

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS

In Re:
Highland Capital Management, L.P.

Debtor(s)
Charitable DAF Fund, L.P. and CLO Holdco, Ltd
Appellant(s)

vs.
Highland Capital Management, L.P.

Appellee(s)

Case No.: 19-34054-sgj11

Chapter No.: 11

Adversary No.: 21-03067-sgj

Civil Action No.: 3:23-CV-01503-B

TRANSMITTAL AND CERTIFICATION OF RECORD ON APPEAL

Pursuant to Federal Rules of Bankruptcy Procedure 8010, the appeal filed on 6/27/2023 regarding [167] Order granting Defendant Highland Capital Management, L.P.'s Renewed motion to dismiss adversary proceeding (related document # 122) Entered on 6/25/2023. by Highland Capital Management, L.P. in the above styled bankruptcy case is hereby transmitted to the U.S. District Court for the Northern District of Texas.

This record on appeal contains all items listed on the attached index, and is in compliance with Rule 8010 of the Federal Rules of Bankruptcy Procedure.

All further pleadings or inquiries regarding this matter should be directed to the U.S. District Clerk's Office until such time as the appeal is fully processed in the U.S. District Court.

The above referenced record was delivered to the U.S. District Clerk's Office on September 11, 2023.

DATED: 9/11/23

FOR THE COURT:
Robert P. Colwell, Clerk of Court

by: /s/J. Blanco, Deputy Clerk



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

In Re: Highland Capital Management, L.P § Case No. **19-34054-SGJ11**

Charitable DAF Fund, L.P et al

Appellant

§

vs.

§

21-03067

Highland Capital Management, L.P

§

Appellee

§

3:23-CV-01503-B

[167] Order granting Defendant Highland Capital Management, L.P.'s Renewed motion to dismiss adversary proceeding (related document # [122](#)) Entered on 6/25/2023.

Volume 1

MINI RECORD

by: /s/J. Blanco, Deputy Clerk

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

In re:	§ Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§ Case No. 19-34054-sgj11
Debtor.	§
CHARITABLE DAF FUND, L.P. AND CLO	§
HOLDCO, LTD., DIRECTLY AND DERIVATIVELY	§
Plaintiffs,	§ Adversary Proceeding No.
vs.	§ 21-03067-sgj11
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§
HIGHLAND HCF ADVISOR, LTD., AND	§
HIGHLAND CLO FUNDING LTD., NOMINALLY	§
Defendant.	§

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**APPELLANTS' SECOND AMENDED STATEMENT OF ISSUES
AND DESIGNATION OF RECORD ON APPEAL**

Pursuant to Rules 8009(a)(1)(A)-(B) and (a)(4) of the Federal Rules of Bankruptcy Procedure, The Charitable DAF Fund, L.P. and CLO Holdco, Ltd. ("Appellants") hereby designate the following items to be included in the record and identify the following issues with respect to

their appeal of the Order Granting Defendant Highland Capital Management, L.P.'s "Renewed Motion to Dismiss Complaint" [Adv. Proc. Doc. No. 122] which was entered by the United States Bankruptcy Court for the Northern District of Texas on June 25, 2023.

I. STATEMENT OF ISSUES TO BE PRESENTED ON APPEAL

- Whether the Bankruptcy Court had jurisdiction to rule on Highland Capital Management L.P.'s Renewed Motion to Dismiss Complaint
- Whether the Renewed Motion to Dismiss Complaint was improperly granted

II. DESIGNATION OF ITEMS TO BE INCLUDED IN THE RECORD

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1. Notice of Appeal for Bankruptcy Case Adversary Proceeding No. 21-03067-sgj11 [Doc. 168].

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2. The judgment, order, or decree appealed from: Memorandum Opinion and Order Granting Defendant Highland Capital Management, L.P.'s "Renewed Motion to Dismiss Complaint" [Adv. Proc. Doc. No. 122] [Doc. 167].

000080

3. Docket Sheet kept by the Bankruptcy Clerk.

4. Documents listed below and as described in the Docket Sheet for Bankruptcy Case Proceeding No. 21-03067-sgj.

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No.	Date Filed	Docket No.	Description/Document Text
1	9/29/21	1	(36 pgs; 3 docs) Adversary case 21-03067. ORDER REFERRING CASE NUMBER 21-CV-0842-B from U.S District Court for the Northern District of Texas, Dallas Division to U.S. Bankruptcy Court for Northern District of Texas, Dallas Division. Complaint by Charitable DAF Fund, LP, CLO Holdco, Ltd. against Highland Capital Management, LP, Highland HCF Advisor Ltd., Highland CLO Funding, Ltd. Fee Amount \$350 (Attachments: # 1 Original Complaint # 2 Docket Sheet from 3:20-cv-0842-B) Nature(s) of suit: 02 (Other (e.g. other actions that would have been brought in state court if unrelated to bankruptcy)). (Okafor, M.)
2	9/29/21	2	(1 pg) Supplemental Document (cover sheet) by CLO Holdco Ltd., Charitable DAF Fund (RE: related document(s)1 Adversary case 21-03067) [ORIGINALLY FILED IN 21-CV-0842 AS #2 ON 04/13/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)

Vol. 2 000139 000232 000239 000270 Thru Vol. 6	3	9/29/21	6	(93 pgs; 6 docs) MOTION for Leave to File First Amended Complaint filed by CLO Holdco Ltd., Charitable DAF Fund LP (Attachments: # 1 Exh 1_First Amended Complaint # 2 Exh 2_Motion for Authorization to Retain James Seery # 3 Exh 3_Order Approving Retention of James Seery # 4 Exh 4_Order Approving Settlement # 5 Proposed Order) (Bridges, Jonathan) (Entered: 04/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #6 ON 04/19/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
	4	9/29/21	22	(7 pgs; 2 docs) MOTION for an Order to Enforce the Order of Reference filed by Highland Capital Management LP. (Attachments: # 1 Exhibit(s) A--Proposed Order) (Annable, Zachery) Modified text on 5/20/2021 (mjr). (Entered: 05/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #22 ON 05/19/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
	5	9/29/21	23	(31 pgs) Brief/Memorandum in Support filed by Highland Capital Management LP re: 22 MOTION for an Order to Enforce the Order of Reference. (Annable, Zachery) Modified text on 5/20/2021 (mjr).(Entered: 05/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #23 ON 05/19/2021 IN U.S.DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
	6	9/29/21	24	(926 pgs; 29 docs) Appendix in Support filed by Highland Capital Management LP re: 23 Brief/Memorandum in Support. (Attachments: # 1 Appendix 1 # 2 Appendix 2 # 3 Appendix 3 # 4 Appendix 4 # 5 Appendix 5 # 6 Appendix 6 # 7 Appendix 7 # 8 Appendix 8 # 9 Appendix 9 # 10 Appendix10 # 11 Appendix 11 # 12 Appendix 12 # 13 Appendix 13 # 14 Appendix 14 # 15 Appendix 15 # 16 Appendix 16 # 17 Appendix 17 # 18 Appendix 18 # 19 Appendix 19 # 20 Appendix 20 # 21 Appendix 21# 22 Appendix 22 # 23 Appendix 23 # 24 Appendix 24 # 25 Appendix 25 # 26 Appendix 26 # 27 Appendix 27 # 28 Appendix 28) (Annable, Zachery) Modified linkage and text on 5/20/2021 (mjr). (Entered:05/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #24 ON 05/19/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
Vol. 7 001196	7	9/29/21	26	(7 pgs; 2 docs) MOTION to Dismiss Complaint filed by Highland Capital Management LP (Attachments: # 1 Exhibit(s) A--Proposed Order) (Annable, Zachery) Modified text on 5/28/2021 (jmg).(Entered: 05/27/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #26 ON 05/27/2021 IN U.S.DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)

Vol. 7 001203 thru Vol. 8	8	9/29/21	28	(508 pgs; 14 docs) Appendix in Support filed by Highland Capital Management LP (Attachments: # 1 Appendix 1 # 2 Appendix 2 # 3 Appendix 3 # 4 Appendix 4 # 5 Appendix 5 # 6 Appendix 6 # 7 Appendix 7 # 8 Appendix 8 # 9 Appendix 9 # 10 Appendix 10 # 11 Appendix 11 # 12 Appendix 12 # 13 Appendix 13) (Annable, Zachery) (Entered: 05/27/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #28 ON 05/27/2021 IN U.S. DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
Vol. 9 001711	9	9/29/21	33	(1 pg) Amended Civil Cover Sheet by CLO Holdco Ltd, Charitable DAF Fund LP. Amendment to 2 Supplemental Document. (Sbaiti, Mazin) Modified text on 6/23/2021 (mjr). (Entered: 06/22/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #33 ON 06/22/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001712	10	9/29/21	36	(26 pgs) RESPONSE filed by CLO Holdco Ltd, Charitable DAF Fund LP re: 22 MOTION for an Order to Enforce the Order of Reference (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #36 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001738	11	9/29/21	37	(22 pgs) Appendix in Support filed by CLO Holdco Ltd, Charitable DAF Fund LP re 36 Response/Objection Response to Motion for an Order to Enforce the Order of Reference (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #37 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001760	12	9/29/21	38	(45 pgs) RESPONSE filed by CLO Holdco Ltd, Charitable DAF Fund LP re: 26 MOTION to Dismiss (Defendant Highland Capital Management, L.P.'s Motion to Dismiss Complaint) (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #38 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001805	13	9/29/21	39	(88 pgs) Appendix in Support filed by CLO Holdco Ltd, Charitable DAF Fund LP re 38 Response/Objection to Defendant Highland Capital Management, L.P.'s Motion to Dismiss Complaint (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #39 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001893	14	9/29/21	42	(12 pgs) REPLY filed by Highland Capital Management LP re: 22 MOTION for an Order to Enforce the Order of Reference (Annable, Zachery) (Entered: 07/13/2021) [ORIGINALLY FILED IN 21-CV-0842AS #42 ON 07/13/2021 IN U.S.

			DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
VOL. 9	15	9/29/21	43 (852 pgs) Appendix in Support filed by Highland Capital Management LP re: 42 Reply. (Annable, Zachery) Modified text on 7/14/2021 (mjr). (Entered: 07/13/2021) [ORIGINALLY FILED IN 21-CV-0842AS #43 ON 07/13/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001905 thru Vol. 13	16	9/29/21	45 (21 pgs) REPLY filed by Highland Capital Management LP re: 26 MOTION to Dismiss (Defendant Highland Capital Management, L.P.'s Motion to Dismiss Complaint) (Annable, Zachery) (Entered:07/13/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #44 ON 07/13/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002757	17	9/29/21	57 (7 pgs; 2 docs) MOTION to Dismiss and Joinder in Motion to Dismiss of Highland Capital Management, L.P. filed by Highland CLO Funding Ltd. (Attachments: # 1 Proposed Order) Attorney Paul R Bessette added to party Highland CLO Funding Ltd (pty:dft) (Bessette, Paul) (Entered: 08/30/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #57 ON 08/30/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002778	18	9/29/23	58 (12 pgs) Brief/Memorandum in Support filed by Highland CLO Funding Ltd. re 57 MOTION to Dismiss and Joinder in Motion to Dismiss of Highland Capital Management, L.P. (Bessette, Paul) (Entered: 08/30/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #58 ON 08/30/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002785	19	9/29/23	59 (80 pgs; 5 docs) Appendix in Support filed by Highland CLO Funding Ltd re 58 Brief/Memorandum in Support of Motion (Attachments: # 1 Exhibit(s) A - Jackson v Dear # 2 Exhibit(s) B - Prudential Assurance v. Newman # 3 Exhibit(s) C - Harbourvest Settlement Agreement # 4 Exhibit(s) D - Boleat Declaration) (Bessette, Paul) (Entered: 08/30/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #59 ON 08/30/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002797	20	9/29/21	64 (1 pg) ORDER OF REFERENCE: Pursuant to 28 U.S.C. § 157 and this District's Miscellaneous Order No. 33, this case is hereby REFERRED to Judge Stacey G. C. Jernigan of the United States Bankruptcy Court for the Northern District of Texas, Dallas Division, to be adjudicated as a matter related to the consolidated Chapter 11 Bankruptcy of Highland Capital Management, L.P., Chapter 11 Case No.19-34054. (Ordered by Judge Jane J. Boyle
002877			

Vol. 14				on 9/20/2021) (svc) (Entered: 09/20/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #64 ON 09/20/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002878	21	10/19/21	66	(5 pgs) Notice of hearing filed by Defendant Highland Capital Management, LP (RE: related document(s) 26 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP, 47 Motion to strike document filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 55 Motion to abate filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) Hearing to be held on 11/23/2021 at 09:30 AM at https://us-courts.webex.com/meet/jerniga for 26 and for 47 and for 55, (Annable, Zachery)
002883 thru Vol. 16	22	11/22/21	71	(509 pgs; 2 docs) Witness and Exhibit List <i>for Hearing on November 23, 2021</i> filed by Defendant Highland Capital Management, LP (RE: related document(s) 26 Motion to dismiss adversary proceeding). (Attachments: # 1 Exhibits 1-13) (Hayward, Melissa)
Vol. 17	23	11/22/21	72	(2 pgs) Witness List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 26 Motion to dismiss adversary proceeding, 47 Motion to strike (related document(s): 43 Document), 55 Motion to abate (related document(s) 1 Complaint), 69 Motion to abate <i>Plaintiffs' Amended Motion to Stay All Proceedings</i> (related document(s) 55 Motion to abate (related document(s) 1 Complaint))). (Sbaiti, Mazin)
003392				
003394	24	11/22/21	73	(189 pgs; 4 docs) Exhibit List <i>for November 23, 2021 hearing</i> filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 47 Motion to strike (related document(s): 43 Document), 55 Motion to abate (related document(s) 1 Complaint)). (Attachments: # 1 Exhibit 1_Defendant's Memorandum of Law in Support of Motion for Reconsideration # 2 Exhibit 2_Highland Memorandum in Support of Motion to Dismiss # 3 Exhibit 3_Order (I) Confirming Fifth Amended Plan of Reorganization of Highland) (Sbaiti, Mazin)
003583	25	12/7/21	80	(2 pgs) Order granting Highland CLO Funding, Ltd.'s motion to dismiss adversary as a party with prejudice (related document 57) Entered on 12/7/2021. (Okafor, Marcey) Modified text on 3/11/2022 (Okafor, Marcey).
003585	26	3/11/22	99	(26 pgs) Memorandum of Opinion and order granting motion to dismiss the adversary proceeding (RE: related document(s) 26 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP). Entered on 3/11/2022 (Okafor, Marcey)
003611	27	3/11/22	100	(26 pgs) Order granting motion to dismiss adversary proceeding with prejudice (related document #26) Entered on 3/11/2022. (Okafor, Marcey)

Vol. 18 003637	28	3/21/22	104	(29 pgs) Notice of appeal. Fee Amount \$298 filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 100 Order on motion to dismiss adversary proceeding). Appellant Designation due by 04/4/2022. (Sbaiti, Mazin)
003666	29	5/26/22	120	(177 pgs; 2 docs) Support/supplemental document <i>Motion to Supplement Appellate Record</i> filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 111 Appellant designation). (Attachments: # 1 Amended Transcript of January 14, 2021 Hearing) (Sbaiti, Mazin)
003843	30	6/9/22	121	(1 pg) DISTRICT COURT Order: Case 3:22-00695-B is hereby transferred to the docket of the Honorable Judge Jane J. Boyle for consolidation with The Charitable DAF Fund LP, et al. v. Highland Capital Management LP, Case No. 3:21-cv-3129-N. Judge Karen Gren Scholer no longer assigned to case.(RE: related document(s) 86 Notice of appeal filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 104 Notice of appeal filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Entered on 6/9/2022 (Whitaker, Sheniqua) (Entered: 06/10/2022)
003844	31	10/24/22	122	(7 pgs) Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP (Annable, Zachery)
003851	32	10/14/22	123	(31 pgs) Brief in support filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Annable, Zachery)
Vol. 19 003882 Thru Vol 20	33	10/14/22	124	(513 pgs; 15 docs) Support/supplemental document (<i>Appendix in Support of Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7 # 8 Exhibit 8 # 9 Exhibit 9 # 10 Exhibit 10 # 11 Exhibit 11 # 12 Exhibit 12 # 13 Exhibit 13 # 14 Exhibit 14) (Annable, Zachery)
Vol. 21 004395	34	10/27/22	126	(5 pgs) Notice of hearing (<i>Notice of Hearing and Briefing Schedule on Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP). Hearing to be held on 12/8/2022 at 09:30 AM at https://us-courts.webex.com/meet/jerniga for 122. (Annable, Zachery)

Vol. 21 004400 004410 004442 Thru Vol. 22	35	11/18/22	128	(10 pgs) Motion for withdrawal of reference. Fee amount \$188, filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (Sbaiti, Mazin)
	36	11/18/22	129	(32 pgs) Response opposed to (related document(s): 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP) filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Sbaiti, Mazin)
	37	11/18/22	130	(254 pgs; 2 docs) Response opposed to (related document(s): 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP) filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Attachments: # 1 Appendix) (Sbaiti, Mazin)
Vol. 22 004696 004717 004732 004737 004742	38	9/2/22	131	(21 pgs) DISTRICT COURT MEMORANDUM OPINION AND ORDER: The Court REVERSES and REMANDS the bankruptcy court's Motion to Dismiss Order and AFFIRMS the bankruptcy courts Motion to Stay Order. re: appeal on Civil Action number: Case 3:22-00695-B consolidated with 3:21-CV-3129-B, (RE: related document(s) 81 Order on motion to abate, 100 Order on motion to dismiss adversary proceeding). Entered on 9/2/2022 (Whitaker, Sheniqua) (Entered: 11/29/2022)
	39	12/2/22	133	(15 pgs) Reply to (related document(s): 129 Response filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 130 Response filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) filed by Defendant Highland Capital Management, LP. (Annable, Zachery)
	40	12/7/22	135	(5 pgs) Notice of hearing filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP). Hearing to be held on 1/25/2023 at 01:30 PM at https://us-courts.webex.com/meet/jerniga for 122, (Annable, Zachery)
	41	12/7/22	136	(5 pgs) Notice of hearing filed by Defendant Highland Capital Management, LP (RE: related document(s) 128 Motion for withdrawal of reference filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Status Conference to be held on 1/25/2023 at 01:30 PM at https://us-courts.webex.com/meet/jerniga . (Annable, Zachery).
	42	12/9/22	138	(3 pgs) Response opposed to (related document(s): 128 Motion for withdrawal of reference. Fee amount \$188, filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) filed by Defendant Highland Capital Management, LP. (Annable, Zachery)

Vol. 22 004745	43	12/9/22	139	(25 pgs) Brief in support filed by Defendant Highland Capital Management, LP (RE: related document(s) 138 Response). (Annable, Zachery)
Vol. 23 004770	44	12/9/22	140	(280 pgs; 8 docs) Support/supplemental document (<i>Appendix in Support of Highland Capital Management, L.P.'s Response to Renewed Motion to Withdraw the Reference</i>) filed by Defendant Highland Capital Management, LP (RE: related document(s) 138 Response). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7) (Annable, Zachery)
Vol. 24 005050	45	12/16/22	144	(6 pgs) Reply to (related document(s): 138 Response filed by Defendant Highland Capital Management, LP) filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Sbaiti, Mazin)
005056 Thru Vol. 25.	46	1/23/23	145	(514 pgs; 15 docs) Witness and Exhibit List filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7 # 8 Exhibit 8 # 9 Exhibit 9 # 10 Exhibit 10 # 11 Exhibit 11 # 12 Exhibit 12 # 13 Exhibit 13 # 14 Exhibit 14) (Annable, Zachery)
Vol. 26 005570	47	1/23/23	146	(280 pgs; 8 docs) Witness and Exhibit List filed by Defendant Highland Capital Management, LP (RE: related document(s) 128 Motion for withdrawal of reference. Fee amount \$188.). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7) (Annable, Zachery)
Vol. 27 005850	48	1/23/23	147	(221 pgs; 7 docs) Witness and Exhibit List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Attachments: # 1 Exhibit 1_Excerpts from July 14, 2020 Hearing Transcript # 2 Exhibit 2_HCLOF Members Agreement Relating to the Company # 3 Exhibit 3_HarbourVest Settlement Agreement # 4 Exhibit 4_Order Approving Debtor's Settlement with HarbourVest # 5 Exhibit 5_HCLOF Offering # 6 Exhibit 6 Amended and Restated Investment Advisory Agreement) (Sbaiti, Mazin)
006071	49	1/23/23	148	(3 pgs) Witness and Exhibit List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 128 Motion for withdrawal of reference. Fee amount \$188.). (Phillips, Louis)
Vol. 28 006074	50	1/25/23	150	(56 pgs; 2 docs) Amended Witness and Exhibit List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 147 List (witness/exhibit/generic), 149 List (witness/exhibit/generic)). (Attachments: # 1 Exh 7_Testimony of Mark Patrick at June 8, 2021 hearing) (Sbaiti, Mazin)

Vol. 28 006130 006133 Thru Vol. 31	51	1/25/23	152	(3 pgs) Notice of Appearance and Request for Notice by Louis M. Phillips filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Phillips, Louis)
	52	1/25/23	154	(1 pg) Court admitted exhibits date of hearing January 25, 2023 (RE: related document(s) 128 Motion for withdrawal of reference, filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) (COURT ADMITTED DEFENDANT'S EXHIBITS #1, #2, #3, #4, #5 & #6 OFFERED BY ATTY GREG DEMO). (Edmond, Michael) (Entered: 01/27/2023)
Vol. 32 006925 006942 006960	53	2/6/23	158	Report and recommendation to the U.S. District Court by U.S. Bankruptcy Judge. (RE: related document(s) 128 Motion for withdrawal of reference filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Entered on 2/6/2023 (Okafor, Marcey)
	54	2/6/23	161	(18 pgs) DISTRICT COURT Notice of transmission of report and recommendation in re: renewed motion to withdraw reference. Civil Case # 3:22-cv-02802-S. (RE: related document(s) 158 Report and recommendation to the U.S. District Court by U.S. Bankruptcy Judge. (RE: related document(s) 128 Motion for withdrawal of reference filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Entered on 2/6/2023) (Whitaker, Sheniqua)
	55	4/3/23	165	(1 pg) DISTRICT COURT ORDER: The Court GRANTS the 11 Joint Motion to Transfer Proceeding and Consolidate Before Original Court and the above-numbered case (3:22-cv-02802-S) is transferred to the docket of the Honorable Judge Jane Boyle: Civil case 3:21-cv-00842-B (order referring case). (RE: related document(s) 1 Complaint filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 143 Notice of transmission of motion to withdraw reference). Entered on 4/3/2023 (Whitaker, Sheniqua) Modified on 4/10/2023 (Whitaker, Sheniqua). (Entered: 04/10/2023)

TRANSCRIPTS

006961	56	11/24/21	78	(104 pgs) Transcript regarding Hearing Held 11-23-2021 RE: Motion Hearing. THIS TRANSCRIPT WILL BE MADE ELECTRONICALLY AVAILABLE TO THE GENERAL PUBLIC 90 DAYS AFTER THE DATE OF FILING. TRANSCRIPT RELEASE DATE IS 02/22/2022. Until that time the transcript may be viewed at the Clerk's Office or a copy may be obtained from the official court transcriber. Court Reporter/Transcriber Liberty Transcripts/Dipti Patel, Telephone number 847-848-4907. (RE: related document(s) 75 Hearing held on 11/23/2021. (RE: related document(s) 55 MOTION to Stay filed by CLO Holdco Ltd, Charitable DAF Fund LP (Sbaiti, Mazin) (Entered: 08/26/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #55 ON 08/26/2021 IN U.S.
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			<p>DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)) (Appearances: J. Pomerantz and J. Morris for Highland Defendants; J. Jordan and P. Bessett for HCLOF; M. Sbaiti for Plaintiffs. Nonevidentiary hearing. Motion denied. Mr. Pomerantz to upload order.), 76 Hearing held on 11/23/2021. (RE: related document(s) 47 Motion to strike 43 Appendix in support filed by CLO Holdco, Ltd., Charitable DAF Fund, LP (Bridges, Jonathan) Modified text on 7/16/2021 (mjr). (Entered: 07/15/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #47 ON 07/15/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)) (Appearances: J. Pomerantz and J. Morris for Highland Defendants; J. Jordan and P. Bessett for HCLOF; M. Sbaiti for Plaintiffs. Nonevidentiary hearing. Motion denied (Plaintiffs acknowledged complained-of Appendices it did not relate to Motion to Dismiss). Mr. Pomerantz to upload order.)). Transcript to be made available to the public on 02/22/2022. (Patel, Dipti)</p>
57	2/21/23	164	<p>164 (112 pgs) Transcript regarding Hearing Held 1/25/23 RE: HEARING ON DEFENDANT HIGHLAND CAPITAL MANAGEMENT L.P.'S RENEWED MOTION TO DISMISS COMPLAINT (122) AND STATUS CONFERENCE RE: MOTION FOR WITHDRAWAL OF REFERENCE FILED BY PLAINTIFF CLO HOLDCO, LTD., PLAINTIFF CHARITABLE DAF FUND, LP (128). THIS TRANSCRIPT WILL BE MADE ELECTRONICALLY AVAILABLE TO THE GENERAL PUBLIC 90 DAYS AFTER THE DATE OF FILING. TRANSCRIPT RELEASE DATE IS 05/22/2023. Until that time the transcript may be viewed at the Clerk's Office or a copy may be obtained from the official court transcriber. Court Reporter/Transcriber Dipti Patel, Telephone number 847-848-4907. (RE: related document(s) 155 Hearing held on 1/25/2023. (RE: related document(s) 122 Motion to dismiss adversary proceeding, (Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint) filed by Defendant Highland Capital Management, LP filed by Defendant Highland Capital Management, LP) (Appearances: J. Morris and G. Demo for Movants; L. Phillips and M. Sbaiti for Plaintiffs. Evidentiary hearing (appendices). Court took matter under advisement.), 156 Hearing held on 1/25/2023. (RE: related document(s) 128 Motion for withdrawal of reference. Fee amount \$188, filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) (Appearances: J. Morris and G. Demo for Movants; L. Phillips and M. Sbaiti for Plaintiffs. Evidentiary hearing (appendices). Court announced it will recommend denial to District Court. Court is working on Report & Recommendation.)). Transcript to be made available to the public on 05/22/2023. (Patel, Dipti)</p>

Dated: July 14, 2023

Respectfully submitted,

SBAITI & COMPANY PLLC

/s/ Mazin A. Sbaiti

Mazin A. Sbaiti

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Counsel for Appellants

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was filed electronically through the Court's ECF system, which provides notice to all parties of interest, on this 14th day of July, 2023.

/s/ Mazin A. Sbaiti

Mazin A. Sbaiti

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*Counsel for The Charitable DAF Fund, L.P.
and CLO Holdco, Ltd.*

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

In re:	§	Chapter 11
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	Case No. 19-34054-sgj11
	§	
Debtor.	§	
CHARITABLE DAF FUND, L.P. AND CLO	§	
HOLDCO, LTD., DIRECTLY AND DERIVATIVELY	§	
	§	
Plaintiffs,	§	Adversary Proceeding No.
	§	
vs.	§	21-03067-sgj11
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	
HIGHLAND HCF ADVISOR, LTD., AND	§	
HIGHLAND CLO FUNDING LTD., NOMINALLY	§	
	§	
Defendant.	§	
	§	

NOTICE OF APPEAL AND STATEMENT OF ELECTION

Part 1: Identify the appellant(s)

1. Name(s) of appellant(s):

Charitable DAF Fund, L.P.
CLO Holdco, Ltd.

2. Position of appellant(s) in the adversary proceeding or bankruptcy case that is the subject of this appeal:

For appeals in an adversary proceeding:

- ☒ Plaintiff
☐ Defendant
☐ Other (describe)
-

For appeals in a bankruptcy case and not in an adversary proceeding:

- ☐ Debtor
☐ Creditor
☐ Trustee
☐ Other (describe)

Part 2: Identify the subject of this appeal

1. Describe the judgment, order, or decree appealed from:

Order Granting Defendant Highland Capital Management, L.P.'s
"Renewed Motion to Dismiss Complaint" [Adv. Proc. Doc. No. 122]

2. State the date on which the judgment, order, or decree was entered: June 25, 2023

Part 3: Identify the other parties to the appeal

List the names of all parties to the judgment, order, or decree appealed from and the names, addresses, and telephone numbers of their attorneys:

1. *Party/Appellee:* Debtor: Highland Capital Management, L.P.

Attorney:

PACHULSKI STANG ZIEHL & JONES LLP
Jeffery N. Pomerantz (CA Bar No. 143717)
John A. Morris (NY Bar No. 2405397)
Gregory V. Demo (NY Bar No. 5371992)
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And

Hayward & Associates PLLC
Melissa S. Hayward
Zachery Z. Annable
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Dallas, TX 75231
Telephone: (972) 755-7100
Fax: (972) 755-7110

2. *Party/Appellants*: Plaintiffs: Charitable DAF Fund, L.P.
CLO Holdco, Ltd.

Attorney:

SBAITI & COMPANY PLLC
Mazin A. Sbaiti (TX Bar No. 24058096)
Jonathan Bridges (TX Bar No. 24028835)
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Part 4: Optional election to have appeal heard by District Court (applicable only in certain districts): Not applicable.

Dated: June 27, 2023

Respectfully submitted,

SBAITI & COMPANY PLLC

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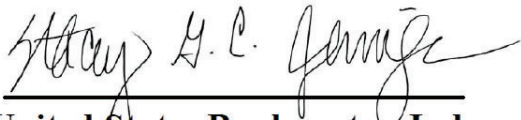
CLERK, U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS

ENTERED

THE DATE OF ENTRY IS ON
THE COURT'S DOCKET

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

Signed June 25, 2023


United States Bankruptcy Judge

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

IN RE:	§	
	§	
HIGHLAND CAPITAL MANAGEMENT	§	BANKR. CASE NO. 19-34054-SGJ-11
L.P.,	§	(CHAPTER 11)
REORGANIZED DEBTOR.	§	
	§	
CHARITABLE DAF FUND, L.P. and	§	
CLO HOLDCO, LTD.,	§	
	§	
PLAINTIFFS,	§	
	§	
VS.	§	ADV. PRO. NO. 21-03067-sgj
	§	
HIGHLAND CAPITAL MANAGEMENT,	§	CIV. ACT. NO. 3:22-cv-02802-B
L.P.,	§	
	§	
DEFENDANT.	§	

MEMORANDUM OPINION AND ORDER GRANTING DEFENDANT
HIGHLAND CAPITAL MANAGEMENT, L.P.'S
"RENEWED MOTION TO DISMISS COMPLAINT"
[ADV. PROC. DOC. NO. 122]

000004

I. INTRODUCTION.

The above-referenced Action (herein so called)—now more than two years running on a circuitous path between the bankruptcy court and district court—is related to the even longer-running Chapter 11 bankruptcy case of Highland Capital Management, L.P. (“Highland,” the “Debtor,” or sometimes the “Reorganized Debtor”). Now before the bankruptcy court is a renewed Rule 12(b)(6)¹ motion to dismiss the Action (“Renewed MTD”) filed by Highland, the main Defendant in this Action. [Adv. Proc. Doc. No. 122].²

This Action was filed by two plaintiffs, Charitable DAF Fund, L.P. and CLO Holdco, Ltd. (“Plaintiffs”), on April 12, 2021. The Action was commenced *in the District Court (during Highland’s bankruptcy case and prior to the effective date of Highland’s Chapter 11 plan)* and was randomly assigned to District Judge Jane Boyle. The Action was originally assigned Civil Action No. 3:21-cv-0842-B. But Highland thereafter filed a motion to *enforce* the standing order of reference in this District,³ urging the District Court to refer the Action to the bankruptcy court presiding over its bankruptcy case. The Plaintiffs filed a response and a cross-motion of their own, urging the District Court to determine that mandatory withdrawal of the reference under 28 U.S.C. § 157(d) applied to the Action. Judge Boyle entered an order on September 20, 2021, granting Highland’s motion to enforce the reference, referring the Action to this bankruptcy court “to be

¹ This is a reference to Fed. R. Civ. Proc. 12(b)(6), applicable in bankruptcy adversary proceedings, pursuant to Fed. R. Bankr. Proc. 7012.

² When referring to pleadings filed in this Action on the docket maintained by the bankruptcy clerk, the court will use the abbreviation “Adv. Proc. Doc. No. ____.” When referring to pleadings filed in the main Highland bankruptcy case on the docket maintained by the bankruptcy clerk, the court will use the abbreviation “Bankr. Doc. No. ____.” When referring to pleadings filed in this Action on the docket maintained by the District Clerk, the court will use the abbreviation “D.C. Doc. No. ____.”

³ See Order of Reference of Bankruptcy Cases and Proceedings Nunc Pro Tunc, of the United States District Court Northern District of Texas (“Miscellaneous Rule No. 33”), dated August 3, 1984.

adjudicated as a matter related to the consolidated Chapter 11 Bankruptcy of Highland Capital Management, L.P., Chapter 11 Case No. 19-34054” (“Original Order of Reference”).⁴

Plaintiffs later brought a “Renewed Motion to Withdraw the Reference” (“Renewed MTWR”) on November 18, 2022—more than a year after Judge Boyle rejected their arguments. The Renewed MTWR was transmitted to the District Court on December 15, 2022, and randomly assigned by computer to a different district judge – Judge Karen Scholer – under new civil action number 3:22-cv-02802-S. The Action was thereafter transferred to Judge Boyle, and renumbered as 3:22-cv-02802-B. The Renewed MTWR remains pending before Judge Boyle at this time.

Much has happened in the Action, before, during, and after the Original Order of Reference and the Renewed MTWR, in what might aptly be referred to as “jurisdictional ping pong.” This is best understood with the timeline of relevant events set forth in Part III below. But first, a description of the parties is in order.

II. THE PARTIES.

A. *The Defendants.*

As noted, Highland is the main Defendant in this Action.

There were originally two other Defendants. One was Highland CLO Funding, Ltd. (“HCLOF”), a non-debtor entity, based in the jurisdiction of Guernsey (which is an island in the English Channel). HCLOF held investments, including investments in vehicles referred to as “CLOs.”⁵ HCLOF is now 50.58% owned by Highland and one Highland’s wholly owned

⁴ See *Original Order of Reference*, Civ. Act. No. 3:21-cv-0842-B, Adv Proc. Doc. No. 64.

⁵ “A CLO is a type of structured financial transaction that pools debt instruments issued by corporations. The pooled loans are funneled into a trust entity commonly referred to as a ‘special purpose vehicle’ (‘SPV’) that raises funds through equity investment and by issuing notes to third-party investors. Cash flow from the CLOs is paid out to noteholders and, subsequently, to equity holders.” *NexPoint Diversified Real Estate Tr. v. Acis Cap. Mgmt., L.P.*, 620 F. Supp. 3d 36, 40 (S.D.N.Y. 2022)(docket citations omitted).

subsidiaries called HCMLP Investments, LLC. The Defendant HCLOF was dismissed with prejudice from this Action on December 7, 2021 [Adv. Proc. Doc. No. 80].

The other Defendant was Highland HCF Advisors, Ltd. (“HCFA”), a non-debtor entity that is wholly owned by Highland and has historically served as the portfolio manager for HCLOF. HCFA has never appeared in this Action. It appears HCFA was never served with the summons and complaint.⁶ The court is unclear why HCFA was never served—perhaps it has no assets and the Plaintiffs decided it was not important in this dispute. Highland’s Brief in support of its Renewed MTD, that is now before the court, states that HCFA’s role is limited at this point in time to simply advising HCLOF regarding the liquidation of HCLOF’s portfolio of investments and the recovery of cash for distributions to HCLOF’s members.⁷ [Adv. Proc. Doc. No. 123, p. 3, n. 11.]

B. The Plaintiffs.

The Plaintiffs are CLO Holdco Ltd. (“CLO Holdco”) and Charitable DAF Fund, L.P. (“DAF”).

DAF is the parent company of CLO Holdco. DAF is a Cayman Island hedge fund that represents that it is part of a “donor-advised fund” established for charitable purposes.

CLO Holdco is also a Cayman Island entity.

⁶ Highland noted in a *Motion for an Order Extending the Time to File a Responsive Pleading*, filed May 6, 2021, in Civ. Act. No. 3:21-cv-0842-B, at D.C. Doc. No. 9, at p. 3, and entered on the bankruptcy docket on September 29, 2021, at Adv. Proc. Doc. No. 9, that “[w]hile Highland agreed to accept service on its own behalf, it could not and did not accept service on behalf of the other defendants, Highland HCF Advisors, Ltd. and Highland CLO Funding, Ltd. (together, the ‘Other Defendants’)” and that “to the best of Highland’s knowledge, the Other Defendants have not been served with the Complaint such that the time for each of them to serve a responsive pleading has not begun to run.” A *Waiver of Service of Summons* with respect to HCLOF was filed on June 3, 2021 (at Doc. No. 30 in both the District Court and bankruptcy court), but there does not appear on either docket any proof of service or waiver of service with respect to HCFA that would indicate that HCFA has been served as of this date.

⁷ HCLOF is represented to be now “past its investment period.”

Both Plaintiffs are part of an intricate structure of companies that were originally funded (long ago) by Highland and/or entities that were controlled by Highland's founder and former CEO Mr. James Dondero ("Mr. Dondero").

Plaintiff CLO Holdco happens to own a 49.02% equity interest in HCLOF (the aforementioned dismissed Defendant). Thus, Defendant Highland and Plaintiff CLO Holdco are essentially co-owners of HCLOF. As explained below, it is not a happy arrangement, post-bankruptcy.

C. Interrelationships.

While this is all complex, the key focus in this Action is the entity HCLOF and Highland's and CLO Holdco's now unhappy co-ownership of same. As noted, Highland (and its subsidiary) own 50.58% of HCLOF, and CLO Holdco owns 49.02% of HCLOF.⁸ As also noted, Highland and CLO Holdco—post-bankruptcy—are not happy business partners with regard to their co-ownership of HCLOF.

It all stems back to when an unrelated third-party, called HarbourVest⁹--previously a 49.98% owner of HCLOF—transferred its ownership interest in HCLOF to Highland (actually to Highland's wholly owned subsidiary, HCMLP Investments, LLC). Before this, Highland had only owned .6% of HCLOF, so the transfer from HarbourVest made Highland (along with its subsidiary) the majority owner of HCLOF (.6% + 49.98% = 50.58%). This transfer happened pursuant to a significant settlement agreement approved during the bankruptcy case (which happened to be objected to by CLO Holdco—although CLO Holdco later withdrew its objection to the settlement).

⁸ Apparently, a few former Highland employees collectively own or owned about .4% of HCLOF.

⁹ "HarbourVest" means, collectively, HarbourVest 2017 Global Fund L.P., HarbourVest 2017 Global AIF L.P., HarbourVest Dover Street IX Investment L.P., HV International VIII Secondary L.P., HarbourVest Skew Base AIF L.P., and HarbourVest Partners L.P.

For ease of reference—and because there are a very large number of lawsuits pending in the Northern District of Texas involving Highland—this Action presently before the court will sometimes be referred to henceforth as the “Lawsuit Pertaining to HarbourVest Bankruptcy Settlement.” The timeline below attempts to fully explain all of this.

III. THE RELEVANT TIMELINE

October 16, 2019: Highland filed its voluntary chapter 11 bankruptcy case (the “Petition Date”).

January 2020: Corporate governance changes were implemented at Highland, as a result of pressure from the Official Committee of Unsecured Creditors appointed in the bankruptcy case and the United States Trustee, both of whom expressed concern with Highland’s then-current management. New independent directors were appointed, including James P. Seery, Jr. (“Mr. Seery”), and thereafter Mr. Seery was named Chief Restructuring Officer (“CRO”) and, eventually, the new Chief Executive Officer (“CEO”) of Highland. Highland’s co-founder, Mr. Dondero, was removed as CEO of Highland. This was all approved by order of the bankruptcy court.

December 23, 2020: Several months into the bankruptcy case, Highland (through its new management) moved for bankruptcy court approval of a significant settlement it reached with the party known as HarbourVest. To be clear, HarbourVest was/is wholly unrelated to Highland (and wholly unrelated to Mr. Dondero). HarbourVest is a large investment firm that was a disputed creditor of Highland—asserting *\$300 million in proofs of claim against Highland*, regarding a prepetition investment opportunity that had not developed in the way HarbourVest had envisioned—specifically, HarbourVest’s investment in HCLOF whereby it acquired a 49.98% equity interest in HCLOF. Pursuant to the proposed settlement between Highland and

HarbourVest (the “HarbourVest Bankruptcy Settlement”), HarbourVest agreed to transfer its 49.98% equity interest in HCLOF to Highland (or an entity to be designated by Highland) and agreed to greatly reduce its disputed proofs of claim in the bankruptcy case from \$300 million to \$80 million (which would be given part unsecured creditor status and part subordinated status). The HarbourVest Bankruptcy Settlement was essentially a rescission of HarbourVest’s investment in HCLOF.

January 8, 2021: Plaintiff CLO Holdco objected to the HarbourVest Bankruptcy Settlement, presumably at the direction of its parent, DAF (the other Plaintiff herein). CLO Holdco argued that: (i) it (as an equity member of HCLOF) had a right to acquire the 49.98% equity interest in HCLOF that HarbourVest was going to be transferring to Highland under the HarbourVest Bankruptcy Settlement, pursuant to an alleged “Right of First Refusal” in the HCLOF membership agreement; and (ii) HarbourVest could not transfer its 49.98% equity interest to Highland without compliance with this purported “Right of First Refusal.” CLO Holdco did not object on any other basis to the HarbourVest Bankruptcy Settlement.

January 14, 2021: The bankruptcy court held an evidentiary hearing on the proposed HarbourVest Bankruptcy Settlement, during which CLO Holdco voluntarily withdrew its objection to the HarbourVest Bankruptcy Settlement premised on the “Right of First Refusal.” The lawyer for CLO Holdco was questioned extensively on the record as to why the objection was being withdrawn so suddenly. His reply was that, after studying the corporate documentation, he and his client had made the determination that the “Right of First Refusal” argument was not meritorious. After an extensive presentation of evidence, the bankruptcy court overruled certain remaining objections (specifically, those of certain family trusts of Mr. Dondero) and approved the HarbourVest Bankruptcy Settlement. The Dondero family trusts appealed to the District Court

the approval of the HarbourVest Bankruptcy Settlement, and their appeal was dismissed for lack of standing.

February 22, 2021: Very soon after the HarbourVest Bankruptcy Settlement, the bankruptcy court entered an order confirming a Chapter 11 plan for Highland [Bankr. Doc. No. 1943] (the “Confirmation Order”), which confirmed Highland’s extensively mediated, negotiated, and litigated plan [Bankr. Doc. No. 1808] (the “Plan”). The Plan became effective on August 11, 2021 [Bankr. Doc. No. 2700] (the “Effective Date”). At least the following provisions of the Plan are germane to this Lawsuit Pertaining to HarbourVest Bankruptcy Settlement. **First**, pursuant to the Plan, the bankruptcy court expressly retained jurisdiction/authority to “allow, disallow, determine, liquidate ... any Claim ... including, without limitation, the resolution of any request for payment of any Administrative Expense Claim” Plan, Art. XI. **Second**, the Plan defined “Administrative Expense Claim,” in relevant part, as a: “Claim for costs and expenses of administration of the Chapter 11 Case . . . pursuant to sections 503(b), 507(a)(2), 507(b) ... of the Bankruptcy Code, including ... (a) the actual and necessary costs and expenses incurred after the Petition Date and through the Effective Date of preserving the Estate and operating the business of the Debtor” Plan, Art. I.B.2.

April 12, 2021: Less than two months after the Plan was confirmed, and before it became effective, the Plaintiffs commenced this Lawsuit Pertaining to HarbourVest Bankruptcy Settlement in the District Court—which was assigned Civ. Action No. 21-CV-0842-B (Judge Boyle)—naming Debtor/Highland, HCFA, and HCLOF as Defendants. To be clear, this lawsuit was filed at a time when Highland was still a debtor in possession (its Plan had recently been confirmed, but the Plan Effective Date had not yet occurred—it occurred August 11, 2021). The

underlying Complaint (“Complaint”)¹⁰ alleges that the conduct of Highland *during the bankruptcy case* in late 2020 and early 2021, surrounding the HarbourVest Bankruptcy Settlement—prior to the Confirmation Order—violated contractual and extra-contractual duties that Highland purportedly owed (i) to Plaintiff CLO Holdco as an investor in HCLOF; and (ii) to Plaintiff DAF as an advisee under an investment advisory agreement. The Complaint raises claims: (i) by both Plaintiffs for breaches of fiduciary duty against Highland and HCFA (Count 1); (ii) by CLO Holdco for breach of contract (i.e., the HCLOF Members Agreement)¹¹ against all three Defendants (Count 2); (iii) by both Plaintiffs for negligence against Highland and HCFA (Count 3); (iv) by both Plaintiffs for violations of the Racketeer Influenced and Corrupt Organizations statute (15 U.S.C. § 1961, et seq. (“RICO”)) against Highland (Count 4); and (v) by CLO Holdco for tortious interference against Highland (Count 5). In Count 1 (breaches of fiduciary duty), Plaintiffs allege that Debtor/Highland violated duties to Plaintiffs under the Investment Advisers Act and Highland’s “internal policies and procedures” by: (i) engaging in “insider trading with HarbourVest”; (ii) “concealing” the value of HarbourVest’s 49.98% equity interest in HCLOF; and (iii) “diverting” the investment opportunity in the HarbourVest entities to the Debtor without first offering it to Plaintiffs.¹² In Count 4 (RICO), Plaintiffs allege that Highland and the co-Defendants were an “association-in-fact” engaged in a pattern of racketeering

¹⁰ See Highland Appendix in support of Renewed MTD, at Adv. Proc. Doc. No. 124, Ex. 11, Appx. 410-436. Henceforth, all references to this appendix will be cited as Highland Appendix, Ex. __, Appx. __.

¹¹ Highland Appendix, Ex. 13, Appx. 459-487.

¹² While specific statutory references to the federal Investment Advisers Act are sparse in the Complaint, subsequent pleadings of the Plaintiffs make clear that they are referring to at least 15 U.S.C. § 80b-6 and 80b-15(a) (which they cite as imposing both a duty of care and a duty of loyalty, each unwaivable, on investment advisors, in favor of funds and its investors, citing *SEC v. Tambone*, 550 F.3d 106, 146 (1st Cir. 2008)); 15 U.S.C. § 206(2) (which they cite as requiring investment advisers to seek “best execution” for all their clients’ transactions, citing *SEC v. Ambassador Advisors, LLC*, 576 F. Supp. 3d 286, 300 (E.D. Pa. 2021)); and 15 U.S.C. § 215 (which they cite as recognizing “a limited private right of action for equitable relief including disgorgement, wherein one may seek to void the rights of a violator who performs a contract in violation of the Advisers Act”). Response to Renewed MTD, pp. 12-13. Adv. Proc. Doc. No. 130.

activity for this same underlying conduct; namely, failing to disclose the value of HCLOF's interest and ultimately effectuating the HarbourVest Bankruptcy Settlement. Again, Highland's alleged misconduct was the act of settling the \$300 million proofs of claim filed against Highland by HarbourVest, pursuant to the terms and conditions of the HarbourVest Bankruptcy Settlement. To be clear, the HarbourVest Bankruptcy Settlement was implemented after full notice to creditors in the Highland bankruptcy case, an opportunity to take discovery, an evidentiary hearing, and approval by the bankruptcy court after fulsome findings of fact and conclusions of law. And as noted earlier, one of the Plaintiffs, CLO Holdco, even objected to the HarbourVest Bankruptcy Settlement and then abruptly withdrew its objection the morning of the bankruptcy court's hearing on the HarbourVest Bankruptcy Settlement.

May 19, 2021: Soon after the commencement of this Lawsuit Pertaining to HarbourVest Bankruptcy Settlement, Highland moved before Judge Boyle for an order to enforce the Northern District of Texas's standing order of reference (Misc. Order No. 33) [Adv. Proc. Doc. No. 22] (the aforementioned "Motion to Enforce"), arguing that the Lawsuit Pertaining to HarbourVest Bankruptcy Settlement should be referred to the bankruptcy court, since it asserted claims arising in, arising under, or related to Title 11 and Highland's bankruptcy case.

May 27, 2021: Highland also moved to dismiss the Lawsuit Pertaining to HarbourVest Bankruptcy Settlement [Adv. Proc. Doc. No. 26] (the "Original MTD"). The Original MTD was fully briefed to Judge Boyle.¹³

June 29, 2021: Plaintiffs filed their response to the Motion to Enforce [Adv. Proc. Doc. No. 36], arguing the Motion to Enforce should be denied, and *cross-moving therein that Judge*

¹³ Defendant HCLOF, which had not yet been dismissed from the Action at this point, filed a *Motion to Dismiss and Joinder in Motion to Dismiss of Highland Capital Management, L.P.* in the District Court, Civ. Act. No. 3:21-cv-0842-B, at D. C. Doc. No. 57 (Adv. Proc. Doc. No. 57) on August 30, 2021.

Boyle should keep the Lawsuit Pertaining to HarbourVest Bankruptcy Settlement because the claims therein were subject to mandatory withdrawal of the reference, under 28 U.S.C § 157(d)—i.e., they involved “consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce” and could not be adjudicated in the bankruptcy court. As earlier noted, the underlying Complaint (while, in essence, complaining about the HarbourVest Bankruptcy Settlement) asserts two claims that purport to be grounded in federal law: breach of fiduciary duty under the federal Investment Advisers Act (“IAA”) and the RICO count. Notably, the arguments in Plaintiffs’ pleading filed on June 29, 2021, appear to be identical to those in Plaintiffs’ Renewed MTWR filed November 18, 2022.

August 26, 2021: Plaintiffs filed a motion before Judge Boyle asking her to stay this Lawsuit Pertaining to HarbourVest Bankruptcy Settlement, pending appeal of the Confirmation Order [Bankr. Doc. No. 55] (the “Stay Motion”), arguing that the Plan injunction might prohibit the prosecution of the Lawsuit Pertaining to HarbourVest Bankruptcy Settlement. The Stay Motion was fully briefed to Judge Boyle.

September 20, 2021: Judge Boyle granted Highland’s Motion to Enforce and referred this Lawsuit Pertaining to HarbourVest Bankruptcy Settlement to the bankruptcy court, including the Original MTD, “[p]ursuant to 28 U.S.C. § 157 ... to be adjudicated as a matter related to the ... Bankruptcy of Highland Capital Management, L.P.” [Adv. Proc. Doc. No. 64].

November 23, 2021: Plaintiffs and Defendants next argued the Stay Motion and the merits of the Original MTD, including their alleged claims under the IAA and RICO, to the bankruptcy court. Following the hearing the bankruptcy court denied the Stay Motion.¹⁴

¹⁴ See *Order Denying Motion to Stay*, Adv. Proc. Doc. No. 81, entered on December 7, 2021. On the same date, the bankruptcy court also entered its *Order* dismissing the Defendant HCLOF from the Action (there was no opposition to this by Plaintiffs) [Adv. Proc. Doc. No. 80].

March 11, 2022: The bankruptcy court granted the Original MTD and issued a written ruling on it (the “Original MTD Order”)—never getting to the merits of the claims in the Lawsuit Pertaining to HarbourVest Bankruptcy Settlement. [Adv. Proc. Doc. No. 100]. Rather, the bankruptcy court dismissed the Lawsuit Pertaining to HarbourVest Bankruptcy Settlement with prejudice, on the basis that the claims were precluded by the doctrines of collateral estoppel and judicial estoppel. *See Charitable DAF Fund, L.P. and CLO Holdco, Ltd. v. Highland Cap. Mgmt., L.P., et al. (In re Highland Cap. Mgmt., L.P.)*, 2022 WL 780991 (Bankr. N.D. Tex., Mar. 11, 2022). The bankruptcy court concluded that the claims in the Lawsuit Pertaining to HarbourVest Bankruptcy Settlement were estopped due to the strategic decisions of Plaintiff CLO Holdco during the bankruptcy case (i.e., choosing to withdraw its objection to the HarbourVest Bankruptcy Settlement) and that this strategic decision was also binding on its Co-Plaintiff DAF (its parent) since the two were in privity. The bankruptcy court concluded that the adjudication of the bona fides of the HarbourVest Bankruptcy Settlement precluded further litigation pertaining to the HarbourVest Bankruptcy Settlement such as this Action. On March 25, 2022, the Plaintiffs appealed the Original MTD Order to the District Court. *See* 3:21-cv-00695-B [D.C. Doc. No. 2].

June 17, 2022: Judge Boyle entered an order consolidating the appeal of the Original MTD Order with Plaintiff’s appeal of the bankruptcy court’s order denying the Stay Motion, which had been assigned Civ. Act. No. 3:21-cv-03129. *See* 3:21-cv-03129-B [D.C. Doc. No. 20].

September 2, 2022: Judge Boyle, sitting this time in an appellate capacity: (i) reversed the bankruptcy court’s conclusion that collateral estoppel barred Plaintiffs’ claims, but (ii) remanded on the judicial estoppel determination.¹⁵ *See Charitable DAF Fund, L.P. v. Highland Cap. Mgmt., L.P. (In re Highland Cap. Mgmt., L.P.)*, 643 B.R. 162, 166 (N.D. Tex. 2022) (the “District Court

¹⁵ Judge Boyle affirmed the bankruptcy court’s order denying the Stay Motion.

9/2/22 Remand Order”). Specifically, Judge Boyle determined that the bankruptcy court had erred in its ruling that *collateral estoppel* barred entirely the claims in this Lawsuit Pertaining to HarbourVest Bankruptcy Settlement, but Judge Boyle separately, in evaluating the bankruptcy court’s determination that *judicial estoppel* also barred Plaintiff’s Lawsuit Pertaining to HarbourVest Bankruptcy Settlement, ruled that the bankruptcy court did not make a certain finding necessary to conclude judicial estoppel applied (i.e., *a finding of “inadvertence”*). Thus, Judge Boyle remanded to the bankruptcy court for possible further findings on the *judicial estoppel doctrine* and presumably for an adjudication on the merits of the various claims asserted in the Lawsuit Pertaining to HarbourVest Bankruptcy Settlement if the bankruptcy court concluded judicial estoppel did *not* apply (after evaluating the “inadvertence” factor).

September 8, 2022: Meanwhile, the U.S. Court of Appeals for the Fifth Circuit affirmed, in material part, the Confirmation Order in support of the Highland Plan. *NexPoint Advisors, L.P., et al. v. Highland Cap. Mgmt., L.P.*, 48 F.4th 419 (5th Cir. 2022). A petition for writ of certiorari is now pending before the U.S. Supreme Court regarding the Confirmation Order. To be clear, there has never been a stay of the Plan (i.e., the Confirmation Order), and the Highland Plan has been in effect since August 11, 2021.

October 14, 2022: In response to the District Court 9/2/22 Remand Order, Highland filed a renewed motion to dismiss [Adv. Proc. Doc. No. 122] (the “Renewed MTD”), which is now before the court. It addresses the “inadvertence” factor on the judicial estoppel defense (arguing that it, indeed, bars Counts 2 and 5 of the Complaint), and also argues that all claims in this Lawsuit Pertaining to HarbourVest Bankruptcy Settlement—even if not precluded by the doctrine of judicial estoppel—are not plausible on their face, under *Iqbal* and *Twombly*.¹⁶

¹⁶ *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

November 18, 2022: Plaintiffs responded to the Renewed MTD and also filed their Renewed MTWR, again urging mandatory withdrawal of the reference. *Plaintiffs, at this point, moved to dismiss their RICO count (without prejudice).* See Plaintiff’s Response to Renewed MTD at 23¹⁷ (“Plaintiffs respectfully dismiss the RICO claim under Rule 41(a) to the extent such a claim is revealed to have existed under non-securities bases. . . . Plaintiffs respectfully reserve the right to bring such a claim but respectfully dismiss their RICO claim at this time.”). Thus, Plaintiffs’ sole “other federal law” argument at this juncture (assuming they have withdrawn their RICO claim) seemingly boils down to this:

This adversary proceeding primarily involves fiduciary duties imposed upon Registered Investment Advisers by the Investment Advisers Act of 1940 (“Advisers Act”) and corresponding state law claims for breach of those duties. As a result, presiding over this action will require extensive consideration of federal laws regulating interstate commerce, which renders withdrawal of the reference to bankruptcy court mandatory under 28 U.S.C. § 157(d).

Renewed MTWR, at ¶ 5.

February 6, 2023: The bankruptcy court issued a Report & Recommendation, recommending that the Renewed MTWR be denied. It is still pending.

IV. JURISDICTION AND LEGAL STANDARD.

The bankruptcy court hereby rules on Highland’s Renewed MTD. In the event the District Court *grants* the pending Renewed MTWR of the Plaintiffs, the bankruptcy court proposes that this Memorandum Opinion and Order should be treated as a Report & Recommendation to the District Court, recommending that it grant Highland’s Renewed MTD.¹⁸

A. Jurisdiction and Core Nature of the Action

¹⁷ Adv. Proc. Doc. No. 129.

¹⁸ See 28 U.S.C. 1334(c)(1). See also *Executive Benefits Ins. Agency v. Arkison*, 134 S. Ct. 2165 (2014).

Bankruptcy subject matter jurisdiction exists over the claims in this Lawsuit Pertaining to HarbourVest Bankruptcy Settlement pursuant to 28 U.S.C. §§ 1334(b) and 157. Under 28 U.S.C. § 1334(b), “district courts shall have original but not exclusive jurisdiction of all civil proceedings *arising under* title 11, or *arising in* or *related to* cases under title 11.”¹⁹ (Emphasis added.) The bankruptcy courts, in turn, are delegated authority to exercise that jurisdiction from the district courts, under 28 U.S.C. § 157(a).²⁰ There does not appear to be any dispute that this Lawsuit Pertaining to HarbourVest Bankruptcy Settlement is at least “related to” the Highland bankruptcy case. Thus, it is undisputed that bankruptcy subject matter jurisdiction exists.²¹ Moreover, the Action involves “core” matters over which a bankruptcy court may generally enter final judgments.²² As noted recently by the Fifth Circuit: “[A] proceeding is core under section 157 if it invokes a substantive right provided by title 11 or if it is a proceeding that, by its nature, could arise only in the context of a bankruptcy case. For example, claims concerning the administration of the estate, allowance or disallowance of claims against the estate, and sale of property of the estate are all core proceedings.”²³

¹⁹ 28 U.S.C. § 1334(b); *see also In re Bass*, 171 F.3d 1016, 1022 (5th Cir. 1999) (“[Section] 1334(b) grants jurisdiction to district courts and adjunct bankruptcy courts to entertain proceedings ‘arising under,’ ‘arising in a case under,’ or ‘related to’ a case under Title 11 of the United States Code, i.e., proceedings ‘related to’ bankruptcy.”).

²⁰ *In re PFO Glob., Inc.*, 26 F.4th 245, 252 (5th Cir. 2022) (citing 28 U.S.C. § 157(a)).

²¹ *In re Bass*, 171 F.3d at 1022 (“To determine whether [bankruptcy] jurisdiction exists, ‘it is necessary only to determine whether a matter is at least “related to” the bankruptcy.’” (quoting *In re Walker*, 51 F.3d 562, 569 (5th Cir. 1995))).

²² As noted earlier, there is a non-debtor Defendant still technically in this lawsuit, HCFA, that is a subsidiary of Highland. The Claims asserted against it by Plaintiffs (which appear to be asserted in Counts 1-3) arguably would not be core matters. However, HCFA has not been served and has failed to appear or defend in this matter. Thus, presumably there will be no adjudication of the claims against HCFA in this Action and, thus, the claims against it are irrelevant.

²³ *Foster v. Aurzada, et al.*, 2023 WL 20872, at p. 2 (5th Cir. Jan. 3, 2023) (per curiam), citing *In re Wood*, 825 F.2d 90, 97 (5th Cir. 1987) and 28 U.S.C. § 157(b)(2)(A), (B), (N), (O)). *See also In re Southmark Corp.*, 163 F.3d 925, 930-31 (5th Cir. 1999) (citing 28 U.S.C. § 157(b)(3) and stating that whether claim has a state law origin is not dispositive to whether it is a core bankruptcy matter; accordingly, malpractice suit against an examiner’s accountant was a core proceeding; “The bankruptcy court must be able to assure itself and the creditors who rely on the process that court-approved managers of the debtor’s estate are performing their work, conscientiously and cost-effectively. . . enforcement of the appropriate standards of conduct are inseparably related functions of bankruptcy courts.”).

To be clear, even though most of the Counts in this Action (Count I, breach of fiduciary duty; Count 2, breach of contract; Count 3, negligence; and Count 5, tortious interference) sound like mostly state law claims, ***they are all claims being asserted against Highland relating to its actions during its Chapter 11 bankruptcy case.***²⁴ Therefore, they are “core” in nature.²⁵ All of the causes of action in this Lawsuit Pertaining to HarbourVest Bankruptcy Settlement are tantamount to the assertion of administrative expense claims against a Chapter 11 Debtor. As a general matter, the filing of administrative expense claims triggers the claims allowance process and subjects a claimant to the bankruptcy court’s equitable jurisdiction.²⁶

B. Legal Standard.

With regard to Rule 12(b)(6), to survive a motion to dismiss pursuant to Rule 12(b)(6), a plaintiff must plead “enough facts to state a claim to relief that is plausible on its face.”²⁷ Dismissal is proper under Rule 12(b)(6) when, taking the facts alleged in the complaint as true, it appears that the plaintiff “cannot prove any set of facts that would entitle it to the relief it seeks.”²⁸

Set forth below, the court will properly analyze whether judicial estoppel bars Count 2 and 5 of the Complaint—as argued by Highland (this time properly considering the “inadvertence factor” which the District Court held was not considered, as required, in its District Court 9/2/22 Remand Order). The court will additionally analyze (regardless of the court’s determination of

²⁴ *In re Wood*, 825 F.2d at 97 n.34 (stating that whether right is state created is not dispositive to whether proceeding is core under 28 U.S.C. § 157).

²⁵ *Foster v. Aurzada, et al.*, 2023 WL 20872, at p. 2.

²⁶ *See, e.g., In re UAL Corp.*, 386 B.R. 701, 707 (Bankr. N.D. Ill. 2008) (“[B]y filing a claim ... the creditor triggers the process of ‘allowance and disallowance of claims,’ thereby subjecting himself to the bankruptcy court’s equitable power ... As such, there is no Seventh Amendment right to a jury trial ... Claims for payment of an administrative expense are no different from other claims in this regard.”) (citing *Langenkamp v. Culp*, 498 U.S. 42 (1990)). *See also Harpole Constr., Inc. v. Medallion Midstream, LLC (In re Harpole Constr., Inc.)*, 565 B.R. 193, 202 (Bankr. D. N.M. 2017) (same); *Carter v. Schott (In re Carter Paper Co.)*, 220 B.R. 276, 290-311 (Bankr. M.D. La. 1998) (finding breach of fiduciary duty claim against bankruptcy trustee originally filed in state court was an administrative expense claim and no jury trial right existed).

²⁷ *Twombly*, 550 U.S. at 570. *See also Iqbal*, 556 U.S. at 663.

²⁸ *C.C. Port, Ltd. v. Davis-Penn Mortg. Co.*, 61 F.3d 288, 289 (5th Cir. 1995).

the judicial estoppel question) whether any or all of the Counts (1, 2, 3, 4, and 5)²⁹ should be dismissed for failure to state a plausible claim. But first, the court sets forth the undisputed facts, many of which were set forth in the timeline at Part III above.

V. UNDISPUTED FACTS.

Highland filed its Chapter 11 case on October 16, 2019. Many months before that, HarbourVest invested approximately \$80 million in HCLOF. In exchange for HarbourVest's investment, HarbourVest obtained a 49.98% interest in HCLOF. The Plaintiff CLO Holdco was also an investor in HCLOF. Following this HarbourVest investment, CLO Holdco owned 49.02% of the equity of HCLOF, and the remaining 1% was held by Highland (.6%) and certain Highland employees (.4%). Thus, the entity HCLOF was owned by HarbourVest, CLO Holdco, Highland and certain employees.

Things eventually grew sour with HarbourVest. After Highland filed bankruptcy, HarbourVest filed proofs of claim against the Debtor in excess of \$300 million, alleging that it was fraudulently induced into its investment by factual misrepresentations and omissions made by Mr. Dondero and certain Highland employees. *See Highland Appendix*, Ex. 1, Appx. 1-61.

The Highland bankruptcy case was very contentious with numerous large, disputed claims—some of which were the subject of mediation before respected mediators. The HarbourVest proofs of claim were among those hotly disputed claims (although not the subject of formal mediation).

Eventually, the Debtor settled the HarbourVest proofs of claim.³⁰ On December 23, 2020, the Debtor filed a motion [Bankr. Doc. No. 1625] (the "HarbourVest Settlement Motion")

²⁹ As noted earlier, Plaintiffs have moved to dismiss the Count 4 RICO claim.

³⁰ As earlier noted herein, during the bankruptcy case (in mid-January 2020)—pursuant to a settlement with the Official Committee of Unsecured Creditors—the Debtor started being governed by an Independent Board of Directors

providing notice and seeking bankruptcy court approval for same. Highland Appendix, Ex. 2, Appx. 62-75. As earlier noted, the key feature of the HarbourVest Bankruptcy Settlement was for HarbourVest to transfer its 49.98% equity interest in HCLOF to the Debtor's designee in exchange for greatly reduced claims against the estate. Highland Appendix, Ex. 2 ¶ 32, Appx. 71-72; Ex. 3, Appx. 76-95. The transfer of this 49.98% equity interest was a key component of the HarbourVest Bankruptcy Settlement. The HarbourVest Settlement Motion disclosed all aspects of the HarbourVest Bankruptcy Settlement, including (i) what HarbourVest was transferring; (ii) the valuation (and method of valuation) of the equity interests it was transferring; (iii) the method of transfer; and (iv) the compromised amount of the HarbourVest proofs of claim that would be allowed. Highland Appendix, Ex. 2 ¶ 32 & n.5, Appx. 71-72; Ex. 3, ¶ 1(b), Appx. 78.

On January 6, 2021, Mr. Dondero filed an objection to the HarbourVest Bankruptcy Settlement [Bankr. Doc. No. 1697] ("Dondero's Objection"). Highland Appendix, Ex. 4, Appx. 96-111. On January 8, 2021, Mr. Dondero's family trusts (i.e., Get Good Trust and The Dugaboy Investment Trust) (the "Dondero Trusts") filed their own objection [Bankr. Doc. No. 1706] (the "Dondero Trusts' Objection"). Highland Appendix, Ex. 5, Appx. 112-122.

CLO Holdco also objected to the HarbourVest Bankruptcy Settlement on January 8, 2021 [Bankr. Doc. No. 1707] ("CLO Holdco's Objection"). Highland Appendix, Ex. 6, Appx. 123-133. CLO Holdco challenged HarbourVest's right to effectuate the transfer of its 49.98% membership interest in HCLOF to Highland, contending that: (i) CLO Holdco and the other members of HCLOF had a "Right of First Refusal" under the HCLOF Members Agreement, *id.* ¶ 3, Appx. 125, and (ii) "HarbourVest has no authority to transfer its interest in HCLOF without first complying with the Right of First Refusal." *Id.* ¶ 6, Appx. 126. CLO Holdco set forth a lengthy

and an independent CRO, who was eventually named CEO (Mr. Seery). The Debtor parted ways in the process with former CEO Mr. Dondero.

analysis of the HCLOF Members Agreement, including CLO Holdco's purported "Right of First Refusal" under Article 6 thereof. *See id.* ¶¶ 9-22, Appx. 127-132.

After filing their objections, CLO Holdco and Mr. Dondero conducted discovery under Bankruptcy Rule 9014(c) and deposed Michael Pugatch, a representative of HarbourVest [Bankr. Doc. No. 1705]. Highland Appendix, Ex. 7, Appx. 134-188. CLO Holdco never contended in the bankruptcy court that: (i) the Debtor had a fiduciary duty to offer the 49.98% membership interest in HCLOF to CLO Holdco, or (ii) the Investment Advisers Act of 1940 (the "IAA") was implicated by the HarbourVest Bankruptcy Settlement.

On January 13, 2021, the Debtor filed its reply [Bankr. Doc. No. 1731] (the "Omnibus Reply") (Highland Appendix, Ex. 8, Appx. 189-211), in which it argued that the HCLOF Members Agreement did not impede the HarbourVest Bankruptcy Settlement and rebutted CLO Holdco's argument regarding the "Right of First Refusal" therein at Article 6, *id.* ¶¶ 26-39, Appx. 203-209.

Much to the bankruptcy court's surprise, at the January 14, 2021, hearing, CLO Holdco suddenly withdrew its objection, indicating that this was after analysis of the HCLOF Members Agreement and applicable law. CLO Holdco's counsel stated on the record:

CLO Holdco has had an opportunity to review the reply briefing, and after doing so has gone back and scrubbed the HCLOF corporate documents. Based on our analysis of Guernsey law and some arguments of counsel on those pleadings and our review of the appropriate documents, I obtained authority from my client, Grant Scott, as trustee for CLO Holdco, to withdraw the CLO Holdco objection based on the interpretation of the Members Agreement.

Highland Appendix, Ex. 9 at 7:20-8:6, Appx. 219-220.

The Debtor called two witnesses in support of the HarbourVest Settlement Motion—its court-appointed CRO and CEO, Mr. Seery, and HarbourVest's representative, Mr. Pugatch. Counsel for Mr. Dondero and the Dondero Trusts cross-examined the Debtor's witnesses but did not inquire about the value of the HCLOF interests, the Debtor's purported fiduciary obligations,

or the transfer of the HCLOF interests. Highland Appendix, Ex. 9 at 87:18-89:21, Appx. 299-301. At the conclusion of the hearing, in reliance on CLO Holdco's withdrawal of its Objection, and the evidence admitted at the hearing, the bankruptcy court entered an order overruling the remaining objections and approving the HarbourVest Bankruptcy Settlement [Bankr. Doc. No. 1788] (the "HarbourVest Settlement Order"). Highland Appendix, Ex. 10, Appx. 386-409.

The HarbourVest Settlement Order expressly authorized the transfer of HarbourVest's 49.98% interest in HCLOF to a Debtor subsidiary providing, in relevant part, that "[p]ursuant to the express terms of the [HCLOF Members Agreement] ... HarbourVest is authorized to transfer its interest in HCLOF to a wholly-owned and controlled subsidiary of the Debtor ... without the need to obtain the consent of any party or to offer such interests first to any other investor in HCLOF." *Id.* ¶ 6, Appx. 390. The bankruptcy court included this language because of concerns that Mr. Dondero, the Dondero Trusts, or CLO Holdco, among others, might "go to a different court somehow to challenge the transfer." Highland Appendix, Ex. 9, Appx. 368.10-369:5.

Approximately three months later, on April 12, 2021, with a new trustee in place at CLO Holdco (Mr. Mark Patrick) and with new counsel, the Plaintiffs filed their Complaint in the District Court, initiating this Lawsuit Pertaining to HarbourVest Settlement, in which they, *inter alia*, have challenged the transfer of the HarbourVest 49.98% interest in HCLOF to Highland's subsidiary, premised on the "Right of First Refusal." Highland Appendix, Ex. 11, Appx. 410-436. As noted earlier, the District Court subsequently referred this Action to the bankruptcy court. [Adv. Proc. Doc. No. 1-1]. To re-cap. the Complaint raises claims for: (i) breach of fiduciary duty (Count 1); (ii) breach of the HCLOF Members Agreement (Count 2); (iii) negligence (Count 3); (iv) RICO violations (Count 4); and (v) tortious interference (Count 5) (each, a "Count" and collectively, the "Counts"). In Count 1 (breach of fiduciary duty), the Plaintiffs allege that the Debtor violated its

“broad” duties to Plaintiffs under the IAA and the Debtor’s “internal policies and procedures” by: (i) engaging in “insider trading with HarbourVest”; (ii) “concealing” the value of HarbourVest’s 49.98% interest in HCLOF; and (iii) “diverting” the investment opportunity in the HCLOF interest to the Debtor without offering it to the Plaintiffs. *Id.* ¶¶ 67-74. In Count 4 (RICO), the Plaintiffs allege that the Debtor and Defendant HCLOF (now dismissed), and Defendant HCFA (never served) were an “association-in-fact” engaged in a pattern of racketeering activity for this same underlying conduct; namely, failing to disclose the valuation of the 49.98% HCLOF interest and ultimately effectuating the HarbourVest Bankruptcy Settlement. *Id.* ¶¶ 113-133. The Plaintiffs’ state-law Counts rest on the same underlying allegations. In support of Count 2 for breach of the HCLOF Members Agreement, the Plaintiffs again allege that the Debtor breached the “Right of First Refusal.” Complaint ¶¶ 92-102. In Count 3 (negligence), the Plaintiffs assert that the Debtor’s actions violated the HCLOF Members Agreement and the Debtor’s internal policies by failing to accurately calculate the HCLOF interests and failing to give the Plaintiffs the Right of First Refusal to purchase the interests. *Id.* ¶¶ 103-112. Count 5 (tortious interference) is again premised on the Debtor’s alleged interference with Plaintiffs’ “Right of First Refusal” under the HCLOF Members Agreement. *Id.* ¶¶ 134-141.

VI. LEGAL ANALYSIS.

A. Revisiting Judicial Estoppel as a Potential Bar to this Lawsuit Pertaining to HarbourVest Bankruptcy Settlement: Upon Further Analysis, the Bankruptcy Court Believes Counts 2 and 5 Are Barred by Judicial Estoppel.

This court now revisits the “judicial estoppel” doctrine, and how it might apply to this Lawsuit Pertaining to HarbourVest Bankruptcy Settlement, mindful of the instruction from the District Court that the bankruptcy court previously failed to consider “inadvertence” as a factor that might prevent application of the judicial estoppel doctrine here.

As earlier noted, after the bankruptcy court issued its Original MTD Order, concluding that two estoppel doctrines (collateral estoppel and judicial estoppel) precluded all claims asserted in this Lawsuit Pertaining to HarbourVest Bankruptcy Settlement, there was an appeal by DAF and CLO Holdco and, thereafter, issuance of the District Court 9/2/22 Remand Order.³¹ To recap, the District Court: (i) reversed the bankruptcy court's determination that collateral estoppel barred the Plaintiffs' claims, but (ii) remanded the bankruptcy court's judicial estoppel determination for consideration of whether the Plaintiffs' (CLO Holdco's) withdrawal of its objection to the HarbourVest Bankruptcy Settlement, based on its claimed Right of First Refusal, was "inadvertent" (as the District Court concluded that "inadvertence" is a factor that might negate application of the judicial estoppel doctrine and, therefore, must be analyzed here).

As explained below, the court, after scrutinizing the "inadvertence" factor, has now concluded that judicial estoppel indeed bars Count 2 (for breach of the HCLOF Members Agreement) and Count 5 (for tortious interference with the HCLOF Members Agreement).

First, to recap, judicial estoppel is "a common law doctrine by which a party who has assumed one position in his pleadings may be estopped from assuming an inconsistent position."³² The purpose of the doctrine is to protect the integrity of the judicial process by "prevent[ing] parties from 'playing fast and loose' with (the courts) to suit the exigencies of self-interest."³³ In other words, "judicial estoppel is designed to protect the judicial system, not the litigants," thus, "detrimental reliance by the party opponent is not required."³⁴ "Generally, judicial estoppel is invoked where 'intentional self-contradiction is being used as a means of obtaining unfair

³¹ *Charitable DAF Fund, L.P. v. Highland Cap. Mgmt., L.P.*, 643 B.R. 162 (N.D. Tex. 2022) (slip opinion version included at Highland Appendix, Ex. 12, Appx. 437-458).

³² *Brandon v. Interfirst Corp.*, 858 F.2d 266, 268 (5th Cir. 1988).

³³ *Id.* (various citations therein omitted); *United States v. McCaskey*, 9 F.3d 368, 378 (5th Cir. 1993).

³⁴ *Superior Crewboats, Inc. v. Primary P & I Underwriters (In re Superior Crewboats, Inc.)*, 374 F.3d 330, 334 (5th Cir. 2004) (cites omitted).

advantage in a forum provided for suitors seeking justice.”³⁵ As stated in the District Court 9/2/22

Remand Order:

A court examines three criteria when determining the applicability of judicial estoppel: “(1) the party against whom judicial estoppel is sought has asserted a legal position which is plainly inconsistent with a prior position; (2) a court accepted the prior position; and (3) the party did not act inadvertently.”³⁶

To be clear, the District Court affirmed the bankruptcy court’s determination on the first two criteria of judicial estoppel but noted that the bankruptcy court did not evaluate whether the Plaintiff’s actions in the bankruptcy court with regard to the HarbourVest Bankruptcy Settlement hearing were inadvertent, and, thus, remanded for a determination as to whether the Plaintiffs’ change of position was “inadvertent.” Thus, the only issue before the bankruptcy court with regard to the judicial estoppel determination is the element of “inadvertence.”³⁷

By way of analogy, the Fifth Circuit has held in the bankruptcy context (albeit when dealing with the debtor; *see* note 37 *supra*) that the act of failing to disclose claims against another in a bankruptcy case is considered “‘inadvertent’ only when, in general, the debtor either **lacks knowledge** of the undisclosed claims or has ***no motive for their concealment***.”³⁸ Applying this

³⁵ *Id.* at 334-335 (citations omitted).

³⁶ District Court 9/2/22 Remand Order, 643 B.R. at 173 (quoting *Reed v. City of Arlington*, 650 F.3d 571, 574 (5th Cir. 2011) (en banc)).

³⁷ The court notes, anecdotally, that the issue of “inadvertence” was not raised by the Plaintiffs in their prior briefing to the bankruptcy court. Perhaps there was some confusion all around as to whether the “inadvertence” factor applies here. Specifically, in the Fifth Circuit, the element of “inadvertence” is generally applied in a bankruptcy context where a **debtor**, post-discharge, seeks to assert a claim that had or could have been addressed within the bankruptcy. Therefore, one might be unclear whether the element of “inadvertence” applies in this case, which relates to **a non-debtor plaintiff’s change of position in an adversary proceeding**. *See Gabarick v. Laurin Mar. (Am.) Inc.*, 753 F.3d 550, 553 n.3 (5th Cir. 2014) (rejecting appellant’s argument that the third factor of “inadvertence” applies in a non-bankruptcy case, noting, “we apply [inadvertence] only when the judicial estoppel is based on the non-disclosure of a claim in a prior bankruptcy proceeding”); *Hall v. GE Plastic Pac. PTE Ltd.*, 327 F.3d 391, 396 (5th Cir. 2003) (applying two-factor test to judicial estoppel determination in non-bankruptcy case, namely, (a) whether position was clearly inconsistent, and (b) whether court was convinced to accept such position).

³⁸ *Superior Crewboats*, 374 F.3d at 335 (emphasis added); *see also Jethroe v. Omnova Sols., Inc.*, 412 F.3d 598, 600-01 (5th Cir. 2005) (“To establish that [debtor’s] failure to disclose was inadvertent, [debtor] may prove either that she did not know of the inconsistent position or that she had no motive to conceal it from the court ... at the time she filed her bankruptcy petition.”).

test to the Plaintiffs here with regard to their claims against the Debtor, the Plaintiffs *knew* of and analyzed the factual and legal issues underpinning Counts 2 and 5 when they unequivocally withdrew the CLO Holdco objection to the HarbourVest Bankruptcy Settlement in the bankruptcy court. To be clear, CLO Holdco filed a multi-page objection to the HarbourVest Bankruptcy Settlement that was almost entirely premised on the position that the transfer contemplated in the settlement, of the HarbourVest 49.98% interest in HCLOF, would violate the “Right of First Refusal” in the HCLOF Members Agreement. *See Highland Appendix*, Ex. 6 ¶¶ 3, 6, Appx. 125-126. Then CLO Holdco came into the bankruptcy court the morning of the hearing on the HarbourVest Bankruptcy Settlement and stated that, after “review[ing] the reply briefing,” “scrubb[ing] the HCLOF corporate documents,” analyzing Guernsey law, and reviewing the “appropriate documents,” it was withdrawing its objection to the HarbourVest Bankruptcy Settlement, premised on the “Right of First Refusal” being violated, “based on the interpretation of the Members Agreement.” *See Highland Appendix*, Ex. 9, Appx. 219-220. Thus, there can be no plausible doubt that the Plaintiffs knew of the underlying facts and legal issues underlying Counts 2 and 5 when CLO Holdco withdrew its objection to the HarbourVest Bankruptcy Settlement in the prior proceedings in the bankruptcy court. Their acts were intentional based on the unrefuted record.

Plaintiffs have alleged in support of Count 2 that they were “not informed of the fact that HarbourVest had offered its shares to Defendant [Highland] for \$22.5 million ...” *Complaint*, ¶ 98. This allegation, assuming for the moment it is true, would be irrelevant, but it is also inaccurate and contradicted by the record. The allegation is irrelevant because the “Right of First Refusal” (if it applied) would not be dependent on the value of the HCLOF shares/membership interests. But the allegation is inaccurate per the record, because HarbourVest did not “offer” its 49.98%

membership interest in HCLOF to Highland. Rather, a component of the HarbourVest Bankruptcy Settlement was for HarbourVest to transfer its membership interest in HCLOF to Highland's nominee in exchange for HarbourVest having allowed (but reduced) claims against the bankruptcy estate. Highland Appendix, Ex. 2 ¶ 32, Appx. 71-72; Ex. 3, Appx. 76-95. Finally, the allegation is contradicted by the record because the HarbourVest Bankruptcy Settlement Motion *expressly stated* that the net asset value of the interest was “estimated to be approximately \$22 million as of December 1, 2020.” Highland Appendix, Ex. 2 ¶ 32 & n.5, Appx. 71-72; Ex. 3, ¶ 1(b), Appx. 78.

As far as the notion of motive—i.e., looking at whether CLO Holdco might have had a motive for concealment—it certainly seems implausible here to conclude that the Plaintiffs would have had no motive to take inconsistent positions on Counts 2 and 5. Why? Thinking through this, if CLO Holdco had successfully pressed the “Right of First Refusal” argument at the bankruptcy court, things likely would not have played out well for CLO Holdco or the bankruptcy estate and its creditors. First, since HarbourVest received a total of \$80 million in allowed claims in the HarbourVest Bankruptcy Settlement, presumably, Plaintiffs would have had to have something significantly more than the alleged \$22.5 million value of the HCLOF membership interests (depending upon what HarbourVest thought its \$80 million worth of allowed proofs of claim might ultimately yield for it during the bankruptcy case). Then, regardless of what CLO Holdco might have had to pay HarbourVest for them, the HCLOF interests would have been speculative, illiquid, hard to value, and subject to portfolio performance risk. And, all the while, HarbourVest may have continued to press its \$300 million of proofs of claim in the bankruptcy case (absent the HarbourVest Bankruptcy Settlement) resulting in potential costly and lengthy litigation, and an overall reduced recovery for creditors. By contrast, in the Complaint, the Plaintiffs now seek monetary recovery or specific performance. *See Complaint*, ¶ 143.

Accordingly, the only current risk to Plaintiffs is litigation risk. They have borne none of the speculative risk of what would happen to the value of the HCLOF membership interests, had they had the opportunity to acquire it.³⁹

In summary, CLO Holdco's inconsistent positions regarding the "Right of First Refusal" under the HCLOF Members Agreement would appear, by any plausible measure, to be deliberate, directed, and *not inadvertent*.⁴⁰ There can be no legitimate dispute that Plaintiffs' conduct—with regard to Plaintiff CLO Holdco's withdrawal of its objection to the HarbourVest Settlement—was "advertent."⁴¹ Therefore, judicial estoppel bars Count 2 (for breach of the HCLOF Members Agreement) and Count 5 (for tortious interference with the HCLOF Members Agreement). These two counts are all about the "Right of First Refusal" provision in the HCLOF Members Agreement.

B. Plaintiffs Failure to State a Plausible Claim on the Other Counts (First, Counts 1, 3, & 4).

With respect to all other Counts in this Lawsuit Pertaining to HarbourVest Bankruptcy Settlement, this court now undertakes a traditional Rule 12(b)(6) analysis. The bankruptcy court has never ruled on the plausibility of the claims in this Action, under an *Iqbal* and *Twombly*

³⁹ See *Superior Crewboats*, 337 F.3d at 336 (debtors "had the requisite motivation to conceal the claim as they would certainly reap a windfall had they been able to recover on the undisclosed claim").

⁴⁰ *Superior Crewboats, Inc.*, 374 F.3d at 335-36 (debtors' non-disclosure of a viable personal injury claim in schedules filed in their no asset bankruptcy case was not "inadvertent" where debtors "were aware of the facts underlying the claim" for months, noting, "[a]lleged confusion as to a limitations period does not evince a lack of knowledge as to the existence of the claim."); *Jethroe*, 412 F.3d at 601 (failure to disclose claim was not "inadvertent" where party was aware of "the facts giving rise to them" at the time she filed bankruptcy); *U.S. ex rel. Long v. GSDMidea City, L.L.C.*, 798 F.3d 265, 272 (5th Cir. 2015) (failure to disclose claims was not "inadvertent" where party "was aware of the facts underlying his claims as early as 2010 and [] filed this lawsuit in 2011," noting that, inadvertence through lack of knowledge cannot be shown "as long as the debtor has enough information to suggest that he may have a potential claim; the debtor need not know all of the underlying facts or even the legal basis of the claim.").

⁴¹ It is indisputable that the Plaintiff DAF is in privity with the Plaintiff CLO Holdco and therefore cannot argue that only CLO Holdco should be bound by judicial estoppel for filing and then withdrawing its objection. See *Charitable DAF Fund L.P.*, 2022 U.S. Dist. LEXIS 175778, at *12-13 ("DAF is in privity with CLO Holdco because it controls and owns 100% of CLO Holdco ... [DAF] had a fair chance to challenge the gatekeeping orders or [is] in privity with an entity that did.")

standard,⁴² because with the Original MTD, the bankruptcy court simply stopped after concluding that ***all Counts*** were precluded by estoppel doctrines. Now, post-remand, and because Highland has filed its Renewed MTD, the bankruptcy court believes it is duty-bound to evaluate all Counts under a traditional Rule 12(b)(6) plausibility standard. The court will start with the Counts as to which it has concluded judicial estoppel does not apply.

(i) Breach of Fiduciary Duty (Count 1).

Plaintiffs fail to state a plausible claim for breach of fiduciary duty (Count 1).

The Plaintiffs' breach of fiduciary duty Count is premised on the Debtor's alleged: (i) insider trading; (ii) concealment of the value of HarbourVest's 49.98% interest in HCLOF; and (iii) diversion of an investment opportunity from Plaintiffs to the Debtor, in violation of Section 10(b) of the Securities and Exchange Act of 1934 and the IAA. *See Complaint* ¶¶ 67-80.⁴³

"Section 10(b) of the Securities and Exchange Act of 1934, 15 U.S.C. § 78j(b), makes unlawful the use of 'any manipulative or deceptive device or contrivance' in contravention of SEC rules."⁴⁴ "A cause of action lies under Rule 10b-5 'only if the conduct alleged can be fairly viewed as manipulative or deceptive' within the meaning of the statute."⁴⁵ To state a securities fraud claim under section 10(b) and Rule 10b-5, plaintiffs must plead: "(1) a misstatement or omission; (2) of a material fact; (3) made with scienter; (4) on which the plaintiffs relied; and (5) that proximately caused the plaintiffs' injuries."⁴⁶ "A fact is material if there is 'a substantial likelihood that, under

⁴² *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

⁴³ Note that where a plaintiff's breach of fiduciary duty claim is premised on theories of securities fraud, Rule 9(b)'s heightened pleading standards apply. *See Tigue Inv. Co. v. Chase Bank of Tex., N.A.*, 2004 WL 3170789, at *2 (N.D. Tex. Nov. 15, 2004).

⁴⁴ *Alabama Farm Bureau Mut. Cas. Co. v. Am. Fid. Life Ins. Co.*, 606 F.2d 602, 608 (5th Cir. 1979).

⁴⁵ *Id.* (quoting *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 473-74 (1977)).

⁴⁶ *Southland Sec. Corp. v. INSpire Ins. Sols., Inc.*, 365 F.3d 353, 362 (5th Cir. 2004).

all the circumstances, the omitted fact would have assumed actual significance in the deliberations of the reasonable shareholder.”⁴⁷ “Scienter is a crucial element of the securities fraud claims.”⁴⁸

Plaintiffs’ allegations underlying their breach of fiduciary duty claim are wholly conclusory. And because Plaintiffs fail to properly plead securities fraud, any fiduciary claim premised on such allegations necessarily fails as well.⁴⁹ Plaintiffs fail to plead with particularity that any alleged omissions by the Debtor posed any real significance to the Plaintiffs. *See, e.g., Complaint* ¶¶ 82-89 (speculating about Plaintiffs’ “lost opportunity cost,” and ambiguously asserting that “Defendants’ malfeasance” has “exposed HCLOF to a massive liability from HarbourVest”).⁵⁰ These allegations also fail to give rise to a “strong interference of scienter” sufficient to state a claim under Rule 10(b).⁵¹ Plaintiffs’ allegations regarding proximate cause are likewise deficient. *See Complaint* ¶¶ 88-89 (vaguely alleging that because of Defendants’ actions, “Plaintiffs have lost over \$25 million”).

Plaintiffs also allege breach of fiduciary duty under state law, citing some Texas law in their Response to Renewed MTD. [Adv. Proc. Doc. No. 129, p.1.] However, HCLOF is a Guernsey entity, and the HCLOF Members Agreement is governed by Guernsey law. *See Highland Appendix*, Ex. 13 at Appx. 475. Under the internal affairs doctrine, Guernsey law controls on issues of fiduciary duties to the members.⁵² In any event, Plaintiffs fail to allege any breach of fiduciary claims premised on Texas state law. Texas law provides “[t]he elements of a breach of

⁴⁷ *Id.* (quoting *Grigsby v. CMI Corp.*, 765 F.2d 1369, 1373 (9th Cir.1985)).

⁴⁸ *Tuchman v. DSC Communications Corp.*, 14 F.3d 1061, 1067 (5th Cir. 1994).

⁴⁹ *See Town North Bank, N.A. v. Shay Fin. Servs.*, 2014 WL 4851558, at *27 (N.D. Tex. Sep. 30, 2014).

⁵⁰ Interestingly, HarbourVest is nowhere to be found in this Lawsuit Pertaining to HarbourVest Bankruptcy Settlement. HarbourVest has never complained about anything—no doubt feeling blissfully free of its former Highland entanglements.

⁵¹ *See In re Enron Corp. Sec., Derivative & ERISA Litig.*, 258 F. Supp. 2d 576, 635-36 (S.D. Tex. 2003); *Southland*, 365 F.3d at 368 (plaintiff must plead “more than allegations of motive and opportunity to withstand dismissal” for claim of securities fraud) (citing *Goldstein v. MCI WorldCom*, 340 F.3d 238, 250-51 (5th Cir. 2003)).

⁵² *See Pridgin v. Safety-Kleen Corp.*, 2021 WL 5964630, at *2 (N.D. Tex. Dec. 16, 2021).

fiduciary duty claim are: (1) a fiduciary relationship between the plaintiff and defendant; (2) the defendant must have breached his fiduciary duty to the plaintiff; and (3) the defendant's breach must result in injury to the plaintiff or benefit to the defendant."⁵³ "The plaintiff must plead some facts as to the nature of the relationship to state a plausible claim that that a fiduciary duty has been breached."⁵⁴ The Complaint fails to sufficiently allege facts regarding the nature of the relationship between Plaintiffs and the Debtor. *See Complaint*, ¶¶ 62-63 (simply alleging that (i) the Debtor "owed a fiduciary duty to [Plaintiffs]" pursuant to which the Debtor "agreed to provide sound investment advice, and (ii) this fiduciary relationship is "broad and applies to the entire advisors-client relationship"). The Complaint also fails to adequately allege that any law of Guernsey setting forth fiduciary duties existed, let alone was breached for the same reasons.⁵⁵ Allegations of the Debtor's breach of its "internal policies and procedures" or the diversion of "corporate opportunities" are vague and conclusory. *See Complaint*, ¶¶ 72-89.⁵⁶

Plaintiffs assert that the Debtor breached its "unwaivable" fiduciary obligation under the IAA by, among other things, "diverting a corporate opportunity." Complaint, ¶¶ 82-84. This Count is purportedly premised on the IAA because (i) the Debtor was the DAF's investment adviser under an advisory agreement and (ii) HCFA is HCLOF's investment adviser under a separate advisory agreement. However, under Supreme Court precedent, the IAA ***does not provide a private right of action to sue for damages arising from breach of fiduciary duty***. *Transamerica Mtg. Advisors, Inc. (TAMA) v. Lewis*, 444 U.S. 11 (1979) (holding there is no private right of action under Section 206 of the IAA). Rather, a party can seek to void an investment management

⁵³ *Matter of ATP Oil & Gas Corp.*, 711 F. App'x 216, 221 (5th Cir. 2017) (and citations therein omitted).

⁵⁴ *In re Life Partners Holdings, Inc.*, 926 F.3d 103, 125 (5th Cir. 2019).

⁵⁵ *Id.* (no allegation of "the nature of the fiduciary duty owed" to plaintiff).

⁵⁶ *See In re Soporex, Inc.*, 463 B.R. 344, 417 (Bankr. N.D. Tex. 2011).

agreement under Section 215 of the IAA, if the agreement's formation or performance would violate the IAA.⁵⁷ Plaintiffs have not pleaded any such claim.

Even if there were a right of action under the IAA, Plaintiffs' allegations would still be deficient for failure to plead "duty" or "breach." The Debtor owed no duty to offer the HarbourVest 49.98% ownership interest in HCLOF to Plaintiffs. The transfer of same was effectuated in compliance with the HCLOF Members Agreement and "Right of First Refusal." The DAF's advisory agreement included full and clear disclosure that the Debtor could compete with the DAF for investments with no obligation to offer those investments to the DAF. *See Highland Appendix*, Ex. 14, at Appx. 504-505 (indicating that the "Fund will be subject to a number of actual and potential conflicts of interest . . . including . . . that . . . Highland . . . may actively engage in transactions in the same securities sought by the Fund and, therefore, may compete with the Fund for investment opportunities . . .").⁵⁸ Highland also owed no duty to CLO Holdco as an investor in HCLOF; there is no fiduciary relationship between an adviser to a fund and the fund's investors.⁵⁹

Finally, there was no corporate opportunity to divert. HarbourVest asserted \$300 million worth of proofs of claim against the Debtor seeking, among other things, effectively the rescission of its investment in HCLOF, an investment allegedly induced by fraud. The HarbourVest Bankruptcy Settlement effectuated that remedy. Because HarbourVest had no claims against

⁵⁷ *NexPoint Diversified Real Estate Tr. v. Acis Cap. Mgmt., L.P.*, 620 F. Supp.3d 36, 43 (S.D.N.Y. 2022) ("Plaintiff has not adequately pleaded a claim . . . under the IAA . . . there is no private right of action to bring a claim pursuant to [Section 206 of the IAA].").

⁵⁸ *See SEC v. Cap. Gains Research Bureau, Inc.*, 375 U.S. 180, 198 (1963) (noting that "the evident purpose of the Investment Advisers Act of 1940 [was] to substitute a philosophy of disclosure for the philosophy of caveat emptor," and discussing that a disclosure of an adviser's practice of trading in the market for his own account and the same time as advising clients would satisfy the adviser's fiduciary obligations under the IAA); *Dugaboy Inv. Trust v. Highland Cap. Mgmt., L.P.*, 2022 WL 4450490, at *5 (N.D. Tex. Sept. 22, 2022) (addressing argument that fiduciary obligations under the IAA cannot be waived and finding no breach of duty when conflict disclosed).

⁵⁹ *Goldstein v. SEC*, 451 F.3d 873, 879-882 (D.C. Cir. 2006).

Plaintiffs, there was no taking of a corporate opportunity. The Debtor was resolving a claim against the Debtor, not purchasing a security for cash, and could not transfer its liability to HarbourVest to Plaintiffs.

Accordingly, the breach of fiduciary duty causes of action (Count 1), should be dismissed for implausibility.

(ii) Negligence (Count 3).

Next, Plaintiffs also fail to state a plausible claim of negligence (Count 3).

The analysis here is quite straightforward. This claim is barred by the confirmed Plan which has been affirmed at the Fifth Circuit.⁶⁰ Pursuant to the Plan, Highland was exculpated from all claims for “conduct occurring on or after the Petition Date [October 16, 2019] in connection with or arising out of (i) the ... administration of the Chapter 11 Case ... and (v) any negotiations, transactions, and documentation in connection with the foregoing” unless such conduct constituted “bad faith, gross negligence, criminal misconduct, or willful misconduct.”⁶¹ The negotiation and consummation of the HarbourVest Bankruptcy Settlement were part of the “administration of the Chapter 11 Case,” and Highland, therefore, has been exculpated from Plaintiffs’ claim for negligence.

Even absent exculpation, Plaintiffs failed to state a claim. “The elements of a negligence claim under Texas law are: ‘(1) a legal duty on the part of the defendant; (2) breach of that duty; and (3) damages proximately resulting from that breach.’”⁶² The negligence allegations are speculative, conclusory, and fail to allege proximate cause.⁶³

⁶⁰ *NexPoint v. Highland Capital Management*, 48 F.4th 419 (5th Cir. 2022).

⁶¹ Plan, Art. I.B.62; Art. IX.C.

⁶² *Sivertsen v. Citibank, N.A. as Tr. for Registered Holders of WAMU Asset-Back Certificates WAMU Series No. 2007-HE2 Tr.*, 390 F. Supp. 3d 769, 789 (E.D. Tex. 2019) (and numerous citations therein).

⁶³ *See Rodgers v. City of Lancaster Police*, 2017 W.L. 457084, *17 (N.D. Tex. Jan. 6, 2017).

(iii) RICO (Count 4).

Next, Plaintiffs also fail to state a plausible claim under RICO (Count 4).

First, it should be noted that Plaintiffs put in their Response to Renewed MTD, at page 23, that they were moving to withdraw their RICO claim, pursuant to Rule 41(a). Specifically, they state:

Plaintiffs respectfully dismiss the RICO claim under Rule 41(a) to the extent such a claim is revealed to have existed under non-securities bases. Because Highland has conceded that Plaintiffs' claims are actionable under the federal securities laws and the Advisers Act, and has cited same as a basis for dismissing the RICO claim, Highland is precluded and estopped from denying the violations of the Securities Laws and the Advisers Act. As such, to the extent that other, non-securities law violations may give rise to RICO violations, Plaintiffs respectfully reserve the right to bring such a claim but respectfully dismiss their RICO claim at this time.

Adv. Proc. Doc. No. 130.

The court is confused and concerned a bit about the procedure employed here. The court is not sure that Rule 41(a) is the correct mechanism (notice, without a court order), particularly after Highland has fully briefed a Rule 12(b)(6) motion and Plaintiffs have not responded to that briefing but, rather, are reserving the right to bring their RICO claims but are dismissing them "at this time." Accordingly, the court will briefly address why it believes Plaintiffs failed to state a plausible claim under RICO.

To state a RICO claim, a plaintiff must allege: "1) the conduct; 2) of an enterprise; 3) through a pattern; 4) of racketeering activity."⁶⁴ The RICO claim must be pleaded "with sufficient particularity" under Rule 9(b).⁶⁵

⁶⁴ *Montesano v. Seafirst Commercial Corp.*, 818 F.2d 423, 424 (5th Cir.1987) (and citations therein).

⁶⁵ *Tel-Phonic Servs., Inc. v. TBS Int'l, Inc.*, 975 F.2d 1134, 1138 (5th Cir. 1992).

First, the Plaintiffs failed to allege a *pattern* of *racketeering activity*. “A pattern of racketeering activity consists of *two or more predicate criminal acts* that are (1) related and (2) amount to or pose a threat of continued criminal activity.”⁶⁶ Plaintiffs allege *three predicate offenses*: (i) wire fraud, (ii) mail fraud, and (iii) violation of the IAA’s antifraud provisions. *See Complaint*, ¶¶ 130-132. But the Plaintiffs fail to sufficiently plead any of these alleged predicate acts.

With regard to *mail fraud*, a plaintiff must allege: “(1) a scheme to defraud, (2) which involves the use of the mails, (3) for the purpose of executing the scheme.”⁶⁷ The elements of *wire fraud* are the same but apply to “wire communications in furtherance of the scheme.”⁶⁸ “[B]oth RICO mail and wire fraud require evidence of intent to defraud, i.e., evidence of a scheme to defraud by false or fraudulent representations.”⁶⁹ The thrust of Plaintiffs’ RICO claim is that the Debtor operated in such a way as to “violate insider trading rules and regulations when it traded with HarbourVest” by concealing “non-public information that it had not supplied” to Plaintiffs. *Complaint*, ¶ 118. Plaintiffs’ RICO claim is a series of conclusory allegations predicated on allegations of mail, wire, and securities fraud. *See id.* at ¶¶ 113-133. But the *Complaint* only vaguely alleges that Mr. Seery (i) “utilized the interstate wires and/or mails to obtain or arrive at valuations of the HCLOF interests,” *id.* at ¶ 120; (ii) “transmitted or caused to be transmitted through the interstate wires information to HCLOF investors from [Highland],” *id.* at ¶ 121 and (iii) “operated [the Debtor] in such a way that he concealed the true value of the HCLOF interests by utilizing the interstate wires and mails to transmit communications to the court in the form of

⁶⁶ *D&T Partners v. Baymark Partners LP*, 2022 WL 1458554, at *6 (N.D. Tex. May 9, 2022) (quoting *St. Germain v. Howard*, 556 F.3d 261, 263 (5th Cir. 2009)).

⁶⁷ *United States v. Gray*, 96 F.3d 769, 773 (5th Cir. 1996) (and cites therein).

⁶⁸ *Id.*

⁶⁹ *St. Paul Mercury Ins. Co. v. Williamson*, 224 F.3d 425, 441 (5th Cir. 2000).

written representations...” *id.* at ¶ 122. The Plaintiffs do not plead with particularity details about the contents of those alleged communications, when the Debtor had them, to whom, or where such communications were directed.⁷⁰ Plaintiffs only generally allege that Mr. Seery testified about the valuation of the HCLOF interests (Complaint, ¶ 125) but provide no details about mail or wire fraud. The Complaint, therefore, “does not identify specific acts of communication by mail or by interstate wires” undertaken by the Debtor “in furtherance of a fraudulent scheme” as required by Rule 9(b).⁷¹ Plaintiffs’ allegations are not sufficient to state a plausible claim for relief under RICO.⁷²

With regard to the *alleged predicate offense of violation of the IAA’s antifraud provisions*, alleged violations of securities laws cannot be predicate acts for a RICO claim.⁷³ Thus, to the extent that the Plaintiffs’ RICO claims allege “conduct that would have been actionable as fraud in connection with the purchase or sale of securities” (18 U.S.C. § 1964(c)), the claims are barred by statute. “Courts have interpreted the scope of § 1964(c)’s so-called ‘securities fraud exception’ broadly to apply even where a plaintiff does not expressly plead securities fraud as the predicate act, where a plaintiff could not have even brought a securities fraud claim against the particular defendant, and where a plaintiff pleads securities fraud violations but fails to state a claim for relief.”⁷⁴ The Plaintiffs’ RICO claim seems predicated on violations of the securities laws: “Defendants’ conduct violated the wire fraud and mail fraud laws, and the [IAA’s] antifraud

⁷⁰ See *Merrill Lynch, Pierce, Fenner & Smith v. Young*, 1994 WL 88129, at *7-9 (S.D.N.Y. Mar. 15, 1994); *Tel-Phonic Servs.*, 975 F.2d at 1138.

⁷¹ See *Merrill Lynch*, 1994 WL 88129, at *11; *Tel-Phonic Servs.*, 975 F.2d at 1134 (Rule 9(b) requires pleading particulars of time, place, content and maker of the misrepresentation).

⁷² See *Robinson v. Standard Mortg. Corp.*, 191 F. Supp. 3d 630, 640 (E.D. La. 2016) (dismissing RICO claims where plaintiff provided no factual details).

⁷³ See 18 U.S.C. § 1964(c); *Affco Invs. 2001, L.L.C. v. Proskauer Rose, L.L.P.*, 625 F.3d 185, 191 (5th Cir. 2010).

⁷⁴ *Woods v. Michael*, 2021 WL 1055816, at *3 (S.D. Fla. Feb. 10, 2021).

provisions.” Complaint, ¶ 132. Because the RICO claim is improperly founded on alleged securities fraud, it must be dismissed.

Additionally, the Plaintiffs have failed to plead a “pattern of racketeering activity.” “To prove a pattern of racketeering activity, a plaintiff must show at least two predicate acts of racketeering that are related and amount to or pose a threat of continued criminal activity.”⁷⁵ To constitute a “pattern,” the activities must show “continuity.”⁷⁶ “Continuity” refers “either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition.”⁷⁷ “Predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement.”⁷⁸

Here, the Complaint does not allege “continuity.” There is no specific “threat of repetition” or distinct threat of long-term criminal conduct. Nor do the allegations suggest the Debtor is “operating as part of a long-term association that exists for criminal purposes.”⁷⁹ Plaintiffs’ RICO allegations concern only non-specific conduct allegedly occurring in a limited period, September 2020 to January 2021, concerning *one transaction*—the HarbourVest Bankruptcy Settlement. *See, e.g., Complaint*, ¶¶ 119-128. Such allegations concern short-term, discrete transactions, and do not show a “pattern of activity,” or threat of “continuing racketeering activity.”⁸⁰

Finally, the Plaintiffs have failed to plausibly allege causation. RICO provides civil remedies to “[a]ny person injured in [their] business or property by reason of a violation of section

⁷⁵ *MWK Recruiting, Inc. v. Jowers*, 2020 WL 722997, at *8 (W.D. Tex. Dec. 8, 2020) (quoting *Tel-Phonic Servs.*, 975 F.2d at 1139-40).

⁷⁶ *Tel-Phonic Servs.*, 975 F.2d at 1140.

⁷⁷ *Id.* at 1139-40.

⁷⁸ *Id.* (quoting *H. J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 241 (1989)); *see also Calcasieu Marine Nat’l Bank v. Grant*, 943 F.2d 1453, 1464 (5th Cir.1991) (“Short-term criminal conduct is not the concern of RICO.”)

⁷⁹ *See Partain v. City of S. Padre Island*, 2018 WL 7202486, at *15-16 (S.D. Tex. Dec. 5, 2018) (quoting *H. J. Inc.*, 492 U.S. at 242-43).

⁸⁰ *See Calcasieu*, 943 F.2d at 1464.

1962.”⁸¹ “An injured party must show that the violation was the but-for and proximate cause of the injury.”⁸²

The Plaintiffs failed to allege that the Debtor’s actions induced them to act or that any Debtor’s actions were the proximate cause of any cognizable injury. Plaintiffs generally allege that “had Plaintiff been offered those interests [the HarbourVest 49.98% interest in HCLOF], it would have happily purchased them and therefore would have infused over \$20 million in cash into the estate for the purpose of executing the HarbourVest Settlement.” Complaint, ¶ 50. Such “would have” allegations are conclusory and speculative and insufficient to show proximate and but-for causation.⁸³

In summary, the Plaintiffs’ RICO claim fails the key elements set forth above and should be dismissed, pursuant to Rule 12(b)(6), rather than Rule 41(a).

C. Dismissal of Counts 2 and 5 for Failure to State a Plausible Claim, in the Event the Judicial Estoppel Doctrine Does Not Bar Such Claims.

If this court has incorrectly determined that the doctrine of judicial estoppel bars Count 2 (for breach of the HCLOF Members Agreement) and Count 5 (for tortious interference with the HCLOF Members Agreement), as set forth in Part VI.A above, this court nevertheless holds that these Counts should be dismissed under Rule 12(b)(6) for failure to state a plausible claim.

With regard to the breach of contract claim (Count 2), HarbourVest’s transfer of its interests in HCLOF to a subsidiary of Highland was permitted under the plain and unambiguous

⁸¹ 18 U.S.C. § 1964(c).

⁸² *Robinson*, 191 F. Supp. 3d at 645 (internal quotations omitted). Causation requires “[a] direct relationship between the fraud and the injury.” *In re Oil Spill by the Oil Rig “Deepwater Horizon,”* 802 F. Supp. 2d 725, 730 (E.D. La. 2011).

⁸³ *See Robinson*, 191 F. Supp. 3d at 645 (allegations failed to state causation where plaintiff’s “after-the-fact” and “bare assertion that she would have acted differently” had she known of certain facts were insufficient “absent additional factual allegations to support or explain this assertion,”); *In re Oil Spill by the Oil Rig “Deepwater Horizon,”* 802 F. Supp. 2d at 729 (no causation where economic harms suffered by plaintiffs were “too remote” and causation theory “depends on a series of speculative assumptions to link the alleged fraud” with the harm).

terms of the HCLOF Members Agreement (Highland Appendix, Ex. 13, Appx. 459-487) and the Right of First Refusal did not apply. Plaintiffs are using semantics in an apparent attempt to recharacterize the transfer of HarbourVest’s 49.98% interest in HCLOF as a “sale to Highland”; but this contradicts the facts and the terms of the transaction authorized by the bankruptcy court in the HarbourVest Settlement Order. As authorized, HarbourVest transferred its 49.98% interest in HCLOF to HCMLP Investments, LLC (“HCMLPI”), a wholly owned subsidiary (or “Affiliate”) of Highland (Highland Appendix, Ex. 10, Appx. 386-409), as part of the settlement of HarbourVest’s very large proofs of claim filed in the Highland bankruptcy case. HCMLPI’s status as an “Affiliate” of Highland is established by documents of which the court may take judicial notice or on which the Complaint relies. *See, e.g., Highland Appendix*, Ex. 3, at Appx. at 87 (showing that Highland is HCMLPI’s member), Ex. 8, at Appx. 204-05 (Highland is an affiliate), and Ex. 10, at Appx. 402 (same). HarbourVest’s interest could be transferred to an “Affiliate” of Highland under the HCLOF Members Agreement.

Plaintiffs’ tortious interference claim (Count 5) also necessarily fails; it is duplicative of Plaintiffs’ breach of contract claim and there is no breach of the HCLOF Members Agreement. Tortious interference with contract claims cannot exist in the absence of a contract right with which a defendant can interfere.⁸⁴ Further, Plaintiffs fail to explain how Highland, a party to the HCLOF Members Agreement, could have interfered with it; only third parties can interfere with a contract.⁸⁵

⁸⁴ *See e.g., WickFire, L.L.C. v. Woodruff*, 989 F.3d 343, 354 (5th Cir. 2021) (“to prevail on an interference claim, the plaintiff must ‘present evidence that some obligatory provision of a contract [was] breached’”) (internal quotations omitted). CLO Holdco, of course, previously conceded in the bankruptcy court, in January 2021, that Plaintiffs had no contractual right of first refusal. In any event, the contract provisions clearly did not give it one under the uncontested facts at bar. Therefore, a claim for tortious interference cannot be viable.

⁸⁵ *1st & Trinity Super Majority, LLC v. Milligan*, 657 S.W.3d 349, 372 (Tex. App.—El Paso 2022) (and cases cited therein).

VII. CONCLUSION.

For all the reasons stated herein, Highland's Renewed MTD is granted in full. First, Counts 2 and 5 are barred by the doctrine of judicial estoppel—due to the inconsistent/contrary positions taken by the Plaintiffs in January 2021 in the prior proceeding in the bankruptcy court involving the HarbourVest Bankruptcy Settlement. It cannot plausibly be argued that the Plaintiffs' prior inconsistent position was inadvertent.

Moreover, all Counts in this Lawsuit Pertaining to HarbourVest Bankruptcy Settlement (including Counts 2 and 5) fail to state claims that are plausible on their face under an *Iqbal/Twombly* analysis and should, accordingly, be dismissed pursuant to Rule 12(b)(6).

IT IS SO ORDERED.

###END OF MEMORANDUM OPINION AND ORDER###



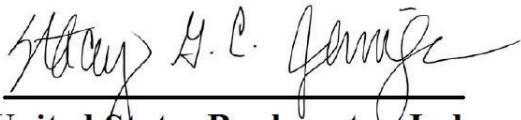
CLERK, U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS

ENTERED

THE DATE OF ENTRY IS ON
THE COURT'S DOCKET

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

Signed June 25, 2023


United States Bankruptcy Judge

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

IN RE:	§	
	§	
HIGHLAND CAPITAL MANAGEMENT	§	BANKR. CASE NO. 19-34054-SGJ-11
L.P.,	§	(CHAPTER 11)
REORGANIZED DEBTOR.	§	
	§	
CHARITABLE DAF FUND, L.P. and	§	
CLO HOLDCO, LTD.,	§	
	§	
PLAINTIFFS,	§	
	§	
VS.	§	ADV. PRO. NO. 21-03067-sgj
	§	
HIGHLAND CAPITAL MANAGEMENT,	§	CIV. ACT. NO. 3:22-cv-02802-B
L.P.,	§	
	§	
DEFENDANT.	§	

MEMORANDUM OPINION AND ORDER GRANTING DEFENDANT
HIGHLAND CAPITAL MANAGEMENT, L.P.'S
"RENEWED MOTION TO DISMISS COMPLAINT"
[ADV. PROC. DOC. NO. 122]

000042

I. INTRODUCTION.

The above-referenced Action (herein so called)—now more than two years running on a circuitous path between the bankruptcy court and district court—is related to the even longer-running Chapter 11 bankruptcy case of Highland Capital Management, L.P. (“Highland,” the “Debtor,” or sometimes the “Reorganized Debtor”). Now before the bankruptcy court is a renewed Rule 12(b)(6)¹ motion to dismiss the Action (“Renewed MTD”) filed by Highland, the main Defendant in this Action. [Adv. Proc. Doc. No. 122].²

This Action was filed by two plaintiffs, Charitable DAF Fund, L.P. and CLO Holdco, Ltd. (“Plaintiffs”), on April 12, 2021. The Action was commenced *in the District Court (during Highland’s bankruptcy case and prior to the effective date of Highland’s Chapter 11 plan)* and was randomly assigned to District Judge Jane Boyle. The Action was originally assigned Civil Action No. 3:21-cv-0842-B. But Highland thereafter filed a motion to *enforce* the standing order of reference in this District,³ urging the District Court to refer the Action to the bankruptcy court presiding over its bankruptcy case. The Plaintiffs filed a response and a cross-motion of their own, urging the District Court to determine that mandatory withdrawal of the reference under 28 U.S.C. § 157(d) applied to the Action. Judge Boyle entered an order on September 20, 2021, granting Highland’s motion to enforce the reference, referring the Action to this bankruptcy court “to be

¹ This is a reference to Fed. R. Civ. Proc. 12(b)(6), applicable in bankruptcy adversary proceedings, pursuant to Fed. R. Bankr. Proc. 7012.

² When referring to pleadings filed in this Action on the docket maintained by the bankruptcy clerk, the court will use the abbreviation “Adv. Proc. Doc. No. ____.” When referring to pleadings filed in the main Highland bankruptcy case on the docket maintained by the bankruptcy clerk, the court will use the abbreviation “Bankr. Doc. No. ____.” When referring to pleadings filed in this Action on the docket maintained by the District Clerk, the court will use the abbreviation “D.C. Doc. No. ____.”

³ See Order of Reference of Bankruptcy Cases and Proceedings Nunc Pro Tunc, of the United States District Court Northern District of Texas (“Miscellaneous Rule No. 33”), dated August 3, 1984.

adjudicated as a matter related to the consolidated Chapter 11 Bankruptcy of Highland Capital Management, L.P., Chapter 11 Case No. 19-34054” (“Original Order of Reference”).⁴

Plaintiffs later brought a “Renewed Motion to Withdraw the Reference” (“Renewed MTWR”) on November 18, 2022—more than a year after Judge Boyle rejected their arguments. The Renewed MTWR was transmitted to the District Court on December 15, 2022, and randomly assigned by computer to a different district judge – Judge Karen Scholer – under new civil action number 3:22-cv-02802-S. The Action was thereafter transferred to Judge Boyle, and renumbered as 3:22-cv-02802-B. The Renewed MTWR remains pending before Judge Boyle at this time.

Much has happened in the Action, before, during, and after the Original Order of Reference and the Renewed MTWR, in what might aptly be referred to as “jurisdictional ping pong.” This is best understood with the timeline of relevant events set forth in Part III below. But first, a description of the parties is in order.

II. THE PARTIES.

A. *The Defendants.*

As noted, Highland is the main Defendant in this Action.

There were originally two other Defendants. One was Highland CLO Funding, Ltd. (“HCLOF”), a non-debtor entity, based in the jurisdiction of Guernsey (which is an island in the English Channel). HCLOF held investments, including investments in vehicles referred to as “CLOs.”⁵ HCLOF is now 50.58% owned by Highland and one Highland’s wholly owned

⁴ See *Original Order of Reference*, Civ. Act. No. 3:21-cv-0842-B, Adv Proc. Doc. No. 64.

⁵ “A CLO is a type of structured financial transaction that pools debt instruments issued by corporations. The pooled loans are funneled into a trust entity commonly referred to as a ‘special purpose vehicle’ (‘SPV’) that raises funds through equity investment and by issuing notes to third-party investors. Cash flow from the CLOs is paid out to noteholders and, subsequently, to equity holders.” *NexPoint Diversified Real Estate Tr. v. Acis Cap. Mgmt., L.P.*, 620 F. Supp. 3d 36, 40 (S.D.N.Y. 2022)(docket citations omitted).

subsidiaries called HCMLP Investments, LLC. The Defendant HCLOF was dismissed with prejudice from this Action on December 7, 2021 [Adv. Proc. Doc. No. 80].

The other Defendant was Highland HCF Advisors, Ltd. (“HCFA”), a non-debtor entity that is wholly owned by Highland and has historically served as the portfolio manager for HCLOF. HCFA has never appeared in this Action. It appears HCFA was never served with the summons and complaint.⁶ The court is unclear why HCFA was never served—perhaps it has no assets and the Plaintiffs decided it was not important in this dispute. Highland’s Brief in support of its Renewed MTD, that is now before the court, states that HCFA’s role is limited at this point in time to simply advising HCLOF regarding the liquidation of HCLOF’s portfolio of investments and the recovery of cash for distributions to HCLOF’s members.⁷ [Adv. Proc. Doc. No. 123, p. 3, n. 11.]

B. The Plaintiffs.

The Plaintiffs are CLO Holdco Ltd. (“CLO Holdco”) and Charitable DAF Fund, L.P. (“DAF”).

DAF is the parent company of CLO Holdco. DAF is a Cayman Island hedge fund that represents that it is part of a “donor-advised fund” established for charitable purposes.

CLO Holdco is also a Cayman Island entity.

⁶ Highland noted in a *Motion for an Order Extending the Time to File a Responsive Pleading*, filed May 6, 2021, in Civ. Act. No. 3:21-cv-0842-B, at D.C. Doc. No. 9, at p. 3, and entered on the bankruptcy docket on September 29, 2021, at Adv. Proc. Doc. No. 9, that “[w]hile Highland agreed to accept service on its own behalf, it could not and did not accept service on behalf of the other defendants, Highland HCF Advisors, Ltd. and Highland CLO Funding, Ltd. (together, the ‘Other Defendants’)” and that “to the best of Highland’s knowledge, the Other Defendants have not been served with the Complaint such that the time for each of them to serve a responsive pleading has not begun to run.” A *Waiver of Service of Summons* with respect to HCLOF was filed on June 3, 2021 (at Doc. No. 30 in both the District Court and bankruptcy court), but there does not appear on either docket any proof of service or waiver of service with respect to HCFA that would indicate that HCFA has been served as of this date.

⁷ HCLOF is represented to be now “past its investment period.”

Both Plaintiffs are part of an intricate structure of companies that were originally funded (long ago) by Highland and/or entities that were controlled by Highland's founder and former CEO Mr. James Dondero ("Mr. Dondero").

Plaintiff CLO Holdco happens to own a 49.02% equity interest in HCLOF (the aforementioned dismissed Defendant). Thus, Defendant Highland and Plaintiff CLO Holdco are essentially co-owners of HCLOF. As explained below, it is not a happy arrangement, post-bankruptcy.

C. Interrelationships.

While this is all complex, the key focus in this Action is the entity HCLOF and Highland's and CLO Holdco's now unhappy co-ownership of same. As noted, Highland (and its subsidiary) own 50.58% of HCLOF, and CLO Holdco owns 49.02% of HCLOF.⁸ As also noted, Highland and CLO Holdco—post-bankruptcy—are not happy business partners with regard to their co-ownership of HCLOF.

It all stems back to when an unrelated third-party, called HarbourVest⁹--previously a 49.98% owner of HCLOF—transferred its ownership interest in HCLOF to Highland (actually to Highland's wholly owned subsidiary, HCMLP Investments, LLC). Before this, Highland had only owned .6% of HCLOF, so the transfer from HarbourVest made Highland (along with its subsidiary) the majority owner of HCLOF (.6% + 49.98% = 50.58%). This transfer happened pursuant to a significant settlement agreement approved during the bankruptcy case (which happened to be objected to by CLO Holdco—although CLO Holdco later withdrew its objection to the settlement).

⁸ Apparently, a few former Highland employees collectively own or owned about .4% of HCLOF.

⁹ "HarbourVest" means, collectively, HarbourVest 2017 Global Fund L.P., HarbourVest 2017 Global AIF L.P., HarbourVest Dover Street IX Investment L.P., HV International VIII Secondary L.P., HarbourVest Skew Base AIF L.P., and HarbourVest Partners L.P.

For ease of reference—and because there are a very large number of lawsuits pending in the Northern District of Texas involving Highland—this Action presently before the court will sometimes be referred to henceforth as the “Lawsuit Pertaining to HarbourVest Bankruptcy Settlement.” The timeline below attempts to fully explain all of this.

III. THE RELEVANT TIMELINE

October 16, 2019: Highland filed its voluntary chapter 11 bankruptcy case (the “Petition Date”).

January 2020: Corporate governance changes were implemented at Highland, as a result of pressure from the Official Committee of Unsecured Creditors appointed in the bankruptcy case and the United States Trustee, both of whom expressed concern with Highland’s then-current management. New independent directors were appointed, including James P. Seery, Jr. (“Mr. Seery”), and thereafter Mr. Seery was named Chief Restructuring Officer (“CRO”) and, eventually, the new Chief Executive Officer (“CEO”) of Highland. Highland’s co-founder, Mr. Dondero, was removed as CEO of Highland. This was all approved by order of the bankruptcy court.

December 23, 2020: Several months into the bankruptcy case, Highland (through its new management) moved for bankruptcy court approval of a significant settlement it reached with the party known as HarbourVest. To be clear, HarbourVest was/is wholly unrelated to Highland (and wholly unrelated to Mr. Dondero). HarbourVest is a large investment firm that was a disputed creditor of Highland—asserting *\$300 million in proofs of claim against Highland*, regarding a prepetition investment opportunity that had not developed in the way HarbourVest had envisioned—specifically, HarbourVest’s investment in HCLOF whereby it acquired a 49.98% equity interest in HCLOF. Pursuant to the proposed settlement between Highland and

HarbourVest (the “HarbourVest Bankruptcy Settlement”), HarbourVest agreed to transfer its 49.98% equity interest in HCLOF to Highland (or an entity to be designated by Highland) and agreed to greatly reduce its disputed proofs of claim in the bankruptcy case from \$300 million to \$80 million (which would be given part unsecured creditor status and part subordinated status). The HarbourVest Bankruptcy Settlement was essentially a rescission of HarbourVest’s investment in HCLOF.

January 8, 2021: Plaintiff CLO Holdco objected to the HarbourVest Bankruptcy Settlement, presumably at the direction of its parent, DAF (the other Plaintiff herein). CLO Holdco argued that: (i) it (as an equity member of HCLOF) had a right to acquire the 49.98% equity interest in HCLOF that HarbourVest was going to be transferring to Highland under the HarbourVest Bankruptcy Settlement, pursuant to an alleged “Right of First Refusal” in the HCLOF membership agreement; and (ii) HarbourVest could not transfer its 49.98% equity interest to Highland without compliance with this purported “Right of First Refusal.” CLO Holdco did not object on any other basis to the HarbourVest Bankruptcy Settlement.

January 14, 2021: The bankruptcy court held an evidentiary hearing on the proposed HarbourVest Bankruptcy Settlement, during which CLO Holdco voluntarily withdrew its objection to the HarbourVest Bankruptcy Settlement premised on the “Right of First Refusal.” The lawyer for CLO Holdco was questioned extensively on the record as to why the objection was being withdrawn so suddenly. His reply was that, after studying the corporate documentation, he and his client had made the determination that the “Right of First Refusal” argument was not meritorious. After an extensive presentation of evidence, the bankruptcy court overruled certain remaining objections (specifically, those of certain family trusts of Mr. Dondero) and approved the HarbourVest Bankruptcy Settlement. The Dondero family trusts appealed to the District Court

the approval of the HarbourVest Bankruptcy Settlement, and their appeal was dismissed for lack of standing.

February 22, 2021: Very soon after the HarbourVest Bankruptcy Settlement, the bankruptcy court entered an order confirming a Chapter 11 plan for Highland [Bankr. Doc. No. 1943] (the “Confirmation Order”), which confirmed Highland’s extensively mediated, negotiated, and litigated plan [Bankr. Doc. No. 1808] (the “Plan”). The Plan became effective on August 11, 2021 [Bankr. Doc. No. 2700] (the “Effective Date”). At least the following provisions of the Plan are germane to this Lawsuit Pertaining to HarbourVest Bankruptcy Settlement. **First**, pursuant to the Plan, the bankruptcy court expressly retained jurisdiction/authority to “allow, disallow, determine, liquidate ... any Claim ... including, without limitation, the resolution of any request for payment of any Administrative Expense Claim” Plan, Art. XI. **Second**, the Plan defined “Administrative Expense Claim,” in relevant part, as a: “Claim for costs and expenses of administration of the Chapter 11 Case . . . pursuant to sections 503(b), 507(a)(2), 507(b) ... of the Bankruptcy Code, including ... (a) the actual and necessary costs and expenses incurred after the Petition Date and through the Effective Date of preserving the Estate and operating the business of the Debtor” Plan, Art. I.B.2.

April 12, 2021: Less than two months after the Plan was confirmed, and before it became effective, the Plaintiffs commenced this Lawsuit Pertaining to HarbourVest Bankruptcy Settlement in the District Court—which was assigned Civ. Action No. 21-CV-0842-B (Judge Boyle)—naming Debtor/Highland, HCFA, and HCLOF as Defendants. To be clear, this lawsuit was filed at a time when Highland was still a debtor in possession (its Plan had recently been confirmed, but the Plan Effective Date had not yet occurred—it occurred August 11, 2021). The

underlying Complaint (“Complaint”)¹⁰ alleges that the conduct of Highland *during the bankruptcy case* in late 2020 and early 2021, surrounding the HarbourVest Bankruptcy Settlement—prior to the Confirmation Order—violated contractual and extra-contractual duties that Highland purportedly owed (i) to Plaintiff CLO Holdco as an investor in HCLOF; and (ii) to Plaintiff DAF as an advisee under an investment advisory agreement. The Complaint raises claims: (i) by both Plaintiffs for breaches of fiduciary duty against Highland and HCFA (Count 1); (ii) by CLO Holdco for breach of contract (i.e., the HCLOF Members Agreement)¹¹ against all three Defendants (Count 2); (iii) by both Plaintiffs for negligence against Highland and HCFA (Count 3); (iv) by both Plaintiffs for violations of the Racketeer Influenced and Corrupt Organizations statute (15 U.S.C. § 1961, et seq. (“RICO”)) against Highland (Count 4); and (v) by CLO Holdco for tortious interference against Highland (Count 5). In Count 1 (breaches of fiduciary duty), Plaintiffs allege that Debtor/Highland violated duties to Plaintiffs under the Investment Advisers Act and Highland’s “internal policies and procedures” by: (i) engaging in “insider trading with HarbourVest”; (ii) “concealing” the value of HarbourVest’s 49.98% equity interest in HCLOF; and (iii) “diverting” the investment opportunity in the HarbourVest entities to the Debtor without first offering it to Plaintiffs.¹² In Count 4 (RICO), Plaintiffs allege that Highland and the co-Defendants were an “association-in-fact” engaged in a pattern of racketeering

¹⁰ See Highland Appendix in support of Renewed MTD, at Adv. Proc. Doc. No. 124, Ex. 11, Appx. 410-436. Henceforth, all references to this appendix will be cited as Highland Appendix, Ex. __, Appx. __.

¹¹ Highland Appendix, Ex. 13, Appx. 459-487.

¹² While specific statutory references to the federal Investment Advisers Act are sparse in the Complaint, subsequent pleadings of the Plaintiffs make clear that they are referring to at least 15 U.S.C. § 80b-6 and 80b-15(a) (which they cite as imposing both a duty of care and a duty of loyalty, each unwaivable, on investment advisors, in favor of funds and its investors, citing *SEC v. Tambone*, 550 F.3d 106, 146 (1st Cir. 2008)); 15 U.S.C. § 206(2) (which they cite as requiring investment advisers to seek “best execution” for all their clients’ transactions, citing *SEC v. Ambassador Advisors, LLC*, 576 F. Supp. 3d 286, 300 (E.D. Pa. 2021)); and 15 U.S.C. § 215 (which they cite as recognizing “a limited private right of action for equitable relief including disgorgement, wherein one may seek to void the rights of a violator who performs a contract in violation of the Advisers Act”). Response to Renewed MTD, pp. 12-13. Adv. Proc. Doc. No. 130.

activity for this same underlying conduct; namely, failing to disclose the value of HCLOF's interest and ultimately effectuating the HarbourVest Bankruptcy Settlement. Again, Highland's alleged misconduct was the act of settling the \$300 million proofs of claim filed against Highland by HarbourVest, pursuant to the terms and conditions of the HarbourVest Bankruptcy Settlement. To be clear, the HarbourVest Bankruptcy Settlement was implemented after full notice to creditors in the Highland bankruptcy case, an opportunity to take discovery, an evidentiary hearing, and approval by the bankruptcy court after fulsome findings of fact and conclusions of law. And as noted earlier, one of the Plaintiffs, CLO Holdco, even objected to the HarbourVest Bankruptcy Settlement and then abruptly withdrew its objection the morning of the bankruptcy court's hearing on the HarbourVest Bankruptcy Settlement.

May 19, 2021: Soon after the commencement of this Lawsuit Pertaining to HarbourVest Bankruptcy Settlement, Highland moved before Judge Boyle for an order to enforce the Northern District of Texas's standing order of reference (Misc. Order No. 33) [Adv. Proc. Doc. No. 22] (the aforementioned "Motion to Enforce"), arguing that the Lawsuit Pertaining to HarbourVest Bankruptcy Settlement should be referred to the bankruptcy court, since it asserted claims arising in, arising under, or related to Title 11 and Highland's bankruptcy case.

May 27, 2021: Highland also moved to dismiss the Lawsuit Pertaining to HarbourVest Bankruptcy Settlement [Adv. Proc. Doc. No. 26] (the "Original MTD"). The Original MTD was fully briefed to Judge Boyle.¹³

June 29, 2021: Plaintiffs filed their response to the Motion to Enforce [Adv. Proc. Doc. No. 36], arguing the Motion to Enforce should be denied, and *cross-moving therein that Judge*

¹³ Defendant HCLOF, which had not yet been dismissed from the Action at this point, filed a *Motion to Dismiss and Joinder in Motion to Dismiss of Highland Capital Management, L.P.* in the District Court, Civ. Act. No. 3:21-cv-0842-B, at D. C. Doc. No. 57 (Adv. Proc. Doc. No. 57) on August 30, 2021.

Boyle should keep the Lawsuit Pertaining to HarbourVest Bankruptcy Settlement because the claims therein were subject to mandatory withdrawal of the reference, under 28 U.S.C § 157(d)—i.e., they involved “consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce” and could not be adjudicated in the bankruptcy court. As earlier noted, the underlying Complaint (while, in essence, complaining about the HarbourVest Bankruptcy Settlement) asserts two claims that purport to be grounded in federal law: breach of fiduciary duty under the federal Investment Advisers Act (“IAA”) and the RICO count. Notably, the arguments in Plaintiffs’ pleading filed on June 29, 2021, appear to be identical to those in Plaintiffs’ Renewed MTWR filed November 18, 2022.

August 26, 2021: Plaintiffs filed a motion before Judge Boyle asking her to stay this Lawsuit Pertaining to HarbourVest Bankruptcy Settlement, pending appeal of the Confirmation Order [Bankr. Doc. No. 55] (the “Stay Motion”), arguing that the Plan injunction might prohibit the prosecution of the Lawsuit Pertaining to HarbourVest Bankruptcy Settlement. The Stay Motion was fully briefed to Judge Boyle.

September 20, 2021: Judge Boyle granted Highland’s Motion to Enforce and referred this Lawsuit Pertaining to HarbourVest Bankruptcy Settlement to the bankruptcy court, including the Original MTD, “[p]ursuant to 28 U.S.C. § 157 ... to be adjudicated as a matter related to the ... Bankruptcy of Highland Capital Management, L.P.” [Adv. Proc. Doc. No. 64].

November 23, 2021: Plaintiffs and Defendants next argued the Stay Motion and the merits of the Original MTD, including their alleged claims under the IAA and RICO, to the bankruptcy court. Following the hearing the bankruptcy court denied the Stay Motion.¹⁴

¹⁴ See *Order Denying Motion to Stay*, Adv. Proc. Doc. No. 81, entered on December 7, 2021. On the same date, the bankruptcy court also entered its *Order* dismissing the Defendant HCLOF from the Action (there was no opposition to this by Plaintiffs) [Adv. Proc. Doc. No. 80].

March 11, 2022: The bankruptcy court granted the Original MTD and issued a written ruling on it (the “Original MTD Order”)—never getting to the merits of the claims in the Lawsuit Pertaining to HarbourVest Bankruptcy Settlement. [Adv. Proc. Doc. No. 100]. Rather, the bankruptcy court dismissed the Lawsuit Pertaining to HarbourVest Bankruptcy Settlement with prejudice, on the basis that the claims were precluded by the doctrines of collateral estoppel and judicial estoppel. *See Charitable DAF Fund, L.P. and CLO Holdco, Ltd. v. Highland Cap. Mgmt., L.P., et al. (In re Highland Cap. Mgmt., L.P.)*, 2022 WL 780991 (Bankr. N.D. Tex., Mar. 11, 2022). The bankruptcy court concluded that the claims in the Lawsuit Pertaining to HarbourVest Bankruptcy Settlement were estopped due to the strategic decisions of Plaintiff CLO Holdco during the bankruptcy case (i.e., choosing to withdraw its objection to the HarbourVest Bankruptcy Settlement) and that this strategic decision was also binding on its Co-Plaintiff DAF (its parent) since the two were in privity. The bankruptcy court concluded that the adjudication of the bona fides of the HarbourVest Bankruptcy Settlement precluded further litigation pertaining to the HarbourVest Bankruptcy Settlement such as this Action. On March 25, 2022, the Plaintiffs appealed the Original MTD Order to the District Court. *See* 3:21-cv-00695-B [D.C. Doc. No. 2].

June 17, 2022: Judge Boyle entered an order consolidating the appeal of the Original MTD Order with Plaintiff’s appeal of the bankruptcy court’s order denying the Stay Motion, which had been assigned Civ. Act. No. 3:21-cv-03129. *See* 3:21-cv-03129-B [D.C. Doc. No. 20].

September 2, 2022: Judge Boyle, sitting this time in an appellate capacity: (i) reversed the bankruptcy court’s conclusion that collateral estoppel barred Plaintiffs’ claims, but (ii) remanded on the judicial estoppel determination.¹⁵ *See Charitable DAF Fund, L.P. v. Highland Cap. Mgmt., L.P. (In re Highland Cap. Mgmt., L.P.)*, 643 B.R. 162, 166 (N.D. Tex. 2022) (the “District Court

¹⁵ Judge Boyle affirmed the bankruptcy court’s order denying the Stay Motion.

9/2/22 Remand Order”). Specifically, Judge Boyle determined that the bankruptcy court had erred in its ruling that *collateral estoppel* barred entirely the claims in this Lawsuit Pertaining to HarbourVest Bankruptcy Settlement, but Judge Boyle separately, in evaluating the bankruptcy court’s determination that *judicial estoppel* also barred Plaintiff’s Lawsuit Pertaining to HarbourVest Bankruptcy Settlement, ruled that the bankruptcy court did not make a certain finding necessary to conclude judicial estoppel applied (i.e., *a finding of “inadvertence”*). Thus, Judge Boyle remanded to the bankruptcy court for possible further findings on the *judicial estoppel doctrine* and presumably for an adjudication on the merits of the various claims asserted in the Lawsuit Pertaining to HarbourVest Bankruptcy Settlement if the bankruptcy court concluded judicial estoppel did *not* apply (after evaluating the “inadvertence” factor).

September 8, 2022: Meanwhile, the U.S. Court of Appeals for the Fifth Circuit affirmed, in material part, the Confirmation Order in support of the Highland Plan. *NexPoint Advisors, L.P., et al. v. Highland Cap. Mgmt., L.P.*, 48 F.4th 419 (5th Cir. 2022). A petition for writ of certiorari is now pending before the U.S. Supreme Court regarding the Confirmation Order. To be clear, there has never been a stay of the Plan (i.e., the Confirmation Order), and the Highland Plan has been in effect since August 11, 2021.

October 14, 2022: In response to the District Court 9/2/22 Remand Order, Highland filed a renewed motion to dismiss [Adv. Proc. Doc. No. 122] (the “Renewed MTD”), which is now before the court. It addresses the “inadvertence” factor on the judicial estoppel defense (arguing that it, indeed, bars Counts 2 and 5 of the Complaint), and also argues that all claims in this Lawsuit Pertaining to HarbourVest Bankruptcy Settlement—even if not precluded by the doctrine of judicial estoppel—are not plausible on their face, under *Iqbal* and *Twombly*.¹⁶

¹⁶ *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

November 18, 2022: Plaintiffs responded to the Renewed MTD and also filed their Renewed MTWR, again urging mandatory withdrawal of the reference. ***Plaintiffs, at this point, moved to dismiss their RICO count (without prejudice).*** See Plaintiff’s Response to Renewed MTD at 23¹⁷ (“Plaintiffs respectfully dismiss the RICO claim under Rule 41(a) to the extent such a claim is revealed to have existed under non-securities bases. . . . Plaintiffs respectfully reserve the right to bring such a claim but respectfully dismiss their RICO claim at this time.”). Thus, Plaintiffs’ sole “other federal law” argument at this juncture (assuming they have withdrawn their RICO claim) seemingly boils down to this:

This adversary proceeding primarily involves fiduciary duties imposed upon Registered Investment Advisers by the Investment Advisers Act of 1940 (“Advisers Act”) and corresponding state law claims for breach of those duties. As a result, presiding over this action will require extensive consideration of federal laws regulating interstate commerce, which renders withdrawal of the reference to bankruptcy court mandatory under 28 U.S.C. § 157(d).

Renewed MTWR, at ¶ 5.

February 6, 2023: The bankruptcy court issued a Report & Recommendation, recommending that the Renewed MTWR be denied. It is still pending.

IV. JURISDICTION AND LEGAL STANDARD.

The bankruptcy court hereby rules on Highland’s Renewed MTD. In the event the District Court ***grants*** the pending Renewed MTWR of the Plaintiffs, the bankruptcy court proposes that this Memorandum Opinion and Order should be treated as a Report & Recommendation to the District Court, recommending that it grant Highland’s Renewed MTD.¹⁸

A. Jurisdiction and Core Nature of the Action

¹⁷ Adv. Proc. Doc. No. 129.

¹⁸ See 28 U.S.C. 1334(c)(1). See also *Executive Benefits Ins. Agency v. Arkison*, 134 S. Ct. 2165 (2014).

Bankruptcy subject matter jurisdiction exists over the claims in this Lawsuit Pertaining to HarbourVest Bankruptcy Settlement pursuant to 28 U.S.C. §§ 1334(b) and 157. Under 28 U.S.C. § 1334(b), “district courts shall have original but not exclusive jurisdiction of all civil proceedings *arising under* title 11, or *arising in* or *related to* cases under title 11.”¹⁹ (Emphasis added.) The bankruptcy courts, in turn, are delegated authority to exercise that jurisdiction from the district courts, under 28 U.S.C. § 157(a).²⁰ There does not appear to be any dispute that this Lawsuit Pertaining to HarbourVest Bankruptcy Settlement is at least “related to” the Highland bankruptcy case. Thus, it is undisputed that bankruptcy subject matter jurisdiction exists.²¹ Moreover, the Action involves “core” matters over which a bankruptcy court may generally enter final judgments.²² As noted recently by the Fifth Circuit: “[A] proceeding is core under section 157 if it invokes a substantive right provided by title 11 or if it is a proceeding that, by its nature, could arise only in the context of a bankruptcy case. For example, claims concerning the administration of the estate, allowance or disallowance of claims against the estate, and sale of property of the estate are all core proceedings.”²³

¹⁹ 28 U.S.C. § 1334(b); *see also In re Bass*, 171 F.3d 1016, 1022 (5th Cir. 1999) (“[Section] 1334(b) grants jurisdiction to district courts and adjunct bankruptcy courts to entertain proceedings ‘arising under,’ ‘arising in a case under,’ or ‘related to’ a case under Title 11 of the United States Code, i.e., proceedings ‘related to’ bankruptcy.”).

²⁰ *In re PFO Glob., Inc.*, 26 F.4th 245, 252 (5th Cir. 2022) (citing 28 U.S.C. § 157(a)).

²¹ *In re Bass*, 171 F.3d at 1022 (“To determine whether [bankruptcy] jurisdiction exists, ‘it is necessary only to determine whether a matter is at least “related to” the bankruptcy.’” (quoting *In re Walker*, 51 F.3d 562, 569 (5th Cir. 1995))).

²² As noted earlier, there is a non-debtor Defendant still technically in this lawsuit, HCFA, that is a subsidiary of Highland. The Claims asserted against it by Plaintiffs (which appear to be asserted in Counts 1-3) arguably would not be core matters. However, HCFA has not been served and has failed to appear or defend in this matter. Thus, presumably there will be no adjudication of the claims against HCFA in this Action and, thus, the claims against it are irrelevant.

²³ *Foster v. Aurzada, et al.*, 2023 WL 20872, at p. 2 (5th Cir. Jan. 3, 2023) (per curiam), citing *In re Wood*, 825 F.2d 90, 97 (5th Cir. 1987) and 28 U.S.C. § 157(b)(2)(A), (B), (N), (O)). *See also In re Southmark Corp.*, 163 F.3d 925, 930-31 (5th Cir. 1999) (citing 28 U.S.C. § 157(b)(3) and stating that whether claim has a state law origin is not dispositive to whether it is a core bankruptcy matter; accordingly, malpractice suit against an examiner’s accountant was a core proceeding; “The bankruptcy court must be able to assure itself and the creditors who rely on the process that court-approved managers of the debtor’s estate are performing their work, conscientiously and cost-effectively. . . enforcement of the appropriate standards of conduct are inseparably related functions of bankruptcy courts.”).

To be clear, even though most of the Counts in this Action (Count I, breach of fiduciary duty; Count 2, breach of contract; Count 3, negligence; and Count 5, tortious interference) sound like mostly state law claims, ***they are all claims being asserted against Highland relating to its actions during its Chapter 11 bankruptcy case.***²⁴ Therefore, they are “core” in nature.²⁵ All of the causes of action in this Lawsuit Pertaining to HarbourVest Bankruptcy Settlement are tantamount to the assertion of administrative expense claims against a Chapter 11 Debtor. As a general matter, the filing of administrative expense claims triggers the claims allowance process and subjects a claimant to the bankruptcy court’s equitable jurisdiction.²⁶

B. Legal Standard.

With regard to Rule 12(b)(6), to survive a motion to dismiss pursuant to Rule 12(b)(6), a plaintiff must plead “enough facts to state a claim to relief that is plausible on its face.”²⁷ Dismissal is proper under Rule 12(b)(6) when, taking the facts alleged in the complaint as true, it appears that the plaintiff “cannot prove any set of facts that would entitle it to the relief it seeks.”²⁸

Set forth below, the court will properly analyze whether judicial estoppel bars Count 2 and 5 of the Complaint—as argued by Highland (this time properly considering the “inadvertence factor” which the District Court held was not considered, as required, in its District Court 9/2/22 Remand Order). The court will additionally analyze (regardless of the court’s determination of

²⁴ *In re Wood*, 825 F.2d at 97 n.34 (stating that whether right is state created is not dispositive to whether proceeding is core under 28 U.S.C. § 157).

²⁵ *Foster v. Aurzada, et al.*, 2023 WL 20872, at p. 2.

²⁶ *See, e.g., In re UAL Corp.*, 386 B.R. 701, 707 (Bankr. N.D. Ill. 2008) (“[B]y filing a claim ... the creditor triggers the process of ‘allowance and disallowance of claims,’ thereby subjecting himself to the bankruptcy court’s equitable power ... As such, there is no Seventh Amendment right to a jury trial ... Claims for payment of an administrative expense are no different from other claims in this regard.”) (citing *Langenkamp v. Culp*, 498 U.S. 42 (1990)). *See also Harpole Constr., Inc. v. Medallion Midstream, LLC (In re Harpole Constr., Inc.)*, 565 B.R. 193, 202 (Bankr. D. N.M. 2017) (same); *Carter v. Schott (In re Carter Paper Co.)*, 220 B.R. 276, 290-311 (Bankr. M.D. La. 1998) (finding breach of fiduciary duty claim against bankruptcy trustee originally filed in state court was an administrative expense claim and no jury trial right existed).

²⁷ *Twombly*, 550 U.S. at 570. *See also Iqbal*, 556 U.S. at 663.

²⁸ *C.C. Port, Ltd. v. Davis-Penn Mortg. Co.*, 61 F.3d 288, 289 (5th Cir. 1995).

the judicial estoppel question) whether any or all of the Counts (1, 2, 3, 4, and 5)²⁹ should be dismissed for failure to state a plausible claim. But first, the court sets forth the undisputed facts, many of which were set forth in the timeline at Part III above.

V. UNDISPUTED FACTS.

Highland filed its Chapter 11 case on October 16, 2019. Many months before that, HarbourVest invested approximately \$80 million in HCLOF. In exchange for HarbourVest's investment, HarbourVest obtained a 49.98% interest in HCLOF. The Plaintiff CLO Holdco was also an investor in HCLOF. Following this HarbourVest investment, CLO Holdco owned 49.02% of the equity of HCLOF, and the remaining 1% was held by Highland (.6%) and certain Highland employees (.4%). Thus, the entity HCLOF was owned by HarbourVest, CLO Holdco, Highland and certain employees.

Things eventually grew sour with HarbourVest. After Highland filed bankruptcy, HarbourVest filed proofs of claim against the Debtor in excess of \$300 million, alleging that it was fraudulently induced into its investment by factual misrepresentations and omissions made by Mr. Dondero and certain Highland employees. *See Highland Appendix*, Ex. 1, Appx. 1-61.

The Highland bankruptcy case was very contentious with numerous large, disputed claims—some of which were the subject of mediation before respected mediators. The HarbourVest proofs of claim were among those hotly disputed claims (although not the subject of formal mediation).

Eventually, the Debtor settled the HarbourVest proofs of claim.³⁰ On December 23, 2020, the Debtor filed a motion [Bankr. Doc. No. 1625] (the "HarbourVest Settlement Motion")

²⁹ As noted earlier, Plaintiffs have moved to dismiss the Count 4 RICO claim.

³⁰ As earlier noted herein, during the bankruptcy case (in mid-January 2020)—pursuant to a settlement with the Official Committee of Unsecured Creditors—the Debtor started being governed by an Independent Board of Directors

providing notice and seeking bankruptcy court approval for same. Highland Appendix, Ex. 2, Appx. 62-75. As earlier noted, the key feature of the HarbourVest Bankruptcy Settlement was for HarbourVest to transfer its 49.98% equity interest in HCLOF to the Debtor's designee in exchange for greatly reduced claims against the estate. Highland Appendix, Ex. 2 ¶ 32, Appx. 71-72; Ex. 3, Appx. 76-95. The transfer of this 49.98% equity interest was a key component of the HarbourVest Bankruptcy Settlement. The HarbourVest Settlement Motion disclosed all aspects of the HarbourVest Bankruptcy Settlement, including (i) what HarbourVest was transferring; (ii) the valuation (and method of valuation) of the equity interests it was transferring; (iii) the method of transfer; and (iv) the compromised amount of the HarbourVest proofs of claim that would be allowed. Highland Appendix, Ex. 2 ¶ 32 & n.5, Appx. 71-72; Ex. 3, ¶ 1(b), Appx. 78.

On January 6, 2021, Mr. Dondero filed an objection to the HarbourVest Bankruptcy Settlement [Bankr. Doc. No. 1697] ("Dondero's Objection"). Highland Appendix, Ex. 4, Appx. 96-111. On January 8, 2021, Mr. Dondero's family trusts (i.e., Get Good Trust and The Dugaboy Investment Trust) (the "Dondero Trusts") filed their own objection [Bankr. Doc. No. 1706] (the "Dondero Trusts' Objection"). Highland Appendix, Ex. 5, Appx. 112-122.

CLO Holdco also objected to the HarbourVest Bankruptcy Settlement on January 8, 2021 [Bankr. Doc. No. 1707] ("CLO Holdco's Objection"). Highland Appendix, Ex. 6, Appx. 123-133. CLO Holdco challenged HarbourVest's right to effectuate the transfer of its 49.98% membership interest in HCLOF to Highland, contending that: (i) CLO Holdco and the other members of HCLOF had a "Right of First Refusal" under the HCLOF Members Agreement, *id.* ¶ 3, Appx. 125, and (ii) "HarbourVest has no authority to transfer its interest in HCLOF without first complying with the Right of First Refusal." *Id.* ¶ 6, Appx. 126. CLO Holdco set forth a lengthy

and an independent CRO, who was eventually named CEO (Mr. Seery). The Debtor parted ways in the process with former CEO Mr. Dondero.

analysis of the HCLOF Members Agreement, including CLO Holdco’s purported “Right of First Refusal” under Article 6 thereof. *See id.* ¶¶ 9-22, Appx. 127-132.

After filing their objections, CLO Holdco and Mr. Dondero conducted discovery under Bankruptcy Rule 9014(c) and deposed Michael Pugatch, a representative of HarbourVest [Bankr. Doc. No. 1705]. Highland Appendix, Ex. 7, Appx. 134-188. CLO Holdco never contended in the bankruptcy court that: (i) the Debtor had a fiduciary duty to offer the 49.98% membership interest in HCLOF to CLO Holdco, or (ii) the Investment Advisers Act of 1940 (the “IAA”) was implicated by the HarbourVest Bankruptcy Settlement.

On January 13, 2021, the Debtor filed its reply [Bankr. Doc. No. 1731] (the “Omnibus Reply”) (Highland Appendix, Ex. 8, Appx. 189-211), in which it argued that the HCLOF Members Agreement did not impede the HarbourVest Bankruptcy Settlement and rebutted CLO Holdco’s argument regarding the “Right of First Refusal” therein at Article 6, *id.* ¶¶ 26-39, Appx. 203-209.

Much to the bankruptcy court’s surprise, at the January 14, 2021, hearing, CLO Holdco suddenly withdrew its objection, indicating that this was after analysis of the HCLOF Members Agreement and applicable law. CLO Holdco’s counsel stated on the record:

CLO Holdco has had an opportunity to review the reply briefing, and after doing so has gone back and scrubbed the HCLOF corporate documents. Based on our analysis of Guernsey law and some arguments of counsel on those pleadings and our review of the appropriate documents, I obtained authority from my client, Grant Scott, as trustee for CLO Holdco, to withdraw the CLO Holdco objection based on the interpretation of the Members Agreement.

Highland Appendix, Ex. 9 at 7:20-8:6, Appx. 219-220.

The Debtor called two witnesses in support of the HarbourVest Settlement Motion—its court-appointed CRO and CEO, Mr. Seery, and HarbourVest’s representative, Mr. Pugatch. Counsel for Mr. Dondero and the Dondero Trusts cross-examined the Debtor’s witnesses but did not inquire about the value of the HCLOF interests, the Debtor’s purported fiduciary obligations,

or the transfer of the HCLOF interests. Highland Appendix, Ex. 9 at 87:18-89:21, Appx. 299-301. At the conclusion of the hearing, in reliance on CLO Holdco's withdrawal of its Objection, and the evidence admitted at the hearing, the bankruptcy court entered an order overruling the remaining objections and approving the HarbourVest Bankruptcy Settlement [Bankr. Doc. No. 1788] (the "HarbourVest Settlement Order"). Highland Appendix, Ex. 10, Appx. 386-409.

The HarbourVest Settlement Order expressly authorized the transfer of HarbourVest's 49.98% interest in HCLOF to a Debtor subsidiary providing, in relevant part, that "[p]ursuant to the express terms of the [HCLOF Members Agreement] ... HarbourVest is authorized to transfer its interest in HCLOF to a wholly-owned and controlled subsidiary of the Debtor ... without the need to obtain the consent of any party or to offer such interests first to any other investor in HCLOF." *Id.* ¶ 6, Appx. 390. The bankruptcy court included this language because of concerns that Mr. Dondero, the Dondero Trusts, or CLO Holdco, among others, might "go to a different court somehow to challenge the transfer." Highland Appendix, Ex. 9, Appx. 368.10-369:5.

Approximately three months later, on April 12, 2021, with a new trustee in place at CLO Holdco (Mr. Mark Patrick) and with new counsel, the Plaintiffs filed their Complaint in the District Court, initiating this Lawsuit Pertaining to HarbourVest Settlement, in which they, *inter alia*, have challenged the transfer of the HarbourVest 49.98% interest in HCLOF to Highland's subsidiary, premised on the "Right of First Refusal." Highland Appendix, Ex. 11, Appx. 410-436. As noted earlier, the District Court subsequently referred this Action to the bankruptcy court. [Adv. Proc. Doc. No. 1-1]. To re-cap. the Complaint raises claims for: (i) breach of fiduciary duty (Count 1); (ii) breach of the HCLOF Members Agreement (Count 2); (iii) negligence (Count 3); (iv) RICO violations (Count 4); and (v) tortious interference (Count 5) (each, a "Count" and collectively, the "Counts"). In Count 1 (breach of fiduciary duty), the Plaintiffs allege that the Debtor violated its

“broad” duties to Plaintiffs under the IAA and the Debtor’s “internal policies and procedures” by: (i) engaging in “insider trading with HarbourVest”; (ii) “concealing” the value of HarbourVest’s 49.98% interest in HCLOF; and (iii) “diverting” the investment opportunity in the HCLOF interest to the Debtor without offering it to the Plaintiffs. *Id.* ¶¶ 67-74. In Count 4 (RICO), the Plaintiffs allege that the Debtor and Defendant HCLOF (now dismissed), and Defendant HCFA (never served) were an “association-in-fact” engaged in a pattern of racketeering activity for this same underlying conduct; namely, failing to disclose the valuation of the 49.98% HCLOF interest and ultimately effectuating the HarbourVest Bankruptcy Settlement. *Id.* ¶¶ 113-133. The Plaintiffs’ state-law Counts rest on the same underlying allegations. In support of Count 2 for breach of the HCLOF Members Agreement, the Plaintiffs again allege that the Debtor breached the “Right of First Refusal.” Complaint ¶¶ 92-102. In Count 3 (negligence), the Plaintiffs assert that the Debtor’s actions violated the HCLOF Members Agreement and the Debtor’s internal policies by failing to accurately calculate the HCLOF interests and failing to give the Plaintiffs the Right of First Refusal to purchase the interests. *Id.* ¶¶ 103-112. Count 5 (tortious interference) is again premised on the Debtor’s alleged interference with Plaintiffs’ “Right of First Refusal” under the HCLOF Members Agreement. *Id.* ¶¶ 134-141.

VI. LEGAL ANALYSIS.

A. Revisiting Judicial Estoppel as a Potential Bar to this Lawsuit Pertaining to HarbourVest Bankruptcy Settlement: Upon Further Analysis, the Bankruptcy Court Believes Counts 2 and 5 Are Barred by Judicial Estoppel.

This court now revisits the “judicial estoppel” doctrine, and how it might apply to this Lawsuit Pertaining to HarbourVest Bankruptcy Settlement, mindful of the instruction from the District Court that the bankruptcy court previously failed to consider “inadvertence” as a factor that might prevent application of the judicial estoppel doctrine here.

As earlier noted, after the bankruptcy court issued its Original MTD Order, concluding that two estoppel doctrines (collateral estoppel and judicial estoppel) precluded all claims asserted in this Lawsuit Pertaining to HarbourVest Bankruptcy Settlement, there was an appeal by DAF and CLO Holdco and, thereafter, issuance of the District Court 9/2/22 Remand Order.³¹ To recap, the District Court: (i) reversed the bankruptcy court's determination that collateral estoppel barred the Plaintiffs' claims, but (ii) remanded the bankruptcy court's judicial estoppel determination for consideration of whether the Plaintiffs' (CLO Holdco's) withdrawal of its objection to the HarbourVest Bankruptcy Settlement, based on its claimed Right of First Refusal, was "inadvertent" (as the District Court concluded that "inadvertence" is a factor that might negate application of the judicial estoppel doctrine and, therefore, must be analyzed here).

As explained below, the court, after scrutinizing the "inadvertence" factor, has now concluded that judicial estoppel indeed bars Count 2 (for breach of the HCLOF Members Agreement) and Count 5 (for tortious interference with the HCLOF Members Agreement).

First, to recap, judicial estoppel is "a common law doctrine by which a party who has assumed one position in his pleadings may be estopped from assuming an inconsistent position."³² The purpose of the doctrine is to protect the integrity of the judicial process by "prevent[ing] parties from 'playing fast and loose' with (the courts) to suit the exigencies of self-interest."³³ In other words, "judicial estoppel is designed to protect the judicial system, not the litigants," thus, "detrimental reliance by the party opponent is not required."³⁴ "Generally, judicial estoppel is invoked where 'intentional self-contradiction is being used as a means of obtaining unfair

³¹ *Charitable DAF Fund, L.P. v. Highland Cap. Mgmt., L.P.*, 643 B.R. 162 (N.D. Tex. 2022) (slip opinion version included at Highland Appendix, Ex. 12, Appx. 437-458).

³² *Brandon v. Interfirst Corp.*, 858 F.2d 266, 268 (5th Cir. 1988).

³³ *Id.* (various citations therein omitted); *United States v. McCaskey*, 9 F.3d 368, 378 (5th Cir. 1993).

³⁴ *Superior Crewboats, Inc. v. Primary P & I Underwriters (In re Superior Crewboats, Inc.)*, 374 F.3d 330, 334 (5th Cir. 2004) (cites omitted).

advantage in a forum provided for suitors seeking justice.”³⁵ As stated in the District Court 9/2/22

Remand Order:

A court examines three criteria when determining the applicability of judicial estoppel: “(1) the party against whom judicial estoppel is sought has asserted a legal position which is plainly inconsistent with a prior position; (2) a court accepted the prior position; and (3) the party did not act inadvertently.”³⁶

To be clear, the District Court affirmed the bankruptcy court’s determination on the first two criteria of judicial estoppel but noted that the bankruptcy court did not evaluate whether the Plaintiff’s actions in the bankruptcy court with regard to the HarbourVest Bankruptcy Settlement hearing were inadvertent, and, thus, remanded for a determination as to whether the Plaintiffs’ change of position was “inadvertent.” Thus, the only issue before the bankruptcy court with regard to the judicial estoppel determination is the element of “inadvertence.”³⁷

By way of analogy, the Fifth Circuit has held in the bankruptcy context (albeit when dealing with the debtor; *see* note 37 *supra*) that the act of failing to disclose claims against another in a bankruptcy case is considered “‘inadvertent’ only when, in general, the debtor either *lacks knowledge* of the undisclosed claims or has *no motive for their concealment*.”³⁸ Applying this

³⁵ *Id.* at 334-335 (citations omitted).

³⁶ District Court 9/2/22 Remand Order, 643 B.R. at 173 (quoting *Reed v. City of Arlington*, 650 F.3d 571, 574 (5th Cir. 2011) (en banc)).

³⁷ The court notes, anecdotally, that the issue of “inadvertence” was not raised by the Plaintiffs in their prior briefing to the bankruptcy court. Perhaps there was some confusion all around as to whether the “inadvertence” factor applies here. Specifically, in the Fifth Circuit, the element of “inadvertence” is generally applied in a bankruptcy context where a *debtor*, post-discharge, seeks to assert a claim that had or could have been addressed within the bankruptcy. Therefore, one might be unclear whether the element of “inadvertence” applies in this case, which relates to *a non-debtor plaintiff’s change of position in an adversary proceeding*. *See Gabarick v. Laurin Mar. (Am.) Inc.*, 753 F.3d 550, 553 n.3 (5th Cir. 2014) (rejecting appellant’s argument that the third factor of “inadvertence” applies in a non-bankruptcy case, noting, “we apply [inadvertence] only when the judicial estoppel is based on the non-disclosure of a claim in a prior bankruptcy proceeding”); *Hall v. GE Plastic Pac. PTE Ltd.*, 327 F.3d 391, 396 (5th Cir. 2003) (applying two-factor test to judicial estoppel determination in non-bankruptcy case, namely, (a) whether position was clearly inconsistent, and (b) whether court was convinced to accept such position).

³⁸ *Superior Crewboats*, 374 F.3d at 335 (emphasis added); *see also Jethroe v. Omnova Sols., Inc.*, 412 F.3d 598, 600-01 (5th Cir. 2005) (“To establish that [debtor’s] failure to disclose was inadvertent, [debtor] may prove either that she did not know of the inconsistent position or that she had no motive to conceal it from the court ... at the time she filed her bankruptcy petition.”).

test to the Plaintiffs here with regard to their claims against the Debtor, the Plaintiffs *knew* of and analyzed the factual and legal issues underpinning Counts 2 and 5 when they unequivocally withdrew the CLO Holdco objection to the HarbourVest Bankruptcy Settlement in the bankruptcy court. To be clear, CLO Holdco filed a multi-page objection to the HarbourVest Bankruptcy Settlement that was almost entirely premised on the position that the transfer contemplated in the settlement, of the HarbourVest 49.98% interest in HCLOF, would violate the “Right of First Refusal” in the HCLOF Members Agreement. *See Highland Appendix*, Ex. 6 ¶¶ 3, 6, Appx. 125-126. Then CLO Holdco came into the bankruptcy court the morning of the hearing on the HarbourVest Bankruptcy Settlement and stated that, after “review[ing] the reply briefing,” “scrubb[ing] the HCLOF corporate documents,” analyzing Guernsey law, and reviewing the “appropriate documents,” it was withdrawing its objection to the HarbourVest Bankruptcy Settlement, premised on the “Right of First Refusal” being violated, “based on the interpretation of the Members Agreement.” *See Highland Appendix*, Ex. 9, Appx. 219-220. Thus, there can be no plausible doubt that the Plaintiffs knew of the underlying facts and legal issues underlying Counts 2 and 5 when CLO Holdco withdrew its objection to the HarbourVest Bankruptcy Settlement in the prior proceedings in the bankruptcy court. Their acts were intentional based on the unrefuted record.

Plaintiffs have alleged in support of Count 2 that they were “not informed of the fact that HarbourVest had offered its shares to Defendant [Highland] for \$22.5 million ...” *Complaint*, ¶ 98. This allegation, assuming for the moment it is true, would be irrelevant, but it is also inaccurate and contradicted by the record. The allegation is irrelevant because the “Right of First Refusal” (if it applied) would not be dependent on the value of the HCLOF shares/membership interests. But the allegation is inaccurate per the record, because HarbourVest did not “offer” its 49.98%

membership interest in HCLOF to Highland. Rather, a component of the HarbourVest Bankruptcy Settlement was for HarbourVest to transfer its membership interest in HCLOF to Highland's nominee in exchange for HarbourVest having allowed (but reduced) claims against the bankruptcy estate. Highland Appendix, Ex. 2 ¶ 32, Appx. 71-72; Ex. 3, Appx. 76-95. Finally, the allegation is contradicted by the record because the HarbourVest Bankruptcy Settlement Motion *expressly stated* that the net asset value of the interest was “estimated to be approximately \$22 million as of December 1, 2020.” Highland Appendix, Ex. 2 ¶ 32 & n.5, Appx. 71-72; Ex. 3, ¶ 1(b), Appx. 78.

As far as the notion of motive—i.e., looking at whether CLO Holdco might have had a motive for concealment—it certainly seems implausible here to conclude that the Plaintiffs would have had no motive to take inconsistent positions on Counts 2 and 5. Why? Thinking through this, if CLO Holdco had successfully pressed the “Right of First Refusal” argument at the bankruptcy court, things likely would not have played out well for CLO Holdco or the bankruptcy estate and its creditors. First, since HarbourVest received a total of \$80 million in allowed claims in the HarbourVest Bankruptcy Settlement, presumably, Plaintiffs would have had to have something significantly more than the alleged \$22.5 million value of the HCLOF membership interests (depending upon what HarbourVest thought its \$80 million worth of allowed proofs of claim might ultimately yield for it during the bankruptcy case). Then, regardless of what CLO Holdco might have had to pay HarbourVest for them, the HCLOF interests would have been speculative, illiquid, hard to value, and subject to portfolio performance risk. And, all the while, HarbourVest may have continued to press its \$300 million of proofs of claim in the bankruptcy case (absent the HarbourVest Bankruptcy Settlement) resulting in potential costly and lengthy litigation, and an overall reduced recovery for creditors. By contrast, in the Complaint, the Plaintiffs now seek monetary recovery or specific performance. *See Complaint*, ¶ 143.

Accordingly, the only current risk to Plaintiffs is litigation risk. They have borne none of the speculative risk of what would happen to the value of the HCLOF membership interests, had they had the opportunity to acquire it.³⁹

In summary, CLO Holdco's inconsistent positions regarding the "Right of First Refusal" under the HCLOF Members Agreement would appear, by any plausible measure, to be deliberate, directed, and *not inadvertent*.⁴⁰ There can be no legitimate dispute that Plaintiffs' conduct—with regard to Plaintiff CLO Holdco's withdrawal of its objection to the HarbourVest Settlement—was "advertent."⁴¹ Therefore, judicial estoppel bars Count 2 (for breach of the HCLOF Members Agreement) and Count 5 (for tortious interference with the HCLOF Members Agreement). These two counts are all about the "Right of First Refusal" provision in the HCLOF Members Agreement.

B. Plaintiffs Failure to State a Plausible Claim on the Other Counts (First, Counts 1, 3, & 4).

With respect to all other Counts in this Lawsuit Pertaining to HarbourVest Bankruptcy Settlement, this court now undertakes a traditional Rule 12(b)(6) analysis. The bankruptcy court has never ruled on the plausibility of the claims in this Action, under an *Iqbal* and *Twombly*

³⁹ See *Superior Crewboats*, 337 F.3d at 336 (debtors "had the requisite motivation to conceal the claim as they would certainly reap a windfall had they been able to recover on the undisclosed claim").

⁴⁰ *Superior Crewboats, Inc.*, 374 F.3d at 335-36 (debtors' non-disclosure of a viable personal injury claim in schedules filed in their no asset bankruptcy case was not "inadvertent" where debtors "were aware of the facts underlying the claim" for months, noting, "[a]lleged confusion as to a limitations period does not evince a lack of knowledge as to the existence of the claim."); *Jethroe*, 412 F.3d at 601 (failure to disclose claim was not "inadvertent" where party was aware of "the facts giving rise to them" at the time she filed bankruptcy); *U.S. ex rel. Long v. GSDMidea City, L.L.C.*, 798 F.3d 265, 272 (5th Cir. 2015) (failure to disclose claims was not "inadvertent" where party "was aware of the facts underlying his claims as early as 2010 and [] filed this lawsuit in 2011," noting that, inadvertence through lack of knowledge cannot be shown "as long as the debtor has enough information to suggest that he may have a potential claim; the debtor need not know all of the underlying facts or even the legal basis of the claim.").

⁴¹ It is indisputable that the Plaintiff DAF is in privity with the Plaintiff CLO Holdco and therefore cannot argue that only CLO Holdco should be bound by judicial estoppel for filing and then withdrawing its objection. See *Charitable DAF Fund L.P.*, 2022 U.S. Dist. LEXIS 175778, at *12-13 ("DAF is in privity with CLO Holdco because it controls and owns 100% of CLO Holdco ... [DAF] had a fair chance to challenge the gatekeeping orders or [is] in privity with an entity that did.")

standard,⁴² because with the Original MTD, the bankruptcy court simply stopped after concluding that **all Counts** were precluded by estoppel doctrines. Now, post-remand, and because Highland has filed its Renewed MTD, the bankruptcy court believes it is duty-bound to evaluate all Counts under a traditional Rule 12(b)(6) plausibility standard. The court will start with the Counts as to which it has concluded judicial estoppel does not apply.

(i) Breach of Fiduciary Duty (Count 1).

Plaintiffs fail to state a plausible claim for breach of fiduciary duty (Count 1).

The Plaintiffs' breach of fiduciary duty Count is premised on the Debtor's alleged: (i) insider trading; (ii) concealment of the value of HarbourVest's 49.98% interest in HCLOF; and (iii) diversion of an investment opportunity from Plaintiffs to the Debtor, in violation of Section 10(b) of the Securities and Exchange Act of 1934 and the IAA. *See Complaint* ¶¶ 67-80.⁴³

"Section 10(b) of the Securities and Exchange Act of 1934, 15 U.S.C. § 78j(b), makes unlawful the use of 'any manipulative or deceptive device or contrivance' in contravention of SEC rules."⁴⁴ "A cause of action lies under Rule 10b-5 'only if the conduct alleged can be fairly viewed as manipulative or deceptive' within the meaning of the statute."⁴⁵ To state a securities fraud claim under section 10(b) and Rule 10b-5, plaintiffs must plead: "(1) a misstatement or omission; (2) of a material fact; (3) made with scienter; (4) on which the plaintiffs relied; and (5) that proximately caused the plaintiffs' injuries."⁴⁶ "A fact is material if there is 'a substantial likelihood that, under

⁴² *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

⁴³ Note that where a plaintiff's breach of fiduciary duty claim is premised on theories of securities fraud, Rule 9(b)'s heightened pleading standards apply. *See Tigie Inv. Co. v. Chase Bank of Tex., N.A.*, 2004 WL 3170789, at *2 (N.D. Tex. Nov. 15, 2004).

⁴⁴ *Alabama Farm Bureau Mut. Cas. Co. v. Am. Fid. Life Ins. Co.*, 606 F.2d 602, 608 (5th Cir. 1979).

⁴⁵ *Id.* (quoting *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 473-74 (1977)).

⁴⁶ *Southland Sec. Corp. v. INSpire Ins. Sols., Inc.*, 365 F.3d 353, 362 (5th Cir. 2004).

all the circumstances, the omitted fact would have assumed actual significance in the deliberations of the reasonable shareholder.”⁴⁷ “Scienter is a crucial element of the securities fraud claims.”⁴⁸

Plaintiffs’ allegations underlying their breach of fiduciary duty claim are wholly conclusory. And because Plaintiffs fail to properly plead securities fraud, any fiduciary claim premised on such allegations necessarily fails as well.⁴⁹ Plaintiffs fail to plead with particularity that any alleged omissions by the Debtor posed any real significance to the Plaintiffs. *See, e.g., Complaint* ¶¶ 82-89 (speculating about Plaintiffs’ “lost opportunity cost,” and ambiguously asserting that “Defendants’ malfeasance” has “exposed HCLOF to a massive liability from HarbourVest”).⁵⁰ These allegations also fail to give rise to a “strong interference of scienter” sufficient to state a claim under Rule 10(b).⁵¹ Plaintiffs’ allegations regarding proximate cause are likewise deficient. *See Complaint* ¶¶ 88-89 (vaguely alleging that because of Defendants’ actions, “Plaintiffs have lost over \$25 million”).

Plaintiffs also allege breach of fiduciary duty under state law, citing some Texas law in their Response to Renewed MTD. [Adv. Proc. Doc. No. 129, p.1.] However, HCLOF is a Guernsey entity, and the HCLOF Members Agreement is governed by Guernsey law. *See Highland Appendix*, Ex. 13 at Appx. 475. Under the internal affairs doctrine, Guernsey law controls on issues of fiduciary duties to the members.⁵² In any event, Plaintiffs fail to allege any breach of fiduciary claims premised on Texas state law. Texas law provides “[t]he elements of a breach of

⁴⁷ *Id.* (quoting *Grigsby v. CMI Corp.*, 765 F.2d 1369, 1373 (9th Cir.1985)).

⁴⁸ *Tuchman v. DSC Communications Corp.*, 14 F.3d 1061, 1067 (5th Cir. 1994).

⁴⁹ *See Town North Bank, N.A. v. Shay Fin. Servs.*, 2014 WL 4851558, at *27 (N.D. Tex. Sep. 30, 2014).

⁵⁰ Interestingly, HarbourVest is nowhere to be found in this Lawsuit Pertaining to HarbourVest Bankruptcy Settlement. HarbourVest has never complained about anything—no doubt feeling blissfully free of its former Highland entanglements.

⁵¹ *See In re Enron Corp. Sec., Derivative & ERISA Litig.*, 258 F. Supp. 2d 576, 635-36 (S.D. Tex. 2003); *Southland*, 365 F.3d at 368 (plaintiff must plead “more than allegations of motive and opportunity to withstand dismissal” for claim of securities fraud) (citing *Goldstein v. MCI WorldCom*, 340 F.3d 238, 250-51 (5th Cir. 2003)).

⁵² *See Pridgin v. Safety-Kleen Corp.*, 2021 WL 5964630, at *2 (N.D. Tex. Dec. 16, 2021).

fiduciary duty claim are: (1) a fiduciary relationship between the plaintiff and defendant; (2) the defendant must have breached his fiduciary duty to the plaintiff; and (3) the defendant's breach must result in injury to the plaintiff or benefit to the defendant."⁵³ "The plaintiff must plead some facts as to the nature of the relationship to state a plausible claim that that a fiduciary duty has been breached."⁵⁴ The Complaint fails to sufficiently allege facts regarding the nature of the relationship between Plaintiffs and the Debtor. *See Complaint*, ¶¶ 62-63 (simply alleging that (i) the Debtor "owed a fiduciary duty to [Plaintiffs]" pursuant to which the Debtor "agreed to provide sound investment advice, and (ii) this fiduciary relationship is "broad and applies to the entire advisors-client relationship"). The Complaint also fails to adequately allege that any law of Guernsey setting forth fiduciary duties existed, let alone was breached for the same reasons.⁵⁵ Allegations of the Debtor's breach of its "internal policies and procedures" or the diversion of "corporate opportunities" are vague and conclusory. *See Complaint*, ¶¶ 72-89.⁵⁶

Plaintiffs assert that the Debtor breached its "unwaivable" fiduciary obligation under the IAA by, among other things, "diverting a corporate opportunity." Complaint, ¶¶ 82-84. This Count is purportedly premised on the IAA because (i) the Debtor was the DAF's investment adviser under an advisory agreement and (ii) HCFA is HCLOF's investment adviser under a separate advisory agreement. However, under Supreme Court precedent, the IAA ***does not provide a private right of action to sue for damages arising from breach of fiduciary duty***. *Transamerica Mtg. Advisors, Inc. (TAMA) v. Lewis*, 444 U.S. 11 (1979) (holding there is no private right of action under Section 206 of the IAA). Rather, a party can seek to void an investment management

⁵³ *Matter of ATP Oil & Gas Corp.*, 711 F. App'x 216, 221 (5th Cir. 2017) (and citations therein omitted).

⁵⁴ *In re Life Partners Holdings, Inc.*, 926 F.3d 103, 125 (5th Cir. 2019).

⁵⁵ *Id.* (no allegation of "the nature of the fiduciary duty owed" to plaintiff).

⁵⁶ *See In re Soporex, Inc.*, 463 B.R. 344, 417 (Bankr. N.D. Tex. 2011).

agreement under Section 215 of the IAA, if the agreement's formation or performance would violate the IAA.⁵⁷ Plaintiffs have not pleaded any such claim.

Even if there were a right of action under the IAA, Plaintiffs' allegations would still be deficient for failure to plead "duty" or "breach." The Debtor owed no duty to offer the HarbourVest 49.98% ownership interest in HCLOF to Plaintiffs. The transfer of same was effectuated in compliance with the HCLOF Members Agreement and "Right of First Refusal." The DAF's advisory agreement included full and clear disclosure that the Debtor could compete with the DAF for investments with no obligation to offer those investments to the DAF. *See Highland Appendix*, Ex. 14, at Appx. 504-505 (indicating that the "Fund will be subject to a number of actual and potential conflicts of interest . . . including . . . that . . . Highland . . . may actively engage in transactions in the same securities sought by the Fund and, therefore, may compete with the Fund for investment opportunities . . .").⁵⁸ Highland also owed no duty to CLO Holdco as an investor in HCLOF; there is no fiduciary relationship between an adviser to a fund and the fund's investors.⁵⁹

Finally, there was no corporate opportunity to divert. HarbourVest asserted \$300 million worth of proofs of claim against the Debtor seeking, among other things, effectively the rescission of its investment in HCLOF, an investment allegedly induced by fraud. The HarbourVest Bankruptcy Settlement effectuated that remedy. Because HarbourVest had no claims against

⁵⁷ *NexPoint Diversified Real Estate Tr. v. Acis Cap. Mgmt., L.P.*, 620 F. Supp.3d 36, 43 (S.D.N.Y. 2022) ("Plaintiff has not adequately pleaded a claim . . . under the IAA . . . there is no private right of action to bring a claim pursuant to [Section 206 of the IAA].").

⁵⁸ *See SEC v. Cap. Gains Research Bureau, Inc.*, 375 U.S. 180, 198 (1963) (noting that "the evident purpose of the Investment Advisers Act of 1940 [was] to substitute a philosophy of disclosure for the philosophy of caveat emptor," and discussing that a disclosure of an adviser's practice of trading in the market for his own account and the same time as advising clients would satisfy the adviser's fiduciary obligations under the IAA); *Dugaboy Inv. Trust v. Highland Cap. Mgmt., L.P.*, 2022 WL 4450490, at *5 (N.D. Tex. Sept. 22, 2022) (addressing argument that fiduciary obligations under the IAA cannot be waived and finding no breach of duty when conflict disclosed).

⁵⁹ *Goldstein v. SEC*, 451 F.3d 873, 879-882 (D.C. Cir. 2006).

Plaintiffs, there was no taking of a corporate opportunity. The Debtor was resolving a claim against the Debtor, not purchasing a security for cash, and could not transfer its liability to HarbourVest to Plaintiffs.

Accordingly, the breach of fiduciary duty causes of action (Count 1), should be dismissed for implausibility.

(ii) Negligence (Count 3).

Next, Plaintiffs also fail to state a plausible claim of negligence (Count 3).

The analysis here is quite straightforward. This claim is barred by the confirmed Plan which has been affirmed at the Fifth Circuit.⁶⁰ Pursuant to the Plan, Highland was exculpated from all claims for “conduct occurring on or after the Petition Date [October 16, 2019] in connection with or arising out of (i) the ... administration of the Chapter 11 Case ... and (v) any negotiations, transactions, and documentation in connection with the foregoing” unless such conduct constituted “bad faith, gross negligence, criminal misconduct, or willful misconduct.”⁶¹ The negotiation and consummation of the HarbourVest Bankruptcy Settlement were part of the “administration of the Chapter 11 Case,” and Highland, therefore, has been exculpated from Plaintiffs’ claim for negligence.

Even absent exculpation, Plaintiffs failed to state a claim. “The elements of a negligence claim under Texas law are: ‘(1) a legal duty on the part of the defendant; (2) breach of that duty; and (3) damages proximately resulting from that breach.’”⁶² The negligence allegations are speculative, conclusory, and fail to allege proximate cause.⁶³

⁶⁰ *NexPoint v. Highland Capital Management*, 48 F.4th 419 (5th Cir. 2022).

⁶¹ Plan, Art. I.B.62; Art. IX.C.

⁶² *Sivertsen v. Citibank, N.A. as Tr. for Registered Holders of WAMU Asset-Back Certificates WAMU Series No. 2007-HE2 Tr.*, 390 F. Supp. 3d 769, 789 (E.D. Tex. 2019) (and numerous citations therein).

⁶³ See *Rodgers v. City of Lancaster Police*, 2017 W.L. 457084, *17 (N.D. Tex. Jan. 6, 2017).

(iii) RICO (Count 4).

Next, Plaintiffs also fail to state a plausible claim under RICO (Count 4).

First, it should be noted that Plaintiffs put in their Response to Renewed MTD, at page 23, that they were moving to withdraw their RICO claim, pursuant to Rule 41(a). Specifically, they state:

Plaintiffs respectfully dismiss the RICO claim under Rule 41(a) to the extent such a claim is revealed to have existed under non-securities bases. Because Highland has conceded that Plaintiffs' claims are actionable under the federal securities laws and the Advisers Act, and has cited same as a basis for dismissing the RICO claim, Highland is precluded and estopped from denying the violations of the Securities Laws and the Advisers Act. As such, to the extent that other, non-securities law violations may give rise to RICO violations, Plaintiffs respectfully reserve the right to bring such a claim but respectfully dismiss their RICO claim at this time.

Adv. Proc. Doc. No. 130.

The court is confused and concerned a bit about the procedure employed here. The court is not sure that Rule 41(a) is the correct mechanism (notice, without a court order), particularly after Highland has fully briefed a Rule 12(b)(6) motion and Plaintiffs have not responded to that briefing but, rather, are reserving the right to bring their RICO claims but are dismissing them "at this time." Accordingly, the court will briefly address why it believes Plaintiffs failed to state a plausible claim under RICO.

To state a RICO claim, a plaintiff must allege: "1) the conduct; 2) of an enterprise; 3) through a pattern; 4) of racketeering activity."⁶⁴ The RICO claim must be pleaded "with sufficient particularity" under Rule 9(b).⁶⁵

⁶⁴ *Montesano v. Seafirst Commercial Corp.*, 818 F.2d 423, 424 (5th Cir.1987) (and citations therein).

⁶⁵ *Tel-Phonic Servs., Inc. v. TBS Int'l, Inc.*, 975 F.2d 1134, 1138 (5th Cir. 1992).

First, the Plaintiffs failed to allege a *pattern* of *racketeering activity*. “A pattern of racketeering activity consists of *two or more predicate criminal acts* that are (1) related and (2) amount to or pose a threat of continued criminal activity.”⁶⁶ Plaintiffs allege *three predicate offenses*: (i) wire fraud, (ii) mail fraud, and (iii) violation of the IAA’s antifraud provisions. *See Complaint*, ¶¶ 130-132. But the Plaintiffs fail to sufficiently plead any of these alleged predicate acts.

With regard to *mail fraud*, a plaintiff must allege: “(1) a scheme to defraud, (2) which involves the use of the mails, (3) for the purpose of executing the scheme.”⁶⁷ The elements of *wire fraud* are the same but apply to “wire communications in furtherance of the scheme.”⁶⁸ “[B]oth RICO mail and wire fraud require evidence of intent to defraud, i.e., evidence of a scheme to defraud by false or fraudulent representations.”⁶⁹ The thrust of Plaintiffs’ RICO claim is that the Debtor operated in such a way as to “violate insider trading rules and regulations when it traded with HarbourVest” by concealing “non-public information that it had not supplied” to Plaintiffs. *Complaint*, ¶ 118. Plaintiffs’ RICO claim is a series of conclusory allegations predicated on allegations of mail, wire, and securities fraud. *See id.* at ¶¶ 113-133. But the *Complaint* only vaguely alleges that Mr. Seery (i) “utilized the interstate wires and/or mails to obtain or arrive at valuations of the HCLOF interests,” *id.* at ¶ 120; (ii) “transmitted or caused to be transmitted through the interstate wires information to HCLOF investors from [Highland],” *id.* at ¶ 121 and (iii) “operated [the Debtor] in such a way that he concealed the true value of the HCLOF interests by utilizing the interstate wires and mails to transmit communications to the court in the form of

⁶⁶ *D&T Partners v. Baymark Partners LP*, 2022 WL 1458554, at *6 (N.D. Tex. May 9, 2022) (quoting *St. Germain v. Howard*, 556 F.3d 261, 263 (5th Cir. 2009)).

⁶⁷ *United States v. Gray*, 96 F.3d 769, 773 (5th Cir. 1996) (and cites therein).

⁶⁸ *Id.*

⁶⁹ *St. Paul Mercury Ins. Co. v. Williamson*, 224 F.3d 425, 441 (5th Cir. 2000).

written representations...” *id.* at ¶ 122. The Plaintiffs do not plead with particularity details about the contents of those alleged communications, when the Debtor had them, to whom, or where such communications were directed.⁷⁰ Plaintiffs only generally allege that Mr. Seery testified about the valuation of the HCLOF interests (Complaint, ¶ 125) but provide no details about mail or wire fraud. The Complaint, therefore, “does not identify specific acts of communication by mail or by interstate wires” undertaken by the Debtor “in furtherance of a fraudulent scheme” as required by Rule 9(b).⁷¹ Plaintiffs’ allegations are not sufficient to state a plausible claim for relief under RICO.⁷²

With regard to the *alleged predicate offense of violation of the IAA’s antifraud provisions*, alleged violations of securities laws cannot be predicate acts for a RICO claim.⁷³ Thus, to the extent that the Plaintiffs’ RICO claims allege “conduct that would have been actionable as fraud in connection with the purchase or sale of securities” (18 U.S.C. § 1964(c)), the claims are barred by statute. “Courts have interpreted the scope of § 1964(c)’s so-called ‘securities fraud exception’ broadly to apply even where a plaintiff does not expressly plead securities fraud as the predicate act, where a plaintiff could not have even brought a securities fraud claim against the particular defendant, and where a plaintiff pleads securities fraud violations but fails to state a claim for relief.”⁷⁴ The Plaintiffs’ RICO claim seems predicated on violations of the securities laws: “Defendants’ conduct violated the wire fraud and mail fraud laws, and the [IAA’s] antifraud

⁷⁰ See *Merrill Lynch, Pierce, Fenner & Smith v. Young*, 1994 WL 88129, at *7-9 (S.D.N.Y. Mar. 15, 1994); *Tel-Phonic Servs.*, 975 F.2d at 1138.

⁷¹ See *Merrill Lynch*, 1994 WL 88129, at *11; *Tel-Phonic Servs.*, 975 F.2d at 1134 (Rule 9(b) requires pleading particulars of time, place, content and maker of the misrepresentation).

⁷² See *Robinson v. Standard Mortg. Corp.*, 191 F. Supp. 3d 630, 640 (E.D. La. 2016) (dismissing RICO claims where plaintiff provided no factual details).

⁷³ See 18 U.S.C. § 1964(c); *Affco Invs. 2001, L.L.C. v. Proskauer Rose, L.L.P.*, 625 F.3d 185, 191 (5th Cir. 2010).

⁷⁴ *Woods v. Michael*, 2021 WL 1055816, at *3 (S.D. Fla. Feb. 10, 2021).

provisions.” Complaint, ¶ 132. Because the RICO claim is improperly founded on alleged securities fraud, it must be dismissed.

Additionally, the Plaintiffs have failed to plead a “pattern of racketeering activity.” “To prove a pattern of racketeering activity, a plaintiff must show at least two predicate acts of racketeering that are related and amount to or pose a threat of continued criminal activity.”⁷⁵ To constitute a “pattern,” the activities must show “continuity.”⁷⁶ “Continuity” refers “either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition.”⁷⁷ “Predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement.”⁷⁸

Here, the Complaint does not allege “continuity.” There is no specific “threat of repetition” or distinct threat of long-term criminal conduct. Nor do the allegations suggest the Debtor is “operating as part of a long-term association that exists for criminal purposes.”⁷⁹ Plaintiffs’ RICO allegations concern only non-specific conduct allegedly occurring in a limited period, September 2020 to January 2021, concerning *one transaction*—the HarbourVest Bankruptcy Settlement. *See, e.g., Complaint*, ¶¶ 119-128. Such allegations concern short-term, discrete transactions, and do not show a “pattern of activity,” or threat of “continuing racketeering activity.”⁸⁰

Finally, the Plaintiffs have failed to plausibly allege causation. RICO provides civil remedies to “[a]ny person injured in [their] business or property by reason of a violation of section

⁷⁵ *MWK Recruiting, Inc. v. Jowers*, 2020 WL 722997, at *8 (W.D. Tex. Dec. 8, 2020) (quoting *Tel-Phonic Servs.*, 975 F.2d at 1139-40).

⁷⁶ *Tel-Phonic Servs.*, 975 F.2d at 1140.

⁷⁷ *Id.* at 1139-40.

⁷⁸ *Id.* (quoting *H. J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 241 (1989)); *see also Calcasieu Marine Nat’l Bank v. Grant*, 943 F.2d 1453, 1464 (5th Cir.1991) (“Short-term criminal conduct is not the concern of RICO.”)

⁷⁹ *See Partain v. City of S. Padre Island*, 2018 WL 7202486, at *15-16 (S.D. Tex. Dec. 5, 2018) (quoting *H. J. Inc.*, 492 U.S. at 242-43).

⁸⁰ *See Calcasieu*, 943 F.2d at 1464.

1962.”⁸¹ “An injured party must show that the violation was the but-for and proximate cause of the injury.”⁸²

The Plaintiffs failed to allege that the Debtor’s actions induced them to act or that any Debtor’s actions were the proximate cause of any cognizable injury. Plaintiffs generally allege that “had Plaintiff been offered those interests [the HarbourVest 49.98% interest in HCLOF], it would have happily purchased them and therefore would have infused over \$20 million in cash into the estate for the purpose of executing the HarbourVest Settlement.” Complaint, ¶ 50. Such “would have” allegations are conclusory and speculative and insufficient to show proximate and but-for causation.⁸³

In summary, the Plaintiffs’ RICO claim fails the key elements set forth above and should be dismissed, pursuant to Rule 12(b)(6), rather than Rule 41(a).

C. Dismissal of Counts 2 and 5 for Failure to State a Plausible Claim, in the Event the Judicial Estoppel Doctrine Does Not Bar Such Claims.

If this court has incorrectly determined that the doctrine of judicial estoppel bars Count 2 (for breach of the HCLOF Members Agreement) and Count 5 (for tortious interference with the HCLOF Members Agreement), as set forth in Part VI.A above, this court nevertheless holds that these Counts should be dismissed under Rule 12(b)(6) for failure to state a plausible claim.

With regard to the breach of contract claim (Count 2), HarbourVest’s transfer of its interests in HCLOF to a subsidiary of Highland was permitted under the plain and unambiguous

⁸¹ 18 U.S.C. § 1964(c).

⁸² *Robinson*, 191 F. Supp. 3d at 645 (internal quotations omitted). Causation requires “[a] direct relationship between the fraud and the injury.” *In re Oil Spill by the Oil Rig “Deepwater Horizon,”* 802 F. Supp. 2d 725, 730 (E.D. La. 2011).

⁸³ *See Robinson*, 191 F. Supp. 3d at 645 (allegations failed to state causation where plaintiff’s “after-the-fact” and “bare assertion that she would have acted differently” had she known of certain facts were insufficient “absent additional factual allegations to support or explain this assertion,”); *In re Oil Spill by the Oil Rig “Deepwater Horizon,”* 802 F. Supp. 2d at 729 (no causation where economic harms suffered by plaintiffs were “too remote” and causation theory “depends on a series of speculative assumptions to link the alleged fraud” with the harm).

terms of the HCLOF Members Agreement (Highland Appendix, Ex. 13, Appx. 459-487) and the Right of First Refusal did not apply. Plaintiffs are using semantics in an apparent attempt to recharacterize the transfer of HarbourVest’s 49.98% interest in HCLOF as a “sale to Highland”; but this contradicts the facts and the terms of the transaction authorized by the bankruptcy court in the HarbourVest Settlement Order. As authorized, HarbourVest transferred its 49.98% interest in HCLOF to HCMLP Investments, LLC (“HCMLPI”), a wholly owned subsidiary (or “Affiliate”) of Highland (Highland Appendix, Ex. 10, Appx. 386-409), as part of the settlement of HarbourVest’s very large proofs of claim filed in the Highland bankruptcy case. HCMLPI’s status as an “Affiliate” of Highland is established by documents of which the court may take judicial notice or on which the Complaint relies. *See, e.g., Highland Appendix*, Ex. 3, at Appx. at 87 (showing that Highland is HCMLPI’s member), Ex. 8, at Appx. 204-05 (Highland is an affiliate), and Ex. 10, at Appx. 402 (same). HarbourVest’s interest could be transferred to an “Affiliate” of Highland under the HCLOF Members Agreement.

Plaintiffs’ tortious interference claim (Count 5) also necessarily fails; it is duplicative of Plaintiffs’ breach of contract claim and there is no breach of the HCLOF Members Agreement. Tortious interference with contract claims cannot exist in the absence of a contract right with which a defendant can interfere.⁸⁴ Further, Plaintiffs fail to explain how Highland, a party to the HCLOF Members Agreement, could have interfered with it; only third parties can interfere with a contract.⁸⁵

⁸⁴ *See e.g., WickFire, L.L.C. v. Woodruff*, 989 F.3d 343, 354 (5th Cir. 2021) (“to prevail on an interference claim, the plaintiff must ‘present evidence that some obligatory provision of a contract [was] breached’”) (internal quotations omitted). CLO Holdco, of course, previously conceded in the bankruptcy court, in January 2021, that Plaintiffs had no contractual right of first refusal. In any event, the contract provisions clearly did not give it one under the uncontested facts at bar. Therefore, a claim for tortious interference cannot be viable.

⁸⁵ *1st & Trinity Super Majority, LLC v. Milligan*, 657 S.W.3d 349, 372 (Tex. App.—El Paso 2022) (and cases cited therein).

VII. CONCLUSION.

For all the reasons stated herein, Highland's Renewed MTD is granted in full. First, Counts 2 and 5 are barred by the doctrine of judicial estoppel—due to the inconsistent/contrary positions taken by the Plaintiffs in January 2021 in the prior proceeding in the bankruptcy court involving the HarbourVest Bankruptcy Settlement. It cannot plausibly be argued that the Plaintiffs' prior inconsistent position was inadvertent.

Moreover, all Counts in this Lawsuit Pertaining to HarbourVest Bankruptcy Settlement (including Counts 2 and 5) fail to state claims that are plausible on their face under an *Iqbal/Twombly* analysis and should, accordingly, be dismissed pursuant to Rule 12(b)(6).

IT IS SO ORDERED.

###END OF MEMORANDUM OPINION AND ORDER###

EXHIBITS, APPEAL, DISMISSED

**U.S. Bankruptcy Court
Northern District of Texas (Dallas)
Adversary Proceeding #: 21-03067-sgj**

Assigned to: Chief Bankruptcy Judge Stacey G. Jernigan

Lead BK Case: 19-34054

Lead BK Title: Highland Capital Management, L.P.

Lead BK Chapter: 11

Demand:

Nature[s] of Suit: 02 Other (e.g. other actions that would have been brought in state court if unrelated to bankruptcy)

Date Filed: 04/12/21

Date Dismissed: 06/25/23

Date Transferred: 09/20/21

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Filing Date	Docket Text
09/29/2021	<u>1</u> Adversary case 21-03067. ORDER REFERRING CASE NUMBER 21-CV-0842-B from U.S District Court for the Northern District of Texas, Dallas Division to U.S. Bankruptcy Court for Northern District of Texas, Dallas Division. Complaint by Charitable DAF Fund, LP , CLO Holdco, Ltd. against Highland Capital Management, LP , Highland HCF Advisor Ltd , Highland CLO Funding, Ltd. . Fee Amount \$350 (Attachments: # <u>1</u> Original Complaint # <u>2</u> Docket Sheet from 3:20-cv-0842-B). Nature(s) of suit: 02 (Other (e.g. other actions that would have been brought in state court if unrelated to bankruptcy)). (Okafor, M.)
09/29/2021	

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	<u>2</u> Supplemental Document (cover sheet) by CLO Holdco Ltd., Charitable DAF Fund (RE: related document(s) <u>1</u> Adversary case 21-03067) [ORIGINALLY FILED IN 21-CV-0842 AS #2 ON 04/13/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
09/29/2021	<u>3</u> Request for Clerk to issue Summons filed by CLO Holdco Ltd, Charitable DAF Fund LP.(Sbaiti, Mazin) [ORIGINALLY FILED IN 21-CV-0842 AS #3 ON 04/13/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
09/29/2021	<u>4</u> DISTRICT COURT ENTRY: New Case Notes: A filing fee has been paid. Pursuant to Misc. Order 6, Plaintiff is provided the Notice of Right to Consent to Proceed Before A U.S. Magistrate Judge (Judge Horan). Clerk to provide copy to plaintiff if not received electronically. (oyh) (Entered: 04/13/2021) (Okafor, M.)
09/29/2021	<u>5</u> Summons Issued as to Highland CLO Funding Ltd, Highland Capital Management LP, Highland HCF Advisor Ltd. (oyh) (Entered: 04/13/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #5 ON 04/13/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
09/29/2021	<u>6</u> MOTION for Leave to File First Amended Complalnt filed by CLO Holdco Ltd, Charitable DAF Fund LP P (Attachments: # <u>1</u> Exh 1 First Amended Complaint # <u>2</u> Exh 2 Motion for Authorization to Retain James Seery # <u>3</u> Exh 3 Order Approving Retention of James Seery # <u>4</u> Exh 4 Order Approving Settlement # <u>5</u> Proposed Order) (Bridges, Jonathan) (Entered: 04/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #6 ON 04/19/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
09/29/2021	<u>7</u> ***DISREGARD FILED IN ERROR per atty***AMENDED DOCUMENT by CLO Holdco Ltd, Charitable DAF Fund LP. Amendment to 6 MOTION for Leave to File First Amended Complalnt. Amended Proposed Order. (Bridges, Jonathan) Modified per atty request on 4/20/2021 (svc). (Entered: 04/20/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #7 ON 04/20/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
09/29/2021	<u>8</u> ELECTRONIC ORDER denying 6 Motion for Leave to File without prejudice. To the extent a motion for leave to file an amended complaint is required under Rule 15, Plaintiffs may renew their motion after Defendants are served and have appeared. (Ordered by Judge Jane J. Boyle on 4/20/2021) (chmb) (Entered: 04/20/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #8 ON 04/20/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
09/29/2021	<u>9</u> Motion for an Order Extending the Time to File a Responsive Pleading filed by Highland Capital Management LP. (Attachments: # <u>1</u> Exhibit A – Proposed Order) (Entered: 05/06/2021) (Annable, Zachery) Modified text on 5/7/2021 (jmg). [ORIGINALLY FILED IN 21-CV-0842 AS #9 ON 05/06/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
09/29/2021	<u>10</u> ELECTRONIC ORDER granting in part and denying in part 9 Motion for Extension of Time to File Answer. Defendant Highland Capital Management, L.P. may file an answer or other responsive pleading on or before May 27, 2021. (Ordered by Judge Jane J. Boyle on 5/7/2021) (chmb) (Entered: 05/07/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #10 ON 05/07/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
09/29/2021	<u>11</u> Application for Admission Pro Hac Vice with Certificate of Good Standing (Filing fee \$100; Receipt number 0539-11879843) filed by Highland Capital Management LP (Attachments: # <u>1</u> Certificate of Good Standing) (Pomerantz, Jeffrey) (Entered: 05/07/2021)

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	05/10/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #11 ON 05/10/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
09/29/2021	<u>12</u> Application for Admission Pro Hac Vice with Certificate of Good Standing (Filing fee \$100; Receipt number 0539-11879878) filed by Highland Capital Management LP (Attachments: # <u>1</u> Certificate of Good Standing) (Demo, Gregory) (Entered: 05/10/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #12 ON 05/10/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
09/29/2021	<u>13</u> Application for Admission Pro Hac Vice without Certificate of Good Standing (Filing fee \$100; Receipt number 0539-11879894) filed by Highland Capital Management LP Attorney John A Morris added to party Highland Capital Management LP(pty:dft) (Morris, John) Modified text on 5/11/2021 (jmg). (Entered: 05/10/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #13 ON 05/10/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
09/29/2021	<u>14</u> Application for Admission Pro Hac Vice with Certificate of Good Standing for Attorney Robert J. Feinstein (Filing fee \$100; Receipt number 0539-11879911) filed by Highland Capital Management LP (Attachments: # <u>1</u> Certificate of Good Standing) (Hayward, Melissa) (Entered: 05/10/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #14 ON 05/10/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
09/29/2021	<u>15</u> CERTIFICATE OF SERVICE by Highland Capital Management LP re 9 Motion for an Order Extending the Time to File a Responsive Pleading (Annable, Zachery) [ORIGINALLY FILED IN 21-CV-0842 AS #15 ON 05/11/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Entered: 05/11/2021)
09/29/2021	<u>16</u> ELECTRONIC ORDER granting <u>11</u> Application for Admission Pro Hac Vice of Jeffrey Pomerantz. Important Reminder: Unless excused for cause, an attorney who is not an ECF user must register within 14 days of the date the attorney appears in a case pursuant to LR 5.1(f) and LCrR 49.2(g). (Ordered by Judge Jane J. Boyle on 5/12/2021) (chmb) (Entered: 05/12/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #16 ON 05/12/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
09/29/2021	<u>17</u> ELECTRONIC ORDER granting <u>12</u> Application for Admission Pro Hac Vice of Gregory Demo. Important Reminder: Unless excused for cause, an attorney who is not an ECF user must register within 14 days of the date the attorney appears in a case pursuant to LR 5.1(f) and LCrR 49.2(g). (Ordered by Judge Jane J. Boyle on 5/12/2021) (chmb) (Entered: 05/12/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #17 ON 05/12/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
09/29/2021	<u>18</u> ELECTRONIC ORDER granting <u>14</u> Application for Admission Pro Hac Vice of Robert Feinstein. Important Reminder: Unless excused for cause, an attorney who is not an ECF user must register within 14 days of the date the attorney appears in a case pursuant to LR 5.1(f) and LCrR 49.2(g). (Ordered by Judge Jane J. Boyle on 5/12/2021) (chmb) (Entered: 05/12/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #18 ON 05/12/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
09/29/2021	<u>19</u> ELECTRONIC ORDER: <u>13</u> The Motion for Admission Pro Hac Vice filed by John Morris is deficient, as it is not accompanied by a certificate of good standing from the licensing authority of a state in which Mr. Morris is licensed to practice law. Mr. Morris must therefore supplement his motion. (Ordered by Judge Jane J. Boyle on 5/12/2021)

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	(chmb) (Entered: 05/12/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #19 ON 05/12/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
09/29/2021	<u>20</u> Supplemental Document by Highland Capital Management LP as to 13 Application for Admission Pro Hac Vice with Certificate of Good Standing (Filing fee \$100; Receipt number 0539-11879894) Certificate of Good Standing. (Morris, John) (Entered: 05/12/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #20 ON 05/12/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
09/29/2021	<u>21</u> ELECTRONIC ORDER granting 13 Application for Admission Pro Hac Vice of John Morris. Important Reminder: Unless excused for cause, an attorney who is not an ECF user must register within 14 days of the date the attorney appears in a case pursuant to LR 5.1(f) and LCrR 49.2(g). (Ordered by Judge Jane J. Boyle on 5/13/2021) (chmb) (Entered: 05/13/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #21 ON 05/13/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
09/29/2021	<u>22</u> MOTION for an Order to Enforce the Order of Reference filed by Highland Capital Management LP. (Attachments: # <u>1</u> Exhibit(s) A—Proposed Order) (Annable, Zachery) Modified text on 5/20/2021 (mjr). (Entered: 05/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #22 ON 05/19/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
09/29/2021	<u>23</u> Brief/Memorandum in Support filed by Highland Capital Management LP re: <u>22</u> MOTION for an Order to Enforce the Order of Reference. (Annable, Zachery) Modified text on 5/20/2021 (mjr). (Entered: 05/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #23 ON 05/19/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
09/29/2021	<u>24</u> Appendix in Support filed by Highland Capital Management LP re: <u>23</u> Brief/Memorandum in Support. (Attachments: # <u>1</u> Appendix 1 # <u>2</u> Appendix 2 # <u>3</u> Appendix 3 # <u>4</u> Appendix 4 # <u>5</u> Appendix 5 # <u>6</u> Appendix 6 # <u>7</u> Appendix 7 # <u>8</u> Appendix 8 # <u>9</u> Appendix 9 # <u>10</u> Appendix 10 # <u>11</u> Appendix 11 # <u>12</u> Appendix 12 # <u>13</u> Appendix 13 # <u>14</u> Appendix 14 # <u>15</u> Appendix 15 # <u>16</u> Appendix 16 # <u>17</u> Appendix 17 # <u>18</u> Appendix 18 # <u>19</u> Appendix 19 # <u>20</u> Appendix 20 # <u>21</u> Appendix 21 # <u>22</u> Appendix 22 # <u>23</u> Appendix 23 # <u>24</u> Appendix 24 # <u>25</u> Appendix 25 # <u>26</u> Appendix 26 # <u>27</u> Appendix 27 # <u>28</u> Appendix 28) (Annable, Zachery) Modified linkage and text on 5/20/2021 (mjr). (Entered: 05/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #24 ON 05/19/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
09/29/2021	<u>25</u> CERTIFICATE OF SERVICE by Highland Capital Management LP re <u>23</u> Brief/Memorandum in Support of Motion, <u>24</u> Appendix in Support, <u>22</u> MOTION for an Order to Enforce the Order of Reference (Annable, Zachery) (Entered: 05/21/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #25 ON 05/21/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
09/29/2021	<u>26</u> MOTION to Dismiss Complaint filed by Highland Capital Management LP (Attachments: # <u>1</u> Exhibit(s) A—Proposed Order) (Annable, Zachery) Modified text on 5/28/2021 (jmg). (Entered: 05/27/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #26 ON 05/27/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
09/29/2021	<u>27</u> Brief/Memorandum in Support filed by Highland Capital Management LP (RE: related document(s) <u>26</u> MOTION to Dismiss Complaint filed by Highland Capital Management LP (Annable, Zachery) (Entered: 05/27/2021) [ORIGINALLY FILED IN 21-CV-0842 AS

	#27 ON 05/27/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
09/29/2021	<u>28</u> Appendix in Support filed by Highland Capital Management LP (Attachments: # <u>1</u> Appendix 1 # <u>2</u> Appendix 2 # <u>3</u> Appendix 3 # <u>4</u> Appendix 4 # <u>5</u> Appendix 5 # <u>6</u> Appendix 6 # <u>7</u> Appendix 7 # <u>8</u> Appendix 8 # <u>9</u> Appendix 9 # <u>10</u> Appendix 10 # <u>11</u> Appendix 11 # <u>12</u> Appendix 12 # <u>13</u> Appendix 13) (Annable, Zachery) (Entered: 05/27/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #28 ON 05/27/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
09/29/2021	<u>29</u> Partially Opposed MOTION for Extension of Time to File Response/Reply to 26 MOTION to Dismiss (Defendant Highland Capital Management, L.P.'s Motion to Dismiss Complaint), 22 MOTION for an Order to Enforce the Order of Reference filed by CLO Holdco Ltd, Charitable DAF Fund LP (Sbaiti, Mazin) Modified text on 6/3/2021 (mjr). (Entered: 06/02/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #29 ON 06/02/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
09/29/2021	<u>30</u> WAIVER OF SERVICE Returned Executed as to CLO Holdco Ltd. Waiver sent on 6/1/2021; Charitable DAF Fund LP. Waiver sent on 6/1/2021. (Sbaiti, Mazin) (Entered: 06/03/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #30 ON 06/03/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
09/29/2021	<u>31</u> ELECTRONIC ORDER granting 29 Motion to Extend Time to File Response/Reply. Plaintiffs may file responses to both 22 the motion to enforce the order of reference and 26 the motion to dismiss on or before June 29, 2021. (Ordered by Judge Jane J. Boyle on 6/3/2021) (chmb) (Entered: 06/03/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #31 ON 06/03/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
09/29/2021	<u>32</u> CERTIFICATE OF SERVICE by Highland Capital Management LP re: 27 Brief/Memorandum in Support of Motion, 28 Appendix in Support, 26 MOTION to Dismiss. (Annable, Zachery) Modified text on 6/7/2021 (mjr). (Entered: 06/04/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #32 ON 06/04/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
09/29/2021	<u>33</u> Amended Civil Cover Sheet by CLO Holdco Ltd, Charitable DAF Fund LP. Amendment to 2 Supplemental Document. (Sbaiti, Mazin) Modified text on 6/23/2021 (mjr). (Entered: 06/22/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #33 ON 06/22/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
09/29/2021	<u>34</u> Unopposed MOTION for Leave to File Response to Motion to Dismiss in Excess of Page Limit filed by CLO Holdco Ltd, Charitable DAF Fund LP (Sbaiti, Mazin) (Entered: 06/28/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #34 ON 06/28/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
09/29/2021	<u>35</u> ELECTRONIC ORDER granting 34 Unopposed Motion for Leave to File Response in Excess of Page Limit. Plaintiffs' response to Defendant's motion to dismiss may exceed the page limit by no more than ten pages. (Ordered by Judge Jane J. Boyle on 6/29/2021) (chmb) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #35 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
09/29/2021	

	<u>36</u> RESPONSE filed by CLO Holdco Ltd, Charitable DAF Fund LP re: 22 MOTION for an Order to Enforce the Order of Reference (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #36 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
09/29/2021	<u>37</u> Appendix in Support filed by CLO Holdco Ltd, Charitable DAF Fund LP re 36 Response/Objection Response to Motion for an Order to Enforce the Order of Reference (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #37 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
09/29/2021	<u>38</u> RESPONSE filed by CLO Holdco Ltd, Charitable DAF Fund LP re: 26 MOTION to Dismiss (Defendant Highland Capital Management, L.P.'s Motion to Dismiss Complaint) (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #38 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
09/29/2021	<u>39</u> Appendix in Support filed by CLO Holdco Ltd, Charitable DAF Fund LP re 38 Response/Objection to Defendant Highland Capital Management, L.P.'s Motion to Dismiss Complaint (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #39 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
09/29/2021	<u>40</u> Unopposed MOTION for Leave to File Reply in Excess of Page Limits (Defendant Highland Capital Management, L.P.'s Unopposed Motion for Leave to Exceed Page Limit) filed by Highland Capital Management LP (Attachments: # <u>1</u> Proposed Order) (Annable, Zachery) (Entered: 07/12/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #40 ON 07/12/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
09/29/2021	<u>41</u> ELECTRONIC ORDER granting 40 Unopposed Motion for Leave to Exceed Page Limit. Defendant Highland Capital Management, L.P. may file a reply of up to fifteen pages. (Ordered by Judge Jane J. Boyle on 7/13/2021) (chmb) (Entered: 07/13/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #41 ON 07/13/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
09/29/2021	<u>42</u> REPLY filed by Highland Capital Management LP re: 22 MOTION for an Order to Enforce the Order of Reference (Annable, Zachery) (Entered: 07/13/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #42 ON 07/13/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
09/29/2021	<u>43</u> Appendix in Support filed by Highland Capital Management LP re: 42 Reply. (Annable, Zachery) Modified text on 7/14/2021 (mjr). (Entered: 07/13/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #43 ON 07/13/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
09/29/2021	<u>44</u> CERTIFICATE OF SERVICE by Highland Capital Management LP re 40 Unopposed MOTION for Leave to File Reply in Excess of Page Limits (Defendant Highland Capital Management, L.P.'s Unopposed Motion for Leave to Exceed Page Limit) (Annable, Zachery) (Entered: 07/13/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #44 ON 07/13/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
09/29/2021	<u>45</u> REPLY filed by Highland Capital Management LP re: 26 MOTION to Dismiss (Defendant Highland Capital Management, L.P.'s Motion to Dismiss Complaint) (Annable, Zachery) (Entered: 07/13/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #44 ON

	07/13/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
09/29/2021	<u>46</u> CERTIFICATE OF SERVICE by Highland Capital Management LP re 42 Reply, 43 Appendix in Support, 45 Reply (Annable, Zachery) (Entered: 07/14/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #46 ON 07/14/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
09/29/2021	<u>47</u> Motion to strike <u>43</u> Appendix in support filed by CLO Holdco, Ltd. , Charitable DAF Fund, LP (Bridges, Jonathan) Modified text on 7/16/2021 (mjr). (Entered: 07/15/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #47 ON 07/15/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
09/29/2021	<u>48</u> RESPONSE filed by Highland Capital Management LP re: <u>47</u> Motion to strike <u>43</u> Appendix in Support (Annable, Zachery) (Entered: 07/20/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #48 ON 07/20/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
09/29/2021	<u>49</u> CERTIFICATE OF INTERESTED PERSONS/DISCLOSURE STATEMENT by Highland Capital Management LP. (Annable, Zachery) (Entered: 07/23/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #49 ON 07/23/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
09/29/2021	<u>50</u> CERTIFICATE OF INTERESTED PERSONS/DISCLOSURE STATEMENT by Charitable DAF Fund LP. (Sbaiti, Mazin) (Entered: 07/23/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #50 ON 07/23/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
09/29/2021	<u>51</u> CERTIFICATE OF SERVICE by Highland Capital Management LP re 48 Response/Objection (Annable, Zachery) (Entered: 07/23/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #51 ON 07/23/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
09/29/2021	<u>52</u> MOTION to Take Judicial Notice of Order filed by Highland Capital Management LP (Attachments: # <u>1</u> Exhibit(s) A # <u>2</u> Proposed Order) (Annable, Zachery) (Entered: 08/11/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #52 ON 08/11/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
09/29/2021	<u>53</u> ELECTRONIC ORDER granting <u>52</u> Motion to Take Judicial Notice of Order. The Court takes judicial notice that the bankruptcy court held Plaintiffs and others in contempt of its orders. See Order, In re Highland Cap. Mgmt., L.P., No. 19-34054-sgj11 (Bankr. N.D. Tex. Aug. 4, 2021) (ECF No. 2660). The Court will consider this fact in addressing the remaining pending motions in this case, which are under advisement. (Ordered by Judge Jane J. Boyle on 8/12/2021) (chmb) (Entered: 08/12/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #53 ON 08/12/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
09/29/2021	<u>54</u> CERTIFICATE OF SERVICE by Highland Capital Management LP re <u>52</u> MOTION to Take Judicial Notice of Order (Annable, Zachery) (Entered: 08/16/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #54 ON 08/16/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
09/29/2021	<u>55</u> MOTION to Stay filed by CLO Holdco Ltd, Charitable DAF Fund LP (Sbaiti, Mazin) (Entered: 08/26/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #55 ON 08/26/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS

	DIVISION] (Okafor, M.)
09/29/2021	<u>56</u> ELECTRONIC ORDER: Defendants are ORDERED to file a response, not to exceed ten pages, to 55 Plaintiffs' motion to stay on or before September 10, 2021. No reply will be permitted. (Ordered by Judge Jane J. Boyle on 8/27/2021) (chmb) (Entered: 08/27/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #56 ON 08/27/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
09/29/2021	<u>57</u> MOTION to Dismiss and Joinder in Motion to Dismiss of Highland Capital Management, L.P. filed by Highland CLO Funding Ltd (Attachments: # <u>1</u> Proposed Order) Attorney Paul R Bessette added to party Highland CLO Funding Ltd(pty:dft) (Bessette, Paul) (Entered: 08/30/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #57 ON 08/30/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
09/29/2021	<u>58</u> Brief/Memorandum in Support filed by Highland CLO Funding Ltd re 57 MOTION to Dismiss and Joinder in Motion to Dismiss of Highland Capital Management, L.P. (Bessette, Paul) (Entered: 08/30/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #58 ON 08/30/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
09/29/2021	<u>59</u> Appendix in Support filed by Highland CLO Funding Ltd re 58 Brief/Memorandum in Support of Motion (Attachments: # <u>1</u> Exhibit(s) A – Jackson v Dear # <u>2</u> Exhibit(s) B – Prudential Assurance v. Newman # <u>3</u> Exhibit(s) C – Harbourvest Settlement Agreement # <u>4</u> Exhibit(s) D – Boleat Declaration) (Bessette, Paul) (Entered: 08/30/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #59 ON 08/30/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
09/29/2021	<u>60</u> RESPONSE filed by Highland Capital Management LP re: 55 MOTION to Stay (Annable, Zachery) (Entered: 09/10/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #60 ON 09/10/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
09/29/2021	<u>61</u> CERTIFICATE OF SERVICE by Highland Capital Management LP re 60 Response/Objection (Annable, Zachery) (Entered: 09/13/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #61 ON 09/13/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
09/29/2021	<u>62</u> Unopposed MOTION for Extension of Time to File Response/Reply to 57 MOTION to Dismiss and Joinder in Motion to Dismiss of Highland Capital Management, L.P. filed by CLO Holdco Ltd, Charitable DAF Fund LP (Sbaiti, Mazin) Modified text on 9/20/2021 (mjr). (Entered: 09/17/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #62 ON 09/17/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
09/29/2021	<u>63</u> ADDITIONAL ATTACHMENTS to 62 Motion for Extension of Time to File Response/Reply by Plaintiffs CLO Holdco Ltd, Charitable DAF Fund LP. (Sbaiti, Mazin) (Entered: 09/20/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #63 ON 09/20/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
09/29/2021	<u>64</u> ORDER OF REFERENCE: Pursuant to 28 U.S.C. § 157 and this District's Miscellaneous Order No. 33, this case is hereby REFERRED to Judge Stacey G. C. Jernigan of the United States Bankruptcy Court for the Northern District of Texas, Dallas Division, to be adjudicated as a matter related to the consolidated Chapter 11 Bankruptcy of Highland Capital Management, L.P., Chapter 11 Case No. 19-34054. (Ordered by Judge Jane J. Boyle on 9/20/2021) (svc) (Entered: 09/20/2021) [ORIGINALLY FILED IN

	21-CV-0842 AS #64 ON 09/20/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
09/29/2021	65 Acknowledgment of referred case received from U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION Case number: 21-CV-0842. (Okafor, M.)
10/19/2021	66 Notice of hearing filed by Defendant Highland Capital Management, LP (RE: related document(s)26 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP, 47 Motion to strike document filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 55 Motion to abate filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Hearing to be held on 11/23/2021 at 09:30 AM at https://us-courts.webex.com/meet/jerniga for 26 and for 47 and for 55, (Annable, Zachery)
10/22/2021	67 Certificate of service re: Notice of Hearing Filed by Claims Agent Kurtzman Carson Consultants LLC (related document(s)66 Notice of hearing filed by Defendant Highland Capital Management, LP (RE: related document(s)26 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP, 47 Motion to strike document filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 55 Motion to abate filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Hearing to be held on 11/23/2021 at 09:30 AM at https://us-courts.webex.com/meet/jerniga for 26 and for 47 and for 55, filed by Defendant Highland Capital Management, LP). (Kass, Albert)
10/22/2021	68 Certificate of service re: (Supplemental) re Notice of Hearing Filed by Claims Agent Kurtzman Carson Consultants LLC (related document(s)66 Notice of hearing filed by Defendant Highland Capital Management, LP (RE: related document(s)26 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP, 47 Motion to strike document filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 55 Motion to abate filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Hearing to be held on 11/23/2021 at 09:30 AM at https://us-courts.webex.com/meet/jerniga for 26 and for 47 and for 55, filed by Defendant Highland Capital Management, LP). (Kass, Albert)
11/18/2021	69 Motion to abate <i>Plaintiffs' Amended Motion to Stay All Proceedings</i> (related document(s)55 Motion to abate (related document(s)1 Complaint)) filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (Attachments: # 1 Exhibit A_Motion to Withdraw Reference) (Sbaiti, Mazin)
11/22/2021	70 Witness and Exhibit List <i>for Hearing on November 23, 2021</i> filed by Defendant Highland Capital Management, LP (RE: related document(s)69 Motion to abate <i>Plaintiffs' Amended Motion to Stay All Proceedings</i> (related document(s)55 Motion to abate (related document(s)1 Complaint))). (Attachments: # 1 Exhibits 1-30) (Hayward, Melissa)
11/22/2021	71 Witness and Exhibit List <i>for Hearing on November 23, 2021</i> filed by Defendant Highland Capital Management, LP (RE: related document(s)26 Motion to dismiss adversary proceeding). (Attachments: # 1 Exhibits 1-13) (Hayward, Melissa)
11/22/2021	72 Witness List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s)26 Motion to dismiss adversary proceeding, 47 Motion to strike (related document(s): 43 Document), 55 Motion to abate (related document(s)1 Complaint), 69 Motion to abate <i>Plaintiffs' Amended Motion to Stay All Proceedings</i> (related document(s)55 Motion to abate (related document(s)1 Complaint))). (Sbaiti, Mazin)
11/22/2021	73 Exhibit List <i>for November 23, 2021 hearing</i> filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s)47 Motion to strike (related document(s): 43 Document), 55 Motion to abate (related document(s)1 Complaint))). (Attachments: # 1 Exhibit 1_Defendant's Memorandum of Law in Support of Motion for

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	Reconsideration # <u>2</u> Exhibit 2 Highland Memorandum in Support of Motion to Dismiss # <u>3</u> Exhibit 3 Order (I) Confirming Fifth Amended Plan of Reorganization of Highland) (Sbaiti, Mazin)
11/23/2021	<u>74</u> Request for transcript regarding a hearing held on 11/23/2021. The requested turn-around time is hourly (Jeng, Hawaii)
11/23/2021	<u>75</u> Hearing held on 11/23/2021. (RE: related document(s) <u>55</u> MOTION to Stay filed by CLO Holdco Ltd, Charitable DAF Fund LP (Sbaiti, Mazin) (Entered: 08/26/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #55 ON 08/26/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)) (Appearances: J. Pomerantz and J. Morris for Highland Defendants; J. Jordan and P. Bessett for HCLOF; M. Sbaiti for Plaintiffs. Nonevidentiary hearing. Motion denied. Mr. Pomerantz to upload order.) (Jeng, Hawaii)
11/23/2021	<u>76</u> Hearing held on 11/23/2021. (RE: related document(s) <u>47</u> Motion to strike <u>43</u> Appendix in support filed by CLO Holdco, Ltd. , Charitable DAF Fund, LP (Bridges, Jonathan) Modified text on 7/16/2021 (mjr). (Entered: 07/15/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #47 ON 07/15/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)) (Appearances: J. Pomerantz and J. Morris for Highland Defendants; J. Jordan and P. Bessett for HCLOF; M. Sbaiti for Plaintiffs. Nonevidentiary hearing . Motion denied (Plaintiffs acknowledged complained-of Appendices it did not relate to Motion to Dismiss). Mr. Pomerantz to upload order.) (Jeng, Hawaii)
11/23/2021	<u>77</u> Hearing held on 11/23/2021. (RE: related document(s) <u>26</u> MOTION to Dismiss Complaint filed by Highland Capital Management LP (Attachments: # <u>1</u> Exhibit(s) A—Proposed Order) (Annable, Zachery) Modified text on 5/28/2021 (jmg). (Entered: 05/27/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #26 ON 05/27/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)) (Appearances: J. Pomerantz and J. Morris for Highland Defendants; J. Jordan and P. Bessett for HCLOF; M. Sbaiti for Plaintiffs. Nonevidentiary hearing (Appendices only). Motion taken under advisement.) (Jeng, Hawaii)
11/24/2021	<u>78</u> Transcript regarding Hearing Held 11-23-2021 RE: Motion Hearing. THIS TRANSCRIPT WILL BE MADE ELECTRONICALLY AVAILABLE TO THE GENERAL PUBLIC 90 DAYS AFTER THE DATE OF FILING. TRANSCRIPT RELEASE DATE IS 02/22/2022. Until that time the transcript may be viewed at the Clerk's Office or a copy may be obtained from the official court transcriber. Court Reporter/Transcriber Liberty Transcripts/Dipti Patel, Telephone number 847-848-4907. (RE: related document(s) <u>75</u> Hearing held on 11/23/2021. (RE: related document(s) <u>55</u> MOTION to Stay filed by CLO Holdco Ltd, Charitable DAF Fund LP (Sbaiti, Mazin) (Entered: 08/26/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #55 ON 08/26/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)) (Appearances: J. Pomerantz and J. Morris for Highland Defendants; J. Jordan and P. Bessett for HCLOF; M. Sbaiti for Plaintiffs. Nonevidentiary hearing. Motion denied. Mr. Pomerantz to upload order.), <u>76</u> Hearing held on 11/23/2021. (RE: related document(s) <u>47</u> Motion to strike <u>43</u> Appendix in support filed by CLO Holdco, Ltd., Charitable DAF Fund, LP (Bridges, Jonathan) Modified text on 7/16/2021 (mjr). (Entered: 07/15/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #47 ON 07/15/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)) (Appearances: J. Pomerantz and J. Morris for Highland Defendants; J. Jordan and P. Bessett for HCLOF; M. Sbaiti for Plaintiffs. Nonevidentiary hearing. Motion denied (Plaintiffs acknowledged complained-of Appendices it did not relate to Motion to Dismiss). Mr. Pomerantz to upload order.)). Transcript to be made available to the public on 02/22/2022. (Patel, Dipti)
11/29/2021	<u>79</u> Certificate of service re: 1) Debtor's Witness and Exhibit List with Respect to Evidentiary Hearing to be Held on November 23, 2021; and 2) Debtor's Witness and Exhibit List with Respect to Evidentiary Hearing to be Held on November 23, 2021 Filed

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	by Claims Agent Kurtzman Carson Consultants LLC (related document(s) <u>70</u> Witness and Exhibit List <i>for Hearing on November 23, 2021</i> filed by Defendant Highland Capital Management, LP (RE: related document(s) <u>69</u> Motion to abate <i>Plaintiffs' Amended Motion to Stay All Proceedings</i> (related document(s) <u>55</u> Motion to abate (related document(s) <u>1</u> Complaint))). (Attachments: # 1 Exhibits 1–30) filed by Defendant Highland Capital Management, LP, <u>71</u> Witness and Exhibit List <i>for Hearing on November 23, 2021</i> filed by Defendant Highland Capital Management, LP (RE: related document(s) <u>26</u> Motion to dismiss adversary proceeding). (Attachments: # 1 Exhibits 1–13) filed by Defendant Highland Capital Management, LP). (Kass, Albert)
12/07/2021	<u>80</u> Order granting Highland CLO Funding, Ltd.'s motion to dismiss adversary as a party with prejudice (related document <u>57</u>) Entered on 12/7/2021. (Okafor, Marcey) Modified text on 3/11/2022 (Okafor, Marcey).
12/07/2021	<u>81</u> Order denying motion to stay (related documents <u>69</u> Plaintiffs' Amended motion to stay all proceedings and <u>55</u> Motion to stay) Entered on 12/7/2021. (Okafor, Marcey). Modified linkage on 1/11/2022 (Okafor, Marcey).
12/07/2021	<u>82</u> Order dismissing motion to strike as moot (document # <u>47</u>) Entered on 12/7/2021. (Okafor, Marcey)
12/09/2021	<u>83</u> BNC certificate of mailing – PDF document. (RE: related document(s) <u>80</u> Order granting Highland CLO Funding, Ltd.'s motion to dismiss adversary proceeding with prejudice (related document <u>57</u>) Entered on 12/7/2021.) No. of Notices: 4. Notice Date 12/09/2021. (Admin.)
12/09/2021	<u>84</u> BNC certificate of mailing – PDF document. (RE: related document(s) <u>81</u> Order denying motion to stay (related document <u>55</u>) Entered on 12/7/2021.) No. of Notices: 5. Notice Date 12/09/2021. (Admin.)
12/09/2021	<u>85</u> BNC certificate of mailing – PDF document. (RE: related document(s) <u>82</u> Order dismissing motion to strike as moot (document <u>47</u>) Entered on 12/7/2021.) No. of Notices: 4. Notice Date 12/09/2021. (Admin.)
12/10/2021	<u>86</u> Notice of appeal of <i>Order Denying Motion to Stay</i> . Fee Amount \$298 filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) <u>81</u> Order on motion to abate). Appellant Designation due by 12/27/2021. (Sbaiti, Mazin)
12/10/2021	Receipt of filing fee for Notice of appeal(<u>21-03067-sgi</u>) [appeal,ntcapl] (298.00). Receipt number A29186237, amount \$ 298.00 (re: Doc# <u>86</u>). (U.S. Treasury)
12/10/2021	<u>87</u> Certificate of service re: 1) Order Granting Highland CLO Funding, Ltd.'s Motion to Dismiss; and 2) Order Denying Motion to Stay Filed by Claims Agent Kurtzman Carson Consultants LLC (related document(s) <u>80</u> Order granting Highland CLO Funding, Ltd.'s motion to dismiss adversary proceeding with prejudice (related document <u>57</u>) Entered on 12/7/2021., <u>81</u> Order denying motion to stay (related document <u>55</u>) Entered on 12/7/2021.). (Kass, Albert)
12/15/2021	<u>89</u> Certificate of mailing regarding appeal (RE: related document(s) <u>86</u> Notice of appeal of <i>Order Denying Motion to Stay</i> . Fee Amount \$298 filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) <u>81</u> Order on motion to abate). Appellant Designation due by 12/27/2021.) (Attachments: # <u>1</u> Service List) (Whitaker, Sheniqua)
12/15/2021	<u>90</u> Notice regarding the record for a bankruptcy appeal to the U.S. District Court. (RE: related document(s) <u>86</u> Notice of appeal of <i>Order Denying Motion to Stay</i> . Fee Amount \$298 filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) <u>81</u> Order on motion to abate). Appellant Designation due by 12/27/2021.)

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	(Whitaker, Sheniqua)
12/15/2021	<u>91</u> Notice of docketing notice of appeal. Civil Action Number: 3:21-cv-03129-N. (RE: related document(s) <u>86</u> Notice of appeal of <i>Order Denying Motion to Stay</i> . Fee Amount \$298 filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) <u>81</u> Order on motion to abate). Appellant Designation due by 12/27/2021.) (Whitaker, Sheniqua)
12/17/2021	<u>92</u> BNC certificate of mailing. (RE: related document(s) <u>90</u> Notice regarding the record for a bankruptcy appeal to the U.S. District Court. (RE: related document(s) <u>86</u> Notice of appeal of <i>Order Denying Motion to Stay</i> . Fee Amount \$298 filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) <u>81</u> Order on motion to abate). Appellant Designation due by 12/27/2021.)) No. of Notices: 0. Notice Date 12/17/2021. (Admin.)
12/27/2021	<u>93</u> Appellant designation of contents for inclusion in record on appeal and statement of issues on appeal. filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) <u>86</u> Notice of appeal, <u>91</u> Notice of docketing notice of appeal/record). Appellee designation due by 01/10/2022. (Sbaiti, Mazin)
12/28/2021	<u>94</u> Clerk's correspondence requesting Amended designation from attorney for appellant. (RE: related document(s) <u>93</u> Appellant designation of contents for inclusion in record on appeal and statement of issues on appeal. filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) <u>86</u> Notice of appeal, <u>91</u> Notice of docketing notice of appeal/record). Appellee designation due by 01/10/2022.) Responses due by 12/30/2021. (Blanco, J.)
12/29/2021	<u>95</u> Amended appellant designation of contents for inclusion in record on appeal and statement of issues on appeal. filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) <u>93</u> Appellant designation). (Sbaiti, Mazin)
02/18/2022	<u>97</u> Transmittal of record on appeal to U.S. District Court . Complete record on appeal . ,Transmitted: Volume 1, Mini Record. Number of appellant volumes: 11 . Civil Case Number: 3:21-CV-03129-N (RE: related document(s) <u>86</u> Notice of appeal of <i>Order Denying Motion to Stay</i> (RE: related document(s) <u>81</u> Order on motion to abate). (Blanco, J.)
02/18/2022	<u>98</u> Notice of docketing record on appeal. 3:21-CV-03129-N (RE: related document(s) <u>86</u> Notice of appeal (RE: related document(s) <u>81</u> Order on motion to abate). (Blanco, J.)
03/11/2022	<u>99</u> Memorandum of Opinion and order granting motion to dismiss the adversary proceeding (RE: related document(s) <u>26</u> Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP). Entered on 3/11/2022 (Okafor, Marcey)
03/11/2022	<u>100</u> Order granting motion to dismiss adversary proceeding with prejudice (related document # <u>26</u>) Entered on 3/11/2022. (Okafor, Marcey)
03/13/2022	<u>101</u> BNC certificate of mailing – PDF document. (RE: related document(s) <u>99</u> Memorandum of Opinion and order granting motion to dismiss the adversary proceeding (RE: related document(s) <u>26</u> Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP). Entered on 3/11/2022) No. of Notices: 4. Notice Date 03/13/2022. (Admin.) (Entered: 03/14/2022)
03/13/2022	<u>102</u> BNC certificate of mailing – PDF document. (RE: related document(s) <u>100</u> Order granting motion to dismiss adversary proceeding with prejudice (related document <u>26</u>) Entered on 3/11/2022.) No. of Notices: 4. Notice Date 03/13/2022. (Admin.) (Entered: 03/14/2022)
03/16/2022	

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	<u>103</u> Certificate of service re: Memorandum Opinion and Order Granting Motion to Dismiss the Adversary Proceeding Filed by Claims Agent Kurtzman Carson Consultants LLC (related document(s) <u>100</u> Order granting motion to dismiss adversary proceeding with prejudice (related document <u>26</u>) Entered on 3/11/2022.). (Kass, Albert)
03/21/2022	<u>104</u> Notice of appeal . Fee Amount \$298 filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) <u>100</u> Order on motion to dismiss adversary proceeding). Appellant Designation due by 04/4/2022. (Sbaiti, Mazin)
03/21/2022	Receipt of filing fee for Notice of appeal(<u>21-03067-sgj</u>) [appeal,ntcapl] (298.00). Receipt number A29409407, amount \$ 298.00 (re: Doc# <u>104</u>). (U.S. Treasury)
03/25/2022	<u>107</u> Notice of docketing notice of appeal. Civil Action Number: 3:22-cv-00695-S. (RE: related document(s) <u>104</u> Notice of appeal filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) <u>100</u> Order on motion to dismiss adversary proceeding). (Blanco, J.)
03/25/2022	<u>108</u> Notice regarding the record for a bankruptcy appeal to the U.S. District Court. 3:22-cv-00695-S (RE: related document(s) <u>104</u> Notice of appeal filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) <u>100</u> Order on motion to dismiss adversary proceeding). (Blanco, J.)
03/25/2022	<u>109</u> Certificate of mailing regarding appeal 3:22-cv-00695-S (RE: related document(s) <u>104</u> Notice of appeal filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) <u>100</u> Order on motion to dismiss adversary proceeding). (Blanco, J.)
03/27/2022	<u>110</u> BNC certificate of mailing. (RE: related document(s) <u>108</u> Notice regarding the record for a bankruptcy appeal to the U.S. District Court. 3:22-cv-00695-S (RE: related document(s) <u>104</u> Notice of appeal filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) <u>100</u> Order on motion to dismiss adversary proceeding). (Blanco, J.)) No. of Notices: 4. Notice Date 03/27/2022. (Admin.)
04/04/2022	<u>111</u> Appellant designation of contents for inclusion in record on appeal and statement of issues on appeal. filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) <u>104</u> Notice of appeal). Appellee designation due by 04/18/2022. (Sbaiti, Mazin)
04/18/2022	<u>112</u> Appellee designation of contents for inclusion in record of appeal filed by Defendant Highland Capital Management, LP (RE: related document(s) <u>86</u> Notice of appeal, <u>91</u> Notice of docketing notice of appeal/record, <u>104</u> Notice of appeal). (Annable, Zachery)
04/19/2022	<u>113</u> Clerk's correspondence requesting amended appellee designation from attorney for appellee. (RE: related document(s) <u>112</u> Appellee designation of contents for inclusion in record of appeal filed by Defendant Highland Capital Management, LP (RE: related document(s) <u>86</u> Notice of appeal, <u>91</u> Notice of docketing notice of appeal/record, <u>104</u> Notice of appeal).) Responses due by 4/21/2022. (Blanco, J.)
04/19/2022	<u>114</u> Amended appellee designation of contents for inclusion in record of appeal filed by Defendant Highland Capital Management, LP (RE: related document(s) <u>112</u> Appellee designation). (Annable, Zachery)
04/21/2022	<u>115</u> Certificate of service re: Appellee's Supplemental Designation of Record on Appeal Filed by Claims Agent Kurtzman Carson Consultants LLC (related document(s) <u>112</u> Appellee designation of contents for inclusion in record of appeal filed by Defendant Highland Capital Management, LP (RE: related document(s) <u>86</u> Notice of appeal, <u>91</u> Notice of docketing notice of appeal/record, <u>104</u> Notice of appeal). filed by Defendant Highland Capital Management, LP). (Kass, Albert)

04/21/2022	<u>116</u> Certificate of service re: Appellee's Amended Supplemental Designation of Record on Appeal Filed by Claims Agent Kurtzman Carson Consultants LLC (related document(s) <u>114</u> Amended appellee designation of contents for inclusion in record of appeal filed by Defendant Highland Capital Management, LP (RE: related document(s) <u>112</u> Appellee designation). filed by Defendant Highland Capital Management, LP). (Kass, Albert)
04/26/2022	<u>118</u> Transmittal of record on appeal to U.S. District Court . Complete record on appeal . ,Transmitted: Volume 1, Mini Record. Number of appellant volumes: 21 Number of appellee volumes: 2. Civil Case Number: 3:22-cv-00695-S (RE: related document(s) <u>104</u> Notice of appeal filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) <u>100</u> Order on motion to dismiss adversary proceeding). (Blanco, J.)
04/26/2022	<u>119</u> Notice of docketing COMPLETE record on appeal. 3:22-cv-00695-S (RE: related document(s) <u>104</u> Notice of appeal filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) <u>100</u> Order on motion to dismiss adversary proceeding). (Blanco, J.)
05/26/2022	<u>120</u> Support/supplemental document <i>Motion to Supplement Appellate Record</i> filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) <u>111</u> Appellant designation). (Attachments: # <u>1</u> Amended Transcript of January 14, 2021 Hearing) (Sbaiti, Mazin)
06/09/2022	<u>121</u> DISTRICT COURT Order: Case 3:22-00695-B is hereby transferred to the docket of the Honorable Judge Jane J. Boyle for consolidation with The Charitable DAF Fund LP, et al. v. Highland Capital Management LP, Case No. 3:21-cv-3129-N. Judge Karen Gren Scholer no longer assigned to case. (RE: related document(s) <u>86</u> Notice of appeal filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., <u>104</u> Notice of appeal filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Entered on 6/9/2022 (Whitaker, Sheniqua) (Entered: 06/10/2022)
09/02/2022	<u>131</u> DISTRICT COURT MEMORANDUM OPINION AND ORDER: The Court REVERSES and REMANDS the bankruptcy court's Motion to Dismiss Order and AFFIRMS the bankruptcy courts Motion to Stay Order. re: appeal on Civil Action number:Case 3:22-00695-B consolidated with 3:21-CV-3129-B, (RE: related document(s) <u>81</u> Order on motion to abate, <u>100</u> Order on motion to dismiss adversary proceeding). Entered on 9/2/2022 (Whitaker, Sheniqua) (Entered: 11/29/2022)
10/14/2022	<u>122</u> Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP (Annable, Zachery)
10/14/2022	<u>123</u> Brief in support filed by Defendant Highland Capital Management, LP (RE: related document(s) <u>122</u> Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Annable, Zachery)
10/14/2022	<u>124</u> Support/supplemental document (<i>Appendix in Support of Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP (RE: related document(s) <u>122</u> Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Attachments: # <u>1</u> Exhibit 1 # <u>2</u> Exhibit 2 # <u>3</u> Exhibit 3 # <u>4</u> Exhibit 4 # <u>5</u> Exhibit 5 # <u>6</u> Exhibit 6 # <u>7</u> Exhibit 7 # <u>8</u> Exhibit 8 # <u>9</u> Exhibit 9 # <u>10</u> Exhibit 10 # <u>11</u> Exhibit 11 # <u>12</u> Exhibit 12 # <u>13</u> Exhibit 13 # <u>14</u> Exhibit 14) (Annable, Zachery)
10/17/2022	<u>125</u> Certificate of service re: 1) Defendant Highland Capital Management, L.P.s Renewed Motion to Dismiss Complaint; 2) Memorandum of Law in Support of Defendant Highland Capital Management, L.P.s Renewed Motion to Dismiss Complaint; and 3) Appendix in Support of Defendant Highland Capital Management, L.P.s Renewed Motion to Dismiss Complaint Filed by Claims Agent Kurtzman Carson Consultants LLC (related document(s) <u>122</u> Motion to dismiss adversary proceeding (<i>Defendant Highland Capital</i>

	<p><i>Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP filed by Defendant Highland Capital Management, LP, <u>123</u> Brief in support filed by Defendant Highland Capital Management, LP (RE: related document(s)<u>122</u> Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). filed by Defendant Highland Capital Management, LP, <u>124</u> Support/supplemental document (<i>Appendix in Support of Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP (RE: related document(s)<u>122</u> Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7 # 8 Exhibit 8 # 9 Exhibit 9 # 10 Exhibit 10 # 11 Exhibit 11 # 12 Exhibit 12 # 13 Exhibit 13 # 14 Exhibit 14) filed by Defendant Highland Capital Management, LP). (Kass, Albert)</p>
10/27/2022	<p><u>126</u> Notice of hearing (<i>Notice of Hearing and Briefing Schedule on Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP (RE: related document(s)<u>122</u> Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP). Hearing to be held on 12/8/2022 at 09:30 AM at https://us-courts.webex.com/meet/jerniga for <u>122</u>, (Annable, Zachery)</p>
10/31/2022	<p><u>127</u> Certificate of service re: Notice of Hearing and Briefing Schedule on Defendant Highland Capital Management, L.P.s Renewed Motion to Dismiss Complaint Filed by Claims Agent Kurtzman Carson Consultants LLC (related document(s)<u>126</u> Notice of hearing (<i>Notice of Hearing and Briefing Schedule on Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP (RE: related document(s)<u>122</u> Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP). Hearing to be held on 12/8/2022 at 09:30 AM at https://us-courts.webex.com/meet/jerniga for <u>122</u>, filed by Defendant Highland Capital Management, LP). (Kass, Albert)</p>
11/18/2022	<p><u>128</u> Motion for withdrawal of reference. Fee amount \$188, filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (Sbaiti, Mazin)</p>
11/18/2022	<p>Receipt of filing fee for Motion for withdrawal of reference(<u>21-03067-sgj</u>) [motion,mwdref] (188.00). Receipt number A29973581, amount \$ 188.00 (re: Doc# <u>128</u>). (U.S. Treasury)</p>
11/18/2022	<p><u>129</u> Response opposed to (related document(s): <u>122</u> Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP) filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Sbaiti, Mazin)</p>
11/18/2022	<p><u>130</u> Response opposed to (related document(s): <u>122</u> Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP) filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Attachments: # <u>1</u> Appendix) (Sbaiti, Mazin)</p>
11/29/2022	<p><u>132</u> Clerk's correspondence requesting a status conference hearing from attorney for plaintiffs. (RE: related document(s)<u>128</u> Motion for withdrawal of reference. Fee amount \$188, filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) Responses due by 12/1/2022. (Whitaker, Sheniqua)</p>
12/02/2022	<p><u>133</u> Reply to (related document(s): <u>129</u> Response filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., <u>130</u> Response filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) filed by Defendant Highland Capital Management, LP. (Annable, Zachery)</p>

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12/06/2022	<u>134</u> Certificate of service re: Reply Memorandum of Law in Further Support of Renewed Motion to Dismiss Complaint Filed by Claims Agent Kurtzman Carson Consultants LLC (related document(s) <u>133</u> Reply to (related document(s): <u>129</u> Response filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., <u>130</u> Response filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) filed by Defendant Highland Capital Management, LP. filed by Defendant Highland Capital Management, LP). (Kass, Albert)
12/07/2022	<u>135</u> Notice of hearing filed by Defendant Highland Capital Management, LP (RE: related document(s) <u>122</u> Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP). Hearing to be held on 1/25/2023 at 01:30 PM at https://us-courts.webex.com/meet/jerniga for <u>122</u> , (Annable, Zachery)
12/07/2022	<u>136</u> Notice of hearing filed by Defendant Highland Capital Management, LP (RE: related document(s) <u>128</u> Motion for withdrawal of reference filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Status Conference to be held on 1/25/2023 at 01:30 PM at https://us-courts.webex.com/meet/jerniga . (Annable, Zachery)
12/08/2022	<u>137</u> Certificate of service re: 1) Amended Notice of Hearing and Notice of Status Conference re: Defendant Highland Capital Management, L.P.s Renewed Motion to Dismiss Complaint; and 2) Amended Notice of Hearing and Notice of Status Conference re: Renewed Motion to Withdraw the Reference Filed by Claims Agent Kurtzman Carson Consultants LLC (related document(s) <u>135</u> Notice of hearing filed by Defendant Highland Capital Management, LP (RE: related document(s) <u>122</u> Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP). Hearing to be held on 1/25/2023 at 01:30 PM at https://us-courts.webex.com/meet/jerniga for <u>122</u> , filed by Defendant Highland Capital Management, LP, <u>136</u> Notice of hearing filed by Defendant Highland Capital Management, LP (RE: related document(s) <u>128</u> Motion for withdrawal of reference filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Status Conference to be held on 1/25/2023 at 01:30 PM at https://us-courts.webex.com/meet/jerniga . filed by Defendant Highland Capital Management, LP). (Kass, Albert)
12/09/2022	<u>138</u> Response opposed to (related document(s): <u>128</u> Motion for withdrawal of reference. Fee amount \$188, filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) filed by Defendant Highland Capital Management, LP. (Annable, Zachery)
12/09/2022	<u>139</u> Brief in support filed by Defendant Highland Capital Management, LP (RE: related document(s) <u>138</u> Response). (Annable, Zachery)
12/09/2022	<u>140</u> Support/supplemental document (<i>Appendix in Support of Highland Capital Management, L.P.'s Response to Renewed Motion to Withdraw the Reference</i>) filed by Defendant Highland Capital Management, LP (RE: related document(s) <u>138</u> Response). (Attachments: # <u>1</u> Exhibit 1 # <u>2</u> Exhibit 2 # <u>3</u> Exhibit 3 # <u>4</u> Exhibit 4 # <u>5</u> Exhibit 5 # <u>6</u> Exhibit 6 # <u>7</u> Exhibit 7) (Annable, Zachery)
12/12/2022	<u>141</u> Certificate of service re: 1) Highland Capital Management, L.P.s Response to Renewed Motion to Withdraw the Reference; 2) Brief in Support of Highland Capital Management, L.P.s Response to Renewed Motion to Withdraw the Reference; and 3) Appendix in Support of Highland Capital Management, L.P.s Response to Renewed Motion to Withdraw the Reference Filed by Claims Agent Kurtzman Carson Consultants LLC (related document(s) <u>138</u> Response opposed to (related document(s): <u>128</u> Motion for withdrawal of reference. Fee amount \$188, filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) filed by Defendant Highland Capital Management, LP. filed by Defendant Highland Capital Management, LP, <u>139</u> Brief in support filed by Defendant Highland Capital Management, LP (RE: related document(s) <u>138</u> Response). filed by Defendant Highland Capital Management, LP, <u>140</u> Support/supplemental document (<i>Appendix in Support of Highland Capital Management, L.P.'s Response to Renewed Motion to Withdraw the Reference</i>) filed by Defendant Highland Capital Management, LP (RE: related document(s) <u>138</u> Response). (Attachments: # <u>1</u> Exhibit 1 # <u>2</u> Exhibit 2 # <u>3</u> Exhibit 3 # <u>4</u> Exhibit 4 # <u>5</u> Exhibit 5 # <u>6</u> Exhibit 6 # <u>7</u> Exhibit 7) filed by Defendant

	Highland Capital Management, LP). (Kass, Albert)
12/15/2022	<u>143</u> DISTRICT COURT Notice of transmission of motion to withdraw reference re: Civil Case # 3:22-cv-02802-S (RE: related document(s) <u>128</u> Motion for withdrawal of reference. filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) (Whitaker, Sheniqua)
12/16/2022	<u>144</u> Reply to (related document(s): <u>138</u> Response filed by Defendant Highland Capital Management, LP) filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Sbaiti, Mazin)
01/23/2023	<u>145</u> Witness and Exhibit List filed by Defendant Highland Capital Management, LP (RE: related document(s) <u>122</u> Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Attachments: # <u>1</u> Exhibit 1 # <u>2</u> Exhibit 2 # <u>3</u> Exhibit 3 # <u>4</u> Exhibit 4 # <u>5</u> Exhibit 5 # <u>6</u> Exhibit 6 # <u>7</u> Exhibit 7 # <u>8</u> Exhibit 8 # <u>9</u> Exhibit 9 # <u>10</u> Exhibit 10 # <u>11</u> Exhibit 11 # <u>12</u> Exhibit 12 # <u>13</u> Exhibit 13 # <u>14</u> Exhibit 14) (Annable, Zachery)
01/23/2023	<u>146</u> Witness and Exhibit List filed by Defendant Highland Capital Management, LP (RE: related document(s) <u>128</u> Motion for withdrawal of reference. Fee amount \$188.). (Attachments: # <u>1</u> Exhibit 1 # <u>2</u> Exhibit 2 # <u>3</u> Exhibit 3 # <u>4</u> Exhibit 4 # <u>5</u> Exhibit 5 # <u>6</u> Exhibit 6 # <u>7</u> Exhibit 7) (Annable, Zachery)
01/23/2023	<u>147</u> Witness and Exhibit List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) <u>122</u> Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Attachments: # <u>1</u> Exhibit 1 _Excerpts from July 14, 2020 Hearing Transcript # <u>2</u> Exhibit 2 _ HCLOF Members Agreement Relating to the Company # <u>3</u> Exhibit 3 _HarbourVest Settlement Agreement # <u>4</u> Exhibit 4 _Order Approving Debtor's Settlement with HarbourVest # <u>5</u> Exhibit 5 _HCLOF Offering # <u>6</u> Exhibit 6 Amended and Restated Investment Advisory Agreement) (Sbaiti, Mazin)
01/23/2023	<u>148</u> Witness and Exhibit List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) <u>128</u> Motion for withdrawal of reference. Fee amount \$188.). (Phillips, Louis)
01/24/2023	<u>149</u> Amended Witness and Exhibit List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) <u>147</u> List (witness/exhibit/generic)). (Attachments: # <u>1</u> Exh 8 _Testimony of Mark Patrick at June 8, 2021 hearing) (Sbaiti, Mazin)
01/24/2023	<u>150</u> Amended Witness and Exhibit List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) <u>147</u> List (witness/exhibit/generic), <u>149</u> List (witness/exhibit/generic)). (Attachments: # <u>1</u> Exh 7 _Testimony of Mark Patrick at June 8, 2021 hearing) (Sbaiti, Mazin)
01/24/2023	<u>151</u> Certificate of service re: re Reorganized Debtors Witness and Exhibit List with Respect to Evidentiary Hearing to be Held on January 25, 2023 Filed by Claims Agent Kurtzman Carson Consultants LLC (related document(s) <u>145</u> Witness and Exhibit List filed by Defendant Highland Capital Management, LP (RE: related document(s) <u>122</u> Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Attachments: # <u>1</u> Exhibit 1 # <u>2</u> Exhibit 2 # <u>3</u> Exhibit 3 # <u>4</u> Exhibit 4 # <u>5</u> Exhibit 5 # <u>6</u> Exhibit 6 # <u>7</u> Exhibit 7 # <u>8</u> Exhibit 8 # <u>9</u> Exhibit 9 # <u>10</u> Exhibit 10 # <u>11</u> Exhibit 11 # <u>12</u> Exhibit 12 # <u>13</u> Exhibit 13 # <u>14</u> Exhibit 14) filed by Defendant Highland Capital Management, LP, <u>146</u> Witness and Exhibit List filed by Defendant Highland Capital Management, LP (RE: related document(s) <u>128</u> Motion for withdrawal of reference. Fee amount \$188.). (Attachments: # <u>1</u> Exhibit 1 # <u>2</u> Exhibit 2 # <u>3</u> Exhibit 3 # <u>4</u> Exhibit 4 # <u>5</u> Exhibit 5 # <u>6</u> Exhibit 6 # <u>7</u> Exhibit 7) filed by Defendant Highland Capital Management, LP). (Kass, Albert)

01/25/2023	<u>152</u> Notice of Appearance and Request for Notice by Louis M. Phillips filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Phillips, Louis)
01/25/2023	<u>153</u> Request for transcript regarding a hearing held on 1/25/2023. The requested turn-around time is hourly. NOTE* Requested arrived at 5:07 pm. (Edmond, Michael)
01/25/2023	<u>154</u> Court admitted exhibits date of hearing January 25, 2023 (RE: related document(s) <u>128</u> Motion for withdrawal of reference, filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) (COURT ADMITTED DEFENDANT'S EXHIBITS #1, #2, #3, #4, #5 & #6 OFFERED BY ATTY GREG DEMO). (Edmond, Michael) (Entered: 01/27/2023)
01/25/2023	<u>155</u> Hearing held on 1/25/2023. (RE: related document(s) <u>122</u> Motion to dismiss adversary proceeding, (Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint) filed by Defendant Highland Capital Management, LP filed by Defendant Highland Capital Management, LP) (Appearances: J. Morris and G. Demo for Movants; L. Phillips and M.Sbaiti for Plaintiffs. Evidentiary hearing (appendices). Court took matter under advisement.) (Edmond, Michael) (Entered: 02/01/2023)
01/25/2023	<u>156</u> Hearing held on 1/25/2023. (RE: related document(s) <u>128</u> Motion for withdrawal of reference. Fee amount \$188, filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) (Appearances: J. Morris and G. Demo for Movants; L. Phillips and M.Sbaiti for Plaintiffs. Evidentiary hearing (appendices). Court announced it will recommend denial to District Court. Court is working on Report & Recommendation.) (Edmond, Michael) (Entered: 02/01/2023)
02/06/2023	<u>157</u> INCORRECT ENTRY: SEE # <u>158</u> – Report and recommendation to the U.S. District Court by U.S. Bankruptcy Judge. (RE: related document(s) <u>128</u> Motion for withdrawal of reference filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Entered on 2/6/2023 (Blanco, J.) Modified on 2/6/2023 (Okafor, Marcey).
02/06/2023	<u>158</u> Report and recommendation to the U.S. District Court by U.S. Bankruptcy Judge. (RE: related document(s) <u>128</u> Motion for withdrawal of reference filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Entered on 2/6/2023 (Okafor, Marcey)
02/06/2023	<u>161</u> DISTRICT COURT Notice of transmission of report and recommendation in re: renewed motion to withdraw reference. Civil Case # 3:22-cv-02802-S. (RE: related document(s) <u>158</u> Report and recommendation to the U.S. District Court by U.S. Bankruptcy Judge. (RE: related document(s) <u>128</u> Motion for withdrawal of reference filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Entered on 2/6/2023) (Whitaker, Sheniqua)
02/06/2023	<u>162</u> DISTRICT COURT Notice of transmission of report and recommendation in re: renewed motion to withdraw reference. Civil Case # 3:21-cv-0842-B (RE: related document(s) <u>158</u> Report and recommendation to the U.S. District Court by U.S. Bankruptcy Judge. (RE: related document(s) <u>128</u> Motion for withdrawal of reference filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). (Related document(s) <u>1</u> Complaint filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd..) Entered on 2/6/2023) (Whitaker, Sheniqua).
02/08/2023	<u>163</u> BNC certificate of mailing – PDF document. (RE: related document(s) <u>158</u> Report and recommendation to the U.S. District Court by U.S. Bankruptcy Judge. (RE: related document(s) <u>128</u> Motion for withdrawal of reference filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Entered on 2/6/2023) No. of Notices: 4. Notice Date 02/08/2023. (Admin.)
02/21/2023	<u>164</u> Transcript regarding Hearing Held 1/25/23 RE: HEARING ON DEFENDANT HIGHLAND CAPITAL MANAGEMENT L.P.'S RENEWED MOTION TO DISMISS

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	COMPLAINT (122) AND STATUS CONFERENCE RE: MOTION FOR WITHDRAWAL OF REFERENCE FILED BY PLAINTIFF CLO HOLDCO, LTD., PLAINTIFF CHARITABLE DAF FUND, LP (128). THIS TRANSCRIPT WILL BE MADE ELECTRONICALLY AVAILABLE TO THE GENERAL PUBLIC 90 DAYS AFTER THE DATE OF FILING. TRANSCRIPT RELEASE DATE IS 05/22/2023. Until that time the transcript may be viewed at the Clerk's Office or a copy may be obtained from the official court transcriber. Court Reporter/Transcriber Dipti Patel, Telephone number 847-848-4907. (RE: related document(s) 155 Hearing held on 1/25/2023. (RE: related document(s) <u>122</u> Motion to dismiss adversary proceeding, (Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint) filed by Defendant Highland Capital Management, LP filed by Defendant Highland Capital Management, LP) (Appearances: J. Morris and G. Demo for Movants; L. Phillips and M.Sbaiti for Plaintiffs. Evidentiary hearing (appendices). Court took matter under advisement.), 156 Hearing held on 1/25/2023. (RE: related document(s) <u>128</u> Motion for withdrawal of reference. Fee amount \$188, filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) (Appearances: J. Morris and G. Demo for Movants; L. Phillips and M.Sbaiti for Plaintiffs. Evidentiary hearing (appendices). Court announced it will recommend denial to District Court. Court is working on Report & Recommendation.)). Transcript to be made available to the public on 05/22/2023. (Patel, Dipti)
04/03/2023	<u>165</u> DISTRICT COURT ORDER: The Court GRANTS the 11 Joint Motion to Transfer Proceeding and Consolidate Before Original Court and the above-numbered case (3:22-cv-02802-S) is transferred to the docket of the Honorable Judge Jane Boyle: Civil case 3:21-cv-00842-B (order referring case). (RE: related document(s) <u>1</u> Complaint filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., <u>143</u> Notice of transmission of motion to withdraw reference). Entered on 4/3/2023 (Whitaker, Sheniqua) Modified on 4/10/2023 (Whitaker, Sheniqua). (Entered: 04/10/2023)
06/25/2023	<u>166</u> Memorandum of opinion granting <u>122</u> Renewed Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP). Entered on 6/25/2023 (Okafor, Marcey)
06/25/2023	<u>167</u> Order granting Defendant Highland Capital Management, L.P.'s Renewed motion to dismiss adversary proceeding (related document # <u>122</u>) Entered on 6/25/2023. (Okafor, Marcey)
06/27/2023	<u>168</u> Notice of appeal . Fee Amount \$298 filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) <u>167</u> Order on motion to dismiss adversary proceeding). Appellant Designation due by 07/11/2023. (Sbaiti, Mazin)
06/27/2023	Receipt of filing fee for Notice of appeal(<u>21-03067-sgj</u>) [appeal,ntcapl] (298.00). Receipt number A30517211, amount \$ 298.00 (re: Doc# <u>168</u>). (U.S. Treasury)
06/28/2023	<u>169</u> BNC certificate of mailing – PDF document. (RE: related document(s) <u>166</u> Memorandum of opinion granting <u>122</u> Renewed Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP). Entered on 6/25/2023) No. of Notices: 3. Notice Date 06/28/2023. (Admin.)
06/28/2023	<u>170</u> BNC certificate of mailing – PDF document. (RE: related document(s) <u>167</u> Order granting Defendant Highland Capital Management, L.P.'s Renewed motion to dismiss adversary proceeding (related document <u>122</u>) Entered on 6/25/2023.) No. of Notices: 3. Notice Date 06/28/2023. (Admin.)
07/06/2023	<u>172</u> Certificate of mailing regarding appeal (RE: related document(s) <u>168</u> Notice of appeal . filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) <u>167</u> Order on motion to dismiss adversary proceeding). Appellant Designation due by 07/11/2023.) (Attachments: # <u>1</u> Service List) (Whitaker, Sheniqua)

07/06/2023	<u>173</u> Notice regarding the record for a bankruptcy appeal to the U.S. District Court. (RE: related document(s) <u>168</u> Notice of appeal . filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) <u>167</u> Order on motion to dismiss adversary proceeding). (Whitaker, Sheniqua)
07/06/2023	<u>174</u> Notice of docketing notice of appeal. Civil Action Number: 3:23-cv-01503-G. (RE: related document(s) <u>168</u> Notice of appeal . filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) <u>167</u> Order on motion to dismiss adversary proceeding). (Whitaker, Sheniqua)
07/08/2023	<u>175</u> BNC certificate of mailing. (RE: related document(s) <u>173</u> Notice regarding the record for a bankruptcy appeal to the U.S. District Court. (RE: related document(s) <u>168</u> Notice of appeal . filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) <u>167</u> Order on motion to dismiss adversary proceeding).) No. of Notices: 1. Notice Date 07/08/2023. (Admin.)
07/11/2023	<u>176</u> Appellant designation of contents for inclusion in record on appeal and statement of issues on appeal. filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) <u>168</u> Notice of appeal). Appellee designation due by 07/25/2023. (Sbaiti, Mazin)
07/12/2023	<u>177</u> Clerk's correspondence requesting amended appellant designation from attorney for appellant. (RE: related document(s) <u>176</u> Appellant designation of contents for inclusion in record on appeal and statement of issues on appeal. filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) <u>168</u> Notice of appeal).) Responses due by 7/16/2023. (Blanco, J.)
07/12/2023	<u>178</u> Amended appellant designation of contents for inclusion in record on appeal and statement of issues on appeal. filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) <u>176</u> Appellant designation). (Sbaiti, Mazin)
07/14/2023	<u>179</u> Amended appellant designation of contents for inclusion in record on appeal filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) <u>178</u> Appellant designation). (Sbaiti, Mazin)
07/18/2023	<u>181</u> DISTRICT COURT ORDER OF TRANSFER: This case is TRANSFERRED to the docket of United States District Judge Jane J. Boyle. All future pleadings shall subsequently be filed under case No. 3:23-CV-1503-B. Senior Judge A. Joe Fish is no longer assigned to case. (Ordered by Senior Judge A. Joe Fish on 7/18/2023) (RE: related document(s) <u>174</u> Notice of docketing notice of appeal/record). Entered on 7/18/2023 (Whitaker, Sheniqua) (Entered: 08/16/2023)
07/26/2023	<u>180</u> DISTRICT COURT Memorandum Opinion and Order: The bankruptcy court's order granting dismissal effectively resolves the adversary proceeding; nothing is left to withdraw. Accordingly, a bankruptcy court's order dismissing the adversary proceeding moots a pending motion to withdraw. The Court therefore DENIES AS MOOT Plaintiff's Motion to Withdraw the Reference (Doc. [1-1]). (Ordered by Judge Jane J Boyle on 7/26/2023) (related doc # <u>128</u>) Entered on 7/26/2023. Civil case 3:22-cv-2802-B (Whitaker, Sheniqua) (Entered: 07/28/2023)

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

In Re: Highland Capital Management, L.P § Case No. **19-34054-SGJ11**

Charitable DAF Fund, L.P et al

Appellant

§

vs.

§

21-03067

Highland Capital Management, L.P

§

Appellee

§

3:23-CV-01503-B

[167] Order granting Defendant Highland Capital Management, L.P.'s Renewed motion to dismiss adversary proceeding (related document # [122](#)) Entered on 6/25/2023.

Volume 2

APPELLANT RECORD

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and CLO Holdco, Ltd.*

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

In re:	§ Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§ Case No. 19-34054-sgj11
Debtor.	§
CHARITABLE DAF FUND, L.P. AND CLO	§
HOLDCO, LTD., DIRECTLY AND DERIVATIVELY	§
Plaintiffs,	§ Adversary Proceeding No.
vs.	§ 21-03067-sgj11
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§
HIGHLAND HCF ADVISOR, LTD., AND	§
HIGHLAND CLO FUNDING LTD., NOMINALLY	§
Defendant.	§

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**APPELLANTS' SECOND AMENDED STATEMENT OF ISSUES
AND DESIGNATION OF RECORD ON APPEAL**

Pursuant to Rules 8009(a)(1)(A)-(B) and (a)(4) of the Federal Rules of Bankruptcy Procedure, The Charitable DAF Fund, L.P. and CLO Holdco, Ltd. ("Appellants") hereby designate the following items to be included in the record and identify the following issues with respect to

their appeal of the Order Granting Defendant Highland Capital Management, L.P.'s "Renewed Motion to Dismiss Complaint" [Adv. Proc. Doc. No. 122] which was entered by the United States Bankruptcy Court for the Northern District of Texas on June 25, 2023.

I. STATEMENT OF ISSUES TO BE PRESENTED ON APPEAL

- Whether the Bankruptcy Court had jurisdiction to rule on Highland Capital Management L.P.'s Renewed Motion to Dismiss Complaint
- Whether the Renewed Motion to Dismiss Complaint was improperly granted

II. DESIGNATION OF ITEMS TO BE INCLUDED IN THE RECORD

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1. Notice of Appeal for Bankruptcy Case Adversary Proceeding No. 21-03067-sgj11 [Doc. 168].

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2. The judgment, order, or decree appealed from: Memorandum Opinion and Order Granting Defendant Highland Capital Management, L.P.'s "Renewed Motion to Dismiss Complaint" [Adv. Proc. Doc. No. 122] [Doc. 167].

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3. Docket Sheet kept by the Bankruptcy Clerk.

4. Documents listed below and as described in the Docket Sheet for Bankruptcy Case Proceeding No. 21-03067-sgj.

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No.	Date Filed	Docket No.	Description/Document Text
1	9/29/21	1	(36 pgs; 3 docs) Adversary case 21-03067. ORDER REFERRING CASE NUMBER 21-CV-0842-B from U.S District Court for the Northern District of Texas, Dallas Division to U.S. Bankruptcy Court for Northern District of Texas, Dallas Division. Complaint by Charitable DAF Fund, LP, CLO Holdco, Ltd. against Highland Capital Management, LP, Highland HCF Advisor Ltd., Highland CLO Funding, Ltd. Fee Amount \$350 (Attachments: # 1 Original Complaint # 2 Docket Sheet from 3:20-cv-0842-B) Nature(s) of suit: 02 (Other (e.g. other actions that would have been brought in state court if unrelated to bankruptcy)). (Okafor, M.)
2	9/29/21	2	(1 pg) Supplemental Document (cover sheet) by CLO Holdco Ltd., Charitable DAF Fund (RE: related document(s)1 Adversary case 21-03067) [ORIGINALLY FILED IN 21-CV-0842 AS #2 ON 04/13/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)

Vol. 2 000139 000232 000239 000270 Thru Vol. 6	3	9/29/21	6	(93 pgs; 6 docs) MOTION for Leave to File First Amended Complaint filed by CLO Holdco Ltd., Charitable DAF Fund LP (Attachments: # 1 Exh 1_First Amended Complaint # 2 Exh 2_Motion for Authorization to Retain James Seery # 3 Exh 3_Order Approving Retention of James Seery # 4 Exh 4_Order Approving Settlement # 5 Proposed Order) (Bridges, Jonathan) (Entered: 04/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #6 ON 04/19/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
	4	9/29/21	22	(7 pgs; 2 docs) MOTION for an Order to Enforce the Order of Reference filed by Highland Capital Management LP. (Attachments: # 1 Exhibit(s) A--Proposed Order) (Annable, Zachery) Modified text on 5/20/2021 (mjr). (Entered: 05/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #22 ON 05/19/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
	5	9/29/21	23	(31 pgs) Brief/Memorandum in Support filed by Highland Capital Management LP re: 22 MOTION for an Order to Enforce the Order of Reference. (Annable, Zachery) Modified text on 5/20/2021 (mjr).(Entered: 05/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #23 ON 05/19/2021 IN U.S.DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
	6	9/29/21	24	(926 pgs; 29 docs) Appendix in Support filed by Highland Capital Management LP re: 23 Brief/Memorandum in Support. (Attachments: # 1 Appendix 1 # 2 Appendix 2 # 3 Appendix 3 # 4 Appendix 4 # 5 Appendix 5 # 6 Appendix 6 # 7 Appendix 7 # 8 Appendix 8 # 9 Appendix 9 # 10 Appendix10 # 11 Appendix 11 # 12 Appendix 12 # 13 Appendix 13 # 14 Appendix 14 # 15 Appendix 15 # 16 Appendix 16 # 17 Appendix 17 # 18 Appendix 18 # 19 Appendix 19 # 20 Appendix 20 # 21 Appendix 21# 22 Appendix 22 # 23 Appendix 23 # 24 Appendix 24 # 25 Appendix 25 # 26 Appendix 26 # 27 Appendix 27 # 28 Appendix 28) (Annable, Zachery) Modified linkage and text on 5/20/2021 (mjr). (Entered:05/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #24 ON 05/19/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
Vol. 7 001196	7	9/29/21	26	(7 pgs; 2 docs) MOTION to Dismiss Complaint filed by Highland Capital Management LP (Attachments: # 1 Exhibit(s) A--Proposed Order) (Annable, Zachery) Modified text on 5/28/2021 (jmg).(Entered: 05/27/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #26 ON 05/27/2021 IN U.S.DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)

Vol. 7 001203 thru Vol. 8	8	9/29/21	28	(508 pgs; 14 docs) Appendix in Support filed by Highland Capital Management LP (Attachments: # 1 Appendix 1 # 2 Appendix 2 # 3 Appendix 3 # 4 Appendix 4 # 5 Appendix 5 # 6 Appendix 6 # 7 Appendix 7 # 8 Appendix 8 # 9 Appendix 9 # 10 Appendix 10 # 11 Appendix 11 # 12 Appendix 12 # 13 Appendix 13) (Annable, Zachery) (Entered: 05/27/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #28 ON 05/27/2021 IN U.S. DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
Vol. 9 001711	9	9/29/21	33	(1 pg) Amended Civil Cover Sheet by CLO Holdco Ltd, Charitable DAF Fund LP. Amendment to 2 Supplemental Document. (Sbaiti, Mazin) Modified text on 6/23/2021 (mjr). (Entered: 06/22/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #33 ON 06/22/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001712	10	9/29/21	36	(26 pgs) RESPONSE filed by CLO Holdco Ltd, Charitable DAF Fund LP re: 22 MOTION for an Order to Enforce the Order of Reference (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #36 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001738	11	9/29/21	37	(22 pgs) Appendix in Support filed by CLO Holdco Ltd, Charitable DAF Fund LP re 36 Response/Objection Response to Motion for an Order to Enforce the Order of Reference (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #37 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001760	12	9/29/21	38	(45 pgs) RESPONSE filed by CLO Holdco Ltd, Charitable DAF Fund LP re: 26 MOTION to Dismiss (Defendant Highland Capital Management, L.P.'s Motion to Dismiss Complaint) (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #38 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001805	13	9/29/21	39	(88 pgs) Appendix in Support filed by CLO Holdco Ltd, Charitable DAF Fund LP re 38 Response/Objection to Defendant Highland Capital Management, L.P.'s Motion to Dismiss Complaint (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #39 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001893	14	9/29/21	42	(12 pgs) REPLY filed by Highland Capital Management LP re: 22 MOTION for an Order to Enforce the Order of Reference (Annable, Zachery) (Entered: 07/13/2021) [ORIGINALLY FILED IN 21-CV-0842AS #42 ON 07/13/2021 IN U.S.

			DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
VOL. 9	15	9/29/21	43 (852 pgs) Appendix in Support filed by Highland Capital Management LP re: 42 Reply. (Annable, Zachery) Modified text on 7/14/2021 (mjr). (Entered: 07/13/2021) [ORIGINALLY FILED IN 21-CV-0842AS #43 ON 07/13/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001905 thru Vol. 13	16	9/29/21	45 (21 pgs) REPLY filed by Highland Capital Management LP re: 26 MOTION to Dismiss (Defendant Highland Capital Management, L.P.'s Motion to Dismiss Complaint) (Annable, Zachery) (Entered: 07/13/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #44 ON 07/13/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002757	17	9/29/21	57 (7 pgs; 2 docs) MOTION to Dismiss and Joinder in Motion to Dismiss of Highland Capital Management, L.P. filed by Highland CLO Funding Ltd. (Attachments: # 1 Proposed Order) Attorney Paul R Bessette added to party Highland CLO Funding Ltd (pty:dft) (Bessette, Paul) (Entered: 08/30/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #57 ON 08/30/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002778	18	9/29/23	58 (12 pgs) Brief/Memorandum in Support filed by Highland CLO Funding Ltd. re 57 MOTION to Dismiss and Joinder in Motion to Dismiss of Highland Capital Management, L.P. (Bessette, Paul) (Entered: 08/30/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #58 ON 08/30/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002785	19	9/29/23	59 (80 pgs; 5 docs) Appendix in Support filed by Highland CLO Funding Ltd re 58 Brief/Memorandum in Support of Motion (Attachments: # 1 Exhibit(s) A - Jackson v Dear # 2 Exhibit(s) B - Prudential Assurance v. Newman # 3 Exhibit(s) C - Harbourvest Settlement Agreement # 4 Exhibit(s) D - Boleat Declaration) (Bessette, Paul) (Entered: 08/30/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #59 ON 08/30/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002797	20	9/29/21	64 (1 pg) ORDER OF REFERENCE: Pursuant to 28 U.S.C. § 157 and this District's Miscellaneous Order No. 33, this case is hereby REFERRED to Judge Stacey G. C. Jernigan of the United States Bankruptcy Court for the Northern District of Texas, Dallas Division, to be adjudicated as a matter related to the consolidated Chapter 11 Bankruptcy of Highland Capital Management, L.P., Chapter 11 Case No.19-34054. (Ordered by Judge Jane J. Boyle
002877			

Vol. 14			on 9/20/2021) (svc) (Entered: 09/20/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #64 ON 09/20/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002878	21	10/19/21	66 (5 pgs) Notice of hearing filed by Defendant Highland Capital Management, LP (RE: related document(s) 26 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP, 47 Motion to strike document filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 55 Motion to abate filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) Hearing to be held on 11/23/2021 at 09:30 AM at https://us-courts.webex.com/meet/jerniga for 26 and for 47 and for 55, (Annable, Zachery)
002883 thru Vol. 16	22	11/22/21	71 (509 pgs; 2 docs) Witness and Exhibit List <i>for Hearing on November 23, 2021</i> filed by Defendant Highland Capital Management, LP (RE: related document(s) 26 Motion to dismiss adversary proceeding). (Attachments: # 1 Exhibits 1-13) (Hayward, Melissa)
Vol. 17	23	11/22/21	72 (2 pgs) Witness List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 26 Motion to dismiss adversary proceeding, 47 Motion to strike (related document(s): 43 Document), 55 Motion to abate (related document(s) 1 Complaint), 69 Motion to abate <i>Plaintiffs' Amended Motion to Stay All Proceedings</i> (related document(s) 55 Motion to abate (related document(s) 1 Complaint))). (Sbaiti, Mazin)
003392	24	11/22/21	73 (189 pgs; 4 docs) Exhibit List <i>for November 23, 2021 hearing</i> filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 47 Motion to strike (related document(s): 43 Document), 55 Motion to abate (related document(s) 1 Complaint)). (Attachments: # 1 Exhibit 1_Defendant's Memorandum of Law in Support of Motion for Reconsideration # 2 Exhibit 2_Highland Memorandum in Support of Motion to Dismiss # 3 Exhibit 3_Order (I) Confirming Fifth Amended Plan of Reorganization of Highland) (Sbaiti, Mazin)
003394	25	12/7/21	80 (2 pgs) Order granting Highland CLO Funding, Ltd.'s motion to dismiss adversary as a party with prejudice (related document 57) Entered on 12/7/2021. (Okafor, Marcey) Modified text on 3/11/2022 (Okafor, Marcey).
003583	26	3/11/22	99 (26 pgs) Memorandum of Opinion and order granting motion to dismiss the adversary proceeding (RE: related document(s) 26 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP). Entered on 3/11/2022 (Okafor, Marcey)
003585	27	3/11/22	100 (26 pgs) Order granting motion to dismiss adversary proceeding with prejudice (related document #26) Entered on 3/11/2022. (Okafor, Marcey)
003611			

Vol. 18 003637	28	3/21/22	104	(29 pgs) Notice of appeal. Fee Amount \$298 filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 100 Order on motion to dismiss adversary proceeding). Appellant Designation due by 04/4/2022. (Sbaiti, Mazin)
003666	29	5/26/22	120	(177 pgs; 2 docs) Support/supplemental document <i>Motion to Supplement Appellate Record</i> filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 111 Appellant designation). (Attachments: # 1 Amended Transcript of January 14, 2021 Hearing) (Sbaiti, Mazin)
003843	30	6/9/22	121	(1 pg) DISTRICT COURT Order: Case 3:22-00695-B is hereby transferred to the docket of the Honorable Judge Jane J. Boyle for consolidation with The Charitable DAF Fund LP, et al. v. Highland Capital Management LP, Case No. 3:21-cv-3129-N. Judge Karen Gren Scholer no longer assigned to case.(RE: related document(s) 86 Notice of appeal filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 104 Notice of appeal filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Entered on 6/9/2022 (Whitaker, Sheniqua) (Entered: 06/10/2022)
003844	31	10/24/22	122	(7 pgs) Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP (Annable, Zachery)
003851	32	10/14/22	123	(31 pgs) Brief in support filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Annable, Zachery)
Vol. 19 003882 Thru Vol 20	33	10/14/22	124	(513 pgs; 15 docs) Support/supplemental document (<i>Appendix in Support of Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7 # 8 Exhibit 8 # 9 Exhibit 9 # 10 Exhibit 10 # 11 Exhibit 11 # 12 Exhibit 12 # 13 Exhibit 13 # 14 Exhibit 14) (Annable, Zachery)
Vol. 21 004395	34	10/27/22	126	(5 pgs) Notice of hearing (<i>Notice of Hearing and Briefing Schedule on Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP). Hearing to be held on 12/8/2022 at 09:30 AM at https://us-courts.webex.com/meet/jerniga for 122. (Annable, Zachery)

Vol. 21 004400 004410 004442 Thru Vol. 22	35	11/18/22	128	(10 pgs) Motion for withdrawal of reference. Fee amount \$188, filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (Sbaiti, Mazin)
	36	11/18/22	129	(32 pgs) Response opposed to (related document(s): 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP) filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Sbaiti, Mazin)
	37	11/18/22	130	(254 pgs; 2 docs) Response opposed to (related document(s): 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP) filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Attachments: # 1 Appendix) (Sbaiti, Mazin)
Vol. 22 004696 004717 004732 004737 004742	38	9/2/22	131	(21 pgs) DISTRICT COURT MEMORANDUM OPINION AND ORDER: The Court REVERSES and REMANDS the bankruptcy court's Motion to Dismiss Order and AFFIRMS the bankruptcy courts Motion to Stay Order. re: appeal on Civil Action number: Case 3:22-00695-B consolidated with 3:21-CV-3129-B, (RE: related document(s) 81 Order on motion to abate, 100 Order on motion to dismiss adversary proceeding). Entered on 9/2/2022 (Whitaker, Sheniqua) (Entered: 11/29/2022)
	39	12/2/22	133	(15 pgs) Reply to (related document(s): 129 Response filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 130 Response filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) filed by Defendant Highland Capital Management, LP. (Annable, Zachery)
	40	12/7/22	135	(5 pgs) Notice of hearing filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP). Hearing to be held on 1/25/2023 at 01:30 PM at https://us-courts.webex.com/meet/jerniga for 122, (Annable, Zachery)
	41	12/7/22	136	(5 pgs) Notice of hearing filed by Defendant Highland Capital Management, LP (RE: related document(s) 128 Motion for withdrawal of reference filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Status Conference to be held on 1/25/2023 at 01:30 PM at https://us-courts.webex.com/meet/jerniga . (Annable, Zachery).
	42	12/9/22	138	(3 pgs) Response opposed to (related document(s): 128 Motion for withdrawal of reference. Fee amount \$188, filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) filed by Defendant Highland Capital Management, LP. (Annable, Zachery)

Vol. 22 004745	43	12/9/22	139	(25 pgs) Brief in support filed by Defendant Highland Capital Management, LP (RE: related document(s) 138 Response). (Annable, Zachery)
Vol. 23 004770	44	12/9/22	140	(280 pgs; 8 docs) Support/supplemental document (<i>Appendix in Support of Highland Capital Management, L.P.'s Response to Renewed Motion to Withdraw the Reference</i>) filed by Defendant Highland Capital Management, LP (RE: related document(s) 138 Response). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7) (Annable, Zachery)
Vol. 24 005050	45	12/16/22	144	(6 pgs) Reply to (related document(s): 138 Response filed by Defendant Highland Capital Management, LP) filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Sbaiti, Mazin)
005056 Thru Vol. 25.	46	1/23/23	145	(514 pgs; 15 docs) Witness and Exhibit List filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7 # 8 Exhibit 8 # 9 Exhibit 9 # 10 Exhibit 10 # 11 Exhibit 11 # 12 Exhibit 12 # 13 Exhibit 13 # 14 Exhibit 14) (Annable, Zachery)
Vol. 26 005570	47	1/23/23	146	(280 pgs; 8 docs) Witness and Exhibit List filed by Defendant Highland Capital Management, LP (RE: related document(s) 128 Motion for withdrawal of reference. Fee amount \$188.). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7) (Annable, Zachery)
Vol. 27 005850	48	1/23/23	147	(221 pgs; 7 docs) Witness and Exhibit List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Attachments: # 1 Exhibit 1_Excerpts from July 14, 2020 Hearing Transcript # 2 Exhibit 2_HCLOF Members Agreement Relating to the Company # 3 Exhibit 3_HarbourVest Settlement Agreement # 4 Exhibit 4_Order Approving Debtor's Settlement with HarbourVest # 5 Exhibit 5_HCLOF Offering # 6 Exhibit 6 Amended and Restated Investment Advisory Agreement) (Sbaiti, Mazin)
006071	49	1/23/23	148	(3 pgs) Witness and Exhibit List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 128 Motion for withdrawal of reference. Fee amount \$188.). (Phillips, Louis)
Vol. 28 006074	50	1/25/23	150	(56 pgs; 2 docs) Amended Witness and Exhibit List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 147 List (witness/exhibit/generic), 149 List (witness/exhibit/generic)). (Attachments: # 1 Exh 7_Testimony of Mark Patrick at June 8, 2021 hearing) (Sbaiti, Mazin)

Vol. 28 006130 006133 Thru Vol. 31	51	1/25/23	152	(3 pgs) Notice of Appearance and Request for Notice by Louis M. Phillips filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Phillips, Louis)
	52	1/25/23	154	(1 pg) Court admitted exhibits date of hearing January 25, 2023 (RE: related document(s) 128 Motion for withdrawal of reference, filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) (COURT ADMITTED DEFENDANT'S EXHIBITS #1, #2, #3, #4, #5 & #6 OFFERED BY ATTY GREG DEMO). (Edmond, Michael) (Entered: 01/27/2023)
Vol. 32 006925 006942 006960	53	2/6/23	158	Report and recommendation to the U.S. District Court by U.S. Bankruptcy Judge. (RE: related document(s) 128 Motion for withdrawal of reference filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Entered on 2/6/2023 (Okafor, Marcey)
	54	2/6/23	161	(18 pgs) DISTRICT COURT Notice of transmission of report and recommendation in re: renewed motion to withdraw reference. Civil Case # 3:22-cv-02802-S. (RE: related document(s) 158 Report and recommendation to the U.S. District Court by U.S. Bankruptcy Judge. (RE: related document(s) 128 Motion for withdrawal of reference filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Entered on 2/6/2023) (Whitaker, Sheniqua)
	55	4/3/23	165	(1 pg) DISTRICT COURT ORDER: The Court GRANTS the 11 Joint Motion to Transfer Proceeding and Consolidate Before Original Court and the above-numbered case (3:22-cv-02802-S) is transferred to the docket of the Honorable Judge Jane Boyle: Civil case 3:21-cv-00842-B (order referring case). (RE: related document(s) 1 Complaint filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 143 Notice of transmission of motion to withdraw reference). Entered on 4/3/2023 (Whitaker, Sheniqua) Modified on 4/10/2023 (Whitaker, Sheniqua). (Entered: 04/10/2023)

TRANSCRIPTS

006961	56	11/24/21	78	(104 pgs) Transcript regarding Hearing Held 11-23-2021 RE: Motion Hearing. THIS TRANSCRIPT WILL BE MADE ELECTRONICALLY AVAILABLE TO THE GENERAL PUBLIC 90 DAYS AFTER THE DATE OF FILING. TRANSCRIPT RELEASE DATE IS 02/22/2022. Until that time the transcript may be viewed at the Clerk's Office or a copy may be obtained from the official court transcriber. Court Reporter/Transcriber Liberty Transcripts/Dipti Patel, Telephone number 847-848-4907. (RE: related document(s) 75 Hearing held on 11/23/2021. (RE: related document(s) 55 MOTION to Stay filed by CLO Holdco Ltd, Charitable DAF Fund LP (Sbaiti, Mazin) (Entered: 08/26/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #55 ON 08/26/2021 IN U.S.
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			<p>DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)) (Appearances: J. Pomerantz and J. Morris for Highland Defendants; J. Jordan and P. Bessett for HCLOF; M. Sbaiti for Plaintiffs. Nonevidentiary hearing. Motion denied. Mr. Pomerantz to upload order.), 76 Hearing held on 11/23/2021. (RE: related document(s) 47 Motion to strike 43 Appendix in support filed by CLO Holdco, Ltd., Charitable DAF Fund, LP (Bridges, Jonathan) Modified text on 7/16/2021 (mjr). (Entered: 07/15/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #47 ON 07/15/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)) (Appearances: J. Pomerantz and J. Morris for Highland Defendants; J. Jordan and P. Bessett for HCLOF; M. Sbaiti for Plaintiffs. Nonevidentiary hearing. Motion denied (Plaintiffs acknowledged complained-of Appendices it did not relate to Motion to Dismiss). Mr. Pomerantz to upload order.)). Transcript to be made available to the public on 02/22/2022. (Patel, Dipti)</p>
57	2/21/23	164	<p>164 (112 pgs) Transcript regarding Hearing Held 1/25/23 RE: HEARING ON DEFENDANT HIGHLAND CAPITAL MANAGEMENT L.P.'S RENEWED MOTION TO DISMISS COMPLAINT (122) AND STATUS CONFERENCE RE: MOTION FOR WITHDRAWAL OF REFERENCE FILED BY PLAINTIFF CLO HOLDCO, LTD., PLAINTIFF CHARITABLE DAF FUND, LP (128). THIS TRANSCRIPT WILL BE MADE ELECTRONICALLY AVAILABLE TO THE GENERAL PUBLIC 90 DAYS AFTER THE DATE OF FILING. TRANSCRIPT RELEASE DATE IS 05/22/2023. Until that time the transcript may be viewed at the Clerk's Office or a copy may be obtained from the official court transcriber. Court Reporter/Transcriber Dipti Patel, Telephone number 847-848-4907. (RE: related document(s) 155 Hearing held on 1/25/2023. (RE: related document(s) 122 Motion to dismiss adversary proceeding, (Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint) filed by Defendant Highland Capital Management, LP filed by Defendant Highland Capital Management, LP) (Appearances: J. Morris and G. Demo for Movants; L. Phillips and M. Sbaiti for Plaintiffs. Evidentiary hearing (appendices). Court took matter under advisement.), 156 Hearing held on 1/25/2023. (RE: related document(s) 128 Motion for withdrawal of reference. Fee amount \$188, filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) (Appearances: J. Morris and G. Demo for Movants; L. Phillips and M. Sbaiti for Plaintiffs. Evidentiary hearing (appendices). Court announced it will recommend denial to District Court. Court is working on Report & Recommendation.)). Transcript to be made available to the public on 05/22/2023. (Patel, Dipti)</p>

Dated: July 14, 2023

Respectfully submitted,

SBAITI & COMPANY PLLC

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was filed electronically through the Court's ECF system, which provides notice to all parties of interest, on this 14th day of July, 2023.

/s/ Mazin A. Sbaiti

Mazin A. Sbaiti

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CHARITABLE DAF FUND, L.P., and §
CLO HOLDCO, LTD., §

Plaintiffs, §

v. §

CIVIL ACTION NO. 3:21-CV-0842-B

HIGHLAND CAPITAL §
MANAGEMENT, L.P., HIGHLAND §
HCF ADVISOR, LTD., and §
HIGHLAND CLO FUNDING, LTD., §

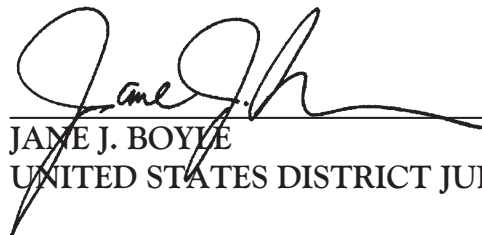
Defendants. §

ORDER OF REFERENCE

Pursuant to 28 U.S.C. § 157 and this District's Miscellaneous Order No. 33, this case is hereby **REFERRED** to Judge Stacey G. C. Jernigan of the United States Bankruptcy Court for the Northern District of Texas, Dallas Division, to be adjudicated as a matter related to the consolidated Chapter 11 Bankruptcy of Highland Capital Management, L.P., Chapter 11 Case No. 19-34054. The Clerk of this Court and the Clerk of the Bankruptcy Court to which this case is hereby referred are directed to take such actions as are necessary and appropriate to cause this matter to be docketed as an Adversary Proceeding associated with the consolidated Chapter 11 Bankruptcy of Highland Capital Management, L.P., Case No. 19-34054.

SO ORDERED.

SIGNED: September 20, 2021.


JANE J. BOYLE
UNITED STATES DISTRICT JUDGE

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

CHARITABLE DAF FUND, L.P.
and CLO HOLDCO, LTD.,
directly and derivatively,

Plaintiffs,

V.

Cause No. _____

**HIGHLAND CAPITAL MANAGEMENT,
L.P. , HIGHLAND HCF ADVISOR, LTD.,
and HIGHLAND CLO FUNDING, LTD.,
*nominally,***

Defendants.

ORIGINAL COMPLAINT

I.

INTRODUCTION

This action arises out of the acts and omissions of Defendant Highland Capital Management, L.P. (“HCM”), which is the general manager of Highland HCF Advisor, Ltd. (“HCFA”), both of which are registered investment advisers under the Investment Advisers Act of 1940 (the “Advisers Act”),¹ and nominal Defendant Highland CLO Funding, Ltd. (“HCLOF”) (HCM and HCFA each a “Defendant,” or together, “Defendants”). The acts and omissions which have recently come to light reveal breaches of fiduciary duty, a pattern of violations of the Advisers Act’s anti-fraud provisions, and concealed breaches of the HCLOF Company Agreement, among others, which have caused and/or likely will cause Plaintiffs damages.

¹ <https://adviserinfo.sec.gov/firm/summary/110126>

At all relevant times, HCM was headed by CEO and potential party James P. Seery (“Seery”). Seery negotiated a settlement with the several Harbourvest² entities who owned 49.98% of HCLOF. The deal had HCM (or its designee) purchasing the Harbourvest membership interests in HCLOF for \$22.5 million. Recent revelations, however, show that the sale was predicated upon a sales price that was vastly below the Net Asset Value (“NAV”) of those interests. Upon information and belief, the NAV of HCLOF’s assets had risen precipitously, but was not disclosed to Harbourvest nor to Plaintiffs.

Under the Advisers Act, Defendants have a non-waivable duty of loyalty and candor, which includes its duty not to inside trade with its own investors, *i.e.*, not to trade with an investor to which HCM and Seery had access to superior non-public information. Upon information and belief, HCM’s internal compliance policies required by the Advisers Act would not generally have allowed a trade of this nature to go forward—meaning, the trade either was approved in spite of compliance rules preventing it, or the compliance protocols themselves were disabled or amended to a level that leaves Defendants HCM and HCLOF exposed to liability. Thus, Defendants have created an unacceptable perpetuation of exposure to liability.

Additionally, Defendants are liable for a pattern of conduct that gives rise to liability for their conduct of the enterprise consisting of HCM in relation to HCFA and HCLOF, through a pattern of concealment, misrepresentation, and violations of the securities rules. In the alternative, HCFA and HCM, are guilty of self-dealing, violations of the Advisers Act, and tortious interference by (a) not disclosing that Harbourvest had agreed to sell at a price well below the current NAV, and (b) diverting the Harbourvest opportunity to themselves.

² “Harbourvest” refers to the collective of Harbourvest Dover Street IX Investment, L.P., Harbourvest 2017 Global AIF, L.P., Harbourvest 2017 Global Fund, L.P., HV International VIII Secondary, L.P., and Harbourvest Skew Base AIF, L.P. Each was a member of Defendant Highland CLO Funding, Ltd.

For these reasons, judgment should be issued in Plaintiffs' favor.

II.

PARTIES

1. Plaintiff CLO Holdco, Ltd. is a limited company incorporated under the laws of the Cayman Islands.

2. Plaintiff Charitable DAF Fund, L.P., ("DAF") is a limited partnership formed under the laws of the Cayman Islands.

3. Defendant Highland Capital Management, L.P. is a limited partnership with its principal place of business at 300 Crescent Court, Suite 700, Dallas, Texas 75201. It may be served at its principal place of business or through its principal officer, James P. Seery, Jr., or through the Texas Secretary of State, or through any other means authorized by federal or state law.

4. Defendant Highland HCF Advisor, Ltd. is a limited company incorporated under the laws of the Cayman Islands. Its principal place of business is 300 Crescent Court, Suite 700, Dallas, Texas 75201. It is a registered investment adviser ("RIA") subject to the laws and regulations of the Investment Advisers Act of 1940 (the "Adviser's Act"). It is a wholly-owned subsidiary of Highland Capital Management, L.P.

5. Nominal Defendant Highland CLO Funding, Ltd. is a limited company incorporated under the laws of the Island of Guernsey. Its registered office is at First Floor, Dorey Court, Admiral Park, St. Peter Port, Guernsey GY1 6HJ, Channel Islands. Its principal place of business is 300 Crescent Court, Suite 700, Dallas, Texas 75201.

6. Potential party James P. Seery, Jr. ("Seery") is an officer and/or director and/or control person of Defendants Highland Capital Management, L.P., Highland CLO Funding, Ltd., and Highland HCF Advisor, Ltd., and is a citizen of and domiciled in Floral Park, New York.

III.

JURISDICTION AND VENUE

7. This Court has subject matter jurisdiction over this dispute under 28 U.S.C. § 1331 as one or more rights and/or causes of action arise under the laws of the United States. This Court has supplemental subject matter jurisdiction over all other claims under 28 U.S.C. § 1367.

8. Personal jurisdiction is proper over the Defendants because they reside and/or have continual contacts with the state of Texas, having regularly submitted to jurisdiction here. Jurisdiction is also proper under 18 U.S.C. § 1965(d).

9. Venue is proper in this Court under 28 U.S.C. § 1391(b) and (c) because one or more Defendants reside in this district and/or a substantial part of the events or omissions giving rise to the claim occurred or a substantial part of property that is the subject of the action is situated in this district. Venue in this district is further provided under 18 U.S.C. § 1965(d).

IV.

RELEVANT BACKGROUND

HCLOF IS FORMED

10. Plaintiff DAF is a charitable fund that helps several causes throughout the country, including providing funding for humanitarian issues (such as veteran's welfare associations and women's shelters), public works (such as museums, parks and zoos), and education (such as specialty schools in underserved communities). Its mission is critical.

11. Since 2012, DAF was advised by its registered investment adviser, Highland Capital Management, L.P., and its various subsidiaries, about where to invest. This relationship was governed by an Investment advisory Agreement.

12. At one point in 2017, HCM advised DAF to acquire 143,454,001 shares of HCLOF, with HCFA (a subsidiary of HCM) serving as the portfolio manager. DAF did so via a holding entity, Plaintiff CLO Holdco, Ltd.

13. On November 15, 2017, through a Subscription and Transfer Agreement, the DAF entered into an agreement with others to sell and transfer shares in HCLOF, wherein the DAF retained 49.02% in CLO Holdco.

14. Pursuant to that agreement, Harbourvest acquired the following interests in the following entities:

Harbourvest Dover Street IX Investment, L.P., acquired 35.49%;

Harbourvest 2017 Global AIF, L.P., acquired 2.42%;

Harbourvest 2017 lobal Fund, L.P., acquired 4.85%;

HV International VIII Secondary, L.P., acquired 6.5%; and

Harbourvest Skew Base AIF, L.P., acquired 0.72%;

for a total of 49.98% (altogether, the “Harbourvest interests”).

15. On or about October 16, 2019, Highland Capital Management filed for Chapter 11 bankruptcy in Delaware Bankruptcy Court, which was later transferred to the Northern District of Texas Bankruptcy Court, in the case styled *In Re: Highland Capital Management, L.P., Debtor*, Cause No. 19-34054, (the “HCM Bankruptcy” and the Court is the “Bankruptcy Court”).

The Harbourvest Settlement with Highland Capital Management in Bankruptcy

16. On April 8, 2020, Harbourvest submitted its proofs of claim in the HCM bankruptcy proceeding. Annexed to its proofs of claims was an explanation of the Proof of Claim and the basis therefor setting out various pre-petition allegations of wrongdoing by HCM. *See, e.g.*, Case No. 19-bk-34054, Doc. 1631-5.

17. The debtor, HCM, made an omnibus response to the proofs of claims, stating they were duplicative of each other, overstated, late, and otherwise meritless.

18. Harbourvest responded to the omnibus objections on September 11, 2020. *See* Cause No. 19-bk-34054, Doc. 1057.

19. Harbourvest represented that it had invested in HCLOF, purchasing 49.98% of HCLOF's outstanding shares.

20. Plaintiff CLO Holdco was and is also a 49.02% holder of HCLOF's member interests.

21. In its Omnibus Response, Harbourvest explained that its claims included unliquidated legal claims for fraud, fraud in the inducement, RICO violations under 18 U.S.C. 1964, among others (the "Harbourvest Claims"). *See* Cause No. 19-bk-34054, Doc. 1057.

22. The Harbourvest Claims centered on allegations that when Harbourvest was intending to invest in a pool of Collateralized Loan Obligations, or CLOs, that were then-managed by Acis Capital Management ("Acis"), a subsidiary of HCM, HCM failed to disclose key facts about ongoing litigation with a former employee, Josh Terry.

23. Harbourvest contended that HCM never sufficiently disclosed the underlying facts about the litigation with Terry, and HCM's then-intended strategy to fight Terry caused HCLOF to incur around \$15 million in legal fees and costs. It contended that had it known the nature of the lawsuit and how it would eventually turn out, Harbourvest never would have invested in HCLOF. *See* Cause No. 19-bk-34054, Doc. 1057.

24. HCLOF's portfolio manager is HCFA. HCM is the parent of HCFA and is managed by its General Partner, Strand Management, who employs Seery and acts on behalf of HCM.

25. Before acceding to the Harbourvest interests, HCM was a 0.6% holder of HCLOF interests.

26. While even assuming Harbourvest's underlying claims were valid as far as the lost \$15 million went, the true damage of the legal fees to Harbourvest would have been 49.98% of the HCLOF losses (i.e., less than \$7.5 million). Harbourvest claimed that it had lost over \$100 million in the HCLOF transaction due to fraud, which, after trebling under the racketeering statute, it claimed it was entitled to over \$300 million in damages.

27. In truth, as of September 2020, Harbourvest had indeed lost some \$52 million due to the alleged diminishing value of the HCLOF assets (largely due to the underperformance of the Acis entities³)—and the values were starting to recover.

28. HCM denied the allegations in the Bankruptcy Court. Other than the claim for waste of corporate assets of \$15 million, HCM at all times viewed the Harbourvest legal claims as being worth near zero and having no merit.

29. On December 23, 2020, HCM moved the Court to approve a settlement between itself and Harbourvest. No discovery had taken place between the parties, and Plaintiff did not have any notice of the settlement terms or other factors prior to the motion's filing (or even during its pendency) in order to investigate its rights.

30. HCM set the hearing right after the Christmas and New Year's holidays, almost ensuring that no party would have the time to scrutinize the underpinnings of the deal.

31. On January 14, 2021, the Bankruptcy Court held an evidentiary hearing and approved the settlement in a bench ruling, overruling the objections to the settlement.

³ Acis was being managed by Joshua Terry. JP Morgan had listed the four ACIS entities under his management as the four worst performers of the 1200 CLOs it evaluated.

32. An integral part of the settlement was allowing \$45 million in unsecured claims that, at the time of the agreement, were expected to net Harbourvest around 70 cents on the dollar. In other words, Harbourvest was expected to recover around \$31,500,000 from the allowed claims.

33. As part of the consideration for the \$45 million in allowed claims, Harbourvest agreed to transfer all of its interests in HCLOF to HCM or its designee.

34. HCM and Seery rationalized the settlement value by allocating \$22.5 million of the net value of the \$45 million in unsecured claims as consideration to purchase Harbourvest's interests in HCLOF, meaning, if 70% of the unsecured claims—i.e., \$31.5 million—was realized, because \$22.5 million of that would be allocated to the purchase price of the Harbourvest interests in HCLOF, the true “settlement” for Harbourvest's legal claims was closer to \$9 million.

35. Plaintiffs here are taking no position at this time about the propriety of settling the Harbourvest legal claims for \$9 million. That is for another day.

36. At the core of this lawsuit is the fact that HCM purchased the Harbourvest interests in HCLOF for \$22.5 million knowing that they were worth far more than that.

37. It has recently come to light that, upon information and belief, the Harbourvest interests, as of December 31, 2020, were worth in excess of \$41,750,000, and they have continued to go up in value.

38. On November 30, 2020, which was less than a month prior to the filing of the Motion to Approve the Settlement, the net asset value of those interests was over \$34.5 million. Plaintiffs were never made aware of that.

39. The change is due to how the net asset value, or NAV, was calculated. The means and methods for calculating the “net asset value” of the assets of HCLOF are subject to and

governed by the regulations passed by the SEC pursuant to the Adviser's Act, and by HCM's internal policies and procedures.

40. Typically, the value of the securities reflected by a market price quote.

41. However, the underlying securities in HCLOF are not liquid and had not been traded in a long while.

42. There not having been any contemporaneous market quotations that could be used in good faith to set the marks⁴ meant that other prescribed methods of assessing the value of the interests, such as the NAV, would have been the proper substitutes.

43. Seery testified that the fair market value of the Harbourvest HCLOF interests was \$22.5 million. Even allowing some leeway there, it was off the mark by a mile.

44. Given the artifice described herein, Seery and the entity Defendants had to know that the representation of the fair market value was false. But it does not appear that they disclosed it to Harbourvest to whom they owed fiduciary duties as the RIA in charge of HCLOF, and they certainly did not disclose the truth to the Plaintiff.

45. It is either the case that (i) Defendants conducted the proper analysis to obtain a current value of the assets but decided to use a far lower valuation in order to whitewash the settlement or enrich the bankruptcy estate; *or* (ii) Defendants never conducted the proper current valuation, and therefore baselessly represented what the current value of the assets was, despite knowingly having no reasonable basis for making such a claim.

46. For years HCM had such internal procedures and compliance protocols. HCM was not allowed by its own compliance officers to trade with an investor where HCM had superior knowledge about the value of the assets, for example. While Plaintiff has no reason to believe that

⁴ The term "mark" is shorthand for an estimated or calculated value for a non-publicly traded instrument.

those procedures were scrapped in recent months, it can only assume that they were either overridden improperly or circumvented wholesale.

47. Upon finalizing the Harbourvest Settlement Agreement and making representations to the Bankruptcy Court to the Plaintiffs about the value of the Harbourvest Interests, Seery and HCM had a duty to use current values and not rely on old valuations of the assets or the HCLOF interests.

48. Given Defendants' actual or constructive knowledge that they were purchasing Harbourvest's Interests in HCLOF for a less than 50% of what those interests were worth—Defendants owed Plaintiff a fiduciary duty not to purchase them for themselves.

49. Defendants should have either had HCLOF repurchase the interests with cash, or offer those interests to Plaintiff and the other members *pro rata*, before HCM agreed to purchase them all lock, stock and barrel, for no up-front cash.

50. Indeed, had Plaintiff been offered those interests, it would have happily purchased them and therefore would have infused over \$20 million in cash into the estate for the purpose of executing the Harbourvest Settlement.

51. That Defendants (and to perhaps a lesser extent, the Unsecured Creditors Committee (the "UCC")) agreed to pay \$22.5 million for the HCLOF assets, where they had previously not consented to any such expenditure by the estate on behalf of HCLOF, strongly indicates their awareness that they were purchasing assets for far below market value.

52. The above is the most reasonable and plausible explanation for why Defendants and the UCC forwent raising as much as \$22.5 million in cash now in favor of hanging on to the HCLOF assets.

53. Indeed, in January 2021 Seery threatened Ethen Powell that “[Judge Jernigan] is laughing at you” and “we are coming after you” in response to the latter’s attempt to exercise his right as beneficial holder of the CLO, and pointing out a conflict of interest in Seery’s plan to liquidate the funds.

54. HCM’s threat, made by Seery, is tantamount to not only a declaration that he intends to liquidate the funds regardless of whether the investors want to do so, and whether it is in their best interests, but also that HCM intends to leverage what it views as the Bankruptcy Court’s sympathy to evade accountability.

V.

CAUSES OF ACTION

FIRST CAUSE OF ACTION *Breaches of Fiduciary Duty*

55. Plaintiffs respectfully incorporate the foregoing factual averments as if fully set forth herein and further alleges the following:

56. HCM is a registered investment advisor and acts on behalf of HCFA. Both are fiduciaries to Plaintiffs.

57. The Advisers Act establishes an unwaivable federal fiduciary duty for investment advisers.⁵

⁵ See e.g., *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 194 (1963); *Transamerica Mortg. Advisors (tama) v. Lewis*, 444 U.S. 11, 17 (1979) (“§ 206 establishes ‘federal fiduciary standards’ to govern the conduct of investment advisers.”); *Santa Fe Indus. v. Green*, 430 U.S. 462, 471, n.11 (1977) (in discussing *SEC v. Capital Gains*, stating that the Supreme Court’s reference to fraud in the “equitable” sense of the term was “premised on its recognition that Congress intended the Investment Advisers Act to establish federal fiduciary standards for investment advisers”). See also Investment Advisers Act Release No. 3060 (July 28, 2010) (“Under the Advisers Act, an adviser is a fiduciary whose duty is to serve the best interests of its clients, which includes an obligation not to subrogate clients’ interests to its own”) (citing Proxy Voting by Investment Advisers, Investment Advisers Act Release No. 2106 (Jan. 31, 2003)).

58. HCM and the DAF entered into an Amended and Restated Investment Advisory Agreement, executed between them on July 1, 2014 (the “RIA Agreement”). It renews annually and continued until the end of January 2021.

59. In addition to being the RIA to the DAF, HCM was appointed the DAF’s attorney-in-fact for certain actions, such as “to purchase or otherwise trade in Financial Instruments that have been approved by the General Partner.” RIA Agreement ¶ 4.

60. The RIA Agreement further commits HCM to value financial assets “in accordance with the then current valuation policy of the Investment Advisor [HCM], a copy of which will provided to the General Partner upon request.” RIA Agreement ¶ 5.

61. While HCM contracted for the recognition that it would be acting on behalf of others and could be in conflict with advice given the DAF, (RIA Agreement ¶ 12), nowhere did it purport to waive the fiduciary duties owed to the DAF not to trade as a principal in a manner that harmed the DAF.

62. HCFA owed a fiduciary duty to Holdco as an investor in HCLOF and to which HCFA was the portfolio manager. HCM owed a fiduciary duty to the DAF (and to Holdco as its subsidiary) pursuant to a written Advisory Agreement HCM and the DAF had where HCM agreed to provide sound investment advice and management functions.

63. As a registered investment adviser, HCM’s fiduciary duty is broad and applies to the entire advisor-client relationship.

64. The core of the fiduciary duty is to act in the best interest of their investors—the advisor must put the ends of the client before its own ends or the ends of a third party.

65. This is manifested in a duty of loyalty and a duty of utmost care. It also means that the RIA has to follow the terms of the company agreements and the regulations that apply to the investment vehicle.

66. The fiduciary duty that HCM and Seery owed to Plaintiff is predicated on trust and confidence. Section 204A of the Advisers Act requires investment advisors (whether SEC-registered or not) to establish, maintain, and enforce written policies and procedures reasonably designed to prevent the RIA from trading on material, non-public information. *See* 17 C.F.R. § 275.206(4)-7. That means that Plaintiff should be able to take Defendants at their word and not have to second guess or dig behind representations made by them.

67. The simple thesis of this claim is that Defendants HCFA and HCM breached their fiduciary duties by (i) insider trading with Harbourvest and concealing the rising NAV of the underlying assets—i.e., trading with Harbourvest on superior, non-public information that was neither revealed to Harbourvest nor to Plaintiff; (ii) concealing the value of the Harbourvest Interests; and (iii) diverting the investment opportunity in the Harbourvest entities to HCM (or its designee) without offering it to or making it available to Plaintiff or the DAF.

68. HCM, as part of its contractual advisory function with Plaintiffs, had expressly recommended the HCLOF investment to the DAF. Thus, diverting the opportunity for returns on its investment was an additional breach of fiduciary duty.

69. This violated a multitude of regulations under 27 C.F.R. part 275, in addition to Rules 10b-5 and 10b5-1. 17 CFR 240.10b5-1 (“Rule 10b5-1”) explains that one who trades while possessing non-public information is liable for insider trading, and they do not necessarily have to have *used* the specific inside information.

70. It also violated HCM’s own internal policies and procedures.

71. Also, the regulations impose obligations on Defendants to calculate a *current* valuation when communicating with an investor, such as what may or may not be taken into account, and what cannot pass muster as a current valuation. Upon information and belief, these regulations were not followed by the Defendants.

72. HCM's internal policies and procedures, which it promised to abide by both in the RIA Agreement and in its Form ADV SEC filing, provided for the means of properly calculating the value of the assets.

73. HCM either did not follow these policies, changed them to be out of compliance both with the Adviser Act regulations and its Form ADV representations, and/or simply misrepresented or concealed their results.

74. In so doing, because the fiduciary duty owed to Plaintiff is a broad one, and because Defendants' malfeasance directly implicates its relationship with Plaintiff, Defendants have breached the Advisers Act's fiduciary duties owed to Plaintiff as part of their fiduciary relationship.⁶

75. At no time between agreeing with Harbourvest to the purchase of its interests and the court approval did Defendants disclose to either Harbourvest or to Plaintiff (and the Bankruptcy Court for that matter) that the purchase was at below 50% the current net asset value as well, and when they failed to offer Plaintiff (and the other members of HCLOF) their right to purchase the interests pro rata at such advantageous valuations. Plaintiff's lost opportunity to

⁶ See Advisers Act Release No. 4197 (Sept. 17, 2015) (Commission Opinion) (“[O]nce an investment Advisory relationship is formed, the Advisers Act does not permit an adviser to exploit that fiduciary relationship by defrauding his client in any investment transaction connected to the Advisory relationship.”); see also *SEC v. Lauer*, No. 03-80612-CIV, 2008 U.S. Dist. LEXIS 73026, at 90 (S.D. Fla. Sept. 24, 2008) (“Unlike the antifraud provisions of the Securities Act and the Exchange Act, Section 206 of the Advisers Act does not require that the activity be ‘in the offer or sale of any’ security or ‘in connection with the purchase or sale of any security.’”).

purchase has harmed Plaintiff. Plaintiff had been led to believe by the Defendants that the value of what was being purchased in the Harbourvest settlement by HCM (or its designee) was at fair market value. This representation, repeated again in the Bankruptcy Court during the Harbourvest confirmation, implicitly suggested that a proper current valuation had been performed.

76. Defendant's principal, Seery, testified in January 2021 that the then-current fair market value of Harbourvest's 49.98% interest in HCLOF was worth around \$22.5 million. But by then, it was worth almost double that amount and has continued to appreciate. Seery knew or should have known that fact because the value of some of the HCLOF assets had increased, and he had a duty to know the current value. His lack of actual knowledge, while potentially not overtly fraudulent, would nonetheless amount to a breach of fiduciary duty for acting without proper diligence and information that was plainly available.

77. Furthermore, HCLOF holds equity in MGM Studios and debt in CCS Medical via various CLO positions. But Seery, in his role as CEO of HCM, was made aware during an advisors meeting in December 2020 that Highland would have to restrict its trading in MGM because of its insider status due to activities that were likely to apply upward pressure on MGM's share price.

78. Furthermore, Seery controlled the Board of CCS Medical. And in or around October 2020, Seery was advocating an equatization that would have increased the value of the CCS securities by 25%, which was not reflected in the HCM report of the NAV of HCLOF's holdings.

79. Seery's knowledge is imputed to HCM.

80. Moreover, it is a breach of fiduciary duty to commit corporate waste, which is effectively what disposing of the HCLOF assets would constitute in a rising market, where there

is no demand for disposition by the investors (save for HCM, whose proper 0.6% interest could easily be sold to the DAF at fair value).

81. As holder of 0.6% of the HCLOF interests, and now assignee of the 49.98% Harbourvest Interests), HCM has essentially committed self-dealing by threatening to liquidate HCLOF now that it may be compelled to do so under its proposed liquidation plan, which perhaps inures to the short term goals of HCM but to the pecuniary detriment of the other holders of HCLOF whose upside will be prematurely truncated.

82. Seery and HCM should not be allowed to benefit from the breach of their fiduciary duties because doing so would also cause Plaintiffs irreparable harm. The means and methods of disposal would likely render the full scope of damages to the DAF not susceptible to specific calculation—particularly as they would relate to calculating the lost opportunity cost. Seery and HCM likely do not have the assets to pay a judgment to Plaintiffs that would be rendered, simply taking the lost appreciation of the HCLOF assets.

83. Defendants are thus liable for diverting a corporate opportunity or asset that would or should have been offered to Plaintiff and the other investors. Because federal law makes the duties invoked herein unwaivable, it is preposterous that HCM, as a 0.6% holder of HCLOF, deemed itself entitled to the all of the value and optionality of the below-market Harbourvest purchase.

84. Defendants cannot rely on any contractual provision that purports to waive this violation. Nothing in any agreement purports to permit, authorize or otherwise sanitize Defendants' self-dealing. All such provisions are void.

85. In the fourth quarter of 2020, Seery and HCM notified staff that they would be terminated on December 31, 2020. That termination was postponed to February 28, 2021.

Purchasing the Harbourvest assets without staffing necessary to be a functioning Registered Investment Advisor was a strategic reversal from prior filings that outlined canceling the CLO management contracts and allowing investors to replace Highland as manager.

86. Seery's compensation agreement with the UCC incentivizes him to expedite recoveries and to prevent transparency regarding the Harbourvest settlement.

87. What is more, Seery had previously testified that the management contracts for the funds—HCLOF included—were unprofitable, and that he intended to transfer them. But he later rejected offers to purchase those management contracts for fair value and instead decided to continue to manage the funds—which is what apparently gave rise to the Harbourvest Settlement, among others. He simultaneously rejected an offer for the Harbourvest assets of \$24 million, stating that they were worth much more than that.

88. Because of Defendants' malfeasance, Plaintiffs have lost over \$25 million in damages—a number that continues to rise—and the Defendants should not be able to obtain a windfall.

89. For the same reason, Defendants' malfeasance has also exposed HCLOF to a massive liability from Harbourvest since the assignment of those interests is now one that is likely unenforceable under the Advisers Act, Section 47(b), if there was unequal information.

90. HCM and HCFA are liable as principals for breach of fiduciary duty, as are the principals and compliance staff of each entity.

91. Plaintiffs seek disgorgement, damages, exemplary damages, attorneys' fees and costs. To the extent the Court determines that this claim had to have been brought derivatively on behalf of HCLOF, then Plaintiffs represent that any pre-suit demand would have been futile since asking HCM to bring suit against its principal, Seery, would have been futile.

SECOND CAUSE OF ACTION
Breach of HCLOF Company Agreement
(By Holdco against HCLOF, HCM and HCFA)

92. Plaintiffs respectfully incorporate the foregoing factual averments as if fully set forth herein and further alleges the following:

93. On November 15, 2017, the members of HCLOF, along with HCLOF and HCFA, executed the *Members Agreement Relating to the Company* (the “Company Agreement”).

94. The Company Agreement governs the rights and duties of the members of HCLOF.

95. Section 6.2 of HCLOF Company Agreement provides that when a member “other than ... CLO Holdco [Plaintiff] or a Highland Affiliate,” intends to sell its interest in HCLOF to a third party (i.e., not to an affiliate of the selling member), then the other members have the first right of refusal to purchase those interests pro rata for the same price that the member has agreed to sell.

96. Here, despite the fact that Harbourvest agreed to sell its interests in HCLOF for \$22.5 million when they were worth more than double that, Defendants did not offer Plaintiff the chance to buy its pro rata share of those interests at the same agreed price of \$22.5 million (adjusted pro rata).

97. The transfer and sale of the interests to HCM were accomplished as part of the Harbourvest Settlement which was approved by the Bankruptcy Court.

98. Plaintiff was not informed of the fact that Harbourvest had offered its shares to Defendant HCM for \$22.5 million—which was under 50% of their true value.

99. Plaintiff was not offered the right to purchase its pro rata share of the Harbourvest interests prior to the agreement being struck or prior to court approval being sought.

100. Had Plaintiff been allowed to do so, it would have obtained the interests with a net equity value over their purchase price worth in excess of \$20 million.

101. No discovery or opportunity to investigate was afforded Plaintiff prior to lodging an objection in the Bankruptcy Court.

102. Plaintiff is entitled to specific performance or, alternatively, disgorgement, constructive trust, damages, attorneys' fees and costs.

THIRD CAUSE OF ACTION
Negligence
(By the DAF and CLO Holdco against HCM and HCFA)

103. Plaintiffs respectfully incorporate the foregoing factual averments as if fully set forth herein, and further alleges the following:

104. Plaintiffs incorporate the foregoing causes of action and note that all the foregoing violations were breaches of the common law duty of care imposed by law on each of Seery, HCFA and HCM.

105. Each of these Defendants should have known that their actions were violations of the Advisers Act, HCM's internal policies and procedures, the Company Agreement, or all three.

106. Seery and HCM owed duties of care to Plaintiffs to follow HCM's internal policies and procedures regarding both the propriety and means of trading with a customer [Harbourvest], the propriety and means of trading as a principal in an account but in a manner adverse to another customer [the DAF and Holdco], and the proper means of valuing the CLOs and other assets held by HCLOF.

107. It would be foreseeable that failing to disclose the current value of the assets in the HCLOF would impact Plaintiffs negatively in a variety of ways.

108. It would be reasonably foreseeable that failing to correctly and accurately calculate the current net asset value of the market value of the interests would cause Plaintiffs to value the Harbourvest Interests differently.

109. It would be reasonably foreseeable that referring to old and antiquated market quotations and/or valuations of the HCLOF assets or interests would result in a mis-valuation of HCLOF and, therefore, a mis-valuation of the Harbourvest Interests.

110. Likewise, it would have been foreseeable that Plaintiff's failure to give Plaintiff the opportunity to purchase the Harbourvest shares at a \$22.5 million valuation would cause Plaintiff damages. Defendants knew that the value of those assets was rising. They further knew or should have known that whereas those assets were sold to HCM for an allowance of claims to be funded in the future, selling them to Plaintiff would have provided the estate with cash funds.

111. Defendants' negligence foreseeably and directly caused Plaintiff harm.

112. Plaintiff is thus entitled to damages.

FOURTH CAUSE OF ACTION
Racketeering Influenced Corrupt Organizations Act
(CLO Holdco and DAF against HCM)

113. Plaintiffs respectfully incorporate the foregoing factual averments as if fully set forth herein, and further alleges the following:

114. Defendants are liable for violations of the Racketeer Influenced and Corrupt Organizations ("RICO") Act, 18 U.S.C. § 1961 *et seq.*, for the conduct of an enterprise through a pattern of racketeering activity.

115. HCLOF constitutes an enterprise under the RICO Act. Additionally, or in the alternative, HCM, HCLA, and HCLOF constituted an association-in-fact enterprise. The purpose of the association-in-fact was the perpetuation of Seery's position at HCM and using the

Harbourvest settlement as a vehicle to enrich persons other than the HCLOF investors, including Holdco and the DAF, and the perpetuation of HCM's holdings in collateralized loan obligations owned by HCLOF, while attempting to deny Plaintiffs the benefit of its rights of ownership.

116. The association-in-fact was bound by informal and formal connections for years prior to the elicited purpose, and then changed when HCM joined it in order to achieve the association's illicit purpose. For example, HCM is the parent and control person over HCFA, which is the portfolio manager of HCLOF pursuant to a contractual agreement—both are registered investment advisors and provide advisory and management services to HCLOF.

117. Defendants injured Plaintiffs through their continuous course of conduct of the HCM-HCLA-HCLOF association-in-fact enterprise. HCM's actions (performed through Seery and others) constitute violations of the federal wire fraud, mail fraud, fraud in connection with a case under Title 11, and/or securities fraud laws, pursuant to 18 U.S.C. § 1961(1)(B) and (D).

118. HCM operated in such a way as to violate insider trading rules and regulations when it traded with Harbourvest while it had material, non-public information that it had not supplied to Harbourvest or to Plaintiffs.

119. In or about November 2020, HCM and Harbourvest entered into discussions about settling the Harbourvest Claims. Seery's conduct of HCLOF and HCLA on behalf of HCM through the interstate mails and/or wires caused HCM to agree to the purchase of Harbourvest's interests in HCLOF.

120. On or about each of September 30, 2020, through December 31, 2020, Seery, through his conduct of the enterprise, utilized the interstate wires and/or mails to obtain or arrive at valuations of the HCLOF interests. Seery's conduct of the enterprise caused them to cease

sending the valuation reports to Plaintiffs, which eventually allowed Plaintiffs to be misled into believing that Seery had properly valued the interests.

121. On or about September 30, 2020, Seery transmitted or caused to be transmitted though the interstate wires information to HCLOF investors from HCM (via HCFA), including Harbourvest, regarding the value of HCLOF interests and underlying assets.

122. Additionally, Seery operated HCM in such a way that he concealed the true value of the HCLOF interests by utilizing the interstate wires and mails to transmit communications to the court in the form of written representations on or about December 23, 2020, and then further transmitted verbal representations of the current market value (the vastly understated one) on January 14, 2021, during live testimony.

123. However, Harbourvest was denied the full picture and the true value of the underlying portfolio. At the end of October and November of 2020, HCM had updated the net asset values of the HCLOF portfolio. According to sources at HCM at the time, the HCLOF assets were worth north of \$72,969,492 as of November 30, 2020. Harbourvest's share of that would have been \$36,484,746.

124. The HCLOF net asset value had reached \$86,440,024 as of December 31, 2021, which means that by the time Seery was testifying in the Bankruptcy Court on January 14, 2021, the fair market value of the Harbourvest Assets was \$22.5 million, when it was actually closer to \$43,202,724. Seery, speaking on behalf of HCM, knew of the distinction in value.

125. On January 14, 2021, Seery also testified that he (implying HCM, HCLA and HCLOF) had valued the Harbourvest Assets at their current valuation and at fair market value. This was not true because the valuation that was used and testified to was ancient. The ostensible purpose of this concealment was to induce Plaintiff and other interest holdings to take no action.

126. In supporting HCM’s motion to the Bankruptcy Court to approve the Harbourvest Settlement, Seery omitted the fact that HCM was purchasing the interests at a massive discount, which would violate the letter and spirit of the Adviser’s Act.

127. Seery was informed in late December 2020 at an in-person meeting in Dallas to which Seery had to fly that HCLOF and HCM had to suspend trading in MGM Studios’ securities because Seery had learned from James Dondero, who was on the Board of MGM, of a potential purchase of the company. The news of the MGM purchase should have caused Seery to revalue the HCLOF investment in MGM.

128. In or around October 2020, Seery (who controls the Board of CSS Medical) was pursuing “equatization” of CSS Medical’s debt, which would have increased the value of certain securities by 25%. In several communications through the U.S. interstate wires and/or mails, and with Plaintiffs, and the several communications with Harbourvest during the negotiations of the settlement, Seery failed to disclose these changes which were responsible in part for the ever-growing value of the HCLOF CLO portfolio.

129. Seery was at all relevant times operating as an agent of HCM.

130. This series of related violations of the wire fraud, mail fraud, and securities fraud laws, in connection with the HCM bankruptcy, constitute a continuing pattern and practice of racketeering for the purpose of winning a windfall for HCM and himself--a nearly \$30,000,000 payday under the confirmation agreement.

131. The federal RICO statute makes it actionable for one’s conduct of an enterprise to include “fraud in connection with a [bankruptcy case]”. The Advisers’ Act antifraud provisions require full transparency and accountability to an advisers’ investors and clients and does not require a showing of reliance or materiality. The wire fraud provision likewise is violated when,

as here, the interstate wires are used as part of a “scheme or artifice ... for obtaining money or property by means of false ... pretenses, [or] representations[.]”

132. Accordingly, because Defendants’ conduct violated the wire fraud and mail fraud laws, and the Advisers’ Act antifraud provisions, and their acts and omissions were in connection with the HCM Bankruptcy proceedings under Title 11, they are sufficient to bring such conduct within the purview of the RICO civil action provisions, **18 U.S.C. § 1964**.

133. Plaintiffs are thus entitled to damages, treble damages, attorneys’ fees and costs of suit, in addition to all other injunctive or equitable relief to which they are justly entitled.

FIFTH CAUSE OF ACTION
Tortious Interference
(CLO Holdco against HCM)

134. Plaintiff respectfully incorporates the foregoing factual averments as if fully set forth herein and further alleges the following:

135. At all relevant times, HCM owned a 0.6% interest in HCLOF.

136. At all relevant times, Seery and HCM knew that Plaintiff had specific rights in HCLOF under the Company Agreement, § 6.2.

137. Section 6.2 of HCLOF Company agreement provides that when a member “other than ... CLO Holdco [Plaintiff] or a Highland Affiliate,” intends to sell its interest in HCLOF to a third party (i.e., not an affiliate of the member), then the other members have the first right of refusal to purchase those interests pro rata for the same price that the member has agreed to sell.

138. HCM, through Seery, tortiously interfered with Plaintiff’s contractual rights with HCLOF by, among other things, diverting the Harbourvest Interests in HCLOF to HCM without giving HCLOF or Plaintiff the option to purchase those assets at the same favorable price that HCM obtained them.

139. HCM and Seery tortiously interfered with Plaintiff's contractual rights with HCLOF by, among other things, misrepresenting the fair market value as \$22.5 million and concealing the current value of those interests.

140. But for HCM and Seery's tortious interference, Plaintiff would have been able to acquire the Harbourvest Interests at a highly favorable price. HCM and Seery's knowledge of the rights and intentional interference with these rights has caused damage to Plaintiff CLO Holdco.

141. Plaintiff is therefore entitled to damages from HCM and Seery, as well as exemplary damages.

VI.

JURY DEMAND

142. Plaintiff demands trial by jury on all claims so triable.

VII.

PRAYER FOR RELIEF

143. Wherefore, for the foregoing reasons, Plaintiffs respectfully pray that the Court enter judgment in its favor and against Defendants, jointly and severally, for:

- a. Actual damages;
- b. Disgorgement;
- c. Treble damages;
- d. Exemplary and punitive damages;
- e. Attorneys' fees and costs as allowed by common law, statute or contract;
- f. A constructive trust to avoid dissipation of assets;
- g. All such other relief to which Plaintiff is justly entitled.

Dated: April 12, 2021

Respectfully submitted,

SBAITI & COMPANY PLLC

/s/ Mazin A. Sbaiti

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**U.S. District Court
Northern District of Texas (Dallas)
CIVIL DOCKET FOR CASE #: 3:21-cv-00842-B**

Charitable DAF Fund et al v. Highland Capital Management LP et al
Assigned to: Judge Jane J. Boyle
Cause: 28:1391 Personal Injury

Date Filed: 04/12/2021
Jury Demand: Plaintiff
Nature of Suit: 470 Other Statutes:
Racketeer Influenced and Corrupt
Organizations
Jurisdiction: Diversity

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Defendant

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Date Filed	#	Docket Text
04/12/2021	<u>1</u>	COMPLAINT WITH JURY DEMAND against Highland CLO Funding, Ltd., Highland Capital Management, L.P., Highland HCF Advisor, Ltd. filed by Charitable DAF Fund, CLO Holdco Ltd.. (Filing fee \$402; Receipt number 0539-11789515) Plaintiff will submit summons(es) for issuance. In each Notice of Electronic Filing, the judge assignment is indicated, and a link to the Judges Copy Requirements and Judge Specific Requirements is provided. The court reminds the filer that any required copy of this and future documents must be delivered to the judge, in the manner prescribed, within three business days of filing. Unless exempted, attorneys who are not admitted to practice in the Northern District of Texas must seek admission promptly. Forms, instructions, and exemption information may be found at www.txnd.uscourts.gov , or by clicking here: Attorney Information - Bar Membership . If admission requirements are not satisfied within 21 days, the clerk will notify the presiding judge. (Sbaiti, Mazin) (Entered: 04/13/2021)
04/13/2021	<u>2</u>	Supplemental Document (cover sheet) by CLO Holdco Ltd., Charitable DAF Fund as to <u>1</u> Complaint . (Sbaiti, Mazin) Modified docket text on 4/13/2021 (oyh). (Entered: 04/13/2021)
04/13/2021	<u>3</u>	Request for Clerk to issue Summons filed by CLO Holdco Ltd, Charitable DAF Fund LP. (Sbaiti, Mazin) Modified linkage and docket text on 4/13/2021 (oyh). (Entered: 04/13/2021)
04/13/2021	<u>4</u>	New Case Notes: A filing fee has been paid. Pursuant to Misc. Order 6, Plaintiff is provided the Notice of Right to Consent to Proceed Before A U.S. Magistrate Judge (Judge Horan). Clerk to provide copy to plaintiff if not received electronically. (oyh) (Entered: 04/13/2021)
04/13/2021	<u>5</u>	Summons Issued as to Highland CLO Funding Ltd, Highland Capital Management LP, Highland HCF Advisor Ltd. (oyh) (Entered: 04/13/2021)
04/19/2021	<u>6</u>	MOTION for Leave to File First Amended Complalnt filed by CLO Holdco Ltd, Charitable DAF Fund LP (Attachments: # <u>1</u> Exh 1_First Amended Complaint, # <u>2</u> Exh 2_Motion for Authorization to Retain James Seery, # <u>3</u> Exh 3_Order Approving Retention of James Seery, # <u>4</u> Exh 4_Order Approving Settlement, # <u>5</u> Proposed Order) (Bridges, Jonathan) (Entered: 04/19/2021)
04/20/2021	<u>7</u>	*** DISREGARD FILED IN ERROR per atty ***AMENDED DOCUMENT by CLO Holdco Ltd, Charitable DAF Fund LP. Amendment to <u>6</u> MOTION for Leave to File First Amended Complalnt. <i>Amended Proposed Order</i> . (Bridges, Jonathan) Modified per atty request on 4/20/2021 (svc). (Entered: 04/20/2021)
04/20/2021	8	ELECTRONIC ORDER denying <u>6</u> Motion for Leave to File without prejudice. To the extent a motion for leave to file an amended complaint is required under Rule 15, Plaintiffs

		may renew their motion after Defendants are served and have appeared. (Ordered by Judge Jane J. Boyle on 4/20/2021) (chmb) (Entered: 04/20/2021)
05/06/2021	9	Motion for an Order Extending the Time to File a Responsive Pleading filed by Highland Capital Management LP. (Attachments: # 1 Exhibit(s) A--Proposed Order) Attorney Zachery Z. Annable added to party Highland Capital Management LP(pty:dft) (Annable, Zachery) Modified text on 5/7/2021 (jmg). (Entered: 05/06/2021)
05/07/2021	10	ELECTRONIC ORDER granting in part and denying in part 9 Motion for Extension of Time to File Answer. Defendant Highland Capital Management, L.P. may file an answer or other responsive pleading on or before May 27, 2021. (Ordered by Judge Jane J. Boyle on 5/7/2021) (chmb) (Entered: 05/07/2021)
05/10/2021	11	Application for Admission Pro Hac Vice with Certificate of Good Standing (Filing fee \$100; Receipt number 0539-11879843) filed by Highland Capital Management LP (Attachments: # 1 Certificate of Good Standing) (Pomerantz, Jeffrey) (Entered: 05/10/2021)
05/10/2021	12	Application for Admission Pro Hac Vice with Certificate of Good Standing (Filing fee \$100; Receipt number 0539-11879878) filed by Highland Capital Management LP (Attachments: # 1 Certificate of Good Standing) (Demo, Gregory) (Entered: 05/10/2021)
05/10/2021	13	Application for Admission Pro Hac Vice without Certificate of Good Standing (Filing fee \$100; Receipt number 0539-11879894) filed by Highland Capital Management LP Attorney John A Morris added to party Highland Capital Management LP(pty:dft) (Morris, John) Modified text on 5/11/2021 (jmg). (Entered: 05/10/2021)
05/10/2021	14	Application for Admission Pro Hac Vice with Certificate of Good Standing for Attorney Robert J. Feinstein (Filing fee \$100; Receipt number 0539-11879911) filed by Highland Capital Management LP (Attachments: # 1 Certificate of Good Standing) (Hayward, Melissa) (Entered: 05/10/2021)
05/11/2021	15	CERTIFICATE OF SERVICE by Highland Capital Management LP re 9 Motion for an Order Extending the Time to File a Responsive Pleading (Annable, Zachery) (Entered: 05/11/2021)
05/12/2021	16	ELECTRONIC ORDER granting 11 Application for Admission Pro Hac Vice of Jeffrey Pomerantz. Important Reminder: Unless excused for cause, an attorney who is not an ECF user must register within 14 days of the date the attorney appears in a case pursuant to LR 5.1(f) and LCrR 49.2(g). (Ordered by Judge Jane J. Boyle on 5/12/2021) (chmb) (Entered: 05/12/2021)
05/12/2021	17	ELECTRONIC ORDER granting 12 Application for Admission Pro Hac Vice of Gregory Demo. Important Reminder: Unless excused for cause, an attorney who is not an ECF user must register within 14 days of the date the attorney appears in a case pursuant to LR 5.1(f) and LCrR 49.2(g). (Ordered by Judge Jane J. Boyle on 5/12/2021) (chmb) (Entered: 05/12/2021)
05/12/2021	18	ELECTRONIC ORDER granting 14 Application for Admission Pro Hac Vice of Robert Feinstein. Important Reminder: Unless excused for cause, an attorney who is not an ECF user must register within 14 days of the date the attorney appears in a case pursuant to LR 5.1(f) and LCrR 49.2(g). (Ordered by Judge Jane J. Boyle on 5/12/2021) (chmb) (Entered: 05/12/2021)
05/12/2021	19	ELECTRONIC ORDER: 13 The Motion for Admission Pro Hac Vice filed by John Morris is deficient, as it is not accompanied by a certificate of good standing from the licensing authority of a state in which Mr. Morris is licensed to practice law. Mr. Morris must

05/12/2021	20	Supplemental Document by Highland Capital Management LP as to 13 Application for Admission Pro Hac Vice with Certificate of Good Standing (Filing fee \$100; Receipt number 0539-11879894) <i>Certificate of Good Standing</i> . (Morris, John) (Entered: 05/12/2021)
05/13/2021	21	ELECTRONIC ORDER granting 13 Application for Admission Pro Hac Vice of John Morris. Important Reminder: Unless excused for cause, an attorney who is not an ECF user must register within 14 days of the date the attorney appears in a case pursuant to LR 5.1(f) and LCrR 49.2(g). (Ordered by Judge Jane J. Boyle on 5/13/2021) (chmb) (Entered: 05/13/2021)
05/19/2021	22	MOTION for an Order to Enforce the Order of Reference filed by Highland Capital Management LP. (Attachments: # 1 Exhibit(s) A--Proposed Order) (Annable, Zachery) Modified text on 5/20/2021 (mjr). (Entered: 05/19/2021)
05/19/2021	23	Brief/Memorandum in Support filed by Highland Capital Management LP re: 22 MOTION for an Order to Enforce the Order of Reference. (Annable, Zachery) Modified text on 5/20/2021 (mjr). (Entered: 05/19/2021)
05/19/2021	24	Appendix in Support filed by Highland Capital Management LP re: 23 Brief/Memorandum in Support. (Attachments: # 1 Appendix 1, # 2 Appendix 2, # 3 Appendix 3, # 4 Appendix 4, # 5 Appendix 5, # 6 Appendix 6, # 7 Appendix 7, # 8 Appendix 8, # 9 Appendix 9, # 10 Appendix 10, # 11 Appendix 11, # 12 Appendix 12, # 13 Appendix 13, # 14 Appendix 14, # 15 Appendix 15, # 16 Appendix 16, # 17 Appendix 17, # 18 Appendix 18, # 19 Appendix 19, # 20 Appendix 20, # 21 Appendix 21, # 22 Appendix 22, # 23 Appendix 23, # 24 Appendix 24, # 25 Appendix 25, # 26 Appendix 26, # 27 Appendix 27, # 28 Appendix 28) (Annable, Zachery) Modified linkage and text on 5/20/2021 (mjr). (Entered: 05/19/2021)
05/21/2021	25	CERTIFICATE OF SERVICE by Highland Capital Management LP re 23 Brief/Memorandum in Support of Motion, 24 Appendix in Support, 22 MOTION for an Order to Enforce the Order of Reference (Annable, Zachery) (Entered: 05/21/2021)
05/27/2021	26	MOTION to Dismiss Complaint filed by Highland Capital Management LP (Attachments: # 1 Exhibit(s) A--Proposed Order) (Annable, Zachery) Modified text on 5/28/2021 (jmg). (Entered: 05/27/2021)
05/27/2021	27	Brief/Memorandum in Support filed by Highland Capital Management LP re 26 MOTION to Dismiss Complain. (Annable, Zachery) (Entered: 05/27/2021)
05/27/2021	28	Appendix in Support filed by Highland Capital Management LP re 26 MOTION to Dismiss Complaint. (Attachments: # 1 Appendix 1, # 2 Appendix 2, # 3 Appendix 3, # 4 Appendix 4, # 5 Appendix 5, # 6 Appendix 6, # 7 Appendix 7, # 8 Appendix 8, # 9 Appendix 9, # 10 Appendix 10, # 11 Appendix 11, # 12 Appendix 12, # 13 Appendix 13) (Annable, Zachery) (Entered: 05/27/2021)
06/02/2021	29	Partially Opposed MOTION for Extension of Time to File Response/Reply to 26 MOTION to Dismiss (<i>Defendant Highland Capital Management, L.P.'s Motion to Dismiss Complaint</i>), 22 MOTION for an Order to Enforce the Order of Reference filed by CLO Holdco Ltd, Charitable DAF Fund LP (Sbaiti, Mazin) Modified text on 6/3/2021 (mjr). (Entered: 06/02/2021)
06/03/2021	30	WAIVER OF SERVICE Returned Executed as to CLO Holdco Ltd. Waiver sent on 6/1/2021; Charitable DAF Fund LP. Waiver sent on 6/1/2021. (Sbaiti, Mazin) (Entered: 06/03/2021)

06/03/2021	31	ELECTRONIC ORDER granting 29 Motion to Extend Time to File Response/Reply. Plaintiffs may file responses to both 22 the motion to enforce the order of reference and 26 the motion to dismiss on or before June 29, 2021. (Ordered by Judge Jane J. Boyle on 6/3/2021) (chmb) (Entered: 06/03/2021)
06/04/2021	32	CERTIFICATE OF SERVICE by Highland Capital Management LP re: 27 Brief/Memorandum in Support of Motion, 28 Appendix in Support, 26 MOTION to Dismiss. (Annable, Zachery) Modified text on 6/7/2021 (mjr). (Entered: 06/04/2021)
06/22/2021	33	Amended Civil Cover Sheet by CLO Holdco Ltd, Charitable DAF Fund LP. Amendment to 2 Supplemental Document. (Sbaiti, Mazin) Modified text on 6/23/2021 (mjr). (Entered: 06/22/2021)
06/28/2021	34	Unopposed MOTION for Leave to File Response to Motion to Dismiss in Excess of Page Limit filed by CLO Holdco Ltd, Charitable DAF Fund LP (Sbaiti, Mazin) (Entered: 06/28/2021)
06/29/2021	35	ELECTRONIC ORDER granting 34 Unopposed Motion for Leave to File Response in Excess of Page Limit. Plaintiffs' response to Defendant's motion to dismiss may exceed the page limit by no more than ten pages. (Ordered by Judge Jane J. Boyle on 6/29/2021) (chmb) (Entered: 06/29/2021)
06/29/2021	36	RESPONSE filed by CLO Holdco Ltd, Charitable DAF Fund LP re: 22 MOTION for an Order to Enforce the Order of Reference (Sbaiti, Mazin) (Entered: 06/29/2021)
06/29/2021	37	Appendix in Support filed by CLO Holdco Ltd, Charitable DAF Fund LP re 36 Response/Objection <i>Response to Motion for an Order to Enforce the Order of Reference</i> (Sbaiti, Mazin) (Entered: 06/29/2021)
06/29/2021	38	RESPONSE filed by CLO Holdco Ltd, Charitable DAF Fund LP re: 26 MOTION to Dismiss (<i>Defendant Highland Capital Management, L.P.'s Motion to Dismiss Complaint</i>) (Sbaiti, Mazin) (Entered: 06/29/2021)
06/29/2021	39	Appendix in Support filed by CLO Holdco Ltd, Charitable DAF Fund LP re 38 Response/Objection <i>to Defendant Highland Capital Management, L.P.'s Motion to Dismiss Complaint</i> (Sbaiti, Mazin) (Entered: 06/29/2021)
07/12/2021	40	Unopposed MOTION for Leave to File Reply in Excess of Page Limits (<i>Defendant Highland Capital Management, L.P.'s Unopposed Motion for Leave to Exceed Page Limit</i>) filed by Highland Capital Management LP (Attachments: # 1 Proposed Order) (Annable, Zachery) (Entered: 07/12/2021)
07/13/2021	41	ELECTRONIC ORDER granting 40 Unopposed Motion for Leave to Exceed Page Limit. Defendant Highland Capital Management, L.P. may file a reply of up to fifteen pages. (Ordered by Judge Jane J. Boyle on 7/13/2021) (chmb) (Entered: 07/13/2021)
07/13/2021	42	REPLY filed by Highland Capital Management LP re: 22 MOTION for an Order to Enforce the Order of Reference (Annable, Zachery) (Entered: 07/13/2021)
07/13/2021	43	Appendix in Support filed by Highland Capital Management LP re: 42 Reply. (Annable, Zachery) Modified text on 7/14/2021 (mjr). (Entered: 07/13/2021)
07/13/2021	44	CERTIFICATE OF SERVICE by Highland Capital Management LP re 40 Unopposed MOTION for Leave to File Reply in Excess of Page Limits (<i>Defendant Highland Capital Management, L.P.'s Unopposed Motion for Leave to Exceed Page Limit</i>) (Annable, Zachery) (Entered: 07/13/2021)
07/13/2021	45	REPLY filed by Highland Capital Management LP re: 26 MOTION to Dismiss (<i>Defendant Highland Capital Management, L.P.'s Motion to Dismiss Complaint</i>) (Annable, Zachery)

07/14/2021	46	CERTIFICATE OF SERVICE by Highland Capital Management LP re 42 Reply, 43 Appendix in Support, 45 Reply (Annable, Zachery) (Entered: 07/14/2021)
07/15/2021	47	MOTION to Strike 43 Appendix in Support filed by CLO Holdco Ltd, Charitable DAF Fund LP. (Bridges, Jonathan) Modified text on 7/16/2021 (mjr). (Entered: 07/15/2021)
07/20/2021	48	RESPONSE filed by Highland Capital Management LP re: 47 MOTION to Strike 43 Appendix in Support (Annable, Zachery) (Entered: 07/20/2021)
07/23/2021	49	CERTIFICATE OF INTERESTED PERSONS/DISCLOSURE STATEMENT by Highland Capital Management LP. (Annable, Zachery) (Entered: 07/23/2021)
07/23/2021	50	CERTIFICATE OF INTERESTED PERSONS/DISCLOSURE STATEMENT by Charitable DAF Fund LP. (Sbaiti, Mazin) (Entered: 07/23/2021)
07/23/2021	51	CERTIFICATE OF SERVICE by Highland Capital Management LP re 48 Response/Objection (Annable, Zachery) (Entered: 07/23/2021)
08/11/2021	52	MOTION to Take Judicial Notice of Order filed by Highland Capital Management LP (Attachments: # 1 Exhibit(s) A, # 2 Proposed Order) (Annable, Zachery) (Entered: 08/11/2021)
08/12/2021	53	ELECTRONIC ORDER granting 52 Motion to Take Judicial Notice of Order. The Court takes judicial notice that the bankruptcy court held Plaintiffs and others in contempt of its orders. See Order, In re Highland Cap. Mgmt., L.P., No. 19-34054-sgj11 (Bankr. N.D. Tex. Aug. 4, 2021) (ECF No. 2660). The Court will consider this fact in addressing the remaining pending motions in this case, which are under advisement. (Ordered by Judge Jane J. Boyle on 8/12/2021) (chmb) (Entered: 08/12/2021)
08/16/2021	54	CERTIFICATE OF SERVICE by Highland Capital Management LP re 52 MOTION to Take Judicial Notice of Order (Annable, Zachery) (Entered: 08/16/2021)
08/26/2021	55	MOTION to Stay filed by CLO Holdco Ltd, Charitable DAF Fund LP (Sbaiti, Mazin) (Entered: 08/26/2021)
08/27/2021	56	ELECTRONIC ORDER: Defendants are ORDERED to file a response, not to exceed ten pages, to 55 Plaintiffs' motion to stay on or before September 10, 2021. No reply will be permitted. (Ordered by Judge Jane J. Boyle on 8/27/2021) (chmb) (Entered: 08/27/2021)
08/30/2021	57	MOTION to Dismiss <i>and Joinder in Motion to Dismiss of Highland Capital Management, L.P.</i> filed by Highland CLO Funding Ltd (Attachments: # 1 Proposed Order) Attorney Paul R Bessette added to party Highland CLO Funding Ltd(pty:dft) (Bessette, Paul) (Entered: 08/30/2021)
08/30/2021	58	Brief/Memorandum in Support filed by Highland CLO Funding Ltd re 57 MOTION to Dismiss <i>and Joinder in Motion to Dismiss of Highland Capital Management, L.P.</i> (Bessette, Paul) (Entered: 08/30/2021)
08/30/2021	59	Appendix in Support filed by Highland CLO Funding Ltd re 58 Brief/Memorandum in Support of Motion (Attachments: # 1 Exhibit(s) A - Jackson v Dear, # 2 Exhibit(s) B - Prudential Assurance v. Newman, # 3 Exhibit(s) C - Harbourvest Settlement Agreement, # 4 Exhibit(s) D - Boleat Declaration) (Bessette, Paul) (Entered: 08/30/2021)
09/10/2021	60	RESPONSE filed by Highland Capital Management LP re: 55 MOTION to Stay (Annable, Zachery) (Entered: 09/10/2021)
09/13/2021	61	CERTIFICATE OF SERVICE by Highland Capital Management LP re 60 Response/Objection (Annable, Zachery) (Entered: 09/13/2021)

09/17/2021	62	Unopposed MOTION for Extension of Time to File Response/Reply to 57 MOTION to Dismiss <i>and Joinder in Motion to Dismiss of Highland Capital Management, L.P.</i> filed by CLO Holdco Ltd, Charitable DAF Fund LP (Sbaiti, Mazin) Modified text on 9/20/2021 (mjr). (Entered: 09/17/2021)
09/20/2021	63	ADDITIONAL ATTACHMENTS to 62 Motion for Extension of Time to File Response/Reply by Plaintiffs CLO Holdco Ltd, Charitable DAF Fund LP. (Sbaiti, Mazin) (Entered: 09/20/2021)
09/20/2021	64	ORDER OF REFERENCE: Pursuant to 28 U.S.C. § 157 and this District's Miscellaneous Order No. 33, this case is hereby REFERRED to Judge Stacey G. C. Jernigan of the United States Bankruptcy Court for the Northern District of Texas, Dallas Division, to be adjudicated as a matter related to the consolidated Chapter 11 Bankruptcy of Highland Capital Management, L.P., Chapter 11 Case No. 19-34054. (Ordered by Judge Jane J. Boyle on 9/20/2021) (svc) (Entered: 09/20/2021)

PACER Service Center			
Transaction Receipt			
09/29/2021 12:19:17			
PACER Login:	hay10501:3480530:0	Client Code:	HCM
Description:	Docket Report	Search Criteria:	3:21-cv-00842-B
Billable Pages:	7	Cost:	0.70

I. (a) PLAINTIFFS CHARITABLE DAF FUND, L.P. and CLO HOLDCO, LTD., (b) County of Residence of First Listed Plaintiff <u>Cayman Islands</u> (EXCEPT IN U.S. PLAINTIFF CASES) (c) Attorneys (Firm Name, Address, and Telephone Number) Sbaiti & Company, PLLC. 2200 Ross Ave. Suite 4900W Dallas, Texas 75201 214-432-2899	DEFENDANTS HIGHLAND CAPITAL MANAGEMENT, L.P. , HIGHLAND HCF ADVISOR, LTD. County of Residence of First Listed Defendant <u>Dallas, Texas</u> (IN U.S. PLAINTIFF CASES ONLY) NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED. Attorneys (If Known)
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II. BASIS OF JURISDICTION (Place an "X" in One Box Only) <input type="checkbox"/> 1 U.S. Government Plaintiff <input type="checkbox"/> 2 U.S. Government Defendant <input checked="" type="checkbox"/> 3 Federal Question (U.S. Government Not a Party) <input type="checkbox"/> 4 Diversity (Indicate Citizenship of Parties in Item III)	III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant) <table><tr><td></td><td>PTF</td><td>DEF</td><td></td><td>PTF</td><td>DEF</td></tr><tr><td>Citizen of This State</td><td><input type="checkbox"/> 1</td><td><input type="checkbox"/> 1</td><td>Incorporated or Principal Place of Business In This State</td><td><input checked="" type="checkbox"/> 4</td><td><input checked="" type="checkbox"/> 4</td></tr><tr><td>Citizen of Another State</td><td><input type="checkbox"/> 2</td><td><input type="checkbox"/> 2</td><td>Incorporated and Principal Place of Business In Another State</td><td><input type="checkbox"/> 5</td><td><input type="checkbox"/> 5</td></tr><tr><td>Citizen or Subject of a Foreign Country</td><td><input checked="" type="checkbox"/> 3</td><td><input checked="" type="checkbox"/> 3</td><td>Foreign Nation</td><td><input type="checkbox"/> 6</td><td><input type="checkbox"/> 6</td></tr></table>		PTF	DEF		PTF	DEF	Citizen of This State	<input type="checkbox"/> 1	<input type="checkbox"/> 1	Incorporated or Principal Place of Business In This State	<input checked="" type="checkbox"/> 4	<input checked="" type="checkbox"/> 4	Citizen of Another State	<input type="checkbox"/> 2	<input type="checkbox"/> 2	Incorporated and Principal Place of Business In Another State	<input type="checkbox"/> 5	<input type="checkbox"/> 5	Citizen or Subject of a Foreign Country	<input checked="" type="checkbox"/> 3	<input checked="" type="checkbox"/> 3	Foreign Nation	<input type="checkbox"/> 6	<input type="checkbox"/> 6
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IV. NATURE OF SUIT (Place an "X" in One Box Only)				Click here for: Nature of Suit Code Descriptions.	
CONTRACT <input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excludes Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	TORTS PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Medical Malpractice PERSONAL INJURY <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	FORFEITURE/PENALTY <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Management Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Employee Retirement Income Security Act IMMIGRATION <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 465 Other Immigration Actions	BANKRUPTCY <input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 835 Patent - Abbreviated New Drug Application <input type="checkbox"/> 840 Trademark <input type="checkbox"/> 880 Defend Trade Secrets Act of 2016 SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	OTHER STATUTES <input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 376 Qui Tam (31 USC 3729(a)) <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input checked="" type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit (15 USC 1681 or 1692) <input type="checkbox"/> 485 Telephone Consumer Protection Act <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes	
REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	CIVIL RIGHTS <input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 448 Education	PRISONER PETITIONS Habeas Corpus: <input type="checkbox"/> 463 Alien Detainee <input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty Other: <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition <input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement			

V. ORIGIN (Place an "X" in One Box Only) <input checked="" type="checkbox"/> 1 Original Proceeding <input type="checkbox"/> 2 Removed from State Court <input type="checkbox"/> 3 Remanded from Appellate Court <input type="checkbox"/> 4 Reinstated or Reopened <input type="checkbox"/> 5 Transferred from Another District (specify) <input type="checkbox"/> 6 Multidistrict Litigation - Transfer <input type="checkbox"/> 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION	Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity): 18 USC 1961 et seq. Brief description of cause: Defendants used wire and mail in relationship to Title 11 proceeding to commit fraud.
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VII. REQUESTED IN COMPLAINT:	<input type="checkbox"/> CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P.	DEMAND \$ NA	CHECK YES only if demanded in complaint: JURY DEMAND: <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No
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VIII. RELATED CASE(S) IF ANY (See instructions):	JUDGE _____	DOCKET NUMBER _____
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DATE 4/12/2021	SIGNATURE OF ATTORNEY OF RECORD /s/ Mazin Sbaiti
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FOR OFFICE USE ONLY	RECEIPT # _____	AMOUNT _____	APPLYING IFP _____	JUDGE _____	MAG. JUDGE _____	000138
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**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS**

**CHARITABLE DAF FUND, L.P.
and CLO HOLDCO, LTD.,
*directly and derivatively,***

Plaintiffs,

V.

**HIGHLAND CAPITAL MANAGEMENT,
L.P., HIGHLAND HCF ADVISOR, LTD.,
and HIGHLAND CLO FUNDING, LTD.,
*nominally,***

Defendants.

§ § § § § § § § § § § §

CAUSE NO. 3:21-cv-00842-B

PLAINTIFFS' MOTION FOR LEAVE TO FILE FIRST AMENDED COMPLAINT

I.

NECESSITY OF MOTION

Plaintiffs submit this Motion under Rule 15 of the Federal Rules of Civil Procedure for one purpose: to name as defendant one James P. Seery, Jr., the CEO of Defendant Highland Capital Management, L.P. (“HCM”), and the chief perpetrator of the wrongdoing that forms the basis of Plaintiffs’ causes of action.

Seery is not named in the Original Complaint. But this is only out of an abundance of caution due to the bankruptcy court, in HCM's pending Chapter 11 proceeding, having issued an order prohibiting the filing of any causes of action against Seery in any way related to his role at HCM, subject to certain prerequisites. In that order, the bankruptcy court also asserts "sole jurisdiction" over all such causes of action.

Plaintiffs respectfully submit that, to the extent the bankruptcy court order prohibits the filing of an action in *this Court*, whose jurisdiction the bankruptcy court's jurisdiction is wholly

derivative of, that order exceeds the bankruptcy court's powers and is unenforceable. Alternatively, Plaintiffs submit that filing *this Motion* satisfies the prerequisites provided in the bankruptcy court's order. Either of these reasons provides sufficient grounds to grant this Motion.

The proposed First Amended Complaint is attached as Exhibit 1.

II.

BACKGROUND

On June 23, 2020, counsel for HCM filed a motion in HC's bankruptcy proceedings asking the bankruptcy court to defer to the "business judgment" of the board's compensation committee and approve the terms of its appointment of Seery as chief executive officer and chief restructuring officer at HCM, retroactive to March.¹ Counsel also asked the bankruptcy court to declare that it had exclusive jurisdiction over any claims asserted against Seery in this role.

On July 16, 2020, the bankruptcy court granted that motion and stated as follows:

No entity may commence or pursue a claim or cause of action of any kind against Mr. Seery relating in any way to his role as the chief executive officer and chief restructuring officer of the Debtor without the Bankruptcy Court (i) first determining after notice that such claim or cause of action represents a colorable claim of willful misconduct or gross negligence against Mr. Seery, and (ii) specifically authorizing such entity to bring such claim. *The Bankruptcy Court shall have sole jurisdiction to adjudicate any such claim for which approval of the Court to commence or pursue has been granted.*²

¹ Debtor's Motion Under Bankruptcy Code Sections 105(a) and 363(b) for Authorization to Retain James P. Seery, Jr., as Chief Executive Officer, Chief Restructuring Officer, and Foreign Representative *Nunc Pro Tunc* to March 15, 2020 [Doc. 774]. This motion is attached as Exhibit 2.

² Order Approving Debtor's Motion Under Bankruptcy Code Sections 105(a) and 363(b) Authorizing Retention of James P. Seery, Jr., as Chief Executive Officer, Chief Restructuring Officer, and Foreign Representative *Nunc Pro Tunc* to March 15, 2020 [Doc 854]. A related order dated January 9, 2020, contains a similar provision with regard to Seery's role as an "Independent Director." Order Approving Settlement with Official Committee of Unsecured Creditors Regarding Governance of the Debtor and Procedures for Operations in the Ordinary Course [Doc 339]. These orders are attached, respectively, as Exhibits 3 and 4.

On March 22, 2021, the bankruptcy court entered an order confirming HCM's reorganization plan.³ That order purports to extend the prohibitions on suits against Seery, and it also prohibits certain actions against HCM and its affiliates. By its own terms, however, that order is not effective due to a pending appeal.

On April 12, 2021, Plaintiffs filed their Original Complaint in this action, alleging that HCM and related entities are liable as a result of insider trading and other violations of the antifraud provisions of the Investment Company Act of 1940, among other causes of action. The Original Complaint does not name Seery as a defendant. But the action is based on Seery's misrepresentations, omissions, and other breaches of duty committed in his role as HCM's CEO, which are sufficient to demonstrate his willful misconduct or gross negligence, though Plaintiffs submit that mere negligence and breach of fiduciary duty also form sufficient bases for his personal liability.

III.

ARGUMENT

This Court should grant leave to amend because the liberal policies behind Rule 15 require it and because leave is not prohibited by the bankruptcy court's order.

A. Rule 15(a) Allows Plaintiffs' Amendment As a Matter of Course

Rule 15(a) instructs the Court to "freely give leave [to amend] when justice so requires." **FED. R. CIV. P. 15(a)**. The Fifth Circuit, in *Martin's Herend Imports, Inc. v. Diamond & Gem Trading United States Co.*, **195 F.3d 765** (5th Cir. 1999), interpreted the rule as "evin[ing] a bias in favor of granting leave to amend." *Id.* at 770. Thus the Court must possess a "substantial reason"

³ Order (I) Confirming the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (As Modified) And (II) Granting Related Relief [Doc. 1943].

to deny a request for leave to amend. *Lyn-Lea Travel Corp. v. Am. Airlines, Inc.*, 283 F.3d 282, 286 (5th Cir. 2002); *Jamieson v. Shaw*, 772 F.2d 1205, 1208 (5th Cir. 1985); cf. *Foman v. Davis*, 371 U.S. 178, 182 (1962) (explaining that leave should be granted “[i]n the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.”).

Moreover, one amendment, filed within 21 days of service of the pleading it seeks to amend or before a responsive pleading is filed, is allowed “as a matter of course.” Fed. R. Civ. P. 15(a)(1); *Zaidi v. Ehrlich*, 732 F.2d 1218, 1220 (5th Cir. 1984) (“When, as in this case, a plaintiff who has a right to amend nevertheless petitions the court for leave to amend, the court should grant the petition.”); *Galustian v. Peter*, 591 F.3d 724, 729-30 (4th Cir. 2010) (holding that district court abused its discretion in denying timely motion to amend adding defendant because “[t]he plaintiff’s right to amend once is absolute”); *Rogers v. Girard Tr. Co.*, 159 F.2d 239, 241 (6th Cir. 1947) (holding that complaint may be amended as matter of course where defendant has filed no responsive pleading, and leave of district court is not necessary, but it is error to deny leave when asked); *Bancoult v. McNamara*, 214 F.R.D. 5, 7-8 (D.D.C. 2003) (holding that plaintiff’s filing of a motion for leave to amend does not nullify plaintiff’s absolute right to amend once before responsive pleadings, even if the amendment would be futile).

Here, Plaintiffs did not name Seery as a defendant in the Original Complaint out of an abundance of caution in light of the bankruptcy court’s order of July 16, 2020 [Doc. 854]. Instead, Plaintiffs are seeking leave in this Motion to do so. Because the proposed amendment is their first, and because it comes within 21 days of service of the Original Complaint, as well as before any

responsive pleadings, Plaintiffs respectfully submit that they are entitled to leave and their proposed First Amended Complaint should be allowed.

B. The Bankruptcy Court's Order Should Not Prohibit Plaintiffs' Amendment

Plaintiffs submit that the bankruptcy court order of July 16, 2020, does not prohibit the proposed amendment for two independent reasons.

1. The Bankruptcy Court's Order Exceeds Its Jurisdiction

a. The Bankruptcy Court Cannot Strip This Court of Jurisdiction

Because the bankruptcy court's jurisdiction derives from and is dependent upon the jurisdiction of this Court, its order declaring that it has "sole jurisdiction" is overreaching.

Congress provided for and limited the jurisdiction of bankruptcy courts in [28 U.S.C. § 1334](#) and [28 U.S.C. § 157](#). As a result, bankruptcy court jurisdiction derives from and is limited by statute. *Celotex Corp. v. Edwards*, [514 U.S. 300, 307](#) (1995) ("The jurisdiction of the bankruptcy courts, like that of other federal courts, is grounded in, and limited by, statute."); *Williams v. SeaBreeze Fin., LLC (In re 7303 Holdings, Inc.)*, Nos. 08-36698, 10-03079, [2010 Bankr. LEXIS 2938 at *7](#) (Bankr. S.D. Tex. Aug. 26, 2010) ("A bankruptcy court's jurisdiction is derivative of the district court's jurisdiction. The bankruptcy court does not have jurisdiction unless the district court could exercise authority over the matter . . ."). The plain provisions of § 1334 grant *to the district courts* "original jurisdiction" over all bankruptcy cases and related civil proceedings. [28 U.S.C. § 1334\(a\)-\(b\)](#). What Congress giveth, the bankruptcy courts cannot taketh away.

b. The Barton Doctrine Does Not Apply

The bankruptcy court's overreach seems to stem from a misapplication of the *Barton* doctrine. That doctrine protects receivers and trustees who are appointed by the bankruptcy court. *Randazzo v. Babin*, No. 15-4943, [2016 U.S. Dist. LEXIS 110465, at *3](#) (E.D. La. Aug. 18, 2016)

(“While the *Barton* case involved a receiver in state court, the United States Court of Appeals for the Fifth Circuit has extended this principle, now known as the *Barton* doctrine, to lawsuits against bankruptcy trustees for acts committed in their official capacities.”). The doctrine does not apply to executives of a debtor, like Seery, who are not receivers or trustees, and who are stretching the truth to claim that they were “appointed” by the bankruptcy court after asking it merely to approve their appointment in deference to their discretion under the business judgment rule.⁴

c. The Order Exceeds the Constitutional Limits of the Bankruptcy Court’s Jurisdiction

Plainly the bankruptcy court does not have “*sole jurisdiction*” over all causes of action that might be brought against Seery related to his role as HCM’s CEO. But more to the point, the bankruptcy court does not even have *concurrent jurisdiction* over *all* such claims. The separation of powers doctrine does not allow that. *See Stern v. Marshall*, 564 U.S. 462, 499 (2011) (holding that Congress cannot bypass Article III and create jurisdiction in bankruptcy courts “simply because a proceeding may have some bearing on a bankruptcy case”); *id.* at 488 (quoting *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 284 (1856), for the proposition that “Congress cannot ‘withdraw from judicial [read Article III] cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty’” with the limited exception of matters involving certain public rights); *id.* at 494 (quoting the dissent’s quote of *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 584 (1985), for the proposition that “Congress may not vest in a non-Article III court the power to adjudicate, render final judgment, and issue binding orders in a traditional contract action arising under state law,” and

⁴ Exhibit 2 at 14-15 (arguing that the bankruptcy court should not “interfere” with their “corporate decisions . . . as long as they are attributable to any rational business purpose”) (internal quotes omitted); *id.* at 5-7 (detailing the compensation committee’s “appointment” of Seery as CEO as well as chief restructuring officer).

then adding “tort” to the rule for purposes of the matter before it); *cf. In re Prescription Home Health Care*, 316 F.3d 542, 548 (5th Cir. 2002) (holding that trustee’s tax liability was not within the bankruptcy court’s related-to jurisdiction and rejecting “the theory that a bankruptcy court has jurisdiction to enjoin any activity that threatens the debtor’s reorganization prospects [because that] would permit the bankruptcy court to intervene in a wide variety of third-party disputes [such as] any action (however personal) against key corporate employees, if they were willing to state that their morale, concentration, or personal credit would be adversely affected by that action”). The bankruptcy court’s order asserting “sole jurisdiction” here is hardly even relevant since that court lacks the power to expand its jurisdiction or manufacture jurisdiction where none exists.

The proposed First Amended Complaint asserts common law and equitable contract and tort claims. For the reasons explained by the Supreme Court in *Stern*, such claims should not be deemed within the bankruptcy court’s jurisdiction.

d. The Order Exceeds the Bankruptcy Court’s Statutory Authorization

Not only are there constitutional issues with the scope of the bankruptcy court’s order, there is also the limitation of 28 U.S.C. § 157(d). *See TMT Procurement Corp. v. Vantage Drilling Co. (In re TMT Procurement Corp.)*, 764 F.3d 512, 523 & n.40 (5th Cir. 2014) (noting bankruptcy court’s “more limited jurisdiction” as a result of its “limited power” under 28 U.S.C. § 157). In § 157(d), Congress prohibited the bankruptcy court, absent the parties’ consent, from presiding over cases or proceedings that require consideration of both Title 11 and other federal law regulating organizations or activities affecting interstate commerce.

The First Amended Complaint’s allegations against Seery—accusing him of insider trading, violations of the RICO statute (18 U.S.C. § 1961 et seq.), and violations of the antifraud provisions of the Investment Advisers Act of 1940—require precisely that. Even determining the

“colorability” of such claims will require a close examination of both the proceedings that took place in the bankruptcy court under Title 11 and the Investment Advisers Act as well as the RICO statute. The bankruptcy court lacks the authority to make such determinations. This Court has that power.

Thus, at least as it applies to the proposed First Amended Complaint, the bankruptcy court’s order exceeds its authority under 28 U.S.C. § 157(d), and any determination of “colorability” should take place in this Court, which Rule 12(b)(6) of the Federal Rules of Civil Procedure already provides for. To hold otherwise would create unnecessary tension with the congressional aims of 28 U.S.C. § 959 (“Trustees, receivers or managers of any property, including debtors in possession, may be sued, without leave of the court appointing them, with respect to any of their acts or transactions in carrying on business connected with such property.”).

2. The Prerequisites in the Bankruptcy Court’s Order Are Satisfied by This Motion and the Detailed Allegations in the Proposed First Amended Complaint

Alternatively, or in addition, should this Court read the bankruptcy court’s order as prohibiting the filing of actions against Seery even in *this* Court, Plaintiffs submit that this Motion seeking leave provides the mechanisms required by that order and therefore satisfies it.

The bankruptcy court’s order requires only that any contemplated action must first be submitted to that court for a preliminary determination of colorability. Because that court only has derivative jurisdiction as a result of this Court’s jurisdiction—and only over matters referred to it by this Court—Plaintiffs submit that filing a motion for leave here is the correct procedure for complying with that order. This Court may refer this Motion to the bankruptcy court under Miscellaneous Order No. 33, as authorized by § 104 of the Bankruptcy Amendments and Federal Judgeship Act of 1984, codified at 28 U.S.C. § 157(a). Or it may instead decline to refer the Motion or withdraw the reference under 28 U.S.C. § 157(d), as Plaintiffs submit is appropriate for the

reasons addressed above. Regardless, this Motion presents the issue in a manner that allows the bankruptcy court to address it, should this Court decide that the bankruptcy court is authorized to do so. *Cf.* Confirmation Order [Doc. 1943] at 77, ¶ AA (“The Bankruptcy Court will have sole and exclusive jurisdiction to determine whether a claim or cause of action is colorable and, *only to the extent legally permissible* and as provided for in Article XI of the Plan, shall have jurisdiction to adjudicate the underlying colorable claim or cause of action.”) (emphasis added).

Plaintiffs therefore submit that, by filing this Motion in this Court, they have complied with the bankruptcy court’s order.

IV.

CONCLUSION

Plaintiffs are entitled to amend as a matter of course. The bankruptcy court lacks jurisdiction to prohibit the proposed amendment. In these circumstances, Plaintiffs respectfully submit that the interests of justice support the granting of leave to amend, and Rule 15(a) requires that this Motion be granted.

Dated: April 19, 2021

Respectfully submitted,

SBAITI & COMPANY PLLC

/s/ Jonathan Bridges

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CERTIFICATE OF CONFERENCE

I hereby certify that, on April 19, 2021, I conferred with Defendant HCM's counsel in the HCM bankruptcy proceedings regarding this Motion. I have not conferred with counsel for the other Defendants because they have not been served and I do not know who will represent them. HCM's counsel indicated that they are opposed to the relief sought in this Motion.

/s/ Jonathan Bridges

Jonathan Bridges

EXHIBIT 1

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

**CHARITABLE DAF FUND, L.P.
and CLO HOLDCO, LTD.,
*directly and derivatively,***

Plaintiffs,

V.

Cause No. 3:21-CV-00842-B

**HIGHLAND CAPITAL MANAGEMENT,
L.P. , HIGHLAND HCF ADVISOR, LTD.,
JAMES P. SEERY, *individually*, and
HIGHLAND CLO FUNDING, LTD.,
nominally,**

Defendants.

FIRST AMENDED COMPLAINT

I.

INTRODUCTION

This action arises out of the acts and omissions of Defendant James P. Seery (“Seery”) in his conduct as chief executive officer and chief restructuring officer of Defendant Highland Capital Management, L.P. (“HCM”), which is the general manager of Highland HCF Advisor, Ltd. (“HCFA”), both of which are registered investment advisers under the Investment Advisers Act of 1940 (the “Advisers Act”),¹ and nominal Defendant Highland CLO Funding, Ltd. (“HCLOF”) (Seery, HCM, and HCFA each a “Defendant,” or together, “Defendants”). The acts and omissions which have recently come to light reveal breaches of fiduciary duty, a pattern of violations of the Advisers Act’s anti-fraud provisions, and concealed breaches of the HCLOF Company Agreement, among others, which have caused and/or likely will cause Plaintiffs damages, and which arise out

¹ <https://adviserinfo.sec.gov/firm/summary/110126>

of or are related to acts or omissions that constitute bad faith, fraud, gross negligence, or willful misconduct.

Seery negotiated a settlement with the several Harbourvest² entities who owned 49.98% of HCLOF. The deal had HCM (or its designee) purchasing the Harbourvest membership interests in HCLOF for \$22.5 million. Recent revelations, however, show that the sale was predicated upon a sales price that was vastly below the Net Asset Value (“NAV”) of those interests. Upon information, the NAV of HCLOF’s assets had risen precipitously, but was not disclosed to Harbourvest nor to Plaintiffs.

Under the Advisers Act, Defendants have a non-waivable duty of loyalty and candor, which includes its duty not to inside trade with its own investors, *i.e.*, not to trade with an investor to which HCM and Seery had access to superior non-public information. Upon information and belief, HCM’s internal compliance policies required by the Advisers Act would not generally have allowed a trade of this nature to go forward—meaning, the trade either was approved in spite of compliance rules preventing it, or the compliance protocols themselves were disabled or amended to a level that leaves Defendants HCM and HCLOF exposed to liability. Thus, Defendants have created an unacceptable perpetuation of exposure to liability.

Additionally, Defendants are liable for a pattern of conduct that gives rise to liability for their conduct of the enterprise consisting of HCM in relation to HCFA and HCLOF, through a pattern of concealment, misrepresentation, and violations of the securities rules. In the alternative, Seery, HCFA and HCM, are guilty of self-dealing, violations of the Advisers Act, and tortious

² “Harbourvest” refers to the collective of Harbourvest Dover Street IX Investment, L.P., Harbourvest 2017 Global AIF, L.P., Harbourvest 2017 Global Fund, L.P., HV International VIII Secondary, L.P., and Harbourvest Skew Base AIF, L.P. Each was a member of Defendant Highland CLO Funding, Ltd.

interference by (a) not disclosing that Harbourvest had agreed to sell at a price well below the current NAV, and (b) diverting the Harbourvest opportunity to themselves.

For these reasons, judgment should be issued in Plaintiffs' favor.

II.

PARTIES

1. Plaintiff CLO Holdco, Ltd. is a limited company incorporated under the laws of the Cayman Islands.

2. Plaintiff Charitable DAF Fund, L.P., ("DAF") is a limited partnership formed under the laws of the Cayman Islands.

3. Defendant Highland Capital Management, L.P. is a limited partnership with its principal place of business at 300 Crescent Court, Suite 700, Dallas, Texas 75201. It may be served at its principal place of business or through its principal officer, James P. Seery, Jr., or through the Texas Secretary of State, or through any other means authorized by federal or state law.

4. Defendant Highland HCF Advisor, Ltd. is a limited company incorporated under the laws of the Cayman Islands. Its principal place of business is 300 Crescent Court, Suite 700, Dallas, Texas 75201. It is a registered investment adviser ("RIA") subject to the laws and regulations of the Investment Advisers Act of 1940 (the "Adviser's Act"). It is a wholly-owned subsidiary of Highland Capital Management, L.P.

5. Defendant James Seery is an officer and/or director and/or control person of Defendants Highland Capital Management, L.P., Highland CLO Funding, Ltd., and Highland HCF Adviser, Ltd., and is a citizen of and domiciled in Floral Park, New York. He can be served personally at 300 Crescent Court, Suite 700, Dallas, Texas 75201, or wherever he may be found.

6. Nominal Defendant Highland CLO Funding, Ltd. is a limited company incorporated under the laws of the Island of Guernsey. Its registered office is at First Floor, Dorey

Court, Admiral Park, St. Peter Port, Guernsey GY1 6HJ, Channel Islands. Its principal place of business is 300 Crescent Court, Suite 700, Dallas, Texas 75201.

III.

JURISDICTION AND VENUE

7. This Court has subject matter jurisdiction over this dispute under 28 U.S.C. § 1331 as one or more rights and/or causes of action arise under the laws of the United States. This Court has supplemental subject matter jurisdiction over all other claims under 28 U.S.C. § 1367.

8. Personal jurisdiction is proper over the Defendants because they reside and/or have continual contacts with the state of Texas, having regularly submitted to jurisdiction here. Jurisdiction is also proper under 18 U.S.C. § 1965(d).

9. Venue is proper in this Court under 28 U.S.C. § 1391(b) and (c) because one or more Defendants reside in this district and/or a substantial part of the events or omissions giving rise to the claim occurred or a substantial part of property that is the subject of the action is situated in this district. Venue in this district is further provided under 18 U.S.C. § 1965(d).

IV.

RELEVANT BACKGROUND

HCLOF IS FORMED

10. Plaintiff DAF is a charitable fund that helps several causes throughout the country, including providing funding for humanitarian issues (such as veteran's welfare associations and women's shelters), public works (such as museums, parks and zoos), and education (such as specialty schools in underserved communities). Its mission is critical.

11. Since 2012, DAF was advised by its registered investment adviser, Highland Capital Management, L.P., and its various subsidiaries, about where to invest. This relationship was governed by an Investment advisory Agreement.

12. At one point in 2017, HCM advised DAF to acquire 143,454,001 shares of HCLOF, with HCFA (a subsidiary of HCM) serving as the portfolio manager. DAF did so via a holding entity, Plaintiff CLO Holdco, Ltd.

13. On November 15, 2017, through a Subscription and Transfer Agreement, the DAF entered into an agreement with others to sell and transfer shares in HCLOF, wherein the DAF retained 49.02% in CLO Holdco.

14. Pursuant to that agreement, Harbourvest acquired the following interests in the following entities:

Harbourvest Dover Street IX Investment, L.P., acquired 35.49%;

Harbourvest 2017 Global AIF, L.P., acquired 2.42%;

Harbourvest 2017 lobal Fund, L.P., acquired 4.85%;

HV International VIII Secondary, L.P., acquired 6.5%; and

Harbourvest Skew Base AIF, L.P., acquired 0.72%;

for a total of 49.98% (altogether, the “Harbourvest interests”).

15. On or about October 16, 2019, Highland Capital Management filed for Chapter 11 bankruptcy in Delaware Bankruptcy Court, which was later transferred to the Northern District of Texas Bankruptcy Court, in the case styled *In Re: Highland Capital Management, L.P., Debtor*, Cause No. 19-34054, (the “HCM Bankruptcy” and the Court is the “Bankruptcy Court”).

16. HCLOF’s portfolio manager is HCFA. HCM is the parent of HCFA and is managed by its General Partner, Strand Management, who employs Seery and acts on behalf of HCM. Seery is the CEO of HCM which, upon information and belief, is the parent of HCFA.

17. Before acceding to the Harbourvest interests, HCM was a 0.6% holder of HCLOF interests.

**The Harbourvest Settlement with
Highland Capital Management in Bankruptcy**

18. On April 8, 2020, Harbourvest submitted its proofs of claim in the HCM bankruptcy proceeding. Annexed to its proofs of claims was an explanation of the Proof of Claim and the basis therefor setting out various pre-petition allegations of wrongdoing by HCM. *See, e.g.*, Case No. 19-bk-34054, Doc. 1631-5.

19. The debtor, HCM, made an omnibus response to the proofs of claims, stating they were duplicative of each other, overstated, late, and otherwise meritless.

20. Harbourvest responded to the omnibus objections on September 11, 2020. *See* Cause No. 19-bk-34054, Doc. 1057.

21. Harbourvest represented that it had invested in HCLOF, purchasing 49.98% of HCLOF's outstanding shares.

22. Plaintiff CLO Holdco was and is also a 49.02% holder of HCLOF's member interests.

23. In its Omnibus Response, Harbourvest explained that its claims included unliquidated legal claims for fraud, fraud in the inducement, RICO violations under 18 U.S.C. 1964, among others (the "Harbourvest Claims"). *See* Cause No. 19-bk-34054, Doc. 1057.

24. The Harbourvest Claims centered on allegations that when Harbourvest was intending to invest in a pool of Collateralized Loan Obligations, or CLOs, that were then-managed by Acis Capital Management ("Acis"), a subsidiary of HCM, HCM failed to disclose key facts about ongoing litigation with a former employee, Josh Terry.

25. Harbourvest claimed that it had lost over \$100 million in the HCLOF transaction due to fraud, which, after trebling under the racketeering statute, it claimed it was entitled to over \$300 million in damages.

26. Harbourvest contended that HCM never sufficiently disclosed the underlying facts about the litigation with Terry, and HCM's then-intended strategy to fight Terry caused HCLOF to incur around \$15 million in legal fees and costs. It contended that had it known the nature of the lawsuit and how it would eventually turn out, Harbourvest never would have invested in HCLOF. *See* Cause No. 19-bk-34054, Doc. 1057.

27. While even assuming Harbourvest's underlying claims were valid as far as the lost \$15 million went, the true damage of the legal fees to Harbourvest would have been 49.98% of the HCLOF losses (i.e., less than \$7.5 million).

28. In truth, as of September 2020, Harbourvest had indeed lost some \$52 million due to the alleged diminishing value of the HCLOF assets (largely due to the underperformance of the Acis entities³)—and the values were starting to recover.

29. HCM denied the allegations in the Bankruptcy Court. Other than the claim for waste of corporate assets of \$15 million, HCM at all times viewed the Harbourvest legal claims as being worth near zero and having no merit.

30. On December 23, 2020, HCM moved the Court to approve a settlement between itself and Harbourvest. No discovery had taken place between the parties, and Plaintiff did not have any notice of the settlement terms or other factors prior to the motion's filing (or even during its pendency) in order to investigate its rights.

31. HCM set the hearing right after the Christmas and New Year's holidays, almost ensuring that no party would have the time to scrutinize the underpinnings of the deal.

³ Acis was being managed by Joshua Terry. JP Morgan had listed the four ACIS entities under his management as the four worst performers of the 1200 CLOs it evaluated.

32. On January 14, 2021, the Bankruptcy Court held an evidentiary hearing and approved the settlement in a bench ruling, overruling the objections to the settlement.

33. An integral part of the settlement was allowing \$45 million in unsecured claims that, at the time of the agreement, were expected to net Harbourvest around 70 cents on the dollar. In other words, Harbourvest was expected to recover around \$31,500,000 from the allowed claims.

34. As part of the consideration for the \$45 million in allowed claims, Harbourvest agreed to transfer all of its interests in HCLOF to HCM.

35. HCM and Seery rationalized the settlement value by allocating \$22.5 million of the net value of the \$45 million in unsecured claims as consideration to purchase Harbourvest's interests in HCLOF, meaning, if 70% of the unsecured claims—i.e., \$31.5 million—was realized, and \$22.5 million of that would be allocated to the purchase price of the Harbourvest interests in HCLOF, the true “settlement” for Harbourvest's legal claims was closer to \$9 million. Still \$1.5 million over the reasonable damages amount that Harbourvest suffered.

36. Plaintiffs here are taking no position at this time about the propriety of settling the Harbourvest legal claims for \$9 million. That is for another day.

37. At the core of this lawsuit is the fact that HCM purchased the Harbourvest interests in HCLOF for \$22.5 million knowing that they were worth far more than that.

38. It has recently come to light that the Harbourvest interests, as of December 31, 2020, were worth in excess of \$41,750,000, and they have continued to go up in value.

39. On November 30, 2020, which was less than a month prior to the filing of the Motion to Approve the Settlement, the net asset value of those interests was over \$34.5 million. Plaintiffs were never made aware of that.

40. The change was due to how the net asset value, or NAV, was calculated. The means and methods for calculating the “net asset value” of the assets of HCLOF are subject to and governed by the regulations passed by the SEC pursuant to the Adviser’s Act, and by HCM’s internal policies and procedures.

41. Typically, the value of the securities are reflected by a market price quote.

42. However, the underlying securities in HCLOF are not liquid and had not been traded in a long while. Therefore, any market quotes were stale.

43. There not having been any contemporaneous market quotations that could be used in good faith to set the marks,⁴ meant that other prescribed methods of assessing the value of the interests, such as the NAV, would have been the proper substitutes.

44. Seery testified that the fair market value of the Harbourvest HCLOF interests was \$22.5 million. Even allowing some leeway there, it was off by a mile.

45. Given the artifice described herein, Seery and the entity Defendants had to know that the representation of the fair market value at \$22.5 million was false because the NAV was so much higher.

46. But it does not appear that they disclosed that fact to Harbourvest to whom they owed fiduciary duties as the RIA in charge of HCLOF, and they certainly did not disclose the truth to the Plaintiff. One would expect HCM to disclose that its trade with Harbourvest—or someone in Harbourvest’s position—was sanitized by complete disclosure of the NAV of the interests, and noting Harbourvest’s acceptance of the trade notwithstanding that disclosure. The abject silence of the information’s disclosure—both in the Settlement Agreement and in the papers seeking to

⁴ The term “mark” is shorthand for an estimated or calculated value for a non-publicly traded instrument.

approval of the settlement and the testimony proffered in its support—strongly suggests its absence from the negotiations.

47. What it appears is that Seery used an old valuation, itself a reckless if not intentional misrepresentation of value. Thus, it is either the case that (i) Defendants conducted the proper analysis to obtain a current value of the assets but decided to use a far lower valuation in order to whitewash the settlement or enrich the bankruptcy estate; *or* (ii) Defendants never conducted the proper current valuation, and therefore baselessly represented what the current value of the assets was, despite knowingly having no reasonable basis for making such a claim.

48. For years HCM had internal procedures and compliance protocols to govern this not infrequent occurrence. Prior to Seery taking over as CEO, HCM's internal compliance policies, enforced by its compliance officers, prohibiting HCM from trading with an investor where HCM had superior knowledge about the value of the assets, for example. While Plaintiff has no reason to believe that those procedures were scrapped in recent months, it can only assume that they were either overridden improperly or circumvented wholesale.

49. Upon finalizing the Harbourvest Settlement Agreement and making representations to the Bankruptcy Court to the Plaintiffs about the value of the Harbourvest Interests, Seery and HCM had a duty to use current values and not rely on old valuations of the assets or the HCLOF interests.

50. Given Defendants' actual or constructive knowledge that they were purchasing Harbourvest's Interests in HCLOF for a less than 50% of what those interests were worth—Defendants owed Plaintiff a fiduciary duty not to purchase them for themselves.

51. Defendants should have either had HCLOF repurchase the interests with cash, or offer those interests to Plaintiff and the other members *pro rata*, before HCM agreed to purchase them all lock, stock and barrel, for no up-front cash.

52. Indeed, had Plaintiff been offered those interests, it would have happily purchased them and therefore would have infused over \$20 million in cash into the estate for the purpose of executing the Harbourvest Settlement.

53. That Defendants (and to perhaps a lesser extent, the Unsecured Creditors Committee (the “UCC”)) agreed to pay \$22.5 million for the HCLOF assets, where they had previously not consented to any such expenditure by the estate on behalf of HCLOF, strongly indicates their awareness that they were purchasing assets for far below market value.

54. The above is the most reasonable and plausible explanation for why Defendants and the UCC forwent raising as much as \$22.5 million in cash now in favor of hanging on to the HCLOF assets.

55. Indeed, in January 2021 Seery threatened Ethen Powell that “[Judge Jernigan] is laughing at you” and “we are coming after you” in response to the latter’s attempt to exercise his right as beneficial holder of the CLO, and pointing out a conflict of interest in Seery’s plan to liquidate the funds.

56. HCM’s threat, made by Seery, is tantamount to not only a declaration that he intends to liquidate the funds regardless of whether the investors want to do so, and whether it is in their best interests, but also that HCM intends to leverage what it views as the Bankruptcy Court’s sympathy to evade accountability.

V.

CAUSES OF ACTION

FIRST CAUSE OF ACTION
Breaches of Fiduciary Duty

57. Plaintiffs respectfully incorporate the foregoing factual averments as if fully set forth herein and further alleges the following:

58. HCM is a registered investment advisor and acts on behalf of HCFA. Both are fiduciaries to Plaintiffs because HCM had a direct advisor agreement with the DAF at all relevant times, and HCM, through HCFA, advised CLO Holdco in the HCLOF venture.

59. The Advisers Act establishes an unwaivable federal fiduciary duty for investment advisers,⁵ and its chief compliance officers.⁶

60. HCM and the DAF entered into an Amended and Restated Investment Advisory Agreement, executed between them on July 1, 2014 (the “RIA Agreement”). It renews annually and continued until the end of January 2021.

61. In addition to being the RIA to the DAF, HCM was appointed the DAF’s attorney-in-fact for certain actions, such as “to purchase or otherwise trade in Financial Instruments that have been approved by the General Partner.” RIA Agreement ¶ 4.

⁵ See e.g., *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 194 (1963); *Transamerica Mortg. Advisors (tama) v. Lewis*, 444 U.S. 11, 17 (1979) (“§ 206 establishes ‘federal fiduciary standards’ to govern the conduct of investment advisers.”); *Santa Fe Indus. v. Green*, 430 U.S. 462, 471, n.11 (1977) (in discussing *SEC v. Capital Gains*, stating that the Supreme Court’s reference to fraud in the “equitable” sense of the term was “premised on its recognition that Congress intended the Investment Advisers Act to establish federal fiduciary standards for investment advisers”). See also Investment Advisers Act Release No. 3060 (July 28, 2010) (“Under the Advisers Act, an adviser is a fiduciary whose duty is to serve the best interests of its clients, which includes an obligation not to subrogate clients’ interests to its own”) (citing Proxy Voting by Investment Advisers, Investment Advisers Act Release No. 2106 (Jan. 31, 2003)).

⁶ Advisers Act Rule 206(4)-7 (“An adviser’s chief compliance officer should be competent and knowledgeable regarding the Advisers Act and should be empowered with full responsibility and authority to develop and enforce appropriate policies and procedures for the firm.”).

62. The RIA Agreement further commits HCM to value financial assets “in accordance with the then current valuation policy of the Investment Advisor [HCM], a copy of which will be provided to the General Partner upon request.” RIA Agreement ¶ 5.

63. While HCM contracted for the recognition that it would be acting on behalf of others and could be in conflict with advice given the DAF, (RIA Agreement ¶ 12), nowhere did it purport to waive the fiduciary duties owed to the DAF not to trade as a principal in a manner that harmed the DAF.

64. HCFA owed a fiduciary duty to Holdco as an investor in HCLOF and to which HCFA was the portfolio manager. HCM owed a fiduciary duty to the DAF (and to Holdco as its subsidiary) pursuant to a written Advisory Agreement HCM and the DAF had where HCM agreed to provide sound investment advice and management functions.

65. As a registered investment adviser, HCM’s fiduciary duty is broad and applies to the entire advisor-client relationship.

66. The core of the fiduciary duty is to act in the best interest of their investors—the advisor must put the ends of the client before its own ends or the ends of a third party.

67. This is manifested in a duty of loyalty and a duty of utmost care. It also means that the RIA has to follow the terms of the company agreements and the regulations that apply to the investment vehicle.

68. Seery in controlling HCM, HCFA, and by extension, HCLOF, directly owed a fiduciary duty to Plaintiffs by virtue of his position, or is liable for aiding and abetting HCM’s and HCFA’s breaches of fiduciary duty by controlling them and either recklessly or intentionally causing them to breach their duties.

69. The fiduciary duty that HCM and Seery owed to Plaintiff is predicated on trust and confidence. Section 204A of the Advisers Act requires investment advisors (whether SEC-registered or not) to establish, maintain, and enforce written policies and procedures reasonably designed to prevent the RIA from trading on material, non-public information. See 17 C.F.R. § 275.206(4)-7. That means that Plaintiff should be able to take Defendants at their word and not have to second guess or dig behind representations made by them.

70. The simple thesis of this claim is that Defendants Seery, HCFA and HCM breached their fiduciary duties by (i) insider trading with Harbourvest and concealing the rising NAV of the underlying assets—i.e., trading with Harbourvest on superior, non-public information that was neither revealed to Harbourvest nor to Plaintiff; (ii) concealing the value of the Harbourvest Interests; and (iii) diverting the investment opportunity in the Harbourvest entities to HCM (or its designee) without offering it to or making it available to Plaintiff or the DAF.

71. HCM, as part of its contractual advisory function with Plaintiffs, had expressly recommended the HCLOF investment to the DAF. Thus, diverting the opportunity for returns on its investment was an additional breach of fiduciary duty.

72. This violated a multitude of regulations under 27 C.F.R. part 275, in addition to Rules 10b-5 and 10b5-1. 17 CFR 240.10b5-1 (“Rule 10b5-1”) explains that one who trades while possessing non-public information is liable for insider trading, and they do not necessarily have to have *used* the specific inside information.

73. It also violated HCM’s own internal policies and procedures.

74. Also, the regulations impose obligations on Defendants to calculate a *current* valuation when communicating with an investor, such as what may or may not be taken into

account, and what cannot pass muster as a current valuation. Upon information and belief, these regulations were not followed by the Defendants.

75. HCM's internal policies and procedures, which it promised to abide by both in the RIA Agreement and in its Form ADV SEC filing, provided for the means of properly calculating the value of the assets.

76. HCM either did not follow these policies, changed them to be out of compliance both with the Adviser Act regulations and its Form ADV representations, and/or simply misrepresented or concealed their results.

77. In so doing, because the fiduciary duty owed to Plaintiff is a broad one, and because Defendants' malfeasance directly implicates its relationship with Plaintiff, Defendants have breached the Advisers Act's fiduciary duties owed to Plaintiff as part of their fiduciary relationship.⁷

78. At no time between agreeing with Harbourvest to the purchase of its interests and the court approval did Defendants disclose to either Harbourvest or to Plaintiff (and the Bankruptcy Court for that matter) that the purchase was at below 50% the current net asset value as well, and when they failed to offer Plaintiff (and the other members of HCLOF) their right to purchase the interests pro rata at such advantageous valuations. Plaintiff's lost opportunity to purchase has harmed Plaintiff. Plaintiff had been led to believe by the Defendants that the value of what was being purchased in the Harbourvest settlement by HCM (or its designee) was at fair

⁷ See Advisers Act Release No. 4197 (Sept. 17, 2015) (Commission Opinion) ("[O]nce an investment Advisory relationship is formed, the Advisers Act does not permit an adviser to exploit that fiduciary relationship by defrauding his client in any investment transaction connected to the Advisory relationship."); see also *SEC v. Lauer*, No. 03-80612-CIV, 2008 U.S. Dist. LEXIS 73026, at 90 (S.D. Fla. Sept. 24, 2008) ("Unlike the antifraud provisions of the Securities Act and the Exchange Act, Section 206 of the Advisers Act does not require that the activity be 'in the offer or sale of any' security or 'in connection with the purchase or sale of any security.'").

market value. This representation, repeated again in the Bankruptcy Court during the Harbourvest confirmation, implicitly suggested that a proper current valuation had been performed.

79. Seery testified in January 2021 that the then-current fair market value of Habourvests's 49.98% interest in HCLOF was worth around \$22.5 million.

80. But by then, it was worth almost double that amount and has continued to appreciate. Seery knew or should have known that fact because the value of some of the HCLOF assets had increased, and he had a duty to know the current value. His lack of actual knowledge, while potentially not overtly fraudulent, would nonetheless amount to a reckless breach of fiduciary duty for acting without proper diligence and information that was plainly available.

81. Furthermore, HCLOF holds equity in MGM Studios and debt in CCS Medical via various CLO positions. But Seery, in his role as CEO of HCM, was made aware during an advisors meeting in December 2020 that Highland would have to restrict its trading in MGM because of its insider status due to activities that were likely to apply upward pressure on MGM's share price.

82. Furthermore, Seery controlled the Board of CCS Medical. And in or around October 2020, Seery was advocating an equatization that would have increased the value of the CCS securities by 25%, which was not reflected in the HCM report of the NAV of HCLOF's holdings.

83. Seery's knowledge is and should be imputed to HCM and HCFA.

84. Moreover, it is a breach of fiduciary duty to commit corporate waste, which is effectively what disposing of the HCLOF assets would constitute in a rising market, where there is no demand for disposition by the investors (save for HCM, whose proper 0.6% interest could easily be sold to the DAF at fair value).

85. As holder of 0.6% of the HCLOF interests, and now assignee of the 49.98% Harbourvest Interests), HCM has essentially committed self-dealing by threatening to liquidate HCLOF now that it may be compelled to do so under its proposed liquidation plan, which perhaps inures to the short term goals of HCM but to the pecuniary detriment of the other holders of HCLOF whose upside will be prematurely truncated.

86. Seery and HCM should not be allowed to benefit from the breach of their fiduciary duties because doing so would also cause Plaintiffs irreparable harm. The means and methods of disposal would likely render the full scope of damages to the DAF not susceptible to specific calculation—particularly as they would relate to calculating the lost opportunity cost. Seery and HCM likely do not have the assets to pay a judgment to Plaintiffs that would be rendered, simply taking the lost appreciation of the HCLOF assets.

87. Defendants are thus liable for diverting a corporate opportunity or asset that would or should have been offered to Plaintiff and the other investors. Because federal law makes the duties invoked herein unwaivable, it is preposterous that HCM, as a 0.6% holder of HCLOF, deemed itself entitled to the all of the value and optionality of the below-market Harbourvest purchase.

88. Defendants cannot rely on any contractual provision that purports to waive this violation. Nothing in any agreement purports to permit, authorize or otherwise sanitize Defendants' self-dealing. All such provisions are void.

89. In the fourth quarter of 2020, Seery and HCM notified staff that they would be terminated on December 31, 2020. That termination was postponed to February 28, 2021. Purchasing the Harbourvest assets without staffing necessary to be a functioning Registered

Investment Advisor was a strategic reversal from prior filings that outlined canceling the CLO management contracts and allowing investors to replace Highland as manager.

90. Seery's compensation agreement with the UCC incentivizes him to expedite recoveries and to prevent transparency regarding the Harbourvest settlement.

91. What is more, Seery had previously testified that the management contracts for the funds—HCLOF included—were unprofitable, and that he intended to transfer them. But he later rejected offers to purchase those management contracts for fair value and instead decided to continue to manage the funds—which is what apparently gave rise to the Harbourvest Settlement, among others. He simultaneously rejected an offer for the Harbourvest assets of \$24 million, stating that they were worth much more than that.

92. Because of Defendants' malfeasance, Plaintiffs have lost over \$25 million in damages—a number that continues to rise—and the Defendants should not be able to obtain a windfall.

93. For the same reason, Defendants' malfeasance has also exposed HCLOF to a massive liability from Harbourvest since the assignment of those interests is now one that is likely unenforceable under the Advisers Act, Section 47(b), if there was unequal information.

94. Seery is liable as a principal and as an officer and control person under the regulations promulgated pursuant to Dodd-Frank and other laws.

95. HCM and HCFA are liable as principals for breach of fiduciary duty, as are the principals and compliance staff of each entity.

96. Plaintiffs seek disgorgement, damages, exemplary damages, attorneys' fees and costs. To the extent the Court determines that this claim had to have been brought derivatively on

behalf of HCLOF, then Plaintiffs represent that any pre-suit demand would have been futile since asking HCM to bring suit against its principal, Seery, would have been futile.

SECOND CAUSE OF ACTION
Breach of HCLOF Company Agreement
(By Holdco against HCLOF, HCM and HCFA)

97. Plaintiffs respectfully incorporate the foregoing factual averments as if fully set forth herein and further alleges the following:

98. On November 15, 2017, the members of HCLOF, along with HCLOF and HCFA, executed the *Members Agreement Relating to the Company* (the “Company Agreement”).

99. The Company Agreement governs the rights and duties of the members of HCLOF.

100. Section 6.2 of HCLOF Company Agreement provides that when a member “other than ... CLO Holdco [Plaintiff] or a Highland Affiliate,” intends to sell its interest in HCLOF to a third party (i.e., not to an affiliate of the selling member), then the other members have the first right of refusal to purchase those interests pro rata for the same price that the member has agreed to sell.

101. Here, despite the fact that Harbourvest agreed to sell its interests in HCLOF for \$22.5 million when they were worth more than double that, Defendants did not offer Plaintiff the chance to buy its pro rata share of those interests at the same agreed price of \$22.5 million (adjusted pro rata).

102. The transfer and sale of the interests to HCM were accomplished as part of the Harbourvest Settlement which was approved by the Bankruptcy Court.

103. Plaintiff was not informed of the fact that Harbourvest had offered its shares to Defendant HCM for \$22.5 million—which was under 50% of their true value.

104. Plaintiff was not offered the right to purchase its pro rata share of the Harbourvest interests prior to the agreement being struck or prior to court approval being sought.

105. Had Plaintiff been allowed to do so, it would have obtained the interests with a net equity value over their purchase price worth in excess of \$20 million.

106. No discovery or opportunity to investigate was afforded Plaintiff prior to lodging an objection in the Bankruptcy Court.

107. Plaintiff is entitled to specific performance or, declaratory relief, and/or disgorgement, constructive trust, damages, attorneys' fees and costs.

THIRD CAUSE OF ACTION
Negligence
(By the DAF and CLO Holdco against Seery, HCM, and HCFA)

108. Plaintiffs respectfully incorporate the foregoing factual averments as if fully set forth herein, and further alleges the following:

109. Plaintiffs incorporate the foregoing causes of action and note that all the foregoing violations were breaches of the common law duty of care imposed by law on each of Seery, HCFA and HCM.

110. Each of these Defendants should have known that their actions were violations of the Advisers Act, HCM's internal policies and procedures, the Company Agreement, or all three.

111. Seery and HCM owed duties of care to Plaintiffs to follow HCM's internal policies and procedures regarding both the propriety and means of trading with a customer [Harbourvest], the propriety and means of trading as a principal in an account but in a manner adverse to another customer [the DAF and Holdco], and the proper means of valuing the CLOs and other assets held by HCLOF.

112. It would be foreseeable that failing to disclose the current value of the assets in the HCLOF would impact Plaintiffs negatively in a variety of ways.

113. It would be reasonably foreseeable that failing to correctly and accurately calculate the current net asset value of the market value of the interests would cause Plaintiffs to value the Harbourvest Interests differently.

114. It would be reasonably foreseeable that referring to old and antiquated market quotations and/or valuations of the HCLOF assets or interests would result in a mis-valuation of HCLOF and, therefore, a mis-valuation of the Harbourvest Interests.

115. Relying on stale valuations without updating them was reckless due to Seery's and HCM's knowledge that the values of the interests were not static and likely would have changed over time, such that old information had a high degree of probability of being inaccurate.

116. Seery's and HCM's failure to inform the DAF and Holdco of the updated valuations, and/or to misstate the value in January 2021 in support of the Harbourvest settlement was likewise reckless in the face of the known risk that Plaintiffs would be relying on those representations, as would Harbourvest and the Court.

117. Seery's and HCM's failure to offer the DAF and Holdco the right to purchase the Harboruvest Interests was likewise reckless in light of the obvious risk.

118. Likewise, it would have been foreseeable that Plaintiff's failure to give Plaintiff the opportunity to purchase the Harbourvest shares at a \$22.5 million valuation would cause Plaintiff damages. Defendants knew that the value of those assets was rising. They further knew or should have known that whereas those assets were sold to HCM for an allowance of claims to be funded in the future, selling them to Plaintiff would have provided the estate with cash funds.

119. Defendants' negligence or gross negligence foreseeably and directly caused Plaintiff harm.

120. Plaintiff is thus entitled to damages.

FOURTH CAUSE OF ACTION
Racketeering Influenced Corrupt Organizations Act
(CLO Holdco and DAF against HCM and Seery)

121. Plaintiffs respectfully incorporate the foregoing factual averments as if fully set forth herein, and further alleges the following:

122. Defendants HCM and Seery are liable for violations of the Racketeer Influenced and Corrupt Organizations ("RICO") Act, 18 U.S.C. § 1961 *et seq.*, for the conduct of an enterprise through a pattern of racketeering activity.

123. HCLOF constitutes an enterprise under the RICO Act. Additionally, or in the alternative, HCM, HCLA, and HCLOF constituted an association-in-fact enterprise. The purpose of the association-in-fact was the perpetuation of Seery's position at HCM and using the Harbourvest settlement as a vehicle to enrich persons other than the HCLOF investors, including Holdco and the DAF, and the perpetuation of HCM's holdings in collateralized loan obligations owned by HCLOF, while attempting to deny Plaintiffs the benefit of its rights of ownership.

124. The association-in-fact was bound by informal and formal connections for years prior to the illicit purpose, and then changed when HCM and Seery joined it in order to achieve the association's illicit purpose. For example, HCM is the parent and control person over HCFA, which is the portfolio manager of HCLOF pursuant to a contractual agreement—both are registered investment advisors and provide advisory and management services to HCLOF.

125. HCM and Seery injured Plaintiffs through their continuous course of conduct of the HCM-HCLA-HCLOF association-in-fact enterprise. Seery's actions (performed on behalf of

HCM and the association-in-fact enterprise) constitute violations of the federal wire fraud, mail fraud, fraud in connection with a case under Title 11, and/or securities fraud laws, pursuant to **18 U.S.C. § 1961(1)(B)** and **(D)**.

126. Seery operated HCM in such a way as to violate insider trading rules and regulations when it traded with Harbourvest while it had material, non-public information that it had not supplied to Harbourvest or to Plaintiffs.

127. In or about November 2020, HCM and Harbourvest entered into discussions about settling the Harbourvest Claims. Seery's conduct of HCLOF and HCLA on behalf of HCM through the interstate mails and/or wires caused HCM to agree to the purchase of Harbourvest's interests in HCLOF.

128. On or about each of September 30, 2020, through December 31, 2020, Seery, through his conduct of the enterprise, utilized the interstate wires and/or mails to obtain or arrive at valuations of the HCLOF interests. Seery's conduct of the enterprise caused them to cease sending the valuation reports to Plaintiffs, which eventually allowed Plaintiffs to be misled into believing that Seery had properly valued the interests.

129. On or about September 30, 2020, Seery transmitted or caused to be transmitted though the interstate wires information to HCLOF investors from HCM (via HCFA), including Harbourvest, regarding the value of HCLOF interests and underlying assets.

130. Additionally, Seery operated HCM in such a way that he concealed the true value of the HCLOF interests by utilizing the interstate wires and mails to transmit communications to the court in the form of written representations on or about December 23, 2020, and then further transmitted verbal representations of the current market value (the vastly understated one) on January 14, 2021, during live testimony.

131. However, Harbourvest was denied the full picture and the true value of the underlying portfolio. At the end of October and November of 2020, HCM had updated the net asset values of the HCLOF portfolio. According to sources at HCM at the time, the HCLOF assets were worth north of \$72,969,492 as of November 30, 2020. Harbourvest's share of that would have been \$36,484,746.

132. The HCLOF net asset value had reached \$86,440,024 as of December 31, 2021, which means that by the time Seery was testifying in the Bankruptcy Court on January 14, 2021, that the fair market value of the Harbourvest Assets was \$22.5 million, it was actually closer to \$43,202,724.

133. Seery, speaking on behalf of HCM, knew of the distinction in value and made the representations either knowingly or with reckless disregard for the truth.

134. On January 14, 2021, Seery also testified that he (implying HCM, HCLA and HCLOF) had valued the Harbourvest Assets at their current valuation and at fair market value. This was not true because the valuation that was used and testified to was at that time ancient. The ostensible purpose of this concealment was to induce Plaintiff and other interest holdings to take no action.

135. In supporting HCM's motion to the Bankruptcy Court to approve the Harbourvest Settlement, Seery omitted the fact that HCM was purchasing the interests at a massive discount, which would violate the letter and spirit of the federal Adviser's Act.

136. Seery was informed in late December 2020 at an in-person meeting in Dallas to which Seery had to fly that HCLOF and HCM had to suspend trading in MGM Studios' securities because Seery had learned from James Dondero, who was on the Board of MGM, of a potential purchase of the company. The news of the MGM purchase should have caused Seery to revalue

the HCLOF investment in MGM. Seery's failure to disclose this information which would have been germane to the valuation of the Harbourvest Interests was another incidence of wrongful omission in violation of the Advisers Act's antifraud provision and RICO.

137. In or around October 2020, Seery (who controls the Board of CSS Medical) was pursuing "equatization" of CSS Medical's debt, which would have increased the value of certain securities by 25%. In several communications through the U.S. interstate wires and/or mails, and with Plaintiffs, and the several communications with Harbourvest during the negotiations of the settlement, Seery failed to disclose these changes which were responsible in part for the ever-growing value of the HCLOF CLO portfolio. Seery's failure to disclose this information which would have been germane to the valuation of the Harbourvest Interests was another incidence of wrongful omission in violation of the Advisers Act's antifraud provision and RICO.

138. Seery's failure to disclose the information about the current valuation, which would have been material to the value of the Harbourvest Interest—and by extension, to Plaintiff's rights with respect to those as part of the Harbourvest Settlement was another incidence of wrongful omission in violation of the Advisers Act's antifraud provision and RICO.

139. The Harbourvest Settlement is not final and unwinding it could prove difficult—which Seery had to be counting on.

140. Seery was at all relevant times operating as an agent of HCM and its control person as CEO.

141. This series of related violations of the wire fraud, mail fraud, and securities fraud laws, in connection with the HCM bankruptcy, constitute a continuing pattern and practice of racketeering for the purpose of winning a windfall for HCM and himself--a nearly \$30,000,000 payday under the confirmation agreement.

142. The federal RICO statute makes it actionable for one's conduct of an enterprise to include "fraud in connection with a [bankruptcy case]". The Advisers' Act antifraud provisions require full transparency and accountability to an advisers' investors and clients and does not require a showing of reliance or materiality. The wire fraud provision likewise is violated when, as here, the interstate wires are used as part of a "scheme or artifice ... for obtaining money or property by means of false ... pretenses, [or] representations[.]"

143. Accordingly, because Seery and HCM's conduct violated the wire fraud and mail fraud laws, and the Advisers' Act antifraud provisions, and their acts and omissions were in connection with the HCM Bankruptcy proceedings under Title 11, they are sufficient to bring such conduct within the purview of the RICO civil action provisions, **18 U.S.C. § 1964**.

144. Plaintiffs are thus entitled to damages, treble damages, attorneys' fees and costs of suit, in addition to all other injunctive or equitable relief to which they are justly entitled.

FIFTH CAUSE OF ACTION
Tortious Interference
(CLO Holdco against HCM and Seery)

145. Plaintiff respectfully incorporates the foregoing factual averments as if fully set forth herein and further alleges the following:

146. At all relevant times, HCM owned a 0.6% interest in HCLOF.

147. At all relevant times, Seery and HCM knew that Plaintiff had specific rights in HCLOF under the Company Agreement, § 6.2.

148. Section 6.2 of HCLOF Company agreement provides that when a member "other than ... CLO Holdco [Plaintiff] or a Highland Affiliate," intends to sell its interest in HCLOF to a third party (i.e., not an affiliate of the member), then the other members have the first right of refusal to purchase those interests pro rata for the same price that the member has agreed to sell.

149. HCM, through Seery, tortiously interfered with Plaintiff's contractual rights with HCLOF by, among other things, diverting the Harbourvest Interests in HCLOF to HCM without giving HCLOF or Plaintiff the option to purchase those assets at the same favorable price that HCM obtained them.

150. HCM and Seery tortiously interfered with Plaintiff's contractual rights with HCLOF by, among other things, misrepresenting the fair market value as \$22.5 million and concealing the current value of those interests.

151. But for HCM and Seery's tortious interference, Plaintiff would have been able to acquire the Harbourvest Interests at a highly favorable price. HCM and Seery's knowledge of the rights and intentional interference with these rights has caused damage to Plaintiff CLO Holdco.

152. Plaintiff is therefore entitled to damages from HCM and Seery, as well as exemplary damages.

VI.

JURY DEMAND

153. Plaintiffs demand trial by jury on all claims so triable.

VII.

PRAYER FOR RELIEF

154. Wherefore, for the foregoing reasons, Plaintiffs respectfully pray that the Court enter judgment in their favor and against Defendants, jointly and severally, for:

- a. Actual damages;
- b. Disgorgement;
- c. Treble damages;
- d. Exemplary and punitive damages;

- e. Attorneys' fees and costs as allowed by common law, statute or contract;
- f. A constructive trust to avoid dissipation of assets;
- g. All such other relief to which Plaintiff is justly entitled.

Dated: April 19, 2021

Respectfully submitted,

SBAITI & COMPANY PLLC

/s/ Jonathan Bridges

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EXHIBIT 2

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**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

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

Response Deadline: July 10, 2020 at 5:00 p.m.
Hearing Date: July 14, 2020 at 1:30 p.m.

**DEBTOR'S MOTION UNDER BANKRUPTCY CODE
SECTIONS 105(a) AND 363(b) FOR AUTHORIZATION TO
RETAIN JAMES P. SEERY, JR., AS CHIEF EXECUTIVE OFFICER,
CHIEF RESTRUCTURING OFFICER AND FOREIGN REPRESENTATIVE
*NUNC PRO TUNC TO MARCH 15, 2020***

The above-captioned debtor and debtor in possession (the “Debtor”) hereby moves (the “Motion”) pursuant to sections 105(a) and 363(b) of title 11 of the United States Code, 11 U.S.C. §§ 101–1532 (the “Bankruptcy Code”) for the entry of an order, substantially in the form attached hereto as Exhibit A (the “Proposed Order”), authorizing the Debtor (a) (i) to retain James P. Seery, Jr. as the chief executive officer and chief restructuring officer of the Debtor, pursuant to the terms of the letter attached as Exhibit 1 to the Proposed Order (the “Agreement”) *nunc pro tunc* to March 15, 2020, and (ii) for Mr. Seery to replace the Debtor’s current chief restructuring officer as the Debtor’s foreign representative pursuant to 11 U.S.C. § 1505, and (b) granting related relief. In support of the Motion, the Debtor respectfully represents as follows:

Jurisdiction

1. The United States Bankruptcy Court for the Northern District of Texas (the “Court”) has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2).

2. The bases for the relief requested herein are sections 105 and 363 of the Bankruptcy Code.

Background

3. On October 16, 2019 (the “Petition Date”), the Debtor filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code in the Bankruptcy Court for the District of Delaware, Case No. 19-12239 (CSS) (the “Delaware Bankruptcy Court”).

4. On October 29, 2019, the Official Committee of Unsecured Creditors (the “Committee”) was appointed by the U.S. Trustee in the Delaware Court. On December 4, 2019,

the Delaware Bankruptcy Court entered an order transferring venue of the Debtor's chapter 11 case to this Court [Docket No. 186].¹

5. The Debtor has continued in the possession of its property and has continued to operate and manage its business as a debtor-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No trustee or examiner has been appointed in this chapter 11 case.

6. On December 4, 2019, the Debtor filed in the Delaware Bankruptcy Court its *Motion of the Debtor Pursuant to 11 U.S.C. §§ 105(a) and 363(b) To Retain Development Specialists, Inc. to Provide a Chief Restructuring Officer, Additional Personnel, and Financial Advisory and Restructuring-Related Services, Nunc Pro Tunc, as of the Petition Date* [Docket No. 74] (the "CRO Motion"). The CRO Motion sought, among other things, to appoint Bradley Sharp as the Debtor's chief restructuring officer and for DSI to provide financial advisory services to the Debtor in support of Mr. Sharp.

7. On December 27, 2019, the Debtor filed the *Motion of the Debtor for Approval of Settlement with the Official Committee of Unsecured Creditors Regarding Governance of the Debtor and Procedures for Operations in the Ordinary Course* [Docket No. 281] (the "Settlement Motion"). The Settlement Motion sought approval of the settlement between the Debtor and the Committee and provided for, among other things, the creation of a new independent board of directors of Strand Advisors, Inc.² (the "New Board") consisting of

¹ All docket numbers refer to the docket maintained by this Court.

² Strand Advisors, Inc. ("Strand") is the general partner of the Debtor.

James P. Seery, Jr., John S. Dubel, and Russell Nelms (collectively, the “Independent Directors”).

8. The order granting the Settlement Motion authorized the Debtor to guarantee Strand’s obligations to indemnify each Independent Director pursuant to the terms of any indemnification agreements entered into by Strand with each of the Independent Directors (the “Indemnification Agreements”).

9. The Court entered orders approving the Settlement Motion on January 9, 2020³ and the DSI Approval Order on January 10, 2020.

10. The Settlement Order approved, among other things, a term sheet setting forth the agreement between the Debtor and the Committee. The final term sheet was attached to the *Notice of Final Term Sheet* filed in the Court on January 14, 2020 [Docket No. 354] (the “Final Term Sheet”). The Settlement Order also provided that no entity could commence or pursue a claim or cause of action against any Independent Director and/or his respective advisors and agents relating in any way to his role as an independent director of Strand unless authorized by this Court pursuant to the criteria set forth in the Settlement Order.⁴

11. The Settlement Motion and Final Term each provided that “[a]s soon as practicable after their appointments, the Independent Directors shall, in consultation with the

³ See *Order Approving Settlement with Official Committee of Unsecured Creditors Regarding Governance of the Debtor and the Procedures for Operations in the Ordinary Course* [Docket No. 339] (the “Settlement Order”).

⁴ Specifically, paragraph 10 of the Settlement Order provides:

No entity may commence or pursue a claim or cause of action of any kind against any Independent Director, any Independent Director’s agents, or any Independent Director’s advisors relating in any way to the Independent Director’s role as an independent director of Strand without the Court (i) first determining after notice that such claim or cause of action represents a colorable claim of willful misconduct or gross negligence against Independent Director, any Independent Director’s agents, or any Independent Director’s advisors and (ii) specifically authorizing such entity to bring such claim. The Court will have sole jurisdiction to adjudicate any such claim for which approval of the Court to commence or pursue has been granted.

Committee, determine whether a CEO should be appointed for the Debtor. If the Independent Directors determine that appointment of a CEO is appropriate, the Independent Directors shall appoint a CEO acceptable to the Committee as soon as possible, which may be one of the Independent Directors.” Final Term Sheet, page 3; Settlement Motion, ¶ 13.

12. On February 18, 2020, the Court entered its *Order (I) Authorizing Bradley D. Sharp to Act as Foreign Representative Pursuant to 11 U.S.C. § 1505 and (II) Granting Related Relief* [Docket No. 461] (the “Foreign Representative Order”). The Foreign Representative Order authorized Mr. Sharp, as chief restructuring officer, to act as the Debtor’s foreign representative pursuant to section 1515 of the Bankruptcy Code (the “Foreign Representative”). The Foreign Representative specifically appointed Mr. Sharp to act as the Debtor’s foreign insolvency officeholder to seek appropriate relief in Bermuda pursuant to Bermudian common law (the “Bermuda Foreign Representative”) and the Cayman Islands pursuant to Section 241(1) of the Companies Law (2019 Revision) with respect to that British overseas territory (the “Cayman Foreign Representative”).

13. Since the appointment of the Independent Directors, it was apparent that it would be more efficient to have a traditional corporate management structure oversee the Debtor – i.e., a fully engaged chief executive officer supervised by the New Board – as contemplated by the Final Term Sheet. This need was driven by the complexity of the Debtor’s organization and business operations and the need for daily management and oversight of the Debtor’s personnel. The search for a chief executive officer, however, was delayed while the Independent Directors made initial efforts to learn the Debtor’s business and its day-to-day operations. It was further delayed with the onset of the COVID-19 global pandemic, which both had a serious impact on

the Debtor's operations and assets and limited the Independent Directors' ability to search for an appropriate chief executive officer.

14. During this time, however, Mr. Seery integrated himself into the daily operations of the Debtor and became essential in stabilizing the Debtor's assets and trading accounts during the economic distress caused by COVID-19. While Mr. Dubel and Mr. Nelms were each spending on average approximately 140 hours a month addressing the operational issues facing the Debtor and certain of its fund entities, Mr. Seery's workload was at least 180 hours a month.

15. As such, it was readily apparent to the Independent Directors who would be the best fit for the role: Mr. Seery. Mr. Seery had the appropriate skill set, extensive relevant background, and was already carrying the responsibility of the role. Mr. Seery had been functionally operating as the Debtor's de facto chief executive officer since at least early March and was already overseeing the Debtor's ordinary course operations, including managing the Debtor's personnel and the daily interactions with the Debtor's bankruptcy professionals

16. The Independent Directors subsequently appointed a compensation committee consisting of Messrs. Dubel and Nelms (the "Compensation Committee") to negotiate the terms and conditions of the Agreement on behalf of the Debtor. And, on June 23, 2020, the Compensation Committee approved the appointment of Mr. Seery to serve as both the Debtor's chief executive officer and chief restructuring officer concurrently with his role as one of the Independent Directors pursuant to the terms of the Agreement. Because Mr. Seery has been fulfilling the role since March 2020, the Compensation Committee determined that it was appropriate to make Mr. Seery's appointment as the Debtor's chief executive officer and chief

restructuring officer effective as of March 15, 2020.⁵ The Independent Directors also authorized the Debtor to file this Motion.

A. The Chief Executive Officer and Chief Restructuring Officer Positions

17. Mr. Seery has agreed to, among other things, provide daily leadership and direction to the Debtor's employees on business and restructuring matters relating to the Debtor's chapter 11 case. In that capacity, he will direct the Debtor's day-to-day ordinary course operations, oversee the Debtor's personnel, make management decisions with respect to the Debtor's trading operations, direct the Debtor's reorganization efforts, monetize the Debtor's assets, oversee the claims objection and resolution process, and lead the process toward the hopeful consensual confirmation of a plan in this chapter 11 case in the capacities as chief executive officer and chief restructuring officer positions. Mr. Seery would report directly to the New Board and would continue to serve as an Independent Director, as provided under the Settlement Order.

18. Mr. Seery has extensive management and restructuring experience. Mr. Seery recently served as a Senior Managing Director at Guggenheim Securities, LLC, where he was responsible for helping direct the development of a credit business. Prior to joining Guggenheim, Mr. Seery was the President and a senior investing partner of River Birch Capital, LLC, where he was responsible for originating, executing, and managing stressed and distressed credit investments. Mr. Seery is also a long-time attorney licensed to practice in New York who

⁵ The Committee has also agreed to Mr. Seery's appointment as chief executive officer and chief restructuring officer and to the amount of Mr. Seery's Base Compensation (as defined below). The Committee has not agreed, however, as to the amount and timing of the payment of the Restructuring Fee (defined below) and are continuing to discuss payment of the Restructuring Fee with the Compensation Committee.

has run corporate reorganization groups and numerous restructuring matters. He also served as a Commissioner of the American Bankruptcy Institute's Commission to Study the Reform of Chapter 11. Mr. Seery was also a Managing Director and the Global Head of Lehman Brothers' Fixed Income Loan business where he was responsible for managing the firm's investment grade and high yield loans business, including underwriting commitments, distribution, hedging, trading and sales (including CLO manager relationships), portfolio management and restructuring. From 2000 to 2004, Mr. Seery ran Lehman Brothers' restructuring and workout businesses with responsibility for the management of distressed corporate debt investments and was a key member of the small team that successfully sold Lehman Brothers to Barclays in 2008.

The Agreement

19. The Compensation Committee negotiated the Agreement with Mr. Seery at arm's length. The additional material economic terms of the Agreement are as follows:⁶

(a) Term: Commencing retroactively to March 15, 2020.

(b) Roles: Mr. Seery shall serve as the chief executive officer and chief restructuring officer of the Debtor and shall be responsible for the overall management of the business of the Debtor during its chapter 11 case, including: directing the Debtor's day-to-day ordinary course operations, overseeing the Debtor's personnel, making management decisions with respect to the Debtor's trading operations, directing the reorganization and restructuring of the Debtor, the monetization of the Debtor's assets, resolution of claims, the development and negotiation of a plan of reorganization or liquidation, and the implementation of such plan. Mr. Seery shall remain a full member of the New Board and shall be entitled to vote on matters other than on those in which he is conflicted. Mr. Seery shall devote as much time to the engagement as he determines is required to execute his responsibilities as chief executive officer and chief restructuring officer. Mr. Seery will have no specific on-site requirements in Dallas, Texas, but shall be

⁶ What follows is by way of summary only and is qualified in its entirety by reference to the Agreement, which controls. Capitalized terms not otherwise defined herein have the meanings ascribed to them in the Agreement.

on site as much as he determines is necessary to execute his responsibilities as chief executive officer and chief restructuring officer, consistent with applicable COVID-19 orders, protocols and advice.

(c) Compensation for Services: Mr. Seery's compensation under the Agreement shall consist of the following:

(1) Base Compensation: \$150,000 per month, which shall be due and payable at the start of each calendar month; plus

(2) Bonus Compensation; Restructuring Fee:

Subject to separate Bankruptcy Court approval, the Compensation Committee and Mr. Seery have reached agreement on the payment of a restructuring fee upon confirmation of either a Case Resolution Plan or a Monetization Vehicle Plan in each case as defined below (the "Restructuring Fee").⁷ The Committee has not yet agreed to the amount, composition, and timing of the Restructuring Fee. The Compensation Committee and Mr. Seery have agreed to defer Court consideration of the Restructuring Fee until further development in the Case. The Restructuring Fee agreed to by Mr. Seery and the Compensation Committee is as follows:

Case Resolution Restructuring Plan

On confirmation of any plan or reorganization or liquidation based on resolution of a material amount of the outstanding claims and their respective treatment, even if such plan includes (x) a debtor/creditor trust or similar monetization and claims resolution vehicle, (y) post-confirmation litigation of certain of the claims, and (z) post-confirmation monetization of debtor assets (a "Case Resolution Plan"):

\$1,000,000 on confirmation of the Case Resolution Plan;

\$500,000 on the effective date of the Case Resolution Plan; and

⁷ Although the Compensation Committee and Mr. Seery have agreed on the amount and timing of the Restructuring Fee, both the Compensation Committee and Mr. Seery understand that the Restructuring Fee is payable only upon order of this Court. The Compensation Committee is reserving the right to seek approval of the Restructuring Fee from this Court in connection with the confirmation hearing on a plan or as otherwise appropriate.

\$750,000 on completion of cash or property distributions to creditors as contemplated by the Case Resolution Plan.

Debtor/Creditor Monetization Vehicle Restructuring Fee:

On confirmation of any plan or reorganization or liquidation based on a debtor/creditor trust or similar asset monetization and claims resolution vehicle that does not include agreement among the debtor and creditors on a material amount of the outstanding claims and their respective treatment at confirmation (a “Monetization Vehicle Plan”):

\$500,000 on confirmation of the Monetization Vehicle Plan;

\$250,000 on the effective date of the Monetization Vehicle Plan; and

A contingent restructuring fee to be determined by the board or oversight committee installed to oversee the implementation of any Monetization Vehicle Plan based on the CEO/CRO (or acting as trustee) based upon performance under the plan after all material distributions under the Monetization Vehicle Plan are made.

(e) Participation in Employee Benefit Plans: Mr. Seery shall act as an independent professional contractor and shall not be an employee of the Debtor. Mr. Seery will pay for his own benefits and will not participate under the Debtor’s existing employee benefit plans.

(f) Expenses: Reimbursement of actual and reasonable out-of-pocket expenses in connection with the services provided under the Agreement. Expenses will be generally consistent with expenses incurred to date as a member of the New Board.

(g) Conflicts and Other Engagements. Mr. Seery is not aware of any potential conflicts of interest based on his understanding of the various parties involved in the Debtor’s chapter 11 case to date. Mr. Seery shall not be precluded from representing or working with or for any other person or entity in matters not directly related to the services being provided to the Debtor under the Agreement. Mr. Seery shall not undertake any engagements directly adverse to the Debtor during the term of his engagement.

(h) Termination. The Agreement may be terminated at any time by either the Debtor or by Mr. Seery upon two weeks advance written notice given to the other party. The termination of the Agreement shall not affect Mr. Seery's right to receive, and the Debtor's obligation to pay, any and all Base Compensation and Expenses incurred (even if not billed) prior to the giving of any termination notice; *provided however*, that (1) if the Agreement is terminated by Mr. Seery, the amount of Base Compensation owed shall be calculated based on the actual number of days worked during the applicable month and Mr. Seery will return any Base Compensation received in excess of such amount, and (2) if the Agreement is terminated by the Debtor, Base Compensation shall be deemed fully earned as of the first day of any month. Bonus Compensation shall be earned by Mr. Seery immediately upon his termination by the Debtor; *provided however*, Mr. Seery shall not be entitled to Bonus Compensation if: (A) the Debtor's chapter 11 case is converted to chapter 7 or dismissed; (B) a chapter 11 trustee is appointed in the Debtor's chapter 11 case; (C) Mr. Seery is terminated by the Debtor for Cause;⁸ or (D) Mr. Seery resigns prior to confirmation of a plan or court approval of a sale as described in the Fees and Expense/Compensation for Services section of the Agreement.

(j) Conditional Requirement to Seek Further Court Approval of Agreement. The Committee may, upon two weeks advance written notice to the Debtor, require the Debtor to file a motion with the Bankruptcy Court on normal notice seeking a continuation of the Agreement and if such motion is not filed, the Agreement will terminate at the expiration of such two week period. If the Debtor files such motion, Mr. Seery will be entitled to the Base Compensation through and including the date on which a final order is entered on such motion by this Court. Notwithstanding anything herein to the contrary, the Committee may not deliver such notice to the Debtor until a date which is more than ninety days following the date this Court enters an order approving the Agreement.

(j) Indemnification. the Debtor agrees (i) to indemnify and hold harmless Mr. Seery and any of his affiliates (the "Indemnified Party"), to the fullest extent lawful, from and against any and all

⁸ For purposes of the Agreement, "Cause" means any of the following grounds for termination of Mr. Seery's engagement, in each case as reasonably determined by the New Board within 60 days of the New Board becoming aware of the existence of the event or circumstance: (A) fraud, embezzlement, or any act of moral turpitude or willful misconduct on the part of Mr. Seery; (B) conviction of or the entry of a plea of *nolo contendere* by Mr. Seery for any felony; (C) the willful breach by Mr. Seery of any material term of the Agreement; or (D) the willful failure or refusal by Mr. Seery to perform his duties to the Debtor, which, if capable of being cured, is not cured on or before fifteen (15) days after Mr. Seery's receipt of written notice from the Debtor.

Mr. Seery is also entitled to any indemnification or other similar provisions under the Debtor's existing or future insurance policies, including any policy tails obtained (or which may be obtained in the future), by the Debtor.

20. By this Motion, the Debtor seeks the entry of the Proposed Order authorizing the Debtor to retain Mr. Seery pursuant to the terms of the Agreement, *nunc pro tunc* to March 15, 2020. The Motion also seeks to amend the Foreign Representative Order to appoint Mr. Seery as the Debtor's Foreign Representative, Bermuda Foreign Representative and Cayman Foreign Representative in the stead of Mr. Sharp.

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consequently, is permissible under Bankruptcy Code section 363(c) without Court approval. However, out of an abundance of caution, the Debtor seeks this Court's approval of the Agreement under Bankruptcy Code section 363(b).

Basis For Relief

B. The Debtor's Entry Into the Agreement is a Valid Exercise of the Debtor's Business Judgment and the Proposed Compensation is Appropriate Under the Circumstances and Within the Range of Similar Market Transactions

22. The Compensation Committee's decision for the Debtor to retain Mr. Seery pursuant to the terms of the Agreement should be approved pursuant to sections 363(b) and 105(a) of the Bankruptcy Code. Section 363(b)(1) of the Bankruptcy Code provides, in relevant part: "[t]he trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate." 11 U.S.C. § 363(b)(1). In addition, section 105(a) of the Bankruptcy Code provides that the Court "may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code]." 11 U.S.C. § 105(a).

23. The proposed use, sale, or lease of property of the estate may be approved under Bankruptcy Code section 363(b) if it is supported by sound business justification. *See In re Montgomery Ward*, 242 B.R. 147, 153 (D. Del. 1999) ("In determining whether to authorize the use, sale or lease of property of the estate under this section, courts require the debtor to show that a sound business purpose justifies such actions"). Although established in the context of a proposed sale, the "business judgment" standard has been applied in non-sale situations. *See, e.g., Inst. Creditors of Cont'l Air Lines v. Cont'l Air Lines (In re Cont'l Air Lines)*, 780 F.2d 1223, 1226 (5th Cir. 1986) (applying the "business judgment" standard in context of proposed

“use” of estate property). Moreover, pursuant to section 105, this Court has expansive equitable powers to fashion any order or decree which is in the interest of preserving or protecting the value of a debtor’s assets. 11 U.S.C. § 105(a).

24. It is well established that courts are unwilling to interfere with corporate decisions absent a showing of bad faith, self-interest, or gross negligence, and will uphold a board’s decisions as long as they are attributable to “any rational business purpose.” *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 954 (Del. 1985) (citing *Sinclair Oil Corp. v. Levien*, 280 A.2d 717, 720 (Del. 1971)). Whether or not there are sufficient business reasons to justify the use of assets of the estate depends upon the facts and circumstances of each case. *See Comm. of Equity Sec. Holders v. Lionel Corp. (In re Lionel Corp.)*, 722 F.2d 1063, 1071 (2d Cir. 1983). In this case, the Debtor has ample justification to retain Mr. Seery as the Debtor’s chief executive officer and chief restructuring officer pursuant to the Agreement. The Final Term Sheet expressly contemplated that the New Board could appoint a chief executive officer and that the chief executive officer could also be one of the Independent Directors. Because Mr. Seery will also be serving as chief restructuring officer, it is not necessary to have two separate ranking chief restructuring officers, especially considering that Mr. Sharp (the current chief restructuring officer) and his firm has agreed to continue to provide financial advisory services on behalf of the Debtor.⁹ Mr. Seery is well- qualified to serve as the Debtor’s chief executive officer and chief restructuring officer.

⁹ See Amended Motion of the Debtor Pursuant to 11 U.S.C. §§ 105(a) and 363(b) to Employ and Retain Development Specialists, Inc. to Provide Financial Advisory and Restructuring-Related Services, Nunc Pro Tunc, to March 15, 2020 filed concurrently herewith

25. The Compensation Committee negotiated the Agreement in good faith and at arm's length. The Compensation Committee also worked with the Debtor's compensation consultant, Mercer (US) Inc., to determine the appropriate compensation for Mr. Seery as chief executive officer and chief restructuring officer. The Compensation Committee, therefore, believes that the terms of the Agreement are reasonable, are consistent with the market within the Debtor's industry, and are entirely appropriate given the scope of Mr. Seery's duties. Accordingly, entry into the Agreement is a sound exercise of the Debtor's business judgment.

26. Finally, the Debtor requests that the Court apply the same criteria by which parties in interest must first petition the Court prior to asserting claims against the Independent Director approved in the Settlement Order be extended to Mr. Seery in his capacity as chief executive officer and chief restructuring officer contemplated by this Motion. *See* Settlement Order, ¶ 10. The rationale for the Court to first determine whether or not a colorable claim or cause of action can be maintained against the Mr. Seery, as one of the Independent Directors, is equally applicable to Mr. Seery in his capacity as chief executive officer and chief restructuring officer, will further aid in the implementation of the Settlement Order, and discourage frivolous litigation. As was true in the Settlement Order with respect to the Independent Directors, no parties will be prejudiced by having to first apply to this Court to determine the propriety of any hypothetical claim that may be asserted against Mr. Seery in his officer capacities of the Debtor.

C. The Debtor Has Satisfied Bankruptcy Code Section 503(c)(3)

27. Bankruptcy Code section 503(c)(3) provides that "transfers or obligations that are outside the ordinary course of business . . . including transfers made to . . . consultants

hired after the date of the filing of the petition” are not allowed if they are “not justified by the facts and circumstances of the case.” 11 U.S.C. § 503(c)(3). Courts generally use a form of the “business judgment” and the “facts and circumstances” standard. *See In re Pilgrim’s Pride Corp.*, 401 B.R. 229, 236-37 (Bankr. N.D. Tex. 2009) (citing *In re Dura Auto Sys., Inc.*, Case No. 06-11202 (Bankr. D. Del. June 29, 2007) and *In re Supplements LT, Inc.*, Case No. 08-10446 (KJC) (Bankr. D. Del. Apr. 14, 2008)). Specifically, the court examines first, whether the transaction meets the Debtor’s business judgment standard, and second, whether the facts and circumstances justify the transaction. *See In re Pilgrim’s Pride Corp.*, 401 B.R. at 237 (Bankr. N.D. Tex. 2009).

28. The Debtor submits that the proposed transaction is within the ordinary course of its business and thus that Bankruptcy Code section 503(c)(3) does not apply to the Agreement. Nevertheless, for the reasons stated above — the benefits from Mr. Seery’s leadership skills and industry experience — even if this were outside the ordinary course of business, entry into the Agreement is well within the Debtor’s business judgment as applied to the facts and circumstances of the Debtor. Further, the facts and circumstances of this case support entry into the relationship under the Agreement where the Debtor will benefit from the ability to retain Mr. Seery at a critical juncture to ongoing restructuring efforts.

29. For the reasons set forth above, the Debtor submits that the relief requested herein is in the best interest of the Debtor, its estate, creditors, stakeholders, and other parties in interest, and therefore, should be granted.

D. The Proposed Chief Executive Officer and Chief Restructuring Officer Should Also Serve as the Debtor's Foreign Representative

30. Bankruptcy Code section 1505 provides that:

A trustee or another entity (including an examiner) may be authorized by the court to act in a foreign country on behalf of an estate created under section 541. An entity authorized to act under this section may act in any way permitted by the applicable foreign law.

11 U.S.C. § 1505.

31. The Debtor respectfully submits that Mr. Seery is qualified and capable of representing the Debtor's estate as the Foreign Representative. The Debtor believes it is appropriate for Mr. Seery, as an officer of the Debtor, to replace Mr. Sharp as Foreign Representative inasmuch as Mr. Sharp will no longer be an officer of the Debtor if the Motion is granted. In order to avoid any possible confusion or doubt regarding this authority and to comply with the requirements of Part XVII of the Cayman Law, the Debtor seeks entry of an order, pursuant to section 1505 of the Bankruptcy Code, explicitly substituting Mr. Seery in the place of Mr. Sharp as the Debtor's Foreign Representative, including specifically to serve as the Bermuda Foreign Representative and Cayman Foreign Representative.

32. For the reasons set forth in the Foreign Representative Motion, authorizing Mr. Seery to act as the Foreign Representative on behalf of the Debtor's estate in Bermuda, the Cayman Islands or any other foreign proceeding will allow coordination of this chapter 11 case and each of the foreign proceedings and provide an effective mechanism to protect and maximize the value of the Debtor's assets and estate. Courts have routinely granted relief similar to that requested herein in other large chapter 11 cases where a debtor has foreign assets or operations requiring a recognition proceeding. *See, e.g., In re CJ Holding Co.*, No. 16-33590 (Bankr. S.D.

Tex. July 21, 2016); ECF No. 59; *In re CHC Group Ltd.*, No. 16-31854 (Bankr. N.D. Tex. Sept. 20, 2016), ECF No. 884; *In re Ultra Petroleum Corp.*, No. 16-32202 (Bankr. S.D. Tex. May 3, 2016); *In re Digital Domain Media Grp., Inc.*, No. 12-12568 (BLS) (Bankr. D. Del. Sept. 12, 2012); ECF No. 82; *In re Probe Resources US Ltd.*, No. 10-40395 (Bankr. S.D. Tex. Mar. 21, 2011); ECF N. 320; *In re Bigler LP*, No. 09-38188 (Bankr. S.D. Tex. Jan. 12, 2010), ECF No. 159; *In re Horsehead Holdings Corp.*, No. 16-10287 (CSS) (Bankr. D. Del. Feb. 4, 2016); *In re Colt Holding Co. LLC*, No. 15-11296 (LSS) (Bankr. D. Del. June 16, 2015). The Debtor believes it is appropriate for one of its officers to serve as the Foreign Representative. In several jurisdictions, an officer or someone acting in a similar capacity is a prerequisite to serve as a Foreign Representative.¹⁰ As more fully explained in the Foreign Representative Motion, the Debtor has assets in jurisdictions other than the United States, including in Bermuda and the Cayman Islands. To the extent any disputes with respect to such assets arise, it is critical that the Foreign Representative be permitted to appear on behalf of the Debtor and its estate in any court in which a foreign proceeding may be pending.

Notice

33. Notice of this Motion shall be given to the following parties or, in lieu thereof, to their counsel, if known: (a) the Office of the United States Trustee; (b) the Office of the United States Attorney for the Northern District of Texas; (c) the Debtor's principal secured

¹⁰ See e.g. Part XVII, Section 240 of the Companies Law (2018 Revision) of the Cayman Islands requiring that the foreign representative be "a trustee, liquidator or other official in respect of a debtor for the purposes of a foreign bankruptcy proceeding." In addition, and as more fully explained in the Foreign Representative Motion, Bermuda common law and conflict of laws principles will recognize the authority of a foreign insolvency officer appointed in proceedings in the jurisdiction of incorporation of a company (or, in the instant case, the jurisdiction of the establishment of a limited partnership) to act on behalf of and in the name of the company (or partnership) in Bermuda.

parties; (d)counsel to the Committee; and (e)parties requesting notice pursuant to Bankruptcy Rule 2002. The Debtor submits that, in light of the nature of the relief requested, no other or further notice need be given.

Conclusion

WHEREFORE, the Debtor respectfully requests that the Court enter an order, substantially in the form annexed hereto as **Exhibit A**, granting the relief requested in the Motion and such other and further relief as may be just and proper.

Dated: June 23, 2020

PACHULSKI STANG ZIEHL & JONES LLP
Jeffrey N. Pomerantz (CA Bar No.143717)
(admitted pro hac vice)
Ira D. Kharasch (CA Bar No. 109084)
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-and-

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Counsel for the Debtor and Debtor-in-Possession

EXHIBIT A

Proposed Order

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

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

ORDER APPROVING DEBTOR’S MOTION UNDER
BANKRUPTCY CODE SECTIONS 105(a) AND 363(b)
AUTHORIZING RETENTION OF JAMES P. SEERY, JR., AS
CHIEF EXECUTIVE OFFICER, CHIEF RESTRUCTURING OFFICER, AND
FOREIGN REPRESENTATIVE NUNC PRO TUNC TO MARCH 15, 2020

Upon the *Debtor’s Motion Under Bankruptcy Code Sections 105(a) and 363(b)*
for Authorization to Retain James P. Seery, Jr., as Chief Executive Officer, Chief Restructuring
Officer and Foreign Representative Nunc Pro Tunc To March 15, 2020 (the “Motion”),¹ and the
Court finding that: (i) this Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157

¹ All terms not otherwise defined herein shall be given the meanings ascribed to them in the Motion.

and 1334; (ii) venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409; (iii) this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2); (iv) due and sufficient notice of the Motion has been given; (v) entry into the Agreement was an exercise of the Debtor's sound business judgment; and (vi) it appearing that the relief requested in the Motion is necessary and in the best interests of the Debtor's estate and creditors; and good and sufficient cause appearing therefor, it is hereby

ORDERED, ADJUDGED, AND DECREED that:

1. The Motion is granted.
2. Pursuant to sections 363(b) and 105(a) of the Bankruptcy Code, the Agreement attached hereto as Exhibit 1 and all terms and conditions thereof are approved, *nunc pro tunc* to March 15, 2020.
3. The Debtor is hereby authorized to enter into and perform under the Agreement.
4. The Debtor is authorized to indemnify Mr. Seery pursuant to the terms of the Agreement. Mr. Seery is also entitled to any indemnification or other similar provisions under the Debtor's existing or future insurance policies, including any policy tails obtained (or which may be obtained in the future), by the Debtor. The Debtor and Strand are authorized to enter into any agreements necessary to execute or implement the transactions described in this paragraph. For avoidance of doubt and notwithstanding anything to the contrary in this Order, Mr. Seery shall be entitled to any state law indemnity protections to which he may be entitled under applicable law.

5. No entity may commence or pursue a claim or cause of action of any kind against Mr. Seery relating in any way to his role as the chief executive officer and chief restructuring officer of the Debtor without the Bankruptcy Court (i) first determining after notice that such claim or cause of action represents a colorable claim of willful misconduct or gross negligence against Mr. Seery, and (ii) specifically authorizing such entity to bring such claim. The Bankruptcy Court shall have sole jurisdiction to adjudicate any such claim for which approval of the Court to commence or pursue has been granted.

6. Notwithstanding Bankruptcy Rule 6004(h), the terms and conditions of this Order shall be immediately effective and enforceable upon its entry.

7. This Court shall retain jurisdiction over any and all matters arising from or related to the interpretation and/or implementation of this Order.

8. The Foreign Representative Order is hereby amended to substitute James P. Seery, Jr., as the chief executive officer, in place of Bradley S. Sharp, as the Debtor's Foreign Representative, Bermuda Foreign Representative and Cayman Foreign Representative. All other provisions of the Foreign Representative Order shall remain in full force and effect.

END OF ORDER

EXHIBIT A-1

Engagement Agreement

795 Columbus Ave., 12A
New York, New York 10025
631-804-2049
jpseeryjr@gmail.com

June 23, 2020

CONFIDENTIAL

The Board of Directors of Strand Advisors, Inc.
c/o Highland Capital Management, L.P.
300 Crescent Court, Suite 700
Dallas, Texas 75201

Re: Highland Capital Management L.P. (the “Company”)

Dear Fellow Board Members:

This letter agreement (“Agreement”) sets forth the terms and conditions of the engagement of the undersigned James P. Seery, Jr. (“I”, “me” or “my”), as Chief Executive Officer (“CEO”) and Chief Restructuring Officer (“CRO”), effective as of March 15, 2020 (the “Commencement Date”), by the Company and its affiliates to perform financial advisory services as detailed below.

I appreciate the trust you have placed in me by asking me to assume these roles and thank you for the opportunity to continue to work with you to restructure the Company.

Roles:

I will serve as the CEO and CRO of the Company during its Chapter 11 bankruptcy case (the “Bankruptcy Case”) currently pending in the United States Bankruptcy Court for the Northern District of Texas (the “Bankruptcy Court”).

In those roles, I will be responsible for overall management of the business of the Company in Chapter 11 including, directing the reorganization and restructuring of the Company, monetization of assets, resolution of claims, development and negotiation of a plan of reorganization or liquidation, and implementation of such a plan.

My direct reports will include the individuals at the Company that currently report to the Board of Directors of Strand Advisors, Inc. (the “Board”) or such other individuals employed by the Company as I determine should report to directly to me. In the event that the Board determines to restructure the reporting lines or functions of the Company, my direct reports will be amended in accordance with the Board approved restructuring.

At all times, I will remain a full member of the Board entitled to vote on all matters other than those on which I am conflicted.

I will devote as much time to this engagement as I determine is required to execute my responsibilities as CEO and CRO. I will have no specific on-site requirements in Dallas, but will be on site as much as I determine is necessary to execute my responsibilities as CEO and CRO, consistent with Covid-19 orders applicable to Dallas and New York City.

Limitations on Services

My services under this engagement are limited to those specifically noted in this Agreement and do not include legal, accounting, or tax-related assistance or advisory services. For the avoidance of doubt, I am not providing any legal services in connection with this engagement and will have not any duties as a lawyer to the Company, the Board, or any of the Company's employees. The accuracy and completeness of all information submitted to me by the Company are the sole responsibility of the Company, and I will be entitled to rely on such information without independent investigation or verification.

In my role as CEO and CRO, I will act as an independent professional contractor to the Company and will not be an employee of the Company. I will provide and pay for my own benefits, including medical benefits, by J.P Seery & Co. LLC or otherwise.

Fees and Expenses:

In consideration of my acceptance of this engagement and performance of the services pursuant to this Agreement, the Company shall pay the following:

1. Compensation for Services:

- a. Base Compensation: As compensation for my services as CEO and CRO of the Company, the Company shall pay me \$150,000.00 per calendar month ("Base Compensation"). Base Compensation shall be due and payable at the start of each calendar month. Consistent with current Board compensation practice, invoices rendered by me to the Company are due and payable by the Company on receipt. Payment of the Base Compensation will be retroactive to March 15, 2020.
- b. Bonus Compensation/Restructuring Fee:
 - i. The Company has agreed to pay me a restructuring fee upon confirmation of either a Case Resolution Plan or a Monetization Vehicle Plan in each case as defined below (the "Restructuring Fee").
 - ii. Case Resolution Restructuring Plan
 1. On confirmation of any plan or reorganization or liquidation based on resolution of a material amount of the outstanding claims and their respective treatment, even if such plan includes (x) a debtor/creditor trust or similar monetization and claims resolution vehicle, (y) post-confirmation litigation of certain of the claims, and (z) post-confirmation monetization of debtor assets (a "Case Resolution Plan"):
 - a. \$1,000,000 on confirmation of the Case Resolution Plan;
 - b. \$500,000 on the effective date of the Case Resolution Plan; and
 - c. \$750,000 on completion of cash or property distributions to creditors as contemplated by the Case Resolution Plan.

iii. Debtor/Creditor Monetization Vehicle Restructuring Fee:

1. On confirmation of any plan or reorganization or liquidation based on a debtor/creditor trust or similar asset monetization and claims resolution vehicle that does not include agreement among the debtor and creditors on a material amount of the outstanding claims and their respective treatment at confirmation (a “Monetization Vehicle Plan”):
 - a. \$500,000 on confirmation of the Monetization Vehicle Plan;
 - b. \$250,000 on the effective date of the Monetization Vehicle Plan; and
 - c. A contingent restructuring fee to be determined by the board or oversight committee installed to oversee the implementation of any Monetization Vehicle Plan based on the CEO/CRO (or acting as trustee) based upon performance under the plan after all material distributions under the Monetization Vehicle Plan are made.
2. Out-of-Pocket Expenses: In addition to the Base and Bonus Compensation, I shall be entitled to reimbursement for actual and reasonable out-of-pocket expenses (“Expenses”) incurred in connection with the provision of services hereunder. Expenses will be billed along with Base Compensation and shall be paid by the Company at the same time. Expenses will be generally consistent with expenses incurred to date as a member of the Board.

Bankruptcy Court Approval

Notwithstanding anything herein to the contrary, I understand that this Agreement is contingent, in all respects, on the approval of the Bankruptcy Court. I also understand that the Company will seek approval of this Agreement in stages and that the Company will first seek approval of my retention as CEO and CRO and the payment of the Base Compensation and will defer seeking Bankruptcy Court approval of the Restructuring Fee until there have been further developments in the Bankruptcy Case.

Conflicts and Other Engagements

I am not aware of any potential conflicts of interest based on my understanding of the various parties involved in this matter to date.

The Company is aware that this engagement is not an exclusive engagement of my time, and that I have and will continue to have other business engagements and investments unrelated to the Company. Nothing in this Agreement or otherwise precludes me from representing or working with or for any other person or entity in matters not directly related to the services being provided to the Company under this Agreement. However, I will not take on any engagements directly adverse to the Company during the term of this engagement.

Privilege

I understand that in the course of this engagement, I may become party to or my services may become part of work product of legal counsel to the Company (the Company's in-house and outside counsel are collectively referred to as "Counsel"), and all communications between Counsel and me relating to this engagement shall be protected from disclosure to third parties under the attorney work product doctrine and/or the attorney-client privilege, and, therefore, shall be treated by me as privileged and confidential. I further understand that the Company has the exclusive right to waive the attorney-client privilege, and Counsel has the exclusive right to waive the protections afforded under the attorney work-product doctrine.

Termination of Engagement

This Agreement may be terminated at any time by either the Company or by me upon two weeks advance written notice given to the other party. The termination of this Agreement shall not affect my right to receive, and the Company's obligation to pay, any and all Base Compensation and Expenses incurred (even if not billed) prior to the giving of the termination notice; provided, however, that (i) if this Agreement is terminated by me, the amount of Base Compensation owed shall be calculated based on the actual number of days worked during the applicable month and I will return any Base Compensation received in excess of such amount and (ii) if this Agreement is terminated by the Company, Base Compensation shall be deemed fully earned as of the first day of any month. Bonus Compensation shall be earned by me immediately upon termination of me by the Company; provided, however, I shall not be entitled to Bonus Compensation if (a) the Bankruptcy Case is converted to chapter 7 or dismissed; (b) a chapter 11 trustee is appointed in the Bankruptcy Case; (c) I am terminated by the Company for Cause; or (d) I resign prior to confirmation of a plan or court approval of a sale as described in the Fees and Expense/Compensation for Services section hereof. For purposes of this Agreement, "Cause" means any of the following grounds for termination of my engagement, in each case as reasonably determined by the Board within 60 days of the Board becoming aware of the existence of the event or circumstance: (A) fraud, embezzlement, or any act of moral turpitude or willful misconduct on my part; (B) conviction of or the entry of a plea of nolo contendere by me for any felony; (C) the willful breach by me of any material term of this Agreement; or (D) the willful failure or refusal by me to perform my duties to the Company, which, if capable of being cured, is not cured on or before fifteen (15) days after my receipt of written notice from the Company.

Conditional Requirement to Seek Further Bankruptcy Court Approval of Agreement

The official committee of unsecured creditors in the Bankruptcy Case (the "Committee") may, upon two weeks advance written notice to the Company, require the Company to file a motion with the Bankruptcy Court on normal notice seeking a continuation of this Agreement and if such motion is not filed, this Agreement will terminate at the expiration of such two week period. If the Company files such motion, I will be entitled to my Base Compensation through and including the date on which a final order is entered on such motion by the Bankruptcy Court. Notwithstanding anything herein to the contrary, the Committee may not deliver such notice to the Company until a date which is more than ninety days following the date the Bankruptcy Court enters an order approving this Agreement.

Indemnification

As a material part of the consideration to me under this Agreement, the Company agrees (i) to indemnify and hold harmless me and any of my affiliates (the “Indemnified Party”), to the fullest extent lawful, from and against any and all losses, claims, costs, damages or liabilities (or actions in respect thereof), joint or several, arising out of or related to this Agreement, my engagement under this Agreement, or any actions taken or omitted to be taken by me or the Company in connection with this Agreement and (ii) to reimburse the Indemnified Party for all expenses (including, without limitation, the reasonable fees and expenses of counsel) as they are incurred in connection with investigating, preparing, pursuing, defending, settling or compromising any action, suit, dispute, inquiry, investigation or proceeding, pending or threatened, brought by or against any person (including, without limitation, any shareholder or derivative action, or any fee dispute), arising out of or relating to this Agreement, or such engagement, or actions. However, the Company shall not be liable under the foregoing indemnity and reimbursement agreement for any loss, claim, damage or liability which is finally judicially determined by a court of competent jurisdiction to have resulted primarily from the willful misconduct or gross negligence of the Indemnified Party.

The indemnification and insurance currently covering my role as a director shall be extended to me and fully cover me as provided therein in my roles as CEO and CRO.

Miscellaneous

This Agreement (a) constitutes the entire agreement of the parties with respect to the subject matter hereof and supersedes any other communications, understandings or agreements among the parties with respect to the subject matter hereof, and (b) may be modified, amended or supplemented only by written agreement among all the parties hereto.

This Agreement is subject to approval by the Bankruptcy Court. As part of such approval the Company shall request that any such order approving this Agreement contain a provision extending the protections afforded to me as a Board Member pursuant to Paragraph 10 of the Order Approving Settlement with Official Committee of Unsecured Creditors Regarding Governance of the Debtor and Procedures for Operations in the Ordinary Course entered by the Bankruptcy Court on January 9, 2020 [Docket No. 339] to my role as CEO and CRO, which Order prohibits the commencement of any action against me without first obtaining Bankruptcy Court approval to initiate such action.

This Agreement and all controversies arising from or related to performance hereunder shall be governed by and construed in accordance with the laws of the State of New York. The parties hereby submit to the jurisdiction of and venue in the federal and state courts located in New York City and waive any right to trial by jury in connection with any dispute related to this Agreement.

This Agreement shall be binding upon the parties and their respective successors and assigns, and no other person shall acquire or have any right under or by virtue of this Agreement.

Failure of any party at any time to require performance of any provision of this Agreement shall not affect the right to require full performance thereof at any time thereafter, and the waiver by any party of a breach of such provisions shall not be taken as or held to be a waiver of any subsequent breach or as nullifying the effectiveness of such provision.

Notices provided for in this Agreement shall be in writing and shall be deemed to have been duly given when delivered by hand or overnight courier or three days after it has been mailed by United States registered mail, return receipt requested, postage prepaid, addressed to the respective address set forth above in this Agreement, or to such other address as either party may have furnished to the other in writing in accordance herewith.

This Agreement and my rights and duties hereunder shall not be assignable or delegable by me.

The Company may withhold from any amounts payable under this Agreement such Federal, state and local taxes as may be required to be withheld pursuant to any applicable law or regulation.

This Agreement may be executed (including by electronic execution) in any number of counterparts, each of which when so executed shall be deemed an original, but all such counterparts shall constitute one and the same instrument. Delivery of an executed counterpart of this Agreement by electronic mail shall have the same force and effect as the delivery of an original executed counterpart of this Agreement.

Please confirm the foregoing is in accordance with your understanding by signing and returning a copy of this Agreement, whereupon it shall become binding and enforceable in accordance with its terms.

Very truly yours,



James. P. Seery, Jr.

AGREED AND ACCEPTED

HIGHLAND CAPITAL MANAGEMENT L.P.

By: Strand Advisors, Inc., its general partner

John Dubel
Director
Strand Advisors, Inc.

Russell Nelms
Director
Strand Advisors, Inc.

000209

This Agreement shall be binding upon the parties and their respective successors and assigns, and no other person shall acquire or have any right under or by virtue of this Agreement.

Failure of any party at any time to require performance of any provision of this Agreement shall not affect the right to require full performance thereof at any time thereafter, and the waiver by any party of a breach of such provisions shall not be taken as or held to be a waiver of any subsequent breach or as nullifying the effectiveness of such provision.

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Please confirm the foregoing is in accordance with your understanding by signing and returning a copy of this Agreement, whereupon it shall become binding and enforceable in accordance with its terms.


Very truly yours,

James. P. Seery, Jr.

AGREED AND ACCEPTED

HIGHLAND CAPITAL MANAGEMENT L.P.

By: Strand Advisors, Inc., its general partner



John Dubel
Director
Strand Advisors, Inc.

Russell Nelms
Director
Strand Advisors, Inc.

This Agreement shall be binding upon the parties and their respective successors and assigns, and no other person shall acquire or have any right under or by virtue of this Agreement.

Failure of any party at any time to require performance of any provision of this Agreement shall not affect the right to require full performance thereof at any time thereafter, and the waiver by any party of a breach of such provisions shall not be taken as or held to be a waiver of any subsequent breach or as nullifying the effectiveness of such provision.

Notices provided for in this Agreement shall be in writing and shall be deemed to have been duly given when delivered by hand or overnight courier or three days after it has been mailed by United States registered mail, return receipt requested, postage prepaid, addressed to the respective address set forth above in this Agreement, or to such other address as either party may have furnished to the other in writing in accordance herewith.

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Please confirm the foregoing is in accordance with your understanding by signing and returning a copy of this Agreement, whereupon it shall become binding and enforceable in accordance with its terms.

Very truly yours,

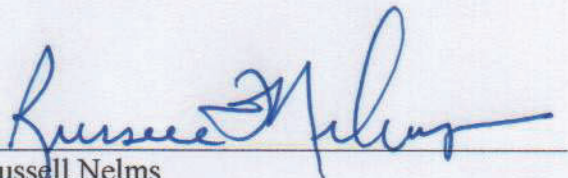
James. P. Seery, Jr.

AGREED AND ACCEPTED

HIGHLAND CAPITAL MANAGEMENT L.P.

By: Strand Advisors, Inc., its general partner

John Dubel
Director
Strand Advisors, Inc.



Russell Nelms
Director
Strand Advisors, Inc.

EXHIBIT 3



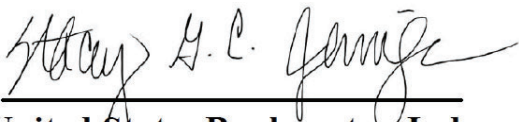
CLERK, U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS

ENTERED

THE DATE OF ENTRY IS ON
THE COURT'S DOCKET

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

Signed July 16, 2020


United States Bankruptcy Judge

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

In re:

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

Debtor.

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§

Case No. 19-34054

Chapter 11

Re: Docket No. 774

**ORDER APPROVING DEBTOR'S MOTION UNDER
BANKRUPTCY CODE SECTIONS 105(a) AND 363(b)
AUTHORIZING RETENTION OF JAMES P. SEERY, JR., AS
CHIEF EXECUTIVE OFFICER, CHIEF RESTRUCTURING OFFICER, AND
FOREIGN REPRESENTATIVE NUNC PRO TUNC TO MARCH 15, 2020**

Upon the *Debtor's Motion under Bankruptcy Code Sections 105(a) and 363(b) for Authorization to Retain James P. Seery, Jr., as Chief Executive Officer, Chief Restructuring Officer and Foreign Representative Nunc Pro Tunc To March 15, 2020* (the "Motion"),¹ and the

¹ All terms not otherwise defined herein shall be given the meanings ascribed to them in the Motion.



Court finding that: (i) this Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334; (ii) venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409; (iii) this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2); (iv) due and sufficient notice of the Motion has been given; (v) entry into the Agreement was an exercise of the Debtor's sound business judgment; and (vi) it appearing that the relief requested in the Motion is necessary and in the best interests of the Debtor's estate and creditors; and good and sufficient cause appearing therefor, it is hereby

ORDERED, ADJUDGED, and DECREED that:

1. The Motion is **GRANTED**.
2. Pursuant to sections 363(b) and 105(a) of the Bankruptcy Code, the Agreement attached hereto as **Exhibit 1** and all terms and conditions thereof are approved, *nunc pro tunc* to March 15, 2020.
3. The Debtor is hereby authorized to enter into and perform under the Agreement.
4. The Debtor is authorized to indemnify Mr. Seery pursuant to the terms of the Agreement. Mr. Seery is also entitled to any indemnification or other similar provisions under the Debtor's existing or future insurance policies, including any policy tails obtained (or which may be obtained in the future), by the Debtor. The Debtor and Strand are authorized to enter into any agreements necessary to execute or implement the transactions described in this paragraph. For avoidance of doubt and notwithstanding anything to the contrary in this Order, Mr. Seery shall be entitled to any state law indemnity protections to which he may be entitled under applicable law.

5. No entity may commence or pursue a claim or cause of action of any kind against Mr. Seery relating in any way to his role as the chief executive officer and chief restructuring officer of the Debtor without the Bankruptcy Court (i) first determining after notice that such claim or cause of action represents a colorable claim of willful misconduct or gross negligence against Mr. Seery, and (ii) specifically authorizing such entity to bring such claim. The Bankruptcy Court shall have sole jurisdiction to adjudicate any such claim for which approval of the Court to commence or pursue has been granted.

6. Notwithstanding anything in the Motion, the Agreement or the Order to the contrary, the Agreement shall be deemed terminated upon the effective date of a confirmed plan of reorganization unless such plan provides otherwise.

7. Notwithstanding Bankruptcy Rule 6004(h), the terms and conditions of this Order shall be immediately effective and enforceable upon its entry.

8. This Court shall retain jurisdiction over any and all matters arising from or related to the interpretation and/or implementation of this Order.

9. The Foreign Representative Order is hereby amended to substitute James P. Seery, Jr., as the chief executive officer, in place of Bradley S. Sharp, as the Debtor's Foreign Representative, Bermuda Foreign Representative and Cayman Foreign Representative. All other provisions of the Foreign Representative Order shall remain in full force and effect.

###END OF ORDER###

EXHIBIT 1

Engagement Agreement

June 23, 2020

CONFIDENTIAL

The Board of Directors of Strand Advisors, Inc.
c/o Highland Capital Management, L.P.
300 Crescent Court, Suite 700
Dallas, Texas 75201

Re: Highland Capital Management L.P. (the "Company")

Dear Fellow Board Members:

This letter agreement ("Agreement") sets forth the terms and conditions of the engagement of the undersigned James P. Seery, Jr. ("I", "me" or "my"), as Chief Executive Officer ("CEO") and Chief Restructuring Officer ("CRO"), effective as of March 15, 2020 (the "Commencement Date"), by the Company and its affiliates to perform financial advisory services as detailed below.

I appreciate the trust you have placed in me by asking me to assume these roles and thank you for the opportunity to continue to work with you to restructure the Company.

Roles:

I will serve as the CEO and CRO of the Company during its Chapter 11 bankruptcy case (the "Bankruptcy Case") currently pending in the United States Bankruptcy Court for the Northern District of Texas (the "Bankruptcy Court").

In those roles, I will be responsible for overall management of the business of the Company in Chapter 11 including, directing the reorganization and restructuring of the Company, monetization of assets, resolution of claims, development and negotiation of a plan of reorganization or liquidation, and implementation of such a plan.

My direct reports will include the individuals at the Company that currently report to the Board of Directors of Strand Advisors, Inc. (the "Board") or such other individuals employed by the Company as I determine should report to directly to me. In the event that the Board determines to restructure the reporting lines or functions of the Company, my direct reports will be amended in accordance with the Board approved restructuring.

At all times, I will remain a full member of the Board entitled to vote on all matters other than those on which I am conflicted.

000217

iii. Debtor/Creditor Monetization Vehicle Restructuring Fee:

1. On confirmation of any plan or reorganization or liquidation based on a debtor/creditor trust or similar asset monetization and claims resolution vehicle that does not include agreement among the debtor and creditors on a material amount of the outstanding claims and their respective treatment at confirmation (a “Monetization Vehicle Plan”):
 - a. \$500,000 on confirmation of the Monetization Vehicle Plan;
 - b. \$250,000 on the effective date of the Monetization Vehicle Plan; and
 - c. A contingent restructuring fee to be determined by the board or oversight committee installed to oversee the implementation of any Monetization Vehicle Plan based on the CEO/CRO (or acting as trustee) based upon performance under the plan after all material distributions under the Monetization Vehicle Plan are made.
2. Out-of-Pocket Expenses: In addition to the Base and Bonus Compensation, I shall be entitled to reimbursement for actual and reasonable out-of-pocket expenses (“Expenses”) incurred in connection with the provision of services hereunder. Expenses will be billed along with Base Compensation and shall be paid by the Company at the same time. Expenses will be generally consistent with expenses incurred to date as a member of the Board.

Bankruptcy Court Approval

Notwithstanding anything herein to the contrary, I understand that this Agreement is contingent, in all respects, on the approval of the Bankruptcy Court. I also understand that the Company will seek approval of this Agreement in stages and that the Company will first seek approval of my retention as CEO and CRO and the payment of the Base Compensation and will defer seeking Bankruptcy Court approval of the Restructuring Fee until there have been further developments in the Bankruptcy Case.

Conflicts and Other Engagements

I am not aware of any potential conflicts of interest based on my understanding of the various parties involved in this matter to date.

The Company is aware that this engagement is not an exclusive engagement of my time, and that I have and will continue to have other business engagements and investments unrelated to the Company. Nothing in this Agreement or otherwise precludes me from representing or working with or for any other person or entity in matters not directly related to the services being provided to the Company under this Agreement. However, I will not take on any engagements directly adverse to the Company during the term of this engagement.

Privilege

Indemnification

As a material part of the consideration to me under this Agreement, the Company agrees (i) to indemnify and hold harmless me and any of my affiliates (the “Indemnified Party”), to the fullest extent lawful, from and against any and all losses, claims, costs, damages or liabilities (or actions in respect thereof), joint or several, arising out of or related to this Agreement, my engagement under this Agreement, or any actions taken or omitted to be taken by me or the Company in connection with this Agreement and (ii) to reimburse the Indemnified Party for all expenses (including, without limitation, the reasonable fees and expenses of counsel) as they are incurred in connection with investigating, preparing, pursuing, defending, settling or compromising any action, suit, dispute, inquiry, investigation or proceeding, pending or threatened, brought by or against any person (including, without limitation, any shareholder or derivative action, or any fee dispute), arising out of or relating to this Agreement, or such engagement, or actions. However, the Company shall not be liable under the foregoing indemnity and reimbursement agreement for any loss, claim, damage or liability which is finally judicially determined by a court of competent jurisdiction to have resulted primarily from the willful misconduct or gross negligence of the Indemnified Party.

The indemnification and insurance currently covering my role as a director shall be extended to me and fully cover me as provided therein in my roles as CEO and CRO.

Miscellaneous

This Agreement (a) constitutes the entire agreement of the parties with respect to the subject matter hereof and supersedes any other communications, understandings or agreements among the parties with respect to the subject matter hereof, and (b) may be modified, amended or supplemented only by written agreement among all the parties hereto.

This Agreement is subject to approval by the Bankruptcy Court. As part of such approval the Company shall request that any such order approving this Agreement contain a provision extending the protections afforded to me as a Board Member pursuant to Paragraph 10 of the Order Approving Settlement with Official Committee of Unsecured Creditors Regarding Governance of the Debtor and Procedures for Operations in the Ordinary Course entered by the Bankruptcy Court on January 9, 2020 [Docket No. 339] to my role as CEO and CRO, which Order prohibits the commencement of any action against me without first obtaining Bankruptcy Court approval to initiate such action.

This Agreement and all controversies arising from or related to performance hereunder shall be governed by and construed in accordance with the laws of the State of New York. The parties hereby submit to the jurisdiction of and venue in the federal and state courts located in New York City and waive any right to trial by jury in connection with any dispute related to this Agreement.

This Agreement shall be binding upon the parties and their respective successors and assigns, and no other person shall acquire or have any right under or by virtue of this Agreement.

This Agreement shall be binding upon the parties and their respective successors and assigns, and no other person shall acquire or have any right under or by virtue of this Agreement.

Failure of any party at any time to require performance of any provision of this Agreement shall not affect the right to require full performance thereof at any time thereafter, and the waiver by any party of a breach of such provisions shall not be taken as or held to be a waiver of any subsequent breach or as nullifying the effectiveness of such provision.

Notices provided for in this Agreement shall be in writing and shall be deemed to have been duly given when delivered by hand or overnight courier or three days after it has been mailed by United States registered mail, return receipt requested, postage prepaid, addressed to the respective address set forth above in this Agreement, or to such other address as either party may have furnished to the other in writing in accordance herewith.

This Agreement and my rights and duties hereunder shall not be assignable or delegable by me.

The Company may withhold from any amounts payable under this Agreement such Federal, state and local taxes as may be required to be withheld pursuant to any applicable law or regulation.

This Agreement may be executed (including by electronic execution) in any number of counterparts, each of which when so executed shall be deemed an original, but all such counterparts shall constitute one and the same instrument. Delivery of an executed counterpart of this Agreement by electronic mail shall have the same force and effect as the delivery of an original executed counterpart of this Agreement.

Please confirm the foregoing is in accordance with your understanding by signing and returning a copy of this Agreement, whereupon it shall become binding and enforceable in accordance with its terms.

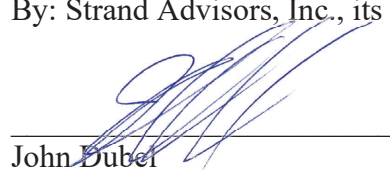
Very truly yours,

James. P. Seery, Jr.

AGREED AND ACCEPTED

HIGHLAND CAPITAL MANAGEMENT L.P.

By: Strand Advisors, Inc., its general partner



John Dubel
Director
Strand Advisors, Inc.

Russell Nelms
Director
Strand Advisors, Inc.

000223

EXHIBIT 4




CLERK, U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS

ENTERED

THE DATE OF ENTRY IS ON
THE COURT'S DOCKET

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

Signed January 9, 2020


United States Bankruptcy Judge

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

In re:

HIGHLAND CAPITAL MANAGEMENT, L.P.,¹

Debtor.

§ Chapter 11
§
§ Case No. 19-34054-sgj11
§
§ Related to Docket Nos. 7 & 259

**ORDER APPROVING SETTLEMENT WITH OFFICIAL COMMITTEE OF
UNSECURED CREDITORS REGARDING GOVERNANCE OF THE DEBTOR
AND PROCEDURES FOR OPERATIONS IN THE ORDINARY COURSE**

Upon the *Motion of the Debtor to Approve Settlement with Official Committee of Unsecured Creditors Regarding Governance of the Debtor and Procedures for Operations in the Ordinary Course* (the "Motion"),² filed by the above-captioned debtor and debtor in possession

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

² Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in the Motion.

(the “Debtor”); the Court having reviewed the Motion, and finding that (a) the Court has jurisdiction over this matter pursuant to 28 U.S.C. §§157 and 1334, (b) this is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(A), and (c) notice of this Motion having been sufficient under the circumstances and no other or further notice is required; and having determined that the legal and factual bases set forth in the Motion establish just cause for the relief granted herein; and having determined that the relief sought in the Motion is in the best interests of the Debtor and its estate; and after due deliberation and sufficient cause appearing therefore,

IT IS HEREBY ORDERED THAT:

1. The Motion is GRANTED on the terms and conditions set forth herein, and the United States Trustee’s objection to the Motion is OVERRULED.
2. The Term Sheet is approved and the Debtor is authorized to take such steps as may be necessary to effectuate the settlement contained in the Term Sheet, including, but not limited to: (i) implementing the Document Production Protocol; and (ii) implementing the Protocols.
3. The Debtor is authorized (A) to compensate the Independent Directors for their services by paying each Independent Director a monthly retainer of (i) \$60,000 for each of the first three months, (ii) \$50,000 for each of the next three months, and (iii) \$30,000 for each of the following six months, provided that the parties will re-visit the director compensation after the sixth month and (B) to reimburse each Independent Director for all reasonable travel or other expenses, including expenses of counsel, incurred by such Independent Director in connection with its service as an Independent Director in accordance with the Debtor’s expense reimbursement policy as in effect from time to time.

4. The Debtor is authorized to guarantee Strand's obligations to indemnify each Independent Director pursuant to the terms of the Indemnification Agreements entered into by Strand with each Independent Director on the date hereof.

5. The Debtor is authorized to purchase an insurance policy to cover the Independent Directors.

6. All of the rights and obligations of the Debtor referred to in paragraphs 3 and 4 hereof shall be afforded administrative expense priority under 11 U.S.C. § 503(b).

7. Subject to the Protocols and the Term Sheet, the Debtor is authorized to continue operations in the ordinary course of its business.

8. Pursuant to the Term Sheet, Mr. James Dondero will remain as an employee of the Debtor, including maintaining his title as portfolio manager for all funds and investment vehicles for which he currently holds that title; provided, however, that Mr. Dondero's responsibilities in such capacities shall in all cases be as determined by the Independent Directors and Mr. Dondero shall receive no compensation for serving in such capacities. Mr. Dondero's role as an employee of the Debtor will be subject at all times to the supervision, direction and authority of the Independent Directors. In the event the Independent Directors determine for any reason that the Debtor shall no longer retain Mr. Dondero as an employee, Mr. Dondero shall resign immediately upon such determination.

9. Mr. Dondero shall not cause any Related Entity to terminate any agreements with the Debtor.

10. No entity may commence or pursue a claim or cause of action of any kind against any Independent Director, any Independent Director's agents, or any Independent

Director's advisors relating in any way to the Independent Director's role as an independent director of Strand without the Court (i) first determining after notice that such claim or cause of action represents a colorable claim of willful misconduct or gross negligence against Independent Director, any Independent Director's agents, or any Independent Director's advisors and (ii) specifically authorizing such entity to bring such claim. The Court will have sole jurisdiction to adjudicate any such claim for which approval of the Court to commence or pursue has been granted.

11. Nothing in the Protocols, the Term Sheet or this Order shall affect or impair Jefferies LLC's rights under its Prime Brokerage Customer Agreements with the Debtor and non-debtor Highland Select Equity Master Fund, L.P., or any of their affiliates, including, but not limited to, Jefferies LLC's rights of termination, liquidation and netting in accordance with the terms of the Prime Brokerage Customer Agreements or, to the extent applicable, under the Bankruptcy Code's "safe harbor" protections, including under sections 555 and 561 of the Bankruptcy Code. The Debtor shall not conduct any transactions or cause any transactions to be conducted in or relating to the Jefferies LLC accounts without the express consent and cooperation of Jefferies LLC or, in the event that Jefferies withholds consent, as otherwise ordered by the Court. For the avoidance of doubt, Jefferies LLC shall not be deemed to have waived any rights under the Prime Brokerage Customer Agreements or, to the extent applicable, the Bankruptcy Code's "safe harbor" protections, including under sections 555 and 561 of the Bankruptcy Code, and shall be entitled to take all actions authorized therein without further order of the Court

12. Notwithstanding any stay under applicable Bankruptcy Rules, this Order shall be effective immediately upon entry.

13. The Court shall retain jurisdiction over all matters arising from or related to the interpretation and implementation of this Order, including matters related to the Committee's approval rights over the appointment and removal of the Independent Directors.

END OF ORDER

PACHULSKI STANG ZIEHL & JONES LLP
Jeffrey N. Pomerantz (CA Bar No. 143717)
Robert J. Feinstein (NY Bar No. 1767805)
John A. Morris (NY Bar No. 266326)
Gregory V. Demo (NY Bar No. 5371992)
Judith Elkin (TX Bar No. 06522200)
Hayley R. Winograd (NY Bar No. 5612569)
10100 Santa Monica Blvd., 13th Floor
Los Angeles, CA 90067
Telephone: (310) 277-6910
Facsimile: (310) 201-0760

HAYWARD PLLC
Melissa S. Hayward (TX Bar No. 24044908)
MHayward@HaywardFirm.com
Zachery Z. Annable (TX Bar No. 24053075)
ZAnnable@HaywardFirm.com
10501 N. Central Expy, Ste. 106
Dallas, TX 75231
Telephone: (972) 755-7100
Facsimile: (972) 755-7110

Counsel for Highland Capital Management, L.P.

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

CHARITABLE DAF FUND, L.P., AND CLO
HOLDCO LTD.

Plaintiff,

vs.

HIGHLAND CAPITAL MANAGEMENT, L.P.,
HIGHLAND HCF ADVISOR, LTD., AND
HIGHLAND CLO FUNDING, LTD.

Defendants.

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Case No. 3:21-cv-00842-B

**DEFENDANT HIGHLAND CAPITAL MANAGEMENT, L.P.’S MOTION FOR
AN ORDER TO ENFORCE THE ORDER OF REFERENCE**

Highland Capital Management, L.P., a defendant in the above-captioned case (the “Debtor” or “Highland”), by and through its undersigned counsel, files this motion (the “Motion”) seeking entry of an order enforcing the *Order of Reference of Bankruptcy Cases and Proceedings Nunc*

Pro Tunc (the “Order of Reference”) and referring this case to the United States Bankruptcy Court for the Northern District of Texas (the “Bankruptcy Court”). In support of its Motion, the Debtor states as follows:

JURISDICTION AND VENUE

1. This Court has jurisdiction over the Motion pursuant to section 1334(a) and (b) of title 11 of the United States Code (the “Bankruptcy Code”).
2. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1409.
3. The predicates for the relief requested in the Motion are 28 U.S.C. § 157(a) and Rule 9019 of the Federal Rules of Bankruptcy Procedure (the Bankruptcy Rules).

RELIEF REQUESTED

4. The Debtor requests that this Court issue the proposed form of order attached as **Exhibit A** (the “Proposed Order”) pursuant to 28 U.S.C. § 157(a).
5. For the reasons set forth more fully in *Defendant Highland Capital Management, L.P.’s Memorandum of Law in Support of Motion for an Order to Enforce the Order of Reference* (the “Memorandum of Law”), filed contemporaneously with this Motion, the Debtor requests that the Court: (a) enforce the Order of Reference and refer this case to the Bankruptcy Court, and (b) grant the Debtor such other and further relief as the Court deems just and proper under the circumstances.
6. In accordance with Rule 7.1 of the *Local Civil Rules of the United States District Court for the Northern District of Texas* (the “Local Rules”), contemporaneously herewith and in support of this Motion, the Debtor is filing: (a) its Memorandum of Law, and (b) the *Declaration of Gregory V. Demo Submitted in Support of the Debtor’s Motion for an Order to Enforce the Order of Reference* (the “Demo Declaration”) together with the exhibits annexed thereto.

7. Based on the exhibits annexed to the Demo Declaration and the arguments contained in the Memorandum of Law, the Debtor is entitled to the relief requested herein as set forth in the Proposed Order.

8. Notice of this Motion has been provided to all parties. The Debtor submits that no other or further notice need be provided.

WHEREFORE, the Debtor respectfully requests that the Court (i) enter the Proposed Order substantially in the formed annexed hereto as **Exhibit A** granting the relief requested herein, and (ii) grant the Debtor such other and further relief as the Court may deem proper.

[Remainder of Page Intentionally Blank]

Dated: May 19, 2021

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EXHIBIT A

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

CHARITABLE DAF FUND, L.P., AND CLO
HOLDCO LTD.

Plaintiff,

VS.

HIGHLAND CAPITAL MANAGEMENT, L.P.,
HIGHLAND HCF ADVISOR, LTD., AND
HIGHLAND CLO FUNDING, LTD.

Defendants.

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Case No. 3:21-cv-00842-B

**ORDER GRANTING MOTION FOR
AN ORDER TO ENFORCE THE ORDER OF REFERENCE**

Before the Court is *Defendant Highland Capital Management L.P.*’s Motion for an Order to Enforce the Order of Reference [Docket No. __] (the “Motion”).¹ Having considered: (a) the Motion; (b) *Defendant Highland Capital Management, L.P.*’s Memorandum of Law in Support of Motion for an Order to Enforce the Order of Reference (the “Memorandum of Law”); and (c) the Declaration of Gregory V. Demo Submitted in Support of the Debtor’s Motion for an Order to Enforce the Order of Reference [Docket No. __] (the “Demo Declaration”) and the exhibits annexed thereto; and this Court having jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334; and this Court having found that venue of this proceeding and the Motion in this District is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and this Court having found that: (a) this case arises under title 11 of the United States Code; (b) this case is a core proceeding under 28 U.S.C. § 157(b); (c) reference to the Bankruptcy Court of the Complaint is mandatory under the plain

¹ Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in the Memorandum of Law.

language of the Order of Reference; (d) the Bankruptcy Court retains jurisdiction over all disputes relating to this Complaint; (e) the Bankruptcy Court retains jurisdiction to interpret and enforce its own orders; (f) there is no basis for a mandatory withdrawal of reference of this Complaint; and (g) the relief requested in the Motion is in the best interests of the Debtor's estate, its creditors, and other parties-in-interest; and this Court having found that the Debtor's notice of the Motion and opportunity for a hearing on the Motion were appropriate under the circumstances and that no other notice need be provided; and this Court having determined that the legal and factual bases set forth in the Motion establish good cause for the relief granted herein; and upon all of the proceedings had before this Court; and after due deliberation and sufficient cause appearing therefor and for the reasons set forth in the record on this Motion, it is **HEREBY ORDERED THAT:**

1. The Motion is **GRANTED** as set forth herein.
2. This proceeding is hereby referred to the Bankruptcy Court.

It is so ordered this _____ day of _____, 2021.

The Honorable Jane J. Boyle
United States District Judge

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

CHARITABLE DAF FUND, L.P., AND CLO
HOLDCO LTD.

Plaintiff,

VS.

HIGHLAND CAPITAL MANAGEMENT, L.P.,
HIGHLAND HCF ADVISOR, LTD., AND
HIGHLAND CLO FUNDING, LTD.

Defendants.

§ § § § § § § § § § § § § § § §

Case No. 3:21-cv-00842-B

**DEFENDANT HIGHLAND CAPITAL MANAGEMENT, L.P.'S
MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR
AN ORDER TO ENFORCE THE ORDER OF REFERENCE**

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Highland Capital Management, L.P., a defendant in the above-captioned case (the “Debtor” or “Highland”), submits this memorandum of law (the “Memorandum”) in support of the *Debtor’s Motion for an Order to Enforce the Order of Reference* (the “Motion”). In support of its Motion, the Debtor states as follows:

PRELIMINARY STATEMENT¹

1. Highland is the debtor and debtor-in-possession in a bankruptcy case currently pending in the Bankruptcy Court for the Northern District of Texas, Dallas Division (the “Bankruptcy Court”), Case No. 19-34054-sgj11 (the “Bankruptcy Case”). The Bankruptcy Case has been pending since October 16, 2019, having been filed at the direction of James Dondero, who, on information and belief, is the person controlling and directing the actions of both The Charitable DAF Fund, L.P. (the “DAF”) and CLO Holdco, Ltd. (“CLOH” and together with the DAF, “Plaintiffs”) today. Both the DAF and CLOH have appeared and objected multiple times in the Bankruptcy Case.

2. In one of those matters, the Bankruptcy Court approved a settlement between the Debtor and HarbourVest² (the “Settlement”) pursuant to 11 U.S.C. §§ 105 and 363 of the Bankruptcy Code and Rule 9019 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”) over the objections of CLOH, a Plaintiff in this action, as well as other entities owned and/or controlled by Mr. Dondero. The Settlement is on appeal.³

¹ Concurrently herewith, the Debtor is filing the *Appendix in Support of the Debtor’s Motion to Enforce the Reference* (the “Appendix”). Citations to the Appendix are notated as follows: Appx. #. The Complaint is Appx. 1.

² “HarbourVest” collectively refers to the following entities: HarbourVest 2017 Global Fund L.P., HarbourVest 2017 Global AIF L.P., HarbourVest Dover Street IX Investment L.P., HV International VIII Secondary L.P., HarbourVest Skew Base AIF L.P., and HarbourVest Partners L.P.

³ The Settlement is being appealed by Mr. Dondero’s two purported family investment trusts: The Dugaboy Investment Trust (“Dugaboy”) and The Get Good Trust (“Get Good” and together with Dugaboy, the “Trusts”). The Trusts, like Plaintiffs, are controlled by Mr. Dondero. The appeal and this litigation are just one battle in Mr. Dondero’s multifaceted litigation assault on the bankruptcy process.

3. Plaintiffs filed their *Original Complaint* (the “Complaint”)⁴ in this Court seeking to have this Court undertake a *de facto* appeal or reconsideration of the Settlement and to assert monetary claims for actions undertaken in the Bankruptcy Case. However, the *Order of Reference of Bankruptcy Cases and Proceedings Nunc Pro Tunc* (the “Order of Reference”) (Appx. 2) in force in the Northern District of Texas required that this action be filed with the Bankruptcy Court presiding over the Bankruptcy Case. The Order of Reference was entered in 1984 and directs courts in this District to refer all proceedings arising under Title 11 and/or arising in or related to a case under Title 11 to the bankruptcy courts. A mandatory application of the Order of Reference prevents a race to the courthouse and inconsistent rulings by providing one forum to adjudicate *all* aspects of a bankruptcy case. Otherwise, debtors and creditors could blatantly forum shop and choose whether to file cases or claims in the bankruptcy court or the district court to evade what may be perceived as an unwelcoming court – which is precisely what has occurred in this case.⁵ Here, the case for enforcing the Order of Reference is compelling. The Complaint addresses issues that not only arise in, arise under, and relate to Title 11 but which have already been adjudicated by the Bankruptcy Court. By this Motion, the Debtor requests that this Court enforce the Order of Reference and refer the Complaint to the Bankruptcy Court for adjudication

4. The reason Plaintiffs filed the Complaint in this Court – rather than in the Bankruptcy Court – is obvious. Plaintiffs, under the direction of the Debtor’s ousted founder, Mr.

⁴ The Complaint contains a number of errors and material omissions, misstatements, misrepresentations, and mischaracterizations. The Debtor believes the Complaint is frivolous and should be dismissed on numerous grounds. The Debtor reserves all rights to contest the substance of the Complaint and intends to promptly inform Plaintiffs’ counsel that the Debtor will seek sanctions if the Complaint is not withdrawn.

⁵ Plaintiffs justify their conduct by contending that under the 1984 Amendments to the Bankruptcy Code, the Bankruptcy Court is a “unit” of this Court. Hence, in Plaintiffs’ minds, the courts are indistinguishable and interchangeable and Plaintiffs can pick and choose where to file. That is not the law and would render the Order of Reference a nullity.

Dondero, have found little traction in the Bankruptcy Court for the serial, frivolous, and vexatious litigation positions they have taken in more than a dozen pending matters in the Bankruptcy Case and their attempts to interfere with the Debtor's business operations – actions that have cost the Debtor millions. Plaintiffs therefore determined their best course of action was to engage in blatant forum shopping with the goal of re-opening settled litigation and closed factual records in a court Plaintiffs hope will be more hospitable.⁶ The Debtor will vigorously defend this action as (a) a flagrant attack on the Bankruptcy Court; (b) a frivolous attempt to avoid settled principals of bankruptcy jurisdiction through (less than) clever pleading; and (c) barred by *res judicata*. The Debtor have also sought to hold Plaintiffs and their counsel, among others, in civil contempt for attempting to add Mr. James P. Seery, Jr., the Debtor's independent, Bankruptcy Court-appointed CEO and CRO, as a defendant in this Case in clear violation of two final Bankruptcy Court orders.⁷

5. The fact that the Complaint was not automatically referred to the Bankruptcy Court is attributable to a blatant omission by Plaintiffs in Section VIII of their Civil Cover Sheet (Appx. 3). Because this action is undoubtedly “related to” the Bankruptcy Case and the pending appeal of the Settlement, Plaintiffs’ attorneys were required to disclose that a “related case” to the Complaint existed – as that term is used in the Local Civil Rules, effective September 1, 2020, of the Northern District of Texas (the “Local Rules”). Plaintiffs’ failure to make such disclosure could not have

⁶ The Complaint is not the first time that Plaintiffs have attempted to disenfranchise the Bankruptcy Court. On March 18, 2021, Mr. Dondero, Plaintiffs, and other entities owned and/or controlled by Mr. Dondero filed *James Dondero, Highland Capital Management Fund Advisors, L.P., NexPoint Advisors, L.P., The Dugaboy Investment Trust, The Get Good Trust, and NexPoint Real Estate Partners, LLC, f/k/a HCRE Partners, LLC, a Delaware Limited Liability Company's Motion to Recuse Pursuant to 28 U.S.C. § 455* [Docket No. 2060] (the “Recusal Motion”) pursuant to which they sought to recuse the Honorable Stacey Jernigan from the Bankruptcy Case. The Recusal Motion was denied by the Bankruptcy Court and has been appealed [Docket No. 2149].

⁷ On April 19, 2021, filed *Plaintiff's Motion for Leave to File First Amended Complaint in the District Court* (the “Seery Motion”) in this Court seeking leave to add Mr. Seery as a defendant, and, in response, on April 23, 2021, the Debtor filed *Debtor's Motion for an Order Requiring the Violators to Show Cause Why They Should Not Be Held in Civil Contempt for Violating Two Court Orders* [Docket No. 2247] (the “Contempt Motion”). The Bankruptcy Court ordered Plaintiffs, among others, to appear at an in person hearing on June 8, 2021, to show cause why they should not be held in contempt [Docket No. 2255] (the “Show Cause Order”).

been inadvertent. And Plaintiffs have also not been candid with the Bankruptcy Court. On May 14, 2021, Plaintiffs filed a response to the Show Cause Order inaccurately claiming they had made full disclosure to this Court.⁸

6. The Bankruptcy Court is the appropriate tribunal to address the Complaint as it clearly “arises under, arises in or relates to the Debtor’s Chapter 11 case and the Settlement. The Court should send Plaintiffs a strong message that (a) such gamesmanship is not acceptable; (b) the Order of Reference will be enforced; and (c) the Complaint will be immediately sent to the Bankruptcy Court where it belongs.

FACTUAL BACKGROUND

A. Plaintiffs’ Ownership and Control

7. Plaintiffs are controlled and/or directed by Mr. Dondero, the Debtor’s ousted founder.⁹ CLOH is an entity wholly owned and controlled by the DAF. Until at least mid-January 2021, Grant Scott, Mr. Dondero’s life-long friend and college roommate, was the sole director of the DAF and of CLOH (neither of which otherwise had any officers or employees).¹⁰ As found by the Bankruptcy Court, Mr. Dondero has engaged in a coordinated litigation campaign against the Debtor both directly and through his related entities, including Plaintiffs, with the goal of

⁸ See *Response of the Charitable DAF Fund, L.P., CLO Holdco, Ltd., and Sbaiti & Company PLLC to Show Cause Order* [Docket No. 2313], pg. 3 (the “Bankruptcy Response”) (Appx. 28). In the Bankruptcy Response, Plaintiffs prognosticate about how this Court would rule: “... [the Debtor] seem[s] to have assumed that the Motion for Leave would be granted, and that the proposed amended complaint naming Seery would be referred to [the Bankruptcy] Court for a report and recommendation.” Appx. 28 at p. 12. If that were the case, Plaintiffs should have just filed in the Bankruptcy Court or, at the very least, disclosed the Bankruptcy Case in the Civil Cover Sheet.

⁹ Mr. Dondero also controls, and has appeared in the Bankruptcy Case, through, among others, his two family investment trusts: Dugaboy and Get Good.

¹⁰ Mr. Scott previously testified during a sworn deposition in the Bankruptcy Case that he had little knowledge of the investment and other activities of the DAF and CLOH and was effectively taking direction from Mr. Dondero with respect to their activities. Appx. 27, 11:10-25; 12:1-25; 13:1-25; 14:1-25; 15:1-25; 16:1-17.

“burn[ing] down the [Debtor].”¹¹ A list of the litigation caused by Mr. Dondero in the Bankruptcy Case since September 2020 is Appx. 4.

B. HarbourVest’s Investment and Claims against the Debtor

8. Prior to the commencement of the Bankruptcy Case, HarbourVest invested approximately \$80 million (the “Investment”) in HCLOF, a Guernsey-based limited company formed and managed by the Debtor and – prior to his ouster – Mr. Dondero. Immediately following the Investment, CLOH held 49.02% of HCLOF’s interests, HarbourVest held 49.98%, and the remaining 1% was held by the Debtor and certain current and former Debtor employees. After the Settlement, in which HarbourVest transferred its interests to a wholly-owned subsidiary of the Debtor, the Debtor’s interest in HCLOF was 50.18% and CLOH’s interest remained 49.02%.

9. HarbourVest filed Claims¹² in the Bankruptcy Case in excess of \$300 million. The Claims alleged HarbourVest was fraudulently induced into the Investment based on the material factual misrepresentations and omissions of Mr. Dondero and certain of his employees, including that the Debtor: (a) did not disclose it never intended to pay an arbitration award obtained by a former portfolio manager, Joshua Terry,¹³ (b) did not disclose that Mr. Dondero and the Debtor

¹¹ The Bankruptcy Court made substantial findings of facts regarding Mr. Dondero and his related entities’ (including Plaintiffs’) history of serial litigation in the *Order Confirming the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (as Modified) and (ii) Granting Related Relief* (the “Confirmation Order”). The Confirmation Order is Appx. 5. See Appx. 5, ¶¶ 17-19, 77-78. The Confirmation Order approved the *Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (as Modified)* [Docket No. 1808] (as amended, the “Plan”), which included certain amendments. See *Debtor’s Notice of Filing of Plan Supplement to the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (as Modified)*, Ex. B [Docket No. 1875]. The Plan is attached to the Confirmation Order.

¹² “Claims” collectively refers: HarbourVest 2017 Global Fund L.P. (Claim No. 143), HarbourVest 2017 Global AIF L.P. (Claim No. 147), HarbourVest Dover Street IX Investment L.P. (Claim No. 150), HV International VIII Secondary L.P. (Claim No. 153), HarbourVest Skew Base AIF L.P. (Claim No. 154), and HarbourVest Partners L.P. (Claim No. 149). The Claims are Appx. 6.

¹³ This award was entered in favor of Mr. Terry against a Debtor subsidiary, Acis Capital Management, L.P. (“Acis”). Instead of satisfying the award, the Dondero-controlled Debtor caused Acis to transfer its assets in an effort to become judgment proof. Mr. Terry filed an involuntary bankruptcy petition against Acis and, after intense litigation and the appointment of a chapter 11 trustee, confirmed a chapter 11 plan, which transferred Acis to Mr. Terry. These actions resulted in Acis filing a claim of not less than \$75 million (Claim No. 23) against the estate.

engaged in a series of fraudulent transfers for the purpose of preventing Mr. Terry from collecting on his arbitration award, (c) misrepresented why the investment manager for HCLOF was changed immediately prior to the Investment, (d) indicated the dispute with Mr. Terry would not impact investment activities, and (e) expressed confidence in HCLOF's ability to reset or redeem certain collateralized loan obligations ("CLOs"). The Claim also asserted causes of action under Racketeering Influenced Corrupt Organizations Act ("RICO") and breaches of fiduciary duty under Guernsey common law.

C. The HarbourVest Settlement and Objections

10. On December 23, 2020, the Debtor filed its *Motion for Entry of an Order Approving Settlement with HarbourVest (Claim Nos. 143, 147, 149, 150, 153, 154) and Authorizing Actions Consistent Therewith* [Docket No. 1625]¹⁴ (the "Settlement Motion"), pursuant to which the Debtor sought Bankruptcy Court approval of the Settlement with HarbourVest pursuant to **11 U.S.C. §§ 105(a)** and **363** and Bankruptcy Rule 9019. Appx. 7. The Debtor concurrently filed the proposed *Settlement Agreement and Transfer Agreement for Ordinary Shares of Highland CLO Funding, Ltd.* (the "Transfer Agreement") [Docket No. 1631-1]. Appx. 8. The Settlement Agreement expressly provided that it was subject to Bankruptcy Court approval. Appx. 7, ¶ 3.

11. Among the material terms of the Settlement was that HarbourVest would transfer its interest in Highland CLO Funding, Ltd. ("HCLOF") to the Debtor or its nominee (the "Transfer"). The Transfer was a necessary component of the Settlement. HarbourVest believed the misrepresentations entitled it to a rescission of its Investment, and HarbourVest wanted to extract itself from the Highland platform. The Settlement also provided HarbourVest with (a) an allowed, general unsecured claim in the amount of \$45 million, (b) a subordinated, allowed, general

¹⁴ Unless otherwise noted, all docket references refer to the docket maintained by the Bankruptcy Court.

unsecured claim in the amount of \$35 million, and (c) other consideration more fully described in the Settlement Agreement. *See* Appx. 7, ¶ 32.

12. The Settlement Motion fully disclosed all aspects of the Transfer, including (a) what HarbourVest was transferring; (b) the valuation (and method of valuation) of the asset being transferred to the Debtor; and (c) the method of the Transfer. (Appx. 7, ¶¶ 1(b) 32, 32 n.5; Appx. 8). Three objections were lodged against the proposed Settlement, all of which were filed by Mr. Dondero or entities controlled by him, including Plaintiff CLOH and Dondero's Trusts. Each of those objections was coordinated by Mr. Dondero.¹⁵

D. Plaintiffs Knew of the Transfer, and Plaintiff CLOH Objected to the Settlement

13. On January 6, 2021, Mr. Dondero filed his *Objection to Debtor's Motion for Entry of an Order Approving Settlement with HarbourVest* [Docket No. 1697] (Appx. 9) contending, among other things, that the Settlement: (a) was not "reasonable or in the best interests of the estate" because the Debtor was ***grossly overpaying*** and (b) amounted to "a blatant attempt to purchase votes in support of the Debtor's plan." *Id.*, ¶ 1. Mr. Dondero did not directly challenge the Transfer but made clear that he knew exactly what was being transferred and the valuation being placed on it: "As part of the settlement, HarbourVest will [] transfer its entire interest in [HCLOF] to an entity to be designated by the Debtor. The Debtor states that the value of this interest is approximately \$22 million as of December 1, 2020." *Id.*, ¶ 1, n.3.

14. On January 8, 2021, Dondero's Trusts filed their *Objection to the Debtor's Motion for Entry of an Order Approving Settlement with HarbourVest (Claim Nos. 143, 147, 149, 150, 153, 154) and Authorizing Actions Consistent Therewith*. [Docket No. 1706]. (Appx. 10) Like Mr. Dondero, the Trusts made clear that they knew of the proposed Transfer and its valuation. But,

¹⁵ *See Debtor's Amended Witness and Exhibit List with Respect to Evidentiary Hearing to be Held on January 8, 2021* [Adv. Proc. 21-03190-sgj, Docket No. 46], Exhibit Q.

unlike Mr. Dondero, the Trusts directly questioned (a) whether HarbourVest had the right to effectuate the Transfer, and (b) the valuation of the HCLOF interests – matters which are directly at issue in the Complaint.

15. Finally, and notably, on January 8, 2021, Plaintiff CLOH – presumably at the direction of its parent, the DAF – filed its *Objection to HarbourVest Settlement* [Docket No. 1707]. (Appx. 11) In its objection, CLOH challenged (as it does again in the Complaint) HarbourVest’s right to implement the Transfer contending, among other things, that: (a) CLOH and the other members of HCLOF had a “Right of First Refusal” under the Members Agreement (*Id.*, ¶ 3) and (b) “HarbourVest has no authority to transfer its interest in HCLOF without first complying with the Right of First Refusal” (*Id.*, ¶ 6). In support of these contentions, CLOH offered a lengthy analysis of the Members Agreement, including CLOH’s purported “Right of First Refusal” under Section 6.2 thereof. *Id.*, ¶¶ 9-22.

E. The Dondero Parties Exercised their Right to Take Discovery

16. By objecting to the Settlement Motion, Mr. Dondero, the Trusts, and CLOH (collectively, the “Dondero Objectors”) initiated a “contested matter” under Bankruptcy Rule 9014¹⁶ and, accordingly, had the unfettered right to conduct discovery under Bankruptcy Rule 9014(c).¹⁷ Thus, for example, the Dondero Objectors had the right to request documents from, and take the depositions of, the Debtor, HarbourVest, HCLOF, and/or Highland HCF Fund Advisor,

¹⁶ See also Local Bankruptcy Rules of the United States Bankruptcy Court for the Northern District of Texas 9014-1(a) (“a response is required with respect to a contested matter”).

¹⁷ The Debtor filed the Settlement Motion on December 23, 2020, and set the hearing on the motion for January 14, 2021 [Docket No. 1626]. The DAF and CLOH allege that the Debtor “set the hearing right after the Christmas and New Year’s holidays, almost ensuring that no party would have the time to scrutinize the underpinnings of the deal.” Appx. 1, ¶ 30. This is a bald lie (one of many) and absurd. The undisputed facts are that (a) the Settlement Motion was filed on regular notice; (b) no one requested or moved for an extension of the hearing date; and (c) no one contended they had insufficient time to “scrutinize the underpinnings of the deal” (at least until the filing of the Complaint).

Ltd. (“HCFA”)¹⁸ concerning the Settlement Motion, their objections thereto, and the Debtor’s valuation of HarbourVest’s interest in HCLOF and the method of valuation.

17. The Dondero Objectors – all sophisticated parties represented by sophisticated counsel – exercised their discovery rights.¹⁹ In particular, Mr. Dondero and CLOH conducted a three and a half hour deposition of Michael Pugatch, a representative of the HarbourVest claimants [Docket No. 1705]. (Appx. 12) However, none of the Dondero Objectors, including Plaintiffs, exercised their right to take discovery from the Debtor, HCLOF, or HCFA in connection with the Settlement Motion, except for informal requests for documents which were provided.

18. Notably, despite the issue of the Transfer being “front and center,” none of the Dondero Objectors, including Plaintiffs, ever asserted (as Plaintiffs do now) that: (a) the Debtor had a fiduciary duty to offer the HCLOF interests to CLOH, or (b) the Investment Advisers Act of 1940 (the “Advisers Act”) was implicated in any way by the proposed Settlement, including the proposed Transfer. Further, although CLOH argued that the Members Agreement gave CLOH a right of first refusal, CLOH, in connection with the Settlement, never offered to buy the HCLOF interests or stated that it wanted to purchase those interests.

F. The Bankruptcy Court Approves the Settlement

19. On January 13, 2021, the Debtor filed its *Omnibus Reply in Support of Debtor’s Motion for Entry of an Order Approving Settlement with HarbourVest (Claim Nos. 143, 147, 149, 150, 153, 154) and Authorizing Actions Consistent Therewith* [Docket No. 1731] (the “Omnibus

¹⁸ HCLOF, HCFA (in its capacity as the portfolio manager of HCLOF), the Debtor’s designee, HCMLP Investments, LLC (as transferee), and HarbourVest (as transferors) were parties to the proposed Transfer Agreement pursuant to which the Transfer would be effectuated. Appx. 7, Ex. A; Appx. 8.

¹⁹ Plaintiffs not only failed to disclose that the Dondero Objectors took discovery, they allege the opposite (“No discovery had taken place between the parties, and plaintiff did not have any notice of the settlement terms or other factors prior to the motion’s filing (*or even during its pendency*) in order to investigate its rights.”). Appx. 1, ¶ 29 (emphasis added).

Reply”). Appx. 13. The Omnibus Reply set forth an extensive rebuttal to CLOH’s flawed argument that the Transfer could not be completed without HCLOF’s other members being offered HarbourVest’s interest in HCLOF, as allegedly required by the “Right of First Refusal” under Section 6.2. *Id.*, ¶¶ 26-39. Both HCLOF – which was independently represented – and HarbourVest agreed with the Debtor’s conclusions that the Members Agreement did not require HarbourVest to offer its interests to CLOH or any other member of HCLOF. *Id.*, ¶ 37. At the January 14, 2021, hearing, CLOH ***voluntarily withdrew*** its objection after reading the Debtor’s analysis of the Members Agreement:

CLO Holdco has had an opportunity to review the reply briefing, and . . . [b]ased on our analysis of Guernsey law and some of the arguments of counsel on those pleadings and our review of the appropriate documents, I obtained authority from my client, Grant Scott, as trustee for CLO Holdco, ***to withdraw the CLO Holdco objection based on the interpretation of the member agreement.***

Appx. 14 at 7:20-8:6 (emphasis added). Following CLOH’s withdrawal of its objection, the Trusts also abandoned their challenge to the Transfer. *Id.* at 22:5-20.

20. The Debtor called two witnesses in support of the Settlement Motion, Mr. Seery and Mr. Pugatch. Counsel for Mr. Dondero and the Trusts cross-examined the Debtor’s witnesses but did not inquire about the value of the HCLOF interests, the Debtor’s fiduciary obligations, or the Transfer (except for a line of questioning concerning which entity would hold the HCLOF interests on behalf of the Debtor). *Id.*, at 87:18-89:21. At the conclusion of the hearing, the Court entered an order overruling the remaining objections and approving the Settlement [Docket No. 1788] (the “Settlement Order”). Appx. 15.

21. The Settlement Order ***expressly*** authorized the transfer of HarbourVest’s interest in HCLOF providing, in relevant part, that “[p]ursuant to the express terms of the [Members Agreement] . . . HarbourVest is authorized to transfer its interest in HCLOF . . . ***without the need to obtain the consent of any party or to offer such interests first to any other investor in***

HCLOF.” *Id.*, ¶ 6 (emphasis added). The Bankruptcy Court specifically included this language in the Settlement Order because of concerns that Mr. Dondero and his entities would “go to a different court somehow to challenge the transfer.” Appx. 14 at 156:19-20.²⁰ The Settlement Order also clearly provided that “[t]he [Bankruptcy] Court shall retain *exclusive jurisdiction* to hear and determine all matters arising from the implementation of this Order.” *Id.*, ¶ 7 (emphasis added).

22. Only the Trusts appealed the Settlement Order [Docket Nos. 1870, 1889]. Appx. 16. Plaintiffs elected not to appeal. However, both the Trust and Plaintiffs are controlled by Mr. Dondero, and Mr. Dondero is thus both appealing the Settlement Order and seeking reconsideration of the Settlement Order in this Court.

G. The DAF and CLOH Sue the Debtor and Others in This Court

23. On April 12, 2021, after obtaining new counsel,²¹ the DAF and CLOH filed the Complaint against the Debtor, HCFA, and HCLOF in this Court. The Complaint seeks to challenge the Transfer and Settlement approved by the Bankruptcy Court over Mr. Dondero’s and Plaintiffs’ objections and to re-open the Bankruptcy Court’s factual record. To justify this blatant attempt to re-litigate the matter, the DAF and CLOH allege they recently learned that (a) the HCLOF interests were substantially more valuable than Mr. Seery testified, and (b) the Debtor had fiduciary and

²⁰ Appx. 14 at 156:10-25; 157:1-5 (emphasis added):

MR. MORRIS: . . . With respect to the order, I just want to make it clear that we are going to include a provision that specifically authorizes the Debtor to engage in -- to receive from HarbourVest the asset, you know, the HCLOF interest, and that that's consistent with its obligations under the agreement.

The objection has been withdrawn, I think the evidence is what it is, and we want to make sure that nobody thinks that they're going to go to a different court somehow to challenge the transfer. So I just want to put the Court on notice and everybody on notice that we are going to put in a specific finding as to that.

THE COURT: All right. Fair . . . Fair enough. I do specifically approve that mechanism and find it is appropriate and supported by the underlying agreements.

And just so you know, I spent some time noodling this yesterday before I knew it was going to be settled, so I’m not just casually doing that. I think it’s fine.

²¹ Upon information and belief, Mr. Dondero effectively fired Mr. Scott and his counsel, John Kane of Kane Russell, after Mr. Scott withdrew CLOH’s objection to the HarbourVest Settlement.

other duties requiring it to provide Plaintiffs with the opportunity to acquire HarbourVest's interest in HCLOF. *See, e.g.*, Appx. 1, ¶¶ 36, 49. Plaintiffs also assert claims for breach of fiduciary duty, breach of contract, negligence, violation of RICO, and tortious interference.

24. In the Complaint, Plaintiffs recite certain facts relating to HarbourVest's Claims and the process by which the Debtor obtained Bankruptcy Court approval (*Id.*, ¶¶ 16-31) but disclose none of the undisputed facts set forth above. Plaintiffs also do not disclose that they – through their relationship to Mr. Dondero – had the same information concerning the value of the HarbourVest interests that Mr. Seery allegedly had. Finally, they do not even attempt to justify why they are seeking, in this Court, to re-litigate a Bankruptcy Court order.

H. Counsel for the DAF and CLOH Willfully Ignore the Gatekeeper Orders

25. Throughout the Complaint, Plaintiffs threatened to name Mr. Seery as a defendant,²² and indeed, on April 19, 2021, just four days after filing the Complaint, Sbaiti & Co. (“Sbaiti”), the newly-retained counsel for the DAF and CLOH, advised the Debtor's counsel that they “intend to move for leave today in the district court seeking permission to amend our complaint to add claims against Mr. Seery. They are the same causes of action. We believe we are entitled to amend as a matter of course.” Counsel asked whether they could “put your client down as unopposed?” Appx. 17. In response, the Debtor informed Sbaiti of the two “Gatekeeper Orders” (defined below), which prohibited this action, provided copies, and told them, among other things, that “[i]f you proceed to amend the complaint as you suggest [] without first obtaining Bankruptcy Court approval we reserve all rights to take appropriate action and seek appropriate relief from the

²² By way of example only, Plaintiffs refer to Mr. Seery as a “potential party” and suggest that he had access to and wrongfully utilized “superior non-public information” and lied under oath about the value of the asset subject to the Transfer in his testimony to the Bankruptcy Court. Appx. 1, at Introduction, ¶¶ 6, 43-44.

Bankruptcy Court.” *Id.* Later that evening, Sbaiti confirmed their intention to seek leave from this Court to sue Mr. Seery and, on April 19, 2021, filed the Seery Motion. Appx. 18.

26. Both Gatekeeper Orders are plain, unambiguous, and final. On January 9, 2020, the Bankruptcy Court, *with Mr. Dondero’s consent and agreement*, entered the *Order Approving Settlement with Official Committee of Unsecured Creditors Regarding Governance of the Debtor and Procedures for Operations in the Ordinary Course* [Docket No. 339] pursuant to 11 U.S.C. §§ 105 and 363 and Rule 9019 (the “January Order”). Appx. 19. Pursuant to the January Order, Mr. Dondero surrendered control of the Debtor and the Independent Board was appointed. To protect the Independent Board and its agents from frivolous litigation (primarily from Mr. Dondero and his related entities), the Debtor asked for, and the Bankruptcy Court included in the January Order (without objection), a “gatekeeper” provision stating in pertinent part:

No entity may commence or pursue a claim or cause of action of any kind against any Independent Director, any Independent Director’s agents, or any Independent Director’s advisors relating in any way to the Independent Director’s role as an independent director of Strand without the Court (i) first determining the Court (i) first determining after notice that such claim or cause of action represents a colorable claim of willful misconduct or gross negligence against Independent Director, any Independent Director’s agents, or any Independent Director’s advisors and (ii) specifically authorizing such entity to bring such claim. The Court will have sole jurisdiction to adjudicate any such claim for which approval of the Court to commence or pursue has been granted.

Id., ¶ 10. Mr. Seery is protected under the January Order as a member of the Independent Board and as the Debtor’s CEO and CRO – an agent of the Independent Board. The January Order provided that the Bankruptcy Court “shall retain jurisdiction over all matters arising from or related to the interpretation and implementation of this Order. . . .”). *Id.*, ¶ 13.

27. Seven months later, the Debtor sought Bankruptcy Court approval to appoint Mr. Seery as the Debtor’s CEO and CRO. After an evidentiary hearing, the Bankruptcy Court granted the motion (without objection) and entered its *Order Approving Debtor’s Motion Under*

Bankruptcy Code Sections 105(a) and 363(b) for Authorization to Retain James P. Seery, Jr., as Chief Executive Officer, Chief Restructuring Officer and Foreign Representative Nunc Pro Tunc To March 15, 2020 [Docket No. 854] pursuant to 11 U.S.C. §§ 105(a) and 363(b) (the “July Order” and with the January Order, the “Gatekeeper Orders”). Appx. 20. Like the January Order, the July Order included a “gatekeeper” provision:

No entity may commence or pursue a claim or cause of action of any kind against Mr. Seery relating in any way to his role as the chief executive officer and chief restructuring officer of the Debtor without the Bankruptcy Court (i) first determining after notice that such claim or cause of action represents a colorable claim of willful misconduct or gross negligence against Mr. Seery, and (ii) specifically authorizing such entity to bring such claim. The Bankruptcy Court shall have sole jurisdiction to adjudicate any such claim for which approval of the Court to commence or pursue has been granted.

Id., ¶ 5. The Bankruptcy Court “retain[ed] jurisdiction over any and all matters arising from or related to the interpretation and/or implementation of [the July] Order.” *Id.*, ¶ 8.

28. The Gatekeeper Orders are final orders, *res judicata*, and law of the case. *See* Appx. 5, ¶ 73 (finding that the Gatekeeper Orders “constitute[] law of this case and are *res judicata* pursuant to *In re Republic Supply Co. v. Shoaf*, 815 F.2d 1046 (5th Cir. 1987)”).

29. The Gatekeeper Orders also featured heavily at the Plan confirmation hearing. CLOH initially objected to the Plan, which Mr. Dondero and his proxies, including CLOH, contested.²³ In the Confirmation Order, the Bankruptcy Court provided the rationale for, and purpose of, the “gatekeeper” provisions in the Gatekeeper Orders (Appx. 5, ¶¶ 12-14) and expressly found that a “gatekeeper” provision was needed in the Plan because “Mr. Dondero and his related entities will likely commence litigation . . . after the Effective Date and do so in jurisdictions other than the Bankruptcy Court in an effort to obtain a forum which Mr. Dondero perceives will be more hospitable to his claims” (Appx. 5, ¶ 78). Despite this clear finding and

²³ Mr. Dondero and a number of his related entities are currently appealing the Confirmation Order.

order, Plaintiffs filed the Seery Motion to add Mr. Seery as a defendant and asked this Court to disregard the Gatekeeper Orders. Although this Court denied the Seery Motion, it stated “Plaintiffs may renew their motion after Defendants are served and have appeared” leaving open the possibility that Plaintiffs may still attempt to add Mr. Seery.²⁴ Appx. 21.

30. In response, on April 23, 2021, the Debtor filed the Contempt Motion in the Bankruptcy Court for an order to show cause as to why Plaintiffs should not be held in contempt. Appx. 24. Plaintiffs then filed a motion in the Bankruptcy Court purporting to seek reconsideration of the July Order [Docket No. 2248] (the “Motion for Reconsideration”).²⁵ Appx. 25. The Bankruptcy Court ordered Plaintiffs, among others, to appear at an in person hearing on June 8, 2021,²⁶ to show cause why they should not be held in contempt. Appx. 26.

31. Finally, on May 14, 2021, Plaintiffs filed the Bankruptcy Response in which they argue that they followed the Gatekeeper Orders by filing the Complaint in this Court rather than the Bankruptcy Court because seeking to amend the Complaint to add Mr. Seery as a defendant was not “pursuing” a claim (as used in the Gatekeeper Orders). Appx. 28 at 13.

ARGUMENT

A. Plaintiffs Violated Local Rule 3.3(a) By Failing to Disclose the Bankruptcy Case

32. When Plaintiffs filed the Complaint, thereby initiating the action, their counsel was required to complete a Civil Cover Sheet, Section VIII of which required them to disclose whether there were any “related cases.” Local Rule 3.3(a) requires that “[w]hen a plaintiff files a complaint and there is a related case . . . the complaint must be accompanied by a notice of related case.” A

²⁴ If Mr. Seery incurs any costs defending or preparing to defend against Plaintiffs’ action, Mr. Seery will be entitled to indemnification directly from the Debtor under the Debtor’s limited partnership agreement (Appx. 22, § 4.1(h)) and indirectly through the Strand’s indemnification obligations and the Debtor’s guarantee of such obligations (Appx. 23).

²⁵ The Contempt Motion and the Motion for Reconsideration were re-docketed on April 27, 2021, without any changes.

²⁶ The hearing on the Show Cause Order will be the first in person hearing since March 2020.

“related case” is defined in pertinent part as a proceeding that “arises from a common nucleus of operative fact with the case being filed or removed, regardless whether the related case is a pending case. . . .” Local Rule 3.3(b)(3). As discussed above, although the Complaint asserts claims based on the same facts as the HarbourVest Settlement approved over Plaintiffs’ objection by the Bankruptcy Court, the Civil Cover Sheet makes no mention of the Bankruptcy Case as a “related case.” It merely describes the nature of the Complaint as one arising under RICO. Yet the Bankruptcy Case is indisputably related to this one.²⁷ Plaintiffs’ failure to disclose the existence of a related case violates the Local Rules. *See Kuzmin v. Thermaflo, Inc.*, 2:07-CV-00554-TJW, 2009 U.S. Dist. LEXIS 42810, at *4-7 (E.D. Tex. May 20, 2009) (finding party violated court’s local rules where they failed to indicate on civil cover sheet that case was “related to” other cases).

B. The Complaint Should Be Automatically Referred to the Bankruptcy Court

i. The Complaint Should Be Heard in the Bankruptcy Court.

33. Jurisdiction of “all civil proceedings arising under title 11, or arising in or related to cases under title 11” is conferred on district courts. 11 U.S.C. §§ 1334(a), (b). District courts, in turn, may refer proceedings to the bankruptcy courts. 28 U.S.C. § 157(a) (“Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.”). On August 3, 1984, this Court entered the Order of Reference, which provides, in pertinent part: “*any or all cases under Title 11 and any or all proceedings arising under Title 11 or arising in or related to a case under Title 11 . . . be and they hereby are referred to the*

²⁷ Under 28 U.S.C. § 1334(a), this Court has original and exclusive jurisdiction over the Bankruptcy Case. Pursuant to 28 U.S.C. § 157 and the Order of Reference, this Court has referred matters in the Bankruptcy Case to the Bankruptcy Court. It is thus clear that the Bankruptcy case is pending in this District pursuant to this Court's jurisdiction, and as noted above the matters alleged in the Complaint related directly to litigated proceedings involving Plaintiffs and the Debtor in the Bankruptcy Case. These facts require appropriate disclosure in the Civil Cover Sheet.

Bankruptcy Judges of this district for consideration and resolution consistent with law.” Appx.

2 (emphasis added). The Order of Reference therefore refers the following proceedings:

- **Proceedings “arising under Title 11”:** A proceeding “arises under” Title 11 if it is a “cause of action created or determined by a statutory provision of title 11.” *Wood v. Wood (In re Wood)*, 825 F.2d 90, 96 (5th Cir. 1987).
- **Proceedings “arising in . . . a case under Title 11”:** A proceeding “arises in” Title 11 if it deals with “administrative matters that arise *only* in bankruptcy cases.” *Wood*, 825 F.2d at 96 (emphasis in original).²⁸
- **Proceedings “related to a case under Title 11”:** A proceeding “relates to” a case under Title 11 if “the outcome of [the non-bankruptcy] proceeding could conceivably have any effect on the estate being administered in bankruptcy.” *Burch v. Freedom Mortg. Corp. (In re Burch)*, 835 Fed. Appx. 741, 748 (5th Cir. 2021) (internal citations omitted); *see also Celotex Corp. v. Edwards*, 514 U.S. 300, 308 (1995) (“Congress intended to grant comprehensive jurisdiction to the bankruptcy courts so that they might deal. . . with all matters connected with the bankruptcy estate”). A proceeding “relates to” a proceeding under Title 11 even if it arises from postpetition conduct if “it affects the estate, not just the debtor.” *Wood*, 825 F.2d at 94.

ii. The Order of Reference is Mandatory.

34. Under the plain language of the Order of Reference, “all proceedings under Title 11 or arising or related to a case under Title 11” are ***automatically*** referred to the bankruptcy courts, and the Debtor respectfully submits that the Order of Reference is mandatory. *See Uralkali Trading, S.A. v. Sylvite Southeast, LLC*, 2012 U.S. Dist. LEXIS 40455, at *3 (M.D. Fla. Mar. 26, 2012) (finding that a substantially similar order of reference in the Middle District of Florida “mandate[d]” referral to the appropriate bankruptcy court); *Welch v. Regions Bank*, 2014 U.S. Dist. LEXIS 96175, at *5 (M.D. Fla. July 15, 2014) (“[T]his Court has declared the enforcement of the Standing Order of Reference mandatory”). The fact that 11 U.S.C. §§ 1334 confers original jurisdiction on the district court does not change this requirement as district courts and bankruptcy

²⁸ Proceedings arising under and arising in Title 11 are “core proceedings” under 28 U.S.C. § 157(b). *Wood*, 825 F.2d at 96 (“[T]he phrases ‘arising under’ and ‘arising in’ are helpful indicators of the meaning of core proceedings. If the proceeding involves a right created by the federal bankruptcy law, it is a core proceeding. . . If the proceeding is one that would arise only in bankruptcy. It is also a core proceeding. . .”).

courts are distinct. *Villegas v. Schmidt*, 788 F.3d 156, 159 (5th Cir. 2015) (“Additionally, every other circuit to address the issue has maintained the distinction between the bankruptcy court and the district court, holding that ‘a debtor must obtain leave of the bankruptcy court before initiating an action in district court when the action is against the trustee or other bankruptcy-court-appointed officer, for acts done in the actor’s official capacity’”) (citations omitted).

iii. Any Disputes Over the Settlement or the Transfer Arise Under, Arise In, and Relate to Title 11 and are Core Proceedings.

35. It is black letter law that the determination of whether to approve a settlement of a claim is a “core proceeding” and arises in and under Title 11. The statutory predicates for relief are 11 U.S.C. §§ 105 and 363 and under Rule 9019, which are “created by the federal bankruptcy law” and “arise only in bankruptcy.” *Wood*, 825 F.2d at 96; *see also, e.g., In re Idearc, Inc.*, 423 B.R. 138, 177 (Bankr. N.D. Tex. 2009) (finding approval of a settlement under Bankruptcy Rule 9019 was a “core proceeding” under 28 U.S.C. § 157(b)); *In re Margaux City Lights Partners, Ltd.*, 2014 Bankr. LEXIS 4841 at *6 (Bankr. N.D. Tex. Nov. 24, 2014) (same); Settlement Order, ¶ 2 (same). The HarbourVest Settlement also involved the allowance of HarbourVest’s Claims – a black letter core proceeding under 28 U.S.C. § 157(b)(2)(B) (“Core proceedings include, but are not limited to – (B) allowance of disallowance of claims against the estate. . .”).

36. Since the Complaint seeks to re-litigate the HarbourVest Settlement and to re-open the Bankruptcy Court’s factual record, it is seeking a ruling from this Court as to the merits of the HarbourVest Settlement and/or to litigate matters that arose from the same operative facts as the HarbourVest Settlement – in each case, a core proceeding arising in and under Title 11. If the Settlement Order or the Transfer is to be re-assessed it must be by the Bankruptcy Court under the Bankruptcy Code and Bankruptcy Rules. This Court should enforce the Order of Reference and refer the Complaint to the Bankruptcy Court. *See Burch*, 835 Fed. Appx. at 748 (“Each of Burch’s

state-court claims is premised on his interpretation of a Chapter 11 bankruptcy order, and so each arises from or is related to his Title 11 bankruptcy proceedings.”).

37. Further, the Bankruptcy Court specifically retained jurisdiction in the Settlement Order to adjudicate all disputes arising from the implementation of the Settlement Order, including the Transfer of the HCLOF interests, and therefore retained jurisdiction to hear the Complaint. *Id.* ¶7. Even if jurisdiction had not been explicitly retained, the Bankruptcy Court, like all federal courts, has jurisdiction to interpret and enforce its own orders. *Rodriguez v. EMC Mortgage Corp.* (*In re Rodriguez*), 2001 U.S. App. LEXIS 30564, at *5 (5th Cir. Mar. 15, 2001); *In re Galaz*, 841 F.3d 316, 322 (5th Cir. 2016); *Angel v. Tauch (In re Chiron Equities, LLC)*, 552 B.R. 674, 684 (Bankr. S.D. Tex. 2016). The Complaint, which seeks to challenge the Transfer and re-litigate the Settlement Order, is therefore itself a core proceeding arising in and under Title 11 and should be heard in the Bankruptcy Court.

iv. Any Disputes Over the Gatekeeper Orders Arise Under, Arise In, and Relate to Title 11 and Are Core Proceedings.

38. The Seery Motion was denied, and Mr. Seery has not been added as a defendant in this Case. Plaintiffs have also filed the Motion for Reconsideration in the Bankruptcy Court. However, to the extent Plaintiffs seek to add Mr. Seery as a defendant in this Case, any such proceedings must be referred to the Bankruptcy Court for the reasons forth in Section B(iii) *supra*. Like the Settlement Order, the January Order is the result of a settlement with the Committee approved under 11 U.S.C. §§ 105 and 363 and Bankruptcy Rule 9019. The “gatekeeper” provision in the January Order was also a required component of that settlement and the settlement would not have been approved without it. *See* Appx. 5, ¶ 12-14. Similarly, the July Order was the result of a motion seeking authority to appoint Mr. Seery as CEO and CRO under 11 U.S.C. §§ 105(a) and 363(b), an administrative action that only exists in Title 11 and thus “arises in” and “arises

under” Title 11. Like the January Order, the “gatekeeper” provision in the July Order was a required component of Mr. Seery’s appointment. *Id.* Any attempt to add Mr. Seery as a defendant would be re-litigating a core proceeding arising under, arising in, and related to Title 11.

v. The Complaint Impacts Creditor Recoveries.

39. The Debtor’s Plan provides for the orderly monetization of the Debtor’s assets and the distribution of the proceeds to creditors. Because the Plan is an asset monetization plan, distributions depend on two things: (a) the total amount of allowed claims against the estate and (b) the cash available to pay those claims. Consequently, the Complaint will have a material and immediate impact on the Debtor’s estate. *First*, any judgment secured by Plaintiffs against the Debtor will decrease the cash available to pay the Debtor’s prepetition creditors (which cash is property of the estate under 11 U.S.C. § 541). *Second*, any delay in determining the amount owed to HarbourVest or the amount owed by the Debtor to Plaintiffs will delay payments to creditors under the Plan as the Debtor will need to reserve against such claims. This impact on creditors and the Debtor’s ability to satisfy its obligations under the Plan clearly impacts the Debtor’s estate and should be adjudicated by the Bankruptcy Court. *Zale*, 62 F.3d at 753 (“Those cases in which courts have upheld ‘related to’ jurisdiction over third-party actions do so because the subject of the third party dispute is property of the estate, or because the dispute over the asset would have an effect on the estate.”); *see generally Centrix Fin. Liq. Trust v. Sutton*, 2019 U.S. Dist. LEXIS 154083 (D. Colo. Sept. 10, 2019) (finding that in a liquidating plan, the bankruptcy court has “related to” jurisdiction over all matters that impact distributions from the liquidating trust).

vi. Mr. Seery Will Have Indemnification Claims Against the Estate.

40. This Court denied the Seery Motion without prejudice, but if Mr. Seery is ever added as a defendant or is compelled to retain personal counsel because of the completely unfounded and false allegations in the Complaint, Mr. Seery will have the right to indemnification

from the estate. See ¶ n.24 *supra*. The cost of this indemnification will immediately decrease the amount available to creditors and will delay distributions. Again, this clearly “relates to” to the Debtor’s bankruptcy. See, e.g., *Collins v. Sidharthan (In re KSRP, Ltd.)*, 809 F.3d 263, 266-67 (5th Cir. 2015) (finding that bankruptcy court had jurisdiction because of potential indemnification claims even though bankruptcy court ultimately determined the indemnification claims were invalid); *Refinery Holdings Co., L.P. v. TRMI Holdings, Inc. (In re El Paso Refinery, L.P.)*, 302 F.3d 343, 349 (5th Cir. 2002) (finding “related to” jurisdiction when “RHC’s claim against Texaco could conceivably have an effect on the Estate in light of the chain of indemnification provisions beginning with Texaco and leading directly to the Debtor.”); *Houston Baseball Partners, LLC v. Comcast Corp. (In re Houston Reg’l Sports Network)*, 2014 Bankr. LEXIS 2274, at *15-25 (Bankr. S.D. Tex. May 22, 2013).

C. There is No Basis for a Mandatory Withdrawal of the Reference

41. In the Seery Motion, Plaintiffs cite 28 U.S.C. § 157(d) for the proposition that bankruptcy courts are “prohibit[ed] . . . absent the parties consent, from presiding over cases or proceedings that require consideration of both Title 11 and other federal law regulation organizations or activities affecting interstate commerce.” Appx. 18, at 7. Plaintiffs argue that, because they pled causes of action arising under the Advisers Act and RICO, this Court will have to withdraw the reference. Plaintiffs make the same argument in the Bankruptcy Response: “Respondents expected that the motion for leave [to amend] would likely be referred to [the Bankruptcy] Court for a report and recommendation. And Respondents planned, if necessary, to move to withdraw the reference. . . .” Appx. 28 at 12.

42. Even assuming Plaintiffs’ federal law claims are not frivolous (and they are), Plaintiffs misinterpret 28 U.S.C. § 157(d)’s applicability to this case. 28 U.S.C. § 157(d) provides for mandatory withdrawal of the reference in certain instances: “The district court shall, on timely

motion of a party, so withdraw the proceeding if . . . resolution of the proceeding *requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.*” 28 U.S.C. § 157(d) (emphasis added). However, in interpreting Section 157(d), courts in this Circuit apply the majority view and require withdrawal of the reference only:

[W]hen “substantial and material consideration” of a federal statute other than the Bankruptcy Code is necessary to the resolution of a case or proceeding. Withdrawal is not mandatory in cases that require only the “straightforward application of a federal statute to a particular set of facts.” Rather, withdrawal is in order only when litigants raise “issues requiring significant interpretation of federal laws that Congress would have intended to [be] decided by a district judge rather than a bankruptcy judge.”

Southern Pac. Transp. v. Voluntary Purchasing Groups, 252 B.R. 373, 382 (E.D. Tex. 2000) (quoting *In re National Gypsum*, 14 B.R. 188, 192-93 (N.D. Tex. 1991)). As such, even the presence of a substantial federal question is not a basis for mandatory withdrawal; mandatory withdrawal is only proper when a bankruptcy court would have to interpret and apply federal law on a novel and unsettled question. See *Beta Operating Co., LLC v. Aera Energy, LLC (In re Memorial Prod. Partners)*, 2018 U.S. Dist. LEXIS 161159, at *9 (S.D. Tex. Sept. 20, 2018); *UPH Holdings, Inc. v. Sprint Nextel Corp.*, 2013 U.S. Dist. LEXIS 189349, at *4 (W.D. Tex. Dec. 10, 2013) (holding no mandatory withdrawal when, among other reasons, “the Bankruptcy Court will be tasked with ‘no more than application of federal communications law to a given set of facts.’”) (citations omitted). Finally, “mandatory withdrawal is to be applied narrowly to ensure bankruptcy cases are litigated in the bankruptcy courts and to prevent 157(d) from becoming an ‘escape hatch’ from litigating cases under the Bankruptcy Code.” See, e.g., *Manila Indus., Inc. v. Ondova Ltd. (In re Ondova Ltd.)*, 2009 U.S. Dist. LEXIS 102134, at *6 (N.D. Tex. Oct. 1, 2009) (quoting *In re G-I Holdings, Inc.*, 295 B.R. 211, 221 (D. N.J. 2003)).

43. None of the putative federal causes of action raised by Plaintiffs require “substantial and material consideration” of a federal statute or more than the cursory application of settled federal law. In fact, most can be summarily dismissed as they either grossly misinterpret settled law, based on materially misstated facts, or assert causes of action that belong to other parties.

D. The Complaint Is Barred by the Doctrine of *Res Judicata*

44. The doctrine of *res judicata* protects the finality of judgements by preventing litigants from re-litigating the same issues over and over again. “[R]es judicata has four elements: (1) the parties are identical or in privity; (2) the judgment. . . was rendered by a court of competent jurisdiction; (3) the prior action was concluded by a final judgment on the merits; and (4) the same claim or cause of action was involved in both actions.” *Comer v. Murphy Oil USA*, 718 F.3d 460, 467 (5th Cir. 2013). Each of those elements is satisfied here, and the Complaint is barred by *res judicata*. Plaintiffs had their opportunity to challenge these orders; they do not get a second bite at the apple or to re-litigate these issues in a different forum.

45. As set forth above, the parties are identical. Plaintiffs had the right to object to the HarbourVest Settlement and the Transfer of the HarbourVest interests, and Plaintiffs (a) actually objected to the Settlement Motion arguing that they had a “Right of First Refusal” under the Members Agreement; (b) had the right to take discovery on all issues, including the value of the HarbourVest interests; (c) could have objected based on the Advisers Act or RICO; (d) deposed HarbourVest’s 30(b)(6) witness; and (e) ***withdrew their objection once they realized that they did not have a “Right of First Refusal.”*** The Bankruptcy Court also indisputably had jurisdiction over the matter. Although the Settlement Order is being appealed by the Trusts, it is a final judgment for purposes of *res judicata*. See *Fid. Standard Life Ins. Co. v. First Nat’l Bank & Trust Co.*, 510 F.2d 272, 273 (5th Cir. 1975) (“A case pending appeal is *res judicata* and entitled to full faith and credit unless and until reversed on appeal.”). Finally, as set forth above, the same claims or causes

of action are involved. The Complaint is a blatant collateral attack on the Settlement Order. *See Miller v. Meinhard-Commercial Corp.*, 462 F.2d 358, 360 (5th Cir. 1972) (finding that regardless of relief sought, it is a collateral attack if it must in some fashion overrule a previous judgment).

46. Similarly, the January Order was entered in January 2020 with Mr. Dondero's consent and with the knowledge of Plaintiffs.²⁹ It was never appealed and is final. The July Order was entered in July 2020 without objection and with the knowledge of Plaintiffs. It was (a) never appealed; (b) is final;³⁰ and (c) the Bankruptcy Court was a court of competent jurisdiction.³¹ *See In re Republic Supply Co. v. Shoaf*, 815 F.2d 1046, 1052-53 (5th Cir. 1987) (finding a court has jurisdiction for purposes of res judicata when no party contests subject matter jurisdiction in the original proceeding). Consequently, any attempt to add Mr. Seery to the Complaint and subsequent challenges to the Gatekeeper Orders would involve the same issues addressed by the Bankruptcy Court and must be dismissed on the basis of *res judicata*.

E. This Court Should Consider Mr. Dondero's Litigious Nature

47. This Court should also consider the history of this case when determining whether to enforce the reference, including Mr. Dondero's history of vexatious litigation (brought directly and indirectly) and the Bankruptcy Court's familiarity with the Bankruptcy Case and the interrelatedness of Mr. Dondero's byzantine web of related companies. Appx. 5, ¶ 77-78. In fact, the Fifth Circuit recently addressed a similar issue in *Burch v. Freedom Mortgage. Corp.* (*In re*

²⁹ On December 4, 2019, CLOH filed a *Notice of Appearance and Request for Copies* [Docket No. 152] in the Bankruptcy Case by and through its counsel Kane Russell Coleman Logan PC. Since then, CLOH has received notice as required by the Bankruptcy Code of all pleadings filed in the Bankruptcy Case.

³⁰ The Bankruptcy Court specifically found that the Gatekeeper Orders were *res judicata* in the Confirmation Order. *See* Appx. 5, ¶ 73; ¶ 28 *supra*.

³¹ Plaintiffs have questioned whether the Bankruptcy Court exceeded its jurisdiction to enter the July Order in the Motion for Reconsideration. Any attempt to litigate that issue in this Court may impact the Motion for Reconsideration and must be referred to the Bankruptcy Court under the Order of Reference. *See In re Margulies*, 476 B.R. 393 (Bankr. S.D.N.Y. 2012) (citing *Mich. Emp't Sec. Comm'n v. Wolverine Radio Co. (In re Wolverine Radio Co.)*, 930 F.2d 1132, 1143 (6th Cir. 1991)) ("If the action between third parties will have a collateral estoppel effect on the debtor, the third party action is 'related to' the bankruptcy case for jurisdictional purposes.").

Burch). In *Burch*, the movant sought to avoid bankruptcy court jurisdiction over claims regarding the interpretation and enforceability of prior bankruptcy court orders. *Burch*, 385 Fed. Appx. at 747. Mr. Burch, like Mr. Dondero, had also been found to be an abusive litigant. The Fifth Circuit denied Mr. Burch’s attempts to avoid bankruptcy court jurisdiction through clever pleading, calling them “frivolous,” and “warn[ed] Burch that any further frivolous or abusive filings in this court, the district court, or the bankruptcy court will invite the imposition of sanctions, including dismissal, monetary sanctions, and/or restrictions on his ability to file pleadings in this court and any court subject to this court’s jurisdiction.” *Id.*, at 749; *see also* 28 U.S.C. § 1927 (“Any attorney or other person . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorney’s fees reasonably incurred because of such conduct.”). Mr. Dondero, directly and through his proxies, is a frivolous and abusive litigant – hence the need for the “gatekeeper” provisions. This Court should not provide him a forum to further abuse the judicial process.

CONCLUSION

WHEREFORE, the Debtor respectfully requests that the Court grant its Motion and enter an order in the form annexed to the Motion as **Exhibit A**, and grant any further relief as the Court deems just and proper.

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Dated: May 19, 2021

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

CHARITABLE DAF FUND, L.P., AND CLO
HOLDCO LTD.

Plaintiff,

vs.

HIGHLAND CAPITAL MANAGEMENT, L.P.,
HIGHLAND HCF ADVISOR, LTD., AND
HIGHLAND CLO FUNDING, LTD.

Defendants.

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Case No. 3:21-cv-00842-B

**APPENDIX IN SUPPORT OF HIGHLAND CAPITAL MANAGEMENT, L.P.'S
MOTION FOR AN ORDER TO ENFORCE THE ORDER OF REFERENCE**

Highland Capital Management, L.P., a defendant in the above-captioned case (the “Debtor” or “Highland”), hereby files this appendix in support of *Highland Capital Management, L.P.’s Motion for an Order to Enforce the Order of Reference* (the “Motion”).¹

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Appx.	Description
1	<i>Original Complaint</i> , Case No. 21-00842-B, Docket No. 1 (N.D. Tex. Apr. 12, 2001)
2	<i>Order of Reference of Bankruptcy Cases and Proceedings Nunc Pro Tunc</i>
3	<i>Civil Cover Sheet</i> , Case No. 21-00842-B, Docket No. 2 (N.D. Tex. Apr. 13, 2001)
4	Summary of Dondero Entity Litigation
5	<i>Order Confirming the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (as Modified) and (ii) Granting Related Relief</i> [Docket No. 1943] ²
6	HarbourVest 2017 Global Fund L.P. Proof of Claim No. 143, HarbourVest 2017 Global AIF L.P., Proof of Claim No. 147, HarbourVest Dover Street IX Investment L.P., Proof of Claim No. 150, HV International VIII Secondary L.P., Proof of Claim No. 153, HarbourVest Skew Base AIF L.P., Proof of Claim No. 154, and HarbourVest Partners L.P., Proof of Claim No. 149.
7	<i>Motion for Entry of an Order Approving Settlement with HarbourVest (Claim Nos. 143, 147, 149, 150, 153, 154) and Authorizing Actions Consistent Therewith</i> [Docket No. 1625]
8	<i>Settlement Agreement and Transfer Agreement for Ordinary Shares of Highland CLO Funding, Ltd.</i> [Docket No. 1631-1]
9	<i>Objection to the Debtor’s Motion for Entry of an Order Approving Settlement with HarbourVest</i> , [Docket No. 1697]
10	<i>Objection to the Debtor’s Motion for Entry of an Order Approving Settlement with HarbourVest (Claim Nos. 143, 147, 149, 150, 153, 154) and Authorizing Actions Consistent Therewith</i> [Docket No. 1706]
11	<i>Objection to HarbourVest Settlement</i> [Docket No. 1707]
12	Notice of Deposition [Docket No. 1705]
13	<i>Omnibus Reply in Support of Debtor’s Motion for Entry of an Order Approving Settlement with HarbourVest (Claim Nos. 143, 147, 149, 150, 153, 154) and Authorizing Actions Consistent Therewith</i> [Docket No. 1731]

¹ All capitalized terms used but not defined herein have the meanings given to them in the Motion.

² Unless otherwise indicated, all docket reference numbers refer to the docket maintained by the Bankruptcy Court.

14	Hearing Transcript, January 14, 2021
15	<i>Order Approving Debtor's Settlement with HarbourVest (Claim Nos. 143, 147, 149, 150, 153, 154) and Authorizing Actions Consistent Therewith</i> [Docket No. 1788]
16	<i>Notice of Appeal</i> [Docket No. 1870]; <i>Amended Notice of Appeal and Statement of Election</i> [Docket No. 1889]
17	Correspondence, Jeffrey Pomerantz and Mazin Sbaiti
18	<i>Plaintiff's Motion for Leave to File First Amended Complaint in the District Court, Case No. 21-00842-B, Docket No. 6 (N.D. Tex. Apr. 19, 2021)</i>
19	<i>Order Approving Settlement with Official Committee of Unsecured Creditors Regarding Governance of the Debtor and Procedures for Operations in the Ordinary Course</i> [Docket No. 339]
20	<i>Order Approving Debtor's Motion Under Bankruptcy Code Sections 105(a) and 363(b) for Authorization to Retain James P. Seery, Jr., as Chief Executive Officer, Chief Restructuring Officer and Foreign Representative Nunc Pro Tunc To March 15, 2020</i> [Docket No. 854]
21	<i>Electronic Order, Case No. 21-00842-B, Docket No. 8 (N.D. Tex. Apr. 20, 2021)</i>
22	Fourth Amended and Restated Agreement of Limited Partnership of Highland Capital Management, L.P., dated December 24, 2015
23	Indemnification and Guaranty Agreement, dated as of January 9, 2020, by and between Strand Advisors, Inc., Highland Capital Management, L.P., and James P. Seery, Jr.
24	<i>Debtor's Motion for an Order Requiring the Violators to Show Cause Why They Should Not Be Held in Civil Contempt for Violating Two Court Orders</i> [Docket No. 2247]
25	<i>Motion for Modification of Order Authorizing Retention of James P. Seery, Jr., Due to Lack of Subject Matter Jurisdiction</i> [Docket No. 2248]
26	<i>Order Requiring the Violators to Show Cause Why They Should Not Be Held in Civil Contempt for Violating Two Court Orders</i> [Docket No. 2255]
27	Deposition Transcript of Grant Scott, January 21, 2021
28	<i>Response of the Charitable DAF Fund, L.P., CLO Holdco, Ltd., and Sbaiti & Company PLLC to Show Cause Order</i> [Docket No. 2313]

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Dated: May 19, 2021.

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APPENDIX 1

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

**CHARITABLE DAF FUND, L.P.
and CLO HOLDCO, LTD.,
*directly and derivatively,***

Plaintiffs,

V.

Cause No. _____

**HIGHLAND CAPITAL MANAGEMENT,
L.P. , HIGHLAND HCF ADVISOR, LTD.,
and HIGHLAND CLO FUNDING, LTD.,
*nominally,***

Defendants.

ORIGINAL COMPLAINT

I.

INTRODUCTION

This action arises out of the acts and omissions of Defendant Highland Capital Management, L.P. (“HCM”), which is the general manager of Highland HCF Advisor, Ltd. (“HCFA”), both of which are registered investment advisers under the Investment Advisers Act of 1940 (the “Advisers Act”),¹ and nominal Defendant Highland CLO Funding, Ltd. (“HCLOF”) (HCM and HCFA each a “Defendant,” or together, “Defendants”). The acts and omissions which have recently come to light reveal breaches of fiduciary duty, a pattern of violations of the Advisers Act’s anti-fraud provisions, and concealed breaches of the HCLOF Company Agreement, among others, which have caused and/or likely will cause Plaintiffs damages.

¹ <https://adviserinfo.sec.gov/firm/summary/110126>



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At all relevant times, HCM was headed by CEO and potential party James P. Seery (“Seery”). Seery negotiated a settlement with the several Harbourvest² entities who owned 49.98% of HCLOF. The deal had HCM (or its designee) purchasing the Harbourvest membership interests in HCLOF for \$22.5 million. Recent revelations, however, show that the sale was predicated upon a sales price that was vastly below the Net Asset Value (“NAV”) of those interests. Upon information and belief, the NAV of HCLOF’s assets had risen precipitously, but was not disclosed to Harbourvest nor to Plaintiffs.

Under the Advisers Act, Defendants have a non-waivable duty of loyalty and candor, which includes its duty not to inside trade with its own investors, *i.e.*, not to trade with an investor to which HCM and Seery had access to superior non-public information. Upon information and belief, HCM’s internal compliance policies required by the Advisers Act would not generally have allowed a trade of this nature to go forward—meaning, the trade either was approved in spite of compliance rules preventing it, or the compliance protocols themselves were disabled or amended to a level that leaves Defendants HCM and HCLOF exposed to liability. Thus, Defendants have created an unacceptable perpetuation of exposure to liability.

Additionally, Defendants are liable for a pattern of conduct that gives rise to liability for their conduct of the enterprise consisting of HCM in relation to HCFA and HCLOF, through a pattern of concealment, misrepresentation, and violations of the securities rules. In the alternative, HCFA and HCM, are guilty of self-dealing, violations of the Advisers Act, and tortious interference by (a) not disclosing that Harbourvest had agreed to sell at a price well below the current NAV, and (b) diverting the Harbourvest opportunity to themselves.

² “Harbourvest” refers to the collective of Harbourvest Dover Street IX Investment, L.P., Harbourvest 2017 Global AIF, L.P., Harbourvest 2017 Global Fund, L.P., HV International VIII Secondary, L.P., and Harbourvest Skew Base AIF, L.P. Each was a member of Defendant Highland CLO Funding, Ltd.

For these reasons, judgment should be issued in Plaintiffs' favor.

II.

PARTIES

1. Plaintiff CLO Holdco, Ltd. is a limited company incorporated under the laws of the Cayman Islands.

2. Plaintiff Charitable DAF Fund, L.P., ("DAF") is a limited partnership formed under the laws of the Cayman Islands.

3. Defendant Highland Capital Management, L.P. is a limited partnership with its principal place of business at 300 Crescent Court, Suite 700, Dallas, Texas 75201. It may be served at its principal place of business or through its principal officer, James P. Seery, Jr., or through the Texas Secretary of State, or through any other means authorized by federal or state law.

4. Defendant Highland HCF Advisor, Ltd. is a limited company incorporated under the laws of the Cayman Islands. Its principal place of business is 300 Crescent Court, Suite 700, Dallas, Texas 75201. It is a registered investment adviser ("RIA") subject to the laws and regulations of the Investment Advisers Act of 1940 (the "Adviser's Act"). It is a wholly-owned subsidiary of Highland Capital Management, L.P.

5. Nominal Defendant Highland CLO Funding, Ltd. is a limited company incorporated under the laws of the Island of Guernsey. Its registered office is at First Floor, Dorey Court, Admiral Park, St. Peter Port, Guernsey GY1 6HJ, Channel Islands. Its principal place of business is 300 Crescent Court, Suite 700, Dallas, Texas 75201.

6. Potential party James P. Seery, Jr. ("Seery") is an officer and/or director and/or control person of Defendants Highland Capital Management, L.P., Highland CLO Funding, Ltd., and Highland HCF Advisor, Ltd., and is a citizen of and domiciled in Floral Park, New York.

III.

JURISDICTION AND VENUE

7. This Court has subject matter jurisdiction over this dispute under 28 U.S.C. § 1331 as one or more rights and/or causes of action arise under the laws of the United States. This Court has supplemental subject matter jurisdiction over all other claims under 28 U.S.C. § 1367.

8. Personal jurisdiction is proper over the Defendants because they reside and/or have continual contacts with the state of Texas, having regularly submitted to jurisdiction here. Jurisdiction is also proper under 18 U.S.C. § 1965(d).

9. Venue is proper in this Court under 28 U.S.C. § 1391(b) and (c) because one or more Defendants reside in this district and/or a substantial part of the events or omissions giving rise to the claim occurred or a substantial part of property that is the subject of the action is situated in this district. Venue in this district is further provided under 18 U.S.C. § 1965(d).

IV.

RELEVANT BACKGROUND

HCLOF IS FORMED

10. Plaintiff DAF is a charitable fund that helps several causes throughout the country, including providing funding for humanitarian issues (such as veteran's welfare associations and women's shelters), public works (such as museums, parks and zoos), and education (such as specialty schools in underserved communities). Its mission is critical.

11. Since 2012, DAF was advised by its registered investment adviser, Highland Capital Management, L.P., and its various subsidiaries, about where to invest. This relationship was governed by an Investment advisory Agreement.

12. At one point in 2017, HCM advised DAF to acquire 143,454,001 shares of HCLOF, with HCFA (a subsidiary of HCM) serving as the portfolio manager. DAF did so via a holding entity, Plaintiff CLO Holdco, Ltd.

13. On November 15, 2017, through a Subscription and Transfer Agreement, the DAF entered into an agreement with others to sell and transfer shares in HCLOF, wherein the DAF retained 49.02% in CLO Holdco.

14. Pursuant to that agreement, Harbourvest acquired the following interests in the following entities:

Harbourvest Dover Street IX Investment, L.P., acquired 35.49%;

Harbourvest 2017 Global AIF, L.P., acquired 2.42%;

Harbourvest 2017 lobal Fund, L.P., acquired 4.85%;

HV International VIII Secondary, L.P., acquired 6.5%; and

Harbourvest Skew Base AIF, L.P., acquired 0.72%;

for a total of 49.98% (altogether, the “Harbourvest interests”).

15. On or about October 16, 2019, Highland Capital Management filed for Chapter 11 bankruptcy in Delaware Bankruptcy Court, which was later transferred to the Northern District of Texas Bankruptcy Court, in the case styled *In Re: Highland Capital Management, L.P., Debtor*, Cause No. 19-34054, (the “HCM Bankruptcy” and the Court is the “Bankruptcy Court”).

The Harbourvest Settlement with Highland Capital Management in Bankruptcy

16. On April 8, 2020, Harbourvest submitted its proofs of claim in the HCM bankruptcy proceeding. Annexed to its proofs of claims was an explanation of the Proof of Claim and the basis therefor setting out various pre-petition allegations of wrongdoing by HCM. *See, e.g.*, Case No. 19-bk-34054, Doc. 1631-5.

17. The debtor, HCM, made an omnibus response to the proofs of claims, stating they were duplicative of each other, overstated, late, and otherwise meritless.

18. Harbourvest responded to the omnibus objections on September 11, 2020. *See* Cause No. 19-bk-34054, Doc. 1057.

19. Harbourvest represented that it had invested in HCLOF, purchasing 49.98% of HCLOF's outstanding shares.

20. Plaintiff CLO Holdco was and is also a 49.02% holder of HCLOF's member interests.

21. In its Omnibus Response, Harbourvest explained that its claims included unliquidated legal claims for fraud, fraud in the inducement, RICO violations under 18 U.S.C. 1964, among others (the "Harbourvest Claims"). *See* Cause No. 19-bk-34054, Doc. 1057.

22. The Harbourvest Claims centered on allegations that when Harbourvest was intending to invest in a pool of Collateralized Loan Obligations, or CLOs, that were then-managed by Acis Capital Management ("Acis"), a subsidiary of HCM, HCM failed to disclose key facts about ongoing litigation with a former employee, Josh Terry.

23. Harbourvest contended that HCM never sufficiently disclosed the underlying facts about the litigation with Terry, and HCM's then-intended strategy to fight Terry caused HCLOF to incur around \$15 million in legal fees and costs. It contended that had it known the nature of the lawsuit and how it would eventually turn out, Harbourvest never would have invested in HCLOF. *See* Cause No. 19-bk-34054, Doc. 1057.

24. HCLOF's portfolio manager is HCFA. HCM is the parent of HCFA and is managed by its General Partner, Strand Management, who employs Seery and acts on behalf of HCM.

25. Before acceding to the Harbourvest interests, HCM was a 0.6% holder of HCLOF interests.

26. While even assuming Harbourvest's underlying claims were valid as far as the lost \$15 million went, the true damage of the legal fees to Harbourvest would have been 49.98% of the HCLOF losses (i.e., less than \$7.5 million). Harbourvest claimed that it had lost over \$100 million in the HCLOF transaction due to fraud, which, after trebling under the racketeering statute, it claimed it was entitled to over \$300 million in damages.

27. In truth, as of September 2020, Harbourvest had indeed lost some \$52 million due to the alleged diminishing value of the HCLOF assets (largely due to the underperformance of the Acis entities³)—and the values were starting to recover.

28. HCM denied the allegations in the Bankruptcy Court. Other than the claim for waste of corporate assets of \$15 million, HCM at all times viewed the Harbourvest legal claims as being worth near zero and having no merit.

29. On December 23, 2020, HCM moved the Court to approve a settlement between itself and Harbourvest. No discovery had taken place between the parties, and Plaintiff did not have any notice of the settlement terms or other factors prior to the motion's filing (or even during its pendency) in order to investigate its rights.

30. HCM set the hearing right after the Christmas and New Year's holidays, almost ensuring that no party would have the time to scrutinize the underpinnings of the deal.

31. On January 14, 2021, the Bankruptcy Court held an evidentiary hearing and approved the settlement in a bench ruling, overruling the objections to the settlement.

³ Acis was being managed by Joshua Terry. JP Morgan had listed the four ACIS entities under his management as the four worst performers of the 1200 CLOs it evaluated.

32. An integral part of the settlement was allowing \$45 million in unsecured claims that, at the time of the agreement, were expected to net Harbourvest around 70 cents on the dollar. In other words, Harbourvest was expected to recover around \$31,500,000 from the allowed claims.

33. As part of the consideration for the \$45 million in allowed claims, Harbourvest agreed to transfer all of its interests in HCLOF to HCM or its designee.

34. HCM and Seery rationalized the settlement value by allocating \$22.5 million of the net value of the \$45 million in unsecured claims as consideration to purchase Harbourvest's interests in HCLOF, meaning, if 70% of the unsecured claims—i.e., \$31.5 million—was realized, because \$22.5 million of that would be allocated to the purchase price of the Harbourvest interests in HCLOF, the true “settlement” for Harbourvest's legal claims was closer to \$9 million.

35. Plaintiffs here are taking no position at this time about the propriety of settling the Harbourvest legal claims for \$9 million. That is for another day.

36. At the core of this lawsuit is the fact that HCM purchased the Harbourvest interests in HCLOF for \$22.5 million knowing that they were worth far more than that.

37. It has recently come to light that, upon information and belief, the Harbourvest interests, as of December 31, 2020, were worth in excess of \$41,750,000, and they have continued to go up in value.

38. On November 30, 2020, which was less than a month prior to the filing of the Motion to Approve the Settlement, the net asset value of those interests was over \$34.5 million. Plaintiffs were never made aware of that.

39. The change is due to how the net asset value, or NAV, was calculated. The means and methods for calculating the “net asset value” of the assets of HCLOF are subject to and

governed by the regulations passed by the SEC pursuant to the Adviser's Act, and by HCM's internal policies and procedures.

40. Typically, the value of the securities reflected by a market price quote.

41. However, the underlying securities in HCLOF are not liquid and had not been traded in a long while.

42. There not having been any contemporaneous market quotations that could be used in good faith to set the marks⁴ meant that other prescribed methods of assessing the value of the interests, such as the NAV, would have been the proper substitutes.

43. Seery testified that the fair market value of the Harbourvest HCLOF interests was \$22.5 million. Even allowing some leeway there, it was off the mark by a mile.

44. Given the artifice described herein, Seery and the entity Defendants had to know that the representation of the fair market value was false. But it does not appear that they disclosed it to Harbourvest to whom they owed fiduciary duties as the RIA in charge of HCLOF, and they certainly did not disclose the truth to the Plaintiff.

45. It is either the case that (i) Defendants conducted the proper analysis to obtain a current value of the assets but decided to use a far lower valuation in order to whitewash the settlement or enrich the bankruptcy estate; *or* (ii) Defendants never conducted the proper current valuation, and therefore baselessly represented what the current value of the assets was, despite knowingly having no reasonable basis for making such a claim.

46. For years HCM had such internal procedures and compliance protocols. HCM was not allowed by its own compliance officers to trade with an investor where HCM had superior knowledge about the value of the assets, for example. While Plaintiff has no reason to believe that

⁴ The term "mark" is shorthand for an estimated or calculated value for a non-publicly traded instrument.

those procedures were scrapped in recent months, it can only assume that they were either overridden improperly or circumvented wholesale.

47. Upon finalizing the Harbourvest Settlement Agreement and making representations to the Bankruptcy Court to the Plaintiffs about the value of the Harbourvest Interests, Seery and HCM had a duty to use current values and not rely on old valuations of the assets or the HCLOF interests.

48. Given Defendants' actual or constructive knowledge that they were purchasing Harbourvest's Interests in HCLOF for a less than 50% of what those interests were worth—Defendants owed Plaintiff a fiduciary duty not to purchase them for themselves.

49. Defendants should have either had HCLOF repurchase the interests with cash, or offer those interests to Plaintiff and the other members *pro rata*, before HCM agreed to purchase them all lock, stock and barrel, for no up-front cash.

50. Indeed, had Plaintiff been offered those interests, it would have happily purchased them and therefore would have infused over \$20 million in cash into the estate for the purpose of executing the Harbourvest Settlement.

51. That Defendants (and to perhaps a lesser extent, the Unsecured Creditors Committee (the "UCC")) agreed to pay \$22.5 million for the HCLOF assets, where they had previously not consented to any such expenditure by the estate on behalf of HCLOF, strongly indicates their awareness that they were purchasing assets for far below market value.

52. The above is the most reasonable and plausible explanation for why Defendants and the UCC forwent raising as much as \$22.5 million in cash now in favor of hanging on to the HCLOF assets.

53. Indeed, in January 2021 Seery threatened Ethen Powell that “[Judge Jernigan] is laughing at you” and “we are coming after you” in response to the latter’s attempt to exercise his right as beneficial holder of the CLO, and pointing out a conflict of interest in Seery’s plan to liquidate the funds.

54. HCM’s threat, made by Seery, is tantamount to not only a declaration that he intends to liquidate the funds regardless of whether the investors want to do so, and whether it is in their best interests, but also that HCM intends to leverage what it views as the Bankruptcy Court’s sympathy to evade accountability.

V.

CAUSES OF ACTION

FIRST CAUSE OF ACTION *Breaches of Fiduciary Duty*

55. Plaintiffs respectfully incorporate the foregoing factual averments as if fully set forth herein and further alleges the following:

56. HCM is a registered investment advisor and acts on behalf of HCFA. Both are fiduciaries to Plaintiffs.

57. The Advisers Act establishes an unwaivable federal fiduciary duty for investment advisers.⁵

⁵ See e.g., *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 194 (1963); *Transamerica Mortg. Advisors (tama) v. Lewis*, 444 U.S. 11, 17 (1979) (“§ 206 establishes ‘federal fiduciary standards’ to govern the conduct of investment advisers.”); *Santa Fe Indus. v. Green*, 430 U.S. 462, 471, n.11 (1977) (in discussing *SEC v. Capital Gains*, stating that the Supreme Court’s reference to fraud in the “equitable” sense of the term was “premised on its recognition that Congress intended the Investment Advisers Act to establish federal fiduciary standards for investment advisers”). See also Investment Advisers Act Release No. 3060 (July 28, 2010) (“Under the Advisers Act, an adviser is a fiduciary whose duty is to serve the best interests of its clients, which includes an obligation not to subrogate clients’ interests to its own”) (citing Proxy Voting by Investment Advisers, Investment Advisers Act Release No. 2106 (Jan. 31, 2003)).

58. HCM and the DAF entered into an Amended and Restated Investment Advisory Agreement, executed between them on July 1, 2014 (the “RIA Agreement”). It renews annually and continued until the end of January 2021.

59. In addition to being the RIA to the DAF, HCM was appointed the DAF’s attorney-in-fact for certain actions, such as “to purchase or otherwise trade in Financial Instruments that have been approved by the General Partner.” RIA Agreement ¶ 4.

60. The RIA Agreement further commits HCM to value financial assets “in accordance with the then current valuation policy of the Investment Advisor [HCM], a copy of which will provided to the General Partner upon request.” RIA Agreement ¶ 5.

61. While HCM contracted for the recognition that it would be acting on behalf of others and could be in conflict with advice given the DAF, (RIA Agreement ¶ 12), nowhere did it purport to waive the fiduciary duties owed to the DAF not to trade as a principal in a manner that harmed the DAF.

62. HCFA owed a fiduciary duty to Holdco as an investor in HCLOF and to which HCFA was the portfolio manager. HCM owed a fiduciary duty to the DAF (and to Holdco as its subsidiary) pursuant to a written Advisory Agreement HCM and the DAF had where HCM agreed to provide sound investment advice and management functions.

63. As a registered investment adviser, HCM’s fiduciary duty is broad and applies to the entire advisor-client relationship.

64. The core of the fiduciary duty is to act in the best interest of their investors—the advisor must put the ends of the client before its own ends or the ends of a third party.

65. This is manifested in a duty of loyalty and a duty of utmost care. It also means that the RIA has to follow the terms of the company agreements and the regulations that apply to the investment vehicle.

66. The fiduciary duty that HCM and Seery owed to Plaintiff is predicated on trust and confidence. Section 204A of the Advisers Act requires investment advisors (whether SEC-registered or not) to establish, maintain, and enforce written policies and procedures reasonably designed to prevent the RIA from trading on material, non-public information. *See* 17 C.F.R. § 275.206(4)-7. That means that Plaintiff should be able to take Defendants at their word and not have to second guess or dig behind representations made by them.

67. The simple thesis of this claim is that Defendants HCFA and HCM breached their fiduciary duties by (i) insider trading with Harbourvest and concealing the rising NAV of the underlying assets—i.e., trading with Harbourvest on superior, non-public information that was neither revealed to Harbourvest nor to Plaintiff; (ii) concealing the value of the Harbourvest Interests; and (iii) diverting the investment opportunity in the Harbourvest entities to HCM (or its designee) without offering it to or making it available to Plaintiff or the DAF.

68. HCM, as part of its contractual advisory function with Plaintiffs, had expressly recommended the HCLOF investment to the DAF. Thus, diverting the opportunity for returns on its investment was an additional breach of fiduciary duty.

69. This violated a multitude of regulations under 27 C.F.R. part 275, in addition to Rules 10b-5 and 10b5-1. 17 CFR 240.10b5-1 (“Rule 10b5-1”) explains that one who trades while possessing non-public information is liable for insider trading, and they do not necessarily have to have *used* the specific inside information.

70. It also violated HCM’s own internal policies and procedures.

71. Also, the regulations impose obligations on Defendants to calculate a *current* valuation when communicating with an investor, such as what may or may not be taken into account, and what cannot pass muster as a current valuation. Upon information and belief, these regulations were not followed by the Defendants.

72. HCM's internal policies and procedures, which it promised to abide by both in the RIA Agreement and in its Form ADV SEC filing, provided for the means of properly calculating the value of the assets.

73. HCM either did not follow these policies, changed them to be out of compliance both with the Adviser Act regulations and its Form ADV representations, and/or simply misrepresented or concealed their results.

74. In so doing, because the fiduciary duty owed to Plaintiff is a broad one, and because Defendants' malfeasance directly implicates its relationship with Plaintiff, Defendants have breached the Advisers Act's fiduciary duties owed to Plaintiff as part of their fiduciary relationship.⁶

75. At no time between agreeing with Harbourvest to the purchase of its interests and the court approval did Defendants disclose to either Harbourvest or to Plaintiff (and the Bankruptcy Court for that matter) that the purchase was at below 50% the current net asset value as well, and when they failed to offer Plaintiff (and the other members of HCLOF) their right to purchase the interests pro rata at such advantageous valuations. Plaintiff's lost opportunity to

⁶ See Advisers Act Release No. 4197 (Sept. 17, 2015) (Commission Opinion) (“[O]nce an investment Advisory relationship is formed, the Advisers Act does not permit an adviser to exploit that fiduciary relationship by defrauding his client in any investment transaction connected to the Advisory relationship.”); see also *SEC v. Lauer*, No. 03-80612-CIV, 2008 U.S. Dist. LEXIS 73026, at 90 (S.D. Fla. Sept. 24, 2008) (“Unlike the antifraud provisions of the Securities Act and the Exchange Act, Section 206 of the Advisers Act does not require that the activity be ‘in the offer or sale of any’ security or ‘in connection with the purchase or sale of any security.’”).

purchase has harmed Plaintiff. Plaintiff had been led to believe by the Defendants that the value of what was being purchased in the Harbourvest settlement by HCM (or its designee) was at fair market value. This representation, repeated again in the Bankruptcy Court during the Harbourvest confirmation, implicitly suggested that a proper current valuation had been performed.

76. Defendant's principal, Seery, testified in January 2021 that the then-current fair market value of Harbourvest's 49.98% interest in HCLOF was worth around \$22.5 million. But by then, it was worth almost double that amount and has continued to appreciate. Seery knew or should have known that fact because the value of some of the HCLOF assets had increased, and he had a duty to know the current value. His lack of actual knowledge, while potentially not overtly fraudulent, would nonetheless amount to a breach of fiduciary duty for acting without proper diligence and information that was plainly available.

77. Furthermore, HCLOF holds equity in MGM Studios and debt in CCS Medical via various CLO positions. But Seery, in his role as CEO of HCM, was made aware during an advisors meeting in December 2020 that Highland would have to restrict its trading in MGM because of its insider status due to activities that were likely to apply upward pressure on MGM's share price.

78. Furthermore, Seery controlled the Board of CCS Medical. And in or around October 2020, Seery was advocating an equatization that would have increased the value of the CCS securities by 25%, which was not reflected in the HCM report of the NAV of HCLOF's holdings.

79. Seery's knowledge is imputed to HCM.

80. Moreover, it is a breach of fiduciary duty to commit corporate waste, which is effectively what disposing of the HCLOF assets would constitute in a rising market, where there

is no demand for disposition by the investors (save for HCM, whose proper 0.6% interest could easily be sold to the DAF at fair value).

81. As holder of 0.6% of the HCLOF interests, and now assignee of the 49.98% Harbourvest Interests), HCM has essentially committed self-dealing by threatening to liquidate HCLOF now that it may be compelled to do so under its proposed liquidation plan, which perhaps inures to the short term goals of HCM but to the pecuniary detriment of the other holders of HCLOF whose upside will be prematurely truncated.

82. Seery and HCM should not be allowed to benefit from the breach of their fiduciary duties because doing so would also cause Plaintiffs irreparable harm. The means and methods of disposal would likely render the full scope of damages to the DAF not susceptible to specific calculation—particularly as they would relate to calculating the lost opportunity cost. Seery and HCM likely do not have the assets to pay a judgment to Plaintiffs that would be rendered, simply taking the lost appreciation of the HCLOF assets.

83. Defendants are thus liable for diverting a corporate opportunity or asset that would or should have been offered to Plaintiff and the other investors. Because federal law makes the duties invoked herein unwaivable, it is preposterous that HCM, as a 0.6% holder of HCLOF, deemed itself entitled to the all of the value and optionality of the below-market Harbourvest purchase.

84. Defendants cannot rely on any contractual provision that purports to waive this violation. Nothing in any agreement purports to permit, authorize or otherwise sanitize Defendants' self-dealing. All such provisions are void.

85. In the fourth quarter of 2020, Seery and HCM notified staff that they would be terminated on December 31, 2020. That termination was postponed to February 28, 2021.

Purchasing the Harbourvest assets without staffing necessary to be a functioning Registered Investment Advisor was a strategic reversal from prior filings that outlined canceling the CLO management contracts and allowing investors to replace Highland as manager.

86. Seery's compensation agreement with the UCC incentivizes him to expedite recoveries and to prevent transparency regarding the Harbourvest settlement.

87. What is more, Seery had previously testified that the management contracts for the funds—HCLOF included—were unprofitable, and that he intended to transfer them. But he later rejected offers to purchase those management contracts for fair value and instead decided to continue to manage the funds—which is what apparently gave rise to the Harbourvest Settlement, among others. He simultaneously rejected an offer for the Harbourvest assets of \$24 million, stating that they were worth much more than that.

88. Because of Defendants' malfeasance, Plaintiffs have lost over \$25 million in damages—a number that continues to rise—and the Defendants should not be able to obtain a windfall.

89. For the same reason, Defendants' malfeasance has also exposed HCLOF to a massive liability from Harbourvest since the assignment of those interests is now one that is likely unenforceable under the Advisers Act, Section 47(b), if there was unequal information.

90. HCM and HCFA are liable as principals for breach of fiduciary duty, as are the principals and compliance staff of each entity.

91. Plaintiffs seek disgorgement, damages, exemplary damages, attorneys' fees and costs. To the extent the Court determines that this claim had to have been brought derivatively on behalf of HCLOF, then Plaintiffs represent that any pre-suit demand would have been futile since asking HCM to bring suit against its principal, Seery, would have been futile.

SECOND CAUSE OF ACTION
Breach of HCLOF Company Agreement
(By Holdco against HCLOF, HCM and HCFA)

92. Plaintiffs respectfully incorporate the foregoing factual averments as if fully set forth herein and further alleges the following:

93. On November 15, 2017, the members of HCLOF, along with HCLOF and HCFA, executed the *Members Agreement Relating to the Company* (the “Company Agreement”).

94. The Company Agreement governs the rights and duties of the members of HCLOF.

95. Section 6.2 of HCLOF Company Agreement provides that when a member “other than ... CLO Holdco [Plaintiff] or a Highland Affiliate,” intends to sell its interest in HCLOF to a third party (i.e., not to an affiliate of the selling member), then the other members have the first right of refusal to purchase those interests pro rata for the same price that the member has agreed to sell.

96. Here, despite the fact that Harbourvest agreed to sell its interests in HCLOF for \$22.5 million when they were worth more than double that, Defendants did not offer Plaintiff the chance to buy its pro rata share of those interests at the same agreed price of \$22.5 million (adjusted pro rata).

97. The transfer and sale of the interests to HCM were accomplished as part of the Harbourvest Settlement which was approved by the Bankruptcy Court.

98. Plaintiff was not informed of the fact that Harbourvest had offered its shares to Defendant HCM for \$22.5 million—which was under 50% of their true value.

99. Plaintiff was not offered the right to purchase its pro rata share of the Harbourvest interests prior to the agreement being struck or prior to court approval being sought.

100. Had Plaintiff been allowed to do so, it would have obtained the interests with a net equity value over their purchase price worth in excess of \$20 million.

101. No discovery or opportunity to investigate was afforded Plaintiff prior to lodging an objection in the Bankruptcy Court.

102. Plaintiff is entitled to specific performance or, alternatively, disgorgement, constructive trust, damages, attorneys' fees and costs.

THIRD CAUSE OF ACTION
Negligence
(By the DAF and CLO Holdco against HCM and HCFA)

103. Plaintiffs respectfully incorporate the foregoing factual averments as if fully set forth herein, and further alleges the following:

104. Plaintiffs incorporate the foregoing causes of action and note that all the foregoing violations were breaches of the common law duty of care imposed by law on each of Seery, HCFA and HCM.

105. Each of these Defendants should have known that their actions were violations of the Advisers Act, HCM's internal policies and procedures, the Company Agreement, or all three.

106. Seery and HCM owed duties of care to Plaintiffs to follow HCM's internal policies and procedures regarding both the propriety and means of trading with a customer [Harbourvest], the propriety and means of trading as a principal in an account but in a manner adverse to another customer [the DAF and Holdco], and the proper means of valuing the CLOs and other assets held by HCLOF.

107. It would be foreseeable that failing to disclose the current value of the assets in the HCLOF would impact Plaintiffs negatively in a variety of ways.

108. It would be reasonably foreseeable that failing to correctly and accurately calculate the current net asset value of the market value of the interests would cause Plaintiffs to value the Harbourvest Interests differently.

109. It would be reasonably foreseeable that referring to old and antiquated market quotations and/or valuations of the HCLOF assets or interests would result in a mis-valuation of HCLOF and, therefore, a mis-valuation of the Harbourvest Interests.

110. Likewise, it would have been foreseeable that Plaintiff's failure to give Plaintiff the opportunity to purchase the Harbourvest shares at a \$22.5 million valuation would cause Plaintiff damages. Defendants knew that the value of those assets was rising. They further knew or should have known that whereas those assets were sold to HCM for an allowance of claims to be funded in the future, selling them to Plaintiff would have provided the estate with cash funds.

111. Defendants' negligence foreseeably and directly caused Plaintiff harm.

112. Plaintiff is thus entitled to damages.

FOURTH CAUSE OF ACTION
Racketeering Influenced Corrupt Organizations Act
(CLO Holdco and DAF against HCM)

113. Plaintiffs respectfully incorporate the foregoing factual averments as if fully set forth herein, and further alleges the following:

114. Defendants are liable for violations of the Racketeer Influenced and Corrupt Organizations ("RICO") Act, 18 U.S.C. § 1961 *et seq.*, for the conduct of an enterprise through a pattern of racketeering activity.

115. HCLOF constitutes an enterprise under the RICO Act. Additionally, or in the alternative, HCM, HCLA, and HCLOF constituted an association-in-fact enterprise. The purpose of the association-in-fact was the perpetuation of Seery's position at HCM and using the

Harbourvest settlement as a vehicle to enrich persons other than the HCLOF investors, including Holdco and the DAF, and the perpetuation of HCM's holdings in collateralized loan obligations owned by HCLOF, while attempting to deny Plaintiffs the benefit of its rights of ownership.

116. The association-in-fact was bound by informal and formal connections for years prior to the elicited purpose, and then changed when HCM joined it in order to achieve the association's illicit purpose. For example, HCM is the parent and control person over HCFA, which is the portfolio manager of HCLOF pursuant to a contractual agreement—both are registered investment advisors and provide advisory and management services to HCLOF.

117. Defendants injured Plaintiffs through their continuous course of conduct of the HCM-HCLA-HCLOF association-in-fact enterprise. HCM's actions (performed through Seery and others) constitute violations of the federal wire fraud, mail fraud, fraud in connection with a case under Title 11, and/or securities fraud laws, pursuant to **18 U.S.C. § 1961(1)(B)** and **(D)**.

118. HCM operated in such a way as to violate insider trading rules and regulations when it traded with Harbourvest while it had material, non-public information that it had not supplied to Harbourvest or to Plaintiffs.

119. In or about November 2020, HCM and Harbourvest entered into discussions about settling the Harbourvest Claims. Seery's conduct of HCLOF and HCLA on behalf of HCM through the interstate mails and/or wires caused HCM to agree to the purchase of Harbourvest's interests in HCLOF.

120. On or about each of September 30, 2020, through December 31, 2020, Seery, through his conduct of the enterprise, utilized the interstate wires and/or mails to obtain or arrive at valuations of the HCLOF interests. Seery's conduct of the enterprise caused them to cease

sending the valuation reports to Plaintiffs, which eventually allowed Plaintiffs to be misled into believing that Seery had properly valued the interests.

121. On or about September 30, 2020, Seery transmitted or caused to be transmitted though the interstate wires information to HCLOF investors from HCM (via HCFA), including Harbourvest, regarding the value of HCLOF interests and underlying assets.

122. Additionally, Seery operated HCM in such a way that he concealed the true value of the HCLOF interests by utilizing the interstate wires and mails to transmit communications to the court in the form of written representations on or about December 23, 2020, and then further transmitted verbal representations of the current market value (the vastly understated one) on January 14, 2021, during live testimony.

123. However, Harbourvest was denied the full picture and the true value of the underlying portfolio. At the end of October and November of 2020, HCM had updated the net asset values of the HCLOF portfolio. According to sources at HCM at the time, the HCLOF assets were worth north of \$72,969,492 as of November 30, 2020. Harbourvest's share of that would have been \$36,484,746.

124. The HCLOF net asset value had reached \$86,440,024 as of December 31, 2021, which means that by the time Seery was testifying in the Bankruptcy Court on January 14, 2021, the fair market value of the Harbourvest Assets was \$22.5 million, when it was actually closer to \$43,202,724. Seery, speaking on behalf of HCM, knew of the distinction in value.

125. On January 14, 2021, Seery also testified that he (implying HCM, HCLA and HCLOF) had valued the Harbourvest Assets at their current valuation and at fair market value. This was not true because the valuation that was used and testified to was ancient. The ostensible purpose of this concealment was to induce Plaintiff and other interest holdings to take no action.

126. In supporting HCM’s motion to the Bankruptcy Court to approve the Harbourvest Settlement, Seery omitted the fact that HCM was purchasing the interests at a massive discount, which would violate the letter and spirit of the Adviser’s Act.

127. Seery was informed in late December 2020 at an in-person meeting in Dallas to which Seery had to fly that HCLOF and HCM had to suspend trading in MGM Studios’ securities because Seery had learned from James Dondero, who was on the Board of MGM, of a potential purchase of the company. The news of the MGM purchase should have caused Seery to revalue the HCLOF investment in MGM.

128. In or around October 2020, Seery (who controls the Board of CSS Medical) was pursuing “equatization” of CSS Medical’s debt, which would have increased the value of certain securities by 25%. In several communications through the U.S. interstate wires and/or mails, and with Plaintiffs, and the several communications with Harbourvest during the negotiations of the settlement, Seery failed to disclose these changes which were responsible in part for the ever-growing value of the HCLOF CLO portfolio.

129. Seery was at all relevant times operating as an agent of HCM.

130. This series of related violations of the wire fraud, mail fraud, and securities fraud laws, in connection with the HCM bankruptcy, constitute a continuing pattern and practice of racketeering for the purpose of winning a windfall for HCM and himself--a nearly \$30,000,000 payday under the confirmation agreement.

131. The federal RICO statute makes it actionable for one’s conduct of an enterprise to include “fraud in connection with a [bankruptcy case]”. The Advisers’ Act antifraud provisions require full transparency and accountability to an advisers’ investors and clients and does not require a showing of reliance or materiality. The wire fraud provision likewise is violated when,

as here, the interstate wires are used as part of a “scheme or artifice ... for obtaining money or property by means of false ... pretenses, [or] representations[.]”

132. Accordingly, because Defendants’ conduct violated the wire fraud and mail fraud laws, and the Advisers’ Act antifraud provisions, and their acts and omissions were in connection with the HCM Bankruptcy proceedings under Title 11, they are sufficient to bring such conduct within the purview of the RICO civil action provisions, **18 U.S.C. § 1964**.

133. Plaintiffs are thus entitled to damages, treble damages, attorneys’ fees and costs of suit, in addition to all other injunctive or equitable relief to which they are justly entitled.

FIFTH CAUSE OF ACTION
Tortious Interference
(CLO Holdco against HCM)

134. Plaintiff respectfully incorporates the foregoing factual averments as if fully set forth herein and further alleges the following:

135. At all relevant times, HCM owned a 0.6% interest in HCLOF.

136. At all relevant times, Seery and HCM knew that Plaintiff had specific rights in HCLOF under the Company Agreement, § 6.2.

137. Section 6.2 of HCLOF Company agreement provides that when a member “other than ... CLO Holdco [Plaintiff] or a Highland Affiliate,” intends to sell its interest in HCLOF to a third party (i.e., not an affiliate of the member), then the other members have the first right of refusal to purchase those interests pro rata for the same price that the member has agreed to sell.

138. HCM, through Seery, tortiously interfered with Plaintiff’s contractual rights with HCLOF by, among other things, diverting the Harbourvest Interests in HCLOF to HCM without giving HCLOF or Plaintiff the option to purchase those assets at the same favorable price that HCM obtained them.

139. HCM and Seery tortiously interfered with Plaintiff's contractual rights with HCLOF by, among other things, misrepresenting the fair market value as \$22.5 million and concealing the current value of those interests.

140. But for HCM and Seery's tortious interference, Plaintiff would have been able to acquire the Harbourvest Interests at a highly favorable price. HCM and Seery's knowledge of the rights and intentional interference with these rights has caused damage to Plaintiff CLO Holdco.

141. Plaintiff is therefore entitled to damages from HCM and Seery, as well as exemplary damages.

VI.

JURY DEMAND

142. Plaintiff demands trial by jury on all claims so triable.

VII.

PRAYER FOR RELIEF

143. Wherefore, for the foregoing reasons, Plaintiffs respectfully pray that the Court enter judgment in its favor and against Defendants, jointly and severally, for:

- a. Actual damages;
- b. Disgorgement;
- c. Treble damages;
- d. Exemplary and punitive damages;
- e. Attorneys' fees and costs as allowed by common law, statute or contract;
- f. A constructive trust to avoid dissipation of assets;
- g. All such other relief to which Plaintiff is justly entitled.

Dated: April 12, 2021

Respectfully submitted,

SBAITI & COMPANY PLLC

/s/ Mazin A. Sbaiti

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APPENDIX 2

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

MISCELLANEOUS ORDER NO. 33

**ORDER OF REFERENCE OF BANKRUPTCY CASES
AND PROCEEDINGS NUNC PRO TUNC**

Pursuant to Section 104 of the Bankruptcy Amendments and Federal Judgeship Act of 1984, **28 U.S.C. Section 157**, it is hereby

ORDERED nunc pro tunc as of June 27, 1984 that any or all cases under Title 11 and any or all proceedings arising under Title 11 or arising in or related to a case under Title 11 which were pending in the Bankruptcy Court of the Northern District of Texas on June 27, 1984, which have been filed in this district since that date and which may be filed herein hereafter (except those cases and proceedings now pending on appeal) be and they hereby are referred to the Bankruptcy Judges of this district for consideration and resolution consistent with law.

It is further ORDERED that the Bankruptcy Judges for the Northern District of Texas be, and they hereby are, directed to exercise the authority and responsibilities conferred upon them as Bankruptcy Judges by the Bankruptcy Amendments and Federal Judgeship Act of 1984 and this court's order of reference, as to all cases and proceedings covered by this order from and after June 27, 1984.

In accordance with **28 U.S.C. Section 157(b)(5)**, it is further ORDERED that all personal injury tort and wrongful death claims arising in or related to a case under Title 11 pending in this court shall be tried in, or as determined by, this court and shall not be referred by this order.

So ORDERED this the 3rd day of August, 1984.

HALBERT O. WOODWARD
Chief Judge
Northern District of Texas

000302

APPENDIX 3

CHARITABLE DAF FUND, L.P.
and CLO HOLDCO, LTD.,

(c) Attorneys (Firm Name, Address, and Telephone Number)

HIGHLAND CAPITAL MANAGEMENT, L.P. , HIGHLAND
HCF ADVISOR, LTD.

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

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APPENDIX 4

SUMMARY OF DONDERO ENTITY LITIGATION****In re Highland Capital Management, L.P., Case No. 19-34054-sgj11 (Bankr. N.D. Tex.)*****9/23/20 Acis Settlement Motion [D.I. 1087]**

Objectors:	Dondero [D.I. 1121]	Acis filed a claim for at least \$75 million. Acis claim was the result of an involuntary bankruptcy initiated when the Debtor refused to pay an arbitration award and instead transferred assets to become judgment proof. Debtor settled claim for an allowed Class 8 claim of \$23 million and approximately \$1 million in cash payments. Dondero objected to the settlement alleging that it was unreasonable and constituted vote buying.	The Acis Settlement Motion was approved and Dondero's [D.I. 1347]. The appeal is being briefed.
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11/18/20 Motion of the Debtor Pursuant to 11 U.S.C. §§ 105(a) and 363(b) for Authority to Enter into Sub-Servicer Agreements [D.I. 1424]

Objectors:	Dondero [D.I. 1447]	The Debtor filed a motion seeking to retain a sub-servicer to assist in its reorganization consistent with the proposed plan. Dondero alleged that the sub-servicer was not needed; was too expensive; and would not be subject to Bankruptcy Court jurisdiction [D.I. 1447].	Dondero withdrew his objection [D.I. 1460] after forcing the Debtor to incur costs responding [D.I. 1459]
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11/19/20 James Dondero's Motion for Entry of an Order Requiring Notice and Hearing for Future Estate Transactions Occurring Outside of the Ordinary Course [D.I. 1439]

Movant:	Dondero	Dondero alleged the Debtor sold significant assets in violation of 11 U.S.C. § 363 and without providing Dondero a chance to bid. Dondero requested an emergency hearing on this motion [D.I. 1443]. Dondero filed this motion despite having agreed to the Protocols governing such sales.	Dondero withdrew this motion [D.I. 1622] after the Debtor and the Committee were forced to incur costs responding and preparing for trial [D.I. 1546, 1551].
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12/8/20 Motion for Order Imposing Temporary Restrictions on Debtor's Ability, as Portfolio Manager, to Initiate Sales by Non-Debtor CLO Vehicles [D.I. 1522]

Movants:	Advisors Funds	Movants argued that the Debtor should be precluded from causing the CLOs to sell assets without Movants' consent. Movants provided no support for this position which directly contradicted the terms of the CLO Agreements; and was filed notwithstanding the Protocols which governed such sales. Movants requested an emergency hearing on this motion [D.I. 1523].	The motion was denied [D.I. 1605] and was characterized as "frivolous."
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* All capitalized terms used but not defined herein have the meanings given to them in *Debtor's Omnibus Response to Motions for Stay Pending Appeal of the Confirmation Order*.

The following is by way of summary only. Nothing herein shall be deemed or considered a waiver of any rights or an omission of fact. The Debtor reserves all rights that it may have whether in law, equity, or contract.

12/23/20	<u>HarbourVest Settlement Motion [D.I. 1625]</u>				
	Objectors:	Dondero [D.I. 1697] Trusts [D.I. 1706] CLO Holdco [D.I. 1707]	The HarbourVest Entities asserted claims in excess of \$300 million in connection with an investment in a fund indirectly managed by the Debtor for, among other things, fraud and fraudulent inducement, concealment, and misrepresentation. Debtor settled for an allowed Class 8 claim of \$45 million and an allowed Class 9 claim of \$35 million. Dondero and the Trusts alleged that the settlement was unreasonable; was a windfall to the HarbourVest Entities; and constituted vote buying. CLO Holdco argued that the settlement could not be effectuated under the operative documents.	CLO Holdco withdrew its objection at the hearing. The settlement was approved and the remaining objections were overruled [D.I. 1788].	The Trusts appealed [D.I. 1870], and the appeal is being briefed. CLO Holdco recently filed a complaint alleging, among other things, that the settlement was a breach of fiduciary duty and a RICO violation.
1/14/21	<u>Motion to Appoint Examiner Pursuant to <i>11 U.S.C. § 1104(c)</i> [D.I. 1752]</u>				
	Movants:	Trusts Dondero [D.I. 1756]	Movants sought the appointment of an examiner 14 months after the Petition Date and commencement of Plan solicitation to assess the legitimacy of the claims against the various Dondero Entities and to avoid litigation. Movants requested an emergency hearing on this motion [D.I. 1748].	The motion was denied [D.I. 1960].	N/A
1/20/21	<u>James Dondero's Objection to Debtor's Proposed Assumption of Executory Contracts and Cure Amounts Proposed in Connection Therewith [D.I. 1784]</u>				
	Objector:	Dondero	Dondero objected to the Debtor's proposed assumption of the limited partnership agreement governing the Debtor and MSCF [D.I. 1719].	Dondero withdrew his objection [D.I. 1876] after forcing the Debtor to incur the expense of responding (which included a statement that the Debtor limited partnership agreement was not being assumed).	N/A
1/22/20	<u>Objections to Fifth Amended Plan of Reorganization [D.I. 1472]</u>				
	Objectors: ¹	Dondero [D.I. 1661] Trusts [D.I. 1667] Advisors & Senior Funds ² [D.I. 1668]	All objections to the Plan were consensually resolved prior to the confirmation hearing except for the objections of the Dondero Entities and the U.S. Trustee. The U.S. Trustee did not press its objection at confirmation.	All objections were overruled and the Confirmation Order was entered.	Dondero, the Trusts, the Advisors, and the Funds appealed [D.I. 1957, 1966, 1970, 1972]. The appeal is

¹ In addition to the Dondero Entities' objections, the following objections were filed: State Taxing Authorities [D.I. 1662]; Former Employees [D.I. 1666]; IRS [D.I. 1668]; US Trustee [D.I. 1671]; Daugherty [D.I. 1678]. These objections were either resolved prior to confirmation or not pressed at confirmation.

1670] [D.I. 1669]

HCRE [D.I. CLO Holdco

1673] [D.I. 1675]

NexBank
Entities

[D.I. 1676]

1/24/21 Application for Allowance of Administrative Expense Claim [D.I. 1826]

Movants: Advisors The Advisors seek an administrative expense claim for approximately \$14 million they allege they overpaid to the Debtor during the bankruptcy case under the Shared Services Agreement. Notably, the Advisors have not paid \$14 million to the Debtor during the bankruptcy. This matter is currently being litigated. N/A

2/3/21 NexBank's Application for Allowance of Administrative Expense Claim [D.I. 1888]

Movant: NexBank NexBank seeks an administrative expense claim for reimbursement of \$2.5 million paid to the Debtor under its Shared Services Agreement and investment advisory agreement. NexBank alleges that it did not receive the services. This matter is currently being litigated. N/A

2/8/21 James Dondero Motion for Status Conference [D.I. 1914]

Movant: Dondero Dondero requested a chambers conference to convince the Court to delay confirmation of the Plan to allow for continued negotiation of the "pot plan." The request was denied [D.I. 1929] after the Debtor and Committee informally objected. N/A

2/28/21 Motions for Stay Pending Appeal

Movants: The only parties requesting a stay pending appeal were the Dondero Entities. They alleged a number of potential harms to the Dondero Entities if a stay was not granted and offered to post a \$1 million bond. Relief was denied [D.I. 2084], Movants sought a stay pending appeal from this Court. Movants' arguments were found to be frivolous.

[D.I. 1973] Advisors [D.I. 1955] Trusts Funds [D.I. 1967] [D.I. 1971]

² In addition to the Funds, this objection was joined by: Highland Fixed Income Fund, Highland Funds I and its series, Highland Funds II and its series, Highland Healthcare Opportunities Fund, Highland Merger Arbitrate Fund, Highland Opportunistic Credit Fund, Highland Small-Cap Equity Fund, Highland Socially Responsible Equity Fund, Highland Total Return Fund, Highland/iBoxx Senior Loan ETF, NexPoint Real Estate Strategies Fund, NexPoint Real Estate Finance Inc., NexPoint Real Estate Capital, LLC, NexPoint Residential Trust, Inc., NexPoint Hospitality Trust, NexPoint Real Estate Partners, LLC, NexPoint Multifamily Capital Trust, Inc., VineBrook Homes Trust, Inc., NexPoint Real Estate Advisors, L.P., NexPoint Real Estate Advisors II, L.P., NexPoint Real Estate Advisors III, L.P., NexPoint Real Estate Advisors IV, L.P., NexPoint Real Estate Advisors V, L.P., NexPoint Real Estate Advisors VI, L.P., NexPoint Real Estate Advisors VII, L.P., and NexPoint Real Estate Advisors VIII, L.P. [D.I. 1677].

3/18/21

James Dondero, Highland Capital Management Fund Advisors, L.P., NexPoint Advisors, L.P., The Dugaboy Investment Trust, The Get Good Trust, and NexPoint Real Estate Partners, LLC, f/k/a HCRE Partners, LLC, a Delaware Limited Liability Company's Motion to Recuse Pursuant to 28 U.S.C. § 455 [D.I. 2060]

Movants:

Dondero
Advisors
Trusts
HCRE

Dondero argued that Judge Jernigan should recuse herself as her rulings against him and his related entities were evidence of her bias.

Judge Jernigan denied the motion without briefing from any other party on March 23, 2021 [D.I. 2083].

The Movants appealed [D.I. 2149].

Highland Capital Management, L.P. v. James D. Dondero, Adv. Proc. No. 20-03190-sgj (Bankr. N.D. Tex.)

12/7/20

Plaintiff Highland Capital Management, L.P.'s Emergency Motion for a Temporary Restraining Order and Preliminary Injunction against Mr. James Dondero [D.I. 21]

Movant: Debtor

The Debtor commenced an adversary proceeding seeking an injunction against Dondero. Dondero actively interfered with the management of the estate. Seery had instructed Debtor employees to sell certain securities on behalf of the CLOs. Dondero disagreed with Seery's direction and intervened to prevent these sales from being executed. Dondero also threatened Seery via text message and sent threatening emails to other Debtor employees.

A TRO was entered on December 10 [D.I. 10], which prohibited Dondero from, among other things, interfering with the Debtor's estate and communicating with Debtor employees unless it related to the Shared Services Agreements. A preliminary injunction was entered on January 12 after an exhaustive evidentiary hearing [D.I. 59].

The Court has this matter under advisement and is expected to rule shortly.

N/A

1/7/21

Plaintiff's Motion for an Order Requiring Mr. James Dondero to Show Cause Why He Should Not Be Held in Civil Contempt for Violating the TRO [D.I. 48]

Movant: Debtor

In late December, the Debtor discovered that Dondero had violated the TRO in multiple ways, including by destroying his cell phone, his text messages, and conspiring with the Debtor's then general counsel and assistant general counsel³ to coordinate offensive litigation against the Debtor. The hearing on this matter was delayed and there was litigation on evidentiary issues, among other things. An extensive evidentiary hearing was held on March 22.

³ As a result of this conduct, among other things, the Debtor terminated its general counsel and assistant general counsel for cause on January 5, 2021.

Highland Capital Management, L.P. v. Highland Capital Management Fund Advisors, L.P., NexPoint Advisors, L.P., Highland Income Fund, NexPoint Strategic Opportunities Fund, NexPoint Capital, Inc., and CLO Holdco, Ltd., Adv. Proc. No. 21-03000-sgj (Bankr. N.D. Tex.)

1/6/21 ***Plaintiff's Emergency Motion for a Temporary Restraining Order and Preliminary Injunction Against Certain Entities Owned and/or Controlled by Mr. James Dondero [D.I. 2]***

Movant:	Debtor	In late December, the Debtor received a number of threatening letters from the Funds, the Advisors, and CLO Holdco regarding the Debtor's management of the CLOs. These letters reiterated the arguments made by these parties in their motion filed on December 8, which the Court concluded were "frivolous." The relief requested by the Debtor was necessary to prevent the Funds, Advisors, and CLO Holdco's improper interference in the Debtor's management of its estate.	The parties agreed to the entry of a temporary restraining order on January 13 [D.I. 20]. A hearing on a preliminary injunction began on January 26 and was continued to May 7. The TRO was further extended with the parties' consent [D.I. 64]. The Debtor reached an agreement with CLO Holdco and dismissed CLO Holdco from the adversary proceeding.	N/A
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Highland Capital Management, L.P. v. Highland Capital Management Fund Advisors, L.P. and NexPoint Advisors, L.P., Adv. Proc. No. 21-03010-sgj (Bankr. N.D. Tex.)

2/17/21 ***Debtor's Emergency Motion for a Mandatory Injunction Requiring the Advisors to Adopt and Implement a Plan for the Transition of Services by February 28, 2021 [D.I. 2]***

Movant:	Debtor	The Debtor's Plan called for a substantial reduction in its work force. As part of this process, the Debtor terminated the Shared Services Agreements and began negotiating a transition plan with the Advisors that would enable them to continue providing services to the retail funds they managed without interruption. The Debtor was led to believe that without the Debtor's assistance the Advisors would not be able to provide services to their retail funds, and, although the Debtor had proceed appropriately, the Debtor was concerned it would be brought into any action brought by the SEC against the Advisors if they could not service the funds. The Debtor brought this action to force the Advisors to formulate a transition plan and to avoid exposure to the SEC, among others.	At a daylong hearing, the Advisors testified that they had a transition plan in place. An order was entered on February 24 [D.I. 25] making factual findings and ruling that the action was moot.	N/A
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Highland Capital Management, L.P. v. James Dondero, Adv. Proc. No. 21-03003-sgj (Bankr. N.D. Tex.)

1/22/21 Complaint for (i) Breach of Contract and (ii) Turnover of Property of the Debtor's Estate [D.I. 1]

Movant: Debtor Dondero borrowed \$8.825 million from Debtor pursuant to a demand note. Dondero did not pay when the note was called and the Debtor was forced to file an adversary. The parties are currently N/A conducting discovery.

4/15/21 James Dondero's Motion and Memorandum of Law in Support to Withdraw the Reference [D.I. 21]

Movant: Dondero Three months after the complaint was filed Dondero The Debtor believes this motion is a delay tactic and will respond appropriately. N/A

Highland Capital Management, L.P. v. Highland Capital Management Fund Advisors, L.P., Adv. Proc. No. 21-03004-sgj (Bankr. N.D. Tex.)

1/22/21 Complaint for (i) Breach of Contract and (ii) Turnover of Property of the Debtor's Estate [D.I. 1]

Movant: Debtor HCMFA borrowed \$7.4 million from Debtor pursuant to a demand note. Dondero did not pay when the note was called and the Debtor was forced to file an adversary. The parties are currently N/A conducting discovery.

4/13/21 Defendants Motion to Withdraw the Reference [D.I. 20]

Movant: HCMFA Three months after the complaint was filed HCMFA The Debtor believes this motion is a delay tactic and will respond appropriately. N/A

Highland Capital Management, L.P. v. NexPoint Advisors, L.P., Adv. Proc. No. 21-03005-sgj (Bankr. N.D. Tex.)

1/22/21 Complaint for (i) Breach of Contract and (ii) Turnover of Property of the Debtor's Estate [D.I. 1]

Movant: Debtor NPA borrowed approximately \$30.75 million under an installment note. NPA did not pay the note when and the Debtor was forced to file an adversary. The parties are currently N/A conducting discovery.

4/13/21 Defendants Motion to Withdraw the Reference [D.I. 19]

Movant: NPA Three months after the complaint was filed HCMFA The Debtor believes this motion is a delay tactic and will respond appropriately. N/A

Highland Capital Management, L.P. v. Highland Capital Management Services, Inc., Adv. Proc. No. 21-03006-sgj (Bankr. N.D. Tex.)

1/22/21

Complaint for (i) Breach of Contract and (ii) Turnover of Property of the Debtor's Estate [D.I. 1]

Movant:	Debtor	Highland Capital Management Services, Inc. ("HCMS"), borrowed \$900,000 in demand notes and approximately \$20.5 million in installment notes. HCMS did not pay the notes when due and the Debtor was forced to file an adversary.	The parties are currently conducting discovery.	N/A
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Highland Capital Management, L.P. v. HCRE Partners, LLC (n/k/a NexPoint Real Estate Partners, LLC), Adv. Proc. No. 21-03007-sgj (Bankr. N.D. Tex.)

1/22/21

Complaint for (i) Breach of Contract and (ii) Turnover of Property of the Debtor's Estate [D.I. 1]

Movant:	Debtor	HCRE borrowed \$4.25 million in demand notes and approximately \$6.05 million in installment notes. HCRE did not pay the notes when due and the Debtor was forced to file an adversary.	The parties are currently conducting discovery.	N/A
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Charitable DAF Fund, L.P., and CLO Holdco, Ltd., v. Highland Capital Management, L.P., Highland HCF Advisor, Ltd., and Highland CLO Funding, Ltd., Case No. Pending (N.D. Tex. April 12, 2021)

4/12/21

Original Complaint [D.I. 1]

Movants:	DAF CLO Holdco	Movants allege that the Debtor and Seery violated SEC rules, breached fiduciary duties, engaged in self-dealing, and violated RICO in connection with its settlement with the HarbourVest Entities. The Movants brought this complaint despite CLO Holdco having objected to the HarbourVest settlement; never raised this issue; and withdrawn its objection. The Debtor believes the complaint is frivolous and represents a collateral attack on the order approving the HarbourVest settlement. The Debtor will take all appropriate actions.	The Complaint was recently filed and is currently in litigation.	N/A
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APPENDIX 5



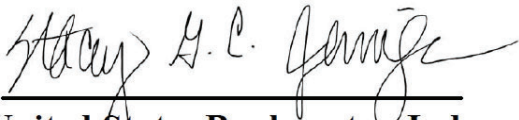
CLERK, U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS

ENTERED

THE DATE OF ENTRY IS ON
THE COURT'S DOCKET

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

Signed February 22, 2021


United States Bankruptcy Judge

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

In re:

HIGHLAND CAPITAL MANAGEMENT, L.P.,¹

Debtor.

) Chapter 11

) Case No. 19-34054-sgj11

**ORDER (I) CONFIRMING THE FIFTH AMENDED
PLAN OF REORGANIZATION OF HIGHLAND CAPITAL
MANAGEMENT, L.P. (AS MODIFIED) AND (II) GRANTING RELATED RELIEF**

The Bankruptcy Court² having:

- a. entered, on November 24, 2020, the *Order (A) Approving the Adequacy of the Disclosure Statement, (B) Scheduling A Hearing to Confirm the Fifth Amended Plan of Reorganization (C) Establishing Deadline for Filing Objections to Confirmation of Plan, (D) Approving Form of Ballots, Voting Deadline and Solicitation Procedures, and (E) Approving Form and Manner of Notice* [Docket No. 1476] (the “Disclosure Statement Order”), pursuant to which the Bankruptcy Court approved the adequacy of the *Disclosure Statement Relating to the Fifth*

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

² Capitalized terms used but not otherwise defined herein have the meanings given to them in the Plan (as defined below). The rules of interpretation set forth in Article I of the Plan apply to this Confirmation Order.



Amended Plan of Reorganization of Highland Capital Management, L.P. [Docket No. 1473] (the “Disclosure Statement”) under section 1125 of the Bankruptcy Code and authorized solicitation of the Disclosure Statement;

- b. set January 5, 2021, at 5:00 p.m. prevailing Central Time (the “Objection Deadline”), as the deadline for filing objections to confirmation of the *Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (As Modified)* [Docket No. 1808] (as amended, supplemented or modified, the “Plan”);
- c. set January 5, 2021, at 5:00 p.m. prevailing Central Time, as the deadline for voting on the Plan (the “Voting Deadline”) in accordance with the Disclosure Statement Order;
- d. initially set January 13, 2021, at 9:30 a.m. prevailing Central Time, as the date and time to commence the hearing to consider confirmation of the Plan pursuant to Bankruptcy Rules 3017 and 3018, sections 1126, 1128, and 1129 of the Bankruptcy Code, and the Disclosure Statement Order, which hearing was continued to January 26, 2021, at 9:30 a.m. prevailing Central Time and further continued to February 2, 2021;
- e. reviewed: (i) the Plan; (ii) the Disclosure Statement; and (iii) *Notice of (I) Entry of Order Approving Disclosure Statement; (II) Hearing to Confirm; and (III) Related Important Dates* (the “Confirmation Hearing Notice”), the form of which is attached as Exhibit 1-B to the Disclosure Statement Order;
- f. reviewed: (i) the *Debtor’s Notice of Filing of Plan Supplement for the Third Amended Plan of Reorganization of Highland Capital Management, L.P.* [Docket No. 1389] filed November 13, 2020; (ii) *Debtor’s Notice of Filing of Plan Supplement for the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.* [Docket No. 1606] filed on December 18, 2020; (iii) the *Debtor’s Notice of Filing of Plan Supplement for the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.* [Docket No. 1656] filed on January 4, 2021; (iv) *Notice of Filing Plan Supplement to the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (with Technical Modifications)* dated January 22, 2021 [Docket No. 1811]; and (v) *Debtor’s Notice of Filing of Plan Supplement to the Fifth Amended Plan of Reorganization of Highland of Highland Capital Management, L.P. (As Modified)* on February 1, 2021 [Docket No. 1875]; (collectively, the documents listed in (i) through (v) of this paragraph, the “Plan Supplements”);
- g. reviewed: (i) the *Notice of (I) Executory Contracts and Unexpired Leases to be Assumed by the Debtor Pursuant to the Fifth Amended Plan, (II) Cure Amounts, if Any, and (III) Related Procedures in Connection Therewith* filed on December 30, 2020 [Docket No. 1648]; (ii) the *Second Notice of (I) Executory Contracts and*

Unexpired Leases to be Assumed by the Debtor Pursuant to the Fifth Amended Plan, (II) Cure Amounts, if Any, and (III) Related Procedures in Connection Therewith filed on January 11, 2021 [Docket No.1719]; (iii) the *Third Notice of (I) Executory Contracts and Unexpired Leases to be Assumed by the Debtor Pursuant to the Fifth Amended Plan, (II) Cure Amounts, if Any, and (III) Related Procedures in Connection Therewith* filed on January 15, 2021 [Docket No. 1749]; (iv) the *Notice of Withdrawal of Certain Executory Contracts and Unexpired Leases from List of Executory Contracts and Unexpired Leases to be Assumed by the Debtor Pursuant to the Fifth Amended Plan* [Docket No. 1791]; (v) the *Fourth Notice of (I) Executory Contracts and Unexpired Leases to be Assumed by the Debtor Pursuant to the Fifth Amended Plan (II) Cure Amounts, if Any, and (III) Released Procedures in Connection Therewith* filed on January 27, 2021 [Docket No. 1847]; (vi) the *Notice of Hearing on Agreed Motion to (I) Assume Nonresidential Real Property Lease with Crescent TC Investors, L.P. Upon Confirmation of Plan and (II) Extend Assumption Deadline* filed on January 28, 2021 [Docket No. 1857]; and (vii) the *Fifth Notice of (I) Executory Contracts and Unexpired Leases to be Assumed by the Debtor Pursuant to the Fifth Amended Plan (II) Cure Amounts, if Any, and (III) Released Procedures in Connection Therewith* filed on February 1, 2021 [Docket No. 1873] (collectively, the documents referred to in (i) to (vii) are referred to as “List of Assumed Contracts”);

- h. reviewed: (i) the *Debtor’s Memorandum of Law in Support of Confirmation of the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.* [Docket No. 1814] (the “Confirmation Brief”); (ii) the *Debtor’s Omnibus Reply to Objections to Confirmation of the Fifth Amended Chapter 11 Plan of Reorganization of Highland Capital Management*; [Docket No. 1807]; and (iii) the *Certification of Patrick M. Leathem With Respect to the Tabulation of Votes on the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.* [Docket No. 1772] and *Supplemental Certification of Patrick M. Leathem With Respect to the Tabulation of Votes on the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.* [Docket No. 1887] filed on February 3, 2021 (together, the “Voting Certifications”).
- i. reviewed: (i) the *Notice of Affidavit of Publication* dated December 3, 2020 [Docket No. 1505]; (ii) the *Certificate of Service* dated December 23, 2020 [Docket No. 1630]; (iii) the *Supplemental Certificate of Service* dated December 24, 2020 [Docket No. 1637]; (iv) the *Second Supplemental Certificate of Service* dated December 31, 2020 [Docket No. 1653]; (v) the *Certificate of Service* dated December 23, 2020 [Docket No. 1627]; (vi) the *Certificate of Service* dated January 6, 2021 [Docket No. 1696]; (vii) the *Certificate of Service* dated January 7, 2021 [Docket No. 1699]; (viii) the *Certificate of Service* dated January 7, 2021 [Docket No 1700]; (ix) the *Certificate of Service* dated January 15, 2021 [Docket No. 1761]; (x) the *Certificate of Service* dated January 19, 2021 [Docket No. 1775]; (xi) the

Certificate of Service dated January 20, 2021 [Docket No. 1787]; (xii) the *Certificate of Service* dated January 26, 2021 [Docket No. 1844]; (xiii) the *Certificate of Service* dated January 27, 2021 [Docket No. 1854]; (xiv) the *Certificate of Service* dated February 1, 2021 [Docket No. 1879]; (xv) the *Certificates of Service* dated February 3, 2021 [Docket No. 1891 and 1893]; and (xvi) the *Certificates of Service* dated February 5, 2021 [Docket Nos. 1906, 1907, 1908 and 1909] (collectively, the “Affidavits of Service and Publication”);

- j. reviewed all filed³ pleadings, exhibits, statements, and comments regarding approval of the Disclosure Statement and confirmation of the Plan, including all objections, statements, and reservations of rights;
- k. conducted a hearing to consider confirmation of the Plan, which commenced on February 2, 2021, at 9:30 a.m. prevailing Central Time and concluded on February 3, 2021, and issued its oral ruling on February 8, 2021 (collectively, the “Confirmation Hearing”);
- l. heard the statements and arguments made by counsel in respect of confirmation of the Plan and having considered the record of this Chapter 11 Case and taken judicial notice of all papers and pleadings filed in this Chapter 11 Case; and
- m. considered all oral representations, testimony, documents, filings, and other evidence regarding confirmation of the Plan, including (a) all of the exhibits admitted into evidence;⁴ (b) the sworn testimony of (i) James P. Seery, Jr., the Debtor’s Chief Executive Officer and Chief Restructuring Officer and a member of the Board of Directors of Strand Advisors, Inc. (“Strand”), the Debtor’s general partner; (ii) John S. Dubel, a member of the Board of Strand; (iii) Marc Tauber, a Vice President at Aon Financial Services; and (iv) Robert Jason Post, the Chief Compliance Officer of NexPoint Advisors, LP (collectively, the “Witnesses”); (c) the credibility of the Witnesses; and (d) the Voting Certifications.

NOW, THEREFORE, after due deliberation thereon and good cause appearing therefor, the Bankruptcy Court hereby makes and issues the following findings of fact and conclusions of law:

³ Unless otherwise indicated, use of the term “filed” herein refers also to the service of the applicable document filed on the docket in this Chapter 11 Case, as applicable.

⁴ The Court admitted the following exhibits into evidence: (a) all of the Debtor’s exhibits lodged at Docket No. 1822 (except TTTTT, which was withdrawn by the Debtor); (b) all of the Debtor’s exhibits lodged at Docket No. 1866; (c) all of the Debtor’s exhibits lodged at Docket No. 1877; (d) all of the Debtor’s exhibits lodged at Docket No. 1895; and (e) Exhibits 6-12 and 15-17 offered by Mr. James Dondero and lodged at Docket No. 1874.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. **Findings of Fact and Conclusions of Law.** The findings and conclusions set forth herein, together with the findings of fact and conclusions of law set forth in the record during the Confirmation Hearing, constitute the Bankruptcy Court’s findings of fact and conclusions of law pursuant to **Federal Rule of Civil Procedure 52**, made applicable to this proceeding pursuant to Bankruptcy Rules 7052 and 9014. To the extent any of the following findings of fact constitute conclusions of law, they are adopted as such. To the extent that any of the following conclusions of law constitute findings of fact, they are adopted as such.

2. **Introduction and Summary of the Plan.** Prior to addressing the specific requirements under the Bankruptcy Code and Bankruptcy Rules with respect to the confirmation of the Plan, the Bankruptcy Court believes it would be useful to first provide the following background of the Debtor’s Chapter 11 Case, the parties involved therewith, and some of the major events that have transpired culminating in the filing and solicitation of the Plan of this very unusual case. Before the Bankruptcy Court is the *Debtor’s Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.*, filed on November 24, 2020, as modified on January 22, 2021 and again on February 1, 2021. The parties have repeatedly referred to the Plan as an “asset monetization plan” because it involves the orderly wind-down of the Debtor’s estate, including the sale of assets and certain of its funds over time, with the Reorganized Debtor continuing to manage certain other funds, subject to the oversight of the Claimant Trust Oversight Board. The Plan provides for a Claimant Trust to, among other things, manage and monetize the Claimant Trust Assets for the benefit of the Debtor’s economic stakeholders. The Claimant Trustee is responsible

for this process, among other duties specified in the Plan's Claimant Trust Agreement. There is also anticipated to be a Litigation Sub-trust established for the purpose of pursuing certain avoidance or other causes of action for the benefit of the Debtor's economic constituents.

3. **Confirmation Requirements Satisfied.** The Plan is supported by the Committee and all claimants with Convenience Claims (*i.e.*, general unsecured claims under \$1 million) who voted in Class 7. Claimants with Class 8 General Unsecured Claims, however, voted to reject the Plan because, although the Plan was accepted by 99.8% of the amount of Claims in that class, only 17 claimants voted to accept the Plan while 27 claimants voted to reject the Plan. As a result of such votes, and because Mr. Dondero and the Dondero Related Entities (as defined below) objected to the Plan on a variety of grounds primarily relating to the Plan's release, exculpation and injunction provisions, the Bankruptcy Court heard two full days of evidence on February 2 and 3, 2021, and considered testimony from five witnesses and thousands of pages of documentary evidence in determining whether the Plan satisfies the confirmation standards required under the Bankruptcy Code. The Bankruptcy Court finds and concludes that the Plan meets all of the relevant requirements of sections 1123, 1124, and 1129, and other applicable provisions of the Bankruptcy Code, as more fully set forth below with respect to each of the applicable confirmation requirements.

4. **Not Your Garden Variety Debtor.** The Debtor's case is not a garden variety chapter 11 case. The Debtor is a multibillion-dollar global investment adviser registered with the SEC, pursuant to the Investment Advisers Act of 1940. It was founded in 1993 by James Dondero and Mark Okada. Mark Okada resigned from his role with Highland prior to the

bankruptcy case being filed on October 16, 2019 (the “Petition Date”). Mr. Dondero controlled the Debtor as of the Petition Date but agreed to relinquish control of it on or about January 9, 2020, pursuant to an agreement reached with the Committee, as described below. Although Mr. Dondero remained with the Debtor as an unpaid employee/portfolio manager after January 9, 2020, his employment with the Debtor terminated on October 9, 2020. Mr. Dondero continues to work for and/or control numerous non-debtor entities in the complex Highland enterprise.

5. **The Debtor.** The Debtor is headquartered in Dallas, Texas. As of the Petition Date, the Debtor employed approximately 76 employees. The Debtor is privately-owned: (a) 99.5% by the Hunter Mountain Investment Trust; (b) 0.1866% by The Dugaboy Investment Trust, a trust created to manage the assets of Mr. Dondero and his family; (c) 0.0627% by Mark Okada, personally and through family trusts; and (d) 0.25% by Strand, the Debtor’s general partner.

6. **The Highland Enterprise.** Pursuant to various contractual arrangements, the Debtor provides money management and advisory services for billions of dollars of assets, including collateralized loan obligation vehicles (“CLOs”), and other investments. Some of these assets are managed by the Debtor pursuant to shared services agreements with certain affiliated entities, including other affiliated registered investment advisors. In fact, there are approximately 2,000 entities in the byzantine complex of entities under the Highland umbrella. None of these affiliated entities filed for chapter 11 protection. Most, but not all, of these entities are not subsidiaries (direct or indirect) of the Debtor. Many of the Debtor’s affiliated companies are

offshore entities, organized in jurisdictions such as the Cayman Islands and Guernsey. *See* Disclosure Statement, at 17-18.

7. **Debtor's Operational History.** The Debtor's primary means of generating revenue has historically been from fees collected for the management and advisory services provided to funds that it manages, plus fees generated for services provided to its affiliates. For additional liquidity, the Debtor, prior to the Petition Date, would sell liquid securities in the ordinary course, primarily through a brokerage account at Jefferies, LLC. The Debtor would also, from time to time, sell assets at non-Debtor subsidiaries and cause those proceeds to be distributed to the Debtor in the ordinary course of business. The Debtor's current Chief Executive Officer, James P. Seery, Jr., credibly testified at the Confirmation Hearing that the Debtor was "run at a deficit for a long time and then would sell assets or defer employee compensation to cover its deficits." The Bankruptcy Court cannot help but wonder if that was necessitated because of enormous litigation fees and expenses incurred by the Debtor due to its culture of litigation—as further addressed below.

8. **Not Your Garden Variety Creditor's Committee.** The Debtor and this chapter 11 case are not garden variety for so many reasons. One of the most obvious standouts in this case is the creditor constituency. The Debtor did not file for bankruptcy because of any of the typical reasons that large companies file chapter 11. For example, the Debtor did not have a large, asset-based secured lender with whom it was in default; it only had relatively insignificant secured indebtedness owing to Jeffries, with whom it had a brokerage account, and one other entity, Frontier State Bank. The Debtor also did not have problems with its trade vendors or landlords.

The Debtor also did not suffer any type of catastrophic business calamity. In fact, the Debtor filed for Chapter 11 protection six months before the onset of the COVID-19 pandemic. Rather, the Debtor filed for Chapter 11 protection due to a myriad of massive, unrelated, business litigation claims that it faced—many of which had finally become liquidated (or were about to become liquidated) after a decade or more of contentious litigation in multiple forums all over the world. The Committee in this case has referred to the Debtor—under its former chief executive, Mr. Dondero—as a “serial litigator.” The Bankruptcy Court agrees with that description. By way of example, the members of the Committee (and their history of litigation with the Debtor and others in the Highland complex) are as follows:

- a. **The Redeemer Committee of the Highland Crusader Fund (the “Redeemer Committee”).** This Committee member obtained an arbitration award against the Debtor in the amount of \$190,824,557, inclusive of interest, approximately five months before the Petition Date, from a panel of the American Arbitration Association. It was on the verge of having that award confirmed by the Delaware Chancery Court immediately prior to the Petition Date, after years of disputes that started in late 2008 (and included legal proceedings in Bermuda). This creditor’s claim was settled during this Chapter 11 Case in the amount of approximately \$137,696,610 (subject to other adjustments and details not relevant for this purpose).
- b. **Acis Capital Management, L.P., and Acis Capital Management GP, LLC (“Acis”).** Acis was formerly in the Highland complex of companies, but was not affiliated with Highland as of the Petition Date. This Committee member and its now-owner, Joshua Terry, were involved in litigation with the Debtor dating back to 2016. Acis was forced by Mr. Terry (who was a former Highland portfolio manager) into an involuntary chapter 11 bankruptcy in the Bankruptcy Court for the Northern District of Texas, Dallas Division before the Bankruptcy Court in 2018, after Mr. Terry obtained an approximately \$8 million arbitration award and judgment against Acis. Mr. Terry ultimately was awarded the equity ownership of Acis by the Bankruptcy Court in the Acis bankruptcy case. Acis subsequently asserted a multi-million dollar claim against Highland in the Bankruptcy Court for Highland’s alleged denuding of Acis to defraud its creditors—primarily Mr. Terry. The litigation involving Acis and Mr. Terry dates back to mid-2016 and has

continued on with numerous appeals of Bankruptcy Court orders, including one appeal still pending at the Fifth Circuit Court of Appeals. There was also litigation involving Mr. Terry and Acis in the Royal Court of the Island of Guernsey and in a state court in New York. The Acis claim was settled during this Chapter 11 Case, in Bankruptcy Court-ordered mediation, for approximately \$23 million (subject to other details not relevant for this purpose), and is the subject of an appeal being pursued by Mr. Dondero.

- c. **UBS Securities LLC and UBS AG London Branch (“UBS”).** UBS is a Committee member that filed a proof of claim in the amount of \$1,039,957,799.40 in this Chapter 11 Case. The UBS Claim was based on a judgment that UBS received from a New York state court in 2020. The underlying decision was issued in November 2019, after a multi-week bench trial (which had occurred many months earlier) on a breach of contract claim against non-Debtor entities in the Highland complex. The UBS litigation related to activities that occurred in 2008 and 2009. The litigation involving UBS and Highland and affiliates was pending for more than a decade (there having been numerous interlocutory appeals during its history). The Debtor and UBS recently announced an agreement in principle for a settlement of the UBS claim (which came a few months after Bankruptcy Court-ordered mediation) which will be subject to a 9019 motion to be filed with the Bankruptcy Court on a future date.
- d. **Meta-E Discovery (“Meta-E”).** Meta-E is a Committee member that is a vendor who happened to supply litigation and discovery-related services to the Debtor over the years. It had unpaid invoices on the Petition Date of more than \$779,000.

It is fair to say that the members of the Committee in this case all have wills of steel. They fought hard before and during this Chapter 11 Case. The members of the Committee, all of whom have volunteered to serve on the Claimant Trust Oversight Board post-confirmation, are highly sophisticated and have had highly sophisticated professionals representing them. They have represented their constituency in this case as fiduciaries extremely well.

9. **Other Key Creditor Constituents.** In addition to the Committee members who were all embroiled in years of litigation with Debtor and its affiliates in various ways, the Debtor has been in litigation with Patrick Daugherty, a former limited partner and employee of the Debtor, for many years in both Delaware and Texas state courts. Mr. Daugherty filed an amended

proof of claim in this Chapter 11 Case for \$40,710,819.42 relating to alleged breaches of employment-related agreements and for defamation arising from a 2017 press release posted by the Debtor. The Debtor and Mr. Daugherty recently announced a settlement of Mr. Daugherty’s claim pursuant to which he will receive \$750,000 in cash on the Effective Date of the Plan, an \$8.25 million general unsecured claim, and a \$2.75 million subordinated claim (subject to other details not relevant for this purpose). Additionally, entities collectively known as “HarbourVest” invested more than \$70 million with an entity in the Highland complex and asserted a \$300 million proof of claim against the Debtor in this case, alleging, among other things, fraud and RICO violations. HarbourVest’s claim was settled during the bankruptcy case for a \$45 million general unsecured claim and a \$35 million subordinated claim, and that settlement is also being appealed by a Dondero Entity.

10. **Other Claims Asserted.** Other than the Claims just described, most of the other Claims in this Chapter 11 Case are Claims asserted against the Debtor by: (a) entities in the Highland complex—most of which entities the Bankruptcy Court finds to be controlled by Mr. Dondero; (b) employees who contend that are entitled to large bonuses or other types of deferred compensation; and (c) numerous law firms that worked for the Debtor prior to the Petition Date and had outstanding amounts due for their prepetition services.

11. **Not Your Garden Variety Post-Petition Corporate Governance Structure.** Yet another reason this is not your garden variety chapter 11 case is its post-petition corporate governance structure. Immediately from its appointment, the Committee’s relationship with the Debtor was contentious at best. First, the Committee moved for a change of venue from

Delaware to Dallas. Second, the Committee (and later, the United States Trustee) expressed its then-desire for the appointment of a chapter 11 trustee due to its concerns over and distrust of Mr. Dondero, his numerous conflicts of interest, and his history of alleged mismanagement (and perhaps worse).

12. **Post-Petition Corporate Governance Settlement with Committee.** After spending many weeks under the threat of the potential appointment of a trustee, the Debtor and Committee engaged in substantial and lengthy negotiations resulting in a corporate governance settlement approved by the Bankruptcy Court on January 9, 2020.⁵ As a result of this settlement, among other things, Mr. Dondero relinquished control of the Debtor and resigned his positions as an officer or director of the Debtor and its general partner, Strand. As noted above, Mr. Dondero agreed to this settlement pursuant a stipulation he executed,⁶ and he also agreed not to cause any Related Entity (as defined in the Settlement Motion) to terminate any agreements with the Debtor. The January 9 Order also (a) required that the Bankruptcy Court serve as “gatekeeper” prior to the commencement of any litigation against the three independent board members appointed to oversee and lead the Debtor’s restructuring in lieu of Mr. Dondero and (b) provided for the exculpation of those board members by limiting claims subject to the “gatekeeper” provision to those alleging willful misconduct and gross negligence.

⁵ This order is hereinafter referred to as the “January 9 Order” and was entered by the Court on January 9, 2020 [Docket No. 339] pursuant to the *Motion of the Debtor to Approve Settlement with Official Committee of Unsecured Creditors Regarding the Governance of the Debtor and Procedures for Operation in the Ordinary Course* [Docket No. 281] (the “Settlement Motion”).

⁶ See *Stipulation in Support of Motion of the Debtor for Approval of Settlement With the Official Committee of Unsecured Creditors Regarding Governance of the Debtor and Procedures for Operations in Ordinary Course* [Docket No. 338] (the “Stipulation”).

13. **Appointment of Independent Directors.** As part of the Bankruptcy Court-approved settlement, three eminently qualified independent directors were chosen to lead Highland through its Chapter 11 Case. They are: James P. Seery, Jr., John S. Dubel (each chosen by the Committee), and Retired Bankruptcy Judge Russell Nelms. These three individuals are each technically independent directors of Strand (Mr. Dondero had previously been the sole director of Strand and, thus, the sole person in ultimate control of the Debtor). The three independent board members' resumes are in evidence. The Bankruptcy Court later approved Mr. Seery's appointment as the Debtor's Chief Executive Officer, Chief Restructuring Officer, and Foreign Representative. Suffice it to say that this settlement and the appointment of the independent directors changed the entire trajectory of the case and saved the Debtor from the appointment of a trustee. The Bankruptcy Court and the Committee each trusted the independent directors. They were the right solution at the right time. Because of the unique character of the Debtor's business, the Bankruptcy Court believed the appointment of three qualified independent directors was a far better outcome for creditors than the appointment of a conventional chapter 11 trustee. Each of the independent directors brought unique qualities to the table. Mr. Seery, in particular, knew and had vast experience at prominent firms with high-yield and distressed investing similar to the Debtor's business. Mr. Dubel had 40 years of experience restructuring large complex businesses and serving on boards in this context. And Retired Judge Nelms had not only vast bankruptcy experience but seemed particularly well-suited to help the Debtor maneuver through conflicts and ethical quandaries. By way of comparison, in the chapter 11 case of Acis, the former affiliate of Highland that the Bankruptcy Court presided over and which company was

much smaller in size and scope than Highland (managing only 5-6 CLOs), the creditors elected a chapter 11 trustee who was not on the normal trustee rotation panel in this district but, rather, was a nationally known bankruptcy attorney with more than 45 years of large chapter 11 experience. While the Acis chapter 11 trustee performed valiantly, he was sued by entities in the Highland complex shortly after he was appointed (which the Bankruptcy Court had to address). The Acis trustee was also unable to persuade the Debtor and its affiliates to agree to any actions taken in the case, and he finally obtained confirmation of Acis' chapter 11 plan over the objections of the Debtor and its affiliates on his fourth attempt (which confirmation was promptly appealed).

14. **Conditions Required by Independent Directors.** Given the experiences in Acis and the Debtor's culture of constant litigation, it was not as easy to get such highly qualified persons to serve as independent board members and, later, as the Debtor's Chief Executive Officer, as it would be in an ordinary chapter 11 case. The independent board members were stepping into a morass of problems. Naturally, they were worried about getting sued no matter how defensible their efforts—given the litigation culture that enveloped Highland historically. Based on the record of this Case and the proceedings in the Acis chapter 11 case, it seemed as though everything always ended in litigation at Highland. The Bankruptcy Court heard credible testimony that none of the independent directors would have taken on the role of independent director without (1) an adequate directors and officers' ("D&O") insurance policy protecting them; (2) indemnification from Strand that would be guaranteed by the Debtor; (3) exculpation for mere negligence claims; and (4) a gatekeeper provision prohibiting the commencement of litigation against the independent directors without the Bankruptcy Court's prior authority. This gatekeeper provision was also

included in the Bankruptcy Court’s order authorizing the appointment of Mr. Seery as the Debtor’s Chief Executive Officer, Chief Restructuring Officer, and Foreign Representative entered on July 16, 2020.⁷ The gatekeeper provisions in both the January 9 Order and July 16 Order are precisely analogous to what bankruptcy trustees have pursuant to the so-called “Barton Doctrine” (first articulated in an old Supreme Court case captioned *Barton v. Barbour*, 104 U.S. 126 (1881)). The Bankruptcy Court approved all of these protections in the January 9 Order and the July 16 Order, and no one appealed either of those orders. As noted above, Mr. Dondero signed the Stipulation that led to the settlement that was approved by the January 9 Order. The Bankruptcy Court finds that, like the Committee, the independent board members have been resilient and unwavering in their efforts to get the enormous problems in this case solved. They seem to have at all times negotiated hard and in good faith, which culminated in the proposal of the Plan currently before the Bankruptcy Court. As noted previously, they completely changed the trajectory of this case.

15. **Not Your Garden Variety Mediators.** And still another reason why this was not your garden variety case was the mediation effort. In the summer of 2020, roughly nine months into the chapter 11 case, the Bankruptcy Court ordered mediation among the Debtor, Acis, UBS, the Redeemer Committee, and Mr. Dondero. The Bankruptcy Court selected co-mediators because mediation among these parties seemed like such a Herculean task—especially during COVID-19 where people could not all be in the same room. Those co-mediators were: Retired

⁷ See Order Approving the Debtor’s Motion Under Bankruptcy Code Sections 105(a) and 363(b) Authorizing Retention of James P. Seery, Jr., as Chief Executive Officer, Chief Restructuring Officer, and Foreign Representative Nunc Pro Tunc to March 15, 2020 [Docket No. 854] entered on July 16, 2020 (the “July 16 Order”)

Bankruptcy Judge Alan Gropper from the Southern District of New York, who had a distinguished career presiding over complex chapter 11 cases, and Ms. Sylvia Mayer, who likewise has had a distinguished career, first as a partner at a preeminent law firm working on complex chapter 11 cases, and subsequently as a mediator and arbitrator in Houston, Texas. As noted earlier, the Redeemer Committee and Acis claims were settled during the mediation—which seemed nothing short of a miracle to the Bankruptcy Court—and the UBS claim was settled several months later and the Bankruptcy Court believes the ground work for that ultimate settlement was laid, or at least helped, through the mediation. And, as earlier noted, other significant claims have been settled during this case, including those of HarbourVest (who asserted a \$300 million claim) and Patrick Daugherty (who asserted a \$40 million claim). The Bankruptcy Court cannot stress strongly enough that the resolution of these enormous claims—and the acceptance by all of these creditors of the Plan that is now before the Bankruptcy Court—seems nothing short of a miracle. It was more than a year in the making.

16. **Not Your Garden Variety Plan Objectors (That Is, Those That Remain).** Finally, a word about the current, remaining objectors to the Plan before the Bankruptcy Court. Once again, the Bankruptcy Court will use the phrase “not your garden variety”, which phrase applies to this case for many reasons. Originally, there were over a dozen objections filed to the Plan. The Debtor then made certain amendments or modifications to the Plan to address some of these objections, none of which require further solicitation of the Plan for reasons set forth in more detail below. The only objectors to the Plan left at the time of the Confirmation Hearing

were Mr. Dondero [Docket No. 1661] and entities that the Bankruptcy Court finds are owned and/or controlled by him and that filed the following objections:

- a. *Objection to Confirmation of the Debtor's Fifth Amended Plan of Reorganization* (filed by Get Good Trust and The Dugaboy Investment Trust) [Docket No. 1667];
- b. *Objection to Confirmation of Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.* (filed by Highland Capital Management Fund Advisors, L.P., Highland Fixed Income Fund, Highland Funds I and its series, Highland Funds II and its series, Highland Global Allocation Fund, Highland Healthcare Opportunities Fund, Highland Income Fund, Highland Merger Arbitrage Fund, Highland Opportunistic Credit Fund, Highland Small-Cap Equity Fund, Highland Socially Responsible Equity Fund, Highland Total Return Fund, Highland/iBoxx Senior Loan ETF, NexPoint Advisors, L.P., NexPoint Capital, Inc., NexPoint Real Estate Strategies Fund, NexPoint Strategic Opportunities Fund) [Docket No. 1670];
- c. *A Joinder to the Objection filed at 1670 by: NexPoint Real Estate Finance Inc., NexPoint Real Estate Capital, LLC, NexPoint Residential Trust, Inc., NexPoint Hospitality Trust, NexPoint Real Estate Partners, LLC, NexPoint Multifamily Capital Trust, Inc., VineBrook Homes Trust, Inc., NexPoint Real Estate Advisors, L.P., NexPoint Real Estate Advisors II, L.P., NexPoint Real Estate Advisors III, L.P., NexPoint Real Estate Advisors IV, L.P., NexPoint Real Estate Advisors V, L.P., NexPoint Real Estate Advisors VI, L.P., NexPoint Real Estate Advisors VII, L.P., NexPoint Real Estate Advisors VIII, L.P., and any funds advised by the foregoing* [Docket No. 1677];
- d. *NexPoint Real Estate Partners LLC's Objection to Debtor's Fifth Amended Plan of Reorganization* (filed by NexPoint Real Estate Partners LLC f/k/a HCRE Partners LLC) [Docket No. 1673]; and
- e. *NexBank's Objection to Debtor's Fifth Amended Plan of Reorganization* (filed by NexBank Title, Inc., NexBank Securities, Inc., NexBank Capital, Inc., and NexBank) [Docket No. 1676]. The entities referred to in (i) through (v) of this paragraph are hereinafter referred to as the "Dondero Related Entities").

17. **Questionability of Good Faith as to Outstanding Confirmation**

Objections. Mr. Dondero and the Dondero Related Entities technically have standing to object to the Plan, but the remoteness of their economic interests is noteworthy, and the Bankruptcy Court

questions the good faith of Mr. Dondero’s and the Dondero Related Entities’ objections. In fact, the Bankruptcy Court has good reason to believe that these parties are not objecting to protect economic interests they have in the Debtor but to be disruptors. Mr. Dondero wants his company back. This is understandable, but it is not a good faith basis to lob objections to the Plan. As detailed below, the Bankruptcy Court has slowed down plan confirmation multiple times and urged the parties to talk to Mr. Dondero in an attempt to arrive at what the parties have repeatedly referred to as a “grand bargain,” the ultimate goal to resolve the Debtor’s restructuring. The Debtor and the Committee represent that they have communicated with Mr. Dondero regarding a grand bargain settlement, and the Bankruptcy Court believes that they have.

18. **Remote Interest of Outstanding Confirmation Objectors.** To be specific about the remoteness of Mr. Dondero’s and the Dondero Related Entities’ interests, the Bankruptcy Court will address them each separately. First, Mr. Dondero has a pending objection to the Plan. Mr. Dondero’s only economic interest with regard to the Debtor is an unliquidated indemnification claim (and, based on everything the Bankruptcy Court has heard, his indemnification claims would be highly questionable at this juncture). Mr. Dondero owns no equity in the Debtor directly. Mr. Dondero owns the Debtor’s general partner, Strand, which in turn owns a quarter percent of the total equity in the Debtor. Second, a joint objection has been filed by The Dugaboy Trust (“Dugaboy”) and the Get Good Trust (“Get Good”). The Dugaboy Trust was created to manage the assets of Mr. Dondero and his family and owns a 0.1866% limited partnership interest in the Debtor. *See* Disclosure Statement at 7, n.3. The Bankruptcy Court is not clear what economic interest the Get Good Trust has, but it likewise seems to be related to Mr. Dondero. Get Good

filed three proofs of claim relating to a pending federal tax audit of the Debtor’s 2008 return, which the Debtor believes arise from Get Good’s equity security interests and are subject to subordination as set forth in its Confirmation Brief. Dugaboy filed three claims against the Debtor: (a) an administrative claim relating to the Debtor’s alleged postpetition management of Multi-Strat Credit Fund, L.P., (b) a prepetition claim against a subsidiary of the Debtor for which it seeks to pierce the corporate veil, each of which the Debtor maintains are frivolous in the Confirmation Brief, and (c) a claim arising from its equity security interest in the Debtor, which the Debtor asserts should be subordinated. Another group of objectors that has joined together in one objection is what the Bankruptcy Court will refer to as the “Highland Advisors and Funds.” *See* Docket No. 1863. The Bankruptcy Court understands they assert disputed administrative expense claims against the estate that were filed shortly before the Confirmation Hearing on January 23, 2021 [Docket No. 1826], and during the Confirmation Hearing on February 3, 2021 [Docket No. 1888]. At the Confirmation Hearing, Mr. Post testified on behalf of the Highland Advisors and Funds that the Funds have independent board members that run the Funds, but the Bankruptcy Court was not convinced of their independence from Mr. Dondero because none of the so-called independent board members have ever testified before the Bankruptcy Court and all have been engaged with the Highland complex for many years. Notably, the Court questions Mr. Post’s credibility because, after more than 12 years of service, he abruptly resigned from the Debtor in October 2020 at the exact same time that Mr. Dondero resigned at the Board of Directors’ request, and he is currently employed by Mr. Dondero. Moreover, Dustin Norris, a witness in a prior proceeding (whose testimony was made part of the record at the Confirmation Hearing), recently

testified on behalf of the Highland Advisors and Funds in another proceeding that Mr. Dondero owned and/or controlled these entities. Finally, various NexBank entities objected to the Plan. The Bankruptcy Court does not believe they have liquidated claims against the Debtor. Mr. Dondero appears to be in control of these entities as well.

19. **Background Regarding Dondero Objecting Parties.** To be clear, the Bankruptcy Court has allowed all these objectors to fully present arguments and evidence in opposition to confirmation, even though their economic interests in the Debtor appear to be extremely remote and the Bankruptcy Court questions their good faith. Specifically, the Bankruptcy Court considers them all to be marching pursuant to the orders of Mr. Dondero. In the recent past, Mr. Dondero has been subject to a temporary restraining order and preliminary injunction by the Bankruptcy Court for interfering with Mr. Seery's management of the Debtor in specific ways that were supported by evidence. Around the time that this all came to light and the Bankruptcy Court began setting hearings on the alleged interference, Mr. Dondero's company phone, which he had been asked to turn in to Highland, mysteriously went missing. The Bankruptcy Court merely mentions this in this context as one of many reasons that the Bankruptcy Court has to question the good faith of Mr. Dondero and his affiliates in raising objections to confirmation of the Plan.

20. **Other Confirmation Objections.** Other than the objections filed by Mr. Dondero and the Dondero Related Entities, the only other pending objection to the Plan is the *United States Trustee's Limited Objection to Confirmation of Debtor's Fifth Amended Plan of Reorganization* [Docket No. 1671], which objected to the Plan's exculpation, injunction, and

Debtor release provisions. In juxtaposition, to these pending objections, the Bankruptcy Court notes that the Debtor resolved the following objections to the Plan:

- a. *CLO Holdco, Ltd.'s Joinder to Objection to Confirmation of Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. and Supplemental Objections to Plan Confirmation* [Docket No. 1675]. This Objection has been resolved pursuant to mutually agreed language by the parties set forth in paragraph VV of the Confirmation Order;
- b. *Objection of Dallas County, City of Allen, Allen ISD, City of Richardson, and Kaufman County to Confirmation of the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.* [Docket No. 1662]. This Objection has been resolved pursuant to mutually agreed language by the parties set forth in paragraph QQ of the Confirmation Order;
- c. *Senior Employees' Limited Objection to Debtor's Fifth Amended Plan of Reorganization (filed by Scott Ellington, Thomas Surgent, Frank Waterhouse, Isaac Leventon)* [Docket No. 1669]. This Objection has been resolved pursuant to mutually agreed language by the parties set forth in paragraph 82 and paragraphs RR and SS of the Confirmation Order;
- d. *Limited Objection of Jack Yang and Brad Borud to Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.* [Docket No. 1666] and the amended joinder filed by Davis Deadman, Paul Kauffman and Todd Travers [Docket No. 1679]. This Objection and the amended joinder were resolved by agreement of the parties pursuant to modifications to the Plan filed by the Debtor;
- e. *United States' (IRS) Limited Objection to Debtor's Fifth Amended Plan of Reorganization* [Docket No. 1668]. This Objection has been resolved pursuant to mutually agreed language by the parties set forth in paragraphs TT and UU of the Confirmation Order; and
- f. *Patrick Hagaman Daugherty's Objection to Confirmation of Fifth Amended Plan of Reorganization* [Docket No. 1678]. This objection was resolved by the parties pursuant to the settlement of Mr. Daugherty's claim announced on the record of the Confirmation Hearing.

21. **Capitalized Terms.** Capitalized terms used herein, but not defined herein, shall have the respective meanings attributed to such terms in the Plan and the Disclosure Statement, as applicable.

24. **Judicial Notice.** The Bankruptcy Court takes judicial notice of the docket in this Chapter 11 Case maintained by the clerk of the Bankruptcy Court and the court-appointed claims agent, Kurtzman Carson Consultants LLC (“KCC”), including, without limitation, all pleadings, notices, and other documents filed, all orders entered, and all evidence and arguments made, proffered or adduced at the hearings held before the Bankruptcy Court during this Chapter 11 Case, including, without limitation, the hearing to consider the adequacy of the Disclosure Statement and the Confirmation Hearing, as well as all pleadings, notices, and other documents filed, all orders entered, and all evidence and arguments made, proffered, or adduced at hearings held before the Bankruptcy Court or the District Court for the Northern District of Texas in

connection with an adversary proceeding or appellate proceeding, respectively, related to this Chapter 11 Case.

25. **Plan Supplement Documents.** Prior to the Confirmation Hearing, the Debtor filed each of the Plan Supplements. The Plan Supplements contain, among other documents, the Retained Causes of Action, the Claimant Trust Agreement, the Litigation Sub-Trust Agreement, the Senior Employee Stipulation, the Related Entity List, the Schedule of Employees, the Reorganized Limited Partnership Agreement, supplements to the Liquidation Analysis/Financial Projections, the Schedule of Contracts and Leases to be Assumed, and the other Plan Documents set forth therein (collectively, the “Plan Supplement Documents”).

26. **Retained Causes of Action Adequately Preserved.** The Bankruptcy Court finds that the list of Retained Causes of Action included in the Plan Supplements sufficiently describes all potential Retained Causes of Action, provides all persons with adequate notice of any Causes of Action regardless of whether any specific claim to be brought in the future is listed therein or whether any specific potential defendant or other party is listed therein, and satisfies applicable law in all respects to preserve all of the Retained Causes of Action. The definition of the Causes of Action and Schedule of Retained Causes of Action, and their inclusion in the Plan, specifically and unequivocally preserve the Causes of Action for the benefit of the Reorganized Debtor, the Claimant Trust, or the Litigation Sub-Trust, as applicable.

27. **Plan Modifications Are Non-Material.** In addition to the Plan Supplements, the Debtor made certain non-material modifications to the Plan, which are reflected in (i) the *Redline of Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.*

(as Modified) filed on January 22, 2021 [Docket No. 1809], and (ii) Exhibit B to the *Debtor's Notice of Filing of Plan Supplement to Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (as Modified)* filed on February 1, 2021 [Docket No. 1875] (collectively, the “Plan Modifications”). Section 1127(a) of the Bankruptcy Code provides that a plan proponent may modify its plan at any time before confirmation so long as such modified plan meets the requirements of sections 1122 and 1123 of the Bankruptcy Code. None of the modifications set forth in the Plan Supplements or the Plan Modifications require any further solicitation pursuant to sections 1125, 1126, or 1127 of the Bankruptcy Code and Bankruptcy Rule 3019, because, among other things, they do not materially adversely change the treatment of the claims of any creditors or interest holders who have not accepted, in writing, such supplements and modifications. Among other things, there were changes to the projections that the Debtor filed shortly before the Confirmation Hearing (which included projected distributions to creditors and a comparison of projected distributions under the Plan to potential distributions under a hypothetical chapter 7 liquidation). The Plan Supplements and Plan Modifications did not mislead or prejudice any creditors or interest holders nor do they require that Holders of Claims or Equity Interests be afforded an opportunity to change previously cast votes to accept or reject the Plan. Specifically, the Amended Liquidation Analysis/Financial Projections filed on February 1, 2021 [Docket No. 1875] do not constitute any material adverse change to the treatment of any creditors or interest holders but, rather, simply update the estimated distributions based on Claims that were settled in the interim and provide updated financial data. The filing and notice of the Plan Supplements and Plan Modifications were appropriate and complied with the requirements of

section 1127(a) of the Bankruptcy Code and the Bankruptcy Rules, and no other solicitation or disclosure or further notice is or shall be required. The Plan Supplements and Plan Modifications each became part of the Plan pursuant section 1127(a) of the Bankruptcy Code. The Debtor or Reorganized Debtor, as applicable, is authorized to modify the Plan or Plan Supplement Documents following entry of this Confirmation Order in a manner consistent with section 1127(b) of the Bankruptcy Code, the Plan, and, if applicable, the terms of the applicable Plan Supplement Document.

28. **Notice of Transmittal, Mailing and Publication of Materials.** As is evidenced by the Voting Certifications and the Affidavits of Service and Publication, the transmittal and service of the Plan, the Disclosure Statement, Ballots, and Confirmation Hearing Notice were adequate and sufficient under the circumstances, and all parties required to be given notice of the Confirmation Hearing (including the deadline for filing and serving objections to the confirmation of the Plan) have been given due, proper, timely, and adequate notice in accordance with the Disclosure Statement Order and in compliance with the Bankruptcy Code, the Bankruptcy Rules, the Local Rules, and applicable non-bankruptcy law, and such parties have had an opportunity to appear and be heard with respect thereto. No other or further notice is required. The publication of the Confirmation Hearing Notice, as set forth in the *Notice of Affidavit of Publication* dated December 3, 2020 [Docket No. 1505], complied with the Disclosure Statement Order.

29. **Voting.** The Bankruptcy Court has reviewed and considered the Voting Certifications. The procedures by which the Ballots for acceptance or rejection of the Plan were

Secured Claims) consists of other secured claims (to the extent any exist) against the Debtor, are not substantially similar to the Secured Claims in Class 1 or Class 2, and are also properly separately classified.

34. **Classification of Priority Claims.** Class 4 (Priority Non-Tax Claims) consists of Claims entitled to priority under section 507(a), other than Priority Tax Claims, and are properly separately classified from non-priority unsecured claims. Class 5 (Retained Employee Claims) consists of the potential claims of employees who may be retained by the Debtor on the Effective Date, which claims will be Reinstated under the Plan, are not substantially similar to other Claims against the Debtor, and are properly classified.

35. **Classification of Unsecured Claims.** Class 6 (PTO Claims) consists solely of the claims of the Debtor's employees for unpaid paid time off in excess of the \$13,650 statutory cap amount under sections 507(a)(4) and (a)(5) of the Bankruptcy Code and are dissimilar from other unsecured claims in Class 7 and Class 8. Class 7 (Convenience Claims) allows holders of eligible and liquidated Claims (below a certain threshold dollar amount) to receive a cash payout of the lesser of 85% of the Allowed amount of the creditor's Claim or such holder's *pro rata* share of the Convenience Claims Cash Pool. Class 7 (Convenience Claims) are provided for administrative convenience purposes in order to allow creditors, most of whom are either trade creditors or holders of professional claims, to receive treatment provided under Class 7 in lieu of the treatment of Class 8 (General Unsecured Claims). The Plan also provides for reciprocal "opt out" mechanisms to allow holders of Class 7 Claims to elect to receive the treatment for Class 8 Claims. Class 8 creditors primarily constitute the litigation claims of the Debtor. Class 8 Creditors

will receive Claimant Trust Interests which will be satisfied pursuant to the terms of the Plan. Class 8 also contains an “opt out” mechanism to allow holders of liquidated Class 8 Claims at or below a \$1 million threshold to elect to receive the treatment of Class 7 Convenience Claims. The Claims in Class 7 (primarily trade and professional Claims against the Debtor) are not substantially similar to the Claims in Class 8 (primarily the litigation Claims against the Debtor), and are appropriately separately classified. Valid business reasons also exist to classify creditors in Class 7 separately from creditors in Class 8. Class 7 creditors largely consist of liquidated trade or service providers to the Debtor. In addition, the Claims of Class 7 creditors are small relative to the large litigation claims in Class 8. Furthermore, the Class 8 Claims were overwhelmingly unliquidated when the Plan was filed. The nature of the Class 7 Claims as being largely liquidated created an expectation of expedited payment relative to the largely unliquidated Claims in Class 8, which consists in large part of parties who have been engaged in years, and in some cases over a decade of litigation with the Debtor. Separate classification of Class 7 and Class 8 creditors was the subject of substantial arm’s-length negotiations between the Debtor and the Committee to appropriately reflect these relative differences.

36. **Classification of Equity Interests.** The Plan properly separately classifies the Equity Interests in Class 10 (Class B/C Limited Partnership Interests) from the Equity Interests in Class 11 (Class A Limited Partnership Interests) because they represent different types of equity security interests in the Debtor and different payment priorities.

37. **Elimination of Vacant Classes.** Section III.C of the Plan provides for the elimination of Classes that do not have at least one holder of a Claim or Equity Interest that is

Allowed in an amount greater than zero for purposes of voting to accept or reject the Plan, and are disregarded for purposes of determining whether the Plan satisfies section 1129(a)(8) of the Bankruptcy Code with respect to such Class. The purpose of this provision is to provide that a Class that does not have voting members shall not be included in the tabulation of whether that Class has accepted or rejected the Plan. Pursuant to the Voting Certifications, the only voting Class of Claims or Equity Interests that did not have any members is Class 5 (Retained Employees). As noted above, Class 5 does not have any voting members because any potential Claims in Class 5 would not arise, except on account of any current employees of the Debtor who may be employed as of the Effective Date, which is currently unknown. Thus, the elimination of vacant Classes provided in Article III.C of the Plan does not violate section 1122 of the Bankruptcy Code. Class 5 is properly disregarded for purposes of determining whether or not the Plan has been accepted under Bankruptcy Code section 1129(a)(8) because there are no members in that Class. However, the Plan properly provides for the treatment of any Claims that may potentially become members of Class 5 as of the Effective Date in accordance with the terms of the Plan. The Plan therefore satisfies section 1122 of the Bankruptcy Code.

38. **Classification of Claims and Designation of Non-Classified Claims (11 U.S.C. §§ 1122, 1123(a)(1)).** Section 1123(a)(1) of the Bankruptcy Code requires that the Plan specify the classification of claims and equity security interests pursuant to section 1122 of the Bankruptcy Code, other than claims specified in sections 507(a)(2), 507(a)(3), or 507(a)(8) of the Bankruptcy Code. In addition to Administrative Claims, Professional Fee Claims, and Priority Tax Claims, each of which need not be classified pursuant to section 1123(a)(1) of the Bankruptcy

Code, the Plan designates eleven (11) Classes of Claims and Equity Interests. The Plan satisfies sections 1122 and 1123(a)(1) of the Bankruptcy Code.

39. **Specification of Unimpaired Classes (11 U.S.C. § 1123(a)(2)).** Article III of the Plan specifies that each of Class 1 (Jefferies Secured Claim), Class 3 (Other Secured Claims), Class 4 (Priority Non-Tax Claims), Class 5 (Retained Employee Claims), and Class 6 (PTO Claims) are Unimpaired under the Plan. Thus, the requirement of section 1123(a)(2) of the Bankruptcy Code is satisfied.

40. **Specification of Treatment of Impaired Classes (11 U.S.C. § 1123(a)(3)).** Article III of the Plan designates each of Class 2 (Frontier Secured Claim), Class 7 (Convenience Claims), Class 8 (General Unsecured Claims), Class 9 (Subordinated Claims), Class 10 (Class B/C Limited Partnership Interests), and Class 11 (Class A Limited Partnership Interests) as Impaired and specifies the treatment of Claims and Equity Interests in such Classes. Thus, the requirement of section 1123(a)(3) of the Bankruptcy Code is satisfied.

41. **No Discrimination (11 U.S.C. § 1123(a)(4)).** The Plan provides for the same treatment by the Plan proponent for each Claim or Equity Interest in each respective Class unless the Holder of a particular Claim or Equity Interest has agreed to a less favorable treatment of such Claim or Equity Interest. The Plan satisfies this requirement because Holders of Allowed Claims or Equity Interests in each Class will receive the same rights and treatment as other Holders of Allowed Claims or Equity Interests within such holder's respective class, subject only to the voluntary "opt out" options afforded to members of Class 7 and Class 8 in accordance with the terms of the Plan. Thus, the requirement of section 1123(a)(4) of the Bankruptcy Code is satisfied.

42. **Implementation of the Plan (11 U.S.C. § 1123(a)(5)).** Article IV of the

Plan sets forth the means for implementation of the Plan which includes, but is not limited to, the establishment of: (i) the Claimant Trust; (ii) the Litigation Sub-Trust; (iii) the Reorganized Debtor; and (iv) New GP LLC, in the manner set forth in the Plan Documents, the forms of which are included in the Plan Supplements.

- a. **The Claimant Trust.** The Claimant Trust Agreement provides for the management of the Claimant Trust, as well as the Reorganized Debtor with the Claimant Trust serving as the managing member of New GP LLC (a wholly-owned subsidiary of the Claimant Trust that will manage the Reorganized Debtor as its general partner). The Claimant Trust, the Claimant Trustee, the management and monetization of the Claimant Trust Assets, and the management of the Reorganized Debtor (through the Claimant Trust's role as managing member of New GP LLC) and the Litigation Sub-Trust will all be managed and overseen by the Claimant Trust Oversight Committee. Additionally, the Plan provides for the transfer to the Claimant Trust of all of the Debtor's rights, title, and interest in and to all of the Claimant Trust Assets in accordance with section 1141 of the Bankruptcy Code and for the Claimant Trust Assets to automatically vest in the Claimant Trust free and clear of all Claims, Liens, encumbrances, or interests subject only to the Claimant Trust Interests and the Claimant Trust Expenses, as provided for in the Claimant Trust Agreement. The Claimant Trust will administer the Claimant Trust Assets as provided under the Plan and the Claimant Trust Agreement contained in the Plan Supplements.
- b. **The Litigation Sub-Trust.** The Plan and the Litigation Sub-Trust Agreement provide for the transfer to the Litigation Sub-Trust all of the Claimant Trust's rights, title, and interest in and to all of the Estate Claims (as transferred to the Claimant Trust by the Debtor) in accordance with section 1141 of the Bankruptcy Code and for the Estate Claims to automatically vest in the Litigation Sub-Trust free and clear of all Claims, Liens, encumbrances, or interests subject only to the Litigation Sub-Trust Interests and the Litigation Sub-Trust Expenses, as provided for in the Litigation Sub-Trust Agreement. The Litigation Trustee is charged with investigating, pursuing, and otherwise resolving any Estate Claims (including those with respect to which the Committee has standing to pursue prior to the Effective Date pursuant to the January 9 Order) pursuant to the terms of the Litigation Sub-Trust Agreement and the Plan, regardless of whether any litigation with respect to any Estate Claim was commenced by the Debtor or the Committee prior to the Effective Date.

- c. **The Reorganized Debtor.** The Reorganized Debtor will administer the Reorganized Debtor Assets, which includes managing the wind down of the Managed Funds.

The precise terms governing the execution of these restructuring transactions are set forth in greater detail in the applicable definitive documents included in the Plan Supplements, including the Claimant Trust Agreement, the Litigation Sub-Trust Agreement, and the Schedule of Retained Causes of Action. The Plan, together with the documents and forms of agreement included in the Plan Supplements, provides a detailed blueprint for the transactions contemplated by the Plan. The Plan's various mechanisms provide for the Debtor's continued management of its business as it seeks to liquidate the Debtor's assets, wind down its affairs, and pay the Claims of the Debtor's creditors. Upon full payment of Allowed Claims, plus interest as provided in the Plan, any residual value would then flow to the holders of Class 10 (Class B/C Limited Partnership Interests), and Class 11 (Class A Limited Partnership Interests). Finally, Mr. Seery testified that the Debtor engaged in substantial and arm's length negotiations with the Committee regarding the Debtor's post-Effective Date corporate governance, as reflected in the Plan. Mr. Seery testified that he believes the selection of the Claimant Trustee, Litigation Trustee, and members of the Claimant Trust Oversight Board are in the best interests of the Debtor's economic constituents. Thus, the requirements of section 1123(a)(5) of the Bankruptcy Code are satisfied.

43. **Non-Voting Equity Securities (11 U.S.C. § 1123(a)(6)).** The Debtor is not a corporation and the charter documents filed in the Plan Supplements otherwise comply with section 1123(a)(6) of the Bankruptcy Code. Therefore, the requirement of section 1123(a)(6) of the Bankruptcy Code is satisfied.

44. **Selection of Officers and Directors (11 U.S.C. § 1123(a)(7)).** Article IV

of the Plan provides for the Claimant Trust to be governed and administered by the Claimant Trustee. The Claimant Trust, the management of the Reorganized Debtor, and the management and monetization of the Claimant Trust Assets and the Litigation Sub-Trust will be managed by the Claimant Trust Oversight Board. The Claimant Trust Oversight Board will consist of: (1) Eric Felton, as representative of the Redeemer Committee; (2) Joshua Terry, as representative of Acis; (3) Elizabeth Kozlowski, as representative of UBS; (4) Paul McVoy, as representative of Meta-E Discovery; and (5) David Pauker. Four of the members of the Claimant Trust Oversight Committee are the holders of several of the largest Claims against the Debtor and/or are current members of the Committee. Each of these creditors has actively participated in the Debtor's case, both through their fiduciary roles as Committee members and in their individual capacities as creditors. They are therefore intimately familiar with the Debtor, its business, and assets. The fifth member of the Claimant Trust Oversight Board, David Pauker, is a disinterested restructuring advisor and turnaround manager with more than 25 years of experience advising public and private companies and their investors, and he has substantial experience overseeing, advising or investigating troubled companies in the financial services industry and has advised or managed such companies on behalf of boards or directors, court-appointed trustees, examiners and special masters, government agencies, and private investor parties. The members of the Claimant Trust Oversight Board will serve without compensation, except for Mr. Pauker, who will receive payment of \$250,000 for his first year of service, and \$150,000 for subsequent years.

45. **Selection of Trustees.** The Plan Supplements disclose that Mr. Seery will serve as the Claimant Trustee and Marc Kirschner will serve as the Litigation Trustee. As noted above, Mr. Seery has served as an Independent Board member since January 2020, and as the Chief Executive Officer and Chief Restructuring Officer since July 2020, and he has extensive management and restructuring experience, as evidenced from his curriculum vitae which is part of the record. The evidence shows that Mr. Seery is intimately familiar with the Debtor's organizational structure, business, and assets, as well as how Claims will be treated under the Plan. Accordingly, it is reasonable and in the Estate's best interests to continue Mr. Seery's employment post-emergence as the Claimant Trustee. Mr. Seery, upon consultation with the Committee, testified that he intends to employ approximately 10 of the Debtor's employees to enable him to manage the Debtor's business until the Claimant Trust effectively monetizes its remaining assets, instead of hiring a sub-servicer to accomplish those tasks. Mr. Seery testified that he believes that the Debtor's post-confirmation business can most efficiently and cost-effectively be supported by a sub-set of the Debtor's current employees, who will be managed internally. Mr. Seery shall initially be paid \$150,000 per month for services rendered after the Effective Date as Claimant Trustee; however, Mr. Seery's long-term salary as Claimant Trustee and the terms of any bonuses and severance are subject to further negotiation by Mr. Seery and the Claimant Trust Oversight Board within forty-five (45) days after the Effective Date. The Bankruptcy Court has also reviewed Mr. Kirschner's curriculum vitae. Mr. Kirschner has been practicing law since 1967 and has substantial experience in bankruptcy litigation matters, particularly with respect to his prior experience as a litigation trustee for several litigation trusts, as set forth on the record of the

Pursuant to section 1129(a)(2) of the Bankruptcy Code, the Debtor has complied with the applicable provisions of the Bankruptcy Code, including sections 1122, 1123, 1124, 1125, and 1126 of the Bankruptcy Code, the Bankruptcy Rules, and the Disclosure Statement Order governing notice, disclosure, and solicitation in connection with the Plan, the Disclosure Statement, the Plan Supplements, and all other matters considered by the Bankruptcy Court in connection with this Chapter 11 Case.

Statement Order. Before the Debtor solicited votes on the Plan, the Bankruptcy Court entered the Disclosure Statement Order. In accordance with the Disclosure Statement Order and evidenced by the Affidavits of Service and Publication, the Debtor appropriately served (i) the Solicitation Packages (as defined in the Disclosure Statement Order) on the Holders of Claims in Classes 2, 7, 8 and 9 and Holders of Equity Interests in Classes 10 and 11 who were entitled to vote on the Plan; and (ii) the Notice of Nonvoting Status (as defined in the Disclosure Statement Order) and the

Confirmation Hearing Notice to the Holders of Claims in Classes 1, 3, 4, 5 and 6, who were not entitled to vote on the Plan pursuant to the Disclosure Statement Order. The Disclosure Statement Order approved the contents of the Solicitation Packages provided to Holders of Claims and Equity Interests entitled to vote on the Plan, the notices provided to parties not entitled to vote on the Plan, and the deadlines for voting on and objecting to the Plan. The Debtor and KCC each complied with the content and delivery requirements of the Disclosure Statement Order, thereby satisfying sections 1125(a) and (b) of the Bankruptcy Code, as evidenced by the Affidavits of Service and Publication. The Debtor also satisfied section 1125(c) of the Bankruptcy Code, which provides that the same disclosure statement must be transmitted to each holder of a claim or interest in a particular class. The Debtor caused the same Disclosure Statement to be transmitted to all holders of Claims and Equity Interests entitled to vote on the Plan. The Debtor has complied in all respects with the solicitation requirements of section 1125 of the Bankruptcy Code and the Disclosure Statement Order. The Bankruptcy Court rejects the arguments of the Mr. Dondero and certain Dondero Related Entities that the changes made to certain assumptions and projections from the Liquidation Analysis annexed as Exhibit C to the Disclosure Statement (the “Liquidation Analysis”) to the Amended Liquidation Analysis/Financial Projections require resolicitation of the Plan. The Bankruptcy Court heard credible testimony from Mr. Seery regarding the changes to the Liquidation Analysis as reflected in the Amended Liquidation Analysis/Financial Projections. Based on the record, including the testimony of Mr. Seery, the Bankruptcy Court finds that the changes between the Liquidation Analysis and the Amended Liquidation Analysis/Financial Projections do not constitute materially adverse change to the treatment of Claims or Equity

Interests. Instead, the changes served to update the projected distributions based on Claims that were settled after the approval of the Disclosure Statement and to otherwise incorporate more recent financial data. Such changes were entirely foreseeable given the large amount of unliquidated Claims at the time the Disclosure Statement was approved and the nature of the Debtor's assets. The Bankruptcy Court therefore finds that holders of Claims and Equity Interests were not misled or prejudiced by the Amended Liquidation Analysis/Financial Projections and the Plan does not need to be resolicited.

48. **Plan Proposed in Good Faith and Not by Means Forbidden by Law (11 U.S.C. § 1129(a)(3)).** The Debtor has proposed the Plan in good faith and not by any means forbidden by law, thereby satisfying section 1129(a)(3) of the Bankruptcy Code. In determining that the Plan has been proposed in good faith, the Bankruptcy Court has examined the totality of the circumstances surrounding the filing of this Chapter 11 Case, the Plan itself, and the extensive, unrebutted testimony of Mr. Seery in which he described the process leading to Plan's formulation. Based on the totality of the circumstances and Mr. Seery's testimony, the Bankruptcy Court finds that the Plan is the result of extensive arm's-length negotiations among the Debtor, the Committee, and key stakeholders, and promotes the objectives and purposes of the Bankruptcy Code. Specifically, the Debtor's good faith in proposing the Plan is supported by the following facts adduced by Mr. Seery:

- a. The Independent Board determined that it should consider all potential restructuring alternatives, including pursuit of a traditional restructuring and the continuation of the Debtor's business, a potential sale of the Debtor's assets in one or more transactions, an asset monetization plan similar to that described in the Plan, and a so-called "grand bargain" plan that would involve Mr. Dondero's sponsorship of a plan with a substantial equity infusion.

- b. The Debtor subsequently engaged in arm's-length, good faith negotiations with the Committee over an asset monetization Plan commencing in June 2020, which negotiations occurred over the next several months.
- c. Negotiations between the Debtor and the Committee were often contentious over disputes, including, but not limited to, the post-confirmation corporate governance structure and the scope of releases contemplated by the Plan.
- d. While negotiations with the Committee progressed, the Independent Board engaged in discussions with Mr. Dondero regarding a potential "grand bargain" plan which contemplated a significant equity infusion by Mr. Dondero, and which Mr. Seery personally spent hundreds of hours pursuing over many months.
- e. On August 3, 2020, the Bankruptcy Court entered the *Order Directing Mediation* [Docket No. 912] pursuant to which the Bankruptcy Court ordered the Debtor, the Committee, UBS, Acis, the Redeemer Committee, and Mr. Dondero into mediation. As a result of this mediation, the Debtor negotiated the settlement of the claims of Acis and Mr. Terry, which the Bankruptcy Court approved on October 28, 2020 [Docket No. 1302].
- f. On August 12, 2020, the Debtor filed its *Chapter 11 Plan of Reorganization of Highland Capital Management, L.P.* [Docket No. 944] (the "Initial Plan") and related disclosure statement (the "Initial Disclosure Statement") which were not supported by either the Committee or Mr. Dondero. The Independent Board filed the Initial Plan and Initial Disclosure Statement in order to act as a catalyst for continued discussions with the Committee while it simultaneously worked with Mr. Dondero on the "grand bargain" plan.
- g. The Bankruptcy Court conducted a contested hearing on the Initial Disclosure Statement on October 27, 2020. The Committee and other parties objected to approval of the Disclosure Statement at the Initial Disclosure Statement hearing, which was eventually continued to November 23, 2020.
- h. Following the Initial Disclosure Statement hearing, the Debtor continued to negotiate with the Committee and ultimately resolved the remaining material disputes and led to the Bankruptcy Court's approval of the Disclosure Statement on November 23, 2020.
- i. Even after obtaining the Bankruptcy Court's approval of the Disclosure Statement, the Debtor and the Committee continued to negotiate with Mr. Dondero and the Committee over a potential "pot plan" as an alternative to the Plan on file with the Bankruptcy Court, but such efforts were unsuccessful. This history conclusively demonstrates that the Plan is being proposed in good faith within the meaning of section 1129(a)(3).

49. **Payments for Services or Costs and Expenses (11 U.S.C. § 1129(a)(4)).**

Article II.B of the Plan provides that Professionals will file all final requests for payment of Professional Fee Claims no later than 60 days after the Effective Date, thereby providing an adequate period of time for interested parties to review such claims. The procedures set forth in the Plan for the Bankruptcy Court's approval of the fees, costs, and expenses to be paid in connection with this chapter 11 Case, or in connection with the Plan and incident to this Chapter 11 Case, satisfy the objectives of and are in compliance with section 1129(a)(4) of the Bankruptcy Code.

50. **Directors, Officers, and Insiders (11 U.S.C. § 1129(a)(5)).** Article IV.B

of the Plan provides for the appointment of the Claimant Trustee, Litigation Trustee, and the Claimant Trust Oversight Committee and the members thereto. For the reasons more fully explained in paragraphs 44-45 of this Confirmation Order with respect to the requirement of section 1123(a)(7) of the Bankruptcy Code, the Debtor has disclosed the nature of compensation of any insider to be employed or retained by the Reorganized Debtor, if applicable, and compensation for any such insider. The appointment of such individuals is consistent with the interests of Claims and Equity Interests and with public policy. Thus, the Plan satisfies section 1129(a)(5) of the Bankruptcy Code.

51. **No Rate Changes (11 U.S.C. § 1129(a)(6)).** The Plan does not provide for

any rate change that requires regulatory approval. Section 1129(a)(6) of the Bankruptcy Code is thus not applicable.

52. **Best Interests of Creditors (11 U.S.C. § 1129(a)(7)).** The “best interests”

test is satisfied as to all Impaired Classes under the Plan, as each Holder of a Claim or Equity Interest in such Impaired Classes will receive or retain property of a value, as of the Effective Date of the Plan, that is not less than the amount that such Holder would so receive or retain if the Debtor were liquidated under chapter 7 of the Bankruptcy Code. On October 15, 2020, the Debtor filed the Liquidation Analysis [Docket 1173], as prepared by the Debtor with the assistance of its advisors and which was attached as Exhibit C to the Disclosure Statement. On January 29, 2021, in advance of Mr. Seery’s deposition in connection with confirmation of the Plan, the Debtor provided an updated version of the Liquidation Analysis to the then-objectors of the Plan, including Mr. Dondero and the Dondero Related Entities. On February 1, 2021, the Debtor filed the Amended Liquidation Analysis/Financial Projections. The Amended Liquidation Analysis/Financial Projections included updates to the Debtor’s projected asset values, revenues, and expenses to reflect: (1) the acquisition of an interest in an entity known as “HCLOF” that the Debtor will acquire as part of its court-approved settlement with HarbourVest and that was valued at \$22.5 million; (2) an increase in the value of certain of the Debtor’s assets due to changes in market conditions and other factors; (3) expected revenues and expenses arising in connection with the Debtor’s continued management of the CLOs pursuant to management agreements that the Debtor decided to retain; (4) increases in projected expenses for headcount (in addition to adding two or three employees to assist in the management of the CLOs, the Debtor also increased modestly the projected headcount as a result of its decision not to engage a Sub-Servicer) and professional fees; and (5) an increase in projected recoveries on notes resulting from the

acceleration of term notes owed to the Debtor by the following Dondero Related Entities: NexPoint Advisors, L.P.; Highland Capital Management Services, Inc.; and HCRE Partners, LLC (n/k/a NexPoint Real Estate Partners, LLC). Under the Plan, as of the Confirmation Date, (a) Class 7 General Unsecured Creditors are projected to receive 85% on account of their claims; and (b) Class 8 General Unsecured Creditors are projected to receive at least approximately 71% on account of their Claims. Under a hypothetical chapter 7 liquidation, all general unsecured creditors are projected to receive approximately 55% on account of their Claims. The Bankruptcy Court finds that the distributions that Class 7 and 8 General Unsecured Creditors are projected to receive under the Plan substantially exceeds that which they would receive under a chapter 7 liquidation based on Mr. Seery's testimony, including the following credible reasons he posited, among others:

- a. The nature of the Debtor's assets is complex. Certain assets relate to complicated real estate structures and private equity investments in operating businesses. Mr. Seery's extensive experience with the Debtor during the thirteen months since his appointment as an Independent Director and later Chief Executive Officer and Chief Restructuring Officer, provides him with a substantial learning curve in connection with the disposition of the Debtor's assets and are reasonably expected to result in him being able to realize tens of millions of dollars more value than would a chapter 7 trustee.
- b. Assuming that a hypothetical chapter 7 trustee could even operate the Debtor's business under chapter 7 of the Bankruptcy Code and hire the necessary personnel with the relevant knowledge and experience to assist him or her in selling the Debtor's assets, a chapter 7 trustee would likely seek to dispose of the Debtor's assets in a forced sale liquidation which would generate substantially less value for the Debtor's creditors than the asset monetization plan contemplated by the Plan.
- c. A chapter 7 trustee would be unlikely to retain the Debtor's existing professionals to assist in its efforts to monetize assets, resulting in delays, increased expenses, and reduced asset yields for the chapter 7 estate.

- d. The chapter 7 estate would be unlikely to maximize value as compared to the asset monetization process contemplated by the Plan because potential buyers are likely to perceive a chapter 7 trustee as engaging in a quick, forced “fire sale” of assets; and
- e. The Debtor’s employees, who are vital to its efforts to maximum value and recoveries for stakeholders, may be unwilling to provide services to a chapter 7 trustee.

Finally, there is no evidence to support the objectors’ argument that the Claimant Trust Agreement’s disclaimed liability for ordinary negligence by the Claimant Trustee compared to a chapter 7 trustee’s liability has any relevance to creditor recoveries in a hypothetical chapter 7 liquidation. Thus, section 1129(a)(7) of the Bankruptcy Code is satisfied.

53. **Acceptance by Certain Classes (11 U.S.C. § 1129(a)(8)).** Classes 1, 3, 4, 5 and 6 are Unimpaired under the Plan. Class 2 (Frontier Secured Claim), Class 7 (Convenience Claims), and Class 9 (Subordinated Claims) have each voted to accept the Plan in accordance with the Bankruptcy Code, thereby satisfying section 1129(a)(8) as to those Classes. However, Class 8 (General Unsecured Claims), Class 10 (Class B/C Limited Partnership Interests), and Class 11 (Class A Limited Partnership Interests) have not accepted the Plan. Accordingly, section 1129(a)(8) of the Bankruptcy Code has not been satisfied. The Plan, however, is still confirmable because it satisfies the nonconsensual confirmation provisions of section 1129(b), as set forth below.

54. **Treatment of Administrative, Priority, Priority Tax Claims, and Professional Fee Claims (11 U.S.C. § 1129(a)(9)).** The treatment of Administrative Claims, Priority Claims, and Professional Fee Claims pursuant to Article III of the Plan, and as set forth below with respect to the resolution of the objections filed by the Internal Revenue Service and

certain Texas taxing authorities satisfies the requirements of sections 1129(a)(9) of the Bankruptcy Code.

55. **Acceptance by Impaired Class (11 U.S.C. § 1129(a)(10)).** Class 2 (Frontier Secured Claims) and Class 7 (Convenience Claims) are each Impaired Classes of Claims that voted to accept the Plan, determined without including any acceptance of the Plan by any insider. Therefore, the requirement of section 1129(a)(10) of the Bankruptcy Code is satisfied.

56. **Feasibility (11 U.S.C. § 1129(a)(11)).** Article IV of the Plan provides for the implementation of the Plan through the Claimant Trust, the Litigation Sub-Trust, and the Reorganized Debtor. The Plan provides that the Claimant Trust, among other things, will monetize and distribute the Debtor's remaining assets. The Disclosure Statement, the Amended Liquidation Analysis/Financial Projections, and the other evidence presented at the Confirmation Hearing provide a reasonable probability of success that the Debtor will be able to effectuate the provisions of the Plan. The Plan contemplates the establishment of the Claimant Trust upon the Effective Date, which will monetize the Estate's assets for the benefit of creditors. Mr. Seery testified that the Class 2 Frontier Secured Claim will be paid over time pursuant to the terms of the New Frontier Note and the Reorganized Debtor will have sufficient assets to satisfy its obligations under this note. The Claims of the Holders of Class 7 Claims (as well as those Class 8 creditors who validly opted to receive the treatment of Class 7 Claims) are expected to be satisfied shortly after the Effective Date. Holders of Class 8 Claims (including any holders of Class 7 Claims who opted to receive the treatment provided to Class 8 Claims) are not guaranteed any recovery and will

periodically receive pro rata distributions as assets are monetized pursuant to the Plan and the Claimant Trust Agreement. Thus, section 1129(a)(11) of the Bankruptcy Code is satisfied.

57. **Payment of Fees (11 U.S.C. § 1129(a)(12)).** All fees payable under 28 U.S.C. § 1930 have been paid or will be paid on or before the Effective Date pursuant to Article XII.A of the Plan, thus satisfying the requirement of section 1129(a)(12) of the Bankruptcy Code. The Debtor has agreed that the Reorganized Debtor, the Claimant Trust, and the Litigation Sub-Trust shall be jointly and severally liable for payment of quarterly fees to the Office of the United States Trustee pursuant to 28 U.S.C. § 1930 through the entry of the Final Decree for the Debtor or the dismissal or conversion of the Chapter 11 Case.

58. **Retiree Benefits.** The Plan provides for the assumption of the Pension Plan (to the extent such Pension Plan provides “retiree benefits” and is governed by section 1114 of the Bankruptcy Code). Thus, the Plan complies with section 1129(a)(13) of the Bankruptcy Code, to the extent applicable.

59. **Miscellaneous Provisions (11 U.S.C. §§ 1129(a)(14)-(16)).** Sections 1129(a)(14)-(16) of the Bankruptcy Code are inapplicable as the Debtor (i) has no domestic support obligations (section 1129(a)(14)), (ii) is not an individual (section 1129(a)(15)), and (iii) is not a nonprofit corporation (section 1129(a)(16)).

60. **No Unfair Discrimination; Fair and Equitable Treatment (11 U.S.C. § 1129(b)).** The classification and treatment of Claims and Equity Interests in Classes 8, 10 and 11, which have not accepted the Plan, is proper pursuant to section 1122 of the Bankruptcy Code, does

- Accordingly, the Plan does not violate the absolute priority rule, does not discriminate unfairly, and is fair and equitable with respect to each Class that has rejected the Plan. Thus, the Plan satisfies the requirements of section 1129(b) of the Bankruptcy Code with respect to Classes 8, 10, and 11.

61. **Only One Plan (11 U.S.C. § 1129(c)).** The Plan is the only chapter 11 plan confirmed in this Chapter 11 Case, and the requirements of section 1129(c) of the Bankruptcy Code are therefore satisfied.

62. **Principal Purpose (11 U.S.C. § 1129(d)).** Mr. Seery testified that the principal purpose of the Plan is neither the avoidance of taxes nor the avoidance of the application of section 5 of the Securities Act of 1933, and no governmental unit has objected to the confirmation of the Plan on any such grounds. Accordingly, section 1129(d) of the Bankruptcy Code is inapplicable.

63. **Satisfaction of Confirmation Requirements.** Based upon the foregoing, the Plan satisfies the requirements for confirmation set forth in section 1129 of the Bankruptcy Code and should be confirmed.

64. **Good Faith Solicitation (11 U.S.C. § 1125(e)).** The Debtor, the Independent Directors, and the Debtor's employees, advisors, Professionals, and agents have acted in good faith within the meaning of section 1125(e) of the Bankruptcy Code and in compliance with the applicable provisions of the Bankruptcy Code and Bankruptcy Rules in connection with all of their respective activities relating to the solicitation of acceptances of the Plan and their participation in the activities described in section 1125 of the Bankruptcy Code, and they are entitled to the protections afforded by section 1125(e) of the Bankruptcy Code.

65. **Discharge (11 U.S.C. § 1141(d)(3)).** The Debtor is entitled to a discharge of debts pursuant to section 1141(d)(3)(B) of the Bankruptcy Code. Under the Plan, the Claimant Trust or Reorganized Debtor, as applicable, will continue to manage funds and conduct business

in the same manner as the Debtor did prior to Plan confirmation, which includes the management of the CLOs, Multi-Strat, Restoration Capital, the Select Fund and the Korea Fund. Although the Plan projects that it will take approximately two years to monetize the Debtor's assets for fair value, Mr. Seery testified that while the Reorganized Debtor and Claimant Trust will be monetizing their assets, there is no specified time frame by which this process must conclude. Mr. Seery's credible testimony demonstrates that the Debtor will continue to engage in business after consummation of the Plan, within the meaning of Section 1141(d)(3)(b) and that the Debtor is entitled to a discharge pursuant to section 1141(d)(1) of the Bankruptcy Code.

66. **Retention of Jurisdiction.** The Bankruptcy Court may properly retain jurisdiction over the matters set forth in Article XI of the Plan and/or section 1142 of the Bankruptcy Code to the maximum extent under applicable law.

67. **Additional Plan Provisions (11 U.S.C. § 1123(b)).** The Plan's provisions are appropriate, in the best interests of the Debtor and its Estate, and consistent with the applicable provisions of the Bankruptcy Code, Bankruptcy Rules, and Local Rules.

68. **Executory Contracts and Unexpired Leases (11 U.S.C. § 1123(b)(2)).** The Debtor has exercised reasonable business judgment with respect to the rejection of the Executory Contracts and Unexpired Leases pursuant the terms of the Plan and this Confirmation Order, and such rejections are justified and appropriate in this Chapter 11 Case. The Debtor also filed the List of Assumed Contracts, which contain notices to the applicable counterparties to the contracts set forth on Exhibit "FF" to Plan Supplement filed on February 1, 2021 [Docket No. 1875] and which exhibit sets forth the list of executory contracts and unexpired leases to be

assumed by the Debtor pursuant to the Plan (collectively, the “Assumed Contracts”). With respect to the Assumed Contracts, only one party objected to the assumption of any of the Assumed Contracts, but that objection was withdrawn.⁸ Any modifications, amendments, supplements, and restatements to the Assumed Contracts that may have been executed by the Debtor during the Chapter 11 Case shall not be deemed to alter the prepetition nature of the Assumed Contracts or the validity, priority, or amount of any Claims that may arise in connection therewith. Assumption of any Assumed Contract pursuant to the Plan and full payment of any applicable Cure pursuant to the Plan shall result in the full release and satisfaction of any Cures, Claims, or defaults, whether monetary or nonmonetary, including defaults of provisions restricting the change in control or ownership interest composition or other bankruptcy-related defaults, arising under any assumed Executory Contract or Unexpired Lease at any time prior to the effective date of assumption.

69. **Compromises and Settlements Under and in Connection with the Plan** (**11 U.S.C. § 1123(b)(3)**). All of the settlements and compromises pursuant to and in connection with the Plan, comply with the requirements of section 1123(b)(3) of the Bankruptcy Code and Bankruptcy Rule 9019.

70. **Debtor Release, Exculpation and Injunctions** (**11 U.S.C. § 1123(b)**). The Debtor Release, Exculpation, and Injunction provisions provided in the Plan (i) are within the jurisdiction of the Bankruptcy Court under **28 U.S.C. § 1334**; (ii) are integral elements of the transactions incorporated into the Plan, and inextricably bound with the other provisions of the Plan; (iii) confer material benefit on, and are in the best interests of, the Debtor, its Estate, and its

⁸ See Notice of Withdrawal of James Dondero’s Objection Debtor’s Proposed Assumption of Contracts and Cure Amounts Proposed in Connection Therewith [Docket No. 1876]

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fraud, or gross negligence of such applicable Released Party as determined by Final Order of the Bankruptcy Court or any other court of competent jurisdiction. The Debtor Release also contains conditions to such releases as set forth in Article X.D of the Plan with respect to employees (the “Release Conditions”). Until the an employee satisfies the Release Conditions or the Release Conditions otherwise terminate, any claims against such employee will be tolled so that if the Release Conditions are not met the Litigation Trustee may pursue claims against an employee at a later date. The evidence before the Bankruptcy Court, including, but not limited to Mr. Seery’s testimony, demonstrates that the Debtor is not aware of any claims against any of the Released Parties, that the Released Parties have been instrumental in assisting the Debtor’s efforts toward confirmation of the Plan and that, therefore, the releases are a *quid pro quo* for the Released Parties’ significant contributions to a highly complex and contentious restructuring. The Committee, whose members hold approximately \$200 million in claims against the Estate, is highly sophisticated and is represented by highly sophisticated professionals, and has actively and vigorously negotiated the terms of the Debtor Release, which was the subject of significant controversy at the Initial Disclosure Statement hearing held by the Bankruptcy Court on October 27, 2020.

72. **Exculpation.** Section IX.C of the Plan provides for the exculpation of certain Exculpated Parties to the extent provided therein (the “Exculpation Provision”). As explained below, the Exculpation Provision is appropriate under the unique circumstances of this litigious Chapter 11 Case and consistent with applicable Fifth Circuit precedent. First, with respect to the Independent Directors, their agents, and their advisors, including any employees acting at

their direction, the Bankruptcy Court finds and concludes that it has already exculpated these parties for acts other than willful misconduct and gross negligence pursuant to the January 9 Order. The January 9 Order was specifically agreed to by Mr. Dondero, who was in control of the Debtor up until entry of the January 9 Order. The January 9 Order was not appealed. In addition to the appointment of the Independent Directors in an already contentious and litigious case, the January 9 Order set the standard of care for the Independent Directors and specifically exculpated them for negligence. Mr. Seery and Mr. Dubel each testified that they had input into the contents of the January 9 Order and would not have agreed to their appointment as Independent Directors if the January 9 Order did not include the protections set forth in paragraph 10 of the January 9 Order. Paragraph 10 of the January 9 Order (1) requires that parties wishing to sue the Independent Directors or their agents and advisors must first seek approval from the Bankruptcy Court before doing so; (2) sets the standard of care for the Independent Directors during the Chapter 11 Case and exculpated the Independent Directors for acts other than willful misconduct or gross negligence; (3) only permits suits against the Independent Directors to proceed for colorable claims of willful misconduct and gross negligence upon order of the Bankruptcy Court; and (4) does not expire by its terms.

73. **Existing Exculpation of Independent Directors.** The Bankruptcy Court also finds and concludes that it has already exculpated Mr. Seery acting in the capacity as Chief Executive Officer and Chief Restructuring Officer pursuant to the July 16 Order. The Bankruptcy Court concludes its previous approval of the exculpation of the Independent Directors, their agents, advisors and employees working at their direction pursuant to the January 9 Order, and the Chief

Executive Officer and Chief Restructuring Officer pursuant to the July 16 Order constitutes the law of this case and are *res judicata* pursuant to *In re Republic Supply Co. v. Shoaf*, 815 F.2d 1046 (5th Cir.1987). The January 9 Order and July 16 Order cannot be collaterally attacked based on the objectors’ objection to the exculpation of the Independent Directors, their agents, and advisors, including any employees acting at their direction, as well as the Chief Executive Officer and Chief Restructuring Officer, that the Bankruptcy Court already approved pursuant to the January 9 Order and the July 16 Order.

74. **The Exculpation Provision Complies with Applicable Law.** Separate and apart from the *res judicata* effect of the January 9 Order and the July 16 Order, the Bankruptcy Court also finds and concludes that the Exculpation Provision is consistent with applicable law, including *In re Pacific Lumber Co.*, 584 F.3d 229 (5th Cir. 2009), for several reasons:

- a. First, the statutory basis for *Pacific Lumber*’s denial of exculpation for certain parties other than a creditors’ committee and its members is that section 524(e) of the Bankruptcy Code “only releases the debtor, not co-liable third parties.” *Pacific Lumber*, 253 F.3d at 253. However, *Pacific Lumber* does not prohibit all exculpations under the Bankruptcy Code and the court in such case specifically approved the exculpations of a creditors’ committee and its members on the grounds that “11 U.S.C. § 1103(c), which lists the creditors’ committee’s powers, implies committee members have qualified immunity for actions within the scope of their duties.... [I]f members of the committee can be sued by persons unhappy with the committee’s performance during the case or unhappy with the outcome of the case, it will be extremely difficult to find members to serve on an official committee.” *Pacific Lumber*, 253 F.3d at 253 (quoting Lawrence P. King, et al, Collier on Bankruptcy, ¶ 1103.05[4][b] (15th Ed. 2008)). *Pacific Lumber*’s rationale for permitted exculpation of creditors’ committees and their members (which was clearly policy-based and based on a creditors’ committee qualified immunity flowing from their duties under section 1103(c) of the Bankruptcy Code and their disinterestedness and importance in chapter 11 cases) does not preclude exculpation to other parties in a particular chapter 11 case that perform similar roles to a creditors’ committee and its members. The Independent Directors, and by extension the Chief Executive Officer and Chief Restructuring Officer, were not

part of the Debtor’s enterprise prior to their appointment by the Bankruptcy Court under the January 9 Order. The Bankruptcy Court appointed the Independent Directors in lieu of a chapter 11 trustee to address what the Bankruptcy Court perceived as serious conflicts of interest and fiduciary duty concerns with the then-existing management prior to January 9, 2020, as identified by the Committee. In addition, the Bankruptcy Court finds that the Independent Directors expected to be exculpated from claims of negligence, and would likely have been unwilling to serve in contentious cases absent exculpation. The uncontroverted testimony of Mr. Seery and Mr. Dubel demonstrates that the Independent Directors would not have agreed to accept their roles without the exculpation and gatekeeper provision in the January 9 Order. Mr. Dubel also testified as to the increasing important role that independent directors are playing in complex chapter 11 restructurings and that unless independent directors could be assured of exculpation for simple negligence in contentious bankruptcy cases they would be reluctant to accept appointment in chapter 11 cases which would adversely affect the chapter 11 restructuring process. The Bankruptcy Court concludes that the Independent Directors were appointed under the January 9 Order in order to avoid the appointment of a chapter 11 trustee and are analogous to a creditors’ committee rather than an incumbent board of directors. The Bankruptcy Court also concludes that if independent directors cannot be assured of exculpation for simple negligence in contentious bankruptcy cases, they may not be willing to serve in that capacity. Based upon the foregoing, the Bankruptcy Court concludes that *Pacific Lumber’s* policy of exculpating creditors’ committees and their members from “being sued by persons unhappy with the committee’s performance during the case or unhappy with the outcome of the case” is applicable to the Independent Directors in this Chapter 11 Case.⁹

- b. Second, the Bankruptcy Court also concludes that *Pacific Lumber* does not preclude the exculpation of parties if there is a showing that “costs [that] the released parties might incur defending against such suits alleging such negligence are likely to swamp either the Exculpated Parties or the reorganization.” *Pacific Lumber*, 584 F.3d at 252. If ever there was a risk of that happening in a chapter 11 reorganization, it is this one. Mr. Seery credibly testified that Mr. Dondero stated outside the courtroom that if Mr. Dondero’s pot plan does not get approved, that Mr. Dondero will “burn the place down.” The Bankruptcy Court can easily expect that the proposed Exculpated Parties might expect to incur costs that could swamp them and the reorganization based on the prior litigious conduct of Mr. Dondero and his controlled entities that justify their inclusion in the Exculpation Provision.

⁹ The same reasoning applies to the inclusion of Strand in the Exculpation Provision because Strand is the general partner of the Debtor through which each of the Independent Board members act.

75. **Injunction.** Section IX.D of the Plan provides for a Plan injunction to implement and enforce the Plan’s release, discharge and release provisions (the “Injunction Provision”). The Injunction Provision is necessary to implement the provisions in the Plan. Mr. Seery testified that the Claimant Trustee will monetize the Debtor’s assets in order to maximize their value. In order to accomplish this goal, the Claimant Trustee needs to be able to pursue this objective without the interference and harassment of Mr. Dondero and his related entities, including the Dondero Related Entities. Mr. Seery also testified that if the Claimant Trust was subject to interference by Mr. Dondero, it would take additional time to monetize the Debtor’s assets and those assets could be monetized for less money to the detriment of the Debtor’s creditors. The Bankruptcy Court finds and concludes that the Injunction Provision is consistent with and permissible under Bankruptcy Code sections 1123(a), 1123(a)(6), 1141(a) and (c), and 1142. The Bankruptcy Court rejects assertions by certain objecting parties that the Injunction Provision constitutes a “third-party release.” The Injunction Provision is appropriate under the circumstances of this Chapter 11 Case and complies with applicable bankruptcy law. The Bankruptcy Court also concludes that the terms “implementation” and “consummation” are neither vague nor ambiguous

76. **Gatekeeper Provision.** Section IX.F of the Plan contains a provision contained in paragraph AA of this Confirmation Order and which the Debtor has referred to as a gatekeeper provision (the “Gatekeeper Provision”). The Gatekeeper Provision requires that Enjoined Parties first seek approval of the Bankruptcy Court before they may commence an action against Protected Parties. Thereafter, if the Bankruptcy Court determines that the action is

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as frivolous and a waste of the Bankruptcy Court’s time [Docket No. 1528] which was denied by the Court [Docket No. 1605]; (iv) multiple plan confirmation objections focused on ensuring the Dondero Related Entities be able to continue their litigation against the Debtor and its successors post-confirmation [Docket Nos. 1661, 1667, 1670, 1673, 1676, 1677 and 1868]; (v) objections to the approval of the Debtor’s settlements with Acis and HarbourVest and subsequent appeals of the Bankruptcy Court’s order approving each of those settlements [Docket Nos. 1347 and 1870]; and (vi) a complaint and injunction sought against Mr. Dondero’s affiliated entities to prevent them from violating the January 9 Order and entry of a restraining order against those entities [Adv Proc. No. 21-03000 Docket No 1] (collectively, the “Dondero Post-Petition Litigation”).

78. **Findings Regarding Dondero Post-Petition Litigation.** The Bankruptcy Court finds that the Dondero Post-Petition Litigation was a result of Mr. Dondero failing to obtain creditor support for his plan proposal and consistent with his comments, as set forth in Mr. Seery’s credible testimony, that if Mr. Dondero’s plan proposal was not accepted, he would “burn down the place.” The Bankruptcy Court concludes that without appropriate protections in place, in the form of the Gatekeeper Provision, Mr. Dondero and his related entities will likely commence litigation against the Protected Parties after the Effective Date and do so in jurisdictions other than the Bankruptcy Court in an effort to obtain a forum which Mr. Dondero perceives will be more hospitable to his claims. The Bankruptcy Court also finds, based upon Mr. Seery’s testimony, that the threat of continued litigation by Mr. Dondero and his related entities after the Effective Date will impede efforts by the Claimant Trust to monetize assets for the benefit of creditors and result

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

In Re: Highland Capital Management, L.P § Case No. **19-34054-SGJ11**

Charitable DAF Fund, L.P et al

Appellant

§

vs.

§

21-03067

Highland Capital Management, L.P

§

Appellee

§

3:23-CV-01503-B

[167] Order granting Defendant Highland Capital Management, L.P.'s Renewed motion to dismiss adversary proceeding (related document # [122](#)) Entered on 6/25/2023.

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APPELLANT RECORD

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

In re:	§ Chapter 11
	§
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§ Case No. 19-34054-sgj11
	§
Debtor.	§
	§
CHARITABLE DAF FUND, L.P. AND CLO	§
HOLDCO, LTD., DIRECTLY AND DERIVATIVELY	§
	§
Plaintiffs,	§ Adversary Proceeding No.
	§
vs.	§ 21-03067-sgj11
	§
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§
HIGHLAND HCF ADVISOR, LTD., AND	§
HIGHLAND CLO FUNDING LTD., NOMINALLY	§
	§
Defendant.	§
	§

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**APPELLANTS' SECOND AMENDED STATEMENT OF ISSUES
AND DESIGNATION OF RECORD ON APPEAL**

Pursuant to Rules 8009(a)(1)(A)-(B) and (a)(4) of the Federal Rules of Bankruptcy Procedure, The Charitable DAF Fund, L.P. and CLO Holdco, Ltd. ("Appellants") hereby designate the following items to be included in the record and identify the following issues with respect to

their appeal of the Order Granting Defendant Highland Capital Management, L.P.'s "Renewed Motion to Dismiss Complaint" [Adv. Proc. Doc. No. 122] which was entered by the United States Bankruptcy Court for the Northern District of Texas on June 25, 2023.

I. STATEMENT OF ISSUES TO BE PRESENTED ON APPEAL

- Whether the Bankruptcy Court had jurisdiction to rule on Highland Capital Management L.P.'s Renewed Motion to Dismiss Complaint
- Whether the Renewed Motion to Dismiss Complaint was improperly granted

II. DESIGNATION OF ITEMS TO BE INCLUDED IN THE RECORD

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1. Notice of Appeal for Bankruptcy Case Adversary Proceeding No. 21-03067-sgj11 [Doc. 168].

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2. The judgment, order, or decree appealed from: Memorandum Opinion and Order Granting Defendant Highland Capital Management, L.P.'s "Renewed Motion to Dismiss Complaint" [Adv. Proc. Doc. No. 122] [Doc. 167].

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3. Docket Sheet kept by the Bankruptcy Clerk.

4. Documents listed below and as described in the Docket Sheet for Bankruptcy Case Proceeding No. 21-03067-sgj.

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No.	Date Filed	Docket No.	Description/Document Text
1	9/29/21	1	(36 pgs; 3 docs) Adversary case 21-03067. ORDER REFERRING CASE NUMBER 21-CV-0842-B from U.S District Court for the Northern District of Texas, Dallas Division to U.S. Bankruptcy Court for Northern District of Texas, Dallas Division. Complaint by Charitable DAF Fund, LP, CLO Holdco, Ltd. against Highland Capital Management, LP, Highland HCF Advisor Ltd., Highland CLO Funding, Ltd. Fee Amount \$350 (Attachments: # 1 Original Complaint # 2 Docket Sheet from 3:20-cv-0842-B) Nature(s) of suit: 02 (Other (e.g. other actions that would have been brought in state court if unrelated to bankruptcy)). (Okafor, M.)
2	9/29/21	2	(1 pg) Supplemental Document (cover sheet) by CLO Holdco Ltd., Charitable DAF Fund (RE: related document(s)1 Adversary case 21-03067) [ORIGINALLY FILED IN 21-CV-0842 AS #2 ON 04/13/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)

Vol. 2 000139 000232 000239 000270 Thru Vol. 6	3	9/29/21	6	(93 pgs; 6 docs) MOTION for Leave to File First Amended Complaint filed by CLO Holdco Ltd., Charitable DAF Fund LP (Attachments: # 1 Exh 1_First Amended Complaint # 2 Exh 2_Motion for Authorization to Retain James Seery # 3 Exh 3_Order Approving Retention of James Seery # 4 Exh 4_Order Approving Settlement # 5 Proposed Order) (Bridges, Jonathan) (Entered: 04/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #6 ON 04/19/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
	4	9/29/21	22	(7 pgs; 2 docs) MOTION for an Order to Enforce the Order of Reference filed by Highland Capital Management LP. (Attachments: # 1 Exhibit(s) A--Proposed Order) (Annable, Zachery) Modified text on 5/20/2021 (mjr). (Entered: 05/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #22 ON 05/19/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
	5	9/29/21	23	(31 pgs) Brief/Memorandum in Support filed by Highland Capital Management LP re: 22 MOTION for an Order to Enforce the Order of Reference. (Annable, Zachery) Modified text on 5/20/2021 (mjr).(Entered: 05/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #23 ON 05/19/2021 IN U.S.DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
	6	9/29/21	24	(926 pgs; 29 docs) Appendix in Support filed by Highland Capital Management LP re: 23 Brief/Memorandum in Support. (Attachments: # 1 Appendix 1 # 2 Appendix 2 # 3 Appendix 3 # 4 Appendix 4 # 5 Appendix 5 # 6 Appendix 6 # 7 Appendix 7 # 8 Appendix 8 # 9 Appendix 9 # 10 Appendix10 # 11 Appendix 11 # 12 Appendix 12 # 13 Appendix 13 # 14 Appendix 14 # 15 Appendix 15 # 16 Appendix 16 # 17 Appendix 17 # 18 Appendix 18 # 19 Appendix 19 # 20 Appendix 20 # 21 Appendix 21# 22 Appendix 22 # 23 Appendix 23 # 24 Appendix 24 # 25 Appendix 25 # 26 Appendix 26 # 27 Appendix 27 # 28 Appendix 28) (Annable, Zachery) Modified linkage and text on 5/20/2021 (mjr). (Entered:05/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #24 ON 05/19/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
Vol. 7 001196	7	9/29/21	26	(7 pgs; 2 docs) MOTION to Dismiss Complaint filed by Highland Capital Management LP (Attachments: # 1 Exhibit(s) A--Proposed Order) (Annable, Zachery) Modified text on 5/28/2021 (jmg).(Entered: 05/27/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #26 ON 05/27/2021 IN U.S.DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)

Vol. 7 001203 thru Vol. 8	8	9/29/21	28	(508 pgs; 14 docs) Appendix in Support filed by Highland Capital Management LP (Attachments: # 1 Appendix 1 # 2 Appendix 2 # 3 Appendix 3 # 4 Appendix 4 # 5 Appendix 5 # 6 Appendix 6 # 7 Appendix 7 # 8 Appendix 8 # 9 Appendix 9 # 10 Appendix 10 # 11 Appendix 11 # 12 Appendix 12 # 13 Appendix 13) (Annable, Zachery) (Entered: 05/27/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #28 ON 05/27/2021 IN U.S. DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
Vol. 9 001711	9	9/29/21	33	(1 pg) Amended Civil Cover Sheet by CLO Holdco Ltd, Charitable DAF Fund LP. Amendment to 2 Supplemental Document. (Sbaiti, Mazin) Modified text on 6/23/2021 (mjr). (Entered: 06/22/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #33 ON 06/22/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001712	10	9/29/21	36	(26 pgs) RESPONSE filed by CLO Holdco Ltd, Charitable DAF Fund LP re: 22 MOTION for an Order to Enforce the Order of Reference (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #36 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001738	11	9/29/21	37	(22 pgs) Appendix in Support filed by CLO Holdco Ltd, Charitable DAF Fund LP re 36 Response/Objection Response to Motion for an Order to Enforce the Order of Reference (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #37 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001760	12	9/29/21	38	(45 pgs) RESPONSE filed by CLO Holdco Ltd, Charitable DAF Fund LP re: 26 MOTION to Dismiss (Defendant Highland Capital Management, L.P.'s Motion to Dismiss Complaint) (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #38 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001805	13	9/29/21	39	(88 pgs) Appendix in Support filed by CLO Holdco Ltd, Charitable DAF Fund LP re 38 Response/Objection to Defendant Highland Capital Management, L.P.'s Motion to Dismiss Complaint (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #39 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001893	14	9/29/21	42	(12 pgs) REPLY filed by Highland Capital Management LP re: 22 MOTION for an Order to Enforce the Order of Reference (Annable, Zachery) (Entered: 07/13/2021) [ORIGINALLY FILED IN 21-CV-0842AS #42 ON 07/13/2021 IN U.S.

			DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
VOL. 9	15	9/29/21	43 (852 pgs) Appendix in Support filed by Highland Capital Management LP re: 42 Reply. (Annable, Zachery) Modified text on 7/14/2021 (mjr). (Entered: 07/13/2021) [ORIGINALLY FILED IN 21-CV-0842AS #43 ON 07/13/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001905 thru Vol. 13	16	9/29/21	45 (21 pgs) REPLY filed by Highland Capital Management LP re: 26 MOTION to Dismiss (Defendant Highland Capital Management, L.P.'s Motion to Dismiss Complaint) (Annable, Zachery) (Entered: 07/13/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #44 ON 07/13/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002757	17	9/29/21	57 (7 pgs; 2 docs) MOTION to Dismiss and Joinder in Motion to Dismiss of Highland Capital Management, L.P. filed by Highland CLO Funding Ltd. (Attachments: # 1 Proposed Order) Attorney Paul R Bessette added to party Highland CLO Funding Ltd (pty:dft) (Bessette, Paul) (Entered: 08/30/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #57 ON 08/30/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002778	18	9/29/23	58 (12 pgs) Brief/Memorandum in Support filed by Highland CLO Funding Ltd. re 57 MOTION to Dismiss and Joinder in Motion to Dismiss of Highland Capital Management, L.P. (Bessette, Paul) (Entered: 08/30/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #58 ON 08/30/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002785	19	9/29/23	59 (80 pgs; 5 docs) Appendix in Support filed by Highland CLO Funding Ltd re 58 Brief/Memorandum in Support of Motion (Attachments: # 1 Exhibit(s) A - Jackson v Dear # 2 Exhibit(s) B - Prudential Assurance v. Newman # 3 Exhibit(s) C - Harbourvest Settlement Agreement # 4 Exhibit(s) D - Boleat Declaration) (Bessette, Paul) (Entered: 08/30/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #59 ON 08/30/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002797	20	9/29/21	64 (1 pg) ORDER OF REFERENCE: Pursuant to 28 U.S.C. § 157 and this District's Miscellaneous Order No. 33, this case is hereby REFERRED to Judge Stacey G. C. Jernigan of the United States Bankruptcy Court for the Northern District of Texas, Dallas Division, to be adjudicated as a matter related to the consolidated Chapter 11 Bankruptcy of Highland Capital Management, L.P., Chapter 11 Case No.19-34054. (Ordered by Judge Jane J. Boyle
002877			

Vol. 14				on 9/20/2021) (svc) (Entered: 09/20/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #64 ON 09/20/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002878	21	10/19/21	66	(5 pgs) Notice of hearing filed by Defendant Highland Capital Management, LP (RE: related document(s) 26 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP, 47 Motion to strike document filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 55 Motion to abate filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) Hearing to be held on 11/23/2021 at 09:30 AM at https://us-courts.webex.com/meet/jerniga for 26 and for 47 and for 55, (Annable, Zachery)
002883 thru Vol. 16	22	11/22/21	71	(509 pgs; 2 docs) Witness and Exhibit List <i>for Hearing on November 23, 2021</i> filed by Defendant Highland Capital Management, LP (RE: related document(s) 26 Motion to dismiss adversary proceeding). (Attachments: # 1 Exhibits 1-13) (Hayward, Melissa)
Vol. 17	23	11/22/21	72	(2 pgs) Witness List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 26 Motion to dismiss adversary proceeding, 47 Motion to strike (related document(s): 43 Document), 55 Motion to abate (related document(s) 1 Complaint), 69 Motion to abate <i>Plaintiffs' Amended Motion to Stay All Proceedings</i> (related document(s) 55 Motion to abate (related document(s) 1 Complaint))). (Sbaiti, Mazin)
003392	24	11/22/21	73	(189 pgs; 4 docs) Exhibit List <i>for November 23, 2021 hearing</i> filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 47 Motion to strike (related document(s): 43 Document), 55 Motion to abate (related document(s) 1 Complaint)). (Attachments: # 1 Exhibit 1_Defendant's Memorandum of Law in Support of Motion for Reconsideration # 2 Exhibit 2_Highland Memorandum in Support of Motion to Dismiss # 3 Exhibit 3_Order (I) Confirming Fifth Amended Plan of Reorganization of Highland) (Sbaiti, Mazin)
003394	25	12/7/21	80	(2 pgs) Order granting Highland CLO Funding, Ltd.'s motion to dismiss adversary as a party with prejudice (related document 57) Entered on 12/7/2021. (Okafor, Marcey) Modified text on 3/11/2022 (Okafor, Marcey).
003583	26	3/11/22	99	(26 pgs) Memorandum of Opinion and order granting motion to dismiss the adversary proceeding (RE: related document(s) 26 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP). Entered on 3/11/2022 (Okafor, Marcey)
003585	27	3/11/22	100	(26 pgs) Order granting motion to dismiss adversary proceeding with prejudice (related document #26) Entered on 3/11/2022. (Okafor, Marcey)
003611				

Vol. 18 003637	28	3/21/22	104	(29 pgs) Notice of appeal. Fee Amount \$298 filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 100 Order on motion to dismiss adversary proceeding). Appellant Designation due by 04/4/2022. (Sbaiti, Mazin)
003666	29	5/26/22	120	(177 pgs; 2 docs) Support/supplemental document <i>Motion to Supplement Appellate Record</i> filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 111 Appellant designation). (Attachments: # 1 Amended Transcript of January 14, 2021 Hearing) (Sbaiti, Mazin)
003843	30	6/9/22	121	(1 pg) DISTRICT COURT Order: Case 3:22-00695-B is hereby transferred to the docket of the Honorable Judge Jane J. Boyle for consolidation with The Charitable DAF Fund LP, et al. v. Highland Capital Management LP, Case No. 3:21-cv-3129-N. Judge Karen Gren Scholer no longer assigned to case.(RE: related document(s) 86 Notice of appeal filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 104 Notice of appeal filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Entered on 6/9/2022 (Whitaker, Sheniqua) (Entered: 06/10/2022)
003844	31	10/24/22	122	(7 pgs) Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP (Annable, Zachery)
003851	32	10/14/22	123	(31 pgs) Brief in support filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Annable, Zachery)
Vol. 19 003882 Thru Vol 20	33	10/14/22	124	(513 pgs; 15 docs) Support/supplemental document (<i>Appendix in Support of Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7 # 8 Exhibit 8 # 9 Exhibit 9 # 10 Exhibit 10 # 11 Exhibit 11 # 12 Exhibit 12 # 13 Exhibit 13 # 14 Exhibit 14) (Annable, Zachery)
Vol. 21 004395	34	10/27/22	126	(5 pgs) Notice of hearing (<i>Notice of Hearing and Briefing Schedule on Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP). Hearing to be held on 12/8/2022 at 09:30 AM at https://us-courts.webex.com/meet/jerniga for 122. (Annable, Zachery)

Vol. 21 004400 004410 004442 Thru Vol. 22	35	11/18/22	128	(10 pgs) Motion for withdrawal of reference. Fee amount \$188, filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (Sbaiti, Mazin)
	36	11/18/22	129	(32 pgs) Response opposed to (related document(s): 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP) filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Sbaiti, Mazin)
	37	11/18/22	130	(254 pgs; 2 docs) Response opposed to (related document(s): 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP) filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Attachments: # 1 Appendix) (Sbaiti, Mazin)
Vol. 22 004696 004717 004732 004737 004742	38	9/2/22	131	(21 pgs) DISTRICT COURT MEMORANDUM OPINION AND ORDER: The Court REVERSES and REMANDS the bankruptcy court's Motion to Dismiss Order and AFFIRMS the bankruptcy courts Motion to Stay Order. re: appeal on Civil Action number: Case 3:22-00695-B consolidated with 3:21-CV-3129-B, (RE: related document(s) 81 Order on motion to abate, 100 Order on motion to dismiss adversary proceeding). Entered on 9/2/2022 (Whitaker, Sheniqua) (Entered: 11/29/2022)
	39	12/2/22	133	(15 pgs) Reply to (related document(s): 129 Response filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 130 Response filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) filed by Defendant Highland Capital Management, LP. (Annable, Zachery)
	40	12/7/22	135	(5 pgs) Notice of hearing filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP). Hearing to be held on 1/25/2023 at 01:30 PM at https://us-courts.webex.com/meet/jerniga for 122, (Annable, Zachery)
	41	12/7/22	136	(5 pgs) Notice of hearing filed by Defendant Highland Capital Management, LP (RE: related document(s) 128 Motion for withdrawal of reference filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Status Conference to be held on 1/25/2023 at 01:30 PM at https://us-courts.webex.com/meet/jerniga . (Annable, Zachery).
	42	12/9/22	138	(3 pgs) Response opposed to (related document(s): 128 Motion for withdrawal of reference. Fee amount \$188, filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) filed by Defendant Highland Capital Management, LP. (Annable, Zachery)

Vol. 22 004745	43	12/9/22	139	(25 pgs) Brief in support filed by Defendant Highland Capital Management, LP (RE: related document(s) 138 Response). (Annable, Zachery)
Vol. 23 004770	44	12/9/22	140	(280 pgs; 8 docs) Support/supplemental document (<i>Appendix in Support of Highland Capital Management, L.P.'s Response to Renewed Motion to Withdraw the Reference</i>) filed by Defendant Highland Capital Management, LP (RE: related document(s) 138 Response). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7) (Annable, Zachery)
Vol. 24 005050	45	12/16/22	144	(6 pgs) Reply to (related document(s): 138 Response filed by Defendant Highland Capital Management, LP) filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Sbaiti, Mazin)
005056 Thru Vol. 25.	46	1/23/23	145	(514 pgs; 15 docs) Witness and Exhibit List filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7 # 8 Exhibit 8 # 9 Exhibit 9 # 10 Exhibit 10 # 11 Exhibit 11 # 12 Exhibit 12 # 13 Exhibit 13 # 14 Exhibit 14) (Annable, Zachery)
Vol. 26 005570	47	1/23/23	146	(280 pgs; 8 docs) Witness and Exhibit List filed by Defendant Highland Capital Management, LP (RE: related document(s) 128 Motion for withdrawal of reference. Fee amount \$188.). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7) (Annable, Zachery)
Vol. 27 005850	48	1/23/23	147	(221 pgs; 7 docs) Witness and Exhibit List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Attachments: # 1 Exhibit 1_Excerpts from July 14, 2020 Hearing Transcript # 2 Exhibit 2_HCLOF Members Agreement Relating to the Company # 3 Exhibit 3_HarbourVest Settlement Agreement # 4 Exhibit 4_Order Approving Debtor's Settlement with HarbourVest # 5 Exhibit 5_HCLOF Offering # 6 Exhibit 6 Amended and Restated Investment Advisory Agreement) (Sbaiti, Mazin)
006071	49	1/23/23	148	(3 pgs) Witness and Exhibit List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 128 Motion for withdrawal of reference. Fee amount \$188.). (Phillips, Louis)
Vol. 28 006074	50	1/25/23	150	(56 pgs; 2 docs) Amended Witness and Exhibit List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 147 List (witness/exhibit/generic), 149 List (witness/exhibit/generic)). (Attachments: # 1 Exh 7_Testimony of Mark Patrick at June 8, 2021 hearing) (Sbaiti, Mazin)

Vol. 28 006130	51	1/25/23	152	(3 pgs) Notice of Appearance and Request for Notice by Louis M. Phillips filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Phillips, Louis)
	52	1/25/23	154	(1 pg) Court admitted exhibits date of hearing January 25, 2023 (RE: related document(s) 128 Motion for withdrawal of reference, filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) (COURT ADMITTED DEFENDANT'S EXHIBITS #1, #2, #3, #4, #5 & #6 OFFERED BY ATTY GREG DEMO). (Edmond, Michael) (Entered: 01/27/2023)
Vol. 32 006925 006942 006960	53	2/6/23	158	Report and recommendation to the U.S. District Court by U.S. Bankruptcy Judge. (RE: related document(s) 128 Motion for withdrawal of reference filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Entered on 2/6/2023 (Okafor, Marcey)
	54	2/6/23	161	(18 pgs) DISTRICT COURT Notice of transmission of report and recommendation in re: renewed motion to withdraw reference. Civil Case # 3:22-cv-02802-S. (RE: related document(s) 158 Report and recommendation to the U.S. District Court by U.S. Bankruptcy Judge. (RE: related document(s) 128 Motion for withdrawal of reference filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Entered on 2/6/2023) (Whitaker, Sheniqua)
	55	4/3/23	165	(1 pg) DISTRICT COURT ORDER: The Court GRANTS the 11 Joint Motion to Transfer Proceeding and Consolidate Before Original Court and the above-numbered case (3:22-cv-02802-S) is transferred to the docket of the Honorable Judge Jane Boyle: Civil case 3:21-cv-00842-B (order referring case). (RE: related document(s) 1 Complaint filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 143 Notice of transmission of motion to withdraw reference). Entered on 4/3/2023 (Whitaker, Sheniqua) Modified on 4/10/2023 (Whitaker, Sheniqua). (Entered: 04/10/2023)

TRANSCRIPTS

006961	56	11/24/21	78	(104 pgs) Transcript regarding Hearing Held 11-23-2021 RE: Motion Hearing. THIS TRANSCRIPT WILL BE MADE ELECTRONICALLY AVAILABLE TO THE GENERAL PUBLIC 90 DAYS AFTER THE DATE OF FILING. TRANSCRIPT RELEASE DATE IS 02/22/2022. Until that time the transcript may be viewed at the Clerk's Office or a copy may be obtained from the official court transcriber. Court Reporter/Transcriber Liberty Transcripts/Dipti Patel, Telephone number 847-848-4907. (RE: related document(s) 75 Hearing held on 11/23/2021. (RE: related document(s) 55 MOTION to Stay filed by CLO Holdco Ltd, Charitable DAF Fund LP (Sbaiti, Mazin) (Entered: 08/26/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #55 ON 08/26/2021 IN U.S.
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			<p>DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)) (Appearances: J. Pomerantz and J. Morris for Highland Defendants; J. Jordan and P. Bessett for HCLOF; M. Sbaiti for Plaintiffs. Nonevidentiary hearing. Motion denied. Mr. Pomerantz to upload order.), 76 Hearing held on 11/23/2021. (RE: related document(s) 47 Motion to strike 43 Appendix in support filed by CLO Holdco, Ltd., Charitable DAF Fund, LP (Bridges, Jonathan) Modified text on 7/16/2021 (mjr). (Entered: 07/15/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #47 ON 07/15/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)) (Appearances: J. Pomerantz and J. Morris for Highland Defendants; J. Jordan and P. Bessett for HCLOF; M. Sbaiti for Plaintiffs. Nonevidentiary hearing. Motion denied (Plaintiffs acknowledged complained-of Appendices it did not relate to Motion to Dismiss). Mr. Pomerantz to upload order.)). Transcript to be made available to the public on 02/22/2022. (Patel, Dipti)</p>
57	2/21/23	164	<p>164 (112 pgs) Transcript regarding Hearing Held 1/25/23 RE: HEARING ON DEFENDANT HIGHLAND CAPITAL MANAGEMENT L.P.'S RENEWED MOTION TO DISMISS COMPLAINT (122) AND STATUS CONFERENCE RE: MOTION FOR WITHDRAWAL OF REFERENCE FILED BY PLAINTIFF CLO HOLDCO, LTD., PLAINTIFF CHARITABLE DAF FUND, LP (128). THIS TRANSCRIPT WILL BE MADE ELECTRONICALLY AVAILABLE TO THE GENERAL PUBLIC 90 DAYS AFTER THE DATE OF FILING. TRANSCRIPT RELEASE DATE IS 05/22/2023. Until that time the transcript may be viewed at the Clerk's Office or a copy may be obtained from the official court transcriber. Court Reporter/Transcriber Dipti Patel, Telephone number 847-848-4907. (RE: related document(s) 155 Hearing held on 1/25/2023. (RE: related document(s) 122 Motion to dismiss adversary proceeding, (Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint) filed by Defendant Highland Capital Management, LP filed by Defendant Highland Capital Management, LP) (Appearances: J. Morris and G. Demo for Movants; L. Phillips and M. Sbaiti for Plaintiffs. Evidentiary hearing (appendices). Court took matter under advisement.), 156 Hearing held on 1/25/2023. (RE: related document(s) 128 Motion for withdrawal of reference. Fee amount \$188, filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) (Appearances: J. Morris and G. Demo for Movants; L. Phillips and M. Sbaiti for Plaintiffs. Evidentiary hearing (appendices). Court announced it will recommend denial to District Court. Court is working on Report & Recommendation.)). Transcript to be made available to the public on 05/22/2023. (Patel, Dipti)</p>

Dated: July 14, 2023

Respectfully submitted,

SBAITI & COMPANY PLLC

/s/ Mazin A. Sbaiti

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Counsel for Appellants

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was filed electronically through the Court's ECF system, which provides notice to all parties of interest, on this 14th day of July, 2023.

/s/ Mazin A. Sbaiti

Mazin A. Sbaiti

in lower distributions to creditors because of costs and distraction such litigation or the threats of such litigation would cause.

79. **Necessity of Gatekeeper Provision.** The Bankruptcy Court further finds that unless the Bankruptcy Court approves the Gatekeeper Provision, the Claimant Trustee and the Claimant Trust Oversight Board will not be able to obtain D&O insurance, the absence of which will present unacceptable risks to parties currently willing to serve in such roles. The Bankruptcy Court heard testimony from Mark Tauber, a Vice President with AON Financial Services, the Debtor's insurance broker ("AON"), regarding his efforts to obtain D&O insurance. Mr. Tauber credibly testified that of all the insurance carriers that AON approached to provide D&O insurance coverage after the Effective Date, the only one willing to do so without an exclusion for claims asserted by Mr. Dondero and his affiliates otherwise requires that this Order approve the Gatekeeper Provision. Based on the foregoing, the Bankruptcy Court finds that the Gatekeeper Provision is necessary and appropriate in light of the history of the continued litigiousness of Mr. Dondero and his related entities in this Chapter 11 Case and necessary to the effective and efficient administration, implementation and consummation of the Plan and is appropriate pursuant to *Carroll v. Abide (In re Carroll)* 850 F.3d 811 (5th Cir. 2017). Approval of the Gatekeeper Provision will prevent baseless litigation designed merely to harass the post-confirmation entities charged with monetizing the Debtor's assets for the benefit of its economic constituents, will avoid abuse of the court system and preempt the use of judicial time that properly could be used to consider the meritorious claims of other litigants. Any suit against a Protected Party would effectively be a suit against the Debtor, and the Debtor may be required to indemnify the Protected

a claim is colorable, which the Bankruptcy Court has jurisdiction to determine, is distinct from whether the Bankruptcy Court would have jurisdiction to adjudicate any claim it finds colorable.

82. **Resolution of Objections of Scott Ellington and Isaac Leventon.** Each of Scott Ellington (“Mr. Ellington”) and Isaac Leventon (“Mr. Leventon”) (each, a “Senior Employee Claimant”) has asserted certain claims for liquidated but unpaid bonus amounts for the following periods: 2016, 2017, and 2018, as set forth in Exhibit A to that certain *Senior Employees’ Limited Objection to Debtor’s Fifth Amended Plan of Reorganization* [Docket No. 1669] (the “Senior Employees’ Objection”) (for each of Mr. Ellington and Mr. Leventon, the “Liquidated Bonus Claims”).

- a. Mr. Ellington has asserted Liquidated Bonus Claims in the aggregate amount of \$1,367,197.00, and Mr. Leventon has asserted Liquidated Bonus Claims in the aggregate amount of \$598,198.00. Mr. Ellington received two Ballots¹⁰ – a Ballot for Class 7 of the Plan and a Ballot for Class 8 of the Plan. Mr. Ellington completed and timely returned both of such Ballots, voted to reject the Plan, and elected to have his Class 8 Liquidated Bonus Claims treated under Class 7 of the Plan, subject to the objections and reservations of rights set forth in the Senior Employees’ Objection. If Mr. Ellington is permitted to elect Class 7 treatment for his Liquidated Bonus Claims, then the maximum amount of his Liquidated Bonus Claims will be \$1,000,000.
- b. Mr. Leventon received two Ballots—a Ballot for Class 7 of the Plan and a Ballot for Class 8 of the Plan. Mr. Leventon completed and timely returned both of such Ballots and voted each such Ballots to rejected the Plan.
- c. The Senior Employees’ Objection, among other things, objects to the Plan on the grounds that the Debtor improperly disputes the right of Mr. Ellington to elect Class 7 treatment for his Liquidated Bonus Claims and Mr. Leventon’s entitlement to receive Class 7 Convenience Class treatment for his Liquidated Bonus Claims. The Debtor contended that neither Mr. Ellington or Mr. Leventon were entitled to elect to receive Class 7 Convenience Class treatment on account of their Liquidated

¹⁰ As defined in the Plan, “Ballot” means the forms(s) distributed to holders of Impaired Claims or Equity Interests entitled to vote on the Plan on which to indicate their acceptance or rejection of the Plan.

Bonus Claims under the terms of the Plan, the Disclosure Statement Order or applicable law.

- d. The Debtor and Mr. Ellington and Mr. Leventon negotiated at arms' length in an effort to resolve all issues raised in the Senior Employee's Objection, including whether or not Mr. Ellington and Mr. Leventon were entitled to Class 7 Convenience Class treatment of their Liquidated Bonus Claims. As a result of such negotiation, the Debtor, Mr. Ellington, and Mr. Leventon have agreed to the settlement described in paragraphs 82(e) through 82(k) below and approved and effectuated pursuant to decretal paragraphs RR through SS (the "Senior Employees' Settlement").
- e. Under the terms of the Senior Employees' Settlement, the Debtor has the right to elect one of two treatments of the Liquidated Bonus Claims for a Senior Employee Claimant. Under the first treatment option ("Option A"), the Liquidated Bonus Claims will be entitled to be treated in Class 7 of the Plan, and the Liquidated Bonus Claims will be entitled to receive payment in an amount equal to 70.125% of the Class 7 amount of the Liquidated Bonus Claims, subject to the Liquidated Bonus Claims becoming Allowed Claims under the terms of the Plan. Under this calculation, Mr. Ellington would be entitled to receive \$701,250.00 on account of his Class 7 Convenience Class Claim when and as Allowed under the Plan, and Mr. Leventon would be entitled to receive \$413,175.10 on account of his Class 7 Convenience Class Claim when and as Allowed under the Plan. If, however, any party in interest objects to the allowance of the Senior Employee Claimant's Liquidated Bonus Claims and does not prevail in such objection, then such Senior Employee Claimant will be entitled to a payment in an amount equal to 85% of his Allowed Liquidated Bonus Claims (subject, in the case of Mr. Ellington, to the cap imposed on Class 7 Claims). In addition, under Option A, each of Mr. Ellington and Mr. Leventon would retain their respective rights to assert that the Liquidated Bonus Claims are entitled to be treated as Administrative Expense Claims, as defined in Article I.B.2. of the Plan, in which case the holder of such Liquidated Bonus Claims would be entitled to payment in full of the Allowed Liquidated Bonus Claims. Under Option A, parties in interest would retain the right to object to any motion seeking payment of the Liquidated Bonus Amounts as Administrative Expenses.
- f. Under the second treatment option ("Option B"), the Debtor would agree that the Senior Employee Claimant has Allowed Liquidated Bonus Claims, no longer subject to objection by any party in interest, in the amounts of the Liquidated Bonus Claims (subject, in the case of Mr. Ellington, to the cap imposed by Class 7). If the Debtor elects Option B as to a Senior Employee Claimant, then such Senior Employee Claimant would be entitled to a payment on account of his Allowed Liquidated Bonus Claims in an amount equal to 60% of the amount of the

Liquidated Bonus Claims (which, in Mr. Ellington's case, would be \$600,000 and in Mr. Leventon's case, would be \$358,918.80), and such payment would be the sole recovery on account of such Allowed Liquidated Bonus Claims.

- g. The Debtor may, with the consent of the Committee, elect Option B with respect to a Senior Employee Claimant at any time prior to the occurrence of the Effective Date. If the Debtor does not make an election, then Option A will apply.
- h. Under either Option A or Option B, Mr. Ellington and Mr. Leventon will retain all their rights with respect to all Claims other than the Liquidated Bonus Amounts, including, but not limited to, their Class 6 PTO Claims, other claims asserted as Class 8 General Unsecured Claims, the Senior Employees' claims for indemnification against the Debtor, and any other claims that they may assert constitute Administrative Expense Claims, and any other such Claims are subject to the rights of any party in interest to object to such Claims, and the Debtor reserves any all of its rights and defenses in connection therewith.
- i. Subject to entry of this Confirmation Order and as set forth and announced on the record at the hearing on confirmation of the Plan and no party objecting thereto, Mr. Ellington and Mr. Leventon agreed to change the votes in their respective Ballots from rejection to acceptance of the Plan and to withdraw the Senior Employees' Objection.
- j. The Senior Employees' Settlement represents a valid exercise of the Debtor's business judgment and satisfies the requirements for a compromise under Bankruptcy Rule 9019(a).
- k. For the avoidance of doubt, neither Mr. Leventon nor Mr. Ellington shall be a Released Party under the Plan regardless of how the Senior Employee Claimants' Claims are to be treated hereunder.

Based upon the foregoing findings, and upon the record made before the Bankruptcy Court at the Confirmation Hearing, and good and sufficient cause appearing therefor, it is hereby

ORDERED, ADJUDGED AND DECREED THAT:

A. Confirmation of the Plan. The Plan is approved in its entirety and **CONFIRMED** under section 1129 of the Bankruptcy Code. The terms of the Plan, including the

Plan Supplements and Plan Modifications, are incorporated by reference into and are an integral part of this Confirmation Order.¹¹

B. Findings of Fact and Conclusions of Law. The findings of fact and the conclusions of law set forth in this Confirmation Order and on the record of the Confirmation Hearing constitute findings of fact and conclusions of law in accordance with Bankruptcy Rule 7052, made applicable to this proceeding by Bankruptcy Rule 9014. All findings of fact and conclusion of law announced by the Bankruptcy Court at the Confirmation Hearing in relation to confirmation of the Plan are hereby incorporated into this Confirmation Order. To the extent that any of the following constitutes findings of fact or conclusions of law, they are adopted as such. To the extent any findings of fact or conclusions of law set forth in this Confirmation Order (including any findings of fact or conclusions of law announced by the Bankruptcy Court at the Confirmation Hearing and incorporated herein) constitutes an order of the Bankruptcy Court, and is adopted as such.

C. Objections. Any resolution or disposition of objections to confirmation of the Plan or otherwise ruled upon by the Bankruptcy Court on the record of the Confirmation Hearing is hereby incorporated by reference. All objections and all reservations of rights pertaining to confirmation of the Plan that have not been withdrawn, waived or settled are overruled on the merits, except as otherwise specifically provided in this Confirmation Order.

D. Plan Supplements and Plan Modifications. The filing with the Bankruptcy Court of the Plan Supplements and the Plan Modifications constitutes due and

¹¹ The Plan is attached hereto as Exhibit A.

sufficient notice thereof. Accordingly, pursuant to section 1127(a) of the Bankruptcy Code and Bankruptcy Rule 3019, the Plan Modifications and the Plan Supplements do not require additional disclosure under section 1125 of the Bankruptcy Code or resolicitation of votes under section 1126 of the Bankruptcy Code, nor do they require that Holders of Claims or Equity Interests be afforded an opportunity to change previously cast acceptances or rejections of the Plan. The Plan Modifications and the Plan Supplements constitute the Plan pursuant to section 1127(a) of the Bankruptcy Code. Accordingly, the Plan, as modified, is properly before the Bankruptcy Court and all votes cast with respect to the Plan prior to such modification shall be binding and shall apply with respect to the Plan.

E. Deemed Acceptance of Plan. In accordance with section 1127 of the Bankruptcy Code and Bankruptcy Rule 3019, all Holders of Claims and Equity Interests who voted to accept the Plan (or whom are conclusively presumed to accept the Plan) are deemed to have accepted the Plan as modified by the Plan Modifications. No holder of a Claim shall be permitted to change its vote as a consequence of the Plan Modifications.

F. Vesting of Assets in the Reorganized Debtor. Except as otherwise provided in the Plan or this Confirmation Order, on or after the Effective Date, all Reorganized Debtor Assets will vest in the Reorganized Debtor, free and clear of all Liens, Claims, charges or other encumbrances pursuant to section 1141(c) of the Bankruptcy Code, except with respect to such Liens, Claims, charges, and other encumbrances that are specifically preserved under the Plan upon the Effective Date. The Reorganized Debtor shall be the exclusive trustee of the Reorganized Debtor Assets for purposes of 31 U.S.C. § 3713(b) and 26 U.S.C. § 6012(b)(3), as well as the

representative of the Estate appointed pursuant to section 1123(b)(3)(B) of the Bankruptcy Code with respect to the Reorganized Debtor Assets.

G. Effectiveness of All Actions. All actions contemplated by the Plan, including all actions in connection with the Claimant Trust Agreement, the Senior Employee Stipulation, the New GP LLC Documents, the New Frontier Note, the Reorganized Limited Partnership Agreement, the Litigation Sub-Trust Agreement, and the other Plan Documents, are authorized to be taken on, prior to, or after the Effective Date, as applicable, under this Confirmation Order, without further application to or order of the Bankruptcy Court, or further action by the directors, managers, officers or partners of the Debtor or the Reorganized Debtor and with the effect that such actions had been taken by unanimous action of such parties.

H. Restructuring Transactions. The Debtor or Reorganized Debtor, as applicable, are authorized to enter into and effectuate the Restructuring provided under the Plan, including, without limitation, the entry into and consummation of the transactions contemplated by the Claimant Trust Agreement, the Senior Employee Stipulation, the New GP LLC Documents, the New Frontier Note, the Reorganized Limited Partnership Agreement, the Litigation Sub-Trust Agreement, and the other Plan Documents, and may take any actions as may be necessary or appropriate to effect a corporate restructuring of its business or a corporate restructuring of the overall corporate structure of the Reorganized Debtor, as and to the extent provided in the Plan. Any transfers of assets or equity interests effected or any obligations incurred through the Restructuring pursuant to the Plan are hereby approved and shall not constitute fraudulent conveyances or fraudulent transfers or otherwise be subject to avoidance.

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

J. Independent Board of Directors of Strand. The terms of the current Independent Directors shall expire on the Effective Date without the need for any further or other action by any of the Independent Directors. For avoidance of doubt, the Assumed Contracts

Interests. On the Effective Date, all Class A Limited Partnership Interests, including the Class A Limited Partnership Interests held by Strand, as general partner, and Class B/C Limited Partnerships in the Debtor will be deemed cancelled, and all obligations or debts owed by, or Claims against, the Debtor on account of, or based upon, such Class A Limited Partnership Interests and Class B/C Limited Partnership Interests shall be deemed as cancelled, released, and discharged, including all obligations or duties by the Debtor relating to the Equity Interests in any of the Debtor's formation documents, including the Limited Partnership Agreement. As of the Effective Date and pursuant to the Plan, new Class A Limited Partnership Interests in the Reorganized Debtor will be issued to the Claimant Trust and New GP LLC. The Claimant Trust, as limited partner, will ratify New GP LLC's appointment as general partner of the Reorganized Debtor, and on and following the Effective Date, the Claimant Trust will be the Reorganized Debtor's limited partner and New GP LLC will be its general partner. The Claimant Trust, as limited partner, and New GP LLC, as general partner, will execute the Reorganized Limited Partnership Agreement, which will amend and restate, in all respects, the Debtor's current Limited

M. Transfer of Estate Claims to Litigation Sub-Trust. On or prior to the Effective Date, the Claimant Trust shall irrevocably transfer and shall be deemed to have irrevocably transferred to the Litigation Sub-Trust all of the Claimant Trust's rights, title, and interest in and to all of the Estate Claims as successor in interest to the Debtor, and in accordance with section 1141 of the Bankruptcy Code, the Estate Claims shall automatically vest in the Litigation Sub-Trust free and clear of all Claims, Liens, encumbrances, or interests subject only to the Litigation Sub-Trust Interests and Litigation Sub-Trust Expenses. The Litigation Trustee will

be authorized to investigate, pursue, and otherwise resolve the Estate Claims pursuant to the terms of the Litigation Sub-Trust Agreement and the Plan, including as successor in interest to the Debtor or Committee, as applicable, in any litigation commenced prior to the Effective Date in which Estate Claims are asserted.

N. Compromise of Controversies. In consideration for the distributions and other benefits, including releases, provided under the Plan, the provisions of the Plan constitute a good faith compromise and settlement of all Claims, Equity Interests, and controversies resolved under the Plan and the entry of this Confirmation Order constitutes approval of such compromise and settlement under Bankruptcy Rule 9019.

O. Objections to Claims. The Claims Objection Deadline shall be the date that is 180 days after the Effective Date, *provided, however*, that the Claims Objection Deadline may be extended by the Bankruptcy Court upon a motion by the Claimant Trustee and as otherwise provided under the Plan.

P. Assumption of Contracts and Leases. Effective as of the date of this Confirmation Order, each of the Assumed Contacts shall be assumed by the Debtor without the need for any further notice to or action, order, or approval of the Bankruptcy Court, under section 365 of the Bankruptcy Code and the payment of Cures, if any, shall be paid in accordance with the Plan. Each Assumed Contract shall include all modifications, amendments, supplements, restatements, or other agreements related thereto, and all rights related thereto, if any, including all easements, licenses, permits, rights, privileges, immunities, options, rights of first refusal, and any other interests. Modifications, amendments, supplements, and restatements to any of the

Assumed Contracts that have been executed by the Debtor during the Chapter 11 Case shall not be deemed to alter the prepetition nature of such Assumed Contracts or the validity, priority, or amount of any Claims that may arise in connection therewith. Assumption of the Assumed Contracts pursuant to Article V.A of the Plan and full payment of any applicable Cure pursuant to the Plan shall result in the full release and satisfaction of any Cures, Claims, or defaults, whether monetary or nonmonetary, including defaults of provisions restricting the change in control or ownership interest composition, or other bankruptcy-related defaults, arising under any Assumed Contracts.

Q. Rejection of Contracts and Leases. Unless previously assumed during the pendency of the Chapter 11 Case or pursuant to the Plan, all other Executory Contracts and Unexpired Leases are rejected as of the date of the entry of this Confirmation Order and pursuant to the terms of the Plan. To the extent that any party asserts any damages resulting from the rejection of any Executory Contract or Unexpired Lease, such claim must be filed within **thirty (30) days** following entry of this Confirmation Order, or such claim will be forever barred and disallowed against the Reorganized Debtor.

R. Assumption of Issuer Executory Contracts. On the Confirmation Date, the Debtor will assume the agreements set forth on **Exhibit B** hereto (collectively, the “Issuer Executory Contracts”) pursuant to section 365 of the Bankruptcy Code and Article V of the Plan. In full and complete satisfaction of its obligation to cure outstanding defaults under section 365(b)(1) of the Bankruptcy Code, the Debtor or, as applicable, any successor manager under the

T. Release of Debtor Claims against Issuer Released Parties. Upon entry of this Order, and to the maximum extent permitted by law, the Debtor hereby forever, finally, fully, unconditionally, and completely releases, relieves, acquits, remises, and exonerates, and covenants never to sue [(i) each Issuer and (ii) Wendy Ebanks, (iii) Yun Zheng, (iv) Laura Chisholm, (v) Mora Goddard, (vi) Stacy Bodden, (vii) Suzan Merren (viii) Scott Dakers, (ix) Samit Ghosh, (x) Inderjit Singh, (xi) Ellen Christian, (xii) Andrew Dean, (xiii) Betsy Mortel, (xiv) David Hogan, (xv) Cleveland Stewart, (xvi) Rachael Rankin, (xvii) Otelia Scott, (xviii) Martin Couch, (xx) Feronia Bartley-Davis, (xxi) Charlotte Cloete, (xxii) Christina McLean, (xxiii) Karen Ellerbe,

U. Authorization to Consummate. The Debtor is authorized to consummate the Plan after the entry of this Confirmation Order subject to satisfaction or waiver of the conditions precedent to the Effective Date of the Plan set forth in Article VIII.A of the Plan. The Plan shall not become effective unless and until the conditions set forth in Article VIII.A of the Plan have been satisfied, or otherwise waived pursuant to Article VIII.B of the Plan.

V. Professional Compensation. All requests for payment of Professional Fee Claims for services rendered and reimbursement of expenses incurred prior to the Effective Date

W. Release, Exculpation, Discharge, and Injunction Provisions. The following release, exculpation, discharge, and injunction provisions set forth in the Plan are approved and authorized in their entirety, and such provisions are effective and binding on all parties and Entities to the extent provided therein.

X. Discharge of Claims and Termination of Interests. To the fullest extent provided under section 1141(d)(1)(A) and other applicable provisions of the Bankruptcy Code, except as otherwise expressly provided by the Plan or this Confirmation Order, all consideration distributed under the Plan will be in exchange for, and in complete satisfaction, settlement,

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

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

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any employment agreement with a current or former employee of the Debtor, (iv) any Avoidance Actions, or (v) any Causes of Action arising from willful misconduct, criminal misconduct, actual fraud, or gross negligence of such applicable Released Party as determined by Final Order of the Bankruptcy Court or any other court of competent jurisdiction.

AA. Injunction. Upon entry of this Confirmation Order, all Enjoined Parties are and shall be permanently enjoined, on and after the Effective Date, from taking any actions to interfere with the implementation or consummation of the Plan. Except as expressly provided in the Plan, this Confirmation Order, or a separate order of the Bankruptcy Court, all Enjoined Parties are and shall be permanently enjoined, on and after the Effective Date, with respect to any Claims and Equity Interests, from directly or indirectly (i) commencing, conducting, or continuing in any manner, any suit, action, or other proceeding of any kind (including any proceeding in a judicial, arbitral, administrative or other forum) against or affecting the Debtor or the property of the Debtor, (ii) enforcing, levying, attaching (including any prejudgment attachment), collecting, or otherwise recovering, enforcing, or attempting to recover or enforce, by any manner or means, any judgment, award, decree, or order against the Debtor or the property of the Debtor, (iii) creating, perfecting, or otherwise enforcing in any manner, any security interest, lien or encumbrance of any kind against the Debtor or the property of the Debtor, (iv) asserting any right of setoff, directly or indirectly, against any obligation due to the Debtor or against property or interests in property of the Debtor, except to the limited extent permitted under Sections 553 and 1141 of the Bankruptcy Code, and (v) acting or proceeding in any manner,

in any place whatsoever, that does not conform to or comply with the provisions of the Plan. The injunctions set forth in the Plan and this Confirmation Order shall extend to, and apply to any act of the type set forth in any of clauses (i)-(v) of the immediately preceding paragraph against any successors of the Debtor, including, but not limited to, the Reorganized Debtor, the Litigation Sub-Trust, and the Claimant Trust and their respective property and interests in property. Subject in all respects to Article XII.D of the Plan, no Enjoined Party may commence or pursue a claim or cause of action of any kind against any Protected Party that arose or arises from or is related to the Chapter 11 Case, the negotiation of the Plan, the administration of the Plan or property to be distributed under the Plan, the wind down of the business of the Debtor or Reorganized Debtor, the administration of the Claimant Trust or the Litigation Sub-Trust, or the transactions in furtherance of the foregoing without the Bankruptcy Court (i) first determining, after notice and a hearing, that such claim or cause of action represents a colorable claim of any kind, including, but not limited to, negligence, bad faith, criminal misconduct, willful misconduct, fraud, or gross negligence against a Protected Party and (ii) specifically authorizing such Enjoined Party to bring such claim or cause of action against any such Protected Party; *provided, however*, the foregoing will not apply to a claim or cause of action against Strand or against any Employee other than with respect to actions taken, respectively, by Strand or by such Employee from the date of appointment of the Independent Directors through the Effective Date. The Bankruptcy Court will have sole and exclusive jurisdiction to determine whether a claim or cause of action is colorable and, only to the extent legally permissible and as provided for in

Article XI of the Plan, shall have jurisdiction to adjudicate the underlying colorable claim or cause of action.

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

CC. Continuance of January 9 Order and July 16 Order. Unless otherwise provided in the Plan, in this Confirmation Order, or in a Final Order of the Bankruptcy Court, each of the *Order Approving Settlement with Official Committee of Unsecured Creditors Regarding Governance of the Debtor and Procedures for Operations in the Ordinary Course*, entered by the Bankruptcy Court on January 9, 2020 [Docket No. 339] and *Order Approving the Debtor's Motion Under Bankruptcy Code Sections 105(a) and 363(b) Authorizing Retention of James P. Seery, Jr., as Chief Executive Officer, Chief Restructuring Officer, and Foreign Representative Nunc Pro Tunc to March 15, 2020* [Docket No. 854] entered on July 16, 2020 shall remain in full force and effect from the Confirmation Date and following the Effective Date.

DD. No Governmental Releases. Nothing in this Confirmation Order or the Plan shall effect a release of any claim by the United States Government or any of its agencies or

any state and local authority whatsoever, including without limitation any claim arising under the Internal Revenue Code, the environmental laws or any criminal laws of the United States or any state and local authority against any party or person, nor shall anything in this Confirmation Order or the Plan enjoin the United States or any state or local authority from bringing any claim, suit, action, or other proceedings against any party or person for any liability of such persons whatever, including without limitation any claim, suit, or action arising under the Internal Revenue Code, the environmental laws or any criminal laws of the United States or any state and local authority against such persons, nor shall anything in this Confirmation Order or the Plan exculpate any party or person from any liability to the United States Government or any of its agencies or any state and local authority whatsoever, including any liabilities arising under the Internal Revenue Code, the environmental laws, or any criminal laws of the United States or any state and local authority against any party or person.

EE. Exemption from Transfer Taxes. Pursuant to section 1146(a) of the Bankruptcy Code, any transfers (whether from the Debtor to the Reorganized Debtor or to any other Person) of property under the Plan or pursuant to: (a) the issuance, distribution, transfer, or exchange of any debt, equity security, or other interest in the Debtor or the Reorganized Debtor; (b) the Restructuring transactions pursuant to the Plan; (c) the creation, modification, consolidation, termination, refinancing, and/or recording of any mortgage, deed of trust, or other security interest, or the securing of additional indebtedness by such or other means; (d) the making, assignment, or recording of any lease or sublease; or (e) the making, delivery, or recording of any deed or other instrument of transfer under, in furtherance of, or in connection with, the Plan,

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NN. References to and Omissions of Plan Provisions. References to articles, sections, and provisions of the Plan are inserted for convenience of reference only and are not intended to be a part of or to affect the interpretation of the Plan. The failure to specifically include or to refer to any particular article, section, or provision of the Plan in this Confirmation Order shall not diminish or impair the effectiveness of such article, section, or provision, it being the intent of the Bankruptcy Court that the Plan be confirmed in its entirety, except as expressly modified herein, and incorporated herein by this reference.

OO. Headings. Headings utilized herein are for convenience and reference only, and do not constitute a part of the Plan or this Confirmation Order for any other purpose.

PP. Effect of Conflict. This Confirmation Order supersedes any Bankruptcy Court order issued prior to the Confirmation Date that may be inconsistent with this Confirmation Order. If there is any inconsistency between the terms of the Plan and the terms of this Confirmation Order, the terms of this Confirmation Order govern and control. If there is any inconsistency between the terms of this Confirmation Order and the terms of a final, executed Plan Supplement Document, the terms of the final, executed Plan Supplement Document will govern and control.

QQ. Resolution of Objection of Texas Taxing Authorities. Dallas County, Kaufman County, City of Allen, Allen ISD and City of Richardson (collectively, the “Tax Authorities”) assert that they are the holders of prepetition and administrative expense claims for 2019, 2020 and 2021 ad valorem real and business personal property taxes. The ad valorem property taxes for tax year 2020 shall be paid in accordance with and to the extent required under

applicable nonbankruptcy law. In the event the 2020 taxes are paid after February 1, 2021, the Tax Authorities may assert any rights and amounts they claim are owed with respect to penalties and interest that have accrued through the date of payment and the Debtor and Reorganized Debtor reserve any all rights and defenses in connection therewith.

- a. The Debtor/Reorganized Debtor shall pay all amounts owed to the Tax Authorities for tax year 2021 in accordance with and to the extent required under applicable nonbankruptcy law. The Tax Authorities shall not be required to file and serve an administrative expense claim and request for payment as a condition of allowance of their administrative expense claims pursuant to **11 U.S.C. Section 503(b)(1)(D)**. With regard to year 2019 ad valorem property taxes, the Tax Authorities will receive payment of their prepetition claims within 30 days of the Effective Date of the Plan. The payment will include interest from the Petition Date through the Effective Date and from the Effective Date through payment in full at the state statutory rate pursuant to **11 U.S.C. Sections 506(b), 511, and 1129**, if applicable, subject to all of the Debtor's and Reorganized Debtor's rights and defenses in connection therewith. Notwithstanding any other provision in the Plan, the Tax Authorities shall (i) retain the liens that secure all prepetition and postpetition amounts ultimately owed to them, if any, as well as (ii) the state law priority of those liens until the claims are paid in full.
- b. The Tax Authorities' prepetition claims and their administrative expense claims shall not be discharged until such time as the amounts owed are paid in full. In the event of a default asserted by the Taxing Authorities, the Tax Authorities shall provide notice Debtor or Reorganized Debtor, as applicable, and may demand cure of any such asserted default. Subject to all of its rights and defenses, the Debtor or Reorganized Debtor shall have fifteen (15) days from the date of the notice to cure the default. If the alleged default is not cured, the Tax Authorities may exercise any of their respective rights under applicable law and pursue collection of all amounts owed pursuant to state law outside of the Bankruptcy Court, subject in all respects to the Debtor's and Reorganized Debtor's applicable rights and defenses. The Debtor/Reorganized Debtor shall be entitled to any notices of default required under applicable nonbankruptcy law and each of the Taxing Authorities, the Debtor and the Reorganized Debtor reserve any and all of their respective rights and defenses in connection therewith. The Debtor's and Reorganized Debtor's rights and defenses under Texas Law and the Bankruptcy Code with respect to this provision of the Confirmation Order, including their right to dispute or object to the Tax Authorities' Claims and liens, are fully preserved.

immediately upon written demand to the Debtor, Reorganized Debtor and/or any successor-in-interest. Failure of the IRS to declare a failure and/or default does not constitute a waiver by the United States or its agency the IRS of the right to declare that the Debtor, Reorganized Debtor, and/or any successor in interest is in default.

(c) The IRS shall only be required to send two notices of failure and/or default, and upon the third event of a failure and/or default, the IRS shall be entitled to proceed as set out in paragraphs (1), (2), and/or (3) herein above without further notice to the Debtor, the Reorganized Debtor, or any successor in interest, or its counsel. The collection statute expiration date for all unpaid federal tax liabilities shall be extended pursuant to non-bankruptcy law.

(d) The Internal Revenue Service shall not be bound by any release provisions in the Plan that would release any liability of the responsible persons of the Debtor, the Reorganized Debtor, and/or any successor in interest to the IRS. The Internal Revenue Service may take such actions as it deems necessary to assess any liability that may be due and owing by the responsible persons of the Debtor, the Reorganized Debtor and/or any successor in interest to the Internal Revenue Service.

(e) Nothing contained in the Plan or the Confirmation Order shall be deemed to be a waiver or relinquishment of any rights, claims, causes of action, rights of setoff or recoupment, rights to appeal tax assessments, or other legal or equitable defenses that the Debtor or Reorganized Debtor have under non-bankruptcy law in connection with any claim, liability or cause of action of the United States and its agency the Internal Revenue Service.

(f) The term “any payment required to be made on federal taxes,” as used herein above, is defined as: any payment or deposit required by the Internal Revenue Code to be made by the Debtor from and after the Confirmation Date, or the Reorganized Debtor and/or any successor in interest from and after the Effective Date, to the date the IRS Claim is together with interest paid in full. The term “any required tax return,” as used herein above, is defined as: any tax return or report required by the Internal Revenue Code to be made by the Debtor from and after the Confirmation Date, or the Reorganized Debtor and/or any successor in interest from and after the Effective Date, to the date the IRS Claim is together with interest paid in full.

UU. IRS Proof of Claim. Notwithstanding anything in the Plan or in this Confirmation Order, until all required tax returns are filed with and processed by the IRS, the IRS’s proof of claim will not be deemed fixed for purposes of Section 502 of the Bankruptcy Code and may be amended in order to reflect the IRS’ assessment of the Debtor’s unpaid priority and general unsecured taxes, penalties and interest.

any role arising from or relating to the Chapter 11 Case, except in connection with final fee applications of Professionals for services rendered prior to the Effective Date (including the right to object thereto). Notwithstanding the foregoing, any Committee member or Professional may serve following the Effective Date with respect to the Claimant Trust Oversight Board or Litigation Sub-Trust. The Professionals retained by the Committee and the members thereof will not be entitled to assert any fee claims for any services rendered to the Committee or expenses incurred in the service of the Committee after the Effective Date, except for reasonable fees for services rendered, and actual and necessary costs incurred, in connection with any applications for allowance of Professional Fees pending on the Effective Date or filed and served after the Effective Date pursuant to the Plan. Nothing in the Plan shall prohibit or limit the ability of the Debtor's or Committee's Professionals to represent either of the Trustees or to be compensated or reimbursed per the Plan, the Claimant Trust Agreement, and/or Litigation Sub-Trust in connection with such representation.

ZZ. Miscellaneous. After the Effective Date, the Debtor or Reorganized Debtor, as applicable, shall have no obligation to file with the Bankruptcy Court or serve on any parties reports that the Debtor or Reorganized Debtor, as applicable, were obligated to file under the Bankruptcy Code or a court order, including monthly operating reports (even for those periods for which a monthly operating report was not filed before the Effective Date), ordinary course professional reports, reports to any parties otherwise required under the "first" and "second" day orders entered in this Chapter 11 Case (including any cash collateral financing orders entered in this Chapter 11 Case) and monthly or quarterly reports for Professionals; *provided, however*, that

the Debtor or Reorganized Debtor, as applicable, will comply with the U.S. Trustee's post confirmation reporting requirements.

###END OF ORDER###

APPENDIX 6

000404

CLAIM 143

Fill in this information to identify the case:

Debtor Highland Capital Management, L.P.

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

Case number 19-34054

Official Form 410 Proof of Claim

04/19

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

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

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

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

Part 1: Identify the Claim

1. Who is the current creditor?	<u>HarbourVest 2017 Global Fund L.P.</u> Name of the current creditor (the person or entity to be paid for this claim)	
	Other names the creditor used with the debtor _____	
2. Has this claim been acquired from someone else?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. From whom? _____	
3. Where should notices and payments to the creditor be sent?	Where should notices to the creditor be sent? <u>HarbourVest 2017 Global Fund L.P.</u> <u>Attn: Erica Weisgerber</u> <u>Debevoise and Plimpton LLP</u> <u>919 Third Avenue</u> <u>New York, NY 10022, U.S.A.</u> Contact phone <u>2129096000</u> Contact email <u>eweisgerber@debevoise.com</u>	Where should payments to the creditor be sent? (if different) <u>See summary page</u> Contact phone <u>6173483773</u> Contact email <u>agoren@harbourvest.com</u>
	Uniform claim identifier for electronic payments in chapter 13 (if you use one): _____	
4. Does this claim amend one already filed?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Claim number on court claims registry (if known) _____ Filed on _____ MM / DD / YYYY	
5. Do you know if anyone else has filed a proof of claim for this claim?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Who made the earlier filing? _____	



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

6. Do you have any number you use to identify the debtor?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Last 4 digits of the debtor's account or any number you use to identify the debtor: ____
7. How much is the claim? \$ <u>See Annex</u>	Does this amount include interest or other charges? <input type="checkbox"/> No <input type="checkbox"/> Yes. Attach statement itemizing interest, fees, expenses, or other charges required by Bankruptcy Rule 3001(c)(2)(A).
8. What is the basis of the claim?	Examples: Goods sold, money loaned, lease, services performed, personal injury or wrongful death, or credit card. Attach redacted copies of any documents supporting the claim required by Bankruptcy Rule 3001(c). Limit disclosing information that is entitled to privacy, such as health care information. <u>See Annex</u>
9. Is all or part of the claim secured?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. The claim is secured by a lien on property. Nature or property: <input type="checkbox"/> Real estate: If the claim is secured by the debtor's principle residence, file a <i>Mortgage Proof of Claim Attachment</i> (Official Form 410-A) with this <i>Proof of Claim</i> . <input type="checkbox"/> Motor vehicle <input type="checkbox"/> Other. Describe: _____ Basis for perfection: _____ Attach redacted copies of documents, if any, that show evidence of perfection of a security interest (for example, a mortgage, lien, certificate of title, financing statement, or other document that shows the lien has been filed or recorded.) Value of property: \$ _____ Amount of the claim that is secured: \$ _____ Amount of the claim that is unsecured: \$ _____ (The sum of the secured and unsecured amount should match the amount in line 7.) Amount necessary to cure any default as of the date of the petition: \$ _____ Annual Interest Rate (when case was filed) _____ % <input type="checkbox"/> Fixed <input type="checkbox"/> Variable
10. Is this claim based on a lease?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Amount necessary to cure any default as of the date of the petition. \$ _____
11. Is this claim subject to a right of setoff?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Identify the property: _____



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

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

☒ No

☐ Yes. Check all that apply:

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

Amount entitled to priority

\$ _____

☐ Up to \$3,025* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use. 11 U.S.C. § 507(a)(7).

\$ _____

☐ Wages, salaries, or commissions (up to \$13,650*) earned within 180 days before the bankruptcy petition is filed or the debtor's business ends, whichever is earlier. 11 U.S.C. § 507(a)(4).

\$ _____

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

\$ _____

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

\$ _____

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

\$ _____

* Amounts are subject to adjustment on 4/01/22 and every 3 years after that for cases begun on or after the date of adjustment.

13. Is all or part of the claim pursuant to 11 U.S.C. § 503(b)(9)?

☒ No

☐ Yes. Indicate the amount of your claim arising from the value of any goods received by the debtor within 20 days before the date of commencement of the above case, in which the goods have been sold to the Debtor in the ordinary course of such Debtor's business. Attach documentation supporting such claim.

\$ _____

Part 3: Sign Below

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

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

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

Check the appropriate box:

☐ I am the creditor.

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

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

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

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

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

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

Executed on date 04/08/2020
MM / DD / YYYY

/s/Michael Pugatch
Signature

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

Name Michael Pugatch
First name Middle name Last name

Title Managing Director - Company: HarbourVest 2017 Global Fund L.P., by Harbo

Company by HarbourVest GP LLC, its General Partner, by HarbourVest Partners, LL
Identify the corporate servicer as the company if the authorized agent is a servicer.

Address

Contact phone _____

Email _____

For phone assistance: Domestic (877) 573-3984 | International (310) 751-1829

Debtor: 19-34054 - Highland Capital Management, L.P. District: Northern District of Texas, Dallas Division		
Creditor: HarbourVest 2017 Global Fund L.P. Attn: Erica Weisgerber Debevoise and Plimpton LLP 919 Third Avenue New York, NY, 10022 U.S.A. Phone: 2129096000 Phone 2: Fax: Email: eweisgerber@debevoise.com	Has Supporting Documentation: Yes, supporting documentation successfully uploaded Related Document Statement:	
	Has Related Claim: No Related Claim Filed By:	
	Filing Party: Authorized agent	
Disbursement/Notice Parties: HarbourVest 2017 Global Fund L.P. c/o HarbourVest Partners, LLC One Financial Center Boston, MA, 02111 U.S.A. Phone: 6173483773 Phone 2: Fax: E-mail: agoren@harbourvest.com DISBURSEMENT ADDRESS		
Other Names Used with Debtor:	Amends Claim: No Acquired Claim: No	
Basis of Claim: See Annex	Last 4 Digits: No	Uniform Claim Identifier:
Total Amount of Claim: See Annex	Includes Interest or Charges: None	
Has Priority Claim: No	Priority Under:	
Has Secured Claim: No Amount of 503(b)(9): No Based on Lease: No Subject to Right of Setoff: No	Nature of Secured Amount: Value of Property: Annual Interest Rate: Arrearage Amount: Basis for Perfection: Amount Unsecured:	
Submitted By: Michael Pugatch on 08-Apr-2020 4:40:16 p.m. Eastern Time Title: Managing Director - Company: HarbourVest 2017 Global Fund L.P., by HarbourVest 2017 Global Associates L.P., its Gen Partner Company: by HarbourVest GP LLC, its General Partner, by HarbourVest Partners, LLC, its Managing Member		

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

In re:

Highland Capital Management, L.P.

Debtor.

Chapter 11

Case No. 19-34054 (SGJ)

ANNEX TO PROOF OF CLAIM

1. This annex (the “Annex”) is part of and is incorporated by reference into the attached proof of claim (together with the Annex, the “Proof of Claim”) and describes in more detail the claims of HarbourVest 2017 Global Fund L.P. (the “Claimant”) against the debtor Highland Capital Management, L.P. (the “Debtor”).

2. The Claimant is a limited partner in one of the Debtor’s managed vehicles, Highland CLO Funding, Ltd. (“HCLOF”). Acis Capital Management GP, L.L.C. and Acis Capital Management L.P. (together, “Acis”), the portfolio manager for HCLOF, filed for chapter 11 in the United States Bankruptcy Court for the Northern District of Texas (the “Court”) on January 30, 2018. The Acis bankruptcy filing resulted from a dispute between Debtor and its former employee, Joshua Terry, who served as portfolio manager for Debtor’s collateral loan obligations funds (“CLO”) business. *See, e.g., Findings of Fact and Conclusions of Law in Support of Orders for Relief Issued After Trial on Contested Involuntary Bankruptcy Petition (“Involuntary Petition Ruling”) [Case No. 18-30264 (SGJ), Dkt. No. 118].* As noted in more detail in the Court’s *Bench Ruling and Memorandum of Law in Support of: (A) Final Approval of Disclosure Statement; and (B) Confirmation of Chapter 11 Trustee’s Third Amended Joint Plan (“Confirmation Ruling”) [Case No. 18-30264 (SGJ), Dkt. No 827]* and related filings in the Acis

bankruptcy cases, there has been extensive litigation regarding alleged improper conduct associated with the management of, and transactions relating to, Acis, including transactions with and related to HCLOF. *See, e.g., id.; Second Amended Complaint* [Case No. 18-03078(SGJ), Dkt. No. 157].

3. Due to the Acis bankruptcy and certain conduct alleged to have been undertaken by the Debtor (to whom Acis subcontracted its functions) and Debtor's employees (who were officers, employees, and agents of Acis), the Claimant has suffered significant harm. Such harm includes, but is not limited to, financial harm resulting from, among other things (i) court orders in the Acis bankruptcy that prevented certain CLOs in which HCLOF was invested from being refinanced or reset and court orders that otherwise regulated the activity of HCLOF; and (ii) significant fees and expenses related to the Acis bankruptcy that were charged to HCLOF. *See, e.g., Involuntary Petition Ruling* ¶ 27; *see also Confirmation Ruling*.

4. Claimant hereby files this Claim to assert any and all of its rights to payment, remedies, and other claims (including contingent or unliquidated claims) against the Debtor in connection with and relating to the foregoing harm, including for any amounts due or owed under the various agreements with the Debtor in connection with HCLOF (including, but not limited to, the Subscription and Transfer Agreement for Ordinary Shares Highland CLO Funding, Ltd., dated as of November 15, 2017, the Members Agreement Relating to the Company, dated as of November 15, 2017, the Highland CLO Funding, Ltd. Offering Memorandum dated November 15, 2017), and any and all legal and equitable claims or causes of action relating to the foregoing harm.

5. The Claimant has not attached the documentation supporting this Claim to this Proof of Claim because the documentation is voluminous and the Debtor has copies of such

documents. However, any requested relevant documents will be provided to the Official Committee of Unsecured Creditors, the Court, the United States Trustee and the Debtor in the event of a dispute regarding this Proof of Claim and will be made available for review by other parties in interest as appropriate upon reasonable request and after consultation with the Debtor and execution of appropriate confidentiality agreements.

6. This Proof of Claim is filed with a full reservation of rights, including the right to amend, update, modify, supplement or otherwise revise this Proof of Claim in any respect at any time. The filing of this Proof of Claim is not and should not be construed to be: (a) a waiver or release of any of the Claimant's rights against any person, entity or property accruing to it against the Debtor and its estate; (b) a waiver of the Claimant's rights to assert that **28 U.S.C. § 157(b)(2)(C)** is unconstitutional; (c) a consent or submission by the Claimant, or waiver of the Claimant's rights to object, to the jurisdiction of this Court with respect to the subject matter of any of the claims described herein, or any objection or other proceeding commenced with respect to any of the claims described herein, or any other proceeding commenced in the Debtor's chapter 11 case against or otherwise involving the Claimant; (d) a waiver or release of any right of the Claimant, or consent by the Claimant, to a trial by jury in this or any other court or proceeding; (e) a waiver or release of, or any limitation on, any right of the Claimant to have orders entered only after *de novo* review by a United States District Judge; (f) an election of remedies; or (g) a waiver of, or any other limitation on, any right of the Claimant to request withdrawal of the reference with respect to any matter, including, without limitation, any matter relating to this Proof of Claim.

7. Claimant's express reservation of all rights and causes of action, includes, without limitation, contingent or unliquidated rights that it or its affiliates may have against the Debtor,

as well as defenses, offsets and counterclaims. This description and classification of claims by the Claimant is not a concession or admission as to the correct characterization or treatment of any such claims or a waiver of any rights of the Claimant.

8. Furthermore, the Claimant expressly reserves its rights to (a) file additional proofs of claim for additional claims that may be based on the same or additional documents or facts or other liability or indebtedness of the Debtor to the Claimant under contract or otherwise; (b) assert claims for cure of defaults in any agreement that the Debtor or any trustee appointed in this chapter 11 case may seek to assume; (c) assert any and all other claims, causes of action, defenses, offsets or counterclaims against the Debtor or any other parties; (d) file a request for payment of an administrative expense under 11 U.S.C. §§ 503 and 507 for any or all of the claims or rights of payment described above and any additional amounts; and (e) seek recovery through any relevant third parties, including any of the Debtor's insurance coverage providers.

9. This Proof of Claim does not encompass all claims that the Claimant or its affiliates may have that arise after the Petition Date and are entitled to administrative priority, and the Claimant expressly reserves its right to file such claim or any similar claim at the appropriate time, including any such post-petition claims arising under these service contracts.

10. This Proof of Claim is filed without prejudice to the filing by the Claimant of additional proofs of claim or requests for payment with respect to any other indebtedness, liability or obligation of the Debtor. The Claimant does not, by this Proof of Claim or any amendment or other action, waive any rights with respect to any scheduled claim.

11. The Claimant reserves the right to withdraw, amend, clarify, modify or supplement this Proof of Claim to assert additional claims, causes of action or additional grounds for this Proof of Claim (including adding any additional contracts, agreements, obligations or

other relationships between the Claimant and the Debtor), as well as the right to file any separate or additional proofs of claim with respect to the claims set forth herein or otherwise, including for the purpose of fixing and liquidating any contingent or unliquidated claim set forth herein, or to file additional proofs of claim in respect of additional amounts or for any other reason.

12. In executing and filing this Proof of Claim, the Claimant does not submit to the jurisdiction of the Bankruptcy Court for the Northern District of Texas for any purpose other than with respect to this Proof of Claim against the Debtor, and does not waive or release any rights or remedies against any other person or entity that may be liable for all or part of this Proof of Claim.

13. The Claimant otherwise reserves its rights, and nothing herein shall prejudice the Claimant's rights, under any order of the Court previously entered in this chapter 11 case.

14. Payments on account of this Proof of Claim should be sent to the Claimant at the address specified for notices to the Claimant in Part 1.3 of the Proof of Claim.

CLAIM 147

Fill in this information to identify the case:

Debtor Highland Capital Management, L.P.

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

Case number 19-34054

Official Form 410 Proof of Claim

04/19

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

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

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

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

Part 1: Identify the Claim

1. Who is the current creditor?	<u>HarbourVest 2017 Global AIF L.P.</u> Name of the current creditor (the person or entity to be paid for this claim)	
	Other names the creditor used with the debtor _____	
2. Has this claim been acquired from someone else?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. From whom? _____	
3. Where should notices and payments to the creditor be sent?	Where should notices to the creditor be sent? <u>HarbourVest 2017 Global AIF L.P.</u> <u>Attn: Erica Weisgerber</u> <u>Debevoise and Plimpton LLP</u> <u>919 Third Avenue</u> <u>New York, NY 10022, U.S.A.</u> Contact phone <u>2129096000</u> Contact email <u>eweisgerber@debevoise.com</u>	Where should payments to the creditor be sent? (if different) <u>See summary page</u> Contact phone <u>6173483773</u> Contact email <u>agoren@harbourvest.com</u>
	Uniform claim identifier for electronic payments in chapter 13 (if you use one): _____	
4. Does this claim amend one already filed?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Claim number on court claims registry (if known) _____ Filed on _____ MM / DD / YYYY	
5. Do you know if anyone else has filed a proof of claim for this claim?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Who made the earlier filing? _____	



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

6. Do you have any number you use to identify the debtor?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Last 4 digits of the debtor's account or any number you use to identify the debtor: ____
7. How much is the claim? \$ <u>See Annex</u>	Does this amount include interest or other charges? <input type="checkbox"/> No <input type="checkbox"/> Yes. Attach statement itemizing interest, fees, expenses, or other charges required by Bankruptcy Rule 3001(c)(2)(A).
8. What is the basis of the claim?	Examples: Goods sold, money loaned, lease, services performed, personal injury or wrongful death, or credit card. Attach redacted copies of any documents supporting the claim required by Bankruptcy Rule 3001(c). Limit disclosing information that is entitled to privacy, such as health care information. <u>See Annex</u>
9. Is all or part of the claim secured?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. The claim is secured by a lien on property. Nature or property: <input type="checkbox"/> Real estate: If the claim is secured by the debtor's principle residence, file a <i>Mortgage Proof of Claim Attachment</i> (Official Form 410-A) with this <i>Proof of Claim</i> . <input type="checkbox"/> Motor vehicle <input type="checkbox"/> Other. Describe: _____ Basis for perfection: _____ Attach redacted copies of documents, if any, that show evidence of perfection of a security interest (for example, a mortgage, lien, certificate of title, financing statement, or other document that shows the lien has been filed or recorded.) Value of property: \$ _____ Amount of the claim that is secured: \$ _____ Amount of the claim that is unsecured: \$ _____ (The sum of the secured and unsecured amount should match the amount in line 7.) Amount necessary to cure any default as of the date of the petition: \$ _____ Annual Interest Rate (when case was filed) _____ % <input type="checkbox"/> Fixed <input type="checkbox"/> Variable
10. Is this claim based on a lease?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Amount necessary to cure any default as of the date of the petition. \$ _____
11. Is this claim subject to a right of setoff?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Identify the property: _____



12. Is all or part of the claim entitled to priority under 11 U.S.C. § 507(a)? A claim may be partly priority and partly nonpriority. For example, in some categories, the law limits the amount entitled to priority.	<div style="display: flex; justify-content: space-between;"><div><input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Check all that apply:</div><div style="text-align: right; background-color: #f0f0f0; padding: 5px;">Amount entitled to priority</div></div> <div style="margin-top: 10px;"><div><input type="checkbox"/> Domestic support obligations (including alimony and child support) under 11 U.S.C. § 507(a)(1)(A) or (a)(1)(B).</div><div style="text-align: right;">\$ _____</div></div> <div style="margin-top: 10px;"><div><input type="checkbox"/> Up to \$3,025* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use. 11 U.S.C. § 507(a)(7).</div><div style="text-align: right;">\$ _____</div></div> <div style="margin-top: 10px;"><div><input type="checkbox"/> Wages, salaries, or commissions (up to \$13,650* earned within 180 days before the bankruptcy petition is filed or the debtor's business ends, whichever is earlier. 11 U.S.C. § 507(a)(4).</div><div style="text-align: right;">\$ _____</div></div> <div style="margin-top: 10px;"><div><input type="checkbox"/> Taxes or penalties owed to governmental units. 11 U.S.C. § 507(a)(8).</div><div style="text-align: right;">\$ _____</div></div> <div style="margin-top: 10px;"><div><input type="checkbox"/> Contributions to an employee benefit plan. 11 U.S.C. § 507(a)(5).</div><div style="text-align: right;">\$ _____</div></div> <div style="margin-top: 10px;"><div><input type="checkbox"/> Other. Specify subsection of 11 U.S.C. § 507(a)() that applies.</div><div style="text-align: right;">\$ _____</div></div> <div style="margin-top: 10px; font-size: small;">* Amounts are subject to adjustment on 4/01/22 and every 3 years after that for cases begun on or after the date of adjustment.</div>
13. Is all or part of the claim pursuant to 11 U.S.C. § 503(b)(9)?	<div><input checked="" type="checkbox"/> No</div> <div><input type="checkbox"/> Yes. Indicate the amount of your claim arising from the value of any goods received by the debtor within 20 days before the date of commencement of the above case, in which the goods have been sold to the Debtor in the ordinary course of such Debtor's business. Attach documentation supporting such claim. \$ _____</div>

Part 3: Sign Below

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

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

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

Check the appropriate box:

- ☐ I am the creditor.
- ☒ I am the creditor's attorney or authorized agent.
- ☐ I am the trustee, or the debtor, or their authorized agent. Bankruptcy Rule 3004.
- ☐ I am a guarantor, surety, endorser, or other codebtor. Bankruptcy Rule 3005.

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

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

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

Executed on date 04/08/2020
MM / DD / YYYY

/s/Michael Pugatch
Signature

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

Name Michael Pugatch
First name Middle name Last name

Title Managing Director-Company: HarbourVest 2017 Global AIF L.P., by HarbourV

Company Inv Fund Mgr, by HarbourVest Partners L.P., its Duly Appointed Investme
Identify the corporate servicer as the company if the authorized agent is a servicer.

Address

Contact phone _____ Email _____

For phone assistance: Domestic (877) 573-3984 | International (310) 751-1829

Debtor: 19-34054 - Highland Capital Management, L.P. District: Northern District of Texas, Dallas Division		
Creditor: HarbourVest 2017 Global AIF L.P. Attn: Erica Weisgerber Debevoise and Plimpton LLP 919 Third Avenue New York, NY, 10022 U.S.A. Phone: 2129096000 Phone 2: Fax: Email: eweisgerber@debevoise.com	Has Supporting Documentation: Yes, supporting documentation successfully uploaded Related Document Statement:	
	Has Related Claim: No Related Claim Filed By:	
	Filing Party: Authorized agent	
Disbursement/Notice Parties: HarbourVest 2017 Global AIF L.P. c/o HarbourVest Partners, LLC One Financial Center Boston, MA, 02111 Phone: 6173483773 Phone 2: Fax: E-mail: agoren@harbourvest.com DISBURSEMENT ADDRESS		
Other Names Used with Debtor:	Amends Claim: No Acquired Claim: No	
Basis of Claim: See Annex	Last 4 Digits: No	Uniform Claim Identifier:
Total Amount of Claim: See Annex	Includes Interest or Charges: None	
Has Priority Claim: No	Priority Under:	
Has Secured Claim: No Amount of 503(b)(9): No Based on Lease: No Subject to Right of Setoff: No	Nature of Secured Amount: Value of Property: Annual Interest Rate: Arrearage Amount: Basis for Perfection: Amount Unsecured:	
Submitted By: Michael Pugatch on 08-Apr-2020 4:49:59 p.m. Eastern Time Title: Managing Director-Company: HarbourVest 2017 Global AIF L.P., by HarbourVest Partners Ireland Limited, its Alternative Company: Inv Fund Mgr, by HarbourVest Partners L.P., its Duly Appointed Investment Manager, by HarbourVest Partners, LLC, its Gen Ptr		

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

In re:

Highland Capital Management, L.P.

Debtor.

Chapter 11

Case No. 19-34054 (SGJ)

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bankruptcy cases, there has been extensive litigation regarding alleged improper conduct associated with the management of, and transactions relating to, Acis, including transactions with and related to HCLOF. *See, e.g., id.; Second Amended Complaint* [Case No. 18-03078(SGJ), Dkt. No. 157].

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4. Claimant hereby files this Claim to assert any and all of its rights to payment, remedies, and other claims (including contingent or unliquidated claims) against the Debtor in connection with and relating to the foregoing harm, including for any amounts due or owed under the various agreements with the Debtor in connection with HCLOF (including, but not limited to, the Subscription and Transfer Agreement for Ordinary Shares Highland CLO Funding, Ltd., dated as of November 15, 2017, the Members Agreement Relating to the Company, dated as of November 15, 2017, the Highland CLO Funding, Ltd. Offering Memorandum dated November 15, 2017), and any and all legal and equitable claims or causes of action relating to the foregoing harm.

5. The Claimant has not attached the documentation supporting this Claim to this Proof of Claim because the documentation is voluminous and the Debtor has copies of such

documents. However, any requested relevant documents will be provided to the Official Committee of Unsecured Creditors, the Court, the United States Trustee and the Debtor in the event of a dispute regarding this Proof of Claim and will be made available for review by other parties in interest as appropriate upon reasonable request and after consultation with the Debtor and execution of appropriate confidentiality agreements.

6. This Proof of Claim is filed with a full reservation of rights, including the right to amend, update, modify, supplement or otherwise revise this Proof of Claim in any respect at any time. The filing of this Proof of Claim is not and should not be construed to be: (a) a waiver or release of any of the Claimant's rights against any person, entity or property accruing to it against the Debtor and its estate; (b) a waiver of the Claimant's rights to assert that **28 U.S.C. § 157(b)(2)(C)** is unconstitutional; (c) a consent or submission by the Claimant, or waiver of the Claimant's rights to object, to the jurisdiction of this Court with respect to the subject matter of any of the claims described herein, or any objection or other proceeding commenced with respect to any of the claims described herein, or any other proceeding commenced in the Debtor's chapter 11 case against or otherwise involving the Claimant; (d) a waiver or release of any right of the Claimant, or consent by the Claimant, to a trial by jury in this or any other court or proceeding; (e) a waiver or release of, or any limitation on, any right of the Claimant to have orders entered only after *de novo* review by a United States District Judge; (f) an election of remedies; or (g) a waiver of, or any other limitation on, any right of the Claimant to request withdrawal of the reference with respect to any matter, including, without limitation, any matter relating to this Proof of Claim.

7. Claimant's express reservation of all rights and causes of action, includes, without limitation, contingent or unliquidated rights that it or its affiliates may have against the Debtor,

as well as defenses, offsets and counterclaims. This description and classification of claims by the Claimant is not a concession or admission as to the correct characterization or treatment of any such claims or a waiver of any rights of the Claimant.

8. Furthermore, the Claimant expressly reserves its rights to (a) file additional proofs of claim for additional claims that may be based on the same or additional documents or facts or other liability or indebtedness of the Debtor to the Claimant under contract or otherwise; (b) assert claims for cure of defaults in any agreement that the Debtor or any trustee appointed in this chapter 11 case may seek to assume; (c) assert any and all other claims, causes of action, defenses, offsets or counterclaims against the Debtor or any other parties; (d) file a request for payment of an administrative expense under 11 U.S.C. §§ 503 and 507 for any or all of the claims or rights of payment described above and any additional amounts; and (e) seek recovery through any relevant third parties, including any of the Debtor's insurance coverage providers.

9. This Proof of Claim does not encompass all claims that the Claimant or its affiliates may have that arise after the Petition Date and are entitled to administrative priority, and the Claimant expressly reserves its right to file such claim or any similar claim at the appropriate time, including any such post-petition claims arising under these service contracts.

10. This Proof of Claim is filed without prejudice to the filing by the Claimant of additional proofs of claim or requests for payment with respect to any other indebtedness, liability or obligation of the Debtor. The Claimant does not, by this Proof of Claim or any amendment or other action, waive any rights with respect to any scheduled claim.

11. The Claimant reserves the right to withdraw, amend, clarify, modify or supplement this Proof of Claim to assert additional claims, causes of action or additional grounds for this Proof of Claim (including adding any additional contracts, agreements, obligations or

other relationships between the Claimant and the Debtor), as well as the right to file any separate or additional proofs of claim with respect to the claims set forth herein or otherwise, including for the purpose of fixing and liquidating any contingent or unliquidated claim set forth herein, or to file additional proofs of claim in respect of additional amounts or for any other reason.

12. In executing and filing this Proof of Claim, the Claimant does not submit to the jurisdiction of the Bankruptcy Court for the Northern District of Texas for any purpose other than with respect to this Proof of Claim against the Debtor, and does not waive or release any rights or remedies against any other person or entity that may be liable for all or part of this Proof of Claim.

13. The Claimant otherwise reserves its rights, and nothing herein shall prejudice the Claimant's rights, under any order of the Court previously entered in this chapter 11 case.

14. Payments on account of this Proof of Claim should be sent to the Claimant at the address specified for notices to the Claimant in Part 1.3 of the Proof of Claim.

CLAIM 150

Fill in this information to identify the case:

Debtor Highland Capital Management, L.P.

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

Case number 19-34054

Official Form 410 Proof of Claim

04/19

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

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

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

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

Part 1: Identify the Claim

1. Who is the current creditor?	<u>HarbourVest Dover Street IX Investment L.P.</u> Name of the current creditor (the person or entity to be paid for this claim)	
	Other names the creditor used with the debtor _____	
2. Has this claim been acquired from someone else?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. From whom? _____	
3. Where should notices and payments to the creditor be sent?	Where should notices to the creditor be sent? See summary page	Where should payments to the creditor be sent? (if different) See summary page
Federal Rule of Bankruptcy Procedure (FRBP) 2002(g)		
	Contact phone <u>2129096000</u> Contact email <u>eweisgerber@debevoise.com</u>	Contact phone <u>6173483773</u> Contact email <u>agoren@harbourvest.com</u>
Uniform claim identifier for electronic payments in chapter 13 (if you use one): _____		
4. Does this claim amend one already filed?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Claim number on court claims registry (if known) _____ Filed on _____ MM / DD / YYYY	
5. Do you know if anyone else has filed a proof of claim for this claim?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Who made the earlier filing? _____	



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

6. Do you have any number you use to identify the debtor?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Last 4 digits of the debtor's account or any number you use to identify the debtor: ____
7. How much is the claim? \$ <u>See Annex</u>	Does this amount include interest or other charges? <input type="checkbox"/> No <input type="checkbox"/> Yes. Attach statement itemizing interest, fees, expenses, or other charges required by Bankruptcy Rule 3001(c)(2)(A).
8. What is the basis of the claim?	Examples: Goods sold, money loaned, lease, services performed, personal injury or wrongful death, or credit card. Attach redacted copies of any documents supporting the claim required by Bankruptcy Rule 3001(c). Limit disclosing information that is entitled to privacy, such as health care information. <u>See Annex</u>
9. Is all or part of the claim secured?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. The claim is secured by a lien on property. Nature or property: <input type="checkbox"/> Real estate: If the claim is secured by the debtor's principle residence, file a <i>Mortgage Proof of Claim Attachment</i> (Official Form 410-A) with this <i>Proof of Claim</i> . <input type="checkbox"/> Motor vehicle <input type="checkbox"/> Other. Describe: _____ Basis for perfection: _____ Attach redacted copies of documents, if any, that show evidence of perfection of a security interest (for example, a mortgage, lien, certificate of title, financing statement, or other document that shows the lien has been filed or recorded.) Value of property: \$ _____ Amount of the claim that is secured: \$ _____ Amount of the claim that is unsecured: \$ _____ (The sum of the secured and unsecured amount should match the amount in line 7.) Amount necessary to cure any default as of the date of the petition: \$ _____ Annual Interest Rate (when case was filed) _____ % <input type="checkbox"/> Fixed <input type="checkbox"/> Variable
10. Is this claim based on a lease?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Amount necessary to cure any default as of the date of the petition. \$ _____
11. Is this claim subject to a right of setoff?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Identify the property: _____



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

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

☒ No

☐ Yes. Check all that apply:

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

Amount entitled to priority

\$ _____

☐ Up to \$3,025* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use. 11 U.S.C. § 507(a)(7).

\$ _____

☐ Wages, salaries, or commissions (up to \$13,650*) earned within 180 days before the bankruptcy petition is filed or the debtor's business ends, whichever is earlier. 11 U.S.C. § 507(a)(4).

\$ _____

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

\$ _____

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

\$ _____

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

\$ _____

* Amounts are subject to adjustment on 4/01/22 and every 3 years after that for cases begun on or after the date of adjustment.

13. Is all or part of the claim pursuant to 11 U.S.C. § 503(b)(9)?

☒ No

☐ Yes. Indicate the amount of your claim arising from the value of any goods received by the debtor within 20 days before the date of commencement of the above case, in which the goods have been sold to the Debtor in the ordinary course of such Debtor's business. Attach documentation supporting such claim.

\$ _____

Part 3: Sign Below

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

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

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

Check the appropriate box:

☐ I am the creditor.

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

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

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

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

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

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

Executed on date 04/08/2020
MM / DD / YYYY

/s/Michael Pugatch
Signature

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

Name Michael Pugatch
First name Middle name Last name

Title Managing Director-Company: HarbourVest Dover Street IX Investment L.P.,

Company Inv Fund Mgr, by HarbourVest Partners L.P., its Duly Appointed Investme
Identify the corporate servicer as the company if the authorized agent is a servicer.

Address

Contact phone _____

Email _____

For phone assistance: Domestic (877) 573-3984 | International (310) 751-1829

Debtor: 19-34054 - Highland Capital Management, L.P. District: Northern District of Texas, Dallas Division		
Creditor: HarbourVest Dover Street IX Investment L.P. Attn: Erica Weisgerber Debevoise and Plimpton LLP 919 Third Avenue New York, NY, 10022 U.S.A. Phone: 2129096000 Phone 2: Fax: Email: eweisgerber@debevoise.com	Has Supporting Documentation: Yes, supporting documentation successfully uploaded Related Document Statement:	
	Has Related Claim: No Related Claim Filed By:	
	Filing Party: Authorized agent	
Disbursement/Notice Parties: HarbourVest Dover Street IX Investment L.P. c/o HarbourVest Partners, LLC One Financial Center Boston, MA, 02111 U.S.A. Phone: 6173483773 Phone 2: Fax: E-mail: agoren@harbourvest.com DISBURSEMENT ADDRESS		
Other Names Used with Debtor:	Amends Claim: No Acquired Claim: No	
Basis of Claim: See Annex	Last 4 Digits: No	Uniform Claim Identifier:
Total Amount of Claim: See Annex	Includes Interest or Charges: None	
Has Priority Claim: No	Priority Under:	
Has Secured Claim: No Amount of 503(b)(9): No Based on Lease: No Subject to Right of Setoff: No	Nature of Secured Amount: Value of Property: Annual Interest Rate: Arrearage Amount: Basis for Perfection: Amount Unsecured:	
Submitted By: Michael Pugatch on 08-Apr-2020 4:59:00 p.m. Eastern Time Title: Managing Director-Company: HarbourVest Dover Street IX Investment L.P., by HarbourVest Partners Ireland Limited, its Alter Company: Inv Fund Mgr, by HarbourVest Partners L.P., its Duly Appointed Investment Manager, by HarbourVest Partners, LLC, its Gen Ptr		

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

In re:

Highland Capital Management, L.P.

Debtor.

Chapter 11

Case No. 19-34054 (SGJ)

ANNEX TO PROOF OF CLAIM

1. This annex (the “Annex”) is part of and is incorporated by reference into the attached proof of claim (together with the Annex, the “Proof of Claim”) and describes in more detail the claims of HarbourVest Dover Street IX Investment L.P. (the “Claimant”) against the debtor Highland Capital Management, L.P. (the “Debtor”).

2. The Claimant is a limited partner in one of the Debtor’s managed vehicles, Highland CLO Funding, Ltd. (“HCLOF”). Acis Capital Management GP, L.L.C. and Acis Capital Management L.P. (together, “Acis”), the portfolio manager for HCLOF, filed for chapter 11 in the United States Bankruptcy Court for the Northern District of Texas (the “Court”) on January 30, 2018. The Acis bankruptcy filing resulted from a dispute between Debtor and its former employee, Joshua Terry, who served as portfolio manager for Debtor’s collateral loan obligations funds (“CLO”) business. *See, e.g., Findings of Fact and Conclusions of Law in Support of Orders for Relief Issued After Trial on Contested Involuntary Bankruptcy Petition (“Involuntary Petition Ruling”) [Case No. 18-30264 (SGJ), Dkt. No. 118].* As noted in more detail in the Court’s *Bench Ruling and Memorandum of Law in Support of: (A) Final Approval of Disclosure Statement; and (B) Confirmation of Chapter 11 Trustee’s Third Amended Joint Plan (“Confirmation Ruling”) [Case No. 18-30264 (SGJ), Dkt. No 827]* and related filings in the Acis

bankruptcy cases, there has been extensive litigation regarding alleged improper conduct associated with the management of, and transactions relating to, Acis, including transactions with and related to HCLOF. *See, e.g., id.; Second Amended Complaint* [Case No. 18-03078(SGJ), Dkt. No. 157].

3. Due to the Acis bankruptcy and certain conduct alleged to have been undertaken by the Debtor (to whom Acis subcontracted its functions) and Debtor's employees (who were officers, employees, and agents of Acis), the Claimant has suffered significant harm. Such harm includes, but is not limited to, financial harm resulting from, among other things (i) court orders in the Acis bankruptcy that prevented certain CLOs in which HCLOF was invested from being refinanced or reset and court orders that otherwise regulated the activity of HCLOF; and (ii) significant fees and expenses related to the Acis bankruptcy that were charged to HCLOF. *See, e.g., Involuntary Petition Ruling* ¶ 27; *see also Confirmation Ruling*.

4. Claimant hereby files this Claim to assert any and all of its rights to payment, remedies, and other claims (including contingent or unliquidated claims) against the Debtor in connection with and relating to the foregoing harm, including for any amounts due or owed under the various agreements with the Debtor in connection with HCLOF (including, but not limited to, the Subscription and Transfer Agreement for Ordinary Shares Highland CLO Funding, Ltd., dated as of November 15, 2017, the Members Agreement Relating to the Company, dated as of November 15, 2017, the Highland CLO Funding, Ltd. Offering Memorandum dated November 15, 2017), and any and all legal and equitable claims or causes of action relating to the foregoing harm.

5. The Claimant has not attached the documentation supporting this Claim to this Proof of Claim because the documentation is voluminous and the Debtor has copies of such

documents. However, any requested relevant documents will be provided to the Official Committee of Unsecured Creditors, the Court, the United States Trustee and the Debtor in the event of a dispute regarding this Proof of Claim and will be made available for review by other parties in interest as appropriate upon reasonable request and after consultation with the Debtor and execution of appropriate confidentiality agreements.

6. This Proof of Claim is filed with a full reservation of rights, including the right to amend, update, modify, supplement or otherwise revise this Proof of Claim in any respect at any time. The filing of this Proof of Claim is not and should not be construed to be: (a) a waiver or release of any of the Claimant's rights against any person, entity or property accruing to it against the Debtor and its estate; (b) a waiver of the Claimant's rights to assert that **28 U.S.C. § 157(b)(2)(C)** is unconstitutional; (c) a consent or submission by the Claimant, or waiver of the Claimant's rights to object, to the jurisdiction of this Court with respect to the subject matter of any of the claims described herein, or any objection or other proceeding commenced with respect to any of the claims described herein, or any other proceeding commenced in the Debtor's chapter 11 case against or otherwise involving the Claimant; (d) a waiver or release of any right of the Claimant, or consent by the Claimant, to a trial by jury in this or any other court or proceeding; (e) a waiver or release of, or any limitation on, any right of the Claimant to have orders entered only after *de novo* review by a United States District Judge; (f) an election of remedies; or (g) a waiver of, or any other limitation on, any right of the Claimant to request withdrawal of the reference with respect to any matter, including, without limitation, any matter relating to this Proof of Claim.

7. Claimant's express reservation of all rights and causes of action, includes, without limitation, contingent or unliquidated rights that it or its affiliates may have against the Debtor,

as well as defenses, offsets and counterclaims. This description and classification of claims by the Claimant is not a concession or admission as to the correct characterization or treatment of any such claims or a waiver of any rights of the Claimant.

8. Furthermore, the Claimant expressly reserves its rights to (a) file additional proofs of claim for additional claims that may be based on the same or additional documents or facts or other liability or indebtedness of the Debtor to the Claimant under contract or otherwise; (b) assert claims for cure of defaults in any agreement that the Debtor or any trustee appointed in this chapter 11 case may seek to assume; (c) assert any and all other claims, causes of action, defenses, offsets or counterclaims against the Debtor or any other parties; (d) file a request for payment of an administrative expense under 11 U.S.C. §§ 503 and 507 for any or all of the claims or rights of payment described above and any additional amounts; and (e) seek recovery through any relevant third parties, including any of the Debtor's insurance coverage providers.

9. This Proof of Claim does not encompass all claims that the Claimant or its affiliates may have that arise after the Petition Date and are entitled to administrative priority, and the Claimant expressly reserves its right to file such claim or any similar claim at the appropriate time, including any such post-petition claims arising under these service contracts.

10. This Proof of Claim is filed without prejudice to the filing by the Claimant of additional proofs of claim or requests for payment with respect to any other indebtedness, liability or obligation of the Debtor. The Claimant does not, by this Proof of Claim or any amendment or other action, waive any rights with respect to any scheduled claim.

11. The Claimant reserves the right to withdraw, amend, clarify, modify or supplement this Proof of Claim to assert additional claims, causes of action or additional grounds for this Proof of Claim (including adding any additional contracts, agreements, obligations or

other relationships between the Claimant and the Debtor), as well as the right to file any separate or additional proofs of claim with respect to the claims set forth herein or otherwise, including for the purpose of fixing and liquidating any contingent or unliquidated claim set forth herein, or to file additional proofs of claim in respect of additional amounts or for any other reason.

12. In executing and filing this Proof of Claim, the Claimant does not submit to the jurisdiction of the Bankruptcy Court for the Northern District of Texas for any purpose other than with respect to this Proof of Claim against the Debtor, and does not waive or release any rights or remedies against any other person or entity that may be liable for all or part of this Proof of Claim.

13. The Claimant otherwise reserves its rights, and nothing herein shall prejudice the Claimant's rights, under any order of the Court previously entered in this chapter 11 case.

14. Payments on account of this Proof of Claim should be sent to the Claimant at the address specified for notices to the Claimant in Part 1.3 of the Proof of Claim.

CLAIM 153

Fill in this information to identify the case:

Debtor Highland Capital Management, L.P.

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

Case number 19-34054

Official Form 410 Proof of Claim

04/19

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

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

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

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

Part 1: Identify the Claim

1. Who is the current creditor?	<u>HV International VIII Secondary L.P.</u> Name of the current creditor (the person or entity to be paid for this claim)	
	Other names the creditor used with the debtor _____	
2. Has this claim been acquired from someone else?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. From whom? _____	
3. Where should notices and payments to the creditor be sent?	Where should notices to the creditor be sent? <u>HV International VIII Secondary L.P.</u> <u>Attn: Erica Weisgerber</u> <u>Debevoise and Plimpton LLP</u> <u>919 Third Avenue</u> <u>New York, NY 10022, U.S.A.</u> Contact phone <u>2129096000</u> Contact email <u>eweisgerber@debevoise.com</u>	Where should payments to the creditor be sent? (if different) <u>See summary page</u> Contact phone <u>6173483773</u> Contact email <u>agoren@harbourvest.com</u>
	Uniform claim identifier for electronic payments in chapter 13 (if you use one): _____	
4. Does this claim amend one already filed?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Claim number on court claims registry (if known) _____ Filed on _____ MM / DD / YYYY	
5. Do you know if anyone else has filed a proof of claim for this claim?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Who made the earlier filing? _____	



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

6. Do you have any number you use to identify the debtor?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Last 4 digits of the debtor's account or any number you use to identify the debtor: ____
7. How much is the claim? \$ <u>See Annex</u>	Does this amount include interest or other charges? <input type="checkbox"/> No <input type="checkbox"/> Yes. Attach statement itemizing interest, fees, expenses, or other charges required by Bankruptcy Rule 3001(c)(2)(A).
8. What is the basis of the claim?	Examples: Goods sold, money loaned, lease, services performed, personal injury or wrongful death, or credit card. Attach redacted copies of any documents supporting the claim required by Bankruptcy Rule 3001(c). Limit disclosing information that is entitled to privacy, such as health care information. <u>See Annex</u>
9. Is all or part of the claim secured?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. The claim is secured by a lien on property. Nature or property: <input type="checkbox"/> Real estate: If the claim is secured by the debtor's principle residence, file a <i>Mortgage Proof of Claim Attachment</i> (Official Form 410-A) with this <i>Proof of Claim</i> . <input type="checkbox"/> Motor vehicle <input type="checkbox"/> Other. Describe: _____ Basis for perfection: _____ Attach redacted copies of documents, if any, that show evidence of perfection of a security interest (for example, a mortgage, lien, certificate of title, financing statement, or other document that shows the lien has been filed or recorded.) Value of property: \$ _____ Amount of the claim that is secured: \$ _____ Amount of the claim that is unsecured: \$ _____ (The sum of the secured and unsecured amount should match the amount in line 7.) Amount necessary to cure any default as of the date of the petition: \$ _____ Annual Interest Rate (when case was filed) _____ % <input type="checkbox"/> Fixed <input type="checkbox"/> Variable
10. Is this claim based on a lease?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Amount necessary to cure any default as of the date of the petition. \$ _____
11. Is this claim subject to a right of setoff?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Identify the property: _____



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

☒ No

☐ Yes. Check all that apply:

	Amount entitled to priority
<input type="checkbox"/> Domestic support obligations (including alimony and child support) under 11 U.S.C. § 507(a)(1)(A) or (a)(1)(B).	\$ _____
<input type="checkbox"/> Up to \$3,025* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use. 11 U.S.C. § 507(a)(7).	\$ _____
<input type="checkbox"/> Wages, salaries, or commissions (up to \$13,650* earned within 180 days before the bankruptcy petition is filed or the debtor's business ends, whichever is earlier. 11 U.S.C. § 507(a)(4).	\$ _____
<input type="checkbox"/> Taxes or penalties owed to governmental units. 11 U.S.C. § 507(a)(8).	\$ _____
<input type="checkbox"/> Contributions to an employee benefit plan. 11 U.S.C. § 507(a)(5).	\$ _____
<input type="checkbox"/> Other. Specify subsection of 11 U.S.C. § 507(a)() that applies.	\$ _____

* Amounts are subject to adjustment on 4/01/22 and every 3 years after that for cases begun on or after the date of adjustment.

13. Is all or part of the claim pursuant to 11 U.S.C. § 503(b)(9)?

☒ No

☐ Yes. Indicate the amount of your claim arising from the value of any goods received by the debtor within 20 days before the date of commencement of the above case, in which the goods have been sold to the Debtor in the ordinary course of such Debtor's business. Attach documentation supporting such claim.

\$ _____

Part 3: Sign Below

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

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

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

Check the appropriate box:

- ☐ I am the creditor.
- ☒ I am the creditor's attorney or authorized agent.
- ☐ I am the trustee, or the debtor, or their authorized agent. Bankruptcy Rule 3004.
- ☐ I am a guarantor, surety, endorser, or other codebtor. Bankruptcy Rule 3005.

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

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

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

Executed on date 04/08/2020
MM / DD / YYYY

/s/Michael Pugatch
Signature

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

Name Michael Pugatch
First name Middle name Last name

Title Managing Director-Company: HV International VIII Secondary L.P., by HII

Company by HarbourVest GP LLC, its General Partner, by HarbourVest Partners, LL
Identify the corporate servicer as the company if the authorized agent is a servicer.

Address

Contact phone _____ Email _____

For phone assistance: Domestic (877) 573-3984 | International (310) 751-1829

Debtor: 19-34054 - Highland Capital Management, L.P. District: Northern District of Texas, Dallas Division		
Creditor: HV International VIII Secondary L.P. Attn: Erica Weisgerber Debevoise and Plimpton LLP 919 Third Avenue New York, NY, 10022 U.S.A. Phone: 2129096000 Phone 2: Fax: Email: eweisgerber@debevoise.com	Has Supporting Documentation: Yes, supporting documentation successfully uploaded Related Document Statement:	
	Has Related Claim: No Related Claim Filed By:	
	Filing Party: Authorized agent	
Disbursement/Notice Parties: HV International VIII Secondary L.P. c/o HarbourVest Partners, LLC One Financial Center Boston, MA, 02111 U.S.A. Phone: 6173483773 Phone 2: Fax: E-mail: agoren@harbourvest.com DISBURSEMENT ADDRESS		
Other Names Used with Debtor:	Amends Claim: No Acquired Claim: No	
Basis of Claim: See Annex	Last 4 Digits: No	Uniform Claim Identifier:
Total Amount of Claim: See Annex	Includes Interest or Charges: None	
Has Priority Claim: No	Priority Under:	
Has Secured Claim: No Amount of 503(b)(9): No Based on Lease: No Subject to Right of Setoff: No	Nature of Secured Amount: Value of Property: Annual Interest Rate: Arrearage Amount: Basis for Perfection: Amount Unsecured:	
Submitted By: Michael Pugatch on 08-Apr-2020 5:16:54 p.m. Eastern Time Title: Managing Director-Company: HV International VIII Secondary L.P., by HIPEP VIII Associates L.P., its General Partner, Company: by HarbourVest GP LLC, its General Partner, by HarbourVest Partners, LLC, its Managing Member		

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

In re:

Highland Capital Management, L.P.

Debtor.

Chapter 11

Case No. 19-34054 (SGJ)

ANNEX TO PROOF OF CLAIM

1. This annex (the “Annex”) is part of and is incorporated by reference into the attached proof of claim (together with the Annex, the “Proof of Claim”) and describes in more detail the claims of HV International VIII Secondary L.P. (the “Claimant”) against the debtor Highland Capital Management, L.P. (the “Debtor”).

2. The Claimant is a limited partner in one of the Debtor’s managed vehicles, Highland CLO Funding, Ltd. (“HCLOF”). Acis Capital Management GP, L.L.C. and Acis Capital Management L.P. (together, “Acis”), the portfolio manager for HCLOF, filed for chapter 11 in the United States Bankruptcy Court for the Northern District of Texas (the “Court”) on January 30, 2018. The Acis bankruptcy filing resulted from a dispute between Debtor and its former employee, Joshua Terry, who served as portfolio manager for Debtor’s collateral loan obligations funds (“CLO”) business. *See, e.g., Findings of Fact and Conclusions of Law in Support of Orders for Relief Issued After Trial on Contested Involuntary Bankruptcy Petition (“Involuntary Petition Ruling”) [Case No. 18-30264 (SGJ), Dkt. No. 118].* As noted in more detail in the Court’s *Bench Ruling and Memorandum of Law in Support of: (A) Final Approval of Disclosure Statement; and (B) Confirmation of Chapter 11 Trustee’s Third Amended Joint Plan (“Confirmation Ruling”) [Case No. 18-30264 (SGJ), Dkt. No 827]* and related filings in the Acis

bankruptcy cases, there has been extensive litigation regarding alleged improper conduct associated with the management of, and transactions relating to, Acis, including transactions with and related to HCLOF. *See, e.g., id.; Second Amended Complaint* [Case No. 18-03078(SGJ), Dkt. No. 157].

3. Due to the Acis bankruptcy and certain conduct alleged to have been undertaken by the Debtor (to whom Acis subcontracted its functions) and Debtor's employees (who were officers, employees, and agents of Acis), the Claimant has suffered significant harm. Such harm includes, but is not limited to, financial harm resulting from, among other things (i) court orders in the Acis bankruptcy that prevented certain CLOs in which HCLOF was invested from being refinanced or reset and court orders that otherwise regulated the activity of HCLOF; and (ii) significant fees and expenses related to the Acis bankruptcy that were charged to HCLOF. *See, e.g., Involuntary Petition Ruling* ¶ 27; *see also Confirmation Ruling*.

4. Claimant hereby files this Claim to assert any and all of its rights to payment, remedies, and other claims (including contingent or unliquidated claims) against the Debtor in connection with and relating to the foregoing harm, including for any amounts due or owed under the various agreements with the Debtor in connection with HCLOF (including, but not limited to, the Subscription and Transfer Agreement for Ordinary Shares Highland CLO Funding, Ltd., dated as of November 15, 2017, the Members Agreement Relating to the Company, dated as of November 15, 2017, the Highland CLO Funding, Ltd. Offering Memorandum dated November 15, 2017), and any and all legal and equitable claims or causes of action relating to the foregoing harm.

5. The Claimant has not attached the documentation supporting this Claim to this Proof of Claim because the documentation is voluminous and the Debtor has copies of such

documents. However, any requested relevant documents will be provided to the Official Committee of Unsecured Creditors, the Court, the United States Trustee and the Debtor in the event of a dispute regarding this Proof of Claim and will be made available for review by other parties in interest as appropriate upon reasonable request and after consultation with the Debtor and execution of appropriate confidentiality agreements.

6. This Proof of Claim is filed with a full reservation of rights, including the right to amend, update, modify, supplement or otherwise revise this Proof of Claim in any respect at any time. The filing of this Proof of Claim is not and should not be construed to be: (a) a waiver or release of any of the Claimant's rights against any person, entity or property accruing to it against the Debtor and its estate; (b) a waiver of the Claimant's rights to assert that **28 U.S.C. § 157(b)(2)(C)** is unconstitutional; (c) a consent or submission by the Claimant, or waiver of the Claimant's rights to object, to the jurisdiction of this Court with respect to the subject matter of any of the claims described herein, or any objection or other proceeding commenced with respect to any of the claims described herein, or any other proceeding commenced in the Debtor's chapter 11 case against or otherwise involving the Claimant; (d) a waiver or release of any right of the Claimant, or consent by the Claimant, to a trial by jury in this or any other court or proceeding; (e) a waiver or release of, or any limitation on, any right of the Claimant to have orders entered only after *de novo* review by a United States District Judge; (f) an election of remedies; or (g) a waiver of, or any other limitation on, any right of the Claimant to request withdrawal of the reference with respect to any matter, including, without limitation, any matter relating to this Proof of Claim.

7. Claimant's express reservation of all rights and causes of action, includes, without limitation, contingent or unliquidated rights that it or its affiliates may have against the Debtor,

as well as defenses, offsets and counterclaims. This description and classification of claims by the Claimant is not a concession or admission as to the correct characterization or treatment of any such claims or a waiver of any rights of the Claimant.

8. Furthermore, the Claimant expressly reserves its rights to (a) file additional proofs of claim for additional claims that may be based on the same or additional documents or facts or other liability or indebtedness of the Debtor to the Claimant under contract or otherwise; (b) assert claims for cure of defaults in any agreement that the Debtor or any trustee appointed in this chapter 11 case may seek to assume; (c) assert any and all other claims, causes of action, defenses, offsets or counterclaims against the Debtor or any other parties; (d) file a request for payment of an administrative expense under 11 U.S.C. §§ 503 and 507 for any or all of the claims or rights of payment described above and any additional amounts; and (e) seek recovery through any relevant third parties, including any of the Debtor's insurance coverage providers.

9. This Proof of Claim does not encompass all claims that the Claimant or its affiliates may have that arise after the Petition Date and are entitled to administrative priority, and the Claimant expressly reserves its right to file such claim or any similar claim at the appropriate time, including any such post-petition claims arising under these service contracts.

10. This Proof of Claim is filed without prejudice to the filing by the Claimant of additional proofs of claim or requests for payment with respect to any other indebtedness, liability or obligation of the Debtor. The Claimant does not, by this Proof of Claim or any amendment or other action, waive any rights with respect to any scheduled claim.

11. The Claimant reserves the right to withdraw, amend, clarify, modify or supplement this Proof of Claim to assert additional claims, causes of action or additional grounds for this Proof of Claim (including adding any additional contracts, agreements, obligations or

other relationships between the Claimant and the Debtor), as well as the right to file any separate or additional proofs of claim with respect to the claims set forth herein or otherwise, including for the purpose of fixing and liquidating any contingent or unliquidated claim set forth herein, or to file additional proofs of claim in respect of additional amounts or for any other reason.

12. In executing and filing this Proof of Claim, the Claimant does not submit to the jurisdiction of the Bankruptcy Court for the Northern District of Texas for any purpose other than with respect to this Proof of Claim against the Debtor, and does not waive or release any rights or remedies against any other person or entity that may be liable for all or part of this Proof of Claim.

13. The Claimant otherwise reserves its rights, and nothing herein shall prejudice the Claimant's rights, under any order of the Court previously entered in this chapter 11 case.

14. Payments on account of this Proof of Claim should be sent to the Claimant at the address specified for notices to the Claimant in Part 1.3 of the Proof of Claim.

CLAIM 154

Fill in this information to identify the case:

Debtor Highland Capital Management, L.P.

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

Case number 19-34054

Official Form 410 Proof of Claim

04/19

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

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

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

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

Part 1: Identify the Claim

1. Who is the current creditor?	<u>HarbourVest Skew Base AIF L.P.</u> Name of the current creditor (the person or entity to be paid for this claim)	
	Other names the creditor used with the debtor _____	
2. Has this claim been acquired from someone else?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. From whom? _____	
3. Where should notices and payments to the creditor be sent?	Where should notices to the creditor be sent? <u>HarbourVest Skew Base AIF L.P.</u> <u>Attn: Erica Weisgerber</u> <u>Debevoise and Plimpton LLP</u> <u>919 Third Avenue</u> <u>New York, NY 10022, U.S.A.</u> Contact phone <u>2129096000</u> Contact email <u>eweisgerber@debevoise.com</u> Uniform claim identifier for electronic payments in chapter 13 (if you use one): _____	Where should payments to the creditor be sent? (if different) <u>See summary page</u> Contact phone <u>6173483773</u> Contact email <u>agoren@harbourvest.com</u>
4. Does this claim amend one already filed?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Claim number on court claims registry (if known) _____ Filed on _____ MM / DD / YYYY	
5. Do you know if anyone else has filed a proof of claim for this claim?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Who made the earlier filing? _____	



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

6. Do you have any number you use to identify the debtor?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Last 4 digits of the debtor's account or any number you use to identify the debtor: ____ _
7. How much is the claim? \$ <u>See Annex</u>	Does this amount include interest or other charges? <input type="checkbox"/> No <input type="checkbox"/> Yes. Attach statement itemizing interest, fees, expenses, or other charges required by Bankruptcy Rule 3001(c)(2)(A).
8. What is the basis of the claim?	Examples: Goods sold, money loaned, lease, services performed, personal injury or wrongful death, or credit card. Attach redacted copies of any documents supporting the claim required by Bankruptcy Rule 3001(c). Limit disclosing information that is entitled to privacy, such as health care information. <u>See Annex</u>
9. Is all or part of the claim secured?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. The claim is secured by a lien on property. Nature or property: <input type="checkbox"/> Real estate: If the claim is secured by the debtor's principle residence, file a <i>Mortgage Proof of Claim Attachment</i> (Official Form 410-A) with this <i>Proof of Claim</i> . <input type="checkbox"/> Motor vehicle <input type="checkbox"/> Other. Describe: _____ Basis for perfection: _____ Attach redacted copies of documents, if any, that show evidence of perfection of a security interest (for example, a mortgage, lien, certificate of title, financing statement, or other document that shows the lien has been filed or recorded.) Value of property: \$ _____ Amount of the claim that is secured: \$ _____ Amount of the claim that is unsecured: \$ _____ (The sum of the secured and unsecured amount should match the amount in line 7.) Amount necessary to cure any default as of the date of the petition: \$ _____ Annual Interest Rate (when case was filed) _____ % <input type="checkbox"/> Fixed <input type="checkbox"/> Variable
10. Is this claim based on a lease?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Amount necessary to cure any default as of the date of the petition. \$ _____
11. Is this claim subject to a right of setoff?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Identify the property: _____



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

☒ No

☐ Yes. Check all that apply:

	Amount entitled to priority
<input type="checkbox"/> Domestic support obligations (including alimony and child support) under 11 U.S.C. § 507(a)(1)(A) or (a)(1)(B).	\$ _____
<input type="checkbox"/> Up to \$3,025* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use. 11 U.S.C. § 507(a)(7).	\$ _____
<input type="checkbox"/> Wages, salaries, or commissions (up to \$13,650*) earned within 180 days before the bankruptcy petition is filed or the debtor's business ends, whichever is earlier. 11 U.S.C. § 507(a)(4).	\$ _____
<input type="checkbox"/> Taxes or penalties owed to governmental units. 11 U.S.C. § 507(a)(8).	\$ _____
<input type="checkbox"/> Contributions to an employee benefit plan. 11 U.S.C. § 507(a)(5).	\$ _____
<input type="checkbox"/> Other. Specify subsection of 11 U.S.C. § 507(a)() that applies.	\$ _____

* Amounts are subject to adjustment on 4/01/22 and every 3 years after that for cases begun on or after the date of adjustment.

13. Is all or part of the claim pursuant to 11 U.S.C. § 503(b)(9)?

☒ No

☐ Yes. Indicate the amount of your claim arising from the value of any goods received by the debtor within 20 days before the date of commencement of the above case, in which the goods have been sold to the Debtor in the ordinary course of such Debtor's business. Attach documentation supporting such claim.

\$ _____

Part 3: Sign Below

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

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

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

Check the appropriate box:

- ☐ I am the creditor.
- ☒ I am the creditor's attorney or authorized agent.
- ☐ I am the trustee, or the debtor, or their authorized agent. Bankruptcy Rule 3004.
- ☐ I am a guarantor, surety, endorser, or other codebtor. Bankruptcy Rule 3005.

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

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

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

Executed on date 04/08/2020
MM / DD / YYYY

/s/Michael Pugatch
Signature

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

Name Michael Pugatch
First name Middle name Last name

Title Managing Director-Company: HarbourVest Skew Base AIF L.P., by HarbourVest

Company Fund Manager, by HarbourVest Partners L.P., its Duly Appointed Investme
Identify the corporate servicer as the company if the authorized agent is a servicer.

Address

Contact phone _____ Email _____

For phone assistance: Domestic (877) 573-3984 | International (310) 751-1829

Debtor: 19-34054 - Highland Capital Management, L.P. District: Northern District of Texas, Dallas Division		
Creditor: HarbourVest Skew Base AIF L.P. Attn: Erica Weisgerber Debevoise and Plimpton LLP 919 Third Avenue New York, NY, 10022 U.S.A. Phone: 2129096000 Phone 2: Fax: Email: eweisgerber@debevoise.com	Has Supporting Documentation: Yes, supporting documentation successfully uploaded Related Document Statement:	
	Has Related Claim: No Related Claim Filed By:	
	Filing Party: Authorized agent	
Disbursement/Notice Parties: HarbourVest Skew Base AIF L.P. c/o HarbourVest Partners, LLC One Financial Center Boston, MA, 02111 Phone: 6173483773 Phone 2: Fax: E-mail: agoren@harbourvest.com DISBURSEMENT ADDRESS		
Other Names Used with Debtor:	Amends Claim: No Acquired Claim: No	
Basis of Claim: See Annex	Last 4 Digits: No	Uniform Claim Identifier:
Total Amount of Claim: See Annex	Includes Interest or Charges: None	
Has Priority Claim: No	Priority Under:	
Has Secured Claim: No Amount of 503(b)(9): No Based on Lease: No Subject to Right of Setoff: No	Nature of Secured Amount: Value of Property: Annual Interest Rate: Arrearage Amount: Basis for Perfection: Amount Unsecured:	
Submitted By: Michael Pugatch on 08-Apr-2020 5:11:50 p.m. Eastern Time Title: Managing Director-Company: HarbourVest Skew Base AIF L.P., by HarbourVest Partners Ireland Limited, its Alternative Inv Company: Fund Manager, by HarbourVest Partners L.P., its Duly Appointed Investment Manager, by HarbourVest Partners, LLC, its Gen Ptr		

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

In re:

Highland Capital Management, L.P.

Debtor.

Chapter 11

Case No. 19-34054 (SGJ)

ANNEX TO PROOF OF CLAIM

1. This annex (the “Annex”) is part of and is incorporated by reference into the attached proof of claim (together with the Annex, the “Proof of Claim”) and describes in more detail the claims of HarbourVest Skew Base AIF L.P. (the “Claimant”) against the debtor Highland Capital Management, L.P. (the “Debtor”).

2. The Claimant is a limited partner in one of the Debtor’s managed vehicles, Highland CLO Funding, Ltd. (“HCLOF”). Acis Capital Management GP, L.L.C. and Acis Capital Management L.P. (together, “Acis”), the portfolio manager for HCLOF, filed for chapter 11 in the United States Bankruptcy Court for the Northern District of Texas (the “Court”) on January 30, 2018. The Acis bankruptcy filing resulted from a dispute between Debtor and its former employee, Joshua Terry, who served as portfolio manager for Debtor’s collateral loan obligations funds (“CLO”) business. *See, e.g., Findings of Fact and Conclusions of Law in Support of Orders for Relief Issued After Trial on Contested Involuntary Bankruptcy Petition* (“Involuntary Petition Ruling”) [Case No. 18-30264 (SGJ), Dkt. No. 118]. As noted in more detail in the Court’s *Bench Ruling and Memorandum of Law in Support of: (A) Final Approval of Disclosure Statement; and (B) Confirmation of Chapter 11 Trustee’s Third Amended Joint Plan* (“Confirmation Ruling”) [Case No. 18-30264 (SGJ), Dkt. No 827] and related filings

in the Acis bankruptcy cases, there has been extensive litigation regarding alleged improper conduct associated with the management of, and transactions relating to, Acis, including transactions with and related to HCLOF. *See, e.g., id.; Second Amended Complaint* [Case No. 18-03078(SGJ), Dkt. No. 157].

3. Due to the Acis bankruptcy and certain conduct alleged to have been undertaken by the Debtor (to whom Acis subcontracted its functions) and Debtor's employees (who were officers, employees, and agents of Acis), the Claimant has suffered significant harm. Such harm includes, but is not limited to, financial harm resulting from, among other things (i) court orders in the Acis bankruptcy that prevented certain CLOs in which HCLOF was invested from being refinanced or reset and court orders that otherwise regulated the activity of HCLOF; and (ii) significant fees and expenses related to the Acis bankruptcy that were charged to HCLOF. *See, e.g., Involuntary Petition Ruling* ¶ 27; *see also Confirmation Ruling*.

4. Claimant hereby files this Claim to assert any and all of its rights to payment, remedies, and other claims (including contingent or unliquidated claims) against the Debtor in connection with and relating to the foregoing harm, including for any amounts due or owed under the various agreements with the Debtor in connection with HCLOF (including, but not limited to, the Subscription and Transfer Agreement for Ordinary Shares Highland CLO Funding, Ltd., dated as of November 15, 2017, the Members Agreement Relating to the Company, dated as of November 15, 2017, the Highland CLO Funding, Ltd. Offering Memorandum dated November 15, 2017), and any and all legal and equitable claims or causes of action relating to the foregoing harm.

5. The Claimant has not attached the documentation supporting this Claim to this Proof of Claim because the documentation is voluminous and the Debtor has copies of such

documents. However, any requested relevant documents will be provided to the Official Committee of Unsecured Creditors, the Court, the United States Trustee and the Debtor in the event of a dispute regarding this Proof of Claim and will be made available for review by other parties in interest as appropriate upon reasonable request and after consultation with the Debtor and execution of appropriate confidentiality agreements.

6. This Proof of Claim is filed with a full reservation of rights, including the right to amend, update, modify, supplement or otherwise revise this Proof of Claim in any respect at any time. The filing of this Proof of Claim is not and should not be construed to be: (a) a waiver or release of any of the Claimant's rights against any person, entity or property accruing to it against the Debtor and its estate; (b) a waiver of the Claimant's rights to assert that **28 U.S.C. § 157(b)(2)(C)** is unconstitutional; (c) a consent or submission by the Claimant, or waiver of the Claimant's rights to object, to the jurisdiction of this Court with respect to the subject matter of any of the claims described herein, or any objection or other proceeding commenced with respect to any of the claims described herein, or any other proceeding commenced in the Debtor's chapter 11 case against or otherwise involving the Claimant; (d) a waiver or release of any right of the Claimant, or consent by the Claimant, to a trial by jury in this or any other court or proceeding; (e) a waiver or release of, or any limitation on, any right of the Claimant to have orders entered only after *de novo* review by a United States District Judge; (f) an election of remedies; or (g) a waiver of, or any other limitation on, any right of the Claimant to request withdrawal of the reference with respect to any matter, including, without limitation, any matter relating to this Proof of Claim.

7. Claimant's express reservation of all rights and causes of action, includes, without limitation, contingent or unliquidated rights that it or its affiliates may have against the Debtor,

as well as defenses, offsets and counterclaims. This description and classification of claims by the Claimant is not a concession or admission as to the correct characterization or treatment of any such claims or a waiver of any rights of the Claimant.

8. Furthermore, the Claimant expressly reserves its rights to (a) file additional proofs of claim for additional claims that may be based on the same or additional documents or facts or other liability or indebtedness of the Debtor to the Claimant under contract or otherwise; (b) assert claims for cure of defaults in any agreement that the Debtor or any trustee appointed in this chapter 11 case may seek to assume; (c) assert any and all other claims, causes of action, defenses, offsets or counterclaims against the Debtor or any other parties; (d) file a request for payment of an administrative expense under 11 U.S.C. §§ 503 and 507 for any or all of the claims or rights of payment described above and any additional amounts; and (e) seek recovery through any relevant third parties, including any of the Debtor's insurance coverage providers.

9. This Proof of Claim does not encompass all claims that the Claimant or its affiliates may have that arise after the Petition Date and are entitled to administrative priority, and the Claimant expressly reserves its right to file such claim or any similar claim at the appropriate time, including any such post-petition claims arising under these service contracts.

10. This Proof of Claim is filed without prejudice to the filing by the Claimant of additional proofs of claim or requests for payment with respect to any other indebtedness, liability or obligation of the Debtor. The Claimant does not, by this Proof of Claim or any amendment or other action, waive any rights with respect to any scheduled claim.

11. The Claimant reserves the right to withdraw, amend, clarify, modify or supplement this Proof of Claim to assert additional claims, causes of action or additional grounds for this Proof of Claim (including adding any additional contracts, agreements, obligations or

other relationships between the Claimant and the Debtor), as well as the right to file any separate or additional proofs of claim with respect to the claims set forth herein or otherwise, including for the purpose of fixing and liquidating any contingent or unliquidated claim set forth herein, or to file additional proofs of claim in respect of additional amounts or for any other reason.

12. In executing and filing this Proof of Claim, the Claimant does not submit to the jurisdiction of the Bankruptcy Court for the Northern District of Texas for any purpose other than with respect to this Proof of Claim against the Debtor, and does not waive or release any rights or remedies against any other person or entity that may be liable for all or part of this Proof of Claim.

13. The Claimant otherwise reserves its rights, and nothing herein shall prejudice the Claimant's rights, under any order of the Court previously entered in this chapter 11 case.

14. Payments on account of this Proof of Claim should be sent to the Claimant at the address specified for notices to the Claimant in Part 1.3 of the Proof of Claim.

CLAIM 149

Fill in this information to identify the case:

Debtor Highland Capital Management, L.P.

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

Case number 19-34054

Official Form 410 Proof of Claim

04/19

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

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

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

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

Part 1: Identify the Claim

1. Who is the current creditor?	<u>HarbourVest Partners L.P. on behalf of funds and accounts under management</u> Name of the current creditor (the person or entity to be paid for this claim)	
	Other names the creditor used with the debtor _____	
2. Has this claim been acquired from someone else?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. From whom? _____	
3. Where should notices and payments to the creditor be sent?	Where should notices to the creditor be sent? See summary page	Where should payments to the creditor be sent? (if different) See summary page
Federal Rule of Bankruptcy Procedure (FRBP) 2002(g)		
	Contact phone <u>2129096000</u> Contact email <u>eweisgerber@debevoise.com</u>	Contact phone <u>6173483773</u> Contact email <u>agoren@harbourvest.com</u>
Uniform claim identifier for electronic payments in chapter 13 (if you use one): _____		
4. Does this claim amend one already filed?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Claim number on court claims registry (if known) _____ Filed on _____ MM / DD / YYYY	
5. Do you know if anyone else has filed a proof of claim for this claim?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Who made the earlier filing? _____	



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

6. Do you have any number you use to identify the debtor?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Last 4 digits of the debtor's account or any number you use to identify the debtor: ____
7. How much is the claim? \$ <u>See Annex</u>	Does this amount include interest or other charges? <input type="checkbox"/> No <input type="checkbox"/> Yes. Attach statement itemizing interest, fees, expenses, or other charges required by Bankruptcy Rule 3001(c)(2)(A).
8. What is the basis of the claim?	Examples: Goods sold, money loaned, lease, services performed, personal injury or wrongful death, or credit card. Attach redacted copies of any documents supporting the claim required by Bankruptcy Rule 3001(c). Limit disclosing information that is entitled to privacy, such as health care information. <u>See Annex</u>
9. Is all or part of the claim secured?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. The claim is secured by a lien on property. Nature or property: <input type="checkbox"/> Real estate: If the claim is secured by the debtor's principle residence, file a <i>Mortgage Proof of Claim Attachment</i> (Official Form 410-A) with this <i>Proof of Claim</i> . <input type="checkbox"/> Motor vehicle <input type="checkbox"/> Other. Describe: _____ Basis for perfection: _____ Attach redacted copies of documents, if any, that show evidence of perfection of a security interest (for example, a mortgage, lien, certificate of title, financing statement, or other document that shows the lien has been filed or recorded.) Value of property: \$ _____ Amount of the claim that is secured: \$ _____ Amount of the claim that is unsecured: \$ _____ (The sum of the secured and unsecured amount should match the amount in line 7.) Amount necessary to cure any default as of the date of the petition: \$ _____ Annual Interest Rate (when case was filed) _____ % <input type="checkbox"/> Fixed <input type="checkbox"/> Variable
10. Is this claim based on a lease?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Amount necessary to cure any default as of the date of the petition. \$ _____
11. Is this claim subject to a right of setoff?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Identify the property: _____



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

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

☒ No

☐ Yes. Check all that apply:

	Amount entitled to priority
<input type="checkbox"/> Domestic support obligations (including alimony and child support) under 11 U.S.C. § 507(a)(1)(A) or (a)(1)(B).	\$ _____
<input type="checkbox"/> Up to \$3,025* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use. 11 U.S.C. § 507(a)(7).	\$ _____
<input type="checkbox"/> Wages, salaries, or commissions (up to \$13,650*) earned within 180 days before the bankruptcy petition is filed or the debtor's business ends, whichever is earlier. 11 U.S.C. § 507(a)(4).	\$ _____
<input type="checkbox"/> Taxes or penalties owed to governmental units. 11 U.S.C. § 507(a)(8).	\$ _____
<input type="checkbox"/> Contributions to an employee benefit plan. 11 U.S.C. § 507(a)(5).	\$ _____
<input type="checkbox"/> Other. Specify subsection of 11 U.S.C. § 507(a)() that applies.	\$ _____

* Amounts are subject to adjustment on 4/01/22 and every 3 years after that for cases begun on or after the date of adjustment.

13. Is all or part of the claim pursuant to 11 U.S.C. § 503(b)(9)?

☒ No

☐ Yes. Indicate the amount of your claim arising from the value of any goods received by the debtor within 20 days before the date of commencement of the above case, in which the goods have been sold to the Debtor in the ordinary course of such Debtor's business. Attach documentation supporting such claim.

\$ _____

Part 3: Sign Below

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

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

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

Check the appropriate box:

- ☐ I am the creditor.
- ☒ I am the creditor's attorney or authorized agent.
- ☐ I am the trustee, or the debtor, or their authorized agent. Bankruptcy Rule 3004.
- ☐ I am a guarantor, surety, endorser, or other codebtor. Bankruptcy Rule 3005.

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

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

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

Executed on date 04/08/2020
MM / DD / YYYY

/s/Michael Pugatch
Signature

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

Name Michael Pugatch
First name Middle name Last name

Title Managing Director

Company HarbourVest Partners L.P., on behalf of funds and accounts under manage
Identify the corporate servicer as the company if the authorized agent is a servicer.

Address

Contact phone _____ Email _____

For phone assistance: Domestic (877) 573-3984 | International (310) 751-1829

Debtor: 19-34054 - Highland Capital Management, L.P. District: Northern District of Texas, Dallas Division		
Creditor: HarbourVest Partners L.P. on behalf of funds and accounts under management Attn: Erica Weisgerber Debevoise and Plimpton LLP 919 Third Avenue New York, NY, 10022 U.S.A. Phone: 2129096000 Phone 2: Fax: Email: eweisgerber@debevoise.com	Has Supporting Documentation: Yes, supporting documentation successfully uploaded Related Document Statement:	
	Has Related Claim: No Related Claim Filed By:	
	Filing Party: Authorized agent	
Disbursement/Notice Parties: HarbourVest Partners L.P. c/o HarbourVest Partners, LLC One Financial Center Boston, MA, 02111 U.S.A. Phone: 6173483773 Phone 2: Fax: E-mail: agoren@harbourvest.com DISBURSEMENT ADDRESS		
Other Names Used with Debtor:	Amends Claim: No Acquired Claim: No	
Basis of Claim: See Annex	Last 4 Digits: No	Uniform Claim Identifier:
Total Amount of Claim: See Annex	Includes Interest or Charges: None	
Has Priority Claim: No	Priority Under:	
Has Secured Claim: No Amount of 503(b)(9): No Based on Lease: No Subject to Right of Setoff: No	Nature of Secured Amount: Value of Property: Annual Interest Rate: Arrearage Amount: Basis for Perfection: Amount Unsecured:	
Submitted By: Michael Pugatch on 08-Apr-2020 5:06:59 p.m. Eastern Time Title: Managing Director Company: HarbourVest Partners L.P., on behalf of funds and accounts under management, by HarbourVest Partners, LLC, its Gen Partner		

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

In re:

Highland Capital Management, L.P.

Debtor.

Chapter 11

Case No. 19-34054 (SGJ)

ANNEX TO PROOF OF CLAIM

1. This annex (the “Annex”) is part of and is incorporated by reference into the attached proof of claim (together with the Annex, the “Proof of Claim”) and describes in more detail the claims of HarbourVest Partners L.P. on behalf of funds and accounts under management (the “Claimant”) against the debtor Highland Capital Management, L.P. (the “Debtor”).

2. The Claimant manages investment funds that are limited partners in one of the Debtor’s managed vehicles, Highland CLO Funding, Ltd. (“HCLOF”). Acis Capital Management GP, L.L.C. and Acis Capital Management L.P. (together, “Acis”), the portfolio manager for HCLOF, filed for chapter 11 in the United States Bankruptcy Court for the Northern District of Texas (the “Court”) on January 30, 2018. The Acis bankruptcy filing resulted from a dispute between Debtor and its former employee, Joshua Terry, who served as portfolio manager for Debtor’s collateral loan obligations funds (“CLO”) business. *See, e.g., Findings of Fact and Conclusions of Law in Support of Orders for Relief Issued After Trial on Contested Involuntary Bankruptcy Petition* (“Involuntary Petition Ruling”) [Case No. 18-30264 (SGJ), Dkt. No. 118]. As noted in more detail in the Court’s *Bench Ruling and Memorandum of Law in Support of: (A) Final Approval of Disclosure Statement; and (B) Confirmation of Chapter 11 Trustee’s Third*

Amended Joint Plan (“Confirmation Ruling”) [Case No. 18-30264 (SGJ), Dkt. No 827] and related filings in the Acis bankruptcy cases, there has been extensive litigation regarding alleged improper conduct associated with the management of, and transactions relating to, Acis, including transactions with and related to HCLOF. *See, e.g., id.; Second Amended Complaint* [Case No. 18-03078(SGJ), Dkt. No. 157].

3. Due to the Acis bankruptcy and certain conduct alleged to have been undertaken by the Debtor (to whom Acis subcontracted its functions) and Debtor’s employees (who were officers, employees, and agents of Acis), the Claimant has suffered significant harm. Such harm includes, but is not limited to, financial harm resulting from, among other things (i) court orders in the Acis bankruptcy that prevented certain CLOs in which HCLOF was invested from being refinanced or reset and court orders that otherwise regulated the activity of HCLOF; and (ii) significant fees and expenses related to the Acis bankruptcy that were charged to HCLOF. *See, e.g., Involuntary Petition Ruling* ¶ 27; *see also Confirmation Ruling*.

4. Claimant hereby files this Claim to assert any and all of its rights to payment, remedies, and other claims (including contingent or unliquidated claims) against the Debtor in connection with and relating to the foregoing harm, including for any amounts due or owed under the various agreements with the Debtor in connection with HCLOF (including, but not limited to, the Subscription and Transfer Agreement for Ordinary Shares Highland CLO Funding, Ltd., dated as of November 15, 2017, the Members Agreement Relating to the Company, dated as of November 15, 2017, the Highland CLO Funding, Ltd. Offering Memorandum dated November 15, 2017), and any and all legal and equitable claims or causes of action relating to the foregoing harm.

5. The Claimant has not attached the documentation supporting this Claim to this Proof of Claim because the documentation is voluminous and the Debtor has copies of such documents. However, any requested relevant documents will be provided to the Official Committee of Unsecured Creditors, the Court, the United States Trustee and the Debtor in the event of a dispute regarding this Proof of Claim and will be made available for review by other parties in interest as appropriate upon reasonable request and after consultation with the Debtor and execution of appropriate confidentiality agreements.

6. This Proof of Claim is filed with a full reservation of rights, including the right to amend, update, modify, supplement or otherwise revise this Proof of Claim in any respect at any time. The filing of this Proof of Claim is not and should not be construed to be: (a) a waiver or release of any of the Claimant's rights against any person, entity or property accruing to it against the Debtor and its estate; (b) a waiver of the Claimant's rights to assert that 28 U.S.C. § 157(b)(2)(C) is unconstitutional; (c) a consent or submission by the Claimant, or waiver of the Claimant's rights to object, to the jurisdiction of this Court with respect to the subject matter of any of the claims described herein, or any objection or other proceeding commenced with respect to any of the claims described herein, or any other proceeding commenced in the Debtor's chapter 11 case against or otherwise involving the Claimant; (d) a waiver or release of any right of the Claimant, or consent by the Claimant, to a trial by jury in this or any other court or proceeding; (e) a waiver or release of, or any limitation on, any right of the Claimant to have orders entered only after *de novo* review by a United States District Judge; (f) an election of remedies; or (g) a waiver of, or any other limitation on, any right of the Claimant to request withdrawal of the reference with respect to any matter, including, without limitation, any matter relating to this Proof of Claim.

7. Claimant's express reservation of all rights and causes of action, includes, without limitation, contingent or unliquidated rights that it or its affiliates may have against the Debtor, as well as defenses, offsets and counterclaims. This description and classification of claims by the Claimant is not a concession or admission as to the correct characterization or treatment of any such claims or a waiver of any rights of the Claimant.

8. Furthermore, the Claimant expressly reserves its rights to (a) file additional proofs of claim for additional claims that may be based on the same or additional documents or facts or other liability or indebtedness of the Debtor to the Claimant under contract or otherwise; (b) assert claims for cure of defaults in any agreement that the Debtor or any trustee appointed in this chapter 11 case may seek to assume; (c) assert any and all other claims, causes of action, defenses, offsets or counterclaims against the Debtor or any other parties; (d) file a request for payment of an administrative expense under 11 U.S.C. §§ 503 and 507 for any or all of the claims or rights of payment described above and any additional amounts; and (e) seek recovery through any relevant third parties, including any of the Debtor's insurance coverage providers.

9. This Proof of Claim does not encompass all claims that the Claimant or its affiliates may have that arise after the Petition Date and are entitled to administrative priority, and the Claimant expressly reserves its right to file such claim or any similar claim at the appropriate time, including any such post-petition claims arising under these service contracts.

10. This Proof of Claim is filed without prejudice to the filing by the Claimant of additional proofs of claim or requests for payment with respect to any other indebtedness, liability or obligation of the Debtor. The Claimant does not, by this Proof of Claim or any amendment or other action, waive any rights with respect to any scheduled claim.

11. The Claimant reserves the right to withdraw, amend, clarify, modify or supplement this Proof of Claim to assert additional claims, causes of action or additional grounds for this Proof of Claim (including adding any additional contracts, agreements, obligations or other relationships between the Claimant and the Debtor), as well as the right to file any separate or additional proofs of claim with respect to the claims set forth herein or otherwise, including for the purpose of fixing and liquidating any contingent or unliquidated claim set forth herein, or to file additional proofs of claim in respect of additional amounts or for any other reason.

12. In executing and filing this Proof of Claim, the Claimant does not submit to the jurisdiction of the Bankruptcy Court for the Northern District of Texas for any purpose other than with respect to this Proof of Claim against the Debtor, and does not waive or release any rights or remedies against any other person or entity that may be liable for all or part of this Proof of Claim.

13. The Claimant otherwise reserves its rights, and nothing herein shall prejudice the Claimant's rights, under any order of the Court previously entered in this chapter 11 case.

14. Payments on account of this Proof of Claim should be sent to the Claimant at the address specified for notices to the Claimant in Part 1.3 of the Proof of Claim.

APPENDIX 7

PACHULSKI STANG ZIEHL & JONES LLP

Jeffrey N. Pomerantz (CA Bar No. 143717) (*admitted pro hac vice*)

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Counsel for the Debtor and Debtor-in-Possession

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

In re:

HIGHLAND CAPITAL MANAGEMENT, L.P.,¹

Debtor.

§
§
§
§
§
§

Chapter 11

Case No. 19-34054-sgj11

**DEBTOR'S MOTION FOR ENTRY OF AN ORDER APPROVING
SETTLEMENT WITH HARBOURVEST (CLAIM NOS. 143, 147, 149, 150, 153, 154)
AND AUTHORIZING ACTIONS CONSISTENT THEREWITH**

TO THE HONORABLE STACEY G. C. JERNIGAN,
UNITED STATES BANKRUPTCY JUDGE:

¹ The last four digits of the Debtor's taxpayer identification number are 6725. The headquarters and service address for the Debtor is 300 Crescent Court, Suite 700, Dallas, TX 75201.



1. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2). Venue in this District is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

2. The statutory predicates for the relief sought herein are sections 105(a) and 363 of title 11 of the United States Code (the “Bankruptcy Code”), and Rule 9019 of the Bankruptcy Rules.

000467

RELEVANT BACKGROUND

A. Procedural Background

3. On October 16, 2019 (the “Petition Date”), the Debtor filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code in the Bankruptcy Court for the District of Delaware, Case No. 19-12239 (CSS) (the “Delaware Court”).

4. On October 29, 2019, the official committee of unsecured creditors (the “Committee”) was appointed by the U.S. Trustee in the Delaware Court.

5. On December 4, 2019, the Delaware Court entered an order transferring venue of the Debtor’s case to this Court [Docket No. 186].³

6. On December 27, 2019, the Debtor filed that certain *Motion of the Debtor for Approval of Settlement with the Official Committee of Unsecured Creditors Regarding Governance of the Debtor and Procedures for Operations in the Ordinary Course* [Docket No. 281] (the “Settlement Motion”). This Court approved the Settlement Motion on January 9, 2020 [Docket No. 339] (the “Settlement Order”).

7. In connection with the Settlement Order, an independent board of directors was constituted at the Debtor’s general partner, Strand Advisors, Inc., and certain operating protocols were instituted.

8. On July 16, 2020, this Court entered an order appointing James P. Seery, Jr., as the Debtor’s chief executive officer and chief restructuring officer [Docket No. 854].

9. The Debtor has continued in the possession of its property and has continued to operate and manage its business as a debtor-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No trustee or examiner has been appointed in this chapter 11 case.

³ All docket numbers refer to the docket maintained by this Court.

B. Overview of HarbourVest's Claims

10. HarbourVest's claims against the Debtor's estate arise from its \$80 million investment in Highland CLO Funding, f/k/a Acis Loan Funding, Ltd. ("HCLOF"), pursuant to which HarbourVest obtained a 49 percent interest in HCLOF (the "Investment").

11. In brief, HarbourVest contends that it was fraudulently induced into entering into the Investment based on the Debtor's misrepresentations and omissions concerning certain material facts, including that the Debtor: (1) failed to disclose that it never intended to pay an arbitration award obtained by a former portfolio manager, (2) failed to disclose that it engaged in a series of fraudulent transfers for the purpose of preventing the former portfolio manager from collecting on his arbitration award and misrepresented the reasons changing the portfolio manager for HCLOF immediately prior to the Investment, (3) indicated that the dispute with the former portfolio manager would not impact investment activities, and (4) expressed confidence in the ability of HCLOF to reset or redeem the collateralized loan obligations ("CLOs") under its control.

12. HarbourVest seeks to rescind its Investment and claims damages in excess of \$300 million based on theories of fraud, fraudulent inducement, fraudulent concealment, fraudulent misrepresentation, negligent misrepresentation, and breach of fiduciary duty (under Guernsey law), and on alleged violations of state securities laws and the Racketeer Influenced Corrupt Organization Act ("RICO").

13. HarbourVest's allegations are summarized below.⁴

⁴ Solely for purposes of this Motion, and not for any other reason, the facts set forth herein are adopted largely from the *HarbourVest Response to Debtor's First Omnibus Objection to Certain (A) Duplicate Claims; (B) Overstated Claims; (C) Late-Filed Claims; (D) Satisfied Claims; (E) No-Liability Claims; and (F) Insufficient-Documentation Claims* [Docket No. 1057] (the "Response").

C. Summary of HarbourVest's Factual Allegations

14. At the time HarbourVest made its Investment, the Debtor was embroiled in an arbitration against Joshua Terry ("Mr. Terry"), a former employee of the Debtor and limited partner of Acis Capital Management, L.P. ("Acis LP"). Through Acis LP, Mr. Terry managed Highland's CLO business, including CLO-related investments held by Acis Loan Funding, Ltd. ("Acis Funding").

15. The litigation between Mr. Terry and the Debtor began in 2016, after the Debtor terminated Mr. Terry and commenced an action against him in Texas state court. Mr. Terry asserted counterclaims for wrongful termination and for the wrongful taking of his ownership interest in Acis LP and subsequently had certain claims referred to arbitration where he obtained an award of approximately \$8 million (the "Arbitration Award") on October 20, 2017.

16. HarbourVest alleges that the Debtor responded to the Arbitration Award by engaging in a series of fraudulent transfers and corporate restructurings, the true purposes of which were fraudulently concealed from HarbourVest.

17. For example, according to HarbourVest, the Debtor changed the name of the target fund from Acis Funding to "Highland CLO Funding, Ltd." ("HCLOF") and "swapped out" Acis LP for Highland HCF Advisor, Ltd. as portfolio manager (the "Structural Changes"). The Debtor allegedly told HarbourVest that it made these changes because of the "reputational harm" to Acis LP resulting from the Arbitration Award. The Debtor further told HarbourVest that in lieu of redemptions, resetting the CLOs was necessary, and that it would be easier to reset them under the "Highland" CLO brand instead of the Acis CLO brand.

18. In addition, HarbourVest also alleges that the Debtor had no intention of allowing Mr. Terry to collect on his Arbitration Award, and orchestrated a scheme to "denude"

Acis of assets by fraudulently transferring virtually all of its assets and attempting to transfer its profitable portfolio management contracts to non-Acis, Debtor-related entities.

19. Unaware of the fraudulent transfers or the true purposes of the Structural Changes, and in reliance on representations made by the Debtor, HarbourVest closed on its Investment in HCLOF on November 15, 2017.

20. After discovering the transfers that occurred between Highland and Acis between October and December 2017 following the Arbitration Award (the “Transfers”), on January 24, 2018, Terry moved for a temporary restraining order (the “TRO”) from the Texas state court on the grounds that the Transfers were pursued for the purpose of rendering Acis LP judgment-proof. The state court granted the TRO, enjoining the Debtor from transferring any CLO management contracts or other assets away from Acis LP.

21. On January 30, 2018, Mr. Terry filed involuntary bankruptcy petitions against Acis LP and its general partner, Acis Capital Management GP, LLC. *See In re Acis Capital Management, L.P.*, Case No. 18-30264-sgj11 (Bankr. N.D. Tex. 2018) and *In re Acis Capital Management GP, LLC*, Case No. 18-30265-sgj11 (Bankr. N.D. Tex. 2018) (collectively, the “Acis Bankruptcy Case”). The Bankruptcy Court overruled the Debtor’s objection, granted the involuntary petitions, and appointed a chapter 11 trustee (the “Acis Trustee”). A long sequence of events subsequently transpired, all of which relate to HarbourVest’s claims, including:

- On May 31, 2018, the Court issued a *sua sponte* TRO preventing any actions in furtherance of the optional redemptions or other liquidation of the Acis CLOs.
- On June 14, 2018, HCLOF withdrew optional redemption notices.
- The TRO expired on June 15, 2018, and HCLOF noticed the Acis Trustee that it was requesting an optional redemption.

- HCLOF's request was withdrawn on July 6, 2018, and on June 21, 2018, the Acis Trustee sought an injunction preventing Highland/HCLOF from seeking further redemptions (the "Preliminary Injunction").
- The Court granted the Preliminary Injunction on July 10, 2018, pending the Acis Trustee's attempts to confirm a plan or resolve the Acis Bankruptcy.
- On August 30, 2018, the Court denied confirmation of the First Amended Joint Plan for Acis, and held that the Preliminary Injunction must stay in place on the ground that the "evidence thus far has been compelling that numerous transfers after the Josh Terry judgment denuded Acis of value."
- After the Debtor made various statements implicating HarbourVest in the Transfers, the Acis Trustee investigated HarbourVest's involvement in such Transfers, including extensive discovery and taking a 30(b)(6) deposition of HarbourVest's managing director, Michael Pugatch, on November 17, 2018.
- On March 20, 2019, HCLOF sent a letter to Acis LP stating that it was not interested in pursuing, or able to pursue, a CLO reset transaction.

**D. The Parties' Pleadings and Positions Concerning HarbourVest's
Proofs of Claim**

22. On April 8, 2020, HarbourVest filed proofs of claim against Highland that were subsequently denoted by the Debtor's claims agents as claim numbers 143, 147, 149, 150, 153, and 154, respectively (collectively, the "Proofs of Claim"). Morris Dec. Exhibits 2-7.

23. The Proofs of Claim assert, among other things, that HarbourVest suffered significant harm due to conduct undertaken by the Debtor and the Debtor's employees, including "financial harm resulting from (i) court orders in the Acis Bankruptcy that prevented certain CLOs in which HCLOF was invested from being refinanced or reset and court orders that otherwise relegated the activity of HCLOF [*i.e.*, the Preliminary Injunction]; and (ii) significant fees and expenses related to the Acis Bankruptcy that were charged to HCLOF." *See, e.g.*, Morris Dec. Exhibit 2 ¶3.

24. HarbourVest also asserted "any and all of its right to payment, remedies, and other claims (including contingent or unliquidated claims) against the Debtor in connection with and relating to the forgoing harm, including for any amounts due or owed under the various

agreements with the Debtor in connection with relating to” the Operative Documents “and any and all legal and equitable claims or causes of action relating to the forgoing harm.” *See, e.g.*, Morris Dec. Exhibit 2 ¶4.

25. Highland subsequently objected to HarbourVest’s Proofs of Claim on the grounds that they were no-liability claims. [Docket No. 906] (the “Claim Objection”).

26. On September 11, 2020, HarbourVest filed its Response. The Response articulated specified claims under U.S. federal and state and Guernsey law, including claims for fraud, fraudulent concealment, fraudulent inducement, fraudulent misrepresentation, negligent misrepresentation (collectively, the “Fraud Claims”), U.S. State and Federal Securities Law Claims (the “Securities Claims”), violations of the Federal Racketeer Influenced and Corrupt Organizations Act (“RICO”), breach of fiduciary duty and misuse of fund assets, and an unfair prejudice claim under Guernsey law (collectively, with the Proofs of Claim, the “HarbourVest Claims”).

27. On October 18, 2020, HarbourVest filed its *Motion of HarbourVest Pursuant to Rule 3018 of the Federal Rules of Bankruptcy Procedure for Temporary Allowance of Claims for Purposes of Voting to Accept or Reject the Plan* [Docket No. 1207] (the “3018 Motion”). In its 3018 Motion, HarbourVest sought for its Claims to be temporarily allowed for voting purposes in the amount of more than \$300 million (based largely on a theory of treble damages).

E. Settlement Discussions

28. In October, the parties discussed the possibility of resolving the Rule 3018 Motion.

29. In November, the parties broadened the discussions in an attempt to reach a global resolution of the HarbourVest Claims. In the pursuit thereof, the parties and their

See generally Morris Dec. Exhibit 1.

BASIS FOR RELIEF REQUESTED

33. Bankruptcy Rule 9019 governs the procedural prerequisites to approval of a settlement, providing that:

On motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement. Notice shall be given to creditors, the United States trustee, the debtor, and indenture trustees as provided in Rule 2002 and to any other entity as the court may direct.

FED. R. BANKR. P. 9019(a).

34. Settlements in bankruptcy are favored as a means of minimizing litigation, expediting the administration of the bankruptcy estate, and providing for the efficient resolution of bankruptcy cases. See *Myers v. Martin (In re Martin)*, 91 F.3d 389, 393 (3d Cir. 1996); *Rivercity v. Herpel (In re Jackson Brewing Co.)*, 624 F.2d 599, 602 (5th Cir. 1980). Pursuant to Bankruptcy Rule 9019(a), a bankruptcy court may approve a compromise or settlement as long as the proposed settlement is fair, reasonable, and in the best interest of the estate. See *In re Age Ref. Inc.*, 801 F.3d 530, 540 (5th Cir. 2015). Ultimately, “approval of a compromise is within the sound discretion of the bankruptcy court.” See *United States v. AWECO, Inc. (In re AWECO, Inc.)*, 725 F.2d 293, 297 (5th Cir. 1984); *Jackson Brewing*, 624 F.2d at 602–03.

35. In making this determination, the United States Court of Appeals for the Fifth Circuit applies a three-part test, “with a focus on comparing ‘the terms of the compromise with the rewards of litigation.’” *Official Comm. of Unsecured Creditors v. Cajun Elec. Power Coop. (In re Cajun Elec. Power Coop.)*, 119 F.3d 349, 356 (5th Cir. 1997) (citing *Jackson Brewing*, 624 F.2d at 602). The Fifth Circuit has instructed courts to consider the following factors: “(1) The probability of success in the litigation, with due consideration for the uncertainty of law and fact, (2) The complexity and likely duration of the litigation and any

attendant expense, inconvenience and delay, and (3) All other factors bearing on the wisdom of the compromise.” *Id.* Under the rubric of the third factor referenced above, the Fifth Circuit has specified two additional factors that bear on the decision to approve a proposed settlement. First, the court should consider “the paramount interest of creditors with proper deference to their reasonable views.” *Id.*; *Conn. Gen. Life Ins. Co. v. United Cos. Fin. Corp. (In re Foster Mortgage Corp.)*, 68 F.3d 914, 917 (5th Cir. 1995). Second, the court should consider the “extent to which the settlement is truly the product of arms-length bargaining, and not of fraud or collusion.” *Age Ref. Inc.*, 801 F.3d at 540; *Foster Mortgage Corp.*, 68 F.3d at 918 (citations omitted).

36. There is ample basis to approve the proposed Settlement Agreement based on the Rule 9019 factors set forth by the Fifth Circuit.

37. First, although the Debtor believes that it has valid defenses to the HarbourVest Claims, there is no guarantee that the Debtor would succeed in its litigation with HarbourVest. Indeed, to establish its defenses, the Debtor would be required to rely, at least in part, on the credibility of witnesses whose veracity has already been called into question by this Court. Moreover, it will be difficult to dispute that the Transfers precipitated the Acis Bankruptcy, and, ultimately, the imposition of the Bankruptcy Court’s TRO that restricted HCLOF’s ability to reset or redeem the CLOs and that is at the core of the HarbourVest Claims.

38. The second factor—the complexity, duration, and costs of litigation—also weighs heavily in favor of approving the Settlement Agreement. As this Court is aware, the events forming the basis of the HarbourVest Claims—including the Terry Litigation and Acis Bankruptcy—proceeded *for years* in this Court and in multiple other forums, and has already cost the Debtor’s estate millions of dollars in legal fees. If the Settlement Agreement is not approved, then the parties will expend significant resources litigating a host of fact-intensive

issues including, among other things, the substance and materiality of the Debtor's alleged fraudulent statements and omissions and whether HarbourVest reasonably relied on those statements and omissions.

39. Third, approval of the Settlement Agreement is justified by the paramount interest of creditors. Specifically, the settlement will enable the Debtor to: (a) avoid incurring substantial litigation costs; (b) avoid the litigation risk associated with HarbourVest's \$300 million claim; and (c) through the plan support provisions, increase the likelihood that the Debtor's pending plan of reorganization will be confirmed.

40. Finally, the Settlement Agreement was unquestionably negotiated at arm's-length. The terms of the settlement are the result of numerous, ongoing discussions and negotiations between the parties and their counsel and represent neither party's "best case scenario." Indeed, the Settlement Agreement should be approved as a rational exercise of the Debtor's business judgment made after due deliberation of the facts and circumstances concerning HarbourVest's Claims.

NO PRIOR REQUEST

41. No previous request for the relief sought herein has been made to this, or any other, Court.

NOTICE

42. Notice of this Motion shall be given to the following parties or, in lieu thereof, to their counsel, if known: (a) counsel for HarbourVest; (b) the Office of the United States Trustee; (c) the Office of the United States Attorney for the Northern District of Texas; (d) the Debtor's principal secured parties; (e) counsel to the Committee; and (f) parties requesting notice pursuant to Bankruptcy Rule 2002. The Debtor submits that, in light of the nature of the relief requested, no other or further notice need be given.

WHEREFORE, the Debtor respectfully requests entry of an order, substantially in the form attached hereto as Exhibit A, (a) granting the relief requested herein, and (b) granting such other relief as is just and proper.

Dated: December 23, 2020.

PACHULSKI STANG ZIEHL & JONES LLP

Jeffrey N. Pomerantz (CA Bar No. 143717)
Ira D. Kharasch (CA Bar No. 109084)
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Counsel for the Debtor and Debtor-in-Possession

APPENDIX 8

SETTLEMENT AGREEMENT

This Settlement Agreement (the “Agreement”) is entered into as of December 23, 2020, between Highland Capital Management, L.P. (the “Debtor”), on the one hand, and HarbourVest 2017 Global Fund L.P., HarbourVest 2017 Global AIF L.P., HarbourVest Dover Street IX Investment L.P., HV International VIII Secondary L.P., HarbourVest Skew Base AIF L.P., and HarbourVest Partners L.P. (each, a “HarbourVest Party,” and collectively, “HarbourVest”), on the other hand. Each of the foregoing are sometimes referred to herein collectively as the “Parties” and individually as a “Party.”

RECITALS

WHEREAS, on October 16, 2019 (the “Petition Date”), the Debtor filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code (the “Bankruptcy Case”) in the Bankruptcy Court for the District of Delaware, Case No. 19-12239 (CSS) (the “Delaware Bankruptcy Court”);

WHEREAS, on December 4, 2019, the Delaware Bankruptcy Court entered an order transferring venue of the Debtor’s case to the Bankruptcy Court for the Northern District of Texas, Dallas Division, Case No. 19-34054-sgj (the “Bankruptcy Court”);

WHEREAS, prior to the Petition Date, HarbourVest invested in Highland CLO Funding, Ltd. f/k/a Acis Loan Funding, Ltd. (“HCLOF”) and acquired an a 49.98% ownership interest in HCLOF (the “HarbourVest Interests”);

WHEREAS, the portfolio manager for HCLOF is Highland HCF Advisor, Ltd., a subsidiary of the Debtor;

WHEREAS, on April 8, 2020, HarbourVest filed proofs of claim in the Bankruptcy Case, which are listed on the Debtor’s claims register as claim numbers 143, 147, 149, 150, 153, and 154 (the “HarbourVest Claims”), asserting claims against the Debtor relating to its investment in HCLOF;

WHEREAS, on July 30, 2020, the Debtor filed the *Debtor’s First Omnibus Objection to Certain (a) Duplicate Claims; (b) Overstated Claims; (c) Late-Filed Claims; (d) Satisfied Claims; (e) No Liability Claims; and (f) Insufficient-Documentation Claims* [Docket No. 906], in which the Debtor objected to the HarbourVest Claims;

WHEREAS, on September 11, 2020, HarbourVest filed the *HarbourVest Response to Debtor’s First Omnibus Objection to Creation (a) Duplicate Claims; (b) Overstated Claims; (c) Late-Filed Claims; (d) Satisfied Claims; (e) No Liability Claims; and (f) Insufficient-Documentation Claims* [Docket No. 1057] (the “HarbourVest Response”);

WHEREAS, on October 18, 2020, HarbourVest filed the *Motion of HarbourVest Pursuant to Rule 3018(a) of the Federal Rules of Bankruptcy Procedure for Temporary Allowance of Claims for Purposes of Voting to Accept or Reject the Plan* [Docket No. 1207] (the “3018 Motion” and together with the HarbourVest Response, the “HarbourVest Pleadings”);

WHEREAS, in the HarbourVest Pleadings, HarbourVest asserted, among other things, that the HarbourVest Claims included claims against the Debtor arising from fraudulent inducement, fraudulent concealment, fraudulent misrepresentation, breach of fiduciary duty, breach of securities laws, and misuse of assets and sought damages in excess of \$300,000,000;

WHEREAS, the Debtor disputes the HarbourVest Claims;

WHEREAS, on November 24, 2020, the Debtor filed the *Fifth Amended Plan of Reorganization for Highland Capital Management, L.P.* [Docket No. 1472] (as amended, the “Plan”).¹

WHEREAS, the Parties desire to enter into this Agreement which incorporates, formalizes, and finalizes the full and final resolution of the HarbourVest Claims and HarbourVest Pleadings; and

WHEREAS, this Agreement will be presented to the Bankruptcy Court for approval pursuant to **Federal Rule of Bankruptcy Procedure 9019** (“Rule 9019”).

NOW THEREFORE, in consideration of the above recitals, the covenants, conditions, and promises made herein, and other good and valuable consideration, the receipt of which is hereby acknowledged, the Parties agree as follows:

1. Settlement of Claims.

(a) In full and complete satisfaction of the HarbourVest Claims, HarbourVest will receive:

(i) an allowed, nonpriority general unsecured claim in the aggregate amount of \$45,000,000 (the “Allowed GUC Claim”); and

(ii) an allowed subordinated claim in the aggregate amount of \$35,000,000 (the “Allowed Subordinated Claim” and together with the Allowed GUC Claim, the “Allowed Claims”).

(b) On the Effective Date, HarbourVest will transfer all of its rights, title, and interest in the HarbourVest Interests to the Debtor or its nominee pursuant to the terms of the *Transfer Agreement for Ordinary Shares of Highland CLO Funding, Ltd.*, attached hereto as Exhibit A (the “Transfer Agreements”) and the Debtor or its nominee will become a shareholder of HCLOF with respect to the HarbourVest Interests. The terms of the Transfer Agreements are incorporated into this Agreement by reference.

2. Releases.

(a) Upon the Effective Date, and to the maximum extent permitted by law, each HarbourVest Party on behalf of itself and each of its current and former advisors, trustees, directors, officers, managers, members, partners, employees, beneficiaries, shareholders, agents,

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

participants, subsidiaries, parents, successors, designees, and assigns hereby forever, finally, fully, unconditionally, and completely releases, relieves, acquits, remises, and exonerates, and covenants never to sue, the Debtor, HCLOF, HCLOF's current and former directors, and the Debtor's current and former advisors, trustees, directors, officers, managers, members, partners, employees, beneficiaries, shareholders, agents, participants, subsidiaries, parents, affiliates, successors, designees, and assigns, except as expressly set forth below (the "Debtor Released Parties"), for and from any and all claims, debts, liabilities, demands, obligations, promises, acts, agreements, liens, losses, costs and expenses (including, without limitation, attorney's fees and related costs), damages, injuries, suits, actions, and causes of action of whatever kind or nature, whether known or unknown, suspected or unsuspected, matured or unmatured, liquidated or unliquidated, contingent or fixed, at law or in equity, statutory or otherwise, including, without limitation, any claims, defenses, and affirmative defenses, whether known or unknown, including, without limitation, those which were or could have been asserted in, in connection with, or with respect to the Bankruptcy Case (collectively, the "HarbourVest Released Claims").

(b) Upon the Effective Date, and to the maximum extent permitted by law, the Debtor hereby forever, finally, fully, unconditionally, and completely releases, relieves, acquits, remises, and exonerates, and covenants never to sue (i) each HarbourVest Party and (ii) each HarbourVest Party's current and former advisors, trustees, directors, officers, managers, members, partners, employees, beneficiaries, shareholders, agents, participants, subsidiaries, parents, affiliates, successors, designees, and assigns (the "HarbourVest Released Parties"), for and from any and all claims, debts, liabilities, demands, obligations, promises, acts, agreements, liens, losses, costs and expenses (including, without limitation, attorney's fees and related costs), damages, injuries, suits, actions, and causes of action of whatever kind or nature, whether known or unknown, suspected or unsuspected, matured or unmatured, liquidated or unliquidated, contingent or fixed, at law or in equity, statutory or otherwise, including, without limitation, any claims, defenses, and affirmative defenses, whether known or unknown, which were or could have been asserted in, in connection with, or with respect to the Bankruptcy Case (collectively, the "Debtor Released Claims"); *provided, however*, that notwithstanding anything herein to the contrary, the release contained in this Section 2(b) will apply to the HarbourVest Released Parties set forth in subsection (b)(ii) only with respect to Debtor Released Claims arising from or relating to HarbourVest's ownership of the HarbourVest Interests.

(c) Notwithstanding anything in this Agreement to the contrary, the releases set forth herein will not apply with respect to (i) the Allowed Claims, (ii) the claims of Charlotte Investor IV, L.P., or (iii) the duties, rights, or obligations of any Party under this Agreement or the Transfer Agreements.

3. **Agreement Subject to Bankruptcy Court Approval.** The effectiveness of this Agreement and the Parties' obligations hereunder are conditioned in all respects on the approval of this Agreement by the Bankruptcy Court. The Parties agree to cooperate and use reasonable efforts to have this Agreement approved by the Bankruptcy Court. The "Effective Date" will be the date of an order entered by the Bankruptcy Court approving this Agreement pursuant to a motion filed under Rule 9019.

4. **Representations and Warranties.** Subject in all respects to Section 3 hereof:

(a) each HarbourVest Party represents and warrants that (i) it has full authority to enter into this Agreement and to release the HarbourVest Released Claims and has not sold, transferred, or assigned any HarbourVest Released Claim to any other person or entity, (ii) no person or entity other than such HarbourVest Party has been, is, or will be authorized to bring, pursue, or enforce any HarbourVest Released Claim on behalf of, for the benefit of, or in the name of (whether directly or derivatively) of such HarbourVest Party; and (iii) HarbourVest owns all of the HCLOF Interests free and clear of any claims or interests; and

(b) the Debtor represents and warrants to HarbourVest that (i) it has full authority to enter into this Agreement and to release the Debtor Released Claims and (ii) no person or entity other than the Debtor has been, is, or will be authorized to bring, pursue, or enforce any Debtor Released Claim on behalf of, for the benefit of, or in the name of (whether directly or derivatively) of the Debtor Party.

5. **Plan Support.**

(a) Each HarbourVest Party hereby agrees that it will (a) vote all HarbourVest Claims held by such HarbourVest Party to accept the Plan, by delivering its duly executed and completed ballots accepting the Plan on a timely basis; and (b) not (i) change, withdraw, or revoke such vote (or cause or direct such vote to be changed withdrawn or revoked); (ii) exercise any right or remedy for the enforcement, collection, or recovery of any claim against the Debtor except in a manner consistent with this Agreement or the Plan, (iii) object to, impede, or take any action other action to interfere with, delay or postpone acceptance or confirmation of the Plan; (iv) directly or indirectly solicit, propose, file, support, participate in the formulation of or vote for, any restructuring, sale of assets (including pursuant to **11 U.S.C. § 363**), merger, workout, or plan of reorganization of the Debtor other than the Plan; or (v) otherwise take any action that would in any material respect interfere with, delay, or postpone the consummation of the Plan; provided, however, that such vote may be revoked (and, upon such revocation, deemed void ab initio) by such HarbourVest Party at any time following the termination of this agreement or the occurrence of a Support Termination Event (it being understood that any termination of this agreement shall entitle each HarbourVest Party to change its vote in accordance with section 1127(d) of the Bankruptcy Code), notwithstanding any voting deadline established by the Bankruptcy Court including without limitation the January 5, 2021, 5:00 p.m. (prevailing Central Time) deadline established by the *Order Approving Form of Ballots, Voting Deadline and Solicitation Procedures* [Docket No. 1476].

(b) In full resolution of the 3018 Motion, HarbourVest will have a general unsecured claim for voting purposes only in the amount of \$45,000,000.

(c) The obligations of the HarbourVest Parties under this Section 5 shall automatically terminate upon the occurrence of any of the following (each a “Support Termination Event”): (i) the effective date of the Plan, (ii) the withdrawal of the Plan, (iii) the entry of an order by the Bankruptcy Court (A) converting the Bankruptcy Case to a case under chapter 7 of the Bankruptcy Code or (B) appointing an examiner with expanded powers beyond those set forth in sections 1106(a)(3) and (4) of the Bankruptcy Code or a trustee in Bankruptcy

Case, or (iv) the failure of the Court to enter an order approving the terms of this Agreement and the settlement described herein pursuant to Rule 9019 prior to confirmation of the Plan.

6. **No Admission of Liability.** The Parties acknowledge that there is a bona fide dispute with respect to the HarbourVest Claims. Nothing in this Agreement will imply, an admission of liability, fault or wrongdoing by the Debtor, HarbourVest, or any other person, and the execution of this Agreement does not constitute an admission of liability, fault, or wrongdoing on the part of the Debtor, HarbourVest, or any other person.

7. **Successors-in-Interest.** This Agreement shall be binding upon and shall inure to the benefit of each of the Parties and their successors, and assigns.

8. **Notice.** Each notice and other communication hereunder will be in writing and will be sent by email and delivered or mailed by registered mail, receipt requested, and will be deemed to have been given on the date of its delivery, if delivered, and on the fifth full business day following the date of the mailing, if mailed to each of the Parties thereto at the following respective addresses or such other address as may be specified in any notice delivered or mailed as set forth below:

HARBOURVEST

HarbourVest Partners L.P.
Attention: Michael J. Pugatch
One Financial Center
Boston, MA 02111
Telephone No. 617-348-3712
E-mail: mpugatch@harbourvest.com

with a copy (which shall not constitute notice) to:

Debevoise & Plimpton LLP
Attention: M. Natasha Labovitz, Esq.
919 Third Avenue
New York, NY 10022
Telephone No. 212-909-6649
E-mail: nlabovitz@debevoise.com

THE DEBTOR

Highland Capital Management, L.P.
300 Crescent Court, Suite 700
Dallas, Texas 75201
Attention: James P. Seery, Jr.
Telephone No.: 972-628-4100
Facsimile No.: 972-628-4147
E-mail: jpseeryjr@gmail.com

with a copy (which shall not constitute notice) to:

Pachulski Stang Ziehl & Jones LLP
Attention: Jeffrey Pomerantz, Esq.
10100 Santa Monica Blvd., 13th Floor
Los Angeles, CA 90067
Telephone No.: 310-277-6910
Facsimile No.: 310-201-0760
E-mail: jpomerantz@pszjlaw.com

9. **Advice of Counsel.** Each Party represents that it has: (a) been adequately represented by independent legal counsel of its own choice, throughout all of the negotiations that preceded the execution of this Agreement; (b) executed this Agreement upon the advice of such counsel; (c) read this Agreement, and understands and assents to all the terms and conditions contained herein without any reservations; and (d) had the opportunity to have this Agreement and all the terms and conditions contained herein explained by independent counsel, who has answered any and all questions asked of such counsel, or which could have been asked of such counsel, including, but not limited to, with regard to the meaning and effect of any of the provisions of this Agreement.

10. **Entire Agreement.** This Agreement and the Transfer Agreement contain the entire agreement and understanding concerning the subject matter of this Agreement, and supersede and replace all prior negotiations and agreements, written or oral and executed or unexecuted, concerning such subject matter. Each of the Parties acknowledges that no other Party, nor any agent of or attorney for any such Party, has made any promise, representation or warranty, express or implied, written or oral, not otherwise contained in this Agreement to induce any Party to execute this Agreement. The Parties further acknowledge that they are not executing this Agreement in reliance on any promise, representation or warranty not contained in this Agreement, and that any such reliance would be unreasonable. This Agreement will not be waived or modified except by an agreement in writing signed by each Party or duly authorized representative of each Party.

11. **No Party Deemed Drafter.** The Parties acknowledge that the terms of this Agreement are contractual and are the result of arms'-length negotiations between the Parties and their chosen counsel. Each Party and its counsel cooperated in the drafting and preparation of this Agreement. In any construction to be made of this Agreement, the Agreement will not be construed against any Party.

12. **Future Cooperation.** The Parties agree to cooperate and execute such further documentation as is reasonably necessary to effectuate the intent of this Agreement.

13. **Counterparts.** This Agreement may be executed in counterparts with the same force and effect as if executed in one complete document. Each Party's signature hereto will signify acceptance of, and agreement to, the terms and provisions contained in this Agreement. Photographic, electronic, and facsimile copies of signed counterparts may be used in lieu of the originals of this Agreement for any purpose.

14. **Governing Law; Venue; Attorneys' Fees and Costs.** The Parties agree that this Agreement will be governed by and will be construed according to the laws of the State of Texas without regard to conflict-of-law principles. Each of the Parties hereby submits to the exclusive jurisdiction of the Bankruptcy Court during the pendency of the Bankruptcy Case and thereafter to the exclusive jurisdiction of the state and federal courts located in the Northern District of Texas, Dallas Division, with respect to any disputes arising from or out of this Agreement. In any action to enforce this Agreement, the prevailing party shall be entitled to recover its reasonable and necessary attorneys' fees and costs (including experts).

[Remainder of Page Intentionally Blank]

IT IS HEREBY AGREED.

HIGHLAND CAPITAL MANAGEMENT, L.P.

By: /s/ James P. Seery, Jr.
Name: James P. Seery, Jr.
Its: CEO/CRO

HarbourVest 2017 Global Fund L.P., by HarbourVest 2017 Global Associates L.P., its General Partner, by HarbourVest GP LLC, its General Partner, by HarbourVest Partners, LLC, its Managing Member

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

HarbourVest 2017 Global AIF L.P., by HarbourVest Partners (Ireland) Limited, its Alternative Investment Fund Manager, by HarbourVest Partners L.P., its Duly Appointed Investment Manager, by HarbourVest Partners, LLC, its General Partner

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

HarbourVest Dover Street IX Investment L.P., by HarbourVest Partners L.P., its Duly Appointed Investment Manager, by HarbourVest Partners, LLC, its General Partner

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

HarbourVest Partners L.P., on behalf of funds and accounts under management, by HarbourVest Partners, LLC, its General Partner

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

**HarbourVest Skew Base AIF L.P., by HarbourVest Partners (Ireland) Limited, its
Alternative Investment Fund Manager, by HarbourVest Partners L.P., its Duly Appointed
Investment Manager, by HarbourVest Partners, LLC, its General Partner**

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

**HV International VIII Secondary L.P., by HIPEP VIII Associates L.P., its General
Partner, by HarbourVest GP LLC, its General Partner, by HarbourVest Partners, LLC,
its Managing Member**

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

Exhibit A

TRANSFER AGREEMENT
FOR ORDINARY SHARES OF
HIGHLAND CLO FUNDING, LTD.

This Transfer Agreement, dated as of December [REDACTED], 2020 (this “**Transfer Agreement**”), is entered into by and among Highland CLO Funding, Ltd. (the “**Fund**”), Highland HCF Advisor, Ltd. (the “**Portfolio Manager**”), HCMLP Investments, LLC (the “**Transferee**”) and each of the following: HarbourVest Dover Street IX Investment L.P., HarbourVest 2017 Global AIF L.P., HarbourVest 2017 Global Fund L.P., HV International VIII Secondary L.P., and HarbourVest Skew Base AIF L.P. (collectively, the “**Transferors**”).

WHEREAS, each Transferor is the record, legal and beneficial owner of the number of ordinary shares (“**Shares**”) of the Fund set forth opposite such Transferor’s name on Exhibit A hereto (with respect to each Transferor, the “**Transferred Shares**”).

WHEREAS the Transferee is an affiliate and wholly owned subsidiary of Highland Capital Management, L.P. (“**HCMLP**”) which is one of the initial members of the Fund.

WHEREAS, each Transferor wishes to transfer and assign 100% of its rights, title and interest as a shareholder in the Fund, including the Transferred Shares (the “**Interest**”) on the terms set forth in this Transfer Agreement.

WHEREAS, subject to and in connection with the approval of that certain Settlement Agreement, dated on or about the date hereof, by and among HCMLP and the Transferors (the “**Settlement Agreement**”), the Transferee desires that the Interest be transferred to Transferee and that thereafter the Transferee will become a Shareholder and the Transferors will no longer be Shareholders.

WHEREAS, the Portfolio Manager desires to consent to such transfers and to the admission of Transferee as a Shareholder on the terms set forth herein, and the Transferors and Transferee agree to such terms.

WHEREAS, the Fund desires to amend its records to reflect the foregoing transfers.

NOW, THEREFORE, the parties hereto agree as follows:

1. Transfer of Shares and Advisory Board

- a. Each Transferor hereby transfers and assigns all of its rights, title, and interest in its Interest to the Transferee, and the Transferee wishes to be admitted to the Fund as a Shareholder.
- b. In connection with the transfer of the Interest as contemplated herein, the Transferee shall be granted the right to appoint a representative to the Fund’s advisory board (the “**Advisory Board**”) to replace the Transferors’ appointed representative to the Advisory Board.

- c. Transferee hereby assumes all of Transferor's rights and obligations in respect of the Interest effective as of the Effective Date (as defined below) and acknowledge that thereafter Transferee shall be subject to the applicable terms and provisions of the Members' Agreement dated as of November 15, 2017 (the "**Members' Agreement**"), the Articles of Incorporation adopted November 15, 2017 (the "**Articles**") and the Subscription and transfer Agreement, dated as of November 15, 2017 among each Transferor, the Fund and the Portfolio Manager (the "**Subscription Agreement**", and together with the Members' Agreement and the Articles, the "**Fund Agreements**") with respect to the Interest. Transferee does not assume any liability or responsibility for any obligations or liabilities incurred by any Transferor prior to the Effective Date of the transfer.
 - d. Following the transfer, each Transferor shall have no further rights or obligations to any party hereunder in respect of the Interest under the Fund Agreements.
 - e. This Transfer Agreement, and the parties' obligations hereunder, are conditioned in all respects on the approval by the Bankruptcy Court for the Northern District of Texas, Dallas Division pursuant to **Federal Rule of Bankruptcy Procedure 9019** of (i) this Transfer Agreement and (ii) the Settlement Agreement, and each of the parties agree that no further action shall be required from any party for the transfer of the Interest to be effective except as described herein.
2. Transferee's Representations and Warranties. The Transferee represents and warrants to the Transferors, the Portfolio Manager, and the Fund as follows:
- a. This Transfer Agreement constitutes a valid and binding obligation of the Transferee, enforceable against it in accordance with its terms;
 - b. This Transfer Agreement has been duly and validly executed and delivered by or on behalf of the Transferee and such execution and delivery have been duly authorized by all necessary trust action of the Transferee;
 - c. The Transferee acknowledges receipt of, has read, and is familiar with, the Fund's Offering Memorandum for Placing Shares dated November 15, 2017 (the "**Offering Memorandum**") and the Fund Agreements;
 - d. The Transferee hereby accepts and receives the Interest from the Transferors for investment, and not with a view to the sale or distribution of any part thereof, and the Transferee has no present intention of selling, granting participations in, or otherwise distributing the same, but subject nevertheless to any requirement of law that the disposition of the Transferee's property shall at all times be within such Transferee's control; and
 - e. The Transferee is an "Eligible U.S. Investor" as defined in the Offering Memorandum.

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[Additional Signatures on Following Page]

IN WITNESS WHEREOF, the undersigned have executed this Transfer Agreement as of the date first above written.

TRANSFERORS:

HarbourVest Dover Street IX Investment L.P.

By: HarbourVest Partners L.P., its Duly Appointed Investment Manager

By: HarbourVest Partners, LLC

By: _____

Name: Michael Pugatch

Title: Managing Director

HV International VIII Secondary L.P.

By: HIPEP VIII Associates L.P.
Its General Partner

By: HarbourVest GP LLC
Its General Partner

By: HarbourVest Partners, LLC
Its Managing Member

By: _____

Name: Michael Pugatch

Title: Managing Director

HarbourVest 2017 Global AIF L.P.

By: HarbourVest Partners (Ireland) Limited
Its Alternative Investment Fund Manager

By: HarbourVest Partners L.P.
Its Duly Appointed Investment Manager

By: HarbourVest Partners, LLC
Its General Partner

By: _____

Name: Michael Pugatch

Title: Managing Director

HarbourVest Skew Base AIF L.P.

By: HarbourVest Partners (Ireland) Limited
Its Alternative Investment Fund Manager

By: HarbourVest Partners L.P.
Its Duly Appointed Investment Manager

By: HarbourVest Partners, LLC
Its General Partner

By: _____

Name: Michael Pugatch

Title: Managing Director

HarbourVest 2017 Global Fund L.P.

By: HarbourVest 2017 Global Associates L.P.
Its General Partner

By: HarbourVest GP LLC
Its General Partner

By: HarbourVest Partners, LLC
Its Managing Member

By: _____

Name: Michael Pugatch

Title: Managing Director

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APPENDIX 9

of confirmation of its Plan. Given the Debtor's prior positions as to the merits of HarbourVest Claim it is necessary for the Court to closely scrutinize the settlement to determine why the Debtor now believes granting HarbourVest a net claim of nearly \$60 million³ resulting from HarbourVest's investment in a non-debtor entity (which was and is managed by a non-debtor) to be in the best interest of the estate. Upon close scrutiny, Respondent believes the Court will find that the proposed settlement is not reasonable or in the best interest of the estate and the Motion therefore should be denied.

II. BACKGROUND

2. On October 16, 2019 (the "Petition Date"), the Debtor filed a voluntary petition for relief under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code") in the U.S. Bankruptcy Court for the District of Delaware, Case No. 19-12239 (CSS) (the "Delaware Court").

3. On October 29, 2019, the Official Committee of Unsecured Creditors (the "Committee") was appointed by the U.S. Trustee in Delaware.

4. On December 4, 2019, the Delaware Court entered an order transferring venue of the Debtor's Bankruptcy Case to this Court [Docket No. 186].

5. On December 27, 2019, the Debtor filed that certain *Motion of the Debtor for Approval of Settlement with the Official Committee of Unsecured Creditors Regarding Governance of the Debtor and Procedures for Operations in the Ordinary Course* [Docket No. 281] (the "Settlement Motion"). This Court approved the Settlement Motion on January 9, 2020 [Docket No. 339] (the "Settlement Order").

³ The proposed settlement provides that HarbourVest shall receive an allowed general unsecured (Class 8) claim in the amount of \$45 million and an allowed subordinated general unsecured (Class 9) claim in the amount of \$35 million. As part of the settlement, HarbourVest will then transfer its entire interest in Highland CLO Funding, Ltd. ("HCLOF") to an entity to be designated by the Debtor. The Debtor states that the value of this interest is approximately \$22 million as of December 1, 2020.

6. In connection with the Settlement Order, an independent board of directors was appointed on January 9, 2020, for the Debtor's general partner, Strand Advisors, Inc. (the "Board"). The members of the Board are James P. Seery, Jr., John S. Dubel, and Russell F. Nelms.

7. On July 16, 2020, this Court entered an order authorizing the Debtor to employ James P. Seery, Jr. as Chief Executive Officer and Chief Restructuring Officer of the Debtor. *See* Docket No. 854.

8. On April 8, 2020, HarbourVest filed Proofs of Claim Numbers 143, 149, 149, 150, 153, and 154 (collectively, the "HarbourVest Claim")⁴.

9. On July 30, 2020, the Debtor filed *Debtor's First Omnibus Objection to Certain (A) Duplicate Claims; (B) Overstated Claims; (C) Late-Filed Claims; (D) Satisfied Claims; (E) No Liability Claims; and (F) Insufficient-Documentation Claims* [Docket No. 906] (the "Debtor Objection"), which contained an objection to the HarbourVest Claim.

10. On September 11, 2020, HarbourVest filed *HarbourVest Response to Debtor's First Omnibus Objection to Certain (A) Duplicate Claims; (B) Overstated Claims; (C) Late-Filed Claims; (D) Satisfied Claims; (E) No Liability Claims; and (F) Insufficient-Documentation Claims* [Docket No. 1057] (the "HarbourVest Response").

11. On December 23, 2020, the Debtor filed the Motion seeking approval of a proposed settlement of the HarbourVest Claim under Rule 9019. Docket No. 1625.

III. LEGAL STANDARD

12. The merits of a proposed compromise should be judged under the criteria set forth in *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414 (1968). *TMT Trailer* requires that a compromise must be "fair and equitable." *TMT Trailer*, 390

⁴ While HarbourVest has filed a number of claims, each filed claim is exactly the same except in the name of the claimant. *See* Claim Nos. 143, 147, 149, 150, 153, and 154.

- (i) the probabilities of ultimate success should the claim be litigated;
- (ii) the complexity, expense, and likely duration of litigating the claim;
- (iii) the difficulties of collecting a judgment rendered from such litigation; and,
- (iv) all other factors relevant to a full and fair assessment of the wisdom of the compromise.

14. In considering whether to approve a proposed compromise, the bankruptcy judge “may not simply accept the trustee’s word that the settlement is reasonable, nor may he merely ‘rubber stamp’ the trustee’s proposal.” *In re Am. Res. Corp.*, 841 F.2d 159, 162 (7th Cir. 1987). “[T]he bankruptcy judge must apprise himself of all facts necessary to evaluate the settlement and make an informed and independent judgment about the settlement.” *See TMT Trailer*, 390 U.S. at 424, 434.

JAMES DONDERO'S OBJECTION TO THE DEBTOR'S MOTION FOR ENTRY OF AN ORDER APPROVING SETTLEMENT WITH HARBOURVEST

to the court, a debtor in possession must administer its case and conduct its business in a fashion amenable to the scrutiny to be expected from creditor and court oversight.”). The Court must conduct an “intelligent, objective and educated evaluation”⁵ of the proposed settlement “to ensure that the settlement is fair, equitable, and in the best interest of the estate and creditors.” *See In re Mirant Corp.*, 348 B.R. 725, 739 (Bankr. N.D. Tex. 2006) (quoting *Conn. Gen. Life Ins. Co. v. Foster Mortgage Corp. (In re Foster Mortgage Corp.)*, 68 F.3d 914, 917 (5th Cir. 1995)).

IV. ARGUMENT AND AUTHORITIES

16. As discussed in detail below, there are three significant issues with the terms of the settlement that merit denial of the Motion: (i) the proposed settlement is not reasonable or in the best interest of the estate given the weakness of the HarbourVest Claim; (ii) the proposed settlement is a blatant attempt to purchase votes in support of Debtor’s plan by giving HarbourVest a substantial claim to which it is not entitled; and (iii) the proposed settlement seeks to improperly classify HarbourVest’s one claim in two separate classes in order to gerrymander an affirmative vote on its reorganization plan. For these and certain additional reasons as discussed below, the Motion should be denied.

A. Through its Claim, HarbourVest Seeks to Revisit this Court’s Orders in the Acis Case

17. As an initial matter, through its proofs of claim, HarbourVest appears to be second guessing the Court’s judgment in the Chapter 11 case of Acis Capital Management, LP and Acis Capital Management GP, LLC (collectively, “Acis”) and seeking to revisit the Court’s orders entered in that case years ago. HarbourVest appears to be arguing that the TRO and injunction

⁵ *In re Jackson Brewing Co.*, 624 F.2d 599, 602 (5th Cir. 1980) (“To assure a proper compromise the bankruptcy judge, must be apprised of all the necessary facts for an intelligent, objective and educated evaluation. He must compare the terms of the compromise with the likely rewards of litigation.”).

speculative nature of the damages and the lack of specificity of the HarbourVest Claim and the role of Acis in the loss of value to HarbourVest all call into question the reliability of the allegations and the legal basis for the claim amount awarded in the settlement.

23. Also absent from Harbourvest's papers is any discussion of any contract or agreement between (i) HarbourVest and the Debtor; and (ii) any agreement that was executed in conjunction with HarbourVest's initial investment. While the proof of claim references a number of agreements, there is no explanation in the claim or in HarbourVest's response to the Debtor's claim objection of how these agreements give rise to liability against the *Debtor*. For example, neither the claim nor the HarbourVest Response (which includes more than 600 pages of attachments) attach *any* written agreement between HarbourVest and any other party. While HarbourVest has alleged a number of claims sounding in tort, many of those claims cannot exist absent a contract or other express relationship between the parties. Moreover, the terms of the relevant contracts themselves likely contain a number of provisions that may call into question Debtor's liability or would be otherwise relevant to merits of the HarbourVest Claim. For example, HarbourVest in its papers appears to assert or imply that the Debtor made a number of false or fraudulent representations to solicit HarbourVest's investment, but then fails to discuss or even identify the applicable agreements it alleges it was induced into signing in connection with its investment (this despite the substantial value of the investment when the Acis plan was confirmed).

24. Given these issues, among many others, the HarbourVest Claim is unsustainable both from a liability and damages standpoint and there are many very high hurdles HarbourVest would have to clear in seeking to prove liability against the Debtor and in proving its damages. For a long period of time, its investment was managed by Acis and the investment's performance was directly tied to Acis's inadequate performance as portfolio manager. Further, the value of

HarbourVest's investment is also directly tied to various market forces that may have impacted its value. The HarbourVest Claim is largely lacking in relevant facts and omits much salient information, such as who it contracted with in connection with its investment, the terms of such agreements, who controlled its investment during the entire period from November 2017 to the present, and the performance of its investment during the last two years. Given these issues, HarbourVest will be unable to demonstrate a causal connection between any conduct of the Debtor and the alleged damages it suffered from a reduction in value of its investment.

25. Because of the speculative nature of the HarbourVest Claim, and the fact that very little pleading or litigation has occurred, the proposed settlement in granting such a large claim is unreasonable, not fair and equitable, and not in the best interest of the estate. The lack of pending litigation, narrowing of threshold questions, and lack of detail in HarbourVest Claim make it impossible to determine whether the huge claim awarded under the proposed settlement is justified under the facts. Accordingly, the Motion should be denied.

C. The Proposed Settlement is an Improper Attempt by the Debtor to Purchase Votes in Support of its Plan and the Separate Classification of the HarbourVest Claim Constitutes Gerrymandering in Violation of 11 U.S.C. § 1122

26. The proposed settlement is a flagrant attempt by the Debtor to purchase votes in support of its Plan by giving HarbourVest a significant claim to which it has not shown itself entitled. Moreover, the separate classification of the HarbourVest Claim into two separate classes constitutes impermissible gerrymandering in violation of section 1122 of the Bankruptcy Code. The proposed settlement essentially gives HarbourVest a claim it is not entitled to in exchange for votes in two separate classes. This is not a proper basis for a settlement and the Court should deny the Motion.

27. Section 1122 of the Bankruptcy Code provides as follows:

(a) Except as provided in subsection (b) of this section, a plan may place a claim or an interest in a particular class only if such claim or interest is substantially similar to the other claims or interests of such class.

(b) A plan may designate a separate class of claims consisting only of every unsecured claim that is less than or reduced to an amount that the court approves as reasonable and necessary for administrative convenience.

11 U.S.C. § 1122.

28. “Chapter 11 requires classification of claims against a debtor for two reasons. Each class of creditors will be treated in the debtor's plan of reorganization based upon the similarity of its members' priority status and other legal rights against the debtor's assets. Proper classification is essential to ensure that creditors with claims of similar priority against the debtor's assets are treated similarly.” *In re Greystone III Joint Venture*, 995 F.2d 1274, 1277 (5th Cir. 1991).

29. “Section 1122 consequently must contemplate some limits on classification of claims of similar priority. A fair reading of both subsections suggests that ordinarily substantially similar claims, those which share common priority and rights against the debtor’s estate, should be placed in the same class.” *Id.* at 1278.

30. The Fifth Circuit has stated that there is “one clear rule that emerges from otherwise muddled caselaw on § 1122 claims classification: thou shalt not classify similar claims differently in order to gerrymander an affirmative vote on a reorganization plan.” *Id.* at 1279. The Court observed:

There must be some limit on a debtor’s power to classify creditors in such a manner. . . . Unless there is some requirement of keeping similar claims together, nothing would stand in the way of a debtor seeking out a few impaired creditors (or even one such creditor) who will vote for the plan and placing them in their own class.

In re Greystone III Joint Venture, 995 F.2d 1274, 1279 (5th Cir. 1991) (quoting *In re U.S. Truck Co.*, 800 F.2d 581, 586 (6th Cir. 1986)).

31. Here, the HarbourVest settlement and the classification of the HarbourVest Claim under the Plan blatantly violate the Fifth Circuit’s “one rule” concerning the classification of claims under section 1122. To the extent that HarbourVest even has a legitimate claim, not only should its claim be classified together with other unsecured creditors, its claim should be classified solely in one class. To allow the Debtor to do otherwise as proposed is improper gerrymandering in order to obtain a consenting class in express violation of section 1122.

D. There Are Other Reasons for the Court to Closely Scrutinize the Proposed Settlement that May Warrant Denial of the Motion

32. There are a number of other reasons for the Court to closely scrutinize the proposed settlement that may warrant denial of the Motion.

33. First, the granting to HarbourVest of a claim in the total amount of \$80 million potentially allows HarbourVest to achieve a significant windfall at the expense of other creditors and equity holders. The Debtor has asserted numerous times that the estate is solvent and, for this reason, the purported subordinated claim of \$35 million (if allowed and approved) may be worth just as much as its general unsecured claim. This is a huge figure in this case, outshined only by the Redeemer Committee, which has an actual arbitration award obtained after lengthy litigation. By contrast, the HarbourVest Claim contains only a few paragraphs of generalized allegations that essentially argue that the Debtor’s alleged actions related to the Acis bankruptcy, and this Court’s orders in the Acis case, are a “but for” cause of the loss of its investment. While the HarbourVest Response is lengthy, it lacks necessary details for the Court to determine whether HarbourVest *may* be entitled to the relief requested by the Motion. The other significant creditors in this case—*inter alia*, Redeemer, UBS and Acis—all had pending claims that were litigated. Nor is HarbourVest a trade creditor, vendor, or other contract counter-party of the Debtor. The HarbourVest Claim is thus uniquely situated in this case and, given the size and the nature of its

claims, should invite close scrutiny. Under these facts, the potential allowance of an \$80 million claim (less the value of its share in HCLOF, which may suffer by continued management by Acis) against the estate for an investment which was not held or managed by the Debtor would be a huge undue windfall.

34. Second, the Motion states that HarbourVest will vote its proposed allowed Class 8 (proposed at \$45 million) and Class 9 (proposed at \$35 million) claims in support of confirmation. There are at least two potential issues with this proposal. First, the deadline for parties to submit ballots was January 5, 2021, and as of the close of business on January 5, the HarbourVest Claim has not been allowed for voting purposes.⁹ Second, the Motion and proposed settlement agreement state that the HarbourVest Claim will be allowed for voting purposes only as a general unsecured claim in the amount of \$45 million. It is unclear how HarbourVest can, or would be authorized to, vote its purported Class 8 and 9 Claims in support of the Plan after the voting deadline and when the settlement provides only for a voting claim in Class 8.

35. Third, while the Motion addresses the factor of probability of success in the litigation, it does not discuss in detail the cost of doing so in relation to the amount to be paid to HarbourVest under the settlement or the likelihood that the Debtor will succeed in the litigation. In addition, unlike the claims filed by Acis and UBS, the HarbourVest Claim does not arise from pending litigation. At this point, relatively little litigation has occurred and the parties have not addressed threshold issues that might dramatically narrow the scope of the HarbourVest Claim. Rule 9019 requires an analysis as to whether the probability of success in litigation is outweighed by the consideration achieved under the settlement. *See In re Jackson Brewing Co.*, 624 F.2d 599, 602 (5th Cir. 1980) (The Court must “compare the terms of the compromise with the likely rewards

⁹ The hearing on the 3018 and 9019 motions are set concurrently with confirmation.

of litigation.”). Given the excessive amount to be paid under the settlement and the weakness of the HarbourVest Claim, this factor weighs in favor of denial of the Motion.

36. Fourth, it is unclear from the settlement papers whether the transfer by HarbourVest of its interest in HCLOF to the Debtor or an entity the Debtor designates will cause the value of the investment to be received by the Debtor’s estate. Further, the interest of HCLOF being conveyed under the proposed settlement may be subject to the Acis plan injunction, which could potentially prevent the Debtor’s estate from realizing the value of this interest. In the event the Court is inclined to approve the settlement, the order should make clear that the available value of the investment should be realized by the Debtor’s estate.

CONCLUSION

For the reasons set forth above, Respondent respectfully requests that the Court enter an order denying the Motion and providing Respondent such other and further relief to which he may be justly entitled.

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Dated: January 6, 2021

Respectfully submitted,

/s/ D. Michael Lynn

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ATTORNEYS FOR JAMES DONDERO

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that, on January 6, 2021, a true and correct copy of the foregoing document was served via the Court's CM/ECF system on counsel for the Debtor and on all other parties requesting or consenting to such service in this case.

/s/ Bryan C. Assink

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

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

**OBJECTION TO DEBTOR’S MOTION FOR ENTRY OF AN ORDER APPROVING
SETTLEMENT WITH HARBOURVEST (CLAIM NOS. 143, 147, 149, 150, 153, 154)
AND AUTHORIZING ACTIONS CONSISTENT THEREWITH**

The Dugaboy Investment Trust and Get Good Trust (jointly, “Objectors”), submit this Objection for the purpose of objecting to the *Debtor’s Motion for Entry of an Order Approving Settlement with HarbourVest (Claim Nos. 143, 147, 149, 150, 153, 154) and Authorizing Actions Consistent Therewith* [Dkt. #1625] (the “Motion”) filed by Highland Capital Management, L.P. (the “Debtor”). Through the Motion, the Debtor seeks approval of its compromise with HarbourVest 2017 Global Fund L.P., HarbourVest 2017 Global AIF L.P., HarbourVest Dover Street IX Investment L.P., HV International VIII Secondary L.P., HarbourVest Skew Base AIF L.P., and HarbourVest Partners L.P. (collectively, “HarbourVest”) pursuant to Rule 9019 of the



Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”). In support of this objection, Objectors respectfully represent as follows:

I. INTRODUCTION

1. Objectors recognize that Courts favorably view settlements and, as a matter of course, generally approve settlements as being in the best interest of the bankruptcy estate. The settlement proposed herein, however, is different than other settlements inasmuch as it represents a 180 degree departure from the Debtor’s own analysis of the Claim of HarbourVest and the fact that the settlement is tied to HarbourVest approving the Debtor’s plan. Little or no information is provided by the Debtor as to why its initial analysis was flawed and what information or legal principal it discovered to change a zero claim into a massive claim that will have a significant impact on the recovery to creditors.

II. BACKGROUND

2. On October 16, 2019 (the “Petition Date”), the Debtor filed a voluntary petition for relief under chapter 11 of title 11 of the United States Code (the “Bankruptcy Code”) in the U.S. Bankruptcy Court for the District of Delaware, Case No. 19-12239 (CSS) (the “Delaware Court”).

3. On October 29, 2019, the Official Committee of Unsecured Creditors (the “Committee”) was appointed by the U.S. Trustee in Delaware.

4. On December 4, 2019, the venue of this case was transferred. [Dkt. #186].

5. On July 16, 2020, this Court entered an order authorizing the Debtor to employ James P. Seery, Jr. as Chief Executive Officer and Chief Restructuring Officer of the Debtor. [See Dkt. #854].

6. On April 8, 2020, HarbourVest filed Proofs of Claim Numbers 143, 149, 149, 150, 153, and 154 (collectively, the “HarbourVest Claim”)¹.

7. On July 30, 2020, the Debtor filed *Debtor’s First Omnibus Objection to Certain (A) Duplicate Claims; (B) Overstated Claims; (C) Late-Filed Claims; (D) Satisfied Claims; (E) No Liability Claims; and (F) Insufficient-Documentation Claims* [Dkt. #906] (the “Debtor Objection”), which contained an objection to the HarbourVest Claim.

8. On September 11, 2020, HarbourVest filed *HarbourVest Response to Debtor’s First Omnibus Objection to Certain (A) Duplicate Claims; (B) Overstated Claims; (C) Late-Filed Claims; (D) Satisfied Claims; (E) No Liability Claims; and (F) Insufficient-Documentation Claims* [Dkt. #1057] (the “HarbourVest Response”).

9. The Debtor, in its *Disclosure Statement for the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.* [Dkt. #1473 pgs. 40-41], described its position relative to the HarbourVest Claim as follows:

The Debtor intends to **vigorously** defend the HarbourVest Claims on various grounds The HarbourVest Entities invested approximately \$80,000,000.00 in HCLOF but seek an allowed claim in excess of 300 million dollars (after giving effect to treble damages for the alleged RICO violations)

10. On December 23, 2020, the Debtor filed the Motion seeking approval of a proposed settlement of the HarbourVest Claim under Rule 9019. [Dkt. # 1625].

11. The proposed settlement provides HarbourVest with the following:

- a. An allowed, general unsecured claim in the amount of \$45,000,000.00 [Dkt. #1625 pg. 9 pp.f]; and

¹ While HarbourVest has filed a number of claims, each filed claim is exactly the same except in the name of the claimant. See Claim Nos. 143, 147, 149, 150, 153, and 154.

b. A \$35,000,000 claim in Class 9 [Dkt. #1625 pg. 9 pp.f].

12. An integral element of the settlement requires that HarbourVest will “support confirmation of the Debtor’s Plan including, but not limited to, voting its claims in support of the Plan.”

13. The settlement also contains a provision that HarbourVest will transfer its entire interest in HCLOF to an entity to be designated by the Debtor. It is unclear whether HarbourVest has a right to transfer the interest and secondly, what the Debtor will do with the interest [Dkt. #1625 pp.f].

14. The sole support for the Motion is the Declaration of John Morris [Dkt. #1631] which fails to account for the enormous change in the Debtor’s position between November 24, 2020 when the Disclosure Statement was approved and December 23, 2020 when the Motion was filed, a period of less than thirty (30) days.

15. The Declaration of John Morris [Dkt. #1631] also contains no information as to the potential cost of the litigation, whether HarbourVest can transfer the interest or reasons, other than conclusory reasons, as to why the settlement is beneficial to the estate. The Debtor makes the assertion that the interest it is acquiring was worth \$22,000,000.00 as of December 1, 2020 without advising as to the basis for the valuation. Is it a book value and, if not, what was the methodology employed to arrive at the valuation? The Court has no basis to evaluate the settlement without essential information as to 1) how the asset being acquired is valued; 2) can the Debtor acquire the interest; and 3) how will the Debtor bring value to the estate in connection with the interest inasmuch as the Debtor has discretion as to where to place the asset to be acquired.

A. LEGAL STANDARDS

16. The law relative to approval of motions pursuant to BR 9019 is well settled. The settlement must be fair and equitable. *See In re Jackson Brewing Co.*, 624 F.2d 599, 602 (5th Cir. 1980). The factors the Court should consider are the following:

- (i) the probabilities of ultimate success should the claim be litigated;
- (ii) the complexity, expense, and likely duration of litigating the claim;
- (iii) the difficulties of collecting a judgment rendered from such litigation; and,
- (iv) all other factors relevant to a full and fair assessment of the wisdom of the compromise.

Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414 (1968).

17. Although the Debtor's business judgment is entitled to a certain deference, "business judgment" is not alone determinative of the issue of court approval. *See In re Endoscopy Ctr. of S. Nev., LLC*, 451 B.R. 527, 536 (Bankr. D. Nev. 2011). However, notwithstanding the business judgment rule, a debtor does not have unfettered freedom to do what it wishes. *See In re Pilgrim's Pride Corp.*, 403 B.R. 413, 426 (Bankr. N.D. Tex. 2009) ("[A]s a fiduciary holding its estate in trust and responsible to the court, a debtor in possession must administer its case and conduct its business in a fashion amenable to the scrutiny to be expected from creditor and court oversight.").

B. ISSUES WITH THE SETTLEMENT

18. Objectors believe that the following issues are not explained or addressed in the Motion and, thus, the Motion should be denied:

- a) The settlement represents a radical change in the Debtor's position that was set forth in its Disclosure Statement. While the Debtor asserts that its position is

based on its fear of parties' oral testimony, the size of the transactions at issue make the case a document case, as opposed to who said what, when and how. A review of the applicable documents to determine whether they support the Debtor's initial position is warranted, as opposed to stating that the case is based upon the credibility of a witness. This settlement is not the settlement of an automobile accident where the parties are disputing who ran a red light;

- b) The settlement requires HarbourVest to support and vote in favor of the Debtor's Plan. On its face this appears to be vote buying. The settlement should not be conditioned upon HarbourVest's support or non-support of the Plan and its vote in favor or against the Plan; and
- c) No information is provided as to whether the Debtor can acquire the interest in HCLOF, liquidate the interest, who will receive the interest, or how will the estate benefit from the interest to be acquired.

CONCLUSION

The settlement with HarbourVest has too many questions to be approved on the record before this Court and the parties, due to the Notice of the Motion, the holidays and the press of other litigation in this case, do not have the time to adequately investigate the propriety of the settlement.

January 8, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that on the 8th day of January, 2021, a copy of the above and foregoing *Objection To Debtor's Motion For Entry Of An Order Approving Settlement With Harbourvest (Claim Nos. 143, 147, 149, 150, 153, 154) And Authorizing Actions Consistent Therewith* has been served electronically to all parties entitled to receive electronic notice in this matter through the Court's ECF system as follows:

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APPENDIX 11

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ATTORNEYS FOR CLO HOLDCO, LTD.

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

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

CLO HOLDCO, LTD.'S OBJECTION TO HARBOURVEST SETTLEMENT

TO THE HONORABLE STACEY G. JERNIGAN, U.S. BANKRUPTCY JUDGE:

CLO Holdco, Ltd. ("**CLO Holdco**") respectfully files this *Objection to Harbourvest Settlement* (the "**Harbourvest Settlement Objection**") which seeks entry of an order from this Court denying the Debtor's *Motion for Entry of an Order Approving Settlement with Harbourvest (Claims Nos. 143, 147, 149, 150, 153, 154) and Authorizing Actions Consistent Therewith* (the "**Harbourvest Settlement Motion**") for the reasons stated below. In support of the Harbourvest Settlement Objection, CLO Holdco respectfully states as follows:

I.
BACKGROUND

A. TRANSFERRING SHARES IN HCLOF



3. Section 6 of the Member Agreement addresses the "Transfer or Disposals of Shares." MEMBER AGREEMENT, § 6. The Member Agreement places strict restrictions on the sale or transfer of shares to entities other than the initial Member's own affiliates. *See id.* at §§ 6.1, 6.2. Before a Member can transfer its interests to a party other than its own affiliates it must: (i) obtain the prior written consent of the Portfolio Manager; and (ii) "offer to the other Members a right to purchase the Shares, on a pro rata basis with respect to their current Shares, at the same price (which must be cash) as such Shares are proposed to be purchased by the prospective third party purchaser pursuant to an irrevocable offer letter" (the "**Right of First Refusal**"). *Id.* As further stated in section 6.2 of the Member Agreement, "The other Members will have 30 days following receipt of the letter to determine whether to purchase their entire pro rata portion of the Shares proposed to be 'Transferred.'" *Id.* at § 6.2.

4. On December 23, 2020, the Debtor filed the Harbourvest Settlement Motion. On the following day, the Debtor filed a copy of the Settlement Agreement referenced in the

Harbourvest Settlement Motion (the "**Settlement Agreement**") [Dkt. No. 3]. In the Settlement Agreement, Harbourvest represents and warrants that it is authorized to transfer its interest in HCLOF to the Transferee, HCMLP Investments, LLC (the "**Transferee**"). SETTLEMENT AGREEMENT, Ex. A. § 3. Further, the Transferee and Debtor agree to be bound by the terms and conditions of the Member Agreement. *Id.* at § 1.c.

5. In exchange for conveniently classified allowed claims under the Debtor's *Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.* (the "**Plan**") [Dkt. No. 1472], Harbourvest agrees to vote in favor of the Plan and to transfer all of its interests in HCLOF to the Transferee. SETTLEMENT AGREEMENT, § 1.

6. As detailed below, CLO Holdco objects to the Harbourvest Settlement Motion because Harbourvest has no authority to transfer its interests in HCLOF without first complying with the Right of First Refusal. The only way to effectuate such a transfer without first providing other members the Right of First Refusal is an intentionally inaccurate interpretation of the Member Agreement's contractual provisions that would render specific passages redundant and meaningless. More simply put, the only way Harbourvest and the Debtor could effectuate the Settlement Agreement is by violating fundamental tenets of contract interpretation.

II.

ARGUMENTS AND AUTHORITIES

A. CONTRACT INTERPRETATION – AVOIDING REDUNDANCIES AND SURPLUS LANGUAGE

7. The Fifth Circuit recognizes fundamental tenets of contract interpretation, and notes that "contracts should be read as a whole, viewing particular language in the context in which it appears. *Woolley v. Clifford Chance Rogers & Wells, L.L.P.*, 51 F. App'x 930 (5th Cir. 2002) (citing Restatement (Second) of Contracts § 202 (1981)). The Fifth Circuit has applied substantially the same tenets of contract interpretation across the laws of various jurisdictions, and consistently reasons that "[a]ll parts of the agreement are to be reconciled, if possible, in order to avoid an

B. ANALYZING THE MEMBER AGREEMENT

No Member shall sell, pledge, charge, mortgage, assign, assign by way of security, transfer, convey, exchange or otherwise dispose of its Shares or its commitment to settle purchases of Shares under the Subscription and Transfer Agreement (each a "Transfer"), other than to an Affiliate of an initial Member party hereto, without the prior written consent of the Portfolio Manager...

000530

should not be discarded as mere surplusage, and the Member Agreement should be interpreted in a manner that gives weight to that provision. *Hawthorne Land*, 309 F.3d at 892-93.

13. If the Member Agreement is read to literally allow all "Transfers to Affiliates of an initial Member" there would be no reason to expressly set forth allowed transfers between specific Members and other Member's Affiliates. If the Member Agreement sought to list all allowed transfers between Members and their Affiliates, it should have similarly noted that any Member could transfer its interest to any Harbourvest Member entity, as each Harbourvest Member entity is an Affiliate of the other Harbourvest Member entities. Alternatively, if the specific enumeration of CLO Holdco and the Highland Principals' transfer rights was surplusage, it would presumably have listed other parties' rights, or had inclusive language such as "including but not limited to" or "for example." The Member Agreement lacks such language and, as a result, should be interpreted in a manner that both gives weight to the specific provision while reconciling other provisions of the contract.

(ii) Absurd Results – Disparate Transfer Rights Between Members

14. Note that the Member Agreement does not generally allow a transfer of interests from Member to Member unless specifically enumerated. Section 6.2 specifically allows only CLO Holdco and the Highland Principals to make transfers to other Members, but those other Members include only the Debtor or another Highland Principal. MEMBER AGREEMENT, § 6.2. It does not allow the Debtor to transfer interests to any Member, and does not expressly allow any Member, other than limited transfers by CLO Holdco and the Highland Principals, to transfer interests to any other Member. *Id.* For instance, if the Debtor wished to transfer its interests to CLO Holdco, it would first have to offer all of the other Members their Right of First Refusal. *Id.*

15. Similarly, if Harbourvest wished to transfer its interest to CLO Holdco, it could not do so without first providing the Right of First Refusal to all other Members. *Id.* As noted above,

however, allowing a Member to transfer its interest to an Affiliate of any initial Member would allow all of the Members to transfer their interests to any Harbourvest Member entity, as the Harbourvest Members are Affiliates of each other. Given the specific enumeration of CLO Holdco and the Highland Principals' rights to inter-Member transfers, it would be inconsistent to expand that specific provision to allow all transfers by all Members to any Harbourvest entity without first providing a Right of First Refusal.

16. Such a reading would lead to absurd results. It would grant similarly situated Members profoundly disparate rights under the agreement, and could easily lead to manipulation. For instance, because the Harbourvest Members are technically Affiliates of an initial Member (each other), they could obtain control of all of the interests in HCLOF without any Member receiving a Right of First Refusal for any transfer. No other Member could do that. For instance, if CLO Holdco wished to acquire other Members' interests, the transferring member (including Harbourvest) would have to offer a Right of First Refusal in every instance. To resolve that potential disparate treatment—though CLO Holdco and Harbourvest own nearly identical ownership interests in HCLOF—CLO Holdco would have to form an Affiliate and acquire interests through the Affiliate. That simply cannot be the intended result of the Member Agreement.

17. Instead, the Member Agreement must be read to require Harbourvest to provide a Right of First Refusal to the other Members of HCLOF before transferring its interests to either the Debtor or the Transferee.

C. THE RIGHT OF FIRST REFUSAL IN BANKRUPTCY

18. Most cases addressing third party rights of first refusal in bankruptcy involve the assignment of leases and landlords' rights of first refusal. In those cases, courts analyze whether such a provision in the debtor's contract is a defacto restriction on assignment that may be excised

or enforce a settlement where the parties were subject to conditions precedent before the settlement could be effective, and the conditions precedent were not satisfied. This Court should similarly deny Harbourvest's proposed settlement, as it would deny the Members' Right of First Refusal, which is the benefit of their bargain under the Member Agreement.

**III.
PRAYER FOR RELIEF**

WHEREFORE, CLO Holdco requests that this Court grant the Objection and enter an order denying the Harbourvest Settlement Motion.

DATED: January 8, 2020

Respectfully submitted,

KANE RUSSELL COLEMAN LOGAN PC

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ATTORNEYS FOR CLO HOLDCO, LTD.

APPENDIX 12

28(a), applicable pursuant to Bankruptcy Rule 7028. The testimony at the deposition may be recorded by videographic and/or stenographic means. You are invited to participate to the extent permitted by the Federal Rules and the Bankruptcy Rules. Any party who plans to attend must contact undersigned counsel, counsel for HarbourVest, and counsel for the Debtor at least 24 hours in advance of the deposition and identify the person(s) who will be attending.

NOTICE IS FURTHER GIVEN that the deposition shall be conducted utilizing Zoom, a secure web-based platform to provide remote access for those parties attending the deposition or wishing to participate in the deposition via the internet and/or telephone. Accordingly, the court reporter may be remote for the purposes of reporting the proceeding and may not be in the presence of the deponent. Necessary credentials, call-in numbers, and testing information has been provided to you, or will be provided to you, by email, or shall be arranged as agreed to by the parties. In addition, Dondero also reserves the right to utilize instant visual display technology such that the court reporter's writing of the proceeding will be displayed simultaneous to their writing of same on one's laptop, iPad, tablet, or other type of display device connected to the court reporter.

This Notice will remain in effect until the deposition is fully completed. You are invited to attend and examine as you see fit.

APPENDIX 13

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

In re:)	
	)	Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P., ¹)	
	)	Case No. 19-34054-sgj11
)	
Debtor.	)	Re: Docket Nos. 1625, 1697, 1706,
	)	1707

**DEBTOR'S OMNIBUS REPLY IN SUPPORT OF DEBTOR'S MOTION FOR
ENTRY OF AN ORDER APPROVING SETTLEMENT WITH HARBOURVEST
(CLAIM NOS. 143, 147, 149, 150, 153, 154), AND AUTHORIZING ACTIONS
CONSISTENT THEREWITH**

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



1. If granted, the Motion will resolve a \$300 million general unsecured claim against the Debtor's estate for less than \$16.8 million in actual value.³ The settlement is another solid achievement for the Debtor and – not surprisingly – is opposed by no one except Mr. Dondero and entities affiliated with him.

2. As discussed in the Motion, in November 2017, HarbourVest invested \$80 million in exchange for a 49.98% membership interest in HCLOF – an entity managed by a subsidiary of the Debtor. The balance of HCLOF’s interests are held by CLO Holdco, Ltd. (an entity affiliated with Mr. Dondero), the Debtor, and certain of the Debtor’s employees. Subsequent to its investment in HCLOF, HarbourVest incurred substantial losses on its investment in HCLOF and filed claims against the Debtor’s estate.

3. HarbourVest asserts claims for fraud, fraudulent inducement, fraudulent concealment, fraudulent misrepresentation, negligent misrepresentation, breach of fiduciary duty

² All capitalized terms used but not defined herein have the meanings given to them in the Motion.

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7. In distinction, the only objecting parties are Mr. Dondero, his family trusts (the Dugaboy Investment Trust (“Dugaboy”) and Get Good Trust (“Get Good,” and together with Dugaboy, the “Trusts”)), and CLO Holdco (a wholly-owned subsidiary of Mr. Dondero’s Charitable Donor Advised Fund, L.P. (the “DAF”)) (collectively, the “Objectors”). Each of the Objectors has only the most tenuous economic interest in and connection to the Debtor’s settlement with HarbourVest. Each of the Objectors is also controlled directly or indirectly by Mr. Dondero who has coordinated each of the Objectors litigation strategies against the Debtor.⁴ Mr. Dondero’s efforts to litigate every issue in this case – directly and by proxy – should be rebuffed, and the objections overruled. The following is a brief summary of the objections.

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<u>Pleading</u>	<u>Objection/Reservation</u>	<u>Response</u>
<i>Objection of James Dondero</i> [Docket No. 1697] (the “ <u>Dondero Objection</u> ”)	Because HarbourVest was damaged by the injunction entered in Acis, the settlement seeks to revisit this Court’s rulings in Acis.	Mr. Dondero is misdirecting the Court. HarbourVest’s claim arises from the misrepresentations of Mr. Dondero, Mr. Ellington, and others, not this Court’s rulings in Acis, including the failure to disclose the fraudulent transfer of assets.
	The settlement is not fair and equitable because it does not address (1) Acis’s mismanagement, (2) how the Debtor is liable for HarbourVest’s damages, (3) the success on the merits, (4) the costs of litigation, and (5) the Debtor’s ability to realize the value of the HCLOF interests in light of the Acis injunction.	Mr. Dondero ignores the dangers of the litigation and HarbourVest’s claims against the estate for misrepresentation and overestimates the ability to resolve the litigation. The Debtor has assessed the value of the HCLOF interests in light of all factors, including the Acis injunction.
	The HarbourVest settlement represents a substantial windfall to HarbourVest.	Mr. Dondero ignores the economics of this case, which have value breaking in Class 8 (General Unsecured Claims). The value of the settlement is not \$60 million; it is approximately \$16.8 million against a claim of \$300 million. There is no windfall.
	The HarbourVest settlement is improper gerrymandering because it provides HarbourVest with a general unsecured claim and a subordinated claim in order to secure votes for the plan.	The HarbourVest settlement provides for the resolution of HarbourVest’s claim. It is nonsensical to think that the Debtor would reach a settlement with HarbourVest that would include HarbourVest’s rejection of the Debtor’s plan, and there is nothing wrong with requiring acceptance of a plan as part of a settlement. Further, the Debtor does not need HarbourVest’s Class 9 vote to confirm a plan.
<i>Objection of the Dugaboy Investment Trust and Get Good Trust</i> [Docket No. 1706] (the “ <u>Trusts Objection</u> ”)	The settlement represents a radical change in the Debtor’s earlier position on the HarbourVest settlement.	Mr. Dondero ignores the dangers of the litigation and HarbourVest’s claims against the estate for misrepresentation and overestimates the ability to resolve the litigation.
	The settlement appears to buy HarbourVest’s vote.	The HarbourVest settlement provides for the resolution of HarbourVest’s claim. It is nonsensical to think that the Debtor would reach a settlement with HarbourVest that would include HarbourVest’s rejection of the Debtor’s plan, and there is nothing wrong with requiring acceptance of a plan as part of a settlement. Further, the Debtor does not need HarbourVest’s Class 9 vote to confirm a plan.
	No information is provided as to whether the Debtor can acquire HarbourVest’s interest in HCLOF or the value of that interest to the estate.	As discussed below, the HCLOF interest will be transferred to a wholly-owned subsidiary of the Debtor. Mr. Seery will testify as to the benefit of the HCLOF interests to the estate.
<i>Objection of CLO Holdco</i> [Docket No. 1707] (“ <u>CLOH Objection</u> ”)	HarbourVest cannot transfer its interests in HCLOF unless it complies with the right of first refusal.	CLO Holdco misinterprets the operative agreements and tries to create ambiguity where none exists.

⁶ (1) *James Dondero's Objection to Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.* [Docket No. 1661]; (2) *Objection to Confirmation of the Debtor's Fifth Amended Plan of Reorganization (filed by Get Good Trust, The Dugaboy Investment Trust)* [Docket No. 1667]; (3) *Senior Employees' Limited Objection to Debtor's Fifth Amended Plan of Reorganization (filed by Scott Ellington, Thomas Surgent, Frank Waterhouse, Isaac Leventon)* [Docket No. 1669]; (4) *Objection to Confirmation of Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (filed by Highland Capital Management Fund Advisors, L.P., Highland Fixed Income Fund, Highland Funds I and its series, Highland Funds II and its series, Highland Global Allocation Fund, Highland Healthcare Opportunities Fund, Highland Income Fund, Highland Merger Arbitrage Fund, Highland Opportunistic Credit Fund, Highland Small-Cap Equity Fund, Highland Socially Responsible Equity Fund, Highland Total Return Fund, Highland/iBoxx Senior Loan ETF, NexPoint Advisors, L.P., NexPoint Capital, Inc., NexPoint Real Estate Strategies Fund, NexPoint Strategic Opportunities Fund)* [Docket No. 1670]; (5) *NexPoint Real Estate Partners LLC's Objection to Debtor's Fifth Amended Plan of Reorganization (filed by NexPoint Real Estate Partners LLC f/k/a HCRE Partners LLC)* [Docket No. 1673]; (6) *CLO Holdco, Ltd.'s Joinder to Objection to Confirmation of Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. and Supplemental Objections to Plan Confirmation* [Docket No. 1675]; and (7) *NexBank's Objection to Debtor's Fifth Amended Plan of Reorganization (filed by NexBank Title, Inc., NexBank Securities, Inc., NexBank Capital, Inc., and NexBank)* [Docket No. 1676].

for its postpetition mismanagement of the Highland Multi Strategy Credit Fund, L.P., and (2) this Court should pierce the corporate veil and allow Dugaboy to sue the Debtor for a claim it ostensibly has against the Highland Select Equity Master Fund, L.P. – a Debtor-managed investment vehicle. The Debtor believes that each of the foregoing claims is frivolous and has objected to them. [Docket No. 906].

12. In its third claim, Dugaboy asserts a claim against the Debtor arising from its Class A limited partnership interest in the Debtor (which represents just 0.1866% of the total limited partnership interests in the Debtor). Similarly, Get Good filed three proofs of claim [Claim Nos. 120; 128; 129] arising from its prior ownership of limited partnership interests in the Debtor. Because each these claims arises from an equity interest, the Debtor will seek to subordinate them under 11 U.S.C. § 510 at the appropriate time. As set forth above, these interests are out of the money and are not expected to receive any economic recovery.

13. Consequently, Mr. Dondero, Dugaboy, and Get Good’s standing to object to the HarbourVest settlement is attenuated and their chances of recovery in this case are extremely speculative at best. *See In re Kutner*, 3 B.R. 422, 425 (Bankr. N.D. Tex. 1980) (finding that a party had standing only when it had a “pecuniary interest . . . directly affected by the bankruptcy proceeding”); *see also In re Flintkote Co.*, 486 B.R. 99, 114-15 (Bankr. D. Del. 2012), *aff’d*, 526 B.R. 515 (D. Del. 2014) (a claim that is speculative cannot confer party in interest standing). Mr. Dondero, Dugaboy, and Get Good’s minimal interest in the estate should not allow them to overrule the estate’s business judgment or veto settlements with creditors, especially when no actual creditors and constituents have objected. “[A] bankruptcy judge must not blindly follow the hue and cry of the most vocal special interest groups; rather, [the judge] should consider all salient factors . . . and . . . act to further the diverse interests of the debtor, creditors and equity

holders, alike.” *In re Lionel*, 722 F.2d 1063, 1071 (2d Cir. 1983).

B. Mr. Dondero’s Objection and his “Trusts” Objection Are Without Merit

14. As discussed in the Motion, under applicable Fifth Circuit precedent, a bankruptcy court may approve a compromise or settlement as long as the proposed settlement is fair, reasonable, and in the best interest of the estate. *See, e.g., In re Age Ref. Inc.*, 801 F.3d 530, 540 (5th Cir. 2015). In making this determination, courts look to the following factors:

- probability of success in the litigation, with due consideration for the uncertainty of law and fact;
- complexity and likely duration of the litigation and any attendant expense, inconvenience and delay; and
- all other factors bearing on the wisdom of the compromise, including (i) “the paramount interest of creditors with proper deference to their reasonable views” and (ii) whether the settlement is the product of arm’s length bargaining and not of fraud or collusion.

Official Comm. of Unsecured Creditors v. Cajun Elec. Power Coop. (In re Cajun Elec. Power Coop.), 119 F.3d 349, 356 (5th Cir. 1997) (citations omitted). *See also Age Ref. Inc.*, 801 F.3d at 540; *Conn. Gen. Life Ins. Co. v. United Cos. Fin. Corp. (In re Foster Mortgage Corp.)*, 68 F.3d 914, 918 (5th Cir. 1995).

15. **The Settlement Seeks to Revisit the Acis Orders.** In the Dondero Objection, Mr. Dondero argues that HarbourVest’s claim is based on the financial harm caused to HarbourVest from Acis’s bankruptcy and the orders entered in the Acis bankruptcy. Mr. Dondero extrapolates from this that HarbourVest is seeking to challenge this Court’s rulings in Acis. (Dondero Obj., ¶¶ 17-20) Mr. Dondero misinterprets HarbourVest’s claims and the dangers such claims pose to the Debtor’s estate.

16. HarbourVest’s claims are for fraud, fraudulent inducement, fraudulent concealment, fraudulent misrepresentation, negligent misrepresentation, breach of fiduciary duty

and unfair prejudice (under Guernsey law), violations of state securities laws, and RICO. HarbourVest is not arguing that Acis or this Court caused its damages; HarbourVest is arguing that *the Debtor* – led by Mr. Dondero – (a) misled HarbourVest as to the nature of Mr. Terry’s claims against the Debtor and the litigation with Acis, (b) knowingly and intentionally failed to disclose that the Debtor was engaged in the fraudulent transfer of assets to prevent Mr. Terry from collecting his judgment, and (c) that *the Debtor* – under the control of Mr. Dondero – improperly engaged in a crusade against Mr. Terry and Acis, which substantially damaged HarbourVest and its investment in HCLOF, in each case in order to induce HarbourVest to invest in HCLOF.

17. Again, HarbourVest does not contend that Acis caused its damages. Rather, HarbourVest contends that the fraudulent transfer of assets as part of the Debtor’s crusade against Mr. Terry and Acis and the false statements and omissions about those matters caused HarbourVest to make an investment it would never have made had Mr. Dondero and the Debtor been honest and transparent. The Acis litigation – in HarbourVest’s estimation – never should have happened. Acis did not cause HarbourVest’s damages. Mr. Dondero’s crusade against Mr. Terry and the Debtor’s allegedly fraudulent statements to HarbourVest about the fraudulent transfers, Mr. Terry and Acis caused HarbourVest’s damages.

18. **The HarbourVest Claim Lacks Merit.** In their objections, Mr. Dondero and the Trusts argue that the HarbourVest settlement is not fair and equitable and not in the best interests of the estate because (a) it does not address the Debtor’s arguments against the HarbourVest claims and (b) there is a lack of pending litigation seeking to narrow the claims against the estate. These arguments only summarily address the first two factors of *Cajun Electric*, which deal with success in the litigation, and, in doing so, mischaracterize the dangers to the Debtor’s estate

the truth. This is especially true in light of the evidence supporting Mr. Ellington's recent termination for cause and the evidence recently provided by HarbourVest supporting its claim for fraudulent misrepresentations.

21. Finally, neither Mr. Dondero nor the "Trusts" even address the third factor analyzed by the Fifth Circuit: all other factors bearing on the wisdom of the compromise, including "the paramount interest of creditors with proper deference to their reasonable views." This is telling because no creditor or party in interest has objected to the settlement. Mr. Dondero and his proxies' preference for constant litigation should not outweigh the preference of the Debtor and its creditors for a reasonable and expeditious settlement of HarbourVest's claims.

22. **The HarbourVest Settlement Is a Windfall to HarbourVest.** Both the Dondero Objection and the "Trusts" Objection argue that the HarbourVest settlement represents a substantial windfall to HarbourVest. Both Mr. Dondero and the "Trusts" ignore the facts. Specifically, Mr. Dondero argues that HarbourVest is receiving \$60 million dollars in *actual* value for its claims. Mr. Dondero's contention, however, wrongly assumes that both the \$45 million general unsecured claim and the \$35 million subordinated claim provided to HarbourVest under the settlement will be paid 100% in full and that HarbourVest will receive \$80 million in cash. From that \$80 million, Mr. Dondero subtracts \$20 million, which represents the value Mr. Dondero ascribes to HarbourVest's interests in HCLOF that are being transferred to the Debtor. Mr. Dondero's math ignores the reality of this case.

23. The Debtor very clearly disclosed in the projections filed with the *Disclosure Statement for the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.*, [Docket No. 1473] (the "Projections") that general unsecured claims would receive an 87.44% recovery *only if* the claims of UBS, HarbourVest, Integrated Financial Associates, Inc., Mr.

Daugherty, and the Hunter Mountain Investment Trust were zero. Because of the Debtor's success in settling litigation, that assumption is proving to be inaccurate. Regardless, even if general unsecured claims receive a recovery of 87.44%, because the subordinated claims are junior to the general unsecured claims, the subordinated claims' projected recovery is currently zero. As such, assuming the HCLOF's interests are worth \$22.5 million,¹⁰ the actual recovery to HarbourVest will be less than \$16.8 million. This is not a windfall. HarbourVest's investment in HCLOF was \$80 million and its claim against the estate was over \$300 million. The settlement represents a substantial discount.

24. **Improper Gerrymandering and/or Vote Buying.** Each of Mr. Dondero and the Trusts argue in one form or another that the HarbourVest settlement is improper as it provides HarbourVest a windfall on its claims in exchange for HarbourVest voting to approve the Plan. These unsubstantiated allegations of vote buying should be disregarded. As an initial matter, and as set forth above, HarbourVest is *not* getting a windfall. HarbourVest is accepting a substantial discount in the settlement. HarbourVest's incentive to support the Plan comes from HarbourVest's determination that the Plan is in its best interests. There is also nothing shocking about a settling creditor supporting a plan. Indeed, it would be nonsensical for a creditor to settle its claims and then object to the plan that would pay those claims.

25. More importantly, HarbourVest's votes in Class 9 (Subordinated Claims) are not needed to confirm the Plan. As will be set forth in the voting declaration, Class 2 (Frontier Secured Claim), Class 7 (Convenience Claims), and Class 8 (General Unsecured Claims) have voted in favor of the Plan.¹¹ In brief, the Plan was approved without HarbourVest's Class 9 vote,

¹⁰ It is currently anticipated that Mr. James P. Seery, Jr., the Debtor's chief executive officer and chief restructuring officer, will testify as to the value of the HCLOF interests to the Debtor's estate.

¹¹ The Debtor anticipates that Mr. Dondero and his related entities will argue that neither Class 7 nor Class 8 voted to accept the Plan because of the votes cast against the Plan in those Classes by current and former Debtor

of Shares) of the Members Agreement (an agreement governed by Guernsey law). (CLOH Obj., ¶ 3) The parties diverge, however, as to how to interpret Article 6. The Debtor, as set forth below, believes Article 6 is clear in that it allows HarbourVest to transfer its interests in HCLOF to any “Affiliate of an initial Member party” without requiring the right of first refusal in Section 6.2 of the Members Agreement. CLO Holdco’s position appears to be that the Members Agreement, despite its clear language, should be interpreted as limiting transfers to an “initial Member’s *own* affiliates” and that any other transfer requires the consent of HHCFA and satisfaction of the right of first refusal. (*Id.* (emphasis added)) CLO Holdco’s reading is contrary to the actual language of the Members Agreement.

29. First, Section 6.1 of the Members Agreement provides, in pertinent part:

[REDACTED]

(Members Agmt, § 6.1 (emphasis added)) Under the Members Agreement, “Affiliate” is defined, in pertinent part, as “[REDACTED]

[REDACTED]

(*Id.*, § 1.1) A “Member” in turn is a [REDACTED].” The “initial Member[s]” are the initial Members of HCLOF listed on the first page of the Members Agreement and include the Debtor, HarbourVest, and CLO Holdco.

30. As such, under the plain language of Section 6.1, HarbourVest is entitled – without the consent of any party – to “Transfer” its interests in HCLOF to an “Affiliate” of any of the Debtor, HarbourVest, or CLO Holdco. And that is exactly what is contemplated by the settlement. HarbourVest is transferring its interests to HCMLPI, a wholly owned and controlled subsidiary of the Debtor, and therefore an “Affiliate” of the Debtor. That transfer is indisputably

allowed under Section 6.1; it is a transfer to an “Affiliate of an initial Member.” CLO Holdco may, tongue in cheek, call this structure “convenient” but that sarcasm is an attempt to avoid the fact that the Members Agreement clearly allows HarbourVest to transfer its interest to HCMLPI without the consent of any party.¹³ The fact that CLO Holdco does not now like the language it previously agreed to when CLO Holdco and the Debtor were both controlled by Mr. Dondero is not a reason to re-write Section 6.1 of the Members Agreement.

31. Second, Section 6.2 of the Members Agreement is also unambiguous and, by its plain language, allows HarbourVest to “Transfer” its interests in HCLOF to “Affiliates of an initial Member” (*i.e.*, HCMLPI) without having to first offer those interests to the other Members (such obligation, the “ROFO”). CLO Holdco attempts to create ambiguity in Section 6.2 by arguing that it must be read in conjunction with Section 6.1 and that interpreting the plain language of Section 6.2 to allow HarbourVest to transfer its interests to HCMLPI without restriction makes certain other language surplus and meaningless. (CLOH Obj., ¶ 11-13) Again, CLO Holdco is attempting to create controversy and ambiguity where none exists.

32. Section 6.2 of the Members Agreement provides, in pertinent part:

[REDACTED]

(Members Agmt., § 6.2 (emphasis added)) Like Section 6.1, Section 6.2 is clear on its face. It exempts from the requirement to comply with the ROFO two categories of “Transfers”: (1) Transfers to “affiliates of an initial Member” from Members *other than* CLO Holdco and the

¹³ Although HHCFA’s consent is not necessary for HarbourVest to transfer its interests to HCMLPI, HHCFA will consent to the transfer.

“Highland Principals” (*i.e.*, the Debtor and certain of its employees)¹⁴ and (2) Transfers from CLO Holdco or a Highland Principal to the Debtor, the Debtor’s “Affiliates,” or another Highland Principal. The fact that a narrower exemption is provided to CLO Holdco and the Debtor than to HarbourVest (or any other Member) under Section 6.2 is of no moment; the language says what it says and was agreed to by all Members, including CLO Holdco, when they executed the Members Agreement.

33. In addition, and although not relevant, the language of Section 6.2 makes sense in the context of the deal. Although CLO Holdco and the Debtor may have disclaimed an “Affiliate” relationship, they are related through Mr. Dondero and invest side by side with the Debtor in multiple deals.¹⁵ The different standards in Section 6.2 serve to ensure that HarbourVest’s (or any successor to HarbourVest) right to Transfer its shares without satisfying the ROFO is limited to three parties: (i) HarbourVest’s Affiliates, (ii) the Debtor’s Affiliates, and (iii) CLO Holdco’s Affiliates. This restriction keeps the relative voting power of each Member static and ensures that CLO Holdco and the Debtor, together, will *always* have more than fifty percent of HCLOF’s total interests and that HarbourVest will *always* have less than fifty percent. This counterintuitively also explains the greater restrictions placed on CLO Holdco and the “Highland Principals.” The Highland Principals include certain Debtor employees. Those employees – as well as CLO Holdco and the Debtor – are prohibited from transferring their HCLOF interests outside of the Dondero family. This restriction makes sense. If, for example, a Debtor employee wanted to transfer its interests to an Affiliate of HarbourVest, HarbourVest could have more than fifty percent of the HCLOF interests because of the thinness

¹⁴ “Highland Principals” means:

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] (Members Agmt., § 1.1)

¹⁵ There can be no real dispute that Mr. Dondero effectively controls CLO Holdco.

of the Dondero-family's majority (approximately 0.2%). At the time the Members Agreement was executed, CLO Holdco and the Debtor were under common control. Section 6.2 preserves those related entities' control over HCLOF by restricting transactions that would transfer that control unless the ROFO is complied with.

34. As such, and notwithstanding CLO Holdco's protestations, Section 6.1 and Section 6.2 are consistent as written and clear on their face. This consistency is further evidenced by HCLOF's Articles of Incorporation¹⁶ and HCLOF's offering memorandum, which each include language identical to Section 6.1 and 6.2 of the Members Agreement.¹⁷ It seems highly unlikely, if not implausible, that sophisticated parties such as CLO Holdco would include the exact same language in six separate places over three documents without a reason for that language and without the intent that such language be interpreted as it is clearly written – not as CLO Holdco now wants it to be interpreted. Accordingly, since HarbourVest is transferring its interests to HCMLPI, an Affiliate of an initial Member, the plain language of Section 6.2

¹⁶ See Articles of Incorporation, adopted November 15, 2017, a true and correct copy of which is attached hereto as Exhibit B.

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
(Articles of Incorporation, § 18.1)

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
(*Id.*, § 18.2)

¹⁷ See Offering Memorandum, dated November 15, 2017, a true and correct copy of which is attached hereto as Exhibit C.

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
(Offering Memorandum, page 89)

exempts HarbourVest from having to comply with the ROFO.

35. Third, and finally, CLO Holdco makes the nonsensical argument that because Section 6.2 provides different treatment to similarly situated Members that this Court should re-write Section 6.2. (CLOH Obj., ¶¶ 15-17) Contracts provide different treatment to ostensibly similarly situated parties all the time and no one objects that that creates an absurd result. It just means that different parties bargained for and received different rights.

36. CLO Holdco’s attempt to justify why this Court should re-write the Members Agreement to correct the “disparate treatment” is also unavailing. As an example of the absurd result caused by the “disparate treatment,” CLO Holdco states: “[B]ecause the HarbourVest Members are technically Affiliates of an initial member (each other), they could obtain control of all of the interests in HCLOF without any Member receiving a Right of First Refusal for any transfer.” (*Id.*, ¶ 16) The scenario posited by CLO Holdco, however, is *exactly* the scenario prevented by the clear language of Section 6.2. For HarbourVest to obtain control of HCLOF, it would – as a matter of mathematical necessity – need the interests held by CLO Holdco (49.02%) and/or the Highland Principals (1% in the aggregate). Section 6.2, however, *expressly* prohibits CLO Holdco and the Highland Principals from transferring their interests to HarbourVest or its Affiliates without satisfying the ROFO. As set forth above, it is Section 6.2 that prevents control from being transferred away from the Dondero family without compliance with the ROFO. In fact, Section 6.2 would only break down if the limiting language in Section 6.2 were read out of it in the manner advocated by CLO Holdco.

37. Ultimately, Article 6 of the Members Agreement is clear as written and expressly allows HarbourVest to transfer its interests to HCMLPI. If CLO Holdco had an objection to the rights provided to HarbourVest under the Members Agreement, CLO Holdco

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APPENDIX 14

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

In Re:) **Case No. 19-34054-sgj-11**
HIGHLAND CAPITAL) Chapter 11
MANAGEMENT, L.P.,) Dallas, Texas
Debtor.) Thursday, January 14, 2021
9:30 a.m. Docket
- MOTION TO PREPAY LOAN
[1590]
- MOTION TO COMPROMISE
CONTROVERSY [1625]
- MOTION TO ALLOW CLAIMS OF
HARBOURVEST [1207]

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE STACEY G.C. JERNIGAN,
UNITED STATES BANKRUPTCY JUDGE.

WEBEX APPEARANCES:

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For the Official Committee of Unsecured Creditors: Matthew A. Clemente
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For CLO Holdco, Ltd.: John J. Kane
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3 D. Michael Lynn
4 John Y. Bonds, III
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12 For Get Good Trust and Douglas S. Draper
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25 Proceedings recorded by electronic sound recording;
transcript produced by transcription service.

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1 DALLAS, TEXAS - JANUARY 14, 2021 - 9:41 A.M.

2 THE CLERK: All rise. The United States Bankruptcy
3 Court for the Northern District of Texas, Dallas Division, is
4 now in session, the Honorable Stacey Jernigan presiding.

5 THE COURT: Good morning. Please be seated. All
6 right. We're a little late getting started because we had
7 lots of reading material for the Court today. All right.
8 This is Judge Jernigan, and we have a couple of Highland
9 settings. The HarbourVest matters are the primary thing we
10 have set today, and then we also have a Debtor's motion
11 pursuant to protocols for authority for Highland Multi-Strat
12 to prepay a loan.

13 All right. Well, let's get a few appearances. First, for
14 the Debtor team, who do we have appearing this morning?

15 MR. POMERANTZ: Good morning, Your Honor. It's Jeff
16 Pomerantz, John Morris, and Greg Demo here on behalf of the
17 Debtor.

18 THE COURT: Okay. Thank you.

19 All right. We have objections on HarbourVest. Who do we
20 have appearing for Mr. Dondero this morning?

21 MR. WILSON: Your Honor, it's John Wilson, and I'm
22 also joined by Michael Lynn, John Bonds, and Bryan Assink.

23 THE COURT: Okay. I'm sorry. Could -- the court
24 reporter does yeoman's work in this case. Let me just make
25 sure we got all three of those names. Say again, Mr. Wilson.

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1 MR. WILSON: John Bonds and Michael Lynn and Bryan
2 Assink.

3 THE COURT: Oh, okay. So, see, I thought I heard
4 somebody Wilson in all of that, which was why I was pressing
5 the issue.

6 All right. Is Mr. Dondero present on the video for
7 today's hearing?

8 MR. WILSON: I believe he is, Your Honor.

9 THE COURT: Mr. Dondero, could you confirm that you
10 are out there? (No response.) Okay. My court reporter says
11 he sees the name out there. Is he in your office?

12 MR. WILSON: Your Honor, he is appearing remotely
13 from my office. I'm not sure exactly where he's appearing
14 from.

15 THE COURT: Okay. Well, Mr. Dondero, if you're out
16 there and you're speaking up to confirm you're present, we're
17 not hearing you. Maybe your device is on mute. So please
18 unmute yourself.

19 (No response.)

20 THE COURT: All right. I'm going to take some other
21 appearances and you -- you need to try to communicate with
22 your client and let him know I need to confirm he's present.
23 Okay?

24 All right. Meanwhile, let's go to our other Objectors.
25 CLO Holdco. Who do we have appearing today?

1 MR. KANE: John Kane; Kane Russell Coleman & Logan;
2 on behalf of CLO Holdco.

3 THE COURT: All right. Thank you, Mr. Kane.

4 We had an objection from Dugaboy Investment Trust and Get
5 Good Trust. Who do we have appearing?

6 MR. DRAPER: Douglas Draper, Your Honor, for -- for
7 Draper.

8 THE COURT: All right. Thank you, Mr. Draper.

9 All right. I think those were the only written objections
10 we had. Mr. Pomerantz, do you confirm, we don't have any
11 other objectors for the motions set, correct?

12 MR. POMERANTZ: Your Honor, there was those three.

13 THE COURT: I'm sorry. I didn't catch your full
14 sentence.

15 MR. POMERANTZ: That is correct, Your Honor. There
16 were three objections to the motion.

17 THE COURT: Okay. Mr. Clemente, you're there for the
18 Creditors' Committee?

19 MR. CLEMENTE: Yes. Good morning, Your Honor. Matt
20 Clemente on behalf of the Official Committee of Unsecured
21 Creditors.

22 THE COURT: All right. Good morning. Thank you.
23 All right. We have a lot of other folks on the video. I'm
24 not going to go ahead and take a roll call of other lawyers.

25 MS. WEISGERBER: Your Honor?

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

In Re: Highland Capital Management, L.P § Case No. **19-34054-SGJ11**

Charitable DAF Fund, L.P et al

Appellant

§

vs.

§

21-03067

Highland Capital Management, L.P

§

Appellee

§

3:23-CV-01503-B

[167] Order granting Defendant Highland Capital Management, L.P.'s Renewed motion to dismiss adversary proceeding (related document # [122](#)) Entered on 6/25/2023.

Volume 4

APPELLANT RECORD

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

In re:	§ Chapter 11
	§
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§ Case No. 19-34054-sgj11
	§
Debtor.	§
	§
CHARITABLE DAF FUND, L.P. AND CLO	§
HOLDCO, LTD., DIRECTLY AND DERIVATIVELY	§
	§
Plaintiffs,	§ Adversary Proceeding No.
	§
vs.	§ 21-03067-sgj11
	§
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§
HIGHLAND HCF ADVISOR, LTD., AND	§
HIGHLAND CLO FUNDING LTD., NOMINALLY	§
	§
Defendant.	§
	§

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**APPELLANTS' SECOND AMENDED STATEMENT OF ISSUES
AND DESIGNATION OF RECORD ON APPEAL**

Pursuant to Rules 8009(a)(1)(A)-(B) and (a)(4) of the Federal Rules of Bankruptcy Procedure, The Charitable DAF Fund, L.P. and CLO Holdco, Ltd. ("Appellants") hereby designate the following items to be included in the record and identify the following issues with respect to

their appeal of the Order Granting Defendant Highland Capital Management, L.P.'s "Renewed Motion to Dismiss Complaint" [Adv. Proc. Doc. No. 122] which was entered by the United States Bankruptcy Court for the Northern District of Texas on June 25, 2023.

I. STATEMENT OF ISSUES TO BE PRESENTED ON APPEAL

- Whether the Bankruptcy Court had jurisdiction to rule on Highland Capital Management L.P.'s Renewed Motion to Dismiss Complaint
- Whether the Renewed Motion to Dismiss Complaint was improperly granted

II. DESIGNATION OF ITEMS TO BE INCLUDED IN THE RECORD

Vol. 1
000001

1. Notice of Appeal for Bankruptcy Case Adversary Proceeding No. 21-03067-sgj11 [Doc. 168].

000042

2. The judgment, order, or decree appealed from: Memorandum Opinion and Order Granting Defendant Highland Capital Management, L.P.'s "Renewed Motion to Dismiss Complaint" [Adv. Proc. Doc. No. 122] [Doc. 167].

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3. Docket Sheet kept by the Bankruptcy Clerk.

4. Documents listed below and as described in the Docket Sheet for Bankruptcy Case Proceeding No. 21-03067-sgj.

Vol. 2

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No.	Date Filed	Docket No.	Description/Document Text
1	9/29/21	1	(36 pgs; 3 docs) Adversary case 21-03067. ORDER REFERRING CASE NUMBER 21-CV-0842-B from U.S District Court for the Northern District of Texas, Dallas Division to U.S. Bankruptcy Court for Northern District of Texas, Dallas Division. Complaint by Charitable DAF Fund, LP, CLO Holdco, Ltd. against Highland Capital Management, LP, Highland HCF Advisor Ltd., Highland CLO Funding, Ltd. Fee Amount \$350 (Attachments: # 1 Original Complaint # 2 Docket Sheet from 3:20-cv-0842-B) Nature(s) of suit: 02 (Other (e.g. other actions that would have been brought in state court if unrelated to bankruptcy)). (Okafor, M.)
2	9/29/21	2	(1 pg) Supplemental Document (cover sheet) by CLO Holdco Ltd., Charitable DAF Fund (RE: related document(s)1 Adversary case 21-03067) [ORIGINALLY FILED IN 21-CV-0842 AS #2 ON 04/13/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)

Vol. 2 000139 000232 000239 000270 Thru Vol. 6	3	9/29/21	6	(93 pgs; 6 docs) MOTION for Leave to File First Amended Complaint filed by CLO Holdco Ltd., Charitable DAF Fund LP (Attachments: # 1 Exh 1_First Amended Complaint # 2 Exh 2_Motion for Authorization to Retain James Seery # 3 Exh 3_Order Approving Retention of James Seery # 4 Exh 4_Order Approving Settlement # 5 Proposed Order) (Bridges, Jonathan) (Entered: 04/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #6 ON 04/19/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
	4	9/29/21	22	(7 pgs; 2 docs) MOTION for an Order to Enforce the Order of Reference filed by Highland Capital Management LP. (Attachments: # 1 Exhibit(s) A--Proposed Order) (Annable, Zachery) Modified text on 5/20/2021 (mjr). (Entered: 05/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #22 ON 05/19/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
	5	9/29/21	23	(31 pgs) Brief/Memorandum in Support filed by Highland Capital Management LP re: 22 MOTION for an Order to Enforce the Order of Reference. (Annable, Zachery) Modified text on 5/20/2021 (mjr).(Entered: 05/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #23 ON 05/19/2021 IN U.S.DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
	6	9/29/21	24	(926 pgs; 29 docs) Appendix in Support filed by Highland Capital Management LP re: 23 Brief/Memorandum in Support. (Attachments: # 1 Appendix 1 # 2 Appendix 2 # 3 Appendix 3 # 4 Appendix 4 # 5 Appendix 5 # 6 Appendix 6 # 7 Appendix 7 # 8 Appendix 8 # 9 Appendix 9 # 10 Appendix10 # 11 Appendix 11 # 12 Appendix 12 # 13 Appendix 13 # 14 Appendix 14 # 15 Appendix 15 # 16 Appendix 16 # 17 Appendix 17 # 18 Appendix 18 # 19 Appendix 19 # 20 Appendix 20 # 21 Appendix 21# 22 Appendix 22 # 23 Appendix 23 # 24 Appendix 24 # 25 Appendix 25 # 26 Appendix 26 # 27 Appendix 27 # 28 Appendix 28) (Annable, Zachery) Modified linkage and text on 5/20/2021 (mjr). (Entered:05/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #24 ON 05/19/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
Vol. 7 001196	7	9/29/21	26	(7 pgs; 2 docs) MOTION to Dismiss Complaint filed by Highland Capital Management LP (Attachments: # 1 Exhibit(s) A--Proposed Order) (Annable, Zachery) Modified text on 5/28/2021 (jmg).(Entered: 05/27/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #26 ON 05/27/2021 IN U.S.DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)

Vol. 7 001203 thru Vol. 8	8	9/29/21	28	(508 pgs; 14 docs) Appendix in Support filed by Highland Capital Management LP (Attachments: # 1 Appendix 1 # 2 Appendix 2 # 3 Appendix 3 # 4 Appendix 4 # 5 Appendix 5 # 6 Appendix 6 # 7 Appendix 7 # 8 Appendix 8 # 9 Appendix 9 # 10 Appendix 10 # 11 Appendix 11 # 12 Appendix 12 # 13 Appendix 13) (Annable, Zachery) (Entered: 05/27/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #28 ON 05/27/2021 IN U.S. DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
Vol. 9 001711	9	9/29/21	33	(1 pg) Amended Civil Cover Sheet by CLO Holdco Ltd, Charitable DAF Fund LP. Amendment to 2 Supplemental Document. (Sbaiti, Mazin) Modified text on 6/23/2021 (mjr). (Entered: 06/22/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #33 ON 06/22/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001712	10	9/29/21	36	(26 pgs) RESPONSE filed by CLO Holdco Ltd, Charitable DAF Fund LP re: 22 MOTION for an Order to Enforce the Order of Reference (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #36 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001738	11	9/29/21	37	(22 pgs) Appendix in Support filed by CLO Holdco Ltd, Charitable DAF Fund LP re 36 Response/Objection Response to Motion for an Order to Enforce the Order of Reference (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #37 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001760	12	9/29/21	38	(45 pgs) RESPONSE filed by CLO Holdco Ltd, Charitable DAF Fund LP re: 26 MOTION to Dismiss (Defendant Highland Capital Management, L.P.'s Motion to Dismiss Complaint) (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #38 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001805	13	9/29/21	39	(88 pgs) Appendix in Support filed by CLO Holdco Ltd, Charitable DAF Fund LP re 38 Response/Objection to Defendant Highland Capital Management, L.P.'s Motion to Dismiss Complaint (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #39 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001893	14	9/29/21	42	(12 pgs) REPLY filed by Highland Capital Management LP re: 22 MOTION for an Order to Enforce the Order of Reference (Annable, Zachery) (Entered: 07/13/2021) [ORIGINALLY FILED IN 21-CV-0842AS #42 ON 07/13/2021 IN U.S.

			DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
VOL. 9	15	9/29/21	43 (852 pgs) Appendix in Support filed by Highland Capital Management LP re: 42 Reply. (Annable, Zachery) Modified text on 7/14/2021 (mjr). (Entered: 07/13/2021) [ORIGINALLY FILED IN 21-CV-0842AS #43 ON 07/13/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001905 thru Vol. 13	16	9/29/21	45 (21 pgs) REPLY filed by Highland Capital Management LP re: 26 MOTION to Dismiss (Defendant Highland Capital Management, L.P.'s Motion to Dismiss Complaint) (Annable, Zachery) (Entered: 07/13/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #44 ON 07/13/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002757	17	9/29/21	57 (7 pgs; 2 docs) MOTION to Dismiss and Joinder in Motion to Dismiss of Highland Capital Management, L.P. filed by Highland CLO Funding Ltd. (Attachments: # 1 Proposed Order) Attorney Paul R Bessette added to party Highland CLO Funding Ltd (pty:dft) (Bessette, Paul) (Entered: 08/30/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #57 ON 08/30/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002778	18	9/29/23	58 (12 pgs) Brief/Memorandum in Support filed by Highland CLO Funding Ltd. re 57 MOTION to Dismiss and Joinder in Motion to Dismiss of Highland Capital Management, L.P. (Bessette, Paul) (Entered: 08/30/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #58 ON 08/30/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002785	19	9/29/23	59 (80 pgs; 5 docs) Appendix in Support filed by Highland CLO Funding Ltd re 58 Brief/Memorandum in Support of Motion (Attachments: # 1 Exhibit(s) A - Jackson v Dear # 2 Exhibit(s) B - Prudential Assurance v. Newman # 3 Exhibit(s) C - Harbourvest Settlement Agreement # 4 Exhibit(s) D - Boleat Declaration) (Bessette, Paul) (Entered: 08/30/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #59 ON 08/30/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002797	20	9/29/21	64 (1 pg) ORDER OF REFERENCE: Pursuant to 28 U.S.C. § 157 and this District's Miscellaneous Order No. 33, this case is hereby REFERRED to Judge Stacey G. C. Jernigan of the United States Bankruptcy Court for the Northern District of Texas, Dallas Division, to be adjudicated as a matter related to the consolidated Chapter 11 Bankruptcy of Highland Capital Management, L.P., Chapter 11 Case No.19-34054. (Ordered by Judge Jane J. Boyle
002877			

Vol. 14 002878				on 9/20/2021) (svc) (Entered: 09/20/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #64 ON 09/20/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
	21	10/19/21	66	(5 pgs) Notice of hearing filed by Defendant Highland Capital Management, LP (RE: related document(s) 26 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP, 47 Motion to strike document filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 55 Motion to abate filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) Hearing to be held on 11/23/2021 at 09:30 AM at https://us-courts.webex.com/meet/jerniga for 26 and for 47 and for 55, (Annable, Zachery)
	22	11/22/21	71	(509 pgs; 2 docs) Witness and Exhibit List <i>for Hearing on November 23, 2021</i> filed by Defendant Highland Capital Management, LP (RE: related document(s) 26 Motion to dismiss adversary proceeding). (Attachments: # 1 Exhibits 1-13) (Hayward, Melissa)
Vol. 17 003392 003394 003583 003585 003611	23	11/22/21	72	(2 pgs) Witness List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 26 Motion to dismiss adversary proceeding, 47 Motion to strike (related document(s): 43 Document), 55 Motion to abate (related document(s) 1 Complaint), 69 Motion to abate <i>Plaintiffs' Amended Motion to Stay All Proceedings</i> (related document(s) 55 Motion to abate (related document(s) 1 Complaint))). (Sbaiti, Mazin)
	24	11/22/21	73	(189 pgs; 4 docs) Exhibit List <i>for November 23, 2021 hearing</i> filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 47 Motion to strike (related document(s): 43 Document), 55 Motion to abate (related document(s) 1 Complaint)). (Attachments: # 1 Exhibit 1_Defendant's Memorandum of Law in Support of Motion for Reconsideration # 2 Exhibit 2_Highland Memorandum in Support of Motion to Dismiss # 3 Exhibit 3_Order (I) Confirming Fifth Amended Plan of Reorganization of Highland) (Sbaiti, Mazin)
	25	12/7/21	80	(2 pgs) Order granting Highland CLO Funding, Ltd.'s motion to dismiss adversary as a party with prejudice (related document 57) Entered on 12/7/2021. (Okafor, Marcey) Modified text on 3/11/2022 (Okafor, Marcey).
	26	3/11/22	99	(26 pgs) Memorandum of Opinion and order granting motion to dismiss the adversary proceeding (RE: related document(s) 26 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP). Entered on 3/11/2022 (Okafor, Marcey)
	27	3/11/22	100	(26 pgs) Order granting motion to dismiss adversary proceeding with prejudice (related document #26) Entered on 3/11/2022. (Okafor, Marcey)

Vol. 18 003637	28	3/21/22	104	(29 pgs) Notice of appeal. Fee Amount \$298 filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 100 Order on motion to dismiss adversary proceeding). Appellant Designation due by 04/4/2022. (Sbaiti, Mazin)
003666	29	5/26/22	120	(177 pgs; 2 docs) Support/supplemental document <i>Motion to Supplement Appellate Record</i> filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 111 Appellant designation). (Attachments: # 1 Amended Transcript of January 14, 2021 Hearing) (Sbaiti, Mazin)
003843	30	6/9/22	121	(1 pg) DISTRICT COURT Order: Case 3:22-00695-B is hereby transferred to the docket of the Honorable Judge Jane J. Boyle for consolidation with The Charitable DAF Fund LP, et al. v. Highland Capital Management LP, Case No. 3:21-cv-3129-N. Judge Karen Gren Scholer no longer assigned to case.(RE: related document(s) 86 Notice of appeal filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 104 Notice of appeal filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Entered on 6/9/2022 (Whitaker, Sheniqua) (Entered: 06/10/2022)
003844	31	10/24/22	122	(7 pgs) Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP (Annable, Zachery)
003851	32	10/14/22	123	(31 pgs) Brief in support filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Annable, Zachery)
Vol. 19 003882 Thru Vol 20	33	10/14/22	124	(513 pgs; 15 docs) Support/supplemental document (<i>Appendix in Support of Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7 # 8 Exhibit 8 # 9 Exhibit 9 # 10 Exhibit 10 # 11 Exhibit 11 # 12 Exhibit 12 # 13 Exhibit 13 # 14 Exhibit 14) (Annable, Zachery)
Vol. 21 004395	34	10/27/22	126	(5 pgs) Notice of hearing (<i>Notice of Hearing and Briefing Schedule on Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP). Hearing to be held on 12/8/2022 at 09:30 AM at https://us-courts.webex.com/meet/jerniga for 122. (Annable, Zachery)

Vol. 21 004400 004410 004442 Thru Vol. 22	35	11/18/22	128	(10 pgs) Motion for withdrawal of reference. Fee amount \$188, filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (Sbaiti, Mazin)
	36	11/18/22	129	(32 pgs) Response opposed to (related document(s): 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP) filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Sbaiti, Mazin)
	37	11/18/22	130	(254 pgs; 2 docs) Response opposed to (related document(s): 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP) filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Attachments: # 1 Appendix) (Sbaiti, Mazin)
Vol. 22 004696 004717 004732 004737 004742	38	9/2/22	131	(21 pgs) DISTRICT COURT MEMORANDUM OPINION AND ORDER: The Court REVERSES and REMANDS the bankruptcy court's Motion to Dismiss Order and AFFIRMS the bankruptcy courts Motion to Stay Order. re: appeal on Civil Action number: Case 3:22-00695-B consolidated with 3:21-CV-3129-B, (RE: related document(s) 81 Order on motion to abate, 100 Order on motion to dismiss adversary proceeding). Entered on 9/2/2022 (Whitaker, Sheniqua) (Entered: 11/29/2022)
	39	12/2/22	133	(15 pgs) Reply to (related document(s): 129 Response filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 130 Response filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) filed by Defendant Highland Capital Management, LP. (Annable, Zachery)
	40	12/7/22	135	(5 pgs) Notice of hearing filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP). Hearing to be held on 1/25/2023 at 01:30 PM at https://us-courts.webex.com/meet/jerniga for 122, (Annable, Zachery)
	41	12/7/22	136	(5 pgs) Notice of hearing filed by Defendant Highland Capital Management, LP (RE: related document(s) 128 Motion for withdrawal of reference filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Status Conference to be held on 1/25/2023 at 01:30 PM at https://us-courts.webex.com/meet/jerniga . (Annable, Zachery).
	42	12/9/22	138	(3 pgs) Response opposed to (related document(s): 128 Motion for withdrawal of reference. Fee amount \$188, filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) filed by Defendant Highland Capital Management, LP. (Annable, Zachery)

Vol. 22 004745	43	12/9/22	139	(25 pgs) Brief in support filed by Defendant Highland Capital Management, LP (RE: related document(s) 138 Response). (Annable, Zachery)
Vol. 23 004770	44	12/9/22	140	(280 pgs; 8 docs) Support/supplemental document (<i>Appendix in Support of Highland Capital Management, L.P.'s Response to Renewed Motion to Withdraw the Reference</i>) filed by Defendant Highland Capital Management, LP (RE: related document(s) 138 Response). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7) (Annable, Zachery)
Vol. 24 005050	45	12/16/22	144	(6 pgs) Reply to (related document(s): 138 Response filed by Defendant Highland Capital Management, LP) filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Sbaiti, Mazin)
005056 Thru Vol. 25.	46	1/23/23	145	(514 pgs; 15 docs) Witness and Exhibit List filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7 # 8 Exhibit 8 # 9 Exhibit 9 # 10 Exhibit 10 # 11 Exhibit 11 # 12 Exhibit 12 # 13 Exhibit 13 # 14 Exhibit 14) (Annable, Zachery)
Vol. 26 005570	47	1/23/23	146	(280 pgs; 8 docs) Witness and Exhibit List filed by Defendant Highland Capital Management, LP (RE: related document(s) 128 Motion for withdrawal of reference. Fee amount \$188.). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7) (Annable, Zachery)
Vol. 27 005850	48	1/23/23	147	(221 pgs; 7 docs) Witness and Exhibit List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Attachments: # 1 Exhibit 1_Excerpts from July 14, 2020 Hearing Transcript # 2 Exhibit 2_HCLOF Members Agreement Relating to the Company # 3 Exhibit 3_HarbourVest Settlement Agreement # 4 Exhibit 4_Order Approving Debtor's Settlement with HarbourVest # 5 Exhibit 5_HCLOF Offering # 6 Exhibit 6 Amended and Restated Investment Advisory Agreement) (Sbaiti, Mazin)
006071	49	1/23/23	148	(3 pgs) Witness and Exhibit List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 128 Motion for withdrawal of reference. Fee amount \$188.). (Phillips, Louis)
Vol. 28 006074	50	1/25/23	150	(56 pgs; 2 docs) Amended Witness and Exhibit List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 147 List (witness/exhibit/generic), 149 List (witness/exhibit/generic)). (Attachments: # 1 Exh 7_Testimony of Mark Patrick at June 8, 2021 hearing) (Sbaiti, Mazin)

Vol. 28 006130	51	1/25/23	152	(3 pgs) Notice of Appearance and Request for Notice by Louis M. Phillips filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Phillips, Louis)
	52	1/25/23	154	(1 pg) Court admitted exhibits date of hearing January 25, 2023 (RE: related document(s) 128 Motion for withdrawal of reference, filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) (COURT ADMITTED DEFENDANT'S EXHIBITS #1, #2, #3, #4, #5 & #6 OFFERED BY ATTY GREG DEMO). (Edmond, Michael) (Entered: 01/27/2023)
Vol. 32 006925 006942 006960	53	2/6/23	158	Report and recommendation to the U.S. District Court by U.S. Bankruptcy Judge. (RE: related document(s) 128 Motion for withdrawal of reference filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Entered on 2/6/2023 (Okafor, Marcey)
	54	2/6/23	161	(18 pgs) DISTRICT COURT Notice of transmission of report and recommendation in re: renewed motion to withdraw reference. Civil Case # 3:22-cv-02802-S. (RE: related document(s) 158 Report and recommendation to the U.S. District Court by U.S. Bankruptcy Judge. (RE: related document(s) 128 Motion for withdrawal of reference filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Entered on 2/6/2023) (Whitaker, Sheniqua)
	55	4/3/23	165	(1 pg) DISTRICT COURT ORDER: The Court GRANTS the 11 Joint Motion to Transfer Proceeding and Consolidate Before Original Court and the above-numbered case (3:22-cv-02802-S) is transferred to the docket of the Honorable Judge Jane Boyle: Civil case 3:21-cv-00842-B (order referring case). (RE: related document(s) 1 Complaint filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 143 Notice of transmission of motion to withdraw reference). Entered on 4/3/2023 (Whitaker, Sheniqua) Modified on 4/10/2023 (Whitaker, Sheniqua). (Entered: 04/10/2023)

TRANSCRIPTS

006961	56	11/24/21	78	(104 pgs) Transcript regarding Hearing Held 11-23-2021 RE: Motion Hearing. THIS TRANSCRIPT WILL BE MADE ELECTRONICALLY AVAILABLE TO THE GENERAL PUBLIC 90 DAYS AFTER THE DATE OF FILING. TRANSCRIPT RELEASE DATE IS 02/22/2022. Until that time the transcript may be viewed at the Clerk's Office or a copy may be obtained from the official court transcriber. Court Reporter/Transcriber Liberty Transcripts/Dipti Patel, Telephone number 847-848-4907. (RE: related document(s) 75 Hearing held on 11/23/2021. (RE: related document(s) 55 MOTION to Stay filed by CLO Holdco Ltd, Charitable DAF Fund LP (Sbaiti, Mazin) (Entered: 08/26/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #55 ON 08/26/2021 IN U.S.
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			<p>DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)) (Appearances: J. Pomerantz and J. Morris for Highland Defendants; J. Jordan and P. Bessett for HCLOF; M. Sbaiti for Plaintiffs. Nonevidentiary hearing. Motion denied. Mr. Pomerantz to upload order.), 76 Hearing held on 11/23/2021. (RE: related document(s) 47 Motion to strike 43 Appendix in support filed by CLO Holdco, Ltd., Charitable DAF Fund, LP (Bridges, Jonathan) Modified text on 7/16/2021 (mjr). (Entered: 07/15/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #47 ON 07/15/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)) (Appearances: J. Pomerantz and J. Morris for Highland Defendants; J. Jordan and P. Bessett for HCLOF; M. Sbaiti for Plaintiffs. Nonevidentiary hearing. Motion denied (Plaintiffs acknowledged complained-of Appendices it did not relate to Motion to Dismiss). Mr. Pomerantz to upload order.)). Transcript to be made available to the public on 02/22/2022. (Patel, Dipti)</p>
57	2/21/23	164	<p>164 (112 pgs) Transcript regarding Hearing Held 1/25/23 RE: HEARING ON DEFENDANT HIGHLAND CAPITAL MANAGEMENT L.P.'S RENEWED MOTION TO DISMISS COMPLAINT (122) AND STATUS CONFERENCE RE: MOTION FOR WITHDRAWAL OF REFERENCE FILED BY PLAINTIFF CLO HOLDCO, LTD., PLAINTIFF CHARITABLE DAF FUND, LP (128). THIS TRANSCRIPT WILL BE MADE ELECTRONICALLY AVAILABLE TO THE GENERAL PUBLIC 90 DAYS AFTER THE DATE OF FILING. TRANSCRIPT RELEASE DATE IS 05/22/2023. Until that time the transcript may be viewed at the Clerk's Office or a copy may be obtained from the official court transcriber. Court Reporter/Transcriber Dipti Patel, Telephone number 847-848-4907. (RE: related document(s) 155 Hearing held on 1/25/2023. (RE: related document(s) 122 Motion to dismiss adversary proceeding, (Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint) filed by Defendant Highland Capital Management, LP filed by Defendant Highland Capital Management, LP) (Appearances: J. Morris and G. Demo for Movants; L. Phillips and M. Sbaiti for Plaintiffs. Evidentiary hearing (appendices). Court took matter under advisement.), 156 Hearing held on 1/25/2023. (RE: related document(s) 128 Motion for withdrawal of reference. Fee amount \$188, filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) (Appearances: J. Morris and G. Demo for Movants; L. Phillips and M. Sbaiti for Plaintiffs. Evidentiary hearing (appendices). Court announced it will recommend denial to District Court. Court is working on Report & Recommendation.)). Transcript to be made available to the public on 05/22/2023. (Patel, Dipti)</p>

Dated: July 14, 2023

Respectfully submitted,

SBAITI & COMPANY PLLC

/s/ Mazin A. Sbaiti

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was filed electronically through the Court's ECF system, which provides notice to all parties of interest, on this 14th day of July, 2023.

/s/ Mazin A. Sbaiti

Mazin A. Sbaiti

1 THE COURT: Yes?

2 MS. WEISGERBER: Excuse me, Your Honor. It's Erica
3 Weisgerber from Debevoise on behalf of HarbourVest.

4 THE COURT: Okay.

5 MS. WEISGERBER: And I'm joined by Natasha Labovitz
6 and Dan Stroik --

7 THE COURT: Okay.

8 MS. WEISGERBER: -- from Debevoise as well.

9 THE COURT: Thank you. I was neglectful in not
10 getting your appearance, because, of course, you're at the
11 front and center of this motion to compromise, and I did see
12 that you filed a reply brief yesterday afternoon. Okay.
13 Thank you.

14 All right. Do we have -- do we have Mr. Dondero on the
15 line? I'm going to check again.

16 (No response.)

17 THE COURT: Mr. Dondero's counsel, I cannot hear you,
18 so please unmute your device.

19 MR. WILSON: Your Honor, it appears to me that Mr.
20 Dondero's device was unmuted as soon as you asked if he was
21 available. I sent him a communication a second ago asking if
22 he's having technical difficulties. I have not received a
23 response, so I --

24 MR. DONDERO: Hello. Can anybody hear me?

25 THE COURT: Oh.

1 MR. WILSON: Okay. I hear him.

2 THE COURT: Mr. Dondero?

3 MR. DONDERO: Hello?

4 THE COURT: Is that you?

5 MR. DONDERO: Yeah, it is. I've been on. I've heard
6 everything since the beginning. It's just we've had technical
7 difficulties. I couldn't use the Highland offices. We've
8 been trying to set up something else.

9 THE COURT: All right.

10 MR. DONDERO: But I'm on now, if -- yes.

11 THE COURT: All right. Very good. Well, I'm glad
12 we've got you.

13 All right. Well, Mr. Pomerantz, how did you want to
14 proceed this morning?

15 MR. POMERANTZ: Your Honor, we could take up the
16 HarbourVest motion first, and I will turn it over to John
17 Morris. He and Greg Demo will be handling that. And then
18 after that we can handle the other motion, which is unopposed.

19 THE COURT: All right. Mr. Morris?

20 MR. KANE: Your Honor, this is -- sorry. This is
21 John Kane for CLO Holdco. Just very briefly, if I may. And
22 this will affect, I think, the Debtor's case in chief, so I'll
23 expedite things a little bit, I believe.

24 CLO Holdco has had an opportunity to review the reply
25 briefing, and after doing so has gone back and scrubbed the

1 HCLOF corporate documents. Based on our analysis of Guernsey
2 law and some of the arguments of counsel in those pleadings
3 and our review of the appropriate documents, I obtained
4 authority from my client, Grant Scott, as Trustee for CLO
5 Holdco, to withdraw the CLO Holdco objection based on the
6 interpretation of the member agreement.

7 THE COURT: All right. Well, thank you for that, Mr.
8 Kane. I think that -- that eliminates one of the major
9 arguments that we had anticipated this morning. So, thank you
10 for that.

11 Any other housekeeping matters that maybe someone had that
12 I didn't ask about?

13 MS. MATSUMURA: Yes, Your Honor. This is Rebecca
14 Matsumura from King & Spalding representing Highland CLO
15 Funding, Ltd. I just wanted to put on the record, we -- our
16 client had requested that some of its organizational documents
17 be filed under seal. But we have given permission for the
18 parties to present the relevant excerpts, to the extent it's
19 still relevant after Mr. Kane's announcement, in court. And
20 we'd just ask that the underlying documents remain sealed, but
21 we're not going to object if they show them on a PowerPoint or
22 anything like that.

23 So, to the extent that you had that on your radar, I just
24 wanted to clear that up for the proceedings.

25 THE COURT: All right. Well, I did sign an order

1 late last night. I don't know if it's popped up on the
2 docket.

3 MS. MATSUMURA: Yes, Your Honor. That's what this
4 referred to. That was what -- these are the documents that
5 were being sealed. And so I just wanted to note, if you --
6 you know, if the Debtor puts up an excerpt of those documents
7 and you're like, wait a minute, didn't I seal those, that we
8 were the party that requested them be under seal and we're
9 fine with them being shown in court, as long as the underlying
10 documents aren't publicly accessible.

11 THE COURT: Okay. Got you. Thank you.

12 All right. Any other housekeeping matters?

13 MR. MORRIS: Yes, Your Honor. This is John Morris
14 from Pachulski Stang for the Debtor. Good morning.

15 THE COURT: Good morning.

16 MR. MORRIS: The only other matter that I wanted to
17 raise, and I can do it now or I can do it later, or Your Honor
18 may tell me that it's not appropriate to do at this time, is
19 to schedule the Debtor's motion to hold Mr. Dondero in
20 contempt for violation of the TRO.

21 THE COURT: All right. Well, let's do that at the
22 conclusion today. And please make sure I do it. I think I
23 was going to address this last Friday, and we went very late
24 and it slipped off my radar screen. But I did see from my
25 courtroom deputy that you all were reaching out to her

1 yesterday to get this set, and then Mr. Dondero's counsel
2 reached out to her and said, We're going to file an objection
3 to a setting next Wednesday, or I think you had asked for a
4 setting next Tuesday or Wednesday.

5 MR. MORRIS: I did.

6 THE COURT: And I don't -- I don't know if that
7 response/objection was ever filed last night. I haven't seen
8 it if it was. So, we'll -- please, make sure I don't forget.
9 We'll take that up at the end of today's matters. All right.
10 Well, --

11 MR. MORRIS: All right. So, --

12 MS. WEISGERBER: Your Honor, one last housekeeping
13 item from -- I'm joined this morning by Michael Pugatch of
14 HarbourVest, who will present some testimony this morning. I
15 just want to confirm he's on the line and confirm no
16 objections to him sitting in for the rest of the hearing.

17 THE COURT: All right. Mr. Pugatch, this is Judge
18 Jernigan. Could you respond? Are you there with us?

19 MR. PUGATCH: Yes. Good morning, Your Honor. Mike
20 Pugatch from HarbourVest here.

21 THE COURT: All right. Very good. I think we had
22 you testify once before in the Acis matter, if I'm not
23 mistaken. Maybe. Maybe not. Maybe I saw a video deposition.
24 I can't remember.

25 All right. So, we're going to let Mr. Pugatch sit in on

1 this. Anyone want to say anything about that? I consider him
2 a party representative, so I don't -- I don't think anyone
3 could invoke the Rule.

4 All right. Very good. Well, let's go forward if there
5 are no more housekeeping matters.

6 MR. MORRIS: Okay.

7 THE COURT: Mr. Morris?

8 MR. MORRIS: Thank you. Thank you very much, Your
9 Honor. John Morris; Pachulski Stang Ziehl & Jones; for the
10 Debtor.

11 It's a rather straightforward motion today. It's a motion
12 under Rule 9019, pursuant to which the Debtor requests the
13 Court's authority and approval to enter into a settlement
14 agreement with HarbourVest that will resolve a number of
15 claims that HarbourVest has filed against the Debtor.

16 What I -- the way I propose to proceed this morning, Your
17 Honor, is to give what I hope is an informative but relatively
18 brief opening statement. I'll defer to HarbourVest and its
19 counsel as to whether they want to make a presentation in
20 advance of the offer of evidence. Any objecting party, I
21 suppose, should then be given the opportunity to present their
22 case to the Court. Then the Debtor will call Jim Seery, the
23 Debtor's CEO and CRO. We will offer documents into evidence.
24 I would propose then that the objecting parties take the
25 opportunity to ask Mr. Seery any questions they'd like on the

1 matter.

2 After the Debtor rests, I think HarbourVest would like to
3 put Mr. Pugatch on the stand to offer some testimony on their
4 behalf. And I think that that will conclude the case. We can
5 finish up with some closing arguments as to what we believe
6 the evidence showed, but that's the way that I'd like to
7 proceed, if that's okay with the Court.

8 THE COURT: All right. That sounds fine.

9 OPENING STATEMENT ON BEHALF OF THE DEBTOR

10 MR. MORRIS: Okay. So, as I said, Your Honor, this
11 is a -- this should be a very straightforward motion under
12 Rule 9019. The standard is well-known to the Court. There
13 are four elements to a 9019 motion. The Debtor clearly has
14 the burden of proof on each one. And we easily meet that
15 burden, Your Honor.

16 The standard, just to be clear, the first part is that we
17 have to establish a probability of success, with due
18 consideration for uncertainty of law and fact. The second one
19 is the complexity, likely duration, expense and inconvenience
20 of the litigation. The third part of the test is the
21 paramount interest of creditors. And the fourth part of the
22 test is whether or not the proposed settlement was reached
23 after arm's-length negotiations.

24 The Debtor believes that it easily meets this standard,
25 and frankly, is a little bit frustrated that it's being forced

1 to incur the expense by Mr. Dondero in going through this
2 process.

3 A plain reading, a fair reading of the economics here
4 relative to the claim shows that this is a very reasonable
5 settlement. I don't need to go beyond that, Your Honor. I
6 don't even need to use the word reasonable. It surely meets
7 the lowest standard.

8 We've prepared a couple of demonstrative exhibits, Your
9 Honor. I'm going to use them with Mr. Seery. But I'd like to
10 just put one up on the screen now, if I may.

11 Ms. Canty, can you please put up Demonstrative Exhibit #3?

12 Demonstrative Exhibit #3 is an outline of the economics of
13 the settlement. It includes the various pieces, the
14 components that the parties have agreed to. And it shows, at
15 least from the Debtor's perspective, just what HarbourVest is
16 being given here.

17 Up on the screen is a demonstrative exhibit. It has
18 citations to the evidence that will be admitted by the Court.
19 The first line shows that HarbourVest will receive a \$45
20 million allowed general unsecured nonpriority claim. And that
21 -- that can be found at Debtor's Exhibit EE, Exhibit 1, at
22 Page 2.

23 That claim is discounted by the expected recovery that
24 general unsecured creditors are supposed to get. As of
25 November, in the liquidation analysis that was part of the

1 disclosure statement -- that's the citation in the footnote --
2 the Debtor believed that unsecured creditors were estimated to
3 recover approximately eighty-seven and a half cents on the
4 dollar. And so we just did the arithmetic there to get to the
5 net economic value of the proposed general unsecured claim.

6 And from that, we reduced \$22-1/2 million because that is
7 the net asset value of HarbourVest's interest in HCLOF, which,
8 pursuant to the settlement agreement, it will transfer back to
9 the Debtor, so that the net economic value is approximately
10 \$16.8 million.

11 You will hear testimony from Mr. Seery that this number
12 is, in fact, overstated, and it's overstated because, since
13 the time the disclosure statement was filed in November, a
14 number of events have occurred that will -- that have caused
15 the estimated recovery percentage to be reduced from
16 approximately 87-1/2 percent to something lower than that. We
17 don't have the exact number, Your Honor, but Mr. Seery will --
18 and the evidence will show that there's been more expenses,
19 that there's been some resolution of certain claims. There's
20 been some positive issues, too. But that number is probably
21 in the 70s somewhere.

22 And in any event, I think the point here is, Your Honor,
23 HarbourVest invested \$80 million in HCLOF, which was going to
24 participate in the investment in CLOs. They filed a claim for
25 \$300 million, through treble damages and other claims. But

1 the net economic impact of this is going to be somewhere
2 probably in between \$12 and \$14 million. I'll let Mr. Seery
3 give more precision to that. And it represents less than -- a
4 less than five percent recovery on the total claim.

5 And we think it's important for the Court to keep that in
6 mind. What are the economics here? Are we overpaying? Is
7 this an unreasonable settlement? And I think the evidence
8 will show that the Debtor is not, but that this settlement
9 that you see before you was the product of arm's length, and
10 I'm going to go in reverse order of the four-part test under
11 9019.

12 So, the last part is whether or not the settlement, the
13 proposed settlement was the product of arm's-length
14 negotiation. You'll hear lots of evidence that this
15 settlement that's up on the screen right now very much was the
16 product of arm's-length negotiation.

17 The third part of the test, Your Honor, is whether it
18 meets the paramount interest of creditors. You know,
19 regrettably, Mr. Dondero is the only purported creditor who is
20 objecting here. He may have done so through different
21 vehicles, but every objecting party here is a debtor [sic]
22 owned and controlled by Mr. Dondero. No other creditor -- not
23 the Creditors' Committee, UBS, Acis, Mr. Terry, Mr. Daugherty
24 -- nobody is objecting to this settlement except for Mr.
25 Dondero. And we believe that that highlights the Debtor's

1 ability to meet the third prong of the test, and that is these
2 are -- this settlement is in the paramount interest of
3 creditors.

4 Again, going in reverse, the second part of the test is
5 the complexity, duration, and expense of litigation. There
6 will be no disputed evidence that we meet -- the Debtor easily
7 meets this prong of the test. The evidence is going to show
8 that HarbourVest's claim is based on fraud, fraud in the
9 inducement, fraudulent statements and omissions, the kind of
10 case, Your Honor, that I'm sure you're familiar with that is
11 incredibly fact-intensive, that will be incredibly difficult
12 to navigate through. It will be prolonged, it will be
13 expensive, because you're necessarily relying on he said/she
14 said, basically. And so we're going to have to get testimony
15 from every person that spoke in connection with the events
16 leading up to the transaction. So we think the second prong
17 will be easily met, Your Honor.

18 And then the last prong -- the first prong, if you will --
19 is the likelihood of success on the merits. We think that the
20 settlement, the economic recovery that's up on the screen
21 here, which ultimately will be less than five percent of the
22 claimed amount, in and of itself shows that the settlement is
23 consistent with the Debtor's perception of its likely success
24 on the merits. I'm certain that HarbourVest disagrees, but
25 that's okay, we're here today and that's the Debtor's view,

1 and the Court is here to assess the Debtor's business judgment
2 and whether the Debtor has properly analyzed the issues and
3 gone through the process. And the evidence will show
4 conclusively that it will. That it has.

5 Mr. Seery will testify at some length as to the risks that
6 he saw. I think that you'll hear counsel for Mr. Dondero ask
7 both Mr. Seery and Mr. Pugatch a number of questions designed
8 to elicit testimony about this defense or that defense. And
9 it's a little -- it's a little ironic, Your Honor, because,
10 really, every defense that they're going to try to suggest to
11 the Court was a valid defense is a defense that the Debtor
12 considered. In fact, it's, you know, it's a little spooky,
13 how they've -- how they've been able to identify kind of the
14 arguments that the Debtor had already considered in the
15 prosecution of their objections here.

16 But be that as it may, the evidence will conclusively show
17 that the Debtor acted consistent with its fiduciary duties,
18 acted in the best interests of the Debtor's estate, acted
19 completely appropriately here in getting yet another very
20 solid achievement for the Debtor, leaving very few claims that
21 are disputed at this point, all but one of which I believe are
22 in the hands of Mr. Dondero.

23 So, that's what we think that the evidence will show.

24 I do want to express my appreciation to Mr. Kane for
25 reflecting on the arguments that we made with respect to the

1 ability of the Debtor to engage in the transfer or the
2 acquisition of the asset from HarbourVest. I would -- I would
3 respectfully request that we just enter into a short
4 stipulation on the record reflecting that the Debtor's
5 acquisition of HarbourVest's interests in HCLOF is compliant
6 with all of the applicable agreements between the parties.

7 And with that, Your Honor, I look forward to putting Mr.
8 Seery on the stand and presenting the Debtor's case.

9 THE COURT: All right. Other opening statements?

10 OPENING STATEMENT ON BEHALF OF CLO HOLDCO, LTD.

11 MR. KANE: Yes, Your Honor. Sorry. John Kane on
12 behalf of CLO Holdco.

13 In response to Mr. Morris, I'm not going to enter into a
14 stipulation on behalf of my client, but the Debtor is
15 compliant with all aspects of the contract. We withdrew our
16 objection, and we believe that's sufficient.

17 THE COURT: All right. Well, I'm content with that.
18 Other opening statements?

19 OPENING STATEMENT ON BEHALF OF HARBOURVEST

20 MS. WEISGERBER: Your Honor, Erica Weisgerber on
21 behalf of HarbourVest.

22 HarbourVest joins in Mr. Morris's comments in support of
23 the settlement, and we believe that the question of whether
24 the settlement between HarbourVest and the Debtor satisfies
25 the Rule 9019 standard is not even a close one.

1 Some Objectors have made arguments about the merits of
2 HarbourVest's claims, which is why we're here. As Your Honor
3 will hear this morning, HarbourVest has meaningful and
4 meritorious claims against Highland, but made the business
5 decision to avoid the time, expense, and inherent risk of
6 litigation in the interest of preserving value, both for
7 itself and for the estate.

8 Today, Michael Pugatch, a managing director of
9 HarbourVest, will testify before the Court. He'll explain
10 that HarbourVest claims against Highland arise out of certain
11 misrepresentations and omissions by Highland to HarbourVest in
12 connection with HarbourVest's purchase of an interest in
13 HCLOF, one of Highland's managed funds. Those
14 misrepresentations and omissions, as Your Honor will hear,
15 relate to Highland's litigation with its former employee,
16 Joshua Terry, and transfers that were conducted in 2017 to
17 strip Acis of value and prevent Mr. Terry from collecting on
18 an \$8 million judgment.

19 Mr. Pugatch will further explain that HarbourVest would
20 not have invested in HCLOF had it known the underlying facts
21 about those Acis transfers.

22 Mr. Pugatch will also testify that not only did
23 HarbourVest not know about those transfers, it learned about
24 those transfers when it was accused of orchestrating the
25 transfers itself in the Acis bankruptcy. Your Honor will hear

1 that the Acis trustee sought extensive discovery from
2 HarbourVest after numerous accusations that HarbourVest was
3 behind the transfers.

4 Mr. Pugatch will also testify that Highland charged legal
5 fees for itself and its affiliates to HCLOF, essentially
6 forcing HCLOF to fund the litigation involving the Acis
7 bankruptcy and Mr. Terry.

8 In total, HarbourVest's claims for damages are over a
9 hundred million dollars in investment-related losses, lost
10 profits, legal fees inappropriately charged to HCLOF, its own
11 legal fees. And that's before interest or trebling damages.

12 But HarbourVest stands ready to litigate its claims, but
13 following hard-fought and extensive negotiations with the
14 Debtors, the parties reached the settlement that's now before
15 the Court. Mr. Pugatch's testimony regarding the strong
16 factual bases for HarbourVest's claims against Highland and
17 its recoverable damages will further underscore the risks that
18 the Debtors faced if they chose to litigate these claims, and
19 why this settlement is fair, equitable, and in the best
20 interest of the estate.

21 THE COURT: All right. Thank you, Counsel.

22 Other opening statements?

23 OPENING STATEMENT ON BEHALF OF GET GOOD AND DUGABOY TRUSTS

24 MR. DRAPER: Your Honor, this is Douglas Draper on
25 behalf of one of the Objectors. I'd like to just make a few

1 comments with respect to what I've heard and what the Court is
2 going to hear.

3 The first issue I'd like to address is the comment by
4 counsel for the Debtor that no other party has objected. The
5 9019 motion is one of the issues that this Court has to rule
6 on, whether or not there was an objection or not. So the fact
7 that this may be -- bankruptcy is not a popularity contest and
8 not an issue of who votes for what and doesn't vote. This,
9 along with the 1129(a) tests, are clearly within your
10 province, and you need to listen carefully because you'll have
11 to make your own independent analysis whether my objection is
12 correct or incorrect.

13 Two other points I'd like to make that I think are very
14 salient. Number one is, if you look at the Debtor's
15 disclosure statement, it basically took the position that the
16 HarbourVest claim is of little or no value. And lo and
17 behold, thirty days later, there's a settlement that brings
18 about a significant recovery to HarbourVest. The timing is
19 interesting, and I think the Court needs to pay careful
20 attention to what transpired between the two dates.

21 And then the last point I'd like to make is, as you listen
22 to the evidence, and what I learned abundantly clear from
23 hearing the depositions, is that the claim of HarbourVest, if
24 there is a claim at all, is probably one hundred percent --
25 should be subordinated in that it appears to arise out of the

1 purchase or sale of a security. And, again, I would ask the
2 Court to listen carefully to this because that's what it
3 appears to be and that's what the evidence is going to show to
4 the Court.

5 THE COURT: All right. Mr. Draper, let me clarify
6 something I'm not sure if I heard you say or not. Were you
7 saying that the Court still needs to drill down on the issue
8 of whether the Debtor can acquire HarbourVest's interest in
9 HCLOF?

10 MR. DRAPER: No.

11 THE COURT: Okay. I was confused whether you were
12 saying I needed to take an independent look at that, now that
13 the objection has been withdrawn of Holdco. You are not
14 pressing that issue?

15 MR. DRAPER: No, I am not. Basically, I think it's
16 the fairness of the settlement. I think the transferability
17 of the interest is separate and apart from the fairness of the
18 settlement itself. I think the fairness -- the
19 transferability was a contractual issue between two parties
20 that the Court does not have to drill down on.

21 THE COURT: All right. I have another question for
22 you. I want to clarify your client's standing. Tell me --
23 I'm looking through a chart I printed out a while back. I
24 guess Dugaboy Investment Trust filed a couple of proofs of
25 claim; is that right?

1 MR. DRAPER: Yes.

2 THE COURT: Okay. What --

3 MR. DRAPER: And objections are pending.

4 THE COURT: Pardon?

5 MR. DRAPER: Objections to those claims are pending
6 before the Court, Your Honor, --

7 THE COURT: Okay.

8 MR. DRAPER: -- and have not been litigated.

9 THE COURT: And what about Get Good Trust?

10 MR. DRAPER: Get Good Trust has a proof of claim also
11 that objections are pending to. Pending.

12 THE COURT: Okay. I don't want to get too
13 sidetracked here, but I know standing was -- was mentioned as
14 a legal argument today. What is the basis for those proofs of
15 claim?

16 MR. DRAPER: The first one is, with respect to the
17 proof of claim for Dugaboy, there is an investment that
18 Dugaboy made that was then funneled, we believe, up to the
19 Debtor. And the -- the loan that exists, we believe is a
20 Debtor loan, as opposed to a loan to the entity that we made
21 the loans to.

22 And, again, it's a matter that the Court is going to hear.
23 The claim may or may not be allowed. It has not been
24 disallowed yet.

25 The second part to the Dugaboy ownership is we own an

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1 interest in the Debtor. And so we are, in fact, a party in
2 interest.

3 THE COURT: Okay.

4 MR. DRAPER: It may be a small interest, but it is an
5 interest.

6 THE COURT: It has a limited partnership interest in
7 the Debtor?

8 MR. DRAPER: Yes.

9 THE COURT: Is that correct?

10 MR. DRAPER: Yes.

11 THE COURT: Okay. Well, I'll move forward. Thank
12 you.

13 Does that cover -- any other opening statements? I think
14 that covered everyone who was -- who filed some sort of
15 pleading today. No.

16 MR. WILSON: Your Honor, John Wilson on behalf of --

17 THE COURT: I'm sorry. I'm sorry.

18 MR. WILSON: -- Mr. Dondero.

19 THE COURT: I missed Mr. Dondero's counsel. I knew
20 we had visited at some point this morning. I just got
21 confused there. Go ahead, Mr. Wilson.

22 MR. WILSON: No problem, Your Honor. I was just
23 going to say that we will reserve our comments until after the
24 conclusion of the testimony.

25 THE COURT: All right. Very well.

1 Mr. Morris, you may call your first witness.

2 MR. MORRIS: Thank you, Your Honor. Before I do,
3 just two very, very quick points.

4 THE COURT: Okay.

5 MR. MORRIS: To be clear, Dugaboy's interest in the
6 Debtor is 0.1866 percent. Less than two-tenths of one
7 percent.

8 Secondly, the argument that Mr. Draper just made with
9 respect to subordination is one that appears in nobody's
10 papers. And, in fact, not only doesn't it appear in anybody's
11 papers, but Mr. Dondero, I believe, specifically took issue
12 with the fact that a portion of the consideration that
13 HarbourVest would receive would be on a subordinated basis,
14 and he would -- and I think he took the position there is no
15 basis to give them a subordinated claim.

16 So, I just wanted to point those items out to the Court,
17 not that I think either one makes a large difference today,
18 but I do want to deal with the facts.

19 THE COURT: Thank you.

20 MR. MORRIS: The Debtor would call -- you're welcome,
21 Your Honor. The Debtor calls Mr. James Seery.

22 THE COURT: All right. Mr. Seery, welcome back to
23 virtual court. If you could say, "Testing, one, two" so I can
24 see you and swear you in.

25 MR. SEERY: Testing, one, two.

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1 THE COURT: All right. I heard you but I'm not yet
2 seeing your video. Is your video turned on?

3 MR. SEERY: Video is on. Yes, Your Honor.

4 THE COURT: Okay. I see you now. Please raise your
5 right hand.

6 JAMES SEERY, DEBTOR'S WITNESS, SWORN

7 THE COURT: Thank you. Mr. Morris?

8 MR. MORRIS: Thank you, Your Honor.

9 DIRECT EXAMINATION

10 BY MR. MORRIS:

11 Q Good morning, Mr. Seery. Can you hear me?

12 A I can. Thank you, Mr. Morris.

13 Q Okay. Let's just cut to the chase here. Are you familiar
14 with HarbourVest's claims filed against the Debtor?

15 A I am, yes.

16 Q And did you personally review them?

17 A I did, yes.

18 Q Do you recall that over the summer the Debtor objected to
19 HarbourVest's claim?

20 A Yes, we did.

21 Q Why -- can you explain to the judge why Harbour -- why the
22 Debtor objected to HarbourVest's claim last summer?

23 A Sure. The HarbourVest claims, I believe there are about
24 six of them, initially were filed, and they were -- they were
25 relatively vague in terms of what the specifics of the claims

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1 were.

2 So, we saw the claims but didn't, frankly, pay a lot of
3 attention to the underlying transaction that was referred to
4 in the proofs of claim and the losses that HarbourVest had
5 claimed to suffer -- to suffer with respect to their purchase
6 of securities related to HCLOF and the damages caused by the
7 Acis case. So we filed a pretty pro forma objection. I
8 believe it was a simply stated objection that we didn't have
9 any record that there was anything in the Debtor's books and
10 records that they had a valid claim for any amount against the
11 Debtor.

12 Q Are you aware that HarbourVest subsequently filed a
13 response to the Debtor's objection to their claims?

14 A Yes. Yes, I am aware.

15 Q And did you familiarize yourself with that particular
16 response?

17 A I did indeed. It was a pretty extensive response, really
18 developing the full panoply of their claims, which included
19 claims for expenses relating to the Acis case, which
20 HarbourVest viewed as being improperly charged to HCLOF by its
21 manager, which is effectively Highland. Those expenses,
22 HarbourVest took the view, were excessive, had nothing to do
23 with the investment, and were simply a pursuit of a personal
24 vendetta against Mr. Terry and his interests by Mr. Dondero,
25 and using HCLOF's money to actually pursue those interests.

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1 In addition, and this was the first time we saw that,
2 HarbourVest brought forth its claims that it was entitled to
3 effectively rescind the transaction. And I say rescind the
4 transaction: In security parlance, they claim that they were
5 induced by fraud, I think as most are -- to enter into the
6 transaction.

7 As most are aware, the liability limitations in the OMs
8 and the exculpation in the documents are pretty broad, and
9 HarbourVest's position was that they weren't going to be
10 subject to those limitations because the actual transaction
11 that they entered into was a fraud on them, designed by Mr.
12 Dondero, Mr. Ellington, and the Highland team.

13 Q All right. Let's talk about your understanding, the
14 Debtor's understanding of the factual background to
15 HarbourVest's claim. What is your understanding of the
16 investment that HarbourVest made?

17 A Well, HarbourVest made an investment in the Highland CLO
18 business. The Highland CLO business was -- was Acis. And
19 effectively, the business had been separated, but in name
20 only. Acis was just a shell, with a few partners --
21 obviously, Mr. Terry as well -- but it was all Highland
22 personnel doing all the work.

23 And what they were trying to do with Acis was, in essence,
24 resuscitate a business that had been in a bit of a decline
25 from its pre-crisis heyday.

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1 They were looking to take additional outside capital.

2 They would -- they would pay down or take money out of the
3 transaction, Highland would, or ultimately Mr. Dondero, and
4 they would -- they would seek to invest in Acis CLOs,
5 Highland's 1.0 CLOs. And then with respect to the Acis CLOs,
6 and potentially new CLOs, but with the Acis CLOs, they'd seek
7 to reset those and capture what they thought would be an
8 opportunity in the market to -- to really use the assets that
9 were there, not have to gather assets in the warehouse but be
10 able to use those assets to reset them to market prices for
11 the liabilities and then make money on the equity.

12 Q Do you have an understanding --

13 A Then --

14 Q I'm sorry. Go ahead.

15 A Why don't I continue? So, the transaction, they found
16 HarbourVest as a potential investor, and the basis of the
17 transaction was that they would make an investment into Acis.

18 Shortly before the transaction, and while they were doing
19 diligence, Mr. Terry received his arbitration award. I
20 believe that was in October of 2017. The transaction with
21 HarbourVest closed in mid- to late November of 2017. But Mr.
22 Terry was not an integral part. Indeed, he wasn't going to be
23 a key man. He had been long gone from Highland by that time.

24 What the -- I think you asked me originally what the basis
25 of their claim was. The transaction went forward, and the

1 basis of their claim is that they really were never -- nothing
2 was disclosed to them about the nature of the dispute with Mr.
3 Terry other than in the highest-level terms; the animosity
4 with respect to which that dispute was held by Highland and
5 potentially Mr. Terry; and really, how those costs would be
6 borne and risks be borne by the investment that they were
7 making.

8 That was, in essence, the transaction and the high-level
9 view of their claim.

10 Q Okay. Just a few very specific facts. Do you have an
11 understanding as to how much HarbourVest invested and what
12 they got in exchange for that investment?

13 A Yeah. HarbourVest invested in a couple tranches, and I
14 forget the exact dates, but approximately \$75 million
15 originally, and then they added another five. Some
16 distributions were made in the first half of 2018, putting
17 their net investment in the mid-seventies on the investment,
18 which now is worth about 22-1/2 million bucks.

19 Q And what percentage interest in HCLOF did HarbourVest
20 acquire, to the best of your knowledge?

21 A They have 49.98 percent of HCLOF. HCLOF, just to refresh
22 -- the Court is, I think, well aware of this, but to refresh,
23 is a Guernsey entity. Not -- not atypical for structures of
24 this type to use offshore jurisdictions and sell the
25 securities under -- at least to U.S. -- can't sell them to

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1 U.S. investors unless they qualify, and these are sold under
2 Reg S to -- to investors that otherwise qualify. And
3 HarbourVest was investing in that transaction through the
4 Guernsey structure.

5 Q And do you have an understanding as to who owned the 50-
6 plus percent of HCLOF that HarbourVest was not going to
7 acquire?

8 A Yeah. There's -- you can tell by the name. HCLOF is
9 Highland CLO Funding. This is a Highland vehicle. So
10 Highland owned and controlled the vehicle. The DAF, which is
11 -- which is Dondero-controlled trusts, have the -- 49 percent.
12 Highland has, I believe, around .63-65 percent directly. And
13 then Highland employees at the time who were involved in the
14 business owned another small percentage.

15 So the majority was going to be controlled by Highland
16 through its control of DAF and its control of the employees
17 that worked for it. HarbourVest would be a minority investor.

18 Q Okay. And I believe you testified that the investment was
19 made in mid-November; is that right?

20 A That's correct. I think it was the 15th, may have been
21 the 17th of November.

22 Q And do you recall when in October the Terry arbitration
23 award was rendered?

24 A It was about a month before. I think it was right around
25 the 20th, the 17th to the 20th. I may be slightly wrong on

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1 each of those dates.

2 Q Okay. What is your understanding as to what happened
3 after the issuance of the award that is the basis or at least
4 one of the bases for HarbourVest's claim?

5 A I don't think there's -- I don't think there's any
6 dispute. And there certainly are judicial findings. Dondero
7 and Highland went about stripping Acis of all of its assets.
8 So, remember that Acis is not a separate standalone company,
9 in any event. It's controlled and dominated completely by
10 Highland at the time. But it did have contracts. And those
11 contracts had value.

12 So the first idea was to strip out the management contract
13 and put it into a separate vehicle, which we called HCF
14 Advisor, which Highland still owns. The second piece was to
15 strip out some valuable assets, the risk retention piece,
16 which was a loan that in essence was equity that Highland had
17 put into Acis but structured as a loan, as many of the
18 transactions we'll see down the road are, in order to deal
19 with some -- avoid taxes in any way possible. And that
20 structure, that value moved value out of Acis for the express
21 purpose of trying to run, in essence, the Highland business
22 back in Highland.

23 Remember, as I said, Acis is just a Highland business
24 moved to a separate shell. When Mr. Terry got his arbitration
25 award against Acis and was seeking to enforce it, it was

1 pretty straightforward, let's take all the assets -- Dondero
2 scheme -- let's take all the assets and move them back into
3 Highland so Terry can't get anything.

4 Q And how does that scheme relate to the HarbourVest claim,
5 to the best of your knowledge?

6 A Well, HarbourVest -- HarbourVest's position is that they
7 invested in Acis and -- and whether Acis was called Acis or
8 called Highland, it doesn't really matter; there were valuable
9 assets in the -- in the entity that they were going to be
10 investing in through the equity in these CLOs and some of the
11 debt securities in those CLOs.

12 And then the stripping out and the fraudulent conveyances
13 out of Acis caused them damages because that's what left the
14 damage to Mr. Terry.

15 The quick math on Acis, by the way, is Acis has probably
16 lost, total damages, 175 million bucks. And that's pretty
17 easy. DAF lost 50. HarbourVest lost 50. Fifteen million of
18 fees charged to HCLOF. Another five million of fees, at
19 least, incurred by Mr. Terry. Ten million that went to Mr.
20 Terry, 15 to Highland fees, another five, plus Mr. Terry's
21 settlement in this case, over eight million bucks.

22 So HarbourVest's position, which, on a factual basis, you
23 know, is problematic for the estate, is, wait a second, we
24 invested in this vehicle with Highland. That was supposed to
25 invest in Highland CLOs. They were called Acis, but they were

1 Highland CLOs. And then you went about causing tremendous
2 damage to that vehicle that we ultimately were investing in,
3 and then charge us for the pleasure.

4 Q You used the phrase earlier "OM," I believe.

5 A Offering memorandum.

6 Q Offering memorandum? Can you just explain to the Court
7 your understanding of what an offering memorandum is?

8 A Typically, under U.S. law, and foreign jurisdictions have
9 similar laws, you have to have a document that explains the
10 securities that you're selling. And it goes into extreme
11 detail about the securities and the risks related to those
12 securities.

13 And the idea is not to have a document that tells you
14 whether it's a good investment or a bad investment, but it's a
15 document that discloses to the potential investor all of the
16 risks with respect to that security or related to the
17 investment over the duration of the security. It doesn't
18 predict the future, but it's supposed to make sure that it
19 gives you a very clean view of the past and a very clean view
20 of what the facts from the past are and how they would
21 implicate the future of the investment.

22 Q And in the course of its diligence, did the Debtor have an
23 opportunity to review the offering memorandum in the context
24 of the claims that were being asserted by HarbourVest?

25 A Oh, absolutely. It was originally effectively -- it's an

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1 HCLOF offering memorandum. But as I said, HCLOF was managed
2 and controlled by Highland, and Highland originally prepared
3 it. And then, of course, in connection with -- with this
4 dispute and these claims, we reviewed it, both myself and my
5 legal team.

6 Q All right.

7 MR. MORRIS: Your Honor, the offering memorandum is
8 on the Debtor's exhibit list, and I think this is an
9 appropriate time to move into evidence Debtor's Exhibits A
10 through EE, all of which appear at Docket No. 1732.

11 THE COURT: 1732?

12 MR. MORRIS: It's the Debtor's Second Amended Witness
13 and Exhibit List.

14 THE COURT: All right. Any objection to admission of
15 A through EE?

16 MR. DRAPER: Douglas Draper. No objection, Your
17 Honor.

18 THE COURT: All right. Mr. --

19 MR. MORRIS: May I proceed?

20 THE COURT: Yeah. Mr. Wilson, did you want to
21 confirm no objection?

22 (Echoing.)

23 THE COURT: All right. Hearing no objection,
24 Debtor's A through EE are admitted.

25 (Debtor's Exhibits A through EE are received into

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1 evidence.)

2 THE COURT: Go ahead, Mr. Morris.

3 MR. MORRIS: Thank you, Your Honor. The offering
4 memorandum itself is one of the documents that we filed under
5 seal, and we did so at the request of counsel to HCLOF. But
6 HCLOF has consented to our sharing up on the screen certain
7 very limited provisions of the document, without waiving the
8 request that the agreement otherwise be maintained under seal.

9 THE COURT: All right.

10 MR. MORRIS: So may I proceed on that basis, Your
11 Honor?

12 THE COURT: You may. Uh-huh.

13 MR. MORRIS: Okay. Ms. Canty, can you please put up
14 on the screen Demonstrative Exhibit #1? Okay. Can we just --
15 is there a way to just expand that just a bit, Ms. Canty?
16 Thank you very much. And if we could just scroll it up?
17 Thank you very much. Perfect.

18 Okay. So, Your Honor, this, as the footnote says, is an
19 excerpt from the offering memorandum that can be found at
20 Debtor's Exhibit AA. Double A. And this particular portion
21 of the offering memorandum is at Page 35.

22 THE COURT: Okay.

23 BY MR. MORRIS:

24 Q Mr. Seery, have you seen this portion of the offering
25 memorandum before?

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1 A Yes, I have. But before I continue, I just -- I should
2 have checked. Are you able to hear me clearly? Am I speaking
3 too quickly or am I cutting out? I just want to make sure.
4 I'm using a different set of audio today.

5 THE COURT: All right.

6 MR. MORRIS: That's fine.

7 THE COURT: I hear you very well.

8 MR. MORRIS: Yeah.

9 THE COURT: So I think we're good right now. Thank
10 you.

11 THE WITNESS: Yeah. Thank you, Your Honor. I was
12 just checking.

13 THE COURT: Okay.

14 THE WITNESS: In response to your question, Mr.
15 Morris, yes, I have seen this before.

16 BY MR. MORRIS:

17 Q Okay. And can you -- did you form a view in doing the due
18 diligence as to the adequacy of this disclosure?

19 A Yes, I did.

20 Q Can you share your -- or share with Judge Jernigan the
21 Debtor's view as to the adequacy of this disclosure concerning
22 the litigation between Highland and Acis?

23 A With respect to the litigation between Highland and Acis,
24 or, really, between Acis, Highland, and Highland's principals
25 and Acis's principal, totally inadequate. The disclosure here

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1 is very high-level. And if there were no other litigation
2 going on, it might serve to suffice. It basically says, In
3 our business, because we invest in distressed loans, there's a
4 lot of litigation around distressed investments, and that's
5 what we have. And then it says, We've talked with the
6 investor about other things and we're -- we think that's
7 enough.

8 Q Is there anything in this portion or anywhere in the
9 offering memorandum that you're aware of that disclosed to
10 HarbourVest that in the weeks leading up to the investment
11 Highland was engaged in the fraudulent transfer of assets away
12 from Acis?

13 A No. And I apologize, because I think it's -- I've
14 conflated two provisions. This one only deals with the very
15 high-level nature of the business. It doesn't give any
16 indication that there's any material litigation going on
17 elsewhere with respect to Acis.

18 I believe there's another provision that says, We -- we
19 have talked to -- oh, here -- I'm sorry. It is here.
20 Shareholders have had an opportunity to discuss with Highland
21 to their satisfaction all litigation matters against Highland
22 and its affiliates unrelated to its distressed business.

23 That, in my opinion, is wholly inadequate.

24 Q Okay.

25 MR. MORRIS: And let's put up -- actually, let's just

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1 move on.

2 BY MR. MORRIS:

3 Q Let's go to the settlement itself.

4 MR. MORRIS: Can we put back up Demonstrative Exhibit
5 #3?

6 BY MR. MORRIS:

7 Q Mr. Seery, can you see that?

8 A Yes, I can.

9 Q Does this generally describe the net economic recovery of
10 the HarbourVest settlement based on estimated recoveries for
11 general unsecured creditors as of November 2020?

12 A As of November 2020, it does. And you alluded to this in
13 your opening, but to be clear, the numbers have shifted.
14 Costs have increased. The -- so the -- effectively, the
15 numerator, in terms of distributable value that we estimate,
16 is lower. And settlements, the denominator, have also
17 increased. So the claims against the estate that have been
18 recognized have increased. And that, that probably takes it
19 down closer, in our view, to about seventy cents distribution,
20 a number closer to nine to ten million, maybe a little bit
21 less.

22 However, there's also some additional value that we -- we
23 believe we will recover directly. There are north of \$150
24 million of intercompany notes owed by Dondero entities to
25 Highland. A number of those notes are demand notes, and we've

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1 already made demand. We'll be initiating actions next week.
2 So those are -- those value, we believe, we'll recover
3 directly from Mr. Dondero and from related entities.

4 To the extent those related entities don't have value, we
5 feel very strongly about our ability to pierce the veil and
6 reach in to Mr. Dondero. And then his assets, either his
7 personal assets or the assets that he claims are in trusts.

8 In addition, there are a significant amount of notes that
9 were extended in two -- I believe around 2017, for no
10 consideration. Those notes were demand notes, I believe, and
11 then extended it 30 years. So they have 2047 maturities.
12 Those were probably going to have to be subject to fraudulent
13 conveyance type actions or -- or some sort of sale at a very
14 discounted value because third parties wouldn't want long-
15 dated notes with Mr. Dondero as the counterparty for very much
16 money.

17 Those -- they defaulted on some of those parties, so we
18 effectively turned them into demand notes. We've accelerated,
19 and we'll be bringing actions against those entities next week
20 as well.

21 So I think (garbled) have come up, so I apologize. One
22 way of saying I think the sixteen and a half is a bit high
23 right now, based upon what we know, but the value is going to
24 be higher than our estimate a couple of weeks ago because we
25 do believe we'll be able to recover on the notes.

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1 One additional caveat, just to be fully transparent here.
2 This summary with the 16.8 doesn't include the subordinated
3 piece of this -- of this claim and our resolution. That --
4 recovery of that piece will be dependent upon the success of
5 litigations.

6 In order for the subordinated piece to get paid, all
7 general unsecured claims in Class -- Classes 7 and 8 will have
8 to be paid in full. And then -- and then the subordinated
9 class in Class 9, which we believe UBS will have a piece of,
10 and HarbourVest will have a piece of by this settlement, those
11 will be able to recover, and those will be based upon other
12 claims of action against -- primarily against related parties.

13 Q And then that last point, is that what's reflected in
14 Footnote 3 on this page?

15 A That's correct, yes.

16 Q Okay. And just for the record, there's a reduction in
17 value of \$22-1/2 million. Do you see that?

18 A Yes.

19 Q And can you just explain to the Court what that is and how
20 that value was arrived at?

21 A Yes. I may be getting slightly ahead of you, Mr. Morris.
22 But to give the Court a reflection of the transaction -- and
23 we can go into the details in a moment -- ultimately, the
24 transaction we structured we think is very fair both
25 economically to the Debtor, but there -- there is some

1 complexity to it to satisfy some of HarbourVest's concerns
2 that they be able to effectively rescind the transaction, at
3 least from an optical perspective. Value was important, but
4 optics were as well. The twenty-two and a half is the current
5 -- actually, the November value of HCL -- the HarbourVest
6 interests in HCLOF. And that's based upon Highland's
7 evaluation of those interests.

8 So we do believe that that is a fair value as of that
9 date. It has not gone down. It hasn't gone up explosively,
10 either, but it hasn't gone down. We think that's good, real
11 value. That value is in the Acis CLOs, the equity in those
12 CLOs, which is 2 through 6, that we -- we will be working with
13 the HCLOF folks to get Mr. Terry to monetize those assets and
14 those longer-dated CLOs.

15 In addition, I think it's 85 percent of the equity in Acis
16 7 -- Acis 7 is managed by Highland -- that is also beyond its
17 reinvestment period. And in talking to the directors -- and
18 they're new directors, and I'll get to that in a minute, for
19 HCLOF -- they'll seek to push Highland, which is the
20 reorganized Highland, to monetize that asset, with due regard
21 to fair value.

22 In addition, Harbour -- HCLOF owned a significant amount
23 of the preferred or equity pieces, if you will, in the
24 Highland CLO, 1.0 CLOs. As we've talked about, those are not
25 really CLOs. Those are effectively closed-end funds with

1 illiquid assets, primarily illiquid assets in them. We've had
2 some dispute in front of the Court about selling the liquid
3 assets in them, which we can go into it another time. Those
4 are being liquidated in the market at fair value.

5 But HCLOF also is a significant holder of those preferred
6 shares, and those directors would -- have indicated to me that
7 they would like to see those interests also monetized.

8 Q All right. Let's shift gears for a moment to talk about
9 the diligence that the Debtor did before entering into this
10 agreement. Can you just describe for the Court generally the
11 diligence that was undertaken at your direction?

12 A Well, when we first received the reply to our objection,
13 we dug into that reply and the specifics in it very
14 aggressively. So we reviewed all of the underlying documents
15 related to the original transaction. We discussed with
16 counsel the legal basis for the HarbourVest claims. We
17 interviewed our own HCMLP employees who were involved in the
18 transaction and tested their recollection, specifically around
19 who dealt with HarbourVest, who had the discussions with
20 HarbourVest, what was disclosed to HarbourVest with respect to
21 the Terry dispute and the Acis litigation.

22 We also had done, as I think the Court is well aware from
23 prior 9019 testimony, extensive work around the transfers and
24 the issues related to Acis. So we were familiar with their
25 impact on HCLOF.

1 We also did extensive work valuing the remaining HCLOF
2 interests to get a good feel of not only how much HarbourVest
3 originally invested, but how much they actually lost in this
4 transaction. And as I said, their original investment was
5 around, in total, in two tranches, about \$80 million, of which
6 they got about \$5 million back, and they've lost \$22 million.
7 So it -- I mean, remaining with \$22 million. So they've lost,
8 you know, in excess of \$50 million.

9 Q Do you recall whether the Debtor reviewed and analyzed all
10 of the documents that were cited in HarbourVest's response to
11 the Debtor's objection to the HarbourVest proofs of claim?

12 A Yeah. I think -- I forget, to be honest, which -- exactly
13 what documents were in there. But we went through their
14 objection with a fine-toothed comb, not only with respect to
15 the issues related to the Acis case, but also their references
16 to Guernsey law, other U.S. law, any of the documents between
17 the parties. And obviously, as I mentioned before, the
18 offering memorandum.

19 MR. MORRIS: Your Honor, I would just note for the
20 record that Debtor's Exhibits I through X are all of the
21 documents that are cited in HarbourVest's response to the
22 Debtor's objection to the HarbourVest proofs of claim, and
23 those are the documents that Mr. Seery just referred to.

24 THE COURT: All right.

25 MR. MORRIS: Just, they're in evidence now, and I

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1 just wanted the Court to understand why they're in evidence.

2 THE COURT: Okay. Thank you.

3 MR. MORRIS: You're welcome.

4 BY MR. MORRIS:

5 Q Let's talk about the Debtor and whether or not it had or
6 has any viable defenses. Did the Debtor form any views as to
7 whether or not it had any defenses to the HarbourVest claims?

8 A Yes, we did.

9 Q Can you describe for the Court the defenses that were
10 reviewed and analyzed by the Debtor?

11 A Yeah. I think we -- we had very significant defenses.
12 So, first and foremost, with respect to the original proof of
13 claim, as I mentioned earlier, it alluded to the expenses and
14 the overcharge. And I think with respect to the 15 million of
15 fees that were charged to HCLOF by Highland, we didn't have a
16 lot of defenses to that claim.

17 It's pretty clear, by any fair view of the Acis case, that
18 HCLOF, as the investor in the Acis CLOs and the Highland CLOs,
19 had no real responsibility for fighting with Acis and Josh
20 Terry and shouldn't have been charged those fees. I don't --
21 I don't think there's a legitimate investor that would
22 actually think that that was an appropriate amount to be
23 charged to a fund.

24 However, the claim was not as broad -- the proof of claim
25 was not as fulsome in terms of discussing and only vaguely

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1 referred to other damages. So we did -- we did, as a
2 threshold matter, think about whether we could argue that it
3 was time-barred because they had not met their obligations to
4 fully disclose under the proof of claim.

5 Secondly, we considered the defenses to the overall claim
6 of fraudulent inducement. Our perspective was that if we
7 could stop the claim of fraudulent inducement, the damages
8 would likely be limited to the 15 and maybe some -- some other
9 damages. With respect to the 15, again, the problem that we
10 had when we got past -- past motions for summary judgment is
11 the factual predicate for our defense was going to be that we
12 divulged these things to HarbourVest and that they did not
13 reasonably -- it was -- reasonably rely on some failure to
14 divulge because they're a sophisticated investor.

15 The problem with that defense is that our witnesses, which
16 really would have primarily been Mr. Dondero and Mr.
17 Ellington, and one other employee who runs the CLO business,
18 Mr. Covitz, would not be pretty good. They've been -- two of
19 them have been in front of this Court and they're not viewed
20 favorably and their testimony would be challenged and
21 potentially suspect.

22 So that gave us a real focus on trying to make sure that
23 we could, if we had to litigate, that we would litigate around
24 the fraudulent inducement.

25 As I said, reasonable reliance, what was disclosed, lack

1 of digging into the public record, because you don't have to
2 go far on Google to find "fraud" within two words of
3 "Highland," and the tremendous, you know, litigious nature of
4 Highland. You know, even at that point, when this investment
5 was made, aside from Mr. Terry's arbitration, which by that
6 point, at least by the time (inaudible) was public, there was,
7 you know, significant public disclosure around the Credit
8 Strat and the litigation, the Crusader litigation, the UBS
9 litigation, the, gosh knows, the Daugherty litigation.

10 So our defense was going to be that you should have
11 figured this out, you're a sophisticated investor, and you
12 should have been able to figure out that there was significant
13 risk that, with respect to Mr. Terry, that Mr. Dondero would
14 not stop litigating and that those costs would put significant
15 risk on the investment.

16 The problem with that, as I mentioned earlier, is that the
17 OM is wholly deficient. If you have a typical risk factor in
18 the offering memorandum, you would have disclosed that there
19 was a litigation with Mr. Terry, a former partner in the
20 business, and that the Debtor had no intention of settling it.
21 There was no intention of settling. That litigation would go
22 on. It could go on for years and it could result in
23 bankruptcy or attachments and other risks to the business, and
24 that the investor should be fully aware that the Offeror does
25 not intend to be involved in any -- or the manager, in any

1 settlement with Mr. Terry, and the fact it undermined the
2 investment. That wasn't there.

3 But that was our preliminary focus, to try to stop fraud
4 in the inducement. And then we -- we had specific facts
5 related to that. You know, once they knew about the
6 bankruptcy in HarbourVest of -- I'm sorry, of Acis,
7 HarbourVest made a second funding, which was there was a -- it
8 was an initial \$75 million draw, and then a second, I believe,
9 about a \$5 million draw, which was in -- I believe in
10 February. And they made it without -- without objection, and
11 that was after the commencement of the bankruptcy.

12 In addition, they were -- they were active in the
13 bankruptcy, so the -- some of the things that happened in the
14 bankruptcy, there were many opportunities to settle that case,
15 from our examination, all of which were turned down to -- by
16 Mr. Dondero. But you don't see HarbourVest pounding the table
17 to settle, either, either with respect to the Oaktree
18 transaction or any other transaction.

19 Now, HarbourVest's defense to that is, well, we were
20 taking advice and all of our information from Highland, and we
21 were getting that information directly from senior folks at
22 Highland why -- what the value was and why we shouldn't do
23 those things. We thought that that would mitigate some of the
24 arguments that -- some of the damages that we might have, I'm
25 sorry, if we -- if we lost.

1 But the focus at that point, you know, our legal strategy,
2 was can we stop HarbourVest at the very forefront to say,
3 You've got to come into the factual realm and get out of the
4 fraud in the inducement realm. And then the defenses and the
5 exculpations and the liability limitations in the documents
6 would also come into play.

7 So that -- those are some of the defenses that we focused
8 on and our analytical thinking around them.

9 Q So, if the Debtor had viable defenses, why is it settling?

10 A Well, this is a significant claim. And we -- we looked at
11 it with respect to both the impact on the case, but, really,
12 the merits of the claim.

13 As I said, there's really little dispute that the legal
14 fees should not have been charged to HarbourVest. We think
15 based upon the testimony in Acis, the suspect credibility of
16 those who would have been our witnesses, and the experience in
17 Acis that the Court has had in terms of the completely hell-
18 bent on litigation, it would be hard for anyone to justifiably
19 defend those fees being charged. So, as an initial matter, we
20 had exposure there.

21 In addition, if HarbourVest got by our defense of -- was
22 able, for example, to claim fraud in the inducement, then we
23 were open to significant damages.

24 We really didn't put much value, frankly, on the RICO part
25 of it. We think that that's waved around often to show treble

1 damages. Although in this case certainly somebody could lay
2 out the predicate acts and put forth a RICO-type argument, we
3 just didn't think that that had real merit in this commercial
4 dispute, even with a fraud claim.

5 But even without the trebling of the damages, there's no
6 dispute that HarbourVest lost more than \$50 million in this
7 investment. You know, we -- we thought about that risk as
8 well.

9 In addition, because the case would really be fact-based,
10 even if we had a high degree of confidence based upon our
11 discussions with our employees and the factual testimony, it
12 was going to be expensive to litigate this case, and time-
13 consuming.

14 And so we looked at the economic value, the potential
15 risks, and the actual value that we were giving up, and found
16 this to be an extremely, extremely reasonable settlement.

17 Importantly, and I think what drove it, you -- one of --
18 one of the things that drove it is another one of our defenses
19 on why, notwithstanding their -- what they held out as
20 meritorious claims, I don't think HarbourVest really wanted to
21 publicly litigate this claim. And we were aggressive in our
22 discussions with HarbourVest of how we would litigate it,
23 which would be quite publicly.

24 Now, that may or may not be fair, but that does put risk
25 on the counterparty. And so I think that helped drive the

1 settlement.

2 In addition, the structure of the settlement we think is
3 extremely favorable to the Debtor and to the estate because,
4 rather than taking the full claim and putting it into a senior
5 unsecured position, we have bifurcated it. We did think about
6 whether this was a claim that could be subordinated under 510.
7 There won't be any arguments, I would be surprised if there's
8 arguments today that we didn't actually give to the Highland
9 employees who have given them to Mr. Dondero's respective
10 counsel.

11 We did structure it in a way that we thought gave
12 HarbourVest the opportunity to effectively claim a rescission,
13 even though that's not really what it is, and then be able to
14 claim that their recovery is based on the bankruptcy, which it
15 is, but not really dilute all the other stakeholders in the
16 case.

17 (Pause.)

18 THE COURT: Mr. Morris? Anything else?

19 MR. MORRIS: I can hear you, Your Honor.

20 THE COURT: Okay.

21 MR. MORRIS: I can hear you.

22 THE COURT: Okay. Now can you --

23 MR. MORRIS: I got cut off from Mr. Seery for a
24 moment.

25 THE COURT: Okay.

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1 BY MR. MORRIS:

2 Q Okay. I appreciate that. Are you done giving the
3 Debtor's basis for entering into this settlement, Mr. Seery,
4 if you can hear me?

5 A I think so, but I think as the Court has probably seen, I
6 can go on.

7 Q Yes.

8 A So I will try to be -- I'll try to be more concise. But
9 this was a -- this was a difficult settlement. We felt good
10 about our defenses. Felt that we could -- we could try them.
11 But it would be extremely expensive, time-consuming, and there
12 would be a lot of risk. And settling at a level which we
13 believe is actually below the damages that were clearly caused
14 only by the fees was a -- was a -- is a -- is a very
15 reasonable settlement.

16 Q Okay. Let's just talk about the process by which we got
17 to the settlement. Do you recall generally when the
18 settlement negotiations have -- were commenced?

19 A I believe it was -- was late summer, early -- early fall.

20 Q Okay. Before I move on, I just want to go back to the
21 Acis matter that you were talking about, one last issue. Do
22 you know how, if at all, the injunction that was entered in
23 the Acis bankruptcy impacted or related to the HarbourVest
24 claims?

25 A Yeah. I -- yes, I do. And I believe it -- it did. I

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1 think there's an argument, and we analyzed it thoroughly, that
2 the injunction effectively caused a lot of the damages.
3 Because if you look at the values of the equity that
4 HarbourVest had, the -- and HCLOF had in the CLOs, it went
5 down dramatically after the Trustee in the Acis case took over
6 and then subsequently, when the case was reorganized and Mr.
7 Terry took over, you know, with Brigade as the sub-advisor.

8 Now, that would -- you know, we would -- we could
9 certainly attempt to throw, in our defense, the causation at
10 Mr. Terry's feet or at Mr. Phelan's feet. HarbourVest's
11 retort is that none of this would have occurred but for the
12 burn-it-down litigation that Mr. Dondero engaged in with
13 Highland.

14 In addition, in Mr. Terry's defense, you know, he did try
15 multiple times with HCLOF, tried to petition, if you will, the
16 HCLOF entity to -- and directors, former directors, to reset
17 the CLOs to make them more economically viable, based upon the
18 current level of asset returns versus the debt costs in the
19 CLOs. And that was rejected by the HCLOF and the Debtor as
20 the controlling party of HCLOF. So, we thought about those
21 risks.

22 You know, similarly, the economic values in Acis 7 went
23 down pretty significantly from that date as well. So I think
24 there's -- there are some defenses, but that's really Mr.
25 Terry's issue, not our issue. So we thought about those

1 issues, we analyzed them, and we certainly did all the work
2 around month-to-month reductions in NAVs and how different
3 events in the Acis case might have -- might have caused those
4 and was that some sort of break from the original
5 transgression that HarbourVest claims, which was the
6 fraudulent inducement.

7 Q Do you recall that in November HarbourVest's motion under
8 3018 was scheduled to be heard?

9 A Yes.

10 Q And can you just tell the Court your understanding of what
11 the 3018 motion was about?

12 A Well, the 3018 motion was going to be on voting. And we
13 took the view that it really was not -- it shouldn't have been
14 that big an issue and HarbourVest should have been content
15 with just taking their actual losses of roughly a \$50-\$60
16 million claim for voting purposes and then we would move on.

17 HarbourVest was very insistent that they have a \$300
18 million claim, because they took the position -- and with
19 extensive documentation; not only the pleadings they filed,
20 but also detailed decks that were prepared by their counsel,
21 which they had presented to us on the merits of their claim --
22 that they were going to litigate for -- the 3018 and for the
23 full \$300 million value.

24 And that became the genesis, if you will, of the
25 negotiations to settle.

1 So, we started talking about the 3018. It was very
2 contentious. My apologies to Ms. Weisgerber and her counsel,
3 her partners, because it was a significant and contentious
4 negotiating call. But the reasons for that I think were that
5 -- their insistence on litigating the 3018 and our view that
6 this was just, you know, another -- another of a series of
7 delays and costs in this case that we really were hoping to
8 avoid.

9 That led to Mr. Pugatch and I stepping away from counsel,
10 no offense to counsel, you know, ours and his, to begin
11 negotiations around the potential for a settlement. First, it
12 started with a 3018, and then, you know, argued that we would,
13 if we got past the 3018, we were going to litigate this,
14 because we effectively had -- thought we could get everyone
15 else done at -- in and around that time. And I think we were
16 also probably a little bit optimistic about UBS at that time
17 and the mediation, which subsequently we have settled. But
18 that was the genesis of those settlements.

19 Q And how did the structure, how did the Debtor and
20 HarbourVest derive at the structure whereby there is a general
21 unsecured claim, there is a subordinated piece, and there's
22 the takeback of the HCLOF interest?

23 A Well, as I outlined, we -- we aggressively set forth our
24 various defenses. Their position was that they -- they should
25 never have been in this transaction before. And they --

1 HarbourVest is, in essence, a fund of funds, and they have
2 investors, and it certainly wouldn't be their, I'm sure, the
3 best-performing asset in their portfolio, to have made this
4 investment and lost \$50 million over this period of time. So
5 they felt strongly that they should never have been in this
6 investment, and but for the failure to disclose and the
7 improper disclosures, they would not have been in this
8 investment.

9 So, optically, getting out of it was important to them,
10 and that led to our idea and construction of a subordinated
11 claim and the transfer of the HCLOF interests to the estate.

12 Importantly, the HCLOF interests, as I mentioned, are --
13 the investments are in the Acis CLOs controlled by Acis and
14 Mr. Terry. The reorganized Acis. As well as the 1.0 CLOs and
15 the Acis 7.

16 So we were keenly focused on, if we were going to get that
17 interest, would we then have the majority control in HCLOF,
18 which we will, and would we be able to drive the recoveries,
19 as opposed to what Highland typically does in these
20 investments is use other people's money, drive down the value,
21 and then try to buy back the interest on the cheap.

22 Q Just in terms of timing, because I think there was a
23 suggestion in one of the openings that there was something
24 untoward about the timing here: At the time the liquidation
25 analysis was prepared on November 24th, had the Debtor reached

1 any agreement in principle with HarbourVest?

2 A If we had, it would have been reflected, so I don't -- I
3 don't think we were agreed by then. I don't recall the
4 specific dates, but if we had, it would have -- it would have
5 been reflected.

6 Q If I can refresh your recollection that the motion was
7 filed on December 24th, does that help form your understanding
8 or refresh your recollection that there was no agreement in
9 principle on November 24th?

10 A Yeah. Well, I'm quite sure there was no agreement in
11 principle or we would have reflected it minimally by a
12 footnote. There's -- there's no chance. It's a material
13 reduction in the claims pool that we were previously telling
14 people that, at least for purposes of distribution, like UBS
15 and a couple others we said we thought we would get to zero
16 on. So we didn't calculate in that amount. So I'm quite sure
17 we didn't have a deal when we filed the disclosure statement.

18 In terms of the timing, anyone who's done this business
19 for any degree of time knows that the crucible of bankruptcy
20 brings people to the settlement when they see something
21 happening in the case, and not before. I think HarbourVest
22 looked at our -- this is my supposition -- HarbourVest looked
23 at our plan, our ability to get this done, our settlement with
24 Redeemer, our settlement with Mr. Terry and Acis, and saw that
25 this plan was coming together, and if they didn't think about

1 the settlement, they were going to think about not only the
2 risks that we laid forth for them with respect our defenses,
3 but also the opportunity to litigate with the Claimant Trustee
4 over a long period of time, which couldn't have been
5 particularly appetizing.

6 Q Can you describe for the Court the role played by the
7 independent board of Strand, the general partner of the
8 Debtor, in analyzing and participating in the approval
9 process?

10 A Yes. I think, as the Court is aware and I've testified
11 before, Mr. Russell Nelms and Mr. John Dubel are fellow
12 independent directors with me, appointed pursuant to the Court
13 order. They are kept abreast of every detail, and -- along
14 the way, not just in a summary form at the end. We have
15 reviewed and analyzed collectively each of the issues. Mr.
16 Dubel has extensive experience in these types of litigation
17 matters. Obviously, Mr. Nelms, from his -- both his practice
18 and his time on the bench, has a keen insight into how to
19 resolve and what the risks and benefits are from settling
20 litigation. So I consult them every step of the way.

21 Q And as part of this process, did the Debtor reach out to
22 the directors of HCLOF?

23 A Yes, we did. So, we reached out and we've had several
24 conversations on video chats with the directors. The
25 directors of HCLOF are two new gentlemen, Mr. Richard Boleat

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1 and Mr. Dicky Burwood. They are extremely professional. They
2 are exceptionally well-informed. They are truly careful, and
3 I would say very experienced professional not only directors,
4 but experienced in -- in these matters, both in respect of
5 structured finance as well as these types of vehicles and
6 litigation.

7 They were appointed by the old directors, Scott and
8 Bestwick, and they have been in control. They have outside
9 counsel, which is King & Spalding in the U.S. They have
10 Guernsey counsel. They have accountants and professional
11 advisors, and are being, in my opinion, exceptionally careful.
12 I've got -- very quickly developed a lot of respect for them,
13 and we consulted with them on this settlement and how it would
14 work.

15 They've been very clear that they represent HCLOF and they
16 work for the benefit of the equity, whomever owns it, and
17 taking a view that they would like to see these assets
18 monetized swiftly, with due regard to value, for the benefit
19 of the equity.

20 Q And is it your understanding that the directors of HCLOF
21 approved of this transaction?

22 A They -- I don't know that their approval was required.
23 It's really -- there are a number of hoops to jump through
24 under the documentation, including opinion of outside counsel
25 that we received from WilmerHale in terms of the effectiveness

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1 of the transfer under the documents. We had a negotiation
2 with -- with those directors, and making sure that we did
3 everything correct -- correctly, excuse me -- with respect to
4 the requirements for the transfer under the documents. And
5 they've indicated their support and acknowledgement that we're
6 doing it correctly.

7 I don't know if it's fair to say they approved it. I'd
8 just have to go check the documents. But they certainly
9 support it. And I think they generally support our position
10 with respect to how to move forward with the assets.

11 Q I appreciate that. I guess I meant approval with a small
12 a and not a capital A.

13 You mentioned WilmerHale. Who do they represent in all of
14 this?

15 A WilmerHale is the Debtor's outside corporate counsel, in
16 particular with respect to the fund issues that we don't
17 handle in-house. We have significant support for fund issues
18 from the expertise of Mr. Surgent, who's been the CCO, and he
19 is also a lawyer, with respect to, you know, some of the
20 difficult fund issues that Highland has. But when we use
21 outside counsel, we use WilmerHale for that, and they've been
22 -- they've been exceptional.

23 Q Okay. Just the last two points that were made in Mr.
24 Dondero's objection, I believe. Did the Debtor overpay in
25 this settlement in order to gain the support of HarbourVest in

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1 connection with its -- with the Debtor's attempt to get its
2 plan confirmed?

3 A Not in any way. My -- I believe the settlement is
4 extremely reasonable. As I testified, it's -- it's less than
5 the -- the actual value going out, depending on unless there's
6 successful litigation, and there well could be, is less than
7 on a pro forma basis the fees that were taken and charged to
8 HCLOF. We didn't do this for votes. We will have Class 2,
9 Class 7, Class 8, and Class 9. So I don't think that's a --
10 there's no vote purchasing, I think you called it. No, not at
11 all.

12 Q Yeah. Well, on that topic, I think the phrase that was
13 used was gerrymandering. Are you aware of the argument that's
14 been made that the subordinated claim was dropped in there in
15 order to gerrymander a positive vote for the impaired class of
16 Class 9, I believe?

17 A In a word, I would say that's preposterous. The -- as I
18 said, we have a number of classes that will vote for the plan.
19 The plan is -- the plan is a monetization plan. And if -- if
20 the creditors determine that they don't want to pursue this
21 plan, we'll go forward with another -- we'll try to get
22 another plan. We tried to have a grand bargain plan. We
23 tried to have a pot plan, as I've testified previously. I'm
24 quite certain that I've done more work on that than anyone
25 else, including Mr. Dondero and anybody who works for him.

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1 And he hasn't been willing to do that.

2 This is a -- this is a plan that's come together. We

3 think it's going to be in the best interests of the estate.

4 That'll be confirmation next week. Or two weeks, I guess.

5 But I don't see how this is any way related -- this settlement

6 is not any way related to the voting on that -- on that -- on

7 that plan.

8 Q Just to put the finest point on it, is the Debtor relying

9 on Class 9 to be the impaired consenting class?

10 A No. I think -- I think what I've -- as I said, I believe

11 we already have the votes in Class -- I think it's 2 or 3, 7,

12 8, and -- and 9 will vote in favor as well. So that won't be

13 an issue.

14 MR. MORRIS: Your Honor, I have no further questions

15 of Mr. Seery.

16 THE COURT: All right. Pass the witness. I'll ask

17 HarbourVest counsel first: Do you have any questions of Mr.

18 Seery?

19 MS. WEISGERBER: No, Your Honor.

20 THE COURT: All right. Thank you.

21 What about cross-examination? Mr. Dondero's counsel?

22 CROSS-EXAMINATION

23 BY MR. WILSON:

24 Q Mr. Seery, how are you doing today?

25 A I'm well, thank you.

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1 Q I'm John Wilson, and I represent Jim Dondero. I have a
2 few questions for you today.

3 Now, the HarbourVest proof of claims were filed on April
4 8th, 2020; is that your recollection?

5 A I believe that's correct. I don't recall the specific
6 date.

7 Q Okay. And do you know when you first became aware of the
8 HarbourVest claims?

9 A I believe it was early in the summer when we filed the
10 omnibus objection. It may have been in late spring, shortly
11 after that. I don't recall the specific date of the filing.

12 Q And before the time of the filing of the omnibus
13 objection, did Highland educate itself regarding the
14 HarbourVest proof of claims?

15 A I'm sorry, could you say that again? I didn't quite
16 understand it.

17 Q Before the omnibus objection was filed, did HarbourVest --
18 I'm sorry, did Highland educate itself on the HarbourVest
19 proof of claims?

20 A Not especially, no.

21 Q Okay. And -- but at some point, Highland did investigate
22 those proofs of claim, correct?

23 A That's correct.

24 Q And when would you -- when do you recall that that
25 investigation began?

1 A I don't recall the date, but the triggering event was
2 HarbourVest's response to our omnibus objection.

3 Q Okay. And that would have been filed September 11th of
4 2020?

5 A I'll take your representation. I don't -- I don't recall
6 the specific date.

7 Q Okay. And so when you began to investigate the
8 HarbourVest claims, what was your initial reaction?

9 A My initial reaction was that the -- the larger claims that
10 they were asserting -- the fraud in the inducement, the RICO
11 -- that those claims were, in my view, attorney-made and that
12 when we dug in and did the work, we saw that HarbourVest
13 clearly lost north of \$50 million on the investment. We had
14 just started to uncover the fee issue and saw the risk we had
15 there.

16 But I thought the bulk of those claims were attorney-made.
17 Clever, but attorney-made, as opposed to what I would think
18 are more legitimate. And so we started to develop our
19 defenses around that.

20 Q And was your initial reaction that the HarbourVest claims
21 were largely worthless?

22 A I think with respect to the claim around the fees, I
23 believed there was significant risk. With respect to the
24 other claims, I thought our defenses would make them
25 worthless, yes.

1 Q And did you ever represent to any party that the
2 HarbourVest claim was worth, at most, \$5 million?

3 A I think I represented often, including to HarbourVest,
4 that it was worth nothing. I don't recall if I specifically
5 said \$5 million. \$5 million would have been a nominal amount
6 to -- which is litigation costs. So it may -- it may have
7 been in my models that I put in that as a settlement amount,
8 but I -- I thought that there were valid and good defenses to
9 those larger claims.

10 Q And you recognize that HarbourVest was a large,
11 sophisticated investor, correct?

12 A Yes. I think they manage north of -- right around a
13 hundred billion dollars.

14 Q And you recognize that HarbourVest routinely structured
15 complex customized investments, correct?

16 A I believe that -- I don't know the intricate part of their
17 businesses, but as a fund of funds who does creative
18 investments, I think that they do do quite a bit of that.
19 This, I believe, was their first investment in the CLO space.

20 Q And it was not -- or I should say, you did not believe
21 that HarbourVest was simply a passive investor in HCLOF,
22 correct?

23 A I don't think that that's true, no.

24 Q You don't -- you don't believe that you denied their claim
25 to be a passive investor?

1 A Oh, I think -- I'm sure that in defense of their claims I
2 would argue that they were -- they were more than a passive
3 investor. But it was pretty clear when you look at the
4 structure of what they invested that there was an intent that
5 they be passive on their part. They didn't take a majority
6 interest.

7 In fact, Highland made it clear in the structure of the
8 deal that they couldn't -- it would be hard for them to get a
9 majority interest because Highland entities would control that
10 and Dondero-controlled entities or individuals would control
11 the majority.

12 I think that they -- they had hoped to be a passive
13 investor.

14 Q But was it not your position that HarbourVest was actually
15 an active, involved investor?

16 A I think our defense was going to be that they knew exactly
17 what was going on, that they participated, that they were
18 active, and that, indeed, that they were in and around some of
19 the subsequent issues in the Acis case.

20 Q And you understood that HarbourVest played a material role
21 in the various outcomes in the Acis bankruptcy case, correct?

22 A I don't believe that to be correct, no.

23 Q Have you ever made that representation to anyone before?

24 A Not -- not that I recall.

25 Q Well, do you recall giving statements to a reporter named

1 Syed Khaderi?

2 A I've never spoken to a reporter named Syed Khaderi in my
3 life.

4 Q Well, did you participate in the preparation of statements
5 to be given to Syed Khaderi?

6 A I've never heard of Syed Khaderi, nor have I participated
7 in any preparation of statements. I don't know who that is.

8 MR. WILSON: All right. I'm going to have Bryan
9 Assink put on the screen a document.

10 And Bryan, can you go to Page 7? Bottom of -- the top of
11 Page 7. Well, actually, before you do that, go to the very
12 top of the document.

13 BY MR. WILSON:

14 Q Now, Mr. Seery, are you familiar with Lucy Bannon?

15 A Yes.

16 Q And who is Lucy Bannon?

17 A She is the Highland public relations person.

18 MR. WILSON: Okay. Now go back to Page 7.

19 BY MR. WILSON:

20 Q Now, do you -- do you see on your screen an email of
21 September 14th from Syed Khaderi that says, Hi, Lucy, how are
22 you?

23 A Yes.

24 Q Have you seen this email before?

25 A Not that I recall, no.

1 Q All right. It continues on that, I saw the filing on
2 Friday about HarbourVest claims against Highland for a CLO
3 investment, and I'm looking to put out a report tomorrow
4 morning London time. Ahead of that, I wanted to check if
5 Highland would like to comment on the matter.

6 MR. MORRIS: Your Honor, this is -- the Debtor
7 respectfully objects. A, this document is not in evidence.
8 B, it's rank hearsay.

9 THE COURT: Response, Mr. Wilson?

10 MR. WILSON: Your Honor, I am attempting to
11 authenticate this document, but I'm using it in rebuttal to
12 the testimony that Mr. Seery just offered.

13 THE COURT: All right. I'll allow it. Overrule the
14 objection.

15 MR. WILSON: All right. Thank you, Your Honor.

16 BY MR. WILSON:

17 Q All right. Now, if we -- and oh, that September 14th
18 date, that was three days after the September 11th date that
19 we discussed was the date that HarbourVest filed its response
20 to the omnibus objection, correct?

21 A Yes. If that's the date that they filed it, then I -- if
22 you're representing that, I concede that the 14th is three
23 days after the 11th.

24 Q All right. And if you go back to the first page of this,
25 it looks like, on the following day, Lucy Bannon sends an

1 email to you, and is that your email address,
2 jpseeryjr@gmail.com?

3 A That's correct, yes.

4 Q And do you recall receiving this email from Lucy Bannon?

5 MR. MORRIS: Your Honor, I renew my objection that
6 this is hearsay. He's not rebutting anything that Mr. Seery
7 testified to. He testified that he'd never heard of the
8 gentleman at the bottom of the document. There's nothing in
9 this document that rebuts Mr. Seery's testimony at all.

10 THE COURT: Response, Mr. Wilson?

11 MR. WILSON: Well, I'm not -- I'm not trying to rebut
12 his statement that he hadn't -- that he hadn't heard of Syed
13 Khaderi. My rebuttal is attempted to -- attempting to show
14 that he has made various statements that he denied.

15 THE COURT: I'll overrule the objection.

16 BY MR. WILSON:

17 Q All right. So, back to this exhibit, Mr. Seery. You
18 recall receiving this email from Lucy Bannon on Tuesday,
19 September 15, 2020?

20 A Not specifically. But to be clear, I recall talking to
21 Lucy Bannon about the HCMLP dispute with HarbourVest.

22 Q Okay. And --

23 MR. WILSON: Bryan, can you go down to the next page?
24 Scroll down to where -- the James Seery email.

25 BY MR. WILSON:

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1 Q Do you see this email on your screen that's dated
2 September 15, 2020 at 10:33 p.m.?

3 A Yes, I do.

4 Q And do you recall sending this email to Lucy?

5 A Not specifically, no.

6 Q Well, do you deny that you sent this email to Lucy?

7 A It appears to be my email.

8 MR. WILSON: Your Honor, we would move to admit this
9 document into evidence as Dondero Exhibit Letter N.

10 THE COURT: Any objections?

11 MR. MORRIS: I would consent to the admission of Mr.
12 Seery's email, but the balance of it ought to be excluded as
13 hearsay.

14 THE COURT: What about that?

15 MR. WILSON: Well, Your Honor, I think that this
16 document -- and I'll get into this in a little more detail in
17 a second -- but I think this document is a combination of the
18 work product of Lucy Bannon and Mr. Seery in preparing a
19 response for the reporter who requested comment from Highland.

20 THE COURT: Okay. I --

21 MR. MORRIS: Your Honor, um, --

22 THE COURT: Go ahead.

23 MR. MORRIS: I just -- I do question how they got
24 this document, but that's for another day. That's number one.
25 Number two, in addition to the hearsay argument, I just --

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1 relevance grounds.

2 THE COURT: Okay. I'll allow the portion that is the
3 communication of Seery, that portion of Exhibit N. All right?

4 MR. WILSON: Okay. With due -- thank you, Your
5 Honor. With due respect, I -- to use that portion, I need to
6 refer to the portion below it, because he says, Good to submit
7 with your final edit/revisions. And so we need to know what
8 those final edit/revisions are, which are contained in the
9 email directly below that on the document that was four
10 minutes earlier in time.

11 THE COURT: All right. Fair enough. That'll be
12 allowed.

13 MR. WILSON: All right. Thank you, Your Honor.

14 (James Dondero's Exhibit N is received into evidence as
15 specified.)

16 MR. WILSON: So, Bryan, now can you scroll to the
17 next page? Oh, actually, let's just -- let's just stop at the
18 top -- at the bottom of the page. What's this statement?

19 BY MR. WILSON:

20 Q So, to be clear, Mr. Seery, when -- in response to Mr.
21 Khaderi's request for information and comment, you prepared
22 actually two responses, and one of those was a statement on
23 the record attributed to a spokesperson for HCMLP or something
24 along those lines. And then --

25 MR. WILSON: Can you scroll down to that next page?

1 BY MR. WILSON:

2 Q And this says -- I think part of this got cut off for some
3 reason, but it looks like the official statement is in
4 quotation marks. It says, "We dispute the allegations made in
5 the filing and believe the underlying claims are invalid and
6 will be found to be without merit. Our focus continues to be
7 treating all valid claims in a transparent, orderly, and
8 equitable manner, and vigorously disputing meritless in the
9 court. That focus will assure that HCMLP's reorganization
10 process -- progress is towards an efficient and equitable
11 resolution."

12 And then below that there's another section of this email
13 that says, Background/Clarification, Not for Attribution. And
14 do you know the purpose of this second section of the
15 response?

16 A Do I know the purpose of that? Yes.

17 Q And what would that purpose be?

18 A Ms. Bannon was speaking on background to reporters. As I
19 said earlier, I've -- I never heard of the gentleman from
20 London. If he's at the bottom of the email, I didn't pay any
21 mind, never heard of him. Nor have I heard it since. Ms.
22 Bannon didn't ever reference the specific person.

23 But she is the public relations person. So, as I
24 testified earlier, she does communicate with the press. And
25 as I previously testified when Mr. Morris questioned me, one

1 of our tactics and our defenses for HarbourVest was going to
2 be that we were going to be very public and aggressive about
3 the investment and it would have a negative impact or negative
4 perspective for viewers, in our opinion, about HarbourVest's
5 investment.

6 Q All right. Well, look with me in the middle of that
7 paragraph right after the closed parenthetical, where it says,
8 "But it's important to note the background of HarbourVest's
9 active and deep involvement in the investment of which it now
10 complains."

11 And so it was your position that HarbourVest had an active
12 and deep involvement in the investment, correct?

13 A No. I don't think that's correct. Ms. Bannon prepared
14 the statement, it was a litigation defense on background, and
15 that's our -- that was our position for this purpose. It was
16 not my view that they were active and deeply involved. They
17 were certainly involved. There's no doubt about it. But they
18 got all their information, in our estimation and our research,
19 from Highland.

20 Q But in any event, you would agree with me that four
21 minutes after receiving this email, you approved this
22 statement to go out to the reporter, correct?

23 A No, that's not correct. That's -- this portion is on
24 background. That statement doesn't go out. The previous
25 statement was the official statement. This is the background

1 discussion that she would have. So, no, she was not
2 authorized in any way whatsoever to send that out. She was
3 authorized to have conversations with those general facts.

4 MR. WILSON: Okay. Bryan, go to the top, or the
5 bottom of the page immediately preceding that. That's it.
6 Yes, that's it right there.

7 BY MR. WILSON:

8 Q Now, you'll see that this email from Lucy Bannon on
9 September 15, 2020 at 10:29 p.m. starts off, "Jim, let me know
10 what you think of the below. And, again, the first would be
11 on the record and the second will be sent for information
12 purposes to ensure accuracy, not for attribution."

13 So the intent was that this -- that this entire statement
14 be sent to the reporter, correct?

15 A I don't believe that's correct. I think when she goes on
16 background she doesn't send them a written doc. It's got to
17 be clear to the reporter, at least my understanding is that
18 what on background means -- I've been involved with this
19 before -- is that typically that's done orally. I don't know
20 if she's done it in a written statement before. I have never
21 seen that done in a written statement before. You give the
22 official statement and then you walk the reporter through your
23 other views on background. And you're not quoted. And it's
24 usually attributed to a source with knowledge.

25 Q Okay. We'll come back to that in a minute. The next

1 sentence after the one I just read to you --

2 MR. WILSON: Go back to where we were on the
3 background.

4 BY MR. WILSON:

5 Q Now, we just read you the sentence that starts with, "Then
6 it's important." The following sentence says, "HarbourVest
7 was not simply invested in HCLOF as an ignorant,
8 unsophisticated, passive investor, but was an active and
9 informed participant in the inception of its investment
10 through all of the Acis bankruptcy proceedings, and
11 HarbourVest played a material role in various outcomes related
12 to that case and its impact on HCLOF."

13 And is it -- did you not just tell me before we
14 investigated this document that HarbourVest did not play a
15 material role in the various outcomes of the Acis bankruptcy?

16 A I don't know exactly what I said, but I think that's
17 correct, after we'd done the research on it, yeah.

18 Q But you took the position in this email that you approved
19 to go out to a reporter that says that -- that HarbourVest was
20 an active and informed participant in the inception of -- of
21 its investment through all of the Acis bankruptcy proceedings
22 and played a material role in various outcomes related to that
23 case and its impact on HCLOF. Can we agree with that?

24 A Yes.

25 Q And then the final sentence of this paragraph says that,

1 We believe that neither the facts nor the law support
2 HarbourVest's, quote, We-were-too-lazy-to-know allegations.

3 Whose words were those, "We-were-too-lazy-to-know
4 allegations"?

5 A I don't recall. They may be mine. It's aggressive the
6 way I am, so that -- that may well be the case.

7 MR. WILSON: All right. Go -- go down to the next
8 page.

9 BY MR. WILSON:

10 Q And with respect your comment that that second paragraph
11 would not have gone to the reporter, look at this email in the
12 middle of the page from Lucy Bannon to Syed Khaderi, September
13 16, 2020, at 1:51 a.m. And --

14 MR. MORRIS: Your Honor, this I will object to as
15 hearsay. There is no witness here to testify to anything on
16 this document.

17 THE COURT: All right. How about that?

18 MR. WILSON: Well, it's -- well, scroll up just a
19 little bit. This email at the top of the page is three
20 minutes after the one in the middle of the page, where Lucy
21 Bannon is forwarding this to James Seery, saying, See below
22 for responses sent to *Creditflux*. Will follow up with the
23 story when it runs or with any other updates.

24 MR. MORRIS: Your Honor, these --

25 MR. WILSON: So I think this --

1 MR. MORRIS: These documents don't appear on the
2 witness list. They're not being offered to impeach anything.
3 They're just -- he's taking discovery as we sit here.

4 MR. WILSON: Your Honor, in response, I'm simply
5 trying to rebut the statements that Mr. Seery made. In fact,
6 he told me just a minute ago that that second paragraph would
7 not have gone out to the reporter. However, this email from
8 Lucy Bannon to Syed Khaderi directly rebuts that statement.

9 THE COURT: But your whole purpose in this line of
10 questioning, with an undisclosed document, is to rebut the
11 earlier testimony he gave before you even put this exhibit in
12 front of him.

13 MR. WILSON: I'm trying to rebut multiple statements
14 that Mr. Seery has made today, and I think it -- you know, if
15 he's going to testify that this information did not go out to
16 a reporter, I think I'm allowed to rebut that to demonstrate
17 that it did.

18 THE COURT: All right. Why didn't you disclose this
19 in advance? It's feeling less and less like an impeachment
20 document the more we go through it.

21 MR. WILSON: Your Honor, I did not -- I did not
22 actually have this document at the time we filed our witness
23 and exhibit list, but I would also say that I didn't have any
24 purpose to use it if I didn't need it for rebuttal.

25 THE COURT: Okay. First off, you're supposed to

1 disclose all exhibits you anticipate using except those for
2 purposes of impeachment. Okay? Not rebuttal, to be
3 technical.

4 So, if you didn't disclose this exhibit, the only way you
5 can use it, subject to other possible objections, is if you're
6 impeaching a statement. And I'm just saying I think we're
7 going beyond trying to impeach the original statement and now
8 we're trying to impeach statements he's made after seeing
9 portions of the document.

10 What did you mean, you didn't have this document in time
11 to disclose it?

12 MR. WILSON: Well, I actually just received this
13 document this morning, Your Honor.

14 THE COURT: Where did you receive it from?

15 MR. MORRIS: From who?

16 MR. WILSON: I -- I honestly do not know the source
17 of this document, although it was provided to me by my client.

18 MR. MORRIS: Your client being Mr. Dondero?

19 THE COURT: Could you answer that, Mr. Wilson?

20 MR. WILSON: Yes, that's -- yes, that's correct.

21 THE COURT: All right. I will -- that's --

22 MR. MORRIS: Your Honor, I'd like to --

23 THE COURT: That's a different can of worms. But for
24 now, I sustain the objection. You're done questioning on this
25 document.

1 MR. WILSON: That's fine, Your Honor. I can move on.

2 BY MR. WILSON:

3 Q Now, Mr. Seery, you would agree with me that whether or
4 not HarbourVest played an active role in the Acis bankruptcy,
5 it was kept apprised of the -- of the ongoings in the
6 bankruptcy? (Pause.) I'm sorry. Could you hear that?

7 A Yes. My understanding is that -- that they were.

8 Q And in fact, did Highland have weekly conference calls
9 with HarbourVest during the Acis bankruptcy to discuss what
10 was going on in the bankruptcy?

11 A I don't know if they were weekly. I've been told that
12 they had regular calls updating HarbourVest, yes.

13 Q Okay. And did Highland produce over 40,000 pages of
14 documents to HarbourVest related to the Acis bankruptcy?

15 A I'm not aware of that, no.

16 Q Have those documents been provided to you?

17 A I hope not.

18 Q So, in your role --

19 A I'm sorry. I don't -- I didn't receive 40,000 documents
20 from anybody.

21 Q Well, did you receive any number of documents that were
22 provided by Highland to HarbourVest during the Acis
23 bankruptcy?

24 A I wasn't involved in this during the Acis bankruptcy. I'm
25 sorry.

1 Q Well, I'm referring to, after you became involved in this
2 Highland bankruptcy, whether you were provided with these
3 documents that were sent from Highland to HarbourVest.

4 A I don't -- I don't know what the documents are. I've
5 reviewed tons of documents with respect to the HarbourVest
6 claims, but I don't know of the documents to which you're
7 referring.

8 Q Okay. And after you performed your investigation into the
9 HarbourVest claim, what was your opinion as to the cause in
10 the reduction in value of HarbourVest's investment in HCLOF?

11 A I think the main cause of the reduction in the investment
12 was the imposition of the Trustee and the failure of Highland
13 HCLOF and then subsequently with the injunction to reset the
14 CLOs.

15 You know, these are -- these are some of the worst-
16 performing CLOs in the market because they weren't reset. And
17 when the liabilities of the CLOs are set at a level to match
18 assets, and then liability -- the assets run off, and the
19 asset financings or the new deals come in at much lower
20 levels, and the obligations of the CLO are not reset, the
21 arbitrage that is the CLO shrinks. And that's what happened
22 to these CLOs.

23 Q And during the course of the Acis bankruptcy, Acis and
24 Brigade were given management responsibilities over the CLOs
25 and HCLOF, correct?

1 A I believe that the Trustee had the overall, and then
2 subsequently, with the confirmation of the plan, they took it
3 over. So I think that ultimately Mr. Terry had the management
4 authority, full management authority, and some advice through
5 Brigade. But I think technically it wasn't actually during
6 the Chapter 7. The Chapter 7 proceeding, I believe that Mr.
7 Phelan had the actual authority.

8 (Echoing.)

9 Q I'm sorry. And so your testimony is that Mr. Phelan had
10 the actual authority but he delegated that authority to Josh
11 Terry and Brigade?

12 A I think that's fair, yes.

13 Q And do you know when that occurred?

14 A I believe that the control of the CLOs was in July of
15 2018, and then the ultimate confirmation of the case was at
16 the very beginning of '19.

17 Q So, after being instituted as portfolio manager, and
18 during the time when Acis and Brigade were working under the
19 direction of the Trustee, who would have receive the fees for
20 managing those portfolios?

21 A I believe -- I don't know. I believe the -- that the Acis
22 estate would have received those fees.

23 Q And who -- and so is that your testimony, that prior to
24 confirmation the Acis estate would have received the
25 management fees?

1 A I believe that -- I believe they would have if they were
2 the manager, yeah.

3 Q Okay. And who would have received the fees after
4 confirmation?

5 A Acis.

6 Q Okay. And who would have had the discretion to set the
7 amount of those management fees?

8 A They would be agreed to in the -- in the investment
9 management agreement.

10 Q They would be agreed to?

11 A Yes. As far as I've seen, I've -- I haven't seen
12 unilateral ability of a manager to set fees at its -- at its
13 whim.

14 Q So is it your understanding that Acis and Brigade ended up
15 charging substantially more fees than Highland had charged
16 when it was under Highland's management?

17 A I think the fees were -- the fees were -- the fees were
18 set by the agreement.

19 MR. MORRIS: Your Honor, I just object to the line of
20 questioning on relevance grounds. This is a 9019 hearing,
21 Your Honor. How -- I just don't think this has any relevance
22 at all.

23 THE COURT: All right. Mr. Wilson, what is the
24 relevance?

25 MR. WILSON: The relevance is that Mr. Seery has

1 testified that these Acis CLOs were among the worst-performing
2 in the market, and frankly, we would agree with that, and I'm
3 trying to get his understanding as to why, because I think
4 there's direct relevance in the reason that the value of the
5 HarbourVest investment diminished.

6 MR. MORRIS: I don't think that was his testimony,
7 Your Honor. But at the end of the day, Your Honor has heard
8 the litany of reasons why the Debtor is entering into this
9 agreement. I just, I just think it's irrelevant, Your Honor.

10 THE COURT: All right. Mr. Wilson, I barely think
11 this is relevant. I mean, I'm going to give you some benefit
12 of the doubt on that because of, you know, the testimony that
13 HarbourVest lost \$50 million of value and --

14 (Echoing.)

15 THE COURT: -- maybe that shouldn't, you know, lie at
16 the feet of Highland. I think the compromise reflects that
17 they don't -- it doesn't lie entirely at the feet of Highland.
18 But, you know, maybe two or three more questions.

19 MR. WILSON: Yes. Thank you, Your Honor. And I
20 didn't have very much more on this point. But to be a hundred
21 percent honest, I can't remember my question right before the
22 objection.

23 THE WITNESS: I think you were asking me about the
24 fees and somehow alluding or implying that the manager could
25 unilaterally set fees.

1 The fees are set in the investment management contract.

2 The manager doesn't get to wake up on Wednesday and say, you
3 know, I'd like another half a basis point. It doesn't work
4 that way.

5 BY MR. WILSON:

6 Q But you would agree with me that the fees and expenses
7 charged to an investment would impact the performance of that
8 investment in the market?

9 A Absolutely.

10 Q Would you also agree with me that there was one CLO -- and
11 I think you referred to it in your direct testimony -- but CLO
12 7, which continued to be managed by Highland?

13 A That's correct.

14 Q And is it fair to say that CLO 7 exceeded the performance
15 of the CLOs that were managed by Acis and Brigade?

16 A I think that's fair. I don't -- I don't recall the
17 magnitude, but I think it's outperformed those -- those CLOs,
18 yes.

19 Q All right. Well, thank you. I want to turn your
20 attention to the portion of the settlement agreement that
21 deals with voting of the HarbourVest claim. How did
22 HarbourVest's commitment to vote for the plan become a part of
23 the settlement?

24 A Pretty straightforward negotiation. We -- in negotiating
25 the settlement, one of the key factors was the cost and

1 expense of the litigation, in addition to the risk on the --
2 on the fees, and whether we could wrap this up in a global
3 settlement now. So in my experience, it's fairly typical, we
4 would try to do this in every settlement, have the settling
5 party, be that the claimant, agree to support the case and the
6 plan.

7 You know, we did not do that with the Committee members,
8 although we wanted to. (Echoing) I frankly still wish I had.
9 Those little -- little bits that have been difficult
10 (echoing). The Committee members have a different interest in
11 (echoing) than their more global interest for creditors at
12 large, which is more difficult than traditionally in
13 bankruptcy cases, less likely to have a Committee member, a
14 sitting Committee member, actually support the (echoing) of
15 the plan.

16 THE COURT: Mr. Wilson, could you be careful to put
17 your device on mute every time you're not talking? Because
18 we're getting some feedback loop from you when Mr. Seery
19 answers your questions. Okay?

20 (Echoing continues.)

21 THE COURT: Like right now. I'm hearing feedback of
22 my own voice through your speakers.

23 Right, Mike? Isn't that what --

24 A VOICE: I am, too.

25 THE COURT: Yes. Okay. So please be sure you put

1 your device on mute whenever you are not speaking. All right.
2 Go ahead.

3 BY MR. WILSON:

4 Q I mean, I think you just answered this question, but there
5 was -- there was no similar voting provision in the Acis or
6 the Redeemer settlements, correct?

7 A There is not, no. And just as a -- by way of explanation,
8 if it's okay, the reason was my counsel advised against it. I
9 did ask for it.

10 Q Your counsel advised against putting that voting
11 requirement in the Acis and Redeemer settlements?

12 A For the reasons I stated. And in my experience, that's
13 consistent, where sitting members of Committees don't
14 generally sign up to resolve their own claims and support the
15 plan because of their larger fiduciary duties to the creditor
16 body as a whole.

17 Q And during the settlement negotiations of the HarbourVest
18 claim, was this commitment to vote a topic of discussion?

19 A Not -- not particularly, no. It was pretty clear that
20 HarbourVest, if they were going to agree to the settlement and
21 the numbers, could see structure. Obviously, it wanted to
22 understand what the potential distributions would be under the
23 plan, but this was not a hotly-negotiated point.

24 Q And would you consider HarbourVest's commitment to vote
25 for the plan an important part of the settlement?

1 A I think it's an important part of the settlement, that the
2 part of the settlement is the subordinated claim. We could
3 put that into presumably any plan. But our plan does -- does
4 have a Class 9 for that. So I think it's a -- it's a part of
5 the settlement that is important or we wouldn't have included
6 it. It clearly wraps everything up and moves us towards
7 confirmation.

8 Q And would you have made the deal with HarbourVest if they
9 had pushed back on the commitment to vote for the plan?

10 A Yeah, I would have.

11 Q All right. Thank you.

12 MR. WILSON: No further questions.

13 THE COURT: All right. Mr. Draper, anything from
14 you?

15 MR. DRAPER: Yes, Your Honor.

16 CROSS-EXAMINATION

17 BY MR. DRAPER:

18 Q Mr. Seery, I may not understand the settlement, and I
19 apologize, but the way I think the settlement reads, the
20 interest that you're acquiring, you have the right to place in
21 any entity. Is that my -- is that correct?

22 A I don't recall the -- the specifics, but just from a
23 structural standpoint, we wanted to be able to put it into a
24 subsidiary as opposed to putting it directly in HCMLP. If we
25 couldn't do that, we would -- we would put it into HCMLP. So

1 there wasn't a -- I don't recall the actual specifics, but we
2 certainly thought about holding that interest in a -- in a
3 subsidiary, just to have a cleaner hold.

4 Q Why aren't you putting it into the Debtor so the Court and
5 the estate have jurisdiction over that?

6 A I think the Court certainly has jurisdiction over an
7 entity that the estate owns a hundred percent of. I don't
8 think that's -- that's even a close call. So the important --

9 Q Now, --

10 A Can I finish?

11 Q Sure.

12 A You asked me why. To the extent that somebody thinks that
13 problematic, I will consent to the Court having complete
14 jurisdiction over it, since I control it a hundred percent.

15 Q No. The real reason is, if I remember correctly, Mr.
16 Dondero and Judge Lynn filed a motion to have some say or some
17 information as to sales by subsidiaries, and I think you took
18 the position that they weren't entitled to it. And so my
19 concern was that putting this in a subsidiary in a sense gave
20 you unfettered control without any review of the item.

21 A I don't -- I don't think that's the case where we --
22 there's a directly-held subsidiary where we own a hundred
23 percent of it. I don't think that that's the case.

24 Q Okay. But you're willing to (a) put this into the Debtor,
25 number one; and number two, have the estate and have the Court

1 have complete control over the disposition of it and its
2 actions, correct?

3 A That's not correct, no.

4 Q What -- what is incorrect about my statement?

5 A The debtor-in-possession has control of its assets. The
6 Court doesn't have complete control over its assets. There's
7 --

8 Q Well, --

9 A -- issues -- hold on a second. This is not -- this is not
10 a game and a trap. We put it in a subsidiary for specific
11 reasons. You asked why. I'm giving you the why. It's not to
12 hide it from anybody. We're not going to sell the asset
13 unless somebody comes up with a great price for it. We're
14 going to monetize the assets. We're going to control HCLOF by
15 a majority.

16 Q But, again, the issue is, if it's in the estate, the Court
17 has supervision over it. If it's not in the estate, the Court
18 has no supervision of it.

19 A I don't think that's correct, because the Court has
20 supervision over the estate, which owns a hundred percent of
21 the special-purpose entity that will own the shares.

22 Q Okay. All right. Now, let's talk about the \$15 million
23 that you discussed and the legal fees that were incurred. Is
24 that the total amount that was spent, or is -- or is that --
25 was the total amount \$30 million and HarbourVest was only

1 responsible for one half of it or functionally took the brunt
2 of one half of it?

3 A I think the total amount is between \$15 and \$20 million.
4 I don't have the exact numbers.

5 Q So, in fact, the HarbourVest loss due to its ownership
6 would have been one half of that, not \$15 million?

7 A Well, the vehicle lost the money. HarbourVest owned 49.98
8 percent of it, and Highland controlled the rest. So if you
9 allocate it that way, I suppose that would be a -- that's how
10 you would divide it, in -- roughly in half, yes.

11 Q And so HarbourVest's actual dollar loss due to the legal
12 fees is really the 49-point-whatever percent of \$15 million,
13 not \$15 million?

14 A I don't know if -- I certainly would argue that. I don't
15 think that HarbourVest has that position.

16 Q Okay. Now, in connection -- you were asked a question
17 about the documentation that was provided by Highland to
18 HarbourVest both during the bankruptcy of Acis and before.
19 You have control over the Harbour -- over the Highland server,
20 correct?

21 A I'm sorry. Can -- can we do two things? One is, Mr.
22 Draper, I can't see you, so it would be better if I could see
23 you during the questioning.

24 Q Okay.

25 A And could you repeat the question?

1 Q All right. I'll be happy to. You were asked a question
2 about the documentation that was provided by Highland to
3 HarbourVest during the Acis bankruptcy and meetings that took
4 place between the parties. Correct?

5 A Yes.

6 Q And you stated you were unaware of the material that was
7 sent over?

8 A I think I testified that I didn't receive the 40,000
9 documents that were mentioned.

10 Q Did you do any search or order a search of the Highland
11 server to see what material was sent over by any party to
12 HarbourVest to analyze what -- what information they had
13 available to them and what was provided to them?

14 A Yes, we did a search.

15 Q And did you review the documentation that was sent over?

16 A The -- the documentation that we looked at was very
17 specific to the investment and to the OM. So we didn't look
18 for the -- the supposed 40,000 documents, no.

19 Q Did you look for the material that was provided to them
20 during the Acis bankruptcy and the periodic meetings that you
21 discussed? Or that you testified to earlier?

22 A The answer is no.

23 Q One last question. I think, and just so I understand your
24 testimony, you've broken out the HarbourVest claim into two
25 pieces. One is the legal fee amount that we've just

1 discussed, and I gather the other piece of that is the fraud
2 in the inducement to enter into the CLO purchase?

3 A It's -- it's more -- it's much more than that.

4 Q Okay. Well, let me say it in a different way. The other
5 part of it is the losses as a result of the fraud in the
6 inducement to purchase the interest?

7 A I don't think that's -- that's fair. If I could explain?

8 Q Sure.

9 A Yeah. The legal fee piece is pretty clear. The other
10 piece starts with fraud in the inducement, but it's extensive
11 fraud claims. Fraud in the inducement, as I testified
12 earlier, would get them around the exculpation and liability
13 limitations in the OM. You don't get around all of those with
14 just the fraud. And so that's -- that's the split of that
15 claim. So the fraud in the inducement contains fraud
16 allegations. Even if you didn't have inducement, you'd have
17 other potential fraud claims.

18 Q But let me state it in a different fashion. But for the
19 investment, the fraud that you allege wouldn't have occurred?

20 A I -- HarbourVest alleges it.

21 Q No, I'm just -- in your analysis of the claim, but for the
22 inducement, the rest of the damages wouldn't have flowed?

23 A That's HarbourVest's position, yes. But for the fraud,
24 they wouldn't have made the investment.

25 Q All right.

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1 MR. DRAPER: I have nothing further for this witness.

2 THE COURT: All right. Any redirect, Mr. Morris?

3 MR. MORRIS: Just a few very questions, Your Honor.

4 Just a very few questions.

5 REDIRECT EXAMINATION

6 BY MR. MORRIS:

7 Q Mr. Seery, you were asked about that document that Lucy
8 prepared. Do you remember that?

9 A Yes, I do.

10 Q In your experience, don't defendants often deny liability
11 before entering into settlements, or even worse, getting
12 adverse judgments entered against them?

13 A Of course. Yes.

14 Q Okay. And in response to Mr. Draper's questions, isn't
15 the Guernsey claim another claim that the Debtor took into
16 account in assessing the potential risks of this settlement?

17 A There's a number of claims contained in it. As I
18 mentioned earlier, I mentioned the RICO claim. But there is a
19 Guernsey shadow director claim, which is not dissimilar to
20 U.S. claims that somebody effectively controls an enterprise,
21 notwithstanding them not having the official role.

22 Q Okay.

23 MR. MORRIS: I have nothing further, Your Honor.

24 THE COURT: All right. Any recross on that redirect?

25 All right.

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1 MR. WILSON: No, Your Honor.

2 MR. DRAPER: No, Your Honor.

3 THE COURT: Thank you. Mr. Seery, that concludes
4 your testimony. Thank you.

5 THE WITNESS: Thank you, Your Honor.

6 THE COURT: We need to take a bathroom break. Before
7 we do, I just want to be clear with what we have left. As I
8 understood it, we were having Mr. Pugatch from HarbourVest.
9 Mr. Morris, will that conclude the Debtor's evidence?
10 (Pause.) Okay. You were on mute, but I think you were saying
11 yes.

12 MR. MORRIS: Sorry. But to be clear, Debevoise is
13 going to be putting their witness on the stand.

14 THE COURT: Okay.

15 MR. MORRIS: But it's part of the evidence in support
16 of the motion.

17 THE COURT: All right. Do the Objectors have any
18 witnesses today?

19 MR. WILSON: Your Honor, Mr. Dondero intends to
20 examine Mr. Pugatch, but if he's going to be called by his
21 counsel, then we will do that as a cross-examination.

22 THE COURT: All right.

23 MR. DRAPER: This is Douglas Draper. I have no
24 witnesses.

25 THE COURT: Okay. All right. Well, I'm asking --

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1 well, I do want to ask: Can we get a time estimate
2 potentially for Mr. Pugatch?

3 MS. WEISGERBER: For my examination, Your Honor,
4 twenty minutes, perhaps.

5 THE COURT: Okay.

6 MS. WEISGERBER: Or less.

7 THE COURT: All right. Well, let me tell you what
8 we're going to do. We're going to take a ten-minute bathroom
9 break. But I have a 1:30 hearing and I have a 2:00 o'clock.
10 Well, I have a 1:30 docket, multiple matters, and a 2:00
11 o'clock docket. So, you know, I'm really intending that we
12 get finished in time to give me and my staff a little bit of a
13 lunch break before launching into the 1:30 docket, so I'm
14 hopeful we can get done around 1:00-ish. If we can't, then
15 we're going to have to reconvene, I'm going to say probably
16 3:00-ish Central time. So let's hope we can get through
17 everything. All right? Ten-minute break.

18 THE CLERK: All rise.

19 (A recess ensued from 11:58 a.m. until 12:08 p.m.)

20 THE CLERK: All rise.

21 THE COURT: All right. Please be seated. We're
22 going back on the record in the Highland matters. Do we have
23 everyone? It looks like we do. Ms. Weisgerber is going to
24 call the next witness; is that correct?

25 MS. WEISGERBER: Yes, Your Honor. We call Michael

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1 Pugatch of HarbourVest to the stand.

2 THE COURT: All right. Mr. Pugatch, if you could
3 turn on your video and say, "Testing one, two."

4 MR. PUGATCH: Two.

5 THE COURT: All right. There you are. Please raise
6 your right hand.

7 MICHAEL PUGATCH, HARBOURVEST'S WITNESS, SWORN

8 THE COURT: Thank you. You may proceed.

9 MS. WEISGERBER: Thank you, Your Honor.

10 DIRECT EXAMINATION

11 BY MS. WEISGERBER:

12 Q Good morning. Can you please state your name for the
13 record?

14 A Sure. It's Michael Pugatch.

15 Q And where do you work, Mr. Pugatch?

16 A HarbourVest Partners.

17 Q And what is your title?

18 A I'm a managing director in our secondary investment
19 group.

20 Q Did HarbourVest file claims in the Highland bankruptcy,
21 Mr. Pugatch?

22 A We did, yes. Several claims, in fact.

23 Q What was the basis for those claims?

24 A Yeah. Among other things, fraudulent inducement based on
25 misrepresentations and omissions on the part of Highland in

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1 connection with our original investment, mismanagement at the
2 HCLOF level, including inappropriate fees that were charged
3 to investors, among a number of other items as well.

4 Q Can you explain what you mean by misrepresentations made
5 to HarbourVest by Highland?

6 A Yeah, sure. So, you know, based on a number of
7 statements that were made to us around the litigation
8 involving Mr. Terry, some of the intentions found, the
9 structural changes that came to light with respect to HCLOF
10 and our investment, as well as the fact that the arbitration
11 award specifically against Mr. Terry would have no impact or
12 implication on Highland's sale or business.

13 Q And can you explain what you mean by omissions made by
14 Highland to HarbourVest?

15 A Sure. So I would say, really, the implications behind
16 the structural changes that were made at the time of our
17 investment into HCLOF. Also, the intention, clear intentions
18 that Highland had to never, in fact, pay the arbitration
19 award that came to light during our due diligence period to
20 Mr. -- to Mr. Terry as part of the investment. And
21 ultimately the -- what Highland went about doing in terms of
22 stripping assets of Acis that led to the material value
23 declines and destruction of value that we've experienced
24 since our investment.

25 Q You mentioned a diligence period. Did HarbourVest

1 conduct diligence on the investment?

2 A We did. We conducted very detailed due diligence, as we
3 do for all of our investments. That diligence period lasted
4 several months ahead of our investment decision.

5 Q And did HarbourVest conduct that diligence by itself?

6 A No. So, in addition to internal investment professionals
7 at HarbourVest, we engage with outside advisors, both
8 consultants as well as legal advisors, in connection with
9 that due diligence.

10 Q And did Highland answer all of HarbourVest's questions
11 during that diligence period?

12 A They did. And they were numerous. But yes, they
13 answered all the questions that we had for them.

14 Q Was the Terry dispute part of HarbourVest's diligence?

15 A It was. That came up as one of the outstanding items of
16 litigation as part of our due diligence.

17 Q I'm going to ask my colleague to pull up on the screen an
18 exhibit that was on our exhibit list as Items -- Exhibits 34
19 and 35. It's an August 15, 2017 email from Brad Eden to
20 Dustin Willard. Mr. Pugatch, do you recognize this document?

21 A I do, yes.

22 Q And what is it?

23 A This was an email sent to us during our due diligence
24 period in response to a request for more information on the
25 outstanding litigation that Highland was involved with.

1 MS. WEISGERBER: And if my colleague can just scroll
2 to the attachment to that email.

3 BY MS. WEISGERBER:

4 Q And do you recall the attachment as well, Mr. Pugatch?

5 A Yes, I do.

6 MS. WEISGERBER: And if you can scroll back up to the
7 first email.

8 BY MS. WEISGERBER:

9 Q Who is Dustin Willard?

10 A Yes. Dustin is a colleague of mine at HarbourVest who
11 worked closely with me on this investment.

12 Q And you said that this document was shared with
13 HarbourVest during the diligence period before the HCLOF
14 investment?

15 A It was, correct.

16 Q Is it typical during diligence to receive a description
17 of litigation such as this?

18 A It is. It's a question that we always ask. Certainly a
19 component of our diligence to understand any outstanding
20 litigation on the part of our counterparty or manager that
21 we're investing in.

22 MS. WEISGERBER: Your Honor, I'd move to offer this
23 exhibit into evidence.

24 THE COURT: Any objection?

25 MR. DRAPER: No objection, Your Honor.

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1 MR. MORRIS: No objection from the Debtor, Your
2 Honor.

3 THE COURT: All right. What is the letter or number
4 for this exhibit?

5 MS. WEISGERBER: It's HarbourVest Exhibit 34.

6 THE COURT: All right. So HarbourVest Exhibit 34 is
7 admitted.

8 (HarbourVest's Exhibit 34 is received into evidence.)

9 THE COURT: And I need to be clear where it appears
10 on the docket. Can someone tell me?

11 MS. WEISGERBER: So, it's identified on our exhibit
12 list, not -- it's not attached to the exhibits. It is on the
13 docket. We were -- when we initially filed the exhibit list,
14 we were working out confidentiality issues. But it was
15 subsequently filed with our reply last night. It's at Docket
16 No. 1735 --

17 THE COURT: All right.

18 MS. WEISGERBER: -- at Pages A -- Pages A345 to A350.

19 THE COURT: All right. Very well. Thank you.

20 BY MS. WEISGERBER:

21 Q Mr. Pugatch, we'll just scroll down to the second page of
22 the attachment. Can you describe generally what the
23 litigation says regarding the Terry dispute?

24 A Yes. Generally speaking, this dispute was described as
25 an employee dispute, employment agreement dispute, with Mr.

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1 Terry, who was a former employee of Highland involved in
2 their CLO business, and is described by Highland to us really
3 having to do with a series of false claims, in their opinion,
4 but having to do with a disgruntled former employee.

5 Q And did it strike you as an unusual or significant
6 dispute?

7 A No. I would say we often -- we'll see, you know, former
8 employees with, you know, claims against a former employer in
9 connection with wrongful termination. I wouldn't say it's
10 extremely common, but certainly not entirely out of the
11 ordinary. And based on the explanations that we'd received
12 from Highland, seemed to be more of an ordinary-course type
13 former employee litigation suit.

14 Q Based on what you now know about the Terry dispute, do
15 you believe that this was an adequate disclosure regarding
16 the dispute?

17 A I would say very clearly not, you know, based on the
18 facts that came to light subsequently, the various rulings in
19 connection with the Acis bankruptcy case. What was very
20 clearly not stated are the actual facts and implications of
21 the ongoing litigation with Mr. Terry.

22 MS. WEISGERBER: I'd ask my colleague to put up the
23 next exhibit. Okay. So, this is on a HarbourVest exhibit
24 list, which is Document No. 1723. It's Exhibit 36 on that.
25 Same issue with respect to initially not filed, but it is on

1 the docket at our response last evening at ECF No. 1735 at
2 Page A351.

3 THE COURT: Page what?

4 MS. WEISGERBER: A351.

5 THE COURT: A351. Thank you.

6 MS. WEISGERBER: You're welcome.

7 BY MS. WEISGERBER:

8 Q Mr. Pugatch, I just put up a November 29, 2017 email from
9 Hunter Covitz to Dustin Willard, Michael Pugatch, and Nick
10 Bellisario. Do you recall this document?

11 A I do, yes.

12 Q And what is this document?

13 A This was an email sent to us by Highland a couple weeks
14 after we closed on our investment on the (inaudible) in
15 response to a *Wall Street Journal* article that had come out
16 regarding Highland, a number of actions that they had taken,
17 and what Highland was articulating to us, a number of false
18 claims that had been made about Highland's prior actions, and
19 specifically trying to explain some of that and also share
20 with HarbourVest a letter that was being sent to the editor
21 of the *Wall Street Journal* highlighting, in their view, some
22 of the inaccuracies around the reporting.

23 Q And did you receive this document?

24 A We did, yes.

25 MS. WEISGERBER: I'd move to offer this, so

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1 HarbourVest Exhibit 36, into evidence.

2 THE COURT: Any objections?

3 MR. WILSON: Your Honor, John Wilson. I would object
4 as to the relevance of this document.

5 THE COURT: All right. What's your response?

6 MS. WEISGERBER: Your Honor, it shows
7 misrepresentations that the witness will testify how it
8 relates back to prior representations prior to HarbourVest's
9 investment, as well as misrepresentations at that time.

10 THE COURT: Okay. I overrule the objection. I'm
11 going to admit it.

12 (HarbourVest's Exhibit 36 is received into evidence.)

13 BY MS. WEISGERBER:

14 Q Mr. Pugatch, can you describe generally -- we spoke about
15 this a little bit -- just what this communication from
16 Highland was conveying to HarbourVest at the time?

17 A Yes. Specifically, again, responding to this *Wall Street*
18 *Journal* article that had been published, trying to defend,
19 again, Highland's own views why there were inaccuracies in
20 the reporting. But importantly, from our perspective, trying
21 to reassure us as to the fact that, you know, these
22 accusations would have no bearing and any results from it
23 would have no bearing on their ongoing business or
24 partnership or the investment that we had made in HCLOF.

25 MS. WEISGERBER: And if you can scroll to the second

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1 page.

2 BY MS. WEISGERBER:

3 Q We'll just look at the last paragraph of another email
4 from Mr. Covitz. Can you just read that first sentence of
5 the last paragraph?

6 A Sure. (reading) While the dispute has no impact on our
7 investment activities, as always, we welcome any questions
8 you may have.

9 Q Mr. Pugatch, was this email and the discussion regarding
10 the Terry dispute consistent with the representations made to
11 you prior to HarbourVest's investment into HCLOF?

12 A It was, yes. Both the message, the lack of any impact
13 that ultimately the dispute with Mr. Terry, the arbitration
14 award would have around Highland's ongoing CLO business, or
15 HCLOF specifically, was all, you know, very clear in this
16 document, but all consistent with the representations that
17 had been made to us leading up to our investment in the
18 middle of November 2017 as well.

19 Q Thank you.

20 MS. WEISGERBER: And you can take down the exhibit,
21 Emily. Thank you.

22 BY MS. WEISGERBER:

23 Q You mentioned, Mr. Pugatch, an arbitration award to Mr.
24 Terry. How did you learn about that arbitration award?

25 A That was initially disclosed to us by Highland as we were

1 in the late stages of our diligence and closing process on
2 the investment into HCLOF.

3 Q And generally, what did Highland tell you about the
4 arbitration award?

5 A We were aware of its existence. We were aware of the
6 quantum of the award, I think it was around an \$8 million
7 arbitration award in the favor of Mr. Terry, and that was
8 following the litigation around the wrongful termination and
9 employee dispute that Highland had described to us
10 previously.

11 Q Did you ask to see a copy of the arbitration award?

12 A No, we did not.

13 Q Why not?

14 A Ultimately, we -- you know, the explanations that
15 Highland had provided to us all seemed very reasonable. We
16 relied on their representations that this was, again, nothing
17 more than a dispute with a former disgruntled employee, in
18 their words, that had no bearing or, you know, would not have
19 any bearing on our investment in HCLOF or their ongoing CLO
20 business, which all very clearly was not the case, as
21 we've -- as we've learned over the last several years.

22 Q Following learning about the arbitration award, did
23 HarbourVest do other diligence?

24 A We did. So, in addition to asking questions related to
25 the arbitration award and any impact that it would have, we

1 also spent some time diligencing a couple of structural
2 changes that were proposed by Highland, and, in fact, ended
3 up delaying the closing of our investment by about two weeks
4 as we vetted some of those structural changes that Highland
5 had proposed. Vetted those both, you know, internally with
6 Highland directly and with external counsel in order to make
7 sure that those structural changes were in fact legally sound
8 in ultimately making our investment.

9 Q And were those changes proposed following the arbitration
10 award?

11 A They were, yes.

12 Q Did Highland tell you the reason for the structural
13 changes?

14 A Yeah. So, so some of this -- and specifically, this
15 involved a change of the portfolio manager at the HCLOF level
16 that was really in connection with a rebranding as Highland
17 was going through a rebuild of its CLO business and wanting
18 to align, from a brand perspective, their business on an
19 ongoing basis with the Highland brand as opposed to the Acis
20 brand. But more specifically, in the case of a late change
21 from a structured standpoint, the -- part of the intention
22 and the investment thesis of HCLOF was to pursue a reset, a
23 refinancing of all the underlying CLOs as they approached the
24 end of their investment period or came out of their
25 investment period.

1 And in connection with that, in light of the arbitration
2 award, Highland's view was that there may be difficulties in
3 the market in resetting certain of those Acis CLOs with the
4 Acis brand associated with them, given, again, the existence
5 of the arbitration award and concerns in the market around
6 the Acis brand reputation.

7 Q And what did they tell you was the market view of Acis,
8 or the Acis brand?

9 A Yeah. Their view or their concern was that the, you
10 know, because of the existence of that arbitration award, the
11 brand would be viewed as toxic.

12 Q Didn't this put you on notice that perhaps there was
13 something wrong with the structural changes?

14 A I mean, we -- I mean, short answer, no. We ultimately
15 asked questions, we diligenced the legal structure, but
16 relied on the representations that were made to us by
17 Highland around the rationale for the structural changes,
18 that these are all changes that were within a Highland-
19 managed vehicle or sat below the vehicle that we were
20 investing in, and so ultimately were in Highland's purview,
21 was the representations that we relied on.

22 Q And did HarbourVest alone do that diligence of the
23 structural changes?

24 A So, no. I mean, in connection with the diligence that we
25 did internally and with Highland directly, we engaged with

1 outside counsel who was working with us at the time to vet
2 those structural changes as well.

3 Q Did HarbourVest rely on Highland's representations
4 regarding the arbitration award and the structural changes in
5 making its investment in HCLOF?

6 A We did, absolutely.

7 Q If Highland had disclosed the nature of the structural
8 changes, of removing Acis as the portfolio manager and
9 related transfers, would HarbourVest have proceeded with its
10 investment?

11 A Definitively, no, we would not have.

12 Q Why not?

13 A I think the reality is if we had understood the intent,
14 you know, that Highland was ultimately undertaking here, we
15 would not have wanted to be any part of this, and certainly
16 getting dragged into all of this, the hassle, the value
17 destruction that we've seen on behalf of the investors and
18 the funds that we manage. And I would say, lastly, we just
19 full stop would not have done business with a firm who
20 engages with this type of behavior, had we actually known the
21 truth.

22 Q Mr. Pugatch, are you familiar with the bankruptcy that
23 followed of Acis?

24 A Yes.

25 Q And what was your -- or, did HarbourVest participate in

1 that bankruptcy?

2 A So, initially, no. Subsequently, we ended up getting
3 dragged into that on account of a number of misstatements by
4 Highland about the role that HarbourVest had played as part
5 of our investment into HCLOF and some of that structure and
6 the structural changes that I alluded to.

7 Q How did HarbourVest learn about those misstatements in
8 the bankruptcy about HarbourVest's role?

9 A So, ultimately, those came to light on -- you know, on
10 account of the ongoing proceedings within the Acis bankruptcy
11 process, and specifically brought to light to us by the Acis
12 trustee at the time, who decided to pursue, you know, further
13 diligence or discovery around the claims that Highland had
14 made around HarbourVest's involvement in those changes.

15 Q And what is your understanding of what the allegations
16 were that caused the Acis trustee to investigate HarbourVest?

17 A Sure. So, you know, our understanding was that Highland
18 had made statements, again, false statements that HarbourVest
19 had actually instructed some of those structural changes,
20 that we were the ones that had said that we would not do
21 business with Acis and had ordered some of the underlying
22 transfer of assets or, again, structural changes, that, you
23 know, very clearly I would say were not the case. Also, that
24 HarbourVest was -- was calling the shots as it relates to any
25 of the ongoing management or future resets of the CLOs.

1 Q Did HarbourVest instruct any of those structural changes
2 or transfers to occur?

3 A We did not. Absolutely not.

4 Q Why didn't HarbourVest itself appear in the Acis
5 bankruptcy and file a claim?

6 A Yeah. HarbourVest's role, again, in HCLOF, we were a
7 passive investor in a Highland-managed company. We had no
8 direct interaction with or relationship with Acis. There was
9 really no reason for us to be directly involved until we were
10 subsequently dragged into involvement on account of those
11 misstatements. And then at that point our focus really
12 pivoted to, you know, whether we needed to defend ourselves
13 against those accusations that had been made by Highland and
14 after a request for further information in discovery by the
15 Acis trustee.

16 Q Did HCLOF participate in the Acis bankruptcy?

17 A They did, yes.

18 Q Did HCLOF incur fees for participating in the Acis
19 bankruptcy?

20 A Yes. In fact, very meaningful fees, to the tune of well
21 in excess of \$15 million of legal fees, as we understand it,
22 that have been incurred, largely in connection with the
23 ongoing Acis bankruptcy and Highland's continued pursuit of
24 and in connection with the litigation with Mr. Terry, which
25 we firmly believe was entirely inappropriate that HCLOF and

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1 ultimately investors in HCLOF bear those expenses, which were
2 not just expenses of HCLOF but of Highland and a number of
3 other Highland affiliates.

4 Q Do those expenses form a basis of separate claims filed
5 by HarbourVest against Highland?

6 A They do, yes. One of the multiple claims that we had
7 filed against Highland.

8 Q And a few more questions, just for the record, Mr.
9 Pugatch. How much did HarbourVest initially invest in HCLOF?

10 A Sure. So, our initial investment in November of 2017 was
11 right about \$73-1/2 million, I believe.

12 Q Did HarbourVest invest any additional money in HCLOF?

13 A We did. There was a subsequent capital call investment
14 of about \$5 million, bringing our total investment to just
15 under \$80 million in aggregate.

16 Q When HarbourVest initially made the investment, did it
17 anticipate making a profit on it?

18 A We did, yes.

19 Q How much did HarbourVest anticipate earning from the
20 investment?

21 A Yeah. So, our -- based on the original \$73-1/2 million
22 investment, we had expected a total return of about \$137
23 million on that -- on that investment.

24 Q What was that projection based on?

25 A So, that projection was based on materials that we had

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1 received from Highland, their internal projection models on
2 the future performance of the underlying CLOs that we were
3 acquiring exposure to through our investment in HCLOF, and
4 was one of the inputs or formed the basis in connection with
5 our diligence that we ultimately ran different sensitivities
6 -- projections around and helped employ -- helped inform our
7 investment thesis.

8 Q Do you know the current value of HarbourVest's investment
9 in HCLOF?

10 A Yes. The current value is right around \$22-1/2 million.

11 Q So roughly how much has the investment itself decreased
12 from HarbourVest's initial investment?

13 A So, net of what was about \$4-1/2 million of distributions
14 that we received early on in the investment, we've lost, to
15 date, in excess of \$50 million on our original investment.

16 Q And just for -- to close out, Mr. Pugatch, knowing all
17 that you know, if HarbourVest had known that -- about the
18 nature of the transfers by Acis or Highland's intent with
19 respect to the arbitration award, would HarbourVest have made
20 this investment?

21 A No. The reality is, had we known the truth, or even had
22 a sense of the truth, the true intentions behind some of
23 those transfers and ultimately what would have happened, we
24 never would have made this investment, full stop.

25 Q Thank you, Mr. Pugatch.

1 THE COURT: All right. I didn't hear you, Ms.
2 Weisgerber. Do you pass the witness?

3 MS. WEISGERBER: Yes, I pass the witness.

4 THE COURT: All right. Thank you.

5 Mr. Morris, any examination from you?

6 MR. MORRIS: No, thank you, Your Honor.

7 THE COURT: All right.

8 (Interruption.)

9 THE COURT: All right. I'm not sure whose voice that
10 was, but please, again, mute your devices when you're not
11 talking.

12 Any cross-examination of Mr. Pugatch? I'll start with
13 you, Mr. Wilson.

14 MR. WILSON: Yes, Your Honor.

15 THE COURT: Okay.

16 CROSS-EXAMINATION

17 BY MR. WILSON:

18 Q How are you -- I guess we're afternoon now. How are you
19 this afternoon, Mr. Pugatch?

20 A I'm doing well. Yourself?

21 Q I'm doing well as well. Do you recall that on Monday of
22 this week I took your deposition?

23 A Yes, I do.

24 Q And so you understand that my name is John Wilson and I
25 represent Jim Dondero, who has filed an objection to the 9019

1 motion filed by the Debtor?

2 I've got a few questions for you today. Has HarbourVest
3 been around for over 35 years?

4 A We have, yes.

5 Q And does HarbourVest have ten offices around the world?

6 A Correct, yes.

7 Q And does HarbourVest employ over 150 investment
8 professionals?

9 A Yes.

10 Q Does HarbourVest have over \$74 billion in assets under
11 management?

12 A Correct, yes.

13 Q And is HarbourVest's client base largely comprised of
14 institutional investors?

15 A Also correct.

16 Q And you would agree with me that HarbourVest is a
17 sophisticated investor, right?

18 A I would, yes.

19 Q How long have you worked for HarbourVest?

20 A I've been employed by HarbourVest for 17 years now.

21 Q And how long have you been a managing director?

22 A I've been a managing director for approximately six
23 years.

24 Q And you were, in fact, the managing director for the
25 investment that HarbourVest made in Highland CLO Funding,

1 Ltd., which has been referred to today as HCLOF, correct?

2 A I was, correct.

3 Q And HarbourVest, I think you just testified, invested
4 approximately \$73 million as its initial investment in HCLOF?

5 A Yes, correct.

6 Q And before HarbourVest made that investment, it had made
7 many investments of this type, correct?

8 A Yeah. We've made hundreds of investments into
9 partnerships over our history, correct.

10 Q So HarbourVest was well-experienced in evaluating and
11 deciding whether to invest in large investments, correct?

12 A It was, yes.

13 Q Now, in your -- and by your, I mean HarbourVest -- in the
14 response to the Debtor's omnibus objection, it says that by
15 summer 2017 HarbourVest was engaged in preliminary
16 discussions with Highland regarding the investment. Is that
17 a correct statement?

18 A Correct, yes.

19 Q And, in fact, those talks began in the second quarter of
20 2017, correct?

21 A Yes.

22 Q And so the investment closed ultimately on November 15th,
23 2017?

24 A Yes, that's correct.

25 Q So it's fair to say that HarbourVest considered and

1 evaluated this transaction for over six months before
2 investing its \$73 million, right?

3 A From the time of the initial conversations that we had
4 with Highland, yes.

5 Q And one of the reasons that it took over six months to
6 complete the investment is that HarbourVest performs due
7 diligence before it makes an investment, correct?

8 A Correct.

9 Q And when you're performing due diligence -- well, first
10 off, you would agree with me that that's a common practice
11 amongst sophisticated investors such as HarbourVest, correct?

12 A To perform due diligence?

13 Q Yes.

14 A Yes.

15 Q And describe -- describe what HarbourVest does in a
16 general sense when it performs its due diligence.

17 A Sure. So, we spend time with the manager -- in this
18 case, Highland -- certainly around the investment thesis, the
19 opportunity, receive materials around the underlying assets.
20 We take that and perform our own independent due diligence
21 around the value of those assets, perform due diligence on
22 the manager itself, the go-forward opportunity. In many
23 cases, and certainly in this case, engage with outside
24 advisors to assist with that due diligence. It's a very
25 robust and thorough process.

1 Q And by outside advisors, are you referring to the outside
2 counsel that you testified about earlier?

3 A Yes. Both outside counsel and outside consultants.

4 Q Okay. And so did you say that it's typical to engage
5 outside counsel when performing due diligence?

6 A Yes.

7 Q And which outside counsel did you retain with respect to
8 this due diligence?

9 A Debevoise and Plimpton as well as Milbank.

10 Q And during the course of HarbourVest's due diligence, did
11 it identify some items of concern?

12 A As with any investment, there are always items that are
13 identified that require further diligence, risks that are
14 identified that we look to mitigate through our due
15 diligence, et cetera.

16 Q And if Harbour -- I'm sorry, did you say something else?

17 A No.

18 Q You were finished? Okay. Now, if HarbourVest identifies
19 an item of concern, is it typical to request additional
20 information regarding those items of concern?

21 A It is, yes.

22 Q And so that actually happened with respect to the HCLOF
23 investment, correct?

24 A In certain cases, yes.

25 Q HarbourVest identified several litigation matters that it

1 had questions about, correct?

2 A Correct. As we would with any investment.

3 Q And it went back to Highland and asked them to explain
4 their position on those litigation matters?

5 A Correct.

6 Q And one of those litigation matters was the Joshua Terry
7 litigation, correct?

8 A Yes.

9 Q And at the time that HarbourVest was considering this
10 investment, beginning in the second quarter and continuing
11 through the summer, that Josh Terry litigation had not
12 resulted in an award or a final judgment, correct?

13 A Correct.

14 Q And I think we looked earlier at a document that your
15 counsel admitted as HarbourVest Exhibits 34 and 35. There
16 was an email from a HarbourVest -- or, I'm sorry, from a
17 Highland representative to a HarbourVest representative that
18 was discussing Highland's position on the litigation,
19 including the Terry litigation, correct?

20 A Are you referring to the document that we looked at
21 earlier?

22 Q I am. And I can put it on the screen if we need to.

23 A No. Right, I recall that, and yes, that's correct.

24 Q Okay. And just to be clear, that document, which stated
25 Highland's positions on the -- and summaries of the

1 litigation, was issued months before the arbitration award to
2 Josh Terry, correct?

3 A I don't remember the exact timing, but it was certainly
4 during our due diligence period and prior to the arbitration
5 award, yes.

6 Q Well, it seems to me that that email that you -- your
7 counsel admitted as an exhibit was issued in August of 2017.
8 Does that sound right to you?

9 A If that's what the email said, yes.

10 Q And if the Terry arbitration award came out in October,
11 then you would agree with me that that is several months
12 prior to the -- or at least two months prior to the
13 arbitration award?

14 A Yes.

15 Q And so when HarbourVest made requests of Highland to
16 provide information regarding its items of concern, Highland
17 complied with those requests, correct?

18 A It did, correct.

19 Q And was there ever a time when HarbourVest requested
20 Highland to provide information and that information was not
21 provided?

22 A Our requests for information, or at least, you know,
23 responses or color to a question, were always met either
24 with, you know, written or verbal communication back to us,
25 yeah.

1 Q And you would agree with me that, in fact, HarbourVest
2 delayed the closing of the investment by two weeks to
3 continue its due diligence, correct?

4 A Correct, related to the structural changes that were made
5 close to closing. That's right.

6 Q And after conducting that due diligence, HarbourVest
7 satisfied itself that the investment was sound?

8 A That the legal structure that had been put in place in
9 connection with those proposed changes by Highland was -- was
10 legally sound, yes, and on the back of, again, statements and
11 misrepresentations on the part of Highland around the nature
12 and potential impact to their ongoing CLO business and HCLOF.

13 MR. WILSON: Well, I'm going to object to the latter
14 part of your response as nonresponsive.

15 THE COURT: Sustained.

16 BY MR. WILSON:

17 Q Now, after you conducted the due diligence, HarbourVest
18 made the investment of \$73 million on November 15th, 2017,
19 correct?

20 A Correct.

21 Q And so I think you testified earlier that prior to that
22 investment HarbourVest had become aware that that Josh Terry
23 litigation had resulted in an arbitration award, correct?

24 A Yes.

25 Q But I think you've also testified that HarbourVest did

1 not request that Highland provide a copy of the arbitration
2 award, correct?

3 A That's correct.

4 Q And you further testified that you were represented by
5 outside counsel at the time, correct?

6 A Correct.

7 Q And as of Monday of this week, you had not reviewed that
8 arbitration award; is that correct?

9 A That's correct.

10 Q Have you reviewed that arbitration award since Monday of
11 this week?

12 A I have not.

13 Q But in any event, you testified that Highland told you
14 about the award?

15 A Yes.

16 Q And they told you the amount of the award?

17 A Yes.

18 Q And then they told you that the award had been converted
19 to a judgment?

20 A When you say the award had been converted to a judgment,
21 can you be more specific?

22 Q Well, I don't know how familiar you are with the
23 litigation process, but in this instance, that award was
24 taken to a court and the court entered a judgment on the
25 arbitration award. Did you -- were you aware of that?

1 A I don't recall the specific legal terms of judgment
2 against it. I was award of the existence of the arbitration
3 award and the -- and the obligation for Highland to comply
4 with that arbitration award.

5 Q And HarbourVest did not make an appearance in the Acis
6 bankruptcy, right?

7 A We did not.

8 Q But you were aware of the Acis bankruptcy, correct?

9 A Yes.

10 Q And you were kept apprised of the Acis bankruptcy by
11 Highland individuals, correct?

12 A We had conversations with a couple of Highland
13 individuals throughout the Acis bankruptcy process, yes.

14 Q Right. And in fact, you testified that you participated
15 in regular conference calls with Highland regarding that
16 bankruptcy?

17 A That's correct, yes.

18 Q And do you recall having been provided with over 40,000
19 documents by Highland related to the Acis bankruptcy?

20 A I do not recall that, no.

21 Q Would those documents have been provided to your outside
22 counsel, had you received them?

23 A I don't know the answer to that.

24 Q Did the outside counsel that represented you in the due
25 diligence continue to represent you throughout the Acis

1 bankruptcy?

2 A They did. One of the counsels did, correct.

3 Q And which counsel was that?

4 A Debevoise.

5 Q So was your counsel actively involved with monitoring the
6 Acis bankruptcy?

7 A They were, yes, particularly after we were ultimately
8 accused of having something to do with the original structure
9 and -- as a result of misstatements by Highland.

10 Q Did your counsel attend hearings in the Acis bankruptcy?

11 A I don't recall.

12 Q Are you familiar with the PACER system?

13 A I am not.

14 Q Now, I think that HarbourVest has been described as a
15 passive investor. You recall that description of HarbourVest
16 in this instance?

17 A Yes.

18 Q But, in fact, HarbourVest invested substantial assets
19 such that it owned a 49.98 percent share of HCLOF. Would you
20 agree with that?

21 A That's correct.

22 Q And in fact, the next largest investor was CLO Holdco,
23 which owned 49.02 percent of the shares, correct?

24 A That sounds right.

25 Q And there was an advisory board that was created pursuant

1 to the formation documents of this investment, correct?

2 A That's correct.

3 Q And in fact, that advisory board only had two members,
4 and one was a representative of HarbourVest and one was a
5 representative of CLO Holdco, correct?

6 A Correct.

7 Q And the advisor -- I'm sorry, the portfolio manager was
8 not allowed to disregard the recommendations of the advisory
9 board, correct?

10 A With respect to the limited set of items that the
11 advisory board could opine on, that is correct.

12 Q All right. I want to go over a couple of the
13 misrepresentations that HarbourVest has identified in its
14 filings related to its claim. The first one is -- and just
15 for the record, I'm reading from Docket No. 1057 filed on
16 September 11, 2020, HarbourVest Response to Debtor's First
17 Omnibus Objection.

18 But the first misrepresentation identified in that
19 document says that Highland never informed HarbourVest that
20 Highland had no intention of paying the arbitration award.
21 And was -- was Highland obligated to pay the Josh Terry
22 arbitration award against Acis?

23 MR. MORRIS: Objection to the question to the extent
24 it calls for a legal conclusion.

25 THE COURT: Sustained.

1 MS. WEISGERBER: Join in that objection.

2 THE COURT: Sustained. I think --

3 BY MR. WILSON:

4 Q Your understanding was --

5 MR. WILSON: I'm sorry, Judge?

6 THE COURT: I sustained the objection as calling for
7 a legal conclusion. So, next question.

8 MR. WILSON: Yes, I -- I heard that. Thank you, Your
9 Honor.

10 BY MR. WILSON:

11 Q In your understanding, was Highland responsible for
12 paying the arbitration award to Josh Terry?

13 A My understanding is on the account of the fact that Acis
14 --

15 MS. WEISGERBER: Objection, Your Honor. Objection,
16 Your Honor, same basis.

17 THE COURT: Sustained. It was essentially the same
18 question.

19 MR. WILSON: Well, Your Honor, I didn't ask --

20 THE COURT: It was essentially the same question, Mr.
21 Wilson. Move on.

22 MR. WILSON: Okay.

23 BY MR. WILSON:

24 Q The next misrepresentation identified by HarbourVest said
25 that Highland did not inform HarbourVest that it undertook

1 the transfers to siphon assets away from Acis, LP and that
2 such transfers would prevent Mr. Terry from collecting on the
3 arbitration award. So the basis for that allegation would be
4 that Highland was siphoning assets from Acis to avoid having
5 Acis pay the arbitration award, correct?

6 A That -- that would be the implication, yes.

7 Q Okay. And then that misrepresentation continues on and
8 says that Highland represented to HarbourVest that it was
9 changing the portfolio manager because Acis was toxic. And
10 do you recall that representation being made to you?

11 A Yes, I do.

12 Q And would you agree with me that whether or not Acis is
13 toxic in the industry would be an opinion?

14 A I suppose it would be an opinion, but by the manager of
15 the vehicle responsible for managing the HCLOF investment and
16 the underlying CLOs. Yeah, we viewed the Acis name and the
17 Highland name as synonymous, if you will. I mean, Acis was a
18 subsidiary of Highland. For all intents and purposes, it was
19 the same from our perspective as we made the investment into
20 HCLOF.

21 Q So did HarbourVest have an independent understanding of
22 whether or not the Acis name was toxic in the industry?

23 A We did not, no. We relied on Highland's views of that as
24 manager of HCLOF.

25 MR. WILSON: Your Honor, just a brief housekeeping

1 item. Did you say that we need to be done at 1:00 o'clock?

2 THE COURT: Well, I said I really wanted you to be
3 done by 1:00 o'clock because I have a 1:30 docket and a 2:00
4 o'clock docket and I'd rather not have to hang up 70-
5 something people and reconnect them again at 3:00 o'clock.
6 How close are you to being finished?

7 MR. WILSON: Well, --

8 THE COURT: This is going at a very slow pace.

9 MR. WILSON: Well, I apologize for that, Your Honor.
10 I think I've got at least ten more minutes, but -- but I know
11 we also have closing remarks. And I was just going to ask if
12 Your Honor had a preference of --

13 THE COURT: Keep going.

14 MR. WILSON: -- of breaking now --

15 THE COURT: Keep -- let's --

16 MR. WILSON: -- or keep going? Okay.

17 THE COURT: Let's talk fast and try to get through.
18 You know, even if I'm sacrificing lunch today, I don't want
19 to inconvenience 75 people this way. So we'll just probably
20 start our 1:30 hearing a little late and inconvenience those
21 people.

22 All right. Go ahead.

23 MR. WILSON: All right. Thank you, Your Honor.

24 BY MR. WILSON:

25 Q Did Acis form its -- I can't recall if you answered this

1 question, but did Acis form its own opinion on whether or not
2 -- I'm sorry, strike that. Did HarbourVest form its own
3 opinion on whether or not the Acis name was toxic in the
4 industry?

5 MS. WEISGERBER: Objection, --

6 THE WITNESS: We did not. We didn't have a basis.

7 THE COURT: I'm sorry, did I have an objection?

8 BY MR. WILSON:

9 Q You did not --

10 THE COURT: Did I have an objection?

11 MS. WEISGERBER: Yeah. Objection. Yes. Objection,
12 asked and answered, Your Honor.

13 THE COURT: Overruled. He can answer.

14 BY MR. WILSON:

15 Q Okay. But --

16 A We did not.

17 Q Did Highland have the ability to investigate the Acis
18 name and make its own determination of whether that name was
19 toxic? I'm sorry, I think I'm misspeaking. HarbourVest.

20 A HarbourVest had the ability to do that, yes.

21 Q I apologize I misspoke. I meant HarbourVest. Did
22 HarbourVest have the ability to investigate that name and
23 determine if it was toxic?

24 A It was irrelevant to our investment thesis. And as I
25 said before, Acis was a subsidiary of Highland. We viewed

1 them as interchangeable in the context of our investment.

2 Q Okay. The next misrepresentation that you refer to says
3 that Highland indicated to HarbourVest that the dispute with
4 Mr. Terry would have no impact on its investment activities.
5 Would you agree with me that that is also an opinion?

6 A It was a statement that --

7 MS. WEISGERBER: Your Honor, I'm going to object to
8 the extent these questions are seeking a legal conclusion
9 regarding, you know, if something's an opinion or not.

10 THE COURT: Okay. Overruled. He can answer.

11 THE WITNESS: It was -- it was a statement that was
12 made to us by Highland and represented in multiple different
13 formats as fact. And a representation that we relied on in
14 connection with our investment.

15 BY MR. WILSON:

16 Q And finally, the misrepresentation, the last
17 misrepresentation identified, is that Highland expressed
18 confidence in the ability of HCLOF to reset or redeem the
19 CLOs. Would you agree with me that that statement is an
20 opinion?

21 A On the basis that it was the core investment thesis of
22 the -- of the investment of HCLOF. Again, whether that's
23 legally viewed as an opinion or a fact, it was -- it was
24 certainly the investment thesis that we made the investment
25 predicated upon.

1 Q And you just testified that you thought that Acis and
2 Highland were interchangeable from the perspective of the
3 investment opportunity, correct?

4 A Correct.

5 Q But you also accepted Highland's recommendation because
6 HarbourVest agreed that the change in the -- to a Highland
7 manager made commercial sense, correct?

8 A We took at face value what Highland recommended because
9 this all had to do with the structuring of an entity that
10 they fully managed with respect to multiple underlying
11 subsidiaries that weren't managed by Highland.

12 Q But would you agree that, at the time, you -- HarbourVest
13 thought that made commercial sense?

14 A It did not seem unreasonable to us based on the
15 explanation we were given.

16 Q Okay.

17 MR. WILSON: I want to refer to HarbourVest Exhibit
18 39.

19 (Pause.)

20 THE COURT: What are we waiting on? What are we
21 waiting on?

22 MR. WILSON: I'm trying to get the document on the
23 screen, Your Honor.

24 (Pause.)

25 THE COURT: We can't hear you. We can't hear you.

1 MR. WILSON: I'm sorry. I'm sorry, Your Honor. I'm
2 speaking with my --

3 THE COURT: Okay.

4 MR. WILSON: -- co-counsel here.

5 THE COURT: All right.

6 (Pause.)

7 MS. WEISGERBER: Mr. Wilson, is it 39 or 38 that
8 you're referring to?

9 MR. WILSON: 39. HarbourVest 9019 motion on the
10 main -- on the Dondero file. And then there's the -- it's --
11 it's John -- and then there's the HarbourVest, and then the
12 exhibits are all in one file.

13 MS. WEISGERBER: Mr. Wilson, I'll just note that 39
14 was subject to confidentiality based on HCLOF's request.
15 HCLOF's counsel is present. I think they know it's an
16 excerpt. But I'd just -- that for HCLOF's counsel.

17 MR. WILSON: Well, is there an objection to showing
18 this document on the screen? Yes. All right. We're not
19 going to put Document 39 on the screen.

20 A VOICE: Yes.

21 MR. WILSON: All right. Scroll down to the next
22 page.

23 BY MR. WILSON:

24 Q This is a -- this is a document that was produced to us
25 this week, the Highland production. It appears to be a

1 Highland CLO Funding, Ltd. Statement of Operations for the
2 Year Ended 31 December 2017. Do you see at the top of that --
3 at the top of that document where it says total investment
4 income of \$26 million?

5 A I do, yes.

6 Q And total expenses were roughly \$1.8 million?

7 A Yes.

8 Q And then net change and unrealized depreciation on
9 investments and net realized loss on investments was \$4.26
10 million cumulative, resulting in a net increase in net assets
11 resulting from operations of \$20.224 million. Do you agree
12 with that?

13 A Yes.

14 Q Okay.

15 MR. WILSON: Go to the next one.

16 BY MR. WILSON:

17 Q And you understand that, in the course of the Acis
18 bankruptcy, the portfolio managers for certain of the CLOs
19 were changed by the Trustee, correct?

20 A Yes, around the underlying CLOs. That's -- that's my
21 understanding, yes.

22 Q And, in fact, Mr. Seery testified earlier today that that
23 occurred in the summer of 2018, correct?

24 MR. WILSON: Scroll.

25 THE WITNESS: I don't recall the timing, but that's

1 what he testified to.

2 BY MR. WILSON:

3 Q Well, this document is HarbourVest Exhibit 40, and this is
4 the statement of operations for the financial year ended 31
5 December 2018. Here, the total investment income is only
6 \$11.1 million. Do you see that?

7 A I do.

8 Q And do you see where the expenses have increased to \$13.6
9 million?

10 A I do, yes.

11 MR. WILSON: Okay. Scroll down some more.

12 BY MR. WILSON:

13 Q And do you see where it says net change and unrealized
14 loss on investments of \$48.47 million?

15 A Yes.

16 Q And so after Acis and Brigade took over the managements of
17 these CLOs, we had a net decrease in net assets resulting from
18 operations of \$52.483 million in the year 2018, correct?

19 MS. WEISGERBER: Objection, Your Honor. Assumes a
20 fact not in evidence.

21 THE COURT: Overruled. He --

22 MR. WILSON: Your Honor, --

23 THE COURT: We're just looking at this statement and
24 testifying about it says, so I overrule the objection.

25 MR. WILSON: Thank you, Your Honor. Thank you, Your

1 Honor. I'm now going to turn to HarbourVest Exhibit 41. All
2 right. I'll --

3 BY MR. WILSON:

4 Q Did you answer the question, Mr. Pugatch?

5 A No, I -- I would agree with the second part of your
6 statement that for the year 2018 the -- the loss was \$52
7 million. I don't -- I don't believe that jives with the first
8 part of your statement that that was after Acis and Brigade
9 took over. As I understand, that was in the middle of the
10 year.

11 Q But in any event, Acis and Brigade had been managing this
12 for at least six months of 2018 when that loss occurred,
13 correct?

14 A They had been managing a portion of the underlying CLO
15 portfolio held by Highland CLO Funding.

16 Q All right. We're now looking at Exhibit #41, which is the
17 Draft Unaudited Statement of Comprehensive Income, 31 December
18 2019. Total income has now dropped to \$4.664 million.

19 MR. WILSON: And scroll down.

20 BY MR. WILSON:

21 Q Expenditures are at \$3.645 million. And then it says
22 investment gains and losses net out to \$11.493 million, a
23 negative \$11.493 million. And --

24 MR. WILSON: Scroll down to the --

25 BY MR. WILSON:

1 Q And so would you agree with me that in the year 2019,
2 HCLOF showed a net loss of \$10.476 million?

3 A Yes, that's what the financial statements say.

4 Q And in this year, the Acis CLOs were solely managed by
5 Acis and Brigade, correct?

6 A The Acis CLOs were. Yes, correct.

7 Q All right.

8 MR. WILSON: Now, go to 42.

9 BY MR. WILSON:

10 Q Now, this is HarbourVest #42.

11 MR. WILSON: Go down to the next page.

12 BY MR. WILSON:

13 Q And this is the Highland CLO Funding, Ltd. Unaudited
14 Condensed Statement of Operations for the Financial Period
15 Ended 30 June 2020. And so this is just half a year of
16 operations. And would you -- and this actually has a
17 comparison between 2019 and 2020. But do you see where it
18 says investment income has dropped from a million dollars in
19 the first half of 2019 to \$381,000 in the first half of 2020?

20 A Yes.

21 MR. WILSON: Okay. Scroll down.

22 BY MR. WILSON:

23 Q And do you see where, in the first half of 2019, total
24 expenses were \$1.85 million, and then in the first half of
25 2020 total expenses were \$2.16 million? Do you see that?

1 A I do.

2 Q And if you go down below that, where it says Net Realized
3 and Unrealized Gain/Loss on Investments, the first half of
4 2019 HCLOF lost \$12 million, and in the first half of 2020 it
5 lost \$39.472 million?

6 MR. MORRIS: Your Honor, I'm going to object. It's
7 John Morris for the Debtor. I'm happy to stipulate. In fact,
8 he can offer this document into evidence. There's no
9 foundation that Mr. Pugatch has any particularized knowledge
10 about any of the numbers behind this. All he's asking him to
11 do is to confirm what the document says. It says what it
12 says. But this -- I'll object on that basis, Your Honor.

13 THE COURT: All right. Mr. Wilson, what about it?
14 You're just getting him to read numbers off of these exhibits.

15 MR. WILSON: Well, --

16 THE COURT: Shall we just --

17 MR. WILSON: -- I understood --

18 THE COURT: -- by stipulation get them into evidence?

19 MR. WILSON: Well, --

20 MR. MORRIS: No objection, Your Honor.

21 MS. WEISGERBER: No objection.

22 THE COURT: All right. So these are exhibits what?
23 We've gone through 39, 41, and I don't know what else. 40,
24 maybe?

25 MR. WILSON: It was Exhibits 39, 40, 41, and 42 that

1 were on the HarbourVest exhibit list.

2 THE COURT: All right. Those will be admitted, and
3 we've already discussed what docket entry number they appear
4 at.

5 (HarbourVest's Exhibits 39 through 42 are received into
6 evidence.)

7 THE COURT: All right. Anything else? You told me
8 you had 10 more minutes about 15 minutes ago.

9 MR. WILSON: Well, I'm sorry if I -- I think I had
10 said I had at least ten more minutes, and I was looking at the
11 -- it was 10:50 [sic] and you wanted to quit at 1:00. So I do
12 have longer than that. I'm sorry, Your Honor.

13 THE COURT: Well, --

14 MR. WILSON: But --

15 THE COURT: -- I feel like I'm being --

16 MR. WILSON: -- I'll try to proffer --

17 THE COURT: Okay, Mr. Wilson, let me just tell you
18 something. I feel like I'm being disrespected now, and the
19 parties are. We really need to pick up the pace. I've told
20 you I've got a 1:30 docket -- with four or five matters on it,
21 by the way. I've got a 2:00 o'clock docket. I'm starting
22 them late. No one advised my courtroom deputy that we were
23 going to need all day today for this, okay? So you've got
24 five more minutes to wrap it up, and then, of course, I have
25 to go to Mr. Draper and see if he has cross. All right? So

1 please don't test my patience any more. Five minutes to
2 finish.

3 MR. DRAPER: Judge, I have no questions.

4 THE COURT: I didn't hear you, Mr. Draper. What did
5 you say?

6 MR. DRAPER: I have no questions.

7 THE COURT: All right. Very good.

8 MR. WILSON: I apologize, Your Honor. I was actually
9 trying to be respectful of your time when I informed you that
10 I had at least ten more minutes left at 12:50, but I will try
11 to be as expedient as I can as I finish up.

12 BY MR. WILSON:

13 Q And I don't see you on my screen.

14 MR. WILSON: You can take that document down.

15 THE WITNESS: Here.

16 BY MR. WILSON:

17 Q Mr. Pugatch, do you have an opinion as to what caused
18 these incredible losses of value at HCLOF?

19 MS. WEISGERBER: Objection to the extent it calls for
20 a legal conclusion.

21 THE COURT: Overruled. He can answer.

22 THE WITNESS: I would say that there's no one cause
23 for the decline in value. I can point to a number of
24 different things, including the exorbitant fees that were
25 charged to HCLOF, including the inability to be able to re --

1 refinance the CLOs on the part of HCLOF, all of which stems
2 from the actions that Highland took prior to our investment in
3 HCLOF.

4 BY MR. WILSON:

5 Q And you've -- I think it's been referenced several times
6 in HarbourVest's arguments that -- that the reset was a
7 fundamental -- the inability to get a reset was a fundamental
8 cause of the loss in value. Is that -- is that HarbourVest's
9 position?

10 A That -- that is a part of the -- the cause in the
11 declining value of the CLOs, yes.

12 Q And you would agree with me that a reset is fundamentally
13 a reset of interest rates, correct?

14 A Of the interest rates of the liabilities of the -- the
15 timing for repayment of those liabilities, yes.

16 Q Now, just say with -- for the sake of a hypothetical
17 example. If you had a home that was valued at \$5 million, or
18 let's just say \$500,000, let's make it more realistic. If you
19 had a \$500,000 home and you had a mortgage on that home at
20 five percent interest, your inability to refinance that home
21 at a lower interest rate would not affect the underlying value
22 of that home, correct?

23 MS. WEISGERBER: Objection, Your Honor. Hypothetical.
24 And objection to relevance as well.

25 THE COURT: Sustained.

1 MS. WEISGERBER: Calls for speculation.

2 THE COURT: Sustained.

3 BY MR. WILSON:

4 Q Is there any reason to believe that the change in the
5 interest rate would have prevented the massive losses of
6 investment value that occurred in HCLOF?

7 MS. WEISGERBER: Object on the same grounds.

8 THE COURT: Sustained.

9 THE WITNESS: The short -- the short answer is yes,
10 with a -- with the amount of leverage --

11 MS. WEISGERBER: I --

12 THE WITNESS: -- that exists. Oh, sorry.

13 MS. WEISGERBER: The objection was sustained.

14 THE COURT: Yeah, I sustained the objection. That
15 means you don't answer.

16 THE WITNESS: I'm sorry, Your Honor.

17 BY MR. WILSON:

18 Q So, would you agree with me that if the expenses and the
19 fees charged by the portfolio manager increased dramatically,
20 that would -- that would impact the value of the investment,
21 correct?

22 MS. WEISGERBER: Objection on the same grounds, and
23 relevance. This is a 9019 hearing, Your Honor. We are not
24 here to try every minutia. And in fact, we're trying to avoid
25 a trial on the merits. And it feels like we're getting a bit

1 far afield now.

2 THE COURT: I sustain.

3 MR. WILSON: All right. I'll pass the witness.

4 THE COURT: All right. Mr. Draper said he had no
5 cross. So, any redirect, Ms. Weisgerber?

6 MS. WEISGERBER: No, Your Honor.

7 THE COURT: All right. Mr. Morris, did you have any
8 redirect?

9 MR. MORRIS: I do not, Your Honor. I have a very
10 brief closing and then some additional remarks if -- if we
11 finish.

12 THE COURT: All right. So, Mr. Pugatch, that
13 concludes your testimony. Thank you. You're excused if you
14 want to be.

15 All right. So, as I understood it, there would be no more
16 evidence after this.

17 MR. WILSON: Well, Your Honor, along those lines, as
18 a housekeeping measure, I think everything on my exhibit list
19 is included on someone else's exhibit list, but just for belt
20 and suspenders I would move to admit all of the exhibits on
21 the -- on Mr. Dondero's exhibit list.

22 THE COURT: Well, is that agreed or not? Because we
23 didn't have a witness to get them in.

24 MR. MORRIS: No objection, Your Honor.

25 THE COURT: Any objection? All right. If there's no

1 objection, I'll --

2 MR. MORRIS: Your Honor, --

3 THE COURT: I'm sorry. Was there an objection? I
4 will admit Dondero Exhibits A through M, and those appear at
5 Docket Entry 1721, correct, Mr. Wilson?

6 MR. WILSON: That is correct, Your Honor.

7 THE COURT: All right.

8 MR. WILSON: That is correct, Your Honor.

9 (James Dondero's Exhibits A through M are received into
10 evidence.)

11 MR. WILSON: And one final matter is, during the
12 examination of Mr. Seery, you at least partially admitted
13 Dondero's Exhibit N, and I was wondering if we need to -- how
14 we'd need to submit that for the record.

15 THE COURT: Okay. First, I'm confused. I think you
16 said Mr. Terry's testimony. You --

17 MR. WILSON: I said Seery. I'm sorry.

18 THE COURT: Oh, Seery?

19 MR. WILSON: Or I may have said Terry, but I meant to
20 say Seery.

21 THE COURT: Okay. Maybe you said it. Okay. During
22 Mr. Seery's testimony -- oh, the email that I admitted a
23 portion of?

24 MR. WILSON: That is -- that's correct, Your Honor.

25 THE COURT: What -- what are you asking? It's not in

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1 your notebook. Are you asking do you need to separately
2 submit it or what?

3 MR. WILSON: Yeah, I was just asking what the Court's
4 preference on how we submit that for the -- put it in the
5 record.

6 THE COURT: Okay. That was so garbled I didn't hear
7 you. You need to file that on the docket as a supplemental
8 exhibit that was admitted, okay?

9 MR. WILSON: Okay. Thank you, Your Honor.

10 THE COURT: All right. Closing arguments? Mr.
11 Morris?

12 CLOSING ARGUMENT ON BEHALF OF THE DEBTOR

13 MR. MORRIS: Yes, very briefly, Your Honor. The
14 Debtor easily meets the standard here. The settlement
15 consideration relative to the claim establishes and reflects
16 the likelihood of success on the merits.

17 You know, I've never -- I did hear Mr. Pugatch in the
18 deposition the other day, but I otherwise haven't heard from
19 him. I found him to be incredibly credible, Your Honor, and I
20 regret the fact that he and HarbourVest are being blamed twice
21 here. The fact that they got 40,000 documents or didn't read
22 the arbitration award, it's just -- it's a shame that they're
23 being dragged through this yet again.

24 The fact is, Your Honor, there is no evidence that they
25 made the disclosures that HarbourVest claims -- complains

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1 about. They just don't. The fraudulent transfers led to the
2 bankruptcy, led to the appointment of a trustee, led to --
3 right? So, so it's -- that's why -- but they're getting
4 something for their claim.

5 It was a hard negotiation, Your Honor. There is no
6 dispute that if we litigated this it would be complex. It
7 would fact-intensive. The Debtor would be forced to rely upon
8 witnesses who are no longer employed by it. That it would be
9 expensive, for sure. There's no dispute about any of that.
10 There's no dispute that the creditor body has spoken loudly
11 here by unanimously refraining from objecting except for Mr.
12 Dondero and the entities controlled by him.

13 And you heard Mr. Seery's testimony. I think he
14 exhaustively informed the Court as to the process by which the
15 transaction was analyzed and negotiated, and there's no
16 evidence to the contrary that this was an arm's-length
17 negotiation.

18 Unless Your Honor has any questions, we would request that
19 the motion be granted.

20 THE COURT: Thank you. Ms. Weisgerber, your closing
21 argument?

22 CLOSING ARGUMENT ON BEHALF OF HARBOURVEST

23 MS. WEISGERBER: Sure. Thank you, Your Honor. I'll
24 also be brief. We again join in Mr. Morris's arguments and
25 comments.

1 The Court has now heard testimony from Mr. Pugatch
2 regarding the factual detail underlying HarbourVest's claims.
3 The Court has also heard about the significant damages that
4 HarbourVest stands to recover for those claims. And
5 HarbourVest came to this Court ready to litigate. It would --
6 it's ready to do so if needed. It believes it would prevail
7 on its claims if it had to do so.

8 But the Court also heard from Mr. Seery about his
9 understanding of HarbourVest's claims, his calculus, and his
10 decision to settle them. And we submit that nothing further
11 is needed by this Court in order to approve the settlement.
12 This is a question of the Debtor's business judgment. We're
13 not here to have a trial on the merits of HarbourVest's
14 claims. The Objectors have made various arguments, including
15 about the cause of HarbourVest's damages. But even the nature
16 of the legal claims that HarbourVest is asserting, some do not
17 require a loss causation. So we submit that's not even
18 relevant to the merits of the claims.

19 The settlement is clearly in the best interest of the
20 estate, and we respectfully request that the Court approve it.

21 THE COURT: Thank you. All right. Mr. Wilson, your
22 closing argument?

23 MR. LYNN: Michael Lynn. I will give the closing
24 argument, if that's satisfactory to the Court.

25 THE COURT: All right. Go ahead.

1 CLOSING ARGUMENT ON BEHALF OF JAMES DONDERO

2 MR. LYNN: Good afternoon, Your Honor. I just want
3 to make a few points, and I'll try to do it as quickly as
4 possible.

5 First, I feel compelled to address the argument of the
6 Debtor that Mr. Dondero is repeating his litigious behavior
7 from the Acis case. I don't know about the Acis case. I
8 wasn't involved except very, very peripherally. But with
9 respect to this case, we have only taken positions in court
10 that we believed -- that is, his lawyers -- believed were
11 warranted by law, facts as we knew them, and that are
12 consistent with professionalism. I'd be glad to explain any
13 position we took.

14 Often, through the Debtor's very persuasive powers, we
15 never had the chance to explain our position previously to the
16 Court. In fact, for the most part, as today, we have been
17 reactive rather than commencing proceedings. In fact, during
18 the first seven months of this case, we only appeared in court
19 a few times, when we felt we had to -- for example, when
20 discovery was being sought by the Creditors' Committee that we
21 feared might invade privilege. Then, much to the Debtor's
22 fury, we opposed the Acis 9019. We did so because we thought
23 it was too much.

24 Since, as the Court can see, the principal instigators of
25 litigation have been the Debtor, and to a lesser extent, the

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1 Committee.

2 Indeed, in an apparent effort to drown Mr. Dondero and his
3 counsel in litigation, the Debtor has repeatedly sought court
4 action on a very short fuse, claiming need for expedited
5 hearing.

6 Perhaps the most startling example of this is the recent
7 contempt motion, for which there is no good reason for a quick
8 hearing. Resolution of that motion is not necessary to reach
9 the confirmation hearing. The motion could be heard after the
10 confirmation hearing. There is no need to put Mr. Dondero and
11 his professionals in a position where they have to respond in
12 a couple of days, two business days, and then will have two
13 days to prepare for trial.

14 Second, Your Honor, Mr. Seery has repeatedly asserted,
15 contrary to today's motion, that the HarbourVest claim was of
16 no merit. That is why, when he came in to settle for tens of
17 millions of dollars, we opposed this motion. It appears that
18 the motion is occurring without any cross-party discovery.
19 There is no consideration, apparently, of trying dispositive
20 -- dispositive motions first. There is no consideration for
21 junior classes of equity, which Mr. Seery has previously
22 opined were in the money. This, even though there's no reason
23 that this settlement is necessary pre-confirmation, unless Mr.
24 Seery wants HarbourVest's vote.

25 Third, for whatever reason, that seems to be the driving

1 factor for settling. On its face, the vote seems to be a key
2 factor of the settlement. About the longest provision of the
3 settlement agreement relates to voting. The motion itself --
4 in the motion itself, five of seven bullet points cited by the
5 Debtor for approval of the settlement deal with and emphasize
6 support of the plan or the vote that is to be cast for the
7 plan.

8 If the settlement is a good deal, it didn't need to have
9 as one of its parts the requirement that HarbourVest vote for
10 the plan.

11 Your Honor, I'll stop there. I know Your Honor would like
12 to get just a few minutes before your 1:30 docket. I've been
13 there and I understand that, and I do apologize for taking the
14 time we have, but I think that responsibility is shared with
15 the Debtor and HarbourVest.

16 Thank you, Your Honor.

17 THE COURT: All right. Thank you for that.

18 Mr. Draper, any closing argument from you?

19 CLOSING ARGUMENT ON BEHALF OF GET GOOD AND DUGABOY TRUSTS

20 MR. DRAPER: Yes, I have three comments. The first
21 is the claim -- the loss claim, absent the fraud claim, is, at
22 best, \$7 million. I think Mr. Seery's argument that a hundred
23 -- one hundred percent is attributable to there is just wrong.
24 If he and I both invested in a company 50-50 and it goes
25 broke, we only lost 50 cents each.

1 Number two, I think the Court heard the evidence. I think
2 this is, at best, a subordinated claim under 5 -- under the
3 Bankruptcy Code. It's really a "But for the
4 misrepresentations, we wouldn't have invested."

5 And the last one is the -- Judge Lynn represented the
6 voting, so I won't deal with that. But the one that troubles
7 me the most is the fact that this asset that is ultimately
8 being paid for in claim dollars that's being transferred over
9 to the Debtor and being put it outside the estate, outside the
10 purview of this Court, and placed in some subsidiary, this --
11 this transaction, if it is approved, must -- should contain a
12 provision that the asset that's being acquired come into the
13 Debtor and be owned by the Debtor.

14 THE COURT: All right.

15 MR. DRAPER: I have nothing further, Your Honor.

16 THE COURT: Thank you, Mr. Draper.

17 Mr. Morris, you get the last word since it's your motion.

18 MR. MORRIS: Very quickly, Your Honor. The
19 subordination argument doesn't hold water. This is not a
20 claim against the Debtor for the security; it's a claim for
21 fraud. Okay? So, so 510(b), if it was a claim against HCLOF,
22 that might make sense, but this is a claim against the Debtor.
23 And it's a Debtor -- it's a claim for fraud. That's number
24 one.

25 Number two, we need to keep this exactly as it's been

1 structured in order to avoid litigation. Mr. Seery told the
2 Court. I'm sure the Court can make its own assessment as to
3 Mr. Seery's credibility as to whether or not the Debtor is
4 intending to somehow get this asset beyond the Court.

5 But there are reasons why we've done this, Your Honor.
6 They could have made an objection on that basis. In fact, if
7 they did, it would be overruled, because there's no -- there's
8 no basis for this Court to find that somehow the Debtor and
9 Mr. Seery are doing something untoward to get assets away from
10 this Court's jurisdiction.

11 You know, I don't know what to say about Mr. Lynn's
12 commentary. Much of it had nothing to do with any evidence in
13 the record.

14 The fact remains, Your Honor, that this settlement is
15 fair. It's reasonable. It's in the best interest of the
16 estate. And we would respectfully request that the Court
17 grant the motion.

18 THE COURT: All right. Thank you. Well, I
19 appreciate all the arguments and evidence I have heard today.
20 I'm going to be brief in my ruling here, but I reserve the
21 right to supplement in a more fulsome written order, which I'm
22 going to instruct Mr. Morris to submit. I am approving the
23 motion to compromise the HarbourVest claim today, and I guess
24 subsumed in that is granting the motion to allow their claim
25 for 3018 voting purposes.

1 I in all ways find this compromise to meet the required
2 legal standard set forth in such cases as *TMT Trailer Ferry*,
3 *AWECO*, and *Foster Mortgage*, numerous other Fifth Circuit
4 cases.

5 First, I'm going to specifically say for the record that I
6 found both witnesses today, Mr. Seery and Mr. Pugatch, to be
7 very credible. Very credible testimony and meaningful
8 testimony was provided to the Court today. And based on that
9 testimony, I find, first, that this compromise was the product
10 of arm's-length negotiations. It was a hard-fought
11 negotiation, as far as I'm concerned. The Debtor objected to
12 these numerous HarbourVest proofs of claim. The Debtor did
13 not want to allow HarbourVest a significant claim for voting
14 purposes. I duly note the statements made in the disclosure
15 statement before this compromise was reached suggesting, you
16 know, the Debtor didn't think HarbourVest should have a large
17 claim.

18 That is consistent with everything I typically see in a
19 bankruptcy case when there's a claim objection. The objector
20 vehemently denies the claimant should have a proof of claim,
21 and then people sit down and think about the risks and rewards
22 of litigating things. And I believe very fervently that's
23 what happened here. There were good-faith, arm's-length
24 negotiations that resulted in this proposed compromise.

25 I find the compromise -- and I'll add to that point, on

1 the good-faith point, I find nothing sinister or improper
2 about the fact that the compromise includes a commitment of
3 HarbourVest to vote in favor of the plan. Again, we see this
4 a lot. You know, there's even a buzz word that doesn't even
5 exist in the Bankruptcy Code: "plan support agreement." You
6 know, we see those a lot -- you know, oftentimes negotiated
7 before the case, but sometimes after. You know, it may be
8 improper in certain situations, but there was nothing here
9 that troubles me about that component of the compromise.

10 I find the compromise to meet the paramount interest of
11 creditors here. Notably, we have very large creditors in this
12 case who have not objected. The *Foster Mortgage* case from the
13 Fifth Circuit tells me I am supposed to consider support or
14 opposition of creditors. No opposition of UBS. No opposition
15 of the Redeemer Committee Crusader Fund. No opposition from
16 Josh Terry or Acis. No opposition from Daugherty.

17 But moreover, when considering the paramount interest of
18 creditors, I find this compromise to be in all ways fair and
19 equitable and in the best interest of the estate, and
20 certainly within the range of reasonableness. The evidence
21 showed that HarbourVest asserted over \$300 million. Over \$300
22 million. Granted, that was based on all kinds of legal
23 theories that would be contested and expensive to litigate,
24 but the evidence also showed that they invested over \$70
25 million. You know, close to \$75 million. I forget the exact

1 number. \$75 or \$80 million, somewhere in that range. And now
2 the credible evidence is that investment is worth about \$22
3 million.

4 So, certainly, while the claim may not have, at the
5 ultimate end of the day in litigation, resulted in a \$300
6 million proof of claim, certainly, certainly there were strong
7 arguments for a very sizeable claim, more than this compromise
8 amount. So it's certainly fair and equitable and reasonable
9 when considering the complexity and duration of further
10 litigation, the risks and rewards, the expense, delay, and
11 likely success.

12 A couple of last things I'm going to say are these. I
13 understand, you know, there is vehement disagreement on the
14 part of our Objectors to the notion that Highland might have
15 caused a \$50 million loss to HarbourVest. But I will tell
16 you, for what it's worth -- I want the record clear that this
17 is part of my evaluation of the reasonableness of the
18 settlement -- my reaction is that, indeed, Highland's
19 litigation strategy in the Acis case caused HCLOF to lose a
20 huge portion of its value, to the detriment of HarbourVest.
21 You know, whether all evidence at the end of the day would
22 convince me of that, I don't know, but that's -- that is
23 definitely this judge's impression.

24 I'm very sympathetic to HarbourVest. It appears in all
25 ways from the record, not just the record before me today, but

1 the record in the Acis case that I presided over, that
2 Highland back then would have rather spent HarbourVest's
3 investment for HCLOF legal fees than let Josh Terry get paid
4 on his judgment. They were perfectly happy to direct the
5 spending of other people's money, is what the record suggested
6 to me.

7 And then, you know, I have alluded to this very recently,
8 as recently as last Friday: I can still remember Mr.
9 Ellington sitting on the witness stand over here to my left
10 and telling the Court, telling the parties under oath, that
11 HarbourVest -- he didn't use its name back then, okay? For
12 the first phase of the Acis case, or most of the Acis case, we
13 were told it was an investor from Boston. And at some point
14 someone even said their name begins with H. I mean, it seemed
15 almost humorous. But Mr. Ellington said it was they,
16 HarbourVest, the undisclosed investor, who was insistent that
17 the Acis name was toxic, and so that's what all of this had
18 been about: the rebranding, the wanting to extract or move
19 things away from Acis.

20 So, you know, I have heard for the -- well, at least the
21 second time today, from Mr. Pugatch, what I perceive to be
22 very credible testimony that that's just not the way it
23 happened.

24 And I guess the last thing I want to say here today, and
25 you know, I guess I have multiple reasons for saying this, not

1 just in connection with approving the settlement, you know,
2 I've heard about how the Acis CLOs, the HCLOF CLOs have lost,
3 you know, a crazy amount of value, that they underperform in
4 the market, that, you know, during the Acis/Brigade tenure
5 and, you know, they should have been reset. You know, I hope
6 those who have not been around as long as some of us in this
7 whole saga know that the -- Mr. Terry, Mr. Phelan, I think
8 Brigade, they all desperately wanted to reset these things,
9 but it was HCLOF, I believe directed by Highland, that wanted
10 to redeem, wanted to liquidate, take the pot of money,
11 warehouse it, and then do their own thing.

12 And there was, I think, from my vantage point, a
13 monumental effort to try to get everyone to the table to do
14 reasonable resets that would be good for the stakeholders at
15 HCLOF and be good for the creditors of Acis, including Josh
16 Terry. That was always the balancing act that most of us were
17 focused on during the Acis bankruptcy. But Highland, I
18 believe, directing HCLOF's strategy, just did not want the
19 resets to happen.

20 So, again, part of me, I suppose, just wants to make the
21 record clear on something that I fear not everyone is clear
22 about. And I say that because the comment was made that the
23 injunctions, the preliminary injunctions sought by the Acis
24 trustee caused the plummet in value, and I think that's just
25 not an accurate statement. I think litigation strategies are

1 what caused the plummet in value, and that's why I think
2 ultimately HarbourVest would potentially have a meritorious
3 claim here in a significant amount if this litigation were to
4 go forward.

5 So, I approve this under 9019. And again, Mr. Morris,
6 you'll upload an order.

7 It is now 1:41, so let's as quickly as possible hear the
8 other motion that I don't think had any objections. Mr.
9 Morris?

10 MR. MORRIS: Your Honor, just -- yes, just very
11 quickly, just four things.

12 With respect to the order, I just want to make it clear
13 that we are going to include a provision that specifically
14 authorizes the Debtor to engage in -- to receive from
15 HarbourVest the asset, you know, the HCLOF interest, and that
16 that's consistent with its obligations under the agreement.

17 The objection has been withdrawn, I think the evidence is
18 what it is, and we want to make sure that nobody thinks that
19 they're going to go to a different court somehow to challenge
20 the transfer. So I just want to put the Court on notice and
21 everybody on notice that we are going to put in a specific
22 finding as to that.

23 THE COURT: All right. Fair --

24 MR. MORRIS: Number two is --

25 THE COURT: Fair enough. I do specifically approve

1 that mechanism and find it is appropriate and supported by the
2 underlying agreements.

3 And just so you know, I spent some time noodling this
4 yesterday before I knew it was going to be settled, so I'm not
5 just casually doing that. I think it's fine.

6 Okay. Next?

7 MR. MORRIS: Thank you very much, Your Honor. Number
8 two, with respect to the motion to pay, there is no objection.
9 If we can just submit an order. Or if Your Honor has other
10 guidance for us, we're happy to take it.

11 THE COURT: Okay. Does anyone have anything they
12 want to say about that motion?

13 Again, I looked at it. I didn't see any objections. I
14 didn't see any problem with it. It's -- you know, you're
15 going through this exercise because of the earlier protocol
16 order.

17 MR. MORRIS: Correct.

18 THE COURT: All right. Well, if there's nothing,
19 then, I will approve that, finding there is good cause to
20 grant that motion.

21 MR. MORRIS: Okay.

22 THE COURT: All right. Is the only other
23 housekeeping matter --

24 MR. MORRIS: I --

25 THE COURT: -- we have the contempt motion?

1 MR. MORRIS: It is, and I do -- I do have to point
2 out how troubled the Debtor is to learn that Mr. Dondero was
3 still receiving documents from Highland as late as this
4 morning. It's got to be a violation of both the TRO -- I
5 guess it's now the preliminary injunction.

6 I would respectfully request -- I know that time is what
7 it is -- but maybe Mr. Dondero can answer now where he got the
8 document, who he got the document from, what other documents
9 he's gotten from the Debtor since Your Honor ordered him not
10 to communicate with the Debtor's employees.

11 This is not saying hello in the hallway. I mean, this is
12 just -- it is really troubling, Your Honor, and it's why we
13 need the contempt motion heard as soon as possible.

14 THE COURT: Well, Mr. Wilson, do you want to address
15 that? I think the words I heard were that you just got the
16 document this morning, and you got it from Mr. Dondero, but we
17 don't know where and when Mr. Dondero got it. Mr. Wilson, are
18 you there?

19 MR. LYNN: I'm afraid I'm back, Your Honor.

20 THE COURT: Okay.

21 MR. LYNN: I am not sure whether Mr. Dondero had it
22 in his files from some -- from back before he was asked not to
23 communicate with members or with employees of the Debtor. I
24 believe -- I believe he's with us, though I don't think he's
25 available by video.

1 Are you there, Mr. Dondero?

2 THE COURT: We can't hear you, Mr. Dondero.

3 MR. DONDERO: Judge?

4 THE COURT: Oh, go ahead.

5 MR. DONDERO: Can you hear me now?

6 THE COURT: Yes.

7 MR. DONDERO: Yes, I -- I -- when I moved offices, I
8 found it in a stack of paper, and --

9 MR. LYNN: I understand it shows that his microphone
10 is working.

11 THE COURT: Okay. Go ahead.

12 MR. DONDERO: Can you hear me?

13 THE COURT: Yes, go ahead.

14 MR. DONDERO: Yeah, I -- I'm sitting in new offices.
15 I've got everything in boxes. I was going through everything
16 yesterday, and I found those emails in a stack of papers and I
17 sent them over because I thought they would be relevant
18 relative to Seery's initial impression.

19 THE COURT: Okay. Well, let's talk about the timing
20 of this hearing. Mr. Morris, I'm going to -- I'm going to ask
21 you why --

22 MR. LYNN: Michael Lynn, Your Honor. I don't want to
23 waste the Court's time. We have not made available anything
24 to the Court objecting to the expedited hearing on the
25 contempt motion. We've been here.

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1 I would say to Your Honor that if Mr. Dondero is indeed in
2 contempt, or was in contempt toward the motion, which has
3 nothing to do with the document that was presented as Dondero
4 Exhibit N, there is no need to hear this on an expedited
5 basis.

6 Every time we turn around, Your Honor, the Debtor is
7 asking that something be heard on an expedited basis. And we
8 have not opposed that. We have not fought that, to speak of,
9 to date. But this is getting a little ridiculous. We're
10 within days of confirmation of the Debtor's plan, and it is
11 simply a means of causing pain and suffering to Mr. Dondero
12 and those who are working with him and for him. And he does
13 have employees at NexPoint who are assisting him.

14 So we most strongly object to being put on a schedule
15 where we are expected to get a response to the contempt motion
16 on file by Monday, today being Thursday, and a weekend
17 intervening. And we strongly object to any setting of this
18 contempt motion on Tuesday or Wednesday. It is absurd, and it
19 is done solely, solely, Your Honor, to cause pain.

20 THE COURT: All right.

21 MR. MORRIS: Your Honor, if I may?

22 THE COURT: Please.

23 MR. MORRIS: Just very briefly, we had a hearing the
24 other day. The evidence is the exact same. The evidence is
25 crystal clear that the violations are meaningful, they're

1 substantial, and they are repeated.

2 After the TRO was entered into, Mr. Dondero and only Mr.
3 Dondero chose to interfere with the Debtor's business. Mr.
4 Dondero and only Mr. Dondero chose to communicate with the
5 Debtor's employees, not about saying hello in the hallway but
6 about coordinating a legal defense strategy against the
7 Debtor.

8 The need is immediate, Your Honor, and I would
9 respectfully request that the hearing be set for Tuesday or
10 Wednesday. They've had this motion now since the 7th of
11 January. They had a full evidentiary hearing, so they know
12 most of the evidence that's going to be presented. They have
13 a whole team of -- they have an army of lawyers, Your Honor,
14 and half a dozen firms working on behalf of Mr. Dondero and
15 his interests. For him to cry here, for him to cry that this
16 is too much is really -- it's obscene. It just is.

17 THE COURT: All right. I'm going to say a couple --

18 MR. LYNN: That is absurd.

19 THE COURT: I'm going to say a couple of things. One
20 is that I -- well, the one time I remember getting reversed
21 for holding someone in contempt of court, the District Court
22 felt like I had not given enough notice of that. The District
23 Courts, what they think is reasonable notice, is sometimes
24 very different from what the bankruptcy judges think. We're
25 used to going very lickety-split fast in the bankruptcy

1 courts. And the Courts of Appeals, District Court, Courts of
2 Appeals obviously, for good reason, are very concerned about
3 due process in this kind of context. So I'm sensitive to
4 that.

5 I'm also sensitive to the fact that it is monetary damages
6 that are being sought here to purge the contempt. Okay? The
7 shifting of attorneys' fees is basically what I understand is
8 being sought at this point. You know, we have a preliminary
9 injunction halting behavior at this point, and so I think
10 that's another reason I'm hesitant to give an emergency
11 hearing. I feel like monetary damages can wait and we can
12 give 21-plus days' notice of the hearing.

13 But I'm going to throw this out there as well. If I do
14 feel like there is a showing of contempt, if I do feel like
15 the phone -- as I told you the other day, I'm very, very
16 fixated on the phone that may have been destroyed or thrown
17 away, maybe at Mr. Dondero's suggestion. I mean, the
18 potential monetary sanction here may be very, very large if
19 the evidence plays out in the way I fear it might play out.
20 So I need to make sure everybody has adequate time to prepare
21 for that hearing and make sure I get all the evidence I need
22 to see. All right? Contempt of court is very, very, very,
23 very serious, and I don't think anyone would deny that.

24 So, with that, it was filed what day? January 4th? Is
25 that what I heard? Or --

1 MR. MORRIS: January 7th, I believe, Your Honor.

2 THE COURT: January 7th? All right. Well, Traci,
3 are you there? Hopefully, you're not in a hunger coma at this
4 point.

5 THE CLERK: I am here.

6 THE COURT: Okay. We have -- we're going to have to
7 go to that first week of February, right? Because we've got
8 the confirmation hearing that, you know, late in January, and
9 then --

10 THE CLERK: Yes. Uh-huh.

11 THE COURT: Okay. Do you have an available date to
12 give right now?

13 THE CLERK: How about -- if you're willing to hear
14 them on Friday, February 5th.

15 THE COURT: Okay. I can do that. February 5th at
16 9:30. Any -- anybody want to argue about that?

17 MR. MORRIS: Thank you, Your Honor. That's
18 acceptable to the Debtor.

19 THE COURT: Okay. Mr. Lynn, is that good with you?

20 MR. LYNN: We'll do that, Your Honor. I would say,
21 by the way, that I'll be happy to buy Mr. Seery, out of my own
22 pocket, five cell phones, which ought to make up for the one
23 that was lost, though I recognize that those cell phones will
24 not have on them the privileged information, the conversations
25 between his lawyers and Mr. Dondero that I imagine he was

1 looking forward to seeing.

2 THE COURT: Well, I wouldn't want him to see that
3 information, but I do think he's entitled to any nonprivileged
4 information, texting, or calls that are on that phone. So,
5 again, I'm either going to hear good explanations for that or
6 not, but it's something very concerning to me.

7 All right. So we have a game plan.

8 I'm going to ask, Did we have good-faith negotiations
9 between Dondero and the Committee and anything positive to
10 report? I'll ask Mr. Lynn and Mr. Clemente to weigh in.

11 MR. CLEMENTE: Yes, Your Honor. I'll go first, Your
12 Honor. Mr. Lynn and I have exchanged several emails over the
13 weekend, and the message that I sent to Mr. Lynn was very
14 clear. There had been a term sheet that Mr. Seery had sent
15 back to Mr. Dondero. I had asked Mr. Lynn to take a pencil
16 out and be very specific as to what it was Mr. Dondero was
17 prepared to do in connection with the pot plan. I instructed
18 him that some of the issues that the Committee still has is
19 obviously the overall value, along with the concept that's
20 signing up to a promise from Mr. Dondero to comply with
21 (indiscernible) as part of that value. As Your Honor may
22 understand, the Committee is obviously very skeptical of Mr.
23 Dondero's future performance under an agreement that he enters
24 into.

25 Those are but a couple of issues, Your Honor, that I

1 advised Mr. Lynn were very concerning to the Committee. And I
2 suggested to him that if he wanted to move things forward, the
3 best way to do it would be to come to us with a fulsome term
4 sheet that explained exactly what it was in clear and precise
5 detail that Mr. Dondero was proposing, and that would be the
6 best way to move the process forward, Your Honor.

7 THE COURT: All right. Mr. Lynn, anything to add to
8 that?

9 MR. LYNN: Well, Your Honor, my experience in
10 negotiations is that it is useful to agree on substantive
11 terms, or at least be in the ballpark, before term sheets are
12 exchanged. Long ago, a term sheet was prepared and presented
13 to the Committee. Ultimately, I think it was rejected, though
14 I don't know if we ever received a formal rejection.

15 I explained in my emails, which I'm happy to share with
16 the Court if Your Honor wants to see them, why I was reluctant
17 to try to put into a term sheet form the proposal that I
18 suggested to Mr. Clemente. As I said, I'm more than happy to
19 provide you with that email chain and let you form your own
20 judgment, Your Honor, as to whether we're proceeding in good
21 faith.

22 THE COURT: All right. Well I'm not going to ask --

23 MR. POMERANTZ: Your Honor? Your Honor, this is Jeff
24 Pomerantz.

25 THE COURT: -- to see any of that. Mr. Pomerantz?

1 MR. POMERANTZ: May I just be heard real quickly?

2 THE COURT: Sure.

3 MR. POMERANTZ: Your Honor, we also took Your Honor's
4 comments to heart. We, Mr. Seery and I, had an over-an-hour
5 conversation with Mr. Lynn and with Mr. Bonds. We provided
6 them with our thoughts as to what they needed to do in order
7 to move forward. Of course, it's not really the Debtor to
8 agree. It's the creditors to agree. But as Mr. Seery has
9 testified many times before and as I have told the Court, we
10 would support a plan that the Committee and Mr. Dondero could
11 get behind.

12 So we again -- I'm not going to divulge the nature of
13 those communications, but we suggested several things that Mr.
14 Dondero could do in order to move the ball forward, and
15 unfortunately, we have not seen any of those things done thus
16 far. So we are, at this point, not optimistic that there will
17 be a grand bargain plan.

18 THE COURT: All right.

19 MR. DONDERO: Your Honor, could I comment for a
20 second? This is Mr. Dondero.

21 THE COURT: If you and your counsel want you to
22 comment, you can comment.

23 MR. DONDERO: I'd love to do a pot plan. I would
24 love to reach some kind of settlement and everybody move on
25 with their lives. The estate started with \$360 million of

1 third-party assets and \$90 million of notes. The \$360 million
2 of third-party assets are down to \$130 million.

3 MR. POMERANTZ: Again, Your Honor, I must interrupt.
4 I did this at the last hearing, and it's not my practice to
5 interrupt, but issues regarding what the value is or not, it's
6 going to require a response, and that's not really before Your
7 Honor. I think before Your Honor is --

8 MR. DONDERO: Okay.

9 MR. POMERANTZ: -- have there been negotiations?
10 Have they been in good faith? If Mr. Dondero wanted to
11 address that, that's fine, but I object to having any
12 discussion at this point, especially with Mr. Dondero not even
13 under oath, on what the nature of the value of the assets and
14 why they have changed and what not.

15 THE COURT: Well, --

16 MR. POMERANTZ: It's just not appropriate.

17 THE COURT: I understand --

18 MR. DONDERO: Okay. Can I --

19 THE COURT: Stop.

20 MR. DONDERO: Can I -- can I finish?

21 THE COURT: Let me please respond to that. I
22 understand your concern, but I've heard from Mr. Seery
23 testimony many months ago about the value plummeting during
24 the case. And I asked why, and I got some explanations. This
25 is not evidence. This is just, you know, this is not going to

1 be binding in any way. Mr. Dondero can speak as to what he
2 thinks, you know, the situation is.

3 Go ahead, Mr. Dondero.

4 MR. DONDERO: Okay. I'm not trying to fixate on the
5 numbers. And as far as the third-party assets are, we would
6 be willing to pay -- I would be willing to pay for those. I'd
7 be willing to pay more, and even some value for the affiliate
8 notes that were really part of compensation agreements
9 throughout the history of Highland and avoid the POC
10 arguments. I'd be willing to pay for the assets and I'd be
11 willing to pay even more than that.

12 I have no transparency in terms of what the assets are,
13 and there's no fulsome discussion in terms of, well, here are
14 the assets, here are the notes, here's what we think the
15 values are, can you get to this number? It's just a -- you --
16 the -- it -- I don't view there is good-faith negotiations
17 going on because it's always just a: You need to put a big
18 number on a piece of paper; otherwise, you're going to get run
19 over.

20 And there's no back and forth going on, but it's not due
21 to a lack of willingness on my part. And maybe there needs to
22 be a committee set up. Maybe there needs to be, I don't know,
23 a mediator or an examiner or somebody to try and push through
24 the pot plan, but there's nothing happening. People are not
25 returning the judge's calls, I mean, Mr. Lynn's calls, or my

1 calls. They're -- there's -- despite efforts of our -- of my
2 own and a willingness of my own, there's no negotiations of
3 any sort going on at the moment.

4 THE COURT: All right. I don't want anyone to
5 respond to that. I know people have different views of what's
6 going on. But let me just say a couple of things, and then
7 we're done.

8 We do have a Committee in this case. We have a Committee
9 with very sophisticated members and very sophisticated
10 professionals. Okay? That's who I wanted you to be talking
11 to before the end of the day Tuesday.

12 We have had co-mediators in this case. Okay? And, you
13 know, I identified very sophisticated human beings for that
14 role. Okay? And in fact, there ended up being settlements
15 that flowed out of the co-mediator process.

16 We're now 15 months into the case. There are major,
17 significant compromises now: HarbourVest, UBS, Acis, Terry,
18 and Redeemer Committee. I hate to use a worn-out metaphor,
19 but the train is leaving the station. We've got confirmation.
20 I've pushed out two weeks. I mean, you all are either going
21 to get there in the next few days or we're just going to go
22 forward with I think what everyone, you know, would rather be
23 a pot plan, but if we can't get there, we're just going to
24 have to consider the plan that's on the table now. Okay?

25 You know, the Committee, again, they're sophisticated.

1 They can compare apples to oranges and decide whether the plan
2 on the table, with its risks of future litigation and
3 recoveries, whether it's better or worse than whatever
4 consideration you're offering, Mr. Dondero.

5 And you know, as we all know, there is distrust here,
6 there, and everywhere among these parties. So I can totally
7 understand them, you know, taking a hard line: We either get
8 all cash or we're just not going to mess with it. We don't
9 want to risk broken promises. We'd rather just do litigation.

10 So, anyway, that's as much as I'm going to say except I am
11 going to further direct good-faith negotiations. It sounds
12 like to me a written term sheet might be the appropriate next
13 step, given where I've heard things are at the moment. But,
14 you know, I guess we don't have any hearings between now and
15 the 26th, right? No Highland hearings that I can think of
16 between now and the 26th.

17 MR. POMERANTZ: I don't think so.

18 MR. MORRIS: I think that's correct, Your Honor.

19 THE COURT: So you have all this time --

20 MR. MORRIS: At the moment.

21 THE COURT: You have all this time to negotiate and
22 simultaneously get ready for the confirmation hearing without
23 any other battles. So I know you will use the time well.

24 All right. We're adjourned.

25 THE CLERK: All rise.

1 MR. BONDS: Thank you, Your Honor.

2 (Proceedings concluded at 2:04 p.m.)

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CERTIFICATE

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I certify that the foregoing is a correct transcript from
the electronic sound recording of the proceedings in the
above-entitled matter.

23

/s/ Kathy Rehling

01/16/2021

24

25

Kathy Rehling, CETD-444
Certified Electronic Court Transcriber

Date

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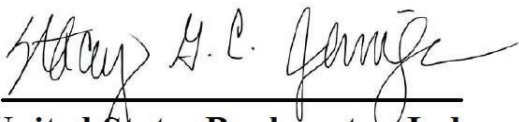
CLERK, U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS

ENTERED

THE DATE OF ENTRY IS ON
THE COURT'S DOCKET

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

Signed January 20, 2021


United States Bankruptcy Judge

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

In re:

HIGHLAND CAPITAL MANAGEMENT, L.P.,¹

Debtor.

§ Chapter 11
§
§ Case No. 19-34054-SGJ11
§
§
§

**ORDER APPROVING DEBTOR'S SETTLEMENT
WITH HARBOURVEST (CLAIM NOS. 143, 147, 149, 150, 153, 154) AND
AUTHORIZING ACTIONS CONSISTENT THEREWITH**

This matter having come before the Court on *Debtor's Motion for Entry of an Order Approving Settlement with HarbourVest (Claim Nos. 143, 147, 149, 150, 153, 154) and Authorizing Actions Consistent Therewith* [Docket No. 1625] (the "Motion"),² filed by Highland Capital Management, L.P., the debtor and debtor-in-possession (the "Debtor") in the above-captioned chapter 11 case (the "Bankruptcy Case"); and this Court having considered (a) the

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

² Capitalized terms used but not otherwise defined herein have the meanings ascribed to them in the Motion.



Motion; (b) the *Declaration of John A. Morris in Support of the Debtor’s Motion for Entry of an Order Approving Settlement with HarbourVest (Claim Nos. 143, 147, 149, 150, 153, 154) and Authorizing Actions Consistent Therewith* [Docket No. 1631] (the “Morris Declaration”), and the exhibits annexed thereto, including the Settlement Agreement attached as **Exhibit “1”** (the “Settlement Agreement”); (c) the arguments and law cited in the Motion; (d) *James Dondero’s Objection to Debtor’s Motion for Entry of an Order Approving Settlement with HarbourVest* [Docket No. 1697] (the “Dondero Objection”), filed by James Dondero; (e) the *Objection to Debtor’s Motion for Entry of an Order Approving Settlement with HarbourVest (Claim Nos. 143, 147, 149, 150, 153, 154) and Authorizing Actions Consistent Therewith* [Docket No. 1706] (the “Trusts’ Objection”), filed by the Dugaboy Investment Trust (“Dugaboy”) and Get Good Trust (“Get Good,” and together with Dugaboy, the “Trusts”); (f) *CLO Holdco’s Objection to HarbourVest Settlement* [Docket No. 1707] (the “CLOH Objection” and collectively, with the Dondero Objection and the Trusts’ Objection, the “Objections”), filed by CLO Holdco, Ltd.; (g) the *Debtor’s Omnibus Reply in Support of Debtor’s Motion for Entry of an Order Approving Settlement with HarbourVest (Claim Nos. 143, 147, 149, 150, 153, 154), and Authorizing Actions Consistent Therewith* [Docket No. 1731] (the “Debtor’s Reply”), filed by the Debtor; (h) the *HarbourVest Reply in Support of Debtor’s Motion for Entry of an Order Approving Settlement with HarbourVest and Authorizing Actions Consistent Therewith* [Docket No. 1734] (the “HarbourVest Reply”), filed by HarbourVest 2017 Global Fund L.P., HarbourVest 2017 Global AIF L.P., HarbourVest Dover Street IX Investment L.P., HV International VIII Secondary L.P., HarbourVest Skew Base AIF L.P., and HarbourVest Partners L.P. (collectively, “HarbourVest”); (i) the testimonial and documentary evidence admitted into evidence during the hearing held on January 14, 2021 (the “Hearing”), including assessing the credibility of the witnesses; and (j) the

arguments made during the Hearing; and this Court having jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334; and this Court having found that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2); and this Court having found that venue of this proceeding and the Motion in this District is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and this Court having found that the relief requested in the Motion is in the best interests of the Debtor's estate, its creditors, and other parties-in-interest; and this Court having found the Settlement Agreement fair and equitable; and this Court having analyzed, for the reasons stated on the record, (1) the probability of success in litigating the claims subject to the Settlement Agreement, with due consideration for the uncertainty in fact and law, (2) the complexity and likely duration of litigation and any attendant expense, inconvenience, and delay, and (3) all other factors bearing on the wisdom of the compromise, including: (i) the best interests of the creditors, with proper deference to their reasonable views, and (ii) the extent to which the settlement is truly the product of arms-length bargaining, and not of fraud or collusion; and this Court having found that the Debtor's notice of the Motion and opportunity for a hearing on the Motion were appropriate under the circumstances and that no other notice need be provided; and this Court having determined that the legal and factual bases set forth in the Motion establish good cause for the relief granted herein; and upon all of the proceedings had before this Court; and after due deliberation and sufficient cause appearing therefor, it is hereby **ORDERED** that:

1. The Motion is **GRANTED** as set forth herein.
2. All objections to the Motion are overruled.
3. The Settlement Agreement, attached hereto as **Exhibit 1**, is approved in all respects pursuant to Rule 9019 of the Federal Rules of Bankruptcy Procedure.

4. All objections to the proofs of claim subject to the Motion³ are overruled as moot in light of the Court's approval of the Settlement Agreement.

5. The Debtor, HarbourVest, and all other parties are authorized to take any and all actions necessary and desirable to implement the Settlement Agreement without need of further approval or notice.

6. Pursuant to the express terms of the *Members Agreement Relating to the Company*, dated November 15, 2017, HarbourVest is authorized to transfer its interests in HCLOF to a wholly-owned and controlled subsidiary of the Debtor pursuant to the terms of the *Transfer Agreement for Ordinary Shares of Highland CLO Funding, Ltd.* without the need to obtain the consent of any party or to offer such interests first to any other investor in HCLOF.

7. The Court shall retain exclusive jurisdiction to hear and determine all matters arising from the implementation of this Order.

###End of Order###

³ This includes the *Debtor's First Omnibus Objection to Certain (A) Duplicate Claims; (B) Overstated Claims; (C) Late-Filed Claims; (D) Satisfied Claims; (E) No-Liability Claims; and (F) Insufficient-Documentation Claims* [Docket No. 906].

EXHIBIT 1

SETTLEMENT AGREEMENT

This Settlement Agreement (the “Agreement”) is entered into as of December 23, 2020, between Highland Capital Management, L.P. (the “Debtor”), on the one hand, and HarbourVest 2017 Global Fund L.P., HarbourVest 2017 Global AIF L.P., HarbourVest Dover Street IX Investment L.P., HV International VIII Secondary L.P., HarbourVest Skew Base AIF L.P., and HarbourVest Partners L.P. (each, a “HarbourVest Party,” and collectively, “HarbourVest”), on the other hand. Each of the foregoing are sometimes referred to herein collectively as the “Parties” and individually as a “Party.”

RECITALS

WHEREAS, on October 16, 2019 (the “Petition Date”), the Debtor filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code (the “Bankruptcy Case”) in the Bankruptcy Court for the District of Delaware, Case No. 19-12239 (CSS) (the “Delaware Bankruptcy Court”);

WHEREAS, on December 4, 2019, the Delaware Bankruptcy Court entered an order transferring venue of the Debtor’s case to the Bankruptcy Court for the Northern District of Texas, Dallas Division, Case No. 19-34054-sgj (the “Bankruptcy Court”);

WHEREAS, prior to the Petition Date, HarbourVest invested in Highland CLO Funding, Ltd. f/k/a Acis Loan Funding, Ltd. (“HCLOF”) and acquired an a 49.98% ownership interest in HCLOF (the “HarbourVest Interests”);

WHEREAS, the portfolio manager for HCLOF is Highland HCF Advisor, Ltd., a subsidiary of the Debtor;

WHEREAS, on April 8, 2020, HarbourVest filed proofs of claim in the Bankruptcy Case, which are listed on the Debtor’s claims register as claim numbers 143, 147, 149, 150, 153, and 154 (the “HarbourVest Claims”), asserting claims against the Debtor relating to its investment in HCLOF;

WHEREAS, on July 30, 2020, the Debtor filed the *Debtor’s First Omnibus Objection to Certain (a) Duplicate Claims; (b) Overstated Claims; (c) Late-Filed Claims; (d) Satisfied Claims; (e) No Liability Claims; and (f) Insufficient-Documentation Claims* [Docket No. 906], in which the Debtor objected to the HarbourVest Claims;

WHEREAS, on September 11, 2020, HarbourVest filed the *HarbourVest Response to Debtor’s First Omnibus Objection to Creation (a) Duplicate Claims; (b) Overstated Claims; (c) Late-Filed Claims; (d) Satisfied Claims; (e) No Liability Claims; and (f) Insufficient-Documentation Claims* [Docket No. 1057] (the “HarbourVest Response”);

WHEREAS, on October 18, 2020, HarbourVest filed the *Motion of HarbourVest Pursuant to Rule 3018(a) of the Federal Rules of Bankruptcy Procedure for Temporary Allowance of Claims for Purposes of Voting to Accept or Reject the Plan* [Docket No. 1207] (the “3018 Motion” and together with the HarbourVest Response, the “HarbourVest Pleadings”);

WHEREAS, in the HarbourVest Pleadings, HarbourVest asserted, among other things, that the HarbourVest Claims included claims against the Debtor arising from fraudulent inducement, fraudulent concealment, fraudulent misrepresentation, breach of fiduciary duty, breach of securities laws, and misuse of assets and sought damages in excess of \$300,000,000;

WHEREAS, the Debtor disputes the HarbourVest Claims;

WHEREAS, on November 24, 2020, the Debtor filed the *Fifth Amended Plan of Reorganization for Highland Capital Management, L.P.* [Docket No. 1472] (as amended, the “Plan”).¹

WHEREAS, the Parties desire to enter into this Agreement which incorporates, formalizes, and finalizes the full and final resolution of the HarbourVest Claims and HarbourVest Pleadings; and

WHEREAS, this Agreement will be presented to the Bankruptcy Court for approval pursuant to **Federal Rule of Bankruptcy Procedure 9019** (“Rule 9019”).

NOW THEREFORE, in consideration of the above recitals, the covenants, conditions, and promises made herein, and other good and valuable consideration, the receipt of which is hereby acknowledged, the Parties agree as follows:

1. Settlement of Claims.

(a) In full and complete satisfaction of the HarbourVest Claims, HarbourVest will receive:

(i) an allowed, nonpriority general unsecured claim in the aggregate amount of \$45,000,000 (the “Allowed GUC Claim”); and

(ii) an allowed subordinated claim in the aggregate amount of \$35,000,000 (the “Allowed Subordinated Claim” and together with the Allowed GUC Claim, the “Allowed Claims”).

(b) On the Effective Date, HarbourVest will transfer all of its rights, title, and interest in the HarbourVest Interests to the Debtor or its nominee pursuant to the terms of the *Transfer Agreement for Ordinary Shares of Highland CLO Funding, Ltd.*, attached hereto as Exhibit A (the “Transfer Agreements”) and the Debtor or its nominee will become a shareholder of HCLOF with respect to the HarbourVest Interests. The terms of the Transfer Agreements are incorporated into this Agreement by reference.

2. Releases.

(a) Upon the Effective Date, and to the maximum extent permitted by law, each HarbourVest Party on behalf of itself and each of its current and former advisors, trustees, directors, officers, managers, members, partners, employees, beneficiaries, shareholders, agents,

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

participants, subsidiaries, parents, successors, designees, and assigns hereby forever, finally, fully, unconditionally, and completely releases, relieves, acquits, remises, and exonerates, and covenants never to sue, the Debtor, HCLOF, HCLOF's current and former directors, and the Debtor's current and former advisors, trustees, directors, officers, managers, members, partners, employees, beneficiaries, shareholders, agents, participants, subsidiaries, parents, affiliates, successors, designees, and assigns, except as expressly set forth below (the "Debtor Released Parties"), for and from any and all claims, debts, liabilities, demands, obligations, promises, acts, agreements, liens, losses, costs and expenses (including, without limitation, attorney's fees and related costs), damages, injuries, suits, actions, and causes of action of whatever kind or nature, whether known or unknown, suspected or unsuspected, matured or unmatured, liquidated or unliquidated, contingent or fixed, at law or in equity, statutory or otherwise, including, without limitation, any claims, defenses, and affirmative defenses, whether known or unknown, including, without limitation, those which were or could have been asserted in, in connection with, or with respect to the Bankruptcy Case (collectively, the "HarbourVest Released Claims").

(b) Upon the Effective Date, and to the maximum extent permitted by law, the Debtor hereby forever, finally, fully, unconditionally, and completely releases, relieves, acquits, remises, and exonerates, and covenants never to sue (i) each HarbourVest Party and (ii) each HarbourVest Party's current and former advisors, trustees, directors, officers, managers, members, partners, employees, beneficiaries, shareholders, agents, participants, subsidiaries, parents, affiliates, successors, designees, and assigns (the "HarbourVest Released Parties"), for and from any and all claims, debts, liabilities, demands, obligations, promises, acts, agreements, liens, losses, costs and expenses (including, without limitation, attorney's fees and related costs), damages, injuries, suits, actions, and causes of action of whatever kind or nature, whether known or unknown, suspected or unsuspected, matured or unmatured, liquidated or unliquidated, contingent or fixed, at law or in equity, statutory or otherwise, including, without limitation, any claims, defenses, and affirmative defenses, whether known or unknown, which were or could have been asserted in, in connection with, or with respect to the Bankruptcy Case (collectively, the "Debtor Released Claims"); *provided, however*, that notwithstanding anything herein to the contrary, the release contained in this Section 2(b) will apply to the HarbourVest Released Parties set forth in subsection (b)(ii) only with respect to Debtor Released Claims arising from or relating to HarbourVest's ownership of the HarbourVest Interests.

(c) Notwithstanding anything in this Agreement to the contrary, the releases set forth herein will not apply with respect to (i) the Allowed Claims, (ii) the claims of Charlotte Investor IV, L.P., or (iii) the duties, rights, or obligations of any Party under this Agreement or the Transfer Agreements.

3. **Agreement Subject to Bankruptcy Court Approval.** The effectiveness of this Agreement and the Parties' obligations hereunder are conditioned in all respects on the approval of this Agreement by the Bankruptcy Court. The Parties agree to cooperate and use reasonable efforts to have this Agreement approved by the Bankruptcy Court. The "Effective Date" will be the date of an order entered by the Bankruptcy Court approving this Agreement pursuant to a motion filed under Rule 9019.

4. **Representations and Warranties.** Subject in all respects to Section 3 hereof:

(a) each HarbourVest Party represents and warrants that (i) it has full authority to enter into this Agreement and to release the HarbourVest Released Claims and has not sold, transferred, or assigned any HarbourVest Released Claim to any other person or entity, (ii) no person or entity other than such HarbourVest Party has been, is, or will be authorized to bring, pursue, or enforce any HarbourVest Released Claim on behalf of, for the benefit of, or in the name of (whether directly or derivatively) of such HarbourVest Party; and (iii) HarbourVest owns all of the HCLOF Interests free and clear of any claims or interests; and

(b) the Debtor represents and warrants to HarbourVest that (i) it has full authority to enter into this Agreement and to release the Debtor Released Claims and (ii) no person or entity other than the Debtor has been, is, or will be authorized to bring, pursue, or enforce any Debtor Released Claim on behalf of, for the benefit of, or in the name of (whether directly or derivatively) of the Debtor Party.

5. **Plan Support.**

(a) Each HarbourVest Party hereby agrees that it will (a) vote all HarbourVest Claims held by such HarbourVest Party to accept the Plan, by delivering its duly executed and completed ballots accepting the Plan on a timely basis; and (b) not (i) change, withdraw, or revoke such vote (or cause or direct such vote to be changed withdrawn or revoked); (ii) exercise any right or remedy for the enforcement, collection, or recovery of any claim against the Debtor except in a manner consistent with this Agreement or the Plan, (iii) object to, impede, or take any action other action to interfere with, delay or postpone acceptance or confirmation of the Plan; (iv) directly or indirectly solicit, propose, file, support, participate in the formulation of or vote for, any restructuring, sale of assets (including pursuant to **11 U.S.C. § 363**), merger, workout, or plan of reorganization of the Debtor other than the Plan; or (v) otherwise take any action that would in any material respect interfere with, delay, or postpone the consummation of the Plan; provided, however, that such vote may be revoked (and, upon such revocation, deemed void ab initio) by such HarbourVest Party at any time following the termination of this agreement or the occurrence of a Support Termination Event (it being understood that any termination of this agreement shall entitle each HarbourVest Party to change its vote in accordance with section 1127(d) of the Bankruptcy Code), notwithstanding any voting deadline established by the Bankruptcy Court including without limitation the January 5, 2021, 5:00 p.m. (prevailing Central Time) deadline established by the *Order Approving Form of Ballots, Voting Deadline and Solicitation Procedures* [Docket No. 1476].

(b) In full resolution of the 3018 Motion, HarbourVest will have a general unsecured claim for voting purposes only in the amount of \$45,000,000.

(c) The obligations of the HarbourVest Parties under this Section 5 shall automatically terminate upon the occurrence of any of the following (each a “Support Termination Event”): (i) the effective date of the Plan, (ii) the withdrawal of the Plan, (iii) the entry of an order by the Bankruptcy Court (A) converting the Bankruptcy Case to a case under chapter 7 of the Bankruptcy Code or (B) appointing an examiner with expanded powers beyond those set forth in sections 1106(a)(3) and (4) of the Bankruptcy Code or a trustee in Bankruptcy

Case, or (iv) the failure of the Court to enter an order approving the terms of this Agreement and the settlement described herein pursuant to Rule 9019 prior to confirmation of the Plan.

6. **No Admission of Liability.** The Parties acknowledge that there is a bona fide dispute with respect to the HarbourVest Claims. Nothing in this Agreement will imply, an admission of liability, fault or wrongdoing by the Debtor, HarbourVest, or any other person, and the execution of this Agreement does not constitute an admission of liability, fault, or wrongdoing on the part of the Debtor, HarbourVest, or any other person.

7. **Successors-in-Interest.** This Agreement shall be binding upon and shall inure to the benefit of each of the Parties and their successors, and assigns.

8. **Notice.** Each notice and other communication hereunder will be in writing and will be sent by email and delivered or mailed by registered mail, receipt requested, and will be deemed to have been given on the date of its delivery, if delivered, and on the fifth full business day following the date of the mailing, if mailed to each of the Parties thereto at the following respective addresses or such other address as may be specified in any notice delivered or mailed as set forth below:

HARBOURVEST

HarbourVest Partners L.P.
Attention: Michael J. Pugatch
One Financial Center
Boston, MA 02111
Telephone No. 617-348-3712
E-mail: mpugatch@harbourvest.com

with a copy (which shall not constitute notice) to:

Debevoise & Plimpton LLP
Attention: M. Natasha Labovitz, Esq.
919 Third Avenue
New York, NY 10022
Telephone No. 212-909-6649
E-mail: nlabovitz@debevoise.com

THE DEBTOR

Highland Capital Management, L.P.
300 Crescent Court, Suite 700
Dallas, Texas 75201
Attention: James P. Seery, Jr.
Telephone No.: 972-628-4100
Facsimile No.: 972-628-4147
E-mail: jpseeryjr@gmail.com

with a copy (which shall not constitute notice) to:

Pachulski Stang Ziehl & Jones LLP
Attention: Jeffrey Pomerantz, Esq.
10100 Santa Monica Blvd., 13th Floor
Los Angeles, CA 90067
Telephone No.: 310-277-6910
Facsimile No.: 310-201-0760
E-mail: jpomerantz@pszjlaw.com

9. **Advice of Counsel.** Each Party represents that it has: (a) been adequately represented by independent legal counsel of its own choice, throughout all of the negotiations that preceded the execution of this Agreement; (b) executed this Agreement upon the advice of such counsel; (c) read this Agreement, and understands and assents to all the terms and conditions contained herein without any reservations; and (d) had the opportunity to have this Agreement and all the terms and conditions contained herein explained by independent counsel, who has answered any and all questions asked of such counsel, or which could have been asked of such counsel, including, but not limited to, with regard to the meaning and effect of any of the provisions of this Agreement.

10. **Entire Agreement.** This Agreement and the Transfer Agreement contain the entire agreement and understanding concerning the subject matter of this Agreement, and supersede and replace all prior negotiations and agreements, written or oral and executed or unexecuted, concerning such subject matter. Each of the Parties acknowledges that no other Party, nor any agent of or attorney for any such Party, has made any promise, representation or warranty, express or implied, written or oral, not otherwise contained in this Agreement to induce any Party to execute this Agreement. The Parties further acknowledge that they are not executing this Agreement in reliance on any promise, representation or warranty not contained in this Agreement, and that any such reliance would be unreasonable. This Agreement will not be waived or modified except by an agreement in writing signed by each Party or duly authorized representative of each Party.

11. **No Party Deemed Drafter.** The Parties acknowledge that the terms of this Agreement are contractual and are the result of arms'-length negotiations between the Parties and their chosen counsel. Each Party and its counsel cooperated in the drafting and preparation of this Agreement. In any construction to be made of this Agreement, the Agreement will not be construed against any Party.

12. **Future Cooperation.** The Parties agree to cooperate and execute such further documentation as is reasonably necessary to effectuate the intent of this Agreement.

13. **Counterparts.** This Agreement may be executed in counterparts with the same force and effect as if executed in one complete document. Each Party's signature hereto will signify acceptance of, and agreement to, the terms and provisions contained in this Agreement. Photographic, electronic, and facsimile copies of signed counterparts may be used in lieu of the originals of this Agreement for any purpose.

14. **Governing Law; Venue; Attorneys' Fees and Costs.** The Parties agree that this Agreement will be governed by and will be construed according to the laws of the State of Texas without regard to conflict-of-law principles. Each of the Parties hereby submits to the exclusive jurisdiction of the Bankruptcy Court during the pendency of the Bankruptcy Case and thereafter to the exclusive jurisdiction of the state and federal courts located in the Northern District of Texas, Dallas Division, with respect to any disputes arising from or out of this Agreement. In any action to enforce this Agreement, the prevailing party shall be entitled to recover its reasonable and necessary attorneys' fees and costs (including experts).

[Remainder of Page Intentionally Blank]

IT IS HEREBY AGREED.

HIGHLAND CAPITAL MANAGEMENT, L.P.

By: /s/ James P. Seery, Jr.
Name: James P. Seery, Jr.
Its: CEO/CRO

HarbourVest 2017 Global Fund L.P., by HarbourVest 2017 Global Associates L.P., its General Partner, by HarbourVest GP LLC, its General Partner, by HarbourVest Partners, LLC, its Managing Member

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

HarbourVest 2017 Global AIF L.P., by HarbourVest Partners (Ireland) Limited, its Alternative Investment Fund Manager, by HarbourVest Partners L.P., its Duly Appointed Investment Manager, by HarbourVest Partners, LLC, its General Partner

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

HarbourVest Dover Street IX Investment L.P., by HarbourVest Partners L.P., its Duly Appointed Investment Manager, by HarbourVest Partners, LLC, its General Partner

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

HarbourVest Partners L.P., on behalf of funds and accounts under management, by HarbourVest Partners, LLC, its General Partner

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

**HarbourVest Skew Base AIF L.P., by HarbourVest Partners (Ireland) Limited, its
Alternative Investment Fund Manager, by HarbourVest Partners L.P., its Duly Appointed
Investment Manager, by HarbourVest Partners, LLC, its General Partner**

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

**HV International VIII Secondary L.P., by HIPEP VIII Associates L.P., its General
Partner, by HarbourVest GP LLC, its General Partner, by HarbourVest Partners, LLC,
its Managing Member**

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

Exhibit A

**TRANSFER AGREEMENT
FOR ORDINARY SHARES OF
HIGHLAND CLO FUNDING, LTD.**

This Transfer Agreement, dated as of January ____, 2021 (this “**Transfer Agreement**”), is entered into by and among Highland CLO Funding, Ltd. (the “**Fund**”), Highland HCF Advisor, Ltd. (the “**Portfolio Manager**”), HCMLP Investments, LLC (the “**Transferee**”) and each of the following: HarbourVest Dover Street IX Investment L.P., HarbourVest 2017 Global AIF L.P., HarbourVest 2017 Global Fund L.P., HV International VIII Secondary L.P., and HarbourVest Skew Base AIF L.P. (collectively, the “**Transferors**”).

WHEREAS, each Transferor is the record, legal and beneficial owner of the number of ordinary shares (“**Shares**”) of the Fund set forth opposite such Transferor’s name on Exhibit A hereto (with respect to each Transferor, the “**Transferred Shares**”).

WHEREAS the Transferee is an affiliate and wholly owned subsidiary of Highland Capital Management, L.P. (“**HCMLP**”) which is one of the initial members of the Fund.

WHEREAS, each Transferor wishes to transfer and assign 100% of its rights, title and interest as a shareholder in the Fund, including the Transferred Shares (the “**Interest**”) on the terms set forth in this Transfer Agreement.

WHEREAS, subject to and in connection with the approval of that certain Settlement Agreement, dated on or about the date hereof, by and among HCMLP and the Transferors (the “**Settlement Agreement**”), the Transferee desires that the Interest be transferred to Transferee and that thereafter the Transferee will become a Shareholder and the Transferors will no longer be Shareholders.

WHEREAS, the Portfolio Manager desires to consent to such transfers and to the admission of Transferee as a Shareholder on the terms set forth herein, and the Transferors and Transferee agree to such terms.

WHEREAS, the Fund desires to amend its records to reflect the foregoing transfers.

NOW, THEREFORE, the parties hereto agree as follows:

1. Transfer of Shares and Advisory Board

- a. Each Transferor hereby transfers and assigns all of its rights, title, and interest in its Interest to the Transferee, and the Transferee wishes to be admitted to the Fund as a Shareholder.
- b. In connection with the transfer of the Interest as contemplated herein, the Transferee shall be granted the right to appoint a representative to the Fund’s advisory board (the “**Advisory Board**”) to replace the Transferors’ appointed representative to the Advisory Board.

- c. Transferee hereby assumes all of Transferor's rights and obligations in respect of the Interest effective as of the Effective Date (as defined below) and acknowledge that thereafter Transferee shall be subject to the applicable terms and provisions of the Members' Agreement dated as of November 15, 2017 (the "**Members' Agreement**"), the Articles of Incorporation adopted November 15, 2017 (the "**Articles**") and the Subscription and transfer Agreement, dated as of November 15, 2017 among each Transferor, the Fund and the Portfolio Manager (the "**Subscription Agreement**", and together with the Members' Agreement and the Articles, the "**Fund Agreements**") with respect to the Interest. Transferee does not assume any liability or responsibility for any obligations or liabilities incurred by any Transferor prior to the Effective Date of the transfer.
 - d. Following the transfer, each Transferor shall have no further rights or obligations to any party hereunder in respect of the Interest under the Fund Agreements.
 - e. This Transfer Agreement, and the parties' obligations hereunder, are conditioned in all respects on the approval by the Bankruptcy Court for the Northern District of Texas, Dallas Division pursuant to **Federal Rule of Bankruptcy Procedure 9019** of (i) this Transfer Agreement and (ii) the Settlement Agreement, and each of the parties agree that no further action shall be required from any party for the transfer of the Interest to be effective except as described herein.
2. Transferee's Representations and Warranties. The Transferee represents and warrants to the Transferors, the Portfolio Manager, and the Fund as follows:
- a. This Transfer Agreement constitutes a valid and binding obligation of the Transferee, enforceable against it in accordance with its terms;
 - b. This Transfer Agreement has been duly and validly executed and delivered by or on behalf of the Transferee and such execution and delivery have been duly authorized by all necessary trust action of the Transferee;
 - c. The Transferee acknowledges receipt of, has read, and is familiar with, the Fund's Offering Memorandum for Placing Shares dated November 15, 2017 (the "**Offering Memorandum**") and the Fund Agreements;
 - d. The Transferee hereby accepts and receives the Interest from the Transferors for investment, and not with a view to the sale or distribution of any part thereof, and the Transferee has no present intention of selling, granting participations in, or otherwise distributing the same, but subject nevertheless to any requirement of law that the disposition of the Transferee's property shall at all times be within such Transferee's control; and
 - e. The Transferee is an "Eligible U.S. Investor" as defined in the Offering Memorandum.

3. Transferors' Representations and Warranties. Each Transferor represents and warrants to the Transferee, the Portfolio Manager, and the Fund as follows:
 - a. This Transfer Agreement constitutes a valid and binding obligation of the Transferor, enforceable against it in accordance with its terms;
 - b. This Transfer Agreement has been duly authorized, and duly and validly executed and delivered by the Transferor and such execution and delivery have been duly authorized by all necessary action of the Transferor; and
 - c. As of the date hereof, the Transferor has good and valid title to the Transferor's Interest, free and clear of any liens, vesting requirements or claims by others.
4. Consent to Transfer. Based in part on the representations and warranties of the Transferors and the Transferee which are included herein, and on the terms contained herein, the Portfolio Manager and the Fund hereby consent to the transfers of the Interest, the admission of the Transferee as a Shareholder and the Transferee's appointment of a representative to the Advisory Board, the Portfolio Manager's execution of this Transfer Agreement constituting its prior written consent to the transfers of the Interest for the purposes of article 18.1 of the Articles and this Transfer Agreement constituting express notice in writing to the Fund of the assignment set out at clause 1(c) above for the purposes of the Law of Property (Miscellaneous Provisions) (Guernsey) Law, 1979 (as amended).
5. Completion: As of the date of approval by the Bankruptcy Court for the Northern District of Texas, Dallas Division pursuant to Federal Rule of Bankruptcy Procedure 9019 of (i) this Transfer Agreement and (ii) the Settlement Agreement (the "**Effective Date**"):
 - a. each Transferor shall deliver or cause to be delivered to the Transferee a transfer instrument relating to the Transferred Shares duly executed and completed by that Transferor in favor of the Transferee; and
 - b. the Transferee shall deliver to the Transferors and the Fund a duly executed and dated Adherence Agreement (as defined in the Members' Agreement).

Prior to the Effective Date the Transferee shall procure that:

 - c. the board of directors of the Fund shall hold a meeting at which the transfer of the Shares to the Transferee shall be approved and registration in the register of members of the Fund shall be effected on the Effective Date.
6. Miscellaneous.
 - a. Each of the parties hereto agree to execute any further instruments and perform any further acts which are or may become reasonably necessary to carry out the intent of this Transfer Agreement or are reasonably requested by the Portfolio Manager, the Fund or a Transferor to complete the transfer of the Interest.

- b. The parties to this Transfer Agreement acknowledge that the terms of this Transfer Agreement are the result of arms'-length negotiations between the parties and their respective counsel. Each party and its counsel cooperated in the drafting and preparation of this Transfer Agreement. In any construction to be made of this Transfer Agreement, the language or drafting of this Transfer Agreement will not be construed against any party.
- c. This Transfer Agreement shall be governed by, and construed and enforced in accordance with, the internal substantive laws of the state of Delaware, without giving effect to conflicts of law principles.
- d. The representations, warranties and covenants of the Transferors and the Transferee shall remain in full force and effect following the transfer of the Interest, and the Fund and the Portfolio Manager thereafter may rely on all such representations, warranties and covenants.
- e. This Transfer Agreement may be executed in multiple counterparts, each of which shall be deemed to be an original, but all of which together shall constitute one and the same instrument. Photographic, electronic, and facsimile copies of signed counterparts may be used in lieu of the originals of this Transfer Agreement for any purpose.
- f. Captions of sections have been added only for convenience and shall not be deemed to be a part of this Transfer Agreement.
- g. This Transfer Agreement is among the parties hereto. No Person that is not a party hereto shall have any right herein as a third-party beneficiary or otherwise except as expressly contemplated hereby.

[Remainder of Page Intentionally Blank]

IN WITNESS WHEREOF, the undersigned have executed this Transfer Agreement as of the date first above written.

TRANSFERORS:

HarbourVest Dover Street IX Investment L.P.

By: HarbourVest Partners L.P., its Duly Appointed Investment Manager

By: HarbourVest Partners, LLC

By: _____

Name: Michael Pugatch

Title: Managing Director

HV International VIII Secondary L.P.

By: HIPEP VIII Associates L.P.
Its General Partner

By: HarbourVest GP LLC
Its General Partner

By: HarbourVest Partners, LLC
Its Managing Member

By: _____

Name: Michael Pugatch

Title: Managing Director

HarbourVest 2017 Global AIF L.P.

By: HarbourVest Partners (Ireland) Limited
Its Alternative Investment Fund Manager

By: HarbourVest Partners L.P.
Its Duly Appointed Investment Manager

By: HarbourVest Partners, LLC
Its General Partner

By: _____

Name: Michael Pugatch

Title: Managing Director

HarbourVest Skew Base AIF L.P.

By: HarbourVest Partners (Ireland) Limited
Its Alternative Investment Fund Manager

By: HarbourVest Partners L.P.
Its Duly Appointed Investment Manager

By: HarbourVest Partners, LLC
Its General Partner

By: _____

Name: Michael Pugatch

Title: Managing Director

Exhibit A

<u>Transferee Name</u>	<u>Number of Shares</u>	<u>Percentage</u>
HarbourVest Dover Street IX Investment L.P.	54,355,482.14	71.0096%
HarbourVest 2017 Global AIF L.P.	7,426,940.38	9.7025%
HarbourVest 2017 Global Fund L.P.	3,713,508.46	4.8513%
HV International VIII Secondary L.P.	9,946,780.11	12.9944%
HarbourVest Skew Base AIF L.P.	1,103,956.03	1.4422%

APPENDIX 16

2. State the date on which the judgment, order, or decree was entered: January 21, 2021

Part 3: Identify the other parties to the appeal

List the names of all parties to the judgment, order, or decree appealed from and the names, addresses, and telephone numbers of their attorneys (attach additional pages if necessary):

1. ***Party/Appellee:*** Debtor: Highland Capital Management, L.P.

Attorney:

PACHULSKI STANG ZIEHL & JONES LLP
Jeffery N. Pomerantz
Ira D. Kharasch
John A. Morris
Gregory V. Demo
Hayley R. Winograd
780 Third Avenue, 34th Floor
New York, NY 10017-2024
Telephone: (212) 561-7700
Fax: (212) 561-7777

And

Hayward & Associates PLLC
Melissa S. Hayward
Zachery Z. Annable
10501 N. Central Expy. Ste. 106
Dallas, TX 75231
Telephone: (972) 755-7100
Fax: (972) 755-7110

2. ***Interested Party:*** Creditor: James Dondero

Attorney:

BONDS ELLIS EPPICH SCHAFFER JONES, LLP
D. Michael Lynn
John Y. Bonds
John T. Wilson
Bryan C. Assink
420 Throckmorton Street, Suite 1000
Fort Worth, Texas 76102
Telephone: (817) 405-6900
Fax: (817) 405-6902

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

In Re: Highland Capital Management, L.P § Case No. **19-34054-SGJ11**

Charitable DAF Fund, L.P et al

Appellant

§

vs.

§

21-03067

Highland Capital Management, L.P

§

Appellee

§

3:23-CV-01503-B

[167] Order granting Defendant Highland Capital Management, L.P.'s Renewed motion to dismiss adversary proceeding (related document # [122](#)) Entered on 6/25/2023.

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APPELLANT RECORD

SBAITI & COMPANY PLLC
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*Counsel for The Charitable DAF Fund, L.P.
and CLO Holdco, Ltd.*

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

In re:	§ Chapter 11
	§
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§ Case No. 19-34054-sgj11
	§
Debtor.	§
	§
CHARITABLE DAF FUND, L.P. AND CLO	§
HOLDCO, LTD., DIRECTLY AND DERIVATIVELY	§
	§
Plaintiffs,	§ Adversary Proceeding No.
	§
vs.	§ 21-03067-sgj11
	§
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§
HIGHLAND HCF ADVISOR, LTD., AND	§
HIGHLAND CLO FUNDING LTD., NOMINALLY	§
	§
Defendant.	§
	§

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**APPELLANTS' SECOND AMENDED STATEMENT OF ISSUES
AND DESIGNATION OF RECORD ON APPEAL**

Pursuant to Rules 8009(a)(1)(A)-(B) and (a)(4) of the Federal Rules of Bankruptcy Procedure, The Charitable DAF Fund, L.P. and CLO Holdco, Ltd. ("Appellants") hereby designate the following items to be included in the record and identify the following issues with respect to

their appeal of the Order Granting Defendant Highland Capital Management, L.P.'s "Renewed Motion to Dismiss Complaint" [Adv. Proc. Doc. No. 122] which was entered by the United States Bankruptcy Court for the Northern District of Texas on June 25, 2023.

I. STATEMENT OF ISSUES TO BE PRESENTED ON APPEAL

- Whether the Bankruptcy Court had jurisdiction to rule on Highland Capital Management L.P.'s Renewed Motion to Dismiss Complaint
- Whether the Renewed Motion to Dismiss Complaint was improperly granted

II. DESIGNATION OF ITEMS TO BE INCLUDED IN THE RECORD

Vol. 1
000001

1. Notice of Appeal for Bankruptcy Case Adversary Proceeding No. 21-03067-sgj11 [Doc. 168].

000042

2. The judgment, order, or decree appealed from: Memorandum Opinion and Order Granting Defendant Highland Capital Management, L.P.'s "Renewed Motion to Dismiss Complaint" [Adv. Proc. Doc. No. 122] [Doc. 167].

000080

3. Docket Sheet kept by the Bankruptcy Clerk.

4. Documents listed below and as described in the Docket Sheet for Bankruptcy Case Proceeding No. 21-03067-sgj.

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No.	Date Filed	Docket No.	Description/Document Text
1	9/29/21	1	(36 pgs; 3 docs) Adversary case 21-03067. ORDER REFERRING CASE NUMBER 21-CV-0842-B from U.S District Court for the Northern District of Texas, Dallas Division to U.S. Bankruptcy Court for Northern District of Texas, Dallas Division. Complaint by Charitable DAF Fund, LP, CLO Holdco, Ltd. against Highland Capital Management, LP, Highland HCF Advisor Ltd., Highland CLO Funding, Ltd. Fee Amount \$350 (Attachments: # 1 Original Complaint # 2 Docket Sheet from 3:20-cv-0842-B) Nature(s) of suit: 02 (Other (e.g. other actions that would have been brought in state court if unrelated to bankruptcy)). (Okafor, M.)
2	9/29/21	2	(1 pg) Supplemental Document (cover sheet) by CLO Holdco Ltd., Charitable DAF Fund (RE: related document(s)1 Adversary case 21-03067) [ORIGINALLY FILED IN 21-CV-0842 AS #2 ON 04/13/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)

Vol. 2 000139 000232 000239 000270 Thru Vol. 6	3	9/29/21	6	(93 pgs; 6 docs) MOTION for Leave to File First Amended Complaint filed by CLO Holdco Ltd., Charitable DAF Fund LP (Attachments: # 1 Exh 1_First Amended Complaint # 2 Exh 2_Motion for Authorization to Retain James Seery # 3 Exh 3_Order Approving Retention of James Seery # 4 Exh 4_Order Approving Settlement # 5 Proposed Order) (Bridges, Jonathan) (Entered: 04/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #6 ON 04/19/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
	4	9/29/21	22	(7 pgs; 2 docs) MOTION for an Order to Enforce the Order of Reference filed by Highland Capital Management LP. (Attachments: # 1 Exhibit(s) A--Proposed Order) (Annable, Zachery) Modified text on 5/20/2021 (mjr). (Entered: 05/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #22 ON 05/19/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
	5	9/29/21	23	(31 pgs) Brief/Memorandum in Support filed by Highland Capital Management LP re: 22 MOTION for an Order to Enforce the Order of Reference. (Annable, Zachery) Modified text on 5/20/2021 (mjr).(Entered: 05/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #23 ON 05/19/2021 IN U.S.DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
	6	9/29/21	24	(926 pgs; 29 docs) Appendix in Support filed by Highland Capital Management LP re: 23 Brief/Memorandum in Support. (Attachments: # 1 Appendix 1 # 2 Appendix 2 # 3 Appendix 3 # 4 Appendix 4 # 5 Appendix 5 # 6 Appendix 6 # 7 Appendix 7 # 8 Appendix 8 # 9 Appendix 9 # 10 Appendix10 # 11 Appendix 11 # 12 Appendix 12 # 13 Appendix 13 # 14 Appendix 14 # 15 Appendix 15 # 16 Appendix 16 # 17 Appendix 17 # 18 Appendix 18 # 19 Appendix 19 # 20 Appendix 20 # 21 Appendix 21# 22 Appendix 22 # 23 Appendix 23 # 24 Appendix 24 # 25 Appendix 25 # 26 Appendix 26 # 27 Appendix 27 # 28 Appendix 28) (Annable, Zachery) Modified linkage and text on 5/20/2021 (mjr). (Entered:05/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #24 ON 05/19/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
Vol. 7 001196	7	9/29/21	26	(7 pgs; 2 docs) MOTION to Dismiss Complaint filed by Highland Capital Management LP (Attachments: # 1 Exhibit(s) A--Proposed Order) (Annable, Zachery) Modified text on 5/28/2021 (jmg).(Entered: 05/27/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #26 ON 05/27/2021 IN U.S.DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)

Vol. 7 001203 thru Vol 8	8	9/29/21	28	(508 pgs; 14 docs) Appendix in Support filed by Highland Capital Management LP (Attachments: # 1 Appendix 1 # 2 Appendix 2 # 3 Appendix 3 # 4 Appendix 4 # 5 Appendix 5 # 6 Appendix 6 # 7 Appendix 7 # 8 Appendix 8 # 9 Appendix 9 # 10 Appendix 10 # 11 Appendix 11 # 12 Appendix 12 # 13 Appendix 13) (Annable, Zachery) (Entered: 05/27/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #28 ON 05/27/2021 IN U.S. DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
Vol. 9 001711	9	9/29/21	33	(1 pg) Amended Civil Cover Sheet by CLO Holdco Ltd, Charitable DAF Fund LP. Amendment to 2 Supplemental Document. (Sbaiti, Mazin) Modified text on 6/23/2021 (mjr). (Entered: 06/22/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #33 ON 06/22/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001712	10	9/29/21	36	(26 pgs) RESPONSE filed by CLO Holdco Ltd, Charitable DAF Fund LP re: 22 MOTION for an Order to Enforce the Order of Reference (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #36 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001738	11	9/29/21	37	(22 pgs) Appendix in Support filed by CLO Holdco Ltd, Charitable DAF Fund LP re 36 Response/Objection Response to Motion for an Order to Enforce the Order of Reference (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #37 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001760	12	9/29/21	38	(45 pgs) RESPONSE filed by CLO Holdco Ltd, Charitable DAF Fund LP re: 26 MOTION to Dismiss (Defendant Highland Capital Management, L.P.'s Motion to Dismiss Complaint) (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #38 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001805	13	9/29/21	39	(88 pgs) Appendix in Support filed by CLO Holdco Ltd, Charitable DAF Fund LP re 38 Response/Objection to Defendant Highland Capital Management, L.P.'s Motion to Dismiss Complaint (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #39 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001893	14	9/29/21	42	(12 pgs) REPLY filed by Highland Capital Management LP re: 22 MOTION for an Order to Enforce the Order of Reference (Annable, Zachery) (Entered: 07/13/2021) [ORIGINALLY FILED IN 21-CV-0842AS #42 ON 07/13/2021 IN U.S.

			DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
VOL. 9	15	9/29/21	43 (852 pgs) Appendix in Support filed by Highland Capital Management LP re: 42 Reply. (Annable, Zachery) Modified text on 7/14/2021 (mjr). (Entered: 07/13/2021) [ORIGINALLY FILED IN 21-CV-0842AS #43 ON 07/13/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001905 thru Vol. 13	16	9/29/21	45 (21 pgs) REPLY filed by Highland Capital Management LP re: 26 MOTION to Dismiss (Defendant Highland Capital Management, L.P.'s Motion to Dismiss Complaint) (Annable, Zachery) (Entered:07/13/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #44 ON 07/13/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002757	17	9/29/21	57 (7 pgs; 2 docs) MOTION to Dismiss and Joinder in Motion to Dismiss of Highland Capital Management, L.P. filed by Highland CLO Funding Ltd. (Attachments: # 1 Proposed Order) Attorney Paul R Bessette added to party Highland CLO Funding Ltd (pty:dft) (Bessette, Paul) (Entered: 08/30/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #57 ON 08/30/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002778	18	9/29/23	58 (12 pgs) Brief/Memorandum in Support filed by Highland CLO Funding Ltd. re 57 MOTION to Dismiss and Joinder in Motion to Dismiss of Highland Capital Management, L.P. (Bessette, Paul) (Entered: 08/30/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #58 ON 08/30/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002785	19	9/29/23	59 (80 pgs; 5 docs) Appendix in Support filed by Highland CLO Funding Ltd re 58 Brief/Memorandum in Support of Motion (Attachments: # 1 Exhibit(s) A - Jackson v Dear # 2 Exhibit(s) B - Prudential Assurance v. Newman # 3 Exhibit(s) C - Harbourvest Settlement Agreement # 4 Exhibit(s) D - Boleat Declaration) (Bessette, Paul) (Entered: 08/30/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #59 ON 08/30/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002797	20	9/29/21	64 (1 pg) ORDER OF REFERENCE: Pursuant to 28 U.S.C. § 157 and this District's Miscellaneous Order No. 33, this case is hereby REFERRED to Judge Stacey G. C. Jernigan of the United States Bankruptcy Court for the Northern District of Texas, Dallas Division, to be adjudicated as a matter related to the consolidated Chapter 11 Bankruptcy of Highland Capital Management, L.P., Chapter 11 Case No.19-34054. (Ordered by Judge Jane J. Boyle
002877			

Vol. 14				on 9/20/2021) (svc) (Entered: 09/20/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #64 ON 09/20/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002878	21	10/19/21	66	(5 pgs) Notice of hearing filed by Defendant Highland Capital Management, LP (RE: related document(s) 26 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP, 47 Motion to strike document filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 55 Motion to abate filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) Hearing to be held on 11/23/2021 at 09:30 AM at https://us-courts.webex.com/meet/jerniga for 26 and for 47 and for 55, (Annable, Zachery)
002883 thru Vol. 16	22	11/22/21	71	(509 pgs; 2 docs) Witness and Exhibit List <i>for Hearing on November 23, 2021</i> filed by Defendant Highland Capital Management, LP (RE: related document(s) 26 Motion to dismiss adversary proceeding). (Attachments: # 1 Exhibits 1-13) (Hayward, Melissa)
Vol. 17	23	11/22/21	72	(2 pgs) Witness List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 26 Motion to dismiss adversary proceeding, 47 Motion to strike (related document(s): 43 Document), 55 Motion to abate (related document(s) 1 Complaint), 69 Motion to abate <i>Plaintiffs' Amended Motion to Stay All Proceedings</i> (related document(s) 55 Motion to abate (related document(s) 1 Complaint))). (Sbaiti, Mazin)
003392	24	11/22/21	73	(189 pgs; 4 docs) Exhibit List <i>for November 23, 2021 hearing</i> filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 47 Motion to strike (related document(s): 43 Document), 55 Motion to abate (related document(s) 1 Complaint)). (Attachments: # 1 Exhibit 1_Defendant's Memorandum of Law in Support of Motion for Reconsideration # 2 Exhibit 2_Highland Memorandum in Support of Motion to Dismiss # 3 Exhibit 3_Order (I) Confirming Fifth Amended Plan of Reorganization of Highland) (Sbaiti, Mazin)
003394	25	12/7/21	80	(2 pgs) Order granting Highland CLO Funding, Ltd.'s motion to dismiss adversary as a party with prejudice (related document 57) Entered on 12/7/2021. (Okafor, Marcey) Modified text on 3/11/2022 (Okafor, Marcey).
003583	26	3/11/22	99	(26 pgs) Memorandum of Opinion and order granting motion to dismiss the adversary proceeding (RE: related document(s) 26 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP). Entered on 3/11/2022 (Okafor, Marcey)
003585	27	3/11/22	100	(26 pgs) Order granting motion to dismiss adversary proceeding with prejudice (related document #26) Entered on 3/11/2022. (Okafor, Marcey)
003611				

Vol. 18 003637 003666 003843 003844 003851	28	3/21/22	104	(29 pgs) Notice of appeal. Fee Amount \$298 filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 100 Order on motion to dismiss adversary proceeding). Appellant Designation due by 04/4/2022. (Sbaiti, Mazin)
	29	5/26/22	120	(177 pgs; 2 docs) Support/supplemental document <i>Motion to Supplement Appellate Record</i> filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 111 Appellant designation). (Attachments: # 1 Amended Transcript of January 14, 2021 Hearing) (Sbaiti, Mazin)
	30	6/9/22	121	(1 pg) DISTRICT COURT Order: Case 3:22-00695-B is hereby transferred to the docket of the Honorable Judge Jane J. Boyle for consolidation with The Charitable DAF Fund LP, et al. v. Highland Capital Management LP, Case No. 3:21-cv-3129-N. Judge Karen Gren Scholer no longer assigned to case.(RE: related document(s) 86 Notice of appeal filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 104 Notice of appeal filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Entered on 6/9/2022 (Whitaker, Sheniqua) (Entered: 06/10/2022)
	31	10/24/22	122	(7 pgs) Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP (Annable, Zachery)
	32	10/14/22	123	(31 pgs) Brief in support filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Annable, Zachery)
Vol. 19 003882 Thru Vol 20	33	10/14/22	124	(513 pgs; 15 docs) Support/supplemental document (<i>Appendix in Support of Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7 # 8 Exhibit 8 # 9 Exhibit 9 # 10 Exhibit 10 # 11 Exhibit 11 # 12 Exhibit 12 # 13 Exhibit 13 # 14 Exhibit 14) (Annable, Zachery)
	34	10/27/22	126	(5 pgs) Notice of hearing (<i>Notice of Hearing and Briefing Schedule on Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP). Hearing to be held on 12/8/2022 at 09:30 AM at https://us-courts.webex.com/meet/jerniga for 122. (Annable, Zachery)

Vol. 21 004400 004410 004442 Thru Vol. 22	35	11/18/22	128	(10 pgs) Motion for withdrawal of reference. Fee amount \$188, filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (Sbaiti, Mazin)
	36	11/18/22	129	(32 pgs) Response opposed to (related document(s): 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP) filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Sbaiti, Mazin)
	37	11/18/22	130	(254 pgs; 2 docs) Response opposed to (related document(s): 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP) filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Attachments: # 1 Appendix) (Sbaiti, Mazin)
Vol. 22 004696 004717 004732 004737 004742	38	9/2/22	131	(21 pgs) DISTRICT COURT MEMORANDUM OPINION AND ORDER: The Court REVERSES and REMANDS the bankruptcy court's Motion to Dismiss Order and AFFIRMS the bankruptcy courts Motion to Stay Order. re: appeal on Civil Action number: Case 3:22-00695-B consolidated with 3:21-CV-3129-B, (RE: related document(s) 81 Order on motion to abate, 100 Order on motion to dismiss adversary proceeding). Entered on 9/2/2022 (Whitaker, Sheniqua) (Entered: 11/29/2022)
	39	12/2/22	133	(15 pgs) Reply to (related document(s): 129 Response filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 130 Response filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) filed by Defendant Highland Capital Management, LP. (Annable, Zachery)
	40	12/7/22	135	(5 pgs) Notice of hearing filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP). Hearing to be held on 1/25/2023 at 01:30 PM at https://us-courts.webex.com/meet/jerniga for 122, (Annable, Zachery)
	41	12/7/22	136	(5 pgs) Notice of hearing filed by Defendant Highland Capital Management, LP (RE: related document(s) 128 Motion for withdrawal of reference filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Status Conference to be held on 1/25/2023 at 01:30 PM at https://us-courts.webex.com/meet/jerniga . (Annable, Zachery).
	42	12/9/22	138	(3 pgs) Response opposed to (related document(s): 128 Motion for withdrawal of reference. Fee amount \$188, filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) filed by Defendant Highland Capital Management, LP. (Annable, Zachery)

Vol. 22 004745	43	12/9/22	139	(25 pgs) Brief in support filed by Defendant Highland Capital Management, LP (RE: related document(s) 138 Response). (Annable, Zachery)
Vol. 23 004770	44	12/9/22	140	(280 pgs; 8 docs) Support/supplemental document (<i>Appendix in Support of Highland Capital Management, L.P.'s Response to Renewed Motion to Withdraw the Reference</i>) filed by Defendant Highland Capital Management, LP (RE: related document(s) 138 Response). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7) (Annable, Zachery)
Vol. 24 005050	45	12/16/22	144	(6 pgs) Reply to (related document(s): 138 Response filed by Defendant Highland Capital Management, LP) filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Sbaiti, Mazin)
005056 Thru Vol. 25.	46	1/23/23	145	(514 pgs; 15 docs) Witness and Exhibit List filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7 # 8 Exhibit 8 # 9 Exhibit 9 # 10 Exhibit 10 # 11 Exhibit 11 # 12 Exhibit 12 # 13 Exhibit 13 # 14 Exhibit 14) (Annable, Zachery)
Vol. 26 005570	47	1/23/23	146	(280 pgs; 8 docs) Witness and Exhibit List filed by Defendant Highland Capital Management, LP (RE: related document(s) 128 Motion for withdrawal of reference. Fee amount \$188.). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7) (Annable, Zachery)
Vol. 27 005850	48	1/23/23	147	(221 pgs; 7 docs) Witness and Exhibit List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Attachments: # 1 Exhibit 1_Excerpts from July 14, 2020 Hearing Transcript # 2 Exhibit 2_HCLOF Members Agreement Relating to the Company # 3 Exhibit 3_HarbourVest Settlement Agreement # 4 Exhibit 4_Order Approving Debtor's Settlement with HarbourVest # 5 Exhibit 5_HCLOF Offering # 6 Exhibit 6 Amended and Restated Investment Advisory Agreement) (Sbaiti, Mazin)
006071	49	1/23/23	148	(3 pgs) Witness and Exhibit List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 128 Motion for withdrawal of reference. Fee amount \$188.). (Phillips, Louis)
Vol. 28 006074	50	1/25/23	150	(56 pgs; 2 docs) Amended Witness and Exhibit List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 147 List (witness/exhibit/generic), 149 List (witness/exhibit/generic)). (Attachments: # 1 Exh 7_Testimony of Mark Patrick at June 8, 2021 hearing) (Sbaiti, Mazin)

Vol. 28 006130	51	1/25/23	152	(3 pgs) Notice of Appearance and Request for Notice by Louis M. Phillips filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Phillips, Louis)
	52	1/25/23	154	(1 pg) Court admitted exhibits date of hearing January 25, 2023 (RE: related document(s) 128 Motion for withdrawal of reference, filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) (COURT ADMITTED DEFENDANT'S EXHIBITS #1, #2, #3, #4, #5 & #6 OFFERED BY ATTY GREG DEMO). (Edmond, Michael) (Entered: 01/27/2023)
Vol. 32 006925 006942 006960	53	2/6/23	158	Report and recommendation to the U.S. District Court by U.S. Bankruptcy Judge. (RE: related document(s) 128 Motion for withdrawal of reference filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Entered on 2/6/2023 (Okafor, Marcey)
	54	2/6/23	161	(18 pgs) DISTRICT COURT Notice of transmission of report and recommendation in re: renewed motion to withdraw reference. Civil Case # 3:22-cv-02802-S. (RE: related document(s) 158 Report and recommendation to the U.S. District Court by U.S. Bankruptcy Judge. (RE: related document(s) 128 Motion for withdrawal of reference filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Entered on 2/6/2023) (Whitaker, Sheniqua)
	55	4/3/23	165	(1 pg) DISTRICT COURT ORDER: The Court GRANTS the 11 Joint Motion to Transfer Proceeding and Consolidate Before Original Court and the above-numbered case (3:22-cv-02802-S) is transferred to the docket of the Honorable Judge Jane Boyle: Civil case 3:21-cv-00842-B (order referring case). (RE: related document(s) 1 Complaint filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 143 Notice of transmission of motion to withdraw reference). Entered on 4/3/2023 (Whitaker, Sheniqua) Modified on 4/10/2023 (Whitaker, Sheniqua). (Entered: 04/10/2023)

TRANSCRIPTS

006961	56	11/24/21	78	(104 pgs) Transcript regarding Hearing Held 11-23-2021 RE: Motion Hearing. THIS TRANSCRIPT WILL BE MADE ELECTRONICALLY AVAILABLE TO THE GENERAL PUBLIC 90 DAYS AFTER THE DATE OF FILING. TRANSCRIPT RELEASE DATE IS 02/22/2022. Until that time the transcript may be viewed at the Clerk's Office or a copy may be obtained from the official court transcriber. Court Reporter/Transcriber Liberty Transcripts/Dipti Patel, Telephone number 847-848-4907. (RE: related document(s) 75 Hearing held on 11/23/2021. (RE: related document(s) 55 MOTION to Stay filed by CLO Holdco Ltd, Charitable DAF Fund LP (Sbaiti, Mazin) (Entered: 08/26/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #55 ON 08/26/2021 IN U.S.
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			<p>DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)) (Appearances: J. Pomerantz and J. Morris for Highland Defendants; J. Jordan and P. Bessett for HCLOF; M. Sbaiti for Plaintiffs. Nonevidentiary hearing. Motion denied. Mr. Pomerantz to upload order.), 76 Hearing held on 11/23/2021. (RE: related document(s) 47 Motion to strike 43 Appendix in support filed by CLO Holdco, Ltd., Charitable DAF Fund, LP (Bridges, Jonathan) Modified text on 7/16/2021 (mjr). (Entered: 07/15/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #47 ON 07/15/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)) (Appearances: J. Pomerantz and J. Morris for Highland Defendants; J. Jordan and P. Bessett for HCLOF; M. Sbaiti for Plaintiffs. Nonevidentiary hearing. Motion denied (Plaintiffs acknowledged complained-of Appendices it did not relate to Motion to Dismiss). Mr. Pomerantz to upload order.)). Transcript to be made available to the public on 02/22/2022. (Patel, Dipti)</p>
57	2/21/23	164	<p>164 (112 pgs) Transcript regarding Hearing Held 1/25/23 RE: HEARING ON DEFENDANT HIGHLAND CAPITAL MANAGEMENT L.P.'S RENEWED MOTION TO DISMISS COMPLAINT (122) AND STATUS CONFERENCE RE: MOTION FOR WITHDRAWAL OF REFERENCE FILED BY PLAINTIFF CLO HOLDCO, LTD., PLAINTIFF CHARITABLE DAF FUND, LP (128). THIS TRANSCRIPT WILL BE MADE ELECTRONICALLY AVAILABLE TO THE GENERAL PUBLIC 90 DAYS AFTER THE DATE OF FILING. TRANSCRIPT RELEASE DATE IS 05/22/2023. Until that time the transcript may be viewed at the Clerk's Office or a copy may be obtained from the official court transcriber. Court Reporter/Transcriber Dipti Patel, Telephone number 847-848-4907. (RE: related document(s) 155 Hearing held on 1/25/2023. (RE: related document(s) 122 Motion to dismiss adversary proceeding, (Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint) filed by Defendant Highland Capital Management, LP filed by Defendant Highland Capital Management, LP) (Appearances: J. Morris and G. Demo for Movants; L. Phillips and M. Sbaiti for Plaintiffs. Evidentiary hearing (appendices). Court took matter under advisement.), 156 Hearing held on 1/25/2023. (RE: related document(s) 128 Motion for withdrawal of reference. Fee amount \$188, filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) (Appearances: J. Morris and G. Demo for Movants; L. Phillips and M. Sbaiti for Plaintiffs. Evidentiary hearing (appendices). Court announced it will recommend denial to District Court. Court is working on Report & Recommendation.)). Transcript to be made available to the public on 05/22/2023. (Patel, Dipti)</p>

Dated: July 14, 2023

Respectfully submitted,

SBAITI & COMPANY PLLC

/s/ Mazin A. Sbaiti

Mazin A. Sbaiti

Texas Bar No. 24058096

Jonathan Bridges

Texas Bar No. 24028835

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E: mas@sbaitilaw.com

jeb@sbaitilaw.com

Counsel for Appellants

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was filed electronically through the Court's ECF system, which provides notice to all parties of interest, on this 14th day of July, 2023.

/s/ Mazin A. Sbaiti

Mazin A. Sbaiti

APPENDIX 17

On 4/19/21, 4:19 PM, "Jeff Pomerantz" <jpomerantz@pszjlaw.com> wrote:

These Orders require you to seek such authority from the Bankruptcy Court which has exclusive jurisdiction to make the determination as to whether an action against Mr. Seery may be brought.

If you violate such Orders by filing your motion in the District Court we will seek appropriate relief from the Bankruptcy Court including sanctions against you and your client for a willful violation of the Bankruptcy Court's orders.

Jeff

On 4/19/21, 4:11 PM, "Mazin Sbaiti" <MAS@sbaitilaw.com> wrote:

District Court where we filed the case, where we suspect it will be referred to the bk court.
M

From Mazin A. Sbaiti, Esq.

-----Original Message-----

From: Jeff Pomerantz <jpomerantz@pszjlaw.com>

Sent: Monday, April 19, 2021 6:10 PM

To: Mazin Sbaiti <MAS@sbaitilaw.com>; Jonathan E. Bridges <JEB@sbaitilaw.com>

Cc: Kim James <KRJ@sbaitilaw.com>; John A. Morris <jmorris@pszjlaw.com>; Jeff Pomerantz
<jpomerantz@pszjlaw.com>

Subject: Re: CLO Holdco v. Highland

Yes. Put us down as opposed. And you will be filing that motion in the bankruptcy court correct?

Jeff

On 4/19/21, 4:09 PM, "Mazin Sbaiti" <MAS@sbaitilaw.com> wrote:

Jeff,

Our meet and confer is for our motion for leave to amend to add him. I believe, per those orders' language, we are following the court's instruction.

We are not unilaterally adding him.

I take it you want us to put you down as "opposed" on the certificate of conference?

Mazin

-----Original Message-----

From: Jeff Pomerantz <jpomerantz@pszjlaw.com>
Sent: Monday, April 19, 2021 6:05 PM
To: Jonathan E. Bridges <JEB@sbaitilaw.com>
Cc: Mazin Sbaiti <MAS@sbaitilaw.com>; Kim James <KRJ@sbaitilaw.com>; Jeff Pomerantz <jpomerantz@pszjlaw.com>; John A. Morris <jmorris@pszjlaw.com>
Subject: Re: CLO Holdco v. Highland

I appreciate that you are new to the case but you need to be aware of the attached July 9, 2020 and July 16, 2020 Bankruptcy Court orders that prohibit Mr. Seery (among others) from being sued without first obtaining authority from the Bankruptcy Court. If you proceed to amend the complaint as you suggest below without first obtaining Bankruptcy Court approval we reserve all rights to take appropriate action and seek appropriate relief from the Bankruptcy Court.

Also please keep my partner John Morris copied on emails.

Jeff Pomerantz

From: "Jonathan E. Bridges" <JEB@sbaitilaw.com>
Date: Monday, April 19, 2021 at 12:49 PM
To: Jeffrey Pomerantz <jpomerantz@pszjlaw.com>
Cc: Mazin Sbaiti <MAS@sbaitilaw.com>, Kim James <KRJ@sbaitilaw.com>
Subject: CLO Holdco v. Highland

Mr. Pomerantz,

Mazin and I intend to move for leave today in the district court seeking permission to amend our complaint to add claims against Mr. Seery. They are the same causes of action. We believe we are entitled to amend as a matter of course. But we will also raise and brief the bankruptcy court's orders re the same.

Can we put your client down as unopposed?

We appreciate your prompt reply.

Jonathan Bridges

[cid:image001.png@01D67A35.9FEE2C90] Sbaiti & Company PLLC CHASE TOWER

2200 Ross Avenue, Suite 4900W<x-apple-data-detectors://1/0>

Dallas, Texas 75201<x-apple-data-detectors://1/0>

O: (214) 432-2899<tel:(214)%20432-2899>

C: (214) 663-3036<tel:(214)%20663-3036>

F: (214) 853-4367<tel:(214)%20853-4367>

E: JEB@SbaitiLaw.com<mailto:JEB@SbaitiLaw.com>

W: <https://protect-us.mimecast.com/s/Y5psCZ6WN6U7YgyJfzdNZs><<https://protect-us.mimecast.com/s/ev5YC1w9Pwf6XGKVtGc2dK>>

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APPENDIX 18

000775

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

**CHARITABLE DAF FUND, L.P.
and CLO HOLDCO, LTD.,
*directly and derivatively,***

Plaintiffs,

V.

**HIGHLAND CAPITAL MANAGEMENT,
L.P., HIGHLAND HCF ADVISOR, LTD.,
and HIGHLAND CLO FUNDING, LTD.,
*nominally,***

Defendants.

[illegible]

CAUSE NO. 3:21-cv-00842-B

PLAINTIFFS' MOTION FOR LEAVE TO FILE FIRST AMENDED COMPLAINT

I.

NECESSITY OF MOTION

Plaintiffs submit this Motion under Rule 15 of the Federal Rules of Civil Procedure for one purpose: to name as defendant one James P. Seery, Jr., the CEO of Defendant Highland Capital Management, L.P. (“HCM”), and the chief perpetrator of the wrongdoing that forms the basis of Plaintiffs’ causes of action.

Seery is not named in the Original Complaint. But this is only out of an abundance of caution due to the bankruptcy court, in HCM's pending Chapter 11 proceeding, having issued an order prohibiting the filing of any causes of action against Seery in any way related to his role at HCM, subject to certain prerequisites. In that order, the bankruptcy court also asserts "sole jurisdiction" over all such causes of action.

Plaintiffs respectfully submit that, to the extent the bankruptcy court order prohibits the filing of an action in *this Court*, whose jurisdiction the bankruptcy court's jurisdiction is wholly



derivative of, that order exceeds the bankruptcy court's powers and is unenforceable. Alternatively, Plaintiffs submit that filing **this Motion** satisfies the prerequisites provided in the bankruptcy court's order. Either of these reasons provides sufficient grounds to grant this Motion.

The proposed First Amended Complaint is attached as Exhibit 1.

II.

BACKGROUND

On June 23, 2020, counsel for HCM filed a motion in HC's bankruptcy proceedings asking the bankruptcy court to defer to the "business judgment" of the board's compensation committee and approve the terms of its appointment of Seery as chief executive officer and chief restructuring officer at HCM, retroactive to March.¹ Counsel also asked the bankruptcy court to declare that it had exclusive jurisdiction over any claims asserted against Seery in this role.

On July 16, 2020, the bankruptcy court granted that motion and stated as follows:

No entity may commence or pursue a claim or cause of action of any kind against Mr. Seery relating in any way to his role as the chief executive officer and chief restructuring officer of the Debtor without the Bankruptcy Court (i) first determining after notice that such claim or cause of action represents a colorable claim of willful misconduct or gross negligence against Mr. Seery, and (ii) specifically authorizing such entity to bring such claim. ***The Bankruptcy Court shall have sole jurisdiction to adjudicate any such claim for which approval of the Court to commence or pursue has been granted.***²

¹ Debtor's Motion Under Bankruptcy Code Sections 105(a) and 363(b) for Authorization to Retain James P. Seery, Jr., as Chief Executive Officer, Chief Restructuring Officer, and Foreign Representative *Nunc Pro Tunc* to March 15, 2020 [Doc. 774]. This motion is attached as Exhibit 2.

² Order Approving Debtor's Motion Under Bankruptcy Code Sections 105(a) and 363(b) Authorizing Retention of James P. Seery, Jr., as Chief Executive Officer, Chief Restructuring Officer, and Foreign Representative *Nunc Pro Tunc* to March 15, 2020 [Doc 854]. A related order dated January 9, 2020, contains a similar provision with regard to Seery's role as an "Independent Director." Order Approving Settlement with Official Committee of Unsecured Creditors Regarding Governance of the Debtor and Procedures for Operations in the Ordinary Course [Doc 339]. These orders are attached, respectively, as Exhibits 3 and 4.

On March 22, 2021, the bankruptcy court entered an order confirming HCM's reorganization plan.³ That order purports to extend the prohibitions on suits against Seery, and it also prohibits certain actions against HCM and its affiliates. By its own terms, however, that order is not effective due to a pending appeal.

On April 12, 2021, Plaintiffs filed their Original Complaint in this action, alleging that HCM and related entities are liable as a result of insider trading and other violations of the antifraud provisions of the Investment Company Act of 1940, among other causes of action. The Original Complaint does not name Seery as a defendant. But the action is based on Seery's misrepresentations, omissions, and other breaches of duty committed in his role as HCM's CEO, which are sufficient to demonstrate his willful misconduct or gross negligence, though Plaintiffs submit that mere negligence and breach of fiduciary duty also form sufficient bases for his personal liability.

III.

ARGUMENT

This Court should grant leave to amend because the liberal policies behind Rule 15 require it and because leave is not prohibited by the bankruptcy court's order.

A. Rule 15(a) Allows Plaintiffs' Amendment As a Matter of Course

Rule 15(a) instructs the Court to "freely give leave [to amend] when justice so requires." **FED. R. CIV. P. 15(a)**. The Fifth Circuit, in *Martin's Herend Imports, Inc. v. Diamond & Gem Trading United States Co.*, **195 F.3d 765** (5th Cir. 1999), interpreted the rule as "evin[ing] a bias in favor of granting leave to amend." *Id.* at 770. Thus the Court must possess a "substantial reason"

³ Order (I) Confirming the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (As Modified) And (II) Granting Related Relief [Doc. 1943].

to deny a request for leave to amend. *Lyn-Lea Travel Corp. v. Am. Airlines, Inc.*, 283 F.3d 282, 286 (5th Cir. 2002); *Jamieson v. Shaw*, 772 F.2d 1205, 1208 (5th Cir. 1985); cf. *Foman v. Davis*, 371 U.S. 178, 182 (1962) (explaining that leave should be granted “[i]n the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.”).

Moreover, one amendment, filed within 21 days of service of the pleading it seeks to amend or before a responsive pleading is filed, is allowed “as a matter of course.” Fed. R. Civ. P. 15(a)(1); *Zaidi v. Ehrlich*, 732 F.2d 1218, 1220 (5th Cir. 1984) (“When, as in this case, a plaintiff who has a right to amend nevertheless petitions the court for leave to amend, the court should grant the petition.”); *Galustian v. Peter*, 591 F.3d 724, 729-30 (4th Cir. 2010) (holding that district court abused its discretion in denying timely motion to amend adding defendant because “[t]he plaintiff’s right to amend once is absolute”); *Rogers v. Girard Tr. Co.*, 159 F.2d 239, 241 (6th Cir. 1947) (holding that complaint may be amended as matter of course where defendant has filed no responsive pleading, and leave of district court is not necessary, but it is error to deny leave when asked); *Bancoult v. McNamara*, 214 F.R.D. 5, 7-8 (D.D.C. 2003) (holding that plaintiff’s filing of a motion for leave to amend does not nullify plaintiff’s absolute right to amend once before responsive pleadings, even if the amendment would be futile).

Here, Plaintiffs did not name Seery as a defendant in the Original Complaint out of an abundance of caution in light of the bankruptcy court’s order of July 16, 2020 [Doc. 854]. Instead, Plaintiffs are seeking leave in this Motion to do so. Because the proposed amendment is their first, and because it comes within 21 days of service of the Original Complaint, as well as before any

responsive pleadings, Plaintiffs respectfully submit that they are entitled to leave and their proposed First Amended Complaint should be allowed.

B. The Bankruptcy Court’s Order Should Not Prohibit Plaintiffs’ Amendment

Plaintiffs submit that the bankruptcy court order of July 16, 2020, does not prohibit the proposed amendment for two independent reasons.

1. The Bankruptcy Court’s Order Exceeds Its Jurisdiction

a. The Bankruptcy Court Cannot Strip This Court of Jurisdiction

Because the bankruptcy court’s jurisdiction derives from and is dependent upon the jurisdiction of this Court, its order declaring that it has “sole jurisdiction” is overreaching.

Congress provided for and limited the jurisdiction of bankruptcy courts in **28 U.S.C. § 1334** and **28 U.S.C. § 157**. As a result, bankruptcy court jurisdiction derives from and is limited by statute. *Celotex Corp. v. Edwards*, **514 U.S. 300, 307** (1995) (“The jurisdiction of the bankruptcy courts, like that of other federal courts, is grounded in, and limited by, statute.”); *Williams v. SeaBreeze Fin., LLC (In re 7303 Holdings, Inc.)*, Nos. 08-36698, 10-03079, **2010 Bankr. LEXIS 2938 at *7** (Bankr. S.D. Tex. Aug. 26, 2010) (“A bankruptcy court’s jurisdiction is derivative of the district court’s jurisdiction. The bankruptcy court does not have jurisdiction unless the district court could exercise authority over the matter . . .”). The plain provisions of § 1334 grant *to the district courts* “original jurisdiction” over all bankruptcy cases and related civil proceedings. **28 U.S.C. § 1334(a)-(b)**. What Congress giveth, the bankruptcy courts cannot taketh away.

b. The Barton Doctrine Does Not Apply

The bankruptcy court’s overreach seems to stem from a misapplication of the *Barton* doctrine. That doctrine protects receivers and trustees who are appointed by the bankruptcy court. *Randazzo v. Babin*, No. 15-4943, **2016 U.S. Dist. LEXIS 110465, at *3** (E.D. La. Aug. 18, 2016)

(“While the *Barton* case involved a receiver in state court, the United States Court of Appeals for the Fifth Circuit has extended this principle, now known as the *Barton* doctrine, to lawsuits against bankruptcy trustees for acts committed in their official capacities.”). The doctrine does not apply to executives of a debtor, like Seery, who are not receivers or trustees, and who are stretching the truth to claim that they were “appointed” by the bankruptcy court after asking it merely to approve their appointment in deference to their discretion under the business judgment rule.⁴

c. The Order Exceeds the Constitutional Limits of the Bankruptcy Court’s Jurisdiction

Plainly the bankruptcy court does not have “*sole jurisdiction*” over all causes of action that might be brought against Seery related to his role as HCM’s CEO. But more to the point, the bankruptcy court does not even have *concurrent jurisdiction* over *all* such claims. The separation of powers doctrine does not allow that. *See Stern v. Marshall*, 564 U.S. 462, 499 (2011) (holding that Congress cannot bypass Article III and create jurisdiction in bankruptcy courts “simply because a proceeding may have some bearing on a bankruptcy case”); *id.* at 488 (quoting *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 284 (1856), for the proposition that “Congress cannot ‘withdraw from judicial [read Article III] cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty’” with the limited exception of matters involving certain public rights); *id.* at 494 (quoting the dissent’s quote of *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 584 (1985), for the proposition that “Congress may not vest in a non-Article III court the power to adjudicate, render final judgment, and issue binding orders in a traditional contract action arising under state law,” and

⁴ Exhibit 2 at 14-15 (arguing that the bankruptcy court should not “interfere” with their “corporate decisions . . . as long as they are attributable to any rational business purpose”) (internal quotes omitted); *id.* at 5-7 (detailing the compensation committee’s “appointment” of Seery as CEO as well as chief restructuring officer).

then adding “tort” to the rule for purposes of the matter before it); *cf. In re Prescription Home Health Care*, 316 F.3d 542, 548 (5th Cir. 2002) (holding that trustee’s tax liability was not within the bankruptcy court’s related-to jurisdiction and rejecting “the theory that a bankruptcy court has jurisdiction to enjoin any activity that threatens the debtor’s reorganization prospects [because that] would permit the bankruptcy court to intervene in a wide variety of third-party disputes [such as] any action (however personal) against key corporate employees, if they were willing to state that their morale, concentration, or personal credit would be adversely affected by that action”). The bankruptcy court’s order asserting “sole jurisdiction” here is hardly even relevant since that court lacks the power to expand its jurisdiction or manufacture jurisdiction where none exists.

The proposed First Amended Complaint asserts common law and equitable contract and tort claims. For the reasons explained by the Supreme Court in *Stern*, such claims should not be deemed within the bankruptcy court’s jurisdiction.

d. The Order Exceeds the Bankruptcy Court’s Statutory Authorization

Not only are there constitutional issues with the scope of the bankruptcy court’s order, there is also the limitation of 28 U.S.C. § 157(d). *See TMT Procurement Corp. v. Vantage Drilling Co. (In re TMT Procurement Corp.)*, 764 F.3d 512, 523 & n.40 (5th Cir. 2014) (noting bankruptcy court’s “more limited jurisdiction” as a result of its “limited power” under 28 U.S.C. § 157). In § 157(d), Congress prohibited the bankruptcy court, absent the parties’ consent, from presiding over cases or proceedings that require consideration of both Title 11 and other federal law regulating organizations or activities affecting interstate commerce.

The First Amended Complaint’s allegations against Seery—accusing him of insider trading, violations of the RICO statute (18 U.S.C. § 1961 et seq.), and violations of the antifraud provisions of the Investment Advisers Act of 1940—require precisely that. Even determining the

“colorability” of such claims will require a close examination of both the proceedings that took place in the bankruptcy court under Title 11 and the Investment Advisers Act as well as the RICO statute. The bankruptcy court lacks the authority to make such determinations. This Court has that power.

Thus, at least as it applies to the proposed First Amended Complaint, the bankruptcy court’s order exceeds its authority under 28 U.S.C. § 157(d), and any determination of “colorability” should take place in this Court, which Rule 12(b)(6) of the Federal Rules of Civil Procedure already provides for. To hold otherwise would create unnecessary tension with the congressional aims of 28 U.S.C. § 959 (“Trustees, receivers or managers of any property, including debtors in possession, may be sued, without leave of the court appointing them, with respect to any of their acts or transactions in carrying on business connected with such property.”).

2. The Prerequisites in the Bankruptcy Court’s Order Are Satisfied by This Motion and the Detailed Allegations in the Proposed First Amended Complaint

Alternatively, or in addition, should this Court read the bankruptcy court’s order as prohibiting the filing of actions against Seery even in *this* Court, Plaintiffs submit that this Motion seeking leave provides the mechanisms required by that order and therefore satisfies it.

The bankruptcy court’s order requires only that any contemplated action must first be submitted to that court for a preliminary determination of colorability. Because that court only has derivative jurisdiction as a result of this Court’s jurisdiction—and only over matters referred to it by this Court—Plaintiffs submit that filing a motion for leave here is the correct procedure for complying with that order. This Court may refer this Motion to the bankruptcy court under Miscellaneous Order No. 33, as authorized by § 104 of the Bankruptcy Amendments and Federal Judgeship Act of 1984, codified at 28 U.S.C. § 157(a). Or it may instead decline to refer the Motion or withdraw the reference under 28 U.S.C. § 157(d), as Plaintiffs submit is appropriate for the

reasons addressed above. Regardless, this Motion presents the issue in a manner that allows the bankruptcy court to address it, should this Court decide that the bankruptcy court is authorized to do so. *Cf.* Confirmation Order [Doc. 1943] at 77, ¶ AA (“The Bankruptcy Court will have sole and exclusive jurisdiction to determine whether a claim or cause of action is colorable and, ***only to the extent legally permissible*** and as provided for in Article XI of the Plan, shall have jurisdiction to adjudicate the underlying colorable claim or cause of action.”) (emphasis added).

Plaintiffs therefore submit that, by filing this Motion in this Court, they have complied with the bankruptcy court’s order.

IV.

CONCLUSION

Plaintiffs are entitled to amend as a matter of course. The bankruptcy court lacks jurisdiction to prohibit the proposed amendment. In these circumstances, Plaintiffs respectfully submit that the interests of justice support the granting of leave to amend, and Rule 15(a) requires that this Motion be granted.

Dated: April 19, 2021

Respectfully submitted,

SBAITI & COMPANY PLLC

/s/ Jonathan Bridges

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CERTIFICATE OF CONFERENCE

I hereby certify that, on April 19, 2021, I conferred with Defendant HCM's counsel in the HCM bankruptcy proceedings regarding this Motion. I have not conferred with counsel for the other Defendants because they have not been served and I do not know who will represent them. HCM's counsel indicated that they are opposed to the relief sought in this Motion.

/s/ Jonathan Bridges

Jonathan Bridges

EXHIBIT 1

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

CHARITABLE DAF FUND, L.P.
and CLO HOLDCO, LTD.,
directly and derivatively,

Plaintiffs,

V.

Cause No. 3:21-CV-00842-B

**HIGHLAND CAPITAL MANAGEMENT,
L.P. , HIGHLAND HCF ADVISOR, LTD.,
JAMES P. SEERY, *individually*, and
HIGHLAND CLO FUNDING, LTD.,
nominally,**

Defendants.

FIRST AMENDED COMPLAINT

I.

INTRODUCTION

This action arises out of the acts and omissions of Defendant James P. Seery (“Seery”) in his conduct as chief executive officer and chief restructuring officer of Defendant Highland Capital Management, L.P. (“HCM”), which is the general manager of Highland HCF Advisor, Ltd. (“HCFA”), both of which are registered investment advisers under the Investment Advisers Act of 1940 (the “Advisers Act”),¹ and nominal Defendant Highland CLO Funding, Ltd. (“HCLOF”) (Seery, HCM, and HCFA each a “Defendant,” or together, “Defendants”). The acts and omissions which have recently come to light reveal breaches of fiduciary duty, a pattern of violations of the Advisers Act’s anti-fraud provisions, and concealed breaches of the HCLOF Company Agreement, among others, which have caused and/or likely will cause Plaintiffs damages, and which arise out

¹ <https://adviserinfo.sec.gov/firm/summary/110126>

of or are related to acts or omissions that constitute bad faith, fraud, gross negligence, or willful misconduct.

Seery negotiated a settlement with the several Harbourvest² entities who owned 49.98% of HCLOF. The deal had HCM (or its designee) purchasing the Harbourvest membership interests in HCLOF for \$22.5 million. Recent revelations, however, show that the sale was predicated upon a sales price that was vastly below the Net Asset Value (“NAV”) of those interests. Upon information, the NAV of HCLOF’s assets had risen precipitously, but was not disclosed to Harbourvest nor to Plaintiffs.

Under the Advisers Act, Defendants have a non-waivable duty of loyalty and candor, which includes its duty not to inside trade with its own investors, *i.e.*, not to trade with an investor to which HCM and Seery had access to superior non-public information. Upon information and belief, HCM’s internal compliance policies required by the Advisers Act would not generally have allowed a trade of this nature to go forward—meaning, the trade either was approved in spite of compliance rules preventing it, or the compliance protocols themselves were disabled or amended to a level that leaves Defendants HCM and HCLOF exposed to liability. Thus, Defendants have created an unacceptable perpetuation of exposure to liability.

Additionally, Defendants are liable for a pattern of conduct that gives rise to liability for their conduct of the enterprise consisting of HCM in relation to HCFA and HCLOF, through a pattern of concealment, misrepresentation, and violations of the securities rules. In the alternative, Seery, HCFA and HCM, are guilty of self-dealing, violations of the Advisers Act, and tortious

² “Harbourvest” refers to the collective of Harbourvest Dover Street IX Investment, L.P., Harbourvest 2017 Global AIF, L.P., Harbourvest 2017 Global Fund, L.P., HV International VIII Secondary, L.P., and Harbourvest Skew Base AIF, L.P. Each was a member of Defendant Highland CLO Funding, Ltd.

interference by (a) not disclosing that Harbourvest had agreed to sell at a price well below the current NAV, and (b) diverting the Harbourvest opportunity to themselves.

For these reasons, judgment should be issued in Plaintiffs' favor.

II.

PARTIES

1. Plaintiff CLO Holdco, Ltd. is a limited company incorporated under the laws of the Cayman Islands.

2. Plaintiff Charitable DAF Fund, L.P., ("DAF") is a limited partnership formed under the laws of the Cayman Islands.

3. Defendant Highland Capital Management, L.P. is a limited partnership with its principal place of business at 300 Crescent Court, Suite 700, Dallas, Texas 75201. It may be served at its principal place of business or through its principal officer, James P. Seery, Jr., or through the Texas Secretary of State, or through any other means authorized by federal or state law.

4. Defendant Highland HCF Advisor, Ltd. is a limited company incorporated under the laws of the Cayman Islands. Its principal place of business is 300 Crescent Court, Suite 700, Dallas, Texas 75201. It is a registered investment adviser ("RIA") subject to the laws and regulations of the Investment Advisers Act of 1940 (the "Adviser's Act"). It is a wholly-owned subsidiary of Highland Capital Management, L.P.

5. Defendant James Seery is an officer and/or director and/or control person of Defendants Highland Capital Management, L.P., Highland CLO Funding, Ltd., and Highland HCF Adviser, Ltd., and is a citizen of and domiciled in Floral Park, New York. He can be served personally at 300 Crescent Court, Suite 700, Dallas, Texas 75201, or wherever he may be found.

6. Nominal Defendant Highland CLO Funding, Ltd. is a limited company incorporated under the laws of the Island of Guernsey. Its registered office is at First Floor, Dorey

Court, Admiral Park, St. Peter Port, Guernsey GY1 6HJ, Channel Islands. Its principal place of business is 300 Crescent Court, Suite 700, Dallas, Texas 75201.

III.

JURISDICTION AND VENUE

7. This Court has subject matter jurisdiction over this dispute under 28 U.S.C. § 1331 as one or more rights and/or causes of action arise under the laws of the United States. This Court has supplemental subject matter jurisdiction over all other claims under 28 U.S.C. § 1367.

8. Personal jurisdiction is proper over the Defendants because they reside and/or have continual contacts with the state of Texas, having regularly submitted to jurisdiction here. Jurisdiction is also proper under 18 U.S.C. § 1965(d).

9. Venue is proper in this Court under 28 U.S.C. § 1391(b) and (c) because one or more Defendants reside in this district and/or a substantial part of the events or omissions giving rise to the claim occurred or a substantial part of property that is the subject of the action is situated in this district. Venue in this district is further provided under 18 U.S.C. § 1965(d).

IV.

RELEVANT BACKGROUND

HCLOF IS FORMED

10. Plaintiff DAF is a charitable fund that helps several causes throughout the country, including providing funding for humanitarian issues (such as veteran's welfare associations and women's shelters), public works (such as museums, parks and zoos), and education (such as specialty schools in underserved communities). Its mission is critical.

11. Since 2012, DAF was advised by its registered investment adviser, Highland Capital Management, L.P., and its various subsidiaries, about where to invest. This relationship was governed by an Investment advisory Agreement.

12. At one point in 2017, HCM advised DAF to acquire 143,454,001 shares of HCLOF, with HCFA (a subsidiary of HCM) serving as the portfolio manager. DAF did so via a holding entity, Plaintiff CLO Holdco, Ltd.

13. On November 15, 2017, through a Subscription and Transfer Agreement, the DAF entered into an agreement with others to sell and transfer shares in HCLOF, wherein the DAF retained 49.02% in CLO Holdco.

14. Pursuant to that agreement, Harbourvest acquired the following interests in the following entities:

Harbourvest Dover Street IX Investment, L.P., acquired 35.49%;

Harbourvest 2017 Global AIF, L.P., acquired 2.42%;

Harbourvest 2017 lobal Fund, L.P., acquired 4.85%;

HV International VIII Secondary, L.P., acquired 6.5%; and

Harbourvest Skew Base AIF, L.P., acquired 0.72%;

for a total of 49.98% (altogether, the “Harbourvest interests”).

15. On or about October 16, 2019, Highland Capital Management filed for Chapter 11 bankruptcy in Delaware Bankruptcy Court, which was later transferred to the Northern District of Texas Bankruptcy Court, in the case styled *In Re: Highland Capital Management, L.P., Debtor*, Cause No. 19-34054, (the “HCM Bankruptcy” and the Court is the “Bankruptcy Court”).

16. HCLOF’s portfolio manager is HCFA. HCM is the parent of HCFA and is managed by its General Partner, Strand Management, who employs Seery and acts on behalf of HCM. Seery is the CEO of HCM which, upon information and belief, is the parent of HCFA.

17. Before acceding to the Harbourvest interests, HCM was a 0.6% holder of HCLOF interests.

The Harbourvest Settlement with Highland Capital Management in Bankruptcy

18. On April 8, 2020, Harbourvest submitted its proofs of claim in the HCM bankruptcy proceeding. Annexed to its proofs of claims was an explanation of the Proof of Claim and the basis therefor setting out various pre-petition allegations of wrongdoing by HCM. *See, e.g.*, Case No. 19-bk-34054, Doc. 1631-5.

19. The debtor, HCM, made an omnibus response to the proofs of claims, stating they were duplicative of each other, overstated, late, and otherwise meritless.

20. Harbourvest responded to the omnibus objections on September 11, 2020. *See* Cause No. 19-bk-34054, Doc. 1057.

21. Harbourvest represented that it had invested in HCLOF, purchasing 49.98% of HCLOF's outstanding shares.

22. Plaintiff CLO Holdco was and is also a 49.02% holder of HCLOF's member interests.

23. In its Omnibus Response, Harbourvest explained that its claims included unliquidated legal claims for fraud, fraud in the inducement, RICO violations under 18 U.S.C. 1964, among others (the “Harbourvest Claims”). *See* Cause No. 19-bk-34054, Doc. 1057.

24. The Harbourvest Claims centered on allegations that when Harbourvest was intending to invest in a pool of Collateralized Loan Obligations, or CLOs, that were then-managed by Acis Capital Management (“Acis”), a subsidiary of HCM, HCM failed to disclose key facts about ongoing litigation with a former employee, Josh Terry.

25. Harbourvest claimed that it had lost over \$100 million in the HCLOF transaction due to fraud, which, after trebling under the racketeering statute, it claimed it was entitled to over \$300 million in damages.

26. Harbourvest contended that HCM never sufficiently disclosed the underlying facts about the litigation with Terry, and HCM's then-intended strategy to fight Terry caused HCLOF to incur around \$15 million in legal fees and costs. It contended that had it known the nature of the lawsuit and how it would eventually turn out, Harbourvest never would have invested in HCLOF. *See* Cause No. 19-bk-34054, Doc. 1057.

27. While even assuming Harbourvest's underlying claims were valid as far as the lost \$15 million went, the true damage of the legal fees to Harbourvest would have been 49.98% of the HCLOF losses (i.e., less than \$7.5 million).

28. In truth, as of September 2020, Harbourvest had indeed lost some \$52 million due to the alleged diminishing value of the HCLOF assets (largely due to the underperformance of the Acis entities³)—and the values were starting to recover.

29. HCM denied the allegations in the Bankruptcy Court. Other than the claim for waste of corporate assets of \$15 million, HCM at all times viewed the Harbourvest legal claims as being worth near zero and having no merit.

30. On December 23, 2020, HCM moved the Court to approve a settlement between itself and Harbourvest. No discovery had taken place between the parties, and Plaintiff did not have any notice of the settlement terms or other factors prior to the motion's filing (or even during its pendency) in order to investigate its rights.

31. HCM set the hearing right after the Christmas and New Year's holidays, almost ensuring that no party would have the time to scrutinize the underpinnings of the deal.

³ Acis was being managed by Joshua Terry. JP Morgan had listed the four ACIS entities under his management as the four worst performers of the 1200 CLOs it evaluated.

32. On January 14, 2021, the Bankruptcy Court held an evidentiary hearing and approved the settlement in a bench ruling, overruling the objections to the settlement.

33. An integral part of the settlement was allowing \$45 million in unsecured claims that, at the time of the agreement, were expected to net Harbourvest around 70 cents on the dollar. In other words, Harbourvest was expected to recover around \$31,500,000 from the allowed claims.

34. As part of the consideration for the \$45 million in allowed claims, Harbourvest agreed to transfer all of its interests in HCLOF to HCM.

35. HCM and Seery rationalized the settlement value by allocating \$22.5 million of the net value of the \$45 million in unsecured claims as consideration to purchase Harbourvest's interests in HCLOF, meaning, if 70% of the unsecured claims—i.e., \$31.5 million—was realized, and \$22.5 million of that would be allocated to the purchase price of the Harbourvest interests in HCLOF, the true “settlement” for Harbourvest's legal claims was closer to \$9 million. Still \$1.5 million over the reasonable damages amount that Harbourvest suffered.

36. Plaintiffs here are taking no position at this time about the propriety of settling the Harbourvest legal claims for \$9 million. That is for another day.

37. At the core of this lawsuit is the fact that HCM purchased the Harbourvest interests in HCLOF for \$22.5 million knowing that they were worth far more than that.

38. It has recently come to light that the Harbourvest interests, as of December 31, 2020, were worth in excess of \$41,750,000, and they have continued to go up in value.

39. On November 30, 2020, which was less than a month prior to the filing of the Motion to Approve the Settlement, the net asset value of those interests was over \$34.5 million. Plaintiffs were never made aware of that.

40. The change was due to how the net asset value, or NAV, was calculated. The means and methods for calculating the “net asset value” of the assets of HCLOF are subject to and governed by the regulations passed by the SEC pursuant to the Adviser’s Act, and by HCM’s internal policies and procedures.

41. Typically, the value of the securities are reflected by a market price quote.

42. However, the underlying securities in HCLOF are not liquid and had not been traded in a long while. Therefore, any market quotes were stale.

43. There not having been any contemporaneous market quotations that could be used in good faith to set the marks,⁴ meant that other prescribed methods of assessing the value of the interests, such as the NAV, would have been the proper substitutes.

44. Seery testified that the fair market value of the Harbourvest HCLOF interests was \$22.5 million. Even allowing some leeway there, it was off by a mile.

45. Given the artifice described herein, Seery and the entity Defendants had to know that the representation of the fair market value at \$22.5 million was false because the NAV was so much higher.

46. But it does not appear that they disclosed that fact to Harbourvest to whom they owed fiduciary duties as the RIA in charge of HCLOF, and they certainly did not disclose the truth to the Plaintiff. One would expect HCM to disclose that its trade with Harbourvest—or someone in Harbourvest’s position—was sanitized by complete disclosure of the NAV of the interests, and noting Harbourvest’s acceptance of the trade notwithstanding that disclosure. The abject silence of the information’s disclosure—both in the Settlement Agreement and in the papers seeking to

⁴ The term “mark” is shorthand for an estimated or calculated value for a non-publicly traded instrument.

approval of the settlement and the testimony proffered in its support—strongly suggests its absence from the negotiations.

47. What it appears is that Seery used an old valuation, itself a reckless if not intentional misrepresentation of value. Thus, it is either the case that (i) Defendants conducted the proper analysis to obtain a current value of the assets but decided to use a far lower valuation in order to whitewash the settlement or enrich the bankruptcy estate; *or* (ii) Defendants never conducted the proper current valuation, and therefore baselessly represented what the current value of the assets was, despite knowingly having no reasonable basis for making such a claim.

48. For years HCM had internal procedures and compliance protocols to govern this not infrequent occurrence. Prior to Seery taking over as CEO, HCM's internal compliance policies, enforced by its compliance officers, prohibiting HCM from trading with an investor where HCM had superior knowledge about the value of the assets, for example. While Plaintiff has no reason to believe that those procedures were scrapped in recent months, it can only assume that they were either overridden improperly or circumvented wholesale.

49. Upon finalizing the Harbourvest Settlement Agreement and making representations to the Bankruptcy Court to the Plaintiffs about the value of the Harbourvest Interests, Seery and HCM had a duty to use current values and not rely on old valuations of the assets or the HCLOF interests.

50. Given Defendants' actual or constructive knowledge that they were purchasing Harbourvest's Interests in HCLOF for a less than 50% of what those interests were worth—Defendants owed Plaintiff a fiduciary duty not to purchase them for themselves.

51. Defendants should have either had HCLOF repurchase the interests with cash, or offer those interests to Plaintiff and the other members *pro rata*, before HCM agreed to purchase them all lock, stock and barrel, for no up-front cash.

52. Indeed, had Plaintiff been offered those interests, it would have happily purchased them and therefore would have infused over \$20 million in cash into the estate for the purpose of executing the Harbourvest Settlement.

53. That Defendants (and to perhaps a lesser extent, the Unsecured Creditors Committee (the “UCC”)) agreed to pay \$22.5 million for the HCLOF assets, where they had previously not consented to any such expenditure by the estate on behalf of HCLOF, strongly indicates their awareness that they were purchasing assets for far below market value.

54. The above is the most reasonable and plausible explanation for why Defendants and the UCC forwent raising as much as \$22.5 million in cash now in favor of hanging on to the HCLOF assets.

55. Indeed, in January 2021 Seery threatened Ethen Powell that “[Judge Jernigan] is laughing at you” and “we are coming after you” in response to the latter’s attempt to exercise his right as beneficial holder of the CLO, and pointing out a conflict of interest in Seery’s plan to liquidate the funds.

56. HCM’s threat, made by Seery, is tantamount to not only a declaration that he intends to liquidate the funds regardless of whether the investors want to do so, and whether it is in their best interests, but also that HCM intends to leverage what it views as the Bankruptcy Court’s sympathy to evade accountability.

V.

CAUSES OF ACTION

FIRST CAUSE OF ACTION
Breaches of Fiduciary Duty

57. Plaintiffs respectfully incorporate the foregoing factual averments as if fully set forth herein and further alleges the following:

58. HCM is a registered investment advisor and acts on behalf of HCFA. Both are fiduciaries to Plaintiffs because HCM had a direct advisor agreement with the DAF at all relevant times, and HCM, through HCFA, advised CLO Holdco in the HCLOF venture.

59. The Advisers Act establishes an unwaivable federal fiduciary duty for investment advisers,⁵ and its chief compliance officers.⁶

60. HCM and the DAF entered into an Amended and Restated Investment Advisory Agreement, executed between them on July 1, 2014 (the “RIA Agreement”). It renews annually and continued until the end of January 2021.

61. In addition to being the RIA to the DAF, HCM was appointed the DAF’s attorney-in-fact for certain actions, such as “to purchase or otherwise trade in Financial Instruments that have been approved by the General Partner.” RIA Agreement ¶ 4.

⁵ See e.g., *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 194 (1963); *Transamerica Mortg. Advisors (tama) v. Lewis*, 444 U.S. 11, 17 (1979) (“§ 206 establishes ‘federal fiduciary standards’ to govern the conduct of investment advisers.”); *Santa Fe Indus. v. Green*, 430 U.S. 462, 471, n.11 (1977) (in discussing *SEC v. Capital Gains*, stating that the Supreme Court’s reference to fraud in the “equitable” sense of the term was “premised on its recognition that Congress intended the Investment Advisers Act to establish federal fiduciary standards for investment advisers”). See also Investment Advisers Act Release No. 3060 (July 28, 2010) (“Under the Advisers Act, an adviser is a fiduciary whose duty is to serve the best interests of its clients, which includes an obligation not to subrogate clients’ interests to its own”) (citing Proxy Voting by Investment Advisers, Investment Advisers Act Release No. 2106 (Jan. 31, 2003)).

⁶ Advisers Act Rule 206(4)-7 (“An adviser’s chief compliance officer should be competent and knowledgeable regarding the Advisers Act and should be empowered with full responsibility and authority to develop and enforce appropriate policies and procedures for the firm.”).

62. The RIA Agreement further commits HCM to value financial assets “in accordance with the then current valuation policy of the Investment Advisor [HCM], a copy of which will be provided to the General Partner upon request.” RIA Agreement ¶ 5.

63. While HCM contracted for the recognition that it would be acting on behalf of others and could be in conflict with advice given the DAF, (RIA Agreement ¶ 12), nowhere did it purport to waive the fiduciary duties owed to the DAF not to trade as a principal in a manner that harmed the DAF.

64. HCFA owed a fiduciary duty to Holdco as an investor in HCLOF and to which HCFA was the portfolio manager. HCM owed a fiduciary duty to the DAF (and to Holdco as its subsidiary) pursuant to a written Advisory Agreement HCM and the DAF had where HCM agreed to provide sound investment advice and management functions.

65. As a registered investment adviser, HCM’s fiduciary duty is broad and applies to the entire advisor-client relationship.

66. The core of the fiduciary duty is to act in the best interest of their investors—the advisor must put the ends of the client before its own ends or the ends of a third party.

67. This is manifested in a duty of loyalty and a duty of utmost care. It also means that the RIA has to follow the terms of the company agreements and the regulations that apply to the investment vehicle.

68. Seery in controlling HCM, HCFA, and by extension, HCLOF, directly owed a fiduciary duty to Plaintiffs by virtue of his position, or is liable for aiding and abetting HCM’s and HCFA’s breaches of fiduciary duty by controlling them and either recklessly or intentionally causing them to breach their duties.

69. The fiduciary duty that HCM and Seery owed to Plaintiff is predicated on trust and confidence. Section 204A of the Advisers Act requires investment advisors (whether SEC-registered or not) to establish, maintain, and enforce written policies and procedures reasonably designed to prevent the RIA from trading on material, non-public information. See 17 C.F.R. § 275.206(4)-7. That means that Plaintiff should be able to take Defendants at their word and not have to second guess or dig behind representations made by them.

70. The simple thesis of this claim is that Defendants Seery, HCFA and HCM breached their fiduciary duties by (i) insider trading with Harbourvest and concealing the rising NAV of the underlying assets—i.e., trading with Harbourvest on superior, non-public information that was neither revealed to Harbourvest nor to Plaintiff; (ii) concealing the value of the Harbourvest Interests; and (iii) diverting the investment opportunity in the Harbourvest entities to HCM (or its designee) without offering it to or making it available to Plaintiff or the DAF.

71. HCM, as part of its contractual advisory function with Plaintiffs, had expressly recommended the HCLOF investment to the DAF. Thus, diverting the opportunity for returns on its investment was an additional breach of fiduciary duty.

72. This violated a multitude of regulations under 27 C.F.R. part 275, in addition to Rules 10b-5 and 10b5-1. 17 CFR 240.10b5-1 (“Rule 10b5-1”) explains that one who trades while possessing non-public information is liable for insider trading, and they do not necessarily have to have *used* the specific inside information.

73. It also violated HCM’s own internal policies and procedures.

74. Also, the regulations impose obligations on Defendants to calculate a *current* valuation when communicating with an investor, such as what may or may not be taken into

account, and what cannot pass muster as a current valuation. Upon information and belief, these regulations were not followed by the Defendants.

75. HCM's internal policies and procedures, which it promised to abide by both in the RIA Agreement and in its Form ADV SEC filing, provided for the means of properly calculating the value of the assets.

76. HCM either did not follow these policies, changed them to be out of compliance both with the Adviser Act regulations and its Form ADV representations, and/or simply misrepresented or concealed their results.

77. In so doing, because the fiduciary duty owed to Plaintiff is a broad one, and because Defendants' malfeasance directly implicates its relationship with Plaintiff, Defendants have breached the Advisers Act's fiduciary duties owed to Plaintiff as part of their fiduciary relationship.⁷

78. At no time between agreeing with Harbourvest to the purchase of its interests and the court approval did Defendants disclose to either Harbourvest or to Plaintiff (and the Bankruptcy Court for that matter) that the purchase was at below 50% the current net asset value as well, and when they failed to offer Plaintiff (and the other members of HCLOF) their right to purchase the interests pro rata at such advantageous valuations. Plaintiff's lost opportunity to purchase has harmed Plaintiff. Plaintiff had been led to believe by the Defendants that the value of what was being purchased in the Harbourvest settlement by HCM (or its designee) was at fair

⁷ See Advisers Act Release No. 4197 (Sept. 17, 2015) (Commission Opinion) (“[O]nce an investment Advisory relationship is formed, the Advisers Act does not permit an adviser to exploit that fiduciary relationship by defrauding his client in any investment transaction connected to the Advisory relationship.”); see also *SEC v. Lauer*, No. 03-80612-CIV, 2008 U.S. Dist. LEXIS 73026, at 90 (S.D. Fla. Sept. 24, 2008) (“Unlike the antifraud provisions of the Securities Act and the Exchange Act, Section 206 of the Advisers Act does not require that the activity be ‘in the offer or sale of any’ security or ‘in connection with the purchase or sale of any security.’”).

market value. This representation, repeated again in the Bankruptcy Court during the Harbourvest confirmation, implicitly suggested that a proper current valuation had been performed.

79. Seery testified in January 2021 that the then-current fair market value of Habourvests's 49.98% interest in HCLOF was worth around \$22.5 million.

80. But by then, it was worth almost double that amount and has continued to appreciate. Seery knew or should have known that fact because the value of some of the HCLOF assets had increased, and he had a duty to know the current value. His lack of actual knowledge, while potentially not overtly fraudulent, would nonetheless amount to a reckless breach of fiduciary duty for acting without proper diligence and information that was plainly available.

81. Furthermore, HCLOF holds equity in MGM Studios and debt in CCS Medical via various CLO positions. But Seery, in his role as CEO of HCM, was made aware during an advisors meeting in December 2020 that Highland would have to restrict its trading in MGM because of its insider status due to activities that were likely to apply upward pressure on MGM's share price.

82. Furthermore, Seery controlled the Board of CCS Medical. And in or around October 2020, Seery was advocating an equatization that would have increased the value of the CCS securities by 25%, which was not reflected in the HCM report of the NAV of HCLOF's holdings.

83. Seery's knowledge is and should be imputed to HCM and HCFA.

84. Moreover, it is a breach of fiduciary duty to commit corporate waste, which is effectively what disposing of the HCLOF assets would constitute in a rising market, where there is no demand for disposition by the investors (save for HCM, whose proper 0.6% interest could easily be sold to the DAF at fair value).

85. As holder of 0.6% of the HCLOF interests, and now assignee of the 49.98% Harbourvest Interests), HCM has essentially committed self-dealing by threatening to liquidate HCLOF now that it may be compelled to do so under its proposed liquidation plan, which perhaps inures to the short term goals of HCM but to the pecuniary detriment of the other holders of HCLOF whose upside will be prematurely truncated.

86. Seery and HCM should not be allowed to benefit from the breach of their fiduciary duties because doing so would also cause Plaintiffs irreparable harm. The means and methods of disposal would likely render the full scope of damages to the DAF not susceptible to specific calculation—particularly as they would relate to calculating the lost opportunity cost. Seery and HCM likely do not have the assets to pay a judgment to Plaintiffs that would be rendered, simply taking the lost appreciation of the HCLOF assets.

87. Defendants are thus liable for diverting a corporate opportunity or asset that would or should have been offered to Plaintiff and the other investors. Because federal law makes the duties invoked herein unwaivable, it is preposterous that HCM, as a 0.6% holder of HCLOF, deemed itself entitled to the all of the value and optionality of the below-market Harbourvest purchase.

88. Defendants cannot rely on any contractual provision that purports to waive this violation. Nothing in any agreement purports to permit, authorize or otherwise sanitize Defendants' self-dealing. All such provisions are void.

89. In the fourth quarter of 2020, Seery and HCM notified staff that they would be terminated on December 31, 2020. That termination was postponed to February 28, 2021. Purchasing the Harbourvest assets without staffing necessary to be a functioning Registered

Investment Advisor was a strategic reversal from prior filings that outlined canceling the CLO management contracts and allowing investors to replace Highland as manager.

90. Seery's compensation agreement with the UCC incentivizes him to expedite recoveries and to prevent transparency regarding the Harbourvest settlement.

91. What is more, Seery had previously testified that the management contracts for the funds—HCLOF included—were unprofitable, and that he intended to transfer them. But he later rejected offers to purchase those management contracts for fair value and instead decided to continue to manage the funds—which is what apparently gave rise to the Harbourvest Settlement, among others. He simultaneously rejected an offer for the Harbourvest assets of \$24 million, stating that they were worth much more than that.

92. Because of Defendants' malfeasance, Plaintiffs have lost over \$25 million in damages—a number that continues to rise—and the Defendants should not be able to obtain a windfall.

93. For the same reason, Defendants' malfeasance has also exposed HCLOF to a massive liability from Harbourvest since the assignment of those interests is now one that is likely unenforceable under the Advisers Act, Section 47(b), if there was unequal information.

94. Seery is liable as a principal and as an officer and control person under the regulations promulgated pursuant to Dodd-Frank and other laws.

95. HCM and HCFA are liable as principals for breach of fiduciary duty, as are the principals and compliance staff of each entity.

96. Plaintiffs seek disgorgement, damages, exemplary damages, attorneys' fees and costs. To the extent the Court determines that this claim had to have been brought derivatively on

behalf of HCLOF, then Plaintiffs represent that any pre-suit demand would have been futile since asking HCM to bring suit against its principal, Seery, would have been futile.

SECOND CAUSE OF ACTION
Breach of HCLOF Company Agreement
(By Holdco against HCLOF, HCM and HCFA)

97. Plaintiffs respectfully incorporate the foregoing factual averments as if fully set forth herein and further alleges the following:

98. On November 15, 2017, the members of HCLOF, along with HCLOF and HCFA, executed the *Members Agreement Relating to the Company* (the “Company Agreement”).

99. The Company Agreement governs the rights and duties of the members of HCLOF.

100. Section 6.2 of HCLOF Company Agreement provides that when a member “other than ... CLO Holdco [Plaintiff] or a Highland Affiliate,” intends to sell its interest in HCLOF to a third party (i.e., not to an affiliate of the selling member), then the other members have the first right of refusal to purchase those interests pro rata for the same price that the member has agreed to sell.

101. Here, despite the fact that Harbourvest agreed to sell its interests in HCLOF for \$22.5 million when they were worth more than double that, Defendants did not offer Plaintiff the chance to buy its pro rata share of those interests at the same agreed price of \$22.5 million (adjusted pro rata).

102. The transfer and sale of the interests to HCM were accomplished as part of the Harbourvest Settlement which was approved by the Bankruptcy Court.

103. Plaintiff was not informed of the fact that Harbourvest had offered its shares to Defendant HCM for \$22.5 million—which was under 50% of their true value.

104. Plaintiff was not offered the right to purchase its pro rata share of the Harbourvest interests prior to the agreement being struck or prior to court approval being sought.

105. Had Plaintiff been allowed to do so, it would have obtained the interests with a net equity value over their purchase price worth in excess of \$20 million.

106. No discovery or opportunity to investigate was afforded Plaintiff prior to lodging an objection in the Bankruptcy Court.

107. Plaintiff is entitled to specific performance or, declaratory relief, and/or disgorgement, constructive trust, damages, attorneys' fees and costs.

THIRD CAUSE OF ACTION
Negligence
(By the DAF and CLO Holdco against Seery, HCM, and HCFA)

108. Plaintiffs respectfully incorporate the foregoing factual averments as if fully set forth herein, and further alleges the following:

109. Plaintiffs incorporate the foregoing causes of action and note that all the foregoing violations were breaches of the common law duty of care imposed by law on each of Seery, HCFA and HCM.

110. Each of these Defendants should have known that their actions were violations of the Advisers Act, HCM's internal policies and procedures, the Company Agreement, or all three.

111. Seery and HCM owed duties of care to Plaintiffs to follow HCM's internal policies and procedures regarding both the propriety and means of trading with a customer [Harbourvest], the propriety and means of trading as a principal in an account but in a manner adverse to another customer [the DAF and Holdco], and the proper means of valuing the CLOs and other assets held by HCLOF.

112. It would be foreseeable that failing to disclose the current value of the assets in the HCLOF would impact Plaintiffs negatively in a variety of ways.

113. It would be reasonably foreseeable that failing to correctly and accurately calculate the current net asset value of the market value of the interests would cause Plaintiffs to value the Harbourvest Interests differently.

114. It would be reasonably foreseeable that referring to old and antiquated market quotations and/or valuations of the HCLOF assets or interests would result in a mis-valuation of HCLOF and, therefore, a mis-valuation of the Harbourvest Interests.

115. Relying on stale valuations without updating them was reckless due to Seery's and HCM's knowledge that the values of the interests were not static and likely would have changed over time, such that old information had a high degree of probability of being inaccurate.

116. Seery's and HCM's failure to inform the DAF and Holdco of the updated valuations, and/or to misstate the value in January 2021 in support of the Harbourvest settlement was likewise reckless in the face of the known risk that Plaintiffs would be relying on those representations, as would Harbourvest and the Court.

117. Seery's and HCM's failure to offer the DAF and Holdco the right to purchase the Harbourvest Interests was likewise reckless in light of the obvious risk.

118. Likewise, it would have been foreseeable that Plaintiff's failure to give Plaintiff the opportunity to purchase the Harbourvest shares at a \$22.5 million valuation would cause Plaintiff damages. Defendants knew that the value of those assets was rising. They further knew or should have known that whereas those assets were sold to HCM for an allowance of claims to be funded in the future, selling them to Plaintiff would have provided the estate with cash funds.

119. Defendants' negligence or gross negligence foreseeably and directly caused Plaintiff harm.

120. Plaintiff is thus entitled to damages.

FOURTH CAUSE OF ACTION
Racketeering Influenced Corrupt Organizations Act
(CLO Holdco and DAF against HCM and Seery)

121. Plaintiffs respectfully incorporate the foregoing factual averments as if fully set forth herein, and further alleges the following:

122. Defendants HCM and Seery are liable for violations of the Racketeer Influenced and Corrupt Organizations ("RICO") Act, 18 U.S.C. § 1961 *et seq.*, for the conduct of an enterprise through a pattern of racketeering activity.

123. HCLOF constitutes an enterprise under the RICO Act. Additionally, or in the alternative, HCM, HCLA, and HCLOF constituted an association-in-fact enterprise. The purpose of the association-in-fact was the perpetuation of Seery's position at HCM and using the Harbourvest settlement as a vehicle to enrich persons other than the HCLOF investors, including Holdco and the DAF, and the perpetuation of HCM's holdings in collateralized loan obligations owned by HCLOF, while attempting to deny Plaintiffs the benefit of its rights of ownership.

124. The association-in-fact was bound by informal and formal connections for years prior to the illicit purpose, and then changed when HCM and Seery joined it in order to achieve the association's illicit purpose. For example, HCM is the parent and control person over HCFA, which is the portfolio manager of HCLOF pursuant to a contractual agreement—both are registered investment advisors and provide advisory and management services to HCLOF.

125. HCM and Seery injured Plaintiffs through their continuous course of conduct of the HCM-HCLA-HCLOF association-in-fact enterprise. Seery's actions (performed on behalf of

HCM and the association-in-fact enterprise) constitute violations of the federal wire fraud, mail fraud, fraud in connection with a case under Title 11, and/or securities fraud laws, pursuant to **18 U.S.C. § 1961(1)(B)** and **(D)**.

126. Seery operated HCM in such a way as to violate insider trading rules and regulations when it traded with Harbourvest while it had material, non-public information that it had not supplied to Harbourvest or to Plaintiffs.

127. In or about November 2020, HCM and Harbourvest entered into discussions about settling the Harbourvest Claims. Seery's conduct of HCLOF and HCLA on behalf of HCM through the interstate mails and/or wires caused HCM to agree to the purchase of Harbourvest's interests in HCLOF.

128. On or about each of September 30, 2020, through December 31, 2020, Seery, through his conduct of the enterprise, utilized the interstate wires and/or mails to obtain or arrive at valuations of the HCLOF interests. Seery's conduct of the enterprise caused them to cease sending the valuation reports to Plaintiffs, which eventually allowed Plaintiffs to be misled into believing that Seery had properly valued the interests.

129. On or about September 30, 2020, Seery transmitted or caused to be transmitted though the interstate wires information to HCLOF investors from HCM (via HCFA), including Harbourvest, regarding the value of HCLOF interests and underlying assets.

130. Additionally, Seery operated HCM in such a way that he concealed the true value of the HCLOF interests by utilizing the interstate wires and mails to transmit communications to the court in the form of written representations on or about December 23, 2020, and then further transmitted verbal representations of the current market value (the vastly understated one) on January 14, 2021, during live testimony.

131. However, Harbourvest was denied the full picture and the true value of the underlying portfolio. At the end of October and November of 2020, HCM had updated the net asset values of the HCLOF portfolio. According to sources at HCM at the time, the HCLOF assets were worth north of \$72,969,492 as of November 30, 2020. Harbourvest's share of that would have been \$36,484,746.

132. The HCLOF net asset value had reached \$86,440,024 as of December 31, 2021, which means that by the time Seery was testifying in the Bankruptcy Court on January 14, 2021, that the fair market value of the Harbourvest Assets was \$22.5 million, it was actually closer to \$43,202,724.

133. Seery, speaking on behalf of HCM, knew of the distinction in value and made the representations either knowingly or with reckless disregard for the truth.

134. On January 14, 2021, Seery also testified that he (implying HCM, HCLA and HCLOF) had valued the Harbourvest Assets at their current valuation and at fair market value. This was not true because the valuation that was used and testified to was at that time ancient. The ostensible purpose of this concealment was to induce Plaintiff and other interest holdings to take no action.

135. In supporting HCM's motion to the Bankruptcy Court to approve the Harbourvest Settlement, Seery omitted the fact that HCM was purchasing the interests at a massive discount, which would violate the letter and spirit of the federal Adviser's Act.

136. Seery was informed in late December 2020 at an in-person meeting in Dallas to which Seery had to fly that HCLOF and HCM had to suspend trading in MGM Studios' securities because Seery had learned from James Dondero, who was on the Board of MGM, of a potential purchase of the company. The news of the MGM purchase should have caused Seery to revalue

the HCLOF investment in MGM. Seery's failure to disclose this information which would have been germane to the valuation of the Harbourvest Interests was another incidence of wrongful omission in violation of the Advisers Act's antifraud provision and RICO.

137. In or around October 2020, Seery (who controls the Board of CSS Medical) was pursuing "equatization" of CSS Medical's debt, which would have increased the value of certain securities by 25%. In several communications through the U.S. interstate wires and/or mails, and with Plaintiffs, and the several communications with Harbourvest during the negotiations of the settlement, Seery failed to disclose these changes which were responsible in part for the ever-growing value of the HCLOF CLO portfolio. Seery's failure to disclose this information which would have been germane to the valuation of the Harbourvest Interests was another incidence of wrongful omission in violation of the Advisers Act's antifraud provision and RICO.

138. Seery's failure to disclose the information about the current valuation, which would have been material to the value of the Harbourvest Interest—and by extension, to Plaintiff's rights with respect to those as part of the Harbourvest Settlement was another incidence of wrongful omission in violation of the Advisers Act's antifraud provision and RICO.

139. The Harbourvest Settlement is not final and unwinding it could prove difficult—which Seery had to be counting on.

140. Seery was at all relevant times operating as an agent of HCM and its control person as CEO.

141. This series of related violations of the wire fraud, mail fraud, and securities fraud laws, in connection with the HCM bankruptcy, constitute a continuing pattern and practice of racketeering for the purpose of winning a windfall for HCM and himself--a nearly \$30,000,000 payday under the confirmation agreement.

142. The federal RICO statute makes it actionable for one's conduct of an enterprise to include "fraud in connection with a [bankruptcy case]". The Advisers' Act antifraud provisions require full transparency and accountability to an advisers' investors and clients and does not require a showing of reliance or materiality. The wire fraud provision likewise is violated when, as here, the interstate wires are used as part of a "scheme or artifice ... for obtaining money or property by means of false ... pretenses, [or] representations[.]"

143. Accordingly, because Seery and HCM's conduct violated the wire fraud and mail fraud laws, and the Advisers' Act antifraud provisions, and their acts and omissions were in connection with the HCM Bankruptcy proceedings under Title 11, they are sufficient to bring such conduct within the purview of the RICO civil action provisions, **18 U.S.C. § 1964**.

144. Plaintiffs are thus entitled to damages, treble damages, attorneys' fees and costs of suit, in addition to all other injunctive or equitable relief to which they are justly entitled.

FIFTH CAUSE OF ACTION
Tortious Interference
(CLO Holdco against HCM and Seery)

145. Plaintiff respectfully incorporates the foregoing factual averments as if fully set forth herein and further alleges the following:

146. At all relevant times, HCM owned a 0.6% interest in HCLOF.

147. At all relevant times, Seery and HCM knew that Plaintiff had specific rights in HCLOF under the Company Agreement, § 6.2.

148. Section 6.2 of HCLOF Company agreement provides that when a member "other than ... CLO Holdco [Plaintiff] or a Highland Affiliate," intends to sell its interest in HCLOF to a third party (i.e., not an affiliate of the member), then the other members have the first right of refusal to purchase those interests pro rata for the same price that the member has agreed to sell.

149. HCM, through Seery, tortiously interfered with Plaintiff's contractual rights with HCLOF by, among other things, diverting the Harbourvest Interests in HCLOF to HCM without giving HCLOF or Plaintiff the option to purchase those assets at the same favorable price that HCM obtained them.

150. HCM and Seery tortiously interfered with Plaintiff's contractual rights with HCLOF by, among other things, misrepresenting the fair market value as \$22.5 million and concealing the current value of those interests.

151. But for HCM and Seery's tortious interference, Plaintiff would have been able to acquire the Harbourvest Interests at a highly favorable price. HCM and Seery's knowledge of the rights and intentional interference with these rights has caused damage to Plaintiff CLO Holdco.

152. Plaintiff is therefore entitled to damages from HCM and Seery, as well as exemplary damages.

VI.

JURY DEMAND

153. Plaintiffs demand trial by jury on all claims so triable.

VII.

PRAYER FOR RELIEF

154. Wherefore, for the foregoing reasons, Plaintiffs respectfully pray that the Court enter judgment in their favor and against Defendants, jointly and severally, for:

- a. Actual damages;
- b. Disgorgement;
- c. Treble damages;
- d. Exemplary and punitive damages;

- e. Attorneys' fees and costs as allowed by common law, statute or contract;
- f. A constructive trust to avoid dissipation of assets;
- g. All such other relief to which Plaintiff is justly entitled.

Dated: April 19, 2021

Respectfully submitted,

SBAITI & COMPANY PLLC

/s/ Jonathan Bridges

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EXHIBIT 2

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**UNITED STATES BANKRUPTCY COURT
 NORTHERN DISTRICT OF TEXAS
 DALLAS DIVISION**

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

Response Deadline: July 10, 2020 at 5:00 p.m.
 Hearing Date: July 14, 2020 at 1:30 p.m.

**DEBTOR'S MOTION UNDER BANKRUPTCY CODE
 SECTIONS 105(a) AND 363(b) FOR AUTHORIZATION TO
 RETAIN JAMES P. SEERY, JR., AS CHIEF EXECUTIVE OFFICER,
 CHIEF RESTRUCTURING OFFICER AND FOREIGN REPRESENTATIVE
 NUNC PRO TUNC TO MARCH 15, 2020**

(c) Compensation for Services: Mr. Seery's compensation under the Agreement shall consist of the following:

(2) Bonus Compensation; Restructuring Fee:

Case Resolution Restructuring Plan

\$1,000,000 on confirmation of the Case Resolution Plan:

⁷ Although the Compensation Committee and Mr. Seery have agreed on the amount and timing of the Restructuring Fee, both the Compensation Committee and Mr. Seery understand that the Restructuring Fee is payable only upon order of this Court. The Compensation Committee is reserving the right to seek approval of the Restructuring Fee from this Court in connection with the confirmation hearing on a plan or as otherwise appropriate.

\$750,000 on completion of cash or property distributions to creditors as contemplated by the Case Resolution Plan.

Debtor/Creditor Monetization Vehicle Restructuring Fee:

On confirmation of any plan or reorganization or liquidation based on a debtor/creditor trust or similar asset monetization and claims resolution vehicle that does not include agreement among the debtor and creditors on a material amount of the outstanding claims and their respective treatment at confirmation (a “Monetization Vehicle Plan”):

\$500,000 on confirmation of the Monetization Vehicle Plan;

\$250,000 on the effective date of the Monetization Vehicle Plan; and

A contingent restructuring fee to be determined by the board or oversight committee installed to oversee the implementation of any Monetization Vehicle Plan based on the CEO/CRO (or acting as trustee) based upon performance under the plan after all material distributions under the Monetization Vehicle Plan are made.

(e) Participation in Employee Benefit Plans: Mr. Seery shall act as an independent professional contractor and shall not be an employee of the Debtor. Mr. Seery will pay for his own benefits and will not participate under the Debtor’s existing employee benefit plans.

(f) Expenses: Reimbursement of actual and reasonable out-of-pocket expenses in connection with the services provided under the Agreement. Expenses will be generally consistent with expenses incurred to date as a member of the New Board.

(g) Conflicts and Other Engagements. Mr. Seery is not aware of any potential conflicts of interest based on his understanding of the various parties involved in the Debtor’s chapter 11 case to date. Mr. Seery shall not be precluded from representing or working with or for any other person or entity in matters not directly related to the services being provided to the Debtor under the Agreement. Mr. Seery shall not undertake any engagements directly adverse to the Debtor during the term of his engagement.

(h) Termination. The Agreement may be terminated at any time by either the Debtor or by Mr. Seery upon two weeks advance written notice given to the other party. The termination of the Agreement shall not affect Mr. Seery's right to receive, and the Debtor's obligation to pay, any and all Base Compensation and Expenses incurred (even if not billed) prior to the giving of any termination notice; *provided however*, that (1) if the Agreement is terminated by Mr. Seery, the amount of Base Compensation owed shall be calculated based on the actual number of days worked during the applicable month and Mr. Seery will return any Base Compensation received in excess of such amount, and (2) if the Agreement is terminated by the Debtor, Base Compensation shall be deemed fully earned as of the first day of any month. Bonus Compensation shall be earned by Mr. Seery immediately upon his termination by the Debtor; *provided however*, Mr. Seery shall not be entitled to Bonus Compensation if: (A) the Debtor's chapter 11 case is converted to chapter 7 or dismissed; (B) a chapter 11 trustee is appointed in the Debtor's chapter 11 case; (C) Mr. Seery is terminated by the Debtor for Cause;⁸ or (D) Mr. Seery resigns prior to confirmation of a plan or court approval of a sale as described in the Fees and Expense/Compensation for Services section of the Agreement.

(j) Conditional Requirement to Seek Further Court Approval of Agreement. The Committee may, upon two weeks advance written notice to the Debtor, require the Debtor to file a motion with the Bankruptcy Court on normal notice seeking a continuation of the Agreement and if such motion is not filed, the Agreement will terminate at the expiration of such two week period. If the Debtor files such motion, Mr. Seery will be entitled to the Base Compensation through and including the date on which a final order is entered on such motion by this Court. Notwithstanding anything herein to the contrary, the Committee may not deliver such notice to the Debtor until a date which is more than ninety days following the date this Court enters an order approving the Agreement.

(j) Indemnification. the Debtor agrees (i) to indemnify and hold harmless Mr. Seery and any of his affiliates (the "Indemnified Party"), to the fullest extent lawful, from and against any and all

⁸ For purposes of the Agreement, "Cause" means any of the following grounds for termination of Mr. Seery's engagement, in each case as reasonably determined by the New Board within 60 days of the New Board becoming aware of the existence of the event or circumstance: (A) fraud, embezzlement, or any act of moral turpitude or willful misconduct on the part of Mr. Seery; (B) conviction of or the entry of a plea of *nolo contendere* by Mr. Seery for any felony; (C) the willful breach by Mr. Seery of any material term of the Agreement; or (D) the willful failure or refusal by Mr. Seery to perform his duties to the Debtor, which, if capable of being cured, is not cured on or before fifteen (15) days after Mr. Seery's receipt of written notice from the Debtor.

losses, claims, costs, damages or liabilities (or actions in respect thereof), joint or several, arising out of or related to the Agreement, Mr. Seery's engagement under the Agreement, or any actions taken or omitted to be taken by Mr. Seery or the Debtor in connection with the Agreement and (ii) to reimburse the Indemnified Party for all expenses (including, without limitation, the reasonable fees and expenses of counsel) as they are incurred in connection with investigating, preparing, pursuing, defending, settling or compromising any action, suit, dispute, inquiry, investigation or proceeding, pending or threatened, brought by or against any person (including, without limitation, any shareholder or derivative action, or any fee dispute), arising out of or relating to the Agreement, or such engagement, or actions. However, the Debtor shall not be liable under the foregoing indemnity and reimbursement agreement for any loss, claim, damage or liability which is finally judicially determined by a court of competent jurisdiction to have resulted primarily from the willful misconduct or gross negligence of the Indemnified Party.

The Debtor has agreed to extend the indemnification and insurance currently covering Mr. Seery's role as a director to fully cover Mr. Seery in his roles as chief executive officer and chief restructuring officer. The Debtor is currently working to extend such coverage.

Mr. Seery is also entitled to any indemnification or other similar provisions under the Debtor's existing or future insurance policies, including any policy tails obtained (or which may be obtained in the future), by the Debtor.

Relief Requested

20. By this Motion, the Debtor seeks the entry of the Proposed Order authorizing the Debtor to retain Mr. Seery pursuant to the terms of the Agreement, *nunc pro tunc* to March 15, 2020. The Motion also seeks to amend the Foreign Representative Order to appoint Mr. Seery as the Debtor's Foreign Representative, Bermuda Foreign Representative and Cayman Foreign Representative in the stead of Mr. Sharp.

21. The Debtor believes that the Debtor's retention of a chief executive officer and chief restructuring officer constitutes an act in the ordinary course of business, and

consequently, is permissible under Bankruptcy Code section 363(c) without Court approval. However, out of an abundance of caution, the Debtor seeks this Court's approval of the Agreement under Bankruptcy Code section 363(b).

Basis For Relief

B. The Debtor's Entry Into the Agreement is a Valid Exercise of the Debtor's Business Judgment and the Proposed Compensation is Appropriate Under the Circumstances and Within the Range of Similar Market Transactions

22. The Compensation Committee's decision for the Debtor to retain Mr. Seery pursuant to the terms of the Agreement should be approved pursuant to sections 363(b) and 105(a) of the Bankruptcy Code. Section 363(b)(1) of the Bankruptcy Code provides, in relevant part: "[t]he trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate." 11 U.S.C. § 363(b)(1). In addition, section 105(a) of the Bankruptcy Code provides that the Court "may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code]." 11 U.S.C. § 105(a).

23. The proposed use, sale, or lease of property of the estate may be approved under Bankruptcy Code section 363(b) if it is supported by sound business justification. *See In re Montgomery Ward*, 242 B.R. 147, 153 (D. Del. 1999) ("In determining whether to authorize the use, sale or lease of property of the estate under this section, courts require the debtor to show that a sound business purpose justifies such actions"). Although established in the context of a proposed sale, the "business judgment" standard has been applied in non-sale situations. *See, e.g., Inst. Creditors of Cont'l Air Lines v. Cont'l Air Lines (In re Cont'l Air Lines)*, 780 F.2d 1223, 1226 (5th Cir. 1986) (applying the "business judgment" standard in context of proposed

“use” of estate property). Moreover, pursuant to section 105, this Court has expansive equitable powers to fashion any order or decree which is in the interest of preserving or protecting the value of a debtor’s assets. 11 U.S.C. § 105(a).

24. It is well established that courts are unwilling to interfere with corporate decisions absent a showing of bad faith, self-interest, or gross negligence, and will uphold a board’s decisions as long as they are attributable to “any rational business purpose.” *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 954 (Del. 1985) (citing *Sinclair Oil Corp. v. Levien*, 280 A.2d 717, 720 (Del. 1971)). Whether or not there are sufficient business reasons to justify the use of assets of the estate depends upon the facts and circumstances of each case. *See Comm. of Equity Sec. Holders v. Lionel Corp. (In re Lionel Corp.)*, 722 F.2d 1063, 1071 (2d Cir. 1983). In this case, the Debtor has ample justification to retain Mr. Seery as the Debtor’s chief executive officer and chief restructuring officer pursuant to the Agreement. The Final Term Sheet expressly contemplated that the New Board could appoint a chief executive officer and that the chief executive officer could also be one of the Independent Directors. Because Mr. Seery will also be serving as chief restructuring officer, it is not necessary to have two separate ranking chief restructuring officers, especially considering that Mr. Sharp (the current chief restructuring officer) and his firm has agreed to continue to provide financial advisory services on behalf of the Debtor.⁹ Mr. Seery is well-qualified to serve as the Debtor’s chief executive officer and chief restructuring officer.

⁹ See Amended Motion of the Debtor Pursuant to 11 U.S.C. §§ 105(a) and 363(b) to Employ and Retain Development Specialists, Inc. to Provide Financial Advisory and Restructuring-Related Services, Nunc Pro Tunc, to March 15, 2020 filed concurrently herewith

25. The Compensation Committee negotiated the Agreement in good faith and at arm's length. The Compensation Committee also worked with the Debtor's compensation consultant, Mercer (US) Inc., to determine the appropriate compensation for Mr. Seery as chief executive officer and chief restructuring officer. The Compensation Committee, therefore, believes that the terms of the Agreement are reasonable, are consistent with the market within the Debtor's industry, and are entirely appropriate given the scope of Mr. Seery's duties. Accordingly, entry into the Agreement is a sound exercise of the Debtor's business judgment.

26. Finally, the Debtor requests that the Court apply the same criteria by which parties in interest must first petition the Court prior to asserting claims against the Independent Director approved in the Settlement Order be extended to Mr. Seery in his capacity as chief executive officer and chief restructuring officer contemplated by this Motion. *See* Settlement Order, ¶ 10. The rationale for the Court to first determine whether or not a colorable claim or cause of action can be maintained against the Mr. Seery, as one of the Independent Directors, is equally applicable to Mr. Seery in his capacity as chief executive officer and chief restructuring officer, will further aid in the implementation of the Settlement Order, and discourage frivolous litigation. As was true in the Settlement Order with respect to the Independent Directors, no parties will be prejudiced by having to first apply to this Court to determine the propriety of any hypothetical claim that may be asserted against Mr. Seery in his officer capacities of the Debtor.

C. The Debtor Has Satisfied Bankruptcy Code Section 503(c)(3)

27. Bankruptcy Code section 503(c)(3) provides that "transfers or obligations that are outside the ordinary course of business . . . including transfers made to . . . consultants

hired after the date of the filing of the petition” are not allowed if they are “not justified by the facts and circumstances of the case.” 11 U.S.C. § 503(c)(3). Courts generally use a form of the “business judgment” and the “facts and circumstances” standard. *See In re Pilgrim’s Pride Corp.*, 401 B.R. 229, 236-37 (Bankr. N.D. Tex. 2009) (citing *In re Dura Auto Sys., Inc.*, Case No. 06-11202 (Bankr. D. Del. June 29, 2007) and *In re Supplements LT, Inc.*, Case No. 08-10446 (KJC) (Bankr. D. Del. Apr. 14, 2008)). Specifically, the court examines first, whether the transaction meets the Debtor’s business judgment standard, and second, whether the facts and circumstances justify the transaction. *See In re Pilgrim’s Pride Corp.*, 401 B.R. at 237 (Bankr. N.D. Tex. 2009).

28. The Debtor submits that the proposed transaction is within the ordinary course of its business and thus that Bankruptcy Code section 503(c)(3) does not apply to the Agreement. Nevertheless, for the reasons stated above — the benefits from Mr. Seery’s leadership skills and industry experience — even if this were outside the ordinary course of business, entry into the Agreement is well within the Debtor’s business judgment as applied to the facts and circumstances of the Debtor. Further, the facts and circumstances of this case support entry into the relationship under the Agreement where the Debtor will benefit from the ability to retain Mr. Seery at a critical juncture to ongoing restructuring efforts.

29. For the reasons set forth above, the Debtor submits that the relief requested herein is in the best interest of the Debtor, its estate, creditors, stakeholders, and other parties in interest, and therefore, should be granted.

D. The Proposed Chief Executive Officer and Chief Restructuring Officer Should Also Serve as the Debtor's Foreign Representative

30. Bankruptcy Code section 1505 provides that:

A trustee or another entity (including an examiner) may be authorized by the court to act in a foreign country on behalf of an estate created under section 541. An entity authorized to act under this section may act in any way permitted by the applicable foreign law.

11 U.S.C. § 1505.

31. The Debtor respectfully submits that Mr. Seery is qualified and capable of representing the Debtor's estate as the Foreign Representative. The Debtor believes it is appropriate for Mr. Seery, as an officer of the Debtor, to replace Mr. Sharp as Foreign Representative inasmuch as Mr. Sharp will no longer be an officer of the Debtor if the Motion is granted. In order to avoid any possible confusion or doubt regarding this authority and to comply with the requirements of Part XVII of the Cayman Law, the Debtor seeks entry of an order, pursuant to section 1505 of the Bankruptcy Code, explicitly substituting Mr. Seery in the place of Mr. Sharp as the Debtor's Foreign Representative, including specifically to serve as the Bermuda Foreign Representative and Cayman Foreign Representative.

32. For the reasons set forth in the Foreign Representative Motion, authorizing Mr. Seery to act as the Foreign Representative on behalf of the Debtor's estate in Bermuda, the Cayman Islands or any other foreign proceeding will allow coordination of this chapter 11 case and each of the foreign proceedings and provide an effective mechanism to protect and maximize the value of the Debtor's assets and estate. Courts have routinely granted relief similar to that requested herein in other large chapter 11 cases where a debtor has foreign assets or operations requiring a recognition proceeding. *See, e.g., In re CJ Holding Co.*, No. 16-33590 (Bankr. S.D.

Tex. July 21, 2016); ECF No. 59; *In re CHC Group Ltd.*, No. 16-31854 (Bankr. N.D. Tex. Sept. 20, 2016), ECF No. 884; *In re Ultra Petroleum Corp.*, No. 16-32202 (Bankr. S.D. Tex. May 3, 2016); *In re Digital Domain Media Grp., Inc.*, No. 12-12568 (BLS) (Bankr. D. Del. Sept. 12, 2012); ECF No. 82; *In re Probe Resources US Ltd.*, No. 10-40395 (Bankr. S.D. Tex. Mar. 21, 2011); ECF N. 320; *In re Bigler LP*, No. 09-38188 (Bankr. S.D. Tex. Jan. 12, 2010), ECF No. 159; *In re Horsehead Holdings Corp.*, No. 16-10287 (CSS) (Bankr. D. Del. Feb. 4, 2016); *In re Colt Holding Co. LLC*, No. 15-11296 (LSS) (Bankr. D. Del. June 16, 2015). The Debtor believes it is appropriate for one of its officers to serve as the Foreign Representative. In several jurisdictions, an officer or someone acting in a similar capacity is a prerequisite to serve as a Foreign Representative.¹⁰ As more fully explained in the Foreign Representative Motion, the Debtor has assets in jurisdictions other than the United States, including in Bermuda and the Cayman Islands. To the extent any disputes with respect to such assets arise, it is critical that the Foreign Representative be permitted to appear on behalf of the Debtor and its estate in any court in which a foreign proceeding may be pending.

Notice

33. Notice of this Motion shall be given to the following parties or, in lieu thereof, to their counsel, if known: (a) the Office of the United States Trustee; (b) the Office of the United States Attorney for the Northern District of Texas; (c) the Debtor's principal secured

¹⁰ See e.g. Part XVII, Section 240 of the Companies Law (2018 Revision) of the Cayman Islands requiring that the foreign representative be "a trustee, liquidator or other official in respect of a debtor for the purposes of a foreign bankruptcy proceeding." In addition, and as more fully explained in the Foreign Representative Motion, Bermuda common law and conflict of laws principles will recognize the authority of a foreign insolvency officer appointed in proceedings in the jurisdiction of incorporation of a company (or, in the instant case, the jurisdiction of the establishment of a limited partnership) to act on behalf of and in the name of the company (or partnership) in Bermuda.

parties; (d)counsel to the Committee; and (e)parties requesting notice pursuant to Bankruptcy Rule 2002. The Debtor submits that, in light of the nature of the relief requested, no other or further notice need be given.

Conclusion

WHEREFORE, the Debtor respectfully requests that the Court enter an order, substantially in the form annexed hereto as **Exhibit A**, granting the relief requested in the Motion and such other and further relief as may be just and proper.

Dated: June 23, 2020

PACHULSKI STANG ZIEHL & JONES LLP
Jeffrey N. Pomerantz (CA Bar No.143717)
(admitted pro hac vice)
Ira D. Kharasch (CA Bar No. 109084)
(admitted pro hac vice)
Gregory V. Demo (NY Bar No. 5371992)
(admitted pro hac vice)
10100 Santa Monica Blvd., 13th Floor
Los Angeles, CA 90067
Telephone: (310) 277-6910
Facsimile: (310) 201-0760
E-mail: jpomerantz@pszjlaw.com
ikharasch@pszjlaw.com
gdemo@pszjlaw.com

-and-

/s/ Zachery Z. Annable

HAYWARD & ASSOCIATES PLLC

Melissa S. Hayward

Texas Bar No. 24044908

MHayward@HaywardFirm.com

Zachery Z. Annable

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ZAnnable@HaywardFirm.com

10501 N. Central Expy, Ste. 106

Dallas, Texas 75231

Tel: (972) 755-7100

Fax: (972) 755-7110

Counsel for the Debtor and Debtor-in-Possession

000835

EXHIBIT A

Proposed Order

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

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

ORDER APPROVING DEBTOR'S MOTION UNDER
BANKRUPTCY CODE SECTIONS 105(a) AND 363(b)
AUTHORIZING RETENTION OF JAMES P. SEERY, JR., AS
CHIEF EXECUTIVE OFFICER, CHIEF RESTRUCTURING OFFICER, AND
FOREIGN REPRESENTATIVE NUNC PRO TUNC TO MARCH 15, 2020

Upon the *Debtor's Motion Under Bankruptcy Code Sections 105(a) and 363(b)*
for Authorization to Retain James P. Seery, Jr., as Chief Executive Officer, Chief Restructuring
Officer and Foreign Representative Nunc Pro Tunc To March 15, 2020 (the "Motion"),¹ and the
Court finding that: (i) this Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157

¹ All terms not otherwise defined herein shall be given the meanings ascribed to them in the Motion.

and 1334; (ii) venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409; (iii) this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2); (iv) due and sufficient notice of the Motion has been given; (v) entry into the Agreement was an exercise of the Debtor's sound business judgment; and (vi) it appearing that the relief requested in the Motion is necessary and in the best interests of the Debtor's estate and creditors; and good and sufficient cause appearing therefor, it is hereby

ORDERED, ADJUDGED, AND DECREED that:

1. The Motion is granted.
2. Pursuant to sections 363(b) and 105(a) of the Bankruptcy Code, the Agreement attached hereto as Exhibit 1 and all terms and conditions thereof are approved, *nunc pro tunc* to March 15, 2020.
3. The Debtor is hereby authorized to enter into and perform under the Agreement.
4. The Debtor is authorized to indemnify Mr. Seery pursuant to the terms of the Agreement. Mr. Seery is also entitled to any indemnification or other similar provisions under the Debtor's existing or future insurance policies, including any policy tails obtained (or which may be obtained in the future), by the Debtor. The Debtor and Strand are authorized to enter into any agreements necessary to execute or implement the transactions described in this paragraph. For avoidance of doubt and notwithstanding anything to the contrary in this Order, Mr. Seery shall be entitled to any state law indemnity protections to which he may be entitled under applicable law.

EXHIBIT A-1

Engagement Agreement

1. On confirmation of any plan or reorganization or liquidation based on a debtor/creditor trust or similar asset monetization and claims resolution vehicle that does not include agreement among the debtor and creditors on a material amount of the outstanding claims and their respective treatment at confirmation (a “Monetization Vehicle Plan”):
 - a. \$500,000 on confirmation of the Monetization Vehicle Plan;
 - b. \$250,000 on the effective date of the Monetization Vehicle Plan; and
 - c. A contingent restructuring fee to be determined by the board or oversight committee installed to oversee the implementation of any Monetization Vehicle Plan based on the CEO/CRO (or acting as trustee) based upon performance under the plan after all material distributions under the Monetization Vehicle Plan are made.

2. Out-of-Pocket Expenses: In addition to the Base and Bonus Compensation, I shall be entitled to reimbursement for actual and reasonable out-of-pocket expenses (“Expenses”) incurred in connection with the provision of services hereunder. Expenses will be billed along with Base Compensation and shall be paid by the Company at the same time. Expenses will be generally consistent with expenses incurred to date as a member of the Board.

Bankruptcy Court Approval

Notwithstanding anything herein to the contrary, I understand that this Agreement is contingent, in all respects, on the approval of the Bankruptcy Court. I also understand that the Company will seek approval of this Agreement in stages and that the Company will first seek approval of my retention as CEO and CRO and the payment of the Base Compensation and will defer seeking Bankruptcy Court approval of the Restructuring Fee until there have been further developments in the Bankruptcy Case.

Conflicts and Other Engagements

I am not aware of any potential conflicts of interest based on my understanding of the various parties involved in this matter to date.

The Company is aware that this engagement is not an exclusive engagement of my time, and that I have and will continue to have other business engagements and investments unrelated to the Company. Nothing in this Agreement or otherwise precludes me from representing or working with or for any other person or entity in matters not directly related to the services being provided to the Company under this Agreement. However, I will not take on any engagements directly adverse to the Company during the term of this engagement.

Privilege

I understand that in the course of this engagement, I may become party to or my services may become part of work product of legal counsel to the Company (the Company's in-house and outside counsel are collectively referred to as "Counsel"), and all communications between Counsel and me relating to this engagement shall be protected from disclosure to third parties under the attorney work product doctrine and/or the attorney-client privilege, and, therefore, shall be treated by me as privileged and confidential. I further understand that the Company has the exclusive right to waive the attorney-client privilege, and Counsel has the exclusive right to waive the protections afforded under the attorney work-product doctrine.

Termination of Engagement

This Agreement may be terminated at any time by either the Company or by me upon two weeks advance written notice given to the other party. The termination of this Agreement shall not affect my right to receive, and the Company's obligation to pay, any and all Base Compensation and Expenses incurred (even if not billed) prior to the giving of the termination notice; provided, however, that (i) if this Agreement is terminated by me, the amount of Base Compensation owed shall be calculated based on the actual number of days worked during the applicable month and I will return any Base Compensation received in excess of such amount and (ii) if this Agreement is terminated by the Company, Base Compensation shall be deemed fully earned as of the first day of any month. Bonus Compensation shall be earned by me immediately upon termination of me by the Company; provided, however, I shall not be entitled to Bonus Compensation if (a) the Bankruptcy Case is converted to chapter 7 or dismissed; (b) a chapter 11 trustee is appointed in the Bankruptcy Case; (c) I am terminated by the Company for Cause; or (d) I resign prior to confirmation of a plan or court approval of a sale as described in the Fees and Expense/Compensation for Services section hereof. For purposes of this Agreement, "Cause" means any of the following grounds for termination of my engagement, in each case as reasonably determined by the Board within 60 days of the Board becoming aware of the existence of the event or circumstance: (A) fraud, embezzlement, or any act of moral turpitude or willful misconduct on my part; (B) conviction of or the entry of a plea of nolo contendere by me for any felony; (C) the willful breach by me of any material term of this Agreement; or (D) the willful failure or refusal by me to perform my duties to the Company, which, if capable of being cured, is not cured on or before fifteen (15) days after my receipt of written notice from the Company.

Conditional Requirement to Seek Further Bankruptcy Court Approval of Agreement

The official committee of unsecured creditors in the Bankruptcy Case (the "Committee") may, upon two weeks advance written notice to the Company, require the Company to file a motion with the Bankruptcy Court on normal notice seeking a continuation of this Agreement and if such motion is not filed, this Agreement will terminate at the expiration of such two week period. If the Company files such motion, I will be entitled to my Base Compensation through and including the date on which a final order is entered on such motion by the Bankruptcy Court. Notwithstanding anything herein to the contrary, the Committee may not deliver such notice to the Company until a date which is more than ninety days following the date the Bankruptcy Court enters an order approving this Agreement.

Indemnification

Failure of any party at any time to require performance of any provision of this Agreement shall not affect the right to require full performance thereof at any time thereafter, and the waiver by any party of a breach of such provisions shall not be taken as or held to be a waiver of any subsequent breach or as nullifying the effectiveness of such provision.

Notices provided for in this Agreement shall be in writing and shall be deemed to have been duly given when delivered by hand or overnight courier or three days after it has been mailed by United States registered mail, return receipt requested, postage prepaid, addressed to the respective address set forth above in this Agreement, or to such other address as either party may have furnished to the other in writing in accordance herewith.

This Agreement and my rights and duties hereunder shall not be assignable or delegable by me.

The Company may withhold from any amounts payable under this Agreement such Federal, state and local taxes as may be required to be withheld pursuant to any applicable law or regulation.

This Agreement may be executed (including by electronic execution) in any number of counterparts, each of which when so executed shall be deemed an original, but all such counterparts shall constitute one and the same instrument. Delivery of an executed counterpart of this Agreement by electronic mail shall have the same force and effect as the delivery of an original executed counterpart of this Agreement.

Please confirm the foregoing is in accordance with your understanding by signing and returning a copy of this Agreement, whereupon it shall become binding and enforceable in accordance with its terms.

Very truly yours,



James. P. Seery, Jr.

AGREED AND ACCEPTED

HIGHLAND CAPITAL MANAGEMENT L.P.

By: Strand Advisors, Inc., its general partner

John Dubel
Director
Strand Advisors, Inc.

Russell Nelms
Director
Strand Advisors, Inc.

000846

This Agreement shall be binding upon the parties and their respective successors and assigns, and no other person shall acquire or have any right under or by virtue of this Agreement.

Failure of any party at any time to require performance of any provision of this Agreement shall not affect the right to require full performance thereof at any time thereafter, and the waiver by any party of a breach of such provisions shall not be taken as or held to be a waiver of any subsequent breach or as nullifying the effectiveness of such provision.

Notices provided for in this Agreement shall be in writing and shall be deemed to have been duly given when delivered by hand or overnight courier or three days after it has been mailed by United States registered mail, return receipt requested, postage prepaid, addressed to the respective address set forth above in this Agreement, or to such other address as either party may have furnished to the other in writing in accordance herewith.

This Agreement and my rights and duties hereunder shall not be assignable or delegable by me.

The Company may withhold from any amounts payable under this Agreement such Federal, state and local taxes as may be required to be withheld pursuant to any applicable law or regulation.

This Agreement may be executed (including by electronic execution) in any number of counterparts, each of which when so executed shall be deemed an original, but all such counterparts shall constitute one and the same instrument. Delivery of an executed counterpart of this Agreement by electronic mail shall have the same force and effect as the delivery of an original executed counterpart of this Agreement.

Please confirm the foregoing is in accordance with your understanding by signing and returning a copy of this Agreement, whereupon it shall become binding and enforceable in accordance with its terms.

Very truly yours,

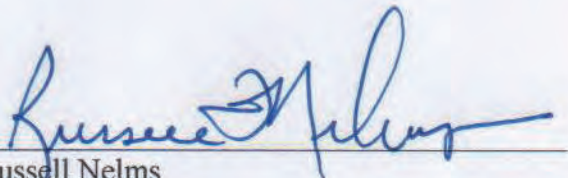
James. P. Seery, Jr.

AGREED AND ACCEPTED

HIGHLAND CAPITAL MANAGEMENT L.P.

By: Strand Advisors, Inc., its general partner

John Dubel
Director
Strand Advisors, Inc.



Russell Nelms
Director
Strand Advisors, Inc.

EXHIBIT 3



CLERK, U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS

ENTERED

**THE DATE OF ENTRY IS ON
THE COURT'S DOCKET**

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

Signed July 16, 2020

Harry H. C. Jones
United States Bankruptcy Judge

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

In re:

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

Debtor.

~~~~~

**Case No. 19-34054**  
**Chapter 11**

**Re: Docket No. 774**

**ORDER APPROVING DEBTOR'S MOTION UNDER  
BANKRUPTCY CODE SECTIONS 105(a) AND 363(b)  
AUTHORIZING RETENTION OF JAMES P. SEERY, JR., AS  
CHIEF EXECUTIVE OFFICER, CHIEF RESTRUCTURING OFFICER, AND  
FOREIGN REPRESENTATIVE NUNC PRO TUNC TO MARCH 15, 2020**

Upon the *Debtor's Motion under Bankruptcy Code Sections 105(a) and 363(b) for Authorization to Retain James P. Seery, Jr., as Chief Executive Officer, Chief Restructuring Officer and Foreign Representative Nunc Pro Tunc To March 15, 2020* (the "Motion"),<sup>1</sup> and the

<sup>1</sup> All terms not otherwise defined herein shall be given the meanings ascribed to them in the Motion.









## **EXHIBIT 1**

# Engagement Agreement

CONFIDENTIAL

Re: Highland Capital Management L.P. (the “Company”)

This letter agreement (“Agreement”) sets forth the terms and conditions of the engagement of the undersigned James P. Seery, Jr. (“I”, “me” or “my”), as Chief Executive Officer (“CEO”) and Chief Restructuring Officer (“CRO”), effective as of March 15, 2020 (the “Commencement Date”), by the Company and its affiliates to perform financial advisory services as detailed below.

Roles:

In those roles, I will be responsible for overall management of the business of the Company in Chapter 11 including, directing the reorganization and restructuring of the Company, monetization of assets, resolution of claims, development and negotiation of a plan of reorganization or liquidation, and implementation of such a plan.

At all times, I will remain a full member of the Board entitled to vote on all matters other than those on which I am conflicted.

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I will devote as much time to this engagement as I determine is required to execute my responsibilities as CEO and CRO. I will have no specific on-site requirements in Dallas, but will be on site as much as I determine is necessary to execute my responsibilities as CEO and CRO, consistent with Covid-19 orders applicable to Dallas and New York City.

#### Limitations on Services

My services under this engagement are limited to those specifically noted in this Agreement and do not include legal, accounting, or tax-related assistance or advisory services. For the avoidance of doubt, I am not providing any legal services in connection with this engagement and will have not any duties as a lawyer to the Company, the Board, or any of the Company's employees. The accuracy and completeness of all information submitted to me by the Company are the sole responsibility of the Company, and I will be entitled to rely on such information without independent investigation or verification.

In my role as CEO and CRO, I will act as an independent professional contractor to the Company and will not be an employee of the Company. I will provide and pay for my own benefits, including medical benefits, by J.P Seery & Co. LLC or otherwise.

#### Fees and Expenses:

In consideration of my acceptance of this engagement and performance of the services pursuant to this Agreement, the Company shall pay the following:

##### 1. Compensation for Services:

- a. Base Compensation: As compensation for my services as CEO and CRO of the Company, the Company shall pay me \$150,000.00 per calendar month ("Base Compensation"). Base Compensation shall be due and payable at the start of each calendar month. Consistent with current Board compensation practice, invoices rendered by me to the Company are due and payable by the Company on receipt. Payment of the Base Compensation will be retroactive to March 15, 2020.
- b. Bonus Compensation/Restructuring Fee:
  - i. The Company has agreed to pay me a restructuring fee upon confirmation of either a Case Resolution Plan or a Monetization Vehicle Plan in each case as defined below (the "Restructuring Fee").
  - ii. Case Resolution Restructuring Plan
    1. On confirmation of any plan or reorganization or liquidation based on resolution of a material amount of the outstanding claims and their respective treatment, even if such plan includes (x) a debtor/creditor trust or similar monetization and claims resolution vehicle, (y) post-confirmation litigation of certain of the claims, and (z) post-confirmation monetization of debtor assets (a "Case Resolution Plan"):
      - a. \$1,000,000 on confirmation of the Case Resolution Plan;
      - b. \$500,000 on the effective date of the Case Resolution Plan; and
      - c. \$750,000 on completion of cash or property distributions to creditors as contemplated by the Case Resolution Plan.

2. Out-of-Pocket Expenses: In addition to the Base and Bonus Compensation, I shall be entitled to reimbursement for actual and reasonable out-of-pocket expenses (“Expenses”) incurred in connection with the provision of services hereunder. Expenses will be billed along with Base Compensation and shall be paid by the Company at the same time. Expenses will be generally consistent with expenses incurred to date as a member of the Board.

## Bankruptcy Court Approval

Notwithstanding anything herein to the contrary, I understand that this Agreement is contingent, in all respects, on the approval of the Bankruptcy Court. I also understand that the Company will seek approval of this Agreement in stages and that the Company will first seek approval of my retention as CEO and CRO and the payment of the Base Compensation and will defer seeking Bankruptcy Court approval of the Restructuring Fee until there have been further developments in the Bankruptcy Case.

## Conflicts and Other Engagements

I am not aware of any potential conflicts of interest based on my understanding of the various parties involved in this matter to date.

The Company is aware that this engagement is not an exclusive engagement of my time, and that I have and will continue to have other business engagements and investments unrelated to the Company. Nothing in this Agreement or otherwise precludes me from representing or working with or for any other person or entity in matters not directly related to the services being provided to the Company under this Agreement. However, I will not take on any engagements directly adverse to the Company during the term of this engagement.

Privilege

I understand that in the course of this engagement, I may become party to or my services may become part of work product of legal counsel to the Company (the Company's in-house and outside counsel are collectively referred to as "Counsel"), and all communications between Counsel and me relating to this engagement shall be protected from disclosure to third parties under the attorney work product doctrine and/or the attorney-client privilege, and, therefore, shall be treated by me as privileged and confidential. I further understand that the Company has the exclusive right to waive the attorney-client privilege, and Counsel has the exclusive right to waive the protections afforded under the attorney work-product doctrine.

#### Termination of Engagement

This Agreement may be terminated at any time by either the Company or by me upon two weeks advance written notice given to the other party. The termination of this Agreement shall not affect my right to receive, and the Company's obligation to pay, any and all Base Compensation and Expenses incurred (even if not billed) prior to the giving of the termination notice; provided, however, that (i) if this Agreement is terminated by me, the amount of Base Compensation owed shall be calculated based on the actual number of days worked during the applicable month and I will return any Base Compensation received in excess of such amount and (ii) if this Agreement is terminated by the Company, Base Compensation shall be deemed fully earned as of the first day of any month. Bonus Compensation shall be earned by me immediately upon termination of me by the Company; provided, however, I shall not be entitled to Bonus Compensation if (a) the Bankruptcy Case is converted to chapter 7 or dismissed; (b) a chapter 11 trustee is appointed in the Bankruptcy Case; (c) I am terminated by the Company for Cause; or (d) I resign prior to confirmation of a plan or court approval of a sale as described in the Fees and Expense/Compensation for Services section hereof. For purposes of this Agreement, "Cause" means any of the following grounds for termination of my engagement, in each case as reasonably determined by the Board within 60 days of the Board becoming aware of the existence of the event or circumstance: (A) fraud, embezzlement, or any act of moral turpitude or willful misconduct on my part; (B) conviction of or the entry of a plea of nolo contendere by me for any felony; (C) the willful breach by me of any material term of this Agreement; or (D) the willful failure or refusal by me to perform my duties to the Company, which, if capable of being cured, is not cured on or before fifteen (15) days after my receipt of written notice from the Company.

#### Conditional Requirement to Seek Further Bankruptcy Court Approval of Agreement

The official committee of unsecured creditors in the Bankruptcy Case (the "Committee") may, upon two weeks advance written notice to the Company, require the Company to file a motion with the Bankruptcy Court on normal notice seeking a continuation of this Agreement and if such motion is not filed, this Agreement will terminate at the expiration of such two week period. If the Company files such motion, I will be entitled to my Base Compensation through and including the date on which a final order is entered on such motion by the Bankruptcy Court. Notwithstanding anything herein to the contrary, the Committee may not deliver such notice to the Company until a date which is more than ninety days following the date the Bankruptcy Court enters an order approving this Agreement.





Failure of any party at any time to require performance of any provision of this Agreement shall not affect the right to require full performance thereof at any time thereafter, and the waiver by any party of a breach of such provisions shall not be taken as or held to be a waiver of any subsequent breach or as nullifying the effectiveness of such provision.

Notices provided for in this Agreement shall be in writing and shall be deemed to have been duly given when delivered by hand or overnight courier or three days after it has been mailed by United States registered mail, return receipt requested, postage prepaid, addressed to the respective address set forth above in this Agreement, or to such other address as either party may have furnished to the other in writing in accordance herewith.

This Agreement and my rights and duties hereunder shall not be assignable or delegable by me.

The Company may withhold from any amounts payable under this Agreement such Federal, state and local taxes as may be required to be withheld pursuant to any applicable law or regulation.

This Agreement may be executed (including by electronic execution) in any number of counterparts, each of which when so executed shall be deemed an original, but all such counterparts shall constitute one and the same instrument. Delivery of an executed counterpart of this Agreement by electronic mail shall have the same force and effect as the delivery of an original executed counterpart of this Agreement.

Please confirm the foregoing is in accordance with your understanding by signing and returning a copy of this Agreement, whereupon it shall become binding and enforceable in accordance with its terms.

Very truly yours,



James P. Seery, Jr.

AGREED AND ACCEPTED

HIGHLAND CAPITAL MANAGEMENT L.P.

By: Strand Advisors, Inc., its general partner

---

John Dubel  
Director  
Strand Advisors, Inc.

---

Russell Nelms  
Director  
Strand Advisors, Inc.

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This Agreement shall be binding upon the parties and their respective successors and assigns, and no other person shall acquire or have any right under or by virtue of this Agreement.

Failure of any party at any time to require performance of any provision of this Agreement shall not affect the right to require full performance thereof at any time thereafter, and the waiver by any party of a breach of such provisions shall not be taken as or held to be a waiver of any subsequent breach or as nullifying the effectiveness of such provision.

Notices provided for in this Agreement shall be in writing and shall be deemed to have been duly given when delivered by hand or overnight courier or three days after it has been mailed by United States registered mail, return receipt requested, postage prepaid, addressed to the respective address set forth above in this Agreement, or to such other address as either party may have furnished to the other in writing in accordance herewith.

This Agreement and my rights and duties hereunder shall not be assignable or delegable by me.

The Company may withhold from any amounts payable under this Agreement such Federal, state and local taxes as may be required to be withheld pursuant to any applicable law or regulation.

This Agreement may be executed (including by electronic execution) in any number of counterparts, each of which when so executed shall be deemed an original, but all such counterparts shall constitute one and the same instrument. Delivery of an executed counterpart of this Agreement by electronic mail shall have the same force and effect as the delivery of an original executed counterpart of this Agreement.

Please confirm the foregoing is in accordance with your understanding by signing and returning a copy of this Agreement, whereupon it shall become binding and enforceable in accordance with its terms.

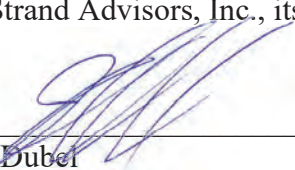
Very truly yours,

James. P. Seery, Jr.

AGREED AND ACCEPTED

**HIGHLAND CAPITAL MANAGEMENT L.P.**

By: Strand Advisors, Inc., its general partner

  
\_\_\_\_\_  
John Dubel  
Director  
Strand Advisors, Inc.

\_\_\_\_\_  
Russell Nelms  
Director  
Strand Advisors, Inc.

000860

This Agreement shall be binding upon the parties and their respective successors and assigns, and no other person shall acquire or have any right under or by virtue of this Agreement.

Failure of any party at any time to require performance of any provision of this Agreement shall not affect the right to require full performance thereof at any time thereafter, and the waiver by any party of a breach of such provisions shall not be taken as or held to be a waiver of any subsequent breach or as nullifying the effectiveness of such provision.

Notices provided for in this Agreement shall be in writing and shall be deemed to have been duly given when delivered by hand or overnight courier or three days after it has been mailed by United States registered mail, return receipt requested, postage prepaid, addressed to the respective address set forth above in this Agreement, or to such other address as either party may have furnished to the other in writing in accordance herewith.

This Agreement and my rights and duties hereunder shall not be assignable or delegable by me.

The Company may withhold from any amounts payable under this Agreement such Federal, state and local taxes as may be required to be withheld pursuant to any applicable law or regulation.

This Agreement may be executed (including by electronic execution) in any number of counterparts, each of which when so executed shall be deemed an original, but all such counterparts shall constitute one and the same instrument. Delivery of an executed counterpart of this Agreement by electronic mail shall have the same force and effect as the delivery of an original executed counterpart of this Agreement.

Please confirm the foregoing is in accordance with your understanding by signing and returning a copy of this Agreement, whereupon it shall become binding and enforceable in accordance with its terms.

Very truly yours,

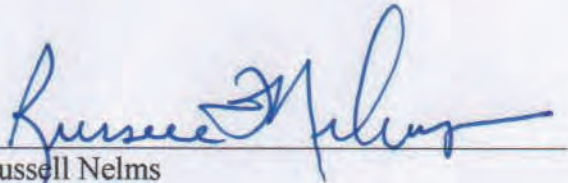
James. P. Seery, Jr.

AGREED AND ACCEPTED

**HIGHLAND CAPITAL MANAGEMENT L.P.**

By: Strand Advisors, Inc., its general partner

\_\_\_\_\_  
John Dubel  
Director  
Strand Advisors, Inc.

  
\_\_\_\_\_  
Russell Nelms  
Director  
Strand Advisors, Inc.

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# EXHIBIT 4



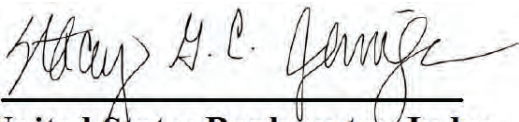
CLERK, U.S. BANKRUPTCY COURT  
NORTHERN DISTRICT OF TEXAS

**ENTERED**

THE DATE OF ENTRY IS ON  
THE COURT'S DOCKET

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

Signed January 9, 2020

  
United States Bankruptcy Judge

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

In re:

HIGHLAND CAPITAL MANAGEMENT, L.P.,<sup>1</sup>

Debtor.

§  
§ Chapter 11  
§  
§ Case No. 19-34054-sgj1  
§  
§ Related to Docket Nos. 7 & 259

**ORDER APPROVING SETTLEMENT WITH OFFICIAL COMMITTEE OF  
UNSECURED CREDITORS REGARDING GOVERNANCE OF THE DEBTOR  
AND PROCEDURES FOR OPERATIONS IN THE ORDINARY COURSE**

Upon the *Motion of the Debtor to Approve Settlement with Official Committee of Unsecured Creditors Regarding Governance of the Debtor and Procedures for Operations in the Ordinary Course* (the “Motion”),<sup>2</sup> filed by the above-captioned debtor and debtor in possession

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

<sup>2</sup> Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in the Motion.



(the “Debtor”); the Court having reviewed the Motion, and finding that (a) the Court has jurisdiction over this matter pursuant to 28 U.S.C. §§157 and 1334, (b) this is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(A), and (c) notice of this Motion having been sufficient under the circumstances and no other or further notice is required; and having determined that the legal and factual bases set forth in the Motion establish just cause for the relief granted herein; and having determined that the relief sought in the Motion is in the best interests of the Debtor and its estate; and after due deliberation and sufficient cause appearing therefore,

IT IS HEREBY ORDERED THAT:

1. The Motion is GRANTED on the terms and conditions set forth herein, and the United States Trustee’s objection to the Motion is OVERRULED.
2. The Term Sheet is approved and the Debtor is authorized to take such steps as may be necessary to effectuate the settlement contained in the Term Sheet, including, but not limited to: (i) implementing the Document Production Protocol; and (ii) implementing the Protocols.
3. The Debtor is authorized (A) to compensate the Independent Directors for their services by paying each Independent Director a monthly retainer of (i) \$60,000 for each of the first three months, (ii) \$50,000 for each of the next three months, and (iii) \$30,000 for each of the following six months, provided that the parties will re-visit the director compensation after the sixth month and (B) to reimburse each Independent Director for all reasonable travel or other expenses, including expenses of counsel, incurred by such Independent Director in connection with its service as an Independent Director in accordance with the Debtor’s expense reimbursement policy as in effect from time to time.

6. All of the rights and obligations of the Debtor referred to in paragraphs 3 and 4 hereof shall be afforded administrative expense priority under 11 U.S.C. § 503(b).

8. Pursuant to the Term Sheet, Mr. James Dondero will remain as an employee of the Debtor, including maintaining his title as portfolio manager for all funds and investment vehicles for which he currently holds that title; provided, however, that Mr. Dondero's responsibilities in such capacities shall in all cases be as determined by the Independent Directors and Mr. Dondero shall receive no compensation for serving in such capacities. Mr. Dondero's role as an employee of the Debtor will be subject at all times to the supervision, direction and authority of the Independent Directors. In the event the Independent Directors determine for any reason that the Debtor shall no longer retain Mr. Dondero as an employee, Mr. Dondero shall resign immediately upon such determination.

10. No entity may commence or pursue a claim or cause of action of any kind against any Independent Director, any Independent Director's agents, or any Independent

Director's advisors relating in any way to the Independent Director's role as an independent director of Strand without the Court (i) first determining after notice that such claim or cause of action represents a colorable claim of willful misconduct or gross negligence against Independent Director, any Independent Director's agents, or any Independent Director's advisors and (ii) specifically authorizing such entity to bring such claim. The Court will have sole jurisdiction to adjudicate any such claim for which approval of the Court to commence or pursue has been granted.

11. Nothing in the Protocols, the Term Sheet or this Order shall affect or impair Jefferies LLC's rights under its Prime Brokerage Customer Agreements with the Debtor and non-debtor Highland Select Equity Master Fund, L.P., or any of their affiliates, including, but not limited to, Jefferies LLC's rights of termination, liquidation and netting in accordance with the terms of the Prime Brokerage Customer Agreements or, to the extent applicable, under the Bankruptcy Code's "safe harbor" protections, including under sections 555 and 561 of the Bankruptcy Code. The Debtor shall not conduct any transactions or cause any transactions to be conducted in or relating to the Jefferies LLC accounts without the express consent and cooperation of Jefferies LLC or, in the event that Jefferies withholds consent, as otherwise ordered by the Court. For the avoidance of doubt, Jefferies LLC shall not be deemed to have waived any rights under the Prime Brokerage Customer Agreements or, to the extent applicable, the Bankruptcy Code's "safe harbor" protections, including under sections 555 and 561 of the Bankruptcy Code, and shall be entitled to take all actions authorized therein without further order of the Court

12. Notwithstanding any stay under applicable Bankruptcy Rules, this Order shall be effective immediately upon entry.

13. The Court shall retain jurisdiction over all matters arising from or related to the interpretation and implementation of this Order, including matters related to the Committee's approval rights over the appointment and removal of the Independent Directors.

**## END OF ORDER ##**



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



**Cause No. 3:21-CV-00842-B**

## ORDER

The Court, having considered Plaintiffs' Motion for Leave to File First Amended Complaint, finds that the Motion should be GRANTED.

IT IS THEREFORE ORDERED that Plaintiff's First Amended Complaint is hereby deemed filed.

SO ORDERED.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 2021.

UNITED STATES DISTRICT JUDGE

000868

## APPENDIX 19



CLERK, U.S. BANKRUPTCY COURT  
NORTHERN DISTRICT OF TEXAS

# ENTERED

**THE DATE OF ENTRY IS ON  
THE COURT'S DOCKET**

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

**Signed January 9, 2020**

Harry L. C. Jones  
United States Bankruptcy Judge

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

In re:

HIGHLAND CAPITAL MANAGEMENT, L.P.,<sup>1</sup>

Debtor.

§ Chapter 11  
§  
§ Case No. 19-34054-sgj11  
§  
§ Related to Docket Nos. 7 & 259  
§

## ORDER APPROVING SETTLEMENT WITH OFFICIAL COMMITTEE OF UNSECURED CREDITORS REGARDING GOVERNANCE OF THE DEBTOR AND PROCEDURES FOR OPERATIONS IN THE ORDINARY COURSE

Upon the *Motion of the Debtor to Approve Settlement with Official Committee of Unsecured Creditors Regarding Governance of the Debtor and Procedures for Operations in the Ordinary Course* (the “Motion”),<sup>2</sup> filed by the above-captioned debtor and debtor in possession

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

<sup>2</sup> Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in the Motion.



(the “Debtor”); the Court having reviewed the Motion, and finding that (a) the Court has jurisdiction over this matter pursuant to 28 U.S.C. §§157 and 1334, (b) this is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(A), and (c) notice of this Motion having been sufficient under the circumstances and no other or further notice is required; and having determined that the legal and factual bases set forth in the Motion establish just cause for the relief granted herein; and having determined that the relief sought in the Motion is in the best interests of the Debtor and its estate; and after due deliberation and sufficient cause appearing therefore,

IT IS HEREBY ORDERED THAT:

1. The Motion is GRANTED on the terms and conditions set forth herein, and the United States Trustee’s objection to the Motion is OVERRULED.

2. The Term Sheet is approved and the Debtor is authorized to take such steps as may be necessary to effectuate the settlement contained in the Term Sheet, including, but not limited to: (i) implementing the Document Production Protocol; and (ii) implementing the Protocols.

3. The Debtor is authorized (A) to compensate the Independent Directors for their services by paying each Independent Director a monthly retainer of (i) \$60,000 for each of the first three months, (ii) \$50,000 for each of the next three months, and (iii) \$30,000 for each of the following six months, provided that the parties will re-visit the director compensation after the sixth month and (B) to reimburse each Independent Director for all reasonable travel or other expenses, including expenses of counsel, incurred by such Independent Director in connection with its service as an Independent Director in accordance with the Debtor’s expense reimbursement policy as in effect from time to time.

4. The Debtor is authorized to guarantee Strand's obligations to indemnify each Independent Director pursuant to the terms of the Indemnification Agreements entered into by Strand with each Independent Director on the date hereof.

5. The Debtor is authorized to purchase an insurance policy to cover the Independent Directors.

6. All of the rights and obligations of the Debtor referred to in paragraphs 3 and 4 hereof shall be afforded administrative expense priority under **11 U.S.C. § 503(b)**.

7. Subject to the Protocols and the Term Sheet, the Debtor is authorized to continue operations in the ordinary course of its business.

8. Pursuant to the Term Sheet, Mr. James Dondero will remain as an employee of the Debtor, including maintaining his title as portfolio manager for all funds and investment vehicles for which he currently holds that title; provided, however, that Mr. Dondero's responsibilities in such capacities shall in all cases be as determined by the Independent Directors and Mr. Dondero shall receive no compensation for serving in such capacities. Mr. Dondero's role as an employee of the Debtor will be subject at all times to the supervision, direction and authority of the Independent Directors. In the event the Independent Directors determine for any reason that the Debtor shall no longer retain Mr. Dondero as an employee, Mr. Dondero shall resign immediately upon such determination.

9. Mr. Dondero shall not cause any Related Entity to terminate any agreements with the Debtor.

10. No entity may commence or pursue a claim or cause of action of any kind against any Independent Director, any Independent Director's agents, or any Independent

Director's advisors relating in any way to the Independent Director's role as an independent director of Strand without the Court (i) first determining after notice that such claim or cause of action represents a colorable claim of willful misconduct or gross negligence against Independent Director, any Independent Director's agents, or any Independent Director's advisors and (ii) specifically authorizing such entity to bring such claim. The Court will have sole jurisdiction to adjudicate any such claim for which approval of the Court to commence or pursue has been granted.

11. Nothing in the Protocols, the Term Sheet or this Order shall affect or impair Jefferies LLC's rights under its Prime Brokerage Customer Agreements with the Debtor and non-debtor Highland Select Equity Master Fund, L.P., or any of their affiliates, including, but not limited to, Jefferies LLC's rights of termination, liquidation and netting in accordance with the terms of the Prime Brokerage Customer Agreements or, to the extent applicable, under the Bankruptcy Code's "safe harbor" protections, including under sections 555 and 561 of the Bankruptcy Code. The Debtor shall not conduct any transactions or cause any transactions to be conducted in or relating to the Jefferies LLC accounts without the express consent and cooperation of Jefferies LLC or, in the event that Jefferies withholds consent, as otherwise ordered by the Court. For the avoidance of doubt, Jefferies LLC shall not be deemed to have waived any rights under the Prime Brokerage Customer Agreements or, to the extent applicable, the Bankruptcy Code's "safe harbor" protections, including under sections 555 and 561 of the Bankruptcy Code, and shall be entitled to take all actions authorized therein without further order of the Court

12. Notwithstanding any stay under applicable Bankruptcy Rules, this Order shall be effective immediately upon entry.

13. The Court shall retain jurisdiction over all matters arising from or related to the interpretation and implementation of this Order, including matters related to the Committee's approval rights over the appointment and removal of the Independent Directors.

**## END OF ORDER ##**



## APPENDIX 20




CLERK, U.S. BANKRUPTCY COURT  
NORTHERN DISTRICT OF TEXAS

**ENTERED**

THE DATE OF ENTRY IS ON  
THE COURT'S DOCKET

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

Signed July 16, 2020

  
United States Bankruptcy Judge

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

**In re:**

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

**Debtor.**

§  
§  
§  
§  
§  
§  
§

**Case No. 19-34054**

**Chapter 11**

**Re: Docket No. 774**

**ORDER APPROVING DEBTOR'S MOTION UNDER  
BANKRUPTCY CODE SECTIONS 105(a) AND 363(b)  
AUTHORIZING RETENTION OF JAMES P. SEERY, JR., AS  
CHIEF EXECUTIVE OFFICER, CHIEF RESTRUCTURING OFFICER, AND  
FOREIGN REPRESENTATIVE NUNC PRO TUNC TO MARCH 15, 2020**

Upon the *Debtor's Motion under Bankruptcy Code Sections 105(a) and 363(b) for Authorization to Retain James P. Seery, Jr., as Chief Executive Officer, Chief Restructuring Officer and Foreign Representative Nunc Pro Tunc To March 15, 2020* (the "Motion"),<sup>1</sup> and the

<sup>1</sup> All terms not otherwise defined herein shall be given the meanings ascribed to them in the Motion.



Court finding that: (i) this Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334; (ii) venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409; (iii) this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2); (iv) due and sufficient notice of the Motion has been given; (v) entry into the Agreement was an exercise of the Debtor's sound business judgment; and (vi) it appearing that the relief requested in the Motion is necessary and in the best interests of the Debtor's estate and creditors; and good and sufficient cause appearing therefor, it is hereby

**ORDERED, ADJUDGED, and DECREED** that:

1. The Motion is **GRANTED**.
2. Pursuant to sections 363(b) and 105(a) of the Bankruptcy Code, the Agreement attached hereto as **Exhibit 1** and all terms and conditions thereof are approved, *nunc pro tunc* to March 15, 2020.
3. The Debtor is hereby authorized to enter into and perform under the Agreement.
4. The Debtor is authorized to indemnify Mr. Seery pursuant to the terms of the Agreement. Mr. Seery is also entitled to any indemnification or other similar provisions under the Debtor's existing or future insurance policies, including any policy tails obtained (or which may be obtained in the future), by the Debtor. The Debtor and Strand are authorized to enter into any agreements necessary to execute or implement the transactions described in this paragraph. For avoidance of doubt and notwithstanding anything to the contrary in this Order, Mr. Seery shall be entitled to any state law indemnity protections to which he may be entitled under applicable law.



**EXHIBIT 1**

**Engagement Agreement**

CONFIDENTIAL

Re: Highland Capital Management L.P. (the “Company”)

This letter agreement (“Agreement”) sets forth the terms and conditions of the engagement of the undersigned James P. Seery, Jr. (“I”, “me” or “my”), as Chief Executive Officer (“CEO”) and Chief Restructuring Officer (“CRO”), effective as of March 15, 2020 (the “Commencement Date”), by the Company and its affiliates to perform financial advisory services as detailed below.

Roles:

In those roles, I will be responsible for overall management of the business of the Company in Chapter 11 including, directing the reorganization and restructuring of the Company, monetization of assets, resolution of claims, development and negotiation of a plan of reorganization or liquidation, and implementation of such a plan.

At all times, I will remain a full member of the Board entitled to vote on all matters other than those on which I am conflicted.

000880









### Indemnification

As a material part of the consideration to me under this Agreement, the Company agrees (i) to indemnify and hold harmless me and any of my affiliates (the “Indemnified Party”), to the fullest extent lawful, from and against any and all losses, claims, costs, damages or liabilities (or actions in respect thereof), joint or several, arising out of or related to this Agreement, my engagement under this Agreement, or any actions taken or omitted to be taken by me or the Company in connection with this Agreement and (ii) to reimburse the Indemnified Party for all expenses (including, without limitation, the reasonable fees and expenses of counsel) as they are incurred in connection with investigating, preparing, pursuing, defending, settling or compromising any action, suit, dispute, inquiry, investigation or proceeding, pending or threatened, brought by or against any person (including, without limitation, any shareholder or derivative action, or any fee dispute), arising out of or relating to this Agreement, or such engagement, or actions. However, the Company shall not be liable under the foregoing indemnity and reimbursement agreement for any loss, claim, damage or liability which is finally judicially determined by a court of competent jurisdiction to have resulted primarily from the willful misconduct or gross negligence of the Indemnified Party.

The indemnification and insurance currently covering my role as a director shall be extended to me and fully cover me as provided therein in my roles as CEO and CRO.

### Miscellaneous

This Agreement (a) constitutes the entire agreement of the parties with respect to the subject matter hereof and supersedes any other communications, understandings or agreements among the parties with respect to the subject matter hereof, and (b) may be modified, amended or supplemented only by written agreement among all the parties hereto.

This Agreement is subject to approval by the Bankruptcy Court. As part of such approval the Company shall request that any such order approving this Agreement contain a provision extending the protections afforded to me as a Board Member pursuant to Paragraph 10 of the Order Approving Settlement with Official Committee of Unsecured Creditors Regarding Governance of the Debtor and Procedures for Operations in the Ordinary Course entered by the Bankruptcy Court on January 9, 2020 [Docket No. 339] to my role as CEO and CRO, which Order prohibits the commencement of any action against me without first obtaining Bankruptcy Court approval to initiate such action.

This Agreement and all controversies arising from or related to performance hereunder shall be governed by and construed in accordance with the laws of the State of New York. The parties hereby submit to the jurisdiction of and venue in the federal and state courts located in New York City and waive any right to trial by jury in connection with any dispute related to this Agreement.

This Agreement shall be binding upon the parties and their respective successors and assigns, and no other person shall acquire or have any right under or by virtue of this Agreement.



This Agreement shall be binding upon the parties and their respective successors and assigns, and no other person shall acquire or have any right under or by virtue of this Agreement.

Failure of any party at any time to require performance of any provision of this Agreement shall not affect the right to require full performance thereof at any time thereafter, and the waiver by any party of a breach of such provisions shall not be taken as or held to be a waiver of any subsequent breach or as nullifying the effectiveness of such provision.

Notices provided for in this Agreement shall be in writing and shall be deemed to have been duly given when delivered by hand or overnight courier or three days after it has been mailed by United States registered mail, return receipt requested, postage prepaid, addressed to the respective address set forth above in this Agreement, or to such other address as either party may have furnished to the other in writing in accordance herewith.

This Agreement and my rights and duties hereunder shall not be assignable or delegable by me.

The Company may withhold from any amounts payable under this Agreement such Federal, state and local taxes as may be required to be withheld pursuant to any applicable law or regulation.

This Agreement may be executed (including by electronic execution) in any number of counterparts, each of which when so executed shall be deemed an original, but all such counterparts shall constitute one and the same instrument. Delivery of an executed counterpart of this Agreement by electronic mail shall have the same force and effect as the delivery of an original executed counterpart of this Agreement.

Please confirm the foregoing is in accordance with your understanding by signing and returning a copy of this Agreement, whereupon it shall become binding and enforceable in accordance with its terms.

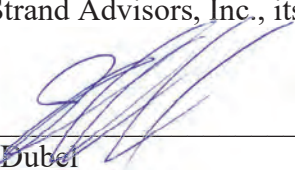
Very truly yours,

James. P. Seery, Jr.

AGREED AND ACCEPTED

**HIGHLAND CAPITAL MANAGEMENT L.P.**

By: Strand Advisors, Inc., its general partner

  
\_\_\_\_\_  
John Dubel  
Director  
Strand Advisors, Inc.

\_\_\_\_\_  
Russell Nelms  
Director  
Strand Advisors, Inc.

000886



This Agreement shall be binding upon the parties and their respective successors and assigns, and no other person shall acquire or have any right under or by virtue of this Agreement.

Failure of any party at any time to require performance of any provision of this Agreement shall not affect the right to require full performance thereof at any time thereafter, and the waiver by any party of a breach of such provisions shall not be taken as or held to be a waiver of any subsequent breach or as nullifying the effectiveness of such provision.

Notices provided for in this Agreement shall be in writing and shall be deemed to have been duly given when delivered by hand or overnight courier or three days after it has been mailed by United States registered mail, return receipt requested, postage prepaid, addressed to the respective address set forth above in this Agreement, or to such other address as either party may have furnished to the other in writing in accordance herewith.

This Agreement and my rights and duties hereunder shall not be assignable or delegable by me.

The Company may withhold from any amounts payable under this Agreement such Federal, state and local taxes as may be required to be withheld pursuant to any applicable law or regulation.

This Agreement may be executed (including by electronic execution) in any number of counterparts, each of which when so executed shall be deemed an original, but all such counterparts shall constitute one and the same instrument. Delivery of an executed counterpart of this Agreement by electronic mail shall have the same force and effect as the delivery of an original executed counterpart of this Agreement.

Please confirm the foregoing is in accordance with your understanding by signing and returning a copy of this Agreement, whereupon it shall become binding and enforceable in accordance with its terms.

Very truly yours,

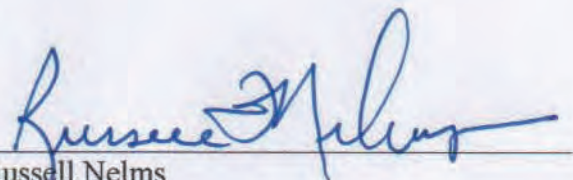
James. P. Seery, Jr.

AGREED AND ACCEPTED

**HIGHLAND CAPITAL MANAGEMENT L.P.**

By: Strand Advisors, Inc., its general partner

\_\_\_\_\_  
John Dubel  
Director  
Strand Advisors, Inc.

  
\_\_\_\_\_  
Russell Nelms  
Director  
Strand Advisors, Inc.

000887

## APPENDIX 21

|            |   |                                                                                                                                                                                                                                                                                                                                    |
|------------|---|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 04/20/2021 | 8 | ELECTRONIC ORDER denying <u>6</u> Motion for Leave to File without prejudice. To the extent a motion for leave to file an amended complaint is required under Rule 15, Plaintiffs may renew their motion after Defendants are served and have appeared. (Ordered by Judge Jane J. Boyle on 4/20/2021) (chmb) (Entered: 04/20/2021) |
|------------|---|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|

## APPENDIX 22



**FOURTH AMENDED AND RESTATED  
AGREEMENT OF LIMITED PARTNERSHIP  
OF  
HIGHLAND CAPITAL MANAGEMENT, L.P.**

THE PARTNERSHIP INTERESTS REPRESENTED BY THIS LIMITED PARTNERSHIP AGREEMENT HAVE NOT BEEN REGISTERED UNDER THE SECURITIES ACT OF 1933 OR UNDER ANY STATE SECURITIES ACTS IN RELIANCE UPON EXEMPTIONS UNDER THOSE ACTS. THE SALE OR OTHER DISPOSITION OF THE PARTNERSHIP INTERESTS IS PROHIBITED UNLESS THAT SALE OR DISPOSITION IS MADE IN COMPLIANCE WITH ALL SUCH APPLICABLE ACTS. ADDITIONAL RESTRICTIONS ON TRANSFER OF THE PARTNERSHIP INTERESTS ARE SET FORTH IN THIS AGREEMENT.

**FOURTH AMENDED AND RESTATED  
AGREEMENT OF LIMITED PARTNERSHIP  
OF  
HIGHLAND CAPITAL MANAGEMENT, L.P.**

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**FOURTH AMENDED AND RESTATED  
AGREEMENT OF LIMITED PARTNERSHIP  
OF  
HIGHLAND CAPITAL MANAGEMENT, L.P.**

THIS FOURTH AMENDED AND RESTATED AGREEMENT OF LIMITED PARTNERSHIP is entered into on this 24<sup>th</sup> day of December, 2015, to be effective as of December 24, 2015, by and among Strand Advisors, Inc., a Delaware corporation ("*Strand*"), as General Partner, the Limited Partners party hereto, and any Person hereinafter admitted as a Limited Partner.

Certain terms used in this Agreement are defined in Article 2.

**ARTICLE 1**

**GENERAL**

**1.1. Continuation.** Subject to the provisions of this Agreement, the Partners hereby continue the Partnership as a limited partnership pursuant to the provisions of the Delaware Act. Except as expressly provided herein, the rights and obligations of the Partners and the administration and termination of the Partnership shall be governed by the Delaware Act.

**1.2. Name.** The name of the Partnership shall be, and the business of the Partnership shall be conducted under the name of Highland Capital Management, L.P. The General Partner, in its sole and unfettered discretion, may change the name of the Partnership at any time and from time to time and shall provide Limited Partners with written notice of such name change within twenty (20) days after such name change.

**1.3. Purpose.** The purpose and business of the Partnership shall be the conduct of any business or activity that may lawfully be conducted by a limited partnership organized pursuant to the Delaware Act. Any or all of the foregoing activities may be conducted directly by the Partnership or indirectly through another partnership, joint venture, or other arrangement.

**1.4. Term.** The Partnership was formed as a limited partnership on July 7, 1997, and shall continue until terminated pursuant to this Agreement.

**1.5. Partnership Offices; Addresses of Partners.**

(a) Partnership Offices. The registered office of the Partnership in the State of Delaware shall be 1013 Centre Road, Wilmington, Delaware 19805-1297, and its registered agent for service of process on the Partnership at that registered office shall be Corporation Service Company, or such other registered office or registered agent as the General Partner may from time to time designate. The principal office of the Partnership shall be 300 Crescent Court, Suite 700, Dallas, Texas 75201, or such other place as the General Partner may from time to time designate. The Partnership may maintain offices at such other place or places as the General Partner deems advisable.

(b) Addresses of Partners. The address of the General Partner is 300 Crescent Court, Suite 700, Dallas, Texas 75201. The address of each Limited Partner shall be the address of that Limited Partner appearing on the books and records of the Partnership. Each Limited Partner agrees to provide the General Partner with prompt written notice of any change in his/her/its address.



## ARTICLE 2

### DEFINITIONS

**2.1. Definitions.** The following definitions shall apply to the terms used in this Agreement, unless otherwise clearly indicated to the contrary in this Agreement:

*“Additional Capital Contribution”* has the meaning set forth in Section 3.1(b) of this Agreement.

*“Adjusted Capital Account Deficit”* means, with respect to any Partner, the deficit balance, if any, in the Capital Account of that Partner as of the end of the relevant Fiscal Year, or other relevant period, giving effect to all adjustments previously made thereto pursuant to Section 3.7 and further adjusted as follows: (i) credit to that Capital Account, any amounts which that Partner is obligated or deemed obligated to restore pursuant to any provision of this Agreement or pursuant to Treasury Regulations Section 1.704-1(b)(2)(ii)(c); (ii) debit to that Capital Account, the items described in Treasury Regulations Sections 1.704-1(b)(2)(ii)(d)(4), (5) and (6); and (iii) to the extent required under the Treasury Regulations, credit to that Capital Account (A) that Partner’s share of “minimum gain” and (B) that Partner’s share of “partner nonrecourse debt minimum gain.” (Each Partner’s share of the minimum gain and partner nonrecourse debt minimum gain shall be determined under Treasury Regulations Sections 1.704-2(g) and 1.704-2(i)(5), respectively.)

*“Affiliate”* means any Person that directly or indirectly controls, is controlled by, or is under common control with the Person in question. As used in this definition, the term *“control”* means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a Person, whether through ownership of voting Securities, by contract or otherwise.

*“Agreement”* means this Fourth Amended and Restated Agreement of Limited Partnership, as it may be amended, supplemented, or restated from time to time.

*“Business Day”* means Monday through Friday of each week, except that a legal holiday recognized as such by the government of the United States or the State of Texas shall not be regarded as a Business Day.

*“Capital Account”* means the capital account maintained for a Partner pursuant to Section 3.7(a).

*“Capital Contribution”* means, with respect to any Partner, the amount of money or property contributed to the Partnership with respect to the interest in the Partnership held by that Person.

*“Certificate of Limited Partnership”* means the Certificate of Limited Partnership filed with the Secretary of State of Delaware by the General Partner, as that Certificate may be amended, supplemented or restated from time to time.

*“Class A Limited Partners”* means those Partners holding a Class A Limited Partnership Interest, as shown on Exhibit A.

*“Class A Limited Partnership Interest”* means a Partnership Interest held by a Partner in its capacity as a Class A Limited Partner.”



**“Class B Limited Partner”** means those Partners holding a Class B Limited Partnership Interest, as shown on Exhibit A.

**“Class B Limited Partnership Interest”** means a Partnership Interest held by a Partner in its capacity as a Class B Limited Partner.”

**“Class B NAV Ratio Trigger Period”** means any period during which the Class B Limited Partner’s aggregate capital contributions, including the original principal balance of the Contribution Note, and reduced by the aggregate amount of distributions to the Class B Limited Partner, exceed 75 percent of the product of the Class B Limited Partner’s Percentage Interest multiplied by the total book value of the Partnership; provided, however, that the General Partner shall only be required to test for a Class B NAV Ratio Trigger Period annually, as of the last day of each calendar year; provided further the General Partner must complete the testing within 180 days of the end of each calendar year; provided further that if the test results in a Class B NAV Ratio Trigger Period, the General Partner may, at its own election, retest at any time to determine the end date of the Class B NAV Ratio Trigger Period.

**“Class C Limited Partner”** means those Partners holding a Class C Limited Partnership Interest, as shown on Exhibit A.

**“Class C Limited Partnership Interest”** means a Partnership Interest held by a Partner in its capacity as a Class C Limited Partner.”

**“Class C NAV Ratio Trigger Period”** means any period during which an amount equal to \$93,000,000.00 reduced by the aggregate amount of distributions to the Class C Limited Partner after the Effective Date exceeds 75 percent of the product of the Class C Limited Partner’s Percentage Interest multiplied by the total book value of the Partnership; provided, however, that the General Partner shall only be required to test for a Class C NAV Ratio Trigger Period annually, as of the last day of each calendar year; provided further the General Partner must complete the testing within 180 days of the end of each calendar year; provided further that if the test results in a Class C NAV Ratio Trigger Period, the General Partner may, at its own election, retest at any time to determine the end date of the Class C NAV Ratio Trigger Period.

**“Code”** means the Internal Revenue Code of 1986, as amended and in effect from time to time.

**“Contribution Note”** means that certain Secured Promissory Note dated December 21, 2015 by and among Hunter Mountain Investment Trust, as maker, and the Partnership as Payee.

**“Default Loan”** has the meaning set forth in Section 3.1(c)(i).

**“Defaulting Partner”** has the meaning set forth in Section 3.1(c).

**“Delaware Act”** means the Delaware Revised Uniform Limited Partnership Act, Part IV, Title C, Chapter 17 of the Delaware Corporation Law Annotated, as it may be amended, supplemented or restated from time to time, and any successor to that Act.

**“Effective Date”** means the date first recited above.

**“Fiscal Year”** has the meaning set forth in Section 3.11(b).



**“Founding Partner Group”** means, all partners holding partnership interests in the Partnership immediately before the Effective Date.

**“General Partner”** means any Person who (i) is referred to as such in the first paragraph of this Agreement, or has become a General Partner pursuant to the terms of this Agreement; and (ii) has not ceased to be a General Partner pursuant to the terms of this Agreement.

**“Limited Partner”** means any Person who (i) is referred to as such in the first paragraph of this Agreement, or has become a Limited Partner pursuant to the terms of this Agreement, and (ii) has not ceased to be a Limited Partner pursuant to the terms of this Agreement.

**“Liquidator”** has the meaning set forth in Section 5.3.

**“Losses”** means, for each Fiscal Year, the losses and deductions of the Partnership determined in accordance with accounting principles consistently applied from year to year employed under the Partnership’s method of accounting and as reported, separately or in the aggregate, as appropriate, on the Partnership’s information tax return filed for federal income tax purposes, plus any expenditures described in Code Section 705(a)(2)(B).

**“Majority Interest”** means the owners of more than fifty percent (50%) of the Percentage Interests of Class A Limited Partners.

**“NAV Ratio Trigger Period”** means a Class B NAV Ratio Trigger Period or a Class C NAV Ratio Trigger Period.

**“Net Increase in Working Capital Accounts”** means the excess of (i) Restricted Cash plus Management and Incentive Fees Receivable plus Other Assets plus Deferred Incentive Fees Receivable less Accounts Payable less Accrued and Other Liabilities as of the end of the period being measured over (ii) Restricted Cash plus Management and Incentive Fees Receivable plus Other Assets plus Deferred Incentive Fees Receivable less Accounts Payable less Accrued and Other Liabilities as of the beginning of the period being measured; provided, however, that amounts within each of the aforementioned categories shall be excluded from the calculation to the extent they are specifically identified as being derived from investing or financing activities. Each of the capitalized terms in this definition shall have the meaning given them in the books and records of the Partnership and appropriate adjustments may be made to the extent the Partnership adds new ledger accounts to its books and records that are current assets or current liabilities.

**“New Issues”** means Securities that are considered to be “new issues,” as defined in the Conduct Rules of the National Association of Securities Dealers, Inc.

**“Nonrecourse Deduction”** has the meaning set forth in Treasury Regulations Section 1.704-2(b)(1), as computed under Treasury Regulations Section 1.704-2(c).

**“Nonrecourse Liability”** has the meaning set forth in Treasury Regulations Section 1.704-2(b)(3).

**“Operating Cash Flow”** means Total Revenue less Total Operating Expenses plus Depreciation & Amortization less Net Increase in Working Capital Accounts year over year. Each of the capitalized terms in this definition shall have the meaning given them in the books and records of the Partnership.

***“Partner”*** means a General Partner or a Limited Partner.

***“Partner Nonrecourse Debt”*** has the meaning set forth in Treasury Regulations Section 1.704-2(b)(4).

***“Partner Nonrecourse Deductions”*** has the meaning set forth in Treasury Regulations Section 1.704-2(i)(2).

***“Partner Nonrecourse Debt Minimum Gain”*** has the meaning set forth in Treasury Regulations Section 1.704-2(i)(5).

***“Partnership”*** means Highland Capital Management, L.P., the Delaware limited partnership established pursuant to this Agreement.

***“Partnership Capital”*** means, as of any relevant date, the net book value of the Partnership’s assets.

***“Partnership Interest”*** means the interest acquired by a Partner in the Partnership including, without limitation, that Partner’s right: (a) to an allocable share of the Profits, Losses, deductions, and credits of the Partnership; (b) to a distributive share of the assets of the Partnership; (c) if a Limited Partner, to vote on those matters described in this Agreement; and (d) if the General Partner, to manage and operate the Partnership.

***“Partnership Minimum Gain”*** has the meaning set forth in Treasury Regulations Section 1.704-2(d).

***“Percentage Interest”*** means the percentage set forth opposite each Partner’s name on Exhibit A as such Exhibit may be amended from time to time in accordance with this Agreement.

***“Person”*** means an individual or a corporation, partnership, trust, estate, unincorporated organization, association, or other entity.

***“Priority Distributions”*** has the meaning set forth in Section 3.9(b).

***“Profits”*** means, for each Fiscal Year, the income and gains of the Partnership determined in accordance with accounting principles consistently applied from year to year employed under the Partnership’s method of accounting and as reported, separately or in the aggregate, as appropriate, on the Partnership’s information tax return filed for federal income tax purposes, plus any income described in Code Section 705(a)(1)(B).

***“Profits Interest Partner”*** means any Person who is issued a Partnership Interest that is treated as a “profits interest” for federal income tax purposes.

***“Purchase Notes”*** means those certain Secured Promissory Notes of even date herewith by and among Hunter Mountain Investment Trust, as maker, and The Dugaboy Investment Trust, The Mark K. Okada, The Mark and Pamela Okada Family Trust – Exempt Trust #1, and The Mark K. Okada, The Mark and Pamela Okada Family Trust – Exempt Trust #2, each as Payees of the respective Secured Promissory Notes.



“**Record Date**” means the date established by the General Partner for determining the identity of Limited Partners entitled to vote or give consent to Partnership action or entitled to exercise rights in respect of any other lawful action of Limited Partners.

“**Second Amended Buy-Sell and Redemption Agreement**” means that certain Second Amended and Restated Buy-Sell and Redemption Agreement, dated December 21, 2015, to be effective as of December 21, 2015 by and between the Partnership and its Partners, as may be amended, supplemented, or restated from time to time.

“**Securities**” means the following: (i) securities of any kind (including, without limitation, “securities” as that term is defined in Section 2(a)(1) of the Securities Act; (ii) commodities of any kind (as that term is defined by the U.S. Securities Laws and the rules and regulations promulgated thereunder); (iii) any contracts for future or forward delivery of any security, commodity or currency; (iv) any contracts based on any securities or group of securities, commodities or currencies; (v) any options on any contracts referred to in clauses (iii) or (iv); or (vi) any evidences of indebtedness (including participations in or assignments of bank loans or trade credit claims). The items set forth in clauses (i) through (vi) herein include, but are not limited to, capital stock, common stock, preferred stock, convertible securities, reorganization certificates, subscriptions, warrants, rights, options, puts, calls, bonds, mutual fund interests, debentures, notes, certificates of deposit, letters of credit, bankers acceptances, trust receipts and other securities of any corporation or other entity, whether readily marketable or not, rights and options, whether granted or written by the Partnership or by others, treasury bills, bonds and notes, any securities or obligations issued or guaranteed by the United States or any foreign country or any state or possession of the United States or any foreign country or any political subdivision or agency or instrumentality of any of the foregoing, and derivatives of any of the foregoing.

“**Securities Act**” means the Securities Act of 1933, as amended, and any successor to such statute.

“**Substitute Limited Partner**” has the meaning set forth in Section 4.6(a).

“**Transfer**” or derivations thereof, of a Partnership Interest means, as a noun, the transfer, sale, assignment, exchange, pledge, hypothecation or other disposition of a Partnership Interest, or any part thereof, directly or indirectly, and as a verb, voluntarily or involuntarily to transfer, sell, assign, exchange, pledge, hypothecate or otherwise dispose of.

“**Treasury Regulations**” means the Department of Treasury Regulations promulgated under the Code, as amended and in effect (including corresponding provisions of succeeding regulations).

**2.2. Other Definitions.** All terms used in this Agreement that are not defined in this Article 2 have the meanings contained elsewhere in this Agreement.

## ARTICLE 3

### FINANCIAL MATTERS

#### 3.1. Capital Contributions.

(a) Initial Capital Contributions. The initial Capital Contribution of each Partner shall be set forth in the books and records of the Partnership.

(b) Additional Capital Contributions.



(i) The General Partner, in its reasonable discretion and for a *bona fide* business purpose, may request in writing that the Founding Partner Group make additional Capital Contributions in proportion to their Percentage Interests (each, an “*Additional Capital Contribution*”).

(ii) Any failure by a Partner to make an Additional Capital Contribution requested under Section 3.1(b)(i) on or before the date on which that Additional Capital Contribution was due shall result in the Partner being in default.

(c) Consequences to Defaulting Partners. In the event a Partner is in default under Section 3.1(b) (a “*Defaulting Partner*”), the Defaulting Partner, in its sole and unfettered discretion, may elect to take either one of the option set forth below.

(i) Default Loans. If the Defaulting Partner so elects, the General Partner shall make a loan to the Defaulting Partner in an amount equal to that Defaulting Partner’s additional capital contribution (a “*Default Loan*”). A Default Loan shall be deemed advanced on the date actually advanced. Default Loans shall earn interest on the outstanding principal amount thereof at a rate equal to the Applicable Federal Mid-Term Rate (determined by the Internal Revenue Service for the month in which the loan is deemed made) from the date actually advanced until the same is repaid in full. The term of any Default Loan shall be six (6) months, unless otherwise extended by the General Partner in its sole and unfettered discretion. If the General Partner makes a Default Loan, the Defaulting Partner shall not receive any distributions pursuant to Section 3.9(a) or Section 5.3 or any proceeds from the Transfer of all or any part of its Partnership Interest while the Default Loan remains unpaid. Instead, the Defaulting Partner’s share of distributions or such other proceeds shall (until all Default Loans and interest thereon shall have been repaid in full) first be paid to the General Partner. Such payments shall be applied first to the payment of interest on such Default Loans and then to the repayment of the principal amounts thereof, but shall be considered, for all other purposes of this Agreement, to have been distributed to the Defaulting Partner. The Defaulting Partner shall be liable for the reasonable fees and expenses incurred by the General Partner (including, without limitation, reasonable attorneys’ fees and disbursements) in connection with any enforcement or foreclosure upon any Default Loan and such costs shall, to the extent enforceable under applicable law, be added to the principal amount of the applicable Default Loan. In addition, at any time during the term of such Default Loan, the Defaulting Partner shall have the right to repay, in full, the Default Loan (including interest and any other charges). If the General Partner makes a Default Loan, the Defaulting Partner shall be deemed to have pledged to the General Partner and granted to the General Partner a continuing first priority security interest in, all of the Defaulting Partner’s Partnership Interest to secure the payment of the principal of, and interest on, such Default Loan in accordance with the provisions hereof, and for such purpose this Agreement shall constitute a security agreement. The Defaulting Partner shall promptly execute, acknowledge and deliver such financing statements, continuation statements or other documents and take such other actions as the General Partner shall request in writing in order to perfect or continue the perfection of such security interest; and, if the Defaulting Partner shall fail to do so within seven (7) days after the Defaulting Partner’s receipt of a notice making demand therefor, the General Partner is hereby appointed the attorney-in-fact of, and is hereby authorized on behalf of, the Defaulting Partner, to execute, acknowledge and deliver all such documents and take all such other actions as may be required to perfect such security interest. Such appointment and authorization are coupled with an interest and shall be irrevocable. The General Partner shall, prior to exercising any right or remedy (whether at law, in equity or pursuant to the terms hereof) available to it in connection with such security interest, provide to the Defaulting Partner a notice, in reasonable detail, of the right or remedy to be exercised and the intended timing of such exercise which shall not be less than five (5) days following the date of such notice.



(ii) Reduction of Percentage Interest. If the Defaulting Partner does not elect to obtain a Default Loan pursuant to Section 3.1(c)(i), the General Partner shall reduce the Defaulting Partner's Percentage Interest in accordance with the following formula:

The Defaulting Partner's new Percentage Interest shall equal the product of (1) the Defaulting Partner's current Percentage Interest, multiplied by (2) the quotient of (a) the current Capital Account of the Defaulting Partner (with such Capital Account determined after taking into account a revaluation of the Capital Accounts immediately prior to such determination), divided by (b) the sum of (i) the current Capital Account of the Defaulting Partner (with such Capital Account determined after taking into account a revaluation of the Capital Accounts immediately prior to such determination), plus (ii) the amount of the additional capital contribution that such Defaulting Partner failed to make when due.

To the extent any downward adjustment is made to the Percentage Interest of a Partner pursuant to this Section 3.1(c)(ii), any resulting benefit shall accrue to the Partners (other than the Defaulting Partner) in proportion to their respective Percentage Interests.

### **3.2. Allocations of Profits and Losses.**

(a) Allocations of Profits. Except as provided in Sections 3.4, 3.5, and 3.6, Profits for any Fiscal Year will be allocated to the Partners as follows:

(i) First, to the Partners until cumulative Profits allocated under this Section 3.2(a)(i) for all prior periods equal the cumulative Losses allocated to the Partners under Section 3.2(b)(iii) for all prior periods in the inverse order in which such Losses were allocated; and

(ii) Next, to the Partners until cumulative Profits allocated under this Section 3.2(a)(ii) for all prior periods equal the cumulative Losses allocated to the Partners under Section 3.2(b)(ii) for all prior periods in the inverse order in which such Losses were allocated; and

(iii) Then, to all Partners in proportion to their respective Percentage Interests.

(b) Allocations of Losses. Except as provided in Sections 3.4, 3.5, and 3.6, Losses for any Fiscal Year will be will be allocated as follows:

(i) First, to the Partners until cumulative Losses allocated under this Section 3.2(b)(i) for all prior periods equal the cumulative Profits allocated to the Partners under Section 3.2(a)(iii) for all prior periods in the inverse order in which such Profits were allocated; and

(ii) Next, to the Partners in proportion to their respective positive Capital Account balances until the aggregate Capital Account balances of the Partners (excluding any negative Capital Account balances) equal zero; *provided, however*, losses shall first be allocated to reduce amounts that were last allocated to the Capital Accounts of the Partners; and

(iii) Then, to all Partners in proportion to their respective Percentage Interests.



(c) Limitation on Loss Allocations. If any allocation of Losses would cause a Limited Partner to have an Adjusted Capital Account Deficit, those Losses instead shall be allocated to the General Partner.

**3.3. Allocations on Transfers.** Taxable items of the Partnership attributable to a Partnership Interest that has been Transferred (including the simultaneous decrease in the Partnership Interest of existing Partners resulting from the admission of a new Partner) shall be allocated in accordance with Section 4.3(d).

**3.4. Special Allocations.** If the requisite stated conditions or facts are present, the following special allocations shall be made in the following order:

(a) Partnership Minimum Gain Chargeback. Notwithstanding any other provision of this Article 3, if there is a net decrease in Partnership Minimum Gain during any taxable year or other period for which allocations are made, prior to any other allocation under this Agreement, each Partner shall be specially allocated items of Partnership income and gain for that period (and, if necessary, subsequent periods) in proportion to, and to the extent of, an amount equal to that Partner's share of the net decrease in Partnership Minimum Gain during that year determined in accordance with Treasury Regulations Section 1.704-2(g)(2). The items to be allocated shall be determined in accordance with Treasury Regulations Section 1.704-2(g). This Section 3.4(a) is intended to comply with the partnership minimum gain chargeback requirements of the Treasury Regulations and shall be subject to all exceptions provided therein.

(b) Partner Nonrecourse Debt Minimum Gain Chargeback. Notwithstanding any other provision of this Article 3 (other than Section 3.4(a)), if there is a net decrease in Partner Nonrecourse Debt Minimum Gain with respect to a Partner Nonrecourse Debt during any taxable year or other period for which allocations are made, any Partner with a share of such Partner Nonrecourse Debt Minimum Gain as of the beginning of the year shall be specially allocated items of Partnership income and gain for that period (and, if necessary, subsequent periods) in an amount equal to that Partner's share of the net decrease in the Partner Nonrecourse Debt Minimum Gain during that year determined in accordance with Treasury Regulations Section 1.704-2(g)(2). The items to be so allocated shall be determined in accordance with Treasury Regulations Section 1.704-2(g). This Section 3.4(b) is intended to comply with the partner nonrecourse debt minimum gain chargeback requirements of the Treasury Regulations, shall be interpreted consistently with the Treasury Regulations and shall be subject to all exceptions provided therein.

(c) Qualified Income Offset. If a Partner unexpectedly receives any adjustments, allocations or distributions described in Treasury Regulations Sections 1.704-1(b)(2)(ii)(d)(4), (d)(5) or (d)(6), then items of Partnership income and gain shall be specially allocated to each such Partner in an amount and manner sufficient to eliminate, to the extent required by the Treasury Regulations, the Adjusted Capital Account Deficit of the Partner as quickly as possible; *provided, however*, an allocation pursuant to this Section 3.4(c) shall be made if and only to the extent that the Partner would have an Adjusted Capital Account Deficit after all other allocations provided for in this Article 3 have been tentatively made without considering this Section 3.4(c).

(d) Gross Income Allocation. If a Partner has a deficit Capital Account at the end of any Fiscal Year of the Partnership that exceeds the sum of (i) the amount the Partner is obligated to restore, and (ii) the amount the Partner is deemed to be obligated to restore pursuant to the penultimate sentences of Treasury Regulations Sections 1.704-2(g)(1) and 1.704-2(i)(5), then each such Partner shall be specially allocated items of income and gain of the Partnership in the amount of the excess as quickly as possible; *provided, however*, an allocation pursuant to this Section 3.4(d) shall be made if and only to



the extent that the Partner would have a deficit Capital Account in excess of that sum after all other allocations provided for in this Article 3 have been tentatively made without considering Section 3.4(c) or 3.4(d).

(e) Nonrecourse Deductions. Nonrecourse Deductions for any taxable year or other period for which allocations are made shall be allocated among the Partners in accordance with their Percentage interests.

(f) Partner Nonrecourse Deductions. Notwithstanding anything to the contrary in this Agreement, any Partner Nonrecourse Deductions for any taxable year or other period for which allocations are made will be allocated to the Partner who bears the economic risk of loss with respect to the Partner Nonrecourse Debt to which the Partner Nonrecourse Deductions are attributable in accordance with Treasury Regulations Section 1.704-2(i).

(g) Section 754 Adjustments. To the extent an adjustment to the adjusted tax basis of any asset of the Partnership under Code Section 734(b) or Code Section 743(b) is required, pursuant to Treasury Regulations Section 1.704-1(b)(2)(iv)(m), to be taken into account in determining Capital Accounts, the amount of the adjustment to the Capital Accounts shall be treated as an item of gain (if the adjustment increases the basis of the asset) or loss (if the adjustment decreases the basis of the asset) and that gain or loss shall be specially allocated to the Partners in a manner consistent with the manner in which their Capital Accounts are required to be adjusted pursuant to that Section of the Treasury Regulations.

(h) Section 481 Adjustments. Any allocable items of income, gain, expense, deduction or credit required to be made by Section 481 of the Code as the result of the sale, transfer, exchange or issuance of a Partnership Interest will be specially allocated to the Partner receiving said Partnership Interest whether such items are positive or negative in amount.

**3.5. Curative Allocations.** The “*Basic Regulatory Allocations*” consist of (i) the allocations pursuant to Section 3.2(c), and (ii) the allocations pursuant to Sections 3.4. Notwithstanding any other provision of this Agreement, the Basic Regulatory Allocations shall be taken into account in allocating items of income, gain, loss and deduction among the Partners so that, to the extent possible, the net amount of the allocations of other items and the Basic Regulatory Allocations to each Partner shall be equal to the net amount that would have been allocated to each such Partner if the Basic Regulatory Allocations had not occurred. For purposes of applying the foregoing sentence, allocations pursuant to this Section 3.5 shall be made with respect to allocations pursuant to Section 3.4 (g) and (h) only to the extent that it is reasonably determined that those allocations will otherwise be inconsistent with the economic agreement among the Partners. To the extent that a special allocation under Section 3.4 is determined not to comply with applicable Treasury Regulations, then the Partners intend that the items shall be allocated in accordance with the Partners’ varying Percentage Interests throughout each tax year during which such items are recognized for tax purposes.

**3.6. Code Section 704(c) Allocations.** In accordance with Code Section 704(c) and the Treasury Regulations thereunder, income, gain, loss and deduction with respect to property contributed to the capital of the Partnership shall, solely for tax purposes, be allocated among the Partners so as to take account of any variation at the time of the contribution between the tax basis of the property to the Partnership and the fair market value of that property. Except as otherwise provided herein, any elections or other decisions relating to those allocations shall be made by the General Partner in any manner that reasonably reflects the purpose and intent of this Agreement. Allocations of income, gain, loss and deduction pursuant to this Section 3.6 are solely for purposes of federal, state and local taxes and shall not affect, or in any way be taken into account in computing, the Capital Account of any Partner or the share



of Profits, Losses, other tax items or distributions of any Partner pursuant to any provision of this Agreement.

### 3.7. Capital Accounts.

(a) Maintenance of Capital Accounts. The Partnership shall establish and maintain a separate capital account ("Capital Account") for each Partner in accordance with the rules of Treasury Regulations Section 1.704-1(b)(2)(iv), subject to and in accordance with the provisions set forth in this Section 3.7.

(i) The Capital Account balance of each Partner shall be credited (increased) by (A) the amount of cash contributed by that Partner to the capital of the Partnership, (B) the fair market value of property contributed by that Partner to the capital of the Partnership (net of liabilities secured by that contributed property that the Partnership assumes or takes subject to under Code Section 752), and (C) that Partner's allocable share of Profits and any items in the nature of income or gain which are specially allocated pursuant to Sections 3.4 and 3.5; and

(ii) The Capital Account balance of each Partner shall be debited (decreased) by (A) the amount of cash distributed to that Partner by the Partnership, (B) the fair market value of property distributed to that Partner by the Partnership (net of liabilities secured by that distributed property that such Partner assumes or takes subject to under Code Section 752), (C) that Partner's allocable share of expenditures of the Partnership described in Code Section 705(a)(2)(B), and (D) that Partner's allocable share of Losses and any items in the nature of expenses or losses which are specially allocated pursuant to Sections 3.2, 3.4 and 3.5.

The provisions of this Section 3.7 and the other provisions of this Agreement relating to the maintenance of Capital Accounts have been included in this Agreement to comply with Code Section 704(b) and the Treasury Regulations promulgated thereunder and will be interpreted and applied in a manner consistent with those provisions. The General Partner may modify the manner in which the Capital Accounts are maintained under this Section 3.7 in order to comply with those provisions, as well as upon the occurrence of events that might otherwise cause this Agreement not to comply with those provisions.

(b) Negative Capital Accounts. If any Partner has a deficit balance in its Capital Account, that Partner shall have no obligation to restore that negative balance or to make any Capital Contribution by reason thereof, and that negative balance shall not be considered an asset of the Partnership or of any Partner.

(c) Interest. No interest shall be paid by the Partnership on Capital Contributions or on balances in Capital Accounts.

(d) No Withdrawal. No Partner shall be entitled to withdraw any part of his/her/its Capital Contribution or his/her/its Capital Account or to receive any distribution from the Partnership, except as provided in Section 3.9 and Article 5.

(e) Loans From Partners. Loans by a Partner to the Partnership shall not be considered Capital Contributions.

(f) Revaluations. The Capital Accounts of the Partners shall not be "booked-up" or "booked-down" to their fair market values under Treasury Regulations Section 1.704(c)-1(b)(2)(iv)(f) or otherwise.



**3.8. Distributive Share for Tax Purpose.** All items of income, deduction, gain, loss or credit that are recognized for federal income tax purposes will be allocated among the Partners in accordance with the allocations of Profits and Losses hereunder as determined by the General Partner in its sole and unfettered discretion. Notwithstanding the foregoing, the General Partner may (i) as to each New Issue, specially allocate to the Partners who were allocated New Issue Profit from that New Issue any short-term capital gains realized during the Fiscal Year upon the disposition of such New Issue during that Fiscal Year, and (ii) specially allocate items of gain (or loss) to Partners who withdraw capital during any Fiscal Year in a manner designed to ensure that each withdrawing Partner is allocated gain (or loss) in an amount equal to the difference between that Partner's Capital Account balance (or portion thereof being withdrawn) at the time of the withdrawal and the tax basis for his/her/ its Partnership Interest at that time (or proportionate amount thereof); *provided, however*, that the General Partner may, without the consent of any other Partner, (a) alter the allocation of any item of taxable income, gain, loss, deduction or credit in any specific instance where the General Partner, in its sole and unfettered discretion, determines such alteration to be necessary or appropriate to avoid a materially inequitable result (*e.g.*, where the allocation would create an inappropriate tax liability); and/or (b) adopt whatever other method of allocating tax items as the General Partner determines is necessary or appropriate in order to be consistent with the spirit and intent of the Treasury Regulations under Code Sections 704(b) and 704(c).

**3.9. Distributions.**

(a) General. The General Partner may make such pro rata or non-pro rata distributions as it may determine in its sole and unfettered discretion, without being limited to current or accumulated income or gains, but no such distribution shall be made out of funds required to make current payments on Partnership indebtedness; provided, however, that the General Partner may not make non-pro rata distributions under this Section 3.9(a) during an NAV Ratio Trigger Period without the consent of the Class B Limited Partner (in the case of a Class B NAV Ratio Trigger Period) and/or the Class C Limited Partner (in the case of a Class C NAV Ratio Trigger Period); provided, further this provision should not be interpreted to limit in any way the General Partner's ability to make non-pro rata tax distributions under Section 3.9(c) and Section 3.9(f). The Partnership has entered into one or more credit facilities with financial institutions that may limit the amount and timing of distributions to the Partners. Thus, the Partners acknowledge that distributions from the Partnership may be limited. Any distributions made to the Class B Limited Partner or the Class C Limited Partner pursuant to Section 3.9(b) shall reduce distributions otherwise allocable to such Partners under this Section 3.9(a) until such aggregate reductions are equal to the aggregate distributions made to the Class B Partners and the Class C Partners under Section 3.9(b).

(b) Priority Distributions. Prior to the distribution of any amounts to Partners pursuant to Section 3.9(a), and notwithstanding any other provision in this Agreement to the contrary, the Partnership shall make the following distributions ("**Priority Distributions**") pro-rata among the Class B Limited Partner and the Class C Limited Partner in accordance with their relative Percentage Interests:

(i) No later than March 31<sup>st</sup> of each calendar year, commencing March 31, 2017, an amount equal to \$1,600,000.00;

(ii) No later than March 31<sup>st</sup> of each year, commencing March 31, 2017, an amount equal to three percent (3%) of the Partnership's investment gain for the prior year, as reflected in the Partnership's books and records within ledger account number 90100 plus three percent (3%) of the gross realized investment gains for the prior year of Highland Select Equity Fund, as reflected in its books and records;



(iii) No later than March 31<sup>st</sup> of each year, commencing March 31, 2017, an amount equal to ten percent (10%) of the Partnership's Operating Cash Flow for the prior year; and

(iv) No later than December 24<sup>th</sup> of each year, commencing December 24, 2016, an amount equal to the aggregate annual principal and interest payments on the Purchase Notes for the then current year.

(c) Tax Distributions. The General Partner may, in its sole discretion, declare and make cash distributions pursuant hereto to the Partners to allow the federal and state income tax attributable to the Partnership's taxable income that is passed through the Partnership to the Partners to be paid by such Partners (a "***Tax Distribution***"). The General Partner may, in its discretion, make Tax Distributions to the Founding Partner Group without also making Tax Distributions to other Partners; provided, however, that if the General Partner makes Tax Distributions to the Founding Partner Group, Tax Distributions must also be made the Class B Limited Partner to the extent the Class B Limited Partner provides the Partnership with documentation showing it is subject to an entity-level federal income tax obligation. Notwithstanding anything else in this Agreement, the General Partner may declare and pay Tax Distributions even if such Tax Distributions cause the Partnership to be unable to make Priority Distributions under Section 3.9(b).

(d) Payments Not Deemed Distributions. Any amounts paid pursuant to Sections 4.1(e) or 4.1(h) shall not be deemed to be distributions for purposes of this Agreement.

(e) Withheld Amounts. Notwithstanding any other provision of this Section 3.9 to the contrary, each Partner hereby authorizes the Partnership to withhold and to pay over, or otherwise pay, any withholding or other taxes payable by the Partnership with respect to that Partner as a result of that Partner's participation in the Partnership. If and to the extent that the Partnership shall be required to withhold or pay any such taxes, that Partner shall be deemed for all purposes of this Agreement to have received a payment from the Partnership as of the time that withholding or tax is paid, which payment shall be deemed to be a distribution with respect to that Partner's Partnership Interest to the extent that the Partner (or any successor to that Partner's Partnership Interest) is then entitled to receive a distribution. To the extent that the aggregate of such payments to a Partner for any period exceeds the distributions to which that Partner is entitled for that period, the amount of such excess shall be considered a loan from the Partnership to that Partner. Such loan shall bear interest (which interest shall be treated as an item of income to the Partnership) at the "Applicable Federal Rate" (as defined in the Code), as determined hereunder from time to time, until discharged by that Partner by repayment, which may be made in the sole and unfettered discretion of the General Partner out of distributions to which that Partner would otherwise be subsequently entitled. Any withholdings authorized by this Section 3.9(d) shall be made at the maximum applicable statutory rate under the applicable tax law unless the General Partner shall have received an opinion of counsel or other evidence satisfactory to the General Partner to the effect that a lower rate is applicable, or that no withholding is applicable.

(f) Special Tax Distributions. The Partnership shall, upon request of such Founding Partner, make distributions to the Founding Partners (or loans, at the election of the General Partner) in an amount necessary for each of them to pay their respective federal income tax obligations incurred through the effective date of the Third Amended and Restated Agreement of Limited Partnership of Highland Capital Management, L.P., the predecessor to this Agreement.

(g) Tolling of Priority Distributions. In the event of a "Honis Trigger Event," as defined in the Second Amended Buy-Sell and Redemption Agreement, the Partnership shall not make any distributions, including priority distributions under Section 3.9(b), to the Class B Limited Partner or the Class C Limited Partner until such time as a replacement trust administrator, manager and general partner,



as applicable, acceptable to the Partnership in its sole discretion, as indicated by an affirmative vote of consent by a Majority Interest, shall be appointed to the Class B Limited Partner/Class C Limited Partner and any of its direct or indirect owners that have governing documents directly affected by a Honis Trigger Event.

### **3.10. Compensation and Reimbursement of General Partner.**

(a) Compensation. The General Partner and any Affiliate of the General Partner shall receive no compensation from the Partnership for services rendered pursuant to this Agreement or any other agreements unless approved by a Majority Interest; provided, however, that no compensation above five million dollars per year may be approved, even by a Majority Interest, during a NAV Ratio Trigger Period.

(b) Reimbursement for Expenses. In addition to amounts paid under other Sections of this Agreement, the General Partner and its Affiliates shall be reimbursed for all expenses, disbursements, and advances incurred or made, and all fees, deposits, and other sums paid in connection with the organization and operation of the Partnership, the qualification of the Partnership to do business, and all related matters.

### **3.11. Books, Records, Accounting, and Reports.**

(a) Records and Accounting. The General Partner shall keep or cause to be kept appropriate books and records with respect to the Partnership's business, which shall at all times be kept at the principal office of the Partnership or such other office as the General Partner may designate for such purpose. The books of the Partnership shall be maintained for financial reporting purposes on the accrual basis or on a cash basis, as the General Partner shall determine in its sole and unfettered discretion, in accordance with generally accepted accounting principles and applicable law. Upon reasonable request, the Class B Limited Partner or the Class C Limited Partner may inspect the books and records of the Partnership.

(b) Fiscal Year. The fiscal year of the Partnership shall be the calendar year unless otherwise determined by the General Partner in its sole and unfettered discretion.

(c) Other Information. The General Partner may release information concerning the operations of the Partnership to any financial institution or other Person that has loaned or may loan funds to the Partnership or the General Partner or any of its Affiliates, and may release such information to any other Person for reasons reasonably related to the business and operations of the Partnership or as required by law or regulation of any regulatory body.

(d) Distribution Reporting to Class B Limited Partner and Class C Limited Partner. Upon request, the Partnership shall provide the Class B Limited Partner and/or the Class C Limited Partner information on any non-pro rata distributions made under Section 3.9 to Partners other than the Partner requesting the information.

### **3.12. Tax Matters.**

(a) Tax Returns. The General Partner shall arrange for the preparation and timely filing of all returns of Partnership income, gain, loss, deduction, credit and other items necessary for federal, state and local income tax purposes. The General Partner shall deliver to each Partner as copy of his/her/its IRS Form K-1 as soon as practicable after the end of the Fiscal Year, but in no event later than October 1. The classification, realization, and recognition of income, gain, loss, deduction, credit and



other items shall be on the cash or accrual method of accounting for federal income tax purposes, as the General Partner shall determine in its sole and unfettered discretion. The General Partner in its sole and unfettered discretion may pay state and local income taxes attributable to operations of the Partnership and treat such taxes as an expense of the Partnership.

(b) Tax Elections. Except as otherwise provided herein, the General Partner shall, in its sole and unfettered discretion, determine whether to make any available tax election.

(c) Tax Controversies. Subject to the provisions hereof, the General Partner is designated the Tax Matters Partner (as defined in Code Section 6231), and is authorized and required to represent the Partnership, at the Partnership's expense, in connection with all examinations of the Partnership's affairs by tax authorities, including resulting administrative and judicial proceedings, and to expend Partnership funds for professional services and costs associated therewith. Each Partner agrees to cooperate with the General Partner in connection with such proceedings.

(d) Taxation as a Partnership. No election shall be made by the Partnership or any Partner for the Partnership to be excluded from the application of any of the provisions of Subchapter K, Chapter 1 of Subtitle A of the Code or from any similar provisions of any state tax laws.

## ARTICLE 4

### RIGHTS AND OBLIGATIONS OF PARTNERS

**4.1. Rights and Obligations of the General Partner.** In addition to the rights and obligations set forth elsewhere in this Agreement, the General Partner shall have the following rights and obligations:

(a) Management. The General Partner shall conduct, direct, and exercise full control of over all activities of the Partnership. Except as otherwise expressly provided in this Agreement, all management powers over the business and affairs of the Partnership shall be exclusively vested in the General Partner, and Limited Partners shall have no right of control over the business and affairs of the Partnership. In addition to the powers now or hereafter granted to a general partner of a limited partnership under applicable law or that are granted to the General Partner under any provision of this Agreement, the General Partner shall have full power and authority to do all things deemed necessary or desirable by it to conduct the business of the Partnership, including, without limitation: (i) the determination of the activities in which the Partnership will participate; (ii) the performance of any and all acts necessary or appropriate to the operation of any business of the Partnership (including, without limitation, purchasing and selling any asset, any debt instruments, any equity interests, any commercial paper, any note receivables and any other obligations); (iii) the procuring and maintaining of such insurance as may be available in such amounts and covering such risks as are deemed appropriate by the General Partner; (iv) the acquisition, disposition, sale, mortgage, pledge, encumbrance, hypothecation, of exchange of any or all of the assets of the Partnership; (v) the execution and delivery on behalf of, and in the name of the Partnership, deeds, deeds of trust, notes, leases, subleases, mortgages, bills of sale and any and all other contracts or instruments necessary or incidental to the conduct of the Partnership's business; (vi) the making of any expenditures, the borrowing of money, the guaranteeing of indebtedness and other liabilities, the issuance of evidences of indebtedness, and the incurrence of any obligations it deems necessary or advisable for the conduct of the activities of the Partnership, including, without limitation, the payment of compensation and reimbursement to the General Partner and its Affiliates pursuant to Section 3.10; (vii) the use of the assets of the Partnership (including, without limitation, cash on hand) for any Partnership purpose on any terms it sees fit, including, without limitation, the financing of operations of the Partnership, the lending of funds to other Persons, and the repayment of obligations



of the Partnership; (viii) the negotiation, execution, and performance of any contracts that it considers desirable, useful, or necessary to the conduct of the business or operations of the Partnership or the implementation of the General Partner's powers under this Agreement; (ix) the distribution of Partnership cash or other assets; (x) the selection, hiring and dismissal of employees, attorneys, accountants, consultants, contractors, agents and representatives and the determination of their compensation and other terms of employment or hiring; (xi) the formation of any further limited or general partnerships, joint ventures, or other relationships that it deems desirable and the contribution to such partnerships, ventures, or relationships of assets and properties of the Partnership; and (xii) the control of any matters affecting the rights and obligations of the Partnership, including, without limitation, the conduct of any litigation, the incurring of legal expenses, and the settlement of claims and suits.

(b) Certificate of Limited Partnership. The General Partner caused the Certificate of Limited Partnership of the Partnership to be filed with the Secretary of State of Delaware as required by the Delaware Act and shall cause to be filed such other certificates or documents (including, without limitation, copies, amendments, or restatements of this Agreement) as may be determined by the General Partner to be reasonable and necessary or appropriate for the formation, qualification, or registration and operation of a limited partnership (or a partnership in which Limited Partners have limited liability) in the State of Delaware and in any other state where the Partnership may elect to do business.

(c) Reliance by Third Parties. Notwithstanding any other provision of this Agreement to the contrary, no lender or purchaser or other Person, including any purchaser of property from the Partnership or any other Person dealing with the Partnership, shall be required to verify any representation by the General Partner as to its authority to encumber, sell, or otherwise use any assets or properties of the Partnership, and any such lender, purchaser, or other Person shall be entitled to rely exclusively on such representations and shall be entitled to deal with the General Partner as if it were the sole party in interest therein, both legally and beneficially. Each Limited Partner hereby waives any and all defenses or other remedies that may be available against any such lender, purchaser, or other Person to contest, negate, or disaffirm any action of the General Partner in connection with any such sale or financing. In no event shall any Person dealing with the General Partner or the General Partner's representative with respect to any business or property of the Partnership be obligated to ascertain that the terms of this Agreement have been complied with, and each such Person shall be entitled to rely on the assumptions that the Partnership has been duly formed and is validly in existence. In no event shall any such Person be obligated to inquire into the necessity or expedience of any act or action of the General Partner or the General Partner's representative, and every contract, agreement, deed, mortgage, security agreement, promissory note, or other instrument or document executed by the General Partner or the General Partner's representative with respect to any business or property of the Partnership shall be conclusive evidence in favor of any and every Person relying thereon or claiming thereunder that (i), at the time of the execution and delivery thereof, this Agreement was in full force and effect; (ii) such instrument or document was duly executed in accordance with the terms and provisions of this Agreement and is binding upon the Partnership; and (iii) the General Partner or the General Partner's representative was duly authorized and empowered to execute and deliver any and every such instrument or document for and on behalf of the Partnership.

(d) Partnership Funds. The funds of the Partnership shall be deposited in such account or accounts as are designated by the General Partner. The General Partner may, in its sole and unfettered discretion, deposit funds of the Partnership in a central disbursing account maintained by or in the name of the General Partner, the Partnership, or any other Person into which funds of the General Partner, the Partnership, or other Persons are also deposited; *provided, however*, at all times books of account are maintained that show the amount of funds of the Partnership on deposit in such account and interest accrued with respect to such funds as credited to the Partnership. The General Partner may use the funds of the Partnership as compensating balances for its benefit; *provided, however*, such funds do



not directly or indirectly secure, and are not otherwise at risk on account of, any indebtedness or other obligation of the General Partner or any director, officer, employee, agent, representative, or Affiliate thereof. Nothing in this Section 4.1(d) shall be deemed to prohibit or limit in any manner the right of the Partnership to lend funds to the General Partner or any Affiliate thereof pursuant to Section 4.1(e)(i). All withdrawals from or charges against such accounts shall be made by the General Partner or by its representatives. Funds of the Partnership may be invested as determined by the General Partner in accordance with the terms and provisions of this Agreement.

(e) Loans to or from General Partner; Contracts with Affiliates; Joint Ventures.

(i) The General Partner or any Affiliate of the General Partner may lend to the Partnership funds needed by the Partnership for such periods of time as the General Partner may determine; *provided, however*, the General Partner or its Affiliate may not charge the Partnership interest at a rate greater than the rate (including points or other financing charges or fees) that would be charged the Partnership (without reference to the General Partner's financial abilities or guaranties) by unrelated lenders on comparable loans. The Partnership shall reimburse the General Partner or its Affiliate, as the case may be, for any costs incurred by the General Partner or that Affiliate in connection with the borrowing of funds obtained by the General Partner or that Affiliate and loaned to the Partnership. The Partnership may loan funds to the General Partner and any member of the Founding Partner Group at the General Partner's sole and exclusive discretion.

(ii) The General Partner or any of its Affiliates may enter into an agreement with the Partnership to render services, including management services, for the Partnership. Any service rendered for the Partnership by the General Partner or any Affiliate thereof shall be on terms that are fair and reasonable to the Partnership.

(iii) The Partnership may Transfer any assets to joint ventures or other partnerships in which it is or thereby becomes a participant upon terms and subject to such conditions consistent with applicable law as the General Partner deems appropriate; provided, however, that the Partnership may not transfer any asset to the General Partner or one of its Affiliates during any NAV Ratio Trigger Period for consideration less than such asset's fair market value.

(f) Outside Activities' Conflicts of Interest. The General Partner or any Affiliate thereof and any director, officer, employee, agent, or representative of the General Partner or any Affiliate thereof shall be entitled to and may have business interests and engage in business activities in addition to those relating to the Partnership, including, without limitation, business interests and activities in direct competition with the Partnership. Neither the Partnership nor any of the Partners shall have any rights by virtue of this Agreement or the partnership relationship created hereby in any business ventures of the General Partner, any Affiliate thereof, or any director, officer, employee, agent, or representative of either the General Partner or any Affiliate thereof.

(g) Resolution of Conflicts of Interest. Unless otherwise expressly provided in this Agreement or any other agreement contemplated herein, whenever a conflict of interest exists or arises between the General Partner or any of its Affiliates, on the one hand, and the Partnership or any Limited Partner, on the other hand, any action taken by the General Partner, in the absence of bad faith by the General Partner, shall not constitute a breach of this Agreement or any other agreement contemplated herein or a breach of any standard of care or duty imposed herein or therein or under the Delaware Act or any other applicable law, rule, or regulation.

(h) Indemnification. The Partnership shall indemnify and hold harmless the General Partner and any director, officer, employee, agent, or representative of the General Partner (collectively,



the "*GP Party*"). against all liabilities, losses, and damages incurred by any of them by reason of any act performed or omitted to be performed in the name of or on behalf of the Partnership, or in connection with the Partnership's business, including, without limitation, attorneys' fees and any amounts expended in the settlement of any claims or liabilities, losses, or damages, to the fullest extent permitted by the Delaware Act; *provided, however*, the Partnership shall have no obligation to indemnify and hold harmless a GP Party for any action or inaction that constitutes gross negligence or willful or wanton misconduct. The Partnership, in the sole and unfettered discretion of the General Partner, may indemnify and hold harmless any Limited Partner, employee, agent, or representative of the Partnership, any Person who is or was serving at the request of the Partnership acting through the General Partner as a director, officer, partner, trustee, employee, agent, or representative of another corporation, partnership, joint venture, trust, or other enterprise, and any other Person to the extent determined by the General Partner in its sole and unfettered discretion, but in no event shall such indemnification exceed the indemnification permitted by the Delaware Act. Notwithstanding anything to the contrary in this Section 4.1(h) or elsewhere in this Agreement, no amendment to the Delaware Act after the date of this Agreement shall reduce or limit in any manner the indemnification provided for or permitted by this Section 4.1(h) unless such reduction or limitation is mandated by such amendment for limited partnerships formed prior to the enactment of such amendment. In no event shall Limited Partners be subject to personal liability by reason of the indemnification provisions of this Agreement.

(i) Liability of General Partner.

(i) Neither the General Partner nor its directors, officers, employees, agents, or representatives shall be liable to the Partnership or any Limited Partner for errors in judgment or for any acts or omissions that do not constitute gross negligence or willful or wanton misconduct.

(ii) The General Partner may exercise any of the powers granted to it by this Agreement and perform any of the duties imposed upon it hereunder either directly or by or through its directors, officers, employees, agents, or representatives, and the General Partner shall not be responsible for any misconduct or negligence on the part of any agent or representative appointed by the General Partner.

(j) Reliance by General Partner.

(i) The General Partner may rely and shall be protected in acting or refraining from acting upon any resolution, certificate, statement, instrument, opinion, report, notice, request, consent, order, bond, debenture, or other paper or document believed by it to be genuine and to have been signed or presented by the proper party or parties.

(ii) The General Partner may consult with legal counsel, accountants, appraisers, management consultants, investment bankers, and other consultants and advisers selected by it, and any opinion of any such Person as to matters which the General Partner believes to be within such Person's professional or expert competence shall be full and complete authorization and protection in respect of any action taken or suffered or omitted by the General Partner hereunder in good faith and in accordance with such opinion.

(k) The General Partner may, from time to time, designate one or more Persons to be officers of the Partnership. No officer need be a Partner. Any officers so designated shall have such authority and perform such duties as the General Partner may, from time to time, delegate to them. The General Partner may assign titles to particular officers, including, without limitation, president, vice president, secretary, assistant secretary, treasurer and assistant treasurer. Each officer shall hold office until such Person's successor shall be duly designated and shall qualify or until such Person's death or



until such Person shall resign or shall have been removed in the manner hereinafter provided. Any number of offices may be held by the same Person. The salaries or other compensation, if any, of the officers and agents of the Partnership shall be fixed from time to time by the General Partner. Any officer may be removed as such, either with or without cause, by the General Partner whenever in the General Partner's judgment the best interests of the Partnership will be served thereby. Any vacancy occurring in any office of the Partnership may be filled by the General Partner.

**4.2. Rights and Obligations of Limited Partners.** In addition to the rights and obligations of Limited Partners set forth elsewhere in this Agreement, Limited Partners shall have the following rights and obligations:

(a) Limitation of Liability. Limited Partners shall have no liability under this Agreement except as provided herein or under the Delaware Act.

(b) Management of Business. No Limited Partner shall take part in the control (within the meaning of the Delaware Act) of the Partnership's business, transact any business in the Partnership's name, or have the power to sign documents for or otherwise bind the Partnership other than as specifically set forth in this Agreement.

(c) Return of Capital. No Limited Partner shall be entitled to the withdrawal or return of its Capital Contribution except to the extent, if any, that distributions made pursuant to this Agreement or upon termination of the Partnership may be considered as such by law and then only to the extent provided for in this Agreement.

(d) Second Amended Buy-Sell and Redemption Agreement. Each Limited Partner shall comply with the terms and conditions of the Second Amended Buy-Sell and Redemption Agreement.

(e) Default on Priority Distributions. If the Partnership fails to timely pay Priority Distributions pursuant to Section 3.9(b), and the Partnership does not subsequently make such Priority Distribution within ninety days of its due date, the Class B Limited Partner or the Class C Limited Partner may require the Partnership to liquidate publicly traded securities held by the Partnership or Highland Select Equity Master Fund, L.P., a Delaware limited partnership controlled by the Partnership; provided, however, that the General Partner may in its sole discretion elect instead to liquidate other non-publicly traded securities owned by the Partnership in order to satisfy the Partnership's obligations under Section 3.9(b) and this Section 4.2(e). In either case, Affiliates of the General Partner shall have the right of first offer to purchase any securities liquidated under this Section 4.2(e).

**4.3. Transfer of Partnership Interests.**

(a) Transfer. No Partnership Interest shall be Transferred, in whole or in part, except in accordance with the terms and conditions set forth in this Section 4.3 and the Second Amended Buy-Sell and Redemption Agreement. Any Transfer or purported Transfer of any Partnership Interest not made in accordance with this Section 4.3 and the Second Amended Buy-Sell and Redemption Agreement shall be null and void. An alleged transferee shall have no right to require any information or account of the Partnership's transactions or to inspect the Partnership's books. The Partnership shall be entitled to treat the alleged transferor of a Partnership Interest as the absolute owner thereof in all respects, and shall incur no liability to any alleged transferee for distributions to the Partner owning that Partnership Interest of record or for allocations of Profits, Losses, deductions or credits or for transmittal of reports and notices required to be given to holders of Partnership Interests.



(b) Transfers by General Partner. The General Partner may Transfer all, but not less than all, of its Partnership Interest to any Person only with the approval of a Majority Interest; provided, however, that the General Partner may not Transfer its Partnership Interest during any NAV Ratio Trigger Period except to the extent such Transfers are for estate planning purposes or resulting from the death of the individual owner of the General Partner. Any Transfer by the General Partner of its Partnership Interest under this Section 4.3(b) to an Affiliate of the General Partner or any other Person shall not constitute a withdrawal of the General Partner under Section 4.5(a), Section 5.1(b), or any other provision of this Agreement. If any such Transfer is deemed to constitute a withdrawal under such provisions or otherwise and results in the dissolution of the Partnership under this Agreement or the laws of any jurisdiction to which the Partnership of this Agreement is subject, the Partners hereby unanimously consent to the reconstitution and continuation of the Partnership immediately following such dissolution, pursuant to Section 5.2.

(c) Transfers by Limited Partners. The Partnership Interest of a Limited Partner may not be Transferred without the consent of the General Partner (which consent may be withheld in the sole and unfettered discretion of the General Partner), and in accordance with the Second Amended Buy-Sell and Redemption Agreement.

(d) Distributions and Allocations in Respect of Transferred Partnership Interests. If any Partnership Interest is Transferred during any Fiscal Year in compliance with the provisions of Article 4 and the Second Amended Buy-Sell and Redemption Agreement, Profits, Losses, and all other items attributable to the transferred interest for that period shall be divided and allocated between the transferor and the transferee by taking into account their varying interests during the period in accordance with Code Section 706(d), using any conventions permitted by law and selected by the General Partner; provided that no allocations shall be made under this Section 4.3(d) that would affect any special allocations made under Section 3.4. All distributions declared on or before the date of that Transfer shall be made to the transferor. Solely for purposes of making such allocations and distributions, the Partnership shall recognize that Transfer not later than the end of the calendar month during which it is given notice of that Transfer; *provided, however*, if the Partnership does not receive a notice stating the date that Partnership Interest was Transferred and such other information as the General Partner may reasonably require within thirty (30) days after the end of the Fiscal Year during which the Transfer occurs, then all of such items shall be allocated, and all distributions shall be made, to the person who, according to the books and records of the Partnership, on the last day of the Fiscal Year during which the Transfer occurs, was the owner of the Partnership Interest. Neither the Partnership nor any Partner shall incur any liability for making allocations and distributions in accordance with the provisions of this Section 4.3(d), whether or not any Partner or the Partnership has knowledge of any Transfer of ownership of any Partnership Interest.

(e) Forfeiture of Partnership Interests Pursuant to the Contribution Note. In the event any Class B Limited Partnership Interests are forfeited in favor of the Partnership as a result of any default on the Contribution Note, the Capital Accounts and Percentage Interests associated with such Class B Limited Partnership Interests shall be allocated pro rata among the Class A Partners. The Priority Distributions in Section 3.9(b) made after the date of such forfeiture shall each be reduced by an amount equal to the ratio of the Percentage Interest associated with the Class B Limited Partnership Interest transferred pursuant to this Section 4.3(e) over the aggregate Percentage Interests of all Class B Limited Partnership Interests and Class C Limited Partnership Interests, calculated immediately prior to any forfeiture of such Class B Limited Partnership Interest.

(f) Transfers of Partnership Interests Pursuant to the Purchase Notes. Notwithstanding any other provision in this Agreement, the Partnership shall respect, and the General Partner hereby provides automatic consent for, any transfers (in whole or transfers of partial interests) of



the Class C Limited Partnership Interests, or a portion thereof, if such transfer occurs as a result of a default on the Purchase Notes. Upon the transfer of any Class C Limited Partnership Interest to any member of the Founding Partner Group (or their assigns), such Class C Limited Partnership Interest shall automatically convert to a Class A Partnership Interest. The Priority Distributions in Section 3.9(b) shall each be reduced by an amount equal to the ratio of the Percentage Interest associated with the transferred Class C Limited Partnership Interest over the aggregate Percentage Interests of all Class B Limited Partnership Interests and Class C Limited Partnership Interests, calculated immediately prior to any transfer of such Class C Limited Partnership Interest.

#### **4.4. Issuances of Partnership Interests to New and Existing Partners.**

(a) Issuance of Partnership Interests to New Limited Partners. The General Partner may admit one or more additional Persons as Limited Partners (“Additional Limited Partners”) to the Partnership at such times and upon such terms as it deems appropriate in its sole and unfettered discretion; provided, however, that the General Partner may only admit additional Persons as Limited Partners in relation to the issuance of equity incentives to key employees of the Partnership; provided, further that the General Partner may not issue such equity incentives to the extent they entitle the holders, in the aggregate, to a Percentage Interest in excess of twenty percent without the consent of the Class B Limited Partner and the Class C Limited Partner. All Class A Limited Partners, the Class B Limited Partner and the Class C Limited Partner shall be diluted proportionately by the issuance of such limited partnership interests. No Person may be admitted to the Partnership as a Limited Partner until he/she/it executes an Addendum to this Agreement in the form attached as Exhibit B (which may be modified by the General Partner in its sole and unfettered discretion) and an addendum to the Second Amended Buy-Sell and Redemption Agreement.

(b) Issuance of an Additional Partnership Interest to an Existing Partner. The General Partner may issue an additional Partnership Interest to any existing Partner at such times and upon such terms as it deems appropriate in its sole and unfettered discretion. Upon the issuance of an additional Partnership Interest to an existing Partner, the Percentage Interests of the members of the Founding Partner Group shall be diluted proportionately. Any additional Partnership Interest shall be subject to all the terms and conditions of this Agreement and the Second Amended Buy-Sell and Redemption Agreement.

#### **4.5. Withdrawal of General Partner**

(a) Option. In the event of the withdrawal of the General Partner from the Partnership, the departing General Partner (the “*Departing Partner*”) shall, at the option of its successor (if any) exercisable prior to the effective date of the departure of that Departing Partner, promptly receive from its successor in exchange for its Partnership Interest as the General Partner, an amount in cash equal to its Capital Account balance, determined as of the effective date of its departure.

(b) Conversion. If the successor to a Departing Partner does not exercise the option described in Section 4.5(a), the Partnership Interest of the Departing Partner as the General Partner of the Partnership shall be converted into a Partnership Interest as a Limited Partner.

#### **4.6. Admission of Substitute Limited Partners and Successor General Partner.**

(a) Admission of Substitute Limited Partners. A transferee (which may be the heir or legatee of a Limited Partner) or assignee of a Limited Partner’s Partnership Interest shall be entitled to receive only the distributive share of the Partnership’s Profits, Losses, deductions, and credits attributable to that Partnership Interest. To become a substitute Limited Partner (a “*Substitute Limited Partner*”),



that transferee or assignee shall (i) obtain the consent of the General Partner (which consent may be withheld in the sole and unfettered discretion of the General Partner), (ii) comply with all the requirements of this Agreement and the Second Amended Buy-Sell and Redemption Agreement with respect to the Transfer of the Partnership Interest at issue, and (iii) execute an Addendum to this Agreement in the form attached as Exhibit B (which may be modified by the General Partner in its sole and unfettered discretion) and an addendum to the Second Amended Buy-Sell and Redemption Agreement. Upon admission of a Substitute Limited Partner, that Limited Partner shall be subject to all of the restrictions applicable to, shall assume all of the obligations of, and shall attain the status of a Limited Partner under and pursuant to this Agreement with respect to the Partnership Interest held by that Limited Partner.

(b) Admission of Successor General Partner. A successor General Partner selected pursuant to Section 5.2 or the transferee of or successor to all of the Partnership Interest of the General Partner pursuant to Section 4.3(b) shall be admitted to the Partnership as the General Partner, effective as of the date of the withdrawal or removal of the predecessor General Partner or the date of Transfer of that predecessor's Partnership Interest.

(c) Action by General Partner. In connection with the admission of any substitute Limited Partner or successor General Partner or any additional Limited Partner, the General Partner shall have the authority to take all such actions as it deems necessary or advisable in connection therewith, including the amendment of Exhibit A and the execution and filing with appropriate authorities of any necessary documentation.

## ARTICLE 5

### DISSOLUTION AND WINDING UP

**5.1. Dissolution.** The Partnership shall be dissolved upon:

(a) The withdrawal, bankruptcy, or dissolution of the General Partner, or any other event that results in its ceasing to be the General Partner (other than by reason of a Transfer pursuant to Section 4.3(b));

(b) An election to dissolve the Partnership by the General Partner that is approved by the affirmative vote of a Majority Interest; *provided, however*, the General Partner may dissolve the Partnership without the approval of the Limited Partners in order to comply with Section 14 of the Second Amended Buy-Sell and Redemption Agreement; or

(c) Any other event that, under the Delaware Act, would cause its dissolution.

For purposes of this Section 5.1, the bankruptcy of the General Partner shall be deemed to have occurred when the General Partner: (i) makes a general assignment for the benefit of creditors; (ii) files a voluntary bankruptcy petition; (iii) becomes the subject of an order for relief or is declared insolvent in any federal or state bankruptcy or insolvency proceeding; (iv) files a petition or answer seeking a reorganization, arrangement, composition, readjustment, liquidation, dissolution, or similar relief under any law; (v) files an answer or other pleading admitting or failing to contest the material allegations of a petition filed against the General Partner in a proceeding of the type described in clauses (i) through (iv) of this paragraph; (vi) seeks, consents to, or acquiesces in the appointment of a trustee, receiver, or liquidator of the General Partner or of all or any substantial part of the General Partner's properties; or (vii) one hundred twenty (120) days expire after the date of the commencement of a proceeding against the General Partner seeking reorganization, arrangement, composition, readjustment, liquidation, dissolution, or



similar relief under any law if the proceeding has not been previously dismissed, or ninety (90) days expire after the date of the appointment, without the General Partner's consent or acquiescence, of a trustee, receiver, or liquidator of the General Partner or of all or any substantial part of the General Partner's properties if the appointment has not previously been vacated or stayed, or ninety (90) days expire after the date of expiration of a stay, if the appointment has not previously been vacated.

**5.2. Continuation of the Partnership.** Upon the occurrence of an event described in Section 5.1(a), the Partnership shall be deemed to be dissolved and reconstituted if a Majority Interest elect to continue the Partnership within ninety (90) days of that event. If no election to continue the Partnership is made within ninety (90) days of that event, the Partnership shall conduct only activities necessary to wind up its affairs. If an election to continue the Partnership is made upon the occurrence of an event described in Section 5.1(a), then:

(a) Within that ninety (90)-day period a successor General Partner shall be selected by a Majority Interest;

(b) The Partnership shall be deemed to be reconstituted and shall continue until the end of the term for which it is formed unless earlier dissolved in accordance with this Article 5;

(c) The interest of the former General Partner shall be converted to an interest as a Limited Partner; and

(d) All necessary steps shall be taken to amend or restate this Agreement and the Certificate of Limited Partnership, and the successor General Partner may for this purpose amend this Agreement and the Certificate of Limited Partnership, as appropriate, without the consent of any Partner.

**5.3. Liquidation.** Upon dissolution of the Partnership, unless the Partnership is continued under Section 5.2, the General Partner or, in the event the General Partner has been dissolved, becomes bankrupt (as defined in Section 5.1), or withdraws from the Partnership, a liquidator or liquidating committee selected by a Majority Interest, shall be the Liquidator. The Liquidator (if other than the General Partner) shall be entitled to receive such compensation for its services as may be approved by a Majority Interest. The Liquidator shall agree not to resign at any time without fifteen (15) days' prior written notice and (if other than the General Partner) may be removed at any time, with or without cause, by notice of removal approved by a Majority Interest. Upon dissolution, removal, or resignation of the Liquidator, a successor and substitute Liquidator (who shall have and succeed to all rights, powers, and duties of the original Liquidator) shall within thirty (30) days thereafter be selected by a Majority Interest. The right to appoint a successor or substitute Liquidator in the manner provided herein shall be recurring and continuing for so long as the functions and services of the Liquidator are authorized to continue under the provisions hereof, and every reference herein to the Liquidator shall be deemed to refer also to any such successor or substitute Liquidator appointed in the manner provided herein. Except as expressly provided in this Article 5, the Liquidator appointed in the manner provided herein shall have and may exercise, without further authorization or consent of any of the parties hereto, all of the powers conferred upon the General Partner under the terms of this Agreement (but subject to all of the applicable limitations, contractual and otherwise, upon the exercise of such powers) to the extent necessary or desirable in the good faith judgment of the Liquidator to carry out the duties and functions of the Liquidator hereunder for and during such period of time as shall be reasonably required in the good faith judgment of the Liquidator to complete the winding up and liquidation of the Partnership as provided herein. The Liquidator shall liquidate the assets of the Partnership and apply and distribute the proceeds of such liquidation in the following order of priority, unless otherwise required by mandatory provisions of applicable law:



(a) To the payment of the expenses of the terminating transactions including, without limitation, brokerage commission, legal fees, accounting fees and closing costs;

(b) To the payment of creditors of the Partnership, including Partners, in order of priority provided by law;

(c) To the Partners and assignees to the extent of, and in proportion to, the positive balances in their respective Capital Accounts as provided in Treasury Regulations Section 1.704-1(b)(2)(ii)(b)(2); *provided, however*, the Liquidator may place in escrow a reserve of cash or other assets of the Partnership for contingent liabilities in an amount determined by the Liquidator to be appropriate for such purposes; and

(d) To the Partners in proportion to their respective Percentage Interests.

**5.4. Distribution in Kind.** Notwithstanding the provisions of Section 5.3 that require the liquidation of the assets of the Partnership, but subject to the order of priorities set forth therein, if on dissolution of the Partnership the Liquidator determines that an immediate sale of part or all of the Partnership's assets would be impractical or would cause undue loss to the Partners and assignees, the Liquidator may defer for a reasonable time the liquidation of any assets except those necessary to satisfy liabilities of the Partnership (other than those to Partners) and/or may distribute to the Partners and assignees, in lieu of cash, as tenants in common and in accordance with the provisions of Section 5.3, undivided interests in such Partnership assets as the Liquidator deems not suitable for liquidation. Any such distributions in kind shall be subject to such conditions relating to the disposition and management of such properties as the Liquidator deems reasonable and equitable and to any joint operating agreements or other agreements governing the operation of such properties at such time. The Liquidator shall determine the fair market value of any property distributed in kind using such reasonable method of valuation as it may adopt.

**5.5. Cancellation of Certificate of Limited Partnership.** Upon the completion of the distribution of Partnership property as provided in Sections 5.3 and 5.4, the Partnership shall be terminated, and the Liquidator (or the General Partner and Limited Partners if necessary) shall cause the cancellation of the Certificate of Limited Partnership in the State of Delaware and of all qualifications and registrations of the Partnership as a foreign limited partnership in jurisdictions other **than** the State of Delaware and shall take such other actions as may be necessary to terminate the Partnership.

**5.6. Return of Capital.** The General Partner shall not be personally liable for the return of the Capital Contributions of Limited Partners, or any portion thereof, it being expressly understood that any such return shall be **made** solely from Partnership assets.

**5.7. Waiver of Partition.** Each Partner hereby waives any rights to partition of the Partnership property.

## ARTICLE 6

### GENERAL PROVISIONS

**6.1. Amendments to Agreement.** The General Partner may amend this Agreement without the consent of any Partner if the General Partner reasonably determines that such amendment is necessary and appropriate; *provided, however*, any action taken by the General Partner shall be subject to its fiduciary duties to the Limited Partners under the Delaware Act; provided further that any amendments



that adversely affect the Class B Limited Partner or the Class C Limited Partner may only be made with the consent of such Partner adversely affected.

**6.2. Addresses and Notices.** Any notice, demand, request, or report required or permitted to be given or made to a Partner under this Agreement shall be in writing and shall be deemed given or made when delivered in person or when sent by United States registered or certified mail to the Partner at his/her/its address as shown on the records of the Partnership, regardless of any claim of any Person who may have an interest in any Partnership Interest by reason of an assignment or otherwise.

**6.3. Titles and Captions.** All article and section titles and captions in the Agreement are for convenience only, shall not be deemed part of this Agreement, and in no way shall define, limit, extend, or describe the scope or intent of any provisions hereof. Except as specifically provided otherwise, references to "Articles," "Sections" and "Exhibits" are to "Articles," "Sections" and "Exhibits" of this Agreement. All Exhibits hereto are incorporated herein by reference.

**6.4. Pronouns and Plurals.** Whenever the context may require, any pronoun used in this Agreement shall include the corresponding masculine, feminine, or neuter forms, and the singular form of nouns, pronouns, and verbs shall include the plural and vice versa.

**6.5. Further Action.** The parties shall execute all documents, provide all information, and take or refrain from taking all actions as may be necessary or appropriate to achieve the purposes of this Agreement.

**6.6. Binding Effect.** This Agreement shall be binding upon and inure to the benefit of the parties hereto and their heirs, executors, administrators, successors, legal representatives, and permitted assigns.

**6.7. Integration.** This Agreement constitutes the entire agreement among the parties hereto pertaining to the subject matter hereof and supersedes all prior agreements and understandings pertaining thereto.

**6.8. Creditors.** None of the provisions of this Agreement shall be for the benefit of or enforceable by any creditors of the Partnership.

**6.9. Waiver.** No failure by any party to insist upon the strict performance of any covenant, duty, agreement, or condition of this Agreement or to exercise any right or remedy consequent upon a breach thereof shall constitute waiver of any such breach or any other covenant, duty, agreement, or condition.

**6.10. Counterparts.** This agreement may be executed in counterparts, all of which together shall constitute one agreement binding on all the parties hereto, notwithstanding that all such parties are not signatories to the original or the same counterpart.

**6.11. Applicable Law.** This Agreement shall be construed in accordance with and governed by the laws of the State of Delaware, without regard to the principles of conflicts of law.

**6.12. Invalidity of Provisions.** If any provision of this Agreement is declared or found to be illegal, unenforceable, or void, in whole or in part, then the parties shall be relieved of all obligations arising under that provision, but only to the extent that it is illegal, unenforceable, or void, it being the intent and agreement of the parties that this Agreement shall be deemed amended by modifying that provision to the extent necessary to make it legal and enforceable while preserving its intent or, if that is



not possible, by substituting therefor another provision that is legal and enforceable and achieves the same objectives.

**6.13. General Partner Discretion.** Whenever the General Partner may use its sole discretion, the General Partner may consider any items it deems relevant, including its own interest and that of its affiliates.

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



*Remainder of Page intentionally Left Blank.  
Signature Page Follows.*

IN WITNESS WHEREOF, the parties hereto have entered into this Agreement as of the date and year first written above.

GENERAL PARTNER:

**STRAND-ADVISORS, INC.,**  
a Delaware corporation

By: \_\_\_\_\_

James D. Dondero,  
President

LIMITED PARTNERS:

**THE DUGABOY INVESTMENT TRUST**

By: \_\_\_\_\_

Nancy M. Dondero  
Name: Nancy M. Dondero  
Its: Trustee

**THE MARK AND PAMELA OKADA FAMILY  
TRUST - EXEMPT TRUST #1**

By: \_\_\_\_\_

Name: Lawrence Tonomura  
Its: Trustee

**THE MARK AND PAMELA OKADA FAMILY  
TRUST - EXEMPT TRUST #2**

By: \_\_\_\_\_

Name: Lawrence Tonomura  
Its: Trustee

**MARK K. OKADA**

\_\_\_\_\_  
Mark K. Okada

IN WITNESS WHEREOF, the parties hereto have entered into this Agreement as of the date and year first written above.

GENERAL PARTNER:

**STRAND ADVISORS, INC.,**  
a Delaware corporation

By: \_\_\_\_\_  
James D. Dondero,  
President

LIMITED PARTNERS:

**THE DUGABOY INVESTMENT TRUST**

By: \_\_\_\_\_  
Name: Nancy M. Dondero  
Its: Trustee

**THE MARK AND PAMELA OKADA FAMILY  
TRUST – EXEMPT TRUST #1**

By: \_\_\_\_\_  
Name: Lawrence Tonomura  
Its: Trustee

**THE MARK AND PAMELA OKADA FAMILY  
TRUST – EXEMPT TRUST #2**

By: \_\_\_\_\_  
Name: Lawrence Tonomura  
Its: Trustee

**MARK K. OKADA**

\_\_\_\_\_  
Mark K. Okada

**HUNTER MOUNTAIN INVESTMENT TRUST**

By: Beacon Mountain LLC, Administrator

By:

Name: John Honis

Its: President

A handwritten signature in black ink, appearing to read "John Honis", is written over a horizontal line. The signature is stylized with a large, sweeping initial "J" and a distinct "H".

*Signature Page to Fourth Amended and Restated  
Agreement of Limited Partnership*

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**EXHIBIT A**

|                                                          | <b><u>Percentage Interest</u></b> |                           |
|----------------------------------------------------------|-----------------------------------|---------------------------|
|                                                          | <b><u>By Class</u></b>            | <b><u>Effective %</u></b> |
| <b><u>CLASS A PARTNERS</u></b>                           |                                   |                           |
| <b><u>GENERAL PARTNER:</u></b>                           |                                   |                           |
| Strand Advisors                                          | 0.5573%                           | 0.2508%                   |
| <b><u>LIMITED PARTNERS:</u></b>                          |                                   |                           |
| The Dugaboy Investment Trust                             | 74.4426%                          | 0.1866%                   |
| Mark K. Okada                                            | 19.4268%                          | 0.0487%                   |
| The Mark and Pamela Okada Family Trust - Exempt Trust #1 | 3.9013%                           | 0.0098%                   |
| The Mark and Pamela Okada Family Trust - Exempt Trust #2 | 1.6720%                           | 0.0042%                   |
| Total Class A Percentage Interest                        | 100.0000%                         | 0.500%                    |
| <b><u>CLASS B LIMITED PARTNERS</u></b>                   |                                   |                           |
| Hunter Mountain Investment Trust                         | 100.0000%                         | 55.0000%                  |
| <b><u>CLASS C LIMITED PARTNERS</u></b>                   |                                   |                           |
| Hunter Mountain Investment Trust                         | 100.0000%                         | 44.500%                   |
| <b><u>PROFIT AND LOSS AMONG CLASSES</u></b>              |                                   |                           |
| Class A Partners                                         | 0.5000%                           |                           |
| Class B Partners                                         | 55.0000%                          |                           |
| Class C Partners                                         | 44.5000%                          |                           |



**EXHIBIT B**

**ADDENDUM  
TO THE  
FOURTH AMENDED AND RESTATED AGREEMENT OF LIMITED PARTNERSHIP  
OF  
HIGHLAND CAPITAL MANAGEMENT, L.P.**

THIS ADDENDUM (this “**Addendum**”) to that certain Fourth Amended and Restated Agreement of Limited Partnership of Highland Capital Management, L.P., dated December 24, 2015, to be effective as of December 24, 2015, as amended from time to time (the “**Agreement**”), is made and entered into as of the \_\_\_\_ day of \_\_\_\_\_, 20\_\_, by and between Strand Advisors, Inc., as the sole General Partner (the “**General Partner**”) of Highland Capital Management, L.P. (the “**Partnership**”) and \_\_\_\_\_ (“\_\_\_\_\_”) (except as otherwise provided herein, all capitalized terms used herein shall have the meanings set forth in the Agreement).

**RECITALS:**

WHEREAS, the General Partner, in its sole and unfettered discretion, and without the consent of any Limited Partner, has the authority under (i) Section 4.4 of the Agreement to admit Additional Limited Partners, (ii) Section 4.6 of the Agreement to admit Substitute Limited Partners and (iii) Section 6.1 of the Agreement to amend the Agreement;

WHEREAS, the General Partner desires to admit \_\_\_\_\_ as a Class \_\_ Limited Partner holding a \_\_% Percentage Interest in the Partnership as of the date hereof;

WHEREAS, \_\_\_\_\_ desires to become a Class \_\_ Limited Partner and be bound by the terms and conditions of the Agreement; and

WHEREAS, the General Partner desires to amend the Agreement to add \_\_\_\_\_ as a party thereto.

**AGREEMENT:**

RESOLVED, as a condition to receiving a Partnership Interest in the Partnership, \_\_\_\_\_ acknowledges and agrees that he/she/it (i) has received and read a copy of the Agreement, (ii) shall be bound by the terms and conditions of the Agreement; and (iii) shall promptly execute an addendum to the Second Amended Buy-Sell and Redemption Agreement; and be it

FURTHER RESOLVED, the General Partner hereby amends the Agreement to add \_\_\_\_\_ as a Limited Partner, and the General Partner shall attach this Addendum to the Agreement and make it a part thereof; and be it

FURTHER RESOLVED, this Addendum may be executed in any number of counterparts, all of which together shall constitute one Addendum binding on all the parties hereto, notwithstanding that all such parties are not signatories to the original or the same counterpart.

IN WITNESS WHEREOF, the undersigned have executed this Addendum as of the day and year above written.

GENERAL PARTNER:

**STRAND ADVISORS, INC.**

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

NEW LIMITED PARTNER:

\_\_\_\_\_]

AGREED AND ACCEPTED:

In consideration of the terms of this Addendum and the Agreement, in consideration of the Partnership's allowing the above signed Person to become a Limited Partner of the Partnership, and for other good and valuable consideration receipt of which is hereby acknowledged, the undersigned shall be bound by the terms and conditions of the Agreement as though a party thereto.

SPOUSE OF NEW LIMITED PARTNER:

\_\_\_\_\_]



## APPENDIX 23

000927

## INDEMNIFICATION AND GUARANTY AGREEMENT

This Indemnification and Guaranty Agreement (“**Agreement**”), dated as of January 9, 2020, is by and between STRAND ADVISORS, INC., a Delaware corporation (the “**Company**”), HIGHLAND CAPITAL MANAGEMENT, L.P., a Delaware partnership (the “**Debtor**”) (solely as to Section 29 hereunder), and Russell Nelms (the “**Indemnitee**”).

WHEREAS, the Company is the general partner of the Debtor and, in such capacity, manages the business affairs of the Debtor;

WHEREAS, Indemnitee has agreed to serve as a member of the Company’s board of directors (the “**Board**”) effective as of the date hereof;

WHEREAS, the Board has determined that enhancing the ability of the Company, on its own behalf and for the benefit of the Debtor, to retain and attract as directors the most capable Persons is in the best interests of the Company and the Debtor and that the Company and the Debtor therefore should seek to assure such Persons that indemnification and insurance coverage is available; and

WHEREAS, in recognition of the need to provide Indemnitee with protection against personal liability, in order to procure Indemnitee’s service as a director of the Company, in order to enhance Indemnitee’s ability to serve the Company in an effective manner and in order to provide such protection pursuant to express contract rights (intended to be enforceable irrespective of, among other things, any amendment to the Company’s Bylaws (as may be amended further from time to time, the “**Bylaws**”), any change in the composition of the Board or any change in control, business combination or similar transaction relating to the Company), the Company wishes to provide in this Agreement for the indemnification of, and the advancement of Expenses (as defined in Section 1(g) below) to, Indemnitee as set forth in this Agreement and for the coverage of Indemnitee under the Company’s directors’ and officers’ liability or similar insurance policies (“**D&O Insurance**”).

NOW, THEREFORE, in consideration of the foregoing and the Indemnitee’s agreement to provide services to the Company, the parties (including the Debtor solely as to Section 29 hereunder) agree as follows:

1. Definitions. For purposes of this Agreement, the following terms shall have the following meanings:

(a) “**Change in Control**” means the occurrence of any of the following: (i) the direct or indirect sale, lease, transfer, conveyance or other disposition, in one or a series of related transactions (including any merger or consolidation or whether by operation of law or otherwise), of all or substantially all of the properties or assets of the Company and its subsidiaries, to a third party purchaser (or group of affiliated third party purchasers) or (ii) the consummation of any transaction (including any merger or consolidation or whether by operation of law or otherwise), the result of which is that a third party purchaser (or group of affiliated third party purchasers) becomes the beneficial



owner, directly or indirectly, of more than fifty percent (50%) of the then outstanding Shares or of the surviving entity of any such merger or consolidation.

(b) **“Claim”** means:

(i) any threatened, pending or completed action, suit, claim, demand, arbitration, inquiry, hearing, proceeding or alternative dispute resolution mechanism, or any actual, threatened or completed proceeding, including any and all appeals, in each case, whether brought by or in the right of the Company or otherwise, whether civil, criminal, administrative, arbitrative, investigative or other, whether formal or informal, and whether made pursuant to federal, state, local, foreign or other law, and whether or not commenced prior to the date of this Agreement, in which Indemnitee was, is or will be involved as a party or otherwise, by reason of or relating to either (a) any action or alleged action taken by Indemnitee (or failure or alleged failure to act) or of any action or alleged action (or failure or alleged failure to act) on Indemnitee’s part, while acting in his or her Corporate Status or (b) the fact that Indemnitee is or was serving at the request of the Company or any subsidiary of the Company as director, officer, employee, partner, member, manager, trustee, fiduciary or agent of another Enterprise, in each case, whether or not serving in such capacity at the time any Loss or Expense is paid or incurred for which indemnification or advancement of Expenses can be provided under this Agreement, except one initiated by Indemnitee to enforce his or her rights under this Agreement; or

(ii) any inquiry, hearing or investigation that the Indemnitee determines might lead to the institution of any such action, suit, proceeding or alternative dispute resolution mechanism.

(c) **“Controlled Entity”** means any corporation, limited liability company, partnership, joint venture, trust or other Enterprise, whether or not for profit, that is, directly or indirectly, controlled by the Company. For purposes of this definition, the term “control” means the possession, directly or indirectly, of the power to direct, or cause the direction of, the management or policies of an Enterprise, whether through the ownership of voting securities, through other voting rights, by contract or otherwise.

(d) **“Corporate Status”** means the status of a Person who is or was a director, officer, employee, partner, member, manager, trustee, fiduciary or agent of the Company or of any other Enterprise which such Person is or was serving at the request of the Company or any subsidiary of the Company. In addition to any service at the actual request of the Company, Indemnitee will be deemed, for purposes of this Agreement, to be serving or to have served at the request of the Company or any subsidiary of the Company as a director, officer, employee, partner, member, manager, trustee, fiduciary or agent of another Enterprise if Indemnitee is or was serving as a director, officer, employee, partner, member, manager, fiduciary, trustee or agent of such Enterprise and (i) such Enterprise is or at the time of such service was a Controlled Entity, (ii) such Enterprise is or at the time of such service was an employee benefit plan (or related trust) sponsored or maintained by the Company or a Controlled Entity or (iii) the Company or a



Controlled Entity, directly or indirectly, caused Indemnitee to be nominated, elected, appointed, designated, employed, engaged or selected to serve in such capacity.

(e) **“Disinterested Director”** means a director of the Company who is not and was not a party to the Claim in respect of which indemnification is sought by Indemnitee. Under no circumstances will James Dondero be considered a Disinterested Director.

(f) **“Enterprise”** means the Company or any subsidiary of the Company or any other corporation, partnership, limited liability company, joint venture, employee benefit plan, trust or other entity or other enterprise of which Indemnitee is or was serving at the request of the Company or any subsidiary of the Company in a Corporate Status.

(g) **“Expenses”** means any and all expenses, fees, including attorneys’, witnesses’ and experts’ fees, disbursements and retainers, court costs, transcript costs, travel expenses, duplicating, printing and binding costs, telephone charges, postage, fax transmission charges, secretarial services, delivery services fees, and all other fees, costs, disbursements and expenses paid or incurred in connection with investigating, defending, prosecuting, being a witness in or participating in (including on appeal), or preparing to defend, prosecute, be a witness or participate in, any Claim. Expenses also shall include (i) Expenses paid or incurred in connection with any appeal resulting from any Claim, including, without limitation, the premium, security for, and other costs relating to any cost bond, supersedeas bond, or other appeal bond or its equivalent, and (ii) for purposes of Section 4 only, Expenses incurred by Indemnitee in connection with the interpretation, enforcement or defense of Indemnitee’s rights under this Agreement, by litigation or otherwise. Expenses, however, shall not include amounts paid in settlement by Indemnitee or the amount of judgments or fines against Indemnitee.

(h) **“Exchange Act”** means the Securities Exchange Act of 1934, as amended, or any successor statute thereto, and the rules and regulations of the United States Securities and Exchange Commission promulgated thereunder.

(i) **“Expense Advance”** means any payment of Expenses advanced to Indemnitee by the Company pursuant to Section 4 or Section 5 hereof.

(j) **“Indemnifiable Event”** means any event or occurrence, whether occurring before, on or after the date of this Agreement, related to the fact that Indemnitee is or was a manager, director, officer, employee or agent of the Company or any subsidiary of the Company, or is or was serving at the request of the Company or any subsidiary of the Company as a manager, director, officer, employee, member, manager, trustee or agent of any other Enterprise or by reason of an action or inaction by Indemnitee in any such capacity (whether or not serving in such capacity at the time any Loss is incurred for which indemnification can be provided under this Agreement).

(k) **“Independent Counsel”** means a law firm, or a member of a law firm, that is experienced in matters of corporation law and neither presently performs, nor in the past three (3) years has performed, services for any of: (i) James Dondero, (ii) the



Company or Indemnitee (other than in connection with matters concerning Indemnitee under this Agreement or of other indemnitees under similar agreements), or (iii) any other party to the Claim giving rise to a claim for indemnification hereunder. Notwithstanding the foregoing, the term “Independent Counsel” shall not include any Person who, under the applicable standards of professional conduct then prevailing, would have a conflict of interest in representing either the Company or Indemnitee in an action to determine Indemnitee’s rights under this Agreement.

(l) “**Losses**” means any and all Expenses, damages, losses, liabilities, judgments, fines (including excise taxes and penalties assessed with respect to employee benefit plans and ERISA excise taxes), penalties (whether civil, criminal or other), amounts paid or payable in settlement, including any interest, assessments, any federal, state, local or foreign taxes imposed as a result of the actual or deemed receipt of any payments under this Agreement and all other charges paid or payable in connection with investigating, defending, being a witness in or participating in (including on appeal), or preparing to defend, be a witness or participate in, any Claim.

(m) “**Person**” means any individual, corporation, firm, partnership, joint venture, limited liability company, estate, trust, business association, organization, governmental entity or other entity and includes the meaning set forth in Sections 13(d) and 14(d) of the Exchange Act.

(n) “**Shares**” means an ownership interest of a member in the Company, including each of the common shares of the Company or any other class or series of Shares designated by the Board.

(o) References to “**serving at the request of the Company**” include any service as a director, manager, officer, employee, representative or agent of the Company which imposes duties on, or involves services by, such director, manager, officer, employee or agent, including but not limited to any employee benefit plan, its participants or beneficiaries; and a Person who acted in good faith and in a manner he or she reasonably believed to be in and not opposed to the best interests of the Company in Indemnitee’s capacity as a director, manager, officer, employee, representative or agent of the Company, including but not limited to acting in the best interest of participants and beneficiaries of an employee benefit plan will be deemed to have acted in a manner “**not opposed to the best interests of the Company**” as referred to under applicable law or in this Agreement.

## 2. Indemnification.

(a) Subject to Section 9 and Section 10 of this Agreement, the Company shall indemnify and hold Indemnitee harmless, to the fullest extent permitted by the laws of the State of Delaware in effect on the date hereof, or as such laws may from time to time hereafter be amended to increase the scope of such permitted indemnification, against any and all Losses and Expenses if Indemnitee was or is or becomes a party to or participant in, or is threatened to be made a party to or participant in, any Claim by reason of or arising in part out of an Indemnifiable Event, including, without limitation, Claims



brought by or in the right of the Company, Claims brought by third parties, and Claims in which the Indemnatee is solely a witness.

(b) For the avoidance of doubt, the indemnification rights and obligations contained herein shall also extend to any Claim in which the Indemnatee was or is a party to, was or is threatened to be made a party to or was or is otherwise involved in any capacity in by reason of Indemnatee's Corporate Status as a fiduciary capacity with respect to an employee benefit plan. In connection therewith, if the Indemnatee has acted in good faith and in a manner which appeared to be consistent with the best interests of the participants and beneficiaries of an employee benefit plan and not opposed thereto, the Indemnatee shall be deemed to have acted in a manner not opposed to the best interests of the Company.

3. Contribution.

(a) Whether or not the indemnification provided in Section 2 is available, if, for any reason, Indemnatee shall elect or be required to pay all or any portion of any judgment or settlement in any Claim in which the Company is jointly liable with Indemnatee (or would be if joined in such Claim), the Company shall contribute to the amount of Losses paid or payable by Indemnatee in proportion to the relative benefits received by the Company and all officers, directors, managers or employees of the Company, other than Indemnatee, who are jointly liable with Indemnatee (or would be if joined in such Claim), on the one hand, and Indemnatee, on the other hand, from the transaction or events from which such Claim arose; provided, however, that the proportion determined on the basis of relative benefit may, to the extent necessary to conform to law, be further adjusted by reference to the relative fault of the Company and all officers, directors, managers or employees of the Company other than Indemnatee who are jointly liable with Indemnatee (or would be if joined in such Claim), on the one hand, and Indemnatee, on the other hand, in connection with the transaction or events that resulted in such Losses, as well as any other equitable considerations which applicable law may require to be considered. The relative fault of the Company and all officers, directors, managers or employees of the Company, other than Indemnatee, who are jointly liable with Indemnatee (or would be if joined in such Claim), on the one hand, and Indemnatee, on the other hand, shall be determined by reference to, among other things, the degree to which their actions were motivated by intent to gain personal profit or advantage, the degree to which their liability is primary or secondary and the degree to which their conduct is active or passive.

(b) The Company hereby agrees to fully indemnify and hold Indemnatee harmless from any claims of contribution which may be brought by officers, directors, managers or employees of the Company, other than Indemnatee, who may be jointly liable with Indemnatee.

(c) To the fullest extent permissible under applicable law, if the indemnification provided for in this Agreement is unavailable to Indemnatee for any reason whatsoever, the Company, in lieu of indemnifying Indemnatee, shall contribute to the amount incurred by Indemnatee, whether for judgments, fines, penalties, excise taxes,



amounts paid or to be paid in settlement and/or for Expenses, in connection with any Claim relating to an Indemnifiable Event under this Agreement, in such proportion as is deemed fair and reasonable in light of all of the circumstances of such Claim in order to reflect (i) the relative benefits received by the Company and Indemnatee as a result of the event(s) and/or transaction(s) giving cause to such Claim; and/or (ii) the relative fault of the Company (and its directors, managers, officers, employees and agents) and Indemnatee in connection with such event(s) and/or transaction(s).

4. Advancement of Expenses. The Company shall, if requested by Indemnatee, advance, to the fullest extent permitted by law, to Indemnatee (an “**Expense Advance**”) any and all Expenses actually and reasonably paid or incurred (even if unpaid) by Indemnatee in connection with any Claim arising out of an Indemnifiable Event (whether prior to or after its final disposition). Indemnatee’s right to such advancement is not subject to the satisfaction of any standard of conduct. Without limiting the generality or effect of the foregoing, within thirty (30) business days after any request by Indemnatee, the Company shall, in accordance with such request, (a) pay such Expenses on behalf of Indemnatee, (b) advance to Indemnatee funds in an amount sufficient to pay such Expenses, or (c) reimburse Indemnatee for such Expenses. In connection with any request for Expense Advances, Indemnatee shall not be required to provide any documentation or information to the extent that the provision thereof would undermine or otherwise jeopardize attorney-client privilege. Execution and delivery to the Company of this Agreement by Indemnatee constitutes an undertaking by the Indemnatee to repay any amounts paid, advanced or reimbursed by the Company pursuant to this Section 4, the final sentence of Section 9(b), or Section 11(b) in respect of Expenses relating to, arising out of or resulting from any Claim in respect of which it shall be determined, pursuant to Section 9, following the final disposition of such Claim, that Indemnatee is not entitled to indemnification hereunder. No other form of undertaking shall be required other than the execution of this Agreement. Each Expense Advance will be unsecured and interest free and will be made by the Company without regard to Indemnatee’s ability to repay the Expense Advance.

5. Indemnification for Expenses in Enforcing Rights. To the fullest extent allowable under applicable law, the Company shall also indemnify against, and, if requested by Indemnatee, shall advance to Indemnatee subject to and in accordance with Section 4, any Expenses actually and reasonably paid or incurred (even if unpaid) by Indemnatee in connection with any action or proceeding by Indemnatee for (a) indemnification or reimbursement or advance payment of Expenses by the Company under any provision of this Agreement, or under any other agreement or provision of the Bylaws now or hereafter in effect relating to Claims relating to Indemnifiable Events, and/or (b) recovery under any D&O Insurance maintained by the Company, regardless of whether Indemnatee ultimately is determined to be entitled to such indemnification or insurance recovery, as the case may be. Indemnatee shall be required to reimburse the Company in the event that a final judicial determination is made that such action brought by Indemnatee was frivolous or not made in good faith.

6. Partial Indemnity. If Indemnatee is entitled under any provision of this Agreement to indemnification by the Company for a portion of any Losses in respect of a Claim



related to an Indemnifiable Event but not for the total amount thereof, the Company shall nevertheless indemnify Indemnitee for the portion thereof to which Indemnitee is entitled.

7. Notification and Defense of Claims.

(a) Notification of Claims. Indemnitee shall notify the Company in writing as soon as reasonably practicable of any Claim which could relate to an Indemnifiable Event or for which Indemnitee could seek Expense Advances, including a brief description (based upon information then available to Indemnitee) of the nature of, and the facts underlying, such Claim, to the extent then known. The failure by Indemnitee to timely notify the Company hereunder shall not relieve the Company from any liability hereunder except to the extent the Company's ability to participate in the defense of such claim was materially and adversely affected by such failure. If at the time of the receipt of such notice, the Company has D&O Insurance or any other insurance in effect under which coverage for Claims related to Indemnifiable Events is potentially available, the Company shall give prompt written notice to the applicable insurers in accordance with the procedures, provisions, and terms set forth in the applicable policies. The Company shall provide to Indemnitee a copy of such notice delivered to the applicable insurers, and copies of all subsequent correspondence between the Company and such insurers regarding the Claim, in each case substantially concurrently with the delivery or receipt thereof by the Company.

(b) Defense of Claims. The Company shall be entitled to participate in the defense of any Claim relating to an Indemnifiable Event at its own expense and, except as otherwise provided below, to the extent the Company so wishes, it may assume the defense thereof with counsel reasonably satisfactory to Indemnitee. After notice from the Company to Indemnitee of its election to assume the defense of any such Claim, the Company shall not be liable to Indemnitee under this Agreement or otherwise for any Expenses subsequently directly incurred by Indemnitee in connection with Indemnitee's defense of such Claim other than reasonable costs of investigation or as otherwise provided below. Indemnitee shall have the right to employ its own legal counsel in such Claim, but all Expenses related to such counsel incurred after notice from the Company of its assumption of the defense shall be at Indemnitee's own expense; provided, however, that if (i) Indemnitee's employment of its own legal counsel has been authorized by the Company, (ii) Indemnitee has reasonably determined that there may be a conflict of interest between Indemnitee and the Company in the defense of such Claim, (iii) after a Change in Control, Indemnitee's employment of its own counsel has been approved by the Independent Counsel or (iv) the Company shall not in fact have employed counsel to assume the defense of such Claim, then Indemnitee shall be entitled to retain its own separate counsel (but not more than one law firm plus, if applicable, local counsel in respect of any such Claim) and all Expenses related to such separate counsel shall be borne by the Company.

8. Procedure upon Application for Indemnification. In order to obtain indemnification pursuant to this Agreement, Indemnitee shall submit to the Company a written request therefor, including in such request such documentation and information as



is reasonably available to Indemnitee and is reasonably necessary to determine whether and to what extent Indemnitee is entitled to indemnification following the final disposition of the Claim, provided that documentation and information need not be so provided to the extent that the provision thereof would undermine or otherwise jeopardize attorney-client privilege. Indemnification shall be made insofar as the Company determines Indemnitee is entitled to indemnification in accordance with Section 9 below.

9. Determination of Right to Indemnification.

(a) Mandatory Indemnification; Indemnification as a Witness.

(i) To the extent that Indemnitee shall have been successful on the merits or otherwise in defense of any Claim relating to an Indemnifiable Event or any portion thereof or in defense of any issue or matter therein, including without limitation dismissal without prejudice, Indemnitee shall be indemnified against all Losses relating to such Claim in accordance with Section 2, and no Standard of Conduct Determination (as defined in Section 9(b)) shall be required.

(ii) To the extent that Indemnitee's involvement in a Claim relating to an Indemnifiable Event is to prepare to serve and serve as a witness, and not as a party, the Indemnitee shall be indemnified against all Losses incurred in connection therewith to the fullest extent allowable by law and no Standard of Conduct Determination (as defined in Section 9(b)) shall be required.

(b) Standard of Conduct. To the extent that the provisions of Section 9(a) are inapplicable to a Claim related to an Indemnifiable Event that shall have been finally disposed of, any determination of whether Indemnitee has satisfied any applicable standard of conduct under Delaware law that is a legally required condition to indemnification of Indemnitee hereunder against Losses relating to such Claim and any determination that Expense Advances must be repaid to the Company (a "**Standard of Conduct Determination**") shall be made as follows:

(i) if no Change in Control has occurred, (A) by a majority vote of the Disinterested Directors, even if less than a quorum of the Board, (B) by a committee of Disinterested Directors designated by a majority vote of the Disinterested Directors, even though less than a quorum or (C) if there are no such Disinterested Directors, by Independent Counsel in a written opinion addressed to the Board, a copy of which shall be delivered to Indemnitee; and

(ii) if a Change in Control shall have occurred, (A) if the Indemnitee so requests in writing, by a majority vote of the Disinterested Directors, even if less than a quorum of the Board or (B) otherwise, by Independent Counsel in a written opinion addressed to the Board, a copy of which shall be delivered to Indemnitee.

Subject to Section 4, the Company shall indemnify and hold Indemnitee harmless against and, if requested by Indemnitee, shall reimburse Indemnitee for, or advance to Indemnitee, within thirty (30) business days of such request, any and all Expenses



incurred by Indemnitee in cooperating with the Person or Persons making such Standard of Conduct Determination.

(c) Making the Standard of Conduct Determination. The Company shall use its reasonable best efforts to cause any Standard of Conduct Determination required under Section 9(b) to be made as promptly as practicable. If the Person or Persons designated to make the Standard of Conduct Determination under Section 9(b) shall not have made a determination within ninety (90) days after the later of (A) receipt by the Company of a written request from Indemnitee for indemnification pursuant to Section 8 (the date of such receipt being the “**Notification Date**”) and (B) the selection of an Independent Counsel, if such determination is to be made by Independent Counsel, then Indemnitee shall be deemed to have satisfied the applicable standard of conduct; provided that such 90-day period may be extended for a reasonable time, not to exceed an additional thirty (30) days, if the Person or Persons making such determination in good faith requires such additional time to obtain or evaluate information relating thereto. Notwithstanding anything in this Agreement to the contrary, no determination as to entitlement of Indemnitee to indemnification under this Agreement shall be required to be made prior to the final disposition of any Claim.

(d) Payment of Indemnification. If, in regard to any Losses:

(i) Indemnitee shall be entitled to indemnification pursuant to Section 9(a);

(ii) no Standard of Conduct Determination is legally required as a condition to indemnification of Indemnitee hereunder; or

(iii) Indemnitee has been determined or deemed pursuant to Section 9(b) or Section 9(c) to have satisfied the Standard of Conduct Determination,

then the Company shall pay to Indemnitee, within thirty (30) business days after the later of (A) the Notification Date or (B) the earliest date on which the applicable criterion specified in clause (i), (ii) or (iii) is satisfied, an amount equal to such Losses.

(e) Selection of Independent Counsel for Standard of Conduct Determination. If a Standard of Conduct Determination is to be made by Independent Counsel pursuant to Section 9(b)(i), the Independent Counsel shall be selected by the Board and the Company shall give written notice to Indemnitee advising him of the identity of the Independent Counsel so selected. If a Standard of Conduct Determination is to be made by Independent Counsel pursuant to Section 9(b)(ii), the Independent Counsel shall be selected by Indemnitee, and Indemnitee shall give written notice to the Company advising it of the identity of the Independent Counsel so selected. In either case, Indemnitee or the Company, as applicable, may, within thirty (3) business days after receiving written notice of selection from the other, deliver to the other a written objection to such selection; provided, however, that such objection may be asserted only on the ground that the Independent Counsel so selected does not satisfy the criteria set forth in the definition of “Independent Counsel” in Section 1(k), and the objection shall



set forth with particularity the factual basis of such assertion. Absent a proper and timely objection, the Person or firm so selected shall act as Independent Counsel. If such written objection is properly and timely made and substantiated, (i) the Independent Counsel so selected may not serve as Independent Counsel unless and until such objection is withdrawn or a court has determined that such objection is without merit; and (ii) the non-objecting party may, at its option, select an alternative Independent Counsel and give written notice to the other party advising such other party of the identity of the alternative Independent Counsel so selected, in which case the provisions of the two immediately preceding sentences, the introductory clause of this sentence and numbered clause (i) of this sentence shall apply to such subsequent selection and notice. If applicable, the provisions of clause (ii) of the immediately preceding sentence shall apply to successive alternative selections. If no Independent Counsel that is permitted under the foregoing provisions of this Section 9(e) to make the Standard of Conduct Determination shall have been selected within twenty (20) days after the Company gives its initial notice pursuant to the first sentence of this Section 9(e) or Indemnatee gives its initial notice pursuant to the second sentence of this Section 9(e), as the case may be, either the Company or Indemnatee may petition the Court of Chancery of the State of Delaware ("**Delaware Court**") to resolve any objection which shall have been made by the Company or Indemnatee to the other's selection of Independent Counsel and/or to appoint as Independent Counsel a Person to be selected by the Court or such other Person as the Court shall designate, and the Person or firm with respect to whom all objections are so resolved or the Person or firm so appointed will act as Independent Counsel. In all events, the Company shall pay all of the reasonable fees and expenses of the Independent Counsel incurred in connection with the Independent Counsel's determination pursuant to Section 9(b).

(f) Presumptions and Defenses.

(i) Indemnatee's Entitlement to Indemnification. In making any Standard of Conduct Determination, the Person or Persons making such determination shall presume that Indemnatee has satisfied the applicable standard of conduct and is entitled to indemnification, and the Company shall have the burden of proof to overcome that presumption and establish that Indemnatee is not so entitled. Any Standard of Conduct Determination that is adverse to Indemnatee may be challenged by the Indemnatee in the Delaware Court. No determination by the Company (including by its Board or any Independent Counsel) that Indemnatee has not satisfied any applicable standard of conduct may be used as a defense to enforcement by Indemnatee of Indemnatee's rights of indemnification or reimbursement or advance of payment of Expenses by the Company hereunder or create a presumption that Indemnatee has not met any applicable standard of conduct.

(ii) Reliance as a Safe Harbor. For purposes of this Agreement, and without creating any presumption as to a lack of good faith if the following circumstances do not exist, Indemnatee shall be deemed to have acted in good faith and in a manner he or she reasonably believed to be in or not opposed to the best interests of the Company if Indemnatee's actions or omissions to act are taken in good faith reliance upon the records of the Company, including its financial statements, or upon information, opinions, reports



or statements furnished to Indemnatee by the officers or employees of the Company or any of its subsidiaries in the course of their duties, or by committees of the Board or by any other Person (including legal counsel, accountants and financial advisors) as to matters Indemnatee reasonably believes are within such other Person's professional or expert competence and who has been selected with reasonable care by or on behalf of the Company. In addition, the knowledge and/or actions, or failures to act, of any director, manager, officer, agent or employee of the Company (other than Indemnatee) shall not be imputed to Indemnatee for purposes of determining the right to indemnity hereunder.

(iii) Defense to Indemnification and Burden of Proof. It shall be a defense to any action brought by Indemnatee against the Company to enforce this Agreement (other than an action brought to enforce a claim for Losses incurred in defending against a Claim related to an Indemnifiable Event in advance of its final disposition) that it is not permissible under applicable law for the Company to indemnify Indemnatee for the amount claimed. In connection with any such action or any related Standard of Conduct Determination, the burden of proving such a defense or that the Indemnatee did not satisfy the applicable standard of conduct shall be on the Company.

10. Exclusions from Indemnification. Notwithstanding anything in this Agreement to the contrary, the Company shall not be obligated to:

(a) indemnify or advance funds to Indemnatee for Losses with respect to proceedings initiated by Indemnatee, including any proceedings against the Company or its managers, officers, employees or other indemnitees and not by way of defense, except:

(i) proceedings referenced in Section 4 above (unless a court of competent jurisdiction determines that each of the material assertions made by Indemnatee in such proceeding was not made in good faith or was frivolous); or

(ii) where the Company has joined in or the Board has consented to the initiation of such proceedings.

(b) indemnify Indemnatee if a final decision by a court of competent jurisdiction determines that such indemnification is prohibited by applicable law.

(c) indemnify Indemnatee for the disgorgement of profits arising from the purchase or sale by Indemnatee of securities of the Company in violation of Section 16(b) of the Exchange Act, or any similar successor statute.

11. Remedies of Indemnatee.

(a) In the event that (i) a determination is made pursuant to Section 9 that Indemnatee is not entitled to indemnification under this Agreement, (ii) an Expense Advance is not timely made pursuant to Section 4, (iii) no determination of entitlement to indemnification is made pursuant to Section 9 within 90 days after receipt by the Company of the request for indemnification, or (iv) payment of indemnification is not made pursuant Section 9(d), Indemnatee shall be entitled to an adjudication in a Delaware Court, or in any other court of competent jurisdiction, of Indemnatee's entitlement to such



indemnification. Indemnatee shall commence such proceeding seeking an adjudication within 180 days following the date on which Indemnatee first has the right to commence such proceeding pursuant to this Section 11(a). The Company shall not oppose Indemnatee's right to seek any such adjudication.

(b) In the event that Indemnatee, pursuant to this Section 11, seeks a judicial adjudication or arbitration of his or her rights under, or to recover damages for breach of, this Agreement, any other agreement for indemnification, payment of Expenses in advance or contribution hereunder or to recover under any director, manager, and officer liability insurance policies or any other insurance policies maintained by the Company, the Company will, to the fullest extent permitted by law and subject to Section 4, indemnify and hold harmless Indemnatee against any and all Expenses which are paid or incurred by Indemnatee in connection with such judicial adjudication or arbitration, regardless of whether Indemnatee ultimately is determined to be entitled to such indemnification, payment of Expenses in advance or contribution or insurance recovery. In addition, if requested by Indemnatee, subject to Section 4 the Company will (within thirty (30) days after receipt by the Company of the written request therefor), pay as an Expense Advance such Expenses, to the fullest extent permitted by law.

(c) In the event that a determination shall have been made pursuant to Section 9 that Indemnatee is not entitled to indemnification, any judicial proceeding commenced pursuant to this Section 11 shall be conducted in all respects as a de novo trial on the merits, and Indemnatee shall not be prejudiced by reason of the adverse determination under Section 9.

(d) If a determination shall have been made pursuant to Section 9 that Indemnatee is entitled to indemnification, the Company shall be bound by such determination in any judicial proceeding commenced pursuant to this Section 11, absent (i) a misstatement by Indemnatee of a material fact, or an omission of a material fact necessary to make Indemnatee's misstatement not materially misleading in connection with the application for indemnification, or (ii) a prohibition of such indemnification under applicable law.

12. Settlement of Claims. The Company shall not be liable to Indemnatee under this Agreement for any amounts paid in settlement of any threatened or pending Claim related to an Indemnifiable Event effected without the Company's prior written consent, which shall not be unreasonably withheld; provided, however, that if a Change in Control has occurred, the Company shall be liable for indemnification of the Indemnatee for amounts paid in settlement if an Independent Counsel (which, for purposes of this Section 12, shall be selected by the Company with the prior consent of the Indemnatee, such consent not to be unreasonably withheld or delayed) has approved the settlement. The Company shall not settle any Claim related to an Indemnifiable Event in any manner that would impose any Losses on the Indemnatee without the Indemnatee's prior written consent.

13. Duration. All agreements and obligations of the Company contained herein shall continue during the period that Indemnatee is a manager of the Company (or is serving at the request of the Company as a director, manager, officer, employee, member, trustee or



agent of another Enterprise) and shall continue thereafter (i) so long as Indemnatee may be subject to any possible Claim relating to an Indemnifiable Event (including any rights of appeal thereto) and (ii) throughout the pendency of any proceeding (including any rights of appeal thereto) commenced by Indemnatee to enforce or interpret his or her rights under this Agreement, even if, in either case, he or she may have ceased to serve in such capacity at the time of any such Claim or proceeding.

14. Other Indemnitors. The Company hereby acknowledges that Indemnatee may have certain rights to indemnification, advancement of Expenses and/or insurance provided by certain private equity funds, hedge funds or other investment vehicles or management companies and/or certain of their affiliates and by personal policies (collectively, the “**Other Indemnitors**”). The Company hereby agrees (i) that it is the indemnitor of first resort (i.e., its obligations to Indemnatee are primary and any obligation of the Other Indemnitors to advance Expenses or to provide indemnification for the same Expenses or liabilities incurred by Indemnatee are secondary), (ii) that it shall be required to advance the full amount of Expenses incurred by Indemnatee and shall be liable for the full amount of all Expenses, judgments, penalties, fines and amounts paid in settlement to the extent legally permitted and as required by the terms of this Agreement and the Bylaws (or any other agreement between the Company and Indemnatee), without regard to any rights Indemnatee may have against the Other Indemnitors, and, (iii) that it irrevocably waives, relinquishes and releases the Other Indemnitors from any and all claims against the Other Indemnitors for contribution, subrogation or any other recovery of any kind in respect thereof. The Company further agrees that no advancement or payment by the Other Indemnitors on behalf of Indemnatee with respect to any claim for which Indemnatee has sought indemnification from the Company shall affect the foregoing and the Other Indemnitors shall have a right of contribution and/or be subrogated to the extent of such advancement or payment to all of the rights of recovery of Indemnatee against the Company. The Company and Indemnatee agree that the Other Indemnitors are express third party beneficiaries of the terms of this Section 14.

15. Non-Exclusivity. The rights of Indemnatee hereunder will be in addition to any other rights Indemnatee may have under the Bylaws, the General Corporation Law of the State of Delaware (as may be amended from time to time, the “**DGCL**”), any other contract, in law or in equity, and under the laws of any state, territory, or jurisdiction, or otherwise (collectively, “**Other Indemnity Provisions**”). The Company will not adopt any amendment to its Bylaws the effect of which would be to deny, diminish, encumber or limit Indemnatee’s right to indemnification under this Agreement or any Other Indemnity Provision.

16. Liability Insurance. For the duration of Indemnatee’s service as a director of the Company, and thereafter for so long as Indemnatee shall be subject to any pending Claim relating to an Indemnifiable Event, the Company shall use best efforts to continue to maintain in effect policies of D&O Insurance providing coverage that is at least substantially comparable in scope and amount to that provided by similarly situated companies. In all policies of D&O Insurance maintained by the Company, Indemnatee shall be named as an insured in such a manner as to provide Indemnatee the same rights



and benefits as are provided to the most favorably insured of the Company's directors. Upon request, the Company will provide to Indemnitee copies of all D&O Insurance applications, binders, policies, declarations, endorsements and other related materials.

17. No Duplication of Payments. The Company shall not be liable under this Agreement to make any payment to Indemnitee in respect of any Losses to the extent Indemnitee has otherwise received payment under any insurance policy, any Other Indemnity Provisions or otherwise of the amounts otherwise indemnifiable by the Company hereunder.

18. Subrogation. In the event of payment to Indemnitee under this Agreement, the Company shall be subrogated to the extent of such payment to all of the rights of recovery of Indemnitee. Indemnitee shall execute all papers required and shall do everything that may be necessary to secure such rights, including the execution of such documents necessary to enable the Company effectively to bring suit to enforce such rights.

19. Indemnitee Consent. The Company will not, without the prior written consent of Indemnitee, consent to the entry of any judgment against Indemnitee or enter into any settlement or compromise which (a) includes an admission of fault of Indemnitee, any non-monetary remedy imposed on Indemnitee or a Loss for which Indemnitee is not wholly indemnified hereunder or (b) with respect to any Claim with respect to which Indemnitee may be or is made a party or a participant or may be or is otherwise entitled to seek indemnification hereunder, does not include, as an unconditional term thereof, the full release of Indemnitee from all liability in respect of such Claim, which release will be in form and substance reasonably satisfactory to Indemnitee. Neither the Company nor Indemnitee will unreasonably withhold its consent to any proposed settlement; provided, however, Indemnitee may withhold consent to any settlement that does not provide a full and unconditional release of Indemnitee from all liability in respect of such Claim.

20. Amendments. No supplement, modification or amendment of this Agreement shall be binding unless executed in writing by both of the parties hereto. No waiver of any of the provisions of this Agreement shall be binding unless in the form of a writing signed by the party against whom enforcement of the waiver is sought, and no such waiver shall operate as a waiver of any other provisions hereof (whether or not similar), nor shall such waiver constitute a continuing waiver. Except as specifically provided herein, no failure to exercise or any delay in exercising any right or remedy hereunder shall constitute a waiver thereof.

21. Binding Effect. This Agreement shall be binding upon and inure to the benefit of and be enforceable by the parties hereto and their respective successors (including any direct or indirect successor by purchase, merger, consolidation or otherwise to all or substantially all of the business and/or assets of the Company), assigns, spouses, heirs and personal and legal representatives. The Company shall require and cause any successor (whether direct or indirect by purchase, merger, consolidation or otherwise) to all, substantially all or a substantial part of the business and/or assets of the Company, by written agreement in form and substance satisfactory to Indemnitee, expressly to assume



and agree to perform this Agreement in the same manner and to the same extent that the Company would be required to perform if no such succession had taken place.

22. Severability. Each provision of this Agreement shall be considered severable and if for any reason any provision which is not essential to the effectuation of the basic purposes of this Agreement is determined by a court of competent jurisdiction to be invalid, unenforceable or contrary to the DGCL or existing or future applicable law, such invalidity, unenforceability or illegality shall not impair the operation of or affect those provisions of this Agreement which are valid, enforceable and legal. In that case, this Agreement shall be construed so as to limit any term or provision so as to make it valid, enforceable and legal within the requirements of any applicable law, and in the event such term or provision cannot be so limited, this Agreement shall be construed to omit such invalid, unenforceable or illegal provisions.

23. Notices. All notices, requests, demands and other communications hereunder shall be in writing and shall be deemed to have been duly given if delivered by hand, against receipt, or mailed, by postage prepaid, certified or registered mail:

- (a) if to Indemnitee, to the address set forth on the signature page hereto.
- (b) if to the Company, to:

Strand Advisors, Inc.  
Attention: Isaac Leventon  
Address: 300 Crescent Court, Suite 700  
Dallas, Texas 75201  
Email: ileventon@highlandcapital.com

Notice of change of address shall be effective only when given in accordance with this Section 23. All notices complying with this Section 23 shall be deemed to have been received on the date of hand delivery or on the third business day after mailing.

24. Governing Law. THIS AGREEMENT SHALL BE GOVERNED BY THE LAWS OF THE STATE OF DELAWARE (OTHER THAN ITS RULES OF CONFLICTS OF LAW TO THE EXTENT THAT THE APPLICATION OF THE LAWS OF ANOTHER JURISDICTION WOULD BE REQUIRED THEREBY).

25. Jurisdiction. The parties hereby agree that any suit, action or proceeding seeking to enforce any provision of, or based on any matter arising out of or in connection with, this Agreement or the transactions contemplated hereby, whether in contract, tort or otherwise, shall be brought in the United States District Court for the District of Delaware or in the Court of Chancery of the State of Delaware (or, if such court lacks subject matter jurisdiction, in the Superior Court of the State of Delaware), so long as one of such courts shall have subject-matter jurisdiction over such suit, action or proceeding, and that any case of action arising out of this Agreement shall be deemed to have arisen from a transaction of business in the State of Delaware. Each of the parties hereby irrevocably



consents to the jurisdiction of such courts (and of the appropriate appellate courts therefrom) in any such suit, action or proceeding and irrevocably waives, to the fullest extent permitted by law, any objection that it may now or hereafter have to the laying of the venue of any such suit, action or proceeding in any such court or that any such suit, action or proceeding which is brought in any such court has been brought in an inconvenient forum.

26. Enforcement.

(a) Without limiting Section 15, this Agreement constitutes the entire agreement between the parties hereto with respect to the subject matter hereof and supersedes all prior agreements and understandings, oral, written and implied, between the parties hereto with respect to the subject matter hereof.

(b) The Company shall not seek from a court, or agree to, a "bar order" which would have the effect of prohibiting or limiting the Indemnitee's rights to receive advancement of Expenses under this Agreement other than in accordance with this Agreement.

27. Headings and Captions. All headings and captions contained in this Agreement and the table of contents hereto are inserted for convenience only and shall not be deemed a part of this Agreement.

28. Counterparts. This Agreement may be executed in counterparts, each of which shall constitute an original and all of which, when taken together, shall constitute one and the same agreement. Facsimile counterpart signatures to this Agreement shall be binding and enforceable.

29. Guaranty By Debtor. The Debtor guarantees to Indemnitee the performance of the obligations of the Company hereunder (the "**Guaranteed Obligations**"). If the Company does not satisfy any of the Guaranteed Obligations when due, Indemnitee may demand that the Debtor satisfy such obligations and the Debtor shall be required to do so by making payment to, or for the benefit of, Indemnitee. Indemnitee can make any number of demands upon the Debtor and such demands can be made for all or part of the Guaranteed Obligations. This guaranty by the Debtor is for the full amount of the Guaranteed Obligations. The Debtor's obligations under this Agreement are continuing. Even though Indemnitee receives payments from or makes arrangements with the Company or anyone else, the Debtor shall remain liable for the Guaranteed Obligations until satisfied in full. The guaranty hereunder is a guaranty of payment, and not merely of collectability, and may be enforced against the Debtor. The Debtor's liability under this Section 29 is unconditional. It is not affected by anything that might release the Debtor from or limit all or part of its obligations.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the date first above written.

STRAND ADVISORS, INC.

By: 

Name: Scott Ellington

Title: Secretary

HIGHLAND CAPITAL MANAGEMENT,  
L.P. (solely as to Section 29 hereunder)

By: Strand Advisors, Inc., its General Partner

By: 

Name: Scott Ellington

Title: Secretary

INDEMNITEE:

\_\_\_\_\_  
Name: RUSSELL NELMS

Address: \_\_\_\_\_

\_\_\_\_\_  
Email: \_\_\_\_\_

## APPENDIX 24



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Ira D. Kharasch (CA Bar No. 109084) (*admitted pro hac vice*)  
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*Counsel for Highland Capital Management, L.P.*

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

|                                                                                                                       |                                 |                                           |
|-----------------------------------------------------------------------------------------------------------------------|---------------------------------|-------------------------------------------|
| <hr style="border: 0.5px solid black;"/> In re:<br><br>HIGHLAND CAPITAL MANAGEMENT, L.P., <sup>1</sup><br><br>Debtor. | §<br>§<br>§<br>§<br>§<br>§<br>§ | Chapter 11<br><br>Case No. 19-34054-sgj11 |
|-----------------------------------------------------------------------------------------------------------------------|---------------------------------|-------------------------------------------|

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**DEBTOR’S MOTION FOR AN ORDER REQUIRING THE VIOLATORS TO SHOW  
CAUSE WHY THEY SHOULD NOT BE HELD IN CIVIL CONTEMPT FOR  
VIOLATING TWO COURT ORDERS**

Highland Capital Management, L.P., the debtor and debtor-in-possession (the “Debtor” or “Highland”) in the above-captioned chapter 11 case (“Bankruptcy Case”), by and through its

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







WHEREFORE, the Debtor respectfully requests that the Court (i) enter the Proposed Order substantially in the formed annexed hereto as **Exhibit A** granting the relief requested herein, and (ii) grant the Debtor such other and further relief as the Court may deem proper.



**EXHIBIT A**



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

In re:

HIGHLAND CAPITAL MANAGEMENT, L.P.,<sup>2</sup>

Debtor.

§  
§  
§  
§  
§  
§

Chapter 11

Case No. 19-34054-sgj11

**ORDER GRANTING DEBTOR’S MOTION FOR AN ORDER REQUIRING THE  
VIOLATORS TO SHOW CAUSE WHY THEY SHOULD NOT BE HELD IN CIVIL  
CONTEMPT FOR VIOLATING TWO COURT ORDERS**

Having considered (a) the *Debtor’s Motion for an Order Requiring the Violators to Show Cause Why They Should Not Be Held in Civil Contempt for Violating Two Court Orders* [Docket No. \_\_] (the “Motion”),<sup>3</sup> (b) the *Debtor’s Memorandum of Law in Support of Motion for an Order Requiring the Violators to Show Cause Why They Should Not Be Held in Civil Contempt for*

<sup>2</sup> The Debtor’s last four digits of its taxpayer identification number are (6725). The headquarters and service address for the above-captioned Debtor is 300 Crescent Court, Suite 700, Dallas, TX 75201.

<sup>3</sup> Capitalized terms used but not otherwise defined herein have the meanings ascribed to them in the Memorandum of Law.



itemized list of expenses; (c) imposing a penalty of three (3) times the Debtor's actual expenses incurred in connection with any future violation of any order of this Court (including filing any motion in the District Court to name Mr. Seery as a defendant without seeking and obtaining this Court's prior approval, as required under the Orders), and (d) granting the Debtor such other and further relief as the Court deems just and proper under the circumstances.

3. The Court shall retain exclusive jurisdiction with respect to all matters arising from or relating to the implementation, interpretation, and enforcement of this Order.

**### END OF ORDER ###**

## APPENDIX 25



## NECESSITY OF MOTION<sup>1</sup>

As applied to their action currently before the Northern District of Texas, Movants would show that this Court’s Order of July 16, 2020 (“Order”)<sup>2</sup> appears to overstate this Court’s jurisdiction. Despite the request from the Debtor, this Court should not attempt to assert *exclusive* jurisdiction over any and all claims that might be asserted against James P. Seery, Jr. (“Seery”), relating in any way to his role as an officer of the Debtor, as the Order asserts that it can.

In 28 U.S.C. § 1334, Congress has vested the federal district courts with original jurisdiction over claims arising under, arising in, or related to title 11. Article III of the Constitution also grants such “judicial power” to the district courts. This Court’s subject matter jurisdiction is derivative of the district courts’ jurisdiction, and it lacks the power to strip that jurisdiction from the district courts. To the extent that the Debtor’s counsel asserts that this Court does have that power, they should identify the specific source of that authority. But Movants respectfully submit that there appears to be no authority providing that this Court can undo what Article III and § 1334 have done.

This Court should modify the Order to clarify or correct the apparent jurisdictional overreach. Plainly, Movants' claims against Seery are within the jurisdiction of the district court—jurisdiction which cannot be divested.

<sup>1</sup> Notably, as undersigned counsel was finalizing this Motion, Highland Capital and James P. Seery, Jr.'s counsel filed a Motion to Show Cause, arguing that the act of merely *asking* the District Court to entertain the addition of James Seery somehow amounts to a Rule 11 violation or contempt of this Court's orders. The Movants intend to respond to that motion in a robust and timely fashion. Movants respectfully suggest that that Motion and this one be considered at the same time.

<sup>2</sup> Order Approving Debtor's Motion Under Bankruptcy Code Sections 105(a) and 363(b) Authorizing Retention of James P. Seery, Jr., as Chief Executive Officer, Chief Restructuring Officer, and Foreign Representative Nunc Pro Tunc to March 15, 2020 [Doc 854].



## II.

### BACKGROUND

On June 23, 2020, counsel for the Debtor filed a motion asking this Court to defer to the “business judgment” of the Strand board’s compensation committee and approve the terms of its appointment of Seery as chief executive officer and chief restructuring officer at the Debtor, retroactive to March.<sup>3</sup> Counsel also asked the Bankruptcy Court to declare that it had exclusive jurisdiction over any claims asserted against Seery in this role.

On July 16, 2020, this Court granted that motion and entered the Order, stating as follows:

***No entity may commence or pursue a claim or cause of action of any kind against Mr. Seery*** relating in any way to his role as the chief executive officer and chief restructuring officer of the Debtor without the Bankruptcy Court (i) first determining after notice that such claim or cause of action represents a colorable claim of willful misconduct or gross negligence against Mr. Seery, and (ii) specifically authorizing such entity to bring such claim. ***The Bankruptcy Court shall have sole jurisdiction to adjudicate any such claim for which approval of the Court to commence or pursue has been granted.***<sup>4</sup>

On March 22, 2021, this Court entered an order confirming the Debtor’s reorganization plan.<sup>5</sup> The confirmation order purports to extend the prohibitions on suits against Seery, and it also prohibits certain actions against the Debtor and its affiliates. By its own terms, however, the confirmation order is not yet effective due to a pending appeal. And this Court explicitly limited the scope of

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<sup>3</sup> Debtor’s Motion Under Bankruptcy Code Sections 105(a) and 363(b) for Authorization to Retain James P. Seery, Jr., as Chief Executive Officer, Chief Restructuring Officer and Foreign Representative *Nunc Pro Tunc* to March 15, 2020 [Doc. 774] (“Debtors Motion”).

<sup>4</sup> A related order dated January 9, 2020, contains a similar provision with regard to Seery’s role as an “Independent Director.” Order Approving Settlement with Official Committee of Unsecured Creditors Regarding Governance of the Debtor and Procedures for Operations in the Ordinary Course, ¶ 5 [Doc. 339].

<sup>5</sup> Order (I) Confirming the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (As Modified) And (II) Granting Related Relief [Doc. 1943].



court is prohibited. Prohibiting that amendment in current circumstances, Movants submit, would be beyond this Court's jurisdiction.

### III.

#### ARGUMENT

Movants submit that the Order should not prohibit amending their action in the district court to assert claims against Seery. To the extent the Order does so, Movants respectfully submit that the prohibition should be modified to avoid exceeding this Court's powers.

##### A. THIS COURT LACKS THE AUTHORITY TO STRIP THE DISTRICT COURT OF JURISDICTION

Movants respectfully submit that, because this Court's jurisdiction derives from and is dependent upon the jurisdiction of the district court, the Order's declaration that this Court has "sole jurisdiction" to the *exclusion* of the district court is an overreach.

Congress provided for and limited the jurisdiction of bankruptcy courts in 28 U.S.C. § 1334 and 28 U.S.C. § 157. As a result, bankruptcy court jurisdiction derives from and is limited by statute. *Celotex Corp. v. Edwards*, 514 U.S. 300, 307 (1995) ("The jurisdiction of the bankruptcy courts, like that of other federal courts, is grounded in, and limited by, statute."); *Williams v. SeaBreeze Fin., LLC (In re 7303 Holdings, Inc.)*, Nos. 08-36698, 10-03079, 2010 Bankr. LEXIS 2938 at \*7 (Bankr. S.D. Tex. Aug. 26, 2010) ("A bankruptcy court's jurisdiction is derivative of the district court's jurisdiction. The bankruptcy court does not have jurisdiction unless the district court could exercise authority over the matter . . ."). The plain provisions of § 1334 grant to the district courts "original jurisdiction" over all bankruptcy cases and related civil proceedings. 28 U.S.C. § 1334(a)-(b). Thus, when it comes to subject matter jurisdiction, what Congress giveth, this Court cannot take away and reserve for itself.





Not only are there constitutional issues with the scope of the Order, there is also the plainly worded “full stop” of 28 U.S.C. § 157(d). See *TMT Procurement Corp. v. Vantage Drilling Co.* (*In re TMT Procurement Corp.*), 764 F.3d 512, 523 & n.40 (5th Cir. 2014) (noting bankruptcy court’s “more limited” jurisdiction as a result of its “limited power” under 28 U.S.C. § 157). In Section 157(d), Congress prohibited the bankruptcy court, absent the parties’ consent, from presiding over cases or proceedings that require consideration of both Title 11 and other federal law regulating organizations or activities affecting interstate commerce.

Thus, at least as it applies to Movants’ district court action, the Order (at least as far as Debtor and Seery seem to interpret it), exceeds this Court’s power under 28 U.S.C. § 157(d). Any determination of “colorability” regarding Movants’ causes of action should take place in the district court, not here.



Furthermore, a contrary conclusion would create unnecessary tension with the congressional aims of 28 U.S.C. § 959 (“Trustees, receivers or managers of any property, including debtors in possession, may be sued, without leave of the court appointing them, with respect to any of their acts or transactions in carrying on business connected with such property.”).

The district court, of course, may refer Movants’ action to this Court under Miscellaneous Order No. 33, as authorized by § 104 of the Bankruptcy Amendments and Federal Judgeship Act of 1984, codified at 28 U.S.C. § 157(a). But withdrawal of that reference would still be mandatory for any determination of “colorability” as previously noted or for any other matter likewise within the scope of § 157(d).

To the extent the Order requires otherwise<sup>11</sup>—and on its face it would seem to—Movants respectfully submit that it is in error.

#### IV.

#### CONCLUSION

Movants ask this Court to modify the provisions of the Order that assert exclusive jurisdiction over any and all causes of action against Seery related to his role as an officer of the Debtor. This Court’s jurisdiction does not reach all such cases. More specifically, it does not reach Movants’ district court action or cancel out that court’s jurisdiction under 28 U.S.C. § 1334.

As a result, the Order is overreaching and should be modified. And Movants respectfully submit that this Motion should be granted.

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<sup>11</sup> To the extent that Seery would seek to assert some kind of immunity, that is an affirmative defense that he may assert in the district court as well.



# EXHIBIT 1



Under the Advisers Act, Defendants have a non-waivable duty of loyalty and candor, which includes its duty not to inside trade with its own investors, *i.e.*, not to trade with an investor to which HCM and Seery had access to superior non-public information. Upon information and belief, HCM's internal compliance policies required by the Advisers Act would not generally have allowed a trade of this nature to go forward—meaning, the trade either was approved in spite of compliance rules preventing it, or the compliance protocols themselves were disabled or amended to a level that leaves Defendants HCM and HCLOF exposed to liability. Thus, Defendants have created an unacceptable perpetuation of exposure to liability.

Additionally, Defendants are liable for a pattern of conduct that gives rise to liability for their conduct of the enterprise consisting of HCM in relation to HCFA and HCLOF, through a pattern of concealment, misrepresentation, and violations of the securities rules. In the alternative, HCFA and HCM, are guilty of self-dealing, violations of the Advisers Act, and tortious interference by (a) not disclosing that Harbourvest had agreed to sell at a price well below the current NAV, and (b) diverting the Harbourvest opportunity to themselves.

<sup>2</sup> “Habourvest” refers to the collective of Harbourvest Dover Street IX Investment, L.P., Harbourvest 2017 Global AIF, L.P., Harbourvest 2017 Global Fund, L.P., HV International VIII Secondary, L.P., and Harbourvest Skew Base AIF, L.P. Each was a member of Defendant Highland CLO Funding, Ltd.

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

**In Re: Highland Capital Management, L.P** § Case No. **19-34054-SGJ11**

**Charitable DAF Fund, L.P et al**

Appellant

§

vs.

§

21-03067

**Highland Capital Management, L.P**

§

Appellee

§

**3:23-CV-01503-B**

[167] Order granting Defendant Highland Capital Management, L.P.'s Renewed motion to dismiss adversary proceeding (related document # [122](#)) Entered on 6/25/2023.

**Volume 6**

**APPELLANT RECORD**



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*Counsel for The Charitable DAF Fund, L.P.  
and CLO Holdco, Ltd.*

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

|                                         |                            |
|-----------------------------------------|----------------------------|
| In re:                                  | § Chapter 11               |
|                                         | §                          |
| HIGHLAND CAPITAL MANAGEMENT, L.P.,      | § Case No. 19-34054-sgj11  |
|                                         | §                          |
| Debtor.                                 | §                          |
|                                         | §                          |
| CHARITABLE DAF FUND, L.P. AND CLO       | §                          |
| HOLDCO, LTD., DIRECTLY AND DERIVATIVELY | §                          |
|                                         | §                          |
| Plaintiffs,                             | § Adversary Proceeding No. |
|                                         | §                          |
| vs.                                     | § 21-03067-sgj11           |
|                                         | §                          |
| HIGHLAND CAPITAL MANAGEMENT, L.P.,      | §                          |
| HIGHLAND HCF ADVISOR, LTD., AND         | §                          |
| HIGHLAND CLO FUNDING LTD., NOMINALLY    | §                          |
|                                         | §                          |
| Defendant.                              | §                          |
|                                         | §                          |

*INDEX*

**APPELLANTS' SECOND AMENDED STATEMENT OF ISSUES  
AND DESIGNATION OF RECORD ON APPEAL**

Pursuant to Rules 8009(a)(1)(A)-(B) and (a)(4) of the Federal Rules of Bankruptcy Procedure, The Charitable DAF Fund, L.P. and CLO Holdco, Ltd. ("Appellants") hereby designate the following items to be included in the record and identify the following issues with respect to

their appeal of the Order Granting Defendant Highland Capital Management, L.P.'s "Renewed Motion to Dismiss Complaint" [Adv. Proc. Doc. No. 122] which was entered by the United States Bankruptcy Court for the Northern District of Texas on June 25, 2023.

**I. STATEMENT OF ISSUES TO BE PRESENTED ON APPEAL**

- Whether the Bankruptcy Court had jurisdiction to rule on Highland Capital Management L.P.'s Renewed Motion to Dismiss Complaint
- Whether the Renewed Motion to Dismiss Complaint was improperly granted

**II. DESIGNATION OF ITEMS TO BE INCLUDED IN THE RECORD**

Vol. 1  
000001

1. Notice of Appeal for Bankruptcy Case Adversary Proceeding No. 21-03067-sgj11 [Doc. 168].

000042

2. The judgment, order, or decree appealed from: Memorandum Opinion and Order Granting Defendant Highland Capital Management, L.P.'s "Renewed Motion to Dismiss Complaint" [Adv. Proc. Doc. No. 122] [Doc. 167].

000080

3. Docket Sheet kept by the Bankruptcy Clerk.

4. Documents listed below and as described in the Docket Sheet for Bankruptcy Case Proceeding No. 21-03067-sgj.

Vol. 2

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000138

| No. | Date Filed | Docket No. | Description/Document Text                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |
|-----|------------|------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 1   | 9/29/21    | 1          | (36 pgs; 3 docs) Adversary case 21-03067. ORDER REFERRING CASE NUMBER 21-CV-0842-B from U.S District Court for the Northern District of Texas, Dallas Division to U.S. Bankruptcy Court for Northern District of Texas, Dallas Division. Complaint by Charitable DAF Fund, LP, CLO Holdco, Ltd. against Highland Capital Management, LP, Highland HCF Advisor Ltd., Highland CLO Funding, Ltd. Fee Amount \$350 (Attachments: # 1 Original Complaint # 2 Docket Sheet from 3:20-cv-0842-B) Nature(s) of suit: 02 (Other (e.g. other actions that would have been brought in state court if unrelated to bankruptcy)). (Okafor, M.) |
| 2   | 9/29/21    | 2          | (1 pg) Supplemental Document (cover sheet) by CLO Holdco Ltd., Charitable DAF Fund (RE: related document(s)) Adversary case 21-03067) [ORIGINALLY FILED IN 21-CV-0842 AS #2 ON 04/13/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)                                                                                                                                                                                                                                                                                                                                                 |

|                       |   |         |    |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |
|-----------------------|---|---------|----|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Vol. 2<br>000139      | 3 | 9/29/21 | 6  | (93 pgs; 6 docs) MOTION for Leave to File First Amended Complaint filed by CLO Holdco Ltd., Charitable DAF Fund LP (Attachments: # 1 Exh 1_First Amended Complaint # 2 Exh 2_Motion for Authorization to Retain James Seery # 3 Exh 3_Order Approving Retention of James Seery # 4 Exh 4_Order Approving Settlement # 5 Proposed Order) (Bridges, Jonathan) (Entered: 04/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #6 ON 04/19/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)                                                                                                                                                                                                                                                                                                                |
| 000232                | 4 | 9/29/21 | 22 | (7 pgs; 2 docs) MOTION for an Order to Enforce the Order of Reference filed by Highland Capital Management LP. (Attachments: # 1 Exhibit(s) A--Proposed Order) (Annable, Zachery) Modified text on 5/20/2021 (mjr). (Entered: 05/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #22 ON 05/19/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)                                                                                                                                                                                                                                                                                                                                                                                                                                                       |
| 000239                | 5 | 9/29/21 | 23 | (31 pgs) Brief/Memorandum in Support filed by Highland Capital Management LP re: 22 MOTION for an Order to Enforce the Order of Reference. (Annable, Zachery) Modified text on 5/20/2021 (mjr).(Entered: 05/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #23 ON 05/19/2021 IN U.S.DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |
| 000270<br>Thru Vol. 6 | 6 | 9/29/21 | 24 | (926 pgs; 29 docs) Appendix in Support filed by Highland Capital Management LP re: 23 Brief/Memorandum in Support. (Attachments: # 1 Appendix 1 # 2 Appendix 2 # 3 Appendix 3 # 4 Appendix 4 # 5 Appendix 5 # 6 Appendix 6 # 7 Appendix 7 # 8 Appendix 8 # 9 Appendix 9 # 10 Appendix10 # 11 Appendix 11 # 12 Appendix 12 # 13 Appendix 13 # 14 Appendix 14 # 15 Appendix 15 # 16 Appendix 16 # 17 Appendix 17 # 18 Appendix 18 # 19 Appendix 19 # 20 Appendix 20 # 21 Appendix 21# 22 Appendix 22 # 23 Appendix 23 # 24 Appendix 24 # 25 Appendix 25 # 26 Appendix 26 # 27 Appendix 27 # 28 Appendix 28) (Annable, Zachery) Modified linkage and text on 5/20/2021 (mjr). (Entered:05/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #24 ON 05/19/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.) |
| Vol. 7<br>001196      | 7 | 9/29/21 | 26 | (7 pgs; 2 docs) MOTION to Dismiss Complaint filed by Highland Capital Management LP (Attachments: # 1 Exhibit(s) A--Proposed Order) (Annable, Zachery) Modified text on 5/28/2021 (jmg).(Entered: 05/27/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #26 ON 05/27/2021 IN U.S.DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |

|                                 |    |         |    |                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |
|---------------------------------|----|---------|----|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Vol. 7<br>001203<br>thru Vol. 8 | 8  | 9/29/21 | 28 | (508 pgs; 14 docs) Appendix in Support filed by Highland Capital Management LP (Attachments: # 1 Appendix 1 # 2 Appendix 2 # 3 Appendix 3 # 4 Appendix 4 # 5 Appendix 5 # 6 Appendix 6 # 7 Appendix 7 # 8 Appendix 8 # 9 Appendix 9 # 10 Appendix 10 # 11 Appendix 11 # 12 Appendix 12 # 13 Appendix 13) (Annable, Zachery) (Entered: 05/27/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #28 ON 05/27/2021 IN U.S. DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.) |
| Vol. 9<br>001711                | 9  | 9/29/21 | 33 | (1 pg) Amended Civil Cover Sheet by CLO Holdco Ltd, Charitable DAF Fund LP. Amendment to 2 Supplemental Document. (Sbaiti, Mazin) Modified text on 6/23/2021 (mjr). (Entered: 06/22/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #33 ON 06/22/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)                                                                                                                         |
| 001712                          | 10 | 9/29/21 | 36 | (26 pgs) RESPONSE filed by CLO Holdco Ltd, Charitable DAF Fund LP re: 22 MOTION for an Order to Enforce the Order of Reference (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #36 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)                                                                                                                                              |
| 001738                          | 11 | 9/29/21 | 37 | (22 pgs) Appendix in Support filed by CLO Holdco Ltd, Charitable DAF Fund LP re 36 Response/Objection Response to Motion for an Order to Enforce the Order of Reference (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #37 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)                                                                                                     |
| 001760                          | 12 | 9/29/21 | 38 | (45 pgs) RESPONSE filed by CLO Holdco Ltd, Charitable DAF Fund LP re: 26 MOTION to Dismiss (Defendant Highland Capital Management, L.P.'s Motion to Dismiss Complaint) (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #38 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)                                                                                                      |
| 001805                          | 13 | 9/29/21 | 39 | (88 pgs) Appendix in Support filed by CLO Holdco Ltd, Charitable DAF Fund LP re 38 Response/Objection to Defendant Highland Capital Management, L.P.'s Motion to Dismiss Complaint (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #39 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)                                                                                          |
| 001893                          | 14 | 9/29/21 | 42 | (12 pgs) REPLY filed by Highland Capital Management LP re: 22 MOTION for an Order to Enforce the Order of Reference (Annable, Zachery) (Entered: 07/13/2021) [ORIGINALLY FILED IN 21-CV-0842AS #42 ON 07/13/2021 IN U.S.                                                                                                                                                                                                                                        |



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|                        |    |         | DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)                                                                                                                                                                                                                                                                                                                                                                                                                        |
| VOL. 9                 | 15 | 9/29/21 | 43 (852 pgs) Appendix in Support filed by Highland Capital Management LP re: 42 Reply. (Annable, Zachery) Modified text on 7/14/2021 (mjr). (Entered: 07/13/2021) [ORIGINALLY FILED IN 21-CV-0842AS #43 ON 07/13/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)                                                                                                                                                                                          |
| 001905<br>thru Vol. 13 | 16 | 9/29/21 | 45 (21 pgs) REPLY filed by Highland Capital Management LP re: 26 MOTION to Dismiss (Defendant Highland Capital Management, L.P.'s Motion to Dismiss Complaint) (Annable, Zachery) (Entered:07/13/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #44 ON 07/13/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)                                                                                                                                                    |
| 002757                 | 17 | 9/29/21 | 57 (7 pgs; 2 docs) MOTION to Dismiss and Joinder in Motion to Dismiss of Highland Capital Management, L.P. filed by Highland CLO Funding Ltd. (Attachments: # 1 Proposed Order) Attorney Paul R Bessette added to party Highland CLO Funding Ltd (pty:dft) (Bessette, Paul) (Entered: 08/30/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #57 ON 08/30/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)                                                         |
| 002778                 | 18 | 9/29/23 | 58 (12 pgs) Brief/Memorandum in Support filed by Highland CLO Funding Ltd. re 57 MOTION to Dismiss and Joinder in Motion to Dismiss of Highland Capital Management, L.P. (Bessette, Paul) (Entered: 08/30/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #58 ON 08/30/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)                                                                                                                                           |
| 002785                 | 19 | 9/29/23 | 59 (80 pgs; 5 docs) Appendix in Support filed by Highland CLO Funding Ltd re 58 Brief/Memorandum in Support of Motion (Attachments: # 1 Exhibit(s) A - Jackson v Dear # 2 Exhibit(s) B - Prudential Assurance v. Newman # 3 Exhibit(s) C - Harbourvest Settlement Agreement # 4 Exhibit(s) D - Boleat Declaration) (Bessette, Paul) (Entered: 08/30/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #59 ON 08/30/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.) |
| 002797                 | 20 | 9/29/21 | 64 (1 pg) ORDER OF REFERENCE: Pursuant to 28 U.S.C. § 157 and this District's Miscellaneous Order No. 33, this case is hereby REFERRED to Judge Stacey G. C. Jernigan of the United States Bankruptcy Court for the Northern District of Texas, Dallas Division, to be adjudicated as a matter related to the consolidated Chapter 11 Bankruptcy of Highland Capital Management, L.P., Chapter 11 Case No.19-34054. (Ordered by Judge Jane J. Boyle                                                     |
| 002877                 |    |         |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |

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| Vol. 14      |    |          |     | on 9/20/2021) (svc) (Entered: 09/20/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #64 ON 09/20/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)                                                                                                                                                                                                                                                                                                                                                                                                              |
|              | 21 | 10/19/21 | 66  | (5 pgs) Notice of hearing filed by Defendant Highland Capital Management, LP (RE: related document(s) 26 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP, 47 Motion to strike document filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 55 Motion to abate filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) Hearing to be held on 11/23/2021 at 09:30 AM at <a href="https://us-courts.webex.com/meet/jerniga">https://us-courts.webex.com/meet/jerniga</a> for 26 and for 47 and for 55, (Annable, Zachery) |
| 002878       |    |          |     |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |
| 002883       | 22 | 11/22/21 | 71  | (509 pgs; 2 docs) Witness and Exhibit List <i>for Hearing on November 23, 2021</i> filed by Defendant Highland Capital Management, LP (RE: related document(s) 26 Motion to dismiss adversary proceeding). (Attachments: # 1 Exhibits 1-13) (Hayward, Melissa)                                                                                                                                                                                                                                                                                                                                       |
| thru Vol. 16 |    |          |     |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |
| Vol. 17      | 23 | 11/22/21 | 72  | (2 pgs) Witness List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 26 Motion to dismiss adversary proceeding, 47 Motion to strike (related document(s): 43 Document), 55 Motion to abate (related document(s) 1 Complaint), 69 Motion to abate <i>Plaintiffs' Amended Motion to Stay All Proceedings</i> (related document(s) 55 Motion to abate (related document(s) 1 Complaint))). (Sbaiti, Mazin)                                                                                                                                                       |
| 003392       |    |          |     |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |
| 003394       | 24 | 11/22/21 | 73  | (189 pgs; 4 docs) Exhibit List <i>for November 23, 2021 hearing</i> filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 47 Motion to strike (related document(s): 43 Document), 55 Motion to abate (related document(s) 1 Complaint)). (Attachments: # 1 Exhibit 1_Defendant's Memorandum of Law in Support of Motion for Reconsideration # 2 Exhibit 2_Highland Memorandum in Support of Motion to Dismiss # 3 Exhibit 3_Order (I) Confirming Fifth Amended Plan of Reorganization of Highland) (Sbaiti, Mazin)                                                  |
| 003583       | 25 | 12/7/21  | 80  | (2 pgs) Order granting Highland CLO Funding, Ltd.'s motion to dismiss adversary as a party with prejudice (related document 57) Entered on 12/7/2021. (Okafor, Marcey) Modified text on 3/11/2022 (Okafor, Marcey).                                                                                                                                                                                                                                                                                                                                                                                  |
| 003585       | 26 | 3/11/22  | 99  | (26 pgs) Memorandum of Opinion and order granting motion to dismiss the adversary proceeding (RE: related document(s) 26 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP). Entered on 3/11/2022 (Okafor, Marcey)                                                                                                                                                                                                                                                                                                                                           |
| 003611       | 27 | 3/11/22  | 100 | (26 pgs) Order granting motion to dismiss adversary proceeding with prejudice (related document #26) Entered on 3/11/2022. (Okafor, Marcey)                                                                                                                                                                                                                                                                                                                                                                                                                                                          |



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| Vol. 18<br>003637                | 28 | 3/21/22  | 104 | (29 pgs) Notice of appeal. Fee Amount \$298 filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 100 Order on motion to dismiss adversary proceeding). Appellant Designation due by 04/4/2022. (Sbaiti, Mazin)                                                                                                                                                                                                                                                                                                                                                                                           |
| 003666                           | 29 | 5/26/22  | 120 | (177 pgs; 2 docs) Support/supplemental document <i>Motion to Supplement Appellate Record</i> filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 111 Appellant designation). (Attachments: # 1 Amended Transcript of January 14, 2021 Hearing) (Sbaiti, Mazin)                                                                                                                                                                                                                                                                                                                                          |
| 003843                           | 30 | 6/9/22   | 121 | (1 pg) DISTRICT COURT Order: Case 3:22-00695-B is hereby transferred to the docket of the Honorable Judge Jane J. Boyle for consolidation with The Charitable DAF Fund LP, et al. v. Highland Capital Management LP, Case No. 3:21-cv-3129-N. Judge Karen Gren Scholer no longer assigned to case.(RE: related document(s) 86 Notice of appeal filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 104 Notice of appeal filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Entered on 6/9/2022 (Whitaker, Sheniqua) (Entered: 06/10/2022)                                                        |
| 003844                           | 31 | 10/24/22 | 122 | (7 pgs) Motion to dismiss adversary proceeding ( <i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i> ) filed by Defendant Highland Capital Management, LP (Annable, Zachery)                                                                                                                                                                                                                                                                                                                                                                                                                          |
| 003851                           | 32 | 10/14/22 | 123 | (31 pgs) Brief in support filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding ( <i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i> )). (Annable, Zachery)                                                                                                                                                                                                                                                                                                                                                                         |
| Vol. 19<br>003882<br>Thru Vol 20 | 33 | 10/14/22 | 124 | (513 pgs; 15 docs) Support/supplemental document ( <i>Appendix in Support of Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i> ) filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding ( <i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i> )). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7 # 8 Exhibit 8 # 9 Exhibit 9 # 10 Exhibit 10 # 11 Exhibit 11 # 12 Exhibit 12 # 13 Exhibit 13 # 14 Exhibit 14) (Annable, Zachery) |
| Vol. 21<br>004395                | 34 | 10/27/22 | 126 | (5 pgs) Notice of hearing ( <i>Notice of Hearing and Briefing Schedule on Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i> ) filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP). Hearing to be held on 12/8/2022 at 09:30 AM at <a href="https://us-courts.webex.com/meet/jerniga">https://us-courts.webex.com/meet/jerniga</a> for 122. (Annable, Zachery)                                                                                                                   |

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| Vol. 21<br>004400<br><br>004410<br><br>004442<br>Thru Vol. 22             | 35 | 11/18/22 | 128 | (10 pgs) Motion for withdrawal of reference. Fee amount \$188, filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (Sbaiti, Mazin)                                                                                                                                                                                                                                                                                                                  |
|                                                                           | 36 | 11/18/22 | 129 | (32 pgs) Response opposed to (related document(s): 122 Motion to dismiss adversary proceeding ( <i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i> ) filed by Defendant Highland Capital Management, LP) filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Sbaiti, Mazin)                                                                                                                                 |
|                                                                           | 37 | 11/18/22 | 130 | (254 pgs; 2 docs) Response opposed to (related document(s): 122 Motion to dismiss adversary proceeding ( <i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i> ) filed by Defendant Highland Capital Management, LP) filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Attachments: # 1 Appendix) (Sbaiti, Mazin)                                                                                            |
| Vol. 22<br>004696<br><br>004717<br><br>004732<br><br>004737<br><br>004742 | 38 | 9/2/22   | 131 | (21 pgs) DISTRICT COURT MEMORANDUM OPINION AND ORDER: The Court REVERSES and REMANDS the bankruptcy court's Motion to Dismiss Order and AFFIRMS the bankruptcy courts Motion to Stay Order. re: appeal on Civil Action number: Case 3:22-00695-B consolidated with 3:21-CV-3129-B, (RE: related document(s) 81 Order on motion to abate, 100 Order on motion to dismiss adversary proceeding). Entered on 9/2/2022 (Whitaker, Sheniqua) (Entered: 11/29/2022) |
|                                                                           | 39 | 12/2/22  | 133 | (15 pgs) Reply to (related document(s): 129 Response filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 130 Response filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) filed by Defendant Highland Capital Management, LP. (Annable, Zachery)                                                                                                                                                                      |
|                                                                           | 40 | 12/7/22  | 135 | (5 pgs) Notice of hearing filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP). Hearing to be held on 1/25/2023 at 01:30 PM at <a href="https://us-courts.webex.com/meet/jerniga">https://us-courts.webex.com/meet/jerniga</a> for 122, (Annable, Zachery)                                                                              |
|                                                                           | 41 | 12/7/22  | 136 | (5 pgs) Notice of hearing filed by Defendant Highland Capital Management, LP (RE: related document(s) 128 Motion for withdrawal of reference filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Status Conference to be held on 1/25/2023 at 01:30 PM at <a href="https://us-courts.webex.com/meet/jerniga">https://us-courts.webex.com/meet/jerniga</a> . (Annable, Zachery).                                                          |
|                                                                           | 42 | 12/9/22  | 138 | (3 pgs) Response opposed to (related document(s): 128 Motion for withdrawal of reference. Fee amount \$188, filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) filed by Defendant Highland Capital Management, LP. (Annable, Zachery)                                                                                                                                                                                                    |

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| Vol. 22<br>004745       | 43 | 12/9/22  | 139 | (25 pgs) Brief in support filed by Defendant Highland Capital Management, LP (RE: related document(s) 138 Response). (Annable, Zachery)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |
| Vol. 23<br>004770       | 44 | 12/9/22  | 140 | (280 pgs; 8 docs) Support/supplemental document ( <i>Appendix in Support of Highland Capital Management, L.P.'s Response to Renewed Motion to Withdraw the Reference</i> ) filed by Defendant Highland Capital Management, LP (RE: related document(s) 138 Response). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7) (Annable, Zachery)                                                                                                                                                                                                                                             |
| Vol. 24<br>005050       | 45 | 12/16/22 | 144 | (6 pgs) Reply to (related document(s): 138 Response filed by Defendant Highland Capital Management, LP) filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Sbaiti, Mazin)                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
| 005056<br>Thru Vol. 25. | 46 | 1/23/23  | 145 | (514 pgs; 15 docs) Witness and Exhibit List filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding ( <i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i> )). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7 # 8 Exhibit 8 # 9 Exhibit 9 # 10 Exhibit 10 # 11 Exhibit 11 # 12 Exhibit 12 # 13 Exhibit 13 # 14 Exhibit 14) (Annable, Zachery)                                                                                                                                     |
| Vol. 26<br>005570       | 47 | 1/23/23  | 146 | (280 pgs; 8 docs) Witness and Exhibit List filed by Defendant Highland Capital Management, LP (RE: related document(s) 128 Motion for withdrawal of reference. Fee amount \$188.). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7) (Annable, Zachery)                                                                                                                                                                                                                                                                                                                                |
| Vol. 27<br>005850       | 48 | 1/23/23  | 147 | (221 pgs; 7 docs) Witness and Exhibit List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding ( <i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i> )). (Attachments: # 1 Exhibit 1_Excerpts from July 14, 2020 Hearing Transcript # 2 Exhibit 2_HCLOF Members Agreement Relating to the Company # 3 Exhibit 3_HarbourVest Settlement Agreement # 4 Exhibit 4_Order Approving Debtor's Settlement with HarbourVest # 5 Exhibit 5_HCLOF Offering # 6 Exhibit 6 Amended and Restated Investment Advisory Agreement) (Sbaiti, Mazin) |
| 006071                  | 49 | 1/23/23  | 148 | (3 pgs) Witness and Exhibit List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 128 Motion for withdrawal of reference. Fee amount \$188.). (Phillips, Louis)                                                                                                                                                                                                                                                                                                                                                                                                                                                 |
| Vol. 28<br>006074       | 50 | 1/25/23  | 150 | (56 pgs; 2 docs) Amended Witness and Exhibit List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 147 List (witness/exhibit/generic), 149 List (witness/exhibit/generic)). (Attachments: # 1 Exh 7_Testimony of Mark Patrick at June 8, 2021 hearing) (Sbaiti, Mazin)                                                                                                                                                                                                                                                                                                                                          |



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| Vol. 28<br>006130<br><br>006133<br><br>Thru Vol. 31 | 51 | 1/25/23 | 152 | (3 pgs) Notice of Appearance and Request for Notice by Louis M. Phillips filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Phillips, Louis)                                                                                                                                                                                                                                                                                                                                                                                                                            |
|                                                     | 52 | 1/25/23 | 154 | (1 pg) Court admitted exhibits date of hearing January 25, 2023 (RE: related document(s) 128 Motion for withdrawal of reference, filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) (COURT ADMITTED DEFENDANT'S EXHIBITS #1, #2, #3, #4, #5 & #6 OFFERED BY ATTY GREG DEMO). (Edmond, Michael) (Entered: 01/27/2023)                                                                                                                                                                              |
| Vol. 32<br>006925<br><br>006942<br><br>006960       | 53 | 2/6/23  | 158 | Report and recommendation to the U.S. District Court by U.S. Bankruptcy Judge. (RE: related document(s) 128 Motion for withdrawal of reference filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Entered on 2/6/2023 (Okafor, Marcey)                                                                                                                                                                                                                                                                                                                         |
|                                                     | 54 | 2/6/23  | 161 | (18 pgs) DISTRICT COURT Notice of transmission of report and recommendation in re: renewed motion to withdraw reference. Civil Case # 3:22-cv-02802-S. (RE: related document(s) 158 Report and recommendation to the U.S. District Court by U.S. Bankruptcy Judge. (RE: related document(s) 128 Motion for withdrawal of reference filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Entered on 2/6/2023) (Whitaker, Sheniqua)                                                                                                                                |
|                                                     | 55 | 4/3/23  | 165 | (1 pg) DISTRICT COURT ORDER: The Court GRANTS the 11 Joint Motion to Transfer Proceeding and Consolidate Before Original Court and the above-numbered case (3:22-cv-02802-S) is transferred to the docket of the Honorable Judge Jane Boyle: Civil case 3:21-cv-00842-B (order referring case). (RE: related document(s) 1 Complaint filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 143 Notice of transmission of motion to withdraw reference). Entered on 4/3/2023 (Whitaker, Sheniqua) Modified on 4/10/2023 (Whitaker, Sheniqua). (Entered: 04/10/2023) |

#### TRANSCRIPTS

|        |    |          |    |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |
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| 006961 | 56 | 11/24/21 | 78 | (104 pgs) Transcript regarding Hearing Held 11-23-2021 RE: Motion Hearing. THIS TRANSCRIPT WILL BE MADE ELECTRONICALLY AVAILABLE TO THE GENERAL PUBLIC 90 DAYS AFTER THE DATE OF FILING. TRANSCRIPT RELEASE DATE IS 02/22/2022. Until that time the transcript may be viewed at the Clerk's Office or a copy may be obtained from the official court transcriber. Court Reporter/Transcriber Liberty Transcripts/Dipti Patel, Telephone number 847-848-4907. (RE: related document(s) 75 Hearing held on 11/23/2021. (RE: related document(s) 55 MOTION to Stay filed by CLO Holdco Ltd, Charitable DAF Fund LP (Sbaiti, Mazin) (Entered: 08/26/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #55 ON 08/26/2021 IN U.S. |
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|    |         |     | <p>DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)) (Appearances: J. Pomerantz and J. Morris for Highland Defendants; J. Jordan and P. Bessett for HCLOF; M. Sbaiti for Plaintiffs. Nonevidentiary hearing. Motion denied. Mr. Pomerantz to upload order.), 76 Hearing held on 11/23/2021. (RE: related document(s) 47 Motion to strike 43 Appendix in support filed by CLO Holdco, Ltd., Charitable DAF Fund, LP (Bridges, Jonathan) Modified text on 7/16/2021 (mjr). (Entered: 07/15/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #47 ON 07/15/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)) (Appearances: J. Pomerantz and J. Morris for Highland Defendants; J. Jordan and P. Bessett for HCLOF; M. Sbaiti for Plaintiffs. Nonevidentiary hearing. Motion denied (Plaintiffs acknowledged complained-of Appendices it did not relate to Motion to Dismiss). Mr. Pomerantz to upload order.)). Transcript to be made available to the public on 02/22/2022. (Patel, Dipti)</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |
| 57 | 2/21/23 | 164 | <p>164 (112 pgs) Transcript regarding Hearing Held 1/25/23 RE: HEARING ON DEFENDANT HIGHLAND CAPITAL MANAGEMENT L.P.'S RENEWED MOTION TO DISMISS COMPLAINT (122) AND STATUS CONFERENCE RE: MOTION FOR WITHDRAWAL OF REFERENCE FILED BY PLAINTIFF CLO HOLDCO, LTD., PLAINTIFF CHARITABLE DAF FUND, LP (128). THIS TRANSCRIPT WILL BE MADE ELECTRONICALLY AVAILABLE TO THE GENERAL PUBLIC 90 DAYS AFTER THE DATE OF FILING. TRANSCRIPT RELEASE DATE IS 05/22/2023. Until that time the transcript may be viewed at the Clerk's Office or a copy may be obtained from the official court transcriber. Court Reporter/Transcriber Dipti Patel, Telephone number 847-848-4907. (RE: related document(s) 155 Hearing held on 1/25/2023. (RE: related document(s) 122 Motion to dismiss adversary proceeding, (Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint) filed by Defendant Highland Capital Management, LP filed by Defendant Highland Capital Management, LP) (Appearances: J. Morris and G. Demo for Movants; L. Phillips and M. Sbaiti for Plaintiffs. Evidentiary hearing (appendices). Court took matter under advisement.), 156 Hearing held on 1/25/2023. (RE: related document(s) 128 Motion for withdrawal of reference. Fee amount \$188, filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) (Appearances: J. Morris and G. Demo for Movants; L. Phillips and M. Sbaiti for Plaintiffs. Evidentiary hearing (appendices). Court announced it will recommend denial to District Court. Court is working on Report &amp; Recommendation.)). Transcript to be made available to the public on 05/22/2023. (Patel, Dipti)</p> |

Dated: July 14, 2023

Respectfully submitted,

**SBAITI & COMPANY PLLC**

/s/ Mazin A. Sbaiti

**Mazin A. Sbaiti**

Texas Bar No. 24058096

**Jonathan Bridges**

Texas Bar No. 24028835

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E: mas@sbaitilaw.com

jeb@sbaitilaw.com

**Counsel for Appellants**

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing document was filed electronically through the Court's ECF system, which provides notice to all parties of interest, on this 14<sup>th</sup> day of July, 2023.

/s/ Mazin A. Sbaiti

Mazin A. Sbaiti







14. Pursuant to that agreement, Harbourvest acquired the following interests in the following entities:

Harbourvest Skew Base AIF, L.P., acquired 0.72%;

15. On or about October 16, 2019, Highland Capital Management filed for Chapter 11 bankruptcy in Delaware Bankruptcy Court, which was later transferred to the Northern District of Texas Bankruptcy Court, in the case styled *In Re: Highland Capital Management, L.P., Debtor*, Cause No. 19-34054, (the “HCM Bankruptcy” and the Court is the “Bankruptcy Court”).

**16.** On April 8, 2020, Harbourvest submitted its proofs of claim in the HCM bankruptcy proceeding. Annexed to its proofs of claims was an explanation of the Proof of Claim and the basis therefor setting out various pre-petition allegations of wrongdoing by HCM. *See, e.g.*, Case No. 19-bk-34054, Doc. 1631-5.

17. The debtor, HCM, made an omnibus response to the proofs of claims, stating they were duplicative of each other, overstated, late, and otherwise meritless.

**18.** Harbourvest responded to the omnibus objections on September 11, 2020. *See* Cause No. 19-bk-34054, Doc. 1057.

**19.** Harbourvest represented that it had invested in HCLOF, purchasing 49.98% of HCLOF's outstanding shares.

**20.** Plaintiff CLO Holdco was and is also a 49.02% holder of HCLOF's member interests.

**21.** In its Omnibus Response, Harbourvest explained that its claims included unliquidated legal claims for fraud, fraud in the inducement, RICO violations under 18 U.S.C. 1964, among others (the “Harbourvest Claims”). *See* Cause No. 19-bk-34054, Doc. 1057.

**22.** The Harbourvest Claims centered on allegations that when Harbourvest was intending to invest in a pool of Collateralized Loan Obligations, or CLOs, that were then-managed by Acis Capital Management (“Acis”), a subsidiary of HCM, HCM failed to disclose key facts about ongoing litigation with a former employee, Josh Terry.

**23.** Harbourvest contended that HCM never sufficiently disclosed the underlying facts about the litigation with Terry, and HCM's then-intended strategy to fight Terry caused HCLOF to incur around \$15 million in legal fees and costs. It contended that had it known the nature of the lawsuit and how it would eventually turn out, Harbourvest never would have invested in HCLOF. *See* Cause No. 19-bk-34054, Doc. 1057.

**24.** HCLOF's portfolio manager is HCFA. HCM is the parent of HCFA and is managed by its General Partner, Strand Management, who employs Seery and acts on behalf of HCM.



34. HCM and Seery rationalized the settlement value by allocating \$22.5 million of the net value of the \$45 million in unsecured claims as consideration to purchase Harbourvest’s interests in HCLOF, meaning, if 70% of the unsecured claims—i.e., \$31.5 million—was realized, because \$22.5 million of that would be allocated to the purchase price of the Harbourvest interests in HCLOF, the true “settlement” for Harbourvest’s legal claims was closer to \$9 million.

**36.** At the core of this lawsuit is the fact that HCM purchased the Harbourvest interests in HCLOF for \$22.5 million knowing that they were worth far more than that.

**38.** On November 30, 2020, which was less than a month prior to the filing of the Motion to Approve the Settlement, the net asset value of those interests was over \$34.5 million. Plaintiffs were never made aware of that.

000975







**V.**

**55.** Plaintiffs respectfully incorporate the foregoing factual averments as if fully set forth herein and further alleges the following:

**56.** HCM is a registered investment advisor and acts on behalf of HCFA. Both are fiduciaries to Plaintiffs.

**57.** The Advisers Act establishes an unwaivable federal fiduciary duty for investment advisers.<sup>5</sup>

000978

**60.** The RIA Agreement further commits HCM to value financial assets “in accordance with the then current valuation policy of the Investment Advisor [HCM], a copy of which will be provided to the General Partner upon request.” RIA Agreement ¶ 5.

**62.** HCFA owed a fiduciary duty to Holdco as an investor in HCLOF and to which HCFA was the portfolio manager. HCM owed a fiduciary duty to the DAF (and to Holdco as its subsidiary) pursuant to a written Advisory Agreement HCM and the DAF had where HCM agreed to provide sound investment advice and management functions.

**64.** The core of the fiduciary duty is to act in the best interest of their investors—the advisor must put the ends of the client before its own ends or the ends of a third party.

**67.** The simple thesis of this claim is that Defendants HCFA and HCM breached their fiduciary duties by (i) insider trading with Harbourvest and concealing the rising NAV of the underlying assets—i.e., trading with Harbourvest on superior, non-public information that was neither revealed to Harbourvest nor to Plaintiff; (ii) concealing the value of the Harbourvest Interests; and (iii) diverting the investment opportunity in the Harbourvest entities to HCM (or its designee) without offering it to or making it available to Plaintiff or the DAF.

**69.** This violated a multitude of regulations under 27 C.F.R. part 275, in addition to Rules 10b-5 and 10b5-1. 17 CFR 240.10b5-1 (“Rule 10b5-1”) explains that one who trades while possessing non-public information is liable for insider trading, and they do not necessarily have to have *used* the specific inside information.

000980

**73.** HCM either did not follow these policies, changed them to be out of compliance both with the Adviser Act regulations and its Form ADV representations, and/or simply misrepresented or concealed their results.

75. At no time between agreeing with Harbourvest to the purchase of its interests and the court approval did Defendants disclose to either Harbourvest or to Plaintiff (and the Bankruptcy Court for that matter) that the purchase was at below 50% the current net asset value as well, and when they failed to offer Plaintiff (and the other members of HCLOF) their right to purchase the interests pro rata at such advantageous valuations. Plaintiff's lost opportunity to

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Original Complaint



77. Furthermore, HCLOF holds equity in MGM Studios and debt in CCS Medical via various CLO positions. But Seery, in his role as CEO of HCM, was made aware during an advisors meeting in December 2020 that Highland would have to restrict its trading in MGM because of its insider status due to activities that were likely to apply upward pressure on MGM's share price.

**79.** Seery's knowledge is imputed to HCM.

000982



87. What is more, Seery had previously testified that the management contracts for the funds—HCLOF included—were unprofitable, and that he intended to transfer them. But he later rejected offers to purchase those management contracts for fair value and instead decided to continue to manage the funds—which is what apparently gave rise to the Harbourvest Settlement, among others. He simultaneously rejected an offer for the Harbourvest assets of \$24 million, stating that they were worth much more than that.

**89.** For the same reason, Defendants' malfeasance has also exposed HCLOF to a massive liability from Harbourvest since the assignment of those interests is now one that is likely unenforceable under the Advisers Act, Section 47(b), if there was unequal information.

**91.** Plaintiffs seek disgorgement, damages, exemplary damages, attorneys' fees and costs. To the extent the Court determines that this claim had to have been brought derivatively on behalf of HCLOF, then Plaintiffs represent that any pre-suit demand would have been futile since asking HCM to bring suit against its principal, Seery, would have been futile.













**128.** In or around October 2020, Seery (who controls the Board of CSS Medical) was pursuing “equatization” of CSS Medical’s debt, which would have increased the value of certain securities by 25%. In several communications through the U.S. interstate wires and/or mails, and with Plaintiffs, and the several communications with Harbourvest during the negotiations of the settlement, Seery failed to disclose these changes which were responsible in part for the ever-growing value of the HCLOF CLO portfolio.

**130.** This series of related violations of the wire fraud, mail fraud, and securities fraud laws, in connection with the HCM bankruptcy, constitute a continuing pattern and practice of racketeering for the purpose of winning a windfall for HCM and himself--a nearly \$30,000,000 payday under the confirmation agreement.

000990



**141.** Plaintiff is therefore entitled to damages from HCM and Seery, as well as exemplary damages.

## JURY DEMAND

## VII.

**143.** Wherefore, for the foregoing reasons, Plaintiffs respectfully pray that the Court enter judgment in its favor and against Defendants, jointly and severally, for:

- 000992





# EXHIBIT 2





### III. ARGUMENT

### A. Rule 15(a) Allows Plaintiffs' Amendment As a Matter of Course

<sup>3</sup> Order (I) Confirming the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (As Modified) And (II) Granting Related Relief [Doc. 1943].

Here, Plaintiffs did not name Seery as a defendant in the Original Complaint out of an abundance of caution in light of the bankruptcy court's order of July 16, 2020 [Doc. 854]. Instead, Plaintiffs are seeking leave in this Motion to do so. Because the proposed amendment is their first, and because it comes within 21 days of service of the Original Complaint, as well as before any

Plaintiffs submit that the bankruptcy court order of July 16, 2020, does not prohibit the proposed amendment for two independent reasons.

### a. The Bankruptcy Court Cannot Strip This Court of Jurisdiction

Because the bankruptcy court’s jurisdiction derives from and is dependent upon the jurisdiction of this Court, its order declaring that it has “sole jurisdiction” is overreaching.

### b. The *Barton* Doctrine Does Not Apply

The bankruptcy court's overreach seems to stem from a misapplication of the *Barton* doctrine. That doctrine protects receivers and trustees who are appointed by the bankruptcy court. *Randazzo v. Babin*, No. 15-4943, 2016 U.S. Dist. LEXIS 110465, at \*3 (E.D. La. Aug. 18, 2016)





then adding “tort” to the rule for purposes of the matter before it); *cf. In re Prescription Home Health Care*, 316 F.3d 542, 548 (5th Cir. 2002) (holding that trustee’s tax liability was not within the bankruptcy court’s related-to jurisdiction and rejecting “the theory that a bankruptcy court has jurisdiction to enjoin any activity that threatens the debtor’s reorganization prospects [because that] would permit the bankruptcy court to intervene in a wide variety of third-party disputes [such as] any action (however personal) against key corporate employees, if they were willing to state that their morale, concentration, or personal credit would be adversely affected by that action”). The bankruptcy court’s order asserting “sole jurisdiction” here is hardly even relevant since that court lacks the power to expand its jurisdiction or manufacture jurisdiction where none exists.

The proposed First Amended Complaint asserts common law and equitable contract and tort claims. For the reasons explained by the Supreme Court in *Stern*, such claims should not be deemed within the bankruptcy court's jurisdiction.

#### **d. The Order Exceeds the Bankruptcy Court's Statutory Authorization**

Not only are there constitutional issues with the scope of the bankruptcy court’s order, there is also the limitation of 28 U.S.C. § 157(d). See *TMT Procurement Corp. v. Vantage Drilling Co.* (*In re TMT Procurement Corp.*), 764 F.3d 512, 523 & n.40 (5th Cir. 2014) (noting bankruptcy court’s “more limited jurisdiction” as a result of its “limited power” under 28 U.S.C. § 157). In § 157(d), Congress prohibited the bankruptcy court, absent the parties’ consent, from presiding over cases or proceedings that require consideration of both Title 11 and other federal law regulating organizations or activities affecting interstate commerce.

The First Amended Complaint’s allegations against Seery—accusing him of insider trading, violations of the RICO statute (18 U.S.C. § 1961 et seq.), and violations of the antifraud provisions of the Investment Advisers Act of 1940—require precisely that. Even determining the

## **2. The Prerequisites in the Bankruptcy Court's Order Are Satisfied by This Motion and the Detailed Allegations in the Proposed First Amended Complaint**

The bankruptcy court's order requires only that any contemplated action must first be submitted to that court for a preliminary determination of colorability. Because that court only has derivative jurisdiction as a result of this Court's jurisdiction—and only over matters referred to it by this Court—Plaintiffs submit that filing a motion for leave here is the correct procedure for complying with that order. This Court may refer this Motion to the bankruptcy court under Miscellaneous Order No. 33, as authorized by § 104 of the Bankruptcy Amendments and Federal Judgeship Act of 1984, codified at 28 U.S.C. § 157(a). Or it may instead decline to refer the Motion or withdraw the reference under 28 U.S.C. § 157(d), as Plaintiffs submit is appropriate for the





## APPENDIX 26





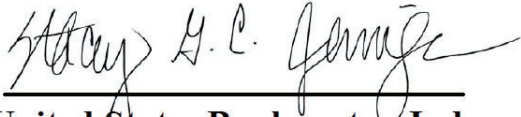
CLERK, U.S. BANKRUPTCY COURT  
NORTHERN DISTRICT OF TEXAS

**ENTERED**

THE DATE OF ENTRY IS ON  
THE COURT'S DOCKET

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

Signed April 28, 2021

  
United States Bankruptcy Judge

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

In re:

HIGHLAND CAPITAL MANAGEMENT, L.P.,<sup>1</sup>

Debtor.

§  
§  
§  
§  
§  
§  
§

Chapter 11

Case No. 19-34054-sgj11

**ORDER REQUIRING THE VIOLATORS TO SHOW CAUSE WHY THEY SHOULD  
NOT BE HELD IN CIVIL CONTEMPT FOR VIOLATING TWO COURT ORDERS**

Having considered (a) the *Debtor's Motion for an Order Requiring the Violators to Show Cause Why They Should Not Be Held in Civil Contempt for Violating Two Court Orders* [Docket No. 2247] (the "Motion"), (b) the *Debtor's Memorandum of Law in Support of Motion for an Order Requiring the Violators to Show Cause Why They Should Not Be Held in Civil Contempt for Violating Two Court* [Docket No. 2236] (the "Memorandum of Law"),<sup>2</sup> (c) the exhibits

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

<sup>2</sup> Capitalized terms used but not otherwise defined herein have the meanings ascribed to them in the Memorandum of Law.







## APPENDIX 27

GRANT SCOTT - 1/21/2021

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

|                               |   |                |
|-------------------------------|---|----------------|
| IN RE:                        | ) |                |
|                               | ) | Chapter 11     |
| HIGHLAND CAPITAL MANAGEMENT,  | ) |                |
| L.P.                          | ) | Case No.       |
|                               | ) | 19-34054-sgj11 |
| Debtor.                       | ) |                |
| -----                         | ) |                |
| HIGHLAND CAPITAL MANAGEMENT,  | ) |                |
| L.P.,                         | ) |                |
| Plaintiff,                    | ) |                |
|                               | ) | Adversary      |
| vs.                           | ) | Proceeding No. |
|                               | ) | 21-03000-sgj   |
| HIGHLAND CAPITAL MANAGEMENT   | ) |                |
| FUND ADVISORS, L.P.; NEXPOINT | ) |                |
| ADVISORS, L.P.; HIGHLAND      | ) |                |
| INCOME FUND; NEXPOINT         | ) |                |
| STRATEGIC OPPORTUNITIES FUND; | ) |                |
| NEXPOINT CAPITAL, INC.; and   | ) |                |
| CLO HoldCo, LTD.,             | ) |                |
|                               | ) |                |
| Defendants.                   | ) |                |
| -----                         | ) |                |

VIDEOCONFERENCE DEPOSITION OF Grant SCOTT

Thursday, 21st of January, 2021

Reported by: Lisa A. Wheeler, RPR, CRR

Job No: 188910

|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <p style="text-align: right;">Page 2</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 January 21, 2021</p> <p>3 2:02 p.m.</p> <p>4</p> <p>5</p> <p>6 Videoconference deposition of Grant</p> <p>7 SCOTT, pursuant to the Federal Rules of</p> <p>8 Civil Procedure before Lisa A. Wheeler,</p> <p>9 RPR, CRR, a Notary Public of the State of</p> <p>10 North Carolina. The court reporter</p> <p>11 reported the proceeding remotely and the</p> <p>12 witness was present via videoconference.</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>                                                                                                                                                                                                          | <p style="text-align: right;">Page 3</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 REMOTE APPEARANCES:</p> <p>3 PACHULSKI STANG ZIEHL &amp; JONES</p> <p>4 Attorneys for Debtor</p> <p>5 780 Third Avenue</p> <p>6 New York, NY 10017</p> <p>7 BY: JOHN MORRIS, ESQ.</p> <p>8</p> <p>9 LATHAM &amp; WATKINS</p> <p>10 Attorneys for UBS</p> <p>11 885 Third Avenue</p> <p>12 New York, NY 10022</p> <p>13 BY: SHANNON McLAUGHLIN, ESQ.</p> <p>14</p> <p>15 SIDLEY AUSTIN</p> <p>16 Attorneys for the Creditors Committee</p> <p>17 2021 McKinney Avenue</p> <p>18 Dallas, TX 75201</p> <p>19 BY: PENNY REID, ESQ.</p> <p>20 ALYSSA RUSSELL, ESQ.</p> <p>21 PAIGE MONTGOMERY, ESQ.</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p> |
| <p style="text-align: right;">Page 4</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 REMOTE APPEARANCES: (Continued)</p> <p>3 KING &amp; SPALDING</p> <p>4 Attorneys for Highland CLO Funding, Ltd.</p> <p>5 500 West 2nd Street</p> <p>6 Austin, TX 78701</p> <p>7 BY: REBECCA MATSUMURA, ESQ.</p> <p>8</p> <p>9 K&amp;L GATES</p> <p>10 Attorneys for Highland Capital Management</p> <p>11 Fund Advisors, L.P., et al.</p> <p>12 4350 Lassiter at North Hills Avenue</p> <p>13 Raleigh, NC 27609</p> <p>14 BY: A. LEE HOGEWOOD, III, ESQ.</p> <p>15 EMILY MATHER, ESQ.</p> <p>16</p> <p>17 HELLER DRAPER &amp; HORN</p> <p>18 Attorneys for The Dugaboy Investment Trust</p> <p>19 and The Get Good Trust</p> <p>20 650 Poydras Street</p> <p>21 New Orleans, LA 70130</p> <p>22 BY: MICHAEL LANDIS, ESQ.</p> <p>23</p> <p>24</p> <p>25</p> | <p style="text-align: right;">Page 5</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 REMOTE APPEARANCES: (Continued)</p> <p>3 KANE RUSSELL COLEMAN &amp; LOGAN</p> <p>4 Attorneys for Defendant CLO HoldCo Limited</p> <p>5 Bank of America Plaza</p> <p>6 901 Main Street</p> <p>7 Dallas, TX 75202</p> <p>8 BY: BRIAN CLARK, ESQ.</p> <p>9 JOHN KANE, ESQ.</p> <p>10</p> <p>11 ALSO PRESENT: La Asia Canty</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>                                                                                                                                                                    |



Page 6

1 GRANT SCOTT - 1/21/2021

2 G R A N T S C O T T ,

3 called as a witness, having been duly sworn

4 by a Notary Public, was examined and

5 testified as follows:

6 MR. MORRIS: Good afternoon. My

7 name is John Morris. I'm an attorney with

8 Pachulski Stang Ziehl & Jones, a law firm

9 who represents the debtor in the bankruptcy

10 known as In Re: Highland Capital

11 Management, L.P., and we're here today for

12 the deposition of Grant Scott.

13 Before I begin, I would just like to

14 have confirmation on the record that

15 everybody here who's representing their

16 respective parties agrees that this

17 deposition can be used in evidence in any

18 subsequent hearing, notwithstanding the

19 fact that it's being conducted remotely,

20 and that the witness is not in the same

21 room as the court reporter.

22 Does anybody have an objection to

23 the admissibility of the transcript subject

24 to any reservation of -- of actual

25 objections on the record to using this

Page 8

1 GRANT SCOTT - 1/21/2021

2 the -- the deposition six to eight years ago,

3 do you have a recollection as to what that was

4 about?

5 A. Yeah. It was a -- it was a patent I

6 wrote for Samsung Electronics.

7 Q. Okay.

8 A. And as being the person that I --

9 that wrote it and the patent was in litigation,

10 not -- not being handled by me, but by virtue

11 of having written the patent, I was -- I was

12 deposed --

13 Q. Okay. So you --

14 A. -- on the -- on the patent.

15 Q. Okay. So you've had a little bit of

16 experience with depositions. But just

17 generally speaking, I'm going to ask you a

18 series of questions. It's very important that

19 you allow me to finish my question before you

20 begin your answer.

21 Is that fair?

22 A. Absolutely.

23 Q. And I will certainly try to extend

24 the same courtesy to you, but if I -- if I step

25 on your words, will you let me know that?

Page 7

1 GRANT SCOTT - 1/21/2021

2 transcript going forward?

3 Okay. Nobody's spoken up, so I --

4 I'd like to begin.

5 EXAMINATION

6 BY MR. MORRIS:

7 Q. Good afternoon, Mr. Scott. As I

8 mentioned, my name is John Morris, and we're

9 here for your deposition today. Have you ever

10 been deposed before?

11 A. On two occasions.

12 Q. And -- and when did the -- when did

13 those depositions take place?

14 A. This past October and maybe six to

15 eight years ago.

16 Q. Okay. Can you just tell me

17 generally what the subject matter was of the

18 deposition this past October.

19 A. It was relating to Jim Dondero's --

20 it was a family law issue in -- in -- with

21 respect to Jim Dondero.

22 Q. Okay. And did you testify in a

23 courtroom, or was it a deposition like this?

24 A. I -- right here, actually.

25 Q. Okay. Super. And -- and what about

Page 9

1 GRANT SCOTT - 1/21/2021

2 A. Okay.

3 Q. And if there's anything that I ask

4 that you don't understand, will you let me know

5 that as well?

6 A. Yes. I'll try -- I'll do my best.

7 Q. Okay. So this is a virtual

8 deposition. We're not in the same room. I am

9 going to be showing you documents today. The

10 documents will be put up on the screen. This

11 isn't a -- a trick of any kind. If at any time

12 you see a document up on the screen and either

13 you believe or you have any reason to want to

14 read other portions of the document, will you

15 let me know that?

16 A. Yes, I -- yes, I will. Uh-huh.

17 Q. With respect to the Dondero family

18 matter, I really don't want to go into the

19 substance of that, but I do want to know

20 whether you testified voluntarily in that

21 matter or whether you -- whether you testified

22 pursuant to subpoena.

23 A. I would have done that, but the

24 first time I found out about it was a -- was a

25 subpoena that I received. I wasn't given the

|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |
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| <p style="text-align: right;">Page 10</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 choice.</p> <p>3 Q. Okay. And do you recall who served</p> <p>4 the subpoena on you? Actually, let me ask a</p> <p>5 different question because I'm really not</p> <p>6 interested in the -- in the details.</p> <p>7 Did Mr. Dondero serve that subpoena</p> <p>8 on you or did somebody else?</p> <p>9 A. His counsel for his ex-wife.</p> <p>10 Q. Mr. -- so -- so the lawyer acting on</p> <p>11 behalf of Mr. Dondero's ex-wife served you with</p> <p>12 the subpoena?</p> <p>13 A. Correct.</p> <p>14 Q. Okay. You're familiar with an</p> <p>15 entity called CLO HoldCo Limited; is that</p> <p>16 right?</p> <p>17 A. Yes.</p> <p>18 Q. Do you know what that entity is?</p> <p>19 A. Yes.</p> <p>20 Q. What -- what -- can you describe for</p> <p>21 me what CLO HoldCo Limited is.</p> <p>22 A. It's a holding company of assets</p> <p>23 including collateralized loan obligation-type</p> <p>24 assets. That's a portion of the overall</p> <p>25 portfolio. It's an organization that is</p>                                                                                                                                                                                           | <p style="text-align: right;">Page 11</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 integrated with other entities as part of a</p> <p>3 charitable -- loosely what we -- what we refer</p> <p>4 to as a charitable foundation equivalent.</p> <p>5 Yeah.</p> <p>6 Q. All right. We'll -- we'll get into</p> <p>7 some detail about the corporate structure in a</p> <p>8 moment. Do you personally play any role at CLO</p> <p>9 HoldCo Limited?</p> <p>10 A. Yes. My technical title is</p> <p>11 director, but I -- I don't necessarily know</p> <p>12 specifically what that title means other than I</p> <p>13 act, as I understand it, as -- as a trustee for</p> <p>14 those -- for those assets.</p> <p>15 Q. And where did you get that</p> <p>16 understanding?</p> <p>17 A. Approximately ten years ago from the</p> <p>18 group that -- that set up the hierarchy.</p> <p>19 Q. And which group set up the</p> <p>20 hierarchy?</p> <p>21 A. Employees at Jim Don- -- as I</p> <p>22 understand it, employees of Highland along with</p> <p>23 outside counsel, as I understand it, and also,</p> <p>24 I guess, input from -- from Jim Dondero.</p> <p>25 Q. At the time that you assumed the</p> |
| <p style="text-align: right;">Page 12</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 role of director of CLO HoldCo Limited, was</p> <p>3 that entity already in existence?</p> <p>4 A. I believe so. I'm not certain. I'm</p> <p>5 not certain.</p> <p>6 Q. What are your duties and</p> <p>7 responsibilities as a director of CLO HoldCo</p> <p>8 Limited?</p> <p>9 A. Well, my day-to-day responsibilities</p> <p>10 are to interface with -- with the manager of</p> <p>11 the -- of the assets of CLO. I do have some</p> <p>12 role in -- with respect to some of the entities</p> <p>13 that are -- I -- I have a limited role with</p> <p>14 respect to a subset of the charitable</p> <p>15 foundations that receive money from the CLO</p> <p>16 HoldCo structure, which is commonly referred to</p> <p>17 as the DAF. There's -- sometimes those are</p> <p>18 used interchangeably.</p> <p>19 Q. What terms are used interchangeably?</p> <p>20 A. Well, the DAF and CLO HoldCo are</p> <p>21 frequently -- by -- by other people they're --</p> <p>22 it's the short -- it's the -- I guess it's</p> <p>23 easier to use the acronym DAF than CLO HoldCo</p> <p>24 Limited, so I'm frequently having to -- there</p> <p>25 is a DAF entity so -- that's above -- above CLO</p> | <p style="text-align: right;">Page 13</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 in terms of the management, and so it's</p> <p>3 frequently confusing and I'm having to clarify</p> <p>4 at times which entity we're talking about,</p> <p>5 but -- but other parties frequently use those</p> <p>6 terms interchangeably.</p> <p>7 Q. Okay.</p> <p>8 MR. MORRIS: Lisa, when we use the</p> <p>9 phrase DAF, because you'll hear that a lot,</p> <p>10 it's all caps, D-A-F.</p> <p>11 BY MR. MORRIS:</p> <p>12 Q. You mentioned that you interface</p> <p>13 with the manager of assets of CLOs. Do I have</p> <p>14 that right?</p> <p>15 A. Well, of all the assets.</p> <p>16 Q. Okay. Who is the manager of the</p> <p>17 assets that you're referring to?</p> <p>18 A. Highland Capital Management.</p> <p>19 Q. Highland Capital Management manages</p> <p>20 all of the assets -- withdrawn.</p> <p>21 Is it your understanding that</p> <p>22 Highland Capital Management manages all the</p> <p>23 assets that are owned by CLO HoldCo Limited?</p> <p>24 A. Yes.</p> <p>25 Q. Who makes the investment decisions</p>                                                                            |

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2 on behalf of CLO HoldCo Limited?

3 A. Highland -- those managers that you

4 mentioned.

5 Q. Okay. I didn't mention anybody in

6 particular.

7 A. Oh, I'm sorry. The -- the -- the

8 money manager -- could you repeat that

9 question? I'm sorry. I'm so sorry.

10 Q. Can you just -- can you just

11 identify for me the person who makes investment

12 decisions on behalf of CLO HoldCo Limited.

13 A. It's -- well, it's -- it's persons

14 as I understand it. I inter- -- interface with

15 a -- with a group, but it's -- it's Highland

16 Capital employee -- Highland Capital Management

17 employees.

18 Q. Okay. Can you just name any of

19 them, please.

20 A. Hunter Covitz, Jim Dondero. Mark

21 Okada's no longer there, but I believe he was

22 involved, and there are others that I interface

23 with.

24 Q. Can you -- can you recall the name

25 of anybody other than Mr. Okada and Mr. Dondero

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2 Q. Is it fair to say that you do not

3 make decisions, investment decisions, on behalf

4 of CLO HoldCo Limited?

5 A. Yes.

6 Q. Does CLO HoldCo Limited have any

7 employees that you know of?

8 A. No.

9 Q. Does CLO HoldCo have any --

10 withdrawn.

11 Does CLO HoldCo Limited have any

12 officers that you know of?

13 A. No.

14 Q. So am I correct that you're the only

15 representative in the world of CLO HoldCo in

16 terms of being a director, officer, or

17 employee?

18 A. Yes.

19 Q. Do you receive any compensation from

20 CLO HoldCo for your services as the director?

21 A. I do now.

22 Q. When did that begin?

23 A. I believe in the middle of 2012.

24 Q. Okay. And had you served as a

25 director prior to that time without

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2 and Mr. Covitz?

3 A. Yeah. Over the years I've worked

4 with Tim Cournoyer, Thomas Surgent, but I

5 think -- I think that's the core -- the core

6 group.

7 Q. All right. And is there anybody

8 within that core group who has the final

9 decision-making authority concerning the

10 investments in CLO HoldCo Limited?

11 A. I don't -- I don't know. I'm sorry.

12 Say that again. I just want to -- I'm sorry.

13 I'm trying to be -- I'm not trying to -- I'm

14 trying to be --

15 Q. I understand. And --

16 A. Sorry. If you could just repeat it.

17 Q. Sure. Is there any particular

18 person who has the final decision-making

19 authority for investments that are being made

20 on behalf of CLO HoldCo Limited?

21 A. Amongst that group I am -- I am not

22 sure.

23 Q. Okay. So are there any other

24 directors of CLO HoldCo besides yourself?

25 A. No.

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2 compensation?

3 A. Yes.

4 Q. And have you been the sole director

5 of CLO HoldCo Limited since the time of your

6 appointment approximately ten years ago?

7 A. Yes.

8 Q. Nobody else has served in that

9 capacity; is that right?

10 A. That is correct.

11 Q. There have been no employees or

12 officers of that entity during the time that

13 you've served as director, correct?

14 A. Yes.

15 Q. Do you know who formed CLO HoldCo

16 Limited?

17 A. I do not.

18 Q. Do you know why CLO HoldCo Limited

19 was formed?

20 A. I believe so.

21 Q. Can you explain to me why -- your

22 understanding as to why CLO HoldCo was formed.

23 A. So as I understand things, Jim

24 Dondero wanted to create a charitable

25 foundation-like entity or entities, and tax

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2 people particularly, I guess, finance people,

3 lawyers, they created this network of entities

4 to carry out that charitable goal. At one

5 point, I thought it was a novel type of

6 institution, if you want to call it, or a

7 novel -- novel type of group of entities, but

8 over time, I came to understand that although

9 not cookie cutter, it -- it follows a general

10 arrangement of entities for legal and tax

11 purposes, compliance purposes, IRS purposes,

12 various insulating purposes to maintain -- or

13 to meet the necessary requisites to carry out

14 that charitable function.

15 Q. When did you come to that

16 understanding?

17 A. Over the last couple of years. I

18 periodically have to refresh my recollection.

19 It's -- it's fairly complex.

20 Q. Okay. In your capacity as the sole

21 director of CLO HoldCo Limited, do you report

22 to anybody?

23 A. No.

24 Q. Other than interfacing with the

25 manager of the assets of the CLO, do you have

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1 GRANT SCOTT - 1/21/2021

2 most of my time is spent working with the

3 various compliance and other people for

4 addressing issues of get- -- you know, getting

5 taxes filed. It runs -- it runs the gamut of

6 every aspect of the organization being -- being

7 handled by Highland.

8 Q. Okay.

9 A. You know, unlike -- unlike my

10 financial -- unlike a financial planner that

11 might, you know, manage assets, they -- they do

12 it all, and I interface with them regularly to

13 maintain -- mostly to deal with compliance

14 issues.

15 Q. Who's the com- -- is there a person

16 who's in charge of compliance?

17 A. I believe Thomas Surgent. I

18 mentioned him. I believe he also has that

19 role, but it's -- you know, they do have

20 turnover, I guess, in that. It's -- I guess

21 they refer to it as the back office. I've

22 heard that term be used, but -- basically, it's

23 a large number of people that have changed over

24 time, but it's -- it's more -- I believe it's

25 more than one collectively.

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2 any other duties and responsibilities as a

3 director of CLO HoldCo Limited?

4 A. Yes. Sorry. My mouth is a little

5 dry.

6 Q. By the way, if you ever need to take

7 a break, just let me know.

8 A. Okay. Thank you. Now I forgot your

9 question. The -- the -- the --

10 Q. I understand.

11 A. The answer -- the -- the answer is

12 yes. I -- why don't you ask -- ask your

13 question again. I'm sorry.

14 Q. Sure. Other than interfacing with

15 the manager of the assets of the CLO, do you

16 have any other duties and responsibilities as

17 the sole director of CLO HoldCo Limited?

18 A. Yes. So Highland Capital because of

19 its -- the way it's set up to manage or service

20 CLO HoldCo and the DAF, it has a relatively

21 large group of people that I have to interface

22 with to do everything from -- everything from

23 soup to nuts. Finances and the money

24 management is one aspect, but most of my

25 time -- on a day-to-day or week-to-week basis,

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2 Q. How much time do you devote -- you

3 know, can you estimate either on a weekly or a

4 monthly basis how many -- how much time do you

5 devote to serving as the director of CLO HoldCo

6 Limited?

7 A. I thought about that. Well, let --

8 let's put it this way: There was the

9 prebankruptcy time I spent per day, and then

10 there was the postbankruptcy time I've spent

11 per -- per -- or per week -- excuse me, or

12 per -- I've estimated it as probably a day --

13 it's so intermittent it's -- it's hard, okay?

14 It's -- I don't dedicate my Mondays to only

15 doing that and then Tuesday through Friday I

16 don't, right? I -- it's -- I have to piece

17 together everything that occurs during the

18 week. There might be some weeks where I don't

19 have any contact. There might be every day of

20 the week I have multiple contact. There may be

21 days where from morning to night there is so

22 much contact, it precludes me from doing

23 anything else meaningfully. So -- but I would

24 estimate it's probably three or four -- maybe

25 three days, four days a month when things are

|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |
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| <p style="text-align: right;">Page 22</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 going well.</p> <p>3 Q. And -- and I think you -- you</p> <p>4 testified just now that there was kind of a</p> <p>5 difference between prebankruptcy and</p> <p>6 postbankruptcy. Do I have that right?</p> <p>7 A. Yes.</p> <p>8 Q. And can you tell me -- is it fair to</p> <p>9 say that before the bankruptcy, you didn't</p> <p>10 devote much time to CLO HoldCo, or do I have</p> <p>11 that wrong?</p> <p>12 A. Well, I -- just the time that --</p> <p>13 that I mentioned just -- I'm sorry. The -- the</p> <p>14 time I just mentioned now when you asked me,</p> <p>15 that was the pre period. Excuse me. I haven't</p> <p>16 talked about the postbankruptcy period.</p> <p>17 Q. So are you -- are you -- are you</p> <p>18 devoting more time or less time since the</p> <p>19 bankruptcy?</p> <p>20 A. Much more.</p> <p>21 Q. Much more since the bankruptcy</p> <p>22 filing?</p> <p>23 A. Yes.</p> <p>24 Q. And so why did the bankruptcy filing</p> <p>25 cause you to spend more time as a director of</p>                                                                                                                                                  | <p style="text-align: right;">Page 23</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 CLO HoldCo Limited?</p> <p>3 A. Well, initially, and this would</p> <p>4 be -- this would be late 2019, it was --</p> <p>5 aft- -- after the bankruptcy was -- was filed</p> <p>6 and I obtained counsel, who are on the phone</p> <p>7 now -- or in this deposition now, excuse me,</p> <p>8 that was -- that transition occurred because</p> <p>9 CLO was a debtor -- excuse me, a creditor to --</p> <p>10 to the debtor and had to take steps to</p> <p>11 establish its -- its claim. So if I understand</p> <p>12 the -- things correctly, the -- the debtor</p> <p>13 identified as part of the filing -- I don't</p> <p>14 know how bankruptcy works, but if I under- --</p> <p>15 if my recollection is correct, there's a</p> <p>16 hierarchy from biggest to smallest, and we were</p> <p>17 relatively high up. And when I say we or I,</p> <p>18 I -- I just mean CLO was relatively high up.</p> <p>19 And so initially, for the first period of so</p> <p>20 many months, the -- the exclusive focus was on</p> <p>21 our position as a creditor -- a creditor having</p> <p>22 a certain claim against a debtor.</p> <p>23 Q. Can you describe for me your</p> <p>24 understanding of the nature of the claim</p> <p>25 against the debtor.</p> |
| <p style="text-align: right;">Page 24</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 A. It was various obligations that were</p> <p>3 owed to -- to CLO, things that had been</p> <p>4 previously donated or -- or agreements that had</p> <p>5 been set up that transferred certain assets,</p> <p>6 and it was basically the -- the -- the amounts</p> <p>7 were derived from those sorts of transactions.</p> <p>8 Q. Okay. You're a patent lawyer; is</p> <p>9 that right?</p> <p>10 A. I -- I'm exclusively a patent</p> <p>11 attorney, yes.</p> <p>12 Q. Have you been a patent lawyer on an</p> <p>13 exclusive basis since the time you graduated</p> <p>14 from law school?</p> <p>15 A. From law school, yes.</p> <p>16 Q. Can you just describe for me</p> <p>17 generally your educational background.</p> <p>18 A. So I'm an electrical engineer by</p> <p>19 training. I graduated from the University of</p> <p>20 Virginia in 1984. I then went to graduate</p> <p>21 school at the University of Illinois. I</p> <p>22 received my master's degree in 1986, and then I</p> <p>23 immediately joined IBM Research at the Thomas</p> <p>24 Watson Institute in New York where I was a --</p> <p>25 my title was research scientist, but I was -- I</p> | <p style="text-align: right;">Page 25</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 guess I was more of a research engineer, if</p> <p>3 that matters. And I did that until I</p> <p>4 transitioned -- or I began law school in the</p> <p>5 fall of 1988, and then I graduated law school</p> <p>6 in May of 1991.</p> <p>7 Q. And where did you go to law school?</p> <p>8 A. University of North Carolina.</p> <p>9 Q. Do you have any formal training in</p> <p>10 investing or finance?</p> <p>11 A. I do not.</p> <p>12 Q. Do you hold yourself out as an</p> <p>13 expert in any field of investment?</p> <p>14 A. None -- none at all.</p> <p>15 Q. Have you had any formal training</p> <p>16 with respect to compliance issues? You</p> <p>17 mentioned compliance issues earlier.</p> <p>18 A. No.</p> <p>19 Q. Now, do you have any knowledge about</p> <p>20 compliance rules or regulations?</p> <p>21 A. Minimal that I've -- that have</p> <p>22 occurred organically but -- but generally, no.</p> <p>23 Q. You don't hold yourself out as an</p> <p>24 expert in com- -- in the area of compliance,</p> <p>25 correct?</p>                                                                                                                                                                                                        |

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| <p style="text-align: right;">Page 26</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 A. No. No. I'm -- no.</p> <p>3 Q. Do you have any particular</p> <p>4 investment philosophy or strategy?</p> <p>5 MR. CLARK: I'm going to object to</p> <p>6 the form of the question. And, John,</p> <p>7 can -- can we get an agreement that -- I</p> <p>8 know you were objecting just simply on the</p> <p>9 form basis yesterday -- that objection to</p> <p>10 form is sufficient today?</p> <p>11 MR. MORRIS: Sure.</p> <p>12 MR. CLARK: Okay. And I object to</p> <p>13 form. Grant, you can answer to the extent</p> <p>14 you can.</p> <p>15 THE WITNESS: I forget the question</p> <p>16 now that you interrupted. I'm sorry.</p> <p>17 BY MR. MORRIS:</p> <p>18 Q. So -- so -- and I'm going to ask a</p> <p>19 different question because in hindsight, that's</p> <p>20 a good objection.</p> <p>21 In your capacity as the director</p> <p>22 of -- withdrawn.</p> <p>23 Do the employees of Highland that</p> <p>24 you identified earlier, do they make investment</p> <p>25 decisions on behalf of CLO HoldCo Limited</p> | <p style="text-align: right;">Page 27</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 without your prior knowledge on occasion?</p> <p>3 A. On occasion, they do.</p> <p>4 Q. So there's no rule that your prior</p> <p>5 approval is needed before investments are made,</p> <p>6 right?</p> <p>7 A. I don't know whether they have an</p> <p>8 internal guideline as to the amount that</p> <p>9 triggers when they get in touch with me or</p> <p>10 whether it's a new -- a change, something new,</p> <p>11 or -- versus recurring. So I don't -- I don't</p> <p>12 know what they use internally for that metric.</p> <p>13 Q. Okay. Are you aware of any</p> <p>14 guideline that was ever used by the Highland</p> <p>15 employees whereby they were required to obtain</p> <p>16 your consent prior to effectuating transactions</p> <p>17 on behalf of CLO HoldCo Limited?</p> <p>18 A. I understand there was one or more,</p> <p>19 but I do not know that.</p> <p>20 Q. Okay. Did you ever see such a</p> <p>21 policy or list of rules that would require your</p> <p>22 prior consent before the Highland employees</p> <p>23 effectuated transactions on behalf of CLO</p> <p>24 HoldCo Limited?</p> <p>25 A. Possibly some time ago, but I -- I</p>                                                                             |
| <p style="text-align: right;">Page 28</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 don't recall.</p> <p>3 Q. Okay. So -- withdrawn. I'll --</p> <p>4 I'll go on.</p> <p>5 How did you come to be the director</p> <p>6 of CLO HoldCo?</p> <p>7 A. I was asked either by Jim Dondero</p> <p>8 or -- directly or indirectly by -- by Jim</p> <p>9 Dondero.</p> <p>10 Q. And who is Jim Dondero?</p> <p>11 A. Well, at the time, he was the head</p> <p>12 or one of the heads of Highland Capital</p> <p>13 Management, a friend of mine.</p> <p>14 Q. How long have you known Mr. Dondero?</p> <p>15 A. Since high school so that -- 1976.</p> <p>16 Q. Where did you and Mr. Dondero grow</p> <p>17 up?</p> <p>18 A. In northern New Jersey.</p> <p>19 Q. Do you consider him among the</p> <p>20 closest friends you have?</p> <p>21 A. I think he is my closest friend.</p> <p>22 Q. Did you two go to college together?</p> <p>23 A. We actually -- for the last -- last</p> <p>24 two years I was at UVA, University of Virginia,</p> <p>25 excuse me, he and I were -- were at UVA. So we</p>                             | <p style="text-align: right;">Page 29</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 did not start out at UVA initially, but -- but</p> <p>3 we both transferred -- I transferred my</p> <p>4 sophomore year. I was actually a chemical</p> <p>5 engineer at the University of Delaware when I</p> <p>6 transferred in, and then he transferred in his</p> <p>7 junior year. So we were there at college for</p> <p>8 two years.</p> <p>9 Q. And -- and based on your</p> <p>10 relationship with him, is it your understanding</p> <p>11 that one of the reasons he chose to transfer to</p> <p>12 UVA is -- is to -- because you were there?</p> <p>13 A. Oh, no. He transferred -- he --</p> <p>14 he -- he transferred there because of the -- so</p> <p>15 he went to the University of -- he -- he went</p> <p>16 to Virginia Tech University, which is more</p> <p>17 known as being an engineering school, which I</p> <p>18 might have wanted to go to, and less a finance</p> <p>19 business school. And if I understand things</p> <p>20 correctly, and I believe I do, he transferred</p> <p>21 to UVA because of the well-known</p> <p>22 business/finance program, accounting program.</p> <p>23 Q. And did you -- did you and</p> <p>24 Mr. Dondero become roommates at UVA?</p> <p>25 A. We weren't roommates, but we lived</p> |



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| <p style="text-align: right;">Page 30</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 in the -- we were housemates. I'm sorry. We</p> <p>3 were housemates.</p> <p>4 Q. So you shared a house together. How</p> <p>5 would you describe your relationship with</p> <p>6 Mr. Dondero today?</p> <p>7 A. It's -- it's been strained a while,</p> <p>8 for some time, but -- but generally, very good.</p> <p>9 Good to very good.</p> <p>10 Q. Without -- without getting personal</p> <p>11 here, can you just generally identify the</p> <p>12 source of the strain that you described.</p> <p>13 A. This -- I think it would be fair to</p> <p>14 say that this bankruptcy, particularly events</p> <p>15 in 2020 so some months after the bankruptcy was</p> <p>16 declared, things have become -- we -- we still</p> <p>17 have a close friendship, but -- but things</p> <p>18 are -- are a bit -- are a bit more difficult.</p> <p>19 Q. Were you ever married?</p> <p>20 A. I've never been married.</p> <p>21 Q. Did you serve as Mr. Dondero's best</p> <p>22 man at his wedding?</p> <p>23 A. I did.</p> <p>24 Q. Is it fair to say that -- that</p> <p>25 Mr. Dondero trusts you?</p> | <p style="text-align: right;">Page 31</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 MR. CLARK: Objection, form.</p> <p>3 BY MR. MORRIS:</p> <p>4 Q. Withdrawn.</p> <p>5 Do you believe that Mr. Dondero</p> <p>6 trusts you?</p> <p>7 A. I do.</p> <p>8 Q. Over the years, is it fair to say</p> <p>9 that Mr. Dondero has confided in you?</p> <p>10 MR. CLARK: Objection, form.</p> <p>11 BY MR. MORRIS:</p> <p>12 Q. You can answer if you understand it.</p> <p>13 A. I think so.</p> <p>14 Q. I -- I -- what's your answer? You</p> <p>15 think so?</p> <p>16 A. Maybe you can de- -- I think of</p> <p>17 confide as -- could you define confide, please.</p> <p>18 Q. Sure. Is it -- is it fair to say</p> <p>19 that over the -- let me -- you've known</p> <p>20 Mr. Dondero for almost 45 years, right?</p> <p>21 A. Yes.</p> <p>22 Q. And you consider him to be your</p> <p>23 closest friend in the world, right?</p> <p>24 A. Yes.</p> <p>25 Q. And is it fair to say over the</p>                                                                                                                                                                                                                                                       |
| <p style="text-align: right;">Page 32</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 course of those 45 years, Mr. Dondero has</p> <p>3 shared confidential information with you that</p> <p>4 he didn't want you to reveal publicly to other</p> <p>5 people?</p> <p>6 A. Yes.</p> <p>7 Q. And is it your understanding that</p> <p>8 because of the nature of your relationship with</p> <p>9 him, he asked you to serve as the director of</p> <p>10 CLO HoldCo Limited?</p> <p>11 A. Yes. I believe it's because he --</p> <p>12 he trusted -- trusted me with -- with assets</p> <p>13 relating to his charitable vision. I -- I --</p> <p>14 yeah. Yes.</p> <p>15 Q. And is it your understanding that he</p> <p>16 thought you would help him execute his</p> <p>17 charitable vision?</p> <p>18 A. That was the point of attraction</p> <p>19 initially. It wasn't for money. I wasn't</p> <p>20 being paid. That was -- the charitable mission</p> <p>21 was the attraction.</p> <p>22 Q. Does Mr. Dondero play any role in</p> <p>23 the management of the CLO HoldCo Limited asset</p> <p>24 pool?</p> <p>25 MR. CLARK: Objection, form.</p>                                        | <p style="text-align: right;">Page 33</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 A. I'm sorry. Could you repeat that?</p> <p>3 My -- my screen went small and then big again.</p> <p>4 I was distracted.</p> <p>5 Q. What role does Mr. Dondero play with</p> <p>6 respect to the management of the CLO HoldCo</p> <p>7 Limited asset pool?</p> <p>8 MR. CLARK: Objection, form.</p> <p>9 A. He is with the company that manages</p> <p>10 that asset pool. He's one of the people I</p> <p>11 named previously as managing those assets.</p> <p>12 Q. He is -- he -- he is the -- do you</p> <p>13 understand that he has the final</p> <p>14 decision-making power with respect to the</p> <p>15 management of the assets that are held by CLO</p> <p>16 HoldCo Limited?</p> <p>17 MR. CLARK: Objection, form.</p> <p>18 A. I believe I ansel -- answered that</p> <p>19 previously. I -- I don't know who has -- for</p> <p>20 certainty I do not know who has that within</p> <p>21 that company. I don't. If -- if -- I -- I</p> <p>22 don't know, consistent with my prior answer.</p> <p>23 Q. Did you ever ask anybody who had the</p> <p>24 final decision-making authority for investments</p> <p>25 on behalf of CLO HoldCo Limited?</p> |

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2 A. I -- I did not.

3 Q. Did you ever make a decision on

4 behalf of -- withdrawn.

5 In your capacity as a director --

6 withdrawn.

7 In your capacity as the sole

8 director of CLO HoldCo Limited, can you think

9 of any decision that you've ever made that

10 Mr. Dondero disagreed with?

11 A. Since -- prior to the bankruptcy,

12 no, not that I'm aware of.

13 Q. And since the bankruptcy?

14 A. There are decisions that I've made

15 that he's disagreed with.

16 Q. Can you identify them?

17 A. Yes.

18 Q. Please do so.

19 A. Okay. So the reason I'm pausing is

20 I'm trying to put these in chronological order

21 and, at the same time, identify maybe some of

22 the more important ones versus the lesser

23 important ones. One of the decisions I made

24 related to a request that I received from the

25 independent board of Highland. I don't know

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2 A. I don't know when he became aware of

3 that decision. I'm not sure I ever volunteered

4 that the decision was even made, but at some

5 point, it became an issue because he found out

6 through -- if I understand the sequence of

7 events correctly, he found out possibly through

8 his counsel because there was ultimately

9 litigation about that issue. It became known

10 to everyone at some point what I had done, I --

11 I think. And subsequent to that, it became an

12 issue because of CLO HoldCo having fairly

13 significant cash flow issues with respect to

14 its expenses and obligations, including payment

15 of management fees as well as some of the

16 scheduled charitable giving that was -- that

17 was by contract already predefined. My

18 decision to tuck that money -- or to agree

19 to -- my agreement to let that money be tucked

20 away created some -- created some -- created

21 some problems --

22 Q. And -- and --

23 A. -- for CLO HoldCo.

24 Q. Okay. And I just want you to focus

25 specifically on my question, and that is, what

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2 how the request was transmitted to me, but I

3 believe the way it played out is as follows: I

4 believe I was asked to call Jim Seery, and the

5 other -- and Russell Nelms, and the third

6 independent director, I believe his name is

7 John. I -- I forget right now what his last

8 name is. They were in New York, said they were

9 in a conference room. I called in. They were

10 very pleasant. They identified who they were,

11 and they had a request, and the request was

12 that I agree to a transfer -- or that I -- that

13 I agree to allow certain assets that were not

14 Highland's assets but they were CLO's as- --

15 assets -- apparently, there was no dispute

16 about that at any point in time, but that I

17 agree to allow certain assets that were due CLO

18 to be transferred to the registry of the

19 bankruptcy court. And either on that call I

20 immediately agreed or ended the call, called my

21 attorney, and then immediately agreed. It was

22 a very -- I accommodated the request quickly.

23 Q. Okay. And can you just tell me at

24 what point in time you spoke with Mr. Dondero,

25 and what did he say that you recall?

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2 did Mr. Dondero say to you that -- that causes

3 you to testify as you did, that this is one

4 issue that he didn't agree with?

5 A. I believe his concern was that

6 because it was money that was undisputably to

7 flow to CLO HoldCo that -- which had many, many

8 other nonliquid assets -- this was a form of a

9 liquid asset. It was cash in effect, proceeds.

10 -- that the money should have been allowed to

11 flow to be available for obligations. He

12 didn't under- -- I -- I -- I don't know what he

13 was thinking, but the -- the issue was that the

14 decision to put it into escrow was -- was --

15 was in- -- incorrect, that there was no basis

16 for it.

17 Q. That -- that's an issue where after

18 learning of your decision, he didn't agree with

19 it; is that fair?

20 A. That's right.

21 Q. Okay. Can you think of any decision

22 that you've ever made on behalf of CLO HoldCo

23 Limited where Mr. Dondero had advance knowledge

24 of what you were going to do and he objected to

25 it, but you nevertheless overruled his

|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |
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| <p style="text-align: right;">Page 38</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 objection and went ahead and did what -- did</p> <p>3 what you thought was right?</p> <p>4 A. Okay. Let me -- let me -- I have --</p> <p>5 I'm sorry.</p> <p>6 Q. We're here.</p> <p>7 A. Oh, I'm sorry. I'm having some</p> <p>8 issues with my screen. So that may have</p> <p>9 occurred with respect to the original proof of</p> <p>10 claim. Then there was a subsequent amendment</p> <p>11 to the proof of claim, and I -- I believe it --</p> <p>12 I believe that he might have been aware of both</p> <p>13 of those and was in disagreement with -- with</p> <p>14 those. But after working with my attorney, we</p> <p>15 just -- you know, we did what we thought was</p> <p>16 right, and I still think what we did was right.</p> <p>17 There was an issue with respect to Har- --</p> <p>18 HarbourVest that occurred relatively recently</p> <p>19 where he objected to a decision that I had</p> <p>20 made. As I understand it, I could have</p> <p>21 contacted my attorney and changed the decision,</p> <p>22 but I didn't, and I still think that was the</p> <p>23 right decision.</p> <p>24 We have filed plan objections. I</p> <p>25 can't say if he has any -- in that regard, I --</p>                | <p style="text-align: right;">Page 39</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 I -- I don't know what his thoughts are on</p> <p>3 objections. They would not have been</p> <p>4 communicated with -- by me to him, but my</p> <p>5 attorney might have consulted with his</p> <p>6 attorney, and there -- they may know what that</p> <p>7 difference is, but I -- that was just another</p> <p>8 big decision. I -- I -- maybe that --</p> <p>9 Q. All right. Let me see if I can --</p> <p>10 let me see if I can summarize this. So two</p> <p>11 proofs of claim. Is it fair to say that</p> <p>12 Mr. Dondero saw those proofs of claim before</p> <p>13 they were filed?</p> <p>14 MR. CLARK: Objection, form.</p> <p>15 BY MR. MORRIS:</p> <p>16 Q. Withdrawn.</p> <p>17 A. It --</p> <p>18 Q. Do -- do you know whether</p> <p>19 Mr. Dondero saw the proofs of claim before they</p> <p>20 were filed?</p> <p>21 A. I don't believe he did.</p> <p>22 Q. What -- what steps in filing the</p> <p>23 proofs of claim did he object to that you</p> <p>24 overruled? Did he think there was -- something</p> <p>25 should be different about them?</p> |
| <p style="text-align: right;">Page 40</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 A. So we had to interface with Highland</p> <p>3 employees at some point to get information to</p> <p>4 support our proof of claim, and my guess, and</p> <p>5 it's just a guess, is that he was aware of</p> <p>6 those inquiries. I -- I'm sorry. I shouldn't</p> <p>7 speculate. I don't know. But he -- with</p> <p>8 respect to the original proof of claim, I'm --</p> <p>9 I'm not aware of what specifically he was</p> <p>10 objecting to or was -- thought should have been</p> <p>11 different, but the -- with respect to the</p> <p>12 amended proof of claim, which reduced the</p> <p>13 original proof of claim to zero, I think that's</p> <p>14 where he had a -- an issue.</p> <p>15 Q. And did you speak with him about</p> <p>16 that topic prior to the time the amended claim</p> <p>17 was filed, or did you only speak with him after</p> <p>18 it was filed?</p> <p>19 A. I'm not sure the timing of that.</p> <p>20 Q. And with respect to HarbourVest, did</p> <p>21 he ask you to object to the settlement on</p> <p>22 behalf of CLO HoldCo Limited, and is that</p> <p>23 something that you declined to do?</p> <p>24 MR. CLARK: Objection, form.</p> <p>25 A. I'm -- I'm sorry. I was confused</p> | <p style="text-align: right;">Page 41</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 with the word. Could you please repeat that?</p> <p>3 Q. Yes. You mentioned HarbourVest</p> <p>4 before, right?</p> <p>5 A. Yes.</p> <p>6 Q. And you mentioned that there was an</p> <p>7 issue with Mr. Dondero and you concerning</p> <p>8 HarbourVest; is that right?</p> <p>9 A. Yes.</p> <p>10 Q. And did that have to do with whether</p> <p>11 or not CLO HoldCo Limited would -- would object</p> <p>12 to the debtor's motion to get the HarbourVest</p> <p>13 settlement approved?</p> <p>14 A. Would -- would get the</p> <p>15 HarbourVest --</p> <p>16 Q. Settlement approved by the court.</p> <p>17 A. I'm not trying to be difficult.</p> <p>18 I'm -- I'm -- could you just repeat that one</p> <p>19 more time? I'm --</p> <p>20 Q. What was -- what was --</p> <p>21 A. There was --</p> <p>22 Q. Let me try again.</p> <p>23 A. Okay.</p> <p>24 Q. What was the issue with respect to</p> <p>25 HarbourVest that he objected to and -- and you</p>                                                                                                          |

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2 overrode his objection and did what you thought

3 was right anyway?

4 A. Okay. Okay. That's -- that's

5 easier for me to understand. I'm sorry. So I

6 had worked with my attorney or he did the work

7 and consulted with -- we consulted, but we had

8 filed an objection, motion objecting to the

9 settlement, if I understand the terminology and

10 nomenclature correctly. Okay. He had -- we

11 had come to an agreement that we had a very

12 valid argument. That argument was evidenced

13 by, I guess it was, our motion that was

14 submitted to the court. On the day of the

15 hearing to resolve this issue, we pulled our

16 request, and that was because I believed it did

17 not have a good-faith basis in law to move

18 forward on.

19 Q. And did you discuss that issue with

20 Mr. Dondero before informing the court that CLO

21 HoldCo Limited was withdrawing its objection,

22 or did he learn about that for the first time

23 during the hearing --

24 MR. CLARK: Objection, form.

25 BY MR. MORRIS:

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2 A. -- thought, okay?

3 THE REPORTER: I didn't --

4 A. Okay. So he --

5 Q. It was a recommendation.

6 A. Yeah. So he -- he called me with a

7 recommendation. It was highly urgent. You

8 know, I was coming out of the men's room, had

9 my phone with me. I got the call.

10 MR. CLARK: Hey, Grant, I -- Grant,

11 I just want to caution you not to -- to --

12 and I don't think counsel is looking for

13 this but not to disclose the -- the

14 substance of any of your communications

15 with counsel, okay?

16 THE WITNESS: Thank you.

17 A. So --

18 THE WITNESS: Thank you. I'm -- I'm

19 sorry.

20 BY MR. MORRIS:

21 Q. It's -- it's really a very simple

22 question. Do you recall --

23 A. He made a recommendation. I -- I --

24 I think I can answer your question without

25 going off tangent. I'm sorry. So he -- my

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2 Q. -- if you know?

3 A. I -- I understand that he learned it

4 during the hearing. I don't know the -- I -- I

5 don't know the -- whether there was any -- I --

6 I don't know for certain on the second half of

7 your question.

8 Q. Let me -- let me try it -- let me

9 try it this way: Did you speak with

10 Mr. Dondero about your decision to withdraw the

11 objection to the HarbourVest settlement prior

12 to the time your counsel made the announcement

13 in court?

14 A. I don't -- I don't believe so. No.

15 No. No. I'm sorry. No.

16 Q. And did --

17 A. Okay. No. Here -- here's where

18 I'm -- I can clarify, okay? I'm sorry. I can

19 clarify.

20 Q. That's all right.

21 A. I gave the decision to my

22 attorney -- I -- I agreed with the

23 recommendation of my attorney, okay? It wasn't

24 my --

25 Q. Did you have a good --

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2 attorney made a recommendation. I agreed with

3 it. We with- -- I -- I told him to withdraw --

4 or I authorized him to withdraw.

5 Q. Okay.

6 A. Then I received a communication, and

7 I -- I guess the most likely scenario is the

8 motion had been withdrawn by the time Jim

9 Dondero found out.

10 Q. And -- and did he write to you, or

11 did he call you? Did he send you a text?

12 A. He called me.

13 Q. What did he say?

14 A. He was asking why, and I explained,

15 and I said I agreed with the decision and I was

16 sticking with the decision.

17 Q. Let's just -- let's just move on to

18 a new topic, and let's talk about the structure

19 of -- of CLO HoldCo. Are you generally

20 familiar with the ownership structure of CLO

21 HoldCo?

22 A. Yeah. I mean, in terms --

23 Q. Are -- are you -- are you generally

24 familiar with it? It's not a test. I'm just

25 asking do you have a general familiarity --

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2 A. With CLO HoldCo or the entities

3 associated with CLO HoldCo?

4 Q. The latter.

5 A. Yes, I believe so.

6 Q. All right. I've prepared what's

7 called a demonstrative exhibit. It's just --

8 A. Yes.

9 Q. -- just -- it's a document that, I

10 think, reflects facts, but I want to ask you

11 about it.

12 MR. MORRIS: La Asia, can we please

13 put up Exhibit 1.

14 (SCOTT EXHIBIT 1, Organizational

15 Structure: CLO HoldCo, Ltd., was marked

16 for identification.)

17 BY MR. MORRIS:

18 Q. Okay. Can you see that, Mr. Scott?

19 A. Yes, I can.

20 Q. Okay. So I think I took the

21 information from resolutions that were attached

22 to the CLO HoldCo proof of claim, and that's

23 why you got that little footnote there at the

24 bottom of the page. But let's start in the

25 lower right-hand corner and see if this chart

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2 particular structure, to the best of your

3 knowledge?

4 A. I -- I didn't -- I'm sorry. I

5 didn't hear you very well.

6 Q. To the best of your knowledge, did

7 Mr. Dondero make the decisions to establish the

8 structure that's reflected on this page?

9 A. Oh, I don't know if he made the

10 decision to establish this structure, although

11 it's -- it's -- I'm sorry. Strike that. I --

12 if -- if what you're saying is did he approve

13 of this structure, to my knowledge, yes.

14 Q. Okay. Do you hold any position with

15 respect to Charitable DAF Fund, L.P.?

16 A. I -- I -- your chart says no. I --

17 I -- I thought I had a role there, too.

18 Q. I don't know. I don't have

19 information on that. That's why I'm asking the

20 question.

21 A. I -- I -- I believe -- yes, I

22 believe I have the same role as I do in -- in

23 CLO HoldCo.

24 Q. And that would be director?

25 A. Yes.

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2 comports with your understanding of the facts.

3 Do you know that CLO HoldCo Limited

4 was formed in the Cayman Islands?

5 A. Yes.

6 Q. And to the best of your knowledge,

7 is CLO HoldCo Limited 100 percent owned by the

8 Charitable DAF Fund, L.P.? If you're not sure,

9 just say you're not sure if you don't know.

10 It's not a test.

11 A. So the -- the -- the familiarity

12 I -- I'm -- I'm familiar with the different --

13 I'm confused with the arrangement of the boxes

14 and the ownership interest versus managerial

15 interest. I believe that's -- that's right.

16 Q. Okay. And -- and you're the sole

17 director of CLO HoldCo Limited, right?

18 A. Yes.

19 Q. And this whole structure was -- the

20 idea for this structure, to the best of your

21 knowledge, was to implement Mr. Dondero's plan

22 for charitable giving; is that fair?

23 A. Yes. Ultimately, yes.

24 Q. And is it fair to say then that

25 he -- he made the decision to establish this

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2 Q. And to the best of your knowledge,

3 is the Charitable DAF GP, LLC, the general

4 partner of Charitable DAF Fund, L.P.?

5 A. Yes.

6 Q. And is it your understanding that

7 you are the managing member of Charitable DAF

8 GP, LLC?

9 A. Yes.

10 Q. Does Charitable DAF GP, LLC, have

11 any employees?

12 A. No.

13 Q. Does Charitable DAF GP, LLC, have

14 any officers or directors?

15 A. No.

16 Q. Are you the only person affiliated

17 with Charitable DAF GP, LLC, to the best of

18 your --

19 A. I believe so.

20 Q. Do you receive any compensation for

21 serving as the managing member of Charitable

22 DAF GP, LLC?

23 A. No. The -- I don't interact with it

24 very often. It's -- no, I don't receive any

25 compensation.

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2 Q. Can you tell me in your capacity as

3 the managing member of Charitable DAF GP, LLC,

4 what's the nature of that entity's business?

5 A. It -- it doesn't perform any

6 day-to-day operations. My understanding is --

7 is that it's -- it's there for purposes of

8 compliance. I can't recall the last time I had

9 any activity with respect to that.

10 Q. How about the Charitable DAF Fund,

11 L.P.? I apologize if I've asked you these

12 questions.

13 A. It -- it's the same. I -- I -- my

14 activity is almost exclusively CLO HoldCo.

15 Q. All right. Let me just ask the

16 questions nevertheless. Does Charitable DAF

17 Fund, L.P., have any employees?

18 A. Employees? No.

19 Q. Does it have any officers and

20 directors?

21 A. No.

22 Q. Are you the sole director of

23 Charitable DAF Fund, L.P.?

24 A. Yes, I believe so.

25 Q. So if we -- if we put under

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2 Q. And did Mr. Dondero ask you to serve

3 as the director of Charitable DAF, L.P. --

4 withdrawn.

5 Did Mr. Dondero ask you to serve as

6 director of Charitable DAF Fund, L.P.?

7 A. Yes.

8 Q. To the best of your knowledge, does

9 Charitable DAF HoldCo Limited own 99 percent of

10 the limited partnership interests in Charitable

11 DAF Fund, L.P.?

12 A. Yes. The -- the feed -- the -- the

13 feeds -- the -- the three horizontal blocks

14 there that identify Highland Dallas Foundation,

15 Kansas City, Santa Barbara -- there's a fourth

16 of -- relatively de minimus in terms of

17 participation. There's a fourth entity that's

18 missing. It's Dallas -- I forget the name.

19 That -- that -- that structure is -- is a bit

20 dated --

21 Q. Okay.

22 A. -- as it -- as is shown.

23 Q. Okay. So I will tell you and we can

24 look the documents if you want, but attached to

25 CLO HoldCo Limited's claim are a number of

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2 Charitable DAF Fund, L.P., Grant Scott,

3 director, and we put under CLO HoldCo Limited

4 Grant Scott, director, would everything on the

5 right side of that page be accurate, to the

6 best of your --

7 A. I believe so.

8 Q. Well, let's move to the left side of

9 the page. Have you heard of the entity

10 Charitable DAF HoldCo Limited?

11 A. Yes.

12 Q. Are you the sole director of

13 Charitable DAF HoldCo Limited?

14 A. Yes.

15 Q. How did you become -- how did you

16 come to be the char- -- the sole director of

17 Charitable DAF HoldCo Limited?

18 A. That was when it was established.

19 Q. And did Mr. Dondero ask you to serve

20 in that capacity?

21 A. Yes.

22 Q. And did Mr. Dondero ask you to serve

23 as the managing member of Charitable DA- -- DAF

24 GP, LLC?

25 A. Yes.

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2 resolutions, and there's one that I have in

3 mind that shows Charitable DAF HoldCo Limited

4 holding 99 percent of the limited partnership

5 interests of Charitable DAF Fund, L.P., and

6 there's another that shows it being a hundred

7 percent. Do you -- do you know which is

8 accurate at least at this time?

9 A. There's a 1 percent/99 percent

10 division, and I am -- I believe it's the 99

11 percent, but I'm -- I'm getting confused by

12 the -- by the arrangement. I'm so used to

13 another arrangement. I -- I believe the 99

14 percent is correct.

15 Q. Okay. Do you have any understanding

16 as to who owns the other 1 percent of the

17 limited partnership interests of Charitable DAF

18 Fund, L.P.?

19 A. No. This -- this is confusing to

20 me. No.

21 Q. Okay. There are, at least on this

22 page, three foundations that I think you've

23 identified. Are those three foundations

24 together with the fourth that you mentioned the

25 owners of the Charitable DAF HoldCo Limited?



|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |
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| <p style="text-align: right;">Page 54</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 A. Owners?</p> <p>3 Q. Yes.</p> <p>4 MR. CLARK: Objection, form.</p> <p>5 A. They -- they only participate in the</p> <p>6 money that flows up to them.</p> <p>7 Q. And what does that mean exactly?</p> <p>8 A. What's that?</p> <p>9 Q. What does that -- what do you mean</p> <p>10 by that? Do the foundations fund Charitable</p> <p>11 DAF Fund HoldCo Limited?</p> <p>12 A. Initially. Initially, as I</p> <p>13 understand it, the money flows downward into</p> <p>14 the Charitable DAF HoldCo Limited before it</p> <p>15 ultimately makes its way to CLO HoldCo, and</p> <p>16 then each of those three entities, the various</p> <p>17 foundations, obtain participation interest in</p> <p>18 the money that flows back to them.</p> <p>19 Q. And -- and is that par- -- are those</p> <p>20 participation interests in Charitable -- you</p> <p>21 know what, let -- let me just pull up one</p> <p>22 document and see if that helps.</p> <p>23 MR. MORRIS: Can we put up -- I</p> <p>24 think it's Exhibit Number 5.</p> <p>25 (SCOTT EXHIBIT 2, Unanimous Written</p> | <p style="text-align: right;">Page 55</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 Consent of Directors In Lieu of Meeting,</p> <p>3 was marked for identification.)</p> <p>4 MR. MORRIS: I apologize. Let's go</p> <p>5 to --</p> <p>6 MS. CANTY: I'm sorry, John. I</p> <p>7 can't hear you. Was that not the exhibit?</p> <p>8 MR. MORRIS: 4.</p> <p>9 MS. CANTY: Okay.</p> <p>10 THE REPORTER: And Mr. Morris, you</p> <p>11 are -- Mr. Morris, you are breaking up just</p> <p>12 a little bit at the end of your questions.</p> <p>13 BY MR. MORRIS:</p> <p>14 Q. Okay. Do you see the document on</p> <p>15 the screen, sir?</p> <p>16 A. Yes, I do.</p> <p>17 Q. Okay. And so this is a unanimous</p> <p>18 written consent of the directors of the</p> <p>19 Highland Dallas Foundation. That's one of the</p> <p>20 entities that was on the chart.</p> <p>21 MR. MORRIS: Can we scroll down to</p> <p>22 the -- the bottom of the document where the</p> <p>23 signature lines are. Right there.</p> <p>24 BY MR. MORRIS:</p> <p>25 Q. Are you a director of the Highland</p>    |
| <p style="text-align: right;">Page 56</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 Dallas Foundation?</p> <p>3 A. Yes, selected by them.</p> <p>4 Q. Selected by whom?</p> <p>5 A. By that foundation.</p> <p>6 Q. Are you -- are you a director of all</p> <p>7 of the four foundations that feed into the</p> <p>8 Charitable DAF HoldCo Limited entities that --</p> <p>9 A. No.</p> <p>10 Q. Which of the four foundations are</p> <p>11 you a director of?</p> <p>12 A. This and the Santa Barbara -- I'm</p> <p>13 sorry, Santa Barbara and Kansas City.</p> <p>14 Q. So is -- there's one that you're not</p> <p>15 a director of; is that right?</p> <p>16 A. Yes.</p> <p>17 Q. And which one is that?</p> <p>18 A. The -- could you go back to the --</p> <p>19 Q. Yeah.</p> <p>20 MR. MORRIS: Go back to the</p> <p>21 demonstrative.</p> <p>22 A. It's the Highland Dallas Foundation</p> <p>23 and Santa Barbara Foundation.</p> <p>24 Q. Those are the two that you're a</p> <p>25 director of?</p>                                                                                                                                                           | <p style="text-align: right;">Page 57</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 A. Yes.</p> <p>3 Q. To the best of your knowledge, does</p> <p>4 Mr. Dondero serve as the president for each of</p> <p>5 the foundations that we're talking about?</p> <p>6 A. Yes.</p> <p>7 Q. To the best of your knowledge, is</p> <p>8 Mr. Dondero a director of each of the</p> <p>9 foundations that we're talking about?</p> <p>10 A. Say that again. I'm sorry.</p> <p>11 Q. Is he also a director of each of the</p> <p>12 foundations?</p> <p>13 A. Yes.</p> <p>14 Q. Do you know whether any of the</p> <p>15 foundations has any employees?</p> <p>16 A. I believe they do, but I -- I -- I</p> <p>17 can't say for certain.</p> <p>18 Q. Does -- withdrawn.</p> <p>19 Do you know if there are any</p> <p>20 officers of any of the four foundations other</p> <p>21 than Mr. Dondero's service as president?</p> <p>22 A. I'm sorry. Say that one more time,</p> <p>23 please.</p> <p>24 Q. Yes. Do you know whether any of the</p> <p>25 four foundations has any officers other than</p> |

|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |
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| <p style="text-align: right;">Page 58</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 Mr. Dondero's service as president?</p> <p>3 A. No.</p> <p>4 Q. You don't know, or they do not?</p> <p>5 A. I -- I don't believe anyone else</p> <p>6 has. I -- actually, I should say I don't -- I</p> <p>7 don't recall. I -- I don't know. I don't -- I</p> <p>8 don't know.</p> <p>9 Q. As a director of the Dallas and</p> <p>10 Santa Barbara foundations, are you aware of any</p> <p>11 officers serving for either of those</p> <p>12 foundations other than Mr. Dondero?</p> <p>13 A. No.</p> <p>14 Q. Do you know who the beneficial owner</p> <p>15 of the Charitable DAF HoldCo Limited entity is?</p> <p>16 A. The beneficial owner?</p> <p>17 Q. Correct.</p> <p>18 A. The various -- various trusts that</p> <p>19 were used to -- that were the vehicles by which</p> <p>20 the money originally was established within --</p> <p>21 within -- within CLO HoldCo.</p> <p>22 Q. Would that be -- would one of them</p> <p>23 be the Get Good Nonexempt Trust?</p> <p>24 A. Yes.</p> <p>25 Q. And you're a trustee of the Get Good</p> | <p style="text-align: right;">Page 59</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 Nonexempt Trust, right?</p> <p>3 A. Yes.</p> <p>4 Q. When did you become a trustee of the</p> <p>5 Get Good Nonexempt Trust?</p> <p>6 A. Many years ago. I -- I don't</p> <p>7 remember.</p> <p>8 Q. Are there any other trustees of the</p> <p>9 Get Good Nonexempt Trust?</p> <p>10 A. No.</p> <p>11 Q. Does the Get Good Nonexempt Trust</p> <p>12 have any officers, directors, or employees?</p> <p>13 A. No.</p> <p>14 MR. CLARK: Objection, form. Sorry.</p> <p>15 BY MR. MORRIS:</p> <p>16 Q. Withdrawn.</p> <p>17 Do you know whether the Get Good</p> <p>18 Nonexempt Trust has any officers, directors, or</p> <p>19 employees?</p> <p>20 A. It does not.</p> <p>21 Q. And I apologize if I asked this, but</p> <p>22 are you the only trustee of the Get Good</p> <p>23 Nonexempt Trust?</p> <p>24 A. Yes.</p> <p>25 Q. Is the Dugaboy Investment Trust also</p>                                                                                              |
| <p style="text-align: right;">Page 60</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 one of the trusts that has an interest in</p> <p>3 Charitable DAF HoldCo Limited?</p> <p>4 A. Yes.</p> <p>5 Q. Are you a trustee of the Dugaboy</p> <p>6 Investment Trust?</p> <p>7 A. I am not.</p> <p>8 Q. Do you know who is?</p> <p>9 A. I believe it's his sister.</p> <p>10 Q. And is that -- you're referring to</p> <p>11 Mr. Dondero's sister?</p> <p>12 A. I'm sorry. Yes.</p> <p>13 Q. And what's the basis for your</p> <p>14 understanding that Mr. Dondero's siv- -- sister</p> <p>15 serves as the trustee of the Dugaboy Investment</p> <p>16 Trust?</p> <p>17 A. Many years ago there was a -- there</p> <p>18 was a clerical error that identified me as the</p> <p>19 trustee of the Dugaboy. That error was present</p> <p>20 for approximately two weeks or a week and a</p> <p>21 half before it was detected and corrected, and</p> <p>22 so I know from that correction that it's Nancy</p> <p>23 Dondero.</p> <p>24 Q. Are there any other trusts that have</p> <p>25 an interest in Charitable DAF HoldCo Limited</p>       | <p style="text-align: right;">Page 61</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 besides those trusts, to the best of your</p> <p>3 knowledge?</p> <p>4 A. No.</p> <p>5 Q. Is it your understanding based on</p> <p>6 what we've just talked about that the Get Good</p> <p>7 Nonexempt Trust and the Dugaboy Investment</p> <p>8 Trust are the indirect beneficiaries of CLO</p> <p>9 HoldCo Limited?</p> <p>10 A. Yes.</p> <p>11 Q. Can you tell me who the</p> <p>12 beneficiaries are of the Get Good trust?</p> <p>13 A. I mean, Jim Dondero.</p> <p>14 Q. And -- and what is that -- is that</p> <p>15 based on the trust agreement -- your knowledge</p> <p>16 of the trust agreement?</p> <p>17 A. Yes.</p> <p>18 Q. Do you have an understanding of who</p> <p>19 the beneficiary is of the Dugaboy Investment</p> <p>20 Trust?</p> <p>21 A. I don't know anything about that</p> <p>22 trust.</p> <p>23 MR. MORRIS: Okay. All right.</p> <p>24 Let's take a short break and reconvene at</p> <p>25 3:30 Eastern Time. We've been going for a</p> |

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| <p style="text-align: right;">Page 62</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 while.</p> <p>3 MR. CLARK: Thank you.</p> <p>4 MR. MORRIS: Okay. Thank you.</p> <p>5 (Whereupon, there was a recess in</p> <p>6 the proceedings from 3:20 p.m. to</p> <p>7 3:31 p.m.)</p> <p>8 BY MR. MORRIS:</p> <p>9 Q. Mr. Scott, earlier I think you</p> <p>10 testified that you interfaced with the folks at</p> <p>11 Highland in connection with your duties as the</p> <p>12 director of CLO HoldCo Limited, right?</p> <p>13 A. Yes.</p> <p>14 Q. Are you aware of any written</p> <p>15 agreement between Highland Capital Management</p> <p>16 and CLO HoldCo Limited?</p> <p>17 A. Yes, the various servicer</p> <p>18 agreements.</p> <p>19 Q. Okay. Are you aware that</p> <p>20 Mr. Dondero resigned from his position at</p> <p>21 Highland Capital Management sometime in</p> <p>22 October?</p> <p>23 A. No.</p> <p>24 Q. Have you communicated with anybody</p> <p>25 at Highland Capital Management about the</p>                                                                                          | <p style="text-align: right;">Page 63</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 affairs of CLO HoldCo Limited at any time since</p> <p>3 October?</p> <p>4 A. Yes.</p> <p>5 Q. Anybody other than Jim Seery?</p> <p>6 A. Yes.</p> <p>7 Q. Okay. Let's start with Mr. Seery.</p> <p>8 You've spoken with him before, right?</p> <p>9 A. Yes.</p> <p>10 Q. Do you have his phone number?</p> <p>11 A. Yes.</p> <p>12 Q. How many times have you spoken with</p> <p>13 Mr. Seery, to the best of your recollection,</p> <p>14 just generally? It's not a test.</p> <p>15 A. Three, maybe four times.</p> <p>16 Q. Okay. Can you identify by name</p> <p>17 anybody else at Highland that you've spoken</p> <p>18 with since -- in the last two or three months?</p> <p>19 A. I spoke to Jim Dondero. I've spoken</p> <p>20 with Mike Throckmorton. The usual suspects, so</p> <p>21 to speak. Mark Patrick, Mel- -- Melissa</p> <p>22 Schroth.</p> <p>23 Q. Can you recall anybody else?</p> <p>24 A. No. No. Sorry.</p> <p>25 Q. Did you -- did you -- withdrawn.</p>                                                                                                                                |
| <p style="text-align: right;">Page 64</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 Do you recall the subject matter of</p> <p>3 your discussions with Mr. Throckmorton?</p> <p>4 MR. CLARK: Objection, form.</p> <p>5 BY MR. MORRIS:</p> <p>6 Q. Withdrawn.</p> <p>7 Do you recall your -- the subject</p> <p>8 matter of your communications with</p> <p>9 Mr. Throckmorton?</p> <p>10 MR. CLARK: Objection, form.</p> <p>11 BY MR. MORRIS:</p> <p>12 Q. You can answer.</p> <p>13 A. I -- I regularly interface with</p> <p>14 Mr. Throckmorton regarding approvals of</p> <p>15 expenses, and he's my sort of -- he's my point</p> <p>16 person for approving wire transfers and things</p> <p>17 of that nature.</p> <p>18 Q. How about Mr. Patrick, what -- what</p> <p>19 area of responsibility does he have with</p> <p>20 respect to CLO HoldCo Limited?</p> <p>21 A. He -- he doesn't, to my knowledge.</p> <p>22 Q. Do you recall the nature of the</p> <p>23 substance of any communications that you've had</p> <p>24 with Mr. Patrick since -- you know, the last</p> <p>25 two or three months?</p> | <p style="text-align: right;">Page 65</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 A. Yes. Or -- yes.</p> <p>3 Q. And what -- what are the nature of</p> <p>4 those conversations or the substance?</p> <p>5 A. He was -- he was one of the</p> <p>6 individuals that helped to establish the</p> <p>7 hierarchy for the -- what I keep referring to</p> <p>8 as the charitable foundation.</p> <p>9 Q. And -- and do you recall why you</p> <p>10 spoke to him in the last -- or -- withdrawn.</p> <p>11 Do you recall the nature of your</p> <p>12 communications in the last two or three months</p> <p>13 with Mr. Patrick?</p> <p>14 A. I --</p> <p>15 MR. CLARK: And hold on, Grant. I'm</p> <p>16 going to caution -- my understanding -- I</p> <p>17 believe Mr. Patrick's an attorney, and so</p> <p>18 I'm going to caution you that you shouldn't</p> <p>19 disclose the substance of -- of those</p> <p>20 communications based on the attorney-client</p> <p>21 privilege.</p> <p>22 MR. MORRIS: Well, I'm -- I -- I am</p> <p>23 the lawyer for the company so -- I guess</p> <p>24 there are other people on the phone and I</p> <p>25 appreciate that, but let's see if we can --</p> |

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2 I don't mean to be contentious here, so it

3 wouldn't -- I -- I'd be part of the

4 privilege anyway.

5 BY MR. MORRIS:

6 Q. But in any event, can you tell me

7 generally -- I'm just looking for general

8 subject matter of your conversations with

9 Mr. Patrick.

10 A. I asked him how I would go about

11 re- -- resigning my position.

12 Q. And when did that conversation take

13 place?

14 A. Within the last two weeks.

15 Q. Have you made a decision to resign?

16 A. No.

17 Q. I think you mentioned Melissa

18 Schroth. Do I have that right?

19 A. Yes.

20 Q. Can you describe generally the

21 communications you had with Ms. Schroth in the

22 last few months.

23 A. They -- she has e-mailed me certain

24 documents that I needed to sign. I had a

25 conversation with her about -- about some

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2 A. No.

3 Q. In your discussions with Mr. Seery,

4 did you ever tell him that you thought Highland

5 Capital Management was in default under any

6 agreement in relation to the CLOs?

7 A. No.

8 Q. I want to focus in particular on the

9 shared services agreement. In -- in your

10 discussions with Mr. Seery, did you ever tell

11 him that you believed that Highland Capital

12 Management was in default or in breach of its

13 shared services agreement with CLO HoldCo

14 Limited?

15 A. No.

16 Q. In your communications with

17 Mr. Seery, did you ever indicate any concern on

18 the part of CLO HoldCo Limited with respect to

19 Highland Capital's Man- -- Highland Capital

20 Management's performance under the shared

21 services agreement?

22 A. No.

23 Q. As you sit here today, do you have

24 any reason to believe that Highland Capital

25 Management has done anything wrong in

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2 home -- home improvements, home construction

3 with respect to Jim Dondero's home in Colorado,

4 and that's -- I -- I think that's -- that's it.

5 Q. Okay. Do you recall communicating

6 with anybody at Highland in the last three

7 months other than Mr. Dondero,

8 Mr. Throckmorton, Mr. Patrick, and Ms. Schroth?

9 A. I -- I spoke with Jim Seery this

10 week.

11 Q. Anybody else?

12 A. I don't -- I don't know.

13 Q. Okay.

14 A. I don't think so.

15 Q. In your communications with

16 Mr. Seery, did you two ever discuss his reasons

17 for making any trade on behalf of any CLO?

18 A. No.

19 Q. In your discussions with Mr. Seery,

20 did you ever tell him that you believed that

21 Highland Capital Management had breached any

22 agreement in relation to any CLO?

23 A. Have I had that discussion with Jim

24 Seery?

25 Q. Yes.

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2 connection with its performance as the

3 portfolio manager of the CLOs in which CLO

4 HoldCo Limited has invested?

5 MR. CLARK: Object to form.

6 A. In terms of the -- are you saying --

7 please say that again. I'm sorry.

8 Q. That's okay. I ask long questions

9 sometimes so forgive me, but I'm trying to

10 get -- I'm trying to be precise so that's why

11 it's difficult sometimes. But let me try

12 again.

13 Does CLO HoldCo Limited contend that

14 Highland Capital Management has done anything

15 wrong in the performance of its duties as

16 portfolio manager of the CLOs in which CLO

17 HoldCo has invested?

18 MR. CLARK: Objection, form.

19 A. Yes. It's -- it's outlined in our

20 objections to -- to the plan.

21 Q. Okay. Any -- are you aware of

22 anything that's not contained within CLO Holdco

23 Limited's objection to the plan?

24 MR. CLARK: Objection, form.

25 A. I don't know if this is responsive

|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |
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| <p style="text-align: right;">Page 70</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 to your quest -- request, but two -- two</p> <p>3 issues, I believe, also pose an in- -- a</p> <p>4 problem for CLO HoldCo. One is we are paying</p> <p>5 for services. I think I referred to the</p> <p>6 services as being soup to nuts, but we are not</p> <p>7 getting the full services. We haven't been for</p> <p>8 some time. So we're likely overpaying. There</p> <p>9 was a Highland Select Equity issue, 11-month</p> <p>10 payment that was delayed which I was unaware of</p> <p>11 was due. Normally, I would have interfaced</p> <p>12 with someone at Highland about that, but my</p> <p>13 attorney -- but my -- my attorney had to make a</p> <p>14 request for payment, and that payment was</p> <p>15 ultimately made. I -- other than that, I -- I</p> <p>16 don't -- I don't know. I don't believe so.</p> <p>17 Q. I want to distinguish between the</p> <p>18 shared services agreement between Highland</p> <p>19 Capital Management and CLO HoldCo Limited on</p> <p>20 the one hand and on the other hand the</p> <p>21 management agreements pursuant to which</p> <p>22 Highland Capital Management manages certain</p> <p>23 CLOs that CLO HoldCo invests in.</p> <p>24 You understand the distinction that</p> <p>25 I'm making?</p> | <p style="text-align: right;">Page 71</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 A. Now I do. I'm sorry. I didn't</p> <p>3 appreciate that.</p> <p>4 Q. Okay. So let's just take each of</p> <p>5 those pieces one at a time. You mentioned your</p> <p>6 concern about services. That's a concern that</p> <p>7 arises under the shared services agreement,</p> <p>8 right?</p> <p>9 A. Yes.</p> <p>10 Q. And you mentioned something about a</p> <p>11 delayed payment having to do with Highland</p> <p>12 Select. Do I have that generally right?</p> <p>13 A. Correct.</p> <p>14 Q. And is that a concern that you have</p> <p>15 that arises under the shared services</p> <p>16 agreement?</p> <p>17 A. It's not the agreement with respect</p> <p>18 to the CLOs as I understand it.</p> <p>19 Q. Okay. So then let's turn to that</p> <p>20 second bucket. You were aware -- you are</p> <p>21 aware, are you not, that Highland Capital</p> <p>22 Management has certain agreements with CLOs</p> <p>23 pursuant to which it manages the assets that</p> <p>24 are owned by the CLOs?</p> <p>25 A. I'm so sorry. Could you please --</p>                                       |
| <p style="text-align: right;">Page 72</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 Q. I'll try again.</p> <p>3 A. I'm just -- I'm sorry. I was</p> <p>4 distracted and -- and I -- I'm sorry for asking</p> <p>5 you to repeat it again. Please --</p> <p>6 Q. Okay.</p> <p>7 A. Please re- --</p> <p>8 Q. Are you aware that CLO HoldCo</p> <p>9 Limited has made investments in certain CLOs?</p> <p>10 A. Oh, yes, certainly.</p> <p>11 Q. And are you aware that those CLOs</p> <p>12 are managed by Highland Capital Management?</p> <p>13 A. Yes. As the -- as the servicer,</p> <p>14 yes.</p> <p>15 Q. Okay. Have you ever seen any of the</p> <p>16 agreements pursuant to which Highland Capital</p> <p>17 Management acts as a servicer?</p> <p>18 A. I've seen a few, yes.</p> <p>19 Q. Does CLO HoldCo Limited contend that</p> <p>20 it is a party to any agreement between Highland</p> <p>21 Capital Management and the CLOs?</p> <p>22 MR. CLARK: Object to form. And I</p> <p>23 just want to note for the record that</p> <p>24 Mr. Scott is here testifying in his</p> <p>25 individual capacity, I believe, not as a</p>                                                                                                                                                                                                           | <p style="text-align: right;">Page 73</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 corporate representative.</p> <p>3 MR. MORRIS: Fair enough. But he is</p> <p>4 the only representative so...</p> <p>5 MR. CLARK: Fair enough. I just</p> <p>6 want that made -- stated for the record,</p> <p>7 but I also object as to form.</p> <p>8 MR. MORRIS: Got it.</p> <p>9 A. It's a third-party beneficiary under</p> <p>10 the agreements.</p> <p>11 Q. And is that because of something you</p> <p>12 read in the document, or is that just your</p> <p>13 belief and understanding?</p> <p>14 A. My belief and understanding.</p> <p>15 Q. And is that belief and understanding</p> <p>16 based on anything other than conversations with</p> <p>17 counsel?</p> <p>18 A. In -- in -- recently it has, but I</p> <p>19 don't recall from previous interactions over</p> <p>20 the years how we discussed that or how I came</p> <p>21 to -- to understand that.</p> <p>22 Q. Does HCLO [sic] HoldCo -- did -- in</p> <p>23 your capacity as the sole director of HCLO</p> <p>24 HoldCo Limited, are you aware of anything that</p> <p>25 Highland Capital Management has done wrong in</p> |

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2 connection with the services provided under the

3 CLO management agreements?

4 MR. CLARK: Objection, form.

5 A. I -- I don't -- I don't -- I

6 don't -- your answer's no.

7 Q. In your capacity as the director of

8 CLO HoldCo Limited, are you aware of any

9 default or breach under the CLO management

10 agreements that -- that Highland Capital

11 Management has caused?

12 MR. CLARK: Objection, form.

13 A. We have raised the issue about

14 ongoing sales in various -- I'm not sure

15 whether they represent a technical breach,

16 though.

17 Q. Okay. Are you aware of any

18 technical breach?

19 MR. CLARK: Objection, form.

20 A. No.

21 Q. I'm sorry. You said, no, sir?

22 A. My answer's no.

23 Q. Thank you. Do you know who made the

24 decision to cause the CLO HoldCo Limited entity

25 to invest in the CLOs that are managed by

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2 making an investment in a CLO that wasn't

3 managed by Highland?

4 A. No.

5 Q. Is there any particular reason why

6 you haven't given that any consideration?

7 A. That hasn't been my role. That's

8 not my expertise. That's been something

9 Highland has done and, quite frankly, over the

10 years brilliantly so, no.

11 Q. You're aware that HCM, L.P., has

12 filed for bankruptcy, right?

13 A. Yes.

14 Q. When did you learn that Highland had

15 filed for bankruptcy?

16 A. After the fact sometime in late --

17 late 2019.

18 Q. Since the bankruptcy filing, have

19 you made any attempt to sell CLO HoldCo

20 Limited's position in any of the CLOs that are

21 managed by Highland?

22 A. No.

23 Q. So notwithstanding the bankruptcy

24 filing, you as the director haven't made any

25 attempt to transfer out of the CLOs that are

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2 Highland Capital?

3 A. The select -- ultimately, I had to.

4 Q. I thought you testified earlier that

5 you didn't make decisions as to investment. Do

6 I have that wrong?

7 A. The selection.

8 Q. Okay.

9 A. I -- I'm --

10 Q. So -- so explain to me --

11 A. I have to approve -- I have to

12 approve the selection. I'm sorry. But the

13 people making -- I was putting that in the camp

14 of the people that make the selection.

15 Q. Okay. Do you know if -- do you know

16 if there are CLOs in the world that exist that

17 aren't managed by Highland Capital Management?

18 MR. CLARK: Objection, form.

19 A. Are there CLOs in the -- in the

20 world that are not --

21 Q. Yes.

22 A. Yes. It's -- it's a well-known --

23 it's a well-known --

24 Q. In your capacity as the director of

25 CLO HoldCo Limited, did you ever consider

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2 managed by Highland, correct?

3 A. Correct.

4 Q. Did you ever give any thought to

5 exiting the CLO vehicles that were managed by

6 Highland in light of its bankruptcy filing?

7 A. No.

8 Q. Have you ever discussed with

9 Mr. Seery anything having to do with the

10 management -- withdrawn.

11 Have you ever discussed with

12 Mr. Seery any aspect of the debtor's management

13 of the CLOs in which CLO HoldCo Limited is

14 invested?

15 A. No.

16 Q. You mentioned earlier a request to

17 stop trading. Do I have that right?

18 A. Yes.

19 Q. Okay. And are you aware that a

20 letter was written purportedly on behalf of CLO

21 HoldCo Limited in which a request to stop

22 trading was made?

23 A. As a cos- -- yeah. Yes.

24 Q. Okay. Have you ever seen that

25 letter before?



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2 A. Yes.

3 MR. MORRIS: Can we put up on the

4 screen -- I think it's now Exhibit 6. It's

5 Exhibit DDDD.

6 (SCOTT EXHIBIT 3, Letter to James A.

7 Wright, III, et al., from Gregory Demo,

8 December 24, 2020, with Exhibit A

9 Attachment, was marked for identification.)

10 MR. MORRIS: Can we scroll down to,

11 I guess, what's Exhibit A. Ri- -- right

12 there.

13 BY MR. MORRIS:

14 Q. You see this is a letter Dece- --

15 dated December 22nd?

16 A. Yes.

17 Q. In the first paragraph there there's

18 a reference to the entities on whose behalf

19 this letter is being sent.

20 Do you see that?

21 A. Yes.

22 Q. Okay. So this letter was sent on

23 December 22nd. Did you see a copy of it before

24 it was sent?

25 A. A -- a draft -- an earlier draft of

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2 that the entities other than CLO HoldCo Limited

3 that are listed in the first paragraph made a

4 motion in the court asking the court for an

5 order that would have prevented Highland from

6 making any transactions for a limited period of

7 time?

8 A. Yes.

9 Q. Did you know that motion was being

10 made prior to the time that it was made?

11 A. I'm not sure.

12 Q. Did you ever think about whether CLO

13 HoldCo Limited should join that particular

14 motion?

15 A. I believe we were -- my attorney was

16 aware of it. I don't recall our discussion

17 about it. We were aware -- when I say we, I

18 mean collectively -- and did not join it.

19 Q. Okay. Can you tell me why you did

20 not join it.

21 MR. CLARK: And, again, Grant, to --

22 to the extent it's based on communications

23 with counsel, you're free to say that

24 but -- but not to disclose any substance of

25 communications with counsel.

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2 this I did.

3 Q. Okay. Did you provide any comments

4 to it?

5 A. I did.

6 MR. CLARK: Well, hold on. Grant,

7 let me caution you. To the extent you

8 provided comments to counsel, we're going

9 to assert the attorney-client privilege on

10 those comments.

11 MR. MORRIS: It's just a yes-or-no

12 question. I'm not looking for the

13 specifics.

14 MR. CLARK: Thank you.

15 A. Yes.

16 Q. Are you aware that earlier letters

17 were -- withdrawn.

18 Are you aware that prior to December

19 22nd, the entities other than CLO HoldCo

20 Limited that are listed in this pers- -- first

21 paragraph had sent a letter making the same

22 request?

23 A. With respect to a letter, no. No,

24 I -- I did not.

25 Q. Are you aware as you sit here now

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2 A. The subject of this letter on the

3 22nd which yielded the original letter you

4 briefly showed me on the 24th as well as an

5 additional letter on the 28th identified two

6 points as I understand it. The first point is

7 what I believe is the somewhat innocuous

8 request to halt sales, not a demand in any way.

9 And the second more substantive issue has to do

10 with steps to remove Highland or a subsequent

11 derived entity from Highland from the various

12 services agreements that you had previously --

13 we had previously discussed. Neither of those

14 issues met the require- -- neither of those

15 issues led us to believe that a motion such as

16 what you've just mentioned was -- was right --

17 Q. Okay.

18 A. -- because no -- no decision has

19 been made on that.

20 Q. Okay.

21 MR. MORRIS: So I want to go back to

22 my question and move to strike as

23 nonresponsive, and I'll just ask my

24 question again.

25 BY MR. MORRIS:

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2 Q. Why did CLO HoldCo Limited decide

3 not to participate in the earlier motion that

4 was brought by the other entities that are

5 identified in Paragraph 1 that asked the court

6 to stop Highland from engaging in trades?

7 A. John, I'm so sorry. There was a

8 feedback loop that came up when you started to

9 re- -- re- -- recite -- restate your question.

10 I'm sorry.

11 Q. That's okay. Why did CLO HoldCo

12 Limited decide not to join in the earlier

13 motion where the entities listed in Paragraph 1

14 asked the court to order Highland not to make

15 any further trades? Why did they not join that

16 motion?

17 A. The -- the issue didn't rise to

18 the -- I don't believe we had formulated a

19 legal basis sufficient to justify such steps.

20 We hadn't laid the foundation necessary to --

21 to do that.

22 Q. Are you aware of what the court

23 decided?

24 A. By virtue of the original letter you

25 sent me dated the -- or show -- showed

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2 A. Oh. Oh. Oh, I'm -- yeah. Yeah.

3 Oh, yes. I'm sorry. Of course.

4 Q. Right? I mean, Highland has been

5 making trades on behalf of CLOs for years,

6 right?

7 A. Yes.

8 Q. And Highland was making trades on

9 behalf of CLOs throughout 2020, to the best of

10 your knowledge, right?

11 A. Yes.

12 Q. And you know when Jim Dondero was

13 still with Highland, he was making trades on

14 behalf of CLO -- on behalf of the CLOs, right?

15 A. Yes.

16 Q. And you never objected when Jim

17 Dondero was doing it; is that right?

18 A. That is correct.

19 Q. Okay. So what changed that caused

20 you in your capacity as the director of CLO

21 HoldCo to request a full stoppage of trading?

22 A. It was my understanding that because

23 of the bankruptcy and the removal of Jim

24 Dondero that the replacement decision-makers

25 did not have the expertise where I felt

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2 initially dated the 24th, I have a general

3 understanding of what they decided.

4 Q. Did you -- did you ever review the

5 transcript of the hearing where the other

6 parties asked the court to stop Highland from

7 engaging in any further trades on the CLOs?

8 A. I did not.

9 Q. Is there anything different about

10 the request in this letter, to the best of your

11 knowledge, from the request that was made of

12 the court just six days earlier?

13 MR. CLARK: Objection, form.

14 A. Yes. There's a -- in -- in my -- my

15 view there's a substantial difference between

16 filing an action converting a request into

17 essentially a demand versus a gentle request

18 with multiple caveats, that that request is not

19 a demand.

20 Q. Okay. Let me ask you this: Are you

21 aware -- what -- when did you first learn that

22 Highland was making trades in its capacity as

23 the servicer of the CLOs? When -- when did you

24 first learn that Highland was doing that? Ten

25 years ago, right? I mean --

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2 comfortable with them making those decisions,

3 but...

4 Q. I thought you testified earlier that

5 you weren't aware that Mr. Dondero left

6 Highland. Am I mistaken in my recollection?

7 A. I think you said in October, and

8 I -- as I -- there's some con- -- I have

9 confusion about when he left versus when he was

10 still there but other -- but he was not making

11 those trades.

12 Q. Okay. Fair enough. The bankruptcy

13 has nothing to do with your desire to stop

14 trading, right, because Highland traded for a

15 year after the bankruptcy and never took any

16 action to try to stop Highland from trading on

17 behalf of the CLOs, fair?

18 A. The -- Highland as of right now

19 isn't the same entity it was -- well, the

20 decision-making team -- the -- the financial

21 decision-making team for CLO Holdco's is no

22 longer the team I have worked with, and upon

23 discussion with counsel, we agreed -- I agreed

24 to this letter, which I did, to just maintain

25 the status quo.

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| <p style="text-align: right;">Page 86</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 Q. How did you form your opinion that</p> <p>3 the debtor doesn't have the expertise to</p> <p>4 execute trades on behalf of the CLOs today?</p> <p>5 What's the basis for that belief?</p> <p>6 A. I -- as I understood it, the -- the</p> <p>7 people historically making that decision were</p> <p>8 no longer making that decision.</p> <p>9 Q. Who besides Mr. Dondero --</p> <p>10 withdrawn.</p> <p>11 Who are you referring to?</p> <p>12 A. Well, Mr. Dondero is one. I don't</p> <p>13 know the names, but I -- I understood it to</p> <p>14 mean that the group previously responsible, for</p> <p>15 exam- -- for example, Hunter Covitz, including</p> <p>16 Hun- -- him, were no longer involved in the</p> <p>17 decision-making process, but...</p> <p>18 Q. How did you -- how -- how -- who</p> <p>19 gave you the information that led you to</p> <p>20 conclude that Hunter Covitz was no longer</p> <p>21 involved in the decision-making process?</p> <p>22 A. Specifically him and that name being</p> <p>23 mentioned, I -- I -- I wasn't informed of his</p> <p>24 speci- -- him -- him being removed. I was</p> <p>25 under the impression that the team that had</p> | <p style="text-align: right;">Page 87</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 previously been doing that was no longer doing</p> <p>3 it.</p> <p>4 Q. And what gave you that impression?</p> <p>5 A. Was communications I had with my</p> <p>6 attorney.</p> <p>7 Q. Okay. Is there any source for your</p> <p>8 information that led you to conclude that the</p> <p>9 team was no longer there that was able to</p> <p>10 engage in the trades on behalf of the CLOs</p> <p>11 other than your attorneys?</p> <p>12 A. Well, this -- this letter -- I -- I</p> <p>13 think the answer is no.</p> <p>14 Q. Thank you. Do you know if Jim -- do</p> <p>15 you have an opinion or a view as to whether Jim</p> <p>16 Seery is qualified to make trades?</p> <p>17 A. This --</p> <p>18 MR. CLARK: Objection, form.</p> <p>19 A. I don't know -- I spoke to Jim Seery</p> <p>20 earlier this week. You -- you asked me whether</p> <p>21 I had his number. I said I did. That's only</p> <p>22 because he called me. My phone rang with his</p> <p>23 number. It was a number I did not recognize,</p> <p>24 it was not in my contacts, but he left me a</p> <p>25 voice mail so I called him back. Then I</p> |
| <p style="text-align: right;">Page 88</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 updated my contacts to -- to add his name so</p> <p>3 now I have his name. And during that</p> <p>4 conversation he informed me that he did have</p> <p>5 that expertise --</p> <p>6 Q. And --</p> <p>7 A. -- without me making any inquiry.</p> <p>8 He volunteered that.</p> <p>9 Q. But you hadn't made any inquiry</p> <p>10 prior to the time that you authorized the</p> <p>11 sending of this letter; is that fair?</p> <p>12 A. That's correct.</p> <p>13 Q. Do you know whether Mr. Seery, in</p> <p>14 fact, engaged in transactions on behalf of the</p> <p>15 debtor since he was appointed back in January?</p> <p>16 A. I do not.</p> <p>17 Q. Did you ask that question prior to</p> <p>18 the time you authorized the sending of this</p> <p>19 letter?</p> <p>20 A. I did not.</p> <p>21 Q. Can you identify a single</p> <p>22 transaction that Jim Seery has ever made that</p> <p>23 you disagree with?</p> <p>24 A. No.</p> <p>25 Q. Can you identify any transaction</p>                                                                                                                                                                                                  | <p style="text-align: right;">Page 89</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 that the debtor made on behalf of any of the</p> <p>3 CLOs since the time that you understand</p> <p>4 Mr. Dondero left Highland that you disagree</p> <p>5 with?</p> <p>6 A. No.</p> <p>7 Q. Did you have any discussion with any</p> <p>8 representative of any of the entities listed on</p> <p>9 this document where they told you they believe</p> <p>10 Jim Seery didn't have the expertise to engage</p> <p>11 in transactions on behalf of the whole -- of</p> <p>12 the CLOs?</p> <p>13 A. You -- your question -- I'm -- I'm</p> <p>14 sorry. I'm trying to be -- I'm trying to be a</p> <p>15 hundred perc- -- I'm trying to be accurate</p> <p>16 here.</p> <p>17 Q. Let me interrupt you and just say,</p> <p>18 I'm very grateful for your testimony. I know</p> <p>19 this is not easy, and I do believe that you're</p> <p>20 earnestly and honestly trying to answer the</p> <p>21 questions the best you can. So no apologies</p> <p>22 necessary anymore. If you need me to repeat</p> <p>23 the question or rephrase it, just say that,</p> <p>24 okay?</p> <p>25 A. Please -- yes.</p>                    |

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2 Q. Okay.

3 A. Please -- please repeat that.

4 Q. Did you ever communicate with any

5 employee, officer, director, representative of

6 any of the entities that are on this page

7 concerning the debtor's ability to service the

8 CLOs?

9 A. I believe so.

10 Q. And can you identify the person or

11 persons?

12 A. I think it's Jim Dondero.

13 Q. Anybody else other than Mr. Dondero?

14 A. No.

15 Q. When did you have that conversation

16 or those conversations with Mr. Dondero?

17 A. This letter is dated the 22nd --

18 Q. Correct.

19 A. -- right?

20 Q. Yes.

21 A. I believe that's the Tuesday before

22 Christmas, and this would have been on the

23 21st, the Monday.

24 Q. What do you recall about your

25 conversation on the 21st regarding the

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2 there.

3 BY MR. MORRIS:

4 Q. Do you see the request that's in the

5 last sentence?

6 A. Yes.

7 Q. Is that the same thing that

8 Mr. Dondero told you should happen, that --

9 that there should be no further CLO

10 transactions at least until the issues raised

11 and addressed by the debtor's plan were

12 resolved substantively?

13 A. Yes.

14 Q. Is there anything that he said

15 that's inconsistent with the request that's

16 made here?

17 MR. CLARK: Objection, form.

18 A. This -- and can you -- can you show

19 me earlier parts?

20 Q. Of course. You know what, I'll

21 withdraw the question.

22 And let me see if I can do it this

23 way: In your discussion with Mr. Dondero, did

24 he indicate that he had seen a draft of this

25 letter?

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2 substance of this particular letter?

3 A. Jim Dondero described why he

4 believed sales being made on an ongoing basis

5 after a request was made to stop was im- --

6 improper.

7 Q. Do you -- do you rely on what

8 Mr. Dondero said to you during that phone call

9 on December 21st in -- in deciding to join in

10 this particular letter?

11 A. No.

12 Q. Did you only then rely on the

13 information you obtained from counsel?

14 A. Yes. I -- I -- I -- I considered

15 this letter to be nearly the most gentle

16 request imaginable amongst lawyers to maintain

17 the status quo.

18 Q. And the request that's made in this

19 letter is perfectly consistent with what

20 Mr. Dondero told you on the 21st of December,

21 correct?

22 A. I don't -- no.

23 Q. How --

24 MR. MORRIS: Can we go to the end of

25 this letter, please. All right. Right

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2 A. No. And I didn't -- I didn't have a

3 discussion with him. I -- I merely listened to

4 him. There was no -- I -- I had no input to

5 the conversation.

6 Q. Okay. I -- I did -- I didn't --

7 I -- I appreciate that. So he called you; is

8 that right?

9 A. We -- we called in.

10 Q. Oh, was it --

11 A. I --

12 Q. Was it --

13 A. I don't know --

14 Q. Was it --

15 A. I don't know the sequence of the

16 calls. I'm sorry.

17 Q. Was there anybody on the call other

18 than you and Mr. Dondero, the call that you're

19 describing on December 21st?

20 A. Yes, my attorney and an attorney --

21 I believe the attorney that signed this letter.

22 Q. Okay. And I just want to focus on

23 what Mr. Dondero said. Did he -- did he say

24 during the call that Highland should not be

25 engaging in any further CLO transactions?

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2 A. He took a more -- if I can

3 characterize his mental -- I looked at the

4 issue of maintaining the status quo since there

5 was somebody that was complaining about it,

6 that that -- because it -- it isn't assets of

7 Highland, it doesn't adversely affect Highland.

8 If -- if stopping the sales -- you know, my --

9 my thought was -- is if stopping the sales

10 reduces the likelihood of litigation

11 disputes -- you already saw that there was the

12 one from middle of December. I -- I thought

13 that would be the more appropriate way to go.

14 I didn't think there'd be any harm.

15 Q. And was that your --

16 A. I think -- I think Jim Dondero had a

17 more legalistic view of its impro- -- im- --

18 improper nature.

19 Q. And did he share that view with you?

20 A. On Monday, yes.

21 Q. Can you describe for me your

22 recollection of what he said about the

23 legalistic view?

24 A. Just the mention of -- all I recall

25 is in terms of -- the law associated with it

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2 transactions before they made a request six

3 days after the court threw out their suit as

4 frivolous? I'll withdraw that. That's too

5 much.

6 A few days later did you authorize

7 the sending of another letter to the debtor in

8 which you suggested that the -- the entities on

9 behoove -- on -- on whose behalf the letter was

10 sent might take steps to terminate the CLO

11 management agreements?

12 A. I did not see -- so there is a --

13 there is a December 28th letter.

14 MR. MORRIS: Let's just go to the

15 next letter, and -- and let's just call

16 that up.

17 BY MR. MORRIS:

18 Q. I think it's -- I think it's

19 actually dated December 23rd. It was the next

20 day.

21 A. Yes.

22 (SCOTT EXHIBIT 4, Letter to James A.

23 Wright, III, et al., from Gregory Demo,

24 December 24, 2020, with Exhibit A

25 Attachment, was marked for identification.)

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2 was -- the Advisers Act was mentioned --

3 Q. Did you have --

4 A. -- but I don't -- I don't know what

5 that is. You know, I don't know what that is.

6 Q. And you -- and -- and you never --

7 it never occurred to you to pick up the phone

8 and -- and to speak with Mr. Seery to see why

9 it was he thought he should be engaging in

10 transactions?

11 A. No. And -- but I -- my lack of

12 volunteering a phone call to Jim Seery isn't --

13 it's -- it's because of -- I -- I thought any

14 phone call by me to Jim Seery would be

15 inappropriate because he's represented by

16 counsel. I mean, we were working on claims

17 against him --

18 Q. Okay.

19 A. -- right, so...

20 Q. Did you -- did you -- did you think

21 to instruct your lawyers to reach out to

22 Mr. Seery to actually speak to him instead of

23 just sending a letter like this and to -- and

24 to ask -- and to maybe inquire as to why he

25 thought it was appropriate to engage in

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2 BY MR. MORRIS:

3 Q. And do you recall that the next day

4 CLO HoldCo Limited joined in another letter to

5 the debtors? Do you have that recollection?

6 A. Yes. Not -- not be- -- yes, I do,

7 but -- yes, I do.

8 Q. Did you see this letter before it

9 was sent?

10 A. I don't believe so.

11 Q. Did you authorize the sending of

12 this letter?

13 A. I gave -- I relied on my attorney to

14 guide me through this process.

15 Q. I appreciate that.

16 A. I let him make that call on this

17 letter, which is -- copies most of the prior

18 letter and then adds another issue.

19 Q. Okay. Do you have an understanding

20 of what that issue is?

21 A. Yes.

22 Q. And what is your understanding of

23 what that additional issue is?

24 A. Somewhere in this letter of the 23rd

25 there's an -- there's an -- an inclusion of

|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |
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| <p style="text-align: right;">Page 98</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 a -- a statement of an -- a future intent.</p> <p>3 Q. A future intent to do what?</p> <p>4 A. To remove Highland as the servicer</p> <p>5 of the agreements you talked to me about</p> <p>6 previously.</p> <p>7 Q. Can you tell me whether there's a</p> <p>8 factual basis on which CLO HoldCo Limited</p> <p>9 believes that the debtor should be removed as</p> <p>10 the servicer of the portfolio manager of the</p> <p>11 CLOs?</p> <p>12 A. Yes. There are -- there are</p> <p>13 multiple bases to consider subject to all the</p> <p>14 other conditional language in the request of</p> <p>15 these letters to consider that going forward</p> <p>16 but no decision. That intent is an intent to</p> <p>17 evaluate, not an intent to take any action. I</p> <p>18 haven't authorized any action. I don't feel</p> <p>19 comfortable with my knowledge base at this</p> <p>20 time, but it's something being explored.</p> <p>21 Q. So knowing everything that you know</p> <p>22 as of today, you have not yet formed a decision</p> <p>23 as to whether CLO HoldCo Limited will take any</p> <p>24 steps to terminate Highland's portfolio</p> <p>25 management agreements, correct?</p>                 | <p style="text-align: right;">Page 99</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 A. I don't -- I don't want to be</p> <p>3 difficult, but I'm -- I'm confused yet again</p> <p>4 with your question. But I have not -- there --</p> <p>5 there are a number of cr- -- a number of issues</p> <p>6 that with my nonfinance background would</p> <p>7 suggest to me that they -- they may be bases</p> <p>8 for -- for cause, to -- to assert a cause. And</p> <p>9 I've been conferring with my attorney about</p> <p>10 that, but it's very preliminary and no -- no</p> <p>11 decision has been made. I -- no decision is</p> <p>12 being made.</p> <p>13 Q. So what -- what are the factors that</p> <p>14 are causing you to consider possibly seeking to</p> <p>15 begin the process of terminating the CLO</p> <p>16 management agreements?</p> <p>17 A. Well, I guess I would break them</p> <p>18 down into maybe two categories, maybe more.</p> <p>19 The one that resonates most with me -- I don't</p> <p>20 know -- maybe because even though I'm a patent</p> <p>21 attorney, I guess at one point I was an</p> <p>22 attorney. But the thing that resonates most</p> <p>23 with me --</p> <p>24 Q. You are an attorney.</p> <p>25 A. -- at the moment -- well, now you</p> |
| <p style="text-align: right;">Page 100</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 know why I'm a patent attorney and not one of</p> <p>3 you guys. But the thing that resonates with me</p> <p>4 the most from a legal substantive, black letter</p> <p>5 law sort of issue is the plan for</p> <p>6 reorganization, which we've objected to. I've</p> <p>7 re- -- I've reviewed the objection, and that</p> <p>8 sets forth our -- that sets forth my position,</p> <p>9 and I consider that to be quite material. The</p> <p>10 others are issues of practical effects of</p> <p>11 what's happened thus far with the bankruptcy,</p> <p>12 the termination of the experts with a long</p> <p>13 track record of success, the soon-to-be</p> <p>14 termination of all employees, the cancellation</p> <p>15 of various representation agreements, things of</p> <p>16 that nature looked at from an additive sort of</p> <p>17 perspective.</p> <p>18 Q. You know that -- can we refer to the</p> <p>19 counterparties under the CLO management</p> <p>20 agreements as the issuers? Are you familiar</p> <p>21 with that term?</p> <p>22 A. I -- I am familiar with the term</p> <p>23 issuers, yes.</p> <p>24 Q. Okay. And do you understand --</p> <p>25 A. There's an agreement between the --</p> | <p style="text-align: right;">Page 101</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 I'm sorry.</p> <p>3 Q. There's an agreement between the</p> <p>4 issuers and Highland pursuant to which Highland</p> <p>5 manages the CLO assets, right?</p> <p>6 A. With res- -- yes.</p> <p>7 Q. Okay. And do you understand what's</p> <p>8 going to happen to those management contracts</p> <p>9 in connection with the plan of reorganization?</p> <p>10 A. Partially.</p> <p>11 Q. What's your partial understanding?</p> <p>12 A. Well, I -- I wouldn't want to</p> <p>13 characterize it as a partial understanding. I</p> <p>14 mean, with respect to part of the agreement.</p> <p>15 Q. Okay.</p> <p>16 A. Okay. Our plan objection lays out</p> <p>17 our basis for objecting to steps that Highland</p> <p>18 is actively taking to preclude us from the full</p> <p>19 rights that we have as third-party</p> <p>20 beneficiaries under that agreement, and they're</p> <p>21 not de minimus. They're quite material. They</p> <p>22 relate to cause issues and no-cause issues, for</p> <p>23 example, as out- -- as outlined in our --</p> <p>24 our -- our objections.</p> <p>25 Q. Okay. Did you ever make any attempt</p>                                                          |



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2 to speak with any issuer concerning Highland's

3 performance under the CLO management

4 agreements?

5 A. No.

6 Q. Why not?

7 A. I -- I don't have any facts --

8 understand I -- I get all of the reports

9 periodically from Highland -- from Highland.

10 I -- I don't have a basis that I'm aware of to

11 complain about performance issues. This is a

12 legal issue that I'm talking about.

13 Q. So you have no basis to suggest that

14 Highland hasn't performed under the CLO

15 management agreements, correct?

16 A. Well, Highland as of right now,

17 the -- the issue really is as -- as to what's

18 next, not -- not -- I -- I don't -- I don't

19 believe I have facts that support a com- --

20 a -- an issue right now. It's -- it's --

21 it's -- it's going forward that is the problem.

22 Q. I --

23 A. That's -- you know, that's --

24 Q. Have you given any thought to

25 speaking with the issuers to try to get their

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2 negotiating with Highland to permit Highland to

3 assume the CLO management agreements and to

4 continue operating under them?

5 A. I believe so --

6 Q. Is that --

7 A. -- but they're --

8 Q. Go ahead. I'm sorry.

9 A. As I understand it, Highland

10 wants -- Highland or its subsidiary -- or

11 its -- its -- its postbankruptcy relative --

12 post- -- excuse me, that Highland

13 postbankruptcy -- or postplan confirmation

14 wants to move forward, substitute itself for

15 the prior issuer -- no, sorry, substitute

16 itself for the prior servicer under those

17 agreements to assume those agreements but in

18 the process of assuming those agreements,

19 carving out a bunch of provisions that from a

20 legal standpoint and a potentially future

21 practical and monetary standpoint are quite

22 substantial, and that has to relate to the

23 removal rights based on cause and without

24 cause. As I understand it, that's all set

25 forth in our plan objection.

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2 views as to what they think is going to happen

3 in the future?

4 A. No.

5 Q. They're the -- they're the actual

6 direct beneficiaries under the CLO management

7 agreements, to the best of your understanding,

8 right?

9 A. Yes. Their rights may not be

10 impacted; it's CLO Holdco's rights that are

11 going to be adversely impacted. So it's -- I

12 don't know that our view is in alignment with

13 their view. But to answer your question, no,

14 we did not contact them.

15 Q. Do you have any knowledge or

16 information as to any assertion by the issuers

17 that Highland is in breach of any of the CLO

18 management agreements?

19 A. No.

20 Q. Do you have any knowledge or

21 information as to whether or not any of the

22 issuers believe that Highland is in default

23 under the CLO management agreements?

24 A. No, I don't have any of those facts.

25 Q. Are you aware that the issuers are

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2 Q. Okay. Are you aware of a third

3 letter that was sent to Highland on behalf of

4 CLO HoldCo and the other entities that are

5 listed in this document?

6 A. The December 28th letter, is that

7 what you mean?

8 Q. It's actually December 31st, if I

9 can refresh your recollection.

10 MR. MORRIS: Can we put up Exhibit

11 F?

12 (SCOTT EXHIBIT 5, Letter to Jeffrey

13 N. Pomerantz from R. Charles Miller,

14 December 31, 2020, was marked for

15 identification.)

16 BY MR. MORRIS:

17 Q. You remember that there was a letter

18 dated on or about December 31st that was

19 sent -- oh, actually, you know, I apologize.

20 If we scroll down to the -- to the next -- to

21 the first box, there actually is no mention of

22 CLO HoldCo.

23 Are you aware that Mr. Dondero was

24 evicted from Highland's offices as of the end

25 of the year?

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2 A. I -- I didn't know the time, but I

3 understand he's no longer there.

4 Q. Does CLO HoldCo Limited contend that

5 it was damaged in any way by Mr. Dondero's

6 eviction from the Highland suite of offices?

7 MR. CLARK: Objection, form.

8 A. I -- I don't have any information to

9 support that as of this time.

10 Q. It's not -- it's not a belief that

11 you hold today?

12 A. I don't have a belief of that, yes.

13 MR. MORRIS: All right. Let's take

14 a short break. I may be done. I -- I'm

15 grateful, Mr. Scott, and don't want to

16 abuse your time. Give me -- let -- just

17 let -- let's come back at 4:50, just eight

18 minutes, and if I have anything further, it

19 will be brief.

20 (Whereupon, there was a recess in

21 the proceedings from 4:42 p.m. to

22 4:49 p.m.)

23 MR. MORRIS: Okay. Mr. Scott, thank

24 you very much for your time. I have no

25 further questions.

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2 C E R T I F I C A T E

3 STATE OF NORTH CAROLINA )

4 ) ss.:

5 COUNTY OF WAKE )

6

7 I, LISA A. WHEELER, RPR, CRR, a

8 Notary Public within and for the State of New

9 York, do hereby certify:

10 That GRANT SCOTT, the witness whose

11 deposition is hereinbefore set forth, having

12 produced satisfactory evidence of

13 identification and having been first duly sworn

14 by me, according to the emergency video

15 notarization requirements contained in G.S.

16 10B-25, and that such deposition is a true

17 record of the testimony given by such witness.

18 I further certify that I am not

19 related to any of the parties to this action by

20 blood or marriage; and that I am in no way

21 interested in the outcome of this matter.

22 IN WITNESS WHEREOF, I have hereunto

23 set my hand this 21st day of January, 2021.

24 -----Lisa A. Wheeler-----

25 LISA A. WHEELER, RPR, CRR

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2 THE WITNESS: Thank you.

3 MR. CLARK: We will reserve our

4 questions.

5 THE WITNESS: I appreciate it, John.

6 MR. MORRIS: Take care. Thanks for

7 your time and your -- and your diligence.

8 I do appreciate it. Take care, guys.

9 THE REPORTER: Okay.

10 MR. CLARK: Thank you.

11 MR. HOGWOOD: No questions from us.

12 (Time Noted: 4:50 p.m.)

13

14

15 -----

16 GRANT SCOTT

17

18 Subscribed and sworn to before me

19 this day of 2021.

20

21 -----

22

23

24

25

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2 -----I N D E X-----

3 PAGE

4 EXAMINATION BY MR. MORRIS 7

5

6

7 -----EXHIBITS-----

8 PAGE

9 EXHIBIT 1 Organizational Structure: 46

10 CLO HoldCo, Ltd.

11 EXHIBIT 2 Unanimous Written Consent of 54

12 Directors In Lieu of Meeting

13

14 EXHIBIT 3 Letter to James A. Wright, 78

15 III, et al., from Gregory

16 Demo, December 24, 2020, with

17 Exhibit A Attachment

18

19 EXHIBIT 4 Letter to James A. Wright, 96

20 III, et al. From Gregory

21 Demo, December 24, 2020, with

22 Exhibit A Attachment

23

24 EXHIBIT 5 Letter to Jeffrey N. 105

25 Pomerantz from R. Charles

Miller, December 31, 2020

|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |
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## APPENDIX 28

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

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

**RESPONSE OF THE CHARITABLE DAF FUND, L.P., CLO HOLDCO, LTD., AND  
SBAITI & COMPANY PLLC TO SHOW CAUSE ORDER**

## I. INTRODUCTION

We write in response on behalf of the Charitable DAF Fund, L.P. (the “DAF”), CLO Holdco, Ltd. (“CLO Holdco”), and Sbaiti & Company PLLC (altogether, the “Respondents”).<sup>1</sup>

We are deeply concerned by this Court’s adoption of the name-calling initiated by Movants. Identifying Respondents as the “Violators” in the order to show cause suggests that this Court has prejudged the issues before it and creates the appearance of impropriety. We are equally concerned that the show-cause order was communicated to us by Debtor’s counsel, verbatim, *three days before* this Court actually issued that order, as if Debtor’s counsel speaks for the Court and has special, advance access to its pronouncements. This also creates the appearance of impropriety.

We are especially concerned that any prejudgment this Court may have made is based solely on the deliberately misleading statements in Movants’ brief. Respondents respectfully submit that the issue before the Court here is not whether Mr. Seery has been sued in violation of an order of this Court, as Movants want this Court to believe. Seery has not been sued at all.

The issue here is whether Respondents should be held in contempt for *asking permission from the district court*, which has original jurisdiction over the action, to sue Seery. Movants claim this Court has stripped the district court of jurisdiction—construing this Court’s reference to “sole jurisdiction” as excluding the district court from which this Court derives its jurisdiction. Not only did we not violate this Court’s orders by filing a motion for leave in the district court, we complied with them. And even were it otherwise, no case cited in the Motion, and no case we could find, has issued sanctions as a result of a party asking a court for leave to do something, even if it was the wrong court.

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<sup>1</sup> The undersigned do not represent the other persons required by this Court’s order to appear in person on June 8, 2021, and therefore, this Response is on behalf of the named respondents.



Finally, we respectfully ask this Court to expunge from its docket any order prejudging Respondents, or anyone for that matter, by referring to us as the “Violators.” Justice requires no less.

## II. PROCEEDINGS IN THE DISTRICT COURT

The DAF is a charitable organization that invests some of its funds as part of its long-term mission to provide financial assistance, primarily in the Dallas/Ft. Worth area to such notable causes as:

- Committing several millions of dollars to support a facility that helps the victims of domestic violence in North Texas—the new facility has, since 2016, supported over 2000 victims each year;
- Supporting children’s advocacy centers, as well as education initiatives for underserved children, in addition to education programs to help in things like job training and adult education in underserved populations;
- Supporting organizations that care for homeless military veterans and other institutions that help retrain and support veterans’ reintegration, into;
- Supporting the arts in DFW such as proving funding the Perot Museum and the Dallas Zoo; and
- Funding medical research, among other things.

All in, the DAF has helped fund over \$32 million in in grants and committed millions more in prospective funding. To meet these commitments, the DAF has an obligation to generate the funds through its investing activities. Doing so marries the charitable mission with the benefits of our market economy.

For that reason as well, the DAF dutifully safeguards its investments and protects its rights when it has been damaged. Hence the underlying lawsuit in the district court. Without the ability to safeguard its investments, the DAF’s ability to fund public causes would be severely hampered, costing the people of Dallas/Ft. Worth millions in benefits given to area families and children in need.



#### A. Respondents' Complaint in District Court Raises Significant, Recently Discovered Issues

The basis of the DAF's action pending in the district court—the action in which Respondents filed their *Motion for Leave to Amend to Add James Seery*<sup>2</sup>—can be summed up in three simple bullets:

- The defendants, including Debtor, had duties under the Investment Advisers Act of 1940 (“Advisers Act”) to the DAF and its subsidiary, CLO Holdco. Those duties arise by operation of law as a result of the defendants’ role as a registered investment adviser to the plaintiffs. And those duties are unwaivable.
- The Harbourvest settlement was predicated on a valuation of the HCLOF assets at \$22.5 million, which Seery testified was the value of those interests. That statement was not true—but it was relied upon by the plaintiffs at the time—there would be no justification for spending \$22.5 million in cash to get \$22.5 million in contingent assets. It was only in March 2021, two months after Seery’s testimony, that another HCLOF investor brought to light the fact that the interests were worth almost double the amount testified to, and that Seery knew or should have known about that differential, in his role as a registered investment advisor.<sup>3</sup>
- Seery’s duty under the Adviser’s Act required him to disclose that differential to the DAF and disclose the opportunity to the DAF to purchase the interests. By not doing so, the defendants violated those unwaivable federal duties in connection with the Harbourvest settlement that this Court approved earlier this year.

The DAF and CLO Holdco to file their Original Complaint in the district court to protect their investment. That Complaint, however, purposefully did **not** name Seery as a defendant. And the Complaint does **not** ask to void, undo, or reverse, the Harbourvest Settlement. Nor is reversing the releases or the “allowed claims” as consideration between Harbourvest and the debtor a necessary predicate to relief in the Complaint. For example, one avenue would be for the defendants to simply sell the Harbourvest interests to the DAF for \$22.5 million—which should

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<sup>2</sup> APP\_0027-0036.

<sup>3</sup> APP\_0015.

be net-neutral to the debtor, and would actually give the debtor \$22.5 million more in cash *now* than what it received under the Harbourvest settlement.<sup>4</sup>

Because of the Orders limiting suits against Seery, Respondents did not name him, but instead filed their *Motion for Leave to Amend to Add James Seery* on April 19, 2021 (the “Motion for Leave”), informing the district court (1) that this Court had entered orders limiting suits against Seery, (2) attaching the orders to the motion, and (3) briefing several good-faith, statutorily-based reasons why those orders should not prohibit what we were asking the district court to allow. This Motion for Leave is what Movants contend merits holding us in contempt.

Respondents submit that a fair recitation of the Motion for Leave cannot support a contempt finding.

#### **B. Movants Make Deliberately Misleading Statements About Us**

Movants’ brief makes no argument that Respondents’ suit in the district court violates any order. Their argument focuses solely on the Motion for Leave, which the district court denied without prejudice on the basis that it was premature.<sup>5</sup> To support their argument, Movants’ brief misstates the record in several ways, the highlights of which we identify here:

##### **1. Movants Misrepresent Respondents’ Prior Knowledge of the Key Facts Underlying the Harbourvest Settlement**

The Movants have misrepresented that “CLO Holdco knew of all aspects of the [Harbourvest settlement, which is the transaction at issue in Respondents’ action in the district court] before [this] Court granted the Debtor’s Settlement Motion.”<sup>6</sup>

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<sup>4</sup> The proposed \$22.5 million would add liquidity to the estate and obviate the need for a questionable exit loan.

<sup>5</sup> APP\_0120.

<sup>6</sup> APP\_0001-0026.

This representation is false in a significant and material way. As noted above, the Harbourvest settlement was predicated on, among other things, the debtor purchasing Harbourvest's interests in Highland CLO Funding, Ltd. for \$22,500,000 in consideration.

As alleged in the Original Complaint, the value of Harbourvest's interest was equal to, roughly, 49.98% of the net asset value of the assets of Highland CLO Funding, Ltd. ("HCLOF"). The net asset values were calculated internally at Highland Capital Management, LP (HCMLP or the debtor)—the registered investment advisor for both Highland CLO Funding, Ltd. and for the DAF/CLO Holdco. In the quarter ending December 31, 2020, the net asset value of HCLOF was *almost double* what Seery represented it to be. But those internal values were never communicated prior to the hearing. Seery's self-serving denials are of no moment because he was a registered investment advisor to the DAF; thus, he *should have* calculated those values properly and represented them to the DAF, the failure to do either of which is equally a breach of duties imposed by federal law. It was only in March 2021 that another HCLOF investor brought to light the fact that the interests were worth *their true value*. As a registered investment advisor to the DAF, Seery knew or should have known otherwise and should have disclosed it.<sup>7</sup>

Thus, the DAF has alleged that Seery, as the person in the middle of these transactions, and one who is cloaked with heightened federally-imposed fiduciary duties under the Advisers Act, concealed material information from the very advisee he owed fiduciary duties to, and consummated a self-dealing transaction at the expense of an advisee to benefit himself, to benefit the debtor, and to benefit its creditors. This Court's orders do not immunize him from the consequences of these acts and omissions.

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<sup>7</sup> APP\_0015.

Unsurprisingly, no case has held that someone in the position of Seery, as a registered investment advisor subject to the federal Advisers Act’s rules and regulations, can shirk federally-imposed fiduciary duties to its advisees for the mere expediency of enriching its wealthy creditors—whether in bankruptcy or not. No case has held that being insolvent is an exception to the Advisers Act either.

## 2. Movants Misrepresent Respondents’ Communications About This Court’s Orders

Movants represent in their brief that Respondents “simply ignored,” “intentionally flout[ed],” and “willfully disregard[ed]” this Court’s orders,<sup>8</sup> when they know full well that was not the case. The record is clear on this fact.

Before Respondents filed the motion for leave that provides the basis of Movants’ motion here, Respondents reached out to Debtor’s counsel to confer regarding that motion:

Mr. Pomerantz,

Mazin [Sbaiti] and I intend to move for leave today in the district court seeking permission to amend our complaint to add claims against Mr. Seery. They are the same causes of action. We believe we are entitled to amend as a matter of course. ***But we will also raise and brief the bankruptcy court’s orders re the same.***

Can we put your client down as unopposed?

We appreciate your prompt reply.<sup>9</sup>

Plainly this communication does not support Movant’s representation that we ignored or disregarded this Court’s orders. Their brief selectively quotes only the third paragraph of this email—“Can we put your client down as unopposed?”—while omitting the context. Apparently only the one line fit the narrative that Movants wished to present to this Court.

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<sup>8</sup> Memorandum ¶¶ 1, 3 & n.3, 51, 53.

<sup>9</sup> APP\_0123.

Counsel responded by informing us that this Court’s gatekeeper orders<sup>10</sup> prohibited us from filing our motion. We responded as follows:

Mr. Pomerantz,

Thank you for sending the orders and for keeping in mind that we’re new to a matter that, in the bankruptcy court, has over 2,000 filings. We may well have missed something. But we have seen and carefully studied the orders that you sent. And we do not believe they prohibit the motion we are filing, which briefs them and explains why we don’t believe they prohibit our motion.

We also don’t think the district court will both decide that we’re wrong about this and nonetheless grant our motion. As I read the orders, that’s the only theoretical way that a motion for leave could violate them.

And if the district court does grant our motion for the reasons we ask—because it finds that the bankruptcy court exceeded its jurisdiction or because it finds that our motion for leave (which can be referred) complies with the bankruptcy court orders—then we don’t think the bankruptcy court can or will overrule the district court.

So please know that we are not willfully violating those orders, as your email suggests. Quite the contrary, we are giving them careful attention. Which is why we are seeking leave rather than amending as of right.<sup>11</sup>

Separately, counsel also explained:

Jeff,

Our meet and confer is for our motion for leave to amend to add [James Seery]. I believe, per those orders’ language, we are following the court’s instruction.

We are not unilaterally adding him.

I take it you want us to put you down as “opposed” on the certificate of conference?<sup>12</sup>

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<sup>10</sup> APP\_0101-0118.

<sup>11</sup> APP\_0121..

<sup>12</sup> APP\_0122.

Movants attempt to gloss over their own apparent *ex parte* communications by gaslighting the Court and Respondents with a preemptive accusation. Movants misrepresented in their brief that Respondents attempted to get a ruling on the Motion for Leave “effectively on an *ex parte* basis.”<sup>13</sup> This is deceitful. Movants obviously knew that we had conferred with them in advance before filing our motion. And they knew we had filed it as an “opposed” motion, guaranteeing that it would not be granted without an opportunity for them to submit a brief. Indeed, the district court denied the motion specifically because not all defendants had yet been served. The minute order states that the denial is without prejudice to refiling once all defendants have been served.<sup>14</sup>

#### 4. Movants Misrepresent Respondents' District Court Action

<sup>15</sup> APP 0100-0118.



### **A. This Court's Orders Do Not Immunize Seery from All Actions**

Thus, it is not surprising that Movants make no argument here that the Original Complaint Respondents filed in the district court action violates any order of this Court. Although that Complaint mentions Seery and his acts and omissions, in detail, it does **not** name him as a defendant and therefore is **not** the commencement or pursuit of “a claim or cause of against” him, which is all that the orders say is prohibited.

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for *asking for permission to sue* Seery. And for doing so in the district court, which Movants say this Court has stripped of its statutorily granted original jurisdiction.

This is a remarkable request. Our research uncovered no precedent of any kind for a finding of contempt as a result of a motion for leave or any other kind of request for permission. Neither have we found any cases holding a party or its counsel in contempt for making a request in the wrong court. Perhaps this is why Movants' argument is so short and devoid of authority.

Moreover, Movants seem to have assumed that the Motion for Leave would be granted, and that the proposed amended complaint naming Seery would therefore be automatically filed. That is not what was intended, and is not what happened,. To the contrary, Respondents expected that the motion for leave would likely be referred to this Court for a report and recommendation. And Respondents planned, if necessary, to move to withdraw the reference under 28 U.S.C. § 157(d). In addition, Respondents carefully avoided asking to have our proposed amended complaint "deemed filed," going so far as to submit an amended proposed order when we realized that we had inadvertently used such terminology in our initial proposed order.<sup>16</sup>

All of these acts are legal and have a sound basis in the statutes and in the case law. None of them can be said to be in "bad faith."

**B. Respondents' Action in District Court Is Not Prohibited by This Court's Orders**

Movants fail to identify the provision in this Court's gatekeeper orders that they claim Respondents have violated. Instead, they summarily declare the orders "definite and specific," and assert that Respondents violated them "by filing the Seery Motion."<sup>17</sup> Of course, the "Seery Motion" is merely Respondents' Motion for Leave. So Respondents are left to decipher precisely

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<sup>16</sup> APP\_0125.

<sup>17</sup> Memorandum ¶ 59.

how Movants think that asking for permission to sue Seery constitutes a violation of any provision of the gatekeeper orders, which provide, in relevant part,

No entity may ***commence or pursue*** a claim or cause of action of any kind against Mr. Seery relating in any way to his role as the chief executive officer and chief restructuring officer of the Debtor without the Bankruptcy Court (i) first determining after notice that such claim or cause of action represents a colorable claim of willful misconduct or gross negligence against Mr. Seery, and (ii) specifically authorizing such entity to bring such claim. The Bankruptcy Court shall have ***sole jurisdiction*** to adjudicate any such claim for which approval of the Court to commence or pursue has been granted.<sup>18</sup>

**First**, Respondents submit that asking for permission to do a thing does not equate to doing a thing. School children asking for permission to go to the restroom are not, obviously, going to the restroom by the mere act of asking. In the same way, our motion for leave to commence an action against Seery cannot, as a matter of law, constitute commencing an action. An alternative interpretation would render the order void for vagueness.

**Second**, Respondents submit that pursuing a claim or cause of action can only follow—not precede—commencing such action. That commencement must happen first is inherent in the term “commence.” Therefore, as a matter of law, our motion for leave cannot amount to pursuing an action.

**Third**, Respondents submit that the terms of the order saying that “this Court shall have sole jurisdiction” necessarily means the Northern District of Texas, to which this Court is an adjunct. Because that is so, filing the motion for leave in the Northern District of Texas cannot violate the order because it necessarily complies with it. The alternative interpretation requires this

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<sup>18</sup> Cite July order. This Court’s January Order includes similar language except that it applies only to matters related to Seery’s conduct as a director of Strand. Respondents do not believe their cause of action is related to Seery’s director role, but that point seems immaterial here because the two orders are so similarly worded.

Court to have meant to strip the district courts of the Northern District of Texas of original jurisdiction. And Respondents do not believe this Court intended to do any such thing.

The reasoning behind this conclusion is not complex. This Court well knows the jurisdictional framework in which it operates, resulting from the Supreme Court's opinion in *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.* opinion.<sup>19</sup> That framework is established by 28 U.S.C. § 151: "In each judicial district, the bankruptcy judges in regular active service shall constitute a unit of the district court to be known as the bankruptcy court for that district."<sup>20</sup>

The Second Circuit, in *United States v. Guariglia*, made precisely this point, holding that an order of the bankruptcy court constitutes an order of the district court it is a unit of:

In each judicial district, the bankruptcy judges in regular active service shall constitute a unit of the district court to be known as the bankruptcy court for that district. Under this provision, much of the autonomy has been stripped from the bankruptcy courts, now labeled 'units' of the district courts. By definition, under the statutory scheme, the bankruptcy court Order restraining Guariglia from gambling was issued by a 'unit' of the district court. As an Order originating from a unit of the district court, *it necessarily follows that the Order constitutes an Order of both the bankruptcy court and the district court for the district encompassing the bankruptcy court from which the Order emanated.*<sup>21</sup>

<sup>19</sup> 458 U.S. 50 (1982).

<sup>20</sup> "[B]ankruptcy courts are a unit of the district court in each judicial district under 28 U.S.C. § 151 and exercise the power of the district court in bankruptcy cases." *In re D&B Countryside LLC*, 217 B.R. 72, 75 n.5 (Bankr. E.D. Va. 1998).

<sup>21</sup> 962 F.2d 160, 162-63 (2d Cir. 1992); accord *In re Coastal Plains Inc.*, 338 B.R. 703 (Bankr. N.D. Tex. 2006) ("When Congress reconstructed the jurisdiction of the bankruptcy courts with the 1984 Act, it made those courts 'a unit of the district courts' and classified bankruptcy judges as 'judicial officers of the district court.' Both of these statutes reinforce the current placement of the bankruptcy courts in the federal judicial scheme as a subset of federal district courts that derive their jurisdiction from the primary branch of the district court. . . . [T]he bankruptcy court as such no longer exists as a distinct jurisdictional entity, but is subsumed within the district court apparatus. Hence, removing a case to a bankruptcy court is the functional equivalent of removing it to the federal district court."); *Thomas v. U.S. Bank*, 2010 Bankr. LEXIS 986 at \*8-9 (Bankr. D. Or. 2010) ("[B]ecause this court is part of the District Court, both tribunals should be considered the same court and debtors should have asked the District Court to decide the contempt issue at the same time as their other claims."). In sum, "the Bankruptcy Court is the District Court." *In re North Am. Funding Corp.*, 64 B.R. 795, 796 (Bankr. S.D. Tex. 1986) (emphasis added); accord

Respondents filed a Motion for Relief from this Court's gatekeeper orders contemporaneously with Movant's show-cause motion. There, we briefed the proper scope of this Court's jurisdiction with regard to the gatekeeper orders and Movants' position that those orders have stripped the district court of jurisdiction. Respondents incorporate that briefing here by reference. But the gist of the argument bears repeating.

*Onewoo Corp. v. Hampshire Brands Inc.*, 566 B.R. 136, 144-45 (Bankr. S.D.N.Y. 2017) (holding that party may not remove case from district court to its bankruptcy court because “[a] court cannot remove a case to itself . . . the bankruptcy court is the district court”); *In re Mitchell*, 206 B.R. 204, 211 (Bankr. C.D. Cal. 1997) (labeling argument that a case can be removed from the district court to its bankruptcy court as “logically idiotic” since it would be a removal “from the district court where it is already pending to that very same court”).

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in light of the separation of powers doctrine and the Supreme Court’s recent decision in *Stern v. Marshall*.<sup>23</sup>

The only conceivable ground for contending, as Movants do, that this Court’s jurisdiction could be somehow “exclusive”—a term of art *not* used in the gatekeeper orders—is the *Barton* doctrine. Respondents respectfully submit that applying the *Barton* doctrine to Seery here—after this Court granted Movants’ motion asking the Court to defer to their business judgment in approving Seery’s appointment<sup>24</sup>—would be both unprecedented and nonsensical.

Moreover, Respondents’ action in the district court—whether or not Seery is ultimately joined by amendment—is beyond the reach of bankruptcy-court jurisdiction.

To begin with, 28 U.S.C. § 157(b) states that “district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.”<sup>25</sup> This principle is stated even more directly in 28 U.S.C. § 1409(a), which provides that an action that is “related to a case under title 11 may be commenced in the district court.” Plainly Respondents’ action in the district court is related to Debtor’s bankruptcy case here. That action therefore “may be commenced in the district court” under § 1409(a).

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<sup>23</sup> 564 U.S. 462, 499 (2011) (holding that “Congress may not bypass Article III simply because a proceeding may have *some* bearing on a bankruptcy case.”).

<sup>24</sup> APP\_0079-0082.

<sup>25</sup> Compare 28 U.S.C. § 1409(a) (stating that cases that are “related to a case under title 11 may be commenced in the district court”). This Court previously recognized this principal in *In re AHN Homecare, LLC*, 222 B.R. 804, 809 (Bankr. N.D. Tex. 1998) (quoting 1 L. King, Collier on Bankruptcy, ¶ 3.01[1][c][ii], at 3–22 (15th ed.1991), for the following proposition: “The language of section 1334(b) grants jurisdiction to the district courts, and therefore to the bankruptcy court, over civil proceedings related to bankruptcy and accords with ‘the intent of Congress to bring all bankruptcy related litigation within the umbrella of the district court, at least as an initial matter, irrespective of congressional statements to the contrary in the context of other specialized litigation.’”).



Bankruptcy courts are not Article III courts. They are created under Congress’s Article I authority, and they do not have original jurisdiction over non-bankruptcy matters.<sup>26</sup> The only reason bankruptcy courts can ever hear such matters is because of the ability of the district courts to refer them under 28 U.S.C. § 157(a). Because of this framework, it necessarily follows that the district court here never gave up jurisdiction over cases related to the Debtor’s bankruptcy case.

Respondents’ action in the district court is such a case. But more to the point, that action falls outside of the reach of this Court’s jurisdiction because, in 28 U.S.C. § 157(d), Congress requires district courts to withdraw the reference to bankruptcy courts in a particular proceeding “if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.” Plainly Respondents’ district court action involves such considerations, since the Advisers Act was passed under Congress’ power to regulate interstate commerce and regulates the investment markets of the United States. Withdrawal of the reference is mandatory in such circumstances.<sup>27</sup>

As a result, this Court lacks jurisdiction to preside over Respondents’ district court action and the district court is the appropriate place to bring it. And Movants’ attempt to describe this Court’s jurisdiction as “exclusive” is both misguided and unsupportable.

#### **D. The Punitive Relief Requested by Movants Exceeds This Court’s Powers**

Movants also overreach with the relief they request. There is no statutory basis for that relief. And although their motion states that they are seeking civil sanctions, that is pretext. The

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<sup>26</sup> See generally *Stern v. Marshall*, 564 U.S. 462 (2011).

<sup>27</sup> *In re Am. Freight Sys., Inc.*, 150 B.R. 790, 793 (D. Kan. 1993) (“Withdrawal is required if the bankruptcy court would be called upon to make a significant interpretation of a non-Code federal statute.”).

relief they seek would be highly punitive in effect, and thus it is in excess of this Court’s subject matter jurisdiction.

Bankruptcy court jurisdiction is expressly limited to “civil proceedings” by 28 U.S.C. § 1334(b). The Fifth Circuit, in fact, expressly held in *In re Hipp, Inc.* “that bankruptcy courts do not have inherent criminal contempt powers, at least with respect to the criminal contempt not committed in (or near) their presence.”<sup>28</sup> Even as to civil sanctions, the standard for imposing them is a high one.<sup>29</sup> The Fifth Circuit holds that a court’s inherent power to sanction “must be exercised with restraint and discretion,”<sup>30</sup> must be accompanied by “a specific finding that the [sanctioned party] acted in ‘bad faith,’”<sup>31</sup> *id.* at 236, and “must comply with the mandates of due process, both in determining that the requisite bad faith exists and in assessing fees.”<sup>32</sup>

Here, this Court’s order requiring Respondents to show cause already names them “violators,” suggesting that they have been prejudged before they even had a chance to be heard. Notice from opposing counsel accurately informed Respondents that this Court had deemed them “violators” and ordered them to appear in person and show cause three days before the order actually issued, suggesting that *ex parte* communications may have taken place in violation of Rule 9003(a). These circumstances raise serious due process concerns.

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<sup>28</sup> 895 F.2d 1503, 1510-11 (5th Cir. 1990).

<sup>29</sup> *Crowe v. Smith*, 151 F.3d 217, 226 (5th Cir. 1998) (“The threshold for the use of inherent power sanctions is high.”).

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 236.

<sup>32</sup> *Gonzalez v. Trinity Marine Group, Inc.*, 117 F.3d 894, 898 (5th Cir. 1997) (quoting *Chambers v. NASCO, Inc.*, 111 S. Ct. at 2136).

As one bankruptcy court explained:

The same is true here.

<sup>33</sup> See *Louisiana Ed. Ass'n v. Richland Parish School Bd.*, 421 F. Supp. 973, aff'd, 585 F.2d 518 (5th Cir. 1978); see also *In re Cannon*, No. BR 17-11549-JGR, 2017 WL 10774809, at \*1 (Bankr. D. Colo. June 13, 2017) (declining “to issue orders that would create such an impression or shift the burden in this manner”).

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

**CHARITABLE DAF FUND, L.P.**  
**and CLO HOLDCO, LTD.,**  
*directly and derivatively,*

***Plaintiffs,***

**V.**

**Cause No.** \_\_\_\_\_

**HIGHLAND CAPITAL MANAGEMENT,  
L.P. , HIGHLAND HCF ADVISOR, LTD.,  
and HIGHLAND CLO FUNDING, LTD.,  
*nominally,***

***Defendants.***

## ORIGINAL COMPLAINT

I.

## INTRODUCTION

This action arises out of the acts and omissions of Defendant Highland Capital Management, L.P. (“HCM”), which is the general manager of Highland HCF Advisor, Ltd. (“HCFA”), both of which are registered investment advisers under the Investment Advisers Act of 1940 (the “Advisers Act”),<sup>1</sup> and nominal Defendant Highland CLO Funding, Ltd. (“HCLOF”) (HCM and HCFA each a “Defendant,” or together, “Defendants”). The acts and omissions which have recently come to light reveal breaches of fiduciary duty, a pattern of violations of the Advisers Act’s anti-fraud provisions, and concealed breaches of the HCLOF Company Agreement, among others, which have caused and/or likely will cause Plaintiffs damages.

<sup>1</sup> <https://adviserinfo.sec.gov/firm/summary/110126>



Additionally, Defendants are liable for a pattern of conduct that gives rise to liability for their conduct of the enterprise consisting of HCM in relation to HCFA and HCLOF, through a pattern of concealment, misrepresentation, and violations of the securities rules. In the alternative, HCFA and HCM, are guilty of self-dealing, violations of the Advisers Act, and tortious interference by (a) not disclosing that Harbourvest had agreed to sell at a price well below the current NAV, and (b) diverting the Harbourvest opportunity to themselves.

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## JURISDICTION AND VENUE

7. This Court has subject matter jurisdiction over this dispute under 28 U.S.C. § 1331 as one or more rights and/or causes of action arise under the laws of the United States. This Court has supplemental subject matter jurisdiction over all other claims under 28 U.S.C. § 1367.

8. Personal jurisdiction is proper over the Defendants because they reside and/or have continual contacts with the state of Texas, having regularly submitted to jurisdiction here. Jurisdiction is also proper under 18 U.S.C. § 1965(d).

9. Venue is proper in this Court under 28 U.S.C. § 1391(b) and (c) because one or more Defendants reside in this district and/or a substantial part of the events or omissions giving rise to the claim occurred or a substantial part of property that is the subject of the action is situated in this district. Venue in this district is further provided under 18 U.S.C. § 1965(d).

## RELEVANT BACKGROUND

## *HClO<sub>2</sub> IS FORMED*

**10.** Plaintiff DAF is a charitable fund that helps several causes throughout the country, including providing funding for humanitarian issues (such as veteran’s welfare associations and women’s shelters), public works (such as museums, parks and zoos), and education (such as specialty schools in underserved communities). Its mission is critical.

**11.** Since 2012, DAF was advised by its registered investment adviser, Highland Capital Management, L.P., and its various subsidiaries, about where to invest. This relationship was governed by an Investment advisory Agreement.



17. The debtor, HCM, made an omnibus response to the proofs of claims, stating they were duplicative of each other, overstated, late, and otherwise meritless.

18. Harbourvest responded to the omnibus objections on September 11, 2020. *See* Cause No. 19-bk-34054, Doc. 1057.

19. Harbourvest represented that it had invested in HCLOF, purchasing 49.98% of HCLOF's outstanding shares.

20. Plaintiff CLO Holdco was and is also a 49.02% holder of HCLOF's member interests.

21. In its Omnibus Response, Harbourvest explained that its claims included unliquidated legal claims for fraud, fraud in the inducement, RICO violations under 18 U.S.C. 1964, among others (the "Harbourvest Claims"). *See* Cause No. 19-bk-34054, Doc. 1057.

22. The Harbourvest Claims centered on allegations that when Harbourvest was intending to invest in a pool of Collateralized Loan Obligations, or CLOs, that were then-managed by Acis Capital Management ("Acis"), a subsidiary of HCM, HCM failed to disclose key facts about ongoing litigation with a former employee, Josh Terry.

23. Harbourvest contended that HCM never sufficiently disclosed the underlying facts about the litigation with Terry, and HCM's then-intended strategy to fight Terry caused HCLOF to incur around \$15 million in legal fees and costs. It contended that had it known the nature of the lawsuit and how it would eventually turn out, Harbourvest never would have invested in HCLOF. *See* Cause No. 19-bk-34054, Doc. 1057.

24. HCLOF's portfolio manager is HCFA. HCM is the parent of HCFA and is managed by its General Partner, Strand Management, who employs Seery and acts on behalf of HCM.





34. HCM and Seery rationalized the settlement value by allocating \$22.5 million of the net value of the \$45 million in unsecured claims as consideration to purchase Harbourvest’s interests in HCLOF, meaning, if 70% of the unsecured claims—i.e., \$31.5 million—was realized, because \$22.5 million of that would be allocated to the purchase price of the Harbourvest interests in HCLOF, the true “settlement” for Harbourvest’s legal claims was closer to \$9 million.

**36.** At the core of this lawsuit is the fact that HCM purchased the Harbourvest interests in HCLOF for \$22.5 million knowing that they were worth far more than that.

**38.** On November 30, 2020, which was less than a month prior to the filing of the Motion to Approve the Settlement, the net asset value of those interests was over \$34.5 million. Plaintiffs were never made aware of that.

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those procedures were scrapped in recent months, it can only assume that they were either overridden improperly or circumvented wholesale.

47. Upon finalizing the Harbourvest Settlement Agreement and making representations to the Bankruptcy Court to the Plaintiffs about the value of the Harbourvest Interests, Seery and HCM had a duty to use current values and not rely on old valuations of the assets or the HCLOF interests.

48. Given Defendants' actual or constructive knowledge that they were purchasing Harbourvest's Interests in HCLOF for a less than 50% of what those interests were worth—Defendants owed Plaintiff a fiduciary duty not to purchase them for themselves.

49. Defendants should have either had HCLOF repurchase the interests with cash, or offer those interests to Plaintiff and the other members *pro rata*, before HCM agreed to purchase them all lock, stock and barrel, for no up-front cash.

50. Indeed, had Plaintiff been offered those interests, it would have happily purchased them and therefore would have infused over \$20 million in cash into the estate for the purpose of executing the Harbourvest Settlement.

51. That Defendants (and to perhaps a lesser extent, the Unsecured Creditors Committee (the "UCC")) agreed to pay \$22.5 million for the HCLOF assets, where they had previously not consented to any such expenditure by the estate on behalf of HCLOF, strongly indicates their awareness that they were purchasing assets for far below market value.

52. The above is the most reasonable and plausible explanation for why Defendants and the UCC forwent raising as much as \$22.5 million in cash now in favor of hanging on to the HCLOF assets.

53. Indeed, in January 2021 Seery threatened Ethen Powell that “[Judge Jernigan] is laughing at you” and “we are coming after you” in response to the latter’s attempt to exercise his right as beneficial holder of the CLO, and pointing out a conflict of interest in Seery’s plan to liquidate the funds.

54. HCM’s threat, made by Seery, is tantamount to not only a declaration that he intends to liquidate the funds regardless of whether the investors want to do so, and whether it is in their best interests, but also that HCM intends to leverage what it views as the Bankruptcy Court’s sympathy to evade accountability.

## V.

### CAUSES OF ACTION

#### FIRST CAUSE OF ACTION *Breaches of Fiduciary Duty*

55. Plaintiffs respectfully incorporate the foregoing factual averments as if fully set forth herein and further alleges the following:

56. HCM is a registered investment advisor and acts on behalf of HCFA. Both are fiduciaries to Plaintiffs.

57. The Advisers Act establishes an unwaivable federal fiduciary duty for investment advisers.<sup>5</sup>

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<sup>5</sup> See e.g., *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 194 (1963); *Transamerica Mortg. Advisors (tama) v. Lewis*, 444 U.S. 11, 17 (1979) (“§ 206 establishes ‘federal fiduciary standards’ to govern the conduct of investment advisers.”); *Santa Fe Indus. v. Green*, 430 U.S. 462, 471, n.11 (1977) (in discussing *SEC v. Capital Gains*, stating that the Supreme Court’s reference to fraud in the “equitable” sense of the term was “premised on its recognition that Congress intended the Investment Advisers Act to establish federal fiduciary standards for investment advisers”). See also Investment Advisers Act Release No. 3060 (July 28, 2010) (“Under the Advisers Act, an adviser is a fiduciary whose duty is to serve the best interests of its clients, which includes an obligation not to subrogate clients’ interests to its own”) (citing Proxy Voting by Investment Advisers, Investment Advisers Act Release No. 2106 (Jan. 31, 2003)).

58. HCM and the DAF entered into an Amended and Restated Investment Advisory Agreement, executed between them on July 1, 2014 (the “RIA Agreement”). It renews annually and continued until the end of January 2021.

59. In addition to being the RIA to the DAF, HCM was appointed the DAF’s attorney-in-fact for certain actions, such as “to purchase or otherwise trade in Financial Instruments that have been approved by the General Partner.” RIA Agreement ¶ 4.

60. The RIA Agreement further commits HCM to value financial assets “in accordance with the then current valuation policy of the Investment Advisor [HCM], a copy of which will provided to the General Partner upon request.” RIA Agreement ¶ 5.

61. While HCM contracted for the recognition that it would be acting on behalf of others and could be in conflict with advice given the DAF, (RIA Agreement ¶ 12), nowhere did it purport to waive the fiduciary duties owed to the DAF not to trade as a principal in a manner that harmed the DAF.

62. HCFA owed a fiduciary duty to Holdco as an investor in HCLOF and to which HCFA was the portfolio manager. HCM owed a fiduciary duty to the DAF (and to Holdco as its subsidiary) pursuant to a written Advisory Agreement HCM and the DAF had where HCM agreed to provide sound investment advice and management functions.

63. As a registered investment adviser, HCM’s fiduciary duty is broad and applies to the entire advisor-client relationship.

64. The core of the fiduciary duty is to act in the best interest of their investors—the advisor must put the ends of the client before its own ends or the ends of a third party.

65. This is manifested in a duty of loyalty and a duty of utmost care. It also means that the RIA has to follow the terms of the company agreements and the regulations that apply to the investment vehicle.

66. The fiduciary duty that HCM and Seery owed to Plaintiff is predicated on trust and confidence. Section 204A of the Advisers Act requires investment advisors (whether SEC-registered or not) to establish, maintain, and enforce written policies and procedures reasonably designed to prevent the RIA from trading on material, non-public information. *See* 17 C.F.R. § 275.206(4)-7. That means that Plaintiff should be able to take Defendants at their word and not have to second guess or dig behind representations made by them.

67. The simple thesis of this claim is that Defendants HCFA and HCM breached their fiduciary duties by (i) insider trading with Harbourvest and concealing the rising NAV of the underlying assets—i.e., trading with Harbourvest on superior, non-public information that was neither revealed to Harbourvest nor to Plaintiff; (ii) concealing the value of the Harbourvest Interests; and (iii) diverting the investment opportunity in the Harbourvest entities to HCM (or its designee) without offering it to or making it available to Plaintiff or the DAF.

68. HCM, as part of its contractual advisory function with Plaintiffs, had expressly recommended the HCLOF investment to the DAF. Thus, diverting the opportunity for returns on its investment was an additional breach of fiduciary duty.

69. This violated a multitude of regulations under 27 C.F.R. part 275, in addition to Rules 10b-5 and 10b5-1. 17 CFR 240.10b5-1 (“Rule 10b5-1”) explains that one who trades while possessing non-public information is liable for insider trading, and they do not necessarily have to have *used* the specific inside information.

70. It also violated HCM’s own internal policies and procedures.



71. Also, the regulations impose obligations on Defendants to calculate a *current* valuation when communicating with an investor, such as what may or may not be taken into account, and what cannot pass muster as a current valuation. Upon information and belief, these regulations were not followed by the Defendants.

72. HCM's internal policies and procedures, which it promised to abide by both in the RIA Agreement and in its Form ADV SEC filing, provided for the means of properly calculating the value of the assets.

73. HCM either did not follow these policies, changed them to be out of compliance both with the Adviser Act regulations and its Form ADV representations, and/or simply misrepresented or concealed their results.

74. In so doing, because the fiduciary duty owed to Plaintiff is a broad one, and because Defendants' malfeasance directly implicates its relationship with Plaintiff, Defendants have breached the Advisers Act's fiduciary duties owed to Plaintiff as part of their fiduciary relationship.<sup>6</sup>

75. At no time between agreeing with Harbourvest to the purchase of its interests and the court approval did Defendants disclose to either Harbourvest or to Plaintiff (and the Bankruptcy Court for that matter) that the purchase was at below 50% the current net asset value as well, and when they failed to offer Plaintiff (and the other members of HCLOF) their right to purchase the interests pro rata at such advantageous valuations. Plaintiff's lost opportunity to

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<sup>6</sup> See Advisers Act Release No. 4197 (Sept. 17, 2015) (Commission Opinion) ("[O]nce an investment Advisory relationship is formed, the Advisers Act does not permit an adviser to exploit that fiduciary relationship by defrauding his client in any investment transaction connected to the Advisory relationship."); see also *SEC v. Lauer*, No. 03-80612-CIV, 2008 U.S. Dist. LEXIS 73026, at 90 (S.D. Fla. Sept. 24, 2008) ("Unlike the antifraud provisions of the Securities Act and the Exchange Act, Section 206 of the Advisers Act does not require that the activity be 'in the offer or sale of any' security or 'in connection with the purchase or sale of any security.'").

purchase has harmed Plaintiff. Plaintiff had been led to believe by the Defendants that the value of what was being purchased in the Harbourvest settlement by HCM (or its designee) was at fair market value. This representation, repeated again in the Bankruptcy Court during the Harbourvest confirmation, implicitly suggested that a proper current valuation had been performed.

**76.** Defendant's principal, Seery, testified in January 2021 that the then-current fair market value of Habourvests's 49.98% interest in HCLOF was worth around \$22.5 million. But by then, it was worth almost double that amount and has continued to appreciate. Seery knew or should have known that fact because the value of some of the HCLOF assets had increased, and he had a duty to know the current value. His lack of actual knowledge, while potentially not overtly fraudulent, would nonetheless amount to a breach of fiduciary duty for acting without proper diligence and information that was plainly available.

**77.** Furthermore, HCLOF holds equity in MGM Studios and debt in CCS Medical via various CLO positions. But Seery, in his role as CEO of HCM, was made aware during an advisors meeting in December 2020 that Highland would have to restrict its trading in MGM because of its insider status due to activities that were likely to apply upward pressure on MGM's share price.

**78.** Furthermore, Seery controlled the Board of CCS Medical. And in or around October 2020, Seery was advocating an equatization that would have increased the value of the CCS securities by 25%, which was not reflected in the HCM report of the NAV of HCLOF's holdings.

**79.** Seery's knowledge is imputed to HCM.

**80.** Moreover, it is a breach of fiduciary duty to commit corporate waste, which is effectively what disposing of the HCLOF assets would constitute in a rising market, where there

is no demand for disposition by the investors (save for HCM, whose proper 0.6% interest could easily be sold to the DAF at fair value).

**81.** As holder of 0.6% of the HCLOF interests, and now assignee of the 49.98% Harbourvest Interests), HCM has essentially committed self-dealing by threatening to liquidate HCLOF now that it may be compelled to do so under its proposed liquidation plan, which perhaps inures to the short term goals of HCM but to the pecuniary detriment of the other holders of HCLOF whose upside will be prematurely truncated.

**82.** Seery and HCM should not be allowed to benefit from the breach of their fiduciary duties because doing so would also cause Plaintiffs irreparable harm. The means and methods of disposal would likely render the full scope of damages to the DAF not susceptible to specific calculation—particularly as they would relate to calculating the lost opportunity cost. Seery and HCM likely do not have the assets to pay a judgment to Plaintiffs that would be rendered, simply taking the lost appreciation of the HCLOF assets.

**83.** Defendants are thus liable for diverting a corporate opportunity or asset that would or should have been offered to Plaintiff and the other investors. Because federal law makes the duties invoked herein unwaivable, it is preposterous that HCM, as a 0.6% holder of HCLOF, deemed itself entitled to the all of the value and optionality of the below-market Harbourvest purchase.

**84.** Defendants cannot rely on any contractual provision that purports to waive this violation. Nothing in any agreement purports to permit, authorize or otherwise sanitize Defendants' self-dealing. All such provisions are void.

**85.** In the fourth quarter of 2020, Seery and HCM notified staff that they would be terminated on December 31, 2020. That termination was postponed to February 28, 2021.

Purchasing the Harbourvest assets without staffing necessary to be a functioning Registered Investment Advisor was a strategic reversal from prior filings that outlined canceling the CLO management contracts and allowing investors to replace Highland as manager.

**86.** Seery's compensation agreement with the UCC incentivizes him to expedite recoveries and to prevent transparency regarding the Harbourvest settlement.

**87.** What is more, Seery had previously testified that the management contracts for the funds—HCLOF included—were unprofitable, and that he intended to transfer them. But he later rejected offers to purchase those management contracts for fair value and instead decided to continue to manage the funds—which is what apparently gave rise to the Harbourvest Settlement, among others. He simultaneously rejected an offer for the Harbourvest assets of \$24 million, stating that they were worth much more than that.

**88.** Because of Defendants' malfeasance, Plaintiffs have lost over \$25 million in damages—a number that continues to rise—and the Defendants should not be able to obtain a windfall.

**89.** For the same reason, Defendants' malfeasance has also exposed HCLOF to a massive liability from Harbourvest since the assignment of those interests is now one that is likely unenforceable under the Advisers Act, Section 47(b), if there was unequal information.

**90.** HCM and HCFA are liable as principals for breach of fiduciary duty, as are the principals and compliance staff of each entity.

**91.** Plaintiffs seek disgorgement, damages, exemplary damages, attorneys' fees and costs. To the extent the Court determines that this claim had to have been brought derivatively on behalf of HCLOF, then Plaintiffs represent that any pre-suit demand would have been futile since asking HCM to bring suit against its principal, Seery, would have been futile.

**SECOND CAUSE OF ACTION**  
***Breach of HCLOF Company Agreement***  
**(By Holdco against HCLOF, HCM and HCFA)**

92. Plaintiffs respectfully incorporate the foregoing factual averments as if fully set forth herein and further alleges the following:

93. On November 15, 2017, the members of HCLOF, along with HCLOF and HCFA, executed the *Members Agreement Relating to the Company* (the “Company Agreement”).

94. The Company Agreement governs the rights and duties of the members of HCLOF.

95. Section 6.2 of HCLOF Company Agreement provides that when a member “other than ... CLO Holdco [Plaintiff] or a Highland Affiliate,” intends to sell its interest in HCLOF to a third party (i.e., not to an affiliate of the selling member), then the other members have the first right of refusal to purchase those interests pro rata for the same price that the member has agreed to sell.

96. Here, despite the fact that Harbourvest agreed to sell its interests in HCLOF for \$22.5 million when they were worth more than double that, Defendants did not offer Plaintiff the chance to buy its pro rata share of those interests at the same agreed price of \$22.5 million (adjusted pro rata).

97. The transfer and sale of the interests to HCM were accomplished as part of the Harbourvest Settlement which was approved by the Bankruptcy Court.

98. Plaintiff was not informed of the fact that Harbourvest had offered its shares to Defendant HCM for \$22.5 million—which was under 50% of their true value.

99. Plaintiff was not offered the right to purchase its pro rata share of the Harbourvest interests prior to the agreement being struck or prior to court approval being sought.

**100.** Had Plaintiff been allowed to do so, it would have obtained the interests with a net equity value over their purchase price worth in excess of \$20 million.

**101.** No discovery or opportunity to investigate was afforded Plaintiff prior to lodging an objection in the Bankruptcy Court.

**102.** Plaintiff is entitled to specific performance or, alternatively, disgorgement, constructive trust, damages, attorneys' fees and costs.

**THIRD CAUSE OF ACTION**  
***Negligence***  
**(By the DAF and CLO Holdco against HCM and HCFA)**

**103.** Plaintiffs respectfully incorporate the foregoing factual averments as if fully set forth herein, and further alleges the following:

**104.** Plaintiffs incorporate the foregoing causes of action and note that all the foregoing violations were breaches of the common law duty of care imposed by law on each of Seery, HCFA and HCM.

**105.** Each of these Defendants should have known that their actions were violations of the Advisers Act, HCM's internal policies and procedures, the Company Agreement, or all three.

**106.** Seery and HCM owed duties of care to Plaintiffs to follow HCM's internal policies and procedures regarding both the propriety and means of trading with a customer [Harbourvest], the propriety and means of trading as a principal in an account but in a manner adverse to another customer [the DAF and Holdco], and the proper means of valuing the CLOs and other assets held by HCLOF.

**107.** It would be foreseeable that failing to disclose the current value of the assets in the HCLOF would impact Plaintiffs negatively in a variety of ways.



108. It would be reasonably foreseeable that failing to correctly and accurately calculate the current net asset value of the market value of the interests would cause Plaintiffs to value the Harbourvest Interests differently.

109. It would be reasonably foreseeable that referring to old and antiquated market quotations and/or valuations of the HCLOF assets or interests would result in a mis-valuation of HCLOF and, therefore, a mis-valuation of the Harbourvest Interests.

110. Likewise, it would have been foreseeable that Plaintiff's failure to give Plaintiff the opportunity to purchase the Harbourvest shares at a \$22.5 million valuation would cause Plaintiff damages. Defendants knew that the value of those assets was rising. They further knew or should have known that whereas those assets were sold to HCM for an allowance of claims to be funded in the future, selling them to Plaintiff would have provided the estate with cash funds.

111. Defendants' negligence foreseeably and directly caused Plaintiff harm.

112. Plaintiff is thus entitled to damages.

**FOURTH CAUSE OF ACTION**  
***Racketeering Influenced Corrupt Organizations Act***  
**(CLO Holdco and DAF against HCM)**

113. Plaintiffs respectfully incorporate the foregoing factual averments as if fully set forth herein, and further alleges the following:

114. Defendants are liable for violations of the Racketeer Influenced and Corrupt Organizations ("RICO") Act, 18 U.S.C. § 1961 *et seq.*, for the conduct of an enterprise through a pattern of racketeering activity.

115. HCLOF constitutes an enterprise under the RICO Act. Additionally, or in the alternative, HCM, HCLA, and HCLOF constituted an association-in-fact enterprise. The purpose of the association-in-fact was the perpetuation of Seery's position at HCM and using the

Harbourvest settlement as a vehicle to enrich persons other than the HCLOF investors, including Holdco and the DAF, and the perpetuation of HCM's holdings in collateralized loan obligations owned by HCLOF, while attempting to deny Plaintiffs the benefit of its rights of ownership.

**116.** The association-in-fact was bound by informal and formal connections for years prior to the elicited purpose, and then changed when HCM joined it in order to achieve the association's illicit purpose. For example, HCM is the parent and control person over HCFA, which is the portfolio manager of HCLOF pursuant to a contractual agreement—both are registered investment advisors and provide advisory and management services to HCLOF.

**117.** Defendants injured Plaintiffs through their continuous course of conduct of the HCM-HCLA-HCLOF association-in-fact enterprise. HCM's actions (performed through Seery and others) constitute violations of the federal wire fraud, mail fraud, fraud in connection with a case under Title 11, and/or securities fraud laws, pursuant to **18 U.S.C. § 1961(1)(B)** and **(D)**.

**118.** HCM operated in such a way as to violate insider trading rules and regulations when it traded with Harbourvest while it had material, non-public information that it had not supplied to Harbourvest or to Plaintiffs.

**119.** In or about November 2020, HCM and Harbourvest entered into discussions about settling the Harbourvest Claims. Seery's conduct of HCLOF and HCLA on behalf of HCM through the interstate mails and/or wires caused HCM to agree to the purchase of Harbourvest's interests in HCLOF.

**120.** On or about each of September 30, 2020, through December 31, 2020, Seery, through his conduct of the enterprise, utilized the interstate wires and/or mails to obtain or arrive at valuations of the HCLOF interests. Seery's conduct of the enterprise caused them to cease

sending the valuation reports to Plaintiffs, which eventually allowed Plaintiffs to be misled into believing that Seery had properly valued the interests.

**121.** On or about September 30, 2020, Seery transmitted or caused to be transmitted though the interstate wires information to HCLOF investors from HCM (via HCFA), including Harbourvest, regarding the value of HCLOF interests and underlying assets.

**122.** Additionally, Seery operated HCM in such a way that he concealed the true value of the HCLOF interests by utilizing the interstate wires and mails to transmit communications to the court in the form of written representations on or about December 23, 2020, and then further transmitted verbal representations of the current market value (the vastly understated one) on January 14, 2021, during live testimony.

**123.** However, Harbourvest was denied the full picture and the true value of the underlying portfolio. At the end of October and November of 2020, HCM had updated the net asset values of the HCLOF portfolio. According to sources at HCM at the time, the HCLOF assets were worth north of \$72,969,492 as of November 30, 2020. Harbourvest's share of that would have been \$36,484,746.

**124.** The HCLOF net asset value had reached \$86,440,024 as of December 31, 2021, which means that by the time Seery was testifying in the Bankruptcy Court on January 14, 2021, the fair market value of the Harbourvest Assets was \$22.5 million, when it was actually closer to \$43,202,724. Seery, speaking on behalf of HCM, knew of the distinction in value.

**125.** On January 14, 2021, Seery also testified that he (implying HCM, HCLA and HCLOF) had valued the Harbourvest Assets at their current valuation and at fair market value. This was not true because the valuation that was used and testified to was ancient. The ostensible purpose of this concealment was to induce Plaintiff and other interest holdings to take no action.

**126.** In supporting HCM’s motion to the Bankruptcy Court to approve the Harbourvest Settlement, Seery omitted the fact that HCM was purchasing the interests at a massive discount, which would violate the letter and spirit of the Adviser’s Act.

**127.** Seery was informed in late December 2020 at an in-person meeting in Dallas to which Seery had to fly that HCLOF and HCM had to suspend trading in MGM Studios’ securities because Seery had learned from James Dondero, who was on the Board of MGM, of a potential purchase of the company. The news of the MGM purchase should have caused Seery to revalue the HCLOF investment in MGM.

**128.** In or around October 2020, Seery (who controls the Board of CSS Medical) was pursuing “equitization” of CSS Medical’s debt, which would have increased the value of certain securities by 25%. In several communications through the U.S. interstate wires and/or mails, and with Plaintiffs, and the several communications with Harbourvest during the negotiations of the settlement, Seery failed to disclose these changes which were responsible in part for the ever-growing value of the HCLOF CLO portfolio.

**129.** Seery was at all relevant times operating as an agent of HCM.

**130.** This series of related violations of the wire fraud, mail fraud, and securities fraud laws, in connection with the HCM bankruptcy, constitute a continuing pattern and practice of racketeering for the purpose of winning a windfall for HCM and himself--a nearly \$30,000,000 payday under the confirmation agreement.

**131.** The federal RICO statute makes it actionable for one’s conduct of an enterprise to include “fraud in connection with a [bankruptcy case]”. The Advisers’ Act antifraud provisions require full transparency and accountability to an advisers’ investors and clients and does not require a showing of reliance or materiality. The wire fraud provision likewise is violated when,

as here, the interstate wires are used as part of a “scheme or artifice ... for obtaining money or property by means of false ... pretenses, [or] representations[.]”

**132.** Accordingly, because Defendants’ conduct violated the wire fraud and mail fraud laws, and the Advisers’ Act antifraud provisions, and their acts and omissions were in connection with the HCM Bankruptcy proceedings under Title 11, they are sufficient to bring such conduct within the purview of the RICO civil action provisions, **18 U.S.C. § 1964.**

**133.** Plaintiffs are thus entitled to damages, treble damages, attorneys’ fees and costs of suit, in addition to all other injunctive or equitable relief to which they are justly entitled.

**FIFTH CAUSE OF ACTION**  
***Tortious Interference***  
**(CLO Holdco against HCM)**

**134.** Plaintiff respectfully incorporates the foregoing factual averments as if fully set forth herein and further alleges the following:

**135.** At all relevant times, HCM owned a 0.6% interest in HCLOF.

**136.** At all relevant times, Seery and HCM knew that Plaintiff had specific rights in HCLOF under the Company Agreement, § 6.2.

**137.** Section 6.2 of HCLOF Company agreement provides that when a member “other than ... CLO Holdco [Plaintiff] or a Highland Affiliate,” intends to sell its interest in HCLOF to a third party (i.e., not an affiliate of the member), then the other members have the first right of refusal to purchase those interests pro rata for the same price that the member has agreed to sell.

**138.** HCM, through Seery, tortiously interfered with Plaintiff’s contractual rights with HCLOF by, among other things, diverting the Harbourvest Interests in HCLOF to HCM without giving HCLOF or Plaintiff the option to purchase those assets at the same favorable price that HCM obtained them.

139. HCM and Seery tortiously interfered with Plaintiff's contractual rights with HCLOF by, among other things, misrepresenting the fair market value as \$22.5 million and concealing the current value of those interests.

140. But for HCM and Seery's tortious interference, Plaintiff would have been able to acquire the Harbourvest Interests at a highly favorable price. HCM and Seery's knowledge of the rights and intentional interference with these rights has caused damage to Plaintiff CLO Holdco.

141. Plaintiff is therefore entitled to damages from HCM and Seery, as well as exemplary damages.

## VI.

### JURY DEMAND

142. Plaintiff demands trial by jury on all claims so triable.

## VII.

### PRAYER FOR RELIEF

143. Wherefore, for the foregoing reasons, Plaintiffs respectfully pray that the Court enter judgment in its favor and against Defendants, jointly and severally, for:

- a. Actual damages;
- b. Disgorgement;
- c. Treble damages;
- d. Exemplary and punitive damages;
- e. Attorneys' fees and costs as allowed by common law, statute or contract;
- f. A constructive trust to avoid dissipation of assets;
- g. All such other relief to which Plaintiff is justly entitled.



Dated: April 12, 2021

Respectfully submitted,

**SBAITI & COMPANY PLLC**

/s/ Mazin A. Sbaiti

**Mazin A. Sbaiti**

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**Counsel for Plaintiffs**

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

**CHARITABLE DAF FUND, L.P.**  
**and CLO HOLDCO, LTD.,**  
*directly and derivatively,*

*Plaintiffs,*

**V.**

**HIGHLAND CAPITAL MANAGEMENT,  
L.P., HIGHLAND HCF ADVISOR, LTD.,  
and HIGHLAND CLO FUNDING, LTD.,  
*nominally,***

***Defendants.***

[illegible]

**CAUSE NO. 3:21-cv-00842-B**

## **PLAINTIFFS' MOTION FOR LEAVE TO FILE FIRST AMENDED COMPLAINT**

## I.

## NECESSITY OF MOTION

Plaintiffs submit this Motion under Rule 15 of the Federal Rules of Civil Procedure for one purpose: to name as defendant one James P. Seery, Jr., the CEO of Defendant Highland Capital Management, L.P. (“HCM”), and the chief perpetrator of the wrongdoing that forms the basis of Plaintiffs’ causes of action.

Seery is not named in the Original Complaint. But this is only out of an abundance of caution due to the bankruptcy court, in HCM's pending Chapter 11 proceeding, having issued an order prohibiting the filing of any causes of action against Seery in any way related to his role at HCM, subject to certain prerequisites. In that order, the bankruptcy court also asserts "sole jurisdiction" over all such causes of action.

Plaintiffs respectfully submit that, to the extent the bankruptcy court order prohibits the filing of an action in *this Court*, whose jurisdiction the bankruptcy court's jurisdiction is wholly

derivative of, that order exceeds the bankruptcy court's powers and is unenforceable. Alternatively, Plaintiffs submit that filing *this Motion* satisfies the prerequisites provided in the bankruptcy court's order. Either of these reasons provides sufficient grounds to grant this Motion.

The proposed First Amended Complaint is attached as Exhibit 1.

## II.

### BACKGROUND

On June 23, 2020, counsel for HCM filed a motion in HC's bankruptcy proceedings asking the bankruptcy court to defer to the "business judgment" of the board's compensation committee and approve the terms of its appointment of Seery as chief executive officer and chief restructuring officer at HCM, retroactive to March.<sup>1</sup> Counsel also asked the bankruptcy court to declare that it had exclusive jurisdiction over any claims asserted against Seery in this role.

On July 16, 2020, the bankruptcy court granted that motion and stated as follows:

No entity may commence or pursue a claim or cause of action of any kind against Mr. Seery relating in any way to his role as the chief executive officer and chief restructuring officer of the Debtor without the Bankruptcy Court (i) first determining after notice that such claim or cause of action represents a colorable claim of willful misconduct or gross negligence against Mr. Seery, and (ii) specifically authorizing such entity to bring such claim. ***The Bankruptcy Court shall have sole jurisdiction to adjudicate any such claim for which approval of the Court to commence or pursue has been granted.***<sup>2</sup>

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<sup>1</sup> Debtor's Motion Under Bankruptcy Code Sections 105(a) and 363(b) for Authorization to Retain James P. Seery, Jr., as Chief Executive Officer, Chief Restructuring Officer, and Foreign Representative *Nunc Pro Tunc* to March 15, 2020 [Doc. 774]. This motion is attached as Exhibit 2.

<sup>2</sup> Order Approving Debtor's Motion Under Bankruptcy Code Sections 105(a) and 363(b) Authorizing Retention of James P. Seery, Jr., as Chief Executive Officer, Chief Restructuring Officer, and Foreign Representative *Nunc Pro Tunc* to March 15, 2020 [Doc 854]. A related order dated January 9, 2020, contains a similar provision with regard to Seery's role as an "Independent Director." Order Approving Settlement with Official Committee of Unsecured Creditors Regarding Governance of the Debtor and Procedures for Operations in the Ordinary Course [Doc 339]. These orders are attached, respectively, as Exhibits 3 and 4.

On March 22, 2021, the bankruptcy court entered an order confirming HCM's reorganization plan.<sup>3</sup> That order purports to extend the prohibitions on suits against Seery, and it also prohibits certain actions against HCM and its affiliates. By its own terms, however, that order is not effective due to a pending appeal.

On April 12, 2021, Plaintiffs filed their Original Complaint in this action, alleging that HCM and related entities are liable as a result of insider trading and other violations of the antifraud provisions of the Investment Company Act of 1940, among other causes of action. The Original Complaint does not name Seery as a defendant. But the action is based on Seery's misrepresentations, omissions, and other breaches of duty committed in his role as HCM's CEO, which are sufficient to demonstrate his willful misconduct or gross negligence, though Plaintiffs submit that mere negligence and breach of fiduciary duty also form sufficient bases for his personal liability.

### III.

#### ARGUMENT

This Court should grant leave to amend because the liberal policies behind Rule 15 require it and because leave is not prohibited by the bankruptcy court's order.

#### **A. Rule 15(a) Allows Plaintiffs' Amendment As a Matter of Course**

Rule 15(a) instructs the Court to "freely give leave [to amend] when justice so requires." **FED. R. CIV. P. 15(a)**. The Fifth Circuit, in *Martin's Herend Imports, Inc. v. Diamond & Gem Trading United States Co.*, **195 F.3d 765** (5th Cir. 1999), interpreted the rule as "evin[ing] a bias in favor of granting leave to amend." *Id.* at 770. Thus the Court must possess a "substantial reason"

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<sup>3</sup> Order (I) Confirming the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (As Modified) And (II) Granting Related Relief [Doc. 1943].

to deny a request for leave to amend. *Lyn-Lea Travel Corp. v. Am. Airlines, Inc.*, 283 F.3d 282, 286 (5th Cir. 2002); *Jamieson v. Shaw*, 772 F.2d 1205, 1208 (5th Cir. 1985); cf. *Foman v. Davis*, 371 U.S. 178, 182 (1962) (explaining that leave should be granted “[i]n the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.”).

Moreover, one amendment, filed within 21 days of service of the pleading it seeks to amend or before a responsive pleading is filed, is allowed “as a matter of course.” Fed. R. Civ. P. 15(a)(1); *Zaidi v. Ehrlich*, 732 F.2d 1218, 1220 (5th Cir. 1984) (“When, as in this case, a plaintiff who has a right to amend nevertheless petitions the court for leave to amend, the court should grant the petition.”); *Galustian v. Peter*, 591 F.3d 724, 729-30 (4th Cir. 2010) (holding that district court abused its discretion in denying timely motion to amend adding defendant because “[t]he plaintiff’s right to amend once is absolute”); *Rogers v. Girard Tr. Co.*, 159 F.2d 239, 241 (6th Cir. 1947) (holding that complaint may be amended as matter of course where defendant has filed no responsive pleading, and leave of district court is not necessary, but it is error to deny leave when asked); *Bancoult v. McNamara*, 214 F.R.D. 5, 7-8 (D.D.C. 2003) (holding that plaintiff’s filing of a motion for leave to amend does not nullify plaintiff’s absolute right to amend once before responsive pleadings, even if the amendment would be futile).

Here, Plaintiffs did not name Seery as a defendant in the Original Complaint out of an abundance of caution in light of the bankruptcy court’s order of July 16, 2020 [Doc. 854]. Instead, Plaintiffs are seeking leave in this Motion to do so. Because the proposed amendment is their first, and because it comes within 21 days of service of the Original Complaint, as well as before any

responsive pleadings, Plaintiffs respectfully submit that they are entitled to leave and their proposed First Amended Complaint should be allowed.

## **B. The Bankruptcy Court's Order Should Not Prohibit Plaintiffs' Amendment**

Plaintiffs submit that the bankruptcy court order of July 16, 2020, does not prohibit the proposed amendment for two independent reasons.

### **1. The Bankruptcy Court's Order Exceeds Its Jurisdiction**

#### **a. The Bankruptcy Court Cannot Strip This Court of Jurisdiction**

Because the bankruptcy court's jurisdiction derives from and is dependent upon the jurisdiction of this Court, its order declaring that it has "sole jurisdiction" is overreaching.

Congress provided for and limited the jurisdiction of bankruptcy courts in [28 U.S.C. § 1334](#) and [28 U.S.C. § 157](#). As a result, bankruptcy court jurisdiction derives from and is limited by statute. *Celotex Corp. v. Edwards*, [514 U.S. 300, 307](#) (1995) ("The jurisdiction of the bankruptcy courts, like that of other federal courts, is grounded in, and limited by, statute."); *Williams v. SeaBreeze Fin., LLC (In re 7303 Holdings, Inc.)*, Nos. 08-36698, 10-03079, [2010 Bankr. LEXIS 2938 at \\*7](#) (Bankr. S.D. Tex. Aug. 26, 2010) ("A bankruptcy court's jurisdiction is derivative of the district court's jurisdiction. The bankruptcy court does not have jurisdiction unless the district court could exercise authority over the matter . . . ."). The plain provisions of § 1334 grant *to the district courts* "original jurisdiction" over all bankruptcy cases and related civil proceedings. [28 U.S.C. § 1334\(a\)-\(b\)](#). What Congress giveth, the bankruptcy courts cannot taketh away.

#### **b. The Barton Doctrine Does Not Apply**

The bankruptcy court's overreach seems to stem from a misapplication of the *Barton* doctrine. That doctrine protects receivers and trustees who are appointed by the bankruptcy court. *Randazzo v. Babin*, No. 15-4943, [2016 U.S. Dist. LEXIS 110465, at \\*3](#) (E.D. La. Aug. 18, 2016)



(“While the *Barton* case involved a receiver in state court, the United States Court of Appeals for the Fifth Circuit has extended this principle, now known as the *Barton* doctrine, to lawsuits against bankruptcy trustees for acts committed in their official capacities.”). The doctrine does not apply to executives of a debtor, like Seery, who are not receivers or trustees, and who are stretching the truth to claim that they were “appointed” by the bankruptcy court after asking it merely to approve their appointment in deference to their discretion under the business judgment rule.<sup>4</sup>

**c. The Order Exceeds the Constitutional Limits of the Bankruptcy Court’s Jurisdiction**

Plainly the bankruptcy court does not have “*sole jurisdiction*” over all causes of action that might be brought against Seery related to his role as HCM’s CEO. But more to the point, the bankruptcy court does not even have *concurrent jurisdiction* over *all* such claims. The separation of powers doctrine does not allow that. *See Stern v. Marshall*, 564 U.S. 462, 499 (2011) (holding that Congress cannot bypass Article III and create jurisdiction in bankruptcy courts “simply because a proceeding may have some bearing on a bankruptcy case”); *id.* at 488 (quoting *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 284 (1856), for the proposition that “Congress cannot ‘withdraw from judicial [read Article III] cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty’” with the limited exception of matters involving certain public rights); *id.* at 494 (quoting the dissent’s quote of *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 584 (1985), for the proposition that “Congress may not vest in a non-Article III court the power to adjudicate, render final judgment, and issue binding orders in a traditional contract action arising under state law,” and

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<sup>4</sup> Exhibit 2 at 14-15 (arguing that the bankruptcy court should not “interfere” with their “corporate decisions . . . as long as they are attributable to any rational business purpose”) (internal quotes omitted); *id.* at 5-7 (detailing the compensation committee’s “appointment” of Seery as CEO as well as chief restructuring officer).

then adding “tort” to the rule for purposes of the matter before it); *cf. In re Prescription Home Health Care*, 316 F.3d 542, 548 (5th Cir. 2002) (holding that trustee’s tax liability was not within the bankruptcy court’s related-to jurisdiction and rejecting “the theory that a bankruptcy court has jurisdiction to enjoin any activity that threatens the debtor’s reorganization prospects [because that] would permit the bankruptcy court to intervene in a wide variety of third-party disputes [such as] any action (however personal) against key corporate employees, if they were willing to state that their morale, concentration, or personal credit would be adversely affected by that action”). The bankruptcy court’s order asserting “sole jurisdiction” here is hardly even relevant since that court lacks the power to expand its jurisdiction or manufacture jurisdiction where none exists.

The proposed First Amended Complaint asserts common law and equitable contract and tort claims. For the reasons explained by the Supreme Court in *Stern*, such claims should not be deemed within the bankruptcy court’s jurisdiction.

#### **d. The Order Exceeds the Bankruptcy Court’s Statutory Authorization**

Not only are there constitutional issues with the scope of the bankruptcy court’s order, there is also the limitation of 28 U.S.C. § 157(d). *See TMT Procurement Corp. v. Vantage Drilling Co. (In re TMT Procurement Corp.)*, 764 F.3d 512, 523 & n.40 (5th Cir. 2014) (noting bankruptcy court’s “more limited jurisdiction” as a result of its “limited power” under 28 U.S.C. § 157). In § 157(d), Congress prohibited the bankruptcy court, absent the parties’ consent, from presiding over cases or proceedings that require consideration of both Title 11 and other federal law regulating organizations or activities affecting interstate commerce.

The First Amended Complaint’s allegations against Seery—accusing him of insider trading, violations of the RICO statute (18 U.S.C. § 1961 et seq.), and violations of the antifraud provisions of the Investment Advisers Act of 1940—require precisely that. Even determining the

“colorability” of such claims will require a close examination of both the proceedings that took place in the bankruptcy court under Title 11 and the Investment Advisers Act as well as the RICO statute. The bankruptcy court lacks the authority to make such determinations. This Court has that power.

Thus, at least as it applies to the proposed First Amended Complaint, the bankruptcy court’s order exceeds its authority under 28 U.S.C. § 157(d), and any determination of “colorability” should take place in this Court, which Rule 12(b)(6) of the Federal Rules of Civil Procedure already provides for. To hold otherwise would create unnecessary tension with the congressional aims of 28 U.S.C. § 959 (“Trustees, receivers or managers of any property, including debtors in possession, may be sued, without leave of the court appointing them, with respect to any of their acts or transactions in carrying on business connected with such property.”).

## **2. The Prerequisites in the Bankruptcy Court’s Order Are Satisfied by This Motion and the Detailed Allegations in the Proposed First Amended Complaint**

Alternatively, or in addition, should this Court read the bankruptcy court’s order as prohibiting the filing of actions against Seery even in *this* Court, Plaintiffs submit that this Motion seeking leave provides the mechanisms required by that order and therefore satisfies it.

The bankruptcy court’s order requires only that any contemplated action must first be submitted to that court for a preliminary determination of colorability. Because that court only has derivative jurisdiction as a result of this Court’s jurisdiction—and only over matters referred to it by this Court—Plaintiffs submit that filing a motion for leave here is the correct procedure for complying with that order. This Court may refer this Motion to the bankruptcy court under Miscellaneous Order No. 33, as authorized by § 104 of the Bankruptcy Amendments and Federal Judgeship Act of 1984, codified at 28 U.S.C. § 157(a). Or it may instead decline to refer the Motion or withdraw the reference under 28 U.S.C. § 157(d), as Plaintiffs submit is appropriate for the

reasons addressed above. Regardless, this Motion presents the issue in a manner that allows the bankruptcy court to address it, should this Court decide that the bankruptcy court is authorized to do so. *Cf.* Confirmation Order [Doc. 1943] at 77, ¶ AA (“The Bankruptcy Court will have sole and exclusive jurisdiction to determine whether a claim or cause of action is colorable and, *only to the extent legally permissible* and as provided for in Article XI of the Plan, shall have jurisdiction to adjudicate the underlying colorable claim or cause of action.”) (emphasis added).

Plaintiffs therefore submit that, by filing this Motion in this Court, they have complied with the bankruptcy court’s order.

#### IV.

#### CONCLUSION

Plaintiffs are entitled to amend as a matter of course. The bankruptcy court lacks jurisdiction to prohibit the proposed amendment. In these circumstances, Plaintiffs respectfully submit that the interests of justice support the granting of leave to amend, and Rule 15(a) requires that this Motion be granted.

Dated: April 19, 2021

Respectfully submitted,

**SBAITI & COMPANY PLLC**

/s/ Jonathan Bridges

**Mazin A. Sbaiti**

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**Counsel for Plaintiffs**

### CERTIFICATE OF CONFERENCE

I hereby certify that, on April 19, 2021, I conferred with Defendant HCM's counsel in the HCM bankruptcy proceedings regarding this Motion. I have not conferred with counsel for the other Defendants because they have not been served and I do not know who will represent them. HCM's counsel indicated that they are opposed to the relief sought in this Motion.

/s/ Jonathan Bridges

Jonathan Bridges

# EXHIBIT 1



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

**CHARITABLE DAF FUND, L.P.**  
**and CLO HOLDCO, LTD.,**  
*directly and derivatively,*

*Plaintiffs,*

**V.**

**Cause No. 3:21-CV-00842-B**

**HIGHLAND CAPITAL MANAGEMENT,  
L.P. , HIGHLAND HCF ADVISOR, LTD.,  
JAMES P. SEERY, *individually*, and  
HIGHLAND CLO FUNDING, LTD.,  
*nominally*,**

***Defendants.***

## FIRST AMENDED COMPLAINT

## I.

## INTRODUCTION

This action arises out of the acts and omissions of Defendant James P. Seery (“Seery”) in his conduct as chief executive officer and chief restructuring officer of Defendant Highland Capital Management, L.P. (“HCM”), which is the general manager of Highland HCF Advisor, Ltd. (“HCFA”), both of which are registered investment advisers under the Investment Advisers Act of 1940 (the “Advisers Act”),<sup>1</sup> and nominal Defendant Highland CLO Funding, Ltd. (“HCLOF”) (Seery, HCM, and HCFA each a “Defendant,” or together, “Defendants”). The acts and omissions which have recently come to light reveal breaches of fiduciary duty, a pattern of violations of the Advisers Act’s anti-fraud provisions, and concealed breaches of the HCLOF Company Agreement, among others, which have caused and/or likely will cause Plaintiffs damages, and which arise out

<sup>1</sup> <https://adviserinfo.sec.gov/firm/summary/110126>

of or are related to acts or omissions that constitute bad faith, fraud, gross negligence, or willful misconduct.

Seery negotiated a settlement with the several Harbourvest<sup>2</sup> entities who owned 49.98% of HCLOF. The deal had HCM (or its designee) purchasing the Harbourvest membership interests in HCLOF for \$22.5 million. Recent revelations, however, show that the sale was predicated upon a sales price that was vastly below the Net Asset Value (“NAV”) of those interests. Upon information, the NAV of HCLOF’s assets had risen precipitously, but was not disclosed to Harbourvest nor to Plaintiffs.

Under the Advisers Act, Defendants have a non-waivable duty of loyalty and candor, which includes its duty not to inside trade with its own investors, *i.e.*, not to trade with an investor to which HCM and Seery had access to superior non-public information. Upon information and belief, HCM’s internal compliance policies required by the Advisers Act would not generally have allowed a trade of this nature to go forward—meaning, the trade either was approved in spite of compliance rules preventing it, or the compliance protocols themselves were disabled or amended to a level that leaves Defendants HCM and HCLOF exposed to liability. Thus, Defendants have created an unacceptable perpetuation of exposure to liability.

Additionally, Defendants are liable for a pattern of conduct that gives rise to liability for their conduct of the enterprise consisting of HCM in relation to HCFA and HCLOF, through a pattern of concealment, misrepresentation, and violations of the securities rules. In the alternative, Seery, HCFA and HCM, are guilty of self-dealing, violations of the Advisers Act, and tortious

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<sup>2</sup> “Harbourvest” refers to the collective of Harbourvest Dover Street IX Investment, L.P., Harbourvest 2017 Global AIF, L.P., Harbourvest 2017 lobal Fund, L.P., HV International VIII Secondary, L.P., and Harbourvest Skew Base AIF, L.P. Each was a member of Defendant Highland CLO Funding, Ltd.

interference by (a) not disclosing that Harbourvest had agreed to sell at a price well below the current NAV, and (b) diverting the Harbourvest opportunity to themselves.

For these reasons, judgment should be issued in Plaintiffs' favor.

## II.

### PARTIES

1. Plaintiff CLO Holdco, Ltd. is a limited company incorporated under the laws of the Cayman Islands.

2. Plaintiff Charitable DAF Fund, L.P., ("DAF") is a limited partnership formed under the laws of the Cayman Islands.

3. Defendant Highland Capital Management, L.P. is a limited partnership with its principal place of business at 300 Crescent Court, Suite 700, Dallas, Texas 75201. It may be served at its principal place of business or through its principal officer, James P. Seery, Jr., or through the Texas Secretary of State, or through any other means authorized by federal or state law.

4. Defendant Highland HCF Advisor, Ltd. is a limited company incorporated under the laws of the Cayman Islands. Its principal place of business is 300 Crescent Court, Suite 700, Dallas, Texas 75201. It is a registered investment adviser ("RIA") subject to the laws and regulations of the Investment Advisers Act of 1940 (the "Adviser's Act"). It is a wholly-owned subsidiary of Highland Capital Management, L.P.

5. Defendant James Seery is an officer and/or director and/or control person of Defendants Highland Capital Management, L.P., Highland CLO Funding, Ltd., and Highland HCF Adviser, Ltd., and is a citizen of and domiciled in Floral Park, New York. He can be served personally at 300 Crescent Court, Suite 700, Dallas, Texas 75201, or wherever he may be found.

6. Nominal Defendant Highland CLO Funding, Ltd. is a limited company incorporated under the laws of the Island of Guernsey. Its registered office is at First Floor, Dorey

Court, Admiral Park, St. Peter Port, Guernsey GY1 6HJ, Channel Islands. Its principal place of business is 300 Crescent Court, Suite 700, Dallas, Texas 75201.

### III.

#### **JURISDICTION AND VENUE**

7. This Court has subject matter jurisdiction over this dispute under 28 U.S.C. § 1331 as one or more rights and/or causes of action arise under the laws of the United States. This Court has supplemental subject matter jurisdiction over all other claims under 28 U.S.C. § 1367.

8. Personal jurisdiction is proper over the Defendants because they reside and/or have continual contacts with the state of Texas, having regularly submitted to jurisdiction here. Jurisdiction is also proper under 18 U.S.C. § 1965(d).

9. Venue is proper in this Court under 28 U.S.C. § 1391(b) and (c) because one or more Defendants reside in this district and/or a substantial part of the events or omissions giving rise to the claim occurred or a substantial part of property that is the subject of the action is situated in this district. Venue in this district is further provided under 18 U.S.C. § 1965(d).

### IV.

#### **RELEVANT BACKGROUND**

##### ***HCLOF IS FORMED***

10. Plaintiff DAF is a charitable fund that helps several causes throughout the country, including providing funding for humanitarian issues (such as veteran's welfare associations and women's shelters), public works (such as museums, parks and zoos), and education (such as specialty schools in underserved communities). Its mission is critical.

11. Since 2012, DAF was advised by its registered investment adviser, Highland Capital Management, L.P., and its various subsidiaries, about where to invest. This relationship was governed by an Investment advisory Agreement.

12. At one point in 2017, HCM advised DAF to acquire 143,454,001 shares of HCLOF, with HCFA (a subsidiary of HCM) serving as the portfolio manager. DAF did so via a holding entity, Plaintiff CLO Holdco, Ltd.

13. On November 15, 2017, through a Subscription and Transfer Agreement, the DAF entered into an agreement with others to sell and transfer shares in HCLOF, wherein the DAF retained 49.02% in CLO Holdco.

14. Pursuant to that agreement, Harbourvest acquired the following interests in the following entities:

Harbourvest Dover Street IX Investment, L.P., acquired 35.49%;

Harbourvest 2017 Global AIF, L.P., acquired 2.42%;

Harbourvest 2017 lobal Fund, L.P., acquired 4.85%;

HV International VIII Secondary, L.P., acquired 6.5%; and

Harbourvest Skew Base AIF, L.P., acquired 0.72%;

for a total of 49.98% (altogether, the “Harbourvest interests”).

15. On or about October 16, 2019, Highland Capital Management filed for Chapter 11 bankruptcy in Delaware Bankruptcy Court, which was later transferred to the Northern District of Texas Bankruptcy Court, in the case styled *In Re: Highland Capital Management, L.P., Debtor*, Cause No. 19-34054, (the “HCM Bankruptcy” and the Court is the “Bankruptcy Court”).

16. HCLOF’s portfolio manager is HCFA. HCM is the parent of HCFA and is managed by its General Partner, Strand Management, who employs Seery and acts on behalf of HCM. Seery is the CEO of HCM which, upon information and belief, is the parent of HCFA.

17. Before acceding to the Harbourvest interests, HCM was a 0.6% holder of HCLOF interests.

**The Harbourvest Settlement with  
Highland Capital Management in Bankruptcy**

18. On April 8, 2020, Harbourvest submitted its proofs of claim in the HCM bankruptcy proceeding. Annexed to its proofs of claims was an explanation of the Proof of Claim and the basis therefor setting out various pre-petition allegations of wrongdoing by HCM. *See, e.g.*, Case No. 19-bk-34054, Doc. 1631-5.

19. The debtor, HCM, made an omnibus response to the proofs of claims, stating they were duplicative of each other, overstated, late, and otherwise meritless.

20. Harbourvest responded to the omnibus objections on September 11, 2020. *See* Cause No. 19-bk-34054, Doc. 1057.

21. Harbourvest represented that it had invested in HCLOF, purchasing 49.98% of HCLOF's outstanding shares.

22. Plaintiff CLO Holdco was and is also a 49.02% holder of HCLOF's member interests.

23. In its Omnibus Response, Harbourvest explained that its claims included unliquidated legal claims for fraud, fraud in the inducement, RICO violations under 18 U.S.C. 1964, among others (the "Harbourvest Claims"). *See* Cause No. 19-bk-34054, Doc. 1057.

24. The Harbourvest Claims centered on allegations that when Harbourvest was intending to invest in a pool of Collateralized Loan Obligations, or CLOs, that were then-managed by Acis Capital Management ("Acis"), a subsidiary of HCM, HCM failed to disclose key facts about ongoing litigation with a former employee, Josh Terry.

25. Harbourvest claimed that it had lost over \$100 million in the HCLOF transaction due to fraud, which, after trebling under the racketeering statute, it claimed it was entitled to over \$300 million in damages.



26. Harbourvest contended that HCM never sufficiently disclosed the underlying facts about the litigation with Terry, and HCM's then-intended strategy to fight Terry caused HCLOF to incur around \$15 million in legal fees and costs. It contended that had it known the nature of the lawsuit and how it would eventually turn out, Harbourvest never would have invested in HCLOF. *See* Cause No. 19-bk-34054, Doc. 1057.

27. While even assuming Harbourvest's underlying claims were valid as far as the lost \$15 million went, the true damage of the legal fees to Harbourvest would have been 49.98% of the HCLOF losses (i.e., less than \$7.5 million).

28. In truth, as of September 2020, Harbourvest had indeed lost some \$52 million due to the alleged diminishing value of the HCLOF assets (largely due to the underperformance of the Acis entities<sup>3</sup>)—and the values were starting to recover.

29. HCM denied the allegations in the Bankruptcy Court. Other than the claim for waste of corporate assets of \$15 million, HCM at all times viewed the Harbourvest legal claims as being worth near zero and having no merit.

30. On December 23, 2020, HCM moved the Court to approve a settlement between itself and Harbourvest. No discovery had taken place between the parties, and Plaintiff did not have any notice of the settlement terms or other factors prior to the motion's filing (or even during its pendency) in order to investigate its rights.

31. HCM set the hearing right after the Christmas and New Year's holidays, almost ensuring that no party would have the time to scrutinize the underpinnings of the deal.

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<sup>3</sup> Acis was being managed by Joshua Terry. JP Morgan had listed the four ACIS entities under his management as the four worst performers of the 1200 CLOs it evaluated.

**32.** On January 14, 2021, the Bankruptcy Court held an evidentiary hearing and approved the settlement in a bench ruling, overruling the objections to the settlement.

**33.** An integral part of the settlement was allowing \$45 million in unsecured claims that, at the time of the agreement, were expected to net Harbourvest around 70 cents on the dollar. In other words, Harbourvest was expected to recover around \$31,500,000 from the allowed claims.

**34.** As part of the consideration for the \$45 million in allowed claims, Harbourvest agreed to transfer all of its interests in HCLOF to HCM.

**35.** HCM and Seery rationalized the settlement value by allocating \$22.5 million of the net value of the \$45 million in unsecured claims as consideration to purchase Harbourvest's interests in HCLOF, meaning, if 70% of the unsecured claims—i.e., \$31.5 million—was realized, and \$22.5 million of that would be allocated to the purchase price of the Harbourvest interests in HCLOF, the true “settlement” for Harbourvest's legal claims was closer to \$9 million. Still \$1.5 million over the reasonable damages amount that Harbourvest suffered.

**36.** Plaintiffs here are taking no position at this time about the propriety of settling the Harbourvest legal claims for \$9 million. That is for another day.

**37.** At the core of this lawsuit is the fact that HCM purchased the Harbourvest interests in HCLOF for \$22.5 million knowing that they were worth far more than that.

**38.** It has recently come to light that the Harbourvest interests, as of December 31, 2020, were worth in excess of \$41,750,000, and they have continued to go up in value.

**39.** On November 30, 2020, which was less than a month prior to the filing of the Motion to Approve the Settlement, the net asset value of those interests was over \$34.5 million. Plaintiffs were never made aware of that.

40. The change was due to how the net asset value, or NAV, was calculated. The means and methods for calculating the “net asset value” of the assets of HCLOF are subject to and governed by the regulations passed by the SEC pursuant to the Adviser’s Act, and by HCM’s internal policies and procedures.

41. Typically, the value of the securities are reflected by a market price quote.

42. However, the underlying securities in HCLOF are not liquid and had not been traded in a long while. Therefore, any market quotes were stale.

43. There not having been any contemporaneous market quotations that could be used in good faith to set the marks,<sup>4</sup> meant that other prescribed methods of assessing the value of the interests, such as the NAV, would have been the proper substitutes.

44. Seery testified that the fair market value of the Harbourvest HCLOF interests was \$22.5 million. Even allowing some leeway there, it was off by a mile.

45. Given the artifice described herein, Seery and the entity Defendants had to know that the representation of the fair market value at \$22.5 million was false because the NAV was so much higher.

46. But it does not appear that they disclosed that fact to Harbourvest to whom they owed fiduciary duties as the RIA in charge of HCLOF, and they certainly did not disclose the truth to the Plaintiff. One would expect HCM to disclose that its trade with Harbourvest—or someone in Harbourvest’s position—was sanitized by complete disclosure of the NAV of the interests, and noting Harbourvest’s acceptance of the trade notwithstanding that disclosure. The abject silence of the information’s disclosure—both in the Settlement Agreement and in the papers seeking to

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<sup>4</sup> The term “mark” is shorthand for an estimated or calculated value for a non-publicly traded instrument.

approval of the settlement and the testimony proffered in its support—strongly suggests its absence from the negotiations.

47. What it appears is that Seery used an old valuation, itself a reckless if not intentional misrepresentation of value. Thus, it is either the case that (i) Defendants conducted the proper analysis to obtain a current value of the assets but decided to use a far lower valuation in order to whitewash the settlement or enrich the bankruptcy estate; *or* (ii) Defendants never conducted the proper current valuation, and therefore baselessly represented what the current value of the assets was, despite knowingly having no reasonable basis for making such a claim.

48. For years HCM had internal procedures and compliance protocols to govern this not infrequent occurrence. Prior to Seery taking over as CEO, HCM's internal compliance policies, enforced by its compliance officers, prohibiting HCM from trading with an investor where HCM had superior knowledge about the value of the assets, for example. While Plaintiff has no reason to believe that those procedures were scrapped in recent months, it can only assume that they were either overridden improperly or circumvented wholesale.

49. Upon finalizing the Harbourvest Settlement Agreement and making representations to the Bankruptcy Court to the Plaintiffs about the value of the Harbourvest Interests, Seery and HCM had a duty to use current values and not rely on old valuations of the assets or the HCLOF interests.

50. Given Defendants' actual or constructive knowledge that they were purchasing Harbourvest's Interests in HCLOF for a less than 50% of what those interests were worth—Defendants owed Plaintiff a fiduciary duty not to purchase them for themselves.

51. Defendants should have either had HCLOF repurchase the interests with cash, or offer those interests to Plaintiff and the other members *pro rata*, before HCM agreed to purchase them all lock, stock and barrel, for no up-front cash.

52. Indeed, had Plaintiff been offered those interests, it would have happily purchased them and therefore would have infused over \$20 million in cash into the estate for the purpose of executing the Harbourvest Settlement.

53. That Defendants (and to perhaps a lesser extent, the Unsecured Creditors Committee (the “UCC”)) agreed to pay \$22.5 million for the HCLOF assets, where they had previously not consented to any such expenditure by the estate on behalf of HCLOF, strongly indicates their awareness that they were purchasing assets for far below market value.

54. The above is the most reasonable and plausible explanation for why Defendants and the UCC forwent raising as much as \$22.5 million in cash now in favor of hanging on to the HCLOF assets.

55. Indeed, in January 2021 Seery threatened Ethen Powell that “[Judge Jernigan] is laughing at you” and “we are coming after you” in response to the latter’s attempt to exercise his right as beneficial holder of the CLO, and pointing out a conflict of interest in Seery’s plan to liquidate the funds.

56. HCM’s threat, made by Seery, is tantamount to not only a declaration that he intends to liquidate the funds regardless of whether the investors want to do so, and whether it is in their best interests, but also that HCM intends to leverage what it views as the Bankruptcy Court’s sympathy to evade accountability.

## V.

### CAUSES OF ACTION

**FIRST CAUSE OF ACTION**  
***Breaches of Fiduciary Duty***

57. Plaintiffs respectfully incorporate the foregoing factual averments as if fully set forth herein and further alleges the following:

58. HCM is a registered investment advisor and acts on behalf of HCFA. Both are fiduciaries to Plaintiffs because HCM had a direct advisor agreement with the DAF at all relevant times, and HCM, through HCFA, advised CLO Holdco in the HCLOF venture.

59. The Advisers Act establishes an unwaivable federal fiduciary duty for investment advisers,<sup>5</sup> and its chief compliance officers.<sup>6</sup>

60. HCM and the DAF entered into an Amended and Restated Investment Advisory Agreement, executed between them on July 1, 2014 (the “RIA Agreement”). It renews annually and continued until the end of January 2021.

61. In addition to being the RIA to the DAF, HCM was appointed the DAF’s attorney-in-fact for certain actions, such as “to purchase or otherwise trade in Financial Instruments that have been approved by the General Partner.” RIA Agreement ¶ 4.

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<sup>5</sup> See e.g., *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 194 (1963); *Transamerica Mortg. Advisors (tama) v. Lewis*, 444 U.S. 11, 17 (1979) (“§ 206 establishes ‘federal fiduciary standards’ to govern the conduct of investment advisers.”); *Santa Fe Indus. v. Green*, 430 U.S. 462, 471, n.11 (1977) (in discussing *SEC v. Capital Gains*, stating that the Supreme Court’s reference to fraud in the “equitable” sense of the term was “premised on its recognition that Congress intended the Investment Advisers Act to establish federal fiduciary standards for investment advisers”). See also Investment Advisers Act Release No. 3060 (July 28, 2010) (“Under the Advisers Act, an adviser is a fiduciary whose duty is to serve the best interests of its clients, which includes an obligation not to subrogate clients’ interests to its own”) (citing Proxy Voting by Investment Advisers, Investment Advisers Act Release No. 2106 (Jan. 31, 2003)).

<sup>6</sup> Advisers Act Rule 206(4)-7 (“An adviser’s chief compliance officer should be competent and knowledgeable regarding the Advisers Act and should be empowered with full responsibility and authority to develop and enforce appropriate policies and procedures for the firm.”).



62. The RIA Agreement further commits HCM to value financial assets “in accordance with the then current valuation policy of the Investment Advisor [HCM], a copy of which will be provided to the General Partner upon request.” RIA Agreement ¶ 5.

63. While HCM contracted for the recognition that it would be acting on behalf of others and could be in conflict with advice given the DAF, (RIA Agreement ¶ 12), nowhere did it purport to waive the fiduciary duties owed to the DAF not to trade as a principal in a manner that harmed the DAF.

64. HCFA owed a fiduciary duty to Holdco as an investor in HCLOF and to which HCFA was the portfolio manager. HCM owed a fiduciary duty to the DAF (and to Holdco as its subsidiary) pursuant to a written Advisory Agreement HCM and the DAF had where HCM agreed to provide sound investment advice and management functions.

65. As a registered investment adviser, HCM’s fiduciary duty is broad and applies to the entire advisor-client relationship.

66. The core of the fiduciary duty is to act in the best interest of their investors—the advisor must put the ends of the client before its own ends or the ends of a third party.

67. This is manifested in a duty of loyalty and a duty of utmost care. It also means that the RIA has to follow the terms of the company agreements and the regulations that apply to the investment vehicle.

68. Seery in controlling HCM, HCFA, and by extension, HCLOF, directly owed a fiduciary duty to Plaintiffs by virtue of his position, or is liable for aiding and abetting HCM’s and HCFA’s breaches of fiduciary duty by controlling them and either recklessly or intentionally causing them to breach their duties.

69. The fiduciary duty that HCM and Seery owed to Plaintiff is predicated on trust and confidence. Section 204A of the Advisers Act requires investment advisors (whether SEC-registered or not) to establish, maintain, and enforce written policies and procedures reasonably designed to prevent the RIA from trading on material, non-public information. See 17 C.F.R. § 275.206(4)-7. That means that Plaintiff should be able to take Defendants at their word and not have to second guess or dig behind representations made by them.

70. The simple thesis of this claim is that Defendants Seery, HCFA and HCM breached their fiduciary duties by (i) insider trading with Harbourvest and concealing the rising NAV of the underlying assets—i.e., trading with Harbourvest on superior, non-public information that was neither revealed to Harbourvest nor to Plaintiff; (ii) concealing the value of the Harbourvest Interests; and (iii) diverting the investment opportunity in the Harbourvest entities to HCM (or its designee) without offering it to or making it available to Plaintiff or the DAF.

71. HCM, as part of its contractual advisory function with Plaintiffs, had expressly recommended the HCLOF investment to the DAF. Thus, diverting the opportunity for returns on its investment was an additional breach of fiduciary duty.

72. This violated a multitude of regulations under 27 C.F.R. part 275, in addition to Rules 10b-5 and 10b5-1. 17 CFR 240.10b5-1 (“Rule 10b5-1”) explains that one who trades while possessing non-public information is liable for insider trading, and they do not necessarily have to have *used* the specific inside information.

73. It also violated HCM’s own internal policies and procedures.

74. Also, the regulations impose obligations on Defendants to calculate a *current* valuation when communicating with an investor, such as what may or may not be taken into

account, and what cannot pass muster as a current valuation. Upon information and belief, these regulations were not followed by the Defendants.

75. HCM's internal policies and procedures, which it promised to abide by both in the RIA Agreement and in its Form ADV SEC filing, provided for the means of properly calculating the value of the assets.

76. HCM either did not follow these policies, changed them to be out of compliance both with the Adviser Act regulations and its Form ADV representations, and/or simply misrepresented or concealed their results.

77. In so doing, because the fiduciary duty owed to Plaintiff is a broad one, and because Defendants' malfeasance directly implicates its relationship with Plaintiff, Defendants have breached the Advisers Act's fiduciary duties owed to Plaintiff as part of their fiduciary relationship.<sup>7</sup>

78. At no time between agreeing with Harbourvest to the purchase of its interests and the court approval did Defendants disclose to either Harbourvest or to Plaintiff (and the Bankruptcy Court for that matter) that the purchase was at below 50% the current net asset value as well, and when they failed to offer Plaintiff (and the other members of HCLOF) their right to purchase the interests pro rata at such advantageous valuations. Plaintiff's lost opportunity to purchase has harmed Plaintiff. Plaintiff had been led to believe by the Defendants that the value of what was being purchased in the Harbourvest settlement by HCM (or its designee) was at fair

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<sup>7</sup> See Advisers Act Release No. 4197 (Sept. 17, 2015) (Commission Opinion) ("[O]nce an investment Advisory relationship is formed, the Advisers Act does not permit an adviser to exploit that fiduciary relationship by defrauding his client in any investment transaction connected to the Advisory relationship."); see also *SEC v. Lauer*, No. 03-80612-CIV, 2008 U.S. Dist. LEXIS 73026, at 90 (S.D. Fla. Sept. 24, 2008) ("Unlike the antifraud provisions of the Securities Act and the Exchange Act, Section 206 of the Advisers Act does not require that the activity be 'in the offer or sale of any' security or 'in connection with the purchase or sale of any security.'").

market value. This representation, repeated again in the Bankruptcy Court during the Harbourvest confirmation, implicitly suggested that a proper current valuation had been performed.

**79.** Seery testified in January 2021 that the then-current fair market value of Habourvests's 49.98% interest in HCLOF was worth around \$22.5 million.

**80.** But by then, it was worth almost double that amount and has continued to appreciate. Seery knew or should have known that fact because the value of some of the HCLOF assets had increased, and he had a duty to know the current value. His lack of actual knowledge, while potentially not overtly fraudulent, would nonetheless amount to a reckless breach of fiduciary duty for acting without proper diligence and information that was plainly available.

**81.** Furthermore, HCLOF holds equity in MGM Studios and debt in CCS Medical via various CLO positions. But Seery, in his role as CEO of HCM, was made aware during an advisors meeting in December 2020 that Highland would have to restrict its trading in MGM because of its insider status due to activities that were likely to apply upward pressure on MGM's share price.

**82.** Furthermore, Seery controlled the Board of CCS Medical. And in or around October 2020, Seery was advocating an equatization that would have increased the value of the CCS securities by 25%, which was not reflected in the HCM report of the NAV of HCLOF's holdings.

**83.** Seery's knowledge is and should be imputed to HCM and HCFA.

**84.** Moreover, it is a breach of fiduciary duty to commit corporate waste, which is effectively what disposing of the HCLOF assets would constitute in a rising market, where there is no demand for disposition by the investors (save for HCM, whose proper 0.6% interest could easily be sold to the DAF at fair value).

**85.** As holder of 0.6% of the HCLOF interests, and now assignee of the 49.98% Harbourvest Interests), HCM has essentially committed self-dealing by threatening to liquidate HCLOF now that it may be compelled to do so under its proposed liquidation plan, which perhaps inures to the short term goals of HCM but to the pecuniary detriment of the other holders of HCLOF whose upside will be prematurely truncated.

**86.** Seery and HCM should not be allowed to benefit from the breach of their fiduciary duties because doing so would also cause Plaintiffs irreparable harm. The means and methods of disposal would likely render the full scope of damages to the DAF not susceptible to specific calculation—particularly as they would relate to calculating the lost opportunity cost. Seery and HCM likely do not have the assets to pay a judgment to Plaintiffs that would be rendered, simply taking the lost appreciation of the HCLOF assets.

**87.** Defendants are thus liable for diverting a corporate opportunity or asset that would or should have been offered to Plaintiff and the other investors. Because federal law makes the duties invoked herein unwaivable, it is preposterous that HCM, as a 0.6% holder of HCLOF, deemed itself entitled to the all of the value and optionality of the below-market Harbourvest purchase.

**88.** Defendants cannot rely on any contractual provision that purports to waive this violation. Nothing in any agreement purports to permit, authorize or otherwise sanitize Defendants' self-dealing. All such provisions are void.

**89.** In the fourth quarter of 2020, Seery and HCM notified staff that they would be terminated on December 31, 2020. That termination was postponed to February 28, 2021. Purchasing the Harbourvest assets without staffing necessary to be a functioning Registered

Investment Advisor was a strategic reversal from prior filings that outlined canceling the CLO management contracts and allowing investors to replace Highland as manager.

**90.** Seery's compensation agreement with the UCC incentivizes him to expedite recoveries and to prevent transparency regarding the Harbourvest settlement.

**91.** What is more, Seery had previously testified that the management contracts for the funds—HCLOF included—were unprofitable, and that he intended to transfer them. But he later rejected offers to purchase those management contracts for fair value and instead decided to continue to manage the funds—which is what apparently gave rise to the Harbourvest Settlement, among others. He simultaneously rejected an offer for the Harbourvest assets of \$24 million, stating that they were worth much more than that.

**92.** Because of Defendants' malfeasance, Plaintiffs have lost over \$25 million in damages—a number that continues to rise—and the Defendants should not be able to obtain a windfall.

**93.** For the same reason, Defendants' malfeasance has also exposed HCLOF to a massive liability from Harbourvest since the assignment of those interests is now one that is likely unenforceable under the Advisers Act, Section 47(b), if there was unequal information.

**94.** Seery is liable as a principal and as an officer and control person under the regulations promulgated pursuant to Dodd-Frank and other laws.

**95.** HCM and HCFA are liable as principals for breach of fiduciary duty, as are the principals and compliance staff of each entity.

**96.** Plaintiffs seek disgorgement, damages, exemplary damages, attorneys' fees and costs. To the extent the Court determines that this claim had to have been brought derivatively on



behalf of HCLOF, then Plaintiffs represent that any pre-suit demand would have been futile since asking HCM to bring suit against its principal, Seery, would have been futile.

**SECOND CAUSE OF ACTION**  
***Breach of HCLOF Company Agreement***  
**(By Holdco against HCLOF, HCM and HCFA)**

97. Plaintiffs respectfully incorporate the foregoing factual averments as if fully set forth herein and further alleges the following:

98. On November 15, 2017, the members of HCLOF, along with HCLOF and HCFA, executed the *Members Agreement Relating to the Company* (the “Company Agreement”).

99. The Company Agreement governs the rights and duties of the members of HCLOF.

100. Section 6.2 of HCLOF Company Agreement provides that when a member “other than ... CLO Holdco [Plaintiff] or a Highland Affiliate,” intends to sell its interest in HCLOF to a third party (i.e., not to an affiliate of the selling member), then the other members have the first right of refusal to purchase those interests pro rata for the same price that the member has agreed to sell.

101. Here, despite the fact that Harbourvest agreed to sell its interests in HCLOF for \$22.5 million when they were worth more than double that, Defendants did not offer Plaintiff the chance to buy its pro rata share of those interests at the same agreed price of \$22.5 million (adjusted pro rata).

102. The transfer and sale of the interests to HCM were accomplished as part of the Harbourvest Settlement which was approved by the Bankruptcy Court.

103. Plaintiff was not informed of the fact that Harbourvest had offered its shares to Defendant HCM for \$22.5 million—which was under 50% of their true value.

**104.** Plaintiff was not offered the right to purchase its pro rata share of the Harbourvest interests prior to the agreement being struck or prior to court approval being sought.

**105.** Had Plaintiff been allowed to do so, it would have obtained the interests with a net equity value over their purchase price worth in excess of \$20 million.

**106.** No discovery or opportunity to investigate was afforded Plaintiff prior to lodging an objection in the Bankruptcy Court.

**107.** Plaintiff is entitled to specific performance or, declaratory relief, and/or disgorgement, constructive trust, damages, attorneys' fees and costs.

**THIRD CAUSE OF ACTION**  
***Negligence***  
**(By the DAF and CLO Holdco against Seery, HCM, and HCFA)**

**108.** Plaintiffs respectfully incorporate the foregoing factual averments as if fully set forth herein, and further alleges the following:

**109.** Plaintiffs incorporate the foregoing causes of action and note that all the foregoing violations were breaches of the common law duty of care imposed by law on each of Seery, HCFA and HCM.

**110.** Each of these Defendants should have known that their actions were violations of the Advisers Act, HCM's internal policies and procedures, the Company Agreement, or all three.

**111.** Seery and HCM owed duties of care to Plaintiffs to follow HCM's internal policies and procedures regarding both the propriety and means of trading with a customer [Harbourvest], the propriety and means of trading as a principal in an account but in a manner adverse to another customer [the DAF and Holdco], and the proper means of valuing the CLOs and other assets held by HCLOF.

**112.** It would be foreseeable that failing to disclose the current value of the assets in the HCLOF would impact Plaintiffs negatively in a variety of ways.

**113.** It would be reasonably foreseeable that failing to correctly and accurately calculate the current net asset value of the market value of the interests would cause Plaintiffs to value the Harbourvest Interests differently.

**114.** It would be reasonably foreseeable that referring to old and antiquated market quotations and/or valuations of the HCLOF assets or interests would result in a mis-valuation of HCLOF and, therefore, a mis-valuation of the Harbourvest Interests.

**115.** Relying on stale valuations without updating them was reckless due to Seery's and HCM's knowledge that the values of the interests were not static and likely would have changed over time, such that old information had a high degree of probability of being inaccurate.

**116.** Seery's and HCM's failure to inform the DAF and Holdco of the updated valuations, and/or to misstate the value in January 2021 in support of the Harbourvest settlement was likewise reckless in the face of the known risk that Plaintiffs would be relying on those representations, as would Harbourvest and the Court.

**117.** Seery's and HCM's failure to offer the DAF and Holdco the right to purchase the Harboruvest Interests was likewise reckless in light of the obvious risk.

**118.** Likewise, it would have been foreseeable that Plaintiff's failure to give Plaintiff the opportunity to purchase the Harbourvest shares at a \$22.5 million valuation would cause Plaintiff damages. Defendants knew that the value of those assets was rising. They further knew or should have known that whereas those assets were sold to HCM for an allowance of claims to be funded in the future, selling them to Plaintiff would have provided the estate with cash funds.

119. Defendants' negligence or gross negligence foreseeably and directly caused Plaintiff harm.

120. Plaintiff is thus entitled to damages.

**FOURTH CAUSE OF ACTION**  
***Racketeering Influenced Corrupt Organizations Act***  
**(CLO Holdco and DAF against HCM and Seery)**

121. Plaintiffs respectfully incorporate the foregoing factual averments as if fully set forth herein, and further alleges the following:

122. Defendants HCM and Seery are liable for violations of the Racketeer Influenced and Corrupt Organizations ("RICO") Act, 18 U.S.C. § 1961 *et seq.*, for the conduct of an enterprise through a pattern of racketeering activity.

123. HCLOF constitutes an enterprise under the RICO Act. Additionally, or in the alternative, HCM, HCLA, and HCLOF constituted an association-in-fact enterprise. The purpose of the association-in-fact was the perpetuation of Seery's position at HCM and using the Harbourvest settlement as a vehicle to enrich persons other than the HCLOF investors, including Holdco and the DAF, and the perpetuation of HCM's holdings in collateralized loan obligations owned by HCLOF, while attempting to deny Plaintiffs the benefit of its rights of ownership.

124. The association-in-fact was bound by informal and formal connections for years prior to the illicit purpose, and then changed when HCM and Seery joined it in order to achieve the association's illicit purpose. For example, HCM is the parent and control person over HCFA, which is the portfolio manager of HCLOF pursuant to a contractual agreement—both are registered investment advisors and provide advisory and management services to HCLOF.

125. HCM and Seery injured Plaintiffs through their continuous course of conduct of the HCM-HCLA-HCLOF association-in-fact enterprise. Seery's actions (performed on behalf of

HCM and the association-in-fact enterprise) constitute violations of the federal wire fraud, mail fraud, fraud in connection with a case under Title 11, and/or securities fraud laws, pursuant to **18 U.S.C. § 1961(1)(B)** and **(D)**.

**126.** Seery operated HCM in such a way as to violate insider trading rules and regulations when it traded with Harbourvest while it had material, non-public information that it had not supplied to Harbourvest or to Plaintiffs.

**127.** In or about November 2020, HCM and Harbourvest entered into discussions about settling the Harbourvest Claims. Seery's conduct of HCLOF and HCLA on behalf of HCM through the interstate mails and/or wires caused HCM to agree to the purchase of Harbourvest's interests in HCLOF.

**128.** On or about each of September 30, 2020, through December 31, 2020, Seery, through his conduct of the enterprise, utilized the interstate wires and/or mails to obtain or arrive at valuations of the HCLOF interests. Seery's conduct of the enterprise caused them to cease sending the valuation reports to Plaintiffs, which eventually allowed Plaintiffs to be misled into believing that Seery had properly valued the interests.

**129.** On or about September 30, 2020, Seery transmitted or caused to be transmitted through the interstate wires information to HCLOF investors from HCM (via HCFA), including Harbourvest, regarding the value of HCLOF interests and underlying assets.

**130.** Additionally, Seery operated HCM in such a way that he concealed the true value of the HCLOF interests by utilizing the interstate wires and mails to transmit communications to the court in the form of written representations on or about December 23, 2020, and then further transmitted verbal representations of the current market value (the vastly understated one) on January 14, 2021, during live testimony.

**131.** However, Harbourvest was denied the full picture and the true value of the underlying portfolio. At the end of October and November of 2020, HCM had updated the net asset values of the HCLOF portfolio. According to sources at HCM at the time, the HCLOF assets were worth north of \$72,969,492 as of November 30, 2020. Harbourvest's share of that would have been \$36,484,746.

**132.** The HCLOF net asset value had reached \$86,440,024 as of December 31, 2021, which means that by the time Seery was testifying in the Bankruptcy Court on January 14, 2021, that the fair market value of the Harbourvest Assets was \$22.5 million, it was actually closer to \$43,202,724.

**133.** Seery, speaking on behalf of HCM, knew of the distinction in value and made the representations either knowingly or with reckless disregard for the truth.

**134.** On January 14, 2021, Seery also testified that he (implying HCM, HCLA and HCLOF) had valued the Harbourvest Assets at their current valuation and at fair market value. This was not true because the valuation that was used and testified to was at that time ancient. The ostensible purpose of this concealment was to induce Plaintiff and other interest holdings to take no action.

**135.** In supporting HCM's motion to the Bankruptcy Court to approve the Harbourvest Settlement, Seery omitted the fact that HCM was purchasing the interests at a massive discount, which would violate the letter and spirit of the federal Adviser's Act.

**136.** Seery was informed in late December 2020 at an in-person meeting in Dallas to which Seery had to fly that HCLOF and HCM had to suspend trading in MGM Studios' securities because Seery had learned from James Dondero, who was on the Board of MGM, of a potential purchase of the company. The news of the MGM purchase should have caused Seery to revalue



the HCLOF investment in MGM. Seery's failure to disclose this information which would have been germane to the valuation of the Harbourvest Interests was another incidence of wrongful omission in violation of the Advisers Act's antifraud provision and RICO.

**137.** In or around October 2020, Seery (who controls the Board of CSS Medical) was pursuing "equitization" of CSS Medical's debt, which would have increased the value of certain securities by 25%. In several communications through the U.S. interstate wires and/or mails, and with Plaintiffs, and the several communications with Harbourvest during the negotiations of the settlement, Seery failed to disclose these changes which were responsible in part for the ever-growing value of the HCLOF CLO portfolio. Seery's failure to disclose this information which would have been germane to the valuation of the Harbourvest Interests was another incidence of wrongful omission in violation of the Advisers Act's antifraud provision and RICO.

**138.** Seery's failure to disclose the information about the current valuation, which would have been material to the value of the Harbourvest Interest—and by extension, to Plaintiff's rights with respect to those as part of the Harbourvest Settlement was another incidence of wrongful omission in violation of the Advisers Act's antifraud provision and RICO.

**139.** The Harbourvest Settlement is not final and unwinding it could prove difficult—which Seery had to be counting on.

**140.** Seery was at all relevant times operating as an agent of HCM and its control person as CEO.

**141.** This series of related violations of the wire fraud, mail fraud, and securities fraud laws, in connection with the HCM bankruptcy, constitute a continuing pattern and practice of racketeering for the purpose of winning a windfall for HCM and himself--a nearly \$30,000,000 payday under the confirmation agreement.

142. The federal RICO statute makes it actionable for one's conduct of an enterprise to include "fraud in connection with a [bankruptcy case]". The Advisers' Act antifraud provisions require full transparency and accountability to an advisers' investors and clients and does not require a showing of reliance or materiality. The wire fraud provision likewise is violated when, as here, the interstate wires are used as part of a "scheme or artifice ... for obtaining money or property by means of false ... pretenses, [or] representations[.]"

143. Accordingly, because Seery and HCM's conduct violated the wire fraud and mail fraud laws, and the Advisers' Act antifraud provisions, and their acts and omissions were in connection with the HCM Bankruptcy proceedings under Title 11, they are sufficient to bring such conduct within the purview of the RICO civil action provisions, 18 U.S.C. § 1964.

144. Plaintiffs are thus entitled to damages, treble damages, attorneys' fees and costs of suit, in addition to all other injunctive or equitable relief to which they are justly entitled.

**FIFTH CAUSE OF ACTION**  
***Tortious Interference***  
**(CLO Holdco against HCM and Seery)**

145. Plaintiff respectfully incorporates the foregoing factual averments as if fully set forth herein and further alleges the following:

146. At all relevant times, HCM owned a 0.6% interest in HCLOF.

147. At all relevant times, Seery and HCM knew that Plaintiff had specific rights in HCLOF under the Company Agreement, § 6.2.

148. Section 6.2 of HCLOF Company agreement provides that when a member "other than ... CLO Holdco [Plaintiff] or a Highland Affiliate," intends to sell its interest in HCLOF to a third party (i.e., not an affiliate of the member), then the other members have the first right of refusal to purchase those interests pro rata for the same price that the member has agreed to sell.

149. HCM, through Seery, tortiously interfered with Plaintiff's contractual rights with HCLOF by, among other things, diverting the Harbourvest Interests in HCLOF to HCM without giving HCLOF or Plaintiff the option to purchase those assets at the same favorable price that HCM obtained them.

150. HCM and Seery tortiously interfered with Plaintiff's contractual rights with HCLOF by, among other things, misrepresenting the fair market value as \$22.5 million and concealing the current value of those interests.

151. But for HCM and Seery's tortious interference, Plaintiff would have been able to acquire the Harbourvest Interests at a highly favorable price. HCM and Seery's knowledge of the rights and intentional interference with these rights has caused damage to Plaintiff CLO Holdco.

152. Plaintiff is therefore entitled to damages from HCM and Seery, as well as exemplary damages.

## VI.

### JURY DEMAND

153. Plaintiffs demand trial by jury on all claims so triable.

## VII.

### PRAYER FOR RELIEF

154. Wherefore, for the foregoing reasons, Plaintiffs respectfully pray that the Court enter judgment in their favor and against Defendants, jointly and severally, for:

- a. Actual damages;
- b. Disgorgement;
- c. Treble damages;
- d. Exemplary and punitive damages;

- e. Attorneys' fees and costs as allowed by common law, statute or contract;
- f. A constructive trust to avoid dissipation of assets;
- g. All such other relief to which Plaintiff is justly entitled.

Dated: April 19, 2021

Respectfully submitted,

**SBAITI & COMPANY PLLC**

/s/ Jonathan Bridges

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# EXHIBIT 2

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*Counsel for the Debtor and Debtor-in-Possession*

**UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION**

|                                     |   |                          |
|-------------------------------------|---|--------------------------|
| <b>In re:</b>                       | § |                          |
|                                     | § |                          |
| <b>HIGHLAND CAPITAL MANAGEMENT,</b> | § | <b>Case No. 19-34054</b> |
| <b>L.P.,</b>                        | § | <b>Chapter 11</b>        |
|                                     | § |                          |
| <b>Debtor.</b>                      | § |                          |
|                                     | § |                          |

Response Deadline: July 10, 2020 at 5:00 p.m.  
Hearing Date: July 14, 2020 at 1:30 p.m.

**DEBTOR'S MOTION UNDER BANKRUPTCY CODE  
SECTIONS 105(a) AND 363(b) FOR AUTHORIZATION TO  
RETAIN JAMES P. SEERY, JR., AS CHIEF EXECUTIVE OFFICER,  
CHIEF RESTRUCTURING OFFICER AND FOREIGN REPRESENTATIVE  
*NUNC PRO TUNC TO MARCH 15, 2020***



1. The United States Bankruptcy Court for the Northern District of Texas (the “Court”) has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2).

## Background

3. On October 16, 2019 (the “Petition Date”), the Debtor filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code in the Bankruptcy Court for the District of Delaware, Case No. 19-12239 (CSS) (the “Delaware Bankruptcy Court”).

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the Delaware Bankruptcy Court entered an order transferring venue of the Debtor's chapter 11 case to this Court [Docket No. 186].<sup>1</sup>

5. The Debtor has continued in the possession of its property and has continued to operate and manage its business as a debtor-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No trustee or examiner has been appointed in this chapter 11 case.

6. On December 4, 2019, the Debtor filed in the Delaware Bankruptcy Court its *Motion of the Debtor Pursuant to 11 U.S.C. §§ 105(a) and 363(b) To Retain Development Specialists, Inc. to Provide a Chief Restructuring Officer, Additional Personnel, and Financial Advisory and Restructuring-Related Services, Nunc Pro Tunc, as of the Petition Date* [Docket No. 74] (the "CRO Motion"). The CRO Motion sought, among other things, to appoint Bradley Sharp as the Debtor's chief restructuring officer and for DSI to provide financial advisory services to the Debtor in support of Mr. Sharp.

7. On December 27, 2019, the Debtor filed the *Motion of the Debtor for Approval of Settlement with the Official Committee of Unsecured Creditors Regarding Governance of the Debtor and Procedures for Operations in the Ordinary Course* [Docket No. 281] (the "Settlement Motion"). The Settlement Motion sought approval of the settlement between the Debtor and the Committee and provided for, among other things, the creation of a new independent board of directors of Strand Advisors, Inc.<sup>2</sup> (the "New Board") consisting of

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<sup>1</sup> All docket numbers refer to the docket maintained by this Court.

<sup>2</sup> Strand Advisors, Inc. ("Strand") is the general partner of the Debtor.

James P. Seery, Jr., John S. Dubel, and Russell Nelms (collectively, the “Independent Directors”).

8. The order granting the Settlement Motion authorized the Debtor to guarantee Strand’s obligations to indemnify each Independent Director pursuant to the terms of any indemnification agreements entered into by Strand with each of the Independent Directors (the “Indemnification Agreements”).

9. The Court entered orders approving the Settlement Motion on January 9, 2020<sup>3</sup> and the DSI Approval Order on January 10, 2020.

10. The Settlement Order approved, among other things, a term sheet setting forth the agreement between the Debtor and the Committee. The final term sheet was attached to the *Notice of Final Term Sheet* filed in the Court on January 14, 2020 [Docket No. 354] (the “Final Term Sheet”). The Settlement Order also provided that no entity could commence or pursue a claim or cause of action against any Independent Director and/or his respective advisors and agents relating in any way to his role as an independent director of Strand unless authorized by this Court pursuant to the criteria set forth in the Settlement Order.<sup>4</sup>

11. The Settlement Motion and Final Term each provided that “[a]s soon as practicable after their appointments, the Independent Directors shall, in consultation with the

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<sup>3</sup> See *Order Approving Settlement with Official Committee of Unsecured Creditors Regarding Governance of the Debtor and the Procedures for Operations in the Ordinary Course* [Docket No. 339] (the “Settlement Order”).

<sup>4</sup> Specifically, paragraph 10 of the Settlement Order provides:

No entity may commence or pursue a claim or cause of action of any kind against any Independent Director, any Independent Director’s agents, or any Independent Director’s advisors relating in any way to the Independent Director’s role as an independent director of Strand without the Court (i) first determining after notice that such claim or cause of action represents a colorable claim of willful misconduct or gross negligence against Independent Director, any Independent Director’s agents, or any Independent Director’s advisors and (ii) specifically authorizing such entity to bring such claim. The Court will have sole jurisdiction to adjudicate any such claim for which approval of the Court to commence or pursue has been granted.

Committee, determine whether a CEO should be appointed for the Debtor. If the Independent Directors determine that appointment of a CEO is appropriate, the Independent Directors shall appoint a CEO acceptable to the Committee as soon as possible, which may be one of the Independent Directors.” Final Term Sheet, page 3; Settlement Motion, ¶ 13.

12. On February 18, 2020, the Court entered its *Order (I) Authorizing Bradley D. Sharp to Act as Foreign Representative Pursuant to 11 U.S.C. § 1505 and (II) Granting Related Relief* [Docket No. 461] (the “Foreign Representative Order”). The Foreign Representative Order authorized Mr. Sharp, as chief restructuring officer, to act as the Debtor’s foreign representative pursuant to section 1515 of the Bankruptcy Code (the “Foreign Representative”). The Foreign Representative specifically appointed Mr. Sharp to act as the Debtor’s foreign insolvency officeholder to seek appropriate relief in Bermuda pursuant to Bermudian common law (the “Bermuda Foreign Representative”) and the Cayman Islands pursuant to Section 241(1) of the Companies Law (2019 Revision) with respect to that British overseas territory (the “Cayman Foreign Representative”).

13. Since the appointment of the Independent Directors, it was apparent that it would be more efficient to have a traditional corporate management structure oversee the Debtor – i.e., a fully engaged chief executive officer supervised by the New Board – as contemplated by the Final Term Sheet. This need was driven by the complexity of the Debtor’s organization and business operations and the need for daily management and oversight of the Debtor’s personnel. The search for a chief executive officer, however, was delayed while the Independent Directors made initial efforts to learn the Debtor’s business and its day-to-day operations. It was further delayed with the onset of the COVID-19 global pandemic, which both had a serious impact on

the Debtor's operations and assets and limited the Independent Directors' ability to search for an appropriate chief executive officer.

14. During this time, however, Mr. Seery integrated himself into the daily operations of the Debtor and became essential in stabilizing the Debtor's assets and trading accounts during the economic distress caused by COVID-19. While Mr. Dubel and Mr. Nelms were each spending on average approximately 140 hours a month addressing the operational issues facing the Debtor and certain of its fund entities, Mr. Seery's workload was at least 180 hours a month.

15. As such, it was readily apparent to the Independent Directors who would be the best fit for the role: Mr. Seery. Mr. Seery had the appropriate skill set, extensive relevant background, and was already carrying the responsibility of the role. Mr. Seery had been functionally operating as the Debtor's de facto chief executive officer since at least early March and was already overseeing the Debtor's ordinary course operations, including managing the Debtor's personnel and the daily interactions with the Debtor's bankruptcy professionals

16. The Independent Directors subsequently appointed a compensation committee consisting of Messrs. Dubel and Nelms (the "Compensation Committee") to negotiate the terms and conditions of the Agreement on behalf of the Debtor. And, on June 23, 2020, the Compensation Committee approved the appointment of Mr. Seery to serve as both the Debtor's chief executive officer and chief restructuring officer concurrently with his role as one of the Independent Directors pursuant to the terms of the Agreement. Because Mr. Seery has been fulfilling the role since March 2020, the Compensation Committee determined that it was appropriate to make Mr. Seery's appointment as the Debtor's chief executive officer and chief

restructuring officer effective as of March 15, 2020.<sup>5</sup> The Independent Directors also authorized the Debtor to file this Motion.

A. The Chief Executive Officer and Chief Restructuring Officer Positions

17. Mr. Seery has agreed to, among other things, provide daily leadership and direction to the Debtor's employees on business and restructuring matters relating to the Debtor's chapter 11 case. In that capacity, he will direct the Debtor's day-to-day ordinary course operations, oversee the Debtor's personnel, make management decisions with respect to the Debtor's trading operations, direct the Debtor's reorganization efforts, monetize the Debtor's assets, oversee the claims objection and resolution process, and lead the process toward the hopeful consensual confirmation of a plan in this chapter 11 case in the capacities as chief executive officer and chief restructuring officer positions. Mr. Seery would report directly to the New Board and would continue to serve as an Independent Director, as provided under the Settlement Order.

18. Mr. Seery has extensive management and restructuring experience. Mr. Seery recently served as a Senior Managing Director at Guggenheim Securities, LLC, where he was responsible for helping direct the development of a credit business. Prior to joining Guggenheim, Mr. Seery was the President and a senior investing partner of River Birch Capital, LLC, where he was responsible for originating, executing, and managing stressed and distressed credit investments. Mr. Seery is also a long-time attorney licensed to practice in New York who

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<sup>5</sup> The Committee has also agreed to Mr. Seery's appointment as chief executive officer and chief restructuring officer and to the amount of Mr. Seery's Base Compensation (as defined below). The Committee has not agreed, however, as to the amount and timing of the payment of the Restructuring Fee (defined below) and are continuing to discuss payment of the Restructuring Fee with the Compensation Committee.



19. The Compensation Committee negotiated the Agreement with Mr. Seery at arm's length. The additional material economic terms of the Agreement are as follows:<sup>6</sup>

(b) Roles: Mr. Seery shall serve as the chief executive officer and chief restructuring officer of the Debtor and shall be responsible for the overall management of the business of the Debtor during its chapter 11 case, including: directing the Debtor's day-to-day ordinary course operations, overseeing the Debtor's personnel, making management decisions with respect to the Debtor's trading operations, directing the reorganization and restructuring of the Debtor, the monetization of the Debtor's assets, resolution of claims, the development and negotiation of a plan of reorganization or liquidation, and the implementation of such plan. Mr. Seery shall remain a full member of the New Board and shall be entitled to vote on matters other than on those in which he is conflicted. Mr. Seery shall devote as much time to the engagement as he determines is required to execute his responsibilities as chief executive officer and chief restructuring officer. Mr. Seery will have no specific on-site requirements in Dallas, Texas, but shall be

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on site as much as he determines is necessary to execute his responsibilities as chief executive officer and chief restructuring officer, consistent with applicable COVID-19 orders, protocols and advice.

(c) Compensation for Services: Mr. Seery's compensation under the Agreement shall consist of the following:

(1) Base Compensation: \$150,000 per month, which shall be due and payable at the start of each calendar month; plus

(2) Bonus Compensation; Restructuring Fee:

Subject to separate Bankruptcy Court approval, the Compensation Committee and Mr. Seery have reached agreement on the payment of a restructuring fee upon confirmation of either a Case Resolution Plan or a Monetization Vehicle Plan in each case as defined below (the "Restructuring Fee").<sup>7</sup> The Committee has not yet agreed to the amount, composition, and timing of the Restructuring Fee. The Compensation Committee and Mr. Seery have agreed to defer Court consideration of the Restructuring Fee until further development in the Case. The Restructuring Fee agreed to by Mr. Seery and the Compensation Committee is as follows:

Case Resolution Restructuring Plan

On confirmation of any plan or reorganization or liquidation based on resolution of a material amount of the outstanding claims and their respective treatment, even if such plan includes (x) a debtor/creditor trust or similar monetization and claims resolution vehicle, (y) post-confirmation litigation of certain of the claims, and (z) post-confirmation monetization of debtor assets (a "Case Resolution Plan"):

\$1,000,000 on confirmation of the Case Resolution Plan;

\$500,000 on the effective date of the Case Resolution Plan; and

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<sup>7</sup> Although the Compensation Committee and Mr. Seery have agreed on the amount and timing of the Restructuring Fee, both the Compensation Committee and Mr. Seery understand that the Restructuring Fee is payable only upon order of this Court. The Compensation Committee is reserving the right to seek approval of the Restructuring Fee from this Court in connection with the confirmation hearing on a plan or as otherwise appropriate.

\$750,000 on completion of cash or property distributions to creditors as contemplated by the Case Resolution Plan.

Debtor/Creditor Monetization Vehicle Restructuring Fee:

On confirmation of any plan or reorganization or liquidation based on a debtor/creditor trust or similar asset monetization and claims resolution vehicle that does not include agreement among the debtor and creditors on a material amount of the outstanding claims and their respective treatment at confirmation (a “Monetization Vehicle Plan”):

\$500,000 on confirmation of the Monetization Vehicle Plan;

\$250,000 on the effective date of the Monetization Vehicle Plan; and

A contingent restructuring fee to be determined by the board or oversight committee installed to oversee the implementation of any Monetization Vehicle Plan based on the CEO/CRO (or acting as trustee) based upon performance under the plan after all material distributions under the Monetization Vehicle Plan are made.

(e) Participation in Employee Benefit Plans: Mr. Seery shall act as an independent professional contractor and shall not be an employee of the Debtor. Mr. Seery will pay for his own benefits and will not participate under the Debtor’s existing employee benefit plans.

(f) Expenses: Reimbursement of actual and reasonable out-of-pocket expenses in connection with the services provided under the Agreement. Expenses will be generally consistent with expenses incurred to date as a member of the New Board.

(g) Conflicts and Other Engagements. Mr. Seery is not aware of any potential conflicts of interest based on his understanding of the various parties involved in the Debtor’s chapter 11 case to date. Mr. Seery shall not be precluded from representing or working with or for any other person or entity in matters not directly related to the services being provided to the Debtor under the Agreement. Mr. Seery shall not undertake any engagements directly adverse to the Debtor during the term of his engagement.

(h) Termination. The Agreement may be terminated at any time by either the Debtor or by Mr. Seery upon two weeks advance written notice given to the other party. The termination of the Agreement shall not affect Mr. Seery's right to receive, and the Debtor's obligation to pay, any and all Base Compensation and Expenses incurred (even if not billed) prior to the giving of any termination notice; *provided however*, that (1) if the Agreement is terminated by Mr. Seery, the amount of Base Compensation owed shall be calculated based on the actual number of days worked during the applicable month and Mr. Seery will return any Base Compensation received in excess of such amount, and (2) if the Agreement is terminated by the Debtor, Base Compensation shall be deemed fully earned as of the first day of any month. Bonus Compensation shall be earned by Mr. Seery immediately upon his termination by the Debtor; *provided however*, Mr. Seery shall not be entitled to Bonus Compensation if: (A) the Debtor's chapter 11 case is converted to chapter 7 or dismissed; (B) a chapter 11 trustee is appointed in the Debtor's chapter 11 case; (C) Mr. Seery is terminated by the Debtor for Cause;<sup>8</sup> or (D) Mr. Seery resigns prior to confirmation of a plan or court approval of a sale as described in the Fees and Expense/Compensation for Services section of the Agreement.

(j) Conditional Requirement to Seek Further Court Approval of Agreement. The Committee may, upon two weeks advance written notice to the Debtor, require the Debtor to file a motion with the Bankruptcy Court on normal notice seeking a continuation of the Agreement and if such motion is not filed, the Agreement will terminate at the expiration of such two week period. If the Debtor files such motion, Mr. Seery will be entitled to the Base Compensation through and including the date on which a final order is entered on such motion by this Court. Notwithstanding anything herein to the contrary, the Committee may not deliver such notice to the Debtor until a date which is more than ninety days following the date this Court enters an order approving the Agreement.

(j) Indemnification. the Debtor agrees (i) to indemnify and hold harmless Mr. Seery and any of his affiliates (the "Indemnified Party"), to the fullest extent lawful, from and against any and all

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<sup>8</sup> For purposes of the Agreement, "Cause" means any of the following grounds for termination of Mr. Seery's engagement, in each case as reasonably determined by the New Board within 60 days of the New Board becoming aware of the existence of the event or circumstance: (A) fraud, embezzlement, or any act of moral turpitude or willful misconduct on the part of Mr. Seery; (B) conviction of or the entry of a plea of *nolo contendere* by Mr. Seery for any felony; (C) the willful breach by Mr. Seery of any material term of the Agreement; or (D) the willful failure or refusal by Mr. Seery to perform his duties to the Debtor, which, if capable of being cured, is not cured on or before fifteen (15) days after Mr. Seery's receipt of written notice from the Debtor.

losses, claims, costs, damages or liabilities (or actions in respect thereof), joint or several, arising out of or related to the Agreement, Mr. Seery's engagement under the Agreement, or any actions taken or omitted to be taken by Mr. Seery or the Debtor in connection with the Agreement and (ii) to reimburse the Indemnified Party for all expenses (including, without limitation, the reasonable fees and expenses of counsel) as they are incurred in connection with investigating, preparing, pursuing, defending, settling or compromising any action, suit, dispute, inquiry, investigation or proceeding, pending or threatened, brought by or against any person (including, without limitation, any shareholder or derivative action, or any fee dispute), arising out of or relating to the Agreement, or such engagement, or actions. However, the Debtor shall not be liable under the foregoing indemnity and reimbursement agreement for any loss, claim, damage or liability which is finally judicially determined by a court of competent jurisdiction to have resulted primarily from the willful misconduct or gross negligence of the Indemnified Party.

The Debtor has agreed to extend the indemnification and insurance currently covering Mr. Seery's role as a director to fully cover Mr. Seery in his roles as chief executive officer and chief restructuring officer. The Debtor is currently working to extend such coverage.

Mr. Seery is also entitled to any indemnification or other similar provisions under the Debtor's existing or future insurance policies, including any policy tails obtained (or which may be obtained in the future), by the Debtor.

#### Relief Requested

20. By this Motion, the Debtor seeks the entry of the Proposed Order authorizing the Debtor to retain Mr. Seery pursuant to the terms of the Agreement, *nunc pro tunc* to March 15, 2020. The Motion also seeks to amend the Foreign Representative Order to appoint Mr. Seery as the Debtor's Foreign Representative, Bermuda Foreign Representative and Cayman Foreign Representative in the stead of Mr. Sharp.

21. The Debtor believes that the Debtor's retention of a chief executive officer and chief restructuring officer constitutes an act in the ordinary course of business, and

consequently, is permissible under Bankruptcy Code section 363(c) without Court approval. However, out of an abundance of caution, the Debtor seeks this Court's approval of the Agreement under Bankruptcy Code section 363(b).

#### Basis For Relief

**B. The Debtor's Entry Into the Agreement is a Valid Exercise of the Debtor's Business Judgment and the Proposed Compensation is Appropriate Under the Circumstances and Within the Range of Similar Market Transactions**

22. The Compensation Committee's decision for the Debtor to retain Mr. Seery pursuant to the terms of the Agreement should be approved pursuant to sections 363(b) and 105(a) of the Bankruptcy Code. Section 363(b)(1) of the Bankruptcy Code provides, in relevant part: "[t]he trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate." 11 U.S.C. § 363(b)(1). In addition, section 105(a) of the Bankruptcy Code provides that the Court "may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code]." 11 U.S.C. § 105(a).

23. The proposed use, sale, or lease of property of the estate may be approved under Bankruptcy Code section 363(b) if it is supported by sound business justification. *See In re Montgomery Ward*, 242 B.R. 147, 153 (D. Del. 1999) ("In determining whether to authorize the use, sale or lease of property of the estate under this section, courts require the debtor to show that a sound business purpose justifies such actions"). Although established in the context of a proposed sale, the "business judgment" standard has been applied in non-sale situations. *See, e.g., Inst. Creditors of Cont'l Air Lines v. Cont'l Air Lines (In re Cont'l Air Lines)*, 780 F.2d 1223, 1226 (5th Cir. 1986) (applying the "business judgment" standard in context of proposed



“use” of estate property). Moreover, pursuant to section 105, this Court has expansive equitable powers to fashion any order or decree which is in the interest of preserving or protecting the value of a debtor’s assets. 11 U.S.C. § 105(a).

24. It is well established that courts are unwilling to interfere with corporate decisions absent a showing of bad faith, self-interest, or gross negligence, and will uphold a board’s decisions as long as they are attributable to “any rational business purpose.” *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 954 (Del. 1985) (citing *Sinclair Oil Corp. v. Levien*, 280 A.2d 717, 720 (Del. 1971)). Whether or not there are sufficient business reasons to justify the use of assets of the estate depends upon the facts and circumstances of each case. *See Comm. of Equity Sec. Holders v. Lionel Corp. (In re Lionel Corp.)*, 722 F.2d 1063, 1071 (2d Cir. 1983). In this case, the Debtor has ample justification to retain Mr. Seery as the Debtor’s chief executive officer and chief restructuring officer pursuant to the Agreement. The Final Term Sheet expressly contemplated that the New Board could appoint a chief executive officer and that the chief executive officer could also be one of the Independent Directors. Because Mr. Seery will also be serving as chief restructuring officer, it is not necessary to have two separate ranking chief restructuring officers, especially considering that Mr. Sharp (the current chief restructuring officer) and his firm has agreed to continue to provide financial advisory services on behalf of the Debtor.<sup>9</sup> Mr. Seery is well- qualified to serve as the Debtor’s chief executive officer and chief restructuring officer.

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<sup>9</sup> See Amended Motion of the Debtor Pursuant to 11 U.S.C. §§ 105(a) and 363(b) to Employ and Retain Development Specialists, Inc. to Provide Financial Advisory and Restructuring-Related Services, Nunc Pro Tunc, to March 15, 2020 filed concurrently herewith

25. The Compensation Committee negotiated the Agreement in good faith and at arm's length. The Compensation Committee also worked with the Debtor's compensation consultant, Mercer (US) Inc., to determine the appropriate compensation for Mr. Seery as chief executive officer and chief restructuring officer. The Compensation Committee, therefore, believes that the terms of the Agreement are reasonable, are consistent with the market within the Debtor's industry, and are entirely appropriate given the scope of Mr. Seery's duties. Accordingly, entry into the Agreement is a sound exercise of the Debtor's business judgment.

26. Finally, the Debtor requests that the Court apply the same criteria by which parties in interest must first petition the Court prior to asserting claims against the Independent Director approved in the Settlement Order be extended to Mr. Seery in his capacity as chief executive officer and chief restructuring officer contemplated by this Motion. *See* Settlement Order, ¶ 10. The rationale for the Court to first determine whether or not a colorable claim or cause of action can be maintained against the Mr. Seery, as one of the Independent Directors, is equally applicable to Mr. Seery in his capacity as chief executive officer and chief restructuring officer, will further aid in the implementation of the Settlement Order, and discourage frivolous litigation. As was true in the Settlement Order with respect to the Independent Directors, no parties will be prejudiced by having to first apply to this Court to determine the propriety of any hypothetical claim that may be asserted against Mr. Seery in his officer capacities of the Debtor.

C. The Debtor Has Satisfied Bankruptcy Code Section 503(c)(3)

27. Bankruptcy Code section 503(c)(3) provides that “transfers or obligations that are outside the ordinary course of business . . . including transfers made to . . . consultants

hired after the date of the filing of the petition” are not allowed if they are “not justified by the facts and circumstances of the case.” 11 U.S.C. § 503(c)(3). Courts generally use a form of the “business judgment” and the “facts and circumstances” standard. *See In re Pilgrim’s Pride Corp.*, 401 B.R. 229, 236-37 (Bankr. N.D. Tex. 2009) (citing *In re Dura Auto Sys., Inc.*, Case No. 06-11202 (Bankr. D. Del. June 29, 2007) and *In re Supplements LT, Inc.*, Case No. 08-10446 (KJC) (Bankr. D. Del. Apr. 14, 2008)). Specifically, the court examines first, whether the transaction meets the Debtor’s business judgment standard, and second, whether the facts and circumstances justify the transaction. *See In re Pilgrim’s Pride Corp.*, 401 B.R. at 237 (Bankr. N.D. Tex. 2009).

28. The Debtor submits that the proposed transaction is within the ordinary course of its business and thus that Bankruptcy Code section 503(c)(3) does not apply to the Agreement. Nevertheless, for the reasons stated above — the benefits from Mr. Seery’s leadership skills and industry experience — even if this were outside the ordinary course of business, entry into the Agreement is well within the Debtor’s business judgment as applied to the facts and circumstances of the Debtor. Further, the facts and circumstances of this case support entry into the relationship under the Agreement where the Debtor will benefit from the ability to retain Mr. Seery at a critical juncture to ongoing restructuring efforts.

29. For the reasons set forth above, the Debtor submits that the relief requested herein is in the best interest of the Debtor, its estate, creditors, stakeholders, and other parties in interest, and therefore, should be granted.

**D. The Proposed Chief Executive Officer and Chief Restructuring Officer Should Also Serve as the Debtor's Foreign Representative**

30. Bankruptcy Code section 1505 provides that:

A trustee or another entity (including an examiner) may be authorized by the court to act in a foreign country on behalf of an estate created under section 541. An entity authorized to act under this section may act in any way permitted by the applicable foreign law.

**11 U.S.C. § 1505.**

31. The Debtor respectfully submits that Mr. Seery is qualified and capable of representing the Debtor's estate as the Foreign Representative. The Debtor believes it is appropriate for Mr. Seery, as an officer of the Debtor, to replace Mr. Sharp as Foreign Representative inasmuch as Mr. Sharp will no longer be an officer of the Debtor if the Motion is granted. In order to avoid any possible confusion or doubt regarding this authority and to comply with the requirements of Part XVII of the Cayman Law, the Debtor seeks entry of an order, pursuant to section 1505 of the Bankruptcy Code, explicitly substituting Mr. Seery in the place of Mr. Sharp as the Debtor's Foreign Representative, including specifically to serve as the Bermuda Foreign Representative and Cayman Foreign Representative.

32. For the reasons set forth in the Foreign Representative Motion, authorizing Mr. Seery to act as the Foreign Representative on behalf of the Debtor's estate in Bermuda, the Cayman Islands or any other foreign proceeding will allow coordination of this chapter 11 case and each of the foreign proceedings and provide an effective mechanism to protect and maximize the value of the Debtor's assets and estate. Courts have routinely granted relief similar to that requested herein in other large chapter 11 cases where a debtor has foreign assets or operations requiring a recognition proceeding. *See, e.g., In re CJ Holding Co.*, No. 16-33590 (Bankr. S.D.

Tex. July 21, 2016); ECF No. 59; *In re CHC Group Ltd.*, No. 16-31854 (Bankr. N.D. Tex. Sept. 20, 2016), ECF No. 884; *In re Ultra Petroleum Corp.*, No. 16-32202 (Bankr. S.D. Tex. May 3, 2016); *In re Digital Domain Media Grp., Inc.*, No. 12-12568 (BLS) (Bankr. D. Del. Sept. 12, 2012); ECF No. 82; *In re Probe Resources US Ltd.*, No. 10-40395 (Bankr. S.D. Tex. Mar. 21, 2011); ECF N. 320; *In re Bigler LP*, No. 09-38188 (Bankr. S.D. Tex. Jan. 12, 2010), ECF No. 159; *In re Horsehead Holdings Corp.*, No. 16-10287 (CSS) (Bankr. D. Del. Feb. 4, 2016); *In re Colt Holding Co. LLC*, No. 15-11296 (LSS) (Bankr. D. Del. June 16, 2015). The Debtor believes it is appropriate for one of its officers to serve as the Foreign Representative. In several jurisdictions, an officer or someone acting in a similar capacity is a prerequisite to serve as a Foreign Representative.<sup>10</sup> As more fully explained in the Foreign Representative Motion, the Debtor has assets in jurisdictions other than the United States, including in Bermuda and the Cayman Islands. To the extent any disputes with respect to such assets arise, it is critical that the Foreign Representative be permitted to appear on behalf of the Debtor and its estate in any court in which a foreign proceeding may be pending.

#### Notice

33. Notice of this Motion shall be given to the following parties or, in lieu thereof, to their counsel, if known: (a) the Office of the United States Trustee; (b) the Office of the United States Attorney for the Northern District of Texas; (c) the Debtor's principal secured

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<sup>10</sup> See e.g. Part XVII, Section 240 of the Companies Law (2018 Revision) of the Cayman Islands requiring that the foreign representative be "a trustee, liquidator or other official in respect of a debtor for the purposes of a foreign bankruptcy proceeding." In addition, and as more fully explained in the Foreign Representative Motion, Bermuda common law and conflict of laws principles will recognize the authority of a foreign insolvency officer appointed in proceedings in the jurisdiction of incorporation of a company (or, in the instant case, the jurisdiction of the establishment of a limited partnership) to act on behalf of and in the name of the company (or partnership) in Bermuda.

parties; (d)counsel to the Committee; and (e)parties requesting notice pursuant to Bankruptcy Rule 2002. The Debtor submits that, in light of the nature of the relief requested, no other or further notice need be given.

#### Conclusion

WHEREFORE, the Debtor respectfully requests that the Court enter an order, substantially in the form annexed hereto as **Exhibit A**, granting the relief requested in the Motion and such other and further relief as may be just and proper.



Dated: June 23, 2020

PACHULSKI STANG ZIEHL & JONES LLP  
Jeffrey N. Pomerantz (CA Bar No.143717)  
(admitted pro hac vice)  
Ira D. Kharasch (CA Bar No. 109084)  
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-and-

*/s/ Zachery Z. Annable*

---

HAYWARD & ASSOCIATES PLLC

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Zachery Z. Annable

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10501 N. Central Expy, Ste. 106

Dallas, Texas 75231

Tel: (972) 755-7100

Fax: (972) 755-7110

*Counsel for the Debtor and Debtor-in-Possession*

**EXHIBIT A**

**Proposed Order**

**UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION**

|                                               |   |                             |
|-----------------------------------------------|---|-----------------------------|
| <b>In re:</b>                                 | § |                             |
|                                               | § |                             |
| <b>HIGHLAND CAPITAL MANAGEMENT,<br/>L.P.,</b> | § | <b>Case No. 19-34054</b>    |
|                                               | § | <b>Chapter 11</b>           |
|                                               | § |                             |
| <b>Debtor.</b>                                | § | <b>Re: Docket No. _____</b> |
|                                               | § |                             |

**ORDER APPROVING DEBTOR’S MOTION UNDER  
BANKRUPTCY CODE SECTIONS 105(a) AND 363(b)  
AUTHORIZING RETENTION OF JAMES P. SEERY, JR., AS  
CHIEF EXECUTIVE OFFICER, CHIEF RESTRUCTURING OFFICER, AND  
FOREIGN REPRESENTATIVE NUNC PRO TUNC TO MARCH 15, 2020**

Upon the *Debtor’s Motion Under Bankruptcy Code Sections 105(a) and 363(b)*  
*for Authorization to Retain James P. Seery, Jr., as Chief Executive Officer, Chief Restructuring*  
*Officer and Foreign Representative Nunc Pro Tunc To March 15, 2020* (the “Motion”),<sup>1</sup> and the  
Court finding that: (i) this Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157

<sup>1</sup> All terms not otherwise defined herein shall be given the meanings ascribed to them in the Motion.

and 1334; (ii) venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409; (iii) this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2); (iv) due and sufficient notice of the Motion has been given; (v) entry into the Agreement was an exercise of the Debtor's sound business judgment; and (vi) it appearing that the relief requested in the Motion is necessary and in the best interests of the Debtor's estate and creditors; and good and sufficient cause appearing therefor, it is hereby

ORDERED, ADJUDGED, AND DECREED that:

1. The Motion is granted.
2. Pursuant to sections 363(b) and 105(a) of the Bankruptcy Code, the Agreement attached hereto as Exhibit 1 and all terms and conditions thereof are approved, *nunc pro tunc* to March 15, 2020.
3. The Debtor is hereby authorized to enter into and perform under the Agreement.
4. The Debtor is authorized to indemnify Mr. Seery pursuant to the terms of the Agreement. Mr. Seery is also entitled to any indemnification or other similar provisions under the Debtor's existing or future insurance policies, including any policy tails obtained (or which may be obtained in the future), by the Debtor. The Debtor and Strand are authorized to enter into any agreements necessary to execute or implement the transactions described in this paragraph. For avoidance of doubt and notwithstanding anything to the contrary in this Order, Mr. Seery shall be entitled to any state law indemnity protections to which he may be entitled under applicable law.

5. No entity may commence or pursue a claim or cause of action of any kind against Mr. Seery relating in any way to his role as the chief executive officer and chief restructuring officer of the Debtor without the Bankruptcy Court (i) first determining after notice that such claim or cause of action represents a colorable claim of willful misconduct or gross negligence against Mr. Seery, and (ii) specifically authorizing such entity to bring such claim. The Bankruptcy Court shall have sole jurisdiction to adjudicate any such claim for which approval of the Court to commence or pursue has been granted.

6. Notwithstanding Bankruptcy Rule 6004(h), the terms and conditions of this Order shall be immediately effective and enforceable upon its entry.

7. This Court shall retain jurisdiction over any and all matters arising from or related to the interpretation and/or implementation of this Order.

8. The Foreign Representative Order is hereby amended to substitute James P. Seery, Jr., as the chief executive officer, in place of Bradley S. Sharp, as the Debtor's Foreign Representative, Bermuda Foreign Representative and Cayman Foreign Representative. All other provisions of the Foreign Representative Order shall remain in full force and effect.

**### END OF ORDER ###**

**EXHIBIT A-1**

**Engagement Agreement**



795 Columbus Ave., 12A  
New York, New York 10025  
631-804-2049  
jpseeryjr@gmail.com

June 23, 2020

CONFIDENTIAL

The Board of Directors of Strand Advisors, Inc.  
c/o Highland Capital Management, L.P.  
300 Crescent Court, Suite 700  
Dallas, Texas 75201

Re: Highland Capital Management L.P. (the “Company”)

Dear Fellow Board Members:

This letter agreement (“Agreement”) sets forth the terms and conditions of the engagement of the undersigned James P. Seery, Jr. (“I”, “me” or “my”), as Chief Executive Officer (“CEO”) and Chief Restructuring Officer (“CRO”), effective as of March 15, 2020 (the “Commencement Date”), by the Company and its affiliates to perform financial advisory services as detailed below.

I appreciate the trust you have placed in me by asking me to assume these roles and thank you for the opportunity to continue to work with you to restructure the Company.

Roles:

I will serve as the CEO and CRO of the Company during its Chapter 11 bankruptcy case (the “Bankruptcy Case”) currently pending in the United States Bankruptcy Court for the Northern District of Texas (the “Bankruptcy Court”).

In those roles, I will be responsible for overall management of the business of the Company in Chapter 11 including, directing the reorganization and restructuring of the Company, monetization of assets, resolution of claims, development and negotiation of a plan of reorganization or liquidation, and implementation of such a plan.

My direct reports will include the individuals at the Company that currently report to the Board of Directors of Strand Advisors, Inc. (the “Board”) or such other individuals employed by the Company as I determine should report to directly to me. In the event that the Board determines to restructure the reporting lines or functions of the Company, my direct reports will be amended in accordance with the Board approved restructuring.

At all times, I will remain a full member of the Board entitled to vote on all matters other than those on which I am conflicted.

I will devote as much time to this engagement as I determine is required to execute my responsibilities as CEO and CRO. I will have no specific on-site requirements in Dallas, but will be on site as much as I determine is necessary to execute my responsibilities as CEO and CRO, consistent with Covid-19 orders applicable to Dallas and New York City.

#### Limitations on Services

My services under this engagement are limited to those specifically noted in this Agreement and do not include legal, accounting, or tax-related assistance or advisory services. For the avoidance of doubt, I am not providing any legal services in connection with this engagement and will have not any duties as a lawyer to the Company, the Board, or any of the Company's employees. The accuracy and completeness of all information submitted to me by the Company are the sole responsibility of the Company, and I will be entitled to rely on such information without independent investigation or verification.

In my role as CEO and CRO, I will act as an independent professional contractor to the Company and will not be an employee of the Company. I will provide and pay for my own benefits, including medical benefits, by J.P Seery & Co. LLC or otherwise.

#### Fees and Expenses:

In consideration of my acceptance of this engagement and performance of the services pursuant to this Agreement, the Company shall pay the following:

##### 1. Compensation for Services:

- a. Base Compensation: As compensation for my services as CEO and CRO of the Company, the Company shall pay me \$150,000.00 per calendar month ("Base Compensation"). Base Compensation shall be due and payable at the start of each calendar month. Consistent with current Board compensation practice, invoices rendered by me to the Company are due and payable by the Company on receipt. Payment of the Base Compensation will be retroactive to March 15, 2020.
- b. Bonus Compensation/Restructuring Fee:
  - i. The Company has agreed to pay me a restructuring fee upon confirmation of either a Case Resolution Plan or a Monetization Vehicle Plan in each case as defined below (the "Restructuring Fee").
  - ii. Case Resolution Restructuring Plan
    1. On confirmation of any plan or reorganization or liquidation based on resolution of a material amount of the outstanding claims and their respective treatment, even if such plan includes (x) a debtor/creditor trust or similar monetization and claims resolution vehicle, (y) post-confirmation litigation of certain of the claims, and (z) post-confirmation monetization of debtor assets (a "Case Resolution Plan"):
      - a. \$1,000,000 on confirmation of the Case Resolution Plan;
      - b. \$500,000 on the effective date of the Case Resolution Plan; and
      - c. \$750,000 on completion of cash or property distributions to creditors as contemplated by the Case Resolution Plan.

iii. Debtor/Creditor Monetization Vehicle Restructuring Fee:

1. On confirmation of any plan or reorganization or liquidation based on a debtor/creditor trust or similar asset monetization and claims resolution vehicle that does not include agreement among the debtor and creditors on a material amount of the outstanding claims and their respective treatment at confirmation (a “Monetization Vehicle Plan”):
  - a. \$500,000 on confirmation of the Monetization Vehicle Plan;
  - b. \$250,000 on the effective date of the Monetization Vehicle Plan; and
  - c. A contingent restructuring fee to be determined by the board or oversight committee installed to oversee the implementation of any Monetization Vehicle Plan based on the CEO/CRO (or acting as trustee) based upon performance under the plan after all material distributions under the Monetization Vehicle Plan are made.
2. Out-of-Pocket Expenses: In addition to the Base and Bonus Compensation, I shall be entitled to reimbursement for actual and reasonable out-of-pocket expenses (“Expenses”) incurred in connection with the provision of services hereunder. Expenses will be billed along with Base Compensation and shall be paid by the Company at the same time. Expenses will be generally consistent with expenses incurred to date as a member of the Board.

Bankruptcy Court Approval

Notwithstanding anything herein to the contrary, I understand that this Agreement is contingent, in all respects, on the approval of the Bankruptcy Court. I also understand that the Company will seek approval of this Agreement in stages and that the Company will first seek approval of my retention as CEO and CRO and the payment of the Base Compensation and will defer seeking Bankruptcy Court approval of the Restructuring Fee until there have been further developments in the Bankruptcy Case.

Conflicts and Other Engagements

I am not aware of any potential conflicts of interest based on my understanding of the various parties involved in this matter to date.

The Company is aware that this engagement is not an exclusive engagement of my time, and that I have and will continue to have other business engagements and investments unrelated to the Company. Nothing in this Agreement or otherwise precludes me from representing or working with or for any other person or entity in matters not directly related to the services being provided to the Company under this Agreement. However, I will not take on any engagements directly adverse to the Company during the term of this engagement.

Privilege

I understand that in the course of this engagement, I may become party to or my services may become part of work product of legal counsel to the Company (the Company's in-house and outside counsel are collectively referred to as "Counsel"), and all communications between Counsel and me relating to this engagement shall be protected from disclosure to third parties under the attorney work product doctrine and/or the attorney-client privilege, and, therefore, shall be treated by me as privileged and confidential. I further understand that the Company has the exclusive right to waive the attorney-client privilege, and Counsel has the exclusive right to waive the protections afforded under the attorney work-product doctrine.

#### Termination of Engagement

This Agreement may be terminated at any time by either the Company or by me upon two weeks advance written notice given to the other party. The termination of this Agreement shall not affect my right to receive, and the Company's obligation to pay, any and all Base Compensation and Expenses incurred (even if not billed) prior to the giving of the termination notice; provided, however, that (i) if this Agreement is terminated by me, the amount of Base Compensation owed shall be calculated based on the actual number of days worked during the applicable month and I will return any Base Compensation received in excess of such amount and (ii) if this Agreement is terminated by the Company, Base Compensation shall be deemed fully earned as of the first day of any month. Bonus Compensation shall be earned by me immediately upon termination of me by the Company; provided, however, I shall not be entitled to Bonus Compensation if (a) the Bankruptcy Case is converted to chapter 7 or dismissed; (b) a chapter 11 trustee is appointed in the Bankruptcy Case; (c) I am terminated by the Company for Cause; or (d) I resign prior to confirmation of a plan or court approval of a sale as described in the Fees and Expense/Compensation for Services section hereof. For purposes of this Agreement, "Cause" means any of the following grounds for termination of my engagement, in each case as reasonably determined by the Board within 60 days of the Board becoming aware of the existence of the event or circumstance: (A) fraud, embezzlement, or any act of moral turpitude or willful misconduct on my part; (B) conviction of or the entry of a plea of nolo contendere by me for any felony; (C) the willful breach by me of any material term of this Agreement; or (D) the willful failure or refusal by me to perform my duties to the Company, which, if capable of being cured, is not cured on or before fifteen (15) days after my receipt of written notice from the Company.

#### Conditional Requirement to Seek Further Bankruptcy Court Approval of Agreement

The official committee of unsecured creditors in the Bankruptcy Case (the "Committee") may, upon two weeks advance written notice to the Company, require the Company to file a motion with the Bankruptcy Court on normal notice seeking a continuation of this Agreement and if such motion is not filed, this Agreement will terminate at the expiration of such two week period. If the Company files such motion, I will be entitled to my Base Compensation through and including the date on which a final order is entered on such motion by the Bankruptcy Court. Notwithstanding anything herein to the contrary, the Committee may not deliver such notice to the Company until a date which is more than ninety days following the date the Bankruptcy Court enters an order approving this Agreement.

### Indemnification

As a material part of the consideration to me under this Agreement, the Company agrees (i) to indemnify and hold harmless me and any of my affiliates (the “Indemnified Party”), to the fullest extent lawful, from and against any and all losses, claims, costs, damages or liabilities (or actions in respect thereof), joint or several, arising out of or related to this Agreement, my engagement under this Agreement, or any actions taken or omitted to be taken by me or the Company in connection with this Agreement and (ii) to reimburse the Indemnified Party for all expenses (including, without limitation, the reasonable fees and expenses of counsel) as they are incurred in connection with investigating, preparing, pursuing, defending, settling or compromising any action, suit, dispute, inquiry, investigation or proceeding, pending or threatened, brought by or against any person (including, without limitation, any shareholder or derivative action, or any fee dispute), arising out of or relating to this Agreement, or such engagement, or actions. However, the Company shall not be liable under the foregoing indemnity and reimbursement agreement for any loss, claim, damage or liability which is finally judicially determined by a court of competent jurisdiction to have resulted primarily from the willful misconduct or gross negligence of the Indemnified Party.

The indemnification and insurance currently covering my role as a director shall be extended to me and fully cover me as provided therein in my roles as CEO and CRO.

### Miscellaneous

This Agreement (a) constitutes the entire agreement of the parties with respect to the subject matter hereof and supersedes any other communications, understandings or agreements among the parties with respect to the subject matter hereof, and (b) may be modified, amended or supplemented only by written agreement among all the parties hereto.

This Agreement is subject to approval by the Bankruptcy Court. As part of such approval the Company shall request that any such order approving this Agreement contain a provision extending the protections afforded to me as a Board Member pursuant to Paragraph 10 of the Order Approving Settlement with Official Committee of Unsecured Creditors Regarding Governance of the Debtor and Procedures for Operations in the Ordinary Course entered by the Bankruptcy Court on January 9, 2020 [Docket No. 339] to my role as CEO and CRO, which Order prohibits the commencement of any action against me without first obtaining Bankruptcy Court approval to initiate such action.

This Agreement and all controversies arising from or related to performance hereunder shall be governed by and construed in accordance with the laws of the State of New York. The parties hereby submit to the jurisdiction of and venue in the federal and state courts located in New York City and waive any right to trial by jury in connection with any dispute related to this Agreement.

This Agreement shall be binding upon the parties and their respective successors and assigns, and no other person shall acquire or have any right under or by virtue of this Agreement.



Failure of any party at any time to require performance of any provision of this Agreement shall not affect the right to require full performance thereof at any time thereafter, and the waiver by any party of a breach of such provisions shall not be taken as or held to be a waiver of any subsequent breach or as nullifying the effectiveness of such provision.

Notices provided for in this Agreement shall be in writing and shall be deemed to have been duly given when delivered by hand or overnight courier or three days after it has been mailed by United States registered mail, return receipt requested, postage prepaid, addressed to the respective address set forth above in this Agreement, or to such other address as either party may have furnished to the other in writing in accordance herewith.

This Agreement and my rights and duties hereunder shall not be assignable or delegable by me.

The Company may withhold from any amounts payable under this Agreement such Federal, state and local taxes as may be required to be withheld pursuant to any applicable law or regulation.

This Agreement may be executed (including by electronic execution) in any number of counterparts, each of which when so executed shall be deemed an original, but all such counterparts shall constitute one and the same instrument. Delivery of an executed counterpart of this Agreement by electronic mail shall have the same force and effect as the delivery of an original executed counterpart of this Agreement.

Please confirm the foregoing is in accordance with your understanding by signing and returning a copy of this Agreement, whereupon it shall become binding and enforceable in accordance with its terms.

Very truly yours,



James. P. Seery, Jr.

AGREED AND ACCEPTED

HIGHLAND CAPITAL MANAGEMENT L.P.

By: Strand Advisors, Inc., its general partner

---

John Dubel  
Director  
Strand Advisors, Inc.

---

Russell Nelms  
Director  
Strand Advisors, Inc.



This Agreement shall be binding upon the parties and their respective successors and assigns, and no other person shall acquire or have any right under or by virtue of this Agreement.

Failure of any party at any time to require performance of any provision of this Agreement shall not affect the right to require full performance thereof at any time thereafter, and the waiver by any party of a breach of such provisions shall not be taken as or held to be a waiver of any subsequent breach or as nullifying the effectiveness of such provision.

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Please confirm the foregoing is in accordance with your understanding by signing and returning a copy of this Agreement, whereupon it shall become binding and enforceable in accordance with its terms.


Very truly yours,

James. P. Seery, Jr.

AGREED AND ACCEPTED

**HIGHLAND CAPITAL MANAGEMENT L.P.**

By: Strand Advisors, Inc., its general partner

  
\_\_\_\_\_  
John Dubel  
Director  
Strand Advisors, Inc.

\_\_\_\_\_  
Russell Nelms  
Director  
Strand Advisors, Inc.

This Agreement shall be binding upon the parties and their respective successors and assigns, and no other person shall acquire or have any right under or by virtue of this Agreement.

Failure of any party at any time to require performance of any provision of this Agreement shall not affect the right to require full performance thereof at any time thereafter, and the waiver by any party of a breach of such provisions shall not be taken as or held to be a waiver of any subsequent breach or as nullifying the effectiveness of such provision.

Notices provided for in this Agreement shall be in writing and shall be deemed to have been duly given when delivered by hand or overnight courier or three days after it has been mailed by United States registered mail, return receipt requested, postage prepaid, addressed to the respective address set forth above in this Agreement, or to such other address as either party may have furnished to the other in writing in accordance herewith.

This Agreement and my rights and duties hereunder shall not be assignable or delegable by me.

The Company may withhold from any amounts payable under this Agreement such Federal, state and local taxes as may be required to be withheld pursuant to any applicable law or regulation.

This Agreement may be executed (including by electronic execution) in any number of counterparts, each of which when so executed shall be deemed an original, but all such counterparts shall constitute one and the same instrument. Delivery of an executed counterpart of this Agreement by electronic mail shall have the same force and effect as the delivery of an original executed counterpart of this Agreement.

Please confirm the foregoing is in accordance with your understanding by signing and returning a copy of this Agreement, whereupon it shall become binding and enforceable in accordance with its terms.

Very truly yours,

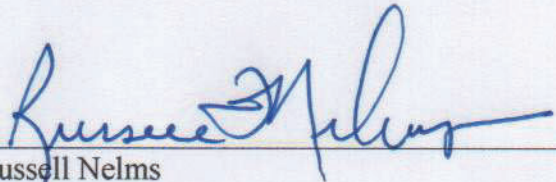
James. P. Seery, Jr.

AGREED AND ACCEPTED

**HIGHLAND CAPITAL MANAGEMENT L.P.**

By: Strand Advisors, Inc., its general partner

\_\_\_\_\_  
John Dubel  
Director  
Strand Advisors, Inc.

  
\_\_\_\_\_  
Russell Nelms  
Director  
Strand Advisors, Inc.

# EXHIBIT 3





CLERK, U.S. BANKRUPTCY COURT  
NORTHERN DISTRICT OF TEXAS

# ENTERED

**THE DATE OF ENTRY IS ON  
THE COURT'S DOCKET**

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

**Signed July 16, 2020**

Harry H. C. Jones  
United States Bankruptcy Judge

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

**In re:**

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

**Debtor.**

~~~~~

Case No. 19-34054
Chapter 11

Re: Docket No. 774

**ORDER APPROVING DEBTOR'S MOTION UNDER
BANKRUPTCY CODE SECTIONS 105(a) AND 363(b)
AUTHORIZING RETENTION OF JAMES P. SEERY, JR., AS
CHIEF EXECUTIVE OFFICER, CHIEF RESTRUCTURING OFFICER, AND
FOREIGN REPRESENTATIVE NUNC PRO TUNC TO MARCH 15, 2020**

Upon the *Debtor's Motion under Bankruptcy Code Sections 105(a) and 363(b) for Authorization to Retain James P. Seery, Jr., as Chief Executive Officer, Chief Restructuring Officer and Foreign Representative Nunc Pro Tunc To March 15, 2020* (the "Motion"),¹ and the

¹ All terms not otherwise defined herein shall be given the meanings ascribed to them in the Motion.



1. The Motion is **GRANTED**.

2. Pursuant to sections 363(b) and 105(a) of the Bankruptcy Code, the Agreement attached hereto as **Exhibit 1** and all terms and conditions thereof are approved, *nunc pro tunc* to March 15, 2020.

3. The Debtor is hereby authorized to enter into and perform under the Agreement.

2

5. No entity may commence or pursue a claim or cause of action of any kind against Mr. Seery relating in any way to his role as the chief executive officer and chief restructuring officer of the Debtor without the Bankruptcy Court (i) first determining after notice that such claim or cause of action represents a colorable claim of willful misconduct or gross negligence against Mr. Seery, and (ii) specifically authorizing such entity to bring such claim. The Bankruptcy Court shall have sole jurisdiction to adjudicate any such claim for which approval of the Court to commence or pursue has been granted.

6. Notwithstanding anything in the Motion, the Agreement or the Order to the contrary, the Agreement shall be deemed terminated upon the effective date of a confirmed plan of reorganization unless such plan provides otherwise.

7. Notwithstanding Bankruptcy Rule 6004(h), the terms and conditions of this Order shall be immediately effective and enforceable upon its entry.

8. This Court shall retain jurisdiction over any and all matters arising from or related to the interpretation and/or implementation of this Order.

9. The Foreign Representative Order is hereby amended to substitute James P. Seery, Jr., as the chief executive officer, in place of Bradley S. Sharp, as the Debtor's Foreign Representative, Bermuda Foreign Representative and Cayman Foreign Representative. All other provisions of the Foreign Representative Order shall remain in full force and effect.

###END OF ORDER###

EXHIBIT 1

Engagement Agreement

CONFIDENTIAL

Re: Highland Capital Management L.P. (the “Company”)

This letter agreement (“Agreement”) sets forth the terms and conditions of the engagement of the undersigned James P. Seery, Jr. (“I”, “me” or “my”), as Chief Executive Officer (“CEO”) and Chief Restructuring Officer (“CRO”), effective as of March 15, 2020 (the “Commencement Date”), by the Company and its affiliates to perform financial advisory services as detailed below.

Roles:

In those roles, I will be responsible for overall management of the business of the Company in Chapter 11 including, directing the reorganization and restructuring of the Company, monetization of assets, resolution of claims, development and negotiation of a plan of reorganization or liquidation, and implementation of such a plan.

At all times, I will remain a full member of the Board entitled to vote on all matters other than those on which I am conflicted.

I will devote as much time to this engagement as I determine is required to execute my responsibilities as CEO and CRO. I will have no specific on-site requirements in Dallas, but will be on site as much as I determine is necessary to execute my responsibilities as CEO and CRO, consistent with Covid-19 orders applicable to Dallas and New York City.

Limitations on Services

My services under this engagement are limited to those specifically noted in this Agreement and do not include legal, accounting, or tax-related assistance or advisory services. For the avoidance of doubt, I am not providing any legal services in connection with this engagement and will have not any duties as a lawyer to the Company, the Board, or any of the Company's employees. The accuracy and completeness of all information submitted to me by the Company are the sole responsibility of the Company, and I will be entitled to rely on such information without independent investigation or verification.

In my role as CEO and CRO, I will act as an independent professional contractor to the Company and will not be an employee of the Company. I will provide and pay for my own benefits, including medical benefits, by J.P Seery & Co. LLC or otherwise.

Fees and Expenses:

In consideration of my acceptance of this engagement and performance of the services pursuant to this Agreement, the Company shall pay the following:

1. Compensation for Services:

- a. Base Compensation: As compensation for my services as CEO and CRO of the Company, the Company shall pay me \$150,000.00 per calendar month ("Base Compensation"). Base Compensation shall be due and payable at the start of each calendar month. Consistent with current Board compensation practice, invoices rendered by me to the Company are due and payable by the Company on receipt. Payment of the Base Compensation will be retroactive to March 15, 2020.
- b. Bonus Compensation/Restructuring Fee:
 - i. The Company has agreed to pay me a restructuring fee upon confirmation of either a Case Resolution Plan or a Monetization Vehicle Plan in each case as defined below (the "Restructuring Fee").
 - ii. Case Resolution Restructuring Plan
 1. On confirmation of any plan or reorganization or liquidation based on resolution of a material amount of the outstanding claims and their respective treatment, even if such plan includes (x) a debtor/creditor trust or similar monetization and claims resolution vehicle, (y) post-confirmation litigation of certain of the claims, and (z) post-confirmation monetization of debtor assets (a "Case Resolution Plan"):
 - a. \$1,000,000 on confirmation of the Case Resolution Plan;
 - b. \$500,000 on the effective date of the Case Resolution Plan; and
 - c. \$750,000 on completion of cash or property distributions to creditors as contemplated by the Case Resolution Plan.

iii. Debtor/Creditor Monetization Vehicle Restructuring Fee:

1. On confirmation of any plan or reorganization or liquidation based on a debtor/creditor trust or similar asset monetization and claims resolution vehicle that does not include agreement among the debtor and creditors on a material amount of the outstanding claims and their respective treatment at confirmation (a “Monetization Vehicle Plan”):
 - a. \$500,000 on confirmation of the Monetization Vehicle Plan;
 - b. \$250,000 on the effective date of the Monetization Vehicle Plan; and
 - c. A contingent restructuring fee to be determined by the board or oversight committee installed to oversee the implementation of any Monetization Vehicle Plan based on the CEO/CRO (or acting as trustee) based upon performance under the plan after all material distributions under the Monetization Vehicle Plan are made.
2. Out-of-Pocket Expenses: In addition to the Base and Bonus Compensation, I shall be entitled to reimbursement for actual and reasonable out-of-pocket expenses (“Expenses”) incurred in connection with the provision of services hereunder. Expenses will be billed along with Base Compensation and shall be paid by the Company at the same time. Expenses will be generally consistent with expenses incurred to date as a member of the Board.

Bankruptcy Court Approval

Notwithstanding anything herein to the contrary, I understand that this Agreement is contingent, in all respects, on the approval of the Bankruptcy Court. I also understand that the Company will seek approval of this Agreement in stages and that the Company will first seek approval of my retention as CEO and CRO and the payment of the Base Compensation and will defer seeking Bankruptcy Court approval of the Restructuring Fee until there have been further developments in the Bankruptcy Case.

Conflicts and Other Engagements

I am not aware of any potential conflicts of interest based on my understanding of the various parties involved in this matter to date.

The Company is aware that this engagement is not an exclusive engagement of my time, and that I have and will continue to have other business engagements and investments unrelated to the Company. Nothing in this Agreement or otherwise precludes me from representing or working with or for any other person or entity in matters not directly related to the services being provided to the Company under this Agreement. However, I will not take on any engagements directly adverse to the Company during the term of this engagement.

Privilege

I understand that in the course of this engagement, I may become party to or my services may become part of work product of legal counsel to the Company (the Company's in-house and outside counsel are collectively referred to as "Counsel"), and all communications between Counsel and me relating to this engagement shall be protected from disclosure to third parties under the attorney work product doctrine and/or the attorney-client privilege, and, therefore, shall be treated by me as privileged and confidential. I further understand that the Company has the exclusive right to waive the attorney-client privilege, and Counsel has the exclusive right to waive the protections afforded under the attorney work-product doctrine.

Termination of Engagement

This Agreement may be terminated at any time by either the Company or by me upon two weeks advance written notice given to the other party. The termination of this Agreement shall not affect my right to receive, and the Company's obligation to pay, any and all Base Compensation and Expenses incurred (even if not billed) prior to the giving of the termination notice; provided, however, that (i) if this Agreement is terminated by me, the amount of Base Compensation owed shall be calculated based on the actual number of days worked during the applicable month and I will return any Base Compensation received in excess of such amount and (ii) if this Agreement is terminated by the Company, Base Compensation shall be deemed fully earned as of the first day of any month. Bonus Compensation shall be earned by me immediately upon termination of me by the Company; provided, however, I shall not be entitled to Bonus Compensation if (a) the Bankruptcy Case is converted to chapter 7 or dismissed; (b) a chapter 11 trustee is appointed in the Bankruptcy Case; (c) I am terminated by the Company for Cause; or (d) I resign prior to confirmation of a plan or court approval of a sale as described in the Fees and Expense/Compensation for Services section hereof. For purposes of this Agreement, "Cause" means any of the following grounds for termination of my engagement, in each case as reasonably determined by the Board within 60 days of the Board becoming aware of the existence of the event or circumstance: (A) fraud, embezzlement, or any act of moral turpitude or willful misconduct on my part; (B) conviction of or the entry of a plea of nolo contendere by me for any felony; (C) the willful breach by me of any material term of this Agreement; or (D) the willful failure or refusal by me to perform my duties to the Company, which, if capable of being cured, is not cured on or before fifteen (15) days after my receipt of written notice from the Company.

Conditional Requirement to Seek Further Bankruptcy Court Approval of Agreement

The official committee of unsecured creditors in the Bankruptcy Case (the "Committee") may, upon two weeks advance written notice to the Company, require the Company to file a motion with the Bankruptcy Court on normal notice seeking a continuation of this Agreement and if such motion is not filed, this Agreement will terminate at the expiration of such two week period. If the Company files such motion, I will be entitled to my Base Compensation through and including the date on which a final order is entered on such motion by the Bankruptcy Court. Notwithstanding anything herein to the contrary, the Committee may not deliver such notice to the Company until a date which is more than ninety days following the date the Bankruptcy Court enters an order approving this Agreement.

Failure of any party at any time to require performance of any provision of this Agreement shall not affect the right to require full performance thereof at any time thereafter, and the waiver by any party of a breach of such provisions shall not be taken as or held to be a waiver of any subsequent breach or as nullifying the effectiveness of such provision.

Notices provided for in this Agreement shall be in writing and shall be deemed to have been duly given when delivered by hand or overnight courier or three days after it has been mailed by United States registered mail, return receipt requested, postage prepaid, addressed to the respective address set forth above in this Agreement, or to such other address as either party may have furnished to the other in writing in accordance herewith.

This Agreement and my rights and duties hereunder shall not be assignable or delegable by me.

The Company may withhold from any amounts payable under this Agreement such Federal, state and local taxes as may be required to be withheld pursuant to any applicable law or regulation.

This Agreement may be executed (including by electronic execution) in any number of counterparts, each of which when so executed shall be deemed an original, but all such counterparts shall constitute one and the same instrument. Delivery of an executed counterpart of this Agreement by electronic mail shall have the same force and effect as the delivery of an original executed counterpart of this Agreement.

Please confirm the foregoing is in accordance with your understanding by signing and returning a copy of this Agreement, whereupon it shall become binding and enforceable in accordance with its terms.

Very truly yours,



James P. Seery, Jr.

AGREED AND ACCEPTED

HIGHLAND CAPITAL MANAGEMENT L.P.

By: Strand Advisors, Inc., its general partner

John Dubel
Director
Strand Advisors, Inc.

Russell Nelms
Director
Strand Advisors, Inc.

001180

This Agreement shall be binding upon the parties and their respective successors and assigns, and no other person shall acquire or have any right under or by virtue of this Agreement.

Failure of any party at any time to require performance of any provision of this Agreement shall not affect the right to require full performance thereof at any time thereafter, and the waiver by any party of a breach of such provisions shall not be taken as or held to be a waiver of any subsequent breach or as nullifying the effectiveness of such provision.

Notices provided for in this Agreement shall be in writing and shall be deemed to have been duly given when delivered by hand or overnight courier or three days after it has been mailed by United States registered mail, return receipt requested, postage prepaid, addressed to the respective address set forth above in this Agreement, or to such other address as either party may have furnished to the other in writing in accordance herewith.

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Please confirm the foregoing is in accordance with your understanding by signing and returning a copy of this Agreement, whereupon it shall become binding and enforceable in accordance with its terms.

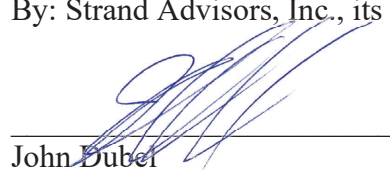
Very truly yours,

James. P. Seery, Jr.

AGREED AND ACCEPTED

HIGHLAND CAPITAL MANAGEMENT L.P.

By: Strand Advisors, Inc., its general partner



John Dubel
Director
Strand Advisors, Inc.

Russell Nelms
Director
Strand Advisors, Inc.

001181

This Agreement shall be binding upon the parties and their respective successors and assigns, and no other person shall acquire or have any right under or by virtue of this Agreement.

Failure of any party at any time to require performance of any provision of this Agreement shall not affect the right to require full performance thereof at any time thereafter, and the waiver by any party of a breach of such provisions shall not be taken as or held to be a waiver of any subsequent breach or as nullifying the effectiveness of such provision.

Notices provided for in this Agreement shall be in writing and shall be deemed to have been duly given when delivered by hand or overnight courier or three days after it has been mailed by United States registered mail, return receipt requested, postage prepaid, addressed to the respective address set forth above in this Agreement, or to such other address as either party may have furnished to the other in writing in accordance herewith.

This Agreement and my rights and duties hereunder shall not be assignable or delegable by me.

The Company may withhold from any amounts payable under this Agreement such Federal, state and local taxes as may be required to be withheld pursuant to any applicable law or regulation.

This Agreement may be executed (including by electronic execution) in any number of counterparts, each of which when so executed shall be deemed an original, but all such counterparts shall constitute one and the same instrument. Delivery of an executed counterpart of this Agreement by electronic mail shall have the same force and effect as the delivery of an original executed counterpart of this Agreement.

Please confirm the foregoing is in accordance with your understanding by signing and returning a copy of this Agreement, whereupon it shall become binding and enforceable in accordance with its terms.

Very truly yours,

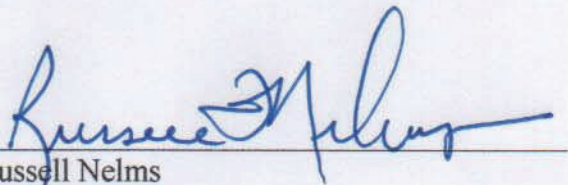
James. P. Seery, Jr.

AGREED AND ACCEPTED

HIGHLAND CAPITAL MANAGEMENT L.P.

By: Strand Advisors, Inc., its general partner

John Dubel
Director
Strand Advisors, Inc.



Russell Nelms
Director
Strand Advisors, Inc.

001182

EXHIBIT 4



CLERK, U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS

ENTERED

THE DATE OF ENTRY IS ON
THE COURT'S DOCKET

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

Signed January 9, 2020

Henry G. C. Gammie
United States Bankruptcy Judge

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

In re:

HIGHLAND CAPITAL MANAGEMENT, L.P.,¹

Debtor.

§ Chapter 11
§
§ Case No. 19-34054-sgj11
§
§ Related to Docket Nos. 7 & 259

**ORDER APPROVING SETTLEMENT WITH OFFICIAL COMMITTEE OF
UNSECURED CREDITORS REGARDING GOVERNANCE OF THE DEBTOR
AND PROCEDURES FOR OPERATIONS IN THE ORDINARY COURSE**

Upon the *Motion of the Debtor to Approve Settlement with Official Committee of Unsecured Creditors Regarding Governance of the Debtor and Procedures for Operations in the Ordinary Course* (the “Motion”),² filed by the above-captioned debtor and debtor in possession

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

² Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in the Motion.

(the “Debtor”); the Court having reviewed the Motion, and finding that (a) the Court has jurisdiction over this matter pursuant to 28 U.S.C. §§157 and 1334, (b) this is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(A), and (c) notice of this Motion having been sufficient under the circumstances and no other or further notice is required; and having determined that the legal and factual bases set forth in the Motion establish just cause for the relief granted herein; and having determined that the relief sought in the Motion is in the best interests of the Debtor and its estate; and after due deliberation and sufficient cause appearing therefore,

IT IS HEREBY ORDERED THAT:

1. The Motion is GRANTED on the terms and conditions set forth herein, and the United States Trustee’s objection to the Motion is OVERRULED.
2. The Term Sheet is approved and the Debtor is authorized to take such steps as may be necessary to effectuate the settlement contained in the Term Sheet, including, but not limited to: (i) implementing the Document Production Protocol; and (ii) implementing the Protocols.
3. The Debtor is authorized (A) to compensate the Independent Directors for their services by paying each Independent Director a monthly retainer of (i) \$60,000 for each of the first three months, (ii) \$50,000 for each of the next three months, and (iii) \$30,000 for each of the following six months, provided that the parties will re-visit the director compensation after the sixth month and (B) to reimburse each Independent Director for all reasonable travel or other expenses, including expenses of counsel, incurred by such Independent Director in connection with its service as an Independent Director in accordance with the Debtor’s expense reimbursement policy as in effect from time to time.

4. The Debtor is authorized to guarantee Strand's obligations to indemnify each Independent Director pursuant to the terms of the Indemnification Agreements entered into by Strand with each Independent Director on the date hereof.

5. The Debtor is authorized to purchase an insurance policy to cover the Independent Directors.

6. All of the rights and obligations of the Debtor referred to in paragraphs 3 and 4 hereof shall be afforded administrative expense priority under 11 U.S.C. § 503(b).

7. Subject to the Protocols and the Term Sheet, the Debtor is authorized to continue operations in the ordinary course of its business.

8. Pursuant to the Term Sheet, Mr. James Dondero will remain as an employee of the Debtor, including maintaining his title as portfolio manager for all funds and investment vehicles for which he currently holds that title; provided, however, that Mr. Dondero's responsibilities in such capacities shall in all cases be as determined by the Independent Directors and Mr. Dondero shall receive no compensation for serving in such capacities. Mr. Dondero's role as an employee of the Debtor will be subject at all times to the supervision, direction and authority of the Independent Directors. In the event the Independent Directors determine for any reason that the Debtor shall no longer retain Mr. Dondero as an employee, Mr. Dondero shall resign immediately upon such determination.

9. Mr. Dondero shall not cause any Related Entity to terminate any agreements with the Debtor.

10. No entity may commence or pursue a claim or cause of action of any kind against any Independent Director, any Independent Director's agents, or any Independent

Director's advisors relating in any way to the Independent Director's role as an independent director of Strand without the Court (i) first determining after notice that such claim or cause of action represents a colorable claim of willful misconduct or gross negligence against Independent Director, any Independent Director's agents, or any Independent Director's advisors and (ii) specifically authorizing such entity to bring such claim. The Court will have sole jurisdiction to adjudicate any such claim for which approval of the Court to commence or pursue has been granted.

11. Nothing in the Protocols, the Term Sheet or this Order shall affect or impair Jefferies LLC's rights under its Prime Brokerage Customer Agreements with the Debtor and non-debtor Highland Select Equity Master Fund, L.P., or any of their affiliates, including, but not limited to, Jefferies LLC's rights of termination, liquidation and netting in accordance with the terms of the Prime Brokerage Customer Agreements or, to the extent applicable, under the Bankruptcy Code's "safe harbor" protections, including under sections 555 and 561 of the Bankruptcy Code. The Debtor shall not conduct any transactions or cause any transactions to be conducted in or relating to the Jefferies LLC accounts without the express consent and cooperation of Jefferies LLC or, in the event that Jefferies withholds consent, as otherwise ordered by the Court. For the avoidance of doubt, Jefferies LLC shall not be deemed to have waived any rights under the Prime Brokerage Customer Agreements or, to the extent applicable, the Bankruptcy Code's "safe harbor" protections, including under sections 555 and 561 of the Bankruptcy Code, and shall be entitled to take all actions authorized therein without further order of the Court

12. Notwithstanding any stay under applicable Bankruptcy Rules, this Order shall be effective immediately upon entry.

13. The Court shall retain jurisdiction over all matters arising from or related to the interpretation and implementation of this Order, including matters related to the Committee's approval rights over the appointment and removal of the Independent Directors.

END OF ORDER

From: [Jonathan E. Bridges](#)
Sent: Monday, April 19, 2021 7:25 PM
To: [Jeff Pomerantz](#)
Cc: [Mazin Sbaiti](#); [Kim James](#); [John A. Morris](#)
Subject: Re: CLO Holdco v. Highland

Mr. Pomerantz,

Thank you for sending the orders and for keeping in mind that we're new to a matter that, in the bankruptcy court, has over 2,000 filings. We may well have missed something. But we have seen and carefully studied the orders that you sent. And we do not believe they prohibit the motion we are filing, which briefs them and explains why we don't believe they prohibit our motion.

We also don't think the district court will both decide that we're wrong about this and nonetheless grant our motion. As I read the orders, that's the only theoretical way that a motion for leave could violate them.

And if the district court does grant our motion for the reasons we ask—because it finds that the bankruptcy court exceeded its jurisdiction or because it finds that our motion for leave (which can be referred) complies with the bankruptcy court orders—then we don't think the bankruptcy court can or will overrule the district court.

So please know that we are not willfully violating those orders, as your email suggests. Quite the contrary, we are giving them careful attention. Which is why we are seeking leave rather than amending as of right.

Jonathan Bridges

Sbaiti & Company PLLC

CHASE TOWER
[2200 Ross Avenue, Suite 4900W](#)
[Dallas, Texas 75201](#)
O: [\(214\) 432-2899](#)
C: [\(214\) 663-3036](#)
F: [\(214\) 853-4367](#)
E: JEB@SbaitiLaw.com
W: <https://www.SbaitiLaw.com>

On Apr 19, 2021, at 6:20 PM, Jeff Pomerantz <jpomerantz@pszjlaw.com> wrote:

These Orders require you to seek such authority from the Bankruptcy Court which has exclusive jurisdiction to make the determination as to whether an action against Mr. Seery may be brought.

If you violate such Orders by filing your motion in the District Court we will seek

appropriate relief from the Bankruptcy Court including sanctions against you and your client for a willful violation of the Bankruptcy Court's orders.

Jeff

On 4/19/21, 4:11 PM, "Mazin Sbaiti" <MAS@sbaitilaw.com> wrote:

District Court where we filed the case, where we suspect it will be referred to the bankruptcy court.

M

From Mazin A. Sbaiti, Esq.

-----Original Message-----

From: Jeff Pomerantz <jpomerantz@pszjlaw.com>

Sent: Monday, April 19, 2021 6:10 PM

To: Mazin Sbaiti <MAS@sbaitilaw.com>; Jonathan E. Bridges <JEB@sbaitilaw.com>

Cc: Kim James <KRJ@sbaitilaw.com>; John A. Morris <jmorris@pszjlaw.com>; Jeff Pomerantz <jpomerantz@pszjlaw.com>

Subject: Re: CLO Holdco v. Highland

Yes. Put us down as opposed. And you will be filing that motion in the bankruptcy court correct?

Jeff

On 4/19/21, 4:09 PM, "Mazin Sbaiti" <MAS@sbaitilaw.com> wrote:

Jeff,

Our meet and confer is for our motion for leave to amend to add him. I believe, per those orders' language, we are following the court's instruction.

We are not unilaterally adding him.

I take it you want us to put you down as "opposed" on the certificate of conference?

Mazin

From Mazin A. Sbaiti, Esq.

-----Original Message-----

From: Jeff Pomerantz <jpomerantz@pszilaw.com>

Sent: Monday, April 19, 2021 6:05 PM
To: Jonathan E. Bridges <JEB@sbaitilaw.com>
Cc: Mazin Sbaiti <MAS@sbaitilaw.com>; Kim James <KRJ@sbaitilaw.com>; Jeff Pomerantz <jpomerantz@pszjlaw.com>; John A. Morris <jmorris@pszjlaw.com>
Subject: Re: CLO Holdco v. Highland

I appreciate that you are new to the case but you need to be aware of the attached July 9, 2020 and July 16, 2020 Bankruptcy Court orders that prohibit Mr. Seery (among others) from being sued without first obtaining authority from the Bankruptcy Court. If you proceed to amend the complaint as you suggest below without first obtaining Bankruptcy Court approval we reserve all rights to take appropriate action and seek appropriate relief from the Bankruptcy Court.

Also please keep my partner John Morris copied on emails.

Jeff Pomerantz

From: "Jonathan E. Bridges" <JEB@sbaitilaw.com>
Date: Monday, April 19, 2021 at 12:49 PM
To: Jeffrey Pomerantz <jpomerantz@pszilaw.com>
Cc: Mazin Sbaiti <MAS@sbaitilaw.com>, Kim James <KRJ@sbaitilaw.com>
Subject: CLO Holdco v. Highland

Mr. Pomerantz,

Mazin and I intend to move for leave today in the district court seeking permission to amend our complaint to add claims against Mr. Seery. They are the same causes of action. We believe we are entitled to amend as a matter of course. But we will also raise and brief the bankruptcy court's orders re the same.

Can we put your client down as unopposed?

We appreciate your prompt reply.

Jonathan Bridges
[\[cid:image001.png@01D67A35.9FEE2C90\]](#) Sbaiti & Company PLLC CHASE TOWER
 2200 Ross Avenue, Suite 4900W<x-apple-data-detectors://1/0>
 Dallas, Texas 75201<x-apple-data-detectors://1/0>
 O: (214) 432-2899<[tel:\(214\)%20432-2899](tel:(214)%20432-2899)>
 C: (214) 663-3036<[tel:\(214\)%20663-3036](tel:(214)%20663-3036)>
 F: (214) 853-4367<[tel:\(214\)%20853-4367](tel:(214)%20853-4367)>
 E: JEB@SbaitiLaw.com<<mailto:JEB@SbaitiLaw.com>>
 W: <https://www.SbaitiLaw.com><<https://www.sbaitilaw.com>>

CONFIDENTIALITY

This e-mail message and any attachments thereto is intended only for use by the addressee(s) named herein and may contain legally privileged and/or confidential information. If you are not the intended recipient of this e-mail message, you are hereby notified that any dissemination, distribution or copying of this e-mail message, and any attachments thereto is strictly prohibited. If you have received this e-mail message in error, please immediately notify me by telephone and permanently delete the original and any copies of this email and any prints thereof.

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

In Re: Highland Capital Management, L.P § Case No. **19-34054-SGJ11**

Charitable DAF Fund, L.P et al

Appellant

§

vs.

§

21-03067

Highland Capital Management, L.P

§

Appellee

§

3:23-CV-01503-B

[167] Order granting Defendant Highland Capital Management, L.P.'s Renewed motion to dismiss adversary proceeding (related document # [122](#)) Entered on 6/25/2023.

Volume 7

APPELLANT RECORD

SBAITI & COMPANY PLLC
Mazin A. Sbaiti (TX Bar No. 24058096)
Jonathan Bridges (TX Bar No. 24028835)
J.P. Morgan Chase Tower
2200 Ross Avenue, Suite 4900W
Dallas, TX 75201
T: (214) 432-2899
F: (214) 853-4367

*Counsel for The Charitable DAF Fund, L.P.
and CLO Holdco, Ltd.*

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

In re:	§ Chapter 11
	§
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§ Case No. 19-34054-sgj11
	§
Debtor.	§
	§
CHARITABLE DAF FUND, L.P. AND CLO	§
HOLDCO, LTD., DIRECTLY AND DERIVATIVELY	§
	§
Plaintiffs,	§ Adversary Proceeding No.
	§
vs.	§ 21-03067-sgj11
	§
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§
HIGHLAND HCF ADVISOR, LTD., AND	§
HIGHLAND CLO FUNDING LTD., NOMINALLY	§
	§
Defendant.	§
	§

INDEX

**APPELLANTS' SECOND AMENDED STATEMENT OF ISSUES
AND DESIGNATION OF RECORD ON APPEAL**

Pursuant to Rules 8009(a)(1)(A)-(B) and (a)(4) of the Federal Rules of Bankruptcy Procedure, The Charitable DAF Fund, L.P. and CLO Holdco, Ltd. ("Appellants") hereby designate the following items to be included in the record and identify the following issues with respect to

their appeal of the Order Granting Defendant Highland Capital Management, L.P.'s "Renewed Motion to Dismiss Complaint" [Adv. Proc. Doc. No. 122] which was entered by the United States Bankruptcy Court for the Northern District of Texas on June 25, 2023.

I. STATEMENT OF ISSUES TO BE PRESENTED ON APPEAL

- Whether the Bankruptcy Court had jurisdiction to rule on Highland Capital Management L.P.'s Renewed Motion to Dismiss Complaint
- Whether the Renewed Motion to Dismiss Complaint was improperly granted

II. DESIGNATION OF ITEMS TO BE INCLUDED IN THE RECORD

Vol. 1
000001

1. Notice of Appeal for Bankruptcy Case Adversary Proceeding No. 21-03067-sgj11 [Doc. 168].

000042

2. The judgment, order, or decree appealed from: Memorandum Opinion and Order Granting Defendant Highland Capital Management, L.P.'s "Renewed Motion to Dismiss Complaint" [Adv. Proc. Doc. No. 122] [Doc. 167].

000080

3. Docket Sheet kept by the Bankruptcy Clerk.

4. Documents listed below and as described in the Docket Sheet for Bankruptcy Case Proceeding No. 21-03067-sgj.

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000102

000138

No.	Date Filed	Docket No.	Description/Document Text
1	9/29/21	1	(36 pgs; 3 docs) Adversary case 21-03067. ORDER REFERRING CASE NUMBER 21-CV-0842-B from U.S District Court for the Northern District of Texas, Dallas Division to U.S. Bankruptcy Court for Northern District of Texas, Dallas Division. Complaint by Charitable DAF Fund, LP, CLO Holdco, Ltd. against Highland Capital Management, LP, Highland HCF Advisor Ltd., Highland CLO Funding, Ltd. Fee Amount \$350 (Attachments: # 1 Original Complaint # 2 Docket Sheet from 3:20-cv-0842-B) Nature(s) of suit: 02 (Other (e.g. other actions that would have been brought in state court if unrelated to bankruptcy)). (Okafor, M.)
2	9/29/21	2	(1 pg) Supplemental Document (cover sheet) by CLO Holdco Ltd., Charitable DAF Fund (RE: related document(s)1 Adversary case 21-03067) [ORIGINALLY FILED IN 21-CV-0842 AS #2 ON 04/13/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)

Vol. 2 000139	3	9/29/21	6	(93 pgs; 6 docs) MOTION for Leave to File First Amended Complaint filed by CLO Holdco Ltd., Charitable DAF Fund LP (Attachments: # 1 Exh 1_First Amended Complaint # 2 Exh 2_Motion for Authorization to Retain James Seery # 3 Exh 3_Order Approving Retention of James Seery # 4 Exh 4_Order Approving Settlement # 5 Proposed Order) (Bridges, Jonathan) (Entered: 04/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #6 ON 04/19/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
000232	4	9/29/21	22	(7 pgs; 2 docs) MOTION for an Order to Enforce the Order of Reference filed by Highland Capital Management LP. (Attachments: # 1 Exhibit(s) A--Proposed Order) (Annable, Zachery) Modified text on 5/20/2021 (mjr). (Entered: 05/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #22 ON 05/19/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
000239	5	9/29/21	23	(31 pgs) Brief/Memorandum in Support filed by Highland Capital Management LP re: 22 MOTION for an Order to Enforce the Order of Reference. (Annable, Zachery) Modified text on 5/20/2021 (mjr).(Entered: 05/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #23 ON 05/19/2021 IN U.S.DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
000270 Thru Vol. 6	6	9/29/21	24	(926 pgs; 29 docs) Appendix in Support filed by Highland Capital Management LP re: 23 Brief/Memorandum in Support. (Attachments: # 1 Appendix 1 # 2 Appendix 2 # 3 Appendix 3 # 4 Appendix 4 # 5 Appendix 5 # 6 Appendix 6 # 7 Appendix 7 # 8 Appendix 8 # 9 Appendix 9 # 10 Appendix10 # 11 Appendix 11 # 12 Appendix 12 # 13 Appendix 13 # 14 Appendix 14 # 15 Appendix 15 # 16 Appendix 16 # 17 Appendix 17 # 18 Appendix 18 # 19 Appendix 19 # 20 Appendix 20 # 21 Appendix 21# 22 Appendix 22 # 23 Appendix 23 # 24 Appendix 24 # 25 Appendix 25 # 26 Appendix 26 # 27 Appendix 27 # 28 Appendix 28) (Annable, Zachery) Modified linkage and text on 5/20/2021 (mjr). (Entered:05/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #24 ON 05/19/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
Vol. 7 001196	7	9/29/21	26	(7 pgs; 2 docs) MOTION to Dismiss Complaint filed by Highland Capital Management LP (Attachments: # 1 Exhibit(s) A--Proposed Order) (Annable, Zachery) Modified text on 5/28/2021 (jmg).(Entered: 05/27/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #26 ON 05/27/2021 IN U.S.DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)

Vol. 7 001203 thru Vol. 8	8	9/29/21	28	(508 pgs; 14 docs) Appendix in Support filed by Highland Capital Management LP (Attachments: # 1 Appendix 1 # 2 Appendix 2 # 3 Appendix 3 # 4 Appendix 4 # 5 Appendix 5 # 6 Appendix 6 # 7 Appendix 7 # 8 Appendix 8 # 9 Appendix 9 # 10 Appendix 10 # 11 Appendix 11 # 12 Appendix 12 # 13 Appendix 13) (Annable, Zachery) (Entered: 05/27/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #28 ON 05/27/2021 IN U.S. DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
Vol. 9 001711	9	9/29/21	33	(1 pg) Amended Civil Cover Sheet by CLO Holdco Ltd, Charitable DAF Fund LP. Amendment to 2 Supplemental Document. (Sbaiti, Mazin) Modified text on 6/23/2021 (mjr). (Entered: 06/22/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #33 ON 06/22/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001712	10	9/29/21	36	(26 pgs) RESPONSE filed by CLO Holdco Ltd, Charitable DAF Fund LP re: 22 MOTION for an Order to Enforce the Order of Reference (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #36 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001738	11	9/29/21	37	(22 pgs) Appendix in Support filed by CLO Holdco Ltd, Charitable DAF Fund LP re 36 Response/Objection Response to Motion for an Order to Enforce the Order of Reference (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #37 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001760	12	9/29/21	38	(45 pgs) RESPONSE filed by CLO Holdco Ltd, Charitable DAF Fund LP re: 26 MOTION to Dismiss (Defendant Highland Capital Management, L.P.'s Motion to Dismiss Complaint) (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #38 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001805	13	9/29/21	39	(88 pgs) Appendix in Support filed by CLO Holdco Ltd, Charitable DAF Fund LP re 38 Response/Objection to Defendant Highland Capital Management, L.P.'s Motion to Dismiss Complaint (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #39 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001893	14	9/29/21	42	(12 pgs) REPLY filed by Highland Capital Management LP re: 22 MOTION for an Order to Enforce the Order of Reference (Annable, Zachery) (Entered: 07/13/2021) [ORIGINALLY FILED IN 21-CV-0842AS #42 ON 07/13/2021 IN U.S.

			DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
VOL. 9	15	9/29/21	43 (852 pgs) Appendix in Support filed by Highland Capital Management LP re: 42 Reply. (Annable, Zachery) Modified text on 7/14/2021 (mjr). (Entered: 07/13/2021) [ORIGINALLY FILED IN 21-CV-0842AS #43 ON 07/13/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001905 thru Vol. 13	16	9/29/21	45 (21 pgs) REPLY filed by Highland Capital Management LP re: 26 MOTION to Dismiss (Defendant Highland Capital Management, L.P.'s Motion to Dismiss Complaint) (Annable, Zachery) (Entered: 07/13/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #44 ON 07/13/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002757	17	9/29/21	57 (7 pgs; 2 docs) MOTION to Dismiss and Joinder in Motion to Dismiss of Highland Capital Management, L.P. filed by Highland CLO Funding Ltd. (Attachments: # 1 Proposed Order) Attorney Paul R Bessette added to party Highland CLO Funding Ltd (pty:dft) (Bessette, Paul) (Entered: 08/30/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #57 ON 08/30/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002778	18	9/29/23	58 (12 pgs) Brief/Memorandum in Support filed by Highland CLO Funding Ltd. re 57 MOTION to Dismiss and Joinder in Motion to Dismiss of Highland Capital Management, L.P. (Bessette, Paul) (Entered: 08/30/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #58 ON 08/30/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002785	19	9/29/23	59 (80 pgs; 5 docs) Appendix in Support filed by Highland CLO Funding Ltd re 58 Brief/Memorandum in Support of Motion (Attachments: # 1 Exhibit(s) A - Jackson v Dear # 2 Exhibit(s) B - Prudential Assurance v. Newman # 3 Exhibit(s) C - Harbourvest Settlement Agreement # 4 Exhibit(s) D - Boleat Declaration) (Bessette, Paul) (Entered: 08/30/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #59 ON 08/30/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002797	20	9/29/21	64 (1 pg) ORDER OF REFERENCE: Pursuant to 28 U.S.C. § 157 and this District's Miscellaneous Order No. 33, this case is hereby REFERRED to Judge Stacey G. C. Jernigan of the United States Bankruptcy Court for the Northern District of Texas, Dallas Division, to be adjudicated as a matter related to the consolidated Chapter 11 Bankruptcy of Highland Capital Management, L.P., Chapter 11 Case No.19-34054. (Ordered by Judge Jane J. Boyle
002877			

Vol. 14				on 9/20/2021) (svc) (Entered: 09/20/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #64 ON 09/20/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
	21	10/19/21	66	(5 pgs) Notice of hearing filed by Defendant Highland Capital Management, LP (RE: related document(s) 26 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP, 47 Motion to strike document filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 55 Motion to abate filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) Hearing to be held on 11/23/2021 at 09:30 AM at https://us-courts.webex.com/meet/jerniga for 26 and for 47 and for 55, (Annable, Zachery)
002878				
	22	11/22/21	71	(509 pgs; 2 docs) Witness and Exhibit List <i>for Hearing on November 23, 2021</i> filed by Defendant Highland Capital Management, LP (RE: related document(s) 26 Motion to dismiss adversary proceeding). (Attachments: # 1 Exhibits 1-13) (Hayward, Melissa)
002883 thru Vol. 16				
	23	11/22/21	72	(2 pgs) Witness List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 26 Motion to dismiss adversary proceeding, 47 Motion to strike (related document(s): 43 Document), 55 Motion to abate (related document(s) 1 Complaint), 69 Motion to abate <i>Plaintiffs' Amended Motion to Stay All Proceedings</i> (related document(s) 55 Motion to abate (related document(s) 1 Complaint))). (Sbaiti, Mazin)
Vol. 17				
	24	11/22/21	73	(189 pgs; 4 docs) Exhibit List <i>for November 23, 2021 hearing</i> filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 47 Motion to strike (related document(s): 43 Document), 55 Motion to abate (related document(s) 1 Complaint)). (Attachments: # 1 Exhibit 1_Defendant's Memorandum of Law in Support of Motion for Reconsideration # 2 Exhibit 2_Highland Memorandum in Support of Motion to Dismiss # 3 Exhibit 3_Order (I) Confirming Fifth Amended Plan of Reorganization of Highland) (Sbaiti, Mazin)
003392				
	25	12/7/21	80	(2 pgs) Order granting Highland CLO Funding, Ltd.'s motion to dismiss adversary as a party with prejudice (related document 57) Entered on 12/7/2021. (Okafor, Marcey) Modified text on 3/11/2022 (Okafor, Marcey).
003394				
	26	3/11/22	99	(26 pgs) Memorandum of Opinion and order granting motion to dismiss the adversary proceeding (RE: related document(s) 26 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP). Entered on 3/11/2022 (Okafor, Marcey)
003583				
	27	3/11/22	100	(26 pgs) Order granting motion to dismiss adversary proceeding with prejudice (related document #26) Entered on 3/11/2022. (Okafor, Marcey)
003585				
003611				

Vol. 18 003637	28	3/21/22	104	(29 pgs) Notice of appeal. Fee Amount \$298 filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 100 Order on motion to dismiss adversary proceeding). Appellant Designation due by 04/4/2022. (Sbaiti, Mazin)
003666	29	5/26/22	120	(177 pgs; 2 docs) Support/supplemental document <i>Motion to Supplement Appellate Record</i> filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 111 Appellant designation). (Attachments: # 1 Amended Transcript of January 14, 2021 Hearing) (Sbaiti, Mazin)
003843	30	6/9/22	121	(1 pg) DISTRICT COURT Order: Case 3:22-00695-B is hereby transferred to the docket of the Honorable Judge Jane J. Boyle for consolidation with The Charitable DAF Fund LP, et al. v. Highland Capital Management LP, Case No. 3:21-cv-3129-N. Judge Karen Gren Scholer no longer assigned to case.(RE: related document(s) 86 Notice of appeal filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 104 Notice of appeal filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Entered on 6/9/2022 (Whitaker, Sheniqua) (Entered: 06/10/2022)
003844	31	10/24/22	122	(7 pgs) Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP (Annable, Zachery)
003851	32	10/14/22	123	(31 pgs) Brief in support filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Annable, Zachery)
Vol. 19 003882 Thru Vol 20	33	10/14/22	124	(513 pgs; 15 docs) Support/supplemental document (<i>Appendix in Support of Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7 # 8 Exhibit 8 # 9 Exhibit 9 # 10 Exhibit 10 # 11 Exhibit 11 # 12 Exhibit 12 # 13 Exhibit 13 # 14 Exhibit 14) (Annable, Zachery)
Vol. 21 004395	34	10/27/22	126	(5 pgs) Notice of hearing (<i>Notice of Hearing and Briefing Schedule on Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP). Hearing to be held on 12/8/2022 at 09:30 AM at https://us-courts.webex.com/meet/jerniga for 122. (Annable, Zachery)

Vol. 21 004400 004410 004442 Thru Vol. 22	35	11/18/22	128	(10 pgs) Motion for withdrawal of reference. Fee amount \$188, filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (Sbaiti, Mazin)
	36	11/18/22	129	(32 pgs) Response opposed to (related document(s): 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP) filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Sbaiti, Mazin)
	37	11/18/22	130	(254 pgs; 2 docs) Response opposed to (related document(s): 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP) filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Attachments: # 1 Appendix) (Sbaiti, Mazin)
Vol. 22 004696 004717 004732 004737 004742	38	9/2/22	131	(21 pgs) DISTRICT COURT MEMORANDUM OPINION AND ORDER: The Court REVERSES and REMANDS the bankruptcy court's Motion to Dismiss Order and AFFIRMS the bankruptcy courts Motion to Stay Order. re: appeal on Civil Action number: Case 3:22-00695-B consolidated with 3:21-CV-3129-B, (RE: related document(s) 81 Order on motion to abate, 100 Order on motion to dismiss adversary proceeding). Entered on 9/2/2022 (Whitaker, Sheniqua) (Entered: 11/29/2022)
	39	12/2/22	133	(15 pgs) Reply to (related document(s): 129 Response filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 130 Response filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) filed by Defendant Highland Capital Management, LP. (Annable, Zachery)
	40	12/7/22	135	(5 pgs) Notice of hearing filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP). Hearing to be held on 1/25/2023 at 01:30 PM at https://us-courts.webex.com/meet/jerniga for 122, (Annable, Zachery)
	41	12/7/22	136	(5 pgs) Notice of hearing filed by Defendant Highland Capital Management, LP (RE: related document(s) 128 Motion for withdrawal of reference filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Status Conference to be held on 1/25/2023 at 01:30 PM at https://us-courts.webex.com/meet/jerniga . (Annable, Zachery).
	42	12/9/22	138	(3 pgs) Response opposed to (related document(s): 128 Motion for withdrawal of reference. Fee amount \$188, filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) filed by Defendant Highland Capital Management, LP. (Annable, Zachery)

Vol. 22 004745	43	12/9/22	139	(25 pgs) Brief in support filed by Defendant Highland Capital Management, LP (RE: related document(s) 138 Response). (Annable, Zachery)
Vol. 23 004770	44	12/9/22	140	(280 pgs; 8 docs) Support/supplemental document (<i>Appendix in Support of Highland Capital Management, L.P.'s Response to Renewed Motion to Withdraw the Reference</i>) filed by Defendant Highland Capital Management, LP (RE: related document(s) 138 Response). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7) (Annable, Zachery)
Vol. 24 005050	45	12/16/22	144	(6 pgs) Reply to (related document(s): 138 Response filed by Defendant Highland Capital Management, LP) filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Sbaiti, Mazin)
005056 Thru Vol. 25.	46	1/23/23	145	(514 pgs; 15 docs) Witness and Exhibit List filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7 # 8 Exhibit 8 # 9 Exhibit 9 # 10 Exhibit 10 # 11 Exhibit 11 # 12 Exhibit 12 # 13 Exhibit 13 # 14 Exhibit 14) (Annable, Zachery)
Vol. 26 005570	47	1/23/23	146	(280 pgs; 8 docs) Witness and Exhibit List filed by Defendant Highland Capital Management, LP (RE: related document(s) 128 Motion for withdrawal of reference. Fee amount \$188.). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7) (Annable, Zachery)
Vol. 27 005850	48	1/23/23	147	(221 pgs; 7 docs) Witness and Exhibit List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Attachments: # 1 Exhibit 1_Excerpts from July 14, 2020 Hearing Transcript # 2 Exhibit 2_HCLOF Members Agreement Relating to the Company # 3 Exhibit 3_HarbourVest Settlement Agreement # 4 Exhibit 4_Order Approving Debtor's Settlement with HarbourVest # 5 Exhibit 5_HCLOF Offering # 6 Exhibit 6 Amended and Restated Investment Advisory Agreement) (Sbaiti, Mazin)
006071	49	1/23/23	148	(3 pgs) Witness and Exhibit List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 128 Motion for withdrawal of reference. Fee amount \$188.). (Phillips, Louis)
Vol. 28 006074	50	1/25/23	150	(56 pgs; 2 docs) Amended Witness and Exhibit List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 147 List (witness/exhibit/generic), 149 List (witness/exhibit/generic)). (Attachments: # 1 Exh 7_Testimony of Mark Patrick at June 8, 2021 hearing) (Sbaiti, Mazin)

Vol. 28 006130	51	1/25/23	152	(3 pgs) Notice of Appearance and Request for Notice by Louis M. Phillips filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Phillips, Louis)
	52	1/25/23	154	(1 pg) Court admitted exhibits date of hearing January 25, 2023 (RE: related document(s) 128 Motion for withdrawal of reference, filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) (COURT ADMITTED DEFENDANT'S EXHIBITS #1, #2, #3, #4, #5 & #6 OFFERED BY ATTY GREG DEMO). (Edmond, Michael) (Entered: 01/27/2023)
Vol. 32 006925 006942 006960	53	2/6/23	158	Report and recommendation to the U.S. District Court by U.S. Bankruptcy Judge. (RE: related document(s) 128 Motion for withdrawal of reference filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Entered on 2/6/2023 (Okafor, Marcey)
	54	2/6/23	161	(18 pgs) DISTRICT COURT Notice of transmission of report and recommendation in re: renewed motion to withdraw reference. Civil Case # 3:22-cv-02802-S. (RE: related document(s) 158 Report and recommendation to the U.S. District Court by U.S. Bankruptcy Judge. (RE: related document(s) 128 Motion for withdrawal of reference filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Entered on 2/6/2023) (Whitaker, Sheniqua)
	55	4/3/23	165	(1 pg) DISTRICT COURT ORDER: The Court GRANTS the 11 Joint Motion to Transfer Proceeding and Consolidate Before Original Court and the above-numbered case (3:22-cv-02802-S) is transferred to the docket of the Honorable Judge Jane Boyle: Civil case 3:21-cv-00842-B (order referring case). (RE: related document(s) 1 Complaint filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 143 Notice of transmission of motion to withdraw reference). Entered on 4/3/2023 (Whitaker, Sheniqua) Modified on 4/10/2023 (Whitaker, Sheniqua). (Entered: 04/10/2023)

TRANSCRIPTS

006961	56	11/24/21	78	(104 pgs) Transcript regarding Hearing Held 11-23-2021 RE: Motion Hearing. THIS TRANSCRIPT WILL BE MADE ELECTRONICALLY AVAILABLE TO THE GENERAL PUBLIC 90 DAYS AFTER THE DATE OF FILING. TRANSCRIPT RELEASE DATE IS 02/22/2022. Until that time the transcript may be viewed at the Clerk's Office or a copy may be obtained from the official court transcriber. Court Reporter/Transcriber Liberty Transcripts/Dipti Patel, Telephone number 847-848-4907. (RE: related document(s) 75 Hearing held on 11/23/2021. (RE: related document(s) 55 MOTION to Stay filed by CLO Holdco Ltd, Charitable DAF Fund LP (Sbaiti, Mazin) (Entered: 08/26/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #55 ON 08/26/2021 IN U.S.
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			<p>DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)) (Appearances: J. Pomerantz and J. Morris for Highland Defendants; J. Jordan and P. Bessett for HCLOF; M. Sbaiti for Plaintiffs. Nonevidentiary hearing. Motion denied. Mr. Pomerantz to upload order.), 76 Hearing held on 11/23/2021. (RE: related document(s) 47 Motion to strike 43 Appendix in support filed by CLO Holdco, Ltd., Charitable DAF Fund, LP (Bridges, Jonathan) Modified text on 7/16/2021 (mjr). (Entered: 07/15/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #47 ON 07/15/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)) (Appearances: J. Pomerantz and J. Morris for Highland Defendants; J. Jordan and P. Bessett for HCLOF; M. Sbaiti for Plaintiffs. Nonevidentiary hearing. Motion denied (Plaintiffs acknowledged complained-of Appendices it did not relate to Motion to Dismiss). Mr. Pomerantz to upload order.)). Transcript to be made available to the public on 02/22/2022. (Patel, Dipti)</p>
57	2/21/23	164	<p>164 (112 pgs) Transcript regarding Hearing Held 1/25/23 RE: HEARING ON DEFENDANT HIGHLAND CAPITAL MANAGEMENT L.P.'S RENEWED MOTION TO DISMISS COMPLAINT (122) AND STATUS CONFERENCE RE: MOTION FOR WITHDRAWAL OF REFERENCE FILED BY PLAINTIFF CLO HOLDCO, LTD., PLAINTIFF CHARITABLE DAF FUND, LP (128). THIS TRANSCRIPT WILL BE MADE ELECTRONICALLY AVAILABLE TO THE GENERAL PUBLIC 90 DAYS AFTER THE DATE OF FILING. TRANSCRIPT RELEASE DATE IS 05/22/2023. Until that time the transcript may be viewed at the Clerk's Office or a copy may be obtained from the official court transcriber. Court Reporter/Transcriber Dipti Patel, Telephone number 847-848-4907. (RE: related document(s) 155 Hearing held on 1/25/2023. (RE: related document(s) 122 Motion to dismiss adversary proceeding, (Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint) filed by Defendant Highland Capital Management, LP filed by Defendant Highland Capital Management, LP) (Appearances: J. Morris and G. Demo for Movants; L. Phillips and M. Sbaiti for Plaintiffs. Evidentiary hearing (appendices). Court took matter under advisement.), 156 Hearing held on 1/25/2023. (RE: related document(s) 128 Motion for withdrawal of reference. Fee amount \$188, filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) (Appearances: J. Morris and G. Demo for Movants; L. Phillips and M. Sbaiti for Plaintiffs. Evidentiary hearing (appendices). Court announced it will recommend denial to District Court. Court is working on Report & Recommendation.)). Transcript to be made available to the public on 05/22/2023. (Patel, Dipti)</p>

Dated: July 14, 2023

Respectfully submitted,

SBAITI & COMPANY PLLC

/s/ Mazin A. Sbaiti

Mazin A. Sbaiti

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jeb@sbaitilaw.com

Counsel for Appellants

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was filed electronically through the Court's ECF system, which provides notice to all parties of interest, on this 14th day of July, 2023.

/s/ Mazin A. Sbaiti

Mazin A. Sbaiti

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Counsel for Highland Capital Management, L.P.

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

CHARITABLE DAF FUND, L.P., AND CLO
HOLDCO LTD.,

Plaintiffs,

VS.

HIGHLAND CAPITAL MANAGEMENT, L.P.,
HIGHLAND HCF ADVISOR, LTD., AND
HIGHLAND CLO FUNDING, LTD.,

Defendants.

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Case No. 3:21-cv-00842-B

**DEFENDANT HIGHLAND CAPITAL MANAGEMENT, L.P.'S
MOTION TO DISMISS COMPLAINT**

Highland Capital Management, L.P., the plaintiff in the above-captioned case (the “Debtor” or “Highland”), by and through its undersigned counsel, files this motion (the “Motion”)

seeking entry of an order dismissing the *Original Complaint* [Docket No. 1] (the “Complaint”) filed by Plaintiffs Charitable DAF Fund, L.P. (the “DAF”) and CLO Holdco, Ltd. (“CLOH”) (together, “Plaintiffs”). In support of its Motion, the Debtor states as follows:

JURISDICTION AND VENUE

1. This Court has jurisdiction over the Motion pursuant to section 1331 and 1367 of title 11 of the United States Code (the “Bankruptcy Code”).
2. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1409.
3. The predicates for the relief requested in the Motion are 28 U.S.C. § 1391.

RELIEF REQUESTED

4. The Debtor requests that this Court issue the proposed form of order attached as **Exhibit A** (the “Proposed Order”) pursuant to Rule 12(b) of the Federal Rules of Civil Procedure.
5. For the reasons set forth more fully in Defendant Highland Capital Management, L.P.’s *Memorandum of Law in Support of Motion to Dismiss Complaint* (the “Memorandum of Law”), filed contemporaneously with this Motion, the Debtor requests that the Court: (a) dismiss the Complaint in its entirety and (b) grant the Debtor such other and further relief as the Court deems just and proper under the circumstances.
6. In accordance with Rule 7.1 of the *Local Civil Rules of the United States District Court for the Northern District of Texas* (the “Local Rules”), contemporaneously herewith and in support of this Motion, the Debtor is filing: (a) its Memorandum of Law, and (b) the *Appendix in Support of Defendant Highland Capital Management L.P.’s Motion to Dismiss the Complaint* (the “Appendix”) together with the exhibits annexed thereto.

7. Based on the exhibits annexed to the Appendix, and the arguments contained in the Memorandum of Law, the Debtor is entitled to the relief requested herein as set forth in the Proposed Order.

8. Notice of this Motion has been provided to all parties. The Debtor submits that no other or further notice need be provided.

WHEREFORE, the Debtor respectfully requests that the Court (i) enter the Proposed Order substantially in the formed annexed hereto as **Exhibit A** granting the relief requested herein, and (ii) grant the Debtor such other and further relief as the Court may deem proper.

Dated: May 27, 2021

PACHULSKI STANG ZIEHL & JONES LLP

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John A. Morris (NY Bar No. 266326)
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-and-

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/s/ Zachery Z. Annable

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EXHIBIT A

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

CHARITABLE DAF FUND, L.P., AND CLO
HOLDCO LTD.,

Plaintiffs,

vs.

HIGHLAND CAPITAL MANAGEMENT, L.P.,
HIGHLAND HCF ADVISOR, LTD., AND
HIGHLAND CLO FUNDING, LTD.,

Defendants.

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Case No. 3:21-cv-00842-B

ORDER GRANTING MOTION TO DISMISS COMPLAINT

Before the Court is *Defendant Highland Capital Management L.P.’s Motion to Dismiss the Complaint* [Docket No. __] (the “Motion”).¹ Having considered: (a) the Motion; (b) Defendant Highland Capital Management, L.P.’s *Memorandum of Law in Support of Motion for an Order to Enforce the Order of Reference* [Docket No. __] (the “Memorandum of Law”); and (c) the *Appendix in Support of Highland Capital Management’s Motion to Dismiss the Complaint* [Docket No. __] (the “Appendix”) and the exhibits annexed thereto; and this Court having jurisdiction over this matter pursuant to **28 U.S.C. § 1331**; and this Court having found that venue of this proceeding and the Motion in this District is proper pursuant to **28 U.S.C. § 1391**; and this Court having found that the Complaint should be dismissed in its entirety because: (a) the Claims asserted therein are barred by the doctrine of *res judicata*; (b) the Claims are barred by the doctrine of judicial estoppel; and (c) the Complaint fails to allege any Claim for relief that is plausible for relief under Rule 12(b)(6) of the Federal Rules of Civil Procedure; and this Court having found that the Debtor’s

¹ Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in the Memorandum of Law.

notice of the Motion and opportunity for a hearing on the Motion were appropriate under the circumstances and that no other notice need be provided; and this Court having determined that the legal and factual bases set forth in the Motion establish good cause for the relief granted herein; and upon all of the proceedings had before this Court; and after due deliberation and sufficient cause appearing therefor and for the reasons set forth in the record on this Motion, it is **HEREBY ORDERED THAT:**

1. The Motion is **GRANTED** as set forth herein.
2. This Complaint is dismissed in its entirety.

It is so ordered this _____ day of _____, 2021.

The Honorable Jane J. Boyle
United States District Judge

PACHULSKI STANG ZIEHL & JONES LLP

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Counsel for Highland Capital Management, L.P.

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
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CHARITABLE DAF FUND, L.P., AND CLO
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vs.

HIGHLAND CAPITAL MANAGEMENT, L.P.,
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Defendants.

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Case No. 3:21-cv-00842-B

**APPENDIX IN SUPPORT OF HIGHLAND CAPITAL MANAGEMENT, L.P.'S
MOTION TO DISMISS THE COMPLAINT**

Highland Capital Management, L.P., a defendant in the above-captioned case (the “Debtor” or “Highland”), hereby files this appendix in support of *Highland Capital Management, L.P.’s Motion to Dismiss the Complaint* (the “Motion”).¹

TABLE OF CONTENTS

Appx.	Description
1	HarbourVest 2017 Global Fund L.P. Proof of Claim No. 143, HarbourVest 2017 Global AIF L.P., Proof of Claim No. 147, HarbourVest Dover Street IX Investment L.P., Proof of Claim No. 150, HV International VIII Secondary L.P., Proof of Claim No. 153, HarbourVest Skew Base AIF L.P., Proof of Claim No. 154, and HarbourVest Partners L.P., Proof of Claim No. 149.
2	<i>Motion for Entry of an Order Approving Settlement with HarbourVest (Claim Nos. 143, 147, 149, 150, 153, 154) and Authorizing Actions Consistent Therewith</i> [Docket No. 1625]
3	<i>Settlement Agreement and Transfer Agreement for Ordinary Shares of Highland CLO Funding, Ltd.</i> [Docket No. 1631-1]
4	<i>Objection to the Debtor’s Motion for Entry of an Order Approving Settlement with HarbourVest</i> , [Docket No. 1697]
5	<i>Objection to the Debtor’s Motion for Entry of an Order Approving Settlement with HarbourVest (Claim Nos. 143, 147, 149, 150, 153, 154) and Authorizing Actions Consistent Therewith</i> [Docket No. 1706]
6	<i>Objection to HarbourVest Settlement</i> [Docket No. 1707]
7	Deposition Transcript of Michael Pugatch, January 21, 2021
8	<i>Omnibus Reply in Support of Debtor’s Motion for Entry of an Order Approving Settlement with HarbourVest (Claim Nos. 143, 147, 149, 150, 153, 154) and Authorizing Actions Consistent Therewith</i> [Docket No. 1731]
9	Hearing Transcript, January 14, 2021
10	<i>Order Approving Debtor’s Settlement with HarbourVest (Claim Nos. 143, 147, 149, 150, 153, 154) and Authorizing Actions Consistent Therewith</i> [Docket No. 1788]
11	<i>Original Complaint</i> , Case No. 21-00842-B, Docket No. 1 (N.D. Tex. Apr. 12, 2001)
12	Deposition Transcript of Grant Scott, January 21, 2021
13	Members Agreement, November 15, 2017

¹ All capitalized terms used but not defined herein have the meanings given to them in the Motion.

Dated: May 27, 2021

PACHULSKI STANG ZIEHL & JONES LLP

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Counsel for Highland Capital Management, L.P.

APPENDIX 1

CLAIM 143

Fill in this information to identify the case:

Debtor Highland Capital Management, L.P.

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

Case number 19-34054

Official Form 410
Proof of Claim

04/19

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

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

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

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

Part 1: Identify the Claim

1. Who is the current creditor?	<u>HarbourVest 2017 Global Fund L.P.</u> Name of the current creditor (the person or entity to be paid for this claim)	
	Other names the creditor used with the debtor _____	
2. Has this claim been acquired from someone else?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. From whom? _____	
3. Where should notices and payments to the creditor be sent?	Where should notices to the creditor be sent? <u>HarbourVest 2017 Global Fund L.P.</u> <u>Attn: Erica Weisgerber</u> <u>Debevoise and Plimpton LLP</u> <u>919 Third Avenue</u> <u>New York, NY 10022, U.S.A.</u> Contact phone <u>2129096000</u> Contact email <u>eweisgerber@debevoise.com</u>	Where should payments to the creditor be sent? (if different) <u>See summary page</u> Contact phone <u>6173483773</u> Contact email <u>agoren@harbourvest.com</u> Uniform claim identifier for electronic payments in chapter 13 (if you use one): _____
4. Does this claim amend one already filed?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Claim number on court claims registry (if known) _____ Filed on _____ MM / DD / YYYY	
5. Do you know if anyone else has filed a proof of claim for this claim?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Who made the earlier filing? _____	



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

6. Do you have any number you use to identify the debtor?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Last 4 digits of the debtor's account or any number you use to identify the debtor: ____
7. How much is the claim? \$ <u>See Annex</u>	Does this amount include interest or other charges? <input type="checkbox"/> No <input type="checkbox"/> Yes. Attach statement itemizing interest, fees, expenses, or other charges required by Bankruptcy Rule 3001(c)(2)(A).
8. What is the basis of the claim?	Examples: Goods sold, money loaned, lease, services performed, personal injury or wrongful death, or credit card. Attach redacted copies of any documents supporting the claim required by Bankruptcy Rule 3001(c). Limit disclosing information that is entitled to privacy, such as health care information. <u>See Annex</u>
9. Is all or part of the claim secured?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. The claim is secured by a lien on property. Nature or property: <input type="checkbox"/> Real estate: If the claim is secured by the debtor's principle residence, file a <i>Mortgage Proof of Claim Attachment</i> (Official Form 410-A) with this <i>Proof of Claim</i> . <input type="checkbox"/> Motor vehicle <input type="checkbox"/> Other. Describe: _____ Basis for perfection: _____ Attach redacted copies of documents, if any, that show evidence of perfection of a security interest (for example, a mortgage, lien, certificate of title, financing statement, or other document that shows the lien has been filed or recorded.) Value of property: \$ _____ Amount of the claim that is secured: \$ _____ Amount of the claim that is unsecured: \$ _____ (The sum of the secured and unsecured amount should match the amount in line 7.) Amount necessary to cure any default as of the date of the petition: \$ _____ Annual Interest Rate (when case was filed) _____ % <input type="checkbox"/> Fixed <input type="checkbox"/> Variable
10. Is this claim based on a lease?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Amount necessary to cure any default as of the date of the petition. \$ _____
11. Is this claim subject to a right of setoff?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Identify the property: _____



12. Is all or part of the claim entitled to priority under 11 U.S.C. § 507(a)? A claim may be partly priority and partly nonpriority. For example, in some categories, the law limits the amount entitled to priority.	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Check all that apply: <input type="checkbox"/> Domestic support obligations (including alimony and child support) under 11 U.S.C. § 507(a)(1)(A) or (a)(1)(B). <input type="checkbox"/> Up to \$3,025* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use. 11 U.S.C. § 507(a)(7). <input type="checkbox"/> Wages, salaries, or commissions (up to \$13,650*) earned within 180 days before the bankruptcy petition is filed or the debtor's business ends, whichever is earlier. 11 U.S.C. § 507(a)(4). <input type="checkbox"/> Taxes or penalties owed to governmental units. 11 U.S.C. § 507(a)(8). <input type="checkbox"/> Contributions to an employee benefit plan. 11 U.S.C. § 507(a)(5). <input type="checkbox"/> Other. Specify subsection of 11 U.S.C. § 507(a)() that applies. * Amounts are subject to adjustment on 4/01/22 and every 3 years after that for cases begun on or after the date of adjustment.	Amount entitled to priority \$ _____ \$ _____ \$ _____ \$ _____ \$ _____ \$ _____
13. Is all or part of the claim pursuant to 11 U.S.C. § 503(b)(9)?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Indicate the amount of your claim arising from the value of any goods received by the debtor within 20 days before the date of commencement of the above case, in which the goods have been sold to the Debtor in the ordinary course of such Debtor's business. Attach documentation supporting such claim. \$ _____	

Part 3: Sign Below

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

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

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

Check the appropriate box:

- ☐ I am the creditor.
☒ I am the creditor's attorney or authorized agent.
☐ I am the trustee, or the debtor, or their authorized agent. Bankruptcy Rule 3004.
☐ I am a guarantor, surety, endorser, or other codebtor. Bankruptcy Rule 3005.

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

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

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

Executed on date 04/08/2020
MM / DD / YYYY

/s/Michael Pugatch
Signature

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

Name Michael Pugatch
First name Middle name Last name

Title Managing Director - Company: HarbourVest 2017 Global Fund L.P., by Harbo

Company by HarbourVest GP LLC, its General Partner, by HarbourVest Partners, LL
Identify the corporate servicer as the company if the authorized agent is a servicer.

Address

Contact phone _____ Email _____



For phone assistance: Domestic (877) 573-3984 | International (310) 751-1829

Debtor: 19-34054 - Highland Capital Management, L.P. District: Northern District of Texas, Dallas Division		
Creditor: HarbourVest 2017 Global Fund L.P. Attn: Erica Weisgerber Debevoise and Plimpton LLP 919 Third Avenue New York, NY, 10022 U.S.A. Phone: 2129096000 Phone 2: Fax: Email: eweisgerber@debevoise.com	Has Supporting Documentation: Yes, supporting documentation successfully uploaded Related Document Statement:	
	Has Related Claim: No Related Claim Filed By:	
	Filing Party: Authorized agent	
Disbursement/Notice Parties: HarbourVest 2017 Global Fund L.P. c/o HarbourVest Partners, LLC One Financial Center Boston, MA, 02111 U.S.A. Phone: 6173483773 Phone 2: Fax: E-mail: agoren@harbourvest.com DISBURSEMENT ADDRESS		
Other Names Used with Debtor:	Amends Claim: No Acquired Claim: No	
Basis of Claim: See Annex	Last 4 Digits: No	Uniform Claim Identifier:
Total Amount of Claim: See Annex	Includes Interest or Charges: None	
Has Priority Claim: No	Priority Under:	
Has Secured Claim: No Amount of 503(b)(9): No Based on Lease: No Subject to Right of Setoff: No	Nature of Secured Amount: Value of Property: Annual Interest Rate: Arrearage Amount: Basis for Perfection: Amount Unsecured:	
Submitted By: Michael Pugatch on 08-Apr-2020 4:40:16 p.m. Eastern Time Title: Managing Director - Company: HarbourVest 2017 Global Fund L.P., by HarbourVest 2017 Global Associates L.P., its Gen Partner Company: by HarbourVest GP LLC, its General Partner, by HarbourVest Partners, LLC, its Managing Member		

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

In re:

Highland Capital Management, L.P.

Debtor.

Chapter 11

Case No. 19-34054 (SGJ)

ANNEX TO PROOF OF CLAIM

1. This annex (the “Annex”) is part of and is incorporated by reference into the attached proof of claim (together with the Annex, the “Proof of Claim”) and describes in more detail the claims of HarbourVest 2017 Global Fund L.P. (the “Claimant”) against the debtor Highland Capital Management, L.P. (the “Debtor”).

2. The Claimant is a limited partner in one of the Debtor’s managed vehicles, Highland CLO Funding, Ltd. (“HCLOF”). Acis Capital Management GP, L.L.C. and Acis Capital Management L.P. (together, “Acis”), the portfolio manager for HCLOF, filed for chapter 11 in the United States Bankruptcy Court for the Northern District of Texas (the “Court”) on January 30, 2018. The Acis bankruptcy filing resulted from a dispute between Debtor and its former employee, Joshua Terry, who served as portfolio manager for Debtor’s collateral loan obligations funds (“CLO”) business. *See, e.g., Findings of Fact and Conclusions of Law in Support of Orders for Relief Issued After Trial on Contested Involuntary Bankruptcy Petition (“Involuntary Petition Ruling”) [Case No. 18-30264 (SGJ), Dkt. No. 118].* As noted in more detail in the Court’s *Bench Ruling and Memorandum of Law in Support of: (A) Final Approval of Disclosure Statement; and (B) Confirmation of Chapter 11 Trustee’s Third Amended Joint Plan (“Confirmation Ruling”) [Case No. 18-30264 (SGJ), Dkt. No 827]* and related filings in the Acis

bankruptcy cases, there has been extensive litigation regarding alleged improper conduct associated with the management of, and transactions relating to, Acis, including transactions with and related to HCLOF. *See, e.g., id.; Second Amended Complaint* [Case No. 18-03078(SGJ), Dkt. No. 157].

3. Due to the Acis bankruptcy and certain conduct alleged to have been undertaken by the Debtor (to whom Acis subcontracted its functions) and Debtor's employees (who were officers, employees, and agents of Acis), the Claimant has suffered significant harm. Such harm includes, but is not limited to, financial harm resulting from, among other things (i) court orders in the Acis bankruptcy that prevented certain CLOs in which HCLOF was invested from being refinanced or reset and court orders that otherwise regulated the activity of HCLOF; and (ii) significant fees and expenses related to the Acis bankruptcy that were charged to HCLOF. *See, e.g., Involuntary Petition Ruling* ¶ 27; *see also Confirmation Ruling*.

4. Claimant hereby files this Claim to assert any and all of its rights to payment, remedies, and other claims (including contingent or unliquidated claims) against the Debtor in connection with and relating to the foregoing harm, including for any amounts due or owed under the various agreements with the Debtor in connection with HCLOF (including, but not limited to, the Subscription and Transfer Agreement for Ordinary Shares Highland CLO Funding, Ltd., dated as of November 15, 2017, the Members Agreement Relating to the Company, dated as of November 15, 2017, the Highland CLO Funding, Ltd. Offering Memorandum dated November 15, 2017), and any and all legal and equitable claims or causes of action relating to the foregoing harm.

5. The Claimant has not attached the documentation supporting this Claim to this Proof of Claim because the documentation is voluminous and the Debtor has copies of such

documents. However, any requested relevant documents will be provided to the Official Committee of Unsecured Creditors, the Court, the United States Trustee and the Debtor in the event of a dispute regarding this Proof of Claim and will be made available for review by other parties in interest as appropriate upon reasonable request and after consultation with the Debtor and execution of appropriate confidentiality agreements.

6. This Proof of Claim is filed with a full reservation of rights, including the right to amend, update, modify, supplement or otherwise revise this Proof of Claim in any respect at any time. The filing of this Proof of Claim is not and should not be construed to be: (a) a waiver or release of any of the Claimant's rights against any person, entity or property accruing to it against the Debtor and its estate; (b) a waiver of the Claimant's rights to assert that **28 U.S.C. § 157(b)(2)(C)** is unconstitutional; (c) a consent or submission by the Claimant, or waiver of the Claimant's rights to object, to the jurisdiction of this Court with respect to the subject matter of any of the claims described herein, or any objection or other proceeding commenced with respect to any of the claims described herein, or any other proceeding commenced in the Debtor's chapter 11 case against or otherwise involving the Claimant; (d) a waiver or release of any right of the Claimant, or consent by the Claimant, to a trial by jury in this or any other court or proceeding; (e) a waiver or release of, or any limitation on, any right of the Claimant to have orders entered only after *de novo* review by a United States District Judge; (f) an election of remedies; or (g) a waiver of, or any other limitation on, any right of the Claimant to request withdrawal of the reference with respect to any matter, including, without limitation, any matter relating to this Proof of Claim.

7. Claimant's express reservation of all rights and causes of action, includes, without limitation, contingent or unliquidated rights that it or its affiliates may have against the Debtor,

as well as defenses, offsets and counterclaims. This description and classification of claims by the Claimant is not a concession or admission as to the correct characterization or treatment of any such claims or a waiver of any rights of the Claimant.

8. Furthermore, the Claimant expressly reserves its rights to (a) file additional proofs of claim for additional claims that may be based on the same or additional documents or facts or other liability or indebtedness of the Debtor to the Claimant under contract or otherwise; (b) assert claims for cure of defaults in any agreement that the Debtor or any trustee appointed in this chapter 11 case may seek to assume; (c) assert any and all other claims, causes of action, defenses, offsets or counterclaims against the Debtor or any other parties; (d) file a request for payment of an administrative expense under 11 U.S.C. §§ 503 and 507 for any or all of the claims or rights of payment described above and any additional amounts; and (e) seek recovery through any relevant third parties, including any of the Debtor's insurance coverage providers.

9. This Proof of Claim does not encompass all claims that the Claimant or its affiliates may have that arise after the Petition Date and are entitled to administrative priority, and the Claimant expressly reserves its right to file such claim or any similar claim at the appropriate time, including any such post-petition claims arising under these service contracts.

10. This Proof of Claim is filed without prejudice to the filing by the Claimant of additional proofs of claim or requests for payment with respect to any other indebtedness, liability or obligation of the Debtor. The Claimant does not, by this Proof of Claim or any amendment or other action, waive any rights with respect to any scheduled claim.

11. The Claimant reserves the right to withdraw, amend, clarify, modify or supplement this Proof of Claim to assert additional claims, causes of action or additional grounds for this Proof of Claim (including adding any additional contracts, agreements, obligations or

other relationships between the Claimant and the Debtor), as well as the right to file any separate or additional proofs of claim with respect to the claims set forth herein or otherwise, including for the purpose of fixing and liquidating any contingent or unliquidated claim set forth herein, or to file additional proofs of claim in respect of additional amounts or for any other reason.

12. In executing and filing this Proof of Claim, the Claimant does not submit to the jurisdiction of the Bankruptcy Court for the Northern District of Texas for any purpose other than with respect to this Proof of Claim against the Debtor, and does not waive or release any rights or remedies against any other person or entity that may be liable for all or part of this Proof of Claim.

13. The Claimant otherwise reserves its rights, and nothing herein shall prejudice the Claimant's rights, under any order of the Court previously entered in this chapter 11 case.

14. Payments on account of this Proof of Claim should be sent to the Claimant at the address specified for notices to the Claimant in Part 1.3 of the Proof of Claim.

CLAIM 147

Fill in this information to identify the case:

Debtor Highland Capital Management, L.P.

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

Case number 19-34054

Official Form 410 Proof of Claim

04/19

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

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

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

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

Part 1: Identify the Claim

1. Who is the current creditor?	<u>HarbourVest 2017 Global AIF L.P.</u> Name of the current creditor (the person or entity to be paid for this claim)	
	Other names the creditor used with the debtor _____	
2. Has this claim been acquired from someone else?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. From whom? _____	
3. Where should notices and payments to the creditor be sent?	Where should notices to the creditor be sent? <u>HarbourVest 2017 Global AIF L.P.</u> <u>Attn: Erica Weisgerber</u> <u>Debevoise and Plimpton LLP</u> <u>919 Third Avenue</u> <u>New York, NY 10022, U.S.A.</u> Contact phone <u>2129096000</u> Contact email <u>eweisgerber@debevoise.com</u>	Where should payments to the creditor be sent? (if different) <u>See summary page</u> Contact phone <u>6173483773</u> Contact email <u>agoren@harbourvest.com</u> Uniform claim identifier for electronic payments in chapter 13 (if you use one): _____
4. Does this claim amend one already filed?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Claim number on court claims registry (if known) _____ Filed on _____ MM / DD / YYYY	
5. Do you know if anyone else has filed a proof of claim for this claim?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Who made the earlier filing? _____	



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

6. Do you have any number you use to identify the debtor?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Last 4 digits of the debtor's account or any number you use to identify the debtor: _____
7. How much is the claim? \$ <u>See Annex</u>	Does this amount include interest or other charges? <input type="checkbox"/> No <input type="checkbox"/> Yes. Attach statement itemizing interest, fees, expenses, or other charges required by Bankruptcy Rule 3001(c)(2)(A).
8. What is the basis of the claim?	Examples: Goods sold, money loaned, lease, services performed, personal injury or wrongful death, or credit card. Attach redacted copies of any documents supporting the claim required by Bankruptcy Rule 3001(c). Limit disclosing information that is entitled to privacy, such as health care information. <u>See Annex</u>
9. Is all or part of the claim secured?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. The claim is secured by a lien on property. Nature or property: <input type="checkbox"/> Real estate: If the claim is secured by the debtor's principle residence, file a <i>Mortgage Proof of Claim Attachment</i> (Official Form 410-A) with this <i>Proof of Claim</i> . <input type="checkbox"/> Motor vehicle <input type="checkbox"/> Other. Describe: _____ Basis for perfection: _____ Attach redacted copies of documents, if any, that show evidence of perfection of a security interest (for example, a mortgage, lien, certificate of title, financing statement, or other document that shows the lien has been filed or recorded.) Value of property: \$ _____ Amount of the claim that is secured: \$ _____ Amount of the claim that is unsecured: \$ _____ (The sum of the secured and unsecured amount should match the amount in line 7.) Amount necessary to cure any default as of the date of the petition: \$ _____ Annual Interest Rate (when case was filed) _____ % <input type="checkbox"/> Fixed <input type="checkbox"/> Variable
10. Is this claim based on a lease?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Amount necessary to cure any default as of the date of the petition. \$ _____
11. Is this claim subject to a right of setoff?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Identify the property: _____



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

☒ No

☐ Yes. Check all that apply:

Amount entitled to priority

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

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

\$ _____

☐ Up to \$3,025* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use. 11 U.S.C. § 507(a)(7).

\$ _____

☐ Wages, salaries, or commissions (up to \$13,650*) earned within 180 days before the bankruptcy petition is filed or the debtor's business ends, whichever is earlier. 11 U.S.C. § 507(a)(4).

\$ _____

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

\$ _____

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

\$ _____

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

\$ _____

* Amounts are subject to adjustment on 4/01/22 and every 3 years after that for cases begun on or after the date of adjustment.

13. Is all or part of the claim pursuant to 11 U.S.C. § 503(b)(9)?

☒ No

☐ Yes. Indicate the amount of your claim arising from the value of any goods received by the debtor within 20 days before the date of commencement of the above case, in which the goods have been sold to the Debtor in the ordinary course of such Debtor's business. Attach documentation supporting such claim.

\$ _____

Part 3: Sign Below

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

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

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

Check the appropriate box:

☐ I am the creditor.

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

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

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

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

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

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

Executed on date 04/08/2020
MM / DD / YYYY

/s/Michael Pugatch
Signature

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

Name Michael Pugatch
First name Middle name Last name

Title Managing Director-Company: HarbourVest 2017 Global AIF L.P., by HarbourV

Company Inv Fund Mgr, by HarbourVest Partners L.P., its Duly Appointed Investme
Identify the corporate servicer as the company if the authorized agent is a servicer.

Address

Contact phone _____

Email _____



For phone assistance: Domestic (877) 573-3984 | International (310) 751-1829

Debtor: 19-34054 - Highland Capital Management, L.P. District: Northern District of Texas, Dallas Division		
Creditor: HarbourVest 2017 Global AIF L.P. Attn: Erica Weisgerber Debevoise and Plimpton LLP 919 Third Avenue New York, NY, 10022 U.S.A. Phone: 2129096000 Phone 2: Fax: Email: eweisgerber@debevoise.com	Has Supporting Documentation: Yes, supporting documentation successfully uploaded Related Document Statement:	
	Has Related Claim: No Related Claim Filed By:	
	Filing Party: Authorized agent	
Disbursement/Notice Parties: HarbourVest 2017 Global AIF L.P. c/o HarbourVest Partners, LLC One Financial Center Boston, MA, 02111 Phone: 6173483773 Phone 2: Fax: E-mail: agoren@harbourvest.com DISBURSEMENT ADDRESS		
Other Names Used with Debtor:	Amends Claim: No Acquired Claim: No	
Basis of Claim: See Annex	Last 4 Digits: No	Uniform Claim Identifier:
Total Amount of Claim: See Annex	Includes Interest or Charges: None	
Has Priority Claim: No	Priority Under:	
Has Secured Claim: No Amount of 503(b)(9): No Based on Lease: No Subject to Right of Setoff: No	Nature of Secured Amount: Value of Property: Annual Interest Rate: Arrearage Amount: Basis for Perfection: Amount Unsecured:	
Submitted By: Michael Pugatch on 08-Apr-2020 4:49:59 p.m. Eastern Time Title: Managing Director-Company: HarbourVest 2017 Global AIF L.P., by HarbourVest Partners Ireland Limited, its Alternative Company: Inv Fund Mgr, by HarbourVest Partners L.P., its Duly Appointed Investment Manager, by HarbourVest Partners, LLC, its Gen Ptr		

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In re:

Highland Capital Management, L.P.

Debtor.

Chapter 11

Case No. 19-34054 (SGJ)

ANNEX TO PROOF OF CLAIM

1. This annex (the “Annex”) is part of and is incorporated by reference into the attached proof of claim (together with the Annex, the “Proof of Claim”) and describes in more detail the claims of HarbourVest 2017 Global AIF L.P. (the “Claimant”) against the debtor Highland Capital Management, L.P. (the “Debtor”).

2. The Claimant is a limited partner in one of the Debtor’s managed vehicles, Highland CLO Funding, Ltd. (“HCLOF”). Acis Capital Management GP, L.L.C. and Acis Capital Management L.P. (together, “Acis”), the portfolio manager for HCLOF, filed for chapter 11 in the United States Bankruptcy Court for the Northern District of Texas (the “Court”) on January 30, 2018. The Acis bankruptcy filing resulted from a dispute between Debtor and its former employee, Joshua Terry, who served as portfolio manager for Debtor’s collateral loan obligations funds (“CLO”) business. *See, e.g., Findings of Fact and Conclusions of Law in Support of Orders for Relief Issued After Trial on Contested Involuntary Bankruptcy Petition (“Involuntary Petition Ruling”) [Case No. 18-30264 (SGJ), Dkt. No. 118].* As noted in more detail in the Court’s *Bench Ruling and Memorandum of Law in Support of: (A) Final Approval of Disclosure Statement; and (B) Confirmation of Chapter 11 Trustee’s Third Amended Joint Plan (“Confirmation Ruling”) [Case No. 18-30264 (SGJ), Dkt. No 827]* and related filings in the Acis

bankruptcy cases, there has been extensive litigation regarding alleged improper conduct associated with the management of, and transactions relating to, Acis, including transactions with and related to HCLOF. *See, e.g., id.; Second Amended Complaint* [Case No. 18-03078(SGJ), Dkt. No. 157].

3. Due to the Acis bankruptcy and certain conduct alleged to have been undertaken by the Debtor (to whom Acis subcontracted its functions) and Debtor's employees (who were officers, employees, and agents of Acis), the Claimant has suffered significant harm. Such harm includes, but is not limited to, financial harm resulting from, among other things (i) court orders in the Acis bankruptcy that prevented certain CLOs in which HCLOF was invested from being refinanced or reset and court orders that otherwise regulated the activity of HCLOF; and (ii) significant fees and expenses related to the Acis bankruptcy that were charged to HCLOF. *See, e.g., Involuntary Petition Ruling* ¶ 27; *see also Confirmation Ruling*.

4. Claimant hereby files this Claim to assert any and all of its rights to payment, remedies, and other claims (including contingent or unliquidated claims) against the Debtor in connection with and relating to the foregoing harm, including for any amounts due or owed under the various agreements with the Debtor in connection with HCLOF (including, but not limited to, the Subscription and Transfer Agreement for Ordinary Shares Highland CLO Funding, Ltd., dated as of November 15, 2017, the Members Agreement Relating to the Company, dated as of November 15, 2017, the Highland CLO Funding, Ltd. Offering Memorandum dated November 15, 2017), and any and all legal and equitable claims or causes of action relating to the foregoing harm.

5. The Claimant has not attached the documentation supporting this Claim to this Proof of Claim because the documentation is voluminous and the Debtor has copies of such

documents. However, any requested relevant documents will be provided to the Official Committee of Unsecured Creditors, the Court, the United States Trustee and the Debtor in the event of a dispute regarding this Proof of Claim and will be made available for review by other parties in interest as appropriate upon reasonable request and after consultation with the Debtor and execution of appropriate confidentiality agreements.

6. This Proof of Claim is filed with a full reservation of rights, including the right to amend, update, modify, supplement or otherwise revise this Proof of Claim in any respect at any time. The filing of this Proof of Claim is not and should not be construed to be: (a) a waiver or release of any of the Claimant's rights against any person, entity or property accruing to it against the Debtor and its estate; (b) a waiver of the Claimant's rights to assert that **28 U.S.C. § 157(b)(2)(C)** is unconstitutional; (c) a consent or submission by the Claimant, or waiver of the Claimant's rights to object, to the jurisdiction of this Court with respect to the subject matter of any of the claims described herein, or any objection or other proceeding commenced with respect to any of the claims described herein, or any other proceeding commenced in the Debtor's chapter 11 case against or otherwise involving the Claimant; (d) a waiver or release of any right of the Claimant, or consent by the Claimant, to a trial by jury in this or any other court or proceeding; (e) a waiver or release of, or any limitation on, any right of the Claimant to have orders entered only after *de novo* review by a United States District Judge; (f) an election of remedies; or (g) a waiver of, or any other limitation on, any right of the Claimant to request withdrawal of the reference with respect to any matter, including, without limitation, any matter relating to this Proof of Claim.

7. Claimant's express reservation of all rights and causes of action, includes, without limitation, contingent or unliquidated rights that it or its affiliates may have against the Debtor,

as well as defenses, offsets and counterclaims. This description and classification of claims by the Claimant is not a concession or admission as to the correct characterization or treatment of any such claims or a waiver of any rights of the Claimant.

8. Furthermore, the Claimant expressly reserves its rights to (a) file additional proofs of claim for additional claims that may be based on the same or additional documents or facts or other liability or indebtedness of the Debtor to the Claimant under contract or otherwise; (b) assert claims for cure of defaults in any agreement that the Debtor or any trustee appointed in this chapter 11 case may seek to assume; (c) assert any and all other claims, causes of action, defenses, offsets or counterclaims against the Debtor or any other parties; (d) file a request for payment of an administrative expense under 11 U.S.C. §§ 503 and 507 for any or all of the claims or rights of payment described above and any additional amounts; and (e) seek recovery through any relevant third parties, including any of the Debtor's insurance coverage providers.

9. This Proof of Claim does not encompass all claims that the Claimant or its affiliates may have that arise after the Petition Date and are entitled to administrative priority, and the Claimant expressly reserves its right to file such claim or any similar claim at the appropriate time, including any such post-petition claims arising under these service contracts.

10. This Proof of Claim is filed without prejudice to the filing by the Claimant of additional proofs of claim or requests for payment with respect to any other indebtedness, liability or obligation of the Debtor. The Claimant does not, by this Proof of Claim or any amendment or other action, waive any rights with respect to any scheduled claim.

11. The Claimant reserves the right to withdraw, amend, clarify, modify or supplement this Proof of Claim to assert additional claims, causes of action or additional grounds for this Proof of Claim (including adding any additional contracts, agreements, obligations or

other relationships between the Claimant and the Debtor), as well as the right to file any separate or additional proofs of claim with respect to the claims set forth herein or otherwise, including for the purpose of fixing and liquidating any contingent or unliquidated claim set forth herein, or to file additional proofs of claim in respect of additional amounts or for any other reason.

12. In executing and filing this Proof of Claim, the Claimant does not submit to the jurisdiction of the Bankruptcy Court for the Northern District of Texas for any purpose other than with respect to this Proof of Claim against the Debtor, and does not waive or release any rights or remedies against any other person or entity that may be liable for all or part of this Proof of Claim.

13. The Claimant otherwise reserves its rights, and nothing herein shall prejudice the Claimant's rights, under any order of the Court previously entered in this chapter 11 case.

14. Payments on account of this Proof of Claim should be sent to the Claimant at the address specified for notices to the Claimant in Part 1.3 of the Proof of Claim.

CLAIM 150

Fill in this information to identify the case:

Debtor Highland Capital Management, L.P.

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

Case number 19-34054

Official Form 410 Proof of Claim

04/19

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

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

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

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

Part 1: Identify the Claim

1. Who is the current creditor?	<u>HarbourVest Dover Street IX Investment L.P.</u> Name of the current creditor (the person or entity to be paid for this claim)	
	Other names the creditor used with the debtor _____	
2. Has this claim been acquired from someone else?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. From whom? _____	
3. Where should notices and payments to the creditor be sent?	Where should notices to the creditor be sent? See summary page	Where should payments to the creditor be sent? (if different) See summary page
Federal Rule of Bankruptcy Procedure (FRBP) 2002(g)		
	Contact phone <u>2129096000</u> Contact email <u>eweisgerber@debevoise.com</u>	Contact phone <u>6173483773</u> Contact email <u>agoren@harbourvest.com</u>
Uniform claim identifier for electronic payments in chapter 13 (if you use one): _____		
4. Does this claim amend one already filed?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Claim number on court claims registry (if known) _____ Filed on _____ MM / DD / YYYY	
5. Do you know if anyone else has filed a proof of claim for this claim?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Who made the earlier filing? _____	



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

6. Do you have any number you use to identify the debtor?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Last 4 digits of the debtor's account or any number you use to identify the debtor: _____
7. How much is the claim? \$ <u>See Annex</u>	Does this amount include interest or other charges? <input type="checkbox"/> No <input type="checkbox"/> Yes. Attach statement itemizing interest, fees, expenses, or other charges required by Bankruptcy Rule 3001(c)(2)(A).
8. What is the basis of the claim?	Examples: Goods sold, money loaned, lease, services performed, personal injury or wrongful death, or credit card. Attach redacted copies of any documents supporting the claim required by Bankruptcy Rule 3001(c). Limit disclosing information that is entitled to privacy, such as health care information. <u>See Annex</u>
9. Is all or part of the claim secured?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. The claim is secured by a lien on property. Nature or property: <input type="checkbox"/> Real estate: If the claim is secured by the debtor's principle residence, file a <i>Mortgage Proof of Claim Attachment</i> (Official Form 410-A) with this <i>Proof of Claim</i> . <input type="checkbox"/> Motor vehicle <input type="checkbox"/> Other. Describe: _____ Basis for perfection: _____ Attach redacted copies of documents, if any, that show evidence of perfection of a security interest (for example, a mortgage, lien, certificate of title, financing statement, or other document that shows the lien has been filed or recorded.) Value of property: \$ _____ Amount of the claim that is secured: \$ _____ Amount of the claim that is unsecured: \$ _____ (The sum of the secured and unsecured amount should match the amount in line 7.) Amount necessary to cure any default as of the date of the petition: \$ _____ Annual Interest Rate (when case was filed) _____ % <input type="checkbox"/> Fixed <input type="checkbox"/> Variable
10. Is this claim based on a lease?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Amount necessary to cure any default as of the date of the petition. \$ _____
11. Is this claim subject to a right of setoff?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Identify the property: _____



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

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

☒ No

☐ Yes. Check all that apply:

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

Amount entitled to priority

\$ _____

☐ Up to \$3,025* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use. 11 U.S.C. § 507(a)(7).

\$ _____

☐ Wages, salaries, or commissions (up to \$13,650*) earned within 180 days before the bankruptcy petition is filed or the debtor's business ends, whichever is earlier. 11 U.S.C. § 507(a)(4).

\$ _____

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

\$ _____

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

\$ _____

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

\$ _____

* Amounts are subject to adjustment on 4/01/22 and every 3 years after that for cases begun on or after the date of adjustment.

13. Is all or part of the claim pursuant to 11 U.S.C. § 503(b)(9)?

☒ No

☐ Yes. Indicate the amount of your claim arising from the value of any goods received by the debtor within 20 days before the date of commencement of the above case, in which the goods have been sold to the Debtor in the ordinary course of such Debtor's business. Attach documentation supporting such claim.

\$ _____

Part 3: Sign Below

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

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

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

Check the appropriate box:

☐ I am the creditor.

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

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

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

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

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

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

Executed on date 04/08/2020
MM / DD / YYYY

/s/Michael Pugatch
Signature

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

Name Michael Pugatch
First name Middle name Last name

Title Managing Director-Company: HarbourVest Dover Street IX Investment L.P.,

Company Inv Fund Mgr, by HarbourVest Partners L.P., its Duly Appointed Investme
Identify the corporate servicer as the company if the authorized agent is a servicer.

Address

Contact phone _____

Email _____



For phone assistance: Domestic (877) 573-3984 | International (310) 751-1829

Debtor: 19-34054 - Highland Capital Management, L.P. District: Northern District of Texas, Dallas Division		
Creditor: HarbourVest Dover Street IX Investment L.P. Attn: Erica Weisgerber Debevoise and Plimpton LLP 919 Third Avenue New York, NY, 10022 U.S.A. Phone: 2129096000 Phone 2: Fax: Email: eweisgerber@debevoise.com	Has Supporting Documentation: Yes, supporting documentation successfully uploaded Related Document Statement:	
	Has Related Claim: No Related Claim Filed By:	
	Filing Party: Authorized agent	
Disbursement/Notice Parties: HarbourVest Dover Street IX Investment L.P. c/o HarbourVest Partners, LLC One Financial Center Boston, MA, 02111 U.S.A. Phone: 6173483773 Phone 2: Fax: E-mail: agoren@harbourvest.com DISBURSEMENT ADDRESS		
Other Names Used with Debtor:	Amends Claim: No Acquired Claim: No	
Basis of Claim: See Annex	Last 4 Digits: No	Uniform Claim Identifier:
Total Amount of Claim: See Annex	Includes Interest or Charges: None	
Has Priority Claim: No	Priority Under:	
Has Secured Claim: No Amount of 503(b)(9): No Based on Lease: No Subject to Right of Setoff: No	Nature of Secured Amount: Value of Property: Annual Interest Rate: Arrearage Amount: Basis for Perfection: Amount Unsecured:	
Submitted By: Michael Pugatch on 08-Apr-2020 4:59:00 p.m. Eastern Time Title: Managing Director-Company: HarbourVest Dover Street IX Investment L.P., by HarbourVest Partners Ireland Limited, its Alter Company: Inv Fund Mgr, by HarbourVest Partners L.P., its Duly Appointed Investment Manager, by HarbourVest Partners, LLC, its Gen Ptr		

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In re:

Highland Capital Management, L.P.

Debtor.

Chapter 11

Case No. 19-34054 (SGJ)

ANNEX TO PROOF OF CLAIM

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2. The Claimant is a limited partner in one of the Debtor’s managed vehicles, Highland CLO Funding, Ltd. (“HCLOF”). Acis Capital Management GP, L.L.C. and Acis Capital Management L.P. (together, “Acis”), the portfolio manager for HCLOF, filed for chapter 11 in the United States Bankruptcy Court for the Northern District of Texas (the “Court”) on January 30, 2018. The Acis bankruptcy filing resulted from a dispute between Debtor and its former employee, Joshua Terry, who served as portfolio manager for Debtor’s collateral loan obligations funds (“CLO”) business. *See, e.g., Findings of Fact and Conclusions of Law in Support of Orders for Relief Issued After Trial on Contested Involuntary Bankruptcy Petition (“Involuntary Petition Ruling”)* [Case No. 18-30264 (SGJ), Dkt. No. 118]. As noted in more detail in the Court’s *Bench Ruling and Memorandum of Law in Support of: (A) Final Approval of Disclosure Statement; and (B) Confirmation of Chapter 11 Trustee’s Third Amended Joint Plan (“Confirmation Ruling”)* [Case No. 18-30264 (SGJ), Dkt. No 827] and related filings in the Acis

bankruptcy cases, there has been extensive litigation regarding alleged improper conduct associated with the management of, and transactions relating to, Acis, including transactions with and related to HCLOF. *See, e.g., id.; Second Amended Complaint* [Case No. 18-03078(SGJ), Dkt. No. 157].

3. Due to the Acis bankruptcy and certain conduct alleged to have been undertaken by the Debtor (to whom Acis subcontracted its functions) and Debtor's employees (who were officers, employees, and agents of Acis), the Claimant has suffered significant harm. Such harm includes, but is not limited to, financial harm resulting from, among other things (i) court orders in the Acis bankruptcy that prevented certain CLOs in which HCLOF was invested from being refinanced or reset and court orders that otherwise regulated the activity of HCLOF; and (ii) significant fees and expenses related to the Acis bankruptcy that were charged to HCLOF. *See, e.g., Involuntary Petition Ruling* ¶ 27; *see also Confirmation Ruling*.

4. Claimant hereby files this Claim to assert any and all of its rights to payment, remedies, and other claims (including contingent or unliquidated claims) against the Debtor in connection with and relating to the foregoing harm, including for any amounts due or owed under the various agreements with the Debtor in connection with HCLOF (including, but not limited to, the Subscription and Transfer Agreement for Ordinary Shares Highland CLO Funding, Ltd., dated as of November 15, 2017, the Members Agreement Relating to the Company, dated as of November 15, 2017, the Highland CLO Funding, Ltd. Offering Memorandum dated November 15, 2017), and any and all legal and equitable claims or causes of action relating to the foregoing harm.

5. The Claimant has not attached the documentation supporting this Claim to this Proof of Claim because the documentation is voluminous and the Debtor has copies of such

documents. However, any requested relevant documents will be provided to the Official Committee of Unsecured Creditors, the Court, the United States Trustee and the Debtor in the event of a dispute regarding this Proof of Claim and will be made available for review by other parties in interest as appropriate upon reasonable request and after consultation with the Debtor and execution of appropriate confidentiality agreements.

6. This Proof of Claim is filed with a full reservation of rights, including the right to amend, update, modify, supplement or otherwise revise this Proof of Claim in any respect at any time. The filing of this Proof of Claim is not and should not be construed to be: (a) a waiver or release of any of the Claimant's rights against any person, entity or property accruing to it against the Debtor and its estate; (b) a waiver of the Claimant's rights to assert that **28 U.S.C. § 157(b)(2)(C)** is unconstitutional; (c) a consent or submission by the Claimant, or waiver of the Claimant's rights to object, to the jurisdiction of this Court with respect to the subject matter of any of the claims described herein, or any objection or other proceeding commenced with respect to any of the claims described herein, or any other proceeding commenced in the Debtor's chapter 11 case against or otherwise involving the Claimant; (d) a waiver or release of any right of the Claimant, or consent by the Claimant, to a trial by jury in this or any other court or proceeding; (e) a waiver or release of, or any limitation on, any right of the Claimant to have orders entered only after *de novo* review by a United States District Judge; (f) an election of remedies; or (g) a waiver of, or any other limitation on, any right of the Claimant to request withdrawal of the reference with respect to any matter, including, without limitation, any matter relating to this Proof of Claim.

7. Claimant's express reservation of all rights and causes of action, includes, without limitation, contingent or unliquidated rights that it or its affiliates may have against the Debtor,

as well as defenses, offsets and counterclaims. This description and classification of claims by the Claimant is not a concession or admission as to the correct characterization or treatment of any such claims or a waiver of any rights of the Claimant.

8. Furthermore, the Claimant expressly reserves its rights to (a) file additional proofs of claim for additional claims that may be based on the same or additional documents or facts or other liability or indebtedness of the Debtor to the Claimant under contract or otherwise; (b) assert claims for cure of defaults in any agreement that the Debtor or any trustee appointed in this chapter 11 case may seek to assume; (c) assert any and all other claims, causes of action, defenses, offsets or counterclaims against the Debtor or any other parties; (d) file a request for payment of an administrative expense under 11 U.S.C. §§ 503 and 507 for any or all of the claims or rights of payment described above and any additional amounts; and (e) seek recovery through any relevant third parties, including any of the Debtor's insurance coverage providers.

9. This Proof of Claim does not encompass all claims that the Claimant or its affiliates may have that arise after the Petition Date and are entitled to administrative priority, and the Claimant expressly reserves its right to file such claim or any similar claim at the appropriate time, including any such post-petition claims arising under these service contracts.

10. This Proof of Claim is filed without prejudice to the filing by the Claimant of additional proofs of claim or requests for payment with respect to any other indebtedness, liability or obligation of the Debtor. The Claimant does not, by this Proof of Claim or any amendment or other action, waive any rights with respect to any scheduled claim.

11. The Claimant reserves the right to withdraw, amend, clarify, modify or supplement this Proof of Claim to assert additional claims, causes of action or additional grounds for this Proof of Claim (including adding any additional contracts, agreements, obligations or

other relationships between the Claimant and the Debtor), as well as the right to file any separate or additional proofs of claim with respect to the claims set forth herein or otherwise, including for the purpose of fixing and liquidating any contingent or unliquidated claim set forth herein, or to file additional proofs of claim in respect of additional amounts or for any other reason.

12. In executing and filing this Proof of Claim, the Claimant does not submit to the jurisdiction of the Bankruptcy Court for the Northern District of Texas for any purpose other than with respect to this Proof of Claim against the Debtor, and does not waive or release any rights or remedies against any other person or entity that may be liable for all or part of this Proof of Claim.

13. The Claimant otherwise reserves its rights, and nothing herein shall prejudice the Claimant's rights, under any order of the Court previously entered in this chapter 11 case.

14. Payments on account of this Proof of Claim should be sent to the Claimant at the address specified for notices to the Claimant in Part 1.3 of the Proof of Claim.

CLAIM 153

Fill in this information to identify the case:

Debtor Highland Capital Management, L.P.

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

Case number 19-34054

Official Form 410 Proof of Claim

04/19

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

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

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

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

Part 1: Identify the Claim

1. Who is the current creditor?	<u>HV International VIII Secondary L.P.</u> Name of the current creditor (the person or entity to be paid for this claim)	
	Other names the creditor used with the debtor _____	
2. Has this claim been acquired from someone else?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. From whom? _____	
3. Where should notices and payments to the creditor be sent?	Where should notices to the creditor be sent? <u>HV International VIII Secondary L.P.</u> <u>Attn: Erica Weisgerber</u> <u>Debevoise and Plimpton LLP</u> <u>919 Third Avenue</u> <u>New York, NY 10022, U.S.A.</u> Contact phone <u>2129096000</u> Contact email <u>eweisgerber@debevoise.com</u>	Where should payments to the creditor be sent? (if different) <u>See summary page</u> Contact phone <u>6173483773</u> Contact email <u>agoren@harbourvest.com</u>
	Uniform claim identifier for electronic payments in chapter 13 (if you use one): _____	
4. Does this claim amend one already filed?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Claim number on court claims registry (if known) _____ Filed on _____ MM / DD / YYYY	
5. Do you know if anyone else has filed a proof of claim for this claim?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Who made the earlier filing? _____	



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

6. Do you have any number you use to identify the debtor?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Last 4 digits of the debtor's account or any number you use to identify the debtor: _____
7. How much is the claim? \$ <u>See Annex</u>	Does this amount include interest or other charges? <input type="checkbox"/> No <input type="checkbox"/> Yes. Attach statement itemizing interest, fees, expenses, or other charges required by Bankruptcy Rule 3001(c)(2)(A).
8. What is the basis of the claim?	Examples: Goods sold, money loaned, lease, services performed, personal injury or wrongful death, or credit card. Attach redacted copies of any documents supporting the claim required by Bankruptcy Rule 3001(c). Limit disclosing information that is entitled to privacy, such as health care information. <u>See Annex</u>
9. Is all or part of the claim secured?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. The claim is secured by a lien on property. Nature or property: <input type="checkbox"/> Real estate: If the claim is secured by the debtor's principle residence, file a <i>Mortgage Proof of Claim Attachment</i> (Official Form 410-A) with this <i>Proof of Claim</i> . <input type="checkbox"/> Motor vehicle <input type="checkbox"/> Other. Describe: _____ Basis for perfection: _____ Attach redacted copies of documents, if any, that show evidence of perfection of a security interest (for example, a mortgage, lien, certificate of title, financing statement, or other document that shows the lien has been filed or recorded.) Value of property: \$ _____ Amount of the claim that is secured: \$ _____ Amount of the claim that is unsecured: \$ _____ (The sum of the secured and unsecured amount should match the amount in line 7.) Amount necessary to cure any default as of the date of the petition: \$ _____ Annual Interest Rate (when case was filed) _____ % <input type="checkbox"/> Fixed <input type="checkbox"/> Variable
10. Is this claim based on a lease?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Amount necessary to cure any default as of the date of the petition. \$ _____
11. Is this claim subject to a right of setoff?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Identify the property: _____



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

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

☒ No

☐ Yes. Check all that apply:

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

Amount entitled to priority

\$ _____

☐ Up to \$3,025* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use. 11 U.S.C. § 507(a)(7).

\$ _____

☐ Wages, salaries, or commissions (up to \$13,650*) earned within 180 days before the bankruptcy petition is filed or the debtor's business ends, whichever is earlier. 11 U.S.C. § 507(a)(4).

\$ _____

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

\$ _____

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

\$ _____

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

\$ _____

* Amounts are subject to adjustment on 4/01/22 and every 3 years after that for cases begun on or after the date of adjustment.

13. Is all or part of the claim pursuant to 11 U.S.C. § 503(b)(9)?

☒ No

☐ Yes. Indicate the amount of your claim arising from the value of any goods received by the debtor within 20 days before the date of commencement of the above case, in which the goods have been sold to the Debtor in the ordinary course of such Debtor's business. Attach documentation supporting such claim.

\$ _____

Part 3: Sign Below

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

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

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

Check the appropriate box:

☐ I am the creditor.

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

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

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

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

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

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

Executed on date 04/08/2020
MM / DD / YYYY

/s/Michael Pugatch
Signature

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

Name Michael Pugatch
First name Middle name Last name

Title Managing Director-Company: HV International VIII Secondary L.P., by HII

Company by HarbourVest GP LLC, its General Partner, by HarbourVest Partners, LL
Identify the corporate servicer as the company if the authorized agent is a servicer.

Address

Contact phone _____

Email _____



For phone assistance: Domestic (877) 573-3984 | International (310) 751-1829

Debtor: 19-34054 - Highland Capital Management, L.P. District: Northern District of Texas, Dallas Division		
Creditor: HV International VIII Secondary L.P. Attn: Erica Weisgerber Debevoise and Plimpton LLP 919 Third Avenue New York, NY, 10022 U.S.A. Phone: 2129096000 Phone 2: Fax: Email: eweisgerber@debevoise.com	Has Supporting Documentation: Yes, supporting documentation successfully uploaded Related Document Statement:	
	Has Related Claim: No Related Claim Filed By:	
	Filing Party: Authorized agent	
Disbursement/Notice Parties: HV International VIII Secondary L.P. c/o HarbourVest Partners, LLC One Financial Center Boston, MA, 02111 U.S.A. Phone: 6173483773 Phone 2: Fax: E-mail: agoren@harbourvest.com DISBURSEMENT ADDRESS		
Other Names Used with Debtor:	Amends Claim: No Acquired Claim: No	
Basis of Claim: See Annex	Last 4 Digits: No	Uniform Claim Identifier:
Total Amount of Claim: See Annex	Includes Interest or Charges: None	
Has Priority Claim: No	Priority Under:	
Has Secured Claim: No Amount of 503(b)(9): No Based on Lease: No Subject to Right of Setoff: No	Nature of Secured Amount: Value of Property: Annual Interest Rate: Arrearage Amount: Basis for Perfection: Amount Unsecured:	
Submitted By: Michael Pugatch on 08-Apr-2020 5:16:54 p.m. Eastern Time Title: Managing Director-Company: HV International VIII Secondary L.P., by HIPEP VIII Associates L.P., its General Partner, Company: by HarbourVest GP LLC, its General Partner, by HarbourVest Partners, LLC, its Managing Member		

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In re:

Highland Capital Management, L.P.

Debtor.

Chapter 11

Case No. 19-34054 (SGJ)

ANNEX TO PROOF OF CLAIM

1. This annex (the “Annex”) is part of and is incorporated by reference into the attached proof of claim (together with the Annex, the “Proof of Claim”) and describes in more detail the claims of HV International VIII Secondary L.P. (the “Claimant”) against the debtor Highland Capital Management, L.P. (the “Debtor”).

2. The Claimant is a limited partner in one of the Debtor’s managed vehicles, Highland CLO Funding, Ltd. (“HCLOF”). Acis Capital Management GP, L.L.C. and Acis Capital Management L.P. (together, “Acis”), the portfolio manager for HCLOF, filed for chapter 11 in the United States Bankruptcy Court for the Northern District of Texas (the “Court”) on January 30, 2018. The Acis bankruptcy filing resulted from a dispute between Debtor and its former employee, Joshua Terry, who served as portfolio manager for Debtor’s collateral loan obligations funds (“CLO”) business. *See, e.g., Findings of Fact and Conclusions of Law in Support of Orders for Relief Issued After Trial on Contested Involuntary Bankruptcy Petition (“Involuntary Petition Ruling”) [Case No. 18-30264 (SGJ), Dkt. No. 118].* As noted in more detail in the Court’s *Bench Ruling and Memorandum of Law in Support of: (A) Final Approval of Disclosure Statement; and (B) Confirmation of Chapter 11 Trustee’s Third Amended Joint Plan (“Confirmation Ruling”) [Case No. 18-30264 (SGJ), Dkt. No 827]* and related filings in the Acis

bankruptcy cases, there has been extensive litigation regarding alleged improper conduct associated with the management of, and transactions relating to, Acis, including transactions with and related to HCLOF. *See, e.g., id.; Second Amended Complaint* [Case No. 18-03078(SGJ), Dkt. No. 157].

3. Due to the Acis bankruptcy and certain conduct alleged to have been undertaken by the Debtor (to whom Acis subcontracted its functions) and Debtor's employees (who were officers, employees, and agents of Acis), the Claimant has suffered significant harm. Such harm includes, but is not limited to, financial harm resulting from, among other things (i) court orders in the Acis bankruptcy that prevented certain CLOs in which HCLOF was invested from being refinanced or reset and court orders that otherwise regulated the activity of HCLOF; and (ii) significant fees and expenses related to the Acis bankruptcy that were charged to HCLOF. *See, e.g., Involuntary Petition Ruling* ¶ 27; *see also Confirmation Ruling*.

4. Claimant hereby files this Claim to assert any and all of its rights to payment, remedies, and other claims (including contingent or unliquidated claims) against the Debtor in connection with and relating to the foregoing harm, including for any amounts due or owed under the various agreements with the Debtor in connection with HCLOF (including, but not limited to, the Subscription and Transfer Agreement for Ordinary Shares Highland CLO Funding, Ltd., dated as of November 15, 2017, the Members Agreement Relating to the Company, dated as of November 15, 2017, the Highland CLO Funding, Ltd. Offering Memorandum dated November 15, 2017), and any and all legal and equitable claims or causes of action relating to the foregoing harm.

5. The Claimant has not attached the documentation supporting this Claim to this Proof of Claim because the documentation is voluminous and the Debtor has copies of such

documents. However, any requested relevant documents will be provided to the Official Committee of Unsecured Creditors, the Court, the United States Trustee and the Debtor in the event of a dispute regarding this Proof of Claim and will be made available for review by other parties in interest as appropriate upon reasonable request and after consultation with the Debtor and execution of appropriate confidentiality agreements.

6. This Proof of Claim is filed with a full reservation of rights, including the right to amend, update, modify, supplement or otherwise revise this Proof of Claim in any respect at any time. The filing of this Proof of Claim is not and should not be construed to be: (a) a waiver or release of any of the Claimant's rights against any person, entity or property accruing to it against the Debtor and its estate; (b) a waiver of the Claimant's rights to assert that **28 U.S.C. § 157(b)(2)(C)** is unconstitutional; (c) a consent or submission by the Claimant, or waiver of the Claimant's rights to object, to the jurisdiction of this Court with respect to the subject matter of any of the claims described herein, or any objection or other proceeding commenced with respect to any of the claims described herein, or any other proceeding commenced in the Debtor's chapter 11 case against or otherwise involving the Claimant; (d) a waiver or release of any right of the Claimant, or consent by the Claimant, to a trial by jury in this or any other court or proceeding; (e) a waiver or release of, or any limitation on, any right of the Claimant to have orders entered only after *de novo* review by a United States District Judge; (f) an election of remedies; or (g) a waiver of, or any other limitation on, any right of the Claimant to request withdrawal of the reference with respect to any matter, including, without limitation, any matter relating to this Proof of Claim.

7. Claimant's express reservation of all rights and causes of action, includes, without limitation, contingent or unliquidated rights that it or its affiliates may have against the Debtor,

as well as defenses, offsets and counterclaims. This description and classification of claims by the Claimant is not a concession or admission as to the correct characterization or treatment of any such claims or a waiver of any rights of the Claimant.

8. Furthermore, the Claimant expressly reserves its rights to (a) file additional proofs of claim for additional claims that may be based on the same or additional documents or facts or other liability or indebtedness of the Debtor to the Claimant under contract or otherwise; (b) assert claims for cure of defaults in any agreement that the Debtor or any trustee appointed in this chapter 11 case may seek to assume; (c) assert any and all other claims, causes of action, defenses, offsets or counterclaims against the Debtor or any other parties; (d) file a request for payment of an administrative expense under 11 U.S.C. §§ 503 and 507 for any or all of the claims or rights of payment described above and any additional amounts; and (e) seek recovery through any relevant third parties, including any of the Debtor's insurance coverage providers.

9. This Proof of Claim does not encompass all claims that the Claimant or its affiliates may have that arise after the Petition Date and are entitled to administrative priority, and the Claimant expressly reserves its right to file such claim or any similar claim at the appropriate time, including any such post-petition claims arising under these service contracts.

10. This Proof of Claim is filed without prejudice to the filing by the Claimant of additional proofs of claim or requests for payment with respect to any other indebtedness, liability or obligation of the Debtor. The Claimant does not, by this Proof of Claim or any amendment or other action, waive any rights with respect to any scheduled claim.

11. The Claimant reserves the right to withdraw, amend, clarify, modify or supplement this Proof of Claim to assert additional claims, causes of action or additional grounds for this Proof of Claim (including adding any additional contracts, agreements, obligations or

other relationships between the Claimant and the Debtor), as well as the right to file any separate or additional proofs of claim with respect to the claims set forth herein or otherwise, including for the purpose of fixing and liquidating any contingent or unliquidated claim set forth herein, or to file additional proofs of claim in respect of additional amounts or for any other reason.

12. In executing and filing this Proof of Claim, the Claimant does not submit to the jurisdiction of the Bankruptcy Court for the Northern District of Texas for any purpose other than with respect to this Proof of Claim against the Debtor, and does not waive or release any rights or remedies against any other person or entity that may be liable for all or part of this Proof of Claim.

13. The Claimant otherwise reserves its rights, and nothing herein shall prejudice the Claimant's rights, under any order of the Court previously entered in this chapter 11 case.

14. Payments on account of this Proof of Claim should be sent to the Claimant at the address specified for notices to the Claimant in Part 1.3 of the Proof of Claim.

CLAIM 154

Fill in this information to identify the case:

Debtor Highland Capital Management, L.P.

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

Case number 19-34054

Official Form 410 Proof of Claim

04/19

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

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

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

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

Part 1: Identify the Claim

1. Who is the current creditor?	<u>HarbourVest Skew Base AIF L.P.</u> Name of the current creditor (the person or entity to be paid for this claim)	
	Other names the creditor used with the debtor _____	
2. Has this claim been acquired from someone else?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. From whom? _____	
3. Where should notices and payments to the creditor be sent?	Where should notices to the creditor be sent? <u>HarbourVest Skew Base AIF L.P.</u> <u>Attn: Erica Weisgerber</u> <u>Debevoise and Plimpton LLP</u> <u>919 Third Avenue</u> <u>New York, NY 10022, U.S.A.</u> Contact phone <u>2129096000</u> Contact email <u>eweisgerber@debevoise.com</u>	Where should payments to the creditor be sent? (if different) <u>See summary page</u> Contact phone <u>6173483773</u> Contact email <u>agoren@harbourvest.com</u>
	Federal Rule of Bankruptcy Procedure (FRBP) 2002(g) Uniform claim identifier for electronic payments in chapter 13 (if you use one): _____	
4. Does this claim amend one already filed?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Claim number on court claims registry (if known) _____ Filed on _____ MM / DD / YYYY	
5. Do you know if anyone else has filed a proof of claim for this claim?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Who made the earlier filing? _____	



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

6. Do you have any number you use to identify the debtor?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Last 4 digits of the debtor's account or any number you use to identify the debtor: _____
7. How much is the claim? \$ <u>See Annex</u>	Does this amount include interest or other charges? <input type="checkbox"/> No <input type="checkbox"/> Yes. Attach statement itemizing interest, fees, expenses, or other charges required by Bankruptcy Rule 3001(c)(2)(A).
8. What is the basis of the claim?	Examples: Goods sold, money loaned, lease, services performed, personal injury or wrongful death, or credit card. Attach redacted copies of any documents supporting the claim required by Bankruptcy Rule 3001(c). Limit disclosing information that is entitled to privacy, such as health care information. <u>See Annex</u>
9. Is all or part of the claim secured?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. The claim is secured by a lien on property. Nature or property: <input type="checkbox"/> Real estate: If the claim is secured by the debtor's principle residence, file a <i>Mortgage Proof of Claim Attachment</i> (Official Form 410-A) with this <i>Proof of Claim</i> . <input type="checkbox"/> Motor vehicle <input type="checkbox"/> Other. Describe: _____ Basis for perfection: _____ Attach redacted copies of documents, if any, that show evidence of perfection of a security interest (for example, a mortgage, lien, certificate of title, financing statement, or other document that shows the lien has been filed or recorded.) Value of property: \$ _____ Amount of the claim that is secured: \$ _____ Amount of the claim that is unsecured: \$ _____ (The sum of the secured and unsecured amount should match the amount in line 7.) Amount necessary to cure any default as of the date of the petition: \$ _____ Annual Interest Rate (when case was filed) _____ % <input type="checkbox"/> Fixed <input type="checkbox"/> Variable
10. Is this claim based on a lease?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Amount necessary to cure any default as of the date of the petition. \$ _____
11. Is this claim subject to a right of setoff?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Identify the property: _____



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

☒ No

☐ Yes. Check all that apply:

Amount entitled to priority

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

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

\$ _____

☐ Up to \$3,025* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use. 11 U.S.C. § 507(a)(7).

\$ _____

☐ Wages, salaries, or commissions (up to \$13,650*) earned within 180 days before the bankruptcy petition is filed or the debtor's business ends, whichever is earlier. 11 U.S.C. § 507(a)(4).

\$ _____

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

\$ _____

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

\$ _____

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

\$ _____

* Amounts are subject to adjustment on 4/01/22 and every 3 years after that for cases begun on or after the date of adjustment.

13. Is all or part of the claim pursuant to 11 U.S.C. § 503(b)(9)?

☒ No

☐ Yes. Indicate the amount of your claim arising from the value of any goods received by the debtor within 20 days before the date of commencement of the above case, in which the goods have been sold to the Debtor in the ordinary course of such Debtor's business. Attach documentation supporting such claim.

\$ _____

Part 3: Sign Below

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

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

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

Check the appropriate box:

☐ I am the creditor.

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

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

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

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

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

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

Executed on date 04/08/2020
MM / DD / YYYY

/s/Michael Pugatch
Signature

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

Name Michael Pugatch
First name Middle name Last name

Title Managing Director-Company: HarbourVest Skew Base AIF L.P., by HarbourVest

Company Fund Manager, by HarbourVest Partners L.P., its Duly Appointed Investme
Identify the corporate servicer as the company if the authorized agent is a servicer.

Address

Contact phone _____

Email _____



For phone assistance: Domestic (877) 573-3984 | International (310) 751-1829

Debtor: 19-34054 - Highland Capital Management, L.P. District: Northern District of Texas, Dallas Division		
Creditor: HarbourVest Skew Base AIF L.P. Attn: Erica Weisgerber Debevoise and Plimpton LLP 919 Third Avenue New York, NY, 10022 U.S.A. Phone: 2129096000 Phone 2: Fax: Email: eweisgerber@debevoise.com	Has Supporting Documentation: Yes, supporting documentation successfully uploaded Related Document Statement:	
	Has Related Claim: No Related Claim Filed By:	
	Filing Party: Authorized agent	
Disbursement/Notice Parties: HarbourVest Skew Base AIF L.P. c/o HarbourVest Partners, LLC One Financial Center Boston, MA, 02111 Phone: 6173483773 Phone 2: Fax: E-mail: agoren@harbourvest.com DISBURSEMENT ADDRESS		
Other Names Used with Debtor:	Amends Claim: No Acquired Claim: No	
Basis of Claim: See Annex	Last 4 Digits: No	Uniform Claim Identifier:
Total Amount of Claim: See Annex	Includes Interest or Charges: None	
Has Priority Claim: No	Priority Under:	
Has Secured Claim: No Amount of 503(b)(9): No Based on Lease: No Subject to Right of Setoff: No	Nature of Secured Amount: Value of Property: Annual Interest Rate: Arrearage Amount: Basis for Perfection: Amount Unsecured:	
Submitted By: Michael Pugatch on 08-Apr-2020 5:11:50 p.m. Eastern Time Title: Managing Director-Company: HarbourVest Skew Base AIF L.P., by HarbourVest Partners Ireland Limited, its Alternative Inv Company: Fund Manager, by HarbourVest Partners L.P., its Duly Appointed Investment Manager, by HarbourVest Partners, LLC, its Gen Ptr		

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

In re:

Highland Capital Management, L.P.

Debtor.

Chapter 11

Case No. 19-34054 (SGJ)

ANNEX TO PROOF OF CLAIM

1. This annex (the “Annex”) is part of and is incorporated by reference into the attached proof of claim (together with the Annex, the “Proof of Claim”) and describes in more detail the claims of HarbourVest Skew Base AIF L.P. (the “Claimant”) against the debtor Highland Capital Management, L.P. (the “Debtor”).

2. The Claimant is a limited partner in one of the Debtor’s managed vehicles, Highland CLO Funding, Ltd. (“HCLOF”). Acis Capital Management GP, L.L.C. and Acis Capital Management L.P. (together, “Acis”), the portfolio manager for HCLOF, filed for chapter 11 in the United States Bankruptcy Court for the Northern District of Texas (the “Court”) on January 30, 2018. The Acis bankruptcy filing resulted from a dispute between Debtor and its former employee, Joshua Terry, who served as portfolio manager for Debtor’s collateral loan obligations funds (“CLO”) business. *See, e.g., Findings of Fact and Conclusions of Law in Support of Orders for Relief Issued After Trial on Contested Involuntary Bankruptcy Petition* (“Involuntary Petition Ruling”) [Case No. 18-30264 (SGJ), Dkt. No. 118]. As noted in more detail in the Court’s *Bench Ruling and Memorandum of Law in Support of: (A) Final Approval of Disclosure Statement; and (B) Confirmation of Chapter 11 Trustee’s Third Amended Joint Plan* (“Confirmation Ruling”) [Case No. 18-30264 (SGJ), Dkt. No 827] and related filings

in the Acis bankruptcy cases, there has been extensive litigation regarding alleged improper conduct associated with the management of, and transactions relating to, Acis, including transactions with and related to HCLOF. *See, e.g., id.; Second Amended Complaint* [Case No. 18-03078(SGJ), Dkt. No. 157].

3. Due to the Acis bankruptcy and certain conduct alleged to have been undertaken by the Debtor (to whom Acis subcontracted its functions) and Debtor's employees (who were officers, employees, and agents of Acis), the Claimant has suffered significant harm. Such harm includes, but is not limited to, financial harm resulting from, among other things (i) court orders in the Acis bankruptcy that prevented certain CLOs in which HCLOF was invested from being refinanced or reset and court orders that otherwise regulated the activity of HCLOF; and (ii) significant fees and expenses related to the Acis bankruptcy that were charged to HCLOF. *See, e.g., Involuntary Petition Ruling* ¶ 27; *see also Confirmation Ruling*.

4. Claimant hereby files this Claim to assert any and all of its rights to payment, remedies, and other claims (including contingent or unliquidated claims) against the Debtor in connection with and relating to the foregoing harm, including for any amounts due or owed under the various agreements with the Debtor in connection with HCLOF (including, but not limited to, the Subscription and Transfer Agreement for Ordinary Shares Highland CLO Funding, Ltd., dated as of November 15, 2017, the Members Agreement Relating to the Company, dated as of November 15, 2017, the Highland CLO Funding, Ltd. Offering Memorandum dated November 15, 2017), and any and all legal and equitable claims or causes of action relating to the foregoing harm.

5. The Claimant has not attached the documentation supporting this Claim to this Proof of Claim because the documentation is voluminous and the Debtor has copies of such

documents. However, any requested relevant documents will be provided to the Official Committee of Unsecured Creditors, the Court, the United States Trustee and the Debtor in the event of a dispute regarding this Proof of Claim and will be made available for review by other parties in interest as appropriate upon reasonable request and after consultation with the Debtor and execution of appropriate confidentiality agreements.

6. This Proof of Claim is filed with a full reservation of rights, including the right to amend, update, modify, supplement or otherwise revise this Proof of Claim in any respect at any time. The filing of this Proof of Claim is not and should not be construed to be: (a) a waiver or release of any of the Claimant's rights against any person, entity or property accruing to it against the Debtor and its estate; (b) a waiver of the Claimant's rights to assert that **28 U.S.C. § 157(b)(2)(C)** is unconstitutional; (c) a consent or submission by the Claimant, or waiver of the Claimant's rights to object, to the jurisdiction of this Court with respect to the subject matter of any of the claims described herein, or any objection or other proceeding commenced with respect to any of the claims described herein, or any other proceeding commenced in the Debtor's chapter 11 case against or otherwise involving the Claimant; (d) a waiver or release of any right of the Claimant, or consent by the Claimant, to a trial by jury in this or any other court or proceeding; (e) a waiver or release of, or any limitation on, any right of the Claimant to have orders entered only after *de novo* review by a United States District Judge; (f) an election of remedies; or (g) a waiver of, or any other limitation on, any right of the Claimant to request withdrawal of the reference with respect to any matter, including, without limitation, any matter relating to this Proof of Claim.

7. Claimant's express reservation of all rights and causes of action, includes, without limitation, contingent or unliquidated rights that it or its affiliates may have against the Debtor,

as well as defenses, offsets and counterclaims. This description and classification of claims by the Claimant is not a concession or admission as to the correct characterization or treatment of any such claims or a waiver of any rights of the Claimant.

8. Furthermore, the Claimant expressly reserves its rights to (a) file additional proofs of claim for additional claims that may be based on the same or additional documents or facts or other liability or indebtedness of the Debtor to the Claimant under contract or otherwise; (b) assert claims for cure of defaults in any agreement that the Debtor or any trustee appointed in this chapter 11 case may seek to assume; (c) assert any and all other claims, causes of action, defenses, offsets or counterclaims against the Debtor or any other parties; (d) file a request for payment of an administrative expense under 11 U.S.C. §§ 503 and 507 for any or all of the claims or rights of payment described above and any additional amounts; and (e) seek recovery through any relevant third parties, including any of the Debtor's insurance coverage providers.

9. This Proof of Claim does not encompass all claims that the Claimant or its affiliates may have that arise after the Petition Date and are entitled to administrative priority, and the Claimant expressly reserves its right to file such claim or any similar claim at the appropriate time, including any such post-petition claims arising under these service contracts.

10. This Proof of Claim is filed without prejudice to the filing by the Claimant of additional proofs of claim or requests for payment with respect to any other indebtedness, liability or obligation of the Debtor. The Claimant does not, by this Proof of Claim or any amendment or other action, waive any rights with respect to any scheduled claim.

11. The Claimant reserves the right to withdraw, amend, clarify, modify or supplement this Proof of Claim to assert additional claims, causes of action or additional grounds for this Proof of Claim (including adding any additional contracts, agreements, obligations or

other relationships between the Claimant and the Debtor), as well as the right to file any separate or additional proofs of claim with respect to the claims set forth herein or otherwise, including for the purpose of fixing and liquidating any contingent or unliquidated claim set forth herein, or to file additional proofs of claim in respect of additional amounts or for any other reason.

12. In executing and filing this Proof of Claim, the Claimant does not submit to the jurisdiction of the Bankruptcy Court for the Northern District of Texas for any purpose other than with respect to this Proof of Claim against the Debtor, and does not waive or release any rights or remedies against any other person or entity that may be liable for all or part of this Proof of Claim.

13. The Claimant otherwise reserves its rights, and nothing herein shall prejudice the Claimant's rights, under any order of the Court previously entered in this chapter 11 case.

14. Payments on account of this Proof of Claim should be sent to the Claimant at the address specified for notices to the Claimant in Part 1.3 of the Proof of Claim.

CLAIM 149

Fill in this information to identify the case:

Debtor Highland Capital Management, L.P.

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

Case number 19-34054

Official Form 410 Proof of Claim

04/19

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

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

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

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

Part 1: Identify the Claim

1. Who is the current creditor?	<u>HarbourVest Partners L.P. on behalf of funds and accounts under management</u> Name of the current creditor (the person or entity to be paid for this claim)	
	Other names the creditor used with the debtor _____	
2. Has this claim been acquired from someone else?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. From whom? _____	
3. Where should notices and payments to the creditor be sent?	Where should notices to the creditor be sent? See summary page	Where should payments to the creditor be sent? (if different) See summary page
Federal Rule of Bankruptcy Procedure (FRBP) 2002(g)		
	Contact phone <u>2129096000</u> Contact email <u>eweisgerber@debevoise.com</u>	Contact phone <u>6173483773</u> Contact email <u>agoren@harbourvest.com</u>
Uniform claim identifier for electronic payments in chapter 13 (if you use one): _____		
4. Does this claim amend one already filed?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Claim number on court claims registry (if known) _____ Filed on _____ MM / DD / YYYY	
5. Do you know if anyone else has filed a proof of claim for this claim?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Who made the earlier filing? _____	



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

6. Do you have any number you use to identify the debtor?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Last 4 digits of the debtor's account or any number you use to identify the debtor: _____
7. How much is the claim? \$ <u>See Annex</u>	Does this amount include interest or other charges? <input type="checkbox"/> No <input type="checkbox"/> Yes. Attach statement itemizing interest, fees, expenses, or other charges required by Bankruptcy Rule 3001(c)(2)(A).
8. What is the basis of the claim?	Examples: Goods sold, money loaned, lease, services performed, personal injury or wrongful death, or credit card. Attach redacted copies of any documents supporting the claim required by Bankruptcy Rule 3001(c). Limit disclosing information that is entitled to privacy, such as health care information. <u>See Annex</u>
9. Is all or part of the claim secured?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. The claim is secured by a lien on property. Nature or property: <input type="checkbox"/> Real estate: If the claim is secured by the debtor's principle residence, file a <i>Mortgage Proof of Claim Attachment</i> (Official Form 410-A) with this <i>Proof of Claim</i> . <input type="checkbox"/> Motor vehicle <input type="checkbox"/> Other. Describe: _____ Basis for perfection: _____ Attach redacted copies of documents, if any, that show evidence of perfection of a security interest (for example, a mortgage, lien, certificate of title, financing statement, or other document that shows the lien has been filed or recorded.) Value of property: \$ _____ Amount of the claim that is secured: \$ _____ Amount of the claim that is unsecured: \$ _____ (The sum of the secured and unsecured amount should match the amount in line 7.) Amount necessary to cure any default as of the date of the petition: \$ _____ Annual Interest Rate (when case was filed) _____ % <input type="checkbox"/> Fixed <input type="checkbox"/> Variable
10. Is this claim based on a lease?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Amount necessary to cure any default as of the date of the petition. \$ _____
11. Is this claim subject to a right of setoff?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Identify the property: _____



12. Is all or part of the claim entitled to priority under 11 U.S.C. § 507(a)? A claim may be partly priority and partly nonpriority. For example, in some categories, the law limits the amount entitled to priority.	<input checked="" type="checkbox"/> No	Amount entitled to priority \$ _____ \$ _____ \$ _____ \$ _____ \$ _____ \$ _____
	<input type="checkbox"/> Yes. Check all that apply:	
	<input type="checkbox"/> Domestic support obligations (including alimony and child support) under 11 U.S.C. § 507(a)(1)(A) or (a)(1)(B).	
	<input type="checkbox"/> Up to \$3,025* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use. 11 U.S.C. § 507(a)(7).	
	<input type="checkbox"/> Wages, salaries, or commissions (up to \$13,650*) earned within 180 days before the bankruptcy petition is filed or the debtor's business ends, whichever is earlier. 11 U.S.C. § 507(a)(4).	
	<input type="checkbox"/> Taxes or penalties owed to governmental units. 11 U.S.C. § 507(a)(8).	
	<input type="checkbox"/> Contributions to an employee benefit plan. 11 U.S.C. § 507(a)(5).	
<input type="checkbox"/> Other. Specify subsection of 11 U.S.C. § 507(a)() that applies.	\$ _____	
* Amounts are subject to adjustment on 4/01/22 and every 3 years after that for cases begun on or after the date of adjustment.		
13. Is all or part of the claim pursuant to 11 U.S.C. § 503(b)(9)?	<input checked="" type="checkbox"/> No	
	<input type="checkbox"/> Yes. Indicate the amount of your claim arising from the value of any goods received by the debtor within 20 days before the date of commencement of the above case, in which the goods have been sold to the Debtor in the ordinary course of such Debtor's business. Attach documentation supporting such claim.	
	\$ _____	

Part 3: Sign Below

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

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

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

Check the appropriate box:

- ☐ I am the creditor.
- ☒ I am the creditor's attorney or authorized agent.
- ☐ I am the trustee, or the debtor, or their authorized agent. Bankruptcy Rule 3004.
- ☐ I am a guarantor, surety, endorser, or other codebtor. Bankruptcy Rule 3005.

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

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

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

Executed on date 04/08/2020
MM / DD / YYYY

/s/Michael Pugatch
Signature

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

Name Michael Pugatch
First name Middle name Last name

Title Managing Director

Company HarbourVest Partners L.P., on behalf of funds and accounts under manage
Identify the corporate servicer as the company if the authorized agent is a servicer.

Address

Contact phone _____ Email _____



For phone assistance: Domestic (877) 573-3984 | International (310) 751-1829

Debtor: 19-34054 - Highland Capital Management, L.P. District: Northern District of Texas, Dallas Division		
Creditor: HarbourVest Partners L.P. on behalf of funds and accounts under management Attn: Erica Weisgerber Debevoise and Plimpton LLP 919 Third Avenue New York, NY, 10022 U.S.A. Phone: 2129096000 Phone 2: Fax: Email: eweisgerber@debevoise.com	Has Supporting Documentation: Yes, supporting documentation successfully uploaded Related Document Statement:	
	Has Related Claim: No Related Claim Filed By:	
	Filing Party: Authorized agent	
Disbursement/Notice Parties: HarbourVest Partners L.P. c/o HarbourVest Partners, LLC One Financial Center Boston, MA, 02111 U.S.A. Phone: 6173483773 Phone 2: Fax: E-mail: agoren@harbourvest.com DISBURSEMENT ADDRESS		
Other Names Used with Debtor:	Amends Claim: No Acquired Claim: No	
Basis of Claim: See Annex	Last 4 Digits: No	Uniform Claim Identifier:
Total Amount of Claim: See Annex	Includes Interest or Charges: None	
Has Priority Claim: No	Priority Under:	
Has Secured Claim: No Amount of 503(b)(9): No Based on Lease: No Subject to Right of Setoff: No	Nature of Secured Amount: Value of Property: Annual Interest Rate: Arrearage Amount: Basis for Perfection: Amount Unsecured:	
Submitted By: Michael Pugatch on 08-Apr-2020 5:06:59 p.m. Eastern Time Title: Managing Director Company: HarbourVest Partners L.P., on behalf of funds and accounts under management, by HarbourVest Partners, LLC, its Gen Partner		

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In re:

Highland Capital Management, L.P.

Debtor.

Chapter 11

Case No. 19-34054 (SGJ)

ANNEX TO PROOF OF CLAIM

1. This annex (the “Annex”) is part of and is incorporated by reference into the attached proof of claim (together with the Annex, the “Proof of Claim”) and describes in more detail the claims of HarbourVest Partners L.P. on behalf of funds and accounts under management (the “Claimant”) against the debtor Highland Capital Management, L.P. (the “Debtor”).

2. The Claimant manages investment funds that are limited partners in one of the Debtor’s managed vehicles, Highland CLO Funding, Ltd. (“HCLOF”). Acis Capital Management GP, L.L.C. and Acis Capital Management L.P. (together, “Acis”), the portfolio manager for HCLOF, filed for chapter 11 in the United States Bankruptcy Court for the Northern District of Texas (the “Court”) on January 30, 2018. The Acis bankruptcy filing resulted from a dispute between Debtor and its former employee, Joshua Terry, who served as portfolio manager for Debtor’s collateral loan obligations funds (“CLO”) business. *See, e.g., Findings of Fact and Conclusions of Law in Support of Orders for Relief Issued After Trial on Contested Involuntary Bankruptcy Petition* (“Involuntary Petition Ruling”) [Case No. 18-30264 (SGJ), Dkt. No. 118]. As noted in more detail in the Court’s *Bench Ruling and Memorandum of Law in Support of: (A) Final Approval of Disclosure Statement; and (B) Confirmation of Chapter 11 Trustee’s Third*

Amended Joint Plan (“Confirmation Ruling”) [Case No. 18-30264 (SGJ), Dkt. No 827] and related filings in the Acis bankruptcy cases, there has been extensive litigation regarding alleged improper conduct associated with the management of, and transactions relating to, Acis, including transactions with and related to HCLOF. *See, e.g., id.; Second Amended Complaint* [Case No. 18-03078(SGJ), Dkt. No. 157].

3. Due to the Acis bankruptcy and certain conduct alleged to have been undertaken by the Debtor (to whom Acis subcontracted its functions) and Debtor’s employees (who were officers, employees, and agents of Acis), the Claimant has suffered significant harm. Such harm includes, but is not limited to, financial harm resulting from, among other things (i) court orders in the Acis bankruptcy that prevented certain CLOs in which HCLOF was invested from being refinanced or reset and court orders that otherwise regulated the activity of HCLOF; and (ii) significant fees and expenses related to the Acis bankruptcy that were charged to HCLOF. *See, e.g., Involuntary Petition Ruling* ¶ 27; *see also Confirmation Ruling*.

4. Claimant hereby files this Claim to assert any and all of its rights to payment, remedies, and other claims (including contingent or unliquidated claims) against the Debtor in connection with and relating to the foregoing harm, including for any amounts due or owed under the various agreements with the Debtor in connection with HCLOF (including, but not limited to, the Subscription and Transfer Agreement for Ordinary Shares Highland CLO Funding, Ltd., dated as of November 15, 2017, the Members Agreement Relating to the Company, dated as of November 15, 2017, the Highland CLO Funding, Ltd. Offering Memorandum dated November 15, 2017), and any and all legal and equitable claims or causes of action relating to the foregoing harm.

5. The Claimant has not attached the documentation supporting this Claim to this Proof of Claim because the documentation is voluminous and the Debtor has copies of such documents. However, any requested relevant documents will be provided to the Official Committee of Unsecured Creditors, the Court, the United States Trustee and the Debtor in the event of a dispute regarding this Proof of Claim and will be made available for review by other parties in interest as appropriate upon reasonable request and after consultation with the Debtor and execution of appropriate confidentiality agreements.

6. This Proof of Claim is filed with a full reservation of rights, including the right to amend, update, modify, supplement or otherwise revise this Proof of Claim in any respect at any time. The filing of this Proof of Claim is not and should not be construed to be: (a) a waiver or release of any of the Claimant's rights against any person, entity or property accruing to it against the Debtor and its estate; (b) a waiver of the Claimant's rights to assert that 28 U.S.C. § 157(b)(2)(C) is unconstitutional; (c) a consent or submission by the Claimant, or waiver of the Claimant's rights to object, to the jurisdiction of this Court with respect to the subject matter of any of the claims described herein, or any objection or other proceeding commenced with respect to any of the claims described herein, or any other proceeding commenced in the Debtor's chapter 11 case against or otherwise involving the Claimant; (d) a waiver or release of any right of the Claimant, or consent by the Claimant, to a trial by jury in this or any other court or proceeding; (e) a waiver or release of, or any limitation on, any right of the Claimant to have orders entered only after *de novo* review by a United States District Judge; (f) an election of remedies; or (g) a waiver of, or any other limitation on, any right of the Claimant to request withdrawal of the reference with respect to any matter, including, without limitation, any matter relating to this Proof of Claim.

7. Claimant's express reservation of all rights and causes of action, includes, without limitation, contingent or unliquidated rights that it or its affiliates may have against the Debtor, as well as defenses, offsets and counterclaims. This description and classification of claims by the Claimant is not a concession or admission as to the correct characterization or treatment of any such claims or a waiver of any rights of the Claimant.

8. Furthermore, the Claimant expressly reserves its rights to (a) file additional proofs of claim for additional claims that may be based on the same or additional documents or facts or other liability or indebtedness of the Debtor to the Claimant under contract or otherwise; (b) assert claims for cure of defaults in any agreement that the Debtor or any trustee appointed in this chapter 11 case may seek to assume; (c) assert any and all other claims, causes of action, defenses, offsets or counterclaims against the Debtor or any other parties; (d) file a request for payment of an administrative expense under 11 U.S.C. §§ 503 and 507 for any or all of the claims or rights of payment described above and any additional amounts; and (e) seek recovery through any relevant third parties, including any of the Debtor's insurance coverage providers.

9. This Proof of Claim does not encompass all claims that the Claimant or its affiliates may have that arise after the Petition Date and are entitled to administrative priority, and the Claimant expressly reserves its right to file such claim or any similar claim at the appropriate time, including any such post-petition claims arising under these service contracts.

10. This Proof of Claim is filed without prejudice to the filing by the Claimant of additional proofs of claim or requests for payment with respect to any other indebtedness, liability or obligation of the Debtor. The Claimant does not, by this Proof of Claim or any amendment or other action, waive any rights with respect to any scheduled claim.

11. The Claimant reserves the right to withdraw, amend, clarify, modify or supplement this Proof of Claim to assert additional claims, causes of action or additional grounds for this Proof of Claim (including adding any additional contracts, agreements, obligations or other relationships between the Claimant and the Debtor), as well as the right to file any separate or additional proofs of claim with respect to the claims set forth herein or otherwise, including for the purpose of fixing and liquidating any contingent or unliquidated claim set forth herein, or to file additional proofs of claim in respect of additional amounts or for any other reason.

12. In executing and filing this Proof of Claim, the Claimant does not submit to the jurisdiction of the Bankruptcy Court for the Northern District of Texas for any purpose other than with respect to this Proof of Claim against the Debtor, and does not waive or release any rights or remedies against any other person or entity that may be liable for all or part of this Proof of Claim.

13. The Claimant otherwise reserves its rights, and nothing herein shall prejudice the Claimant's rights, under any order of the Court previously entered in this chapter 11 case.

14. Payments on account of this Proof of Claim should be sent to the Claimant at the address specified for notices to the Claimant in Part 1.3 of the Proof of Claim.

APPENDIX 2

Highland Capital Management, L.P., the above-captioned debtor and debtor-in-possession (“Highland” or the “Debtor”), files this motion (the “Motion”) for entry of an order, substantially in the form attached hereto as **Exhibit A**, pursuant to Rule 9019 of the **Federal Rules of Bankruptcy Procedure** (the “Bankruptcy Rules”), approving a settlement agreement (the “Settlement Agreement”),² a copy of which is attached as Exhibit 1 to the *Declaration of John A. Morris in Support of the Debtor’s Motion for Entry of an Order Approving Settlement with HarbourVest (Claim Nos. 143, 147, 149, 150, 153, 154) and Authorizing Actions Consistent Therewith* being filed simultaneously with this Motion (“Morris Dec.”), that, among other things, fully and finally resolves the proofs of claim filed by HarbourVest 2017 Global Fund L.P., HarbourVest 2017 Global AIF L.P., HarbourVest Dover Street IX Investment L.P., HV International VIII Secondary L.P., HarbourVest Skew Base AIF L.P., and HarbourVest Partners L.P. (collectively, “HarbourVest”). In support of this Motion, the Debtor represents as follows:

JURISDICTION

1. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2). Venue in this District is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

2. The statutory predicates for the relief sought herein are sections 105(a) and 363 of title 11 of the United States Code (the “Bankruptcy Code”), and Rule 9019 of the Bankruptcy Rules.

² All capitalized terms used but not defined herein shall have the meanings given to them in the Settlement Agreement.

RELEVANT BACKGROUND

A. Procedural Background

3. On October 16, 2019 (the “Petition Date”), the Debtor filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code in the Bankruptcy Court for the District of Delaware, Case No. 19-12239 (CSS) (the “Delaware Court”).

4. On October 29, 2019, the official committee of unsecured creditors (the “Committee”) was appointed by the U.S. Trustee in the Delaware Court.

5. On December 4, 2019, the Delaware Court entered an order transferring venue of the Debtor’s case to this Court [Docket No. 186].³

6. On December 27, 2019, the Debtor filed that certain *Motion of the Debtor for Approval of Settlement with the Official Committee of Unsecured Creditors Regarding Governance of the Debtor and Procedures for Operations in the Ordinary Course* [Docket No. 281] (the “Settlement Motion”). This Court approved the Settlement Motion on January 9, 2020 [Docket No. 339] (the “Settlement Order”).

7. In connection with the Settlement Order, an independent board of directors was constituted at the Debtor’s general partner, Strand Advisors, Inc., and certain operating protocols were instituted.

8. On July 16, 2020, this Court entered an order appointing James P. Seery, Jr., as the Debtor’s chief executive officer and chief restructuring officer [Docket No. 854].

9. The Debtor has continued in the possession of its property and has continued to operate and manage its business as a debtor-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No trustee or examiner has been appointed in this chapter 11 case.

³ All docket numbers refer to the docket maintained by this Court.

B. Overview of HarbourVest's Claims

10. HarbourVest's claims against the Debtor's estate arise from its \$80 million investment in Highland CLO Funding, f/k/a Acis Loan Funding, Ltd. ("HCLOF"), pursuant to which HarbourVest obtained a 49 percent interest in HCLOF (the "Investment").

11. In brief, HarbourVest contends that it was fraudulently induced into entering into the Investment based on the Debtor's misrepresentations and omissions concerning certain material facts, including that the Debtor: (1) failed to disclose that it never intended to pay an arbitration award obtained by a former portfolio manager, (2) failed to disclose that it engaged in a series of fraudulent transfers for the purpose of preventing the former portfolio manager from collecting on his arbitration award and misrepresented the reasons changing the portfolio manager for HCLOF immediately prior to the Investment, (3) indicated that the dispute with the former portfolio manager would not impact investment activities, and (4) expressed confidence in the ability of HCLOF to reset or redeem the collateralized loan obligations ("CLOs") under its control.

12. HarbourVest seeks to rescind its Investment and claims damages in excess of \$300 million based on theories of fraud, fraudulent inducement, fraudulent concealment, fraudulent misrepresentation, negligent misrepresentation, and breach of fiduciary duty (under Guernsey law), and on alleged violations of state securities laws and the Racketeer Influenced Corrupt Organization Act ("RICO").

13. HarbourVest's allegations are summarized below.⁴

⁴ Solely for purposes of this Motion, and not for any other reason, the facts set forth herein are adopted largely from the *HarbourVest Response to Debtor's First Omnibus Objection to Certain (A) Duplicate Claims; (B) Overstated Claims; (C) Late-Filed Claims; (D) Satisfied Claims; (E) No-Liability Claims; and (F) Insufficient-Documentation Claims* [Docket No. 1057] (the "Response").

C. Summary of HarbourVest's Factual Allegations

14. At the time HarbourVest made its Investment, the Debtor was embroiled in an arbitration against Joshua Terry ("Mr. Terry"), a former employee of the Debtor and limited partner of Acis Capital Management, L.P. ("Acis LP"). Through Acis LP, Mr. Terry managed Highland's CLO business, including CLO-related investments held by Acis Loan Funding, Ltd. ("Acis Funding").

15. The litigation between Mr. Terry and the Debtor began in 2016, after the Debtor terminated Mr. Terry and commenced an action against him in Texas state court. Mr. Terry asserted counterclaims for wrongful termination and for the wrongful taking of his ownership interest in Acis LP and subsequently had certain claims referred to arbitration where he obtained an award of approximately \$8 million (the "Arbitration Award") on October 20, 2017.

16. HarbourVest alleges that the Debtor responded to the Arbitration Award by engaging in a series of fraudulent transfers and corporate restructurings, the true purposes of which were fraudulently concealed from HarbourVest.

17. For example, according to HarbourVest, the Debtor changed the name of the target fund from Acis Funding to "Highland CLO Funding, Ltd." ("HCLOF") and "swapped out" Acis LP for Highland HCF Advisor, Ltd. as portfolio manager (the "Structural Changes"). The Debtor allegedly told HarbourVest that it made these changes because of the "reputational harm" to Acis LP resulting from the Arbitration Award. The Debtor further told HarbourVest that in lieu of redemptions, resetting the CLOs was necessary, and that it would be easier to reset them under the "Highland" CLO brand instead of the Acis CLO brand.

18. In addition, HarbourVest also alleges that the Debtor had no intention of allowing Mr. Terry to collect on his Arbitration Award, and orchestrated a scheme to "denude"

- HCLOF's request was withdrawn on July 6, 2018, and on June 21, 2018, the Acis Trustee sought an injunction preventing Highland/HCLOF from seeking further redemptions (the "Preliminary Injunction").
- The Court granted the Preliminary Injunction on July 10, 2018, pending the Acis Trustee's attempts to confirm a plan or resolve the Acis Bankruptcy.
- On August 30, 2018, the Court denied confirmation of the First Amended Joint Plan for Acis, and held that the Preliminary Injunction must stay in place on the ground that the "evidence thus far has been compelling that numerous transfers after the Josh Terry judgment denuded Acis of value."
- After the Debtor made various statements implicating HarbourVest in the Transfers, the Acis Trustee investigated HarbourVest's involvement in such Transfers, including extensive discovery and taking a 30(b)(6) deposition of HarbourVest's managing director, Michael Pugatch, on November 17, 2018.
- On March 20, 2019, HCLOF sent a letter to Acis LP stating that it was not interested in pursuing, or able to pursue, a CLO reset transaction.

**D. The Parties' Pleadings and Positions Concerning HarbourVest's
Proofs of Claim**

22. On April 8, 2020, HarbourVest filed proofs of claim against Highland that were subsequently denoted by the Debtor's claims agents as claim numbers 143, 147, 149, 150, 153, and 154, respectively (collectively, the "Proofs of Claim"). Morris Dec. Exhibits 2-7.

23. The Proofs of Claim assert, among other things, that HarbourVest suffered significant harm due to conduct undertaken by the Debtor and the Debtor's employees, including "financial harm resulting from (i) court orders in the Acis Bankruptcy that prevented certain CLOs in which HCLOF was invested from being refinanced or reset and court orders that otherwise relegated the activity of HCLOF [*i.e.*, the Preliminary Injunction]; and (ii) significant fees and expenses related to the Acis Bankruptcy that were charged to HCLOF." *See, e.g.*, Morris Dec. Exhibit 2 ¶3.

24. HarbourVest also asserted "any and all of its right to payment, remedies, and other claims (including contingent or unliquidated claims) against the Debtor in connection with and relating to the forgoing harm, including for any amounts due or owed under the various

26. On September 11, 2020, HarbourVest filed its Response. The Response articulated specified claims under U.S. federal and state and Guernsey law, including claims for fraud, fraudulent concealment, fraudulent inducement, fraudulent misrepresentation, negligent misrepresentation (collectively, the “Fraud Claims”), U.S. State and Federal Securities Law Claims (the “Securities Claims”), violations of the Federal Racketeer Influenced and Corrupt Organizations Act (“RICO”), breach of fiduciary duty and misuse of fund assets, and an unfair prejudice claim under Guernsey law (collectively, with the Proofs of Claim, the “HarbourVest Claims”).

E. Settlement Discussions

29. In November, the parties broadened the discussions in an attempt to reach a global resolution of the HarbourVest Claims. In the pursuit thereof, the parties and their

counsel participated in several conference calls where they engaged in a spirited exchange of perspectives concerning the facts and the law.

30. During follow up meetings, the parties' interests became more defined. Specifically, HarbourVest sought to maximize its recovery while fully extracting itself from the Investment, while the Debtor sought to minimize the HarbourVest Claims consistent with its perceptions of the facts and law.

31. After the parties' interests became more defined, the principals engaged in a series of direct, arm's-length, telephonic negotiations that ultimately lead to the settlement, whose terms are summarized below.

F. Summary of Settlement Terms

32. The Settlement Agreement contains the following material terms, among others:

- HarbourVest shall transfer its entire interest in HCLOF to an entity to be designated by the Debtor;⁵
- HarbourVest shall receive an allowed, general unsecured, non-priority claim in the amount of \$45 million and shall vote its Class 8 claim in that amount to support the Plan;
- HarbourVest shall receive a subordinated, allowed, general unsecured, non-priority claim in the amount of \$35 million and shall vote its Class 9 claim in that amount to support the Plan;
- HarbourVest will support confirmation of the Debtor's Plan, including, but not limited to, voting its claims in support of the Plan;
- The HarbourVest Claims shall be allowed in the aggregate amount of \$45 million for voting purposes;
- HarbourVest will support the Debtor's pursuit of its pending Plan of Reorganization; and
- The parties shall exchange mutual releases.

⁵ The NAV for HarbourVest's 49.98% interest in HCLOF was estimated to be approximately \$22 million as of December 1, 2020.

See generally Morris Dec. Exhibit 1.

BASIS FOR RELIEF REQUESTED

33. Bankruptcy Rule 9019 governs the procedural prerequisites to approval of a settlement, providing that:

On motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement. Notice shall be given to creditors, the United States trustee, the debtor, and indenture trustees as provided in Rule 2002 and to any other entity as the court may direct.

FED. R. BANKR. P. 9019(a).

34. Settlements in bankruptcy are favored as a means of minimizing litigation, expediting the administration of the bankruptcy estate, and providing for the efficient resolution of bankruptcy cases. See *Myers v. Martin (In re Martin)*, 91 F.3d 389, 393 (3d Cir. 1996); *Rivercity v. Herpel (In re Jackson Brewing Co.)*, 624 F.2d 599, 602 (5th Cir. 1980). Pursuant to Bankruptcy Rule 9019(a), a bankruptcy court may approve a compromise or settlement as long as the proposed settlement is fair, reasonable, and in the best interest of the estate. See *In re Age Ref. Inc.*, 801 F.3d 530, 540 (5th Cir. 2015). Ultimately, “approval of a compromise is within the sound discretion of the bankruptcy court.” See *United States v. AWECO, Inc. (In re AWECO, Inc.)*, 725 F.2d 293, 297 (5th Cir. 1984); *Jackson Brewing*, 624 F.2d at 602–03.

35. In making this determination, the United States Court of Appeals for the Fifth Circuit applies a three-part test, “with a focus on comparing ‘the terms of the compromise with the rewards of litigation.’” *Official Comm. of Unsecured Creditors v. Cajun Elec. Power Coop. (In re Cajun Elec. Power Coop.)*, 119 F.3d 349, 356 (5th Cir. 1997) (citing *Jackson Brewing*, 624 F.2d at 602). The Fifth Circuit has instructed courts to consider the following factors: “(1) The probability of success in the litigation, with due consideration for the uncertainty of law and fact, (2) The complexity and likely duration of the litigation and any

37. First, although the Debtor believes that it has valid defenses to the HarbourVest Claims, there is no guarantee that the Debtor would succeed in its litigation with HarbourVest. Indeed, to establish its defenses, the Debtor would be required to rely, at least in part, on the credibility of witnesses whose veracity has already been called into question by this Court. Moreover, it will be difficult to dispute that the Transfers precipitated the Acis Bankruptcy, and, ultimately, the imposition of the Bankruptcy Court's TRO that restricted HCLOF's ability to reset or redeem the CLOs and that is at the core of the HarbourVest Claims.

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issues including, among other things, the substance and materiality of the Debtor's alleged fraudulent statements and omissions and whether HarbourVest reasonably relied on those statements and omissions.

39. Third, approval of the Settlement Agreement is justified by the paramount interest of creditors. Specifically, the settlement will enable the Debtor to: (a) avoid incurring substantial litigation costs; (b) avoid the litigation risk associated with HarbourVest's \$300 million claim; and (c) through the plan support provisions, increase the likelihood that the Debtor's pending plan of reorganization will be confirmed.

40. Finally, the Settlement Agreement was unquestionably negotiated at arm's-length. The terms of the settlement are the result of numerous, ongoing discussions and negotiations between the parties and their counsel and represent neither party's "best case scenario." Indeed, the Settlement Agreement should be approved as a rational exercise of the Debtor's business judgment made after due deliberation of the facts and circumstances concerning HarbourVest's Claims.

NO PRIOR REQUEST

41. No previous request for the relief sought herein has been made to this, or any other, Court.

NOTICE

42. Notice of this Motion shall be given to the following parties or, in lieu thereof, to their counsel, if known: (a) counsel for HarbourVest; (b) the Office of the United States Trustee; (c) the Office of the United States Attorney for the Northern District of Texas; (d) the Debtor's principal secured parties; (e) counsel to the Committee; and (f) parties requesting notice pursuant to Bankruptcy Rule 2002. The Debtor submits that, in light of the nature of the relief requested, no other or further notice need be given.

WHEREFORE, the Debtor respectfully requests entry of an order, substantially in the form attached hereto as Exhibit A, (a) granting the relief requested herein, and (b) granting such other relief as is just and proper.

Dated: December 23, 2020.

PACHULSKI STANG ZIEHL & JONES LLP

Jeffrey N. Pomerantz (CA Bar No. 143717)
Ira D. Kharasch (CA Bar No. 109084)
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gdemo@pszjlaw.com
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-and-

HAYWARD & ASSOCIATES PLLC

/s/ Zachery Z. Annable

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MHayward@HaywardFirm.com
Zachery Z. Annable
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ZAnnable@HaywardFirm.com
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Dallas, Texas 75231
Tel: (972) 755-7100
Fax: (972) 755-7110

Counsel for the Debtor and Debtor-in-Possession

APPENDIX 3

SETTLEMENT AGREEMENT

This Settlement Agreement (the “Agreement”) is entered into as of December 23, 2020, between Highland Capital Management, L.P. (the “Debtor”), on the one hand, and HarbourVest 2017 Global Fund L.P., HarbourVest 2017 Global AIF L.P., HarbourVest Dover Street IX Investment L.P., HV International VIII Secondary L.P., HarbourVest Skew Base AIF L.P., and HarbourVest Partners L.P. (each, a “HarbourVest Party,” and collectively, “HarbourVest”), on the other hand. Each of the foregoing are sometimes referred to herein collectively as the “Parties” and individually as a “Party.”

RECITALS

WHEREAS, on October 16, 2019 (the “Petition Date”), the Debtor filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code (the “Bankruptcy Case”) in the Bankruptcy Court for the District of Delaware, Case No. 19-12239 (CSS) (the “Delaware Bankruptcy Court”);

WHEREAS, on December 4, 2019, the Delaware Bankruptcy Court entered an order transferring venue of the Debtor’s case to the Bankruptcy Court for the Northern District of Texas, Dallas Division, Case No. 19-34054-sgj (the “Bankruptcy Court”);

WHEREAS, prior to the Petition Date, HarbourVest invested in Highland CLO Funding, Ltd. f/k/a Acis Loan Funding, Ltd. (“HCLOF”) and acquired an a 49.98% ownership interest in HCLOF (the “HarbourVest Interests”);

WHEREAS, the portfolio manager for HCLOF is Highland HCF Advisor, Ltd., a subsidiary of the Debtor;

WHEREAS, on April 8, 2020, HarbourVest filed proofs of claim in the Bankruptcy Case, which are listed on the Debtor’s claims register as claim numbers 143, 147, 149, 150, 153, and 154 (the “HarbourVest Claims”), asserting claims against the Debtor relating to its investment in HCLOF;

WHEREAS, on July 30, 2020, the Debtor filed the *Debtor’s First Omnibus Objection to Certain (a) Duplicate Claims; (b) Overstated Claims; (c) Late-Filed Claims; (d) Satisfied Claims; (e) No Liability Claims; and (f) Insufficient-Documentation Claims* [Docket No. 906], in which the Debtor objected to the HarbourVest Claims;

WHEREAS, on September 11, 2020, HarbourVest filed the *HarbourVest Response to Debtor’s First Omnibus Objection to Creation (a) Duplicate Claims; (b) Overstated Claims; (c) Late-Filed Claims; (d) Satisfied Claims; (e) No Liability Claims; and (f) Insufficient-Documentation Claims* [Docket No. 1057] (the “HarbourVest Response”);

WHEREAS, on October 18, 2020, HarbourVest filed the *Motion of HarbourVest Pursuant to Rule 3018(a) of the Federal Rules of Bankruptcy Procedure for Temporary Allowance of Claims for Purposes of Voting to Accept or Reject the Plan* [Docket No. 1207] (the “3018 Motion” and together with the HarbourVest Response, the “HarbourVest Pleadings”);

WHEREAS, in the HarbourVest Pleadings, HarbourVest asserted, among other things, that the HarbourVest Claims included claims against the Debtor arising from fraudulent inducement, fraudulent concealment, fraudulent misrepresentation, breach of fiduciary duty, breach of securities laws, and misuse of assets and sought damages in excess of \$300,000,000;

WHEREAS, the Debtor disputes the HarbourVest Claims;

WHEREAS, on November 24, 2020, the Debtor filed the *Fifth Amended Plan of Reorganization for Highland Capital Management, L.P.* [Docket No. 1472] (as amended, the “Plan”).¹

WHEREAS, the Parties desire to enter into this Agreement which incorporates, formalizes, and finalizes the full and final resolution of the HarbourVest Claims and HarbourVest Pleadings; and

WHEREAS, this Agreement will be presented to the Bankruptcy Court for approval pursuant to **Federal Rule of Bankruptcy Procedure 9019** (“Rule 9019”).

NOW THEREFORE, in consideration of the above recitals, the covenants, conditions, and promises made herein, and other good and valuable consideration, the receipt of which is hereby acknowledged, the Parties agree as follows:

1. Settlement of Claims.

(a) In full and complete satisfaction of the HarbourVest Claims, HarbourVest will receive:

(i) an allowed, nonpriority general unsecured claim in the aggregate amount of \$45,000,000 (the “Allowed GUC Claim”); and

(ii) an allowed subordinated claim in the aggregate amount of \$35,000,000 (the “Allowed Subordinated Claim” and together with the Allowed GUC Claim, the “Allowed Claims”).

(b) On the Effective Date, HarbourVest will transfer all of its rights, title, and interest in the HarbourVest Interests to the Debtor or its nominee pursuant to the terms of the *Transfer Agreement for Ordinary Shares of Highland CLO Funding, Ltd.*, attached hereto as Exhibit A (the “Transfer Agreements”) and the Debtor or its nominee will become a shareholder of HCLOF with respect to the HarbourVest Interests. The terms of the Transfer Agreements are incorporated into this Agreement by reference.

2. Releases.

(a) Upon the Effective Date, and to the maximum extent permitted by law, each HarbourVest Party on behalf of itself and each of its current and former advisors, trustees, directors, officers, managers, members, partners, employees, beneficiaries, shareholders, agents,

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

participants, subsidiaries, parents, successors, designees, and assigns hereby forever, finally, fully, unconditionally, and completely releases, relieves, acquits, remises, and exonerates, and covenants never to sue, the Debtor, HCLOF, HCLOF's current and former directors, and the Debtor's current and former advisors, trustees, directors, officers, managers, members, partners, employees, beneficiaries, shareholders, agents, participants, subsidiaries, parents, affiliates, successors, designees, and assigns, except as expressly set forth below (the "Debtor Released Parties"), for and from any and all claims, debts, liabilities, demands, obligations, promises, acts, agreements, liens, losses, costs and expenses (including, without limitation, attorney's fees and related costs), damages, injuries, suits, actions, and causes of action of whatever kind or nature, whether known or unknown, suspected or unsuspected, matured or unmatured, liquidated or unliquidated, contingent or fixed, at law or in equity, statutory or otherwise, including, without limitation, any claims, defenses, and affirmative defenses, whether known or unknown, including, without limitation, those which were or could have been asserted in, in connection with, or with respect to the Bankruptcy Case (collectively, the "HarbourVest Released Claims").

(b) Upon the Effective Date, and to the maximum extent permitted by law, the Debtor hereby forever, finally, fully, unconditionally, and completely releases, relieves, acquits, remises, and exonerates, and covenants never to sue (i) each HarbourVest Party and (ii) each HarbourVest Party's current and former advisors, trustees, directors, officers, managers, members, partners, employees, beneficiaries, shareholders, agents, participants, subsidiaries, parents, affiliates, successors, designees, and assigns (the "HarbourVest Released Parties"), for and from any and all claims, debts, liabilities, demands, obligations, promises, acts, agreements, liens, losses, costs and expenses (including, without limitation, attorney's fees and related costs), damages, injuries, suits, actions, and causes of action of whatever kind or nature, whether known or unknown, suspected or unsuspected, matured or unmatured, liquidated or unliquidated, contingent or fixed, at law or in equity, statutory or otherwise, including, without limitation, any claims, defenses, and affirmative defenses, whether known or unknown, which were or could have been asserted in, in connection with, or with respect to the Bankruptcy Case (collectively, the "Debtor Released Claims"); *provided, however*, that notwithstanding anything herein to the contrary, the release contained in this Section 2(b) will apply to the HarbourVest Released Parties set forth in subsection (b)(ii) only with respect to Debtor Released Claims arising from or relating to HarbourVest's ownership of the HarbourVest Interests.

(c) Notwithstanding anything in this Agreement to the contrary, the releases set forth herein will not apply with respect to (i) the Allowed Claims, (ii) the claims of Charlotte Investor IV, L.P., or (iii) the duties, rights, or obligations of any Party under this Agreement or the Transfer Agreements.

3. **Agreement Subject to Bankruptcy Court Approval.** The effectiveness of this Agreement and the Parties' obligations hereunder are conditioned in all respects on the approval of this Agreement by the Bankruptcy Court. The Parties agree to cooperate and use reasonable efforts to have this Agreement approved by the Bankruptcy Court. The "Effective Date" will be the date of an order entered by the Bankruptcy Court approving this Agreement pursuant to a motion filed under Rule 9019.

4. **Representations and Warranties.** Subject in all respects to Section 3 hereof:

(a) each HarbourVest Party represents and warrants that (i) it has full authority to enter into this Agreement and to release the HarbourVest Released Claims and has not sold, transferred, or assigned any HarbourVest Released Claim to any other person or entity, (ii) no person or entity other than such HarbourVest Party has been, is, or will be authorized to bring, pursue, or enforce any HarbourVest Released Claim on behalf of, for the benefit of, or in the name of (whether directly or derivatively) of such HarbourVest Party; and (iii) HarbourVest owns all of the HCLOF Interests free and clear of any claims or interests; and

(b) the Debtor represents and warrants to HarbourVest that (i) it has full authority to enter into this Agreement and to release the Debtor Released Claims and (ii) no person or entity other than the Debtor has been, is, or will be authorized to bring, pursue, or enforce any Debtor Released Claim on behalf of, for the benefit of, or in the name of (whether directly or derivatively) of the Debtor Party.

5. **Plan Support.**

(a) Each HarbourVest Party hereby agrees that it will (a) vote all HarbourVest Claims held by such HarbourVest Party to accept the Plan, by delivering its duly executed and completed ballots accepting the Plan on a timely basis; and (b) not (i) change, withdraw, or revoke such vote (or cause or direct such vote to be changed withdrawn or revoked); (ii) exercise any right or remedy for the enforcement, collection, or recovery of any claim against the Debtor except in a manner consistent with this Agreement or the Plan, (iii) object to, impede, or take any action other action to interfere with, delay or postpone acceptance or confirmation of the Plan; (iv) directly or indirectly solicit, propose, file, support, participate in the formulation of or vote for, any restructuring, sale of assets (including pursuant to **11 U.S.C. § 363**), merger, workout, or plan of reorganization of the Debtor other than the Plan; or (v) otherwise take any action that would in any material respect interfere with, delay, or postpone the consummation of the Plan; provided, however, that such vote may be revoked (and, upon such revocation, deemed void ab initio) by such HarbourVest Party at any time following the termination of this agreement or the occurrence of a Support Termination Event (it being understood that any termination of this agreement shall entitle each HarbourVest Party to change its vote in accordance with section 1127(d) of the Bankruptcy Code), notwithstanding any voting deadline established by the Bankruptcy Court including without limitation the January 5, 2021, 5:00 p.m. (prevailing Central Time) deadline established by the *Order Approving Form of Ballots, Voting Deadline and Solicitation Procedures* [Docket No. 1476].

(b) In full resolution of the 3018 Motion, HarbourVest will have a general unsecured claim for voting purposes only in the amount of \$45,000,000.

(c) The obligations of the HarbourVest Parties under this Section 5 shall automatically terminate upon the occurrence of any of the following (each a “Support Termination Event”): (i) the effective date of the Plan, (ii) the withdrawal of the Plan, (iii) the entry of an order by the Bankruptcy Court (A) converting the Bankruptcy Case to a case under chapter 7 of the Bankruptcy Code or (B) appointing an examiner with expanded powers beyond those set forth in sections 1106(a)(3) and (4) of the Bankruptcy Code or a trustee in Bankruptcy

Case, or (iv) the failure of the Court to enter an order approving the terms of this Agreement and the settlement described herein pursuant to Rule 9019 prior to confirmation of the Plan.

6. **No Admission of Liability.** The Parties acknowledge that there is a bona fide dispute with respect to the HarbourVest Claims. Nothing in this Agreement will imply, an admission of liability, fault or wrongdoing by the Debtor, HarbourVest, or any other person, and the execution of this Agreement does not constitute an admission of liability, fault, or wrongdoing on the part of the Debtor, HarbourVest, or any other person.

7. **Successors-in-Interest.** This Agreement shall be binding upon and shall inure to the benefit of each of the Parties and their successors, and assigns.

8. **Notice.** Each notice and other communication hereunder will be in writing and will be sent by email and delivered or mailed by registered mail, receipt requested, and will be deemed to have been given on the date of its delivery, if delivered, and on the fifth full business day following the date of the mailing, if mailed to each of the Parties thereto at the following respective addresses or such other address as may be specified in any notice delivered or mailed as set forth below:

HARBOURVEST

HarbourVest Partners L.P.
Attention: Michael J. Pugatch
One Financial Center
Boston, MA 02111
Telephone No. 617-348-3712
E-mail: mpugatch@harbourvest.com

with a copy (which shall not constitute notice) to:

Debevoise & Plimpton LLP
Attention: M. Natasha Labovitz, Esq.
919 Third Avenue
New York, NY 10022
Telephone No. 212-909-6649
E-mail: nlabovitz@debevoise.com

THE DEBTOR

Highland Capital Management, L.P.
300 Crescent Court, Suite 700
Dallas, Texas 75201
Attention: James P. Seery, Jr.
Telephone No.: 972-628-4100
Facsimile No.: 972-628-4147
E-mail: jpseeryjr@gmail.com

with a copy (which shall not constitute notice) to:

Pachulski Stang Ziehl & Jones LLP
Attention: Jeffrey Pomerantz, Esq.
10100 Santa Monica Blvd., 13th Floor
Los Angeles, CA 90067
Telephone No.: 310-277-6910
Facsimile No.: 310-201-0760
E-mail: jpomerantz@pszjlaw.com

9. **Advice of Counsel.** Each Party represents that it has: (a) been adequately represented by independent legal counsel of its own choice, throughout all of the negotiations that preceded the execution of this Agreement; (b) executed this Agreement upon the advice of such counsel; (c) read this Agreement, and understands and assents to all the terms and conditions contained herein without any reservations; and (d) had the opportunity to have this Agreement and all the terms and conditions contained herein explained by independent counsel, who has answered any and all questions asked of such counsel, or which could have been asked of such counsel, including, but not limited to, with regard to the meaning and effect of any of the provisions of this Agreement.

10. **Entire Agreement.** This Agreement and the Transfer Agreement contain the entire agreement and understanding concerning the subject matter of this Agreement, and supersede and replace all prior negotiations and agreements, written or oral and executed or unexecuted, concerning such subject matter. Each of the Parties acknowledges that no other Party, nor any agent of or attorney for any such Party, has made any promise, representation or warranty, express or implied, written or oral, not otherwise contained in this Agreement to induce any Party to execute this Agreement. The Parties further acknowledge that they are not executing this Agreement in reliance on any promise, representation or warranty not contained in this Agreement, and that any such reliance would be unreasonable. This Agreement will not be waived or modified except by an agreement in writing signed by each Party or duly authorized representative of each Party.

11. **No Party Deemed Drafter.** The Parties acknowledge that the terms of this Agreement are contractual and are the result of arms'-length negotiations between the Parties and their chosen counsel. Each Party and its counsel cooperated in the drafting and preparation of this Agreement. In any construction to be made of this Agreement, the Agreement will not be construed against any Party.

12. **Future Cooperation.** The Parties agree to cooperate and execute such further documentation as is reasonably necessary to effectuate the intent of this Agreement.

13. **Counterparts.** This Agreement may be executed in counterparts with the same force and effect as if executed in one complete document. Each Party's signature hereto will signify acceptance of, and agreement to, the terms and provisions contained in this Agreement. Photographic, electronic, and facsimile copies of signed counterparts may be used in lieu of the originals of this Agreement for any purpose.

14. **Governing Law; Venue; Attorneys' Fees and Costs.** The Parties agree that this Agreement will be governed by and will be construed according to the laws of the State of Texas without regard to conflict-of-law principles. Each of the Parties hereby submits to the exclusive jurisdiction of the Bankruptcy Court during the pendency of the Bankruptcy Case and thereafter to the exclusive jurisdiction of the state and federal courts located in the Northern District of Texas, Dallas Division, with respect to any disputes arising from or out of this Agreement. In any action to enforce this Agreement, the prevailing party shall be entitled to recover its reasonable and necessary attorneys' fees and costs (including experts).

[Remainder of Page Intentionally Blank]

IT IS HEREBY AGREED.

HIGHLAND CAPITAL MANAGEMENT, L.P.

By: /s/ James P. Seery, Jr.
Name: James P. Seery, Jr.
Its: CEO/CRO

HarbourVest 2017 Global Fund L.P., by HarbourVest 2017 Global Associates L.P., its General Partner, by HarbourVest GP LLC, its General Partner, by HarbourVest Partners, LLC, its Managing Member

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

HarbourVest 2017 Global AIF L.P., by HarbourVest Partners (Ireland) Limited, its Alternative Investment Fund Manager, by HarbourVest Partners L.P., its Duly Appointed Investment Manager, by HarbourVest Partners, LLC, its General Partner

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

HarbourVest Dover Street IX Investment L.P., by HarbourVest Partners L.P., its Duly Appointed Investment Manager, by HarbourVest Partners, LLC, its General Partner

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

HarbourVest Partners L.P., on behalf of funds and accounts under management, by HarbourVest Partners, LLC, its General Partner

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

**HarbourVest Skew Base AIF L.P., by HarbourVest Partners (Ireland) Limited, its
Alternative Investment Fund Manager, by HarbourVest Partners L.P., its Duly Appointed
Investment Manager, by HarbourVest Partners, LLC, its General Partner**

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

**HV International VIII Secondary L.P., by HIPEP VIII Associates L.P., its General
Partner, by HarbourVest GP LLC, its General Partner, by HarbourVest Partners, LLC,
its Managing Member**

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

Exhibit A

TRANSFER AGREEMENT
FOR ORDINARY SHARES OF
HIGHLAND CLO FUNDING, LTD.

This Transfer Agreement, dated as of December [REDACTED], 2020 (this “**Transfer Agreement**”), is entered into by and among Highland CLO Funding, Ltd. (the “**Fund**”), Highland HCF Advisor, Ltd. (the “**Portfolio Manager**”), HCMLP Investments, LLC (the “**Transferee**”) and each of the following: HarbourVest Dover Street IX Investment L.P., HarbourVest 2017 Global AIF L.P., HarbourVest 2017 Global Fund L.P., HV International VIII Secondary L.P., and HarbourVest Skew Base AIF L.P. (collectively, the “**Transferors**”).

WHEREAS, each Transferor is the record, legal and beneficial owner of the number of ordinary shares (“**Shares**”) of the Fund set forth opposite such Transferor’s name on Exhibit A hereto (with respect to each Transferor, the “**Transferred Shares**”).

WHEREAS the Transferee is an affiliate and wholly owned subsidiary of Highland Capital Management, L.P. (“**HCMLP**”) which is one of the initial members of the Fund.

WHEREAS, each Transferor wishes to transfer and assign 100% of its rights, title and interest as a shareholder in the Fund, including the Transferred Shares (the “**Interest**”) on the terms set forth in this Transfer Agreement.

WHEREAS, subject to and in connection with the approval of that certain Settlement Agreement, dated on or about the date hereof, by and among HCMLP and the Transferors (the “**Settlement Agreement**”), the Transferee desires that the Interest be transferred to Transferee and that thereafter the Transferee will become a Shareholder and the Transferors will no longer be Shareholders.

WHEREAS, the Portfolio Manager desires to consent to such transfers and to the admission of Transferee as a Shareholder on the terms set forth herein, and the Transferors and Transferee agree to such terms.

WHEREAS, the Fund desires to amend its records to reflect the foregoing transfers.

NOW, THEREFORE, the parties hereto agree as follows:

1. Transfer of Shares and Advisory Board

- a. Each Transferor hereby transfers and assigns all of its rights, title, and interest in its Interest to the Transferee, and the Transferee wishes to be admitted to the Fund as a Shareholder.
- b. In connection with the transfer of the Interest as contemplated herein, the Transferee shall be granted the right to appoint a representative to the Fund’s advisory board (the “**Advisory Board**”) to replace the Transferors’ appointed representative to the Advisory Board.

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[Additional Signatures on Following Page]

HarbourVest 2017 Global Fund L.P.

By: HarbourVest 2017 Global Associates L.P.
Its General Partner

By: HarbourVest GP LLC
Its General Partner

By: HarbourVest Partners, LLC
Its Managing Member

By: _____

Name: Michael Pugatch

Title: Managing Director

Exhibit A

<u>Transferee Name</u>	<u>Number of Shares</u>	<u>Percentage</u>
HarbourVest Dover Street IX Investment L.P.	[REDACTED]	[REDACTED]
HarbourVest 2017 Global AIF L.P.	[REDACTED]	[REDACTED]
HarbourVest 2017 Global Fund L.P.	[REDACTED]	[REDACTED]
HV International VIII Secondary L.P.	[REDACTED]	[REDACTED]
HarbourVest Skew Base AIF L.P.	[REDACTED]	[REDACTED]

APPENDIX 4

Rules of Bankruptcy Procedure (the “Bankruptcy Rules”). In support of this objection, Respondent respectfully represents as follows:

I. INTRODUCTION

1. Under Bankruptcy Rule 9019, the Bankruptcy Court is tasked with making an independent judgment on the merits of a proposed settlement to ensure that the proposed settlement is “fair, equitable, and in the best interest of the estate.”¹ While Respondent recognizes the Debtor’s efforts in arranging a settlement, there are at least three significant issues with the terms of the settlement that merit denial of the Motion: (i) the proposed settlement is not reasonable or in the best interest of the estate given the weakness of the HarbourVest Claim (as hereinafter defined); (ii) the proposed settlement is a blatant attempt to purchase votes in support of Debtor’s plan by giving HarbourVest a significant claim to which it would not otherwise be entitled; and (iii) the proposed settlement seeks to improperly classify the HarbourVest Claim² in two separate classes in order to gerrymander an affirmative vote on its reorganization plan. Moreover, the proposed settlement does not satisfy the factors for approval fixed by case law. On information and belief, Debtor’s CEO/CRO, Mr. Seery, has previously asserted on multiple occasions that the HarbourVest Claim had no value and that the Debtor could resolve such claim for no more than \$5 million. While Respondent and Mr. Seery have had a number of disagreements in this case, Respondent agrees with Mr. Seery’s initial conclusion that the HarbourVest Claim is substantially without merit. Respondent understands that any settlement will not necessarily provide the best possible outcome for the Debtor, but in this instance the proposed settlement far exceeds the bounds of reasonableness and, on its face, is an attempt by the Debtor to purchase votes in favor

¹ See *In re Jackson Brewing Co.*, 624 F.2d 599, 602 (5th Cir. 1980).

² While HarbourVest has filed a number of claims, each filed claim is exactly the same except in the name of the claimant. See Claim Nos. 143, 147, 149, 150, 153, and 154.

of confirmation of its Plan. Given the Debtor's prior positions as to the merits of HarbourVest Claim it is necessary for the Court to closely scrutinize the settlement to determine why the Debtor now believes granting HarbourVest a net claim of nearly \$60 million³ resulting from HarbourVest's investment in a non-debtor entity (which was and is managed by a non-debtor) to be in the best interest of the estate. Upon close scrutiny, Respondent believes the Court will find that the proposed settlement is not reasonable or in the best interest of the estate and the Motion therefore should be denied.

II. BACKGROUND

2. On October 16, 2019 (the "Petition Date"), the Debtor filed a voluntary petition for relief under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code") in the U.S. Bankruptcy Court for the District of Delaware, Case No. 19-12239 (CSS) (the "Delaware Court").

3. On October 29, 2019, the Official Committee of Unsecured Creditors (the "Committee") was appointed by the U.S. Trustee in Delaware.

4. On December 4, 2019, the Delaware Court entered an order transferring venue of the Debtor's Bankruptcy Case to this Court [Docket No. 186].

5. On December 27, 2019, the Debtor filed that certain *Motion of the Debtor for Approval of Settlement with the Official Committee of Unsecured Creditors Regarding Governance of the Debtor and Procedures for Operations in the Ordinary Course* [Docket No. 281] (the "Settlement Motion"). This Court approved the Settlement Motion on January 9, 2020 [Docket No. 339] (the "Settlement Order").

³ The proposed settlement provides that HarbourVest shall receive an allowed general unsecured (Class 8) claim in the amount of \$45 million and an allowed subordinated general unsecured (Class 9) claim in the amount of \$35 million. As part of the settlement, HarbourVest will then transfer its entire interest in Highland CLO Funding, Ltd. ("HCLOF") to an entity to be designated by the Debtor. The Debtor states that the value of this interest is approximately \$22 million as of December 1, 2020.

6. In connection with the Settlement Order, an independent board of directors was appointed on January 9, 2020, for the Debtor's general partner, Strand Advisors, Inc. (the "Board"). The members of the Board are James P. Seery, Jr., John S. Dubel, and Russell F. Nelms.

7. On July 16, 2020, this Court entered an order authorizing the Debtor to employ James P. Seery, Jr. as Chief Executive Officer and Chief Restructuring Officer of the Debtor. *See* Docket No. 854.

8. On April 8, 2020, HarbourVest filed Proofs of Claim Numbers 143, 149, 149, 150, 153, and 154 (collectively, the "HarbourVest Claim")⁴.

9. On July 30, 2020, the Debtor filed *Debtor's First Omnibus Objection to Certain (A) Duplicate Claims; (B) Overstated Claims; (C) Late-Filed Claims; (D) Satisfied Claims; (E) No Liability Claims; and (F) Insufficient-Documentation Claims* [Docket No. 906] (the "Debtor Objection"), which contained an objection to the HarbourVest Claim.

10. On September 11, 2020, HarbourVest filed *HarbourVest Response to Debtor's First Omnibus Objection to Certain (A) Duplicate Claims; (B) Overstated Claims; (C) Late-Filed Claims; (D) Satisfied Claims; (E) No Liability Claims; and (F) Insufficient-Documentation Claims* [Docket No. 1057] (the "HarbourVest Response").

11. On December 23, 2020, the Debtor filed the Motion seeking approval of a proposed settlement of the HarbourVest Claim under Rule 9019. Docket No. 1625.

III. LEGAL STANDARD

12. The merits of a proposed compromise should be judged under the criteria set forth in *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414 (1968). *TMT Trailer* requires that a compromise must be "fair and equitable." *TMT Trailer*, 390

⁴ While HarbourVest has filed a number of claims, each filed claim is exactly the same except in the name of the claimant. *See* Claim Nos. 143, 147, 149, 150, 153, and 154.

- (i) the probabilities of ultimate success should the claim be litigated;
- (ii) the complexity, expense, and likely duration of litigating the claim;
- (iii) the difficulties of collecting a judgment rendered from such litigation; and,
- (iv) all other factors relevant to a full and fair assessment of the wisdom of the compromise.

14. In considering whether to approve a proposed compromise, the bankruptcy judge “may not simply accept the trustee’s word that the settlement is reasonable, nor may he merely ‘rubber stamp’ the trustee’s proposal.” *In re Am. Res. Corp.*, 841 F.2d 159, 162 (7th Cir. 1987). “[T]he bankruptcy judge must apprise himself of all facts necessary to evaluate the settlement and make an informed and independent judgment about the settlement.” *See TMT Trailer*, 390 U.S. at 424, 434.

JAMES DONDERO'S OBJECTION TO THE DEBTOR'S MOTION FOR ENTRY OF AN ORDER APPROVING SETTLEMENT WITH HARBOURVEST

to the court, a debtor in possession must administer its case and conduct its business in a fashion amenable to the scrutiny to be expected from creditor and court oversight.”). The Court must conduct an “intelligent, objective and educated evaluation”⁵ of the proposed settlement “to ensure that the settlement is fair, equitable, and in the best interest of the estate and creditors.” *See In re Mirant Corp.*, 348 B.R. 725, 739 (Bankr. N.D. Tex. 2006) (quoting *Conn. Gen. Life Ins. Co. v. Foster Mortgage Corp. (In re Foster Mortgage Corp.)*, 68 F.3d 914, 917 (5th Cir. 1995)).

IV. ARGUMENT AND AUTHORITIES

16. As discussed in detail below, there are three significant issues with the terms of the settlement that merit denial of the Motion: (i) the proposed settlement is not reasonable or in the best interest of the estate given the weakness of the HarbourVest Claim; (ii) the proposed settlement is a blatant attempt to purchase votes in support of Debtor’s plan by giving HarbourVest a substantial claim to which it is not entitled; and (iii) the proposed settlement seeks to improperly classify HarbourVest’s one claim in two separate classes in order to gerrymander an affirmative vote on its reorganization plan. For these and certain additional reasons as discussed below, the Motion should be denied.

A. Through its Claim, HarbourVest Seeks to Revisit this Court’s Orders in the Acis Case

17. As an initial matter, through its proofs of claim, HarbourVest appears to be second guessing the Court’s judgment in the Chapter 11 case of Acis Capital Management, LP and Acis Capital Management GP, LLC (collectively, “Acis”) and seeking to revisit the Court’s orders entered in that case years ago. HarbourVest appears to be arguing that the TRO and injunction

⁵ *In re Jackson Brewing Co.*, 624 F.2d 599, 602 (5th Cir. 1980) (“To assure a proper compromise the bankruptcy judge, must be apprised of all the necessary facts for an intelligent, objective and educated evaluation. He must compare the terms of the compromise with the likely rewards of litigation.”).

B. The HarbourVest Claim Lacks Merit and the Proposed Settlement is Not Reasonable

21. Based on the HarbourVest Claim and its filed response to the Debtor's objection, Respondent believes that the HarbourVest claim is meritless and the proposed settlement is not reasonable, fair and equitable, or in the best interest of the estate.

22. First, the proposed settlement is concerning particularly because HarbourVest's bare bones proof of claim contains very little in terms of allegations of specific conduct against the Debtor that would give rise to a \$60 million claim against this estate. While HarbourVest's response to the Debtor's claim objection is lengthy, it contains very little in real substance supporting its right to such a claim against the estate. The response also omits a number of key facts that are relevant and potentially fatal to its claim for damages against the Debtor's estate. Among them is the fact that Acis (and thereafter Reorganized Acis), along with Mr. Joshua Terry, managed HarbourVest's investment for years after it was made.⁷ Despite this fact, HarbourVest's alleged damages appear to be based largely on the difference between the value of its initial investment at confirmation of Acis's Plan and the current value of the investment—which amount was directly determined by the performance of the CLOs that Acis managed during this time.⁸ Neither the claim nor the response directly address the implications of Acis's management of the CLOs during the period following HarbourVest's investment. Nor does HarbourVest address or discuss performance of the CLOs, the market forces that may have caused HarbourVest's investment to lose value, or other factors influencing the current value of its investment. The

⁷ See, e.g., HarbourVest Proof of Claim 143, p. 5 ("The Claimant is a limited partner in one of the Debtor's managed vehicles, Highland CLO Funding, Ltd. ("HCLOF"). Acis Capital Management GP, L.L.C. and Acis Capital Management L.P. (together, "Acis"), the portfolio manager for HCLOF, filed for chapter 11 in the United States Bankruptcy Court for the Northern District of Texas (the "Court") on January 30, 2018.").

⁸ See HarbourVest Response, Docket No. 1057, para. 40 ("HarbourVest has been injured from the Investment: not only has the Investment failed to accrue value, its value plummeted. The Investment's current value is far less than HarbourVest's initial contribution.").

speculative nature of the damages and the lack of specificity of the HarbourVest Claim and the role of Acis in the loss of value to HarbourVest all call into question the reliability of the allegations and the legal basis for the claim amount awarded in the settlement.

23. Also absent from Harbourvest's papers is any discussion of any contract or agreement between (i) HarbourVest and the Debtor; and (ii) any agreement that was executed in conjunction with HarbourVest's initial investment. While the proof of claim references a number of agreements, there is no explanation in the claim or in HarbourVest's response to the Debtor's claim objection of how these agreements give rise to liability against the *Debtor*. For example, neither the claim nor the HarbourVest Response (which includes more than 600 pages of attachments) attach *any* written agreement between HarbourVest and any other party. While HarbourVest has alleged a number of claims sounding in tort, many of those claims cannot exist absent a contract or other express relationship between the parties. Moreover, the terms of the relevant contracts themselves likely contain a number of provisions that may call into question Debtor's liability or would be otherwise relevant to merits of the HarbourVest Claim. For example, HarbourVest in its papers appears to assert or imply that the Debtor made a number of false or fraudulent representations to solicit HarbourVest's investment, but then fails to discuss or even identify the applicable agreements it alleges it was induced into signing in connection with its investment (this despite the substantial value of the investment when the Acis plan was confirmed).

24. Given these issues, among many others, the HarbourVest Claim is unsustainable both from a liability and damages standpoint and there are many very high hurdles HarbourVest would have to clear in seeking to prove liability against the Debtor and in proving its damages. For a long period of time, its investment was managed by Acis and the investment's performance was directly tied to Acis's inadequate performance as portfolio manager. Further, the value of

HarbourVest's investment is also directly tied to various market forces that may have impacted its value. The HarbourVest Claim is largely lacking in relevant facts and omits much salient information, such as who it contracted with in connection with its investment, the terms of such agreements, who controlled its investment during the entire period from November 2017 to the present, and the performance of its investment during the last two years. Given these issues, HarbourVest will be unable to demonstrate a causal connection between any conduct of the Debtor and the alleged damages it suffered from a reduction in value of its investment.

25. Because of the speculative nature of the HarbourVest Claim, and the fact that very little pleading or litigation has occurred, the proposed settlement in granting such a large claim is unreasonable, not fair and equitable, and not in the best interest of the estate. The lack of pending litigation, narrowing of threshold questions, and lack of detail in HarbourVest Claim make it impossible to determine whether the huge claim awarded under the proposed settlement is justified under the facts. Accordingly, the Motion should be denied.

C. The Proposed Settlement is an Improper Attempt by the Debtor to Purchase Votes in Support of its Plan and the Separate Classification of the HarbourVest Claim Constitutes Gerrymandering in Violation of 11 U.S.C. § 1122

26. The proposed settlement is a flagrant attempt by the Debtor to purchase votes in support of its Plan by giving HarbourVest a significant claim to which it has not shown itself entitled. Moreover, the separate classification of the HarbourVest Claim into two separate classes constitutes impermissible gerrymandering in violation of section 1122 of the Bankruptcy Code. The proposed settlement essentially gives HarbourVest a claim it is not entitled to in exchange for votes in two separate classes. This is not a proper basis for a settlement and the Court should deny the Motion.

27. Section 1122 of the Bankruptcy Code provides as follows:

(a) Except as provided in subsection (b) of this section, a plan may place a claim or an interest in a particular class only if such claim or interest is substantially similar to the other claims or interests of such class.

(b) A plan may designate a separate class of claims consisting only of every unsecured claim that is less than or reduced to an amount that the court approves as reasonable and necessary for administrative convenience.

11 U.S.C. § 1122.

28. “Chapter 11 requires classification of claims against a debtor for two reasons. Each class of creditors will be treated in the debtor's plan of reorganization based upon the similarity of its members' priority status and other legal rights against the debtor's assets. Proper classification is essential to ensure that creditors with claims of similar priority against the debtor's assets are treated similarly.” *In re Greystone III Joint Venture*, 995 F.2d 1274, 1277 (5th Cir. 1991).

29. “Section 1122 consequently must contemplate some limits on classification of claims of similar priority. A fair reading of both subsections suggests that ordinarily substantially similar claims, those which share common priority and rights against the debtor’s estate, should be placed in the same class.” *Id.* at 1278.

30. The Fifth Circuit has stated that there is “one clear rule that emerges from otherwise muddled caselaw on § 1122 claims classification: thou shalt not classify similar claims differently in order to gerrymander an affirmative vote on a reorganization plan.” *Id.* at 1279. The Court observed:

There must be some limit on a debtor’s power to classify creditors in such a manner. . . . Unless there is some requirement of keeping similar claims together, nothing would stand in the way of a debtor seeking out a few impaired creditors (or even one such creditor) who will vote for the plan and placing them in their own class.

In re Greystone III Joint Venture, 995 F.2d 1274, 1279 (5th Cir. 1991) (quoting *In re U.S. Truck Co.*, 800 F.2d 581, 586 (6th Cir. 1986)).

31. Here, the HarbourVest settlement and the classification of the HarbourVest Claim under the Plan blatantly violate the Fifth Circuit’s “one rule” concerning the classification of claims under section 1122. To the extent that HarbourVest even has a legitimate claim, not only should its claim be classified together with other unsecured creditors, its claim should be classified solely in one class. To allow the Debtor to do otherwise as proposed is improper gerrymandering in order to obtain a consenting class in express violation of section 1122.

D. There Are Other Reasons for the Court to Closely Scrutinize the Proposed Settlement that May Warrant Denial of the Motion

32. There are a number of other reasons for the Court to closely scrutinize the proposed settlement that may warrant denial of the Motion.

33. First, the granting to HarbourVest of a claim in the total amount of \$80 million potentially allows HarbourVest to achieve a significant windfall at the expense of other creditors and equity holders. The Debtor has asserted numerous times that the estate is solvent and, for this reason, the purported subordinated claim of \$35 million (if allowed and approved) may be worth just as much as its general unsecured claim. This is a huge figure in this case, outshined only by the Redeemer Committee, which has an actual arbitration award obtained after lengthy litigation. By contrast, the HarbourVest Claim contains only a few paragraphs of generalized allegations that essentially argue that the Debtor’s alleged actions related to the Acis bankruptcy, and this Court’s orders in the Acis case, are a “but for” cause of the loss of its investment. While the HarbourVest Response is lengthy, it lacks necessary details for the Court to determine whether HarbourVest *may* be entitled to the relief requested by the Motion. The other significant creditors in this case—*inter alia*, Redeemer, UBS and Acis—all had pending claims that were litigated. Nor is HarbourVest a trade creditor, vendor, or other contract counter-party of the Debtor. The HarbourVest Claim is thus uniquely situated in this case and, given the size and the nature of its

claims, should invite close scrutiny. Under these facts, the potential allowance of an \$80 million claim (less the value of its share in HCLOF, which may suffer by continued management by Acis) against the estate for an investment which was not held or managed by the Debtor would be a huge undue windfall.

34. Second, the Motion states that HarbourVest will vote its proposed allowed Class 8 (proposed at \$45 million) and Class 9 (proposed at \$35 million) claims in support of confirmation. There are at least two potential issues with this proposal. First, the deadline for parties to submit ballots was January 5, 2021, and as of the close of business on January 5, the HarbourVest Claim has not been allowed for voting purposes.⁹ Second, the Motion and proposed settlement agreement state that the HarbourVest Claim will be allowed for voting purposes only as a general unsecured claim in the amount of \$45 million. It is unclear how HarbourVest can, or would be authorized to, vote its purported Class 8 and 9 Claims in support of the Plan after the voting deadline and when the settlement provides only for a voting claim in Class 8.

35. Third, while the Motion addresses the factor of probability of success in the litigation, it does not discuss in detail the cost of doing so in relation to the amount to be paid to HarbourVest under the settlement or the likelihood that the Debtor will succeed in the litigation. In addition, unlike the claims filed by Acis and UBS, the HarbourVest Claim does not arise from pending litigation. At this point, relatively little litigation has occurred and the parties have not addressed threshold issues that might dramatically narrow the scope of the HarbourVest Claim. Rule 9019 requires an analysis as to whether the probability of success in litigation is outweighed by the consideration achieved under the settlement. *See In re Jackson Brewing Co.*, 624 F.2d 599, 602 (5th Cir. 1980) (The Court must “compare the terms of the compromise with the likely rewards

⁹ The hearing on the 3018 and 9019 motions are set concurrently with confirmation.

of litigation.”). Given the excessive amount to be paid under the settlement and the weakness of the HarbourVest Claim, this factor weighs in favor of denial of the Motion.

36. Fourth, it is unclear from the settlement papers whether the transfer by HarbourVest of its interest in HCLOF to the Debtor or an entity the Debtor designates will cause the value of the investment to be received by the Debtor’s estate. Further, the interest of HCLOF being conveyed under the proposed settlement may be subject to the Acis plan injunction, which could potentially prevent the Debtor’s estate from realizing the value of this interest. In the event the Court is inclined to approve the settlement, the order should make clear that the available value of the investment should be realized by the Debtor’s estate.

CONCLUSION

For the reasons set forth above, Respondent respectfully requests that the Court enter an order denying the Motion and providing Respondent such other and further relief to which he may be justly entitled.

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Dated: January 6, 2021

Respectfully submitted,

/s/ D. Michael Lynn

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ATTORNEYS FOR JAMES DONDERO

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that, on January 6, 2021, a true and correct copy of the foregoing document was served via the Court's CM/ECF system on counsel for the Debtor and on all other parties requesting or consenting to such service in this case.

/s/ Bryan C. Assink

Bryan C. Assink

APPENDIX 5

6. On April 8, 2020, HarbourVest filed Proofs of Claim Numbers 143, 149, 149, 150, 153, and 154 (collectively, the “HarbourVest Claim”)¹.

7. On July 30, 2020, the Debtor filed *Debtor’s First Omnibus Objection to Certain (A) Duplicate Claims; (B) Overstated Claims; (C) Late-Filed Claims; (D) Satisfied Claims; (E) No Liability Claims; and (F) Insufficient-Documentation Claims* [Dkt. #906] (the “Debtor Objection”), which contained an objection to the HarbourVest Claim.

8. On September 11, 2020, HarbourVest filed *HarbourVest Response to Debtor’s First Omnibus Objection to Certain (A) Duplicate Claims; (B) Overstated Claims; (C) Late-Filed Claims; (D) Satisfied Claims; (E) No Liability Claims; and (F) Insufficient-Documentation Claims* [Dkt. #1057] (the “HarbourVest Response”).

9. The Debtor, in its *Disclosure Statement for the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.* [Dkt. #1473 pgs. 40-41], described its position relative to the HarbourVest Claim as follows:

The Debtor intends to **vigorously** defend the HarbourVest Claims on various grounds The HarbourVest Entities invested approximately \$80,000,000.00 in HCLOF but seek an allowed claim in excess of 300 million dollars (after giving effect to treble damages for the alleged RICO violations)

10. On December 23, 2020, the Debtor filed the Motion seeking approval of a proposed settlement of the HarbourVest Claim under Rule 9019. [Dkt. # 1625].

11. The proposed settlement provides HarbourVest with the following:

- a. An allowed, general unsecured claim in the amount of \$45,000,000.00 [Dkt. #1625 pg. 9 pp.f]; and

¹ While HarbourVest has filed a number of claims, each filed claim is exactly the same except in the name of the claimant. See Claim Nos. 143, 147, 149, 150, 153, and 154.

b. A \$35,000,000 claim in Class 9 [Dkt. #1625 pg. 9 pp.f].

12. An integral element of the settlement requires that HarbourVest will “support confirmation of the Debtor’s Plan including, but not limited to, voting its claims in support of the Plan.”

13. The settlement also contains a provision that HarbourVest will transfer its entire interest in HCLOF to an entity to be designated by the Debtor. It is unclear whether HarbourVest has a right to transfer the interest and secondly, what the Debtor will do with the interest [Dkt. #1625 pp.f].

14. The sole support for the Motion is the Declaration of John Morris [Dkt. #1631] which fails to account for the enormous change in the Debtor’s position between November 24, 2020 when the Disclosure Statement was approved and December 23, 2020 when the Motion was filed, a period of less than thirty (30) days.

15. The Declaration of John Morris [Dkt. #1631] also contains no information as to the potential cost of the litigation, whether HarbourVest can transfer the interest or reasons, other than conclusory reasons, as to why the settlement is beneficial to the estate. The Debtor makes the assertion that the interest it is acquiring was worth \$22,000,000.00 as of December 1, 2020 without advising as to the basis for the valuation. Is it a book value and, if not, what was the methodology employed to arrive at the valuation? The Court has no basis to evaluate the settlement without essential information as to 1) how the asset being acquired is valued; 2) can the Debtor acquire the interest; and 3) how will the Debtor bring value to the estate in connection with the interest inasmuch as the Debtor has discretion as to where to place the asset to be acquired.

A. LEGAL STANDARDS

16. The law relative to approval of motions pursuant to BR 9019 is well settled. The settlement must be fair and equitable. *See In re Jackson Brewing Co.*, 624 F.2d 599, 602 (5th Cir. 1980). The factors the Court should consider are the following:

- (i) the probabilities of ultimate success should the claim be litigated;
- (ii) the complexity, expense, and likely duration of litigating the claim;
- (iii) the difficulties of collecting a judgment rendered from such litigation; and,
- (iv) all other factors relevant to a full and fair assessment of the wisdom of the compromise.

Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414 (1968).

17. Although the Debtor’s business judgment is entitled to a certain deference, “business judgment” is not alone determinative of the issue of court approval. *See In re Endoscopy Ctr. of S. Nev., LLC*, 451 B.R. 527, 536 (Bankr. D. Nev. 2011). However, notwithstanding the business judgment rule, a debtor does not have unfettered freedom to do what it wishes. *See In re Pilgrim’s Pride Corp.*, 403 B.R. 413, 426 (Bankr. N.D. Tex. 2009) (“[A]s a fiduciary holding its estate in trust and responsible to the court, a debtor in possession must administer its case and conduct its business in a fashion amenable to the scrutiny to be expected from creditor and court oversight.”).

B. ISSUES WITH THE SETTLEMENT

18. Objectors believe that the following issues are not explained or addressed in the Motion and, thus, the Motion should be denied:

- a) The settlement represents a radical change in the Debtor's position that was set forth in its Disclosure Statement. While the Debtor asserts that its position is

based on its fear of parties' oral testimony, the size of the transactions at issue make the case a document case, as opposed to who said what, when and how. A review of the applicable documents to determine whether they support the Debtor's initial position is warranted, as opposed to stating that the case is based upon the credibility of a witness. This settlement is not the settlement of an automobile accident where the parties are disputing who ran a red light;

- b) The settlement requires HarbourVest to support and vote in favor of the Debtor's Plan. On its face this appears to be vote buying. The settlement should not be conditioned upon HarbourVest's support or non-support of the Plan and its vote in favor or against the Plan; and
- c) No information is provided as to whether the Debtor can acquire the interest in HCLOF, liquidate the interest, who will receive the interest, or how will the estate benefit from the interest to be acquired.

CONCLUSION

The settlement with HarbourVest has too many questions to be approved on the record before this Court and the parties, due to the Notice of the Motion, the holidays and the press of other litigation in this case, do not have the time to adequately investigate the propriety of the settlement.

January 8, 2021

Respectfully submitted,

/s/Douglas S. Draper.

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APPENDIX 6

1. CLO Holdco owns 75,061,630.55 shares, or about 49.02% of Highland CLO Funding, Ltd. ("**HCLOF**"). Other shareholders include Harbourvest 2017 Global AIF L.P., Harbourvest Global Fund L.P., Harbourvest Dover Street IX Investment L.P., and Harbourvest Skew Base AIF L.P., and HV International VIII Secondary L.P. (collectively, "**Harbourvest**"). Harbourvest owns approximately 49.98% of HCLOF. The remaining 1% is owned by the Debtor and a five other investors.

2. HCLOF is governed by a *Members Agreement Relating to the Company* dated November 15, 2017 by and between each of the members of HCLOF, including Harbourvest, the Debtor, and CLO Holdco (the "**Member Agreement**"). A copy of that agreement is attached hereto as **Exhibit A**.

3. Section 6 of the Member Agreement addresses the "Transfer or Disposals of Shares." MEMBER AGREEMENT, § 6. The Member Agreement places strict restrictions on the sale or transfer of shares to entities other than the initial Member's own affiliates. *See id.* at §§ 6.1, 6.2. Before a Member can transfer its interests to a party other than its own affiliates it must: (i) obtain the prior written consent of the Portfolio Manager; and (ii) "offer to the other Members a right to purchase the Shares, on a pro rata basis with respect to their current Shares, at the same price (which must be cash) as such Shares are proposed to be purchased by the prospective third party purchaser pursuant to an irrevocable offer letter" (the "**Right of First Refusal**"). *Id.* As further stated in section 6.2 of the Member Agreement, "The other Members will have 30 days following receipt of the letter to determine whether to purchase their entire pro rata portion of the Shares proposed to be Transferred." *Id.* at § 6.2.

B. THE HARBOURVEST SETTLEMENT

4. On December 23, 2020, the Debtor filed the Harbourvest Settlement Motion. On the following day, the Debtor filed a copy of the Settlement Agreement referenced in the

6. As detailed below, CLO Holdco objects to the Harbourvest Settlement Motion because Harbourvest has no authority to transfer its interests in HCLOF without first complying with the Right of First Refusal. The only way to effectuate such a transfer without first providing other members the Right of First Refusal is an intentionally inaccurate interpretation of the Member Agreement's contractual provisions that would render specific passages redundant and meaningless. More simply put, the only way Harbourvest and the Debtor could effectuate the Settlement Agreement is by violating fundamental tenets of contract interpretation.

A. CONTRACT INTERPRETATION – AVOIDING REDUNDANCIES AND SURPLUS LANGUAGE

CLO HOLDCO, LTD.'S OBJECTION TO HARBOURVEST SETTLEMENT

B. ANALYZING THE MEMBER AGREEMENT

No Member shall sell, pledge, charge, mortgage, assign, assign by way of security, transfer, convey, exchange or otherwise dispose of its Shares or its commitment to settle purchases of Shares under the Subscription and Transfer Agreement (each a "Transfer"), other than to an Affiliate of an initial Member party hereto, without the prior written consent of the Portfolio Manager...

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conveniently transferring its interests in HCLOF to an Affiliate of the Debtor, and that the Debtor is an initial Member listed in the Member Agreement.

10. Section 6.1, however, must be read in the context of the Member Agreement, and in conjunction with the transfer restrictions found in section 6.2. Read together it is clear that the consent exception allowing a transfer in 6.1 was intended to allow a Member to transfer its shares to *its* own Affiliate, without required consents and effectuating a Right of First Refusal. Doing so would allow inter-company transfers within a corporate structure without the need for complicated procedures. Applying Fifth Circuit precedent, this interpretation fits squarely within the agreement and gives weight to the terms of section 6.2 of the Member Agreement, as explained below.

(i) Surplusage – Specific Allowance of Transfers by CLO Holdco to Debtor Affiliates

11. Recall that both CLO Holdco and the Debtor are initial Members to the Member Agreement. MEMBER AGREEMENT, p. 3. Section 6.2 of the Member Agreement states, in pertinent part, that "Prior to making any Transfer of Shares (other than Transfers to Affiliates of an initial Member or, *in the case of CLO Holdco or a Highland Principal, to Highland, its Affiliates or another Highland Principal*) a Member must first..." comply with the Right of First Refusal. *Id.* at § 6.2 (emphasis added). The italicized language above is important for two reasons: (i) it specifically enumerates that CLO Holdco can transfer its interests to Debtor Affiliates without having to pursue the Right of First Refusal; and (ii) it allows only limited transfers between Members, as opposed to between a Member and an Affiliate of an initial Member.

12. If, as the Debtor and Harbourvest will likely argue, Members are allowed to transfer their interests to any Affiliates of any other initial Members, there is absolutely no need for the Member Agreement to specifically authorize CLO Holdco to transfer its interests to the Debtor's Affiliates. Per Fifth Circuit fundamentals of contract interpretation, that purported redundancy

should not be discarded as mere surplusage, and the Member Agreement should be interpreted in a manner that gives weight to that provision. *Hawthorne Land*, 309 F.3d at 892-93.

13. If the Member Agreement is read to literally allow all "Transfers to Affiliates of an initial Member" there would be no reason to expressly set forth allowed transfers between specific Members and other Member's Affiliates. If the Member Agreement sought to list all allowed transfers between Members and their Affiliates, it should have similarly noted that any Member could transfer its interest to any Harbourvest Member entity, as each Harbourvest Member entity is an Affiliate of the other Harbourvest Member entities. Alternatively, if the specific enumeration of CLO Holdco and the Highland Principals' transfer rights was surplusage, it would presumably have listed other parties' rights, or had inclusive language such as "including but not limited to" or "for example." The Member Agreement lacks such language and, as a result, should be interpreted in a manner that both gives weight to the specific provision while reconciling other provisions of the contract.

(ii) Absurd Results – Disparate Transfer Rights Between Members

14. Note that the Member Agreement does not generally allow a transfer of interests from Member to Member unless specifically enumerated. Section 6.2 specifically allows only CLO Holdco and the Highland Principals to make transfers to other Members, but those other Members include only the Debtor or another Highland Principal. MEMBER AGREEMENT, § 6.2. It does not allow the Debtor to transfer interests to any Member, and does not expressly allow any Member, other than limited transfers by CLO Holdco and the Highland Principals, to transfer interests to any other Member. *Id.* For instance, if the Debtor wished to transfer its interests to CLO Holdco, it would first have to offer all of the other Members their Right of First Refusal. *Id.*

15. Similarly, if Harbourvest wished to transfer its interest to CLO Holdco, it could not do so without first providing the Right of First Refusal to all other Members. *Id.* As noted above,

however, allowing a Member to transfer its interest to an Affiliate of any initial Member would allow all of the Members to transfer their interests to any Harbourvest Member entity, as the Harbourvest Members are Affiliates of each other. Given the specific enumeration of CLO Holdco and the Highland Principals' rights to inter-Member transfers, it would be inconsistent to expand that specific provision to allow all transfers by all Members to any Harbourvest entity without first providing a Right of First Refusal.

16. Such a reading would lead to absurd results. It would grant similarly situated Members profoundly disparate rights under the agreement, and could easily lead to manipulation. For instance, because the Harbourvest Members are technically Affiliates of an initial Member (each other), they could obtain control of all of the interests in HCLOF without any Member receiving a Right of First Refusal for any transfer. No other Member could do that. For instance, if CLO Holdco wished to acquire other Members' interests, the transferring member (including Harbourvest) would have to offer a Right of First Refusal in every instance. To resolve that potential disparate treatment—though CLO Holdco and Harbourvest own nearly identical ownership interests in HCLOF—CLO Holdco would have to form an Affiliate and acquire interests through the Affiliate. That simply cannot be the intended result of the Member Agreement.

17. Instead, the Member Agreement must be read to require Harbourvest to provide a Right of First Refusal to the other Members of HCLOF before transferring its interests to either the Debtor or the Transferee.

C. THE RIGHT OF FIRST REFUSAL IN BANKRUPTCY

18. Most cases addressing third party rights of first refusal in bankruptcy involve the assignment of leases and landlords' rights of first refusal. In those cases, courts analyze whether such a provision in the debtor's contract is a defacto restriction on assignment that may be excised

from the agreement. This case is very different. Here, it is a creditor that owes a right of first refusal to another non-debtor entity.

19. Even so, at least one court has issued telling commentary on a bankruptcy court's ability to excise provisions of a bargained-for contract, stating "A bankruptcy court's authority to excise a bargained for element of a contract is questionable and modification of a nondebtor contracting party's rights is not to be taken lightly." *In re E-Z Serve Convenience Stores, Inc.*, 289 B.R. 45, 51-52 (Bankr. M.D.N.C. 2003) (citing *In re Joshua Slocum Ltd.*, 922 F.2d 1081, 1091 (3d Cir. 1991)). CLO Holdco was unable to find any case that would allow a bankruptcy court to invalidate or otherwise excise a third party's right of first refusal in what largely amounts to a non-debtor contract.

20. As the Member Agreement requires Harbourvest to provide a Right of First Refusal to the non-Debtor Members under section 6.2 of the Agreement, and such Members have 30 days to review and determine whether to purchase their pro-rata shares offered by Harbourvest, Harbourvest lacks contractual authority to enter into the Settlement Agreement.

D. HARBOURVEST'S LACK OF AUTHORITY PRECLUDES ENFORCEMENT OF SETTLEMENT

21. Harbourvest has not completed its conditions precedent to the transfer of its interest to Transferee under the Member Agreement. As detailed above, and in section 6.2 of the Agreement, Harbourvest must effectuate the Right of First Refusal before it can transfer its interests in HCLOF. MEMBER AGREEMENT, § 6.2. Harbourvest is, in essence, bound by the condition precedent of effectuating the Right of First Refusal before it is authorized under the Member Agreement to enter into the Settlement Agreement.

22. Courts should not enforce a settlement agreement where a party has a condition precedent to entry into the agreement and fails to satisfy that condition. *In re De La Fuente*, 409 B.R. 842, 846 (Bankr. S.D. Tex. 2009). As noted in part in *De La Fuente*, the court would not recognize

or enforce a settlement where the parties were subject to conditions precedent before the settlement could be effective, and the conditions precedent were not satisfied. This Court should similarly deny Harbourvest's proposed settlement, as it would deny the Members' Right of First Refusal, which is the benefit of their bargain under the Member Agreement.

**III.
PRAYER FOR RELIEF**

WHEREFORE, CLO Holdco requests that this Court grant the Objection and enter an order denying the Harbourvest Settlement Motion.

DATED: January 8, 2020

Respectfully submitted,

KANE RUSSELL COLEMAN LOGAN PC

By: /s/ John J. Kane
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ATTORNEYS FOR CLO HOLDCO, LTD.

CERTIFICATE OF SERVICE

I hereby certify that on January 8, 2020, a true and correct copy of the foregoing CLO Holdco Objection was served via the Court's electronic case filing (ECF) system upon all parties receiving such service in this bankruptcy case; and via e-mail upon the United States Trustee at Lisa.L.Lambert@usdoj.gov and upon the following parties:

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APPENDIX 7

1

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

5 IN RE:

6 CHAPTER 11

7 CASE NO.

HIGHLAND CAPITAL 19-34054-
MANAGEMENT, L.P. SGJLL

8

Debtor.

9

10

11 Confidential - Under Protective Order

12 REMOTE DEPOSITION OF

13 MICHAEL PUGATCH

Zoom Videoconference

01/11/2021

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24 REPORTED BY: AMANDA GORRONO, CLR

CLR NO. 052005-01

25 JOB NO. 188591

<p>Page 2</p> <p>1</p> <p>2 01/11/2021</p> <p>3 1:07 P.M. (EDT)</p> <p>4</p> <p>5</p> <p>6 REMOTE ORAL DEPOSITION OF MICHAEL</p> <p>7 PUGATCH, held virtually via Zoom</p> <p>8 Videoconferencing, pursuant to the</p> <p>9 Federal Rules of Civil Procedure before</p> <p>10 Amanda Gorrono, Certified Live Note</p> <p>11 Reporter, and Notary Public of the State</p> <p>12 of New York.</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	<p>Page 3</p> <p>1</p> <p>2 A P P E A R A N C E S: (Via Remote)</p> <p>3 PACHULSKI STANG ZIEHL & JONES</p> <p>4 Attorneys for Debtor</p> <p>5 780 Third Avenue</p> <p>6 New York, New York 10017</p> <p>7 BY: JOHN MORRIS, ESQ.</p> <p>8 HAYLEY WINOGRAD, ESQ.</p> <p>9</p> <p>10 BONDS ELLIS EPPICH SCHAFFER JONES</p> <p>11 Attorneys for Jim Dondero</p> <p>12 420 Throckmorton Street</p> <p>13 Fort Worth, Texas 76102</p> <p>14 BY: JOHN WILSON, ESQ.</p> <p>15 BRYAN ASSINK, ESQ.</p> <p>16</p> <p>17 DEBEVOISE & PLIMPTON</p> <p>18 Attorneys for HarbourVest</p> <p>19 919 Third Avenue</p> <p>20 New York, New York 10022</p> <p>21 BY: ERICA WEISGERBER, ESQ.</p> <p>22 M. NATASHA LABOVITZ, ESQ.</p> <p>23 EMILY HUSH, ESQ.</p> <p>24 DANIEL STROIK, ESQ.</p> <p>25</p>
<p>Page 4</p> <p>1</p> <p>2 A P P E A R A N C E S: (Via Remote)</p> <p>3 KANE RUSSELL COLEMAN & LOGAN</p> <p>4 Attorneys for CLO Holdco Limited</p> <p>5 Bank of America Plaza</p> <p>6 901 Main Street</p> <p>7 Dallas, Texas 75202</p> <p>8 BY: JOHN KANE, ESQ.</p> <p>9</p> <p>10 HELLER, DRAPER, HAYDEN, PATRICK, & HORN</p> <p>11 Attorneys for The Dugaboy Investment</p> <p>12 Trust and the Get Good Trust</p> <p>13 650 Poydras Street</p> <p>14 New Orleans, Louisiana 70130</p> <p>15 BY: DOUGLAS DRAPER, ESQ.</p> <p>16</p> <p>17 LATHAM & WATKINS</p> <p>18 Attorney For UBS</p> <p>19 885 Third Avenue</p> <p>20 New York, New York</p> <p>21 BY: SHANNON MCLAUGHLIN, ESQ.</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	<p>Page 5</p> <p>1</p> <p>2 A P P E A R A N C E S: (Via Remote)</p> <p>3 KING & SPALDING</p> <p>4 Attorney for Highland CLO Funding, Ltd.</p> <p>5 1180 Peachtree Street, NE</p> <p>6 Atlanta, Georgia 30309</p> <p>7 BY: MARK MALONEY, ESQ.</p> <p>8</p> <p>9</p> <p>10</p> <p>11 ALSO PRESENT:</p> <p>12 ALIZA GOREN, ESQ.</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>

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<div>1</div> <div>2MR. WILSON: I'm John Wilson</div> <div>3with the firm of Bonds Ellis Eppich</div> <div>4Schafer Jones LP. And I represent Jim</div> <div>5Dondero.</div> <div>6MR. MORRIS: John Morris and</div> <div>7Hayley Winograd of Pachulski Stang</div> <div>8Ziehl & Jones for the Debtor.</div> <div>9MS. WEISGERBER: Erica</div> <div>10Weisgerber from Debevoise & Plimpton</div> <div>11for HarbourVest.</div> <div>12MR. KANE: John Kane of Kane</div> <div>13Russell Coleman & Logan, for CLO</div> <div>14Holdco Limited.</div> <div>15MR. DRAPER: Douglas Draper of</div> <div>16Heller Draper & Horn, for The Dugaboy</div> <div>17Investment Trust and the Get Good</div> <div>18Trust.</div> <div>19MS. McLAUGHLIN: Shannon</div> <div>20McLaughlin from Latham & Watkins LLP</div> <div>21for UBS.</div> <div>22MR. MALONEY: Mark Maloney from</div> <div>23King & Spalding, on behalf of Highland</div> <div>24CLO Funding Limited.</div> <div>25MS. WEISGERBER: I'm joined on</div>	<div>1</div> <div>2the line by my colleagues from</div> <div>3Debevoise, Natasha Labovitz and Emily</div> <div>4Hush, and Aliza Goren from HarbourVest</div> <div>5is on the line, as well.</div> <div>6MR. WILSON: As a preliminary</div> <div>7matter, the witness' counsel has</div> <div>8produced some documents to us that</div> <div>9they've requested be subject to the</div> <div>10confidentially order or a brief</div> <div>11protective order entered at Document</div> <div>12Number 382, in this case.</div> <div>13And she's also requested that</div> <div>14all counsel and participants in this</div> <div>15deposition agree to be bound by the</div> <div>16terms of that order, because some of</div> <div>17the documents that were produced are</div> <div>18stamped "confidential," and they want</div> <div>19to maintain that confidentially.</div> <div>20Do we have an agreement of all</div> <div>21counsel and participants on the</div> <div>22deposition to be bound by the terms of</div> <div>23that agreed protective order?</div> <div>24(All agreed.)</div> <div>25MS. WEISGERBER: Okay. I think</div>																																																																												

<p style="text-align: right;">Page 10</p> <p>1 Confidential - Pugatch</p> <p>2 that was everyone. Thank you all for</p> <p>3 confirming. And the deposition will</p> <p>4 be marked "confidential" until and</p> <p>5 unless HarbourVest designates the</p> <p>6 testimony otherwise.</p> <p>7 MR. WILSON: And that's fine.</p> <p>8 (Whereupon, a request for</p> <p>9 Transcript be marked Confidential</p> <p>10 under the Protective Order was made.)</p> <p>11 MICHAEL PUGATCH,</p> <p>12 called as a witness, having been</p> <p>13 first duly affirmed by a Notary Public of</p> <p>14 the State of New York, was examined and</p> <p>15 testified as follows:</p> <p>16 EXAMINATION</p> <p>17 BY MR. WILSON:</p> <p>18 Q. All right. Mr. Pugatch, how do</p> <p>19 you pronounce your name? I'm sorry.</p> <p>20 A. Yep, you've got it. Pugatch.</p> <p>21 Q. Pugatch. Okay. Can you state</p> <p>22 your full name for the record?</p> <p>23 A. Yeah. Michael Pugatch.</p> <p>24 Q. Okay. And you've been</p> <p>25 designated by HarbourVest to discuss some</p>	<p style="text-align: right;">Page 11</p> <p>1 Confidential - Pugatch</p> <p>2 matters related to the 9019 motion. And</p> <p>3 specifically we asked that HarbourVest</p> <p>4 produce a witness who could talk about the</p> <p>5 negotiations of the settlement with the</p> <p>6 Debtor, and also the factual allegations</p> <p>7 underlying HarbourVest's Proof of Claim,</p> <p>8 and those described in HarbourVest's</p> <p>9 response to the claim objection, including</p> <p>10 without limitation, its investment with</p> <p>11 Acis/HCLOF in the alleged representations</p> <p>12 made by the Debtor and/or Acis/HCLOF to</p> <p>13 HarbourVest, and any and all agreements</p> <p>14 entered into between HarbourVest and any</p> <p>15 other party related to its investment.</p> <p>16 Do you agree that you're the</p> <p>17 best person to talk about these matters on</p> <p>18 behalf of HarbourVest?</p> <p>19 A. Yes. Yes.</p> <p>20 Q. Okay. Have you given a</p> <p>21 deposition before?</p> <p>22 A. I have.</p> <p>23 Q. Okay. So you understand how it</p> <p>24 works that you're under oath, and that I'm</p> <p>25 going to be asking questions and you're</p>
<p style="text-align: right;">Page 12</p> <p>1 Confidential - Pugatch</p> <p>2 going to be giving answers. If at any</p> <p>3 time I ask a question that you don't</p> <p>4 understand, or we've had some problems</p> <p>5 with sometimes connectivity issues with</p> <p>6 Zoom. But yeah, any time that you don't</p> <p>7 understand my question or you didn't catch</p> <p>8 it, I'll be happy to repeat it.</p> <p>9 Also, one thing I found with</p> <p>10 Zoom is that it's easier to talk over</p> <p>11 people. I'll try not to talk over you. I</p> <p>12 would ask that you try to ensure that I've</p> <p>13 finished asking my question before you</p> <p>14 start your answer. And I will likewise</p> <p>15 try to ensure that you've finished your</p> <p>16 answer before start my next question.</p> <p>17 And at any time during this</p> <p>18 deposition if you feel the need to take a</p> <p>19 break, that's totally okay with me. The</p> <p>20 one thing that I would ask is if I've just</p> <p>21 asked a question, that you answer the</p> <p>22 question before requesting the break.</p> <p>23 And if we have that agreement</p> <p>24 and the ground rules, then I think I'm</p> <p>25 ready to start asking you my questions.</p>	<p style="text-align: right;">Page 13</p> <p>1 Confidential - Pugatch</p> <p>2 A. Sounds good.</p> <p>3 Q. What's your current address?</p> <p>4 A. 47 Wayne Road in Needham,</p> <p>5 Massachusetts.</p> <p>6 Q. Okay. And where are you located</p> <p>7 today?</p> <p>8 A. At that address.</p> <p>9 Q. Okay. That's your home address?</p> <p>10 A. Correct.</p> <p>11 Q. And is anyone in the room with</p> <p>12 you there?</p> <p>13 A. No.</p> <p>14 Q. And did you talk with anyone</p> <p>15 about your deposition today?</p> <p>16 A. Only counsel.</p> <p>17 Q. Okay. And did you go over the</p> <p>18 facts of the underlying investment and the</p> <p>19 settlement negotiations with your counsel?</p> <p>20 MS. WEISGERBER: I'm going to</p> <p>21 object on privilege grounds. He</p> <p>22 can – he prepared for the deposition</p> <p>23 with counsel. I don't think you can</p> <p>24 inquire into specifics of the</p> <p>25 preparation.</p>

<p style="text-align: right;">Page 14</p> <p>1 Confidential - Pugatch</p> <p>2 MR. WILSON: Okay. Well, you</p> <p>3 know, he was designated to talk about</p> <p>4 these matters, and I'm just asking if</p> <p>5 he discussed these matters with his</p> <p>6 counsel his before his testimony.</p> <p>7 That's all. I'm not asking the</p> <p>8 substance of those communications.</p> <p>9 MS. WEISGERBER: You're asking</p> <p>10 about conversations with counsel. How</p> <p>11 about you just ask if he's prepared to</p> <p>12 talk about those topics today?</p> <p>13 MR. WILSON: Okay.</p> <p>14 BY MR. WILSON:</p> <p>15 Q. Are you prepared to talk about</p> <p>16 those topics today?</p> <p>17 A. Yes.</p> <p>18 Q. Okay. Now, HarbourVest has</p> <p>19 filed several proofs of claim in this</p> <p>20 matter, and it looks like those are</p> <p>21 numbered 143 on behalf of HarbourVest,</p> <p>22 217 Global Fund L.P., and 144 HarbourVest</p> <p>23 2017 Global AIF, 149 HarbourVest Partners</p> <p>24 L.P., 150 HarbourVest Dover Street, IX</p> <p>25 Investment L.P., 153 HarbourVest – or I'm</p>	<p style="text-align: right;">Page 15</p> <p>1 Confidential - Pugatch</p> <p>2 sorry, HV International VIII Secondary</p> <p>3 L.P., and 154 HarbourVest Skew Base AIF</p> <p>4 LP.</p> <p>5 And you're here to talk on</p> <p>6 behalf of all of those entities, and you</p> <p>7 have, for purpose of this settlement and</p> <p>8 you're – the 9019 motion, these proofs of</p> <p>9 claim are all lumped together as one</p> <p>10 claim; is that correct?</p> <p>11 MS. WEISGERBER: I'm just going</p> <p>12 to object quickly and clarify that</p> <p>13 he's not here as a 30(b)(6) witness,</p> <p>14 but he is here as someone from</p> <p>15 HarbourVest who signed those proofs of</p> <p>16 claim. So with that, I'll let you</p> <p>17 continue.</p> <p>18 A. I'll just answered the question,</p> <p>19 yes, as a representative on behalf of all</p> <p>20 of those entities. I would defer to</p> <p>21 counsel, from a legal perspective, whether</p> <p>22 these are treated as a single or separate</p> <p>23 claims.</p> <p>24 MR. WILSON: Okay. And we can</p> <p>25 move on for now.</p>
<p style="text-align: right;">Page 16</p> <p>1 Confidential - Pugatch</p> <p>2 I'm going to submit the first</p> <p>3 exhibit. It's going to be Exhibit</p> <p>4 No. 1 to the deposition. I'm sending</p> <p>5 it by E-mail, and I'm also going to</p> <p>6 use a share screen.</p> <p>7 (Whereupon, Exhibit 1, Proof of</p> <p>8 Claim 143 filed 4/08/2020 nine pages,</p> <p>9 was marked for identification.)</p> <p>10 MR. WILSON: So this document</p> <p>11 right here is Claim Number 143 filed</p> <p>12 on April 8, 2020, and this one is</p> <p>13 filed on behalf of HarbourVest 2017</p> <p>14 Global Fund L.P.</p> <p>15 If we go down, scroll to the</p> <p>16 annex to proof of claim, it's Page 5</p> <p>17 of the document. It says that the</p> <p>18 Claimant is a limited partner in one</p> <p>19 of the Debtor's managed vehicles,</p> <p>20 Highland CLO Funding, Ltd.</p> <p>21 And I'm going to now send out an</p> <p>22 E-mail with Exhibit No. 2. I'm going</p> <p>23 to pull this Exhibit No. 2 document up</p> <p>24 on the share screen, as well. I guess</p> <p>25 that's right.</p>	<p style="text-align: right;">Page 17</p> <p>1 Confidential - Pugatch</p> <p>2 (Whereupon, Exhibit 2, Proof of</p> <p>3 Claim 149 filed 4/08/2020 nine pages,</p> <p>4 was marked for identification.)</p> <p>5 BY MR. WILSON:</p> <p>6 Q. Can you see the official proof,</p> <p>7 official form 410 proof of claim on your</p> <p>8 screen?</p> <p>9 A. The first one that you shared?</p> <p>10 Q. I'm now on Exhibit No. 2. Is it</p> <p>11 showing up on your screen?</p> <p>12 A. No.</p> <p>13 Q. Okay. Actually, I'm sorry. Is</p> <p>14 it now showing up on your screen?</p> <p>15 A. Now, it's showing up, yep.</p> <p>16 Q. Okay. So this one is Proof of</p> <p>17 Claim 149, filed on the same date. And</p> <p>18 this one's filed on behalf HarbourVest</p> <p>19 Partners L.P. And I'm going to scroll</p> <p>20 down to the annex to proof of claim, which</p> <p>21 looks largely like the annex to the</p> <p>22 previous proof of claim we looked at.</p> <p>23 But this one says, in Paragraph</p> <p>24 No. 2, the Claimant manages investment</p> <p>25 funds that are limited partners in one of</p>

<p style="text-align: right;">Page 18</p> <p>1 Confidential - Pugatch</p> <p>2 the Debtor's managed vehicles, Highland</p> <p>3 CLO Funding, Ltd.</p> <p>4 And can you tell me why this</p> <p>5 HarbourVest Partners L.P. filed a separate</p> <p>6 proof of claim, from the entities that</p> <p>7 were investors in HCLOF?</p> <p>8 A. I would only be able to answer</p> <p>9 that, based on conversations with counsel.</p> <p>10 Q. But in any event, HarbourVest</p> <p>11 Partners L.P. did not invest in HCLOF,</p> <p>12 correct?</p> <p>13 A. Not directly on behalf of</p> <p>14 itself, no.</p> <p>15 Q. All right. I'm going to stop</p> <p>16 that share screen.</p> <p>17 MR. WILSON: And this is going</p> <p>18 to be Exhibit Number 3.</p> <p>19 (Whereupon, Exhibit 3,</p> <p>20 Declaration of Michael Pugatch in</p> <p>21 Support of Motion of HarbourVest</p> <p>22 Pursuant to Rule 3018(a), was marked</p> <p>23 for identification.)</p> <p>24 MR. WILSON: And Exhibit No. 3</p> <p>25 that I've just submitted via E-mail,</p>	<p style="text-align: right;">Page 19</p> <p>1 Confidential - Pugatch</p> <p>2 and I'm about to put it up on the</p> <p>3 screen, is the Declaration of</p> <p>4 HarbourVest. Let me get it up here,</p> <p>5 so you can see it. This is the</p> <p>6 declaration of Michael Pugatch in</p> <p>7 support of motion of HarbourVest</p> <p>8 pursuant to Rule 3018(a).</p> <p>9 BY MR. WILSON:</p> <p>10 Q. Have you seen this document</p> <p>11 before?</p> <p>12 A. Yes.</p> <p>13 Q. And, in fact, this is your</p> <p>14 declaration; is that correct?</p> <p>15 A. Yes.</p> <p>16 Q. And at the first line of this,</p> <p>17 of Paragraph 1 says that you're the</p> <p>18 managing director of HarbourVest Partners</p> <p>19 LLC?</p> <p>20 A. Correct.</p> <p>21 Q. And how is HarbourVest Partners</p> <p>22 LLC connected to these claims?</p> <p>23 A. That is the corporate entity or</p> <p>24 managing member of all of the underlying</p> <p>25 funds that are managed on behalf of</p>
<p style="text-align: right;">Page 20</p> <p>1 Confidential - Pugatch</p> <p>2 HarbourVest Partners L.P.</p> <p>3 Q. And you're the managing director</p> <p>4 of that entity?</p> <p>5 A. A managing director to that</p> <p>6 entity, yes.</p> <p>7 Q. You said "a managing director,"</p> <p>8 are there others?</p> <p>9 A. Yes.</p> <p>10 Q. Who are the others?</p> <p>11 A. There are over 50 managing</p> <p>12 directors at HarbourVest Partners LLC.</p> <p>13 Q. And are you the managing</p> <p>14 director that has charge of this</p> <p>15 particular HarbourVest investment, the one</p> <p>16 in HCLOF?</p> <p>17 A. Yes.</p> <p>18 MR. WILSON: All right. I beg</p> <p>19 your patience. I'm trying to conduct</p> <p>20 this deposition solo. I've got a lot</p> <p>21 of stuff I've got to go through. So</p> <p>22 I'll do my best to do it efficiently.</p> <p>23 But this next exhibit I'm going</p> <p>24 to submit is going to be Exhibit No.</p> <p>25 4. I'm sending it in the E-mail now.</p>	<p style="text-align: right;">Page 21</p> <p>1 Confidential - Pugatch</p> <p>2 (Whereupon, Exhibit 4, Member</p> <p>3 Agreement 28 pages, was marked for</p> <p>4 identification.)</p> <p>5 BY MR. WILSON:</p> <p>6 Q. Can you see this on your share</p> <p>7 screen?</p> <p>8 A. I can.</p> <p>9 Q. This is the Members Agreement</p> <p>10 relating to the Company.</p> <p>11 A. (Nods.)</p> <p>12 Q. I'm just going to scroll down.</p> <p>13 Okay. So this is the signature page for</p> <p>14 the HarbourVest entities that were</p> <p>15 invested in this company. And it says</p> <p>16 that you were the authorized person to</p> <p>17 sign on behalf of the first two entities:</p> <p>18 HarbourVest Dover Street, HarbourVest 2017</p> <p>19 Global, and then the next one here it says</p> <p>20 you're managing director. And here we see</p> <p>21 that HarbourVest Partners LLC.</p> <p>22 And if we scroll down, we see</p> <p>23 that you're the managing director of</p> <p>24 HarbourVest Partners LLC, again, on behalf</p> <p>25 of HV International, and that you're an</p>

<p style="text-align: right;">Page 22</p> <p>1 Confidential - Pugatch</p> <p>2 authorized person on behalf of HarbourVest</p> <p>3 Skew Base.</p> <p>4 So you signed all these</p> <p>5 agreements on behalf of the HarbourVest</p> <p>6 entities, when HarbourVest made its</p> <p>7 investment in HCLOF. Would that be</p> <p>8 correct?</p> <p>9 A. Correct.</p> <p>10 Q. Okay. Sorry that was</p> <p>11 cumbersome, but I needed to get through</p> <p>12 it.</p> <p>13 MR. WILSON: I'm going to now</p> <p>14 stop that share screen. And I'll need</p> <p>15 to go to Exhibit No. 5. I'm E-mailing</p> <p>16 out Exhibit No. 5 right now.</p> <p>17 (Whereupon, Exhibit 5,</p> <p>18 HarbourVest Response to Debtor's First</p> <p>19 Omnibus Objection 617 pages, was</p> <p>20 marked for identification.)</p> <p>21 BY MR. WILSON:</p> <p>22 Q. This is -- I'll do another share</p> <p>23 screen -- this is Docket 1057 filed in the</p> <p>24 Highland bankruptcy. And this is</p> <p>25 HarbourVest Response to Debtor's First</p>	<p style="text-align: right;">Page 23</p> <p>1 Confidential - Pugatch</p> <p>2 Omnibus Objection.</p> <p>3 Did you participate in the</p> <p>4 creation of this document?</p> <p>5 A. Yes.</p> <p>6 Q. So you had an opportunity to</p> <p>7 review this document, before it was filed?</p> <p>8 A. Correct.</p> <p>9 Q. And you agree with the</p> <p>10 statements and the positions taken in this</p> <p>11 document?</p> <p>12 A. I do.</p> <p>13 Q. All right. So what this says in</p> <p>14 Paragraph 8, that by the summer of 2017,</p> <p>15 HarbourVest was engaged in preliminary</p> <p>16 discussions with Highland, regarding the</p> <p>17 investment.</p> <p>18 First off, why was HarbourVest</p> <p>19 engaged in preliminary discussions with</p> <p>20 Highland?</p> <p>21 A. Highland had approached</p> <p>22 HarbourVest with an investment</p> <p>23 opportunity. This was really borne out of</p> <p>24 discussions that we had with them around a</p> <p>25 couple of investment opportunities, that</p>
<p style="text-align: right;">Page 24</p> <p>1 Confidential - Pugatch</p> <p>2 this opportunity with HCLOF being the one</p> <p>3 that by the summer of 2017, as stated</p> <p>4 here, was in, was advancing through</p> <p>5 discussions.</p> <p>6 Q. And which individuals at</p> <p>7 Highland were you engaged in discussions</p> <p>8 with? By "you," I mean HarbourVest.</p> <p>9 A. Yeah, I mean, originally it was</p> <p>10 through a couple of members of their</p> <p>11 investor relations team. My first point</p> <p>12 of contact was with Brad Eden, and then</p> <p>13 subsequently progressed to a larger subset</p> <p>14 of employees of Highland.</p> <p>15 Q. And who on behalf of HarbourVest</p> <p>16 was engaging in these discussions?</p> <p>17 A. It was primarily myself, my</p> <p>18 colleague, or two -- two colleagues</p> <p>19 primarily, alongside myself.</p> <p>20 Q. I'm sorry. I didn't catch the</p> <p>21 last part.</p> <p>22 A. Sorry. Myself and two other</p> <p>23 colleagues primarily.</p> <p>24 Q. And who are these two other</p> <p>25 colleagues?</p>	<p style="text-align: right;">Page 25</p> <p>1 Confidential - Pugatch</p> <p>2 A. Dustin Willard and then a more</p> <p>3 junior member of the HarbourVest team.</p> <p>4 Q. When you say "the HarbourVest</p> <p>5 team," what does that mean?</p> <p>6 A. So the broader investment team</p> <p>7 and specifically in this context, the</p> <p>8 secondary investment team at HarbourVest,</p> <p>9 that this was an opportunity for.</p> <p>10 Q. So who made the final decision,</p> <p>11 on behalf of HarbourVest, to make this</p> <p>12 investment?</p> <p>13 A. Ultimately it was a decision</p> <p>14 made by the investment committee of</p> <p>15 HarbourVest.</p> <p>16 Q. And who's on that investment</p> <p>17 committee?</p> <p>18 A. It's a four-member committee</p> <p>19 comprised of managing directors within the</p> <p>20 firm.</p> <p>21 Q. And who are those managing</p> <p>22 directors?</p> <p>23 A. I don't recall at the time who</p> <p>24 the members were. I can tell you the</p> <p>25 members now, of that committee. It has</p>

<p style="text-align: right;">Page 26</p> <p>1 Confidential - Pugatch</p> <p>2 changed or evolved over time.</p> <p>3 Q. And that committee included you?</p> <p>4 A. I was involved in the</p> <p>5 decisionmaking of that, yes, correct.</p> <p>6 Q. So you were part of the four-man</p> <p>7 committee that made this decision?</p> <p>8 A. Yes.</p> <p>9 Q. All right. I'm going to go back</p> <p>10 to what we've marked as Exhibit 3, which</p> <p>11 is your declaration. And it says in</p> <p>12 Paragraph 2, that HarbourVest is a passive</p> <p>13 minority investor in Highland CLO funds,</p> <p>14 HCLOF, and by the way, I haven't stated</p> <p>15 this before, but in this deposition if I</p> <p>16 say HCLOF, I'm going to be referring to</p> <p>17 Highland CLO funds.</p> <p>18 But it says that the vehicle is</p> <p>19 managed by Highland Capital Management,</p> <p>20 L.P.</p> <p>21 And why do you say that that</p> <p>22 vehicle was managed by Highland Capital</p> <p>23 Management, L.P.?</p> <p>24 A. I believe that is the named</p> <p>25 investment manager of HCLOF, per the</p>	<p style="text-align: right;">Page 27</p> <p>1 Confidential - Pugatch</p> <p>2 organization documents of that vehicle.</p> <p>3 Q. You believe that that was the</p> <p>4 investment manager on the organization</p> <p>5 documents, which –</p> <p>6 A. Of the various transaction</p> <p>7 documents that we entered into, in</p> <p>8 connection with our investment.</p> <p>9 Q. Would those have been the</p> <p>10 documents that you had entered on November</p> <p>11 the 15 of 2017?</p> <p>12 A. Yes.</p> <p>13 Q. Okay. It says that HarbourVest</p> <p>14 initially invested \$73,522,928 for roughly</p> <p>15 49 percent interest in HCLOF; and more</p> <p>16 specifically, that would be a 49.98</p> <p>17 percent interest in HCLOF, correct?</p> <p>18 A. Sounds right, yes.</p> <p>19 Q. Okay. And then HarbourVest</p> <p>20 contributed an additional \$4,998,501</p> <p>21 following a capital call, and it's</p> <p>22 received three dividends, each totally</p> <p>23 \$1,570,429.</p> <p>24 Is all of that correct?</p> <p>25 A. Yes.</p>
<p style="text-align: right;">Page 28</p> <p>1 Confidential - Pugatch</p> <p>2 Q. And has HarbourVest received any</p> <p>3 additional dividends, since the making of</p> <p>4 this declaration?</p> <p>5 A. No, we have not.</p> <p>6 Q. Now, I want to skip down to</p> <p>7 Paragraph 3, where it says that</p> <p>8 HarbourVest expected proceeds from the</p> <p>9 original HCLOF investment were projected</p> <p>10 to exceed 135 million.</p> <p>11 Do you agree with that?</p> <p>12 A. That was the original projected</p> <p>13 value of the investment, yes.</p> <p>14 Q. Well, whose expectation was</p> <p>15 that?</p> <p>16 A. Those were figures, as I recall,</p> <p>17 that were originally provided to us by</p> <p>18 Highland to form the basis of our due</p> <p>19 diligence that we went through, and</p> <p>20 penultimately were included as part of our</p> <p>21 investment thesis in making the</p> <p>22 investment.</p> <p>23 Q. So your testimony is that</p> <p>24 Highland told you that your investment</p> <p>25 would be worth over \$135 million?</p>	<p style="text-align: right;">Page 29</p> <p>1 Confidential - Pugatch</p> <p>2 A. Yes.</p> <p>3 MS. WEISGERBER: Objection to</p> <p>4 the form. Misstates testimony.</p> <p>5 Go ahead, Mike.</p> <p>6 A. That was, that was part of our</p> <p>7 original due diligence, on the investment</p> <p>8 opportunity.</p> <p>9 Q. When you say part of your due</p> <p>10 diligence, are you saying that the number</p> <p>11 originated from Highland or that the</p> <p>12 number originated from your due diligence</p> <p>13 operations?</p> <p>14 MS. WEISGERBER: Objection to</p> <p>15 form.</p> <p>16 A. The number originally came from</p> <p>17 Highland and formed the basis upon which</p> <p>18 we conducted due diligence on the</p> <p>19 investment opportunity.</p> <p>20 Q. And after performing due</p> <p>21 diligence, you were satisfied that that</p> <p>22 was a reasonable projection?</p> <p>23 A. Yes.</p> <p>24 Q. And what was the, what was the</p> <p>25 estimated date, in which the value of your</p>

<p style="text-align: right;">Page 30</p> <p>1 Confidential - Pugatch</p> <p>2 investment would exceed the \$135 million?</p> <p>3 MS. WEISGERBER: Objection to</p> <p>4 form.</p> <p>5 A. I don't recall exactly. That</p> <p>6 would have been over, over several years.</p> <p>7 And again, this was the -- this was the</p> <p>8 projected value based on the original</p> <p>9 investment or the assets that were held by</p> <p>10 HCLOF, at the time of our investment.</p> <p>11 Q. Now, when you talk about a</p> <p>12 portfolio manager -- I'm sorry, when you</p> <p>13 talk about investment manager, are you</p> <p>14 referring to the portfolio manager?</p> <p>15 A. No.</p> <p>16 Q. So what's the difference in an</p> <p>17 investment manager and a portfolio</p> <p>18 manager?</p> <p>19 A. So in the context of this</p> <p>20 investment, the investment manager. We --</p> <p>21 we had -- HarbourVest had an investment</p> <p>22 with HCLOF. Highland was the investment</p> <p>23 manager of HCLOF that in turn held equity</p> <p>24 positions in a variety of CLOs, which had</p> <p>25 various portfolio managers associated with</p>	<p style="text-align: right;">Page 31</p> <p>1 Confidential - Pugatch</p> <p>2 those, all Highland affiliates.</p> <p>3 Q. And so who was the portfolio</p> <p>4 manager for the HarbourVest investment in</p> <p>5 HCLOF?</p> <p>6 MS. WEISGERBER: Objection to</p> <p>7 form.</p> <p>8 A. There were various underling</p> <p>9 portfolio managers, depending on the</p> <p>10 underlying CLO position.</p> <p>11 Q. Well, who was the initial</p> <p>12 portfolio manager?</p> <p>13 A. So, again it would depend on</p> <p>14 which underlying assets we're talking</p> <p>15 about. HCLOF was a diversified portfolio</p> <p>16 of multiple underlying CLO equity</p> <p>17 positions, all with portfolio managers</p> <p>18 that were Highland affiliates, as we</p> <p>19 understood it.</p> <p>20 Q. Well, I'm going to go back to</p> <p>21 Exhibit 1, Paragraph 2, this says, in the</p> <p>22 second sentence, "Acis Capital Management</p> <p>23 GP, LLC, and Acis Capital Management,</p> <p>24 L.P., together Acis, the portfolio manager</p> <p>25 for HCLOF," and then it continues on,</p>
<p style="text-align: right;">Page 32</p> <p>1 Confidential - Pugatch</p> <p>2 "filed for Chapter 11."</p> <p>3 Is this proof of claim correct,</p> <p>4 when it states that Acis Capital</p> <p>5 Management GP, LLC, and Acis Capital</p> <p>6 Management, L.P., were the portfolio</p> <p>7 manager for HCLOF?</p> <p>8 MS. WEISGERBER: Objection to</p> <p>9 form.</p> <p>10 A. I know that there was an issue</p> <p>11 with the portfolio manager for at least</p> <p>12 the Acis CLOs that were held by HCLOF.</p> <p>13 Q. Well, how do you distinguish</p> <p>14 between the Acis CLOs and the Highland</p> <p>15 CLOs? Is that based on who was managing</p> <p>16 them?</p> <p>17 MS. WEISGERBER: Objection to</p> <p>18 form.</p> <p>19 A. Again, they were all underlying</p> <p>20 investments of HCLOF. We didn't</p> <p>21 distinguish the portfolio manager, if you</p> <p>22 will, of those vehicles, other than again</p> <p>23 they were Highland affiliates.</p> <p>24 Q. But it's fair to say that Acis</p> <p>25 was managing at least a portion of the</p>	<p style="text-align: right;">Page 33</p> <p>1 Confidential - Pugatch</p> <p>2 HCLOF investment, correct?</p> <p>3 A. Correct. The underlying</p> <p>4 investments held by HCLOF, correct.</p> <p>5 Q. And did anything -- from the</p> <p>6 time that you -- well, let's just go to</p> <p>7 the -- I think we had the members</p> <p>8 agreement up a second ago. This would</p> <p>9 have been Exhibit 4.</p> <p>10 Yeah, right here. No. 14,</p> <p>11 Highland HCF Advisor, Ltd. is listed as</p> <p>12 the portfolio manager on the members</p> <p>13 agreement.</p> <p>14 Is that accurate, that Highland</p> <p>15 HCF Advisor, Ltd. was the portfolio</p> <p>16 manager?</p> <p>17 MS. WEISGERBER: Objection to</p> <p>18 form. Can you state as of what date</p> <p>19 you're asking, Counsel?</p> <p>20 MR. WILSON: Well, the date of</p> <p>21 this memorandum is, it says right</p> <p>22 here, 15 November 2017.</p> <p>23 BY MR. WILSON:</p> <p>24 Q. So as of the date November 15,</p> <p>25 2017, who was the portfolio manager for</p>

<p style="text-align: right;">Page 34</p> <p>1 Confidential - Pugatch</p> <p>2 this investment?</p> <p>3 A. I don't recall the specific</p> <p>4 names of the various entities that sat</p> <p>5 below the HCLOF level or below Highland</p> <p>6 Capital, as the investment manager of</p> <p>7 HCLOF.</p> <p>8 Q. Well, are you familiar with a</p> <p>9 company called Brigade?</p> <p>10 A. Yes.</p> <p>11 Q. And was that company a</p> <p>12 sub-manager of this investment?</p> <p>13 MS. WEISGERBER: Objection to</p> <p>14 form.</p> <p>15 A. Not at the time of our</p> <p>16 investment.</p> <p>17 Q. Not at the time. Well, when did</p> <p>18 the portfolio managers begin to change in</p> <p>19 this investment?</p> <p>20 MS. WEISGERBER: Objection to</p> <p>21 form.</p> <p>22 A. Do you mean subsequent to our</p> <p>23 investment?</p> <p>24 Q. Yes.</p> <p>25 A. So as I understand it in</p>	<p style="text-align: right;">Page 35</p> <p>1 Confidential - Pugatch</p> <p>2 connection with the Acis bankruptcy that</p> <p>3 took place, there was a change in the</p> <p>4 underlying either portfolio manager of</p> <p>5 certain of the CLOs, the Acis-managed CLOs</p> <p>6 or Acis-branded CLOs, I should say, and/or</p> <p>7 sub-advisor of those CLOs.</p> <p>8 Q. And was that at the direction of</p> <p>9 the Chapter 11 trustee?</p> <p>10 MS. WEISGERBER: Objection.</p> <p>11 A. That's my understanding.</p> <p>12 Q. And so when this investment was</p> <p>13 initially made, was Highland HCF Advisor,</p> <p>14 Ltd. the portfolio manager of the entire</p> <p>15 investment?</p> <p>16 MS. WEISGERBER: Objection to</p> <p>17 form.</p> <p>18 A. I don't recall the specifics</p> <p>19 underneath the HCLOF entity.</p> <p>20 Q. Well, there aren't any other</p> <p>21 portfolio managers listed on this</p> <p>22 document, that I can see.</p> <p>23 Is there any place in this</p> <p>24 document that you can point me to that</p> <p>25 would identify another portfolio manager?</p>
<p style="text-align: right;">Page 36</p> <p>1 Confidential - Pugatch</p> <p>2 MS. WEISGERBER: Objection to</p> <p>3 form. The document speaks for itself.</p> <p>4 A. Again, I think we may be</p> <p>5 distinguishing here between portfolio</p> <p>6 manager at the HCLOF level and portfolio</p> <p>7 manager sub-advisor, again, I'm not sure</p> <p>8 the proper terminology as it relates to</p> <p>9 each of the underlying CLOs that were</p> <p>10 partially owned by HCLOF.</p> <p>11 Q. Well, after the Acis bankruptcy</p> <p>12 was filed, and after the Chapter 11</p> <p>13 trustee appointed Acis as a portfolio</p> <p>14 manager of at least part of HCLOF, did</p> <p>15 Highland HCF Advisor continue to serve as</p> <p>16 portfolio manager?</p> <p>17 MS. WEISGERBER: Objection to</p> <p>18 form.</p> <p>19 A. All of HarbourVest's interaction</p> <p>20 was with Highland as the investment</p> <p>21 manager of HCLOF. My understanding of the</p> <p>22 change in those entities related to the</p> <p>23 portfolio management of the underlying</p> <p>24 Acis CLOs, not a change in the portfolio</p> <p>25 manager, at the HCLOF level.</p>	<p style="text-align: right;">Page 37</p> <p>1 Confidential - Pugatch</p> <p>2 Q. Well, Highland is listed as a</p> <p>3 member under this -- Highland Capital</p> <p>4 Management LLP is listed as a member under</p> <p>5 this Member Agreement; is that correct?</p> <p>6 MS. WEISGERBER: Objection to</p> <p>7 form.</p> <p>8 A. If that's what the document</p> <p>9 says, yes.</p> <p>10 Q. I'm going to look -- let me stop</p> <p>11 my share screen for a second.</p> <p>12 All right. I'm now at the top</p> <p>13 of Page 5 of this Exhibit 4, where it</p> <p>14 says, "Dover IX shall mean HarbourVest</p> <p>15 Dover Street IX Investment L.P."</p> <p>16 And Dover IX was the largest</p> <p>17 single investor of the HarbourVest Group;</p> <p>18 is that correct?</p> <p>19 A. Correct.</p> <p>20 Q. All right. I'm now going to go</p> <p>21 down to Paragraph 5. I'm sorry, it's not</p> <p>22 Paragraph 5. Paragraph 4, where it says</p> <p>23 "Composition of Advisory Board" in</p> <p>24 Paragraph 4.1, The Company shall establish</p> <p>25 an Advisory Board composed of two</p>

<p style="text-align: right;">Page 38</p> <p>1 Confidential - Pugatch</p> <p>2 individuals, one of whom shall be a</p> <p>3 representative of CLO Holdco and one of</p> <p>4 whom shall be a representative of</p> <p>5 Dover IX.</p> <p>6 And did this Advisory Board get</p> <p>7 created?</p> <p>8 A. I believe it was created, yes.</p> <p>9 Q. And who was the representative</p> <p>10 for CLO Holdco on the Advisory Board?</p> <p>11 A. I don't know.</p> <p>12 Q. Who was the representative for</p> <p>13 Dover IX on the Advisory Board?</p> <p>14 A. I can't recall whether it was</p> <p>15 myself or one other colleague who jointly</p> <p>16 manages this investment with me.</p> <p>17 Q. You don't recall if you were on</p> <p>18 the Advisory Board?</p> <p>19 A. The Advisory Board never met</p> <p>20 formally under its capacity as an Advisory</p> <p>21 Board.</p> <p>22 Q. Well, if you look down in</p> <p>23 Paragraph 4.3, I've got my mouse pointed</p> <p>24 here, I don't know if you can see it.</p> <p>25 About two-thirds of the way down in this</p>	<p style="text-align: right;">Page 39</p> <p>1 Confidential - Pugatch</p> <p>2 paragraph it says, "The consent of the</p> <p>3 Advisory Board shall be required to</p> <p>4 approve the following actions," and then</p> <p>5 it lists a number of things.</p> <p>6 Did the Advisory Board not have</p> <p>7 to – was it not required that the</p> <p>8 Advisory Board ever meet, because they</p> <p>9 didn't take any of these actions?</p> <p>10 MS. WEISGERBER: Objection.</p> <p>11 Objection to form.</p> <p>12 A. There may have been one or two</p> <p>13 actions taken by the Advisory Board, I'm</p> <p>14 looking at the list here to see what those</p> <p>15 may even have been, during the duration of</p> <p>16 our investment; but if so, those would</p> <p>17 have been written resolutions or written</p> <p>18 consents, as opposed to any meeting that</p> <p>19 was convened amongst the entire Advisory</p> <p>20 Board.</p> <p>21 Q. Okay. And the entire Advisory</p> <p>22 Board is just two individuals, correct?</p> <p>23 A. Correct, that's my</p> <p>24 understanding.</p> <p>25 Q. Okay. And if you go up a few</p>
<p style="text-align: right;">Page 40</p> <p>1 Confidential - Pugatch</p> <p>2 sentences above that in Paragraph 4.3 it</p> <p>3 says, The portfolio manager shall not act</p> <p>4 contrary to advice of the Advisory Board</p> <p>5 with respect to any action or</p> <p>6 determination expressly conditioned herein</p> <p>7 or in the offering memorandum on the</p> <p>8 consider approval of the Advisory Board.</p> <p>9 So the portfolio manager did not</p> <p>10 have the authority to disregard the advice</p> <p>11 of the Advisory Board; is that correct?</p> <p>12 MS. WEISGERBER: Objection to</p> <p>13 form; misstates the document.</p> <p>14 A. With respect to the limited role</p> <p>15 that the Advisory Board would have to</p> <p>16 play, yes, that would be my read.</p> <p>17 Q. Now, what is your understanding</p> <p>18 of a reset transaction?</p> <p>19 A. Has to do with a refinancing and</p> <p>20 reset of the investment period of an</p> <p>21 underlying CLO.</p> <p>22 Q. And would a reset transaction be</p> <p>23 contained within this – these actions</p> <p>24 that the Advisory Board's consent is</p> <p>25 required to approve?</p>	<p style="text-align: right;">Page 41</p> <p>1 Confidential - Pugatch</p> <p>2 A. No, it would not.</p> <p>3 MS. WEISGERBER: Objection.</p> <p>4 MR. MALONEY: Join.</p> <p>5 Q. It would not?</p> <p>6 A. It would not.</p> <p>7 Q. Well, if a reset was to be</p> <p>8 proposed, who would have the discretion to</p> <p>9 make that decision to enter a reset</p> <p>10 transaction?</p> <p>11 MS. WEISGERBER: Objection to</p> <p>12 form and foundation.</p> <p>13 MR. MALONEY: Join.</p> <p>14 A. That would be Highland as the</p> <p>15 manager of HCLOF, who owns the equity</p> <p>16 position to the underlying CLOs.</p> <p>17 Q. So you're saying that Highland</p> <p>18 would have the exclusive authority to</p> <p>19 enter a reset transaction?</p> <p>20 A. Correct.</p> <p>21 MS. WEISGERBER: Objection to</p> <p>22 form.</p> <p>23 MR. MALONEY: Join.</p> <p>24 Q. What if HarbourVest objected to</p> <p>25 a reset transaction? Would it have any</p>

<p style="text-align: right;">Page 42</p> <p>1 Confidential - Pugatch</p> <p>2 rights or remedies, in your understanding?</p> <p>3 MS. WEISGERBER: I'm going to</p> <p>4 object to form. And also just object</p> <p>5 to the extent that this is calling for</p> <p>6 legal conclusions.</p> <p>7 Mike --</p> <p>8 MR. WILSON: I've ask the</p> <p>9 witness, within his understanding of</p> <p>10 the way this investment worked.</p> <p>11 MS. WEISGERBER: If you have an</p> <p>12 understanding separate from any other</p> <p>13 conversations with counsel, Mike, you</p> <p>14 can certainly answer.</p> <p>15 A. Within my understanding,</p> <p>16 HarbourVest would not have had any ability</p> <p>17 or rights to object to a reset or for</p> <p>18 similar actions by Highland, as the</p> <p>19 manager of the HCLOF.</p> <p>20 Q. Okay. And just to, just for</p> <p>21 clarity, in 4.2 it says that, All actions</p> <p>22 taken by the Advisory Board shall be (i)</p> <p>23 by a unanimous vote of all of the members</p> <p>24 of the Advisory Board in attendance; or</p> <p>25 (ii), by written consent in lieu of a</p>	<p style="text-align: right;">Page 43</p> <p>1 Confidential - Pugatch</p> <p>2 meeting signed by all of the members of</p> <p>3 the Advisory Board.</p> <p>4 And we've talked about how there</p> <p>5 were two members, one of which represented</p> <p>6 CLO Holdco and one of which represented</p> <p>7 HarbourVest, and it was your testimony</p> <p>8 that you don't recall a meeting ever being</p> <p>9 conducted that you believed that there had</p> <p>10 been some written consents issued by the</p> <p>11 Advisory Board; is that correct?</p> <p>12 MS. WEISGERBER: Objection to</p> <p>13 form.</p> <p>14 A. That is my recollection, yes.</p> <p>15 Q. I'm sorry? I didn't hear your</p> <p>16 answer.</p> <p>17 A. That is my recollection, yes.</p> <p>18 Q. Okay. So what is the Advisory</p> <p>19 Board's general function in your</p> <p>20 understanding?</p> <p>21 MS. WEISGERBER: Objection to</p> <p>22 form.</p> <p>23 You can answer, Mike, if you</p> <p>24 know, other than, you know, legal</p> <p>25 conclusions, things like that, legal</p>
<p style="text-align: right;">Page 44</p> <p>1 Confidential - Pugatch</p> <p>2 advice.</p> <p>3 And also, Mike, you're welcome</p> <p>4 to look at the document, I think John</p> <p>5 is E-mailing you the documents as</p> <p>6 well. I don't know if you have the</p> <p>7 full document in front of you.</p> <p>8 THE WITNESS: Yeah, I can pull</p> <p>9 it up here.</p> <p>10 A. I mean, my understanding is the</p> <p>11 Advisory Board, the Advisory Board's</p> <p>12 involvement is as spelled as in Section</p> <p>13 4.3 of the agreement that you have on the</p> <p>14 screen. And that is the extent of the</p> <p>15 role that the Advisory Board would play.</p> <p>16 Q. Well, but as a practical matter,</p> <p>17 what did that entail?</p> <p>18 MS. WEISGERBER: Objection to</p> <p>19 form.</p> <p>20 A. Again, as a practical matter,</p> <p>21 the listed items, which I can't see, that</p> <p>22 are off the screen further down in 4.3 are</p> <p>23 the items that would require approval by</p> <p>24 the Advisory Board.</p> <p>25 Q. But other than those items, the</p>	<p style="text-align: right;">Page 45</p> <p>1 Confidential - Pugatch</p> <p>2 Advisory Board was not a routine part of</p> <p>3 the decision-making of the portfolio</p> <p>4 manager?</p> <p>5 MS. WEISGERBER: Objection to</p> <p>6 form.</p> <p>7 A. Not at all.</p> <p>8 Q. Did you say "not at all"?</p> <p>9 A. Not at all, no.</p> <p>10 Q. I'm going to refer back to</p> <p>11 Exhibit 5, which was Document -- or Docket</p> <p>12 1057. I'll put that back on the share</p> <p>13 screen. I wanted you to scroll, sorry.</p> <p>14 It's a long document.</p> <p>15 I want you to look at</p> <p>16 Paragraph 37, which should be on your</p> <p>17 screen. And it says that these are</p> <p>18 misrepresentations that HarbourVest</p> <p>19 alleges were made by Highland. And the</p> <p>20 first bullet point states that, "Highland</p> <p>21 never informed HarbourVest that Highland</p> <p>22 had no intention of paying the Arbitration</p> <p>23 Award and was undertaking steps to ensure</p> <p>24 that Mr. Terry could not collect on his</p> <p>25 judgment."</p>

<p style="text-align: right;">Page 46</p> <p>1 Confidential - Pugatch</p> <p>2 Now, Mr. Terry did not have an</p> <p>3 arbitration award against Highland; is</p> <p>4 that correct?</p> <p>5 MS. WEISGERBER: Objection to</p> <p>6 form and foundation.</p> <p>7 A. My understanding is there was an</p> <p>8 Arbitration Award, awarded for the benefit</p> <p>9 of Mr. Terry.</p> <p>10 Q. But that award was against Acis,</p> <p>11 correct?</p> <p>12 MS. WEISGERBER: Objection to</p> <p>13 form.</p> <p>14 A. I don't know all of the details.</p> <p>15 I do know that Acis was a subsidiary of</p> <p>16 Highland, and there was an arbitration</p> <p>17 award that was for the benefit of</p> <p>18 Mr. Terry.</p> <p>19 Q. But you would agree with me that</p> <p>20 if, if Highland, or I'm sorry if Mr. Terry</p> <p>21 had an arbitration award against Acis,</p> <p>22 then Highland would not have any</p> <p>23 obligation to pay that award?</p> <p>24 MR. MORRIS: Objection to the</p> <p>25 form of the question.</p>	<p style="text-align: right;">Page 47</p> <p>1 Confidential - Pugatch</p> <p>2 MS. WEISGERBER: Objection to</p> <p>3 the form. Objection to the extent</p> <p>4 that it calls for a legal conclusion.</p> <p>5 I don't -- Mike, if you have a</p> <p>6 layman's understanding of the answer</p> <p>7 to that question, you're welcome to</p> <p>8 answer. But if not, don't answer.</p> <p>9 A. My understanding was Acis was a</p> <p>10 controlled subsidiary of Highland's.</p> <p>11 Q. Okay. Well, the next bullet</p> <p>12 point says that, "Highland did not inform</p> <p>13 HarbourVest that it undertook the</p> <p>14 transfers to siphon assets away from Acis,</p> <p>15 L.P., and that such transfers would</p> <p>16 prevent Mr. Terry from collecting on the</p> <p>17 Arbitration Award."</p> <p>18 So if your understanding was</p> <p>19 that Highland was responsible for the</p> <p>20 arbitration award, then why is it relevant</p> <p>21 that Highland siphoned assets away from</p> <p>22 Acis, L.P.?</p> <p>23 MS. WEISGERBER: Objection to</p> <p>24 form. Misstates testimony.</p> <p>25 Can you clarify that question,</p>
<p style="text-align: right;">Page 48</p> <p>1 Confidential - Pugatch</p> <p>2 John? I think the beginning of it was</p> <p>3 a little muddled.</p> <p>4 BY MR. WILSON:</p> <p>5 Q. Well, this objection says that</p> <p>6 Highland had -- or response to objection,</p> <p>7 says that Highland had no intention of</p> <p>8 paying the arbitration award, but that</p> <p>9 seems to conflict with the next bullet</p> <p>10 point that says that it undertook</p> <p>11 transfers to siphon assets away from Acis,</p> <p>12 L.P., to prevent Mr. Terry from collecting</p> <p>13 on the arbitration award.</p> <p>14 So where were those assets being</p> <p>15 siphoned to?</p> <p>16 MS. WEISGERBER: Objection to</p> <p>17 form and foundation.</p> <p>18 If you're capable of answering</p> <p>19 that question, Mike, you can.</p> <p>20 A. I don't know the specific</p> <p>21 details of where those assets were</p> <p>22 siphoned off to, other than it was to</p> <p>23 another Highland affiliate.</p> <p>24 Q. The next sentence says that,</p> <p>25 "Highland simply did not inform</p>	<p style="text-align: right;">Page 49</p> <p>1 Confidential - Pugatch</p> <p>2 HarbourVest and represented to HarbourVest</p> <p>3 that the reason for changing the portfolio</p> <p>4 manager for HCLOF was because Acis was</p> <p>5 toxic in the industry."</p> <p>6 Do you see that?</p> <p>7 A. Yes.</p> <p>8 Q. And it seems when I read these</p> <p>9 documents that have been filed in the</p> <p>10 Highland bankruptcy, and also the Acis</p> <p>11 bankruptcy, that there's a difference in</p> <p>12 position as to which entity, being either</p> <p>13 Highland or HarbourVest, had the belief</p> <p>14 that the Acis name was toxic. Can you</p> <p>15 shed any light on that?</p> <p>16 MS. WEISGERBER: Objection to</p> <p>17 form.</p> <p>18 A. I can unequivocally say that the</p> <p>19 idea to change the portfolio manager or</p> <p>20 the idea that the Acis brand was toxic did</p> <p>21 not come from HarbourVest.</p> <p>22 Q. That was not at HarbourVest's</p> <p>23 suggestion or insistence?</p> <p>24 A. Absolutely not.</p> <p>25 Q. Well, whose suggestion was it</p>

<p style="text-align: right;">Page 50</p> <p>1 Confidential - Pugatch</p> <p>2 that the Acis name was toxic?</p> <p>3 A. Somebody at Highland.</p> <p>4 Q. Do you know who?</p> <p>5 A. I don't recall the conversation</p> <p>6 where that first came up or who said, or</p> <p>7 who at Highland said that.</p> <p>8 Q. But that conversation did occur</p> <p>9 prior to HarbourVest's investment?</p> <p>10 A. Yes.</p> <p>11 Q. So Acis was previously the</p> <p>12 portfolio manager for HCLOF prior to</p> <p>13 November 15, 2017, and now November 17 --</p> <p>14 or 15th, 2017, the portfolio manager was</p> <p>15 changed.</p> <p>16 And what is HarbourVest's</p> <p>17 position as to why that change in</p> <p>18 portfolio manager damaged it?</p> <p>19 MS. WEISGERBER: Objection;</p> <p>20 form, objection to the extent it calls</p> <p>21 for a legal conclusion.</p> <p>22 Mike, you can answer --</p> <p>23 MR. WILSON: I'm not asking for</p> <p>24 a -- with all due respect, I'm not</p> <p>25 asking for a legal conclusion. I'm</p>	<p style="text-align: right;">Page 51</p> <p>1 Confidential - Pugatch</p> <p>2 asking for his understanding why the</p> <p>3 change in the portfolio manager</p> <p>4 damaged HarbourVest.</p> <p>5 MS. WEISGERBER: Same objection.</p> <p>6 You can provide any</p> <p>7 non-privileged answer that you have,</p> <p>8 Mike, if any.</p> <p>9 A. Ultimately my understanding is</p> <p>10 that that change in portfolio manager and</p> <p>11 the subsequent litigation between Acis,</p> <p>12 Highland, and Josh Terry led to material</p> <p>13 diminution in value, as it relates to the</p> <p>14 underlying assets of HCLOF stemming from</p> <p>15 Highland's decision not to comply with the</p> <p>16 arbitration award to Mr. Terry.</p> <p>17 Q. Okay. Now, if you go up to</p> <p>18 Page 4 in this document, it says that on</p> <p>19 October 27th, and this is Paragraph 11</p> <p>20 now, "On October 27, 2017, Acis' portfolio</p> <p>21 management rights for HCLOF were</p> <p>22 transferred to Highland HCF"; is that</p> <p>23 correct?</p> <p>24 A. That sounds right, yes.</p> <p>25 Q. And this is over two weeks prior</p>
<p style="text-align: right;">Page 52</p> <p>1 Confidential - Pugatch</p> <p>2 to HarbourVest's investment, correct?</p> <p>3 A. Correct.</p> <p>4 Q. So HarbourVest had full</p> <p>5 knowledge that that the portfolio manager</p> <p>6 of HCLOF was being changed prior to its</p> <p>7 investment, correct?</p> <p>8 A. Correct.</p> <p>9 MS. WEISGERBER: Objection to</p> <p>10 form.</p> <p>11 And just to clarify, you're</p> <p>12 asking him, HarbourVest, he's</p> <p>13 testifying on behalf of himself. I</p> <p>14 could just take a standing objection</p> <p>15 to that because I know sometimes</p> <p>16 you're just saying HarbourVest meaning</p> <p>17 Mike, so...</p> <p>18 BY MR. WILSON:</p> <p>19 Q. Okay. And just to be clear,</p> <p>20 HCLOF changed its portfolio manager on</p> <p>21 October 27, 2017, but after the Acis</p> <p>22 bankruptcy was initiated the Chapter 11</p> <p>23 trustee made changes to the portfolio</p> <p>24 manager, correct?</p> <p>25 MS. WEISGERBER: Objection to</p>	<p style="text-align: right;">Page 53</p> <p>1 Confidential - Pugatch</p> <p>2 form, foundation.</p> <p>3 A. I know there were changes</p> <p>4 subsequent to the Acis bankruptcy, to the</p> <p>5 underlying management of the Acis CLOs.</p> <p>6 Q. All right. I'm going to go back</p> <p>7 to Paragraph 37, and I want to look at</p> <p>8 these next two bullet points.</p> <p>9 It says that, in the third</p> <p>10 bullet point, that "Highland indicated to</p> <p>11 HarbourVest that the dispute with</p> <p>12 Mr. Terry (which appeared on a litigation</p> <p>13 schedule presented to HarbourVest during</p> <p>14 diligence) would have no impact on</p> <p>15 investment activities."</p> <p>16 And that would be the opinion of</p> <p>17 Highland, correct?</p> <p>18 MS. WEISGERBER: Objection to</p> <p>19 form. The opinion of Highland? Is</p> <p>20 that what you meant to ask?</p> <p>21 MR. WILSON: Right.</p> <p>22 BY MR. WILSON:</p> <p>23 Q. That's Highland expressing its</p> <p>24 opinion to HarbourVest, correct?</p> <p>25 MS. WEISGERBER: Objection to</p>

<p style="text-align: right;">Page 54</p> <p>1 Confidential - Pugatch</p> <p>2 form.</p> <p>3 A. I would just say Highland</p> <p>4 presented that as facts to HarbourVest.</p> <p>5 Q. Okay. And the next one, it says</p> <p>6 that "Highland expressed confidence in the</p> <p>7 ability of HCLOF to reset or redeem the</p> <p>8 CLOs notwithstanding that Highland was</p> <p>9 using HCLOF as part of its scheme to avoid</p> <p>10 the pending Arbitration Award."</p> <p>11 That's again an opinion, right,</p> <p>12 that Highland expressed confidence in the</p> <p>13 ability of HCLOF?</p> <p>14 MS. WEISGERBER: Objection to</p> <p>15 form. Objection to the extent it</p> <p>16 calls for a legal conclusion.</p> <p>17 A. Ultimately, their ability, or</p> <p>18 HCLOF's ability to reset or redeem the</p> <p>19 CLOs would be subject to market conditions</p> <p>20 and the ability to actually affect those</p> <p>21 transactions, but they expressed their,</p> <p>22 you know, their belief or view in HCLOF's</p> <p>23 ability to do that notwithstanding the,</p> <p>24 that change in portfolio manager.</p> <p>25 Q. Well, in Paragraph 39 on that</p>	<p style="text-align: right;">Page 55</p> <p>1 Confidential - Pugatch</p> <p>2 same page, it says, "In reliance on</p> <p>3 Highland's misrepresentations and</p> <p>4 omissions, HarbourVest invested in HCLOF."</p> <p>5 Now, HarbourVest is a</p> <p>6 sophisticated investor, correct?</p> <p>7 A. Correct.</p> <p>8 Q. And if we were to go to</p> <p>9 Paragraph 36, it says, right here in the</p> <p>10 middle, "These facts were material:</p> <p>11 indeed, HarbourVest expressed concern and</p> <p>12 requested further information regarding</p> <p>13 the Transfers, the Arbitration Award, and</p> <p>14 their implications for HCLOF, and the</p> <p>15 investment's closing date was delayed."</p> <p>16 And the closing date was</p> <p>17 ultimately November 15, 2017, correct?</p> <p>18 A. Correct.</p> <p>19 Q. What was the initial closing</p> <p>20 date that had to be delayed?</p> <p>21 A. I believe it was scheduled for</p> <p>22 November 1st.</p> <p>23 Q. So HarbourVest had full</p> <p>24 knowledge of these facts that it, that it</p> <p>25 lays out here forming the basis of the</p>
<p style="text-align: right;">Page 56</p> <p>1 Confidential - Pugatch</p> <p>2 alleged misrepresentations, and they</p> <p>3 requested further information regarding</p> <p>4 those facts.</p> <p>5 Did they receive any further</p> <p>6 information?</p> <p>7 MR. MORRIS: Objection to the</p> <p>8 form of the question.</p> <p>9 MS. WEISGERBER: Objection to</p> <p>10 form. Misstates testimony.</p> <p>11 A. We did have subsequent</p> <p>12 conversations and, I believe, receive</p> <p>13 subsequent information describing the</p> <p>14 intent around, and the, you know, new</p> <p>15 structure, pro forma structure, of the</p> <p>16 action that Highland had undertaken. And</p> <p>17 part of the reason for the delay in the</p> <p>18 closing was to ensure that we had adequate</p> <p>19 time to diligence those changes, ask</p> <p>20 questions, in connection with a thorough</p> <p>21 due diligence process, and ensure that the</p> <p>22 underlying legal structure was still</p> <p>23 sound.</p> <p>24 Q. And HarbourVest was investing</p> <p>25 over \$73 million, correct?</p>	<p style="text-align: right;">Page 57</p> <p>1 Confidential - Pugatch</p> <p>2 A. Right.</p> <p>3 Q. And HarbourVest had made</p> <p>4 investments of this nature previously,</p> <p>5 correct?</p> <p>6 A. We did.</p> <p>7 MS. WEISGERBER: Objection to</p> <p>8 form.</p> <p>9 A. HarbourVest has made hundreds of</p> <p>10 investment over its years, yes.</p> <p>11 Q. And HarbourVest has conducted</p> <p>12 due diligence regarding its investments in</p> <p>13 the past, correct?</p> <p>14 A. Correct.</p> <p>15 Q. And HarbourVest received</p> <p>16 additional information on items of concern</p> <p>17 and reviewed that information and</p> <p>18 satisfied itself that this was an</p> <p>19 appropriate investment, correct?</p> <p>20 MS. WEISGERBER: Objection to</p> <p>21 form. Misstates testimony.</p> <p>22 A. On the back of</p> <p>23 misrepresentations by Highland, yes.</p> <p>24 MR. WILSON: Well, I think</p> <p>25 that's nonresponsive and I object.</p>

<p style="text-align: right;">Page 58</p> <p>1 Confidential - Pugatch</p> <p>2 Q. I'm just, I'm just, reading from</p> <p>3 your pleading that you filed in the</p> <p>4 bankruptcy, where you say that these were</p> <p>5 material facts, and HarbourVest sought</p> <p>6 more information regarding these facts.</p> <p>7 And then you've testified that they</p> <p>8 performed additional due diligence</p> <p>9 regarding that information they received,</p> <p>10 and then they determined that the</p> <p>11 investment was appropriate, correct?</p> <p>12 MS. WEISGERBER: Objection to</p> <p>13 form. Misstates testimony.</p> <p>14 Go ahead, Mike.</p> <p>15 A. Yeah, that is correct, on the</p> <p>16 back of the additional information we</p> <p>17 received from Highland.</p> <p>18 And I would add, with, you know,</p> <p>19 with the benefit of external advisors and</p> <p>20 outside counsel reviewing those structural</p> <p>21 changes, as well.</p> <p>22 Q. All right. Thank you.</p> <p>23 Now, going back to your</p> <p>24 declaration, which we've marked as</p> <p>25 Exhibit 3, Paragraph 3 says that "The</p>	<p style="text-align: right;">Page 59</p> <p>1 Confidential - Pugatch</p> <p>2 unaudited net asset value of HCLOF, as of</p> <p>3 August 31, 2020, was \$44,587,820."</p> <p>4 And is that a – is that a book</p> <p>5 value, I guess?</p> <p>6 A. That is a fair market value, in</p> <p>7 accordance with the valuation policy of</p> <p>8 HCLOF.</p> <p>9 Q. Do you happen to know the net</p> <p>10 asset value of HCLOF as of February 1,</p> <p>11 2019? And I don't want an exact number, I</p> <p>12 just want an approximation.</p> <p>13 A. No, I do not.</p> <p>14 Q. Do you know where I could get</p> <p>15 that information?</p> <p>16 A. Presumably from the Debtor.</p> <p>17 Q. We'll come back to this in a</p> <p>18 minute, but I'm going to –</p> <p>19 MS. WEISGERBER: I think we've</p> <p>20 been going about an hour, John, if we</p> <p>21 can take a quick break.</p> <p>22 MR. WILSON: Yeah, a break is</p> <p>23 fine.</p> <p>24 MS. WEISGERBER: Actually,</p> <p>25 Mike...</p>
<p style="text-align: right;">Page 60</p> <p>1 Confidential - Pugatch</p> <p>2 MR. WILSON: I'm sorry? I</p> <p>3 didn't hear you.</p> <p>4 MS. WEISGERBER: It can be up to</p> <p>5 Mike.</p> <p>6 Mike, do you want to take a</p> <p>7 quick break? Do you want to keep</p> <p>8 going?</p> <p>9 MR. WILSON: No, we can, if</p> <p>10 y'all need a break, we can take a</p> <p>11 break, like 10, 15 minutes.</p> <p>12 THE WITNESS: Yeah, why don't we</p> <p>13 take a break, please.</p> <p>14 MR. WILSON: What do y'all</p> <p>15 prefer? 10, 15?</p> <p>16 MS. WEISGERBER: Ten minutes is</p> <p>17 fine.</p> <p>18 Mike, is that good with you.</p> <p>19 THE WITNESS: Yeah, ten-minute</p> <p>20 break is fine.</p> <p>21 MR. WILSON: Okay. Well, we'll</p> <p>22 break till, let's say, 1:20 central</p> <p>23 time.</p> <p>24 THE WITNESS: Perfect.</p> <p>25 MR. WILSON: All right. Thanks</p>	<p style="text-align: right;">Page 61</p> <p>1 Confidential - Pugatch</p> <p>2 guys.</p> <p>3 (Recess taken.)</p> <p>4 MR. WILSON: Yes, I just sent</p> <p>5 out an E-mail with Exhibit 6, and I'm</p> <p>6 going to pull that up on the screen</p> <p>7 share, as well.</p> <p>8 (Whereupon, Exhibit 6, Offering</p> <p>9 Memorandum 122 pages, was marked for</p> <p>10 identification.)</p> <p>11 BY MR. WILSON:</p> <p>12 Q. All right. So this is the</p> <p>13 Offering Memorandum, and I'm looking at</p> <p>14 the bottom of Page 1 – I mean, the top of</p> <p>15 Page 1, I'm sorry.</p> <p>16 The Company that was being</p> <p>17 invested in is Highland CLO Funding, Ltd.</p> <p>18 Do you see that, Mr. Pugatch?</p> <p>19 MS. WEISGERBER: Objection to</p> <p>20 form.</p> <p>21 A. I do. Okay.</p> <p>22 Q. And then this document defines</p> <p>23 Highland, as Highland Capital Management,</p> <p>24 L.P. Do you see that?</p> <p>25 A. Yes.</p>

<p style="text-align: right;">Page 62</p> <p>1 Confidential - Pugatch</p> <p>2 Q. Okay. Now, if we go down to, I</p> <p>3 guess it's Page 8 of this document, and</p> <p>4 this first full paragraph at the top, it</p> <p>5 says, "No voting member of the Advisory</p> <p>6 Board shall be a controlled affiliate of</p> <p>7 Highland."</p> <p>8 Do you see that?</p> <p>9 A. I do.</p> <p>10 Q. And then it also says that, "It</p> <p>11 being understood that none of CLO Holdco</p> <p>12 Ltd., it's wholly-owned subsidiaries, or</p> <p>13 any of their respective directors or</p> <p>14 trustees shall be deemed to be a</p> <p>15 controlled affiliate of Highland, due to</p> <p>16 their preexisting non-discretionary</p> <p>17 advisory relationship with Highland."</p> <p>18 Do you see that?</p> <p>19 A. Yes.</p> <p>20 Q. So there were no affiliates of</p> <p>21 Highland on the Advisory Board, correct?</p> <p>22 MS. WEISGERBER: Objection to</p> <p>23 form.</p> <p>24 A. For voting purposes under the</p> <p>25 document, that is how this reads, correct.</p>	<p style="text-align: right;">Page 63</p> <p>1 Confidential - Pugatch</p> <p>2 MR. WILSON: All right. I'm</p> <p>3 going to turn to the next exhibit.</p> <p>4 And this is going to be Exhibit No. 7</p> <p>5 coming in the E-mail. I'm also going</p> <p>6 to put Exhibit No. 7 on the screen.</p> <p>7 (Whereupon, Exhibit 7, Share</p> <p>8 Subscription and Transfer Agreement 31</p> <p>9 pages, was marked for identification.)</p> <p>10 Q. All right. Do you see that?</p> <p>11 The "Subscription and Transfer Agreement</p> <p>12 For Ordinary Shares"?</p> <p>13 A. Yep.</p> <p>14 Q. All right. So what this</p> <p>15 document says is that, it repeats that</p> <p>16 Highland HCLF Advisory Ltd. is the</p> <p>17 portfolio manager. Highland CLO Funding</p> <p>18 Ltd. is the fund, and CLO Holdco Ltd. is</p> <p>19 the existing shareholder.</p> <p>20 And if we go down to the bottom</p> <p>21 half of this page, it says that</p> <p>22 HarbourVest was acquiring its shares in</p> <p>23 this investment from CLO Holdco, correct?</p> <p>24 A. Yes.</p> <p>25 MS. WEISGERBER: Objection to</p>
<p style="text-align: right;">Page 64</p> <p>1 Confidential - Pugatch</p> <p>2 form.</p> <p>3 Q. And prior to the date of this</p> <p>4 document, which I believe is November 15,</p> <p>5 2017, CLO Holdco held 100 percent of the</p> <p>6 shares of HCLOF, correct?</p> <p>7 MS. WEISGERBER: Objection to</p> <p>8 form, foundation.</p> <p>9 A. I don't recall. I know they</p> <p>10 were the largest, the largest investor. I</p> <p>11 don't recall if it was 100 percent.</p> <p>12 Q. Well, if you look at the chart</p> <p>13 below Paragraph A, it says that CLO Holdco</p> <p>14 Ltd. immediately prior to the placing on</p> <p>15 100 percent share percentage.</p> <p>16 Do you have any reason to</p> <p>17 disagree with that?</p> <p>18 A. No.</p> <p>19 MS. WEISGERBER: Objection to</p> <p>20 form.</p> <p>21 Q. All right. Now, below CLO</p> <p>22 Holdco Ltd., these are the five</p> <p>23 HarbourVest entities that have filed</p> <p>24 proofs of claim in this bankruptcy,</p> <p>25 correct?</p>	<p style="text-align: right;">Page 65</p> <p>1 Confidential - Pugatch</p> <p>2 MS. WEISGERBER: Objection to</p> <p>3 form.</p> <p>4 A. Those are the five HarbourVest</p> <p>5 entities with a direct investment in</p> <p>6 HCLOF.</p> <p>7 Q. And each one of those entities</p> <p>8 has filed a proof of claim in this</p> <p>9 bankruptcy, correct?</p> <p>10 A. Yes.</p> <p>11 Q. And the largest – I think we</p> <p>12 discussed this earlier, but Dover Street</p> <p>13 IX is the largest of those investors, with</p> <p>14 a 35.49 percent share percentage, correct?</p> <p>15 MS. WEISGERBER: Objection to</p> <p>16 form.</p> <p>17 A. Correct.</p> <p>18 Q. And if you take the total of</p> <p>19 those investments of the HarbourVest</p> <p>20 entities, you get a 49.98 percent total.</p> <p>21 Is that your understanding?</p> <p>22 MS. WEISGERBER: Objection to</p> <p>23 form.</p> <p>24 A. I know it has 49 percent, and</p> <p>25 some percentage. I'll take your math as</p>

<p style="text-align: right;">Page 66</p> <p>1 Confidential - Pugatch</p> <p>2 correct.</p> <p>3 Q. And 49.98 percent is larger than</p> <p>4 the next largest shareholder, which is CLO</p> <p>5 Holdco which is 49.02 percent, correct?</p> <p>6 MS. WEISGERBER: Objection to</p> <p>7 form.</p> <p>8 A. In taking all of the HarbourVest</p> <p>9 entities, collectively, yes, correct.</p> <p>10 Q. And so I want to go back to</p> <p>11 earlier where we saw in documents filed by</p> <p>12 HarbourVest, where it refers to itself as</p> <p>13 a passive investor. What do you, I</p> <p>14 apologize if I've already asked you this</p> <p>15 question, but what do you mean by passive</p> <p>16 investor?</p> <p>17 A. Meaning we were a minority</p> <p>18 investor in HCLOF. HCLOF was fully</p> <p>19 controlled by Highland as the investment</p> <p>20 manager. So HarbourVest did not have any</p> <p>21 governance, rights, or control as it</p> <p>22 related to the ongoing investment</p> <p>23 management and decisionmaking of HCLOF.</p> <p>24 Q. HarbourVest has the largest</p> <p>25 percentage of the shares of any of these</p>	<p style="text-align: right;">Page 67</p> <p>1 Confidential - Pugatch</p> <p>2 investors, correct?</p> <p>3 MS. WEISGERBER: Objection to</p> <p>4 form.</p> <p>5 A. Taken collectively, yes.</p> <p>6 Q. And HarbourVest owned one of the</p> <p>7 two spots on the Advisory Board, correct?</p> <p>8 MS. WEISGERBER: Objection to</p> <p>9 form.</p> <p>10 A. Correct.</p> <p>11 Q. And if you look down below the</p> <p>12 HarbourVest entities on this chart, you</p> <p>13 see that Highland Capital Management, L.P.</p> <p>14 is purchasing a .63 percent interest,</p> <p>15 correct?</p> <p>16 MS. WEISGERBER: Objection to</p> <p>17 form. The document speaks for itself.</p> <p>18 A. According to the document, yes.</p> <p>19 Q. Do you have any reason to</p> <p>20 disagree with that document?</p> <p>21 MS. WEISGERBER: Objection to</p> <p>22 form.</p> <p>23 A. I do not.</p> <p>24 MR. WILSON: All right. I'm</p> <p>25 going to stop that screen share. I'm</p>
<p style="text-align: right;">Page 68</p> <p>1 Confidential - Pugatch</p> <p>2 going to E-mail out the next exhibit.</p> <p>3 This was Exhibit 8 that I just sent,</p> <p>4 and I'll pull it up on the screen</p> <p>5 share.</p> <p>6 (Whereupon, Exhibit 8, E-mail</p> <p>7 08/15/2017, was marked for</p> <p>8 identification.)</p> <p>9 Q. Now, I'll represent to you that</p> <p>10 I received this document this morning from</p> <p>11 your counsel. Do you recognize this</p> <p>12 E-mail? Have you seen it before?</p> <p>13 A. Yes, I have.</p> <p>14 Q. And this E-mail is sent by Brad</p> <p>15 Eden. I think you mentioned that he was</p> <p>16 one of the representatives that was</p> <p>17 involved in the pre-investment discussions</p> <p>18 with Highland?</p> <p>19 A. Correct.</p> <p>20 Q. And I think you told me that</p> <p>21 Dustin Willard was involved in those</p> <p>22 discussions on the HarbourVest side,</p> <p>23 correct?</p> <p>24 A. Correct.</p> <p>25 Q. And so this is an E-mail sent on</p>	<p style="text-align: right;">Page 69</p> <p>1 Confidential - Pugatch</p> <p>2 August 15, 2017 from Brad Eden to Dustin</p> <p>3 Willard. Are you familiar with Thomas</p> <p>4 Surgent?</p> <p>5 A. Yes.</p> <p>6 Q. Was he involved in those</p> <p>7 discussions with you and HarbourVest as</p> <p>8 well?</p> <p>9 A. In some of those discussions,</p> <p>10 yes.</p> <p>11 Q. Okay. So when it says, "Dustin,</p> <p>12 attached is a legal summary. Of course,</p> <p>13 Thomas is available to answer any</p> <p>14 follow-up questions." Do you know if</p> <p>15 Thomas was consulted with any follow-up</p> <p>16 questions?</p> <p>17 A. I recall --</p> <p>18 MS. WEISGERBER: Objection to</p> <p>19 form.</p> <p>20 A. -- having follow-up</p> <p>21 conversations with Highland, I don't --</p> <p>22 around these legal summaries. I don't</p> <p>23 recall with whom.</p> <p>24 Q. Okay. And just to show you the</p> <p>25 attachment that's referenced in the</p>

<p style="text-align: right;">Page 70</p> <p>1 Confidential - Pugatch</p> <p>2 E-mail, this says that SEC financial</p> <p>3 crisis matter crusader, Terry, Daugherty</p> <p>4 and UBS. So and then I guess these are --</p> <p>5 this is information provided by Highland</p> <p>6 to HarbourVest regarding these matters.</p> <p>7 Why were these particular matters</p> <p>8 addressed in this E-mail, to your</p> <p>9 knowledge?</p> <p>10 MS. WEISGERBER: Objection to</p> <p>11 form and foundation.</p> <p>12 A. These were all outstanding</p> <p>13 litigation matters that we had become</p> <p>14 aware of in connection with our diligence</p> <p>15 that we asked for a further explanation</p> <p>16 from Highland on the underlying substance.</p> <p>17 Q. Now, did you become</p> <p>18 independently aware of these in the course</p> <p>19 of your due diligence, or were these</p> <p>20 brought to your attention by Highland</p> <p>21 first?</p> <p>22 A. I don't know.</p> <p>23 MS. WEISGERBER: Objection to</p> <p>24 form.</p> <p>25 Q. You don't know?</p>	<p style="text-align: right;">Page 71</p> <p>1 Confidential - Pugatch</p> <p>2 A. (Nods.)</p> <p>3 Q. Okay. And particularly with</p> <p>4 respect to Mr. Terry, is it your opinion</p> <p>5 that there are any material</p> <p>6 misrepresentations made in this summary?</p> <p>7 MS. WEISGERBER: Objection to</p> <p>8 form. Objection to the extent it</p> <p>9 calls for a legal conclusion.</p> <p>10 Mike, to the extent you have an</p> <p>11 answer that does not infringe on</p> <p>12 conversations with counsel, you can</p> <p>13 provide it.</p> <p>14 A. Yeah, I would say our</p> <p>15 understanding or interpretation of that,</p> <p>16 or the answer to that question would be</p> <p>17 based on conversations with counsel.</p> <p>18 Q. Well, this document was provided</p> <p>19 to you in the course of the discussions</p> <p>20 prior to HarbourVest's investment, and</p> <p>21 you've stated that Highland, or you've</p> <p>22 taken the position that Highland made</p> <p>23 material misrepresentations to</p> <p>24 HarbourVest, in the course of these</p> <p>25 discussions.</p>
<p style="text-align: right;">Page 72</p> <p>1 Confidential - Pugatch</p> <p>2 Does this document evidence</p> <p>3 those material misrepresentations?</p> <p>4 MS. WEISGERBER: Objection to</p> <p>5 form. Objection to the extent it</p> <p>6 calls for a legal conclusion.</p> <p>7 A. Yeah, same answer as previous.</p> <p>8 Q. Well, I'm not asking you for a</p> <p>9 legal conclusion. I'm asking you are</p> <p>10 there misrepresentations in this document</p> <p>11 that you claim Highland made?</p> <p>12 MS. WEISGERBER: Same</p> <p>13 objections.</p> <p>14 I think misrepresentations calls</p> <p>15 for a legal conclusion regarding legal</p> <p>16 misrepresentations, actionable</p> <p>17 misrepresentations. So if he doesn't</p> <p>18 have any non-privileged testimony to</p> <p>19 give, he can't give any testimony.</p> <p>20 MR. WILSON: Well, I'm here</p> <p>21 today to investigate HarbourVest's</p> <p>22 claim and one of the basis of</p> <p>23 HarbourVest's claim is</p> <p>24 misrepresentation. So I'm trying to</p> <p>25 figure out what those</p>	<p style="text-align: right;">Page 73</p> <p>1 Confidential - Pugatch</p> <p>2 misrepresentations were.</p> <p>3 And I would ask that the witness</p> <p>4 tell me if there's a misrepresentation</p> <p>5 in this document that was provided in</p> <p>6 this E-mail.</p> <p>7 MS. WEISGERBER: Same</p> <p>8 objections.</p> <p>9 Mike, if you have a general</p> <p>10 understanding of, generally,</p> <p>11 misrepresentations that HarbourVest</p> <p>12 believes were made in connection or</p> <p>13 regarding the Terry litigation,</p> <p>14 et cetera, you can provide that</p> <p>15 information.</p> <p>16 THE WITNESS: Yeah, sure.</p> <p>17 A. So in general, my understanding</p> <p>18 and the way that Highland had</p> <p>19 characterized the ongoing litigation with</p> <p>20 Mr. Terry was that it was nothing more</p> <p>21 than an employment dispute with a former</p> <p>22 employee and that, you know, the</p> <p>23 arbitration -- well, actually, it was</p> <p>24 before the Arbitration Board, but the</p> <p>25 ongoing litigation had no impact, bearing,</p>

<p style="text-align: right;">Page 74</p> <p>1 Confidential - Pugatch</p> <p>2 or ultimate result on the underlying CLOs</p> <p>3 that Highland managed, including the Acis</p> <p>4 CLOs.</p> <p>5 Q. So you're saying that</p> <p>6 Highland --</p> <p>7 MR. MORRIS: John, I'm sorry to</p> <p>8 interrupt. Before you go on, somebody</p> <p>9 with the initials DSD just joined the</p> <p>10 deposition. Can you please identify</p> <p>11 yourself?</p> <p>12 MR. DRAPER: This is Douglas</p> <p>13 Draper. I just changed machines.</p> <p>14 MR. MORRIS: Okay. No problem,</p> <p>15 Doug. Thank you.</p> <p>16 BY MR. WILSON:</p> <p>17 Q. So, and I'm not trying to put</p> <p>18 words in your mouth, but is the gist of</p> <p>19 what you're telling me that Highland</p> <p>20 represented that this was a minor dispute</p> <p>21 with a former employee and it would not</p> <p>22 affect its CLO business?</p> <p>23 A. Correct.</p> <p>24 MS. WEISGERBER: Objection to</p> <p>25 form.</p>	<p style="text-align: right;">Page 75</p> <p>1 Confidential - Pugatch</p> <p>2 A. Correct.</p> <p>3 Q. Well, are there any more</p> <p>4 specific E-mails or written</p> <p>5 communications, that you're aware of, that</p> <p>6 would contain misrepresentations by</p> <p>7 Highland to HarbourVest?</p> <p>8 MS. WEISGERBER: Objection to</p> <p>9 form.</p> <p>10 Are you asking about from</p> <p>11 today's production, or are you asking</p> <p>12 about just, in general?</p> <p>13 MR. WILSON: Well, you produced</p> <p>14 two E-mails to us today. I'm just</p> <p>15 asking if there's anything else he's</p> <p>16 aware of where there's written</p> <p>17 misrepresentations from Highland to</p> <p>18 HarbourVest.</p> <p>19 MS. WEISGERBER: Mike, if you</p> <p>20 have an answer separate from</p> <p>21 conversations with lawyers, et cetera,</p> <p>22 you can certainly answer.</p> <p>23 A. Yeah, my understanding of the</p> <p>24 documents I reviewed that were part of the</p> <p>25 production to you earlier today, there is</p>
<p style="text-align: right;">Page 76</p> <p>1 Confidential - Pugatch</p> <p>2 another document that would also include</p> <p>3 misrepresentations on the part of this,</p> <p>4 the Terry lawsuit and ultimate impact on</p> <p>5 the CLO business.</p> <p>6 BY MR. WILSON:</p> <p>7 Q. And what document is that?</p> <p>8 A. That was the E-mail, E-mail with</p> <p>9 an attachment around a response to a Wall</p> <p>10 Street Journal article and some of the</p> <p>11 content in the E-mail itself.</p> <p>12 Q. Okay. We'll look at that one.</p> <p>13 What was the -- HarbourVest had</p> <p>14 seen the Terry Arbitration Award, correct?</p> <p>15 MS. WEISGERBER: Objection to</p> <p>16 form.</p> <p>17 Q. Prior to making its investment</p> <p>18 in HCLOF?</p> <p>19 A. We were aware of the existence</p> <p>20 and the outcome of the Arbitration Award.</p> <p>21 Q. Had you read the Arbitration</p> <p>22 Award?</p> <p>23 A. No.</p> <p>24 Q. Well, how did you know the</p> <p>25 substance of the Arbitration Award without</p>	<p style="text-align: right;">Page 77</p> <p>1 Confidential - Pugatch</p> <p>2 reading it?</p> <p>3 MS. WEISGERBER: Objection to</p> <p>4 form.</p> <p>5 A. We were informed by Highland of</p> <p>6 the outcome of the ongoing litigation and</p> <p>7 the outcome of the Arbitration Award.</p> <p>8 Q. Was that part of the</p> <p>9 documentation that you requested Highland</p> <p>10 provide you to continue your due</p> <p>11 diligence, before making the investment?</p> <p>12 MS. WEISGERBER: Objection to</p> <p>13 form.</p> <p>14 A. We certainly requested more</p> <p>15 color around the outcome of that, and any</p> <p>16 impact that it could have to HCLOF or the</p> <p>17 ongoing viability of Highland's CLO</p> <p>18 business.</p> <p>19 Q. And what, what were you provided</p> <p>20 with respect to the Terry Arbitration</p> <p>21 Award?</p> <p>22 MS. WEISGERBER: Objection to</p> <p>23 form.</p> <p>24 A. The existence of that award, the</p> <p>25 quantum of that award, the judgment of</p>

<p style="text-align: right;">Page 78</p> <p>1 Confidential - Pugatch</p> <p>2 just under \$8 million in connection with</p> <p>3 that award. That was the information that</p> <p>4 was disclosed at – and represented as a</p> <p>5 settlement or, you know, arbitration</p> <p>6 ruling, in connection with the employee</p> <p>7 litigation, wrongful termination suit.</p> <p>8 Q. So did HarbourVest not request a</p> <p>9 copy of the Arbitration Award to review?</p> <p>10 MS. WEISGERBER: Objection to</p> <p>11 form.</p> <p>12 A. We did not specifically, no.</p> <p>13 Q. And so, to this day, have you</p> <p>14 read the Arbitration Award?</p> <p>15 A. I have not.</p> <p>16 MS. WEISGERBER: Objection to</p> <p>17 form.</p> <p>18 Q. You have not?</p> <p>19 A. I have not.</p> <p>20 MR. WILSON: Okay. I think my</p> <p>21 last E-mail went out with Exhibit 9 on</p> <p>22 it. I will pull that up.</p> <p>23 Q. Can you see that on the screen</p> <p>24 share?</p> <p>25 A. Yes.</p>	<p style="text-align: right;">Page 79</p> <p>1 Confidential - Pugatch</p> <p>2 (Whereupon, Exhibit 9,</p> <p>3 11/29/2017 E-mail with cover letter</p> <p>4 Highland Capital Management, was</p> <p>5 marked for identification.)</p> <p>6 Q. Okay. So I think this is out of</p> <p>7 order, but this should have been first in</p> <p>8 the exhibit. But this is an E-mail from</p> <p>9 Hunter Covitz to Dustin Willard, Michael</p> <p>10 Pugatch and Nick Bellisario, carbon copies</p> <p>11 to Trey Parker and Brad Eden.</p> <p>12 And Trey Parker and Brad Eden</p> <p>13 are Highland affiliates, right?</p> <p>14 A. Yes.</p> <p>15 Q. And we've talked about Dustin</p> <p>16 Willard. Who's Nick Bellisario?</p> <p>17 A. He was another member of the</p> <p>18 HarbourVest team.</p> <p>19 Q. And was he on the, the</p> <p>20 four-member board that you talked about</p> <p>21 earlier, that made the investment</p> <p>22 decision?</p> <p>23 A. No, he was the junior member of</p> <p>24 the investment team that I alluded to.</p> <p>25 Q. Okay. And this, this E-mail</p>
<p style="text-align: right;">Page 80</p> <p>1 Confidential - Pugatch</p> <p>2 came out about two weeks after the</p> <p>3 HarbourVest investment, correct?</p> <p>4 A. Correct.</p> <p>5 Q. And it's your opinion or</p> <p>6 position that this E-mail contains</p> <p>7 misrepresentations that Highland made to</p> <p>8 HarbourVest?</p> <p>9 MS. WEISGERBER: Objection to</p> <p>10 form. Objection to the extent it</p> <p>11 calls for a legal conclusion.</p> <p>12 A. Yes.</p> <p>13 Q. And there was a Wall Street</p> <p>14 Journal article that had come out shortly</p> <p>15 before this E-mail, correct?</p> <p>16 A. Correct.</p> <p>17 Q. And how did you became aware of</p> <p>18 that Wall Street Journal article?</p> <p>19 A. I certainly would have seen it.</p> <p>20 I may have been sent it separately by</p> <p>21 Highland, I don't recall.</p> <p>22 Q. You don't recall if you saw it</p> <p>23 independently or Highland telling you</p> <p>24 about it?</p> <p>25 A. I don't.</p>	<p style="text-align: right;">Page 81</p> <p>1 Confidential - Pugatch</p> <p>2 Q. And what did you – what was</p> <p>3 your reaction to receiving these E-mails</p> <p>4 from Highland regarding that article?</p> <p>5 MS. WEISGERBER: Objection to</p> <p>6 form.</p> <p>7 A. The article or the accusations</p> <p>8 in the article were something that</p> <p>9 required more explanation from our</p> <p>10 perspective.</p> <p>11 Q. And attached to this E-mail</p> <p>12 was – we just scrolled through it a</p> <p>13 second ago – but a letter from James</p> <p>14 Dondero that was sent to the</p> <p>15 editor-in-chief of the Wall Street</p> <p>16 Journal, Mr. Gerard Baker, on November</p> <p>17 28th.</p> <p>18 And did you read this</p> <p>19 attachment?</p> <p>20 A. Yes.</p> <p>21 Q. And did this attachment to this</p> <p>22 E-mail aleve your concerns that you had</p> <p>23 regarding the article?</p> <p>24 MS. WEISGERBER: Objection to</p> <p>25 form.</p>

<p style="text-align: right;">Page 82</p> <p>1 Confidential - Pugatch</p> <p>2 A. I wouldn't say alleviated the</p> <p>3 concerns but certainly provided an</p> <p>4 explanation or refute to some of the</p> <p>5 claims made in the, in the article.</p> <p>6 Q. And do you contend that this</p> <p>7 letter that was written to Gerard Baker</p> <p>8 and provided later to HarbourVest was a</p> <p>9 material misrepresentation?</p> <p>10 MS. WEISGERBER: Objection to</p> <p>11 form.</p> <p>12 Don't answer that, Mike. It</p> <p>13 calls for a legal conclusion.</p> <p>14 MR. WILSON: I'm asking for his</p> <p>15 understanding.</p> <p>16 Q. Do you contend that there's</p> <p>17 misrepresentations in this letter?</p> <p>18 MS. WEISGERBER: Material</p> <p>19 misrepresentations absolutely calls</p> <p>20 for a legal conclusion, John.</p> <p>21 MR. WILSON: Well, I've</p> <p>22 shortened it to misrepresentations.</p> <p>23 So I just want to know if he thinks</p> <p>24 there's anything that's misrepresented</p> <p>25 in this letter.</p>	<p style="text-align: right;">Page 83</p> <p>1 Confidential - Pugatch</p> <p>2 MS. WEISGERBER: Same</p> <p>3 objections.</p> <p>4 Mike, if you have an</p> <p>5 understanding, separate from</p> <p>6 conversations with lawyers, you can</p> <p>7 answer.</p> <p>8 A. I would need to reread the</p> <p>9 letter to definitively answer that outside</p> <p>10 of conversations with counsel.</p> <p>11 Q. But to be clear, this letter was</p> <p>12 issued two weeks after HarbourVest's</p> <p>13 investment, correct?</p> <p>14 A. Correct.</p> <p>15 MS. WEISGERBER: Objection;</p> <p>16 asked and answered.</p> <p>17 MR. WILSON: I'm going to now</p> <p>18 send out the next exhibit, which is</p> <p>19 going to be Exhibit No. 10.</p> <p>20 (Whereupon, Exhibit 10, 2004</p> <p>21 Examination of Investor in Highland</p> <p>22 CLO Funding Ltd. 10/10/2018, was</p> <p>23 marked for identification.)</p> <p>24 MR. WILSON: It just went</p> <p>25 through. So I'm going to pull it up</p>
<p style="text-align: right;">Page 84</p> <p>1 Confidential - Pugatch</p> <p>2 on my screen share.</p> <p>3 So this Exhibit 10, the document</p> <p>4 I received this morning, filed in the</p> <p>5 Acis bankruptcy, it looks like, well,</p> <p>6 let's see, dated in, dated October 10,</p> <p>7 2018.</p> <p>8 BY MR. WILSON:</p> <p>9 Q. Have you seen this document</p> <p>10 before?</p> <p>11 A. Yes.</p> <p>12 Q. And it's a motion for 2004</p> <p>13 Examination of Investor in Highland CLO</p> <p>14 Funding, Ltd., correct?</p> <p>15 A. Sorry. Was there a question,</p> <p>16 John?</p> <p>17 Q. Yeah. I was just asking you to</p> <p>18 confirm that this was the motion for 2004</p> <p>19 Examination of Investor in Highland CLO</p> <p>20 Funding?</p> <p>21 A. Yes.</p> <p>22 Q. And so if I scroll down to</p> <p>23 Paragraph 6, which is on, it looks like</p> <p>24 it's on Page 4. In the second sentence,</p> <p>25 it says that "Although HCLOF/ALF was a one</p>	<p style="text-align: right;">Page 85</p> <p>1 Confidential - Pugatch</p> <p>2 time wholly-owned by an affiliate of</p> <p>3 Highland, it did an offering memorandum in</p> <p>4 November of 2017 and as a result, is now</p> <p>5 owned 49.985% by certain affiliates of a</p> <p>6 large investor and manager of private</p> <p>7 equity funds."</p> <p>8 And that's defined as investor.</p> <p>9 So the Investor is the HarbourVest</p> <p>10 entities collectively, correct?</p> <p>11 A. Correct.</p> <p>12 Q. All right. And then the next</p> <p>13 sentence, says that "Despite its large</p> <p>14 ownership percentage in HCLOF in the</p> <p>15 alleged millions in losses that will</p> <p>16 result if the Acis CLOs are not reset to</p> <p>17 make them consistent with prevailing</p> <p>18 market conditions the Investor has not yet</p> <p>19 appeared in this case or taken any</p> <p>20 position in this bankruptcy case."</p> <p>21 Do you see that?</p> <p>22 A. I do.</p> <p>23 Q. Is that correct?</p> <p>24 MS. WEISGERBER: Objection to</p> <p>25 form.</p>

<p style="text-align: right;">Page 86</p> <p>1 Confidential - Pugatch</p> <p>2 A. Is what correct?</p> <p>3 Q. Well, I guess, I'm most</p> <p>4 concerned with this last part of the</p> <p>5 sentence. It starts with "The Investor</p> <p>6 has not yet appeared in this case or taken</p> <p>7 any position in the bankruptcy case."</p> <p>8 Do you agree with that?</p> <p>9 MS. WEISGERBER: Objection to</p> <p>10 form.</p> <p>11 Mike, if you want to look at the</p> <p>12 whole document, you're welcome to.</p> <p>13 This is not a document that's a</p> <p>14 HarbourVest-prepared document.</p> <p>15 BY MR. WILSON:</p> <p>16 Q. Maybe a better way of asking the</p> <p>17 question is: As of the date of this</p> <p>18 document, which was in October of 2018,</p> <p>19 had HarbourVest appeared in the Acis</p> <p>20 bankruptcy?</p> <p>21 A. No, we did not.</p> <p>22 Q. And had they asserted any</p> <p>23 positions regarding the Acis bankruptcy?</p> <p>24 A. Not through the court.</p> <p>25 MS. WEISGERBER: Objection to</p>	<p style="text-align: right;">Page 87</p> <p>1 Confidential - Pugatch</p> <p>2 form.</p> <p>3 Q. Okay. Had Highland encouraged</p> <p>4 HarbourVest to participate in the Acis</p> <p>5 bankruptcy?</p> <p>6 MS. WEISGERBER: Objection to</p> <p>7 form.</p> <p>8 A. No.</p> <p>9 Q. They did not?</p> <p>10 MS. WEISGERBER: Objection to</p> <p>11 form.</p> <p>12 Q. Highland did not encourage</p> <p>13 HarbourVest to participate in the Acis</p> <p>14 bankruptcy?</p> <p>15 A. When you say "participate," can</p> <p>16 you define that, please.</p> <p>17 Q. Well, appear in the case, as</p> <p>18 stated in this motion.</p> <p>19 A. No, they had not.</p> <p>20 Q. Did Harbour – I'm sorry – did</p> <p>21 Highland keep HarbourVest apprised of the</p> <p>22 events that occurred in the Acis</p> <p>23 bankruptcy?</p> <p>24 MS. WEISGERBER: Objection to</p> <p>25 form. I'm just going to restate my</p>
<p style="text-align: right;">Page 88</p> <p>1 Confidential - Pugatch</p> <p>2 objection to the extent you're asking</p> <p>3 questions about HarbourVest. This is</p> <p>4 Mr. Pugatch answering, based on his</p> <p>5 knowledge.</p> <p>6 A. We were kept informed from time</p> <p>7 to time throughout the Acis bankruptcy</p> <p>8 proceeding.</p> <p>9 Q. Well, did you, in fact, have</p> <p>10 weekly conference calls with Highland</p> <p>11 representatives regarding the Acis</p> <p>12 bankruptcy?</p> <p>13 MS. WEISGERBER: Objection to</p> <p>14 form.</p> <p>15 A. I don't recall them being</p> <p>16 weekly, no.</p> <p>17 Q. You can agree with me you</p> <p>18 participated in the conference calls with</p> <p>19 Highland regarding the Acis bankruptcy?</p> <p>20 A. Yes.</p> <p>21 MS. WEISGERBER: Same objection.</p> <p>22 Q. And on what, on what –</p> <p>23 MR. WILSON: Sorry. Strike</p> <p>24 that.</p> <p>25 Q. With what regularity would you</p>	<p style="text-align: right;">Page 89</p> <p>1 Confidential - Pugatch</p> <p>2 estimate those conference calls occurred,</p> <p>3 if it's not weekly?</p> <p>4 MS. WEISGERBER: Objection to</p> <p>5 form.</p> <p>6 A. From memory, maybe once, once a</p> <p>7 month on average. Sometimes more</p> <p>8 frequently, sometimes less frequently.</p> <p>9 Q. Did Highland provide you with</p> <p>10 documents and evidence that were filed in</p> <p>11 the Acis bankruptcy?</p> <p>12 MS. WEISGERBER: Objection to</p> <p>13 form.</p> <p>14 We're really starting to get</p> <p>15 pretty far afield here, John, from</p> <p>16 HarbourVest. You know, I'm not sure</p> <p>17 where you're going with this. This is</p> <p>18 a settlement motion that's teed up for</p> <p>19 the court.</p> <p>20 You're welcome to keep going,</p> <p>21 but at some point we're going to cut</p> <p>22 it off.</p> <p>23 MR. WILSON: Well, I think – I</p> <p>24 don't think I'm going to go too far</p> <p>25 down this path, but I think this</p>

<p style="text-align: right;">Page 90</p> <p>1 Confidential - Pugatch</p> <p>2 directly relates to the claims that</p> <p>3 HarbourVest has made. But I'll repeat</p> <p>4 my question.</p> <p>5 BY MR. WILSON:</p> <p>6 Q. Did Highland provide HarbourVest</p> <p>7 with documents and evidence that were</p> <p>8 filed in the Acis bankruptcy?</p> <p>9 MS. WEISGERBER: Objection to</p> <p>10 form.</p> <p>11 A. I don't recall what documents</p> <p>12 Highland may have provided to us, at that</p> <p>13 point in time.</p> <p>14 Q. I don't want you to recall</p> <p>15 specific documents that were provided, but</p> <p>16 did, did Highland provide documents from</p> <p>17 the Acis bankruptcy to HarbourVest?</p> <p>18 MS. WEISGERBER: Objection to</p> <p>19 form. Asked and answered.</p> <p>20 A. I don't recall.</p> <p>21 Q. You don't recall?</p> <p>22 A. (Nods.)</p> <p>23 Q. Would you dispute that between</p> <p>24 2018 and 2019 that Highland provided over</p> <p>25 40,000 pages of documents related to the</p>	<p style="text-align: right;">Page 91</p> <p>1 Confidential - Pugatch</p> <p>2 Acis bankruptcy to HarbourVest?</p> <p>3 MS. WEISGERBER: Objection to</p> <p>4 form, foundation.</p> <p>5 A. I don't know and I don't recall.</p> <p>6 Q. And the Acis plan became</p> <p>7 effective on February 1st, 2019. Is that</p> <p>8 your understanding?</p> <p>9 A. I believe so, yes.</p> <p>10 Q. And do you -- I asked you this</p> <p>11 earlier, but I'm going to ask again. Do</p> <p>12 you have any understanding of what the</p> <p>13 value of HCLOF was, at that date?</p> <p>14 A. I don't recall.</p> <p>15 MS. WEISGERBER: Objection to</p> <p>16 form.</p> <p>17 Q. You don't?</p> <p>18 A. I don't recall, no.</p> <p>19 Q. And there was an injunction put</p> <p>20 in place in the Acis bankruptcy that</p> <p>21 prevented certain actions with respect to</p> <p>22 HCLOF, correct?</p> <p>23 MS. WEISGERBER: Objection to</p> <p>24 form, foundation.</p> <p>25 MR. MALONEY: Join.</p>
<p style="text-align: right;">Page 92</p> <p>1 Confidential - Pugatch</p> <p>2 A. Yes.</p> <p>3 Q. Now, I'm going to go back up to</p> <p>4 Paragraph 2. This says that Acis LP</p> <p>5 manages the Acis CLOs, that certain</p> <p>6 portfolio management agreement between</p> <p>7 Acis, and then it goes on. So what are</p> <p>8 the Acis CLOs, as it relates to the</p> <p>9 investment that HarbourVest made?</p> <p>10 MR. MALONEY: Objection to the</p> <p>11 form of the question.</p> <p>12 MS. WEISGERBER: Objection to</p> <p>13 form.</p> <p>14 A. The Acis CLOs -- or HCLOF owned</p> <p>15 equity in certain of the Acis CLOs as a</p> <p>16 portion of its investment portfolio.</p> <p>17 Q. And I think you were trying to</p> <p>18 distinguish earlier between who the</p> <p>19 portfolio manager was. And that would</p> <p>20 depend on whether it was an Acis CLO or a</p> <p>21 Highland CLO; is that correct?</p> <p>22 MR. MALONEY: Objection to form.</p> <p>23 MS. WEISGERBER: Objection to</p> <p>24 form, misstates testimony.</p> <p>25 A. I was referencing the portfolio</p>	<p style="text-align: right;">Page 93</p> <p>1 Confidential - Pugatch</p> <p>2 manager of the underlying CLOs, yes.</p> <p>3 Q. But we can agree that Acis had</p> <p>4 responsibility for managing at least a</p> <p>5 portion of HCLOF, correct?</p> <p>6 A. Highland --</p> <p>7 MR. WILSON: Objection to form.</p> <p>8 MR. MALONEY: Objection to form</p> <p>9 as well, foundation, and legal</p> <p>10 conclusion.</p> <p>11 (Reporter clarification.)</p> <p>12 A. It's my understanding it's</p> <p>13 Highlands' subsidiaries, yes.</p> <p>14 Q. Okay. Well, I'm going to go</p> <p>15 down to Paragraph 4, at the top of your</p> <p>16 screen here where it says, "Recently</p> <p>17 William Scott, the director of HCLOF,</p> <p>18 testified that he wants to reset the Acis</p> <p>19 CLOs to bring them in line with current</p> <p>20 market interest rates, that the inability</p> <p>21 to do the reset is causing damages to</p> <p>22 HCLOF in the amount of approximately</p> <p>23 \$295,000 per week."</p> <p>24 Is that an accurate statement?</p> <p>25 MS. WEISGERBER: Objection to</p>

<p style="text-align: right;">Page 94</p> <p>1 Confidential - Pugatch</p> <p>2 form and foundation.</p> <p>3 MR. MALONEY: Mark Maloney.</p> <p>4 Object to form and foundation.</p> <p>5 A. I don't know. You'd have to ask</p> <p>6 William Scott.</p> <p>7 Q. Well, were you aware, I mean,</p> <p>8 there's a citation to a, well, I don't</p> <p>9 know if there's a citation on this one.</p> <p>10 But it says that he recently testified.</p> <p>11 Were you aware that he testified that he</p> <p>12 wanted to reset the Acis CLOs?</p> <p>13 MS. WEISGERBER: Same objection.</p> <p>14 We're really getting far afield.</p> <p>15 MR. WILSON: I'm just asking if</p> <p>16 he was aware that this statement</p> <p>17 occurred.</p> <p>18 A. At some point in time, yes, I</p> <p>19 became aware of that.</p> <p>20 Q. Okay. Do you agree that the</p> <p>21 inability to do a reset was causing</p> <p>22 damages in the amount of \$295,000 per</p> <p>23 week?</p> <p>24 MS. WEISGERBER: Objection to</p> <p>25 form and foundation. This is not a</p>	<p style="text-align: right;">Page 95</p> <p>1 Confidential - Pugatch</p> <p>2 HarbourVest-prepared document.</p> <p>3 MR. WILSON: Well, I understand</p> <p>4 that. I'm just asking if he agrees</p> <p>5 with it.</p> <p>6 A. I don't have enough information</p> <p>7 to assess that, specifically the \$295,000</p> <p>8 per week number.</p> <p>9 Q. I want to go down to Paragraph 7</p> <p>10 of this document, and this is going to be</p> <p>11 at the top of Page 5. It says</p> <p>12 "Mr. Ellington also testified that because</p> <p>13 it would be putting in additional capital</p> <p>14 in connection with any reset CLOs, the</p> <p>15 Investor," and we discussed that that's</p> <p>16 HarbourVest, "had the ability to start</p> <p>17 'calling the shots' and dictate the terms</p> <p>18 of any reset transactions."</p> <p>19 Do you agree with that?</p> <p>20 A. No.</p> <p>21 MS. WEISGERBER: Objection to</p> <p>22 form.</p> <p>23 Q. I want to go down to Paragraph</p> <p>24 9.</p> <p>25 It says, "The Trustee also needs</p>
<p style="text-align: right;">Page 96</p> <p>1 Confidential - Pugatch</p> <p>2 information regarding whether the Investor</p> <p>3 presently has any concerns about pursuing</p> <p>4 reset transactions with the Reorganized</p> <p>5 Acis and Brigade, under the plan now that</p> <p>6 Acis has been able to successfully serve</p> <p>7 as the portfolio manager for the Acis CLOs</p> <p>8 on a post-petition basis, and there are no</p> <p>9 impediments to the ability of the</p> <p>10 Reorganized Acis and Brigade to pursue a</p> <p>11 reset on the Acis CLOs."</p> <p>12 Do you know whether the Investor</p> <p>13 had any concerns about pursuing a reset?</p> <p>14 MS. WEISGERBER: Objection to</p> <p>15 form, foundation.</p> <p>16 A. The context of a reset or</p> <p>17 refinancing of the various CLOs in HCLOF</p> <p>18 was part of the original investment</p> <p>19 thesis. So there would not have been</p> <p>20 concerns about the ability to do so. Our</p> <p>21 concerns were more in the inability to do</p> <p>22 so, as a result of the Acis bankruptcy.</p> <p>23 Q. But here, you've got the Trustee</p> <p>24 representing in Paragraph 5, that</p> <p>25 according to the Trustee's Second Amended</p>	<p style="text-align: right;">Page 97</p> <p>1 Confidential - Pugatch</p> <p>2 Joint Plan, it provides for such a reset</p> <p>3 to be performed by the Reorganized Acis</p> <p>4 and supervised by Brigade Capital</p> <p>5 Management.</p> <p>6 And it appears to me that the</p> <p>7 Trustee is trying to get the Investor's</p> <p>8 position on whether a reset should be</p> <p>9 pursued. And I'm just asking you whether</p> <p>10 HarbourVest objected to a reset at this</p> <p>11 time?</p> <p>12 MS. WEISGERBER: I'm going to</p> <p>13 object to all of the colloquy before.</p> <p>14 I'm going to object to any extent</p> <p>15 Mike's being asked about what the</p> <p>16 Trustee wanted or viewed. If you want</p> <p>17 to ask your question in isolation, go</p> <p>18 ahead.</p> <p>19 Q. What was HarbourVest's position</p> <p>20 regarding a reset, as of the date that</p> <p>21 this was filed, and I'll look again,</p> <p>22 October 10, 2018?</p> <p>23 MS. WEISGERBER: Objection to</p> <p>24 form. Objection to the extent it's</p> <p>25 asking HarbourVest's position. And I</p>

<p style="text-align: right;">Page 98</p> <p>1 Confidential - Pugatch</p> <p>2 cannot conceive how this is relevant</p> <p>3 to the 9019 motion before the court</p> <p>4 right now.</p> <p>5 Nonetheless, Mike, if you have</p> <p>6 an answer, on behalf of yourself, you</p> <p>7 can answer.</p> <p>8 A. HarbourVest was a passive</p> <p>9 minority investor in HCLOF. It had no</p> <p>10 ability to control the underlying</p> <p>11 portfolio management or ability to reset,</p> <p>12 refinance, or call in any of the equity of</p> <p>13 the underlying CLOs. That was all under</p> <p>14 the purview of Highland.</p> <p>15 Q. Did you understand that</p> <p>16 Mr. Ellington had given sworn testimony</p> <p>17 that the Investor is the party calling the</p> <p>18 shots for HCLOF, with respect to any reset</p> <p>19 transactions?</p> <p>20 MS. WEISGERBER: Objection to</p> <p>21 form.</p> <p>22 A. I did become aware of it, yes.</p> <p>23 Q. When did you become aware of</p> <p>24 that?</p> <p>25 A. At some point subsequent to that</p>	<p style="text-align: right;">Page 99</p> <p>1 Confidential - Pugatch</p> <p>2 testimony being given.</p> <p>3 Q. But was it when you read this</p> <p>4 motion that we're looking at as</p> <p>5 Exhibit 10?</p> <p>6 MS. WEISGERBER: Objection to</p> <p>7 form.</p> <p>8 A. It may have been. I don't</p> <p>9 recall the exact time or medium that I</p> <p>10 became aware of that.</p> <p>11 Q. Was a deposition given as a</p> <p>12 result of this motion?</p> <p>13 MS. WEISGERBER: Objection to</p> <p>14 form. If you have the whole document,</p> <p>15 Mike, that may make sense.</p> <p>16 MR. WILSON: Well, this motion</p> <p>17 at the top says it's a Motion for 2004</p> <p>18 Examination of Investor. And then</p> <p>19 attached to this motion are some</p> <p>20 document requests, and then deposition</p> <p>21 topics for a corporate representative</p> <p>22 of the Investor, and then a proposed</p> <p>23 order.</p> <p>24 BY MR. WILSON:</p> <p>25 Q. Do you recall whether a</p>
<p style="text-align: right;">Page 100</p> <p>1 Confidential - Pugatch</p> <p>2 deposition was given, after this motion</p> <p>3 was filed?</p> <p>4 A. Yes.</p> <p>5 Q. And who was the designated</p> <p>6 deponent?</p> <p>7 A. I was.</p> <p>8 Q. And were documents produced, as</p> <p>9 a result of this?</p> <p>10 A. Yes, there were.</p> <p>11 Q. And were you asked at that</p> <p>12 deposition what the Investor's position on</p> <p>13 a reset was?</p> <p>14 MS. WEISGERBER: Objection to</p> <p>15 form.</p> <p>16 If you recall.</p> <p>17 A. I don't recall specifically that</p> <p>18 question being asked.</p> <p>19 Q. Well, do you know what</p> <p>20 the Debtor's position -- I'm sorry, the</p> <p>21 Debtor's -- the Investor's position on a</p> <p>22 reset was as of that day?</p> <p>23 MS. WEISGERBER: Objection to</p> <p>24 form. Asked and answered.</p> <p>25 A. I would just say again, in</p>	<p style="text-align: right;">Page 101</p> <p>1 Confidential - Pugatch</p> <p>2 general, the original investment thesis</p> <p>3 here was predicated on a refinancing reset</p> <p>4 of the various CLOs, and we were not in</p> <p>5 control as a passive minority investor</p> <p>6 here to --</p> <p>7 Q. Well, you said you weren't in</p> <p>8 control, but what would HarbourVest's</p> <p>9 preference have been?</p> <p>10 MS. WEISGERBER: Objection to</p> <p>11 form.</p> <p>12 A. I do not recall.</p> <p>13 MS. WEISGERBER: If you recall.</p> <p>14 A. I don't recall the specifics</p> <p>15 around what Acis CLO were referring to</p> <p>16 here or what the specific implications of</p> <p>17 a reset were at that time; but regardless,</p> <p>18 that was a decision for the investment</p> <p>19 manager of HCLO.</p> <p>20 Q. But was it your opinion, your</p> <p>21 personal opinion, that a reset was</p> <p>22 appropriate?</p> <p>23 MS. WEISGERBER: Objection to</p> <p>24 form.</p> <p>25 A. Again, we were not the portfolio</p>

<p style="text-align: right;">Page 102</p> <p>1 Confidential - Pugatch</p> <p>2 manager of HCLOF. We were not in control</p> <p>3 of those decisions or making</p> <p>4 recommendations on those decisions. That</p> <p>5 was the delegated authority of Highland,</p> <p>6 as the investment manager.</p> <p>7 Q. I'm not asking for that. I'm</p> <p>8 asking for your personal feelings toward a</p> <p>9 reset.</p> <p>10 MS. WEISGERBER: Same objection.</p> <p>11 He's only answering on behalf of</p> <p>12 himself, and it's been asked and</p> <p>13 answered three times since.</p> <p>14 MR. WILSON: Well, he hasn't</p> <p>15 answered the question. He's just told</p> <p>16 me they don't have the authority to do</p> <p>17 the reset.</p> <p>18 MS. WEISGERBER: And he told you</p> <p>19 the other information he'd be required</p> <p>20 to even have an opinion on it. So</p> <p>21 same objection stands. It's not a</p> <p>22 specific enough question for him.</p> <p>23 Mike, you're welcome, if you</p> <p>24 have, if you have an answer, you're</p> <p>25 welcome to give it.</p>	<p style="text-align: right;">Page 103</p> <p>1 Confidential - Pugatch</p> <p>2 A. Yeah, the investment guidelines</p> <p>3 of HCLOF, from the documents that we</p> <p>4 signed at the time we entered into the</p> <p>5 transaction, laid out the specific, again,</p> <p>6 investment guidelines that HCLOF would be</p> <p>7 guided under, including the opportunity to</p> <p>8 refinance or reset various CLOs over time,</p> <p>9 in accordance with Highland's, you know,</p> <p>10 expectations and ultimate decision to do</p> <p>11 so.</p> <p>12 Q. But did you believe, at this</p> <p>13 time, that a reset was appropriate?</p> <p>14 MS. WEISGERBER: Objection to</p> <p>15 form. This is asked and answered</p> <p>16 several times now, I think we should</p> <p>17 move on. He's given you an answer.</p> <p>18 MR. WILSON: Well, I want to</p> <p>19 know what his personal opinion was</p> <p>20 about whether the reset was</p> <p>21 appropriate.</p> <p>22 A. What reset are you referring to?</p> <p>23 Q. A reset as of October 10, 2018.</p> <p>24 At that time, did you believe that a reset</p> <p>25 was appropriate?</p>
<p style="text-align: right;">Page 104</p> <p>1 Confidential - Pugatch</p> <p>2 A. A reset of what?</p> <p>3 MS. WEISGERBER: Same objection.</p> <p>4 Q. A reset as been discussed all</p> <p>5 through this motion, the same reset we're</p> <p>6 talking about.</p> <p>7 MS. WEISGERBER: Objection.</p> <p>8 Same objections. I just don't see how</p> <p>9 he could possibly answer this vague</p> <p>10 question.</p> <p>11 Q. Okay. So William Scott,</p> <p>12 director of HCLOF, testified that he</p> <p>13 wanted to reset the Acis CLOs because if</p> <p>14 they don't, they are losing \$295,000 a</p> <p>15 week.</p> <p>16 Did you think that a reset was</p> <p>17 appropriate in line with what Mr. Scott</p> <p>18 believed?</p> <p>19 MR. MALONEY: Objection to form,</p> <p>20 foundation.</p> <p>21 MS. WEISGERBER: Same</p> <p>22 objections. And asked and answered</p> <p>23 numerous times.</p> <p>24 A. We were not managing the</p> <p>25 portfolio. We were an investor in a</p>	<p style="text-align: right;">Page 105</p> <p>1 Confidential - Pugatch</p> <p>2 company, an investment company that was</p> <p>3 managing this. We were not, I was not</p> <p>4 proximate enough to any of the underlying</p> <p>5 happenings of the look through CLO</p> <p>6 positions of HCLOF to have an informed</p> <p>7 view on this, at this time.</p> <p>8 Q. Is your testimony that you did</p> <p>9 not have an opinion as to whether the Acis</p> <p>10 CLO should be reset in late 2018?</p> <p>11 MS. WEISGERBER: Objection to</p> <p>12 form. Misstates testimony.</p> <p>13 A. My view is that the original</p> <p>14 investment guidelines here called for a</p> <p>15 reset or refinance of the CLOs and that</p> <p>16 Highland was subsequently in full control</p> <p>17 of whether or not to pursue this, and we,</p> <p>18 HarbourVest, as an investor had no ability</p> <p>19 to object or to force that on a go-forward</p> <p>20 basis.</p> <p>21 MR. WILSON: Objection.</p> <p>22 Nonresponsive.</p> <p>23 Q. I want to know your personal</p> <p>24 opinion of whether you thought a reset was</p> <p>25 appropriate in October of 2018.</p>

<p style="text-align: right;">Page 106</p> <p>1 Confidential - Pugatch</p> <p>2 MR. MORRIS: Objection to the</p> <p>3 form of the question. That's been</p> <p>4 asked and answered.</p> <p>5 MR. WILSON: He has yet to give</p> <p>6 his answer to –</p> <p>7 MR. MORRIS: He just told you he</p> <p>8 didn't have enough information. He</p> <p>9 just told you that, crystal clear.</p> <p>10 MR. WILSON: Well, I'm not going</p> <p>11 to argue with you, John, but I just</p> <p>12 want an answer to my question.</p> <p>13 His answer, he wouldn't agree</p> <p>14 with my, with my summation that he had</p> <p>15 no opinion, so I just want to know</p> <p>16 what his opinion is.</p> <p>17 MS. WEISGERBER: Same</p> <p>18 objections.</p> <p>19 You're not giving him enough</p> <p>20 information to answer the question,</p> <p>21 and at this point, it would be</p> <p>22 speculation. We can just keep going</p> <p>23 in circles on this, but your –</p> <p>24 MR. WILSON: His opinion would</p> <p>25 be speculation?</p>	<p style="text-align: right;">Page 107</p> <p>1 Confidential - Pugatch</p> <p>2 MS. WEISGERBER: He said that,</p> <p>3 he actually testified at some point</p> <p>4 that he doesn't recall specifics of</p> <p>5 the time, so that was another piece of</p> <p>6 the puzzle.</p> <p>7 I mean, I don't want to be</p> <p>8 coaching the witness or giving</p> <p>9 testimony here, but I think you're not</p> <p>10 listening to the things he's saying,</p> <p>11 John, just because you don't like it.</p> <p>12 BY MR. WILSON:</p> <p>13 Q. Mr. Pugatch, did you have an</p> <p>14 opinion, in October of 2019, about whether</p> <p>15 the Acis CLOs should be reset?</p> <p>16 MS. WEISGERBER: Objection to</p> <p>17 form.</p> <p>18 A. I don't recall any definitive</p> <p>19 opinion I would have had, but as stated,</p> <p>20 was not proximate enough to have an</p> <p>21 informed opinion, in any event.</p> <p>22 Q. And to your knowledge, have the</p> <p>23 Acis CLOs ever been reset?</p> <p>24 MS. WEISGERBER: Objection to</p> <p>25 form, foundation.</p>
<p style="text-align: right;">Page 108</p> <p>1 Confidential - Pugatch</p> <p>2 A. I do not believe that any of the</p> <p>3 Acis CLOs were ever reset.</p> <p>4 Q. All right. So who negotiated</p> <p>5 this claim, the settlement of this claim</p> <p>6 on behalf of HarbourVest?</p> <p>7 A. I did.</p> <p>8 Q. And who negotiated for the</p> <p>9 Debtor?</p> <p>10 A. Jim Seery.</p> <p>11 Q. And when did those negotiations</p> <p>12 begin?</p> <p>13 A. It started sometime in November,</p> <p>14 I believe.</p> <p>15 Q. And are you aware that Jim Seery</p> <p>16 has ever taken the position that the</p> <p>17 HarbourVest claim was worthless?</p> <p>18 MS. WEISGERBER: Objection to</p> <p>19 form, foundation.</p> <p>20 A. No, I'm not aware of that.</p> <p>21 Q. Has Jim Seery ever offered</p> <p>22 \$5 million to settle the HarbourVest</p> <p>23 claim?</p> <p>24 A. Not to my knowledge.</p> <p>25 MS. WEISGERBER: Objection to</p>	<p style="text-align: right;">Page 109</p> <p>1 Confidential - Pugatch</p> <p>2 form.</p> <p>3 MR. WILSON: I'm going to send</p> <p>4 out Exhibit 11.</p> <p>5 (Whereupon, Exhibit 11,</p> <p>6 Declaration of John A. Morris in</p> <p>7 Support of the Debtor's Motion For</p> <p>8 Entry of an Order Approving Settlement</p> <p>9 With Harbourvest (Claim Nos. 143, 147,</p> <p>10 149, 150, 153, 154) and Authorizing</p> <p>11 Actions, 82 pages, was marked for</p> <p>12 identification.)</p> <p>13 BY MR. WILSON:</p> <p>14 Q. I want pull this up on the</p> <p>15 screen share. This Exhibit 11 is the</p> <p>16 Declaration of John Morris in Support of</p> <p>17 the Debtor's 9019 Motion, bears</p> <p>18 Document 1631. And attached to this</p> <p>19 exhibit is a trim cut copy of the</p> <p>20 Settlement Agreement executed December 23,</p> <p>21 2020.</p> <p>22 And the Settlement Agreement has</p> <p>23 Paragraph 1, Settlement of Claims, that</p> <p>24 HarbourVest is going to receive a</p> <p>25 \$45 million unsecured, general unsecured</p>

<p style="text-align: right;">Page 110</p> <p>1 Confidential - Pugatch</p> <p>2 claim, and a \$35 million subordinated</p> <p>3 claim.</p> <p>4 And then Part B of that</p> <p>5 paragraph states that HarbourVest is going</p> <p>6 to transfer all its rights, titles, and</p> <p>7 interests to its investment in CLOF to the</p> <p>8 Debtor or its nominee.</p> <p>9 Is that your understanding of</p> <p>10 the general terms of this settlement?</p> <p>11 MS. WEISGERBER: Objection to</p> <p>12 form.</p> <p>13 A. Yes, it is.</p> <p>14 Q. Okay. And also in Paragraph 5,</p> <p>15 Each HarbourVest party agrees that it will</p> <p>16 vote all of HarbourVest claims held by</p> <p>17 such HarbourVest party to accept the plan.</p> <p>18 And I won't read all of that.</p> <p>19 But the gist of this paragraph is that</p> <p>20 HarbourVest is going to vote for the</p> <p>21 Debtor's proposed plan; is that correct?</p> <p>22 MS. WEISGERBER: Objection to</p> <p>23 form.</p> <p>24 A. Yes, correct.</p> <p>25 Q. And how did that term come to be</p>	<p style="text-align: right;">Page 111</p> <p>1 Confidential - Pugatch</p> <p>2 in this Settlement Agreement?</p> <p>3 MS. WEISGERBER: Objection to</p> <p>4 form.</p> <p>5 A. I believe it was put there as</p> <p>6 part of the drafting of the ultimate</p> <p>7 agreement to the fund.</p> <p>8 Q. Well, whose suggestion was it</p> <p>9 that it be added to the drafting?</p> <p>10 MS. WEISGERBER: Objection to</p> <p>11 form.</p> <p>12 A. I believe that it came from</p> <p>13 Debtor's counsel, as they took the lead on</p> <p>14 drafting the documentation here.</p> <p>15 Q. Did Jim Seery ever tell you that</p> <p>16 it was important to him that HarbourVest</p> <p>17 vote in support of the plan?</p> <p>18 MS. WEISGERBER: Objection to</p> <p>19 form.</p> <p>20 A. I don't recall that ever being</p> <p>21 discussed. Certainly it was not the</p> <p>22 prominent feature of any of the</p> <p>23 discussions or negotiations that I ever</p> <p>24 had with Jim.</p> <p>25 Q. Okay.</p>
<p style="text-align: right;">Page 112</p> <p>1 Confidential - Pugatch</p> <p>2 MR. WILSON: I'm going to take a</p> <p>3 ten-minute break, and I think I'm</p> <p>4 almost ready to wrap up. So I want to</p> <p>5 stop my screen share. And let's,</p> <p>6 well, let's start back at 2:30, and I</p> <p>7 think I'll be quick. Thank you.</p> <p>8 (Recess taken.)</p> <p>9 BY MR. WILSON:</p> <p>10 Q. Mr. Pugatch, earlier you</p> <p>11 testified that consistent with your</p> <p>12 declaration you filed that as of August</p> <p>13 31, 2020, the value of HCLOF was</p> <p>14 \$44.5 million. And then if we look at --</p> <p>15 I don't remember which --</p> <p>16 Okay. So this would have been</p> <p>17 Exhibit 7. I'll do a share screen.</p> <p>18 As of November 15, 2017 these</p> <p>19 shares were purchased at \$1.02 and change</p> <p>20 apiece, and there were a total number of</p> <p>21 143 million shares.</p> <p>22 Was the value of this investment</p> <p>23 roughly \$150 million, as of November 15,</p> <p>24 2017?</p> <p>25 MS. WEISGERBER: Objection to</p>	<p style="text-align: right;">Page 113</p> <p>1 Confidential - Pugatch</p> <p>2 form. Foundation.</p> <p>3 MR. MALONEY: Join.</p> <p>4 MS. WEISGERBER: I don't know,</p> <p>5 Mike, if you're comfortable doing that</p> <p>6 math or what.</p> <p>7 A. Yes, approximately that's</p> <p>8 correct.</p> <p>9 Q. Okay. And you know, and I've</p> <p>10 read your papers and you talk about</p> <p>11 attorneys' fees that you say weren't</p> <p>12 appropriate to be charged to HCLOF and</p> <p>13 that part of it, but as to the loss of</p> <p>14 value of the actual investment, what's</p> <p>15 your understanding of what led to that?</p> <p>16 MS. WEISGERBER: Objection to</p> <p>17 form. Objection to the extent it</p> <p>18 calls for a legal conclusion.</p> <p>19 Mike, to the extent you have a</p> <p>20 nonlegal opinion on that, that's not</p> <p>21 based on conversations with counsel,</p> <p>22 you can answer.</p> <p>23 A. Yeah, I think a lot of the value</p> <p>24 erosion was due to the inability to</p> <p>25 refinance, reset a number of the</p>

<p style="text-align: right;">Page 114</p> <p>1 Confidential - Pugatch</p> <p>2 underlying CLOs that was part of the</p> <p>3 original investment thesis here, largely</p> <p>4 as a result of the ongoing litigation,</p> <p>5 that Highland was involved in, and the</p> <p>6 subsequent Acis bankruptcy.</p> <p>7 Q. And so during the period of time</p> <p>8 when the injunction prohibited certain</p> <p>9 actions with respect to this investment,</p> <p>10 is it your opinion that this investment</p> <p>11 was losing value?</p> <p>12 MR. MALONEY: Objection.</p> <p>13 MS. WEISGERBER: Objection to</p> <p>14 form.</p> <p>15 A. Can you repeat the question,</p> <p>16 John?</p> <p>17 Q. Well, I guess I want to know,</p> <p>18 like, in a, on a timeline kind of basis,</p> <p>19 do you think that the significant</p> <p>20 reduction of value occurred prior to or</p> <p>21 after the confirmation of the Acis plan on</p> <p>22 February 1, 2019?</p> <p>23 MS. WEISGERBER: Objection to</p> <p>24 form. Objection to the extent it</p> <p>25 calls for a legal conclusion.</p>	<p style="text-align: right;">Page 115</p> <p>1 Confidential - Pugatch</p> <p>2 You can give your lay opinion,</p> <p>3 if you have one, Mike.</p> <p>4 A. I think it's all been as a</p> <p>5 result of the events leading up to the</p> <p>6 Acis bankruptcy, including the inability</p> <p>7 to refinance or reset the CLOs which would</p> <p>8 have been to the benefit of the CLO equity</p> <p>9 holders including HCLOF.</p> <p>10 Q. And so what, what was the cause</p> <p>11 of the inability to reset?</p> <p>12 MS. WEISGERBER: Same</p> <p>13 objections: form, foundation, legal</p> <p>14 conclusion.</p> <p>15 If you have a non-privileged</p> <p>16 answer, Mike, go ahead.</p> <p>17 A. Yeah, my understanding was</p> <p>18 originally the TRO, preventing Highland</p> <p>19 and HCLOF from pursuing that, and then</p> <p>20 subsequent to the Acis bankruptcy ruling,</p> <p>21 a similar injunction that remained around</p> <p>22 the inability for the equity holders of</p> <p>23 those CLOs to redeem or refinances or</p> <p>24 reset.</p> <p>25 Q. So do you -- is there any</p>
<p style="text-align: right;">Page 116</p> <p>1 Confidential - Pugatch</p> <p>2 component, in your opinion, of the loss of</p> <p>3 value of these investments due to</p> <p>4 portfolio mismanagement?</p> <p>5 MS. WEISGERBER: Objection to</p> <p>6 form, foundation, legal conclusion, or</p> <p>7 expert opinion, calling for</p> <p>8 speculation.</p> <p>9 If you have a view, Mike.</p> <p>10 A. Yeah. Can you be more specific</p> <p>11 with the question, John?</p> <p>12 Q. Well, I'll ask it a different</p> <p>13 way.</p> <p>14 Do you think that portfolio</p> <p>15 mismanagement was a portion of the cause</p> <p>16 of the reduction in value?</p> <p>17 MS. WEISGERBER: Same objection.</p> <p>18 A. I can't speculate as to, you</p> <p>19 know, the underlying management decisions</p> <p>20 around the CLOs, but what I do know is</p> <p>21 that the mismanagement and</p> <p>22 misrepresentations at the HCLOF level,</p> <p>23 that would ultimately result in the Acis</p> <p>24 bankruptcy and subsequent to that, the TRO</p> <p>25 and the inability to refinance or reset</p>	<p style="text-align: right;">Page 117</p> <p>1 Confidential - Pugatch</p> <p>2 that has been the, far and away, the</p> <p>3 largest contributor to loss of value</p> <p>4 within the portfolio.</p> <p>5 Q. One of the allegations that</p> <p>6 HarbourVest has made is that Highland</p> <p>7 improperly changed the portfolio manager.</p> <p>8 Is it your opinion that if that had not</p> <p>9 been done, the portfolio manager had not</p> <p>10 been changed at the inception of</p> <p>11 HarbourVest's investment, that that would</p> <p>12 have preserved any value of this fund?</p> <p>13 MR. MORRIS: Objection to the</p> <p>14 form of the question.</p> <p>15 MS. WEISGERBER: Same objection.</p> <p>16 Calling for speculation, hypothetical</p> <p>17 lay opinion.</p> <p>18 If you have testimony, go ahead,</p> <p>19 Mike.</p> <p>20 A. Sorry, could you just repeat the</p> <p>21 question, John? I want to make sure I'm</p> <p>22 answering it correctly.</p> <p>23 Q. I guess I just want to know, and</p> <p>24 I think you kind of hinted at this a</p> <p>25 little bit earlier today, but I guess what</p>

<p style="text-align: right;">Page 118</p> <p>1 Confidential - Pugatch</p> <p>2 I really want to know is do you think that</p> <p>3 the particular portfolio manager made a</p> <p>4 difference in the loss of value that HCLOF</p> <p>5 suffered?</p> <p>6 MS. WEISGERBER: Same</p> <p>7 objections.</p> <p>8 A. Again, it sounds like you're</p> <p>9 asking a different question there than</p> <p>10 what I thought I understood your question</p> <p>11 to be initially. What I would say to that</p> <p>12 is the decision originally to change the</p> <p>13 portfolio manager, and ultimately the</p> <p>14 events that took place following the</p> <p>15 Arbitration Award for Mr. Terry, resulted</p> <p>16 in the subsequent Acis bankruptcy, which</p> <p>17 in turn has led to the destruction of</p> <p>18 value, because of the inability to</p> <p>19 refinance or reset, the underlying CLOs.</p> <p>20 Q. So HarbourVest is not alleging</p> <p>21 that the portfolio manager made any</p> <p>22 particular decisions or participated in</p> <p>23 any mismanagement that led to reduction in</p> <p>24 value?</p> <p>25 MS. WEISGERBER: Objection to</p>	<p style="text-align: right;">Page 119</p> <p>1 Confidential - Pugatch</p> <p>2 form.</p> <p>3 A. When you're asking about</p> <p>4 portfolio manager, are we referring to the</p> <p>5 portfolio manager at the underlying CLO</p> <p>6 level or at the HCLOF level? I think</p> <p>7 there are two different levels here of</p> <p>8 portfolio management.</p> <p>9 Q. Well, I'm talking about the</p> <p>10 portfolio manager, and you can tell me</p> <p>11 which one it is, but which portfolio</p> <p>12 manager has the ability to, to impact the</p> <p>13 performance of these funds?</p> <p>14 MR. MORRIS: Objection.</p> <p>15 A. If you're referring to HCLOF,</p> <p>16 the --</p> <p>17 MS. WEISGERBER: Objection to</p> <p>18 form.</p> <p>19 A. -- investment manager, or the</p> <p>20 portfolio manager of HCLOF has the ability</p> <p>21 to drive value creation by virtue of its</p> <p>22 equity position in the underlying CLOs.</p> <p>23 Q. Well, which portfolio manager</p> <p>24 makes the day-to-day decisions about</p> <p>25 selling assets, trading assets, that, that</p>
<p style="text-align: right;">Page 120</p> <p>1 Confidential - Pugatch</p> <p>2 I guess --</p> <p>3 A. If you're referring to</p> <p>4 underlaying credits, that would be the</p> <p>5 portfolio manager in each of the</p> <p>6 individual CLOs. The impact in value to</p> <p>7 the equity investment in the CLOs is a</p> <p>8 decision at the HCLOF level, where the</p> <p>9 majority of that value erosion has</p> <p>10 resulted from the inability to refinance</p> <p>11 or reset those CLO entities.</p> <p>12 Q. And that's what we're talking</p> <p>13 about when you said that they, that</p> <p>14 Highland changed the portfolio manager,</p> <p>15 you're talking about at the HCLOF level,</p> <p>16 right?</p> <p>17 MS. WEISGERBER: Objection to</p> <p>18 form.</p> <p>19 A. Well, I was responding to the</p> <p>20 question that I thought you asked. I</p> <p>21 wasn't necessarily stating that.</p> <p>22 Q. I guess all I'm really trying to</p> <p>23 do here is just understand HarbourVest's</p> <p>24 position. And it sounds to me, and</p> <p>25 correct me if I'm wrong, it sounds to me</p>	<p style="text-align: right;">Page 121</p> <p>1 Confidential - Pugatch</p> <p>2 that what you're saying is that the</p> <p>3 diminution of value wasn't attributable to</p> <p>4 poor investment decisions by a portfolio</p> <p>5 manager, as much as it was the</p> <p>6 consequences in the Acis bankruptcy of the</p> <p>7 change in portfolio manager; is that fair?</p> <p>8 MS. WEISGERBER: Objection to</p> <p>9 form. Misstates testimony.</p> <p>10 A. Yes, it is. That is my general</p> <p>11 understanding, yes.</p> <p>12 MR. WILSON: Okay. No further</p> <p>13 questions.</p> <p>14 MR. MORRIS: All right. Well,</p> <p>15 thank you very much.</p> <p>16 THE REPORTER: Does anybody have</p> <p>17 any other questions?</p> <p>18 MR. KANE: Yes. This is John</p> <p>19 Kane with CLO Holdco. I'll jump on</p> <p>20 video. I've got some questions, but</p> <p>21 I'm going to be relatively short. If</p> <p>22 anybody else has a little bit heavier</p> <p>23 schedule, let me know.</p> <p>24 All right. I'll take that as a</p> <p>25 go-ahead.</p>

<p style="text-align: right;">Page 122</p> <p>1 Confidential - Pugatch</p> <p>2 EXAMINATION</p> <p>3 BY MR. KANE:</p> <p>4 Q. This is John Kane. I represent</p> <p>5 CLO Holdco.</p> <p>6 Hi, Mike Pugatch. It's nice to</p> <p>7 talk to you.</p> <p>8 A. Likewise.</p> <p>9 Q. I just wanted to briefly</p> <p>10 confirm. I believe you testified you</p> <p>11 participated in negotiations that lead to</p> <p>12 the Settlement Agreement, that is part of</p> <p>13 the 9019 motion, before the bankruptcy</p> <p>14 court; is that correct?</p> <p>15 A. Correct.</p> <p>16 Q. And did you actively negotiate</p> <p>17 the terms of that Settlement Agreement?</p> <p>18 A. Yes.</p> <p>19 Q. As in dollar amounts, what the</p> <p>20 consideration exchanged, how it would</p> <p>21 work, that kind of stuff, obviously with</p> <p>22 the assistance of counsel?</p> <p>23 A. Yes. All of that. The</p> <p>24 negotiations were, you know, over the</p> <p>25 course of a number of weeks and a number</p>	<p style="text-align: right;">Page 123</p> <p>1 Confidential - Pugatch</p> <p>2 of conversations directly with the Debtor,</p> <p>3 with counsel, all-hands calls, et cetera.</p> <p>4 Q. Okay. And as part of that in</p> <p>5 the Settlement Agreement, you say the</p> <p>6 HarbourVest entities were members in HCLOF</p> <p>7 are in essence selling their shares to the</p> <p>8 Debtor, and also in exchange getting some</p> <p>9 claims back in the Debtor's plan. Is that</p> <p>10 a fair summary?</p> <p>11 MS. WEISGERBER: Objection to</p> <p>12 form. Compound question.</p> <p>13 Q. Let me ask it a different way.</p> <p>14 A. Can you re-ask that, please?</p> <p>15 Q. Yeah. I'm happy to do that.</p> <p>16 Why don't you describe for me</p> <p>17 how you would summarize that settlement?</p> <p>18 A. Largely, as I think you just</p> <p>19 described it, which was in exchange for,</p> <p>20 in exchange for the, both the unsecured</p> <p>21 creditors' claim, and subordinated</p> <p>22 creditors' claim, that settlement value is</p> <p>23 in exchange for us transferring the</p> <p>24 interest in HCLOF to the Debtor, as part</p> <p>25 of that overall negotiating package.</p>
<p style="text-align: right;">Page 124</p> <p>1 Confidential - Pugatch</p> <p>2 Q. And what would you estimate, I</p> <p>3 going to have to imagine, let me rephrase</p> <p>4 the question.</p> <p>5 Have you guys done kind of an</p> <p>6 internal best guess of what your unsecured</p> <p>7 and subordinated claims would be, under</p> <p>8 the plan, the value?</p> <p>9 MS. WEISGERBER: Objection.</p> <p>10 Objection to form.</p> <p>11 A. Just to be clear, John, are you</p> <p>12 referring to the expected recovery value</p> <p>13 of our claims?</p> <p>14 Q. Yes, sir.</p> <p>15 MS. WEISGERBER: Objection to</p> <p>16 form. Can we just clarify, so you're</p> <p>17 talking about what they'll recover</p> <p>18 ultimately? Is that the question,</p> <p>19 John? I'm confused myself. I just</p> <p>20 want to be sure I am following.</p> <p>21 MR. KANE: Yeah. So I'm asking</p> <p>22 Mike how much he believes, based on</p> <p>23 his analysis, that HarbourVest is</p> <p>24 likely to recover from the \$45 million</p> <p>25 allowed general unsecured claim and</p>	<p style="text-align: right;">Page 125</p> <p>1 Confidential - Pugatch</p> <p>2 \$35 million allowed subordinated</p> <p>3 claim, if the settlement is approved</p> <p>4 and the plan is confirmed.</p> <p>5 MS. WEISGERBER: Objection to</p> <p>6 form.</p> <p>7 But you can answer, if you have</p> <p>8 an answer, Mike.</p> <p>9 A. We do have a sense. It's really</p> <p>10 a range of projected outcomes, as you can</p> <p>11 imagine, based on the recoveries, largely</p> <p>12 informed by conversations with the Debtor.</p> <p>13 Q. And what is that range of value?</p> <p>14 MS. WEISGERBER: Objection to</p> <p>15 form.</p> <p>16 A. Our understanding, again, based</p> <p>17 on those conversations, is that the</p> <p>18 general unsecured claim could be valued in</p> <p>19 a 75 to 80 cents on the dollar recovery.</p> <p>20 And then a, you know, that the junior</p> <p>21 class claim is really sort of upside</p> <p>22 potential, to the extent there is more</p> <p>23 recovery or more asset value of the</p> <p>24 estate, for the benefit of creditors over</p> <p>25 time.</p>

<p style="text-align: right;">Page 126</p> <p>1 Confidential - Pugatch</p> <p>2 Q. What is your understanding of</p> <p>3 the current value of the HarbourVest</p> <p>4 shares in HCLOF that would be transferred</p> <p>5 under this Agreement?</p> <p>6 A. It's roughly \$22.5 million of</p> <p>7 their value.</p> <p>8 Q. So doing a little bit of, you</p> <p>9 know, back-of-the-table-cloth math, how do</p> <p>10 you allocate value between the releases</p> <p>11 that you are receiving and the shares that</p> <p>12 you are transferring?</p> <p>13 MR. KANE: I'm sorry. Let me</p> <p>14 rephrase that. Let me ask that</p> <p>15 question differently.</p> <p>16 Q. In addition to the claims under</p> <p>17 the plan, HarbourVest is providing the</p> <p>18 Debt – sorry, in addition to the shares</p> <p>19 that are being transferred, HarbourVest is</p> <p>20 providing to the Debtor certain releases</p> <p>21 for its litigation claims; is that</p> <p>22 correct?</p> <p>23 MS. WEISGERBER: Objection to</p> <p>24 form.</p> <p>25 A. Correct.</p>	<p style="text-align: right;">Page 127</p> <p>1 Confidential - Pugatch</p> <p>2 Q. So how has HarbourVest allocated</p> <p>3 value, as far as this Settlement Agreement</p> <p>4 is concerned?</p> <p>5 And to make sure we're on the</p> <p>6 same page about what I'm asking,</p> <p>7 HarbourVest is trading a bundle of sticks,</p> <p>8 right? And there's really two things</p> <p>9 within that bundle of sticks, and please</p> <p>10 confirm that's correct, you're trading</p> <p>11 shares, and in addition, releases; is that</p> <p>12 right? In exchange you're getting back</p> <p>13 claims that have a potential future value.</p> <p>14 So, how have you allocated value</p> <p>15 among the shares transferred and the</p> <p>16 releases that are being granted?</p> <p>17 MR. MORRIS: Objection.</p> <p>18 MS. WEISGERBER: Objection.</p> <p>19 You can go ahead, Mike.</p> <p>20 A. Yeah. So ultimately we looked</p> <p>21 at it as a package, and so it was less</p> <p>22 about the attribution of value between the</p> <p>23 two different sticks, as you described it,</p> <p>24 and more about the overall package value</p> <p>25 in exchange for the transfer of our</p>
<p style="text-align: right;">Page 128</p> <p>1 Confidential - Pugatch</p> <p>2 interest and the release of the claims</p> <p>3 that we had outstanding as the Debtor.</p> <p>4 MR. KANE: Now, I want to turn</p> <p>5 your attention to what I've included</p> <p>6 in the chat. You can pull it down</p> <p>7 pretty easily if you want. But it</p> <p>8 would be Holdco Depo Exhibit 2. If</p> <p>9 that would be easier than a screen</p> <p>10 share, if you'd like, I'm happy to do</p> <p>11 that as well.</p> <p>12 MS. WEISGERBER: Which document</p> <p>13 is it, John? Because I just can't</p> <p>14 pull stuff off the Zoom right now.</p> <p>15 MR. KANE: Oh, I'm sorry. It's</p> <p>16 the Settlement Agreement with the</p> <p>17 attached exhibits. I can share my</p> <p>18 screen so we're all on the same page.</p> <p>19 Just to confirm we're looking at</p> <p>20 the same thing, here's the Settlement</p> <p>21 Agreement. There's a docket entry at</p> <p>22 the top so you can see it, 1631 filed</p> <p>23 by the Debtor 12/24/20.</p> <p>24 This is Exhibit 1 to the</p> <p>25 Declaration of John Morris in Support</p>	<p style="text-align: right;">Page 129</p> <p>1 Confidential - Pugatch</p> <p>2 of Debtor's Motion for an Entry</p> <p>3 Approving Settlement with HarbourVest.</p> <p>4 BY MR. KANE:</p> <p>5 Q. Now, this Settlement Agreement</p> <p>6 is a document that you assisted in</p> <p>7 negotiations; is that correct?</p> <p>8 A. Correct.</p> <p>9 Q. Okay. And here in Section 1B,</p> <p>10 this addresses the transfer of the shares</p> <p>11 of the HarbourVest entities to a Debtor</p> <p>12 affiliate; is that correct?</p> <p>13 MS. WEISGERBER: Objection to</p> <p>14 form.</p> <p>15 A. Correct.</p> <p>16 Q. Is that your understanding,</p> <p>17 Mr. Pugatch?</p> <p>18 A. Yes, correct.</p> <p>19 Q. Okay. Thank you. Section 4A,</p> <p>20 and is this your understanding that</p> <p>21 HarbourVest is representing that it has</p> <p>22 the authority to enter into this agreement</p> <p>23 and to transfer the shares to the Debtor's</p> <p>24 affiliate if this is approved?</p> <p>25 MS. WEISGERBER: Objection to</p>

<p style="text-align: right;">Page 130</p> <p>1 Confidential - Pugatch</p> <p>2 form. The document speaks for itself.</p> <p>3 Is that a question, John?</p> <p>4 MR. KANE: Yeah. I asked if</p> <p>5 that was his understanding, that this</p> <p>6 is a representation by HarbourVest</p> <p>7 that it has the authority to transfer</p> <p>8 the shares if the Settlement Agreement</p> <p>9 is approved.</p> <p>10 MS. WEISGERBER: Objection to</p> <p>11 form. Objection to the extent it</p> <p>12 calls for a legal conclusion.</p> <p>13 To the extent you have a</p> <p>14 nonlegal conclusion, non-privileged</p> <p>15 understanding, Mike, you can share</p> <p>16 that.</p> <p>17 A. Yeah, I'm just saying I can only</p> <p>18 answer that based on conversations with</p> <p>19 counsel.</p> <p>20 MR. KANE: Okay. I won't push</p> <p>21 that. That's fine.</p> <p>22 Q. If we keep going down here as</p> <p>23 part of this attachment, there's a</p> <p>24 Transfer Agreement, Exhibit A to the</p> <p>25 Settlement Agreement. Are you familiar</p>	<p style="text-align: right;">Page 131</p> <p>1 Confidential - Pugatch</p> <p>2 with this document?</p> <p>3 A. Yes. I've seen it.</p> <p>4 Q. And did you assist with the</p> <p>5 preparation or negotiation of this</p> <p>6 Agreement?</p> <p>7 A. Yes.</p> <p>8 Q. Okay. Did you understand that</p> <p>9 HarbourVest would need the consent of the</p> <p>10 HCLOF portfolio advisor to effectuate the</p> <p>11 transfer?</p> <p>12 MS. WEISGERBER: Objection to</p> <p>13 form. Objection to the extent it</p> <p>14 calls for a legal conclusion.</p> <p>15 Mike, if you have a view other</p> <p>16 than from privileged conversation, you</p> <p>17 can answer, otherwise do not answer.</p> <p>18 A. Yeah, I'm sorry. I can only</p> <p>19 answer that based on conversation with</p> <p>20 counsel and the read of the document.</p> <p>21 Q. So to make sure I understand</p> <p>22 that, you have no independent</p> <p>23 understanding of whether or not consent</p> <p>24 was required from the portfolio manager</p> <p>25 before you could effectuate a transfer; is</p>
<p style="text-align: right;">Page 132</p> <p>1 Confidential - Pugatch</p> <p>2 that correct?</p> <p>3 MS. WEISGERBER: Same objection.</p> <p>4 I think you can give your</p> <p>5 general understanding, but then not</p> <p>6 get into specific conversations.</p> <p>7 A. My understanding of that is</p> <p>8 based on conversations with counsel, but</p> <p>9 yes, that is my understanding, John.</p> <p>10 Q. Okay. I'm going to highlight a</p> <p>11 passage here. Can you see this</p> <p>12 highlighted area? "Whereas, the Portfolio</p> <p>13 Manager desires to consent to such</p> <p>14 transfers and to the admission of</p> <p>15 Transferee as a shareholder..."</p> <p>16 Were you aware of that</p> <p>17 provision?</p> <p>18 MS. WEISGERBER: Objection to</p> <p>19 form.</p> <p>20 A. Yes. It's in the document.</p> <p>21 Q. Do you have any understanding of</p> <p>22 why that provision was included in this</p> <p>23 agreement?</p> <p>24 MS. WEISGERBER: Objection to</p> <p>25 form. Objection to the extent it</p>	<p style="text-align: right;">Page 133</p> <p>1 Confidential - Pugatch</p> <p>2 calls for a privileged conversation.</p> <p>3 A. As I answered before, based on</p> <p>4 conversations with counsel, my</p> <p>5 understanding is that consent is requiring</p> <p>6 in connection to transfer.</p> <p>7 Q. I'd like to turn your attention</p> <p>8 now – this is a document you've seen</p> <p>9 before during your deposition. This is</p> <p>10 the member's agreement related to the</p> <p>11 Company for HCLOF. This is previously</p> <p>12 produced by the Debtor, that's why it's</p> <p>13 got the Bates stamp on it. This is dated</p> <p>14 November 15, 2017.</p> <p>15 Are you familiar with this</p> <p>16 document?</p> <p>17 A. Yes.</p> <p>18 Q. Do you see on Line 14, in the</p> <p>19 between, on Page 1 shows Highland HCF</p> <p>20 Advisor, Ltd. as the portfolio manager?</p> <p>21 A. Yes, I see that.</p> <p>22 Q. I know there was quite a bit</p> <p>23 of – quite a few questions about this</p> <p>24 earlier, but you understand that Highland</p> <p>25 HCF Advisor, Ltd. is still the HCLOF</p>

<p style="text-align: right;">Page 134</p> <p>1 Confidential - Pugatch</p> <p>2 portfolio manager?</p> <p>3 MS. WEISGERBER: Objection to</p> <p>4 form.</p> <p>5 A. Honestly, I don't have -- I</p> <p>6 don't have enough information to answer</p> <p>7 that definitively.</p> <p>8 Q. Okay. Going back to the</p> <p>9 Settlement Agreement, there's a reference</p> <p>10 in here to a defined term, "portfolio</p> <p>11 manager."</p> <p>12 Do you see that?</p> <p>13 A. Yep.</p> <p>14 Q. And is this the same one that's</p> <p>15 listed in the Member Agreement, Highland</p> <p>16 HCF Advisor, Ltd.?</p> <p>17 A. I believe that seems to be the</p> <p>18 position, yes.</p> <p>19 Q. Okay. So when we're talking</p> <p>20 about down here, "Whereas, the Portfolio</p> <p>21 Manager desires to consent," this consent</p> <p>22 provision is referring to the same</p> <p>23 definition of portfolio manager that's</p> <p>24 included in this Member Agreement; is that</p> <p>25 correct?</p>	<p style="text-align: right;">Page 135</p> <p>1 Confidential - Pugatch</p> <p>2 MR. MORRIS: Objection to the</p> <p>3 form.</p> <p>4 MS. WEISGERBER: Objection --</p> <p>5 same objections. Objection to the</p> <p>6 extent it calls for privileged</p> <p>7 information.</p> <p>8 A. That sounds like a legal</p> <p>9 conclusion.</p> <p>10 Q. I would have thought it was</p> <p>11 reading, Mr. Pugatch.</p> <p>12 A. Well, if you're asking me to</p> <p>13 definitively confirm that, that sounds</p> <p>14 like a legal interpretation.</p> <p>15 Q. Let me ask that a different way.</p> <p>16 Do you understand that the</p> <p>17 portfolio manager is listed as Highland</p> <p>18 HCF Advisor, Ltd. in the Member Agreement?</p> <p>19 A. Yes.</p> <p>20 Q. And in this Transfer Agreement,</p> <p>21 the portfolio manager is listed as</p> <p>22 Highland HCF Advisor, Ltd.?</p> <p>23 A. Yes.</p> <p>24 Q. And those are the same entities?</p> <p>25 A. Yes.</p>
<p style="text-align: right;">Page 136</p> <p>1 Confidential - Pugatch</p> <p>2 Q. All right. Are you familiar</p> <p>3 with Section 6 of this Member Agreement?</p> <p>4 A. (Nods.)</p> <p>5 Q. Have you ever read this</p> <p>6 document?</p> <p>7 A. I have.</p> <p>8 Q. Okay. And can you give me your</p> <p>9 understanding of what must take place</p> <p>10 under this document for HarbourVest to</p> <p>11 transfer its shares?</p> <p>12 MS. WEISGERBER: Object to the</p> <p>13 form. Object to the extent it calls</p> <p>14 for a legal conclusion. Object to the</p> <p>15 extent it calls for any privileged</p> <p>16 information or conversations.</p> <p>17 Mike, to the extent you have an</p> <p>18 independent understanding, separate</p> <p>19 from conversations with counsel, you</p> <p>20 can answer the question.</p> <p>21 A. I would say my understanding of</p> <p>22 what's required in connection with the</p> <p>23 transfer is based on conversations with</p> <p>24 counsel.</p> <p>25 Q. Do you believe that the</p>	<p style="text-align: right;">Page 137</p> <p>1 Confidential - Pugatch</p> <p>2 HarbourVest entities can transfer its</p> <p>3 shares without obtaining the consent of</p> <p>4 the portfolio manager?</p> <p>5 MS. WEISGERBER: Objection to</p> <p>6 form. Objection to the extent it</p> <p>7 calls for a legal conclusion.</p> <p>8 Same instruction, Mike, as to</p> <p>9 privileged conversations.</p> <p>10 A. Again, my view on that would be</p> <p>11 based on conversations with counsel.</p> <p>12 Q. Are you aware of whether</p> <p>13 HarbourVest provided any notice to other</p> <p>14 members of its intent to transfer its</p> <p>15 shares to the Debtor's affiliate under the</p> <p>16 Settlement Agreement, other than the</p> <p>17 filing of the 9019 motion?</p> <p>18 MS. WEISGERBER: Same objection.</p> <p>19 But there is a factual question in</p> <p>20 there if you can answer it, Mike, but</p> <p>21 no privileged conversation.</p> <p>22 A. Yeah, I'm not aware of that.</p> <p>23 Q. Did you provide members 30 days</p> <p>24 after the receipt of notice of</p> <p>25 HarbourVest's intent to transfer its</p>

<p style="text-align: right;">Page 138</p> <p>1 Confidential - Pugatch</p> <p>2 shares to the Debtor's affiliate and</p> <p>3 provide those members with an opportunity</p> <p>4 to purchase their pro rata amount of the</p> <p>5 shares?</p> <p>6 MS. WEISGERBER: Same objection.</p> <p>7 A. No.</p> <p>8 Q. And just to make sure I'm not</p> <p>9 asking this question in a way that you</p> <p>10 don't understand what I'm asking: Do you</p> <p>11 see this highlighted provision here?</p> <p>12 A. Yes.</p> <p>13 Q. I'm asking whether HarbourVest</p> <p>14 provided members 30 days after the receipt</p> <p>15 of a notice letter and an opportunity to</p> <p>16 purchase their entire pro rata share of</p> <p>17 the shares proposed to be transferred by</p> <p>18 the HarbourVest entities?</p> <p>19 MS. WEISGERBER: Objection to</p> <p>20 form. Objection to the extent it</p> <p>21 calls for privileged conversations or</p> <p>22 a legal conclusion. Objection to the</p> <p>23 extent it's asking about one piece of</p> <p>24 the document.</p> <p>25 And you're welcome to look at</p>	<p style="text-align: right;">Page 139</p> <p>1 Confidential - Pugatch</p> <p>2 the full document if you'd like, Mike.</p> <p>3 I think it was one of the ones that</p> <p>4 was E-mailed as well, or maybe you</p> <p>5 were able to pull it down.</p> <p>6 THE WITNESS: Yeah, no, I was.</p> <p>7 Thank you.</p> <p>8 A. And I'm sorry, John, could you</p> <p>9 just repeat the question?</p> <p>10 BY MR. KANE:</p> <p>11 Q. Yeah, sure, absolutely. And I'm</p> <p>12 not calling for any conversations with</p> <p>13 counsel. I'm asking you if you know</p> <p>14 whether HarbourVest did something or not.</p> <p>15 So let's -- let's keep it to that, because</p> <p>16 I --</p> <p>17 MR. KANE: Erica, I appreciate</p> <p>18 your concerns, but I really don't want</p> <p>19 to have any disclosures from Mike</p> <p>20 about his discussions with you on</p> <p>21 whether something needed to be done or</p> <p>22 not. I'm asking simply the facts of</p> <p>23 whether HarbourVest did it or not.</p> <p>24 Q. So did HarbourVest provide</p> <p>25 notice, 30 days' notice, to the members</p>
<p style="text-align: right;">Page 140</p> <p>1 Confidential - Pugatch</p> <p>2 listed under this Member Agreement of</p> <p>3 HarbourVest's intent to transfer the</p> <p>4 shares that are the subject to the</p> <p>5 Settlement Agreement?</p> <p>6 A. No.</p> <p>7 Q. Has HarbourVest provided any</p> <p>8 members with a right of first refusal and</p> <p>9 a cash purchase price for which it would</p> <p>10 sell its shares instead of transferring</p> <p>11 those shares to the Debtor or the Debtor's</p> <p>12 affiliate under the Settlement Agreement?</p> <p>13 MS. WEISGERBER: Same</p> <p>14 objections. Objection to form.</p> <p>15 Objection to extent it calls for a</p> <p>16 legal conclusion or privileged</p> <p>17 conversations, including -- regarding</p> <p>18 the specifics of that provision.</p> <p>19 I don't think that's a purely</p> <p>20 factual question.</p> <p>21 Q. Did HarbourVest offer to sell</p> <p>22 the shares to the other members? That's</p> <p>23 not a factual question?</p> <p>24 MS. WEISGERBER: Objection --</p> <p>25 A. On the basis of that factual</p>	<p style="text-align: right;">Page 141</p> <p>1 Confidential - Pugatch</p> <p>2 question, no.</p> <p>3 Q. So let me ask this question</p> <p>4 again, I don't recall if I got an answer</p> <p>5 or not.</p> <p>6 Did HarbourVest affirmatively</p> <p>7 seek to obtain the consent of Highland HCF</p> <p>8 Advisors to transfer its shares to the</p> <p>9 Debtor affiliate under the Settlement</p> <p>10 Agreement?</p> <p>11 MS. WEISGERBER: Same</p> <p>12 objections. Same instruction</p> <p>13 regarding the privileged conversation.</p> <p>14 A. I mean, as a Highland-affiliated</p> <p>15 entity, the Debtor, who's obviously the</p> <p>16 other party here involved in the transfer,</p> <p>17 you know, was involved in these</p> <p>18 discussions.</p> <p>19 Q. I'm sorry. Would you mind</p> <p>20 clarifying? Did you say that Highland HCF</p> <p>21 Advisors was involved in those discussions</p> <p>22 or the Debtor was involved in those</p> <p>23 discussions and you assume Highland HCF</p> <p>24 Advisors was?</p> <p>25 MS. WEISGERBER: Objection to</p>

<p style="text-align: right;">Page 142</p> <p>1 Confidential - Pugatch</p> <p>2 form. Misstates testimony.</p> <p>3 A. Sorry, could you just repeat the</p> <p>4 question, please, John?</p> <p>5 Q. Yes, Mr. Pugatch.</p> <p>6 I'm actually just trying to get</p> <p>7 some clarification from you, because I</p> <p>8 don't think I understood your answer</p> <p>9 about -- I had asked just -- again, I</p> <p>10 don't want any correspondence with your</p> <p>11 counsel or what your counsel advised, I'm</p> <p>12 asking: Do you know whether HarbourVest</p> <p>13 sought written consent from Highland HCF</p> <p>14 Advisor for its -- or to transfer its</p> <p>15 shares to the Debtor or the Debtor's</p> <p>16 affiliate under the Settlement Agreement?</p> <p>17 MS. WEISGERBER: Same objection.</p> <p>18 A. My understanding is HarbourVest</p> <p>19 did not explicitly have those</p> <p>20 conversations or seek that consent.</p> <p>21 Q. Okay. Are you aware of whether</p> <p>22 HarbourVest received any written consent</p> <p>23 from Highland HCF Advisors, other than</p> <p>24 what's in the Transfer Agreement attached</p> <p>25 to the Settlement Agreement?</p>	<p style="text-align: right;">Page 143</p> <p>1 Confidential - Pugatch</p> <p>2 A. I am not.</p> <p>3 MS. WEISGERBER: Same objection.</p> <p>4 Q. Do you know if HarbourVest has</p> <p>5 any written consent? Not just to seek it,</p> <p>6 but do you know if HarbourVest has a piece</p> <p>7 of paper, other than the transfer</p> <p>8 agreement, in which Highland HCF advisors</p> <p>9 provided its consent to the transfer of</p> <p>10 shares to the Debtor's affiliate?</p> <p>11 MS. WEISGERBER: Same</p> <p>12 objections.</p> <p>13 A. I would have to speak with</p> <p>14 counsel. I am not aware of that directly,</p> <p>15 no.</p> <p>16 Q. Are you aware of whether</p> <p>17 HarbourVest had any correspondence with</p> <p>18 HCLOF representatives about effectuating</p> <p>19 the transfer of the shares to the Debtor's</p> <p>20 affiliate under the Settlement Agreement?</p> <p>21 MS. WEISGERBER: Same objection.</p> <p>22 You can answer.</p> <p>23 A. We have had discussions with</p> <p>24 them, yes.</p> <p>25 Q. Did HCLOF representatives</p>
<p style="text-align: right;">Page 144</p> <p>1 Confidential - Pugatch</p> <p>2 provide consent, whether written or</p> <p>3 otherwise, to the transfer?</p> <p>4 A. I am not aware that that consent</p> <p>5 has been provided as of yet.</p> <p>6 Q. Are you aware of whether any</p> <p>7 HarbourVest representatives have had</p> <p>8 conversations with the Debtor's</p> <p>9 representatives about the necessity of</p> <p>10 consent to the transfer of their shares?</p> <p>11 MS. WEISGERBER: Objection to</p> <p>12 form --</p> <p>13 MR. KANE: I'll re-ask the</p> <p>14 question. I want to clarify that</p> <p>15 point.</p> <p>16 BY MR. KANE:</p> <p>17 Q. Mr. Pugatch, are you aware of</p> <p>18 whether any HarbourVest representatives</p> <p>19 had conversations with the Debtor's</p> <p>20 representatives about the necessity of</p> <p>21 obtaining the HCLOF portfolio manager's</p> <p>22 written consent before transferring the</p> <p>23 shares to the Debtor's representative or</p> <p>24 affiliate under the terms of the</p> <p>25 Settlement Agreement?</p>	<p style="text-align: right;">Page 145</p> <p>1 Confidential - Pugatch</p> <p>2 MS. WEISGERBER: Objection to</p> <p>3 form.</p> <p>4 And, John, I'm sorry to do this,</p> <p>5 can you just clarify what you mean by</p> <p>6 "representative"?</p> <p>7 MR. KANE: Yeah. I mean,</p> <p>8 anybody that has agency authority to</p> <p>9 act on behalf of the Debtor in</p> <p>10 negotiations, in the preparation of</p> <p>11 the documents, in negotiation of the</p> <p>12 terms of the Settlement Agreement.</p> <p>13 I mean, I think that it's, you</p> <p>14 know, a pretty broad term here.</p> <p>15 MS. WEISGERBER: Objection to</p> <p>16 form. Objection to the extent it</p> <p>17 calls for discussions with counsel.</p> <p>18 As a factual matter, if you have</p> <p>19 an answer, you can give it.</p> <p>20 A. I'm aware of conversations that</p> <p>21 have taken place about all of the terms of</p> <p>22 the Transfer Agreement in connection with</p> <p>23 the settlement, with all parties.</p> <p>24 Q. Is it your understanding based</p> <p>25 on those conversations that written</p>

<p style="text-align: right;">Page 146</p> <p>1 Confidential - Pugatch</p> <p>2 consent of the portfolio manager as</p> <p>3 defined in the Transfer Agreement was</p> <p>4 required before the shares could be</p> <p>5 transferred under the Settlement</p> <p>6 Agreement?</p> <p>7 MS. WEISGERBER: Objection to</p> <p>8 the form. Objection to the extent it</p> <p>9 calls for a legal conclusion or</p> <p>10 privileged conversation. And I think</p> <p>11 that one does, John.</p> <p>12 A. Yeah, I can only answer that</p> <p>13 based on conversation with lawyers.</p> <p>14 Q. Wasn't the question whether --</p> <p>15 I'm sorry. Maybe I forgot my own</p> <p>16 question.</p> <p>17 But I thought it was based on</p> <p>18 your conversations with the Debtor's</p> <p>19 representative, was it your understanding,</p> <p>20 not based on your conversation with</p> <p>21 counsel.</p> <p>22 MS. WEISGERBER: Can you repeat</p> <p>23 the whole question because I</p> <p>24 definitely misunderstood it then too.</p> <p>25 Q. Okay. Based on your</p>	<p style="text-align: right;">Page 147</p> <p>1 Confidential - Pugatch</p> <p>2 conversations with the Debtor's</p> <p>3 representatives, was it your understanding</p> <p>4 that the consent of the portfolio manager</p> <p>5 was required for the shares to be</p> <p>6 transferred from the HarbourVest entities</p> <p>7 to the Debtor's affiliate under the terms</p> <p>8 of the Settlement Agreement?</p> <p>9 MS. WEISGERBER: Okay. Same</p> <p>10 objections. Also objection to the</p> <p>11 extent there is a common interest</p> <p>12 privilege.</p> <p>13 A. I don't recall having that</p> <p>14 explicit conversation with representative</p> <p>15 of the Debtor.</p> <p>16 MR. KANE: I'll pass the</p> <p>17 witness.</p> <p>18 Thank you, Mr. Pugatch.</p> <p>19 MR. MORRIS: Anybody else?</p> <p>20 Thank you, all.</p> <p>21 MS. WEISGERBER: Can we --</p> <p>22 before we break, could we have a</p> <p>23 two-minute break and then come back</p> <p>24 before we conclude.</p> <p>25 BY MS. WEISGERBER:</p>
<p style="text-align: right;">Page 148</p> <p>1 Confidential - Pugatch</p> <p>2 Q. Mr. Pugatch, during Mr. Wilson's</p> <p>3 questioning, I believe his last question</p> <p>4 related to identifying as between two</p> <p>5 choices the primary source or the cause of</p> <p>6 HarbourVest's damages.</p> <p>7 In your opinion, is -- are</p> <p>8 HarbourVest damages attributable to any</p> <p>9 one cause?</p> <p>10 A. No, I would say there were</p> <p>11 multiple root causes of the damages and</p> <p>12 diminution in value that was suffered in</p> <p>13 connection with the investment.</p> <p>14 MS. WEISGERBER: Okay. I don't</p> <p>15 have any further questions.</p> <p>16 MR. WILSON: I think I'd like to</p> <p>17 ask a couple more.</p> <p>18 BY MR. WILSON:</p> <p>19 Q. Mr. Pugatch, I think you</p> <p>20 testified earlier that the investment in</p> <p>21 HCLOF was comprised of multiple CLOs,</p> <p>22 correct?</p> <p>23 A. Correct.</p> <p>24 Q. And some of those CLOs were</p> <p>25 managed by Acis, to your understanding?</p>	<p style="text-align: right;">Page 149</p> <p>1 Confidential - Pugatch</p> <p>2 MS. WEISGERBER: Objection.</p> <p>3 A. Correct.</p> <p>4 MS. WEISGERBER: Just to</p> <p>5 clarify, John, is this within the</p> <p>6 scope of the questions I asked</p> <p>7 Mr. Pugatch?</p> <p>8 MR. WILSON: I believe it is.</p> <p>9 I'm going to be really short. But</p> <p>10 so --</p> <p>11 MS. WEISGERBER: I would like to</p> <p>12 have a standing objection to the</p> <p>13 extent it's not within the scope of</p> <p>14 the questions that was asked to</p> <p>15 Mr. Pugatch.</p> <p>16 BY MR. WILSON:</p> <p>17 Q. So some of those CLOs you</p> <p>18 contend are managed by Acis?</p> <p>19 MS. WEISGERBER: Objection to</p> <p>20 form.</p> <p>21 A. A majority.</p> <p>22 Q. And just generally, do you</p> <p>23 contend that Highland managed the balance</p> <p>24 of those CLOs?</p> <p>25 MR. MORRIS: Objection to the</p>

<p style="text-align: right;">Page 150</p> <p>1 Confidential - Pugatch</p> <p>2 form of the question.</p> <p>3 MS. WEISGERBER: Objection.</p> <p>4 Same objection.</p> <p>5 A. Yes.</p> <p>6 Q. Yes. Okay. Thank you.</p> <p>7 And I just had two more</p> <p>8 questions.</p> <p>9 So, if there was going to be a</p> <p>10 reset, that would have to be done at the</p> <p>11 CLO level, each CLO would have to be</p> <p>12 reset?</p> <p>13 MR. MORRIS: Objection.</p> <p>14 MS. WEISGERBER: Objection to</p> <p>15 form.</p> <p>16 A. That is correct.</p> <p>17 Q. And do you know of any specific</p> <p>18 CLO that requested a reset but was not</p> <p>19 granted a reset?</p> <p>20 MR. MORRIS: Objection to form.</p> <p>21 MS. WEISGERBER: Same objection.</p> <p>22 And foundation.</p> <p>23 A. When you say "CLOs who requested</p> <p>24 a reset," can be more clear, please?</p> <p>25 Q. We just talked about how this</p>	<p style="text-align: right;">Page 151</p> <p>1 Confidential - Pugatch</p> <p>2 investment is comprised of multiple CLOs</p> <p>3 and each one of those CLOs would have to</p> <p>4 be reset, according to its own terms, I</p> <p>5 guess. Do you know of any one of those</p> <p>6 CLOs that requested a reset?</p> <p>7 MR. MORRIS: Objection to the</p> <p>8 form of the question.</p> <p>9 MS. WEISGERBER: Same objection.</p> <p>10 A. I'm aware of Highland having in</p> <p>11 its capacity as manager of the HCLOF</p> <p>12 having requested or pursued resets of</p> <p>13 certain of the Acis HCLOs.</p> <p>14 Q. Your understanding is that</p> <p>15 Highland requested a reset of the Acis</p> <p>16 CLOs?</p> <p>17 MS. WEISGERBER: Objection to</p> <p>18 form.</p> <p>19 A. I'm sorry. I'm trying to</p> <p>20 understand what you said.</p> <p>21 MS. WEISGERBER: I'm really</p> <p>22 wondering how this relates at all to</p> <p>23 the scope of the questions I asked Mr.</p> <p>24 Pugatch on follow up.</p> <p>25 I think it's time to wrap this</p>
<p style="text-align: right;">Page 152</p> <p>1 Confidential - Pugatch</p> <p>2 up, John.</p> <p>3 MR. WILSON: This was my last</p> <p>4 question, I just need an answer to it.</p> <p>5 And I think he tried to answer, but I</p> <p>6 didn't understand what he said.</p> <p>7 MS. WEISGERBER: Objection. Can</p> <p>8 you re-ask the question so we have a</p> <p>9 clear question.</p> <p>10 MR. WILSON: Well, Madam Court</p> <p>11 Reporter, can you read back his last</p> <p>12 response?</p> <p>13 (Record read.)</p> <p>14 BY MR. WILSON:</p> <p>15 Q. Can you repeat what you intended</p> <p>16 to answer to the last question?</p> <p>17 MS. WEISGERBER: Same objection.</p> <p>18 If you recall, Mike.</p> <p>19 A. I'm sorry, John. Can you just</p> <p>20 repeat the question, please, make sure I'm</p> <p>21 answering what you want me to answer.</p> <p>22 Q. My question is the same as it's</p> <p>23 been: Are you aware of any CLO that</p> <p>24 requested a reset and was not granted one?</p> <p>25 MS. WEISGERBER: Objection to</p>	<p style="text-align: right;">Page 153</p> <p>1 Confidential - Pugatch</p> <p>2 form. Objection to foundation.</p> <p>3 MR. MORRIS: Objection to the</p> <p>4 form of the question.</p> <p>5 A. Again, my understanding is the</p> <p>6 CLOs do not request the reset. Highland,</p> <p>7 as manager of HCLOF in its capacity as</p> <p>8 majority equity owner of certain of the</p> <p>9 CLOs, have requested a reset post our</p> <p>10 original investment.</p> <p>11 Q. Okay.</p> <p>12 MR. WILSON: I'll pass the</p> <p>13 witness.</p> <p>14 MS. WEISGERBER: I think we're</p> <p>15 done.</p> <p>16 THE REPORTER: Will everyone put</p> <p>17 their orders on the record, please?</p> <p>18 MR. MORRIS: John Morris for the</p> <p>19 Debtor. Expedited, please.</p> <p>20 MR. WILSON: John Wilson. I'm</p> <p>21 not sure what arrangements my office</p> <p>22 has previously made, but we want an</p> <p>23 expedited transcript, as well.</p> <p>24 THE REPORTER: Do you want a</p> <p>25 rough too?</p>

<div style="text-align: right; font-weight: bold;">Page 154</div> <p>1 Confidential - Pugatch</p> <p>2 MR. WILSON: Yes, please.</p> <p>3 MR. MORRIS: Yes, please.</p> <p>4 MS. WEISGERBER: Same for</p> <p>5 HarbourVest, please.</p> <p>6 MR. MALONEY: I don't need an</p> <p>7 expedited transcript. I'd just be</p> <p>8 happy to get one regular copy. I'll</p> <p>9 take whatever you would produce in the</p> <p>10 ordinary course. Same as what</p> <p>11 everyone else ordered.</p> <p>12 (Time Noted: 4:35 p.m. EDT.)</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	<div style="text-align: right; font-weight: bold;">Page 155</div> <p>1</p> <p>2 ACKNOWLEDGEMENT OF DEPONENT</p> <p>3</p> <p>4 I, MICHAEL PUGATCH, do hereby</p> <p>5 acknowledge that I have read and</p> <p>6 examined the foregoing testimony, and</p> <p>7 the same is a true, correct and</p> <p>8 complete transcription of the</p> <p>9 testimony given by me, and any</p> <p>10 corrections appear on the attached</p> <p>11 Errata sheet signed by me.</p> <p>12</p> <p>13</p> <p>14 _____</p> <p>15 (DATE) (SIGNATURE)</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>																																																																
<div style="text-align: right; font-weight: bold;">Page 156</div> <p>1</p> <p>2 CERTIFICATE OF SHORTHAND REPORTER-NOTARY</p> <p>3 PUBLIC</p> <p>4 I, Amanda Gorrone, the officer</p> <p>5 before whom the foregoing deposition</p> <p>6 was taken, do hereby certify that the</p> <p>7 foregoing transcript is a true and</p> <p>8 correct record of the testimony given;</p> <p>9 that said testimony was taken by me</p> <p>10 stenographically and thereafter</p> <p>11 reduced to typewriting under my</p> <p>12 direction; and that I am neither</p> <p>13 counsel for, related to, nor employed</p> <p>14 by any of the parties to this case and</p> <p>15 have no interest, financial or</p> <p>16 otherwise, in its outcome.</p> <p>17 IN WITNESS WHEREOF, I have</p> <p>18 hereunto set my hand this 12th day of</p> <p>19 January, 2021.</p> <p>20</p> <p>21 _____</p> <p>22 AMANDA GORRONE, CLR</p> <p>23 CLR NO: 052005 - 01</p> <p>24 Notary Public in and for the State of New</p> <p>25 York</p> <p>County of Suffolk</p>	<div style="text-align: right; font-weight: bold;">Page 157</div> <p>1 ERRATA SHEET</p> <p>2 Case Name:</p> <p>3 Deposition Date:</p> <p>4 Deponent:</p> <table style="width: 100%; border-collapse: collapse;"> <tr> <th style="width: 5%;">5 Pg.</th> <th style="width: 15%;">No. Now Reads</th> <th style="width: 15%;">Should Read</th> <th style="width: 75%;">Reason</th> </tr> <tr><td>6</td><td>_____</td><td>_____</td><td>_____</td></tr> <tr><td>7</td><td>_____</td><td>_____</td><td>_____</td></tr> <tr><td>8</td><td>_____</td><td>_____</td><td>_____</td></tr> <tr><td>9</td><td>_____</td><td>_____</td><td>_____</td></tr> <tr><td>10</td><td>_____</td><td>_____</td><td>_____</td></tr> <tr><td>11</td><td>_____</td><td>_____</td><td>_____</td></tr> <tr><td>12</td><td>_____</td><td>_____</td><td>_____</td></tr> <tr><td>13</td><td>_____</td><td>_____</td><td>_____</td></tr> <tr><td>14</td><td>_____</td><td>_____</td><td>_____</td></tr> <tr><td>15</td><td>_____</td><td>_____</td><td>_____</td></tr> <tr><td>16</td><td>_____</td><td>_____</td><td>_____</td></tr> <tr><td>17</td><td>_____</td><td>_____</td><td>_____</td></tr> <tr><td>18</td><td>_____</td><td>_____</td><td>_____</td></tr> <tr><td>19</td><td>_____</td><td>_____</td><td>_____</td></tr> <tr><td>20</td><td>_____</td><td>_____</td><td>_____</td></tr> </table> <p>21 _____</p> <p style="text-align: center;">Signature of Deponent</p> <p>22 SUBSCRIBED AND SWORN BEFORE ME</p> <p>23 THIS ____ DAY OF _____, 20__.</p> <p>24 _____</p> <p>25 (Notary Public) MY COMMISSION EXPIRES: _____</p>	5 Pg.	No. Now Reads	Should Read	Reason	6	_____	_____	_____	7	_____	_____	_____	8	_____	_____	_____	9	_____	_____	_____	10	_____	_____	_____	11	_____	_____	_____	12	_____	_____	_____	13	_____	_____	_____	14	_____	_____	_____	15	_____	_____	_____	16	_____	_____	_____	17	_____	_____	_____	18	_____	_____	_____	19	_____	_____	_____	20	_____	_____	_____
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APPENDIX 8

1. If granted, the Motion will resolve a \$300 million general unsecured claim against the Debtor's estate for less than \$16.8 million in actual value.³ The settlement is another solid achievement for the Debtor and – not surprisingly – is opposed by no one except Mr. Dondero and entities affiliated with him.

2. As discussed in the Motion, in November 2017, HarbourVest invested \$80 million in exchange for a 49.98% membership interest in HCLOF – an entity managed by a subsidiary of the Debtor. The balance of HCLOF’s interests are held by CLO Holdco, Ltd. (an entity affiliated with Mr. Dondero), the Debtor, and certain of the Debtor’s employees. Subsequent to its investment in HCLOF, HarbourVest incurred substantial losses on its investment in HCLOF and filed claims against the Debtor’s estate.

3. HarbourVest asserts claims for fraud, fraudulent inducement, fraudulent concealment, fraudulent misrepresentation, negligent misrepresentation, breach of fiduciary duty

³ Under the proposed settlement, HarbourVest would receive an allowed, general unsecured claim of \$45 million and an allowed, subordinated claim of \$35 million. Based on the estimated recovery for general unsecured creditors of 87.44% (which is a recovery based on certain outdated assumptions discussed *infra*), HarbourVest's \$45 million general unsecured claim is estimated to be worth approximately \$39.3 million and the \$35 million subordinated claim, which is junior to the general unsecured claim, is currently estimated to have value only if there are litigation recoveries. In addition, HarbourVest is transferring to an affiliate of the Debtor its interest in HCLOF, which is estimated to be worth approximately \$22.5 million. Thus, HarbourVest's estimated recovery on its general unsecured and subordinated claims is estimated at approximately \$16.8 million on a net economic basis. This estimate, however, is dated and is based on the claims that were settled as of the filing of the Debtor's plan in November 2020.

and unfair prejudice (under Guernsey law), violations of state securities laws, and RICO. In furtherance of these claims, HarbourVest alleges it was misled by the Debtor and its employees, including Mr. Scott Ellington (then the Debtor's general counsel), and that subsequent to investing in HCLOF, Mr. Dondero and the Debtor used HCLOF both as a piggybank to fund the litigation against Acis Capital Management, L.P. ("Acis") and as a scapegoat for the Debtor's litigation strategy, in each case to HarbourVest's substantial detriment.

4. Specifically, HarbourVest alleges that:

- the Debtor and its employees, including Mr. Ellington, misled HarbourVest about its intentions with respect to Mr. Terry's arbitration award against Acis and orchestrated a series of fraudulent transfers and corporate restructurings, the true purpose of which was to denude Acis of assets and make it judgment proof;
- the Debtor and its employees, including Mr. Ellington, misled HarbourVest as to the intent and true purpose of these restructurings and led HarbourVest to believe that Mr. Terry's claims against Acis were meritless and a simple employment dispute that would not affect HarbourVest's investment;
- the Debtor, through Mr. Dondero, improperly exercised control over or misled HCLOF's Guernsey-based board of directors to cause HCLOF to engage in unnecessary, unwarranted, and resource-draining litigation against Acis;
- the Debtor improperly caused HCLOF to pay substantial legal fees of various entities in the Acis bankruptcy that were unwarranted, imprudent, and not properly chargeable to HCLOF; and
- the Debtor used HarbourVest as a scapegoat in its litigation against Acis by asserting that the Debtor's improper conduct and scorched-earth litigation strategy was at HarbourVest's request, which was untrue.

5. The Debtor believed, and continues to believe, that it has viable defenses to HarbourVest's claims. Nevertheless, those defenses would be subject to substantial factual disputes and would require expensive and time-consuming litigation that would likely be resolved only after a lengthy trial all while the Debtor (or its successor) assumes the risk that the defenses might fail. The evidence will show that the proposed settlement is the product of substantial, arm's length – and sometimes quite heated – negotiations between and among the

principals and their counsel. The evidence will also show that one of HarbourVest's primary concerns in settling its claim was that part of that settlement would include the extrication of HarbourVest from the Highland web of entities and the related litigation. The proposed settlement accomplishes that and does so in compliance with HCLOF's governing agreements.

6. Pursuant to the proposed settlement, (a) HarbourVest will receive (i) an allowed, general unsecured claim in the amount of \$45 million, and (ii) an allowed, subordinated claim in the amount of \$35 million; (b) HarbourVest will transfer its 49.98% interest in HCLOF (valued at approximately \$22.5 million) to a wholly-owned subsidiary of the Debtor; and (c) the parties will exchange mutual and general releases. The Debtor believes that the proposed settlement is reasonable and results from the valid and proper exercise of its business judgment. And the Debtor's creditors apparently agree. None of the major parties-in-interest or creditors in this case has objected to the Motion: not the Committee, the Redeemer Committee, Acis, Patrick Daugherty, or UBS.

7. In distinction, the only objecting parties are Mr. Dondero, his family trusts (the Dugaboy Investment Trust ("Dugaboy") and Get Good Trust ("Get Good," and together with Dugaboy, the "Trusts")), and CLO Holdco (a wholly-owned subsidiary of Mr. Dondero's Charitable Donor Advised Fund, L.P. (the "DAF")) (collectively, the "Objectors"). Each of the Objectors has only the most tenuous economic interest in and connection to the Debtor's settlement with HarbourVest. Each of the Objectors is also controlled directly or indirectly by Mr. Dondero who has coordinated each of the Objectors litigation strategies against the Debtor.⁴ Mr. Dondero's efforts to litigate every issue in this case – directly and by proxy – should be rebuffed, and the objections overruled. The following is a brief summary of the objections.

⁴ See *Debtor's Amended Witness and Exhibit List with Respect to Evidentiary Hearing to be Held on January 8, 2021* [Adv. Pro. 20-3190-sgj, Docket No. 46], Exhibit Q.

<u>Pleading</u>	<u>Objection/Reservation</u>	<u>Response</u>
<i>Objection of James Dondero</i> [Docket No. 1697] (the “ <u>Dondero Objection</u> ”)	Because HarbourVest was damaged by the injunction entered in Acis, the settlement seeks to revisit this Court’s rulings in Acis.	Mr. Dondero is misdirecting the Court. HarbourVest’s claim arises from the misrepresentations of Mr. Dondero, Mr. Ellington, and others, not this Court’s rulings in Acis, including the failure to disclose the fraudulent transfer of assets.
	The settlement is not fair and equitable because it does not address (1) Acis’s mismanagement, (2) how the Debtor is liable for HarbourVest’s damages, (3) the success on the merits, (4) the costs of litigation, and (5) the Debtor’s ability to realize the value of the HCLOF interests in light of the Acis injunction.	Mr. Dondero ignores the dangers of the litigation and HarbourVest’s claims against the estate for misrepresentation and overestimates the ability to resolve the litigation. The Debtor has assessed the value of the HCLOF interests in light of all factors, including the Acis injunction.
	The HarbourVest settlement represents a substantial windfall to HarbourVest.	Mr. Dondero ignores the economics of this case, which have value breaking in Class 8 (General Unsecured Claims). The value of the settlement is not \$60 million; it is approximately \$16.8 million against a claim of \$300 million. There is no windfall.
	The HarbourVest settlement is improper gerrymandering because it provides HarbourVest with a general unsecured claim and a subordinated claim in order to secure votes for the plan.	The HarbourVest settlement provides for the resolution of HarbourVest’s claim. It is nonsensical to think that the Debtor would reach a settlement with HarbourVest that would include HarbourVest’s rejection of the Debtor’s plan, and there is nothing wrong with requiring acceptance of a plan as part of a settlement. Further, the Debtor does not need HarbourVest’s Class 9 vote to confirm a plan.
<i>Objection of the Dugaboy Investment Trust and Get Good Trust</i> [Docket No. 1706] (the “ <u>Trusts Objection</u> ”)	The settlement represents a radical change in the Debtor’s earlier position on the HarbourVest settlement.	Mr. Dondero ignores the dangers of the litigation and HarbourVest’s claims against the estate for misrepresentation and overestimates the ability to resolve the litigation.
	The settlement appears to buy HarbourVest’s vote.	The HarbourVest settlement provides for the resolution of HarbourVest’s claim. It is nonsensical to think that the Debtor would reach a settlement with HarbourVest that would include HarbourVest’s rejection of the Debtor’s plan, and there is nothing wrong with requiring acceptance of a plan as part of a settlement. Further, the Debtor does not need HarbourVest’s Class 9 vote to confirm a plan.
	No information is provided as to whether the Debtor can acquire HarbourVest’s interest in HCLOF or the value of that interest to the estate.	As discussed below, the HCLOF interest will be transferred to a wholly-owned subsidiary of the Debtor. Mr. Seery will testify as to the benefit of the HCLOF interests to the estate.
<i>Objection of CLO Holdco</i> [Docket No. 1707] (“ <u>CLOH Objection</u> ”)	HarbourVest cannot transfer its interests in HCLOF unless it complies with the right of first refusal.	CLO Holdco misinterprets the operative agreements and tries to create ambiguity where none exists.

8. These objections are just the latest objections filed by Mr. Dondero and his related entities to any attempt by the Debtor to resolve this case,⁵ including the Debtor's settlement with Acis [Docket No. 1087] and the seven separate objections filed by Mr. Dondero and his related entities to the *Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.* [Docket No. 1472] (the "Plan").⁶ It will not shock this Court to hear that each of the Objectors is also objecting to the Plan. In contradistinction, the Debtor has heard this Court's admonishments about old Highland's culture of litigation as evidenced by this case, Acis's bankruptcy, and beyond. Although the Debtor has vigorously contested claims when appropriate, the Debtor has also sought to settle claims and limit the senseless fighting. The Debtor has successfully resolved the largest claims against the estate, including the claims of the Redeemer Committee, Acis, and, as recently announced to this Court, UBS. The Debtor would ask this Court to see through the pretense of the Dondero-related entities' objections to the HarbourVest settlement and approve it as a valid exercise of the Debtor's business judgment.

⁵ As an example of Mr. Dondero's litigiousness, on January 12, 2021, Mr. Dondero filed notice that he will be appealing the preliminary injunction entered against him earlier on January 12, 2021.

⁶ (1) *James Dondero's Objection to Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.* [Docket No. 1661]; (2) *Objection to Confirmation of the Debtor's Fifth Amended Plan of Reorganization* (filed by Get Good Trust, The Dugaboy Investment Trust) [Docket No. 1667]; (3) *Senior Employees' Limited Objection to Debtor's Fifth Amended Plan of Reorganization* (filed by Scott Ellington, Thomas Surgent, Frank Waterhouse, Isaac Leventon) [Docket No. 1669]; (4) *Objection to Confirmation of Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.* (filed by Highland Capital Management Fund Advisors, L.P., Highland Fixed Income Fund, Highland Funds I and its series, Highland Funds II and its series, Highland Global Allocation Fund, Highland Healthcare Opportunities Fund, Highland Income Fund, Highland Merger Arbitrage Fund, Highland Opportunistic Credit Fund, Highland Small-Cap Equity Fund, Highland Socially Responsible Equity Fund, Highland Total Return Fund, Highland/iBoxx Senior Loan ETF, NexPoint Advisors, L.P., NexPoint Capital, Inc., NexPoint Real Estate Strategies Fund, NexPoint Strategic Opportunities Fund) [Docket No. 1670]; (5) *NexPoint Real Estate Partners LLC's Objection to Debtor's Fifth Amended Plan of Reorganization* (filed by NexPoint Real Estate Partners LLC f/k/a HCRE Partners LLC) [Docket No. 1673]; (6) *CLO Holdco, Ltd.'s Joinder to Objection to Confirmation of Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. and Supplemental Objections to Plan Confirmation* [Docket No. 1675]; and (7) *NexBank's Objection to Debtor's Fifth Amended Plan of Reorganization* (filed by NexBank Title, Inc., NexBank Securities, Inc., NexBank Capital, Inc., and NexBank) [Docket No. 1676].

REPLY

A. Standing

9. **James Dondero.** In the Dondero Objection, Mr. Dondero asserts he is a “creditor, indirect equity security holder, and party in interest” in the Debtor’s bankruptcy. While that claim is ostensibly true, it is tenuous at best. On April 8, 2020, Mr. Dondero filed three unliquidated, contingent claims that he promised to update “in the next ninety days.”⁷ More than nine months later, Mr. Dondero has yet to “update” those claims to assert an actual claim against the Debtor’s estate.⁸

10. Mr. Dondero's claim as an "indirect equity security holder" is also a stretch. Mr. Dondero holds no direct equity interest in the Debtor. Mr. Dondero instead owns 100% of Strand Advisors, Inc. ("Strand"), the Debtor's general partner. Strand, however, holds only 0.25% of the total limited partnership interests in the Debtor through its ownership of Class A limited partnership interests. The Class A limited partnership interests are junior in priority of distribution to the Debtor's Class B and Class C limited partnership interests. The Class A interests are also junior to all other claims filed against the Debtor. Finally, Mr. Dondero's recovery on his indirect equity interest is junior to any claims against Strand itself. Consequently, before Mr. Dondero can recover on his "indirect" equity interest, the Debtor's estate must be solvent, priority distributions to Class B and Class C creditors must be satisfied, and all claims against Strand must be satisfied.

11. **Dugaboy and Get Good.** Dugaboy and Get Good are sham Dondero “trusts” with only the most attenuated standing. Dugaboy has filed three proofs of claim [Claim Nos. 113; 131; 177]. In two of these claims, Dugaboy argues that (1) the Debtor is liable to Dugaboy

⁷ Mr. Dondero filed two other proofs of claim that he has since withdrawn with prejudice. *See* Docket No. 1460.

⁸ Without knowing the nature of the “updates,” the Debtor does not concede that any “updates” would have been procedurally proper and reserves the right to object to any proposed amendment to Mr. Dondero’s claims.

for its postpetition mismanagement of the Highland Multi Strategy Credit Fund, L.P., and (2) this Court should pierce the corporate veil and allow Dugaboy to sue the Debtor for a claim it ostensibly has against the Highland Select Equity Master Fund, L.P. – a Debtor-managed investment vehicle. The Debtor believes that each of the foregoing claims is frivolous and has objected to them. [Docket No. 906].

12. In its third claim, Dugaboy asserts a claim against the Debtor arising from its Class A limited partnership interest in the Debtor (which represents just 0.1866% of the total limited partnership interests in the Debtor). Similarly, Get Good filed three proofs of claim [Claim Nos. 120; 128; 129] arising from its prior ownership of limited partnership interests in the Debtor. Because each these claims arises from an equity interest, the Debtor will seek to subordinate them under 11 U.S.C. § 510 at the appropriate time. As set forth above, these interests are out of the money and are not expected to receive any economic recovery.

13. Consequently, Mr. Dondero, Dugaboy, and Get Good’s standing to object to the HarbourVest settlement is attenuated and their chances of recovery in this case are extremely speculative at best. *See In re Kutner*, 3 B.R. 422, 425 (Bankr. N.D. Tex. 1980) (finding that a party had standing only when it had a “pecuniary interest . . . directly affected by the bankruptcy proceeding”); *see also In re Flintkote Co.*, 486 B.R. 99, 114-15 (Bankr. D. Del. 2012), *aff’d*, 526 B.R. 515 (D. Del. 2014) (a claim that is speculative cannot confer party in interest standing). Mr. Dondero, Dugaboy, and Get Good’s minimal interest in the estate should not allow them to overrule the estate’s business judgment or veto settlements with creditors, especially when no actual creditors and constituents have objected. “[A] bankruptcy judge must not blindly follow the hue and cry of the most vocal special interest groups; rather, [the judge] should consider all salient factors . . . and . . . act to further the diverse interests of the debtor, creditors and equity

holders, alike.” *In re Lionel*, 722 F.2d 1063, 1071 (2d Cir. 1983).

B. Mr. Dondero’s Objection and his “Trusts” Objection Are Without Merit

14. As discussed in the Motion, under applicable Fifth Circuit precedent, a bankruptcy court may approve a compromise or settlement as long as the proposed settlement is fair, reasonable, and in the best interest of the estate. *See, e.g., In re Age Ref. Inc.*, 801 F.3d 530, 540 (5th Cir. 2015). In making this determination, courts look to the following factors:

- probability of success in the litigation, with due consideration for the uncertainty of law and fact;
- complexity and likely duration of the litigation and any attendant expense, inconvenience and delay; and
- all other factors bearing on the wisdom of the compromise, including (i) “the paramount interest of creditors with proper deference to their reasonable views” and (ii) whether the settlement is the product of arm’s length bargaining and not of fraud or collusion.

Official Comm. of Unsecured Creditors v. Cajun Elec. Power Coop. (In re Cajun Elec. Power Coop.), 119 F.3d 349, 356 (5th Cir. 1997) (citations omitted). *See also Age Ref. Inc.*, 801 F.3d at 540; *Conn. Gen. Life Ins. Co. v. United Cos. Fin. Corp. (In re Foster Mortgage Corp.)*, 68 F.3d 914, 918 (5th Cir. 1995).

15. **The Settlement Seeks to Revisit the Acis Orders.** In the Dondero Objection, Mr. Dondero argues that HarbourVest’s claim is based on the financial harm caused to HarbourVest from Acis’s bankruptcy and the orders entered in the Acis bankruptcy. Mr. Dondero extrapolates from this that HarbourVest is seeking to challenge this Court’s rulings in Acis. (Dondero Obj., ¶¶ 17-20) Mr. Dondero misinterprets HarbourVest’s claims and the dangers such claims pose to the Debtor’s estate.

16. HarbourVest’s claims are for fraud, fraudulent inducement, fraudulent concealment, fraudulent misrepresentation, negligent misrepresentation, breach of fiduciary duty

17. Again, HarbourVest does not contend that Acis caused its damages. Rather, HarbourVest contends that the fraudulent transfer of assets as part of the Debtor's crusade against Mr. Terry and Acis and the false statements and omissions about those matters caused HarbourVest to make an investment it would never have made had Mr. Dondero and the Debtor been honest and transparent. The Acis litigation – in HarbourVest's estimation – never should have happened. Acis did not cause HarbourVest's damages. Mr. Dondero's crusade against Mr. Terry and the Debtor's allegedly fraudulent statements to HarbourVest about the fraudulent transfers, Mr. Terry and Acis caused HarbourVest's damages.

10

posed by HarbourVest's claims. (Dondero Obj., ¶¶ 21-25; Trusts Obj., ¶ 18(a))

19. Both the Dondero Objection and – to a much lesser extent - the “Trusts” Objection allege that (a) HarbourVest's losses were caused by Acis and its (mis)management of HCLOF's investments (Dondero Obj., ¶¶ 22, 24), (b) there is no contract that supports HarbourVest's claims (Dondero Obj. ¶ 23; Trusts Obj., ¶ 18(a)), (c) there is no causal connection between HarbourVest's losses and the Debtor's conduct (Dondero Obj., ¶ 24), and (d) the Debtor should litigate all or a portion of HarbourVest's claim before settling (Dondero Obj., ¶ 25). Again, though, as set forth above, both Mr. Dondero and the “Trusts” seek to shift the cause of HarbourVest's damages away from the Debtor's misrepresentations and to Mr. Terry's management of HCLOF's investments. This is simple misdirection.

20. HarbourVest's claims are that it invested in HCLOF based on the Debtor's fraudulent misrepresentations. Fraudulent misrepresentation sounds in tort, not contract. *See, e.g., Clark v. Constellation Brands, Inc.*, 348 Fed. Appx. 19, 21 (5th Cir. 2009) (referring to party's claim based on fraudulent misrepresentation as a tort); *Eastman Chem. Co. v. Niro, Inc.*, 80 F. Supp. 2d 712, 717 (S.D. Tex. 2000) (noting that party had common law duty not to commit intentional tort of fraudulent misrepresentation). There is thus no need for HarbourVest to point to a contractual provision to support its claim.⁹ Moreover, in order to defend against HarbourVest's claims, the Debtor would need to elicit evidence showing that its employees did not make misrepresentations to HarbourVest. Such a defense would require the Debtor to rely on the veracity of Mr. Ellington's testimony, among others. That is a high hurdle, and no reasonable person would expect the Debtor to stake the resolution of HarbourVest's \$300 million claim on the Debtor's ability to convince this Court that Mr. Ellington was telling HarbourVest

⁹ Subsequent to filing the Motion, the Objectors requested all agreements between HarbourVest, HCLOF, and the Debtor, and such agreements were provided.

the truth. This is especially true in light of the evidence supporting Mr. Ellington's recent termination for cause and the evidence recently provided by HarbourVest supporting its claim for fraudulent misrepresentations.

21. Finally, neither Mr. Dondero nor the "Trusts" even address the third factor analyzed by the Fifth Circuit: all other factors bearing on the wisdom of the compromise, including "the paramount interest of creditors with proper deference to their reasonable views." This is telling because no creditor or party in interest has objected to the settlement. Mr. Dondero and his proxies' preference for constant litigation should not outweigh the preference of the Debtor and its creditors for a reasonable and expeditious settlement of HarbourVest's claims.

22. **The HarbourVest Settlement Is a Windfall to HarbourVest.** Both the Dondero Objection and the "Trusts" Objection argue that the HarbourVest settlement represents a substantial windfall to HarbourVest. Both Mr. Dondero and the "Trusts" ignore the facts. Specifically, Mr. Dondero argues that HarbourVest is receiving \$60 million dollars in *actual* value for its claims. Mr. Dondero's contention, however, wrongly assumes that both the \$45 million general unsecured claim and the \$35 million subordinated claim provided to HarbourVest under the settlement will be paid 100% in full and that HarbourVest will receive \$80 million in cash. From that \$80 million, Mr. Dondero subtracts \$20 million, which represents the value Mr. Dondero ascribes to HarbourVest's interests in HCLOF that are being transferred to the Debtor. Mr. Dondero's math ignores the reality of this case.

23. The Debtor very clearly disclosed in the projections filed with the *Disclosure Statement for the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.*, [Docket No. 1473] (the "Projections") that general unsecured claims would receive an 87.44% recovery *only if* the claims of UBS, HarbourVest, Integrated Financial Associates, Inc., Mr.

Daugherty, and the Hunter Mountain Investment Trust were zero. Because of the Debtor's success in settling litigation, that assumption is proving to be inaccurate. Regardless, even if general unsecured claims receive a recovery of 87.44%, because the subordinated claims are junior to the general unsecured claims, the subordinated claims' projected recovery is currently zero. As such, assuming the HCLOF's interests are worth \$22.5 million,¹⁰ the actual recovery to HarbourVest will be less than \$16.8 million. This is not a windfall. HarbourVest's investment in HCLOF was \$80 million and its claim against the estate was over \$300 million. The settlement represents a substantial discount.

24. **Improper Gerrymandering and/or Vote Buying.** Each of Mr. Dondero and the Trusts argue in one form or another that the HarbourVest settlement is improper as it provides HarbourVest a windfall on its claims in exchange for HarbourVest voting to approve the Plan. These unsubstantiated allegations of vote buying should be disregarded. As an initial matter, and as set forth above, HarbourVest is *not* getting a windfall. HarbourVest is accepting a substantial discount in the settlement. HarbourVest's incentive to support the Plan comes from HarbourVest's determination that the Plan is in its best interests. There is also nothing shocking about a settling creditor supporting a plan. Indeed, it would be nonsensical for a creditor to settle its claims and then object to the plan that would pay those claims.

25. More importantly, HarbourVest's votes in Class 9 (Subordinated Claims) are not needed to confirm the Plan. As will be set forth in the voting declaration, Class 2 (Frontier Secured Claim), Class 7 (Convenience Claims), and Class 8 (General Unsecured Claims) have voted in favor of the Plan.¹¹ In brief, the Plan was approved without HarbourVest's Class 9 vote,

¹⁰ It is currently anticipated that Mr. James P. Seery, Jr., the Debtor's chief executive officer and chief restructuring officer, will testify as to the value of the HCLOF interests to the Debtor's estate.

¹¹ The Debtor anticipates that Mr. Dondero and his related entities will argue that neither Class 7 nor Class 8 voted to accept the Plan because of the votes cast against the Plan in those Classes by current and former Debtor

of Shares) of the Members Agreement (an agreement governed by Guernsey law). (CLOH Obj., ¶ 3) The parties diverge, however, as to how to interpret Article 6. The Debtor, as set forth below, believes Article 6 is clear in that it allows HarbourVest to transfer its interests in HCLOF to any “Affiliate of an initial Member party” without requiring the right of first refusal in Section 6.2 of the Members Agreement. CLO Holdco’s position appears to be that the Members Agreement, despite its clear language, should be interpreted as limiting transfers to an “initial Member’s *own* affiliates” and that any other transfer requires the consent of HHCFA and satisfaction of the right of first refusal. (*Id.* (emphasis added)) CLO Holdco’s reading is contrary to the actual language of the Members Agreement.

29. First, Section 6.1 of the Members Agreement provides, in pertinent part:

[REDACTED]

(Members Agmt, § 6.1 (emphasis added)) Under the Members Agreement, “Affiliate” is defined, in pertinent part, as “[REDACTED]

[REDACTED]

(*Id.*, § 1.1) A “Member” in turn is a [REDACTED].” The “initial Member[s]” are the initial Members of HCLOF listed on the first page of the Members Agreement and include the Debtor, HarbourVest, and CLO Holdco.

30. As such, under the plain language of Section 6.1, HarbourVest is entitled – without the consent of any party – to “Transfer” its interests in HCLOF to an “Affiliate” of any of the Debtor, HarbourVest, or CLO Holdco. And that is exactly what is contemplated by the settlement. HarbourVest is transferring its interests to HCMLPI, a wholly owned and controlled subsidiary of the Debtor, and therefore an “Affiliate” of the Debtor. That transfer is indisputably

allowed under Section 6.1; it is a transfer to an “Affiliate of an initial Member.” CLO Holdco may, tongue in cheek, call this structure “convenient” but that sarcasm is an attempt to avoid the fact that the Members Agreement clearly allows HarbourVest to transfer its interest to HCMLPI without the consent of any party.¹³ The fact that CLO Holdco does not now like the language it previously agreed to when CLO Holdco and the Debtor were both controlled by Mr. Dondero is not a reason to re-write Section 6.1 of the Members Agreement.

31. Second, Section 6.2 of the Members Agreement is also unambiguous and, by its plain language, allows HarbourVest to “Transfer” its interests in HCLOF to “Affiliates of an initial Member” (*i.e.*, HCMLPI) without having to first offer those interests to the other Members (such obligation, the “ROFO”). CLO Holdco attempts to create ambiguity in Section 6.2 by arguing that it must be read in conjunction with Section 6.1 and that interpreting the plain language of Section 6.2 to allow HarbourVest to transfer its interests to HCMLPI without restriction makes certain other language surplus and meaningless. (CLOH Obj., ¶ 11-13) Again, CLO Holdco is attempting to create controversy and ambiguity where none exists.

32. Section 6.2 of the Members Agreement provides, in pertinent part:

[REDACTED]

(Members Agmt., § 6.2 (emphasis added)) Like Section 6.1, Section 6.2 is clear on its face. It exempts from the requirement to comply with the ROFO two categories of “Transfers”: (1) Transfers to “affiliates of an initial Member” from Members *other than* CLO Holdco and the

¹³ Although HHCFA’s consent is not necessary for HarbourVest to transfer its interests to HCMLPI, HHCFA will consent to the transfer.

14 “Highland Principals” means: [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] (Members Agmt., § 1.1)

001411

of the Dondero-family's majority (approximately 0.2%). At the time the Members Agreement was executed, CLO Holdco and the Debtor were under common control. Section 6.2 preserves those related entities' control over HCLOF by restricting transactions that would transfer that control unless the ROFO is complied with.

34. As such, and notwithstanding CLO Holdco's protestations, Section 6.1 and Section 6.2 are consistent as written and clear on their face. This consistency is further evidenced by HCLOF's Articles of Incorporation¹⁶ and HCLOF's offering memorandum, which each include language identical to Section 6.1 and 6.2 of the Members Agreement.¹⁷ It seems highly unlikely, if not implausible, that sophisticated parties such as CLO Holdco would include the exact same language in six separate places over three documents without a reason for that language and without the intent that such language be interpreted as it is clearly written – not as CLO Holdco now wants it to be interpreted. Accordingly, since HarbourVest is transferring its interests to HCMLPI, an Affiliate of an initial Member, the plain language of Section 6.2

¹⁶ See Articles of Incorporation, adopted November 15, 2017, a true and correct copy of which is attached hereto as Exhibit B.

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
(Articles of Incorporation, § 18.1)

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
(*Id.*, § 18.2)

¹⁷ See Offering Memorandum, dated November 15, 2017, a true and correct copy of which is attached hereto as Exhibit C.

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
(Offering Memorandum, page 89)

exempts HarbourVest from having to comply with the ROFO.

35. Third, and finally, CLO Holdco makes the nonsensical argument that because Section 6.2 provides different treatment to similarly situated Members that this Court should re-write Section 6.2. (CLOH Obj., ¶¶ 15-17) Contracts provide different treatment to ostensibly similarly situated parties all the time and no one objects that that creates an absurd result. It just means that different parties bargained for and received different rights.

36. CLO Holdco's attempt to justify why this Court should re-write the Members Agreement to correct the "disparate treatment" is also unavailing. As an example of the absurd result caused by the "disparate treatment," CLO Holdco states: "[B]ecause the HarbourVest Members are technically Affiliates of an initial member (each other), they could obtain control of all of the interests in HCLOF without any Member receiving a Right of First Refusal for any transfer." (*Id.*, ¶ 16) The scenario posited by CLO Holdco, however, is *exactly* the scenario prevented by the clear language of Section 6.2. For HarbourVest to obtain control of HCLOF, it would – as a matter of mathematical necessity – need the interests held by CLO Holdco (49.02%) and/or the Highland Principals (1% in the aggregate). Section 6.2, however, *expressly* prohibits CLO Holdco and the Highland Principals from transferring their interests to HarbourVest or its Affiliates without satisfying the ROFO. As set forth above, it is Section 6.2 that prevents control from being transferred away from the Dondero family without compliance with the ROFO. In fact, Section 6.2 would only break down if the limiting language in Section 6.2 were read out of it in the manner advocated by CLO Holdco.

37. Ultimately, Article 6 of the Members Agreement is clear as written and expressly allows HarbourVest to transfer its interests to HCMLPI. If CLO Holdco had an objection to the rights provided to HarbourVest under the Members Agreement, CLO Holdco

should have raised that objection three and a half years ago before agreeing to the Members Agreement. CLO Holdco should not be allowed to create ambiguity in an unambiguous contract or to re-write that agreement to impose additional restrictions on HarbourVest. *See Clardy Mfg. Co. v. Marine Midland Bus. Loans Inc.*, 88 F.3d 347, 352 (5th Cir. 1996) (enforcing the “unambiguous language in a contract as written,” noting that where a contract is unambiguous, a party may not create ambiguity or “give the contract a meaning different from that which its language imports”) (internal quotations omitted); *Texas v. Am. Tobacco Co.*, 463 F.3d 399, 407 (5th Cir. 2006) (“Courts interpreting unambiguous contracts are confined to the four corners of the document, and cannot look to extrinsic evidence to create an ambiguity.”).

38. It should go without saying, but CLO Holdco (and the other parties to the Members Agreement) should also be required to satisfy their obligations under the Members Agreement and execute the “Adherence Agreement” as required by Section 6.6 of the Members Agreement in connection with the Transfer of HarbourVest’s interests to HCMLPI or any other permitted Transfer.

39. Finally, and notably, although CLO Holdco spends considerable time arguing that HarbourVest should be required to comply with the ROFO, nowhere in the CLOH Objection does CLO Holdco state that it wishes to purchase HarbourVest’s interests in HCLOF. This omission is telling. CLO Holdco and the other Objectors have no interest in actually exercising their alleged right of first refusal contained in the Members Agreement. Rather, their only interest is in causing the Debtor to spend time and money responding to a legion of related (and coordinated) objections.¹⁸

¹⁸ See *Debtor’s Amended Witness and Exhibit List with Respect to Evidentiary Hearing to be Held on January 8, 2021* [Adv. Pro. 20-3190-sgj, Docket No. 46], Exhibit Q; Exhibit T (email from Mr. Dondero as forwarded to Mr. Ellington stating “Holy bananas..... make sure we object [to the HarbourVest Settlement]”); Exhibit Y.

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APPENDIX 9

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

In Re:) **Case No. 19-34054-sgj-11**
) Chapter 11
)
HIGHLAND CAPITAL) Dallas, Texas
MANAGEMENT, L.P.,) Thursday, January 14, 2021
) 9:30 a.m. Docket
Debtor.)
) - MOTION TO PREPAY LOAN
) [1590]
) - MOTION TO COMPROMISE
) CONTROVERSY [1625]
) - MOTION TO ALLOW CLAIMS OF
) HARBOURVEST [1207]
)
_____)

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE STACEY G.C. JERNIGAN,
UNITED STATES BANKRUPTCY JUDGE.

WEBEX APPEARANCES:

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25 Proceedings recorded by electronic sound recording;
transcript produced by transcription service.

1 DALLAS, TEXAS - JANUARY 14, 2021 - 9:41 A.M.

2 THE CLERK: All rise. The United States Bankruptcy
3 Court for the Northern District of Texas, Dallas Division, is
4 now in session, the Honorable Stacey Jernigan presiding.

5 THE COURT: Good morning. Please be seated. All
6 right. We're a little late getting started because we had
7 lots of reading material for the Court today. All right.
8 This is Judge Jernigan, and we have a couple of Highland
9 settings. The HarbourVest matters are the primary thing we
10 have set today, and then we also have a Debtor's motion
11 pursuant to protocols for authority for Highland Multi-Strat
12 to prepay a loan.

13 All right. Well, let's get a few appearances. First, for
14 the Debtor team, who do we have appearing this morning?

15 MR. POMERANTZ: Good morning, Your Honor. It's Jeff
16 Pomerantz, John Morris, and Greg Demo here on behalf of the
17 Debtor.

18 THE COURT: Okay. Thank you.

19 All right. We have objections on HarbourVest. Who do we
20 have appearing for Mr. Dondero this morning?

21 MR. WILSON: Your Honor, it's John Wilson, and I'm
22 also joined by Michael Lynn, John Bonds, and Bryan Assink.

23 THE COURT: Okay. I'm sorry. Could -- the court
24 reporter does yeoman's work in this case. Let me just make
25 sure we got all three of those names. Say again, Mr. Wilson.

1 MR. WILSON: John Bonds and Michael Lynn and Bryan
2 Assink.

3 THE COURT: Oh, okay. So, see, I thought I heard
4 somebody Wilson in all of that, which was why I was pressing
5 the issue.

6 All right. Is Mr. Dondero present on the video for
7 today's hearing?

8 MR. WILSON: I believe he is, Your Honor.

9 THE COURT: Mr. Dondero, could you confirm that you
10 are out there? (No response.) Okay. My court reporter says
11 he sees the name out there. Is he in your office?

12 MR. WILSON: Your Honor, he is appearing remotely
13 from my office. I'm not sure exactly where he's appearing
14 from.

15 THE COURT: Okay. Well, Mr. Dondero, if you're out
16 there and you're speaking up to confirm you're present, we're
17 not hearing you. Maybe your device is on mute. So please
18 unmute yourself.

19 (No response.)

20 THE COURT: All right. I'm going to take some other
21 appearances and you -- you need to try to communicate with
22 your client and let him know I need to confirm he's present.
23 Okay?

24 All right. Meanwhile, let's go to our other Objectors.
25 CLO Holdco. Who do we have appearing today?

1 MR. KANE: John Kane; Kane Russell Coleman & Logan;
2 on behalf of CLO Holdco.

3 THE COURT: All right. Thank you, Mr. Kane.

4 We had an objection from Dugaboy Investment Trust and Get
5 Good Trust. Who do we have appearing?

6 MR. DRAPER: Douglas Draper, Your Honor, for -- for
7 Draper.

8 THE COURT: All right. Thank you, Mr. Draper.

9 All right. I think those were the only written objections
10 we had. Mr. Pomerantz, do you confirm, we don't have any
11 other objectors for the motions set, correct?

12 MR. POMERANTZ: Your Honor, there was those three.

13 THE COURT: I'm sorry. I didn't catch your full
14 sentence.

15 MR. POMERANTZ: That is correct, Your Honor. There
16 were three objections to the motion.

17 THE COURT: Okay. Mr. Clemente, you're there for the
18 Creditors' Committee?

19 MR. CLEMENTE: Yes. Good morning, Your Honor. Matt
20 Clemente on behalf of the Official Committee of Unsecured
21 Creditors.

22 THE COURT: All right. Good morning. Thank you.
23 All right. We have a lot of other folks on the video. I'm
24 not going to go ahead and take a roll call of other lawyers.

25 MS. WEISGERBER: Your Honor?

1 THE COURT: Yes?

2 MS. WEISGERBER: Excuse me, Your Honor. It's Erica
3 Weisgerber from Debevoise on behalf of HarbourVest.

4 THE COURT: Okay.

5 MS. WEISGERBER: And I'm joined by Natasha Labovitz
6 and Dan Stroik --

7 THE COURT: Okay.

8 MS. WEISGERBER: -- from Debevoise as well.

9 THE COURT: Thank you. I was neglectful in not
10 getting your appearance, because, of course, you're at the
11 front and center of this motion to compromise, and I did see
12 that you filed a reply brief yesterday afternoon. Okay.
13 Thank you.

14 All right. Do we have -- do we have Mr. Dondero on the
15 line? I'm going to check again.

16 (No response.)

17 THE COURT: Mr. Dondero's counsel, I cannot hear you,
18 so please unmute your device.

19 MR. WILSON: Your Honor, it appears to me that Mr.
20 Dondero's device was unmuted as soon as you asked if he was
21 available. I sent him a communication a second ago asking if
22 he's having technical difficulties. I have not received a
23 response, so I --

24 MR. DONDERO: Hello. Can anybody hear me?

25 THE COURT: Oh.

1 MR. WILSON: Okay. I hear him.

2 THE COURT: Mr. Dondero?

3 MR. DONDERO: Hello?

4 THE COURT: Is that you?

5 MR. DONDERO: Yeah, it is. I've been on. I've heard
6 everything since the beginning. It's just we've had technical
7 difficulties. I couldn't use the Highland offices. We've
8 been trying to set up something else.

9 THE COURT: All right.

10 MR. DONDERO: But I'm on now, if -- yes.

11 THE COURT: All right. Very good. Well, I'm glad
12 we've got you.

13 All right. Well, Mr. Pomerantz, how did you want to
14 proceed this morning?

15 MR. POMERANTZ: Your Honor, we could take up the
16 HarbourVest motion first, and I will turn it over to John
17 Morris. He and Greg Demo will be handling that. And then
18 after that we can handle the other motion, which is unopposed.

19 THE COURT: All right. Mr. Morris?

20 MR. KANE: Your Honor, this is -- sorry. This is
21 John Kane for CLO Holdco. Just very briefly, if I may. And
22 this will affect, I think, the Debtor's case in chief, so I'll
23 expedite things a little bit, I believe.

24 CLO Holdco has had an opportunity to review the reply
25 briefing, and after doing so has gone back and scrubbed the

1 HCLOF corporate documents. Based on our analysis of Guernsey
2 law and some of the arguments of counsel in those pleadings
3 and our review of the appropriate documents, I obtained
4 authority from my client, Grant Scott, as Trustee for CLO
5 Holdco, to withdraw the CLO Holdco objection based on the
6 interpretation of the member agreement.

7 THE COURT: All right. Well, thank you for that, Mr.
8 Kane. I think that -- that eliminates one of the major
9 arguments that we had anticipated this morning. So, thank you
10 for that.

11 Any other housekeeping matters that maybe someone had that
12 I didn't ask about?

13 MS. MATSUMURA: Yes, Your Honor. This is Rebecca
14 Matsumura from King & Spalding representing Highland CLO
15 Funding, Ltd. I just wanted to put on the record, we -- our
16 client had requested that some of its organizational documents
17 be filed under seal. But we have given permission for the
18 parties to present the relevant excerpts, to the extent it's
19 still relevant after Mr. Kane's announcement, in court. And
20 we'd just ask that the underlying documents remain sealed, but
21 we're not going to object if they show them on a PowerPoint or
22 anything like that.

23 So, to the extent that you had that on your radar, I just
24 wanted to clear that up for the proceedings.

25 THE COURT: All right. Well, I did sign an order

1 late last night. I don't know if it's popped up on the
2 docket.

3 MS. MATSUMURA: Yes, Your Honor. That's what this
4 referred to. That was what -- these are the documents that
5 were being sealed. And so I just wanted to note, if you --
6 you know, if the Debtor puts up an excerpt of those documents
7 and you're like, wait a minute, didn't I seal those, that we
8 were the party that requested them be under seal and we're
9 fine with them being shown in court, as long as the underlying
10 documents aren't publicly accessible.

11 THE COURT: Okay. Got you. Thank you.

12 All right. Any other housekeeping matters?

13 MR. MORRIS: Yes, Your Honor. This is John Morris
14 from Pachulski Stang for the Debtor. Good morning.

15 THE COURT: Good morning.

16 MR. MORRIS: The only other matter that I wanted to
17 raise, and I can do it now or I can do it later, or Your Honor
18 may tell me that it's not appropriate to do at this time, is
19 to schedule the Debtor's motion to hold Mr. Dondero in
20 contempt for violation of the TRO.

21 THE COURT: All right. Well, let's do that at the
22 conclusion today. And please make sure I do it. I think I
23 was going to address this last Friday, and we went very late
24 and it slipped off my radar screen. But I did see from my
25 courtroom deputy that you all were reaching out to her

1 yesterday to get this set, and then Mr. Dondero's counsel
2 reached out to her and said, We're going to file an objection
3 to a setting next Wednesday, or I think you had asked for a
4 setting next Tuesday or Wednesday.

5 MR. MORRIS: I did.

6 THE COURT: And I don't -- I don't know if that
7 response/objection was ever filed last night. I haven't seen
8 it if it was. So, we'll -- please, make sure I don't forget.
9 We'll take that up at the end of today's matters. All right.
10 Well, --

11 MR. MORRIS: All right. So, --

12 MS. WEISGERBER: Your Honor, one last housekeeping
13 item from -- I'm joined this morning by Michael Pugatch of
14 HarbourVest, who will present some testimony this morning. I
15 just want to confirm he's on the line and confirm no
16 objections to him sitting in for the rest of the hearing.

17 THE COURT: All right. Mr. Pugatch, this is Judge
18 Jernigan. Could you respond? Are you there with us?

19 MR. PUGATCH: Yes. Good morning, Your Honor. Mike
20 Pugatch from HarbourVest here.

21 THE COURT: All right. Very good. I think we had
22 you testify once before in the Acis matter, if I'm not
23 mistaken. Maybe. Maybe not. Maybe I saw a video deposition.
24 I can't remember.

25 All right. So, we're going to let Mr. Pugatch sit in on

1 this. Anyone want to say anything about that? I consider him
2 a party representative, so I don't -- I don't think anyone
3 could invoke the Rule.

4 All right. Very good. Well, let's go forward if there
5 are no more housekeeping matters.

6 MR. MORRIS: Okay.

7 THE COURT: Mr. Morris?

8 MR. MORRIS: Thank you. Thank you very much, Your
9 Honor. John Morris; Pachulski Stang Ziehl & Jones; for the
10 Debtor.

11 It's a rather straightforward motion today. It's a motion
12 under Rule 9019, pursuant to which the Debtor requests the
13 Court's authority and approval to enter into a settlement
14 agreement with HarbourVest that will resolve a number of
15 claims that HarbourVest has filed against the Debtor.

16 What I -- the way I propose to proceed this morning, Your
17 Honor, is to give what I hope is an informative but relatively
18 brief opening statement. I'll defer to HarbourVest and its
19 counsel as to whether they want to make a presentation in
20 advance of the offer of evidence. Any objecting party, I
21 suppose, should then be given the opportunity to present their
22 case to the Court. Then the Debtor will call Jim Seery, the
23 Debtor's CEO and CRO. We will offer documents into evidence.
24 I would propose then that the objecting parties take the
25 opportunity to ask Mr. Seery any questions they'd like on the

1 matter.

2 After the Debtor rests, I think HarbourVest would like to
3 put Mr. Pugatch on the stand to offer some testimony on their
4 behalf. And I think that that will conclude the case. We can
5 finish up with some closing arguments as to what we believe
6 the evidence showed, but that's the way that I'd like to
7 proceed, if that's okay with the Court.

8 THE COURT: All right. That sounds fine.

9 OPENING STATEMENT ON BEHALF OF THE DEBTOR

10 MR. MORRIS: Okay. So, as I said, Your Honor, this
11 is a -- this should be a very straightforward motion under
12 Rule 9019. The standard is well-known to the Court. There
13 are four elements to a 9019 motion. The Debtor clearly has
14 the burden of proof on each one. And we easily meet that
15 burden, Your Honor.

16 The standard, just to be clear, the first part is that we
17 have to establish a probability of success, with due
18 consideration for uncertainty of law and fact. The second one
19 is the complexity, likely duration, expense and inconvenience
20 of the litigation. The third part of the test is the
21 paramount interest of creditors. And the fourth part of the
22 test is whether or not the proposed settlement was reached
23 after arm's-length negotiations.

24 The Debtor believes that it easily meets this standard,
25 and frankly, is a little bit frustrated that it's being forced

1 to incur the expense by Mr. Dondero in going through this
2 process.

3 A plain reading, a fair reading of the economics here
4 relative to the claim shows that this is a very reasonable
5 settlement. I don't need to go beyond that, Your Honor. I
6 don't even need to use the word reasonable. It surely meets
7 the lowest standard.

8 We've prepared a couple of demonstrative exhibits, Your
9 Honor. I'm going to use them with Mr. Seery. But I'd like to
10 just put one up on the screen now, if I may.

11 Ms. Canty, can you please put up Demonstrative Exhibit #3?

12 Demonstrative Exhibit #3 is an outline of the economics of
13 the settlement. It includes the various pieces, the
14 components that the parties have agreed to. And it shows, at
15 least from the Debtor's perspective, just what HarbourVest is
16 being given here.

17 Up on the screen is a demonstrative exhibit. It has
18 citations to the evidence that will be admitted by the Court.
19 The first line shows that HarbourVest will receive a \$45
20 million allowed general unsecured nonpriority claim. And that
21 -- that can be found at Debtor's Exhibit EE, Exhibit 1, at
22 Page 2.

23 That claim is discounted by the expected recovery that
24 general unsecured creditors are supposed to get. As of
25 November, in the liquidation analysis that was part of the

1 disclosure statement -- that's the citation in the footnote --
2 the Debtor believed that unsecured creditors were estimated to
3 recover approximately eighty-seven and a half cents on the
4 dollar. And so we just did the arithmetic there to get to the
5 net economic value of the proposed general unsecured claim.

6 And from that, we reduced \$22-1/2 million because that is
7 the net asset value of HarbourVest's interest in HCLOF, which,
8 pursuant to the settlement agreement, it will transfer back to
9 the Debtor, so that the net economic value is approximately
10 \$16.8 million.

11 You will hear testimony from Mr. Seery that this number
12 is, in fact, overstated, and it's overstated because, since
13 the time the disclosure statement was filed in November, a
14 number of events have occurred that will -- that have caused
15 the estimated recovery percentage to be reduced from
16 approximately 87-1/2 percent to something lower than that. We
17 don't have the exact number, Your Honor, but Mr. Seery will --
18 and the evidence will show that there's been more expenses,
19 that there's been some resolution of certain claims. There's
20 been some positive issues, too. But that number is probably
21 in the 70s somewhere.

22 And in any event, I think the point here is, Your Honor,
23 HarbourVest invested \$80 million in HCLOF, which was going to
24 participate in the investment in CLOs. They filed a claim for
25 \$300 million, through treble damages and other claims. But

1 the net economic impact of this is going to be somewhere
2 probably in between \$12 and \$14 million. I'll let Mr. Seery
3 give more precision to that. And it represents less than -- a
4 less than five percent recovery on the total claim.

5 And we think it's important for the Court to keep that in
6 mind. What are the economics here? Are we overpaying? Is
7 this an unreasonable settlement? And I think the evidence
8 will show that the Debtor is not, but that this settlement
9 that you see before you was the product of arm's length, and
10 I'm going to go in reverse order of the four-part test under
11 9019.

12 So, the last part is whether or not the settlement, the
13 proposed settlement was the product of arm's-length
14 negotiation. You'll hear lots of evidence that this
15 settlement that's up on the screen right now very much was the
16 product of arm's-length negotiation.

17 The third part of the test, Your Honor, is whether it
18 meets the paramount interest of creditors. You know,
19 regrettably, Mr. Dondero is the only purported creditor who is
20 objecting here. He may have done so through different
21 vehicles, but every objecting party here is a debtor [sic]
22 owned and controlled by Mr. Dondero. No other creditor -- not
23 the Creditors' Committee, UBS, Acis, Mr. Terry, Mr. Daugherty
24 -- nobody is objecting to this settlement except for Mr.
25 Dondero. And we believe that that highlights the Debtor's

1 ability to meet the third prong of the test, and that is these
2 are -- this settlement is in the paramount interest of
3 creditors.

4 Again, going in reverse, the second part of the test is
5 the complexity, duration, and expense of litigation. There
6 will be no disputed evidence that we meet -- the Debtor easily
7 meets this prong of the test. The evidence is going to show
8 that HarbourVest's claim is based on fraud, fraud in the
9 inducement, fraudulent statements and omissions, the kind of
10 case, Your Honor, that I'm sure you're familiar with that is
11 incredibly fact-intensive, that will be incredibly difficult
12 to navigate through. It will be prolonged, it will be
13 expensive, because you're necessarily relying on he said/she
14 said, basically. And so we're going to have to get testimony
15 from every person that spoke in connection with the events
16 leading up to the transaction. So we think the second prong
17 will be easily met, Your Honor.

18 And then the last prong -- the first prong, if you will --
19 is the likelihood of success on the merits. We think that the
20 settlement, the economic recovery that's up on the screen
21 here, which ultimately will be less than five percent of the
22 claimed amount, in and of itself shows that the settlement is
23 consistent with the Debtor's perception of its likely success
24 on the merits. I'm certain that HarbourVest disagrees, but
25 that's okay, we're here today and that's the Debtor's view,

1 and the Court is here to assess the Debtor's business judgment
2 and whether the Debtor has properly analyzed the issues and
3 gone through the process. And the evidence will show
4 conclusively that it will. That it has.

5 Mr. Seery will testify at some length as to the risks that
6 he saw. I think that you'll hear counsel for Mr. Dondero ask
7 both Mr. Seery and Mr. Pugatch a number of questions designed
8 to elicit testimony about this defense or that defense. And
9 it's a little -- it's a little ironic, Your Honor, because,
10 really, every defense that they're going to try to suggest to
11 the Court was a valid defense is a defense that the Debtor
12 considered. In fact, it's, you know, it's a little spooky,
13 how they've -- how they've been able to identify kind of the
14 arguments that the Debtor had already considered in the
15 prosecution of their objections here.

16 But be that as it may, the evidence will conclusively show
17 that the Debtor acted consistent with its fiduciary duties,
18 acted in the best interests of the Debtor's estate, acted
19 completely appropriately here in getting yet another very
20 solid achievement for the Debtor, leaving very few claims that
21 are disputed at this point, all but one of which I believe are
22 in the hands of Mr. Dondero.

23 So, that's what we think that the evidence will show.

24 I do want to express my appreciation to Mr. Kane for
25 reflecting on the arguments that we made with respect to the

1 ability of the Debtor to engage in the transfer or the
2 acquisition of the asset from HarbourVest. I would -- I would
3 respectfully request that we just enter into a short
4 stipulation on the record reflecting that the Debtor's
5 acquisition of HarbourVest's interests in HCLOF is compliant
6 with all of the applicable agreements between the parties.

7 And with that, Your Honor, I look forward to putting Mr.
8 Seery on the stand and presenting the Debtor's case.

9 THE COURT: All right. Other opening statements?

10 OPENING STATEMENT ON BEHALF OF CLO HOLDCO, LTD.

11 MR. KANE: Yes, Your Honor. Sorry. John Kane on
12 behalf of CLO Holdco.

13 In response to Mr. Morris, I'm not going to enter into a
14 stipulation on behalf of my client, but the Debtor is
15 compliant with all aspects of the contract. We withdrew our
16 objection, and we believe that's sufficient.

17 THE COURT: All right. Well, I'm content with that.
18 Other opening statements?

19 OPENING STATEMENT ON BEHALF OF HARBOURVEST

20 MS. WEISGERBER: Your Honor, Erica Weisgerber on
21 behalf of HarbourVest.

22 HarbourVest joins in Mr. Morris's comments in support of
23 the settlement, and we believe that the question of whether
24 the settlement between HarbourVest and the Debtor satisfies
25 the Rule 9019 standard is not even a close one.

1 Some Objectors have made arguments about the merits of
2 HarbourVest's claims, which is why we're here. As Your Honor
3 will hear this morning, HarbourVest has meaningful and
4 meritorious claims against Highland, but made the business
5 decision to avoid the time, expense, and inherent risk of
6 litigation in the interest of preserving value, both for
7 itself and for the estate.

8 Today, Michael Pugatch, a managing director of
9 HarbourVest, will testify before the Court. He'll explain
10 that HarbourVest claims against Highland arise out of certain
11 misrepresentations and omissions by Highland to HarbourVest in
12 connection with HarbourVest's purchase of an interest in
13 HCLOF, one of Highland's managed funds. Those
14 misrepresentations and omissions, as Your Honor will hear,
15 relate to Highland's litigation with its former employee,
16 Joshua Terry, and transfers that were conducted in 2017 to
17 strip Acis of value and prevent Mr. Terry from collecting on
18 an \$8 million judgment.

19 Mr. Pugatch will further explain that HarbourVest would
20 not have invested in HCLOF had it known the underlying facts
21 about those Acis transfers.

22 Mr. Pugatch will also testify that not only did
23 HarbourVest not know about those transfers, it learned about
24 those transfers when it was accused of orchestrating the
25 transfers itself in the Acis bankruptcy. Your Honor will hear

1 that the Acis trustee sought extensive discovery from
2 HarbourVest after numerous accusations that HarbourVest was
3 behind the transfers.

4 Mr. Pugatch will also testify that Highland charged legal
5 fees for itself and its affiliates to HCLOF, essentially
6 forcing HCLOF to fund the litigation involving the Acis
7 bankruptcy and Mr. Terry.

8 In total, HarbourVest's claims for damages are over a
9 hundred million dollars in investment-related losses, lost
10 profits, legal fees inappropriately charged to HCLOF, its own
11 legal fees. And that's before interest or trebling damages.

12 But HarbourVest stands ready to litigate its claims, but
13 following hard-fought and extensive negotiations with the
14 Debtors, the parties reached the settlement that's now before
15 the Court. Mr. Pugatch's testimony regarding the strong
16 factual bases for HarbourVest's claims against Highland and
17 its recoverable damages will further underscore the risks that
18 the Debtors faced if they chose to litigate these claims, and
19 why this settlement is fair, equitable, and in the best
20 interest of the estate.

21 THE COURT: All right. Thank you, Counsel.

22 Other opening statements?

23 OPENING STATEMENT ON BEHALF OF GET GOOD AND DUGABOY TRUSTS

24 MR. DRAPER: Your Honor, this is Douglas Draper on
25 behalf of one of the Objectors. I'd like to just make a few

1 comments with respect to what I've heard and what the Court is
2 going to hear.

3 The first issue I'd like to address is the comment by
4 counsel for the Debtor that no other party has objected. The
5 9019 motion is one of the issues that this Court has to rule
6 on, whether or not there was an objection or not. So the fact
7 that this may be -- bankruptcy is not a popularity contest and
8 not an issue of who votes for what and doesn't vote. This,
9 along with the 1129(a) tests, are clearly within your
10 province, and you need to listen carefully because you'll have
11 to make your own independent analysis whether my objection is
12 correct or incorrect.

13 Two other points I'd like to make that I think are very
14 salient. Number one is, if you look at the Debtor's
15 disclosure statement, it basically took the position that the
16 HarbourVest claim is of little or no value. And lo and
17 behold, thirty days later, there's a settlement that brings
18 about a significant recovery to HarbourVest. The timing is
19 interesting, and I think the Court needs to pay careful
20 attention to what transpired between the two dates.

21 And then the last point I'd like to make is, as you listen
22 to the evidence, and what I learned abundantly clear from
23 hearing the depositions, is that the claim of HarbourVest, if
24 there is a claim at all, is probably one hundred percent --
25 should be subordinated in that it appears to arise out of the

1 purchase or sale of a security. And, again, I would ask the
2 Court to listen carefully to this because that's what it
3 appears to be and that's what the evidence is going to show to
4 the Court.

5 THE COURT: All right. Mr. Draper, let me clarify
6 something I'm not sure if I heard you say or not. Were you
7 saying that the Court still needs to drill down on the issue
8 of whether the Debtor can acquire HarbourVest's interest in
9 HCLOF?

10 MR. DRAPER: No.

11 THE COURT: Okay. I was confused whether you were
12 saying I needed to take an independent look at that, now that
13 the objection has been withdrawn of Holdco. You are not
14 pressing that issue?

15 MR. DRAPER: No, I am not. Basically, I think it's
16 the fairness of the settlement. I think the transferability
17 of the interest is separate and apart from the fairness of the
18 settlement itself. I think the fairness -- the
19 transferability was a contractual issue between two parties
20 that the Court does not have to drill down on.

21 THE COURT: All right. I have another question for
22 you. I want to clarify your client's standing. Tell me --
23 I'm looking through a chart I printed out a while back. I
24 guess Dugaboy Investment Trust filed a couple of proofs of
25 claim; is that right?

1 MR. DRAPER: Yes.

2 THE COURT: Okay. What --

3 MR. DRAPER: And objections are pending.

4 THE COURT: Pardon?

5 MR. DRAPER: Objections to those claims are pending
6 before the Court, Your Honor, --

7 THE COURT: Okay.

8 MR. DRAPER: -- and have not been litigated.

9 THE COURT: And what about Get Good Trust?

10 MR. DRAPER: Get Good Trust has a proof of claim also
11 that objections are pending to. Pending.

12 THE COURT: Okay. I don't want to get too
13 sidetracked here, but I know standing was -- was mentioned as
14 a legal argument today. What is the basis for those proofs of
15 claim?

16 MR. DRAPER: The first one is, with respect to the
17 proof of claim for Dugaboy, there is an investment that
18 Dugaboy made that was then funneled, we believe, up to the
19 Debtor. And the -- the loan that exists, we believe is a
20 Debtor loan, as opposed to a loan to the entity that we made
21 the loans to.

22 And, again, it's a matter that the Court is going to hear.
23 The claim may or may not be allowed. It has not been
24 disallowed yet.

25 The second part to the Dugaboy ownership is we own an

1 interest in the Debtor. And so we are, in fact, a party in
2 interest.

3 THE COURT: Okay.

4 MR. DRAPER: It may be a small interest, but it is an
5 interest.

6 THE COURT: It has a limited partnership interest in
7 the Debtor?

8 MR. DRAPER: Yes.

9 THE COURT: Is that correct?

10 MR. DRAPER: Yes.

11 THE COURT: Okay. Well, I'll move forward. Thank
12 you.

13 Does that cover -- any other opening statements? I think
14 that covered everyone who was -- who filed some sort of
15 pleading today. No.

16 MR. WILSON: Your Honor, John Wilson on behalf of --

17 THE COURT: I'm sorry. I'm sorry.

18 MR. WILSON: -- Mr. Dondero.

19 THE COURT: I missed Mr. Dondero's counsel. I knew
20 we had visited at some point this morning. I just got
21 confused there. Go ahead, Mr. Wilson.

22 MR. WILSON: No problem, Your Honor. I was just
23 going to say that we will reserve our comments until after the
24 conclusion of the testimony.

25 THE COURT: All right. Very well.

1 Mr. Morris, you may call your first witness.

2 MR. MORRIS: Thank you, Your Honor. Before I do,
3 just two very, very quick points.

4 THE COURT: Okay.

5 MR. MORRIS: To be clear, Dugaboy's interest in the
6 Debtor is 0.1866 percent. Less than two-tenths of one
7 percent.

8 Secondly, the argument that Mr. Draper just made with
9 respect to subordination is one that appears in nobody's
10 papers. And, in fact, not only doesn't it appear in anybody's
11 papers, but Mr. Dondero, I believe, specifically took issue
12 with the fact that a portion of the consideration that
13 HarbourVest would receive would be on a subordinated basis,
14 and he would -- and I think he took the position there is no
15 basis to give them a subordinated claim.

16 So, I just wanted to point those items out to the Court,
17 not that I think either one makes a large difference today,
18 but I do want to deal with the facts.

19 THE COURT: Thank you.

20 MR. MORRIS: The Debtor would call -- you're welcome,
21 Your Honor. The Debtor calls Mr. James Seery.

22 THE COURT: All right. Mr. Seery, welcome back to
23 virtual court. If you could say, "Testing, one, two" so I can
24 see you and swear you in.

25 MR. SEERY: Testing, one, two.

Seery - Direct

26

1 THE COURT: All right. I heard you but I'm not yet
2 seeing your video. Is your video turned on?

3 MR. SEERY: Video is on. Yes, Your Honor.

4 THE COURT: Okay. I see you now. Please raise your
5 right hand.

6 JAMES SEERY, DEBTOR'S WITNESS, SWORN

7 THE COURT: Thank you. Mr. Morris?

8 MR. MORRIS: Thank you, Your Honor.

9 DIRECT EXAMINATION

10 BY MR. MORRIS:

11 Q Good morning, Mr. Seery. Can you hear me?

12 A I can. Thank you, Mr. Morris.

13 Q Okay. Let's just cut to the chase here. Are you familiar
14 with HarbourVest's claims filed against the Debtor?

15 A I am, yes.

16 Q And did you personally review them?

17 A I did, yes.

18 Q Do you recall that over the summer the Debtor objected to
19 HarbourVest's claim?

20 A Yes, we did.

21 Q Why -- can you explain to the judge why Harbour -- why the
22 Debtor objected to HarbourVest's claim last summer?

23 A Sure. The HarbourVest claims, I believe there are about
24 six of them, initially were filed, and they were -- they were
25 relatively vague in terms of what the specifics of the claims

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1 were.

2 So, we saw the claims but didn't, frankly, pay a lot of
3 attention to the underlying transaction that was referred to
4 in the proofs of claim and the losses that HarbourVest had
5 claimed to suffer -- to suffer with respect to their purchase
6 of securities related to HCLOF and the damages caused by the
7 Acis case. So we filed a pretty pro forma objection. I
8 believe it was a simply stated objection that we didn't have
9 any record that there was anything in the Debtor's books and
10 records that they had a valid claim for any amount against the
11 Debtor.

12 Q Are you aware that HarbourVest subsequently filed a
13 response to the Debtor's objection to their claims?

14 A Yes. Yes, I am aware.

15 Q And did you familiarize yourself with that particular
16 response?

17 A I did indeed. It was a pretty extensive response, really
18 developing the full panoply of their claims, which included
19 claims for expenses relating to the Acis case, which
20 HarbourVest viewed as being improperly charged to HCLOF by its
21 manager, which is effectively Highland. Those expenses,
22 HarbourVest took the view, were excessive, had nothing to do
23 with the investment, and were simply a pursuit of a personal
24 vendetta against Mr. Terry and his interests by Mr. Dondero,
25 and using HCLOF's money to actually pursue those interests.

1 In addition, and this was the first time we saw that,
2 HarbourVest brought forth its claims that it was entitled to
3 effectively rescind the transaction. And I say rescind the
4 transaction: In security parlance, they claim that they were
5 induced by fraud, I think as most are -- to enter into the
6 transaction.

7 As most are aware, the liability limitations in the OMs
8 and the exculpation in the documents are pretty broad, and
9 HarbourVest's position was that they weren't going to be
10 subject to those limitations because the actual transaction
11 that they entered into was a fraud on them, designed by Mr.
12 Dondero, Mr. Ellington, and the Highland team.

13 Q All right. Let's talk about your understanding, the
14 Debtor's understanding of the factual background to
15 HarbourVest's claim. What is your understanding of the
16 investment that HarbourVest made?

17 A Well, HarbourVest made an investment in the Highland CLO
18 business. The Highland CLO business was -- was Acis. And
19 effectively, the business had been separated, but in name
20 only. Acis was just a shell, with a few partners --
21 obviously, Mr. Terry as well -- but it was all Highland
22 personnel doing all the work.

23 And what they were trying to do with Acis was, in essence,
24 resuscitate a business that had been in a bit of a decline
25 from its pre-crisis heyday.

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

In Re: Highland Capital Management, L.P § Case No. **19-34054-SGJ11**

Charitable DAF Fund, L.P et al

Appellant

§

vs.

§

21-03067

Highland Capital Management, L.P

§

Appellee

§

3:23-CV-01503-B

[167] Order granting Defendant Highland Capital Management, L.P.'s Renewed motion to dismiss adversary proceeding (related document # [122](#)) Entered on 6/25/2023.

Volume 8

APPELLANT RECORD

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

In re:	§ Chapter 11
	§
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§ Case No. 19-34054-sgj11
	§
Debtor.	§
	§
CHARITABLE DAF FUND, L.P. AND CLO	§
HOLDCO, LTD., DIRECTLY AND DERIVATIVELY	§
	§
Plaintiffs,	§ Adversary Proceeding No.
	§
vs.	§ 21-03067-sgj11
	§
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§
HIGHLAND HCF ADVISOR, LTD., AND	§
HIGHLAND CLO FUNDING LTD., NOMINALLY	§
	§
Defendant.	§
	§

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**APPELLANTS' SECOND AMENDED STATEMENT OF ISSUES
AND DESIGNATION OF RECORD ON APPEAL**

Pursuant to Rules 8009(a)(1)(A)-(B) and (a)(4) of the Federal Rules of Bankruptcy Procedure, The Charitable DAF Fund, L.P. and CLO Holdco, Ltd. ("Appellants") hereby designate the following items to be included in the record and identify the following issues with respect to

their appeal of the Order Granting Defendant Highland Capital Management, L.P.'s "Renewed Motion to Dismiss Complaint" [Adv. Proc. Doc. No. 122] which was entered by the United States Bankruptcy Court for the Northern District of Texas on June 25, 2023.

I. STATEMENT OF ISSUES TO BE PRESENTED ON APPEAL

- Whether the Bankruptcy Court had jurisdiction to rule on Highland Capital Management L.P.'s Renewed Motion to Dismiss Complaint
- Whether the Renewed Motion to Dismiss Complaint was improperly granted

II. DESIGNATION OF ITEMS TO BE INCLUDED IN THE RECORD

Vol. 1
000001

1. Notice of Appeal for Bankruptcy Case Adversary Proceeding No. 21-03067-sgj11 [Doc. 168].

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2. The judgment, order, or decree appealed from: Memorandum Opinion and Order Granting Defendant Highland Capital Management, L.P.'s "Renewed Motion to Dismiss Complaint" [Adv. Proc. Doc. No. 122] [Doc. 167].

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3. Docket Sheet kept by the Bankruptcy Clerk.

4. Documents listed below and as described in the Docket Sheet for Bankruptcy Case Proceeding No. 21-03067-sgj.

Vol. 2

000102

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No.	Date Filed	Docket No.	Description/Document Text
1	9/29/21	1	(36 pgs; 3 docs) Adversary case 21-03067. ORDER REFERRING CASE NUMBER 21-CV-0842-B from U.S District Court for the Northern District of Texas, Dallas Division to U.S. Bankruptcy Court for Northern District of Texas, Dallas Division. Complaint by Charitable DAF Fund, LP, CLO Holdco, Ltd. against Highland Capital Management, LP, Highland HCF Advisor Ltd., Highland CLO Funding, Ltd. Fee Amount \$350 (Attachments: # 1 Original Complaint # 2 Docket Sheet from 3:20-cv-0842-B) Nature(s) of suit: 02 (Other (e.g. other actions that would have been brought in state court if unrelated to bankruptcy)). (Okafor, M.)
2	9/29/21	2	(1 pg) Supplemental Document (cover sheet) by CLO Holdco Ltd., Charitable DAF Fund (RE: related document(s)1 Adversary case 21-03067) [ORIGINALLY FILED IN 21-CV-0842 AS #2 ON 04/13/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)

Vol. 2 000139 000232 000239 000270 Thru Vol. 6	3	9/29/21	6	(93 pgs; 6 docs) MOTION for Leave to File First Amended Complaint filed by CLO Holdco Ltd., Charitable DAF Fund LP (Attachments: # 1 Exh 1_First Amended Complaint # 2 Exh 2_Motion for Authorization to Retain James Seery # 3 Exh 3_Order Approving Retention of James Seery # 4 Exh 4_Order Approving Settlement # 5 Proposed Order) (Bridges, Jonathan) (Entered: 04/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #6 ON 04/19/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
	4	9/29/21	22	(7 pgs; 2 docs) MOTION for an Order to Enforce the Order of Reference filed by Highland Capital Management LP. (Attachments: # 1 Exhibit(s) A--Proposed Order) (Annable, Zachery) Modified text on 5/20/2021 (mjr). (Entered: 05/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #22 ON 05/19/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
	5	9/29/21	23	(31 pgs) Brief/Memorandum in Support filed by Highland Capital Management LP re: 22 MOTION for an Order to Enforce the Order of Reference. (Annable, Zachery) Modified text on 5/20/2021 (mjr).(Entered: 05/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #23 ON 05/19/2021 IN U.S.DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
	6	9/29/21	24	(926 pgs; 29 docs) Appendix in Support filed by Highland Capital Management LP re: 23 Brief/Memorandum in Support. (Attachments: # 1 Appendix 1 # 2 Appendix 2 # 3 Appendix 3 # 4 Appendix 4 # 5 Appendix 5 # 6 Appendix 6 # 7 Appendix 7 # 8 Appendix 8 # 9 Appendix 9 # 10 Appendix10 # 11 Appendix 11 # 12 Appendix 12 # 13 Appendix 13 # 14 Appendix 14 # 15 Appendix 15 # 16 Appendix 16 # 17 Appendix 17 # 18 Appendix 18 # 19 Appendix 19 # 20 Appendix 20 # 21 Appendix 21# 22 Appendix 22 # 23 Appendix 23 # 24 Appendix 24 # 25 Appendix 25 # 26 Appendix 26 # 27 Appendix 27 # 28 Appendix 28) (Annable, Zachery) Modified linkage and text on 5/20/2021 (mjr). (Entered:05/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #24 ON 05/19/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
Vol. 7 001196	7	9/29/21	26	(7 pgs; 2 docs) MOTION to Dismiss Complaint filed by Highland Capital Management LP (Attachments: # 1 Exhibit(s) A--Proposed Order) (Annable, Zachery) Modified text on 5/28/2021 (jmg).(Entered: 05/27/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #26 ON 05/27/2021 IN U.S.DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)

Vol. 7 001203 thru Vol 8	8	9/29/21	28	(508 pgs; 14 docs) Appendix in Support filed by Highland Capital Management LP (Attachments: # 1 Appendix 1 # 2 Appendix 2 # 3 Appendix 3 # 4 Appendix 4 # 5 Appendix 5 # 6 Appendix 6 # 7 Appendix 7 # 8 Appendix 8 # 9 Appendix 9 # 10 Appendix 10 # 11 Appendix 11 # 12 Appendix 12 # 13 Appendix 13) (Annable, Zachery) (Entered: 05/27/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #28 ON 05/27/2021 IN U.S. DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
Vol. 9 001711	9	9/29/21	33	(1 pg) Amended Civil Cover Sheet by CLO Holdco Ltd, Charitable DAF Fund LP. Amendment to 2 Supplemental Document. (Sbaiti, Mazin) Modified text on 6/23/2021 (mjr). (Entered: 06/22/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #33 ON 06/22/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001712	10	9/29/21	36	(26 pgs) RESPONSE filed by CLO Holdco Ltd, Charitable DAF Fund LP re: 22 MOTION for an Order to Enforce the Order of Reference (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #36 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001738	11	9/29/21	37	(22 pgs) Appendix in Support filed by CLO Holdco Ltd, Charitable DAF Fund LP re 36 Response/Objection Response to Motion for an Order to Enforce the Order of Reference (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #37 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001760	12	9/29/21	38	(45 pgs) RESPONSE filed by CLO Holdco Ltd, Charitable DAF Fund LP re: 26 MOTION to Dismiss (Defendant Highland Capital Management, L.P.'s Motion to Dismiss Complaint) (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #38 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001805	13	9/29/21	39	(88 pgs) Appendix in Support filed by CLO Holdco Ltd, Charitable DAF Fund LP re 38 Response/Objection to Defendant Highland Capital Management, L.P.'s Motion to Dismiss Complaint (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #39 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001893	14	9/29/21	42	(12 pgs) REPLY filed by Highland Capital Management LP re: 22 MOTION for an Order to Enforce the Order of Reference (Annable, Zachery) (Entered: 07/13/2021) [ORIGINALLY FILED IN 21-CV-0842AS #42 ON 07/13/2021 IN U.S.

			DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
VOL. 9	15	9/29/21	43 (852 pgs) Appendix in Support filed by Highland Capital Management LP re: 42 Reply. (Annable, Zachery) Modified text on 7/14/2021 (mjr). (Entered: 07/13/2021) [ORIGINALLY FILED IN 21-CV-0842AS #43 ON 07/13/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001905 thru Vol. 13	16	9/29/21	45 (21 pgs) REPLY filed by Highland Capital Management LP re: 26 MOTION to Dismiss (Defendant Highland Capital Management, L.P.'s Motion to Dismiss Complaint) (Annable, Zachery) (Entered: 07/13/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #44 ON 07/13/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002757	17	9/29/21	57 (7 pgs; 2 docs) MOTION to Dismiss and Joinder in Motion to Dismiss of Highland Capital Management, L.P. filed by Highland CLO Funding Ltd. (Attachments: # 1 Proposed Order) Attorney Paul R Bessette added to party Highland CLO Funding Ltd (pty:dft) (Bessette, Paul) (Entered: 08/30/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #57 ON 08/30/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002778	18	9/29/23	58 (12 pgs) Brief/Memorandum in Support filed by Highland CLO Funding Ltd. re 57 MOTION to Dismiss and Joinder in Motion to Dismiss of Highland Capital Management, L.P. (Bessette, Paul) (Entered: 08/30/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #58 ON 08/30/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002785	19	9/29/23	59 (80 pgs; 5 docs) Appendix in Support filed by Highland CLO Funding Ltd re 58 Brief/Memorandum in Support of Motion (Attachments: # 1 Exhibit(s) A - Jackson v Dear # 2 Exhibit(s) B - Prudential Assurance v. Newman # 3 Exhibit(s) C - Harbourvest Settlement Agreement # 4 Exhibit(s) D - Boleat Declaration) (Bessette, Paul) (Entered: 08/30/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #59 ON 08/30/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002797	20	9/29/21	64 (1 pg) ORDER OF REFERENCE: Pursuant to 28 U.S.C. § 157 and this District's Miscellaneous Order No. 33, this case is hereby REFERRED to Judge Stacey G. C. Jernigan of the United States Bankruptcy Court for the Northern District of Texas, Dallas Division, to be adjudicated as a matter related to the consolidated Chapter 11 Bankruptcy of Highland Capital Management, L.P., Chapter 11 Case No.19-34054. (Ordered by Judge Jane J. Boyle
002877			

Vol. 14				on 9/20/2021) (svc) (Entered: 09/20/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #64 ON 09/20/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002878	21	10/19/21	66	(5 pgs) Notice of hearing filed by Defendant Highland Capital Management, LP (RE: related document(s) 26 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP, 47 Motion to strike document filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 55 Motion to abate filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) Hearing to be held on 11/23/2021 at 09:30 AM at https://us-courts.webex.com/meet/jerniga for 26 and for 47 and for 55, (Annable, Zachery)
002883 thru Vol. 16	22	11/22/21	71	(509 pgs; 2 docs) Witness and Exhibit List <i>for Hearing on November 23, 2021</i> filed by Defendant Highland Capital Management, LP (RE: related document(s) 26 Motion to dismiss adversary proceeding). (Attachments: # 1 Exhibits 1-13) (Hayward, Melissa)
Vol. 17	23	11/22/21	72	(2 pgs) Witness List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 26 Motion to dismiss adversary proceeding, 47 Motion to strike (related document(s): 43 Document), 55 Motion to abate (related document(s) 1 Complaint), 69 Motion to abate <i>Plaintiffs' Amended Motion to Stay All Proceedings</i> (related document(s) 55 Motion to abate (related document(s) 1 Complaint))). (Sbaiti, Mazin)
003392	24	11/22/21	73	(189 pgs; 4 docs) Exhibit List <i>for November 23, 2021 hearing</i> filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 47 Motion to strike (related document(s): 43 Document), 55 Motion to abate (related document(s) 1 Complaint)). (Attachments: # 1 Exhibit 1_Defendant's Memorandum of Law in Support of Motion for Reconsideration # 2 Exhibit 2_Highland Memorandum in Support of Motion to Dismiss # 3 Exhibit 3_Order (I) Confirming Fifth Amended Plan of Reorganization of Highland) (Sbaiti, Mazin)
003394	25	12/7/21	80	(2 pgs) Order granting Highland CLO Funding, Ltd.'s motion to dismiss adversary as a party with prejudice (related document 57) Entered on 12/7/2021. (Okafor, Marcey) Modified text on 3/11/2022 (Okafor, Marcey).
003583	26	3/11/22	99	(26 pgs) Memorandum of Opinion and order granting motion to dismiss the adversary proceeding (RE: related document(s) 26 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP). Entered on 3/11/2022 (Okafor, Marcey)
003585	27	3/11/22	100	(26 pgs) Order granting motion to dismiss adversary proceeding with prejudice (related document #26) Entered on 3/11/2022. (Okafor, Marcey)
003611				

Vol. 18 003637	28	3/21/22	104	(29 pgs) Notice of appeal. Fee Amount \$298 filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 100 Order on motion to dismiss adversary proceeding). Appellant Designation due by 04/4/2022. (Sbaiti, Mazin)
003666	29	5/26/22	120	(177 pgs; 2 docs) Support/supplemental document <i>Motion to Supplement Appellate Record</i> filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 111 Appellant designation). (Attachments: # 1 Amended Transcript of January 14, 2021 Hearing) (Sbaiti, Mazin)
003843	30	6/9/22	121	(1 pg) DISTRICT COURT Order: Case 3:22-00695-B is hereby transferred to the docket of the Honorable Judge Jane J. Boyle for consolidation with The Charitable DAF Fund LP, et al. v. Highland Capital Management LP, Case No. 3:21-cv-3129-N. Judge Karen Gren Scholer no longer assigned to case.(RE: related document(s) 86 Notice of appeal filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 104 Notice of appeal filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Entered on 6/9/2022 (Whitaker, Sheniqua) (Entered: 06/10/2022)
003844	31	10/24/22	122	(7 pgs) Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP (Annable, Zachery)
003851	32	10/14/22	123	(31 pgs) Brief in support filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Annable, Zachery)
Vol. 19 003882 Thru Vol 20	33	10/14/22	124	(513 pgs; 15 docs) Support/supplemental document (<i>Appendix in Support of Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7 # 8 Exhibit 8 # 9 Exhibit 9 # 10 Exhibit 10 # 11 Exhibit 11 # 12 Exhibit 12 # 13 Exhibit 13 # 14 Exhibit 14) (Annable, Zachery)
Vol. 21 004395	34	10/27/22	126	(5 pgs) Notice of hearing (<i>Notice of Hearing and Briefing Schedule on Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP). Hearing to be held on 12/8/2022 at 09:30 AM at https://us-courts.webex.com/meet/jerniga for 122. (Annable, Zachery)

Vol. 21 004400 004410 004442 Thru Vol. 22	35	11/18/22	128	(10 pgs) Motion for withdrawal of reference. Fee amount \$188, filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (Sbaiti, Mazin)
	36	11/18/22	129	(32 pgs) Response opposed to (related document(s): 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP) filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Sbaiti, Mazin)
	37	11/18/22	130	(254 pgs; 2 docs) Response opposed to (related document(s): 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP) filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Attachments: # 1 Appendix) (Sbaiti, Mazin)
Vol. 22 004696 004717 004732 004737 004742	38	9/2/22	131	(21 pgs) DISTRICT COURT MEMORANDUM OPINION AND ORDER: The Court REVERSES and REMANDS the bankruptcy court's Motion to Dismiss Order and AFFIRMS the bankruptcy courts Motion to Stay Order. re: appeal on Civil Action number: Case 3:22-00695-B consolidated with 3:21-CV-3129-B, (RE: related document(s) 81 Order on motion to abate, 100 Order on motion to dismiss adversary proceeding). Entered on 9/2/2022 (Whitaker, Sheniqua) (Entered: 11/29/2022)
	39	12/2/22	133	(15 pgs) Reply to (related document(s): 129 Response filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 130 Response filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) filed by Defendant Highland Capital Management, LP. (Annable, Zachery)
	40	12/7/22	135	(5 pgs) Notice of hearing filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP). Hearing to be held on 1/25/2023 at 01:30 PM at https://us-courts.webex.com/meet/jerniga for 122, (Annable, Zachery)
	41	12/7/22	136	(5 pgs) Notice of hearing filed by Defendant Highland Capital Management, LP (RE: related document(s) 128 Motion for withdrawal of reference filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Status Conference to be held on 1/25/2023 at 01:30 PM at https://us-courts.webex.com/meet/jerniga . (Annable, Zachery).
	42	12/9/22	138	(3 pgs) Response opposed to (related document(s): 128 Motion for withdrawal of reference. Fee amount \$188, filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) filed by Defendant Highland Capital Management, LP. (Annable, Zachery)

Vol. 22 004745	43	12/9/22	139	(25 pgs) Brief in support filed by Defendant Highland Capital Management, LP (RE: related document(s) 138 Response). (Annable, Zachery)
Vol. 23 004770	44	12/9/22	140	(280 pgs; 8 docs) Support/supplemental document (<i>Appendix in Support of Highland Capital Management, L.P.'s Response to Renewed Motion to Withdraw the Reference</i>) filed by Defendant Highland Capital Management, LP (RE: related document(s) 138 Response). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7) (Annable, Zachery)
Vol. 24 005050	45	12/16/22	144	(6 pgs) Reply to (related document(s): 138 Response filed by Defendant Highland Capital Management, LP) filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Sbaiti, Mazin)
005056 Thru Vol. 25.	46	1/23/23	145	(514 pgs; 15 docs) Witness and Exhibit List filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7 # 8 Exhibit 8 # 9 Exhibit 9 # 10 Exhibit 10 # 11 Exhibit 11 # 12 Exhibit 12 # 13 Exhibit 13 # 14 Exhibit 14) (Annable, Zachery)
Vol. 26 005570	47	1/23/23	146	(280 pgs; 8 docs) Witness and Exhibit List filed by Defendant Highland Capital Management, LP (RE: related document(s) 128 Motion for withdrawal of reference. Fee amount \$188.). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7) (Annable, Zachery)
Vol. 27 005850	48	1/23/23	147	(221 pgs; 7 docs) Witness and Exhibit List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Attachments: # 1 Exhibit 1_Excerpts from July 14, 2020 Hearing Transcript # 2 Exhibit 2_HCLOF Members Agreement Relating to the Company # 3 Exhibit 3_HarbourVest Settlement Agreement # 4 Exhibit 4_Order Approving Debtor's Settlement with HarbourVest # 5 Exhibit 5_HCLOF Offering # 6 Exhibit 6 Amended and Restated Investment Advisory Agreement) (Sbaiti, Mazin)
006071	49	1/23/23	148	(3 pgs) Witness and Exhibit List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 128 Motion for withdrawal of reference. Fee amount \$188.). (Phillips, Louis)
Vol. 28 006074	50	1/25/23	150	(56 pgs; 2 docs) Amended Witness and Exhibit List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 147 List (witness/exhibit/generic), 149 List (witness/exhibit/generic)). (Attachments: # 1 Exh 7_Testimony of Mark Patrick at June 8, 2021 hearing) (Sbaiti, Mazin)

Vol. 28 006130 006133 Thru Vol. 31	51	1/25/23	152	(3 pgs) Notice of Appearance and Request for Notice by Louis M. Phillips filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Phillips, Louis)
	52	1/25/23	154	(1 pg) Court admitted exhibits date of hearing January 25, 2023 (RE: related document(s) 128 Motion for withdrawal of reference, filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) (COURT ADMITTED DEFENDANT'S EXHIBITS #1, #2, #3, #4, #5 & #6 OFFERED BY ATTY GREG DEMO). (Edmond, Michael) (Entered: 01/27/2023)
Vol. 32 006925 006942 006960	53	2/6/23	158	Report and recommendation to the U.S. District Court by U.S. Bankruptcy Judge. (RE: related document(s) 128 Motion for withdrawal of reference filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Entered on 2/6/2023 (Okafor, Marcey)
	54	2/6/23	161	(18 pgs) DISTRICT COURT Notice of transmission of report and recommendation in re: renewed motion to withdraw reference. Civil Case # 3:22-cv-02802-S. (RE: related document(s) 158 Report and recommendation to the U.S. District Court by U.S. Bankruptcy Judge. (RE: related document(s) 128 Motion for withdrawal of reference filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Entered on 2/6/2023) (Whitaker, Sheniqua)
	55	4/3/23	165	(1 pg) DISTRICT COURT ORDER: The Court GRANTS the 11 Joint Motion to Transfer Proceeding and Consolidate Before Original Court and the above-numbered case (3:22-cv-02802-S) is transferred to the docket of the Honorable Judge Jane Boyle: Civil case 3:21-cv-00842-B (order referring case). (RE: related document(s) 1 Complaint filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 143 Notice of transmission of motion to withdraw reference). Entered on 4/3/2023 (Whitaker, Sheniqua) Modified on 4/10/2023 (Whitaker, Sheniqua). (Entered: 04/10/2023)

TRANSCRIPTS

006961	56	11/24/21	78	(104 pgs) Transcript regarding Hearing Held 11-23-2021 RE: Motion Hearing. THIS TRANSCRIPT WILL BE MADE ELECTRONICALLY AVAILABLE TO THE GENERAL PUBLIC 90 DAYS AFTER THE DATE OF FILING. TRANSCRIPT RELEASE DATE IS 02/22/2022. Until that time the transcript may be viewed at the Clerk's Office or a copy may be obtained from the official court transcriber. Court Reporter/Transcriber Liberty Transcripts/Dipti Patel, Telephone number 847-848-4907. (RE: related document(s) 75 Hearing held on 11/23/2021. (RE: related document(s) 55 MOTION to Stay filed by CLO Holdco Ltd, Charitable DAF Fund LP (Sbaiti, Mazin) (Entered: 08/26/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #55 ON 08/26/2021 IN U.S.
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			<p>DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)) (Appearances: J. Pomerantz and J. Morris for Highland Defendants; J. Jordan and P. Bessett for HCLOF; M. Sbaiti for Plaintiffs. Nonevidentiary hearing. Motion denied. Mr. Pomerantz to upload order.), 76 Hearing held on 11/23/2021. (RE: related document(s) 47 Motion to strike 43 Appendix in support filed by CLO Holdco, Ltd., Charitable DAF Fund, LP (Bridges, Jonathan) Modified text on 7/16/2021 (mjr). (Entered: 07/15/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #47 ON 07/15/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)) (Appearances: J. Pomerantz and J. Morris for Highland Defendants; J. Jordan and P. Bessett for HCLOF; M. Sbaiti for Plaintiffs. Nonevidentiary hearing. Motion denied (Plaintiffs acknowledged complained-of Appendices it did not relate to Motion to Dismiss). Mr. Pomerantz to upload order.)). Transcript to be made available to the public on 02/22/2022. (Patel, Dipti)</p>
57	2/21/23	164	<p>164 (112 pgs) Transcript regarding Hearing Held 1/25/23 RE: HEARING ON DEFENDANT HIGHLAND CAPITAL MANAGEMENT L.P.'S RENEWED MOTION TO DISMISS COMPLAINT (122) AND STATUS CONFERENCE RE: MOTION FOR WITHDRAWAL OF REFERENCE FILED BY PLAINTIFF CLO HOLDCO, LTD., PLAINTIFF CHARITABLE DAF FUND, LP (128). THIS TRANSCRIPT WILL BE MADE ELECTRONICALLY AVAILABLE TO THE GENERAL PUBLIC 90 DAYS AFTER THE DATE OF FILING. TRANSCRIPT RELEASE DATE IS 05/22/2023. Until that time the transcript may be viewed at the Clerk's Office or a copy may be obtained from the official court transcriber. Court Reporter/Transcriber Dipti Patel, Telephone number 847-848-4907. (RE: related document(s) 155 Hearing held on 1/25/2023. (RE: related document(s) 122 Motion to dismiss adversary proceeding, (Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint) filed by Defendant Highland Capital Management, LP filed by Defendant Highland Capital Management, LP) (Appearances: J. Morris and G. Demo for Movants; L. Phillips and M. Sbaiti for Plaintiffs. Evidentiary hearing (appendices). Court took matter under advisement.), 156 Hearing held on 1/25/2023. (RE: related document(s) 128 Motion for withdrawal of reference. Fee amount \$188, filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) (Appearances: J. Morris and G. Demo for Movants; L. Phillips and M. Sbaiti for Plaintiffs. Evidentiary hearing (appendices). Court announced it will recommend denial to District Court. Court is working on Report & Recommendation.)). Transcript to be made available to the public on 05/22/2023. (Patel, Dipti)</p>

Dated: July 14, 2023

Respectfully submitted,

SBAITI & COMPANY PLLC

/s/ Mazin A. Sbaiti

Mazin A. Sbaiti

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Counsel for Appellants

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was filed electronically through the Court's ECF system, which provides notice to all parties of interest, on this 14th day of July, 2023.

/s/ Mazin A. Sbaiti

Mazin A. Sbaiti

Seery - Direct

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1 They were looking to take additional outside capital.

2 They would -- they would pay down or take money out of the
3 transaction, Highland would, or ultimately Mr. Dondero, and
4 they would -- they would seek to invest in Acis CLOs,
5 Highland's 1.0 CLOs. And then with respect to the Acis CLOs,
6 and potentially new CLOs, but with the Acis CLOs, they'd seek
7 to reset those and capture what they thought would be an
8 opportunity in the market to -- to really use the assets that
9 were there, not have to gather assets in the warehouse but be
10 able to use those assets to reset them to market prices for
11 the liabilities and then make money on the equity.

12 Q Do you have an understanding --

13 A Then --

14 Q I'm sorry. Go ahead.

15 A Why don't I continue? So, the transaction, they found
16 HarbourVest as a potential investor, and the basis of the
17 transaction was that they would make an investment into Acis.

18 Shortly before the transaction, and while they were doing
19 diligence, Mr. Terry received his arbitration award. I
20 believe that was in October of 2017. The transaction with
21 HarbourVest closed in mid- to late November of 2017. But Mr.
22 Terry was not an integral part. Indeed, he wasn't going to be
23 a key man. He had been long gone from Highland by that time.

24 What the -- I think you asked me originally what the basis
25 of their claim was. The transaction went forward, and the

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Seery - Direct

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1 basis of their claim is that they really were never -- nothing
2 was disclosed to them about the nature of the dispute with Mr.
3 Terry other than in the highest-level terms; the animosity
4 with respect to which that dispute was held by Highland and
5 potentially Mr. Terry; and really, how those costs would be
6 borne and risks be borne by the investment that they were
7 making.

8 That was, in essence, the transaction and the high-level
9 view of their claim.

10 Q Okay. Just a few very specific facts. Do you have an
11 understanding as to how much HarbourVest invested and what
12 they got in exchange for that investment?

13 A Yeah. HarbourVest invested in a couple tranches, and I
14 forget the exact dates, but approximately \$75 million
15 originally, and then they added another five. Some
16 distributions were made in the first half of 2018, putting
17 their net investment in the mid-seventies on the investment,
18 which now is worth about 22-1/2 million bucks.

19 Q And what percentage interest in HCLOF did HarbourVest
20 acquire, to the best of your knowledge?

21 A They have 49.98 percent of HCLOF. HCLOF, just to refresh
22 -- the Court is, I think, well aware of this, but to refresh,
23 is a Guernsey entity. Not -- not atypical for structures of
24 this type to use offshore jurisdictions and sell the
25 securities under -- at least to U.S. -- can't sell them to

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1 U.S. investors unless they qualify, and these are sold under
2 Reg S to -- to investors that otherwise qualify. And
3 HarbourVest was investing in that transaction through the
4 Guernsey structure.

5 Q And do you have an understanding as to who owned the 50-
6 plus percent of HCLOF that HarbourVest was not going to
7 acquire?

8 A Yeah. There's -- you can tell by the name. HCLOF is
9 Highland CLO Funding. This is a Highland vehicle. So
10 Highland owned and controlled the vehicle. The DAF, which is
11 -- which is Dondero-controlled trusts, have the -- 49 percent.
12 Highland has, I believe, around .63-65 percent directly. And
13 then Highland employees at the time who were involved in the
14 business owned another small percentage.

15 So the majority was going to be controlled by Highland
16 through its control of DAF and its control of the employees
17 that worked for it. HarbourVest would be a minority investor.

18 Q Okay. And I believe you testified that the investment was
19 made in mid-November; is that right?

20 A That's correct. I think it was the 15th, may have been
21 the 17th of November.

22 Q And do you recall when in October the Terry arbitration
23 award was rendered?

24 A It was about a month before. I think it was right around
25 the 20th, the 17th to the 20th. I may be slightly wrong on

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1 each of those dates.

2 Q Okay. What is your understanding as to what happened
3 after the issuance of the award that is the basis or at least
4 one of the bases for HarbourVest's claim?

5 A I don't think there's -- I don't think there's any
6 dispute. And there certainly are judicial findings. Dondero
7 and Highland went about stripping Acis of all of its assets.
8 So, remember that Acis is not a separate standalone company,
9 in any event. It's controlled and dominated completely by
10 Highland at the time. But it did have contracts. And those
11 contracts had value.

12 So the first idea was to strip out the management contract
13 and put it into a separate vehicle, which we called HCF
14 Advisor, which Highland still owns. The second piece was to
15 strip out some valuable assets, the risk retention piece,
16 which was a loan that in essence was equity that Highland had
17 put into Acis but structured as a loan, as many of the
18 transactions we'll see down the road are, in order to deal
19 with some -- avoid taxes in any way possible. And that
20 structure, that value moved value out of Acis for the express
21 purpose of trying to run, in essence, the Highland business
22 back in Highland.

23 Remember, as I said, Acis is just a Highland business
24 moved to a separate shell. When Mr. Terry got his arbitration
25 award against Acis and was seeking to enforce it, it was

1 pretty straightforward, let's take all the assets -- Dondero
2 scheme -- let's take all the assets and move them back into
3 Highland so Terry can't get anything.

4 Q And how does that scheme relate to the HarbourVest claim,
5 to the best of your knowledge?

6 A Well, HarbourVest -- HarbourVest's position is that they
7 invested in Acis and -- and whether Acis was called Acis or
8 called Highland, it doesn't really matter; there were valuable
9 assets in the -- in the entity that they were going to be
10 investing in through the equity in these CLOs and some of the
11 debt securities in those CLOs.

12 And then the stripping out and the fraudulent conveyances
13 out of Acis caused them damages because that's what left the
14 damage to Mr. Terry.

15 The quick math on Acis, by the way, is Acis has probably
16 lost, total damages, 175 million bucks. And that's pretty
17 easy. DAF lost 50. HarbourVest lost 50. Fifteen million of
18 fees charged to HCLOF. Another five million of fees, at
19 least, incurred by Mr. Terry. Ten million that went to Mr.
20 Terry, 15 to Highland fees, another five, plus Mr. Terry's
21 settlement in this case, over eight million bucks.

22 So HarbourVest's position, which, on a factual basis, you
23 know, is problematic for the estate, is, wait a second, we
24 invested in this vehicle with Highland. That was supposed to
25 invest in Highland CLOs. They were called Acis, but they were

1 Highland CLOs. And then you went about causing tremendous
2 damage to that vehicle that we ultimately were investing in,
3 and then charge us for the pleasure.

4 Q You used the phrase earlier "OM," I believe.

5 A Offering memorandum.

6 Q Offering memorandum? Can you just explain to the Court
7 your understanding of what an offering memorandum is?

8 A Typically, under U.S. law, and foreign jurisdictions have
9 similar laws, you have to have a document that explains the
10 securities that you're selling. And it goes into extreme
11 detail about the securities and the risks related to those
12 securities.

13 And the idea is not to have a document that tells you
14 whether it's a good investment or a bad investment, but it's a
15 document that discloses to the potential investor all of the
16 risks with respect to that security or related to the
17 investment over the duration of the security. It doesn't
18 predict the future, but it's supposed to make sure that it
19 gives you a very clean view of the past and a very clean view
20 of what the facts from the past are and how they would
21 implicate the future of the investment.

22 Q And in the course of its diligence, did the Debtor have an
23 opportunity to review the offering memorandum in the context
24 of the claims that were being asserted by HarbourVest?

25 A Oh, absolutely. It was originally effectively -- it's an

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1 HCLOF offering memorandum. But as I said, HCLOF was managed
2 and controlled by Highland, and Highland originally prepared
3 it. And then, of course, in connection with -- with this
4 dispute and these claims, we reviewed it, both myself and my
5 legal team.

6 Q All right.

7 MR. MORRIS: Your Honor, the offering memorandum is
8 on the Debtor's exhibit list, and I think this is an
9 appropriate time to move into evidence Debtor's Exhibits A
10 through EE, all of which appear at Docket No. 1732.

11 THE COURT: 1732?

12 MR. MORRIS: It's the Debtor's Second Amended Witness
13 and Exhibit List.

14 THE COURT: All right. Any objection to admission of
15 A through EE?

16 MR. DRAPER: Douglas Draper. No objection, Your
17 Honor.

18 THE COURT: All right. Mr. --

19 MR. MORRIS: May I proceed?

20 THE COURT: Yeah. Mr. Wilson, did you want to
21 confirm no objection?

22 (Echoing.)

23 THE COURT: All right. Hearing no objection,
24 Debtor's A through EE are admitted.

25 (Debtor's Exhibits A through EE are received into

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1 evidence.)

2 THE COURT: Go ahead, Mr. Morris.

3 MR. MORRIS: Thank you, Your Honor. The offering
4 memorandum itself is one of the documents that we filed under
5 seal, and we did so at the request of counsel to HCLOF. But
6 HCLOF has consented to our sharing up on the screen certain
7 very limited provisions of the document, without waiving the
8 request that the agreement otherwise be maintained under seal.

9 THE COURT: All right.

10 MR. MORRIS: So may I proceed on that basis, Your
11 Honor?

12 THE COURT: You may. Uh-huh.

13 MR. MORRIS: Okay. Ms. Canty, can you please put up
14 on the screen Demonstrative Exhibit #1? Okay. Can we just --
15 is there a way to just expand that just a bit, Ms. Canty?
16 Thank you very much. And if we could just scroll it up?
17 Thank you very much. Perfect.

18 Okay. So, Your Honor, this, as the footnote says, is an
19 excerpt from the offering memorandum that can be found at
20 Debtor's Exhibit AA. Double A. And this particular portion
21 of the offering memorandum is at Page 35.

22 THE COURT: Okay.

23 BY MR. MORRIS:

24 Q Mr. Seery, have you seen this portion of the offering
25 memorandum before?

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1 A Yes, I have. But before I continue, I just -- I should
2 have checked. Are you able to hear me clearly? Am I speaking
3 too quickly or am I cutting out? I just want to make sure.
4 I'm using a different set of audio today.

5 THE COURT: All right.

6 MR. MORRIS: That's fine.

7 THE COURT: I hear you very well.

8 MR. MORRIS: Yeah.

9 THE COURT: So I think we're good right now. Thank
10 you.

11 THE WITNESS: Yeah. Thank you, Your Honor. I was
12 just checking.

13 THE COURT: Okay.

14 THE WITNESS: In response to your question, Mr.
15 Morris, yes, I have seen this before.

16 BY MR. MORRIS:

17 Q Okay. And can you -- did you form a view in doing the due
18 diligence as to the adequacy of this disclosure?

19 A Yes, I did.

20 Q Can you share your -- or share with Judge Jernigan the
21 Debtor's view as to the adequacy of this disclosure concerning
22 the litigation between Highland and Acis?

23 A With respect to the litigation between Highland and Acis,
24 or, really, between Acis, Highland, and Highland's principals
25 and Acis's principal, totally inadequate. The disclosure here

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1 is very high-level. And if there were no other litigation
2 going on, it might serve to suffice. It basically says, In
3 our business, because we invest in distressed loans, there's a
4 lot of litigation around distressed investments, and that's
5 what we have. And then it says, We've talked with the
6 investor about other things and we're -- we think that's
7 enough.

8 Q Is there anything in this portion or anywhere in the
9 offering memorandum that you're aware of that disclosed to
10 HarbourVest that in the weeks leading up to the investment
11 Highland was engaged in the fraudulent transfer of assets away
12 from Acis?

13 A No. And I apologize, because I think it's -- I've
14 conflated two provisions. This one only deals with the very
15 high-level nature of the business. It doesn't give any
16 indication that there's any material litigation going on
17 elsewhere with respect to Acis.

18 I believe there's another provision that says, We -- we
19 have talked to -- oh, here -- I'm sorry. It is here.
20 Shareholders have had an opportunity to discuss with Highland
21 to their satisfaction all litigation matters against Highland
22 and its affiliates unrelated to its distressed business.

23 That, in my opinion, is wholly inadequate.

24 Q Okay.

25 MR. MORRIS: And let's put up -- actually, let's just

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1 move on.

2 BY MR. MORRIS:

3 Q Let's go to the settlement itself.

4 MR. MORRIS: Can we put back up Demonstrative Exhibit
5 #3?

6 BY MR. MORRIS:

7 Q Mr. Seery, can you see that?

8 A Yes, I can.

9 Q Does this generally describe the net economic recovery of
10 the HarbourVest settlement based on estimated recoveries for
11 general unsecured creditors as of November 2020?

12 A As of November 2020, it does. And you alluded to this in
13 your opening, but to be clear, the numbers have shifted.
14 Costs have increased. The -- so the -- effectively, the
15 numerator, in terms of distributable value that we estimate,
16 is lower. And settlements, the denominator, have also
17 increased. So the claims against the estate that have been
18 recognized have increased. And that, that probably takes it
19 down closer, in our view, to about seventy cents distribution,
20 a number closer to nine to ten million, maybe a little bit
21 less.

22 However, there's also some additional value that we -- we
23 believe we will recover directly. There are north of \$150
24 million of intercompany notes owed by Dondero entities to
25 Highland. A number of those notes are demand notes, and we've

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1 already made demand. We'll be initiating actions next week.
2 So those are -- those value, we believe, we'll recover
3 directly from Mr. Dondero and from related entities.

4 To the extent those related entities don't have value, we
5 feel very strongly about our ability to pierce the veil and
6 reach in to Mr. Dondero. And then his assets, either his
7 personal assets or the assets that he claims are in trusts.

8 In addition, there are a significant amount of notes that
9 were extended in two -- I believe around 2017, for no
10 consideration. Those notes were demand notes, I believe, and
11 then extended it 30 years. So they have 2047 maturities.
12 Those were probably going to have to be subject to fraudulent
13 conveyance type actions or -- or some sort of sale at a very
14 discounted value because third parties wouldn't want long-
15 dated notes with Mr. Dondero as the counterparty for very much
16 money.

17 Those -- they defaulted on some of those parties, so we
18 effectively turned them into demand notes. We've accelerated,
19 and we'll be bringing actions against those entities next week
20 as well.

21 So I think (garbled) have come up, so I apologize. One
22 way of saying I think the sixteen and a half is a bit high
23 right now, based upon what we know, but the value is going to
24 be higher than our estimate a couple of weeks ago because we
25 do believe we'll be able to recover on the notes.

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1 One additional caveat, just to be fully transparent here.
2 This summary with the 16.8 doesn't include the subordinated
3 piece of this -- of this claim and our resolution. That --
4 recovery of that piece will be dependent upon the success of
5 litigations.

6 In order for the subordinated piece to get paid, all
7 general unsecured claims in Class -- Classes 7 and 8 will have
8 to be paid in full. And then -- and then the subordinated
9 class in Class 9, which we believe UBS will have a piece of,
10 and HarbourVest will have a piece of by this settlement, those
11 will be able to recover, and those will be based upon other
12 claims of action against -- primarily against related parties.

13 Q And then that last point, is that what's reflected in
14 Footnote 3 on this page?

15 A That's correct, yes.

16 Q Okay. And just for the record, there's a reduction in
17 value of \$22-1/2 million. Do you see that?

18 A Yes.

19 Q And can you just explain to the Court what that is and how
20 that value was arrived at?

21 A Yes. I may be getting slightly ahead of you, Mr. Morris.
22 But to give the Court a reflection of the transaction -- and
23 we can go into the details in a moment -- ultimately, the
24 transaction we structured we think is very fair both
25 economically to the Debtor, but there -- there is some

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1 complexity to it to satisfy some of HarbourVest's concerns
2 that they be able to effectively rescind the transaction, at
3 least from an optical perspective. Value was important, but
4 optics were as well. The twenty-two and a half is the current
5 -- actually, the November value of HCL -- the HarbourVest
6 interests in HCLOF. And that's based upon Highland's
7 evaluation of those interests.

8 So we do believe that that is a fair value as of that
9 date. It has not gone down. It hasn't gone up explosively,
10 either, but it hasn't gone down. We think that's good, real
11 value. That value is in the Acis CLOs, the equity in those
12 CLOs, which is 2 through 6, that we -- we will be working with
13 the HCLOF folks to get Mr. Terry to monetize those assets and
14 those longer-dated CLOs.

15 In addition, I think it's 85 percent of the equity in Acis
16 7 -- Acis 7 is managed by Highland -- that is also beyond its
17 reinvestment period. And in talking to the directors -- and
18 they're new directors, and I'll get to that in a minute, for
19 HCLOF -- they'll seek to push Highland, which is the
20 reorganized Highland, to monetize that asset, with due regard
21 to fair value.

22 In addition, Harbour -- HCLOF owned a significant amount
23 of the preferred or equity pieces, if you will, in the
24 Highland CLO, 1.0 CLOs. As we've talked about, those are not
25 really CLOs. Those are effectively closed-end funds with

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1 illiquid assets, primarily illiquid assets in them. We've had
2 some dispute in front of the Court about selling the liquid
3 assets in them, which we can go into it another time. Those
4 are being liquidated in the market at fair value.

5 But HCLOF also is a significant holder of those preferred
6 shares, and those directors would -- have indicated to me that
7 they would like to see those interests also monetized.

8 Q All right. Let's shift gears for a moment to talk about
9 the diligence that the Debtor did before entering into this
10 agreement. Can you just describe for the Court generally the
11 diligence that was undertaken at your direction?

12 A Well, when we first received the reply to our objection,
13 we dug into that reply and the specifics in it very
14 aggressively. So we reviewed all of the underlying documents
15 related to the original transaction. We discussed with
16 counsel the legal basis for the HarbourVest claims. We
17 interviewed our own HCMLP employees who were involved in the
18 transaction and tested their recollection, specifically around
19 who dealt with HarbourVest, who had the discussions with
20 HarbourVest, what was disclosed to HarbourVest with respect to
21 the Terry dispute and the Acis litigation.

22 We also had done, as I think the Court is well aware from
23 prior 9019 testimony, extensive work around the transfers and
24 the issues related to Acis. So we were familiar with their
25 impact on HCLOF.

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1 We also did extensive work valuing the remaining HCLOF
2 interests to get a good feel of not only how much HarbourVest
3 originally invested, but how much they actually lost in this
4 transaction. And as I said, their original investment was
5 around, in total, in two tranches, about \$80 million, of which
6 they got about \$5 million back, and they've lost \$22 million.
7 So it -- I mean, remaining with \$22 million. So they've lost,
8 you know, in excess of \$50 million.

9 Q Do you recall whether the Debtor reviewed and analyzed all
10 of the documents that were cited in HarbourVest's response to
11 the Debtor's objection to the HarbourVest proofs of claim?

12 A Yeah. I think -- I forget, to be honest, which -- exactly
13 what documents were in there. But we went through their
14 objection with a fine-toothed comb, not only with respect to
15 the issues related to the Acis case, but also their references
16 to Guernsey law, other U.S. law, any of the documents between
17 the parties. And obviously, as I mentioned before, the
18 offering memorandum.

19 MR. MORRIS: Your Honor, I would just note for the
20 record that Debtor's Exhibits I through X are all of the
21 documents that are cited in HarbourVest's response to the
22 Debtor's objection to the HarbourVest proofs of claim, and
23 those are the documents that Mr. Seery just referred to.

24 THE COURT: All right.

25 MR. MORRIS: Just, they're in evidence now, and I

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1 just wanted the Court to understand why they're in evidence.

2 THE COURT: Okay. Thank you.

3 MR. MORRIS: You're welcome.

4 BY MR. MORRIS:

5 Q Let's talk about the Debtor and whether or not it had or
6 has any viable defenses. Did the Debtor form any views as to
7 whether or not it had any defenses to the HarbourVest claims?

8 A Yes, we did.

9 Q Can you describe for the Court the defenses that were
10 reviewed and analyzed by the Debtor?

11 A Yeah. I think we -- we had very significant defenses.
12 So, first and foremost, with respect to the original proof of
13 claim, as I mentioned earlier, it alluded to the expenses and
14 the overcharge. And I think with respect to the 15 million of
15 fees that were charged to HCLOF by Highland, we didn't have a
16 lot of defenses to that claim.

17 It's pretty clear, by any fair view of the Acis case, that
18 HCLOF, as the investor in the Acis CLOs and the Highland CLOs,
19 had no real responsibility for fighting with Acis and Josh
20 Terry and shouldn't have been charged those fees. I don't --
21 I don't think there's a legitimate investor that would
22 actually think that that was an appropriate amount to be
23 charged to a fund.

24 However, the claim was not as broad -- the proof of claim
25 was not as fulsome in terms of discussing and only vaguely

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1 referred to other damages. So we did -- we did, as a
2 threshold matter, think about whether we could argue that it
3 was time-barred because they had not met their obligations to
4 fully disclose under the proof of claim.

5 Secondly, we considered the defenses to the overall claim
6 of fraudulent inducement. Our perspective was that if we
7 could stop the claim of fraudulent inducement, the damages
8 would likely be limited to the 15 and maybe some -- some other
9 damages. With respect to the 15, again, the problem that we
10 had when we got past -- past motions for summary judgment is
11 the factual predicate for our defense was going to be that we
12 divulged these things to HarbourVest and that they did not
13 reasonably -- it was -- reasonably rely on some failure to
14 divulge because they're a sophisticated investor.

15 The problem with that defense is that our witnesses, which
16 really would have primarily been Mr. Dondero and Mr.
17 Ellington, and one other employee who runs the CLO business,
18 Mr. Covitz, would not be pretty good. They've been -- two of
19 them have been in front of this Court and they're not viewed
20 favorably and their testimony would be challenged and
21 potentially suspect.

22 So that gave us a real focus on trying to make sure that
23 we could, if we had to litigate, that we would litigate around
24 the fraudulent inducement.

25 As I said, reasonable reliance, what was disclosed, lack

1 of digging into the public record, because you don't have to
2 go far on Google to find "fraud" within two words of
3 "Highland," and the tremendous, you know, litigious nature of
4 Highland. You know, even at that point, when this investment
5 was made, aside from Mr. Terry's arbitration, which by that
6 point, at least by the time (inaudible) was public, there was,
7 you know, significant public disclosure around the Credit
8 Strat and the litigation, the Crusader litigation, the UBS
9 litigation, the, gosh knows, the Daugherty litigation.

10 So our defense was going to be that you should have
11 figured this out, you're a sophisticated investor, and you
12 should have been able to figure out that there was significant
13 risk that, with respect to Mr. Terry, that Mr. Dondero would
14 not stop litigating and that those costs would put significant
15 risk on the investment.

16 The problem with that, as I mentioned earlier, is that the
17 OM is wholly deficient. If you have a typical risk factor in
18 the offering memorandum, you would have disclosed that there
19 was a litigation with Mr. Terry, a former partner in the
20 business, and that the Debtor had no intention of settling it.
21 There was no intention of settling. That litigation would go
22 on. It could go on for years and it could result in
23 bankruptcy or attachments and other risks to the business, and
24 that the investor should be fully aware that the Offeror does
25 not intend to be involved in any -- or the manager, in any

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1 settlement with Mr. Terry, and the fact it undermined the
2 investment. That wasn't there.

3 But that was our preliminary focus, to try to stop fraud
4 in the inducement. And then we -- we had specific facts
5 related to that. You know, once they knew about the
6 bankruptcy in HarbourVest of -- I'm sorry, of Acis,
7 HarbourVest made a second funding, which was there was a -- it
8 was an initial \$75 million draw, and then a second, I believe,
9 about a \$5 million draw, which was in -- I believe in
10 February. And they made it without -- without objection, and
11 that was after the commencement of the bankruptcy.

12 In addition, they were -- they were active in the
13 bankruptcy, so the -- some of the things that happened in the
14 bankruptcy, there were many opportunities to settle that case,
15 from our examination, all of which were turned down to -- by
16 Mr. Dondero. But you don't see HarbourVest pounding the table
17 to settle, either, either with respect to the Oaktree
18 transaction or any other transaction.

19 Now, HarbourVest's defense to that is, well, we were
20 taking advice and all of our information from Highland, and we
21 were getting that information directly from senior folks at
22 Highland why -- what the value was and why we shouldn't do
23 those things. We thought that that would mitigate some of the
24 arguments that -- some of the damages that we might have, I'm
25 sorry, if we -- if we lost.

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1 But the focus at that point, you know, our legal strategy,
2 was can we stop HarbourVest at the very forefront to say,
3 You've got to come into the factual realm and get out of the
4 fraud in the inducement realm. And then the defenses and the
5 exculpations and the liability limitations in the documents
6 would also come into play.

7 So that -- those are some of the defenses that we focused
8 on and our analytical thinking around them.

9 Q So, if the Debtor had viable defenses, why is it settling?

10 A Well, this is a significant claim. And we -- we looked at
11 it with respect to both the impact on the case, but, really,
12 the merits of the claim.

13 As I said, there's really little dispute that the legal
14 fees should not have been charged to HarbourVest. We think
15 based upon the testimony in Acis, the suspect credibility of
16 those who would have been our witnesses, and the experience in
17 Acis that the Court has had in terms of the completely hell-
18 bent on litigation, it would be hard for anyone to justifiably
19 defend those fees being charged. So, as an initial matter, we
20 had exposure there.

21 In addition, if HarbourVest got by our defense of -- was
22 able, for example, to claim fraud in the inducement, then we
23 were open to significant damages.

24 We really didn't put much value, frankly, on the RICO part
25 of it. We think that that's waved around often to show treble

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1 damages. Although in this case certainly somebody could lay
2 out the predicate acts and put forth a RICO-type argument, we
3 just didn't think that that had real merit in this commercial
4 dispute, even with a fraud claim.

5 But even without the trebling of the damages, there's no
6 dispute that HarbourVest lost more than \$50 million in this
7 investment. You know, we -- we thought about that risk as
8 well.

9 In addition, because the case would really be fact-based,
10 even if we had a high degree of confidence based upon our
11 discussions with our employees and the factual testimony, it
12 was going to be expensive to litigate this case, and time-
13 consuming.

14 And so we looked at the economic value, the potential
15 risks, and the actual value that we were giving up, and found
16 this to be an extremely, extremely reasonable settlement.

17 Importantly, and I think what drove it, you -- one of --
18 one of the things that drove it is another one of our defenses
19 on why, notwithstanding their -- what they held out as
20 meritorious claims, I don't think HarbourVest really wanted to
21 publicly litigate this claim. And we were aggressive in our
22 discussions with HarbourVest of how we would litigate it,
23 which would be quite publicly.

24 Now, that may or may not be fair, but that does put risk
25 on the counterparty. And so I think that helped drive the

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1 settlement.

2 In addition, the structure of the settlement we think is
3 extremely favorable to the Debtor and to the estate because,
4 rather than taking the full claim and putting it into a senior
5 unsecured position, we have bifurcated it. We did think about
6 whether this was a claim that could be subordinated under 510.
7 There won't be any arguments, I would be surprised if there's
8 arguments today that we didn't actually give to the Highland
9 employees who have given them to Mr. Dondero's respective
10 counsel.

11 We did structure it in a way that we thought gave
12 HarbourVest the opportunity to effectively claim a rescission,
13 even though that's not really what it is, and then be able to
14 claim that their recovery is based on the bankruptcy, which it
15 is, but not really dilute all the other stakeholders in the
16 case.

17 (Pause.)

18 THE COURT: Mr. Morris? Anything else?

19 MR. MORRIS: I can hear you, Your Honor.

20 THE COURT: Okay.

21 MR. MORRIS: I can hear you.

22 THE COURT: Okay. Now can you --

23 MR. MORRIS: I got cut off from Mr. Seery for a
24 moment.

25 THE COURT: Okay.

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1 BY MR. MORRIS:

2 Q Okay. I appreciate that. Are you done giving the
3 Debtor's basis for entering into this settlement, Mr. Seery,
4 if you can hear me?

5 A I think so, but I think as the Court has probably seen, I
6 can go on.

7 Q Yes.

8 A So I will try to be -- I'll try to be more concise. But
9 this was a -- this was a difficult settlement. We felt good
10 about our defenses. Felt that we could -- we could try them.
11 But it would be extremely expensive, time-consuming, and there
12 would be a lot of risk. And settling at a level which we
13 believe is actually below the damages that were clearly caused
14 only by the fees was a -- was a -- is a -- is a very
15 reasonable settlement.

16 Q Okay. Let's just talk about the process by which we got
17 to the settlement. Do you recall generally when the
18 settlement negotiations have -- were commenced?

19 A I believe it was -- was late summer, early -- early fall.

20 Q Okay. Before I move on, I just want to go back to the
21 Acis matter that you were talking about, one last issue. Do
22 you know how, if at all, the injunction that was entered in
23 the Acis bankruptcy impacted or related to the HarbourVest
24 claims?

25 A Yeah. I -- yes, I do. And I believe it -- it did. I

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1 think there's an argument, and we analyzed it thoroughly, that
2 the injunction effectively caused a lot of the damages.
3 Because if you look at the values of the equity that
4 HarbourVest had, the -- and HCLOF had in the CLOs, it went
5 down dramatically after the Trustee in the Acis case took over
6 and then subsequently, when the case was reorganized and Mr.
7 Terry took over, you know, with Brigade as the sub-advisor.

8 Now, that would -- you know, we would -- we could
9 certainly attempt to throw, in our defense, the causation at
10 Mr. Terry's feet or at Mr. Phelan's feet. HarbourVest's
11 retort is that none of this would have occurred but for the
12 burn-it-down litigation that Mr. Dondero engaged in with
13 Highland.

14 In addition, in Mr. Terry's defense, you know, he did try
15 multiple times with HCLOF, tried to petition, if you will, the
16 HCLOF entity to -- and directors, former directors, to reset
17 the CLOs to make them more economically viable, based upon the
18 current level of asset returns versus the debt costs in the
19 CLOs. And that was rejected by the HCLOF and the Debtor as
20 the controlling party of HCLOF. So, we thought about those
21 risks.

22 You know, similarly, the economic values in Acis 7 went
23 down pretty significantly from that date as well. So I think
24 there's -- there are some defenses, but that's really Mr.
25 Terry's issue, not our issue. So we thought about those

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1 issues, we analyzed them, and we certainly did all the work
2 around month-to-month reductions in NAVs and how different
3 events in the Acis case might have -- might have caused those
4 and was that some sort of break from the original
5 transgression that HarbourVest claims, which was the
6 fraudulent inducement.

7 Q Do you recall that in November HarbourVest's motion under
8 3018 was scheduled to be heard?

9 A Yes.

10 Q And can you just tell the Court your understanding of what
11 the 3018 motion was about?

12 A Well, the 3018 motion was going to be on voting. And we
13 took the view that it really was not -- it shouldn't have been
14 that big an issue and HarbourVest should have been content
15 with just taking their actual losses of roughly a \$50-\$60
16 million claim for voting purposes and then we would move on.

17 HarbourVest was very insistent that they have a \$300
18 million claim, because they took the position -- and with
19 extensive documentation; not only the pleadings they filed,
20 but also detailed decks that were prepared by their counsel,
21 which they had presented to us on the merits of their claim --
22 that they were going to litigate for -- the 3018 and for the
23 full \$300 million value.

24 And that became the genesis, if you will, of the
25 negotiations to settle.

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1 So, we started talking about the 3018. It was very
2 contentious. My apologies to Ms. Weisgerber and her counsel,
3 her partners, because it was a significant and contentious
4 negotiating call. But the reasons for that I think were that
5 -- their insistence on litigating the 3018 and our view that
6 this was just, you know, another -- another of a series of
7 delays and costs in this case that we really were hoping to
8 avoid.

9 That led to Mr. Pugatch and I stepping away from counsel,
10 no offense to counsel, you know, ours and his, to begin
11 negotiations around the potential for a settlement. First, it
12 started with a 3018, and then, you know, argued that we would,
13 if we got past the 3018, we were going to litigate this,
14 because we effectively had -- thought we could get everyone
15 else done at -- in and around that time. And I think we were
16 also probably a little bit optimistic about UBS at that time
17 and the mediation, which subsequently we have settled. But
18 that was the genesis of those settlements.

19 Q And how did the structure, how did the Debtor and
20 HarbourVest derive at the structure whereby there is a general
21 unsecured claim, there is a subordinated piece, and there's
22 the takeback of the HCLOF interest?

23 A Well, as I outlined, we -- we aggressively set forth our
24 various defenses. Their position was that they -- they should
25 never have been in this transaction before. And they --

1 HarbourVest is, in essence, a fund of funds, and they have
2 investors, and it certainly wouldn't be their, I'm sure, the
3 best-performing asset in their portfolio, to have made this
4 investment and lost \$50 million over this period of time. So
5 they felt strongly that they should never have been in this
6 investment, and but for the failure to disclose and the
7 improper disclosures, they would not have been in this
8 investment.

9 So, optically, getting out of it was important to them,
10 and that led to our idea and construction of a subordinated
11 claim and the transfer of the HCLOF interests to the estate.

12 Importantly, the HCLOF interests, as I mentioned, are --
13 the investments are in the Acis CLOs controlled by Acis and
14 Mr. Terry. The reorganized Acis. As well as the 1.0 CLOs and
15 the Acis 7.

16 So we were keenly focused on, if we were going to get that
17 interest, would we then have the majority control in HCLOF,
18 which we will, and would we be able to drive the recoveries,
19 as opposed to what Highland typically does in these
20 investments is use other people's money, drive down the value,
21 and then try to buy back the interest on the cheap.

22 Q Just in terms of timing, because I think there was a
23 suggestion in one of the openings that there was something
24 untoward about the timing here: At the time the liquidation
25 analysis was prepared on November 24th, had the Debtor reached

1 any agreement in principle with HarbourVest?

2 A If we had, it would have been reflected, so I don't -- I
3 don't think we were agreed by then. I don't recall the
4 specific dates, but if we had, it would have -- it would have
5 been reflected.

6 Q If I can refresh your recollection that the motion was
7 filed on December 24th, does that help form your understanding
8 or refresh your recollection that there was no agreement in
9 principle on November 24th?

10 A Yeah. Well, I'm quite sure there was no agreement in
11 principle or we would have reflected it minimally by a
12 footnote. There's -- there's no chance. It's a material
13 reduction in the claims pool that we were previously telling
14 people that, at least for purposes of distribution, like UBS
15 and a couple others we said we thought we would get to zero
16 on. So we didn't calculate in that amount. So I'm quite sure
17 we didn't have a deal when we filed the disclosure statement.

18 In terms of the timing, anyone who's done this business
19 for any degree of time knows that the crucible of bankruptcy
20 brings people to the settlement when they see something
21 happening in the case, and not before. I think HarbourVest
22 looked at our -- this is my supposition -- HarbourVest looked
23 at our plan, our ability to get this done, our settlement with
24 Redeemer, our settlement with Mr. Terry and Acis, and saw that
25 this plan was coming together, and if they didn't think about

1 the settlement, they were going to think about not only the
2 risks that we laid forth for them with respect our defenses,
3 but also the opportunity to litigate with the Claimant Trustee
4 over a long period of time, which couldn't have been
5 particularly appetizing.

6 Q Can you describe for the Court the role played by the
7 independent board of Strand, the general partner of the
8 Debtor, in analyzing and participating in the approval
9 process?

10 A Yes. I think, as the Court is aware and I've testified
11 before, Mr. Russell Nelms and Mr. John Dubel are fellow
12 independent directors with me, appointed pursuant to the Court
13 order. They are kept abreast of every detail, and -- along
14 the way, not just in a summary form at the end. We have
15 reviewed and analyzed collectively each of the issues. Mr.
16 Dubel has extensive experience in these types of litigation
17 matters. Obviously, Mr. Nelms, from his -- both his practice
18 and his time on the bench, has a keen insight into how to
19 resolve and what the risks and benefits are from settling
20 litigation. So I consult them every step of the way.

21 Q And as part of this process, did the Debtor reach out to
22 the directors of HCLOF?

23 A Yes, we did. So, we reached out and we've had several
24 conversations on video chats with the directors. The
25 directors of HCLOF are two new gentlemen, Mr. Richard Boleat

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1 and Mr. Dicky Burwood. They are extremely professional. They
2 are exceptionally well-informed. They are truly careful, and
3 I would say very experienced professional not only directors,
4 but experienced in -- in these matters, both in respect of
5 structured finance as well as these types of vehicles and
6 litigation.

7 They were appointed by the old directors, Scott and
8 Bestwick, and they have been in control. They have outside
9 counsel, which is King & Spalding in the U.S. They have
10 Guernsey counsel. They have accountants and professional
11 advisors, and are being, in my opinion, exceptionally careful.
12 I've got -- very quickly developed a lot of respect for them,
13 and we consulted with them on this settlement and how it would
14 work.

15 They've been very clear that they represent HCLOF and they
16 work for the benefit of the equity, whomever owns it, and
17 taking a view that they would like to see these assets
18 monetized swiftly, with due regard to value, for the benefit
19 of the equity.

20 Q And is it your understanding that the directors of HCLOF
21 approved of this transaction?

22 A They -- I don't know that their approval was required.
23 It's really -- there are a number of hoops to jump through
24 under the documentation, including opinion of outside counsel
25 that we received from WilmerHale in terms of the effectiveness

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1 of the transfer under the documents. We had a negotiation
2 with -- with those directors, and making sure that we did
3 everything correct -- correctly, excuse me -- with respect to
4 the requirements for the transfer under the documents. And
5 they've indicated their support and acknowledgement that we're
6 doing it correctly.

7 I don't know if it's fair to say they approved it. I'd
8 just have to go check the documents. But they certainly
9 support it. And I think they generally support our position
10 with respect to how to move forward with the assets.

11 Q I appreciate that. I guess I meant approval with a small
12 a and not a capital A.

13 You mentioned WilmerHale. Who do they represent in all of
14 this?

15 A WilmerHale is the Debtor's outside corporate counsel, in
16 particular with respect to the fund issues that we don't
17 handle in-house. We have significant support for fund issues
18 from the expertise of Mr. Surgent, who's been the CCO, and he
19 is also a lawyer, with respect to, you know, some of the
20 difficult fund issues that Highland has. But when we use
21 outside counsel, we use WilmerHale for that, and they've been
22 -- they've been exceptional.

23 Q Okay. Just the last two points that were made in Mr.
24 Dondero's objection, I believe. Did the Debtor overpay in
25 this settlement in order to gain the support of HarbourVest in

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1 connection with its -- with the Debtor's attempt to get its
2 plan confirmed?

3 A Not in any way. My -- I believe the settlement is
4 extremely reasonable. As I testified, it's -- it's less than
5 the -- the actual value going out, depending on unless there's
6 successful litigation, and there well could be, is less than
7 on a pro forma basis the fees that were taken and charged to
8 HCLOF. We didn't do this for votes. We will have Class 2,
9 Class 7, Class 8, and Class 9. So I don't think that's a --
10 there's no vote purchasing, I think you called it. No, not at
11 all.

12 Q Yeah. Well, on that topic, I think the phrase that was
13 used was gerrymandering. Are you aware of the argument that's
14 been made that the subordinated claim was dropped in there in
15 order to gerrymander a positive vote for the impaired class of
16 Class 9, I believe?

17 A In a word, I would say that's preposterous. The -- as I
18 said, we have a number of classes that will vote for the plan.
19 The plan is -- the plan is a monetization plan. And if -- if
20 the creditors determine that they don't want to pursue this
21 plan, we'll go forward with another -- we'll try to get
22 another plan. We tried to have a grand bargain plan. We
23 tried to have a pot plan, as I've testified previously. I'm
24 quite certain that I've done more work on that than anyone
25 else, including Mr. Dondero and anybody who works for him.

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1 And he hasn't been willing to do that.

2 This is a -- this is a plan that's come together. We
3 think it's going to be in the best interests of the estate.
4 That'll be confirmation next week. Or two weeks, I guess.
5 But I don't see how this is any way related -- this settlement
6 is not any way related to the voting on that -- on that -- on
7 that plan.

8 Q Just to put the finest point on it, is the Debtor relying
9 on Class 9 to be the impaired consenting class?

10 A No. I think -- I think what I've -- as I said, I believe
11 we already have the votes in Class -- I think it's 2 or 3, 7,
12 8, and -- and 9 will vote in favor as well. So that won't be
13 an issue.

14 MR. MORRIS: Your Honor, I have no further questions
15 of Mr. Seery.

16 THE COURT: All right. Pass the witness. I'll ask
17 HarbourVest counsel first: Do you have any questions of Mr.
18 Seery?

19 MS. WEISGERBER: No, Your Honor.

20 THE COURT: All right. Thank you.

21 What about cross-examination? Mr. Dondero's counsel?

22 CROSS-EXAMINATION

23 BY MR. WILSON:

24 Q Mr. Seery, how are you doing today?

25 A I'm well, thank you.

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1 Q I'm John Wilson, and I represent Jim Dondero. I have a
2 few questions for you today.

3 Now, the HarbourVest proof of claims were filed on April
4 8th, 2020; is that your recollection?

5 A I believe that's correct. I don't recall the specific
6 date.

7 Q Okay. And do you know when you first became aware of the
8 HarbourVest claims?

9 A I believe it was early in the summer when we filed the
10 omnibus objection. It may have been in late spring, shortly
11 after that. I don't recall the specific date of the filing.

12 Q And before the time of the filing of the omnibus
13 objection, did Highland educate itself regarding the
14 HarbourVest proof of claims?

15 A I'm sorry, could you say that again? I didn't quite
16 understand it.

17 Q Before the omnibus objection was filed, did HarbourVest --
18 I'm sorry, did Highland educate itself on the HarbourVest
19 proof of claims?

20 A Not especially, no.

21 Q Okay. And -- but at some point, Highland did investigate
22 those proofs of claim, correct?

23 A That's correct.

24 Q And when would you -- when do you recall that that
25 investigation began?

1 A I don't recall the date, but the triggering event was
2 HarbourVest's response to our omnibus objection.

3 Q Okay. And that would have been filed September 11th of
4 2020?

5 A I'll take your representation. I don't -- I don't recall
6 the specific date.

7 Q Okay. And so when you began to investigate the
8 HarbourVest claims, what was your initial reaction?

9 A My initial reaction was that the -- the larger claims that
10 they were asserting -- the fraud in the inducement, the RICO
11 -- that those claims were, in my view, attorney-made and that
12 when we dug in and did the work, we saw that HarbourVest
13 clearly lost north of \$50 million on the investment. We had
14 just started to uncover the fee issue and saw the risk we had
15 there.

16 But I thought the bulk of those claims were attorney-made.
17 Clever, but attorney-made, as opposed to what I would think
18 are more legitimate. And so we started to develop our
19 defenses around that.

20 Q And was your initial reaction that the HarbourVest claims
21 were largely worthless?

22 A I think with respect to the claim around the fees, I
23 believed there was significant risk. With respect to the
24 other claims, I thought our defenses would make them
25 worthless, yes.

1 Q And did you ever represent to any party that the
2 HarbourVest claim was worth, at most, \$5 million?

3 A I think I represented often, including to HarbourVest,
4 that it was worth nothing. I don't recall if I specifically
5 said \$5 million. \$5 million would have been a nominal amount
6 to -- which is litigation costs. So it may -- it may have
7 been in my models that I put in that as a settlement amount,
8 but I -- I thought that there were valid and good defenses to
9 those larger claims.

10 Q And you recognize that HarbourVest was a large,
11 sophisticated investor, correct?

12 A Yes. I think they manage north of -- right around a
13 hundred billion dollars.

14 Q And you recognize that HarbourVest routinely structured
15 complex customized investments, correct?

16 A I believe that -- I don't know the intricate part of their
17 businesses, but as a fund of funds who does creative
18 investments, I think that they do do quite a bit of that.
19 This, I believe, was their first investment in the CLO space.

20 Q And it was not -- or I should say, you did not believe
21 that HarbourVest was simply a passive investor in HCLOF,
22 correct?

23 A I don't think that that's true, no.

24 Q You don't -- you don't believe that you denied their claim
25 to be a passive investor?

1 A Oh, I think -- I'm sure that in defense of their claims I
2 would argue that they were -- they were more than a passive
3 investor. But it was pretty clear when you look at the
4 structure of what they invested that there was an intent that
5 they be passive on their part. They didn't take a majority
6 interest.

7 In fact, Highland made it clear in the structure of the
8 deal that they couldn't -- it would be hard for them to get a
9 majority interest because Highland entities would control that
10 and Dondero-controlled entities or individuals would control
11 the majority.

12 I think that they -- they had hoped to be a passive
13 investor.

14 Q But was it not your position that HarbourVest was actually
15 an active, involved investor?

16 A I think our defense was going to be that they knew exactly
17 what was going on, that they participated, that they were
18 active, and that, indeed, that they were in and around some of
19 the subsequent issues in the Acis case.

20 Q And you understood that HarbourVest played a material role
21 in the various outcomes in the Acis bankruptcy case, correct?

22 A I don't believe that to be correct, no.

23 Q Have you ever made that representation to anyone before?

24 A Not -- not that I recall.

25 Q Well, do you recall giving statements to a reporter named

1 Syed Khaderi?

2 A I've never spoken to a reporter named Syed Khaderi in my
3 life.

4 Q Well, did you participate in the preparation of statements
5 to be given to Syed Khaderi?

6 A I've never heard of Syed Khaderi, nor have I participated
7 in any preparation of statements. I don't know who that is.

8 MR. WILSON: All right. I'm going to have Bryan
9 Assink put on the screen a document.

10 And Bryan, can you go to Page 7? Bottom of -- the top of
11 Page 7. Well, actually, before you do that, go to the very
12 top of the document.

13 BY MR. WILSON:

14 Q Now, Mr. Seery, are you familiar with Lucy Bannon?

15 A Yes.

16 Q And who is Lucy Bannon?

17 A She is the Highland public relations person.

18 MR. WILSON: Okay. Now go back to Page 7.

19 BY MR. WILSON:

20 Q Now, do you -- do you see on your screen an email of
21 September 14th from Syed Khaderi that says, Hi, Lucy, how are
22 you?

23 A Yes.

24 Q Have you seen this email before?

25 A Not that I recall, no.

1 Q All right. It continues on that, I saw the filing on
2 Friday about HarbourVest claims against Highland for a CLO
3 investment, and I'm looking to put out a report tomorrow
4 morning London time. Ahead of that, I wanted to check if
5 Highland would like to comment on the matter.

6 MR. MORRIS: Your Honor, this is -- the Debtor
7 respectfully objects. A, this document is not in evidence.
8 B, it's rank hearsay.

9 THE COURT: Response, Mr. Wilson?

10 MR. WILSON: Your Honor, I am attempting to
11 authenticate this document, but I'm using it in rebuttal to
12 the testimony that Mr. Seery just offered.

13 THE COURT: All right. I'll allow it. Overrule the
14 objection.

15 MR. WILSON: All right. Thank you, Your Honor.

16 BY MR. WILSON:

17 Q All right. Now, if we -- and oh, that September 14th
18 date, that was three days after the September 11th date that
19 we discussed was the date that HarbourVest filed its response
20 to the omnibus objection, correct?

21 A Yes. If that's the date that they filed it, then I -- if
22 you're representing that, I concede that the 14th is three
23 days after the 11th.

24 Q All right. And if you go back to the first page of this,
25 it looks like, on the following day, Lucy Bannon sends an

1 email to you, and is that your email address,
2 jpseeryjr@gmail.com?

3 A That's correct, yes.

4 Q And do you recall receiving this email from Lucy Bannon?

5 MR. MORRIS: Your Honor, I renew my objection that
6 this is hearsay. He's not rebutting anything that Mr. Seery
7 testified to. He testified that he'd never heard of the
8 gentleman at the bottom of the document. There's nothing in
9 this document that rebuts Mr. Seery's testimony at all.

10 THE COURT: Response, Mr. Wilson?

11 MR. WILSON: Well, I'm not -- I'm not trying to rebut
12 his statement that he hadn't -- that he hadn't heard of Syed
13 Khaderi. My rebuttal is attempted to -- attempting to show
14 that he has made various statements that he denied.

15 THE COURT: I'll overrule the objection.

16 BY MR. WILSON:

17 Q All right. So, back to this exhibit, Mr. Seery. You
18 recall receiving this email from Lucy Bannon on Tuesday,
19 September 15, 2020?

20 A Not specifically. But to be clear, I recall talking to
21 Lucy Bannon about the HCMLP dispute with HarbourVest.

22 Q Okay. And --

23 MR. WILSON: Bryan, can you go down to the next page?
24 Scroll down to where -- the James Seery email.

25 BY MR. WILSON:

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1 Q Do you see this email on your screen that's dated
2 September 15, 2020 at 10:33 p.m.?

3 A Yes, I do.

4 Q And do you recall sending this email to Lucy?

5 A Not specifically, no.

6 Q Well, do you deny that you sent this email to Lucy?

7 A It appears to be my email.

8 MR. WILSON: Your Honor, we would move to admit this
9 document into evidence as Dondero Exhibit Letter N.

10 THE COURT: Any objections?

11 MR. MORRIS: I would consent to the admission of Mr.
12 Seery's email, but the balance of it ought to be excluded as
13 hearsay.

14 THE COURT: What about that?

15 MR. WILSON: Well, Your Honor, I think that this
16 document -- and I'll get into this in a little more detail in
17 a second -- but I think this document is a combination of the
18 work product of Lucy Bannon and Mr. Seery in preparing a
19 response for the reporter who requested comment from Highland.

20 THE COURT: Okay. I --

21 MR. MORRIS: Your Honor, um, --

22 THE COURT: Go ahead.

23 MR. MORRIS: I just -- I do question how they got
24 this document, but that's for another day. That's number one.
25 Number two, in addition to the hearsay argument, I just --

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1 relevance grounds.

2 THE COURT: Okay. I'll allow the portion that is the
3 communication of Seery, that portion of Exhibit N. All right?

4 MR. WILSON: Okay. With due -- thank you, Your
5 Honor. With due respect, I -- to use that portion, I need to
6 refer to the portion below it, because he says, Good to submit
7 with your final edit/revisions. And so we need to know what
8 those final edit/revisions are, which are contained in the
9 email directly below that on the document that was four
10 minutes earlier in time.

11 THE COURT: All right. Fair enough. That'll be
12 allowed.

13 MR. WILSON: All right. Thank you, Your Honor.

14 (James Dondero's Exhibit N is received into evidence as
15 specified.)

16 MR. WILSON: So, Bryan, now can you scroll to the
17 next page? Oh, actually, let's just -- let's just stop at the
18 top -- at the bottom of the page. What's this statement?

19 BY MR. WILSON:

20 Q So, to be clear, Mr. Seery, when -- in response to Mr.
21 Khaderi's request for information and comment, you prepared
22 actually two responses, and one of those was a statement on
23 the record attributed to a spokesperson for HCMLP or something
24 along those lines. And then --

25 MR. WILSON: Can you scroll down to that next page?

1 BY MR. WILSON:

2 Q And this says -- I think part of this got cut off for some
3 reason, but it looks like the official statement is in
4 quotation marks. It says, "We dispute the allegations made in
5 the filing and believe the underlying claims are invalid and
6 will be found to be without merit. Our focus continues to be
7 treating all valid claims in a transparent, orderly, and
8 equitable manner, and vigorously disputing meritless in the
9 court. That focus will assure that HCMLP's reorganization
10 process -- progress is towards an efficient and equitable
11 resolution."

12 And then below that there's another section of this email
13 that says, Background/Clarification, Not for Attribution. And
14 do you know the purpose of this second section of the
15 response?

16 A Do I know the purpose of that? Yes.

17 Q And what would that purpose be?

18 A Ms. Bannon was speaking on background to reporters. As I
19 said earlier, I've -- I never heard of the gentleman from
20 London. If he's at the bottom of the email, I didn't pay any
21 mind, never heard of him. Nor have I heard it since. Ms.
22 Bannon didn't ever reference the specific person.

23 But she is the public relations person. So, as I
24 testified earlier, she does communicate with the press. And
25 as I previously testified when Mr. Morris questioned me, one

1 of our tactics and our defenses for HarbourVest was going to
2 be that we were going to be very public and aggressive about
3 the investment and it would have a negative impact or negative
4 perspective for viewers, in our opinion, about HarbourVest's
5 investment.

6 Q All right. Well, look with me in the middle of that
7 paragraph right after the closed parenthetical, where it says,
8 "But it's important to note the background of HarbourVest's
9 active and deep involvement in the investment of which it now
10 complains."

11 And so it was your position that HarbourVest had an active
12 and deep involvement in the investment, correct?

13 A No. I don't think that's correct. Ms. Bannon prepared
14 the statement, it was a litigation defense on background, and
15 that's our -- that was our position for this purpose. It was
16 not my view that they were active and deeply involved. They
17 were certainly involved. There's no doubt about it. But they
18 got all their information, in our estimation and our research,
19 from Highland.

20 Q But in any event, you would agree with me that four
21 minutes after receiving this email, you approved this
22 statement to go out to the reporter, correct?

23 A No, that's not correct. That's -- this portion is on
24 background. That statement doesn't go out. The previous
25 statement was the official statement. This is the background

1 discussion that she would have. So, no, she was not
2 authorized in any way whatsoever to send that out. She was
3 authorized to have conversations with those general facts.

4 MR. WILSON: Okay. Bryan, go to the top, or the
5 bottom of the page immediately preceding that. That's it.
6 Yes, that's it right there.

7 BY MR. WILSON:

8 Q Now, you'll see that this email from Lucy Bannon on
9 September 15, 2020 at 10:29 p.m. starts off, "Jim, let me know
10 what you think of the below. And, again, the first would be
11 on the record and the second will be sent for information
12 purposes to ensure accuracy, not for attribution."

13 So the intent was that this -- that this entire statement
14 be sent to the reporter, correct?

15 A I don't believe that's correct. I think when she goes on
16 background she doesn't send them a written doc. It's got to
17 be clear to the reporter, at least my understanding is that
18 what on background means -- I've been involved with this
19 before -- is that typically that's done orally. I don't know
20 if she's done it in a written statement before. I have never
21 seen that done in a written statement before. You give the
22 official statement and then you walk the reporter through your
23 other views on background. And you're not quoted. And it's
24 usually attributed to a source with knowledge.

25 Q Okay. We'll come back to that in a minute. The next

1 sentence after the one I just read to you --

2 MR. WILSON: Go back to where we were on the
3 background.

4 BY MR. WILSON:

5 Q Now, we just read you the sentence that starts with, "Then
6 it's important." The following sentence says, "HarbourVest
7 was not simply invested in HCLOF as an ignorant,
8 unsophisticated, passive investor, but was an active and
9 informed participant in the inception of its investment
10 through all of the Acis bankruptcy proceedings, and
11 HarbourVest played a material role in various outcomes related
12 to that case and its impact on HCLOF."

13 And is it -- did you not just tell me before we
14 investigated this document that HarbourVest did not play a
15 material role in the various outcomes of the Acis bankruptcy?

16 A I don't know exactly what I said, but I think that's
17 correct, after we'd done the research on it, yeah.

18 Q But you took the position in this email that you approved
19 to go out to a reporter that says that -- that HarbourVest was
20 an active and informed participant in the inception of -- of
21 its investment through all of the Acis bankruptcy proceedings
22 and played a material role in various outcomes related to that
23 case and its impact on HCLOF. Can we agree with that?

24 A Yes.

25 Q And then the final sentence of this paragraph says that,

1 We believe that neither the facts nor the law support
2 HarbourVest's, quote, We-were-too-lazy-to-know allegations.

3 Whose words were those, "We-were-too-lazy-to-know
4 allegations"?

5 A I don't recall. They may be mine. It's aggressive the
6 way I am, so that -- that may well be the case.

7 MR. WILSON: All right. Go -- go down to the next
8 page.

9 BY MR. WILSON:

10 Q And with respect your comment that that second paragraph
11 would not have gone to the reporter, look at this email in the
12 middle of the page from Lucy Bannon to Syed Khaderi, September
13 16, 2020, at 1:51 a.m. And --

14 MR. MORRIS: Your Honor, this I will object to as
15 hearsay. There is no witness here to testify to anything on
16 this document.

17 THE COURT: All right. How about that?

18 MR. WILSON: Well, it's -- well, scroll up just a
19 little bit. This email at the top of the page is three
20 minutes after the one in the middle of the page, where Lucy
21 Bannon is forwarding this to James Seery, saying, See below
22 for responses sent to *Creditflux*. Will follow up with the
23 story when it runs or with any other updates.

24 MR. MORRIS: Your Honor, these --

25 MR. WILSON: So I think this --

1 MR. MORRIS: These documents don't appear on the
2 witness list. They're not being offered to impeach anything.
3 They're just -- he's taking discovery as we sit here.

4 MR. WILSON: Your Honor, in response, I'm simply
5 trying to rebut the statements that Mr. Seery made. In fact,
6 he told me just a minute ago that that second paragraph would
7 not have gone out to the reporter. However, this email from
8 Lucy Bannon to Syed Khaderi directly rebuts that statement.

9 THE COURT: But your whole purpose in this line of
10 questioning, with an undisclosed document, is to rebut the
11 earlier testimony he gave before you even put this exhibit in
12 front of him.

13 MR. WILSON: I'm trying to rebut multiple statements
14 that Mr. Seery has made today, and I think it -- you know, if
15 he's going to testify that this information did not go out to
16 a reporter, I think I'm allowed to rebut that to demonstrate
17 that it did.

18 THE COURT: All right. Why didn't you disclose this
19 in advance? It's feeling less and less like an impeachment
20 document the more we go through it.

21 MR. WILSON: Your Honor, I did not -- I did not
22 actually have this document at the time we filed our witness
23 and exhibit list, but I would also say that I didn't have any
24 purpose to use it if I didn't need it for rebuttal.

25 THE COURT: Okay. First off, you're supposed to

1 disclose all exhibits you anticipate using except those for
2 purposes of impeachment. Okay? Not rebuttal, to be
3 technical.

4 So, if you didn't disclose this exhibit, the only way you
5 can use it, subject to other possible objections, is if you're
6 impeaching a statement. And I'm just saying I think we're
7 going beyond trying to impeach the original statement and now
8 we're trying to impeach statements he's made after seeing
9 portions of the document.

10 What did you mean, you didn't have this document in time
11 to disclose it?

12 MR. WILSON: Well, I actually just received this
13 document this morning, Your Honor.

14 THE COURT: Where did you receive it from?

15 MR. MORRIS: From who?

16 MR. WILSON: I -- I honestly do not know the source
17 of this document, although it was provided to me by my client.

18 MR. MORRIS: Your client being Mr. Dondero?

19 THE COURT: Could you answer that, Mr. Wilson?

20 MR. WILSON: Yes, that's -- yes, that's correct.

21 THE COURT: All right. I will -- that's --

22 MR. MORRIS: Your Honor, I'd like to --

23 THE COURT: That's a different can of worms. But for
24 now, I sustain the objection. You're done questioning on this
25 document.

1 MR. WILSON: That's fine, Your Honor. I can move on.

2 BY MR. WILSON:

3 Q Now, Mr. Seery, you would agree with me that whether or
4 not HarbourVest played an active role in the Acis bankruptcy,
5 it was kept apprised of the -- of the ongoings in the
6 bankruptcy? (Pause.) I'm sorry. Could you hear that?

7 A Yes. My understanding is that -- that they were.

8 Q And in fact, did Highland have weekly conference calls
9 with HarbourVest during the Acis bankruptcy to discuss what
10 was going on in the bankruptcy?

11 A I don't know if they were weekly. I've been told that
12 they had regular calls updating HarbourVest, yes.

13 Q Okay. And did Highland produce over 40,000 pages of
14 documents to HarbourVest related to the Acis bankruptcy?

15 A I'm not aware of that, no.

16 Q Have those documents been provided to you?

17 A I hope not.

18 Q So, in your role --

19 A I'm sorry. I don't -- I didn't receive 40,000 documents
20 from anybody.

21 Q Well, did you receive any number of documents that were
22 provided by Highland to HarbourVest during the Acis
23 bankruptcy?

24 A I wasn't involved in this during the Acis bankruptcy. I'm
25 sorry.

1 Q Well, I'm referring to, after you became involved in this
2 Highland bankruptcy, whether you were provided with these
3 documents that were sent from Highland to HarbourVest.

4 A I don't -- I don't know what the documents are. I've
5 reviewed tons of documents with respect to the HarbourVest
6 claims, but I don't know of the documents to which you're
7 referring.

8 Q Okay. And after you performed your investigation into the
9 HarbourVest claim, what was your opinion as to the cause in
10 the reduction in value of HarbourVest's investment in HCLOF?

11 A I think the main cause of the reduction in the investment
12 was the imposition of the Trustee and the failure of Highland
13 HCLOF and then subsequently with the injunction to reset the
14 CLOs.

15 You know, these are -- these are some of the worst-
16 performing CLOs in the market because they weren't reset. And
17 when the liabilities of the CLOs are set at a level to match
18 assets, and then liability -- the assets run off, and the
19 asset financings or the new deals come in at much lower
20 levels, and the obligations of the CLO are not reset, the
21 arbitrage that is the CLO shrinks. And that's what happened
22 to these CLOs.

23 Q And during the course of the Acis bankruptcy, Acis and
24 Brigade were given management responsibilities over the CLOs
25 and HCLOF, correct?

1 A I believe that the Trustee had the overall, and then
2 subsequently, with the confirmation of the plan, they took it
3 over. So I think that ultimately Mr. Terry had the management
4 authority, full management authority, and some advice through
5 Brigade. But I think technically it wasn't actually during
6 the Chapter 7. The Chapter 7 proceeding, I believe that Mr.
7 Phelan had the actual authority.

8 (Echoing.)

9 Q I'm sorry. And so your testimony is that Mr. Phelan had
10 the actual authority but he delegated that authority to Josh
11 Terry and Brigade?

12 A I think that's fair, yes.

13 Q And do you know when that occurred?

14 A I believe that the control of the CLOs was in July of
15 2018, and then the ultimate confirmation of the case was at
16 the very beginning of '19.

17 Q So, after being instituted as portfolio manager, and
18 during the time when Acis and Brigade were working under the
19 direction of the Trustee, who would have receive the fees for
20 managing those portfolios?

21 A I believe -- I don't know. I believe the -- that the Acis
22 estate would have received those fees.

23 Q And who -- and so is that your testimony, that prior to
24 confirmation the Acis estate would have received the
25 management fees?

Seery - Cross

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1 A I believe that -- I believe they would have if they were
2 the manager, yeah.

3 Q Okay. And who would have received the fees after
4 confirmation?

5 A Acis.

6 Q Okay. And who would have had the discretion to set the
7 amount of those management fees?

8 A They would be agreed to in the -- in the investment
9 management agreement.

10 Q They would be agreed to?

11 A Yes. As far as I've seen, I've -- I haven't seen
12 unilateral ability of a manager to set fees at its -- at its
13 whim.

14 Q So is it your understanding that Acis and Brigade ended up
15 charging substantially more fees than Highland had charged
16 when it was under Highland's management?

17 A I think the fees were -- the fees were -- the fees were
18 set by the agreement.

19 MR. MORRIS: Your Honor, I just object to the line of
20 questioning on relevance grounds. This is a 9019 hearing,
21 Your Honor. How -- I just don't think this has any relevance
22 at all.

23 THE COURT: All right. Mr. Wilson, what is the
24 relevance?

25 MR. WILSON: The relevance is that Mr. Seery has

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1 testified that these Acis CLOs were among the worst-performing
2 in the market, and frankly, we would agree with that, and I'm
3 trying to get his understanding as to why, because I think
4 there's direct relevance in the reason that the value of the
5 HarbourVest investment diminished.

6 MR. MORRIS: I don't think that was his testimony,
7 Your Honor. But at the end of the day, Your Honor has heard
8 the litany of reasons why the Debtor is entering into this
9 agreement. I just, I just think it's irrelevant, Your Honor.

10 THE COURT: All right. Mr. Wilson, I barely think
11 this is relevant. I mean, I'm going to give you some benefit
12 of the doubt on that because of, you know, the testimony that
13 HarbourVest lost \$50 million of value and --

14 (Echoing.)

15 THE COURT: -- maybe that shouldn't, you know, lie at
16 the feet of Highland. I think the compromise reflects that
17 they don't -- it doesn't lie entirely at the feet of Highland.
18 But, you know, maybe two or three more questions.

19 MR. WILSON: Yes. Thank you, Your Honor. And I
20 didn't have very much more on this point. But to be a hundred
21 percent honest, I can't remember my question right before the
22 objection.

23 THE WITNESS: I think you were asking me about the
24 fees and somehow alluding or implying that the manager could
25 unilaterally set fees.

1 The fees are set in the investment management contract.

2 The manager doesn't get to wake up on Wednesday and say, you
3 know, I'd like another half a basis point. It doesn't work
4 that way.

5 BY MR. WILSON:

6 Q But you would agree with me that the fees and expenses
7 charged to an investment would impact the performance of that
8 investment in the market?

9 A Absolutely.

10 Q Would you also agree with me that there was one CLO -- and
11 I think you referred to it in your direct testimony -- but CLO
12 7, which continued to be managed by Highland?

13 A That's correct.

14 Q And is it fair to say that CLO 7 exceeded the performance
15 of the CLOs that were managed by Acis and Brigade?

16 A I think that's fair. I don't -- I don't recall the
17 magnitude, but I think it's outperformed those -- those CLOs,
18 yes.

19 Q All right. Well, thank you. I want to turn your
20 attention to the portion of the settlement agreement that
21 deals with voting of the HarbourVest claim. How did
22 HarbourVest's commitment to vote for the plan become a part of
23 the settlement?

24 A Pretty straightforward negotiation. We -- in negotiating
25 the settlement, one of the key factors was the cost and

1 expense of the litigation, in addition to the risk on the --
2 on the fees, and whether we could wrap this up in a global
3 settlement now. So in my experience, it's fairly typical, we
4 would try to do this in every settlement, have the settling
5 party, be that the claimant, agree to support the case and the
6 plan.

7 You know, we did not do that with the Committee members,
8 although we wanted to. (Echoing) I frankly still wish I had.
9 Those little -- little bits that have been difficult
10 (echoing). The Committee members have a different interest in
11 (echoing) than their more global interest for creditors at
12 large, which is more difficult than traditionally in
13 bankruptcy cases, less likely to have a Committee member, a
14 sitting Committee member, actually support the (echoing) of
15 the plan.

16 THE COURT: Mr. Wilson, could you be careful to put
17 your device on mute every time you're not talking? Because
18 we're getting some feedback loop from you when Mr. Seery
19 answers your questions. Okay?

20 (Echoing continues.)

21 THE COURT: Like right now. I'm hearing feedback of
22 my own voice through your speakers.

23 Right, Mike? Isn't that what --

24 A VOICE: I am, too.

25 THE COURT: Yes. Okay. So please be sure you put

1 your device on mute whenever you are not speaking. All right.
2 Go ahead.

3 BY MR. WILSON:

4 Q I mean, I think you just answered this question, but there
5 was -- there was no similar voting provision in the Acis or
6 the Redeemer settlements, correct?

7 A There is not, no. And just as a -- by way of explanation,
8 if it's okay, the reason was my counsel advised against it. I
9 did ask for it.

10 Q Your counsel advised against putting that voting
11 requirement in the Acis and Redeemer settlements?

12 A For the reasons I stated. And in my experience, that's
13 consistent, where sitting members of Committees don't
14 generally sign up to resolve their own claims and support the
15 plan because of their larger fiduciary duties to the creditor
16 body as a whole.

17 Q And during the settlement negotiations of the HarbourVest
18 claim, was this commitment to vote a topic of discussion?

19 A Not -- not particularly, no. It was pretty clear that
20 HarbourVest, if they were going to agree to the settlement and
21 the numbers, could see structure. Obviously, it wanted to
22 understand what the potential distributions would be under the
23 plan, but this was not a hotly-negotiated point.

24 Q And would you consider HarbourVest's commitment to vote
25 for the plan an important part of the settlement?

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1 A I think it's an important part of the settlement, that the
2 part of the settlement is the subordinated claim. We could
3 put that into presumably any plan. But our plan does -- does
4 have a Class 9 for that. So I think it's a -- it's a part of
5 the settlement that is important or we wouldn't have included
6 it. It clearly wraps everything up and moves us towards
7 confirmation.

8 Q And would you have made the deal with HarbourVest if they
9 had pushed back on the commitment to vote for the plan?

10 A Yeah, I would have.

11 Q All right. Thank you.

12 MR. WILSON: No further questions.

13 THE COURT: All right. Mr. Draper, anything from
14 you?

15 MR. DRAPER: Yes, Your Honor.

16 CROSS-EXAMINATION

17 BY MR. DRAPER:

18 Q Mr. Seery, I may not understand the settlement, and I
19 apologize, but the way I think the settlement reads, the
20 interest that you're acquiring, you have the right to place in
21 any entity. Is that my -- is that correct?

22 A I don't recall the -- the specifics, but just from a
23 structural standpoint, we wanted to be able to put it into a
24 subsidiary as opposed to putting it directly in HCMLP. If we
25 couldn't do that, we would -- we would put it into HCMLP. So

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1 there wasn't a -- I don't recall the actual specifics, but we
2 certainly thought about holding that interest in a -- in a
3 subsidiary, just to have a cleaner hold.

4 Q Why aren't you putting it into the Debtor so the Court and
5 the estate have jurisdiction over that?

6 A I think the Court certainly has jurisdiction over an
7 entity that the estate owns a hundred percent of. I don't
8 think that's -- that's even a close call. So the important --

9 Q Now, --

10 A Can I finish?

11 Q Sure.

12 A You asked me why. To the extent that somebody thinks that
13 problematic, I will consent to the Court having complete
14 jurisdiction over it, since I control it a hundred percent.

15 Q No. The real reason is, if I remember correctly, Mr.
16 Dondero and Judge Lynn filed a motion to have some say or some
17 information as to sales by subsidiaries, and I think you took
18 the position that they weren't entitled to it. And so my
19 concern was that putting this in a subsidiary in a sense gave
20 you unfettered control without any review of the item.

21 A I don't -- I don't think that's the case where we --
22 there's a directly-held subsidiary where we own a hundred
23 percent of it. I don't think that that's the case.

24 Q Okay. But you're willing to (a) put this into the Debtor,
25 number one; and number two, have the estate and have the Court

1 have complete control over the disposition of it and its
2 actions, correct?

3 A That's not correct, no.

4 Q What -- what is incorrect about my statement?

5 A The debtor-in-possession has control of its assets. The
6 Court doesn't have complete control over its assets. There's
7 --

8 Q Well, --

9 A -- issues -- hold on a second. This is not -- this is not
10 a game and a trap. We put it in a subsidiary for specific
11 reasons. You asked why. I'm giving you the why. It's not to
12 hide it from anybody. We're not going to sell the asset
13 unless somebody comes up with a great price for it. We're
14 going to monetize the assets. We're going to control HCLOF by
15 a majority.

16 Q But, again, the issue is, if it's in the estate, the Court
17 has supervision over it. If it's not in the estate, the Court
18 has no supervision of it.

19 A I don't think that's correct, because the Court has
20 supervision over the estate, which owns a hundred percent of
21 the special-purpose entity that will own the shares.

22 Q Okay. All right. Now, let's talk about the \$15 million
23 that you discussed and the legal fees that were incurred. Is
24 that the total amount that was spent, or is -- or is that --
25 was the total amount \$30 million and HarbourVest was only

1 responsible for one half of it or functionally took the brunt
2 of one half of it?

3 A I think the total amount is between \$15 and \$20 million.
4 I don't have the exact numbers.

5 Q So, in fact, the HarbourVest loss due to its ownership
6 would have been one half of that, not \$15 million?

7 A Well, the vehicle lost the money. HarbourVest owned 49.98
8 percent of it, and Highland controlled the rest. So if you
9 allocate it that way, I suppose that would be a -- that's how
10 you would divide it, in -- roughly in half, yes.

11 Q And so HarbourVest's actual dollar loss due to the legal
12 fees is really the 49-point-whatever percent of \$15 million,
13 not \$15 million?

14 A I don't know if -- I certainly would argue that. I don't
15 think that HarbourVest has that position.

16 Q Okay. Now, in connection -- you were asked a question
17 about the documentation that was provided by Highland to
18 HarbourVest both during the bankruptcy of Acis and before.
19 You have control over the Harbour -- over the Highland server,
20 correct?

21 A I'm sorry. Can -- can we do two things? One is, Mr.
22 Draper, I can't see you, so it would be better if I could see
23 you during the questioning.

24 Q Okay.

25 A And could you repeat the question?

1 Q All right. I'll be happy to. You were asked a question
2 about the documentation that was provided by Highland to
3 HarbourVest during the Acis bankruptcy and meetings that took
4 place between the parties. Correct?

5 A Yes.

6 Q And you stated you were unaware of the material that was
7 sent over?

8 A I think I testified that I didn't receive the 40,000
9 documents that were mentioned.

10 Q Did you do any search or order a search of the Highland
11 server to see what material was sent over by any party to
12 HarbourVest to analyze what -- what information they had
13 available to them and what was provided to them?

14 A Yes, we did a search.

15 Q And did you review the documentation that was sent over?

16 A The -- the documentation that we looked at was very
17 specific to the investment and to the OM. So we didn't look
18 for the -- the supposed 40,000 documents, no.

19 Q Did you look for the material that was provided to them
20 during the Acis bankruptcy and the periodic meetings that you
21 discussed? Or that you testified to earlier?

22 A The answer is no.

23 Q One last question. I think, and just so I understand your
24 testimony, you've broken out the HarbourVest claim into two
25 pieces. One is the legal fee amount that we've just

1 discussed, and I gather the other piece of that is the fraud
2 in the inducement to enter into the CLO purchase?

3 A It's -- it's more -- it's much more than that.

4 Q Okay. Well, let me say it in a different way. The other
5 part of it is the losses as a result of the fraud in the
6 inducement to purchase the interest?

7 A I don't think that's -- that's fair. If I could explain?

8 Q Sure.

9 A Yeah. The legal fee piece is pretty clear. The other
10 piece starts with fraud in the inducement, but it's extensive
11 fraud claims. Fraud in the inducement, as I testified
12 earlier, would get them around the exculpation and liability
13 limitations in the OM. You don't get around all of those with
14 just the fraud. And so that's -- that's the split of that
15 claim. So the fraud in the inducement contains fraud
16 allegations. Even if you didn't have inducement, you'd have
17 other potential fraud claims.

18 Q But let me state it in a different fashion. But for the
19 investment, the fraud that you allege wouldn't have occurred?

20 A I -- HarbourVest alleges it.

21 Q No, I'm just -- in your analysis of the claim, but for the
22 inducement, the rest of the damages wouldn't have flowed?

23 A That's HarbourVest's position, yes. But for the fraud,
24 they wouldn't have made the investment.

25 Q All right.

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1 MR. DRAPER: I have nothing further for this witness.

2 THE COURT: All right. Any redirect, Mr. Morris?

3 MR. MORRIS: Just a few very questions, Your Honor.

4 Just a very few questions.

5 REDIRECT EXAMINATION

6 BY MR. MORRIS:

7 Q Mr. Seery, you were asked about that document that Lucy
8 prepared. Do you remember that?

9 A Yes, I do.

10 Q In your experience, don't defendants often deny liability
11 before entering into settlements, or even worse, getting
12 adverse judgments entered against them?

13 A Of course. Yes.

14 Q Okay. And in response to Mr. Draper's questions, isn't
15 the Guernsey claim another claim that the Debtor took into
16 account in assessing the potential risks of this settlement?

17 A There's a number of claims contained in it. As I
18 mentioned earlier, I mentioned the RICO claim. But there is a
19 Guernsey shadow director claim, which is not dissimilar to
20 U.S. claims that somebody effectively controls an enterprise,
21 notwithstanding them not having the official role.

22 Q Okay.

23 MR. MORRIS: I have nothing further, Your Honor.

24 THE COURT: All right. Any recross on that redirect?

25 All right.

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1 MR. WILSON: No, Your Honor.

2 MR. DRAPER: No, Your Honor.

3 THE COURT: Thank you. Mr. Seery, that concludes
4 your testimony. Thank you.

5 THE WITNESS: Thank you, Your Honor.

6 THE COURT: We need to take a bathroom break. Before
7 we do, I just want to be clear with what we have left. As I
8 understood it, we were having Mr. Pugatch from HarbourVest.
9 Mr. Morris, will that conclude the Debtor's evidence?
10 (Pause.) Okay. You were on mute, but I think you were saying
11 yes.

12 MR. MORRIS: Sorry. But to be clear, Debevoise is
13 going to be putting their witness on the stand.

14 THE COURT: Okay.

15 MR. MORRIS: But it's part of the evidence in support
16 of the motion.

17 THE COURT: All right. Do the Objectors have any
18 witnesses today?

19 MR. WILSON: Your Honor, Mr. Dondero intends to
20 examine Mr. Pugatch, but if he's going to be called by his
21 counsel, then we will do that as a cross-examination.

22 THE COURT: All right.

23 MR. DRAPER: This is Douglas Draper. I have no
24 witnesses.

25 THE COURT: Okay. All right. Well, I'm asking --

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1 well, I do want to ask: Can we get a time estimate
2 potentially for Mr. Pugatch?

3 MS. WEISGERBER: For my examination, Your Honor,
4 twenty minutes, perhaps.

5 THE COURT: Okay.

6 MS. WEISGERBER: Or less.

7 THE COURT: All right. Well, let me tell you what
8 we're going to do. We're going to take a ten-minute bathroom
9 break. But I have a 1:30 hearing and I have a 2:00 o'clock.
10 Well, I have a 1:30 docket, multiple matters, and a 2:00
11 o'clock docket. So, you know, I'm really intending that we
12 get finished in time to give me and my staff a little bit of a
13 lunch break before launching into the 1:30 docket, so I'm
14 hopeful we can get done around 1:00-ish. If we can't, then
15 we're going to have to reconvene, I'm going to say probably
16 3:00-ish Central time. So let's hope we can get through
17 everything. All right? Ten-minute break.

18 THE CLERK: All rise.

19 (A recess ensued from 11:58 a.m. until 12:08 p.m.)

20 THE CLERK: All rise.

21 THE COURT: All right. Please be seated. We're
22 going back on the record in the Highland matters. Do we have
23 everyone? It looks like we do. Ms. Weisgerber is going to
24 call the next witness; is that correct?

25 MS. WEISGERBER: Yes, Your Honor. We call Michael

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1 Pugatch of HarbourVest to the stand.

2 THE COURT: All right. Mr. Pugatch, if you could
3 turn on your video and say, "Testing one, two."

4 MR. PUGATCH: Two.

5 THE COURT: All right. There you are. Please raise
6 your right hand.

7 MICHAEL PUGATCH, HARBOURVEST'S WITNESS, SWORN

8 THE COURT: Thank you. You may proceed.

9 MS. WEISGERBER: Thank you, Your Honor.

10 DIRECT EXAMINATION

11 BY MS. WEISGERBER:

12 Q Good morning. Can you please state your name for the
13 record?

14 A Sure. It's Michael Pugatch.

15 Q And where do you work, Mr. Pugatch?

16 A HarbourVest Partners.

17 Q And what is your title?

18 A I'm a managing director in our secondary investment
19 group.

20 Q Did HarbourVest file claims in the Highland bankruptcy,
21 Mr. Pugatch?

22 A We did, yes. Several claims, in fact.

23 Q What was the basis for those claims?

24 A Yeah. Among other things, fraudulent inducement based on
25 misrepresentations and omissions on the part of Highland in

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1 connection with our original investment, mismanagement at the
2 HCLOF level, including inappropriate fees that were charged
3 to investors, among a number of other items as well.

4 Q Can you explain what you mean by misrepresentations made
5 to HarbourVest by Highland?

6 A Yeah, sure. So, you know, based on a number of
7 statements that were made to us around the litigation
8 involving Mr. Terry, some of the intentions found, the
9 structural changes that came to light with respect to HCLOF
10 and our investment, as well as the fact that the arbitration
11 award specifically against Mr. Terry would have no impact or
12 implication on Highland's sale or business.

13 Q And can you explain what you mean by omissions made by
14 Highland to HarbourVest?

15 A Sure. So I would say, really, the implications behind
16 the structural changes that were made at the time of our
17 investment into HCLOF. Also, the intention, clear intentions
18 that Highland had to never, in fact, pay the arbitration
19 award that came to light during our due diligence period to
20 Mr. -- to Mr. Terry as part of the investment. And
21 ultimately the -- what Highland went about doing in terms of
22 stripping assets of Acis that led to the material value
23 declines and destruction of value that we've experienced
24 since our investment.

25 Q You mentioned a diligence period. Did HarbourVest

1 conduct diligence on the investment?

2 A We did. We conducted very detailed due diligence, as we
3 do for all of our investments. That diligence period lasted
4 several months ahead of our investment decision.

5 Q And did HarbourVest conduct that diligence by itself?

6 A No. So, in addition to internal investment professionals
7 at HarbourVest, we engage with outside advisors, both
8 consultants as well as legal advisors, in connection with
9 that due diligence.

10 Q And did Highland answer all of HarbourVest's questions
11 during that diligence period?

12 A They did. And they were numerous. But yes, they
13 answered all the questions that we had for them.

14 Q Was the Terry dispute part of HarbourVest's diligence?

15 A It was. That came up as one of the outstanding items of
16 litigation as part of our due diligence.

17 Q I'm going to ask my colleague to pull up on the screen an
18 exhibit that was on our exhibit list as Items -- Exhibits 34
19 and 35. It's an August 15, 2017 email from Brad Eden to
20 Dustin Willard. Mr. Pugatch, do you recognize this document?

21 A I do, yes.

22 Q And what is it?

23 A This was an email sent to us during our due diligence
24 period in response to a request for more information on the
25 outstanding litigation that Highland was involved with.

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1 MS. WEISGERBER: And if my colleague can just scroll
2 to the attachment to that email.

3 BY MS. WEISGERBER:

4 Q And do you recall the attachment as well, Mr. Pugatch?

5 A Yes, I do.

6 MS. WEISGERBER: And if you can scroll back up to the
7 first email.

8 BY MS. WEISGERBER:

9 Q Who is Dustin Willard?

10 A Yes. Dustin is a colleague of mine at HarbourVest who
11 worked closely with me on this investment.

12 Q And you said that this document was shared with
13 HarbourVest during the diligence period before the HCLOF
14 investment?

15 A It was, correct.

16 Q Is it typical during diligence to receive a description
17 of litigation such as this?

18 A It is. It's a question that we always ask. Certainly a
19 component of our diligence to understand any outstanding
20 litigation on the part of our counterparty or manager that
21 we're investing in.

22 MS. WEISGERBER: Your Honor, I'd move to offer this
23 exhibit into evidence.

24 THE COURT: Any objection?

25 MR. DRAPER: No objection, Your Honor.

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1 MR. MORRIS: No objection from the Debtor, Your
2 Honor.

3 THE COURT: All right. What is the letter or number
4 for this exhibit?

5 MS. WEISGERBER: It's HarbourVest Exhibit 34.

6 THE COURT: All right. So HarbourVest Exhibit 34 is
7 admitted.

8 (HarbourVest's Exhibit 34 is received into evidence.)

9 THE COURT: And I need to be clear where it appears
10 on the docket. Can someone tell me?

11 MS. WEISGERBER: So, it's identified on our exhibit
12 list, not -- it's not attached to the exhibits. It is on the
13 docket. We were -- when we initially filed the exhibit list,
14 we were working out confidentiality issues. But it was
15 subsequently filed with our reply last night. It's at Docket
16 No. 1735 --

17 THE COURT: All right.

18 MS. WEISGERBER: -- at Pages A -- Pages A345 to A350.

19 THE COURT: All right. Very well. Thank you.

20 BY MS. WEISGERBER:

21 Q Mr. Pugatch, we'll just scroll down to the second page of
22 the attachment. Can you describe generally what the
23 litigation says regarding the Terry dispute?

24 A Yes. Generally speaking, this dispute was described as
25 an employee dispute, employment agreement dispute, with Mr.

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1 Terry, who was a former employee of Highland involved in
2 their CLO business, and is described by Highland to us really
3 having to do with a series of false claims, in their opinion,
4 but having to do with a disgruntled former employee.

5 Q And did it strike you as an unusual or significant
6 dispute?

7 A No. I would say we often -- we'll see, you know, former
8 employees with, you know, claims against a former employer in
9 connection with wrongful termination. I wouldn't say it's
10 extremely common, but certainly not entirely out of the
11 ordinary. And based on the explanations that we'd received
12 from Highland, seemed to be more of an ordinary-course type
13 former employee litigation suit.

14 Q Based on what you now know about the Terry dispute, do
15 you believe that this was an adequate disclosure regarding
16 the dispute?

17 A I would say very clearly not, you know, based on the
18 facts that came to light subsequently, the various rulings in
19 connection with the Acis bankruptcy case. What was very
20 clearly not stated are the actual facts and implications of
21 the ongoing litigation with Mr. Terry.

22 MS. WEISGERBER: I'd ask my colleague to put up the
23 next exhibit. Okay. So, this is on a HarbourVest exhibit
24 list, which is Document No. 1723. It's Exhibit 36 on that.
25 Same issue with respect to initially not filed, but it is on

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1 the docket at our response last evening at ECF No. 1735 at
2 Page A351.

3 THE COURT: Page what?

4 MS. WEISGERBER: A351.

5 THE COURT: A351. Thank you.

6 MS. WEISGERBER: You're welcome.

7 BY MS. WEISGERBER:

8 Q Mr. Pugatch, I just put up a November 29, 2017 email from
9 Hunter Covitz to Dustin Willard, Michael Pugatch, and Nick
10 Bellisario. Do you recall this document?

11 A I do, yes.

12 Q And what is this document?

13 A This was an email sent to us by Highland a couple weeks
14 after we closed on our investment on the (inaudible) in
15 response to a *Wall Street Journal* article that had come out
16 regarding Highland, a number of actions that they had taken,
17 and what Highland was articulating to us, a number of false
18 claims that had been made about Highland's prior actions, and
19 specifically trying to explain some of that and also share
20 with HarbourVest a letter that was being sent to the editor
21 of the *Wall Street Journal* highlighting, in their view, some
22 of the inaccuracies around the reporting.

23 Q And did you receive this document?

24 A We did, yes.

25 MS. WEISGERBER: I'd move to offer this, so

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1 HarbourVest Exhibit 36, into evidence.

2 THE COURT: Any objections?

3 MR. WILSON: Your Honor, John Wilson. I would object
4 as to the relevance of this document.

5 THE COURT: All right. What's your response?

6 MS. WEISGERBER: Your Honor, it shows
7 misrepresentations that the witness will testify how it
8 relates back to prior representations prior to HarbourVest's
9 investment, as well as misrepresentations at that time.

10 THE COURT: Okay. I overrule the objection. I'm
11 going to admit it.

12 (HarbourVest's Exhibit 36 is received into evidence.)

13 BY MS. WEISGERBER:

14 Q Mr. Pugatch, can you describe generally -- we spoke about
15 this a little bit -- just what this communication from
16 Highland was conveying to HarbourVest at the time?

17 A Yes. Specifically, again, responding to this *Wall Street*
18 *Journal* article that had been published, trying to defend,
19 again, Highland's own views why there were inaccuracies in
20 the reporting. But importantly, from our perspective, trying
21 to reassure us as to the fact that, you know, these
22 accusations would have no bearing and any results from it
23 would have no bearing on their ongoing business or
24 partnership or the investment that we had made in HCLOF.

25 MS. WEISGERBER: And if you can scroll to the second

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1 page.

2 BY MS. WEISGERBER:

3 Q We'll just look at the last paragraph of another email
4 from Mr. Covitz. Can you just read that first sentence of
5 the last paragraph?

6 A Sure. (reading) While the dispute has no impact on our
7 investment activities, as always, we welcome any questions
8 you may have.

9 Q Mr. Pugatch, was this email and the discussion regarding
10 the Terry dispute consistent with the representations made to
11 you prior to HarbourVest's investment into HCLOF?

12 A It was, yes. Both the message, the lack of any impact
13 that ultimately the dispute with Mr. Terry, the arbitration
14 award would have around Highland's ongoing CLO business, or
15 HCLOF specifically, was all, you know, very clear in this
16 document, but all consistent with the representations that
17 had been made to us leading up to our investment in the
18 middle of November 2017 as well.

19 Q Thank you.

20 MS. WEISGERBER: And you can take down the exhibit,
21 Emily. Thank you.

22 BY MS. WEISGERBER:

23 Q You mentioned, Mr. Pugatch, an arbitration award to Mr.
24 Terry. How did you learn about that arbitration award?

25 A That was initially disclosed to us by Highland as we were

1 in the late stages of our diligence and closing process on
2 the investment into HCLOF.

3 Q And generally, what did Highland tell you about the
4 arbitration award?

5 A We were aware of its existence. We were aware of the
6 quantum of the award, I think it was around an \$8 million
7 arbitration award in the favor of Mr. Terry, and that was
8 following the litigation around the wrongful termination and
9 employee dispute that Highland had described to us
10 previously.

11 Q Did you ask to see a copy of the arbitration award?

12 A No, we did not.

13 Q Why not?

14 A Ultimately, we -- you know, the explanations that
15 Highland had provided to us all seemed very reasonable. We
16 relied on their representations that this was, again, nothing
17 more than a dispute with a former disgruntled employee, in
18 their words, that had no bearing or, you know, would not have
19 any bearing on our investment in HCLOF or their ongoing CLO
20 business, which all very clearly was not the case, as
21 we've -- as we've learned over the last several years.

22 Q Following learning about the arbitration award, did
23 HarbourVest do other diligence?

24 A We did. So, in addition to asking questions related to
25 the arbitration award and any impact that it would have, we

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1 also spent some time diligencing a couple of structural
2 changes that were proposed by Highland, and, in fact, ended
3 up delaying the closing of our investment by about two weeks
4 as we vetted some of those structural changes that Highland
5 had proposed. Vetted those both, you know, internally with
6 Highland directly and with external counsel in order to make
7 sure that those structural changes were in fact legally sound
8 in ultimately making our investment.

9 Q And were those changes proposed following the arbitration
10 award?

11 A They were, yes.

12 Q Did Highland tell you the reason for the structural
13 changes?

14 A Yeah. So, so some of this -- and specifically, this
15 involved a change of the portfolio manager at the HCLOF level
16 that was really in connection with a rebranding as Highland
17 was going through a rebuild of its CLO business and wanting
18 to align, from a brand perspective, their business on an
19 ongoing basis with the Highland brand as opposed to the Acis
20 brand. But more specifically, in the case of a late change
21 from a structured standpoint, the -- part of the intention
22 and the investment thesis of HCLOF was to pursue a reset, a
23 refinancing of all the underlying CLOs as they approached the
24 end of their investment period or came out of their
25 investment period.

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1 And in connection with that, in light of the arbitration
2 award, Highland's view was that there may be difficulties in
3 the market in resetting certain of those Acis CLOs with the
4 Acis brand associated with them, given, again, the existence
5 of the arbitration award and concerns in the market around
6 the Acis brand reputation.

7 Q And what did they tell you was the market view of Acis,
8 or the Acis brand?

9 A Yeah. Their view or their concern was that the, you
10 know, because of the existence of that arbitration award, the
11 brand would be viewed as toxic.

12 Q Didn't this put you on notice that perhaps there was
13 something wrong with the structural changes?

14 A I mean, we -- I mean, short answer, no. We ultimately
15 asked questions, we diligenced the legal structure, but
16 relied on the representations that were made to us by
17 Highland around the rationale for the structural changes,
18 that these are all changes that were within a Highland-
19 managed vehicle or sat below the vehicle that we were
20 investing in, and so ultimately were in Highland's purview,
21 was the representations that we relied on.

22 Q And did HarbourVest alone do that diligence of the
23 structural changes?

24 A So, no. I mean, in connection with the diligence that we
25 did internally and with Highland directly, we engaged with

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1 outside counsel who was working with us at the time to vet
2 those structural changes as well.

3 Q Did HarbourVest rely on Highland's representations
4 regarding the arbitration award and the structural changes in
5 making its investment in HCLOF?

6 A We did, absolutely.

7 Q If Highland had disclosed the nature of the structural
8 changes, of removing Acis as the portfolio manager and
9 related transfers, would HarbourVest have proceeded with its
10 investment?

11 A Definitively, no, we would not have.

12 Q Why not?

13 A I think the reality is if we had understood the intent,
14 you know, that Highland was ultimately undertaking here, we
15 would not have wanted to be any part of this, and certainly
16 getting dragged into all of this, the hassle, the value
17 destruction that we've seen on behalf of the investors and
18 the funds that we manage. And I would say, lastly, we just
19 full stop would not have done business with a firm who
20 engages with this type of behavior, had we actually known the
21 truth.

22 Q Mr. Pugatch, are you familiar with the bankruptcy that
23 followed of Acis?

24 A Yes.

25 Q And what was your -- or, did HarbourVest participate in

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1 that bankruptcy?

2 A So, initially, no. Subsequently, we ended up getting
3 dragged into that on account of a number of misstatements by
4 Highland about the role that HarbourVest had played as part
5 of our investment into HCLOF and some of that structure and
6 the structural changes that I alluded to.

7 Q How did HarbourVest learn about those misstatements in
8 the bankruptcy about HarbourVest's role?

9 A So, ultimately, those came to light on -- you know, on
10 account of the ongoing proceedings within the Acis bankruptcy
11 process, and specifically brought to light to us by the Acis
12 trustee at the time, who decided to pursue, you know, further
13 diligence or discovery around the claims that Highland had
14 made around HarbourVest's involvement in those changes.

15 Q And what is your understanding of what the allegations
16 were that caused the Acis trustee to investigate HarbourVest?

17 A Sure. So, you know, our understanding was that Highland
18 had made statements, again, false statements that HarbourVest
19 had actually instructed some of those structural changes,
20 that we were the ones that had said that we would not do
21 business with Acis and had ordered some of the underlying
22 transfer of assets or, again, structural changes, that, you
23 know, very clearly I would say were not the case. Also, that
24 HarbourVest was -- was calling the shots as it relates to any
25 of the ongoing management or future resets of the CLOs.

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1 Q Did HarbourVest instruct any of those structural changes
2 or transfers to occur?

3 A We did not. Absolutely not.

4 Q Why didn't HarbourVest itself appear in the Acis
5 bankruptcy and file a claim?

6 A Yeah. HarbourVest's role, again, in HCLOF, we were a
7 passive investor in a Highland-managed company. We had no
8 direct interaction with or relationship with Acis. There was
9 really no reason for us to be directly involved until we were
10 subsequently dragged into involvement on account of those
11 misstatements. And then at that point our focus really
12 pivoted to, you know, whether we needed to defend ourselves
13 against those accusations that had been made by Highland and
14 after a request for further information in discovery by the
15 Acis trustee.

16 Q Did HCLOF participate in the Acis bankruptcy?

17 A They did, yes.

18 Q Did HCLOF incur fees for participating in the Acis
19 bankruptcy?

20 A Yes. In fact, very meaningful fees, to the tune of well
21 in excess of \$15 million of legal fees, as we understand it,
22 that have been incurred, largely in connection with the
23 ongoing Acis bankruptcy and Highland's continued pursuit of
24 and in connection with the litigation with Mr. Terry, which
25 we firmly believe was entirely inappropriate that HCLOF and

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1 ultimately investors in HCLOF bear those expenses, which were
2 not just expenses of HCLOF but of Highland and a number of
3 other Highland affiliates.

4 Q Do those expenses form a basis of separate claims filed
5 by HarbourVest against Highland?

6 A They do, yes. One of the multiple claims that we had
7 filed against Highland.

8 Q And a few more questions, just for the record, Mr.
9 Pugatch. How much did HarbourVest initially invest in HCLOF?

10 A Sure. So, our initial investment in November of 2017 was
11 right about \$73-1/2 million, I believe.

12 Q Did HarbourVest invest any additional money in HCLOF?

13 A We did. There was a subsequent capital call investment
14 of about \$5 million, bringing our total investment to just
15 under \$80 million in aggregate.

16 Q When HarbourVest initially made the investment, did it
17 anticipate making a profit on it?

18 A We did, yes.

19 Q How much did HarbourVest anticipate earning from the
20 investment?

21 A Yeah. So, our -- based on the original \$73-1/2 million
22 investment, we had expected a total return of about \$137
23 million on that -- on that investment.

24 Q What was that projection based on?

25 A So, that projection was based on materials that we had

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1 received from Highland, their internal projection models on
2 the future performance of the underlying CLOs that we were
3 acquiring exposure to through our investment in HCLOF, and
4 was one of the inputs or formed the basis in connection with
5 our diligence that we ultimately ran different sensitivities
6 -- projections around and helped employ -- helped inform our
7 investment thesis.

8 Q Do you know the current value of HarbourVest's investment
9 in HCLOF?

10 A Yes. The current value is right around \$22-1/2 million.

11 Q So roughly how much has the investment itself decreased
12 from HarbourVest's initial investment?

13 A So, net of what was about \$4-1/2 million of distributions
14 that we received early on in the investment, we've lost, to
15 date, in excess of \$50 million on our original investment.

16 Q And just for -- to close out, Mr. Pugatch, knowing all
17 that you know, if HarbourVest had known that -- about the
18 nature of the transfers by Acis or Highland's intent with
19 respect to the arbitration award, would HarbourVest have made
20 this investment?

21 A No. The reality is, had we known the truth, or even had
22 a sense of the truth, the true intentions behind some of
23 those transfers and ultimately what would have happened, we
24 never would have made this investment, full stop.

25 Q Thank you, Mr. Pugatch.

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1 THE COURT: All right. I didn't hear you, Ms.
2 Weisgerber. Do you pass the witness?

3 MS. WEISGERBER: Yes, I pass the witness.

4 THE COURT: All right. Thank you.

5 Mr. Morris, any examination from you?

6 MR. MORRIS: No, thank you, Your Honor.

7 THE COURT: All right.

8 (Interruption.)

9 THE COURT: All right. I'm not sure whose voice that
10 was, but please, again, mute your devices when you're not
11 talking.

12 Any cross-examination of Mr. Pugatch? I'll start with
13 you, Mr. Wilson.

14 MR. WILSON: Yes, Your Honor.

15 THE COURT: Okay.

16 CROSS-EXAMINATION

17 BY MR. WILSON:

18 Q How are you -- I guess we're afternoon now. How are you
19 this afternoon, Mr. Pugatch?

20 A I'm doing well. Yourself?

21 Q I'm doing well as well. Do you recall that on Monday of
22 this week I took your deposition?

23 A Yes, I do.

24 Q And so you understand that my name is John Wilson and I
25 represent Jim Dondero, who has filed an objection to the 9019

1 motion filed by the Debtor?

2 I've got a few questions for you today. Has HarbourVest
3 been around for over 35 years?

4 A We have, yes.

5 Q And does HarbourVest have ten offices around the world?

6 A Correct, yes.

7 Q And does HarbourVest employ over 150 investment
8 professionals?

9 A Yes.

10 Q Does HarbourVest have over \$74 billion in assets under
11 management?

12 A Correct, yes.

13 Q And is HarbourVest's client base largely comprised of
14 institutional investors?

15 A Also correct.

16 Q And you would agree with me that HarbourVest is a
17 sophisticated investor, right?

18 A I would, yes.

19 Q How long have you worked for HarbourVest?

20 A I've been employed by HarbourVest for 17 years now.

21 Q And how long have you been a managing director?

22 A I've been a managing director for approximately six
23 years.

24 Q And you were, in fact, the managing director for the
25 investment that HarbourVest made in Highland CLO Funding,

1 Ltd., which has been referred to today as HCLOF, correct?

2 A I was, correct.

3 Q And HarbourVest, I think you just testified, invested
4 approximately \$73 million as its initial investment in HCLOF?

5 A Yes, correct.

6 Q And before HarbourVest made that investment, it had made
7 many investments of this type, correct?

8 A Yeah. We've made hundreds of investments into
9 partnerships over our history, correct.

10 Q So HarbourVest was well-experienced in evaluating and
11 deciding whether to invest in large investments, correct?

12 A It was, yes.

13 Q Now, in your -- and by your, I mean HarbourVest -- in the
14 response to the Debtor's omnibus objection, it says that by
15 summer 2017 HarbourVest was engaged in preliminary
16 discussions with Highland regarding the investment. Is that
17 a correct statement?

18 A Correct, yes.

19 Q And, in fact, those talks began in the second quarter of
20 2017, correct?

21 A Yes.

22 Q And so the investment closed ultimately on November 15th,
23 2017?

24 A Yes, that's correct.

25 Q So it's fair to say that HarbourVest considered and

1 evaluated this transaction for over six months before
2 investing its \$73 million, right?

3 A From the time of the initial conversations that we had
4 with Highland, yes.

5 Q And one of the reasons that it took over six months to
6 complete the investment is that HarbourVest performs due
7 diligence before it makes an investment, correct?

8 A Correct.

9 Q And when you're performing due diligence -- well, first
10 off, you would agree with me that that's a common practice
11 amongst sophisticated investors such as HarbourVest, correct?

12 A To perform due diligence?

13 Q Yes.

14 A Yes.

15 Q And describe -- describe what HarbourVest does in a
16 general sense when it performs its due diligence.

17 A Sure. So, we spend time with the manager -- in this
18 case, Highland -- certainly around the investment thesis, the
19 opportunity, receive materials around the underlying assets.
20 We take that and perform our own independent due diligence
21 around the value of those assets, perform due diligence on
22 the manager itself, the go-forward opportunity. In many
23 cases, and certainly in this case, engage with outside
24 advisors to assist with that due diligence. It's a very
25 robust and thorough process.

1 Q And by outside advisors, are you referring to the outside
2 counsel that you testified about earlier?

3 A Yes. Both outside counsel and outside consultants.

4 Q Okay. And so did you say that it's typical to engage
5 outside counsel when performing due diligence?

6 A Yes.

7 Q And which outside counsel did you retain with respect to
8 this due diligence?

9 A Debevoise and Plimpton as well as Milbank.

10 Q And during the course of HarbourVest's due diligence, did
11 it identify some items of concern?

12 A As with any investment, there are always items that are
13 identified that require further diligence, risks that are
14 identified that we look to mitigate through our due
15 diligence, et cetera.

16 Q And if Harbour -- I'm sorry, did you say something else?

17 A No.

18 Q You were finished? Okay. Now, if HarbourVest identifies
19 an item of concern, is it typical to request additional
20 information regarding those items of concern?

21 A It is, yes.

22 Q And so that actually happened with respect to the HCLOF
23 investment, correct?

24 A In certain cases, yes.

25 Q HarbourVest identified several litigation matters that it

1 had questions about, correct?

2 A Correct. As we would with any investment.

3 Q And it went back to Highland and asked them to explain
4 their position on those litigation matters?

5 A Correct.

6 Q And one of those litigation matters was the Joshua Terry
7 litigation, correct?

8 A Yes.

9 Q And at the time that HarbourVest was considering this
10 investment, beginning in the second quarter and continuing
11 through the summer, that Josh Terry litigation had not
12 resulted in an award or a final judgment, correct?

13 A Correct.

14 Q And I think we looked earlier at a document that your
15 counsel admitted as HarbourVest Exhibits 34 and 35. There
16 was an email from a HarbourVest -- or, I'm sorry, from a
17 Highland representative to a HarbourVest representative that
18 was discussing Highland's position on the litigation,
19 including the Terry litigation, correct?

20 A Are you referring to the document that we looked at
21 earlier?

22 Q I am. And I can put it on the screen if we need to.

23 A No. Right, I recall that, and yes, that's correct.

24 Q Okay. And just to be clear, that document, which stated
25 Highland's positions on the -- and summaries of the

1 litigation, was issued months before the arbitration award to
2 Josh Terry, correct?

3 A I don't remember the exact timing, but it was certainly
4 during our due diligence period and prior to the arbitration
5 award, yes.

6 Q Well, it seems to me that that email that you -- your
7 counsel admitted as an exhibit was issued in August of 2017.
8 Does that sound right to you?

9 A If that's what the email said, yes.

10 Q And if the Terry arbitration award came out in October,
11 then you would agree with me that that is several months
12 prior to the -- or at least two months prior to the
13 arbitration award?

14 A Yes.

15 Q And so when HarbourVest made requests of Highland to
16 provide information regarding its items of concern, Highland
17 complied with those requests, correct?

18 A It did, correct.

19 Q And was there ever a time when HarbourVest requested
20 Highland to provide information and that information was not
21 provided?

22 A Our requests for information, or at least, you know,
23 responses or color to a question, were always met either
24 with, you know, written or verbal communication back to us,
25 yeah.

1 Q And you would agree with me that, in fact, HarbourVest
2 delayed the closing of the investment by two weeks to
3 continue its due diligence, correct?

4 A Correct, related to the structural changes that were made
5 close to closing. That's right.

6 Q And after conducting that due diligence, HarbourVest
7 satisfied itself that the investment was sound?

8 A That the legal structure that had been put in place in
9 connection with those proposed changes by Highland was -- was
10 legally sound, yes, and on the back of, again, statements and
11 misrepresentations on the part of Highland around the nature
12 and potential impact to their ongoing CLO business and HCLOF.

13 MR. WILSON: Well, I'm going to object to the latter
14 part of your response as nonresponsive.

15 THE COURT: Sustained.

16 BY MR. WILSON:

17 Q Now, after you conducted the due diligence, HarbourVest
18 made the investment of \$73 million on November 15th, 2017,
19 correct?

20 A Correct.

21 Q And so I think you testified earlier that prior to that
22 investment HarbourVest had become aware that that Josh Terry
23 litigation had resulted in an arbitration award, correct?

24 A Yes.

25 Q But I think you've also testified that HarbourVest did

1 not request that Highland provide a copy of the arbitration
2 award, correct?

3 A That's correct.

4 Q And you further testified that you were represented by
5 outside counsel at the time, correct?

6 A Correct.

7 Q And as of Monday of this week, you had not reviewed that
8 arbitration award; is that correct?

9 A That's correct.

10 Q Have you reviewed that arbitration award since Monday of
11 this week?

12 A I have not.

13 Q But in any event, you testified that Highland told you
14 about the award?

15 A Yes.

16 Q And they told you the amount of the award?

17 A Yes.

18 Q And then they told you that the award had been converted
19 to a judgment?

20 A When you say the award had been converted to a judgment,
21 can you be more specific?

22 Q Well, I don't know how familiar you are with the
23 litigation process, but in this instance, that award was
24 taken to a court and the court entered a judgment on the
25 arbitration award. Did you -- were you aware of that?

1 A I don't recall the specific legal terms of judgment
2 against it. I was award of the existence of the arbitration
3 award and the -- and the obligation for Highland to comply
4 with that arbitration award.

5 Q And HarbourVest did not make an appearance in the Acis
6 bankruptcy, right?

7 A We did not.

8 Q But you were aware of the Acis bankruptcy, correct?

9 A Yes.

10 Q And you were kept apprised of the Acis bankruptcy by
11 Highland individuals, correct?

12 A We had conversations with a couple of Highland
13 individuals throughout the Acis bankruptcy process, yes.

14 Q Right. And in fact, you testified that you participated
15 in regular conference calls with Highland regarding that
16 bankruptcy?

17 A That's correct, yes.

18 Q And do you recall having been provided with over 40,000
19 documents by Highland related to the Acis bankruptcy?

20 A I do not recall that, no.

21 Q Would those documents have been provided to your outside
22 counsel, had you received them?

23 A I don't know the answer to that.

24 Q Did the outside counsel that represented you in the due
25 diligence continue to represent you throughout the Acis

1 bankruptcy?

2 A They did. One of the counsels did, correct.

3 Q And which counsel was that?

4 A Debevoise.

5 Q So was your counsel actively involved with monitoring the
6 Acis bankruptcy?

7 A They were, yes, particularly after we were ultimately
8 accused of having something to do with the original structure
9 and -- as a result of misstatements by Highland.

10 Q Did your counsel attend hearings in the Acis bankruptcy?

11 A I don't recall.

12 Q Are you familiar with the PACER system?

13 A I am not.

14 Q Now, I think that HarbourVest has been described as a
15 passive investor. You recall that description of HarbourVest
16 in this instance?

17 A Yes.

18 Q But, in fact, HarbourVest invested substantial assets
19 such that it owned a 49.98 percent share of HCLOF. Would you
20 agree with that?

21 A That's correct.

22 Q And in fact, the next largest investor was CLO Holdco,
23 which owned 49.02 percent of the shares, correct?

24 A That sounds right.

25 Q And there was an advisory board that was created pursuant

1 to the formation documents of this investment, correct?

2 A That's correct.

3 Q And in fact, that advisory board only had two members,
4 and one was a representative of HarbourVest and one was a
5 representative of CLO Holdco, correct?

6 A Correct.

7 Q And the advisor -- I'm sorry, the portfolio manager was
8 not allowed to disregard the recommendations of the advisory
9 board, correct?

10 A With respect to the limited set of items that the
11 advisory board could opine on, that is correct.

12 Q All right. I want to go over a couple of the
13 misrepresentations that HarbourVest has identified in its
14 filings related to its claim. The first one is -- and just
15 for the record, I'm reading from Docket No. 1057 filed on
16 September 11, 2020, HarbourVest Response to Debtor's First
17 Omnibus Objection.

18 But the first misrepresentation identified in that
19 document says that Highland never informed HarbourVest that
20 Highland had no intention of paying the arbitration award.
21 And was -- was Highland obligated to pay the Josh Terry
22 arbitration award against Acis?

23 MR. MORRIS: Objection to the question to the extent
24 it calls for a legal conclusion.

25 THE COURT: Sustained.

1 MS. WEISGERBER: Join in that objection.

2 THE COURT: Sustained. I think --

3 BY MR. WILSON:

4 Q Your understanding was --

5 MR. WILSON: I'm sorry, Judge?

6 THE COURT: I sustained the objection as calling for
7 a legal conclusion. So, next question.

8 MR. WILSON: Yes, I -- I heard that. Thank you, Your
9 Honor.

10 BY MR. WILSON:

11 Q In your understanding, was Highland responsible for
12 paying the arbitration award to Josh Terry?

13 A My understanding is on the account of the fact that Acis
14 --

15 MS. WEISGERBER: Objection, Your Honor. Objection,
16 Your Honor, same basis.

17 THE COURT: Sustained. It was essentially the same
18 question.

19 MR. WILSON: Well, Your Honor, I didn't ask --

20 THE COURT: It was essentially the same question, Mr.
21 Wilson. Move on.

22 MR. WILSON: Okay.

23 BY MR. WILSON:

24 Q The next misrepresentation identified by HarbourVest said
25 that Highland did not inform HarbourVest that it undertook

1 the transfers to siphon assets away from Acis, LP and that
2 such transfers would prevent Mr. Terry from collecting on the
3 arbitration award. So the basis for that allegation would be
4 that Highland was siphoning assets from Acis to avoid having
5 Acis pay the arbitration award, correct?

6 A That -- that would be the implication, yes.

7 Q Okay. And then that misrepresentation continues on and
8 says that Highland represented to HarbourVest that it was
9 changing the portfolio manager because Acis was toxic. And
10 do you recall that representation being made to you?

11 A Yes, I do.

12 Q And would you agree with me that whether or not Acis is
13 toxic in the industry would be an opinion?

14 A I suppose it would be an opinion, but by the manager of
15 the vehicle responsible for managing the HCLOF investment and
16 the underlying CLOs. Yeah, we viewed the Acis name and the
17 Highland name as synonymous, if you will. I mean, Acis was a
18 subsidiary of Highland. For all intents and purposes, it was
19 the same from our perspective as we made the investment into
20 HCLOF.

21 Q So did HarbourVest have an independent understanding of
22 whether or not the Acis name was toxic in the industry?

23 A We did not, no. We relied on Highland's views of that as
24 manager of HCLOF.

25 MR. WILSON: Your Honor, just a brief housekeeping

1 item. Did you say that we need to be done at 1:00 o'clock?

2 THE COURT: Well, I said I really wanted you to be
3 done by 1:00 o'clock because I have a 1:30 docket and a 2:00
4 o'clock docket and I'd rather not have to hang up 70-
5 something people and reconnect them again at 3:00 o'clock.
6 How close are you to being finished?

7 MR. WILSON: Well, --

8 THE COURT: This is going at a very slow pace.

9 MR. WILSON: Well, I apologize for that, Your Honor.
10 I think I've got at least ten more minutes, but -- but I know
11 we also have closing remarks. And I was just going to ask if
12 Your Honor had a preference of --

13 THE COURT: Keep going.

14 MR. WILSON: -- of breaking now --

15 THE COURT: Keep -- let's --

16 MR. WILSON: -- or keep going? Okay.

17 THE COURT: Let's talk fast and try to get through.
18 You know, even if I'm sacrificing lunch today, I don't want
19 to inconvenience 75 people this way. So we'll just probably
20 start our 1:30 hearing a little late and inconvenience those
21 people.

22 All right. Go ahead.

23 MR. WILSON: All right. Thank you, Your Honor.

24 BY MR. WILSON:

25 Q Did Acis form its -- I can't recall if you answered this

1 question, but did Acis form its own opinion on whether or not
2 -- I'm sorry, strike that. Did HarbourVest form its own
3 opinion on whether or not the Acis name was toxic in the
4 industry?

5 MS. WEISGERBER: Objection, --

6 THE WITNESS: We did not. We didn't have a basis.

7 THE COURT: I'm sorry, did I have an objection?

8 BY MR. WILSON:

9 Q You did not --

10 THE COURT: Did I have an objection?

11 MS. WEISGERBER: Yeah. Objection. Yes. Objection,
12 asked and answered, Your Honor.

13 THE COURT: Overruled. He can answer.

14 BY MR. WILSON:

15 Q Okay. But --

16 A We did not.

17 Q Did Highland have the ability to investigate the Acis
18 name and make its own determination of whether that name was
19 toxic? I'm sorry, I think I'm misspeaking. HarbourVest.

20 A HarbourVest had the ability to do that, yes.

21 Q I apologize I misspoke. I meant HarbourVest. Did
22 HarbourVest have the ability to investigate that name and
23 determine if it was toxic?

24 A It was irrelevant to our investment thesis. And as I
25 said before, Acis was a subsidiary of Highland. We viewed

1 them as interchangeable in the context of our investment.

2 Q Okay. The next misrepresentation that you refer to says
3 that Highland indicated to HarbourVest that the dispute with
4 Mr. Terry would have no impact on its investment activities.
5 Would you agree with me that that is also an opinion?

6 A It was a statement that --

7 MS. WEISGERBER: Your Honor, I'm going to object to
8 the extent these questions are seeking a legal conclusion
9 regarding, you know, if something's an opinion or not.

10 THE COURT: Okay. Overruled. He can answer.

11 THE WITNESS: It was -- it was a statement that was
12 made to us by Highland and represented in multiple different
13 formats as fact. And a representation that we relied on in
14 connection with our investment.

15 BY MR. WILSON:

16 Q And finally, the misrepresentation, the last
17 misrepresentation identified, is that Highland expressed
18 confidence in the ability of HCLOF to reset or redeem the
19 CLOs. Would you agree with me that that statement is an
20 opinion?

21 A On the basis that it was the core investment thesis of
22 the -- of the investment of HCLOF. Again, whether that's
23 legally viewed as an opinion or a fact, it was -- it was
24 certainly the investment thesis that we made the investment
25 predicated upon.

1 Q And you just testified that you thought that Acis and
2 Highland were interchangeable from the perspective of the
3 investment opportunity, correct?

4 A Correct.

5 Q But you also accepted Highland's recommendation because
6 HarbourVest agreed that the change in the -- to a Highland
7 manager made commercial sense, correct?

8 A We took at face value what Highland recommended because
9 this all had to do with the structuring of an entity that
10 they fully managed with respect to multiple underlying
11 subsidiaries that weren't managed by Highland.

12 Q But would you agree that, at the time, you -- HarbourVest
13 thought that made commercial sense?

14 A It did not seem unreasonable to us based on the
15 explanation we were given.

16 Q Okay.

17 MR. WILSON: I want to refer to HarbourVest Exhibit
18 39.

19 (Pause.)

20 THE COURT: What are we waiting on? What are we
21 waiting on?

22 MR. WILSON: I'm trying to get the document on the
23 screen, Your Honor.

24 (Pause.)

25 THE COURT: We can't hear you. We can't hear you.

1 MR. WILSON: I'm sorry. I'm sorry, Your Honor. I'm
2 speaking with my --

3 THE COURT: Okay.

4 MR. WILSON: -- co-counsel here.

5 THE COURT: All right.

6 (Pause.)

7 MS. WEISGERBER: Mr. Wilson, is it 39 or 38 that
8 you're referring to?

9 MR. WILSON: 39. HarbourVest 9019 motion on the
10 main -- on the Dondero file. And then there's the -- it's --
11 it's John -- and then there's the HarbourVest, and then the
12 exhibits are all in one file.

13 MS. WEISGERBER: Mr. Wilson, I'll just note that 39
14 was subject to confidentiality based on HCLOF's request.
15 HCLOF's counsel is present. I think they know it's an
16 excerpt. But I'd just -- that for HCLOF's counsel.

17 MR. WILSON: Well, is there an objection to showing
18 this document on the screen? Yes. All right. We're not
19 going to put Document 39 on the screen.

20 A VOICE: Yes.

21 MR. WILSON: All right. Scroll down to the next
22 page.

23 BY MR. WILSON:

24 Q This is a -- this is a document that was produced to us
25 this week, the Highland production. It appears to be a

1 Highland CLO Funding, Ltd. Statement of Operations for the
2 Year Ended 31 December 2017. Do you see at the top of that --
3 at the top of that document where it says total investment
4 income of \$26 million?

5 A I do, yes.

6 Q And total expenses were roughly \$1.8 million?

7 A Yes.

8 Q And then net change and unrealized depreciation on
9 investments and net realized loss on investments was \$4.26
10 million cumulative, resulting in a net increase in net assets
11 resulting from operations of \$20.224 million. Do you agree
12 with that?

13 A Yes.

14 Q Okay.

15 MR. WILSON: Go to the next one.

16 BY MR. WILSON:

17 Q And you understand that, in the course of the Acis
18 bankruptcy, the portfolio managers for certain of the CLOs
19 were changed by the Trustee, correct?

20 A Yes, around the underlying CLOs. That's -- that's my
21 understanding, yes.

22 Q And, in fact, Mr. Seery testified earlier today that that
23 occurred in the summer of 2018, correct?

24 MR. WILSON: Scroll.

25 THE WITNESS: I don't recall the timing, but that's

1 what he testified to.

2 BY MR. WILSON:

3 Q Well, this document is HarbourVest Exhibit 40, and this is
4 the statement of operations for the financial year ended 31
5 December 2018. Here, the total investment income is only
6 \$11.1 million. Do you see that?

7 A I do.

8 Q And do you see where the expenses have increased to \$13.6
9 million?

10 A I do, yes.

11 MR. WILSON: Okay. Scroll down some more.

12 BY MR. WILSON:

13 Q And do you see where it says net change and unrealized
14 loss on investments of \$48.47 million?

15 A Yes.

16 Q And so after Acis and Brigade took over the managements of
17 these CLOs, we had a net decrease in net assets resulting from
18 operations of \$52.483 million in the year 2018, correct?

19 MS. WEISGERBER: Objection, Your Honor. Assumes a
20 fact not in evidence.

21 THE COURT: Overruled. He --

22 MR. WILSON: Your Honor, --

23 THE COURT: We're just looking at this statement and
24 testifying about it says, so I overrule the objection.

25 MR. WILSON: Thank you, Your Honor. Thank you, Your

1 Honor. I'm now going to turn to HarbourVest Exhibit 41. All
2 right. I'll --

3 BY MR. WILSON:

4 Q Did you answer the question, Mr. Pugatch?

5 A No, I -- I would agree with the second part of your
6 statement that for the year 2018 the -- the loss was \$52
7 million. I don't -- I don't believe that jives with the first
8 part of your statement that that was after Acis and Brigade
9 took over. As I understand, that was in the middle of the
10 year.

11 Q But in any event, Acis and Brigade had been managing this
12 for at least six months of 2018 when that loss occurred,
13 correct?

14 A They had been managing a portion of the underlying CLO
15 portfolio held by Highland CLO Funding.

16 Q All right. We're now looking at Exhibit #41, which is the
17 Draft Unaudited Statement of Comprehensive Income, 31 December
18 2019. Total income has now dropped to \$4.664 million.

19 MR. WILSON: And scroll down.

20 BY MR. WILSON:

21 Q Expenditures are at \$3.645 million. And then it says
22 investment gains and losses net out to \$11.493 million, a
23 negative \$11.493 million. And --

24 MR. WILSON: Scroll down to the --

25 BY MR. WILSON:

1 Q And so would you agree with me that in the year 2019,
2 HCLOF showed a net loss of \$10.476 million?

3 A Yes, that's what the financial statements say.

4 Q And in this year, the Acis CLOs were solely managed by
5 Acis and Brigade, correct?

6 A The Acis CLOs were. Yes, correct.

7 Q All right.

8 MR. WILSON: Now, go to 42.

9 BY MR. WILSON:

10 Q Now, this is HarbourVest #42.

11 MR. WILSON: Go down to the next page.

12 BY MR. WILSON:

13 Q And this is the Highland CLO Funding, Ltd. Unaudited
14 Condensed Statement of Operations for the Financial Period
15 Ended 30 June 2020. And so this is just half a year of
16 operations. And would you -- and this actually has a
17 comparison between 2019 and 2020. But do you see where it
18 says investment income has dropped from a million dollars in
19 the first half of 2019 to \$381,000 in the first half of 2020?

20 A Yes.

21 MR. WILSON: Okay. Scroll down.

22 BY MR. WILSON:

23 Q And do you see where, in the first half of 2019, total
24 expenses were \$1.85 million, and then in the first half of
25 2020 total expenses were \$2.16 million? Do you see that?

1 A I do.

2 Q And if you go down below that, where it says Net Realized
3 and Unrealized Gain/Loss on Investments, the first half of
4 2019 HCLOF lost \$12 million, and in the first half of 2020 it
5 lost \$39.472 million?

6 MR. MORRIS: Your Honor, I'm going to object. It's
7 John Morris for the Debtor. I'm happy to stipulate. In fact,
8 he can offer this document into evidence. There's no
9 foundation that Mr. Pugatch has any particularized knowledge
10 about any of the numbers behind this. All he's asking him to
11 do is to confirm what the document says. It says what it
12 says. But this -- I'll object on that basis, Your Honor.

13 THE COURT: All right. Mr. Wilson, what about it?
14 You're just getting him to read numbers off of these exhibits.

15 MR. WILSON: Well, --

16 THE COURT: Shall we just --

17 MR. WILSON: -- I understood --

18 THE COURT: -- by stipulation get them into evidence?

19 MR. WILSON: Well, --

20 MR. MORRIS: No objection, Your Honor.

21 MS. WEISGERBER: No objection.

22 THE COURT: All right. So these are exhibits what?
23 We've gone through 39, 41, and I don't know what else. 40,
24 maybe?

25 MR. WILSON: It was Exhibits 39, 40, 41, and 42 that

1 were on the HarbourVest exhibit list.

2 THE COURT: All right. Those will be admitted, and
3 we've already discussed what docket entry number they appear
4 at.

5 (HarbourVest's Exhibits 39 through 42 are received into
6 evidence.)

7 THE COURT: All right. Anything else? You told me
8 you had 10 more minutes about 15 minutes ago.

9 MR. WILSON: Well, I'm sorry if I -- I think I had
10 said I had at least ten more minutes, and I was looking at the
11 -- it was 10:50 [sic] and you wanted to quit at 1:00. So I do
12 have longer than that. I'm sorry, Your Honor.

13 THE COURT: Well, --

14 MR. WILSON: But --

15 THE COURT: -- I feel like I'm being --

16 MR. WILSON: -- I'll try to proffer --

17 THE COURT: Okay, Mr. Wilson, let me just tell you
18 something. I feel like I'm being disrespected now, and the
19 parties are. We really need to pick up the pace. I've told
20 you I've got a 1:30 docket -- with four or five matters on it,
21 by the way. I've got a 2:00 o'clock docket. I'm starting
22 them late. No one advised my courtroom deputy that we were
23 going to need all day today for this, okay? So you've got
24 five more minutes to wrap it up, and then, of course, I have
25 to go to Mr. Draper and see if he has cross. All right? So

1 please don't test my patience any more. Five minutes to
2 finish.

3 MR. DRAPER: Judge, I have no questions.

4 THE COURT: I didn't hear you, Mr. Draper. What did
5 you say?

6 MR. DRAPER: I have no questions.

7 THE COURT: All right. Very good.

8 MR. WILSON: I apologize, Your Honor. I was actually
9 trying to be respectful of your time when I informed you that
10 I had at least ten more minutes left at 12:50, but I will try
11 to be as expedient as I can as I finish up.

12 BY MR. WILSON:

13 Q And I don't see you on my screen.

14 MR. WILSON: You can take that document down.

15 THE WITNESS: Here.

16 BY MR. WILSON:

17 Q Mr. Pugatch, do you have an opinion as to what caused
18 these incredible losses of value at HCLOF?

19 MS. WEISGERBER: Objection to the extent it calls for
20 a legal conclusion.

21 THE COURT: Overruled. He can answer.

22 THE WITNESS: I would say that there's no one cause
23 for the decline in value. I can point to a number of
24 different things, including the exorbitant fees that were
25 charged to HCLOF, including the inability to be able to re --

1 refinance the CLOs on the part of HCLOF, all of which stems
2 from the actions that Highland took prior to our investment in
3 HCLOF.

4 BY MR. WILSON:

5 Q And you've -- I think it's been referenced several times
6 in HarbourVest's arguments that -- that the reset was a
7 fundamental -- the inability to get a reset was a fundamental
8 cause of the loss in value. Is that -- is that HarbourVest's
9 position?

10 A That -- that is a part of the -- the cause in the
11 declining value of the CLOs, yes.

12 Q And you would agree with me that a reset is fundamentally
13 a reset of interest rates, correct?

14 A Of the interest rates of the liabilities of the -- the
15 timing for repayment of those liabilities, yes.

16 Q Now, just say with -- for the sake of a hypothetical
17 example. If you had a home that was valued at \$5 million, or
18 let's just say \$500,000, let's make it more realistic. If you
19 had a \$500,000 home and you had a mortgage on that home at
20 five percent interest, your inability to refinance that home
21 at a lower interest rate would not affect the underlying value
22 of that home, correct?

23 MS. WEISGERBER: Objection, Your Honor. Hypothetical.
24 And objection to relevance as well.

25 THE COURT: Sustained.

1 MS. WEISGERBER: Calls for speculation.

2 THE COURT: Sustained.

3 BY MR. WILSON:

4 Q Is there any reason to believe that the change in the
5 interest rate would have prevented the massive losses of
6 investment value that occurred in HCLOF?

7 MS. WEISGERBER: Object on the same grounds.

8 THE COURT: Sustained.

9 THE WITNESS: The short -- the short answer is yes,
10 with a -- with the amount of leverage --

11 MS. WEISGERBER: I --

12 THE WITNESS: -- that exists. Oh, sorry.

13 MS. WEISGERBER: The objection was sustained.

14 THE COURT: Yeah, I sustained the objection. That
15 means you don't answer.

16 THE WITNESS: I'm sorry, Your Honor.

17 BY MR. WILSON:

18 Q So, would you agree with me that if the expenses and the
19 fees charged by the portfolio manager increased dramatically,
20 that would -- that would impact the value of the investment,
21 correct?

22 MS. WEISGERBER: Objection on the same grounds, and
23 relevance. This is a 9019 hearing, Your Honor. We are not
24 here to try every minutia. And in fact, we're trying to avoid
25 a trial on the merits. And it feels like we're getting a bit

1 far afield now.

2 THE COURT: I sustain.

3 MR. WILSON: All right. I'll pass the witness.

4 THE COURT: All right. Mr. Draper said he had no
5 cross. So, any redirect, Ms. Weisgerber?

6 MS. WEISGERBER: No, Your Honor.

7 THE COURT: All right. Mr. Morris, did you have any
8 redirect?

9 MR. MORRIS: I do not, Your Honor. I have a very
10 brief closing and then some additional remarks if -- if we
11 finish.

12 THE COURT: All right. So, Mr. Pugatch, that
13 concludes your testimony. Thank you. You're excused if you
14 want to be.

15 All right. So, as I understood it, there would be no more
16 evidence after this.

17 MR. WILSON: Well, Your Honor, along those lines, as
18 a housekeeping measure, I think everything on my exhibit list
19 is included on someone else's exhibit list, but just for belt
20 and suspenders I would move to admit all of the exhibits on
21 the -- on Mr. Dondero's exhibit list.

22 THE COURT: Well, is that agreed or not? Because we
23 didn't have a witness to get them in.

24 MR. MORRIS: No objection, Your Honor.

25 THE COURT: Any objection? All right. If there's no

1 objection, I'll --

2 MR. MORRIS: Your Honor, --

3 THE COURT: I'm sorry. Was there an objection? I
4 will admit Dondero Exhibits A through M, and those appear at
5 Docket Entry 1721, correct, Mr. Wilson?

6 MR. WILSON: That is correct, Your Honor.

7 THE COURT: All right.

8 MR. WILSON: That is correct, Your Honor.

9 (James Dondero's Exhibits A through M are received into
10 evidence.)

11 MR. WILSON: And one final matter is, during the
12 examination of Mr. Seery, you at least partially admitted
13 Dondero's Exhibit N, and I was wondering if we need to -- how
14 we'd need to submit that for the record.

15 THE COURT: Okay. First, I'm confused. I think you
16 said Mr. Terry's testimony. You --

17 MR. WILSON: I said Seery. I'm sorry.

18 THE COURT: Oh, Seery?

19 MR. WILSON: Or I may have said Terry, but I meant to
20 say Seery.

21 THE COURT: Okay. Maybe you said it. Okay. During
22 Mr. Seery's testimony -- oh, the email that I admitted a
23 portion of?

24 MR. WILSON: That is -- that's correct, Your Honor.

25 THE COURT: What -- what are you asking? It's not in

1 your notebook. Are you asking do you need to separately
2 submit it or what?

3 MR. WILSON: Yeah, I was just asking what the Court's
4 preference on how we submit that for the -- put it in the
5 record.

6 THE COURT: Okay. That was so garbled I didn't hear
7 you. You need to file that on the docket as a supplemental
8 exhibit that was admitted, okay?

9 MR. WILSON: Okay. Thank you, Your Honor.

10 THE COURT: All right. Closing arguments? Mr.
11 Morris?

12 CLOSING ARGUMENT ON BEHALF OF THE DEBTOR

13 MR. MORRIS: Yes, very briefly, Your Honor. The
14 Debtor easily meets the standard here. The settlement
15 consideration relative to the claim establishes and reflects
16 the likelihood of success on the merits.

17 You know, I've never -- I did hear Mr. Pugatch in the
18 deposition the other day, but I otherwise haven't heard from
19 him. I found him to be incredibly credible, Your Honor, and I
20 regret the fact that he and HarbourVest are being blamed twice
21 here. The fact that they got 40,000 documents or didn't read
22 the arbitration award, it's just -- it's a shame that they're
23 being dragged through this yet again.

24 The fact is, Your Honor, there is no evidence that they
25 made the disclosures that HarbourVest claims -- complains

1 about. They just don't. The fraudulent transfers led to the
2 bankruptcy, led to the appointment of a trustee, led to --
3 right? So, so it's -- that's why -- but they're getting
4 something for their claim.

5 It was a hard negotiation, Your Honor. There is no
6 dispute that if we litigated this it would be complex. It
7 would fact-intensive. The Debtor would be forced to rely upon
8 witnesses who are no longer employed by it. That it would be
9 expensive, for sure. There's no dispute about any of that.
10 There's no dispute that the creditor body has spoken loudly
11 here by unanimously refraining from objecting except for Mr.
12 Dondero and the entities controlled by him.

13 And you heard Mr. Seery's testimony. I think he
14 exhaustively informed the Court as to the process by which the
15 transaction was analyzed and negotiated, and there's no
16 evidence to the contrary that this was an arm's-length
17 negotiation.

18 Unless Your Honor has any questions, we would request that
19 the motion be granted.

20 THE COURT: Thank you. Ms. Weisgerber, your closing
21 argument?

22 CLOSING ARGUMENT ON BEHALF OF HARBOURVEST

23 MS. WEISGERBER: Sure. Thank you, Your Honor. I'll
24 also be brief. We again join in Mr. Morris's arguments and
25 comments.

1 The Court has now heard testimony from Mr. Pugatch
2 regarding the factual detail underlying HarbourVest's claims.
3 The Court has also heard about the significant damages that
4 HarbourVest stands to recover for those claims. And
5 HarbourVest came to this Court ready to litigate. It would --
6 it's ready to do so if needed. It believes it would prevail
7 on its claims if it had to do so.

8 But the Court also heard from Mr. Seery about his
9 understanding of HarbourVest's claims, his calculus, and his
10 decision to settle them. And we submit that nothing further
11 is needed by this Court in order to approve the settlement.
12 This is a question of the Debtor's business judgment. We're
13 not here to have a trial on the merits of HarbourVest's
14 claims. The Objectors have made various arguments, including
15 about the cause of HarbourVest's damages. But even the nature
16 of the legal claims that HarbourVest is asserting, some do not
17 require a loss causation. So we submit that's not even
18 relevant to the merits of the claims.

19 The settlement is clearly in the best interest of the
20 estate, and we respectfully request that the Court approve it.

21 THE COURT: Thank you. All right. Mr. Wilson, your
22 closing argument?

23 MR. LYNN: Michael Lynn. I will give the closing
24 argument, if that's satisfactory to the Court.

25 THE COURT: All right. Go ahead.

1 CLOSING ARGUMENT ON BEHALF OF JAMES DONDERO

2 MR. LYNN: Good afternoon, Your Honor. I just want
3 to make a few points, and I'll try to do it as quickly as
4 possible.

5 First, I feel compelled to address the argument of the
6 Debtor that Mr. Dondero is repeating his litigious behavior
7 from the Acis case. I don't know about the Acis case. I
8 wasn't involved except very, very peripherally. But with
9 respect to this case, we have only taken positions in court
10 that we believed -- that is, his lawyers -- believed were
11 warranted by law, facts as we knew them, and that are
12 consistent with professionalism. I'd be glad to explain any
13 position we took.

14 Often, through the Debtor's very persuasive powers, we
15 never had the chance to explain our position previously to the
16 Court. In fact, for the most part, as today, we have been
17 reactive rather than commencing proceedings. In fact, during
18 the first seven months of this case, we only appeared in court
19 a few times, when we felt we had to -- for example, when
20 discovery was being sought by the Creditors' Committee that we
21 feared might invade privilege. Then, much to the Debtor's
22 fury, we opposed the Acis 9019. We did so because we thought
23 it was too much.

24 Since, as the Court can see, the principal instigators of
25 litigation have been the Debtor, and to a lesser extent, the

1 Committee.

2 Indeed, in an apparent effort to drown Mr. Dondero and his
3 counsel in litigation, the Debtor has repeatedly sought court
4 action on a very short fuse, claiming need for expedited
5 hearing.

6 Perhaps the most startling example of this is the recent
7 contempt motion, for which there is no good reason for a quick
8 hearing. Resolution of that motion is not necessary to reach
9 the confirmation hearing. The motion could be heard after the
10 confirmation hearing. There is no need to put Mr. Dondero and
11 his professionals in a position where they have to respond in
12 a couple of days, two business days, and then will have two
13 days to prepare for trial.

14 Second, Your Honor, Mr. Seery has repeatedly asserted,
15 contrary to today's motion, that the HarbourVest claim was of
16 no merit. That is why, when he came in to settle for tens of
17 millions of dollars, we opposed this motion. It appears that
18 the motion is occurring without any cross-party discovery.
19 There is no consideration, apparently, of trying dispositive
20 -- dispositive motions first. There is no consideration for
21 junior classes of equity, which Mr. Seery has previously
22 opined were in the money. This, even though there's no reason
23 that this settlement is necessary pre-confirmation, unless Mr.
24 Seery wants HarbourVest's vote.

25 Third, for whatever reason, that seems to be the driving

1 factor for settling. On its face, the vote seems to be a key
2 factor of the settlement. About the longest provision of the
3 settlement agreement relates to voting. The motion itself --
4 in the motion itself, five of seven bullet points cited by the
5 Debtor for approval of the settlement deal with and emphasize
6 support of the plan or the vote that is to be cast for the
7 plan.

8 If the settlement is a good deal, it didn't need to have
9 as one of its parts the requirement that HarbourVest vote for
10 the plan.

11 Your Honor, I'll stop there. I know Your Honor would like
12 to get just a few minutes before your 1:30 docket. I've been
13 there and I understand that, and I do apologize for taking the
14 time we have, but I think that responsibility is shared with
15 the Debtor and HarbourVest.

16 Thank you, Your Honor.

17 THE COURT: All right. Thank you for that.

18 Mr. Draper, any closing argument from you?

19 CLOSING ARGUMENT ON BEHALF OF GET GOOD AND DUGABOY TRUSTS

20 MR. DRAPER: Yes, I have three comments. The first
21 is the claim -- the loss claim, absent the fraud claim, is, at
22 best, \$7 million. I think Mr. Seery's argument that a hundred
23 -- one hundred percent is attributable to there is just wrong.
24 If he and I both invested in a company 50-50 and it goes
25 broke, we only lost 50 cents each.

1 Number two, I think the Court heard the evidence. I think
2 this is, at best, a subordinated claim under 5 -- under the
3 Bankruptcy Code. It's really a "But for the
4 misrepresentations, we wouldn't have invested."

5 And the last one is the -- Judge Lynn represented the
6 voting, so I won't deal with that. But the one that troubles
7 me the most is the fact that this asset that is ultimately
8 being paid for in claim dollars that's being transferred over
9 to the Debtor and being put it outside the estate, outside the
10 purview of this Court, and placed in some subsidiary, this --
11 this transaction, if it is approved, must -- should contain a
12 provision that the asset that's being acquired come into the
13 Debtor and be owned by the Debtor.

14 THE COURT: All right.

15 MR. DRAPER: I have nothing further, Your Honor.

16 THE COURT: Thank you, Mr. Draper.

17 Mr. Morris, you get the last word since it's your motion.

18 MR. MORRIS: Very quickly, Your Honor. The
19 subordination argument doesn't hold water. This is not a
20 claim against the Debtor for the security; it's a claim for
21 fraud. Okay? So, so 510(b), if it was a claim against HCLOF,
22 that might make sense, but this is a claim against the Debtor.
23 And it's a Debtor -- it's a claim for fraud. That's number
24 one.

25 Number two, we need to keep this exactly as it's been

1 structured in order to avoid litigation. Mr. Seery told the
2 Court. I'm sure the Court can make its own assessment as to
3 Mr. Seery's credibility as to whether or not the Debtor is
4 intending to somehow get this asset beyond the Court.

5 But there are reasons why we've done this, Your Honor.
6 They could have made an objection on that basis. In fact, if
7 they did, it would be overruled, because there's no -- there's
8 no basis for this Court to find that somehow the Debtor and
9 Mr. Seery are doing something untoward to get assets away from
10 this Court's jurisdiction.

11 You know, I don't know what to say about Mr. Lynn's
12 commentary. Much of it had nothing to do with any evidence in
13 the record.

14 The fact remains, Your Honor, that this settlement is
15 fair. It's reasonable. It's in the best interest of the
16 estate. And we would respectfully request that the Court
17 grant the motion.

18 THE COURT: All right. Thank you. Well, I
19 appreciate all the arguments and evidence I have heard today.
20 I'm going to be brief in my ruling here, but I reserve the
21 right to supplement in a more fulsome written order, which I'm
22 going to instruct Mr. Morris to submit. I am approving the
23 motion to compromise the HarbourVest claim today, and I guess
24 subsumed in that is granting the motion to allow their claim
25 for 3018 voting purposes.

1 I in all ways find this compromise to meet the required
2 legal standard set forth in such cases as *TMT Trailer Ferry*,
3 *AWECO*, and *Foster Mortgage*, numerous other Fifth Circuit
4 cases.

5 First, I'm going to specifically say for the record that I
6 found both witnesses today, Mr. Seery and Mr. Pugatch, to be
7 very credible. Very credible testimony and meaningful
8 testimony was provided to the Court today. And based on that
9 testimony, I find, first, that this compromise was the product
10 of arm's-length negotiations. It was a hard-fought
11 negotiation, as far as I'm concerned. The Debtor objected to
12 these numerous HarbourVest proofs of claim. The Debtor did
13 not want to allow HarbourVest a significant claim for voting
14 purposes. I duly note the statements made in the disclosure
15 statement before this compromise was reached suggesting, you
16 know, the Debtor didn't think HarbourVest should have a large
17 claim.

18 That is consistent with everything I typically see in a
19 bankruptcy case when there's a claim objection. The objector
20 vehemently denies the claimant should have a proof of claim,
21 and then people sit down and think about the risks and rewards
22 of litigating things. And I believe very fervently that's
23 what happened here. There were good-faith, arm's-length
24 negotiations that resulted in this proposed compromise.

25 I find the compromise -- and I'll add to that point, on

1 the good-faith point, I find nothing sinister or improper
2 about the fact that the compromise includes a commitment of
3 HarbourVest to vote in favor of the plan. Again, we see this
4 a lot. You know, there's even a buzz word that doesn't even
5 exist in the Bankruptcy Code: "plan support agreement." You
6 know, we see those a lot -- you know, oftentimes negotiated
7 before the case, but sometimes after. You know, it may be
8 improper in certain situations, but there was nothing here
9 that troubles me about that component of the compromise.

10 I find the compromise to meet the paramount interest of
11 creditors here. Notably, we have very large creditors in this
12 case who have not objected. The *Foster Mortgage* case from the
13 Fifth Circuit tells me I am supposed to consider support or
14 opposition of creditors. No opposition of UBS. No opposition
15 of the Redeemer Committee Crusader Fund. No opposition from
16 Josh Terry or Acis. No opposition from Daugherty.

17 But moreover, when considering the paramount interest of
18 creditors, I find this compromise to be in all ways fair and
19 equitable and in the best interest of the estate, and
20 certainly within the range of reasonableness. The evidence
21 showed that HarbourVest asserted over \$300 million. Over \$300
22 million. Granted, that was based on all kinds of legal
23 theories that would be contested and expensive to litigate,
24 but the evidence also showed that they invested over \$70
25 million. You know, close to \$75 million. I forget the exact

1 number. \$75 or \$80 million, somewhere in that range. And now
2 the credible evidence is that investment is worth about \$22
3 million.

4 So, certainly, while the claim may not have, at the
5 ultimate end of the day in litigation, resulted in a \$300
6 million proof of claim, certainly, certainly there were strong
7 arguments for a very sizeable claim, more than this compromise
8 amount. So it's certainly fair and equitable and reasonable
9 when considering the complexity and duration of further
10 litigation, the risks and rewards, the expense, delay, and
11 likely success.

12 A couple of last things I'm going to say are these. I
13 understand, you know, there is vehement disagreement on the
14 part of our Objectors to the notion that Highland might have
15 caused a \$50 million loss to HarbourVest. But I will tell
16 you, for what it's worth -- I want the record clear that this
17 is part of my evaluation of the reasonableness of the
18 settlement -- my reaction is that, indeed, Highland's
19 litigation strategy in the Acis case caused HCLOF to lose a
20 huge portion of its value, to the detriment of HarbourVest.
21 You know, whether all evidence at the end of the day would
22 convince me of that, I don't know, but that's -- that is
23 definitely this judge's impression.

24 I'm very sympathetic to HarbourVest. It appears in all
25 ways from the record, not just the record before me today, but

1 the record in the Acis case that I presided over, that
2 Highland back then would have rather spent HarbourVest's
3 investment for HCLOF legal fees than let Josh Terry get paid
4 on his judgment. They were perfectly happy to direct the
5 spending of other people's money, is what the record suggested
6 to me.

7 And then, you know, I have alluded to this very recently,
8 as recently as last Friday: I can still remember Mr.
9 Ellington sitting on the witness stand over here to my left
10 and telling the Court, telling the parties under oath, that
11 HarbourVest -- he didn't use its name back then, okay? For
12 the first phase of the Acis case, or most of the Acis case, we
13 were told it was an investor from Boston. And at some point
14 someone even said their name begins with H. I mean, it seemed
15 almost humorous. But Mr. Ellington said it was they,
16 HarbourVest, the undisclosed investor, who was insistent that
17 the Acis name was toxic, and so that's what all of this had
18 been about: the rebranding, the wanting to extract or move
19 things away from Acis.

20 So, you know, I have heard for the -- well, at least the
21 second time today, from Mr. Pugatch, what I perceive to be
22 very credible testimony that that's just not the way it
23 happened.

24 And I guess the last thing I want to say here today, and
25 you know, I guess I have multiple reasons for saying this, not

1 just in connection with approving the settlement, you know,
2 I've heard about how the Acis CLOs, the HCLOF CLOs have lost,
3 you know, a crazy amount of value, that they underperform in
4 the market, that, you know, during the Acis/Brigade tenure
5 and, you know, they should have been reset. You know, I hope
6 those who have not been around as long as some of us in this
7 whole saga know that the -- Mr. Terry, Mr. Phelan, I think
8 Brigade, they all desperately wanted to reset these things,
9 but it was HCLOF, I believe directed by Highland, that wanted
10 to redeem, wanted to liquidate, take the pot of money,
11 warehouse it, and then do their own thing.

12 And there was, I think, from my vantage point, a
13 monumental effort to try to get everyone to the table to do
14 reasonable resets that would be good for the stakeholders at
15 HCLOF and be good for the creditors of Acis, including Josh
16 Terry. That was always the balancing act that most of us were
17 focused on during the Acis bankruptcy. But Highland, I
18 believe, directing HCLOF's strategy, just did not want the
19 resets to happen.

20 So, again, part of me, I suppose, just wants to make the
21 record clear on something that I fear not everyone is clear
22 about. And I say that because the comment was made that the
23 injunctions, the preliminary injunctions sought by the Acis
24 trustee caused the plummet in value, and I think that's just
25 not an accurate statement. I think litigation strategies are

1 what caused the plummet in value, and that's why I think
2 ultimately HarbourVest would potentially have a meritorious
3 claim here in a significant amount if this litigation were to
4 go forward.

5 So, I approve this under 9019. And again, Mr. Morris,
6 you'll upload an order.

7 It is now 1:41, so let's as quickly as possible hear the
8 other motion that I don't think had any objections. Mr.
9 Morris?

10 MR. MORRIS: Your Honor, just -- yes, just very
11 quickly, just four things.

12 With respect to the order, I just want to make it clear
13 that we are going to include a provision that specifically
14 authorizes the Debtor to engage in -- to receive from
15 HarbourVest the asset, you know, the HCLOF interest, and that
16 that's consistent with its obligations under the agreement.

17 The objection has been withdrawn, I think the evidence is
18 what it is, and we want to make sure that nobody thinks that
19 they're going to go to a different court somehow to challenge
20 the transfer. So I just want to put the Court on notice and
21 everybody on notice that we are going to put in a specific
22 finding as to that.

23 THE COURT: All right. Fair --

24 MR. MORRIS: Number two is --

25 THE COURT: Fair enough. I do specifically approve

1 that mechanism and find it is appropriate and supported by the
2 underlying agreements.

3 And just so you know, I spent some time noodling this
4 yesterday before I knew it was going to be settled, so I'm not
5 just casually doing that. I think it's fine.

6 Okay. Next?

7 MR. MORRIS: Thank you very much, Your Honor. Number
8 two, with respect to the motion to pay, there is no objection.
9 If we can just submit an order. Or if Your Honor has other
10 guidance for us, we're happy to take it.

11 THE COURT: Okay. Does anyone have anything they
12 want to say about that motion?

13 Again, I looked at it. I didn't see any objections. I
14 didn't see any problem with it. It's -- you know, you're
15 going through this exercise because of the earlier protocol
16 order.

17 MR. MORRIS: Correct.

18 THE COURT: All right. Well, if there's nothing,
19 then, I will approve that, finding there is good cause to
20 grant that motion.

21 MR. MORRIS: Okay.

22 THE COURT: All right. Is the only other
23 housekeeping matter --

24 MR. MORRIS: I --

25 THE COURT: -- we have the contempt motion?

1 MR. MORRIS: It is, and I do -- I do have to point
2 out how troubled the Debtor is to learn that Mr. Dondero was
3 still receiving documents from Highland as late as this
4 morning. It's got to be a violation of both the TRO -- I
5 guess it's now the preliminary injunction.

6 I would respectfully request -- I know that time is what
7 it is -- but maybe Mr. Dondero can answer now where he got the
8 document, who he got the document from, what other documents
9 he's gotten from the Debtor since Your Honor ordered him not
10 to communicate with the Debtor's employees.

11 This is not saying hello in the hallway. I mean, this is
12 just -- it is really troubling, Your Honor, and it's why we
13 need the contempt motion heard as soon as possible.

14 THE COURT: Well, Mr. Wilson, do you want to address
15 that? I think the words I heard were that you just got the
16 document this morning, and you got it from Mr. Dondero, but we
17 don't know where and when Mr. Dondero got it. Mr. Wilson, are
18 you there?

19 MR. LYNN: I'm afraid I'm back, Your Honor.

20 THE COURT: Okay.

21 MR. LYNN: I am not sure whether Mr. Dondero had it
22 in his files from some -- from back before he was asked not to
23 communicate with members or with employees of the Debtor. I
24 believe -- I believe he's with us, though I don't think he's
25 available by video.

1 Are you there, Mr. Dondero?

2 THE COURT: We can't hear you, Mr. Dondero.

3 MR. DONDERO: Judge?

4 THE COURT: Oh, go ahead.

5 MR. DONDERO: Can you hear me now?

6 THE COURT: Yes.

7 MR. DONDERO: Yes, I -- I -- when I moved offices, I
8 found it in a stack of paper, and --

9 MR. LYNN: I understand it shows that his microphone
10 is working.

11 THE COURT: Okay. Go ahead.

12 MR. DONDERO: Can you hear me?

13 THE COURT: Yes, go ahead.

14 MR. DONDERO: Yeah, I -- I'm sitting in new offices.
15 I've got everything in boxes. I was going through everything
16 yesterday, and I found those emails in a stack of papers and I
17 sent them over because I thought they would be relevant
18 relative to Seery's initial impression.

19 THE COURT: Okay. Well, let's talk about the timing
20 of this hearing. Mr. Morris, I'm going to -- I'm going to ask
21 you why --

22 MR. LYNN: Michael Lynn, Your Honor. I don't want to
23 waste the Court's time. We have not made available anything
24 to the Court objecting to the expedited hearing on the
25 contempt motion. We've been here.

1 I would say to Your Honor that if Mr. Dondero is indeed in
2 contempt, or was in contempt toward the motion, which has
3 nothing to do with the document that was presented as Dondero
4 Exhibit N, there is no need to hear this on an expedited
5 basis.

6 Every time we turn around, Your Honor, the Debtor is
7 asking that something be heard on an expedited basis. And we
8 have not opposed that. We have not fought that, to speak of,
9 to date. But this is getting a little ridiculous. We're
10 within days of confirmation of the Debtor's plan, and it is
11 simply a means of causing pain and suffering to Mr. Dondero
12 and those who are working with him and for him. And he does
13 have employees at NexPoint who are assisting him.

14 So we most strongly object to being put on a schedule
15 where we are expected to get a response to the contempt motion
16 on file by Monday, today being Thursday, and a weekend
17 intervening. And we strongly object to any setting of this
18 contempt motion on Tuesday or Wednesday. It is absurd, and it
19 is done solely, solely, Your Honor, to cause pain.

20 THE COURT: All right.

21 MR. MORRIS: Your Honor, if I may?

22 THE COURT: Please.

23 MR. MORRIS: Just very briefly, we had a hearing the
24 other day. The evidence is the exact same. The evidence is
25 crystal clear that the violations are meaningful, they're

1 substantial, and they are repeated.

2 After the TRO was entered into, Mr. Dondero and only Mr.
3 Dondero chose to interfere with the Debtor's business. Mr.
4 Dondero and only Mr. Dondero chose to communicate with the
5 Debtor's employees, not about saying hello in the hallway but
6 about coordinating a legal defense strategy against the
7 Debtor.

8 The need is immediate, Your Honor, and I would
9 respectfully request that the hearing be set for Tuesday or
10 Wednesday. They've had this motion now since the 7th of
11 January. They had a full evidentiary hearing, so they know
12 most of the evidence that's going to be presented. They have
13 a whole team of -- they have an army of lawyers, Your Honor,
14 and half a dozen firms working on behalf of Mr. Dondero and
15 his interests. For him to cry here, for him to cry that this
16 is too much is really -- it's obscene. It just is.

17 THE COURT: All right. I'm going to say a couple --

18 MR. LYNN: That is absurd.

19 THE COURT: I'm going to say a couple of things. One
20 is that I -- well, the one time I remember getting reversed
21 for holding someone in contempt of court, the District Court
22 felt like I had not given enough notice of that. The District
23 Courts, what they think is reasonable notice, is sometimes
24 very different from what the bankruptcy judges think. We're
25 used to going very lickety-split fast in the bankruptcy

1 courts. And the Courts of Appeals, District Court, Courts of
2 Appeals obviously, for good reason, are very concerned about
3 due process in this kind of context. So I'm sensitive to
4 that.

5 I'm also sensitive to the fact that it is monetary damages
6 that are being sought here to purge the contempt. Okay? The
7 shifting of attorneys' fees is basically what I understand is
8 being sought at this point. You know, we have a preliminary
9 injunction halting behavior at this point, and so I think
10 that's another reason I'm hesitant to give an emergency
11 hearing. I feel like monetary damages can wait and we can
12 give 21-plus days' notice of the hearing.

13 But I'm going to throw this out there as well. If I do
14 feel like there is a showing of contempt, if I do feel like
15 the phone -- as I told you the other day, I'm very, very
16 fixated on the phone that may have been destroyed or thrown
17 away, maybe at Mr. Dondero's suggestion. I mean, the
18 potential monetary sanction here may be very, very large if
19 the evidence plays out in the way I fear it might play out.
20 So I need to make sure everybody has adequate time to prepare
21 for that hearing and make sure I get all the evidence I need
22 to see. All right? Contempt of court is very, very, very,
23 very serious, and I don't think anyone would deny that.

24 So, with that, it was filed what day? January 4th? Is
25 that what I heard? Or --

1 MR. MORRIS: January 7th, I believe, Your Honor.

2 THE COURT: January 7th? All right. Well, Traci,
3 are you there? Hopefully, you're not in a hunger coma at this
4 point.

5 THE CLERK: I am here.

6 THE COURT: Okay. We have -- we're going to have to
7 go to that first week of February, right? Because we've got
8 the confirmation hearing that, you know, late in January, and
9 then --

10 THE CLERK: Yes. Uh-huh.

11 THE COURT: Okay. Do you have an available date to
12 give right now?

13 THE CLERK: How about -- if you're willing to hear
14 them on Friday, February 5th.

15 THE COURT: Okay. I can do that. February 5th at
16 9:30. Any -- anybody want to argue about that?

17 MR. MORRIS: Thank you, Your Honor. That's
18 acceptable to the Debtor.

19 THE COURT: Okay. Mr. Lynn, is that good with you?

20 MR. LYNN: We'll do that, Your Honor. I would say,
21 by the way, that I'll be happy to buy Mr. Seery, out of my own
22 pocket, five cell phones, which ought to make up for the one
23 that was lost, though I recognize that those cell phones will
24 not have on them the privileged information, the conversations
25 between his lawyers and Mr. Dondero that I imagine he was

1 looking forward to seeing.

2 THE COURT: Well, I wouldn't want him to see that
3 information, but I do think he's entitled to any nonprivileged
4 information, texting, or calls that are on that phone. So,
5 again, I'm either going to hear good explanations for that or
6 not, but it's something very concerning to me.

7 All right. So we have a game plan.

8 I'm going to ask, Did we have good-faith negotiations
9 between Dondero and the Committee and anything positive to
10 report? I'll ask Mr. Lynn and Mr. Clemente to weigh in.

11 MR. CLEMENTE: Yes, Your Honor. I'll go first, Your
12 Honor. Mr. Lynn and I have exchanged several emails over the
13 weekend, and the message that I sent to Mr. Lynn was very
14 clear. There had been a term sheet that Mr. Seery had sent
15 back to Mr. Dondero. I had asked Mr. Lynn to take a pencil
16 out and be very specific as to what it was Mr. Dondero was
17 prepared to do in connection with the pot plan. I instructed
18 him that some of the issues that the Committee still has is
19 obviously the overall value, along with the concept that's
20 signing up to a promise from Mr. Dondero to comply with
21 (indiscernible) as part of that value. As Your Honor may
22 understand, the Committee is obviously very skeptical of Mr.
23 Dondero's future performance under an agreement that he enters
24 into.

25 Those are but a couple of issues, Your Honor, that I

1 advised Mr. Lynn were very concerning to the Committee. And I
2 suggested to him that if he wanted to move things forward, the
3 best way to do it would be to come to us with a fulsome term
4 sheet that explained exactly what it was in clear and precise
5 detail that Mr. Dondero was proposing, and that would be the
6 best way to move the process forward, Your Honor.

7 THE COURT: All right. Mr. Lynn, anything to add to
8 that?

9 MR. LYNN: Well, Your Honor, my experience in
10 negotiations is that it is useful to agree on substantive
11 terms, or at least be in the ballpark, before term sheets are
12 exchanged. Long ago, a term sheet was prepared and presented
13 to the Committee. Ultimately, I think it was rejected, though
14 I don't know if we ever received a formal rejection.

15 I explained in my emails, which I'm happy to share with
16 the Court if Your Honor wants to see them, why I was reluctant
17 to try to put into a term sheet form the proposal that I
18 suggested to Mr. Clemente. As I said, I'm more than happy to
19 provide you with that email chain and let you form your own
20 judgment, Your Honor, as to whether we're proceeding in good
21 faith.

22 THE COURT: All right. Well I'm not going to ask --

23 MR. POMERANTZ: Your Honor? Your Honor, this is Jeff
24 Pomerantz.

25 THE COURT: -- to see any of that. Mr. Pomerantz?

1 MR. POMERANTZ: May I just be heard real quickly?

2 THE COURT: Sure.

3 MR. POMERANTZ: Your Honor, we also took Your Honor's
4 comments to heart. We, Mr. Seery and I, had an over-an-hour
5 conversation with Mr. Lynn and with Mr. Bonds. We provided
6 them with our thoughts as to what they needed to do in order
7 to move forward. Of course, it's not really the Debtor to
8 agree. It's the creditors to agree. But as Mr. Seery has
9 testified many times before and as I have told the Court, we
10 would support a plan that the Committee and Mr. Dondero could
11 get behind.

12 So we again -- I'm not going to divulge the nature of
13 those communications, but we suggested several things that Mr.
14 Dondero could do in order to move the ball forward, and
15 unfortunately, we have not seen any of those things done thus
16 far. So we are, at this point, not optimistic that there will
17 be a grand bargain plan.

18 THE COURT: All right.

19 MR. DONDERO: Your Honor, could I comment for a
20 second? This is Mr. Dondero.

21 THE COURT: If you and your counsel want you to
22 comment, you can comment.

23 MR. DONDERO: I'd love to do a pot plan. I would
24 love to reach some kind of settlement and everybody move on
25 with their lives. The estate started with \$360 million of

1 third-party assets and \$90 million of notes. The \$360 million
2 of third-party assets are down to \$130 million.

3 MR. POMERANTZ: Again, Your Honor, I must interrupt.
4 I did this at the last hearing, and it's not my practice to
5 interrupt, but issues regarding what the value is or not, it's
6 going to require a response, and that's not really before Your
7 Honor. I think before Your Honor is --

8 MR. DONDERO: Okay.

9 MR. POMERANTZ: -- have there been negotiations?
10 Have they been in good faith? If Mr. Dondero wanted to
11 address that, that's fine, but I object to having any
12 discussion at this point, especially with Mr. Dondero not even
13 under oath, on what the nature of the value of the assets and
14 why they have changed and what not.

15 THE COURT: Well, --

16 MR. POMERANTZ: It's just not appropriate.

17 THE COURT: I understand --

18 MR. DONDERO: Okay. Can I --

19 THE COURT: Stop.

20 MR. DONDERO: Can I -- can I finish?

21 THE COURT: Let me please respond to that. I
22 understand your concern, but I've heard from Mr. Seery
23 testimony many months ago about the value plummeting during
24 the case. And I asked why, and I got some explanations. This
25 is not evidence. This is just, you know, this is not going to

1 be binding in any way. Mr. Dondero can speak as to what he
2 thinks, you know, the situation is.

3 Go ahead, Mr. Dondero.

4 MR. DONDERO: Okay. I'm not trying to fixate on the
5 numbers. And as far as the third-party assets are, we would
6 be willing to pay -- I would be willing to pay for those. I'd
7 be willing to pay more, and even some value for the affiliate
8 notes that were really part of compensation agreements
9 throughout the history of Highland and avoid the POC
10 arguments. I'd be willing to pay for the assets and I'd be
11 willing to pay even more than that.

12 I have no transparency in terms of what the assets are,
13 and there's no fulsome discussion in terms of, well, here are
14 the assets, here are the notes, here's what we think the
15 values are, can you get to this number? It's just a -- you --
16 the -- it -- I don't view there is good-faith negotiations
17 going on because it's always just a: You need to put a big
18 number on a piece of paper; otherwise, you're going to get run
19 over.

20 And there's no back and forth going on, but it's not due
21 to a lack of willingness on my part. And maybe there needs to
22 be a committee set up. Maybe there needs to be, I don't know,
23 a mediator or an examiner or somebody to try and push through
24 the pot plan, but there's nothing happening. People are not
25 returning the judge's calls, I mean, Mr. Lynn's calls, or my

1 calls. They're -- there's -- despite efforts of our -- of my
2 own and a willingness of my own, there's no negotiations of
3 any sort going on at the moment.

4 THE COURT: All right. I don't want anyone to
5 respond to that. I know people have different views of what's
6 going on. But let me just say a couple of things, and then
7 we're done.

8 We do have a Committee in this case. We have a Committee
9 with very sophisticated members and very sophisticated
10 professionals. Okay? That's who I wanted you to be talking
11 to before the end of the day Tuesday.

12 We have had co-mediators in this case. Okay? And, you
13 know, I identified very sophisticated human beings for that
14 role. Okay? And in fact, there ended up being settlements
15 that flowed out of the co-mediator process.

16 We're now 15 months into the case. There are major,
17 significant compromises now: HarbourVest, UBS, Acis, Terry,
18 and Redeemer Committee. I hate to use a worn-out metaphor,
19 but the train is leaving the station. We've got confirmation.
20 I've pushed out two weeks. I mean, you all are either going
21 to get there in the next few days or we're just going to go
22 forward with I think what everyone, you know, would rather be
23 a pot plan, but if we can't get there, we're just going to
24 have to consider the plan that's on the table now. Okay?

25 You know, the Committee, again, they're sophisticated.

1 They can compare apples to oranges and decide whether the plan
2 on the table, with its risks of future litigation and
3 recoveries, whether it's better or worse than whatever
4 consideration you're offering, Mr. Dondero.

5 And you know, as we all know, there is distrust here,
6 there, and everywhere among these parties. So I can totally
7 understand them, you know, taking a hard line: We either get
8 all cash or we're just not going to mess with it. We don't
9 want to risk broken promises. We'd rather just do litigation.

10 So, anyway, that's as much as I'm going to say except I am
11 going to further direct good-faith negotiations. It sounds
12 like to me a written term sheet might be the appropriate next
13 step, given where I've heard things are at the moment. But,
14 you know, I guess we don't have any hearings between now and
15 the 26th, right? No Highland hearings that I can think of
16 between now and the 26th.

17 MR. POMERANTZ: I don't think so.

18 MR. MORRIS: I think that's correct, Your Honor.

19 THE COURT: So you have all this time --

20 MR. MORRIS: At the moment.

21 THE COURT: You have all this time to negotiate and
22 simultaneously get ready for the confirmation hearing without
23 any other battles. So I know you will use the time well.

24 All right. We're adjourned.

25 THE CLERK: All rise.

MR. BONDS: Thank you, Your Honor.

(Proceedings concluded at 2:04 p.m.)

--oOo--

CERTIFICATE

I certify that the foregoing is a correct transcript from
the electronic sound recording of the proceedings in the
above-entitled matter.

/s/ Kathy Rehling

01/16/2021

Kathy Rehling, CETD-444
Certified Electronic Court Transcriber

Date

001588

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APPENDIX 10



CLERK, U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS

ENTERED

THE DATE OF ENTRY IS ON
THE COURT'S DOCKET

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

Signed January 20, 2021

United States Bankruptcy Judge

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

In re:

HIGHLAND CAPITAL MANAGEMENT, L.P.,¹

Debtor.

§
§
§
§
§
§

Chapter 11

Case No. 19-34054-sgj11

**ORDER APPROVING DEBTOR'S SETTLEMENT
WITH HARBOURVEST (CLAIM NOS. 143, 147, 149, 150, 153, 154) AND
AUTHORIZING ACTIONS CONSISTENT THEREWITH**

This matter having come before the Court on *Debtor's Motion for Entry of an Order Approving Settlement with HarbourVest (Claim Nos. 143, 147, 149, 150, 153, 154) and Authorizing Actions Consistent Therewith* [Docket No. 1625] (the "Motion"),² filed by Highland Capital Management, L.P., the debtor and debtor-in-possession (the "Debtor") in the above-captioned chapter 11 case (the "Bankruptcy Case"); and this Court having considered (a) the

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

² Capitalized terms used but not otherwise defined herein have the meanings ascribed to them in the Motion.



arguments made during the Hearing; and this Court having jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334; and this Court having found that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2); and this Court having found that venue of this proceeding and the Motion in this District is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and this Court having found that the relief requested in the Motion is in the best interests of the Debtor's estate, its creditors, and other parties-in-interest; and this Court having found the Settlement Agreement fair and equitable; and this Court having analyzed, for the reasons stated on the record, (1) the probability of success in litigating the claims subject to the Settlement Agreement, with due consideration for the uncertainty in fact and law, (2) the complexity and likely duration of litigation and any attendant expense, inconvenience, and delay, and (3) all other factors bearing on the wisdom of the compromise, including: (i) the best interests of the creditors, with proper deference to their reasonable views, and (ii) the extent to which the settlement is truly the product of arms-length bargaining, and not of fraud or collusion; and this Court having found that the Debtor's notice of the Motion and opportunity for a hearing on the Motion were appropriate under the circumstances and that no other notice need be provided; and this Court having determined that the legal and factual bases set forth in the Motion establish good cause for the relief granted herein; and upon all of the proceedings had before this Court; and after due deliberation and sufficient cause appearing therefor, it is hereby **ORDERED** that:

1. The Motion is **GRANTED** as set forth herein.
2. All objections to the Motion are overruled.
3. The Settlement Agreement, attached hereto as **Exhibit 1**, is approved in all respects pursuant to Rule 9019 of the Federal Rules of Bankruptcy Procedure.

EXHIBIT 1

SETTLEMENT AGREEMENT

This Settlement Agreement (the “Agreement”) is entered into as of December 23, 2020, between Highland Capital Management, L.P. (the “Debtor”), on the one hand, and HarbourVest 2017 Global Fund L.P., HarbourVest 2017 Global AIF L.P., HarbourVest Dover Street IX Investment L.P., HV International VIII Secondary L.P., HarbourVest Skew Base AIF L.P., and HarbourVest Partners L.P. (each, a “HarbourVest Party,” and collectively, “HarbourVest”), on the other hand. Each of the foregoing are sometimes referred to herein collectively as the “Parties” and individually as a “Party.”

RECITALS

WHEREAS, on October 16, 2019 (the “Petition Date”), the Debtor filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code (the “Bankruptcy Case”) in the Bankruptcy Court for the District of Delaware, Case No. 19-12239 (CSS) (the “Delaware Bankruptcy Court”);

WHEREAS, on December 4, 2019, the Delaware Bankruptcy Court entered an order transferring venue of the Debtor’s case to the Bankruptcy Court for the Northern District of Texas, Dallas Division, Case No. 19-34054-sgj (the “Bankruptcy Court”);

WHEREAS, prior to the Petition Date, HarbourVest invested in Highland CLO Funding, Ltd. f/k/a Acis Loan Funding, Ltd. (“HCLOF”) and acquired an a 49.98% ownership interest in HCLOF (the “HarbourVest Interests”);

WHEREAS, the portfolio manager for HCLOF is Highland HCF Advisor, Ltd., a subsidiary of the Debtor;

WHEREAS, on April 8, 2020, HarbourVest filed proofs of claim in the Bankruptcy Case, which are listed on the Debtor’s claims register as claim numbers 143, 147, 149, 150, 153, and 154 (the “HarbourVest Claims”), asserting claims against the Debtor relating to its investment in HCLOF;

WHEREAS, on July 30, 2020, the Debtor filed the *Debtor’s First Omnibus Objection to Certain (a) Duplicate Claims; (b) Overstated Claims; (c) Late-Filed Claims; (d) Satisfied Claims; (e) No Liability Claims; and (f) Insufficient-Documentation Claims* [Docket No. 906], in which the Debtor objected to the HarbourVest Claims;

WHEREAS, on September 11, 2020, HarbourVest filed the *HarbourVest Response to Debtor’s First Omnibus Objection to Creation (a) Duplicate Claims; (b) Overstated Claims; (c) Late-Filed Claims; (d) Satisfied Claims; (e) No Liability Claims; and (f) Insufficient-Documentation Claims* [Docket No. 1057] (the “HarbourVest Response”);

WHEREAS, on October 18, 2020, HarbourVest filed the *Motion of HarbourVest Pursuant to Rule 3018(a) of the Federal Rules of Bankruptcy Procedure for Temporary Allowance of Claims for Purposes of Voting to Accept or Reject the Plan* [Docket No. 1207] (the “3018 Motion” and together with the HarbourVest Response, the “HarbourVest Pleadings”);

WHEREAS, in the HarbourVest Pleadings, HarbourVest asserted, among other things, that the HarbourVest Claims included claims against the Debtor arising from fraudulent inducement, fraudulent concealment, fraudulent misrepresentation, breach of fiduciary duty, breach of securities laws, and misuse of assets and sought damages in excess of \$300,000,000;

WHEREAS, the Debtor disputes the HarbourVest Claims;

WHEREAS, on November 24, 2020, the Debtor filed the *Fifth Amended Plan of Reorganization for Highland Capital Management, L.P.* [Docket No. 1472] (as amended, the “Plan”).¹

WHEREAS, the Parties desire to enter into this Agreement which incorporates, formalizes, and finalizes the full and final resolution of the HarbourVest Claims and HarbourVest Pleadings; and

WHEREAS, this Agreement will be presented to the Bankruptcy Court for approval pursuant to **Federal Rule of Bankruptcy Procedure 9019** (“Rule 9019”).

NOW THEREFORE, in consideration of the above recitals, the covenants, conditions, and promises made herein, and other good and valuable consideration, the receipt of which is hereby acknowledged, the Parties agree as follows:

1. Settlement of Claims.

(a) In full and complete satisfaction of the HarbourVest Claims, HarbourVest will receive:

(i) an allowed, nonpriority general unsecured claim in the aggregate amount of \$45,000,000 (the “Allowed GUC Claim”); and

(ii) an allowed subordinated claim in the aggregate amount of \$35,000,000 (the “Allowed Subordinated Claim” and together with the Allowed GUC Claim, the “Allowed Claims”).

(b) On the Effective Date, HarbourVest will transfer all of its rights, title, and interest in the HarbourVest Interests to the Debtor or its nominee pursuant to the terms of the *Transfer Agreement for Ordinary Shares of Highland CLO Funding, Ltd.*, attached hereto as Exhibit A (the “Transfer Agreements”) and the Debtor or its nominee will become a shareholder of HCLOF with respect to the HarbourVest Interests. The terms of the Transfer Agreements are incorporated into this Agreement by reference.

2. Releases.

(a) Upon the Effective Date, and to the maximum extent permitted by law, each HarbourVest Party on behalf of itself and each of its current and former advisors, trustees, directors, officers, managers, members, partners, employees, beneficiaries, shareholders, agents,

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

participants, subsidiaries, parents, successors, designees, and assigns hereby forever, finally, fully, unconditionally, and completely releases, relieves, acquits, remises, and exonerates, and covenants never to sue, the Debtor, HCLOF, HCLOF's current and former directors, and the Debtor's current and former advisors, trustees, directors, officers, managers, members, partners, employees, beneficiaries, shareholders, agents, participants, subsidiaries, parents, affiliates, successors, designees, and assigns, except as expressly set forth below (the "Debtor Released Parties"), for and from any and all claims, debts, liabilities, demands, obligations, promises, acts, agreements, liens, losses, costs and expenses (including, without limitation, attorney's fees and related costs), damages, injuries, suits, actions, and causes of action of whatever kind or nature, whether known or unknown, suspected or unsuspected, matured or unmatured, liquidated or unliquidated, contingent or fixed, at law or in equity, statutory or otherwise, including, without limitation, any claims, defenses, and affirmative defenses, whether known or unknown, including, without limitation, those which were or could have been asserted in, in connection with, or with respect to the Bankruptcy Case (collectively, the "HarbourVest Released Claims").

(b) Upon the Effective Date, and to the maximum extent permitted by law, the Debtor hereby forever, finally, fully, unconditionally, and completely releases, relieves, acquits, remises, and exonerates, and covenants never to sue (i) each HarbourVest Party and (ii) each HarbourVest Party's current and former advisors, trustees, directors, officers, managers, members, partners, employees, beneficiaries, shareholders, agents, participants, subsidiaries, parents, affiliates, successors, designees, and assigns (the "HarbourVest Released Parties"), for and from any and all claims, debts, liabilities, demands, obligations, promises, acts, agreements, liens, losses, costs and expenses (including, without limitation, attorney's fees and related costs), damages, injuries, suits, actions, and causes of action of whatever kind or nature, whether known or unknown, suspected or unsuspected, matured or unmatured, liquidated or unliquidated, contingent or fixed, at law or in equity, statutory or otherwise, including, without limitation, any claims, defenses, and affirmative defenses, whether known or unknown, which were or could have been asserted in, in connection with, or with respect to the Bankruptcy Case (collectively, the "Debtor Released Claims"); *provided, however*, that notwithstanding anything herein to the contrary, the release contained in this Section 2(b) will apply to the HarbourVest Released Parties set forth in subsection (b)(ii) only with respect to Debtor Released Claims arising from or relating to HarbourVest's ownership of the HarbourVest Interests.

(c) Notwithstanding anything in this Agreement to the contrary, the releases set forth herein will not apply with respect to (i) the Allowed Claims, (ii) the claims of Charlotte Investor IV, L.P., or (iii) the duties, rights, or obligations of any Party under this Agreement or the Transfer Agreements.

3. **Agreement Subject to Bankruptcy Court Approval.** The effectiveness of this Agreement and the Parties' obligations hereunder are conditioned in all respects on the approval of this Agreement by the Bankruptcy Court. The Parties agree to cooperate and use reasonable efforts to have this Agreement approved by the Bankruptcy Court. The "Effective Date" will be the date of an order entered by the Bankruptcy Court approving this Agreement pursuant to a motion filed under Rule 9019.

4. **Representations and Warranties.** Subject in all respects to Section 3 hereof:

(a) each HarbourVest Party represents and warrants that (i) it has full authority to enter into this Agreement and to release the HarbourVest Released Claims and has not sold, transferred, or assigned any HarbourVest Released Claim to any other person or entity, (ii) no person or entity other than such HarbourVest Party has been, is, or will be authorized to bring, pursue, or enforce any HarbourVest Released Claim on behalf of, for the benefit of, or in the name of (whether directly or derivatively) of such HarbourVest Party; and (iii) HarbourVest owns all of the HCLOF Interests free and clear of any claims or interests; and

(b) the Debtor represents and warrants to HarbourVest that (i) it has full authority to enter into this Agreement and to release the Debtor Released Claims and (ii) no person or entity other than the Debtor has been, is, or will be authorized to bring, pursue, or enforce any Debtor Released Claim on behalf of, for the benefit of, or in the name of (whether directly or derivatively) of the Debtor Party.

5. **Plan Support.**

(a) Each HarbourVest Party hereby agrees that it will (a) vote all HarbourVest Claims held by such HarbourVest Party to accept the Plan, by delivering its duly executed and completed ballots accepting the Plan on a timely basis; and (b) not (i) change, withdraw, or revoke such vote (or cause or direct such vote to be changed withdrawn or revoked); (ii) exercise any right or remedy for the enforcement, collection, or recovery of any claim against the Debtor except in a manner consistent with this Agreement or the Plan, (iii) object to, impede, or take any action other action to interfere with, delay or postpone acceptance or confirmation of the Plan; (iv) directly or indirectly solicit, propose, file, support, participate in the formulation of or vote for, any restructuring, sale of assets (including pursuant to **11 U.S.C. § 363**), merger, workout, or plan of reorganization of the Debtor other than the Plan; or (v) otherwise take any action that would in any material respect interfere with, delay, or postpone the consummation of the Plan; provided, however, that such vote may be revoked (and, upon such revocation, deemed void ab initio) by such HarbourVest Party at any time following the termination of this agreement or the occurrence of a Support Termination Event (it being understood that any termination of this agreement shall entitle each HarbourVest Party to change its vote in accordance with section 1127(d) of the Bankruptcy Code), notwithstanding any voting deadline established by the Bankruptcy Court including without limitation the January 5, 2021, 5:00 p.m. (prevailing Central Time) deadline established by the *Order Approving Form of Ballots, Voting Deadline and Solicitation Procedures* [Docket No. 1476].

(b) In full resolution of the 3018 Motion, HarbourVest will have a general unsecured claim for voting purposes only in the amount of \$45,000,000.

(c) The obligations of the HarbourVest Parties under this Section 5 shall automatically terminate upon the occurrence of any of the following (each a “Support Termination Event”): (i) the effective date of the Plan, (ii) the withdrawal of the Plan, (iii) the entry of an order by the Bankruptcy Court (A) converting the Bankruptcy Case to a case under chapter 7 of the Bankruptcy Code or (B) appointing an examiner with expanded powers beyond those set forth in sections 1106(a)(3) and (4) of the Bankruptcy Code or a trustee in Bankruptcy

Case, or (iv) the failure of the Court to enter an order approving the terms of this Agreement and the settlement described herein pursuant to Rule 9019 prior to confirmation of the Plan.

6. **No Admission of Liability.** The Parties acknowledge that there is a bona fide dispute with respect to the HarbourVest Claims. Nothing in this Agreement will imply, an admission of liability, fault or wrongdoing by the Debtor, HarbourVest, or any other person, and the execution of this Agreement does not constitute an admission of liability, fault, or wrongdoing on the part of the Debtor, HarbourVest, or any other person.

7. **Successors-in-Interest.** This Agreement shall be binding upon and shall inure to the benefit of each of the Parties and their successors, and assigns.

8. **Notice.** Each notice and other communication hereunder will be in writing and will be sent by email and delivered or mailed by registered mail, receipt requested, and will be deemed to have been given on the date of its delivery, if delivered, and on the fifth full business day following the date of the mailing, if mailed to each of the Parties thereto at the following respective addresses or such other address as may be specified in any notice delivered or mailed as set forth below:

HARBOURVEST

HarbourVest Partners L.P.
Attention: Michael J. Pugatch
One Financial Center
Boston, MA 02111
Telephone No. 617-348-3712
E-mail: mpugatch@harbourvest.com

with a copy (which shall not constitute notice) to:

Debevoise & Plimpton LLP
Attention: M. Natasha Labovitz, Esq.
919 Third Avenue
New York, NY 10022
Telephone No. 212-909-6649
E-mail: nlabovitz@debevoise.com

THE DEBTOR

Highland Capital Management, L.P.
300 Crescent Court, Suite 700
Dallas, Texas 75201
Attention: James P. Seery, Jr.
Telephone No.: 972-628-4100
Facsimile No.: 972-628-4147
E-mail: jpseeryjr@gmail.com

with a copy (which shall not constitute notice) to:

Pachulski Stang Ziehl & Jones LLP
Attention: Jeffrey Pomerantz, Esq.
10100 Santa Monica Blvd., 13th Floor
Los Angeles, CA 90067
Telephone No.: 310-277-6910
Facsimile No.: 310-201-0760
E-mail: jpomerantz@pszjlaw.com

9. **Advice of Counsel.** Each Party represents that it has: (a) been adequately represented by independent legal counsel of its own choice, throughout all of the negotiations that preceded the execution of this Agreement; (b) executed this Agreement upon the advice of such counsel; (c) read this Agreement, and understands and assents to all the terms and conditions contained herein without any reservations; and (d) had the opportunity to have this Agreement and all the terms and conditions contained herein explained by independent counsel, who has answered any and all questions asked of such counsel, or which could have been asked of such counsel, including, but not limited to, with regard to the meaning and effect of any of the provisions of this Agreement.

10. **Entire Agreement.** This Agreement and the Transfer Agreement contain the entire agreement and understanding concerning the subject matter of this Agreement, and supersede and replace all prior negotiations and agreements, written or oral and executed or unexecuted, concerning such subject matter. Each of the Parties acknowledges that no other Party, nor any agent of or attorney for any such Party, has made any promise, representation or warranty, express or implied, written or oral, not otherwise contained in this Agreement to induce any Party to execute this Agreement. The Parties further acknowledge that they are not executing this Agreement in reliance on any promise, representation or warranty not contained in this Agreement, and that any such reliance would be unreasonable. This Agreement will not be waived or modified except by an agreement in writing signed by each Party or duly authorized representative of each Party.

11. **No Party Deemed Drafter.** The Parties acknowledge that the terms of this Agreement are contractual and are the result of arms'-length negotiations between the Parties and their chosen counsel. Each Party and its counsel cooperated in the drafting and preparation of this Agreement. In any construction to be made of this Agreement, the Agreement will not be construed against any Party.

12. **Future Cooperation.** The Parties agree to cooperate and execute such further documentation as is reasonably necessary to effectuate the intent of this Agreement.

13. **Counterparts.** This Agreement may be executed in counterparts with the same force and effect as if executed in one complete document. Each Party's signature hereto will signify acceptance of, and agreement to, the terms and provisions contained in this Agreement. Photographic, electronic, and facsimile copies of signed counterparts may be used in lieu of the originals of this Agreement for any purpose.

14. **Governing Law; Venue; Attorneys' Fees and Costs.** The Parties agree that this Agreement will be governed by and will be construed according to the laws of the State of Texas without regard to conflict-of-law principles. Each of the Parties hereby submits to the exclusive jurisdiction of the Bankruptcy Court during the pendency of the Bankruptcy Case and thereafter to the exclusive jurisdiction of the state and federal courts located in the Northern District of Texas, Dallas Division, with respect to any disputes arising from or out of this Agreement. In any action to enforce this Agreement, the prevailing party shall be entitled to recover its reasonable and necessary attorneys' fees and costs (including experts).

[Remainder of Page Intentionally Blank]

IT IS HEREBY AGREED.

HIGHLAND CAPITAL MANAGEMENT, L.P.

By: /s/ James P. Seery, Jr.
Name: James P. Seery, Jr.
Its: CEO/CRO

HarbourVest 2017 Global Fund L.P., by HarbourVest 2017 Global Associates L.P., its General Partner, by HarbourVest GP LLC, its General Partner, by HarbourVest Partners, LLC, its Managing Member

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

HarbourVest 2017 Global AIF L.P., by HarbourVest Partners (Ireland) Limited, its Alternative Investment Fund Manager, by HarbourVest Partners L.P., its Duly Appointed Investment Manager, by HarbourVest Partners, LLC, its General Partner

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

HarbourVest Dover Street IX Investment L.P., by HarbourVest Partners L.P., its Duly Appointed Investment Manager, by HarbourVest Partners, LLC, its General Partner

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

HarbourVest Partners L.P., on behalf of funds and accounts under management, by HarbourVest Partners, LLC, its General Partner

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

**HarbourVest Skew Base AIF L.P., by HarbourVest Partners (Ireland) Limited, its
Alternative Investment Fund Manager, by HarbourVest Partners L.P., its Duly Appointed
Investment Manager, by HarbourVest Partners, LLC, its General Partner**

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

**HV International VIII Secondary L.P., by HIPEP VIII Associates L.P., its General
Partner, by HarbourVest GP LLC, its General Partner, by HarbourVest Partners, LLC,
its Managing Member**

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

Exhibit A

- a. This Transfer Agreement constitutes a valid and binding obligation of the Transferee, enforceable against it in accordance with its terms;
- b. This Transfer Agreement has been duly and validly executed and delivered by or on behalf of the Transferee and such execution and delivery have been duly authorized by all necessary trust action of the Transferee;
- c. The Transferee acknowledges receipt of, has read, and is familiar with, the Fund's Offering Memorandum for Placing Shares dated November 15, 2017 (the "**Offering Memorandum**") and the Fund Agreements;
- d. The Transferee hereby accepts and receives the Interest from the Transferors for investment, and not with a view to the sale or distribution of any part thereof, and the Transferee has no present intention of selling, granting participations in, or otherwise distributing the same, but subject nevertheless to any requirement of law that the disposition of the Transferee's property shall at all times be within such Transferee's control; and
- e. The Transferee is an "Eligible U.S. Investor" as defined in the Offering Memorandum.

4

IN WITNESS WHEREOF, the undersigned have executed this Transfer Agreement as of the date first above written.

TRANSFERORS:

HarbourVest Dover Street IX Investment L.P.

By: HarbourVest Partners L.P., its Duly Appointed Investment Manager

By: HarbourVest Partners, LLC

By: _____

Name: Michael Pugatch

Title: Managing Director

HV International VIII Secondary L.P.

By: HIPEP VIII Associates L.P.
Its General Partner

By: HarbourVest GP LLC
Its General Partner

By: HarbourVest Partners, LLC
Its Managing Member

By: _____

Name: Michael Pugatch

Title: Managing Director

HarbourVest 2017 Global AIF L.P.

By: HarbourVest Partners (Ireland) Limited
Its Alternative Investment Fund Manager

By: HarbourVest Partners L.P.
Its Duly Appointed Investment Manager

By: HarbourVest Partners, LLC
Its General Partner

By: _____

Name: Michael Pugatch

Title: Managing Director

HarbourVest Skew Base AIF L.P.

By: HarbourVest Partners (Ireland) Limited
Its Alternative Investment Fund Manager

By: HarbourVest Partners L.P.
Its Duly Appointed Investment Manager

By: HarbourVest Partners, LLC
Its General Partner

By: _____

Name: Michael Pugatch

Title: Managing Director

Exhibit A

<u>Transferee Name</u>	<u>Number of Shares</u>	<u>Percentage</u>
HarbourVest Dover Street IX Investment L.P.	54,355,482.14	71.0096%
HarbourVest 2017 Global AIF L.P.	7,426,940.38	9.7025%
HarbourVest 2017 Global Fund L.P.	3,713,508.46	4.8513%
HV International VIII Secondary L.P.	9,946,780.11	12.9944%
HarbourVest Skew Base AIF L.P.	1,103,956.03	1.4422%

APPENDIX 11

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

CHARITABLE DAF FUND, L.P.
and CLO HOLDCO, LTD.,
directly and derivatively,

Plaintiffs,

V.

Cause No. _____

**HIGHLAND CAPITAL MANAGEMENT,
L.P. , HIGHLAND HCF ADVISOR, LTD.,
and HIGHLAND CLO FUNDING, LTD.,
*nominally,***

Defendants.

ORIGINAL COMPLAINT

I.

INTRODUCTION

This action arises out of the acts and omissions of Defendant Highland Capital Management, L.P. (“HCM”), which is the general manager of Highland HCF Advisor, Ltd. (“HCFA”), both of which are registered investment advisers under the Investment Advisers Act of 1940 (the “Advisers Act”),¹ and nominal Defendant Highland CLO Funding, Ltd. (“HCLOF”) (HCM and HCFA each a “Defendant,” or together, “Defendants”). The acts and omissions which have recently come to light reveal breaches of fiduciary duty, a pattern of violations of the Advisers Act’s anti-fraud provisions, and concealed breaches of the HCLOF Company Agreement, among others, which have caused and/or likely will cause Plaintiffs damages.

¹ <https://adviserinfo.sec.gov/firm/summary/110126>

At all relevant times, HCM was headed by CEO and potential party James P. Seery (“Seery”). Seery negotiated a settlement with the several Harbourvest² entities who owned 49.98% of HCLOF. The deal had HCM (or its designee) purchasing the Harbourvest membership interests in HCLOF for \$22.5 million. Recent revelations, however, show that the sale was predicated upon a sales price that was vastly below the Net Asset Value (“NAV”) of those interests. Upon information and belief, the NAV of HCLOF’s assets had risen precipitously, but was not disclosed to Harbourvest nor to Plaintiffs.

Under the Advisers Act, Defendants have a non-waivable duty of loyalty and candor, which includes its duty not to inside trade with its own investors, *i.e.*, not to trade with an investor to which HCM and Seery had access to superior non-public information. Upon information and belief, HCM’s internal compliance policies required by the Advisers Act would not generally have allowed a trade of this nature to go forward—meaning, the trade either was approved in spite of compliance rules preventing it, or the compliance protocols themselves were disabled or amended to a level that leaves Defendants HCM and HCLOF exposed to liability. Thus, Defendants have created an unacceptable perpetuation of exposure to liability.

Additionally, Defendants are liable for a pattern of conduct that gives rise to liability for their conduct of the enterprise consisting of HCM in relation to HCFA and HCLOF, through a pattern of concealment, misrepresentation, and violations of the securities rules. In the alternative, HCFA and HCM, are guilty of self-dealing, violations of the Advisers Act, and tortious interference by (a) not disclosing that Harbourvest had agreed to sell at a price well below the current NAV, and (b) diverting the Harbourvest opportunity to themselves.

² “Harbourvest” refers to the collective of Harbourvest Dover Street IX Investment, L.P., Harbourvest 2017 Global AIF, L.P., Harbourvest 2017 Global Fund, L.P., HV International VIII Secondary, L.P., and Harbourvest Skew Base AIF, L.P. Each was a member of Defendant Highland CLO Funding, Ltd.

For these reasons, judgment should be issued in Plaintiffs' favor.

II.

PARTIES

1. Plaintiff CLO Holdco, Ltd. is a limited company incorporated under the laws of the Cayman Islands.

2. Plaintiff Charitable DAF Fund, L.P., ("DAF") is a limited partnership formed under the laws of the Cayman Islands.

3. Defendant Highland Capital Management, L.P. is a limited partnership with its principal place of business at 300 Crescent Court, Suite 700, Dallas, Texas 75201. It may be served at its principal place of business or through its principal officer, James P. Seery, Jr., or through the Texas Secretary of State, or through any other means authorized by federal or state law.

4. Defendant Highland HCF Advisor, Ltd. is a limited company incorporated under the laws of the Cayman Islands. Its principal place of business is 300 Crescent Court, Suite 700, Dallas, Texas 75201. It is a registered investment adviser ("RIA") subject to the laws and regulations of the Investment Advisers Act of 1940 (the "Adviser's Act"). It is a wholly-owned subsidiary of Highland Capital Management, L.P.

5. Nominal Defendant Highland CLO Funding, Ltd. is a limited company incorporated under the laws of the Island of Guernsey. Its registered office is at First Floor, Dorey Court, Admiral Park, St. Peter Port, Guernsey GY1 6HJ, Channel Islands. Its principal place of business is 300 Crescent Court, Suite 700, Dallas, Texas 75201.

6. Potential party James P. Seery, Jr. ("Seery") is an officer and/or director and/or control person of Defendants Highland Capital Management, L.P., Highland CLO Funding, Ltd., and Highland HCF Advisor, Ltd., and is a citizen of and domiciled in Floral Park, New York.

III.

JURISDICTION AND VENUE

7. This Court has subject matter jurisdiction over this dispute under 28 U.S.C. § 1331 as one or more rights and/or causes of action arise under the laws of the United States. This Court has supplemental subject matter jurisdiction over all other claims under 28 U.S.C. § 1367.

8. Personal jurisdiction is proper over the Defendants because they reside and/or have continual contacts with the state of Texas, having regularly submitted to jurisdiction here. Jurisdiction is also proper under 18 U.S.C. § 1965(d).

9. Venue is proper in this Court under 28 U.S.C. § 1391(b) and (c) because one or more Defendants reside in this district and/or a substantial part of the events or omissions giving rise to the claim occurred or a substantial part of property that is the subject of the action is situated in this district. Venue in this district is further provided under 18 U.S.C. § 1965(d).

IV.

RELEVANT BACKGROUND

HCLOF IS FORMED

10. Plaintiff DAF is a charitable fund that helps several causes throughout the country, including providing funding for humanitarian issues (such as veteran's welfare associations and women's shelters), public works (such as museums, parks and zoos), and education (such as specialty schools in underserved communities). Its mission is critical.

11. Since 2012, DAF was advised by its registered investment adviser, Highland Capital Management, L.P., and its various subsidiaries, about where to invest. This relationship was governed by an Investment advisory Agreement.

12. At one point in 2017, HCM advised DAF to acquire 143,454,001 shares of HCLOF, with HCFA (a subsidiary of HCM) serving as the portfolio manager. DAF did so via a holding entity, Plaintiff CLO Holdco, Ltd.

13. On November 15, 2017, through a Subscription and Transfer Agreement, the DAF entered into an agreement with others to sell and transfer shares in HCLOF, wherein the DAF retained 49.02% in CLO Holdco.

14. Pursuant to that agreement, Harbourvest acquired the following interests in the following entities:

Harbourvest Dover Street IX Investment, L.P., acquired 35.49%;

Harbourvest 2017 Global AIF, L.P., acquired 2.42%;

Harbourvest 2017 lobal Fund, L.P., acquired 4.85%;

HV International VIII Secondary, L.P., acquired 6.5%; and

Harbourvest Skew Base AIF, L.P., acquired 0.72%;

for a total of 49.98% (altogether, the “Harbourvest interests”).

15. On or about October 16, 2019, Highland Capital Management filed for Chapter 11 bankruptcy in Delaware Bankruptcy Court, which was later transferred to the Northern District of Texas Bankruptcy Court, in the case styled *In Re: Highland Capital Management, L.P., Debtor*, Cause No. 19-34054, (the “HCM Bankruptcy” and the Court is the “Bankruptcy Court”).

The Harbourvest Settlement with Highland Capital Management in Bankruptcy

16. On April 8, 2020, Harbourvest submitted its proofs of claim in the HCM bankruptcy proceeding. Annexed to its proofs of claims was an explanation of the Proof of Claim and the basis therefor setting out various pre-petition allegations of wrongdoing by HCM. *See, e.g.*, Case No. 19-bk-34054, Doc. 1631-5.

17. The debtor, HCM, made an omnibus response to the proofs of claims, stating they were duplicative of each other, overstated, late, and otherwise meritless.

18. Harbourvest responded to the omnibus objections on September 11, 2020. *See* Cause No. 19-bk-34054, Doc. 1057.

19. Harbourvest represented that it had invested in HCLOF, purchasing 49.98% of HCLOF's outstanding shares.

20. Plaintiff CLO Holdco was and is also a 49.02% holder of HCLOF's member interests.

21. In its Omnibus Response, Harbourvest explained that its claims included unliquidated legal claims for fraud, fraud in the inducement, RICO violations under 18 U.S.C. 1964, among others (the "Harbourvest Claims"). *See* Cause No. 19-bk-34054, Doc. 1057.

22. The Harbourvest Claims centered on allegations that when Harbourvest was intending to invest in a pool of Collateralized Loan Obligations, or CLOs, that were then-managed by Acis Capital Management ("Acis"), a subsidiary of HCM, HCM failed to disclose key facts about ongoing litigation with a former employee, Josh Terry.

23. Harbourvest contended that HCM never sufficiently disclosed the underlying facts about the litigation with Terry, and HCM's then-intended strategy to fight Terry caused HCLOF to incur around \$15 million in legal fees and costs. It contended that had it known the nature of the lawsuit and how it would eventually turn out, Harbourvest never would have invested in HCLOF. *See* Cause No. 19-bk-34054, Doc. 1057.

24. HCLOF's portfolio manager is HCFA. HCM is the parent of HCFA and is managed by its General Partner, Strand Management, who employs Seery and acts on behalf of HCM.

25. Before acceding to the Harbourvest interests, HCM was a 0.6% holder of HCLOF interests.

26. While even assuming Harbourvest's underlying claims were valid as far as the lost \$15 million went, the true damage of the legal fees to Harbourvest would have been 49.98% of the HCLOF losses (i.e., less than \$7.5 million). Harbourvest claimed that it had lost over \$100 million in the HCLOF transaction due to fraud, which, after trebling under the racketeering statute, it claimed it was entitled to over \$300 million in damages.

27. In truth, as of September 2020, Harbourvest had indeed lost some \$52 million due to the alleged diminishing value of the HCLOF assets (largely due to the underperformance of the Acis entities³)—and the values were starting to recover.

28. HCM denied the allegations in the Bankruptcy Court. Other than the claim for waste of corporate assets of \$15 million, HCM at all times viewed the Harbourvest legal claims as being worth near zero and having no merit.

29. On December 23, 2020, HCM moved the Court to approve a settlement between itself and Harbourvest. No discovery had taken place between the parties, and Plaintiff did not have any notice of the settlement terms or other factors prior to the motion's filing (or even during its pendency) in order to investigate its rights.

30. HCM set the hearing right after the Christmas and New Year's holidays, almost ensuring that no party would have the time to scrutinize the underpinnings of the deal.

31. On January 14, 2021, the Bankruptcy Court held an evidentiary hearing and approved the settlement in a bench ruling, overruling the objections to the settlement.

³ Acis was being managed by Joshua Terry. JP Morgan had listed the four ACIS entities under his management as the four worst performers of the 1200 CLOs it evaluated.

32. An integral part of the settlement was allowing \$45 million in unsecured claims that, at the time of the agreement, were expected to net Harbourvest around 70 cents on the dollar. In other words, Harbourvest was expected to recover around \$31,500,000 from the allowed claims.

33. As part of the consideration for the \$45 million in allowed claims, Harbourvest agreed to transfer all of its interests in HCLOF to HCM or its designee.

34. HCM and Seery rationalized the settlement value by allocating \$22.5 million of the net value of the \$45 million in unsecured claims as consideration to purchase Harbourvest's interests in HCLOF, meaning, if 70% of the unsecured claims—i.e., \$31.5 million—was realized, because \$22.5 million of that would be allocated to the purchase price of the Harbourvest interests in HCLOF, the true “settlement” for Harbourvest's legal claims was closer to \$9 million.

35. Plaintiffs here are taking no position at this time about the propriety of settling the Harbourvest legal claims for \$9 million. That is for another day.

36. At the core of this lawsuit is the fact that HCM purchased the Harbourvest interests in HCLOF for \$22.5 million knowing that they were worth far more than that.

37. It has recently come to light that, upon information and belief, the Harbourvest interests, as of December 31, 2020, were worth in excess of \$41,750,000, and they have continued to go up in value.

38. On November 30, 2020, which was less than a month prior to the filing of the Motion to Approve the Settlement, the net asset value of those interests was over \$34.5 million. Plaintiffs were never made aware of that.

39. The change is due to how the net asset value, or NAV, was calculated. The means and methods for calculating the “net asset value” of the assets of HCLOF are subject to and

governed by the regulations passed by the SEC pursuant to the Adviser's Act, and by HCM's internal policies and procedures.

40. Typically, the value of the securities reflected by a market price quote.

41. However, the underlying securities in HCLOF are not liquid and had not been traded in a long while.

42. There not having been any contemporaneous market quotations that could be used in good faith to set the marks⁴ meant that other prescribed methods of assessing the value of the interests, such as the NAV, would have been the proper substitutes.

43. Seery testified that the fair market value of the Harbourvest HCLOF interests was \$22.5 million. Even allowing some leeway there, it was off the mark by a mile.

44. Given the artifice described herein, Seery and the entity Defendants had to know that the representation of the fair market value was false. But it does not appear that they disclosed it to Harbourvest to whom they owed fiduciary duties as the RIA in charge of HCLOF, and they certainly did not disclose the truth to the Plaintiff.

45. It is either the case that (i) Defendants conducted the proper analysis to obtain a current value of the assets but decided to use a far lower valuation in order to whitewash the settlement or enrich the bankruptcy estate; *or* (ii) Defendants never conducted the proper current valuation, and therefore baselessly represented what the current value of the assets was, despite knowingly having no reasonable basis for making such a claim.

46. For years HCM had such internal procedures and compliance protocols. HCM was not allowed by its own compliance officers to trade with an investor where HCM had superior knowledge about the value of the assets, for example. While Plaintiff has no reason to believe that

⁴ The term "mark" is shorthand for an estimated or calculated value for a non-publicly traded instrument.

those procedures were scrapped in recent months, it can only assume that they were either overridden improperly or circumvented wholesale.

47. Upon finalizing the Harbourvest Settlement Agreement and making representations to the Bankruptcy Court to the Plaintiffs about the value of the Harbourvest Interests, Seery and HCM had a duty to use current values and not rely on old valuations of the assets or the HCLOF interests.

48. Given Defendants' actual or constructive knowledge that they were purchasing Harbourvest's Interests in HCLOF for a less than 50% of what those interests were worth—Defendants owed Plaintiff a fiduciary duty not to purchase them for themselves.

49. Defendants should have either had HCLOF repurchase the interests with cash, or offer those interests to Plaintiff and the other members *pro rata*, before HCM agreed to purchase them all lock, stock and barrel, for no up-front cash.

50. Indeed, had Plaintiff been offered those interests, it would have happily purchased them and therefore would have infused over \$20 million in cash into the estate for the purpose of executing the Harbourvest Settlement.

51. That Defendants (and to perhaps a lesser extent, the Unsecured Creditors Committee (the "UCC")) agreed to pay \$22.5 million for the HCLOF assets, where they had previously not consented to any such expenditure by the estate on behalf of HCLOF, strongly indicates their awareness that they were purchasing assets for far below market value.

52. The above is the most reasonable and plausible explanation for why Defendants and the UCC forwent raising as much as \$22.5 million in cash now in favor of hanging on to the HCLOF assets.

53. Indeed, in January 2021 Seery threatened Ethen Powell that “[Judge Jernigan] is laughing at you” and “we are coming after you” in response to the latter’s attempt to exercise his right as beneficial holder of the CLO, and pointing out a conflict of interest in Seery’s plan to liquidate the funds.

54. HCM’s threat, made by Seery, is tantamount to not only a declaration that he intends to liquidate the funds regardless of whether the investors want to do so, and whether it is in their best interests, but also that HCM intends to leverage what it views as the Bankruptcy Court’s sympathy to evade accountability.

V.

CAUSES OF ACTION

FIRST CAUSE OF ACTION ***Breaches of Fiduciary Duty***

55. Plaintiffs respectfully incorporate the foregoing factual averments as if fully set forth herein and further alleges the following:

56. HCM is a registered investment advisor and acts on behalf of HCFA. Both are fiduciaries to Plaintiffs.

57. The Advisers Act establishes an unwaivable federal fiduciary duty for investment advisers.⁵

⁵ See e.g., *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 194 (1963); *Transamerica Mortg. Advisors (tama) v. Lewis*, 444 U.S. 11, 17 (1979) (“§ 206 establishes ‘federal fiduciary standards’ to govern the conduct of investment advisers.”); *Santa Fe Indus. v. Green*, 430 U.S. 462, 471, n.11 (1977) (in discussing *SEC v. Capital Gains*, stating that the Supreme Court’s reference to fraud in the “equitable” sense of the term was “premised on its recognition that Congress intended the Investment Advisers Act to establish federal fiduciary standards for investment advisers”). See also Investment Advisers Act Release No. 3060 (July 28, 2010) (“Under the Advisers Act, an adviser is a fiduciary whose duty is to serve the best interests of its clients, which includes an obligation not to subrogate clients’ interests to its own”) (citing Proxy Voting by Investment Advisers, Investment Advisers Act Release No. 2106 (Jan. 31, 2003)).

58. HCM and the DAF entered into an Amended and Restated Investment Advisory Agreement, executed between them on July 1, 2014 (the “RIA Agreement”). It renews annually and continued until the end of January 2021.

59. In addition to being the RIA to the DAF, HCM was appointed the DAF’s attorney-in-fact for certain actions, such as “to purchase or otherwise trade in Financial Instruments that have been approved by the General Partner.” RIA Agreement ¶ 4.

60. The RIA Agreement further commits HCM to value financial assets “in accordance with the then current valuation policy of the Investment Advisor [HCM], a copy of which will provided to the General Partner upon request.” RIA Agreement ¶ 5.

61. While HCM contracted for the recognition that it would be acting on behalf of others and could be in conflict with advice given the DAF, (RIA Agreement ¶ 12), nowhere did it purport to waive the fiduciary duties owed to the DAF not to trade as a principal in a manner that harmed the DAF.

62. HCFA owed a fiduciary duty to Holdco as an investor in HCLOF and to which HCFA was the portfolio manager. HCM owed a fiduciary duty to the DAF (and to Holdco as its subsidiary) pursuant to a written Advisory Agreement HCM and the DAF had where HCM agreed to provide sound investment advice and management functions.

63. As a registered investment adviser, HCM’s fiduciary duty is broad and applies to the entire advisor-client relationship.

64. The core of the fiduciary duty is to act in the best interest of their investors—the advisor must put the ends of the client before its own ends or the ends of a third party.

65. This is manifested in a duty of loyalty and a duty of utmost care. It also means that the RIA has to follow the terms of the company agreements and the regulations that apply to the investment vehicle.

66. The fiduciary duty that HCM and Seery owed to Plaintiff is predicated on trust and confidence. Section 204A of the Advisers Act requires investment advisors (whether SEC-registered or not) to establish, maintain, and enforce written policies and procedures reasonably designed to prevent the RIA from trading on material, non-public information. *See* 17 C.F.R. § 275.206(4)-7. That means that Plaintiff should be able to take Defendants at their word and not have to second guess or dig behind representations made by them.

67. The simple thesis of this claim is that Defendants HCFA and HCM breached their fiduciary duties by (i) insider trading with Harbourvest and concealing the rising NAV of the underlying assets—i.e., trading with Harbourvest on superior, non-public information that was neither revealed to Harbourvest nor to Plaintiff; (ii) concealing the value of the Harbourvest Interests; and (iii) diverting the investment opportunity in the Harbourvest entities to HCM (or its designee) without offering it to or making it available to Plaintiff or the DAF.

68. HCM, as part of its contractual advisory function with Plaintiffs, had expressly recommended the HCLOF investment to the DAF. Thus, diverting the opportunity for returns on its investment was an additional breach of fiduciary duty.

69. This violated a multitude of regulations under 27 C.F.R. part 275, in addition to Rules 10b-5 and 10b5-1. 17 CFR 240.10b5-1 (“Rule 10b5-1”) explains that one who trades while possessing non-public information is liable for insider trading, and they do not necessarily have to have *used* the specific inside information.

70. It also violated HCM’s own internal policies and procedures.

71. Also, the regulations impose obligations on Defendants to calculate a *current* valuation when communicating with an investor, such as what may or may not be taken into account, and what cannot pass muster as a current valuation. Upon information and belief, these regulations were not followed by the Defendants.

72. HCM's internal policies and procedures, which it promised to abide by both in the RIA Agreement and in its Form ADV SEC filing, provided for the means of properly calculating the value of the assets.

73. HCM either did not follow these policies, changed them to be out of compliance both with the Adviser Act regulations and its Form ADV representations, and/or simply misrepresented or concealed their results.

74. In so doing, because the fiduciary duty owed to Plaintiff is a broad one, and because Defendants' malfeasance directly implicates its relationship with Plaintiff, Defendants have breached the Advisers Act's fiduciary duties owed to Plaintiff as part of their fiduciary relationship.⁶

75. At no time between agreeing with Harbourvest to the purchase of its interests and the court approval did Defendants disclose to either Harbourvest or to Plaintiff (and the Bankruptcy Court for that matter) that the purchase was at below 50% the current net asset value as well, and when they failed to offer Plaintiff (and the other members of HCLOF) their right to purchase the interests pro rata at such advantageous valuations. Plaintiff's lost opportunity to

⁶ See Advisers Act Release No. 4197 (Sept. 17, 2015) (Commission Opinion) (“[O]nce an investment Advisory relationship is formed, the Advisers Act does not permit an adviser to exploit that fiduciary relationship by defrauding his client in any investment transaction connected to the Advisory relationship.”); see also *SEC v. Lauer*, No. 03-80612-CIV, 2008 U.S. Dist. LEXIS 73026, at 90 (S.D. Fla. Sept. 24, 2008) (“Unlike the antifraud provisions of the Securities Act and the Exchange Act, Section 206 of the Advisers Act does not require that the activity be ‘in the offer or sale of any’ security or ‘in connection with the purchase or sale of any security.’”).

purchase has harmed Plaintiff. Plaintiff had been led to believe by the Defendants that the value of what was being purchased in the Harbourvest settlement by HCM (or its designee) was at fair market value. This representation, repeated again in the Bankruptcy Court during the Harbourvest confirmation, implicitly suggested that a proper current valuation had been performed.

76. Defendant's principal, Seery, testified in January 2021 that the then-current fair market value of Harbourvest's 49.98% interest in HCLOF was worth around \$22.5 million. But by then, it was worth almost double that amount and has continued to appreciate. Seery knew or should have known that fact because the value of some of the HCLOF assets had increased, and he had a duty to know the current value. His lack of actual knowledge, while potentially not overtly fraudulent, would nonetheless amount to a breach of fiduciary duty for acting without proper diligence and information that was plainly available.

77. Furthermore, HCLOF holds equity in MGM Studios and debt in CCS Medical via various CLO positions. But Seery, in his role as CEO of HCM, was made aware during an advisors meeting in December 2020 that Highland would have to restrict its trading in MGM because of its insider status due to activities that were likely to apply upward pressure on MGM's share price.

78. Furthermore, Seery controlled the Board of CCS Medical. And in or around October 2020, Seery was advocating an equatization that would have increased the value of the CCS securities by 25%, which was not reflected in the HCM report of the NAV of HCLOF's holdings.

79. Seery's knowledge is imputed to HCM.

80. Moreover, it is a breach of fiduciary duty to commit corporate waste, which is effectively what disposing of the HCLOF assets would constitute in a rising market, where there

is no demand for disposition by the investors (save for HCM, whose proper 0.6% interest could easily be sold to the DAF at fair value).

81. As holder of 0.6% of the HCLOF interests, and now assignee of the 49.98% Harbourvest Interests), HCM has essentially committed self-dealing by threatening to liquidate HCLOF now that it may be compelled to do so under its proposed liquidation plan, which perhaps inures to the short term goals of HCM but to the pecuniary detriment of the other holders of HCLOF whose upside will be prematurely truncated.

82. Seery and HCM should not be allowed to benefit from the breach of their fiduciary duties because doing so would also cause Plaintiffs irreparable harm. The means and methods of disposal would likely render the full scope of damages to the DAF not susceptible to specific calculation—particularly as they would relate to calculating the lost opportunity cost. Seery and HCM likely do not have the assets to pay a judgment to Plaintiffs that would be rendered, simply taking the lost appreciation of the HCLOF assets.

83. Defendants are thus liable for diverting a corporate opportunity or asset that would or should have been offered to Plaintiff and the other investors. Because federal law makes the duties invoked herein unwaivable, it is preposterous that HCM, as a 0.6% holder of HCLOF, deemed itself entitled to the all of the value and optionality of the below-market Harbourvest purchase.

84. Defendants cannot rely on any contractual provision that purports to waive this violation. Nothing in any agreement purports to permit, authorize or otherwise sanitize Defendants' self-dealing. All such provisions are void.

85. In the fourth quarter of 2020, Seery and HCM notified staff that they would be terminated on December 31, 2020. That termination was postponed to February 28, 2021.

Purchasing the Harbourvest assets without staffing necessary to be a functioning Registered Investment Advisor was a strategic reversal from prior filings that outlined canceling the CLO management contracts and allowing investors to replace Highland as manager.

86. Seery's compensation agreement with the UCC incentivizes him to expedite recoveries and to prevent transparency regarding the Harbourvest settlement.

87. What is more, Seery had previously testified that the management contracts for the funds—HCLOF included—were unprofitable, and that he intended to transfer them. But he later rejected offers to purchase those management contracts for fair value and instead decided to continue to manage the funds—which is what apparently gave rise to the Harbourvest Settlement, among others. He simultaneously rejected an offer for the Harbourvest assets of \$24 million, stating that they were worth much more than that.

88. Because of Defendants' malfeasance, Plaintiffs have lost over \$25 million in damages—a number that continues to rise—and the Defendants should not be able to obtain a windfall.

89. For the same reason, Defendants' malfeasance has also exposed HCLOF to a massive liability from Harbourvest since the assignment of those interests is now one that is likely unenforceable under the Advisers Act, Section 47(b), if there was unequal information.

90. HCM and HCFA are liable as principals for breach of fiduciary duty, as are the principals and compliance staff of each entity.

91. Plaintiffs seek disgorgement, damages, exemplary damages, attorneys' fees and costs. To the extent the Court determines that this claim had to have been brought derivatively on behalf of HCLOF, then Plaintiffs represent that any pre-suit demand would have been futile since asking HCM to bring suit against its principal, Seery, would have been futile.

SECOND CAUSE OF ACTION
Breach of HCLOF Company Agreement
(By Holdco against HCLOF, HCM and HCFA)

92. Plaintiffs respectfully incorporate the foregoing factual averments as if fully set forth herein and further alleges the following:

93. On November 15, 2017, the members of HCLOF, along with HCLOF and HCFA, executed the *Members Agreement Relating to the Company* (the “Company Agreement”).

94. The Company Agreement governs the rights and duties of the members of HCLOF.

95. Section 6.2 of HCLOF Company Agreement provides that when a member “other than ... CLO Holdco [Plaintiff] or a Highland Affiliate,” intends to sell its interest in HCLOF to a third party (i.e., not to an affiliate of the selling member), then the other members have the first right of refusal to purchase those interests pro rata for the same price that the member has agreed to sell.

96. Here, despite the fact that Harbourvest agreed to sell its interests in HCLOF for \$22.5 million when they were worth more than double that, Defendants did not offer Plaintiff the chance to buy its pro rata share of those interests at the same agreed price of \$22.5 million (adjusted pro rata).

97. The transfer and sale of the interests to HCM were accomplished as part of the Harbourvest Settlement which was approved by the Bankruptcy Court.

98. Plaintiff was not informed of the fact that Harbourvest had offered its shares to Defendant HCM for \$22.5 million—which was under 50% of their true value.

99. Plaintiff was not offered the right to purchase its pro rata share of the Harbourvest interests prior to the agreement being struck or prior to court approval being sought.

100. Had Plaintiff been allowed to do so, it would have obtained the interests with a net equity value over their purchase price worth in excess of \$20 million.

101. No discovery or opportunity to investigate was afforded Plaintiff prior to lodging an objection in the Bankruptcy Court.

102. Plaintiff is entitled to specific performance or, alternatively, disgorgement, constructive trust, damages, attorneys' fees and costs.

THIRD CAUSE OF ACTION
Negligence
(By the DAF and CLO Holdco against HCM and HCFA)

103. Plaintiffs respectfully incorporate the foregoing factual averments as if fully set forth herein, and further alleges the following:

104. Plaintiffs incorporate the foregoing causes of action and note that all the foregoing violations were breaches of the common law duty of care imposed by law on each of Seery, HCFA and HCM.

105. Each of these Defendants should have known that their actions were violations of the Advisers Act, HCM's internal policies and procedures, the Company Agreement, or all three.

106. Seery and HCM owed duties of care to Plaintiffs to follow HCM's internal policies and procedures regarding both the propriety and means of trading with a customer [Harbourvest], the propriety and means of trading as a principal in an account but in a manner adverse to another customer [the DAF and Holdco], and the proper means of valuing the CLOs and other assets held by HCLOF.

107. It would be foreseeable that failing to disclose the current value of the assets in the HCLOF would impact Plaintiffs negatively in a variety of ways.

108. It would be reasonably foreseeable that failing to correctly and accurately calculate the current net asset value of the market value of the interests would cause Plaintiffs to value the Harbourvest Interests differently.

109. It would be reasonably foreseeable that referring to old and antiquated market quotations and/or valuations of the HCLOF assets or interests would result in a mis-valuation of HCLOF and, therefore, a mis-valuation of the Harbourvest Interests.

110. Likewise, it would have been foreseeable that Plaintiff's failure to give Plaintiff the opportunity to purchase the Harbourvest shares at a \$22.5 million valuation would cause Plaintiff damages. Defendants knew that the value of those assets was rising. They further knew or should have known that whereas those assets were sold to HCM for an allowance of claims to be funded in the future, selling them to Plaintiff would have provided the estate with cash funds.

111. Defendants' negligence foreseeably and directly caused Plaintiff harm.

112. Plaintiff is thus entitled to damages.

FOURTH CAUSE OF ACTION
Racketeering Influenced Corrupt Organizations Act
(CLO Holdco and DAF against HCM)

113. Plaintiffs respectfully incorporate the foregoing factual averments as if fully set forth herein, and further alleges the following:

114. Defendants are liable for violations of the Racketeer Influenced and Corrupt Organizations ("RICO") Act, 18 U.S.C. § 1961 *et seq.*, for the conduct of an enterprise through a pattern of racketeering activity.

115. HCLOF constitutes an enterprise under the RICO Act. Additionally, or in the alternative, HCM, HCLA, and HCLOF constituted an association-in-fact enterprise. The purpose of the association-in-fact was the perpetuation of Seery's position at HCM and using the

Harbourvest settlement as a vehicle to enrich persons other than the HCLOF investors, including Holdco and the DAF, and the perpetuation of HCM's holdings in collateralized loan obligations owned by HCLOF, while attempting to deny Plaintiffs the benefit of its rights of ownership.

116. The association-in-fact was bound by informal and formal connections for years prior to the elicited purpose, and then changed when HCM joined it in order to achieve the association's illicit purpose. For example, HCM is the parent and control person over HCFA, which is the portfolio manager of HCLOF pursuant to a contractual agreement—both are registered investment advisors and provide advisory and management services to HCLOF.

117. Defendants injured Plaintiffs through their continuous course of conduct of the HCM-HCLA-HCLOF association-in-fact enterprise. HCM's actions (performed through Seery and others) constitute violations of the federal wire fraud, mail fraud, fraud in connection with a case under Title 11, and/or securities fraud laws, pursuant to **18 U.S.C. § 1961(1)(B)** and **(D)**.

118. HCM operated in such a way as to violate insider trading rules and regulations when it traded with Harbourvest while it had material, non-public information that it had not supplied to Harbourvest or to Plaintiffs.

119. In or about November 2020, HCM and Harbourvest entered into discussions about settling the Harbourvest Claims. Seery's conduct of HCLOF and HCLA on behalf of HCM through the interstate mails and/or wires caused HCM to agree to the purchase of Harbourvest's interests in HCLOF.

120. On or about each of September 30, 2020, through December 31, 2020, Seery, through his conduct of the enterprise, utilized the interstate wires and/or mails to obtain or arrive at valuations of the HCLOF interests. Seery's conduct of the enterprise caused them to cease

sending the valuation reports to Plaintiffs, which eventually allowed Plaintiffs to be misled into believing that Seery had properly valued the interests.

121. On or about September 30, 2020, Seery transmitted or caused to be transmitted though the interstate wires information to HCLOF investors from HCM (via HCFA), including Harbourvest, regarding the value of HCLOF interests and underlying assets.

122. Additionally, Seery operated HCM in such a way that he concealed the true value of the HCLOF interests by utilizing the interstate wires and mails to transmit communications to the court in the form of written representations on or about December 23, 2020, and then further transmitted verbal representations of the current market value (the vastly understated one) on January 14, 2021, during live testimony.

123. However, Harbourvest was denied the full picture and the true value of the underlying portfolio. At the end of October and November of 2020, HCM had updated the net asset values of the HCLOF portfolio. According to sources at HCM at the time, the HCLOF assets were worth north of \$72,969,492 as of November 30, 2020. Harbourvest's share of that would have been \$36,484,746.

124. The HCLOF net asset value had reached \$86,440,024 as of December 31, 2021, which means that by the time Seery was testifying in the Bankruptcy Court on January 14, 2021, the fair market value of the Harbourvest Assets was \$22.5 million, when it was actually closer to \$43,202,724. Seery, speaking on behalf of HCM, knew of the distinction in value.

125. On January 14, 2021, Seery also testified that he (implying HCM, HCLA and HCLOF) had valued the Harbourvest Assets at their current valuation and at fair market value. This was not true because the valuation that was used and testified to was ancient. The ostensible purpose of this concealment was to induce Plaintiff and other interest holdings to take no action.

126. In supporting HCM’s motion to the Bankruptcy Court to approve the Harbourvest Settlement, Seery omitted the fact that HCM was purchasing the interests at a massive discount, which would violate the letter and spirit of the Adviser’s Act.

127. Seery was informed in late December 2020 at an in-person meeting in Dallas to which Seery had to fly that HCLOF and HCM had to suspend trading in MGM Studios’ securities because Seery had learned from James Dondero, who was on the Board of MGM, of a potential purchase of the company. The news of the MGM purchase should have caused Seery to revalue the HCLOF investment in MGM.

128. In or around October 2020, Seery (who controls the Board of CSS Medical) was pursuing “equatization” of CSS Medical’s debt, which would have increased the value of certain securities by 25%. In several communications through the U.S. interstate wires and/or mails, and with Plaintiffs, and the several communications with Harbourvest during the negotiations of the settlement, Seery failed to disclose these changes which were responsible in part for the ever-growing value of the HCLOF CLO portfolio.

129. Seery was at all relevant times operating as an agent of HCM.

130. This series of related violations of the wire fraud, mail fraud, and securities fraud laws, in connection with the HCM bankruptcy, constitute a continuing pattern and practice of racketeering for the purpose of winning a windfall for HCM and himself--a nearly \$30,000,000 payday under the confirmation agreement.

131. The federal RICO statute makes it actionable for one’s conduct of an enterprise to include “fraud in connection with a [bankruptcy case]”. The Advisers’ Act antifraud provisions require full transparency and accountability to an advisers’ investors and clients and does not require a showing of reliance or materiality. The wire fraud provision likewise is violated when,

as here, the interstate wires are used as part of a “scheme or artifice ... for obtaining money or property by means of false ... pretenses, [or] representations[.]”

132. Accordingly, because Defendants’ conduct violated the wire fraud and mail fraud laws, and the Advisers’ Act antifraud provisions, and their acts and omissions were in connection with the HCM Bankruptcy proceedings under Title 11, they are sufficient to bring such conduct within the purview of the RICO civil action provisions, **18 U.S.C. § 1964**.

133. Plaintiffs are thus entitled to damages, treble damages, attorneys’ fees and costs of suit, in addition to all other injunctive or equitable relief to which they are justly entitled.

FIFTH CAUSE OF ACTION
Tortious Interference
(CLO Holdco against HCM)

134. Plaintiff respectfully incorporates the foregoing factual averments as if fully set forth herein and further alleges the following:

135. At all relevant times, HCM owned a 0.6% interest in HCLOF.

136. At all relevant times, Seery and HCM knew that Plaintiff had specific rights in HCLOF under the Company Agreement, § 6.2.

137. Section 6.2 of HCLOF Company agreement provides that when a member “other than ... CLO Holdco [Plaintiff] or a Highland Affiliate,” intends to sell its interest in HCLOF to a third party (i.e., not an affiliate of the member), then the other members have the first right of refusal to purchase those interests pro rata for the same price that the member has agreed to sell.

138. HCM, through Seery, tortiously interfered with Plaintiff’s contractual rights with HCLOF by, among other things, diverting the Harbourvest Interests in HCLOF to HCM without giving HCLOF or Plaintiff the option to purchase those assets at the same favorable price that HCM obtained them.

139. HCM and Seery tortiously interfered with Plaintiff's contractual rights with HCLOF by, among other things, misrepresenting the fair market value as \$22.5 million and concealing the current value of those interests.

140. But for HCM and Seery's tortious interference, Plaintiff would have been able to acquire the Harbourvest Interests at a highly favorable price. HCM and Seery's knowledge of the rights and intentional interference with these rights has caused damage to Plaintiff CLO Holdco.

141. Plaintiff is therefore entitled to damages from HCM and Seery, as well as exemplary damages.

VI.

JURY DEMAND

142. Plaintiff demands trial by jury on all claims so triable.

VII.

PRAYER FOR RELIEF

143. Wherefore, for the foregoing reasons, Plaintiffs respectfully pray that the Court enter judgment in its favor and against Defendants, jointly and severally, for:

- a. Actual damages;
- b. Disgorgement;
- c. Treble damages;
- d. Exemplary and punitive damages;
- e. Attorneys' fees and costs as allowed by common law, statute or contract;
- f. A constructive trust to avoid dissipation of assets;
- g. All such other relief to which Plaintiff is justly entitled.

Dated: April 12, 2021

Respectfully submitted,

SBAITI & COMPANY PLLC

/s/ Mazin A. Sbaiti

Mazin A. Sbaiti

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Counsel for Plaintiffs

APPENDIX 12

GRANT SCOTT - 1/21/2021

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

IN RE:)	
	)	Chapter 11
HIGHLAND CAPITAL MANAGEMENT,)	
L.P.	)	Case No.
	)	19-34054-sgj11
Debtor.)	
-----)	
HIGHLAND CAPITAL MANAGEMENT,)	
L.P.,)	
Plaintiff,)	
	)	Adversary
vs.	)	Proceeding No.
	)	21-03000-sgj
HIGHLAND CAPITAL MANAGEMENT)	
FUND ADVISORS, L.P.; NEXPOINT)	
ADVISORS, L.P.; HIGHLAND)	
INCOME FUND; NEXPOINT)	
STRATEGIC OPPORTUNITIES FUND;)	
NEXPOINT CAPITAL, INC.; and)	
CLO HoldCo, LTD.,)	
)	
Defendants.)	

VIDEOCONFERENCE DEPOSITION OF Grant SCOTT

Thursday, 21st of January, 2021

Reported by: Lisa A. Wheeler, RPR, CRR

Job No: 188910

<p style="text-align: right;">Page 2</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 January 21, 2021</p> <p>3 2:02 p.m.</p> <p>4</p> <p>5</p> <p>6 Videoconference deposition of Grant</p> <p>7 SCOTT, pursuant to the Federal Rules of</p> <p>8 Civil Procedure before Lisa A. Wheeler,</p> <p>9 RPR, CRR, a Notary Public of the State of</p> <p>10 North Carolina. The court reporter</p> <p>11 reported the proceeding remotely and the</p> <p>12 witness was present via videoconference.</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	<p style="text-align: right;">Page 3</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 REMOTE APPEARANCES:</p> <p>3 PACHULSKI STANG ZIEHL & JONES</p> <p>4 Attorneys for Debtor</p> <p>5 780 Third Avenue</p> <p>6 New York, NY 10017</p> <p>7 BY: JOHN MORRIS, ESQ.</p> <p>8</p> <p>9 LATHAM & WATKINS</p> <p>10 Attorneys for UBS</p> <p>11 885 Third Avenue</p> <p>12 New York, NY 10022</p> <p>13 BY: SHANNON McLAUGHLIN, ESQ.</p> <p>14</p> <p>15 SIDLEY AUSTIN</p> <p>16 Attorneys for the Creditors Committee</p> <p>17 2021 McKinney Avenue</p> <p>18 Dallas, TX 75201</p> <p>19 BY: PENNY REID, ESQ.</p> <p>20 ALYSSA RUSSELL, ESQ.</p> <p>21 PAIGE MONTGOMERY, ESQ.</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>
<p style="text-align: right;">Page 4</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 REMOTE APPEARANCES: (Continued)</p> <p>3 KING & SPALDING</p> <p>4 Attorneys for Highland CLO Funding, Ltd.</p> <p>5 500 West 2nd Street</p> <p>6 Austin, TX 78701</p> <p>7 BY: REBECCA MATSUMURA, ESQ.</p> <p>8</p> <p>9 K&L GATES</p> <p>10 Attorneys for Highland Capital Management</p> <p>11 Fund Advisors, L.P., et al.</p> <p>12 4350 Lassiter at North Hills Avenue</p> <p>13 Raleigh, NC 27609</p> <p>14 BY: A. LEE HOGEWOOD, III, ESQ.</p> <p>15 EMILY MATHER, ESQ.</p> <p>16</p> <p>17 HELLER DRAPER & HORN</p> <p>18 Attorneys for The Dugaboy Investment Trust</p> <p>19 and The Get Good Trust</p> <p>20 650 Poydras Street</p> <p>21 New Orleans, LA 70130</p> <p>22 BY: MICHAEL LANDIS, ESQ.</p> <p>23</p> <p>24</p> <p>25</p>	<p style="text-align: right;">Page 5</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 REMOTE APPEARANCES: (Continued)</p> <p>3 KANE RUSSELL COLEMAN & LOGAN</p> <p>4 Attorneys for Defendant CLO HoldCo Limited</p> <p>5 Bank of America Plaza</p> <p>6 901 Main Street</p> <p>7 Dallas, TX 75202</p> <p>8 BY: BRIAN CLARK, ESQ.</p> <p>9 JOHN KANE, ESQ.</p> <p>10</p> <p>11 ALSO PRESENT: La Asia Canty</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>

<p style="text-align: right;">Page 6</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 G R A N T S C O T T ,</p> <p>3 called as a witness, having been duly sworn</p> <p>4 by a Notary Public, was examined and</p> <p>5 testified as follows:</p> <p>6 MR. MORRIS: Good afternoon. My</p> <p>7 name is John Morris. I'm an attorney with</p> <p>8 Pachulski Stang Ziehl & Jones, a law firm</p> <p>9 who represents the debtor in the bankruptcy</p> <p>10 known as In Re: Highland Capital</p> <p>11 Management, L.P., and we're here today for</p> <p>12 the deposition of Grant Scott.</p> <p>13 Before I begin, I would just like to</p> <p>14 have confirmation on the record that</p> <p>15 everybody here who's representing their</p> <p>16 respective parties agrees that this</p> <p>17 deposition can be used in evidence in any</p> <p>18 subsequent hearing, notwithstanding the</p> <p>19 fact that it's being conducted remotely,</p> <p>20 and that the witness is not in the same</p> <p>21 room as the court reporter.</p> <p>22 Does anybody have an objection to</p> <p>23 the admissibility of the transcript subject</p> <p>24 to any reservation of -- of actual</p> <p>25 objections on the record to using this</p>	<p style="text-align: right;">Page 7</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 transcript going forward?</p> <p>3 Okay. Nobody's spoken up, so I --</p> <p>4 I'd like to begin.</p> <p>5 EXAMINATION</p> <p>6 BY MR. MORRIS:</p> <p>7 Q. Good afternoon, Mr. Scott. As I</p> <p>8 mentioned, my name is John Morris, and we're</p> <p>9 here for your deposition today. Have you ever</p> <p>10 been deposed before?</p> <p>11 A. On two occasions.</p> <p>12 Q. And -- and when did the -- when did</p> <p>13 those depositions take place?</p> <p>14 A. This past October and maybe six to</p> <p>15 eight years ago.</p> <p>16 Q. Okay. Can you just tell me</p> <p>17 generally what the subject matter was of the</p> <p>18 deposition this past October.</p> <p>19 A. It was relating to Jim Dondero's --</p> <p>20 it was a family law issue in -- in -- with</p> <p>21 respect to Jim Dondero.</p> <p>22 Q. Okay. And did you testify in a</p> <p>23 courtroom, or was it a deposition like this?</p> <p>24 A. I -- right here, actually.</p> <p>25 Q. Okay. Super. And -- and what about</p>
<p style="text-align: right;">Page 8</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 the -- the deposition six to eight years ago,</p> <p>3 do you have a recollection as to what that was</p> <p>4 about?</p> <p>5 A. Yeah. It was a -- it was a patent I</p> <p>6 wrote for Samsung Electronics.</p> <p>7 Q. Okay.</p> <p>8 A. And as being the person that I --</p> <p>9 that wrote it and the patent was in litigation,</p> <p>10 not -- not being handled by me, but by virtue</p> <p>11 of having written the patent, I was -- I was</p> <p>12 deposed --</p> <p>13 Q. Okay. So you --</p> <p>14 A. -- on the -- on the patent.</p> <p>15 Q. Okay. So you've had a little bit of</p> <p>16 experience with depositions. But just</p> <p>17 generally speaking, I'm going to ask you a</p> <p>18 series of questions. It's very important that</p> <p>19 you allow me to finish my question before you</p> <p>20 begin your answer.</p> <p>21 Is that fair?</p> <p>22 A. Absolutely.</p> <p>23 Q. And I will certainly try to extend</p> <p>24 the same courtesy to you, but if I -- if I step</p> <p>25 on your words, will you let me know that?</p>	<p style="text-align: right;">Page 9</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 A. Okay.</p> <p>3 Q. And if there's anything that I ask</p> <p>4 that you don't understand, will you let me know</p> <p>5 that as well?</p> <p>6 A. Yes. I'll try -- I'll do my best.</p> <p>7 Q. Okay. So this is a virtual</p> <p>8 deposition. We're not in the same room. I am</p> <p>9 going to be showing you documents today. The</p> <p>10 documents will be put up on the screen. This</p> <p>11 isn't a -- a trick of any kind. If at any time</p> <p>12 you see a document up on the screen and either</p> <p>13 you believe or you have any reason to want to</p> <p>14 read other portions of the document, will you</p> <p>15 let me know that?</p> <p>16 A. Yes, I -- yes, I will. Uh-huh.</p> <p>17 Q. With respect to the Dondero family</p> <p>18 matter, I really don't want to go into the</p> <p>19 substance of that, but I do want to know</p> <p>20 whether you testified voluntarily in that</p> <p>21 matter or whether you -- whether you testified</p> <p>22 pursuant to subpoena.</p> <p>23 A. I would have done that, but the</p> <p>24 first time I found out about it was a -- was a</p> <p>25 subpoena that I received. I wasn't given the</p>

<p style="text-align: right;">Page 10</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 choice.</p> <p>3 Q. Okay. And do you recall who served</p> <p>4 the subpoena on you? Actually, let me ask a</p> <p>5 different question because I'm really not</p> <p>6 interested in the -- in the details.</p> <p>7 Did Mr. Dondero serve that subpoena</p> <p>8 on you or did somebody else?</p> <p>9 A. His counsel for his ex-wife.</p> <p>10 Q. Mr. -- so -- so the lawyer acting on</p> <p>11 behalf of Mr. Dondero's ex-wife served you with</p> <p>12 the subpoena?</p> <p>13 A. Correct.</p> <p>14 Q. Okay. You're familiar with an</p> <p>15 entity called CLO HoldCo Limited; is that</p> <p>16 right?</p> <p>17 A. Yes.</p> <p>18 Q. Do you know what that entity is?</p> <p>19 A. Yes.</p> <p>20 Q. What -- what -- can you describe for</p> <p>21 me what CLO HoldCo Limited is.</p> <p>22 A. It's a holding company of assets</p> <p>23 including collateralized loan obligation-type</p> <p>24 assets. That's a portion of the overall</p> <p>25 portfolio. It's an organization that is</p>	<p style="text-align: right;">Page 11</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 integrated with other entities as part of a</p> <p>3 charitable -- loosely what we -- what we refer</p> <p>4 to as a charitable foundation equivalent.</p> <p>5 Yeah.</p> <p>6 Q. All right. We'll -- we'll get into</p> <p>7 some detail about the corporate structure in a</p> <p>8 moment. Do you personally play any role at CLO</p> <p>9 HoldCo Limited?</p> <p>10 A. Yes. My technical title is</p> <p>11 director, but I -- I don't necessarily know</p> <p>12 specifically what that title means other than I</p> <p>13 act, as I understand it, as -- as a trustee for</p> <p>14 those -- for those assets.</p> <p>15 Q. And where did you get that</p> <p>16 understanding?</p> <p>17 A. Approximately ten years ago from the</p> <p>18 group that -- that set up the hierarchy.</p> <p>19 Q. And which group set up the</p> <p>20 hierarchy?</p> <p>21 A. Employees at Jim Don- -- as I</p> <p>22 understand it, employees of Highland along with</p> <p>23 outside counsel, as I understand it, and also,</p> <p>24 I guess, input from -- from Jim Dondero.</p> <p>25 Q. At the time that you assumed the</p>
<p style="text-align: right;">Page 12</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 role of director of CLO HoldCo Limited, was</p> <p>3 that entity already in existence?</p> <p>4 A. I believe so. I'm not certain. I'm</p> <p>5 not certain.</p> <p>6 Q. What are your duties and</p> <p>7 responsibilities as a director of CLO HoldCo</p> <p>8 Limited?</p> <p>9 A. Well, my day-to-day responsibilities</p> <p>10 are to interface with -- with the manager of</p> <p>11 the -- of the assets of CLO. I do have some</p> <p>12 role in -- with respect to some of the entities</p> <p>13 that are -- I -- I have a limited role with</p> <p>14 respect to a subset of the charitable</p> <p>15 foundations that receive money from the CLO</p> <p>16 HoldCo structure, which is commonly referred to</p> <p>17 as the DAF. There's -- sometimes those are</p> <p>18 used interchangeably.</p> <p>19 Q. What terms are used interchangeably?</p> <p>20 A. Well, the DAF and CLO HoldCo are</p> <p>21 frequently -- by -- by other people they're --</p> <p>22 it's the short -- it's the -- I guess it's</p> <p>23 easier to use the acronym DAF than CLO HoldCo</p> <p>24 Limited, so I'm frequently having to -- there</p> <p>25 is a DAF entity so -- that's above -- above CLO</p>	<p style="text-align: right;">Page 13</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 in terms of the management, and so it's</p> <p>3 frequently confusing and I'm having to clarify</p> <p>4 at times which entity we're talking about,</p> <p>5 but -- but other parties frequently use those</p> <p>6 terms interchangeably.</p> <p>7 Q. Okay.</p> <p>8 MR. MORRIS: Lisa, when we use the</p> <p>9 phrase DAF, because you'll hear that a lot,</p> <p>10 it's all caps, D-A-F.</p> <p>11 BY MR. MORRIS:</p> <p>12 Q. You mentioned that you interface</p> <p>13 with the manager of assets of CLOs. Do I have</p> <p>14 that right?</p> <p>15 A. Well, of all the assets.</p> <p>16 Q. Okay. Who is the manager of the</p> <p>17 assets that you're referring to?</p> <p>18 A. Highland Capital Management.</p> <p>19 Q. Highland Capital Management manages</p> <p>20 all of the assets -- withdrawn.</p> <p>21 Is it your understanding that</p> <p>22 Highland Capital Management manages all the</p> <p>23 assets that are owned by CLO HoldCo Limited?</p> <p>24 A. Yes.</p> <p>25 Q. Who makes the investment decisions</p>

Page 14

1 GRANT SCOTT - 1/21/2021

2 on behalf of CLO HoldCo Limited?

3 A. Highland -- those managers that you

4 mentioned.

5 Q. Okay. I didn't mention anybody in

6 particular.

7 A. Oh, I'm sorry. The -- the -- the

8 money manager -- could you repeat that

9 question? I'm sorry. I'm so sorry.

10 Q. Can you just -- can you just

11 identify for me the person who makes investment

12 decisions on behalf of CLO HoldCo Limited.

13 A. It's -- well, it's -- it's persons

14 as I understand it. I inter- -- interface with

15 a -- with a group, but it's -- it's Highland

16 Capital employee -- Highland Capital Management

17 employees.

18 Q. Okay. Can you just name any of

19 them, please.

20 A. Hunter Covitz, Jim Dondero. Mark

21 Okada's no longer there, but I believe he was

22 involved, and there are others that I interface

23 with.

24 Q. Can you -- can you recall the name

25 of anybody other than Mr. Okada and Mr. Dondero

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2 Q. Is it fair to say that you do not

3 make decisions, investment decisions, on behalf

4 of CLO HoldCo Limited?

5 A. Yes.

6 Q. Does CLO HoldCo Limited have any

7 employees that you know of?

8 A. No.

9 Q. Does CLO HoldCo have any --

10 withdrawn.

11 Does CLO HoldCo Limited have any

12 officers that you know of?

13 A. No.

14 Q. So am I correct that you're the only

15 representative in the world of CLO HoldCo in

16 terms of being a director, officer, or

17 employee?

18 A. Yes.

19 Q. Do you receive any compensation from

20 CLO HoldCo for your services as the director?

21 A. I do now.

22 Q. When did that begin?

23 A. I believe in the middle of 2012.

24 Q. Okay. And had you served as a

25 director prior to that time without

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2 and Mr. Covitz?

3 A. Yeah. Over the years I've worked

4 with Tim Cournoyer, Thomas Surgent, but I

5 think -- I think that's the core -- the core

6 group.

7 Q. All right. And is there anybody

8 within that core group who has the final

9 decision-making authority concerning the

10 investments in CLO HoldCo Limited?

11 A. I don't -- I don't know. I'm sorry.

12 Say that again. I just want to -- I'm sorry.

13 I'm trying to be -- I'm not trying to -- I'm

14 trying to be --

15 Q. I understand. And --

16 A. Sorry. If you could just repeat it.

17 Q. Sure. Is there any particular

18 person who has the final decision-making

19 authority for investments that are being made

20 on behalf of CLO HoldCo Limited?

21 A. Amongst that group I am -- I am not

22 sure.

23 Q. Okay. So are there any other

24 directors of CLO HoldCo besides yourself?

25 A. No.

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2 compensation?

3 A. Yes.

4 Q. And have you been the sole director

5 of CLO HoldCo Limited since the time of your

6 appointment approximately ten years ago?

7 A. Yes.

8 Q. Nobody else has served in that

9 capacity; is that right?

10 A. That is correct.

11 Q. There have been no employees or

12 officers of that entity during the time that

13 you've served as director, correct?

14 A. Yes.

15 Q. Do you know who formed CLO HoldCo

16 Limited?

17 A. I do not.

18 Q. Do you know why CLO HoldCo Limited

19 was formed?

20 A. I believe so.

21 Q. Can you explain to me why -- your

22 understanding as to why CLO HoldCo was formed.

23 A. So as I understand things, Jim

24 Dondero wanted to create a charitable

25 foundation-like entity or entities, and tax

<p style="text-align: right;">Page 18</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 people particularly, I guess, finance people,</p> <p>3 lawyers, they created this network of entities</p> <p>4 to carry out that charitable goal. At one</p> <p>5 point, I thought it was a novel type of</p> <p>6 institution, if you want to call it, or a</p> <p>7 novel -- novel type of group of entities, but</p> <p>8 over time, I came to understand that although</p> <p>9 not cookie cutter, it -- it follows a general</p> <p>10 arrangement of entities for legal and tax</p> <p>11 purposes, compliance purposes, IRS purposes,</p> <p>12 various insulating purposes to maintain -- or</p> <p>13 to meet the necessary requisites to carry out</p> <p>14 that charitable function.</p> <p>15 Q. When did you come to that</p> <p>16 understanding?</p> <p>17 A. Over the last couple of years. I</p> <p>18 periodically have to refresh my recollection.</p> <p>19 It's -- it's fairly complex.</p> <p>20 Q. Okay. In your capacity as the sole</p> <p>21 director of CLO HoldCo Limited, do you report</p> <p>22 to anybody?</p> <p>23 A. No.</p> <p>24 Q. Other than interfacing with the</p> <p>25 manager of the assets of the CLO, do you have</p>	<p style="text-align: right;">Page 19</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 any other duties and responsibilities as a</p> <p>3 director of CLO HoldCo Limited?</p> <p>4 A. Yes. Sorry. My mouth is a little</p> <p>5 dry.</p> <p>6 Q. By the way, if you ever need to take</p> <p>7 a break, just let me know.</p> <p>8 A. Okay. Thank you. Now I forgot your</p> <p>9 question. The -- the -- the --</p> <p>10 Q. I understand.</p> <p>11 A. The answer -- the -- the answer is</p> <p>12 yes. I -- why don't you ask -- ask your</p> <p>13 question again. I'm sorry.</p> <p>14 Q. Sure. Other than interfacing with</p> <p>15 the manager of the assets of the CLO, do you</p> <p>16 have any other duties and responsibilities as</p> <p>17 the sole director of CLO HoldCo Limited?</p> <p>18 A. Yes. So Highland Capital because of</p> <p>19 its -- the way it's set up to manage or service</p> <p>20 CLO HoldCo and the DAF, it has a relatively</p> <p>21 large group of people that I have to interface</p> <p>22 with to do everything from -- everything from</p> <p>23 soup to nuts. Finances and the money</p> <p>24 management is one aspect, but most of my</p> <p>25 time -- on a day-to-day or week-to-week basis,</p>
<p style="text-align: right;">Page 20</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 most of my time is spent working with the</p> <p>3 various compliance and other people for</p> <p>4 addressing issues of get- -- you know, getting</p> <p>5 taxes filed. It runs -- it runs the gamut of</p> <p>6 every aspect of the organization being -- being</p> <p>7 handled by Highland.</p> <p>8 Q. Okay.</p> <p>9 A. You know, unlike -- unlike my</p> <p>10 financial -- unlike a financial planner that</p> <p>11 might, you know, manage assets, they -- they do</p> <p>12 it all, and I interface with them regularly to</p> <p>13 maintain -- mostly to deal with compliance</p> <p>14 issues.</p> <p>15 Q. Who's the com- -- is there a person</p> <p>16 who's in charge of compliance?</p> <p>17 A. I believe Thomas Surgent. I</p> <p>18 mentioned him. I believe he also has that</p> <p>19 role, but it's -- you know, they do have</p> <p>20 turnover, I guess, in that. It's -- I guess</p> <p>21 they refer to it as the back office. I've</p> <p>22 heard that term be used, but -- basically, it's</p> <p>23 a large number of people that have changed over</p> <p>24 time, but it's -- it's more -- I believe it's</p> <p>25 more than one collectively.</p>	<p style="text-align: right;">Page 21</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 Q. How much time do you devote -- you</p> <p>3 know, can you estimate either on a weekly or a</p> <p>4 monthly basis how many -- how much time do you</p> <p>5 devote to serving as the director of CLO HoldCo</p> <p>6 Limited?</p> <p>7 A. I thought about that. Well, let --</p> <p>8 let's put it this way: There was the</p> <p>9 prebankruptcy time I spent per day, and then</p> <p>10 there was the postbankruptcy time I've spent</p> <p>11 per -- per -- or per week -- excuse me, or</p> <p>12 per -- I've estimated it as probably a day --</p> <p>13 it's so intermittent it's -- it's hard, okay?</p> <p>14 It's -- I don't dedicate my Mondays to only</p> <p>15 doing that and then Tuesday through Friday I</p> <p>16 don't, right? I -- it's -- I have to piece</p> <p>17 together everything that occurs during the</p> <p>18 week. There might be some weeks where I don't</p> <p>19 have any contact. There might be every day of</p> <p>20 the week I have multiple contact. There may be</p> <p>21 days where from morning to night there is so</p> <p>22 much contact, it precludes me from doing</p> <p>23 anything else meaningfully. So -- but I would</p> <p>24 estimate it's probably three or four -- maybe</p> <p>25 three days, four days a month when things are</p>

<p style="text-align: right;">Page 22</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 going well.</p> <p>3 Q. And -- and I think you -- you</p> <p>4 testified just now that there was kind of a</p> <p>5 difference between prebankruptcy and</p> <p>6 postbankruptcy. Do I have that right?</p> <p>7 A. Yes.</p> <p>8 Q. And can you tell me -- is it fair to</p> <p>9 say that before the bankruptcy, you didn't</p> <p>10 devote much time to CLO HoldCo, or do I have</p> <p>11 that wrong?</p> <p>12 A. Well, I -- just the time that --</p> <p>13 that I mentioned just -- I'm sorry. The -- the</p> <p>14 time I just mentioned now when you asked me,</p> <p>15 that was the pre period. Excuse me. I haven't</p> <p>16 talked about the postbankruptcy period.</p> <p>17 Q. So are you -- are you -- are you</p> <p>18 devoting more time or less time since the</p> <p>19 bankruptcy?</p> <p>20 A. Much more.</p> <p>21 Q. Much more since the bankruptcy</p> <p>22 filing?</p> <p>23 A. Yes.</p> <p>24 Q. And so why did the bankruptcy filing</p> <p>25 cause you to spend more time as a director of</p>	<p style="text-align: right;">Page 23</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 CLO HoldCo Limited?</p> <p>3 A. Well, initially, and this would</p> <p>4 be -- this would be late 2019, it was --</p> <p>5 aft- -- after the bankruptcy was -- was filed</p> <p>6 and I obtained counsel, who are on the phone</p> <p>7 now -- or in this deposition now, excuse me,</p> <p>8 that was -- that transition occurred because</p> <p>9 CLO was a debtor -- excuse me, a creditor to --</p> <p>10 to the debtor and had to take steps to</p> <p>11 establish its -- its claim. So if I understand</p> <p>12 the -- things correctly, the -- the debtor</p> <p>13 identified as part of the filing -- I don't</p> <p>14 know how bankruptcy works, but if I under- --</p> <p>15 if my recollection is correct, there's a</p> <p>16 hierarchy from biggest to smallest, and we were</p> <p>17 relatively high up. And when I say we or I,</p> <p>18 I -- I just mean CLO was relatively high up.</p> <p>19 And so initially, for the first period of so</p> <p>20 many months, the -- the exclusive focus was on</p> <p>21 our position as a creditor -- a creditor having</p> <p>22 a certain claim against a debtor.</p> <p>23 Q. Can you describe for me your</p> <p>24 understanding of the nature of the claim</p> <p>25 against the debtor.</p>
<p style="text-align: right;">Page 24</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 A. It was various obligations that were</p> <p>3 owed to -- to CLO, things that had been</p> <p>4 previously donated or -- or agreements that had</p> <p>5 been set up that transferred certain assets,</p> <p>6 and it was basically the -- the -- the amounts</p> <p>7 were derived from those sorts of transactions.</p> <p>8 Q. Okay. You're a patent lawyer; is</p> <p>9 that right?</p> <p>10 A. I -- I'm exclusively a patent</p> <p>11 attorney, yes.</p> <p>12 Q. Have you been a patent lawyer on an</p> <p>13 exclusive basis since the time you graduated</p> <p>14 from law school?</p> <p>15 A. From law school, yes.</p> <p>16 Q. Can you just describe for me</p> <p>17 generally your educational background.</p> <p>18 A. So I'm an electrical engineer by</p> <p>19 training. I graduated from the University of</p> <p>20 Virginia in 1984. I then went to graduate</p> <p>21 school at the University of Illinois. I</p> <p>22 received my master's degree in 1986, and then I</p> <p>23 immediately joined IBM Research at the Thomas</p> <p>24 Watson Institute in New York where I was a --</p> <p>25 my title was research scientist, but I was -- I</p>	<p style="text-align: right;">Page 25</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 guess I was more of a research engineer, if</p> <p>3 that matters. And I did that until I</p> <p>4 transitioned -- or I began law school in the</p> <p>5 fall of 1988, and then I graduated law school</p> <p>6 in May of 1991.</p> <p>7 Q. And where did you go to law school?</p> <p>8 A. University of North Carolina.</p> <p>9 Q. Do you have any formal training in</p> <p>10 investing or finance?</p> <p>11 A. I do not.</p> <p>12 Q. Do you hold yourself out as an</p> <p>13 expert in any field of investment?</p> <p>14 A. None -- none at all.</p> <p>15 Q. Have you had any formal training</p> <p>16 with respect to compliance issues? You</p> <p>17 mentioned compliance issues earlier.</p> <p>18 A. No.</p> <p>19 Q. Now, do you have any knowledge about</p> <p>20 compliance rules or regulations?</p> <p>21 A. Minimal that I've -- that have</p> <p>22 occurred organically but -- but generally, no.</p> <p>23 Q. You don't hold yourself out as an</p> <p>24 expert in com- -- in the area of compliance,</p> <p>25 correct?</p>

<p style="text-align: right;">Page 26</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 A. No. No. I'm -- no.</p> <p>3 Q. Do you have any particular</p> <p>4 investment philosophy or strategy?</p> <p>5 MR. CLARK: I'm going to object to</p> <p>6 the form of the question. And, John,</p> <p>7 can -- can we get an agreement that -- I</p> <p>8 know you were objecting just simply on the</p> <p>9 form basis yesterday -- that objection to</p> <p>10 form is sufficient today?</p> <p>11 MR. MORRIS: Sure.</p> <p>12 MR. CLARK: Okay. And I object to</p> <p>13 form. Grant, you can answer to the extent</p> <p>14 you can.</p> <p>15 THE WITNESS: I forget the question</p> <p>16 now that you interrupted. I'm sorry.</p> <p>17 BY MR. MORRIS:</p> <p>18 Q. So -- so -- and I'm going to ask a</p> <p>19 different question because in hindsight, that's</p> <p>20 a good objection.</p> <p>21 In your capacity as the director</p> <p>22 of -- withdrawn.</p> <p>23 Do the employees of Highland that</p> <p>24 you identified earlier, do they make investment</p> <p>25 decisions on behalf of CLO HoldCo Limited</p>	<p style="text-align: right;">Page 27</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 without your prior knowledge on occasion?</p> <p>3 A. On occasion, they do.</p> <p>4 Q. So there's no rule that your prior</p> <p>5 approval is needed before investments are made,</p> <p>6 right?</p> <p>7 A. I don't know whether they have an</p> <p>8 internal guideline as to the amount that</p> <p>9 triggers when they get in touch with me or</p> <p>10 whether it's a new -- a change, something new,</p> <p>11 or -- versus recurring. So I don't -- I don't</p> <p>12 know what they use internally for that metric.</p> <p>13 Q. Okay. Are you aware of any</p> <p>14 guideline that was ever used by the Highland</p> <p>15 employees whereby they were required to obtain</p> <p>16 your consent prior to effectuating transactions</p> <p>17 on behalf of CLO HoldCo Limited?</p> <p>18 A. I understand there was one or more,</p> <p>19 but I do not know that.</p> <p>20 Q. Okay. Did you ever see such a</p> <p>21 policy or list of rules that would require your</p> <p>22 prior consent before the Highland employees</p> <p>23 effectuated transactions on behalf of CLO</p> <p>24 HoldCo Limited?</p> <p>25 A. Possibly some time ago, but I -- I</p>
<p style="text-align: right;">Page 28</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 don't recall.</p> <p>3 Q. Okay. So -- withdrawn. I'll --</p> <p>4 I'll go on.</p> <p>5 How did you come to be the director</p> <p>6 of CLO HoldCo?</p> <p>7 A. I was asked either by Jim Dondero</p> <p>8 or -- directly or indirectly by -- by Jim</p> <p>9 Dondero.</p> <p>10 Q. And who is Jim Dondero?</p> <p>11 A. Well, at the time, he was the head</p> <p>12 or one of the heads of Highland Capital</p> <p>13 Management, a friend of mine.</p> <p>14 Q. How long have you known Mr. Dondero?</p> <p>15 A. Since high school so that -- 1976.</p> <p>16 Q. Where did you and Mr. Dondero grow</p> <p>17 up?</p> <p>18 A. In northern New Jersey.</p> <p>19 Q. Do you consider him among the</p> <p>20 closest friends you have?</p> <p>21 A. I think he is my closest friend.</p> <p>22 Q. Did you two go to college together?</p> <p>23 A. We actually -- for the last -- last</p> <p>24 two years I was at UVA, University of Virginia,</p> <p>25 excuse me, he and I were -- were at UVA. So we</p>	<p style="text-align: right;">Page 29</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 did not start out at UVA initially, but -- but</p> <p>3 we both transferred -- I transferred my</p> <p>4 sophomore year. I was actually a chemical</p> <p>5 engineer at the University of Delaware when I</p> <p>6 transferred in, and then he transferred in his</p> <p>7 junior year. So we were there at college for</p> <p>8 two years.</p> <p>9 Q. And -- and based on your</p> <p>10 relationship with him, is it your understanding</p> <p>11 that one of the reasons he chose to transfer to</p> <p>12 UVA is -- is to -- because you were there?</p> <p>13 A. Oh, no. He transferred -- he --</p> <p>14 he -- he transferred there because of the -- so</p> <p>15 he went to the University of -- he -- he went</p> <p>16 to Virginia Tech University, which is more</p> <p>17 known as being an engineering school, which I</p> <p>18 might have wanted to go to, and less a finance</p> <p>19 business school. And if I understand things</p> <p>20 correctly, and I believe I do, he transferred</p> <p>21 to UVA because of the well-known</p> <p>22 business/finance program, accounting program.</p> <p>23 Q. And did you -- did you and</p> <p>24 Mr. Dondero become roommates at UVA?</p> <p>25 A. We weren't roommates, but we lived</p>

<p style="text-align: right;">Page 30</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 in the -- we were housemates. I'm sorry. We</p> <p>3 were housemates.</p> <p>4 Q. So you shared a house together. How</p> <p>5 would you describe your relationship with</p> <p>6 Mr. Dondero today?</p> <p>7 A. It's -- it's been strained a while,</p> <p>8 for some time, but -- but generally, very good.</p> <p>9 Good to very good.</p> <p>10 Q. Without -- without getting personal</p> <p>11 here, can you just generally identify the</p> <p>12 source of the strain that you described.</p> <p>13 A. This -- I think it would be fair to</p> <p>14 say that this bankruptcy, particularly events</p> <p>15 in 2020 so some months after the bankruptcy was</p> <p>16 declared, things have become -- we -- we still</p> <p>17 have a close friendship, but -- but things</p> <p>18 are -- are a bit -- are a bit more difficult.</p> <p>19 Q. Were you ever married?</p> <p>20 A. I've never been married.</p> <p>21 Q. Did you serve as Mr. Dondero's best</p> <p>22 man at his wedding?</p> <p>23 A. I did.</p> <p>24 Q. Is it fair to say that -- that</p> <p>25 Mr. Dondero trusts you?</p>	<p style="text-align: right;">Page 31</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 MR. CLARK: Objection, form.</p> <p>3 BY MR. MORRIS:</p> <p>4 Q. Withdrawn.</p> <p>5 Do you believe that Mr. Dondero</p> <p>6 trusts you?</p> <p>7 A. I do.</p> <p>8 Q. Over the years, is it fair to say</p> <p>9 that Mr. Dondero has confided in you?</p> <p>10 MR. CLARK: Objection, form.</p> <p>11 BY MR. MORRIS:</p> <p>12 Q. You can answer if you understand it.</p> <p>13 A. I think so.</p> <p>14 Q. I -- I -- what's your answer? You</p> <p>15 think so?</p> <p>16 A. Maybe you can de- -- I think of</p> <p>17 confide as -- could you define confide, please.</p> <p>18 Q. Sure. Is it -- is it fair to say</p> <p>19 that over the -- let me -- you've known</p> <p>20 Mr. Dondero for almost 45 years, right?</p> <p>21 A. Yes.</p> <p>22 Q. And you consider him to be your</p> <p>23 closest friend in the world, right?</p> <p>24 A. Yes.</p> <p>25 Q. And is it fair to say over the</p>
<p style="text-align: right;">Page 32</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 course of those 45 years, Mr. Dondero has</p> <p>3 shared confidential information with you that</p> <p>4 he didn't want you to reveal publicly to other</p> <p>5 people?</p> <p>6 A. Yes.</p> <p>7 Q. And is it your understanding that</p> <p>8 because of the nature of your relationship with</p> <p>9 him, he asked you to serve as the director of</p> <p>10 CLO HoldCo Limited?</p> <p>11 A. Yes. I believe it's because he --</p> <p>12 he trusted -- trusted me with -- with assets</p> <p>13 relating to his charitable vision. I -- I --</p> <p>14 yeah. Yes.</p> <p>15 Q. And is it your understanding that he</p> <p>16 thought you would help him execute his</p> <p>17 charitable vision?</p> <p>18 A. That was the point of attraction</p> <p>19 initially. It wasn't for money. I wasn't</p> <p>20 being paid. That was -- the charitable mission</p> <p>21 was the attraction.</p> <p>22 Q. Does Mr. Dondero play any role in</p> <p>23 the management of the CLO HoldCo Limited asset</p> <p>24 pool?</p> <p>25 MR. CLARK: Objection, form.</p>	<p style="text-align: right;">Page 33</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 A. I'm sorry. Could you repeat that?</p> <p>3 My -- my screen went small and then big again.</p> <p>4 I was distracted.</p> <p>5 Q. What role does Mr. Dondero play with</p> <p>6 respect to the management of the CLO HoldCo</p> <p>7 Limited asset pool?</p> <p>8 MR. CLARK: Objection, form.</p> <p>9 A. He is with the company that manages</p> <p>10 that asset pool. He's one of the people I</p> <p>11 named previously as managing those assets.</p> <p>12 Q. He is -- he -- he is the -- do you</p> <p>13 understand that he has the final</p> <p>14 decision-making power with respect to the</p> <p>15 management of the assets that are held by CLO</p> <p>16 HoldCo Limited?</p> <p>17 MR. CLARK: Objection, form.</p> <p>18 A. I believe I ansel -- answered that</p> <p>19 previously. I -- I don't know who has -- for</p> <p>20 certainty I do not know who has that within</p> <p>21 that company. I don't. If -- if -- I -- I</p> <p>22 don't know, consistent with my prior answer.</p> <p>23 Q. Did you ever ask anybody who had the</p> <p>24 final decision-making authority for investments</p> <p>25 on behalf of CLO HoldCo Limited?</p>

<p style="text-align: right;">Page 34</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 A. I -- I did not.</p> <p>3 Q. Did you ever make a decision on</p> <p>4 behalf of -- withdrawn.</p> <p>5 In your capacity as a director --</p> <p>6 withdrawn.</p> <p>7 In your capacity as the sole</p> <p>8 director of CLO HoldCo Limited, can you think</p> <p>9 of any decision that you've ever made that</p> <p>10 Mr. Dondero disagreed with?</p> <p>11 A. Since -- prior to the bankruptcy,</p> <p>12 no, not that I'm aware of.</p> <p>13 Q. And since the bankruptcy?</p> <p>14 A. There are decisions that I've made</p> <p>15 that he's disagreed with.</p> <p>16 Q. Can you identify them?</p> <p>17 A. Yes.</p> <p>18 Q. Please do so.</p> <p>19 A. Okay. So the reason I'm pausing is</p> <p>20 I'm trying to put these in chronological order</p> <p>21 and, at the same time, identify maybe some of</p> <p>22 the more important ones versus the lesser</p> <p>23 important ones. One of the decisions I made</p> <p>24 related to a request that I received from the</p> <p>25 independent board of Highland. I don't know</p>	<p style="text-align: right;">Page 35</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 how the request was transmitted to me, but I</p> <p>3 believe the way it played out is as follows: I</p> <p>4 believe I was asked to call Jim Seery, and the</p> <p>5 other -- and Russell Nelms, and the third</p> <p>6 independent director, I believe his name is</p> <p>7 John. I -- I forget right now what his last</p> <p>8 name is. They were in New York, said they were</p> <p>9 in a conference room. I called in. They were</p> <p>10 very pleasant. They identified who they were,</p> <p>11 and they had a request, and the request was</p> <p>12 that I agree to a transfer -- or that I -- that</p> <p>13 I agree to allow certain assets that were not</p> <p>14 Highland's assets but they were CLO's as- --</p> <p>15 assets -- apparently, there was no dispute</p> <p>16 about that at any point in time, but that I</p> <p>17 agree to allow certain assets that were due CLO</p> <p>18 to be transferred to the registry of the</p> <p>19 bankruptcy court. And either on that call I</p> <p>20 immediately agreed or ended the call, called my</p> <p>21 attorney, and then immediately agreed. It was</p> <p>22 a very -- I accommodated the request quickly.</p> <p>23 Q. Okay. And can you just tell me at</p> <p>24 what point in time you spoke with Mr. Dondero,</p> <p>25 and what did he say that you recall?</p>
<p style="text-align: right;">Page 36</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 A. I don't know when he became aware of</p> <p>3 that decision. I'm not sure I ever volunteered</p> <p>4 that the decision was even made, but at some</p> <p>5 point, it became an issue because he found out</p> <p>6 through -- if I understand the sequence of</p> <p>7 events correctly, he found out possibly through</p> <p>8 his counsel because there was ultimately</p> <p>9 litigation about that issue. It became known</p> <p>10 to everyone at some point what I had done, I --</p> <p>11 I think. And subsequent to that, it became an</p> <p>12 issue because of CLO HoldCo having fairly</p> <p>13 significant cash flow issues with respect to</p> <p>14 its expenses and obligations, including payment</p> <p>15 of management fees as well as some of the</p> <p>16 scheduled charitable giving that was -- that</p> <p>17 was by contract already predefined. My</p> <p>18 decision to tuck that money -- or to agree</p> <p>19 to -- my agreement to let that money be tucked</p> <p>20 away created some -- created some -- created</p> <p>21 some problems --</p> <p>22 Q. And -- and --</p> <p>23 A. -- for CLO HoldCo.</p> <p>24 Q. Okay. And I just want you to focus</p> <p>25 specifically on my question, and that is, what</p>	<p style="text-align: right;">Page 37</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 did Mr. Dondero say to you that -- that causes</p> <p>3 you to testify as you did, that this is one</p> <p>4 issue that he didn't agree with?</p> <p>5 A. I believe his concern was that</p> <p>6 because it was money that was undisputably to</p> <p>7 flow to CLO HoldCo that -- which had many, many</p> <p>8 other nonliquid assets -- this was a form of a</p> <p>9 liquid asset. It was cash in effect, proceeds.</p> <p>10 -- that the money should have been allowed to</p> <p>11 flow to be available for obligations. He</p> <p>12 didn't under- -- I -- I -- I don't know what he</p> <p>13 was thinking, but the -- the issue was that the</p> <p>14 decision to put it into escrow was -- was --</p> <p>15 was in- -- incorrect, that there was no basis</p> <p>16 for it.</p> <p>17 Q. That -- that's an issue where after</p> <p>18 learning of your decision, he didn't agree with</p> <p>19 it; is that fair?</p> <p>20 A. That's right.</p> <p>21 Q. Okay. Can you think of any decision</p> <p>22 that you've ever made on behalf of CLO HoldCo</p> <p>23 Limited where Mr. Dondero had advance knowledge</p> <p>24 of what you were going to do and he objected to</p> <p>25 it, but you nevertheless overruled his</p>

<p style="text-align: right;">Page 38</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 objection and went ahead and did what -- did</p> <p>3 what you thought was right?</p> <p>4 A. Okay. Let me -- let me -- I have --</p> <p>5 I'm sorry.</p> <p>6 Q. We're here.</p> <p>7 A. Oh, I'm sorry. I'm having some</p> <p>8 issues with my screen. So that may have</p> <p>9 occurred with respect to the original proof of</p> <p>10 claim. Then there was a subsequent amendment</p> <p>11 to the proof of claim, and I -- I believe it --</p> <p>12 I believe that he might have been aware of both</p> <p>13 of those and was in disagreement with -- with</p> <p>14 those. But after working with my attorney, we</p> <p>15 just -- you know, we did what we thought was</p> <p>16 right, and I still think what we did was right.</p> <p>17 There was an issue with respect to Har- --</p> <p>18 HarbourVest that occurred relatively recently</p> <p>19 where he objected to a decision that I had</p> <p>20 made. As I understand it, I could have</p> <p>21 contacted my attorney and changed the decision,</p> <p>22 but I didn't, and I still think that was the</p> <p>23 right decision.</p> <p>24 We have filed plan objections. I</p> <p>25 can't say if he has any -- in that regard, I --</p>	<p style="text-align: right;">Page 39</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 I -- I don't know what his thoughts are on</p> <p>3 objections. They would not have been</p> <p>4 communicated with -- by me to him, but my</p> <p>5 attorney might have consulted with his</p> <p>6 attorney, and there -- they may know what that</p> <p>7 difference is, but I -- that was just another</p> <p>8 big decision. I -- I -- maybe that --</p> <p>9 Q. All right. Let me see if I can --</p> <p>10 let me see if I can summarize this. So two</p> <p>11 proofs of claim. Is it fair to say that</p> <p>12 Mr. Dondero saw those proofs of claim before</p> <p>13 they were filed?</p> <p>14 MR. CLARK: Objection, form.</p> <p>15 BY MR. MORRIS:</p> <p>16 Q. Withdrawn.</p> <p>17 A. It --</p> <p>18 Q. Do -- do you know whether</p> <p>19 Mr. Dondero saw the proofs of claim before they</p> <p>20 were filed?</p> <p>21 A. I don't believe he did.</p> <p>22 Q. What -- what steps in filing the</p> <p>23 proofs of claim did he object to that you</p> <p>24 overruled? Did he think there was -- something</p> <p>25 should be different about them?</p>
<p style="text-align: right;">Page 40</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 A. So we had to interface with Highland</p> <p>3 employees at some point to get information to</p> <p>4 support our proof of claim, and my guess, and</p> <p>5 it's just a guess, is that he was aware of</p> <p>6 those inquiries. I -- I'm sorry. I shouldn't</p> <p>7 speculate. I don't know. But he -- with</p> <p>8 respect to the original proof of claim, I'm --</p> <p>9 I'm not aware of what specifically he was</p> <p>10 objecting to or was -- thought should have been</p> <p>11 different, but the -- with respect to the</p> <p>12 amended proof of claim, which reduced the</p> <p>13 original proof of claim to zero, I think that's</p> <p>14 where he had a -- an issue.</p> <p>15 Q. And did you speak with him about</p> <p>16 that topic prior to the time the amended claim</p> <p>17 was filed, or did you only speak with him after</p> <p>18 it was filed?</p> <p>19 A. I'm not sure the timing of that.</p> <p>20 Q. And with respect to HarbourVest, did</p> <p>21 he ask you to object to the settlement on</p> <p>22 behalf of CLO HoldCo Limited, and is that</p> <p>23 something that you declined to do?</p> <p>24 MR. CLARK: Objection, form.</p> <p>25 A. I'm -- I'm sorry. I was confused</p>	<p style="text-align: right;">Page 41</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 with the word. Could you please repeat that?</p> <p>3 Q. Yes. You mentioned HarbourVest</p> <p>4 before, right?</p> <p>5 A. Yes.</p> <p>6 Q. And you mentioned that there was an</p> <p>7 issue with Mr. Dondero and you concerning</p> <p>8 HarbourVest; is that right?</p> <p>9 A. Yes.</p> <p>10 Q. And did that have to do with whether</p> <p>11 or not CLO HoldCo Limited would -- would object</p> <p>12 to the debtor's motion to get the HarbourVest</p> <p>13 settlement approved?</p> <p>14 A. Would -- would get the</p> <p>15 HarbourVest --</p> <p>16 Q. Settlement approved by the court.</p> <p>17 A. I'm not trying to be difficult.</p> <p>18 I'm -- I'm -- could you just repeat that one</p> <p>19 more time? I'm --</p> <p>20 Q. What was -- what was --</p> <p>21 A. There was --</p> <p>22 Q. Let me try again.</p> <p>23 A. Okay.</p> <p>24 Q. What was the issue with respect to</p> <p>25 HarbourVest that he objected to and -- and you</p>

<p style="text-align: right;">Page 42</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 overrode his objection and did what you thought</p> <p>3 was right anyway?</p> <p>4 A. Okay. Okay. That's -- that's</p> <p>5 easier for me to understand. I'm sorry. So I</p> <p>6 had worked with my attorney or he did the work</p> <p>7 and consulted with -- we consulted, but we had</p> <p>8 filed an objection, motion objecting to the</p> <p>9 settlement, if I understand the terminology and</p> <p>10 nomenclature correctly. Okay. He had -- we</p> <p>11 had come to an agreement that we had a very</p> <p>12 valid argument. That argument was evidenced</p> <p>13 by, I guess it was, our motion that was</p> <p>14 submitted to the court. On the day of the</p> <p>15 hearing to resolve this issue, we pulled our</p> <p>16 request, and that was because I believed it did</p> <p>17 not have a good-faith basis in law to move</p> <p>18 forward on.</p> <p>19 Q. And did you discuss that issue with</p> <p>20 Mr. Dondero before informing the court that CLO</p> <p>21 HoldCo Limited was withdrawing its objection,</p> <p>22 or did he learn about that for the first time</p> <p>23 during the hearing --</p> <p>24 MR. CLARK: Objection, form.</p> <p>25 BY MR. MORRIS:</p>	<p style="text-align: right;">Page 43</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 Q. -- if you know?</p> <p>3 A. I -- I understand that he learned it</p> <p>4 during the hearing. I don't know the -- I -- I</p> <p>5 don't know the -- whether there was any -- I --</p> <p>6 I don't know for certain on the second half of</p> <p>7 your question.</p> <p>8 Q. Let me -- let me try it -- let me</p> <p>9 try it this way: Did you speak with</p> <p>10 Mr. Dondero about your decision to withdraw the</p> <p>11 objection to the HarbourVest settlement prior</p> <p>12 to the time your counsel made the announcement</p> <p>13 in court?</p> <p>14 A. I don't -- I don't believe so. No.</p> <p>15 No. No. I'm sorry. No.</p> <p>16 Q. And did --</p> <p>17 A. Okay. No. Here -- here's where</p> <p>18 I'm -- I can clarify, okay? I'm sorry. I can</p> <p>19 clarify.</p> <p>20 Q. That's all right.</p> <p>21 A. I gave the decision to my</p> <p>22 attorney -- I -- I agreed with the</p> <p>23 recommendation of my attorney, okay? It wasn't</p> <p>24 my --</p> <p>25 Q. Did you have a good --</p>
<p style="text-align: right;">Page 44</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 A. -- thought, okay?</p> <p>3 THE REPORTER: I didn't --</p> <p>4 A. Okay. So he --</p> <p>5 Q. It was a recommendation.</p> <p>6 A. Yeah. So he -- he called me with a</p> <p>7 recommendation. It was highly urgent. You</p> <p>8 know, I was coming out of the men's room, had</p> <p>9 my phone with me. I got the call.</p> <p>10 MR. CLARK: Hey, Grant, I -- Grant,</p> <p>11 I just want to caution you not to -- to --</p> <p>12 and I don't think counsel is looking for</p> <p>13 this but not to disclose the -- the</p> <p>14 substance of any of your communications</p> <p>15 with counsel, okay?</p> <p>16 THE WITNESS: Thank you.</p> <p>17 A. So --</p> <p>18 THE WITNESS: Thank you. I'm -- I'm</p> <p>19 sorry.</p> <p>20 BY MR. MORRIS:</p> <p>21 Q. It's -- it's really a very simple</p> <p>22 question. Do you recall --</p> <p>23 A. He made a recommendation. I -- I --</p> <p>24 I think I can answer your question without</p> <p>25 going off tangent. I'm sorry. So he -- my</p>	<p style="text-align: right;">Page 45</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 attorney made a recommendation. I agreed with</p> <p>3 it. We with- -- I -- I told him to withdraw --</p> <p>4 or I authorized him to withdraw.</p> <p>5 Q. Okay.</p> <p>6 A. Then I received a communication, and</p> <p>7 I -- I guess the most likely scenario is the</p> <p>8 motion had been withdrawn by the time Jim</p> <p>9 Dondero found out.</p> <p>10 Q. And -- and did he write to you, or</p> <p>11 did he call you? Did he send you a text?</p> <p>12 A. He called me.</p> <p>13 Q. What did he say?</p> <p>14 A. He was asking why, and I explained,</p> <p>15 and I said I agreed with the decision and I was</p> <p>16 sticking with the decision.</p> <p>17 Q. Let's just -- let's just move on to</p> <p>18 a new topic, and let's talk about the structure</p> <p>19 of -- of CLO HoldCo. Are you generally</p> <p>20 familiar with the ownership structure of CLO</p> <p>21 HoldCo?</p> <p>22 A. Yeah. I mean, in terms --</p> <p>23 Q. Are -- are you -- are you generally</p> <p>24 familiar with it? It's not a test. I'm just</p> <p>25 asking do you have a general familiarity --</p>

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2 A. With CLO HoldCo or the entities

3 associated with CLO HoldCo?

4 Q. The latter.

5 A. Yes, I believe so.

6 Q. All right. I've prepared what's

7 called a demonstrative exhibit. It's just --

8 A. Yes.

9 Q. -- just -- it's a document that, I

10 think, reflects facts, but I want to ask you

11 about it.

12 MR. MORRIS: La Asia, can we please

13 put up Exhibit 1.

14 (SCOTT EXHIBIT 1, Organizational

15 Structure: CLO HoldCo, Ltd., was marked

16 for identification.)

17 BY MR. MORRIS:

18 Q. Okay. Can you see that, Mr. Scott?

19 A. Yes, I can.

20 Q. Okay. So I think I took the

21 information from resolutions that were attached

22 to the CLO HoldCo proof of claim, and that's

23 why you got that little footnote there at the

24 bottom of the page. But let's start in the

25 lower right-hand corner and see if this chart

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2 particular structure, to the best of your

3 knowledge?

4 A. I -- I didn't -- I'm sorry. I

5 didn't hear you very well.

6 Q. To the best of your knowledge, did

7 Mr. Dondero make the decisions to establish the

8 structure that's reflected on this page?

9 A. Oh, I don't know if he made the

10 decision to establish this structure, although

11 it's -- it's -- I'm sorry. Strike that. I --

12 if -- if what you're saying is did he approve

13 of this structure, to my knowledge, yes.

14 Q. Okay. Do you hold any position with

15 respect to Charitable DAF Fund, L.P.?

16 A. I -- I -- your chart says no. I --

17 I -- I thought I had a role there, too.

18 Q. I don't know. I don't have

19 information on that. That's why I'm asking the

20 question.

21 A. I -- I -- I believe -- yes, I

22 believe I have the same role as I do in -- in

23 CLO HoldCo.

24 Q. And that would be director?

25 A. Yes.

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2 comports with your understanding of the facts.

3 Do you know that CLO HoldCo Limited

4 was formed in the Cayman Islands?

5 A. Yes.

6 Q. And to the best of your knowledge,

7 is CLO HoldCo Limited 100 percent owned by the

8 Charitable DAF Fund, L.P.? If you're not sure,

9 just say you're not sure if you don't know.

10 It's not a test.

11 A. So the -- the -- the familiarity

12 I -- I'm -- I'm familiar with the different --

13 I'm confused with the arrangement of the boxes

14 and the ownership interest versus managerial

15 interest. I believe that's -- that's right.

16 Q. Okay. And -- and you're the sole

17 director of CLO HoldCo Limited, right?

18 A. Yes.

19 Q. And this whole structure was -- the

20 idea for this structure, to the best of your

21 knowledge, was to implement Mr. Dondero's plan

22 for charitable giving; is that fair?

23 A. Yes. Ultimately, yes.

24 Q. And is it fair to say then that

25 he -- he made the decision to establish this

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2 Q. And to the best of your knowledge,

3 is the Charitable DAF GP, LLC, the general

4 partner of Charitable DAF Fund, L.P.?

5 A. Yes.

6 Q. And is it your understanding that

7 you are the managing member of Charitable DAF

8 GP, LLC?

9 A. Yes.

10 Q. Does Charitable DAF GP, LLC, have

11 any employees?

12 A. No.

13 Q. Does Charitable DAF GP, LLC, have

14 any officers or directors?

15 A. No.

16 Q. Are you the only person affiliated

17 with Charitable DAF GP, LLC, to the best of

18 your --

19 A. I believe so.

20 Q. Do you receive any compensation for

21 serving as the managing member of Charitable

22 DAF GP, LLC?

23 A. No. The -- I don't interact with it

24 very often. It's -- no, I don't receive any

25 compensation.

<p style="text-align: right;">Page 50</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 Q. Can you tell me in your capacity as</p> <p>3 the managing member of Charitable DAF GP, LLC,</p> <p>4 what's the nature of that entity's business?</p> <p>5 A. It -- it doesn't perform any</p> <p>6 day-to-day operations. My understanding is --</p> <p>7 is that it's -- it's there for purposes of</p> <p>8 compliance. I can't recall the last time I had</p> <p>9 any activity with respect to that.</p> <p>10 Q. How about the Charitable DAF Fund,</p> <p>11 L.P.? I apologize if I've asked you these</p> <p>12 questions.</p> <p>13 A. It -- it's the same. I -- I -- my</p> <p>14 activity is almost exclusively CLO HoldCo.</p> <p>15 Q. All right. Let me just ask the</p> <p>16 questions nevertheless. Does Charitable DAF</p> <p>17 Fund, L.P., have any employees?</p> <p>18 A. Employees? No.</p> <p>19 Q. Does it have any officers and</p> <p>20 directors?</p> <p>21 A. No.</p> <p>22 Q. Are you the sole director of</p> <p>23 Charitable DAF Fund, L.P.?</p> <p>24 A. Yes, I believe so.</p> <p>25 Q. So if we -- if we put under</p>	<p style="text-align: right;">Page 51</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 Charitable DAF Fund, L.P., Grant Scott,</p> <p>3 director, and we put under CLO HoldCo Limited</p> <p>4 Grant Scott, director, would everything on the</p> <p>5 right side of that page be accurate, to the</p> <p>6 best of your --</p> <p>7 A. I believe so.</p> <p>8 Q. Well, let's move to the left side of</p> <p>9 the page. Have you heard of the entity</p> <p>10 Charitable DAF HoldCo Limited?</p> <p>11 A. Yes.</p> <p>12 Q. Are you the sole director of</p> <p>13 Charitable DAF HoldCo Limited?</p> <p>14 A. Yes.</p> <p>15 Q. How did you become -- how did you</p> <p>16 come to be the char- -- the sole director of</p> <p>17 Charitable DAF HoldCo Limited?</p> <p>18 A. That was when it was established.</p> <p>19 Q. And did Mr. Dondero ask you to serve</p> <p>20 in that capacity?</p> <p>21 A. Yes.</p> <p>22 Q. And did Mr. Dondero ask you to serve</p> <p>23 as the managing member of Charitable DA- -- DAF</p> <p>24 GP, LLC?</p> <p>25 A. Yes.</p>
<p style="text-align: right;">Page 52</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 Q. And did Mr. Dondero ask you to serve</p> <p>3 as the director of Charitable DAF, L.P. --</p> <p>4 withdrawn.</p> <p>5 Did Mr. Dondero ask you to serve as</p> <p>6 director of Charitable DAF Fund, L.P.?</p> <p>7 A. Yes.</p> <p>8 Q. To the best of your knowledge, does</p> <p>9 Charitable DAF HoldCo Limited own 99 percent of</p> <p>10 the limited partnership interests in Charitable</p> <p>11 DAF Fund, L.P.?</p> <p>12 A. Yes. The -- the feed -- the -- the</p> <p>13 feeds -- the -- the three horizontal blocks</p> <p>14 there that identify Highland Dallas Foundation,</p> <p>15 Kansas City, Santa Barbara -- there's a fourth</p> <p>16 of -- relatively de minimus in terms of</p> <p>17 participation. There's a fourth entity that's</p> <p>18 missing. It's Dallas -- I forget the name.</p> <p>19 That -- that -- that structure is -- is a bit</p> <p>20 dated --</p> <p>21 Q. Okay.</p> <p>22 A. -- as it -- as is shown.</p> <p>23 Q. Okay. So I will tell you and we can</p> <p>24 look the documents if you want, but attached to</p> <p>25 CLO HoldCo Limited's claim are a number of</p>	<p style="text-align: right;">Page 53</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 resolutions, and there's one that I have in</p> <p>3 mind that shows Charitable DAF HoldCo Limited</p> <p>4 holding 99 percent of the limited partnership</p> <p>5 interests of Charitable DAF Fund, L.P., and</p> <p>6 there's another that shows it being a hundred</p> <p>7 percent. Do you -- do you know which is</p> <p>8 accurate at least at this time?</p> <p>9 A. There's a 1 percent/99 percent</p> <p>10 division, and I am -- I believe it's the 99</p> <p>11 percent, but I'm -- I'm getting confused by</p> <p>12 the -- by the arrangement. I'm so used to</p> <p>13 another arrangement. I -- I believe the 99</p> <p>14 percent is correct.</p> <p>15 Q. Okay. Do you have any understanding</p> <p>16 as to who owns the other 1 percent of the</p> <p>17 limited partnership interests of Charitable DAF</p> <p>18 Fund, L.P.?</p> <p>19 A. No. This -- this is confusing to</p> <p>20 me. No.</p> <p>21 Q. Okay. There are, at least on this</p> <p>22 page, three foundations that I think you've</p> <p>23 identified. Are those three foundations</p> <p>24 together with the fourth that you mentioned the</p> <p>25 owners of the Charitable DAF HoldCo Limited?</p>

<p style="text-align: right;">Page 54</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 A. Owners?</p> <p>3 Q. Yes.</p> <p>4 MR. CLARK: Objection, form.</p> <p>5 A. They -- they only participate in the</p> <p>6 money that flows up to them.</p> <p>7 Q. And what does that mean exactly?</p> <p>8 A. What's that?</p> <p>9 Q. What does that -- what do you mean</p> <p>10 by that? Do the foundations fund Charitable</p> <p>11 DAF Fund HoldCo Limited?</p> <p>12 A. Initially. Initially, as I</p> <p>13 understand it, the money flows downward into</p> <p>14 the Charitable DAF HoldCo Limited before it</p> <p>15 ultimately makes its way to CLO HoldCo, and</p> <p>16 then each of those three entities, the various</p> <p>17 foundations, obtain participation interest in</p> <p>18 the money that flows back to them.</p> <p>19 Q. And -- and is that par- -- are those</p> <p>20 participation interests in Charitable -- you</p> <p>21 know what, let -- let me just pull up one</p> <p>22 document and see if that helps.</p> <p>23 MR. MORRIS: Can we put up -- I</p> <p>24 think it's Exhibit Number 5.</p> <p>25 (SCOTT EXHIBIT 2, Unanimous Written</p>	<p style="text-align: right;">Page 55</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 Consent of Directors In Lieu of Meeting,</p> <p>3 was marked for identification.)</p> <p>4 MR. MORRIS: I apologize. Let's go</p> <p>5 to --</p> <p>6 MS. CANTY: I'm sorry, John. I</p> <p>7 can't hear you. Was that not the exhibit?</p> <p>8 MR. MORRIS: 4.</p> <p>9 MS. CANTY: Okay.</p> <p>10 THE REPORTER: And Mr. Morris, you</p> <p>11 are -- Mr. Morris, you are breaking up just</p> <p>12 a little bit at the end of your questions.</p> <p>13 BY MR. MORRIS:</p> <p>14 Q. Okay. Do you see the document on</p> <p>15 the screen, sir?</p> <p>16 A. Yes, I do.</p> <p>17 Q. Okay. And so this is a unanimous</p> <p>18 written consent of the directors of the</p> <p>19 Highland Dallas Foundation. That's one of the</p> <p>20 entities that was on the chart.</p> <p>21 MR. MORRIS: Can we scroll down to</p> <p>22 the -- the bottom of the document where the</p> <p>23 signature lines are. Right there.</p> <p>24 BY MR. MORRIS:</p> <p>25 Q. Are you a director of the Highland</p>
<p style="text-align: right;">Page 56</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 Dallas Foundation?</p> <p>3 A. Yes, selected by them.</p> <p>4 Q. Selected by whom?</p> <p>5 A. By that foundation.</p> <p>6 Q. Are you -- are you a director of all</p> <p>7 of the four foundations that feed into the</p> <p>8 Charitable DAF HoldCo Limited entities that --</p> <p>9 A. No.</p> <p>10 Q. Which of the four foundations are</p> <p>11 you a director of?</p> <p>12 A. This and the Santa Barbara -- I'm</p> <p>13 sorry, Santa Barbara and Kansas City.</p> <p>14 Q. So is -- there's one that you're not</p> <p>15 a director of; is that right?</p> <p>16 A. Yes.</p> <p>17 Q. And which one is that?</p> <p>18 A. The -- could you go back to the --</p> <p>19 Q. Yeah.</p> <p>20 MR. MORRIS: Go back to the</p> <p>21 demonstrative.</p> <p>22 A. It's the Highland Dallas Foundation</p> <p>23 and Santa Barbara Foundation.</p> <p>24 Q. Those are the two that you're a</p> <p>25 director of?</p>	<p style="text-align: right;">Page 57</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 A. Yes.</p> <p>3 Q. To the best of your knowledge, does</p> <p>4 Mr. Dondero serve as the president for each of</p> <p>5 the foundations that we're talking about?</p> <p>6 A. Yes.</p> <p>7 Q. To the best of your knowledge, is</p> <p>8 Mr. Dondero a director of each of the</p> <p>9 foundations that we're talking about?</p> <p>10 A. Say that again. I'm sorry.</p> <p>11 Q. Is he also a director of each of the</p> <p>12 foundations?</p> <p>13 A. Yes.</p> <p>14 Q. Do you know whether any of the</p> <p>15 foundations has any employees?</p> <p>16 A. I believe they do, but I -- I -- I</p> <p>17 can't say for certain.</p> <p>18 Q. Does -- withdrawn.</p> <p>19 Do you know if there are any</p> <p>20 officers of any of the four foundations other</p> <p>21 than Mr. Dondero's service as president?</p> <p>22 A. I'm sorry. Say that one more time,</p> <p>23 please.</p> <p>24 Q. Yes. Do you know whether any of the</p> <p>25 four foundations has any officers other than</p>

<p style="text-align: right;">Page 58</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 Mr. Dondero's service as president?</p> <p>3 A. No.</p> <p>4 Q. You don't know, or they do not?</p> <p>5 A. I -- I don't believe anyone else</p> <p>6 has. I -- actually, I should say I don't -- I</p> <p>7 don't recall. I -- I don't know. I don't -- I</p> <p>8 don't know.</p> <p>9 Q. As a director of the Dallas and</p> <p>10 Santa Barbara foundations, are you aware of any</p> <p>11 officers serving for either of those</p> <p>12 foundations other than Mr. Dondero?</p> <p>13 A. No.</p> <p>14 Q. Do you know who the beneficial owner</p> <p>15 of the Charitable DAF HoldCo Limited entity is?</p> <p>16 A. The beneficial owner?</p> <p>17 Q. Correct.</p> <p>18 A. The various -- various trusts that</p> <p>19 were used to -- that were the vehicles by which</p> <p>20 the money originally was established within --</p> <p>21 within -- within CLO HoldCo.</p> <p>22 Q. Would that be -- would one of them</p> <p>23 be the Get Good Nonexempt Trust?</p> <p>24 A. Yes.</p> <p>25 Q. And you're a trustee of the Get Good</p>	<p style="text-align: right;">Page 59</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 Nonexempt Trust, right?</p> <p>3 A. Yes.</p> <p>4 Q. When did you become a trustee of the</p> <p>5 Get Good Nonexempt Trust?</p> <p>6 A. Many years ago. I -- I don't</p> <p>7 remember.</p> <p>8 Q. Are there any other trustees of the</p> <p>9 Get Good Nonexempt Trust?</p> <p>10 A. No.</p> <p>11 Q. Does the Get Good Nonexempt Trust</p> <p>12 have any officers, directors, or employees?</p> <p>13 A. No.</p> <p>14 MR. CLARK: Objection, form. Sorry.</p> <p>15 BY MR. MORRIS:</p> <p>16 Q. Withdrawn.</p> <p>17 Do you know whether the Get Good</p> <p>18 Nonexempt Trust has any officers, directors, or</p> <p>19 employees?</p> <p>20 A. It does not.</p> <p>21 Q. And I apologize if I asked this, but</p> <p>22 are you the only trustee of the Get Good</p> <p>23 Nonexempt Trust?</p> <p>24 A. Yes.</p> <p>25 Q. Is the Dugaboy Investment Trust also</p>
<p style="text-align: right;">Page 60</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 one of the trusts that has an interest in</p> <p>3 Charitable DAF HoldCo Limited?</p> <p>4 A. Yes.</p> <p>5 Q. Are you a trustee of the Dugaboy</p> <p>6 Investment Trust?</p> <p>7 A. I am not.</p> <p>8 Q. Do you know who is?</p> <p>9 A. I believe it's his sister.</p> <p>10 Q. And is that -- you're referring to</p> <p>11 Mr. Dondero's sister?</p> <p>12 A. I'm sorry. Yes.</p> <p>13 Q. And what's the basis for your</p> <p>14 understanding that Mr. Dondero's sive -- sister</p> <p>15 serves as the trustee of the Dugaboy Investment</p> <p>16 Trust?</p> <p>17 A. Many years ago there was a -- there</p> <p>18 was a clerical error that identified me as the</p> <p>19 trustee of the Dugaboy. That error was present</p> <p>20 for approximately two weeks or a week and a</p> <p>21 half before it was detected and corrected, and</p> <p>22 so I know from that correction that it's Nancy</p> <p>23 Dondero.</p> <p>24 Q. Are there any other trusts that have</p> <p>25 an interest in Charitable DAF HoldCo Limited</p>	<p style="text-align: right;">Page 61</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 besides those trusts, to the best of your</p> <p>3 knowledge?</p> <p>4 A. No.</p> <p>5 Q. Is it your understanding based on</p> <p>6 what we've just talked about that the Get Good</p> <p>7 Nonexempt Trust and the Dugaboy Investment</p> <p>8 Trust are the indirect beneficiaries of CLO</p> <p>9 HoldCo Limited?</p> <p>10 A. Yes.</p> <p>11 Q. Can you tell me who the</p> <p>12 beneficiaries are of the Get Good trust?</p> <p>13 A. I mean, Jim Dondero.</p> <p>14 Q. And -- and what is that -- is that</p> <p>15 based on the trust agreement -- your knowledge</p> <p>16 of the trust agreement?</p> <p>17 A. Yes.</p> <p>18 Q. Do you have an understanding of who</p> <p>19 the beneficiary is of the Dugaboy Investment</p> <p>20 Trust?</p> <p>21 A. I don't know anything about that</p> <p>22 trust.</p> <p>23 MR. MORRIS: Okay. All right.</p> <p>24 Let's take a short break and reconvene at</p> <p>25 3:30 Eastern Time. We've been going for a</p>

<p style="text-align: right;">Page 62</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 while.</p> <p>3 MR. CLARK: Thank you.</p> <p>4 MR. MORRIS: Okay. Thank you.</p> <p>5 (Whereupon, there was a recess in</p> <p>6 the proceedings from 3:20 p.m. to</p> <p>7 3:31 p.m.)</p> <p>8 BY MR. MORRIS:</p> <p>9 Q. Mr. Scott, earlier I think you</p> <p>10 testified that you interfaced with the folks at</p> <p>11 Highland in connection with your duties as the</p> <p>12 director of CLO HoldCo Limited, right?</p> <p>13 A. Yes.</p> <p>14 Q. Are you aware of any written</p> <p>15 agreement between Highland Capital Management</p> <p>16 and CLO HoldCo Limited?</p> <p>17 A. Yes, the various servicer</p> <p>18 agreements.</p> <p>19 Q. Okay. Are you aware that</p> <p>20 Mr. Dondero resigned from his position at</p> <p>21 Highland Capital Management sometime in</p> <p>22 October?</p> <p>23 A. No.</p> <p>24 Q. Have you communicated with anybody</p> <p>25 at Highland Capital Management about the</p>	<p style="text-align: right;">Page 63</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 affairs of CLO HoldCo Limited at any time since</p> <p>3 October?</p> <p>4 A. Yes.</p> <p>5 Q. Anybody other than Jim Seery?</p> <p>6 A. Yes.</p> <p>7 Q. Okay. Let's start with Mr. Seery.</p> <p>8 You've spoken with him before, right?</p> <p>9 A. Yes.</p> <p>10 Q. Do you have his phone number?</p> <p>11 A. Yes.</p> <p>12 Q. How many times have you spoken with</p> <p>13 Mr. Seery, to the best of your recollection,</p> <p>14 just generally? It's not a test.</p> <p>15 A. Three, maybe four times.</p> <p>16 Q. Okay. Can you identify by name</p> <p>17 anybody else at Highland that you've spoken</p> <p>18 with since -- in the last two or three months?</p> <p>19 A. I spoke to Jim Dondero. I've spoken</p> <p>20 with Mike Throckmorton. The usual suspects, so</p> <p>21 to speak. Mark Patrick, Mel- -- Melissa</p> <p>22 Schroth.</p> <p>23 Q. Can you recall anybody else?</p> <p>24 A. No. No. Sorry.</p> <p>25 Q. Did you -- did you -- withdrawn.</p>
<p style="text-align: right;">Page 64</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 Do you recall the subject matter of</p> <p>3 your discussions with Mr. Throckmorton?</p> <p>4 MR. CLARK: Objection, form.</p> <p>5 BY MR. MORRIS:</p> <p>6 Q. Withdrawn.</p> <p>7 Do you recall your -- the subject</p> <p>8 matter of your communications with</p> <p>9 Mr. Throckmorton?</p> <p>10 MR. CLARK: Objection, form.</p> <p>11 BY MR. MORRIS:</p> <p>12 Q. You can answer.</p> <p>13 A. I -- I regularly interface with</p> <p>14 Mr. Throckmorton regarding approvals of</p> <p>15 expenses, and he's my sort of -- he's my point</p> <p>16 person for approving wire transfers and things</p> <p>17 of that nature.</p> <p>18 Q. How about Mr. Patrick, what -- what</p> <p>19 area of responsibility does he have with</p> <p>20 respect to CLO HoldCo Limited?</p> <p>21 A. He -- he doesn't, to my knowledge.</p> <p>22 Q. Do you recall the nature of the</p> <p>23 substance of any communications that you've had</p> <p>24 with Mr. Patrick since -- you know, the last</p> <p>25 two or three months?</p>	<p style="text-align: right;">Page 65</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 A. Yes. Or -- yes.</p> <p>3 Q. And what -- what are the nature of</p> <p>4 those conversations or the substance?</p> <p>5 A. He was -- he was one of the</p> <p>6 individuals that helped to establish the</p> <p>7 hierarchy for the -- what I keep referring to</p> <p>8 as the charitable foundation.</p> <p>9 Q. And -- and do you recall why you</p> <p>10 spoke to him in the last -- or -- withdrawn.</p> <p>11 Do you recall the nature of your</p> <p>12 communications in the last two or three months</p> <p>13 with Mr. Patrick?</p> <p>14 A. I --</p> <p>15 MR. CLARK: And hold on, Grant. I'm</p> <p>16 going to caution -- my understanding -- I</p> <p>17 believe Mr. Patrick's an attorney, and so</p> <p>18 I'm going to caution you that you shouldn't</p> <p>19 disclose the substance of -- of those</p> <p>20 communications based on the attorney-client</p> <p>21 privilege.</p> <p>22 MR. MORRIS: Well, I'm -- I -- I am</p> <p>23 the lawyer for the company so -- I guess</p> <p>24 there are other people on the phone and I</p> <p>25 appreciate that, but let's see if we can --</p>

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2 I don't mean to be contentious here, so it

3 wouldn't -- I -- I'd be part of the

4 privilege anyway.

5 BY MR. MORRIS:

6 Q. But in any event, can you tell me

7 generally -- I'm just looking for general

8 subject matter of your conversations with

9 Mr. Patrick.

10 A. I asked him how I would go about

11 re- -- resigning my position.

12 Q. And when did that conversation take

13 place?

14 A. Within the last two weeks.

15 Q. Have you made a decision to resign?

16 A. No.

17 Q. I think you mentioned Melissa

18 Schroth. Do I have that right?

19 A. Yes.

20 Q. Can you describe generally the

21 communications you had with Ms. Schroth in the

22 last few months.

23 A. They -- she has e-mailed me certain

24 documents that I needed to sign. I had a

25 conversation with her about -- about some

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2 A. No.

3 Q. In your discussions with Mr. Seery,

4 did you ever tell him that you thought Highland

5 Capital Management was in default under any

6 agreement in relation to the CLOs?

7 A. No.

8 Q. I want to focus in particular on the

9 shared services agreement. In -- in your

10 discussions with Mr. Seery, did you ever tell

11 him that you believed that Highland Capital

12 Management was in default or in breach of its

13 shared services agreement with CLO HoldCo

14 Limited?

15 A. No.

16 Q. In your communications with

17 Mr. Seery, did you ever indicate any concern on

18 the part of CLO HoldCo Limited with respect to

19 Highland Capital's Man- -- Highland Capital

20 Management's performance under the shared

21 services agreement?

22 A. No.

23 Q. As you sit here today, do you have

24 any reason to believe that Highland Capital

25 Management has done anything wrong in

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2 home -- home improvements, home construction

3 with respect to Jim Dondero's home in Colorado,

4 and that's -- I -- I think that's -- that's it.

5 Q. Okay. Do you recall communicating

6 with anybody at Highland in the last three

7 months other than Mr. Dondero,

8 Mr. Throckmorton, Mr. Patrick, and Ms. Schroth?

9 A. I -- I spoke with Jim Seery this

10 week.

11 Q. Anybody else?

12 A. I don't -- I don't know.

13 Q. Okay.

14 A. I don't think so.

15 Q. In your communications with

16 Mr. Seery, did you two ever discuss his reasons

17 for making any trade on behalf of any CLO?

18 A. No.

19 Q. In your discussions with Mr. Seery,

20 did you ever tell him that you believed that

21 Highland Capital Management had breached any

22 agreement in relation to any CLO?

23 A. Have I had that discussion with Jim

24 Seery?

25 Q. Yes.

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2 connection with its performance as the

3 portfolio manager of the CLOs in which CLO

4 HoldCo Limited has invested?

5 MR. CLARK: Object to form.

6 A. In terms of the -- are you saying --

7 please say that again. I'm sorry.

8 Q. That's okay. I ask long questions

9 sometimes so forgive me, but I'm trying to

10 get -- I'm trying to be precise so that's why

11 it's difficult sometimes. But let me try

12 again.

13 Does CLO HoldCo Limited contend that

14 Highland Capital Management has done anything

15 wrong in the performance of its duties as

16 portfolio manager of the CLOs in which CLO

17 HoldCo has invested?

18 MR. CLARK: Objection, form.

19 A. Yes. It's -- it's outlined in our

20 objections to -- to the plan.

21 Q. Okay. Any -- are you aware of

22 anything that's not contained within CLO Holdco

23 Limited's objection to the plan?

24 MR. CLARK: Objection, form.

25 A. I don't know if this is responsive

<p style="text-align: right;">Page 70</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 to your quest -- request, but two -- two</p> <p>3 issues, I believe, also pose an in- -- a</p> <p>4 problem for CLO HoldCo. One is we are paying</p> <p>5 for services. I think I referred to the</p> <p>6 services as being soup to nuts, but we are not</p> <p>7 getting the full services. We haven't been for</p> <p>8 some time. So we're likely overpaying. There</p> <p>9 was a Highland Select Equity issue, 11-month</p> <p>10 payment that was delayed which I was unaware of</p> <p>11 was due. Normally, I would have interfaced</p> <p>12 with someone at Highland about that, but my</p> <p>13 attorney -- but my -- my attorney had to make a</p> <p>14 request for payment, and that payment was</p> <p>15 ultimately made. I -- other than that, I -- I</p> <p>16 don't -- I don't know. I don't believe so.</p> <p>17 Q. I want to distinguish between the</p> <p>18 shared services agreement between Highland</p> <p>19 Capital Management and CLO HoldCo Limited on</p> <p>20 the one hand and on the other hand the</p> <p>21 management agreements pursuant to which</p> <p>22 Highland Capital Management manages certain</p> <p>23 CLOs that CLO HoldCo invests in.</p> <p>24 You understand the distinction that</p> <p>25 I'm making?</p>	<p style="text-align: right;">Page 71</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 A. Now I do. I'm sorry. I didn't</p> <p>3 appreciate that.</p> <p>4 Q. Okay. So let's just take each of</p> <p>5 those pieces one at a time. You mentioned your</p> <p>6 concern about services. That's a concern that</p> <p>7 arises under the shared services agreement,</p> <p>8 right?</p> <p>9 A. Yes.</p> <p>10 Q. And you mentioned something about a</p> <p>11 delayed payment having to do with Highland</p> <p>12 Select. Do I have that generally right?</p> <p>13 A. Correct.</p> <p>14 Q. And is that a concern that you have</p> <p>15 that arises under the shared services</p> <p>16 agreement?</p> <p>17 A. It's not the agreement with respect</p> <p>18 to the CLOs as I understand it.</p> <p>19 Q. Okay. So then let's turn to that</p> <p>20 second bucket. You were aware -- you are</p> <p>21 aware, are you not, that Highland Capital</p> <p>22 Management has certain agreements with CLOs</p> <p>23 pursuant to which it manages the assets that</p> <p>24 are owned by the CLOs?</p> <p>25 A. I'm so sorry. Could you please --</p>
<p style="text-align: right;">Page 72</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 Q. I'll try again.</p> <p>3 A. I'm just -- I'm sorry. I was</p> <p>4 distracted and -- and I -- I'm sorry for asking</p> <p>5 you to repeat it again. Please --</p> <p>6 Q. Okay.</p> <p>7 A. Please re- --</p> <p>8 Q. Are you aware that CLO HoldCo</p> <p>9 Limited has made investments in certain CLOs?</p> <p>10 A. Oh, yes, certainly.</p> <p>11 Q. And are you aware that those CLOs</p> <p>12 are managed by Highland Capital Management?</p> <p>13 A. Yes. As the -- as the servicer,</p> <p>14 yes.</p> <p>15 Q. Okay. Have you ever seen any of the</p> <p>16 agreements pursuant to which Highland Capital</p> <p>17 Management acts as a servicer?</p> <p>18 A. I've seen a few, yes.</p> <p>19 Q. Does CLO HoldCo Limited contend that</p> <p>20 it is a party to any agreement between Highland</p> <p>21 Capital Management and the CLOs?</p> <p>22 MR. CLARK: Object to form. And I</p> <p>23 just want to note for the record that</p> <p>24 Mr. Scott is here testifying in his</p> <p>25 individual capacity, I believe, not as a</p>	<p style="text-align: right;">Page 73</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 corporate representative.</p> <p>3 MR. MORRIS: Fair enough. But he is</p> <p>4 the only representative so...</p> <p>5 MR. CLARK: Fair enough. I just</p> <p>6 want that made -- stated for the record,</p> <p>7 but I also object as to form.</p> <p>8 MR. MORRIS: Got it.</p> <p>9 A. It's a third-party beneficiary under</p> <p>10 the agreements.</p> <p>11 Q. And is that because of something you</p> <p>12 read in the document, or is that just your</p> <p>13 belief and understanding?</p> <p>14 A. My belief and understanding.</p> <p>15 Q. And is that belief and understanding</p> <p>16 based on anything other than conversations with</p> <p>17 counsel?</p> <p>18 A. In -- in -- recently it has, but I</p> <p>19 don't recall from previous interactions over</p> <p>20 the years how we discussed that or how I came</p> <p>21 to -- to understand that.</p> <p>22 Q. Does HCLO [sic] HoldCo -- did -- in</p> <p>23 your capacity as the sole director of HCLO</p> <p>24 HoldCo Limited, are you aware of anything that</p> <p>25 Highland Capital Management has done wrong in</p>

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2 connection with the services provided under the

3 CLO management agreements?

4 MR. CLARK: Objection, form.

5 A. I -- I don't -- I don't -- I

6 don't -- your answer's no.

7 Q. In your capacity as the director of

8 CLO HoldCo Limited, are you aware of any

9 default or breach under the CLO management

10 agreements that -- that Highland Capital

11 Management has caused?

12 MR. CLARK: Objection, form.

13 A. We have raised the issue about

14 ongoing sales in various -- I'm not sure

15 whether they represent a technical breach,

16 though.

17 Q. Okay. Are you aware of any

18 technical breach?

19 MR. CLARK: Objection, form.

20 A. No.

21 Q. I'm sorry. You said, no, sir?

22 A. My answer's no.

23 Q. Thank you. Do you know who made the

24 decision to cause the CLO HoldCo Limited entity

25 to invest in the CLOs that are managed by

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2 making an investment in a CLO that wasn't

3 managed by Highland?

4 A. No.

5 Q. Is there any particular reason why

6 you haven't given that any consideration?

7 A. That hasn't been my role. That's

8 not my expertise. That's been something

9 Highland has done and, quite frankly, over the

10 years brilliantly so, no.

11 Q. You're aware that HCM, L.P., has

12 filed for bankruptcy, right?

13 A. Yes.

14 Q. When did you learn that Highland had

15 filed for bankruptcy?

16 A. After the fact sometime in late --

17 late 2019.

18 Q. Since the bankruptcy filing, have

19 you made any attempt to sell CLO HoldCo

20 Limited's position in any of the CLOs that are

21 managed by Highland?

22 A. No.

23 Q. So notwithstanding the bankruptcy

24 filing, you as the director haven't made any

25 attempt to transfer out of the CLOs that are

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2 Highland Capital?

3 A. The select -- ultimately, I had to.

4 Q. I thought you testified earlier that

5 you didn't make decisions as to investment. Do

6 I have that wrong?

7 A. The selection.

8 Q. Okay.

9 A. I -- I'm --

10 Q. So -- so explain to me --

11 A. I have to approve -- I have to

12 approve the selection. I'm sorry. But the

13 people making -- I was putting that in the camp

14 of the people that make the selection.

15 Q. Okay. Do you know if -- do you know

16 if there are CLOs in the world that exist that

17 aren't managed by Highland Capital Management?

18 MR. CLARK: Objection, form.

19 A. Are there CLOs in the -- in the

20 world that are not --

21 Q. Yes.

22 A. Yes. It's -- it's a well-known --

23 it's a well-known --

24 Q. In your capacity as the director of

25 CLO HoldCo Limited, did you ever consider

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2 managed by Highland, correct?

3 A. Correct.

4 Q. Did you ever give any thought to

5 exiting the CLO vehicles that were managed by

6 Highland in light of its bankruptcy filing?

7 A. No.

8 Q. Have you ever discussed with

9 Mr. Seery anything having to do with the

10 management -- withdrawn.

11 Have you ever discussed with

12 Mr. Seery any aspect of the debtor's management

13 of the CLOs in which CLO HoldCo Limited is

14 invested?

15 A. No.

16 Q. You mentioned earlier a request to

17 stop trading. Do I have that right?

18 A. Yes.

19 Q. Okay. And are you aware that a

20 letter was written purportedly on behalf of CLO

21 HoldCo Limited in which a request to stop

22 trading was made?

23 A. As a cos- -- yeah. Yes.

24 Q. Okay. Have you ever seen that

25 letter before?

<p style="text-align: right;">Page 78</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 A. Yes.</p> <p>3 MR. MORRIS: Can we put up on the</p> <p>4 screen -- I think it's now Exhibit 6. It's</p> <p>5 Exhibit DDDD.</p> <p>6 (SCOTT EXHIBIT 3, Letter to James A.</p> <p>7 Wright, III, et al., from Gregory Demo,</p> <p>8 December 24, 2020, with Exhibit A</p> <p>9 Attachment, was marked for identification.)</p> <p>10 MR. MORRIS: Can we scroll down to,</p> <p>11 I guess, what's Exhibit A. Ri- -- right</p> <p>12 there.</p> <p>13 BY MR. MORRIS:</p> <p>14 Q. You see this is a letter Dece- --</p> <p>15 dated December 22nd?</p> <p>16 A. Yes.</p> <p>17 Q. In the first paragraph there there's</p> <p>18 a reference to the entities on whose behalf</p> <p>19 this letter is being sent.</p> <p>20 Do you see that?</p> <p>21 A. Yes.</p> <p>22 Q. Okay. So this letter was sent on</p> <p>23 December 22nd. Did you see a copy of it before</p> <p>24 it was sent?</p> <p>25 A. A -- a draft -- an earlier draft of</p>	<p style="text-align: right;">Page 79</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 this I did.</p> <p>3 Q. Okay. Did you provide any comments</p> <p>4 to it?</p> <p>5 A. I did.</p> <p>6 MR. CLARK: Well, hold on. Grant,</p> <p>7 let me caution you. To the extent you</p> <p>8 provided comments to counsel, we're going</p> <p>9 to assert the attorney-client privilege on</p> <p>10 those comments.</p> <p>11 MR. MORRIS: It's just a yes-or-no</p> <p>12 question. I'm not looking for the</p> <p>13 specifics.</p> <p>14 MR. CLARK: Thank you.</p> <p>15 A. Yes.</p> <p>16 Q. Are you aware that earlier letters</p> <p>17 were -- withdrawn.</p> <p>18 Are you aware that prior to December</p> <p>19 22nd, the entities other than CLO HoldCo</p> <p>20 Limited that are listed in this pers- -- first</p> <p>21 paragraph had sent a letter making the same</p> <p>22 request?</p> <p>23 A. With respect to a letter, no. No,</p> <p>24 I -- I did not.</p> <p>25 Q. Are you aware as you sit here now</p>
<p style="text-align: right;">Page 80</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 that the entities other than CLO HoldCo Limited</p> <p>3 that are listed in the first paragraph made a</p> <p>4 motion in the court asking the court for an</p> <p>5 order that would have prevented Highland from</p> <p>6 making any transactions for a limited period of</p> <p>7 time?</p> <p>8 A. Yes.</p> <p>9 Q. Did you know that motion was being</p> <p>10 made prior to the time that it was made?</p> <p>11 A. I'm not sure.</p> <p>12 Q. Did you ever think about whether CLO</p> <p>13 HoldCo Limited should join that particular</p> <p>14 motion?</p> <p>15 A. I believe we were -- my attorney was</p> <p>16 aware of it. I don't recall our discussion</p> <p>17 about it. We were aware -- when I say we, I</p> <p>18 mean collectively -- and did not join it.</p> <p>19 Q. Okay. Can you tell me why you did</p> <p>20 not join it.</p> <p>21 MR. CLARK: And, again, Grant, to --</p> <p>22 to the extent it's based on communications</p> <p>23 with counsel, you're free to say that</p> <p>24 but -- but not to disclose any substance of</p> <p>25 communications with counsel.</p>	<p style="text-align: right;">Page 81</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 A. The subject of this letter on the</p> <p>3 22nd which yielded the original letter you</p> <p>4 briefly showed me on the 24th as well as an</p> <p>5 additional letter on the 28th identified two</p> <p>6 points as I understand it. The first point is</p> <p>7 what I believe is the somewhat innocuous</p> <p>8 request to halt sales, not a demand in any way.</p> <p>9 And the second more substantive issue has to do</p> <p>10 with steps to remove Highland or a subsequent</p> <p>11 derived entity from Highland from the various</p> <p>12 services agreements that you had previously --</p> <p>13 we had previously discussed. Neither of those</p> <p>14 issues met the require- -- neither of those</p> <p>15 issues led us to believe that a motion such as</p> <p>16 what you've just mentioned was -- was right --</p> <p>17 Q. Okay.</p> <p>18 A. -- because no -- no decision has</p> <p>19 been made on that.</p> <p>20 Q. Okay.</p> <p>21 MR. MORRIS: So I want to go back to</p> <p>22 my question and move to strike as</p> <p>23 nonresponsive, and I'll just ask my</p> <p>24 question again.</p> <p>25 BY MR. MORRIS:</p>

<p style="text-align: right;">Page 82</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 Q. Why did CLO HoldCo Limited decide</p> <p>3 not to participate in the earlier motion that</p> <p>4 was brought by the other entities that are</p> <p>5 identified in Paragraph 1 that asked the court</p> <p>6 to stop Highland from engaging in trades?</p> <p>7 A. John, I'm so sorry. There was a</p> <p>8 feedback loop that came up when you started to</p> <p>9 re- -- re- -- recite -- restate your question.</p> <p>10 I'm sorry.</p> <p>11 Q. That's okay. Why did CLO HoldCo</p> <p>12 Limited decide not to join in the earlier</p> <p>13 motion where the entities listed in Paragraph 1</p> <p>14 asked the court to order Highland not to make</p> <p>15 any further trades? Why did they not join that</p> <p>16 motion?</p> <p>17 A. The -- the issue didn't rise to</p> <p>18 the -- I don't believe we had formulated a</p> <p>19 legal basis sufficient to justify such steps.</p> <p>20 We hadn't laid the foundation necessary to --</p> <p>21 to do that.</p> <p>22 Q. Are you aware of what the court</p> <p>23 decided?</p> <p>24 A. By virtue of the original letter you</p> <p>25 sent me dated the -- or show -- showed</p>	<p style="text-align: right;">Page 83</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 initially dated the 24th, I have a general</p> <p>3 understanding of what they decided.</p> <p>4 Q. Did you -- did you ever review the</p> <p>5 transcript of the hearing where the other</p> <p>6 parties asked the court to stop Highland from</p> <p>7 engaging in any further trades on the CLOs?</p> <p>8 A. I did not.</p> <p>9 Q. Is there anything different about</p> <p>10 the request in this letter, to the best of your</p> <p>11 knowledge, from the request that was made of</p> <p>12 the court just six days earlier?</p> <p>13 MR. CLARK: Objection, form.</p> <p>14 A. Yes. There's a -- in -- in my -- my</p> <p>15 view there's a substantial difference between</p> <p>16 filing an action converting a request into</p> <p>17 essentially a demand versus a gentle request</p> <p>18 with multiple caveats, that that request is not</p> <p>19 a demand.</p> <p>20 Q. Okay. Let me ask you this: Are you</p> <p>21 aware -- what -- when did you first learn that</p> <p>22 Highland was making trades in its capacity as</p> <p>23 the servicer of the CLOs? When -- when did you</p> <p>24 first learn that Highland was doing that? Ten</p> <p>25 years ago, right? I mean --</p>
<p style="text-align: right;">Page 84</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 A. Oh. Oh. Oh, I'm -- yeah. Yeah.</p> <p>3 Oh, yes. I'm sorry. Of course.</p> <p>4 Q. Right? I mean, Highland has been</p> <p>5 making trades on behalf of CLOs for years,</p> <p>6 right?</p> <p>7 A. Yes.</p> <p>8 Q. And Highland was making trades on</p> <p>9 behalf of CLOs throughout 2020, to the best of</p> <p>10 your knowledge, right?</p> <p>11 A. Yes.</p> <p>12 Q. And you know when Jim Dondero was</p> <p>13 still with Highland, he was making trades on</p> <p>14 behalf of CLO -- on behalf of the CLOs, right?</p> <p>15 A. Yes.</p> <p>16 Q. And you never objected when Jim</p> <p>17 Dondero was doing it; is that right?</p> <p>18 A. That is correct.</p> <p>19 Q. Okay. So what changed that caused</p> <p>20 you in your capacity as the director of CLO</p> <p>21 HoldCo to request a full stoppage of trading?</p> <p>22 A. It was my understanding that because</p> <p>23 of the bankruptcy and the removal of Jim</p> <p>24 Dondero that the replacement decision-makers</p> <p>25 did not have the expertise where I felt</p>	<p style="text-align: right;">Page 85</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 comfortable with them making those decisions,</p> <p>3 but...</p> <p>4 Q. I thought you testified earlier that</p> <p>5 you weren't aware that Mr. Dondero left</p> <p>6 Highland. Am I mistaken in my recollection?</p> <p>7 A. I think you said in October, and</p> <p>8 I -- as I -- there's some con- -- I have</p> <p>9 confusion about when he left versus when he was</p> <p>10 still there but other -- but he was not making</p> <p>11 those trades.</p> <p>12 Q. Okay. Fair enough. The bankruptcy</p> <p>13 has nothing to do with your desire to stop</p> <p>14 trading, right, because Highland traded for a</p> <p>15 year after the bankruptcy and never took any</p> <p>16 action to try to stop Highland from trading on</p> <p>17 behalf of the CLOs, fair?</p> <p>18 A. The -- Highland as of right now</p> <p>19 isn't the same entity it was -- well, the</p> <p>20 decision-making team -- the -- the financial</p> <p>21 decision-making team for CLO Holdco's is no</p> <p>22 longer the team I have worked with, and upon</p> <p>23 discussion with counsel, we agreed -- I agreed</p> <p>24 to this letter, which I did, to just maintain</p> <p>25 the status quo.</p>

<p style="text-align: right;">Page 86</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 Q. How did you form your opinion that</p> <p>3 the debtor doesn't have the expertise to</p> <p>4 execute trades on behalf of the CLOs today?</p> <p>5 What's the basis for that belief?</p> <p>6 A. I -- as I understood it, the -- the</p> <p>7 people historically making that decision were</p> <p>8 no longer making that decision.</p> <p>9 Q. Who besides Mr. Dondero --</p> <p>10 withdrawn.</p> <p>11 Who are you referring to?</p> <p>12 A. Well, Mr. Dondero is one. I don't</p> <p>13 know the names, but I -- I understood it to</p> <p>14 mean that the group previously responsible, for</p> <p>15 exam- -- for example, Hunter Covitz, including</p> <p>16 Hun- -- him, were no longer involved in the</p> <p>17 decision-making process, but...</p> <p>18 Q. How did you -- how -- how -- who</p> <p>19 gave you the information that led you to</p> <p>20 conclude that Hunter Covitz was no longer</p> <p>21 involved in the decision-making process?</p> <p>22 A. Specifically him and that name being</p> <p>23 mentioned, I -- I -- I wasn't informed of his</p> <p>24 speci- -- him -- him being removed. I was</p> <p>25 under the impression that the team that had</p>	<p style="text-align: right;">Page 87</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 previously been doing that was no longer doing</p> <p>3 it.</p> <p>4 Q. And what gave you that impression?</p> <p>5 A. Was communications I had with my</p> <p>6 attorney.</p> <p>7 Q. Okay. Is there any source for your</p> <p>8 information that led you to conclude that the</p> <p>9 team was no longer there that was able to</p> <p>10 engage in the trades on behalf of the CLOs</p> <p>11 other than your attorneys?</p> <p>12 A. Well, this -- this letter -- I -- I</p> <p>13 think the answer is no.</p> <p>14 Q. Thank you. Do you know if Jim -- do</p> <p>15 you have an opinion or a view as to whether Jim</p> <p>16 Seery is qualified to make trades?</p> <p>17 A. This --</p> <p>18 MR. CLARK: Objection, form.</p> <p>19 A. I don't know -- I spoke to Jim Seery</p> <p>20 earlier this week. You -- you asked me whether</p> <p>21 I had his number. I said I did. That's only</p> <p>22 because he called me. My phone rang with his</p> <p>23 number. It was a number I did not recognize,</p> <p>24 it was not in my contacts, but he left me a</p> <p>25 voice mail so I called him back. Then I</p>
<p style="text-align: right;">Page 88</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 updated my contacts to -- to add his name so</p> <p>3 now I have his name. And during that</p> <p>4 conversation he informed me that he did have</p> <p>5 that expertise --</p> <p>6 Q. And --</p> <p>7 A. -- without me making any inquiry.</p> <p>8 He volunteered that.</p> <p>9 Q. But you hadn't made any inquiry</p> <p>10 prior to the time that you authorized the</p> <p>11 sending of this letter; is that fair?</p> <p>12 A. That's correct.</p> <p>13 Q. Do you know whether Mr. Seery, in</p> <p>14 fact, engaged in transactions on behalf of the</p> <p>15 debtor since he was appointed back in January?</p> <p>16 A. I do not.</p> <p>17 Q. Did you ask that question prior to</p> <p>18 the time you authorized the sending of this</p> <p>19 letter?</p> <p>20 A. I did not.</p> <p>21 Q. Can you identify a single</p> <p>22 transaction that Jim Seery has ever made that</p> <p>23 you disagree with?</p> <p>24 A. No.</p> <p>25 Q. Can you identify any transaction</p>	<p style="text-align: right;">Page 89</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 that the debtor made on behalf of any of the</p> <p>3 CLOs since the time that you understand</p> <p>4 Mr. Dondero left Highland that you disagree</p> <p>5 with?</p> <p>6 A. No.</p> <p>7 Q. Did you have any discussion with any</p> <p>8 representative of any of the entities listed on</p> <p>9 this document where they told you they believe</p> <p>10 Jim Seery didn't have the expertise to engage</p> <p>11 in transactions on behalf of the whole -- of</p> <p>12 the CLOs?</p> <p>13 A. You -- your question -- I'm -- I'm</p> <p>14 sorry. I'm trying to be -- I'm trying to be a</p> <p>15 hundred perc- -- I'm trying to be accurate</p> <p>16 here.</p> <p>17 Q. Let me interrupt you and just say,</p> <p>18 I'm very grateful for your testimony. I know</p> <p>19 this is not easy, and I do believe that you're</p> <p>20 earnestly and honestly trying to answer the</p> <p>21 questions the best you can. So no apologies</p> <p>22 necessary anymore. If you need me to repeat</p> <p>23 the question or rephrase it, just say that,</p> <p>24 okay?</p> <p>25 A. Please -- yes.</p>

<p style="text-align: right;">Page 90</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 Q. Okay.</p> <p>3 A. Please -- please repeat that.</p> <p>4 Q. Did you ever communicate with any</p> <p>5 employee, officer, director, representative of</p> <p>6 any of the entities that are on this page</p> <p>7 concerning the debtor's ability to service the</p> <p>8 CLOs?</p> <p>9 A. I believe so.</p> <p>10 Q. And can you identify the person or</p> <p>11 persons?</p> <p>12 A. I think it's Jim Dondero.</p> <p>13 Q. Anybody else other than Mr. Dondero?</p> <p>14 A. No.</p> <p>15 Q. When did you have that conversation</p> <p>16 or those conversations with Mr. Dondero?</p> <p>17 A. This letter is dated the 22nd --</p> <p>18 Q. Correct.</p> <p>19 A. -- right?</p> <p>20 Q. Yes.</p> <p>21 A. I believe that's the Tuesday before</p> <p>22 Christmas, and this would have been on the</p> <p>23 21st, the Monday.</p> <p>24 Q. What do you recall about your</p> <p>25 conversation on the 21st regarding the</p>	<p style="text-align: right;">Page 91</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 substance of this particular letter?</p> <p>3 A. Jim Dondero described why he</p> <p>4 believed sales being made on an ongoing basis</p> <p>5 after a request was made to stop was im- --</p> <p>6 improper.</p> <p>7 Q. Do you -- do you rely on what</p> <p>8 Mr. Dondero said to you during that phone call</p> <p>9 on December 21st in -- in deciding to join in</p> <p>10 this particular letter?</p> <p>11 A. No.</p> <p>12 Q. Did you only then rely on the</p> <p>13 information you obtained from counsel?</p> <p>14 A. Yes. I -- I -- I -- I considered</p> <p>15 this letter to be nearly the most gentle</p> <p>16 request imaginable amongst lawyers to maintain</p> <p>17 the status quo.</p> <p>18 Q. And the request that's made in this</p> <p>19 letter is perfectly consistent with what</p> <p>20 Mr. Dondero told you on the 21st of December,</p> <p>21 correct?</p> <p>22 A. I don't -- no.</p> <p>23 Q. How --</p> <p>24 MR. MORRIS: Can we go to the end of</p> <p>25 this letter, please. All right. Right</p>
<p style="text-align: right;">Page 92</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 there.</p> <p>3 BY MR. MORRIS:</p> <p>4 Q. Do you see the request that's in the</p> <p>5 last sentence?</p> <p>6 A. Yes.</p> <p>7 Q. Is that the same thing that</p> <p>8 Mr. Dondero told you should happen, that --</p> <p>9 that there should be no further CLO</p> <p>10 transactions at least until the issues raised</p> <p>11 and addressed by the debtor's plan were</p> <p>12 resolved substantively?</p> <p>13 A. Yes.</p> <p>14 Q. Is there anything that he said</p> <p>15 that's inconsistent with the request that's</p> <p>16 made here?</p> <p>17 MR. CLARK: Objection, form.</p> <p>18 A. This -- and can you -- can you show</p> <p>19 me earlier parts?</p> <p>20 Q. Of course. You know what, I'll</p> <p>21 withdraw the question.</p> <p>22 And let me see if I can do it this</p> <p>23 way: In your discussion with Mr. Dondero, did</p> <p>24 he indicate that he had seen a draft of this</p> <p>25 letter?</p>	<p style="text-align: right;">Page 93</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 A. No. And I didn't -- I didn't have a</p> <p>3 discussion with him. I -- I merely listened to</p> <p>4 him. There was no -- I -- I had no input to</p> <p>5 the conversation.</p> <p>6 Q. Okay. I -- I did -- I didn't --</p> <p>7 I -- I appreciate that. So he called you; is</p> <p>8 that right?</p> <p>9 A. We -- we called in.</p> <p>10 Q. Oh, was it --</p> <p>11 A. I --</p> <p>12 Q. Was it --</p> <p>13 A. I don't know --</p> <p>14 Q. Was it --</p> <p>15 A. I don't know the sequence of the</p> <p>16 calls. I'm sorry.</p> <p>17 Q. Was there anybody on the call other</p> <p>18 than you and Mr. Dondero, the call that you're</p> <p>19 describing on December 21st?</p> <p>20 A. Yes, my attorney and an attorney --</p> <p>21 I believe the attorney that signed this letter.</p> <p>22 Q. Okay. And I just want to focus on</p> <p>23 what Mr. Dondero said. Did he -- did he say</p> <p>24 during the call that Highland should not be</p> <p>25 engaging in any further CLO transactions?</p>

<p style="text-align: right;">Page 94</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 A. He took a more -- if I can</p> <p>3 characterize his mental -- I looked at the</p> <p>4 issue of maintaining the status quo since there</p> <p>5 was somebody that was complaining about it,</p> <p>6 that that -- because it -- it isn't assets of</p> <p>7 Highland, it doesn't adversely affect Highland.</p> <p>8 If -- if stopping the sales -- you know, my --</p> <p>9 my thought was -- is if stopping the sales</p> <p>10 reduces the likelihood of litigation</p> <p>11 disputes -- you already saw that there was the</p> <p>12 one from middle of December. I -- I thought</p> <p>13 that would be the more appropriate way to go.</p> <p>14 I didn't think there'd be any harm.</p> <p>15 Q. And was that your --</p> <p>16 A. I think -- I think Jim Dondero had a</p> <p>17 more legalistic view of its impro- -- im- --</p> <p>18 improper nature.</p> <p>19 Q. And did he share that view with you?</p> <p>20 A. On Monday, yes.</p> <p>21 Q. Can you describe for me your</p> <p>22 recollection of what he said about the</p> <p>23 legalistic view?</p> <p>24 A. Just the mention of -- all I recall</p> <p>25 is in terms of -- the law associated with it</p>	<p style="text-align: right;">Page 95</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 was -- the Advisers Act was mentioned --</p> <p>3 Q. Did you have --</p> <p>4 A. -- but I don't -- I don't know what</p> <p>5 that is. You know, I don't know what that is.</p> <p>6 Q. And you -- and -- and you never --</p> <p>7 it never occurred to you to pick up the phone</p> <p>8 and -- and to speak with Mr. Seery to see why</p> <p>9 it was he thought he should be engaging in</p> <p>10 transactions?</p> <p>11 A. No. And -- but I -- my lack of</p> <p>12 volunteering a phone call to Jim Seery isn't --</p> <p>13 it's -- it's because of -- I -- I thought any</p> <p>14 phone call by me to Jim Seery would be</p> <p>15 inappropriate because he's represented by</p> <p>16 counsel. I mean, we were working on claims</p> <p>17 against him --</p> <p>18 Q. Okay.</p> <p>19 A. -- right, so...</p> <p>20 Q. Did you -- did you -- did you think</p> <p>21 to instruct your lawyers to reach out to</p> <p>22 Mr. Seery to actually speak to him instead of</p> <p>23 just sending a letter like this and to -- and</p> <p>24 to ask -- and to maybe inquire as to why he</p> <p>25 thought it was appropriate to engage in</p>
<p style="text-align: right;">Page 96</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 transactions before they made a request six</p> <p>3 days after the court threw out their suit as</p> <p>4 frivolous? I'll withdraw that. That's too</p> <p>5 much.</p> <p>6 A few days later did you authorize</p> <p>7 the sending of another letter to the debtor in</p> <p>8 which you suggested that the -- the entities on</p> <p>9 behoove -- on -- on whose behalf the letter was</p> <p>10 sent might take steps to terminate the CLO</p> <p>11 management agreements?</p> <p>12 A. I did not see -- so there is a --</p> <p>13 there is a December 28th letter.</p> <p>14 MR. MORRIS: Let's just go to the</p> <p>15 next letter, and -- and let's just call</p> <p>16 that up.</p> <p>17 BY MR. MORRIS:</p> <p>18 Q. I think it's -- I think it's</p> <p>19 actually dated December 23rd. It was the next</p> <p>20 day.</p> <p>21 A. Yes.</p> <p>22 (SCOTT EXHIBIT 4, Letter to James A.</p> <p>23 Wright, III, et al., from Gregory Demo,</p> <p>24 December 24, 2020, with Exhibit A</p> <p>25 Attachment, was marked for identification.)</p>	<p style="text-align: right;">Page 97</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 BY MR. MORRIS:</p> <p>3 Q. And do you recall that the next day</p> <p>4 CLO HoldCo Limited joined in another letter to</p> <p>5 the debtors? Do you have that recollection?</p> <p>6 A. Yes. Not -- not be- -- yes, I do,</p> <p>7 but -- yes, I do.</p> <p>8 Q. Did you see this letter before it</p> <p>9 was sent?</p> <p>10 A. I don't believe so.</p> <p>11 Q. Did you authorize the sending of</p> <p>12 this letter?</p> <p>13 A. I gave -- I relied on my attorney to</p> <p>14 guide me through this process.</p> <p>15 Q. I appreciate that.</p> <p>16 A. I let him make that call on this</p> <p>17 letter, which is -- copies most of the prior</p> <p>18 letter and then adds another issue.</p> <p>19 Q. Okay. Do you have an understanding</p> <p>20 of what that issue is?</p> <p>21 A. Yes.</p> <p>22 Q. And what is your understanding of</p> <p>23 what that additional issue is?</p> <p>24 A. Somewhere in this letter of the 23rd</p> <p>25 there's an -- there's an -- an inclusion of</p>

<p style="text-align: right;">Page 98</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 a -- a statement of an -- a future intent.</p> <p>3 Q. A future intent to do what?</p> <p>4 A. To remove Highland as the servicer</p> <p>5 of the agreements you talked to me about</p> <p>6 previously.</p> <p>7 Q. Can you tell me whether there's a</p> <p>8 factual basis on which CLO HoldCo Limited</p> <p>9 believes that the debtor should be removed as</p> <p>10 the servicer of the portfolio manager of the</p> <p>11 CLOs?</p> <p>12 A. Yes. There are -- there are</p> <p>13 multiple bases to consider subject to all the</p> <p>14 other conditional language in the request of</p> <p>15 these letters to consider that going forward</p> <p>16 but no decision. That intent is an intent to</p> <p>17 evaluate, not an intent to take any action. I</p> <p>18 haven't authorized any action. I don't feel</p> <p>19 comfortable with my knowledge base at this</p> <p>20 time, but it's something being explored.</p> <p>21 Q. So knowing everything that you know</p> <p>22 as of today, you have not yet formed a decision</p> <p>23 as to whether CLO HoldCo Limited will take any</p> <p>24 steps to terminate Highland's portfolio</p> <p>25 management agreements, correct?</p>	<p style="text-align: right;">Page 99</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 A. I don't -- I don't want to be</p> <p>3 difficult, but I'm -- I'm confused yet again</p> <p>4 with your question. But I have not -- there --</p> <p>5 there are a number of cr- -- a number of issues</p> <p>6 that with my nonfinance background would</p> <p>7 suggest to me that they -- they may be bases</p> <p>8 for -- for cause, to -- to assert a cause. And</p> <p>9 I've been conferring with my attorney about</p> <p>10 that, but it's very preliminary and no -- no</p> <p>11 decision has been made. I -- no decision is</p> <p>12 being made.</p> <p>13 Q. So what -- what are the factors that</p> <p>14 are causing you to consider possibly seeking to</p> <p>15 begin the process of terminating the CLO</p> <p>16 management agreements?</p> <p>17 A. Well, I guess I would break them</p> <p>18 down into maybe two categories, maybe more.</p> <p>19 The one that resonates most with me -- I don't</p> <p>20 know -- maybe because even though I'm a patent</p> <p>21 attorney, I guess at one point I was an</p> <p>22 attorney. But the thing that resonates most</p> <p>23 with me --</p> <p>24 Q. You are an attorney.</p> <p>25 A. -- at the moment -- well, now you</p>
<p style="text-align: right;">Page 100</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 know why I'm a patent attorney and not one of</p> <p>3 you guys. But the thing that resonates with me</p> <p>4 the most from a legal substantive, black letter</p> <p>5 law sort of issue is the plan for</p> <p>6 reorganization, which we've objected to. I've</p> <p>7 re- -- I've reviewed the objection, and that</p> <p>8 sets forth our -- that sets forth my position,</p> <p>9 and I consider that to be quite material. The</p> <p>10 others are issues of practical effects of</p> <p>11 what's happened thus far with the bankruptcy,</p> <p>12 the termination of the experts with a long</p> <p>13 track record of success, the soon-to-be</p> <p>14 termination of all employees, the cancellation</p> <p>15 of various representation agreements, things of</p> <p>16 that nature looked at from an additive sort of</p> <p>17 perspective.</p> <p>18 Q. You know that -- can we refer to the</p> <p>19 counterparties under the CLO management</p> <p>20 agreements as the issuers? Are you familiar</p> <p>21 with that term?</p> <p>22 A. I -- I am familiar with the term</p> <p>23 issuers, yes.</p> <p>24 Q. Okay. And do you understand --</p> <p>25 A. There's an agreement between the --</p>	<p style="text-align: right;">Page 101</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 I'm sorry.</p> <p>3 Q. There's an agreement between the</p> <p>4 issuers and Highland pursuant to which Highland</p> <p>5 manages the CLO assets, right?</p> <p>6 A. With res- -- yes.</p> <p>7 Q. Okay. And do you understand what's</p> <p>8 going to happen to those management contracts</p> <p>9 in connection with the plan of reorganization?</p> <p>10 A. Partially.</p> <p>11 Q. What's your partial understanding?</p> <p>12 A. Well, I -- I wouldn't want to</p> <p>13 characterize it as a partial understanding. I</p> <p>14 mean, with respect to part of the agreement.</p> <p>15 Q. Okay.</p> <p>16 A. Okay. Our plan objection lays out</p> <p>17 our basis for objecting to steps that Highland</p> <p>18 is actively taking to preclude us from the full</p> <p>19 rights that we have as third-party</p> <p>20 beneficiaries under that agreement, and they're</p> <p>21 not de minimus. They're quite material. They</p> <p>22 relate to cause issues and no-cause issues, for</p> <p>23 example, as out- -- as outlined in our --</p> <p>24 our -- our objections.</p> <p>25 Q. Okay. Did you ever make any attempt</p>

<p style="text-align: right;">Page 102</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 to speak with any issuer concerning Highland's</p> <p>3 performance under the CLO management</p> <p>4 agreements?</p> <p>5 A. No.</p> <p>6 Q. Why not?</p> <p>7 A. I -- I don't have any facts --</p> <p>8 understand I -- I get all of the reports</p> <p>9 periodically from Highland -- from Highland.</p> <p>10 I -- I don't have a basis that I'm aware of to</p> <p>11 complain about performance issues. This is a</p> <p>12 legal issue that I'm talking about.</p> <p>13 Q. So you have no basis to suggest that</p> <p>14 Highland hasn't performed under the CLO</p> <p>15 management agreements, correct?</p> <p>16 A. Well, Highland as of right now,</p> <p>17 the -- the issue really is as -- as to what's</p> <p>18 next, not -- not -- I -- I don't -- I don't</p> <p>19 believe I have facts that support a com- --</p> <p>20 a -- an issue right now. It's -- it's --</p> <p>21 it's -- it's going forward that is the problem.</p> <p>22 Q. I --</p> <p>23 A. That's -- you know, that's --</p> <p>24 Q. Have you given any thought to</p> <p>25 speaking with the issuers to try to get their</p>	<p style="text-align: right;">Page 103</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 views as to what they think is going to happen</p> <p>3 in the future?</p> <p>4 A. No.</p> <p>5 Q. They're the -- they're the actual</p> <p>6 direct beneficiaries under the CLO management</p> <p>7 agreements, to the best of your understanding,</p> <p>8 right?</p> <p>9 A. Yes. Their rights may not be</p> <p>10 impacted; it's CLO Holdco's rights that are</p> <p>11 going to be adversely impacted. So it's -- I</p> <p>12 don't know that our view is in alignment with</p> <p>13 their view. But to answer your question, no,</p> <p>14 we did not contact them.</p> <p>15 Q. Do you have any knowledge or</p> <p>16 information as to any assertion by the issuers</p> <p>17 that Highland is in breach of any of the CLO</p> <p>18 management agreements?</p> <p>19 A. No.</p> <p>20 Q. Do you have any knowledge or</p> <p>21 information as to whether or not any of the</p> <p>22 issuers believe that Highland is in default</p> <p>23 under the CLO management agreements?</p> <p>24 A. No, I don't have any of those facts.</p> <p>25 Q. Are you aware that the issuers are</p>
<p style="text-align: right;">Page 104</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 negotiating with Highland to permit Highland to</p> <p>3 assume the CLO management agreements and to</p> <p>4 continue operating under them?</p> <p>5 A. I believe so --</p> <p>6 Q. Is that --</p> <p>7 A. -- but they're --</p> <p>8 Q. Go ahead. I'm sorry.</p> <p>9 A. As I understand it, Highland</p> <p>10 wants -- Highland or its subsidiary -- or</p> <p>11 its -- its -- its postbankruptcy relative --</p> <p>12 post- -- excuse me, that Highland</p> <p>13 postbankruptcy -- or postplan confirmation</p> <p>14 wants to move forward, substitute itself for</p> <p>15 the prior issuer -- no, sorry, substitute</p> <p>16 itself for the prior servicer under those</p> <p>17 agreements to assume those agreements but in</p> <p>18 the process of assuming those agreements,</p> <p>19 carving out a bunch of provisions that from a</p> <p>20 legal standpoint and a potentially future</p> <p>21 practical and monetary standpoint are quite</p> <p>22 substantial, and that has to relate to the</p> <p>23 removal rights based on cause and without</p> <p>24 cause. As I understand it, that's all set</p> <p>25 forth in our plan objection.</p>	<p style="text-align: right;">Page 105</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 Q. Okay. Are you aware of a third</p> <p>3 letter that was sent to Highland on behalf of</p> <p>4 CLO HoldCo and the other entities that are</p> <p>5 listed in this document?</p> <p>6 A. The December 28th letter, is that</p> <p>7 what you mean?</p> <p>8 Q. It's actually December 31st, if I</p> <p>9 can refresh your recollection.</p> <p>10 MR. MORRIS: Can we put up Exhibit</p> <p>11 F?</p> <p>12 (SCOTT EXHIBIT 5, Letter to Jeffrey</p> <p>13 N. Pomerantz from R. Charles Miller,</p> <p>14 December 31, 2020, was marked for</p> <p>15 identification.)</p> <p>16 BY MR. MORRIS:</p> <p>17 Q. You remember that there was a letter</p> <p>18 dated on or about December 31st that was</p> <p>19 sent -- oh, actually, you know, I apologize.</p> <p>20 If we scroll down to the -- to the next -- to</p> <p>21 the first box, there actually is no mention of</p> <p>22 CLO HoldCo.</p> <p>23 Are you aware that Mr. Dondero was</p> <p>24 evicted from Highland's offices as of the end</p> <p>25 of the year?</p>

<p style="text-align: right;">Page 106</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 A. I -- I didn't know the time, but I</p> <p>3 understand he's no longer there.</p> <p>4 Q. Does CLO HoldCo Limited contend that</p> <p>5 it was damaged in any way by Mr. Dondero's</p> <p>6 eviction from the Highland suite of offices?</p> <p>7 MR. CLARK: Objection, form.</p> <p>8 A. I -- I don't have any information to</p> <p>9 support that as of this time.</p> <p>10 Q. It's not -- it's not a belief that</p> <p>11 you hold today?</p> <p>12 A. I don't have a belief of that, yes.</p> <p>13 MR. MORRIS: All right. Let's take</p> <p>14 a short break. I may be done. I -- I'm</p> <p>15 grateful, Mr. Scott, and don't want to</p> <p>16 abuse your time. Give me -- let -- just</p> <p>17 let -- let's come back at 4:50, just eight</p> <p>18 minutes, and if I have anything further, it</p> <p>19 will be brief.</p> <p>20 (Whereupon, there was a recess in</p> <p>21 the proceedings from 4:42 p.m. to</p> <p>22 4:49 p.m.)</p> <p>23 MR. MORRIS: Okay. Mr. Scott, thank</p> <p>24 you very much for your time. I have no</p> <p>25 further questions.</p>	<p style="text-align: right;">Page 107</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 THE WITNESS: Thank you.</p> <p>3 MR. CLARK: We will reserve our</p> <p>4 questions.</p> <p>5 THE WITNESS: I appreciate it, John.</p> <p>6 MR. MORRIS: Take care. Thanks for</p> <p>7 your time and your -- and your diligence.</p> <p>8 I do appreciate it. Take care, guys.</p> <p>9 THE REPORTER: Okay.</p> <p>10 MR. CLARK: Thank you.</p> <p>11 MR. HOGWOOD: No questions from us.</p> <p>12 (Time Noted: 4:50 p.m.)</p> <p>13</p> <p>14</p> <p>15 -----</p> <p>16 GRANT SCOTT</p> <p>17</p> <p>18 Subscribed and sworn to before me</p> <p>19 this day of 2021.</p> <p>20</p> <p>21 -----</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>
<p style="text-align: right;">Page 108</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 C E R T I F I C A T E</p> <p>3 STATE OF NORTH CAROLINA)</p> <p>4) ss.:</p> <p>5 COUNTY OF WAKE)</p> <p>6</p> <p>7 I, LISA A. WHEELER, RPR, CRR, a</p> <p>8 Notary Public within and for the State of New</p> <p>9 York, do hereby certify:</p> <p>10 That GRANT SCOTT, the witness whose</p> <p>11 deposition is hereinbefore set forth, having</p> <p>12 produced satisfactory evidence of</p> <p>13 identification and having been first duly sworn</p> <p>14 by me, according to the emergency video</p> <p>15 notarization requirements contained in G.S.</p> <p>16 10B-25, and that such deposition is a true</p> <p>17 record of the testimony given by such witness.</p> <p>18 I further certify that I am not</p> <p>19 related to any of the parties to this action by</p> <p>20 blood or marriage; and that I am in no way</p> <p>21 interested in the outcome of this matter.</p> <p>22 IN WITNESS WHEREOF, I have hereunto</p> <p>23 set my hand this 21st day of January, 2021.</p> <p>24 -----Lisa Wheeler-----</p> <p>25 LISA A. WHEELER, RPR, CRR</p>	<p style="text-align: right;">Page 109</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 -----I N D E X-----</p> <p>3 PAGE</p> <p>4 EXAMINATION BY MR. MORRIS 7</p> <p>5</p> <p>6</p> <p>7 -----EXHIBITS-----</p> <p>8 PAGE</p> <p>9 EXHIBIT 1 Organizational Structure: 46</p> <p>10 CLO HoldCo, Ltd.</p> <p>11 EXHIBIT 2 Unanimous Written Consent of 54</p> <p>12 Directors In Lieu of Meeting</p> <p>13</p> <p>14 EXHIBIT 3 Letter to James A. Wright, 78</p> <p>15 III, et al., from Gregory</p> <p>16 Demo, December 24, 2020, with</p> <p>17 Exhibit A Attachment</p> <p>18</p> <p>19 EXHIBIT 4 Letter to James A. Wright, 96</p> <p>20 III, et al. From Gregory</p> <p>21 Demo, December 24, 2020, with</p> <p>22 Exhibit A Attachment</p> <p>23</p> <p>24 EXHIBIT 5 Letter to Jeffrey N. 105</p> <p>25 Pomerantz from R. Charles</p> <p>Miller, December 31, 2020</p>

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APPENDIX 13

Between

CLO HOLDCO, LTD.

And

HARBOURVEST DOVER STREET IX INVESTMENT L.P.

And

HARBOURVEST 2017 GLOBAL AIF L.P.

And

HARBOURVEST 2017 GLOBAL FUND L.P.

And

HV INTERNATIONAL VIII SECONDARY L.P.

And

HARBOURVEST SKEW BASE AIF L.P.

And

HIGHLAND CAPITAL MANAGEMENT, L.P.

And

LEE BLACKWELL PARKER, III

And

QUEST IRA, INC., FBO LEE B. PARKER III, ACCT. # 3058311

And

QUEST IRA, INC., FBO HUNTER COVITZ, ACCT. # 1469811

And

QUEST IRA, INC., FBO JON POGLITSCH, ACCT. # 1470612

And

QUEST IRA, INC., FBO NEIL DESAI, ACCT. # 3059211

And

HIGHLAND CLO FUNDING, LTD.

And

HIGHLAND HCF ADVISOR, LTD.

MEMBERS AGREEMENT RELATING TO THE COMPANY

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THIS AGREEMENT is made the 15th day of November 2017

BETWEEN

- (1) **CLO HOLDCO, LTD.** whose registered office address is at Intertrust Corporate Services (Cayman) Limited, 190 Elgin Avenue, George Town, Grand Cayman KY1-9005, Cayman Islands;
- (2) **HARBOURVEST DOVER IX INVESTMENT L.P.** of c/o HarbourVest Partners, LLC, One Financial Center, 44th Floor, Boston, MA 02111, USA
- (3) **HARBOURVEST 2017 GLOBAL AIF L.P.** of c/o HarbourVest Partners, LLC, One Financial Center, 44th Floor, Boston, MA 02111, USA
- (4) **HARBOURVEST 2017 GLOBAL FUND L.P.** of c/o HarbourVest Partners, LLC, One Financial Center, 44th Floor, Boston, MA 02111, USA
- (5) **HV INTERNATIONAL VIII SECONDARY L.P.** of c/o HarbourVest Partners, LLC, One Financial Center, 44th Floor, Boston, MA 02111, USA
- (6) **HARBOURVEST SKEW BASE AIF L.P.** of c/o HarbourVest Partners, LLC, One Financial Center, 44th Floor, Boston, MA 02111, USA
- (7) **HIGHLAND CAPITAL MANAGEMENT, L.P.** of 300 Crescent Court, Suite 700, Dallas, Texas 75201, USA
- (8) **LEE BLACKWELL PARKER, III** of 300 Crescent Court, Suite 700, Dallas, Texas 75201, USA
- (9) **QUEST IRA, INC., FBO LEE B. PARKER III, ACCT. # 3058311** of 17171 Park Row #100, Houston, Texas 77084, USA
- (10) **QUEST IRA, INC., FBO HUNTER COVITZ, ACCT. # 1469811** of 17171 Park Row #100, Houston, Texas 77084, USA
- (11) **QUEST IRA, INC., FBO JON POGLITSCH, ACCT. # 1470612** of 17171 Park Row #100, Houston, Texas 77084, USA
- (12) **QUEST IRA, INC., FBO NEIL DESAI, ACCT. # 3059211** of 17171 Park Row #100, Houston, Texas 77084, USA

(together the "**Members**") and

- (13) **HIGHLAND CLO FUNDING, LTD.**, with registration number 60120 whose registered office is at First Floor, Dorey Court, Admiral Park, St Peter Port, Guernsey GY1 6HJ, Channel Islands (the "**Company**") and
- (14) **HIGHLAND HCF ADVISOR, LTD.**, whose registered address is at Maples Corporate Services Limited, PO Box 309, Ugland House, Grand Cayman, KY1-1104, Cayman Islands (the "**Portfolio Manager**").

WHEREAS:

- (A) The Company is a limited company incorporated under the laws of the Island of Guernsey on 30 March 2015.
- (B) The Company has been established to provide its investors with exposure to CLO Notes on both a direct basis and indirect basis and senior secured loans on an indirect basis, through the use of the investments described in its investment policy as set forth in the Offering Memorandum dated 15 November 2017, the (the "**Offering Memorandum**"), subject to the restrictions set forth therein.

- (C) The Members are the owners of the entire issued capital of the Company.
- (D) The Parties are entering into this Agreement to regulate the relationship between them and the operation and management of the Company.

OPERATIVE PROVISIONS

1. INTERPRETATION

In this Agreement, including the Schedule:

- 1.1 the following words and expressions shall have the following meanings, unless they are inconsistent with the context:

"Adherence Agreement" means the agreement under which a person agrees to be bound by the terms of this Agreement in the form substantially similar as set out in the Schedule;

"Advisers Act" shall mean the U.S. Investment Advisers Act of 1940, as amended from time to time, and the rules and regulations of the U.S. Securities and Exchange Commission promulgated thereunder;

"Affiliate" means, with respect to a person, (i) any other person who, directly or indirectly, is in control of, or controlled by, or is under common control with, such person or (ii) any other person who is a director, officer or employee (a) of such person, (b) of any subsidiary or parent company of such person or (c) of any person described in clause (i) above. For the purposes of this definition, control of a person shall mean the power, direct or indirect, (i) to vote more than 50% of the securities having ordinary voting power for the election of directors of such persons or (ii) to direct or cause the direction of the management and policies of such person whether by contract or otherwise. For purposes of this definition, the management of an account by one person for the benefit of any other person shall not constitute "control" of such other person and no entity shall be deemed an "Affiliate" of the Company solely because the administrator or its Affiliates serve as administrator or share trustee for such entity;

"Agreement" means this agreement together with the Schedule;

"Articles" means the articles of incorporation of the Company as amended from time to time;

"Business" means the business of the Company as described in Recital (B);

"Business Day" means a day (other than a Saturday or Sunday) on which banks are open for ordinary banking business in Guernsey;

"Directors" means the directors of the Company from time to time;

"CLO Holdco" means CLO Holdco, Ltd. (or any permitted successor to the business of CLO Holdco, Ltd. or interest in the Company);

"Code" shall mean the U.S. Internal Revenue Code of 1986, as amended from time to time.

"Directors" means the directors of the Company from time to time;

"Dover IX" means HarbourVest Dover Street IX Investment L.P. (or any permitted successor to the business of HarbourVest Dover Street IX Investment L.P. or any interest in the Company);

"DOL" shall mean the U.S. Department of Labor, or any governmental agency that succeeds to the powers and functions thereof.

"DOL Regulations" shall mean the regulations of the DOL included within 29 C.F.R. section 2510.3-101.

"Dover IX" shall mean HarbourVest Dover Street IX Investment L.P. (or any permitted successor to the business of HarbourVest Dover Street IX Investment L.P. or interest in the Company);

"ERISA" shall mean the U.S. Employee Retirement Income Security Act of 1974, as amended from time to time;

"ERISA Member" shall mean a Member that (a) is a "benefit plan investor" (as such term is defined in the DOL Regulations as modified by section 3(42) of ERISA) subject to the fiduciary responsibility provisions of part 4 of title I of ERISA or is a "plan" (as such term is defined in section 4975(e) of the Code) subject to section 4975 of the Code or (b) is designated as an ERISA Member by the General Partner in writing on or before the date at which such ERISA Member is admitted to the Company;

"HarbourVest Entities" means: Dover IX; HarbourVest 2017 Global AIF L.P.; HarbourVest 2017 Global Fund L.P.; HV International VIII Secondary L.P.; and HarbourVest Skew Base AIF L.P. (or any of their respective permitted successors to their businesses or interests in the Company);

"Highland Principals" means: Highland Capital Management, L.P.; Lee Blackwell Parker, III, Quest IRA, Inc., fbo Lee B. Parker III Acct. # 3058311; Quest IRA, Inc., fbo Hunter Covitz Acct. # 1469811; Quest IRA, Inc., fbo Jon Poglitsch Acct. # 1470612; Quest IRA, Inc., fbo Neil Desai Acct. # 3059211 (or any of their respective permitted successors to their businesses or interests in the Company);

"Law" means the Companies (Guernsey) Law, 2008, as amended;

"Member" means a person whose name is from time to time entered in the register of members of the Company as the holder of shares in the Company;

"Parties" means the parties to this Agreement and any other person who agrees to be bound by the terms of this Agreement under an Adherence Agreement;

"Shares" means ordinary shares in the Company;

"Subsidiary" shall have the meaning ascribed to it in the Law;

"Subscription and Transfer Agreement" means the Subscription and Transfer Agreement, dated as of 15 November 2017, entered into by and among CLO HoldCo, Ltd. and each of the Members and acknowledged and agreed by the Company and the Portfolio Manager.

Any capitalized terms used herein without definition have the meanings specified in the Offering Memorandum.

- 1.2 any reference to the Parties being obliged to procure shall so far as they are able includes, without limitation, procuring by the exercise of votes which they directly or indirectly control at meetings of the Directors or general meetings of the Company;
- 1.3 any reference to a person includes, where appropriate, that person's heirs, personal representatives and successors;
- 1.4 any reference to a person includes any individual, body corporate, corporation, firm, unincorporated association, organisation, trust or partnership;
- 1.5 any reference to time shall be to Guernsey time;
- 1.6 except where the context otherwise requires words denoting the singular include the plural and vice versa and words denoting any one gender include all genders;

- 1.7 unless otherwise stated, a reference to a Clause or a Schedule is a reference to a Clause or a Schedule to this Agreement; and
- 1.8 Clause headings are for ease of reference only and do not affect the construction of any provision.

2. THE BUSINESS OF THE COMPANY

- 2.1 The Parties hereby agree that the objects and purpose of the Company shall be to carry on the Business.
- 2.2 The Parties shall so far as they are able (including without limitation by the exercise of votes which they directly or indirectly control at meetings of the Directors or general meetings of the Company) procure that (i) the Company's principal activities shall be the pursuit of the objects and purposes described in Clause 2.1 conducted in accordance with the provisions hereof and with the Offering Memorandum, the Subscription and Transfer Agreement and Articles of the Company and (ii) the Parties shall not take any action inconsistent with the provisions of the Offering Memorandum, including, without limitation the investment strategy set forth in the "Summary" and the applicable restrictions during and after the Investment Period and the suspension or termination of the Investment Period following a Key Person Event.
- 2.3 The Members shall (so long as they hold shares in the capital of the Company) use all reasonable endeavours to promote and develop the Business of the Company.

3. VOTING RIGHTS

- 3.1 The Parties agree that the following provisions of this Clause 3 shall apply during such period or periods as the Members parties hereto are Members.
- 3.2 The Parties shall procure that the Company shall not take any action at any meeting requiring the sanction of an ordinary or special resolution or by written resolution, in each case of the Directors or of the Members, without the affirmative vote or prior written consent, as applicable, of the Members totalling in the aggregate more than seventy-five percent (75%) of the Company, including, but not limited to, the following actions:
 - 3.2.1 any issuance of new shares of the Company or a new class of shares of the Company or payment of any dividend by issuance of new shares of the Company, other than issuances of Shares pursuant to the Offering Memorandum and the Subscription and Transfer Agreement;
 - 3.2.2 any alteration or cancellation of any rights of any Shares or of the Share capital of the Company,
 - 3.2.3 any conversion or redemption of Shares, except pursuant to Clause 5.5,
 - 3.2.4 any payment of commission in consideration for subscribing or agreeing to subscribe for any shares in the Company,
 - 3.2.5 the creation of any lien on any Shares, except pursuant to the remedies in Clause 5.3. or
 - 3.2.6 the suspension of the calculation of the NAV; other than a temporary suspension of the calculation of the NAV and NAV per Share by the Board of Directors during any period if it determines in good faith that such a suspension is warranted by extraordinary circumstances, including: (i) during any period when any market on which the Company's investments are quoted, traded or dealt in is closed, other than for ordinary holidays and weekends, or during periods in which dealings are restricted or suspended; (ii) during the existence of any state of affairs, including as a result of political, economic, military or monetary events or any circumstances outside the control of the Portfolio Manager or the Company, as a result of which,

in the reasonable opinion of the Portfolio Manager, the determination of the value of the assets of the Company, would not be reasonably practicable or would be seriously prejudicial to the Members taken as a whole; (iii) during any breakdown in the means of communication normally employed in determining the price or value of the Company's assets or liabilities, or of current prices in any market as aforesaid, or when for any other reason the prices or values of any assets or liabilities of the Company cannot reasonably be accurately ascertained within a reasonable time frame; (iv) during any period when the transfer of funds involved in the realization or acquisition of any investments cannot, in the reasonable opinion of the Portfolio Manager, be effected at normal rates of exchange; or (v) automatically upon liquidation of the Company.

4. **ADVISORY BOARD.**

- 4.1 Composition of Advisory Board. The Company shall establish an advisory board (the "**Advisory Board**") composed of two individuals, one of whom shall be a representative of CLO Holdco and one of whom shall be a representative of Dover IX (or, in each case, or any permitted successor to the interest in the Company of such Member). No voting member of the Advisory Board shall be a controlled Affiliate of the Portfolio Manager (including, for the avoidance of doubt, following a permitted transfer of CLO Holdco's interest to an Affiliate of the Portfolio Manager, if applicable), it being understood that for the purposes of this sentence none of CLO Holdco, its wholly-owned subsidiaries nor any of their respective directors or trustees shall be deemed to be a controlled Affiliate of the Portfolio Manager due to their pre-existing non-discretionary advisory relationship with the Portfolio Manager. None of the members of the Advisory Board shall receive any compensation (other than reimbursement for reasonable and documented out-of-pocket expenses) in connection with their position on the Advisory Board. The Company shall bear any fees, costs and expenses related to the Advisory Board.
- 4.2 Meetings of Advisory Board; Written Consents. The Advisory Board shall meet with the Portfolio Manager at such times as requested by the Portfolio Manager from time to time. The quorum for a meeting of the Advisory Board shall be all of its members entitled to vote. All actions taken by the Advisory Board shall be (i) by a unanimous vote of all of the members of the Advisory Board in attendance in a meeting at which a quorum is present and entitled to vote and not abstaining from voting or (ii) by a written consent in lieu of a meeting signed by all of the members of the Advisory Board entitled to consent and not abstaining from consenting. Meetings of the Advisory Board may be held in person, by telephone or by other electronic device.
- 4.3 Functions of Advisory Board. The Advisory Board shall provide (or determine not to provide) any consents or approvals expressly contemplated by this Agreement and the Offering Memorandum to be provided by the Advisory Board and, at the request of the Portfolio Manager in its sole discretion, provide general advice (which, for the avoidance of doubt, shall be non-binding) to the Portfolio Manager or the Company with regard to Company activities and operations and other matters. For the avoidance of doubt, no consent or approval of the Advisory Board shall be required for any action or determination expressly permitted or contemplated hereunder or in the Offering Memorandum and not conditioned on such a consent or approval. The Portfolio Manager shall not act contrary to the advice of the Advisory Board with respect to any action or determination expressly conditioned herein or in the Offering Memorandum on the consent or approval of the Advisory Board. Without limiting the foregoing, the Advisory Board shall be authorized to give any approval or consent required or deemed necessary or advisable under the Advisers Act on behalf of the Company and the Members, including under Section 206(3) of the Advisers Act. The Portfolio Manager may from time to time in its discretion request the Advisory Board to review and ratify certain Company matters. The consent of the Advisory Board shall be required to approve the following actions: (i) any extension of the Investment Period; (ii) any extension of the Term (other than an automatic extension following an extension of the Investment Period that has been approved by the Advisory Board); (iii) any allotment of additional equity securities by the Company; and (iv) any investment in a Related Obligation or any other transaction between the Company or any entity in which the Company holds a direct or indirect interest, on the one hand, and Highland or any of its Affiliates, on the other hand and (v) other matters as set forth in the Offering

Memorandum. Notwithstanding the foregoing or anything to the contrary set forth herein, no transaction that is specifically authorized in the governing documents of the Company shall require approval of the Advisory Board, including, without limitation, sales or securitizations of all or a portion of the Company's loan portfolio into new Qualifying CLOs (i.e. the transfer of warehoused assets into new Qualifying CLOs), investments in CLO Notes issued by CLOs managed by Highland Affiliates, and the NexBank Credit Facility and any Permitted NexBank Credit Facility Amendments, in each case as described in the Offering Memorandum. Any such approval, consent or ratification given by the Advisory Board shall be binding on the Company and the Members. Neither the Advisory Board nor any member thereof shall have the power to bind or act for or on behalf of the Company in any manner, and no shareholder who appoints a member of the Advisory Board shall be deemed to be an Affiliate of the Company or Highland solely by reason of such appointment.

- 4.4 Term of Members of Advisory Board. A member of the Advisory Board shall be deemed removed from the Advisory Board (i) if such member is no longer an officer, director, manager, trustee, employee, consultant or other representative of CLO Holdco or Dover IX, as applicable, or their respective Affiliates and shall be replaced as soon as practicable with a representative of CLO Holdco or Dover IX, or their respective Affiliates, as applicable, or (ii) if the Member represented by such member either becomes a Defaulting Member or such member ceases to be eligible to represent such Member pursuant to Clause 4.1.
- 4.5 No Duties to Other Members. No Advisory Board member who is the representative of any Member shall, to the extent permitted by law, owe a fiduciary duty to the Company or any other Member (other than the duty to act in good faith), and may, to the fullest extent permitted by law, in all instances act in such member's own interest and in the interest of the Member that appointed such member.

5. **DEFAULTING MEMBERS**

- 5.1 In the event any Member defaults in its obligation to pay the full amount of the purchase price of Shares called for settlement under the Subscription and Transfer Agreement on the applicable Settlement Date (such unpaid amount, an "**Outstanding Settlement Amount**"), the Portfolio Manager, on behalf of the Company, shall provide written or telephonic notice of such default to such Member. If such default is not cured within 5 business days after written (or if applicable telephonic or email) notice thereof given by the Portfolio Manager, on behalf of the Company, has been received by such Member, such Outstanding Settlement Amount shall automatically accrue interest on a retroactive basis from the date such Outstanding Settlement Amount was due at 12% (the "**Default Interest Rate**") (which interest, once paid, shall not be applied to the purchase of the unsettled Shares of such Member, but which will upon receipt be distributed pro rata to those Members who have funded any such Outstanding Settlement Amounts pursuant to this Clause 5). No such Shares which have failed to be settled will be issued to any Member until settlement of the full amount of the purchase price has been made. In addition, if such default is not cured within 10 business days after written or telephonic notice thereof given by the Portfolio Manager, on behalf of the Company, has been received by such Member (a "**Defaulting Member**"), the following provisions shall apply:
 - 5.2 Whenever the vote or consent of the Defaulting Member would otherwise be required or permitted hereunder or under the Articles, the Defaulting Member shall not be entitled to participate in such vote or consent in respect of his existing shareholding and with respect to any representative of such Defaulting Member on the Advisory Board, and such vote or consent shall be calculated as if such Defaulting Member were not a Member and, as applicable, any representative of such Defaulting Member on the Advisory Board were not a member of the Advisory Board.
 - 5.3 The Portfolio Manager, on behalf of the Company, may pursue and enforce all rights and remedies available, including the commencement of legal proceedings against the Defaulting Member to collect the Outstanding Settlement Amounts, together with interest thereon for the account of the Company from the date due at the Default Interest Rate, plus the costs and expenses of collection (including attorneys' fees and expenses).

- 5.4 The Portfolio Manager, on behalf of the Company, may (at the sole cost of the Defaulting Member) borrow funds from any person (other than the Defaulting Member or its Affiliates) to cover such shortfall and/or advance all or a portion of the Defaulting Member's Outstanding Settlement Amount to the Company on behalf of the Defaulting Member, and such advance shall be repaid by the Defaulting Member to the Portfolio Manager, on behalf of the Company, with interest for the account of the Portfolio Manager, on behalf of the Company, on the amount outstanding from time to time commencing on the date of the advance at the Default Interest Rate. To the extent the Portfolio Manager, on behalf of the Company, advances funds to the Company on behalf of a Defaulting Member, all distributions from the Company that would otherwise be made to the Defaulting Member shall be paid to the Portfolio Manager, on behalf of the Company, (with any such amounts being applied first against accrued but unpaid interest and then against principal), until all amounts payable by the Defaulting Member to the Portfolio Manager, on behalf of the Company, under this Clause 5.4 (including interest) have been paid in full.
- 5.5 The Portfolio Manager, on behalf of the Company, may elect, upon notice to the Defaulting Member, to redeem the Defaulting Member's shares in an amount equal to 50% of the outstanding amount existing as of the date of the default at a price of \$0.0001 per Share. Thereupon, the commitment of the Defaulting Member under the Subscription and Transfer Agreement shall be zero, the Defaulting Member shall not be obligated to make any further settlements, the voting capital of such Defaulting Member and of each other Member shall be re-determined as of the date of such default to reflect the new commitment of the Defaulting Member, and the Portfolio Manager shall revise the books and records of the Company to reflect the reduction of the commitment of the Defaulting Member. The Members agree (x) that the damages suffered by the Company as the result of a failure by a Member to settle a commitment to purchase Shares that is required by this Agreement cannot be estimated with reasonable accuracy and (y) that the foregoing provisions of this Clause 5.5 shall act as liquidated damages for the default by the Defaulting Member (which each Member hereby agrees are reasonable).
- 5.6 The Board may offer to the non-Defaulting Members (pro rata in accordance with their respective Commitments) the option of purchasing the Defaulting Member's unsettled Shares on the terms set forth in the applicable Settlement Notice (as defined in the Subscription and Transfer Agreement).
- 5.7 At the election of the Board, distributions of dividends otherwise payable to the Defaulting Member under the Articles shall not be paid to the Defaulting Member, but instead shall be applied against the amount of the Outstanding Settlement Amount (plus interest at the Default Interest Rate and related costs); provided that any amounts so applied shall be deemed to have been distributed to the Defaulting Member under the Articles.
- 5.8 The Portfolio Manager may send an amended or new Settlement Notice to the Members other than the Defaulting Member in an amount equal to the Defaulting Member's Outstanding Settlement Amount and otherwise in accordance with the Subscription and Transfer Agreement.
- 5.9 Each Defaulting Member further appoints the Portfolio Manager as agent and attorney-in-fact for the Defaulting Member and hereby grants to the Portfolio Manager an irrevocable power of attorney to take all actions necessary on its behalf to sell, assign, or transfer the commitment to purchase unsettled Shares of such Defaulting Member pursuant to Clause 5.6 or as necessary on its behalf to effect the other remedies or rights set forth in this Clause 5; provided that the Portfolio Manager shall not bind any Defaulting Member to an indemnification or other similar obligation which guarantees the financial performance of the Company or which exceeds the ability of the Defaulting Member to provide indemnification under applicable law.

6. TRANSFERS OR DISPOSALS OF SHARES

- 6.1 No Member shall sell, pledge, charge, mortgage, assign, assign by way of security, transfer, convey, exchange or otherwise dispose of its Shares or its commitment to settle purchases of Shares under the Subscription and Transfer Agreement (each a "**Transfer**"), other than to an Affiliate of an initial Member party hereto, without the prior written consent of the Portfolio

Manager, which consent shall be in the sole discretion of the Portfolio Manager; provided that no such Transfer shall be made unless in the opinion of counsel reasonably satisfactory to the Portfolio Manager (who may be counsel for the Company, and which requirement for an opinion may be waived, in whole or in part, in the sole discretion of the Portfolio Manager) that:

- 6.1.1 such Transfer would not require registration under the Securities Act or any state securities or "Blue Sky" laws or other laws applicable to the Shares to be assigned or transferred and is conducted in conformance with the restrictions set forth in the Offering Memorandum;
 - 6.1.2 such Transfer would not be reasonably likely to cause the Company to be subject to tax in any jurisdiction other than of its incorporation on a net income basis, not be reasonably likely to cause the Company to become subject to registration as an investment company under the Investment Company Act of 1940, as amended;
 - 6.1.3 such Transfer would not cause the Company to be considered to be an entity whose underlying assets are considered to include "plan assets" by reason of investment by an "employee benefit plan" or "plan" in such entity pursuant to the U.S. Plan Assets Regulations; and
 - 6.1.4 such sale, assignment, disposition or transfer would not cause all or any portion of the assets of the Company to constitute "plan assets" under ERISA or the Code.
- 6.2 Prior to making any Transfer of Shares (other than Transfers to Affiliates of an initial Member or, in the case of CLO Holdco or a Highland Principal, to Highland, its Affiliates or another Highland Principal) a Member must first offer to the other Members a right to purchase the Shares, on a pro rata basis with respect to their current Shares, at the same price (which must be cash) as such Shares are proposed to be purchased by the prospective third party purchaser pursuant to an irrevocable offer letter. The other Members will have 30 days following receipt of the letter to determine whether to purchase their entire pro rata portion of the Shares proposed to be Transferred. If the other Members do not accept the offer, the Member may (subject to complying with the other Transfer restrictions in this Agreement) Transfer the applicable Shares that such Members have not elected to purchase to a third party at a price equal to or greater than the price described in the offer letter, provided that if the Member has not (a) entered into a definitive agreement to effect such sale within 90 days after the expiration of the period that the other Members have to accept the offer in the offer letter or (b) consummated the sale within 120 day after the entry into the definitive agreement to consummate the sale, it must comply with these right of first refusal procedures again. Any Member (other than the Member proposing to Transfer its Shares) may assign its right to purchase its pro rata portion of the Shares to any other Member (subject to complying with the other Transfer restrictions in this Agreement), any initial Member (other than the Member proposing to Transfer its Shares) may assign its right to purchase its pro rata portion of the Shares to an Affiliate (subject to complying with the other Transfer restrictions in this Agreement), and CLO Holdco and the Highland Principals (unless such Member is the Member proposing the Transfer its Shares) may assign its right to purchase its pro rata portion of the Shares to Highland, an Affiliate of Highland or other Highland Principals (subject to complying with the other Transfer restrictions in this Agreement).
- 6.3 No Highland Principal may transfer his or its interests in the Company other than (i) to a trust or other tax or estate planning vehicle or (ii) to the Portfolio Manager, its Affiliates or another Highland Principal upon the termination of such Highland Principal's (or the beneficial owner of such Highland Principal, if applicable) employment by Highland Capital Management, L.P.
- 6.4 Any transferor of any Share shall remain bound by the terms of this Agreement applicable to it prior to such transfer and that nothing in this Agreement shall constitute a waiver of any rights a Party to this Agreement may have by reason of a breach of this Agreement by a transferor prior to transfer. The transferor and/or the transferee shall bear all costs of any Transfer.
- 6.5 The Parties agree not to Transfer their Shares to any person unless such transferee agrees to be bound by the terms of this Agreement.
- 6.6 All Adherence Agreements executed pursuant to this Clause shall be executed by the transferee or allottee and each Party.

7. CONFIDENTIALITY

- 7.1 Each Party agrees to keep any information received by it pursuant to this Agreement or relating to the Business as confidential and not (save with the relevant Party's consent or as may be required by Law or the rules of any regulatory authority or any stock exchange) disclose to any person such information.
- 7.2 Notwithstanding the foregoing, the Parties agree that the HarbourVest Entities may disclose to their limited partners and prospective limited partners (including any agents of such limited partners or prospective limited partners), clients and applicable governmental agencies (a) the name and address of the Company, (b) the capital commitment and the remaining capital commitment, (c) the net asset value of such HarbourVest Entity's interest in the Company, (d) the amount of distributions that have been made to such HarbourVest Entity by the Company and the amount of contributions that have been made by such HarbourVest Entity to the Company, (e) such ratios and performance information calculated by such HarbourVest Entity using the information in clauses (a) through (d) above, including the ratio of net asset value plus distributions to contributions (i.e., the "multiple") and such HarbourVest Entity's internal rate of return with respect to its investment in the Company, and (f) tax information with respect to the Company.

8. DIVIDENDS

- 8.1 The Company agrees that it shall not, and the Portfolio Manager agrees it shall not cause the Company to, make any dividends except pursuant to the section titled "Summary—Dividend Policy" of the Offering Memorandum.

9. TERM OF THE COMPANY

- 9.1 Each Party agrees to cause the winding up and dissolution of the Company after the ten year anniversary of the date hereof (the "**Term**"); provided that the Portfolio Manager, in its reasonable discretion, may postpone dissolution of the Company for up to 180 days in order to facilitate orderly liquidation of the investments; provided, further, that the Term shall be automatically extended for any amount of time for which the Investment Period may be extended.
- 9.2 Notwithstanding the foregoing, the Term may be extended with the consent of the Portfolio Manager and the Advisory Board for up to two successive periods of one year each.

10. ERISA MATTERS

- 10.1 The Portfolio Manager, the Company and each Member shall use their reasonable best efforts to conduct the affairs and operations of the Company so as to limit investment in the Company by "benefit plan investors" (within the meaning of the DOL Regulations as modified by section 3(42) of ERISA) to less than the U.S. Plan Threshold. In the event the U.S. Plan Threshold is met or exceeded, the Portfolio Manager, on behalf of the Company, may require any Non-Qualified Holder that is a U.S. Plan Investor to sell or transfer their Shares to a person qualified to own the same that is not a U.S. Plan Investor within 30 days and within such 30 days and to provide the Company with satisfactory evidence of such sale or transfer such that such sale or transfer, together with other sale or transfers pursuant to this Clause, would result in the investment in the Company by "benefit plan investors" (within the meaning of the DOL Regulations as modified by section 3(42) of ERISA) to be less than the U.S. Plan Threshold. Where the conditions above are not satisfied within 30 days after the serving of the notice to transfer, such Non-Qualified Holder will be deemed, upon the expiration of such 30 days, to have forfeited their Shares.

11. TAX MATTERS

- 11.1 PFIC. For each fiscal year of the Company, the Company will no later than 120 days after the end of such fiscal year, commencing with the first fiscal year for which the Company is determined to be a PFIC (a "passive foreign investment company"), furnish to each of the

HarbourVest Entities (x) all information necessary to permit such HarbourVest Entity or any of its partners to complete United States Internal Revenue Service Form 8621 with respect to their interests in the Company and (y) a PFIC Annual Information Statement under section 1295(b) of the Code with respect to the Company; provided that if the Company is unable to furnish such final information and Statement within such 120 days, then the Company shall use its reasonable best efforts to furnish estimates of such information and Statement on or before the 120th day after the end of such fiscal year.

- 11.2 CFC. The Company shall furnish to each of the HarbourVest Entities within 120 days after the end of each fiscal year of the Company, a United States Internal Revenue Service Form 5471 for such fiscal year, completed for all information concerning the Company required to be filed by such HarbourVest Entity or any of its partners (i.e., all portions applicable to the relevant category of filer other than page 1 items A-D and page 2 Schedule B), to the extent such Form 5471 is required to be filed by such HarbourVest Entity or any of its partners; provided that if the Company is unable to furnish such final information within such 120 days, then the Company shall use its reasonable best efforts to furnish estimates of such information on or before the 120th day after the end of each fiscal year.
- 11.3 Other Tax Information. The Company shall furnish to each of the HarbourVest Entities (a) within 120 days after the end of each fiscal year of the Company such other information reasonably requested by the HarbourVest Entities that any HarbourVest Entity may require in order for it or any of its partners to comply with its U.S. federal income tax reporting obligations with respect to its interest in the Company; provided that if the Company is unable to furnish such final information within such 120 days, then the Company shall use its reasonable best efforts to furnish estimates of such information on or before the 120th day after the end of such fiscal year and (b) promptly upon request such other information reasonably requested by such HarbourVest Entity in order to withhold tax or to file tax returns and reports or to furnish tax information to any of its partners with respect to the Company.
- 11.4 Withholding and Other Taxes. The Company will use reasonable best efforts to acquire investments that will not result in withholding or other taxes being imposed directly or indirectly on the Company by any jurisdiction with respect to income or distributions from such investments.

12. **AMENDMENTS TO CERTAIN AGREEMENTS**

- 12.1 The Portfolio Manager and the Company shall not amend or terminate, or agree to amend or terminate, the Memorandum or Articles of Incorporation of the Company or that certain Portfolio Management Agreement between the Portfolio Manager and the Company dated as of the date hereof (the "**Management Agreement**") without the consent of the Parties.
- 12.2 The Portfolio Manager agrees that it shall not assign its rights, duties and obligations under the Management Agreement without the consent of the Members totalling in the aggregate more than seventy-five percent (75%) of the Company. Notwithstanding the foregoing, the Portfolio Manager may, without the consent of the Members, assign any of its rights or obligations under the Management Agreement to an Affiliate; provided that such Affiliate (A) has demonstrated ability, whether as an entity or by its personnel, to professionally and competently perform duties similar to those imposed upon the Portfolio Manager pursuant to the Management Agreement, (B) has the legal right and capacity to act as Portfolio Manager thereunder and (C) shall not cause the Company or the pool of collateral to become required to register under the provisions of the Investment Company Act and such action does not cause the company to be subject to tax in any jurisdiction outside of its jurisdiction of incorporation.
- 12.3 The Company agrees that it shall not hire any portfolio manager without the consent of the Parties and such new portfolio manager shall be required to join and abide by this Agreement.

13. **FINANCIAL REPORTS**

- 13.1 The books and records of account of the Company shall be audited as of the end of each fiscal year of the Company by a nationally recognized independent public accounting firm selected by

the Portfolio Manager that is registered with, and subject to regular inspection as of the commencement of the professional engagement period, and as of each calendar year-end, by, the Public Company Accounting Oversight Board in accordance with its rules. During the Term, the Portfolio Manager or the Company shall prepare and mail, deliver by fax, email or other electronic means or otherwise make available a financial report (audited in the case of a report sent as of the end of a fiscal year and unaudited in the case of a report sent as of the end of a quarter) to each Member on or before the 120th day after the end of each fiscal year and the 45th day after the end of each of the first three quarters of each fiscal year, setting forth for such fiscal year or quarter (a) the assets and liabilities of the Company as of the end of such fiscal year or quarter; (b) the net profit or net loss of the Company for such fiscal year or quarter; and (c) such Member's closing capital account balance as of the end of such fiscal year or quarter; provided that if the Portfolio Manager or the Company is unable to furnish final information with respect to any of the above, then the Portfolio Manager or the Company shall use its reasonable best efforts to furnish estimates of such information on or before the 120th day after the end of each fiscal year and the 45th day after the end of the first three quarters of each fiscal year. On or before the 60th day after the end of each fiscal year, the Portfolio Manager or the Company shall provide to each Member an unaudited draft of the financial report for such fiscal year.

- 13.2 After the end of each fiscal year or quarter, the Portfolio Manager or the Company shall cause to be delivered to the Advisory Board a reasonably detailed summary of the expenses incurred by the Company during such period.

14. **TERMINATION AND LIQUIDATION**

- 14.1 Save as provided for in Clause 13.2, this Agreement shall terminate:

- 14.1.1 when one Party holds all the Shares;
- 14.1.2 when a resolution is passed by the Company's Members or creditors, or an order made by a court or other competent body or person instituting a process that shall lead to the Company being wound up and its assets being distributed among the Company's creditors, Members or other contributors; or
- 14.1.3 with the written consent of all the Parties.

- 14.2 The following provisions of this Agreement remain in full force after termination: Clause 1 (Interpretation), Clause 7 (Confidentiality), this Clause, Clause 14 (Whole Agreement), Clause 16 (Assignments), Clause 17 (Variation and Waiver), Clause 18 (Service of Notice), Clause 19 (General) and Clause 21 (Governing Law and Jurisdiction).

- 14.3 Termination of this Agreement shall not affect any rights or liabilities that the Parties may have accrued under it.

- 14.4 Where the Company is to be wound up and its assets distributed, the Parties shall agree a suitable basis for dealing with the interests and assets of the Company and shall endeavour to ensure that:

- 14.4.1 all existing contracts of the Company are performed to the extent that there are sufficient resources;
- 14.4.2 the Company shall not enter into any new contractual obligations;
- 14.4.3 the Company is dissolved and its assets are distributed as soon as practical; and
- 14.4.4 any other proprietary information belonging to or originating from a Party shall be returned to it by the other Parties.

15. **WHOLE AGREEMENT**

- 15.1 This Agreement, and any documents referred to in it, constitute the whole agreement between the Parties and supersede any arrangements, understanding or previous agreement between them relating to the subject matter they cover.
- 15.2 Each Party acknowledges that in entering into this Agreement, and any documents referred to in it, it does not rely on, and shall have no remedy in respect of, any statement, representation, assurance or warranty of any person other than as expressly set out in this Agreement or those documents.
- 15.3 Nothing in this Clause 14 operates to limit or exclude any liability for fraud.

16. **STATUS OF AGREEMENT**

- 16.1 Each Party shall, to the extent that it is able to do so, exercise its voting rights and other powers in relation to the Company to procure that the provisions of this Agreement are properly and promptly observed and given full force and effect according to the spirit and intention of the Agreement.
- 16.2 If any provision in the memorandum of incorporation of the Company or the Articles conflicts with any provision of this Agreement, the provisions of this Agreement shall prevail as between the Parties. Each of the Parties shall, to the extent that it is able to do so, exercise its voting rights and other powers in relation to the Company to procure the modification of the memorandum of association of the Company or the Articles (as the case may be) in order to eliminate the conflict, but this Agreement shall not itself constitute a modification of the memorandum of association of the Company or the Articles.

17. **ASSIGNMENTS**

Save as expressly permitted by this Agreement, no person may assign, or grant any security interest over, any of its rights under this Agreement or any document referred to in it without the prior written consent of the Parties.

18. **VARIATION AND WAIVER**

- 18.1 A variation of this Agreement shall be in writing and signed by or on behalf of the Parties.
- 18.2 A waiver of any right under this Agreement is only effective if it is in writing and it applies only to the person to which the waiver is addressed and the circumstances for which it is given.
- 18.3 A person that waives a right in relation to one person, or takes or fails to take any action against that person, does not affect its rights against any other person.

19. **SERVICE OF NOTICE**

- 19.1 Any notice required to be given by any of the Parties may be sent by post or facsimile to the address and facsimile number of the addressee as set out in this Agreement, in either case marked for the attention of the relevant person named below, or to such other address and/or facsimile number and/or marked for the attention of such other person as the addressee may from time to time have notified for the purposes of this Clause.

19.1.1 to the Company:
Address:
First Floor, Dorey Court, Admiral Park
St Peter Port, Guernsey GY1 6HJ
Channel Islands

19.1.2 to CLO Holdco:

Address:
c/o Highland Capital Management, L.P.
300 Crescent Court, Suite 700
Dallas, TX 75201
Attn: General Counsel
Tel: +1 (972) 628-4100
Email: Notices@highlandcapital.com

19.1.3 to any HarbourVest Entity:

Address:
c/o HarbourVest Partners, LLC
One Financial Center, 44th Floor
Boston, MA 02111
USA
Attn: Michael Pugatch
Tel: +1 (617) 348-3712
F
Email: mpugatch@harbourvest.com

19.1.4 to any other Party: by post or hand delivery only to the address specified in the register of members of the Company.

19.2 Communications sent by post shall be deemed to have been received 24 hours after posting. Communications sent by facsimile transmission shall be deemed to have been received at the time the transmission has been received by the addressee **PROVIDED THAT** if the facsimile transmission, where permitted, is received after 5.00pm or on a day which is not a Business Day, it shall be deemed to have been received 11.00am the Business Day following thereafter.

19.3 In proving service by post it shall only be necessary to prove that the notice was contained in an envelope which was duly addressed and posted in accordance with this Clause and in the case of facsimile transmission it shall be necessary to prove that the facsimile was duly transmitted to the correct number.

20. **GENERAL**

20.1 Each of the Parties hereby agree not to enter into or abide by any agreement whether written or oral with any one or more of the other Parties in respect of the voting of Shares or the submission of Member resolutions to any Members for voting by them, or otherwise to direct or influence, or attempt to direct or influence, the day-to-day management of the Company, either directly or indirectly, other than in order to comply with the other terms of this Agreement or the Articles. In this regard, each of the Parties agrees to not to direct or influence or to attempt to direct or influence any of the Directors through any employment relationship that the Directors may have outside of the Company other than in order to comply with the other terms of this Agreement or the Articles. Each of the Parties hereby agree that this provision shall continue to apply to them whether or not they are or remain a Member.

20.2 Unless otherwise provided, all costs in connection with the negotiation, preparation, execution and performance of this Agreement, shall be borne by the Party that incurred the costs.

20.3 The Parties are not in partnership with each other and there is no relationship of principal and agent between them.

20.4 All transactions entered into between any Party and the Company shall be conducted in good faith and on the basis set out or referred to in this Agreement or, if not provided for in this Agreement, as may be agreed by the Parties and, in the absence of such agreement, on an arm's length basis.

20.5 Each Party shall at all times act in good faith towards the other Parties and shall use all reasonable endeavours to ensure that this Agreement is observed.

20.6 Each Party shall promptly execute and deliver all such documents, and do all such things, as the other Parties may from time to time reasonably require for the purpose of giving full effect to the provisions of this Agreement.

20.7 This Agreement may be executed in any number of counterparts, each of which is an original and which together have the same effect as if each Party had signed the same document. This Agreement may not be amended except with the consent of each Party.

21. STATUS OF AGREEMENT

21.1 The Parties shall, when necessary, exercise their powers of voting and any other rights and powers they have to amend, waive or suspend a conflicting provision in the Articles to the extent necessary to permit the Company and its Business to be administered as provided in this Agreement.

21.2 If there is an inconsistency between any of the provisions of this agreement and the provisions of the Articles, the provisions of this agreement shall prevail as between the Parties.

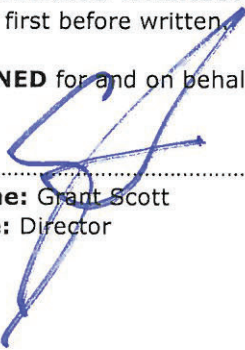
22. GOVERNING LAW AND JURISDICTION

This Agreement shall be governed by and construed in accordance with the laws of the Island of Guernsey and each of the Parties submits to the non-exclusive jurisdiction of the Royal Courts of the Island of Guernsey.

[Signature Page Follows.]

IN WITNESS WHEREOF the Parties hereto have caused this Agreement to be executed the day and year first before written.

SIGNED for and on behalf of **CLO HOLDCO, LTD.**

By:.....

Name: Grant Scott

Title: Director

SIGNED for and on behalf of
HARBOURVEST DOVER STREET IX INVESTMENT L.P.

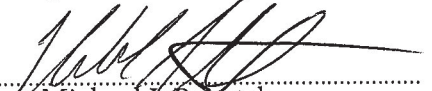
By: HarbourVest Partners (Europe) Limited,
its Alternative Investment Fund Manager

By: 

Name: Michael J. Pugatch
Title: Authorized Person

SIGNED for and on behalf of
HARBOURVEST 2017 GLOBAL AIF L.P.

By: HarbourVest Partners (Europe) Limited,
its Alternative Investment Fund Manager

By: 

Name: Michael J. Pugatch
Title: Authorized Person

SIGNED for and on behalf of
HARBOURVEST 2017 GLOBAL FUND L.P.

By: HarbourVest 2017 Global Associates L.P.,
its General Partner

By: HarbourVest GP LLC,
its General Partner

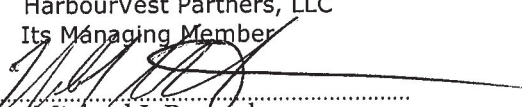
By: HarbourVest Partners, LLC,
its Managing Member

By: 

Name: Michael J. Pugatch
Title: Managing Director

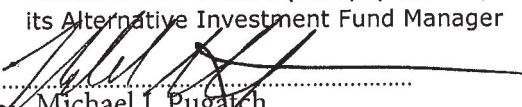
SIGNED for and on behalf of
HV INTERNATIONAL VIII SECONDARY L.P.

By: HIPEP VIII Associates L.P.
Its General Partner
By: HarbourVest GP LLC
Its General Partner
By: HarbourVest Partners, LLC
Its Managing Member

By: 
Name: Michael J. Pugatch
Title: Managing Director

SIGNED for and on behalf of
HARBOURVEST SKEW BASE AIF L.P.

By: HarbourVest Partners (Europe) Limited,
its Alternative Investment Fund Manager

By: 
Name: Michael J. Pugatch
Title: Authorized Person


SIGNED




Lee Blackwell Parker, III

SIGNED for and on behalf of
QUEST IRA, INC.
FBO LEE B. PARKER III, ACCT. # 3058311

Read and approved

By: 
Name: Emmanuel Maciel
Title: transactions supervisor

X 

SIGNED for and on behalf of
QUEST IRA, INC.
FBO HUNTER COVITZ, ACCT. # 1469811

By:
Name:
Title:

SIGNED for and on behalf of
QUEST IRA, INC.
FBO JON POGLITSCH, ACCT. # 1470612

By:
Name:
Title:

SIGNED for and on behalf of
QUEST IRA, INC.
FBO NEIL DESAI, ACCT. # 3059211

By:
Name:
Title:


SIGNATURE PAGE TO MEMBERS' AGREEMENT

001703

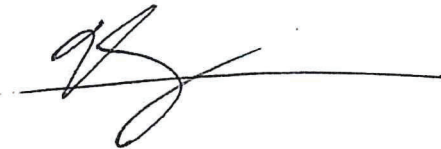
SIGNED for and on behalf of
QUEST IRA, INC.
FBO LEE B. PARKER III, ACCT. # 3058311

By:.....
Name:
Title:

SIGNED for and on behalf of
QUEST IRA, INC.
FBO HUNTER COVITZ, ACCT. # 1469811

By: 
Name: Emmanuel Mader
Title: Transaction Supervisor

Read & approved



SIGNED for and on behalf of
QUEST IRA, INC.
FBO JON POGLITSCH, ACCT. # 1470612

By:.....
Name:
Title:

SIGNED for and on behalf of
QUEST IRA, INC.
FBO NEIL DESAI, ACCT. # 3059211

By:.....
Name:
Title:


SIGNED for and on behalf of
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By:.....
Name:
Title:

SIGNED for and on behalf of
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By:.....
Name:
Title:

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QUEST IRA, INC.
FBO JON POGLITSCH, ACCT. # 1470612

By: 
Name: Emmanuel Mager
Title: Transactions Supervisor

Read and Approved:

 11/7/17

SIGNED for and on behalf of
QUEST IRA, INC.
FBO NEIL DESAI, ACCT. # 3059211

By:.....
Name:
Title:

SIGNED for and on behalf of
QUEST IRA, INC.
FBO LEE B. PARKER III, ACCT. # 3058311

By:.....
Name:
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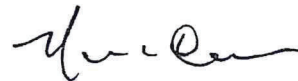
SIGNED for and on behalf of
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FBO JON POGLITSCH, ACCT. # 1470612

By:.....
Name:
Title:

SIGNED for and on behalf of
QUEST IRA, INC.
FBO NEIL DESAI, ACCT. # 3059211

By: 
Name: Emmanuel Mader
Title: Transactional Supervisor

Read and approved



SIGNED for and on behalf of
HIGHLAND CAPITAL MANAGEMENT, L.P.

By: Strand Advisors, Inc.,
its General Partner



By:

Name: James Dondero

Title: President

SIGNED for and on behalf of
HIGHLAND HCF ADVISOR, LTD.


By:
Name: James Dondero
Title: President

SIGNED for and on behalf of
HIGHLAND CLO FUNDING, LTD.

By:

Name: William Scott

Title: Director



SCHEDULE

Adherence Agreement

THIS ADHERENCE AGREEMENT is made on [•] 200[•]

BETWEEN:

- (1) [•] of [•] (the "**Covenantor**");
- (2) CLO HOLDCO, LTD. of [] (a "**Member**");
- (3) [•] of [] (a "**Member**");
- (4) [•] of [] (a "**Member**");
- (5) HIGHLAND CLO FUNDING, LTD., with registration number 60120 whose registered office is at First Floor, Dorey Court, Admiral Park, St Peter Port, Guernsey GY1 6HJ, Channel Islands (the "**Company**");
- (6) HIGHLAND HCF ADVISOR, LTD., registered address is at Maples Corporate Services Limited, PO Box 309, Ugland House, Grand Cayman, KY1-1104, Cayman Islands (the "**Portfolio Manager**").

RECITAL

This Agreement is supplemental to the members agreement made on November 15 2017 between the Members, the Portfolio Manager and the Company (the "**Members Agreement**").

IT IS HEREBY AGREED as follows:

1. The Covenantor hereby confirms that he has been supplied with a copy of the Members Agreement and hereby covenants with each of the parties thereto to observe, perform and be bound by all the terms of the Members Agreement as if it were a party thereto.
2. Each of the other parties to the Members Agreement hereby covenants with the Covenantor that the Covenantor shall be entitled to the benefit of the terms of the Members Agreement as if he were a party thereto.
3. This Agreement shall be governed by and construed in accordance with Guernsey law.

IN WITNESS of which this Agreement has been executed by the Covenantor and each of the parties to the Members Agreement on the date shown above.

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

In Re: Highland Capital Management, L.P § Case No. **19-34054-SGJ11**

Charitable DAF Fund, L.P et al

Appellant

§

vs.

§

21-03067

Highland Capital Management, L.P

§

Appellee

§

3:23-CV-01503-B

[167] Order granting Defendant Highland Capital Management, L.P.'s Renewed motion to dismiss adversary proceeding (related document # [122](#)) Entered on 6/25/2023.

Volume 9

APPELLANT RECORD

SBAITI & COMPANY PLLC
Mazin A. Sbaiti (TX Bar No. 24058096)
Jonathan Bridges (TX Bar No. 24028835)
J.P. Morgan Chase Tower
2200 Ross Avenue, Suite 4900W
Dallas, TX 75201
T: (214) 432-2899
F: (214) 853-4367

*Counsel for The Charitable DAF Fund, L.P.
and CLO Holdco, Ltd.*

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

In re:	§ Chapter 11
	§
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§ Case No. 19-34054-sgj11
	§
Debtor.	§
	§
CHARITABLE DAF FUND, L.P. AND CLO	§
HOLDCO, LTD., DIRECTLY AND DERIVATIVELY	§
	§
Plaintiffs,	§ Adversary Proceeding No.
	§
vs.	§ 21-03067-sgj11
	§
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§
HIGHLAND HCF ADVISOR, LTD., AND	§
HIGHLAND CLO FUNDING LTD., NOMINALLY	§
	§
Defendant.	§
	§

INDEX

**APPELLANTS' SECOND AMENDED STATEMENT OF ISSUES
AND DESIGNATION OF RECORD ON APPEAL**

Pursuant to Rules 8009(a)(1)(A)-(B) and (a)(4) of the Federal Rules of Bankruptcy Procedure, The Charitable DAF Fund, L.P. and CLO Holdco, Ltd. ("Appellants") hereby designate the following items to be included in the record and identify the following issues with respect to

their appeal of the Order Granting Defendant Highland Capital Management, L.P.'s "Renewed Motion to Dismiss Complaint" [Adv. Proc. Doc. No. 122] which was entered by the United States Bankruptcy Court for the Northern District of Texas on June 25, 2023.

I. STATEMENT OF ISSUES TO BE PRESENTED ON APPEAL

- Whether the Bankruptcy Court had jurisdiction to rule on Highland Capital Management L.P.'s Renewed Motion to Dismiss Complaint
- Whether the Renewed Motion to Dismiss Complaint was improperly granted

II. DESIGNATION OF ITEMS TO BE INCLUDED IN THE RECORD

Vol. 1
000001

1. Notice of Appeal for Bankruptcy Case Adversary Proceeding No. 21-03067-sgj11 [Doc. 168].

000042

2. The judgment, order, or decree appealed from: Memorandum Opinion and Order Granting Defendant Highland Capital Management, L.P.'s "Renewed Motion to Dismiss Complaint" [Adv. Proc. Doc. No. 122] [Doc. 167].

000080

3. Docket Sheet kept by the Bankruptcy Clerk.

4. Documents listed below and as described in the Docket Sheet for Bankruptcy Case Proceeding No. 21-03067-sgj.

Vol. 2

000102

000138

No.	Date Filed	Docket No.	Description/Document Text
1	9/29/21	1	(36 pgs; 3 docs) Adversary case 21-03067. ORDER REFERRING CASE NUMBER 21-CV-0842-B from U.S District Court for the Northern District of Texas, Dallas Division to U.S. Bankruptcy Court for Northern District of Texas, Dallas Division. Complaint by Charitable DAF Fund, LP, CLO Holdco, Ltd. against Highland Capital Management, LP, Highland HCF Advisor Ltd., Highland CLO Funding, Ltd. Fee Amount \$350 (Attachments: # 1 Original Complaint # 2 Docket Sheet from 3:20-cv-0842-B) Nature(s) of suit: 02 (Other (e.g. other actions that would have been brought in state court if unrelated to bankruptcy)). (Okafor, M.)
2	9/29/21	2	(1 pg) Supplemental Document (cover sheet) by CLO Holdco Ltd., Charitable DAF Fund (RE: related document(s)1 Adversary case 21-03067) [ORIGINALLY FILED IN 21-CV-0842 AS #2 ON 04/13/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)

Vol. 2 000139 000232 000239 000270 Thru Vol. 6	3	9/29/21	6	(93 pgs; 6 docs) MOTION for Leave to File First Amended Complaint filed by CLO Holdco Ltd., Charitable DAF Fund LP (Attachments: # 1 Exh 1_First Amended Complaint # 2 Exh 2_Motion for Authorization to Retain James Seery # 3 Exh 3_Order Approving Retention of James Seery # 4 Exh 4_Order Approving Settlement # 5 Proposed Order) (Bridges, Jonathan) (Entered: 04/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #6 ON 04/19/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
	4	9/29/21	22	(7 pgs; 2 docs) MOTION for an Order to Enforce the Order of Reference filed by Highland Capital Management LP. (Attachments: # 1 Exhibit(s) A--Proposed Order) (Annable, Zachery) Modified text on 5/20/2021 (mjr). (Entered: 05/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #22 ON 05/19/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
	5	9/29/21	23	(31 pgs) Brief/Memorandum in Support filed by Highland Capital Management LP re: 22 MOTION for an Order to Enforce the Order of Reference. (Annable, Zachery) Modified text on 5/20/2021 (mjr).(Entered: 05/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #23 ON 05/19/2021 IN U.S.DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
	6	9/29/21	24	(926 pgs; 29 docs) Appendix in Support filed by Highland Capital Management LP re: 23 Brief/Memorandum in Support. (Attachments: # 1 Appendix 1 # 2 Appendix 2 # 3 Appendix 3 # 4 Appendix 4 # 5 Appendix 5 # 6 Appendix 6 # 7 Appendix 7 # 8 Appendix 8 # 9 Appendix 9 # 10 Appendix10 # 11 Appendix 11 # 12 Appendix 12 # 13 Appendix 13 # 14 Appendix 14 # 15 Appendix 15 # 16 Appendix 16 # 17 Appendix 17 # 18 Appendix 18 # 19 Appendix 19 # 20 Appendix 20 # 21 Appendix 21# 22 Appendix 22 # 23 Appendix 23 # 24 Appendix 24 # 25 Appendix 25 # 26 Appendix 26 # 27 Appendix 27 # 28 Appendix 28) (Annable, Zachery) Modified linkage and text on 5/20/2021 (mjr). (Entered:05/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #24 ON 05/19/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
Vol. 7 001196	7	9/29/21	26	(7 pgs; 2 docs) MOTION to Dismiss Complaint filed by Highland Capital Management LP (Attachments: # 1 Exhibit(s) A--Proposed Order) (Annable, Zachery) Modified text on 5/28/2021 (jmg).(Entered: 05/27/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #26 ON 05/27/2021 IN U.S.DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)

Vol. 7 001203 thru Vol. 8	8	9/29/21	28	(508 pgs; 14 docs) Appendix in Support filed by Highland Capital Management LP (Attachments: # 1 Appendix 1 # 2 Appendix 2 # 3 Appendix 3 # 4 Appendix 4 # 5 Appendix 5 # 6 Appendix 6 # 7 Appendix 7 # 8 Appendix 8 # 9 Appendix 9 # 10 Appendix 10 # 11 Appendix 11 # 12 Appendix 12 # 13 Appendix 13) (Annable, Zachery) (Entered: 05/27/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #28 ON 05/27/2021 IN U.S. DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
Vol. 9 001711	9	9/29/21	33	(1 pg) Amended Civil Cover Sheet by CLO Holdco Ltd, Charitable DAF Fund LP. Amendment to 2 Supplemental Document. (Sbaiti, Mazin) Modified text on 6/23/2021 (mjr). (Entered: 06/22/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #33 ON 06/22/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001712	10	9/29/21	36	(26 pgs) RESPONSE filed by CLO Holdco Ltd, Charitable DAF Fund LP re: 22 MOTION for an Order to Enforce the Order of Reference (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #36 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001738	11	9/29/21	37	(22 pgs) Appendix in Support filed by CLO Holdco Ltd, Charitable DAF Fund LP re 36 Response/Objection Response to Motion for an Order to Enforce the Order of Reference (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #37 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001760	12	9/29/21	38	(45 pgs) RESPONSE filed by CLO Holdco Ltd, Charitable DAF Fund LP re: 26 MOTION to Dismiss (Defendant Highland Capital Management, L.P.'s Motion to Dismiss Complaint) (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #38 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001805	13	9/29/21	39	(88 pgs) Appendix in Support filed by CLO Holdco Ltd, Charitable DAF Fund LP re 38 Response/Objection to Defendant Highland Capital Management, L.P.'s Motion to Dismiss Complaint (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #39 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001893	14	9/29/21	42	(12 pgs) REPLY filed by Highland Capital Management LP re: 22 MOTION for an Order to Enforce the Order of Reference (Annable, Zachery) (Entered: 07/13/2021) [ORIGINALLY FILED IN 21-CV-0842AS #42 ON 07/13/2021 IN U.S.

			DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
VOL. 9	15	9/29/21	43 (852 pgs) Appendix in Support filed by Highland Capital Management LP re: 42 Reply. (Annable, Zachery) Modified text on 7/14/2021 (mjr). (Entered: 07/13/2021) [ORIGINALLY FILED IN 21-CV-0842AS #43 ON 07/13/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001905 thru Vol. 13	16	9/29/21	45 (21 pgs) REPLY filed by Highland Capital Management LP re: 26 MOTION to Dismiss (Defendant Highland Capital Management, L.P.'s Motion to Dismiss Complaint) (Annable, Zachery) (Entered: 07/13/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #44 ON 07/13/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002757	17	9/29/21	57 (7 pgs; 2 docs) MOTION to Dismiss and Joinder in Motion to Dismiss of Highland Capital Management, L.P. filed by Highland CLO Funding Ltd. (Attachments: # 1 Proposed Order) Attorney Paul R Bessette added to party Highland CLO Funding Ltd (pty:dft) (Bessette, Paul) (Entered: 08/30/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #57 ON 08/30/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002778	18	9/29/23	58 (12 pgs) Brief/Memorandum in Support filed by Highland CLO Funding Ltd. re 57 MOTION to Dismiss and Joinder in Motion to Dismiss of Highland Capital Management, L.P. (Bessette, Paul) (Entered: 08/30/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #58 ON 08/30/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002785	19	9/29/23	59 (80 pgs; 5 docs) Appendix in Support filed by Highland CLO Funding Ltd re 58 Brief/Memorandum in Support of Motion (Attachments: # 1 Exhibit(s) A - Jackson v Dear # 2 Exhibit(s) B - Prudential Assurance v. Newman # 3 Exhibit(s) C - Harbourvest Settlement Agreement # 4 Exhibit(s) D - Boleat Declaration) (Bessette, Paul) (Entered: 08/30/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #59 ON 08/30/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002797	20	9/29/21	64 (1 pg) ORDER OF REFERENCE: Pursuant to 28 U.S.C. § 157 and this District's Miscellaneous Order No. 33, this case is hereby REFERRED to Judge Stacey G. C. Jernigan of the United States Bankruptcy Court for the Northern District of Texas, Dallas Division, to be adjudicated as a matter related to the consolidated Chapter 11 Bankruptcy of Highland Capital Management, L.P., Chapter 11 Case No.19-34054. (Ordered by Judge Jane J. Boyle
002877			

Vol. 14				on 9/20/2021) (svc) (Entered: 09/20/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #64 ON 09/20/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
	21	10/19/21	66	(5 pgs) Notice of hearing filed by Defendant Highland Capital Management, LP (RE: related document(s) 26 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP, 47 Motion to strike document filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 55 Motion to abate filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) Hearing to be held on 11/23/2021 at 09:30 AM at https://us-courts.webex.com/meet/jerniga for 26 and for 47 and for 55, (Annable, Zachery)
002878				
002883	22	11/22/21	71	(509 pgs; 2 docs) Witness and Exhibit List <i>for Hearing on November 23, 2021</i> filed by Defendant Highland Capital Management, LP (RE: related document(s) 26 Motion to dismiss adversary proceeding). (Attachments: # 1 Exhibits 1-13) (Hayward, Melissa)
thru Vol. 16				
Vol. 17	23	11/22/21	72	(2 pgs) Witness List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 26 Motion to dismiss adversary proceeding, 47 Motion to strike (related document(s): 43 Document), 55 Motion to abate (related document(s) 1 Complaint), 69 Motion to abate <i>Plaintiffs' Amended Motion to Stay All Proceedings</i> (related document(s) 55 Motion to abate (related document(s) 1 Complaint))). (Sbaiti, Mazin)
003392				
003394	24	11/22/21	73	(189 pgs; 4 docs) Exhibit List <i>for November 23, 2021 hearing</i> filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 47 Motion to strike (related document(s): 43 Document), 55 Motion to abate (related document(s) 1 Complaint)). (Attachments: # 1 Exhibit 1_Defendant's Memorandum of Law in Support of Motion for Reconsideration # 2 Exhibit 2_Highland Memorandum in Support of Motion to Dismiss # 3 Exhibit 3_Order (I) Confirming Fifth Amended Plan of Reorganization of Highland) (Sbaiti, Mazin)
003583	25	12/7/21	80	(2 pgs) Order granting Highland CLO Funding, Ltd.'s motion to dismiss adversary as a party with prejudice (related document 57) Entered on 12/7/2021. (Okafor, Marcey) Modified text on 3/11/2022 (Okafor, Marcey).
003585	26	3/11/22	99	(26 pgs) Memorandum of Opinion and order granting motion to dismiss the adversary proceeding (RE: related document(s) 26 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP). Entered on 3/11/2022 (Okafor, Marcey)
003611	27	3/11/22	100	(26 pgs) Order granting motion to dismiss adversary proceeding with prejudice (related document #26) Entered on 3/11/2022. (Okafor, Marcey)

Vol. 18 003637	28	3/21/22	104	(29 pgs) Notice of appeal. Fee Amount \$298 filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 100 Order on motion to dismiss adversary proceeding). Appellant Designation due by 04/4/2022. (Sbaiti, Mazin)
003666	29	5/26/22	120	(177 pgs; 2 docs) Support/supplemental document <i>Motion to Supplement Appellate Record</i> filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 111 Appellant designation). (Attachments: # 1 Amended Transcript of January 14, 2021 Hearing) (Sbaiti, Mazin)
003843	30	6/9/22	121	(1 pg) DISTRICT COURT Order: Case 3:22-00695-B is hereby transferred to the docket of the Honorable Judge Jane J. Boyle for consolidation with The Charitable DAF Fund LP, et al. v. Highland Capital Management LP, Case No. 3:21-cv-3129-N. Judge Karen Gren Scholer no longer assigned to case.(RE: related document(s) 86 Notice of appeal filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 104 Notice of appeal filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Entered on 6/9/2022 (Whitaker, Sheniqua) (Entered: 06/10/2022)
003844	31	10/24/22	122	(7 pgs) Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP (Annable, Zachery)
003851	32	10/14/22	123	(31 pgs) Brief in support filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Annable, Zachery)
Vol. 19 003882 Thru Vol 20	33	10/14/22	124	(513 pgs; 15 docs) Support/supplemental document (<i>Appendix in Support of Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7 # 8 Exhibit 8 # 9 Exhibit 9 # 10 Exhibit 10 # 11 Exhibit 11 # 12 Exhibit 12 # 13 Exhibit 13 # 14 Exhibit 14) (Annable, Zachery)
Vol. 21 004395	34	10/27/22	126	(5 pgs) Notice of hearing (<i>Notice of Hearing and Briefing Schedule on Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP). Hearing to be held on 12/8/2022 at 09:30 AM at https://us-courts.webex.com/meet/jerniga for 122. (Annable, Zachery)

Vol. 21 004400 004410 004442 Thru Vol. 22	35	11/18/22	128	(10 pgs) Motion for withdrawal of reference. Fee amount \$188, filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (Sbaiti, Mazin)
	36	11/18/22	129	(32 pgs) Response opposed to (related document(s): 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP) filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Sbaiti, Mazin)
	37	11/18/22	130	(254 pgs; 2 docs) Response opposed to (related document(s): 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP) filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Attachments: # 1 Appendix) (Sbaiti, Mazin)
Vol. 22 004696 004717 004732 004737 004742	38	9/2/22	131	(21 pgs) DISTRICT COURT MEMORANDUM OPINION AND ORDER: The Court REVERSES and REMANDS the bankruptcy court's Motion to Dismiss Order and AFFIRMS the bankruptcy courts Motion to Stay Order. re: appeal on Civil Action number: Case 3:22-00695-B consolidated with 3:21-CV-3129-B, (RE: related document(s) 81 Order on motion to abate, 100 Order on motion to dismiss adversary proceeding). Entered on 9/2/2022 (Whitaker, Sheniqua) (Entered: 11/29/2022)
	39	12/2/22	133	(15 pgs) Reply to (related document(s): 129 Response filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 130 Response filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) filed by Defendant Highland Capital Management, LP. (Annable, Zachery)
	40	12/7/22	135	(5 pgs) Notice of hearing filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP). Hearing to be held on 1/25/2023 at 01:30 PM at https://us-courts.webex.com/meet/jerniga for 122, (Annable, Zachery)
	41	12/7/22	136	(5 pgs) Notice of hearing filed by Defendant Highland Capital Management, LP (RE: related document(s) 128 Motion for withdrawal of reference filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Status Conference to be held on 1/25/2023 at 01:30 PM at https://us-courts.webex.com/meet/jerniga . (Annable, Zachery).
	42	12/9/22	138	(3 pgs) Response opposed to (related document(s): 128 Motion for withdrawal of reference. Fee amount \$188, filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) filed by Defendant Highland Capital Management, LP. (Annable, Zachery)

Vol. 22 004745	43	12/9/22	139	(25 pgs) Brief in support filed by Defendant Highland Capital Management, LP (RE: related document(s) 138 Response). (Annable, Zachery)
Vol. 23 004770	44	12/9/22	140	(280 pgs; 8 docs) Support/supplemental document (<i>Appendix in Support of Highland Capital Management, L.P.'s Response to Renewed Motion to Withdraw the Reference</i>) filed by Defendant Highland Capital Management, LP (RE: related document(s) 138 Response). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7) (Annable, Zachery)
Vol. 24 005050	45	12/16/22	144	(6 pgs) Reply to (related document(s): 138 Response filed by Defendant Highland Capital Management, LP) filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Sbaiti, Mazin)
005056 Thru Vol. 25.	46	1/23/23	145	(514 pgs; 15 docs) Witness and Exhibit List filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7 # 8 Exhibit 8 # 9 Exhibit 9 # 10 Exhibit 10 # 11 Exhibit 11 # 12 Exhibit 12 # 13 Exhibit 13 # 14 Exhibit 14) (Annable, Zachery)
Vol. 26 005570	47	1/23/23	146	(280 pgs; 8 docs) Witness and Exhibit List filed by Defendant Highland Capital Management, LP (RE: related document(s) 128 Motion for withdrawal of reference. Fee amount \$188.). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7) (Annable, Zachery)
Vol. 27 005850	48	1/23/23	147	(221 pgs; 7 docs) Witness and Exhibit List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Attachments: # 1 Exhibit 1_Excerpts from July 14, 2020 Hearing Transcript # 2 Exhibit 2_HCLOF Members Agreement Relating to the Company # 3 Exhibit 3_HarbourVest Settlement Agreement # 4 Exhibit 4_Order Approving Debtor's Settlement with HarbourVest # 5 Exhibit 5_HCLOF Offering # 6 Exhibit 6 Amended and Restated Investment Advisory Agreement) (Sbaiti, Mazin)
006071	49	1/23/23	148	(3 pgs) Witness and Exhibit List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 128 Motion for withdrawal of reference. Fee amount \$188.). (Phillips, Louis)
Vol. 28 006074	50	1/25/23	150	(56 pgs; 2 docs) Amended Witness and Exhibit List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 147 List (witness/exhibit/generic), 149 List (witness/exhibit/generic)). (Attachments: # 1 Exh 7_Testimony of Mark Patrick at June 8, 2021 hearing) (Sbaiti, Mazin)

Vol. 28 006130	51	1/25/23	152	(3 pgs) Notice of Appearance and Request for Notice by Louis M. Phillips filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Phillips, Louis)
	52	1/25/23	154	(1 pg) Court admitted exhibits date of hearing January 25, 2023 (RE: related document(s) 128 Motion for withdrawal of reference, filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) (COURT ADMITTED DEFENDANT'S EXHIBITS #1, #2, #3, #4, #5 & #6 OFFERED BY ATTY GREG DEMO). (Edmond, Michael) (Entered: 01/27/2023)
Vol. 32 006925 006942 006960	53	2/6/23	158	Report and recommendation to the U.S. District Court by U.S. Bankruptcy Judge. (RE: related document(s) 128 Motion for withdrawal of reference filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Entered on 2/6/2023 (Okafor, Marcey)
	54	2/6/23	161	(18 pgs) DISTRICT COURT Notice of transmission of report and recommendation in re: renewed motion to withdraw reference. Civil Case # 3:22-cv-02802-S. (RE: related document(s) 158 Report and recommendation to the U.S. District Court by U.S. Bankruptcy Judge. (RE: related document(s) 128 Motion for withdrawal of reference filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Entered on 2/6/2023) (Whitaker, Sheniqua)
	55	4/3/23	165	(1 pg) DISTRICT COURT ORDER: The Court GRANTS the 11 Joint Motion to Transfer Proceeding and Consolidate Before Original Court and the above-numbered case (3:22-cv-02802-S) is transferred to the docket of the Honorable Judge Jane Boyle: Civil case 3:21-cv-00842-B (order referring case). (RE: related document(s) 1 Complaint filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 143 Notice of transmission of motion to withdraw reference). Entered on 4/3/2023 (Whitaker, Sheniqua) Modified on 4/10/2023 (Whitaker, Sheniqua). (Entered: 04/10/2023)

TRANSCRIPTS

006961	56	11/24/21	78	(104 pgs) Transcript regarding Hearing Held 11-23-2021 RE: Motion Hearing. THIS TRANSCRIPT WILL BE MADE ELECTRONICALLY AVAILABLE TO THE GENERAL PUBLIC 90 DAYS AFTER THE DATE OF FILING. TRANSCRIPT RELEASE DATE IS 02/22/2022. Until that time the transcript may be viewed at the Clerk's Office or a copy may be obtained from the official court transcriber. Court Reporter/Transcriber Liberty Transcripts/Dipti Patel, Telephone number 847-848-4907. (RE: related document(s) 75 Hearing held on 11/23/2021. (RE: related document(s) 55 MOTION to Stay filed by CLO Holdco Ltd, Charitable DAF Fund LP (Sbaiti, Mazin) (Entered: 08/26/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #55 ON 08/26/2021 IN U.S.
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			<p>DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)) (Appearances: J. Pomerantz and J. Morris for Highland Defendants; J. Jordan and P. Bessett for HCLOF; M. Sbaiti for Plaintiffs. Nonevidentiary hearing. Motion denied. Mr. Pomerantz to upload order.), 76 Hearing held on 11/23/2021. (RE: related document(s) 47 Motion to strike 43 Appendix in support filed by CLO Holdco, Ltd., Charitable DAF Fund, LP (Bridges, Jonathan) Modified text on 7/16/2021 (mjr). (Entered: 07/15/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #47 ON 07/15/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)) (Appearances: J. Pomerantz and J. Morris for Highland Defendants; J. Jordan and P. Bessett for HCLOF; M. Sbaiti for Plaintiffs. Nonevidentiary hearing. Motion denied (Plaintiffs acknowledged complained-of Appendices it did not relate to Motion to Dismiss). Mr. Pomerantz to upload order.)). Transcript to be made available to the public on 02/22/2022. (Patel, Dipti)</p>
57	2/21/23	164	<p>164 (112 pgs) Transcript regarding Hearing Held 1/25/23 RE: HEARING ON DEFENDANT HIGHLAND CAPITAL MANAGEMENT L.P.'S RENEWED MOTION TO DISMISS COMPLAINT (122) AND STATUS CONFERENCE RE: MOTION FOR WITHDRAWAL OF REFERENCE FILED BY PLAINTIFF CLO HOLDCO, LTD., PLAINTIFF CHARITABLE DAF FUND, LP (128). THIS TRANSCRIPT WILL BE MADE ELECTRONICALLY AVAILABLE TO THE GENERAL PUBLIC 90 DAYS AFTER THE DATE OF FILING. TRANSCRIPT RELEASE DATE IS 05/22/2023. Until that time the transcript may be viewed at the Clerk's Office or a copy may be obtained from the official court transcriber. Court Reporter/Transcriber Dipti Patel, Telephone number 847-848-4907. (RE: related document(s) 155 Hearing held on 1/25/2023. (RE: related document(s) 122 Motion to dismiss adversary proceeding, (Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint) filed by Defendant Highland Capital Management, LP filed by Defendant Highland Capital Management, LP) (Appearances: J. Morris and G. Demo for Movants; L. Phillips and M. Sbaiti for Plaintiffs. Evidentiary hearing (appendices). Court took matter under advisement.), 156 Hearing held on 1/25/2023. (RE: related document(s) 128 Motion for withdrawal of reference. Fee amount \$188, filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) (Appearances: J. Morris and G. Demo for Movants; L. Phillips and M. Sbaiti for Plaintiffs. Evidentiary hearing (appendices). Court announced it will recommend denial to District Court. Court is working on Report & Recommendation.)). Transcript to be made available to the public on 05/22/2023. (Patel, Dipti)</p>

Dated: July 14, 2023

Respectfully submitted,

SBAITI & COMPANY PLLC

/s/ Mazin A. Sbaiti

Mazin A. Sbaiti

Texas Bar No. 24058096

Jonathan Bridges

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was filed electronically through the Court's ECF system, which provides notice to all parties of interest, on this 14th day of July, 2023.

/s/ Mazin A. Sbaiti

Mazin A. Sbaiti

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I. (a) PLAINTIFFS

Charitable DAF Fund, L.P. and CLO Holdco, Ltd.

(b) County of Residence of First Listed Plaintiff Cayman Islands
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)

Sbaiti & Company PLLC, 2200 Ross Avenue, Suite 4900W,
Dallas, TX 75201 (214-432-2899)

DEFENDANTS

Highland Capital Management, L.P., et al

County of Residence of First Listed Defendant Dallas County
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF
THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff
- ☒ 3 Federal Question
(U.S. Government Not a Party)
- ☐ 2 U.S. Government Defendant
- ☐ 4 Diversity
(Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- | | PTF | DEF | | PTF | DEF |
|---|----------------------------|----------------------------|---|---------------------------------------|---------------------------------------|
| Citizen of This State | <input type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State | <input checked="" type="checkbox"/> 4 | <input checked="" type="checkbox"/> 4 |
| Citizen of Another State | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

IV. NATURE OF SUIT (Place an "X" in One Box Only)

Click here for: [Nature of Suit Code Descriptions.](#)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excludes Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Medical Malpractice PERSONAL INJURY <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Management Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Employee Retirement Income Security Act IMMIGRATION <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 835 Patent - Abbreviated New Drug Application <input type="checkbox"/> 840 Trademark <input type="checkbox"/> 880 Defend Trade Secrets Act of 2016 SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 376 Qui Tam (31 USC 3729(a)) <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input checked="" type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit (15 USC 1681 or 1692) <input type="checkbox"/> 485 Telephone Consumer Protection Act <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes
REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	CIVIL RIGHTS <input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 448 Education PRISONER PETITIONS Habeas Corpus: <input type="checkbox"/> 463 Alien Detainee <input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty Other: <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition <input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement			

V. ORIGIN (Place an "X" in One Box Only)

- ☒ 1 Original Proceeding
- ☐ 2 Removed from State Court
- ☐ 3 Remanded from Appellate Court
- ☐ 4 Reinstated or Reopened
- ☐ 5 Transferred from Another District (specify)
- ☐ 6 Multidistrict Litigation - Transfer
- ☐ 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):

18 USC 1961, et seq.

Brief description of cause:

Defendants used wire and mail in relationship to Title 11 proceeding to commit fraud.

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P.

DEMAND \$

CHECK YES only if demanded in complaint:

JURY DEMAND: ☒ Yes ☐ No

VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE Stacey G. Jernigan

DOCKET NUMBER 19-34054-sgj11 NDTX BK

DATE 6/22/21 SIGNATURE OF ATTORNEY OF RECORD [Signature]

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFF _____ JUDGE _____ MAG. JUDGE _____

001711

*Counsel for Charitable DAF Fund, L.P. and
CLO Holdco, Ltd.*

[illegible]

**PLAINTIFFS' RESPONSE TO DEFENDANT HIGHLAND CAPITAL MANAGEMENT, L.P.'S
MOTION FOR AN ORDER TO ENFORCE THE ORDER OF REFERENCE**

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**PLAINTIFFS' RESPONSE TO DEFENDANT HIGHLAND CAPITAL
MANAGEMENT, L.P.'S MOTION FOR AN ORDER TO ENFORCE
THE ORDER OF REFERENCE AND CROSS MOTION**

I.

PRELIMINARY STATEMENT

Plaintiffs The Charitable DAF Fund, L.P. and CLO Holdco Ltd. oppose Defendant Highland Capital Management, L.P.'s Motion for an Order to Enforce the Order of Reference.

This action primarily involves fiduciary duties imposed upon Registered Investment Advisers by the Investment Advisers Act of 1940 ("Advisers Act") and corresponding state law claims for breach of those duties. It also involves causes of action under the civil RICO statute, for which breaches of Advisers Act fiduciary duties serve as the predicate act. As a result, presiding over this action will require extensive consideration of federal laws regulating interstate commerce, which renders withdrawal of the reference to bankruptcy court mandatory under **28 U.S.C. § 157(d)** ("The district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.").

No authority requires this Court to refer this action to the bankruptcy court, only to have it return on a motion for withdrawal of the reference. The opposite is true. *In re Harrah's Entm't*, No. 95-3925, **1996 U.S. Dist. LEXIS 18097**, at *11 (E.D. La. 1996) (Clement, J.) ("Although 'related to' bankruptcy jurisdiction exists over the non-debtor plaintiffs' non-bankruptcy federal securities claims against non-debtor defendants, placing that bankruptcy jurisdiction in the bankruptcy court is inappropriate because plaintiffs would be entitled to a mandatory withdrawal

of the reference. Rather than *waste judicial resources* on a meaningless referral to bankruptcy court, the Court will retain jurisdiction over this suit.” (emphasis added)). Defendant’s arguments to the contrary are unsupported by law.

Defendant’s attempts to smear Plaintiffs with 12 pages of irrelevant facts and a 926-page appendix provide no additional support for the Motion. This action involves matters well outside the experience of bankruptcy courts and requires adjudication in an Article III court.

Because the reasons for denying Defendant’s Motion are also reasons that this Court should withdraw the reference under **28 U.S.C. § 157(d)**, and because deciding the same issue twice would be inefficient and unnecessary, Plaintiffs cross-move for withdrawal of the reference.

II.

BACKGROUND

Defendant’s factual assertions include considerable bluster and vitriol, unsupported by the lengthy materials in its appendix. Importantly, the opening sentence under the heading “Factual Background” is unsupported and false. Memorandum of Law [Doc. 23] ¶ 7. Plaintiffs are not controlled or directed by James Dondero; Plaintiffs are both controlled and directed by Mark Patrick. APP_16-17, 22; *see also* APP_10-14; *see generally* APP_1-22. And Patrick’s testimony to this extent went unchallenged in a hearing before the bankruptcy court earlier this month. *Id.*

Of equal importance is Defendant’s assertion that all aspects of the Harbourvest settlement, including the valuation of the assets involved, were fully disclosed. Memorandum of Law [Doc. 23] ¶ 12. This statement is unsupported by the appendix cite accompanying it, which at most constitutes a self-serving denial. And it is a hotly contested issue between the parties. The impetus to this action, in fact, was Plaintiffs having learned that the value of the assets transferred in the Harbourvest settlement was *not* as represented. Original Complaint (“Complaint” [Doc. 1]), ¶¶ 36-

48. Plaintiffs disagree with much of the remainder of what Defendant presents as “fact” in its Memorandum of Law. But Plaintiffs respectfully submit that none of it is relevant to resolution of the present Motion. And so, for brevity’s sake, Plaintiffs have not elected to engage in a blow-by-blow effort to litigate those issues.

Instead, Plaintiffs’ brief will focus on the nature of their causes of action as that pertains to which court—district or bankruptcy—should preside over them.

III.

ARGUMENT & AUTHORITY

Plaintiffs respectfully submit that Defendant’s Motion should be denied and Plaintiffs’ cross-motion granted for the reasons provided below:

A. The Motion Should Be Denied Because Withdrawal of the Reference Is Mandatory

Because the Complaint relies extensively on and largely is predicated on the Investment Advisers Act of 1940, withdrawal of the reference to the bankruptcy court is mandatory here under **28 U.S.C. § 157(d)**. That statute requires withdrawal of the reference when a proceeding “requires consideration” of non-bankruptcy federal laws regulating interstate commerce:

The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown. The district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.

28 U.S.C. § 157(d); *cf. TMT Procurement Corp. v. Vantage Drilling Co. (In re TMT Procurement Corp.)*, **764 F.3d 512, 523** & n.40 (5th Cir. 2014) (noting bankruptcy court’s “more limited jurisdiction” as a result of its “limited power” under **28 U.S.C. § 157**); *LightSquared Inc. v. Deere & Co.*, **2014 U.S. Dist. LEXIS 14752** (S.D.N.Y. 2014) (quoting *Investor Prot. Corp. v. Bernard*

L. Madoff Inv. Sec. LLC, 454 B.R. 307, 312 (S.D.N.Y. 2011), for the proposition that, “[i]n determining whether withdrawal is mandatory, the Court ‘need not evaluate the merits of the parties’ claims; rather, it is sufficient for the Court to determine that the proceeding will involve consideration of federal non-bankruptcy law’”); *In re Cont’l Airlines Corp.*, 50 B.R. 342, 360 (S.D. Tex. 1985), *aff’d*, 790 F.2d 5th Cir. 1986) (“While that second clause [of § 157(d)] might not apply when some ‘other law’ *only tangentially affects the proceeding*, it surely does apply when federal labor legislation *will likely be material* to the proceeding’s resolution.”) (emphasis added).

Plainly here, the claims in the Complaint at least involve federal laws “regulating organizations or activities affecting interstate commerce.” The Advisers Act and the RICO statute are such laws, and at least the first and fourth counts of the Complaint sound under them. *See, e.g.*, Complaint ¶¶ 57 & n.5, 66, 69, 74 & n.6, 89 (explicitly invoking various provisions of the Advisers Act and accompanying regulations), 114, 117, 131, 132 (invoking the RICO statute). Defendant’s entire argument against withdrawal of the reference thus turns on whether these laws “must be considered.”

It is remarkable that Defendant suggests these statutes need not be considered. The briefing already puts at issue significant, hotly contested issues regarding the interplay of bankruptcy law and the Advisers Act, including

1. Whether Defendant owed fiduciary duties under the Advisers Act that are unwaivable;
2. To whom such duties are owed and whether they were violated;
3. Whether such Advisers Act fiduciary duties can be terminated by a blanket release in a bankruptcy settlement;
4. Whether *res judicata* applies to bar claims for breach of Advisers Act duties that had not yet accrued at the time of the action alleged to have barred them;

5. Whether a contractual jury waiver is enforceable as to claims for breach of unwaivable Advisers Act fiduciary duties;
6. Whether such waivers can be enforced as to non-parties to the waiver;
7. Whether breach of Advisers Act fiduciary duties can serve as a predicate for civil RICO liability under the RICO statute, among other significant legal issues.

Presiding over this action most certainly will require consideration of all these issues.

Before joining the Fifth Circuit, Judge Clement addressed a motion similar to Defendant's during her time in the Eastern District of Louisiana. There, in *In re Harrah's Entm't*, 1996 U.S. Dist. LEXIS 18097, at *7-8 (E.D. La. 1996), she denied a motion to refer a federal securities action to bankruptcy court, despite finding that the bankruptcy court had related-to jurisdiction. Judge Clement wrote,

Although "related to" bankruptcy jurisdiction exists over the non-debtor plaintiffs' non-bankruptcy federal securities claims against non-debtor defendants, placing that bankruptcy jurisdiction in the bankruptcy court is inappropriate because plaintiffs would be entitled to a mandatory withdrawal of the reference. Rather than waste judicial resources on a meaningless referral to bankruptcy court, the Court will retain jurisdiction over this suit.

Id. at *11.

Judge Clement rejected the argument Defendant parrots here that the case would "only involve the simple application of established federal securities laws." *Id.* at *7. Instead, she relied on alleged "violations of several federal securities laws" and the plaintiff's attempt "to hold defendants directly liable and secondarily liable based on a 'controlling person' theory for certain acts and omissions." *Id.* Without any need to analyze how "established" the applicable law might be, Judge Clement concluded, [t]his federal securities litigation involves more than simple application of federal securities laws and will be complicated enough to warrant mandatory withdrawal under § 157(d)." *Id.* (citing *Rannd Res. v. Von Harten (In re Rannd Res.)*, 175 B.R.

393, 396 (D. Nev. 1994), for the proposition that withdrawal of the reference is mandatory where resolution requires more than simple application of federal securities laws, even though that court’s determination was based solely on a review of the complaint’s alleged violations of § 12(2) of the Securities Act of 1933, § 10 of the Securities Exchange Act of 1934, and Rule 10b-5).

This authority applies here. In the Complaint, Plaintiffs allege violations of federal securities law (the Advisers Act), as well as the RICO statute. Deciding even the pending motion to dismiss will require far more than simple application of these laws. Nothing more is necessary to satisfy § 157(d). *Cf. In re IQ Telecomms., Inc.*, 70 B.R. 742, 745 (N.D. Ill. 1987) (“Nevertheless, Central’s second amended complaint easily meets [the § 157(d)] standard. Count 2 of the complaint consists of 76 pages and alleges that 29 individuals and entities violated RICO by engaging in a pattern of mail fraud, 18 U.S.C. § 1341, wire fraud, 18 U.S.C. § 1343, and 139 specific instances of bankruptcy fraud, 18 U.S.C. § 152.”).

Although it is unnecessary here to demonstrate that Plaintiffs’ Advisers Act allegations will require application of *underdeveloped* law, that is certainly the case. As the Third Circuit pointed out in 2013, there is considerable “confusion” in the case law stemming from the fact that federal law (the Advisers Act) provides “the duty and the standard to which investment advisers are to be held,” but “the cause of action is presented as springing from state law.” *Belmont v. MB Inv. Partners, Inc.*, 708 F.3d 470, 502 (3d Cir. 2013). The *Belmont* court further suggests the “confusion [that this situation] engenders may explain why there has been *little development in either state or federal law* on the applicable standards.” *Id.* (emphasis added). “Half a century later,” the *Belmont* court tells us, “courts still look primarily to *Capital Gains Research [Inc.]*, 375 U.S. 180, 192 (1963),] for a description of an investment adviser’s fiduciary duties.” *Id.* at 503;

see also Plaintiffs' Response to Motion to Dismiss (addressing Defendant's erroneous argument that the Advisers Act creates no private right of action).

This observation is bolstered by the necessity of relying extensively on SEC regulations and rulings in the Complaint. *See* Complaint ¶ 57 & n.5 (invoking Investment Advisers Act Release Nos. 3060 (July 28, 2010), and 2106 (Jan. 31, 2003), 66 (17 C.F.R. 275.206(4)-7), 69 (27 C.F.R. part 275 and Rule 10b5-1), 74 & n.6 (Advisers Act Release No. 4197 (Sept. 17, 2015))).

None of the cases Defendant cites even remotely suggests that this type of complicated litigation involving underdeveloped securities laws does not require "consideration" of federal laws. In its lead case, *Beta Operating Co., LLC v. Aera Energy, LLC (In re Mem'l Prod. Partners, L.P.)*, No. H-18-411, [2018 U.S. Dist. LEXIS 161159](#) (S.D. Tex. 2018), the court only held that a state-law contract claim did not require substantial reliance on federal law merely because it involved a trust created under federal law (the OCSLA). *Id.* at *16-17. Moreover, the court's determination appears to have relied primarily, if not solely, on the fact that the bankruptcy court had already submitted a memorandum opinion on the defendant's summary judgment motion, disposing of the case without the need to rely on non-bankruptcy federal law. *Id.* at *14-15, 17.

Next, Defendant cites *UPH Holdings, Inc. v. Sprint Nextel Corp.*, No. A-13-CA-748-SS, [2013 U.S. Dist. LEXIS 189349](#) (W.D. Tex. 2013), which is, at most, only slightly on point. There, the court declined to withdraw the reference with regard to a turnover action under the Bankruptcy Code, with little analysis other than having repeated the parties' arguments. Thus, it is difficult to draw any significance from the decision. But the court seems to rely on the fact that "the primary dispute center[ed] around the existence of a 'regulatory black hole,' a span of time during which the rules concerning how to set [a telecom] intercarrier compensation rate were left undetermined." *Id.* at *6. And for that reason, the court seemed to believe there was little non-bankruptcy federal

law to consider. *Id.* at 7. Here, in contrast, the causes of action do not arise under the Bankruptcy Code, and there is an extensive regulatory scheme that, plainly, must be considered.

The other cases Defendant cites add little to the analysis, except that *S. Pac. Transp. Co. v. Voluntary Purchasing Gps.*, 252 B.R. 373, 382 (E.D. Tex. 2000), holds against Defendant's position, having determined that even the court's "limited" role in approving a CERCLA settlement "necessarily involves the substantial and material consideration of CERCLA and not merely its straightforward application to the facts of this case." *Id.* at 384. The court's reason for this conclusion: its decision "will require the court to examine the unique facts of the case in light of those CERCLA provisions which create the causes of action at issue." *Id.* Of course, the same examination will be necessary here.

Notably, in *S. Pac. Transp.*, the court also stated, "[i]t is well settled that CERCLA is a statute "'rooted in the commerce clause' and is precisely 'the type of law . . . Congress had in mind when it enacted the statutory withdrawal provision [in § 157(d)].'" *Id.* at 382 (quoting *In re Nat'l Gypsum Co.*, 134 B.R. 188, 191 (N.D. Tex. 1991), (alterations in original)). The court could just as easily have been talking about the Advisers Act. See 15 U.S.C. § 80b-1 ("Upon the basis of facts disclosed by the record and report of the Securities and Exchange Commission made pursuant to section 30 of the Public Utility Holding Company Act of 1935, and facts otherwise disclosed and ascertained, it is hereby found that investment advisers are of national concern, in that, among other things—(1) their advice, counsel, publications, writings, analyses, and reports are furnished and distributed, and their contracts, subscription agreements, and other arrangements with clients are negotiated and performed, by the use of the mails and means and instrumentalities of interstate commerce; (2) their advice, counsel, publications, writings, analyses, and reports customarily relate to the purchase and sale of securities traded on national securities exchanges and in interstate

over-the-counter markets, securities issued by companies engaged in business in interstate commerce, and securities issued by national banks and member banks of the Federal Reserve System; and (3) the foregoing transactions occur in such volume as substantially to affect interstate commerce, national securities exchanges, and other securities markets, the national banking system and the national economy.”).

In sum, the Complaint alleges violations of non-bankruptcy federal law. In presiding over the case—indeed, in addressing the currently pending Motion to Dismiss—this Court will have to substantially and materially consider those laws and their interplay with bankruptcy law. Under § 157(d), this requires withdrawal of the reference, and Defendant’s motion should be denied.

B. Automatic Referral Is Unnecessary and Would Be Inefficient

As noted previously, Judge Clement’s ruling in *In re Harrah’s Entm’t*, 1996 U.S. Dist. LEXIS 18097 (E.D. La. 1996), establishes that reference to the bankruptcy court—only to have the reference withdrawn—is unnecessary:

Although “related to” bankruptcy jurisdiction exists over the non-debtor plaintiffs’ non-bankruptcy federal securities claims against non-debtor defendants, placing that bankruptcy jurisdiction in the bankruptcy court is inappropriate because plaintiffs would be entitled to a mandatory withdrawal of the reference. *Rather than waste judicial resources on a meaningless referral to bankruptcy court, the Court will retain jurisdiction over this suit.*

Id. at *11 (emphasis added).

Defendant nonetheless argues this Court must do precisely that. Plaintiffs submit this is both wrong and tenuous, because at this stage of the bankruptcy proceedings—post confirmation—it is unclear that the bankruptcy court has jurisdiction at all.

1. The causes of action asserted by the Plaintiffs do not “arise under,” or “arise in” Title 11 and are not “core” proceedings.

In the Complaint, Plaintiffs do not seek relief that would undo or reverse any settlement approved by the bankruptcy court. Neither do they attempt an end run around the provisions of any approval, Defendant’s protestations notwithstanding. A proper jurisdictional analysis demonstrates Plaintiffs’ causes of action asserted here are not core proceedings within the bankruptcy court’s jurisdiction, for the reasons addressed below.

First of all, “the ‘core proceeding’ analysis is properly applied not to the case as a whole, but as to each cause of action within a case.” *Legal Xtranet, Inc. v. AT&T Mgmt. Servs., L.P.* (*In re Legal Xtranet, Inc.*), 453 B.R. 699, 708–09 (Bankr. W.D. Tex. 2011); *Davis v. Life Inv’rs Ins. Co. of Am.*, 282 B.R. 186, 193 n. 4 (S.D. Miss.2002); *see also In re Exide Techs.*, 544 F.3d 196, 206 (3d Cir. 2008) (“A single cause of action may include both core and non-core claims. The mere fact that a non-core claim is filed with a core claim will not mean the second claim becomes ‘core.’”).

Second, the Fifth Circuit has explained that “§ 157 equates core proceedings with the categories of ‘arising under’ and ‘arising in’ proceedings; therefore, a proceeding is core under section 157 if it invokes a substantive right provided by title 11[, it ‘arises under’ the Bankruptcy Code,] or if it is a proceeding that, by its nature, could arise only in the context of a bankruptcy case[, it ‘arises in’ a bankruptcy case].” *United States. Brass Corp. v. Travelers Ins. Grp., Inc.* (*In re United States Brass Corp.*), 301 F.3d 296, 304 (5th Cir. 2002); *TXMS Real Estate Invs., Inc. v. Senior Care Ctrs., LLC* (*In re Senior Care Centers, LLC*), 622 B.R. 680, 692–93 (Bankr. N.D. Tex. 2020); *Stern v. Marshall*, 564 U.S. 462, 476 (2011).

Third, none of the Plaintiffs’ five causes of action—breach of fiduciary duty under the Advisers Act, breach of contract related to the HCLOF Company Agreement, negligence, RICO, and tortious interference—arise under title 11. That is, none of the substantive rights of recovery are created by federal bankruptcy law. And plainly so. Because “[a]rising under’ jurisdiction [only] involve[s] cause[s] of action created or determined by a statutory provision of title 11,” this is indisputably the case. *Wood v. Wood (In re Wood)*, 825 F.2d 90, 97 (5th Cir.1987) (noting that a proceeding does not “arise under” Title 11 if it does not invoke a substantive right, created by federal bankruptcy law, that could not exist outside of bankruptcy).

Fourth and finally, for similar reasons, none of Plaintiffs’ causes of action “arise in” a bankruptcy case. “Claims that ‘arise in’ a bankruptcy case are claims that by their nature, *not their particular factual circumstance*, could *only* arise in the context of a bankruptcy case.” *Legal Xtranet, Inc.*, 453 B.R. at 708–09 (emphasis added) (citing *Stoe v. Flaherty*, 436 F.3d 209, 216 (3d Cir. 2006)). Defendants contend that, because the factual circumstances giving rise to the causes of action included the HarbourVest Settlement, which was approved by the bankruptcy court, this somehow transforms these causes of action into core claims. *See* Memorandum of Law ¶ 36. But it is the nature of the causes of action that determines whether they are core, not their “particular factual circumstance.”

To illustrate the point, in *Gupta v. Quincy Med. Ctr.*, 858 F.3d 657, 660 (1st Cir. 2017), the bankruptcy court issued a sale order which approved an asset purchase agreement whereby the purchaser became obligated to make certain payments to employees. The purchaser failed to make these payments so the employees sued the purchaser in bankruptcy court, and the bankruptcy rendered a judgment in favor of the employees. On appeal, the district court concluded that the bankruptcy court lacked subject matter jurisdiction over the claims—claims plainly related to and

existing only because of the approved sale order that gave rise to them. The First Circuit affirmed, explaining as follows:

[T]he fact that a matter would not have arisen had there not been a bankruptcy case does not ipso facto mean that the proceeding qualifies as an ‘arising in’ proceeding. Instead, the fundamental question is whether the proceeding by its nature, *not its particular factual circumstance*, could arise only in the context of a bankruptcy case. In other words, it is not enough that Appellants’ claims arose in the context of a bankruptcy case or even that those claims exist only because Debtors (Appellants’ former employer) declared bankruptcy; rather, “arising in” jurisdiction exists only if Appellants’ claims are the type of claims that can only exist in a bankruptcy case.

Id. at 664–65 (emphasis added).

Like the claims in *Gupta*, the Plaintiffs’ causes of action here arose in the context of a transaction approved in a bankruptcy case. But obviously, the causes of action are not “the type of claims that can only exist in a bankruptcy case.” And that ends the analysis. Because Plaintiffs’ causes of action do arise under the Bankruptcy Code, and because they are not claims that could only arise in the context of bankruptcy, this action is not a core proceeding.

2. The Bankruptcy Court has limited post-confirmation “related to” jurisdiction.

Plaintiffs do not contest that this action is related to the bankruptcy case in some fashion. That is why they amended the Civil Cover Sheet to note the bankruptcy matter. But “related to” jurisdiction is a term of art with differing requirements depending on the status of the bankruptcy case. In its current, post-confirmation status, Plaintiffs submit that the bankruptcy court lacks even “related to” jurisdiction over this action.

“Related to” jurisdiction is meant to avoid piecemeal adjudication and promote judicial economy by aiding in the efficient and expeditious resolution of all matters connected to the debtor’s estate. *See Feld v. Zale Corp. (In re Zale Corp.)*, 62 F.3d 746, 752 (5th Cir.1995). Importantly, proceedings merely “related to” a case under title 11 are considered “non-core”

proceedings. *Stern*, 564 U.S. at 477; Collier on Bankruptcy ¶ 3.02[2], p. 3–26, n.5 (16th ed. 2010) (“The terms ‘non-core’ and ‘related’ are synonymous.”). The jurisdictional standard for related to jurisdiction varies depending on whether the proceeding at issue was commenced pre or post confirmation. *See Beitel v. OCA, Inc. (In re OCA, Inc.)*, 551 F.3d 359, 367 at n.10 (5th Cir. 2008). And “after confirmation of a reorganization plan, a stricter post-confirmation standard applies.” *See Bank of La. v. Craig’s Stores of Tex., Inc. (In re Craig’s Stores of Tex., Inc.)*, 266 F.3d 388, 390–91 (5th Cir.2001) (explaining this distinction).

Essentially, “after a debtor’s reorganization plan has been confirmed, the debtor’s estate, and thus bankruptcy jurisdiction, ceases to exist, other than for matters pertaining to the implementation or execution of the plan.” *Id.* 266 F.3d at 390; *Faulkner v. Eagle View Capital Mgmt. (In re The Heritage Org., L.L.C.)*, 454 B.R. 353, 358 (Bankr. N.D. Tex. 2011).

Here, on February 22, 2021, the Bankruptcy Court entered the *Order (I) Confirming the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (as Modified) and (II) Granting Related Relief* [Bankruptcy Court Dkt. No. 1943]. The Complaint was filed on April 12, 2021. Thus, the proceeding was commenced post confirmation.

Defendant does not argue that this action involves “matters pertaining to the implementation or execution of the plan,” as required under *Craig’s Stores*. It does not even cite to that authority. Certainly Plaintiffs can think of no way that their action affects plan implementation or execution. Thus, it seems, Defendant’s argument for bankruptcy court jurisdiction fails entirely.

While Defendant does argue that the bankruptcy court has “related to” jurisdiction as a result of a judgment potentially reducing available cash to pay creditors under the Confirmed Plan, Memorandum of Law ¶ 39, this is precisely the argument that the Fifth Circuit rejected in *Craig’s*

Stores. See *Coho Oil & Gas, Inc. v. Finley Res., Inc. (In re Coho Energy, Inc.)*, 309 B.R. 217, 220 (Bankr. N.D. Tex. 2004) (recognizing the rejection of this argument). As the Fifth Circuit explained: “while Craig’s insists that the status of its contract with the Bank will affect its distribution to creditors under the plan, the same could be said of any other post-confirmation contractual relations in which Craig’s is engaged.” 266 F.3d at 391. And that type of effect does not meet the threshold for post-confirmation related-to jurisdiction.

Defendant also contends that there is post-confirmation “related to” jurisdiction because the lawsuit will delay payments to creditors under the Confirmed Plan. *Id.* But this is just a re-packaged reduction-in-assets argument. The same would be true of any post-confirmation lawsuit against Defendant and does not meet the “more exacting theory of post-confirmation bankruptcy jurisdiction” required by *Craig’s Stores*.

Defendant may argue that the bankruptcy court’s confirmation order has not yet gone effective due to having been appealed. But even if this distinction matters, at minimum, there ought to be a sliding scale toward narrower application of “related to” jurisdiction once the bankruptcy court has issued a final confirmation order. See *Montana v. Goldin (In re Pegasus Gold Corp.)*, 394 F.3d 1189, 1194 (9th Cir. 2005) (stating “post-confirmation bankruptcy court jurisdiction is necessarily more limited than pre-confirmation jurisdiction, and ... the *Pacor* formulation [used to analyze related-to jurisdiction] may be somewhat overbroad in the post-confirmation context”); *Faulkner v. Kornman*, No. 10-301, 2015 Bankr. LEXIS 700 (Bankr. S.D. Tex. 2015) (stating “[t]he general rule is that post-confirmation subject matter jurisdiction is limited”); *Triad Guar. Ins. v. Am. Home Mortg. Inv. Corp (In re Am. Home Mortg. Holding)*, 477 B.R. 517, 529-30 (Bankr. D. Del. 2012) (stating “[a]fter confirmation... the test for ‘related to ’jurisdiction becomes more

stringent if the plaintiff *files* its action after the confirmation date”) (emphasis in original); cf. *rabbd*

v. Rochford, 947 F.2d 829, 832 n.1 (7th Cir. 1991) (noting that “after a bankruptcy is over, it may well be more appropriate to bring suit in district court”).

Finally, the retention of jurisdiction in the confirmed plan does nothing to alter the forgoing analysis. *Travelers Indem. Co. v. Bailey*, 557 U.S. 137, 151 (2009). A bankruptcy court may not “retain” jurisdiction it does not have. *Celotex Corp. v. Edwards*, 514 U.S. 300, 307 (1995). “[N]either the parties nor the bankruptcy court can create § 1334 jurisdiction by simply inserting a retention of jurisdiction provision in a plan of reorganization if jurisdiction otherwise is lacking.” *Valley Historic Ltd. P’ship. v. Bank of N.Y.*, 486 F.3d 831, 837 (4th Cir. 2007); see also *Zerand–Bernal Group, Inc. v. Cox*, 23 F.3d 159, 164 (7th Cir. 1994) (“[O]rders approving [a] bankruptcy sale [or] . . . plan of reorganization . . . [cannot] confer jurisdiction. A court cannot write its own jurisdictional ticket.”).

C. The Res Judicata Argument Is Not Relevant to the Relief Sought in This Motion

Defendant’s *res-judicata* argument does not belong in this Motion. It has no bearing on the issue presented here. This is because, to begin with, *res judicata* is always addressed by the second court in the second action. See, e.g., *Memphis-Shelby Cty. Airport Auth. v. Braniff Airways, Inc. (In re Braniff Airways, Inc.)*, 783 F.2d 1283 (5th Cir. 1986); *Davis v. Dall. Area Rapid Transit*, 383 F.3d 309 (5th Cir. 2004); *Travelers Ins. Co. v. St. Jude Hosp.*, 37 F.3d 193 (5th Cir. 1994); *Applewood Chair Co. v. Three Rivers Planning & Dev. Dist. (In re Applewood Chair Co.)*, 203 F.3d 914 (5th Cir. 2000); *Risby v. United States*, No. 3:04-CV-1414-H, 2006 U.S. Dist. LEXIS 8798 (N.D. Tex. 2006); *Chalmers v. Gavin*, 2002 U.S. Dist. LEXIS 5636, 2002 WL 511512 (N.D. Tex. Apr. 2, 2002); *Reynolds v. Tombone*, Civil No. 3:96-CV-3330-BC, 1999 U.S. Dist. LEXIS

9995 (N.D. Tex. June 24, 1999). Moreover, *res judicata* is not a basis for referring a matter to the bankruptcy court, and Defendant offers no authority for the notion that it is.

Instead of arguing that its *res judicata* affirmative defense should result in referral to the bankruptcy court, Defendant argues that “the Complaint . . . must be dismissed on the basis of *res judicata*. Memorandum of Law at 24; *see also id.* at 23 (subheading: “The Complaint Is Barred by the Doctrine of Res Judicata”). But dismissal is the relief sought in Defendant’s pending Motion to Dismiss, which raises the same *res judicata* arguments asserted here. Plaintiffs therefore will address *res judicata* in their concurrently filed response to the Motion to Dismiss.

D. The Local Rule 3.3 Argument Is Unavailing

Defendant argues that Plaintiffs failed to disclose the related bankruptcy case by omitting it on the Civil Cover Sheet accompanying the Complaint, although Defendant does not request that the Court take any action as a result of the omission.

Plaintiffs submit that the omission was inadvertent, harmless, and has been corrected. The omission was inadvertent in that Plaintiffs intended to identify the Highland bankruptcy on the Civil Cover Sheet but inadvertently failed to do so and have since submitted an amended Civil Cover Sheet correcting the error. [Doc. 33]. The omission was harmless because the Complaint discloses both the bankruptcy and its relationship to the present action, a disclosure that was supplemented by Plaintiffs’ Motion for Leave to Amend, which provides additional detail regarding the related bankruptcy case and attaches two orders issued in that case. Complaint ¶¶ 15-36; Motion for Leave and Exhibits [Docs. 6, 6-1, 6-2].

Defendant refers the Court to *Kuzmin v. Thermaflo.*, No. 2:07-cv-00554-TJW, 2009 U.S. Dist. LEXIS 42810, at *4-7 (E.D. Tex. May 20, 2009), for the proposition that failing to disclose a related case is a violation of the Local Rules. In *Kuzmin*, however, the plaintiff was faulted for

numerous failings, including (1) the failure to submit a Civil Cover Sheet at all, (2) the failure, upon receiving notice of the deficiency, to provide sufficient information for the clerk to identify the related action, and (3) filing a third action without any information indicating it was related to the previous two. *Id.* at *5. The court continued, finding that plaintiff's counsel in that case had also committed violations of the mandate for professionalism in the Texas Lawyer's Creed by failing to communicate about the filings with known counsel for the opposition. *Id.* at *6-12.

Plaintiffs respectfully submit that the *Kuzmin* case is inapposite. Plaintiffs here did not fail to submit a Civil Cover Sheet. They corrected the omission after it was brought to their attention, and their original filing did disclose, in the text of the Complaint, the information that was inadvertently omitted from the Civil Cover Sheet. Further, Plaintiffs here communicated promptly with counsel for the Defendant regarding the action and the related bankruptcy case by asking the Defendant's counsel in the related action if they would accept service of the Complaint and whether they objected to Plaintiffs' Motion for Leave to Amend.

These circumstances, Plaintiffs submit, do not rise to the level of a violation of Local Rule 3.3 or, alternatively, they constitute a harmless, corrected error at most. Plaintiffs ask the Court to treat them as no worse than Defendant's failure to include a certificate of conference with this Motion (Local Rule 7(h)), or its failure to confer with Plaintiffs' counsel before filing it (Local Rule 7(a)), or its failure to paginate its appendix consecutively (Local Rule 7(i)).

Finally, Plaintiffs submit that the omission complained of does not justify or even relate to the relief sought in this Motion.

E. The Litigious-Nature Argument Is Likewise Unavailing

Defendant's claims regarding James Dondero's litigiousness are likewise unconnected to the relief they are requesting here. Dondero is not a party to this case. Neither does he control either Plaintiff. APP_16-17.

For this argument, Defendant relies solely on *Burch v. Freedom Mortg. Corp. (In re Burch)*, 835 F. App'x 741 (5th Cir. 2021), and 28 U.S.C. § 1927 ("Any attorney or other person . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct."). Neither authority addresses whether jurisdiction appropriately lies here or in the bankruptcy court. It appears that they are cited here merely to raise the specter of potential sanctions.

Plaintiffs respectfully submit that their claims here have merit and are not frivolous. And Defendant's contrary position can and should be addressed in connection with Defendant's pending motion under Rule 12(b)(6) rather than in connection with this Motion.

F. Plaintiffs' Cross-Motion Should Be Granted

For the same reasons Defendant's Motion should be denied, Plaintiffs' cross-motion should be granted. Presiding over this action will require consideration of non-bankruptcy federal laws regulating interstate commerce, as well as their interplay with the Bankruptcy Code. Thus, the mandatory-withdrawal-of-the-reference provision of 28 U.S.C. § 157(d) applies.

Moreover, the bankruptcy court's jurisdiction is limited, both by § 157(d) and by plan confirmation. See *TMT Procurement Corp. v. Vantage Drilling Co. (In re TMT Procurement Corp.)*, 764 F.3d 512, 523 & n.40 (5th Cir. 2014) (noting bankruptcy court's "more limited jurisdiction" as a result of its "limited power" under 28 U.S.C. § 157); *Bank of La. v. Craig's*

Stores of Tex., Inc. (In re Craig's Stores of Tex., Inc.), 266 F.3d 388, 390–91 (5th Cir.2001) (explaining that, “after confirmation of a reorganization plan, a stricter post-confirmation standard applies,” and “after a debtor’s reorganization plan has been confirmed, the debtor’s estate, and thus bankruptcy jurisdiction, ceases to exist, other than for matters pertaining to the implementation or execution of the plan.”).

No authority requires this Court to refer this action to the bankruptcy court, only to have it return on a motion for withdrawal of the reference. The opposite is true. *In re Harrah's Entm't*, No. 95-3925, 1996 U.S. Dist. LEXIS 18097, at *11 (E.D. La. 1996) (Clement, J.). Thus, this Court should deny Defendant’s Motion, withdraw the reference under § 157(d), and retain jurisdiction over this action.

VI.

CONCLUSION

For all of these reasons, Plaintiffs respectfully submit Defendant’s Motion should be denied.

Dated: June 29, 2021

Respectfully submitted,

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/s Jonathan Bridges

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

CHARITABLE DAF FUND, L.P.
and CLO HOLDCO, LTD.,
directly and derivatively,

Plaintiffs,

V.

**HIGHLAND CAPITAL MANAGEMENT,
L.P., HIGHLAND HCF ADVISOR, LTD.,
and HIGHLAND CLO FUNDING, LTD.,
*nominally,***

Defendants.

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CAUSE NO. 3:21-cv-00842-B

**APPENDIX IN SUPPORT OF PLAINTIFFS' RESPONSE TO HIGHLAND CAPITAL
MANAGEMENT, L.P.'S MOTION FOR AN ORDER TO ENFORCE THE ORDER OF
REFERENCE AND CROSS-MOTION**

App'x No.	Description	Bates Range
1	Declaration of Jonathan Bridges	APP_002
2	Excerpts from June 8, 2021 Transcript of Hearing of Show Cause, Motion to Modify Order Authorizing Retention of James Seery, and Motion for Order Further Extending the Period Within Which Debtor May Remove Actions	APP_003 - 019
3	DAF/CLO Holdco Structure Chart introduced as Exhibit 25 in Hearing of Show Cause, Motion to Modify Order Authorizing Retention of James Seery, and Motion for Order Further Extending the Period Within Which Debtor May Remove Actions	APP_020 - 022

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

CHARITABLE DAF FUND, L.P.
and CLO HOLDCO, LTD.,
directly and derivatively,

Plaintiffs,

V.

**HIGHLAND CAPITAL MANAGEMENT,
L.P., HIGHLAND HCF ADVISOR, LTD.,
and HIGHLAND CLO FUNDING, LTD.,
*nominally,***

Defendants.

DECLARATION OF JONATHAN BRIDGES

1. My name is Jonathan Bridges. I am over twenty-one years old and fully competent in all respects to make this Declaration.

2. I am a partner at Sbaiti & Company PLLC, and I represent Plaintiffs Charitable DAF Fund, L.P. and CLO Holdco, Ltd. in this matter. The facts stated in this Declaration are based on my personal knowledge.

3. Attached as Exhibit 1 is a true and correct copy of excerpts from a June 8, 2021 transcript of a hearing before the bankruptcy court at which Mr. Mark Patrick provided sworn testimony regarding Plaintiffs, his right to control them, and Mr. James Dondero's lack of any such right.

4. Attached as Exhibit 2 is a true and correct copy of Exhibit 25 from that same hearing, which is proved up by Mr. Patrick's testimony in Exhibit 1, and which constitutes an organizational chart depicting the corporate relationships described in the testimony.

Executed on June 29, 2021.

/s/ Jonathan Bridges
Jonathan Bridges

EXHIBIT 1

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

In Re:) **Case No. 19-34054-sgj-11**
) Chapter 11
)
HIGHLAND CAPITAL) Dallas, Texas
MANAGEMENT, L.P.,) Tuesday, June 8, 2021
) 9:30 a.m. Docket
Debtor.)
) - SHOW CAUSE HEARING (2255)
) - MOTION TO MODIFY ORDER
) AUTHORIZING RETENTION OF
) JAMES SEERY (2248)
) - MOTION FOR ORDER FURTHER
) EXTENDING THE PERIOD WITHIN
) WHICH DEBTOR MAY REMOVE
) ACTIONS (2304)

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE STACEY G.C. JERNIGAN,
UNITED STATES BANKRUPTCY JUDGE.

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Proceedings recorded by electronic sound recording;
transcript produced by transcription service.

Patrick - Direct

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1 our witness stand and I'll swear you in. Please raise your
2 right hand.

3 (The witness is sworn.)

4 THE COURT: All right. Please take a seat.

5 MARK PATRICK, DEBTOR'S WITNESS, SWORN

6 DIRECT EXAMINATION

7 BY MR. MORRIS:

8 Q Good afternoon, Mr. Patrick.

9 A Good afternoon.

10 Q Can you hear me okay?

11 A Yes, I can.

12 Q Okay. You have before you several sets of binders.

13 They're rather large. But when I deposed you on Friday, we
14 did that virtually. Now, I may direct you specifically to one
15 of the binders or one of the documents from time to time, so I
16 just wanted you to know that those were in front of you and
17 that I may be doing that.

18 Mr. Patrick, since March 1st, 2001 [sic], you've been
19 employed by Highland Consultants, right?

20 A I believe the name is Highgate Consultants doing business
21 as Skyview Group.

22 Q Okay. And that's an entity that was created by certain
23 former Highland employees, correct?

24 A That is my understanding, correct.

25 Q And your understanding is that Mr. Dondero doesn't have an

Patrick - Direct

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1 Q Okay. Let's talk for a little bit about the line of
2 succession for the DAF and CLO Holdco. Can we please go to
3 Exhibit 25, which is in the other binder? It's in the other
4 binder, sir.

5 (Pause.)

6 Q I guess you could look on the screen or you can look in
7 the binder, whatever's easier for you.

8 A Yeah. I prefer the screen. I prefer the screen.

9 Q Okay.

10 A It's much easier.

11 Q All right. We've got it in both spots. But do you have
12 Exhibit 25 in front of you, sir?

13 A Yes, I do.

14 Q All right. Do you know what it is?

15 A This is the organizational chart depicting a variety of
16 charitable entities as well as entities that are commonly
17 referred to the DAF. However, when I look at this chart, I do
18 not look at and see just boxes, what I see is the humanitarian
19 effort that these boxes represent.

20 MR. MORRIS: Your Honor, may I interrupt?

21 THE COURT: You may.

22 MR. MORRIS: Okay.

23 BY MR. MORRIS:

24 Q I appreciate that, and when your lawyers get up to ask you
25 questions, I bet they'll want to know just what you were about

Patrick - Direct

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1 to tell me. But I just want to understand what this chart is.

2 This chart is the DAF, CLO Holdco, structure chart. Correct?

3 A Correct.

4 Q Okay. And you were personally involved in creating this
5 organizational structure, correct?

6 A I -- yes.

7 Q Okay. And from time to time, the Charitable DAF Holdco
8 Limited distributes cash to the foundations that are above it.
9 Correct?

10 A Correct.

11 Q All right. I want to talk a little bit more specifically
12 about how this happens. The source of the cash distributed by
13 Charitable DAF Holdco Limited is CLO Holdco, Ltd., that
14 entity, the Cayman Islands entity near the bottom. Correct?

15 MR. ANDERSON: Your Honor, I have an objection.
16 Completely irrelevant. I'm objecting on relevance grounds.
17 This has nothing to do with the contempt proceeding. We've
18 already gone over that he authorized the filing of the
19 complaint, that he authorized the filing of the motion to
20 amend. It's all in the record. This is completely irrelevant
21 at this point.

22 THE COURT: Okay. Relevance objection. Your
23 response?

24 MR. MORRIS: I believe that it's relevant to the
25 Debtor's motion to hold Mr. Dondero in contempt for pursuing

Patrick - Direct

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1 transaction, because I was not a part of it -- that by Mr.
2 Dondero holding that GP interest, that it would be -- the
3 Plaintiffs, if you will, would be an affiliate entity for
4 regulatory purposes, and so he advised that if he -- if Mr.
5 Dondero transferred his GP interest to Mr. Scott, it would no
6 longer be an affiliate, is my recollection.

7 Q Okay. You didn't appoint Mr. Scott, did you?

8 A No.

9 Q That was Mr. Dondero. Is that right?

10 A Yes.

11 Q Okay. Let's go to 2021. Let's come back to the current
12 time. Sometime in February, Mr. Scott called you to ask about
13 the mechanics of how he could resign. Correct?

14 A That is correct.

15 Q But the decision to have you replace Mr. Scott was not
16 made until March 24th, the day you sent an email to Mr. Scott
17 with the transfer documents. Correct?

18 A That is correct.

19 Q And it's your understanding that he could have transferred
20 the management shares and control of the DAF to anyone in the
21 world. Correct?

22 A Correct.

23 Q That's what the docu... that he had the authority under
24 the documentation, as you understood it, to freely trade or
25 transfer the management shares. Correct?

Patrick - Direct

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1 A Wait. Now, let's be precise here.

2 Q Okay.

3 A Are you talking about the GP interests or the management
4 shares held by Charitable DAF Holdco, Ltd.?

5 Q Let's start with the management shares. Can you explain
6 to the Court what the management shares are?

7 MR. ANDERSON: Your Honor? Hang on one second. Your
8 Honor, I want to object again on relevance. We're going way
9 beyond the scope of the contempt issue, whether or not --

10 MR. MORRIS: This is about control.

11 MR. ANDERSON: -- the motion to amend somehow
12 violated the prior order of this Court. Getting into the
13 management structure, transfer of shares, that's way outside
14 the bounds. I object on relevance.

15 THE COURT: Okay. Relevance objection?

16 MR. MORRIS: Your Honor, they have probably 30
17 documents, maybe 20 documents, on their exhibit list that
18 relate to management and control. I'm asking questions about
19 management and control. Okay? This is important, again, to
20 (a) establish his authority, but (b) the circumstances under
21 which he came to be the purported control person.

22 THE COURT: Okay. Overruled. Go ahead.

23 THE WITNESS: It might be helpful to look at the
24 organizational chart, but if not -- but I'll describe it to
25 you again. With respect to the entity called --

Patrick - Direct

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1 MR. MORRIS: Hold on one second. Can we put up the
2 organizational chart again, Ms. Canty, if you can? There you
3 go.

4 THE WITNESS: Okay. So with respect to the
5 Charitable DAF Holdco, Ltd., it is my understanding that Mr.
6 Scott, he organized that entity when he was the independent
7 director of the Charitable Remainder Trust, and he caused the
8 issuance of the management shares to be issued to himself.
9 And then those are, again, noneconomic shares, but they are
10 control shares over that entity.

11 And I think, to answer your question, is -- it -- he alone
12 decides who he can transfer those shares to.

13 BY MR. MORRIS:

14 Q Do I have this right, that whoever holds the noneconomic
15 management shares has the sole authority to appoint the
16 representatives for each of the Charitable DAF entities and
17 CLO Holdco? It's kind of a magic ticket, if you will?

18 A It -- I think there's a -- the answer really is no from a
19 legal standpoint, because Charitable DAF Holdco is a limited
20 partner in Charitable DAF Fund, LP, so it does not have
21 authority -- authority under all -- the respective entities
22 underneath that. It could cause a redemption, if you will, of
23 Charitable DAF Fund. And so, really, the authority -- the
24 trickle-down authority that you're referencing is with respect
25 to his holding of the Charitable DAF GP, LLC interest. It's a

Patrick - Direct

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1 member-managed Delaware limited liability company. And from
2 that, he -- that authority kind of trickles down to where he
3 can appoint directorships.

4 Q All right. I think I want to just follow up on that a
5 bit. Which entity is the issuer of the manager shares, the
6 management shares?

7 A Yeah, the -- per the organizational chart, it is accurate,
8 it's the Charitable DAF Holdco, Ltd. which issued the
9 management shares to Mr. Scott.

10 Q Okay. And that's why you have the arrow from Mr. Scott
11 into that entity?

12 A Correct.

13 Q And do those -- does the holder of the management shares
14 have the authority to control the Charitable DAF Holdco, Ltd.?

15 A Yes.

16 Q Okay. And as the control person for the Charitable DAF
17 Holdco, Ltd., they own a hundred -- withdrawn. Charitable DAF
18 Holdco Limited owns a hundred percent of the limited
19 partnership interests of the Charitable DAF Fund, LP.

20 Correct?

21 A Correct.

22 Q And so does the holder of that hundred percent limited
23 partnership interest have the authority to decide who acts on
24 behalf of the Charitable DAF Fund, LP?

25 A I would say no. I mean, you know, just -- I would love to

Patrick - Direct

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1 read the partnership agreement again. But I, conceptually,
2 what I know with partnerships, I would say the limited partner
3 would not. It would be through the Charitable DAF GP, LLC
4 interest.

5 Q The one on the left, the general partner?

6 A The general partner.

7 Q I see. So when Mr. Scott transferred to you the one
8 hundred percent of the management shares as well as the title
9 of the managing member of the Charitable DAF GP, LLC, did
10 those two events give you the authority to control the
11 entities below it?

12 A Yes.

13 Q Thank you. And so prior to the time that he transferred
14 those interests to you, is it your understanding that Mr.
15 Scott had the unilateral right to transfer those interests to
16 anybody in the world?

17 A Yes.

18 Q Okay. And you have that right today, don't you?

19 A Yes, I do.

20 Q If you wanted, you could transfer it to me, right?

21 A Yes, I could.

22 Q Okay. But of all the people in the world, Mr. Scott
23 decided to transfer the management shares and the managing
24 member title of the DAF GP to you, correct?

25 A Restate that question again?

Patrick - Direct

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1 Q Of all the people in the world, Mr. Scott decided to
2 transfer it to you, correct?

3 A Yeah. Mr. Scott transferred those interests to me.

4 Q Okay. And you accepted them, right?

5 A Yes.

6 Q You're not getting paid anything for taking on this
7 responsibility, correct?

8 A I am not paid by any of the entities depicted on this
9 chart.

10 Q And Mr. Scott used to get \$5,000 a month, didn't he?

11 A I believe that's what he testified to.

12 Q Yeah. But you don't get anything, right?

13 A Correct.

14 Q In fact, you get the exact same salary and compensation
15 from Skyview that you had before you became the authorized
16 representative of the DAF entities and CLO Holdco. Correct?

17 A Correct.

18 MR. MORRIS: Okay. Your Honor, if I may just take a
19 moment, I may be done.

20 THE COURT: Okay.

21 (Pause.)

22 MR. MORRIS: Your Honor, I have no further questions.

23 THE COURT: All right. Pass the witness. Any
24 examination of the witness?

25 CROSS-EXAMINATION

1 Q So did Mr. Dondero both have the control shares of the GP,
2 LLC and DAF Holdco Limited?

3 A No, I believe not. I believe he only held the Charitable
4 DAF GP interest and that Mr. Scott at all times held the
5 Charitable DAF Holdco, LTD interest, until he decided to
6 transfer it to me.

7 Q Can you just tell us how Mr. Scott came to hold the
8 control shares of the Charitable DAF Holdco, LTD?

9 A When he was the independent trustee of the Charitable
10 Remainder Trust, he caused that -- the creation of that
11 entity, and that's how he became in receipt of those
12 management shares.

13 Q And does the Charitable DAF GP, LLC have any control over
14 Charitable DAF Fund, LP's actions or activities?

15 A Yes, it does.

16 Q What kind of control is that?

17 A I would describe complete control. It's the managing
18 member of that entity and can -- and effectively owns, you
19 know, the hundred percent interest in the respective
20 subsidiaries, and so the control follows down.

21 Q And when did Mr. Scott replace Mr. Dondero as the GP --
22 managing member of the GP?

23 A Well, I think as the -- and Mr. Morris had shown me with
24 respect to that transfer occurring on March 2012.

25 Q So nine years ago?

Patrick - Cross

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1 A Yes.

2 Q Does Mr. Dondero today exercise any control over the
3 activities of the DAF Charitable -- the Charitable DAF, GP or
4 the Charitable DAF Holdco, LTD?

5 A No.

6 Q Is he a board member of sorts for either of those
7 entities?

8 A No.

9 Q Is he a board members of CLO Holdco?

10 A No.

11 Q Does he have any decision-making authority at CLO Holdco?

12 A None.

13 Q The decision to authorize the lawsuit and the decision to
14 authorize the motion that you've been asked about, who made
15 that authorization?

16 A I did.

17 Q Did you have to ask for anyone's permission?

18 A No.

19 MR. SBAITI: No more questions, Your Honor.

20 THE COURT: Okay. Any -- I guess Mr. Taylor, no.

21 All right. Any redirect?

22 REDIRECT EXAMINATION

23 BY MR. MORRIS:

24 Q Since becoming the authorized representative of the
25 Plaintiffs, have you ever made a decision on behalf of those

1 entities that Mr. Dondero disagreed with?

2 A I have made decisions that were adverse to Mr. Dondero's
3 financial -- financial decision. I mean, financial interests.
4 Whether he disagreed with them or not, I don't -- he has not
5 communicated them to me. But they have been adverse, at least
6 two very strong instances.

7 Q Have you ever -- have you ever talked to him about making
8 a decision that would be adverse to his interests? Did he
9 tell -- did --

10 A I didn't -- I don't -- I did not discuss with him prior to
11 making the decisions that I made that were adverse to his
12 economic interests.

13 MR. MORRIS: Okay. No further questions, Your Honor.

14 THE COURT: Any further examination? Recross on that
15 redirect?

16 MR. ANDERSON: No further questions.

17 MR. SBAITI: No further questions, Your Honor.

18 MR. ANDERSON: Sorry.

19 THE COURT: Nothing?

20 MR. ANDERSON: I think we're good.

21 THE COURT: Okay. I have one question, Mr. Patrick.
22 My brain sometimes goes in weird directions.

23 EXAMINATION BY THE COURT

24 THE COURT: I'm just curious. What are these Cayman
25 Island entities, charitable organizations formed in the Cayman

1 THE COURT: I guess I'll see you Thursday on the
2 WebEx. Thank you.

3 THE CLERK: All rise.

4 (Proceedings concluded at 6:00 p.m.)

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CERTIFICATE

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I certify that the foregoing is a correct transcript from
the electronic sound recording of the proceedings in the
above-entitled matter.

23

/s/ Kathy Rehling

06/09/2021

24

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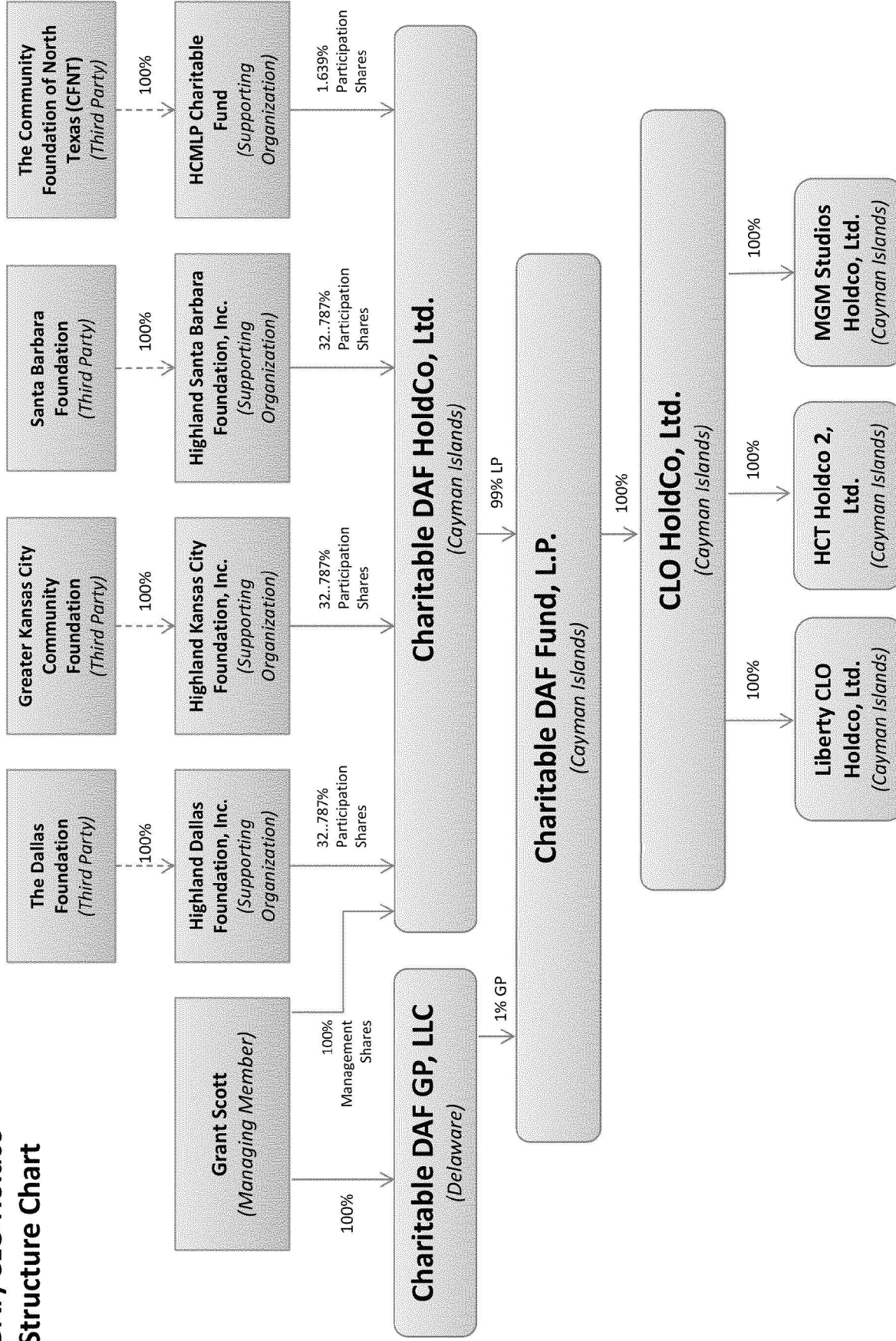
Kathy Rehling, CETD-444
Certified Electronic Court Transcriber

Date

EXHIBIT 2

EXHIBIT 25

DAF/CLO Holdco Structure Chart



001759

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

**CHARITABLE DAF FUND, L.P.
and CLO HOLDCO, LTD.,
*directly and derivatively,***

Plaintiffs,

V.

**Highland CAPITAL MANAGEMENT,
L.P., Highland HCF ADVISOR, LTD.,
and Highland CLO FUNDING, LTD.,
*nominally,***

Defendants.

§ § § § § § § § § § § § § § § §

CAUSE NO. 3:21-cv-00842-B

PLAINTIFFS' RESPONSE TO MOTION TO DISMISS COMPLAINT

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TABLE OF AUTHORITIES

Cases

<i>Abraham v. Singh</i> , 480 F.3d 351 (5th Cir. 2007)	25, 27
<i>Aloe Creme Labs., Inc. v. Francine Co.</i> , 425 F.2d 1295 (5th Cir. 1970)	19
<i>Applewood Chair Co. v. Three Rivers Planning & Dev. Dist. (In re Applewood Chair Co.)</i> , 203 F.3d 914 (5th Cir. 2000)	6-7
<i>Ashcroft v. Iqbal</i> , 556 U.S. 662 (2009).....	5
<i>Basic Capital Mgmt. v. Dynex Commer., Inc.</i> , 402 S.W.3d 257 (Tex. App.—Dallas 2013).....	24
<i>Bell Atlantic Corp. v. Twombly</i> , 550 U.S. 544 (2007).....	5
<i>Belmont v. MB Inv. Partners, Inc.</i> , 708 F.3d 470 (3d Cir. 2013).....	17, 18
<i>Benson & Ford, Inc. v. Wanda Petroleum Co.</i> , 833 F.2d 1172 (5th Cir. 1987)	11
<i>Bridge v. Phx. Bond & Indem. Co.</i> , 553 U.S. 639 (2008).....	32, 33
<i>Chalmers v. Gavin</i> , No. 3:01-CV-528-H, 2002 U.S. Dist. LEXIS 5636 (N.D. Tex., Apr. 2, 2002)	8
<i>Collins v. Morgan Stanley Dean Witter</i> , 224 F.3d 496 (5th Cir. 2000)	5
<i>Conn. Gen. Life Ins. Co. v. United Cos. Fin. Corp. (In re Foster Mortg. Corp.)</i> , 68 F.3d 914 (5th Cir. 1995)	8
<i>Crowe v. Henry</i> , 43 F.3d 198 (5th Cir. 1995)	26, 27
<i>Cudd Pressure Control, Inc. v. Roles</i> , 328 F. App'x 961 (5th Cir. 2009).....	14

<i>Davis v. Dall, Area Rapid Transit,</i> 383 F.3d 309 (5 th Cir. 2004)	6
<i>Douglass v. Beakley,</i> 900 F. Supp. 2d 736 (N.D. Tex. 2012)	16
<i>Dussouy v. Gulf Coast Inv. Corp.,</i> 660 F.2d 594 (5th Cir. 1981)	34
<i>Fuqua v. Taylor,</i> 683 S.W. 2d 735 (Tex. App.—Dallas 1984).....	16
<i>Goldenson v. Steffens,</i> No. 2:10-cv-00440-JAW, 2014 U.S. Dist. LEXIS 201258 (D. Me. 2014).....	17
<i>Hall v. GE Plastic Pac. PTE Ltd.,</i> 327 F.3d 391 (5th Cir. 2003)	13
<i>Hand v. Dean Witter Reynolds, Inc.,</i> 889 S.W. 2d 483 (Tex. App.—Houston [14th Dist.] 1994).....	16
<i>Harrison Co. LLC v. A-Z Wholesalers, Inc.,</i> No. 3:19-CV-1057-B, 2021 U.S. Dist. LEXIS 44534 (N.D. Tex. 2021)	12-13
<i>Hishon v. King & Spalding,</i> 467 U.S. 69 (1984).....	5
<i>In re Alfonso,</i> No. 16-51448-RBK, 2019 Bankr. LEXIS 2816 (Bankr. W.D. Tex. 2019)	8
<i>In re Katrina Canal Breaches Litigation,</i> 495 F.3d 191 (5th Cir. 2007)	26
<i>In re Texas Extrusion Corp.,</i> 844 F.2d 1142 (5th Cir. 1988)	8
<i>Jackson v. Dear and Seven Others,</i> [2013 GLR 167] Guernsey Royal Ct.	14
<i>Jacobsen v. Osborne,</i> 133 F.3d 315 (5th Cir. 1998)	35
<i>Laird v. Integrated Res.,</i> 897 F.2d 826 (5th Cir. 1990)	16, 17

<i>Lampkin v. UBS Painewebber, Inc. (In re Enron Corp. Sec., Derivative & ERISA Litig.),</i> 238 F. Supp.3d 799 (S.D. Tex. 2017)	16
<i>Leffall v. Dallas Indep. Sch. Dist.,</i> 28 F.3d 521 (5th Cir. 1994)	35
<i>Lovelace v. Software Spectrum,</i> 78 F.3d 1015 (5th Cir. 1996)	11
<i>Memphis-Shelby Cty. Airport Auth. v. Braniff Airways, Inc. (In re Braniff Airways, Inc.)</i> 783 F.2d 1283 (5 th Cir. 1986)	5-6
<i>Nabors Drilling, U.S.A., Inc. v. Escoto,</i> 288 S.W.3d 401 (Tex. 2009).....	25
<i>Navigant Consulting, Inc. v. Wilkinson,</i> 508 F.3d 277 (5th Cir. 2007)	14
<i>Official Comm. of Unsecured Creditors v. Moeller (In re Age Ref., Inc.),</i> 801 F.3d 530 (5th Cir. 2015)	9
<i>Petras v. Mole,</i> Civil Action No. 3:11-CV-1402-N, 2012 U.S. Dist. LEXIS 207745 (N.D. Tex. 2012).....	11-12
<i>Pool v. Johnson,</i> Civil Action No. 3:01-CV-1168-L, 2002 U.S. Dist. LEXIS 6613 (N.D. Tex. 2002).....	15
<i>R.A.G.S. Couture, Inc. v. Hyatt,</i> 774 F.2d 1350 (5th Cir.1985)	33
<i>Reneker v. Offill,</i> No. 3:08-cv-1394-D, 2010 U.S. Dist. LEXIS 38526 (N.D. Tex. Apr. 19. 2010).....	11
<i>Reynolds v. Tombone,</i> Civil No. 3:96-CV-3330-BC, 1999 U.S. Dist. LEXIS 9995 (N.D. Tex., June 24, 1999).....	8
<i>Risby v. United States,</i> No. 3:04-CV-1414-H, 2006 U.S. Dist. LEXIS 8798 (N.D. Tex. 2006)	7, 10
<i>Riverwoods Chappaqua Corp. v. Marine Midland Bank, N.A.,</i> 30 F.3d 339 (2d Cir. 1994).....	27

<i>Sassen v. Tanglegrove Townhouse Condo. Ass’n</i> , 877 S.W.2d 489 (Tex. App.—Texarkana 1994).....	15
<i>Scanlan v. Texas A&M Univ.</i> , 343 F.3d 533 (5th Cir. 2003)	5
<i>S.E.C. v. Blavin</i> , 760 F.2d 706 (6 th Cir. 1985)	17, 20
<i>SEC v. Capital Gains Research Bureau, Inc.</i> , 375 U.S. 180 (1963).....	17, 22
<i>Snowden v. Wells Fargo Bank, N.A.</i> , No. 3:18-cv-1797-K-BN, 2019 U.S. Dist. LEXIS 23557 (N.D. Tex. 2019).....	24
<i>State ex rel. Udall v. Colonial Penn Ins. Co.</i> , 112 N.M. 123, 812 P.2d 777 (N.M. 1991).....	17
<i>Strougo ex rel. Brazil Fund v. Scudder, Stevens & Clark, Inc.</i> , 964 F. Supp. 783 (S.D.N.Y. 1997).....	17
<i>Strougo v. Bassini</i> , 282 F.3d 162 (2d Cir. 2002).....	17
<i>Taylor v. Charter Med. Corp.</i> , 162 F.3d 82 (5th Cir. 1998)	11
<i>Tigue Inv. Co. v. Chase Bank of Tex., N.A.</i> , Civil Action No. 3:03-CV-2490-N, 2004 U.S. Dist. LEXIS 27582 (N.D. Tex. 2004).....	23, 23
<i>Transamerica Mortg. Advisors (tama) v. Lewis</i> , 444 U.S. 11 (1979).....	19, 35
<i>Travelers Ins. Co. v. St. Jude Hosp.</i> , 37 F.3d 193 (5th Cir. 1994)	6, 10
<i>United States v. Beggerly</i> , 524 U.S. 38 (1998).....	12
<i>United States v. Bruno</i> , 809 F.2d 1097 (5th Cir. 1987)	28
<i>United States SEC v. Markusen</i> , 143 F. Supp. 3d 877 (D. Minn. 2015).....	19

<i>United States v. Westbo</i> , 746 F.2d 1022 (5th Cir. 1984)	28
<i>Victaulic Co. v. Tieman</i> , 499 F.3d 227 (3d Cir. 2007).....	11
<i>Word of Faith World Outreach Ctr. Church, Inc. v. Sawyer</i> , 90 F.3d 118 (5th Cir. 1996)	25
<i>Youmans v. Simon</i> , 791 F.2d 341 (5th Cir. 1986)	30

Rules & Statutes

15 U.S.C. § 80b-6	<i>passim</i>
15 U.S.C. § 80b-6(4).....	<i>passim</i>
15 U.S.C. § 80b-8(d).....	<i>passim</i>
18 U.S.C.S. § 1961(4).....	26
18 U.S.C.S. § 1961(5).....	28
18 U.S.C.S. § 1961(1)(B).....	28, 30
18 U.S.C.S. § 1961(1)(D)	30
28 U.S.C. § 157(d)	9
Fed. R. Bankr. P. 2002(a)(3).....	10
Fed. R. Bankr. P. 9019.....	4
Fed. R. Civ. P. 9(b)	<i>passim</i>
Fed. R. Civ. P. 12(b)(1).....	13
Fed. R. Civ. P. 12(b)(3).....	13
Fed. R. Civ. P. 12(b)(6).....	<i>passim</i>
Fed. R. Civ. P. 12(c)	13
Fed. R. Civ. P. 12(g)(2).....	13

Fed. R. Civ. P. 12(h)(2).....	13
Fed. R. Civ. P. 15(a)	34
Fed. R. Civ.. P. 60(d)	12
LRCiv 7.1(i)(4)	11
LRCiv 7.2(e)	11
Tex. Civ. P. Rem. Code § 16.004	11

Other

17 C.F.R. § 275.206(4)-8.....	19
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Uniform Requirements for the Investment Adviser <i>Brochure</i> and <i>Brochure</i> <i>Supplement</i> , General Instruction 3 to Part 2 of Form ADV	12

I.

INTRODUCTION

Defendant's Motion asking this Court to dismiss Plaintiffs' detailed, 26 page Complaint is not based on that pleading but on over 500 pages of material submitted in an appendix that does not comply with the Local Rules. The Motion asks this Court to bar Plaintiffs' claims under the doctrine of res judicata, not because Plaintiffs have obtained judgments on their claims in previous litigation but because they are forced to participate in Defendant's sprawling bankruptcy proceedings. The Motion invokes the doctrine of judicial estoppel, not because Plaintiffs have convinced a prior court to rule in their favor but because one of them submitted and then *withdrew* an objection that was therefore not considered by the prior court, and for that obvious reason had no bearing on its decision. The Motion asks this Court to ignore federal law imposing fiduciary duties, not because they do not apply, but because it is an inconvenient truth that they cannot shake. The Motion asks this Court to dismiss Plaintiffs' claims as implausible, not because they are foreclosed by any contract or admission of Plaintiffs', but because Defendant and its agents have contradicted Plaintiffs' factual allegations in some of the voluminous documents in Defendant's appendix, for which it improperly seeks judicial notice.

Plaintiffs respectfully submit the Motion is without merit.

This action arose when Plaintiffs learned—after the fact—that Defendant had failed to disclose to them the true value of securities sold in connection with a settlement that was approved in Defendant's bankruptcy proceedings. But that settlement—and the facts underlying it--does not form the basis of Plaintiffs' claims or constitute the occurrence or transaction at issue here. The case arises from Defendant's role as an Investment Adviser to the Plaintiffs under the Investment Advisers Act of 1940 (the "Advisers Act"). It seeks damages and other remedies for Defendant's

mismanagement of a securities transaction (including its omission the true value of assets transferred in connection with the HarbourVest Settlement and the benefit Highland would gain). Defendant's actions thus violated fiduciary duties arising as a matter of federal securities law under the Advisers Act.

The bankruptcy court's approval of the HarbourVest Settlement in no way undermines Plaintiffs' claims that Defendant breached fiduciary duties by failing to make appropriate disclosures and through self-dealing (Count I), that Defendant breached contractual obligations by doing the same (Count II), that Defendant acted negligently in failing to make accurate, appropriate disclosures (Count III), or that Defendant is liable under the civil RICO statute, for which violations of the Advisers Act serve as a predicate act.

II.

FACTUAL BACKGROUND

Plaintiff Charitable DAF Fund, L.P. ("DAF") is a charitable fund that helps several causes throughout the country, including providing millions of dollars every year to local charities in Dallas and around the country, such as family shelters, education initiatives, veteran's welfare associations, public works (such as museums, parks and zoos), and education (such as specialty schools in underserved communities). Original Complaint ("Compl.") at ¶ 10.

Since 2012, DAF was advised by its registered investment adviser, Defendant Highland Capital Management, L.P. ("Highland"), and its various subsidiaries about where to invest. Compl. at ¶ 11). This relationship was governed by an investment advisory agreement. (Compl. at ¶ 12). As the DAF's investment advisor, Highland owed the DAF fiduciary obligations, including the duty to put the DAF's best interest ahead of its own. (Compl. at ¶¶ 56–57, 62).

In 2017, Highland advised the DAF to acquire 143,454,001 shares of Highland CLO Funding, Ltd (“HCLOF”), which the DAF did via a holding entity, Plaintiff CLO Holdco, Ltd. (“CLO Holdco”). (Compl. at ¶ 12).

Shortly thereafter, CLO Holdco entered into a Subscription and Transfer Agreement whereby a series of related entities collectively referred to as “HarbourVest” acquired a 49.98% membership interest in HCLOF (the “HarbourVest Interests”). (Compl. at ¶¶ 13–14). As part of this transaction DAF retained a 49.02% membership interest, (Compl. at ¶ 13). and Highland took a 0.6% membership interest HCLOF (Compl. at ¶ 25).

HCLOF’s portfolio manager is Highland Highland Advisor, Ltd. (“HCFA”), which is subsidiary of Highland and is controlled and operated by Highland. (Compl. at ¶ 24). As such, both Highland and HCFA owed fiduciary duties to CLO Holdco as an investor in the HCLOF fund. James P. Seery, Jr., CEO of Highland, testified that Highland owed such fiduciary duties under the Advisers Act to investors in the funds that Highland manages (App_0008-10, 0014).

The HCLOF parties’ rights and obligations as members of HCLOF were governed by the *Members Agreement Relating to the Company* dated November 15, 2017 (“Company Agreement”). (Compl. at ¶¶ 93–94) (App_0018-35). Under the Company Agreement, no member was allowed to sell shares to another member without first providing all other members the right to purchase a pro rata portion thereof at the same price. (Compl. at ¶ 95; App_0026-27).

In October 2019, Highland filed for Chapter 11 (Compl. at ¶ 15). As part of this bankruptcy, HarbourVest filed proof of claims against Highland totaling over \$300 million, notionally (Compl. at ¶¶ 16, 21-23). Highland denied the validity of these claims. (Compl. at ¶ 17, 26).

In the meantime, Highland continued to control HCLOF through its subsidiary HCFA. (Compl. at ¶¶ 115–124). In September 2020, HCLOF was underperforming, and the value of the

investment had diminished—the HarbourVest Interests had diminished \$52 million in value. (Compl. at ¶ 27). In September 30, 2020, Highland utilized interstate wires to transmit information to the HCLOF investors regarding the value of their respective interests. (Compl. at ¶ 121).

In the following months, however, the value HCLOF began to improve; by the end of November 2020, the value of HCLOF’s total assets increased to \$72,969,492 (\$36,484,746 allocated to HarbourVest) and by the end of December, HCLOF’s net asset value reached \$86,440,024 (with \$43,202,724 allocated to HarbourVest’s Interests). (Compl. at ¶¶ 123–124). However, Highland did not transmit these valuations to Plaintiffs (Compl. at ¶ 120).

Around November 2020, Highland and HarbourVest—utilizing the interstate wires—entered into discussions about settling HarbourVest’s claims in the bankruptcy. (Compl. at ¶ 119). Highland and HarbourVest reached a settlement, which Highland requested the bankruptcy court to approve on December 23, 2020. (Compl. at ¶ 29; App_0046-64). As part of the settlement, Highland agreed to allow HarbourVest \$45 million in unsecured claims, which were expected to yield about to cents on the dollar to HarbourVest (roughly \$31,500,000). (Compl. at ¶ 32; App_46-64). As part of the consideration for the \$45 million in allowed claims, HarbourVest agreed to sell its interest in HCLOF to Highland (Compl. at ¶ 33) (the “HarbourVest Settlement”).

Despite Highland’s fiduciary obligations to Plaintiffs, Highland concealed the rising value of HCLOF and the Harbourview Interests, as well as the value that it was buying the interest for. It diverted the entire opportunity to participate in this windfall transaction to itself in violation of its fiduciary duties (Compl. at ¶ 67).

At the January 14, 2021, Bankruptcy Rule 9019 hearing to approve the settlement, HCF’s CEO testified that the value allocated to the HarbourVest Interests was \$22.5 million, despite that this interest was actually valued at \$41,750,000 just two weeks before. (Compl. at ¶¶ 34, 37). In

other words, Highland obtained a windfall. The bankruptcy court issued an order approving the HarbourVest Settlement (App_0065-68) (the “9019 Order”). The sale of the HarbourVest Interests transformed Highland from a minority member with a 0.6% interest into the controlling member with a 50.49% interest.

III.

LEGAL STANDARD

Motions to dismiss for failure to state a claim are viewed with disfavor and are seldom granted. *See Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498 (5th Cir. 2000). “Under Federal Rule of Civil Procedure 8(a)(2), a pleading must contain ‘a short and plain statement of the claim showing that the pleader is entitled to the relief.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 677-678 (2009). Rule 8 does not demand “‘detailed factual allegations[.]’” *Id.* at 678 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

In ruling upon a Rule 12(b)(6) motion, the Court cannot decide disputed fact issues. The court may grant a motion under Rule 12(b)(6) *only if* it can determine with certainty that *the plaintiff cannot prove facts that would allow the relief sought* in the complaint. *See Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984); *Scanlan v. Texas A&M Univ.*, 343 F.3d 533, 536 (5th Cir. 2003) (emphasis added). In its consideration, a court must draw all reasonable inferences in favor of the plaintiff. *See Collins*, 224 F.3d at 498.

IV.

THE PRECLUSION DOCTRINES DO NOT APPLY

A. HIGHLAND’S RES JUDICATA DEFENSES FAIL

Highland’s preclusion defenses fail. As the proponent of the affirmative defense, Highland must establish all elements of those defenses as a matter of law. *See Memphis-Shelby Cty. Airport*

Auth. v. Braniff Airways, Inc. (In re Braniff Airways, Inc.), 783 F.2d 1283, 1289 (5th Cir. 1986).

“The doctrine of res judicata, or claim preclusion, forecloses relitigation of claims that were or could have been raised in a prior action.” *Davis v. Dallas Area Rapid Transit*, 383 F.3d 309, 312-13 (citation omitted). “In this circuit, an action is barred by the doctrine of res judicata only if: (1) the parties are identical in both actions; (2) the prior judgment was rendered by a court of competent jurisdiction; (3) the prior judgment was final on the merits; and (4) the cases involve the same cause of action.” *Travelers Ins. Co. v. St. Jude Hosp.*, 37 F.3d 193, 195 (5th Cir. 1994).

Importantly, the Original Complaint does not seek to reverse or unwind the HarbourVest Settlement. Nothing in the Original Complaint seeks to put the parties to that settlement in the same position they were prior to January 14, 2021. Suing a party to a transaction for harm caused in the course of conducting that transaction is not the same thing as suing to rescind the transaction.

This false equivalency is what Highland’s entire argument is based upon.

1. *Res Judicata* Does Not Apply Because the Court’s 9019 Order Does Not Specifically Release Plaintiffs’ Claims or Resolve them on the Merits

The Fifth Circuit previously held that a bankruptcy court’s final order confirming a plan of reorganization did not have *res judicata* effect on third party claims against the debtors’ insiders, when the plan did not specifically identify the claims or conclusively resolve them on the merits. In *Applewood Chair Co. v. Three Rivers Planning & Dev. Dist. (In re Applewood Chair Co.)*, 203 F.3d 914, 919 (5th Cir. 2000), the Fifth Circuit addressed whether general release language in a bankruptcy order applied to unenumerated claims. The bankruptcy court’s order provided that:

The provisions of the confirmed plan shall bind all creditors and parties in interest, whether or not they accept the plan and shall discharge the Debtor, its officers, shareholders and directors from all claims that arose prior to Confirmation.

Id. at 919.

Admitting that this language would have released the personal guarantees of certain officers, shareholders and directors—the “Spiveys”—the Fifth Circuit nonetheless refused to apply *res judicata* to preclude the plaintiff’s suit on those guarantees. The court explained that the merits of those guarantees had not been litigated, and importantly, “[n]o specific discharge or release of the Spiveys’ individual guarantees to [a creditor] was enumerated or approved by the bankruptcy court in this matter.” *Id.* This was enough to prevent the application of *res judicata*.

Here, the 9019 Order does not even seek to resolve the entire Highland bankruptcy, as did the plan confirmation order in *Applewood*. Rather, it merely approves a settlement agreement—a privately negotiated contract—between Highland and HarbourVest. There is no dispute that the 9019 Order is a final order as to Highland and HarbourVest’s settlement—but nothing suggests that it bestows immunity on Highland (or anyone else) for *any and all* violations committed in the process of obtaining that settlement. Neither of the Plaintiffs here were parties to the litigation between HarbourVest and Highland, nor were they parties to the settlement agreement itself.

Similarly, the 9019 Order does not purport to resolve Plaintiffs’ claims on the merits, nor does it specifically purport to release Plaintiffs’ claims that are raised herein. (App_0065-69). The 9019 Order simply overrules objections *en masse* without addressing the merits thereof. (App_67 (“All objections to the Motion are overruled.”)). Accordingly, *res judicata* cannot apply because the 9019 Order neither addressed nor disposed of Plaintiffs’ causes of action *on the merits*. *Accord Applewood*, 203 F.3d 914, 919; *Risby v. United States*, No. 3:04-CV-1414-H, 2006 U.S. Dist. LEXIS 8798, at *19-21 (N.D. Tex. 2006) (R&R) (denying *res judicata* because “to operate as a *res judicata* bar, a final judgment must address the merits of a claim. ...”).

Defendant’s contention that CLO Holdco’s withdrawal of its objection to the settlement is an abandonment of the merits of its causes of action—all of them—arising in any way from

Highland's misconduct is baseless. The withdrawal did not purport to be "with prejudice," and cannot implicitly have been with prejudice as to matters not addressed by the Court on the merits. *See Chalmers v. Gavin*, 2002 U.S. Dist. LEXIS 5636, *3 (N.D. Tex., Apr. 2, 2002) (finding that *res judicata* did not bar action where previous claims were dismissed without prejudice and thus did not operate as an adjudication on the merits); *cf. Reynolds v. Tombone*, 1999 U.S. Dist. LEXIS 9995, at *12 and n.5 (N.D. Tex., June 24, 1999) (finding that *res judicata* did not bar later action where prior motion was not adjudicated on the merits).

Notably, Highland cites no authority for the proposition that a withdrawal of an objection to a settlement in bankruptcy is with prejudice to the substantive legal rights of the objector who might be injured. Nor can Highland do so. The court's role of approving an otherwise privately negotiated settlement is a far cry from its role finder of fact after a trial. The bankruptcy court has discretion to overrule an objection; *See* Fed. R. Bankr. 9019; *In re Texas Extrusion Corp.*, 844 F.2d 1142 (5th Cir. 1988). The Fifth Circuit has specifically stated that a Rule 9019 approval order does NOT involve a "mini trial". *Official Comm. of Unsecured Creditors v. Moeller (In re Age Ref., Inc.)*, 801 F.3d 530, 541 (5th Cir. 2015). A bankruptcy court "is to 'canvas the issues' to see if the settlement falls 'below the lowest point in the range of reasonableness.'" *In re Alfonso*, No. 16-51448-RBK, 2019 Bankr. LEXIS 2816, at *8 (Bankr. W.D. Tex. 2019) (citation omitted).

In other words, a bankruptcy court *may* approve a settlement *notwithstanding* the merits or any claim or objection that is raised by a third party, if the court finds that the settlement is nonetheless fair to the *debtor*. *See Conn. Gen. Life Ins. Co. v. United Cos. Fin. Corp. (In re Foster Mortg. Corp.)*, 68 F.3d 914, 917 (5th Cir. 1995). Among the factors that a bankruptcy court is required to consider in determining whether a settlement is in the best interests of the estate—none requires dispensing with the "claims" of any objectors on the merits; at best, the court is only

required to consider “the best interests of the creditors, with proper deference to their reasonable views[.]”¹ Here, the bankruptcy court did not state it was doing anything more than that in approving the HarbourVest Settlement—in fact, it specifically recited that line *verbatim* (App_67).

Accordingly, while the 9019 Order is final as to the settled claims themselves. To say that it resolves all causes of action for damages that could have been brought by any third-party objector on the merits is, well, meritless. The bankruptcy court’s having the sole *discretion* in approving the HarbourVest Settlement is completely at odds with the premise that it was necessarily resolving anything else *on the merits*. Therefore, the 9019 Order is insufficient to support preclusion.

2. The Bankruptcy Court Was Not a Court of Proper Jurisdiction to Hear the Causes of Action

While the bankruptcy court could hear Plaintiff CLO Holdco’s objection to the HarbourVest Settlement, it lacked the power under 28 U.S.C. § 157(d) to claim jurisdiction over the causes of action. Much ink is being spilled on the bankruptcy court’s province to hear the claims raised in this action. Pending before this Court is Highland’s *Motion for an Order to Enforce the Order of Reference*, and Plaintiffs’ Response and *Cross-Motion to Withdraw the Reference* under § 157(d)’s mandatory withdrawal language. Plaintiffs incorporate here their briefing in the Response and Cross-Motion, and respectfully submit that if this Court decides that

¹ “In determining whether a settlement is fair and equitable, we apply the three-part test set out in *Jackson Brewing* with a focus on comparing “the terms of the compromise with the likely rewards of litigation.” A bankruptcy court must evaluate: (1) the probability of success in litigating the claim subject to settlement, with due consideration for the uncertainty in fact and law; (2) the complexity and likely duration of litigation and any attendant expense, inconvenience, and delay; and (3) all other factors bearing on the wisdom of the compromise. These “other” factors—the so-called *Foster Mortgage* factors—include: (i) “**the best interests of the creditors, with proper deference to their reasonable views**”; and (ii) “the extent to which the settlement is truly the product of arms-length bargaining, and not of fraud or collusion.” *Official Comm. of Unsecured Creditors v. Moeller (In re Age Ref., Inc.)*, 801 F.3d 530, 540 (5th Cir. 2015) (citations omitted) (bolding added).

mandatory withdrawal applies, then it cannot find that the bankruptcy court's already-entered final judgement was rendered on Plaintiffs' causes of action and had jurisdiction to do so.

3. These Claims Do Not Arise Out of the Same Nucleus of Operative Facts

In order to assess the "same causes of action" element, the Fifth Circuit asks "whether the claims arise out of the same nucleus of operative facts." *Travelers*, 37 F.3d at 195 (citations omitted). Where a different legal duty is implicated in the subsequent action, it is not the same nucleus of operative facts. *Id.* Additionally, where a litigant could not have litigated the claims in the prior litigation, then they do not arise from the same nucleus of operative facts, and res judicata will not apply. *Id.*

Here, the claims raised in the Original Complaint did not ripen until after the HarbourVest Settlement was consummated, which itself was accomplished only *after* the bankruptcy court entered its 9019 Order. *Compare, e.g.*, Compl. ¶¶ 76, 81, 88, 90, 92-99, 113-133, 136-140.

Specifically, the first time Plaintiffs ever heard about the valuation of the HarbourVest Interests in HCLOF was during the January 14, 2021 approval hearing. Compl. ¶ 31, 76. The motion papers and exhibits Highland filed on December 23, 2020, contained no such valuation; they instead lumped in the \$80 million in claims allowed by Highland as undifferentiated consideration for both (a) the releases of HarbourVest's causes of action against Highland, and (b) the sale of the HCLOF shares to Highland. *See* Compl. ¶ 29; App_0047. Therefore, it would have been impossible for Plaintiffs to bring these claims in the bankruptcy court prior to January 14, 2021, and so it is impossible that they were, or could have been, decided on the merits at that time. *Risby*, 2006 U.S. Dist. LEXIS 8798, at *19-21.

4. Highland's Litany of Attachments Changes Nothing

Highland attaches a litany of documents in the hopes of convincing this Court that the claims in this lawsuit were already fulsomely litigated.² They were not. Although the 9019 Motion barely complied with the twenty-one day notice requirement set forth in [Fed. R. Bankr. P. 2002\(a\)\(3\)](#), it is preposterous to claim that a motion, filed on December 23, 2020, and heard 22 days later (with Christmas and New Year's in the middle), gave Plaintiffs a reasonable opportunity to litigate their dispute (which had not even ripened yet).

Note that the statute of limitations for Plaintiffs' lead claims is *four* years³—but Defendant contends that 22 days is all Plaintiffs had to discover and bring these claims on pain of permanent disposition. This would surely be a violation of Plaintiffs' due process rights. *See Benson & Ford*,

² Highland's appendix violates this Court's local rules requiring pagination, Local Rule 7.1(i)(4), and references to specifically paginated appendices, Local Rule 7.2(e). The lack of such reference, and the lack of any specificity in Highland's general request for this Court to take judicial notice of adjudicative facts found in 500 pages of appendices—without specifically explaining why judicial notice can be taken—should cause this Court to reject the invitation. This Court's sister court has held that a court should only take judicial notice of facts “sparingly at the pleadings stage.” *Reneker v. Offill*, No. 3:08-cv-1394-D, [2010 U.S. Dist. LEXIS 38526](#), at *5 (N.D. Tex. Apr. 19, 2010) (Fitzwater, J.) (quoting *Victaulic Co. v. Tieman*, [499 F.3d 227, 236](#) (3d Cir. 2007)). “Only in the clearest cases should a district court reach outside the pleadings for facts necessary to resolve a case at that point.” *Id.* Courts in the Fifth Circuit have been very careful to note while they may take judicial notice of the fact of certain filings, they cannot take notice of the *facts recounted in them* unless they are undisputed, or facts found by another court. *See Lovelace v. Software Spectrum*, [78 F.3d 1015, 1018](#) (5th Cir. 1996) (noting that at 12(b)(6) stage, judicial notice of filed documents “should be considered only for the purpose of determining what statements the documents contain, not to prove the truth of the documents' contents”); *Taylor v. Charter Med. Corp.*, [162 F.3d 827, 829-30](#) (5th Cir. 1998) (noting the general rule that a court cannot take judicial notice of the findings of another court because it would undermine the standards applicable to *res judicata*). To the extent Highland asks this Court to take judicial notice of adjudicative facts, the Court should refuse to do so.

³ The statute of limitations in Texas for breaches of contract, breach of fiduciary duty, and tortious interference are all four years. Tex. Civ. P. Rem. Code § 16.004. The RICO Statute of limitations is likewise four years. *Petrus v. Mole*, Civil Action No. 3:11-CV-1402-N, [2012 U.S. Dist. LEXIS 207745](#), at *12-13 (N.D. Tex. 2012).

Inc. v. Wanda Petroleum Co., 833 F.2d 1172, 1174 (5th Cir. 1987) (“A litigant has a due process right to a full and fair opportunity to litigate an issue.”) (internal citations omitted).

In arguing, disingenuously, that Plaintiffs are at fault for trusting Highland’s representations, Highland conveniently elides the fact that as a Registered Investment Adviser, the Advisers Act imposed an affirmative duty on *Highland* to—without being asked—truthfully disclose the entire extent of the transaction it was contemplating *before* it consummated it, including the value of the interest it was self-dealing in.^{4,5}

B. HIGHLAND’S REQUEST FOR JUDICIAL ESTOPPEL FAILS

As an affirmative defense, it is Defendant’s duty to prove all the elements of judicial estoppel as a matter of law. Here, Highland has failed to do so. “[T]wo bases for judicial estoppel must be satisfied before a party can be estopped. First, it must be shown that the position of the

⁴ The SEC explains that: “To meet its duty of loyalty, an adviser must make full and fair disclosure to its clients of all material facts relating to the advisory relationship. Material facts relating to the advisory relationship include the capacity in which the firm is acting with respect to the advice provided.” See Securities and Exchange Commission Interpretative Release, *Commission Interpretation Regarding Standard of Conduct for Investment Advisers*, 84 FR 33681 SEC Release No. IA-5248; File No. S7-07-18, 17 CFR Part 276, June 5, 2019 (“SEC Interpretation”) at p. 6 (internal citations omitted). See also General Instruction 3 to Part 2 of Form ADV (“Under federal and state law, you are a fiduciary and must make full disclosure to your clients of all material facts relating to the advisory relationship. As a fiduciary, you also must seek to avoid conflicts of interest with your clients, and, at a minimum, make full disclosure of all material conflicts of interest between you and your clients that could affect the advisory relationship. This obligation requires that you provide the client with sufficiently specific facts so that the client is able to understand the conflicts of interest you have and the business practices in which you engage, and can give informed consent to such conflicts or practices or reject them.”).

⁵ Even if Highland is correct that the HarbourVest Settlement is somehow a final order on the claims Plaintiffs’ raised in the Original Complaint, the Original Complaint (as the later filing) should be construed as one seeking equitable relief from the 9019 Order under Rule 60(d). Rule 60 authorizes equitable relief from a final judgment, order, or proceeding, and subsection (d) specifically authorizes “an *independent* action to relieve a party from a judgment, order or proceeding[.]” FED. R. CIV. P. 60(d). This mechanism provides an exception to *res judicata*. See *United States v. Beggerly*, 524 U.S. 38, 46 (1998).

party to be estopped is clearly inconsistent with its previous one; and second, that party must have **convinced** the court to accept that previous position.” *Harrison Co. LLC v. A-Z Wholesalers, Inc.*, No. 3:19-CV-1057-B, **2021 U.S. Dist. LEXIS 44534**, at *18 (N.D. Tex. 2021) (quoting *Hall v. GE Plastic Pac. PTE Ltd.*, 327 F.3d 391, 396 (5th Cir. 2003)) (emphasis added).

The Defendant has not met its burden as to either prong of judicial estoppel. There has been no decision on the merits in favor of the DAF or Holdco on their claims in bankruptcy court. Withdrawing an objection and then raising the argument later is not the same thing as “taking an inconsistent position” under any guise of law or common sense. Plaintiffs were clearly not “successful” on the objection before.

V.

PLAINTIFFS HAVE STATED A CLAIM FOR RELIEF

A. THE MOTION FAILS UNDER RULE 12(G) AND IS PREMATURE

Rule 12(g) only permits one motion under Rule 12 to be filed—and that any defense not raised in the first motion is waived, except as provided in Rule 12(h)(2). See **FED. R. CIV. P. 12(g)(2)** Rule 12(h)(2) states that while the defense of failure to state a claim is not waived by failure to bring it in the first-filed Rule 12 motion, it may be only brought via a later motion under Rule 12(c). Here, Highland’s first-filed motion, *Motion for an Order to Enforce the Order of Reference* is functionally a motion under Rule 12(b)(1) or 12(b)(3). Accordingly, Defendant is limited to bringing its failure to state a claim motion via a motion under Rule 12(c) after the pleadings are closed. Furthermore, the fact that Highland has shown that there are issues of fact—such as the scope of duties it owes and to whom under federal law—its motions are more appropriately reserved for summary judgment, after the close of discovery.

B. PLAINTIFFS HAVE PLED CLAIMS FOR BREACH OF FIDUCIARY DUTY

In Texas, the elements of a breach of fiduciary duty are: ‘(1) a fiduciary relationship between the plaintiff and defendant; (2) the defendant must have breached his fiduciary duty to the plaintiff; and (3) the defendant's breach must result in injury to the plaintiff or benefit to the defendant.’” *Cudd Pressure Control, Inc. v. Roles*, 328 F. App'x 961, 964 (5th Cir. 2009) (quoting *Navigant Consulting, Inc. v. Wilkinson*, 508 F.3d 277, 283 (5th Cir. 2007)).

1. The Complaint Pleads that Highland and HCFA Owe Fiduciary Duties Under the Advisers Act and Other Bases

a. The Fiduciary Duty of Highland and HCFA to CLO Holdco

The Original Complaint specifically states that a fiduciary duty is owed by Highland and HCFA to Holdco via the Advisers Act and via corporate governance law.

First, HCFA is a wholly-owned subsidiary of Highland, and both are registered investment advisers under the Advisers Act of 1940. (Compl. ¶ 56). Highland operates HCFA, which serves as the Portfolio Manager of Highland CLO Funding, Ltd. (“HCLOF”). Highland and HCFA owed a fiduciary duty to Holdco as an investor in HCLOF. (Compl. ¶ 61).

Second, as the control person of HCLOF, Highland via HCFA owed fiduciary duties to Holdco, and so Holdco’s fiduciary duty claims are additionally derivative in nature under the minority oppression doctrine.⁶ Highland has not challenged this basis for a fiduciary duty claim.

b. The Fiduciary Duty of Highland Directly to the DAF

The Original Complaint pleads that Highland and the DAF are in a direct advisory relationship by virtue of a contractual arrangement. (Compl. ¶ 58).⁷ In addition to being the RIA

⁶ Guernsey law recognizes both derivative and double-derivative actions, especially where the company is controlled by the alleged wrong-doer, as HCLOF is here. *See cf. Jackson v. Dear and Seven Others*, [2013 GLR 167] Guernsey Royal Ct. (Talbot, Lieut, Bailiff).

⁷ Although the Complaint pleads that the operative agreement is the Amended and Restated Investment Advisory Agreement, we have since learned that there is a Second Amended and

to the DAF, Highland was appointed the DAF's attorney-in-fact for certain actions, such as "to purchase or otherwise trade in Financial Instruments that have been approved by the General Partner." RIA Agreement ¶ 4. (Compl. ¶ 59). The RIA Agreement further commits Highland to value financial assets "in accordance with the then current valuation policy of the Investment Advisor [Highland], a copy of which will provided to the General Partner upon request." (Compl. ¶ 60). And while Highland contracted for the recognition that it would be acting on behalf of others and could be in conflict with advice given the DAF, (RIA Agreement ¶ 12), nowhere did it purport to waive the fiduciary duties owed to the DAF not to trade as a principal in a manner that harmed the DAF. (Compl. ¶ 61).

"Since 2012, DAF was advised by its registered investment adviser, Highland Capital Management, L.P., and its various subsidiaries, about where to invest. This relationship was governed by an Investment advisory Agreement." (Compl. at ¶ 11). As DAF's registered investment advisor, Highland is DAF's fiduciary. *See Douglass v. Beakley*,, 900 F. Supp. 2d 736, at 751-52, n.16.

Additionally, Highland was appointed the DAF's attorney-in-fact. (Compl. at ¶ 59). "As the appointment of an attorney-in-fact creates a fiduciary relationship as a matter of law, Texas law imposes special duties on persons acting in that capacity." *Pool v. Johnson*, Civil Action No. 3:01-CV-1168-L, 2002 U.S. Dist. LEXIS 6613, at *17 (N.D. Tex. 2002) (citing *Sassen v. Tanglegrove Townhouse Condo. Ass'n*, 877 S.W.2d 489, 492 (Tex. App.—Texarkana 1994, writ denied)). Under Texas law, "[a] fiduciary owes its principal a high duty of good faith, fair dealing, honest performance, and strict accountability." *Id.* (citing *Sassen*, 877 S.W.2d at 492).

Restated Advisory Agreement, and our proposed amendment, among other things, corrects this error.

2. The Fiduciary Duties Imposed by the Advisers Act Are Actionable Under Texas Law and are Owed to Investors Like CLO Holdco

“Whether a fiduciary duty exists is a question of law for the court. The facts giving rise to a fiduciary duty, however, are to be determined by the fact finder.” *Lampkin v. UBS Painewebber, Inc. (In re Enron Corp. Sec., Derivative & ERISA Litig.)*, 238 F. Supp.3d 799, 852 (S.D. Tex. 2017) (citing *Fuqua v. Taylor*, 683 S.W. 2d 735, 737 (Tex. App.—Dallas 1984, writ ref’d n.r.e.)).

a. The Advisers Act’s Imposition of a Fiduciary Duty is Actionable Under Texas Fiduciary Duty Law

Under Texas law, an investment advisor /advisee client relationship is considered a formal fiduciary relationship because it is a principal and agent relationship. *Accord Lampkin v. UBS Painewebber, Inc. (In re Enron Corp. Sec., Derivative & “ERISA” Litig.)*, 238 F. Supp. 3d 799, 851 (S.D. Tex. 2017). Texas law provides that a fiduciary relationship is governed by the terms of the agency. *See Hand v. Dean Witter Reynolds, Inc.*, 889 S.W. 2d 483, 492 (Tex. App.—Houston [14th Dist.] 1994, writ denied). The Advisers Act provides the scope of, and rules governing, the adviser/adviser agency relationship. *Laird v. Integrated Res.*, 897 F.2d 826, 834 (5th Cir. 1990).

Recognizing that fact, this very Court decided almost a decade ago that, although the Advisers Act does not itself create a cause of action, it is still actionable through state law fiduciary duty claims. *See Douglass v. Beakley*, 900 F. Supp. 2d 736, 751-52, n.16 (N.D. Tex. 2012) (Boyle, J.) (denying motion to dismiss state fiduciary duty claims predicated on breaches of the Advisers Act, noting in footnote that the Advisers Act provided the bases for a formal fiduciary relationship and thus plaintiffs’ state breach of fiduciary duty claims could be predicated on breach of the

Advisers Act).⁸ No decision we could find has held that a Texas fiduciary duty claim cannot seek redress for breaches of the fiduciary obligations imposed under the Advisers Act.

b. *The Advisers Act's Fiduciary Duty Extends to Investors like Holdco*

“As a fiduciary, the standard of care to which an investment adviser must adhere imposes ‘an affirmative duty of ‘utmost good faith, and full and fair disclosure to all material facts,’ as well as an affirmative obligation to ‘employ reasonable care to avoid misleading’ his clients.’” *Laird v. Integrated Res.*, 897 F.2d 826, 834 (5th Cir. 1990) (quoting *S.E.C. v. Blavin*, 760 F.2d 706, 711-12 (6th Cir. 1985) (citing *Capital Gains*, 375 U.S. at 194 (citations omitted))).

As explained by the SEC in its Rule making and interpretative Guidance: “under its duty of loyalty, an investment adviser must eliminate or make full and fair disclosure of all conflicts of interest which might incline an investment adviser—consciously or unconsciously—to render advice which is not disinterested such that a client can provide informed consent to the conflict.” Securities and Exchange Commission Interpretative Release, *Commission Interpretation Regarding Standard of Conduct for Investment Advisers*, 84 FR 33681 SEC Release No. IA-5248; File No. S7-07-18, 17 CFR Part 276, June 5, 2019 (“SEC Release”) at p. 8 (internal citations omitted). The SEC is empowered under the Advisers Act to give interpretive guidance, which is

⁸ Other courts are in accord. See *Goldenson v. Steffens*, No. 2:10-cv-00440-JAW, 2014 U.S. Dist. LEXIS 201258, at *137 (D. Me. 2014) (“Even assuming the [Advisers Act] provides no private right of action, this does not mean that it does not create a standard of care from which a duty arises....”); *State ex rel. Udall v. Colonial Penn Ins. Co.*, 112 N.M. 123, 812 P.2d 777, 785 (N.M. 1991) (citing *Capital Gains Research*, and applying the standard set forth therein, in ruling on a state law claim for breach of fiduciary duty against an investment adviser). Cf. *Belmont v. MB Inv. Partners, Inc.*, 708 F.3d 470, 502-06 (3d Cir. 2013) (holding that state fiduciary duty claims are a recognized vehicle for enforcing violations of the Advisers Act, but granting summary judgment on the basis that plaintiffs had not properly proved an advisory relationship or a conflict of interest); *Strougo ex rel. Brazil Fund v. Scudder, Stevens & Clark, Inc.*, 964 F.Supp. 783, 799 (S.D.N.Y. 1997) (holding that state fiduciary duty claims could be predicated on duties supplied under the Investment Company Act of 1940), *rev’d in part on other grounds in Strougo v. Bassini*, 282 F.3d 162 (2d Cir. 2002).

accorded *Chevron* deference. See *SEC v. Zandford*, 535 U.S. 813 (2002) (SEC interpretations and rule making entitled to *Chevron* deference). “In order for disclosure to be full and fair, it should be sufficiently specific so that a client is able to understand the material fact or conflict of interest and make an informed decision whether to provide consent.” *Id.* at 24.

Further, an investment advisor’s “duty of loyalty requires that an advisor not subordinate its clients’ interests to its own. In other words, an investment adviser must not place its own interest ahead of its client’s interests.” *Id.* at 21. In sum, an investment advisor has a “duty to act in the *client’s* best interest[.]” not its own. “Under the “best interest” test, an adviser may benefit from a transaction recommended to a client if, *and only if*, that benefit and all related details of the transaction are fully disclosed.” *Belmont v. MB Inv. Partners, Inc.*, 708 F.3d 470, 503 (3d Cir. 2013). While not disagreeing with the scope and terms of the fiduciary duty, Highland contends that neither it, nor HCFA, owed a fiduciary duty to CLO Holdco, which was an investor in HCLOF. This is false for a couple of reasons:

First, Highland’s CEO, James Seery, in discussing the necessity of his appointment as CEO and the degree to which he understood the importance of his job, he testified under oath—under *direct examination*—that he and Highland, as registered investment advisers—owed fiduciary duties to the funds they managed, and the investors in those funds. (App_0009) (“The goals of the debtor...number one, discharge Highland’s, ... duties to investors in the funds. Those are fiduciary duties under the Investment Advisers Act.”); (App_14) (“the Investment Advisers Act puts a fiduciary duty on Highland Capital to discharge its duty to the investors. So while we have duties to the estate, we also duties, as I mentioned in my last testimony, to each of the investors in the funds.”). Seery’s sworn, uncontradicted testimony, is an undisputed fact that this

Court may take judicial notice of at this stage. See **Fed. R. Evid. 201(b)**; *Aloe Creme Labs., Inc. v. Francine Co.*, **425 F.2d 1295, 1296** (5th Cir. 1970) (per curiam)).

Second, the Supreme Court has stated that the Advisor’s Act’s provisions in **15 U.S.C. § 80b-6**, are fiduciary duties. See *Transamerica Mortg. Advisors (tama) v. Lewis*, **444 U.S. 11, 17, 100 S. Ct. 242, 246** (1979) (“As we have previously recognized, § 206 [**15 U.S.C. § 80b-6**] establishes ‘federal fiduciary standards’ to govern the conduct of investment advisers.”). Subsection (d) of that statute delegates to the SEC the power to enact standards for its enforcement. To wit, the SEC enacted **17 C.F.R. § 275.206(4)-8**, to enforce the fiduciary standards in Section 206(d) of the Advisers Act:

- (1) Make any untrue statement of a material fact or to omit to state a material fact necessary to make the statements made, in the light of the circumstances under which they were made, not misleading, **to any investor** or prospective investor in the pooled investment vehicle; or
- (2) Otherwise engage in any act, practice, or course of business that is fraudulent, deceptive, or manipulative **with respect to any investor** or prospective investor in the pooled investment vehicle.

17 C.F.R. § 275.206(4)-8 (bold added).⁹ Therefore, as a matter of statute, Highland owes duties to investors like Holdco.

Third, Highland’s entire premise—that it owes no duties to Holdco as an investor in HCLOF—is based upon the notion that Holdco is not a “client” under the Act because Highland and Holdco have no Advisory Agreement between them. But the Investor’s Act does not state, anywhere, that an RIA has *no* duties to an investor just because they are not a client under an

⁹ Although Highland does not contest that HCLOF is a “pooled investment vehicle” for the purposes of this regulation, the HCLOF does qualify because, according to the Company Agreement, it “[has] less than 100 investors and do[es] not publicly offer [its] securities.” *United States SEC v. Markusen*, **143 F. Supp. 3d 877, 891** (D. Minn. 2015).

advisory agreement. Accordingly, Highland's contention that it owes no fiduciary duties directly to investors like Holdco fails on its face, and is contradicted by the law and the facts.

3. Plaintiffs Have Alleged Several Breaches of Fiduciary Duty

Highland breached multiple fiduciary obligations in the process of negotiating and consummating the HarbourVest Settlement. The materiality of misrepresenting the value and the benefit to Highland of the investment is not debatable. *Accord S.E.C. v. Blavin*, 760 F.2d 706, 711 (6th Cir. 1985). And Highland cannot escape liability for this duty by conducting its advisory activities through HCFA. *See* 15 U.S.C. § 80b-8(d) ("It shall be unlawful for any person indirectly, or through or by any other person, to do any act or thing which it would be unlawful for such person to do directly under the provisions of this title [15 USCS § 80b-1 *et seq.*] or any rule or regulation thereunder.").

The core fiduciary duty that was breached is the duty against self-dealing, which is a core conflict of interest. The Advisers Act's primary purpose is to eliminate advisers' conflicts of interest. *See Laird*, 897 F.2d at 839 (purpose of § 80b-6 of Advisers Act was to eliminate conflicts of interests between advisers and their advisees). The Advisers Act also makes clear that the duty of loyalty means putting CLO Holdco's interest first.¹⁰ Under this duty, the Advisers Act explains that an adviser must have a rational, non-self-interested basis for how it allocates investment opportunities that are appropriate for its advisees.¹¹ Here, the HCLOF Company Agreement makes

¹⁰ *See* SEC Release at 23.

¹¹ SEC Release at 27 ("When allocating investment opportunities among eligible clients, an adviser may face conflicts of interest either between its own interests and those of a client ... When allocating investment opportunities, an adviser is permitted to consider the nature and objectives of the client and the scope of the relationship. An adviser need not have pro rata allocation policies, or any particular method of allocation, but, **as with other conflicts and material facts, the adviser's allocation practices must not prevent it from providing advice that is in the best interest of its clients.**"); *see also* SEC Release at 21 and n.54 (noting that SEC deems it breach of

it clear that the purposes of HCLOF's investors is to acquire profitable CLO and CLO related securities—which the shares in HCLOF would fall under (App_0020).¹²

Highland entered into settlement negotiations in November 2020 with HarbourVest where it first learned of HarbourVest's intent to sell its interests in HCLOF. (Compl. ¶ 119). On December 23, 2020, Highland moved for approval of the HarborVest Settlement. On January 14, 2021, at the Bankruptcy Court for the Northern District of Texas, Highland's CEO declared that the value of HarbourVest's Interest in HCLOF was \$22.5 million. (Compl. at ¶ 34). As Defendant concedes, Counsel for Plaintiff CLO Holding, who also represented DAF, attended that hearing. (Doc. No. 27 at ¶ 10). The Bankruptcy Court approved a settlement that permitted Highland to obtain HCLOF's interest for this amount. (Compl. at ¶¶ 32-34). In truth, the HarbourVest Interests were worth in excess of \$41,750,000 at that time. (Compl. at ¶ 37). Highland, however, did not disclose the true value of HarbourVest's interests to Plaintiffs—*ever*. (Compl. at ¶ 75). Highland's failure to disclose the true value of the HarbourVest Interests was a breach of its duty of full and fair disclosure, regardless of its intent.

Furthermore, the value of the trade, the potential upside in the trade, and the nature of the trade were never disclosed to Holdco or the DAF prior to the hearing—indeed, the value and nature was misrepresented to them at the hearing. (Compl. ¶ 76, ¶ 120). Highland converted its 0.6% interest into a 50.58% interest and thereby control of HCLOF. Therefore, Highland and HCFM, by allocating 100% of the investment opportunity in the HarbourVest Interests to itself (then, a

the duties of Section 206 of Advisers Act for an adviser to allocate the trades to its own account at the expense of advisees).

¹² The Company Agreement states that HCLOG “has been established to provide its investors with exposure to CLO Notes on both a direct basis and indirect basis and senior secured loans on an indirect basis, through the use of the investments described in its investment policy [in the Offering Memo].”

mere 0.6% holder of HCLOF (Compl. at ¶ 25), and doing so without the informed consent of both HCLOF or CLO Holdco, violated its duty of loyalty to both. The same goes to its duties to the DAF under the Advisory Agreement.

To the extent Highland contends that the Company Agreement or any other provision waives its obligations under the Advisers Act, or those of HCFA, those waivers are null and void under 15 U.S.C. § 80b-15(a).¹³

4. Rule 9(b) Does Not Apply—But Even if it Did, it has Been Met

“By its clear terms, Rule 9(b) applies only to averments of fraud or mistake, not to averments of negligence, breach of fiduciary duty, or non-fraudulent misstatement. *Tigue Inv. Co. v. Chase Bank of Tex., N.A.*, Civil Action No. 3:03-CV-2490-N, 2004 U.S. Dist. LEXIS 27582, at *7 (N.D. Tex. 2004). Here, Plaintiffs’ fiduciary duty claims do not turn on fraudulent intent. The Advisers Act forbids investment advisors from “engag[ing] in any act, practice, or course of business which is fraudulent, deceptive, or manipulative.” 15 U.S.C. § 80b-6(4).

The violations of § 80b-6 of the Advisor’s Act, although called the “antifraud” provisions, do not require a pleading of scienter. *See SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 195, 84 S. Ct. 275, 284-85 (1963) (“... Congress, in empowering the courts to enjoin any practice which operates ‘as a fraud or deceit’ upon a client, did not intend to require proof of intent to injure and actual injury to the client.”). To wit, Plaintiffs also allege that Highland breached its fiduciary duty by self-dealing when it purchased the entire HarbourVest Interests without providing Plaintiffs with the opportunity to participate. (Compl. at ¶ 76–88). These allegation do

¹³ Even if this court dismisses the Company Agreement claim (Count II), that would not operate to deprive CLO Holdco or the DAF of the right to have Highland put their interests first as a matter of Advisers Act fiduciary duty. The Company Agreement and Advisory Agreement cannot waive those fiduciary obligations.

not require a false statement, nor require Plaintiffs' reliance, nor damage to Plaintiffs (a benefit to Highland suffices) all of which are elements of fraud. Because fraudulent conduct does not underlie Plaintiffs' allegations, Rule 9(b) does not apply. *Tigue Inv. Co.*, Civil Action No. 3:03-CV-2490-N, 2004 U.S. Dist. LEXIS 27582, at *7–8.

Nonetheless, the Complaint satisfies Rule 9(b). The Complaint systematically goes through and identifies the dates, acts, communications, omissions and consequences of the breaches of fiduciary duties under the Advisers Act and under state law. *See, e.g.*, Compl. ¶ § 55-91, 119-125, 127-129. Defendant's blythe throw-away statement that Rule 9(b) has not been met is simply unsupportable.

C. PLAINTIFF CLO HOLDCO HAS PLED A CLAIM FOR BREACH OF CONTRACT AND TORTIOUS INTERFERENCE

Plaintiff CLO Holdco's breach of contract claim is straightforward. Under the HCLOF Company Agreement, a "Transfer" of the shares of HCLOF is defined to include the "sale" of the shares. Members Agreement, § 6.1 (App_0026).

Sections 6.1 and 6.2 of the Agreement purport to allow sales by members of their interests in HCLOF to "affiliates" of Members, but not to members themselves, without certain conditions precedent. App_0026-27). One of those conditions precedent is that the other members have to be afforded the right to purchase their pro-rata portion (App_0027).

Highland contends that the "transfer" to its "nominee," HCMLP Investments, LLC, is a transfer to an "affiliate," which is consistent with the Company Agreement. But this is factual gerrymandering and outside the scope of a 12(b)(6). The Transfer that is the basis of Plaintiffs' contract claim is the sale by HarbourVest. That sale was accomplished through the Settlement Agreement with Highland (App_0046-54). In the Settlement Agreement, Highland paid for the Harbourvest Interests. In return, HarbourVest agreed to release its claims against Highland and

transfer the HarbourVest Interests to *Highland*. (App_0047). Highland’s supposed “nominee,” HCMLP Investments, LLC was not a party to this agreement. Highland’s nominee did not pay for those interests. *Id.* Therefore, the Settlement Agreement constitutes a sale to *Highland*. And to the extent it was a sale to Highland, the sale violated Section 6.2 of the Company Agreement.

Defendant argues that because the shares were titled in the name of Highland’s nominee, HCMLP Investments, LLC, it is an affiliate of Highland, and therefore there was no breach of contract. But this argument ignores the fact that even though the shares were ultimately titled in the name of an affiliate, the HCLOF shares were *sold* by HarbourVest to *Highland*. The addendum transfer where Highland delegated its right to receive the shares to a nominee is “form over substance” and is bad faith, in violation of the Company Agreement § 20.5’s “good faith” clause.

Defendant argues that Plaintiff failed to plead actual damages. But Defendant ignores that fact that Plaintiff pleads that the breach of contract denied it the opportunity to obtain a share of the HarbourVest Interests at a \$20+ million discount, which it alleges are damages. (Compl. at ¶¶ 98–100, 102). Lost profits are an available remedy for breach of contract. *Basic Capital Mgmt. v. Dynex Commer., Inc.*, 402 S.W.3d 257, 268 (Tex. App.—Dallas 2013). “Recovery for loss profits does not require that the loss be susceptible of exact calculation.” *Id.* (quoting *Holt Atherton Industries, Inc. v. Heine*, 835 S.W.2d 80, 84 (Tex. 1992)).

Highland claims that Plaintiff’s damages are too speculative. The case it cites, *Snowden v. Wells Fargo Bank, N.A.*, No. 3:18-cv-1797, 2019 U.S. Dist. LEXIS 23557, at *13–14 (N.D. Tex. 2019), which is completely inapposite on the facts because there no one had actually lost their use and enjoyment of the home. However, Plaintiff does plead that it would have paid for the interest with cash. (Compl. ¶ 49-50). Highland’s choice to disbelieve this allegation is not relevant here.

Because Highland's entire premise for dismissing Plaintiffs' tortious interference claim is predicated on the non-existence of an enforceable contract, Plaintiff's tortious interference claim likewise survives.

D. PLAINTIFFS HAVE PLED A CLAIM FOR NEGLIGENCE

Highland's entire argument for dismissal of the negligence cause of action is incorporating its other arguments. But this is a waiver because it has not articulated any basis for dismissal, and has not shown which elements have not been met. First, under long-established Texas law, the elements of a negligence claim are: (a) a legal duty owed by one person to another; (b) breach of that duty; and (c) damages proximately caused by the breach. *Nabors Drilling, U.S.A., Inc. v. Escoto*, 288 S.W.3d 401, 404 (Tex. 2009). Here, the Motion should be denied because the elements have all been pled. *See* Compl. ¶ 103-112.

E. PLAINTIFFS HAVE PLED A CAUSE OF ACTION UNDER RICO

Highland seeks to dismiss Plaintiffs' Racketeer Influenced and Corrupt Organizations (15 U.S.C. § 1961 et seq.) claims ("RICO") under Rule 12(b)(6), alleging that the Complaint does not comply with Rule 9(b). The Motion should be denied because Plaintiffs have pled facts with sufficient particularity to meet the elements of a RICO violation and to give notice to Highland of the claims against it.

"Regardless of subsection, RICO claims under § 196[4] [sic] have three common elements: '(1) a person who engages in (2) a pattern of racketeering activity, (3) connected to the acquisition, establishment, conduct, or control of an enterprise.'" *Abraham v. Singh*, 480 F.3d 351, 355 (5th Cir. 2007) (quoting *Word of Faith World Outreach Ctr. Church, Inc. v. Sawyer*, 90 F.3d 118, 122 (5th Cir. 1996)). To recover under § 1964(c), a plaintiff must plead that the elements of a

substantive RICO violation as well as that it “has been injured in [its] business or property by the conduct constituting the violation.” *Sedimav. Imrex Co.*, 473 U.S. 479, 496 (1985).

We address the elements in turn.

1. Highland is a “RICO” Person

Plaintiffs have alleged that Highland is a RICO person for the purposes of the RICO claim via its conduct by James Seery. (Compl. ¶¶ 129-133). Highland takes no issue with this element in its Motion.

2. Plaintiffs Have Pled a RICO “Enterprise”

For the purpose of RICO, an “enterprise” may be “any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.” 18 U.S.C. § 1961(4). Thus, “[a] RICO enterprise can be either a legal entity or an association-in-fact.” *Crowe v. Henry*, 43 F.3d 198, 204 (5th Cir. 1995).

Plaintiffs have alleged that HCLOF may rightly be considered an enterprise unto itself because it is a legal entity. (Compl. ¶¶ 5, 115). *Crowe*, 43 F.3d at 204.

Additionally, Plaintiffs have alleged that the association between HCLOF, HCFA and Highland is rightly an “association in fact” enterprise (Compl. ¶ 115-116). HCFA was the portfolio manager of HCLOF, and Highland operated HCFA as its wholly owned subsidiary (Compl. ¶ 24). HCFA—and by extension, Highland—was able to exert near plenary power over HCLOF under the HCLOF Company Agreement.¹⁴ An association-in-fact enterprise “1) must have an existence separate and apart from the pattern of racketeering, 2) must be an ongoing organization and 3) its

¹⁴ The HCLOF Company agreement is incorporated by reference in the Complaint, (Compl. ¶ 93). The Court is thus permitted to consider it alongside this Response. *Accord In re Katrina Canal Breaches Litigation*, 495 F.3d 191, 205 (5th Cir. 2007) (contracts referenced in the complaint may be considered as part of a 12(b)(6) consideration).

members must function as a continuing unit as shown by a hierarchical or consensual decision-making structure.” *Crowe*, 43 F.3d at 205. Here, all three of these have been met:

First, the association in fact has an existence separate and apart from the pattern of racketeering.¹⁵ HCLOF is an investment vehicle run by HCFA and Highland pursuant to contracts between and among them, such as the HCLOF Company Agreement at Recital B which explains the “Business” in which HCLOF was to engage (App_20).

Second, the association-in-fact was an ongoing association amongst the three since the 2017—well before the alleged acts of racketeering began.

Third, they functioned as a continuing unit given their hierarchical, consensual decision-making structure. *Accord Crowe*, 43 F.3d at 205 (holding that farming venture was association in fact because it existed outside of the purpose to commit fraud and theft, and therefore satisfied association in fact enterprise).

Accordingly, the “enterprise” element has been met in two different ways.

3. Plaintiffs Have Pled a Pattern of Racketeering Activity with Particularity

“‘Racketeering activity’ consists of two or more predicate criminal acts that are (1) related and (2) ‘amount to or pose a threat of continued criminal activity.’” *Abraham*, 480 F.3d at 355 (quoting *Sawyer*, 90 F.3d at 122).

RICO defines a “pattern of racketeering activity” as one comprised of “at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of

¹⁵ Highland contends that there is no separateness because it and HCFA are defendants. But the mere fact that Highland and HCLOF are both defendants and part of the enterprise, or that HCLOF is both an enterprise unto itself and part of an enterprise-in-fact, do not defeat the “enterprise” element. *Accord Riverwoods Chappaqua Corp. v. Marine Midland Bank, N.A.*, 30 F.3d 339, 344 (2d Cir. 1994).

which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity.” 18 U.S.C.S. § 1961(5). Racketeering activity includes, relevantly, “(B) any act which is indictable under any of the following provisions of title 18, United States Code: ...section 1341 (relating to mail fraud), section 1343 (relating to wire fraud),...[or] (D) any offense involving fraud connected with a case under title 11 [...and] fraud in the sale of securities.” See 18 U.S.C.S. § 1961(1)(B) and (D).

Plaintiffs plead that Highland conducted and controlled the enterprise (whether HCLOF or the Highland-HCFA-HCLOF enterprises) through a pattern of violations of the wire fraud statute, breaches of the Advisers Act’s antifraud provisions in 15 U.S.C. § 80b-6, and the acts and omissions designed to defraud Plaintiff of the HarbourVest Interests in HCLOF (Compl. ¶ 132).

Wire and Mail Fraud

“To establish either mail or wire fraud, the plaintiffs must only [plead] fraudulent intent; proof of a successful fraudulent scheme is not necessary.” *Laird v. Integrated Res.*, 897 F.2d 826, 839 (5th Cir. 1990). The use of the wires to achieve any part of the scheme is sufficient—one need not allege (much less prove) that an allegedly fraudulent statement was uttered or communicated through the interstate mails or wires. *Accord United States v. Westbo*, 746 F.2d 1022, 1025-26 (5th Cir. 1984) (“when a defendant is proved to be a participant in a scheme to defraud and a document is mailed in furtherance of the scheme, the defendant may be convicted of mail fraud.”).¹⁶

Here, the Original Complaint alleges that:

15. On or about October 16, 2019, Highland Capital Management filed for Chapter 11 bankruptcy in Delaware Bankruptcy Court, which was later transferred to the

¹⁶ Mail fraud precedent counts for wire fraud. *United States v. Bruno*, 809 F.2d 1097, 1104 (5th Cir. 1987) (“Because the requisite elements of ‘scheme to defraud’ under the wire fraud statute, 18 U.S.C. § 1343 and the mail fraud statute are identical, cases construing mail fraud apply to the wire fraud statute as well.”);

Northern District of Texas Bankruptcy Court, in the case styled In Re: Highland Capital Management, L.P., Debtor, Cause No. 19-34054...

17. The debtor, HCM, made an omnibus response to the [HarbourVest] proofs of claims, stating they were duplicative of each other, overstated, late, and otherwise meritless.

29. On December 23, 2020, HCM moved the Court to approve a settlement between itself and HarbourVest. No discovery had taken place between the parties, and Plaintiff did not have any notice of the settlement terms or other factors prior to the motion's filing (or even during its pendency) in order to investigate its rights.

31. On January 14, 2021, the Bankruptcy Court held an evidentiary hearing and approved the settlement in a bench ruling, overruling the objections to the settlement.

119. In or about November 2020, HCM and HarbourVest entered into discussions about settling the HarbourVest Claims. Seery's conduct of HCLOF and HCLA on behalf of HCM through the interstate mails and/or wires caused HCM to agree to the purchase of HarbourVest's Interests in HCLOF.

120. On or about each of September 30, 2020, through December 31, 2020, Seery, through his conduct of the enterprise, utilized the interstate wires and/or mails to obtain or arrive at valuations of the HCLOF interests. Seery's conduct of the enterprise caused them to cease sending the valuation reports to Plaintiffs, which eventually allowed Plaintiffs to be misled into believing that Seery had properly valued the interests.

121. On or about September 30, 2020, Seery transmitted or caused to be transmitted through the interstate wires information to HCLOF investors from HCM (via HCFA), including HarbourVest, regarding the value of HCLOF interests and underlying assets.

122. Additionally, Seery operated HCM in such a way that he concealed the true value of the HCLOF interests by utilizing the interstate wires and mails to transmit communications to the court in the form of written representations on or about December 23, 2020, and then further transmitted verbal representations of the current market value (the vastly understated one) on January 14, 2021, during live testimony.

124. The HCLOF net asset value had reached \$86,440,024 as of December 31, 2021, which means that by the time Seery was testifying in the Bankruptcy Court on January 14, 2021, the fair market value of the HarbourVest Assets was \$22.5 million, when it was actually closer to \$43,202,724. Seery, speaking on behalf of HCM, knew of the distinction in value.

125. On January 14, 2021, Seery also testified that he (implying HCM, HCLA and HCLOF) had valued the HarbourVest Assets at their current valuation and at fair market value. [...]

126. In supporting HCM's motion to the Bankruptcy Court to approve the HarbourVest Settlement, Seery omitted the fact that HCM was purchasing the interests at a massive discount, which would violate the letter and spirit of the Adviser's Act.

129. Seery was at all relevant times operating as an agent of HCM.

Compl. ¶¶ *passim*. Defendant’s contention that the allegations of the use of the mails and wires were not sufficiently pled under Rule 9(b) is meritless.¹⁷

Fraud in Connection the Sale of a Security

The violation of the securities laws, including the Investment Advisers Act if it is in connection with the sale of securities, can serve as a predicate to a RICO claim. *See* 18 U.S.C.S. § 1961(1)(D). *See also Youmans v. Simon*, 791 F.2d 341, 348 (5th Cir. 1986); *Laird v. Integrated Res.*, 897 F.2d 826, 839 (5th Cir. 1990).

Here, Plaintiffs have already addressed above why the scheme of self-dealing and self-enrichment alleged in the Complaint constitute violations of the Advisers Act. *See supra*. *See also* Comp. ¶¶ 55-91; 113-133. That these were in connection with the sale of HCLOF interests which are securities is uncontested. Indeed, the HCLOF Company Agreement provides that the ownership interests are “ordinary shares” and that shareholders generally own passive interests in HCLOF.¹⁸ 15 U.S.C. § 80b-6 specifically states that it shall be unlawful to use the interstate wires

¹⁷ There are additional allegations of using the interstate wires and instrumentalities of interstate commerce to reach the settlement because the parties were in different states (Compl. ¶¶ 1-5, 119), to conduct valuations of the HCLOF interests on or about September 30, 2020 (Compl. ¶¶ 40, 120), to communicate valuations which themselves were false (Compl. ¶ 121), to cause the motion for approval of the settlement to be filed in the bankruptcy court on December 23, 2020 via ECF (Compl. ¶ 122), misrepresenting the value of the assets in live court testimony (which was obviously conducted remotely via Webex (App_5)) (Compl. ¶ 122), that Seery had travelled to Dallas in December 2020 to attend a meeting wherein he received material information (Compl. ¶ 127), among several others.

¹⁸ (App__0024-25 (discussing control of business of HCLOF is in Board and Portfolio Manager)), HCLOF Company Agreement at ¶¶ 1.1 (HCFA is Portfolio Manager), ¶ 3.2 (power of Portfolio Manager to decide the value of assets), ¶ 4.1 (power of Portfolio Manager to run HCLOF’s business and make investment decisions unilaterally), ¶ 4.3 (power of Portfolio Manager to take any action unless it requests approval “in its sole discretion”, unless narrow exceptions apply), ¶ 5.3 (power of Portfolio Manager to take over shares from defaulting Member)), ¶ 9.1 (power of Portfolio Manager to dissolve company).

or mails, or “any instrumentality of interstate commerce” in connection with any of the violative courses of conduct. The violations and nexus to the instrumentalities of interstate commerce have already been addressed above and are incorporated herein.

Accordingly, because there are numerous predicate acts that allege a fraud in *connection with* the sale of a security (e.g., the sale of the HarbourVest Interests to Highland as opposed to CLO Holdco), these acts, together and when combined with the alleged acts of use of the interstate wires and mail, form a pattern of racketeering activity.

4. Plaintiffs Have Pled a Basis to Infer Scienter

To establish a RICO claim based on a pattern of mail or wire fraud, the plaintiff must plead that the defendant “act[ed] knowingly with the specific intent to deceive for the purpose of causing pecuniary loss to another or bringing about some financial gain to himself.” *United States v. Akpan*, 407 F.3d 360, 370 (5th Cir. 2005). This can be met through pleading circumstantial evidence from which knowledge or intent can reasonably be inferred. *Ranieri v. Advocare Int’l, L.P.*, 336 F. Supp. 3d 701, 716 (N.D. Tex. 2018) (finding scienter met through circumstantial evidence).

Here, Plaintiffs allege that Highland knew of its disclosure obligations when trading in securities that its advisees and those to whom it owes fiduciary duties may be interested, and that it is charged with knowing them because it is a Registered Investment Adviser under the Advisers Act (Compl. ¶ 4, 11). It is charged with such an awareness of its duties as well, and with the SEC’s rules. *See* SEC Release at p. 6. The Advisers Act requires Highland to maintain policies and procedures that will ensure compliance with its fiduciary duties. *See* SEC Release at p. 21-22 (and footnotes therein). Indeed, Plaintiffs alleged that Highland’s policies and procedures were supposed to prevent its trading adverse to its investors (Compl. ¶ 46). Jim Seery admitted that he and Highland had these fiduciary duties under the Advisers Act (App_0009, 0014).

Plaintiffs have also alleged that Seery knew or should have known the value of the HarbourVest Interests at the time her was negotiating with Harborne's, and at the time of the approval hearing in January 2021. *See* Compl. ¶¶ 45, 76. The Company Agreement imposes a duty to manage that as well (App_ 0023, 0029-30 (noting the ongoing duty to calculate the NAV (net asset value, and financial reporting duties)).

These are undisputed facts. Therefore Highland cannot credibly disclaim awareness of fiduciary duties in connection with the sale of HCLOF interests from HarbourVest to itself. Plaintiffs have credibly pled that Highland was aware that it was purchasing the HarbourVest Interests at a substantial discount to the then-current NAV, which was a corporate opportunity that it contractually would have been aware belonged to HCLOF or its investors (App_0020; 0023).

Thus, a reasonable jury could infer from these facts that Highland purposefully withheld the disclosures and information it was obligated under the Advisers Act to supply, for the specific purpose of taking advantage of the HarbourVest Interests (a gain for Highland), while intending to deprive Plaintiffs of that interest (a pecuniary loss to Plaintiffs). Courts have found adequate lesser allegations of scienter. *Accord Ranieri*, 336 F. Supp. 3d at 716.

5. Plaintiffs Have Pled Injury to Their Business or Property Due to the RICO Violations

Plaintiffs have been injured because it was wrongfully deprived of the HarbourVest Interests in HCLOF through a pattern of racketeering activity (Compl. ¶¶ 133). Contrary to the suggestion by the Defendant, the Supreme Court has held that a RICO plaintiff need not allege a "RICO injury" separate and apart from the injury arising from the racketeering activity itself. *See Sedima S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479 (1985).

As the Supreme Court put it in *Bridge v. Phoenix Bond & Indemnity Co.*: "[A] person can be injured 'by reason of' a pattern of mail fraud even if he has not relied on any

misrepresentations.” The Court explained that “[p]roof that the plaintiff relied on the defendant's misrepresentations may in some cases be sufficient to establish proximate cause, but there is no sound reason to conclude that such proof is always necessary.” *Bridge v. Phx. Bond & Indem. Co.*, 553 U.S. 639, 649 (2008). “Moreover, a person can be injured ‘by reason of’ a pattern of mail fraud even if he has not relied on any misrepresentations.” *Id.* Specifically, if they have lost the right to obtain a valuable asset. *Id.* (“Accepting their allegations as true, respondents clearly were injured by petitioners’ scheme: As a result of petitioners’ fraud, respondents lost valuable liens they otherwise would have been awarded. And this is true even though they did not rely on petitioners' false attestations of compliance with the county's rules.”) *Id.*

Here, Plaintiff CLO Holdco has alleged that but for Highland scheme to deprive Plaintiffs of the HarbourVest Interests, and the actions taken in connection with it, Highland would have otherwise been forced to disclose the entire transaction first because of the conflict of interest, and to purge that interest it would have had to offer it to the Plaintiffs. Plaintiff Holdco has alleged that had it been offered the HarbourVest Interests, it would have paid cash for it. (Compl. ¶ 50). Highland contends this allegation is “speculative.” While Highland can investigate in discovery whether Holdco had the cash is actually true, that does not render the allegation speculative.

6. Highland’s Defenses Are Legally Infirm or Improper at the 12(b)(6) Stage

Highland contends that under various precedent, the fact that Plaintiffs have pled a single transaction that is alleged to be fraudulent is insufficient to make out a RICO claim, and that it lacks the requisite “continuity.” However, the Fifth Circuit in *R.A.G.S. Couture, Inc. v. Hyatt*, held that two alleged uses of interstate wires, in a short period of time, and connected to a single transaction alleged to have been fraudulent, was sufficient to state a claim under RICO. 774 F.2d 1350, 1351-53 (5th Cir. 1985). The Fifth Circuit rejected the arguments raised by Highland here,

that “more” is needed, noting also that the Supreme Court had “held that an enterprise may be organized solely for illegitimate purposes, and that evidence of the existence of the enterprise may coalesce with evidence of the underlying pattern of racketeering.” *Id.* at 1353. *Accord Abell v. Potomac Ins. Co.*, 858 F.2d 1104, 1129 (5th Cir. 1988) (following *R.A.G.S.*, and holding plaintiff’s allegation of “over half a dozen acts of mail fraud and wire fraud, each of which stems from Westside’s bond offer” and in a short period of time).

Highland’s reliance on the Supreme Court’s opinion in *H.J. Inc. v. Northwestern Bell Tel. Co.* is also misplaced. There, the Supreme Court pointed out that continuity does not require a showing of *separate* illegal schemes. 492 U.S. 229, 236 (1989) (“We find no support in those sources for the proposition, espoused by the Court of Appeals for the Eighth Circuit in this case, that predicate acts of racketeering may form a pattern only when they are part of separate illegal schemes.”). Contrary to Highland’s taxing interpretation, *H.J.* merely held that the predicate acts have to relate to each other in order to constitute a “pattern”. *Id.* at 239. Highland’s contention that the Court’s reference to a “threat of continuing activity.”¹⁹

Therefore, Highland’s objections should be overruled and its Motion denied.

VI.

MOTION FOR LEAVE TO AMEND

Plaintiffs respectfully ask for leave to amend in the alternative to cure any pleading deficiencies that the Court determines exist. A court’s discretion to grant leave is severely limited by the bias of Rule 15(a) favoring amendment. *Dussouy v. Gulf Coast Investment Corp.*, 660 F.2d

¹⁹ Plaintiff would further suggest that upon amendment, Plaintiff would plead that there is a pattern of violations of the Advisers Act by Highland over the course of the past year, one threatens to continue unabated into the future because Highland has clearly decided to shirk fiduciary duties to the investors in its funds.

594, 598 (5th Cir. 1981). Leave to amend "should not be denied 'unless there is a *substantial reason* to do so.'" *Jacobsen v. Osborne*, 133 F.3d 315, 318 (5th Cir. 1998) (emphasis added) (quoting *Leffall v. Dallas Indep. Sch. Dist.*, 28 F.3d 521, 524 (5th Cir. 1994)).

Amendment would not be futile because—to the extent necessary under Rule 9(b)—Plaintiffs could add more detail on the instrumentalities of interstate commerce and address in further detail the allegations claimed to be deficient. The balance between Rule 8 and Rule 9(b) is not always perfect on the first try, and Plaintiffs should not be dismissed for want of an opportunity to cure any deficiencies. Plaintiffs further would request the opportunity to add a Rule 10b-5 claim, which can be premised on violations of the Advisers Act. *Laird v. Integrated Res.*, 897 F.2d 826, 835 (5th Cir. 1990 (recognizing that Advisers Act violations can be a basis for 10b-5 liability, holding that “for the purpose of rule 10(b)-5, an investment adviser is a fiduciary and therefore has an affirmative duty of utmost good faith to avoid misleading clients. This duty includes disclosure of all material facts and all possible conflicts of interest.”). Plaintiffs would finally request to add a claim under the Advisers Act to divest *Highland* of the rights it obtained in violation thereof under 15 U.S.C. § 80b-15(b). *Transamerica Mortg. Advisors (tama) v. Lewis*, 444 U.S. at 17 (finding private right of action under Section 215 of Advisers Act to seek equitable relief to disgorge rights obtained in violation of the Advisers Act).

VII.

CONCLUSION

For the foregoing reasons, the 12(b)(6) motion should be denied in full.

Dated: June 29, 2021

Respectfully submitted,

SBAITI & COMPANY PLLC

/s/ Mazin A. Sbaiti

Mazin A. Sbaiti

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Counsel for Plaintiffs

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

CHARITABLE DAF FUND, L.P.
and CLO HOLDCO, LTD.,
directly and derivatively,

Plaintiffs,

V.

**HIGHLAND CAPITAL MANAGEMENT,
L.P., HIGHLAND HCF ADVISOR, LTD.,
and HIGHLAND CLO FUNDING, LTD.,
*nominally,***

Defendants.

[illegible]

CAUSE NO. 3:21-cv-00842-B

APPENDIX IN SUPPORT OF PLAINTIFF’S RESPONSE TO
HIGHLAND CAPITAL MANAGEMENT, L.P.’S MOTION TO DISMISS COMPLAINT

App'x No.	Description	Bates Range
1	Declaration of Mazin A. Sbaiti	APP_0001 - 0005
2	Excerpts from Transcript of Hearing of Application to Employ James P. Seery, Jr. on July 14, 2020	APP_0006 - 0017
3	Highland CLO Funding - Members Agreement Relating to the Company	APP_0018 - 0045
4	HarbourVest Settlement Agreement	APP_0040 - 0058
5	Order Approving Debtor's Settlement with HarbourVest	APP_0065 - 0087

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

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and CLO HOLDCO, LTD.,
*directly and derivatively,***

Plaintiffs,

V.

**HIGHLAND CAPITAL MANAGEMENT,
L.P., HIGHLAND HCF ADVISOR, LTD.,
and HIGHLAND CLO FUNDING, LTD.,
*nominally,***

Defendants.

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§

CAUSE NO. 3:21-cv-00842-B

DECLARATION OF MAZIN A. SBAITI

1. My name is Mazin A. Sbaiti. I am over twenty-one years old and fully competent in all respects to make this Declaration.

2. I am a partner at Sbaiti & Company PLLC, and am admitted in good standing in this Court. I represent Plaintiffs Charitable DAF Fund, L.P. and CLO Holdco, Ltd. in this matter. The facts stated in this Declaration are based on my personal knowledge and made under penalty of perjury.

3. Exhibit 1 is a true and correct copy of excerpts from a Transcript of the July 14, 2020 Hearing before the Northern District of Texas Bankruptcy Court, in the *In Re Highland Capital Management, LP*, Cause No. 19-34054-sgj11.

4. Exhibit 2 is a true and correct copy of the Highland CLO Funding Members Agreement Relating to the Company, executed on

5. Exhibit 3 is a true and correct copy of the HarbourVest Settlement Agreement, entered into between Highland Capital Management and the various Harbourvest entities in the bankruptcy.

6. Exhibit 4 is a true and correct copy of the Order Approving Settlement with Harbourvest under Rule 9019 (the “9019 Order”).

Executed on June 29, 2021.

/s/ Mazin A. Sbaiti

Mazin A. Sbaiti

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

In Re:) **Case No. 19-34054-sgj11**
)
)
HIGHLAND CAPITAL) Dallas, Texas
MANAGEMENT, L.P.,) July 14, 2020
) 1:30 p.m. Docket
Debtor.)
) APPLICATIONS TO EMPLOY JAMES
) P. SEERY AND DEVELOPMENT
) SPECIALISTS, INC. (774, 775)

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE STACEY G.C. JERNIGAN,
UNITED STATES BANKRUPTCY JUDGE.

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Seery - Direct

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1 matter as well as financing in distressed matters during that
2 time.

3 In 1999, I went to the business side and I began to manage
4 distressed assets at Lehman Brothers as well as a leverage
5 finance business. That grew into my running the risky finance
6 business as well as the loan business at Lehman globally,
7 which included high-grade loans, high-yield loans, trading and
8 sales of those products, a big part of distressed, all of
9 restructuring, all of asset management, and all of the hedging
10 of the portfolio that we had.

11 From there, I left Lehman with a small group and sold it
12 to Barclay's. I moved on and ran a hedge fund with two former
13 partners of mine who are the founding partners called River
14 Birch Capital. It was a long-short credit fund; mostly
15 credit, though we did structured finance as well, and we also
16 handled some equities.

17 Q Okay. Let's spend a few minutes, as a preview, talking
18 about the Debtor and its business. And let's start with the
19 basics. Is there a way you can summarize the business of the
20 Debtor?

21 A I think, from a high level, the best way to think about
22 the Debtor is that it's a registered investment advisor. As a
23 registered investment advisor, which is really any advisor of
24 third-party money over \$25 million, it has to register with
25 the SEC, and it manages funds in many different ways.

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1 The Debtor manages approximately \$200 million current
2 values -- it was more than that at the start of the case -- of
3 its own assets. It doesn't have to be a registered investment
4 advisor for those assets, but it does manage its own assets,
5 which include directly-owned securities; loans from mostly
6 related entities, but not all; and investments in certain
7 funds which it also manages.

8 In addition, the Debtor manages about roughly \$2 billion
9 in -- \$2 billion in total managed assets, around \$2 billion in
10 CLO assets, and then other entities, which are hedge funds or
11 PE style.

12 In addition, the Debtor provides shared services for
13 approximately \$6 billion of assets. Those are assets that are
14 owned by related entities but not owned by Debtor-owned or
15 managed entities. And those are a combination of back office
16 services, which include timely reporting, asset management,
17 legal and compliance support, trading and research support,
18 but not the actual management of the assets.

19 The Debtors run -- and I think the way to think about it
20 is on a functional basis; at least, that's the way I think
21 about it -- and there's really six areas. There's corporate
22 management; finance, accounting and tax; trading and research;
23 private equity and fund investing; compliance and legal; and
24 then structured equity, which really includes all of the CLO
25 businesses.

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1 The goals of the Debtor generally are what you'd expect
2 out of an asset manager. A little bit different than most
3 because the Debtor does own assets, which is a little
4 different than when money asset managers typically hold assets
5 away from the asset manager. But number one, discharge
6 Highland's, which I'll call Highland (inaudible), LP, duties
7 to investors in the funds. Those are fiduciary duties under
8 the Investment Advisors Act. Each day, you've got to make
9 sure that you do that first and foremost.

10 Number two, create positive MPD in each of the funds that
11 we manage, either through sales, purchases, or hedging.

12 Next, make sure that we report timely finances of our own
13 assets, including in the funds, but also, to the third-party
14 investors. Maximize the value of HCMLP's owned assets. And
15 then operate as efficiently as possible for the lowest cost.

16 That's essentially how the Debtor -- how we think about
17 the Debtor from a functional perspective. It's got about 70
18 employees laid out in those areas that I mentioned, and each
19 of those employees every day usually think about those goals
20 and try to discharge their duties by focusing on those goals.

21 Q Thank you, Mr. Seery. And can you describe for the Court
22 how those 70 or so employees are organized? Is there an
23 internal corporate structure that you're working with?

24 A Yeah. The way -- the way -- I apologize. The way we
25 think about it is, as I said, corporate management, which is

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1 really HR and overseeing the function that it's filling every
2 day, that's been really -- because Mr. Dondero was removed
3 from management. It used to all roll up to him. That's been
4 effectively rolling up to me since February.

5 Finance, accounting, and tax. Each of these businesses
6 every day require certain amounts of liquidity. Each of them
7 have requirements that they have to pay out to investors.
8 Each of them have expenses. And all of them have different
9 kinds of tax either obligations or reporting. Those are
10 managed by Frank Waterhouse as the CFO. (inaudible), sorry.

11 Trading and research. With respect to the assets, they're
12 not -- they're not static assets. Many of them do get traded
13 on a regular basis. A gentleman, Joe Sowin, heads up the
14 trading of the liquid assets. John Povish (phonetic) heads up
15 the research and the trading of the more illiquid assets, but
16 not PE. In addition, we have PE assets that require some
17 management every day, including Board seats. That's a
18 gentleman by the name of Cameron Baynard, and also he will
19 fund investments in that area. J.P. Sevilla is responsible
20 for working with Cameron on those investments and leading that
21 team.

22 Importantly, because of the nature of what the Debtor
23 does, the fiduciary obligations, as well as the
24 responsibilities to each investor and the legal overlay, we
25 have a robust compliance and legal department. That's headed

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1 by Thomas Surgent and Scott Ellington. Scott: more focused
2 on transactional issues with respect to legal. He is actually
3 general counsel. Everything that has do with compliance, the
4 interrelatedness of the funds, trading between funds or
5 positions that are shared across funds, which are many, runs
6 through Thomas Surgent and his team.

7 And finally, structured equity. Sitting on top of the
8 structured finance business that we have, understanding those
9 assets, particularly of two billion-ish assets in CLOs, that's
10 headed by Hunter Covitz.

11 Q Can you describe for the Court your interaction with each
12 of the department heads that you just identified?

13 A Well, depending on the nature of the issue each day, I
14 have at least -- I'd say generally at least weekly contact
15 with most, often daily contact with most. So, for example,
16 when there are trading issues, particularly as the market was
17 extremely volatile with respect to unliquid securities, Joe
18 Sowin and I were on the phone several times a day.

19 Relating to the COVID issues, Brian Collins, who heads the
20 HR group, and I were on the phone several times a day.

21 Relating to structured equity, depending on what's
22 happening with a particular fund or what's happening in loan
23 prices, I speak to Hunter Covitz. And it goes down the line.

24 So it really depends on each of the areas and what's going
25 on in the business, but I try to touch base with each of those

Seery - Direct

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1 department heads on a regular basis.

2 Frank Waterhouse, of course, is at least weekly. We have
3 a standing call every week to make sure that we're focused on
4 liquidity, which is always a concern in a Chapter 11, and
5 Frank and his team are on that call and prepare weekly
6 materials for us.

7 Q Okay.

8 MR. MORRIS: Your Honor, before I move to the next
9 area of questions, the work of the Board, I just wanted to see
10 if the Court had any questions on the corporate organizational
11 structure, the internal structure of the business, or any of
12 the matters that Mr. Seery touched on?

13 THE COURT: I do not. And I do have in front of me a
14 demonstrative aid that Mr. Annable sent over ahead of time, so
15 I appreciate that as well.

16 MR. MORRIS: Okay. Your Honor, I think Mr. Seery
17 covered much of what's on that document, but if you'd like him
18 to go through that, we're happy to do it.

19 THE COURT: No, that's fine.

20 MR. MORRIS: Okay.

21 BY MR. MORRIS:

22 Q Then let's shift gears a little bit and start talking
23 about the work of the Independent Board itself. The
24 Independent Board was appointed in mid-January; is that right?

25 A Yeah. It was the first -- January 9th, the first week of

Seery - Direct

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1 January, and we started working that afternoon.

2 Q Okay. Can you describe for the Court what the -- the
3 Board's initial focus? What were you focused on?

4 A Well, if you think about the areas that I just mentioned
5 previously, the Board initially, for lack of a better term,
6 gang-tackled everything. So we tried to make sure that we had
7 a broad base of understanding among the three of us with
8 respect to the business.

9 I, because of my background, had a lot more familiarity
10 with asset management, these type of asset security
11 businesses. But we wanted to make sure that each of us was at
12 least facile with the main areas that we had to understand.
13 First was operations. How does the company run each day?
14 Particularly, how was it going to run without Mr. Dondero?
15 And I went through some of those functional areas and how we
16 thought about those and who head each of those.

17 Next in the -- I don't mean to say it's second, because
18 it's always first, but liquidity. What did the Debtors'
19 liquidity look like? How are we going to manage that
20 liquidity, not just for the near-term, but also for the
21 medium-term, and then even into the slightly longer-term? We
22 had to think about what assets are there, what money those
23 assets might need that we would have to invest in them, and
24 whether there was liquidity in those assets that we can create
25 liquidity in order to fund the Debtors' business.

Seery - Direct

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1 Personnel, we needed a good opportunity to understand who
2 did what, not just in the senior managers that I mentioned,
3 but deeper into the staff, because we're going to rely on
4 those folks. Particularly worked through with DSI.

5 As I mentioned, the Debtor, unlike a lot of other asset
6 managers, owns a lot of assets. It's a disparate group of
7 assets, but getting a feel and understanding for what those
8 assets were, what the critical issues surrounding those assets
9 are, who managed them day-to-day: We wanted to make sure that
10 each of the directors had a good (inaudible) and understanding
11 of those issues that might arise with respect to those assets,
12 and a good sense of how quickly those issues could, you know,
13 further arise.

14 We also had to get a very good understanding of each of
15 the funds that we manage. As I said, the Investment Advisors
16 Act puts a fiduciary duty on Highland Capital to discharge its
17 duty to the investors. So while we have duties to the estate,
18 we also have duties, as I mentioned in my last testimony, to
19 each of the investors in the funds.

20 Now, some of them are related parties, and those are a
21 little bit easier. Some of them are owned by Highland. But
22 there are third-party investors in these funds who have no
23 relation whatsoever to Highland, and we owe them a fiduciary
24 duty both to manage their assets prudently but also to seek to
25 maximize value. And we wanted to make sure we had a good

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1 understanding of that.

2 Finally, with respect to the shared service arrangements,
3 we needed to get an understanding of that \$6 billion in assets
4 and how our business, HCMLP, worked with those -- those shared
5 service counterparties and exactly who did what for whom.
6 It's very complicated because it had been run much more on a
7 functional basis than on a line basis from each contract. So
8 it's not as if your employees are allocated to NexBank. It's
9 the whole panoply of businesses that we enter into, and
10 providing those services to NexBank, not through a central
11 point but through whatever requests come in from the counter-
12 parties. So we needed a good understanding of what those
13 contracts looked and what those obligations were.

14 A VOICE: John, you're on mute.

15 MR. MORRIS: Thank you.

16 BY MR. MORRIS:

17 Q All of that work was going on in the first weeks of the
18 appointment of the Board?

19 A Yeah, it would not be fair to say we could do that in a
20 couple weeks. So it took far longer than that. But that
21 didn't mean that issues didn't start to arise immediately in
22 February. And so, while we were learning, we were also
23 starting to get a feel for different things that could happen
24 in the company.

25 As in many companies, immediately, one of the first things

Seery - Direct

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1 you have to deal with is, particularly at the beginning of the
2 year, what does compensation look like; who are the -- what do
3 promotions look like; are you going to be able to hold this
4 team together to service these assets? And yeah, we had that,
5 with an additional wrinkle that Highland's payment structure
6 defers a significant amount of compensation to its employees,
7 and it vests over time, and it has the very typical provision
8 that if you are not there when it vests -- when it is going to
9 be paid, actually, not when it vests. Even if you're vested,
10 if you're not there when it gets paid, you're not entitled to
11 it. And so understanding who was owed what; how the vesting
12 worked; what the compensation structure looked like compared
13 to third parties, was one of the first things we had to do.
14 And Highland has an extremely robust review process. Brian
15 Collins manages it. It's first-rate. It goes through both
16 360 in terms of what other employees think of each other as
17 well as bottoms up, in terms of performance. And then it has
18 a top-down component, which ultimately ran through Mr.
19 Dondero. Since he was effectively removed from that role, the
20 Board had to jump in and get a full understanding with Brian
21 about what the process looked like; how it was going to work;
22 how it compared to other firms; and whether we could go
23 forward with it. And that was one of the motions that was
24 brought early to the Court.

25 A Let's talk a minute about the transactional work that the

1 yesterday counsel for Mr. Dondero filed a joinder in the
2 Debtors' objection to Acis's claim. So, again, just thinking
3 about this in the context of mediation, I think, with that
4 joinder, they will be a necessary party. So, going back to
5 Mr. Seery's point, this is not just --

6 THE COURT: Oh, absolutely. Mr. Dondero is --

7 MS. PATEL: -- a two-party --

8 THE COURT: -- going to be a required party in
9 mediation. Absolutely. So, --

10 MS. PATEL: Thank you, Your Honor.

11 THE COURT: All right. Well, if there's nothing
12 further, we'll see you on the 21st. And, again, my courtroom
13 deputy may be reaching out before then if we've got things
14 nailed down on mediation.

15 (Proceedings concluded at 4:54 p.m.)

16 --oOo--

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CERTIFICATE

21

22 I certify that the foregoing is a correct transcript to
23 the best of my ability from the electronic sound recording of
24 the proceedings in the above-entitled matter.

25

/s/ Kathy Rehling

07/16/2020

26

27
28 Kathy Rehling, CETD-444
29 Certified Electronic Court Transcriber

Date

Between

CLO HOLDCO, LTD.

And

HARBOURVEST DOVER STREET IX INVESTMENT L.P.

And

HARBOURVEST 2017 GLOBAL AIF L.P.

And

HARBOURVEST 2017 GLOBAL FUND L.P.

And

HV INTERNATIONAL VIII SECONDARY L.P.

And

HARBOURVEST SKEW BASE AIF L.P.

And

HIGHLAND CAPITAL MANAGEMENT, L.P.

And

LEE BLACKWELL PARKER, III

And

QUEST IRA, INC., FBO LEE B. PARKER III, ACCT. # 3058311

And

QUEST IRA, INC., FBO HUNTER COVITZ, ACCT. # 1469811

And

QUEST IRA, INC., FBO JON POGLITSCH, ACCT. # 1470612

And

QUEST IRA, INC., FBO NEIL DESAI, ACCT. # 3059211

And

HIGHLAND CLO FUNDING, LTD.

And

HIGHLAND HCF ADVISOR, LTD.

MEMBERS AGREEMENT RELATING TO THE COMPANY

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THIS AGREEMENT is made the 15th day of November 2017

BETWEEN

- (1) **CLO HOLDCO, LTD.** whose registered office address is at Intertrust Corporate Services (Cayman) Limited, 190 Elgin Avenue, George Town, Grand Cayman KY1-9005, Cayman Islands;
- (2) **HARBOURVEST DOVER IX INVESTMENT L.P.** of c/o HarbourVest Partners, LLC, One Financial Center, 44th Floor, Boston, MA 02111, USA
- (3) **HARBOURVEST 2017 GLOBAL AIF L.P.** of c/o HarbourVest Partners, LLC, One Financial Center, 44th Floor, Boston, MA 02111, USA
- (4) **HARBOURVEST 2017 GLOBAL FUND L.P.** of c/o HarbourVest Partners, LLC, One Financial Center, 44th Floor, Boston, MA 02111, USA
- (5) **HV INTERNATIONAL VIII SECONDARY L.P.** of c/o HarbourVest Partners, LLC, One Financial Center, 44th Floor, Boston, MA 02111, USA
- (6) **HARBOURVEST SKEW BASE AIF L.P.** of c/o HarbourVest Partners, LLC, One Financial Center, 44th Floor, Boston, MA 02111, USA
- (7) **HIGHLAND CAPITAL MANAGEMENT, L.P.** of 300 Crescent Court, Suite 700, Dallas, Texas 75201, USA
- (8) **LEE BLACKWELL PARKER, III** of 300 Crescent Court, Suite 700, Dallas, Texas 75201, USA
- (9) **QUEST IRA, INC., FBO LEE B. PARKER III, ACCT. # 3058311** of 17171 Park Row #100, Houston, Texas 77084, USA
- (10) **QUEST IRA, INC., FBO HUNTER COVITZ, ACCT. # 1469811** of 17171 Park Row #100, Houston, Texas 77084, USA
- (11) **QUEST IRA, INC., FBO JON POGLITSCH, ACCT. # 1470612** of 17171 Park Row #100, Houston, Texas 77084, USA
- (12) **QUEST IRA, INC., FBO NEIL DESAI, ACCT. # 3059211** of 17171 Park Row #100, Houston, Texas 77084, USA

(together the "**Members**") and

- (13) **HIGHLAND CLO FUNDING, LTD.**, with registration number 60120 whose registered office is at First Floor, Dorey Court, Admiral Park, St Peter Port, Guernsey GY1 6HJ, Channel Islands (the "**Company**") and
- (14) **HIGHLAND HCF ADVISOR, LTD.**, whose registered address is at Maples Corporate Services Limited, PO Box 309, Ugland House, Grand Cayman, KY1-1104, Cayman Islands (the "**Portfolio Manager**").

WHEREAS:

- (A) The Company is a limited company incorporated under the laws of the Island of Guernsey on 30 March 2015.
- (B) The Company has been established to provide its investors with exposure to CLO Notes on both a direct basis and indirect basis and senior secured loans on an indirect basis, through the use of the investments described in its investment policy as set forth in the Offering Memorandum dated 15 November 2017, the (the "**Offering Memorandum**"), subject to the restrictions set forth therein.

- (C) The Members are the owners of the entire issued capital of the Company.
- (D) The Parties are entering into this Agreement to regulate the relationship between them and the operation and management of the Company.

OPERATIVE PROVISIONS

1. INTERPRETATION

In this Agreement, including the Schedule:

- 1.1 the following words and expressions shall have the following meanings, unless they are inconsistent with the context:

"Adherence Agreement" means the agreement under which a person agrees to be bound by the terms of this Agreement in the form substantially similar as set out in the Schedule;

"Advisers Act" shall mean the U.S. Investment Advisers Act of 1940, as amended from time to time, and the rules and regulations of the U.S. Securities and Exchange Commission promulgated thereunder;

"Affiliate" means, with respect to a person, (i) any other person who, directly or indirectly, is in control of, or controlled by, or is under common control with, such person or (ii) any other person who is a director, officer or employee (a) of such person, (b) of any subsidiary or parent company of such person or (c) of any person described in clause (i) above. For the purposes of this definition, control of a person shall mean the power, direct or indirect, (i) to vote more than 50% of the securities having ordinary voting power for the election of directors of such persons or (ii) to direct or cause the direction of the management and policies of such person whether by contract or otherwise. For purposes of this definition, the management of an account by one person for the benefit of any other person shall not constitute "control" of such other person and no entity shall be deemed an "Affiliate" of the Company solely because the administrator or its Affiliates serve as administrator or share trustee for such entity;

"Agreement" means this agreement together with the Schedule;

"Articles" means the articles of incorporation of the Company as amended from time to time;

"Business" means the business of the Company as described in Recital (B);

"Business Day" means a day (other than a Saturday or Sunday) on which banks are open for ordinary banking business in Guernsey;

"Directors" means the directors of the Company from time to time;

"CLO Holdco" means CLO Holdco, Ltd. (or any permitted successor to the business of CLO Holdco, Ltd. or interest in the Company);

"Code" shall mean the U.S. Internal Revenue Code of 1986, as amended from time to time.

"Directors" means the directors of the Company from time to time;

"Dover IX" means HarbourVest Dover Street IX Investment L.P. (or any permitted successor to the business of HarbourVest Dover Street IX Investment L.P. or any interest in the Company);

"DOL" shall mean the U.S. Department of Labor, or any governmental agency that succeeds to the powers and functions thereof.

"DOL Regulations" shall mean the regulations of the DOL included within 29 C.F.R. section 2510.3-101.

"Dover IX" shall mean HarbourVest Dover Street IX Investment L.P. (or any permitted successor to the business of HarbourVest Dover Street IX Investment L.P. or interest in the Company);

"ERISA" shall mean the U.S. Employee Retirement Income Security Act of 1974, as amended from time to time;

"ERISA Member" shall mean a Member that (a) is a "benefit plan investor" (as such term is defined in the DOL Regulations as modified by section 3(42) of ERISA) subject to the fiduciary responsibility provisions of part 4 of title I of ERISA or is a "plan" (as such term is defined in section 4975(e) of the Code) subject to section 4975 of the Code or (b) is designated as an ERISA Member by the General Partner in writing on or before the date at which such ERISA Member is admitted to the Company;

"HarbourVest Entities" means: Dover IX; HarbourVest 2017 Global AIF L.P.; HarbourVest 2017 Global Fund L.P.; HV International VIII Secondary L.P.; and HarbourVest Skew Base AIF L.P. (or any of their respective permitted successors to their businesses or interests in the Company);

"Highland Principals" means: Highland Capital Management, L.P.; Lee Blackwell Parker, III, Quest IRA, Inc., fbo Lee B. Parker III Acct. # 3058311; Quest IRA, Inc., fbo Hunter Covitz Acct. # 1469811; Quest IRA, Inc., fbo Jon Poglitsch Acct. # 1470612; Quest IRA, Inc., fbo Neil Desai Acct. # 3059211 (or any of their respective permitted successors to their businesses or interests in the Company);

"Law" means the Companies (Guernsey) Law, 2008, as amended;

"Member" means a person whose name is from time to time entered in the register of members of the Company as the holder of shares in the Company;

"Parties" means the parties to this Agreement and any other person who agrees to be bound by the terms of this Agreement under an Adherence Agreement;

"Shares" means ordinary shares in the Company;

"Subsidiary" shall have the meaning ascribed to it in the Law;

"Subscription and Transfer Agreement" means the Subscription and Transfer Agreement, dated as of 15 November 2017, entered into by and among CLO HoldCo, Ltd. and each of the Members and acknowledged and agreed by the Company and the Portfolio Manager.

Any capitalized terms used herein without definition have the meanings specified in the Offering Memorandum.

- 1.2 any reference to the Parties being obliged to procure shall so far as they are able includes, without limitation, procuring by the exercise of votes which they directly or indirectly control at meetings of the Directors or general meetings of the Company;
- 1.3 any reference to a person includes, where appropriate, that person's heirs, personal representatives and successors;
- 1.4 any reference to a person includes any individual, body corporate, corporation, firm, unincorporated association, organisation, trust or partnership;
- 1.5 any reference to time shall be to Guernsey time;
- 1.6 except where the context otherwise requires words denoting the singular include the plural and vice versa and words denoting any one gender include all genders;

1.7 unless otherwise stated, a reference to a Clause or a Schedule is a reference to a Clause or a Schedule to this Agreement; and

1.8 Clause headings are for ease of reference only and do not affect the construction of any provision.

2. THE BUSINESS OF THE COMPANY

2.1 The Parties hereby agree that the objects and purpose of the Company shall be to carry on the Business.

2.2 The Parties shall so far as they are able (including without limitation by the exercise of votes which they directly or indirectly control at meetings of the Directors or general meetings of the Company) procure that (i) the Company's principal activities shall be the pursuit of the objects and purposes described in Clause 2.1 conducted in accordance with the provisions hereof and with the Offering Memorandum, the Subscription and Transfer Agreement and Articles of the Company and (ii) the Parties shall not take any action inconsistent with the provisions of the Offering Memorandum, including, without limitation the investment strategy set forth in the "Summary" and the applicable restrictions during and after the Investment Period and the suspension or termination of the Investment Period following a Key Person Event.

2.3 The Members shall (so long as they hold shares in the capital of the Company) use all reasonable endeavours to promote and develop the Business of the Company.

3. VOTING RIGHTS

3.1 The Parties agree that the following provisions of this Clause 3 shall apply during such period or periods as the Members parties hereto are Members.

3.2 The Parties shall procure that the Company shall not take any action at any meeting requiring the sanction of an ordinary or special resolution or by written resolution, in each case of the Directors or of the Members, without the affirmative vote or prior written consent, as applicable, of the Members totalling in the aggregate more than seventy-five percent (75%) of the Company, including, but not limited to, the following actions:

3.2.1 any issuance of new shares of the Company or a new class of shares of the Company or payment of any dividend by issuance of new shares of the Company, other than issuances of Shares pursuant to the Offering Memorandum and the Subscription and Transfer Agreement;

3.2.2 any alteration or cancellation of any rights of any Shares or of the Share capital of the Company,

3.2.3 any conversion or redemption of Shares, except pursuant to Clause 5.5,

3.2.4 any payment of commission in consideration for subscribing or agreeing to subscribe for any shares in the Company,

3.2.5 the creation of any lien on any Shares, except pursuant to the remedies in Clause 5.3. or

3.2.6 the suspension of the calculation of the NAV; other than a temporary suspension of the calculation of the NAV and NAV per Share by the Board of Directors during any period if it determines in good faith that such a suspension is warranted by extraordinary circumstances, including: (i) during any period when any market on which the Company's investments are quoted, traded or dealt in is closed, other than for ordinary holidays and weekends, or during periods in which dealings are restricted or suspended; (ii) during the existence of any state of affairs, including as a result of political, economic, military or monetary events or any circumstances outside the control of the Portfolio Manager or the Company, as a result of which,

in the reasonable opinion of the Portfolio Manager, the determination of the value of the assets of the Company, would not be reasonably practicable or would be seriously prejudicial to the Members taken as a whole; (iii) during any breakdown in the means of communication normally employed in determining the price or value of the Company's assets or liabilities, or of current prices in any market as aforesaid, or when for any other reason the prices or values of any assets or liabilities of the Company cannot reasonably be accurately ascertained within a reasonable time frame; (iv) during any period when the transfer of funds involved in the realization or acquisition of any investments cannot, in the reasonable opinion of the Portfolio Manager, be effected at normal rates of exchange; or (v) automatically upon liquidation of the Company.

4. **ADVISORY BOARD.**

- 4.1 Composition of Advisory Board. The Company shall establish an advisory board (the "**Advisory Board**") composed of two individuals, one of whom shall be a representative of CLO Holdco and one of whom shall be a representative of Dover IX (or, in each case, or any permitted successor to the interest in the Company of such Member). No voting member of the Advisory Board shall be a controlled Affiliate of the Portfolio Manager (including, for the avoidance of doubt, following a permitted transfer of CLO Holdco's interest to an Affiliate of the Portfolio Manager, if applicable), it being understood that for the purposes of this sentence none of CLO Holdco, its wholly-owned subsidiaries nor any of their respective directors or trustees shall be deemed to be a controlled Affiliate of the Portfolio Manager due to their pre-existing non-discretionary advisory relationship with the Portfolio Manager. None of the members of the Advisory Board shall receive any compensation (other than reimbursement for reasonable and documented out-of-pocket expenses) in connection with their position on the Advisory Board. The Company shall bear any fees, costs and expenses related to the Advisory Board.
- 4.2 Meetings of Advisory Board; Written Consents. The Advisory Board shall meet with the Portfolio Manager at such times as requested by the Portfolio Manager from time to time. The quorum for a meeting of the Advisory Board shall be all of its members entitled to vote. All actions taken by the Advisory Board shall be (i) by a unanimous vote of all of the members of the Advisory Board in attendance in a meeting at which a quorum is present and entitled to vote and not abstaining from voting or (ii) by a written consent in lieu of a meeting signed by all of the members of the Advisory Board entitled to consent and not abstaining from consenting. Meetings of the Advisory Board may be held in person, by telephone or by other electronic device.
- 4.3 Functions of Advisory Board. The Advisory Board shall provide (or determine not to provide) any consents or approvals expressly contemplated by this Agreement and the Offering Memorandum to be provided by the Advisory Board and, at the request of the Portfolio Manager in its sole discretion, provide general advice (which, for the avoidance of doubt, shall be non-binding) to the Portfolio Manager or the Company with regard to Company activities and operations and other matters. For the avoidance of doubt, no consent or approval of the Advisory Board shall be required for any action or determination expressly permitted or contemplated hereunder or in the Offering Memorandum and not conditioned on such a consent or approval. The Portfolio Manager shall not act contrary to the advice of the Advisory Board with respect to any action or determination expressly conditioned herein or in the Offering Memorandum on the consent or approval of the Advisory Board. Without limiting the foregoing, the Advisory Board shall be authorized to give any approval or consent required or deemed necessary or advisable under the Advisers Act on behalf of the Company and the Members, including under Section 206(3) of the Advisers Act. The Portfolio Manager may from time to time in its discretion request the Advisory Board to review and ratify certain Company matters. The consent of the Advisory Board shall be required to approve the following actions: (i) any extension of the Investment Period; (ii) any extension of the Term (other than an automatic extension following an extension of the Investment Period that has been approved by the Advisory Board); (iii) any allotment of additional equity securities by the Company; and (iv) any investment in a Related Obligation or any other transaction between the Company or any entity in which the Company holds a direct or indirect interest, on the one hand, and Highland or any of its Affiliates, on the other hand and (v) other matters as set forth in the Offering

Memorandum. Notwithstanding the foregoing or anything to the contrary set forth herein, no transaction that is specifically authorized in the governing documents of the Company shall require approval of the Advisory Board, including, without limitation, sales or securitizations of all or a portion of the Company's loan portfolio into new Qualifying CLOs (i.e. the transfer of warehoused assets into new Qualifying CLOs), investments in CLO Notes issued by CLOs managed by Highland Affiliates, and the NexBank Credit Facility and any Permitted NexBank Credit Facility Amendments, in each case as described in the Offering Memorandum. Any such approval, consent or ratification given by the Advisory Board shall be binding on the Company and the Members. Neither the Advisory Board nor any member thereof shall have the power to bind or act for or on behalf of the Company in any manner, and no shareholder who appoints a member of the Advisory Board shall be deemed to be an Affiliate of the Company or Highland solely by reason of such appointment.

- 4.4 Term of Members of Advisory Board. A member of the Advisory Board shall be deemed removed from the Advisory Board (i) if such member is no longer an officer, director, manager, trustee, employee, consultant or other representative of CLO Holdco or Dover IX, as applicable, or their respective Affiliates and shall be replaced as soon as practicable with a representative of CLO Holdco or Dover IX, or their respective Affiliates, as applicable, or (ii) if the Member represented by such member either becomes a Defaulting Member or such member ceases to be eligible to represent such Member pursuant to Clause 4.1.
- 4.5 No Duties to Other Members. No Advisory Board member who is the representative of any Member shall, to the extent permitted by law, owe a fiduciary duty to the Company or any other Member (other than the duty to act in good faith), and may, to the fullest extent permitted by law, in all instances act in such member's own interest and in the interest of the Member that appointed such member.

5. **DEFAULTING MEMBERS**

- 5.1 In the event any Member defaults in its obligation to pay the full amount of the purchase price of Shares called for settlement under the Subscription and Transfer Agreement on the applicable Settlement Date (such unpaid amount, an "**Outstanding Settlement Amount**"), the Portfolio Manager, on behalf of the Company, shall provide written or telephonic notice of such default to such Member. If such default is not cured within 5 business days after written (or if applicable telephonic or email) notice thereof given by the Portfolio Manager, on behalf of the Company, has been received by such Member, such Outstanding Settlement Amount shall automatically accrue interest on a retroactive basis from the date such Outstanding Settlement Amount was due at 12% (the "**Default Interest Rate**") (which interest, once paid, shall not be applied to the purchase of the unsettled Shares of such Member, but which will upon receipt be distributed pro rata to those Members who have funded any such Outstanding Settlement Amounts pursuant to this Clause 5). No such Shares which have failed to be settled will be issued to any Member until settlement of the full amount of the purchase price has been made. In addition, if such default is not cured within 10 business days after written or telephonic notice thereof given by the Portfolio Manager, on behalf of the Company, has been received by such Member (a "**Defaulting Member**"), the following provisions shall apply:
- 5.2 Whenever the vote or consent of the Defaulting Member would otherwise be required or permitted hereunder or under the Articles, the Defaulting Member shall not be entitled to participate in such vote or consent in respect of his existing shareholding and with respect to any representative of such Defaulting Member on the Advisory Board, and such vote or consent shall be calculated as if such Defaulting Member were not a Member and, as applicable, any representative of such Defaulting Member on the Advisory Board were not a member of the Advisory Board.
- 5.3 The Portfolio Manager, on behalf of the Company, may pursue and enforce all rights and remedies available, including the commencement of legal proceedings against the Defaulting Member to collect the Outstanding Settlement Amounts, together with interest thereon for the account of the Company from the date due at the Default Interest Rate, plus the costs and expenses of collection (including attorneys' fees and expenses).

- 5.4 The Portfolio Manager, on behalf of the Company, may (at the sole cost of the Defaulting Member) borrow funds from any person (other than the Defaulting Member or its Affiliates) to cover such shortfall and/or advance all or a portion of the Defaulting Member's Outstanding Settlement Amount to the Company on behalf of the Defaulting Member, and such advance shall be repaid by the Defaulting Member to the Portfolio Manager, on behalf of the Company, with interest for the account of the Portfolio Manager, on behalf of the Company, on the amount outstanding from time to time commencing on the date of the advance at the Default Interest Rate. To the extent the Portfolio Manager, on behalf of the Company, advances funds to the Company on behalf of a Defaulting Member, all distributions from the Company that would otherwise be made to the Defaulting Member shall be paid to the Portfolio Manager, on behalf of the Company, (with any such amounts being applied first against accrued but unpaid interest and then against principal), until all amounts payable by the Defaulting Member to the Portfolio Manager, on behalf of the Company, under this Clause 5.4 (including interest) have been paid in full.
- 5.5 The Portfolio Manager, on behalf of the Company, may elect, upon notice to the Defaulting Member, to redeem the Defaulting Member's shares in an amount equal to 50% of the outstanding amount existing as of the date of the default at a price of \$0.0001 per Share. Thereupon, the commitment of the Defaulting Member under the Subscription and Transfer Agreement shall be zero, the Defaulting Member shall not be obligated to make any further settlements, the voting capital of such Defaulting Member and of each other Member shall be re-determined as of the date of such default to reflect the new commitment of the Defaulting Member, and the Portfolio Manager shall revise the books and records of the Company to reflect the reduction of the commitment of the Defaulting Member. The Members agree (x) that the damages suffered by the Company as the result of a failure by a Member to settle a commitment to purchase Shares that is required by this Agreement cannot be estimated with reasonable accuracy and (y) that the foregoing provisions of this Clause 5.5 shall act as liquidated damages for the default by the Defaulting Member (which each Member hereby agrees are reasonable).
- 5.6 The Board may offer to the non-Defaulting Members (pro rata in accordance with their respective Commitments) the option of purchasing the Defaulting Member's unsettled Shares on the terms set forth in the applicable Settlement Notice (as defined in the Subscription and Transfer Agreement).
- 5.7 At the election of the Board, distributions of dividends otherwise payable to the Defaulting Member under the Articles shall not be paid to the Defaulting Member, but instead shall be applied against the amount of the Outstanding Settlement Amount (plus interest at the Default Interest Rate and related costs); provided that any amounts so applied shall be deemed to have been distributed to the Defaulting Member under the Articles.
- 5.8 The Portfolio Manager may send an amended or new Settlement Notice to the Members other than the Defaulting Member in an amount equal to the Defaulting Member's Outstanding Settlement Amount and otherwise in accordance with the Subscription and Transfer Agreement.
- 5.9 Each Defaulting Member further appoints the Portfolio Manager as agent and attorney-in-fact for the Defaulting Member and hereby grants to the Portfolio Manager an irrevocable power of attorney to take all actions necessary on its behalf to sell, assign, or transfer the commitment to purchase unsettled Shares of such Defaulting Member pursuant to Clause 5.6 or as necessary on its behalf to effect the other remedies or rights set forth in this Clause 5; provided that the Portfolio Manager shall not bind any Defaulting Member to an indemnification or other similar obligation which guarantees the financial performance of the Company or which exceeds the ability of the Defaulting Member to provide indemnification under applicable law.

6. TRANSFERS OR DISPOSALS OF SHARES

- 6.1 No Member shall sell, pledge, charge, mortgage, assign, assign by way of security, transfer, convey, exchange or otherwise dispose of its Shares or its commitment to settle purchases of Shares under the Subscription and Transfer Agreement (each a "**Transfer**"), other than to an Affiliate of an initial Member party hereto, without the prior written consent of the Portfolio

- Manager, which consent shall be in the sole discretion of the Portfolio Manager; provided that no such Transfer shall be made unless in the opinion of counsel reasonably satisfactory to the Portfolio Manager (who may be counsel for the Company, and which requirement for an opinion may be waived, in whole or in part, in the sole discretion of the Portfolio Manager) that:
- 6.1.1 such Transfer would not require registration under the Securities Act or any state securities or "Blue Sky" laws or other laws applicable to the Shares to be assigned or transferred and is conducted in conformance with the restrictions set forth in the Offering Memorandum;
 - 6.1.2 such Transfer would not be reasonably likely to cause the Company to be subject to tax in any jurisdiction other than of its incorporation on a net income basis, not be reasonably likely to cause the Company to become subject to registration as an investment company under the Investment Company Act of 1940, as amended;
 - 6.1.3 such Transfer would not cause the Company to be considered to be an entity whose underlying assets are considered to include "plan assets" by reason of investment by an "employee benefit plan" or "plan" in such entity pursuant to the U.S. Plan Assets Regulations; and
 - 6.1.4 such sale, assignment, disposition or transfer would not cause all or any portion of the assets of the Company to constitute "plan assets" under ERISA or the Code.
- 6.2 Prior to making any Transfer of Shares (other than Transfers to Affiliates of an initial Member or, in the case of CLO Holdco or a Highland Principal, to Highland, its Affiliates or another Highland Principal) a Member must first offer to the other Members a right to purchase the Shares, on a pro rata basis with respect to their current Shares, at the same price (which must be cash) as such Shares are proposed to be purchased by the prospective third party purchaser pursuant to an irrevocable offer letter. The other Members will have 30 days following receipt of the letter to determine whether to purchase their entire pro rata portion of the Shares proposed to be Transferred. If the other Members do not accept the offer, the Member may (subject to complying with the other Transfer restrictions in this Agreement) Transfer the applicable Shares that such Members have not elected to purchase to a third party at a price equal to or greater than the price described in the offer letter, provided that if the Member has not (a) entered into a definitive agreement to effect such sale within 90 days after the expiration of the period that the other Members have to accept the offer in the offer letter or (b) consummated the sale within 120 day after the entry into the definitive agreement to consummate the sale, it must comply with these right of first refusal procedures again. Any Member (other than the Member proposing to Transfer its Shares) may assign its right to purchase its pro rata portion of the Shares to any other Member (subject to complying with the other Transfer restrictions in this Agreement), any initial Member (other than the Member proposing to Transfer its Shares) may assign its right to purchase its pro rata portion of the Shares to an Affiliate (subject to complying with the other Transfer restrictions in this Agreement), and CLO Holdco and the Highland Principals (unless such Member is the Member proposing the Transfer its Shares) may assign its right to purchase its pro rata portion of the Shares to Highland, an Affiliate of Highland or other Highland Principals (subject to complying with the other Transfer restrictions in this Agreement).
- 6.3 No Highland Principal may transfer his or its interests in the Company other than (i) to a trust or other tax or estate planning vehicle or (ii) to the Portfolio Manager, its Affiliates or another Highland Principal upon the termination of such Highland Principal's (or the beneficial owner of such Highland Principal, if applicable) employment by Highland Capital Management, L.P.
- 6.4 Any transferor of any Share shall remain bound by the terms of this Agreement applicable to it prior to such transfer and that nothing in this Agreement shall constitute a waiver of any rights a Party to this Agreement may have by reason of a breach of this Agreement by a transferor prior to transfer. The transferor and/or the transferee shall bear all costs of any Transfer.
- 6.5 The Parties agree not to Transfer their Shares to any person unless such transferee agrees to be bound by the terms of this Agreement.
- 6.6 All Adherence Agreements executed pursuant to this Clause shall be executed by the transferee or allottee and each Party.

7. **CONFIDENTIALITY**

- 7.1 Each Party agrees to keep any information received by it pursuant to this Agreement or relating to the Business as confidential and not (save with the relevant Party's consent or as may be required by Law or the rules of any regulatory authority or any stock exchange) disclose to any person such information.
- 7.2 Notwithstanding the foregoing, the Parties agree that the HarbourVest Entities may disclose to their limited partners and prospective limited partners (including any agents of such limited partners or prospective limited partners), clients and applicable governmental agencies (a) the name and address of the Company, (b) the capital commitment and the remaining capital commitment, (c) the net asset value of such HarbourVest Entity's interest in the Company, (d) the amount of distributions that have been made to such HarbourVest Entity by the Company and the amount of contributions that have been made by such HarbourVest Entity to the Company, (e) such ratios and performance information calculated by such HarbourVest Entity using the information in clauses (a) through (d) above, including the ratio of net asset value plus distributions to contributions (i.e., the "multiple") and such HarbourVest Entity's internal rate of return with respect to its investment in the Company, and (f) tax information with respect to the Company.

8. **DIVIDENDS**

- 8.1 The Company agrees that it shall not, and the Portfolio Manager agrees it shall not cause the Company to, make any dividends except pursuant to the section titled "Summary—Dividend Policy" of the Offering Memorandum.

9. **TERM OF THE COMPANY**

- 9.1 Each Party agrees to cause the winding up and dissolution of the Company after the ten year anniversary of the date hereof (the "**Term**"); provided that the Portfolio Manager, in its reasonable discretion, may postpone dissolution of the Company for up to 180 days in order to facilitate orderly liquidation of the investments; provided, further, that the Term shall be automatically extended for any amount of time for which the Investment Period may be extended.
- 9.2 Notwithstanding the foregoing, the Term may be extended with the consent of the Portfolio Manager and the Advisory Board for up to two successive periods of one year each.

10. **ERISA MATTERS**

- 10.1 The Portfolio Manager, the Company and each Member shall use their reasonable best efforts to conduct the affairs and operations of the Company so as to limit investment in the Company by "benefit plan investors" (within the meaning of the DOL Regulations as modified by section 3(42) of ERISA) to less than the U.S. Plan Threshold. In the event the U.S. Plan Threshold is met or exceeded, the Portfolio Manager, on behalf of the Company, may require any Non-Qualified Holder that is a U.S. Plan Investor to sell or transfer their Shares to a person qualified to own the same that is not a U.S. Plan Investor within 30 days and within such 30 days and to provide the Company with satisfactory evidence of such sale or transfer such that such sale or transfer, together with other sale or transfers pursuant to this Clause, would result in the investment in the Company by "benefit plan investors" (within the meaning of the DOL Regulations as modified by section 3(42) of ERISA) to be less than the U.S. Plan Threshold. Where the conditions above are not satisfied within 30 days after the serving of the notice to transfer, such Non-Qualified Holder will be deemed, upon the expiration of such 30 days, to have forfeited their Shares.

11. **TAX MATTERS**

- 11.1 PFIC. For each fiscal year of the Company, the Company will no later than 120 days after the end of such fiscal year, commencing with the first fiscal year for which the Company is determined to be a PFIC (a "passive foreign investment company"), furnish to each of the

HarbourVest Entities (x) all information necessary to permit such HarbourVest Entity or any of its partners to complete United States Internal Revenue Service Form 8621 with respect to their interests in the Company and (y) a PFIC Annual Information Statement under section 1295(b) of the Code with respect to the Company; provided that if the Company is unable to furnish such final information and Statement within such 120 days, then the Company shall use its reasonable best efforts to furnish estimates of such information and Statement on or before the 120th day after the end of such fiscal year.

- 11.2 CFC. The Company shall furnish to each of the HarbourVest Entities within 120 days after the end of each fiscal year of the Company, a United States Internal Revenue Service Form 5471 for such fiscal year, completed for all information concerning the Company required to be filed by such HarbourVest Entity or any of its partners (i.e., all portions applicable to the relevant category of filer other than page 1 items A-D and page 2 Schedule B), to the extent such Form 5471 is required to be filed by such HarbourVest Entity or any of its partners; provided that if the Company is unable to furnish such final information within such 120 days, then the Company shall use its reasonable best efforts to furnish estimates of such information on or before the 120th day after the end of each fiscal year.
- 11.3 Other Tax Information. The Company shall furnish to each of the HarbourVest Entities (a) within 120 days after the end of each fiscal year of the Company such other information reasonably requested by the HarbourVest Entities that any HarbourVest Entity may require in order for it or any of its partners to comply with its U.S. federal income tax reporting obligations with respect to its interest in the Company; provided that if the Company is unable to furnish such final information within such 120 days, then the Company shall use its reasonable best efforts to furnish estimates of such information on or before the 120th day after the end of such fiscal year and (b) promptly upon request such other information reasonably requested by such HarbourVest Entity in order to withhold tax or to file tax returns and reports or to furnish tax information to any of its partners with respect to the Company.
- 11.4 Withholding and Other Taxes. The Company will use reasonable best efforts to acquire investments that will not result in withholding or other taxes being imposed directly or indirectly on the Company by any jurisdiction with respect to income or distributions from such investments.

12. **AMENDMENTS TO CERTAIN AGREEMENTS**

- 12.1 The Portfolio Manager and the Company shall not amend or terminate, or agree to amend or terminate, the Memorandum or Articles of Incorporation of the Company or that certain Portfolio Management Agreement between the Portfolio Manager and the Company dated as of the date hereof (the "**Management Agreement**") without the consent of the Parties.
- 12.2 The Portfolio Manager agrees that it shall not assign its rights, duties and obligations under the Management Agreement without the consent of the Members totalling in the aggregate more than seventy-five percent (75%) of the Company. Notwithstanding the foregoing, the Portfolio Manager may, without the consent of the Members, assign any of its rights or obligations under the Management Agreement to an Affiliate; provided that such Affiliate (A) has demonstrated ability, whether as an entity or by its personnel, to professionally and competently perform duties similar to those imposed upon the Portfolio Manager pursuant to the Management Agreement, (B) has the legal right and capacity to act as Portfolio Manager thereunder and (C) shall not cause the Company or the pool of collateral to become required to register under the provisions of the Investment Company Act and such action does not cause the company to be subject to tax in any jurisdiction outside of its jurisdiction of incorporation.
- 12.3 The Company agrees that it shall not hire any portfolio manager without the consent of the Parties and such new portfolio manager shall be required to join and abide by this Agreement.

13. **FINANCIAL REPORTS**

- 13.1 The books and records of account of the Company shall be audited as of the end of each fiscal year of the Company by a nationally recognized independent public accounting firm selected by

the Portfolio Manager that is registered with, and subject to regular inspection as of the commencement of the professional engagement period, and as of each calendar year-end, by, the Public Company Accounting Oversight Board in accordance with its rules. During the Term, the Portfolio Manager or the Company shall prepare and mail, deliver by fax, email or other electronic means or otherwise make available a financial report (audited in the case of a report sent as of the end of a fiscal year and unaudited in the case of a report sent as of the end of a quarter) to each Member on or before the 120th day after the end of each fiscal year and the 45th day after the end of each of the first three quarters of each fiscal year, setting forth for such fiscal year or quarter (a) the assets and liabilities of the Company as of the end of such fiscal year or quarter; (b) the net profit or net loss of the Company for such fiscal year or quarter; and (c) such Member's closing capital account balance as of the end of such fiscal year or quarter; provided that if the Portfolio Manager or the Company is unable to furnish final information with respect to any of the above, then the Portfolio Manager or the Company shall use its reasonable best efforts to furnish estimates of such information on or before the 120th day after the end of each fiscal year and the 45th day after the end of the first three quarters of each fiscal year. On or before the 60th day after the end of each fiscal year, the Portfolio Manager or the Company shall provide to each Member an unaudited draft of the financial report for such fiscal year.

- 13.2 After the end of each fiscal year or quarter, the Portfolio Manager or the Company shall cause to be delivered to the Advisory Board a reasonably detailed summary of the expenses incurred by the Company during such period.

14. **TERMINATION AND LIQUIDATION**

- 14.1 Save as provided for in Clause 13.2, this Agreement shall terminate:

- 14.1.1 when one Party holds all the Shares;
- 14.1.2 when a resolution is passed by the Company's Members or creditors, or an order made by a court or other competent body or person instituting a process that shall lead to the Company being wound up and its assets being distributed among the Company's creditors, Members or other contributors; or
- 14.1.3 with the written consent of all the Parties.

- 14.2 The following provisions of this Agreement remain in full force after termination: Clause 1 (Interpretation), Clause 7 (Confidentiality), this Clause, Clause 14 (Whole Agreement), Clause 16 (Assignments), Clause 17 (Variation and Waiver), Clause 18 (Service of Notice), Clause 19 (General) and Clause 21 (Governing Law and Jurisdiction).

- 14.3 Termination of this Agreement shall not affect any rights or liabilities that the Parties may have accrued under it.

- 14.4 Where the Company is to be wound up and its assets distributed, the Parties shall agree a suitable basis for dealing with the interests and assets of the Company and shall endeavour to ensure that:

- 14.4.1 all existing contracts of the Company are performed to the extent that there are sufficient resources;
- 14.4.2 the Company shall not enter into any new contractual obligations;
- 14.4.3 the Company is dissolved and its assets are distributed as soon as practical; and
- 14.4.4 any other proprietary information belonging to or originating from a Party shall be returned to it by the other Parties.

15. WHOLE AGREEMENT

- 15.1 This Agreement, and any documents referred to in it, constitute the whole agreement between the Parties and supersede any arrangements, understanding or previous agreement between them relating to the subject matter they cover.
- 15.2 Each Party acknowledges that in entering into this Agreement, and any documents referred to in it, it does not rely on, and shall have no remedy in respect of, any statement, representation, assurance or warranty of any person other than as expressly set out in this Agreement or those documents.
- 15.3 Nothing in this Clause 14 operates to limit or exclude any liability for fraud.

16. STATUS OF AGREEMENT

- 16.1 Each Party shall, to the extent that it is able to do so, exercise its voting rights and other powers in relation to the Company to procure that the provisions of this Agreement are properly and promptly observed and given full force and effect according to the spirit and intention of the Agreement.
- 16.2 If any provision in the memorandum of incorporation of the Company or the Articles conflicts with any provision of this Agreement, the provisions of this Agreement shall prevail as between the Parties. Each of the Parties shall, to the extent that it is able to do so, exercise its voting rights and other powers in relation to the Company to procure the modification of the memorandum of association of the Company or the Articles (as the case may be) in order to eliminate the conflict, but this Agreement shall not itself constitute a modification of the memorandum of association of the Company or the Articles.

17. ASSIGNMENTS

Save as expressly permitted by this Agreement, no person may assign, or grant any security interest over, any of its rights under this Agreement or any document referred to in it without the prior written consent of the Parties.

18. VARIATION AND WAIVER

- 18.1 A variation of this Agreement shall be in writing and signed by or on behalf of the Parties.
- 18.2 A waiver of any right under this Agreement is only effective if it is in writing and it applies only to the person to which the waiver is addressed and the circumstances for which it is given.
- 18.3 A person that waives a right in relation to one person, or takes or fails to take any action against that person, does not affect its rights against any other person.

19. SERVICE OF NOTICE

- 19.1 Any notice required to be given by any of the Parties may be sent by post or facsimile to the address and facsimile number of the addressee as set out in this Agreement, in either case marked for the attention of the relevant person named below, or to such other address and/or facsimile number and/or marked for the attention of such other person as the addressee may from time to time have notified for the purposes of this Clause.

19.1.1 to the Company:
Address:
First Floor, Dorey Court, Admiral Park
St Peter Port, Guernsey GY1 6HJ
Channel Islands

19.1.2 to CLO Holdco:

Address:
c/o Highland Capital Management, L.P.
300 Crescent Court, Suite 700
Dallas, TX 75201
Attn: General Counsel
Tel: +1 (972) 628-4100
Email: Notices@highlandcapital.com

19.1.3 to any HarbourVest Entity:

Address:
c/o HarbourVest Partners, LLC
One Financial Center, 44th Floor
Boston, MA 02111
USA
Attn: Michael Pugatch
Tel: +1 (617) 348-3712
F
Email: mpugatch@harbourvest.com

19.1.4 to any other Party: by post or hand delivery only to the address specified in the register of members of the Company.

19.2 Communications sent by post shall be deemed to have been received 24 hours after posting. Communications sent by facsimile transmission shall be deemed to have been received at the time the transmission has been received by the addressee **PROVIDED THAT** if the facsimile transmission, where permitted, is received after 5.00pm or on a day which is not a Business Day, it shall be deemed to have been received 11.00am the Business Day following thereafter.

19.3 In proving service by post it shall only be necessary to prove that the notice was contained in an envelope which was duly addressed and posted in accordance with this Clause and in the case of facsimile transmission it shall be necessary to prove that the facsimile was duly transmitted to the correct number.

20. **GENERAL**

20.1 Each of the Parties hereby agree not to enter into or abide by any agreement whether written or oral with any one or more of the other Parties in respect of the voting of Shares or the submission of Member resolutions to any Members for voting by them, or otherwise to direct or influence, or attempt to direct or influence, the day-to-day management of the Company, either directly or indirectly, other than in order to comply with the other terms of this Agreement or the Articles. In this regard, each of the Parties agrees to not to direct or influence or to attempt to direct or influence any of the Directors through any employment relationship that the Directors may have outside of the Company other than in order to comply with the other terms of this Agreement or the Articles. Each of the Parties hereby agree that this provision shall continue to apply to them whether or not they are or remain a Member.

20.2 Unless otherwise provided, all costs in connection with the negotiation, preparation, execution and performance of this Agreement, shall be borne by the Party that incurred the costs.

20.3 The Parties are not in partnership with each other and there is no relationship of principal and agent between them.

20.4 All transactions entered into between any Party and the Company shall be conducted in good faith and on the basis set out or referred to in this Agreement or, if not provided for in this Agreement, as may be agreed by the Parties and, in the absence of such agreement, on an arm's length basis.

20.5 Each Party shall at all times act in good faith towards the other Parties and shall use all reasonable endeavours to ensure that this Agreement is observed.

20.6 Each Party shall promptly execute and deliver all such documents, and do all such things, as the other Parties may from time to time reasonably require for the purpose of giving full effect to the provisions of this Agreement.

20.7 This Agreement may be executed in any number of counterparts, each of which is an original and which together have the same effect as if each Party had signed the same document. This Agreement may not be amended except with the consent of each Party.

21. STATUS OF AGREEMENT

21.1 The Parties shall, when necessary, exercise their powers of voting and any other rights and powers they have to amend, waive or suspend a conflicting provision in the Articles to the extent necessary to permit the Company and its Business to be administered as provided in this Agreement.

21.2 If there is an inconsistency between any of the provisions of this agreement and the provisions of the Articles, the provisions of this agreement shall prevail as between the Parties.

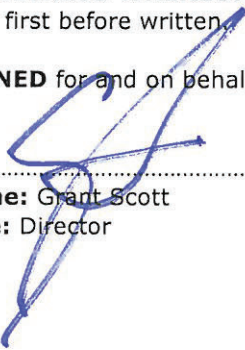
22. GOVERNING LAW AND JURISDICTION

This Agreement shall be governed by and construed in accordance with the laws of the Island of Guernsey and each of the Parties submits to the non-exclusive jurisdiction of the Royal Courts of the Island of Guernsey.

[Signature Page Follows.]

IN WITNESS WHEREOF the Parties hereto have caused this Agreement to be executed the day and year first before written.

SIGNED for and on behalf of **CLO HOLDCO, LTD.**


By:.....

Name: Grant Scott

Title: Director


SIGNED for and on behalf of
HARBOURVEST DOVER STREET IX INVESTMENT L.P.

By: HarbourVest Partners (Europe) Limited,
its Alternative Investment Fund Manager

By: 
Name: Michael J. Pugatch
Title: Authorized Person

SIGNED for and on behalf of
HARBOURVEST 2017 GLOBAL AIF L.P.

By: HarbourVest Partners (Europe) Limited,
its Alternative Investment Fund Manager

By: 
Name: Michael J. Pugatch
Title: Authorized Person

SIGNED for and on behalf of
HARBOURVEST 2017 GLOBAL FUND L.P.

By: HarbourVest 2017 Global Associates L.P.,
its General Partner

By: HarbourVest GP LLC,
its General Partner

By: HarbourVest Partners, LLC,
its Managing Member

By: 
Name: Michael J. Pugatch
Title: Managing Director

SIGNED for and on behalf of
HV INTERNATIONAL VIII SECONDARY L.P.

By: HIPEP VIII Associates L.P.

Its General Partner

By: HarbourVest GP LLC

Its General Partner

By: HarbourVest Partners, LLC

Its Managing Member

By: 

Name: Michael J. Pugatch

Title: Managing Director

SIGNED for and on behalf of
HARBOURVEST SKEW BASE AIF L.P.

By: HarbourVest Partners (Europe) Limited,
its Alternative Investment Fund Manager

By: 

Name: Michael J. Pugatch

Title: Authorized Person

SIGNED



.....
Lee Blackwell Parker, III


SIGNATURE PAGE TO MEMBERS' AGREEMENT

APP_0037

001842

SIGNED for and on behalf of
QUEST IRA, INC.
FBO LEE B. PARKER III, ACCT. # 3058311

Read and approved

By: 
Name: *Emmanuel Maciel*
Title: *transactions supervisor*

X 

SIGNED for and on behalf of
QUEST IRA, INC.
FBO HUNTER COVITZ, ACCT. # 1469811

By:
Name:
Title:

SIGNED for and on behalf of
QUEST IRA, INC.
FBO JON POGLITSCH, ACCT. # 1470612

By:
Name:
Title:

SIGNED for and on behalf of
QUEST IRA, INC.
FBO NEIL DESAI, ACCT. # 3059211

By:
Name:
Title:

SIGNATURE PAGE TO MEMBERS' AGREEMENT


APP_0038

001843

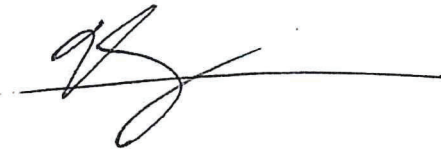
SIGNED for and on behalf of
QUEST IRA, INC.
FBO LEE B. PARKER III, ACCT. # 3058311

By:.....
Name:
Title:

SIGNED for and on behalf of
QUEST IRA, INC.
FBO HUNTER COVITZ, ACCT. # 1469811

By: 
Name: Emmanuel Mader
Title: Transaction Supervisor

Read & approved



SIGNED for and on behalf of
QUEST IRA, INC.
FBO JON POGLITSCH, ACCT. # 1470612

By:.....
Name:
Title:

SIGNED for and on behalf of
QUEST IRA, INC.
FBO NEIL DESAI, ACCT. # 3059211

By:.....
Name:
Title:


SIGNED for and on behalf of
QUEST IRA, INC.
FBO LEE B. PARKER III, ACCT. # 3058311

By:.....
Name:
Title:

SIGNED for and on behalf of
QUEST IRA, INC.
FBO HUNTER COVITZ, ACCT. # 1469811

By:.....
Name:
Title:

SIGNED for and on behalf of
QUEST IRA, INC.
FBO JON POGLITSCH, ACCT. # 1470612

By: 
Name: Emmanuel Mager
Title: Transactions Supervisor

Read and Approved:

 11/7/17

SIGNED for and on behalf of
QUEST IRA, INC.
FBO NEIL DESAI, ACCT. # 3059211

By:.....
Name:
Title:

SIGNED for and on behalf of
QUEST IRA, INC.
FBO LEE B. PARKER III, ACCT. # 3058311

By:.....
Name:
Title:

SIGNED for and on behalf of
QUEST IRA, INC.
FBO HUNTER COVITZ, ACCT. # 1469811

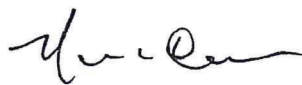
By:.....
Name:
Title:

SIGNED for and on behalf of
QUEST IRA, INC.
FBO JON POGLITSCH, ACCT. # 1470612

By:.....
Name:
Title:

SIGNED for and on behalf of
QUEST IRA, INC.
FBO NEIL DESAI, ACCT. # 3059211

By:.....
Name: Emmanuel Mader
Title: Transactional Supervisor

Read and approved


SIGNED for and on behalf of
HIGHLAND CAPITAL MANAGEMENT, L.P.

By: Strand Advisors, Inc.,
its General Partner



By:

Name: James Dondero

Title: President

SIGNED for and on behalf of
HIGHLAND HCF ADVISOR, LTD.


By:
Name: James Dondero
Title: President

SIGNED for and on behalf of
HIGHLAND CLO FUNDING, LTD.

By: 
Name: William Scott
Title: Director

SIGNATURE PAGE TO MEMBERS' AGREEMENT

APP_0044

001849

SCHEDULE

Adherence Agreement

THIS ADHERENCE AGREEMENT is made on [●] 200[●]

BETWEEN:

- (1) [●] of [●] (the "**Covenantor**");
- (2) CLO HOLDCO, LTD. of [] (a "**Member**");
- (3) [●] of [] (a "**Member**");
- (4) [●] of [] (a "**Member**");
- (5) HIGHLAND CLO FUNDING, LTD., with registration number 60120 whose registered office is at First Floor, Dorey Court, Admiral Park, St Peter Port, Guernsey GY1 6HJ, Channel Islands (the "**Company**");
- (6) HIGHLAND HCF ADVISOR, LTD., registered address is at Maples Corporate Services Limited, PO Box 309, Ugland House, Grand Cayman, KY1-1104, Cayman Islands (the "**Portfolio Manager**").

RECITAL

This Agreement is supplemental to the members agreement made on November 15 2017 between the Members, the Portfolio Manager and the Company (the "**Members Agreement**").

IT IS HEREBY AGREED as follows:

1. The Covenantor hereby confirms that he has been supplied with a copy of the Members Agreement and hereby covenants with each of the parties thereto to observe, perform and be bound by all the terms of the Members Agreement as if it were a party thereto.
2. Each of the other parties to the Members Agreement hereby covenants with the Covenantor that the Covenantor shall be entitled to the benefit of the terms of the Members Agreement as if he were a party thereto.
3. This Agreement shall be governed by and construed in accordance with Guernsey law.

IN WITNESS of which this Agreement has been executed by the Covenantor and each of the parties to the Members Agreement on the date shown above.

SETTLEMENT AGREEMENT

This Settlement Agreement (the “Agreement”) is entered into as of December 23, 2020, between Highland Capital Management, L.P. (the “Debtor”), on the one hand, and HarbourVest 2017 Global Fund L.P., HarbourVest 2017 Global AIF L.P., HarbourVest Dover Street IX Investment L.P., HV International VIII Secondary L.P., HarbourVest Skew Base AIF L.P., and HarbourVest Partners L.P. (each, a “HarbourVest Party,” and collectively, “HarbourVest”), on the other hand. Each of the foregoing are sometimes referred to herein collectively as the “Parties” and individually as a “Party.”

RECITALS

WHEREAS, on October 16, 2019 (the “Petition Date”), the Debtor filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code (the “Bankruptcy Case”) in the Bankruptcy Court for the District of Delaware, Case No. 19-12239 (CSS) (the “Delaware Bankruptcy Court”);

WHEREAS, on December 4, 2019, the Delaware Bankruptcy Court entered an order transferring venue of the Debtor’s case to the Bankruptcy Court for the Northern District of Texas, Dallas Division, Case No. 19-34054-sgj (the “Bankruptcy Court”);

WHEREAS, prior to the Petition Date, HarbourVest invested in Highland CLO Funding, Ltd. f/k/a Acis Loan Funding, Ltd. (“HCLOF”) and acquired an a 49.98% ownership interest in HCLOF (the “HarbourVest Interests”);

WHEREAS, the portfolio manager for HCLOF is Highland HCF Advisor, Ltd., a subsidiary of the Debtor;

WHEREAS, on April 8, 2020, HarbourVest filed proofs of claim in the Bankruptcy Case, which are listed on the Debtor’s claims register as claim numbers 143, 147, 149, 150, 153, and 154 (the “HarbourVest Claims”), asserting claims against the Debtor relating to its investment in HCLOF;

WHEREAS, on July 30, 2020, the Debtor filed the *Debtor’s First Omnibus Objection to Certain (a) Duplicate Claims; (b) Overstated Claims; (c) Late-Filed Claims; (d) Satisfied Claims; (e) No Liability Claims; and (f) Insufficient-Documentation Claims* [Docket No. 906], in which the Debtor objected to the HarbourVest Claims;

WHEREAS, on September 11, 2020, HarbourVest filed the *HarbourVest Response to Debtor’s First Omnibus Objection to Creation (a) Duplicate Claims; (b) Overstated Claims; (c) Late-Filed Claims; (d) Satisfied Claims; (e) No Liability Claims; and (f) Insufficient-Documentation Claims* [Docket No. 1057] (the “HarbourVest Response”);

WHEREAS, on October 18, 2020, HarbourVest filed the *Motion of HarbourVest Pursuant to Rule 3018(a) of the Federal Rules of Bankruptcy Procedure for Temporary Allowance of Claims for Purposes of Voting to Accept or Reject the Plan* [Docket No. 1207] (the “3018 Motion” and together with the HarbourVest Response, the “HarbourVest Pleadings”);

WHEREAS, in the HarbourVest Pleadings, HarbourVest asserted, among other things, that the HarbourVest Claims included claims against the Debtor arising from fraudulent inducement, fraudulent concealment, fraudulent misrepresentation, breach of fiduciary duty, breach of securities laws, and misuse of assets and sought damages in excess of \$300,000,000;

WHEREAS, the Debtor disputes the HarbourVest Claims;

WHEREAS, on November 24, 2020, the Debtor filed the *Fifth Amended Plan of Reorganization for Highland Capital Management, L.P.* [Docket No. 1472] (as amended, the “Plan”).¹

WHEREAS, the Parties desire to enter into this Agreement which incorporates, formalizes, and finalizes the full and final resolution of the HarbourVest Claims and HarbourVest Pleadings; and

WHEREAS, this Agreement will be presented to the Bankruptcy Court for approval pursuant to **Federal Rule of Bankruptcy Procedure 9019** (“Rule 9019”).

NOW THEREFORE, in consideration of the above recitals, the covenants, conditions, and promises made herein, and other good and valuable consideration, the receipt of which is hereby acknowledged, the Parties agree as follows:

1. Settlement of Claims.

(a) In full and complete satisfaction of the HarbourVest Claims, HarbourVest will receive:

(i) an allowed, nonpriority general unsecured claim in the aggregate amount of \$45,000,000 (the “Allowed GUC Claim”); and

(ii) an allowed subordinated claim in the aggregate amount of \$35,000,000 (the “Allowed Subordinated Claim” and together with the Allowed GUC Claim, the “Allowed Claims”).

(b) On the Effective Date, HarbourVest will transfer all of its rights, title, and interest in the HarbourVest Interests to the Debtor or its nominee pursuant to the terms of the *Transfer Agreement for Ordinary Shares of Highland CLO Funding, Ltd.*, attached hereto as Exhibit A (the “Transfer Agreements”) and the Debtor or its nominee will become a shareholder of HCLOF with respect to the HarbourVest Interests. The terms of the Transfer Agreements are incorporated into this Agreement by reference.

2. Releases.

(a) Upon the Effective Date, and to the maximum extent permitted by law, each HarbourVest Party on behalf of itself and each of its current and former advisors, trustees, directors, officers, managers, members, partners, employees, beneficiaries, shareholders, agents,

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

participants, subsidiaries, parents, successors, designees, and assigns hereby forever, finally, fully, unconditionally, and completely releases, relieves, acquits, remises, and exonerates, and covenants never to sue, the Debtor, HCLOF, HCLOF's current and former directors, and the Debtor's current and former advisors, trustees, directors, officers, managers, members, partners, employees, beneficiaries, shareholders, agents, participants, subsidiaries, parents, affiliates, successors, designees, and assigns, except as expressly set forth below (the "Debtor Released Parties"), for and from any and all claims, debts, liabilities, demands, obligations, promises, acts, agreements, liens, losses, costs and expenses (including, without limitation, attorney's fees and related costs), damages, injuries, suits, actions, and causes of action of whatever kind or nature, whether known or unknown, suspected or unsuspected, matured or unmatured, liquidated or unliquidated, contingent or fixed, at law or in equity, statutory or otherwise, including, without limitation, any claims, defenses, and affirmative defenses, whether known or unknown, including, without limitation, those which were or could have been asserted in, in connection with, or with respect to the Bankruptcy Case (collectively, the "HarbourVest Released Claims").

(b) Upon the Effective Date, and to the maximum extent permitted by law, the Debtor hereby forever, finally, fully, unconditionally, and completely releases, relieves, acquits, remises, and exonerates, and covenants never to sue (i) each HarbourVest Party and (ii) each HarbourVest Party's current and former advisors, trustees, directors, officers, managers, members, partners, employees, beneficiaries, shareholders, agents, participants, subsidiaries, parents, affiliates, successors, designees, and assigns (the "HarbourVest Released Parties"), for and from any and all claims, debts, liabilities, demands, obligations, promises, acts, agreements, liens, losses, costs and expenses (including, without limitation, attorney's fees and related costs), damages, injuries, suits, actions, and causes of action of whatever kind or nature, whether known or unknown, suspected or unsuspected, matured or unmatured, liquidated or unliquidated, contingent or fixed, at law or in equity, statutory or otherwise, including, without limitation, any claims, defenses, and affirmative defenses, whether known or unknown, which were or could have been asserted in, in connection with, or with respect to the Bankruptcy Case (collectively, the "Debtor Released Claims"); *provided, however*, that notwithstanding anything herein to the contrary, the release contained in this Section 2(b) will apply to the HarbourVest Released Parties set forth in subsection (b)(ii) only with respect to Debtor Released Claims arising from or relating to HarbourVest's ownership of the HarbourVest Interests.

(c) Notwithstanding anything in this Agreement to the contrary, the releases set forth herein will not apply with respect to (i) the Allowed Claims, (ii) the claims of Charlotte Investor IV, L.P., or (iii) the duties, rights, or obligations of any Party under this Agreement or the Transfer Agreements.

3. **Agreement Subject to Bankruptcy Court Approval.** The effectiveness of this Agreement and the Parties' obligations hereunder are conditioned in all respects on the approval of this Agreement by the Bankruptcy Court. The Parties agree to cooperate and use reasonable efforts to have this Agreement approved by the Bankruptcy Court. The "Effective Date" will be the date of an order entered by the Bankruptcy Court approving this Agreement pursuant to a motion filed under Rule 9019.

4. **Representations and Warranties.** Subject in all respects to Section 3 hereof:

(a) each HarbourVest Party represents and warrants that (i) it has full authority to enter into this Agreement and to release the HarbourVest Released Claims and has not sold, transferred, or assigned any HarbourVest Released Claim to any other person or entity, (ii) no person or entity other than such HarbourVest Party has been, is, or will be authorized to bring, pursue, or enforce any HarbourVest Released Claim on behalf of, for the benefit of, or in the name of (whether directly or derivatively) of such HarbourVest Party; and (iii) HarbourVest owns all of the HCLOF Interests free and clear of any claims or interests; and

(b) the Debtor represents and warrants to HarbourVest that (i) it has full authority to enter into this Agreement and to release the Debtor Released Claims and (ii) no person or entity other than the Debtor has been, is, or will be authorized to bring, pursue, or enforce any Debtor Released Claim on behalf of, for the benefit of, or in the name of (whether directly or derivatively) of the Debtor Party.

5. **Plan Support.**

(a) Each HarbourVest Party hereby agrees that it will (a) vote all HarbourVest Claims held by such HarbourVest Party to accept the Plan, by delivering its duly executed and completed ballots accepting the Plan on a timely basis; and (b) not (i) change, withdraw, or revoke such vote (or cause or direct such vote to be changed withdrawn or revoked); (ii) exercise any right or remedy for the enforcement, collection, or recovery of any claim against the Debtor except in a manner consistent with this Agreement or the Plan, (iii) object to, impede, or take any action other action to interfere with, delay or postpone acceptance or confirmation of the Plan; (iv) directly or indirectly solicit, propose, file, support, participate in the formulation of or vote for, any restructuring, sale of assets (including pursuant to **11 U.S.C. § 363**), merger, workout, or plan of reorganization of the Debtor other than the Plan; or (v) otherwise take any action that would in any material respect interfere with, delay, or postpone the consummation of the Plan; provided, however, that such vote may be revoked (and, upon such revocation, deemed void ab initio) by such HarbourVest Party at any time following the termination of this agreement or the occurrence of a Support Termination Event (it being understood that any termination of this agreement shall entitle each HarbourVest Party to change its vote in accordance with section 1127(d) of the Bankruptcy Code), notwithstanding any voting deadline established by the Bankruptcy Court including without limitation the January 5, 2021, 5:00 p.m. (prevailing Central Time) deadline established by the *Order Approving Form of Ballots, Voting Deadline and Solicitation Procedures* [Docket No. 1476].

(b) In full resolution of the 3018 Motion, HarbourVest will have a general unsecured claim for voting purposes only in the amount of \$45,000,000.

(c) The obligations of the HarbourVest Parties under this Section 5 shall automatically terminate upon the occurrence of any of the following (each a “Support Termination Event”): (i) the effective date of the Plan, (ii) the withdrawal of the Plan, (iii) the entry of an order by the Bankruptcy Court (A) converting the Bankruptcy Case to a case under chapter 7 of the Bankruptcy Code or (B) appointing an examiner with expanded powers beyond those set forth in sections 1106(a)(3) and (4) of the Bankruptcy Code or a trustee in Bankruptcy

Case, or (iv) the failure of the Court to enter an order approving the terms of this Agreement and the settlement described herein pursuant to Rule 9019 prior to confirmation of the Plan.

6. **No Admission of Liability.** The Parties acknowledge that there is a bona fide dispute with respect to the HarbourVest Claims. Nothing in this Agreement will imply, an admission of liability, fault or wrongdoing by the Debtor, HarbourVest, or any other person, and the execution of this Agreement does not constitute an admission of liability, fault, or wrongdoing on the part of the Debtor, HarbourVest, or any other person.

7. **Successors-in-Interest.** This Agreement shall be binding upon and shall inure to the benefit of each of the Parties and their successors, and assigns.

8. **Notice.** Each notice and other communication hereunder will be in writing and will be sent by email and delivered or mailed by registered mail, receipt requested, and will be deemed to have been given on the date of its delivery, if delivered, and on the fifth full business day following the date of the mailing, if mailed to each of the Parties thereto at the following respective addresses or such other address as may be specified in any notice delivered or mailed as set forth below:

HARBOURVEST

HarbourVest Partners L.P.
Attention: Michael J. Pugatch
One Financial Center
Boston, MA 02111
Telephone No. 617-348-3712
E-mail: mpugatch@harbourvest.com

with a copy (which shall not constitute notice) to:

Debevoise & Plimpton LLP
Attention: M. Natasha Labovitz, Esq.
919 Third Avenue
New York, NY 10022
Telephone No. 212-909-6649
E-mail: nlabovitz@debevoise.com

THE DEBTOR

Highland Capital Management, L.P.
300 Crescent Court, Suite 700
Dallas, Texas 75201
Attention: James P. Seery, Jr.
Telephone No.: 972-628-4100
Facsimile No.: 972-628-4147
E-mail: jpseeryjr@gmail.com

with a copy (which shall not constitute notice) to:

Pachulski Stang Ziehl & Jones LLP
Attention: Jeffrey Pomerantz, Esq.
10100 Santa Monica Blvd., 13th Floor
Los Angeles, CA 90067
Telephone No.: 310-277-6910
Facsimile No.: 310-201-0760
E-mail: jpomerantz@pszjlaw.com

9. **Advice of Counsel.** Each Party represents that it has: (a) been adequately represented by independent legal counsel of its own choice, throughout all of the negotiations that preceded the execution of this Agreement; (b) executed this Agreement upon the advice of such counsel; (c) read this Agreement, and understands and assents to all the terms and conditions contained herein without any reservations; and (d) had the opportunity to have this Agreement and all the terms and conditions contained herein explained by independent counsel, who has answered any and all questions asked of such counsel, or which could have been asked of such counsel, including, but not limited to, with regard to the meaning and effect of any of the provisions of this Agreement.

10. **Entire Agreement.** This Agreement and the Transfer Agreement contain the entire agreement and understanding concerning the subject matter of this Agreement, and supersede and replace all prior negotiations and agreements, written or oral and executed or unexecuted, concerning such subject matter. Each of the Parties acknowledges that no other Party, nor any agent of or attorney for any such Party, has made any promise, representation or warranty, express or implied, written or oral, not otherwise contained in this Agreement to induce any Party to execute this Agreement. The Parties further acknowledge that they are not executing this Agreement in reliance on any promise, representation or warranty not contained in this Agreement, and that any such reliance would be unreasonable. This Agreement will not be waived or modified except by an agreement in writing signed by each Party or duly authorized representative of each Party.

11. **No Party Deemed Drafter.** The Parties acknowledge that the terms of this Agreement are contractual and are the result of arms'-length negotiations between the Parties and their chosen counsel. Each Party and its counsel cooperated in the drafting and preparation of this Agreement. In any construction to be made of this Agreement, the Agreement will not be construed against any Party.

12. **Future Cooperation.** The Parties agree to cooperate and execute such further documentation as is reasonably necessary to effectuate the intent of this Agreement.

13. **Counterparts.** This Agreement may be executed in counterparts with the same force and effect as if executed in one complete document. Each Party's signature hereto will signify acceptance of, and agreement to, the terms and provisions contained in this Agreement. Photographic, electronic, and facsimile copies of signed counterparts may be used in lieu of the originals of this Agreement for any purpose.

14. **Governing Law; Venue; Attorneys' Fees and Costs.** The Parties agree that this Agreement will be governed by and will be construed according to the laws of the State of Texas without regard to conflict-of-law principles. Each of the Parties hereby submits to the exclusive jurisdiction of the Bankruptcy Court during the pendency of the Bankruptcy Case and thereafter to the exclusive jurisdiction of the state and federal courts located in the Northern District of Texas, Dallas Division, with respect to any disputes arising from or out of this Agreement. In any action to enforce this Agreement, the prevailing party shall be entitled to recover its reasonable and necessary attorneys' fees and costs (including experts).

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IT IS HEREBY AGREED.

HIGHLAND CAPITAL MANAGEMENT, L.P.

By: /s/ James P. Seery, Jr.
Name: James P. Seery, Jr.
Its: CEO/CRO

HarbourVest 2017 Global Fund L.P., by HarbourVest 2017 Global Associates L.P., its General Partner, by HarbourVest GP LLC, its General Partner, by HarbourVest Partners, LLC, its Managing Member

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

HarbourVest 2017 Global AIF L.P., by HarbourVest Partners (Ireland) Limited, its Alternative Investment Fund Manager, by HarbourVest Partners L.P., its Duly Appointed Investment Manager, by HarbourVest Partners, LLC, its General Partner

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

HarbourVest Dover Street IX Investment L.P., by HarbourVest Partners L.P., its Duly Appointed Investment Manager, by HarbourVest Partners, LLC, its General Partner

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

HarbourVest Partners L.P., on behalf of funds and accounts under management, by HarbourVest Partners, LLC, its General Partner

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

**HarbourVest Skew Base AIF L.P., by HarbourVest Partners (Ireland) Limited, its
Alternative Investment Fund Manager, by HarbourVest Partners L.P., its Duly Appointed
Investment Manager, by HarbourVest Partners, LLC, its General Partner**

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

**HV International VIII Secondary L.P., by HIPEP VIII Associates L.P., its General
Partner, by HarbourVest GP LLC, its General Partner, by HarbourVest Partners, LLC,
its Managing Member**

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

Exhibit A

TRANSFER AGREEMENT
FOR ORDINARY SHARES OF
HIGHLAND CLO FUNDING, LTD.

This Transfer Agreement, dated as of December [REDACTED], 2020 (this “**Transfer Agreement**”), is entered into by and among Highland CLO Funding, Ltd. (the “**Fund**”), Highland HCF Advisor, Ltd. (the “**Portfolio Manager**”), HCMLP Investments, LLC (the “**Transferee**”) and each of the following: HarbourVest Dover Street IX Investment L.P., HarbourVest 2017 Global AIF L.P., HarbourVest 2017 Global Fund L.P., HV International VIII Secondary L.P., and HarbourVest Skew Base AIF L.P. (collectively, the “**Transferors**”).

WHEREAS, each Transferor is the record, legal and beneficial owner of the number of ordinary shares (“**Shares**”) of the Fund set forth opposite such Transferor’s name on Exhibit A hereto (with respect to each Transferor, the “**Transferred Shares**”).

WHEREAS the Transferee is an affiliate and wholly owned subsidiary of Highland Capital Management, L.P. (“**HCMLP**”) which is one of the initial members of the Fund.

WHEREAS, each Transferor wishes to transfer and assign 100% of its rights, title and interest as a shareholder in the Fund, including the Transferred Shares (the “**Interest**”) on the terms set forth in this Transfer Agreement.

WHEREAS, subject to and in connection with the approval of that certain Settlement Agreement, dated on or about the date hereof, by and among HCMLP and the Transferors (the “**Settlement Agreement**”), the Transferee desires that the Interest be transferred to Transferee and that thereafter the Transferee will become a Shareholder and the Transferors will no longer be Shareholders.

WHEREAS, the Portfolio Manager desires to consent to such transfers and to the admission of Transferee as a Shareholder on the terms set forth herein, and the Transferors and Transferee agree to such terms.

WHEREAS, the Fund desires to amend its records to reflect the foregoing transfers.

NOW, THEREFORE, the parties hereto agree as follows:

1. Transfer of Shares and Advisory Board

- a. Each Transferor hereby transfers and assigns all of its rights, title, and interest in its Interest to the Transferee, and the Transferee wishes to be admitted to the Fund as a Shareholder.
- b. In connection with the transfer of the Interest as contemplated herein, the Transferee shall be granted the right to appoint a representative to the Fund’s advisory board (the “**Advisory Board**”) to replace the Transferors’ appointed representative to the Advisory Board.

- c. Transferee hereby assumes all of Transferor's rights and obligations in respect of the Interest effective as of the Effective Date (as defined below) and acknowledge that thereafter Transferee shall be subject to the applicable terms and provisions of the Members' Agreement dated as of November 15, 2017 (the "**Members' Agreement**"), the Articles of Incorporation adopted November 15, 2017 (the "**Articles**") and the Subscription and transfer Agreement, dated as of November 15, 2017 among each Transferor, the Fund and the Portfolio Manager (the "**Subscription Agreement**", and together with the Members' Agreement and the Articles, the "**Fund Agreements**") with respect to the Interest. Transferee does not assume any liability or responsibility for any obligations or liabilities incurred by any Transferor prior to the Effective Date of the transfer.
 - d. Following the transfer, each Transferor shall have no further rights or obligations to any party hereunder in respect of the Interest under the Fund Agreements.
 - e. This Transfer Agreement, and the parties' obligations hereunder, are conditioned in all respects on the approval by the Bankruptcy Court for the Northern District of Texas, Dallas Division pursuant to **Federal Rule of Bankruptcy Procedure 9019** of (i) this Transfer Agreement and (ii) the Settlement Agreement, and each of the parties agree that no further action shall be required from any party for the transfer of the Interest to be effective except as described herein.
2. Transferee's Representations and Warranties. The Transferee represents and warrants to the Transferors, the Portfolio Manager, and the Fund as follows:
- a. This Transfer Agreement constitutes a valid and binding obligation of the Transferee, enforceable against it in accordance with its terms;
 - b. This Transfer Agreement has been duly and validly executed and delivered by or on behalf of the Transferee and such execution and delivery have been duly authorized by all necessary trust action of the Transferee;
 - c. The Transferee acknowledges receipt of, has read, and is familiar with, the Fund's Offering Memorandum for Placing Shares dated November 15, 2017 (the "**Offering Memorandum**") and the Fund Agreements;
 - d. The Transferee hereby accepts and receives the Interest from the Transferors for investment, and not with a view to the sale or distribution of any part thereof, and the Transferee has no present intention of selling, granting participations in, or otherwise distributing the same, but subject nevertheless to any requirement of law that the disposition of the Transferee's property shall at all times be within such Transferee's control; and
 - e. The Transferee is an "Eligible U.S. Investor" as defined in the Offering Memorandum.

3. Transferors' Representations and Warranties. Each Transferor represents and warrants to the Transferee, the Portfolio Manager, and the Fund as follows:
 - a. This Transfer Agreement constitutes a valid and binding obligation of the Transferor, enforceable against it in accordance with its terms;
 - b. This Transfer Agreement has been duly authorized, and duly and validly executed and delivered by the Transferor and such execution and delivery have been duly authorized by all necessary action of the Transferor; and
 - c. As of the date hereof, the Transferor has good and valid title to the Transferor's Interest, free and clear of any liens, vesting requirements or claims by others.
4. Consent to Transfer. Based in part on the representations and warranties of the Transferors and the Transferee which are included herein, and on the terms contained herein, the Portfolio Manager and the Fund hereby consent to the transfers of the Interest, the admission of the Transferee as a Shareholder and the Transferee's appointment of a representative to the Advisory Board, the Portfolio Manager's execution of this Transfer Agreement constituting its prior written consent to the transfers of the Interest for the purposes of article 18.1 of the Articles and this Transfer Agreement constituting express notice in writing to the Fund of the assignment set out at clause 1(c) above for the purposes of the Law of Property (Miscellaneous Provisions) (Guernsey) Law, 1979 (as amended).
5. Completion: As of the date of approval by the Bankruptcy Court for the Northern District of Texas, Dallas Division pursuant to Federal Rule of Bankruptcy Procedure 9019 of (i) this Transfer Agreement and (ii) the Settlement Agreement (the "**Effective Date**"):
 - a. each Transferor shall deliver or cause to be delivered to the Transferee a transfer instrument relating to the Transferred Shares duly executed and completed by that Transferor in favor of the Transferee; and
 - b. the Transferee shall deliver to the Transferors and the Fund a duly executed and dated Adherence Agreement (as defined in the Members' Agreement).

Prior to the Effective Date the Transferee shall procure that:

 - c. the board of directors of the Fund shall hold a meeting at which the transfer of the Shares to the Transferee shall be approved and registration in the register of members of the Fund shall be effected on the Effective Date.
6. Miscellaneous.
 - a. Each of the parties hereto agree to execute any further instruments and perform any further acts which are or may become reasonably necessary to carry out the intent of this Transfer Agreement or are reasonably requested by the Portfolio Manager, the Fund or a Transferor to complete the transfer of the Interest.

- b. The parties to this Transfer Agreement acknowledge that the terms of this Transfer Agreement are the result of arms'-length negotiations between the parties and their respective counsel. Each party and its counsel cooperated in the drafting and preparation of this Transfer Agreement. In any construction to be made of this Transfer Agreement, the language or drafting of this Transfer Agreement will not be construed against any party.
- c. This Transfer Agreement shall be governed by, and construed and enforced in accordance with, the internal substantive laws of the state of Delaware, without giving effect to conflicts of law principles.
- d. The representations, warranties and covenants of the Transferors and the Transferee shall remain in full force and effect following the transfer of the Interest, and the Fund and the Portfolio Manager thereafter may rely on all such representations, warranties and covenants.
- e. This Transfer Agreement may be executed in multiple counterparts, each of which shall be deemed to be an original, but all of which together shall constitute one and the same instrument. Photographic, electronic, and facsimile copies of signed counterparts may be used in lieu of the originals of this Transfer Agreement for any purpose.
- f. Captions of sections have been added only for convenience and shall not be deemed to be a part of this Transfer Agreement.
- g. This Transfer Agreement is among the parties hereto. No Person that is not a party hereto shall have any right herein as a third-party beneficiary or otherwise except as expressly contemplated hereby.

[Remainder of Page Intentionally Blank]

IN WITNESS WHEREOF, the undersigned have executed this Transfer Agreement as of the date first above written.

TRANSFeree:

HCMLP Investments, LLC

By: Highland Capital Management, L.P.

Its: Member

By: _____

Name: James P. Seery, Jr.

Title: Chief Executive Officer

PORTFOLIO MANAGER:

Highland HCF Advisor, Ltd.

By: _____

Name: James P. Seery, Jr.

Title: President

FUND:

Highland CLO Funding, Ltd.

By: _____

Name:

Title:

[Additional Signatures on Following Page]

HarbourVest 2017 Global Fund L.P.

By: HarbourVest 2017 Global Associates L.P.
Its General Partner

By: HarbourVest GP LLC
Its General Partner

By: HarbourVest Partners, LLC
Its Managing Member

By: _____

Name: Michael Pugatch

Title: Managing Director

Exhibit A

<u>Transferee Name</u>	<u>Number of Shares</u>	<u>Percentage</u>
HarbourVest Dover Street IX Investment L.P.	[REDACTED]	[REDACTED]
HarbourVest 2017 Global AIF L.P.	[REDACTED]	[REDACTED]
HarbourVest 2017 Global Fund L.P.	[REDACTED]	[REDACTED]
HV International VIII Secondary L.P.	[REDACTED]	[REDACTED]
HarbourVest Skew Base AIF L.P.	[REDACTED]	[REDACTED]



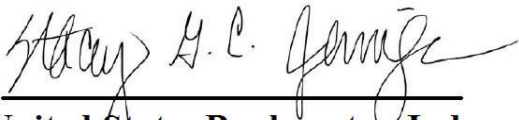
CLERK, U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS

ENTERED

THE DATE OF ENTRY IS ON
THE COURT'S DOCKET

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

Signed January 20, 2021


United States Bankruptcy Judge

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

In re:

HIGHLAND CAPITAL MANAGEMENT, L.P.,¹

Debtor.

§
§ Chapter 11
§
§ Case No. 19-34054-sgj11
§
§
§

**ORDER APPROVING DEBTOR'S SETTLEMENT
WITH HARBOURVEST (CLAIM NOS. 143, 147, 149, 150, 153, 154) AND
AUTHORIZING ACTIONS CONSISTENT THEREWITH**

This matter having come before the Court on *Debtor's Motion for Entry of an Order Approving Settlement with HarbourVest (Claim Nos. 143, 147, 149, 150, 153, 154) and Authorizing Actions Consistent Therewith* [Docket No. 1625] (the "Motion"),² filed by Highland Capital Management, L.P., the debtor and debtor-in-possession (the "Debtor") in the above-captioned chapter 11 case (the "Bankruptcy Case"); and this Court having considered (a) the

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

² Capitalized terms used but not otherwise defined herein have the meanings ascribed to them in the Motion.

Motion; (b) the *Declaration of John A. Morris in Support of the Debtor’s Motion for Entry of an Order Approving Settlement with HarbourVest (Claim Nos. 143, 147, 149, 150, 153, 154) and Authorizing Actions Consistent Therewith* [Docket No. 1631] (the “Morris Declaration”), and the exhibits annexed thereto, including the Settlement Agreement attached as **Exhibit “1”** (the “Settlement Agreement”); (c) the arguments and law cited in the Motion; (d) *James Dondero’s Objection to Debtor’s Motion for Entry of an Order Approving Settlement with HarbourVest* [Docket No. 1697] (the “Dondero Objection”), filed by James Dondero; (e) the *Objection to Debtor’s Motion for Entry of an Order Approving Settlement with HarbourVest (Claim Nos. 143, 147, 149, 150, 153, 154) and Authorizing Actions Consistent Therewith* [Docket No. 1706] (the “Trusts’ Objection”), filed by the Dugaboy Investment Trust (“Dugaboy”) and Get Good Trust (“Get Good,” and together with Dugaboy, the “Trusts”); (f) *CLO Holdco’s Objection to HarbourVest Settlement* [Docket No. 1707] (the “CLOH Objection” and collectively, with the Dondero Objection and the Trusts’ Objection, the “Objections”), filed by CLO Holdco, Ltd.; (g) the *Debtor’s Omnibus Reply in Support of Debtor’s Motion for Entry of an Order Approving Settlement with HarbourVest (Claim Nos. 143, 147, 149, 150, 153, 154), and Authorizing Actions Consistent Therewith* [Docket No. 1731] (the “Debtor’s Reply”), filed by the Debtor; (h) the *HarbourVest Reply in Support of Debtor’s Motion for Entry of an Order Approving Settlement with HarbourVest and Authorizing Actions Consistent Therewith* [Docket No. 1734] (the “HarbourVest Reply”), filed by HarbourVest 2017 Global Fund L.P., HarbourVest 2017 Global AIF L.P., HarbourVest Dover Street IX Investment L.P., HV International VIII Secondary L.P., HarbourVest Skew Base AIF L.P., and HarbourVest Partners L.P. (collectively, “HarbourVest”); (i) the testimonial and documentary evidence admitted into evidence during the hearing held on January 14, 2021 (the “Hearing”), including assessing the credibility of the witnesses; and (j) the

arguments made during the Hearing; and this Court having jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334; and this Court having found that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2); and this Court having found that venue of this proceeding and the Motion in this District is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and this Court having found that the relief requested in the Motion is in the best interests of the Debtor's estate, its creditors, and other parties-in-interest; and this Court having found the Settlement Agreement fair and equitable; and this Court having analyzed, for the reasons stated on the record, (1) the probability of success in litigating the claims subject to the Settlement Agreement, with due consideration for the uncertainty in fact and law, (2) the complexity and likely duration of litigation and any attendant expense, inconvenience, and delay, and (3) all other factors bearing on the wisdom of the compromise, including: (i) the best interests of the creditors, with proper deference to their reasonable views, and (ii) the extent to which the settlement is truly the product of arms-length bargaining, and not of fraud or collusion; and this Court having found that the Debtor's notice of the Motion and opportunity for a hearing on the Motion were appropriate under the circumstances and that no other notice need be provided; and this Court having determined that the legal and factual bases set forth in the Motion establish good cause for the relief granted herein; and upon all of the proceedings had before this Court; and after due deliberation and sufficient cause appearing therefor, it is hereby **ORDERED** that:

1. The Motion is **GRANTED** as set forth herein.
2. All objections to the Motion are overruled.
3. The Settlement Agreement, attached hereto as **Exhibit 1**, is approved in all respects pursuant to Rule 9019 of the Federal Rules of Bankruptcy Procedure.

4. All objections to the proofs of claim subject to the Motion³ are overruled as moot in light of the Court's approval of the Settlement Agreement.

5. The Debtor, HarbourVest, and all other parties are authorized to take any and all actions necessary and desirable to implement the Settlement Agreement without need of further approval or notice.

6. Pursuant to the express terms of the *Members Agreement Relating to the Company*, dated November 15, 2017, HarbourVest is authorized to transfer its interests in HCLOF to a wholly-owned and controlled subsidiary of the Debtor pursuant to the terms of the *Transfer Agreement for Ordinary Shares of Highland CLO Funding, Ltd.* without the need to obtain the consent of any party or to offer such interests first to any other investor in HCLOF.

7. The Court shall retain exclusive jurisdiction to hear and determine all matters arising from the implementation of this Order.

###End of Order###

³ This includes the *Debtor's First Omnibus Objection to Certain (A) Duplicate Claims; (B) Overstated Claims; (C) Late-Filed Claims; (D) Satisfied Claims; (E) No-Liability Claims; and (F) Insufficient-Documentation Claims* [Docket No. 906].

EXHIBIT 1

SETTLEMENT AGREEMENT

This Settlement Agreement (the “Agreement”) is entered into as of December 23, 2020, between Highland Capital Management, L.P. (the “Debtor”), on the one hand, and HarbourVest 2017 Global Fund L.P., HarbourVest 2017 Global AIF L.P., HarbourVest Dover Street IX Investment L.P., HV International VIII Secondary L.P., HarbourVest Skew Base AIF L.P., and HarbourVest Partners L.P. (each, a “HarbourVest Party,” and collectively, “HarbourVest”), on the other hand. Each of the foregoing are sometimes referred to herein collectively as the “Parties” and individually as a “Party.”

RECITALS

WHEREAS, on October 16, 2019 (the “Petition Date”), the Debtor filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code (the “Bankruptcy Case”) in the Bankruptcy Court for the District of Delaware, Case No. 19-12239 (CSS) (the “Delaware Bankruptcy Court”);

WHEREAS, on December 4, 2019, the Delaware Bankruptcy Court entered an order transferring venue of the Debtor’s case to the Bankruptcy Court for the Northern District of Texas, Dallas Division, Case No. 19-34054-sgj (the “Bankruptcy Court”);

WHEREAS, prior to the Petition Date, HarbourVest invested in Highland CLO Funding, Ltd. f/k/a Acis Loan Funding, Ltd. (“HCLOF”) and acquired an a 49.98% ownership interest in HCLOF (the “HarbourVest Interests”);

WHEREAS, the portfolio manager for HCLOF is Highland HCF Advisor, Ltd., a subsidiary of the Debtor;

WHEREAS, on April 8, 2020, HarbourVest filed proofs of claim in the Bankruptcy Case, which are listed on the Debtor’s claims register as claim numbers 143, 147, 149, 150, 153, and 154 (the “HarbourVest Claims”), asserting claims against the Debtor relating to its investment in HCLOF;

WHEREAS, on July 30, 2020, the Debtor filed the *Debtor’s First Omnibus Objection to Certain (a) Duplicate Claims; (b) Overstated Claims; (c) Late-Filed Claims; (d) Satisfied Claims; (e) No Liability Claims; and (f) Insufficient-Documentation Claims* [Docket No. 906], in which the Debtor objected to the HarbourVest Claims;

WHEREAS, on September 11, 2020, HarbourVest filed the *HarbourVest Response to Debtor’s First Omnibus Objection to Creation (a) Duplicate Claims; (b) Overstated Claims; (c) Late-Filed Claims; (d) Satisfied Claims; (e) No Liability Claims; and (f) Insufficient-Documentation Claims* [Docket No. 1057] (the “HarbourVest Response”);

WHEREAS, on October 18, 2020, HarbourVest filed the *Motion of HarbourVest Pursuant to Rule 3018(a) of the Federal Rules of Bankruptcy Procedure for Temporary Allowance of Claims for Purposes of Voting to Accept or Reject the Plan* [Docket No. 1207] (the “3018 Motion” and together with the HarbourVest Response, the “HarbourVest Pleadings”);

WHEREAS, in the HarbourVest Pleadings, HarbourVest asserted, among other things, that the HarbourVest Claims included claims against the Debtor arising from fraudulent inducement, fraudulent concealment, fraudulent misrepresentation, breach of fiduciary duty, breach of securities laws, and misuse of assets and sought damages in excess of \$300,000,000;

WHEREAS, the Debtor disputes the HarbourVest Claims;

WHEREAS, on November 24, 2020, the Debtor filed the *Fifth Amended Plan of Reorganization for Highland Capital Management, L.P.* [Docket No. 1472] (as amended, the “Plan”).¹

WHEREAS, the Parties desire to enter into this Agreement which incorporates, formalizes, and finalizes the full and final resolution of the HarbourVest Claims and HarbourVest Pleadings; and

WHEREAS, this Agreement will be presented to the Bankruptcy Court for approval pursuant to **Federal Rule of Bankruptcy Procedure 9019** (“Rule 9019”).

NOW THEREFORE, in consideration of the above recitals, the covenants, conditions, and promises made herein, and other good and valuable consideration, the receipt of which is hereby acknowledged, the Parties agree as follows:

1. Settlement of Claims.

(a) In full and complete satisfaction of the HarbourVest Claims, HarbourVest will receive:

(i) an allowed, nonpriority general unsecured claim in the aggregate amount of \$45,000,000 (the “Allowed GUC Claim”); and

(ii) an allowed subordinated claim in the aggregate amount of \$35,000,000 (the “Allowed Subordinated Claim” and together with the Allowed GUC Claim, the “Allowed Claims”).

(b) On the Effective Date, HarbourVest will transfer all of its rights, title, and interest in the HarbourVest Interests to the Debtor or its nominee pursuant to the terms of the *Transfer Agreement for Ordinary Shares of Highland CLO Funding, Ltd.*, attached hereto as Exhibit A (the “Transfer Agreements”) and the Debtor or its nominee will become a shareholder of HCLOF with respect to the HarbourVest Interests. The terms of the Transfer Agreements are incorporated into this Agreement by reference.

2. Releases.

(a) Upon the Effective Date, and to the maximum extent permitted by law, each HarbourVest Party on behalf of itself and each of its current and former advisors, trustees, directors, officers, managers, members, partners, employees, beneficiaries, shareholders, agents,

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

participants, subsidiaries, parents, successors, designees, and assigns hereby forever, finally, fully, unconditionally, and completely releases, relieves, acquits, remises, and exonerates, and covenants never to sue, the Debtor, HCLOF, HCLOF's current and former directors, and the Debtor's current and former advisors, trustees, directors, officers, managers, members, partners, employees, beneficiaries, shareholders, agents, participants, subsidiaries, parents, affiliates, successors, designees, and assigns, except as expressly set forth below (the "Debtor Released Parties"), for and from any and all claims, debts, liabilities, demands, obligations, promises, acts, agreements, liens, losses, costs and expenses (including, without limitation, attorney's fees and related costs), damages, injuries, suits, actions, and causes of action of whatever kind or nature, whether known or unknown, suspected or unsuspected, matured or unmatured, liquidated or unliquidated, contingent or fixed, at law or in equity, statutory or otherwise, including, without limitation, any claims, defenses, and affirmative defenses, whether known or unknown, including, without limitation, those which were or could have been asserted in, in connection with, or with respect to the Bankruptcy Case (collectively, the "HarbourVest Released Claims").

(b) Upon the Effective Date, and to the maximum extent permitted by law, the Debtor hereby forever, finally, fully, unconditionally, and completely releases, relieves, acquits, remises, and exonerates, and covenants never to sue (i) each HarbourVest Party and (ii) each HarbourVest Party's current and former advisors, trustees, directors, officers, managers, members, partners, employees, beneficiaries, shareholders, agents, participants, subsidiaries, parents, affiliates, successors, designees, and assigns (the "HarbourVest Released Parties"), for and from any and all claims, debts, liabilities, demands, obligations, promises, acts, agreements, liens, losses, costs and expenses (including, without limitation, attorney's fees and related costs), damages, injuries, suits, actions, and causes of action of whatever kind or nature, whether known or unknown, suspected or unsuspected, matured or unmatured, liquidated or unliquidated, contingent or fixed, at law or in equity, statutory or otherwise, including, without limitation, any claims, defenses, and affirmative defenses, whether known or unknown, which were or could have been asserted in, in connection with, or with respect to the Bankruptcy Case (collectively, the "Debtor Released Claims"); *provided, however*, that notwithstanding anything herein to the contrary, the release contained in this Section 2(b) will apply to the HarbourVest Released Parties set forth in subsection (b)(ii) only with respect to Debtor Released Claims arising from or relating to HarbourVest's ownership of the HarbourVest Interests.

(c) Notwithstanding anything in this Agreement to the contrary, the releases set forth herein will not apply with respect to (i) the Allowed Claims, (ii) the claims of Charlotte Investor IV, L.P., or (iii) the duties, rights, or obligations of any Party under this Agreement or the Transfer Agreements.

3. **Agreement Subject to Bankruptcy Court Approval.** The effectiveness of this Agreement and the Parties' obligations hereunder are conditioned in all respects on the approval of this Agreement by the Bankruptcy Court. The Parties agree to cooperate and use reasonable efforts to have this Agreement approved by the Bankruptcy Court. The "Effective Date" will be the date of an order entered by the Bankruptcy Court approving this Agreement pursuant to a motion filed under Rule 9019.

4. **Representations and Warranties.** Subject in all respects to Section 3 hereof:

(a) each HarbourVest Party represents and warrants that (i) it has full authority to enter into this Agreement and to release the HarbourVest Released Claims and has not sold, transferred, or assigned any HarbourVest Released Claim to any other person or entity, (ii) no person or entity other than such HarbourVest Party has been, is, or will be authorized to bring, pursue, or enforce any HarbourVest Released Claim on behalf of, for the benefit of, or in the name of (whether directly or derivatively) of such HarbourVest Party; and (iii) HarbourVest owns all of the HCLOF Interests free and clear of any claims or interests; and

(b) the Debtor represents and warrants to HarbourVest that (i) it has full authority to enter into this Agreement and to release the Debtor Released Claims and (ii) no person or entity other than the Debtor has been, is, or will be authorized to bring, pursue, or enforce any Debtor Released Claim on behalf of, for the benefit of, or in the name of (whether directly or derivatively) of the Debtor Party.

5. **Plan Support.**

(a) Each HarbourVest Party hereby agrees that it will (a) vote all HarbourVest Claims held by such HarbourVest Party to accept the Plan, by delivering its duly executed and completed ballots accepting the Plan on a timely basis; and (b) not (i) change, withdraw, or revoke such vote (or cause or direct such vote to be changed withdrawn or revoked); (ii) exercise any right or remedy for the enforcement, collection, or recovery of any claim against the Debtor except in a manner consistent with this Agreement or the Plan, (iii) object to, impede, or take any action other action to interfere with, delay or postpone acceptance or confirmation of the Plan; (iv) directly or indirectly solicit, propose, file, support, participate in the formulation of or vote for, any restructuring, sale of assets (including pursuant to **11 U.S.C. § 363**), merger, workout, or plan of reorganization of the Debtor other than the Plan; or (v) otherwise take any action that would in any material respect interfere with, delay, or postpone the consummation of the Plan; provided, however, that such vote may be revoked (and, upon such revocation, deemed void ab initio) by such HarbourVest Party at any time following the termination of this agreement or the occurrence of a Support Termination Event (it being understood that any termination of this agreement shall entitle each HarbourVest Party to change its vote in accordance with section 1127(d) of the Bankruptcy Code), notwithstanding any voting deadline established by the Bankruptcy Court including without limitation the January 5, 2021, 5:00 p.m. (prevailing Central Time) deadline established by the *Order Approving Form of Ballots, Voting Deadline and Solicitation Procedures* [Docket No. 1476].

(b) In full resolution of the 3018 Motion, HarbourVest will have a general unsecured claim for voting purposes only in the amount of \$45,000,000.

(c) The obligations of the HarbourVest Parties under this Section 5 shall automatically terminate upon the occurrence of any of the following (each a “Support Termination Event”): (i) the effective date of the Plan, (ii) the withdrawal of the Plan, (iii) the entry of an order by the Bankruptcy Court (A) converting the Bankruptcy Case to a case under chapter 7 of the Bankruptcy Code or (B) appointing an examiner with expanded powers beyond those set forth in sections 1106(a)(3) and (4) of the Bankruptcy Code or a trustee in Bankruptcy

Case, or (iv) the failure of the Court to enter an order approving the terms of this Agreement and the settlement described herein pursuant to Rule 9019 prior to confirmation of the Plan.

6. **No Admission of Liability.** The Parties acknowledge that there is a bona fide dispute with respect to the HarbourVest Claims. Nothing in this Agreement will imply, an admission of liability, fault or wrongdoing by the Debtor, HarbourVest, or any other person, and the execution of this Agreement does not constitute an admission of liability, fault, or wrongdoing on the part of the Debtor, HarbourVest, or any other person.

7. **Successors-in-Interest.** This Agreement shall be binding upon and shall inure to the benefit of each of the Parties and their successors, and assigns.

8. **Notice.** Each notice and other communication hereunder will be in writing and will be sent by email and delivered or mailed by registered mail, receipt requested, and will be deemed to have been given on the date of its delivery, if delivered, and on the fifth full business day following the date of the mailing, if mailed to each of the Parties thereto at the following respective addresses or such other address as may be specified in any notice delivered or mailed as set forth below:

HARBOURVEST

HarbourVest Partners L.P.
Attention: Michael J. Pugatch
One Financial Center
Boston, MA 02111
Telephone No. 617-348-3712
E-mail: mpugatch@harbourvest.com

with a copy (which shall not constitute notice) to:

Debevoise & Plimpton LLP
Attention: M. Natasha Labovitz, Esq.
919 Third Avenue
New York, NY 10022
Telephone No. 212-909-6649
E-mail: nlabovitz@debevoise.com

THE DEBTOR

Highland Capital Management, L.P.
300 Crescent Court, Suite 700
Dallas, Texas 75201
Attention: James P. Seery, Jr.
Telephone No.: 972-628-4100
Facsimile No.: 972-628-4147
E-mail: jpseeryjr@gmail.com

with a copy (which shall not constitute notice) to:

Pachulski Stang Ziehl & Jones LLP
Attention: Jeffrey Pomerantz, Esq.
10100 Santa Monica Blvd., 13th Floor
Los Angeles, CA 90067
Telephone No.: 310-277-6910
Facsimile No.: 310-201-0760
E-mail: jpomerantz@pszjlaw.com

9. **Advice of Counsel.** Each Party represents that it has: (a) been adequately represented by independent legal counsel of its own choice, throughout all of the negotiations that preceded the execution of this Agreement; (b) executed this Agreement upon the advice of such counsel; (c) read this Agreement, and understands and assents to all the terms and conditions contained herein without any reservations; and (d) had the opportunity to have this Agreement and all the terms and conditions contained herein explained by independent counsel, who has answered any and all questions asked of such counsel, or which could have been asked of such counsel, including, but not limited to, with regard to the meaning and effect of any of the provisions of this Agreement.

10. **Entire Agreement.** This Agreement and the Transfer Agreement contain the entire agreement and understanding concerning the subject matter of this Agreement, and supersede and replace all prior negotiations and agreements, written or oral and executed or unexecuted, concerning such subject matter. Each of the Parties acknowledges that no other Party, nor any agent of or attorney for any such Party, has made any promise, representation or warranty, express or implied, written or oral, not otherwise contained in this Agreement to induce any Party to execute this Agreement. The Parties further acknowledge that they are not executing this Agreement in reliance on any promise, representation or warranty not contained in this Agreement, and that any such reliance would be unreasonable. This Agreement will not be waived or modified except by an agreement in writing signed by each Party or duly authorized representative of each Party.

11. **No Party Deemed Drafter.** The Parties acknowledge that the terms of this Agreement are contractual and are the result of arms'-length negotiations between the Parties and their chosen counsel. Each Party and its counsel cooperated in the drafting and preparation of this Agreement. In any construction to be made of this Agreement, the Agreement will not be construed against any Party.

12. **Future Cooperation.** The Parties agree to cooperate and execute such further documentation as is reasonably necessary to effectuate the intent of this Agreement.

13. **Counterparts.** This Agreement may be executed in counterparts with the same force and effect as if executed in one complete document. Each Party's signature hereto will signify acceptance of, and agreement to, the terms and provisions contained in this Agreement. Photographic, electronic, and facsimile copies of signed counterparts may be used in lieu of the originals of this Agreement for any purpose.

14. **Governing Law; Venue; Attorneys' Fees and Costs.** The Parties agree that this Agreement will be governed by and will be construed according to the laws of the State of Texas without regard to conflict-of-law principles. Each of the Parties hereby submits to the exclusive jurisdiction of the Bankruptcy Court during the pendency of the Bankruptcy Case and thereafter to the exclusive jurisdiction of the state and federal courts located in the Northern District of Texas, Dallas Division, with respect to any disputes arising from or out of this Agreement. In any action to enforce this Agreement, the prevailing party shall be entitled to recover its reasonable and necessary attorneys' fees and costs (including experts).

[Remainder of Page Intentionally Blank]

IT IS HEREBY AGREED.

HIGHLAND CAPITAL MANAGEMENT, L.P.

By: /s/ James P. Seery, Jr.
Name: James P. Seery, Jr.
Its: CEO/CRO

HarbourVest 2017 Global Fund L.P., by HarbourVest 2017 Global Associates L.P., its General Partner, by HarbourVest GP LLC, its General Partner, by HarbourVest Partners, LLC, its Managing Member

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

HarbourVest 2017 Global AIF L.P., by HarbourVest Partners (Ireland) Limited, its Alternative Investment Fund Manager, by HarbourVest Partners L.P., its Duly Appointed Investment Manager, by HarbourVest Partners, LLC, its General Partner

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

HarbourVest Dover Street IX Investment L.P., by HarbourVest Partners L.P., its Duly Appointed Investment Manager, by HarbourVest Partners, LLC, its General Partner

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

HarbourVest Partners L.P., on behalf of funds and accounts under management, by HarbourVest Partners, LLC, its General Partner

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

**HarbourVest Skew Base AIF L.P., by HarbourVest Partners (Ireland) Limited, its
Alternative Investment Fund Manager, by HarbourVest Partners L.P., its Duly Appointed
Investment Manager, by HarbourVest Partners, LLC, its General Partner**

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

**HV International VIII Secondary L.P., by HIPEP VIII Associates L.P., its General
Partner, by HarbourVest GP LLC, its General Partner, by HarbourVest Partners, LLC,
its Managing Member**

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

Exhibit A

**TRANSFER AGREEMENT
FOR ORDINARY SHARES OF
HIGHLAND CLO FUNDING, LTD.**

This Transfer Agreement, dated as of January ____, 2021 (this “**Transfer Agreement**”), is entered into by and among Highland CLO Funding, Ltd. (the “**Fund**”), Highland HCF Advisor, Ltd. (the “**Portfolio Manager**”), HCMLP Investments, LLC (the “**Transferee**”) and each of the following: HarbourVest Dover Street IX Investment L.P., HarbourVest 2017 Global AIF L.P., HarbourVest 2017 Global Fund L.P., HV International VIII Secondary L.P., and HarbourVest Skew Base AIF L.P. (collectively, the “**Transferors**”).

WHEREAS, each Transferor is the record, legal and beneficial owner of the number of ordinary shares (“**Shares**”) of the Fund set forth opposite such Transferor’s name on Exhibit A hereto (with respect to each Transferor, the “**Transferred Shares**”).

WHEREAS the Transferee is an affiliate and wholly owned subsidiary of Highland Capital Management, L.P. (“**HCMLP**”) which is one of the initial members of the Fund.

WHEREAS, each Transferor wishes to transfer and assign 100% of its rights, title and interest as a shareholder in the Fund, including the Transferred Shares (the “**Interest**”) on the terms set forth in this Transfer Agreement.

WHEREAS, subject to and in connection with the approval of that certain Settlement Agreement, dated on or about the date hereof, by and among HCMLP and the Transferors (the “**Settlement Agreement**”), the Transferee desires that the Interest be transferred to Transferee and that thereafter the Transferee will become a Shareholder and the Transferors will no longer be Shareholders.

WHEREAS, the Portfolio Manager desires to consent to such transfers and to the admission of Transferee as a Shareholder on the terms set forth herein, and the Transferors and Transferee agree to such terms.

WHEREAS, the Fund desires to amend its records to reflect the foregoing transfers.

NOW, THEREFORE, the parties hereto agree as follows:

1. Transfer of Shares and Advisory Board

- a. Each Transferor hereby transfers and assigns all of its rights, title, and interest in its Interest to the Transferee, and the Transferee wishes to be admitted to the Fund as a Shareholder.
- b. In connection with the transfer of the Interest as contemplated herein, the Transferee shall be granted the right to appoint a representative to the Fund’s advisory board (the “**Advisory Board**”) to replace the Transferors’ appointed representative to the Advisory Board.

- c. Transferee hereby assumes all of Transferor's rights and obligations in respect of the Interest effective as of the Effective Date (as defined below) and acknowledge that thereafter Transferee shall be subject to the applicable terms and provisions of the Members' Agreement dated as of November 15, 2017 (the "**Members' Agreement**"), the Articles of Incorporation adopted November 15, 2017 (the "**Articles**") and the Subscription and transfer Agreement, dated as of November 15, 2017 among each Transferor, the Fund and the Portfolio Manager (the "**Subscription Agreement**", and together with the Members' Agreement and the Articles, the "**Fund Agreements**") with respect to the Interest. Transferee does not assume any liability or responsibility for any obligations or liabilities incurred by any Transferor prior to the Effective Date of the transfer.
 - d. Following the transfer, each Transferor shall have no further rights or obligations to any party hereunder in respect of the Interest under the Fund Agreements.
 - e. This Transfer Agreement, and the parties' obligations hereunder, are conditioned in all respects on the approval by the Bankruptcy Court for the Northern District of Texas, Dallas Division pursuant to **Federal Rule of Bankruptcy Procedure 9019** of (i) this Transfer Agreement and (ii) the Settlement Agreement, and each of the parties agree that no further action shall be required from any party for the transfer of the Interest to be effective except as described herein.
2. Transferee's Representations and Warranties. The Transferee represents and warrants to the Transferors, the Portfolio Manager, and the Fund as follows:
- a. This Transfer Agreement constitutes a valid and binding obligation of the Transferee, enforceable against it in accordance with its terms;
 - b. This Transfer Agreement has been duly and validly executed and delivered by or on behalf of the Transferee and such execution and delivery have been duly authorized by all necessary trust action of the Transferee;
 - c. The Transferee acknowledges receipt of, has read, and is familiar with, the Fund's Offering Memorandum for Placing Shares dated November 15, 2017 (the "**Offering Memorandum**") and the Fund Agreements;
 - d. The Transferee hereby accepts and receives the Interest from the Transferors for investment, and not with a view to the sale or distribution of any part thereof, and the Transferee has no present intention of selling, granting participations in, or otherwise distributing the same, but subject nevertheless to any requirement of law that the disposition of the Transferee's property shall at all times be within such Transferee's control; and
 - e. The Transferee is an "Eligible U.S. Investor" as defined in the Offering Memorandum.

3. Transferors' Representations and Warranties. Each Transferor represents and warrants to the Transferee, the Portfolio Manager, and the Fund as follows:
 - a. This Transfer Agreement constitutes a valid and binding obligation of the Transferor, enforceable against it in accordance with its terms;
 - b. This Transfer Agreement has been duly authorized, and duly and validly executed and delivered by the Transferor and such execution and delivery have been duly authorized by all necessary action of the Transferor; and
 - c. As of the date hereof, the Transferor has good and valid title to the Transferor's Interest, free and clear of any liens, vesting requirements or claims by others.
4. Consent to Transfer. Based in part on the representations and warranties of the Transferors and the Transferee which are included herein, and on the terms contained herein, the Portfolio Manager and the Fund hereby consent to the transfers of the Interest, the admission of the Transferee as a Shareholder and the Transferee's appointment of a representative to the Advisory Board, the Portfolio Manager's execution of this Transfer Agreement constituting its prior written consent to the transfers of the Interest for the purposes of article 18.1 of the Articles and this Transfer Agreement constituting express notice in writing to the Fund of the assignment set out at clause 1(c) above for the purposes of the Law of Property (Miscellaneous Provisions) (Guernsey) Law, 1979 (as amended).
5. Completion: As of the date of approval by the Bankruptcy Court for the Northern District of Texas, Dallas Division pursuant to Federal Rule of Bankruptcy Procedure 9019 of (i) this Transfer Agreement and (ii) the Settlement Agreement (the "**Effective Date**"):
 - a. each Transferor shall deliver or cause to be delivered to the Transferee a transfer instrument relating to the Transferred Shares duly executed and completed by that Transferor in favor of the Transferee; and
 - b. the Transferee shall deliver to the Transferors and the Fund a duly executed and dated Adherence Agreement (as defined in the Members' Agreement).

Prior to the Effective Date the Transferee shall procure that:

 - c. the board of directors of the Fund shall hold a meeting at which the transfer of the Shares to the Transferee shall be approved and registration in the register of members of the Fund shall be effected on the Effective Date.
6. Miscellaneous.
 - a. Each of the parties hereto agree to execute any further instruments and perform any further acts which are or may become reasonably necessary to carry out the intent of this Transfer Agreement or are reasonably requested by the Portfolio Manager, the Fund or a Transferor to complete the transfer of the Interest.

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HarbourVest 2017 Global Fund L.P.

By: HarbourVest 2017 Global Associates L.P.
Its General Partner

By: HarbourVest GP LLC
Its General Partner

By: HarbourVest Partners, LLC
Its Managing Member

By: _____

Name: Michael Pugatch

Title: Managing Director

[Signature Page to Transfer of Ordinary Shares of Highland CLO Funding, Ltd.]

Exhibit A

<u>Transferee Name</u>	<u>Number of Shares</u>	<u>Percentage</u>
HarbourVest Dover Street IX Investment L.P.	54,355,482.14	71.0096%
HarbourVest 2017 Global AIF L.P.	7,426,940.38	9.7025%
HarbourVest 2017 Global Fund L.P.	3,713,508.46	4.8513%
HV International VIII Secondary L.P.	9,946,780.11	12.9944%
HarbourVest Skew Base AIF L.P.	1,103,956.03	1.4422%

PACHULSKI STANG ZIEHL & JONES LLP
Jeffrey N. Pomerantz (CA Bar No. 143717)
Robert J. Feinstein (NY Bar No. 1767805)
John A. Morris (NY Bar No. 266326)
Gregory V. Demo (NY Bar No. 5371992)
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-and-

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ZAnnable@HaywardFirm.com
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Dallas, Texas 75231
Tel: (972) 755-7100
Fax: (972) 755-7110

Counsel for Highland Capital Management, L.P.

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

CHARITABLE DAF FUND, L.P., AND CLO
HOLDCO LTD.,

Plaintiff,

vs.

HIGHLAND CAPITAL MANAGEMENT, L.P.,
HIGHLAND HCF ADVISOR, LTD., AND
HIGHLAND CLO FUNDING, LTD.

Defendants.

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Case No. 3:21-cv-00842-B

**DEBTOR'S REPLY IN SUPPORT OF DEBTOR'S MOTION TO ENFORCE THE
ORDER OF REFERENCE**

The Debtor submits this reply in support of the *Debtor's Motion for an Order to Enforce the Order of Reference* [D.I. 22] (the "Motion").¹ In further support of its Motion, the Debtor states as follows:

I. PRELIMINARY STATEMENT²

1. Plaintiffs argue that the Court should deny the Motion because (i) mandatory withdrawal is required under 28 U.S.C. § 157(d); (ii) the Bankruptcy Court lacks jurisdiction to adjudicate the Complaint; and (iii) their violation of Local Rule 3.3 is harmless because withdrawal of the reference was inevitable. Plaintiffs' arguments fail for several reasons.

2. **First**, mandatory withdrawal does not apply. The Complaint does not require substantial and material consideration of non-bankruptcy federal law. Rather, it involves application of well-settled law, including law from the Supreme Court, to address four fundamental issues: (a) did the Defendants owe Plaintiffs a fiduciary duty under the Advisers Act; (b) the scope of such duty and if it was breached; (c) remedies and damages for any breach; and (d) if a violation of the Advisers Act is a predicate act under RICO. Bankruptcy courts routinely adjudicate these issues. None of them require mandatory withdrawal.

3. **Second**, the Bankruptcy Court has jurisdiction to adjudicate the Complaint. Bankruptcy jurisdiction is determined when the facts giving rise to the claim arose, not when a lawsuit is filed. The facts underlying the Complaint arose **prior** to confirmation (and would constitute an administrative claim if a claim exists); the Plan has not yet become effective; and the Debtor's assets have not vested in the Reorganized Debtor. Under Fifth Circuit precedent, the

¹ All capitalized terms used but not defined herein have the meanings set forth in *Defendant Highland Capital Management, L.P.'s Memorandum of Law in Support of Motion for an Order to Enforce the Order of Reference* [D.I. 22] (the "Memorandum").

² Concurrently herewith, the Debtor is filing the *Appendix in Support of Debtor's Reply in Support of the Debtor's Motion to Enforce the Order of Reference*. Citations to the Appendix are notated as follows: Appx. #.

Bankruptcy Court has jurisdiction to adjudicate the Complaint as it is integrally related to the Bankruptcy Court's prior approval of the HarbourVest Settlement.³ Even if a narrower standard is appropriate, which it is not, the Bankruptcy Court has "related to" jurisdiction.

4. **Third**, Plaintiffs' failure to follow Local Rule 3.3 is not harmless. Had they followed the Rule, the Complaint would likely have been referred to the Bankruptcy Court and, under the local bankruptcy rules,⁴ the **Bankruptcy Court** would have conducted a status conference on withdrawal of the reference and provided a recommendation to this Court as to whether mandatory withdrawal applies. Plaintiffs conveniently filed an inaccurate Civil Cover Sheet⁵ and could not explain why the Complaint did not refer to **28 U.S.C. § 1334** as a jurisdictional predicate.⁶ Plaintiffs' goal⁷ here (and its wider strategy) is to avoid the Bankruptcy Court and allow it no input on which court should adjudicate the Complaint.⁸

NO SUBSTANTIAL AND MATERIAL CONSIDERATION OF FEDERAL LAW

5. Withdrawal of the reference is required under **28 U.S.C § 157(d)** if a matter requires "substantial and material consideration" and "significant interpretation of federal laws" rather than a "straightforward application of a federal statute to a particular set of facts." *In re Nat'l Gypsum*,

³ The claims in the Complaint are barred by *res judicata* for the reasons set forth in the *Memorandum* (Appx. 1 at 29-30) and *Debtor's Reply in Support of Motion to Dismiss Complaint* filed concurrently herewith.

⁴ Local Bankruptcy Rules of the United States Bankruptcy Court for the Northern District of Texas, Rule 5011-1.

⁵ Plaintiffs filed an amended Civil Cover Sheet [D.I. 33] but failed to disclose another related matter: the appeal of the HarbourVest Settlement pending in the District Court for the Northern District of Texas.

⁶ Appx. 2 at 109-110.

⁷ Plaintiffs attempt to distance themselves from Mr. Dondero and the vexatious litigation he has initiated directly and through his related entities. Mr. Patrick's testimony that Mr. Dondero does not control the litigation was controverted and is contradicted by Mr. Patrick's own testimony and that of Mr. Dondero, and Grant Scott. *See, e.g.*, Appx. 2 at 137-141, 155-156, 189-191, 200-201, 213, 234-240, 242; Appx. 3 at 339-380. Further, the Bankruptcy Court found in the Confirmation Order that Mr. Dondero was coordinating his related entities' efforts to "burn down the Debtor" through vexatious litigation. *See* Appx. 4 at 398-400, 436-438. A list of this litigation was included in the appendix to the Memorandum; however, it is outdated as Mr. Dondero has continued to litigate. An updated list is Appx. 5 at 543. The Motion should be viewed in the context of this litigation.

⁸ The Bankruptcy Court conducted a hearing on the Contempt Motion on June 8, 2021, and subsequently said it will find certain defendants in that action, which may include Plaintiffs, in contempt. Appx. 2 at 322-323. The Bankruptcy Court has not yet issued its written order but intends to do so shortly. Appx. 6 at 676.

14 B.R. 188, 192-93 (N.D. Tex. 1991); *see also Rodriguez v Countrywide Home Loans, Inc.*, 421 B.R. 341, 347-8 (S.D. Tex. 2009) (adopting majority view requiring “material and substantial consideration of non-Bankruptcy Code federal law” for mandatory withdrawal). “Consideration” means something more than the mere process of examining, thinking about, or taking into account.” *In re Vicars Ins. Agency, Inc.*, 96 F.3d 949, 953-54 (7th Cir. 1996) (internal quotations omitted). Simply asserting federal law is insufficient and mandatory withdrawal only applies when a matter requires something “more than mere application of existing law to new facts.” *Vicars*, 96 F.3d at 953-54; *City of N.Y. v., Exxon Corp.*, 932 F.2d 1020, 1026 (2d Cir. 1991) (mandatory withdrawal requires “significant interpretation, as opposed to simple application, of federal laws”). “[M]andatory withdrawal is to be applied narrowly” to “prevent 157(d) from becoming an ‘escape hatch.’” *Manila Indus., Inc. v. Ondova Ltd. (In re Ondova Ltd.)*, 2009 U.S. Dist. LEXIS 101134, at *6 (N.D. Tex. Oct. 1, 2009), *aff’d* 2009 U.S. Dist. LEXIS 102071 (N.D. Tex. Nov. 3, 2009).

6. Plaintiffs attempt to meet this stringent standard by exaggerating the complexity of their claims. But, their claims are simple and straightforward: (1) (a) did Defendants owe Plaintiffs a fiduciary duty under the Advisers Act; (b) what was that duty and was it violated; and (c) if violated, what are the remedies and potential damages and (2) is the securities violation a predicate act under RICO? These are not difficult questions or outside the Bankruptcy Court’s expertise.

7. **Fiduciary Duty under the Advisers Act.** It is well-settled that, with limited, inapplicable exceptions, Section 206 of the Advisers Act⁹ creates a fiduciary duty to an investment adviser’s “client” (*i.e.*, the person or entity that is the counterparty to the investment management agreement) but not to an underlying investor in the “client.” *Goldstein v. SEC*, 451 F.3d 873,

⁹ Plaintiffs cite Rule 206(4)-8 of the Advisers Act, but Rule 206(4)-8 “does not create under the Advisers Act a fiduciary duty to investors or prospective investors in a pooled investment vehicle not otherwise imposed by law” or “a private right of action.” Inv. Adv. Act Rel. No. 2628 (Aug. 3, 2007), Appx. 12 at 843-844.

881(D.C. Cir. 2006) (“The adviser owes fiduciary duties only to the fund [i.e., the client], not to the fund’s investors. . . If the investors are owed a duty and the entity is also owed a fiduciary duty, then the adviser will inevitably face conflicts of interest.”);¹⁰ *see also, e.g., SEC v. Northshore Asset Mgmt.*, 2008 U.S. Dist. LEXIS 36160, at *18-20 (S.D.N.Y. May 5, 2008) (dismissing a claim that an investment adviser owed a duty to a fund’s investors rather than just the fund); *SEC v. Trabulse*, 526 F.Supp.2d 1008, 1016 (N.D. Cal. 2007) (same). HCLOF is a fund managed by HCFA, an affiliate of the Debtor. The DAF and CLOH are investors in HCLOF. The Debtor and HCFA’s duties do not run to investors in HCLOF. The Debtor has never had a management agreement or client relationship with CLOH and owes it no fiduciary duty. The Debtor, at all relevant times, was party to a management agreement with the DAF and owed DAF certain duties under the agreement.¹¹ This analysis is not complicated and only requires a straightforward application of federal law to the facts.

8. **The Scope of the Fiduciary Duty and Breach.** An adviser’s fiduciary duty is satisfied by disclosure. “To meet its duty of loyalty, an adviser must make full and fair disclosure to its clients of all material facts relating to the advisory relationship.” *See Commission Interpretation Regarding Standard of Conduct for Investment Advisers*, Release No. IA-5248; File No. S7-07-18, Effective July 12, 2019, Appx. 8 at 722-723. The law is well-established; includes Supreme Court jurisprudence; and is not based on interpretation of SEC releases. *See, e.g., SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 191-92 (1963); *Laird v. Integrated Resources*,

¹⁰ There are limited exceptions to *Goldstein*, which rely on specific features in the relationship between the adviser and the investor that are not applicable here. *See U.S. v. Lay*, 612 F.3d 440, 444 (6th Cir. 2010) (only one investor in the fund); *SEC v. Sentinel Mgmt. Grp., Inc.*, 2012 U.S. Dist. LEXIS 57579, at *13 (N.D. Ill. Mar. 30, 2012) (investment guidelines were personalized for each individual investor); *Goldenson v. Steffens*, 802 F. Supp. 2d 240, 268 (D. Me. 2011) (allegations adviser had provided personalized advice to investor).

¹¹ The Debtor and the DAF entered into that certain *Second Amended and Restated Investment Advisory Agreement*, effective from January 1, 2017 (the “DAF Agreement”). The DAF Agreement terminated on February 28, 2021.

Inc., 897 F.2d 826, 831-36 (5th Cir. 1990). Adjudicating this issue only requires determining if appropriate disclosures were made.¹²

9. **Remedies for Breach of Duty.** Assuming, *arguendo*, the Debtor breached its fiduciary duty to the DAF under the Advisers Act, there is no private right of action for such breach. *Transamerica Mortg. Advisors v. Lewis*, 444 U.S. 11, 13-14 (1979) (“[W]e hold there exists a limited private remedy under the Investment Advisers Act of 1940 to void an investment advisers contract, but that the Act confers no other private causes of action, legal or equitable [on a client].”)¹³ The *only* remedy the DAF has for breach of fiduciary duty is to void the DAF Agreement (which has already been terminated), and the DAF cannot seek damages for breach of fiduciary duty (with the possibility of restitution). *See, e.g., Transamerica*, 441 U.S. at 13-14; *Corwin*, 788 F.2d at 1066; *Douglass*, 900 F.Supp.2d at 746.

10. **Bankruptcy Courts Apply the Advisers Act.** Bankruptcy courts routinely analyze federal securities laws. In fact, prior to the commencement of the Debtor’s case, the Debtor, under Mr. Dondero’s control, was heavily involved in the bitterly contested *Acis* bankruptcy. Appx. 1 at 15. HCLOF invested in certain CLOs managed by Acis. Mr. Dondero owned and controlled Acis prior to the appointment of a chapter 11 trustee in the *Acis* bankruptcy and controlled HCLOF prior to the Bankruptcy Case. In *Acis*, the Debtor (controlled by Dondero) brought claims *in the Bankruptcy Court* alleging Acis was liable to it for breach of fiduciary duties under the Advisers

¹² Exhibit A to the DAF Agreement includes pages of disclosures, including the following: (1) “None of the [Highland Group] . . . is precluded from engaging in or owning an interest in. . . investment activities of any kind, whether or not such ventures are competitive with [the DAF]” and (2) “[T]he Highland Group. . . may actively engage in transactions in the same securities sought by [the DAF] and, therefore, may compete with [the DAF] for investment opportunities or may hold positions opposite to positions maintained by [the DAF].” Appx. 7 at 694-695.

¹³ *See also Belmont v. MB Inv. Partners, Inc.*, 708 F.3d 470, 502 (3rd Cir. 2012) (“With the exception of a private remedy relating to certain investment advisory contracts, ‘the [Advisers] Act confers no other private causes of action, legal or equitable.’”) (citations omitted); *Corwin v. Marney, Orton Inv.*, 788 F.2d 1063, 1066 (5th Cir. 1986) (affirming dismissal of claims under the Advisers Act “because the investors had no private causes of action”); *Douglass*, 900 F.Supp.2d at 746-47 (same).

Act – asserting nearly identical claims to those made in the Complaint. Appx. 9 at 757-758. Plaintiffs’ position is an about-face from Mr. Dondero’s prior position, and their argument that the Bankruptcy Court cannot adjudicate these disputes is disingenuous.

11. Further, 11 U.S.C. § 523(a)(19) requires bankruptcy courts to determine whether there were violations of “federal securities laws (as that term is defined in section 3(a)(47) of the Securities Exchange Act of 1934),¹⁴ any of the State securities laws, or any regulation or order issued under such Federal or State securities laws. . .” in connection with dischargeability. As part of this analysis, bankruptcy courts look to, among other things, the applicability of the Advisers Act. *See, e.g., Tillman Enters., LLC v. Horlbeck (In re Horlbeck)*, 589 B.R. 818, 832 (Bankr. N.D. Ill. 2018) (“bankruptcy courts have jurisdiction to determine liability on an underlying securities claim for purposes of § 523(a)(19)” and “liability under § 523(a)(19) cannot be supported by an alleged violation” of the Advisers Act as there is no private remedy or “actionable claim”); *Tradex Global Master Fund SPC, Ltd. v. Pui-Yun Chui (In re Pui-Yun Chui)*, 538 B.R. 793, 806-08 (Bankr. N.D. Cal. 2015) (same).¹⁵ Bankruptcy court analysis of the Advisers Act is not limited to Section 523(a)(19). *See Calvert v. Zions Bancorporation (In re Consol. Meridian Funds)*, 485 B.R. 604 (Bankr. W.D. Wash. 2013) (dismissing complaint alleging that defendant owed a fiduciary duty to an investor under the Advisers Act for failure to state a claim); *Living Benefits Asset Mgmt. v. Kestrel Aircraft Co. (In re Living Benefits Asset Mgmt.)*, 587 B.R. 311, 317-20 (N.D. Tex. 2018) (affirming bankruptcy court’s rulings under the Advisers Act), *aff’d* 916 F.3d 528 (5th Cir. 2019);

¹⁴ Section 3(a)(47) of the Securities Exchange Act of 1934 (the “Exchange Act”) defines “securities laws” as “the Securities Act of 1933 (15 U.S.C. 78a et seq.), the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.), the Sarbanes-Oxley Act of 2002, the Trust Indenture Act of 1939 (15 U.S.C. 77aaa et seq.), the Investment Company Act of 1940 (15 U.S.C. 80a-1 et seq.), the *Investment Advisers Act of 1940* (15 U.S.C. 80b et seq.), and the Securities Investor Protection Act of 1970 (15 U.S.C. 78aaa, et seq.).”

¹⁵ *See also King v. Skolness (In re King)*, 624 B.R. 259, 301 (Bankr. N.D. Ga. 2020) (bankruptcy court could determine liability under state and federal securities laws for purposes of § 523(a)(19)); *Holzhueter v. Groth (In re Holzhueter)*, 571 B.R. 812, 822-24 (Bankr. W.D. Wis. 2017) (same).

In re Acis Capital Mgmt. L.P., et al., Case No. 18-30264-sgj11, D.I. 549 (Bankr. N.D. Tex. Sept. 4, 2018) (finding the Advisers Act did not prohibit assumption of a management agreement under Section 365).

12. **Plaintiffs Cite No Applicable Case Law.** Plaintiffs wave the red flag of “securities laws” and cite two factually inapposite cases to support their argument. **First**, they cite *In re Harrah’s Entertainment*, 1996 U.S. Dist. LEXIS 18097 (E.D. La. Nov. 26, 1996), which has nothing to do with the Advisers Act. *Harrah’s* involved a class action arising from the issuance of \$435 million in publicly-traded debt; claims that the prospectus violated the Exchange Act; and attempts to hold the issuer’s partners liable for the issuer’s actions under the Exchange Act. The district court ruled that mandatory withdrawal applied because of the foregoing factors; however, none of them apply here. There is no public issuance; no retail investors; no class action; no derivative liability; no applicability of the Exchange Act; and no complicated factual analysis. Plaintiffs’ Advisers Act claims require only the straightforward application of settled law to the facts in a dispute between two private parties. **Second**, Plaintiffs cite *Belmont* for the proposition that there is “considerable ‘confusion’” because “federal law (the Advisers Act) provides, ‘the duty and the standard to which investment advisers are to be held,’ but ‘the cause of action is presented as springing from state law.’” Appx. 10 at 788. Plaintiffs ignore *Belmont’s* holding. *Belmont* confirms no private right exists under the Advisers Act. *Belmont*, 708 F.3d at 502. The only “confusion” is if **state, not federal, law** creates a private right. *Id.* (finding the prohibition on private rights in the Advisers Act “ought to call into serious question whether a limitation in federal law can be circumvented simply by hanging the label ‘state law’ on an otherwise forbidden federal law claim” but recognizing split on state law claims). 28 U.S.C. § 157(d) deals with federal law, and state law claims are irrelevant.

13. **The Advisers Act Is Not a Predicate for RICO:** Plaintiffs allege the violation of the Advisers Act, among other things, in connection with a sale of a security (the HCLOF interests) is a predicate act. Appx. 11 at 826-827. However, RICO expressly excludes securities fraud as a predicate act. 18 U.S.C.A. § 1964(c) (“[N]o person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of [RICO].”).¹⁶ Plaintiffs’ RICO claim is for securities fraud; is barred by statute; and cannot support mandatory withdrawal. *See, e.g., MLSMK Inv. Co. v. JP Morgan Chase & Co.*, 651 F.3d 268, 273-80 (2d Cir. 2011) (barring RICO claims arising out of the operation of a Ponzi scheme because they involved a purchase or sale of a security despite no private right of action existing); *Affco Invs. 2001 LLC v. Proskauer Rose L.L.P.*, 625 F.3d 185, 189-91 (5th Cir. 2010) (same).¹⁷

THE BANKRUPTCY COURT HAS JURISDICTION

14. “Related to” jurisdiction exists if resolution of a dispute would have a “conceivable impact on the estate.” *Wood v. Wood (In re Wood)*, 825 F.2d 90, 93 (5th Cir. 1987). A judgment against the Debtor would significantly impact the estate and there is “related to” jurisdiction.¹⁸

¹⁶ *See also* H.R. Rep. No. 104-369, at 47 (1995) (“The Committee intends this amendment to eliminate securities fraud as a predicate offense in a civil RICO action. In addition, the . . . Committee intends that a plaintiff may not plead other specified offenses, such as mail or wire fraud, as predicate acts under civil RICO if such offenses are based on conduct that would have been actionable as securities fraud.”).

¹⁷ Plaintiffs’ additional arguments to support mandatory withdrawal are easily disposed of. First, there is no contention that the HarbourVest Settlement Order released Plaintiffs’ claims and this issue is made up. Second, there is no issue regarding whether *res judicata* applies to claims not yet accrued. The Debtor’s alleged breach of duties raised in the Complaint occurred prior to approval of the HarbourVest Settlement. Third, *res judicata* is an issue, but there is no “federal issue” to consider. *See Rothstein v. Kuosenfung*, 2009 U.S. Dist. LEXIS 68329, at *4-5 (S.D.N.Y. July 29, 2009) (finding movant’s Advisers Act claim barred by *res judicata* under typical analysis); *Pt Pukuaifu Inda v. SEC*, 2009 U.S. Dist. LEXIS 92986, at *18 (E.D. Mich. Oct. 6, 2009) (same). Lastly, Plaintiffs’ jury trial waiver argument is a red herring. The DAF waived its jury trial right in the DAF Agreement. The Debtor has not argued that CLOH waived its jury trial rights (if any). It argues the Debtor owes no fiduciary duty to CLOH and that no private right of action exists under the Advisers Act. The Court should reject the attempt to create controversy and a federal issue where none exists. *See, e.g., Keach v. World Fuel Servs. Corp. (In re Montreal Me. & Atl. Ry.)*, 2015 U.S. Dist. LEXIS 74006, at *21-23 (D. Me. June 8, 2015) (finding no mandatory withdrawal when movant simply “tries to kick up some dust to make the relevant analysis seem complicated”).

¹⁸ A proceeding “relates to” a proceeding under title 11 *even if it arises from post-petition conduct* if “it affects the estate, not just the debtor.” *Wood*, 825 F.2d at 94 (emphasis added).

15. Plaintiffs argue that because the Bankruptcy Court confirmed the Plan its jurisdiction is limited and determined under the restrictive standard in *Bank of Louisiana v. Craig's Stores of Texas, Inc. (In re Craig's Stores of Texas, Inc.)*, 266 F.3d 388 (5th Cir. 2001). *Craig's Stores* did hold that a bankruptcy court may **lack** jurisdiction over **post-confirmation claims based on post-confirmation activities** but not that a bankruptcy court **loses** jurisdiction over **pre-confirmation claims based on pre-confirmation activities** just because of confirmation. *Newby v. Enron Corp. (In re Enron Corp. Sec.)*, 535 F.3d 325, 335-336 (5th Cir. 2008) citing *Craig's Stores*, 266 F.3d at 389-90. Here, Plaintiffs' alleged claims arose from the HarbourVest Settlement and **prior to** confirmation of the Plan.

16. Based on *Craig's Stores* and other decisions,¹⁹ courts developed a six-factor test to determine if there is "related to" jurisdiction post-confirmation: (1) when the claim arose; (2) what provisions in the plan exist for resolving disputes and whether the plan retains jurisdiction; (3) if the plan has been substantially consummated; (4) the parties involved; (5) if state or bankruptcy law applies; and (6) indices of forum shopping. *Coho Oil & Gas, Inc. v. Finley Res., Inc. (In re Coho Energy, Inc.)*, 309 B.R. 217 (Bankr. N.D. Tex. 2004); *Ebner v. Woodforest Partners, L.P. (In re EBCO Land Dev., Ltd.)*, 2008 Bankr. LEXIS 1207 (Bankr. S.D. Tex. Apr. 17, 2008).

17. Even if the more restrictive standard applies, these factors support bankruptcy court jurisdiction in this case. The claims in the Complaint arose from the HarbourVest Settlement (which occurred pre-confirmation) and, if they exist, are administrative claims;²⁰ the Plan provides

¹⁹See *EOP-Colonnade of Dallas Ltd. P'ship v. Faulkner (In re Stonebridge Techs., Inc.)*, 430 F.3d 260 (5th Cir. 2005); *U.S. Brass Corp. v. Travelers Ins. Group (In re U.S. Brass Corp.)*, 301 F.3d 296 (5th Cir. 2002); *In re Case*, 937 F.2d 1014 (5th Cir. 1991).

²⁰ The causes of action asserted in the Complaint arose post-petition/pre-confirmation and thus the Complaint is, in effect, a motion for payment of an administrative claim under 11 U.S.C. § 503; should have been filed in the Bankruptcy Court; and is subject to allowance under the Bankruptcy Code and the Plan. A request for payment of an administrative claim is a core proceeding under 28 U.S.C. § 157(B)(2)(A) and (O), and arises in and under title 11. See, e.g., *Piper Aircraft Corp. v. Calabro (In re Piper Aircraft Corp.)*, 169 B.R. 766, 776 (Bankr. S.D. Fla. 1994) (in tort context, administrative claim arises from a transaction with the debtor-in-possession, and that transaction must

a procedure for administrative claims; the Plan has not been substantially consummated;²¹ the defendant is the Debtor (and possibly its CRO/CEO); and Plaintiffs are forum shopping.²²

NO WASTE OF JUDICIAL RESOURCES

18. Granting the Motion would give this Court the benefit of the Bankruptcy Court's recommendation on mandatory withdrawal as required by the local rules, which require a party to file a motion for withdrawal with the bankruptcy clerk so the bankruptcy court can make a report and recommendation to this Court.²³ This is particularly important here as the Bankruptcy Court is very familiar with the parties and the issues, having conducted the evidentiary hearing to approve the HarbourVest Settlement.²⁴ The Bankruptcy Court's report and recommendation will aid this Court in analyzing whether withdrawal is appropriate. Plaintiffs' attempts to maneuver around the Bankruptcy Court should not be rewarded.

have benefitted the debtor in the operation of its post-petition business.). Once paid or disallowed, Plaintiff's administrative claim will be discharged under 11 U.S.C. § 1141(d)(1).

²¹ There is recognition that while 11 U.S.C. § 1141 references confirmation of the plan, the "Effective Date is the date upon which a confirmed plan becomes operative and distribution of property and cash is commenced." See Benjamin Weintraub & Michael J. Cramers, *Defining Consummation, Effective Date of Plan of Reorganization and Retention of Postconfirmation Jurisdiction: Suggested Amendments to the Bankruptcy Code and Bankruptcy Rules*, 64 Am. Bankr. L.J. 245, 277 (1990) (emphasis added); see also 11 U.S.C. § 1129 (allowing confirmation only if certain requirements are met, including nine referencing "the effective date of the plan").

²² Plaintiffs, without any authority, contend that confirmation is a significant event in the jurisdictional analysis. As the *Ebner* court stated: "An action impacting a confirmed, but not substantially consummated, plan would have an impact on the debtor-creditor relationship, a factor which favors continuing jurisdiction. See *Craig's Stores*, 266 F.3d at 391." *Ebner* at *20-21. The Plan is not effective and has not been substantially consummated. See 11 U.S.C. § 1101(2). And it makes sense that the jurisdictional analysis of a dispute arising before a plan is effective should be more expansive. The rationale for narrowing post-confirmation jurisdiction is that the debtor is no longer under the supervision and control of the bankruptcy court; has emerged from bankruptcy; and is continuing to operate its business unfettered by the strictures of the Bankruptcy Code. *Craig's Stores*, 266 F.3d 390. Because the Plan in this case is not yet effective, the Debtor's assets have not vested in the Reorganized Debtor and the Debtor continues to operate under the strictures of the Bankruptcy Code. Plaintiffs cite no cases to support a restrictive view of bankruptcy court jurisdiction in the post-confirmation, pre-effective date period.

²³ Local Bankruptcy Rules of the United States Bankruptcy Court for the Northern District of Texas, Rule 5011-1.

²⁴ Plaintiffs also argue allowing the Bankruptcy Court to adjudicate the *res judicata* defense is inappropriate because the second court determines if *res judicata* applies, not the first. Plaintiffs' argument misses the point. The Bankruptcy Court will be the second court if the Order of Reference is enforced and will evaluate the *res judicata* argument as the court presiding over the Complaint. Who better to determine if the proceedings in the first court (i.e. the HarbourVest Settlement) are *res judicata* in the second court than the Bankruptcy Court?

Dated: July 13, 2021

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

CHARITABLE DAF FUND, L.P., AND CLO	§	
HOLDCO LTD.	§	
	§	Case No. 3:21-cv-00842-B
Plaintiff,	§	
	§	
vs.	§	
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	
HIGHLAND HCF ADVISOR, LTD., AND	§	
HIGHLAND CLO FUNDING, LTD.	§	
	§	
Defendants.	§	

**APPENDIX IN SUPPORT OF DEBTOR'S REPLY IN SUPPORT OF THE DEBTORS'
MOTION TO ENFORCE THE ORDER OF REFERENCE**

Highland Capital Management, L.P., a defendant in the above-captioned case (the “Debtor” or “Highland”), hereby files this *Appendix in Support of Debtor’s Reply in Support of the Debtors’ Motion to Enforce the Order of Reference* (the “Reply”).¹

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Appx.	Description
1	<i>Defendant Highland Capital Management, L.P.’s Memorandum of Law in Support of Motion for an Order to Enforce the Order of Reference</i> , Case No. 3:21-cv-00842-B, D.I. 23 (N.D. Tex. May 19, 2021)
2	Hearing Transcript, June 8, 2021
3	<i>Debtor’s Second Amended Witness and Exhibit List with Respect to Evidentiary Hearing to Be Held on June 8, 2021</i> , [Docket No. 2423] ²
4	<i>Order Confirming the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (as Modified) and (ii) Granting Related Relief</i> [Docket No. 1943]
5	Summary of Dondero Entity Litigation
6	Hearing Transcript, June 25, 2021
7	<i>Second Amended and Restated Investment Advisory Agreement</i> , effective from January 1, 2017
8	<i>Commission Interpretation Regarding Standard of Conduct for Investment Advisers</i> , Release No. IA-5248; File No. S7-07-18, Effective July 12, 2019
9	<i>In re Acis Capital Management, L.P., et al</i> , Case No. 18-30264-sgj11, D.I. 497 (Bankr. N.D. Tex. Aug. 13, 2018)
10	<i>Plaintiffs’ Response to Defendant Highland Capital Management, L.P.’s Motion for an Order to Enforce the Order of Reference</i> , Case No. 3:21-cv-00842-B, D.I. 36 (N.D. Tex. June 29, 2021)
11	<i>Original Complaint</i> , Case No. 3:21-cv-00842-B, D.I. 1 (N.D. Tex. Apr. 12, 2021)
12	<i>Prohibition of Fraud by Advisers to Certain Pooled Investment Vehicles</i> , Release No. 2628 (Aug. 3, 2007)

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¹ All capitalized terms used but not defined herein have the meanings given to them in the Reply.

² Unless otherwise indicated, all docket reference numbers refer to the docket maintained by the Bankruptcy Court.

Dated: July 13, 2021.

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

In Re: Highland Capital Management, L.P § Case No. **19-34054-SGJ11**

Charitable DAF Fund, L.P et al

Appellant

§

vs.

§

21-03067

Highland Capital Management, L.P

§

Appellee

§

3:23-CV-01503-B

[167] Order granting Defendant Highland Capital Management, L.P.'s Renewed motion to dismiss adversary proceeding (related document # [122](#)) Entered on 6/25/2023.

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APPELLANT RECORD

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

In re:	§ Chapter 11
	§
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§ Case No. 19-34054-sgj11
	§
Debtor.	§
	§
CHARITABLE DAF FUND, L.P. AND CLO	§
HOLDCO, LTD., DIRECTLY AND DERIVATIVELY	§
	§
Plaintiffs,	§ Adversary Proceeding No.
	§
vs.	§ 21-03067-sgj11
	§
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§
HIGHLAND HCF ADVISOR, LTD., AND	§
HIGHLAND CLO FUNDING LTD., NOMINALLY	§
	§
Defendant.	§
	§

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**APPELLANTS' SECOND AMENDED STATEMENT OF ISSUES
AND DESIGNATION OF RECORD ON APPEAL**

Pursuant to Rules 8009(a)(1)(A)-(B) and (a)(4) of the Federal Rules of Bankruptcy Procedure, The Charitable DAF Fund, L.P. and CLO Holdco, Ltd. ("Appellants") hereby designate the following items to be included in the record and identify the following issues with respect to

their appeal of the Order Granting Defendant Highland Capital Management, L.P.'s "Renewed Motion to Dismiss Complaint" [Adv. Proc. Doc. No. 122] which was entered by the United States Bankruptcy Court for the Northern District of Texas on June 25, 2023.

I. STATEMENT OF ISSUES TO BE PRESENTED ON APPEAL

- Whether the Bankruptcy Court had jurisdiction to rule on Highland Capital Management L.P.'s Renewed Motion to Dismiss Complaint
- Whether the Renewed Motion to Dismiss Complaint was improperly granted

II. DESIGNATION OF ITEMS TO BE INCLUDED IN THE RECORD

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1. Notice of Appeal for Bankruptcy Case Adversary Proceeding No. 21-03067-sgj11 [Doc. 168].

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2. The judgment, order, or decree appealed from: Memorandum Opinion and Order Granting Defendant Highland Capital Management, L.P.'s "Renewed Motion to Dismiss Complaint" [Adv. Proc. Doc. No. 122] [Doc. 167].

000080

3. Docket Sheet kept by the Bankruptcy Clerk.

4. Documents listed below and as described in the Docket Sheet for Bankruptcy Case Proceeding No. 21-03067-sgj.

Vol. 2

000102

000138

No.	Date Filed	Docket No.	Description/Document Text
1	9/29/21	1	(36 pgs; 3 docs) Adversary case 21-03067. ORDER REFERRING CASE NUMBER 21-CV-0842-B from U.S District Court for the Northern District of Texas, Dallas Division to U.S. Bankruptcy Court for Northern District of Texas, Dallas Division. Complaint by Charitable DAF Fund, LP, CLO Holdco, Ltd. against Highland Capital Management, LP, Highland HCF Advisor Ltd., Highland CLO Funding, Ltd. Fee Amount \$350 (Attachments: # 1 Original Complaint # 2 Docket Sheet from 3:20-cv-0842-B) Nature(s) of suit: 02 (Other (e.g. other actions that would have been brought in state court if unrelated to bankruptcy)). (Okafor, M.)
2	9/29/21	2	(1 pg) Supplemental Document (cover sheet) by CLO Holdco Ltd., Charitable DAF Fund (RE: related document(s)1 Adversary case 21-03067) [ORIGINALLY FILED IN 21-CV-0842 AS #2 ON 04/13/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)

Vol. 2 000139 000232 000239 000270 Thru Vol. 6	3	9/29/21	6	(93 pgs; 6 docs) MOTION for Leave to File First Amended Complaint filed by CLO Holdco Ltd., Charitable DAF Fund LP (Attachments: # 1 Exh 1_First Amended Complaint # 2 Exh 2_Motion for Authorization to Retain James Seery # 3 Exh 3_Order Approving Retention of James Seery # 4 Exh 4_Order Approving Settlement # 5 Proposed Order) (Bridges, Jonathan) (Entered: 04/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #6 ON 04/19/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
	4	9/29/21	22	(7 pgs; 2 docs) MOTION for an Order to Enforce the Order of Reference filed by Highland Capital Management LP. (Attachments: # 1 Exhibit(s) A--Proposed Order) (Annable, Zachery) Modified text on 5/20/2021 (mjr). (Entered: 05/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #22 ON 05/19/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
	5	9/29/21	23	(31 pgs) Brief/Memorandum in Support filed by Highland Capital Management LP re: 22 MOTION for an Order to Enforce the Order of Reference. (Annable, Zachery) Modified text on 5/20/2021 (mjr).(Entered: 05/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #23 ON 05/19/2021 IN U.S.DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
	6	9/29/21	24	(926 pgs; 29 docs) Appendix in Support filed by Highland Capital Management LP re: 23 Brief/Memorandum in Support. (Attachments: # 1 Appendix 1 # 2 Appendix 2 # 3 Appendix 3 # 4 Appendix 4 # 5 Appendix 5 # 6 Appendix 6 # 7 Appendix 7 # 8 Appendix 8 # 9 Appendix 9 # 10 Appendix10 # 11 Appendix 11 # 12 Appendix 12 # 13 Appendix 13 # 14 Appendix 14 # 15 Appendix 15 # 16 Appendix 16 # 17 Appendix 17 # 18 Appendix 18 # 19 Appendix 19 # 20 Appendix 20 # 21 Appendix 21# 22 Appendix 22 # 23 Appendix 23 # 24 Appendix 24 # 25 Appendix 25 # 26 Appendix 26 # 27 Appendix 27 # 28 Appendix 28) (Annable, Zachery) Modified linkage and text on 5/20/2021 (mjr). (Entered:05/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #24 ON 05/19/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
Vol. 7 001196	7	9/29/21	26	(7 pgs; 2 docs) MOTION to Dismiss Complaint filed by Highland Capital Management LP (Attachments: # 1 Exhibit(s) A--Proposed Order) (Annable, Zachery) Modified text on 5/28/2021 (jmg).(Entered: 05/27/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #26 ON 05/27/2021 IN U.S.DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)

Vol. 7 001203 thru Vol 8	8	9/29/21	28	(508 pgs; 14 docs) Appendix in Support filed by Highland Capital Management LP (Attachments: # 1 Appendix 1 # 2 Appendix 2 # 3 Appendix 3 # 4 Appendix 4 # 5 Appendix 5 # 6 Appendix 6 # 7 Appendix 7 # 8 Appendix 8 # 9 Appendix 9 # 10 Appendix 10 # 11 Appendix 11 # 12 Appendix 12 # 13 Appendix 13) (Annable, Zachery) (Entered: 05/27/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #28 ON 05/27/2021 IN U.S. DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
Vol. 9 001711	9	9/29/21	33	(1 pg) Amended Civil Cover Sheet by CLO Holdco Ltd, Charitable DAF Fund LP. Amendment to 2 Supplemental Document. (Sbaiti, Mazin) Modified text on 6/23/2021 (mjr). (Entered: 06/22/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #33 ON 06/22/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001712	10	9/29/21	36	(26 pgs) RESPONSE filed by CLO Holdco Ltd, Charitable DAF Fund LP re: 22 MOTION for an Order to Enforce the Order of Reference (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #36 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001738	11	9/29/21	37	(22 pgs) Appendix in Support filed by CLO Holdco Ltd, Charitable DAF Fund LP re 36 Response/Objection Response to Motion for an Order to Enforce the Order of Reference (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #37 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001760	12	9/29/21	38	(45 pgs) RESPONSE filed by CLO Holdco Ltd, Charitable DAF Fund LP re: 26 MOTION to Dismiss (Defendant Highland Capital Management, L.P.'s Motion to Dismiss Complaint) (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #38 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001805	13	9/29/21	39	(88 pgs) Appendix in Support filed by CLO Holdco Ltd, Charitable DAF Fund LP re 38 Response/Objection to Defendant Highland Capital Management, L.P.'s Motion to Dismiss Complaint (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #39 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001893	14	9/29/21	42	(12 pgs) REPLY filed by Highland Capital Management LP re: 22 MOTION for an Order to Enforce the Order of Reference (Annable, Zachery) (Entered: 07/13/2021) [ORIGINALLY FILED IN 21-CV-0842AS #42 ON 07/13/2021 IN U.S.

			DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
VOL. 9	15	9/29/21	43 (852 pgs) Appendix in Support filed by Highland Capital Management LP re: 42 Reply. (Annable, Zachery) Modified text on 7/14/2021 (mjr). (Entered: 07/13/2021) [ORIGINALLY FILED IN 21-CV-0842AS #43 ON 07/13/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001905 thru Vol. 13	16	9/29/21	45 (21 pgs) REPLY filed by Highland Capital Management LP re: 26 MOTION to Dismiss (Defendant Highland Capital Management, L.P.'s Motion to Dismiss Complaint) (Annable, Zachery) (Entered:07/13/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #44 ON 07/13/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002757	17	9/29/21	57 (7 pgs; 2 docs) MOTION to Dismiss and Joinder in Motion to Dismiss of Highland Capital Management, L.P. filed by Highland CLO Funding Ltd. (Attachments: # 1 Proposed Order) Attorney Paul R Bessette added to party Highland CLO Funding Ltd (pty:dft) (Bessette, Paul) (Entered: 08/30/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #57 ON 08/30/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002778	18	9/29/23	58 (12 pgs) Brief/Memorandum in Support filed by Highland CLO Funding Ltd. re 57 MOTION to Dismiss and Joinder in Motion to Dismiss of Highland Capital Management, L.P. (Bessette, Paul) (Entered: 08/30/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #58 ON 08/30/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002785	19	9/29/23	59 (80 pgs; 5 docs) Appendix in Support filed by Highland CLO Funding Ltd re 58 Brief/Memorandum in Support of Motion (Attachments: # 1 Exhibit(s) A - Jackson v Dear # 2 Exhibit(s) B - Prudential Assurance v. Newman # 3 Exhibit(s) C - Harbourvest Settlement Agreement # 4 Exhibit(s) D - Boleat Declaration) (Bessette, Paul) (Entered: 08/30/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #59 ON 08/30/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002797	20	9/29/21	64 (1 pg) ORDER OF REFERENCE: Pursuant to 28 U.S.C. § 157 and this District's Miscellaneous Order No. 33, this case is hereby REFERRED to Judge Stacey G. C. Jernigan of the United States Bankruptcy Court for the Northern District of Texas, Dallas Division, to be adjudicated as a matter related to the consolidated Chapter 11 Bankruptcy of Highland Capital Management, L.P., Chapter 11 Case No.19-34054. (Ordered by Judge Jane J. Boyle
002877			

Vol. 14				on 9/20/2021) (svc) (Entered: 09/20/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #64 ON 09/20/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002878	21	10/19/21	66	(5 pgs) Notice of hearing filed by Defendant Highland Capital Management, LP (RE: related document(s) 26 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP, 47 Motion to strike document filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 55 Motion to abate filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) Hearing to be held on 11/23/2021 at 09:30 AM at https://us-courts.webex.com/meet/jerniga for 26 and for 47 and for 55, (Annable, Zachery)
002883 thru Vol. 16	22	11/22/21	71	(509 pgs; 2 docs) Witness and Exhibit List <i>for Hearing on November 23, 2021</i> filed by Defendant Highland Capital Management, LP (RE: related document(s) 26 Motion to dismiss adversary proceeding). (Attachments: # 1 Exhibits 1-13) (Hayward, Melissa)
Vol. 17	23	11/22/21	72	(2 pgs) Witness List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 26 Motion to dismiss adversary proceeding, 47 Motion to strike (related document(s): 43 Document), 55 Motion to abate (related document(s) 1 Complaint), 69 Motion to abate <i>Plaintiffs' Amended Motion to Stay All Proceedings</i> (related document(s) 55 Motion to abate (related document(s) 1 Complaint))). (Sbaiti, Mazin)
003392				
003394	24	11/22/21	73	(189 pgs; 4 docs) Exhibit List <i>for November 23, 2021 hearing</i> filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 47 Motion to strike (related document(s): 43 Document), 55 Motion to abate (related document(s) 1 Complaint)). (Attachments: # 1 Exhibit 1_Defendant's Memorandum of Law in Support of Motion for Reconsideration # 2 Exhibit 2_Highland Memorandum in Support of Motion to Dismiss # 3 Exhibit 3_Order (I) Confirming Fifth Amended Plan of Reorganization of Highland) (Sbaiti, Mazin)
003583	25	12/7/21	80	(2 pgs) Order granting Highland CLO Funding, Ltd.'s motion to dismiss adversary as a party with prejudice (related document 57) Entered on 12/7/2021. (Okafor, Marcey) Modified text on 3/11/2022 (Okafor, Marcey).
003585	26	3/11/22	99	(26 pgs) Memorandum of Opinion and order granting motion to dismiss the adversary proceeding (RE: related document(s) 26 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP). Entered on 3/11/2022 (Okafor, Marcey)
003611	27	3/11/22	100	(26 pgs) Order granting motion to dismiss adversary proceeding with prejudice (related document #26) Entered on 3/11/2022. (Okafor, Marcey)

Vol. 18 003637	28	3/21/22	104	(29 pgs) Notice of appeal. Fee Amount \$298 filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 100 Order on motion to dismiss adversary proceeding). Appellant Designation due by 04/4/2022. (Sbaiti, Mazin)
003666	29	5/26/22	120	(177 pgs; 2 docs) Support/supplemental document <i>Motion to Supplement Appellate Record</i> filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 111 Appellant designation). (Attachments: # 1 Amended Transcript of January 14, 2021 Hearing) (Sbaiti, Mazin)
003843	30	6/9/22	121	(1 pg) DISTRICT COURT Order: Case 3:22-00695-B is hereby transferred to the docket of the Honorable Judge Jane J. Boyle for consolidation with The Charitable DAF Fund LP, et al. v. Highland Capital Management LP, Case No. 3:21-cv-3129-N. Judge Karen Gren Scholer no longer assigned to case.(RE: related document(s) 86 Notice of appeal filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 104 Notice of appeal filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Entered on 6/9/2022 (Whitaker, Sheniqua) (Entered: 06/10/2022)
003844	31	10/24/22	122	(7 pgs) Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP (Annable, Zachery)
003851	32	10/14/22	123	(31 pgs) Brief in support filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Annable, Zachery)
Vol. 19 003882 Thru Vol 20	33	10/14/22	124	(513 pgs; 15 docs) Support/supplemental document (<i>Appendix in Support of Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7 # 8 Exhibit 8 # 9 Exhibit 9 # 10 Exhibit 10 # 11 Exhibit 11 # 12 Exhibit 12 # 13 Exhibit 13 # 14 Exhibit 14) (Annable, Zachery)
Vol. 21 004395	34	10/27/22	126	(5 pgs) Notice of hearing (<i>Notice of Hearing and Briefing Schedule on Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP). Hearing to be held on 12/8/2022 at 09:30 AM at https://us-courts.webex.com/meet/jerniga for 122. (Annable, Zachery)

Vol. 21 004400 004410 004442 Thru Vol. 22	35	11/18/22	128	(10 pgs) Motion for withdrawal of reference. Fee amount \$188, filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (Sbaiti, Mazin)
	36	11/18/22	129	(32 pgs) Response opposed to (related document(s): 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP) filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Sbaiti, Mazin)
	37	11/18/22	130	(254 pgs; 2 docs) Response opposed to (related document(s): 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP) filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Attachments: # 1 Appendix) (Sbaiti, Mazin)
Vol. 22 004696 004717 004732 004737 004742	38	9/2/22	131	(21 pgs) DISTRICT COURT MEMORANDUM OPINION AND ORDER: The Court REVERSES and REMANDS the bankruptcy court's Motion to Dismiss Order and AFFIRMS the bankruptcy courts Motion to Stay Order. re: appeal on Civil Action number: Case 3:22-00695-B consolidated with 3:21-CV-3129-B, (RE: related document(s) 81 Order on motion to abate, 100 Order on motion to dismiss adversary proceeding). Entered on 9/2/2022 (Whitaker, Sheniqua) (Entered: 11/29/2022)
	39	12/2/22	133	(15 pgs) Reply to (related document(s): 129 Response filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 130 Response filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) filed by Defendant Highland Capital Management, LP. (Annable, Zachery)
	40	12/7/22	135	(5 pgs) Notice of hearing filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP). Hearing to be held on 1/25/2023 at 01:30 PM at https://us-courts.webex.com/meet/jerniga for 122, (Annable, Zachery)
	41	12/7/22	136	(5 pgs) Notice of hearing filed by Defendant Highland Capital Management, LP (RE: related document(s) 128 Motion for withdrawal of reference filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Status Conference to be held on 1/25/2023 at 01:30 PM at https://us-courts.webex.com/meet/jerniga . (Annable, Zachery).
	42	12/9/22	138	(3 pgs) Response opposed to (related document(s): 128 Motion for withdrawal of reference. Fee amount \$188, filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) filed by Defendant Highland Capital Management, LP. (Annable, Zachery)

Vol. 22 004745	43	12/9/22	139	(25 pgs) Brief in support filed by Defendant Highland Capital Management, LP (RE: related document(s) 138 Response). (Annable, Zachery)
Vol. 23 004770	44	12/9/22	140	(280 pgs; 8 docs) Support/supplemental document (<i>Appendix in Support of Highland Capital Management, L.P.'s Response to Renewed Motion to Withdraw the Reference</i>) filed by Defendant Highland Capital Management, LP (RE: related document(s) 138 Response). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7) (Annable, Zachery)
Vol. 24 005050	45	12/16/22	144	(6 pgs) Reply to (related document(s): 138 Response filed by Defendant Highland Capital Management, LP) filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Sbaiti, Mazin)
005056 Thru Vol. 25.	46	1/23/23	145	(514 pgs; 15 docs) Witness and Exhibit List filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7 # 8 Exhibit 8 # 9 Exhibit 9 # 10 Exhibit 10 # 11 Exhibit 11 # 12 Exhibit 12 # 13 Exhibit 13 # 14 Exhibit 14) (Annable, Zachery)
Vol. 26 005570	47	1/23/23	146	(280 pgs; 8 docs) Witness and Exhibit List filed by Defendant Highland Capital Management, LP (RE: related document(s) 128 Motion for withdrawal of reference. Fee amount \$188.). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7) (Annable, Zachery)
Vol. 27 005850	48	1/23/23	147	(221 pgs; 7 docs) Witness and Exhibit List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Attachments: # 1 Exhibit 1_Excerpts from July 14, 2020 Hearing Transcript # 2 Exhibit 2_HCLOF Members Agreement Relating to the Company # 3 Exhibit 3_HarbourVest Settlement Agreement # 4 Exhibit 4_Order Approving Debtor's Settlement with HarbourVest # 5 Exhibit 5_HCLOF Offering # 6 Exhibit 6 Amended and Restated Investment Advisory Agreement) (Sbaiti, Mazin)
006071	49	1/23/23	148	(3 pgs) Witness and Exhibit List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 128 Motion for withdrawal of reference. Fee amount \$188.). (Phillips, Louis)
Vol. 28 006074	50	1/25/23	150	(56 pgs; 2 docs) Amended Witness and Exhibit List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 147 List (witness/exhibit/generic), 149 List (witness/exhibit/generic)). (Attachments: # 1 Exh 7_Testimony of Mark Patrick at June 8, 2021 hearing) (Sbaiti, Mazin)

Vol. 28 006130 006133 Thru Vol. 31	51	1/25/23	152	(3 pgs) Notice of Appearance and Request for Notice by Louis M. Phillips filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Phillips, Louis)
	52	1/25/23	154	(1 pg) Court admitted exhibits date of hearing January 25, 2023 (RE: related document(s) 128 Motion for withdrawal of reference, filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) (COURT ADMITTED DEFENDANT'S EXHIBITS #1, #2, #3, #4, #5 & #6 OFFERED BY ATTY GREG DEMO). (Edmond, Michael) (Entered: 01/27/2023)
Vol. 32 006925 006942 006960	53	2/6/23	158	Report and recommendation to the U.S. District Court by U.S. Bankruptcy Judge. (RE: related document(s) 128 Motion for withdrawal of reference filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Entered on 2/6/2023 (Okafor, Marcey)
	54	2/6/23	161	(18 pgs) DISTRICT COURT Notice of transmission of report and recommendation in re: renewed motion to withdraw reference. Civil Case # 3:22-cv-02802-S. (RE: related document(s) 158 Report and recommendation to the U.S. District Court by U.S. Bankruptcy Judge. (RE: related document(s) 128 Motion for withdrawal of reference filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Entered on 2/6/2023) (Whitaker, Sheniqua)
	55	4/3/23	165	(1 pg) DISTRICT COURT ORDER: The Court GRANTS the 11 Joint Motion to Transfer Proceeding and Consolidate Before Original Court and the above-numbered case (3:22-cv-02802-S) is transferred to the docket of the Honorable Judge Jane Boyle: Civil case 3:21-cv-00842-B (order referring case). (RE: related document(s) 1 Complaint filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 143 Notice of transmission of motion to withdraw reference). Entered on 4/3/2023 (Whitaker, Sheniqua) Modified on 4/10/2023 (Whitaker, Sheniqua). (Entered: 04/10/2023)

TRANSCRIPTS

006961	56	11/24/21	78	(104 pgs) Transcript regarding Hearing Held 11-23-2021 RE: Motion Hearing. THIS TRANSCRIPT WILL BE MADE ELECTRONICALLY AVAILABLE TO THE GENERAL PUBLIC 90 DAYS AFTER THE DATE OF FILING. TRANSCRIPT RELEASE DATE IS 02/22/2022. Until that time the transcript may be viewed at the Clerk's Office or a copy may be obtained from the official court transcriber. Court Reporter/Transcriber Liberty Transcripts/Dipti Patel, Telephone number 847-848-4907. (RE: related document(s) 75 Hearing held on 11/23/2021. (RE: related document(s) 55 MOTION to Stay filed by CLO Holdco Ltd, Charitable DAF Fund LP (Sbaiti, Mazin) (Entered: 08/26/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #55 ON 08/26/2021 IN U.S.
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			<p>DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)) (Appearances: J. Pomerantz and J. Morris for Highland Defendants; J. Jordan and P. Bessett for HCLOF; M. Sbaiti for Plaintiffs. Nonevidentiary hearing. Motion denied. Mr. Pomerantz to upload order.), 76 Hearing held on 11/23/2021. (RE: related document(s) 47 Motion to strike 43 Appendix in support filed by CLO Holdco, Ltd., Charitable DAF Fund, LP (Bridges, Jonathan) Modified text on 7/16/2021 (mjr). (Entered: 07/15/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #47 ON 07/15/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)) (Appearances: J. Pomerantz and J. Morris for Highland Defendants; J. Jordan and P. Bessett for HCLOF; M. Sbaiti for Plaintiffs. Nonevidentiary hearing. Motion denied (Plaintiffs acknowledged complained-of Appendices it did not relate to Motion to Dismiss). Mr. Pomerantz to upload order.)). Transcript to be made available to the public on 02/22/2022. (Patel, Dipti)</p>
57	2/21/23	164	<p>164 (112 pgs) Transcript regarding Hearing Held 1/25/23 RE: HEARING ON DEFENDANT HIGHLAND CAPITAL MANAGEMENT L.P.'S RENEWED MOTION TO DISMISS COMPLAINT (122) AND STATUS CONFERENCE RE: MOTION FOR WITHDRAWAL OF REFERENCE FILED BY PLAINTIFF CLO HOLDCO, LTD., PLAINTIFF CHARITABLE DAF FUND, LP (128). THIS TRANSCRIPT WILL BE MADE ELECTRONICALLY AVAILABLE TO THE GENERAL PUBLIC 90 DAYS AFTER THE DATE OF FILING. TRANSCRIPT RELEASE DATE IS 05/22/2023. Until that time the transcript may be viewed at the Clerk's Office or a copy may be obtained from the official court transcriber. Court Reporter/Transcriber Dipti Patel, Telephone number 847-848-4907. (RE: related document(s) 155 Hearing held on 1/25/2023. (RE: related document(s) 122 Motion to dismiss adversary proceeding, (Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint) filed by Defendant Highland Capital Management, LP filed by Defendant Highland Capital Management, LP) (Appearances: J. Morris and G. Demo for Movants; L. Phillips and M. Sbaiti for Plaintiffs. Evidentiary hearing (appendices). Court took matter under advisement.), 156 Hearing held on 1/25/2023. (RE: related document(s) 128 Motion for withdrawal of reference. Fee amount \$188, filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) (Appearances: J. Morris and G. Demo for Movants; L. Phillips and M. Sbaiti for Plaintiffs. Evidentiary hearing (appendices). Court announced it will recommend denial to District Court. Court is working on Report & Recommendation.)). Transcript to be made available to the public on 05/22/2023. (Patel, Dipti)</p>

Dated: July 14, 2023

Respectfully submitted,

SBAITI & COMPANY PLLC

/s/ Mazin A. Sbaiti

Mazin A. Sbaiti

Texas Bar No. 24058096

Jonathan Bridges

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was filed electronically through the Court's ECF system, which provides notice to all parties of interest, on this 14th day of July, 2023.

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

CHARITABLE DAF FUND, L.P., AND CLO
HOLDCO LTD.

Plaintiff,

VS.

HIGHLAND CAPITAL MANAGEMENT, L.P.,
HIGHLAND HCF ADVISOR, LTD., AND
HIGHLAND CLO FUNDING, LTD.

Defendants.

[Decorative flourish]

Case No. 3:21-cv-00842-B

**DEFENDANT HIGHLAND CAPITAL MANAGEMENT, L.P.'S
MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR
AN ORDER TO ENFORCE THE ORDER OF REFERENCE**

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Highland Capital Management, L.P., a defendant in the above-captioned case (the “Debtor” or “Highland”), submits this memorandum of law (the “Memorandum”) in support of the *Debtor’s Motion for an Order to Enforce the Order of Reference* (the “Motion”). In support of its Motion, the Debtor states as follows:

PRELIMINARY STATEMENT¹

1. Highland is the debtor and debtor-in-possession in a bankruptcy case currently pending in the Bankruptcy Court for the Northern District of Texas, Dallas Division (the “Bankruptcy Court”), Case No. 19-34054-sgj11 (the “Bankruptcy Case”). The Bankruptcy Case has been pending since October 16, 2019, having been filed at the direction of James Dondero, who, on information and belief, is the person controlling and directing the actions of both The Charitable DAF Fund, L.P. (the “DAF”) and CLO Holdco, Ltd. (“CLOH” and together with the DAF, “Plaintiffs”) today. Both the DAF and CLOH have appeared and objected multiple times in the Bankruptcy Case.

2. In one of those matters, the Bankruptcy Court approved a settlement between the Debtor and HarbourVest² (the “Settlement”) pursuant to 11 U.S.C. §§ 105 and 363 of the Bankruptcy Code and Rule 9019 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”) over the objections of CLOH, a Plaintiff in this action, as well as other entities owned and/or controlled by Mr. Dondero. The Settlement is on appeal.³

¹ Concurrently herewith, the Debtor is filing the *Appendix in Support of the Debtor’s Motion to Enforce the Reference* (the “Appendix”). Citations to the Appendix are notated as follows: Appx. #. The Complaint is Appx. 1.

² “HarbourVest” collectively refers to the following entities: HarbourVest 2017 Global Fund L.P., HarbourVest 2017 Global AIF L.P., HarbourVest Dover Street IX Investment L.P., HV International VIII Secondary L.P., HarbourVest Skew Base AIF L.P., and HarbourVest Partners L.P.

³ The Settlement is being appealed by Mr. Dondero’s two purported family investment trusts: The Dugaboy Investment Trust (“Dugaboy”) and The Get Good Trust (“Get Good” and together with Dugaboy, the “Trusts”). The Trusts, like Plaintiffs, are controlled by Mr. Dondero. The appeal and this litigation are just one battle in Mr. Dondero’s multifaceted litigation assault on the bankruptcy process.

3. Plaintiffs filed their *Original Complaint* (the “Complaint”)⁴ in this Court seeking to have this Court undertake a *de facto* appeal or reconsideration of the Settlement and to assert monetary claims for actions undertaken in the Bankruptcy Case. However, the *Order of Reference of Bankruptcy Cases and Proceedings Nunc Pro Tunc* (the “Order of Reference”) (Appx. 2) in force in the Northern District of Texas required that this action be filed with the Bankruptcy Court presiding over the Bankruptcy Case. The Order of Reference was entered in 1984 and directs courts in this District to refer all proceedings arising under Title 11 and/or arising in or related to a case under Title 11 to the bankruptcy courts. A mandatory application of the Order of Reference prevents a race to the courthouse and inconsistent rulings by providing one forum to adjudicate *all* aspects of a bankruptcy case. Otherwise, debtors and creditors could blatantly forum shop and choose whether to file cases or claims in the bankruptcy court or the district court to evade what may be perceived as an unwelcoming court – which is precisely what has occurred in this case.⁵ Here, the case for enforcing the Order of Reference is compelling. The Complaint addresses issues that not only arise in, arise under, and relate to Title 11 but which have already been adjudicated by the Bankruptcy Court. By this Motion, the Debtor requests that this Court enforce the Order of Reference and refer the Complaint to the Bankruptcy Court for adjudication

4. The reason Plaintiffs filed the Complaint in this Court – rather than in the Bankruptcy Court – is obvious. Plaintiffs, under the direction of the Debtor’s ousted founder, Mr.

⁴ The Complaint contains a number of errors and material omissions, misstatements, misrepresentations, and mischaracterizations. The Debtor believes the Complaint is frivolous and should be dismissed on numerous grounds. The Debtor reserves all rights to contest the substance of the Complaint and intends to promptly inform Plaintiffs’ counsel that the Debtor will seek sanctions if the Complaint is not withdrawn.

⁵ Plaintiffs justify their conduct by contending that under the 1984 Amendments to the Bankruptcy Code, the Bankruptcy Court is a “unit” of this Court. Hence, in Plaintiffs’ minds, the courts are indistinguishable and interchangeable and Plaintiffs can pick and choose where to file. That is not the law and would render the Order of Reference a nullity.

Dondero, have found little traction in the Bankruptcy Court for the serial, frivolous, and vexatious litigation positions they have taken in more than a dozen pending matters in the Bankruptcy Case and their attempts to interfere with the Debtor's business operations – actions that have cost the Debtor millions. Plaintiffs therefore determined their best course of action was to engage in blatant forum shopping with the goal of re-opening settled litigation and closed factual records in a court Plaintiffs hope will be more hospitable.⁶ The Debtor will vigorously defend this action as (a) a flagrant attack on the Bankruptcy Court; (b) a frivolous attempt to avoid settled principles of bankruptcy jurisdiction through (less than) clever pleading; and (c) barred by *res judicata*. The Debtor have also sought to hold Plaintiffs and their counsel, among others, in civil contempt for attempting to add Mr. James P. Seery, Jr., the Debtor's independent, Bankruptcy Court-appointed CEO and CRO, as a defendant in this Case in clear violation of two final Bankruptcy Court orders.⁷

5. The fact that the Complaint was not automatically referred to the Bankruptcy Court is attributable to a blatant omission by Plaintiffs in Section VIII of their Civil Cover Sheet (Appx. 3). Because this action is undoubtedly “related to” the Bankruptcy Case and the pending appeal of the Settlement, Plaintiffs’ attorneys were required to disclose that a “related case” to the Complaint existed – as that term is used in the Local Civil Rules, effective September 1, 2020, of the Northern District of Texas (the “Local Rules”). Plaintiffs’ failure to make such disclosure could not have

⁶ The Complaint is not the first time that Plaintiffs have attempted to disenfranchise the Bankruptcy Court. On March 18, 2021, Mr. Dondero, Plaintiffs, and other entities owned and/or controlled by Mr. Dondero filed *James Dondero, Highland Capital Management Fund Advisors, L.P., NexPoint Advisors, L.P., The Dugaboy Investment Trust, The Get Good Trust, and NexPoint Real Estate Partners, LLC, f/k/a HCRE Partners, LLC, a Delaware Limited Liability Company's Motion to Recuse Pursuant to 28 U.S.C. § 455* [Docket No. 2060] (the “Recusal Motion”) pursuant to which they sought to recuse the Honorable Stacey Jernigan from the Bankruptcy Case. The Recusal Motion was denied by the Bankruptcy Court and has been appealed [Docket No. 2149].

⁷ On April 19, 2021, filed *Plaintiff's Motion for Leave to File First Amended Complaint in the District Court* (the “Seery Motion”) in this Court seeking leave to add Mr. Seery as a defendant, and, in response, on April 23, 2021, the Debtor filed *Debtor's Motion for an Order Requiring the Violators to Show Cause Why They Should Not Be Held in Civil Contempt for Violating Two Court Orders* [Docket No. 2247] (the “Contempt Motion”). The Bankruptcy Court ordered Plaintiffs, among others, to appear at an in person hearing on June 8, 2021, to show cause why they should not be held in contempt [Docket No. 2255] (the “Show Cause Order”).

been inadvertent. And Plaintiffs have also not been candid with the Bankruptcy Court. On May 14, 2021, Plaintiffs filed a response to the Show Cause Order inaccurately claiming they had made full disclosure to this Court.⁸

6. The Bankruptcy Court is the appropriate tribunal to address the Complaint as it clearly “arises under, arises in or relates to the Debtor’s Chapter 11 case and the Settlement. The Court should send Plaintiffs a strong message that (a) such gamesmanship is not acceptable; (b) the Order of Reference will be enforced; and (c) the Complaint will be immediately sent to the Bankruptcy Court where it belongs.

FACTUAL BACKGROUND

A. Plaintiffs’ Ownership and Control

7. Plaintiffs are controlled and/or directed by Mr. Dondero, the Debtor’s ousted founder.⁹ CLOH is an entity wholly owned and controlled by the DAF. Until at least mid-January 2021, Grant Scott, Mr. Dondero’s life-long friend and college roommate, was the sole director of the DAF and of CLOH (neither of which otherwise had any officers or employees).¹⁰ As found by the Bankruptcy Court, Mr. Dondero has engaged in a coordinated litigation campaign against the Debtor both directly and through his related entities, including Plaintiffs, with the goal of

⁸ See *Response of the Charitable DAF Fund, L.P., CLO Holdco, Ltd., and Sbaiti & Company PLLC to Show Cause Order* [Docket No. 2313], pg. 3 (the “Bankruptcy Response”) (Appx. 28). In the Bankruptcy Response, Plaintiffs prognosticate about how this Court would rule: “... [the Debtor] seem[s] to have assumed that the Motion for Leave would be granted, and that the proposed amended complaint naming Seery would be referred to [the Bankruptcy] Court for a report and recommendation.” Appx. 28 at p. 12. If that were the case, Plaintiffs should have just filed in the Bankruptcy Court or, at the very least, disclosed the Bankruptcy Case in the Civil Cover Sheet.

⁹ Mr. Dondero also controls, and has appeared in the Bankruptcy Case, through, among others, his two family investment trusts: Dugaboy and Get Good.

¹⁰ Mr. Scott previously testified during a sworn deposition in the Bankruptcy Case that he had little knowledge of the investment and other activities of the DAF and CLOH and was effectively taking direction from Mr. Dondero with respect to their activities. Appx. 27, 11:10-25; 12:1-25; 13:1-25; 14:1-25; 15:1-25; 16:1-17.

10. On December 23, 2020, the Debtor filed its *Motion for Entry of an Order Approving Settlement with HarbourVest (Claim Nos. 143, 147, 149, 150, 153, 154) and Authorizing Actions Consistent Therewith* [Docket No. 1625]¹⁴ (the “Settlement Motion”), pursuant to which the Debtor sought Bankruptcy Court approval of the Settlement with HarbourVest pursuant to 11 U.S.C. §§ 105(a) and 363 and Bankruptcy Rule 9019. Appx. 7. The Debtor concurrently filed the proposed *Settlement Agreement and Transfer Agreement for Ordinary Shares of Highland CLO Funding, Ltd.* (the “Transfer Agreement”) [Docket No. 1631-1]. Appx. 8. The Settlement Agreement expressly provided that it was subject to Bankruptcy Court approval. Appx. 7, ¶ 3.

11. Among the material terms of the Settlement was that HarbourVest would transfer its interest in Highland CLO Funding, Ltd. (“HCLOF”) to the Debtor or its nominee (the “Transfer”). The Transfer was a necessary component of the Settlement. HarbourVest believed the misrepresentations entitled it to a rescission of its Investment, and HarbourVest wanted to extract itself from the Highland platform. The Settlement also provided HarbourVest with (a) an allowed, general unsecured claim in the amount of \$45 million, (b) a subordinated, allowed, general

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unsecured claim in the amount of \$35 million, and (c) other consideration more fully described in the Settlement Agreement. *See* Appx. 7, ¶ 32.

12. The Settlement Motion fully disclosed all aspects of the Transfer, including (a) what HarbourVest was transferring; (b) the valuation (and method of valuation) of the asset being transferred to the Debtor; and (c) the method of the Transfer. (Appx. 7, ¶¶ 1(b) 32, 32 n.5; Appx. 8). Three objections were lodged against the proposed Settlement, all of which were filed by Mr. Dondero or entities controlled by him, including Plaintiff CLOH and Dondero's Trusts. Each of those objections was coordinated by Mr. Dondero.¹⁵

D. Plaintiffs Knew of the Transfer, and Plaintiff CLOH Objected to the Settlement

13. On January 6, 2021, Mr. Dondero filed his *Objection to Debtor's Motion for Entry of an Order Approving Settlement with HarbourVest* [Docket No. 1697] (Appx. 9) contending, among other things, that the Settlement: (a) was not "reasonable or in the best interests of the estate" because the Debtor was ***grossly overpaying*** and (b) amounted to "a blatant attempt to purchase votes in support of the Debtor's plan." *Id.*, ¶ 1. Mr. Dondero did not directly challenge the Transfer but made clear that he knew exactly what was being transferred and the valuation being placed on it: "As part of the settlement, HarbourVest will [] transfer its entire interest in [HCLOF] to an entity to be designated by the Debtor. The Debtor states that the value of this interest is approximately \$22 million as of December 1, 2020." *Id.*, ¶ 1, n.3.

14. On January 8, 2021, Dondero's Trusts filed their *Objection to the Debtor's Motion for Entry of an Order Approving Settlement with HarbourVest (Claim Nos. 143, 147, 149, 150, 153, 154) and Authorizing Actions Consistent Therewith*. [Docket No. 1706]. (Appx. 10) Like Mr. Dondero, the Trusts made clear that they knew of the proposed Transfer and its valuation. But,

¹⁵ *See Debtor's Amended Witness and Exhibit List with Respect to Evidentiary Hearing to be Held on January 8, 2021* [Adv. Proc. 21-03190-sgj, Docket No. 46], Exhibit Q.

Reply”). Appx. 13. The Omnibus Reply set forth an extensive rebuttal to CLOH’s flawed argument that the Transfer could not be completed without HCLOF’s other members being offered HarbourVest’s interest in HCLOF, as allegedly required by the “Right of First Refusal” under Section 6.2. *Id.*, ¶¶ 26-39. Both HCLOF – which was independently represented – and HarbourVest agreed with the Debtor’s conclusions that the Members Agreement did not require HarbourVest to offer its interests to CLOH or any other member of HCLOF. *Id.*, ¶ 37. At the January 14, 2021, hearing, CLOH ***voluntarily withdrew*** its objection after reading the Debtor’s analysis of the Members Agreement:

CLO Holdco has had an opportunity to review the reply briefing, and . . . [b]ased on our analysis of Guernsey law and some of the arguments of counsel on those pleadings and our review of the appropriate documents, I obtained authority from my client, Grant Scott, as trustee for CLO Holdco, ***to withdraw the CLO Holdco objection based on the interpretation of the member agreement.***

Appx. 14 at 7:20-8:6 (emphasis added). Following CLOH’s withdrawal of its objection, the Trusts also abandoned their challenge to the Transfer. *Id.* at 22:5-20.

20. The Debtor called two witnesses in support of the Settlement Motion, Mr. Seery and Mr. Pugatch. Counsel for Mr. Dondero and the Trusts cross-examined the Debtor’s witnesses but did not inquire about the value of the HCLOF interests, the Debtor’s fiduciary obligations, or the Transfer (except for a line of questioning concerning which entity would hold the HCLOF interests on behalf of the Debtor). *Id.*, at 87:18-89:21. At the conclusion of the hearing, the Court entered an order overruling the remaining objections and approving the Settlement [Docket No. 1788] (the “Settlement Order”). Appx. 15.

21. The Settlement Order ***expressly*** authorized the transfer of HarbourVest’s interest in HCLOF providing, in relevant part, that “[p]ursuant to the express terms of the [Members Agreement] . . . HarbourVest is authorized to transfer its interest in HCLOF . . . ***without the need to obtain the consent of any party or to offer such interests first to any other investor in***

G. The DAF and CLOH Sue the Debtor and Others in This Court

²⁰ Appx. 14 at 156:10-25; 157:1-5 (emphasis added):

And just so you know, I spent some time noodling this yesterday before I knew it was going to be settled, so I'm not just casually doing that. I think it's fine.

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other duties requiring it to provide Plaintiffs with the opportunity to acquire HarbourVest's interest in HCLOF. *See, e.g.*, Appx. 1, ¶¶ 36, 49. Plaintiffs also assert claims for breach of fiduciary duty, breach of contract, negligence, violation of RICO, and tortious interference.

24. In the Complaint, Plaintiffs recite certain facts relating to HarbourVest's Claims and the process by which the Debtor obtained Bankruptcy Court approval (*Id.*, ¶¶ 16-31) but disclose none of the undisputed facts set forth above. Plaintiffs also do not disclose that they – through their relationship to Mr. Dondero – had the same information concerning the value of the HarbourVest interests that Mr. Seery allegedly had. Finally, they do not even attempt to justify why they are seeking, in this Court, to re-litigate a Bankruptcy Court order.

H. Counsel for the DAF and CLOH Willfully Ignore the Gatekeeper Orders

25. Throughout the Complaint, Plaintiffs threatened to name Mr. Seery as a defendant,²² and indeed, on April 19, 2021, just four days after filing the Complaint, Sbaiti & Co. (“Sbaiti”), the newly-retained counsel for the DAF and CLOH, advised the Debtor's counsel that they “intend to move for leave today in the district court seeking permission to amend our complaint to add claims against Mr. Seery. They are the same causes of action. We believe we are entitled to amend as a matter of course.” Counsel asked whether they could “put your client down as unopposed?” Appx. 17. In response, the Debtor informed Sbaiti of the two “Gatekeeper Orders” (defined below), which prohibited this action, provided copies, and told them, among other things, that “[i]f you proceed to amend the complaint as you suggest [] without first obtaining Bankruptcy Court approval we reserve all rights to take appropriate action and seek appropriate relief from the

²² By way of example only, Plaintiffs refer to Mr. Seery as a “potential party” and suggest that he had access to and wrongfully utilized “superior non-public information” and lied under oath about the value of the asset subject to the Transfer in his testimony to the Bankruptcy Court. Appx. 1, at Introduction, ¶¶ 6, 43-44.

Bankruptcy Court.” *Id.* Later that evening, Sbaiti confirmed their intention to seek leave from this Court to sue Mr. Seery and, on April 19, 2021, filed the Seery Motion. Appx. 18.

26. Both Gatekeeper Orders are plain, unambiguous, and final. On January 9, 2020, the Bankruptcy Court, *with Mr. Dondero’s consent and agreement*, entered the *Order Approving Settlement with Official Committee of Unsecured Creditors Regarding Governance of the Debtor and Procedures for Operations in the Ordinary Course* [Docket No. 339] pursuant to 11 U.S.C. §§ 105 and 363 and Rule 9019 (the “January Order”). Appx. 19. Pursuant to the January Order, Mr. Dondero surrendered control of the Debtor and the Independent Board was appointed. To protect the Independent Board and its agents from frivolous litigation (primarily from Mr. Dondero and his related entities), the Debtor asked for, and the Bankruptcy Court included in the January Order (without objection), a “gatekeeper” provision stating in pertinent part:

No entity may commence or pursue a claim or cause of action of any kind against any Independent Director, any Independent Director’s agents, or any Independent Director’s advisors relating in any way to the Independent Director’s role as an independent director of Strand without the Court (i) first determining the Court (i) first determining after notice that such claim or cause of action represents a colorable claim of willful misconduct or gross negligence against Independent Director, any Independent Director’s agents, or any Independent Director’s advisors and (ii) specifically authorizing such entity to bring such claim. The Court will have sole jurisdiction to adjudicate any such claim for which approval of the Court to commence or pursue has been granted.

Id., ¶ 10. Mr. Seery is protected under the January Order as a member of the Independent Board and as the Debtor’s CEO and CRO – an agent of the Independent Board. The January Order provided that the Bankruptcy Court “shall retain jurisdiction over all matters arising from or related to the interpretation and implementation of this Order. . . .”). *Id.*, ¶ 13.

27. Seven months later, the Debtor sought Bankruptcy Court approval to appoint Mr. Seery as the Debtor’s CEO and CRO. After an evidentiary hearing, the Bankruptcy Court granted the motion (without objection) and entered its *Order Approving Debtor’s Motion Under*

Bankruptcy Code Sections 105(a) and 363(b) for Authorization to Retain James P. Seery, Jr., as Chief Executive Officer, Chief Restructuring Officer and Foreign Representative Nunc Pro Tunc To March 15, 2020 [Docket No. 854] pursuant to 11 U.S.C. §§ 105(a) and 363(b) (the “July Order” and with the January Order, the “Gatekeeper Orders”). Appx. 20. Like the January Order, the July Order included a “gatekeeper” provision:

No entity may commence or pursue a claim or cause of action of any kind against Mr. Seery relating in any way to his role as the chief executive officer and chief restructuring officer of the Debtor without the Bankruptcy Court (i) first determining after notice that such claim or cause of action represents a colorable claim of willful misconduct or gross negligence against Mr. Seery, and (ii) specifically authorizing such entity to bring such claim. The Bankruptcy Court shall have sole jurisdiction to adjudicate any such claim for which approval of the Court to commence or pursue has been granted.

Id., ¶ 5. The Bankruptcy Court “retain[ed] jurisdiction over any and all matters arising from or related to the interpretation and/or implementation of [the July] Order.” *Id.*, ¶ 8.

28. The Gatekeeper Orders are final orders, *res judicata*, and law of the case. *See* Appx. 5, ¶ 73 (finding that the Gatekeeper Orders “constitute[] law of this case and are *res judicata* pursuant to *In re Republic Supply Co. v. Shoaf*, 815 F.2d 1046 (5th Cir. 1987)”).

29. The Gatekeeper Orders also featured heavily at the Plan confirmation hearing. CLOH initially objected to the Plan, which Mr. Dondero and his proxies, including CLOH, contested.²³ In the Confirmation Order, the Bankruptcy Court provided the rationale for, and purpose of, the “gatekeeper” provisions in the Gatekeeper Orders (Appx. 5, ¶¶ 12-14) and expressly found that a “gatekeeper” provision was needed in the Plan because “Mr. Dondero and his related entities will likely commence litigation . . . after the Effective Date and do so in jurisdictions other than the Bankruptcy Court in an effort to obtain a forum which Mr. Dondero perceives will be more hospitable to his claims” (Appx. 5, ¶ 78). Despite this clear finding and

²³ Mr. Dondero and a number of his related entities are currently appealing the Confirmation Order.

order, Plaintiffs filed the Seery Motion to add Mr. Seery as a defendant and asked this Court to disregard the Gatekeeper Orders. Although this Court denied the Seery Motion, it stated “Plaintiffs may renew their motion after Defendants are served and have appeared” leaving open the possibility that Plaintiffs may still attempt to add Mr. Seery.²⁴ Appx. 21.

30. In response, on April 23, 2021, the Debtor filed the Contempt Motion in the Bankruptcy Court for an order to show cause as to why Plaintiffs should not be held in contempt. Appx. 24. Plaintiffs then filed a motion in the Bankruptcy Court purporting to seek reconsideration of the July Order [Docket No. 2248] (the “Motion for Reconsideration”).²⁵ Appx. 25. The Bankruptcy Court ordered Plaintiffs, among others, to appear at an in person hearing on June 8, 2021,²⁶ to show cause why they should not be held in contempt. Appx. 26.

31. Finally, on May 14, 2021, Plaintiffs filed the Bankruptcy Response in which they argue that they followed the Gatekeeper Orders by filing the Complaint in this Court rather than the Bankruptcy Court because seeking to amend the Complaint to add Mr. Seery as a defendant was not “pursuing” a claim (as used in the Gatekeeper Orders). Appx. 28 at 13.

ARGUMENT

A. Plaintiffs Violated Local Rule 3.3(a) By Failing to Disclose the Bankruptcy Case

32. When Plaintiffs filed the Complaint, thereby initiating the action, their counsel was required to complete a Civil Cover Sheet, Section VIII of which required them to disclose whether there were any “related cases.” Local Rule 3.3(a) requires that “[w]hen a plaintiff files a complaint and there is a related case . . . the complaint must be accompanied by a notice of related case.” A

²⁴ If Mr. Seery incurs any costs defending or preparing to defend against Plaintiffs’ action, Mr. Seery will be entitled to indemnification directly from the Debtor under the Debtor’s limited partnership agreement (Appx. 22, § 4.1(h)) and indirectly through the Strand’s indemnification obligations and the Debtor’s guarantee of such obligations (Appx. 23).

²⁵ The Contempt Motion and the Motion for Reconsideration were re-docketed on April 27, 2021, without any changes.

²⁶ The hearing on the Show Cause Order will be the first in person hearing since March 2020.

“related case” is defined in pertinent part as a proceeding that “arises from a common nucleus of operative fact with the case being filed or removed, regardless whether the related case is a pending case. . . .” Local Rule 3.3(b)(3). As discussed above, although the Complaint asserts claims based on the same facts as the HarbourVest Settlement approved over Plaintiffs’ objection by the Bankruptcy Court, the Civil Cover Sheet makes no mention of the Bankruptcy Case as a “related case.” It merely describes the nature of the Complaint as one arising under RICO. Yet the Bankruptcy Case is indisputably related to this one.²⁷ Plaintiffs’ failure to disclose the existence of a related case violates the Local Rules. *See Kuzmin v. Thermaflo, Inc.*, 2:07-CV-00554-TJW, 2009 U.S. Dist. LEXIS 42810, at *4-7 (E.D. Tex. May 20, 2009) (finding party violated court’s local rules where they failed to indicate on civil cover sheet that case was “related to” other cases).

B. The Complaint Should Be Automatically Referred to the Bankruptcy Court

i. The Complaint Should Be Heard in the Bankruptcy Court.

33. Jurisdiction of “all civil proceedings arising under title 11, or arising in or related to cases under title 11” is conferred on district courts. 11 U.S.C. §§ 1334(a), (b). District courts, in turn, may refer proceedings to the bankruptcy courts. 28 U.S.C. § 157(a) (“Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.”). On August 3, 1984, this Court entered the Order of Reference, which provides, in pertinent part: “*any or all cases under Title 11 and any or all proceedings arising under Title 11 or arising in or related to a case under Title 11 . . . be and they hereby are referred to the*

²⁷ Under 28 U.S.C. § 1334(a), this Court has original and exclusive jurisdiction over the Bankruptcy Case. Pursuant to 28 U.S.C. § 157 and the Order of Reference, this Court has referred matters in the Bankruptcy Case to the Bankruptcy Court. It is thus clear that the Bankruptcy case is pending in this District pursuant to this Court’s jurisdiction, and as noted above the matters alleged in the Complaint related directly to litigated proceedings involving Plaintiffs and the Debtor in the Bankruptcy Case. These facts require appropriate disclosure in the Civil Cover Sheet.

Bankruptcy Judges of this district for consideration and resolution consistent with law.” Appx.

2 (emphasis added). The Order of Reference therefore refers the following proceedings:

- **Proceedings “arising under Title 11”:** A proceeding “arises under” Title 11 if it is a “cause of action created or determined by a statutory provision of title 11.” *Wood v. Wood (In re Wood)*, 825 F.2d 90, 96 (5th Cir. 1987).
- **Proceedings “arising in . . . a case under Title 11”:** A proceeding “arises in” Title 11 if it deals with “administrative matters that arise *only* in bankruptcy cases.” *Wood*, 825 F.2d at 96 (emphasis in original).²⁸
- **Proceedings “related to a case under Title 11”:** A proceeding “relates to” a case under Title 11 if “the outcome of [the non-bankruptcy] proceeding could conceivably have any effect on the estate being administered in bankruptcy.” *Burch v. Freedom Mortg. Corp. (In re Burch)*, 835 Fed. Appx. 741, 748 (5th Cir. 2021) (internal citations omitted); *see also Celotex Corp. v. Edwards*, 514 U.S. 300, 308 (1995) (“Congress intended to grant comprehensive jurisdiction to the bankruptcy courts so that they might deal. . . with all matters connected with the bankruptcy estate”). A proceeding “relates to” a proceeding under Title 11 even if it arises from postpetition conduct if “it affects the estate, not just the debtor.” *Wood*, 825 F.2d at 94.

ii. The Order of Reference is Mandatory.

34. Under the plain language of the Order of Reference, “all proceedings under Title 11 or arising or related to a case under Title 11” are ***automatically*** referred to the bankruptcy courts, and the Debtor respectfully submits that the Order of Reference is mandatory. *See Uralkali Trading, S.A. v. Sylvite Southeast, LLC*, 2012 U.S. Dist. LEXIS 40455, at *3 (M.D. Fla. Mar. 26, 2012) (finding that a substantially similar order of reference in the Middle District of Florida “mandate[d]” referral to the appropriate bankruptcy court); *Welch v. Regions Bank*, 2014 U.S. Dist. LEXIS 96175, at *5 (M.D. Fla. July 15, 2014) (“[T]his Court has declared the enforcement of the Standing Order of Reference mandatory”). The fact that 11 U.S.C. §§ 1334 confers original jurisdiction on the district court does not change this requirement as district courts and bankruptcy

²⁸ Proceedings arising under and arising in Title 11 are “core proceedings” under 28 U.S.C. § 157(b). *Wood*, 825 F.2d at 96 (“[T]he phrases ‘arising under’ and ‘arising in’ are helpful indicators of the meaning of core proceedings. If the proceeding involves a right created by the federal bankruptcy law, it is a core proceeding. . . If the proceeding is one that would arise only in bankruptcy. It is also a core proceeding. . .”).

courts are distinct. *Villegas v. Schmidt*, 788 F.3d 156, 159 (5th Cir. 2015) (“Additionally, every other circuit to address the issue has maintained the distinction between the bankruptcy court and the district court, holding that ‘a debtor must obtain leave of the bankruptcy court before initiating an action in district court when the action is against the trustee or other bankruptcy-court-appointed officer, for acts done in the actor’s official capacity’”) (citations omitted).

iii. Any Disputes Over the Settlement or the Transfer Arise Under, Arise In, and Relate to Title 11 and are Core Proceedings.

35. It is black letter law that the determination of whether to approve a settlement of a claim is a “core proceeding” and arises in and under Title 11. The statutory predicates for relief are 11 U.S.C. §§ 105 and 363 and under Rule 9019, which are “created by the federal bankruptcy law” and “arise only in bankruptcy.” *Wood*, 825 F.2d at 96; see also, e.g., *In re Idearc, Inc.*, 423 B.R. 138, 177 (Bankr. N.D. Tex. 2009) (finding approval of a settlement under Bankruptcy Rule 9019 was a “core proceeding” under 28 U.S.C. § 157(b)); *In re Margaux City Lights Partners, Ltd.*, 2014 Bankr. LEXIS 4841 at *6 (Bankr. N.D. Tex. Nov. 24, 2014) (same); Settlement Order, ¶ 2 (same). The HarbourVest Settlement also involved the allowance of HarbourVest’s Claims – a black letter core proceeding under 28 U.S.C. § 157(b)(2)(B) (“Core proceedings include, but are not limited to – (B) allowance of disallowance of claims against the estate. . .”).

36. Since the Complaint seeks to re-litigate the HarbourVest Settlement and to re-open the Bankruptcy Court’s factual record, it is seeking a ruling from this Court as to the merits of the HarbourVest Settlement and/or to litigate matters that arose from the same operative facts as the HarbourVest Settlement – in each case, a core proceeding arising in and under Title 11. If the Settlement Order or the Transfer is to be re-assessed it must be by the Bankruptcy Court under the Bankruptcy Code and Bankruptcy Rules. This Court should enforce the Order of Reference and refer the Complaint to the Bankruptcy Court. See *Burch*, 835 Fed. Appx. at 748 (“Each of Burch’s

state-court claims is premised on his interpretation of a Chapter 11 bankruptcy order, and so each arises from or is related to his Title 11 bankruptcy proceedings.”).

37. Further, the Bankruptcy Court specifically retained jurisdiction in the Settlement Order to adjudicate all disputes arising from the implementation of the Settlement Order, including the Transfer of the HCLOF interests, and therefore retained jurisdiction to hear the Complaint. *Id.* ¶7. Even if jurisdiction had not been explicitly retained, the Bankruptcy Court, like all federal courts, has jurisdiction to interpret and enforce its own orders. *Rodriguez v. EMC Mortgage Corp. (In re Rodriguez)*, 2001 U.S. App. LEXIS 30564, at *5 (5th Cir. Mar. 15, 2001); *In re Galaz*, 841 F.3d 316, 322 (5th Cir. 2016); *Angel v. Tauch (In re Chiron Equities, LLC)*, 552 B.R. 674, 684 (Bankr. S.D. Tex. 2016). The Complaint, which seeks to challenge the Transfer and re-litigate the Settlement Order, is therefore itself a core proceeding arising in and under Title 11 and should be heard in the Bankruptcy Court.

iv. Any Disputes Over the Gatekeeper Orders Arise Under, Arise In, and Relate to Title 11 and Are Core Proceedings.

38. The Seery Motion was denied, and Mr. Seery has not been added as a defendant in this Case. Plaintiffs have also filed the Motion for Reconsideration in the Bankruptcy Court. However, to the extent Plaintiffs seek to add Mr. Seery as a defendant in this Case, any such proceedings must be referred to the Bankruptcy Court for the reasons forth in Section B(iii) *supra*. Like the Settlement Order, the January Order is the result of a settlement with the Committee approved under 11 U.S.C. §§ 105 and 363 and Bankruptcy Rule 9019. The “gatekeeper” provision in the January Order was also a required component of that settlement and the settlement would not have been approved without it. *See* Appx. 5, ¶ 12-14. Similarly, the July Order was the result of a motion seeking authority to appoint Mr. Seery as CEO and CRO under 11 U.S.C. §§ 105(a) and 363(b), an administrative action that only exists in Title 11 and thus “arises in” and “arises

under” Title 11. Like the January Order, the “gatekeeper” provision in the July Order was a required component of Mr. Seery’s appointment. *Id.* Any attempt to add Mr. Seery as a defendant would be re-litigating a core proceeding arising under, arising in, and related to Title 11.

v. The Complaint Impacts Creditor Recoveries.

39. The Debtor’s Plan provides for the orderly monetization of the Debtor’s assets and the distribution of the proceeds to creditors. Because the Plan is an asset monetization plan, distributions depend on two things: (a) the total amount of allowed claims against the estate and (b) the cash available to pay those claims. Consequently, the Complaint will have a material and immediate impact on the Debtor’s estate. *First*, any judgment secured by Plaintiffs against the Debtor will decrease the cash available to pay the Debtor’s prepetition creditors (which cash is property of the estate under 11 U.S.C. § 541). *Second*, any delay in determining the amount owed to HarbourVest or the amount owed by the Debtor to Plaintiffs will delay payments to creditors under the Plan as the Debtor will need to reserve against such claims. This impact on creditors and the Debtor’s ability to satisfy its obligations under the Plan clearly impacts the Debtor’s estate and should be adjudicated by the Bankruptcy Court. *Zale*, 62 F.3d at 753 (“Those cases in which courts have upheld ‘related to’ jurisdiction over third-party actions do so because the subject of the third party dispute is property of the estate, or because the dispute over the asset would have an effect on the estate.”); *see generally Centrix Fin. Liq. Trust v. Sutton*, 2019 U.S. Dist. LEXIS 154083 (D. Colo. Sept. 10, 2019) (finding that in a liquidating plan, the bankruptcy court has “related to” jurisdiction over all matters that impact distributions from the liquidating trust).

vi. Mr. Seery Will Have Indemnification Claims Against the Estate.

40. This Court denied the Seery Motion without prejudice, but if Mr. Seery is ever added as a defendant or is compelled to retain personal counsel because of the completely unfounded and false allegations in the Complaint, Mr. Seery will have the right to indemnification

from the estate. See ¶ n.24 *supra*. The cost of this indemnification will immediately decrease the amount available to creditors and will delay distributions. Again, this clearly “relates to” to the Debtor’s bankruptcy. See, e.g., *Collins v. Sidharthan (In re KSRP, Ltd.)*, 809 F.3d 263, 266-67 (5th Cir. 2015) (finding that bankruptcy court had jurisdiction because of potential indemnification claims even though bankruptcy court ultimately determined the indemnification claims were invalid); *Refinery Holdings Co., L.P. v. TRMI Holdings, Inc. (In re El Paso Refinery, L.P.)*, 302 F.3d 343, 349 (5th Cir. 2002) (finding “related to” jurisdiction when “RHC’s claim against Texaco could conceivably have an effect on the Estate in light of the chain of indemnification provisions beginning with Texaco and leading directly to the Debtor.”); *Houston Baseball Partners, LLC v. Comcast Corp. (In re Houston Reg’l Sports Network)*, 2014 Bankr. LEXIS 2274, at *15-25 (Bankr. S.D. Tex. May 22, 2013).

C. There is No Basis for a Mandatory Withdrawal of the Reference

41. In the Seery Motion, Plaintiffs cite 28 U.S.C. § 157(d) for the proposition that bankruptcy courts are “prohibit[ed] . . . absent the parties consent, from presiding over cases or proceedings that require consideration of both Title 11 and other federal law regulation organizations or activities affecting interstate commerce.” Appx. 18, at 7. Plaintiffs argue that, because they pled causes of action arising under the Advisers Act and RICO, this Court will have to withdraw the reference. Plaintiffs make the same argument in the Bankruptcy Response: “Respondents expected that the motion for leave [to amend] would likely be referred to [the Bankruptcy] Court for a report and recommendation. And Respondents planned, if necessary, to move to withdraw the reference. . . .” Appx. 28 at 12.

42. Even assuming Plaintiffs’ federal law claims are not frivolous (and they are), Plaintiffs misinterpret 28 U.S.C. § 157(d)’s applicability to this case. 28 U.S.C. § 157(d) provides for mandatory withdrawal of the reference in certain instances: “The district court shall, on timely

motion of a party, so withdraw the proceeding if . . . resolution of the proceeding *requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.*” 28 U.S.C. § 157(d) (emphasis added). However, in interpreting Section 157(d), courts in this Circuit apply the majority view and require withdrawal of the reference only:

[W]hen “substantial and material consideration” of a federal statute other than the Bankruptcy Code is necessary to the resolution of a case or proceeding. Withdrawal is not mandatory in cases that require only the “straightforward application of a federal statute to a particular set of facts.” Rather, withdrawal is in order only when litigants raise “issues requiring significant interpretation of federal laws that Congress would have intended to [be] decided by a district judge rather than a bankruptcy judge.”

Southern Pac. Transp. v. Voluntary Purchasing Groups, 252 B.R. 373, 382 (E.D. Tex. 2000) (quoting *In re National Gypsum*, 14 B.R. 188, 192-93 (N.D. Tex. 1991). As such, even the presence of a substantial federal question is not a basis for mandatory withdrawal; mandatory withdrawal is only proper when a bankruptcy court would have to interpret and apply federal law on a novel and unsettled question. See *Beta Operating Co., LLC v. Aera Energy, LLC (In re Memorial Prod. Partners)*, 2018 U.S. Dist. LEXIS 161159, at *9 (S.D. Tex. Sept. 20, 2018); *UPH Holdings, Inc. v. Sprint Nextel Corp.*, 2013 U.S. Dist. LEXIS 189349, at *4 (W.D. Tex. Dec. 10, 2013) (holding no mandatory withdrawal when, among other reasons, “the Bankruptcy Court will be tasked with ‘no more than application of federal communications law to a given set of facts.’”) (citations omitted). Finally, “mandatory withdrawal is to be applied narrowly to ensure bankruptcy cases are litigated in the bankruptcy courts and to prevent 157(d) from becoming an ‘escape hatch’ from litigating cases under the Bankruptcy Code.” See, e.g., *Manila Indus., Inc. v. Ondova Ltd. (In re Ondova Ltd.)*, 2009 U.S. Dist. LEXIS 102134, at *6 (N.D. Tex. Oct. 1, 2009) (quoting *In re G-I Holdings, Inc.*, 295 B.R. 211, 221 (D. N.J. 2003)).

43. None of the putative federal causes of action raised by Plaintiffs require “substantial and material consideration” of a federal statute or more than the cursory application of settled federal law. In fact, most can be summarily dismissed as they either grossly misinterpret settled law, based on materially misstated facts, or assert causes of action that belong to other parties.

D. The Complaint Is Barred by the Doctrine of *Res Judicata*

44. The doctrine of *res judicata* protects the finality of judgements by preventing litigants from re-litigating the same issues over and over again. “[R]es judicata has four elements: (1) the parties are identical or in privity; (2) the judgment. . . was rendered by a court of competent jurisdiction; (3) the prior action was concluded by a final judgment on the merits; and (4) the same claim or cause of action was involved in both actions.” *Comer v. Murphy Oil USA*, 718 F.3d 460, 467 (5th Cir. 2013). Each of those elements is satisfied here, and the Complaint is barred by *res judicata*. Plaintiffs had their opportunity to challenge these orders; they do not get a second bite at the apple or to re-litigate these issues in a different forum.

45. As set forth above, the parties are identical. Plaintiffs had the right to object to the HarbourVest Settlement and the Transfer of the HarbourVest interests, and Plaintiffs (a) actually objected to the Settlement Motion arguing that they had a “Right of First Refusal” under the Members Agreement; (b) had the right to take discovery on all issues, including the value of the HarbourVest interests; (c) could have objected based on the Advisers Act or RICO; (d) deposed HarbourVest’s 30(b)(6) witness; and (e) ***withdrew their objection once they realized that they did not have a “Right of First Refusal.”*** The Bankruptcy Court also indisputably had jurisdiction over the matter. Although the Settlement Order is being appealed by the Trusts, it is a final judgment for purposes of *res judicata*. See *Fid. Standard Life Ins. Co. v. First Nat’l Bank & Trust Co.*, 510 F.2d 272, 273 (5th Cir. 1975) (“A case pending appeal is *res judicata* and entitled to full faith and credit unless and until reversed on appeal.”). Finally, as set forth above, the same claims or causes

Burch). In *Burch*, the movant sought to avoid bankruptcy court jurisdiction over claims regarding the interpretation and enforceability of prior bankruptcy court orders. *Burch*, 385 Fed. Appx. at 747. Mr. Burch, like Mr. Dondero, had also been found to be an abusive litigant. The Fifth Circuit denied Mr. Burch’s attempts to avoid bankruptcy court jurisdiction through clever pleading, calling them “frivolous,” and “warn[ed] Burch that any further frivolous or abusive filings in this court, the district court, or the bankruptcy court will invite the imposition of sanctions, including dismissal, monetary sanctions, and/or restrictions on his ability to file pleadings in this court and any court subject to this court’s jurisdiction.” *Id.*, at 749; *see also* 28 U.S.C. § 1927 (“Any attorney or other person . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorney’s fees reasonably incurred because of such conduct.”). Mr. Dondero, directly and through his proxies, is a frivolous and abusive litigant – hence the need for the “gatekeeper” provisions. This Court should not provide him a forum to further abuse the judicial process.

CONCLUSION

WHEREFORE, the Debtor respectfully requests that the Court grant its Motion and enter an order in the form annexed to the Motion as **Exhibit A**, and grant any further relief as the Court deems just and proper.

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Dated: May 19, 2021

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EXHIBIT 2

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

In Re:) **Case No. 19-34054-sgj-11**
HIGHLAND CAPITAL) Chapter 11
MANAGEMENT, L.P.,) Dallas, Texas
Debtor.) Tuesday, June 8, 2021
9:30 a.m. Docket
- SHOW CAUSE HEARING (2255)
- MOTION TO MODIFY ORDER
AUTHORIZING RETENTION OF
JAMES SEERY (2248)
- MOTION FOR ORDER FURTHER
EXTENDING THE PERIOD WITHIN
WHICH DEBTOR MAY REMOVE
ACTIONS (2304)

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE STACEY G.C. JERNIGAN,
UNITED STATES BANKRUPTCY JUDGE.

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23 Proceedings recorded by electronic sound recording;
24 transcript produced by transcription service.
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1 DALLAS, TEXAS - JUNE 8, 2021 - 9:30 A.M.

2 THE COURT: All right. We have settings in Highland
3 this morning. We have three settings. We have the show cause
4 hearing with regard to a lawsuit filed in the District Court.
5 We have a couple of more, I would say, ministerial matters,
6 although I think we do have objections. I know we have
7 objections. We have a motion to extend the removal period in
8 this case as well as a motion to modify the order authorizing
9 Mr. Seery's retention.

10 So let's go ahead and start out by getting appearances
11 from the lawyers who are participating today. I'll get those
12 now.

13 MR. MORRIS: Good morning, Your Honor.

14 THE COURT: Good morning.

15 MR. MORRIS: John Morris from Pachulski, Stang, Ziehl
16 & Jones for the Debtor. I'm joined with me this morning by my
17 colleagues, Jeffrey Pomerantz, Greg Demo, and Zachery Annable.

18 THE COURT: Okay.

19 MR. MORRIS: We do have a proposal on how to proceed
20 today, a substantial portion of which is in agreement with the
21 Respondents.

22 THE COURT: Okay.

23 MR. MORRIS: So, at the appropriate time, I'd be
24 happy to present that to the Court.

25 THE COURT: All right. Well, let's get all the

1 appearances and then I'll hear from you on that.

2 MR. SBAITI: Your Honor, my name is -- would you like
3 me to approach, Your Honor?

4 THE COURT: Yes, please.

5 MR. SBAITI: It's my first time appearing in
6 Bankruptcy Court, Your Honor. My name is Mazin Sbaiti. I'm
7 here on behalf of the charitable DAF Fund, CLO Holdco, and the
8 Respondents to the show cause hearing. We are also
9 representing them as the Movants on the motion to modify the
10 Court's order appointing Mr. Seery.

11 THE COURT: All right. Thank you.

12 MR. BRIDGES: Jonathan Bridges, Your Honor, with Mr.
13 Sbaiti, also representing the Charitable DAF and CLO Holdco,
14 as well as our firm that is named in the show cause order.

15 THE COURT: Okay.

16 MR. BRIDGES: Thank you, Your Honor.

17 THE COURT: Thank you.

18 MR. PHILLIPS: Good morning, Your Honor. Louis M.
19 Phillips from Kelly Hart Hallman here on behalf of Mark
20 Patrick in the show cause matter. I'm joined with my
21 colleague Michael Anderson from the Kelly Hart firm here in
22 Fort Worth. And that's the matter that we're involved in, the
23 show cause auction.

24 THE COURT: All right. Thank you, Mr. Phillips.

25 MR. TAYLOR: Good morning, Your Honor. Clay Taylor

1 of Bonds Ellis Eppich Schafer Jones here on behalf of Jim
2 Dondero. I have Mr. Will Howell here with me from my firm.

3 THE COURT: All right. Thank you.

4 MR. CLEMENTE: Good morning, Your Honor. Matthew
5 Clemente from Sidley Austin on behalf of the Committee. I'm
6 here with my partner, Paige Montgomery.

7 THE COURT: Okay. Thank you.

8 MR. CLEMENTE: Good morning.

9 THE COURT: All right. Just to remind people, we do
10 have participants on the WebEx, but in setting the hearing I
11 made clear that participants today needed to be here live in
12 the courtroom. So the WebEx participants are going to be only
13 observers.

14 We have a camera on the screen here that is poised to
15 capture both the lawyer podium as well as the witness box, and
16 then another camera on the bench.

17 So, please be mindful. We want the lawyers to speak from
18 the podium so that they are captured and heard by the WebEx.
19 And so hopefully we don't have any cords you will trip over.
20 We've worked hard to make it easy to maneuver around the
21 courtroom.

22 All right. So, Mr. Morris, you had a proposal on how we
23 would approach this today?

24 MR. MORRIS: I do, Your Honor. And it's rather
25 brief, but I think it makes a lot of sense.

1 There are three motions on the calendar for today, --

2 THE COURT: Uh-huh.

3 MR. MORRIS: -- only one of which required the
4 personal appearance of certain parties.

5 THE COURT: Uh-huh.

6 MR. MORRIS: And for that reason, and because,
7 frankly, it was the first of the three motions filed, we
8 believe that that ought to go first.

9 THE COURT: Okay.

10 MR. MORRIS: And then it can be followed by the
11 motion for reconsideration of the July order, assuming time
12 permits, and then the motion to extend the removal deadline.

13 And with respect to the contempt motion, Your Honor, the
14 parties have agreed that each side shall have a maximum of
15 three hours to make opening statements, closing arguments,
16 direct and cross-examination of witnesses.

17 You know, I did point out to them that from time to time
18 Your Honor has used the Court's discretion to adjust the time
19 --

20 THE COURT: Uh-huh.

21 MR. MORRIS: -- if the Court is making inquiries, and
22 I guess we'll deal with that matter as it comes. But as a
23 general matter, that is what we've agreed to. And I would
24 propose that, unless anybody has any objections, that we just
25 proceed on that basis.

1 THE COURT: Okay.

2 MR. MORRIS: And I could -- I could go right forward.

3 THE COURT: So, three hours in the aggregate?

4 MR. MORRIS: Uh-huh.

5 THE COURT: It doesn't matter how people spend it --
6 with argument, examination, cross -- three hours in the
7 aggregate?

8 MR. MORRIS: Correct.

9 THE COURT: Okay. So, Nate, you'll be the timer on
10 that.

11 MR. MORRIS: Yeah. We thought it was very important
12 to get this done today, with people coming in from out of
13 town.

14 THE COURT: Okay. Sounds fine.

15 MR. MORRIS: So does the Court want to inquire if
16 anybody has any questions or comments?

17 THE COURT: I do. Well, I see Mr. Bridges getting
18 up. You confirm that that's agreeable?

19 MR. BRIDGES: Thank you, Your Honor. Yes, that's
20 agreeable. We have one slight difference in our proposal. We
21 would suggest to Your Honor that the motion for modification,
22 if Your Honor decides our way, would moot the entire motion
23 for contempt. And we'd suggest, if that possibility is
24 realistic, that we would go first with that motion, perhaps
25 obviate having to have the evidence presented and the lengthy

1 hearing.

2 The motion for modification, Your Honor, asks the Court to
3 reconsider -- to modify that order because of jurisdictional
4 and other shortcomings in it that make the order
5 unenforceable. And because that's the order that is the
6 subject of the contempt motion, we'd ask Your Honor to
7 consider putting that motion first.

8 THE COURT: Okay. Or second? Ahead of the contempt
9 matter?

10 MR. BRIDGES: Ahead of the contempt matter, --

11 THE COURT: Uh-huh.

12 MR. BRIDGES: -- because it has a possibility --

13 THE COURT: We have the removal matter, which I think
14 is the shortest. All right.

15 MR. BRIDGES: No objection to that, Your Honor.
16 That's correct.

17 THE COURT: Okay. So, Mr. Morris, that's fine by
18 you?

19 MR. MORRIS: Your Honor, that doesn't make a lot of
20 sense to us. We don't believe there's any basis for the Court
21 to reconsider, modify, or amend in any way the July order.
22 But even if we were wrong about that, that would not
23 retroactively validate conduct which was otherwise wrongful at
24 the time it was committed.

25 The contempt motion needs to go first. The other motion

1 will have no impact on whether or not there is a finding of
2 contempt of court.

3 THE COURT: All right. And update me on this. There
4 was something filed yesterday, a notice of a proposed form of
5 order that the Debtor had proposed, that I think was not
6 agreed to, where there would be a change about any action that
7 goes forward, the cause of action would be in the sole
8 jurisdiction of the Court, and you all agreed to change that
9 part of the order, correct?

10 MR. MORRIS: So, just as a division of labor for Your
11 Honor, I'm doing the contempt motion.

12 THE COURT: Okay. That's Mr. Pomerantz's?

13 MR. MORRIS: Mr. Pomerantz is going to take care of
14 that.

15 MR. POMERANTZ: Yes, Your Honor. Good morning. Good
16 to see you again.

17 THE COURT: Good to see you.

18 MR. POMERANTZ: Yes, Your Honor, that's correct. If
19 Your Honor recalls, there's really three aspects of the
20 January 9th and the July 16th order. First, requiring people
21 to come to Bankruptcy Court before commencing or pursuing an
22 action. Second, for the Bankruptcy Court to have the sole and
23 exclusive authority to determine whether the claim is a
24 colorable claim of willful negligence or gross misconduct.
25 And then third, if Your Honor passed the claim through the

1 gate, whether you would have jurisdiction.

2 In Your Honor's January 9th and July 16th orders, you said
3 you would have exclusive jurisdiction. In the motion for
4 reconsideration, and particularly the reply, Movants said, if
5 you just change that and say that if passes through the gate
6 that you'd have jurisdiction only to the extent you would
7 otherwise have it, that would resolve the motion, in the same
8 way that the plan of reorganization was amended.

9 We proposed that. They rejected it. We put it before
10 Your Honor. So we believe that it moots out a good portion --
11 actually, we think it should moot out the entire motion. They
12 obviously disagree. But we definitely agree it moots out the
13 most significant portion of their motion, which is that Your
14 Honor would take jurisdiction to adjudicate a matter on an
15 exclusive basis when you might not otherwise have jurisdiction
16 on an exclusive basis.

17 THE COURT: Okay. Well, --

18 MR. BRIDGES: Your Honor, may I respond to that?

19 THE COURT: You may. And --

20 MR. BRIDGES: Thank you, Your Honor.

21 THE COURT: -- why -- could you clarify why you think
22 it would moot out the entire show cause matter? I wouldn't be
23 retroactively changing my order. Is that what you're
24 proposing?

25 MR. BRIDGES: Your Honor, with all respect, we

1 believe the order is defective and unenforceable and has to be
2 modified in order to fix it. And because of the defects,
3 we're -- we're actually arguing, Your Honor, that it is
4 unenforceable in a contempt proceeding. That is exactly what
5 our argument is.

6 THE COURT: Okay. I think I'm getting way farther
7 down this road than maybe I want to right now. But I guess
8 here's the elephant in the room, I feel like: *Republic Supply*
9 *versus Shoaf*.

10 MR. BRIDGES: Uh-huh.

11 THE COURT: The U.S. Supreme Court *Espinosa* case, for
12 that matter. If I accept your argument that maybe there was a
13 flaw in those orders, that maybe they went too far, don't you
14 have a problem with those two cases?

15 MR. BRIDGES: Your --

16 THE COURT: The orders weren't appealed.

17 MR. BRIDGES: I understand completely, Your Honor.

18 THE COURT: Uh-huh.

19 MR. BRIDGES: And I think the answer is no because of
20 the *Applewood* case from the Fifth Circuit. The *Applewood* case
21 cited in our reply brief explains that in order for an order,
22 a final order of the Bankruptcy Court to have exculpatory
23 effect, in order for it to release claims, for example, that
24 the claims at issue must be enumerated in the order. It's not
25 enough to have a blanket statement like the order, the July

1 order has, like the January order has, saying that Mr. Seery's
2 claims -- claims cannot be brought against him for ordinary
3 negligence at all. The -- Your Honor, we're delving into my
4 argument.

5 THE COURT: Okay.

6 MR. BRIDGES: And I was hoping to do this on a
7 preliminary basis.

8 THE COURT: Right.

9 MR. BRIDGES: I don't mean to bog you down with that.
10 But Your Honor, no, mandatory authority from the Fifth Circuit
11 after *Shoaf* limits *Shoaf's* application and says that it does
12 not extinguish the claims that are not specifically enumerated
13 in the order. And the reason for that is because it doesn't
14 give the kind of notice to the parties that they would need to
15 make an appearance and object to those orders at the time. It
16 actually helps to stem the amount of litigation at the time
17 rather than to encourage it.

18 THE COURT: All right. Well, you'll get your
19 opportunity to make your full argument on this. But I'm not
20 convinced, preliminarily, at least, to affect my decision on
21 the sequence, okay? So even if it potentially wastes time
22 under your view of the law, I am going to do the removal
23 matter first -- the extension of time request, I should say --
24 and then the show cause and then the motion to modify. And I
25 realize, those last two matters, everything is kind of

1 interrelated. All right?

2 MR. BRIDGES: Yes, Your Honor.

3 THE COURT: All right. So, with that decided, is
4 there a desire on the part of the lawyers to make opening
5 statements, or shall we just go to the motions? And, of
6 course, people can use their three hours for oral argument,
7 however much they want to use for oral argument.

8 MR. MORRIS: Your Honor, the -- to be clear, the six-
9 hour time limit only applies to the contempt proceeding.

10 THE COURT: Oh, yes. Yes. Uh-huh.

11 MR. MORRIS: And I do want to make an opening
12 statement.

13 THE COURT: Okay.

14 MR. MORRIS: So, as the Movant, I'd like to go first.

15 THE COURT: You want to make opening statements?

16 MR. BRIDGES: Yes. Yes, Your Honor.

17 THE COURT: Okay. Okay.

18 MR. BRIDGES: I believe we've got a PowerPoint
19 prepared that I think can lay out our side of it.

20 THE COURT: Okay.

21 MR. BRIDGES: I don't think we're participating in
22 the motion to extend the removal time.

23 THE COURT: Okay.

24 MR. BRIDGES: That's going first.

25 THE COURT: All right.

1 MR. BRIDGES: So we'll wait until that is --

2 THE COURT: Well, so we don't get confused on the
3 timing, let's just do the motion to extend right now. And I
4 think we only had one objection. As Mr. Sbaiti just pointed
5 out, they're not objecting on that one. We have a Dondero
6 objection. So let's, without starting the timer, hear that
7 one. Okay?

8 MR. DEMO: Good morning, Your Honor. Greg Demo;
9 Pachulski, Stang, Ziehl & Jones.

10 THE COURT: Good morning.

11 MR. DEMO: I'll be arguing the removal motion and
12 then turn it over.

13 It's fairly basic and straightforward, Your Honor. We're
14 asking for a further extension of the statutory deadline to
15 remove cases until December 14th, 2021. The deadline is
16 procedural only. As Your Honor is well aware, there's a lot
17 of moving parts in this case. You know, we don't know to this
18 date, really, the full universe of what could actually be out
19 there. So we're just asking for a short extension of the
20 removal period to cover through December.

21 I know that there was an objection from Mr. Dondero. I
22 know that he argues that 9006 does not allow us to extend that
23 deadline past the effective date of the plan, and he cites one
24 case for that purpose, which is *Health Support*. I think it's
25 out of Florida. That case dealt with the extension of the

1 two-year extension of the statute of limitations and was very
2 clear that you can't use 9 --

3 THE COURT: You mean the 546 deadline?

4 MR. BRIDGES: Yes. Yes.

5 THE COURT: Okay.

6 MR. BRIDGES: That you can't use 9006 to extend non-
7 bankruptcy deadlines. That's not what we're doing here, Your
8 Honor. We're using 9006 to extend the bankruptcy deadline to
9 remove the cases.

10 THE COURT: Uh-huh.

11 MR. DEMO: And we'd just ask Your Honor for the
12 extension through December.

13 THE COURT: Okay. I'll hear Mr. Dondero's counsel.

14 MR. HOWELL: Good morning, Judge. Will Howell for
15 Mr. Dondero.

16 So, the argument here is not that the Court can't do this.
17 I was just pointing that there is an outside limit to what
18 we're doing. And so if you look at the cases that the Debtor
19 cites in support of this motion, the one that is most apt was
20 when Judge Nelms did a fourth extension of time. But those
21 were all 90-day extensions. Here, we're in a situation where
22 the Debtor is asking for a fourth 180-day extension of time,
23 and this is really where the, you know, objection came -- or,
24 the response in opposition came from. They specifically asked
25 that it be without prejudice to further extensions.

1 And so, at some point, you know, does 9006 have an outside
2 limit? You know, do we need to see some sort of a light at
3 the end of the tunnel here?

4 So we would ask that the motion, at a minimum, be denied
5 in part with respect to this open-ended request for extension
6 beyond two years for a 90-day period. The other cases that
7 they cite, they have one extension here, one extension there,
8 120 days here, but not 180 days after 180 days after 180 days,
9 and then asking specifically for without prejudice to further
10 extensions beyond two years. So that's -- that's where this
11 comes from.

12 THE COURT: All right. Do you think it matters that
13 this is a very complex case?

14 MR. BRIDGES: I --

15 THE COURT: There's litigation here, there, and
16 everywhere.

17 MR. HOWELL: I also think, you know, *Mirant* was
18 complex. I think *Pilgrim's Pride* was complex. I think, you
19 know, it is not out of bounds for the Court to grant a fourth
20 extension.

21 THE COURT: Uh-huh.

22 MR. BRIDGES: But to -- you know, at some point --
23 you know, maybe the Court could grant a 90-day extension and
24 make them come back a little more frequently to kind of corral
25 this thing, rather than just saying "This grant of 180 days,

1 the fourth time, is going to be without prejudice to further
2 extensions." It just gets kind of large.

3 THE COURT: Okay. Mr. Demo, your motion. You get
4 the last word.

5 MR. DEMO: Your Honor, I mean, it is without
6 prejudice for further extensions, but that doesn't mean that
7 Your Honor is granting the further extensions now. It means
8 we'll have to come back. We'll have to make our case for why
9 an extension is necessary. And, you know, if Your Honor
10 doesn't want to give us another extension past December 2021,
11 Your Honor doesn't have to. This is not an order saying that
12 it's a limitless grant.

13 You know, I'd also ask, you know, quite honestly, why Mr.
14 Dondero has such an issue with this. He hasn't said that any
15 of these cases involve him. He hasn't given any reasons why
16 this affects him. He hasn't given any reason why this damages
17 him at all. So I do, I guess, wonder as an initial matter
18 kind of why we're here, you know, why we're responding to Mr.
19 Dondero's request, when that request really has no impact on
20 him.

21 And then, Your Honor, to the extent that you are inclined
22 to limit this, I would say, you know, we would ask for a
23 reasonable extension of time. We do think an extension of
24 time, because of the complexity of this case, through December
25 is warranted. But if Your Honor for some reason does agree

1 that a shorter extension is necessary under 9006 -- I don't
2 think it is -- we'd just ask that Your Honor grant us leave to
3 come back for further extensions of time.

4 THE COURT: Okay. All right. I will -- I'll grant a
5 90-day extension, without prejudice for further extensions.

6 MR. DEMO: Thank you, Your Honor.

7 THE COURT: Maybe in 90 days we'll be farther down
8 the road and we won't need any more extensions, but you'll
9 have the ability to argue for more if you think it's really
10 necessary. All right. So that will bring us to around
11 September 14th, I guess.

12 All right. Well, let's go ahead and hear opening
13 statements with regard to the show cause matter. And again,
14 if you want to roll in arguments about the -- well, no, you
15 said the six hours only applies to show cause, so we'll not
16 hear opening statements with regard to the Seery retention
17 modification, just show cause.

18 MR. MORRIS: All right. Before I begin, Your Honor,
19 I have a small deck to guide --

20 THE COURT: Okay.

21 MR. MORRIS: -- to guide my opening statement.

22 THE COURT: All right.

23 MR. MORRIS: Can I approach the bench?

24 THE COURT: You may. And is your legal assistant
25 going to share her content --

1 MR. MORRIS: Yes.

2 THE COURT: -- so people on the WebEx will see?

3 Okay.

4 MR. MORRIS: That's the intention, Your Honor.

5 THE COURT: Okay.

6 MR. MORRIS: All right. Are you ready for me to
7 proceed?

8 THE COURT: I am. And obviously, everyone has a
9 copy?

10 MR. MORRIS: Yes.

11 THE COURT: Your opponents have a copy of this?

12 MR. MORRIS: Yep.

13 THE COURT: Okay. Although we hope to see it on the
14 screen.

15 OPENING STATEMENT ON BEHALF OF THE DEBTOR

16 MR. MORRIS: Good morning, Your Honor. John Morris;
17 Pachulski, Stang, Ziehl & Jones; for the Debtor.

18 We're here today on the Debtor's motion to hold certain
19 entities and individuals in contempt of court for violating a
20 very clear and specific court order. I hope to be relatively
21 brief in my opening here, Your Honor, and I'd like to begin
22 where I think we must, and that is, how do we -- how do we
23 prove this and what do we have to prove?

24 The elements of a claim for contempt of court are really
25 rather straightforward. The Movant must establish by clear

1 and convincing evidence three things.

2 THE COURT: Let me stop you and stop the clock.

3 We're not seeing the shared content.

4 MR. MORRIS: Uh-huh.

5 THE COURT: Did you want her to go ahead and share
6 her content?

7 MR. MORRIS: I did.

8 THE COURT: Okay.

9 MR. MORRIS: I was hoping that she'd do that.

10 THE COURT: All right. It says it's receiving
11 content.

12 MR. MORRIS: There we go. It's on my screen, anyway.

13 THE COURT: Oh, here it is. I don't know why it's
14 not on my Polycom. Can you all see it out there?

15 (Chorus of affirmative replies.)

16 THE COURT: Okay. Very good.

17 MR. MORRIS: Okay.

18 THE COURT: You may proceed.

19 MR. MORRIS: Thank you, Your Honor.

20 So, there's three elements to the cause of action for
21 contempt, for civil contempt. We have to prove by clear and
22 convincing evidence that a court order was in effect; that the
23 order required certain conduct by the Respondents; and that
24 the Respondent failed to comply with the Court's order.

25 We've cited in the footnote the applicable case law from

1 the Fifth Circuit, and I don't believe that there's any
2 dispute that is indeed the legal standard.

3 The intent of the Respondents as to liability is
4 completely irrelevant. It doesn't matter if they thought they
5 were doing the right thing. It doesn't matter if they
6 believed in their heart of hearts that the court order was
7 invalid. These are the three elements, and we will be able to
8 establish these elements not by clear and convincing evidence,
9 but if we ever had to, beyond reasonable doubt.

10 If we can go to the next slide, please.

11 We begin with the Court's order, the Court's July 9 order.
12 And that order states very clearly what conduct was required.
13 And the conduct that was required was that no entity could
14 commence or pursue -- those are really the magic words --
15 commence or pursue a claim against Mr. Seery without the
16 Bankruptcy Court doing certain things. And we've referred to
17 this as the gatekeeper. And the only question I believe the
18 Court has to ask today is whether the Respondents commenced or
19 pursued a claim against Mr. Seery without seeking Bankruptcy
20 Court approval, as set forth in this order.

21 I'll dispute that there's anything ambiguous about this.
22 I'll dispute that it could not be clearer what conduct was
23 prohibited. It could not be clearer. The only question is
24 whether the conduct constitutes the pursuit of a claim.

25 Let's see what they did. If we could go to the next

1 slide. There will be no dispute about what they did. And
2 what they did is, a week after filing a lawsuit against the
3 Debtor and two others arising out of the HarbourVest
4 settlement, a settlement that this Court approved, after
5 notice and a hearing and participation by the Respondents,
6 after they had the opportunity to take discovery, after they
7 had the opportunity to examine Mr. Seery about the value of
8 HarbourVest's interest in HCLOF, after all of that, they
9 brought a lawsuit after Mr. Patrick took control of the DAF
10 and CLO Holdco. And that lawsuit related to nothing but the
11 HarbourVest suit, and it named in Paragraph 2, right up above,
12 Mr. Seery as a potential party. And a week later, Your Honor,
13 they filed what we call the Seery Motion, and it was a motion
14 for leave to amend their complaint to add Mr. Seery as a
15 defendant.

16 We believe that that clearly violates the Court's July 7
17 order. And indeed, again, these are facts. They're not --
18 they're not in dispute. Just look at the first sentence of
19 their motion. The purpose of the motion was to name James
20 Seery as a defendant. That was the purpose of the motion.
21 And the way that they made the motion, Your Honor -- and these
22 are undisputed facts -- the way they made the motion, Your
23 Honor, shows contemptuous intent. We don't have to prove
24 intent, but I think it might be relevant when you get to
25 remedies. Okay?

1 And so how do I -- why do I say that? Because they made
2 this motion, Your Honor, and they didn't have to. Everybody
3 knows that under Rule 15 they could have amended the complaint
4 if they wanted to. If they wanted to, they didn't need the
5 Court's permission. What they wanted to do was try to get the
6 District Court to do what they knew they couldn't. And that's
7 contemptuous.

8 And they did it, Your Honor, without notice to the Debtor.
9 Even after the Debtor had accepted service of the complaint,
10 even after we told them, if you go down this path, we're going
11 to file a motion for contempt, they did it anyway. They
12 didn't serve the Debtor. They didn't give the Debtor a
13 courtesy copy. They didn't notify the Debtor. The only thing
14 that happened was the next day, when the District Court
15 dismissed it without prejudice, they sent us a copy of that
16 notice. And within three days, we were here.

17 A court order was in effect. Mr. Patrick is going to
18 admit to that. There's not going to be any dispute about
19 that. The order required that the Respondents come to this
20 Court before they pursue a claim against Mr. Seery, and they
21 failed to comply with that order. The facts, again -- if we
22 can go to the next slide. We can look at some of the detail,
23 because the timeline is mindboggling.

24 Mr. Patrick became the Plaintiffs' authorized
25 representative on March 24th. And folks, when I took their

1 depositions, weren't specific about dates, and that's why some
2 of the entries here refer to sometime after, but there's no
3 question that the order of events is as presented here and as
4 the evidence will show today.

5 The evidence will show that sometime after Patrick became
6 the Plaintiffs' authorized representative, Mr. Dondero
7 informed Mr. Patrick that Highland had usurped an investment
8 opportunity from the Plaintiffs. Mr. Patrick is going to
9 testify to that. Mr. Patrick is also going to testify that,
10 without prompting, without making a request, D.C. Sauter, the
11 general counsel of NexPoint Advisors, recommended the Sbaiti
12 firm to Mr. Patrick. Mr. Patrick considered nobody else.

13 Mr. Patrick retained the Sbaiti firm in April. In other
14 words, within 12 days of the filing of the complaint. They're
15 retained and they conduct an investigation. You're going to
16 hear the assertion of the attorney-client and the common
17 interest privilege every time I ask Mr. Dondero what he and
18 Mr. Sbaiti talked about and whether they talked about naming
19 Jim Seery as a defendant. But with Patrick's authorization,
20 the Sbaiti firm filed the complaint on April 12th, just days
21 after they were retained.

22 It's like a -- it's an enormous complaint. I don't know
23 how they did that so quickly. But in any event, the important
24 point is that they all worked together. None of this happened
25 until Mr. Patrick became the authorized representative.

1 Mr. Patrick is going to tell you, Your Honor, he's going
2 to tell you that he had no knowledge of any wrongdoing by Mr.
3 Seery prior to the time he assumed the rein of the DAF and the
4 CLO Holdco. He had no knowledge, Your Honor, of any claims
5 that the DAF and CLO Holdco had against the Debtor until he
6 became the Plaintiffs' authorized representative and Mr.
7 Dondero spoke to him.

8 If we can flip to the next page. Mr. Dondero has
9 effective control of the DAF. He has effective control of CLO
10 Holdco. You're going to be bombarded with corporate documents
11 today, because they're going to show you -- and they want you
12 to respect the corporate form, they really want you to follow
13 the rules and respect the corporate form, because only Mr.
14 Scott was responsible for the DAF and CLO Holdco until he
15 handed the reins on March 24th to Mr. Patrick. Mr. Dondero
16 has nothing to do with this. He's going to tell you. He's
17 going to tell you he had nothing to do with the selection of
18 Mr. Patrick as Mr. Scott's replacement.

19 The facts are going to show otherwise, Your Honor. The
20 DAF is a \$200 million charitable organization that is funded
21 almost exclusively with assets derived from Highland or Mr.
22 Dondero or the Get Good Trust or the Dugaboy Trust. The
23 evidence is going to show that at all times these entities had
24 shared services agreements and investment advisory agreements
25 with HCMLP. The evidence will show that HCMLP at all times

1 was controlled by Mr. Dondero.

2 And it made sense. The guy put in an awful lot of money
3 for charitable usage. Is he really just going to say, I don't
4 really care who runs it? The evidence is going to show that
5 between October 2020 and January 2021, Grant Scott actually
6 exercised independence. Grant Scott was Mr. Dondero's
7 childhood friend. They went to UVA together. They were
8 roommates. Mr. Scott was the best man at Mr. Dondero's
9 wedding. But we were now in bankruptcy court. We're now in
10 the fishbowl. And I will -- this may be a little argument,
11 but there's no disputing the facts that Mr. Scott acted
12 independently, and he paid the price for it. Mr. Scott did it
13 three times.

14 He did it when he amended CLO Holdco's proof of claim to
15 take it down to zero. He did it again after he withdrew the
16 objection to the HarbourVest settlement motion. And he did it
17 again when he settled the lawsuit that the Debtors had brought
18 against CLO Holdco. And that -- and on each of those three
19 occasions, the evidence will show that Mr. Scott did not
20 communicate with Mr. Dondero in advance, that Mr. Dondero
21 found out about these acts of independence after the fact, and
22 that each time he found out about it he had a little
23 conversation with Mr. Scott.

24 Mr. Dondero is going to tell you about it, and he's going
25 to tell you that he told Mr. Scott each act was inappropriate.

1 You may have heard that word before. Each act was not in the
2 best interests of the DAF.

3 The last of those conversations happened either on or just
4 after January 26th. And by January 31st, Mr. Scott gave
5 notice of his resignation. And you're going to see that
6 notice of resignation. And he asks for releases.

7 Mr. Patrick becomes, almost two months later, the
8 successor to Mr. Scott. Mr. Dondero is going to say he has no
9 idea how that happened. He was just told after the fact that
10 Mr. Patrick and Mr. Scott had an agreement. He's going to
11 tell you they had an agreement and he just heard about it
12 afterwards. He didn't really -- for two months, I guess, he
13 sat there after Mr. Scott told him that he wanted out and did
14 nothing to try to find out who's going to take control of my
15 charitable foundation with \$200 million. He wasn't
16 interested.

17 But here's the thing, Your Honor. If we go to the next
18 slide. Let's see what Mr. Scott said at his deposition last
19 week. Question, "Do you know who selected Mark?" Answer, "I
20 do not." Question, "Do you know how Mark was selected?" Mark
21 is a reference to Mark Patrick. "I do not." "Did you ever
22 ask Mark how he was selected?" "I did not." "Did you ever
23 ask Mark who selected him?" "I did not." "Did you ever ask
24 anybody at any time how Mr. Patrick was selected to succeed
25 you?" "No, I did not." "Did you ever ask anybody at any time

1 as to who made the decision to select Mr. Patrick to succeed
2 you?" "No, I did not."

3 So I don't know what happened between Mr. Patrick and Mr.
4 Dondero when Mr. Patrick supposedly told Mr. Dondero that
5 there was an agreement with Mr. Scott, but that is news to Mr.
6 Scott. He had no idea.

7 Your Honor, we are going to prove by clear and convincing
8 evidence that each of the Respondents violated a very clear
9 and specific court order. And unless the Court has any other
10 questions, I'll stop for now.

11 THE COURT: No questions.

12 MR. MORRIS: Thank you, Your Honor.

13 THE COURT: All right. Who is making the argument
14 for the Respondents?

15 MR. SBAITI: Your Honor, I am. I'm just trying to
16 put the PowerPoint up on the WebEx.

17 THE COURT: Okay.

18 MR. SBAITI: Sorry about that.

19 MR. MORRIS: Your Honor, I'll try not to make this a
20 practice, but can I inquire as to how much time I used?

21 THE COURT: Oh. Nate?

22 THE CLERK: About thirteen minutes.

23 THE COURT: Thirteen minutes?

24 MR. MORRIS: Thank you very much.

25 THE COURT: Okay. All right.

1 MR. SBAITI: Your Honor, our PowerPoint is a little
2 bit longer than that one. May I approach with a copy?

3 THE COURT: You may. Uh-huh.

4 (Pause.)

5 MR. SBAITI: Your Honor, it does feel good to be back
6 in the courtroom.

7 THE COURT: Okay.

8 MR. SBAITI: It's been a long time.

9 THE COURT: Yes. For us, too.

10 MR. SBAITI: Just wish it wasn't under a circumstance
11 where someone is trying to sanction me.

12 But we're going to be dividing up this oral argument a
13 little bit. Also, to just kind of break up a little bit of
14 the monotony, because I think we have a lot to cover at the
15 opening stage of this. And I'll try to be as expeditious as I
16 can be.

17 OPENING STATEMENT ON BEHALF OF THE SHOW CAUSE RESPONDENTS

18 MR. SBAITI: Your Honor, the thing we -- the thing we
19 open with is the due process issue that we raised in our
20 brief. And where this really arises from is the Court's show
21 cause order calls us violators before we've had a chance to
22 respond to the allegations and before we've obviously been
23 able to approach this hearing. And the word violators means
24 something to us, Your Honor, because I've been a lawyer for a
25 long time, my partner has been a lawyer for a long time, our

1 clients have never been sanctioned, we've never been
2 sanctioned, and for us to be labeled violators first by
3 counsel and then in a court order makes us wonder whether or
4 not this process is already prejudged or predetermined.

5 THE COURT: I actually want to address that. Turn
6 off the clock.

7 Just so you know, I looked this up a while back, because
8 we gave a bankruptcy judges panel at some CLE. The average
9 bankruptcy judge in our district, back when I looked, signs
10 over 200 orders a week.

11 MR. SBAITI: Sure.

12 THE COURT: Many of those -- in fact, most of them --
13 are submitted by lawyers. So, you know, a big chunk of my
14 week is signing orders. And I obviously give more scrutiny to
15 those that are substantive in nature. Okay? If someone
16 submits to me a 50-page debtor-in-possession financing order,
17 I will look at that much more carefully than what I consider a
18 mere procedural order setting a hearing.

19 So I regret that that word was used, but I can assure you
20 I fairly quickly set that -- signed that, I should say --
21 regarding it as a merely procedural order setting a hearing.
22 Okay? So it's as simple as that. There was no hmm, I like
23 that word, violator. I had a stack, if you will, an
24 electronic stack of probably 200 orders in front of me the day
25 I signed that. Okay?

1 So, if that makes anyone feel any better, I don't know,
2 but that's the reality.

3 Okay. You can start the clock again.

4 MR. SBAITI: And I appreciate Your Honor saying that.
5 It does make us feel better, both about where the -- the
6 genesis of the order and the impact and its reflection on what
7 Your Honor thinks in terms of going into this.

8 The other thing that obviously raised concerns, and I
9 assume this comes from the same place, was four days ahead of
10 that order counsel told us the Court was going to order
11 everyone to be in person, and they had advance notice of that,
12 and we weren't sure how they had advance notice of that. I
13 guess they assumed --

14 THE COURT: I can assure you right here on the record
15 I never had ex parte communications with any lawyer in this
16 case, on this matter or any other matter. Okay? Again, those
17 are pretty strong words to venture out there with, which your
18 pleading did venture out there with those words.

19 My courtroom deputy, Traci, I think answers her phone 24
20 hours a day. So I'm quite sure she had communications with
21 the lawyers about this, just like she probably had
22 communications with you and your firm and every other firm in
23 this case. Okay?

24 MR. SBAITI: Like I said, Your Honor, we appreciated
25 what Your Honor -- appreciate what Your Honor said, but that

1 issue obviously stuck out -- stuck out to us, in combination.
2 So I'll move on from that issue.

3 This has to do with the lawsuit that was filed, and the
4 lawsuit, the genesis of the lawsuit, I think it's important to
5 say, because the argument has been raised in the briefing and
6 we wanted to address it upfront, why the lawsuit comes about.
7 And it comes about because of the Advisers Act and the
8 responsibilities that the Debtor has to the assets of the
9 funds that it manages. And the Advisers Act imposes a duty
10 not only on Highland but obviously on its control people and
11 its supervised people. And the lawsuit has to do with HCLOF,
12 which is what HarbourVest owned a piece of. And Highland, as
13 the advisor to HCLOF and the advisor to the DAF, owed
14 fiduciary duties to CLO Holdco, which is the DAF's holding
15 entity of its assets in HCLOF, but Highland Capital was also
16 an advisor, a registered investment advisor to the DAF
17 directly at the time. And so those federally-imposed
18 fiduciary duties lie at the crux of that lawsuit.

19 Moving on, Mr. Seery testified at the hearing that was in
20 this Court to be -- to get him appointed, and this was Exhibit
21 2 that was presented by the Debtor, and on Page 16 at the
22 bottom he says -- of the transcript, he says, I think, from a
23 high level, the best way to think about the Debtor is that
24 it's a registered investment advisor. As a registered
25 investment advisor, which is really any advisor of third-party

1 money over \$25 million, it has to register with the SEC, and
2 it manages funds in many different ways.

3 In the middle of the next page he says, In addition, the
4 Debtor manages about \$2 billion, \$2 billion in total managed
5 assets, around \$2 billion in CLO assets, and then other
6 securities, which are hedge funds -- other entities, rather,
7 which are hedge funds or PE style. Private equity style.

8 On Page 23 towards the bottom he says, As I said, the
9 Investment Advisers Act puts a fiduciary duty on Highland
10 Capital to discharge its duty to the investors. So while we
11 have duties to the estate, we also have duties, as I mentioned
12 in my last testimony, to each of the investors in the funds.
13 CLO Holdco would be an investor in one of those funds, HCLOF.

14 He goes on to say, Some of them are related parties, and
15 those are a little bit easier. Some of them are owned by
16 Highland. HCLOF was not owned by Highland. But there are
17 third-party investors in these funds who have no relation
18 whatsoever to Highland, and we owe them a fiduciary duty both
19 to manage their assets prudently but also to seek to maximize
20 value.

21 Now, the lawsuit alleges that Seery testified that the
22 HarbourVest portion of Highland CLO Funding was worth \$22-1/2
23 million. Now, Mr. Morris wants the Court to hinge on the fact
24 that, well, no one asked him whether he was lying. But that's
25 not really the standard, and it certainly isn't the standard

1 when someone's an investment advisor and owes fiduciary
2 duties, which include fiduciary duties to be transparent with
3 your investors.

4 It also includes fiduciary duties not to self-deal.

5 The lawsuit also alleges that, in reality, those assets
6 were worth double that -- double that amount at the time. We
7 found out just, you know, in late March/early April that a
8 third -- from a third party who had access to the underlying
9 valuations at the time that those values were actually double
10 and that there was a misrepresentation, giving rise to the
11 lawsuit. That change in circumstance is the key issue behind
12 the lawsuit.

13 We allege that Mr. Seery and the Debtor, as RIAs, had a
14 duty to not self-deal and be fully transparent with that
15 information, and we think both of those things were violated
16 under the Advisers Act.

17 We don't allege that the HarbourVest settlement should be
18 undone or unwound. We can't unscramble that egg. We do seek
19 damages, as I believe is our right, arising out of the
20 wrongdoing and the process of pushing forth the settlement.

21 I think one of the allegations in the actual motion for
22 the show cause order was that this was going to undo all of
23 the hard work that Court had done and basically unwind and try
24 to re-piece Humpty Dumpty back together again. But that's
25 simply not the case. Nowhere in our allegations or in the

1 relief that we request are we trying to undo the HarbourVest
2 settlement as such.

3 Now, whether the lawsuit should be dismissed under the
4 affirmative defenses that they bring up -- res judicata,
5 waiver, release -- all of those are questionable under the
6 Advisers Act, given the change of circumstance, and therefore
7 are also questions on the merits. They don't go to the
8 colorability of the underlying claims in and of themselves,
9 which I think is important.

10 So we asked for leave to amend from the Court. And what
11 they want us to do, Your Honor, is they want to sanction us
12 for asking. They're saying asking for leave to amend is the
13 same thing as pursuing a claim. And I'll get to the specifics
14 on that in a little bit. But that's the frame. Can we be
15 sanctioned for asking a court, any court, even if it's the
16 wrong court, for permission to bring the lawsuit? They don't
17 cite a single case that says that that, in and of itself, is
18 sanctionable conduct, us asking.

19 So I'd like to introduce some of the Respondents.

20 Your Honor, may I have one of these waters?

21 THE COURT: Certainly.

22 MR. SBAITI: Thank you.

23 THE COURT: That's why they're there, by the way.

24 MR. SBAITI: I didn't know if they belonged to
25 somebody else.

1 THE COURT: We've scattered water bottles around for
2 people.

3 MR. SBAITI: I appreciate it. Thank you, Your Honor.

4 THE COURT: So if you see these little ones, that's
5 for anyone.

6 MR. SBAITI: So, this is an org chart, and you'll see
7 it as -- the exhibits that the Debtor's going to bring up.
8 And when we talk about the DAF, Your Honor -- I don't know if
9 that's visible to you. We're on Slide 19, if you're looking
10 at it on paper. There's a little number at the lower right-
11 hand corner. The charitable DAF GP, LLP and then the
12 Charitable DAF Holdco, Ltd. together are the principles of the
13 Charitable DAF Fund, LP. And so when we refer to the DAF or
14 the Charitable DAF, that's really the entity structure that
15 we're referring to. And then the GP and Holdco Ltd. have a
16 managing member. It used to be Grant Scott at the time this
17 was done. Today, it's Mr. Mark Patrick, who's in the room,
18 sitting next to Mr. Bridges.

19 The DAF is a charitable fund. It's funded over \$32
20 million, as the evidence will show, including Dallas-Fort
21 Worth organizations, The Family Place, Dallas Children's
22 Advocacy, Center for Brain Health, the Crystal Ray Initiative,
23 Friends of the Dallas Police, Snowball Express, various
24 community and education initiatives, Dallas Arts, museums, the
25 Perot Museum, Dallas Zoo. That evidence is undisputed, Your

1 Honor. The DAF is a real fund. It is a real charitable fund.
2 It does real good in the community.

3 Now, Respondents -- Holdco, which you will see at the
4 bottom of that chart, is essentially the investment arm.
5 There are assets that the DAF owns in various pots, and Holdco
6 is the actual business engine that generates the money from
7 those assets that then -- that then gets passed up to the
8 charitable -- the four charitable foundations at the top.

9 I'll go back to Slide 21. And if you look at the top,
10 Your Honor, the Dallas Foundation, Greater Kansas City
11 Community, Santa Barbara Foundation, The Community Foundation
12 of North Texas: Those are the charities that then themselves
13 bestow the funds onto the actual recipients. So the money
14 flows up as dividends or distributions, and then gets
15 contributed.

16 CLO Holdco invests those assets, and it's an important
17 part of the business model, so that you're not sending out
18 principal. It's the money that CLO makes, the profits, if you
19 will, that it is able to generate that gets donated and makes
20 its way into the community.

21 So there's an important feature to the structure in that
22 it has to be able to generate money. It's not just money that
23 sits there and waits to be distributed. There's active
24 investing going on.

25 Mr. Mark Patrick owns the control shares of the entities

1 comprising the DAF and CLO Holdco, as I showed you, and the
2 beneficiary charitable foundations hold what we call
3 beneficial interests, where they just get money. They don't
4 have a vote.

5 Mr. Patrick cares about the public service the DAF engages
6 in. He's been an advisor to the DAF, CLO Holdco, and its
7 predecessor, Mr. Scott, since its inception. He receives no
8 compensation for the job he's doing today. And you'll hear
9 how he became -- how he inured to the control position of the
10 DAF and CLO Holdco from him, but it doesn't involve Mr.
11 Dondero, and the absence of someone saying that it did, I
12 think, is going to be striking by the end of the presentation
13 of evidence.

14 Their only argument against you, Your Honor, is going to
15 be you just can't believe them. But not believing witnesses
16 is not a substitute for the lack of affirmative evidence.

17 Mr. Patrick has said all along he authorized the filing of
18 the motion for leave to add Mr. Seery to the lawsuit in
19 District Court. He doesn't believe the motion to amend
20 violated this Court's orders, for the reasons stated in our
21 responsive filings to the motions for contempt and show cause
22 order. That's why he authorized it.

23 My firm, Sbaiti & Company, we're a small Dallas litigation
24 boutique retained by the DAF and CLO Holdco to file the
25 lawsuit. We did an investigation. I'm tickled to death that

1 Mr. Morris loved our complaint so much and gave us the
2 compliment that we got it done in a short amount of time, but
3 we did get it done in a short amount of time, because, in the
4 end, it's a rather simple issue, as I was able to lay it out
5 in about three or four bullet points in a previous slide.

6 The written aspect of that doesn't take that long, as Your
7 Honor knows, but the idea that there's a suspicion that we
8 didn't write it or someone else wrote it and ghost-wrote it
9 and gave it to us, which I think is the insinuation he was
10 making, is completely unfounded. There's no evidence of that.

11 We carefully read Your Honor's orders. We developed a
12 good-faith basis, as required by Rule 11, that the lawsuit and
13 the motion to add Mr. Seery were not filed in bad faith or for
14 an improper purpose. We don't think they're frivolous. We
15 don't think they're in violation of Your Honor's orders, given
16 the current state of the law.

17 Mr. Dondero is one of the settlors of the CRT, of the
18 Charitable Remainder Trust that ultimately provided assets to
19 CLO Holdco and the DAF. He does care about the DAF's mission.
20 I think Mr. Morris hit the nail on the head. Of course Mr.
21 Dondero cares about what happens to it. He's one of the
22 settlors, and it was his funds that initially were put into
23 it, so he's allowed to care. And I don't think him caring is
24 insidious, and him caring doesn't mean he has control and
25 doesn't mean he's the driving force behind some insidious

1 conspiracy that they're trying to insinuate exists.

2 He is an advisor to the DAF and CLO Holdco. It is a lot
3 of money and it needs advice, and he's an advisor to Mr.
4 Patrick. We don't run away from any of those facts, Your
5 Honor.

6 We also don't run away from the fact that he was the
7 source of some of the information that came in to that
8 complaint and that he relayed some of that information. The
9 content, we do claim work product privilege and attorney-
10 client privilege, because he's an agent of our client, and as
11 lawyers doing an investigation, the content of our
12 communications is protected under the attorney-client and work
13 product privileges, as well as the joint interest privilege.
14 But the fact that we admit that those communications happened,
15 we're not running away from that fact.

16 So, what does he have to do with this? It's interesting
17 that that opening argument you just heard spent about three
18 minutes on contempt and the other fourteen or fifteen minutes
19 or so on Mr. Dondero. And only on Mr. Dondero. There's a
20 negative halo effect, I believe, that they're trying to get
21 this Court to abide by. They want to inflame Your Honor and
22 hopefully capture -- cultivate and then capitalize on whatever
23 antipathy you might have for Mr. Dondero, and then sweep us
24 all in under that umbrella and sanction everybody just because
25 he had some involvement.

1 But whatever involvement he has, which we admit he had
2 some involvement in helping us marshal the facts, that's not a
3 basis for us to be sanctioned if there isn't an actual
4 sanctionable conduct that -- as we say there isn't.

5 We think there's an ulterior motive. That's why Mr.
6 Morris just announced to Your Honor, Mr. Dondero controls it
7 all. The ulterior motive, I believe, is, down the line, when
8 they want to argue some kind of alter ego theory, they want to
9 lay that foundation here. I don't think this is the
10 appropriate time for that foundation, and I don't think any of
11 the information and the evidence they're trying to marshal in
12 front of you is really going to be relevant to the very
13 specific question that's before Your Honor: Does our motion
14 asking the District Court to add Mr. Seery violate your order,
15 or violate it in a way that can be -- that we can be
16 sanctioned for? We don't believe it violates it.

17 So, the three core standards that have to be met. First
18 of all, civil contempt requires a valid, enforceable order.
19 It's not debatable and it's not -- I don't think that's a
20 shocking statement. Then they have to have clear and
21 convincing evidence of a violation of a specific unambiguous
22 term therein. Mr. Morris wants his version of the word pursue
23 to be unambiguous, and I think the word pursue is unambiguous.
24 But the way he wants you to construe it makes it completely
25 ambiguous, and we'll -- I'll get to that in a moment.

1 Now, for sanctioning counsel, the Fifth Circuit has held
2 you have to find bad faith. We're adjudged under a slightly
3 separate standard under the Fifth Circuit law. So the
4 contempt motion, though, to the extent it seeks to impose
5 double and treble attorney's fees, those are in punitive
6 fines. They are not compensatory. So criminal contempt
7 standards are raised, and so they have to show a violation in
8 bad faith. In other words, our arguments that we're making
9 have to be bad faith, not simply that we're wrong, and they
10 have to show beyond a reasonable doubt, usually in front of a
11 jury. The U.S. Supreme Court explained the difference and the
12 different procedural protections that have to be involved if
13 they're really going to seek double and treble compensatory
14 damages.

15 Now, he's right. Saying we intended -- saying that we
16 didn't mean to violate it isn't necessarily a defense. But
17 what you're actually going to hear from him is the opposite
18 argument, that even though we didn't violate it, we wanted to.
19 That's what he says. That's why he quoted you the opening
20 section of our motion asking for permission to sue Mr. Seery,
21 because that's a statement of purpose. And he says you should
22 sanction them right there. That's literally what he said.
23 It's right there, their purpose. If intent is irrelevant to
24 them, it's irrelevant as to us. The fact that we wanted to
25 sue Seery is fully admitted. We don't deny the fact that we

1 believe Mr. Seery should be a defendant in this lawsuit. But
2 the fact that we didn't sue him is why we didn't violate the
3 order. And they can't say that the fact that we eventually
4 wanted to sue him means we did violate the order. That door
5 swings both ways, Your Honor.

6 We don't think any element is met. The order, while writ
7 large, prohibits suing Mr. Seery without permission, and we
8 did not sue James Seery, pure and simple. The July 12 --
9 14th, 2020 order purports to reserve exclusively to this Court
10 that which, according to the statutes and the case law, we
11 believe the Court can't exclusively reserve to itself. And
12 Your Honor, the order prohibits commencing and pursuing a
13 claim against Jim Seery without coming here first to decide
14 the colorability of such a claim.

15 They, I believe, admit that we didn't commence a claim
16 against Jim Seery. I think they've admitted that now. So now
17 we're talking about what does pursue mean? We didn't pursue a
18 claim against Jim Seery. Is asking for leave to bring suit
19 the same thing as pursuing a claim? That's the question
20 that's really before Your Honor. Lawyers never talk of
21 pursuing a claim that hasn't been filed. We don't say, I'm
22 pursuing a claim and I'm going to file it next week or next
23 year. Usually, that type of language is in an order, because
24 when the order happens, there may already be claims against
25 Mr. Seery. And so the pursuit of claim is supposed to attack

1 those cases, to come here and show colorability, presumably,
2 before they continue on with those lawsuits. It doesn't mean
3 asking for permission.

4 If it did mean asking for permission, then complying with
5 Your Honor's order would be a violation. If the motion for
6 leave is a violation because it is pursuing a claim, if I had
7 filed that motion in this Court, it would still be pursuing a
8 claim without Your Honor's permission. I'd have to get
9 permission just to ask for permission. It puts us in this
10 endless loop of, well, if asking for permission is pursuing a
11 claim, and pursuing a claim is without permission violates the
12 Court's order, we'd always be in violation of the Court's
13 order just for asking, just for following Your Honor's edict.

14 THE COURT: I'm just, I'm going to interject. You
15 were supposed to, under the order, file a motion in this
16 Court.

17 MR. SBAITI: I understand that, Your Honor, and I
18 think that we can get to the specifics on why we disagree with
19 how the motion went, Your Honor. We hadn't sued Mr. Seery.
20 So as long as we dealt with the order, which is what our
21 position is, then we don't believe we violated the order.

22 THE COURT: You think the order was ambiguous,
23 requiring a motion to be filed in the Bankruptcy Court?

24 MR. SBAITI: Your Honor, what we believe is that the
25 order was ambiguous in terms of whether us asking for

1 permission in the District Court was in and of itself a
2 violation of the order. We don't think it was. Actually, we
3 don't think the order's ambiguous to that extent. The second
4 we file a suit against Mr. Seery and we don't have some
5 resolution of the issue, then I think the question of
6 sanctionability comes in. But we never filed suit, Your
7 Honor.

8 The Court doesn't say I can't seek permission in the
9 District Court or that we can't go to the District Court with
10 -- which has general jurisdiction over this case, and has
11 jurisdiction, we believe, over the actual case and controversy
12 that's being raised. But the idea of pursuit being a
13 violation of the order, of the letter of that order, is
14 nonsensical under that, it leads to an absurd result, and it's
15 plainly vague and ambiguous, Your Honor.

16 Asking Judge Boyle or asking a District Court for
17 permission is not a violation of this Court's order, not the
18 way it was written and not -- and I don't even believe it was
19 a violation necessarily of the Court's -- of the language that
20 the Court has. We -- it doesn't unambiguously prevent us from
21 asking the District Court for leave.

22 The Court's order yesterday, Your Honor, applied this very
23 rule. The TRO -- you said the TRO did not specifically state,
24 Turn your cell phone over. And you denied motion for
25 sanctions on that. That's basically the argument we're making

1 here, Your Honor. We think that was the correct ruling, and
2 we think the same type of ruling applies here.

3 Your order yesterday also determined that the Court
4 ultimately believes that hiring lawyers to file motions should
5 not be viewed as having crossed the line into contemptuous
6 behavior. That's essentially the argument they want you to
7 buy, that there's somehow a vindictiveness behind this and an
8 insidious plan to violate court orders, Your Honor. We don't
9 have any evidence of that.

10 THE COURT: Okay. Take the words vindictiveness and
11 insidious out of the equation. That's making things personal,
12 and I don't like that. The key is the literal wording of the
13 order, is it not?

14 MR. SBAITI: Your Honor, the key, I believe, is the
15 --

16 THE COURT: No entity may commence or pursue a cause
17 of action of any kind against Mr. Seery relating in any way to
18 his role as the chief executive officer and chief
19 restructuring officer of the Debtor without the Bankruptcy
20 Court first determining, after notice, that such claim or
21 cause of action represents a colorable claim of willful
22 misconduct or gross negligence against Mr. Seery and
23 specifically authorizing such entity to bring such a claim.
24 So I'm trying to understand why you argue that filing a motion
25 asking the District Court for permission is not inconsistent

1 with this order.

2 MR. SBAITI: Because it's not commencing a claim,
3 Your Honor. It's not commencing a claim against him.

4 THE COURT: Okay. So is your argument that if Judge
5 Boyle authorizes amendment of the pleading to add Mr. Seery
6 and then you do it, at that point they may have grounds for a
7 motion for contempt, but not yet, because she has not actually
8 granted your motion?

9 MR. SBAITI: Correct, Your Honor. I mean, in a
10 nutshell. In fact, that's one of -- I think that's probably
11 our next argument. We think, in a sense, this argument is
12 incredibly premature. There is three ways that this -- well,
13 I'd like to address this, so I've got -- I've got a diagram
14 that I think will actually help elucidate what our thought
15 process was.

16 There's three things she could have done. She could have
17 referred -- referred it to Your Honor, which is what we
18 expected was likely to happen.

19 THE COURT: But you didn't file a motion for referral
20 of the motion before her.

21 MR. SBAITI: Well, no, I don't mean in respect of
22 enforcing the reference. The referral we thought was most
23 likely going to happen because it's an associated case, and we
24 actually put those orders in front of her, so we expected that
25 those orders would end up -- that the question would

1 ultimately end up in front of Your Honor on that basis.

2 She could have denied our motion outright, in which case
3 we haven't filed a claim, we haven't violated it, or she could
4 have granted our motion and done one of two things. She could
5 have granted it to the extent that she thought leave would be
6 proper but then referred it down, or she could have decided --
7 taken the decision as the court with general jurisdiction and
8 simply decided it all on her own. She had all of those
9 options, Your Honor, and none of them results in a claim being
10 commenced or pursued without the leave of this Court, if leave
11 is absolutely necessary, Your Honor. And that's the point
12 that we were trying to make.

13 Your Honor, the -- there's -- you know, there's no
14 evidence that, absent an order from a court with jurisdiction,
15 that we were going to file a claim against Mr. Seery, that we
16 were going to commence or pursue a claim against Mr. Seery.
17 We were cognizant of Your Honor's order. We considered that.
18 And the reason we filed them the way we did is because,
19 according to the statutes and the case law, this is the type
20 of case that would be subject to a mandatory withdrawal of the
21 reference.

22 And so there's this paradox that arises, Your Honor. And
23 the paradox that arises is that we show up and immediately go,
24 well, we need to be back in the District Court. So we filed
25 our motion there, and I don't think that was contemptuous, it

1 wasn't intended to be contemptuous of the Court, but we showed
2 the orders to the Court, made the same arguments that we have
3 been making here, that we believe that there's problems with
4 the order, we believe the order oversteps its jurisdiction and
5 maybe is unenforceable, and it's up to that District Court, as
6 it has been in almost all of these other gatekeeper order
7 cases that get filed. None of them result in sanctions, Your
8 Honor. What they result in is a District Court deciding,
9 well, either they refer it or they decide I don't need to
10 refer it. But I don't think that that is the same thing as
11 commencing or pursuing a claim in the end, Your Honor, because
12 all we did was ask for permission, and permission could have
13 been denied or granted or granted in part.

14 Your Honor, they haven't cited an injury. You've heard
15 the testimony, Your Honor, that they -- the first time they
16 knew we had filed a motion -- which I don't understand why
17 that's the first time they knew we had filed a motion; we told
18 them we were going to file the motion -- was when I forwarded
19 an email saying that it's been denied without prejudice, Your
20 Honor. Well, that means they didn't have to do any work to
21 respond to the motion. They didn't have to do any work to do
22 any of the other things.

23 And one hundred percent of the damages that they're going
24 to say they incurred is the litigation of this contempt
25 hearing or this sanction motion, as opposed to some other

1 simpler remedy, like going in to Judge Boyle and saying, Your
2 Honor, all that needs to go, which is what they eventually
3 did. But they would have had to incur those costs anyway
4 because they're now moving to enforce the reference. They
5 filed a 12(b)(6). That briefing would have existed regardless
6 of whether or not we had filed our motion, regardless of
7 whether the sanctions hearing had commenced.

8 Your Honor, I'm going to let my partner, Mr. Bridges,
9 address this part of it, if I could. I think that gets into
10 more of the questions that you asked, and I think he can
11 answer them a lot better than I can.

12 THE COURT: Okay.

13 MR. SBAITI: Thank you.

14 THE COURT: That's fine.

15 MR. BRIDGES: Thank you, Your Honor. And I do want
16 to address pointedly the questions that you're asking. First,
17 though, I was hoping to back up to some preliminary remarks
18 that you made and say that I find the 200 orders a week just
19 mindboggling. It amazes me, and puts the entire hearing in a
20 different perspective for me. I'm grateful that you shared
21 that with us.

22 Your expression of regret about naming us violators was
23 very meaningful to me. It causes me -- well, the strong words
24 in our brief were mine. I wrote them. And your expression of
25 regret causes me to regret some of those words. I'm hopeful

1 that you can understand, at least in part, our reaction out of
2 concern.

3 And Your Honor, it's awkward for me to talk about problems
4 with your order, and that's the task that's come to me, to
5 list and talk through four of them and why we think they put
6 us in a really awkward position in deciding what to do in this
7 case, in the filing of it, in where we filed it, and in how we
8 sought leave to go forward against Mr. Seery. That was
9 awkward and difficult for us, and I'm hopeful that I can
10 explain that and that you'll understand, if I'm blunt about
11 problems with the order, that I mean it very respectfully.
12 Two hundred orders a week is still very difficult for me to
13 get my mind around.

14 The four issues in the order start with the gatekeeping.
15 Then, secondly, in the preliminary remarks, I made mention of
16 the *Applewood* case and the notice that the order releases some
17 claims. Its effect of --

18 THE COURT: And by the way, I mean, you might
19 elaborate on the facts and holding of *Applewood*, because I
20 came into this thinking *Republic Supply v. Shoaf*, and for that
21 matter, as I said, *Espinosa*, were much more germane. And so,
22 you know, you'll have to elaborate on *Applewood*. I remember
23 that case, but it's just not one people cite as frequently as
24 those two.

25 MR. BRIDGES: Yes, Your Honor. And our reply brief

1 devotes a page to the case, and I'm hopeful that I can
2 remember it well enough to give you what you're looking for
3 about it, but I would point you to our reply brief on that
4 topic as well.

5 The *Shoaf* case that *Applewood* quotes from and
6 distinguishes and expressly limits, the *Shoaf* case actually
7 has been cautioned and limited and distinguished numerous
8 times, if you Shepardize it, and the *Applewood* case is the
9 leading case, and it also is from the Fifth Circuit, that
10 describes and cabins the effects of *Shoaf*. And in *Applewood*,
11 what happened is a bankruptcy confirmation order became final
12 with releases in it, and the court held that exculpatory
13 orders in a final order from the Bankruptcy Court do not have
14 res judicata effect and do not release claims unless those
15 claims are enumerated in the exculpatory order. And --

16 THE COURT: Okay. So it was about specificity more
17 than anything else, right?

18 MR. BRIDGES: Yes, Your Honor. It was a --

19 THE COURT: Okay.

20 MR. BRIDGES: -- a blanket release, a blanket --

21 THE COURT: Okay.

22 MR. BRIDGES: -- exculpatory order that didn't
23 specify what claims were released by what parties, and
24 therefore the parties didn't have the requisite notice.

25 In my mind, Your Honor, it's comparable to the Texas

1 Supreme Court's holdings on what's required in a settlement
2 release in terms of a disclaimer of reliance, --

3 THE COURT: Okay. But, again, --

4 MR. BRIDGES: -- that if you aren't --

5 THE COURT: -- it's about specificity --

6 MR. BRIDGES: Yes, Your Honor.

7 THE COURT: -- more than anything else? And then
8 we've got the U.S. Supreme Court *Espinosa* case subsequent.

9 MR. BRIDGES: Okay. Your Honor, I'm not sure what
10 *Espinosa* you're referring to. Can you tell me why that
11 applies?

12 THE COURT: Well, it was a confirmation order. It
13 was in a Chapter 13 context. And there were provisions that
14 operated to discharge student loan debt, --

15 MR. BRIDGES: Uh-huh.

16 THE COURT: -- which, of course, cannot be discharged
17 without a 523 action, a separate adversary proceeding.
18 Nevertheless, the confirmation order operated to do what 523
19 suggests you cannot do, discharge student loan debt through a
20 plan confirmation order.

21 The U.S. Supreme Court says, well, that's unfortunate that
22 the confirmation order did something which it doesn't look
23 like you can do, but no one ever objected or appealed. That's
24 my recollection of *Espinosa*. So it seems to be the same
25 holding as *Republic Supply v. Shoaf*. And what I -- why I

1 asked you to elaborate on *Applewood* is because it does seem to
2 deal with the specificity of the order versus the
3 enforceability, no?

4 MR. BRIDGES: Your Honor, if it's not obvious
5 already, I'm not prepared to argue *Espinosa*. And your
6 explanation of it is very helpful to me. I think you're right
7 that the specificity issue from *Applewood* is what we're
8 relying on. And it sounds like --

9 THE COURT: Okay. So, that being the case, how was
10 this order not specific? Okay?

11 MR. BRIDGES: That's easy, Your Honor, because it
12 doesn't say which parties are releasing which claims. And
13 what we're talking specifically about there -- as we go
14 through the order, I can show you the language -- but what
15 we're talking about specifically are the ordinary negligence
16 and breach of fiduciary duty claims that your order doesn't
17 provide for at all. Rather, it says colorability of gross
18 negligence or willful wrongdoing, if I remember the words
19 precisely, that's what must be shown to pursue a case -- a
20 cause of action against Mr. Seery, thereby -- thereby
21 indicating that claims for mere negligence, not gross
22 negligence, or breach of fiduciary duty, which is an even
23 lesser standard, that those claims are prohibited entirely.

24 And by having that kind of general all-encompassing
25 release or exculpation for potential liability involving

1 negligence, and most importantly, fiduciary duty breach under
2 the Advisers Act, that that kind of exculpation under
3 *Applewood* is not enforceable and has no res judicata effect
4 because it wasn't -- those claims weren't enumerated in the
5 order.

6 That for it to have the intended exculpatory effect, if
7 that was what was intended, that the fiduciary duty claims and
8 the parties who those claims may belong to would have to have
9 been enumerated.

10 And indeed, that kind of specificity, what was required in
11 *Applewood*, isn't even possible for a claim that hasn't yet
12 occurred for future conduct. It's not possible to enumerate
13 the details, any details, of a future claim, because the
14 underlying act -- if the underlying basis, facts for that
15 claim, haven't yet happened. It's something to happen in the
16 future.

17 And here, that's what we're dealing with. We're dealing
18 with conduct that took place well after the January and July
19 2020 orders that had that exculpatory effect. Is -- is that
20 clear?

21 THE COURT: Understood.

22 MR. BRIDGES: Thank you, Your Honor. So, the four
23 areas of the order, the four functions that the order does
24 that are problematic to us that led us to do what we have done
25 are the gatekeeping function; the release; the fact that by

1 stating sole jurisdiction, that it had a jurisdiction-
2 stripping effect; and then, finally, jurisdiction asserting,
3 where, respectfully, Your Honor, we think to some extent the
4 order goes beyond what this Court's jurisdiction is. And so
5 that not only claiming exclusive jurisdiction, but claiming
6 jurisdiction over all actions against Mr. Seery, as described
7 in the order, is going too far.

8 And those are the four issues I want to talk about one at
9 a time, and here -- I went two screens instead of one. There
10 we go. And here's the order. I have numbered the highlights
11 here out of sequence because this is the sequence that I wish
12 to talk about them and that I think their significance to our
13 decision applies.

14 Before we get into the words of this July 16, 2020 order,
15 I want to mention the January order as well. Although the
16 motion for contempt recites both orders, we don't actually
17 think the January order applies to us, because our lawsuit
18 against Mr. Seery is not about his role as a director at
19 Strand in any way. We didn't make an issue of that, other
20 than in a footnote in our brief, because we don't think that
21 distinction matters much since the orders essentially say the
22 same things.

23 I'm not sure that it matters whether we have potentially
24 violated one order or two. If Your Honor finds we've violated
25 one, I think we're on the hook regardless. If Your Honor

1 finds that we didn't violate the July order, I don't think you
2 will find that we violated the January order, either. So my
3 focus is on the July order.

4 The gatekeeping function comes from the preliminary
5 language about commencing or pursuing a claim or cause of
6 action against Mr. Seery. And it says what you want us to do
7 first before bringing such a claim.

8 The second issue of the release comes a little bit later.
9 It's the colorable claim of willful misconduct or gross
10 negligence language. In other words, because only claims of
11 willful misconduct or gross negligence can pass the bar, can
12 pass muster under this order, that lesser claims -- ordinary
13 negligence and breach of fiduciary duty -- that those claims
14 are released by this order. That's the second argument.

15 Third is your reference to sole jurisdiction and the
16 effect that that has of attempting to say that other courts,
17 courts of original jurisdiction, do not have jurisdiction
18 because it solely resides here. That's the third thing I want
19 to address.

20 And then the fourth is the notion that we have to come to
21 this Court first for any action that fits the description of
22 an action against Mr. Seery, when some actions are, through
23 acts of Congress, removed from what this Court has the power
24 to address. Under 157(d) of Title 28, Your Honor, there are
25 some kinds of actions which withdrawal of the reference is

1 mandatory, and therefore this court lacks jurisdiction to
2 address those.

3 And so those are the four issues I want to tackle,
4 starting with the first, the gatekeeping. Your Honor, Section
5 28 -- Section 959 of Title 28 appears to be precisely on
6 point. It calls -- it is called by some courts an exception
7 to the Barton Doctrine, which we believe is the only basis,
8 the Barton Doctrine, for this Court to claim that it has
9 jurisdiction or sole jurisdiction and can require us to come
10 here first. We think the Barton Doctrine is the only basis
11 for that. We haven't seen anything in the briefing from
12 opposing counsel indicating there was another basis for it.
13 We think we're talking about the Barton Doctrine here as the
14 basis for that.

15 959 is exception to the Barton Doctrine, and we think it
16 explicitly authorizes what we have done.

17 Secondly, Your Honor, the order, the gatekeeping functions
18 of the order are too broad because of its incorporation of the
19 jurisdictional problems and the release problem that we'll
20 talk about later. But for problem number one, the key issue
21 that we're talking about is 959 as an exception to the Barton
22 Doctrine. And I went the wrong way.

23 THE COURT: So, we could go down a lot of rabbit
24 trails today, and I'm going to try not to do that, but are you
25 saying the very common practice of having gatekeeping

1 provisions in Chapter 11 cases is just defective law under 28
2 U.S.C. § 959(a)?

3 MR. BRIDGES: Can I say yes and no?

4 THE COURT: Okay.

5 MR. BRIDGES: Yes, to some extent, for some claims.

6 No as to other claims to another extent. We are not saying
7 gatekeeping orders are altogether wrong, --

8 THE COURT: Okay.

9 MR. BRIDGES: -- no.

10 THE COURT: Okay.

11 MR. BRIDGES: There are problems with gatekeeping
12 orders that do more than what the law, Section 959 in
13 particular, allows them to do.

14 THE COURT: Okay. Be more explicit. I'm not -- I
15 think you're saying, no, except when certain situations exist,
16 but I don't know what the certain situations are.

17 MR. BRIDGES: And Your Honor, you're exactly right.
18 It's complicated, and it takes a long explanation. Let me
19 start --

20 THE COURT: Okay. I really want to know, --

21 MR. BRIDGES: Yeah, me, too.

22 THE COURT: -- since I do these all the time, and
23 most of my colleagues do.

24 MR. BRIDGES: Thank you, Your Honor. And 959 is on
25 the screen. Managers of any property --

1 THE COURT: Uh-huh.

2 MR. BRIDGES: -- is what we're talking about,
3 including debtors in possession. Now, it starts off by saying
4 trustees, receivers. I mean, this is exactly what the Barton
5 Doctrine is about, right? We're talking about trustees and
6 receivers, but not just them. We're also talking about
7 managers of any property, including debtors in possession, --

8 THE COURT: Uh-huh.

9 MR. BRIDGES: -- may be sued without leave of the
10 court appointing that. That's contrary to the Barton Doctrine
11 so far.

12 With respect to what I've numbered five here -- these
13 numbers are mine -- the quote is directly verbatim out of the
14 U.S. Code, but the numbering one through five is mine. With
15 respect to what acts or transactions in carrying on business
16 connected with such property.

17 And so, Your Honor, what we're talking about isn't Barton
18 Doctrine is inapplicable, or you can't have a gatekeeping
19 order for any claims, but it's about managers of property.
20 And one of the hornbook examples of this is the grocery store
21 that files for bankruptcy and then, when --

22 THE COURT: Slip-and-fall.

23 MR. BRIDGES: You've got it, Your Honor.

24 THE COURT: Uh-huh.

25 MR. BRIDGES: And because they're managing property,

1 --

2 THE COURT: So your cause of action, if it went
3 forward, is the equivalent of a slip-and-fall --

4 MR. BRIDGES: Yes, Your Honor.

5 THE COURT: -- in a grocery store?

6 MR. BRIDGES: Yes, Your Honor.

7 THE COURT: Okay. Let me skip ahead. What about the
8 last sentence of 959(a)?

9 MR. BRIDGES: 959(b)? Or 959(a)?

10 THE COURT: No, of 959(a).

11 MR. BRIDGES: What we're looking at here?

12 THE COURT: That's the sentence that I have always
13 thought was one justification for a gatekeeper provision. And
14 I know, you know, a lot of others feel the same.

15 MR. BRIDGES: Are we talking about what I have listed
16 in number five here?

17 THE COURT: No. I'm talking about the last sentence
18 of 959(a). Such actions, okay, shall be subject to the
19 general equity power of such court, you know, meaning the
20 Bankruptcy Court, so far as the same may be necessary to the
21 ends of justice, but this shall not deprive a litigant of his
22 right to a trial by jury.

23 Isn't that one of the provisions that lawyers sometimes
24 rely on in arguing a gatekeeper provision is appropriate?

25 MR. BRIDGES: Certain --

1 THE COURT: You, Bankruptcy Judge, have the power,
2 the general equity power, so far as the same may be necessary
3 to the ends of justice?

4 MR. BRIDGES: Your Honor, you bet. Absolutely, there
5 is equitable power to do more. There's no doubt that there
6 are reliance -- there is reliance on that in many instances.
7 So I'm not sure -- I'm not sure I'm responding to your point.

8 THE COURT: Well, again, I think this is the third or
9 fourth argument down the line that really you start with in
10 the analytical framework here, but I guess I'm just saying I
11 always thought a gatekeeping provision was consistent,
12 entirely consistent with 28 U.S.C. § 959(a), the last
13 sentence.

14 MR. BRIDGES: When you're dealing --

15 THE COURT: You disagree with that?

16 MR. BRIDGES: I do, Your Honor.

17 THE COURT: Okay.

18 MR. BRIDGES: And it's not that the Court lacks
19 equitable powers to do more. It's that those equitable powers
20 are affected by when management of other parties, third
21 parties' property is at issue.

22 What we're talking about is similar to yesterday's
23 contempt order. When you set the basis of describing what it
24 is that Highland's business is, that they're a registered
25 investment advisor in the business of buying, selling, and

1 managing assets -- assets, of course, are property, and that
2 property is not just Highland's, but it's third-party
3 property, as if a railroad loses luggage belonging to its
4 customers. Rather than the railroad with a trustee appointed
5 having mismanaged railroad property, we're talking about
6 third-party property here, third-party property that belongs
7 to the CLOs, about a billion dollars of assets in these CLO
8 SPEs that Highland manages.

9 And again, the slide that Mr. Sbaiti showed you showing
10 Highland, yes, they manage their own assets, the assets of the
11 Debtor, but also of the third parties, including the
12 Charitable DAF and CLO Holdco, and that the Advisers Act
13 imposes fiduciary duties on them that are unwaivable when
14 they're doing that.

15 In *Anderson*, the Fifth Circuit called 959 an exception to
16 the rule requiring court's permission for leave to sue. In
17 *Hoffman v. City of San Diego* much more recently, relying on
18 this statute again, the court rejected a *Barton* challenge and
19 called it a statutory exception. And in *Barton* itself, from a
20 century ago, the U.S. Supreme Court even acknowledged there
21 that where a receiver misappropriated the property of another
22 -- not the debtor's property, the property of another -- that
23 the receiver could still be sued personally, without leave of
24 court.

25 Absent *Barton*, absent applicability of the Barton

1 Doctrine, Your Honor, the gatekeeper order is problematic.

2 *Barton* applies where a court has appointed a trustee, and
3 I don't think, Your Honor, under the circumstances in this
4 case, that it is fair to say Mr. Seery was appointed, as
5 opposed to approved by this Court. And it involves a
6 trustee's actions under the powers conferred on him. The
7 Barton Doctrine is not about a broader exculpation of the
8 trustee.

9 Here, what the Debtor asked for in its motion for
10 approval, approval of hiring Mr. Seery, what it asked for
11 specifically in the motion was that the Court not interfere
12 with corporate decisions absent a showing of bad faith, self-
13 interest, or gross negligence, and asking the Court to uphold
14 the board's decision to appoint Mr. Seery as the CEO as long
15 as they are attributable to any rationale business purpose.

16 At the hearing, Your Honor, at the hearing, we've quoted
17 your comments saying that the evidence amply shows a sound
18 business justification and reasonable business judgment on the
19 part of the Debtor in proposing that Mr. Seery be CEO and CRO.
20 Your Honor, respectfully, those words don't sound like the
21 judge using its discretion to choose -- appoint a trustee.
22 They sound like the Court exercising deference to the business
23 judgment of a business. And appropriately so. We don't have
24 trouble with application of the business judgment rule. Our
25 problem is with application of it and the Barton Doctrine.

1 Those two do not go together. A trustee has protection
2 because it's acting under color of the court that appointed
3 it. A court that merely deferred to someone else's
4 appointment, that's not what the Barton Doctrine is about.
5 The Barton Doctrine is about the court's function that the
6 trustee takes on, not deference to the business judgment of
7 the debtor in possession or the other fiduciary appointed by
8 the court.

9 Problem one was the gatekeeping. Problem two is about the
10 release and the *Applewood* case. Your Honor, again, ordinary
11 negligence and ordinary fiduciary duty breaches do not rise to
12 the level of gross negligence and willful misconduct. And
13 because of that, the language of this order appears to be
14 barring them entirely. No entity may bring a lawsuit against
15 Mr. Seery in certain circumstances without the Bankruptcy
16 Court doing what? Determining that the cause of action
17 represents a colorable claim of willful misconduct or gross
18 negligence against Mr. Seery.

19 A breach of fiduciary duty under the Advisers Act can be
20 unintentional, it can fall short of gross negligence by miles,
21 and to exculpate Mr. Seery from those kinds of claims entirely
22 is to make him no longer a fiduciary. A fiduciary duty that
23 is unenforceable makes someone not a fiduciary. That's
24 plainly not what Mr. Seery thinks his role is. It's
25 inconsistent with the Advisers Act. And Your Honor, the

1 notion that he would not owe his clients fiduciary duties as
2 he manages their assets would require disclosures under the
3 SEC regulations. It creates all kinds of problems to state
4 that a fiduciary under the Advisers Act does not have
5 enforceable fiduciary duties. The order appears to be
6 releasing all of those. But for *Applewood's* specificity
7 requirement, it would be doing that.

8 As an asset manager under the Advisers Act, Mr. Seery is
9 managing assets belonging to CLO Holdco and The Charitable
10 DAF. That's precisely what the District Court action is
11 about, those fiduciary duties. And Mr. Seery, in describing
12 these recently in testimony here -- forgive me for reading
13 through this, Your Honor, but it is pretty short -- Mr. Seery
14 testifies, I think, from a high level, the best way to think
15 about the Debtor is that it's a registered investment advisor.
16 As a registered investment advisor, which is really any
17 advisor of third-party money over \$25 million, it has to
18 register with the SEC and it manages funds in many different
19 ways. The Debtor manages approximately \$200 million current
20 values -- it was more than that of the start of the case -- of
21 its own assets.

22 I'm pausing there, Your Honor. \$200 million of its own
23 assets, but we're about to talk about third-party assets.

24 It doesn't have to be a registered investment advisor for
25 those assets, but it does manage its own assets, which include

1 directly-owned securities, loans, from mostly related entities
2 but not all, and investments in certain funds, which it also
3 manages.

4 And then here it comes: In addition, the manager -- the
5 Debtor manages about roughly \$2 billion, \$2 billion in total
6 managed assets, around \$2 billion in CLO assets, and then
7 other entities, which are hedge funds or PE style.

8 We also had to get a very good understanding of each of
9 the funds that we manage. And as I said, the Investment
10 Advisers Act puts a fiduciary duty on Highland Capital to
11 discharge its duty to the investors. So while we have duties
12 to the estate, we also have duties, as I mentioned in my last
13 testimony, to each of the investors in the funds.

14 Now, some of them are related parties, and those are a
15 little bit easier. Some of them are owned by Highland. But
16 there are third-party investors in these funds who have no
17 relation whatsoever to Highland, and we owe them a fiduciary
18 duty both to manage their assets prudently but also to seek to
19 manage -- maximize value.

20 Those duties do not require -- requires the opposite of
21 what I mean. They don't merely require avoiding gross
22 negligence or willful wrongdoing. When you're managing assets
23 of others, the fiduciary duties that you owe are far stricter
24 than that. The highest duty known to law is a fiduciary duty.

25 The order is inconsistent with that testimony,

1 acknowledging the fiduciary duties owed to The Charitable DAF
2 and to CLO Holdco. It appears to release the Debtor -- maybe
3 not the Debtor. My slide may be wrong about that. It appears
4 to release Seery from having to uphold these duties.

5 In addition to problems with the gatekeeping under the
6 Barton Doctrine, in addition to the release problem and
7 *Applewood* and the unwaivable fiduciary duties under the
8 Advisers Act, there's also a problem with telling other courts
9 that they lack jurisdiction. Your Honor knows bankruptcy
10 court law -- bankruptcy -- and the Bankruptcy Code far better
11 than I do, I'm certain. But a first principle, I believe, of
12 bankruptcy law is that this Court's jurisdiction is derivative
13 of the District Court's. And the only doctrine I've heard of
14 that can allow this Court to exercise exclusive jurisdiction
15 of the District Court that it sits in is the Barton Doctrine,
16 which, again, is very problematic to apply in this case, for
17 the reasons we've discussed already.

18 By claiming to have -- by stating in the order that this
19 Court has sole jurisdiction, it appears to either be inclusive
20 of the District Court, which I understand Your Honor doesn't
21 think her order can be read that way, but if it's not read
22 that way, then it results in telling the District Court that
23 it doesn't have the original jurisdiction that Congress has
24 given it. And that's problematic in the order as well.

25 THE COURT: Let me ask you. If you think the word

1 "power" had been used, or "authority," versus "jurisdiction,"
2 that would have cured it?

3 MR. BRIDGES: I think there would still have been
4 other problems. Would it have cured this? I don't think so,
5 Your Honor, because, again, I think the only basis for that
6 power is the Barton Doctrine.

7 THE COURT: Okay.

8 MR. BRIDGES: To listen to opposing counsel, you'd
9 think that our jurisdictional argument was entirely about the
10 jurisdiction stripping. It's not. Frankly, Your Honor,
11 that's maybe even a lesser point. A key problem here to is
12 the assertion of jurisdiction, not over any of the claims, but
13 over all of the claims, because of 157(d), Your Honor, because
14 some claims, some causes of action, have been put outside the
15 reach of bankruptcy, the Bankruptcy Court, and those actions
16 may in some instances fit within your description of the cases
17 that are precluded here.

18 That's a problem jurisdictionally with this Court's
19 ability to say it retains jurisdiction or that it has, that it
20 asserts jurisdiction. Over what? Any kind of claim or cause
21 of action against Mr. Seery relating in any way to his role as
22 the chief executive officer and chief restructuring officer of
23 the Debtor.

24 Some claims that fit into that bucket also fit into the
25 description in 157(d) of cases that require both consideration

1 of bankruptcy law and federal laws affecting interstate
2 commerce or regulating it. Right? Some cases must fall into
3 -- under 157(d), despite having something to do with Mr.
4 Seery's role as a chief executive officer. And Your Honor,
5 the Advisers Act fiduciary duty claims asserted by Respondents
6 in the District Court are such claims. They cannot be decided
7 without considering the Advisers Act.

8 There are also RICO claims that, of course, require
9 consideration of the RICO statute. But the Advisers Act
10 claims absolutely require consideration of both bankruptcy law
11 and this Court's order exonerating -- exculpating Mr. Seery
12 from some liability, in addition to the unwaivable fiduciary
13 duties imposed by the Advisers Act.

14 The assertion of jurisdiction here blanketed, in a blanket
15 manner, over all claims against Mr. Seery in any way related
16 to his CEO role is a 157(d) problem that the order has no --
17 has no solution for and we see no way around. 157(d) requires
18 withdrawal of the reference, makes it mandatory, when a case
19 requires considerations of federal law implicating interstate
20 commerce.

21 Your Honor, we think we had to do it the way we did,
22 filing in the District Court instead of filing here, in order
23 to preserve our jurisdictional arguments. To come to this
24 Court with a motion and then what? Immediately file a motion
25 to withdraw the reference on our own motion here? To come

1 here and ask for a decision on colorability, when first
2 colorability would exclude the claims that we're trying to
3 bring, at least some of them, the mere negligence, mere
4 fiduciary duty breaches, because they don't rise to the level
5 necessarily of gross negligence or willful wrongdoing.

6 Your Honor, coming here and asking this Court to rule on
7 that may well have waived our jurisdictional objections.
8 Coming here to this Court and doing that and immediately
9 filing a motion --

10 THE COURT: I don't get it.

11 MR. BRIDGES: The ordinary --

12 THE COURT: Subject matter jurisdiction, if it's a
13 problem, it's not waivable.

14 MR. BRIDGES: The ordinary issue -- the ordinary
15 waiver rule, Your Honor, is that when you come and ask for a
16 court to rule on something, that you waive your right to -- to
17 later -- you're estopped judicially from taking the contrary
18 position.

19 THE COURT: Okay. Well, again, I don't get it. If
20 you filed your motion and I ruled in a way you didn't like,
21 you would appeal to the District Court.

22 MR. BRIDGES: Yes, Your Honor. An appeal to the
23 District Court, we would be entitled to do. I understand, no
24 matter what happens here, we can appeal to the District Court.
25 That's different from whether or not, by coming here first,

1 have we waived or have we created an estoppel situation, in
2 terms of arguing jurisdiction.

3 THE COURT: Okay.

4 MR. BRIDGES: Because of the problems with the order,
5 we thought we were in a situation where coming here would
6 waive rights that we could avoid waiving by asking in the
7 District Court.

8 In other words, there was a jurisdictional paradox: How
9 does a party ask a court to do something it believes the court
10 lacks the power to do? That's the spot we found ourselves in.
11 What were we supposed to do?

12 Your Honor, it is definitely a complex case. And coming
13 into this matter with over 2,000 filings on the docket before
14 I had ever heard of Highland was a very daunting thing, coming
15 into this case. And whether or not there's something that we
16 missed is certainly possible, but these orders that are the
17 subject of the contempt motion, these orders are not things
18 that we overlooked. These are things that we studied
19 carefully, that we did not ignore or have disdain for, but
20 that affected and changed our actions.

21 And in the Slide #3 from Mr. Morris's -- from Mr. Morris's
22 presentation, in his third slide, he quotes from the first
23 page of our motion for leave, the motion that he says exhibits
24 our contemptuous behavior.

25 The second paragraph is kind of tiny print there, Your

1 Honor, and it's not highlighted, but I'd like to read it.
2 Seery is not named in the original complaint, but this is only
3 out of an abundance of caution due to the Bankruptcy Court in
4 HCM's pending Chapter 11 proceeding having issued an order
5 prohibiting the filing of any causes of action against Seery
6 in any way related to his role at HCM, subject to certain
7 prerequisites. In that order, the Bankruptcy Court also
8 asserts sole jurisdiction over all such causes of action.

9 Your Honor, our intent was not to violate the order. Our
10 intent was to be cautious about how we proceeded, to fully
11 disclose what we were doing, and to do it in a District Court
12 that absolutely could refer the matter here to this Court for
13 a decision, but to do it in a way that didn't waive our
14 jurisdictional arguments, that didn't waive our arguments
15 regarding the release of the very claims we were trying to
16 bring, by first having to prove that they were colorful claims
17 of willful misconduct or gross negligence, when we were trying
18 to assert claims that weren't willful negligence or gross --
19 gross negligence or willful misconduct. That was what I was
20 trying to say.

21 Your Honor, this was not disregard of your order. If
22 we're wrong on the law, we're wrong on the law, but it's not
23 that we disregarded your order or lacked respect for it. We
24 disclosed it.

25 Mr. Morris has argued in the briefs that we attempted to

1 do this on an ex parte basis. Your Honor, we did not attempt
2 to do this on an ex parte basis. And if there are errors,
3 they probably are mine. I know one error is mine. On the
4 civil cover sheet in the filing in the District Court, I noted
5 and passed on that we should check the box for related case
6 and list this case on there. I did not follow up to make sure
7 that it happened, and administratively, it didn't happen. We
8 did not check the box on the civil cover sheet. Mr. Morris is
9 correct that we failed to do that. He's incorrect that that
10 was sneaky or intentional. It was my error, having noticed it
11 but not followed up.

12 Your Honor, similarly, the argument that we didn't serve
13 them with the motion I think is disingenuous. What happened,
14 Your Honor, is that counsel for the Debtor had agreed to
15 accept service of the complaint itself against the Debtor
16 before the motion for leave, and after accepting service, I
17 was under the impression that they'd be monitoring the docket,
18 especially when I emailed them, informed them that we were
19 filing the motion for leave to amend, because I was required
20 to submit a certificate of conference on that motion. I
21 informed them in a polite email. The polite email is not
22 quoted in their brief. It is included in the record, and it's
23 quoted in full in our brief.

24 The email exchange indicates to them, Thank you for
25 pointing out the Court's orders. We've carefully studied them

1 and we don't think what we're doing is a violation of those
2 orders.

3 That we didn't serve them is because we thought they
4 already knew that the motion was coming and would be
5 monitoring the docket, and we didn't know which lawyers they
6 were going to have make an appearance in that case, so we
7 wouldn't have known who to serve. But if not serving them --
8 first, the Rules do not require that service. But if not
9 serving them out of politeness --

10 THE COURT: Mr. Morris is standing up. Did --

11 MR. MORRIS: I move to strike all of this, Your
12 Honor. If Counsel wants to take the stand and raise his hand,
13 he should testify under oath. I'm just going to leave it at
14 that. He's not on their witness list.

15 THE COURT: All right. I overrule. You can
16 continue.

17 MR. BRIDGES: Thank you, Your Honor.

18 If failure to serve them was an error, it was mine. I
19 know of no rule that requires it.

20 THE COURT: Can I ask you, you were talking about the
21 cover sheet mistake in not checking the box. What about your
22 jurisdictional statement in the actual complaint not
23 mentioning 28 U.S.C. § 1334 as a possible basis for subject
24 matter jurisdiction? Do you think that was a mistake as well,
25 or was that purposeful, not necessary?

1 MR. BRIDGES: Candidly, Your Honor, standing here
2 right now, I have no recollection whatsoever of it.

3 THE COURT: You mention 28 U.S.C. § 1331, and then
4 1367 supplemental jurisdiction, but you don't mention 1334.

5 MR. BRIDGES: I suspect it's true, but Mr. Sbaiti
6 would have written that.

7 THE COURT: Okay.

8 MR. BRIDGES: I have no recollection of --

9 THE COURT: Okay.

10 MR. BRIDGES: -- making any decision at all --

11 THE COURT: All right.

12 MR. BRIDGES: -- with regards to that.

13 THE COURT: Okay.

14 MR. BRIDGES: Your Honor, you've been very patient
15 with a very long opening argument, and I'm very grateful for
16 that. Please know that we take this Court's order seriously.
17 We voluntarily appeared here before the Court ordered us to do
18 so by filing our motion asking for a modification of the order
19 we're accused now of having been in violation of.

20 And the last thing I'd like to say, Your Honor, Mr.
21 Morris's brief claims that the first he knew of the motion,
22 the motion seeking leave to add Mr. Seery to the District
23 Court claim, the first he knew of that was when Mr. Sbaiti
24 forwarded him the District Court's order dismissing that
25 motion, denying that motion without prejudice.

1 Your Honor, in a civil contempt proceeding, where the
2 issue is compensating, not punishing, if the aggrieved party
3 didn't even know about the action until it had been denied by
4 the District Court, we submit that there can be no harm from
5 that having taken place.

6 That's all I have for opening. Thank you, Your Honor.

7 THE COURT: All right. Thank you.

8 Before we give you a time check, do we have other opening
9 statements?

10 MR. ANDERSON: Yes. Yes, Your Honor. Michael
11 Anderson on behalf of Mr. Patrick. If we need to take a
12 break, that's fine, too.

13 THE COURT: Well, how long do you plan to use?

14 MR. ANDERSON: No more than ten minutes, for sure.

15 THE COURT: Let's go ahead and do that, and then
16 we'll take a break.

17 MR. POMERANTZ: Your Honor, after, I would ask the
18 opportunity to respond to Mr. Bridges' argument. Probably
19 another ten minutes.

20 THE COURT: All right. Let's go ahead and take a
21 ten-minute break. And Mr. Taylor, you're going to have
22 something, because you --

23 MR. TAYLOR: Five.

24 THE COURT: Okay. We'll take a ten-minute break.

25 And Nate, can you give them a time?

1 THE CLERK: I'm showing it was about 59-1/2 minutes.

2 THE COURT: Fifty-nine and a half? And is that
3 subtracting some for my questioning?

4 THE CLERK: I stopped whenever you talked, maybe a
5 little over --

6 THE COURT: Okay. So he stopped it whenever I asked
7 questions and you answered, so 59 minutes has been used by the
8 Respondents.

9 All right. We'll take a ten-minute break. We'll come
10 back at 11:35.

11 THE CLERK: All rise.

12 (A recess ensued from 11:25 a.m. to 11:37 a.m.)

13 THE COURT: All right. We're going back on the
14 record in the Highland matter. We have further opening
15 statements. Counsel, you may proceed.

16 OPENING STATEMENT ON BEHALF OF MARK PATRICK, RESPONDENT

17 MR. ANDERSON: Thank you. May it please the Court,
18 Counsel. Michael Anderson on behalf of Respondent, Mark
19 Patrick.

20 Your Honor, after listening to this and looking at the
21 filings in this case, this issue of whether there's contempt
22 -- and I would argue there's not -- is ripe for decision. We
23 have no real undisputed facts for purposes of the contempt
24 issue. We have your Court's July order, the subject of Mr.
25 Bridge's arguments. We have the Plaintiffs in the underlying

1 lawsuit at issue. They commenced the lawsuit in April of this
2 year. There's absolutely nothing improper about that filing.
3 It's not subject to the contempt. A week later, there is a
4 motion for leave to add Mr. Seery. That's the issue. There's
5 no dispute over that. There's no dispute that Mr. Patrick
6 authorized the filing of the motion for leave.

7 And so then the question becomes we look at the Court's
8 July order, did a motion for leave, did that violate the terms
9 of the order? The motion for leave is not commencing a
10 lawsuit. It's also not pursuing a claim, because whether or
11 not the Court grants the motion, denies the motion, or
12 whatever the Court does, nothing happened, because the day
13 after the motion for leave was filed it was dismissed *sua*
14 *sponte* without prejudice because not all parties had been
15 served in the case.

16 It was permission asked one day. The matter was mooted
17 the following day by the District Court. And so that is
18 completely undisputed.

19 And so the question is, is asking permission, is that
20 commence? I think everybody says there's no way that's
21 commencing a lawsuit because you have asked permission. The
22 question, then, is it pursuing a claim? And the argument,
23 well, no, that's not pursuing a claim; it's asking permission.

24 And I think it's also important to note that when the
25 motion for leave was filed, there were no secrets there. I

1 mean, I'm coming in this after the fact, representing Mr.
2 Patrick. You look at a motion for leave, and right there on
3 Page 1 it talks about Your Honor's order. Page 2, it quotes
4 the order and it gives the reasons, there's arguments being
5 made as to why that order doesn't bar adding Mr. Seery as a
6 defendant in the lawsuit, many of the arguments that Mr.
7 Bridges made.

8 So that's where we are. And so when I hear, hey, we've
9 got six hours, three hours and three hours, and we're going to
10 split this up, you know, maybe too simplistic from Fort Worth,
11 but I'm like, wait a second, this is all undisputed. It's
12 totally undisputed. The -- whether or not the prior order is
13 enforceable or not enforceable, those are all legal arguments.
14 You know, no witnesses are necessary for that. And as I
15 understood, right before we broke, counsel stood up and he's
16 going to do what generally doesn't happen in opening
17 statements, which is respond to opening statements, which
18 shows that that's a legal issue.

19 And so it really does come down to undisputed facts.
20 There's no testimony. No -- nothing is necessary. And a lot
21 of what this comes down to is the old statement, you know, is
22 it better to ask forgiveness or permission? And usually that
23 statement comes up when somebody has already done something:
24 Hey, I'm going to go do it anyway and I'll ask for forgiveness
25 later. Well, what the Plaintiffs in the underlying case did

1 was ask permission. Motion for leave. That is not
2 contemptuous. And there's literally no damages. As was
3 pointed out, by the time counsel found out, it had already
4 been dismissed.

5 The last thing I want to point out, Your Honor, is that
6 the argument from opposing counsel was, well, under Rule 15 of
7 the Federal Rules of Civil Procedure, since parties hadn't
8 answered yet, the Plaintiffs in the underlying case could have
9 just simply added Mr. Seery as a defendant and moved on that
10 way, but then that would be another ball of wax and then we
11 would be addressing issues as far as whether or not there is a
12 violation of the Court's order, notwithstanding Mr. Bridge's
13 arguments. But then we would have those issues. But that's
14 not what happened. Everybody knows that's not what happened.
15 It was a motion for leave that was resolved the following day.

16 And so, Your Honor, for those reasons, and those
17 undisputed reasons, we would request that the Court at the end
18 of this hearing deny the request for sanctions and a contempt
19 finding against our client, Mr. Patrick.

20 Mr. Phillips is going to address one brief issue
21 bankruptcy-wise I believe that was raised earlier.

22 THE COURT: Okay. Mr. Phillips?

23 MR. PHILLIPS: Your Honor, thank you very much.
24 Louis M. Phillips on behalf of Mark Patrick.

25 The only thing that I would point out, Your Honor, and I'm

1 going to do -- try to simplistically, because that's about the
2 level at which I operate, boil down the questions about the
3 order.

4 This order was an employment order. The problem that Mr.
5 Bridges has elucidated to Your Honor is that the precise
6 effect, one of the precise effects of that order is to bar the
7 claims of third parties that arise into the future on the
8 basis of the employment of Mr. Seery, because the order
9 required that all claims asserting gross negligence or willful
10 misconduct need to be brought before you to determine that
11 they're colorable.

12 One question I have is, does it apply to the lawsuit that
13 was filed? Doesn't apply unless the effect of the order was
14 to release those claims and preclude any party from bringing
15 those claims at all. And while you can say correctly that
16 this Court issues gatekeeper orders all of the time, one thing
17 I cannot imagine that you would say is that in employment
18 orders you release claims of third parties existing and as may
19 arise in the future that could be brought against the party
20 employed to be a CRO of a debtor, who, by his own testimony,
21 says we do all kinds of stuff in the billions of dollars for
22 third parties that we owe fiduciary duties to.

23 There's no way, Your Honor, that you were considering your
24 July order to bar third-party claims arising from breach of
25 fiduciary duties by Mr. Seery to third parties who held third-

1 party claims that did not involve some assertion that, in his
2 capacity as CRO, he was in some way acting within the scope of
3 his authority as CRO for the Debtor and yet committed
4 negligence against the Debtor.

5 Now, if the order was asserting that you know what a lot
6 of people in this courtroom know, that the standard of
7 liability for a CRO doing work for a debtor, just like the
8 standard of liability for the president of a corporation or an
9 officer of the corporation, is as long as you're within the
10 course and scope of your employment, your actions for the
11 corporation have -- can -- the corporation takes care of you
12 because there's no personal claim unless you're outside the
13 scope, and you're outside the scope if you commit gross
14 negligence or willful misconduct.

15 That, if you're restating the standard of care and
16 standard of liability for a CRO, we have no problem with that,
17 because Mr. Patrick did not authorize a cause of action
18 arising against Mr. Seery against the Debtors for damage to
19 the Debtors. He authorized the filing of a complaint in the
20 District Court with jurisdiction for a third-party claim for
21 breach of a fiduciary duty to a third party that Mr. Seery
22 admits he owes, and then sought leave because they didn't
23 understand the order that Your Honor issued. It couldn't have
24 been to release the breach of fiduciary duty claims that
25 wouldn't rise to gross negligence or willful misconduct, it

1 couldn't be that, but it might be. But if it did, under an
2 employment order? That's very different from *Espinosa*, that's
3 very different from *Shoaf*, when you're at the end of a case in
4 a confirmation of a plan and you're talking about matters
5 arising in the past.

6 This order, if it has the effect it could be read to have,
7 precludes any third party from asserting a breach of fiduciary
8 duty against Seery for actions that violate the duty to that
9 third party, when Seery's biggest job, it looks to us like, is
10 running third-party money. That could not have been what Your
11 Honor was thinking.

12 And so all I'm pointing out is I'm trying to distill down.
13 The lawsuit doesn't involve gross negligence or willful
14 misconduct allegations. It involves breach of fiduciary duty,
15 breach of the Advisers Act, et cetera, et cetera. Mr. Patrick
16 authorized that lawsuit.

17 Now, what we're here for today is to determine whether the
18 complaint, which was not against the Debtor -- which was not
19 against Seery, the motion for leave, which did not -- all they
20 did was ask for permission, not forgiveness. And we can't
21 understand how the Debtor should be saying, all they had to do
22 was amend. Well, if they amended, would we be in hotter water
23 than we are today for asking for permission to sue? I think
24 we would have been, that should have been the prescribed
25 course, when we are more concerned and we are more risk-averse

1 by asking for leave rather than just amending by right.

2 Absolutely, that makes no sense. We can't be held to be more
3 contemptuous because we asked for permission, when we could
4 have just sued him, because they're saying asking for
5 permission was wrong. Certainly, suing him would have been
6 wrong. That would have been easier.

7 THE COURT: But Mr. Phillips, the issue is you all
8 didn't come to the Bankruptcy Court and ask permission.

9 MR. PHILLIPS: Look at your order, Your Honor.

10 THE COURT: It's right in front of me.

11 MR. PHILLIPS: Right. That order either doesn't
12 apply to the claims that were brought or it released the
13 claims that were brought. That's our point. It couldn't have
14 released them. Does it apply to them? Thank you.

15 THE COURT: Okay. Mr. Taylor?

16 MR. TAYLOR: Good morning.

17 THE COURT: Good morning.

18 OPENING STATEMENT ON BEHALF OF JAMES DONDERO

19 MR. TAYLOR: Your Honor, Clay Taylor on behalf of Jim
20 Dondero. I'll be very brief because I know we've already
21 spent a lot of time on opening argument. But I do think it is
22 appropriate to, one, first look at who brought the lawsuit,
23 CLO Holdco & DAF. That was authorized -- it's undisputed it
24 was authorized by Mr. Patrick. There is no dispute about
25 that. There's no dispute who the Plaintiffs are. But yet my

1 client is up here as an alleged violator.

2 I think it's very clear, as all the parties have said,
3 there's no dispute as to there's an order, there was a
4 complaint, and there was a motion for leave.

5 It seems to me that the rest of the evidentiary hearing
6 that you may be about to go through is going to be about pin
7 the blame on Mr. Dondero. It is undisputed that he is not a
8 control person for the DAF or CLO Holdco. The only type of
9 evidence you will hear is going to be insinuation that he
10 somehow controls Mr. Patrick and used to control Mr. Scott.
11 There will be no direct evidence that he authorized this or
12 that he's the control person and the proper corporate
13 authorized representative that signed off on the --

14 It seems to me, Your Honor, first of all, that's a
15 discrete issue that should be able to be decided separately
16 from this, and the first gating issue is, was there indeed a
17 violation of this Court's order? It would seem to me that
18 there is no disputes about those facts and that we should
19 bifurcate that, and if you then find that there is a violation
20 and find that there is any even need to move into who the
21 alleged violators are, that then we could have that
22 evidentiary portion. But there is no reason to do that now
23 before there's even been found to be a violation.

24 THE COURT: All right. Thank you.

25 All right. Well, someone made the point rebuttals in

1 opening statements are not very common, --

2 MR. POMERANTZ: Your -- Your --

3 THE COURT: -- but you can use your three hours
4 however you want.

5 OPENING STATEMENT ON BEHALF OF THE DEBTOR

6 MR. POMERANTZ: Your Honor, I didn't intend to stand
7 up.

8 THE COURT: Okay.

9 MR. POMERANTZ: I also didn't intend to have the
10 motion to modify the sealing order presented to Your Honor,
11 which it was in the course of that opening argument. And
12 despite your comments at the beginning of the hearing, the
13 Movants have taken Your Honor down a series of rabbit holes
14 that have really no relevance to the contempt motion. And
15 notwithstanding, as I said, your ruling that basically the
16 contempt would go first and the modification would go second,
17 there they were, persistent in making all the arguments why
18 this Court should modify the order.

19 They're just really trying to obfuscate the simple issue
20 that Mr. Morris presented and raised at the beginning of the
21 hearing: Did they violate the order by pursuing a claim? We
22 think the answer is undoubtedly yes.

23 I'm not going to try to address each of the issues they
24 raised in connection with the modification motion in detail.
25 I have a lengthy presentation. I'll do it at the appropriate

1 time. But there are a few issues I want to address. I want
2 to address one of the last points Mr. Bridges raised first.
3 If they thought that the order was a problem, they could have
4 filed their motion to modify that order before Your Honor.
5 They could have had that heard first. There was no statute of
6 limitations issue in connection with the HarbourVest matter.
7 They could have come to Your Honor to do that. But no, they
8 didn't. They went to the District Court first, and it was
9 only after we filed our contempt motion that they came back
10 and said, well, Your Honor, you should modify the order.
11 Their argument that if they did that there would have been
12 waiver and estoppel is just an after-the-fact justification
13 for what they did and what they tried to do, which was
14 unsuccessful. They tried to have the District Court make the
15 decision.

16 And why? Your Honor, they've filed motions to recuse
17 before Your Honor. They -- they -- it's no secret the disdain
18 they have for Your Honor's rulings as it relates to them.
19 They wanted to be out of this courtroom and in another
20 courtroom.

21 And their belated argument, Mr. Bridges falling on the
22 sword, that they failed to check the box, inadvertent, it's on
23 me, it's very curious. Because if they had done so and had
24 referred to the correct 1334 jurisdictional predicate, as Your
25 Honor had mentioned, the complaint would have been referred to

1 this Court and the entire trajectory of the proceedings would
2 have been different. They would have had the opportunity to
3 take their shot to go to District Court and argue that your
4 order didn't apply.

5 Your Honor, they say the January 9th order is not
6 relevant. It is entirely relevant. It covered the
7 independent directors and their agents. Yes, Mr. Seery is an
8 independent director, but he was also an agent of the
9 independent directors and carried out the duties. You heard
10 argument at the July 16th hearing that Mr. Seery had been
11 acting as the chief executive officer for several months. And
12 why is it important? Mr. Bridges said, well, if we violated
13 one order, we violated the other. It's important because,
14 Your Honor, number one, Mr. Dondero supported that order. We
15 would never have had an independent board in this case if Mr.
16 Dondero, the decision-making -- of the Debtor at that time,
17 supported that order and supported the exculpations that are
18 now claimed to have been invalid.

19 And also Your Honor heard testimony at the confirmation
20 hearing that the independent directors would never have taken
21 this job, would never have taken this job because of the
22 potential for litigation, litigation that we've now had to
23 endure for several months. So to come back 16 months later
24 and say, well, you know, you couldn't really exculpate them,
25 it's really an employment order: It was an employment order.

1 They know it. We know it. Your Honor knows it. It was a
2 resolution of corporate governance issues that changed the
3 whole trajectory of the case, and luckily it -- luckily, Your
4 Honor approved it.

5 The question just is whether they violated the order,
6 period. And I'll have a lot to say about res judicata, but I
7 won't go in too much in detail, but I will just briefly
8 address their arguments. They're correct and the Court is
9 correct that there's a difference between *Applewood* and *Shoaf*.
10 And Your Honor got the exact difference. In one case, a
11 release was not specific, *Applewood*. In one case it was.
12 *Shoaf* hasn't been discredited by *Applewood*. It was different
13 facts. In fact, *Shoaf* relied on two Supreme Court cases, the
14 *Stoll* case and the *Chicot* case, both for the propositions that
15 a court that enters an order, a clear order, even if it didn't
16 have jurisdiction, that cannot be attacked in res judicata.
17 So here what we have is clear, unambiguous, you come to this
18 Court before commencing or pursuing a claim. That's the
19 clarity. The focus on the releases, that's not what we're
20 here for today, that's not what we're here for on a contempt
21 motion, on whether the release covered them or it didn't cover
22 them. We're here on the clear issue of did they violate the
23 language, and we submit that they did.

24 And similarly, *Espinosa* applies. Your Honor, just to
25 quote some language, "Appellees could have moved to remand the

1 action to state court after it improperly -- after its
2 improper removal to the federal court or challenge the
3 district court's exercise in jurisdiction on direct appeal.
4 Because they did neither, they are now barred by principles of
5 res judicata."

6 Res judicata actually does apply, and I will speak about
7 it in much more detail in the modification motion.

8 With respect to *Barton*, Your Honor, we disagree with their
9 argument that Mr. Seery is not a court-appointed agent. We've
10 briefed it extensively in our motion to modify. *Barton*
11 applies to debtors in possession. *Barton* applies to general
12 partners of the debtor. *Barton* applies to chief restructuring
13 orders -- officers who are approved by the debtor. And it
14 applies to general counsel who are appointed by the chief
15 restructuring order. Officer.

16 So the argument that *Barton* is somehow inapplicable is
17 just wrong. Your Honor knows that. Your Honor has written
18 extensively on *Barton* in connection with your *Ondova* opinion.

19 Some of the argument about 959 is all wrong, as well.
20 Your Honor got it right that 959 applies to slip-and-fall
21 cases or torts, injuries to parties that are strangers to this
22 process. There is a legion of cases that I will cite to Your
23 Honor in connection with argument. 959 does not apply here.
24 There's nothing more core to this case than the transactions
25 surrounding the resolution of the HarbourVest claims.

1 We also disagree, Your Honor, that the complaint is
2 subject to mandatory withdrawal of the reference. We've --
3 one of our exhibits in the motion to modify is our motion to
4 enforce the reference. We think Movants have it completely
5 wrong. This is not the type of case that will be subject to
6 withdrawal -- mandatory withdrawal of the reference, and in
7 any event, for this contempt motion, it's irrelevant.

8 And they argue -- one of the other points Mr. Bridges
9 raises is that, because this Court would not have had
10 jurisdiction under 157 because of the mandatory withdrawal,
11 then Your Honor could not legally act as a gatekeeper. But
12 they haven't addressed *Villegas v. Schmidt*. We've raised it
13 throughout this case. And again, in these series of
14 pleadings, they don't even address it. And *Villegas v.*
15 *Schmidt* was a *Barton* case. It was a *Barton* case where the --
16 where the argument was that *Barton* does not apply because it's
17 a *Stern* claim and the Bankruptcy Court would not have
18 jurisdiction. And *Villegas* said no, it does apply. And Your
19 Honor even cited that in your *Ondova* case. And why does it
20 apply? Because there's nothing inconsistent with a Bankruptcy
21 Court having exclusive decision to make a *Barton*
22 determination.

23 In fact, in that case *Villegas* said, you can't go to the
24 District Court for that decision, it is the Bankruptcy Court's
25 decision.

1 So, again, it's a red herring, Your Honor. Your Honor had
2 the ability to act as an exclusive gatekeeper for these types
3 of actions.

4 With that, Your Honor, I'll leave the rest of my argument
5 for the next motion.

6 THE COURT: All right. Thanks.

7 All right. Nate, let's give everyone their time.

8 THE CLERK: That was just about eight and a half
9 additional from the Debtor, and then altogether the other ones
10 were just shy of fourteen minutes. Thirteen minutes and fifty
11 seconds for the other three combined. Do you want me to --

12 THE COURT: Yes, I meant for Debtor combined versus
13 --

14 THE CLERK: Oh. Oh.

15 THE COURT: Respondents combined.

16 THE CLERK: So that would be twenty one and a half
17 the Debtor. Let me do the math on the other one. Be an hour
18 twelve minutes and fifty seconds for --

19 THE COURT: Okay. All right. Got that? Debtors
20 used a total of twenty one and a half minutes; Responders have
21 used an hour twelve minutes and fifty seconds.

22 All right. Mr. Morris, you may call your first witness.

23 MR. MORRIS: Thank you very much, Your Honor. The
24 Debtor calls Mark Patrick.

25 THE COURT: All right. Mr. Patrick? Please approach

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1 our witness stand and I'll swear you in. Please raise your
2 right hand.

3 (The witness is sworn.)

4 THE COURT: All right. Please take a seat.

5 MARK PATRICK, DEBTOR'S WITNESS, SWORN

6 DIRECT EXAMINATION

7 BY MR. MORRIS:

8 Q Good afternoon, Mr. Patrick.

9 A Good afternoon.

10 Q Can you hear me okay?

11 A Yes, I can.

12 Q Okay. You have before you several sets of binders.

13 They're rather large. But when I deposed you on Friday, we
14 did that virtually. Now, I may direct you specifically to one
15 of the binders or one of the documents from time to time, so I
16 just wanted you to know that those were in front of you and
17 that I may be doing that.

18 Mr. Patrick, since March 1st, 2001 [sic], you've been
19 employed by Highland Consultants, right?

20 A I believe the name is Highgate Consultants doing business
21 as Skyview Group.

22 Q Okay. And that's an entity that was created by certain
23 former Highland employees, correct?

24 A That is my understanding, correct.

25 Q And your understanding is that Mr. Dondero doesn't have an

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1 ownership interest in that entity, correct?

2 A That he does not. That is correct.

3 Q And your understanding is that he's not an employee of
4 that -- of Skyview, correct?

5 A That is correct.

6 Q Prior to joining Skyview on March 1st, you had worked at
7 Highland Capital Management, LP for about 13 years, correct?

8 A Correct.

9 Q Joining in, I believe, early 2008?

10 A Correct.

11 Q Okay. I'm going to refer to Highland Capital Management,
12 LP from time to time as HCMLP. Is that okay?

13 A Yes.

14 Q While at HCMLP, you served as a tax counselor, correct?

15 A No, I would like to distinguish that. I did have the
16 title tax counsel. However, essentially all my activities
17 were in a non-lawyer capacity, being the client
18 representative. I would engage other outside law firms to
19 provide legal advice.

20 Q Okay. So you are an attorney, correct?

21 A Yes, I am.

22 Q But essentially everything you did at Highland during your
23 13 years was in a non-lawyer capacity, correct?

24 A Correct.

25 Q In fact, you didn't even work in the legal department; is

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1 that right?

2 A That is correct. I worked for the tax department.

3 Q Okay. Let's talk about how you became the authorized
4 representative of the Plaintiffs. You are, in fact,
5 authorized representative today of CLO Holdco, Ltd. and
6 Charitable DAF, LP, correct?

7 A Charitable DAF Fund, LP. Correct.

8 Q And those are the two entities that filed the complaint in
9 the United States District Court against the Debtor and two
10 other entities, correct?

11 A Correct.

12 Q And may I refer to those two entities going forward as the
13 Plaintiffs?

14 A Yes.

15 Q You became the authorized representative of the Plaintiffs
16 on March 24th, 2021, the day you and Mr. Scott executed
17 certain transfer documents, correct?

18 A Correct.

19 Q And you had no authority to act on behalf of either of the
20 Plaintiffs before March 24th, correct?

21 A Correct.

22 Q The DAF controls about \$200 million in assets, correct?

23 A The Plaintiffs, you mean? CLO Holdco and Charitable DAF
24 Fund, LP.

25 Q Yes.

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1 A Around there.

2 Q Okay. Let me try and just ask that again, and thank you
3 for correcting me. To the best of your knowledge, the
4 Plaintiffs control about \$200 million in assets, correct?

5 A Net assets, correct.

6 Q Okay. And that asset base is derived largely from HCMLP,
7 Mr. Dondero, or Mr. Dondero's trusts, correct?

8 A Can you restate that question again, Mr. Morris?

9 Q Sure. The asset base that you just referred to is derived
10 largely from HCMLP, Mr. Dondero, or donor trusts?

11 A The way I would characterize it -- you're using the word
12 derived. I would characterize it with respect to certain
13 charitable donations --

14 Q Uh-huh.

15 A -- that were -- that were made at certain time periods,
16 where the donors gave up complete dominion and control over
17 the respective assets and at that time claimed a federal
18 income tax deduction for that.

19 I do -- I do believe that, as far as the donor group, as
20 you specified, Highland Capital Management, I recall, provided
21 a donation to a Charitable Remainder Trust that eventually had
22 expired and that eventually such assets went into the
23 supporting organizations. And then I do believe Mr. Dondero
24 also contributed to the Charitable Remainder Trust No. 2,
25 which seeded substantial amounts of the original assets that

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1 were eventually composed of the \$200 million. And then from
2 time to time I do believe that Mr. Dondero's trusts made
3 charitable donations to their respective supporting
4 organizations.

5 Q Okay. Thank you.

6 A Is that responsive?

7 Q It is. It's very responsive. Thank you very much. So,
8 to the best of your knowledge, the charitable donations that
9 were made that form the bases of the assets came from those
10 three -- primarily from those three sources, correct?

11 A Well, you know, there's two different trusts. There's the
12 Dugaboy Trust and the Get Good Trust.

13 Q Okay.

14 A Then you have Mr. Dondero and Highland Capital Management.
15 So I would say four sources.

16 Q Okay. All right. Thank you. Prior to assuming your role
17 as the authorized representative of the Plaintiff, you had
18 never had meaningful responsibility for making investment
19 decisions, correct?

20 A I'm sorry. You kind of talk a little bit fast. Please
21 slow it down --

22 Q That's okay.

23 A -- and restate it. Thank you.

24 Q And I appreciate that. And any time you don't understand
25 what I'm saying or I speak too fast, please do exactly what

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1 you're doing. You're doing fine.

2 Prior to assuming your role as the authorized
3 representative of the Plaintiffs, you never had any meaningful
4 responsibility making investment decisions. Is that correct?

5 A To whom?

6 Q For anybody.

7 A Well, during my deposition, I believe I testified that I
8 make investment decisions with respect to my family. Family
9 and friends come to me and they ask me for investment
10 decisions. I was -- in my deposition, I indicated to you that
11 I was a board member of a nonprofit called the 500, Inc. They
12 had received a donation of stock in Yahoo!, and the members
13 there looked to me for financial guidance. As an undergrad at
14 the University of Miami, I was a -- I was a finance major, and
15 so I do have a variety of background with respect to
16 investments.

17 Q Okay. So you told me that from time to time friends and
18 family members come to you for investing advice. Is that
19 right?

20 A That is correct.

21 Q And when you were a young lawyer you were on the board of
22 a nonprofit that received a donation of Yahoo! stock and the
23 board looked to you for guidance. Is that correct?

24 THE COURT: Just a moment. I think there's an
25 objection.

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1 MR. MORRIS: Uh-huh.

2 THE COURT: Go ahead.

3 MR. ANDERSON: So far -- relevance, Your Honor. This
4 is way out of the bounds of the contempt proceeding. You
5 know, what he did as a young person with Yahoo! stock. We're
6 here to -- he authorized the lawsuit. They filed the lawsuit.
7 That's it. Getting into all this peripheral stuff is
8 completely irrelevant.

9 THE COURT: Your response?

10 MR. MORRIS: My response, Your Honor, is very simple.
11 Mr. Patrick assumed responsibility, and you're going to be
12 told that he exercised full and complete authority over a \$200
13 million fund that was created by Mr. Dondero, --

14 THE COURT: Okay.

15 MR. MORRIS: -- that funds -- that is funded
16 virtually by Mr. Dondero, and for which -- Mr. Patrick is a
17 lovely man, and I don't mean to disparage him at all -- but he
18 has no meaningful experience in investing at all.

19 THE COURT: All right. Counsel, I overrule. I think
20 there's potential relevance.

21 And may I remind people that when you're back at counsel
22 table, please make sure you speak your objections into the
23 microphone. Thank you.

24 BY MR. MORRIS:

25 Q When you were a young lawyer, sir, you were on the board

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1 of a nonprofit that received a donation of Yahoo! stock and
2 the board looked to you for guidance, correct?

3 A Yes, correct.

4 Q And -- but during your 13 years at Highland, you never had
5 formal responsibility for making investment decisions,
6 correct?

7 A That is correct.

8 Q Yeah. In fact, other than investment opportunities that
9 you personally presented where you served as a co-decider, you
10 never had any responsibility or authority to make investment
11 decisions on behalf of HCMLP or any of its affiliated
12 entities, correct?

13 A That is correct.

14 Q And at least during your deposition, you couldn't identify
15 a single opportunity where you actually had the authority and
16 did authorize the execution of a transaction on behalf of
17 HCMLP or any of its affiliates, correct?

18 A Correct.

19 Q And yet today you are now solely responsible for making
20 all investment decisions with respect to a \$200 million
21 charitable fund, correct?

22 A Yes, but I get some help. I've engaged an outside third
23 party called ValueScope, and they have been as -- effectively
24 working as a "gatekeeper" for me, and I look to them for
25 investment guidance and advice, and I informally look to Mr.

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1 Dondero since the time period of when I took control on March
2 24th for any questions I may have with respect to the
3 portfolio. So I don't feel like I'm all by myself in making
4 decisions.

5 Q Okay. I didn't mean to suggest that you were, sir, and I
6 apologize if you took it that way. I was just asking the
7 question, you are the person now solely responsible for making
8 the investment decisions, correct?

9 A Yes.

10 Q Okay. Let's talk about the circumstances that led to the
11 filing of the complaint for a bit. On April 12, 2021, you
12 caused the Plaintiffs to commence an action against HCMLP and
13 two other entities, correct?

14 A Correct.

15 Q Okay. One of the binders -- you've got a couple of
16 binders in front of you. If you look at the bottom, one of
17 them says Volume 1 of 2, Exhibits 1 through 18. And if you
18 could grab that one and turn to Exhibit 12. Do you have that,
19 sir?

20 A It says -- it says the original complaint. Is that the
21 right one?

22 Q That is the right one. And just as I said when we were
23 doing this virtually last Friday, if I ask you a question
24 about a particular document, you should always feel free to
25 review as much of the document as you think you need to

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Patrick - Direct

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1 competently and fully answer the question. Okay?

2 A Okay. Thank you.

3 Q All right. You instructed the Sbaiti firm to file that
4 complaint on behalf of the Plaintiffs, correct?

5 A Correct.

6 Q And to the best of your recollection, the Plaintiffs
7 returned -- retained the Sbaiti firm in April, correct?

8 A Correct.

9 Q So the Sbaiti firm was retained no more than twelve days
10 before the complaint was filed, correct?

11 A Correct.

12 Q You personally retained the Sbaiti firm, correct?

13 A Correct.

14 Q And the idea of filing this complaint originated with the
15 Sbaiti firm, correct?

16 A Correct.

17 Q Before filing -- withdrawn. Before becoming the
18 Plaintiffs' authorized representative, you hadn't had any
19 communications with anyone about potential claims that might
20 be brought against the Debtor arising out of the HarbourVest
21 settlement, correct?

22 A That is correct.

23 Q Now, after you became the Plaintiffs' authorized
24 representative, Mr. Dondero communicated with the Sbaiti firm
25 about the complaint that's marked as Exhibit 12, correct?

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1 A Yes. After he brought certain information to myself and
2 then that I engaged the Sbaiti firm to launch an
3 investigation, I also wanted Mr. Dondero to work with the
4 Sbaiti firm with respect to their investigation of the
5 underlying facts.

6 Q Okay. Mr. Dondero did not discuss the complaint with you,
7 but he did communicate with the Sbaiti firm about the
8 complaint, correct?

9 A I believe -- yeah. I heard you slip in at the end "the
10 complaint." I know he communicated with the Sbaiti firm. I
11 can't -- I can't say what he said or didn't say with respect
12 to the -- the actual complaint.

13 Q Okay. But Mr. Dondero got involved in the process
14 initially when he brought some information to your attention
15 concerning the HarbourVest transaction, correct?

16 A Correct.

17 Q And he came to you with the HarbourVest information after
18 you assumed your role as the authorized representative of the
19 Plaintiffs on March 24th, correct?

20 A That is correct.

21 Q At the time he came to you, you did not have any specific
22 knowledge about the HarbourVest transaction, correct?

23 A I did not have specific knowledge with respect to the
24 allegations that were laid out and the facts with respect to
25 the original complaint. I think I had just had a general

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Patrick - Direct

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1 awareness that there was a HarbourVest something or other, but
2 the specific aspects of it, I was unaware.

3 Q Okay. And you had no reason to believe that Mr. Seery had
4 done anything wrong with respect to the HarbourVest
5 transaction at the time you became the Plaintiffs' authorized
6 representative, correct?

7 A That is correct.

8 Q But you recall very specifically that some time after
9 March 24th Mr. Dondero told you that an investment opportunity
10 was essentially usurped or taken away, to the Plaintiffs' harm
11 and for the benefit of HCMLP, correct?

12 A That is correct.

13 Q And after Mr. Dondero brought this information to your
14 attention, you hired the Sbaiti firm to launch an
15 investigation into the facts, correct?

16 A Correct.

17 Q You had never worked with the Sbaiti firm before, correct?

18 A That is correct.

19 Q And you had hired many firms as a tax counselor at HCMLP,
20 but not the Sbaiti firm until now. Correct?

21 A That is correct.

22 Q You got to the Sbaiti firm through a recommendation from
23 D.C. Sauter, correct?

24 A Correct.

25 Q Mr. Sauter is the in-house counsel, the in-house general

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1 counsel at NexPoint Advisors, correct?

2 A Correct.

3 Q You didn't ask Mr. Sauter for a recommendation for a
4 lawyer; he just volunteered that you should use the Sbaiti
5 firm. Correct?

6 A That is correct.

7 Q And you never used -- considered using another firm, did
8 you?

9 A When they were presented to me, they appeared to have all
10 the sufficient skills necessary to undertake this action, and
11 so I don't recall interviewing any other firms.

12 Q Okay. Now, after bringing the matter to your action, Mr.
13 Dondero communicated directly with the Sbaiti firm in relation
14 to the investigation that was being undertaken. Correct?

15 A That is correct.

16 Q But you weren't privy to the communications between Mr.
17 Dondero and the Sbaiti firm, correct?

18 A I did not participate in those conversations as the --
19 what I, again, considered Mr. Dondero as the investment
20 advisor to the portfolio, and he was very versant in the
21 assets. I wanted him to participate in the investigation that
22 the Sbaiti firm was undertaking prior to the filing of this
23 complaint.

24 Q Let's talk for a minute about the notion of Mr. Dondero
25 being the investment advisor. Until recently, the entity

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Patrick - Direct

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1 known as the DAF had an investment advisory committee with HC
2 -- an investment advisory agreement with HCMLP. Correct?

3 A It's my understanding that the investment advisory
4 agreement existed with the Plaintiffs, CLO Holdco, as well as
5 Charitable DAF Fund, LP, up and to the end of February,
6 throughout the HarbourVest transaction.

7 Q Okay. And since February, the Plaintiffs do not have an
8 investment advisory agreement with anybody, correct?

9 A That is correct.

10 Q Okay. So Mr. Dondero, if he serves as an investment
11 advisor, it's on an informal basis. Is that fair?

12 A After I took control, he serves as an informal investment
13 advisor.

14 Q Okay. So there's no contract that you're aware of between
15 either of the Plaintiffs and Mr. Dondero pursuant to which he
16 is authorized to act as the investment advisor for the
17 Plaintiffs, correct?

18 A That is correct.

19 Q Okay. When you communicated with Grant Scott --
20 withdrawn. You know who Grant Scott is, right?

21 A Yes, I do.

22 Q He's the gentleman who preceded you as the authorized
23 representative of the Plaintiffs, correct?

24 A Yes.

25 Q Okay. You communicated with Mr. Scott from time to time

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Patrick - Direct

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1 during February and March 2021, correct?

2 A February and March are the dates? Yes.

3 Q Yeah. And from February 1st until March 21st -- well,
4 withdrawn. Prior to March 24th, 2021, Mr. Scott was the
5 Plaintiffs' authorized representative, correct?

6 A Correct.

7 Q And you have no recollection of discussing with Mr. Scott
8 at any time prior to March 24th any aspect of the HarbourVest
9 settlement with Mr. Scott. Correct?

10 A Correct.

11 Q And you have no recollection of discussing whether the
12 Plaintiffs had potential claims that might be brought against
13 the Debtor. Correct? Withdrawn. Let me ask a better
14 question.

15 You have no recollection of discussing with Mr. Scott at
16 any time prior to March 24th whether the Plaintiffs had
17 potential claims against the Debtor. Correct?

18 A That is correct.

19 Q You and Mr. Scott never discussed whether either of --
20 either of the Plaintiffs had potential claims against Mr.
21 Seery. Correct?

22 A Correct.

23 Q Okay. At the time that you became their authorized
24 representative, you had no knowledge that the Plaintiffs would
25 be filing a complaint against the Debtors relating to the

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Patrick - Direct

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1 HarbourVest settlement less than three weeks later, correct?

2 A That is correct.

3 Q Okay. Now, if you look at Page 2 of the complaint, you'll
4 see at the top it refers to Mr. Seery as a potential party.

5 Do you see that?

6 A Yes, I do.

7 Q Okay. You don't know why Mr. Seery was named --
8 withdrawn. You don't know why Mr. Seery was not named as a
9 defendant in the complaint, correct?

10 A No, I -- that's correct. I do not know why he was not
11 named. That's in the purview of the Sbaiti firm.

12 Q Okay. And the Sbaiti firm also made the decision to name
13 Mr. Seery on Page 2 there as a potential party when drafting
14 the complaint, correct?

15 A That's what the document says.

16 Q And you weren't involved in the decision to identify Mr.
17 Seery as a potential party, correct?

18 A That is correct. Again, I rely on the law firm to decide
19 what parties to bring a suit to -- against.

20 Q Okay. Okay. Do you recall the other day we talked about
21 a document called the July order?

22 A Yes.

23 Q Okay. That's in -- that's in Tab 16 in your binder, if
24 you can turn to that. And take a moment to look at it, if
25 you'd like. And my first question is simply whether this is

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1 the July order, as you understand it.

2 (Pause.)

3 A Yes, it is. I was just looking for the gatekeeper
4 provision. It looks like it's Paragraph 5. So, --

5 Q Okay. Thank you for that. About a week after the
6 complaint was filed, you authorized the Plaintiffs to file a
7 motion in the District Court for leave to amend the
8 Plaintiffs' complaint to add Mr. Seery as a defendant.
9 Correct?

10 A I authorized the filing of a motion in Federal District
11 Court that would ask the Federal District Court whether or not
12 Jim Seery could be named in the original complaint with
13 respect to the gatekeeper provision cited in that motion and
14 with respect to the arguments that were made in that motion.

15 Q Okay. Just to be clear, if you turn to Exhibit 17, the
16 next tab, --

17 A I'm here.

18 Q -- do you see that document is called Plaintiffs' Motion
19 for Leave to File First Amended Complaint?

20 A Yes.

21 Q And that's the document that you authorized the Plaintiffs
22 to file on or about April 19th, correct?

23 A Correct.

24 Q Okay. And can we refer to that document as the motion to
25 amend?

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1 A Yes.

2 Q Okay. You were aware of the July order at Tab 16 before
3 you authorized the filing of the motion to amend. Correct?

4 A Yes, because it's cited in the motion itself.

5 Q Okay. And at the time that you authorized the filing of
6 the motion to amend, you understood that the July order was
7 still in effect. Correct?

8 A Yes, because it was referenced in the motion, so my
9 assumption would be it would still be in effect.

10 Q Okay. Before the motion to amend was filed, you're -- you
11 are aware that my firm and the Sbaiti firm communicated by
12 email about the propriety of filing the motion to amend?

13 A Before it was filed? Communications between your firm and
14 the Sbaiti firm? I would have to have my recollection
15 refreshed.

16 Q I'll just ask the question a different way. Did you know
17 before you authorized the filing of the motion to amend that
18 my firm and the Sbaiti firm had engaged in an email exchange
19 about the propriety of filing the motion to amend in the
20 District Court?

21 A It's my recollection -- and again, I could be wrong here
22 -- but I thought the email exchange occurred after the fact,
23 not before. But again, I -- I just --

24 Q Okay. In any event, on April 19th, the motion to amend
25 was filed. Correct?

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1 A Correct.

2 Q That's the document that is Exhibit 17. And you
3 personally authorized the Sbaiti firm to file the motion to
4 amend on behalf of the Plaintiffs, correct?

5 A Correct.

6 Q And you authorized the filing of the motion to amend with
7 knowledge -- withdrawn.

8 Can you read the first sentence of the motion to amend out
9 loud, please?

10 A Yeah. (reading) Plaintiffs submit this motion under Rule
11 15 of the Federal Rules of Civil Procedure for one purpose:
12 to name as defendant one James P. Seery, Jr., the CEO of
13 defendant Highland Capital Management, LP (HCM) and the chief
14 perpetrator of the wrongdoing that forms the basis of the
15 Plaintiffs' causes of action.

16 Q And does that fairly state the purpose of the motion?

17 MR. SBAITI: Objection, Your Honor. Asks him to make
18 a legal conclusion about the purpose of the legal motion filed
19 in court that he didn't draft.

20 THE COURT: Okay. I overrule. You can answer if you
21 have an answer.

22 THE WITNESS: It's always been my general
23 understanding that the purpose of filing this motion was to go
24 to the Federal District Court and ask that Court of reference
25 to this Court whether or not Mr. Seery could be named with

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1 respect to the original complaint, citing again the gatekeeper
2 provisions and citing the various arguments that we've heard
3 much earlier.

4 BY MR. MORRIS:

5 Q Okay. You personally didn't learn anything between April
6 9th, when the complaint was filed, and April 19th, when the
7 motion to amend was filed, that caused you to authorize the
8 filing of the motion to amend, correct?

9 A That is correct.

10 Q In fact, you relied on the Sbaiti firm with respect to
11 decisions concerning the timing of the motion to amend.
12 Correct?

13 A Correct.

14 Q And you had no knowledge of whether anyone acting on
15 behalf of the Plaintiffs ever served the Debtor with a copy of
16 the motion to amend. Correct?

17 A Yes. I have no knowledge.

18 Q Okay. And you have no knowledge that the Sbaiti firm ever
19 provided my firm with a copy of the motion to amend. Correct?

20 A I cannot recall one way or another.

21 Q Okay. You never instructed anyone on behalf -- acting on
22 behalf of the Plaintiffs to inform the Debtor that the motion
23 to amend had been filed, correct?

24 A That is correct.

25 Q And that's because you relied on the Sbaiti firm on

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Patrick - Direct

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1 procedural issues, correct?

2 A That is correct.

3 Q You didn't consider waiting until the Debtor --

4 (Interruption.)

5 Q -- had appeared in the action before authorizing the
6 filing of the motion --

7 A Yeah, --

8 THE COURT: Yes. Y'all are being a little bit loud.
9 Okay.

10 A VOICE: Sorry.

11 MR. MORRIS: No problem.

12 MR. PHILLIPS: I've heard that before, Your Honor,
13 and I apologize.

14 THE COURT: I bet you have. Thank you.

15 MR. MORRIS: Admonish Mr. Phillips, please.

16 THE COURT: Okay.

17 MR. MORRIS: He's always the wild card.

18 MR. PHILLIPS: I admonish --

19 MR. MORRIS: He's always the wild card.

20 MR. PHILLIPS: I admonish myself.

21 THE COURT: All right. I think he got the message.
22 Continue.

23 BY MR. MORRIS:

24 Q You didn't consider waiting until the Debtor had appeared
25 in the action before filing the motion to amend, correct?

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Patrick - Direct

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1 A Again, I am the client and I rely upon the law firm that's
2 engaged with respect to making legal decisions as to the
3 timing and notice and appearance and what have you. I'm a tax
4 lawyer.

5 Q Okay. You wanted the District Court to grant the relief
6 that the Plaintiffs were seeking. Correct?

7 A I wanted the District Court to consider, under the
8 gatekeeper provisions of this Court, whether or not Mr. Seery
9 could be named in the original complaint. That's -- that,
10 from my perspective, is what was desired.

11 Q All right. You wanted the District Court to grant the
12 relief that the Plaintiffs were seeking, correct?

13 MR. SBAITI: Objection, Your Honor. Asked and
14 answered.

15 THE COURT: Overruled.

16 THE WITNESS: Again, I would characterize this motion
17 as not necessarily asking for specific relief, but asking the
18 Federal District Court whether or not, under the gatekeeper
19 provision, that Mr. Seery could be named on there. What
20 happens after that would be a second step. So I kind of -- I
21 dispute that characterization.

22 BY MR. MORRIS:

23 Q All right. I'm going to cross my fingers and hope that
24 Ms. Canty is on the line, and I would ask her to put up Page
25 57 from Mr. Patrick's deposition transcript.

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1 THE COURT: There it is.

2 MR. MORRIS: There it is. It's like magic. Can we
3 go down to Lines 18 through 20?

4 BY MR. MORRIS:

5 Q Mr. Patrick, during the deposition on Friday, did I ask
6 you this question and did you give me this answer? Question,
7 "Did you want the Court to grant the relief you were seeking?"
8 Answer, "Yes."

9 A I -- and it was qualified with respect to Lines 12 through
10 17. In my view, when I answered yes, I was simply restating
11 what I stated in Line 12. I wanted the District Court to
12 consider this motion as to whether or not Mr. Seery could be
13 named in the original complaint or the amended complaint
14 pursuant to the existing gatekeeper rules and the arguments
15 that were made in that motion. That's -- that's what I
16 wanted. And so then when I was asked, did you want the Court
17 to grant the relief that you were seeking, when I answered
18 yes, it was from that perspective.

19 Q Okay. Thank you very much. If the District Court had
20 granted the relief that you were seeking, you would have
21 authorized the Sbaiti firm to file the amended complaint
22 naming Mr. Seery as a defendant if the Sbaiti firm recommended
23 that you do so. Correct?

24 A If the Sbaiti firm recommended that I do so. That is
25 correct.

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1 Q Okay. Let's talk for a little bit about the line of
2 succession for the DAF and CLO Holdco. Can we please go to
3 Exhibit 25, which is in the other binder? It's in the other
4 binder, sir.

5 (Pause.)

6 Q I guess you could look on the screen or you can look in
7 the binder, whatever's easier for you.

8 A Yeah. I prefer the screen. I prefer the screen.

9 Q Okay.

10 A It's much easier.

11 Q All right. We've got it in both spots. But do you have
12 Exhibit 25 in front of you, sir?

13 A Yes, I do.

14 Q All right. Do you know what it is?

15 A This is the organizational chart depicting a variety of
16 charitable entities as well as entities that are commonly
17 referred to the DAF. However, when I look at this chart, I do
18 not look at and see just boxes, what I see is the humanitarian
19 effort that these boxes represent.

20 MR. MORRIS: Your Honor, may I interrupt?

21 THE COURT: You may.

22 MR. MORRIS: Okay.

23 BY MR. MORRIS:

24 Q I appreciate that, and when your lawyers get up to ask you
25 questions, I bet they'll want to know just what you were about

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1 to tell me. But I just want to understand what this chart is.
2 This chart is the DAF, CLO Holdco, structure chart. Correct?

3 A Correct.

4 Q Okay. And you were personally involved in creating this
5 organizational structure, correct?

6 A I -- yes.

7 Q Okay. And from time to time, the Charitable DAF Holdco
8 Limited distributes cash to the foundations that are above it.
9 Correct?

10 A Correct.

11 Q All right. I want to talk a little bit more specifically
12 about how this happens. The source of the cash distributed by
13 Charitable DAF Holdco Limited is CLO Holdco, Ltd., that
14 entity, the Cayman Islands entity near the bottom. Correct?

15 MR. ANDERSON: Your Honor, I have an objection.
16 Completely irrelevant. I'm objecting on relevance grounds.
17 This has nothing to do with the contempt proceeding. We've
18 already gone over that he authorized the filing of the
19 complaint, that he authorized the filing of the motion to
20 amend. It's all in the record. This is completely irrelevant
21 at this point.

22 THE COURT: Okay. Relevance objection. Your
23 response?

24 MR. MORRIS: I believe that it's relevant to the
25 Debtor's motion to hold Mr. Dondero in contempt for pursuing

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Patrick - Direct

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1 claims against Mr. Seery, in violation of the July 7 order. I
2 think an understanding of what the Plaintiffs are, how they're
3 funded, and Mr. Dondero's interest in pursuing claims on
4 behalf of those entities is relevant to the -- to the -- just
5 -- it's just against him. It's not against their clients,
6 frankly. It's just against Mr. Dondero.

7 THE COURT: I overrule.

8 MR. MORRIS: I'll try and -- I'll try and make this
9 quick, though.

10 BY MR. MORRIS:

11 Q CLO Holdco had two primary sources of capital. Is that
12 right?

13 A Two primary sources of capital?

14 Q Let me ask it differently. There was a Charitable
15 Remainder Trust that was going to expire in 2011, correct?

16 A That is correct.

17 Q And that Charitable Remainder Trust had certain CLO equity
18 assets, correct?

19 A Correct.

20 Q And the donor to that Charitable Remainder Trust was
21 Highland Capital Management, LP. Correct?

22 A Not correct. After my deposition, I refreshed my memory.
23 There were two Charitable Remainder Trusts that existed, which
24 I think in my mind caused a little bit of confusion. The
25 Charitable Remainder Trust No. 2, which is the one that

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Patrick - Direct

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1 expired in 2011, was originally funded by Mr. Dondero.

2 Q Okay. So, so the Charitable Remainder Trust that we were
3 talking about on Friday wasn't seeded with capital from
4 Highland Capital Management, it came from Mr. Dondero
5 personally?

6 A That is correct.

7 Q Okay. Thank you. And the other primary source of capital
8 was the Dallas Foundation, the entity that's in the upper
9 left-hand corner of the chart. Is that correct?

10 A No.

11 Q The -- you didn't tell me that the other day?

12 A You said -- you're pointing to the Dallas Foundation.
13 That's a 501(c)(3) organization.

14 Q I apologize. Did you tell me the other day that the
15 Dallas Foundation was the second source of capital for HCLO
16 Hold Company?

17 A No, I did not. You --

18 (Pause.)

19 Q Maybe I know the source of the confusion. Is the Highland
20 Dallas Foundation something different?

21 A Yes. On this organizational chart, you'll see that it has
22 an indication, it's a supporting organization.

23 Q Ah, okay. So, so let me restate the question, then. The
24 second primary source of capital for CLO Holdco, Ltd. is the
25 Highland Dallas Foundation. Do I have that right?

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Patrick - Direct

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1 A Yes.

2 Q Okay. And the sources of that entity's capital were
3 grantor trusts and possibly Mr. Dondero personally. Correct?

4 A In addition -- per my refreshing my recollection from our
5 deposition, the other Charitable Remainder Trust, I believe
6 Charitable Remainder Trust No. 1, which expired later, also
7 sent a donation, if you will, or assets to -- and I cannot
8 recall specifically whether it was just the Highland Dallas
9 Foundation or the other supporting organizations that you see
10 on this chart.

11 Q But the source of that -- the source of the assets that
12 became the second Charitable Remainder Trust was Highland
13 Capital Management, LP. Is that right?

14 A I think that is accurate from my recollection. And again,
15 I'm talking about Charitable Remainder Trust No. 1.

16 Q Okay. So is it fair to say -- I'm just going to try and
17 summarize, if I can. Is it fair to say that CLO Holdco, Ltd.
18 is the investment arm of the organizational structure on this
19 page?

20 A Yes.

21 Q And is it fair to say that nearly all of the assets that
22 are in there derived from either Mr. Dondero, one of his
23 trusts, or Highland Capital Management, LP?

24 A Yes. It's like the Bill Gates Foundation or the
25 Rockefeller Foundation. These come from the folks that make

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Patrick - Direct

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1 their donations and put their name on it.

2 Q Okay.

3 MR. MORRIS: Now, now, Your Honor, I'm going to go
4 back just for a few minutes to how Mr. Scott got appointed,
5 because I think that lays kind of the groundwork for his
6 replacement. It won't take long.

7 THE COURT: Okay. I have a question either --

8 MR. MORRIS: Sure.

9 THE COURT: -- for you or the witness. I'm sorry,
10 but --

11 MR. MORRIS: Sure. Yeah.

12 THE COURT: -- the organizational chart, it's not
13 meant to show everything that might be connected to this
14 substructure, right? Because doesn't CLO Holdco, Ltd. own
15 49.02 percent of HCLOF, --

16 MR. MORRIS: That --

17 THE COURT: -- which gets us into the whole
18 HarbourVest transaction issue?

19 MR. MORRIS: You're exactly right, Your Honor.

20 THE COURT: Okay.

21 MR. MORRIS: But that's just an investment that HCLO
22 Holdco made.

23 THE COURT: Right.

24 MR. MORRIS: Right? And so I -- let me ask the
25 witness, actually.

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Patrick - Direct

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1 THE COURT: Okay. Thank you. Thank you.

2 MR. MORRIS: Let me ask the witness. Yeah.

3 THE COURT: I just want my brain --

4 MR. MORRIS: Right.

5 THE COURT: -- to be complete on this chart.

6 BY MR. MORRIS:

7 Q Mr. Patrick, there are three entities under CLO Holdco,
8 Ltd. Do you see that?

9 A Yes.

10 Q And does CLO Holdco, Ltd. own one hundred percent of the
11 interests in each of those three entities?

12 A Yes.

13 Q Do you know why those three entities are depicted on this
14 particular chart? Is it because they're wholly-owned
15 subsidiaries?

16 A Correct.

17 Q Okay. And CLO Holdco, Ltd. has interests in other
18 companies. Isn't that right?

19 A It has other investments. That is correct.

20 Q And the reason that they're not depicted on here is
21 because they're not wholly-owned subsidiaries, they're just
22 investments; is that fair?

23 A That is fair.

24 MR. MORRIS: Does that--?

25 THE COURT: Yes.

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Patrick - Direct

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1 MR. MORRIS: Okay.

2 THE COURT: Uh-huh.

3 BY MR. MORRIS:

4 Q So, so let's go back to Mr. Grant for a moment. Mr.

5 Scott, rather. Mr. Dondero was actually the original general
6 partner. If you look at this chart, while it's still up here,
7 you see on the left there's Charitable DAF GP, LLC?

8 A Yes.

9 Q And the Charitable DAF GP, LLC is the general partner of
10 the Charitable DAF Fund, LP. Correct?

11 A Correct.

12 Q And on this chart, Grant Scott was the managing member of
13 Charitable DAF GP, LLC. Right?

14 A Correct.

15 Q Okay. But Mr. Dondero was the original general partner of
16 that entity, correct?

17 A That is correct. But I do want to point out, I just note
18 that the GP interest is indicating a one percent interest and
19 the 99 interest to Charitable DAF Holdco. I believe that's
20 incorrect. It's a hundred percent by Charitable DAF Holdco,
21 Ltd., and the Charitable DAF GP interest is a noneconomic
22 interest. So that should actually reflect a zero percent to
23 the extent it may indicate some sort of profits or otherwise.

24 Q Okay. Thank you for the clarification. Can you turn to
25 Exhibit 26, please, in your binder? And is it your

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Patrick - Direct

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1 understanding that that is the amended and restated LLC
2 agreement for the DAF GP, LLC?

3 A Yes.

4 Q Okay. And this was amended and restated effective as of
5 January 1st, 2012, correct?

6 A Yes.

7 Q And if you go to the last page, you'll see there are
8 signatures for Mr. Scott and Mr. Dondero, correct?

9 A Yes.

10 Q And Mr. Dondero is identified as the forming -- former
11 managing member and Mr. Scott is identified as the new
12 managing member. Correct?

13 A Correct. That's what the document says.

14 Q And it's your understanding that Mr. Dondero had the
15 authority to select his successor. Correct?

16 A Correct.

17 Q In fact, it's based on your understanding of documents and
18 your recollection that Mr. Dondero personally selected Mr.
19 Scott as the person he was going to transfer control to,
20 correct?

21 A Upon advice of Highland Capital Management's tax
22 compliance officer, Mr. Tom Surgent.

23 Q What advice did Mr. Surgent give?

24 A He gave advice that, because Mr. Dondero -- and this is
25 what I came to an understanding after the fact of this

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Patrick - Direct

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1 transaction, because I was not a part of it -- that by Mr.
2 Dondero holding that GP interest, that it would be -- the
3 Plaintiffs, if you will, would be an affiliate entity for
4 regulatory purposes, and so he advised that if he -- if Mr.
5 Dondero transferred his GP interest to Mr. Scott, it would no
6 longer be an affiliate, is my recollection.

7 Q Okay. You didn't appoint Mr. Scott, did you?

8 A No.

9 Q That was Mr. Dondero. Is that right?

10 A Yes.

11 Q Okay. Let's go to 2021. Let's come back to the current
12 time. Sometime in February, Mr. Scott called you to ask about
13 the mechanics of how he could resign. Correct?

14 A That is correct.

15 Q But the decision to have you replace Mr. Scott was not
16 made until March 24th, the day you sent an email to Mr. Scott
17 with the transfer documents. Correct?

18 A That is correct.

19 Q And it's your understanding that he could have transferred
20 the management shares and control of the DAF to anyone in the
21 world. Correct?

22 A Correct.

23 Q That's what the docu... that he had the authority under
24 the documentation, as you understood it, to freely trade or
25 transfer the management shares. Correct?

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Patrick - Direct

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1 A Wait. Now, let's be precise here.

2 Q Okay.

3 A Are you talking about the GP interests or the management
4 shares held by Charitable DAF Holdco, Ltd.?

5 Q Let's start with the management shares. Can you explain
6 to the Court what the management shares are?

7 MR. ANDERSON: Your Honor? Hang on one second. Your
8 Honor, I want to object again on relevance. We're going way
9 beyond the scope of the contempt issue, whether or not --

10 MR. MORRIS: This is about control.

11 MR. ANDERSON: -- the motion to amend somehow
12 violated the prior order of this Court. Getting into the
13 management structure, transfer of shares, that's way outside
14 the bounds. I object on relevance.

15 THE COURT: Okay. Relevance objection?

16 MR. MORRIS: Your Honor, they have probably 30
17 documents, maybe 20 documents, on their exhibit list that
18 relate to management and control. I'm asking questions about
19 management and control. Okay? This is important, again, to
20 (a) establish his authority, but (b) the circumstances under
21 which he came to be the purported control person.

22 THE COURT: Okay. Overruled. Go ahead.

23 THE WITNESS: It might be helpful to look at the
24 organizational chart, but if not -- but I'll describe it to
25 you again. With respect to the entity called --

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Patrick - Direct

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1 MR. MORRIS: Hold on one second. Can we put up the
2 organizational chart again, Ms. Canty, if you can? There you
3 go.

4 THE WITNESS: Okay. So with respect to the
5 Charitable DAF Holdco, Ltd., it is my understanding that Mr.
6 Scott, he organized that entity when he was the independent
7 director of the Charitable Remainder Trust, and he caused the
8 issuance of the management shares to be issued to himself.
9 And then those are, again, noneconomic shares, but they are
10 control shares over that entity.

11 And I think, to answer your question, is -- it -- he alone
12 decides who he can transfer those shares to.

13 BY MR. MORRIS:

14 Q Do I have this right, that whoever holds the noneconomic
15 management shares has the sole authority to appoint the
16 representatives for each of the Charitable DAF entities and
17 CLO Holdco? It's kind of a magic ticket, if you will?

18 A It -- I think there's a -- the answer really is no from a
19 legal standpoint, because Charitable DAF Holdco is a limited
20 partner in Charitable DAF Fund, LP, so it does not have
21 authority -- authority under all -- the respective entities
22 underneath that. It could cause a redemption, if you will, of
23 Charitable DAF Fund. And so, really, the authority -- the
24 trickle-down authority that you're referencing is with respect
25 to his holding of the Charitable DAF GP, LLC interest. It's a

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Patrick - Direct

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1 member-managed Delaware limited liability company. And from
2 that, he -- that authority kind of trickles down to where he
3 can appoint directorships.

4 Q All right. I think I want to just follow up on that a
5 bit. Which entity is the issuer of the manager shares, the
6 management shares?

7 A Yeah, the -- per the organizational chart, it is accurate,
8 it's the Charitable DAF Holdco, Ltd. which issued the
9 management shares to Mr. Scott.

10 Q Okay. And that's why you have the arrow from Mr. Scott
11 into that entity?

12 A Correct.

13 Q And do those -- does the holder of the management shares
14 have the authority to control the Charitable DAF Holdco, Ltd.?

15 A Yes.

16 Q Okay. And as the control person for the Charitable DAF
17 Holdco, Ltd., they own a hundred -- withdrawn. Charitable DAF
18 Holdco Limited owns a hundred percent of the limited
19 partnership interests of the Charitable DAF Fund, LP.

20 Correct?

21 A Correct.

22 Q And so does the holder of that hundred percent limited
23 partnership interest have the authority to decide who acts on
24 behalf of the Charitable DAF Fund, LP?

25 A I would say no. I mean, you know, just -- I would love to

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Patrick - Direct

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1 read the partnership agreement again. But I, conceptually,
2 what I know with partnerships, I would say the limited partner
3 would not. It would be through the Charitable DAF GP, LLC
4 interest.

5 Q The one on the left, the general partner?

6 A The general partner.

7 Q I see. So when Mr. Scott transferred to you the one
8 hundred percent of the management shares as well as the title
9 of the managing member of the Charitable DAF GP, LLC, did
10 those two events give you the authority to control the
11 entities below it?

12 A Yes.

13 Q Thank you. And so prior to the time that he transferred
14 those interests to you, is it your understanding that Mr.
15 Scott had the unilateral right to transfer those interests to
16 anybody in the world?

17 A Yes.

18 Q Okay. And you have that right today, don't you?

19 A Yes, I do.

20 Q If you wanted, you could transfer it to me, right?

21 A Yes, I could.

22 Q Okay. But of all the people in the world, Mr. Scott
23 decided to transfer the management shares and the managing
24 member title of the DAF GP to you, correct?

25 A Restate that question again?

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Patrick - Direct

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1 Q Of all the people in the world, Mr. Scott decided to
2 transfer it to you, correct?

3 A Yeah. Mr. Scott transferred those interests to me.

4 Q Okay. And you accepted them, right?

5 A Yes.

6 Q You're not getting paid anything for taking on this
7 responsibility, correct?

8 A I am not paid by any of the entities depicted on this
9 chart.

10 Q And Mr. Scott used to get \$5,000 a month, didn't he?

11 A I believe that's what he testified to.

12 Q Yeah. But you don't get anything, right?

13 A Correct.

14 Q In fact, you get the exact same salary and compensation
15 from Skyview that you had before you became the authorized
16 representative of the DAF entities and CLO Holdco. Correct?

17 A Correct.

18 MR. MORRIS: Okay. Your Honor, if I may just take a
19 moment, I may be done.

20 THE COURT: Okay.

21 (Pause.)

22 MR. MORRIS: Your Honor, I have no further questions.

23 THE COURT: All right. Pass the witness. Any
24 examination of the witness?

25 CROSS-EXAMINATION

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Patrick - Cross

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1 BY MR. ANDERSON:

2 Q Mr. Patrick, I just had a few follow-up questions. When
3 you authorized the filing of the lawsuit against Highland
4 Capital Management, LP, Highland HCF Advisor Limited, and
5 Highland CLO Funding, Limited, when that lawsuit was filed in
6 April of this year, was Mr. Seery included as a defendant?

7 A No.

8 Q Have the two Plaintiffs in that lawsuit, have they
9 commenced any lawsuit against Mr. Seery?

10 A No.

11 Q Have they pursued any lawsuit against Mr. Seery?

12 A No.

13 Q Have they pursued a claim or cause of action against Mr.
14 Seery?

15 A No.

16 Q At most, did the Plaintiffs file a motion for leave to add
17 Mr. Seery as a defendant?

18 MR. MORRIS: Objection, Your Honor. To the extent
19 that any of these questions are legal conclusions, I object.
20 He's using the word pursue. If he's trying -- if he's then
21 going to argue that, But the witness testified that he didn't
22 pursue and that's somehow a finding of fact, I object.

23 THE COURT: Okay. I understand.

24 MR. MORRIS: Yeah.

25 THE COURT: But I overrule. He can answer.

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Patrick - Cross

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1 MR. MORRIS: That's fine.

2 THE WITNESS: Can you restate the question again?

3 BY MR. ANDERSON:

4 Q Sure. On behalf of the Plaintiffs -- well, strike that.

5 Did the Plaintiffs pursue a claim or cause of action against

6 Mr. Seery?

7 A No.

8 Q At most, did the Plaintiffs file a motion for leave to

9 file an amended complaint regarding Mr. Seery?

10 A Yes. But, again, I viewed the motion as simply asking the

11 Federal District Court whether Mr. Seery could or could not be

12 named in a complaint, and then the next step might be how the

13 Federal District Court might rule with respect to that.

14 Q And we have -- it's Tab 17 in the binders in front of you.

15 That is Plaintiffs' motion for leave. If you could turn to

16 that, please.

17 A Yes. I've got it open.

18 Q Is the Court's July order, the Bankruptcy Court's July

19 order, is it mentioned on the first page and then throughout

20 the motion for leave to amend?

21 A Yes, it is. I see it quoted verbatim on Page 2 under

22 Background.

23 Q Was the Court's order hidden at all from the District

24 Court?

25 A The document speaks for itself. It's very transparent.

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Patrick - Cross

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1 Q Was there any effort whatsoever to hide the prior order of
2 the Bankruptcy Court?

3 A No.

4 MR. ANDERSON: Pass the witness.

5 THE COURT: Okay. Other examination?

6 MR. SBAITI: Yes, Your Honor. Just a couple of
7 questions.

8 CROSS-EXAMINATION

9 BY MR. SBAITI:

10 Q Do you mind flipping to Exhibit 25, which I believe is the
11 org chart, the one that you were looking at before?

12 A Okay.

13 Q It'll still be in --

14 A Okay. Yeah.

15 Q -- the defense binder. No reason to swap out right now.

16 A I've got the right binders. Some of them are repeatable
17 exhibits, so --

18 Q Yeah.

19 A -- I have to grab the right binder. Yes.

20 Q As this org chart would sit today, is the only difference
21 that Grant Scott's name would instead be Mark Patrick?

22 A Yes.

23 Q Was there ever a period of time where Jim Dondero's name
24 would sit instead of Grant Scott's name prior?

25 A Yes, originally, when this -- yes.

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1 Q So did Mr. Dondero both have the control shares of the GP,
2 LLC and DAF Holdco Limited?

3 A No, I believe not. I believe he only held the Charitable
4 DAF GP interest and that Mr. Scott at all times held the
5 Charitable DAF Holdco, LTD interest, until he decided to
6 transfer it to me.

7 Q Can you just tell us how Mr. Scott came to hold the
8 control shares of the Charitable DAF Holdco, LTD?

9 A When he was the independent trustee of the Charitable
10 Remainder Trust, he caused that -- the creation of that
11 entity, and that's how he became in receipt of those
12 management shares.

13 Q And does the Charitable DAF GP, LLC have any control over
14 Charitable DAF Fund, LP's actions or activities?

15 A Yes, it does.

16 Q What kind of control is that?

17 A I would describe complete control. It's the managing
18 member of that entity and can -- and effectively owns, you
19 know, the hundred percent interest in the respective
20 subsidiaries, and so the control follows down.

21 Q And when did Mr. Scott replace Mr. Dondero as the GP --
22 managing member of the GP?

23 A Well, I think as the -- and Mr. Morris had shown me with
24 respect to that transfer occurring on March 2012.

25 Q So nine years ago?

Patrick - Cross

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1 A Yes.

2 Q Does Mr. Dondero today exercise any control over the
3 activities of the DAF Charitable -- the Charitable DAF, GP or
4 the Charitable DAF Holdco, LTD?

5 A No.

6 Q Is he a board member of sorts for either of those
7 entities?

8 A No.

9 Q Is he a board members of CLO Holdco?

10 A No.

11 Q Does he have any decision-making authority at CLO Holdco?

12 A None.

13 Q The decision to authorize the lawsuit and the decision to
14 authorize the motion that you've been asked about, who made
15 that authorization?

16 A I did.

17 Q Did you have to ask for anyone's permission?

18 A No.

19 MR. SBAITI: No more questions, Your Honor.

20 THE COURT: Okay. Any -- I guess Mr. Taylor, no.

21 All right. Any redirect?

22 REDIRECT EXAMINATION

23 BY MR. MORRIS:

24 Q Since becoming the authorized representative of the
25 Plaintiffs, have you ever made a decision on behalf of those

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1 entities that Mr. Dondero disagreed with?

2 A I have made decisions that were adverse to Mr. Dondero's
3 financial -- financial decision. I mean, financial interests.
4 Whether he disagreed with them or not, I don't -- he has not
5 communicated them to me. But they have been adverse, at least
6 two very strong instances.

7 Q Have you ever -- have you ever talked to him about making
8 a decision that would be adverse to his interests? Did he
9 tell -- did --

10 A I didn't -- I don't -- I did not discuss with him prior to
11 making the decisions that I made that were adverse to his
12 economic interests.

13 MR. MORRIS: Okay. No further questions, Your Honor.

14 THE COURT: Any further examination? Recross on that
15 redirect?

16 MR. ANDERSON: No further questions.

17 MR. SBAITI: No further questions, Your Honor.

18 MR. ANDERSON: Sorry.

19 THE COURT: Nothing?

20 MR. ANDERSON: I think we're good.

21 THE COURT: Okay. I have one question, Mr. Patrick.
22 My brain sometimes goes in weird directions.

23 EXAMINATION BY THE COURT

24 THE COURT: I'm just curious. What are these Cayman
25 Island entities, charitable organizations formed in the Cayman

1 Islands?

2 THE WITNESS: Yeah. I'll keep it as simple as I can,
3 even though I'm a tax lawyer, so I won't get into the tax
4 rules, but the Cayman structure is modeled after what you
5 typically see in the investment management industry, and so I
6 -- and I won't reference specific entities here with respect
7 to the Highland case, but I think you'll note some
8 similarities, if you think about it. They're -- it's
9 described as an offshore master fund structure where you have
10 a -- and that would be the Charitable DAF Fund that's
11 organized offshore, usually in the Cayman or Bermuda Islands,
12 where the general partner, typically, in the industry, holds
13 the management --

14 THE COURT: Yeah. Let --

15 THE WITNESS: Okay.

16 THE COURT: -- me just stop you. I've seen this
17 enough --

18 THE WITNESS: Yeah, it's

19 THE COURT: -- to know that it happens in the
20 investment world. But in --

21 THE WITNESS: Yeah.

22 THE COURT: You know, usually, I see 501(c)(3), you
23 know, domestically-created entities for charitable purposes,
24 so I'm just curious.

25 THE WITNESS: Yes.

Patrick - Examination by the Court

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1 THE COURT: Uh-huh.

2 THE WITNESS: The offshore master fund structure
3 typically will have two different types of -- they call it
4 foreign feeder funds. One foreign feeder fund is meant to
5 accommodate foreign investors; the other foreign feeder fund
6 is meant to accommodate U.S. tax-exempt investors.

7 Why, why is it structured that way? In order to avoid
8 something called -- I was trying not to be wonkish -- UBTI.
9 That's, let's see, Un -- Unrelated Trader Business Income. I
10 probably have that slightly wrong. But it's essentially,
11 it's a means to avoid active business income, which includes
12 debt finance income, which is what these CLOs tend to be, that
13 would throw off income that would be taxable normally if the
14 exempts did not go through this foreign blocker, and it
15 converts that UBTI income -- it's called (inaudible) income --
16 into passive income that flows -- that flows up to the
17 charities.

18 And so it's very typical that you'll have a U.S. tax-
19 exempt investor, when they make an investment in a fund,
20 prefer to go through an offshore feeder fund, which is
21 actually Charitable DAF Holdco, LTD. That's essentially what,
22 from a tax perspective, represents as a UBTI blocker entity.
23 And then you have the offshore investments being held offshore
24 because there's a variety of safe harbors where the receipt of
25 interest, the portfolio interest exception, is not taxable.

002080

Patrick - Examination by the Court

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1 The creation of capital gains or losses under the -- they call
2 it the trading, 864(b) trading safe harbor, is not taxable.
3 So that's why you'll find these structures operating offshore
4 to rely on those safe harbor provisions as well as -- as well
5 as what I indicated with respect to the two type blocker
6 entities. It's very typical and industry practice to organize
7 these way. And so when this was set --

8 THE COURT: It's very typical in the charitable world
9 to --

10 THE WITNESS: In the investment management --

11 THE COURT: -- form this way?

12 THE WITNESS: In the investment management world,
13 when you have charitable entities that are taking some
14 exposure to assets that are levered, to set this structure up
15 in this way. It was modeled after -- they just call them
16 offshore master fund structures. They're known as Mickey
17 Mouse structures, where you'll have U.S. investors --

18 THE COURT: Yes. I -- yes, I --

19 THE WITNESS: -- enter through a U.S. partnership,
20 and the foreign investors enter through a blocker.

21 THE COURT: It was really just the charitable aspect
22 of this that I was --

23 THE WITNESS: Yeah. Yeah.

24 THE COURT: -- getting at.

25 THE WITNESS: Yeah. No, but I'm just trying to

1 emphasize if --

2 THE COURT: All right. It's --

3 THE WITNESS: Yeah.

4 THE COURT: -- neither here nor there. All right.

5 MR. SBAITI: Your Honor, may I ask a slightly
6 clarifying leading question on that, because I think I
7 understand what he was trying to say, just for the record?

8 THE COURT: Well, --

9 MR. MORRIS: I object.

10 THE COURT: -- I tell you what. Anyone who wants to
11 ask one follow-up question on the judge's question can do so.
12 Okay? You can go first.

13 MR. SBAITI: I'll approach, Your Honor.

14 THE COURT: Okay.

15 RECROSS-EXAMINATION

16 BY MR. SBAITI:

17 Q Would it be a fair summary of what you were saying a
18 minute ago that the reason the bottom end of that structure is
19 offshore is so that it doesn't get taxed before the money
20 reaches the charities on the U.S. side?

21 A Tax -- it converts the nature of the income that is being
22 thrown off by the investments so that it becomes a tax
23 friendly income to the tax-exempt entity. Passive income.
24 That's --

25 Q So, essentially, --

Patrick - Recross

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1 THE COURT: Okay. Okay.

2 MR. SBAITI: -- so it doesn't get taxed before it
3 hits the --

4 THE COURT: I said one question.

5 MR. SBAITI: Sorry, Your Honor.

6 THE COURT: Okay. He answered it.

7 MR. PHILLIPS: And I have one question, Your Honor

8 THE COURT: Okay.

9 MR. PHILLIPS: I don't know if I need to ask this
10 question, but I'd rather not ask you if I need to ask it.

11 THE COURT: Go ahead.

12 MR. PHILLIPS: But if I do, you know, I could --

13 THE COURT: Go ahead.

14 MR. PHILLIPS: Well, okay.

15 RECROSS-EXAMINATION

16 BY MR. PHILLIPS:

17 Q We've talked about the offshore structure. Are the
18 foundations in the top two tiers of the organizational chart
19 offshore entities?

20 A No.

21 Q They're --

22 A They're onshore entities. They're tax-exempt entities.

23 Q Thank you.

24 A The investments are offshore.

25 Q Thank you.

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Patrick - Further Redirect

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1 THE COURT: Mr. Morris? One question.

2 FURTHER REDIRECT EXAMINATION

3 BY MR. MORRIS:

4 Q Do you hold yourself out as an expert on the
5 organizational structures in the Caribbean for charitable
6 organizations?

7 A I hold myself out as a tax professional versant on setting
8 up offshore master fund structures. It's sort of a bread-and-
9 butter thing. But there are plenty of people that can testify
10 that this is very typical.

11 Q Uh-huh. Okay.

12 THE COURT: Okay. Thank you.

13 All right. You are excused, Mr. Patrick. I suppose
14 you'll want to stay around. I don't know if you'll
15 potentially be recalled today.

16 (The witness steps down.)

17 THE COURT: All right. We should take a lunch break.
18 I'm going to put this out for a democratic vote. Forty-five
19 minutes? Is that good with everyone?

20 MR. SBAITI: Do we have to leave the building to eat,
21 Your Honor, or is there food in the building?

22 THE COURT: I think --

23 MR. SBAITI: I'm sorry to ask that question, but --

24 THE COURT: Yes. You know what, there used to be a
25 very bad cafeteria, but I think it closed. Right, Mike? So,

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1 you know, --

2 MR. SBAITI: Sorry I asked that.

3 A VOICE: Hate to miss that one.

4 THE COURT: Is 45 minutes not enough since you have
5 to go off campus? I'll give you an hour. It just means we
6 stay later tonight.

7 A VOICE: Can we just say 2:00 o'clock?

8 MR. SBAITI: That's fine with us, Your Honor.

9 THE COURT: 2:00 o'clock. That's 50 minutes. See
10 you then.

11 MR. SBAITI: Thank you.

12 A VOICE: Your Honor, can we just get a time check?

13 THE COURT: Okay.

14 THE CLERK: Yeah. The Debtors are at an hour and
15 eleven minutes. Respondents at an hour nineteen.

16 THE COURT: And hour and eleven and an hour and
17 nineteen.

18 A VOICE: Wait, that's not right.

19 A VOICE: That can't be right.

20 A VOICE: Two hours? We started at --

21 THE COURT: Okay. So, again, their side, the
22 collective Respondents?

23 THE CLERK: An hour and eleven, responding to your
24 questions, --

25 A VOICE: Yeah, he's not recording --

1 THE CLERK: So an hour and eleven and an hour and
2 nineteen.

3 THE COURT: But they were already over an hour --

4 A VOICE: Yeah. It's been over three hours.

5 THE COURT: -- with opening statements.

6 THE CLERK: An hour and twelve. Yes. They were very
7 short with the questioning. It was only like --

8 THE COURT: Okay. We'll double-check that over the
9 break with the court reporter.

10 A VOICE: All right. Thank you, Your Honor.

11 THE COURT: We'll double-check and let you know.

12 THE COURT: All rise.

13 (A luncheon recess ensued from 1:09 p.m. until 2:03 p.m.)

14 THE COURT: All right. Please be seated. We're
15 going back on the record in Highland after our lunch break.
16 I'm going to confirm time. We've had the Debtor an aggregate
17 of an hour and eleven minutes. The Respondents, an aggregate
18 of an hour and twenty minutes. Okay? So we've gone two hours
19 and thirty-one minutes.

20 If it seems like we've been going longer, it's because we
21 did not do the clock on the opening matters regarding removal,
22 extension of time. And then when I interjected with
23 questions, we stopped the clock. All right? So let's go.

24 You may call your next witness, Mr. Morris.

25 MR. MORRIS: Thank you, Your Honor. The Debtor calls

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1 James Dondero.

2 THE COURT: All right.

3 A VOICE: He had to step down the hall. We had a
4 little trouble getting through security. Let me --

5 THE COURT: All right. Mr. Dondero, you've been
6 called as the next witness. So if you'll approach our witness
7 stand, please. All right. Please raise your right hand.

8 (The witness is sworn.)

9 THE COURT: All right. Please be seated.

10 JAMES D. DONDERO, DEBTOR'S WITNESS, SWORN

11 DIRECT EXAMINATION

12 BY MR. MORRIS:

13 Q Good afternoon, Mr. Dondero.

14 A Good afternoon.

15 Q Can you hear me?

16 A Yes.

17 Q Okay. So, you were here this morning, correct?

18 A Yes.

19 Q All right. So, we're going to put up -- we'll put it up
20 on the screen, but if you'd prefer to look at a hard copy in
21 the binder that's marked Volume 1 of -- 2 of 2, I'd ask you to
22 turn to Exhibit 25. Or you could just follow on the screen.
23 And this is a one-page document, so maybe that's easier.

24 A Sure.

25 Q Do you have it? All right.

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1 A Yes.

2 Q This is the organizational chart for what's known as the
3 DAF, correct?

4 A Yes.

5 Q And Mark Patrick set up this structure, correct?

6 A I believe he coordinated. I believe it was set up by
7 third-party law firms. I believe it was Hutton or a firm like
8 that.

9 Q Mr. Patrick participated in the creation of this structure
10 because you gave him the task of setting up a charitable
11 entity for Highland at that time, correct?

12 A Yes.

13 Q And you approved of this organizational structure,
14 correct?

15 A Yes.

16 Q And Grant Scott was the Trustee of the DAF for a number of
17 years, correct?

18 A I often use that word, trustee, but technically I think
19 it's managing member.

20 Q That's right. I appreciate that. I was using your word
21 from the deposition. But is it fair to say that, to the best
22 of your knowledge, Grant Scott was the sole authorized
23 representative of the entity known as the DAF from 2011 until
24 just recently?

25 A Sole -- I would describe it more he was in a trustee

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1 function.

2 Q Uh-huh.

3 A Advice was being provided by Highland on the investment
4 side. He wasn't expected to be a financial or an investment
5 expert. And then accounting, tax, portfolio, tracking, you
6 know, compliance with all the offshore formation documents,
7 that was all done by Highland as part of a shared services
8 agreement.

9 Q Okay. I appreciate that, but listen carefully to my
10 question. All I asked you was whether he was the authorized
11 representative, the sole authorized representative for the
12 ten-year period from 2011 until recently.

13 A Yes.

14 Q Okay.

15 A I believe so.

16 Q Thank you. You served as the managing member of the DAF
17 GP, LLC before Mr. Scott, correct?

18 A Yes.

19 Q Okay. And if you turn to Exhibit 26 in your binder,
20 that's the amended and restated limited liability company
21 agreement for the DAF GP, LLC, correct?

22 A Yes.

23 Q And on the last page, that's your signature line, right?

24 A Yes.

25 Q And you stepped down as the managing member on March 12,

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1 2012, and were replaced by Mr. Scott, correct?

2 A Yes.

3 Q And as you recall it, Mr. Scott came to be appointed the
4 trustee of the DAF based on your recommendation, right?

5 A Based on my recommendation? Yes, I would say that's fair.

6 Q And you made that recommendation to Mr. Patrick, right?

7 A I -- I don't remember who I made the recommendation to.
8 But I would echo the testimony of Mark Patrick earlier that
9 the purpose of stepping down was to make the DAF unaffiliated
10 or independent versus being in any way affiliated.

11 MR. MORRIS: I move to strike.

12 BY MR. MORRIS:

13 Q And I'd ask you to listen carefully to my question.

14 THE COURT: Sustained.

15 BY MR. MORRIS:

16 Q You made the recommendation to Mr. Patrick, correct?

17 A I would give the same answer again.

18 Q Okay.

19 MR. MORRIS: Can we please put up Mr. Dondero's
20 deposition transcript from last Friday at Page 297?

21 I believe, Your Honor, that the court reporter thought
22 that this was a continuation of a prior deposition, and that's
23 why the pages begin in the, you know, high in the 200s and not
24 at Page 1. Just to avoid any confusion.

25 BY MR. MORRIS:

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1 Q Mr. Dondero, do you see the transcript in front of you?

2 A Yes.

3 Q Okay. Were you asked this question and did you give this
4 answer? "Who did you make the" -- question, "Who did you make
5 the recommendation to?" Answer, "It would have been Mark
6 Patrick."

7 A I don't recall right now as I sit here, and it seems like
8 I was speculating when I answered, but it -- it probably would
9 have been Mark Patrick. I just don't have a specific
10 recollection.

11 Q You made the recommendation to Mr. Patrick because he was
12 responsible for setting up the overall structure, correct?

13 A I -- I can't testify to why I did something I don't
14 remember. I think that would be --

15 Q Can we --

16 A -- speculative.

17 Q Are you finished, sir?

18 A Yeah.

19 Q Okay.

20 MR. MORRIS: Can we go to Page 299, please?

21 BY MR. MORRIS:

22 Q Lines 6 through 10. Did I ask this question and did you
23 give me this answer? Question, "But why did you select Mr.

24 Patrick as the person to whom to make your recommendation?"

25 Answer, "Because he was responsible for setting up the overall

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1 structure."

2 Were you asked that question and did you give that answer
3 last Friday?

4 A Yes.

5 Q Thank you. But it's your testimony that you don't really
6 know what process led to Mr. Scott's appointment, correct?

7 A No, I -- I said I was refreshed by Mark Patrick's
8 testimony earlier.

9 Q Yeah. Were you refreshed that, in fact, you specifically
10 had the authority to and did appoint Grant Scott as the
11 managing member of the DAF GP, LLC?

12 A I -- I don't know.

13 Q Well, you're referring to Mr. Patrick's testimony and I'm
14 asking you a very specific question. Did you agree -- is your
15 memory refreshed now that you're the person who put Grant
16 Scott in the position in the DAF?

17 A I -- I don't know if I owned those secret shares that --
18 well, they're not secret, but shares that could appoint
19 anybody on the planet. I guess if I was in that box at that
20 time before Grant, then I would have had that ability. I'm
21 not denying at all that I recommended Grant. I'm just saying
22 I don't -- I don't remember if I went specifically to him or
23 if it was Thomas Surgent that was orchestrating it at the
24 time. I don't remember.

25 Q Do you deny that you had the authority to and that you did

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1 appoint Grant Scott as your successor?

2 MR. TAYLOR: Your Honor, objection to the extent it
3 calls for a legal conclusion. I can't get close to a mic, so
4 --

5 THE COURT: I overrule the objection.

6 THE WITNESS: Can you repeat the question for me?

7 BY MR. MORRIS:

8 Q Do you deny that you had the authority to and that you
9 did, in fact, appoint Grant Scott as your successor?

10 A It'd be better to say I don't -- I don't -- no, I don't
11 remember or I didn't know the details at the time. But,
12 again, I -- I assume I owned those shares. And, again, I do
13 remember recommending Grant and -- but exactly how it
14 happened, I don't remember.

15 Q Did you hear Mark Patrick say just an hour ago that you
16 appointed Grant Scott as your successor?

17 MR. SBAITI: Objection, Your Honor. Misstates
18 testimony. The witness testified he transferred shares.
19 That's different than an appointment power.

20 THE COURT: Response? I can't remember the exact way
21 you worded it, to be honest.

22 MR. MORRIS: Neither can I, but I'll even take it
23 that way.

24 THE COURT: Okay.

25 MR. MORRIS: I think he's wrong, but I'll even take

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1 it that way.

2 THE COURT: Okay.

3 BY MR. MORRIS:

4 Q Mr. Dondero, did you listen to Mark Patrick say that you
5 are the person who made the decision to transfer the shares to
6 Mr. Scott in 2012?

7 A Yes, I heard him say that.

8 Q Okay. So, do you -- do you dispute that testimony?

9 A I -- I don't have any better knowledge to dispute or
10 confirm.

11 Q You and Mr. Scott have known each other since high school,
12 correct?

13 A Yes.

14 Q You spent a couple of years at UVA together, correct?

15 A Yes.

16 Q You were housemates together, correct?

17 A Yes.

18 Q He was the best man at your wedding, correct?

19 A Yes.

20 Q He's a patent lawyer, correct?

21 A Yes.

22 Q He had no expertise in finance when -- when he was
23 appointed as your successor to the DAF, correct?

24 A Correct.

25 Q To the best of your knowledge, at the time Mr. Scott

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1 assumed his position, he had never made any decisions
2 concerning collateralized loan obligations, correct?

3 A Correct, but he wasn't hired for that. That wasn't his
4 position.

5 Q Was he the person who was going to make the decisions with
6 respect to the DAF's investments?

7 A My understanding on how it was structured was the DAF was
8 paying a significant investment advisory fee to Highland.
9 Highland was doing portfolio construction and the investment
10 selection of -- or the investment recommendations for the
11 portfolio. There is an independent trustee protocol that I
12 believe was adhered to, but it was never my direct
13 involvement. It was always the portfolio managers or the
14 traders.

15 You have to provide three similar or at least two other
16 alternatives, and then with a rationale for each of them, but
17 a rationale for why you think one in particular is better.
18 And the trustee looks at the three, evaluates them. And the
19 way I understand it always worked, that it works at pretty
20 much every charitable trust or trust that I'm aware of, they
21 generally, if not always, pick alongside the -- or, pick the
22 recommendation of their highly-paid investment advisory firm.

23 Q And are you the highly-paid investment advisory firm?

24 A Highland was at the time, yes.

25 Q And you controlled Highland, right?

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1 A Yes.

2 Q Okay. But at the end of the day, is it your understanding
3 that Mr. Scott had the exclusive responsibility for making
4 actual decisions on behalf of the charitable trust that you
5 had created?

6 A Yeah, I mean, subject to the protocol I just described.

7 Q Yeah, okay, so let's keep going. Mr. Scott had no
8 experience or expertise running charitable organizations at
9 the time you decided to transfer the shares to him, correct?

10 A Yes, I believe that's correct.

11 Q Okay. You didn't recommend Mr. Scott to serve as the
12 DAF's investment advisor, did you?

13 A No.

14 Q And until early 2021, as you testified, I believe,
15 already, HCMLP served as the DAF's investment advisor,
16 correct?

17 A Yes.

18 Q And until early 2021, all of the DAF's day-to-day
19 operations were conducted by HCMLP pursuant to a shared
20 services agreement, correct?

21 A Yes.

22 Q And from the time the DAF was formed until January 9,
23 2020, you controlled HCMLP, correct?

24 A Yes.

25 Q You can't think of one investment decision that HCMLP

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1 recommended that Mr. Scott ever rejected in the ten-year
2 period, correct?

3 MR. SBAITI: Objection, Your Honor. Lacks
4 foundation.

5 THE COURT: Response?

6 MR. MORRIS: I'm not quite sure what to say, Your
7 Honor. The witness has already testified that HCMLP was the
8 investment advisor, made recommendations to Mr. Scott, and
9 that Mr. Scott was the one who had to make the investment
10 decisions at the end of the day.

11 MR. SBAITI: He's not here as a witness for HCMLP.
12 He's here in his personal capacity. There's no foundation
13 he'd have personal knowledge of which specific investments
14 were proposed, which ones were rejected or accepted. He said
15 it was done by the portfolio manager.

16 THE COURT: Okay. I overrule. He can answer if he
17 has an answer.

18 BY MR. MORRIS:

19 Q Sir, you can't think of one investment decision that HCMLP
20 ever recommended to Mr. Scott that he rejected, correct?

21 A I can't think of one, but I would caveat with I wouldn't
22 have expected there to be any.

23 Q So you expected him to just do exactly what HCMLP
24 recommended, correct?

25 A No. I would expect him to sort through the various

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1 investments when he was given three or four to choose from and
2 be able to discern that, just as we had with our expertise,
3 which was much greater than his, discern which one was the
4 best and most suitable investment, the best risk-adjusted
5 investment, that he would come to the same conclusion.

6 Q Okay. You can't think of an investment that Mr. Scott
7 ever made on behalf of the DAF that didn't originate with
8 HCMLP, correct?

9 A Again, no, but I wouldn't expect there to be.

10 Q Okay. And that's because you expected all of the
11 investments to originate with the company that you were
12 controlling, correct?

13 A We were the hired investment advisor with fiduciary
14 responsibility --

15 Q Uh-huh.

16 A -- and with a vested interest in making sure the DAF
17 performance was the best it could be.

18 Q Okay. Let --

19 A He was, as you said, a patent attorney. It would have
20 been unusual for him to second-guess. I'm sure, in any
21 private investment or any investment that was one off or
22 didn't have comps, you know, he probably sought third-party
23 valuations. But you would have to talk to him about that, or
24 the people at Highland that did that.

25 MR. MORRIS: I move to strike. It's a very simple

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1 question.

2 THE COURT: Sustained.

3 BY MR. MORRIS:

4 Q Sir, you can't think of one investment that Mr. Scott made
5 on behalf of the DAF that did not originate with HCMLP,
6 correct?

7 A I'm going to give the same answer.

8 Q Okay. Let's go to Page 371 of the transcript, please.
9 Lines 7 through 11.

10 Oh, I apologize. I think I might -- I think I meant 317.
11 I think I got that inverted. Yeah.

12 Did I ask this question and did you give this answer:
13 "Can you think of any investment that Mr. Scott made on behalf
14 of the DAF that didn't original with HCMLP?" Answer, "He
15 wasn't the investment advisor, but no, I don't -- I don't
16 recall."

17 Is that the answer you gave on Friday?

18 A Yes.

19 Q Thank you. Let's --

20 MR. SBAITI: Just for clarification, Your Honor, --

21 THE COURT: Pardon?

22 MR. SBAITI: -- the deposition was last Tuesday, not
23 on Friday.

24 MR. MORRIS: I stand corrected, Your Honor.

25 THE COURT: Okay.

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1 MR. MORRIS: I apologize.

2 THE COURT: Okay.

3 MR. MORRIS: I apologize if the Court thinks I misled
4 it.

5 BY MR. MORRIS:

6 Q Let's talk about Mr. Scott's decision during the
7 bankruptcy case that preceded his resignation. After HCMLP
8 filed for bankruptcy, CLO Holdco, Ltd. filed a proof of claim,
9 correct?

10 MR. ANDERSON: Your Honor, I haven't objected yet,
11 but we literally haven't covered anything that deals with
12 commencing or pursuing a claim or cause of action. I'm going
13 to object. This is way outside, again, the bounds of the
14 contempt hearing. It's -- otherwise, it's other discovery for
15 something else. It literally has nothing to do with pursue a
16 claim or cause of action.

17 THE COURT: We have another relevance objection.
18 Your response?

19 MR. MORRIS: Your Honor, the evidence is going to
20 show that Mr. Dondero told Mr. Scott on three separate
21 occasions that his conduct, which were acts of independence,
22 were inappropriate and were not in the best interests of the
23 DAF. Within days of the third strike, he resigned. Okay?

24 I think it's relevant to Mr. Dondero's control of the DAF.
25 I think that the moment that Mr. -- this is the argument I'm

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1 going to make. I'll make it right now. You want me to make
2 it now, I'll make it now. The moment that Mr. Scott exercised
3 independence, Mr. Dondero was all over him, and Mr. Scott
4 left. That's what happened. The evidence is going to be
5 crystal clear.

6 And I think that that control of the DAF is exactly what
7 led to this lawsuit. And what led -- and I'm allowed to make
8 my argument. So that's why it's relevant, Your Honor, because
9 I think it shows that Mr. Scott -- Mr. Scott, after exercising
10 independence, was forced out.

11 MR. ANDERSON: That doesn't move the needle one bit
12 as to whether a lawsuit was commenced or a claim or cause of
13 action was pursued, which is the subject of the contempt
14 motion. It doesn't move the needle one bit as to those two
15 issues, as to whether that has any bearing on was it commenced
16 or was it pursued.

17 MR. MORRIS: Your Honor, I appreciate the very narrow
18 focus that counsel for a different party is trying to put on
19 this, but it is absolutely relevant to the question of whether
20 Mr. Dondero was involved in the pursuit of these claims. All
21 right? That's what the order says. Pursue.

22 THE COURT: All right. Overruled.

23 BY MR. MORRIS:

24 Q After HCMLP filed for bankruptcy, CLO Holdco filed a proof
25 of claim, correct?

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1 A I believe so.

2 Q And in the fall of 2020, Mr. Scott amended the proof of
3 claim to effectively reduce it to zero, correct?

4 A I -- I guess.

5 Q And Mr. Scott made that decision without discussing it
6 with you in advance, correct?

7 A Yes.

8 Q But you did discuss it with him after you learned of that
9 decision, correct?

10 A I don't -- I don't recall. I'm willing to be refreshed,
11 but I don't remember.

12 Q Well, you told him specifically that he had given up bona
13 fide claims against the Debtor, correct?

14 A Let me state or clarify my testimony this way. Um, --

15 MR. MORRIS: Your Honor, it's really just a yes or no
16 question. His counsel can ask him if he wants to clarify, but
17 it's really just a yes or no question.

18 BY MR. MORRIS:

19 Q You told Mr. Scott that he gave up bona fide claims
20 against the Debtor, correct?

21 THE COURT: Okay.

22 THE WITNESS: I don't know if I told him then with
23 regard to those claims.

24 BY MR. MORRIS:

25 Q Okay. Can we go to Page 321 of the transcript? At the

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1 bottom, Line 21? 22, I apologize.

2 Did I ask this question and did you give this answer?

3 "And what do you" -- Question, "And what do you recall about
4 your discussion with Mr. Scott afterwards?" Answer, "That he
5 had given up bona fide claims against the Debtor and I didn't
6 understand why."

7 Did I ask that question and did you give that answer last
8 Tuesday?

9 A Yes.

10 Q Okay. A short time later, in December, the Debtor filed
11 notice of their intention to enter into a settlement with
12 HarbourVest, correct?

13 A Yes.

14 Q And CLO Holdco, under Mr. Scott's direction, filed an
15 objection to that settlement, correct?

16 A Yes.

17 Q And that settlement, the substance of that settlement was
18 that the Debtor did not have the right to receive
19 HarbourVest's interests in HCLOF at the time, correct?

20 A I don't remember the exact substance of it.

21 Q Okay. But you do remember that you learned that Mr. Scott
22 caused CLO Holdco to withdraw the objection, correct?

23 A Yes, ultimately.

24 Q Okay. And again, Mr. Scott did not give you advance
25 notice that he was going to withdraw the HarbourVest

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1 objection, correct?

2 A No, he -- he did it an hour before the hearing. He didn't
3 give anybody notice.

4 Q You learned that Mr. Scott caused CLO Holdco to withdraw
5 its objection to the HarbourVest settlement at the hearing,
6 correct?

7 A Yes.

8 Q And you were surprised by that, weren't you?

9 A I believe everybody was.

10 Q You were sur... you were surprised by that, weren't you,
11 sir?

12 A Yes.

13 Q And you were surprised by that because you believed Mr.
14 Scott's decision was inappropriate, right?

15 A Partly inappropriate, and partly because 8:00 o'clock the
16 night before he confirmed that he was going forward with the
17 objection. And I think the DAF's objection was scheduled to
18 be first, I think.

19 Q After you learned that Mr. Scott instructed his attorneys
20 to withdraw the CLO Holdco objection to the HarbourVest
21 settlement, you again spoke with Mr. Scott, correct?

22 A Yes.

23 Q And that conversation took place the day of the hearing or
24 shortly thereafter, correct?

25 A Yes.

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1 Q And during that conversation, you told Mr. Scott that it
2 was inappropriate to withdraw the objection, correct?

3 A Yes.

4 Q And in response, Mr. Scott told you that he followed the
5 advice of his lawyers, correct?

6 A Yes.

7 Q But that didn't -- that explanation didn't make sense to
8 you, right?

9 A Yes.

10 Q In fact, you believed that Mr. Scott failed to act in the
11 best interests of the DAF and CLO Holdco by withdrawing its
12 objection to the HarbourVest settlement, correct?

13 A Yes.

14 Q And while you didn't specifically use the words fiduciary
15 duty, you reminded Mr. Scott in your communications with him
16 that he needed to do what was in the best interests of the
17 DAF, correct?

18 A Yes.

19 Q You're the founder of the DAF, correct?

20 A I put it -- I put it in motion. Yeah. I tasked Mark
21 Patrick and third-party law firms to do it, but if that boils
22 down to founder, I guess yes.

23 Q Uh-huh. And you're the primary donor to the DAF, correct?

24 A Yes.

25 Q You're the investment advisor to the DAF, or at least you

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1 were at that time?

2 A Yes.

3 Q And because you served in these roles, you expected Mr.
4 Scott to discuss his decision to withdraw the HarbourVest
5 objection in advance, correct?

6 A Yes, I -- I think it was even broader than that. I mean,
7 he was having health and anxiety issues, and to the extent he
8 felt overwhelmed, I -- you know, yeah, you should do what's in
9 the best interests at all times, but -- but yes, I thought it
10 would be helpful if he conferred with me or Mark Patrick or
11 whoever he was comfortable with.

12 Q Mr. Dondero, you specifically believed that Mr. Scott's
13 failure to tell you that he was going to withdraw the
14 HarbourVest objection in advance was inappropriate, right?

15 A Yes.

16 Q Even though he was the sole authorized representative, you
17 believed that, because you were the founder of the DAF, the
18 primary donor of the DAF, and the investment advisor to the
19 DAF, he should have discussed that before he actually made the
20 decision, correct?

21 A No. What I'm saying is at 8:00 o'clock at night, when he
22 confirms to numerous people he's ready to go first thing with
23 his objection, and then he or counsel or some combination of
24 them change their mind and don't tell anybody before the
25 hearing, that's odd and inappropriate behavior.

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1 MR. MORRIS: Can we go to Page 330 of the transcript,
2 please?

3 And Your Honor, before I read the testimony, there is an
4 objection there. So I'd like you to rule --

5 THE COURT: Okay.

6 MR. MORRIS: -- before I do that. It can be found at
7 -- on Page 330 at Line 21.

8 (Pause.)

9 MR. MORRIS: Here we go. Page 30, beginning at Line
10 19. 330, rather.

11 THE COURT: Okay.

12 (Pause.)

13 THE COURT: Okay. I overrule that objection.

14 BY MR. MORRIS:

15 Q Mr. Dondero, were you asked this question and did you give
16 this answer last Tuesday? Question, "Do you believe that he
17 had an obligation to inform you in advance?" Answer, "I don't
18 know if I would use the word obligation, but, again, as the
19 founder or the primary donor and continued donor to the DAF,
20 and as the investment advisor fighting for above-average
21 returns on a daily basis for the fund, significant decisions
22 that affect the finances of the fund would be something I
23 would expect typically a trustee to discuss with the primary
24 donor."

25 Did you give that answer the other day, sir?

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

In Re: Highland Capital Management, L.P § Case No. **19-34054-SGJ11**

Charitable DAF Fund, L.P et al

Appellant

§

vs.

§

21-03067

Highland Capital Management, L.P

§

Appellee

§

3:23-CV-01503-B

[167] Order granting Defendant Highland Capital Management, L.P.'s Renewed motion to dismiss adversary proceeding (related document # [122](#)) Entered on 6/25/2023.

Volume 11

APPELLANT RECORD

SBAITI & COMPANY PLLC
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and CLO Holdco, Ltd.*

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

In re:	§ Chapter 11
	§
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§ Case No. 19-34054-sgj11
	§
Debtor.	§
	§
CHARITABLE DAF FUND, L.P. AND CLO	§
HOLDCO, LTD., DIRECTLY AND DERIVATIVELY	§
	§
Plaintiffs,	§ Adversary Proceeding No.
	§
vs.	§ 21-03067-sgj11
	§
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§
HIGHLAND HCF ADVISOR, LTD., AND	§
HIGHLAND CLO FUNDING LTD., NOMINALLY	§
	§
Defendant.	§
	§

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**APPELLANTS' SECOND AMENDED STATEMENT OF ISSUES
AND DESIGNATION OF RECORD ON APPEAL**

Pursuant to Rules 8009(a)(1)(A)-(B) and (a)(4) of the Federal Rules of Bankruptcy Procedure, The Charitable DAF Fund, L.P. and CLO Holdco, Ltd. ("Appellants") hereby designate the following items to be included in the record and identify the following issues with respect to

their appeal of the Order Granting Defendant Highland Capital Management, L.P.'s "Renewed Motion to Dismiss Complaint" [Adv. Proc. Doc. No. 122] which was entered by the United States Bankruptcy Court for the Northern District of Texas on June 25, 2023.

I. STATEMENT OF ISSUES TO BE PRESENTED ON APPEAL

- Whether the Bankruptcy Court had jurisdiction to rule on Highland Capital Management L.P.'s Renewed Motion to Dismiss Complaint
- Whether the Renewed Motion to Dismiss Complaint was improperly granted

II. DESIGNATION OF ITEMS TO BE INCLUDED IN THE RECORD

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1. Notice of Appeal for Bankruptcy Case Adversary Proceeding No. 21-03067-sgj11 [Doc. 168].

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2. The judgment, order, or decree appealed from: Memorandum Opinion and Order Granting Defendant Highland Capital Management, L.P.'s "Renewed Motion to Dismiss Complaint" [Adv. Proc. Doc. No. 122] [Doc. 167].

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3. Docket Sheet kept by the Bankruptcy Clerk.

4. Documents listed below and as described in the Docket Sheet for Bankruptcy Case Proceeding No. 21-03067-sgj.

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No.	Date Filed	Docket No.	Description/Document Text
1	9/29/21	1	(36 pgs; 3 docs) Adversary case 21-03067. ORDER REFERRING CASE NUMBER 21-CV-0842-B from U.S District Court for the Northern District of Texas, Dallas Division to U.S. Bankruptcy Court for Northern District of Texas, Dallas Division. Complaint by Charitable DAF Fund, LP, CLO Holdco, Ltd. against Highland Capital Management, LP, Highland HCF Advisor Ltd., Highland CLO Funding, Ltd. Fee Amount \$350 (Attachments: # 1 Original Complaint # 2 Docket Sheet from 3:20-cv-0842-B) Nature(s) of suit: 02 (Other (e.g. other actions that would have been brought in state court if unrelated to bankruptcy)). (Okafor, M.)
2	9/29/21	2	(1 pg) Supplemental Document (cover sheet) by CLO Holdco Ltd., Charitable DAF Fund (RE: related document(s)1 Adversary case 21-03067) [ORIGINALLY FILED IN 21-CV-0842 AS #2 ON 04/13/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)

Vol. 2 000139 000232 000239 000270 Thru Vol. 6	3	9/29/21	6	(93 pgs; 6 docs) MOTION for Leave to File First Amended Complaint filed by CLO Holdco Ltd., Charitable DAF Fund LP (Attachments: # 1 Exh 1_First Amended Complaint # 2 Exh 2_Motion for Authorization to Retain James Seery # 3 Exh 3_Order Approving Retention of James Seery # 4 Exh 4_Order Approving Settlement # 5 Proposed Order) (Bridges, Jonathan) (Entered: 04/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #6 ON 04/19/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
	4	9/29/21	22	(7 pgs; 2 docs) MOTION for an Order to Enforce the Order of Reference filed by Highland Capital Management LP. (Attachments: # 1 Exhibit(s) A--Proposed Order) (Annable, Zachery) Modified text on 5/20/2021 (mjr). (Entered: 05/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #22 ON 05/19/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
	5	9/29/21	23	(31 pgs) Brief/Memorandum in Support filed by Highland Capital Management LP re: 22 MOTION for an Order to Enforce the Order of Reference. (Annable, Zachery) Modified text on 5/20/2021 (mjr).(Entered: 05/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #23 ON 05/19/2021 IN U.S.DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
	6	9/29/21	24	(926 pgs; 29 docs) Appendix in Support filed by Highland Capital Management LP re: 23 Brief/Memorandum in Support. (Attachments: # 1 Appendix 1 # 2 Appendix 2 # 3 Appendix 3 # 4 Appendix 4 # 5 Appendix 5 # 6 Appendix 6 # 7 Appendix 7 # 8 Appendix 8 # 9 Appendix 9 # 10 Appendix10 # 11 Appendix 11 # 12 Appendix 12 # 13 Appendix 13 # 14 Appendix 14 # 15 Appendix 15 # 16 Appendix 16 # 17 Appendix 17 # 18 Appendix 18 # 19 Appendix 19 # 20 Appendix 20 # 21 Appendix 21# 22 Appendix 22 # 23 Appendix 23 # 24 Appendix 24 # 25 Appendix 25 # 26 Appendix 26 # 27 Appendix 27 # 28 Appendix 28) (Annable, Zachery) Modified linkage and text on 5/20/2021 (mjr). (Entered:05/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #24 ON 05/19/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
Vol. 7 001196	7	9/29/21	26	(7 pgs; 2 docs) MOTION to Dismiss Complaint filed by Highland Capital Management LP (Attachments: # 1 Exhibit(s) A--Proposed Order) (Annable, Zachery) Modified text on 5/28/2021 (jmg).(Entered: 05/27/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #26 ON 05/27/2021 IN U.S.DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)

Vol. 7 001203 thru Vol. 8	8	9/29/21	28	(508 pgs; 14 docs) Appendix in Support filed by Highland Capital Management LP (Attachments: # 1 Appendix 1 # 2 Appendix 2 # 3 Appendix 3 # 4 Appendix 4 # 5 Appendix 5 # 6 Appendix 6 # 7 Appendix 7 # 8 Appendix 8 # 9 Appendix 9 # 10 Appendix 10 # 11 Appendix 11 # 12 Appendix 12 # 13 Appendix 13) (Annable, Zachery) (Entered: 05/27/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #28 ON 05/27/2021 IN U.S. DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
Vol. 9 001711	9	9/29/21	33	(1 pg) Amended Civil Cover Sheet by CLO Holdco Ltd, Charitable DAF Fund LP. Amendment to 2 Supplemental Document. (Sbaiti, Mazin) Modified text on 6/23/2021 (mjr). (Entered: 06/22/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #33 ON 06/22/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001712	10	9/29/21	36	(26 pgs) RESPONSE filed by CLO Holdco Ltd, Charitable DAF Fund LP re: 22 MOTION for an Order to Enforce the Order of Reference (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #36 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001738	11	9/29/21	37	(22 pgs) Appendix in Support filed by CLO Holdco Ltd, Charitable DAF Fund LP re 36 Response/Objection Response to Motion for an Order to Enforce the Order of Reference (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #37 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001760	12	9/29/21	38	(45 pgs) RESPONSE filed by CLO Holdco Ltd, Charitable DAF Fund LP re: 26 MOTION to Dismiss (Defendant Highland Capital Management, L.P.'s Motion to Dismiss Complaint) (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #38 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001805	13	9/29/21	39	(88 pgs) Appendix in Support filed by CLO Holdco Ltd, Charitable DAF Fund LP re 38 Response/Objection to Defendant Highland Capital Management, L.P.'s Motion to Dismiss Complaint (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #39 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001893	14	9/29/21	42	(12 pgs) REPLY filed by Highland Capital Management LP re: 22 MOTION for an Order to Enforce the Order of Reference (Annable, Zachery) (Entered: 07/13/2021) [ORIGINALLY FILED IN 21-CV-0842AS #42 ON 07/13/2021 IN U.S.

			DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
VOL. 9	15	9/29/21	43 (852 pgs) Appendix in Support filed by Highland Capital Management LP re: 42 Reply. (Annable, Zachery) Modified text on 7/14/2021 (mjr). (Entered: 07/13/2021) [ORIGINALLY FILED IN 21-CV-0842AS #43 ON 07/13/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001905 thru Vol. 13	16	9/29/21	45 (21 pgs) REPLY filed by Highland Capital Management LP re: 26 MOTION to Dismiss (Defendant Highland Capital Management, L.P.'s Motion to Dismiss Complaint) (Annable, Zachery) (Entered:07/13/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #44 ON 07/13/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002757	17	9/29/21	57 (7 pgs; 2 docs) MOTION to Dismiss and Joinder in Motion to Dismiss of Highland Capital Management, L.P. filed by Highland CLO Funding Ltd. (Attachments: # 1 Proposed Order) Attorney Paul R Bessette added to party Highland CLO Funding Ltd (pty:dft) (Bessette, Paul) (Entered: 08/30/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #57 ON 08/30/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002778	18	9/29/23	58 (12 pgs) Brief/Memorandum in Support filed by Highland CLO Funding Ltd. re 57 MOTION to Dismiss and Joinder in Motion to Dismiss of Highland Capital Management, L.P. (Bessette, Paul) (Entered: 08/30/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #58 ON 08/30/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002785	19	9/29/23	59 (80 pgs; 5 docs) Appendix in Support filed by Highland CLO Funding Ltd re 58 Brief/Memorandum in Support of Motion (Attachments: # 1 Exhibit(s) A - Jackson v Dear # 2 Exhibit(s) B - Prudential Assurance v. Newman # 3 Exhibit(s) C - Harbourvest Settlement Agreement # 4 Exhibit(s) D - Boleat Declaration) (Bessette, Paul) (Entered: 08/30/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #59 ON 08/30/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002797	20	9/29/21	64 (1 pg) ORDER OF REFERENCE: Pursuant to 28 U.S.C. § 157 and this District's Miscellaneous Order No. 33, this case is hereby REFERRED to Judge Stacey G. C. Jernigan of the United States Bankruptcy Court for the Northern District of Texas, Dallas Division, to be adjudicated as a matter related to the consolidated Chapter 11 Bankruptcy of Highland Capital Management, L.P., Chapter 11 Case No.19-34054. (Ordered by Judge Jane J. Boyle
002877			

Vol. 14				on 9/20/2021) (svc) (Entered: 09/20/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #64 ON 09/20/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
	21	10/19/21	66	(5 pgs) Notice of hearing filed by Defendant Highland Capital Management, LP (RE: related document(s) 26 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP, 47 Motion to strike document filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 55 Motion to abate filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) Hearing to be held on 11/23/2021 at 09:30 AM at https://us-courts.webex.com/meet/jerniga for 26 and for 47 and for 55, (Annable, Zachery)
002878				
002883	22	11/22/21	71	(509 pgs; 2 docs) Witness and Exhibit List <i>for Hearing on November 23, 2021</i> filed by Defendant Highland Capital Management, LP (RE: related document(s) 26 Motion to dismiss adversary proceeding). (Attachments: # 1 Exhibits 1-13) (Hayward, Melissa)
thru Vol. 16				
Vol. 17	23	11/22/21	72	(2 pgs) Witness List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 26 Motion to dismiss adversary proceeding, 47 Motion to strike (related document(s): 43 Document), 55 Motion to abate (related document(s) 1 Complaint), 69 Motion to abate <i>Plaintiffs' Amended Motion to Stay All Proceedings</i> (related document(s) 55 Motion to abate (related document(s) 1 Complaint))). (Sbaiti, Mazin)
003392				
003394	24	11/22/21	73	(189 pgs; 4 docs) Exhibit List <i>for November 23, 2021 hearing</i> filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 47 Motion to strike (related document(s): 43 Document), 55 Motion to abate (related document(s) 1 Complaint)). (Attachments: # 1 Exhibit 1_Defendant's Memorandum of Law in Support of Motion for Reconsideration # 2 Exhibit 2_Highland Memorandum in Support of Motion to Dismiss # 3 Exhibit 3_Order (I) Confirming Fifth Amended Plan of Reorganization of Highland) (Sbaiti, Mazin)
003583	25	12/7/21	80	(2 pgs) Order granting Highland CLO Funding, Ltd.'s motion to dismiss adversary as a party with prejudice (related document 57) Entered on 12/7/2021. (Okafor, Marcey) Modified text on 3/11/2022 (Okafor, Marcey).
003585	26	3/11/22	99	(26 pgs) Memorandum of Opinion and order granting motion to dismiss the adversary proceeding (RE: related document(s) 26 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP). Entered on 3/11/2022 (Okafor, Marcey)
003611	27	3/11/22	100	(26 pgs) Order granting motion to dismiss adversary proceeding with prejudice (related document #26) Entered on 3/11/2022. (Okafor, Marcey)

Vol. 18 003637	28	3/21/22	104	(29 pgs) Notice of appeal. Fee Amount \$298 filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 100 Order on motion to dismiss adversary proceeding). Appellant Designation due by 04/4/2022. (Sbaiti, Mazin)
003666	29	5/26/22	120	(177 pgs; 2 docs) Support/supplemental document <i>Motion to Supplement Appellate Record</i> filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 111 Appellant designation). (Attachments: # 1 Amended Transcript of January 14, 2021 Hearing) (Sbaiti, Mazin)
003843	30	6/9/22	121	(1 pg) DISTRICT COURT Order: Case 3:22-00695-B is hereby transferred to the docket of the Honorable Judge Jane J. Boyle for consolidation with The Charitable DAF Fund LP, et al. v. Highland Capital Management LP, Case No. 3:21-cv-3129-N. Judge Karen Gren Scholer no longer assigned to case.(RE: related document(s) 86 Notice of appeal filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 104 Notice of appeal filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Entered on 6/9/2022 (Whitaker, Sheniqua) (Entered: 06/10/2022)
003844	31	10/24/22	122	(7 pgs) Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP (Annable, Zachery)
003851	32	10/14/22	123	(31 pgs) Brief in support filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Annable, Zachery)
Vol. 19 003882 Thru Vol 20	33	10/14/22	124	(513 pgs; 15 docs) Support/supplemental document (<i>Appendix in Support of Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7 # 8 Exhibit 8 # 9 Exhibit 9 # 10 Exhibit 10 # 11 Exhibit 11 # 12 Exhibit 12 # 13 Exhibit 13 # 14 Exhibit 14) (Annable, Zachery)
Vol. 21 004395	34	10/27/22	126	(5 pgs) Notice of hearing (<i>Notice of Hearing and Briefing Schedule on Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP). Hearing to be held on 12/8/2022 at 09:30 AM at https://us-courts.webex.com/meet/jerniga for 122. (Annable, Zachery)

Vol. 21 004400 004410 004442 Thru Vol. 22	35	11/18/22	128	(10 pgs) Motion for withdrawal of reference. Fee amount \$188, filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (Sbaiti, Mazin)
	36	11/18/22	129	(32 pgs) Response opposed to (related document(s): 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP) filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Sbaiti, Mazin)
	37	11/18/22	130	(254 pgs; 2 docs) Response opposed to (related document(s): 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP) filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Attachments: # 1 Appendix) (Sbaiti, Mazin)
Vol. 22 004696 004717 004732 004737 004742	38	9/2/22	131	(21 pgs) DISTRICT COURT MEMORANDUM OPINION AND ORDER: The Court REVERSES and REMANDS the bankruptcy court's Motion to Dismiss Order and AFFIRMS the bankruptcy courts Motion to Stay Order. re: appeal on Civil Action number: Case 3:22-00695-B consolidated with 3:21-CV-3129-B, (RE: related document(s) 81 Order on motion to abate, 100 Order on motion to dismiss adversary proceeding). Entered on 9/2/2022 (Whitaker, Sheniqua) (Entered: 11/29/2022)
	39	12/2/22	133	(15 pgs) Reply to (related document(s): 129 Response filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 130 Response filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) filed by Defendant Highland Capital Management, LP. (Annable, Zachery)
	40	12/7/22	135	(5 pgs) Notice of hearing filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP). Hearing to be held on 1/25/2023 at 01:30 PM at https://us-courts.webex.com/meet/jerniga for 122, (Annable, Zachery)
	41	12/7/22	136	(5 pgs) Notice of hearing filed by Defendant Highland Capital Management, LP (RE: related document(s) 128 Motion for withdrawal of reference filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Status Conference to be held on 1/25/2023 at 01:30 PM at https://us-courts.webex.com/meet/jerniga . (Annable, Zachery).
	42	12/9/22	138	(3 pgs) Response opposed to (related document(s): 128 Motion for withdrawal of reference. Fee amount \$188, filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) filed by Defendant Highland Capital Management, LP. (Annable, Zachery)

Vol. 22 004745	43	12/9/22	139	(25 pgs) Brief in support filed by Defendant Highland Capital Management, LP (RE: related document(s) 138 Response). (Annable, Zachery)
Vol. 23 004770	44	12/9/22	140	(280 pgs; 8 docs) Support/supplemental document (<i>Appendix in Support of Highland Capital Management, L.P.'s Response to Renewed Motion to Withdraw the Reference</i>) filed by Defendant Highland Capital Management, LP (RE: related document(s) 138 Response). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7) (Annable, Zachery)
Vol. 24 005050	45	12/16/22	144	(6 pgs) Reply to (related document(s): 138 Response filed by Defendant Highland Capital Management, LP) filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Sbaiti, Mazin)
005056 Thru Vol. 25.	46	1/23/23	145	(514 pgs; 15 docs) Witness and Exhibit List filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7 # 8 Exhibit 8 # 9 Exhibit 9 # 10 Exhibit 10 # 11 Exhibit 11 # 12 Exhibit 12 # 13 Exhibit 13 # 14 Exhibit 14) (Annable, Zachery)
Vol. 26 005570	47	1/23/23	146	(280 pgs; 8 docs) Witness and Exhibit List filed by Defendant Highland Capital Management, LP (RE: related document(s) 128 Motion for withdrawal of reference. Fee amount \$188.). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7) (Annable, Zachery)
Vol. 27 005850	48	1/23/23	147	(221 pgs; 7 docs) Witness and Exhibit List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Attachments: # 1 Exhibit 1_Excerpts from July 14, 2020 Hearing Transcript # 2 Exhibit 2_HCLOF Members Agreement Relating to the Company # 3 Exhibit 3_HarbourVest Settlement Agreement # 4 Exhibit 4_Order Approving Debtor's Settlement with HarbourVest # 5 Exhibit 5_HCLOF Offering # 6 Exhibit 6 Amended and Restated Investment Advisory Agreement) (Sbaiti, Mazin)
006071	49	1/23/23	148	(3 pgs) Witness and Exhibit List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 128 Motion for withdrawal of reference. Fee amount \$188.). (Phillips, Louis)
Vol. 28 006074	50	1/25/23	150	(56 pgs; 2 docs) Amended Witness and Exhibit List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 147 List (witness/exhibit/generic), 149 List (witness/exhibit/generic)). (Attachments: # 1 Exh 7_Testimony of Mark Patrick at June 8, 2021 hearing) (Sbaiti, Mazin)

Vol. 28 006130	51	1/25/23	152	(3 pgs) Notice of Appearance and Request for Notice by Louis M. Phillips filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Phillips, Louis)
	52	1/25/23	154	(1 pg) Court admitted exhibits date of hearing January 25, 2023 (RE: related document(s) 128 Motion for withdrawal of reference, filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) (COURT ADMITTED DEFENDANT'S EXHIBITS #1, #2, #3, #4, #5 & #6 OFFERED BY ATTY GREG DEMO). (Edmond, Michael) (Entered: 01/27/2023)
Vol. 32 006925 006942 006960	53	2/6/23	158	Report and recommendation to the U.S. District Court by U.S. Bankruptcy Judge. (RE: related document(s) 128 Motion for withdrawal of reference filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Entered on 2/6/2023 (Okafor, Marcey)
	54	2/6/23	161	(18 pgs) DISTRICT COURT Notice of transmission of report and recommendation in re: renewed motion to withdraw reference. Civil Case # 3:22-cv-02802-S. (RE: related document(s) 158 Report and recommendation to the U.S. District Court by U.S. Bankruptcy Judge. (RE: related document(s) 128 Motion for withdrawal of reference filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Entered on 2/6/2023) (Whitaker, Sheniqua)
	55	4/3/23	165	(1 pg) DISTRICT COURT ORDER: The Court GRANTS the 11 Joint Motion to Transfer Proceeding and Consolidate Before Original Court and the above-numbered case (3:22-cv-02802-S) is transferred to the docket of the Honorable Judge Jane Boyle: Civil case 3:21-cv-00842-B (order referring case). (RE: related document(s) 1 Complaint filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 143 Notice of transmission of motion to withdraw reference). Entered on 4/3/2023 (Whitaker, Sheniqua) Modified on 4/10/2023 (Whitaker, Sheniqua). (Entered: 04/10/2023)

TRANSCRIPTS

006961	56	11/24/21	78	(104 pgs) Transcript regarding Hearing Held 11-23-2021 RE: Motion Hearing. THIS TRANSCRIPT WILL BE MADE ELECTRONICALLY AVAILABLE TO THE GENERAL PUBLIC 90 DAYS AFTER THE DATE OF FILING. TRANSCRIPT RELEASE DATE IS 02/22/2022. Until that time the transcript may be viewed at the Clerk's Office or a copy may be obtained from the official court transcriber. Court Reporter/Transcriber Liberty Transcripts/Dipti Patel, Telephone number 847-848-4907. (RE: related document(s) 75 Hearing held on 11/23/2021. (RE: related document(s) 55 MOTION to Stay filed by CLO Holdco Ltd, Charitable DAF Fund LP (Sbaiti, Mazin) (Entered: 08/26/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #55 ON 08/26/2021 IN U.S.
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			<p>DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)) (Appearances: J. Pomerantz and J. Morris for Highland Defendants; J. Jordan and P. Bessett for HCLOF; M. Sbaiti for Plaintiffs. Nonevidentiary hearing. Motion denied. Mr. Pomerantz to upload order.), 76 Hearing held on 11/23/2021. (RE: related document(s) 47 Motion to strike 43 Appendix in support filed by CLO Holdco, Ltd., Charitable DAF Fund, LP (Bridges, Jonathan) Modified text on 7/16/2021 (mjr). (Entered: 07/15/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #47 ON 07/15/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)) (Appearances: J. Pomerantz and J. Morris for Highland Defendants; J. Jordan and P. Bessett for HCLOF; M. Sbaiti for Plaintiffs. Nonevidentiary hearing. Motion denied (Plaintiffs acknowledged complained-of Appendices it did not relate to Motion to Dismiss). Mr. Pomerantz to upload order.)). Transcript to be made available to the public on 02/22/2022. (Patel, Dipti)</p>
57	2/21/23	164	<p>164 (112 pgs) Transcript regarding Hearing Held 1/25/23 RE: HEARING ON DEFENDANT HIGHLAND CAPITAL MANAGEMENT L.P.'S RENEWED MOTION TO DISMISS COMPLAINT (122) AND STATUS CONFERENCE RE: MOTION FOR WITHDRAWAL OF REFERENCE FILED BY PLAINTIFF CLO HOLDCO, LTD., PLAINTIFF CHARITABLE DAF FUND, LP (128). THIS TRANSCRIPT WILL BE MADE ELECTRONICALLY AVAILABLE TO THE GENERAL PUBLIC 90 DAYS AFTER THE DATE OF FILING. TRANSCRIPT RELEASE DATE IS 05/22/2023. Until that time the transcript may be viewed at the Clerk's Office or a copy may be obtained from the official court transcriber. Court Reporter/Transcriber Dipti Patel, Telephone number 847-848-4907. (RE: related document(s) 155 Hearing held on 1/25/2023. (RE: related document(s) 122 Motion to dismiss adversary proceeding, (Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint) filed by Defendant Highland Capital Management, LP filed by Defendant Highland Capital Management, LP) (Appearances: J. Morris and G. Demo for Movants; L. Phillips and M. Sbaiti for Plaintiffs. Evidentiary hearing (appendices). Court took matter under advisement.), 156 Hearing held on 1/25/2023. (RE: related document(s) 128 Motion for withdrawal of reference. Fee amount \$188, filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) (Appearances: J. Morris and G. Demo for Movants; L. Phillips and M. Sbaiti for Plaintiffs. Evidentiary hearing (appendices). Court announced it will recommend denial to District Court. Court is working on Report & Recommendation.)). Transcript to be made available to the public on 05/22/2023. (Patel, Dipti)</p>

Dated: July 14, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was filed electronically through the Court's ECF system, which provides notice to all parties of interest, on this 14th day of July, 2023.

/s/ Mazin A. Sbaiti

Mazin A. Sbaiti

1 A Yes.

2 Q If Mr. Patrick decides tomorrow to withdraw the lawsuit
3 that's in District Court, does he have an the obligation to
4 tell you in advance?

5 A Again, I wouldn't use the word obligation. But something
6 that I think ultimately is going to be a \$20 or \$30 million,
7 if not more, benefit to the DAF, to the detriment of Highland,
8 if you were to give that up, I would expect him to have a
9 rationale and I would expect him to get other people's
10 thoughts and opinions before he did that.

11 Q Okay. But does he have to get your opinion before he
12 acts?

13 A No, he does not.

14 Q Okay. So he -- Mr. Patrick could do that tomorrow, he
15 could settle the case, and if he doesn't come to you to
16 discuss it in advance, you won't be critical of him, right?

17 A He doesn't have the obligation, but there's -- there's a
18 reasonableness in alignment of interests. I -- a growing
19 entrepreneur sets up a trust, a lot of times they'll put their
20 wife in charge of it, and she hires investment advisers and
21 whatever, but they've got the best interests at mind for the
22 charity or the children or whatever.

23 You know, people who go rogue and move in their own self-
24 interest or panic, that stuff can happen all the time. It
25 doesn't make it appropriate, though.

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1 Q A couple of weeks after Mr. Scott withdraw the objection
2 to the HarbourVest settlement, he entered into a settlement
3 agreement with the Debtor pursuant to which he settled the
4 dispute between the Debtor and CLO Holdco, correct?

5 A Yes.

6 Q Okay. You didn't get advance notice of that third
7 decision, correct?

8 A No.

9 Q Can we go to Page -- Exhibit 32 in your binder? And this
10 is the settlement agreement between CLO Holdco and the Debtor,
11 correct? Attached as the exhibit. I apologize.

12 A Yes.

13 Q And do you understand that that's Mr. Scott's signature on
14 the last page?

15 A Yep.

16 Q And you learned about this settlement only after it had
17 been reached, correct?

18 A Yep.

19 Q And you believed Mr. Scott's decision not to pursue
20 certain claims against the Debtor or to remove HCMLP as the
21 manager of the CLOs was not in the best interests of the DAF,
22 correct?

23 A Correct.

24 Q And you let Mr. Scott know that, correct?

25 A Yes.

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Dondero - Direct

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1 Q After learning about the settlement agreement on January
2 26th, you had one or two conversations with Mr. Scott on this
3 topic, correct?

4 A Yes.

5 Q And your message to Mr. Scott was that the compromise or
6 settlement wasn't in the DAF's best interest, correct?

7 A It was horrible for the DAF.

8 Q Uh-huh. And you told him that, right?

9 A Yes.

10 Q Okay. From your perspective, any time a trustee doesn't
11 do what you believe is in the trust's best interest, you leave
12 yourself open to getting sued, correct?

13 A Who is "you" in that question?

14 Q You. Mr. Dondero.

15 A Can you repeat the question, then, please?

16 Q Sure. From your perspective, any time you're a trustee
17 and you don't believe that the trustee is doing what's in the
18 best interests of the fund, the trustee leaves himself open to
19 getting sued, correct?

20 A I don't know who the trustee leaves himself open to, but
21 as soon as you go down a path of self-interest or panic, you
22 -- you potentially create a bad situation. But I don't know
23 who holds who liable.

24 Q Did you believe that Mr. Scott was acting out of self-
25 interest or panic when he decided to settle the dispute with

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Dondero - Direct

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1 the Debtor on behalf of CLO Holdco?

2 A Yes.

3 Q Did you tell him that?

4 A He told me that.

5 Q He told you that he was acting out of panic or
6 desperation? With self-int... withdrawn. Withdrawn. Did he
7 tell you that he was acting out of self-interest?

8 A He was having health problems, anxiety problems, and he
9 didn't want to deal with the conflict. He didn't want to
10 testify. He didn't want to come to court. He didn't want to
11 do those things. And I told him I didn't think the settlement
12 was going to get him out of that stuff. I think, you know, it
13 got him out of some issues, but I think you guys are going to
14 go after him for other stuff. But he -- he panicked.

15 MR. MORRIS: I move to strike the latter remark.

16 THE COURT: Sustained.

17 BY MR. MORRIS:

18 Q Shortly after you had the conversation with Mr. Scott, he
19 sent you notice of his intent to resign from his positions at
20 the DAF and CLO Holdco, correct?

21 A Yes.

22 Q Okay. Let's take a look at that, please. Exhibit 29.
23 This is Mr. Scott's notice of resignation, correct?

24 A Yes.

25 Q He sent it only to you, correct?

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1 A Yes.

2 Q A couple of days before he sent this, he told you he was
3 considering resigning; isn't that right?

4 A Yes.

5 Q Okay. And he told you he was considering resigning
6 because he was suffering from health and anxiety issues
7 regarding the confrontation and the challenges of
8 administering the DAF given the bankruptcy, correct?

9 A Yes.

10 Q He didn't tell you that he made the decision -- withdrawn.
11 Did you tell him in this same conversation -- withdrawn. Is
12 this the same conversation where you conveyed the message that
13 the compromise or settlement wasn't in the best interests of
14 the DAF?

15 A You mean the conversation -- or the resignation? Is that
16 -- can you rephrase the question, please?

17 Q Yeah, I apologize. It's my fault, sir. You testified
18 that after the January 26th hearing you had a conversation
19 with Mr. Scott where you told him that the compromise or
20 settlement was not in the best interests of the DAF, correct?

21 A Yes.

22 Q Okay. Did Mr. Scott share with you his concerns about
23 anxiety and health issues in that same conversation, or was it
24 in a subsequent conversation?

25 A It was at or around that time. I -- I don't remember

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1 which conversation.

2 Q Okay.

3 A But it was right at or around that time.

4 Q All right. You never asked Mr. Scott to reconsider, did
5 you?

6 A No.

7 Q You don't recall sending this notice of resignation to
8 anyone, do you?

9 A No.

10 Q You don't remember notifying anyone that you'd received
11 notice of Mr. Scott's intent to resign from the DAF, do you?

12 A It was -- yeah, no, I -- I don't remember. It was a busy
13 time around that time and this was a secondary issue.

14 Q Okay. So the fact that the person who has been running
15 the DAF for a decade gives you and only you notice of his
16 intent to resign was a secondary issue in your mind?

17 A Yes, because when I talked to him at about that time, I
18 said, okay, well, it's going to take a while. I don't even
19 know how the mechanism works. But don't do anything adverse
20 to the DAF, don't do anything else until, you know, you've
21 figured out transition.

22 Q Uh-huh.

23 A And so once he had confirmed he wouldn't do anything
24 outside normal course until he transitioned, I didn't worry
25 about this. I had bigger issues to worry about at the time.

1 Q In the third paragraph of his email to you, he wrote that
2 his resignation will not be effective until he approves of the
3 indemnification provisions and obtains any and all necessary
4 releases. Do you see that?

5 A Yes.

6 Q And that was the condition that on January 31st Mr. Scott
7 placed on the effectiveness of his resignation, correct?

8 A Condition? Yeah, I -- I think he's trying to state the
9 timing will happen after that.

10 Q After he gets the release, right?

11 A Yes.

12 Q And he wanted the release because you'd told him three
13 different times that he wasn't acting in the best of the DAF,
14 correct?

15 MR. TAYLOR: Objection, Your Honor.

16 MR. SBAITI: Objection. Calls for --

17 MR. TAYLOR: Objection. Calls for speculation.

18 THE WITNESS: Yeah, I --

19 THE COURT: Sustained.

20 THE WITNESS: I can't take that jump. Yeah.

21 BY MR. MORRIS:

22 Q In response to this email from your lifelong friend, you
23 responded, if we could scroll up, about whether divest was a
24 synonym -- if we can look at the first one -- whether divest
25 is a synonym for resigned. Do I have that right?

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1 A (no immediate response)

2 Q If you will look at your response on Monday morning at
3 9:50.

4 A Yes.

5 Q Okay. And then after Mr. Scott responds, you respond
6 further, if we can scroll up, and you specifically told him,
7 "You need to tell me ASAP that you have no intent to divest
8 assets." Correct?

9 A Yes.

10 Q And you wrote that because you believed some of his
11 behavior was unpredictable, right?

12 A I think I wrote that because the term divest in investment
13 terms means sale or liquidate, but I guess it had a different
14 legal term in the way he was looking at it. I wasn't aware at
15 that time of the shares that could be bequeathed to anybody,
16 and I think the divest refers to that, but I wasn't aware that
17 that's how the structure worked at that time, and I was
18 worried that divest could be the investment term and I -- it
19 wouldn't have been appropriate for him to liquidate the
20 portfolio.

21 Q So, and you wanted to make sure he wasn't liquidating or
22 intending to liquidate any of the CLOs, correct?

23 A Correct.

24 Q Okay. So he's still the authorized, the sole authorized
25 representative, but you wanted to make sure that he didn't do

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1 anything that you thought was inappropriate. Fair?

2 A It's because I had talked to him before this and he said
3 he wasn't going to do anything outside normal course, and then
4 the word divest scared me, but I didn't realize it was a legal
5 term in this parlance here.

6 Q And so after he explained, you still wanted to make sure
7 that he wasn't divesting any assets, correct?

8 A Yes.

9 Q Okay. Since February 1st, you've exchanged exactly one
10 text messages with Mr. Scott; is that right?

11 A I think there've been several, several text messages. But
12 one on his birthday.

13 Q Yeah. And you haven't spoken to him in months, correct?

14 A In a couple months, yes.

15 Q All right. Let's talk about the replacement of Mr. Scott.
16 With -- with Mr. Scott's notice, someone needed to find a
17 replacement, correct?

18 A Yes.

19 Q And the replacement was going to be responsible for
20 managing a charitable organization with approximately \$200
21 million of assets, most of which was seeded directly or
22 indirectly through you, correct?

23 A Yes.

24 Q And the replacement was going to get his and her -- his or
25 her investment advice from you and NexPoint Advisors; do I

1 have that right?

2 A That was the plan.

3 Q Okay. Ultimately, Mr. Patrick replaced Mr. Scott,
4 correct?

5 A Yes.

6 Q But it's your testimony that you had no knowledge that Mr.
7 Patrick was going to replace Mr. Scott until after it happened
8 on March 24, 2021. Correct?

9 A That's correct. I believe it happened suddenly.

10 Q So, for nearly two months after you had received notice of
11 Mr. Scott's intent to resign, you were uninvolved in the
12 process of selecting his replacement, correct?

13 A I was uninvolved. I'd say the process was dormant for an
14 extended period of time until Mark Patrick came on board, and
15 then Mark Patrick ran the process of interviewing multiple
16 potential candidates.

17 Q Mark Patrick didn't have any authority prior to March
18 24th, correct?

19 A Is March 24th the date that he transitioned the shares to
20 himself from Grant Scott?

21 Q Yep.

22 A That's when he then became the trustee of the DAF, yes.

23 Q Do you know -- do you know who was instructing Mr. Patrick
24 on who to interview or how to carry the process out?

25 A He was doing that on his own with, I think,

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1 recommendations from third-party tax firms.

2 Q So Mr. Patrick was trying to find a successor to Mr.
3 Scott, even though he had no authority to do that, and you
4 were completely uninvolved in the whole process? Do I have
5 that right?

6 A I was uninvolved, yes. He was trying to facilitate it for
7 the benefit of his friendship with Grant Scott and knowing
8 that it -- it -- with his resignation, it had to transition to
9 somebody. And he enjoys working on the DAF, he enjoys the
10 charitable stuff in the community, and he was the most
11 appropriate person to work on helping Grant transition.

12 MR. MORRIS: All right. I move to strike, Your
13 Honor. It's hearsay.

14 THE COURT: Sustained.

15 BY MR. MORRIS:

16 Q You're aware that Mr. Seery was appointed the Debtor's CEO
17 and CRO last summer, correct?

18 A Yes.

19 Q And you're aware that Mr. Seery's appointment was approved
20 by the Bankruptcy Court, correct?

21 A Yes.

22 Q And you were aware of that at the time it happened,
23 correct?

24 A Yes.

25 Q And even before that, in January of 2020, you consented to

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1 a settlement where you gave up control of the Debtor.

2 Correct?

3 A To the independent board for a consensual Chapter 11
4 restructuring that would leave Highland intact.

5 Q And do you understand that the gatekeeper provision in the
6 July order is exactly like the one that you agreed to in
7 January except that it applies to Mr. Seery instead of the
8 independent directors?

9 A I -- I learned a lot about that today, but I don't think
10 it's appropriate to move what applied to the board to the CEO
11 of a registered investment advisor.

12 Q Okay. I'm just asking you, sir. Listen carefully to my
13 question. Were you aware in January 2020 that you agreed to a
14 gatekeeper provision on behalf of the independent board?

15 A Generally, but not specifically.

16 Q Okay.

17 A Not -- not like what we've been going over today.

18 Q Okay. And you knew that Mr. Seery had applied to be
19 appointed CEO subject to the Court's approval, correct?

20 A Wasn't it backdated to March? I -- I think the hearing
21 was in June, but it was backdated for -- for money and other
22 purposes, right? I -- that's my recollection. I don't
23 remember otherwise.

24 Q You do remember that Mr. Seery got -- he got -- his
25 appointment got approved by the Court, right?

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1 A Yes. But, as far as the dates are concerned, I thought it
2 was either in March or retroactive to March. Maybe it was
3 June or July.

4 Q And you --

5 A But I don't remember.

6 Q Did you have your lawyers review the motion that was filed
7 on behalf of the Debtor?

8 A I'm -- I assume they do their job. I -- if they didn't, I
9 don't know.

10 Q Okay. That's what you hired them to do; is that fair?

11 A Yes.

12 Q Okay. Can we go to Exhibit 12, please? I think it's in
13 Binder 1. You've seen this document before, correct?

14 A Yes.

15 Q In fact, you saw versions of this complaint before it was
16 filed, correct?

17 A Yes, I saw one or two versions towards the end. I don't
18 know if I saw the final version, but --

19 Q Sir, you participated in discussions with Mr. Sbaiti
20 concerning the substance of this complaint before it was
21 filed, correct?

22 A Some. I would just use the word some.

23 Q Okay. Can you describe for me all of your conversations
24 with Mr. Sbaiti concerning the substance of this complaint?

25 MR. SBAITI: Your Honor, I would object on the basis

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1 of work product privilege and attorney-client communications.
2 He was an agent for my client, the DAF, at the time he was
3 having these discussions with us, and our discussions with him
4 were work product. So to the extent he can reveal the
5 conversations without discussing the actual content, we would
6 raise privilege objection, Your Honor.

7 THE COURT: Mr. Morris?

8 MR. MORRIS: Your Honor, there is no privilege here.
9 That's exactly why I asked Mr. Patrick the questions earlier
10 today. Mr. Dondero is not party to any agreement with the DAF
11 today. It's an informal agreement, perhaps, but there is no
12 contractual relationship, there is no privity any longer
13 between Mr. Dondero or any entity that owns and controls in
14 the DAF, as far as I know. If they have evidence of it, I'm
15 happy to listen, but that -- that's exactly why I asked those
16 questions of Mr. Patrick earlier today.

17 THE COURT: All right.

18 MR. SBAITI: Your --

19 THE COURT: That was the testimony. There's an
20 informal arrangement, at best.

21 MR. SBAITI: Well, Your Honor, I would suggest that
22 that doesn't necessarily mean that he isn't an agent of the
23 DAF. It doesn't have to be a formal agreement for him to be
24 an agent of the DAF.

25 Everyone's agreed he was an advisor. Everyone's agreed he

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1 was helping out. That is an agency relationship. It doesn't
2 have to be written down. It doesn't have to be a formal
3 investment advisory relationship. He's still an agent of the
4 DAF. He was requested to do something and agreed to do it
5 under the expectation that all of us had that those would be
6 privileged, Your Honor. That is -- that is sufficient -- that
7 is sufficient, I would argue, to get us where we need to be.
8 The privilege should apply, Your Honor, and they don't have a
9 basis for, I would say, invading the privilege, Your Honor.

10 THE COURT: Well, do you have any authority? Because
11 it just sounds wrong. He's not an employee of your client.
12 He doesn't have any contractual arrangement with your client.

13 MR. SBAITI: Your Honor, I would dispute the idea
14 that he has no contractual arrangement with my client. The
15 question was asked, do you have a -- do you have a written
16 agreement, and then the question was, so you don't have a
17 contract, and the answer was no, I don't have a contract,
18 building upon that first -- that first question. But the
19 testimony as he just recounted is that there is an agreement
20 that he would advise Mr. Patrick and he would advise the DAF.

21 THE COURT: Okay.

22 MR. SBAITI: That's -- that's a contract.

23 THE COURT: Okay. My question was, do you have any
24 legal authority? That's what I meant when I said authority.
25 Any legal authority to support the privilege applying in this

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1 kind of --

2 MR. SBAITI: In an informal arrangement, Your Honor?
3 I don't have one at my fingertips at the moment, Your Honor,
4 but I don't know that that should be a reason to invade the
5 privilege.

6 And I would just add, Your Honor, I would just add, we've
7 already -- because of the purpose of these questions, you've
8 heard Mr. Morris state several times that the purpose is to
9 show that Mr. -- that Mr. Dondero had some role in advising
10 and participating in the creation of this complaint. That's
11 been conceded by myself. I believe it was conceded by Mr.
12 Dondero.

13 The actual specific facts, the actual specific
14 conversations, Your Honor, shouldn't be relevant at this point
15 and they shouldn't be admissible, given -- given the
16 relevancy, given the perspective of the privilege.

17 THE COURT: Okay.

18 MR. MORRIS: If I might --

19 THE COURT: I overrule your objection. I don't think
20 a privilege has been shown here --

21 MR. SBAITI: And Your Honor, --

22 THE COURT: -- and I think it's relevant.

23 MR. SBAITI: -- I would ask if we could *voir dire* the
24 witness on the basis of the privilege, if that's --

25 THE COURT: All right. You may do so.

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Dondero - Voir Dire

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1 VOIR DIRE EXAMINATION

2 BY MR. SBAITI:

3 Q Mr. Dondero, do you have a relationship with the DAF?

4 A Yes.

5 Q How would you describe that relationship?

6 A I view myself and my firm as the investment advisor. I
7 was actually surprised by the testimony today that there
8 wasn't a contract in place, but there should be one. There
9 should be one soon, in my opinion.

10 Q Have you -- did you hear Mr. Patrick testify earlier that
11 he comes to you for advice?

12 A Yes.

13 Q Is that --

14 A As he should. Yeah.

15 Q Is that true?

16 A Yes.

17 Q When you render that advice, do you render that advice
18 with some expectation about him following or listening to that
19 advice?

20 A Okay, I think there's only been one investment or one
21 change in the DAF portfolio since Mark Patrick's been
22 involved, only one, and it was a real estate investment that I
23 wasn't directly involved in. And so the people who put that
24 investment forward worked with Mark without my involvement,
25 and then I think Mark got third-party appraisal firms and

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1 third-party valuation firms involved to make sure he was
2 comfortable, which was a good process.

3 Q When you supplied information to Mr. Patrick, do you do so
4 under the belief that there is a contractual, informal or
5 formal, relationship?

6 MR. MORRIS: Objection to the form of the question.

7 THE COURT: Overruled.

8 MR. SBAITI: What specific form?

9 THE COURT: Overruled.

10 MR. SBAITI: Thank you.

11 THE WITNESS: Yes. I believe it -- it's a
12 relationship that can and should be papered as -- soon.
13 That's my -- I mean, unless I get some reason from counsel not
14 to, I think it's something that should be memorialized.

15 BY MR. SBAITI:

16 Q And when you have that -- in that relationship, when you
17 communicate with Mr. Patrick about matters, investment or
18 otherwise, is there an expectation of privacy?

19 A Yes.

20 Q When Mr. Patrick -- did Mr. Patrick request that you
21 interface with my firm and myself, as he testified earlier?

22 A Yes.

23 Q And when he did so, did he ask you to do so in an
24 investigatory manner?

25 MR. MORRIS: Objection to the form of the question.

1 THE COURT: Sustained. Rephrase.

2 BY MR. SBAITI:

3 Q Did he tell you why he wanted you to talk to us?

4 A Yeah. At that point, he had started an investigation into
5 the HarbourVest transaction.

6 Q And -- and when he -- when you were providing information
7 to us, did he tell you whether he wanted you to help the
8 Sbaiti firm conduct the investigation?

9 A The -- overall, the financial numbers and tables in there
10 were prepared by not myself, but I -- I did -- I did help on
11 -- on the -- some of the registered investment advisor issues
12 as I understood them.

13 Q Okay. And the communications that you had with us, was
14 that part of our investigation?

15 MR. MORRIS: Objection to the form of the question.

16 THE COURT: Overruled.

17 THE WITNESS: Yes.

18 BY MR. SBAITI:

19 Q And did you understand that we had been retained by Mr.
20 Patrick on behalf of the DAF and CLO Holdco?

21 A Yes.

22 Q And did you appreciate or have any understanding of
23 whether or not you were helping the law firm perform its legal
24 function on behalf of the DAF and CLO Holdco?

25 A Perform its legal function? I was just helping with

1 regard to the registered investment advisor aspects of the
2 overall, you know, like that.

3 Q Let me ask a more simple question. Did you -- did you
4 appreciate that you were assisting a law firm in its
5 representation of the DAF?

6 A Yes.

7 Q And you were helping the law -- and were you helping the
8 law firm develop the facts for a complaint?

9 A Yes. I would almost say, more importantly, I wanted to
10 make sure that there weren't errors in terms of understanding
11 either how CLOs worked or how the Investment Advisers Act
12 worked. So I was -- it was almost more of a proofing.

13 MR. SBAITI: Your Honor, based upon that, I mean,
14 he's helping a law firm perform its function for the client.
15 That's an agency relationship that gets cloaked. You can call
16 him a consulting expert. You can call him, to a certain
17 extent, a fact witness, Your Honor. If we want to take a
18 break, I'm sure we could find authority on that basis for a
19 work product privilege pretty easily.

20 But he's an agent of the DAF. Even if it's an informal
21 agency relationship, that's still agency. He's in some
22 respects, I guess, an agent of the law firm, to the extent
23 he's helping us perform our legal work. And it seems like
24 invading that privilege at this juncture is (a) unnecessary,
25 because we've already conceded that there's been

1 conversations, which I think is the relationship they wanted
2 to establish. And it's not unusual for a law firm to use
3 someone with specialized knowledge to understand some of the
4 intricacies of the actual issues that they're -- that they're
5 getting ready to litigate.

6 THE COURT: Okay. I find no privilege. All right.
7 That's the ruling.

8 MR. BRIDGES: Your Honor, may I add one thing to the
9 objection for the record?

10 THE COURT: Okay, we have a rule, one lawyer per
11 witness. Okay? So, thank you. A District Court rule, by the
12 way, not mine.

13 MR. SBAITI: Your Honor, may we take a short recess,
14 given the Court's ruling?

15 THE COURT: Well, I'd really like to finish this
16 witness. How much longer do you have?

17 MR. MORRIS: About eight more questions.

18 THE COURT: All right. We'll take a break after the
19 direct, okay?

20 MR. SBAITI: Your Honor, I would ask that we -- if
21 he's going to ask him more questions about the content of the
22 communications, I ask respectfully for a recess so we can
23 figure out what to do about that. Because, right now, there's
24 a ruling that he's going to have to reveal privileged
25 information, and we don't have a way to go around and figure

1 out how to resolve that issue if we needed to.

2 THE COURT: Okay. I've ruled it's not privilege.

3 Okay?

4 MR. SBAITI: I understand that, Your Honor, but --

5 THE COURT: Your client is CLO Holdco and the DAF.

6 MR. SBAITI: Yes, Your Honor.

7 THE COURT: Representative, Mark Patrick. No
8 contract with Mr. Dondero. The fact that he may be very
9 involved I don't think gives rise to a privilege. That's my
10 ruling.

11 MR. SBAITI: I understand, Your Honor. I understand,
12 Your Honor, but I'm asking for a recess so that we can at
13 least undertake to provide Your Honor with some case law on a
14 reconsideration before we go there, because that bell can't be
15 unrung.

16 MR. MORRIS: Your Honor, if I may?

17 MR. SBAITI: And it's --

18 THE COURT: Uh-huh.

19 MR. MORRIS: I'm happy to give them ten minutes, Your
20 Honor, as long as they don't talk to the witness.

21 THE COURT: Okay.

22 MR. MORRIS: I want to give them the opportunity. Go
23 right ahead.

24 THE COURT: All right. We'll take a ten-minute
25 break.

1 MR. SBAITI: Thank you.

2 THE COURT: It's 3:05.

3 THE CLERK: All rise.

4 (A recess ensued from 3:03 p.m. until 3:17 p.m.)

5 THE CLERK: All rise.

6 THE COURT: Okay. Please be seated. Going back on
7 the record in Highland. Mr. Sbaiti?

8 MR. SBAITI: Yes, Your Honor. May I approach?

9 THE COURT: You may.

10 MR. SBAITI: Your Honor, we have some authority to
11 support the position we'd taken. We'd ask the Court to
12 reconsider your ruling on the privilege.

13 The first bit of authority is Section 70 of the
14 Restatement (Third) of Law Governing Lawyers. Privileged
15 persons within the meaning of Section 68, which governs the
16 privilege, says that those persons include either agents of
17 either the lawyer or the client who facilitate communications
18 between the two in order for the lawyers to perform their
19 function.

20 Another case that we found is 232 F.R.D. 103 from the
21 Southern District of New York, 2005. It's *Express Imperial*
22 *Bank of U.S. v. Asia Pulp Company*. And in that case, Your
23 Honor, the consultant was a -- had a close working
24 relationship with the company and performed a similar role to
25 that of the employee and was assisting the law firm in

1 performing their functions, and the court there found that the
2 work product privilege -- actually, the attorney-client
3 privilege -- attached in what they called a Functional
4 Equivalents Doctrine, Your Honor.

5 And here we have pretty much the same set of facts that's
6 pretty much undisputed. The fact that there -- and the fact
7 that there isn't a written agreement doesn't mean there isn't
8 a contractual arrangement for him to have rendered services
9 and advice. And the fact that he's, you know, recruited by us
10 to help us perform our functions puts him in the realm, as I
11 said, of something of a consulting expert.

12 Either way, the work product privilege, Your Honor, should
13 apply, and we'd ask Your Honor not to invade that privilege at
14 this point, Your Honor. And I'll ask you to reconsider your
15 prior ruling.

16 Furthermore, I believe Mr. Morris, you know, in making his
17 argument, is trying to create separation. The fact that he
18 has no relationship, that the privilege can be invaded, seems
19 to defeat the whole premise of his whole line of questioning.

20 So, once again, Your Honor, I just -- it's a tit for a tat
21 there, and it seems to kind of eat itself. Either he is
22 working with us, which we've admitted he is working with us,
23 us being the law firm, and helping us do our jobs, or he's
24 not. And if he's not, then this should be done.

25 THE COURT: Okay.

1 MR. MORRIS: Your Honor, briefly?

2 THE COURT: Well, among other things, what do you
3 want me to do? Take a break and read your one sentence from
4 the Restatements and your one case? And could you not have
5 anticipated this beforehand?

6 MR. SBAITI: Your Honor, --

7 THE COURT: This is not the way we work in the
8 bankruptcy courts, okay? We're business courts. We have
9 thousands of cases. We expect briefing ahead of time.

10 MR. SBAITI: Your Honor, this has been a rather
11 rushed process anyway. And to be honest, --

12 THE COURT: When was the motion filed?

13 MR. SBAITI: Your Honor, --

14 THE COURT: More than a month ago.

15 MR. SBAITI: -- his deposition was a week ago.

16 THE COURT: Well, okay. So you could not have
17 anticipated this issue until his deposition one week ago?

18 MR. SBAITI: Your Honor, this issue arose at the
19 deposition, obviously, because that's what he's quoting from.
20 However, at least to us, this is such a well-settled area, and
21 to be honest, --

22 THE COURT: Such a well-settled area that you have
23 one sentence from the Restatement and one case from the
24 Southern District of New York?

25 MR. SBAITI: No, Your Honor. I think the work

1 product privilege lexicon -- we had ten minutes to try to find
2 something more on point than the general case law that applies
3 the work product privilege to people that work with lawyers,
4 consultants who work with lawyers, employees who work with
5 lawyers, even low-down employees who normally wouldn't enjoy
6 the privileges that attach to the corporation, when they work
7 with the company for -- when they work with the company
8 lawyers, it typically attaches.

9 THE COURT: You know, obviously, I know a few things
10 about work product privilege, but he doesn't check any of the
11 boxes you just listed out.

12 MR. SBAITI: I disagree, Your Honor.

13 THE COURT: He's not an employee. He's not a low-
14 level employee.

15 MR. SBAITI: He's a consultant.

16 THE COURT: With no agreement.

17 MR. SBAITI: With a verbal agreement. He's an
18 advisor. And he was recruited by us, and at the request of
19 the DAF, of the head of the DAF, Mr. Patrick, to help us do
20 our job for the DAF. I don't --

21 THE COURT: Okay. Mr. Morris, what do you want to
22 say?

23 MR. MORRIS: Just briefly, Your Honor. This issue
24 has been ripe since last Tuesday. They directed him not to
25 answer a whole host of questions about his involvement at the

1 deposition last Tuesday, so they've actually had six days to
2 deal with this. That's number one.

3 Number two, there's absolutely nothing inconsistent with
4 the Debtor's position that Mr. Dondero is participating in the
5 pursuit of claims and at the same time saying that his
6 communications with the Sbaiti firm are not privileged.
7 There's nothing inconsistent about that.

8 So the argument that he just made, that somehow because
9 we're trying to create separation, that that's inconsistent
10 with our overall arching theme that Mr. Dondero is precisely
11 engaged in the pursuit of claims against Mr. Seery, I think
12 that takes care of that argument.

13 Finally, your Honor, with respect to this consultancy
14 arrangement, not only isn't there anything in writing, but
15 either you or Mr. Sbaiti or I, I think, should ask Mr. Dondero
16 the terms of the agreement. Is he getting paid? Is he doing
17 it for free? Who retained him? Was it Mr. -- because the --
18 there's no such thing. There's no such thing.

19 The fact of the matter is what happened is akin to I have
20 a slip-and-fall case and I go to a personal injury lawyer and
21 I bring my brother with me because I trust my brother with
22 everything. It's not privileged. Any time you bring in
23 somebody who is not the attorney or the client, the privilege
24 is broken. It's really quite simple. Unless there's a common
25 interest. They can't assert that here. There is no common

1 interest. So --

2 THE COURT: Okay. Mr. Sbaiti, I'll give you up to
3 three more minutes to *voir dire* Mr. Dondero to try to
4 establish some sort of agency relationship or other evidence
5 that you think might be relevant.

6 VOIR DIRE, RESUMED

7 BY MR. SBAITI:

8 Q Mr. Dondero, when you provided information to the law
9 firm, were you doing so under an agency relationship? Do you
10 know what an agency relationship is?

11 A Generally. When you're working on the -- or why don't you
12 tell me?

13 Q Tell me your understanding, so we can use --

14 A That you're working for the benefit or as a proxy for the
15 other entity or the other firm or the other person.

16 Q Right. So you're working for the DAF?

17 A Yes.

18 Q Do you do work for the DAF?

19 A Yes. As I stated, I'm surprised there isn't -- when we
20 reconstituted after leaving Highland, we put in shared
21 services agreements in place and asset management agreements
22 in place and tasked people with doing that for most of the
23 entities. There might be still a few contracts that are being
24 negotiated, but I thought most of them were in place.

25 So I would imagine that there'll be an asset management

1 agreement with the DAF back to NexPoint sometime soon, so it
2 -- it's --

3 Q Let me ask you this question. When you were providing
4 information to us and having conversations with us, were you
5 doing that as an agent of the DAF, the way you described it,
6 --

7 A Yes.

8 Q -- on their behalf?

9 A Yes.

10 Q Were you also doing it to help us do our jobs for the DAF?

11 A Yes.

12 Q Did you respond to requests for information from myself?

13 A Yes.

14 Q Did you help coordinate other -- finding other witnesses
15 or sources of information at my request?

16 A Yes.

17 Q Did you do so based upon any understanding that I was
18 working on behalf of the DAF for that?

19 A Yes. I knew -- I knew you were working for the DAF. No
20 one else, yeah.

21 Q And so -- and so did you provide any expertise or any in-
22 depth understanding to myself in helping me prepare that
23 complaint?

24 A I think so, but I give a lot of credit to your firm for
25 researching things that I -- I knew reasonably well but then

1 you guys researched in even more depth.

2 MR. MORRIS: I'd move to strike the answer as
3 nonresponsive.

4 THE COURT: Sustained.

5 BY MR. SBAITI:

6 Q Let me ask the question again. When you were providing us
7 information and expertise, were you doing so knowing you were
8 working -- helping us work for the DAF?

9 A Yes.

10 Q Now, did you demand any compensation for that?

11 A No.

12 Q Do you require compensation necessarily to help the DAF?

13 A No.

14 Q Do you do other things for the DAF sometimes without
15 compensation?

16 A Right. We do the right thing, whether we get paid for it
17 or not. Yes.

18 Q Had you known that our communications were not necessarily
19 part of an agency relationship with the DAF, as you understood
20 it, that you were just some guy out on the street, would you
21 have had the same conversations with us?

22 A (sighs)

23 Q Let me ask a better question. If I had come to you
24 working for someone that wasn't the DAF, you didn't already
25 have a relationship with, would you have given us the same

1 help?

2 A I wouldn't have been involved if it was somebody else.

3 Q Is the reason you got involved because we were the lawyers
4 for the DAF?

5 A Correct.

6 MR. MORRIS: Objection. It's just leading. This is
7 all leading.

8 THE WITNESS: Correct.

9 THE COURT: Sustained.

10 MR. SBAITI: Can --

11 THE WITNESS: Yeah. Sorry.

12 BY MR. SBAITI:

13 Q Do you get -- do -- did you -- did you do work for the --
14 did you provide the help for the DAF laboring under the
15 understanding that there was an agreement?

16 MR. MORRIS: Objection; leading.

17 THE COURT: Sustained.

18 BY MR. SBAITI:

19 Q Earlier you testified you believed there was an agreement?

20 A I thought that was an agreement, and I thought there will
21 be one shortly if there isn't one, yes.

22 Q Okay.

23 A And so we -- I've been operating in a bona fide way in the
24 best interests of the DAF throughout -- assuming there was an
25 agreement, but even if there wasn't a formal one, I would

Dondero - Voir Dire

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1 still be moving in the best interests of the DAF and helping
2 your firm out or --

3 Q And you did that because you believed there was an
4 agreement or soon would be?

5 A Yes.

6 MR. SBAITI: Your Honor, I mean, I believe we've
7 established a dual role here, both as an agent of the DAF and
8 as an agent of the law firm, Your Honor.

9 THE COURT: Okay. Just a minute. I'm looking at
10 Texas authority on common interest privilege to see if there's
11 anything that --

12 (Pause.)

13 THE COURT: All right. Again, it would have been
14 very nice to get briefing ahead of time. I think this
15 absolutely could have been anticipated.

16 I do not find the evidence supports any sort of protection
17 of this testimony under work product privilege, common
18 interest privilege. I just haven't been given authority or
19 evidence that supports that conclusion. So the objections are
20 overruled.

21 Mr. Morris, go ahead.

22 DIRECT EXAMINATION, RESUMED

23 BY MR. MORRIS:

24 Q Can you describe for the Court the substance of your
25 communications with Mr. Sbaiti concerning the complaint?

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Dondero - Direct

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1 A As I've stated, directing him toward the Advisers Act and
2 then largely in a proofing function regarding CLO nomenclature
3 and some of the other fund nomenclature that sometimes gets
4 chaotic in legal briefs.

5 Q Did you communicate in writing at any time with anybody at
6 the Sbaiti firm regarding any of the matters that are the
7 subject of the complaint?

8 A I can't remember anything in writing. Almost everything
9 was verbal, on the phone.

10 Q You don't tend to write much, right?

11 A Periodically.

12 Q Did you communicate with Mr. Patrick? Did you communicate
13 with anybody in the world in writing regarding the substance
14 of anything having to do with the complaint?

15 MR. SBAITI: Objection, Your Honor. Argumentative.

16 THE COURT: Overruled.

17 THE WITNESS: I --

18 MR. SBAITI: Your Honor, may I just -- one
19 housekeeping. Rather than raise the same objection, may we
20 have a standing objection, just so we're not disruptive, as to
21 the privilege, just for preservation purposes, on the content
22 of these communications? Otherwise, I'll just make the same
23 objections and we can go through it.

24 THE COURT: Well, disruptive as it may be, I think
25 you need to object to every --

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Dondero - Direct

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1 MR. SBAITI: Okay.

2 THE COURT: -- question you think the privilege
3 applies to.

4 MR. SBAITI: I will do so. Thank you, Your Honor.
5 Uh-huh.

6 BY MR. MORRIS:

7 Q Mr. Dondero, the question was whether you've ever
8 communicated with anybody in the world in writing concerning
9 anything having to do with the complaint?

10 A Not that I remember.

11 Q Okay.

12 MR. MORRIS: I will point out, Your Honor, that last
13 week, when the privilege was asserted, I had requested the
14 production of a privilege log. I was told -- I forget exactly
15 what I was told, but we never received one. I'll just point
16 that out as well.

17 THE COURT: Okay.

18 BY MR. MORRIS:

19 Q You provided comments to the drafts of the complaint
20 before it was filed, correct?

21 A Yes, a few.

22 Q Can you describe for the Court all of the comments that
23 you provided to earlier drafts of the complaint?

24 MR. SBAITI: Your Honor, we object on the basis of
25 privilege and work product and joint -- joint interest

002141

1 privilege.

2 THE COURT: Overruled.

3 THE WITNESS: It's along the lines of things I've
4 said in this court several times. The obligations under the
5 Advisers Act cannot be negotiated away and they cannot be
6 waived by the people involved, full stop. I remember giving
7 the -- Mazin the example of the only reason why we're in a
8 bankruptcy is from an arbitration award that, even though we
9 did what was in the best interests of the investors, we got
10 the investors out more than whole over an extended period of
11 time, they got an arbitration award that said when we
12 purchased some of the secondary interests we should have
13 offered them up to the other 800 members in the committee
14 besides the -- the 800 investors in the fund besides the eight
15 people on the committee who had approved it and that the
16 committee couldn't approve a settlement that went against the
17 Advisers Act and the Advisers Act stipulates specifically that
18 you have to offer it up to other investors before you take an
19 opportunity for yourself. And someday, hell or high water, in
20 this court or some other, we will get justice on that. And
21 that was the primary point that I reminded Mazin about.

22 BY MR. MORRIS:

23 Q And that's exactly the conversation you had with Mark
24 Patrick that started this whole thing, correct?

25 A No.

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1 Q You told Mark Patrick that you believe the Debtor had
2 usurped a corporate opportunity that should have gone to the
3 DAF, didn't you?

4 A That was not our conversation.

5 Q So when Mr. Patrick testified to that earlier today, he
6 just got it wrong, right?

7 A Well, maybe later on, but it wasn't that in the beginning.
8 The beginning, any conversation I had with Mark Patrick in the
9 beginning was smelling a rat in the way that the Debtor had
10 priced the portfolio for HarbourVest.

11 Q Hmm. So you're the one, again, who started that piece of
12 the discussion as well, correct?

13 A Started the -- I -- I guess I smelled a rat, but I put the
14 person who could do all the numbers in touch with the Sbaiti
15 firm.

16 Q And was the rat Mr. Seery?

17 A Was the rat Mr. Seery? Or the independent board. Or a
18 combination thereof. I believe the independent board knew
19 exactly what Seery was doing with --

20 Q Do you have any idea --

21 A -- HarbourVest.

22 Q Do you have any idea why, why the Sbaiti firm didn't name
23 the whole independent board in the -- in the motion for leave
24 to amend?

25 A I don't know. Maybe they will at some point.

002143

1 Q Yeah.

2 A I don't know.

3 Q But did you tell the Sbaiti firm that you thought the
4 whole independent board was acting in bad faith and was a rat?

5 MR. SBAITI: Your Honor, I object on the basis of
6 privilege.

7 THE COURT: Overruled.

8 MR. SBAITI: All three.

9 THE WITNESS: I knew Jim Seery was and I knew Jim
10 Seery had weekly meetings with the other independent board
11 members, so the HarbourVest settlement was significant enough
12 that it would have been approved, but I don't have direct
13 knowledge of their involvement.

14 BY MR. MORRIS:

15 Q And so you -- but you believed Jim Seery was certainly a
16 rat, right?

17 A Oh, I -- there was a defrauding of third-party investors
18 to the tune of not insignificant 30, 40, 50 million bucks, and
19 it was obfuscated, it was -- it was highly obfuscated in the
20 9019.

21 Q Did you think Mr. Seery was a rat, sir? Yes or no?

22 A I believe he had monthly financials. He knew that the
23 numbers presented in the 9019 were wrong. And if that makes
24 him a rat, that makes him a rat. Or maybe he's just being
25 aggressive for the benefit of his incentive or for the estate.

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1 But I -- I believe those things wholeheartedly.

2 Q Did you tell the Sbaiti firm you thought Jim Seery was a
3 rat?

4 MR. SBAITI: Objection, Your Honor. Privilege.

5 THE COURT: Overruled.

6 THE WITNESS: I -- I don't remember using those
7 words.

8 BY MR. MORRIS:

9 Q Did you tell the Sbaiti Firm that you thought Jim Seery
10 had engaged in wrongful conduct?

11 MR. SBAITI: Your Honor, objection. Privilege.

12 THE COURT: Overruled.

13 THE WITNESS: I believe he violated the Advisers Act,
14 and I was clear on that throughout.

15 BY MR. MORRIS:

16 Q Listen carefully to my question. Did you tell the Sbaiti
17 firm that you believed that Jim Seery engaged in wrongful
18 conduct?

19 MR. SBAITI: Objection, Your Honor. Calls for
20 privileged communications.

21 THE COURT: Overruled.

22 THE WITNESS: I think I gave the answer. I'll give
23 the same answer. I believe he violated the Advisers Act.

24 BY MR. MORRIS:

25 Q What other wrongful conduct did you tell the Sbaiti firm

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1 you thought Mr. Seery had engaged in?

2 MR. SBAITI: Same objection, Your Honor.

3 THE COURT: Overruled.

4 MR. SBAITI: Calls for privileged communications.

5 THE COURT: Overruled.

6 THE WITNESS: I -- I just remember the obfuscating
7 and mispricing portfolio violations of the Advisers Act was
8 all I discussed with the Sbaiti firm regarding Seery's
9 behavior.

10 BY MR. MORRIS:

11 Q Did you talk to them about coming to this Court under the
12 gatekeeper order to see if you could get permission to sue Mr.
13 Seery?

14 A I --

15 MR. SBAITI: Objection, Your Honor. Calls for
16 privileged communication.

17 THE COURT: Overruled.

18 THE WITNESS: I wasn't involved in any of the --

19 BY MR. MORRIS:

20 Q Did you --

21 A -- tactical stuff on who to sell or -- who to sue or when
22 or whatever.

23 Q Did you tell the Sbaiti firm that you thought they should
24 sue Mr. Seery?

25 MR. SBAITI: Objection, Your Honor. Calls for

1 privileged communication.

2 THE COURT: Overruled.

3 MR. SBAITI: I'll also say, Your Honor, the question
4 is getting a little argumentative.

5 THE WITNESS: I didn't get directly --

6 THE COURT: Overruled.

7 THE WITNESS: I didn't get directly involved in who
8 was -- who was specifically liable.

9 BY MR. MORRIS:

10 Q How many times did you speak with the Sbaiti firm
11 concerning the complaint?

12 A Half a dozen times, maybe.

13 Q Did you ever meet with them in person?

14 A I've only met with them in person a couple, three times.
15 And I don't think any of them -- no, it was, excuse me, it was
16 on deposition or other stuff. It wasn't regarding this.

17 Q Did you send them any information that was related to the
18 complaint?

19 A I did not.

20 Q Did you ask anybody to send the Sbaiti firm information
21 that related to the complaint?

22 A I did not. I -- I was aware that Hunter Covitz was
23 providing the historic detailed knowledge to the firm, but it
24 -- it wasn't -- I don't believe it was me who orchestrated
25 that.

Dondero - Direct

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1 Q Did you talk to anybody at Skyview about the allegations
2 that are contained in the complaint before it was filed?

3 A I don't -- I don't remember.

4 Q Have you ever talked to Isaac Leventon or Scott Ellington
5 about the allegations in the complaint?

6 A No. They weren't involved.

7 Q How about -- how about D.C. Sauter? You ever speak to him
8 about it?

9 A I don't --

10 MR. TAYLOR: Objection, Your Honor.

11 THE WITNESS: I don't remember.

12 MR. TAYLOR: At this point, D.C. Sauter is indeed an
13 employee of Skybridge and is a general counsel for some of the
14 entities which he worked for. And to the extent he's trying
15 to ask for those communications, that would be invasion of the
16 privilege.

17 MR. MORRIS: I'll withdraw it, Your Honor. That's
18 fair.

19 THE COURT: Okay

20 MR. MORRIS: That's fair.

21 THE COURT: Question withdrawn.

22 THE WITNESS: I thought you only had eight more
23 questions.

24 MR. MORRIS: Opened the door.

25 BY MR. MORRIS:

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Dondero - Direct

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1 Q Can you describe the general fact -- withdrawn. You
2 provided facts and ideas to the Sbaiti firm in connection with
3 your review of the draft complaint, correct?

4 A Ideas and proofreading.

5 Q Anything beyond what you haven't described already?

6 A Nope.

7 Q Okay. Who is your primary contact at the Sbaiti firm, if
8 you had one?

9 A Mazin.

10 Q Okay. Did you suggest to Mr. Sbaiti that Mr. Seery should
11 be named as a defendant in the lawsuit before it was filed?

12 MR. SBAITI: Your Honor, calls for privileged
13 communication. We object --

14 THE COURT: Overruled.

15 MR. SBAITI: -- to that answer.

16 MR. SBAITI: Okay.

17 THE WITNESS: Again, no. I wasn't involved with the
18 tactics on who would be defendants and when or if other people
19 would be added.

20 BY MR. MORRIS:

21 Q Did you -- are familiar with the motion to amend that was
22 filed by the Sbaiti firm?

23 A I'm more familiar with it after today --

24 Q Right.

25 A -- than I was before.

Dondero - Direct

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1 Q And were you aware that that motion was going to be filed
2 prior to the time that it actually was filed?

3 A I -- I don't remember. Probably.

4 Q And who would have been the source of that information?
5 Would that have been Mr. Sbaiti?

6 A Yes.

7 Q Okay. And did you express any support for the decision to
8 file the motion for leave to amend in the District Court?

9 A I -- I wasn't involved. It was very complicated legal
10 preservation conver... -- I wasn't involved. I knew the
11 conversations were going on between different lawyers, but I
12 wasn't involved in the ultimate decision. I didn't encourage,
13 applaud, or even know exactly what court it was going to be
14 filed in.

15 MR. MORRIS: All right. I have no further questions,
16 Your Honor.

17 THE COURT: All right. Pass the witness.

18 MR.

19 ANDERSON: We have no questions, Your Honor.

20 THE COURT: Okay. Any questions from Respondents?

21 MR. SBAITI: No questions.

22 THE COURT: Okay. Mr. Taylor?

23 CROSS-EXAMINATION

24 BY MR. TAYLOR:

25 Q Mr. Dondero, --

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Dondero - Cross

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1 A Yes, sir.

2 Q -- you are not the authorized representative of CLO

3 Holdco, are you?

4 A No.

5 Q You're not the authorized representative for the DAF, are
6 you?

7 A No.

8 Q Do you know who that person is as we sit here today?

9 A Yes.

10 Q Who is that?

11 A Mark Patrick.

12 Q Thank you.

13 MR. TAYLOR: No further questions.

14 THE COURT: Any redirect on that cross?

15 MR. MORRIS: I do not, Your Honor. I would just like
16 to finish up the Debtor's case in chief by moving my exhibits
17 into evidence.

18 THE COURT: Okay. Mr. Dondero, you're excused.

19 (The witness steps down.)

20 THE COURT: All right. So you have no more
21 witnesses; you're just going to offer exhibits?

22 MR. MORRIS: Yes, Your Honor.

23 THE COURT: Okay.

24 MR. MORRIS: So, at Docket #2410, --

25 THE COURT: Uh-huh.

002151

1 MR. MORRIS: -- the Court will find Exhibits 1
2 through 53.

3 THE COURT: Uh-huh.

4 MR. MORRIS: In advance, Your Honor, I've conferred
5 with the Respondents' counsel. They had previously objected
6 to Exhibits 15 and 16, which I believe were the Grant Scott
7 deposition transcripts. They objected to them on the grounds
8 of lack of completeness because I had taken the time to make
9 deposition designations, but I'm happy to put the entirety of
10 both transcripts into evidence, and I hope that that will
11 remove the objections to Exhibits 15 and 16.

12 THE COURT: All right. Before we confirm, let's just
13 make sure we have the right one.

14 MR. MORRIS: Oh, I apologize.

15 THE COURT: I have 16 as the July order.

16 MR. MORRIS: I apologize. You're absolutely right,
17 Your Honor. What I was referring to was -- oh, goodness. One
18 second. (Pause.) I was referring to Exhibits 23 and 24.
19 Those are Mr. Scott's deposition designations. They had
20 lodged an informal objection with me on grounds of
21 completeness. And in order to resolve that objection, we're
22 happy to put the entirety of both transcripts in.

23 THE COURT: All right. So if our Respondents could
24 confirm with the agreement to put in the entire depositions at 23
25 and 24, you stipulate to 1 through 53?

1 MR. PHILLIPS: We also -- Your Honor, --

2 MR. MORRIS: Yeah, I was going to take them one at a
3 time. Just take those two.

4 MR. PHILLIPS: Yeah, can we just take those two?
5 Confirmed?

6 MR. MORRIS: Okay.

7 THE COURT: Oh, okay.

8 MR. PHILLIPS: Because there are other -- there are
9 other -- we exchanged objections to each other's witness and
10 exhibit lists. And so I think you can handle the rest of them
11 kind of in a bunch, right?

12 MR. MORRIS: Yeah. Yeah, there's two bunches,
13 actually.

14 MR. PHILLIPS: Yeah.

15 THE COURT: Okay. So you have just now stipulated to
16 23 and 24 being admitted --

17 MR. MORRIS: Correct.

18 THE COURT: -- with the full depos? Okay.

19 MR. PHILLIPS: Yes, ma'am. Thank you.

20 THE COURT: All right.

21 (Debtor's Exhibits 23 and 24 are received into evidence.)

22 MR. MORRIS: And then the next two that they objected
23 to are Exhibits 15 and 16. 15 is the January order and 16 is
24 the July order. They objected on relevance grounds. I think
25 16 -- these are the two orders that the Debtors contend the

1 Respondents have violated, so I don't understand the relevance
2 objection, but that's what it was and that's my response.

3 MR. PHILLIPS: Resolved, Your Honor.

4 THE COURT: Okay. 15 and 16 are admitted.

5 (Debtor's Exhibits 15 and 16 are received into evidence.)

6 MR. MORRIS: Okay. And then the last objection
7 relates to a group of exhibits. They're Exhibits 1 through
8 11. Those exhibits I think either come in together or stay
9 out together. They are exhibits that relate to the
10 HarbourVest proceedings, including deposition notices,
11 including I think the transcript from the hearing, the Court's
12 order, the motion that was filed.

13 The Debtor believes that those documents are relevant
14 because they go right to the issue of the gatekeeper order and
15 had they filed, had the Respondents followed the gatekeeper
16 order, this is -- this is why they didn't do it. You know
17 what I mean? That's the argument, is that the Respondents,
18 one of the reasons the Respondents -- argument -- one of the
19 reasons the Respondents didn't come to this Court is because
20 they knew this Court had that kind of record before it. And I
21 think that's very relevant.

22 THE COURT: All right. Response?

23 MR. PHILLIPS: Your Honor, we think that these
24 exhibits are not relevant. We have a very focused, we think,
25 -- we have the Court's order. Those objections are withdrawn.

1 We have the complaint. We have the motion to amend. And the
2 issue is whether the motion to amend, which was dismissed one
3 day, or the next day after it was filed, constitutes criminal
4 -- constitutes contempt.

5 So we think the prior proceedings go to their underlying
6 argument, which is the lawsuit or the complaint is no good,
7 and that has nothing to do with -- there's been no foundation
8 laid and it's not relevant what happened in connection with
9 the HarbourVest settlement. It is what it is, and there's no
10 dispute that it is what it is, but it's not relevant to
11 establish any type of -- they've even said intent is not even
12 relevant here. So we -- that's -- we think all of that goes
13 out and simplifies the record, because it has nothing to do
14 with whether or not there was a contempt.

15 THE COURT: Response?

16 MR. MORRIS: We withdraw the exhibits, Your Honor.
17 I'm just going to make it simple for the Court.

18 THE COURT: Okay.

19 MR. MORRIS: I'm just going to make it simple for the
20 Court.

21 THE COURT: 1 through 11 are withdrawn.

22 (Debtor's Exhibits 1 through 11 are withdrawn.)

23 MR. MORRIS: So, the balance, there was no objection.
24 So all of the Debtor's exhibits on Docket #2410 -- let me
25 restate that. Exhibits 12 through 53 no longer have an

1 objection. Is that correct?

2 MR. PHILLIPS: Yes.

3 MR. MORRIS: Okay. And then --

4 MR. PHILLIPS: Confirmed.

5 THE COURT: Okay.

6 (Debtor's Exhibits 12 through 53 are received into
7 evidence.)

8 MR. MORRIS: Okay. Thank you. And then we filed an
9 amended list, I believe, yesterday --

10 THE COURT: Uh-huh.

11 MR. MORRIS: -- to add Exhibits 40 -- 54 and 55.

12 THE COURT: Uh-huh.

13 MR. MORRIS: And those exhibits are simply my firm's
14 billing records.

15 THE COURT: Okay.

16 MR. MORRIS: You know, we added Mr. Demo to the
17 witness list in case there was a need to establish a
18 foundation. That's the only thing he would testify to. I
19 don't know if there's an objection to those two exhibits,
20 because we hadn't had an opportunity to confer.

21 THE COURT: Any objection?

22 MR. PHILLIPS: Your Honor, we're not going to require
23 authenticity and foundation for -- we have the right, we
24 think, to say that they're not a ground -- we're not going to
25 challenge that they are the bills, and the bills say what they

1 say. We don't need Mr. -- we don't need a witness to
2 authenticate those exhibits. But we reserve all substantive
3 rights with respect to the effect of those exhibits.

4 THE COURT: All right. 54 and 55 are admitted.
5 (Debtor's Exhibits 54 and 55 are received into evidence.)

6 MR. MORRIS: And with that, Your Honor, the Debtor
7 rests.

8 THE COURT: Okay. All right. Respondents?
9 (Counsel confer.)

10 MR. PHILLIPS: If I could have a second?

11 THE COURT: Okay.

12 A VOICE: Sorry, Your Honor.

13 (Pause.)

14 MR. PHILLIPS: Your Honor, we have filed in our
15 witness and exhibit list, and I have to say I don't have the
16 number, but we'll get the docket entry number, but we have 44
17 exhibits. There's an objection to Exhibit #2, which is --
18 thank you -- it's Document 2411, Your Honor. Thank you.

19 THE COURT: Uh-huh.

20 MR. PHILLIPS: There is a pending objection to
21 Exhibit #2 which we have not resolved. There's no objection
22 to any other exhibit. But in reviewing our exhibit list, I
23 found that we had some -- some mistakes and duplications.

24 So, with respect to 2411, we would withdraw Exhibit 13,
25 14, and 29, and we would offer Exhibit 1, and then 30 through

1 44, with 13, 14, and 29 deleted.

2 THE COURT: Okay. So 1, 3 through 12, --

3 MR. PHILLIPS: Yes.

4 THE COURT: -- 15 through 28, and then 30 --

5 MR. PHILLIPS: And then 30 through 44.

6 THE COURT: -- through 44? Do you confirm, Mr.

7 Morris?

8 MR. MORRIS: Yes, Your Honor. The only objection we
9 have is to Exhibit #2.

10 THE COURT: And that's -- he's not offering that?

11 MR. MORRIS: Yeah.

12 MR. PHILLIPS: Not at this time, Your Honor.

13 THE COURT: Okay.

14 MR. PHILLIPS: We would have to have testimony about
15 that.

16 THE COURT: Okay. All right. So those are admitted.

17 MR. PHILLIPS: Okay.

18 (Mark Patrick's Exhibits 1, 3 through 12, 15 through 28,
19 and 30 through 44 are received into evidence.)

20 THE COURT: By the way, it looks like Exhibit 44 is
21 at a different docket number, Docket 2420. Correct? You have
22 --

23 MR. SBAITI: Your Honor, I believe Exhibit 44 is the
24 hearing transcript from the July approval hearing. At least
25 that's what it's supposed to be.

1 THE COURT: Okay.

2 MR. SBAITI: It was Exhibit 2 on the Debtor's list,
3 and then I think they took it off, so we had to add it.

4 MR. PHILLIPS: Oh, okay. I was looking -- oh, that's
5 right. They -- that's correct, Your Honor.

6 THE COURT: Okay.

7 MR. PHILLIPS: Exhibit 44 was added --

8 THE COURT: Okay.

9 MR. PHILLIPS: -- because the Debtor's withdrew it,
10 and so it was added in the second -- in the supplemental and
11 amended list. The -- the one that I was talking about was the
12 prior list.

13 THE COURT: Okay. So that's at Docket 2420?

14 MR. PHILLIPS: Yes.

15 THE COURT: You're not offering 45 or 46?

16 MR. PHILLIPS: No, I think we'd offer 45 and 46 as
17 well. I'm sorry.

18 THE COURT: Okay. Any objections, Mr. Morris?

19 MR. MORRIS: No, Your Honor.

20 THE COURT: Okay. So 45 and 46 are admitted as well.
21 They're at Docket Entry 2420.

22 (Mark Patrick's Exhibits 45 and 46 are received into
23 evidence.)

24 THE COURT: All right. Your witnesses?

25 MR. PHILLIPS: Your Honor, could we have five minutes

1 to just see what we're -- our plan is, and then we'll be back
2 at 4:00?

3 THE COURT: Okay. We'll be back at 4:00.

4 MR. PHILLIPS: Thank you.

5 THE CLERK: All rise.

6 (A recess ensued from 3:55 p.m. until 4:04 p.m.)

7 THE CLERK: All rise.

8 THE COURT: Please be seated. All right. Back on
9 the record in Highland. Mr. Phillips?

10 MR. PHILLIPS: Your Honor, with the introduction of
11 the Respondents -- CLO Holdco, DAF Fund, LP, and Mark Patrick,
12 those Respondents, and we consider Mark Patrick a Respondent
13 although not formally named as a Respondent because he is the
14 party who authorized the filing of the Seery motion -- we
15 rest.

16 THE COURT: You rest? Okay. Well, Mr. Morris,
17 closing arguments?

18 MR. MORRIS: How much time do I have?

19 THE COURT: You've got a lot more time than you
20 probably thought you were going to. You're under an hour.

21 MR. MORRIS: 42 minutes?

22 THE COURT: How much?

23 THE CLERK: 42 minutes.

24 THE COURT: 42 minutes? Feel free not to use it all.

25 MR. SBAITI: Out of curiosity, how long do we have?

1 THE COURT: You have a lot of time, which I hope you
2 won't use.

3 THE CLERK: Hour and twenty-five minutes or so.

4 MR. SBAITI: I was afraid it was going to be an hour
5 and twenty, so --

6 MR. PHILLIPS: No, not either.

7 MR. MORRIS: I don't suspect I'll use all the time.

8 THE COURT: Okay. Thank you.

9 MR. MORRIS: May I proceed?

10 THE COURT: You may.

11 CLOSING ARGUMENT ON BEHALF OF THE DEBTOR

12 MR. MORRIS: Good afternoon, Your Honor. John
13 Morris; Pachulski Stang Ziehl & Jones; for the Debtor. I'd
14 like to just make some closing remarks after the evidence has
15 closed.

16 This is a very, very important motion, Your Honor. I take
17 this stuff seriously. It's only the second contempt motion
18 I've ever brought in my life. I've never gone after another
19 law firm. But these facts and circumstances require it,
20 because my client is under attack, and these orders were
21 entered to prevent that.

22 It is serious stuff. There's no question in my mind,
23 there's no question the evidence showed, clear and
24 convincingly, beyond reasonable doubt, that they violated this
25 Court's order.

1 I started off with three very simple prongs. So simple
2 you'd think I'd remember them. Number one, was a court order
3 in effect? There is no dispute. The court order was in
4 effect.

5 Number two, did the order require certain conduct by the
6 Respondent? We believe it did. We heard an hour-long
7 argument styled as an opening statement, but it was really
8 argument and not an opening statement, about all the defects
9 in the order. But the one thing that is crystal clear in the
10 order are the words commence or pursue. You've been told many
11 times by the Respondent that nobody has commenced an action
12 against Mr. Seery. That is true. We all know what the word
13 commence means. We all know what the word pursue means.

14 I heard argument this morning that pursue means after a
15 claim is filed you pursue a case. That's the way lawyers talk
16 about it. But that doesn't make any sense, Your Honor,
17 because once you've commenced the action you've violated the
18 order. It's commence or pursue, it's in the disjunctive, and
19 you can't read out of the order the concept of pursuit by
20 making it an event that happens after the commencement,
21 because that's exactly what they're trying to do. They're
22 trying to read out of the order the word pursuit.

23 And I ask you to use very simple common sense. If filing
24 a motion for leave to amend a complaint to add Mr. Seery as a
25 defendant is not pursuit, what is? What is? There's nothing

1 left. You commence an action or you do something less than
2 commencing an action when you're going after the man. That's
3 what pursuit means. They're going after the man. And they
4 asked the District Court to do what they knew they couldn't.

5 Mr. Phillips is exactly right. I made the point about
6 Rule 15 because they knew they couldn't do it. I'm not
7 suggesting that they should have. I'm suggesting that the
8 reason that they didn't is because they knew they were -- they
9 were in a bad place. Because if they really just wanted to
10 name Mr. Seery as a defendant, they wouldn't have done it.
11 They knew commence was crystal clear.

12 What they're trying to do is claim that somehow there's an
13 ambiguity around the word pursuit. Does that make any sense
14 at all? Filing a motion for leave to amend the complaint.
15 And Mr. Patrick, to his credit, candidly admitted that if the
16 motion was granted, they were suing, yeah, as long -- as long
17 as the Sbaiti firm, you know, recommended it. That's what
18 would have happened.

19 Those orders that you signed, nothing, absolutely
20 meaningless from their point of view. They believed they were
21 wrong. They believed that they were overbroad. They believed
22 they were too narrow. They believed they were vague. They
23 believed they were without authority. They don't get to be
24 the gatekeeper. They want to be the gate -- that's this
25 Court's decision. That's why we went through all of the

1 processes that we did. And they just flagrantly said, I don't
2 agree. I don't agree because it's wrong this way and it's
3 wrong that way and it's wrong the other way, and therefore let
4 me go find a higher authority to validate my thinking. That's
5 not the way this process is supposed to work.

6 The independent directors and Mr. Seery relied on the
7 gatekeeper in accepting their positions. It was a quid pro
8 quo. Mr. Dondero agreed to the exact same provision, the
9 exact same gatekeeper provision in the January order that he
10 now complains about today, that the DAF complains about today.
11 Where were these people?

12 As the Court knows, nobody appealed either order. The
13 Debtor, the independent board, Mr. Seery expected that the
14 plain and unambiguous words would be honored and enforced. I
15 think that's fair. I think that's the way the process is
16 supposed to work.

17 Instead, we have games. We have these linguistic
18 gymnastics. We have statements that are too cute by half.
19 Mr. Dondero won't even admit that he appointed Mr. Scott back
20 in 2012. I couldn't even get him to do that, really, even
21 though the documents say it, even though Mr. Patrick says it.

22 I'll take the Respondents one at a time in a moment, but I
23 just want to deal with some of the more interesting arguments
24 they make. The order was vague because it didn't say you
25 can't seek leave from the District Court to amend your

1 complaint to add Mr. Seery. They said that that's what makes
2 the order vague.

3 Your Honor, if you had thought to put that language in,
4 you know what they would have done? They would have sued Mr.
5 Seery in New York State Supreme Court, where he lives, and
6 said, the order didn't say I couldn't do that. Where does it
7 end?

8 There's a reason why the order was crafted broadly to say
9 no commencement or pursuit without Bankruptcy Court approval.
10 You have to bring a colorable claim.

11 We heard an argument this morning that they couldn't
12 possibly have brought that motion for reconsideration first.
13 You know, the one they filed about eight hours after we filed
14 the contempt motion. They couldn't possibly have brought that
15 motion before the motion for leave to amend because somehow
16 they would have been estopped or they would have been found to
17 have waived some right.

18 How could it be that anybody reasonably believes that
19 complying with a court order results in a waiver of some
20 right? It just -- these are games. These are not good
21 arguments. And they certainly don't carry the day on a
22 contempt motion.

23 We've heard repeatedly, the District Court denied the
24 motion without prejudice, how have you been harmed? They
25 shouldn't be able to rely on the District Court's prudence to

1 protect themselves. The question shouldn't be, have you been
2 harmed since the District Court didn't grant the motion? No.
3 The question should be, were we harmed by the attempt to name
4 Mr. Seery a defendant, in violation of court orders, without
5 notice? Without notice.

6 I'm told they assumed that I'd be checking the dockets. I
7 wasn't checking the docket, Your Honor. I hadn't filed an
8 appearance in the case. And, in fact, if you look at the
9 exhibits, because I could pull it out, but we put in the
10 communications between the lawyers. The last communication
11 was from Mr. Pomerantz, and the last communication from Mr.
12 Pomerantz said, Don't do it or we're going to file a motion
13 for contempt. That's now in the evidence.

14 So, having sent that message, I wasn't going to check the
15 docket to see if they really were going to go ahead and do it.
16 I didn't think they would. And if they did, I certainly
17 thought I'd get notice of it. Nothing.

18 And, again, I don't really need to establish intent at all
19 in order to meet my burden of clear and convincing evidence of
20 a contempt of court, but I think it is relevant when the Court
21 hopefully finds liability and is considering damages, because
22 that's really the most important point I have to make right
23 now, is the Court needs to enforce its own orders, because if
24 the Court doesn't, or doesn't impose a penalty that's
25 meaningful, this is just going to continue. And Your Honor,

1 it's all in the record. Your Honor knows this. Mr. Daugherty
2 has gone through it. Right? Mr. Terry went through it. UBS
3 went through it. You've seen litigation now for a year and a
4 half. It's happening in New York, right, the Sbaiti firm is
5 reopening the Acis case. we've got this other lawsuit that's
6 filed by an entity with like a five-tenths of one percent
7 interest who's complaining about the SSP transaction that Mr.
8 -- that the Debtor engaged in. There's no end here.

9 We need the Court to pump the brakes. We need the Court
10 to exercise its authority. We need the Court to protect the
11 estate fiduciary that it approved.

12 It is true, Mr. Seery is not a trustee. But it is also
13 true that he is a third-party outsider who came into this case
14 with the expectation and the promise in an order that he
15 wouldn't be subjected to frivolous litigation, that this Court
16 would be the arbiter of whether claims could be pursued
17 against him. That was the code of conduct. That was the quid
18 pro quo. That was the deal that Mr. Seery made. It's the
19 deal that the board members made.

20 What gives these people the right to just say, your order
21 is wrong, and because I think your order is wrong I'm going to
22 go to the District Court, and if the District Court agrees,
23 too bad, and if the District Court doesn't agree, we'll be
24 back before Your Honor, and no harm, no foul? No. It can't
25 be. It can't be that that's the way this process works. It

1 just can't.

2 So, Your Honor, let me take the Defendants one at a time,
3 the Respondents one at a time. CLO Holdco and the DAF are
4 corporate entities. They've done what they've done. Mr.
5 Patrick, bless him, I think he's a lovely man. I don't think
6 he quite bargained for what he's getting right now, but
7 nevertheless he is where he is and he's willing to stand up
8 and be counted, and for that, at least, I admire his courage.
9 He's willing to say, I authorized those. But you know what?
10 It's a violation of the law, it's a violation of this Court's
11 order to file that motion, and so he has -- and he was very
12 candid today. He knew of the order. Right? He knew it was
13 in effect. He pointed out that it was in their papers.
14 Right?

15 They're trying to be cute, they're trying to thread this
16 needle, but it has no hole in it. They keep -- they keep
17 doing this. Well, maybe if we do it this way, maybe if we do
18 it -- no. The order was crystal clear.

19 The Sbaiti firm. They're probably fathers and husbands
20 and good people and I wish them no ill will, but this is
21 wrong. This is wrong. To come into a court you've never been
22 in before and in less than twelve days to jump the shark like
23 this in twelve -- in less than twelve days, because Mr.
24 Patrick said they weren't hired until April, and the complaint
25 was filed on the 12th.

1 We're told that they understood this was an overwhelming
2 case with two -- why don't you take your time? What was the
3 rush? Why not wait until the Defendant -- the Debtor appeared
4 in the action before rushing to do this?

5 It's bad conduct, Your Honor, and that's really a very
6 important point that I have to make, is that there's lots of
7 lawyers who are engaging in highly-questionable conduct here
8 that, from my perspective, goes well beyond the bounds of
9 zealous advocacy.

10 It's not aggressive lawyering. I love aggressive
11 lawyering. I really do. Respectful, honest -- and I don't,
12 you know, I don't want to say that they're dishonest people.
13 I don't mean to do that. But I think, I think they made a
14 gross error in judgment, and there's no question that they
15 violated this Court's order.

16 And then that leaves Mr. Dondero. I don't even know what
17 to say about his testimony, Your Honor. He pursued claims
18 against Mr. Seery. He thinks he's a rat. He's the one who
19 started the whole process. He's the one who put the bug in
20 Mark Patrick's ear. All of this is uncontested. Right?
21 Uncontested.

22 I don't have to go back in time. We can talk about what
23 happened to Grant Scott. It's a very sad story. Mr. Scott, I
24 think, did his honest best to do what he believed, on the
25 advice of counsel, was in the best interest of the DAF. And

1 Mr. Dondero, as you hear time and time again when he speaks
2 about Mr. Seery, it was inappropriate. He's the arbiter of
3 what's in the best interest of entities that other people
4 control. And they pay a price. And they pay a price. And so
5 Mr. Dondero felt it was his job, even though he tries to
6 distance himself from the DAF -- I have no responsibility, I
7 don't -- I'm not involved -- until, until somebody wants to
8 sue Seery and the Debtor. Then he'll go all in on that, no
9 matter how specious the claim may be.

10 The Debtor's not going to fold its tent because a motion
11 for leave to amend was denied without prejudice. That's not
12 the point. The point is that people need to respect this
13 Court, people need to respect the Court's orders, and those
14 that aid and abet or otherwise support the violation of court
15 orders ought to be held to account, Your Honor.

16 I have nothing further.

17 THE COURT: All right. Thank you. Respondents?

18 CLOSING ARGUMENT ON BEHALF OF THE RESPONDENTS

19 MR. SBAITI: Your Honor, the fact that we're here on
20 a motion for leave, and the motion for leave is what they're
21 saying is pursuing a claim under the Court's order, and then
22 you hear that the mere act of investigating a claim against
23 Mr. Seery is also pursuing a claim, this goes to the infinite
24 regression problem with this word pursue the way they want to
25 construe it, Your Honor. Asking for permission is not

1 pursuing a claim and can't be the definition of pursuing a
2 claim because it's not doing anything other than asking for
3 permission.

4 We didn't file a suit. We didn't commence a suit. I
5 think that's established. We did not pursue a claim. Mr.
6 Morris ignores, I think, the very commonsensical aspect that
7 we put out in the opening, which is that the reason pursue --
8 and sometimes the language in these types of orders is,
9 instead of pursue, it's maintain -- but the reason that word
10 is there is because sometimes the case has already been
11 started when the order is entered. And so to pursue a claim,
12 *i.e.*, one that's already been filed as of the date of the
13 order, that would be lost if the commencement of that claim
14 hadn't happened until after the -- until the -- if the
15 commencement happened before the order was filed. That's the
16 --

17 THE COURT: Okay. So are you saying it's a
18 sequential thing?

19 MR. SBAITI: I'm not sure I understood your question,
20 Your Honor. I'm sorry.

21 THE COURT: Well, I'm trying to understand what it is
22 you're saying about how pursue should be interpreted.

23 MR. SBAITI: Sure.

24 THE COURT: I think you're saying you have to -- you
25 can either have -- well, we've got a prohibition on commencing

1 an action.

2 MR. SBAITI: Yes.

3 THE COURT: And then the separate word pursue, I
4 think you're saying that must refer to you already have an
5 action that's been commenced and you're continuing on with it.
6 Is that what you're saying?

7 MR. SBAITI: Yes, Your Honor.

8 THE COURT: Then why not use the word continue?

9 MR. SBAITI: Well, Your Honor, the choice of --

10 THE COURT: Kind of like 362(a) of the Bankruptcy
11 Code, you know, is worded.

12 MR. SBAITI: Well, Your Honor, the choice of the
13 wording of pursue at that point, Your Honor, I believe ends up
14 being ambiguous, because by filing the motion here that would
15 be pursuing a claim under that definition. So before I got
16 permission to pursue a claim, I've got to pursue a claim.
17 That's the problem that they have with the words that they're
18 trying to get you to adopt, or the meaning of the words
19 they're trying to get you to adopt.

20 If I came to this Court and said, Judge, I need
21 permission, I need leave to file suit against Mr. Seery, and
22 then the question is, well, you're not allowed to seek leave
23 because that's pursuing the claim, it's infinitely regressive.
24 And in fact, his closing argument just proved how it's
25 infinitely regressive.

1 THE COURT: Okay. Let me -- I'm not following this
2 infinitely regressive or whatever the term was.

3 MR. SBAITI: Yes.

4 THE COURT: Just answer this very direct question.
5 Why did you not file a motion for leave in the Bankruptcy
6 Court? That would have clearly, clearly complied with the
7 July order.

8 MR. SBAITI: Your Honor, I believe we explained this
9 in the opening. I took a stab at it. Mr. Bridges took a stab
10 at it. We did not believe coming here and asking for leave
11 and asking for -- for Your Honor to do what we don't believe
12 Your Honor can do, would effectuate an estoppel or a waiver,
13 which we didn't think was in the best interest of our client
14 to have. Your Honor, this happens -- I don't believe this is
15 the --

16 THE COURT: Okay. Connect the dots. Make that clear
17 as clear can be for me. You file a motion for leave --

18 MR. SBAITI: Yes.

19 THE COURT: -- to file this District Court action
20 against the Debtor and Seery, and if I say yes, everything is
21 fine and dandy from your perspective. If I say no, tell me
22 again what your estoppel argument is.

23 MR. SBAITI: Your Honor, the key question is whether
24 us putting the Court's ability to decide colorability and the
25 Court's gatekeeper functions, for us to invoke those functions

1 concerned us because there's case law that says that that
2 effectuates an estoppel. And so we don't get our chance in
3 front of an Article III judge to make that in the first
4 instance.

5 THE COURT: Okay. Tell me what cases you're talking
6 about and the exact context of those cases.

7 MR. SBAITI: Your Honor, I would have to defer to my
8 partner on this one, Your Honor.

9 THE COURT: Okay.

10 MR. SBAITI: So, --

11 THE COURT: Because I'm just letting you know --

12 MR. SBAITI: Yes.

13 THE COURT: -- I am at a complete loss. I'm at a
14 complete loss understanding what you're saying. I am.

15 MR. SBAITI: Well, Your Honor, the --

16 THE COURT: I don't understand. If you have followed
17 the order to the letter and I tell you no, --

18 MR. SBAITI: Then --

19 THE COURT: -- what, you're saying you were worried
20 you'd be estopped from appealing my order to the District
21 Court and saying abuse of discretion or invalid order in the
22 first place? You'd be estopped from taking an appeal?

23 MR. SBAITI: No, Your Honor. We wouldn't be estopped
24 from taking an appeal.

25 THE COURT: Then why didn't you follow the letter of

1 the order?

2 MR. SBAITI: For one thing, Your Honor, asking the
3 District Court made sense to us, given the order and given our
4 understanding of the law. Certainly, we had other options, as
5 Your Honor is pointing out. We could have come here. Our
6 read of the law, our understanding of what we were doing, made
7 it -- put us in, like I said, put us in the sort of
8 jurisdictional and paradoxical position.

9 THE COURT: This is your chance to tell me exactly
10 which law you think applies here. What case? What statute?

11 MR. SBAITI: Your Honor, like I said, I don't have
12 those at the moment.

13 THE COURT: Why not? Your whole argument rides on
14 this, apparently.

15 MR. SBAITI: Well, Your Honor, I don't know that our
16 whole argument rides on that.

17 THE COURT: Okay.

18 MR. SBAITI: I mean, our argument rides on we don't
19 think we violated the letter of the order. I think that's
20 really what I'm -- what we're here to say, is that we didn't
21 commence a lawsuit and we didn't pursue a claim by filing for
22 leave in the District Court, just like filing for leave in
23 this Court would not be pursuing a claim. It would be filing
24 for leave.

25 THE COURT: I agree. Filing a motion for leave in

1 this Court would be exactly what the order contemplated.

2 MR. SBAITI: I understand, Your Honor.

3 THE COURT: What you did is not exactly what the
4 order contemplated.

5 MR. SBAITI: Your Honor, but we're -- we're moving
6 back and forth between two concepts. One, your question is
7 why didn't we file for leave?

8 THE COURT: Uh-huh.

9 MR. SBAITI: And the answer to that, I've tried to
10 explain. And if we -- if you'd like us to bring up the case
11 law or to give you a better articulation of our concern, I'm
12 happy to defer to my partner.

13 What I'm really here to say, Your Honor, is a very simple
14 point, though. Just because we didn't file for leave here and
15 we filed for leave in the District Court doesn't mean we
16 violated your order, and that's the point I'm trying to make,
17 Your Honor. And I think that's the simplest point I can make.
18 Asking the Article III judge for leave to amend, for leave to
19 amend to add Mr. Seery, doesn't violate, facially, at least as
20 we read it, Your Honor's order. It's not commencing a suit
21 and it's not -- it's not pursuing a claim against him. It's
22 all preliminary to pursuing a claim against him, because a
23 claim hasn't even been filed.

24 The judge could have -- the judge could have -- the
25 District Court could have denied it, the District Court could

1 have referred it down here, the District Court could have
2 decided part of it and then asked Your Honor to rule on some
3 portion of it. There are innumerable ways that could have
4 gone. That fork -- those forks in the road is precisely why
5 we say this is not pursuing the claim. Otherwise, where does
6 it stop?

7 Does pursuing a claim happen just when we file the motion
8 for leave? Why didn't it happen when we started the
9 investigation? If pursuing a claim means having the intent
10 and taking steps towards eventually filing a lawsuit, that's
11 the point that I'm making that it is infinitely regressive,
12 and that's exactly what Mr. Morris argued to you.

13 He said Mr. Dondero, by merely speaking to me, is pursuing
14 a claim and that violates your order. Speaking to me. Even
15 if we had never filed it. Speaking is pursuing a claim.

16 THE COURT: I don't agree with that, for what it's
17 worth.

18 MR. SBAITI: Okay. But that was his argument. I'm
19 just responding to it.

20 THE COURT: Okay.

21 MR. SBAITI: And if that's not pursuing a claim,
22 filing a motion for leave likewise wouldn't be pursuing a
23 claim. I understand it's an official act in a court, but we
24 did it in a Court that is an adjutant to this Court. This
25 Court is an adjutant to that Court. It's the Court with

1 original jurisdiction over the matter. So we didn't go to New
2 York. We didn't go to the state court in New York where I
3 learned Mr. Seery lives. We came to the Northern District of
4 Texas, understanding that this Court and this Court's orders
5 had to be -- had to be addressed. And that's the very first
6 thing we did. We asked the Court to address it.

7 That judge could either decide to send it down here, which
8 is normally what I think -- what we understood would happen.
9 So it's not like we were avoiding it. But we wanted to invoke
10 the jurisdiction which we, as the Plaintiff, we believe we had
11 the right to invoke. We're allowed to choose our forum. So
12 that's the forum we chose for the primary case, which there's
13 not a problem, no one's raised an issue with us filing the
14 underlying lawsuit.

15 Adding Mr. Seery to that lawsuit and filing a motion for
16 leave in the same court where we actually had the lawsuit,
17 knowing that it might get -- that might get decided or
18 referred in some way, doesn't strike me as being anything
19 improper, because he didn't get sued and we don't know what
20 Judge Boyle would have said had the motion gone forward. And
21 for them to speculate and to say that, well, this is exactly
22 the type of thing you have to protect against, I completely
23 disagree.

24 The case law that they cited for you on these -- on most
25 of these orders really do discuss the fact that you have

1 somebody who is actually protecting the underlying property of
2 the Debtor. This claim comes from a complete third party that
3 Mr. Seery himself has admitted under oath he owes a fiduciary
4 duty to. Two third parties. One is an investor of a fund
5 that he manages, and one to a fund that the Debtor, with Mr.
6 Seery as the head of it, was an advisor for up until recently.

7 Those fiduciary duties exist. We felt like there was a
8 valid claim to be brought against Mr. Seery. And the only
9 reason -- and he says this like it's a negative; I view it as
10 a positive -- the reason he wasn't named is because of Your
11 Honor's orders. And so we asked a Court, the Court with
12 general jurisdiction, to address it for us or to tell us what
13 to do. And I don't see how that is a violation of this
14 Court's order, nor is it contemptuous of this Court's order.

15 If every time one of these issues came up it was a
16 contempt of the court that appointed a trustee, we'd see a lot
17 more contempt orders.

18 Interestingly, the cases that were thrown out to you in
19 the opening argument by the other side, for example, *Villages*
20 [sic] *v. Schmidt*, was a trustee case, but not one that
21 involved a sanction. And the trustee case specifically in
22 that case held that the Barton Doctrine didn't have an
23 exception for *Stern* cases, whereas the cases we cited to you,
24 *Anderson*, for example, in the Fifth Circuit, which is 520 F.2d
25 1027, expressly held that Section 959 is an exception to the

1 Barton Doctrine.

2 And my partner, Mr. Bridges, can walk through the issues
3 that we had on the enforceability of the order, but all -- to
4 me, all of that is sort of a secondary issue because, *prima*
5 *facie*, we didn't violate this order. I understand it may
6 irritate the Debtor and may raise questions about why the
7 motion wasn't filed here versus the District Court. But it
8 was a motion for leave. In order to sanction us, Your Honor
9 would have to find that asking for permission is sanctionable
10 conduct in the gatekeeper order. Even if we ask the wrong
11 court. Simply asking the wrong court is sanctionable, not
12 knowing what that court would have done, not knowing what that
13 court's mindset was, not even having the benefit of the
14 argument. And that's, I guess, where this bottom -- the
15 bottom line is for me.

16 The evidence that they put on for you, Your Honor.
17 Everything you heard was evidence in the negative. You know,
18 they talk about the transition from Mr. Dondero to Mr. Scott
19 and Mr. Scott to Mr. Patrick, but if you actually look at the
20 evidence he wants you to see and he wants you to rule on, it's
21 the evidence that wasn't there. It's the evidence that Mr.
22 Dondero had no control. In fact, I believe that was the basis
23 he argued for why there should be no privilege. And all he
24 said is that he was promoting it.

25 But the fact of the matter is, like I said, all of that is

1 secondary to the core issue that we didn't violate the order.
2 We didn't take steps to violate the order. We took steps to
3 try to not violate the order. And they want you to punish us
4 to send a message. Even used words like the Court needs to
5 enforce its own orders. And he did that as a transition away
6 from the idea that there were no damages, Your Honor, and I
7 think that has implications.

8 And then he said you have to enforce a meaningful penalty.
9 Well, Your Honor, I don't think that is the purpose of these
10 sanctions. These sanctions are supposed to be remedial,
11 according to the case law, according to the case law that they
12 cite. So a meaningful --

13 THE COURT: Coercive or remedial.

14 MR. SBAITI: Sorry?

15 THE COURT: Coercive or remedial. Civil contempt.

16 MR. SBAITI: Sure, Your Honor. But usually coercive
17 sanctions require someone to do something or they are
18 sanctioned until they do it.

19 THE COURT: Coerced compliance. Coerced compliance
20 --

21 MR. SBAITI: Yes.

22 THE COURT: -- with an existing order.

23 MR. SBAITI: Yes.

24 THE COURT: Uh-huh.

25 MR. SBAITI: The last thing, he says you have to

1 protect the estate of the fiduciary and his expectation -- I
2 believe he's talking about Mr. Seery -- his expectation that
3 the Court would be the gatekeeper. And Your Honor, that
4 argument rings a little bit hollow here, given that what
5 they're really saying is that we should have come here first
6 and asked for permission. But that insinuates that, by coming
7 here, the case is dead on arrival, which I don't think is the
8 right argument.

9 I think the issue for us has been, who do we have to ask
10 and who can we ask to deal with the Court's gatekeeper order?
11 I believe we chose a court, a proper court, a court with
12 jurisdiction, to hear the issue and decide the issue. Your
13 Court's -- Your Honor's indication of the jurisdiction of this
14 Court we believed invoked the District Court's jurisdiction at
15 the same time.

16 And so the last thing is he said -- the last thing, and
17 getting back to the core issue, is Mr. Morris wants you to
18 believe that we intended to violate the order, and now, as an
19 afterthought, we're using linguistic gymnastics to get around
20 all of that. But it's not linguistic gymnastics. Linguistic
21 gymnastics is saying that pursue means doing anything in
22 pursuit of a claim. That's a little -- I believe that's
23 almost a direct quote. They're chasing the man. Well, that's
24 the infinite regression that I talked about, Your Honor, that
25 it's going to be impossible in any principled way to reconcile

1 Mr. Morris's or the Debtor's definition of pursue with any
2 logical, reasonable limitation that is readable into the
3 order, Your Honor.

4 And I'm going to defer to my partner, Mr. Bridges -- oh,
5 go ahead.

6 THE COURT: I'm going to stop you. I mean, we have
7 the linguistic argument. But how do you respond to this?

8 MR. SBAITI: Sure.

9 THE COURT: What if I tell you, in my gut, this
10 appears to be an end run? An end run. I mean, I'm stating
11 something that should be obvious, right? An end run around
12 this Court. This Court spent hours, probably, reading a
13 motion to compromise issues with HarbourVest, issues between
14 the Debtor and HarbourVest. I had objections. An objection
15 from CLO Holdco that was very document-oriented, as I recall.
16 Right of first refusal. HarbourVest can't transfer its 49.98
17 percent interest in HCLOF, right? Talk about alphabet soup.
18 We definitely have it.

19 MR. SBAITI: Yes.

20 THE COURT: Without giving CLO Holdco the first right
21 to buy those assets. Read pleadings. Law clerk and I stay up
22 late. And then, you know, we get to the hearing and there's
23 the withdrawal -- we heard a little bit about that today --
24 withdrawal of the objection. We kind of confirmed that two or
25 three different ways on the record. And then I remember going

1 to Mr. Draper, who represents the Dugaboy and Get Good Trusts.
2 You know, are you challenging the legal propriety of doing
3 this? And he backed off any objection.

4 So the Court ended up having a hearing where we went
5 through what I would call the standard 9019 prove-up, where we
6 looked at was it in the best interest, was it fair and
7 equitable given all the risks, rewards, dah, dah, dah, dah.
8 You know, HarbourVest had initially, you know, started at a
9 \$300 million proof of claim, eye-popping, but this all put to
10 bed a very complicated claim.

11 MR. SBAITI: Yeah.

12 THE COURT: Tell me something that would make me feel
13 better about what is, in my core, in my gut, that this is just
14 a big, giant end run around the Bankruptcy Court approval of
15 the HarbourVest settlement, which is not on appeal, right?
16 There are a gazillion appeals in this case, but I don't think
17 the HarbourVest --

18 A VOICE: It is on -- it is on appeal, Your Honor.

19 THE COURT: Is it? Oh, it is on appeal? Okay. So I
20 may be told --

21 MR. SBAITI: I didn't know.

22 THE COURT: I may be told, gosh, you got it wrong,
23 Judge. You know, that happens sometimes.

24 So, this feels like an end run. You know, the appeal is
25 either going to prevail or not. If it's successful, then, you

1 know, do you really need this lawsuit? You know, I don't --
2 okay. Your chance.

3 MR. SBAITI: Thank you, Your Honor.

4 THE COURT: Uh-huh.

5 MS. SBAITI: Your Honor, this wouldn't be the first
6 case where finality or where there was a settlement -- I'm not
7 familiar as well with bankruptcy, but certainly in litigation
8 -- where the settlement then reveals -- well, after a
9 settlement is done, after everyone thinks it's done, some new
10 facts come to light that change people's views about what
11 happened before the settlement or before the resolution. And
12 that's what happened here, Your Honor. This is what we've
13 pled. And this is what we understand.

14 There were the instances of Mr. Seery's testimony where he
15 testified to the value of the HarbourVest assets. I believe,
16 as I recall, he testified in I believe it's the approval
17 hearing that Your Honor is talking about that the settlement
18 gave HarbourVest a certain amount of claims of I think it's,
19 Series 8 and then Series 9 claims, and that those were
20 discounted to a certain dollar value that he quantified as
21 about \$30, \$31 million. And the way he ratified and justified
22 the actual settlement value, the actual money or value he was
23 conferring on HarbourVest, given the critique of HarbourVest
24 claims that he was settling, is he explained it this way. He
25 said \$22-1/2 million of this whole pot that I'm giving them

1 pays for the HarbourVest -- HarbourVest's interests in HCLOF
2 -- it's alphabet soup again -- and Highland CLO Funding,
3 Limited. And so it's the other \$9 million that's really
4 settling their claims. And given the amount of expense it's
5 going to take, so on and so forth, \$9 million seems like a
6 reasonable amount to settle them with, especially since we're
7 just giving them claims.

8 So that \$22-1/2 million everyone apparently took to the
9 bank as being the value, including CLO Holdco at the time,
10 because they didn't have the underlying valuations. Highland
11 was supposed to give the updated valuations.

12 So, fast-forward a couple of months -- and this is what
13 we've played in our lawsuit, Your Honor; this is why I don't
14 think it's an end run -- we pled in our lawsuit just a couple
15 months later Highland -- I believe some of the people that
16 worked at Highland started leaving, according to some
17 mechanisms that I saw where Highland didn't want to keep all
18 the staff and so the staff was migrated to other places. And
19 one of those gentlemen, I believe Mr. Dondero referred to him
20 as a gentleman named Hunter Covitz, and Hunter Covitz, who's
21 also an investor in HCLOF, he owns a small piece of HCLOF, he
22 had the data, he had some of the information that showed that,
23 actually, in January, when Mr. Seery said that the HarbourVest
24 settlement was worth 22 -- excuse me, the HarbourVest
25 interests in HCLOF were worth \$22-1/2 million, that they're

1 actually worth upwards of \$45 million.

2 And so that information, Your Honor, we believe gives us a
3 different -- a different take on what happened and what was
4 supposed to happen. This is strictly about the lack of
5 transparency.

6 THE COURT: Okay. Assuming --

7 MR. SBAITI: Yeah.

8 THE COURT: -- I buy into your argument that this is
9 newly-discovered evidence --

10 MR. SBAITI: Yes.

11 THE COURT: -- CLO Holdco would not have had reason
12 to know -- I guess that's what you're saying, right?

13 MR. SBAITI: I'm saying they -- they didn't know.

14 THE COURT: That they didn't know.

15 MR. SBAITI: Uh-huh.

16 THE COURT: And didn't have reason to know. I'm
17 trying to figure out who's damaged here.

18 MR. SBAITI: Well, CLO Holdco, my client, is damaged,
19 Your Honor.

20 THE COURT: How?

21 MR. SBAITI: Because one of the aspects of the -- of
22 Highland, one of the issues under, excuse me, of Highland's
23 advisory, is that it has a fiduciary duty. And that fiduciary
24 duty, at least here, entails two, if not, three prongs. The
25 first prong is they have to be transparent. You can't say --

1 THE COURT: How is -- you know, I know a lot about
2 fiduciary duties, believe it or not. How is CLO Holdco harmed
3 and the DAF harmed?

4 MR. SBAITI: Because, Your Honor, they lost out on an
5 investment opportunity to buy the piece of -- the HarbourVest
6 piece. They would have been able to go out and raise the
7 money. They had the opportunity --

8 THE COURT: Okay.

9 MR. SBAITI: They would have had the opportunity to
10 make a different argument.

11 THE COURT: What you're saying, you're saying, if
12 they had known what they didn't have reason to know, that it
13 was worth, let's say, \$45 million, that they would have gone
14 out and raised money and said, oh, we do want to exercise this
15 right of first refusal that we decided we didn't have and gave
16 in on, we're going to press the issue and then outbid the \$22
17 million, because we know it's worth more? Is that where
18 you're going? I'm trying to figure out where the heck you're
19 going, to be honest.

20 MR. SBAITI: That's -- Your Honor, I'd push back on a
21 little of the phrasing, only because the way these duties --
22 the way we understand the SEC's duties work when you're an
23 investment advisor is you have a transparency obligation and
24 an obligation --

25 THE COURT: Yes. Yes.

1 MR. SBAITI: -- not to divert these. So, yes, CLO
2 Holdco would have at least had the opportunity and been
3 offered the opportunity, which it could have taken advantage
4 of, to, if the assets were really on the block for \$22-1/2
5 million, they should have been able to buy their percentage
6 pro rata share of that \$22-1/2 million deal. I mean, in a
7 nutshell, that's -- that's where we believe we've been harmed.
8 And we believe that the obfuscation of those values and, to a
9 certain extent, the misrepresentation of those values in the
10 settlement is not cleansable by the argument, well, you should
11 have asked.

12 Well, you should have asked is fine in normal litigation,
13 but when the person you should have asked actually owes you a
14 positive duty to inform, we believe that the should-have-asked
15 piece doesn't really apply and there's -- and that's, that's
16 the basis of our case.

17 So it's not an end run around the settlement, Your Honor.
18 I think I opened with we're not trying to undo the settlement.
19 We're not saying HarbourVest has to take its interest back.
20 We're not saying the settlement has to go on. We're not even
21 saying any of the things that happened in Bankruptcy Court
22 need to change. But Section 959 is pretty clear that this is
23 management of third-party property --

24 THE COURT: I guess -- okay. Again, rabbit trail,
25 maybe. But CLO Holdco still owns its same 49.02 percent

1 interest that it did before this transaction. So if there's
2 value galore in HCLOF, it still has its 49.02 percent
3 interest. What am I missing?

4 MR. SBAITI: Oh, I think Your Honor's assuming that
5 HCLOF bought the piece back from HarbourVest. It didn't.

6 THE COURT: No, I'm not.

7 MR. SBAITI: Oh.

8 THE COURT: I'm not assuming that.

9 MR. SBAITI: Well, --

10 THE COURT: I know that now the Debtor has, what,
11 fifty point, you know, five percent of HCLOF, whereas it only
12 had, you know, a fraction.

13 MR. SBAITI: Point six-ish. Yeah.

14 THE COURT: Point six-ish, and HarbourVest had 49.98.

15 MR. SBAITI: Right.

16 THE COURT: So, again, please educate me. I'm really
17 trying to figure out how this lawsuit isn't just some crazy
18 end run around a settlement I approved. And moreover, what's
19 the damages?

20 MR. SBAITI: Well, Your Honor, --

21 THE COURT: What's the damages? CLO Holdco still has
22 its 49.02 percent interest in HCLOF.

23 MR. SBAITI: Your Honor, again, --

24 THE COURT: What am I missing? I must be missing
25 something.

1 MR. SBAITI: I think so, Your Honor.

2 THE COURT: What?

3 MR. SBAITI: The damages is the lost opportunity, the
4 lost opportunity to own more of HCLOF.

5 THE COURT: Oh, it could have owned the whole darn
6 thing?

7 MR. SBAITI: I could have owned 90 -- whatever 49
8 plus 49.98, 98.98 percent.

9 THE COURT: But --

10 MS. SBAITI: Or some pro rata portion.

11 THE COURT: But Mr. Seery had some information that
12 you think he was holding back from CLO Holdco that CLO Holdco
13 had no reason to know?

14 MR. SBAITI: Yes, Your Honor. The -- the -- what he
15 testified to that the value of those assets, excuse me, the
16 value of the HarbourVest interests in HCLOF or its share of
17 the underlying assets being \$22-1/2 million was either, one,
18 intentionally obfuscated, or, two, and I don't think this
19 excuses it at all, he simply used ancient data and simply
20 never updated himself, not for the Court and not for any
21 representations to the investors, who he himself testified
22 under oath in this Court that he has a fiduciary duty to under
23 the Investment Advisers Act.

24 THE COURT: This could get very --

25 MR. SBAITI: So that's injury to my client, Your

1 Honor.

2 THE COURT: This could get really dangerous. Maybe

3 --

4 MR. SBAITI: I'm sorry.

5 THE COURT: This could get really dangerous. Maybe I
6 should cut off where I'm going on this.

7 MR. SBAITI: Okay.

8 THE COURT: Of course, someone dangled it out there
9 in a pleading. You know where I'm going, right?

10 MR. SBAITI: I'm not sure I do, Your Honor.

11 THE COURT: Hmm. I do read the newspaper, but
12 someone put it in a pleading. HCLOF owns MGM stock, right?
13 Is that what this is all about? Is that what this is all
14 about? Or shall we not do this on the record?

15 MR. SBAITI: Well, Your Honor, this has nothing -- I
16 don't -- I don't think this has anything to do with the MGM
17 stock one way or the other.

18 THE COURT: You don't? OH?

19 MR. SBAITI: Your Honor, my charge as a counsel for
20 the DAF is pretty straightforward. We looked at the claims.
21 We looked at the newly-discovered information. We talked to
22 the people who had it, Your Honor. That was our
23 investigation. We put together a complaint. We believed that
24 we had a good basis to file suit, despite Your Honor's -- the
25 settlement approval. We expressly, because we understand how

1 finality is so critical in a bankruptcy context, we expressly
2 didn't ask for rescission. We expressly didn't ask for
3 anything that would undo the settlement.

4 Asking for damages because of how the settlement happened,
5 through no fault of the Court's, of course, but asking for
6 damages is not, at least not as I see it, an end run around
7 the Court's settlement, and it's a legitimate claim. And I
8 don't think this is far from the first time that new evidence
9 has come up that's allowed someone to question how something
10 was done that actually -- that actually damaged them.

11 THE COURT: Usually, they come in for a motion to
12 reopen evidence to the court who issued the order approving
13 the settlement.

14 MR. SBAITI: Well, Your Honor, I mean, that's --

15 THE COURT: Newly-discovered evidence.

16 MR. SBAITI: That would be the case in a final
17 judgment, Your Honor. But, you know, our understanding of the
18 way the settlement worked was that that was not necessarily
19 going to be -- not the direction anybody wanted to go, but
20 seeking damages on a straight claim for damages, which we're
21 allowed to seek, which I think is our prerogative to seek, we
22 went that direction.

23 THE COURT: Okay. Okay.

24 MR. SBAITI: But this --

25 THE COURT: My last question.

1 MR. SBAITI: Yes, Your Honor.

2 THE COURT: Again, I have to know. You have filed
3 some sort of pleading to reopen litigation against Acis in New
4 York? I'm only asking this because it's part of what's going
5 on here. What is going on here?

6 MR. SBAITI: Your Honor, that's a -- that's a
7 separate lawsuit, and it's not to reopen litigation against
8 Acis. It deals with post-plan confirmation mismanagement by
9 Acis.

10 THE COURT: Oh, okay. Okay.

11 MR. SBAITI: Yeah.

12 THE COURT: All right.

13 MR. SBAITI: But I believe there's a motion in front
14 of Your Honor, just to -- that gave notice that the suit was
15 filed, but I believe Mr. -- well, a bankruptcy lawyer filed
16 it. I don't know.

17 THE COURT: A motion or a notice? I don't know.

18 MR. SBAITI: I don't know, Your Honor. That's above
19 my paygrade.

20 THE COURT: I have not seen it. Okay?

21 MR. SBAITI: Okay.

22 THE COURT: Maybe it's there, but no one has called
23 it to my attention.

24 MR. SBAITI: With the Court's permission, I'm going
25 to yield time to Mr. Bridges.

1 THE COURT: Okay. Mr. Bridges?

2 CLOSING ARGUMENT ON BEHALF OF THE RESPONDENTS

3 MR. BRIDGES: Thank you, Your Honor. I'm grateful
4 that you asked most of those questions to Mr. Sbaiti. I would
5 not have been able to answer them. The one I can answer is
6 the one about judicial estoppel. Apparently, I did a pretty
7 lousy job earlier. I think I'm prepared to do a better job
8 now.

9 The case law I'd like to refer you to is the Texas Supreme
10 Court's 2009 decision in *Ferguson v. Building Materials*, 295
11 S.W.3d 642. And this was my concern and my issue, perhaps
12 because I used to teach it and so it was at the front of my
13 mind. But contrary to what you would think and what you said
14 earlier, it's not your ruling against us that would create a
15 judicial estoppel problem. It's if you ruled in our favor.
16 And I know that seems weird. Let me explain.

17 The two things that have to take place for there to be
18 judicial estoppel are, first, successfully maintaining a
19 position in one proceeding, and then taking an inconsistent
20 position in another. And Your Honor, what we talked about
21 earlier is the notion that your July order forecloses the key
22 claim that Mr. Sbaiti was just describing, that Mr. Seery
23 should have known. Not that he was grossly negligent or did
24 intentional wrong, but that he breached fiduciary duties
25 because he should have known and should have disclosed.

1 And if your order forecloses that and we come and convince
2 you that we nonetheless have colorable claims, colorable
3 claims of gross negligence or willful wrongdoing, that we
4 ultimately are unable to prove, our lawsuit could fail, even
5 though we had proved -- in the lawsuit we had proved he should
6 have known and that he breached fiduciary duties, but we would
7 be estopped, having succeeded from coming here and asking in
8 compliance with the order and its colorability rule, that we
9 would be estopped from then saying that this Court lacked the
10 authority to have issued that order in the first place, to
11 have released the claim on the mere breach of fiduciary duty
12 or ordinary negligence. That's the inconsistency that I was
13 concerned about.

14 By coming here rather than trying to make our objection
15 and our position known without submitting to the foreclosure
16 of that claim that is, in many ways, the most important, the
17 headliner from our District Court complaint, is the concern,
18 Your Honor. And frankly, if Your Honor's order does foreclose
19 that, then we're in serious trouble. That's the claim that
20 we're trying to preserve.

21 But Your Honor, I don't think it was in anyone's
22 contemplation in July of 2000 that what that order would do is
23 terminate -- 2020; sorry, Your Honor -- in July of 2020, that
24 that order would terminate future claims that might arise
25 based on future conduct that had not yet happened in Mr.

1 Seery's role. Not in his role as a manager of the Debtor's
2 property, but in his role as a registered investment advisor
3 on behalf of his clients and their property. And that is the
4 concern that the judicial estoppel argument is about.

5 THE COURT: I still don't understand. I'm very well
6 aware of judicial estoppel, the old expression, you can't play
7 fast and loose with the court. Take one position in one
8 court, you're successful, and then take another position in
9 another court. That's the concept.

10 MR. BRIDGES: Coming here --

11 THE COURT: How is this judicial estoppel if you had
12 done what I think the order required and asked this Court for
13 leave? What -- and I said fine, you have leave. Where's the
14 judicial estoppel problem?

15 MR. BRIDGES: If you say fine, you have leave, but
16 that leave is only, as the order states, because we have
17 colorable claims of gross negligence, colorable claims of
18 intentional wrongdoing, what happens to our mere negligence
19 and mere breach of fiduciary duty claims? Are they
20 foreclosed? The order on its face --

21 THE COURT: Well, I would interpret the order to be
22 yes, and then you could appeal me, and the Court would either
23 say it's too late to appeal that because you didn't appeal it
24 in July 2020, or fine, I'll hear your appeal. Where's the
25 estoppel?

1 MR. BRIDGES: Your Honor, our claims that this Court
2 lacks the authority either to have made that order in the
3 first place or the jurisdiction to rule on colorability now
4 because of Section -- the mandatory abstention provision,
5 whose section number I've now lost. That if we come to you
6 and ask you to rule on those things, have we not thereby
7 waived on appeal our claim that you couldn't rule in the first
8 place on those things?

9 That is what our motion for leave in the District Court
10 argues, is that there's -- there are jurisdictional
11 shortcomings with your ability to decide what we're asking
12 that Court to decide. And Your Honor, by coming here first
13 and then appealing, that's what we fear we would have lost.
14 And instead of coming here and appealing, what we -- what we
15 would have done, in the alternative, I guess, would be to come
16 here and ask you not to rule but move to withdraw the
17 reference of our own motion.

18 That two-step, filing here and filing a motion to withdraw
19 the reference on the thing we filed here, we didn't think was
20 required, nor could we find any case law or rule saying that
21 that was appropriate.

22 THE COURT: Okay.

23 MR. BRIDGES: These are not games, Your Honor. We
24 were not trying to play games. We aren't bankruptcy court
25 lawyers. We're not regularly in front of the Bankruptcy

1 Court. So the notion why didn't we come here first isn't
2 exactly at the top of our mind. The question for trial
3 lawyers typically is, where can we file this, what are the
4 permissible venues, not why don't we come to Bankruptcy Court?
5 Especially when your order appears to say that causes of
6 action that don't rise to the level of gross negligence or
7 intentional wrongdoing are already foreclosed.

8 Your Honor, the January order, I think I have to just
9 briefly address again, even though I don't understand why it
10 makes a difference. Apparently, counsel thinks it makes a
11 difference because Mr. Dondero apparently supported it in some
12 way. Our position is, for whatever difference it makes, the
13 January versus the July, we don't believe there's anything in
14 the District Court complaint putting at issue Mr. Seery's role
15 as a director, so we don't understand how that order is
16 implicated.

17 Again, I'm not sure that matters at all. I'm not raising
18 it as a defense. I'm just telling Your Honor this is all
19 about the July order, from our perspective. Certainly, the
20 July order puts his role as a CEO -- certainly, the District
21 Court case puts his role as a CEO at issue, and that's what
22 the July order is about.

23 Your Honor, the *Applewood* case requires specifics in order
24 to terminate our rights to sue and to bring certain causes of
25 action, and without that kind of specificity, Your Honor, we

1 believe that that order fails to preclude, fails to have
2 preclusive effect as to these later-arising claims. And we
3 would submit not only that it was not contemplated, but that
4 it was not intended to have that effect, and that even Mr.
5 Seery's testimony suggests that that's not how he understood
6 that order to be effective.

7 Counsel argued that the Barton Doctrine does apply here
8 and rattled off the names of cases that don't -- to my
9 knowledge, no case, no case that I can find deals with this
10 type of deferential order where someone is asked -- where a
11 court is asked to defer to the business judgment of an entity
12 in approving an appointment, and nonetheless deciding that the
13 Barton Doctrine applies. That's not what *Villegas* holds.
14 That's not what *Espinosa* holds. I don't think *Barton* is
15 applicable in a situation like that. Certainly, it's outside
16 of the context of what *Barton* anticipated itself over a
17 century ago when it was decided.

18 Your Honor, if we're wrong, please know we're wrong in
19 earnest. These are not games. These are not sneakiness. No
20 such motivation is at issue here. I was hopeful that that
21 would be plain from the text of the motion for leave itself.
22 If it's not, I'd offer this in addition. The docket at the
23 District Court shows that immediately upon filing the motion
24 for leave, a proposed order was filed with it asking to have
25 the proposed complaint deemed filed, which as soon as I saw I

1 asked us to immediately retract it and to substitute a new
2 proposed order that does not ask for the amended complaint to
3 be deemed filed. That is not what we wanted.

4 And the fear was what if our motion is granted because the
5 District Court says you have the right, you don't even need
6 leave, but as to the Bankruptcy Court, you're on your own,
7 this is at your own risk, I'm not going to rule on any of the
8 jurisdictional questions that you attempt to raise? We did
9 not want our complaint deemed filed for that reason. What we
10 did want was for a court where we did not risk judicial
11 estoppel to decide whether or not our key claim under the
12 Advisers Act had been foreclosed by your July order, and that
13 was the key and motivating factor.

14 On top of that, Your Honor, instead of arguing the meaning
15 of the word pursue, let me just say this. We understood
16 pursue in that context to refer to claims or causes of action,
17 not potential, unfiled, unasserted, contemplated claims or
18 causes of action. That until a claim or cause of action is
19 actually asserted in some way, that it can't be pursued, and
20 that the reference here was to two kinds of action, those that
21 had not yet been commenced -- and your order foreclosed the
22 commencing of them without permission -- and those that had
23 been commenced. And your order couldn't foreclose the
24 commencing of them because they hadn't been commenced yet, but
25 your order did foreclose pursuing them.

1 And that was my reading of what that order said. And it
2 fits with this notion that a claim or cause of action isn't
3 something you're considering or even researching. It didn't
4 dawn on us that researching or talking to a client about a
5 potential claim could violate the order because in some
6 respect that conversation could be in pursuit of the claim.

7 By the same notion, we didn't think asking a court with
8 original jurisdiction according to Congress, asking a court to
9 decide whether or not we were foreclosed from bringing our
10 claims in a motion for leave was violating your order.

11 We don't have much else, Your Honor. In terms of the need
12 to enforce compliance with your orders, if we understand them,
13 we sure as heck are going to follow them. And if we've
14 misconstrued the term pursue, I'm certainly very sorry about
15 that.

16 I appreciate counsel saying he thinks we're probably good
17 people. I did not think what we did was any kind of gross
18 error in judgment. I thought that what we were doing was
19 preserving our clients' rights, going to a court of competent
20 jurisdiction, and asking the question, can we do what we think
21 we ought to be able to do, but is -- frankly, Your Honor,
22 we're a bit confused about because of the order that seems on
23 its face to foreclose the very lawsuit that we think we should
24 be bringing on behalf on this charitable organization that
25 foreclosed it months before the conduct at issue that gave

1 rise to the complaint. And with that conundrum, knowing what
2 to do was not obvious or easy for the lawyers or for the
3 client who was dependent on his lawyers to give him good,
4 sound advice.

5 I'm very grateful for you giving us the time and for your
6 very pointed questions. Thank you, Your Honor.

7 THE COURT: Thank you. All right. Who's next?

8 CLOSING ARGUMENT ON BEHALF OF MARK PATRICK

9 MR. ANDERSON: May it please the Court, Michael
10 Anderson on behalf of Mr. Patrick, Mark Patrick.

11 You know, this is a contempt proceeding. It's very
12 serious. And, you know, my stomach aches for the people here.

13 THE COURT: Mine does, too, by the way.

14 MR. ANDERSON: It truly aches.

15 THE COURT: Uh-huh.

16 MR. ANDERSON: And I mean what I said when I did
17 opening, when I said we don't need a hearing, an evidentiary
18 hearing. And I still don't believe we did, because it comes
19 down to what does the word pursue mean, because there's
20 already been an acknowledgement --

21 THE COURT: Do you all want to withdraw all your
22 exhibits? I've got a lot of exhibits that I now need to go
23 through. If I admit them into evidence, I'm going to read
24 them.

25 MR. ANDERSON: No, I understand.

1 THE COURT: Uh-huh.

2 MR. ANDERSON: But it does come down to the word
3 pursue. Counsel has already said commence doesn't do it, and
4 so then it's pursue.

5 And I could ask Your Honor, what did you mean when you
6 said pursue in the July order, but I'm not going to say that.
7 And I asked my client on the stand, you know, did you pursue a
8 claim or cause of action? And then it was very telling. What
9 happened with counsel? He stood up and objected to me even
10 asking if it was pursued. And it dawned on me, if he's going
11 to object, does pursue have some sort of legal -- that was his
12 objection. It was he objected on legal grounds. Does that
13 have some sort of legal meaning?

14 This is contempt. You can't be held in contempt unless it
15 is bright-line clear that you have deviated from a standard of
16 conduct and there's no ambiguity. Well, clearly, there is
17 ambiguity, because over on this side of the room we say filing
18 a motion for leave can't be pursue. We can look at the order
19 and we know it doesn't mean pursue because I just heard Your
20 Honor say you should have filed a motion for leave in this
21 Court before doing anything. All right? So if that -- if
22 that is what without the Bankruptcy Court first determining,
23 if that's what the motion for leave is, well, then if we go up
24 to the first sentence, No entity may commence or pursue a
25 claim or cause of action, then it has this, without the

1 Bankruptcy Court first determining, that means -- if pursue
2 means a motion for leave, if that's what that means, then that
3 order says you can't commence or file a motion for leave
4 before you file a motion for leave. Because that's what it
5 means. If pursue means motion for leave and you've said you
6 should have come here and filed a motion for leave because it
7 says, Debtor, without the Bankruptcy Court first determining
8 that notice that such claim or cause of action represents a
9 colorable claim, and specifically authorizing. The vehicle to
10 do that would be a motion for leave, right? And you can't
11 pursue anything until a motion for leave has been filed.

12 Now, where was the motion for leave? And I understand,
13 Your Honor, you know, no expert at reading the room,
14 obviously, you're frustrated that the motion for leave was
15 filed in the District Court and not in this Court. But it
16 doesn't change the fact, and neither did any of the evidence,
17 change anything, is what does pursue mean?

18 And if someone says, well, it's obviously clear it means
19 x, well, is it really obviously clear it means filing a motion
20 for leave? Because nobody on my side, when you read it, when
21 you say pursue, can read it that way. And if we're going to
22 have contempt sanctions being posed, and there has to be clear
23 and convincing evidence or beyond reasonable doubt, depending
24 upon, you know, I don't think you have to get to that part,
25 but clear --

1 THE COURT: This is not criminal contempt.

2 MR. ANDERSON: Clear and convincing is the civil
3 standard for contempt.

4 THE COURT: Right.

5 MR. ANDERSON: And if pursue is open to that much
6 interpretation, it's not the kind of thing that can be held in
7 contempt on. And I understand the frustration. I hear the
8 frustration. I hear counsel talk about that was not their
9 intent when they filed it. You know, I heard Mr. Patrick get
10 up there. I heard counsel say, hey, Mr. Patrick's doing his
11 job, he's a good guy, seems like a good guy. Well, Mr.
12 Patrick's up there. Look, they filed the underlying lawsuit.
13 Nobody -- there's no motion for that in this Court about the
14 underlying lawsuit. It's only about the motion for leave.
15 That's all we're here about.

16 And so you go to that, and we've heard all these arguments
17 about it, and we've been here almost as long as the motion for
18 leave was actually on file before it was sua sponte dismissed
19 without prejudice.

20 And so I go back to that and I say that, if pursue means
21 filing a motion for leave, then that order would require an
22 order for anyone to violate -- it would be violated upon the
23 filing of a motion for leave, because you can't pursue
24 something until the Bankruptcy Court has already first
25 determined, after notice, that such claim or cause of action

1 represents a colorable claim and specifically authorizing the
2 entity to bring such a claim. Because that -- we already know
3 that's a motion for leave in and of itself. Therefore,
4 pursue, just simply filing a motion for leave will put you in
5 that.

6 But that gets into all these -- we don't need to be having
7 this discussion about, you know, is a motion for leave pursue?
8 Is pursue a motion for leave? I've heard both arguments here.
9 It doesn't justify contempt. And I know -- and so certainly
10 with respect to my side, I, you know -- given that, I would
11 request that the Court deny the request for contempt.

12 And again, I want to say, too, look, we hear you.
13 Absolutely hear you. Understand the frustration. Totally
14 hear you on that.

15 I'm going to turn over the balance of my time to Mr.
16 Phillips, --

17 THE COURT: Okay.

18 MR. ANDERSON: -- unless you have any questions, Your
19 Honor. I appreciate it.

20 THE COURT: Okay. I do not.

21 CLOSING ARGUMENT ON BEHALF OF MARK PATRICK

22 MR. PHILLIPS: Your Honor, Louis M. Phillips, and
23 I'll be brief. I'm going to try to bring it down to -- I was
24 not involved. We are -- we are here because of the
25 indemnification provisions of CLO Holdco representing Mr.

1 Patrick individually. My firm was not involved in the
2 litigation. We were hired to represent CLO Holdco and some of
3 the defendants in the UCC litigation, and our role has
4 expanded to do some other stuff, particularly represent Mr.
5 Patrick because of the indemnification provisions of the
6 Holdco entity documents. He's entitled to indemnification and
7 we're providing a defense for him. That's why we're here.

8 So I come way after the order. We have not been involved
9 in anything. But I think I'm just going to try to distill
10 everything about the order and about the concern and about the
11 litigation, because the Court is asking about is this an end
12 run on the settlement? The Court is also saying, all you had
13 to do was come here first.

14 But let's look. We're here about one thing, the motion
15 for leave. And as Mr. Anderson pointed out, the commence or
16 pursue a claim, according to the order, commence or pursue can
17 only occur after the Court has authorized the litigation.
18 Okay. So that's what the order says. You can't commence or
19 pursue.

20 Counsel for the Debtors says, well, it can't be after
21 commencement because you've already commenced the action. So
22 pursue has to mean something before the commencement of the
23 action. It would mean something before the commencement of
24 the action under this order.

25 But it doesn't mean something before the Court approves

1 the commencement of the action, because commence or pursue
2 under this order does not occur before the Court has acted.
3 That's the language of the order. It only occurs after the
4 Court has authorized it. That's the context in which commence
5 or pursue exists, after this Court has authorized.

6 Okay. So it can't be pursuit before the Court has
7 authorized without commencement because it only is triggered
8 by the Court's authorization of the action, which means,
9 before you commence it, actions in time take time, before you
10 commence the action, you have to pursue the action to commence
11 it. But you can't do that until you've approved it. All
12 right?

13 That's the temporal concern and why we say the motion for
14 leave can't be pursuit of an action under this order. It
15 might be pursuit under another definition or another order.
16 In other words, maybe an order could be issued saying, you
17 can't file a motion for leave in any other court but this one.
18 I don't know whether it'd be a good order, but the order could
19 say that. But when you say all you had to do was file a
20 motion for leave in this Court and everything would be okay,
21 no. The motion for leave is not, under this order, pursuit.
22 Pursuit only occurs under this order after you've done
23 something, after Your Honor has done something.

24 So if a motion for leave is violative at the District
25 Court, the motion for leave would be violative here, because

1 it occurs before Your Honor has taken action.

2 Now, clearly, you want people to ask, but just as clearly,
3 and this was the point of my remarks earlier at the tail-end
4 of opening, just as clearly, I have a question, because
5 frankly, I understand what these guys are saying. These guys
6 haven't really said it. They're a little shame-faced at what
7 these guys are asking. Because what these guys are asking is
8 whether or not an employee Seery, as the CRO -- and we heard,
9 oh, he bargained for it, he wouldn't have done it without
10 getting the order and the protections because -- did he
11 bargain for not having to comply with the Investor Advisory
12 Act? Did he bargain for not having a fiduciary duty to third
13 parties? Because the one thing that Mr. Bridges has been
14 trying to tell you is that, under this order, if it's
15 interpreted one way, you would never authorize a violation of
16 the Investment Advisory Act because it wouldn't necessarily be
17 gross negligence or willful misconduct.

18 In other words, in employing Seery, did the Debtor go out
19 in this disclosure statement and say, we are advisor to \$1.2
20 billion of third-party money, and guess what, our CRO has no
21 fiduciary duty to you? We have forestalled any claim under
22 the Investment Advisory Act in our employment order. Did that
23 happen?

24 Because if that happened, I don't know if the Court was
25 really thinking that way, because that -- that can't happen in

1 a confirmation order before, under the Fifth Circuit
2 authority, after disclosure statement, plan, et cetera, et
3 cetera, because that's a third party release of claims that
4 may -- that haven't occurred yet. You would be releasing
5 because you would be saying you have no right. You have no
6 right. This is not temporal. This is saying you have no
7 right, if it's saying that, to bring an Investment Advisory --
8 Investment Advisory Act or a Breach of Fiduciary Duty Act
9 that's not gross negligence or willful misconduct forever upon
10 an employment order.

11 Now, if that's not what it means, then we have another
12 conundrum. The other conundrum -- and I'm new to this, maybe
13 this has been thought out by everybody, but I don't think so.
14 The other conundrum is this order doesn't apply to actions
15 that don't involve willful -- gross negligence or willful
16 misconduct. It only applies to those types of actions. So,
17 frankly, I don't know what the order does.

18 I think the problem -- I probably shouldn't be the
19 purviewer of who ought to know because my standard's probably
20 really low, given my capacity here. But I'm a guy off the
21 street. Seery gets hired to run the Debtor. Seery testifies
22 and he admits, we've got Investment Advisory Act all over the
23 place. We're making lots of fees out of administering all
24 this third-party money. Do they know? Do they know he's
25 immune? Do the third parties know?

1 Now, a standard about managing the Debtor? Absolutely.
2 That's just pure D Chapter 11, pure D corporate, pure D
3 standard liability if you're operating an entity. You're not
4 liable for gross negligence or willful misconduct. You're
5 not. And so any claim for damage to the Debtor or to the
6 estate by actions taken in the CRO capacity, absolutely.
7 Absolutely. You don't want a bunch of yoyos suing, you did
8 something against the Debtor and the Debtor is now worth \$147
9 less than it was because you did something, you were negligent
10 and you forgot to put the dog out. No. It's got to be gross
11 negligence or willful misconduct if you are talking about
12 running the Debtor and running the estate.

13 But that's not what we have here. And you can ask all the
14 questions you want about whether the lawsuit's any good, but
15 that's not what's up before the Court. What's up before the
16 Court is whether filing a motion for leave is contempt. And
17 under this order, you're saying, all you had to do is come
18 here. Well, in one reading of it, you'd have never got relief
19 because you can't bring the kind of action. I foreclosed it
20 by employing Seery. He no longer has a fiduciary duty and is
21 no longer bound by the Investment Advisory Act. Case closed.
22 Get out of here. Unless you can formulate something around so
23 that you can establish gross negligence or willful misconduct,
24 I've done away with all those causes of action.

25 I don't think that's what happened. And if that's not

1 what happened, this doesn't apply because it shouldn't apply
2 to third-party actions. It should apply to actions for damage
3 to the estate by creditors of the estate for whom Seery is
4 acting as CRO of the Debtor, who is the -- in possession of
5 the estate. That makes perfect sense. Perfect sense. And
6 nobody would say that you shouldn't have sole authority to
7 determine whether a CRO who's acting for the estate and
8 damages the estate -- because that'd be a claim against the
9 estate. That would be an administrative claim against the
10 estate. That is just hornbook law.

11 That's the way I see this order. And I admit I didn't
12 write it. I admit I didn't submit it. I admit I didn't
13 litigate it. I admit I'm coming in late. But sometimes maybe
14 a fresh pair of elderly, trifocal-assisted eyes doesn't hurt.
15 Because I will tell you, Judge, on one read this Court says
16 don't bother coming here because you don't have the kind of
17 claim that can be brought, even if you're a third party. And
18 the only way that happens is if Seery's released from any
19 obligation under the Investment Advisory Act, and I think
20 everybody would like to know that. And he can't be sued for
21 breach of fiduciary duty to third parties that he admits he
22 owes. I think people would like to know that.

23 And if it doesn't, then this is not -- this order is not
24 about that. But the fact -- I've been at this 40 years, and I
25 usually don't want to talk about myself. There's really not a

1 lot to talk about. But I hear Mr. Morris how he's never done
2 this, he's never done that. I hear this, I'm a good -- you
3 know, whatever. I'm confused. I've been doing this 41 years.
4 Bankruptcy, 39.7. I must be crazy, but that's what I've been
5 doing. And I'm confused because I don't even know if they
6 needed to come here. I don't even know if, had they come
7 here, if they could have even presented an action for gross --
8 for negligence or breach of fiduciary duty, could have --
9 gross negligence or willful misconduct? I don't know whether
10 this order just applies to Seery's duties as CRO vis-a-vis
11 creditors of the estate and property of the estate and damage
12 to the estate. Because that's not what we're dealing with
13 here.

14 The point is, Judge, this is contempt. And I understand
15 Your Honor knows all about contempt. Your Honor knows about
16 *Matter of Hipp*. Your Honor knows about civil contempt
17 authorization for bankruptcy courts. Your Honor knows that
18 you can't operate without the right to impose civil contempt
19 sanctions. And Your Honor knows, and I agree with Your Honor,
20 that civil contempt is both remedial and coercive.

21 But how do you coerce around my questions? Maybe I am all
22 wet, but if I am, I don't think I am, and I don't understand
23 that I am, and that's why I'm concerned about going off into
24 this contempt wilderness and millions in fees, when the motion
25 for leave was dismissed and when the lawsuit doesn't ask for

1 or includes most of its claims. I don't even -- I have not
2 studied the lawsuit. I wasn't involved in it. But if it's a
3 breach of fiduciary duty and Advisory Act and it says what
4 you've been told it says, that he should have pulled up
5 different stuff, that the valuation metrics were different,
6 that he shouldn't have used it, I don't know that they're
7 saying fraud. I don't know that they're saying he knew he was
8 doing -- I think they're saying he breached the Investment
9 Advisory Act. And that's not gross negligence or willful
10 misconduct. Then does this order apply or this order -- does
11 this order foreclose that?

12 The fact is, I think we could have decided this on the
13 pleadings and on the order. We didn't. The fact that Mr.
14 Dondero did A, B, C. And I will tell you this. Mr. Patrick
15 has stood up. He's going to get a harpoon, he's going to get
16 a harpoon, subject to his right to appeal. But he has told
17 this Court. We represent him. We're not trying to get him
18 out of having authorized the order. It's very important for
19 this Court to understand. Mr. Patrick is one of these
20 entities. Mr. Dondero can holler and scream all he wants to.
21 Mr. -- and look, did he terminate Grant Scott? If I'm Grant
22 Scott, and this is my best friend and I was in his wedding and
23 I was his roommate and I was his best friend and I'm doing
24 this stuff for \$5,000 and I do something and \$5,000 a month
25 and I do something and I get hollered at and I've got a full a

1 law practice, I'm an IP lawyer, why don't I just tell him to
2 go jump in a lake, which is the other way you could look at
3 Grant Scott leaving. I want you to jump in a lake. I'm out
4 of here. I don't need this.

5 Thank you.

6 THE COURT: All right. Thank you.

7 MR. DEMO: Your Honor, how much time do they have
8 left, --

9 THE COURT: Um, --

10 MR. DEMO: -- to be honest?

11 THE COURT: Nate, are you -- 26 minutes? All right.

12 MR. TAYLOR: I'll go way under, Your Honor.

13 THE COURT: Okay.

14 CLOSING ARGUMENT ON BEHALF OF JAMES DONDERO

15 MR. TAYLOR: Your Honor, Clay Taylor. I'm here on
16 behalf of Mr. Dondero. He was named as an individual alleged
17 violator within the order.

18 THE COURT: Okay. I'm getting lawyers mixed up. Mr.
19 Anderson, who did you represent?

20 MR. ANDERSON: Mr. Patrick. Mr. Phillips and I
21 represent --

22 THE COURT: You're Mr. Patrick?

23 MR. PHILLIPS: We're Mr. Patrick.

24 THE COURT: You're both --

25 MR. PHILLIPS: Mr. Patrick.

1 THE COURT: Okay. I'm sorry. I'm getting my Fort
2 Worth law firms mixed up. Okay.

3 MR. TAYLOR: That's quite all right. Clay Taylor
4 from Bonds Ellis here on behalf of Mr. Dondero. And we're
5 here because he was named in the alleged violator motion
6 within the order as an alleged violator. We don't think that
7 he is, for the reasons that we're about to explain, but we
8 were ordered to appear --

9 A VOICE: No.

10 MR. TAYLOR: -- and so therefore we are appearing and
11 telling you why we're not an alleged violator.

12 First of all, for all the reasons that Mr. Sbaiti and Mr.
13 Bridges and Mr. Phillips and Mr. Anderson said, the court
14 order was in effect. We agree with that. It required certain
15 conduct to be done. Yes, it did. It said you couldn't
16 commence something. It said you couldn't pursue it. I think
17 we have gone through what the pursuit and commence. Nobody is
18 arguing that anything was commenced. It comes down to
19 pursuit.

20 But let's talk about what the evidence shows about Mr.
21 Dondero. It shows that Mr. Dondero believes that there have
22 been breaches of fiduciary duty. He thinks that there has
23 been negligence committed. He believes that actions should be
24 taken. We don't run away from that. He, frankly, told you
25 that.

1 But here, he didn't take any action to pursue it. The DAF
2 did. CLO Holdco did. It's undisputed that he's not an
3 officer, director, or control person for either of those
4 entities. The act we're here on is a motion for leave to file
5 an amended complaint to include Mr. Seery. That's -- Mr.
6 Dondero didn't take any of those acts. He believes it should
7 have been done, but he's not the authorizing person.

8 He might have -- let's just pretend that he thought he was
9 authorizing something. It doesn't matter that he thought he
10 could authorize something or that he was trying to push for
11 it. The fact remains he can't authorize it. You know, he can
12 say, I declare war on Afghanistan. Well, he can't. Congress
13 can't. He can write a letter to his Congressman. He already
14 wrote a letter to his Congressman. He talked. He talked with
15 the head of the acting CLO -- CLO Holdco and he said, I think
16 there's something wrong here. I think you should be looking
17 into it. You know what, he goes, you might be right. Go talk
18 with Mazin about it. Give him some data. Conduct an
19 investigation. They did. And then they went to the
20 authorizing person and they filed a motion for leave to
21 include Mr. Seery. Mr. Dondero did nothing wrong in that.

22 Now, there is some personal animosity. I think that Your
23 Honor has probably seen there seems to be some personal
24 animosity between Mr. Seery and Mr. Dondero, and that's
25 unfortunate. But just because there's some personal animosity

1 doesn't mean that maybe something wasn't done wrong. Maybe
2 that Mr. Dondero -- he's certainly allowed to at least tell
3 people, well, I think there was something done wrong. And if
4 there is an action to be had, then those appropriate entities
5 can take it. But he didn't do those things.

6 And so even if he says, just like Michael Scott, "I
7 declare bankruptcy," it doesn't matter. You have to take the
8 certain actions.

9 THE COURT: I got it. I don't know if everyone did.

10 MR. TAYLOR: Yes, well, yeah, you have to be a *The*
11 *Office* fan.

12 But so that's where we stand. And for all the reasons the
13 prior people have discussed, I don't think that there was any
14 violation of this Court's order. But even if there was, Mr.
15 Dondero in this situation was not the one. We're going to
16 have to deal with the other order that came out yesterday in
17 due course, but for this discrete issue that is before this
18 Court today, Mr. Dondero didn't violate anything.

19 Thank you.

20 THE COURT: All right. Mr. Morris, you get the last
21 word.

22 REBUTTAL CLOSING ARGUMENT ON BEHALF OF THE DEBTOR

23 MR. MORRIS: Thank you, Your Honor. These are going
24 to be discrete points because it's truly rebuttal. I'm going
25 to try to respond to certain points.

1 Mr. Bridges and Mr. Phillips made extensive arguments
2 about why they believe the order is wrong, why it's
3 overreaching. They tried to get into your head to think about
4 what you intended or what you thought. The fact of the matter
5 is, the answer to all of those questions -- first of all, none
6 of it's relevant to this motion because we've got the order --
7 but the answer is very simple. Forget about coming here to
8 seek leave to amend to add Mr. Seery. We can avoid Mr.
9 Sbaiti's concerns about judicial estoppel or something. Why
10 didn't they just file the motion for reconsideration? They
11 filed that after they filed the motion for leave to amend,
12 after we filed the motion for contempt. Only then did they
13 file the motion for reconsideration.

14 Now, we think it's ill-thought-out. We think it's
15 problematic. Probably not today, is my guess, we'll argue to
16 you as to why we think that motion ought to be denied. But if
17 they truly believed that the order was infirm in any way,
18 wouldn't the proper thing to have been to come here and tell
19 you that? Wouldn't the proper thing to be to come to the
20 court that issued the order that you have a problem with and
21 ask the court to review it again? And if Your Honor overruled
22 the motion, to appeal it.

23 Why are we even doing this? Why did they do it? It's not
24 we. Why did they do it? Right? And that solves almost
25 everything they've said. That's point one.

1 Point two, the January order. The January order is very
2 important. It's important not just because it applies to
3 directors, but it's important because Mr. Dondero agreed to
4 it, and it also applies -- I want to get it -- Paragraph 10.
5 It's Exhibit 15. It applies to the independent directors and
6 the independents directors' agents. If a CEO is not an agent
7 of an independent director, I'm not sure what is. The
8 independent directors are the body that appointed the CEO.
9 The CEO, Mr. Seery, is acting on behalf of the board. This is
10 the order that Mr. Dondero agreed to. It's the order -- take
11 out the word independent director; put in Mr. Seery -- it's
12 the order everybody's complaining about. But even the January
13 order certainly applied to Mr. Seery. That's point two.

14 Point three. I've heard a lot of concerns about the
15 slippery slope and what does pursuit mean and does talking to
16 a lawyer mean pursuit and doing an investigation being
17 pursuit. I don't know, Your Honor, and I don't care, because
18 that's not what we're here to talk about. We're here to talk
19 about a specific act -- not a hypothetical, not a slippery
20 slope. We're talking about the filing of a motion for leave
21 to amend a complaint to add Mr. Seery as a defendant. That's
22 all we're talking about. So, you know, the rest of it, it's
23 just noise. And the only question is whether, and I think
24 it's pretty clear, that means pursuit.

25 Another version on the theme of was there any alternative

1 to filing the motion in the District Court, I think there was.
2 The Sbaiti firm did file that suit against Acis in New York.
3 And if Your Honor checks the docket in the Acis bankruptcy, I
4 think you'll find that there's a motion from Mr. Rukavina, for
5 a comfort order, basically, saying that -- asking the court to
6 declare that the filing of the complaint in New York against
7 Acis didn't violate the plan injunction. I think I have that
8 right.

9 But I point that out, Your Honor -- it's not evidence in
10 the record, but the Court can certainly take judicial notice
11 of what's on its docket -- I point that out because there's
12 another example of a lawyer who is very active in this case
13 who actually -- now, he already commenced the suit, so he did
14 -- they did both simultaneously, so I don't want to suggest
15 that that's the perfect thing to have done, but at least he's
16 here asking for -- he's bringing it to your attention, he's
17 telling you it's happened, he's asking for a comfort order,
18 and someday Your Honor may rule on it. I don't know.

19 Number six, what's with the pursuit of Mr. Seery? What is
20 with the pursuit of Mr. Seery? Is there any doubt in
21 anybody's mind that the Debtor is going to have to indemnify
22 Mr. Seery and will bring in another law firm? And while I
23 don't think it will ever happen in a hundred billion years, if
24 there is a judgment against Mr. Seery, isn't that going to be
25 the Debtor's responsibility? Why are they even bothering to

1 do this? I think it's a fair question for the Court to ask.

2 I think Mr. Taylor came up and talked about animosity.

3 How do you explain going after Jim Seery? How do you do it?

4 He's going to be indemnified. It's in -- it's in like three

5 different orders. It's in the confirmation order. It's in

6 the CEO order. It's -- it's probably as a matter of law.

7 It's in the Strand partnership agreement. It's -- he's been

8 indemnified like 12 different times. What is the purpose,

9 other than to make Mr. Seery's life miserable? There is none.

10 You'll never hear a rational explanation for why they're doing

11 this.

12 THE COURT: Just so you know, I've not looked at any
13 of the pleadings in the District Court --

14 MR. MORRIS: And I'm not asking you to.

15 THE COURT: -- other than what has been presented to
16 me today.

17 MR. MORRIS: Yeah. That's fine, Your Honor.

18 THE COURT: But I'm very flipped out about the causes
19 of action against the Debtor, --

20 MR. MORRIS: Yeah.

21 THE COURT: -- who hasn't reached an effective date.

22 MR. MORRIS: Well, --

23 THE COURT: And I'm most interested to know what the
24 defenses, motions --

25 MR. MORRIS: We'll get to that.

1 THE COURT: -- are going to be raised in that regard.

2 MR. MORRIS: We will get to that in due course.

3 I do want to point out, just to be clear, because we keep
4 hearing that they learned about, you know, all of these
5 horrible things after the fact. In the complaint, which I
6 think is Exhibit 12, --

7 THE COURT: I'm there.

8 MR. MORRIS: -- at Paragraph 127, the Plaintiffs
9 allege, "Mr. Seery was informed in late December 2020 at an
10 in-person meeting in Dallas, to which Mr. Seery had to fly,
11 that HCO" -- excuse me "HCLF and HCM had to suspend trading in
12 MGM Studios' securities because Seery had learned from James
13 Dondero, who was on the board, of a potential purchase of the
14 company. The news of the MGM purchase should have caused
15 Seery to revalue."

16 I cannot begin to tell you the problems with that
17 paragraph. We're not going to discuss them today. I made a
18 promise to these folks that we wouldn't get into the merits of
19 the complaint. But Your Honor was onto something before, and
20 those issues, you know, may see the light of day one day. And
21 if they do, folks are going to have to deal with it. But I
22 will point out that at the time the communication was made,
23 the other TRO was in effect. We didn't bring that one to the
24 Court's attention. But the important point there, Your Honor,
25 is December 2020. It is December 2020. That is the

1 allegation that's being made against Mr. Seery. And the fact
2 of the matter is, because I've done the research myself, the
3 Court will find that on December 23rd, the day the HarbourVest
4 settlement motion was filed, it was fully public knowledge
5 that Amazon and Apple, I think, had shut down negotiations
6 with MGM at that time. Right? So the big secret information,
7 it was in the public domain on December 23rd.

8 There will also never be any evidence ever that Mr. Seery
9 got on a plane and flew to Dallas in December 2020, but that's
10 a minor point.

11 I'd like to just conclude, Your Honor, by saying I've
12 heard pleas that they understand. They understand, Your
13 Honor, now they understand. It would be good if they promised
14 the Court that they won't seek to assert claims against Mr.
15 Seery anywhere but in this Court and comply with the order as
16 it's written. That, that, that would be taking a little bit
17 of responsibility.

18 I have nothing further, Your Honor.

19 THE COURT: Okay. Thank you.

20 All right. Let me give you some clue of when I'm going to
21 be able to rule. I've been glancing at my email in hopes that
22 something set tomorrow would go away, but that's not
23 happening. I've got a hearing that I've been told will take
24 all day tomorrow on a case involving a half-built hotel,
25 luxury hotel in Palm Springs, California. So I have to spend

1 the next I don't know how long getting ready for that hearing
2 tomorrow, and then I have what looks like a full day of
3 hearings Thursday, including you people coming back on
4 something.

5 MR. POMERANTZ: Your Honor, I was going to address
6 that. We have Dugaboy's motion to enforce compliance on the
7 2015(3) reports.

8 THE COURT: That's what it was.

9 MR. POMERANTZ: Since we haven't gotten to the motion
10 to modify the Seery order, my suggestion would be we use that
11 time -- of course, Dugaboy, I'm not sure if they're on the
12 phone. They're not here. I'm not sure that's time sensitive.
13 But if Your Honor wanted to have a hearing on that motion,
14 which was contemplated to take place today, the Debtor would
15 be okay having that motion heard on Thursday, perhaps by
16 WebEx, unless Your Honor wants us to stay here, which we would
17 if you do, and then reschedule the 2015(3) motion.

18 But again, that wasn't my motion. It's Dugaboy's. I'm
19 not sure Mr. Draper is on. But we obviously have some
20 calendar issues.

21 MR. MORRIS: And Your Honor, just to complete it, I
22 think also on Thursday the Court is supposed to hear HCRE and
23 Highland Capital Management Services motions for leave to
24 amend their complaint in the promissory note litigation
25 against each of them. I think that's also on the calendar for

1 Thursday. I don't expect that -- I hope that doesn't take
2 very long, but that's also, I believe, on the calendar.

3 THE COURT: Okay. Mr. Draper, are you out there?

4 MR. PHILLIPS: I didn't see him on the list, Your
5 Honor. I was just looking. But --

6 THE COURT: Okay. All right. Well, --

7 MR. PHILLIPS: What is the question? I can send him
8 a text real quick.

9 THE COURT: Well, just have -- if you all could
10 follow up with Traci Ellison, my courtroom deputy, tomorrow, I
11 am perfectly happy to continue the motion to modify the Seery
12 order to Thursday morning at 9:30 if Draper is willing to
13 continue the 2015 motion.

14 MR. POMERANTZ: I know, if I was him, my first
15 question would be is what times does the Court have available?
16 We could work that through Ms. Ellison.

17 THE COURT: Yes. And I'm just letting you know --
18 talk to her. Okay. Number one, I'll do these by video, okay?
19 WebEx. But I know I don't have any time Wednesday, and
20 Thursday's a busy day.

21 We have court Friday morning at 9:30 in--?

22 THE CLERK: Cici's Pizza.

23 THE COURT: Cici's Pizza? That's not going to take
24 very long, right?

25 THE CLERK: I don't think so.

1 THE COURT: I can potentially do something, you know,
2 10:00 o'clock Friday morning. Other than that, then you've
3 got to wait a while, because I have a seven-day trial, live
4 human beings in the courtroom starting next Monday. And so my
5 point is mainly to tell you, as much as I would like to rule
6 very, very fast, it's going to be, it looks like, a couple of
7 weeks or so before I can give you a ruling on this.

8 MR. BRIDGES: Your Honor?

9 THE COURT: Yes?

10 MR. BRIDGES: May I? It's our motion. I would
11 propose, if counsel would agree, that we just submit it on the
12 papers.

13 THE COURT: Everybody good with that? I'm certainly
14 good with that.

15 MR. POMERANTZ: Your Honor, I'd like there to be
16 argument. I have a lengthy argument. I think I'd like to
17 address a number of the things that -- Mr. Bridges made his
18 argument today. Okay?

19 THE COURT: Okay.

20 MR. POMERANTZ: His deck, it was entitled, Motion to
21 Modify.

22 THE COURT: Okay.

23 MR. POMERANTZ: So that's very nice of him, but I
24 would like to make my argument.

25 THE COURT: Okay. Let's try to nail this down right

1 now. Friday at 10:00 o'clock, can we do the oral argument
2 WebEx?

3 MR. POMERANTZ: On that one, yes, Your Honor.

4 THE COURT: On that one? Everybody good? Okay. So
5 we'll come back Friday, 10:00 o'clock, WebEx, for that motion.

6 You know, I'm going to say a couple of things where --
7 I've leaned toward thinking this is a pretty simple motion
8 before me, the motion for contempt, but when people offer into
9 evidence documents, I read your documents. Okay? That's my
10 duty. And so I have however many exhibits I admitted today
11 that I am going to look at and see how they sway me one way or
12 another on this issue. But I will tell you that my gut is
13 there has been contempt of court. Okay? I don't see anything
14 ambiguous at all about Paragraph 5 of my July 16th, 2020
15 order. Somebody may think I overreached, but if that was the
16 case, someone should have argued at the time I was
17 overreaching. Someone should have appealed the order. And I
18 think it's a *Shoaf/Espinosa* problem at this point for anyone
19 to argue about the enforceability of that order.

20 I think there's nothing ambiguous in the wording. Pursue
21 is not ambiguous. There's nothing confusing about the
22 requirement that any entity who wanted to sue or pursue a
23 claim, you know, commence claim, pursue a claim against Mr.
24 Seery, had to come to the Bankruptcy Court. Standard-fare
25 gatekeeping order.

1 So what I'm going to be looking at is, do these documents
2 I admitted into evidence change my view on that, and then the
3 harder question is who of the alleged contemnors am I going to
4 think it's clear and convincing committed contempt and -- who
5 are the contemnors, and then, of course, what are the damages?
6 Coercive or compensatory damages?

7 So, again, you know how I feel, to the extent that's
8 helpful in your planning purposes. I'm pretty convinced
9 contempt of court has occurred. It's just a matter of who's a
10 contemnor and what are the damages.

11 I'll say a couple of remaining things. I continue to be
12 frustrated, I think was the word people used, about
13 unproductive ways we all spend our time. I am going to spend
14 I don't know how many more hours drafting another ruling on a
15 contempt motion, and attorneys' fees are through the roof.
16 And, you know, I dangled out there a question I couldn't
17 resist about MGM.

18 And I will tell you, I mean, someone mentioned about their
19 stomach aching. Personal story, I could hardly sleep the
20 night it became public about the Amazon purchase, because,
21 silly me, maybe, I'm thinking game-changer. This is such
22 potentially a windfall, an economic windfall. Maybe this
23 could be the impetus to make everyone get in a room and say
24 look, we've got this wonderful windfall of money. I don't
25 know how much is owned directly or indirectly by the Debtor of

1 MGM stock. I don't know how much the Debtor manages. I
2 don't know how much, you know, some other entity. I know it's
3 probably spread out in many different entities. But I know, I
4 know because I listen, that one or more of the Highland-
5 managed CLOs has some of this, and I think I read -- remember
6 that HCLOF, which now Highland owns more than 50 percent of,
7 has some of this stock. Right?

8 MR. DONDERO: Do you want to know what happened?

9 THE COURT: Oh.

10 A VOICE: No.

11 THE COURT: Well, okay. So, you know, I can
12 understand I'm getting into maybe uncomfortable territory in a
13 public proceeding, so I'll stop.

14 But, you know, do we need to set up a status conference?
15 Do you all need to like talk about this? Am I just being
16 naïve? Couldn't this be a game-changer, where maybe it would
17 give new incentive to --

18 MR. POMERANTZ: Your Honor, I would -- he's been
19 pretty quiet through the whole hearing, Mr. Clemente. He has
20 the Committee, that a couple of people you've heard have sold
21 claims. They're now held by other parties.

22 You know, the door is always open. I don't think this is
23 going to be game-changer, unfortunately. We would like
24 nothing more, as Debtor's counsel. We don't enjoy coming to
25 Your Honor for contempt hearings.

1 Mr. Clemente said that it was productive. We would sure
2 participate. But right now, we have creditors who are very
3 angry that millions and millions of dollars have been spent on
4 really a waste of time and a waste of the Court's time and a
5 waste of everyone's time and eating into the creditors' money.
6 So I would ask Mr. Clemente to address that.

7 MR. CLEMENTE: I'm here.

8 THE COURT: Yes, he's way in the back, hoping to be
9 ignored.

10 MR. CLEMENTE: It's too cold, Your Honor, where I was
11 sitting. For the record, Your Honor, --

12 THE COURT: I noticed some entity called Muck
13 Holdings bought HarbourVest, according to the docket.

14 MR. CLEMENTE: That's correct. Muck Holdings bought
15 HarbourVest, and I believe also the Acis claim, and then
16 there's a different entity that bought the Redeemer claim.

17 THE COURT: Uh-huh.

18 MR. CLEMENTE: So, as we mentioned in our -- one of
19 our pleadings, I think it was the retention pleading for
20 Teneo, the Committee consists of two members currently, Meta-e
21 and UBS.

22 THE COURT: Uh-huh.

23 MR. CLEMENTE: Obviously, Your Honor just approved
24 the UBS settlement recently. The U.S. Trustee is aware of the
25 make-up of the Committee, and is currently comfortable with

1 the Committee maintaining a two-person membership at this
2 point.

3 In terms of whether the MGM transaction is a game-changer,
4 we've not yet seen, to Your Honor's point, how all of that
5 rolls up through the various interests that the Debtor may or
6 -- you know, may have --

7 THE COURT: Okay.

8 MR. CLEMENTE: -- that would be implicated by the MGM
9 transaction. If ultimately the MGM transaction has to
10 actually occur, right? I mean, so, you know, just based on
11 what I read in the public documents, we're not sure when that
12 transaction may actually happen. But obviously it's a good
13 thing for the Debtor's estate because it's going to recognize
14 value for the estate.

15 In terms of whether it ultimately changes how Mr. Dondero,
16 you know, wishes to proceed, that's entirely up to him, Your
17 Honor. But we don't see it as something at this point that
18 would suggest that there's an overall back to let's talk about
19 a pot plan because of where the MGM transaction might
20 ultimately come out.

21 So I don't know if that's helpful to Your Honor, but those
22 are -- that's my perspective.

23 THE COURT: Well, and I'm not trying to, you know,
24 push a pot plan on anyone.

25 MR. CLEMENTE: No, I understand.

1 THE COURT: I'm just saying it looked like an
2 economic windfall. I just -- I don't know how much is
3 Highland versus other entities in the so-called byzantine
4 complex, but, gosh, I just hoped that there might be something
5 there to change the dynamic of, you know, lawsuit, lawsuit,
6 lawsuit, lawsuit, motion for contempt, motion for contempt.

7 MR. CLEMENTE: Agreed, Your Honor.

8 THE COURT: Uh-huh.

9 MR. CLEMENTE: And like I said, it was a very
10 positive development obviously for the creditors for the
11 Debtor. But whether it's the game-changer that Your Honor
12 would envision, I'm not sure that I can suggest at this point
13 that it is.

14 I think that, you know, obviously, we don't like to see
15 these lawsuits continue to be filed. That's the whole point
16 of the gatekeeper order, Your Honor.

17 THE COURT: Uh-huh.

18 MR. CLEMENTE: I didn't say anything during the
19 hearing, but obviously the January 9th order, as Your Honor
20 has said many times, was in the context of a trustee being
21 appointed.

22 THE COURT: Right. Right.

23 MR. CLEMENTE: Right? So, and the July 16th order,
24 very similar vein, it's an outshoot of that. In fact, it was
25 contemplated in the January 9th settlement that a CEO could be

1 appointed.

2 So I think, again, it's just -- it's important, the
3 context in which that January 9th order came into play, for
4 this very reason, so we could avoid this type of litigation,
5 Your Honor.

6 THE COURT: Uh-huh.

7 MR. CLEMENTE: And so again, I didn't -- I obviously
8 didn't rise to mention that during the hearing, but Your Honor
9 is already aware of that. I didn't need to remind Your Honor
10 of that.

11 THE COURT: Uh-huh. Okay.

12 MR. CLEMENTE: Anything else for me, Your Honor?

13 THE COURT: No. Thank you.

14 MR. CLEMENTE: Okay, then, Your Honor.

15 THE COURT: Sorry I picked on you. But, all right.
16 Well, again, I hope the message has landed in the way I hope
17 will matter, and that is I'm going to look at your documents
18 but I feel very strongly that, unless there's something in
19 there that, whoa, is somehow eye-opening, I'm going to find
20 contempt of court. It's just a matter of who and what the
21 damages are. There's just not a thing in the world ambiguous
22 about Paragraph 5 of the July 9th, 2020 order. So I'll get to
23 it as soon as we humanly can get to it.

24 Mr. Morris, anything else?

25 MR. MORRIS: Nothing. No, thank you.

1 THE COURT: I guess I'll see you Thursday on the
2 WebEx. Thank you.

3 THE CLERK: All rise.

4 (Proceedings concluded at 6:00 p.m.)

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CERTIFICATE

21

22

I certify that the foregoing is a correct transcript from
the electronic sound recording of the proceedings in the
above-entitled matter.

23

/s/ Kathy Rehling

06/09/2021

24

25

Kathy Rehling, CETD-444
Certified Electronic Court Transcriber

Date

002236

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EXHIBIT 3

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Counsel for the Debtor and Debtor-in-Possession

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

In re:)	
	)	Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P., ¹	)	Case No. 19-34054-sgj11
)	
Debtor.)	
)	

**DEBTOR'S WITNESS AND EXHIBIT LIST WITH RESPECT
TO EVIDENTIARY HEARING TO BE HELD ON JUNE 8, 2021**

Highland Capital Management, L.P. (the "Debtor") submits the following witness and exhibit list with respect to the *Motion for Modification of Order Authorizing Retention of James P. Seery, Jr. Due to Lack of Subject Matter Jurisdiction* [Docket No. 2248], which the Court has

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



set for hearing at 9:30 a.m. (Central Time) on June 8, 2021 (the “Hearing”) in the above-styled bankruptcy case (the “Bankruptcy Case”).

A. Witnesses:

1. James P. Seery, Jr.;
2. Grant Scott (by deposition designation);
3. Any witness identified by or called by any other party; and
4. Any witness necessary for rebuttal.

B. Exhibits:

Letter	Exhibit	Offered	Admitted
1.	Transcript of January 9, 2020 Hearing		
2.	Transcript of July 14, 2020 Hearing		
3.	Transcript of February 2, 2021 Hearing		
4.	Transcript of February 14, 2021 Hearing		
5.	Debtor’s Motion for an Order to Enforce the Order of Reference [Docket 2351-4]		
6.	DAF/CLO Holdco Structure Chart (GScott000007) [Dondero June 1, 2021 Deposition Exhibit 1]		
7.	CLO Holdco, Ltd.’s Notice of Appearance and Request for Copies [Docket No. 152]		
8.	Certificate of Service [Docket No. 296]		
9.	Order Approving Settlement With Official Committee of Unsecured Creditors Regarding Governance of the Debtor and Procedures For Operations in the Ordinary Course [Docket No. 339]		
10.	Certificate of Service [Docket No. 345]		

Letter	Exhibit	Offered	Admitted
11.	Debtor's Motion Under Bankruptcy Code Sections 105(a) and 363(b) for Authorization to Retain James P. Seery, Jr., as Chief Executive Officer, Chief Restructuring Officer and Foreign Representative <i>Nunc Pro Tunc</i> to March 15, 2020 [Docket No. 774]		
12.	Certificate of Service [Docket No. 779]		
13.	Order Approving Debtor's Motion Under Bankruptcy Code Sections 105(a) and 363(b) for Authorization to Retain James P. Seery, Jr., as Chief Executive Officer, Chief Restructuring Officer and Foreign Representative <i>Nunc Pro Tunc</i> to March 15, 2020 [Docket No. 854]		
14.	Redline of Fifth Amended Plan of Highland Capital Management, L.P. (AS MODIFIED) [Docket No. 1809]		
15.	Order (I) Confirming the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (as Modified) and (II) Granting Related Relief [Docket No. 1943]		
16.	Transcript Designations from the January 21, 2021 Deposition of Grant Scott		
17.	Transcript Designations from the June 1, 2021 Deposition of Grant Scott		
18.	Amended and Restated Investment Advisory Agreement by and between Charitable DAF Fund, L.P., Charitable DAF GP, LLC, and HCMLP, effective July 1, 2014 (PATRICK_000923)		
19.	Amended and Restated Service Agreement by and among HCMLP, Charitable DAF Fund, L.P., and Charitable DAF GP, LLC, effective July 1, 2014 (PATRICK_000938)		
20.	Any document entered or filed in the Bankruptcy Case, including any exhibits thereto		
21.	All exhibits necessary for impeachment and/or rebuttal purposes		
22.	All exhibits identified by or offered by any other party at the Hearing		

Dated: June 5, 2021.

PACHULSKI STANG ZIEHL & JONES LLP

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EXHIBIT 16

GRANT SCOTT - 1/21/2021

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

IN RE:)	
	)	Chapter 11
HIGHLAND CAPITAL MANAGEMENT,)	
L.P.	)	Case No.
	)	19-34054-sgj11
Debtor.)	
-----)	
HIGHLAND CAPITAL MANAGEMENT,)	
L.P.,)	
Plaintiff,)	
	)	Adversary
vs.	)	Proceeding No.
	)	21-03000-sgj
HIGHLAND CAPITAL MANAGEMENT)	
FUND ADVISORS, L.P.; NEXPOINT)	
ADVISORS, L.P.; HIGHLAND)	
INCOME FUND; NEXPOINT)	
STRATEGIC OPPORTUNITIES FUND;)	
NEXPOINT CAPITAL, INC.; and)	
CLO HoldCo, LTD.,)	
)	
Defendants.)	
-----)	

VIDEOCONFERENCE DEPOSITION OF Grant SCOTT

Thursday, 21st of January, 2021

Reported by: Lisa A. Wheeler, RPR, CRR

Job No: 188910

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2 choice.

3 Q. Okay. And do you recall who served

4 the subpoena on you? Actually, let me ask a

5 different question because I'm really not

6 interested in the -- in the details.

7 Did Mr. Dondero serve that subpoena

8 on you or did somebody else?

9 A. His counsel for his ex-wife.

10 Q. Mr. -- so -- so the lawyer acting on

11 behalf of Mr. Dondero's ex-wife served you with

12 the subpoena?

13 A. Correct.

14 Q. Okay. You're familiar with an

15 entity called CLO HoldCo Limited; is that

16 right?

17 A. Yes.

18 Q. Do you know what that entity is?

19 A. Yes.

20 Q. What -- what -- can you describe for

21 me what CLO HoldCo Limited is.

22 A. It's a holding company of assets

23 including collateralized loan obligation-type

24 assets. That's a portion of the overall

25 portfolio. It's an organization that is

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2 role of director of CLO HoldCo Limited, was

3 that entity already in existence?

4 A. I believe so. I'm not certain. I'm

5 not certain.

6 Q. What are your duties and

7 responsibilities as a director of CLO HoldCo

8 Limited?

9 A. Well, my day-to-day responsibilities

10 are to interface with -- with the manager of

11 the -- of the assets of CLO. I do have some

12 role in -- with respect to some of the entities

13 that are -- I -- I have a limited role with

14 respect to a subset of the charitable

15 foundations that receive money from the CLO

16 HoldCo structure, which is commonly referred to

17 as the DAF. There's -- sometimes those are

18 used interchangeably.

19 Q. What terms are used interchangeably?

20 A. Well, the DAF and CLO HoldCo are

21 frequently -- by -- by other people they're --

22 it's the short -- it's the -- I guess it's

23 easier to use the acronym DAF than CLO HoldCo

24 Limited, so I'm frequently having to -- there

25 is a DAF entity so -- that's above -- above CLO

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2 integrated with other entities as part of a

3 charitable -- loosely what we -- what we refer

4 to as a charitable foundation equivalent.

5 Yeah.

6 Q. All right. We'll -- we'll get into

7 some detail about the corporate structure in a

8 moment. Do you personally play any role at CLO

9 HoldCo Limited?

10 A. Yes. My technical title is

11 director, but I -- I don't necessarily know

12 specifically what that title means other than I

13 act, as I understand it, as -- as a trustee for

14 those -- for those assets.

15 Q. And where did you get that

16 understanding?

17 A. Approximately ten years ago from the

18 group that -- that set up the hierarchy.

19 Q. And which group set up the

20 hierarchy?

21 A. Employees at Jim Don- -- as I

22 understand it, employees of Highland along with

23 outside counsel, as I understand it, and also,

24 I guess, input from -- from Jim Dondero.

25 Q. At the time that you assumed the

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1 GRANT SCOTT - 1/21/2021

2 in terms of the management, and so it's

3 frequently confusing and I'm having to clarify

4 at times which entity we're talking about,

5 but -- but other parties frequently use those

6 terms interchangeably.

7 Q. Okay.

8 MR. MORRIS: Lisa, when we use the

9 phrase DAF, because you'll hear that a lot,

10 it's all caps, D-A-F.

11 BY MR. MORRIS:

12 Q. You mentioned that you interface

13 with the manager of assets of CLOs. Do I have

14 that right?

15 A. Well, of all the assets.

16 Q. Okay. Who is the manager of the

17 assets that you're referring to?

18 A. Highland Capital Management.

19 Q. Highland Capital Management manages

20 all of the assets -- withdrawn.

21 Is it your understanding that

22 Highland Capital Management manages all the

23 assets that are owned by CLO HoldCo Limited?

24 A. Yes.

25 Q. Who makes the investment decisions

Page 14

1 GRANT SCOTT - 1/21/2021

2 on behalf of CLO HoldCo Limited?

3 A. Highland -- those managers that you

4 mentioned.

5 Q. Okay. I didn't mention anybody in

6 particular.

7 A. Oh, I'm sorry. The -- the -- the

8 money manager -- could you repeat that

9 question? I'm sorry. I'm so sorry.

10 Q. Can you just -- can you just

11 identify for me the person who makes investment

12 decisions on behalf of CLO HoldCo Limited.

13 A. It's -- well, it's -- it's persons

14 as I understand it. I inter- -- interface with

15 a -- with a group, but it's -- it's Highland

16 Capital employee -- Highland Capital Management

17 employees.

18 Q. Okay. Can you just name any of

19 them, please.

20 A. Hunter Covitz, Jim Dondero. Mark

21 Okada's no longer there, but I believe he was

22 involved, and there are others that I interface

23 with.

24 Q. Can you -- can you recall the name

25 of anybody other than Mr. Okada and Mr. Dondero

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2 Q. Is it fair to say that you do not

3 make decisions, investment decisions, on behalf

4 of CLO HoldCo Limited?

5 A. Yes.

6 Q. Does CLO HoldCo Limited have any

7 employees that you know of?

8 A. No.

9 Q. Does CLO HoldCo have any --

10 withdrawn.

11 Does CLO HoldCo Limited have any

12 officers that you know of?

13 A. No.

14 Q. So am I correct that you're the only

15 representative in the world of CLO HoldCo in

16 terms of being a director, officer, or

17 employee?

18 A. Yes.

19 Q. Do you receive any compensation from

20 CLO HoldCo for your services as the director?

21 A. I do now.

22 Q. When did that begin?

23 A. I believe in the middle of 2012.

24 Q. Okay. And had you served as a

25 director prior to that time without

Page 15

1 GRANT SCOTT - 1/21/2021

2 and Mr. Covitz?

3 A. Yeah. Over the years I've worked

4 with Tim Cournoyer, Thomas Surgent, but I

5 think -- I think that's the core -- the core

6 group.

7 Q. All right. And is there anybody

8 within that core group who has the final

9 decision-making authority concerning the

10 investments in CLO HoldCo Limited?

11 A. I don't -- I don't know. I'm sorry.

12 Say that again. I just want to -- I'm sorry.

13 I'm trying to be -- I'm not trying to -- I'm

14 trying to be --

15 Q. I understand. And --

16 A. Sorry. If you could just repeat it.

17 Q. Sure. Is there any particular

18 person who has the final decision-making

19 authority for investments that are being made

20 on behalf of CLO HoldCo Limited?

21 A. Amongst that group I am -- I am not

22 sure.

23 Q. Okay. So are there any other

24 directors of CLO HoldCo besides yourself?

25 A. No.

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2 compensation?

3 A. Yes.

4 Q. And have you been the sole director

5 of CLO HoldCo Limited since the time of your

6 appointment approximately ten years ago?

7 A. Yes.

8 Q. Nobody else has served in that

9 capacity; is that right?

10 A. That is correct.

11 Q. There have been no employees or

12 officers of that entity during the time that

13 you've served as director, correct?

14 A. Yes.

15 Q. Do you know who formed CLO HoldCo

16 Limited?

17 A. I do not.

18 Q. Do you know why CLO HoldCo Limited

19 was formed?

20 A. I believe so.

21 Q. Can you explain to me why -- your

22 understanding as to why CLO HoldCo was formed.

23 A. So as I understand things, Jim

24 Dondero wanted to create a charitable

25 foundation-like entity or entities, and tax

Page 22

Page 23

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2 going well.
3 Q. And -- and I think you -- you
4 testified just now that there was kind of a
5 difference between prebankruptcy and
6 postbankruptcy. Do I have that right?
7 A. Yes.
8 Q. And can you tell me -- is it fair to
9 say that before the bankruptcy, you didn't
10 devote much time to CLO HoldCo, or do I have
11 that wrong?
12 A. Well, I -- just the time that --
13 that I mentioned just -- I'm sorry. The -- the
14 time I just mentioned now when you asked me,
15 that was the pre period. Excuse me. I haven't
16 talked about the postbankruptcy period.
17 Q. So are you -- are you -- are you
18 devoting more time or less time since the
19 bankruptcy?
20 A. Much more.
21 Q. Much more since the bankruptcy
22 filing?
23 A. Yes.
24 Q. And so why did the bankruptcy filing
25 cause you to spend more time as a director of

Page 24

Page 25

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1 A. It was various obligations that were
2 owed to -- to CLO, things that had been
3 previously donated or -- or agreements that had
4 been set up that transferred certain assets,
5 and it was basically the -- the -- the amounts
6 were derived from those sorts of transactions.

7 Q. Okay. You're a patent lawyer; is
8 that right?

9 A. I -- I'm exclusively a patent
10 attorney, yes.

11 Q. Have you been a patent lawyer on an
12 exclusive basis since the time you graduated
13 from law school?

14 A. From law school, yes.

15 Q. Can you just describe for me
16 generally your educational background.

17 A. So I'm an electrical engineer by
18 training. I graduated from the University of
19 Virginia in 1984. I then went to graduate
20 school at the University of Illinois. I
21 received my master's degree in 1986, and then I
22 immediately joined IBM Research at the Thomas
23 Watson Institute in New York where I was a --
24 my title was research scientist, but I was -- I

1 GRANT SCOTT - 1/21/2021
2 CLO HoldCo Limited?
3 A. Well, initially, and this would
4 be -- this would be late 2019, it was --
5 aft- -- after the bankruptcy was -- was filed
6 and I obtained counsel, who are on the phone
7 now -- or in this deposition now, excuse me,
8 that was -- that transition occurred because
9 CLO was a debtor -- excuse me, a creditor to --
10 to the debtor and had to take steps to
11 establish its -- its claim. So if I understand
12 the -- things correctly, the -- the debtor
13 identified as part of the filing -- I don't
14 know how bankruptcy works, but if I under- --
15 if my recollection is correct, there's a
16 hierarchy from biggest to smallest, and we were
17 relatively high up. And when I say we or I,
18 I -- I just mean CLO was relatively high up.
19 And so initially, for the first period of so
20 many months, the -- the exclusive focus was on
21 our position as a creditor -- a creditor having
22 a certain claim against a debtor.
23 Q. Can you describe for me your
24 understanding of the nature of the claim
25 against the debtor.

Page 24

Page 25

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2 guess I was more of a research engineer, if

3 that matters. And I did that until I

4 transitioned -- or I began law school in the

5 fall of 1988, and then I graduated law school

6 in May of 1991.

7 Q. And where did you go to law school?

8 A. University of North Carolina.

9 Q. Do you have any formal training in

10 investing or finance?

11 A. I do not.

12 Q. Do you hold yourself out as an

13 expert in any field of investment?

14 A. None -- none at all.

15 Q. Have you had any formal training

16 with respect to compliance issues? You

17 mentioned compliance issues earlier.

18 A. No.

19 Q. Now, do you have any knowledge about

20 compliance rules or regulations?

21 A. Minimal that I've -- that have

22 occurred organically but -- but generally, no.

23 Q. You don't hold yourself out as an

24 expert in com- -- in the area of compliance,

25 correct?

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2 A. No. No. I'm -- no.

3 Q. Do you have any particular

4 investment philosophy or strategy?

5 MR. CLARK: I'm going to object to

6 the form of the question. And, John,

7 can -- can we get an agreement that -- I

8 know you were objecting just simply on the

9 form basis yesterday -- that objection to

10 form is sufficient today?

11 MR. MORRIS: Sure.

12 MR. CLARK: Okay. And I object to

13 form. Grant, you can answer to the extent

14 you can.

15 THE WITNESS: I forget the question

16 now that you interrupted. I'm sorry.

17 BY MR. MORRIS:

18 Q. So -- so -- and I'm going to ask a

19 different question because in hindsight, that's

20 a good objection.

21 In your capacity as the director

22 of -- withdrawn.

23 Do the employees of Highland that

24 you identified earlier, do they make investment

25 decisions on behalf of CLO HoldCo Limited?

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2 don't recall.

3 Q. Okay. So -- withdrawn. I'll --

4 I'll go on.

5 How did you come to be the director

6 of CLO HoldCo?

7 A. I was asked either by Jim Dondero

8 or -- directly or indirectly by -- by Jim

9 Dondero.

10 Q. And who is Jim Dondero?

11 A. Well, at the time, he was the head

12 or one of the heads of Highland Capital

13 Management, a friend of mine.

14 Q. How long have you known Mr. Dondero?

15 A. Since high school so that -- 1976.

16 Q. Where did you and Mr. Dondero grow

17 up?

18 A. In northern New Jersey.

19 Q. Do you consider him among the

20 closest friends you have?

21 A. I think he is my closest friend.

22 Q. Did you two go to college together?

23 A. We actually -- for the last -- last

24 two years I was at UVA, University of Virginia,

25 excuse me, he and I were -- were at UVA. So we

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2 without your prior knowledge on occasion?

3 A. On occasion, they do.

4 Q. So there's no rule that your prior

5 approval is needed before investments are made,

6 right?

7 A. I don't know whether they have an

8 internal guideline as to the amount that

9 triggers when they get in touch with me or

10 whether it's a new -- a change, something new,

11 or -- versus recurring. So I don't -- I don't

12 know what they use internally for that metric.

13 Q. Okay. Are you aware of any

14 guideline that was ever used by the Highland

15 employees whereby they were required to obtain

16 your consent prior to effectuating transactions

17 on behalf of CLO HoldCo Limited?

18 A. I understand there was one or more,

19 but I do not know that.

20 Q. Okay. Did you ever see such a

21 policy or list of rules that would require your

22 prior consent before the Highland employees

23 effectuated transactions on behalf of CLO

24 HoldCo Limited?

25 A. Possibly some time ago, but I -- I

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2 did not start out at UVA initially, but -- but

3 we both transferred -- I transferred my

4 sophomore year. I was actually a chemical

5 engineer at the University of Delaware when I

6 transferred in, and then he transferred in his

7 junior year. So we were there at college for

8 two years.

9 Q. And -- and based on your

10 relationship with him, is it your understanding

11 that one of the reasons he chose to transfer to

12 UVA is -- is to -- because you were there?

13 A. Oh, no. He transferred -- he --

14 he -- he transferred there because of the -- so

15 he went to the University of -- he -- he went

16 to Virginia Tech University, which is more

17 known as being an engineering school, which I

18 might have wanted to go to, and less a finance

19 business school. And if I understand things

20 correctly, and I believe I do, he transferred

21 to UVA because of the well-known

22 business/finance program, accounting program.

23 Q. And did you -- did you and

24 Mr. Dondero become roommates at UVA?

25 A. We weren't roommates, but we lived

<p style="text-align: right;">Page 30</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 in the -- we were housemates. I'm sorry. We</p> <p>3 were housemates.</p> <p>4 Q. So you shared a house together. How</p> <p>5 would you describe your relationship with</p> <p>6 Mr. Dondero today?</p> <p>7 A. It's -- it's been strained a while,</p> <p>8 for some time, but -- but generally, very good.</p> <p>9 Good to very good.</p> <p>10 Q. Without -- without getting personal</p> <p>11 here, can you just generally identify the</p> <p>12 source of the strain that you described.</p> <p>13 A. This -- I think it would be fair to</p> <p>14 say that this bankruptcy, particularly events</p> <p>15 in 2020 so some months after the bankruptcy was</p> <p>16 declared, things have become -- we -- we still</p> <p>17 have a close friendship, but -- but things</p> <p>18 are -- are a bit -- are a bit more difficult.</p> <p>19 Q. Were you ever married?</p> <p>20 A. I've never been married.</p> <p>21 Q. Did you serve as Mr. Dondero's best</p> <p>22 man at his wedding?</p> <p>23 A. I did.</p> <p>24 Q. Is it fair to say that -- that</p> <p>25 Mr. Dondero trusts you?</p>	<p style="text-align: right;">Page 31</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 MR. CLARK: Objection, form.</p> <p>3 BY MR. MORRIS:</p> <p>4 Q. Withdrawn.</p> <p>5 Do you believe that Mr. Dondero</p> <p>6 trusts you?</p> <p>7 A. I do.</p> <p>8 Q. Over the years, is it fair to say</p> <p>9 that Mr. Dondero has confided in you?</p> <p>10 MR. CLARK: Objection, form.</p> <p>11 BY MR. MORRIS:</p> <p>12 Q. You can answer if you understand it.</p> <p>13 A. I think so.</p> <p>14 Q. I -- I -- what's your answer? You</p> <p>15 think so?</p> <p>16 A. Maybe you can de- -- I think of</p> <p>17 confide as -- could you define confide, please.</p> <p>18 Q. Sure. Is it -- is it fair to say</p> <p>19 that over the -- let me -- you've known</p> <p>20 Mr. Dondero for almost 45 years, right?</p> <p>21 A. Yes.</p> <p>22 Q. And you consider him to be your</p> <p>23 closest friend in the world, right?</p> <p>24 A. Yes.</p> <p>25 Q. And is it fair to say over the</p>
<p style="text-align: right;">Page 32</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 course of those 45 years, Mr. Dondero has</p> <p>3 shared confidential information with you that</p> <p>4 he didn't want you to reveal publicly to other</p> <p>5 people?</p> <p>6 A. Yes.</p> <p>7 Q. And is it your understanding that</p> <p>8 because of the nature of your relationship with</p> <p>9 him, he asked you to serve as the director of</p> <p>10 CLO HoldCo Limited?</p> <p>11 A. Yes. I believe it's because he --</p> <p>12 he trusted -- trusted me with -- with assets</p> <p>13 relating to his charitable vision. I -- I --</p> <p>14 yeah. Yes.</p> <p>15 Q. And is it your understanding that he</p> <p>16 thought you would help him execute his</p> <p>17 charitable vision?</p> <p>18 A. That was the point of attraction</p> <p>19 initially. It wasn't for money. I wasn't</p> <p>20 being paid. That was -- the charitable mission</p> <p>21 was the attraction.</p> <p>22 Q. Does Mr. Dondero play any role in</p> <p>23 the management of the CLO HoldCo Limited asset</p> <p>24 pool?</p> <p>25 MR. CLARK: Objection, form.</p>	<p style="text-align: right;">Page 33</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 A. I'm sorry. Could you repeat that?</p> <p>3 My -- my screen went small and then big again.</p> <p>4 I was distracted.</p> <p>5 Q. What role does Mr. Dondero play with</p> <p>6 respect to the management of the CLO HoldCo</p> <p>7 Limited asset pool?</p> <p>8 MR. CLARK: Objection, form.</p> <p>9 A. He is with the company that manages</p> <p>10 that asset pool. He's one of the people I</p> <p>11 named previously as managing those assets.</p> <p>12 Q. He is -- he -- he is the -- do you</p> <p>13 understand that he has the final</p> <p>14 decision-making power with respect to the</p> <p>15 management of the assets that are held by CLO</p> <p>16 HoldCo Limited?</p> <p>17 MR. CLARK: Objection, form.</p> <p>18 A. I believe I ansel -- answered that</p> <p>19 previously. I -- I don't know who has -- for</p> <p>20 certainty I do not know who has that within</p> <p>21 that company. I don't. If -- if -- I -- I</p> <p>22 don't know, consistent with my prior answer.</p> <p>23 Q. Did you ever ask anybody who had the</p> <p>24 final decision-making authority for investments</p> <p>25 on behalf of CLO HoldCo Limited?</p>

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2 A. I -- I did not.

3 Q. Did you ever make a decision on

4 behalf of -- withdrawn.

5 In your capacity as a director --

6 withdrawn.

7 In your capacity as the sole

8 director of CLO HoldCo Limited, can you think

9 of any decision that you've ever made that

10 Mr. Dondero disagreed with?

11 A. Since -- prior to the bankruptcy,

12 no, not that I'm aware of.

13 Q. And since the bankruptcy?

14 A. There are decisions that I've made

15 that he's disagreed with.

16 Q. Can you identify them?

17 A. Yes.

18 Q. Please do so.

19 A. Okay. So the reason I'm pausing is

20 I'm trying to put these in chronological order

21 and, at the same time, identify maybe some of

22 the more important ones versus the lesser

23 important ones. One of the decisions I made

24 related to a request that I received from the

25 independent board of Highland. I don't know

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2 A. I don't know when he became aware of

3 that decision. I'm not sure I ever volunteered

4 that the decision was even made, but at some

5 point, it became an issue because he found out

6 through -- if I understand the sequence of

7 events correctly, he found out possibly through

8 his counsel because there was ultimately

9 litigation about that issue. It became known

10 to everyone at some point what I had done, I --

11 I think. And subsequent to that, it became an

12 issue because of CLO HoldCo having fairly

13 significant cash flow issues with respect to

14 its expenses and obligations, including payment

15 of management fees as well as some of the

16 scheduled charitable giving that was -- that

17 was by contract already predefined. My

18 decision to tuck that money -- or to agree

19 to -- my agreement to let that money be tucked

20 away created some -- created some -- created

21 some problems --

22 Q. And -- and --

23 A. -- for CLO HoldCo.

24 Q. Okay. And I just want you to focus

25 specifically on my question, and that is, what

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2 how the request was transmitted to me, but I

3 believe the way it played out is as follows: I

4 believe I was asked to call Jim Seery, and the

5 other -- and Russell Nelms, and the third

6 independent director, I believe his name is

7 John. I -- I forget right now what his last

8 name is. They were in New York, said they were

9 in a conference room. I called in. They were

10 very pleasant. They identified who they were,

11 and they had a request, and the request was

12 that I agree to a transfer -- or that I -- that

13 I agree to allow certain assets that were not

14 Highland's assets but they were CLO's as- --

15 assets -- apparently, there was no dispute

16 about that at any point in time, but that I

17 agree to allow certain assets that were due CLO

18 to be transferred to the registry of the

19 bankruptcy court. And either on that call I

20 immediately agreed or ended the call, called my

21 attorney, and then immediately agreed. It was

22 a very -- I accommodated the request quickly.

23 Q. Okay. And can you just tell me at

24 what point in time you spoke with Mr. Dondero,

25 and what did he say that you recall?

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2 did Mr. Dondero say to you that -- that causes

3 you to testify as you did, that this is one

4 issue that he didn't agree with?

5 A. I believe his concern was that

6 because it was money that was undisputably to

7 flow to CLO HoldCo that -- which had many, many

8 other nonliquid assets -- this was a form of a

9 liquid asset. It was cash in effect, proceeds.

10 -- that the money should have been allowed to

11 flow to be available for obligations. He

12 didn't under- -- I -- I -- I don't know what he

13 was thinking, but the -- the issue was that the

14 decision to put it into escrow was -- was --

15 was in- -- incorrect, that there was no basis

16 for it.

17 Q. That -- that's an issue where after

18 learning of your decision, he didn't agree with

19 it; is that fair?

20 A. That's right.

21 Q. Okay. Can you think of any decision

22 that you've ever made on behalf of CLO HoldCo

23 Limited where Mr. Dondero had advance knowledge

24 of what you were going to do and he objected to

25 it, but you nevertheless overruled his

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2 objection and went ahead and did what -- did

3 what you thought was right?

4 A. Okay. Let me -- let me -- I have --

5 I'm sorry.

6 Q. We're here.

7 A. Oh, I'm sorry. I'm having some

8 issues with my screen. So that may have

9 occurred with respect to the original proof of

10 claim. Then there was a subsequent amendment

11 to the proof of claim, and I -- I believe it --

12 I believe that he might have been aware of both

13 of those and was in disagreement with -- with

14 those. But after working with my attorney, we

15 just -- you know, we did what we thought was

16 right, and I still think what we did was right.

17 There was an issue with respect to Har- --

18 HarbourVest that occurred relatively recently

19 where he objected to a decision that I had

20 made. As I understand it, I could have

21 contacted my attorney and changed the decision,

22 but I didn't, and I still think that was the

23 right decision.

24 We have filed plan objections. I

25 can't say if he has any -- in that regard, I --

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2 A. So we had to interface with Highland

3 employees at some point to get information to

4 support our proof of claim, and my guess, and

5 it's just a guess, is that he was aware of

6 those inquiries. I -- I'm sorry. I shouldn't

7 speculate. I don't know. But he -- with

8 respect to the original proof of claim, I'm --

9 I'm not aware of what specifically he was

10 objecting to or was -- thought should have been

11 different, but the -- with respect to the

12 amended proof of claim, which reduced the

13 original proof of claim to zero, I think that's

14 where he had a -- an issue.

15 Q. And did you speak with him about

16 that topic prior to the time the amended claim

17 was filed, or did you only speak with him after

18 it was filed?

19 A. I'm not sure the timing of that.

20 Q. And with respect to HarbourVest, did

21 he ask you to object to the settlement on

22 behalf of CLO HoldCo Limited, and is that

23 something that you declined to do?

24 MR. CLARK: Objection, form.

25 A. I'm -- I'm sorry. I was confused

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2 I -- I don't know what his thoughts are on

3 objections. They would not have been

4 communicated with -- by me to him, but my

5 attorney might have consulted with his

6 attorney, and there -- they may know what that

7 difference is, but I -- that was just another

8 big decision. I -- I -- maybe that --

9 Q. All right. Let me see if I can --

10 let me see if I can summarize this. So two

11 proofs of claim. Is it fair to say that

12 Mr. Dondero saw those proofs of claim before

13 they were filed?

14 MR. CLARK: Objection, form.

15 BY MR. MORRIS:

16 Q. Withdrawn.

17 A. It --

18 Q. Do -- do you know whether

19 Mr. Dondero saw the proofs of claim before they

20 were filed?

21 A. I don't believe he did.

22 Q. What -- what steps in filing the

23 proofs of claim did he object to that you

24 overruled? Did he think there was -- something

25 should be different about them?

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2 with the word. Could you please repeat that?

3 Q. Yes. You mentioned HarbourVest

4 before, right?

5 A. Yes.

6 Q. And you mentioned that there was an

7 issue with Mr. Dondero and you concerning

8 HarbourVest; is that right?

9 A. Yes.

10 Q. And did that have to do with whether

11 or not CLO HoldCo Limited would -- would object

12 to the debtor's motion to get the HarbourVest

13 settlement approved?

14 A. Would -- would get the

15 HarbourVest --

16 Q. Settlement approved by the court.

17 A. I'm not trying to be difficult.

18 I'm -- I'm -- could you just repeat that one

19 more time? I'm --

20 Q. What was -- what was --

21 A. There was --

22 Q. Let me try again.

23 A. Okay.

24 Q. What was the issue with respect to

25 HarbourVest that he objected to and -- and you

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comports with your understanding of the facts.

Do you know that CLO HoldCo Limited was formed in the Cayman Islands?

A. Yes.

Q. And to the best of your knowledge, is CLO HoldCo Limited 100 percent owned by the Charitable DAF Fund, L.P.? If you're not sure, just say you're not sure if you don't know. It's not a test.

A. So the -- the -- the familiarity I -- I'm -- I'm familiar with the different -- I'm confused with the arrangement of the boxes and the ownership interest versus managerial interest. I believe that's -- that's right.

Q. Okay. And -- and you're the sole director of CLO HoldCo Limited, right?

A. Yes.

Q. And this whole structure was -- the idea for this structure, to the best of your knowledge, was to implement Mr. Dondero's plan for charitable giving; is that fair?

A. Yes. Ultimately, yes.

Q. And is it fair to say then that he -- he made the decision to establish this

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Q. And to the best of your knowledge, is the Charitable DAF GP, LLC, the general partner of Charitable DAF Fund, L.P.?

A. Yes.

Q. And is it your understanding that you are the managing member of Charitable DAF GP, LLC?

A. Yes.

Q. Does Charitable DAF GP, LLC, have any employees?

A. No.

Q. Does Charitable DAF GP, LLC, have any officers or directors?

A. No.

Q. Are you the only person affiliated with Charitable DAF GP, LLC, to the best of your --

A. I believe so.

Q. Do you receive any compensation for serving as the managing member of Charitable DAF GP, LLC?

A. No. The -- I don't interact with it very often. It's -- no, I don't receive any compensation.

<p style="text-align: right;">Page 54</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 A. Owners?</p> <p>3 Q. Yes.</p> <p>4 MR. CLARK: Objection, form.</p> <p>5 A. They -- they only participate in the</p> <p>6 money that flows up to them.</p> <p>7 Q. And what does that mean exactly?</p> <p>8 A. What's that?</p> <p>9 Q. What does that -- what do you mean</p> <p>10 by that? Do the foundations fund Charitable</p> <p>11 DAF Fund HoldCo Limited?</p> <p>12 A. Initially. Initially, as I</p> <p>13 understand it, the money flows downward into</p> <p>14 the Charitable DAF HoldCo Limited before it</p> <p>15 ultimately makes its way to CLO HoldCo, and</p> <p>16 then each of those three entities, the various</p> <p>17 foundations, obtain participation interest in</p> <p>18 the money that flows back to them.</p> <p>19 Q. And -- and is that par- -- are those</p> <p>20 participation interests in Charitable -- you</p> <p>21 know what, let -- let me just pull up one</p> <p>22 document and see if that helps.</p> <p>23 MR. MORRIS: Can we put up -- I</p> <p>24 think it's Exhibit Number 5.</p> <p>25 (SCOTT EXHIBIT 2, Unanimous Written</p>	<p style="text-align: right;">Page 55</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 Consent of Directors In Lieu of Meeting,</p> <p>3 was marked for identification.)</p> <p>4 MR. MORRIS: I apologize. Let's go</p> <p>5 to --</p> <p>6 MS. CANTY: I'm sorry, John. I</p> <p>7 can't hear you. Was that not the exhibit?</p> <p>8 MR. MORRIS: 4.</p> <p>9 MS. CANTY: Okay.</p> <p>10 THE REPORTER: And Mr. Morris, you</p> <p>11 are -- Mr. Morris, you are breaking up just</p> <p>12 a little bit at the end of your questions.</p> <p>13 BY MR. MORRIS:</p> <p>14 Q. Okay. Do you see the document on</p> <p>15 the screen, sir?</p> <p>16 A. Yes, I do.</p> <p>17 Q. Okay. And so this is a unanimous</p> <p>18 written consent of the directors of the</p> <p>19 Highland Dallas Foundation. That's one of the</p> <p>20 entities that was on the chart.</p> <p>21 MR. MORRIS: Can we scroll down to</p> <p>22 the -- the bottom of the document where the</p> <p>23 signature lines are. Right there.</p> <p>24 BY MR. MORRIS:</p> <p>25 Q. Are you a director of the Highland</p>
<p style="text-align: right;">Page 56</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 Dallas Foundation?</p> <p>3 A. Yes, selected by them.</p> <p>4 Q. Selected by whom?</p> <p>5 A. By that foundation.</p> <p>6 Q. Are you -- are you a director of all</p> <p>7 of the four foundations that feed into the</p> <p>8 Charitable DAF HoldCo Limited entities that --</p> <p>9 A. No.</p> <p>10 Q. Which of the four foundations are</p> <p>11 you a director of?</p> <p>12 A. This and the Santa Barbara -- I'm</p> <p>13 sorry, Santa Barbara and Kansas City.</p> <p>14 Q. So is -- there's one that you're not</p> <p>15 a director of; is that right?</p> <p>16 A. Yes.</p> <p>17 Q. And which one is that?</p> <p>18 A. The -- could you go back to the --</p> <p>19 Q. Yeah.</p> <p>20 MR. MORRIS: Go back to the</p> <p>21 demonstrative.</p> <p>22 A. It's the Highland Dallas Foundation</p> <p>23 and Santa Barbara Foundation.</p> <p>24 Q. Those are the two that you're a</p> <p>25 director of?</p>	<p style="text-align: right;">Page 57</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 A. Yes.</p> <p>3 Q. To the best of your knowledge, does</p> <p>4 Mr. Dondero serve as the president for each of</p> <p>5 the foundations that we're talking about?</p> <p>6 A. Yes.</p> <p>7 Q. To the best of your knowledge, is</p> <p>8 Mr. Dondero a director of each of the</p> <p>9 foundations that we're talking about?</p> <p>10 A. Say that again. I'm sorry.</p> <p>11 Q. Is he also a director of each of the</p> <p>12 foundations?</p> <p>13 A. Yes.</p> <p>14 Q. Do you know whether any of the</p> <p>15 foundations has any employees?</p> <p>16 A. I believe they do, but I -- I -- I</p> <p>17 can't say for certain.</p> <p>18 Q. Does -- withdrawn.</p> <p>19 Do you know if there are any</p> <p>20 officers of any of the four foundations other</p> <p>21 than Mr. Dondero's service as president?</p> <p>22 A. I'm sorry. Say that one more time,</p> <p>23 please.</p> <p>24 Q. Yes. Do you know whether any of the</p> <p>25 four foundations has any officers other than</p>

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2 Mr. Dondero's service as president?

3 A. No.

4 Q. You don't know, or they do not?

5 A. I -- I don't believe anyone else

6 has. I -- actually, I should say I don't -- I

7 don't recall. I -- I don't know. I don't -- I

8 don't know.

9 Q. As a director of the Dallas and

10 Santa Barbara foundations, are you aware of any

11 officers serving for either of those

12 foundations other than Mr. Dondero?

13 A. No.

14 Q. Do you know who the beneficial owner

15 of the Charitable DAF HoldCo Limited entity is?

16 A. The beneficial owner?

17 Q. Correct.

18 A. The various -- various trusts that

19 were used to -- that were the vehicles by which

20 the money originally was established within --

21 within -- within CLO HoldCo.

22 Q. Would that be -- would one of them

23 be the Get Good Nonexempt Trust?

24 A. Yes.

25 Q. And you're a trustee of the Get Good

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2 one of the trusts that has an interest in

3 Charitable DAF HoldCo Limited?

4 A. Yes.

5 Q. Are you a trustee of the Dugaboy

6 Investment Trust?

7 A. I am not.

8 Q. Do you know who is?

9 A. I believe it's his sister.

10 Q. And is that -- you're referring to

11 Mr. Dondero's sister?

12 A. I'm sorry. Yes.

13 Q. And what's the basis for your

14 understanding that Mr. Dondero's sive -- sister

15 serves as the trustee of the Dugaboy Investment

16 Trust?

17 A. Many years ago there was a -- there

18 was a clerical error that identified me as the

19 trustee of the Dugaboy. That error was present

20 for approximately two weeks or a week and a

21 half before it was detected and corrected, and

22 so I know from that correction that it's Nancy

23 Dondero.

24 Q. Are there any other trusts that have

25 an interest in Charitable DAF HoldCo Limited

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2 Nonexempt Trust, right?

3 A. Yes.

4 Q. When did you become a trustee of the

5 Get Good Nonexempt Trust?

6 A. Many years ago. I -- I don't

7 remember.

8 Q. Are there any other trustees of the

9 Get Good Nonexempt Trust?

10 A. No.

11 Q. Does the Get Good Nonexempt Trust

12 have any officers, directors, or employees?

13 A. No.

14 MR. CLARK: Objection, form. Sorry.

15 BY MR. MORRIS:

16 Q. Withdrawn.

17 Do you know whether the Get Good

18 Nonexempt Trust has any officers, directors, or

19 employees?

20 A. It does not.

21 Q. And I apologize if I asked this, but

22 are you the only trustee of the Get Good

23 Nonexempt Trust?

24 A. Yes.

25 Q. Is the Dugaboy Investment Trust also

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2 besides those trusts, to the best of your

3 knowledge?

4 A. No.

5 Q. Is it your understanding based on

6 what we've just talked about that the Get Good

7 Nonexempt Trust and the Dugaboy Investment

8 Trust are the indirect beneficiaries of CLO

9 HoldCo Limited?

10 A. Yes.

11 Q. Can you tell me who the

12 beneficiaries are of the Get Good trust?

13 A. I mean, Jim Dondero.

14 Q. And -- and what is that -- is that

15 based on the trust agreement -- your knowledge

16 of the trust agreement?

17 A. Yes.

18 Q. Do you have an understanding of who

19 the beneficiary is of the Dugaboy Investment

20 Trust?

21 A. I don't know anything about that

22 trust.

23 MR. MORRIS: Okay. All right.

24 Let's take a short break and reconvene at

25 3:30 Eastern Time. We've been going for a

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2 while.

3 MR. CLARK: Thank you.

4 MR. MORRIS: Okay. Thank you.

5 (Whereupon, there was a recess in

6 the proceedings from 3:20 p.m. to

7 3:31 p.m.)

8 BY MR. MORRIS:

9 Q. Mr. Scott, earlier I think you

10 testified that you interfaced with the folks at

11 Highland in connection with your duties as the

12 director of CLO HoldCo Limited, right?

13 A. Yes.

14 Q. Are you aware of any written

15 agreement between Highland Capital Management

16 and CLO HoldCo Limited?

17 A. Yes, the various servicer

18 agreements.

19 Q. Okay. Are you aware that

20 Mr. Dondero resigned from his position at

21 Highland Capital Management sometime in

22 October?

23 A. No.

24 Q. Have you communicated with anybody

25 at Highland Capital Management about the

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2 Do you recall the subject matter of

3 your discussions with Mr. Throckmorton?

4 MR. CLARK: Objection, form.

5 BY MR. MORRIS:

6 Q. Withdrawn.

7 Do you recall your -- the subject

8 matter of your communications with

9 Mr. Throckmorton?

10 MR. CLARK: Objection, form.

11 BY MR. MORRIS:

12 Q. You can answer.

13 A. I -- I regularly interface with

14 Mr. Throckmorton regarding approvals of

15 expenses, and he's my sort of -- he's my point

16 person for approving wire transfers and things

17 of that nature.

18 Q. How about Mr. Patrick, what -- what

19 area of responsibility does he have with

20 respect to CLO HoldCo Limited?

21 A. He -- he doesn't, to my knowledge.

22 Q. Do you recall the nature of the

23 substance of any communications that you've had

24 with Mr. Patrick since -- you know, the last

25 two or three months?

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2 affairs of CLO HoldCo Limited at any time since

3 October?

4 A. Yes.

5 Q. Anybody other than Jim Seery?

6 A. Yes.

7 Q. Okay. Let's start with Mr. Seery.

8 You've spoken with him before, right?

9 A. Yes.

10 Q. Do you have his phone number?

11 A. Yes.

12 Q. How many times have you spoken with

13 Mr. Seery, to the best of your recollection,

14 just generally? It's not a test.

15 A. Three, maybe four times.

16 Q. Okay. Can you identify by name

17 anybody else at Highland that you've spoken

18 with since -- in the last two or three months?

19 A. I spoke to Jim Dondero. I've spoken

20 with Mike Throckmorton. The usual suspects, so

21 to speak. Mark Patrick, Mel -- Melissa

22 Schroth.

23 Q. Can you recall anybody else?

24 A. No. No. Sorry.

25 Q. Did you -- did you -- withdrawn.

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2 A. Yes. Or -- yes.

3 Q. And what -- what are the nature of

4 those conversations or the substance?

5 A. He was -- he was one of the

6 individuals that helped to establish the

7 hierarchy for the -- what I keep referring to

8 as the charitable foundation.

9 Q. And -- and do you recall why you

10 spoke to him in the last -- or -- withdrawn.

11 Do you recall the nature of your

12 communications in the last two or three months

13 with Mr. Patrick?

14 A. I --

15 MR. CLARK: And hold on, Grant. I'm

16 going to caution -- my understanding -- I

17 believe Mr. Patrick's an attorney, and so

18 I'm going to caution you that you shouldn't

19 disclose the substance of -- of those

20 communications based on the attorney-client

21 privilege.

22 MR. MORRIS: Well, I'm -- I -- I am

23 the lawyer for the company so -- I guess

24 there are other people on the phone and I

25 appreciate that, but let's see if we can --

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2 I don't mean to be contentious here, so it

3 wouldn't -- I -- I'd be part of the

4 privilege anyway.

5 BY MR. MORRIS:

6 Q. But in any event, can you tell me

7 generally -- I'm just looking for general

8 subject matter of your conversations with

9 Mr. Patrick.

10 A. I asked him how I would go about

11 re- -- resigning my position.

12 Q. And when did that conversation take

13 place?

14 A. Within the last two weeks.

15 Q. Have you made a decision to resign?

16 A. No.

17 Q. I think you mentioned Melissa

18 Schroth. Do I have that right?

19 A. Yes.

20 Q. Can you describe generally the

21 communications you had with Ms. Schroth in the

22 last few months.

23 A. They -- she has e-mailed me certain

24 documents that I needed to sign. I had a

25 conversation with her about -- about some

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2 A. No.

3 Q. In your discussions with Mr. Seery,

4 did you ever tell him that you thought Highland

5 Capital Management was in default under any

6 agreement in relation to the CLOs?

7 A. No.

8 Q. I want to focus in particular on the

9 shared services agreement. In -- in your

10 discussions with Mr. Seery, did you ever tell

11 him that you believed that Highland Capital

12 Management was in default or in breach of its

13 shared services agreement with CLO HoldCo

14 Limited?

15 A. No.

16 Q. In your communications with

17 Mr. Seery, did you ever indicate any concern on

18 the part of CLO HoldCo Limited with respect to

19 Highland Capital's Man- -- Highland Capital

20 Management's performance under the shared

21 services agreement?

22 A. No.

23 Q. As you sit here today, do you have

24 any reason to believe that Highland Capital

25 Management has done anything wrong in

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2 home -- home improvements, home construction

3 with respect to Jim Dondero's home in Colorado,

4 and that's -- I -- I think that's -- that's it.

5 Q. Okay. Do you recall communicating

6 with anybody at Highland in the last three

7 months other than Mr. Dondero,

8 Mr. Throckmorton, Mr. Patrick, and Ms. Schroth?

9 A. I -- I spoke with Jim Seery this

10 week.

11 Q. Anybody else?

12 A. I don't -- I don't know.

13 Q. Okay.

14 A. I don't think so.

15 Q. In your communications with

16 Mr. Seery, did you two ever discuss his reasons

17 for making any trade on behalf of any CLO?

18 A. No.

19 Q. In your discussions with Mr. Seery,

20 did you ever tell him that you believed that

21 Highland Capital Management had breached any

22 agreement in relation to any CLO?

23 A. Have I had that discussion with Jim

24 Seery?

25 Q. Yes.

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2 connection with its performance as the

3 portfolio manager of the CLOs in which CLO

4 HoldCo Limited has invested?

5 MR. CLARK: Object to form.

6 A. In terms of the -- are you saying --

7 please say that again. I'm sorry.

8 Q. That's okay. I ask long questions

9 sometimes so forgive me, but I'm trying to

10 get -- I'm trying to be precise so that's why

11 it's difficult sometimes. But let me try

12 again.

13 Does CLO HoldCo Limited contend that

14 Highland Capital Management has done anything

15 wrong in the performance of its duties as

16 portfolio manager of the CLOs in which CLO

17 HoldCo has invested?

18 MR. CLARK: Objection, form.

19 A. Yes. It's -- it's outlined in our

20 objections to -- to the plan.

21 Q. Okay. Any -- are you aware of

22 anything that's not contained within CLO Holdco

23 Limited's objection to the plan?

24 MR. CLARK: Objection, form.

25 A. I don't know if this is responsive

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2 to your quest -- request, but two -- two

3 issues, I believe, also pose an in- -- a

4 problem for CLO HoldCo. One is we are paying

5 for services. I think I referred to the

6 services as being soup to nuts, but we are not

7 getting the full services. We haven't been for

8 some time. So we're likely overpaying. There

9 was a Highland Select Equity issue, 11-month

10 payment that was delayed which I was unaware of

11 was due. Normally, I would have interfaced

12 with someone at Highland about that, but my

13 attorney -- but my -- my attorney had to make a

14 request for payment, and that payment was

15 ultimately made. I -- other than that, I -- I

16 don't -- I don't know. I don't believe so.

17 Q. I want to distinguish between the

18 shared services agreement between Highland

19 Capital Management and CLO HoldCo Limited on

20 the one hand and on the other hand the

21 management agreements pursuant to which

22 Highland Capital Management manages certain

23 CLOs that CLO HoldCo invests in.

24 You understand the distinction that

25 I'm making?

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2 Q. I'll try again.

3 A. I'm just -- I'm sorry. I was

4 distracted and -- and I -- I'm sorry for asking

5 you to repeat it again. Please --

6 Q. Okay.

7 A. Please re- --

8 Q. Are you aware that CLO HoldCo

9 Limited has made investments in certain CLOs?

10 A. Oh, yes, certainly.

11 Q. And are you aware that those CLOs

12 are managed by Highland Capital Management?

13 A. Yes. As the -- as the servicer,

14 yes.

15 Q. Okay. Have you ever seen any of the

16 agreements pursuant to which Highland Capital

17 Management acts as a servicer?

18 A. I've seen a few, yes.

19 Q. Does CLO HoldCo Limited contend that

20 it is a party to any agreement between Highland

21 Capital Management and the CLOs?

22 MR. CLARK: Object to form. And I

23 just want to note for the record that

24 Mr. Scott is here testifying in his

25 individual capacity, I believe, not as a

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2 A. Now I do. I'm sorry. I didn't

3 appreciate that.

4 Q. Okay. So let's just take each of

5 those pieces one at a time. You mentioned your

6 concern about services. That's a concern that

7 arises under the shared services agreement,

8 right?

9 A. Yes.

10 Q. And you mentioned something about a

11 delayed payment having to do with Highland

12 Select. Do I have that generally right?

13 A. Correct.

14 Q. And is that a concern that you have

15 that arises under the shared services

16 agreement?

17 A. It's not the agreement with respect

18 to the CLOs as I understand it.

19 Q. Okay. So then let's turn to that

20 second bucket. You were aware -- you are

21 aware, are you not, that Highland Capital

22 Management has certain agreements with CLOs

23 pursuant to which it manages the assets that

24 are owned by the CLOs?

25 A. I'm so sorry. Could you please --

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2 corporate representative.

3 MR. MORRIS: Fair enough. But he is

4 the only representative so...

5 MR. CLARK: Fair enough. I just

6 want that made -- stated for the record,

7 but I also object as to form.

8 MR. MORRIS: Got it.

9 A. It's a third-party beneficiary under

10 the agreements.

11 Q. And is that because of something you

12 read in the document, or is that just your

13 belief and understanding?

14 A. My belief and understanding.

15 Q. And is that belief and understanding

16 based on anything other than conversations with

17 counsel?

18 A. In -- in -- recently it has, but I

19 don't recall from previous interactions over

20 the years how we discussed that or how I came

21 to -- to understand that.

22 Q. Does HCLO [sic] HoldCo -- did -- in

23 your capacity as the sole director of HCLO

24 HoldCo Limited, are you aware of anything that

25 Highland Capital Management has done wrong in

<p style="text-align: right;">Page 74</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 connection with the services provided under the</p> <p>3 CLO management agreements?</p> <p>4 MR. CLARK: Objection, form.</p> <p>5 A. I -- I don't -- I don't -- I</p> <p>6 don't -- your answer's no.</p> <p>7 Q. In your capacity as the director of</p> <p>8 CLO HoldCo Limited, are you aware of any</p> <p>9 default or breach under the CLO management</p> <p>10 agreements that -- that Highland Capital</p> <p>11 Management has caused?</p> <p>12 MR. CLARK: Objection, form.</p> <p>13 A. We have raised the issue about</p> <p>14 ongoing sales in various -- I'm not sure</p> <p>15 whether they represent a technical breach,</p> <p>16 though.</p> <p>17 Q. Okay. Are you aware of any</p> <p>18 technical breach?</p> <p>19 MR. CLARK: Objection, form.</p> <p>20 A. No.</p> <p>21 Q. I'm sorry. You said, no, sir?</p> <p>22 A. My answer's no.</p> <p>23 Q. Thank you. Do you know who made the</p> <p>24 decision to cause the CLO HoldCo Limited entity</p> <p>25 to invest in the CLOs that are managed by</p>	<p style="text-align: right;">Page 75</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 Highland Capital?</p> <p>3 A. The select -- ultimately, I had to.</p> <p>4 Q. I thought you testified earlier that</p> <p>5 you didn't make decisions as to investment. Do</p> <p>6 I have that wrong?</p> <p>7 A. The selection.</p> <p>8 Q. Okay.</p> <p>9 A. I -- I'm --</p> <p>10 Q. So -- so explain to me --</p> <p>11 A. I have to approve -- I have to</p> <p>12 approve the selection. I'm sorry. But the</p> <p>13 people making -- I was putting that in the camp</p> <p>14 of the people that make the selection.</p> <p>15 Q. Okay. Do you know if -- do you know</p> <p>16 if there are CLOs in the world that exist that</p> <p>17 aren't managed by Highland Capital Management?</p> <p>18 MR. CLARK: Objection, form.</p> <p>19 A. Are there CLOs in the -- in the</p> <p>20 world that are not --</p> <p>21 Q. Yes.</p> <p>22 A. Yes. It's -- it's a well-known --</p> <p>23 it's a well-known --</p> <p>24 Q. In your capacity as the director of</p> <p>25 CLO HoldCo Limited, did you ever consider</p>
<p style="text-align: right;">Page 76</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 making an investment in a CLO that wasn't</p> <p>3 managed by Highland?</p> <p>4 A. No.</p> <p>5 Q. Is there any particular reason why</p> <p>6 you haven't given that any consideration?</p> <p>7 A. That hasn't been my role. That's</p> <p>8 not my expertise. That's been something</p> <p>9 Highland has done and, quite frankly, over the</p> <p>10 years brilliantly so, no.</p> <p>11 Q. You're aware that HCM, L.P., has</p> <p>12 filed for bankruptcy, right?</p> <p>13 A. Yes.</p> <p>14 Q. When did you learn that Highland had</p> <p>15 filed for bankruptcy?</p> <p>16 A. After the fact sometime in late --</p> <p>17 late 2019.</p> <p>18 Q. Since the bankruptcy filing, have</p> <p>19 you made any attempt to sell CLO HoldCo</p> <p>20 Limited's position in any of the CLOs that are</p> <p>21 managed by Highland?</p> <p>22 A. No.</p> <p>23 Q. So notwithstanding the bankruptcy</p> <p>24 filing, you as the director haven't made any</p> <p>25 attempt to transfer out of the CLOs that are</p>	<p style="text-align: right;">Page 77</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 managed by Highland, correct?</p> <p>3 A. Correct.</p> <p>4 Q. Did you ever give any thought to</p> <p>5 exiting the CLO vehicles that were managed by</p> <p>6 Highland in light of its bankruptcy filing?</p> <p>7 A. No.</p> <p>8 Q. Have you ever discussed with</p> <p>9 Mr. Seery anything having to do with the</p> <p>10 management -- withdrawn.</p> <p>11 Have you ever discussed with</p> <p>12 Mr. Seery any aspect of the debtor's management</p> <p>13 of the CLOs in which CLO HoldCo Limited is</p> <p>14 invested?</p> <p>15 A. No.</p> <p>16 Q. You mentioned earlier a request to</p> <p>17 stop trading. Do I have that right?</p> <p>18 A. Yes.</p> <p>19 Q. Okay. And are you aware that a</p> <p>20 letter was written purportedly on behalf of CLO</p> <p>21 HoldCo Limited in which a request to stop</p> <p>22 trading was made?</p> <p>23 A. As a cos- -- yeah. Yes.</p> <p>24 Q. Okay. Have you ever seen that</p> <p>25 letter before?</p>

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1 Q. How did you form your opinion that
2 the debtor doesn't have the expertise to
3 execute trades on behalf of the CLOs today?
4 What's the basis for that belief?

5 A. I -- as I understood it, the -- the
6 people historically making that decision were
7 no longer making that decision.

8 Q. Who besides Mr. Dondero --
9 withdrawn.

10 Who are you referring to?

11 A. Well, Mr. Dondero is one. I don't
12 know the names, but I -- I understood it to
13 mean that the group previously responsible, for
14 exam- -- for example, Hunter Covitz, including
15 Hun- -- him, were no longer involved in the
16 decision-making process, but...

17 Q. How did you -- how -- how -- who
18 gave you the information that led you to
19 conclude that Hunter Covitz was no longer
20 involved in the decision-making process?

21 A. Specifically him and that name being
22 mentioned, I -- I -- I wasn't informed of his
23 speci- -- him -- him being removed. I was
24 under the impression that the team that had
25

GRANT SCOTT - 1/21/2021

1 previously been doing that was no longer doing
2 it.

3 Q. And what gave you that impression?

4 A. Was communications I had with my
5 attorney.

6 Q. Okay. Is there any source for your
7 information that led you to conclude that the
8 team was no longer there that was able to
9 engage in the trades on behalf of the CLOs
10 other than your attorneys?

11 A. Well, this -- this letter -- I -- I
12 think the answer is no.

13 Q. Thank you. Do you know if Jim -- do
14 you have an opinion or a view as to whether Jim
15 Seery is qualified to make trades?

16 A. This --

17 MR. CLARK: Objection, form.

18 A. I don't know -- I spoke to Jim Seery
19 earlier this week. You -- you asked me whether
20 I had his number. I said I did. That's only
21 because he called me. My phone rang with his
22 number. It was a number I did not recognize,
23 it was not in my contacts, but he left me a
24 voice mail so I called him back. Then I

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1 updated my contacts to -- to add his name so
2 now I have his name. And during that
3 conversation he informed me that he did have
4 that expertise --
5 Q. And --
6 A. -- without me making any inquiry.
7 He volunteered that.
8 Q. But you hadn't made any inquiry
9 prior to the time that you authorized the
10 sending of this letter; is that fair?
11 A. That's correct.
12 Q. Do you know whether Mr. Seery, in
13 fact, engaged in transactions on behalf of the
14 debtor since he was appointed back in January?
15 A. I do not.
16 Q. Did you ask that question prior to
17 the time you authorized the sending of this
18 letter?
19 A. I did not.
20 Q. Can you identify a single
21 transaction that Jim Seery has ever made that
22 you disagree with?
23 A. No.
24 Q. Can you identify any transaction

1 GRANT SCOTT - 1/21/2021

2 that the debtor made on behalf of any of the

3 CLOs since the time that you understand

4 Mr. Dondero left Highland that you disagree

5 with?

6 A. No.

7 Q. Did you have any discussion with any

8 representative of any of the entities listed on

9 this document where they told you they believe

10 Jim Seery didn't have the expertise to engage

11 in transactions on behalf of the whole -- of

12 the CLOs?

13 A. You -- your question -- I'm -- I'm

14 sorry. I'm trying to be -- I'm trying to be a

15 hundred perc- -- I'm trying to be accurate

16 here.

17 Q. Let me interrupt you and just say,

18 I'm very grateful for your testimony. I know

19 this is not easy, and I do believe that you're

20 earnestly and honestly trying to answer the

21 questions the best you can. So no apologies

22 necessary anymore. If you need me to repeat

23 the question or rephrase it, just say that,

24 okay?

25 A. Please -- yes.

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2 Q. Okay.

3 A. Please -- please repeat that.

4 Q. Did you ever communicate with any

5 employee, officer, director, representative of

6 any of the entities that are on this page

7 concerning the debtor's ability to service the

8 CLOs?

9 A. I believe so.

10 Q. And can you identify the person or

11 persons?

12 A. I think it's Jim Dondero.

13 Q. Anybody else other than Mr. Dondero?

14 A. No.

15 Q. When did you have that conversation

16 or those conversations with Mr. Dondero?

17 A. This letter is dated the 22nd --

18 Q. Correct.

19 A. -- right?

20 Q. Yes.

21 A. I believe that's the Tuesday before

22 Christmas, and this would have been on the

23 21st, the Monday.

24 Q. What do you recall about your

25 conversation on the 21st regarding the

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1 GRANT SCOTT - 1/21/2021

2 there.

3 BY MR. MORRIS:

4 Q. Do you see the request that's in the

5 last sentence?

6 A. Yes.

7 Q. Is that the same thing that

8 Mr. Dondero told you should happen, that --

9 that there should be no further CLO

10 transactions at least until the issues raised

11 and addressed by the debtor's plan were

12 resolved substantively?

13 A. Yes.

14 Q. Is there anything that he said

15 that's inconsistent with the request that's

16 made here?

17 MR. CLARK: Objection, form.

18 A. This -- and can you -- can you show

19 me earlier parts?

20 Q. Of course. You know what, I'll

21 withdraw the question.

22 And let me see if I can do it this

23 way: In your discussion with Mr. Dondero, did

24 he indicate that he had seen a draft of this

25 letter?

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1 GRANT SCOTT - 1/21/2021

2 substance of this particular letter?

3 A. Jim Dondero described why he

4 believed sales being made on an ongoing basis

5 after a request was made to stop was im- --

6 improper.

7 Q. Do you -- do you rely on what

8 Mr. Dondero said to you during that phone call

9 on December 21st in -- in deciding to join in

10 this particular letter?

11 A. No.

12 Q. Did you only then rely on the

13 information you obtained from counsel?

14 A. Yes. I -- I -- I -- I considered

15 this letter to be nearly the most gentle

16 request imaginable amongst lawyers to maintain

17 the status quo.

18 Q. And the request that's made in this

19 letter is perfectly consistent with what

20 Mr. Dondero told you on the 21st of December,

21 correct?

22 A. I don't -- no.

23 Q. How --

24 MR. MORRIS: Can we go to the end of

25 this letter, please. All right. Right

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1 GRANT SCOTT - 1/21/2021

2 A. No. And I didn't -- I didn't have a

3 discussion with him. I -- I merely listened to

4 him. There was no -- I -- I had no input to

5 the conversation.

6 Q. Okay. I -- I did -- I didn't --

7 I -- I appreciate that. So he called you; is

8 that right?

9 A. We -- we called in.

10 Q. Oh, was it --

11 A. I --

12 Q. Was it --

13 A. I don't know --

14 Q. Was it --

15 A. I don't know the sequence of the

16 calls. I'm sorry.

17 Q. Was there anybody on the call other

18 than you and Mr. Dondero, the call that you're

19 describing on December 21st?

20 A. Yes, my attorney and an attorney --

21 I believe the attorney that signed this letter.

22 Q. Okay. And I just want to focus on

23 what Mr. Dondero said. Did he -- did he say

24 during the call that Highland should not be

25 engaging in any further CLO transactions?

EXHIBIT 17

Grant Scott

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

In Re:

Case No.

HIGHLAND CAPITAL MANAGEMENT L.P.,

19-34054

Debtor,

Chapter 11

HIGHLAND CAPITAL MANAGEMENT,

Adversary No.

L.P.,

21-03003-sgi

Plaintiff,

Vs.

JAMES D. DONDERO,

Defendant.

Virtual Zoom Deposition of Grant Scott

Tuesday, June 1, 2021

At 2:00 p.m.

Reported by LeShaunda Cass-Byrd, CSR, RPR

TSG Job No. 194692

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1 Grant Scott
2 GRANT SCOTT,
3 having been first duly sworn, was examined and
4 testified as follows:
5 EXAMINATION
6 BY MR. MORRIS:
7 Q. Good afternoon, Mr. Scott.
8 A. Good afternoon, John.
9 Q. Okay. As you recall, my name is John
10 Morris. I'm an attorney with Pachulski Stang Ziehl &
11 Jones. We represent Highland Capital Management LP, a
12 debtor in a bankruptcy case that is pending in the
13 Northern District of Texas.
14 Do you recall any of that?
15 A. Yes.
16 Q. Okay. And we are here today for your
17 deposition, and I appreciate your compliance with the
18 subpoena. Just a few ground rules to remind you, I'm
19 going to ask you a series of questions, and it's
20 important that you allow me to finish my question
21 before you begin your answer; is that fair?
22 A. Yes.
23 Q. And I will attempt to give you the same
24 courtesy, but if for some reason I step on your words,
25 just let me know that because I don't mean to cut you

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1 Grant Scott
2 A. Yes.
3 Q. So today's deposition concerns a particular
4 motion that the debtor filed recently where the debtor
5 is seeking to hold certain individuals and entities in
6 contempt of court. Have you seen or reviewed the
7 debtor's motion that was filed?
8 A. I have seen the e-mails which I kept, but I
9 have not read them.
10 Q. Okay. I want to just begin with some
11 background.
12 MR. MORRIS: And then I would ask Ms.
13 Canty to put up what we will mark as
14 Exhibit -- you know, let's pick up the
15 numbering from this morning, La Asia. Did
16 we use 7 this morning?
17 Actually, this is going to be Exhibit
18 1. It's the same document that we had this
19 morning.
20 MS. CANTY: Yes.
21 MR. MORRIS: We will call it Exhibit
22 1, and it's an organizational chart. If we
23 can just put that on the screen.
24 (Deposition Exhibit 1 was marked for
25 identification.)

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1 Grant Scott
2 off. Okay?
3 A. Okay.
4 Q. If there's anything that I ask you that you
5 do not understand, will you let me know?
6 A. Yes, sir.
7 Q. If you need a break at any time, will you
8 let me know?
9 A. Yes.
10 Q. Okay. Because this deposition is being
11 conducted remotely, we are going to be putting
12 documents on the screen. I'm not attempting to trick
13 you in any way. If you believe there is any of
14 portion of a document that you need to see, either to
15 put something in context or to refresh your
16 recollection, I encourage to let me know that, and I
17 will be happy to accommodate you. Okay?
18 A. Okay.
19 Q. Okay. Have you seen the subpoena that the
20 debtors served on your lawyer in this case?
21 A. The one relating to my deposition?
22 Q. Correct.
23 A. Yes.
24 Q. And are you here today pursuant to that
25 subpoena?

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1 Grant Scott
2 BY MR. MORRIS:
3 Q. Okay. Have you seen this before,
4 Mr. Scott?
5 A. Yes.
6 Q. Do you know what it is?
7 A. It's the -- yes. The DAF CLO HoldCo
8 structure chart.
9 Q. And this is structure chart that you
10 produced in response to the subpoena; is that right?
11 A. Correct.
12 Q. You are familiar with the gentleman named
13 Mark Patrick; is that right?
14 A. Yes.
15 Q. Is it your understanding that Mr. Patrick
16 was one of the individuals that helped establish the
17 hierarchy that is depicted on Exhibit 1?
18 A. Yes.
19 Q. And what is the basis for that
20 understanding?
21 A. That goes back many years to the
22 origination of my role.
23 Q. Okay. And do you recall that you assumed
24 your role in or around 2012?
25 A. Yes.

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1 Grant Scott

2 Q. Okay. Did you know Mr. Patrick prior to

3 the time that you assumed your role?

4 A. I did not.

5 Q. Okay. Do you know -- withdrawn.

6 Do you have any knowledge as to whether

7 anybody other than Mr. Patrick helped establish the

8 hierarchy that is depicted on Exhibit 1?

9 A. There was a law firm name that came to

10 mind, and there was an expert, I gather, a lawyer that

11 was familiar with charitable entities that I believe

12 was involved.

13 Q. Can you identify any -- withdrawn.

14 At the time that you understood Mr. Patrick

15 had helped to create this hierarchy, did you

16 understand who employed Mr. Patrick?

17 A. Yes. I believe so.

18 Q. Who did you believe Mr. Patrick worked for

19 at that time?

20 A. Highland Capital Management.

21 Q. Can you identify any other person at

22 Highland Capital Management who was involved in the

23 creation of this hierarchy?

24 A. No.

25 Q. Okay. Now for looking at the hierarchy

Page 12

1 Grant Scott

2 members of some of those organizations.

3 Q. And would they be the ones that are

4 labelled as third parties or as supporting

5 organizations?

6 A. The -- the third party organizations.

7 And -- and possibly the supporting organizations.

8 Q. Do you know what the difference is between

9 a third party and a supporting organization as those

10 phrases are used on Exhibit 1?

11 A. I don't recall anymore what the delineation

12 is between those two.

13 Q. Okay. Do you hold any position today with

14 any of the entities that are depicted on Exhibit 1?

15 A. I do not -- I do not believe so. Well, I

16 believe technically, I'm still -- I may still be a

17 director of CLO HoldCo, but I -- I'm not certain of

18 the status as of today.

19 Q. Is there a particular reason why you may

20 remain today as a director of CLO HoldCo Limited?

21 A. I don't know if the -- I don't know if the

22 transfer after my resignation has been completely

23 finalized, and I haven't -- yeah. I don't know how

24 close it is to being completely finalized. I'm not --

25 I'm not sure.

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1 Grant Scott

2 here, for the period for approximately 10 years prior

3 to March 24th, 2021, you served as the managing member

4 of the charitable DAF GP, LLC, correct?

5 A. Correct.

6 Q. And for approximately 10 years prior to

7 March 30 -- 20 -- withdrawn.

8 For approximately 10 years prior to March

9 24th, 2021, you were the sole director of charitable

10 DAF HoldCo, LTD, correct?

11 A. Correct.

12 Q. And for approximately 10 years prior to

13 March 24th, 2021, you were the sole director of

14 charitable DAF Fund LP, correct?

15 A. I believe that is correct.

16 Q. And for approximately 10 years prior to

17 March 24, 2021, you served as the sole director of CLO

18 HoldCo Limited, correct?

19 A. Yes. That is correct.

20 Q. Did you serve in any capacity for any other

21 entity that is depicted on this sheet at any time

22 prior to March 24th, 2021?

23 A. If you go -- if you look at the top of that

24 chart where it's directed at the charitable giving

25 components, I had some involvement with various

Page 13

1 Grant Scott

2 Q. But your intent is to resign as the

3 director of CLO HoldCo Limited; is that right?

4 A. Yes.

5 Q. And the only reason that that hasn't

6 happened yet, is it fair to say, is for administrative

7 reasons?

8 MR. BRIDGES: Objection. Assumes

9 facts not in evidence.

10 BY MR. MORRIS:

11 Q. You can answer.

12 A. I --

13 Q. Withdrawn. I will ask a different

14 question.

15 Do you know why your intended resignation

16 from CLO HoldCo Limited has not yet become effective?

17 MR. BRIDGES: The same objection.

18 Facts not in evidence.

19 BY MR. MORRIS:

20 Q. You can go ahead.

21 MR. KANE: I object to form, also.

22 Grant, go ahead.

23 THE WITNESS: I do not.

24 BY MR. MORRIS:

25 Q. Okay. Do you hold any positions of any

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1 Grant Scott

2 kind today with any entity that you believe is either

3 directly or indirectly owned or controlled by

4 Mr. Dondero?

5 A. I don't believe so.

6 Q. Do you have -- I'm just going to explore

7 that for a little bit.

8 Do you know have -- do you know whether you

9 continue to HoldCo any position with any NexBank

10 entity?

11 A. I'm not in -- no, I don't have any

12 involvement with NexBank.

13 Q. Okay.

14 MR. KANE: Hey, John, can you shed a

15 little light on why that is relevant?

16 MR. MORRIS: I'm just trying to find

17 connections between Mr. Scott and

18 Mr. Dondero because I -- I just -- I

19 think -- I think the purpose of the

20 deposition is to try to -- to try to deduce

21 facts that are related to whether or not

22 Mr. Dondero is going to be a responsible

23 party under the contempt motion. So I'm

24 just looking for --

25 MR. KANE: I understand. I'm just

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1 Grant Scott

2 ahead, Grant.

3 (Reporter clarification.)

4 THE WITNESS: I believe so.

5 BY MR. MORRIS:

6 Q. And is it your understanding that Mr. Mark

7 Patrick replaced you in those capacities on or about

8 March 24th, 2021?

9 A. It's my understanding that on March 24th,

10 the management shares that I had previously -- that

11 had been in my name were transferred to him. I am not

12 sure how that impacts the current status in the

13 various other entities.

14 Q. Okay. During the time that you served as

15 the managing member of the charitable DAF GP LLC, that

16 entity had no officers or employees, correct?

17 A. I believe that is correct.

18 MR. KANE: Object to the form.

19 BY MR. MORRIS:

20 Q. And you served as the sole director of that

21 entity during the time that you served as the

22 director, correct?

23 A. I believe that is correct.

24 Q. And during the period of time that you

25 served as a director of charitable DAF HoldCo Limited,

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1 Grant Scott

2 trying to figure out Grant's -- you know,

3 whether he has a --

4 MR. MORRIS: That is all right. I'm

5 moving on anyway.

6 MR. KANE: Appreciate it.

7 BY MR. MORRIS:

8 Q. Now looking at the chart, Mr. Scott, I

9 believe you testified that you were either the

10 managing member or a director of each of the DAF

11 entities and CLO HoldCo Limited.

12 Do I have that right?

13 A. I believe that is correct.

14 Q. All right. Is it your understanding that

15 Mr. --

16 A. Excuse me. I am sorry. Currently or was?

17 Q. Was. Up until March 24th.

18 A. Okay. Correct.

19 Q. All right. Let me ask the question again

20 so it's clean.

21 Did you serve as either the managing member

22 or the director for each of the charitable DAF

23 entities and the CLO HoldCo Limited entity for

24 approximately 10 years prior to March 24th, 2021?

25 MR. KANE: Objection. Form. Go

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1 Grant Scott

2 you were the only person to serve in that capacity; is

3 that correct?

4 A. I believe so.

5 Q. And during the period that you served as

6 director of charitable DAF HoldCo Limited, that entity

7 had no officers or employees, correct?

8 A. I believe that is correct.

9 Q. During the time that you served as a

10 director of charitable DAF Fund LP, you were the sole

11 director of that entity, correct?

12 A. Correct.

13 Q. And during the time that you served as the

14 sole director of charitable DAF Fund LP, that entity

15 had no officers or employees, correct?

16 A. I believe that is correct.

17 Q. You served as the sole director of CLO

18 HoldCo Limited; is that right?

19 A. Yes. That is correct.

20 Q. And during the period that you served as

21 the sole director of CLO HoldCo Limited, that entity

22 had no officers or employees, correct?

23 A. That is correct.

24 Q. Is that why the DAF had certain agreements

25 with Highland Capital Management LP pursuant to which

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1 Grant Scott

2 HCMLP provided back office and advisory and investment

3 services?

4 MR. KANE: Objection. Form.

5 THE WITNESS: I think that is

6 correct.

7 BY MR. MORRIS:

8 Q. Do you recall that that DAF had agreements

9 with Highland Capital Management that were amended and

10 restated in 2014?

11 MR. KANE: Objection. Form.

12 THE WITNESS: I understand there were

13 various agreements over the years that had

14 been restated. I'm not entirely sure

15 anymore of the dates that we received

16 that --

17 MR. MORRIS: Okay. Let's mark --

18 THE WITNESS: I'm sorry?

19 MR. MORRIS: Let's mark as Exhibit

20 8 --

21 MR. BRIDGES: Objection. Objection.

22 Please let the witness answer his question.

23 MR. MORRIS: Let's mark this --

24 MR. BRIDGES: No. Please allow the

25 witness to continue his answer.

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1 Grant Scott

2 BY MR. MORRIS:

3 Q. Grant, do you have anything else to add?

4 A. You had asked me -- you asked about a

5 specific date, I think, 2014. I just -- I don't know

6 what the dates are or were.

7 Q. That is what I heard you say. Is there

8 anything else that you have to add?

9 A. No, I don't -- I don't think so.

10 Q. I didn't think so either.

11 MR. MORRIS: Let's go to Exhibit 8,

12 please, the next document.

13 (Deposition Exhibit 8 was marked for

14 identification.)

15 MR. MORRIS: Okay. If we could just

16 scroll down a little bit. Just to the

17 e-mail.

18 BY MR. MORRIS:

19 Q. All right. Were you familiar with Caitlin

20 Nelson and Helen Kim and Thomas Surgent and David Klos

21 in and around August 2004?

22 A. I believe they were all Highland employees.

23 Q. Okay.

24 MR. MORRIS: Can we just scroll up to

25 the next e-mail, please?

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1 Grant Scott

2 BY MR. MORRIS:

3 Q. Okay. Do you see that Mrs. Kim sends you

4 an e-mail on August 26th, 2014?

5 A. Yes. I see that.

6 Q. And do you see that she had attached for

7 your review and execution, drafts of an amended and

8 restated service agreement and amended and restated

9 advisory agreement and GP resolutions?

10 A. I do see that.

11 Q. Okay. Do you have any recollection as to

12 whose idea it was to amend and restate those

13 agreements at that moment in time?

14 A. I do not.

15 Q. Do you have any recollection as to why

16 those agreements were amended and restated at that

17 time?

18 A. No, I do not.

19 Q. Okay. Let's just scroll down and just show

20 Mr. Scott the agreements. I'm not going to ask

21 anything substantive about it. But do you see here is

22 the -- if we can stop right there -- the Amended and

23 Restated Service Agreement that is dated from the

24 first day of July, 2014, and it's between the DAF

25 Fund -- the charitable DAF Fund LP, the charitable DAF

Page 21

1 Grant Scott

2 GP LLC, as well as Highland Capital Management LP.

3 Do you see that?

4 A. I do see that.

5 Q. Do you recall that the entity that is

6 commonly referred to as the DAF had a service

7 agreement with Highland Capital Management LP?

8 A. I believe that is correct. Yes.

9 Q. Do you recall whether -- whether the

10 service agreement was ever the subject of any

11 negotiations?

12 A. I don't know.

13 Q. Did you participate in any negotiations

14 concerning the service agreement that was entered --

15 entered in between the entity known as the DAF and

16 Highland Capital Management LP?

17 MR. KANE: Objection to form.

18 John, will you clarify the time

19 period?

20 BY MR. MORRIS:

21 Q. Right here. 2014.

22 A. Sir, I don't recall anything about this

23 with respect to 2014.

24 Q. Do you know if -- if the agreement was ever

25 amended at any time after 2014? And when I use the

Page 22

1 Grant Scott

2 phrase "agreement," I'm specifically referring to the

3 Amended and Restated Service Agreement that we are

4 looking at.

5 A. I believe -- I think there was a further

6 amended and restated agreement.

7 Q. Okay. Did you participate in any

8 negotiations concerning that further amended and

9 restated agreement?

10 A. I don't remember.

11 Q. Do you remember offering any comments

12 concerning any subsequent amendment or restatement?

13 A. I don't -- I don't remember.

14 Q. Did you ever hire outside counsel to assist

15 you in the negotiation of any service agreements with

16 Highland Capital Management LP?

17 A. I did not.

18 Q. Do you -- do you recall who prepared each

19 of the service agreements to which the DAF was a

20 party?

21 A. I don't remember.

22 Q. To the best of your recollection, would it

23 have been inhouse counsel at Highland Capital

24 Management?

25 MR. KANE: Objection. Form.

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1 Grant Scott

2 A. I believe so.

3 Q. And the agreements that you signed on

4 behalf of that entity, were any of them -- were there

5 multiple drafts of any such agreement?

6 A. There were frequently multiple drafts or

7 agreements. But I just don't remember them.

8 Q. Do you remember whether you personally ever

9 provided any comments to any particular draft?

10 A. I do not.

11 Q. Let me ask you this: Are you familiar with

12 the phrase "arm's length negotiations"?

13 A. Yes.

14 Q. And can you tell me what your understanding

15 is of an arm's length negotiation?

16 A. Well, it would depend on the nature of the

17 parties. For example, a -- two strangers would

18 have -- arm's length would differ from the nature of

19 an agreement between parties maybe having fiduciary or

20 related obligations.

21 Q. Let me ask you this --

22 A. I don't know what the black -- I don't know

23 what the blackball definition is to that term.

24 Q. Would you agree that arm's length

25 negotiations take place between two parties that are

Page 23

1 Grant Scott

2 THE WITNESS: I don't -- I don't

3 know.

4 BY MR. MORRIS:

5 Q. Can you recall the name of any law firm

6 that was involved in the drafting or the negotiation

7 of any service agreement between the entity known as

8 the DAF and Highland Capital Management LP?

9 MR. KANE: Objection. Form.

10 THE WITNESS: I don't remember any.

11 BY MR. MORRIS:

12 Q. Can you recall during your tenure as the

13 managing member of the DAF GP LLC, whether there was

14 any particular term or provision in any service

15 agreement that was the subject of negotiation or even

16 discussion?

17 A. I don't remember those -- any of those

18 discussions.

19 Q. Do you know if they took place or you just

20 can't remember them?

21 A. I just can't remember them.

22 Q. Do you recall ever seeing multiple drafts

23 of any service agreement that you -- withdrawn.

24 Did you personally sign service agreements

25 on behalf of the entity known as the DAF?

Page 25

1 Grant Scott

2 acting out of their own self interest?

3 MR. KANE: Objection.

4 MR. BRIDGES: Objection to form and

5 foundation.

6 BY MR. MORRIS:

7 Q. Withdrawn. Withdrawn.

8 MR. BRIDGES: Calls for a legal

9 opinion.

10 BY MR. MORRIS:

11 Q. Mr. Scott, do you believe that the service

12 agreements between the entity known as the DAF and

13 the -- and Highland Capital Management LP were arm's

14 length agreements?

15 MR. BRIDGES: Objection. Again, lack

16 of foundation, calls for a legal opinion.

17 MR. MORRIS: Okay. I'm not asking

18 for a legal opinion. I'm asking for

19 Mr. Scott's view of it, so I will try one

20 more time.

21 BY MR. MORRIS:

22 Q. Mr. Scott, do you believe that the service

23 agreements between the DAF and HCMLP were the subject

24 and result of arm's length negotiations?

25 MR. BRIDGES: Objection. Foundation,

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1 Grant Scott

2 A. Why did I send it at the end of January?

3 Q. What caused you to send this e-mail at that

4 moment in time?

5 A. Well, I mean, there are a couple of

6 reasons. It was -- it was necessary that I do it, and

7 the time seemed right in view of the events in

8 January. It was like a good transition point from my

9 perspective.

10 Q. And why was it necessary at that time?

11 A. Well, there was --

12 MR. BRIDGES: Objection. Assumes

13 facts not in evidence.

14 BY MR. MORRIS:

15 Q. You can answer.

16 A. I previously testified during this

17 deposition that throughout 2020, the desire -- or,

18 rather, the appropriateness of my wanting to resign

19 was expanding, and based on what had happened in

20 January and December as well, but mostly January, I

21 basically just did a critical mass on whether I could

22 sustain my role, given my commitments to my existing

23 firm and given my discussions with the managing

24 members of my existing firm.

25 And it -- there was just no way I could

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1 Grant Scott

2 John Kane.

3 THE WITNESS: Yes. I didn't know who

4 best to inform my decision.

5 BY MR. MORRIS:

6 Q. And why did you think that Mr. Dondero

7 would know?

8 MR. BRIDGES: Objection. Asked and

9 answered.

10 THE WITNESS: He knows a lot more

11 about the workings of -- I mean, it was --

12 CLO HoldCo and the charitable admission was

13 something that he worked to develop with

14 others 10 years ago, and he was committed

15 to the charity and he knew all of the

16 players and I just -- I guess I just

17 assumed he would know where to direct it.

18 BY MR. MORRIS:

19 Q. Did you ever ask?

20 A. He knew how to effectuate -- he knew how to

21 effectuate -- or I thought he knew how to effectuate

22 my resignation by directing it to the appropriate

23 personnel.

24 Q. Did you ever ask him who it should be

25 directed to?

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1 Grant Scott

2 continue with the time commitment required. I had

3 made various promises and representations to my firm

4 throughout 2020 that the bankruptcy would be handled

5 relatively efficiently and wouldn't require a great

6 deal of time commitment. And then I guess the straw

7 that broke the camel's back was the second lawsuit,

8 meaning me personally, and it just -- from a personal

9 standpoint, the most significant factor was just my --

10 my being overwhelmed, trying to sustain my career and

11 engage in what seem like the 2021 that was going to

12 involve my having to defend two lawsuits. And I felt

13 like I got CLO HoldCo through the bankruptcy and then

14 that was a good jumping off point.

15 Q. What -- why did you send this e-mail to

16 Mr. Dondero?

17 A. I knew, or at least I reasonably believed

18 he would know where to who to send it to because I

19 wasn't exactly sure.

20 Q. So you were the managing member of the

21 general partnership and the director of the other DAF

22 entities and CLO HoldCo Limited, and you were not sure

23 who to send your notice of resignation to.

24 Do I have that right?

25 MR. KANE: Objection. Form. That's

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1 Grant Scott

2 A. No.

3 Q. Looking at the third paragraph, it says,

4 quote, my resignation will not be effective until I

5 approve of the indemnification provisions and obtain

6 any and all releases.

7 Do you see that?

8 A. Yes.

9 Q. Why did you condition the effectiveness of

10 your resignation on those things?

11 A. Well, although I'm a patent attorney and

12 basically just a technical writer that doesn't deal

13 with legal issues all of the time, it seemed like

14 appropriate language.

15 I have a number of outstanding litigations

16 where I am named personally, and the actions that I

17 took which resulted in my being sued were actions I

18 took on behalf of CLO HoldCo solely in that position,

19 and so I thought just to have the appropriate notice

20 that I would like indemnification to help -- to help

21 deal with those litigation matters. That is all.

22 Q. Did anybody suggest to you at any time

23 prior to the time that you sent this e-mail, that any

24 of the DAF entities or CLO HoldCo Limited might have

25 claims against you?

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1 Grant Scott

2 A. No. No.

3 Q. Were you concerned that Mr. Dondero or

4 anyone acting on his behalf might sue you?

5 A. No.

6 Q. Did Mr. Dondero ever threaten to sue you?

7 A. No.

8 Q. Did you ever obtain the Indemnity provision

9 and any and all necessary releases that you asked for

10 in this e-mail?

11 A. Not yet.

12 Q. And what does that mean?

13 A. I understand that those provisions are --

14 indemnification proposals are in the works, I think.

15 Q. And do you know who is negotiating --

16 withdrawn.

17 Is somebody negotiating those

18 indemnification and release provisions on your behalf?

19 A. My -- my attorney would be.

20 Q. And do you know if your attorney is

21 negotiating with anybody concerning potential

22 indemnification and release provisions for you?

23 A. I don't know specifically, no.

24 Q. Do you know if he is -- if -- from whom do

25 you want to obtain releases?

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1 Grant Scott

2 A. I would like to, yes.

3 Q. Did you ever have any discussion with

4 Mr. Dondero about the releases that you wanted?

5 A. No.

6 Q. Have you communicated with Mr. Dondero

7 since -- since you sent this e-mail?

8 A. Yes.

9 Q. Other than the birth date text that he sent

10 to you, have you spoken with him?

11 A. In February.

12 Q. So you haven't spoken to him since then?

13 A. That is correct.

14 Q. What did you speak to him about in

15 February?

16 A. He called me to ask me if I knew anything

17 about in particular -- I think it might have been an

18 asset of CLO HoldCo, if I was aware of whether it had

19 been purchased or sold, and I just told them I didn't

20 know what he was -- I didn't know what -- I didn't

21 know what he was referring to. That was the last

22 conversation that we had.

23 Q. Can I refer to the period from the date of

24 this --

25 MR. MORRIS: Actually, let's look

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1 Grant Scott

2 MR. BRIDGES: Objection. Facts not

3 in evidence.

4 BY MR. MORRIS:

5 Q. Withdrawn.

6 When you refer to any and all necessary

7 releases, who did you want to obtain releases from?

8 A. CLO HoldCo.

9 Q. Anybody else?

10 A. Well, I mean, and -- and the related

11 entities in that structure chart that you showed.

12 I'm -- I'm -- understand that to me, that is just

13 boilerplate legal language to put in a resignation,

14 you know, just to cross the T's, dot the I's, so to

15 speak. I'm not anticipating that will be -- that will

16 be a problem. I am sorry.

17 Q. You asked for this more than three months

18 ago now, right?

19 A. Correct.

20 Q. Do you know why you haven't gotten what you

21 asked for more than three months ago?

22 MR. BRIDGES: Objection. Form.

23 THE WITNESS: I -- I don't.

24 BY MR. MORRIS:

25 Q. But you still want the releases, right?

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1 Grant Scott

2 at -- let's scroll up a little bit, please.

3 BY MR. MORRIS:

4 Q. Did Mr. Dondero ever try to talk you out of

5 resigning?

6 A. No.

7 MR. MORRIS: Can you scroll up?

8 THE WITNESS: I -- I am sorry. I

9 need to correct that. I had conversations

10 with him where I had expressed, not so much

11 a desire to resign, but a belief that it --

12 it made strategic sense or was appropriate.

13 And it had to do with this issue of my

14 independence, and he suggested that family

15 members and friends are not precluded from

16 occupying positions of trust like trustees

17 and things like that, and that there was

18 nothing per se wrong with my -- my activity

19 with CLO HoldCo by virtue of being a friend

20 of his. So in that sense, he was trying to

21 talk me out of that, I guess.

22 BY MR. MORRIS:

23 Q. When did that conversation take place?

24 A. We had a number of those in 2020 and

25 January of 2021.

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1 Grant Scott

2 MR. MORRIS: Can we scroll up just a

3 little bit on this e-mail, please?

4 MR. BRIDGES: May I ask what exhibit

5 number this is? I've lost track. I am

6 sorry.

7 MS. CANTY: This is Exhibit 5 from

8 earlier. We are continuing the numbers.

9 So this was marked as Exhibit 5 in this

10 morning's deposition.

11 MR. BRIDGES: Thank you so much.

12 BY MR. MORRIS:

13 Q. Do you see where Mr. Dondero wrote to

14 you -- it's just of above the yellow highlighting

15 at -- 9:57 a.m. This is the next day. Quote, you

16 need to tell me ASAP that you have no intent to divest

17 assets.

18 Do you see that?

19 A. Yes.

20 Q. Did Mr. -- do you have any understanding as

21 to why he said that to you?

22 A. I know that he was mistaken in that

23 statement.

24 Q. Right. Do you have any understanding as to

25 whether Mr. Dondero had the ability to stop you from

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1 Grant Scott

2 selling assets?

3 A. No. It wasn't -- it was a misunderstanding

4 about what the word "divest" meant in the subject

5 line.

6 Q. And did you understand that until you

7 corrected him, he was concerned and he expressed the

8 concern to you not to sell any assets?

9 MR. KANE: Objection to form.

10 THE WITNESS: No. It had -- I am

11 sorry. There -- the term "divest" was

12 maybe not a term I should have used.

13 However, my understanding was that my -- my

14 status at CLO HoldCo had a property related

15 aspect to it. And I used that term to

16 emphasize that I would need to -- that that

17 property aspect would need to be

18 transferred, meaning to the next entity or

19 person. He mistook it as something being

20 sold. It had nothing to do with that.

21 That is all.

22 BY MR. MORRIS:

23 Q. I understand that. But did you

24 understand -- did you have any understanding as to

25 what interest he had and whether or not assets were

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1 Grant Scott

2 being sold?

3 MR. BRIDGES: Object to form.

4 MR. KANE: Objection. Asked and

5 answered.

6 BY MR. MORRIS:

7 Q. You can answer.

8 A. No. I had -- I had no idea what he was --

9 Q. Okay. Let's -- let's -- can we -- can we

10 call the period of time between the time you sent this

11 notice of your intent to resign in March 24, 2021 as

12 the interim period?

13 A. Sure.

14 Q. And that's the period during which you had

15 expressed your intent to resign, but your resignation

16 had not yet become effective; is that fair?

17 A. I guess it was the period of time when --

18 yes. I guess that is correct.

19 Q. Okay. Is it fair to say that there were

20 certain things you needed to do during the interim

21 period on behalf of CLO HoldCo and the DAF entities

22 before -- even before your resignation became

23 effective?

24 A. Yes.

25 Q. Okay. Was someone designated to act as

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1 Grant Scott

2 your liaison with respect to matters concerning the --

3 the DAF entities and the CLO HoldCo during the interim

4 period?

5 MR. KANE: Objection. Form.

6 THE WITNESS: I had conversations

7 with Mark Patrick in February when I came

8 to -- to believe he -- he would be director

9 elect, so to speak, in terms -- in terms of

10 moving forward.

11 BY MR. MORRIS:

12 Q. During the interim period, did you have any

13 understanding as to whether Mr. Patrick had any

14 authority to act on behalf of any of the DAF entities

15 or CLO HoldCo?

16 MR. KANE: Objection. Form.

17 THE WITNESS: I came to believe he

18 did, upon signing the management shared

19 transfer agreement.

20 BY MR. MORRIS:

21 Q. Okay. So that was -- that was on or about

22 March 24th, 2021, right?

23 A. Correct.

24 Q. So I'm asking just about the interim period

25 between January 31st, 2021 when you sent your notice

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1 Grant Scott

2 of intent to resign, and March 24th. That is what I

3 am defining as the interim period.

4 So with that understanding, did you have

5 any reason to believe that Mr. Patrick had any

6 authority to act on behalf of any of the DAF entities

7 or CLO HoldCo during the interim period?

8 A. Well, it was -- he was part of a group of

9 entity -- a group of individuals that were with an

10 entity that had taken over from -- from Highland, and

11 so in -- certainly in that capacity, he -- as -- as

12 occurred for 10 years or more prior, that -- in that

13 role, you certainly had rights to -- to perform or to

14 act on CLO's behalf here.

15 Q. And what entity are you referring to?

16 A. I think it's the Highgate Consulting Group,

17 the Highland employees that took over -- or that

18 created that entity.

19 Q. And did the -- do you have an understanding

20 as to whether the Highgate Employment Group succeeded

21 to Highland Capital Management LP in the shared

22 services capacity or in the investment advisory

23 capacity or something else?

24 MR. BRIDGES: Object to form.

25 (Reporter clarification.)

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1 Grant Scott

2 A. They were conversations about the workings

3 with outside counsel to arrange the -- to arrange the

4 transfer of my responsibilities to another person or

5 entity at first, and then I came to learn that that

6 person was -- was -- would be Mark.

7 Q. Do you know who selected mark?

8 A. I do not.

9 Q. Do you know how Mark was selected?

10 A. I -- I do not.

11 Q. Did you ever ask Mark how he was selected?

12 A. I did not.

13 Q. Did you ever ask Mark who selected him?

14 A. I did not.

15 Q. Did you ever ask anybody at any time how

16 Mr. Patrick was selected to succeed you?

17 A. No, I did not.

18 Q. Did you ask anybody at any time as to who

19 made the decision to select Mr. Patrick to succeed

20 you?

21 A. No, I did not.

22 MR. BRIDGES: Objection. Facts not

23 in evidence and foundation.

24 BY MR. MORRIS:

25 Q. Okay. Do you have any understanding today,

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1 Grant Scott

2 THE WITNESS: I'm not entirely sure

3 of that.

4 BY MR. MORRIS:

5 Q. So is --

6 A. But he -- but --

7 Q. I am sorry. Did you finish your answer?

8 A. I'm not -- I'm not sure of the delineation

9 between the two.

10 Q. So on what basis did you believe that

11 Mr. Patrick had the authority to act on behalf of the

12 DAF entities and CLO HoldCo during the interim period?

13 MR. BRIDGES: Objection. Asked and

14 answered.

15 THE WITNESS: We had -- we had had a

16 number of conversations. And over the

17 course of a number of weeks, I came to -- I

18 came to understand that he would be the

19 director going forward. So...

20 BY MR. MORRIS:

21 Q. How did you come to that understanding?

22 A. Through the conversations that we had had,

23 I guess.

24 Q. What conversations did you have with Mr. --

25 were these conversations with Mr. Patrick?

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1 Grant Scott

2 as to who has the authority to select your --

3 withdrawn.

4 Do you have any understanding today, as to

5 who had the authority to select your replacement?

6 A. I do not.

7 MR. MORRIS: All right. Let's take a

8 short break. And I am certainly -- I'm

9 closer to the end than the beginning. It's

10 3:22 Eastern Time. Let's come back at

11 3:35, please, and hopefully I will be

12 finished by about 4, 4:15.

13 (Recess taken.)

14 BY MR. MORRIS:

15 Q. I want to go back, Mr. Scott, to the time

16 that you became appointed the managing member of the

17 general partnership and to the director of the other

18 DAF entities and CLO HoldCo. Do you remember how that

19 came to be?

20 A. My recollection is that various law firms

21 and Mark Patrick had a role in its creation and

22 configuration following some -- it's -- I believe it's

23 modeled after some expert -- expert in the field. I

24 am sorry. I don't know if I answered your question.

25 Q. You did not. So let me try it again. Do

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1 Grant Scott

2 you recall how it came to be that you assumed those

3 positions?

4 A. Ten years ago I accepted that role.

5 Q. And who offered the role to you?

6 A. Jim Dondero.

7 Q. Did -- did you communicate with anybody

8 other than Mr. Dondero concerning the opportunity that

9 he presented to you to assume these roles prior to the

10 time you accepted the position?

11 MR. KANE: Objection. Form.

12 BY MR. MORRIS:

13 Q. Withdrawn.

14 A. Possibly or --

15 Q. Withdrawn. Let me ask -- let me ask --

16 it's a good objection.

17 Mr. Scott, prior to the time that you

18 assumed your positions with the DAF entities and

19 CLO HoldCo, did you speak with anybody other than

20 Mr. Dondero, about the duties and responsibilities of

21 those positions?

22 MR. KANE: Objection to form.

23 THE WITNESS: The only thing that

24 comes to mind is Hunton & Williams. But

25 I -- I'm not sure. I don't know.

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1 Grant Scott

2 Do you see that?

3 A. Yes.

4 Q. And do you see that it's effective January

5 1, 2012?

6 And if we could go to the last page. And

7 is that your signature, sir?

8 A. That is correct.

9 Q. And is this the document that you signed on

10 March 12th, 2012, pursuant to which you became the

11 general partner of the DAF GP?

12 MR. KANE: Objection. Form.

13 THE WITNESS: It's not March 12th.

14 It's dated as March 21st, just to clarify,

15 but I believe so.

16 BY MR. MORRIS:

17 Q. I appreciate that. I'm going to ask the

18 question again, just because I was wrong and I want to

19 get it right.

20 Is this the document you signed on or about

21 March 21, 2012, pursuant to which you became the

22 managing member of the DAF GP, LLC?

23 A. I believe so.

24 Q. Okay. And you replaced Mr. Dondero in that

25 capacity; is that right?

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1 Grant Scott

2 BY MR. MORRIS:

3 Q. Do you have any memory of interviewing with

4 anybody?

5 A. I don't have any recollection of that, no.

6 Q. Did you submit a resume of any kind?

7 A. Possibly a CV. But I -- I just don't

8 remember anymore.

9 Q. Do you know who made the decision to select

10 you to serve in those capacities?

11 MR. KANE: Objection. Form.

12 THE WITNESS: I don't know.

13 BY MR. MORRIS:

14 Q. Did anybody -- withdrawn.

15 Did you meet with Patrick before or after

16 you assumed these roles?

17 A. It's going back 10 years. I -- I'm not

18 sure.

19 MR. MORRIS: Can we put up on the

20 screen a document that we marked this

21 morning. I believe it's Exhibit 2.

22 BY MR. MORRIS:

23 Q. And this is a document titled An Amended

24 and Restated Limited Liability Company Agreement of

25 Charitable DAF GP LLC.

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1 Grant Scott

2 A. Yes.

3 Q. And your recollection is that Mr. Dondero

4 presented the opportunity to you; is that right?

5 MR. KANE: Objection. Form.

6 THE WITNESS: Yes. I guess you could

7 call it an opportunity.

8 BY MR. MORRIS:

9 Q. And do you have any recollection as to

10 whether or not anybody else was involved in the

11 decision to offer the opportunity to you?

12 A. I -- I don't recall.

13 Q. Okay. We can take that down, please.

14 Do you recall whether Mr. Patrick was

15 involved in your selection as the replacement

16 management member of the DAF GP, LLC in 2012?

17 A. I have no recollection.

18 MR. KANE: Objection to form.

19 Yes. Okay.

20 BY MR. MORRIS:

21 Q. I want to go back to what we had defined

22 earlier as the interim period, and that was the period

23 between January 31st, 2021, when you sent in that

24 notice and March 24, 2021, when you transferred the

25 shares. That is what we were calling the interim

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2 period, right?

3 A. Yes.

4 Q. Okay. Is it fair to say that Mr. Patrick

5 served as your primary contact with respect to matters

6 concerning CLO HoldCo and the DAF during the interim

7 period?

8 A. Yes.

9 Q. Okay. And, in fact, Mr. Patrick gave you

10 instructions on what to do for the DAF and the

11 CLO HoldCo on certain matters during the interim

12 period, correct?

13 MR. KANE: Objection to form.

14 THE WITNESS: Periodically, yes.

15 BY MR. MORRIS:

16 Q. I am sorry. What is the answer?

17 A. Periodically, yes.

18 Q. Okay. Did somebody ever tell you that you

19 should follow Mr. Patrick's instructions?

20 A. No, I don't believe so.

21 Q. And, Mr. Patrick, to the best of your

22 knowledge, didn't HoldCo any positions with any of the

23 DAF entities or CLO HoldCo Limited, correct?

24 MR. KANE: Objection to form.

25 MR. BRIDGES: Object to foundation.

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1 Grant Scott

2 Q. Did you sign any agreement on behalf of any

3 of the DAF entities or CLO HoldCo with the entity that

4 you are referring to as Highgate?

5 A. I'm not sure.

6 Q. Do you have any recollection at all of ever

7 signing any agreements in your capacity as the

8 authorized representative of any of the DAF entities

9 or CLO HoldCo and Highgate?

10 MR. KANE: Objection. Form.

11 THE WITNESS: I -- I don't recall.

12 BY MR. MORRIS:

13 Q. And I may have asked you this already. If

14 I have, I'm sure there will be an objection. But do

15 you recall if Highgate was providing services

16 equivalent to the shared services that Highland

17 previously provided, or was it providing investment

18 advisory services of the type Highland previously

19 provided?

20 MR. KANE: Objection to form.

21 MR. BRIDGES: Objection.

22 BY MR. MORRIS:

23 Q. You can answer.

24 A. I don't know the delineation of the

25 services they were providing.

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1 Grant Scott

2 BY MR. MORRIS:

3 Q. You can answer.

4 A. During the interim period?

5 Q. Correct.

6 A. I do not believe so.

7 Q. If Mr. Patrick didn't hold any positions,

8 why did you follow his instructions?

9 MR. BRIDGES: Objection.

10 MR. KANE: Objection. Go ahead,

11 sorry.

12 MR. BRIDGES: Facts not in evidence.

13 MR. KANE: And objection to form.

14 BY MR. MORRIS:

15 Q. You can answer, sir.

16 A. Yes. Well, there -- I mean, there was a

17 lot of activity that was required to transfer over

18 from how things had been handled under Highland, to

19 how they would now be handled under -- with the

20 services being provided by Highgate, and he was a

21 member, and he was the point person, I guess, and he

22 was my main interface to get those large numbers of

23 issues resolved.

24 There was -- you know, it was a very busy,

25 challenging time.

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1 Grant Scott

2 Q. Do you know whether during the interim

3 period, any entity other than Highgate was providing

4 services on behalf of any of the DAF entities or

5 CLO HoldCo?

6 A. Well, I knew from various wires that were

7 approved, that various entities were providing

8 services. Law firms, for example.

9 Q. But was there any -- any entity other than

10 Highgate that was providing any of the services that

11 had previously been provided by Highland?

12 A. Well, Highland provided a lot of legal

13 services. I don't know that Highgate had the same

14 capability. So I don't know how to answer that.

15 Q. All right. I'm going to try a different

16 way.

17 Before -- before 2021, the DAF entities had

18 both a shared services arrangement and an investment

19 advisory arrangement with Highland.

20 Do I have that right?

21 A. Yes.

22 Q. During the interim period, Highland was no

23 longer providing any of those services, correct?

24 A. That's what I understand, yes.

25 Q. Did anybody replace Highland in the

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1 Grant Scott

2 provision of those services during the interim period?

3 MR. BRIDGES: Objection, asked and

4 answered.

5 BY MR. MORRIS:

6 Q. You can answer, sir.

7 A. I mean, besides the services Highgate

8 were -- was -- were providing, I'm not sure.

9 Q. And -- and I do know that I've asked this

10 before, but now with that context: Do you know

11 whether Highgate was providing services of the shared

12 services type, or the investment advisory type, or you

13 just don't know?

14 MR. BRIDGES: Objection to the form.

15 THE WITNESS: At least I would think

16 mostly the shared services type.

17 BY MR. MORRIS:

18 Q. Okay. Is it your understanding that under

19 the shared services agreement, that Highgate had the

20 ability to make decisions on behalf of any of the DAF

21 entities or CLO HoldCo?

22 MR. BRIDGES: Objection.

23 MR. KANE: Objection to form.

24 MR. BRIDGES: Misstates testimony.

25 THE WITNESS: Yeah, my prior

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1 Grant Scott

2 fact, to be clear. I'm not asking for any legal

3 conclusions. I'm asking for your understanding as the

4 authorized representative of the DAF entities and

5 CLO HoldCo during the interim period.

6 So with that -- with that background as the

7 authorized entity, that -- withdrawn.

8 As the authorized representative during the

9 interim period, did you have any understanding as to

10 whether Mr. Patrick had the authority to bind any of

11 the DAF entities or CLO HoldCo during that time?

12 MR. KANE: Objection.

13 MR. BRIDGES: Objection. Calls for

14 legal conclusion. Also, objection as to

15 vagueness of the question.

16 BY MR. MORRIS:

17 Q. I'm sorry, Mr. Scott, did you answer?

18 A. I did not. No, I have not. I --

19 Q. I apologize.

20 A. I don't know what the status of his legal

21 authorization was.

22 Q. Do you recall that in early March, you

23 bought a couple of events to Mr. Patrick's attention?

24 A. I know that I forwarded documents to his

25 attention, yes.

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1 Grant Scott

2 testimony was I didn't see the agreements,

3 so I don't know.

4 BY MR. MORRIS:

5 Q. You haven't seen any agreement with

6 Highgate; is that right?

7 A. I don't recall that I have.

8 Q. Do you have any understanding as to whether

9 Highgate had the authority to bind any of the DAF

10 entities or CLO HoldCo during the interim period?

11 MR. BRIDGES: Objection. Calls for a

12 legal conclusion.

13 THE WITNESS: I don't know.

14 BY MR. MORRIS:

15 Q. Do you have any understanding as to whether

16 Mark Patrick had the ability as an individual to bind

17 any of the DAF entities or CLO HoldCo during the

18 interim period?

19 MR. BRIDGES: Objection. Calls for a

20 legal conclusion.

21 MR. KANE: Objection. Calls for a

22 legal conclusion.

23 THE WITNESS: I don't know.

24 BY MR. MORRIS:

25 Q. Okay. And I'm just asking as a matter of

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1 Grant Scott

2 Q. And why did you forward documents to

3 Mr. Patrick's attention during the interim period?

4 A. Because I was resigning, and I understood

5 that he was essentially going to be, or was the

6 director elect, and I just thought it appropriate to

7 bring such things to his attention.

8 Q. And when did you -- when did you learn that

9 he was doing to be the director elect?

10 A. I -- I believe it was February. Sometime

11 in February.

12 Q. Do you recall how you learned that he was

13 going to become the director elect?

14 A. I can't point to a specific conversation.

15 I can't -- I can't point to the specific conversation.

16 At some point, it went from being some future third

17 party, and I came to believe it would be him. I'm

18 not -- I'm not sure of the timing.

19 Q. Okay. Do you know from whom you learned

20 that he was going to be the director elect?

21 A. I believe it was him.

22 Q. Okay. So he told you that he was going to

23 replace you; is that right?

24 A. I don't know that he said it specifically.

25 I don't remember our conversations.

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1 Grant Scott

2 Q. Did you ever do anything to confirm with

3 anybody that Mark Patrick was going to be the director

4 elect, or did you just take his word for it?

5 A. I did not independently confirm it, no.

6 Q. Did you ever ask Mr. Dondero if -- if he

7 approved of the selection of Mr. Patrick as your

8 successor?

9 A. I did not.

10 Q. Did you ever discuss with Mr. Dondero, the

11 topic of who would be your successor?

12 A. Going back. Prior to the interim period, I

13 had recommended him, Mark.

14 Q. Did you -- did you discuss Mr. Patrick's

15 selection as your successor with anybody in the world

16 at any time other than Mr. Patrick?

17 A. I talked with my attorney about it. But I

18 don't think so. No.

19 Q. Did you talk with anybody that you believed

20 was authorized to make the decision on behalf of the

21 DAF entities and CLO HoldCo about your successor?

22 A. No, I did not.

23 MR. MORRIS: Can we put up the

24 document that was marked, La Asia, on Page

25 7, as Bates number 80.

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2 (Deposition Exhibit 10 was marked for

3 identification.)

4 BY MR. MORRIS:

5 Q. Do you see that -- if you scroll just down

6 a little bit. I guess not.

7 Mr. Patrick wrote an e-mail to you and

8 said, "The successor will respond to this complaint,"

9 and at the top you wrote "understood" --

10 A. Yes.

11 Q. -- or the top of the e-mail.

12 Do you recall that in early March, you

13 received a new complaint in which CLO HoldCo was named

14 the defendant?

15 A. I believe this -- this was the unsecured

16 creditors' committee complaint; is that correct?

17 Q. I think so, but it's your testimony. I'm

18 just asking you if you recall that in early March,

19 CLO HoldCo was sued?

20 A. Yes. I think this was the second lawsuit

21 that I was referring to personally.

22 Q. Okay. And so this -- this actually

23 occurred after the time you had already given notice,

24 right?

25 A. Yes.

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1 Grant Scott

2 Q. Yeah. And was the first lawsuit, the one

3 that you settled, before you gave notice?

4 A. No. The -- no, both lawsuits are pending.

5 Q. Okay. Do you know when the -- who's the

6 plaintiff in the first one?

7 A. Acis.

8 (Reporter clarification.)

9 THE WITNESS: Acis, A-C-I-S.

10 BY MR. MORRIS:

11 Q. So the debtor never sued you personally; is

12 that right?

13 A. Not yet.

14 Q. And is it right that Mr. Patrick told you

15 that -- that the successor will respond to the

16 complaint?

17 A. Yes.

18 Q. Now, he's not referring to himself yet, is

19 he?

20 A. That appears correct, yes.

21 Q. Does that refresh your recollection that

22 you had not known yet as of March 2nd who the

23 successor would be?

24 A. I guess it does.

25 MR. MORRIS: Can we put up the next

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1 Grant Scott

2 exhibit, please, the one ending in -- the

3 one Bates number 85. And please remind us,

4 La Asia, what exhibit number are we up to?

5 MS. CANTY: We're up to 10, but the

6 one I'm about to put up is Exhibit 6 from

7 earlier today.

8 MR. MORRIS: Thank you very much.

9 BY MR. MORRIS:

10 Q. Now, if we can just scroll down a little

11 bit. Do you remember something called an Adherence

12 Agreement being discussed in March of 2021?

13 A. A what agreement?

14 Q. Adherence Agreement.

15 A. I see that. Was it directed to me?

16 Q. Yeah. If we can just scroll up.

17 Okay. So right there, do you see that

18 Thomas Surgent sends it to Mr. Kane? The subject is

19 'Adherence Agreement.'

20 A. Yes.

21 Q. And you do see that you forwarded that

22 e-mail to Mr. Patrick on the same day, March 2nd?

23 A. Yes.

24 Q. And it says "This relates to the second

25 issue from the debtor."

<p style="text-align: right;">Page 86</p> <p>1 Grant Scott</p> <p>2 MR. BRIDGES: Objection.</p> <p>3 MR. MORRIS: Withdrawn. Withdrawn.</p> <p>4 BY MR. MORRIS:</p> <p>5 Q. You didn't provide a substantive response</p> <p>6 to Elysium; is that right?</p> <p>7 MR. KANE: Objection. Assumes facts</p> <p>8 not in evidence.</p> <p>9 MR. MORRIS: That is why I'm asking</p> <p>10 the question.</p> <p>11 BY MR. MORRIS:</p> <p>12 Q. Go ahead, Mr. Scott. You can answer.</p> <p>13 A. I did not provide a substantive response to</p> <p>14 their inquiry.</p> <p>15 Q. Okay. Thank you.</p> <p>16 Can we go to the top. In fact -- in fact,</p> <p>17 you were instructed by Mr. Patrick to do nothing,</p> <p>18 correct?</p> <p>19 MR. BRIDGES: Objection. Misstates</p> <p>20 the testimony.</p> <p>21 THE WITNESS: No.</p> <p>22 BY MR. MORRIS:</p> <p>23 Q. Sir, the e-mail says "Do nothing," correct?</p> <p>24 A. That is correct, and they were handling it,</p> <p>25 not me.</p>	<p style="text-align: right;">Page 87</p> <p>1 Grant Scott</p> <p>2 Q. Okay. Now, did you resign on or about</p> <p>3 March 24th, 2021?</p> <p>4 A. Yes. That's -- that's when the transfer --</p> <p>5 share of transfer.</p> <p>6 Q. Okay.</p> <p>7 MR. MORRIS: Can we put the next</p> <p>8 exhibit up, please. It's the one at the</p> <p>9 top at page 10. It's file 3, document 5.</p> <p>10 MR. BRIDGES: Mr. Morris, can I ask</p> <p>11 you how it is for time because you told us</p> <p>12 earlier -- you teased us with a 4:15 end</p> <p>13 time, potentially.</p> <p>14 MR. MORRIS: Yeah, I'm just on the</p> <p>15 last couple of documents.</p> <p>16 MR. BRIDGES: Thank you.</p> <p>17 MR. MORRIS: You bet.</p> <p>18 BY MR. MORRIS:</p> <p>19 Q. Do you see this is a document called an</p> <p>20 Assignment and Assumption of Membership Interest</p> <p>21 Agreement?</p> <p>22 A. Yes.</p> <p>23 MR. MORRIS: And if we can scroll</p> <p>24 down.</p> <p>25 BY MR. MORRIS:</p>
<p style="text-align: right;">Page 88</p> <p>1 Grant Scott</p> <p>2 Q. Did you sign this document?</p> <p>3 A. Yes, sir.</p> <p>4 Q. Okay. Do you know what this document is?</p> <p>5 A. I believe it's the Management Share</p> <p>6 Transfer Agreement.</p> <p>7 Q. Okay. And do you know who prepared it?</p> <p>8 A. I do not.</p> <p>9 Q. Did you assign something pursuant to this</p> <p>10 document?</p> <p>11 A. Yes. The -- the -- the management shares.</p> <p>12 MR. MORRIS: Okay. Can we go to the</p> <p>13 first page, please?</p> <p>14 BY MR. MORRIS:</p> <p>15 Q. And do you see in paragraph 1, there is a</p> <p>16 description of the assignment and assumption of the</p> <p>17 signed interest?</p> <p>18 A. Yes, I see that.</p> <p>19 Q. Okay. Does that paragraph describe</p> <p>20 everything that you assigned to Mr. Patrick?</p> <p>21 A. In this agreement. Yes.</p> <p>22 MR. BRIDGES: Objection. Calls --</p> <p>23 objection. Calls for a legal conclusion.</p> <p>24 MR. KANE: I join the objection.</p> <p>25 BY MR. MORRIS:</p>	<p style="text-align: right;">Page 89</p> <p>1 Grant Scott</p> <p>2 Q. You can answer, sir.</p> <p>3 A. Yes. I mean, it says what it says. But</p> <p>4 yes, that is what I was transferring.</p> <p>5 Q. And can you identify for me anything that</p> <p>6 you know that you ever assigned to Mr. Patrick that is</p> <p>7 not set forth in paragraph 1?</p> <p>8 MR. BRIDGES: Objection. Form.</p> <p>9 THE WITNESS: I'm unaware of</p> <p>10 anything.</p> <p>11 BY MR. MORRIS:</p> <p>12 Q. Do you know if -- if the items and assets</p> <p>13 that are set forth in paragraph 1 had any value?</p> <p>14 MR. KANE: Objection. Form.</p> <p>15 THE WITNESS: They had value, maybe</p> <p>16 not monetary.</p> <p>17 BY MR. MORRIS:</p> <p>18 Q. And what value did they have?</p> <p>19 A. I believe they had the property interest</p> <p>20 that I referred to previously.</p> <p>21 Q. And what property interest are you</p> <p>22 referring to?</p> <p>23 MR. KANE: Objection. Form. Calls</p> <p>24 for a legal conclusion.</p> <p>25 BY MR. MORRIS:</p>

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2 Q. You can answer. Sir, it's your words we

3 need.

4 A. The shares were the -- these management

5 shares were the -- I was treating as property.

6 Q. Do you have any understanding as to what

7 the value of the management shares was at the time you

8 entered into this agreement?

9 A. I did not.

10 Q. Did you have any understanding as to

11 whether those management shares held any particular

12 rights at the time you entered into this agreement?

13 MR. KANE: Objection to form.

14 THE WITNESS: My understanding was

15 they had my rights previously. Ultimately.

16 BY MR. MORRIS:

17 Q. And what rights did you believe flowed from

18 the management shares?

19 A. The controlling rights that flowed down to

20 the various entities.

21 Q. Did you receive anything in return in

22 exchange for your assignment of these property

23 interests and the other assets set forth in paragraph

24 1?

25 A. It allowed me to finally resign. That is

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1 Grant Scott

2 legal conclusion.

3 MR. KANE: I join the objection.

4 THE WITNESS: I didn't make -- I did

5 not make an assessment of that.

6 BY MR. MORRIS:

7 Q. Do you know -- withdrawn.

8 Do you have any understanding as to whether

9 there were any restrictions on the transferability of

10 the interests that you assigned pursuant to this

11 agreement?

12 MR. KANE: Objection. Calls for a

13 legal conclusion.

14 THE WITNESS: I did not.

15 BY MR. MORRIS:

16 Q. Did you let anybody know that you were

17 willing to assign the interests that are described in

18 paragraph 1 other than Mr. Patrick?

19 A. Anyone that I -- conceivably, anyone that I

20 let know that was at all familiar with the structure,

21 anyone that was informed of my desire to resign would

22 have arguably have known that.

23 Q. Okay. I'm not asking you to put yourself

24 in the shoes of anybody else. I'm asking for what you

25 recall telling people.

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1 Grant Scott

2 what I received. I mean, it ended my -- it ended my

3 role as a -- maybe as an agent, or an employee or

4 whatever. Those are my substantive rights, as I

5 understood it.

6 Q. Okay. So you -- you surrendered the

7 substantive rights in an exchange -- you no longer had

8 your substantive rights?

9 MR. BRIDGES: Objection. Asked and

10 answered.

11 MR. KANE: Objection. Form.

12 BY MR. MORRIS:

13 Q. You can answer, sir. Did you get anything

14 other than -- withdrawn.

15 Did you get anything other than what you

16 already described?

17 A. Relief. Yes.

18 Q. Excellent. Did you ever consider assigning

19 these interests or assets to anybody other than

20 Mr. Patrick?

21 A. I did not.

22 Q. Did you ever consider -- did you have any

23 belief as to whether the interests that were assigned

24 were freely tradeable?

25 MR. BRIDGES: Objection. Calls for a

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1 Grant Scott

2 Did you ever tell anybody at any time that

3 you were ready, willing and able to transfer and

4 assign the interests that are in this document other

5 than Mr. Patrick and your lawyers?

6 A. I am sorry. I misunderstood your question.

7 The answer is no.

8 Q. Did you ever think to try to assign these

9 interests for a profit?

10 A. Good grief, no.

11 (Reporter clarification.)

12 A. No.

13 Q. Did you -- was anybody, other than

14 Mr. Patrick, ever identified as a potential assignee

15 of the interests that are described in paragraph 1?

16 MR. KANE: Objection to form.

17 THE WITNESS: I was unaware of any.

18 BY MR. MORRIS:

19 Q. Okay. Did you make any effort to identify

20 anybody other than Mr. Patrick as a potential assignee

21 for the interests that are set forth in paragraph 1?

22 A. No, I did not.

23 Q. Did any -- did anybody acting on your

24 behalf, to the best of your knowledge, ever make any

25 efforts to identify any potential assignee other than

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1 Grant Scott

2 Mr. Patrick for the interests set forth in paragraph

3 1?

4 MR. BRIDGES: Objection. Foundation.

5 THE WITNESS: I don't have that

6 knowledge. No.

7 MR. MORRIS: Can we go to the next

8 exhibit, please?

9 (Deposition Exhibit 14 was marked for

10 identification.)

11 BY MR. MORRIS:

12 Q. Okay. And do you see that these are

13 written resolutions dated the next day, March 25th?

14 A. Yes.

15 Q. And these resolutions provide for the

16 shared transfer described in the document?

17 A. It appears so, yes.

18 Q. And are these the management shares that

19 you were referring to earlier?

20 A. I believe so.

21 Q. Did you believe at the time that you owned

22 all of the management shares of charitable DAF HoldCo

23 Limited?

24 A. That was my understanding.

25 Q. How did you acquire those shares?

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1 Grant Scott

2 Q. Were you paid anything of value for your

3 services as the, either the managing member of the DAF

4 GP, or as a director of any of the other DAF or

5 CLO HoldCo Limited entities at any time?

6 A. For a majority of the years, yes, I

7 received a monthly statement.

8 Q. And is that -- how much was the monthly

9 statement?

10 A. I believe it was \$5,000.

11 Q. Did it ever increase to an amount more than

12 \$5,000?

13 A. No.

14 Q. Did you receive anything else of value for

15 your service to the DAF entities and CLO HoldCo

16 Limited other than the \$5,000 monthly stipend that you

17 just described?

18 A. I did not.

19 Q. Do you recall that after you resigned, you

20 got reappointed, and then subsequently replaced again

21 by Mr. Patrick?

22 MR. KANE: Objection to form.

23 (Reporter clarification.)

24 THE WITNESS: Can you repeat -- did

25 you say -- it went away, and then it came

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1 Grant Scott

2 A. I'm not sure the exact timing, but I

3 believe that was all established when I became

4 involved.

5 Q. Did you pay anything of value for the

6 shares at the time that you acquired them?

7 A. I am -- I don't believe so, no.

8 Q. Did you need to obtain anybody's approval

9 before you could transfer the shares?

10 A. No. I don't believe so.

11 Q. Did you make any effort to obtain anybody's

12 approval before you transferred the shares?

13 A. I did not.

14 Q. Did you have any reason to believe that

15 Mr. Dondero approved of the transfer of the management

16 shares to Mr. Patrick?

17 A. I -- I don't know that.

18 Q. Did you testify earlier, that you had

19 discussed with Mr. Dondero in January, Mark Patrick

20 succeeding you?

21 MR. BRIDGES: Objection. Misstates

22 prior testimony.

23 BY MR. MORRIS:

24 Q. You can answer, sir.

25 A. I believe it was prior to that.

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1 Grant Scott

2 back. I don't understand the question. I

3 am sorry.

4 BY MR. MORRIS:

5 Q. That is okay. I just saw this in the

6 documents, and I thought it was odd. But let me put

7 the documents up and see if you can shed any light.

8 MR. MORRIS: Let's start with the

9 next exhibit, Patrick File 3, Document 9.

10 (Deposition Exhibit 15 was marked for

11 identification.)

12 BY MR. MORRIS:

13 Q. And do you see in the resolutions, if we

14 can go up just a bit, dated March 24th, and it was

15 resolved that you were removed as a director of the

16 company and Mr. Patrick was appointed as your

17 replacement, if that is a fair characterization?

18 Do you see that?

19 A. I see that.

20 MR. MORRIS: And now if we can put up

21 the next document.

22 (Deposition Exhibit 16 was marked for

23 identification.)

24 BY MR. MORRIS:

25 Q. So this is a week later. It's March 31st.

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1 Grant Scott

2 MR. MORRIS: And if we can just

3 scroll down and see if it's signed.

4 BY MR. MORRIS:

5 Q. Do you see that Mr. Patrick was removed as

6 the director and you were reappointed?

7 A. Yes, I do see that.

8 Q. Do you have any understanding as to why

9 Mr. Patrick resigned and reappointed you as the

10 director a week later?

11 A. I don't have -- I don't -- I don't know.

12 Q. Did you even know this happened?

13 A. Is my signature on that agreement?

14 Q. No.

15 A. I'm not sure.

16 Q. Do you have any -- do you have any

17 recollection as -- as to whether or not you were ever

18 reappointed as the director of the company on or about

19 March 31st, 2021?

20 A. I don't know if I have received any

21 communication about this or not.

22 Q. Okay.

23 MR. MORRIS: Can we go to the next

24 document, please?

25 (Deposition Exhibit 17 was marked for

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1 Grant Scott

2 Q. Did anybody ever describe for you or

3 explain to you what error had been made?

4 A. I am sorry. I'm not familiar with these

5 documents.

6 Q. Okay. Is it fair to say that -- well, I

7 will just leave it at that.

8 So nobody ever informed you that there was

9 a mistake that had to be corrected; is that right?

10 MR. BRIDGES: Objection. Asked and

11 answered.

12 BY MR. MORRIS:

13 Q. You can answer.

14 A. I don't know that there was this -- this

15 may have -- I don't know that there was a mistake.

16 Q. You have no knowledge of --

17 A. I have no knowledge of this. I was in a

18 very complex process. I think there...

19 Q. And nobody ever asked -- nobody ever asked

20 your consent to be reappointed as the director of the

21 company, correct?

22 MR. BRIDGES: Objection. Asked and

23 answered.

24 THE WITNESS: I didn't receive any

25 communications about this.

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2 identification.)

3 MR. KANE: Mr. Morris, can you help

4 me with the exhibit numbers? Was that 16,

5 or are we still on 15, additional portions

6 of it?

7 MS. CANTY: That was 16 but not going

8 to 17.

9 MR. KANE: Thank you. I apologize.

10 MR. MORRIS: That is okay, Jonathan.

11 We will get to everything and clear up any

12 confusion.

13 BY MR. MORRIS:

14 Q. So if you go to the bottom of that

15 document, can you see that it was signed?

16 All right. Do you see Mr. Patrick signed

17 this document?

18 A. Yes, I see that.

19 Q. Do you see that it's dated -- if we can go

20 back up to the top. It's April 2nd, and do you see

21 that you are -- pursuant to these resolutions, you

22 were removed as the director again and replaced by

23 Mr. Patrick?

24 A. Yes, I see that. And they seem to be

25 correcting an error of some sort.

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1 Grant Scott

2 BY MR. MORRIS:

3 Q. And so you didn't provide your consent to

4 be reappointed as the director of the company,

5 correct?

6 MR. BRIDGES: Objection. Asked and

7 answered.

8 THE WITNESS: That's correct.

9 BY MR. MORRIS:

10 Q. Okay. Did you become aware that after you

11 resigned, that DAF and CLO HoldCo started a lawsuit

12 against the debtor and some other defendants related

13 to the HarbourVest settlement?

14 A. I did become aware of it, yes.

15 Q. And were you aware of the lawsuit -- were

16 you aware that DAF and CLO HoldCo were considering

17 filing the lawsuit before it was actually commenced?

18 A. No.

19 Q. Did you have any communications with

20 anybody at any time about the possibility that the DAF

21 and CLO HoldCo would commence a lawsuit against the

22 debtor and others relating to the HarbourVest

23 settlement prior to the time that the lawsuit was

24 commenced?

25 A. I did not.

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1 Grant Scott

2 Q. So is it fair to say that you did not

3 provide any information to anybody at any time to

4 support the claim -- the complaint that was filed

5 against the debtor and the other defendants in the

6 lawsuit that was brought by the DAF and CLO HoldCo?

7 MR. BRIDGES: Objection. Foundation.

8 THE WITNESS: I didn't provide

9 anything with respect to the litigation

10 that was filed.

11 BY MR. MORRIS:

12 Q. And did anybody ever ask you for

13 information relating to potential claims against the

14 debtor and others?

15 A. No.

16 Q. Did you ever have any discussions with

17 anybody at any time as to whether Jim Seery should be

18 named as a defendant in the lawsuit that was brought by

19 the DAF and CLO HoldCo against the debtor and others?

20 A. No.

21 MR. MORRIS: I have no further

22 questions. Thank you, Mr. Scott.

23 MR. BRIDGES: I don't have any

24 questions.

25 MR. KANE: Can I -- I've got a couple

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1 Grant Scott

2 Q. And did you read that transcript?

3 A. I believe we discussed it. I'm not -- I'm

4 not sure.

5 Q. Did you have a recollection that Judge

6 Jernigan made a comment or comments about you and

7 Jim Dondero during her ruling?

8 A. Yes.

9 Q. Do you believe that Judge Jernigan's

10 comments were inaccurate?

11 MR. MORRIS: Objection to the form of

12 the question. No foundation. Leading.

13 BY MR. KANE:

14 Q. I will rephrase. I will rephrase.

15 I will ask it -- a different question.

16 Mr. Scott, do you believe that you acted

17 independently during the bankruptcy case?

18 A. Yes.

19 Q. Do you believe you acted in the best

20 interests of CLO HoldCo?

21 A. Yes, I do.

22 MR. KANE: I'm done.

23 MR. MORRIS: Just some follow-up

24 questions, Mr. Scott.

25

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1 Grant Scott

2 just follow-up for clarification purposes.

3 EXAMINATION

4 BY MR. KANE:

5 Q. Grant, earlier you were testifying about

6 resigning and noted -- I believe your testimony was

7 one of the reasons was an issue of independence. Can

8 you clarify what you meant by issue of independence?

9 A. I came to believe that there was a

10 perception, and my friendship with Jim Dondero

11 precluded my -- my independence.

12 Q. Perception by whom?

13 A. The judge in the case.

14 (Reporter clarification.)

15 A. The judge in the bankruptcy case.

16 Q. Was there a specific reason or instance

17 that caused you to have that belief?

18 A. Yes. When I spoke with you about the --

19 Q. Well, I don't want to go into any

20 attorney-client communications.

21 A. I am sorry.

22 Q. So let me ask you a different question.

23 Were you provided a transcript of the Court's ruling

24 on the escrow hearing for the registry dispute?

25 A. I believe so.

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1 Grant Scott

2 EXAMINATION

3 BY MR. MORRIS:

4 Q. Did you ever testify before Judge Jernigan?

5 A. I have not.

6 Q. So is it fair to say that you had no reason

7 to believe that she could ever access your credibility

8 as a witness?

9 MR. BRIDGES: I'm going to object.

10 That calls for a legal conclusion.

11 BY MR. MORRIS:

12 Q. You can answer.

13 A. From -- from what I understand from the

14 transcript of that hearing, a number of comments were

15 made by the judge regarding my independence, that sort

16 of thing, that made me -- that made me think that

17 maybe I could just remove that as an issue in the case

18 by resigning. That is essentially, what my conclusion

19 was from that hearing.

20 Q. But you didn't resign at the time that the

21 judge made those statements, did you?

22 MR. BRIDGES: Objection.

23 Argumentative.

24 BY MR. MORRIS:

25 Q. You can answer.

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1 Grant Scott

2 Q. Which settlement are you referring to?

3 A. The -- the TRO settlement.

4 Q. And were you on the -- did you listen in to

5 the hearing during that hearing when -- when the judge

6 approved the settlement?

7 A. I did not.

8 Q. Did you read the transcript?

9 A. I did not.

10 Q. Did anybody ever tell you that the judge

11 said anything during that hearing to question your

12 independence?

13 MR. KANE: Objection to the extent it

14 calls for attorney/client privileged

15 information.

16 THE WITNESS: No. No, I think you

17 misunderstand. I had one data point to go

18 on, and that's what made me start the

19 process of thinking of resigning. That's

20 all.

21 BY MR. MORRIS:

22 Q. I appreciate that.

23 A. The issue -- the issue has been raised

24 repeatedly, whether it was my idea or somebody else's

25 idea, that's all I'm saying. If you can, it was my

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1 Grant Scott

2 REPORTER'S CERTIFICATE

3 I, LESHAUNDA CASS-BYRD, CSR No. B-2291, RPR,

4 Registered Professional Reporter, certify that the

5 foregoing proceedings were taken before me at the time

6 and place therein set forth, at which time the witness

7 was put under oath by me;

8 That the testimony of the witness, the questions

9 propounded, and all objections and statements made at

10 the time of the examination were recorded

11 stenographically by me and were thereafter

12 transcribed;

13 That the foregoing is a true and correct

14 transcript of my shorthand notes to taken.

15 I further certify that I am not a relative or employee

16 of any attorney or the parties, nor financially

17 interested in the action.

18 I declare under penalty of perjury under the laws

19 of North Carolina that the foregoing is true and

20 correct.

21 Dated this June 1, 2021.

22

23 *Leshanda Byrd*

24 LESHAUNDA CASS-BYRD, CCR-B-2291, RPR

25

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1 Grant Scott

2 idea.

3 Q. Okay. And I'm asking you if you have any

4 other data points after that hearing to support the

5 notion that Judge Jernigan questioned your

6 independence?

7 A. No.

8 MR. MORRIS: I have no further

9 questions.

10 MR. BRIDGES: Me either.

11 MR. KANE: I'm done. Thank you.

12 Mr. Scott.

13 (Deposition adjourned at 4:42 p.m.)

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1 ERRATA SHEET

2 Case Name:

3 Deposition Date:

4 Deponent:

5 Pg.	6 No.	7 Now Reads	8 Should Read	9 Reason
6	___	___	___	___
7	___	___	___	___
8	___	___	___	___
9	___	___	___	___
10	___	___	___	___
11	___	___	___	___
12	___	___	___	___
13	___	___	___	___
14	___	___	___	___
15	___	___	___	___
16	___	___	___	___
17	___	___	___	___
18	___	___	___	___
19	___	___	___	___
20	___	___	___	___

21 _____

22 Signature of Deponent

23 SUBSCRIBED AND SWORN BEFORE ME

24 THIS ____ DAY OF _____, 2021.

25 _____

(Notary Public) MY COMMISSION EXPIRES: _____

EXHIBIT 4



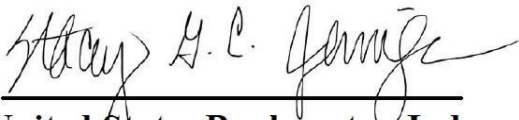
CLERK, U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS

ENTERED

THE DATE OF ENTRY IS ON
THE COURT'S DOCKET

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

Signed February 22, 2021


United States Bankruptcy Judge

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

In re:

HIGHLAND CAPITAL MANAGEMENT, L.P.,¹

Debtor.

) Chapter 11

) Case No. 19-34054-sgj11

**ORDER (I) CONFIRMING THE FIFTH AMENDED
PLAN OF REORGANIZATION OF HIGHLAND CAPITAL
MANAGEMENT, L.P. (AS MODIFIED) AND (II) GRANTING RELATED RELIEF**

The Bankruptcy Court² having:

- a. entered, on November 24, 2020, the *Order (A) Approving the Adequacy of the Disclosure Statement, (B) Scheduling A Hearing to Confirm the Fifth Amended Plan of Reorganization (C) Establishing Deadline for Filing Objections to Confirmation of Plan, (D) Approving Form of Ballots, Voting Deadline and Solicitation Procedures, and (E) Approving Form and Manner of Notice* [Docket No. 1476] (the “Disclosure Statement Order”), pursuant to which the Bankruptcy Court approved the adequacy of the *Disclosure Statement Relating to the Fifth*

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

² Capitalized terms used but not otherwise defined herein have the meanings given to them in the Plan (as defined below). The rules of interpretation set forth in Article I of the Plan apply to this Confirmation Order.



Amended Plan of Reorganization of Highland Capital Management, L.P. [Docket No. 1473] (the “Disclosure Statement”) under section 1125 of the Bankruptcy Code and authorized solicitation of the Disclosure Statement;

- b. set January 5, 2021, at 5:00 p.m. prevailing Central Time (the “Objection Deadline”), as the deadline for filing objections to confirmation of the *Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (As Modified)* [Docket No. 1808] (as amended, supplemented or modified, the “Plan”);
- c. set January 5, 2021, at 5:00 p.m. prevailing Central Time, as the deadline for voting on the Plan (the “Voting Deadline”) in accordance with the Disclosure Statement Order;
- d. initially set January 13, 2021, at 9:30 a.m. prevailing Central Time, as the date and time to commence the hearing to consider confirmation of the Plan pursuant to Bankruptcy Rules 3017 and 3018, sections 1126, 1128, and 1129 of the Bankruptcy Code, and the Disclosure Statement Order, which hearing was continued to January 26, 2021, at 9:30 a.m. prevailing Central Time and further continued to February 2, 2021;
- e. reviewed: (i) the Plan; (ii) the Disclosure Statement; and (iii) *Notice of (I) Entry of Order Approving Disclosure Statement; (II) Hearing to Confirm; and (III) Related Important Dates* (the “Confirmation Hearing Notice”), the form of which is attached as Exhibit 1-B to the Disclosure Statement Order;
- f. reviewed: (i) the *Debtor’s Notice of Filing of Plan Supplement for the Third Amended Plan of Reorganization of Highland Capital Management, L.P.* [Docket No. 1389] filed November 13, 2020; (ii) *Debtor’s Notice of Filing of Plan Supplement for the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.* [Docket No. 1606] filed on December 18, 2020; (iii) the *Debtor’s Notice of Filing of Plan Supplement for the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.* [Docket No. 1656] filed on January 4, 2021; (iv) *Notice of Filing Plan Supplement to the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (with Technical Modifications)* dated January 22, 2021 [Docket No. 1811]; and (v) *Debtor’s Notice of Filing of Plan Supplement to the Fifth Amended Plan of Reorganization of Highland of Highland Capital Management, L.P. (As Modified)* on February 1, 2021 [Docket No. 1875]; (collectively, the documents listed in (i) through (v) of this paragraph, the “Plan Supplements”);
- g. reviewed: (i) the *Notice of (I) Executory Contracts and Unexpired Leases to be Assumed by the Debtor Pursuant to the Fifth Amended Plan, (II) Cure Amounts, if Any, and (III) Related Procedures in Connection Therewith* filed on December 30, 2020 [Docket No. 1648]; (ii) the *Second Notice of (I) Executory Contracts and*

Unexpired Leases to be Assumed by the Debtor Pursuant to the Fifth Amended Plan, (II) Cure Amounts, if Any, and (III) Related Procedures in Connection Therewith filed on January 11, 2021 [Docket No.1719]; (iii) the *Third Notice of (I) Executory Contracts and Unexpired Leases to be Assumed by the Debtor Pursuant to the Fifth Amended Plan, (II) Cure Amounts, if Any, and (III) Related Procedures in Connection Therewith* filed on January 15, 2021 [Docket No. 1749]; (iv) the *Notice of Withdrawal of Certain Executory Contracts and Unexpired Leases from List of Executory Contracts and Unexpired Leases to be Assumed by the Debtor Pursuant to the Fifth Amended Plan* [Docket No. 1791]; (v) the *Fourth Notice of (I) Executory Contracts and Unexpired Leases to be Assumed by the Debtor Pursuant to the Fifth Amended Plan (II) Cure Amounts, if Any, and (III) Released Procedures in Connection Therewith* filed on January 27, 2021 [Docket No. 1847]; (vi) the *Notice of Hearing on Agreed Motion to (I) Assume Nonresidential Real Property Lease with Crescent TC Investors, L.P. Upon Confirmation of Plan and (II) Extend Assumption Deadline* filed on January 28, 2021 [Docket No. 1857]; and (vii) the *Fifth Notice of (I) Executory Contracts and Unexpired Leases to be Assumed by the Debtor Pursuant to the Fifth Amended Plan (II) Cure Amounts, if Any, and (III) Released Procedures in Connection Therewith* filed on February 1, 2021 [Docket No. 1873] (collectively, the documents referred to in (i) to (vii) are referred to as “List of Assumed Contracts”);

- h. reviewed: (i) the *Debtor’s Memorandum of Law in Support of Confirmation of the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.* [Docket No. 1814] (the “Confirmation Brief”); (ii) the *Debtor’s Omnibus Reply to Objections to Confirmation of the Fifth Amended Chapter 11 Plan of Reorganization of Highland Capital Management*; [Docket No. 1807]; and (iii) the *Certification of Patrick M. Leathem With Respect to the Tabulation of Votes on the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.* [Docket No. 1772] and *Supplemental Certification of Patrick M. Leathem With Respect to the Tabulation of Votes on the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.* [Docket No. 1887] filed on February 3, 2021 (together, the “Voting Certifications”).
- i. reviewed: (i) the *Notice of Affidavit of Publication* dated December 3, 2020 [Docket No. 1505]; (ii) the *Certificate of Service* dated December 23, 2020 [Docket No. 1630]; (iii) the *Supplemental Certificate of Service* dated December 24, 2020 [Docket No. 1637]; (iv) the *Second Supplemental Certificate of Service* dated December 31, 2020 [Docket No. 1653]; (v) the *Certificate of Service* dated December 23, 2020 [Docket No. 1627]; (vi) the *Certificate of Service* dated January 6, 2021 [Docket No. 1696]; (vii) the *Certificate of Service* dated January 7, 2021 [Docket No. 1699]; (viii) the *Certificate of Service* dated January 7, 2021 [Docket No 1700]; (ix) the *Certificate of Service* dated January 15, 2021 [Docket No. 1761]; (x) the *Certificate of Service* dated January 19, 2021 [Docket No. 1775]; (xi) the

Certificate of Service dated January 20, 2021 [Docket No. 1787]; (xii) the *Certificate of Service* dated January 26, 2021 [Docket No. 1844]; (xiii) the *Certificate of Service* dated January 27, 2021 [Docket No. 1854]; (xiv) the *Certificate of Service* dated February 1, 2021 [Docket No. 1879]; (xv) the *Certificates of Service* dated February 3, 2021 [Docket No. 1891 and 1893]; and (xvi) the *Certificates of Service* dated February 5, 2021 [Docket Nos. 1906, 1907, 1908 and 1909] (collectively, the “Affidavits of Service and Publication”);

- j. reviewed all filed³ pleadings, exhibits, statements, and comments regarding approval of the Disclosure Statement and confirmation of the Plan, including all objections, statements, and reservations of rights;
- k. conducted a hearing to consider confirmation of the Plan, which commenced on February 2, 2021, at 9:30 a.m. prevailing Central Time and concluded on February 3, 2021, and issued its oral ruling on February 8, 2021 (collectively, the “Confirmation Hearing”);
- l. heard the statements and arguments made by counsel in respect of confirmation of the Plan and having considered the record of this Chapter 11 Case and taken judicial notice of all papers and pleadings filed in this Chapter 11 Case; and
- m. considered all oral representations, testimony, documents, filings, and other evidence regarding confirmation of the Plan, including (a) all of the exhibits admitted into evidence;⁴ (b) the sworn testimony of (i) James P. Seery, Jr., the Debtor’s Chief Executive Officer and Chief Restructuring Officer and a member of the Board of Directors of Strand Advisors, Inc. (“Strand”), the Debtor’s general partner; (ii) John S. Dubel, a member of the Board of Strand; (iii) Marc Tauber, a Vice President at Aon Financial Services; and (iv) Robert Jason Post, the Chief Compliance Officer of NexPoint Advisors, LP (collectively, the “Witnesses”); (c) the credibility of the Witnesses; and (d) the Voting Certifications.

NOW, THEREFORE, after due deliberation thereon and good cause appearing therefor, the Bankruptcy Court hereby makes and issues the following findings of fact and conclusions of law:

³ Unless otherwise indicated, use of the term “filed” herein refers also to the service of the applicable document filed on the docket in this Chapter 11 Case, as applicable.

⁴ The Court admitted the following exhibits into evidence: (a) all of the Debtor’s exhibits lodged at Docket No. 1822 (except TTTTT, which was withdrawn by the Debtor); (b) all of the Debtor’s exhibits lodged at Docket No. 1866; (c) all of the Debtor’s exhibits lodged at Docket No. 1877; (d) all of the Debtor’s exhibits lodged at Docket No. 1895; and (e) Exhibits 6-12 and 15-17 offered by Mr. James Dondero and lodged at Docket No. 1874.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. **Findings of Fact and Conclusions of Law.** The findings and conclusions set forth herein, together with the findings of fact and conclusions of law set forth in the record during the Confirmation Hearing, constitute the Bankruptcy Court's findings of fact and conclusions of law pursuant to **Federal Rule of Civil Procedure 52**, made applicable to this proceeding pursuant to Bankruptcy Rules 7052 and 9014. To the extent any of the following findings of fact constitute conclusions of law, they are adopted as such. To the extent that any of the following conclusions of law constitute findings of fact, they are adopted as such.

2. **Introduction and Summary of the Plan.** Prior to addressing the specific requirements under the Bankruptcy Code and Bankruptcy Rules with respect to the confirmation of the Plan, the Bankruptcy Court believes it would be useful to first provide the following background of the Debtor's Chapter 11 Case, the parties involved therewith, and some of the major events that have transpired culminating in the filing and solicitation of the Plan of this very unusual case. Before the Bankruptcy Court is the *Debtor's Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.*, filed on November 24, 2020, as modified on January 22, 2021 and again on February 1, 2021. The parties have repeatedly referred to the Plan as an "asset monetization plan" because it involves the orderly wind-down of the Debtor's estate, including the sale of assets and certain of its funds over time, with the Reorganized Debtor continuing to manage certain other funds, subject to the oversight of the Claimant Trust Oversight Board. The Plan provides for a Claimant Trust to, among other things, manage and monetize the Claimant Trust Assets for the benefit of the Debtor's economic stakeholders. The Claimant Trustee is responsible

for this process, among other duties specified in the Plan’s Claimant Trust Agreement. There is also anticipated to be a Litigation Sub-trust established for the purpose of pursuing certain avoidance or other causes of action for the benefit of the Debtor’s economic constituents.

3. **Confirmation Requirements Satisfied.** The Plan is supported by the Committee and all claimants with Convenience Claims (*i.e.*, general unsecured claims under \$1 million) who voted in Class 7. Claimants with Class 8 General Unsecured Claims, however, voted to reject the Plan because, although the Plan was accepted by 99.8% of the amount of Claims in that class, only 17 claimants voted to accept the Plan while 27 claimants voted to reject the Plan. As a result of such votes, and because Mr. Dondero and the Dondero Related Entities (as defined below) objected to the Plan on a variety of grounds primarily relating to the Plan’s release, exculpation and injunction provisions, the Bankruptcy Court heard two full days of evidence on February 2 and 3, 2021, and considered testimony from five witnesses and thousands of pages of documentary evidence in determining whether the Plan satisfies the confirmation standards required under the Bankruptcy Code. The Bankruptcy Court finds and concludes that the Plan meets all of the relevant requirements of sections 1123, 1124, and 1129, and other applicable provisions of the Bankruptcy Code, as more fully set forth below with respect to each of the applicable confirmation requirements.

4. **Not Your Garden Variety Debtor.** The Debtor’s case is not a garden variety chapter 11 case. The Debtor is a multibillion-dollar global investment adviser registered with the SEC, pursuant to the Investment Advisers Act of 1940. It was founded in 1993 by James Dondero and Mark Okada. Mark Okada resigned from his role with Highland prior to the

bankruptcy case being filed on October 16, 2019 (the “Petition Date”). Mr. Dondero controlled the Debtor as of the Petition Date but agreed to relinquish control of it on or about January 9, 2020, pursuant to an agreement reached with the Committee, as described below. Although Mr. Dondero remained with the Debtor as an unpaid employee/portfolio manager after January 9, 2020, his employment with the Debtor terminated on October 9, 2020. Mr. Dondero continues to work for and/or control numerous non-debtor entities in the complex Highland enterprise.

5. **The Debtor.** The Debtor is headquartered in Dallas, Texas. As of the Petition Date, the Debtor employed approximately 76 employees. The Debtor is privately-owned: (a) 99.5% by the Hunter Mountain Investment Trust; (b) 0.1866% by The Dugaboy Investment Trust, a trust created to manage the assets of Mr. Dondero and his family; (c) 0.0627% by Mark Okada, personally and through family trusts; and (d) 0.25% by Strand, the Debtor’s general partner.

6. **The Highland Enterprise.** Pursuant to various contractual arrangements, the Debtor provides money management and advisory services for billions of dollars of assets, including collateralized loan obligation vehicles (“CLOs”), and other investments. Some of these assets are managed by the Debtor pursuant to shared services agreements with certain affiliated entities, including other affiliated registered investment advisors. In fact, there are approximately 2,000 entities in the byzantine complex of entities under the Highland umbrella. None of these affiliated entities filed for chapter 11 protection. Most, but not all, of these entities are not subsidiaries (direct or indirect) of the Debtor. Many of the Debtor’s affiliated companies are

The Debtor also did not suffer any type of catastrophic business calamity. In fact, the Debtor filed for Chapter 11 protection six months before the onset of the COVID-19 pandemic. Rather, the Debtor filed for Chapter 11 protection due to a myriad of massive, unrelated, business litigation claims that it faced—many of which had finally become liquidated (or were about to become liquidated) after a decade or more of contentious litigation in multiple forums all over the world. The Committee in this case has referred to the Debtor—under its former chief executive, Mr. Dondero—as a “serial litigator.” The Bankruptcy Court agrees with that description. By way of example, the members of the Committee (and their history of litigation with the Debtor and others in the Highland complex) are as follows:

continued on with numerous appeals of Bankruptcy Court orders, including one appeal still pending at the Fifth Circuit Court of Appeals. There was also litigation involving Mr. Terry and Acis in the Royal Court of the Island of Guernsey and in a state court in New York. The Acis claim was settled during this Chapter 11 Case, in Bankruptcy Court-ordered mediation, for approximately \$23 million (subject to other details not relevant for this purpose), and is the subject of an appeal being pursued by Mr. Dondero.

- c. **UBS Securities LLC and UBS AG London Branch (“UBS”).** UBS is a Committee member that filed a proof of claim in the amount of \$1,039,957,799.40 in this Chapter 11 Case. The UBS Claim was based on a judgment that UBS received from a New York state court in 2020. The underlying decision was issued in November 2019, after a multi-week bench trial (which had occurred many months earlier) on a breach of contract claim against non-Debtor entities in the Highland complex. The UBS litigation related to activities that occurred in 2008 and 2009. The litigation involving UBS and Highland and affiliates was pending for more than a decade (there having been numerous interlocutory appeals during its history). The Debtor and UBS recently announced an agreement in principle for a settlement of the UBS claim (which came a few months after Bankruptcy Court-ordered mediation) which will be subject to a 9019 motion to be filed with the Bankruptcy Court on a future date.
- d. **Meta-E Discovery (“Meta-E”).** Meta-E is a Committee member that is a vendor who happened to supply litigation and discovery-related services to the Debtor over the years. It had unpaid invoices on the Petition Date of more than \$779,000.

It is fair to say that the members of the Committee in this case all have wills of steel. They fought hard before and during this Chapter 11 Case. The members of the Committee, all of whom have volunteered to serve on the Claimant Trust Oversight Board post-confirmation, are highly sophisticated and have had highly sophisticated professionals representing them. They have represented their constituency in this case as fiduciaries extremely well.

9. **Other Key Creditor Constituents.** In addition to the Committee members who were all embroiled in years of litigation with Debtor and its affiliates in various ways, the Debtor has been in litigation with Patrick Daugherty, a former limited partner and employee of the Debtor, for many years in both Delaware and Texas state courts. Mr. Daugherty filed an amended

proof of claim in this Chapter 11 Case for \$40,710,819.42 relating to alleged breaches of employment-related agreements and for defamation arising from a 2017 press release posted by the Debtor. The Debtor and Mr. Daugherty recently announced a settlement of Mr. Daugherty's claim pursuant to which he will receive \$750,000 in cash on the Effective Date of the Plan, an \$8.25 million general unsecured claim, and a \$2.75 million subordinated claim (subject to other details not relevant for this purpose). Additionally, entities collectively known as "HarbourVest" invested more than \$70 million with an entity in the Highland complex and asserted a \$300 million proof of claim against the Debtor in this case, alleging, among other things, fraud and RICO violations. HarbourVest's claim was settled during the bankruptcy case for a \$45 million general unsecured claim and a \$35 million subordinated claim, and that settlement is also being appealed by a Dondero Entity.

10. **Other Claims Asserted.** Other than the Claims just described, most of the other Claims in this Chapter 11 Case are Claims asserted against the Debtor by: (a) entities in the Highland complex—most of which entities the Bankruptcy Court finds to be controlled by Mr. Dondero; (b) employees who contend that are entitled to large bonuses or other types of deferred compensation; and (c) numerous law firms that worked for the Debtor prior to the Petition Date and had outstanding amounts due for their prepetition services.

11. **Not Your Garden Variety Post-Petition Corporate Governance Structure.** Yet another reason this is not your garden variety chapter 11 case is its post-petition corporate governance structure. Immediately from its appointment, the Committee's relationship with the Debtor was contentious at best. First, the Committee moved for a change of venue from

Delaware to Dallas. Second, the Committee (and later, the United States Trustee) expressed its then-desire for the appointment of a chapter 11 trustee due to its concerns over and distrust of Mr. Dondero, his numerous conflicts of interest, and his history of alleged mismanagement (and perhaps worse).

12. **Post-Petition Corporate Governance Settlement with Committee.** After spending many weeks under the threat of the potential appointment of a trustee, the Debtor and Committee engaged in substantial and lengthy negotiations resulting in a corporate governance settlement approved by the Bankruptcy Court on January 9, 2020.⁵ As a result of this settlement, among other things, Mr. Dondero relinquished control of the Debtor and resigned his positions as an officer or director of the Debtor and its general partner, Strand. As noted above, Mr. Dondero agreed to this settlement pursuant a stipulation he executed,⁶ and he also agreed not to cause any Related Entity (as defined in the Settlement Motion) to terminate any agreements with the Debtor. The January 9 Order also (a) required that the Bankruptcy Court serve as “gatekeeper” prior to the commencement of any litigation against the three independent board members appointed to oversee and lead the Debtor’s restructuring in lieu of Mr. Dondero and (b) provided for the exculpation of those board members by limiting claims subject to the “gatekeeper” provision to those alleging willful misconduct and gross negligence.

⁵ This order is hereinafter referred to as the “January 9 Order” and was entered by the Court on January 9, 2020 [Docket No. 339] pursuant to the *Motion of the Debtor to Approve Settlement with Official Committee of Unsecured Creditors Regarding the Governance of the Debtor and Procedures for Operation in the Ordinary Course* [Docket No. 281] (the “Settlement Motion”).

⁶ See *Stipulation in Support of Motion of the Debtor for Approval of Settlement With the Official Committee of Unsecured Creditors Regarding Governance of the Debtor and Procedures for Operations in Ordinary Course* [Docket No. 338] (the “Stipulation”).

13. **Appointment of Independent Directors.** As part of the Bankruptcy Court-approved settlement, three eminently qualified independent directors were chosen to lead Highland through its Chapter 11 Case. They are: James P. Seery, Jr., John S. Dubel (each chosen by the Committee), and Retired Bankruptcy Judge Russell Nelms. These three individuals are each technically independent directors of Strand (Mr. Dondero had previously been the sole director of Strand and, thus, the sole person in ultimate control of the Debtor). The three independent board members' resumes are in evidence. The Bankruptcy Court later approved Mr. Seery's appointment as the Debtor's Chief Executive Officer, Chief Restructuring Officer, and Foreign Representative. Suffice it to say that this settlement and the appointment of the independent directors changed the entire trajectory of the case and saved the Debtor from the appointment of a trustee. The Bankruptcy Court and the Committee each trusted the independent directors. They were the right solution at the right time. Because of the unique character of the Debtor's business, the Bankruptcy Court believed the appointment of three qualified independent directors was a far better outcome for creditors than the appointment of a conventional chapter 11 trustee. Each of the independent directors brought unique qualities to the table. Mr. Seery, in particular, knew and had vast experience at prominent firms with high-yield and distressed investing similar to the Debtor's business. Mr. Dubel had 40 years of experience restructuring large complex businesses and serving on boards in this context. And Retired Judge Nelms had not only vast bankruptcy experience but seemed particularly well-suited to help the Debtor maneuver through conflicts and ethical quandaries. By way of comparison, in the chapter 11 case of Acis, the former affiliate of Highland that the Bankruptcy Court presided over and which company was

much smaller in size and scope than Highland (managing only 5-6 CLOs), the creditors elected a chapter 11 trustee who was not on the normal trustee rotation panel in this district but, rather, was a nationally known bankruptcy attorney with more than 45 years of large chapter 11 experience. While the Acis chapter 11 trustee performed valiantly, he was sued by entities in the Highland complex shortly after he was appointed (which the Bankruptcy Court had to address). The Acis trustee was also unable to persuade the Debtor and its affiliates to agree to any actions taken in the case, and he finally obtained confirmation of Acis' chapter 11 plan over the objections of the Debtor and its affiliates on his fourth attempt (which confirmation was promptly appealed).

14. **Conditions Required by Independent Directors.** Given the experiences in Acis and the Debtor's culture of constant litigation, it was not as easy to get such highly qualified persons to serve as independent board members and, later, as the Debtor's Chief Executive Officer, as it would be in an ordinary chapter 11 case. The independent board members were stepping into a morass of problems. Naturally, they were worried about getting sued no matter how defensible their efforts—given the litigation culture that enveloped Highland historically. Based on the record of this Case and the proceedings in the Acis chapter 11 case, it seemed as though everything always ended in litigation at Highland. The Bankruptcy Court heard credible testimony that none of the independent directors would have taken on the role of independent director without (1) an adequate directors and officers' ("D&O") insurance policy protecting them; (2) indemnification from Strand that would be guaranteed by the Debtor; (3) exculpation for mere negligence claims; and (4) a gatekeeper provision prohibiting the commencement of litigation against the independent directors without the Bankruptcy Court's prior authority. This gatekeeper provision was also

included in the Bankruptcy Court’s order authorizing the appointment of Mr. Seery as the Debtor’s Chief Executive Officer, Chief Restructuring Officer, and Foreign Representative entered on July 16, 2020.⁷ The gatekeeper provisions in both the January 9 Order and July 16 Order are precisely analogous to what bankruptcy trustees have pursuant to the so-called “Barton Doctrine” (first articulated in an old Supreme Court case captioned *Barton v. Barbour*, 104 U.S. 126 (1881)). The Bankruptcy Court approved all of these protections in the January 9 Order and the July 16 Order, and no one appealed either of those orders. As noted above, Mr. Dondero signed the Stipulation that led to the settlement that was approved by the January 9 Order. The Bankruptcy Court finds that, like the Committee, the independent board members have been resilient and unwavering in their efforts to get the enormous problems in this case solved. They seem to have at all times negotiated hard and in good faith, which culminated in the proposal of the Plan currently before the Bankruptcy Court. As noted previously, they completely changed the trajectory of this case.

15. **Not Your Garden Variety Mediators.** And still another reason why this was not your garden variety case was the mediation effort. In the summer of 2020, roughly nine months into the chapter 11 case, the Bankruptcy Court ordered mediation among the Debtor, Acis, UBS, the Redeemer Committee, and Mr. Dondero. The Bankruptcy Court selected co-mediators because mediation among these parties seemed like such a Herculean task—especially during COVID-19 where people could not all be in the same room. Those co-mediators were: Retired

⁷ See Order Approving the Debtor’s Motion Under Bankruptcy Code Sections 105(a) and 363(b) Authorizing Retention of James P. Seery, Jr., as Chief Executive Officer, Chief Restructuring Officer, and Foreign Representative Nunc Pro Tunc to March 15, 2020 [Docket No. 854] entered on July 16, 2020 (the “July 16 Order”)

Bankruptcy Judge Alan Gropper from the Southern District of New York, who had a distinguished career presiding over complex chapter 11 cases, and Ms. Sylvia Mayer, who likewise has had a distinguished career, first as a partner at a preeminent law firm working on complex chapter 11 cases, and subsequently as a mediator and arbitrator in Houston, Texas. As noted earlier, the Redeemer Committee and Acis claims were settled during the mediation—which seemed nothing short of a miracle to the Bankruptcy Court—and the UBS claim was settled several months later and the Bankruptcy Court believes the ground work for that ultimate settlement was laid, or at least helped, through the mediation. And, as earlier noted, other significant claims have been settled during this case, including those of HarbourVest (who asserted a \$300 million claim) and Patrick Daugherty (who asserted a \$40 million claim). The Bankruptcy Court cannot stress strongly enough that the resolution of these enormous claims—and the acceptance by all of these creditors of the Plan that is now before the Bankruptcy Court—seems nothing short of a miracle. It was more than a year in the making.

16. **Not Your Garden Variety Plan Objectors (That Is, Those That Remain).** Finally, a word about the current, remaining objectors to the Plan before the Bankruptcy Court. Once again, the Bankruptcy Court will use the phrase “not your garden variety”, which phrase applies to this case for many reasons. Originally, there were over a dozen objections filed to the Plan. The Debtor then made certain amendments or modifications to the Plan to address some of these objections, none of which require further solicitation of the Plan for reasons set forth in more detail below. The only objectors to the Plan left at the time of the Confirmation Hearing

were Mr. Dondero [Docket No. 1661] and entities that the Bankruptcy Court finds are owned and/or controlled by him and that filed the following objections:

- a. *Objection to Confirmation of the Debtor's Fifth Amended Plan of Reorganization* (filed by Get Good Trust and The Dugaboy Investment Trust) [Docket No. 1667];
- b. *Objection to Confirmation of Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.* (filed by Highland Capital Management Fund Advisors, L.P., Highland Fixed Income Fund, Highland Funds I and its series, Highland Funds II and its series, Highland Global Allocation Fund, Highland Healthcare Opportunities Fund, Highland Income Fund, Highland Merger Arbitrage Fund, Highland Opportunistic Credit Fund, Highland Small-Cap Equity Fund, Highland Socially Responsible Equity Fund, Highland Total Return Fund, Highland/iBoxx Senior Loan ETF, NexPoint Advisors, L.P., NexPoint Capital, Inc., NexPoint Real Estate Strategies Fund, NexPoint Strategic Opportunities Fund) [Docket No. 1670];
- c. *A Joinder to the Objection filed at 1670 by: NexPoint Real Estate Finance Inc., NexPoint Real Estate Capital, LLC, NexPoint Residential Trust, Inc., NexPoint Hospitality Trust, NexPoint Real Estate Partners, LLC, NexPoint Multifamily Capital Trust, Inc., VineBrook Homes Trust, Inc., NexPoint Real Estate Advisors, L.P., NexPoint Real Estate Advisors II, L.P., NexPoint Real Estate Advisors III, L.P., NexPoint Real Estate Advisors IV, L.P., NexPoint Real Estate Advisors V, L.P., NexPoint Real Estate Advisors VI, L.P., NexPoint Real Estate Advisors VII, L.P., NexPoint Real Estate Advisors VIII, L.P., and any funds advised by the foregoing* [Docket No. 1677];
- d. *NexPoint Real Estate Partners LLC's Objection to Debtor's Fifth Amended Plan of Reorganization* (filed by NexPoint Real Estate Partners LLC f/k/a HCRE Partners LLC) [Docket No. 1673]; and
- e. *NexBank's Objection to Debtor's Fifth Amended Plan of Reorganization* (filed by NexBank Title, Inc., NexBank Securities, Inc., NexBank Capital, Inc., and NexBank) [Docket No. 1676]. The entities referred to in (i) through (v) of this paragraph are hereinafter referred to as the "Dondero Related Entities").

17. Questionability of Good Faith as to Outstanding Confirmation

Objections. Mr. Dondero and the Dondero Related Entities technically have standing to object to the Plan, but the remoteness of their economic interests is noteworthy, and the Bankruptcy Court

questions the good faith of Mr. Dondero’s and the Dondero Related Entities’ objections. In fact, the Bankruptcy Court has good reason to believe that these parties are not objecting to protect economic interests they have in the Debtor but to be disruptors. Mr. Dondero wants his company back. This is understandable, but it is not a good faith basis to lob objections to the Plan. As detailed below, the Bankruptcy Court has slowed down plan confirmation multiple times and urged the parties to talk to Mr. Dondero in an attempt to arrive at what the parties have repeatedly referred to as a “grand bargain,” the ultimate goal to resolve the Debtor’s restructuring. The Debtor and the Committee represent that they have communicated with Mr. Dondero regarding a grand bargain settlement, and the Bankruptcy Court believes that they have.

18. **Remote Interest of Outstanding Confirmation Objectors.** To be specific about the remoteness of Mr. Dondero’s and the Dondero Related Entities’ interests, the Bankruptcy Court will address them each separately. First, Mr. Dondero has a pending objection to the Plan. Mr. Dondero’s only economic interest with regard to the Debtor is an unliquidated indemnification claim (and, based on everything the Bankruptcy Court has heard, his indemnification claims would be highly questionable at this juncture). Mr. Dondero owns no equity in the Debtor directly. Mr. Dondero owns the Debtor’s general partner, Strand, which in turn owns a quarter percent of the total equity in the Debtor. Second, a joint objection has been filed by The Dugaboy Trust (“Dugaboy”) and the Get Good Trust (“Get Good”). The Dugaboy Trust was created to manage the assets of Mr. Dondero and his family and owns a 0.1866% limited partnership interest in the Debtor. *See* Disclosure Statement at 7, n.3. The Bankruptcy Court is not clear what economic interest the Get Good Trust has, but it likewise seems to be related to Mr. Dondero. Get Good

filed three proofs of claim relating to a pending federal tax audit of the Debtor’s 2008 return, which the Debtor believes arise from Get Good’s equity security interests and are subject to subordination as set forth in its Confirmation Brief. Dugaboy filed three claims against the Debtor: (a) an administrative claim relating to the Debtor’s alleged postpetition management of Multi-Strat Credit Fund, L.P., (b) a prepetition claim against a subsidiary of the Debtor for which it seeks to pierce the corporate veil, each of which the Debtor maintains are frivolous in the Confirmation Brief, and (c) a claim arising from its equity security interest in the Debtor, which the Debtor asserts should be subordinated. Another group of objectors that has joined together in one objection is what the Bankruptcy Court will refer to as the “Highland Advisors and Funds.” *See* Docket No. 1863. The Bankruptcy Court understands they assert disputed administrative expense claims against the estate that were filed shortly before the Confirmation Hearing on January 23, 2021 [Docket No. 1826], and during the Confirmation Hearing on February 3, 2021 [Docket No. 1888]. At the Confirmation Hearing, Mr. Post testified on behalf of the Highland Advisors and Funds that the Funds have independent board members that run the Funds, but the Bankruptcy Court was not convinced of their independence from Mr. Dondero because none of the so-called independent board members have ever testified before the Bankruptcy Court and all have been engaged with the Highland complex for many years. Notably, the Court questions Mr. Post’s credibility because, after more than 12 years of service, he abruptly resigned from the Debtor in October 2020 at the exact same time that Mr. Dondero resigned at the Board of Directors’ request, and he is currently employed by Mr. Dondero. Moreover, Dustin Norris, a witness in a prior proceeding (whose testimony was made part of the record at the Confirmation Hearing), recently

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

In Re: Highland Capital Management, L.P § Case No. **19-34054-SGJ11**

Charitable DAF Fund, L.P et al

Appellant

§

vs.

§

21-03067

Highland Capital Management, L.P

§

Appellee

§

3:23-CV-01503-B

[167] Order granting Defendant Highland Capital Management, L.P.'s Renewed motion to dismiss adversary proceeding (related document # [122](#)) Entered on 6/25/2023.

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APPELLANT RECORD

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

In re:	§ Chapter 11
	§
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§ Case No. 19-34054-sgj11
	§
Debtor.	§
	§
CHARITABLE DAF FUND, L.P. AND CLO	§
HOLDCO, LTD., DIRECTLY AND DERIVATIVELY	§
	§
Plaintiffs,	§ Adversary Proceeding No.
	§
vs.	§ 21-03067-sgj11
	§
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§
HIGHLAND HCF ADVISOR, LTD., AND	§
HIGHLAND CLO FUNDING LTD., NOMINALLY	§
	§
Defendant.	§
	§

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**APPELLANTS' SECOND AMENDED STATEMENT OF ISSUES
AND DESIGNATION OF RECORD ON APPEAL**

Pursuant to Rules 8009(a)(1)(A)-(B) and (a)(4) of the Federal Rules of Bankruptcy Procedure, The Charitable DAF Fund, L.P. and CLO Holdco, Ltd. ("Appellants") hereby designate the following items to be included in the record and identify the following issues with respect to

their appeal of the Order Granting Defendant Highland Capital Management, L.P.'s "Renewed Motion to Dismiss Complaint" [Adv. Proc. Doc. No. 122] which was entered by the United States Bankruptcy Court for the Northern District of Texas on June 25, 2023.

I. STATEMENT OF ISSUES TO BE PRESENTED ON APPEAL

- Whether the Bankruptcy Court had jurisdiction to rule on Highland Capital Management L.P.'s Renewed Motion to Dismiss Complaint
- Whether the Renewed Motion to Dismiss Complaint was improperly granted

II. DESIGNATION OF ITEMS TO BE INCLUDED IN THE RECORD

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1. Notice of Appeal for Bankruptcy Case Adversary Proceeding No. 21-03067-sgj11 [Doc. 168].

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2. The judgment, order, or decree appealed from: Memorandum Opinion and Order Granting Defendant Highland Capital Management, L.P.'s "Renewed Motion to Dismiss Complaint" [Adv. Proc. Doc. No. 122] [Doc. 167].

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3. Docket Sheet kept by the Bankruptcy Clerk.

4. Documents listed below and as described in the Docket Sheet for Bankruptcy Case Proceeding No. 21-03067-sgj.

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No.	Date Filed	Docket No.	Description/Document Text
1	9/29/21	1	(36 pgs; 3 docs) Adversary case 21-03067. ORDER REFERRING CASE NUMBER 21-CV-0842-B from U.S District Court for the Northern District of Texas, Dallas Division to U.S. Bankruptcy Court for Northern District of Texas, Dallas Division. Complaint by Charitable DAF Fund, LP, CLO Holdco, Ltd. against Highland Capital Management, LP, Highland HCF Advisor Ltd., Highland CLO Funding, Ltd. Fee Amount \$350 (Attachments: # 1 Original Complaint # 2 Docket Sheet from 3:20-cv-0842-B) Nature(s) of suit: 02 (Other (e.g. other actions that would have been brought in state court if unrelated to bankruptcy)). (Okafor, M.)
2	9/29/21	2	(1 pg) Supplemental Document (cover sheet) by CLO Holdco Ltd., Charitable DAF Fund (RE: related document(s)1 Adversary case 21-03067) [ORIGINALLY FILED IN 21-CV-0842 AS #2 ON 04/13/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)

Vol. 2 000139 000232 000239 000270 Thru Vol. 6	3	9/29/21	6	(93 pgs; 6 docs) MOTION for Leave to File First Amended Complaint filed by CLO Holdco Ltd., Charitable DAF Fund LP (Attachments: # 1 Exh 1_First Amended Complaint # 2 Exh 2_Motion for Authorization to Retain James Seery # 3 Exh 3_Order Approving Retention of James Seery # 4 Exh 4_Order Approving Settlement # 5 Proposed Order) (Bridges, Jonathan) (Entered: 04/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #6 ON 04/19/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
	4	9/29/21	22	(7 pgs; 2 docs) MOTION for an Order to Enforce the Order of Reference filed by Highland Capital Management LP. (Attachments: # 1 Exhibit(s) A--Proposed Order) (Annable, Zachery) Modified text on 5/20/2021 (mjr). (Entered: 05/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #22 ON 05/19/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
	5	9/29/21	23	(31 pgs) Brief/Memorandum in Support filed by Highland Capital Management LP re: 22 MOTION for an Order to Enforce the Order of Reference. (Annable, Zachery) Modified text on 5/20/2021 (mjr).(Entered: 05/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #23 ON 05/19/2021 IN U.S.DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
	6	9/29/21	24	(926 pgs; 29 docs) Appendix in Support filed by Highland Capital Management LP re: 23 Brief/Memorandum in Support. (Attachments: # 1 Appendix 1 # 2 Appendix 2 # 3 Appendix 3 # 4 Appendix 4 # 5 Appendix 5 # 6 Appendix 6 # 7 Appendix 7 # 8 Appendix 8 # 9 Appendix 9 # 10 Appendix10 # 11 Appendix 11 # 12 Appendix 12 # 13 Appendix 13 # 14 Appendix 14 # 15 Appendix 15 # 16 Appendix 16 # 17 Appendix 17 # 18 Appendix 18 # 19 Appendix 19 # 20 Appendix 20 # 21 Appendix 21# 22 Appendix 22 # 23 Appendix 23 # 24 Appendix 24 # 25 Appendix 25 # 26 Appendix 26 # 27 Appendix 27 # 28 Appendix 28) (Annable, Zachery) Modified linkage and text on 5/20/2021 (mjr). (Entered:05/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #24 ON 05/19/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
Vol. 7 001196	7	9/29/21	26	(7 pgs; 2 docs) MOTION to Dismiss Complaint filed by Highland Capital Management LP (Attachments: # 1 Exhibit(s) A--Proposed Order) (Annable, Zachery) Modified text on 5/28/2021 (jmg).(Entered: 05/27/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #26 ON 05/27/2021 IN U.S.DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)

Vol. 7 001203 thru Vol. 8	8	9/29/21	28	(508 pgs; 14 docs) Appendix in Support filed by Highland Capital Management LP (Attachments: # 1 Appendix 1 # 2 Appendix 2 # 3 Appendix 3 # 4 Appendix 4 # 5 Appendix 5 # 6 Appendix 6 # 7 Appendix 7 # 8 Appendix 8 # 9 Appendix 9 # 10 Appendix 10 # 11 Appendix 11 # 12 Appendix 12 # 13 Appendix 13) (Annable, Zachery) (Entered: 05/27/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #28 ON 05/27/2021 IN U.S. DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
Vol. 9 001711	9	9/29/21	33	(1 pg) Amended Civil Cover Sheet by CLO Holdco Ltd, Charitable DAF Fund LP. Amendment to 2 Supplemental Document. (Sbaiti, Mazin) Modified text on 6/23/2021 (mjr). (Entered: 06/22/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #33 ON 06/22/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001712	10	9/29/21	36	(26 pgs) RESPONSE filed by CLO Holdco Ltd, Charitable DAF Fund LP re: 22 MOTION for an Order to Enforce the Order of Reference (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #36 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001738	11	9/29/21	37	(22 pgs) Appendix in Support filed by CLO Holdco Ltd, Charitable DAF Fund LP re 36 Response/Objection Response to Motion for an Order to Enforce the Order of Reference (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #37 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001760	12	9/29/21	38	(45 pgs) RESPONSE filed by CLO Holdco Ltd, Charitable DAF Fund LP re: 26 MOTION to Dismiss (Defendant Highland Capital Management, L.P.'s Motion to Dismiss Complaint) (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #38 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001805	13	9/29/21	39	(88 pgs) Appendix in Support filed by CLO Holdco Ltd, Charitable DAF Fund LP re 38 Response/Objection to Defendant Highland Capital Management, L.P.'s Motion to Dismiss Complaint (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #39 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001893	14	9/29/21	42	(12 pgs) REPLY filed by Highland Capital Management LP re: 22 MOTION for an Order to Enforce the Order of Reference (Annable, Zachery) (Entered: 07/13/2021) [ORIGINALLY FILED IN 21-CV-0842AS #42 ON 07/13/2021 IN U.S.

			DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
VOL. 9	15	9/29/21	43 (852 pgs) Appendix in Support filed by Highland Capital Management LP re: 42 Reply. (Annable, Zachery) Modified text on 7/14/2021 (mjr). (Entered: 07/13/2021) [ORIGINALLY FILED IN 21-CV-0842AS #43 ON 07/13/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001905 thru Vol. 13	16	9/29/21	45 (21 pgs) REPLY filed by Highland Capital Management LP re: 26 MOTION to Dismiss (Defendant Highland Capital Management, L.P.'s Motion to Dismiss Complaint) (Annable, Zachery) (Entered:07/13/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #44 ON 07/13/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002757	17	9/29/21	57 (7 pgs; 2 docs) MOTION to Dismiss and Joinder in Motion to Dismiss of Highland Capital Management, L.P. filed by Highland CLO Funding Ltd. (Attachments: # 1 Proposed Order) Attorney Paul R Bessette added to party Highland CLO Funding Ltd (pty:dft) (Bessette, Paul) (Entered: 08/30/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #57 ON 08/30/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002778	18	9/29/23	58 (12 pgs) Brief/Memorandum in Support filed by Highland CLO Funding Ltd. re 57 MOTION to Dismiss and Joinder in Motion to Dismiss of Highland Capital Management, L.P. (Bessette, Paul) (Entered: 08/30/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #58 ON 08/30/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002785	19	9/29/23	59 (80 pgs; 5 docs) Appendix in Support filed by Highland CLO Funding Ltd re 58 Brief/Memorandum in Support of Motion (Attachments: # 1 Exhibit(s) A - Jackson v Dear # 2 Exhibit(s) B - Prudential Assurance v. Newman # 3 Exhibit(s) C - Harbourvest Settlement Agreement # 4 Exhibit(s) D - Boleat Declaration) (Bessette, Paul) (Entered: 08/30/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #59 ON 08/30/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002797	20	9/29/21	64 (1 pg) ORDER OF REFERENCE: Pursuant to 28 U.S.C. § 157 and this District's Miscellaneous Order No. 33, this case is hereby REFERRED to Judge Stacey G. C. Jernigan of the United States Bankruptcy Court for the Northern District of Texas, Dallas Division, to be adjudicated as a matter related to the consolidated Chapter 11 Bankruptcy of Highland Capital Management, L.P., Chapter 11 Case No.19-34054. (Ordered by Judge Jane J. Boyle
002877			

Vol. 14				on 9/20/2021) (svc) (Entered: 09/20/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #64 ON 09/20/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002878	21	10/19/21	66	(5 pgs) Notice of hearing filed by Defendant Highland Capital Management, LP (RE: related document(s) 26 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP, 47 Motion to strike document filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 55 Motion to abate filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) Hearing to be held on 11/23/2021 at 09:30 AM at https://us-courts.webex.com/meet/jerniga for 26 and for 47 and for 55, (Annable, Zachery)
002883 thru Vol. 16	22	11/22/21	71	(509 pgs; 2 docs) Witness and Exhibit List <i>for Hearing on November 23, 2021</i> filed by Defendant Highland Capital Management, LP (RE: related document(s) 26 Motion to dismiss adversary proceeding). (Attachments: # 1 Exhibits 1-13) (Hayward, Melissa)
Vol. 17	23	11/22/21	72	(2 pgs) Witness List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 26 Motion to dismiss adversary proceeding, 47 Motion to strike (related document(s): 43 Document), 55 Motion to abate (related document(s) 1 Complaint), 69 Motion to abate <i>Plaintiffs' Amended Motion to Stay All Proceedings</i> (related document(s) 55 Motion to abate (related document(s) 1 Complaint))). (Sbaiti, Mazin)
003392				
003394	24	11/22/21	73	(189 pgs; 4 docs) Exhibit List <i>for November 23, 2021 hearing</i> filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 47 Motion to strike (related document(s): 43 Document), 55 Motion to abate (related document(s) 1 Complaint)). (Attachments: # 1 Exhibit 1_Defendant's Memorandum of Law in Support of Motion for Reconsideration # 2 Exhibit 2_Highland Memorandum in Support of Motion to Dismiss # 3 Exhibit 3_Order (I) Confirming Fifth Amended Plan of Reorganization of Highland) (Sbaiti, Mazin)
003583	25	12/7/21	80	(2 pgs) Order granting Highland CLO Funding, Ltd.'s motion to dismiss adversary as a party with prejudice (related document 57) Entered on 12/7/2021. (Okafor, Marcey) Modified text on 3/11/2022 (Okafor, Marcey).
003585	26	3/11/22	99	(26 pgs) Memorandum of Opinion and order granting motion to dismiss the adversary proceeding (RE: related document(s) 26 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP). Entered on 3/11/2022 (Okafor, Marcey)
003611	27	3/11/22	100	(26 pgs) Order granting motion to dismiss adversary proceeding with prejudice (related document #26) Entered on 3/11/2022. (Okafor, Marcey)

Vol. 18 003637	28	3/21/22	104	(29 pgs) Notice of appeal. Fee Amount \$298 filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 100 Order on motion to dismiss adversary proceeding). Appellant Designation due by 04/4/2022. (Sbaiti, Mazin)
003666	29	5/26/22	120	(177 pgs; 2 docs) Support/supplemental document <i>Motion to Supplement Appellate Record</i> filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 111 Appellant designation). (Attachments: # 1 Amended Transcript of January 14, 2021 Hearing) (Sbaiti, Mazin)
003843	30	6/9/22	121	(1 pg) DISTRICT COURT Order: Case 3:22-00695-B is hereby transferred to the docket of the Honorable Judge Jane J. Boyle for consolidation with The Charitable DAF Fund LP, et al. v. Highland Capital Management LP, Case No. 3:21-cv-3129-N. Judge Karen Gren Scholer no longer assigned to case.(RE: related document(s) 86 Notice of appeal filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 104 Notice of appeal filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Entered on 6/9/2022 (Whitaker, Sheniqua) (Entered: 06/10/2022)
003844	31	10/24/22	122	(7 pgs) Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP (Annable, Zachery)
003851	32	10/14/22	123	(31 pgs) Brief in support filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Annable, Zachery)
Vol. 19 003882 Thru Vol 20	33	10/14/22	124	(513 pgs; 15 docs) Support/supplemental document (<i>Appendix in Support of Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7 # 8 Exhibit 8 # 9 Exhibit 9 # 10 Exhibit 10 # 11 Exhibit 11 # 12 Exhibit 12 # 13 Exhibit 13 # 14 Exhibit 14) (Annable, Zachery)
Vol. 21 004395	34	10/27/22	126	(5 pgs) Notice of hearing (<i>Notice of Hearing and Briefing Schedule on Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP). Hearing to be held on 12/8/2022 at 09:30 AM at https://us-courts.webex.com/meet/jerniga for 122. (Annable, Zachery)

Vol. 21 004400 004410 004442 Thru Vol. 22	35	11/18/22	128	(10 pgs) Motion for withdrawal of reference. Fee amount \$188, filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (Sbaiti, Mazin)
	36	11/18/22	129	(32 pgs) Response opposed to (related document(s): 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP) filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Sbaiti, Mazin)
	37	11/18/22	130	(254 pgs; 2 docs) Response opposed to (related document(s): 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP) filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Attachments: # 1 Appendix) (Sbaiti, Mazin)
Vol. 22 004696 004717 004732 004737 004742	38	9/2/22	131	(21 pgs) DISTRICT COURT MEMORANDUM OPINION AND ORDER: The Court REVERSES and REMANDS the bankruptcy court's Motion to Dismiss Order and AFFIRMS the bankruptcy courts Motion to Stay Order. re: appeal on Civil Action number: Case 3:22-00695-B consolidated with 3:21-CV-3129-B, (RE: related document(s) 81 Order on motion to abate, 100 Order on motion to dismiss adversary proceeding). Entered on 9/2/2022 (Whitaker, Sheniqua) (Entered: 11/29/2022)
	39	12/2/22	133	(15 pgs) Reply to (related document(s): 129 Response filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 130 Response filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) filed by Defendant Highland Capital Management, LP. (Annable, Zachery)
	40	12/7/22	135	(5 pgs) Notice of hearing filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP). Hearing to be held on 1/25/2023 at 01:30 PM at https://us-courts.webex.com/meet/jerniga for 122, (Annable, Zachery)
	41	12/7/22	136	(5 pgs) Notice of hearing filed by Defendant Highland Capital Management, LP (RE: related document(s) 128 Motion for withdrawal of reference filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Status Conference to be held on 1/25/2023 at 01:30 PM at https://us-courts.webex.com/meet/jerniga . (Annable, Zachery).
	42	12/9/22	138	(3 pgs) Response opposed to (related document(s): 128 Motion for withdrawal of reference. Fee amount \$188, filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) filed by Defendant Highland Capital Management, LP. (Annable, Zachery)

Vol. 22 004745	43	12/9/22	139	(25 pgs) Brief in support filed by Defendant Highland Capital Management, LP (RE: related document(s) 138 Response). (Annable, Zachery)
Vol. 23 004770	44	12/9/22	140	(280 pgs; 8 docs) Support/supplemental document (<i>Appendix in Support of Highland Capital Management, L.P.'s Response to Renewed Motion to Withdraw the Reference</i>) filed by Defendant Highland Capital Management, LP (RE: related document(s) 138 Response). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7) (Annable, Zachery)
Vol. 24 005050	45	12/16/22	144	(6 pgs) Reply to (related document(s): 138 Response filed by Defendant Highland Capital Management, LP) filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Sbaiti, Mazin)
005056 Thru Vol. 25.	46	1/23/23	145	(514 pgs; 15 docs) Witness and Exhibit List filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7 # 8 Exhibit 8 # 9 Exhibit 9 # 10 Exhibit 10 # 11 Exhibit 11 # 12 Exhibit 12 # 13 Exhibit 13 # 14 Exhibit 14) (Annable, Zachery)
Vol. 26 005570	47	1/23/23	146	(280 pgs; 8 docs) Witness and Exhibit List filed by Defendant Highland Capital Management, LP (RE: related document(s) 128 Motion for withdrawal of reference. Fee amount \$188.). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7) (Annable, Zachery)
Vol. 27 005850	48	1/23/23	147	(221 pgs; 7 docs) Witness and Exhibit List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Attachments: # 1 Exhibit 1_Excerpts from July 14, 2020 Hearing Transcript # 2 Exhibit 2_HCLOF Members Agreement Relating to the Company # 3 Exhibit 3_HarbourVest Settlement Agreement # 4 Exhibit 4_Order Approving Debtor's Settlement with HarbourVest # 5 Exhibit 5_HCLOF Offering # 6 Exhibit 6 Amended and Restated Investment Advisory Agreement) (Sbaiti, Mazin)
006071	49	1/23/23	148	(3 pgs) Witness and Exhibit List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 128 Motion for withdrawal of reference. Fee amount \$188.). (Phillips, Louis)
Vol. 28 006074	50	1/25/23	150	(56 pgs; 2 docs) Amended Witness and Exhibit List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 147 List (witness/exhibit/generic), 149 List (witness/exhibit/generic)). (Attachments: # 1 Exh 7_Testimony of Mark Patrick at June 8, 2021 hearing) (Sbaiti, Mazin)

Vol. 28 006130	51	1/25/23	152	(3 pgs) Notice of Appearance and Request for Notice by Louis M. Phillips filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Phillips, Louis)
	52	1/25/23	154	(1 pg) Court admitted exhibits date of hearing January 25, 2023 (RE: related document(s) 128 Motion for withdrawal of reference, filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) (COURT ADMITTED DEFENDANT'S EXHIBITS #1, #2, #3, #4, #5 & #6 OFFERED BY ATTY GREG DEMO). (Edmond, Michael) (Entered: 01/27/2023)
Vol. 32 006925 006942 006960	53	2/6/23	158	Report and recommendation to the U.S. District Court by U.S. Bankruptcy Judge. (RE: related document(s) 128 Motion for withdrawal of reference filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Entered on 2/6/2023 (Okafor, Marcey)
	54	2/6/23	161	(18 pgs) DISTRICT COURT Notice of transmission of report and recommendation in re: renewed motion to withdraw reference. Civil Case # 3:22-cv-02802-S. (RE: related document(s) 158 Report and recommendation to the U.S. District Court by U.S. Bankruptcy Judge. (RE: related document(s) 128 Motion for withdrawal of reference filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Entered on 2/6/2023) (Whitaker, Sheniqua)
	55	4/3/23	165	(1 pg) DISTRICT COURT ORDER: The Court GRANTS the 11 Joint Motion to Transfer Proceeding and Consolidate Before Original Court and the above-numbered case (3:22-cv-02802-S) is transferred to the docket of the Honorable Judge Jane Boyle: Civil case 3:21-cv-00842-B (order referring case). (RE: related document(s) 1 Complaint filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 143 Notice of transmission of motion to withdraw reference). Entered on 4/3/2023 (Whitaker, Sheniqua) Modified on 4/10/2023 (Whitaker, Sheniqua). (Entered: 04/10/2023)

TRANSCRIPTS

006961	56	11/24/21	78	(104 pgs) Transcript regarding Hearing Held 11-23-2021 RE: Motion Hearing. THIS TRANSCRIPT WILL BE MADE ELECTRONICALLY AVAILABLE TO THE GENERAL PUBLIC 90 DAYS AFTER THE DATE OF FILING. TRANSCRIPT RELEASE DATE IS 02/22/2022. Until that time the transcript may be viewed at the Clerk's Office or a copy may be obtained from the official court transcriber. Court Reporter/Transcriber Liberty Transcripts/Dipti Patel, Telephone number 847-848-4907. (RE: related document(s) 75 Hearing held on 11/23/2021. (RE: related document(s) 55 MOTION to Stay filed by CLO Holdco Ltd, Charitable DAF Fund LP (Sbaiti, Mazin) (Entered: 08/26/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #55 ON 08/26/2021 IN U.S.
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			<p>DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)) (Appearances: J. Pomerantz and J. Morris for Highland Defendants; J. Jordan and P. Bessett for HCLOF; M. Sbaiti for Plaintiffs. Nonevidentiary hearing. Motion denied. Mr. Pomerantz to upload order.), 76 Hearing held on 11/23/2021. (RE: related document(s) 47 Motion to strike 43 Appendix in support filed by CLO Holdco, Ltd., Charitable DAF Fund, LP (Bridges, Jonathan) Modified text on 7/16/2021 (mjr). (Entered: 07/15/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #47 ON 07/15/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)) (Appearances: J. Pomerantz and J. Morris for Highland Defendants; J. Jordan and P. Bessett for HCLOF; M. Sbaiti for Plaintiffs. Nonevidentiary hearing. Motion denied (Plaintiffs acknowledged complained-of Appendices it did not relate to Motion to Dismiss). Mr. Pomerantz to upload order.)). Transcript to be made available to the public on 02/22/2022. (Patel, Dipti)</p>
57	2/21/23	164	<p>164 (112 pgs) Transcript regarding Hearing Held 1/25/23 RE: HEARING ON DEFENDANT HIGHLAND CAPITAL MANAGEMENT L.P.'S RENEWED MOTION TO DISMISS COMPLAINT (122) AND STATUS CONFERENCE RE: MOTION FOR WITHDRAWAL OF REFERENCE FILED BY PLAINTIFF CLO HOLDCO, LTD., PLAINTIFF CHARITABLE DAF FUND, LP (128). THIS TRANSCRIPT WILL BE MADE ELECTRONICALLY AVAILABLE TO THE GENERAL PUBLIC 90 DAYS AFTER THE DATE OF FILING. TRANSCRIPT RELEASE DATE IS 05/22/2023. Until that time the transcript may be viewed at the Clerk's Office or a copy may be obtained from the official court transcriber. Court Reporter/Transcriber Dipti Patel, Telephone number 847-848-4907. (RE: related document(s) 155 Hearing held on 1/25/2023. (RE: related document(s) 122 Motion to dismiss adversary proceeding, (Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint) filed by Defendant Highland Capital Management, LP filed by Defendant Highland Capital Management, LP) (Appearances: J. Morris and G. Demo for Movants; L. Phillips and M. Sbaiti for Plaintiffs. Evidentiary hearing (appendices). Court took matter under advisement.), 156 Hearing held on 1/25/2023. (RE: related document(s) 128 Motion for withdrawal of reference. Fee amount \$188, filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) (Appearances: J. Morris and G. Demo for Movants; L. Phillips and M. Sbaiti for Plaintiffs. Evidentiary hearing (appendices). Court announced it will recommend denial to District Court. Court is working on Report & Recommendation.)). Transcript to be made available to the public on 05/22/2023. (Patel, Dipti)</p>

Dated: July 14, 2023

Respectfully submitted,

SBAITI & COMPANY PLLC

/s/ Mazin A. Sbaiti

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was filed electronically through the Court's ECF system, which provides notice to all parties of interest, on this 14th day of July, 2023.

/s/ Mazin A. Sbaiti

Mazin A. Sbaiti

testified on behalf of the Highland Advisors and Funds in another proceeding that Mr. Dondero owned and/or controlled these entities. Finally, various NexBank entities objected to the Plan. The Bankruptcy Court does not believe they have liquidated claims against the Debtor. Mr. Dondero appears to be in control of these entities as well.

19. **Background Regarding Dondero Objecting Parties.** To be clear, the Bankruptcy Court has allowed all these objectors to fully present arguments and evidence in opposition to confirmation, even though their economic interests in the Debtor appear to be extremely remote and the Bankruptcy Court questions their good faith. Specifically, the Bankruptcy Court considers them all to be marching pursuant to the orders of Mr. Dondero. In the recent past, Mr. Dondero has been subject to a temporary restraining order and preliminary injunction by the Bankruptcy Court for interfering with Mr. Seery's management of the Debtor in specific ways that were supported by evidence. Around the time that this all came to light and the Bankruptcy Court began setting hearings on the alleged interference, Mr. Dondero's company phone, which he had been asked to turn in to Highland, mysteriously went missing. The Bankruptcy Court merely mentions this in this context as one of many reasons that the Bankruptcy Court has to question the good faith of Mr. Dondero and his affiliates in raising objections to confirmation of the Plan.

20. **Other Confirmation Objections.** Other than the objections filed by Mr. Dondero and the Dondero Related Entities, the only other pending objection to the Plan is the *United States Trustee's Limited Objection to Confirmation of Debtor's Fifth Amended Plan of Reorganization* [Docket No. 1671], which objected to the Plan's exculpation, injunction, and

Debtor release provisions. In juxtaposition, to these pending objections, the Bankruptcy Court notes that the Debtor resolved the following objections to the Plan:

- a. *CLO Holdco, Ltd.'s Joinder to Objection to Confirmation of Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. and Supplemental Objections to Plan Confirmation* [Docket No. 1675]. This Objection has been resolved pursuant to mutually agreed language by the parties set forth in paragraph VV of the Confirmation Order;
- b. *Objection of Dallas County, City of Allen, Allen ISD, City of Richardson, and Kaufman County to Confirmation of the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.* [Docket No. 1662]. This Objection has been resolved pursuant to mutually agreed language by the parties set forth in paragraph QQ of the Confirmation Order;
- c. *Senior Employees' Limited Objection to Debtor's Fifth Amended Plan of Reorganization (filed by Scott Ellington, Thomas Surgent, Frank Waterhouse, Isaac Leventon)* [Docket No. 1669]. This Objection has been resolved pursuant to mutually agreed language by the parties set forth in paragraph 82 and paragraphs RR and SS of the Confirmation Order;
- d. *Limited Objection of Jack Yang and Brad Borud to Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.* [Docket No. 1666] and the amended joinder filed by Davis Deadman, Paul Kauffman and Todd Travers [Docket No. 1679]. This Objection and the amended joinder were resolved by agreement of the parties pursuant to modifications to the Plan filed by the Debtor;
- e. *United States' (IRS) Limited Objection to Debtor's Fifth Amended Plan of Reorganization* [Docket No. 1668]. This Objection has been resolved pursuant to mutually agreed language by the parties set forth in paragraphs TT and UU of the Confirmation Order; and
- f. *Patrick Hagaman Daugherty's Objection to Confirmation of Fifth Amended Plan of Reorganization* [Docket No. 1678]. This objection was resolved by the parties pursuant to the settlement of Mr. Daugherty's claim announced on the record of the Confirmation Hearing.

21. **Capitalized Terms.** Capitalized terms used herein, but not defined herein, shall have the respective meanings attributed to such terms in the Plan and the Disclosure Statement, as applicable.

22. **Jurisdiction and Venue.** The Bankruptcy Court has jurisdiction over the Debtor's Chapter 11 Case pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). Venue of this proceeding and this Chapter 11 Case is proper in this district and in the Bankruptcy Court pursuant to 28 U.S.C. §§ 1408 and 1409.

23. **Chapter 11 Petition.** On the Petition Date, the Debtor commenced a voluntary case under chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware, which case was transferred to the Bankruptcy Court on December 19, 2019. The Debtor continues to operate its business and manage its property as debtor in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No trustee or examiner has been appointed in this Chapter 11 Case. The Office of the United States Trustee appointed the Committee on October 29, 2019.

24. **Judicial Notice.** The Bankruptcy Court takes judicial notice of the docket in this Chapter 11 Case maintained by the clerk of the Bankruptcy Court and the court-appointed claims agent, Kurtzman Carson Consultants LLC ("KCC"), including, without limitation, all pleadings, notices, and other documents filed, all orders entered, and all evidence and arguments made, proffered or adduced at the hearings held before the Bankruptcy Court during this Chapter 11 Case, including, without limitation, the hearing to consider the adequacy of the Disclosure Statement and the Confirmation Hearing, as well as all pleadings, notices, and other documents filed, all orders entered, and all evidence and arguments made, proffered, or adduced at hearings held before the Bankruptcy Court or the District Court for the Northern District of Texas in

connection with an adversary proceeding or appellate proceeding, respectively, related to this Chapter 11 Case.

25. **Plan Supplement Documents.** Prior to the Confirmation Hearing, the Debtor filed each of the Plan Supplements. The Plan Supplements contain, among other documents, the Retained Causes of Action, the Claimant Trust Agreement, the Litigation Sub-Trust Agreement, the Senior Employee Stipulation, the Related Entity List, the Schedule of Employees, the Reorganized Limited Partnership Agreement, supplements to the Liquidation Analysis/Financial Projections, the Schedule of Contracts and Leases to be Assumed, and the other Plan Documents set forth therein (collectively, the “Plan Supplement Documents”).

26. **Retained Causes of Action Adequately Preserved.** The Bankruptcy Court finds that the list of Retained Causes of Action included in the Plan Supplements sufficiently describes all potential Retained Causes of Action, provides all persons with adequate notice of any Causes of Action regardless of whether any specific claim to be brought in the future is listed therein or whether any specific potential defendant or other party is listed therein, and satisfies applicable law in all respects to preserve all of the Retained Causes of Action. The definition of the Causes of Action and Schedule of Retained Causes of Action, and their inclusion in the Plan, specifically and unequivocally preserve the Causes of Action for the benefit of the Reorganized Debtor, the Claimant Trust, or the Litigation Sub-Trust, as applicable.

27. **Plan Modifications Are Non-Material.** In addition to the Plan Supplements, the Debtor made certain non-material modifications to the Plan, which are reflected in (i) the *Redline of Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.*

(as Modified) filed on January 22, 2021 [Docket No. 1809], and (ii) Exhibit B to the *Debtor's Notice of Filing of Plan Supplement to Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (as Modified)* filed on February 1, 2021 [Docket No. 1875] (collectively, the “Plan Modifications”). Section 1127(a) of the Bankruptcy Code provides that a plan proponent may modify its plan at any time before confirmation so long as such modified plan meets the requirements of sections 1122 and 1123 of the Bankruptcy Code. None of the modifications set forth in the Plan Supplements or the Plan Modifications require any further solicitation pursuant to sections 1125, 1126, or 1127 of the Bankruptcy Code and Bankruptcy Rule 3019, because, among other things, they do not materially adversely change the treatment of the claims of any creditors or interest holders who have not accepted, in writing, such supplements and modifications. Among other things, there were changes to the projections that the Debtor filed shortly before the Confirmation Hearing (which included projected distributions to creditors and a comparison of projected distributions under the Plan to potential distributions under a hypothetical chapter 7 liquidation). The Plan Supplements and Plan Modifications did not mislead or prejudice any creditors or interest holders nor do they require that Holders of Claims or Equity Interests be afforded an opportunity to change previously cast votes to accept or reject the Plan. Specifically, the Amended Liquidation Analysis/Financial Projections filed on February 1, 2021 [Docket No. 1875] do not constitute any material adverse change to the treatment of any creditors or interest holders but, rather, simply update the estimated distributions based on Claims that were settled in the interim and provide updated financial data. The filing and notice of the Plan Supplements and Plan Modifications were appropriate and complied with the requirements of

section 1127(a) of the Bankruptcy Code and the Bankruptcy Rules, and no other solicitation or disclosure or further notice is or shall be required. The Plan Supplements and Plan Modifications each became part of the Plan pursuant section 1127(a) of the Bankruptcy Code. The Debtor or Reorganized Debtor, as applicable, is authorized to modify the Plan or Plan Supplement Documents following entry of this Confirmation Order in a manner consistent with section 1127(b) of the Bankruptcy Code, the Plan, and, if applicable, the terms of the applicable Plan Supplement Document.

28. **Notice of Transmittal, Mailing and Publication of Materials.** As is evidenced by the Voting Certifications and the Affidavits of Service and Publication, the transmittal and service of the Plan, the Disclosure Statement, Ballots, and Confirmation Hearing Notice were adequate and sufficient under the circumstances, and all parties required to be given notice of the Confirmation Hearing (including the deadline for filing and serving objections to the confirmation of the Plan) have been given due, proper, timely, and adequate notice in accordance with the Disclosure Statement Order and in compliance with the Bankruptcy Code, the Bankruptcy Rules, the Local Rules, and applicable non-bankruptcy law, and such parties have had an opportunity to appear and be heard with respect thereto. No other or further notice is required. The publication of the Confirmation Hearing Notice, as set forth in the *Notice of Affidavit of Publication* dated December 3, 2020 [Docket No. 1505], complied with the Disclosure Statement Order.

29. **Voting.** The Bankruptcy Court has reviewed and considered the Voting Certifications. The procedures by which the Ballots for acceptance or rejection of the Plan were

distributed and tabulated, including the tabulation as subsequently amended to reflect the settlement of certain Claims to be Allowed in Class 7, were fairly and properly conducted and complied with the Disclosure Statement Order, the Bankruptcy Code, the Bankruptcy Rules, and the Local Rules.

30. **Bankruptcy Rule 3016(a).** In accordance with Bankruptcy Rule 3016(a), the Plan is dated and identifies the Debtor as the proponent of the Plan.

31. **Plan Compliance with Bankruptcy Code (11 U.S.C. § 1129(a)(1)).** As set forth below, the Plan complies with all of the applicable provisions of the Bankruptcy Code, thereby satisfying section 1129(a)(1) of the Bankruptcy Code.

32. **Proper Classification (11 U.S.C. §§ 1122, 1123(a)(1)).** Section 1122 of the Bankruptcy Code provides that a plan may place a claim or interest in a particular class only if such claim or interest is substantially similar to the other claims or interest of such class. The Claims and Equity Interests placed in each Class are substantially similar to other Claims and Equity Interests, as the case may be, in each such Class. Valid business, factual, and legal reasons exist for separately classifying the various Classes of Claims and Equity Interests created under the Plan, and such Classes do not unfairly discriminate between Holders of Claims and Equity Interests.

33. **Classification of Secured Claims.** Class 1 (Jefferies Secured Claim) and Class 2 (Frontier Secured Claim) each constitute separate secured claims held by Jefferies LLC and Frontier State Bank, respectively, and it is proper and consistent with section 1122 of the Bankruptcy Code to separately classify the claims of these secured creditors. Class 3 (Other

Secured Claims) consists of other secured claims (to the extent any exist) against the Debtor, are not substantially similar to the Secured Claims in Class 1 or Class 2, and are also properly separately classified.

34. **Classification of Priority Claims.** Class 4 (Priority Non-Tax Claims) consists of Claims entitled to priority under section 507(a), other than Priority Tax Claims, and are properly separately classified from non-priority unsecured claims. Class 5 (Retained Employee Claims) consists of the potential claims of employees who may be retained by the Debtor on the Effective Date, which claims will be Reinstated under the Plan, are not substantially similar to other Claims against the Debtor, and are properly classified.

35. **Classification of Unsecured Claims.** Class 6 (PTO Claims) consists solely of the claims of the Debtor's employees for unpaid paid time off in excess of the \$13,650 statutory cap amount under sections 507(a)(4) and (a)(5) of the Bankruptcy Code and are dissimilar from other unsecured claims in Class 7 and Class 8. Class 7 (Convenience Claims) allows holders of eligible and liquidated Claims (below a certain threshold dollar amount) to receive a cash payout of the lesser of 85% of the Allowed amount of the creditor's Claim or such holder's *pro rata* share of the Convenience Claims Cash Pool. Class 7 (Convenience Claims) are provided for administrative convenience purposes in order to allow creditors, most of whom are either trade creditors or holders of professional claims, to receive treatment provided under Class 7 in lieu of the treatment of Class 8 (General Unsecured Claims). The Plan also provides for reciprocal "opt out" mechanisms to allow holders of Class 7 Claims to elect to receive the treatment for Class 8 Claims. Class 8 creditors primarily constitute the litigation claims of the Debtor. Class 8 Creditors

will receive Claimant Trust Interests which will be satisfied pursuant to the terms of the Plan. Class 8 also contains an “opt out” mechanism to allow holders of liquidated Class 8 Claims at or below a \$1 million threshold to elect to receive the treatment of Class 7 Convenience Claims. The Claims in Class 7 (primarily trade and professional Claims against the Debtor) are not substantially similar to the Claims in Class 8 (primarily the litigation Claims against the Debtor), and are appropriately separately classified. Valid business reasons also exist to classify creditors in Class 7 separately from creditors in Class 8. Class 7 creditors largely consist of liquidated trade or service providers to the Debtor. In addition, the Claims of Class 7 creditors are small relative to the large litigation claims in Class 8. Furthermore, the Class 8 Claims were overwhelmingly unliquidated when the Plan was filed. The nature of the Class 7 Claims as being largely liquidated created an expectation of expedited payment relative to the largely unliquidated Claims in Class 8, which consists in large part of parties who have been engaged in years, and in some cases over a decade of litigation with the Debtor. Separate classification of Class 7 and Class 8 creditors was the subject of substantial arm’s-length negotiations between the Debtor and the Committee to appropriately reflect these relative differences.

36. **Classification of Equity Interests.** The Plan properly separately classifies the Equity Interests in Class 10 (Class B/C Limited Partnership Interests) from the Equity Interests in Class 11 (Class A Limited Partnership Interests) because they represent different types of equity security interests in the Debtor and different payment priorities.

37. **Elimination of Vacant Classes.** Section III.C of the Plan provides for the elimination of Classes that do not have at least one holder of a Claim or Equity Interest that is

Allowed in an amount greater than zero for purposes of voting to accept or reject the Plan, and are disregarded for purposes of determining whether the Plan satisfies section 1129(a)(8) of the Bankruptcy Code with respect to such Class. The purpose of this provision is to provide that a Class that does not have voting members shall not be included in the tabulation of whether that Class has accepted or rejected the Plan. Pursuant to the Voting Certifications, the only voting Class of Claims or Equity Interests that did not have any members is Class 5 (Retained Employees). As noted above, Class 5 does not have any voting members because any potential Claims in Class 5 would not arise, except on account of any current employees of the Debtor who may be employed as of the Effective Date, which is currently unknown. Thus, the elimination of vacant Classes provided in Article III.C of the Plan does not violate section 1122 of the Bankruptcy Code. Class 5 is properly disregarded for purposes of determining whether or not the Plan has been accepted under Bankruptcy Code section 1129(a)(8) because there are no members in that Class. However, the Plan properly provides for the treatment of any Claims that may potentially become members of Class 5 as of the Effective Date in accordance with the terms of the Plan. The Plan therefore satisfies section 1122 of the Bankruptcy Code.

38. **Classification of Claims and Designation of Non-Classified Claims (11 U.S.C. §§ 1122, 1123(a)(1)).** Section 1123(a)(1) of the Bankruptcy Code requires that the Plan specify the classification of claims and equity security interests pursuant to section 1122 of the Bankruptcy Code, other than claims specified in sections 507(a)(2), 507(a)(3), or 507(a)(8) of the Bankruptcy Code. In addition to Administrative Claims, Professional Fee Claims, and Priority Tax Claims, each of which need not be classified pursuant to section 1123(a)(1) of the Bankruptcy

Code, the Plan designates eleven (11) Classes of Claims and Equity Interests. The Plan satisfies sections 1122 and 1123(a)(1) of the Bankruptcy Code.

39. **Specification of Unimpaired Classes (11 U.S.C. § 1123(a)(2)).** Article III of the Plan specifies that each of Class 1 (Jefferies Secured Claim), Class 3 (Other Secured Claims), Class 4 (Priority Non-Tax Claims), Class 5 (Retained Employee Claims), and Class 6 (PTO Claims) are Unimpaired under the Plan. Thus, the requirement of section 1123(a)(2) of the Bankruptcy Code is satisfied.

40. **Specification of Treatment of Impaired Classes (11 U.S.C. § 1123(a)(3)).** Article III of the Plan designates each of Class 2 (Frontier Secured Claim), Class 7 (Convenience Claims), Class 8 (General Unsecured Claims), Class 9 (Subordinated Claims), Class 10 (Class B/C Limited Partnership Interests), and Class 11 (Class A Limited Partnership Interests) as Impaired and specifies the treatment of Claims and Equity Interests in such Classes. Thus, the requirement of section 1123(a)(3) of the Bankruptcy Code is satisfied.

41. **No Discrimination (11 U.S.C. § 1123(a)(4)).** The Plan provides for the same treatment by the Plan proponent for each Claim or Equity Interest in each respective Class unless the Holder of a particular Claim or Equity Interest has agreed to a less favorable treatment of such Claim or Equity Interest. The Plan satisfies this requirement because Holders of Allowed Claims or Equity Interests in each Class will receive the same rights and treatment as other Holders of Allowed Claims or Equity Interests within such holder's respective class, subject only to the voluntary "opt out" options afforded to members of Class 7 and Class 8 in accordance with the terms of the Plan. Thus, the requirement of section 1123(a)(4) of the Bankruptcy Code is satisfied.

42. **Implementation of the Plan (11 U.S.C. § 1123(a)(5)).** Article IV of the

Plan sets forth the means for implementation of the Plan which includes, but is not limited to, the establishment of: (i) the Claimant Trust; (ii) the Litigation Sub-Trust; (iii) the Reorganized Debtor; and (iv) New GP LLC, in the manner set forth in the Plan Documents, the forms of which are included in the Plan Supplements.

- a. **The Claimant Trust.** The Claimant Trust Agreement provides for the management of the Claimant Trust, as well as the Reorganized Debtor with the Claimant Trust serving as the managing member of New GP LLC (a wholly-owned subsidiary of the Claimant Trust that will manage the Reorganized Debtor as its general partner). The Claimant Trust, the Claimant Trustee, the management and monetization of the Claimant Trust Assets, and the management of the Reorganized Debtor (through the Claimant Trust's role as managing member of New GP LLC) and the Litigation Sub-Trust will all be managed and overseen by the Claimant Trust Oversight Committee. Additionally, the Plan provides for the transfer to the Claimant Trust of all of the Debtor's rights, title, and interest in and to all of the Claimant Trust Assets in accordance with section 1141 of the Bankruptcy Code and for the Claimant Trust Assets to automatically vest in the Claimant Trust free and clear of all Claims, Liens, encumbrances, or interests subject only to the Claimant Trust Interests and the Claimant Trust Expenses, as provided for in the Claimant Trust Agreement. The Claimant Trust will administer the Claimant Trust Assets as provided under the Plan and the Claimant Trust Agreement contained in the Plan Supplements.
- b. **The Litigation Sub-Trust.** The Plan and the Litigation Sub-Trust Agreement provide for the transfer to the Litigation Sub-Trust all of the Claimant Trust's rights, title, and interest in and to all of the Estate Claims (as transferred to the Claimant Trust by the Debtor) in accordance with section 1141 of the Bankruptcy Code and for the Estate Claims to automatically vest in the Litigation Sub-Trust free and clear of all Claims, Liens, encumbrances, or interests subject only to the Litigation Sub-Trust Interests and the Litigation Sub-Trust Expenses, as provided for in the Litigation Sub-Trust Agreement. The Litigation Trustee is charged with investigating, pursuing, and otherwise resolving any Estate Claims (including those with respect to which the Committee has standing to pursue prior to the Effective Date pursuant to the January 9 Order) pursuant to the terms of the Litigation Sub-Trust Agreement and the Plan, regardless of whether any litigation with respect to any Estate Claim was commenced by the Debtor or the Committee prior to the Effective Date.

- c. **The Reorganized Debtor.** The Reorganized Debtor will administer the Reorganized Debtor Assets, which includes managing the wind down of the Managed Funds.

The precise terms governing the execution of these restructuring transactions are set forth in greater detail in the applicable definitive documents included in the Plan Supplements, including the Claimant Trust Agreement, the Litigation Sub-Trust Agreement, and the Schedule of Retained Causes of Action. The Plan, together with the documents and forms of agreement included in the Plan Supplements, provides a detailed blueprint for the transactions contemplated by the Plan. The Plan's various mechanisms provide for the Debtor's continued management of its business as it seeks to liquidate the Debtor's assets, wind down its affairs, and pay the Claims of the Debtor's creditors. Upon full payment of Allowed Claims, plus interest as provided in the Plan, any residual value would then flow to the holders of Class 10 (Class B/C Limited Partnership Interests), and Class 11 (Class A Limited Partnership Interests). Finally, Mr. Seery testified that the Debtor engaged in substantial and arm's length negotiations with the Committee regarding the Debtor's post-Effective Date corporate governance, as reflected in the Plan. Mr. Seery testified that he believes the selection of the Claimant Trustee, Litigation Trustee, and members of the Claimant Trust Oversight Board are in the best interests of the Debtor's economic constituents. Thus, the requirements of section 1123(a)(5) of the Bankruptcy Code are satisfied.

43. **Non-Voting Equity Securities (11 U.S.C. § 1123(a)(6)).** The Debtor is not a corporation and the charter documents filed in the Plan Supplements otherwise comply with section 1123(a)(6) of the Bankruptcy Code. Therefore, the requirement of section 1123(a)(6) of the Bankruptcy Code is satisfied.

44. **Selection of Officers and Directors (11 U.S.C. § 1123(a)(7)).** Article IV

of the Plan provides for the Claimant Trust to be governed and administered by the Claimant Trustee. The Claimant Trust, the management of the Reorganized Debtor, and the management and monetization of the Claimant Trust Assets and the Litigation Sub-Trust will be managed by the Claimant Trust Oversight Board. The Claimant Trust Oversight Board will consist of: (1) Eric Felton, as representative of the Redeemer Committee; (2) Joshua Terry, as representative of Acis; (3) Elizabeth Kozlowski, as representative of UBS; (4) Paul McVoy, as representative of Meta-E Discovery; and (5) David Pauker. Four of the members of the Claimant Trust Oversight Committee are the holders of several of the largest Claims against the Debtor and/or are current members of the Committee. Each of these creditors has actively participated in the Debtor's case, both through their fiduciary roles as Committee members and in their individual capacities as creditors. They are therefore intimately familiar with the Debtor, its business, and assets. The fifth member of the Claimant Trust Oversight Board, David Pauker, is a disinterested restructuring advisor and turnaround manager with more than 25 years of experience advising public and private companies and their investors, and he has substantial experience overseeing, advising or investigating troubled companies in the financial services industry and has advised or managed such companies on behalf of boards or directors, court-appointed trustees, examiners and special masters, government agencies, and private investor parties. The members of the Claimant Trust Oversight Board will serve without compensation, except for Mr. Pauker, who will receive payment of \$250,000 for his first year of service, and \$150,000 for subsequent years.

45. **Selection of Trustees.** The Plan Supplements disclose that Mr. Seery will serve as the Claimant Trustee and Marc Kirschner will serve as the Litigation Trustee. As noted above, Mr. Seery has served as an Independent Board member since January 2020, and as the Chief Executive Officer and Chief Restructuring Officer since July 2020, and he has extensive management and restructuring experience, as evidenced from his curriculum vitae which is part of the record. The evidence shows that Mr. Seery is intimately familiar with the Debtor's organizational structure, business, and assets, as well as how Claims will be treated under the Plan. Accordingly, it is reasonable and in the Estate's best interests to continue Mr. Seery's employment post-emergence as the Claimant Trustee. Mr. Seery, upon consultation with the Committee, testified that he intends to employ approximately 10 of the Debtor's employees to enable him to manage the Debtor's business until the Claimant Trust effectively monetizes its remaining assets, instead of hiring a sub-servicer to accomplish those tasks. Mr. Seery testified that he believes that the Debtor's post-confirmation business can most efficiently and cost-effectively be supported by a sub-set of the Debtor's current employees, who will be managed internally. Mr. Seery shall initially be paid \$150,000 per month for services rendered after the Effective Date as Claimant Trustee; however, Mr. Seery's long-term salary as Claimant Trustee and the terms of any bonuses and severance are subject to further negotiation by Mr. Seery and the Claimant Trust Oversight Board within forty-five (45) days after the Effective Date. The Bankruptcy Court has also reviewed Mr. Kirschner's curriculum vitae. Mr. Kirschner has been practicing law since 1967 and has substantial experience in bankruptcy litigation matters, particularly with respect to his prior experience as a litigation trustee for several litigation trusts, as set forth on the record of the

Confirmation Hearing and in the Confirmation Brief. Mr. Kirschner shall be paid \$40,000 per month for the first three months and \$20,000 per month thereafter, plus a success fee related to litigation recoveries. The Committee and the Debtor had arm's lengths negotiations regarding the post-Effective Date corporate governance structure of the Reorganized Debtor and believe that the selection of the Claimant Trustee, the Litigation Trustee, and the Claimant Trust Oversight Committee are in the best interests of the Debtor's economic stakeholders. Section 1123(a)(7) of the Bankruptcy Code is satisfied.

46. Debtor's Compliance with Bankruptcy Code (11 U.S.C. § 1129(a)(2)).

Pursuant to section 1129(a)(2) of the Bankruptcy Code, the Debtor has complied with the applicable provisions of the Bankruptcy Code, including sections 1122, 1123, 1124, 1125, and 1126 of the Bankruptcy Code, the Bankruptcy Rules, and the Disclosure Statement Order governing notice, disclosure, and solicitation in connection with the Plan, the Disclosure Statement, the Plan Supplements, and all other matters considered by the Bankruptcy Court in connection with this Chapter 11 Case.

47. Debtor's Solicitation Complied with Bankruptcy Code and Disclosure Statement Order. Before the Debtor solicited votes on the Plan, the Bankruptcy Court entered the Disclosure Statement Order. In accordance with the Disclosure Statement Order and evidenced by the Affidavits of Service and Publication, the Debtor appropriately served (i) the Solicitation Packages (as defined in the Disclosure Statement Order) on the Holders of Claims in Classes 2, 7, 8 and 9 and Holders of Equity Interests in Classes 10 and 11 who were entitled to vote on the Plan; and (ii) the Notice of Nonvoting Status (as defined in the Disclosure Statement Order) and the

Confirmation Hearing Notice to the Holders of Claims in Classes 1, 3, 4, 5 and 6, who were not entitled to vote on the Plan pursuant to the Disclosure Statement Order. The Disclosure Statement Order approved the contents of the Solicitation Packages provided to Holders of Claims and Equity Interests entitled to vote on the Plan, the notices provided to parties not entitled to vote on the Plan, and the deadlines for voting on and objecting to the Plan. The Debtor and KCC each complied with the content and delivery requirements of the Disclosure Statement Order, thereby satisfying sections 1125(a) and (b) of the Bankruptcy Code, as evidenced by the Affidavits of Service and Publication. The Debtor also satisfied section 1125(c) of the Bankruptcy Code, which provides that the same disclosure statement must be transmitted to each holder of a claim or interest in a particular class. The Debtor caused the same Disclosure Statement to be transmitted to all holders of Claims and Equity Interests entitled to vote on the Plan. The Debtor has complied in all respects with the solicitation requirements of section 1125 of the Bankruptcy Code and the Disclosure Statement Order. The Bankruptcy Court rejects the arguments of the Mr. Dondero and certain Dondero Related Entities that the changes made to certain assumptions and projections from the Liquidation Analysis annexed as Exhibit C to the Disclosure Statement (the “Liquidation Analysis”) to the Amended Liquidation Analysis/Financial Projections require resolicitation of the Plan. The Bankruptcy Court heard credible testimony from Mr. Seery regarding the changes to the Liquidation Analysis as reflected in the Amended Liquidation Analysis/Financial Projections. Based on the record, including the testimony of Mr. Seery, the Bankruptcy Court finds that the changes between the Liquidation Analysis and the Amended Liquidation Analysis/Financial Projections do not constitute materially adverse change to the treatment of Claims or Equity

Interests. Instead, the changes served to update the projected distributions based on Claims that were settled after the approval of the Disclosure Statement and to otherwise incorporate more recent financial data. Such changes were entirely foreseeable given the large amount of unliquidated Claims at the time the Disclosure Statement was approved and the nature of the Debtor's assets. The Bankruptcy Court therefore finds that holders of Claims and Equity Interests were not misled or prejudiced by the Amended Liquidation Analysis/Financial Projections and the Plan does not need to be resolicited.

48. **Plan Proposed in Good Faith and Not by Means Forbidden by Law (11 U.S.C. § 1129(a)(3)).** The Debtor has proposed the Plan in good faith and not by any means forbidden by law, thereby satisfying section 1129(a)(3) of the Bankruptcy Code. In determining that the Plan has been proposed in good faith, the Bankruptcy Court has examined the totality of the circumstances surrounding the filing of this Chapter 11 Case, the Plan itself, and the extensive, unrebutted testimony of Mr. Seery in which he described the process leading to Plan's formulation. Based on the totality of the circumstances and Mr. Seery's testimony, the Bankruptcy Court finds that the Plan is the result of extensive arm's-length negotiations among the Debtor, the Committee, and key stakeholders, and promotes the objectives and purposes of the Bankruptcy Code. Specifically, the Debtor's good faith in proposing the Plan is supported by the following facts adduced by Mr. Seery:

- a. The Independent Board determined that it should consider all potential restructuring alternatives, including pursuit of a traditional restructuring and the continuation of the Debtor's business, a potential sale of the Debtor's assets in one or more transactions, an asset monetization plan similar to that described in the Plan, and a so-called "grand bargain" plan that would involve Mr. Dondero's sponsorship of a plan with a substantial equity infusion.

- b. The Debtor subsequently engaged in arm's-length, good faith negotiations with the Committee over an asset monetization Plan commencing in June 2020, which negotiations occurred over the next several months.
- c. Negotiations between the Debtor and the Committee were often contentious over disputes, including, but not limited to, the post-confirmation corporate governance structure and the scope of releases contemplated by the Plan.
- d. While negotiations with the Committee progressed, the Independent Board engaged in discussions with Mr. Dondero regarding a potential "grand bargain" plan which contemplated a significant equity infusion by Mr. Dondero, and which Mr. Seery personally spent hundreds of hours pursuing over many months.
- e. On August 3, 2020, the Bankruptcy Court entered the *Order Directing Mediation* [Docket No. 912] pursuant to which the Bankruptcy Court ordered the Debtor, the Committee, UBS, Acis, the Redeemer Committee, and Mr. Dondero into mediation. As a result of this mediation, the Debtor negotiated the settlement of the claims of Acis and Mr. Terry, which the Bankruptcy Court approved on October 28, 2020 [Docket No. 1302].
- f. On August 12, 2020, the Debtor filed its *Chapter 11 Plan of Reorganization of Highland Capital Management, L.P.* [Docket No. 944] (the "Initial Plan") and related disclosure statement (the "Initial Disclosure Statement") which were not supported by either the Committee or Mr. Dondero. The Independent Board filed the Initial Plan and Initial Disclosure Statement in order to act as a catalyst for continued discussions with the Committee while it simultaneously worked with Mr. Dondero on the "grand bargain" plan.
- g. The Bankruptcy Court conducted a contested hearing on the Initial Disclosure Statement on October 27, 2020. The Committee and other parties objected to approval of the Disclosure Statement at the Initial Disclosure Statement hearing, which was eventually continued to November 23, 2020.
- h. Following the Initial Disclosure Statement hearing, the Debtor continued to negotiate with the Committee and ultimately resolved the remaining material disputes and led to the Bankruptcy Court's approval of the Disclosure Statement on November 23, 2020.
- i. Even after obtaining the Bankruptcy Court's approval of the Disclosure Statement, the Debtor and the Committee continued to negotiate with Mr. Dondero and the Committee over a potential "pot plan" as an alternative to the Plan on file with the Bankruptcy Court, but such efforts were unsuccessful. This history conclusively demonstrates that the Plan is being proposed in good faith within the meaning of section 1129(a)(3).

49. **Payments for Services or Costs and Expenses (11 U.S.C. § 1129(a)(4)).**

Article II.B of the Plan provides that Professionals will file all final requests for payment of Professional Fee Claims no later than 60 days after the Effective Date, thereby providing an adequate period of time for interested parties to review such claims. The procedures set forth in the Plan for the Bankruptcy Court's approval of the fees, costs, and expenses to be paid in connection with this chapter 11 Case, or in connection with the Plan and incident to this Chapter 11 Case, satisfy the objectives of and are in compliance with section 1129(a)(4) of the Bankruptcy Code.

50. **Directors, Officers, and Insiders (11 U.S.C. § 1129(a)(5)).** Article IV.B

of the Plan provides for the appointment of the Claimant Trustee, Litigation Trustee, and the Claimant Trust Oversight Committee and the members thereto. For the reasons more fully explained in paragraphs 44-45 of this Confirmation Order with respect to the requirement of section 1123(a)(7) of the Bankruptcy Code, the Debtor has disclosed the nature of compensation of any insider to be employed or retained by the Reorganized Debtor, if applicable, and compensation for any such insider. The appointment of such individuals is consistent with the interests of Claims and Equity Interests and with public policy. Thus, the Plan satisfies section 1129(a)(5) of the Bankruptcy Code.

51. **No Rate Changes (11 U.S.C. § 1129(a)(6)).** The Plan does not provide for

any rate change that requires regulatory approval. Section 1129(a)(6) of the Bankruptcy Code is thus not applicable.

acceleration of term notes owed to the Debtor by the following Dondero Related Entities: NexPoint Advisors, L.P.; Highland Capital Management Services, Inc.; and HCRE Partners, LLC (n/k/a NexPoint Real Estate Partners, LLC). Under the Plan, as of the Confirmation Date, (a) Class 7 General Unsecured Creditors are projected to receive 85% on account of their claims; and (b) Class 8 General Unsecured Creditors are projected to receive at least approximately 71% on account of their Claims. Under a hypothetical chapter 7 liquidation, all general unsecured creditors are projected to receive approximately 55% on account of their Claims. The Bankruptcy Court finds that the distributions that Class 7 and 8 General Unsecured Creditors are projected to receive under the Plan substantially exceeds that which they would receive under a chapter 7 liquidation based on Mr. Seery's testimony, including the following credible reasons he posited, among others:

- a. The nature of the Debtor's assets is complex. Certain assets relate to complicated real estate structures and private equity investments in operating businesses. Mr. Seery's extensive experience with the Debtor during the thirteen months since his appointment as an Independent Director and later Chief Executive Officer and Chief Restructuring Officer, provides him with a substantial learning curve in connection with the disposition of the Debtor's assets and are reasonably expected to result in him being able to realize tens of millions of dollars more value than would a chapter 7 trustee.
- b. Assuming that a hypothetical chapter 7 trustee could even operate the Debtor's business under chapter 7 of the Bankruptcy Code and hire the necessary personnel with the relevant knowledge and experience to assist him or her in selling the Debtor's assets, a chapter 7 trustee would likely seek to dispose of the Debtor's assets in a forced sale liquidation which would generate substantially less value for the Debtor's creditors than the asset monetization plan contemplated by the Plan.
- c. A chapter 7 trustee would be unlikely to retain the Debtor's existing professionals to assist in its efforts to monetize assets, resulting in delays, increased expenses, and reduced asset yields for the chapter 7 estate.

- d. The chapter 7 estate would be unlikely to maximize value as compared to the asset monetization process contemplated by the Plan because potential buyers are likely to perceive a chapter 7 trustee as engaging in a quick, forced “fire sale” of assets; and
- e. The Debtor’s employees, who are vital to its efforts to maximum value and recoveries for stakeholders, may be unwilling to provide services to a chapter 7 trustee.

Finally, there is no evidence to support the objectors’ argument that the Claimant Trust Agreement’s disclaimed liability for ordinary negligence by the Claimant Trustee compared to a chapter 7 trustee’s liability has any relevance to creditor recoveries in a hypothetical chapter 7 liquidation. Thus, section 1129(a)(7) of the Bankruptcy Code is satisfied.

53. **Acceptance by Certain Classes (11 U.S.C. § 1129(a)(8)).** Classes 1, 3, 4, 5 and 6 are Unimpaired under the Plan. Class 2 (Frontier Secured Claim), Class 7 (Convenience Claims), and Class 9 (Subordinated Claims) have each voted to accept the Plan in accordance with the Bankruptcy Code, thereby satisfying section 1129(a)(8) as to those Classes. However, Class 8 (General Unsecured Claims), Class 10 (Class B/C Limited Partnership Interests), and Class 11 (Class A Limited Partnership Interests) have not accepted the Plan. Accordingly, section 1129(a)(8) of the Bankruptcy Code has not been satisfied. The Plan, however, is still confirmable because it satisfies the nonconsensual confirmation provisions of section 1129(b), as set forth below.

54. **Treatment of Administrative, Priority, Priority Tax Claims, and Professional Fee Claims (11 U.S.C. § 1129(a)(9)).** The treatment of Administrative Claims, Priority Claims, and Professional Fee Claims pursuant to Article III of the Plan, and as set forth below with respect to the resolution of the objections filed by the Internal Revenue Service and

certain Texas taxing authorities satisfies the requirements of sections 1129(a)(9) of the Bankruptcy Code.

55. **Acceptance by Impaired Class (11 U.S.C. § 1129(a)(10)).** Class 2 (Frontier Secured Claims) and Class 7 (Convenience Claims) are each Impaired Classes of Claims that voted to accept the Plan, determined without including any acceptance of the Plan by any insider. Therefore, the requirement of section 1129(a)(10) of the Bankruptcy Code is satisfied.

56. **Feasibility (11 U.S.C. § 1129(a)(11)).** Article IV of the Plan provides for the implementation of the Plan through the Claimant Trust, the Litigation Sub-Trust, and the Reorganized Debtor. The Plan provides that the Claimant Trust, among other things, will monetize and distribute the Debtor's remaining assets. The Disclosure Statement, the Amended Liquidation Analysis/Financial Projections, and the other evidence presented at the Confirmation Hearing provide a reasonable probability of success that the Debtor will be able to effectuate the provisions of the Plan. The Plan contemplates the establishment of the Claimant Trust upon the Effective Date, which will monetize the Estate's assets for the benefit of creditors. Mr. Seery testified that the Class 2 Frontier Secured Claim will be paid over time pursuant to the terms of the New Frontier Note and the Reorganized Debtor will have sufficient assets to satisfy its obligations under this note. The Claims of the Holders of Class 7 Claims (as well as those Class 8 creditors who validly opted to receive the treatment of Class 7 Claims) are expected to be satisfied shortly after the Effective Date. Holders of Class 8 Claims (including any holders of Class 7 Claims who opted to receive the treatment provided to Class 8 Claims) are not guaranteed any recovery and will

periodically receive pro rata distributions as assets are monetized pursuant to the Plan and the Claimant Trust Agreement. Thus, section 1129(a)(11) of the Bankruptcy Code is satisfied.

57. **Payment of Fees (11 U.S.C. § 1129(a)(12)).** All fees payable under 28 U.S.C. § 1930 have been paid or will be paid on or before the Effective Date pursuant to Article XII.A of the Plan, thus satisfying the requirement of section 1129(a)(12) of the Bankruptcy Code. The Debtor has agreed that the Reorganized Debtor, the Claimant Trust, and the Litigation Sub-Trust shall be jointly and severally liable for payment of quarterly fees to the Office of the United States Trustee pursuant to 28 U.S.C. § 1930 through the entry of the Final Decree for the Debtor or the dismissal or conversion of the Chapter 11 Case.

58. **Retiree Benefits.** The Plan provides for the assumption of the Pension Plan (to the extent such Pension Plan provides “retiree benefits” and is governed by section 1114 of the Bankruptcy Code). Thus, the Plan complies with section 1129(a)(13) of the Bankruptcy Code, to the extent applicable.

59. **Miscellaneous Provisions (11 U.S.C. §§ 1129(a)(14)-(16)).** Sections 1129(a)(14)-(16) of the Bankruptcy Code are inapplicable as the Debtor (i) has no domestic support obligations (section 1129(a)(14)), (ii) is not an individual (section 1129(a)(15)), and (iii) is not a nonprofit corporation (section 1129(a)(16)).

60. **No Unfair Discrimination; Fair and Equitable Treatment (11 U.S.C. § 1129(b)).** The classification and treatment of Claims and Equity Interests in Classes 8, 10 and 11, which have not accepted the Plan, is proper pursuant to section 1122 of the Bankruptcy Code, does

not discriminate unfairly, and is fair and equitable pursuant to section 1129(b)(1) of the Bankruptcy Code.

- a. Class 8. The Plan is fair and equitable with respect to Class 8 General Unsecured Claims. While Equity Interests in Class 10 and Class 11 will receive a contingent interest in the Claimant Trust under the Plan (the “Contingent Interests”), the Contingent Interests will not vest unless and until holders of Class 8 General Unsecured Claims and Class 9 Subordinated Claims receive distributions equal to 100% of the amount of their Allowed Claims plus interest as provided under the Plan and Claimant Trust Agreement. Accordingly, as the holders of Equity Interests that are junior to the Claims in Class 8 and Class 9 will not receive or retain under the Plan on account of such junior claim interest any property unless and until the Claims in Class 8 and Class 9 are paid in full plus applicable interest, the Plan is fair and equitable with respect to holders of Class 8 General Unsecured Claims pursuant to section 1129(b)(2)(B) of the Bankruptcy Code and the reasoning of *In re Introgen Therapeutics* 429 B.R 570 (Bankr. W.D. Tex. 2010).
- b. Class 10 and Class 11. There are no Claims or Equity Interests junior to the Equity Interests in Class 10 and Class 11. Equity Interests in Class 10 and 11 will neither receive nor retain any property under the Plan unless Allowed Claims in Class 8 and Class 9 are paid in full plus applicable interest pursuant to the terms of the Plan and Claimant Trust Agreement. Thus, the Plan does not violate the absolute priority rule with respect to Classes 10 and 11 pursuant to Bankruptcy Code section 1129(b)(2)(C). The Plan does not discriminate unfairly as to Equity Interests. As noted above, separate classification of the Class B/C Partnership Interests from the Class A Partnerships Interests is appropriate because they constitute different classes of equity security interests in the Debtor, and each are appropriately separately classified and treated.

Accordingly, the Plan does not violate the absolute priority rule, does not discriminate unfairly, and is fair and equitable with respect to each Class that has rejected the Plan. Thus, the Plan satisfies the requirements of section 1129(b) of the Bankruptcy Code with respect to Classes 8, 10, and 11.

61. **Only One Plan (11 U.S.C. § 1129(c)).** The Plan is the only chapter 11 plan confirmed in this Chapter 11 Case, and the requirements of section 1129(c) of the Bankruptcy Code are therefore satisfied.

62. **Principal Purpose (11 U.S.C. § 1129(d)).** Mr. Seery testified that the principal purpose of the Plan is neither the avoidance of taxes nor the avoidance of the application of section 5 of the Securities Act of 1933, and no governmental unit has objected to the confirmation of the Plan on any such grounds. Accordingly, section 1129(d) of the Bankruptcy Code is inapplicable.

63. **Satisfaction of Confirmation Requirements.** Based upon the foregoing, the Plan satisfies the requirements for confirmation set forth in section 1129 of the Bankruptcy Code and should be confirmed.

64. **Good Faith Solicitation (11 U.S.C. § 1125(e)).** The Debtor, the Independent Directors, and the Debtor's employees, advisors, Professionals, and agents have acted in good faith within the meaning of section 1125(e) of the Bankruptcy Code and in compliance with the applicable provisions of the Bankruptcy Code and Bankruptcy Rules in connection with all of their respective activities relating to the solicitation of acceptances of the Plan and their participation in the activities described in section 1125 of the Bankruptcy Code, and they are entitled to the protections afforded by section 1125(e) of the Bankruptcy Code.

65. **Discharge (11 U.S.C. § 1141(d)(3)).** The Debtor is entitled to a discharge of debts pursuant to section 1141(d)(3)(B) of the Bankruptcy Code. Under the Plan, the Claimant Trust or Reorganized Debtor, as applicable, will continue to manage funds and conduct business

in the same manner as the Debtor did prior to Plan confirmation, which includes the management of the CLOs, Multi-Strat, Restoration Capital, the Select Fund and the Korea Fund. Although the Plan projects that it will take approximately two years to monetize the Debtor's assets for fair value, Mr. Seery testified that while the Reorganized Debtor and Claimant Trust will be monetizing their assets, there is no specified time frame by which this process must conclude. Mr. Seery's credible testimony demonstrates that the Debtor will continue to engage in business after consummation of the Plan, within the meaning of Section 1141(d)(3)(b) and that the Debtor is entitled to a discharge pursuant to section 1141(d)(1) of the Bankruptcy Code.

66. **Retention of Jurisdiction.** The Bankruptcy Court may properly retain jurisdiction over the matters set forth in Article XI of the Plan and/or section 1142 of the Bankruptcy Code to the maximum extent under applicable law.

67. **Additional Plan Provisions (11 U.S.C. § 1123(b)).** The Plan's provisions are appropriate, in the best interests of the Debtor and its Estate, and consistent with the applicable provisions of the Bankruptcy Code, Bankruptcy Rules, and Local Rules.

68. **Executory Contracts and Unexpired Leases (11 U.S.C. § 1123(b)(2)).** The Debtor has exercised reasonable business judgment with respect to the rejection of the Executory Contracts and Unexpired Leases pursuant the terms of the Plan and this Confirmation Order, and such rejections are justified and appropriate in this Chapter 11 Case. The Debtor also filed the List of Assumed Contracts, which contain notices to the applicable counterparties to the contracts set forth on Exhibit "FF" to Plan Supplement filed on February 1, 2021 [Docket No. 1875] and which exhibit sets forth the list of executory contracts and unexpired leases to be

assumed by the Debtor pursuant to the Plan (collectively, the “Assumed Contracts”). With respect to the Assumed Contracts, only one party objected to the assumption of any of the Assumed Contracts, but that objection was withdrawn.⁸ Any modifications, amendments, supplements, and restatements to the Assumed Contracts that may have been executed by the Debtor during the Chapter 11 Case shall not be deemed to alter the prepetition nature of the Assumed Contracts or the validity, priority, or amount of any Claims that may arise in connection therewith. Assumption of any Assumed Contract pursuant to the Plan and full payment of any applicable Cure pursuant to the Plan shall result in the full release and satisfaction of any Cures, Claims, or defaults, whether monetary or nonmonetary, including defaults of provisions restricting the change in control or ownership interest composition or other bankruptcy-related defaults, arising under any assumed Executory Contract or Unexpired Lease at any time prior to the effective date of assumption.

69. **Compromises and Settlements Under and in Connection with the Plan** (**11 U.S.C. § 1123(b)(3)**). All of the settlements and compromises pursuant to and in connection with the Plan, comply with the requirements of section 1123(b)(3) of the Bankruptcy Code and Bankruptcy Rule 9019.

70. **Debtor Release, Exculpation and Injunctions** (**11 U.S.C. § 1123(b)**). The Debtor Release, Exculpation, and Injunction provisions provided in the Plan (i) are within the jurisdiction of the Bankruptcy Court under **28 U.S.C. § 1334**; (ii) are integral elements of the transactions incorporated into the Plan, and inextricably bound with the other provisions of the Plan; (iii) confer material benefit on, and are in the best interests of, the Debtor, its Estate, and its

⁸ See Notice of Withdrawal of James Dondero’s Objection Debtor’s Proposed Assumption of Contracts and Cure Amounts Proposed in Connection Therewith [Docket No. 1876]

creditors; (iv) are fair, equitable, and reasonable; (v) are given and made after due notice and opportunity for hearing; (vi) satisfy the requirements of Bankruptcy Rule 9019; and (vii) are consistent with the Bankruptcy Code and other applicable law, and as set forth below.

71. **Debtor Release.** Section IX.D of the Plan provides for the Debtor’s release of the Debtor’s and Estate’s claims against the Released Parties. Releases by a debtor are discretionary and can be provided by a debtor to persons who have provided consideration to the Debtor and its estate pursuant to section 1123(b)(3)(A) of the Bankruptcy Code. Contrary to the objections raised by Mr. Dondero and certain of the Dondero Related Entities, the Debtor Release is appropriately limited to release claims held by the Debtor and does not purport to release the claims held by the Claimant Trust, Litigation Sub-Trust, or other third parties. The Plan does not purport to release any claims held by third parties and the Bankruptcy Court finds that the Debtor Release is not a “disguised” release of any third party claims as asserted by certain objecting parties. The limited scope of the Debtor Release in the Plan was extensively negotiated with the Committee, particularly with the respect to the Debtor’s conditional release of claims against employees, as identified in the Plan, and the Plan’s conditions and terms of such releases. The Plan does not release (i) any obligations of any party under the Plan or any document, instrument, or agreement executed to implement the Plan, (ii) the rights or obligations of any current employee of the Debtor under any employment agreement or plan, (iii) the rights of the Debtor with respect to any confidentiality provisions or covenants restricting competition in favor of the Debtor under any employment agreement with a current or former employee of the Debtor, (iv) any Avoidance Actions, or (v) any Causes of Action arising from willful misconduct, criminal misconduct, actual

fraud, or gross negligence of such applicable Released Party as determined by Final Order of the Bankruptcy Court or any other court of competent jurisdiction. The Debtor Release also contains conditions to such releases as set forth in Article X.D of the Plan with respect to employees (the “Release Conditions”). Until the an employee satisfies the Release Conditions or the Release Conditions otherwise terminate, any claims against such employee will be tolled so that if the Release Conditions are not met the Litigation Trustee may pursue claims against an employee at a later date. The evidence before the Bankruptcy Court, including, but not limited to Mr. Seery’s testimony, demonstrates that the Debtor is not aware of any claims against any of the Released Parties, that the Released Parties have been instrumental in assisting the Debtor’s efforts toward confirmation of the Plan and that, therefore, the releases are a *quid pro quo* for the Released Parties’ significant contributions to a highly complex and contentious restructuring. The Committee, whose members hold approximately \$200 million in claims against the Estate, is highly sophisticated and is represented by highly sophisticated professionals, and has actively and vigorously negotiated the terms of the Debtor Release, which was the subject of significant controversy at the Initial Disclosure Statement hearing held by the Bankruptcy Court on October 27, 2020.

72. **Exculpation.** Section IX.C of the Plan provides for the exculpation of certain Exculpated Parties to the extent provided therein (the “Exculpation Provision”). As explained below, the Exculpation Provision is appropriate under the unique circumstances of this litigious Chapter 11 Case and consistent with applicable Fifth Circuit precedent. First, with respect to the Independent Directors, their agents, and their advisors, including any employees acting at

their direction, the Bankruptcy Court finds and concludes that it has already exculpated these parties for acts other than willful misconduct and gross negligence pursuant to the January 9 Order. The January 9 Order was specifically agreed to by Mr. Dondero, who was in control of the Debtor up until entry of the January 9 Order. The January 9 Order was not appealed. In addition to the appointment of the Independent Directors in an already contentious and litigious case, the January 9 Order set the standard of care for the Independent Directors and specifically exculpated them for negligence. Mr. Seery and Mr. Dubel each testified that they had input into the contents of the January 9 Order and would not have agreed to their appointment as Independent Directors if the January 9 Order did not include the protections set forth in paragraph 10 of the January 9 Order. Paragraph 10 of the January 9 Order (1) requires that parties wishing to sue the Independent Directors or their agents and advisors must first seek approval from the Bankruptcy Court before doing so; (2) sets the standard of care for the Independent Directors during the Chapter 11 Case and exculpated the Independent Directors for acts other than willful misconduct or gross negligence; (3) only permits suits against the Independent Directors to proceed for colorable claims of willful misconduct and gross negligence upon order of the Bankruptcy Court; and (4) does not expire by its terms.

73. **Existing Exculpation of Independent Directors.** The Bankruptcy Court also finds and concludes that it has already exculpated Mr. Seery acting in the capacity as Chief Executive Officer and Chief Restructuring Officer pursuant to the July 16 Order. The Bankruptcy Court concludes its previous approval of the exculpation of the Independent Directors, their agents, advisors and employees working at their direction pursuant to the January 9 Order, and the Chief

Executive Officer and Chief Restructuring Officer pursuant to the July 16 Order constitutes the law of this case and are *res judicata* pursuant to *In re Republic Supply Co. v. Shoaf*, 815 F.2d 1046 (5th Cir.1987). The January 9 Order and July 16 Order cannot be collaterally attacked based on the objectors' objection to the exculpation of the Independent Directors, their agents, and advisors, including any employees acting at their direction, as well as the Chief Executive Officer and Chief Restructuring Officer, that the Bankruptcy Court already approved pursuant to the January 9 Order and the July 16 Order.

74. **The Exculpation Provision Complies with Applicable Law.** Separate and apart from the *res judicata* effect of the January 9 Order and the July 16 Order, the Bankruptcy Court also finds and concludes that the Exculpation Provision is consistent with applicable law, including *In re Pacific Lumber Co.*, 584 F.3d 229 (5th Cir. 2009), for several reasons:

- a. First, the statutory basis for *Pacific Lumber's* denial of exculpation for certain parties other than a creditors' committee and its members is that section 524(e) of the Bankruptcy Code "only releases the debtor, not co-liable third parties." *Pacific Lumber*, 253 F.3d at 253. However, *Pacific Lumber* does not prohibit all exculpations under the Bankruptcy Code and the court in such case specifically approved the exculpations of a creditors' committee and its members on the grounds that "11 U.S.C. § 1103(c), which lists the creditors' committee's powers, implies committee members have qualified immunity for actions within the scope of their duties.... [I]f members of the committee can be sued by persons unhappy with the committee's performance during the case or unhappy with the outcome of the case, it will be extremely difficult to find members to serve on an official committee." *Pacific Lumber*, 253 F.3d at 253 (quoting Lawrence P. King, et al, Collier on Bankruptcy, ¶ 1103.05[4][b] (15th Ed. 2008)). *Pacific Lumber's* rationale for permitted exculpation of creditors' committees and their members (which was clearly policy-based and based on a creditors' committee qualified immunity flowing from their duties under section 1103(c) of the Bankruptcy Code and their disinterestedness and importance in chapter 11 cases) does not preclude exculpation to other parties in a particular chapter 11 case that perform similar roles to a creditors' committee and its members. The Independent Directors, and by extension the Chief Executive Officer and Chief Restructuring Officer, were not

part of the Debtor's enterprise prior to their appointment by the Bankruptcy Court under the January 9 Order. The Bankruptcy Court appointed the Independent Directors in lieu of a chapter 11 trustee to address what the Bankruptcy Court perceived as serious conflicts of interest and fiduciary duty concerns with the then-existing management prior to January 9, 2020, as identified by the Committee. In addition, the Bankruptcy Court finds that the Independent Directors expected to be exculpated from claims of negligence, and would likely have been unwilling to serve in contentious cases absent exculpation. The uncontroverted testimony of Mr. Seery and Mr. Dubel demonstrates that the Independent Directors would not have agreed to accept their roles without the exculpation and gatekeeper provision in the January 9 Order. Mr. Dubel also testified as to the increasing important role that independent directors are playing in complex chapter 11 restructurings and that unless independent directors could be assured of exculpation for simple negligence in contentious bankruptcy cases they would be reluctant to accept appointment in chapter 11 cases which would adversely affect the chapter 11 restructuring process. The Bankruptcy Court concludes that the Independent Directors were appointed under the January 9 Order in order to avoid the appointment of a chapter 11 trustee and are analogous to a creditors' committee rather than an incumbent board of directors. The Bankruptcy Court also concludes that if independent directors cannot be assured of exculpation for simple negligence in contentious bankruptcy cases, they may not be willing to serve in that capacity. Based upon the foregoing, the Bankruptcy Court concludes that *Pacific Lumber's* policy of exculpating creditors' committees and their members from "being sued by persons unhappy with the committee's performance during the case or unhappy with the outcome of the case" is applicable to the Independent Directors in this Chapter 11 Case.⁹

- b. Second, the Bankruptcy Court also concludes that *Pacific Lumber* does not preclude the exculpation of parties if there is a showing that "costs [that] the released parties might incur defending against such suits alleging such negligence are likely to swamp either the Exculpated Parties or the reorganization." *Pacific Lumber*, 584 F.3d at 252. If ever there was a risk of that happening in a chapter 11 reorganization, it is this one. Mr. Seery credibly testified that Mr. Dondero stated outside the courtroom that if Mr. Dondero's pot plan does not get approved, that Mr. Dondero will "burn the place down." The Bankruptcy Court can easily expect that the proposed Exculpated Parties might expect to incur costs that could swamp them and the reorganization based on the prior litigious conduct of Mr. Dondero and his controlled entities that justify their inclusion in the Exculpation Provision.

⁹ The same reasoning applies to the inclusion of Strand in the Exculpation Provision because Strand is the general partner of the Debtor through which each of the Independent Board members act.

75. **Injunction.** Section IX.D of the Plan provides for a Plan injunction to implement and enforce the Plan’s release, discharge and release provisions (the “Injunction Provision”). The Injunction Provision is necessary to implement the provisions in the Plan. Mr. Seery testified that the Claimant Trustee will monetize the Debtor’s assets in order to maximize their value. In order to accomplish this goal, the Claimant Trustee needs to be able to pursue this objective without the interference and harassment of Mr. Dondero and his related entities, including the Dondero Related Entities. Mr. Seery also testified that if the Claimant Trust was subject to interference by Mr. Dondero, it would take additional time to monetize the Debtor’s assets and those assets could be monetized for less money to the detriment of the Debtor’s creditors. The Bankruptcy Court finds and concludes that the Injunction Provision is consistent with and permissible under Bankruptcy Code sections 1123(a), 1123(a)(6), 1141(a) and (c), and 1142. The Bankruptcy Court rejects assertions by certain objecting parties that the Injunction Provision constitutes a “third-party release.” The Injunction Provision is appropriate under the circumstances of this Chapter 11 Case and complies with applicable bankruptcy law. The Bankruptcy Court also concludes that the terms “implementation” and “consummation” are neither vague nor ambiguous

76. **Gatekeeper Provision.** Section IX.F of the Plan contains a provision contained in paragraph AA of this Confirmation Order and which the Debtor has referred to as a gatekeeper provision (the “Gatekeeper Provision”). The Gatekeeper Provision requires that Enjoined Parties first seek approval of the Bankruptcy Court before they may commence an action against Protected Parties. Thereafter, if the Bankruptcy Court determines that the action is

colorable, the Bankruptcy Court may, if it has jurisdiction, adjudicate the action. The Bankruptcy Court finds that the inclusion of the Gatekeeper Provision is critical to the effective and efficient administration, implementation, and consummation of the Plan. The Bankruptcy Court also concludes that the Bankruptcy Court has the statutory authority as set forth below to approve the Gatekeeper Provision.

77. **Factual Support for Gatekeeper Provision.** The facts supporting the need for the Gatekeeper Provision are as follows. As discussed earlier in this Confirmation Order, prior to the commencement of the Debtor's bankruptcy case, and while under the direction of Mr. Dondero, the Debtor had been involved in a myriad of litigation, some of which had gone on for years and, in some cases, over a decade. Substantially all of the creditors in this case are either parties who were engaged in litigation with the Debtor, parties who represented the Debtor in connection with such litigation and had not been paid, or trade creditors who provided litigation-related services to the Debtor. During the last several months, Mr. Dondero and the Dondero Related Entities have harassed the Debtor, which has resulted in further substantial, costly, and time-consuming litigation for the Debtor. Such litigation includes: (i) entry of a temporary restraining order and preliminary injunction against Mr. Dondero [Adv. Proc. No. 20-03190 Docket No. 10 and 59] because of, among other things, his harassment of Mr. Seery and employees and interference with the Debtor's business operations; (ii) a contempt motion against Mr. Dondero for violation of the temporary restraining order, which motion is still pending before the Bankruptcy Court [Adv. Proc. No. 20-03190 Docket No. 48]; (iii) a motion by Mr. Dondero's controlled investors in certain CLOs managed by the Debtor that the Bankruptcy Court referred to

as frivolous and a waste of the Bankruptcy Court’s time [Docket No. 1528] which was denied by the Court [Docket No. 1605]; (iv) multiple plan confirmation objections focused on ensuring the Dondero Related Entities be able to continue their litigation against the Debtor and its successors post-confirmation [Docket Nos. 1661, 1667, 1670, 1673, 1676, 1677 and 1868]; (v) objections to the approval of the Debtor’s settlements with Acis and HarbourVest and subsequent appeals of the Bankruptcy Court’s order approving each of those settlements [Docket Nos. 1347 and 1870]; and (vi) a complaint and injunction sought against Mr. Dondero’s affiliated entities to prevent them from violating the January 9 Order and entry of a restraining order against those entities [Adv Proc. No. 21-03000 Docket No 1] (collectively, the “Dondero Post-Petition Litigation”).

78. **Findings Regarding Dondero Post-Petition Litigation.** The Bankruptcy Court finds that the Dondero Post-Petition Litigation was a result of Mr. Dondero failing to obtain creditor support for his plan proposal and consistent with his comments, as set forth in Mr. Seery’s credible testimony, that if Mr. Dondero’s plan proposal was not accepted, he would “burn down the place.” The Bankruptcy Court concludes that without appropriate protections in place, in the form of the Gatekeeper Provision, Mr. Dondero and his related entities will likely commence litigation against the Protected Parties after the Effective Date and do so in jurisdictions other than the Bankruptcy Court in an effort to obtain a forum which Mr. Dondero perceives will be more hospitable to his claims. The Bankruptcy Court also finds, based upon Mr. Seery’s testimony, that the threat of continued litigation by Mr, Dondero and his related entities after the Effective Date will impede efforts by the Claimant Trust to monetize assets for the benefit of creditors and result

in lower distributions to creditors because of costs and distraction such litigation or the threats of such litigation would cause.

79. **Necessity of Gatekeeper Provision.** The Bankruptcy Court further finds that unless the Bankruptcy Court approves the Gatekeeper Provision, the Claimant Trustee and the Claimant Trust Oversight Board will not be able to obtain D&O insurance, the absence of which will present unacceptable risks to parties currently willing to serve in such roles. The Bankruptcy Court heard testimony from Mark Tauber, a Vice President with AON Financial Services, the Debtor's insurance broker ("AON"), regarding his efforts to obtain D&O insurance. Mr. Tauber credibly testified that of all the insurance carriers that AON approached to provide D&O insurance coverage after the Effective Date, the only one willing to do so without an exclusion for claims asserted by Mr. Dondero and his affiliates otherwise requires that this Order approve the Gatekeeper Provision. Based on the foregoing, the Bankruptcy Court finds that the Gatekeeper Provision is necessary and appropriate in light of the history of the continued litigiousness of Mr. Dondero and his related entities in this Chapter 11 Case and necessary to the effective and efficient administration, implementation and consummation of the Plan and is appropriate pursuant to *Carroll v. Abide (In re Carroll)* 850 F.3d 811 (5th Cir. 2017). Approval of the Gatekeeper Provision will prevent baseless litigation designed merely to harass the post-confirmation entities charged with monetizing the Debtor's assets for the benefit of its economic constituents, will avoid abuse of the court system and preempt the use of judicial time that properly could be used to consider the meritorious claims of other litigants. Any suit against a Protected Party would effectively be a suit against the Debtor, and the Debtor may be required to indemnify the Protected

Parties under the Limited Partnership Agreement, which will remain in effect through the Effective Date, or those certain *Indemnification and Guaranty Agreements*, dated January 9, 2020, between Strand, the Debtor, and each Independent Director, following the Confirmation Date as each such agreement will be assumed pursuant to **11 U.S.C. § 365** pursuant to the Plan.

80. **Statutory Authority to Approve Gatekeeper Provision.** The Bankruptcy Court finds it has the statutory authority to approve the Gatekeeper Provision under sections 1123(a)(5), 1123(b)(6), 1141, 1142(b), and 105(a). The Gatekeeper Provision is also within the spirit of the Supreme Court’s “Barton Doctrine.” *Barton v. Barbour*, **104 U.S. 126** (1881). The Gatekeeper Provision is also consistent with the notion of a prefiling injunction to deter vexatious litigants, that has been approved by the Fifth Circuit in such cases as *Baum v. Blue Moon Ventures, LLC*, **513 F.3d 181, 189** (5th Cir. 2008), and *In re Carroll*, **850 F.3d 811** (5th Cir. 2017).

81. **Jurisdiction to Implement Gatekeeper Provision.** The Bankruptcy Court finds that it will have jurisdiction after the Effective Date to implement the Gatekeeper Provision as post-confirmation bankruptcy court jurisdiction has been interpreted by the Fifth Circuit under *United States Brass Corp. v. Travelers Ins. Group, Inc. (In re United States Brass Corp.)*, **301 F.3d 296** (5th Cir. 2002) and *EOP-Colonnade of Dallas Ltd. P’Ship v. Faulkner (In re Stonebridge Techs., Inc.)*, **430 F.3d 260** (5th Cir. 2005). Based upon the rationale of the Fifth Circuit in *Villegas v. Schmidt*, **788 F.3d 156, 158-59** (5th Cir. 2015), the Bankruptcy Court’s jurisdiction to act as a gatekeeper does not violate *Stern v. Marshall*. The Bankruptcy Court’s determination of whether

a claim is colorable, which the Bankruptcy Court has jurisdiction to determine, is distinct from whether the Bankruptcy Court would have jurisdiction to adjudicate any claim it finds colorable.

82. **Resolution of Objections of Scott Ellington and Isaac Leventon.** Each of Scott Ellington (“Mr. Ellington”) and Isaac Leventon (“Mr. Leventon”) (each, a “Senior Employee Claimant”) has asserted certain claims for liquidated but unpaid bonus amounts for the following periods: 2016, 2017, and 2018, as set forth in Exhibit A to that certain *Senior Employees’ Limited Objection to Debtor’s Fifth Amended Plan of Reorganization* [Docket No. 1669] (the “Senior Employees’ Objection”) (for each of Mr. Ellington and Mr. Leventon, the “Liquidated Bonus Claims”).

- a. Mr. Ellington has asserted Liquidated Bonus Claims in the aggregate amount of \$1,367,197.00, and Mr. Leventon has asserted Liquidated Bonus Claims in the aggregate amount of \$598,198.00. Mr. Ellington received two Ballots¹⁰ – a Ballot for Class 7 of the Plan and a Ballot for Class 8 of the Plan. Mr. Ellington completed and timely returned both of such Ballots, voted to reject the Plan, and elected to have his Class 8 Liquidated Bonus Claims treated under Class 7 of the Plan, subject to the objections and reservations of rights set forth in the Senior Employees’ Objection. If Mr. Ellington is permitted to elect Class 7 treatment for his Liquidated Bonus Claims, then the maximum amount of his Liquidated Bonus Claims will be \$1,000,000.
- b. Mr. Leventon received two Ballots—a Ballot for Class 7 of the Plan and a Ballot for Class 8 of the Plan. Mr. Leventon completed and timely returned both of such Ballots and voted each such Ballots to rejected the Plan.
- c. The Senior Employees’ Objection, among other things, objects to the Plan on the grounds that the Debtor improperly disputes the right of Mr. Ellington to elect Class 7 treatment for his Liquidated Bonus Claims and Mr. Leventon’s entitlement to receive Class 7 Convenience Class treatment for his Liquidated Bonus Claims. The Debtor contended that neither Mr. Ellington or Mr. Leventon were entitled to elect to receive Class 7 Convenience Class treatment on account of their Liquidated

¹⁰ As defined in the Plan, “Ballot” means the forms(s) distributed to holders of Impaired Claims or Equity Interests entitled to vote on the Plan on which to indicate their acceptance or rejection of the Plan.

Bonus Claims under the terms of the Plan, the Disclosure Statement Order or applicable law.

- d. The Debtor and Mr. Ellington and Mr. Leventon negotiated at arms' length in an effort to resolve all issues raised in the Senior Employee's Objection, including whether or not Mr. Ellington and Mr. Leventon were entitled to Class 7 Convenience Class treatment of their Liquidated Bonus Claims. As a result of such negotiation, the Debtor, Mr. Ellington, and Mr. Leventon have agreed to the settlement described in paragraphs 82(e) through 82(k) below and approved and effectuated pursuant to decretal paragraphs RR through SS (the "Senior Employees' Settlement").
- e. Under the terms of the Senior Employees' Settlement, the Debtor has the right to elect one of two treatments of the Liquidated Bonus Claims for a Senior Employee Claimant. Under the first treatment option ("Option A"), the Liquidated Bonus Claims will be entitled to be treated in Class 7 of the Plan, and the Liquidated Bonus Claims will be entitled to receive payment in an amount equal to 70.125% of the Class 7 amount of the Liquidated Bonus Claims, subject to the Liquidated Bonus Claims becoming Allowed Claims under the terms of the Plan. Under this calculation, Mr. Ellington would be entitled to receive \$701,250.00 on account of his Class 7 Convenience Class Claim when and as Allowed under the Plan, and Mr. Leventon would be entitled to receive \$413,175.10 on account of his Class 7 Convenience Class Claim when and as Allowed under the Plan. If, however, any party in interest objects to the allowance of the Senior Employee Claimant's Liquidated Bonus Claims and does not prevail in such objection, then such Senior Employee Claimant will be entitled to a payment in an amount equal to 85% of his Allowed Liquidated Bonus Claims (subject, in the case of Mr. Ellington, to the cap imposed on Class 7 Claims). In addition, under Option A, each of Mr. Ellington and Mr. Leventon would retain their respective rights to assert that the Liquidated Bonus Claims are entitled to be treated as Administrative Expense Claims, as defined in Article I.B.2. of the Plan, in which case the holder of such Liquidated Bonus Claims would be entitled to payment in full of the Allowed Liquidated Bonus Claims. Under Option A, parties in interest would retain the right to object to any motion seeking payment of the Liquidated Bonus Amounts as Administrative Expenses.
- f. Under the second treatment option ("Option B"), the Debtor would agree that the Senior Employee Claimant has Allowed Liquidated Bonus Claims, no longer subject to objection by any party in interest, in the amounts of the Liquidated Bonus Claims (subject, in the case of Mr. Ellington, to the cap imposed by Class 7). If the Debtor elects Option B as to a Senior Employee Claimant, then such Senior Employee Claimant would be entitled to a payment on account of his Allowed Liquidated Bonus Claims in an amount equal to 60% of the amount of the

Liquidated Bonus Claims (which, in Mr. Ellington's case, would be \$600,000 and in Mr. Leventon's case, would be \$358,918.80), and such payment would be the sole recovery on account of such Allowed Liquidated Bonus Claims.

- g. The Debtor may, with the consent of the Committee, elect Option B with respect to a Senior Employee Claimant at any time prior to the occurrence of the Effective Date. If the Debtor does not make an election, then Option A will apply.
- h. Under either Option A or Option B, Mr. Ellington and Mr. Leventon will retain all their rights with respect to all Claims other than the Liquidated Bonus Amounts, including, but not limited to, their Class 6 PTO Claims, other claims asserted as Class 8 General Unsecured Claims, the Senior Employees' claims for indemnification against the Debtor, and any other claims that they may assert constitute Administrative Expense Claims, and any other such Claims are subject to the rights of any party in interest to object to such Claims, and the Debtor reserves any all of its rights and defenses in connection therewith.
- i. Subject to entry of this Confirmation Order and as set forth and announced on the record at the hearing on confirmation of the Plan and no party objecting thereto, Mr. Ellington and Mr. Leventon agreed to change the votes in their respective Ballots from rejection to acceptance of the Plan and to withdraw the Senior Employees' Objection.
- j. The Senior Employees' Settlement represents a valid exercise of the Debtor's business judgment and satisfies the requirements for a compromise under Bankruptcy Rule 9019(a).
- k. For the avoidance of doubt, neither Mr. Leventon nor Mr. Ellington shall be a Released Party under the Plan regardless of how the Senior Employee Claimants' Claims are to be treated hereunder.

Based upon the foregoing findings, and upon the record made before the Bankruptcy Court at the Confirmation Hearing, and good and sufficient cause appearing therefor, it is hereby

ORDERED, ADJUDGED AND DECREED THAT:

A. Confirmation of the Plan. The Plan is approved in its entirety and **CONFIRMED** under section 1129 of the Bankruptcy Code. The terms of the Plan, including the

Plan Supplements and Plan Modifications, are incorporated by reference into and are an integral part of this Confirmation Order.¹¹

B. Findings of Fact and Conclusions of Law. The findings of fact and the conclusions of law set forth in this Confirmation Order and on the record of the Confirmation Hearing constitute findings of fact and conclusions of law in accordance with Bankruptcy Rule 7052, made applicable to this proceeding by Bankruptcy Rule 9014. All findings of fact and conclusion of law announced by the Bankruptcy Court at the Confirmation Hearing in relation to confirmation of the Plan are hereby incorporated into this Confirmation Order. To the extent that any of the following constitutes findings of fact or conclusions of law, they are adopted as such. To the extent any findings of fact or conclusions of law set forth in this Confirmation Order (including any findings of fact or conclusions of law announced by the Bankruptcy Court at the Confirmation Hearing and incorporated herein) constitutes an order of the Bankruptcy Court, and is adopted as such.

C. Objections. Any resolution or disposition of objections to confirmation of the Plan or otherwise ruled upon by the Bankruptcy Court on the record of the Confirmation Hearing is hereby incorporated by reference. All objections and all reservations of rights pertaining to confirmation of the Plan that have not been withdrawn, waived or settled are overruled on the merits, except as otherwise specifically provided in this Confirmation Order.

D. Plan Supplements and Plan Modifications. The filing with the Bankruptcy Court of the Plan Supplements and the Plan Modifications constitutes due and

¹¹ The Plan is attached hereto as Exhibit A.

sufficient notice thereof. Accordingly, pursuant to section 1127(a) of the Bankruptcy Code and Bankruptcy Rule 3019, the Plan Modifications and the Plan Supplements do not require additional disclosure under section 1125 of the Bankruptcy Code or resolicitation of votes under section 1126 of the Bankruptcy Code, nor do they require that Holders of Claims or Equity Interests be afforded an opportunity to change previously cast acceptances or rejections of the Plan. The Plan Modifications and the Plan Supplements constitute the Plan pursuant to section 1127(a) of the Bankruptcy Code. Accordingly, the Plan, as modified, is properly before the Bankruptcy Court and all votes cast with respect to the Plan prior to such modification shall be binding and shall apply with respect to the Plan.

E. Deemed Acceptance of Plan. In accordance with section 1127 of the Bankruptcy Code and Bankruptcy Rule 3019, all Holders of Claims and Equity Interests who voted to accept the Plan (or whom are conclusively presumed to accept the Plan) are deemed to have accepted the Plan as modified by the Plan Modifications. No holder of a Claim shall be permitted to change its vote as a consequence of the Plan Modifications.

F. Vesting of Assets in the Reorganized Debtor. Except as otherwise provided in the Plan or this Confirmation Order, on or after the Effective Date, all Reorganized Debtor Assets will vest in the Reorganized Debtor, free and clear of all Liens, Claims, charges or other encumbrances pursuant to section 1141(c) of the Bankruptcy Code, except with respect to such Liens, Claims, charges, and other encumbrances that are specifically preserved under the Plan upon the Effective Date. The Reorganized Debtor shall be the exclusive trustee of the Reorganized Debtor Assets for purposes of 31 U.S.C. § 3713(b) and 26 U.S.C. § 6012(b)(3), as well as the

representative of the Estate appointed pursuant to section 1123(b)(3)(B) of the Bankruptcy Code with respect to the Reorganized Debtor Assets.

G. Effectiveness of All Actions. All actions contemplated by the Plan, including all actions in connection with the Claimant Trust Agreement, the Senior Employee Stipulation, the New GP LLC Documents, the New Frontier Note, the Reorganized Limited Partnership Agreement, the Litigation Sub-Trust Agreement, and the other Plan Documents, are authorized to be taken on, prior to, or after the Effective Date, as applicable, under this Confirmation Order, without further application to or order of the Bankruptcy Court, or further action by the directors, managers, officers or partners of the Debtor or the Reorganized Debtor and with the effect that such actions had been taken by unanimous action of such parties.

H. Restructuring Transactions. The Debtor or Reorganized Debtor, as applicable, are authorized to enter into and effectuate the Restructuring provided under the Plan, including, without limitation, the entry into and consummation of the transactions contemplated by the Claimant Trust Agreement, the Senior Employee Stipulation, the New GP LLC Documents, the New Frontier Note, the Reorganized Limited Partnership Agreement, the Litigation Sub-Trust Agreement, and the other Plan Documents, and may take any actions as may be necessary or appropriate to effect a corporate restructuring of its business or a corporate restructuring of the overall corporate structure of the Reorganized Debtor, as and to the extent provided in the Plan. Any transfers of assets or equity interests effected or any obligations incurred through the Restructuring pursuant to the Plan are hereby approved and shall not constitute fraudulent conveyances or fraudulent transfers or otherwise be subject to avoidance.

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

J. Independent Board of Directors of Strand. The terms of the current Independent Directors shall expire on the Effective Date without the need for any further or other action by any of the Independent Directors. For avoidance of doubt, the Assumed Contracts

include the *Indemnification and Guaranty Agreement between Highland Capital Management, Strand Advisors, Inc. and James Seery*; the *Indemnification and Guaranty Agreement between Highland Capital Management, Strand Advisors, Inc. and John Dubel* and *Indemnification and Guaranty Agreement between Highland Capital Management, Strand Advisors, Inc. and Russell Nelms* and shall each remain in full force and effect notwithstanding the expiration of the terms of any Independent Directors.

K. Cancellation of Equity Interests and Issuance of New Partnership

Interests. On the Effective Date, all Class A Limited Partnership Interests, including the Class A Limited Partnership Interests held by Strand, as general partner, and Class B/C Limited Partnerships in the Debtor will be deemed cancelled, and all obligations or debts owed by, or Claims against, the Debtor on account of, or based upon, such Class A Limited Partnership Interests and Class B/C Limited Partnership Interests shall be deemed as cancelled, released, and discharged, including all obligations or duties by the Debtor relating to the Equity Interests in any of the Debtor's formation documents, including the Limited Partnership Agreement. As of the Effective Date and pursuant to the Plan, new Class A Limited Partnership Interests in the Reorganized Debtor will be issued to the Claimant Trust and New GP LLC. The Claimant Trust, as limited partner, will ratify New GP LLC's appointment as general partner of the Reorganized Debtor, and on and following the Effective Date, the Claimant Trust will be the Reorganized Debtor's limited partner and New GP LLC will be its general partner. The Claimant Trust, as limited partner, and New GP LLC, as general partner, will execute the Reorganized Limited Partnership Agreement, which will amend and restate, in all respects, the Debtor's current Limited

Partnership Agreement. Following the Effective Date, the Reorganized Debtor will be managed consistent with the terms of the Reorganized Limited Partnership Agreement by New GP LLC. The sole managing member of New GP LLC will be the Claimant Trust, and the Claimant Trustee will be the sole officer of New GP LLC on the Effective Date.

L. Transfer of Assets to Claimant Trust. On or prior to the Effective Date, the Debtor shall irrevocably transfer and shall be deemed to have irrevocably transferred to the Claimant Trust all of its rights, title, and interest in and to all of the Claimant Trust Assets, and in accordance with section 1141 of the Bankruptcy Code, the Claimant Trust Assets shall automatically vest in the Claimant Trust free and clear of all Claims, Liens, encumbrances, or interests subject only to the Claimant Trust Interests and the Claimant Trust Expenses, as provided for in the Claimant Trust Agreement, and such transfer shall be exempt from any stamp, real estate transfer, mortgage from any stamp, transfer, reporting, sales, use, or other similar tax. Following the Effective Date, the Claimant Trust will administer the Claimant Trust Assets pursuant to the Plan and the Claimant Trust Agreement.

M. Transfer of Estate Claims to Litigation Sub-Trust. On or prior to the Effective Date, the Claimant Trust shall irrevocably transfer and shall be deemed to have irrevocably transferred to the Litigation Sub-Trust all of the Claimant Trust's rights, title, and interest in and to all of the Estate Claims as successor in interest to the Debtor, and in accordance with section 1141 of the Bankruptcy Code, the Estate Claims shall automatically vest in the Litigation Sub-Trust free and clear of all Claims, Liens, encumbrances, or interests subject only to the Litigation Sub-Trust Interests and Litigation Sub-Trust Expenses. The Litigation Trustee will

be authorized to investigate, pursue, and otherwise resolve the Estate Claims pursuant to the terms of the Litigation Sub-Trust Agreement and the Plan, including as successor in interest to the Debtor or Committee, as applicable, in any litigation commenced prior to the Effective Date in which Estate Claims are asserted.

N. Compromise of Controversies. In consideration for the distributions and other benefits, including releases, provided under the Plan, the provisions of the Plan constitute a good faith compromise and settlement of all Claims, Equity Interests, and controversies resolved under the Plan and the entry of this Confirmation Order constitutes approval of such compromise and settlement under Bankruptcy Rule 9019.

O. Objections to Claims. The Claims Objection Deadline shall be the date that is 180 days after the Effective Date, *provided, however*, that the Claims Objection Deadline may be extended by the Bankruptcy Court upon a motion by the Claimant Trustee and as otherwise provided under the Plan.

P. Assumption of Contracts and Leases. Effective as of the date of this Confirmation Order, each of the Assumed Contacts shall be assumed by the Debtor without the need for any further notice to or action, order, or approval of the Bankruptcy Court, under section 365 of the Bankruptcy Code and the payment of Cures, if any, shall be paid in accordance with the Plan. Each Assumed Contract shall include all modifications, amendments, supplements, restatements, or other agreements related thereto, and all rights related thereto, if any, including all easements, licenses, permits, rights, privileges, immunities, options, rights of first refusal, and any other interests. Modifications, amendments, supplements, and restatements to any of the

Assumed Contracts that have been executed by the Debtor during the Chapter 11 Case shall not be deemed to alter the prepetition nature of such Assumed Contracts or the validity, priority, or amount of any Claims that may arise in connection therewith. Assumption of the Assumed Contracts pursuant to Article V.A of the Plan and full payment of any applicable Cure pursuant to the Plan shall result in the full release and satisfaction of any Cures, Claims, or defaults, whether monetary or nonmonetary, including defaults of provisions restricting the change in control or ownership interest composition, or other bankruptcy-related defaults, arising under any Assumed Contracts.

Q. Rejection of Contracts and Leases. Unless previously assumed during the pendency of the Chapter 11 Case or pursuant to the Plan, all other Executory Contracts and Unexpired Leases are rejected as of the date of the entry of this Confirmation Order and pursuant to the terms of the Plan. To the extent that any party asserts any damages resulting from the rejection of any Executory Contract or Unexpired Lease, such claim must be filed within **thirty (30) days** following entry of this Confirmation Order, or such claim will be forever barred and disallowed against the Reorganized Debtor.

R. Assumption of Issuer Executory Contracts. On the Confirmation Date, the Debtor will assume the agreements set forth on **Exhibit B** hereto (collectively, the “Issuer Executory Contracts”) pursuant to section 365 of the Bankruptcy Code and Article V of the Plan. In full and complete satisfaction of its obligation to cure outstanding defaults under section 365(b)(1) of the Bankruptcy Code, the Debtor or, as applicable, any successor manager under the

Issuer Executory Contracts (collectively, the “Portfolio Manager”) will pay to the Issuers¹² a cumulative amount of \$525,000 (the “Cure Amount”) as follows:

- a. \$200,000 in cash on the date that is five business days from the Effective Date, with such payment paid directly to Schulte Roth & Zabel LLP (“SRZ”) in the amount of \$85,714.29, Jones Walker LLP (“JW”) in the amount of \$72,380.95, and Maples Group (“Maples” and collectively with SRZ and JW, the “Issuers’ Counsel”) in the amount of \$41,904.76 as reimbursement for the attorney’s fees and other legal expenses incurred by the Issuers in connection with the Debtor’s bankruptcy case; and
- b. \$325,000 in four equal quarterly payments of \$81,250.00 (each, a “Payment”), which amounts shall be paid to SRZ in the amount of \$34,821.43, JW in the amount of \$29,404.76, and Maples in the amount of \$17,023.81 as additional reimbursement for the attorney’s fees and other legal expenses incurred by the Issuers in connection with the Debtor’s bankruptcy case (i) from any management fees actually paid to the Portfolio Manager under the Issuer Executory Contracts (the “Management Fees”), and (ii) on the date(s) Management Fees are required to be paid under the Issuer Executory Contracts (the “Payment Dates”), and such obligation shall be considered an irrevocable direction from the Debtor and the Bankruptcy Court to the relevant CLO Trustee to pay, on each Payment Date, the Payment to Issuers’ Counsel, allocated in the proportion set forth in such agreement; *provided, however*, that (x) if the Management Fees are insufficient to make any Payment in full on a Payment Date, such shortfall, in addition to any other amounts due hereunder, shall be paid out of the Management Fees owed on the following Payment Date, and (y) nothing herein shall limit either Debtor’s liability to pay the amounts set forth herein, nor the recourse of the Issuers or Issuers’ Counsel to the Debtor, in the event of any failure to make any Payment.

S. Release of Issuer Claims. Effective as of the Confirmation Date, and to the maximum extent permitted by law, each Issuer on behalf of itself and each of its current and former advisors, trustees, directors, officers, managers, members, partners, employees, beneficiaries, shareholders, agents, participants, subsidiaries, parents, successors, designees, and

¹² The “Issuers” are: Brentwood CLO, Ltd., Gleneagles CLO, Ltd., Greenbriar CLO, Ltd., Highland CLO 2018-1, Ltd., Highland Legacy Limited, Highland Loan Funding V Ltd., Highland Park CDO I, Ltd., Pam Capital Funding LP, Rockwall CDO II Ltd., Rockwall CDO Ltd., Southfork CLO Ltd., Stratford CLO Ltd., Westchester CLO, Ltd., Aberdeen Loan Funding, Ltd., Eastland CLO, Ltd., Grayson CLO, Ltd., Highland Credit Opportunities CDO Ltd., Jasper CLO, Ltd., Liberty Cayman Holdings, Ltd., Liberty CLO, Ltd., Red River CLO, Ltd., Valhalla CLO, Ltd.

assigns hereby forever, finally, fully, unconditionally, and completely releases, relieves, acquits, remises, and exonerates, and covenants never to sue, (i) the Debtor and (ii) the Professionals retained by the Debtor and the Committee in the Chapter 11 Case, the Independent Directors, the CEO/CRO, and with respect to the Persons listed in this subsection (ii), such Person's Related Persons (collectively, the "Debtor Released Parties"), for and from any and all claims, debts, liabilities, demands, obligations, promises, acts, agreements, liens, losses, costs and expenses (including, without limitation, attorney's fees and related costs), damages, injuries, suits, actions, and causes of action of whatever kind or nature, whether known or unknown, suspected or unsuspected, matured or unmatured, liquidated or unliquidated, contingent or fixed, at law or in equity, statutory or otherwise, including, without limitation, any claims, defenses, and affirmative defenses, whether known or unknown, including, without limitation, those which were or could have been asserted in, in connection with, or with respect to the Bankruptcy Case (collectively, the "Issuer Released Claims").

T. Release of Debtor Claims against Issuer Released Parties. Upon entry of this Order, and to the maximum extent permitted by law, the Debtor hereby forever, finally, fully, unconditionally, and completely releases, relieves, acquits, remises, and exonerates, and covenants never to sue [(i) each Issuer and (ii) Wendy Ebanks, (iii) Yun Zheng, (iv) Laura Chisholm, (v) Mora Goddard, (vi) Stacy Bodden, (vii) Suzan Merren (viii) Scott Dakers, (ix) Samit Ghosh, (x) Inderjit Singh, (xi) Ellen Christian, (xii) Andrew Dean, (xiii) Betsy Mortel, (xiv) David Hogan, (xv) Cleveland Stewart, (xvi) Rachael Rankin, (xvii) Otelia Scott, (xviii) Martin Couch, (xx) Feronia Bartley-Davis, (xxi) Charlotte Cloete, (xxii) Christina McLean, (xxiii) Karen Ellerbe,

(xxiv) Gennie Kay Bigord, (xxv) Evert Brunekreef, (xxvii) Evan Charles Burtton (collectively, the “Issuer Released Parties”),] for and from any and all claims, debts, liabilities, demands, obligations, promises, acts, agreements, liens, losses, costs and expenses (including, without limitation, attorney’s fees and related costs), damages, injuries, suits, actions, and causes of action of whatever kind or nature, whether known or unknown, suspected or unsuspected, matured or unmatured, liquidated or unliquidated, contingent or fixed, at law or in equity, statutory or otherwise, including, without limitation, any claims, defenses, and affirmative defenses, whether known or unknown, which were or could have been asserted in, in connection with, or with respect to the Bankruptcy Case (collectively, the “Debtor Released Claims”); *provided, however*, that notwithstanding anything herein to the contrary, the release contained herein will apply to the Issuer Released Parties set forth in subsection (ii) above only with respect to Debtor Released Claims arising from or relating to the Issuer Executory Contracts. Notwithstanding anything in this Order to the contrary, the releases set forth in paragraphs S and T hereof will not apply with respect to the duties, rights, or obligations of the Debtor or any Issuer hereunder.

U. Authorization to Consummate. The Debtor is authorized to consummate the Plan after the entry of this Confirmation Order subject to satisfaction or waiver of the conditions precedent to the Effective Date of the Plan set forth in Article VIII.A of the Plan. The Plan shall not become effective unless and until the conditions set forth in Article VIII.A of the Plan have been satisfied, or otherwise waived pursuant to Article VIII.B of the Plan.

V. Professional Compensation. All requests for payment of Professional Fee Claims for services rendered and reimbursement of expenses incurred prior to the Effective Date

must be filed no **later than sixty (60) days after the Effective Date**. The Bankruptcy Court shall determine the Allowed amounts of such Professional Fee Claims after notice and an opportunity for hearing in accordance with the procedures established by the Bankruptcy Code and the Bankruptcy Court. The Debtor shall fund the Professional Fee Reserve as provided under the Plan. The Reorganized Debtor shall pay Professional Fee Claims in Cash in the amounts the Bankruptcy Court allows. The Debtor is authorized to pay the pre-Effective Date fees and expenses of all ordinary course professionals in the ordinary course of business without the need for further Bankruptcy Court order or approval. From and after the Effective Date, any requirement that Professionals comply with sections 327 through 331 and 1103 (if applicable) of the Bankruptcy Code in seeking retention or compensation for services rendered after such date shall terminate, and the Reorganized Debtor or Claimant Trustee, as applicable, may employ and pay any Professional or Entity employed in the ordinary course of the Debtor's business without any further notice to or action, order, or approval of the Bankruptcy Court.

W. Release, Exculpation, Discharge, and Injunction Provisions. The following release, exculpation, discharge, and injunction provisions set forth in the Plan are approved and authorized in their entirety, and such provisions are effective and binding on all parties and Entities to the extent provided therein.

X. Discharge of Claims and Termination of Interests. To the fullest extent provided under section 1141(d)(1)(A) and other applicable provisions of the Bankruptcy Code, except as otherwise expressly provided by the Plan or this Confirmation Order, all consideration distributed under the Plan will be in exchange for, and in complete satisfaction, settlement,

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

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

provided, however, the foregoing will not apply to (a) any acts or omissions of an Exculpated Party arising out of or related to acts or omissions that constitute bad faith, fraud, gross negligence, criminal misconduct, or willful misconduct or (b) Strand or any Employee other than with respect to actions taken by such Entities from the date of appointment of the Independent Directors through the Effective Date. The Plan's exculpation shall be in addition to, and not in limitation of, all other releases, indemnities, exculpations, any other applicable law or rules, or any other provisions of the Plan, including Article IV.C.2 of the Plan, protecting such Exculpated Parties from liability.

Z. Releases by the Debtor. On and after the Effective Date, each Released Party is deemed to be, hereby conclusively, absolutely, unconditionally, irrevocably, and forever released and discharged by the Debtor and the Estate, in each case on behalf of themselves and their respective successors, assigns, and representatives, including, but not limited to, the Claimant Trust and the Litigation Sub-Trust from any and all Causes of Action, including any derivative claims, asserted on behalf of the Debtor, whether known or unknown, foreseen or unforeseen, matured or unmatured, existing or hereafter arising, in law, equity, contract, tort or otherwise, that the Debtor or the Estate would have been legally entitled to assert in their own right (whether individually or collectively) or on behalf of the holder of any Claim against, or Interest in, a Debtor or other Person. Notwithstanding anything contained herein to the contrary, the foregoing release does not release: (i) any obligations of any party under the Plan or any document, instrument, or agreement executed to implement the Plan, (ii) the rights or obligations of any current employee of the Debtor under any employment agreement or plan, (iii) the rights of the Debtor with respect to any confidentiality provisions or covenants restricting competition in favor of the Debtor under

any employment agreement with a current or former employee of the Debtor, (iv) any Avoidance Actions, or (v) any Causes of Action arising from willful misconduct, criminal misconduct, actual fraud, or gross negligence of such applicable Released Party as determined by Final Order of the Bankruptcy Court or any other court of competent jurisdiction.

AA. Injunction. Upon entry of this Confirmation Order, all Enjoined Parties are and shall be permanently enjoined, on and after the Effective Date, from taking any actions to interfere with the implementation or consummation of the Plan. Except as expressly provided in the Plan, this Confirmation Order, or a separate order of the Bankruptcy Court, all Enjoined Parties are and shall be permanently enjoined, on and after the Effective Date, with respect to any Claims and Equity Interests, from directly or indirectly (i) commencing, conducting, or continuing in any manner, any suit, action, or other proceeding of any kind (including any proceeding in a judicial, arbitral, administrative or other forum) against or affecting the Debtor or the property of the Debtor, (ii) enforcing, levying, attaching (including any prejudgment attachment), collecting, or otherwise recovering, enforcing, or attempting to recover or enforce, by any manner or means, any judgment, award, decree, or order against the Debtor or the property of the Debtor, (iii) creating, perfecting, or otherwise enforcing in any manner, any security interest, lien or encumbrance of any kind against the Debtor or the property of the Debtor, (iv) asserting any right of setoff, directly or indirectly, against any obligation due to the Debtor or against property or interests in property of the Debtor, except to the limited extent permitted under Sections 553 and 1141 of the Bankruptcy Code, and (v) acting or proceeding in any manner,

in any place whatsoever, that does not conform to or comply with the provisions of the Plan. The injunctions set forth in the Plan and this Confirmation Order shall extend to, and apply to any act of the type set forth in any of clauses (i)-(v) of the immediately preceding paragraph against any successors of the Debtor, including, but not limited to, the Reorganized Debtor, the Litigation Sub-Trust, and the Claimant Trust and their respective property and interests in property. Subject in all respects to Article XII.D of the Plan, no Enjoined Party may commence or pursue a claim or cause of action of any kind against any Protected Party that arose or arises from or is related to the Chapter 11 Case, the negotiation of the Plan, the administration of the Plan or property to be distributed under the Plan, the wind down of the business of the Debtor or Reorganized Debtor, the administration of the Claimant Trust or the Litigation Sub-Trust, or the transactions in furtherance of the foregoing without the Bankruptcy Court (i) first determining, after notice and a hearing, that such claim or cause of action represents a colorable claim of any kind, including, but not limited to, negligence, bad faith, criminal misconduct, willful misconduct, fraud, or gross negligence against a Protected Party and (ii) specifically authorizing such Enjoined Party to bring such claim or cause of action against any such Protected Party; *provided, however*, the foregoing will not apply to a claim or cause of action against Strand or against any Employee other than with respect to actions taken, respectively, by Strand or by such Employee from the date of appointment of the Independent Directors through the Effective Date. The Bankruptcy Court will have sole and exclusive jurisdiction to determine whether a claim or cause of action is colorable and, only to the extent legally permissible and as provided for in

Article XI of the Plan, shall have jurisdiction to adjudicate the underlying colorable claim or cause of action.

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

CC. Continuance of January 9 Order and July 16 Order. Unless otherwise provided in the Plan, in this Confirmation Order, or in a Final Order of the Bankruptcy Court, each of the *Order Approving Settlement with Official Committee of Unsecured Creditors Regarding Governance of the Debtor and Procedures for Operations in the Ordinary Course*, entered by the Bankruptcy Court on January 9, 2020 [Docket No. 339] and *Order Approving the Debtor's Motion Under Bankruptcy Code Sections 105(a) and 363(b) Authorizing Retention of James P. Seery, Jr., as Chief Executive Officer, Chief Restructuring Officer, and Foreign Representative Nunc Pro Tunc to March 15, 2020* [Docket No. 854] entered on July 16, 2020 shall remain in full force and effect from the Confirmation Date and following the Effective Date.

DD. No Governmental Releases. Nothing in this Confirmation Order or the Plan shall effect a release of any claim by the United States Government or any of its agencies or

any state and local authority whatsoever, including without limitation any claim arising under the Internal Revenue Code, the environmental laws or any criminal laws of the United States or any state and local authority against any party or person, nor shall anything in this Confirmation Order or the Plan enjoin the United States or any state or local authority from bringing any claim, suit, action, or other proceedings against any party or person for any liability of such persons whatever, including without limitation any claim, suit, or action arising under the Internal Revenue Code, the environmental laws or any criminal laws of the United States or any state and local authority against such persons, nor shall anything in this Confirmation Order or the Plan exculpate any party or person from any liability to the United States Government or any of its agencies or any state and local authority whatsoever, including any liabilities arising under the Internal Revenue Code, the environmental laws, or any criminal laws of the United States or any state and local authority against any party or person.

EE. Exemption from Transfer Taxes. Pursuant to section 1146(a) of the Bankruptcy Code, any transfers (whether from the Debtor to the Reorganized Debtor or to any other Person) of property under the Plan or pursuant to: (a) the issuance, distribution, transfer, or exchange of any debt, equity security, or other interest in the Debtor or the Reorganized Debtor; (b) the Restructuring transactions pursuant to the Plan; (c) the creation, modification, consolidation, termination, refinancing, and/or recording of any mortgage, deed of trust, or other security interest, or the securing of additional indebtedness by such or other means; (d) the making, assignment, or recording of any lease or sublease; or (e) the making, delivery, or recording of any deed or other instrument of transfer under, in furtherance of, or in connection with, the Plan,

including any deeds, bills of sale, assignments, or other instrument of transfer executed in connection with any transaction arising out of, contemplated by, or in any way related to the Plan, shall not be subject to any document recording tax, stamp tax, conveyance fee, intangibles or similar tax, mortgage tax, real estate transfer tax, mortgage recording tax, Uniform Commercial Code filing or recording fee, regulatory filing or recording fee, or other similar tax or governmental assessment to the fullest extent contemplated by section 1146(a) of the Bankruptcy Code, and upon entry of this Confirmation Order, the appropriate state or local governmental officials or agents shall forego the collection of any such tax or governmental assessment and accept for filing and recordation of any of the foregoing instruments or other documents without the payment of any such tax, recordation fee, or governmental assessment.

FF. Cancellation of Notes, Certificates and Instruments. Except for the purpose of evidencing a right to a distribution under the Plan and except as otherwise set forth in the Plan or as otherwise provided in this Confirmation Order, on the Effective Date, all agreements, instruments, Securities and other documents evidencing any prepetition Claim or Equity Interest and any rights of any Holder in respect thereof shall be deemed cancelled, discharged, and of no force or effect. The holders of or parties to such cancelled instruments, Securities, and other documentation will have no rights arising from or related to such instruments, Securities, or other documentation or the cancellation thereof, except the rights provided for pursuant to the Plan, and the obligations of the Debtor thereunder or in any way related thereto will be fully released, terminated, extinguished and discharged, in each case without further notice to or order of the

Bankruptcy Court, act or action under applicable law, regulation, order, or rule or any requirement of further action, vote or other approval or authorization by any Person.

GG. Documents, Mortgages, and Instruments. Each federal, state, commonwealth, local, foreign, or other governmental agency is authorized to accept any and all documents, mortgages, and instruments necessary or appropriate to effectuate, implement, or consummate the Plan, including the Restructuring transactions contemplated under the Plan, and this Confirmation Order.

HH. Post-Confirmation Modifications. Subject section 1127(b) of the Bankruptcy Code and the Plan, the Debtor and the Reorganized Debtor expressly reserve their rights to revoke or withdraw, or to alter, amend, or modify materially the Plan, one or more times after Confirmation and, to the extent necessary, may initiate proceedings in the Bankruptcy Court to so alter, amend, or modify the Plan, or remedy any defect or omission, or reconcile any inconsistencies in the Plan or this Confirmation Order, in such manner as may be necessary to carry out the purposes and intent of the Plan. Any such modification or supplement shall be considered a modification of the Plan and shall be made in accordance with Article XII.B of the Plan.

II. Applicable Nonbankruptcy Law. The provisions of this Confirmation Order, the Plan and related documents, or any amendments or modifications thereto, shall apply and be enforceable notwithstanding any otherwise applicable nonbankruptcy law.

JJ. Governmental Approvals Not Required. This Confirmation Order shall constitute all approvals and consents required, if any, by the laws, rules, or regulations of any state,

federal, or other governmental authority with respect to the dissemination, implementation, or consummation of the Plan and the Disclosure Statement, any certifications, documents, instruments or agreements, and any amendments or modifications thereto, and any other acts referred to in, or contemplated by, the Plan and the Disclosure Statement.

KK. Notice of Effective Date. As soon as reasonably practicable after the Effective Date, the Reorganized Debtor shall file notice of the Effective Date and shall serve a copy of the same on all Holders of Claims and Equity Interests, and all parties who have filed with the Bankruptcy Court requests to receive notices in accordance with Bankruptcy Rules 2002 and 3020(c). Notwithstanding the above, no notice of Confirmation or Consummation or service of any kind shall be required to be mailed or made upon any Entity to whom the Debtor mailed notice of the Confirmation Hearing, but received such notice returned marked “undeliverable as addressed,” “moved, left no forwarding address” or “forwarding order expired,” or similar reason, unless the Debtor has been informed in writing by such Entity, or is otherwise aware, of that Entity’s new address. The above-referenced notices are adequate under the particular circumstances of this Chapter 11 Case and no other or further notice is necessary.

LL. Substantial Consummation. On the Effective Date, the Plan shall be deemed to be substantially consummated under sections 1101 and 1127 of the Bankruptcy Code.

MM. Waiver of Stay. For good cause shown, the stay of this Confirmation Order provided by any Bankruptcy Rule is waived, and this Confirmation Order shall be effective and enforceable immediately upon its entry by the Bankruptcy Court.

NN. References to and Omissions of Plan Provisions. References to articles, sections, and provisions of the Plan are inserted for convenience of reference only and are not intended to be a part of or to affect the interpretation of the Plan. The failure to specifically include or to refer to any particular article, section, or provision of the Plan in this Confirmation Order shall not diminish or impair the effectiveness of such article, section, or provision, it being the intent of the Bankruptcy Court that the Plan be confirmed in its entirety, except as expressly modified herein, and incorporated herein by this reference.

OO. Headings. Headings utilized herein are for convenience and reference only, and do not constitute a part of the Plan or this Confirmation Order for any other purpose.

PP. Effect of Conflict. This Confirmation Order supersedes any Bankruptcy Court order issued prior to the Confirmation Date that may be inconsistent with this Confirmation Order. If there is any inconsistency between the terms of the Plan and the terms of this Confirmation Order, the terms of this Confirmation Order govern and control. If there is any inconsistency between the terms of this Confirmation Order and the terms of a final, executed Plan Supplement Document, the terms of the final, executed Plan Supplement Document will govern and control.

QQ. Resolution of Objection of Texas Taxing Authorities. Dallas County, Kaufman County, City of Allen, Allen ISD and City of Richardson (collectively, the “Tax Authorities”) assert that they are the holders of prepetition and administrative expense claims for 2019, 2020 and 2021 ad valorem real and business personal property taxes. The ad valorem property taxes for tax year 2020 shall be paid in accordance with and to the extent required under

applicable nonbankruptcy law. In the event the 2020 taxes are paid after February 1, 2021, the Tax Authorities may assert any rights and amounts they claim are owed with respect to penalties and interest that have accrued through the date of payment and the Debtor and Reorganized Debtor reserve any all rights and defenses in connection therewith.

- a. The Debtor/Reorganized Debtor shall pay all amounts owed to the Tax Authorities for tax year 2021 in accordance with and to the extent required under applicable nonbankruptcy law. The Tax Authorities shall not be required to file and serve an administrative expense claim and request for payment as a condition of allowance of their administrative expense claims pursuant to **11 U.S.C. Section 503(b)(1)(D)**. With regard to year 2019 ad valorem property taxes, the Tax Authorities will receive payment of their prepetition claims within 30 days of the Effective Date of the Plan. The payment will include interest from the Petition Date through the Effective Date and from the Effective Date through payment in full at the state statutory rate pursuant to **11 U.S.C. Sections 506(b), 511, and 1129**, if applicable, subject to all of the Debtor's and Reorganized Debtor's rights and defenses in connection therewith. Notwithstanding any other provision in the Plan, the Tax Authorities shall (i) retain the liens that secure all prepetition and postpetition amounts ultimately owed to them, if any, as well as (ii) the state law priority of those liens until the claims are paid in full.
- b. The Tax Authorities' prepetition claims and their administrative expense claims shall not be discharged until such time as the amounts owed are paid in full. In the event of a default asserted by the Taxing Authorities, the Tax Authorities shall provide notice Debtor or Reorganized Debtor, as applicable, and may demand cure of any such asserted default. Subject to all of its rights and defenses, the Debtor or Reorganized Debtor shall have fifteen (15) days from the date of the notice to cure the default. If the alleged default is not cured, the Tax Authorities may exercise any of their respective rights under applicable law and pursue collection of all amounts owed pursuant to state law outside of the Bankruptcy Court, subject in all respects to the Debtor's and Reorganized Debtor's applicable rights and defenses. The Debtor/Reorganized Debtor shall be entitled to any notices of default required under applicable nonbankruptcy law and each of the Taxing Authorities, the Debtor and the Reorganized Debtor reserve any and all of their respective rights and defenses in connection therewith. The Debtor's and Reorganized Debtor's rights and defenses under Texas Law and the Bankruptcy Code with respect to this provision of the Confirmation Order, including their right to dispute or object to the Tax Authorities' Claims and liens, are fully preserved.

RR. Resolution of Objections of Scott Ellington and Isaac Leventon.

Pursuant to Bankruptcy Rule 9019(a), the Senior Employees' Settlement is approved in all respects. The Debtor may, only with the consent of the Committee, elect Option B for a Senior Employee Claimant by written notice to such Senior Employee Claimant on or before the occurrence of the Effective Date. If the Debtor does not elect Option B, then Option A will govern the treatment of the Liquidated Bonus Claims.

- a. Notwithstanding any language in the Plan, the Disclosure Statement, or this Confirmation Order to the contrary, if Option A applies to the Liquidated Bonus Claims of a Senior Employee Claimant, then the Liquidated Bonus Claims of such Senior Employee Claimant will receive the treatment described in paragraph 82(e) hereof, and if the Debtor timely elects Option B with respect to the Liquidated Bonus Claims of a Senior Employee Claimant, then the Liquidated Bonus Claims of such Senior Employee will receive the treatment described in paragraph 82(f) hereof.
- b. The Senior Employees' Settlement is hereby approved, without prejudice to the respective rights of Mr. Ellington and Mr. Leventon to assert all their remaining Claims against the Debtor's estate, including, but not limited to, their Class 6 PTO Claims, their remaining Class 8 General Unsecured Claims, any indemnification claims, and any Administrative Expense Claims that they may assert and is without prejudice to the rights of any party in interest to object to any such Claims.
- c. Pursuant to Bankruptcy Rule 3018(a), Mr. Ellington and Mr. Leventon were permitted to change their votes on the Plan. Accordingly, Mr. Ellington's votes on his Ballots in Class 7 and Class 8 of the Plan were changed from a rejection of the Plan to acceptance of the Plan, and Mr. Leventon's votes on his Ballots in Class 7 and Class 8 of the Plan were, changed from rejections of the Plan to acceptances of the Plan.
- d. The Senior Employees' Objection is deemed withdrawn.

SS. No Release of Claims Against Senior Employee Claimants. For the avoidance of doubt, the Senior Employees' Settlement, as approved herein, shall not, and shall not be deemed to, release any Claims or Causes of Action held by the Debtor against either Senior

Employee Claimant nor shall either Senior Employee Claimant be, or be deemed to be, a “Released Party” under the Plan.

TT. Resolution of Objection of Internal Revenue Service. Notwithstanding any other provision or term of the Plan or Confirmation Order, the following Default Provision shall control as to the United States of America, Internal Revenue Service (“IRS”) and all of its claims, including any administrative claim (the “IRS Claim”):

(a) Notwithstanding any other provision in the Plan, if the Debtor, the Reorganized Debtor, or any successor in interest fails to pay when due any payment required to be made on federal taxes, the IRS Claim, or other payment required to be made to the IRS under the terms and provisions of this Plan, the Confirmation Order, or the Internal Revenue Code (26 U.S.C.), or fails to timely file any required federal tax return, or if any other event of default as set forth in the Plan occurs, the IRS shall be entitled to give the Debtor, the Reorganized Debtor and/or any successor in interest and their counsel of record, by United States Certified Mail, written notice of the failure and/or default with demand that it be cured, and if the failure and/or default is not cured within 14 days of the date of said notice and demand, then the following shall apply to the IRS:

(1) The administrative collection powers and the rights of the IRS shall be reinstated as they existed prior to the filing of the bankruptcy petition, including, but not limited to, the assessment of taxes, the filing of a notice of Federal tax lien and the powers of levy, seizure, and collection as provided under the Internal Revenue Code;

(2) The automatic stay of **11 U.S.C. § 362** and any injunction of the Plan or in the Confirmation Order shall, with regard to the IRS only, lift or terminate without further notice or hearing by the Bankruptcy Court, and the entire prepetition liability owed to the IRS, together with any unpaid postpetition tax liabilities, may become due and payable immediately; and

(3) The IRS shall have the right to proceed to collect from the Debtor, the Reorganized Debtor or any successor in interest any of the prepetition tax liabilities and related penalties and interest through administrative or judicial collection procedures available under the United States Code as if no bankruptcy petition had been filed and as if no plan had been confirmed.

(b) If the IRS declares the Debtor, the Reorganized Debtor, or any successor-in-interest to be in default of the Debtor’s, the Reorganized Debtor’s and/ or any successor- in-interest’s obligations under the Plan, then entire prepetition liability of an IRS’ Allowed Claim, together with any unpaid postpetition tax liabilities shall become due and payable

immediately upon written demand to the Debtor, Reorganized Debtor and/or any successor-in-interest. Failure of the IRS to declare a failure and/or default does not constitute a waiver by the United States or its agency the IRS of the right to declare that the Debtor, Reorganized Debtor, and/or any successor in interest is in default.

(c) The IRS shall only be required to send two notices of failure and/or default, and upon the third event of a failure and/or default, the IRS shall be entitled to proceed as set out in paragraphs (1), (2), and/or (3) herein above without further notice to the Debtor, the Reorganized Debtor, or any successor in interest, or its counsel. The collection statute expiration date for all unpaid federal tax liabilities shall be extended pursuant to non-bankruptcy law.

(d) The Internal Revenue Service shall not be bound by any release provisions in the Plan that would release any liability of the responsible persons of the Debtor, the Reorganized Debtor, and/or any successor in interest to the IRS. The Internal Revenue Service may take such actions as it deems necessary to assess any liability that may be due and owing by the responsible persons of the Debtor, the Reorganized Debtor and/or any successor in interest to the Internal Revenue Service.

(e) Nothing contained in the Plan or the Confirmation Order shall be deemed to be a waiver or relinquishment of any rights, claims, causes of action, rights of setoff or recoupment, rights to appeal tax assessments, or other legal or equitable defenses that the Debtor or Reorganized Debtor have under non-bankruptcy law in connection with any claim, liability or cause of action of the United States and its agency the Internal Revenue Service.

(f) The term “any payment required to be made on federal taxes,” as used herein above, is defined as: any payment or deposit required by the Internal Revenue Code to be made by the Debtor from and after the Confirmation Date, or the Reorganized Debtor and/or any successor in interest from and after the Effective Date, to the date the IRS Claim is together with interest paid in full. The term “any required tax return,” as used herein above, is defined as: any tax return or report required by the Internal Revenue Code to be made by the Debtor from and after the Confirmation Date, or the Reorganized Debtor and/or any successor in interest from and after the Effective Date, to the date the IRS Claim is together with interest paid in full.

UU. IRS Proof of Claim. Notwithstanding anything in the Plan or in this Confirmation Order, until all required tax returns are filed with and processed by the IRS, the IRS’s proof of claim will not be deemed fixed for purposes of Section 502 of the Bankruptcy Code and may be amended in order to reflect the IRS’ assessment of the Debtor’s unpaid priority and general unsecured taxes, penalties and interest.

VV. CLO Holdco, Ltd. Settlement Notwithstanding anything contained herein to the contrary, nothing in this Order is or is intended to supersede the rights and obligations of either the Debtor or CLO Holdco contained in that certain *Settlement Agreement between CLO Holdco, Ltd., and Highland Capital Management, L.P., dated January 25, 2021* [Docket No. 1838-1] (the “CLOH Settlement Agreement”). In the event of any conflict between the terms of this Order and the terms of the CLOH Settlement Agreement, the terms of the CLOH Settlement Agreement will govern.

WW. Retention of Jurisdiction. The Bankruptcy Court may properly, and upon the Effective Date shall, to the maximum extent permitted under applicable law, retain jurisdiction over all matters arising out of, and related to, this Chapter 11 Case, including the matters set forth in Article XI of the Plan and section 1142 of the Bankruptcy Code.

XX. Payment of Statutory Fees; Filing of Quarterly Reports. All fees payable pursuant to **28 U.S.C. § 1930** shall be paid on or before the Effective Date. The Reorganized Debtor, the Claimant Trust, and the Litigation Sub-Trust shall be jointly and severally liable for payment of quarterly fees to the Office of the United States Trustee pursuant to **28 U.S.C. § 1930** through the entry of the Final Decree for the Debtor or the dismissal or conversion of the Chapter 11 Case. Notwithstanding anything to the contrary in the Plan, the U.S. Trustee shall not be required to file any proofs of claim with respect to quarterly fees payable pursuant to **28 U.S.C. § 1930**.

YY. Dissolution of the Committee. On the Effective Date, the Committee will dissolve, and the members of the Committee and the Committee’s Professionals will cease to have

any role arising from or relating to the Chapter 11 Case, except in connection with final fee applications of Professionals for services rendered prior to the Effective Date (including the right to object thereto). Notwithstanding the foregoing, any Committee member or Professional may serve following the Effective Date with respect to the Claimant Trust Oversight Board or Litigation Sub-Trust. The Professionals retained by the Committee and the members thereof will not be entitled to assert any fee claims for any services rendered to the Committee or expenses incurred in the service of the Committee after the Effective Date, except for reasonable fees for services rendered, and actual and necessary costs incurred, in connection with any applications for allowance of Professional Fees pending on the Effective Date or filed and served after the Effective Date pursuant to the Plan. Nothing in the Plan shall prohibit or limit the ability of the Debtor's or Committee's Professionals to represent either of the Trustees or to be compensated or reimbursed per the Plan, the Claimant Trust Agreement, and/or Litigation Sub-Trust in connection with such representation.

ZZ. Miscellaneous. After the Effective Date, the Debtor or Reorganized Debtor, as applicable, shall have no obligation to file with the Bankruptcy Court or serve on any parties reports that the Debtor or Reorganized Debtor, as applicable, were obligated to file under the Bankruptcy Code or a court order, including monthly operating reports (even for those periods for which a monthly operating report was not filed before the Effective Date), ordinary course professional reports, reports to any parties otherwise required under the "first" and "second" day orders entered in this Chapter 11 Case (including any cash collateral financing orders entered in this Chapter 11 Case) and monthly or quarterly reports for Professionals; *provided, however*, that

the Debtor or Reorganized Debtor, as applicable, will comply with the U.S. Trustee's post confirmation reporting requirements.

###END OF ORDER###

Exhibit A

Fifth Amended Plan (as Modified)

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

In re:

HIGHLAND CAPITAL MANAGEMENT, L.P.,¹

Debtor.

)
) Chapter 11
)
) Case No. 19-34054-sgj11
)
)
)
)

**FIFTH AMENDED PLAN OF REORGANIZATION OF HIGHLAND
CAPITAL MANAGEMENT, L.P. (AS MODIFIED)**

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

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DEBTOR'S CHAPTER 11 PLAN OF REORGANIZATION

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

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

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

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

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

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

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

B. Defined Terms

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

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

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

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

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

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

6. “*Allowed*” means, with respect to any Claim, except as otherwise provided in the Plan: (a) any Claim that is evidenced by a Proof of Claim that has been timely Filed by the Bar Date, or that is not required to be evidenced by a Filed Proof of Claim under the Bankruptcy

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

108. “*Reinstated*” means, with respect to any Claim or Equity Interest, (a) leaving unaltered the legal, equitable, and contractual rights to which a Claim entitles the Holder of such Claim or Equity Interest in accordance with section 1124 of the Bankruptcy Code or (b) notwithstanding any contractual provision or applicable law that entitles the Holder of such Claim or Equity Interest to demand or receive accelerated payment of such Claim or Equity Interest after the occurrence of a default: (i) curing any such default that occurred before or after the Petition Date, other than a default of a kind specified in section 365(b)(2) of the Bankruptcy Code or of a kind that section 365(b)(2) of the Bankruptcy Code expressly does not require to be cured; (ii) reinstating the maturity of such Claim or Equity Interest as such maturity existed before such default; (iii) compensating the Holder of such Claim or Equity Interest for any damages incurred as a result of any reasonable reliance by such Holder on such contractual provision or such applicable law; (iv) if such Claim or Equity Interest arises from any failure to perform a nonmonetary obligation, other than a default arising from failure to operate a non-residential real property lease subject to section 365(b)(1)(A) of the Bankruptcy Code, compensating the Holder

of such Claim or Equity Interest (other than any Debtor or an insider of any Debtor) for any actual pecuniary loss incurred by such Holder as a result of such failure; and (v) not otherwise altering the legal, equitable, or contractual rights to which such Claim entitles the Holder of such Claim.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

129. “*Subordinated Claim*” means any Claim that is subordinated to the Convenience Claims and General Unsecured Claims pursuant to an order entered by the Bankruptcy Court (including any other court having jurisdiction over the Chapter 11 Case) after notice and a hearing.

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

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

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

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

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

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

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

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

ARTICLE II.

ADMINISTRATIVE EXPENSES AND PRIORITY TAX CLAIMS

A. Administrative Expense Claims

On the later of the Effective Date or the date on which an Administrative Expense Claim becomes an Allowed Administrative Expense Claim, or, in each such case, as soon as practicable thereafter, each Holder of an Allowed Administrative Expense Claim (other than Professional Fee Claims) will receive, in full satisfaction, settlement, discharge and release of, and in exchange for, such Allowed Administrative Expense Claim either (i) payment in full in Available Cash for the unpaid portion of such Allowed Administrative Expense Claim; or (ii) such other less favorable treatment as agreed to in writing by the Debtor or the Reorganized Debtor, as applicable, and such Holder; *provided, however*, that Administrative Expense Claims incurred by the Debtor in the ordinary course of business may be paid in the ordinary course of business in the discretion of the Debtor in accordance with such applicable terms and conditions relating thereto without further notice to or order of the Bankruptcy Court. All statutory fees payable under 28 U.S.C. § 1930(a) shall be paid as such fees become due.

If an Administrative Expense Claim (other than a Professional Fee Claim) is not paid by the Debtor in the ordinary course, the Holder of such Administrative Expense Claim must File, on

or before the applicable Administrative Expense Claims Bar Date, and serve on the Debtor or Reorganized Debtor, as applicable, and such other Entities who are designated by the Bankruptcy Rules, the Confirmation Order or other order of the Bankruptcy Court, an application for allowance and payment of such Administrative Expense Claim.

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

B. Professional Fee Claims

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

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

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

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

C. Priority Tax Claims

On or as soon as reasonably practicable after the later of (i) the Initial Distribution Date if such Priority Tax Claim is an Allowed Priority Tax Claim as of the Effective Date or (ii) the date on which such Priority Tax Claim becomes an Allowed Priority Tax Claim, each Holder of an Allowed Priority Tax Claim will receive in full satisfaction, settlement, discharge and release of, and in exchange for, such Allowed Priority Tax Claim, at the election of the Debtor: (a) Cash in an amount of a total value as of the Effective Date of the Plan equal to the amount of such Allowed

Priority Tax Claim in accordance with section 1129(a)(9)(C) of the Bankruptcy Code, or (b) if paid over time, payment of such Allowed Priority Tax Claim in accordance with section 1129(a)(9)(C) of the Bankruptcy Code; or (c) such other less favorable treatment as agreed to in writing by the Debtor and such Holder. Payment of statutory fees due pursuant to 28 U.S.C. § 1930(a)(6) will be made at all appropriate times until the entry of a final decree; *provided, however*, that the Debtor may prepay any or all such Claims at any time, without premium or penalty.

ARTICLE III.

CLASSIFICATION AND TREATMENT OF CLASSIFIED CLAIMS AND EQUITY INTERESTS

A. Summary

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

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

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

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

C. Elimination of Vacant Classes

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

D. Impaired/Voting Classes

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

E. Unimpaired/Non-Voting Classes

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

F. Impaired/Non-Voting Classes

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

G. Cramdown

If any Class of Claims or Equity Interests is deemed to reject this Plan or does not vote to accept this Plan, the Debtor may (i) seek confirmation of this Plan under section 1129(b) of the Bankruptcy Code or (ii) amend or modify this Plan in accordance with the terms hereof and the Bankruptcy Code. If a controversy arises as to whether any Claims or Equity Interests, or any class of Claims or Equity Interests, are Impaired, the Bankruptcy Court shall, after notice and a hearing, determine such controversy on or before the Confirmation Date.

H. Classification and Treatment of Claims and Equity Interests

1. Class 1 – Jefferies Secured Claim

- *Classification:* Class 1 consists of the Jefferies Secured Claim.
- *Treatment:* On or as soon as reasonably practicable after the Effective Date, each Holder of an Allowed Class 1 Claim will receive in full satisfaction, settlement, discharge and release of, and in exchange for, such Allowed Class 1 Claim, at the election of the Debtor: (A) Cash equal to the amount of such Allowed Class 1 Claim; (B) such other less favorable treatment as to which the Debtor and the Holder of such Allowed Class 1 Claim will have agreed upon in writing; or (C) such other treatment rendering such Claim Unimpaired. Each Holder of an Allowed Class 1 Claim will retain the Liens securing its Allowed Class 1 Claim as of the Effective Date until

full and final payment of such Allowed Class 1 Claim is made as provided herein.

- *Impairment and Voting:* Class 1 is Unimpaired, and the Holders of Class 1 Claims are conclusively deemed to have accepted this Plan pursuant to section 1126(f) of the Bankruptcy Code. Therefore, the Holders of Class 1 Claims are not entitled to vote to accept or reject this Plan and will not be solicited.

2. Class 2 – Frontier Secured Claim

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

3. Class 3 – Other Secured Claims

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

4. Class 4 – Priority Non-Tax Claims

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

5. Class 5 – Retained Employee Claims

- *Classification:* Class 5 consists of the Retained Employee Claims.
- *Allowance and Treatment:* On or as soon as reasonably practicable after the Effective Date, each Allowed Class 5 Claim will be Reinstated.
- *Impairment and Voting:* Class 5 is Unimpaired, and the Holders of Class 5 Claims are conclusively deemed to have accepted this Plan pursuant to section 1126(f) of the Bankruptcy Code. Therefore, the Holders of Class 5 Claims are not entitled to vote to accept or reject this Plan and will not be solicited.

6. Class 6 – PTO Claims

- *Classification:* Class 6 consists of the PTO Claims.
- *Allowance and Treatment:* On or as soon as reasonably practicable after the later of (i) the Initial Distribution Date if such Class 6 Claim is Allowed on the Effective Date or (ii) the date on which such Class 6 Claim becomes an Allowed Class 6 Claim, each Holder of an Allowed Class 6 Claim will receive in full satisfaction, settlement, discharge and release of, and in exchange for, its Allowed Claim 6 Claim Cash equal to the amount of such Allowed Class 6 Claim.
- *Impairment and Voting:* Class 6 is Unimpaired, and the Holders of Class 6 Claims are conclusively deemed to have accepted this Plan pursuant to section 1126(f) of the Bankruptcy Code. Therefore, the Holders of Class 6

Claims are not entitled to vote to accept or reject this Plan and will not be solicited.

7. Class 7 – Convenience Claims

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

8. Class 8 – General Unsecured Claims

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

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

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

9. Class 9 – Subordinated Claims

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

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

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

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

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

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

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

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

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

11. Class 11 – Class A Limited Partnership Interests

- *Classification:* Class 11 consists of the Class A Limited Partnership Interests.

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

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

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

I. Special Provision Governing Unimpaired Claims

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

J. Subordinated Claims

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

ARTICLE IV. MEANS FOR IMPLEMENTATION OF THIS PLAN

A. Summary

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

On the Effective Date, all Class A Limited Partnership Interests, including the Class A Limited Partnership Interests held by Strand, as general partner, and Class B/C Limited Partnerships in the Debtor will be cancelled, and new Class A Limited Partnership Interests in the Reorganized Debtor will be issued to the Claimant Trust and New GP LLC – a newly-chartered limited liability company wholly-owned by the Claimant Trust. The Claimant Trust, as limited

partner, will ratify New GP LLC's appointment as general partner of the Reorganized Debtor, and on and following the Effective Date, the Claimant Trust will be the Reorganized Debtor's limited partner and New GP LLC will be its general partner. The Claimant Trust, as limited partner, and New GP LLC, as general partner, will execute the Reorganized Limited Partnership Agreement, which will amend and restate, in all respects, the Debtor's current Limited Partnership Agreement. Following the Effective Date, the Reorganized Debtor will be managed consistent with the terms of the Reorganized Limited Partnership Agreement by New GP LLC. The sole managing member of New GP LLC will be the Claimant Trust, and the Claimant Trustee will be the sole officer of New GP LLC on the Effective Date.

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

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

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

B. The Claimant Trust²

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

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

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

such transfer shall be exempt from any stamp, real estate transfer, mortgage from any stamp, transfer, reporting, sales, use, or other similar tax.

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

On the Effective Date, the Claimant Trustee and Litigation Trustee shall execute the Litigation Sub-Trust Agreement and shall take all steps necessary to establish the Litigation Sub-Trust. Upon the creation of the Litigation Sub-Trust, the Claimant Trust shall irrevocably transfer and assign to the Litigation Sub-Trust the Estate Claims. The Claimant Trust shall be governed by the Claimant Trust Agreement and administered by the Claimant Trustee. The powers, rights, and responsibilities of the Claimant Trustee shall be specified in the Claimant Trust Agreement and shall include the authority and responsibility to, among other things, take the actions set forth in this ARTICLE IV, subject to any required reporting to the Claimant Trust Oversight Committee as may be set forth in the Claimant Trust Agreement. The Claimant Trust shall hold and distribute the Claimant Trust Assets (including the proceeds from the Estate Claims, if any) in accordance with the provisions of the Plan and the Claimant Trust Agreement; *provided* that the Claimant Trust Oversight Committee may direct the Claimant Trust to reserve Cash from distributions as necessary to fund the Claimant Trust and Litigation Sub-Trust. Other rights and duties of the Claimant Trustee and the Claimant Trust Beneficiaries shall be as set forth in the Claimant Trust Agreement. After the Effective Date, neither the Debtor nor the Reorganized Debtor shall have any interest in the Claimant Trust Assets.

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

2. Claimant Trust Oversight Committee

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

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

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

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

3. Purpose of the Claimant Trust.

The Claimant Trust shall be established for the purpose of (i) managing and monetizing the Claimant Trust Assets, subject to the terms of the Claimant Trust Agreement and the oversight of the Claimant Trust Oversight Committee, (ii) serving as the limited partner of, and holding the limited partnership interests in, the Reorganized Debtor, (iii) serving as the sole member and manager of New GP LLC, the Reorganized Debtor's general partner, (iv) in its capacity as the sole member and manager of New GP LLC, overseeing the management and monetization of the Reorganized Debtor Assets pursuant to the terms of the Reorganized Limited Partnership Agreement; and (v) administering the Disputed Claims Reserve and serving as Distribution Agent with respect to Disputed Claims in Class 7 or Class 8.

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

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

4. Purpose of the Litigation Sub-Trust.

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

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

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

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

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

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

- (i) the payment of other reasonable expenses of the Litigation Sub-Trust;

(ii) the retention of employees, counsel, accountants, financial advisors, or other professionals and the payment of their reasonable compensation; and

(iii) the investigation and prosecution of Estate Claims, which may include the prosecution, settlement, abandonment, or dismissal of any such Estate Claims, subject to reporting and oversight as set forth in the Litigation Sub-Trust Agreement.

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

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

6. Compensation and Duties of Trustees.

The salient terms of each Trustee's employment, including such Trustee's duties and compensation shall be set forth in the Claimant Trust Agreement and the Litigation Sub-Trust Agreement, as appropriate. The Trustees shall each be entitled to reasonable compensation in an amount consistent with that of similar functionaries in similar types of bankruptcy cases.

7. Cooperation of Debtor and Reorganized Debtor.

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

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

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

Unless the IRS requires otherwise, for all United States federal income tax purposes, the parties shall treat the transfer of the Claimant Trust Assets to the Claimant Trust as: (a) a transfer

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

9. Tax Reporting.

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

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

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

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

10. Claimant Trust Assets.

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

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

11. Claimant Trust Expenses.

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

12. Trust Distributions to Claimant Trust Beneficiaries.

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

13. Cash Investments.

With the consent of the Claimant Trust Oversight Committee, the Claimant Trustee may invest Cash (including any earnings thereon or proceeds therefrom) in a manner consistent with the terms of the Claimant Trust Agreement; *provided, however*, that such investments are investments permitted to be made by a “liquidating trust” within the meaning of Treasury Regulation section 301.7701-4(d), as reflected therein, or under applicable IRS guidelines, rulings or other controlling authorities.

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

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

no extension, together with any prior extensions, shall exceed three years without a favorable letter ruling from the Internal Revenue Service or an opinion of counsel that any further extension would not adversely affect the status of the Claimant Trust as a liquidating trust for federal income tax purposes.

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

C. The Reorganized Debtor

1. Corporate Existence

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

2. Cancellation of Equity Interests and Release

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

3. Issuance of New Partnership Interests

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

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

4. Management of the Reorganized Debtor

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

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

5. Vesting of Assets in the Reorganized Debtor

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

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

6. Purpose of the Reorganized Debtor

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

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

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

Any proceeds received by the Reorganized Debtor will be distributed to the Claimant Trust, as limited partner, and New GP LLC, as general partner, in the manner set forth in the Reorganized Limited Partnership Agreement. As set forth in the Reorganized Limited Partnership Agreement,

the Reorganized Debtor may, from time to time distribute Reorganized Debtor Assets to the Claimant Trust either in Cash or in-kind, including to institute the wind-down and dissolution of the Reorganized Debtor. Any assets distributed to the Claimant Trust will be (i) deemed transferred in all respects as forth in ARTICLE IV.B.1, (ii) deemed Claimant Trust Assets, and (iii) administered as Claimant Trust Assets.

D. Company Action

Each of the Debtor, the Reorganized Debtor, and the Trustees, as applicable, may take any and all actions to execute, deliver, File or record such contracts, instruments, releases and other agreements or documents and take such actions as may be necessary or appropriate to effectuate and implement the provisions of this Plan, the Claimant Trust Agreement, the Reorganized Limited Partnership Agreement, or the New GP LLC Documents, as applicable, in the name of and on behalf of the Debtor, the Reorganized Debtor, or the Trustees, as applicable, and in each case without further notice to or order of the Bankruptcy Court, act or action under applicable law, regulation, order, or rule or any requirement of further action, vote or other approval or authorization by the security holders, officers, or directors of the Debtor or the Reorganized Debtor, as applicable, or by any other Person.

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

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

E. Release of Liens, Claims and Equity Interests

Except as otherwise provided in the Plan or in any contract, instrument, release or other agreement or document entered into or delivered in connection with the Plan, from and after the Effective Date and concurrently with the applicable distributions made pursuant to the Plan, all Liens, Claims, Equity Interests, mortgages, deeds of trust, or other security interests against the property of the Estate will be fully released, terminated, extinguished and discharged, in each case without further notice to or order of the Bankruptcy Court, act or action under applicable law, regulation, order, or rule or the vote, consent, authorization or approval of any Entity. Any Entity holding such Liens or Equity Interests extinguished pursuant to the prior sentence will, pursuant to section 1142 of the Bankruptcy Code, promptly execute and deliver to the Debtor, the Reorganized Debtor, or the Claimant Trustee, as applicable, such instruments of termination, release, satisfaction and/or assignment (in recordable form) as may be reasonably requested by the Debtor, the Reorganized Debtor, or the Claimant Trustee, as applicable. For the avoidance of doubt, this section is in addition to, and shall not be read to limit in any respects, ARTICLE IV.C.2.

F. Cancellation of Notes, Certificates and Instruments

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

G. Cancellation of Existing Instruments Governing Security Interests

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

H. Control Provisions

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

I. Treatment of Vacant Classes

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

J. Plan Documents

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

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

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

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

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

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

ARTICLE V.
TREATMENT OF EXECUTORY CONTRACTS AND UNEXPIRED LEASES

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

Unless an Executory Contract or Unexpired Lease: (i) was previously assumed or rejected by the Debtor pursuant to this Plan on or prior to the Confirmation Date; (ii) previously expired or terminated pursuant to its own terms or by agreement of the parties thereto; (iii) is the subject of a motion to assume filed by the Debtor on or before the Confirmation Date; (iv) contains a change of control or similar provision that would be triggered by the Chapter 11 Case (unless such provision has been irrevocably waived); or (v) is specifically designated as a contract or lease to be assumed in the Plan or the Plan Supplement, on the Confirmation Date, each Executory Contract and Unexpired Lease shall be deemed rejected pursuant to section 365 of the Bankruptcy Code, without the need for any further notice to or action, order, or approval of the Bankruptcy Court, unless such Executory Contract or Unexpired Lease is listed in the Plan Supplement.

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

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

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

Notwithstanding anything herein to the contrary, the Debtor shall assume or reject that certain real property lease with Crescent TC Investors L.P. ("Landlord") for the Debtor's headquarters located at 200/300 Crescent Ct., Suite #700, Dallas, Texas 75201 (the "Lease") in accordance with the notice to Landlord, procedures and timing required by 11 U.S.C. §365(d)(4),

as modified by that certain *Agreed Order Granting Motion to Extend Time to Assume or Reject Unexpired Nonresidential Real Property Lease* [Docket No. 1122].

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

Any Executory Contract or Unexpired Lease not assumed or rejected on or before the Confirmation Date shall be deemed rejected, pursuant to the Confirmation Order. Any Person asserting a Rejection Claim shall File a proof of claim within thirty days of the Confirmation Date. Any Rejection Claims that are not timely Filed pursuant to this Plan shall be forever disallowed and barred. If one or more Rejection Claims are timely Filed, the Claimant Trustee may File an objection to any Rejection Claim.

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

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

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

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

Assumption or assignment of any Executory Contract or Unexpired Lease pursuant to the Plan or otherwise and full payment of any applicable cure amounts pursuant to this ARTICLE V.C shall result in the full release and satisfaction of any cure amounts, Claims, or defaults, whether monetary or nonmonetary, including defaults of provisions restricting the change in control or ownership interest composition or other bankruptcy-related defaults, arising under any assumed or assigned Executory Contract or Unexpired Lease at any time prior to the effective date of assumption or assignment. Any and all Proofs of Claim based upon Executory Contracts or Unexpired Leases that have been assumed or assigned in the Chapter 11 Case, including pursuant to the Confirmation Order, and for which any cure amounts have been fully paid pursuant to this ARTICLE V.C, shall be deemed disallowed and expunged as of the Confirmation Date without the need for any objection thereto or any further notice to or action, order, or approval of the Bankruptcy Court.

ARTICLE VI.

PROVISIONS GOVERNING DISTRIBUTIONS

A. Dates of Distributions

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

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

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

B. Distribution Agent

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

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

The Distribution Agent shall be empowered to (a) effect all actions and execute all agreements, instruments, and other documents necessary to perform its duties under this Plan; (b) make all distributions contemplated hereby; (c) employ professionals to represent it with respect to its responsibilities; and (d) exercise such other powers as may be vested in the Distribution Agent by order of the Bankruptcy Court, pursuant to this Plan, or as deemed by the Distribution Agent to be necessary and proper to implement the provisions hereof.

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

C. Cash Distributions

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

D. Disputed Claims Reserve

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

E. Distributions from the Disputed Claims Reserve

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

F. Rounding of Payments

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

G. De Minimis Distribution

Except as to any Allowed Claim that is Unimpaired under this Plan, none of the Debtor, the Reorganized Debtor, or the Distribution Agent shall have any obligation to make any Plan Distributions with a value of less than \$100, unless a written request therefor is received by the Distribution Agent from the relevant recipient at the addresses set forth in ARTICLE VI.J hereof within 120 days after the later of the (i) Effective Date and (ii) the date such Claim becomes an Allowed Claim. *De minimis* distributions for which no such request is timely received shall revert to the Claimant Trust. Upon such reversion, the relevant Allowed Claim (and any Claim on account of missed distributions) shall be automatically deemed satisfied, discharged and forever barred, notwithstanding any federal or state escheat laws to the contrary.

H. Distributions on Account of Allowed Claims

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

I. General Distribution Procedures

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

J. Address for Delivery of Distributions

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

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

K. Undeliverable Distributions and Unclaimed Property

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

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

L. Withholding Taxes

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

M. Setoffs

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

N. Surrender of Cancelled Instruments or Securities

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

O. Lost, Stolen, Mutilated or Destroyed Securities

In addition to any requirements under any applicable agreement and applicable law, any Holder of a Claim or Equity Interest evidenced by a security or note that has been lost, stolen, mutilated, or destroyed will, in lieu of surrendering such security or note to the extent required by this Plan, deliver to the Distribution Agent: (i) evidence reasonably satisfactory to the Distribution Agent of such loss, theft, mutilation, or destruction; and (ii) such security or indemnity as may be required by the Distribution Agent to hold such party harmless from any damages, liabilities, or costs incurred in treating such individual as a Holder of an Allowed Claim or Equity Interest. Upon compliance with ARTICLE VI.O of this Plan as determined by the Distribution Agent, by a Holder of a Claim evidenced by a security or note, such Holder will, for all purposes under this Plan, be deemed to have surrendered such security or note to the Distribution Agent.

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

A. Filing of Proofs of Claim

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

B. Disputed Claims

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

C. Procedures Regarding Disputed Claims or Disputed Equity Interests

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

D. Allowance of Claims and Equity Interests

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

1. Allowance of Claims

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

2. Estimation

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

3. Disallowance of Claims

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

EXCEPT AS OTHERWISE PROVIDED HEREIN OR AS AGREED TO BY THE DEBTOR, REORGANIZED DEBTOR, OR CLAIMANT TRUSTEE, AS APPLICABLE,

ANY AND ALL PROOFS OF CLAIM FILED AFTER THE BAR DATE SHALL BE DEEMED DISALLOWED AND EXPUNGED AS OF THE EFFECTIVE DATE WITHOUT ANY FURTHER NOTICE TO OR ACTION, ORDER, OR APPROVAL OF THE BANKRUPTCY COURT, AND HOLDERS OF SUCH CLAIMS MAY NOT RECEIVE ANY DISTRIBUTIONS ON ACCOUNT OF SUCH CLAIMS, UNLESS SUCH LATE PROOF OF CLAIM HAS BEEN DEEMED TIMELY FILED BY A FINAL ORDER.

**ARTICLE VIII.
EFFECTIVENESS OF THIS PLAN**

A. Conditions Precedent to the Effective Date

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

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

Agreement, and the New GP LLC Documents, in each case in form and substance reasonably acceptable to the Debtor and the Committee, shall have (a) been tendered for delivery, and (b) been effected by, executed by, or otherwise deemed binding upon, all Entities party thereto and shall be in full force and effect. All conditions precedent to such documents and agreements shall have been satisfied or waived pursuant to the terms of such documents or agreements.

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

B. Waiver of Conditions

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

C. Dissolution of the Committee

On the Effective Date, the Committee will dissolve, and the members of the Committee and the Committee's Professionals will cease to have any role arising from or relating to the Chapter 11 Case, except in connection with final fee applications of Professionals for services rendered prior to the Effective Date (including the right to object thereto). The Professionals retained by the Committee and the members thereof will not be entitled to assert any fee claims for any services rendered to the Committee or expenses incurred in the service of the Committee after the Effective Date, except for reasonable fees for services rendered, and actual and necessary costs incurred, in connection with any applications for allowance of Professional Fees pending on

the Effective Date or filed and served after the Effective Date pursuant to the Plan. Nothing in the Plan shall prohibit or limit the ability of the Debtor's or Committee's Professionals to represent either of the Trustees or to be compensated or reimbursed per the Plan and the Claimant Trust Agreement in connection with such representation.

ARTICLE IX.

EXCULPATION, INJUNCTION AND RELATED PROVISIONS

A. General

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

B. Discharge of Claims

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

C. Exculpation

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

will not apply to (a) any acts or omissions of an Exculpated Party arising out of or related to acts or omissions that constitute bad faith, fraud, gross negligence, criminal misconduct, or willful misconduct or (b) Strand or any Employee other than with respect to actions taken by such Entities from the date of appointment of the Independent Directors through the Effective Date. This exculpation shall be in addition to, and not in limitation of, all other releases, indemnities, exculpations, any other applicable law or rules, or any other provisions of this Plan, including ARTICLE IV.C.2, protecting such Exculpated Parties from liability.

D. Releases by the Debtor

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

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

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

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

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

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

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

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

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

E. Preservation of Rights of Action

1. Maintenance of Causes of Action

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

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

Unless a Cause of Action against a Holder of a Claim or an Equity Interest or other Entity is expressly waived, relinquished, released, compromised or settled in this Plan or any Final Order (including, without limitation, the Confirmation Order), such Cause of Action is expressly reserved for later adjudication by the Reorganized Debtor or Claimant Trust, as applicable (including,

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

F. Injunction

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

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

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

Subject in all respects to ARTICLE XII.D, no Enjoined Party may commence or pursue a claim or cause of action of any kind against any Protected Party that arose or arises from or is related to the Chapter 11 Case, the negotiation of the Plan, the administration of the Plan or property to be distributed under the Plan, the wind down of the business of the Debtor or Reorganized Debtor, the administration of the Claimant Trust or the Litigation Sub-Trust, or the transactions in furtherance of the foregoing without the Bankruptcy Court

(i) first determining, after notice and a hearing, that such claim or cause of action represents a colorable claim of any kind, including, but not limited to, negligence, bad faith, criminal misconduct, willful misconduct, fraud, or gross negligence against a Protected Party and (ii) specifically authorizing such Enjoined Party to bring such claim or cause of action against any such Protected Party; *provided, however*, the foregoing will not apply to a claim or cause of action against Strand or against any Employee other than with respect to actions taken, respectively, by Strand or by such Employee from the date of appointment of the Independent Directors through the Effective Date. The Bankruptcy Court will have sole and exclusive jurisdiction to determine whether a claim or cause of action is colorable and, only to the extent legally permissible and as provided for in ARTICLE XI, shall have jurisdiction to adjudicate the underlying colorable claim or cause of action.

G. Duration of Injunctions and Stays

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

H. Continuance of January 9 Order

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

**ARTICLE X.
BINDING NATURE OF PLAN**

On the Effective Date, and effective as of the Effective Date, the Plan, including, without limitation, the provisions in ARTICLE IX, will bind, and will be deemed binding upon, all Holders of Claims against and Equity Interests in the Debtor and such Holder's respective successors and assigns, to the maximum extent permitted by applicable law, notwithstanding whether or not such Holder will receive or retain any property or interest in property under the Plan. All Claims and Debts shall be fixed and adjusted pursuant to this Plan. The Plan shall also bind any taxing authority, recorder of deeds, or similar official for any county, state, Governmental Unit or parish in which any instrument related to the Plan or related to any transaction contemplated thereby is to be recorded with respect to any taxes of the kind specified in Bankruptcy Code section 1146(a).

ARTICLE XI.

RETENTION OF JURISDICTION

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

- allow, disallow, determine, liquidate, classify, estimate or establish the priority, secured, unsecured, or subordinated status of any Claim or Equity Interest, including, without limitation, the resolution of any request for payment of any Administrative Expense Claim and the resolution of any and all objections to the allowance or priority of any Claim or Equity Interest;
- grant or deny any applications for allowance of compensation or reimbursement of expenses authorized pursuant to the Bankruptcy Code or this Plan, for periods ending on or before the Effective Date; *provided, however*, that, from and after the Effective Date, the Reorganized Debtor shall pay Professionals in the ordinary course of business for any work performed after the Effective Date subject to the terms of this Plan and the Confirmation Order, and such payment shall not be subject to the approval of the Bankruptcy Court;
- resolve any matters related to the assumption, assignment or rejection of any Executory Contract or Unexpired Lease to which the Debtor is party or with respect to which the Debtor, Reorganized Debtor, or Claimant Trust may be liable and to adjudicate and, if necessary, liquidate, any Claims arising therefrom, including, without limitation, any dispute regarding whether a contract or lease is or was executory or expired;
- make any determination with respect to a claim or cause of action against a Protected Party as set forth in ARTICLE IX;
- resolve any claim or cause of action against an Exculpated Party or Protected Party arising from or related to the Chapter 11 Case, the negotiation of this Plan, the administration of the Plan or property to be distributed under the Plan, the wind down of the business of the Debtor or Reorganized Debtor, or the transactions in furtherance of the foregoing;
- if requested by the Reorganized Debtor or the Claimant Trustee, authorize, approve, and allow any sale, disposition, assignment or other transfer of the Reorganized Debtor Assets or Claimant Trust Assets, including any break-up compensation or expense reimbursement that may be requested by a purchaser thereof; *provided, however*, that neither the Reorganized Debtor nor the Claimant Trustee shall be required to seek such authority or approval from the Bankruptcy Court unless otherwise specifically required by this Plan or the Confirmation Order;

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

- resolve any other matters that may arise in connection with or relate to this Plan, the Disclosure Statement, the Confirmation Order, the Plan Documents, or any contract, instrument, release, indenture or other agreement or document adopted in connection with this Plan or the Disclosure Statement; and
- enter an order concluding or closing the Chapter 11 Case after the Effective Date.

ARTICLE XII.

MISCELLANEOUS PROVISIONS

A. Payment of Statutory Fees and Filing of Reports

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

B. Modification of Plan

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

C. Revocation of Plan

The Debtor reserves the right to revoke or withdraw this Plan prior to the Confirmation Date and to File a subsequent chapter 11 plan with the consent of the Committee. If the Debtor revokes or withdraws this Plan prior to the Confirmation Date, then: (i) this Plan shall be null and void in all respects; (ii) any settlement or compromise embodied in this Plan, assumption of Executory Contracts or Unexpired Leases effected by this Plan and any document or agreement executed pursuant hereto shall be deemed null and void except as may be set forth in a separate order entered by the Bankruptcy Court; and (iii) nothing contained in this Plan shall: (a) constitute a waiver or release of any Claims by or against, or any Equity Interests in, the Debtor or any other Entity; (b) prejudice in any manner the rights of the Debtor or any other Entity; or (c) constitute an admission, acknowledgement, offer or undertaking of any sort by the Debtor or any other Entity.

D. Obligations Not Changed

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

E. Entire Agreement

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

F. Closing of Chapter 11 Case

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

G. Successors and Assigns

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

H. Reservation of Rights

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

Neither the exclusion or inclusion by the Debtor of any contract or lease on any exhibit, schedule, or other annex to this Plan or in the Plan Documents, nor anything contained in this Plan, will constitute an admission by the Debtor that any such contract or lease is or is not an executory contract or lease or that the Debtor, the Reorganized Debtor, the Claimant Trustee, or their respective Affiliates has any liability thereunder.

Except as explicitly provided in this Plan, nothing herein shall waive, excuse, limit, diminish, or otherwise alter any of the defenses, claims, Causes of Action, or other rights of the

Debtor, the Reorganized Debtor, or the Claimant Trustee under any executory or non-executory contract.

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

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

I. Further Assurances

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

J. Severability

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

K. Service of Documents

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

If to the Claimant Trust:

Highland Claimant Trust
c/o Highland Capital Management, L.P.
300 Crescent Court, Suite 700

Dallas, Texas 75201
Attention: James P. Seery, Jr.

If to the Debtor:

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

with copies to:

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

If to the Reorganized Debtor:

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

with copies to:

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

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

To the extent permitted by applicable law, pursuant to section 1146(a) of the Bankruptcy Code, any transfers of property pursuant hereto shall not be subject to any Stamp or Similar Tax or governmental assessment in the United States, and the Confirmation Order shall direct the appropriate federal, state or local governmental officials or agents or taxing authority to forego the collection of any such Stamp or Similar Tax or governmental assessment and to accept for filing and recordation instruments or other documents pursuant to such transfers of property without the payment of any such Stamp or Similar Tax or governmental assessment. Such exemption specifically applies, without limitation, to (i) all actions, agreements and documents necessary to

evidence and implement the provisions of and the distributions to be made under this Plan; (ii) the maintenance or creation of security or any Lien as contemplated by this Plan; and (iii) assignments, sales, or transfers executed in connection with any transaction occurring under this Plan.

M. Governing Law

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

N. Tax Reporting and Compliance

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

O. Exhibits and Schedules

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

P. Controlling Document

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

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Dated: January 22, 2021

Respectfully submitted,

HIGHLAND CAPITAL MANAGEMENT, L.P.

By: 

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

Prepared by:

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Email: MHayward@HaywardFirm.com

ZAnnable@HaywardFirm.com

Counsel for the Debtor and Debtor-in-Possession

Exhibit B

Schedule of CLO Management Agreements and Related Contracts to Be Assumed

Schedule of CLO Management Agreements and Related Contracts to Be Assumed

1. Servicing Agreement, dated December 20, 2007, by and among Greenbriar CLO, Ltd., and Highland Capital Management, L.P.
2. Investment Management Agreement, dated November 1, 2007, by and between Longhorn Credit Funding, LLC, and Highland Capital Management, L.P. (as amended)
3. Reference Portfolio Management Agreement, dated August 1, 2016, by and between Highland Capital Management, L.P., and Valhalla CLO, Ltd.
4. Collateral Servicing Agreement, dated December 20, 2006, by and among Highland Park CDO I, Ltd., and Highland Capital Management, L.P.
5. Portfolio Management Agreement, dated March 15, 2005, by and among Southfork CLO Ltd., and Highland Capital Management, L.P.
6. Amended and Restated Portfolio Management Agreement, dated November 30, 2005, by and among Jasper CLO Ltd., and Highland Capital Management, L.P.
7. Servicing Agreement, dated May 31, 2007, by and among Westchester CLO, Ltd., and Highland Capital Management, L.P.
8. Servicing Agreement, dated May 10, 2006, by and among Rockwall CDO Ltd. and Highland Capital Management, L.P. (as amended)
9. Portfolio Management Agreement, dated December 8, 2005, by and between Liberty CLO, Ltd., and Highland Capital Management, L.P.
10. Servicing Agreement, dated March 27, 2008, by and among Aberdeen Loan Funding, Ltd., and Highland Capital Management, L.P.
11. Servicing Agreement, dated May 9, 2007, by and among Rockwall CDO II Ltd. and Highland Capital Management, L.P.
12. Collateral Management Agreement, by and between, Highland Loan Funding V Ltd. and Highland Capital Management, L.P., dated August 1, 2001.
13. Collateral Management Agreement, dated August 18, 1999, by and between Highland Legacy Limited and Highland Capital Management, L.P.
14. Servicing Agreement, dated November 30, 2006, by and among Grayson CLO Ltd., and Highland Capital Management, L.P. (as amended)
15. Servicing Agreement, dated October 25, 2007, by and among Stratford CLO Ltd., and Highland Capital Management, L.P.
16. Servicing Agreement, dated August 3, 2006, by and among Red River CLO Ltd., and Highland Capital Management, L.P. (as amended)
17. Servicing Agreement, dated December 21, 2006, by and among Brentwood CLO, Ltd., and Highland Capital Management, L.P.
18. Servicing Agreement, dated March 13, 2007, by and among Eastland CLO Ltd., and Highland Capital Management, L.P.

19. Portfolio Management, Agreement, dated October 13, 2005, by and among Gleneagles CLO, Ltd., and Highland Capital Management, L.P.
20. Members' Agreement and Amendment, dated November 15, 2017, by and between Highland CLO Funding, Ltd. and Highland Capital Management, L.P.
21. Collateral Management Agreement, dated May 19, 1998, by and between Pam Capital Funding LP, Ranger Asset Mgt LP and Highland Capital Management, L.P.
22. Collateral Management Agreement, dated August 6, 1997, by and between Pamco Cayman Ltd., Ranger Asset Mgt LP and Highland Capital Management, L.P.
23. Amendment No. 1 to Servicing Agreement, October 2, 2007, between Highland Capital Management, L.P. and Red River CLO Ltd. et al
24. Interim Collateral Management Agreement, June 15, 2005, between Highland Capital Management, L.P. and Rockwall CDO Ltd
25. Amendment No. 1 to Servicing Agreement, October 2, 2007, between Highland Capital Management, L.P. and Rockwall CDO Ltd
26. Collateral Servicing Agreement dated December 20, 2006, between Highland Capital Management, L.P. and Highland Park CDO I, Ltd.; The Bank of New York Trust Company, National Association
27. Representations and Warranties Agreement, dated December 20, 2006, between Highland Capital Management, L.P. and Highland Park CDO I, Ltd.
28. Collateral Administration Agreement, dated March 27, 2008, between Highland Capital Management, L.P. and Aberdeen Loan Funding, Ltd.; State Street Bank and Trust Company
29. Collateral Administration Agreement, dated December 20, 2007, between Highland Capital Management, L.P. and Greenbriar CLO, Ltd.; State Street Bank and Trust Company
30. Collateral Acquisition Agreement, dated March 13, 2007, between Highland Capital Management, L.P. and Eastland CLO, Ltd
31. Collateral Administration Agreement, dated March 13, 2007, between Highland Capital Management, L.P. and Eastland CLO, Ltd. and Investors Bank and Trust Company
32. Collateral Administration Agreement, dated October 13, 2005, between Highland Capital Management, L.P. and Gleneagles CLO, Ltd.; JPMorgan Chase Bank, National Association
33. Collateral Acquisition Agreement, dated November 30, 2006, between Highland Capital Management, L.P. and Grayson CLO, Ltd.
34. Collateral Administration Agreement, dated November 30, 2006, between Highland Capital Management, L.P. and Grayson CLO, Ltd.; Investors Bank & Trust Company
35. Collateral Acquisition Agreement, dated August 3, 2006, between Highland Capital Management, L.P. and Red River CLO, Ltd.

36. Collateral Administration Agreement, dated August 3, 2006, between Highland Capital Management, L.P. and Red River CLO, Ltd.; U.S. Bank National Association
37. Master Warehousing and Participation Agreement, dated April 19, 2006, between Highland Capital Management, L.P. and Red River CLO Ltd.; Highland Special Opportunities Holding Company
38. Master Warehousing and Participation Agreement, dated February 2, 2006, between Highland Capital Management, L.P. and Red River CLO Ltd.; MMP-5 Funding, LLC; IXIS Financial Products Inc.
39. Master Warehousing and Participation Agreement (Amendment No. 2), dated May 5, 2006, between Highland Capital Management, L.P. and Red River CLO Ltd.; MMP-5 Funding, LLC; IXIS Financial Products Inc.
40. Master Warehousing and Participation Agreement (Amendment No. 1), dated April 12, 2006, between Highland Capital Management, L.P. and Red River CLO Ltd.; MMP-5 Funding, LLC; IXIS Financial Products Inc.
41. Master Warehousing and Participation Agreement (Amendment No. 3), dated June 22, 2006, between Highland Capital Management, L.P. and Red River CLO Ltd.; MMP-5 Funding, LLC; IXIS Financial Products Inc.
42. Master Warehousing and Participation Agreement (Amendment No. 4), dated July 17, 2006, between Highland Capital Management, L.P. and Red River CLO Ltd.; MMP-5 Funding, LLC; IXIS Financial Products Inc.
43. Collateral Administration Agreement, dated February 2, 2006, between Highland Capital Management, L.P. and Red River CLO Ltd.; U.S. Bank National Association; IXIS Financial Products Inc.
44. Collateral Administration Agreement, dated April 18, 2006, between Highland Capital Management, L.P. and Red River CLO Ltd.; Highland Special Opportunities Holding Company; U.S. Bank National Association
45. Master Participation Agreement, dated June 5, 2006, between Highland Capital Management, L.P. and Red River CLO Ltd.; Grand Central Asset Trust
46. A&R Asset Acquisition Agreement, dated July 18, 2001, between Highland Capital Management, L.P. and Salomon Smith Barney Inc.; Highland Loan Funding V Ltd.
47. A&R Master Participation Agreement, dated July 18, 2001, between Highland Capital Management, L.P. and Salomon Brothers Holding Company; Highland Loan Funding V Ltd.
48. Collateral Acquisition Agreement, dated June 29, 2005, between Highland Capital Management, L.P. and Jasper CLO Ltd.
49. Collateral Administration Agreement, dated June 29, 2005, between Highland Capital Management, L.P. and Jasper CLO Ltd.; JPMorgan Chase Bank, National Association
50. Master Warehousing and Participation Agreement, dated March 24, 2005, between Highland Capital Management, L.P. and Jasper CLO Ltd; MMP-5 Funding, LLC; and IXIS Financial Products Inc.

51. Master Warehousing and Participation Agreement (Amendment No. 1), dated May 16, 2005, between Highland Capital Management, L.P. and Jasper CLO Ltd; MMP-5 Funding, LLC; and IXIS Financial Products Inc.
52. Collateral Administration Agreement, dated December 8, 2005, between Highland Capital Management, L.P. and Liberty CLO Ltd.
53. Collateral Administration Agreement, dated May 10, 2006, between Highland Capital Management, L.P. and Rockwall CDO Ltd; JPMorgan Chase Bank, National Association
54. Collateral Administration Agreement, dated May 9, 2007, between Highland Capital Management, L.P. and Rockwall CDO II, Ltd.; Investors Bank & Trust Company
55. Collateral Administration Agreement, dated March 15, 2005, between Highland Capital Management, L.P. and Southfork CLO Ltd.; JPMorgan Chase Bank, National Association
56. Collateral Administration Agreement, dated October 25, 2007, between Highland Capital Management, L.P. and Stratford CLO Ltd.; State Street
57. Collateral Administration Agreement, dated August 18, 2004, between Highland Capital Management, L.P. and Valhalla CLO, Ltd.; JPMorgan Chase Bank
58. Collateral Acquisition Agreement, dated May 31, 2007, between Highland Capital Management, L.P. and Westchester CLO, Ltd.
59. Collateral Administration Agreement, dated May 31, 2007, between Highland Capital Management, L.P. and Westchester CLO, Ltd.; Investors Bank & Trust Company
60. Collateral Administration Agreement, dated December 21, 2006, between Highland Capital Management, L.P. and Brentwood CLO, Ltd.; Investors Bank & Trust Company

EXHIBIT 5

In re Highland Capital Management, L.P., Case No. 19-34054-sgj11 (Bankr. N.D. Tex.)

9/23/20 *Debtor's Motion for Entry of an Order Approving Settlement with (a) Acis Capital Management, L.P. and Acis Capital Management GP LLC (Claim No. 23), (b) Joshua N. Terry and Jennifer G. Terry (Claim No. 156), and (c) Acis Capital Management, L.P. (Claim No. 159) and Authorizing Actions Consistent Therewith [D.I. 1087]*

Objectors: Dondero [D.I. 1121] The Acis Settlement Motion Dondero appealed was the result of an involuntary bankruptcy initiated was approved and Dondero's [D.I. 1347]. The when the Debtor refused to pay an arbitration award and objection was overruled [D.I. appeal is being instead transferred assets to become judgment proof. 1302]. briefed. Debtor settled claim for an allowed Class 8 claim of \$23 million and approximately \$1 million in cash payments. Dondero objected to the settlement alleging that it was unreasonable and constituted vote buying.

11/18/20 *Motion of the Debtor Pursuant to 11 U.S.C. §§ 105(a) and 363(b) for Authority to Enter into Sub-Servicer Agreements [D.I. 1424]*

Objectors: Dondero [D.I. 1447] The Debtor filed a motion seeking to retain a sub-servicer to assist in its reorganization consistent with the objection [D.I. 1460] after proposed plan. Dondero alleged that the sub-servicer forcing the Debtor to incur costs was not needed; was too expensive; and would not be responding [D.I. 1459] subject to Bankruptcy Court jurisdiction [D.I. 1447].

11/19/20 *James Dondero's Motion for Entry of an Order Requiring Notice and Hearing for Future Estate Transactions Occurring Outside of the Ordinary Course [D.I. 1439]*

Movant: Dondero Dondero alleged the Debtor sold significant assets in violation of 11 U.S.C. § 363 and without providing [D.I. 1622] after the Debtor and Dondero a chance to bid. Dondero requested an the Committee were forced to incur costs responding and emergency hearing on this motion [D.I. 1443]. Dondero preparing for trial [D.I. 1546, filed this motion despite having agreed to the Protocols 1551]. governing such sales.

12/8/20 *Motion for Order Imposing Temporary Restrictions on Debtor's Ability, as Portfolio Manager, to Initiate Sales by Non-Debtor CLO Vehicles [D.I. 1522]*

Movants: Advisors Funds The motion was denied [D.I. N/A from causing the CLOs to sell assets without Movants' 1605] and was characterized as consent. Movants provided no support for this position "frivolous." which directly contradicted the terms of the CLO Agreements; and was filed notwithstanding the Protocols which governed such sales. Movants requested an emergency hearing on this motion [D.I. 1523].

* The following is by way of summary only and does not include discovery disputes or similar matters. Nothing herein shall be deemed or considered a waiver of any rights or an admission of fact. The Debtor reserves all rights that it may have whether in law or in equity.

12/23/20

Debtor's Motion for Entry of an Order Approving Settlement with HarbourVest (Claim Nos. 143, 147, 150, 153, 154) and Authorizing Actions Consistent Therewith [D.I. 1625]

Objectors: Dondero [D.I. 1697] The HarbourVest Entities asserted claims in excess of \$300 million in connection with an investment in a fund indirectly managed by the Debtor for, among other things, fraud and fraudulent inducement, concealment, and misrepresentation. Debtor settled for an allowed Class 8 claim of \$45 million and an allowed Class 9 claim of \$35 million. Dondero and the Trusts alleged that the settlement was unreasonable; was a windfall to the HarbourVest Entities; and constituted vote buying. CLOH argued that the settlement could not be effectuated under the operative documents.

The Trusts appealed [D.I. 1870], and the appeal is being briefed. CLOH recently filed a complaint alleging, among other things, that the settlement was a breach of fiduciary duty and a RICO violation.

1/14/21

Motion to Appoint Examiner Pursuant to 11 U.S.C. § 1104(c) [D.I. 1752]

Movants: Trusts Dondero [D.I. 1756]

Movants sought the appointment of an examiner 14 months after the Petition Date and commencement of Plan solicitation to assess the legitimacy of the claims against the various Dondero Entities and to avoid litigation. Movants requested an emergency hearing on this motion [D.I. 1748].

The motion was denied [D.I. 1960]. N/A

1/20/21

James Dondero's Objection to Debtor's Proposed Assumption of Executory Contracts and Cure Amounts Proposed in Connection Therewith [D.I. 1784]

Objector: Dondero

Dondero objected to the Debtor's proposed assumption of the limited partnership agreement governing the Debtor and MSCF [D.I. 1719].

Dondero withdrew his objection [D.I. 1876] after forcing the Debtor to incur the expense of responding (which included a statement that the Debtor limited partnership agreement was not being assumed).

N/A

1/22/20

Objections to Fifth Amended Plan of Reorganization [D.I. 1472]

Objectors:¹

Dondero [D.I. 1661]
Trusts [D.I. 1667]
Advisors & Senior Employees Funds² [D.I. 1669]
1670 [D.I. 1669]
HCRE [D.I. 1673]
CLOH [D.I. 1675]
NexBank Entities [D.I. 1676]

All objections to the Plan were consensually resolved prior to the confirmation hearing except for the objections of the Dondero Entities and the U.S. Trustee. The U.S. Trustee did not press its objection at confirmation.

All objections were overruled and the Confirmation Order was entered. The Confirmation Order specifically found that Mr. Dondero would “burn the place down” if his case resolution plan was not accepted.

Dondero, the Trusts, the Advisors, and the Funds appealed [D.I. 1957, 1966, 1970, 1972]. The appeal is being briefed.

1/24/21

Application for Allowance of Administrative Expense Claim [D.I. 1826]

Movants:

Advisors

The Advisors seek an administrative expense claim for approximately \$14 million they allege they overpaid to the Debtor during the bankruptcy case under the Shared Services Agreement. Notably, the Advisors have not paid \$14 million to the Debtor during the bankruptcy.

This matter is currently being litigated. N/A

2/3/21

NexBank’s Application for Allowance of Administrative Expense Claim [D.I. 1888]

Movant:

NexBank

NexBank seeks an administrative expense claim for reimbursement of \$2.5 million paid to the Debtor under its Shared Services Agreement and investment advisory agreement. NexBank alleges that it did not receive the services.

This matter is currently being litigated. N/A

¹ In addition to the Dondero Entities’ objections, the following objections were filed: State Taxing Authorities [D.I. 1662]; Former Employees [D.I. 1666]; IRS [D.I. 1668]; US Trustee [D.I. 1671]; Daugherty [D.I. 1678]. These objections were either resolved prior to confirmation or not pressed at confirmation.

² In addition to the Funds, this objection was joined by: Highland Fixed Income Fund, Highland Funds I and its series, Highland Funds II and its series, Highland Healthcare Opportunities Fund, Highland Merger Arbitrage Fund, Highland Opportunistic Credit Fund, Highland Small-Cap Equity Fund, Highland Socially Responsible Equity Fund, Highland Total Return Fund, Highland/iBoxx Senior Loan ETF, NexPoint Real Estate Strategies Fund, NexPoint Real Estate Finance Inc., NexPoint Real Estate Capital, LLC, NexPoint Residential Trust, Inc., NexPoint Hospitality Trust, NexPoint Real Estate Partners, LLC, NexPoint Multifamily Capital Trust, Inc., VineBrook Homes Trust, Inc., NexPoint Real Estate Advisors, L.P., NexPoint Real Estate Advisors II, L.P., NexPoint Real Estate Advisors III, L.P., NexPoint Real Estate Advisors IV, L.P., NexPoint Real Estate Advisors V, L.P., NexPoint Real Estate Advisors VI, L.P., NexPoint Real Estate Advisors VII, L.P., and NexPoint Real Estate Advisors VIII, L.P. [D.I. 1677].

2/8/21

James Dondero Motion for Status Conference [D.I. 1914]

Movant: Dondero Dondero requested a chambers conference to convince the Court to delay confirmation of the Plan to allow for continued negotiation of the “pot plan.” The request was denied [D.I. 1929] after the Debtor and Committee informally objected. N/A.

2/28/21

Motions for Stay Pending Appeal

Movants: Dondero Advisors [D.I. 1973] Funds [D.I. 1967] [D.I. 1971] The only parties requesting a stay pending appeal were the Dondero Entities. They alleged a number of potential harms to the Dondero Entities if a stay was not granted and offered to post a \$1 million bond. Relief was denied [D.I. 2084, 2095] and a number of the Movants’ arguments were found to be frivolous. Movants sought a stay pending appeal from this Court.

3/18/21

James Dondero, Highland Capital Management Fund Advisors, L.P., NexPoint Advisors, L.P., The Dugaboy Investment Trust, The Get Good Trust, and NexPoint Real Estate Partners, LLC, f/k/a HCRE Partners, LLC, a Delaware Limited Liability Company’s Motion to Recuse Pursuant to 28 U.S.C. § 455 [D.I. 2060]

Movants: Dondero Advisors Trusts HCRE Dondero argued that Judge Jernigan should recuse herself as her rulings against him and his related entities were evidence of her bias. Judge Jernigan denied the motion without briefing from any other party on March 23, 2021 [D.I. 2083]. The Movants appealed [D.I. 2149].

4/15/21

Debtor’s Motion for Entry of an Order Approving Settlement with UBS Securities LLC and UBS AG London Branch and Authorizing Actions Consistent Therewith [D.I. 2199]

Movants: Debtor UBS Securities LLC and UBS AG London Branch (collectively, “UBS”) asserted claims against the Debtor in excess of \$1 billion arising from two Debtor-managed funds’ breach of contract in 2008. The settlement resolved ten plus years of litigation but had to be renegotiated when the Debtor discovered that the Dondero-controlled Debtor had caused the funds to transfer cash and securities with a face amount of over \$300 million to a Cayman-based Dondero controlled entity in 2017, presumably to thwart UBS’s ability to collect on its judgment. The only parties to object were Dondero [D.I. 2295] and Dugaboy [D.I. 2268, 2293]. The Debtor filed an omnibus reply on May 14, 2021 [D.I. 2308]. UBS also filed a reply [D.I. 2310]. The UBS settlement was approved on May 24, 2021 [D.I. 2389]. The objectors have until June 7 to appeal.

4/23/21

Debtor's Motion for an Order Requiring the Violators to Show Cause Why They Should Not Be Held in Civil Contempt for Violating Two Court Orders [D.I. 2247]

Movants: Debtor

Debtor filed a motion seeking an order to show cause as to why Dondero, CLOH, DAF, and their counsel should not be held in contempt of court for willingly violating two final Bankruptcy Court orders. The Bankruptcy Court entered an order to show cause on April 29, 2021 [D.I. 2255] and set an in-person hearing for June 8, 2021.

Dondero, CLOH, the DAF, Mark Patrick (allegedly the person in control of the DAF), and their counsel filed responses to the order to show cause on May 14, 2021 [D.I. 2309, 2312, 2313]. The Debtor filed its reply on May 21, 2021 [D.I. 2350]. A hearing was held on June 8, 2021. The Court stated that she would find contempt but no formal order has been entered.

4/23/21

Motion for Modification of Order Authorizing Appointment of James P. Seerv, Jr. Due to Lack of Subject Matter Jurisdiction [D.I. 2242]

Movants: Debtor

DAF and CLOH filed a motion asking the Bankruptcy Court to modify the July 16, 2020, order appointing Seervy as the Debtor's CEO/CRO alleging the Bankruptcy Court lacked subject matter jurisdiction.

On May 14, 2021, the Debtor filed a response [D.I. 2311] stating that DAF and CLOH's motion was a collateral attack and barred by res judicata, among other things. The Committee joined in the Debtor's response [D.I. 2315]. DAF and CLOH filed their reply on May 21, 2021 [D.I. 2347]. The Motion was denied on June 25, 2021 [D.I. 2506]. The Court denied DAF and CLOH have appealed. [D.I. 2513]

4/20/21

Debtor's Motion for Entry of an Order (i) Authorizing the Debtor to (a) Enter into Exit Financing Agreement in Aid of Confirmed Chapter 11 Plan and (b) Incur and Pay Related Fees and Expenses and (ii) Granting Related Relief [D.I. 2229]

Movants: Debtor

The Debtor filed a motion seeking authority to enter into an exit financing facility. The facility was required, in part, to fund the increased costs to the estate from Dondero's litigiousness. Dugaboy filed two objections to the motion alleging, among other things, that there was no basis for the financing [D.I. 2403; 2467]

The motion was granted on June 30 [D.I. 2503] N/A

4/29/21

Motion to Compel Compliance with Bankruptcy Rule 2015.3 [D.I. 2256]

Movants:	Trusts	The Trusts filed a motion on negative notice seeking to compel the Debtor to file certain reports under Rule 2015.3 [D.I. 2256]. The Debtor opposed that motion on May 20, 2021 [D.I. 2341], which was joined by the Committee [D.I. 2343]. The Trusts filed their reply on June 8, 2021 [D.I. 2424]	A hearing was held on June 10, 2021 [D.I. 2442] and the motion was adjourned.	N/A
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Highland Capital Management, L.P. v. James D. Dondero, Adv. Proc. No. 20-03190-sgj (Bankr. N.D. Tex.)

12/7/20

Plaintiff Highland Capital Management, L.P.'s Emergency Restraining Order and Preliminary Injunction against Mr. James Dondero [D.I. 2]

Movant:	Debtor	The Debtor commenced an adversary proceeding seeking an injunction against Dondero. Dondero actively interfered with the management of the estate. Seery had instructed Debtor employees to sell certain securities on behalf of the CLOs. Dondero disagreed with Seery's direction and intervened to prevent these sales from being executed. Dondero also threatened Seery via text message and sent threatening emails to other Debtor employees.	A TRO was entered on December 10 [D.I. 10], which prohibited Dondero from, among other things, interfering with the Debtor's estate and communicating with Debtor employees unless it related to the Shared Services Agreements. A preliminary injunction was entered on January 12 after an exhaustive evidentiary hearing [D.I. 59]. This matter was resolved consensually by order entered May 18, 2021 [D.I. 182], which enjoined Dondero from certain conduct until the close of the Bankruptcy Case.	Dondero appealed to the District Court, which declined to hear the interlocutory appeal. Dondero is seeking a writ of mandamus from the Fifth Circuit. The writ of mandamus was withdrawn as part of the settlement.
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1/7/21

Plaintiff's Motion for an Order Requiring Mr. James Dondero to Show Cause Why He Should Not Be Held in Civil Contempt for Violating the TRO [D.I. 48]

Movant: Debtor

In late December, the Debtor discovered that Dondero had violated the TRO in multiple ways, including by destroying his cell phone, his text messages, and conspiring with the Debtor's then general counsel and assistant general counsel³ to coordinate offensive litigation against the Debtor. The hearing on this matter was delayed and there was litigation on evidentiary issues, among other things. An extensive evidentiary hearing was held on March 22.

The Court entered an order finding Mr. Dondero in contempt of court on June 7, 2021 [D.I. 190]

Highland Capital Management, L.P. v. Highland Capital Management Fund Advisors, L.P., NexPoint Advisors, L.P., Highland Income Fund, NexPoint Strategic Opportunities Fund, NexPoint Capital, Inc., and CLO Holdco, Ltd., Adv. Proc. No. 21-03000-sgj (Bankr. N.D. Tex.)

1/6/21

Plaintiff's Emergency Motion for a Temporary Restraining Order and Preliminary Injunction Against Certain Entities Owned and/or Controlled by Mr. James Dondero [D.I. 2]

Movant: Debtor

In late December, the Debtor received a number of threatening letters from the Funds, the Advisors, and CLOH regarding the Debtor's management of the CLOs. These letters reiterated the arguments made by these parties in their motion filed on December 8, which the Court concluded were "frivolous." The relief requested by the Debtor was necessary to prevent the Funds, Advisors, and CLOH's improper interference in the Debtor's management of its estate.

N/A

The parties agreed to the entry of a temporary restraining order on January 13 [D.I. 20]. A hearing on a preliminary injunction began on January 26 and was continued to May 7. The TRO was further extended with the parties' consent [D.I. 64]. The Debtor reached an agreement with CLOH and dismissed CLOH from the adversary proceeding. The Debtor believes it has reached an agreement in principle with the Funds and Advisors that will settle this matter.

³ As a result of this conduct, among other things, the Debtor terminated its general counsel and assistant general counsel for cause on January 5, 2021.

Highland Capital Management, L.P. v. Highland Capital Management Fund Advisors, L.P. and NexPoint Advisors, L.P., Adv. Proc. No. 21-03010-sgj (Bankr. N.D. Tex.)

2/17/21 **Debtor's Emergency Motion for a Mandatory Injunction Requiring the Advisors to Adopt and Implement a Plan for the Transition of Services by February 28, 2021 [D.I. 2]**

Movant:	Debtor	The Debtor's Plan called for a substantial reduction in its work force. As part of this process, the Debtor terminated the Shared Services Agreements and began negotiating a transition plan with the Advisors that would enable them to continue providing services to the retail funds they managed without interruption. The Debtor was led to believe that without the Debtor's assistance the Advisors would not be able to provide services to their retail funds, and, although the Debtor had proceed appropriately, the Debtor was concerned it would be brought into any action brought by the SEC against the Advisors if they could not service the funds. The Debtor brought this action to force the Advisors to formulate a transition plan and to avoid exposure to the SEC, among others.	At a daylong hearing, the Advisors testified that they had a transition plan in place. An order was entered on February 24 [D.I. 25] making factual findings and ruling that the action was moot.	N/A
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Highland Capital Management, L.P. v. James Dondero, Adv. Proc. No. 21-03003-sgj (Bankr. N.D. Tex.)

1/22/21 **Complaint for (i) Breach of Contract and (ii) Turnover of Property of the Debtor's Estate [D.I. 1]**

Movant:	Debtor	Dondero borrowed \$8.825 million from Debtor pursuant to a demand note. Dondero did not pay when the note was called and the Debtor was forced to file an adversary.	The parties are currently conducting discovery.	N/A
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4/15/21 **James Dondero's Motion and Memorandum of Law in Support to Withdraw the Reference [D.I. 21]**

Movant:	Dondero	Three months after the complaint was filed Dondero filed a motion to withdraw the bankruptcy reference and a motion to stay the adversary pending resolution of his motion [D.I. 22].	A hearing was held on May 25, 2021, and a stay was granted until mid-July 2021. The Court transmitted a report and recommendation on July 7 [D.I. 69].	N/A
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Highland Capital Management, L.P. v. Highland Capital Management Fund Advisors, L.P., Adv. Proc. No. 21-03004-sgj (Bankr. N.D. Tex.)

1/22/21 Complaint for (i) Breach of Contract and (ii) Turnover of Property of the Debtor's Estate [D.I. 1]
Movant: Debtor HCMFA borrowed \$7.4 million from Debtor pursuant to a demand note. Dondero did not pay when the note was called and the Debtor was forced to file an adversary. The parties are currently N/A conducting discovery.

4/13/21 Defendants Motion to Withdraw the Reference [D.I. 20]
Movant: HCMFA Three months after the complaint was filed HCMFA filed a motion to withdraw the bankruptcy reference. A hearing was held on May 25, 2021. The Court transmitted a report and recommendation on July 9 [D.I. 52]. N/A

Highland Capital Management, L.P. v. NexPoint Advisors, L.P., Adv. Proc. No. 21-03005-sgj (Bankr. N.D. Tex.)

1/22/21 Complaint for (i) Breach of Contract and (ii) Turnover of Property of the Debtor's Estate [D.I. 1]

Movant: Debtor NPA borrowed approximately \$30.75 million under an installment note. NPA did not pay the note when and the Debtor was forced to file an adversary. The parties are currently N/A conducting discovery.

4/13/21 Defendants Motion to Withdraw the Reference [D.I. 19]
Movant: NPA Three months after the complaint was filed HCMFA filed a motion to withdraw the bankruptcy reference. A hearing was held on May 25, 2021. The Court transmitted a report and recommendation on July 9 [D.I. 42]. N/A

Highland Capital Management, L.P. v. Highland Capital Management Services, Inc., Adv. Proc. No. 21-03006-sgj (Bankr. N.D. Tex.)

1/22/21 Complaint for (i) Breach of Contract and (ii) Turnover of Property of the Debtor's Estate [D.I. 1]
Movant: Debtor Highland Capital Management Services, Inc. ("HCM"), borrowed \$900,000 in demand notes and approximately \$20.5 million in installment notes. HCM did not pay the notes when due and the Debtor was forced to file an adversary. The parties are currently N/A conducting discovery.

6/3/21 Defendants Motion to Withdraw the Reference [D.I. 19]
Movant: HCM Five months after the complaint was filed HCM filed a motion to withdraw the reference. A hearing was held on July 8, 2021. The Court is preparing a report and recommendation on the motion to withdraw.

Highland Capital Management, L.P. v. HCRE Partners, LLC (n/k/a NexPoint Real Estate Partners, LLC), Adv. Proc. No. 21-03007-sgj (Bankr. N.D. Tex.)

1/22/21

Complaint for (i) Breach of Contract and (ii) Turnover of Property of the Debtor's Estate [D.I. 1]

Movant:	Debtor	HCRE borrowed \$4.25 million in demand notes and approximately \$6.05 million in installment notes. HCRE did not pay the notes when due and the Debtor was forced to file an adversary.	The parties are currently conducting discovery.	N/A
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6/3/21

Defendants Motion to Withdraw the Reference [D.I. 20]

Movant	HCMS	Five months after the complaint was filed HCMS filed a motion to withdraw the reference.	A hearing was held on July 8, 2021. The Court is preparing a report and recommendation on the motion to withdraw.
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Charitable DAF Fund, L.P., and CLO Holdco, Ltd., v. Highland Capital Management, L.P., Highland HCF Advisor, Ltd., and Highland CLO Funding, Ltd., Case No. 21-cv-00842-B (N.D. Tex. April 12, 2021)

4/12/21

Original Complaint

Movants:	DAF CLOH	Movants allege that the Debtor and Seery violated SEC rules, breached fiduciary duties, engaged in self-dealing, and violated RICO in connection with its settlement with the HarbourVest Entities. The Movants brought this complaint despite CLOH having objected to the HarbourVest settlement; never raised this issue; and withdrawn its objection. The Debtor believes the complaint is frivolous and represents a collateral attack on the order approving the HarbourVest settlement. The Debtor will take all appropriate actions.	On May 19, the Debtor filed a motion to enforce the order of reference seeking to have the case referred to the Bankruptcy Court [D.I. 22]. On May 27, 2019, the Debtor filed a motion to dismiss the complaint [D.I. 26]	N/A
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4/19/21

Plaintiff's Motion for Leave to File First Amended Complaint in the District Court

Movants:	DAF CLOH	Movants filed a motion seeking leave from this Court to add Seery as a defendant and to seek, in this Court, a reconsideration of two final Bankruptcy Court orders.	This Court denied the motion but with leave to refile.	N/A
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PCMG Trading Partners XXIII, L.P. v. Highland Capital Management, L.P., Case No. 21-cv-01169-N (N.D. Tex. May 21, 2021)
Original Complaint

4/12/21

Movants:	PCMG Trading Partners XXIII, L.P.	Movants allege that the Debtor violated SEC rules and breached fiduciary duties by causing one of its managed investment vehicles to sell certain assets. The Movant is an entity owned and controlled by Dondero, which had less than a 0.05% interest in the investment vehicle at issue and is no longer an investor. The Debtor believes the complaint is frivolous. The Debtor will take all appropriate actions.	The Complaint was recently filed and is currently in litigation.	N/A
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The Dugaboy Investment Trust v. Highland Capital Management, L.P., Case No. 21-cv-01479-S (N.D. Tex. June 23, 2021)
Original Complaint

4/12/21

Movants:	Dugaboy	Dugaboy alleges that the Debtor violated SEC rules and breached fiduciary duties by causing one of its managed investment vehicles to sell certain assets. Dugaboy is Dondero's family trust with less than a 2% interest in the vehicle. Dugaboy's allegations in the complaint are duplicative of allegations it made in proofs of claim filed in the Bankruptcy Court.	The Complaint was withdrawn after the Debtor informed the Bankruptcy Court of the filing.	N/A
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EXHIBIT 6

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

In Re:) **Case No. 19-34054-sgj-11**
) Chapter 11
)
HIGHLAND CAPITAL) Dallas, Texas
MANAGEMENT, L.P.,) Friday, June 25, 2021
) 9:30 a.m. Docket
Debtor.)
) EXCERPT: MOTION FOR
) MODIFICATION OF ORDER
) AUTHORIZING RETENTION OF JAMES
) P. SEERY, JR. DUE TO LACK OF
) SUBJECT MATTER JURISDICTION
) (2248)
)

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE STACEY G.C. JERNIGAN,
UNITED STATES BANKRUPTCY JUDGE.

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Proceedings recorded by electronic sound recording;
transcript produced by transcription service.

1 DALLAS, TEXAS - JUNE 25, 2021 - 9:36 A.M.

2 (Transcript excerpt begins at 11:33 a.m.)

3 THE CLERK: All rise.

4 THE COURT: All right. Please be seated. We are
5 back on the record, and our last motion this morning is the
6 Motion to Reconsider filed by CLO Holdco and the DAF. Do we
7 have Mr. Bridges and Mr. Sbaiti back with us now?

8 MR. BRIDGES: Yes, Your Honor. I have changed seats
9 because of audio problems we're having here, but we're both
10 here.

11 THE COURT: Okay. Well, I think we heard an
12 agreement that you all have agreed that you're going to have
13 an hour and a half each, and I presume that means everything:
14 opening statements, arguments, evidence. So, we'll start the
15 clock. Nate, it's 11:35. So, Mr. Bridges, your opening
16 statement?

17 OPENING STATEMENT ON BEHALF OF CLO HOLDCO AND THE CHARITABLE
18 DAF, LP

19 MR. BRIDGES: Thank you, Your Honor. We're here on a
20 motion to modify an order that we'd submit has already been
21 modified by the plan confirmation order, although that order
22 has not yet become effective.

23 The modification there was to add the phrase "to the
24 extent legally permissible" to the Court's assertion of
25 jurisdiction in what is essentially the same gatekeeper

1 provision that's at issue here. We submit that change is an
2 admission or at least a strong indication that the unmodified
3 order, at least as applied in some instances, contains
4 legally-impermissible provisions. The entire argument today
5 from our side is about what's not legally permissible in that
6 order.

7 And that starts with our concerns regarding the
8 application of 28 U.S.C. § 959(a). As Your Honor knows well,
9 959(a) is a provision of law that the Fifth Circuit and
10 *Collier on Bankruptcy* call an exception to the *Barton*
11 doctrine. I know from the last time we were here that the
12 Court is already aware of what 959(a) says. It's the second
13 sentence, I understand, which the Court pointed to in our
14 previous hearing that creates general equity powers or
15 authorizes the Court to use its general equity powers to
16 exercise some jurisdiction, some control over actions that
17 fall within the first sentence of 959(a). But that second
18 sentence also prohibits explicitly the Court's using general
19 equity powers to deprive a litigant of his right to trial by
20 jury.

21 Here, we're not under *Barton*, the statutory exception to
22 *Barton* applies, because Mr. Seery is a manager of hundreds of
23 millions of third-party investor property. Instead, we're
24 here under the Court's general equity powers, as authorized by
25 959(a). And those equity powers cannot deprive the right to

1 trial by jury.

2 But the order does deprive trials by jury, first by
3 asserting sole jurisdiction here, where jury trials are
4 unavailable, and secondly, by abolishing any trial rights for
5 claims that do not involve gross negligence or intentional
6 misconduct.

7 Movants' third cause of action in the District Court case
8 is for ordinary negligence. It comes with a Seventh Amendment
9 jury right. But it's barred by the order because the order
10 only allows colorable claims involving gross negligence or
11 intentional conduct, not ordinary negligence.

12 Movants' second cause of action in the District Court case
13 is for breach of contract. That comes with a Seventh
14 Amendment jury right, but it's barred by the order because the
15 order only allows colorable claims of gross negligence or
16 intentional misconduct, not negligent or faultless breaches of
17 contractual obligations.

18 Movants' first cause of action in the District Court case,
19 breach of Advisers Act fiduciary duties, comes with a jury
20 right. It's also barred by the order because the order only
21 allows colorable claims involving gross negligence or
22 intentional misconduct.

23 You see there what I mean. Congress couldn't have been
24 clearer. Courts cannot deprive litigants of their day in
25 court before a jury of their peers by invoking general equity

1 powers. Those powers don't trump the constitutional right to
2 a jury trial.

3 Yet this Court's order purports to do precisely that, not
4 only for the Movants, but also for future potential litigants
5 who may have claims that have not even accrued yet. If those
6 claims are for ordinary negligence or breach of contract or
7 breach of fiduciary duties and don't rise to the level of
8 gross negligence or intentional misconduct, this order says
9 that those claims are barred, and it would deprive them of
10 their day in court.

11 The Court's general equity powers are simply not broad
12 enough to uphold such an order.

13 This issue is even more problematic when the causes of
14 action at issue fall within the mandatory withdrawal of the
15 reference provisions of 28 U.S.C. § 157(d). As this Court
16 knows, it lacks jurisdiction over proceedings that require
17 consideration of non-bankruptcy federal law regulating
18 interstate commerce. Some such claims -- Movants' Advisers
19 Act claim, for instance -- do not involve culpability rising
20 to the level of gross negligence or intentional misconduct,
21 but the order purports to bar them nonetheless, despite this
22 Court's lacking jurisdiction over the subject matter of those
23 claims.

24 Even if there is gross negligence or intentional
25 misconduct, the order states that this Court will have sole

1 jurisdiction over such claims. And that can't be right if
2 withdrawal of the reference is mandatory.

3 Opposing counsel will tell you that 157(d) is inapplicable
4 here because they think our claims in the District Court won't
5 require substantial consideration of the Advisers Act or any
6 other federal laws regulating interstate commerce. But their
7 cases don't come anywhere close to making that showing, as the
8 briefing demonstrates.

9 And in any case, that argument is beside the point. This
10 order is contrary to 157(d) because it asserts jurisdiction
11 over claims that 157(d) does not apply -- I'm sorry, does
12 apply to. And that's true regardless of whether Movants'
13 claims are among those.

14 The idea that there's no substantial consideration of
15 federal law, however, in the District Court case is undermined
16 by Mr. Seery's testimony in support of his appointment in
17 which he confirmed that the Advisers Act applies to him and
18 that he has fiduciary duties under that Act to the investors
19 of the funds he manages.

20 Your Honor, importantly, the Advisers Act isn't the
21 typical federal statute with loads of case law under it. It's
22 actually an underdeveloped, less-relied-upon statute, and most
23 -- most of the law under that Act is promulgated by regulation
24 and supervised by the SEC. As a registered investment
25 advisor, Mr. Seery is bound by that Act, which he admits, he

1 agrees to. But to flesh out what his duties are requires a
2 close exam of more than three dozen regulations under 17
3 C.F.R. Part 275.

4 The obligations include robust duties of transparency and
5 disclosure, as well as duties against self-dealing and the
6 necessity of obtaining informed consent, none of which are
7 waivable, these duties.

8 The proceedings here in this Court reflect an effort to
9 have those unwaivable duties waived. The allegations in the
10 District Court are essentially insider trading allegations
11 that the Debtor and Mr. Seery knew or should have known
12 information that they had a duty under the Advisers Act to
13 disclose to their advisees. Both under the Act and
14 contractually, they had those duties. And, instead, they did
15 not disclose and consummated a transaction that benefited
16 themselves nonetheless.

17 In considering those claims, the presiding court will have
18 to consider and apply the Advisers Act and the many
19 regulations promulgated under it, in addition to other federal
20 laws regulating interstate commerce. For that reason,
21 withdrawal of the reference on the District Court action is
22 mandatory. That's the two major -- that's two major problems
23 out of four with the order that we're here on today.

24 First, it deprives litigants of their right to trial, to a
25 jury trial, when Section 959(a) says that can't be done. And,

1 two, the order asserts jurisdiction -- sole jurisdiction, even
2 -- over proceedings in which withdrawal of the reference is
3 mandatory under 157(d).

4 The fourth major problem is what the Court called
5 specificity at the previous hearing. The Fifth Circuit's
6 *Applewood Chair* case holds that the rule from *Shoaf* does not
7 apply without a "specific discharge or release," and that that
8 release has to be enumerated and approved by the Bankruptcy
9 Court. Thus, the order here can't exculpate Mr. Seery of
10 liability for ordinary negligence and the like in a blanket
11 fashion. The claims being released must be identified.

12 That's what happened in *Shoaf*. Shoaf's guaranty
13 obligation was explicitly released. That's also what happened
14 in *Espinosa*. Espinosa's plan listed his student loan as his
15 only specific indebtedness. But it's not what happened here.
16 And it couldn't happen here, because the ordinary negligence
17 and similar claims being discharged by the order had not yet
18 accrued and thus were not even in existence at the time the
19 order issued.

20 Instead, what we have here is a nonconsensual, nondebtor
21 injunction or release that's precisely what the Fifth Circuit
22 refused to enforce in the *Pacific Lumber* case.

23 So, lack of specificity is the third major problem with
24 the order. And that brings us to the fourth problem, which is
25 the *Barton* doctrine. *Barton* is the only possible basis for

1 this Court to assert exclusive or sole jurisdiction over
2 anything. Outside of *Barton*, it's plain black letter law that
3 the District Court's jurisdiction is equal to and includes
4 anything that this Court's derivative jurisdiction would also
5 reach.

6 But the exception to the *Barton* doctrine in 959(a) plainly
7 applies here, leaving no basis for exclusivity with regards to
8 jurisdiction and the District Court. That's because Mr. Seery
9 is carrying on the business of a debtor and managing the
10 property of others, rather than merely administering the
11 bankruptcy estate. The exclusive jurisdiction function of the
12 *Barton* doctrine has no applicability because 959(a) creates
13 that exception here.

14 Under its general equity powers, yes, 959(a) still
15 authorizes this Court to exercise some control over actions
16 against Mr. Seery, but short of depriving litigants of their
17 day in court. And nothing in 959(a), that exception to
18 *Barton*, says that the Court can nonetheless exercise
19 exclusivity in that jurisdiction. Those general equity powers
20 do not create exclusive or sole jurisdiction. They do not
21 deprive the District Court of its Congressionally-granted
22 original jurisdiction.

23 Moreover, Mr. Seery is not an appointed trustee entitled
24 to the protections of the *Barton* doctrine in any case. His
25 appointment was a corporate decision that the Court was asked

1 not to interfere with. The Court was asked to defer under the
2 business judgment rule to the Debtor's appointment of Mr.
3 Seery. And the Court did so.

4 As we asserted last time, no authority that we can find
5 combines these two unrelated doctrines, the *Barton* doctrine
6 and the business judgment rule. And they don't go together.
7 None of the testimony or the briefing or argument, in the July
8 order, in the January order that preceded it, none of that
9 indicated that Mr. Seery would be a trustee or the functional
10 equivalent of a trustee. The word "trustee" does not appear
11 in any of those briefs or transcripts.

12 Opposing -- and because of that, the District Court suit
13 is not about -- well, not because of that. The District Court
14 suit simply is not about any trustee-like role that Mr. Seery
15 may have played anyway. Opposing counsel will try to convince
16 you otherwise, will tell you that the District Court case is a
17 collateral attack on the settlement, but it's not. Wearing
18 his estate administrator hat, Mr. Seery can settle claims in
19 this court. Wearing his advisor hat, he has to fulfill his
20 Advisers Act duties and properly advise his clients.

21 He doesn't have to wear both hats, and it seems highly
22 unusual that he would choose to fill both of those roles
23 simultaneously. But he has chosen both roles. And the
24 District Court case is a hundred percent about his role as an
25 advisor. Did he comply with the Act? Did he do the things

1 that his advisor role obligated him to do as a manager of that
2 property?

3 The District Court suit really is only being used to
4 illustrate the issues that we're raising here. It's
5 important, it's timely to address those issues now because of
6 the District Court action, but that's an illustration of the
7 problems with the order. It is not exclusively that that
8 action is what we're attempting to address. Rather, the order
9 exculpating Mr. Seery from ordinary negligence liability and
10 similar liability is problematic, is contrary to the law. On
11 top of that, the Court is asserting jurisdiction over gross
12 negligence and intentional misconduct claims. To the extent
13 that 157(d) applies, it is problematic and contrary to law as
14 well.

15 THE COURT: Okay. We're occasionally getting some
16 breakup of your sound. So please -- I don't know what you can
17 do to adjust, but it was just now, and intermittently we get a
18 little bit of garbly. So if you could just say your last
19 sentence one more time, and we'll see if it improves.

20 MR. BRIDGES: Your Honor, I'm not sure I can say this
21 last sentence again.

22 THE COURT: Okay.

23 MR. BRIDGES: I was -- I was mentioning that the
24 District Court case is an illustration of our argument. Our
25 argument is not merely that the District Court case should be

1 exempted or excepted from the order. Our argument is that the
2 order is legally infirm and that the District Court case and
3 the claims there illustrate some of those infirmities, but
4 that the infirmities go beyond just what's at issue in the
5 District Court case.

6 In sum, there are four problems with the order that render
7 parts of it legally infirm. It deprives the right of a jury
8 trial -- in fact, of any trial -- in contravention of 959(a)
9 for some causes of action.

10 It asserts jurisdiction -- two, it asserts jurisdiction
11 over claims that are subject to the mandatory withdrawal of
12 the reference provision (garbled) 157(d).

13 And three, it lacks the specificity required to discharge
14 future claims under *Applewood*.

15 Finally, Your Honor, number four, the order relies on the
16 *Barton* doctrine, which doesn't apply and which 959(a) creates
17 an exception to.

18 Movants respectfully submit the order should be modified
19 for those reasons.

20 MR. SBAITI: Tell him Mark Patrick is here, for the
21 record.

22 THE COURT: All right. I have a couple of follow-up
23 questions for you. I want to drill down on the issue of your
24 client not having appealed the July 2020 order. Or the
25 HarbourVest settlement order, for that matter. Tell me as

1 directly as possible why you don't view that as a big problem.
2 Because it's high on my list of possible problems here.

3 MR. BRIDGES: I understand, Your Honor. The
4 *Applewood Chair* case is our -- our defense to that argument,
5 that without providing specifics as to the claims being
6 discharged in the July order, that *Shoaf* cannot apply to
7 create a res judicata effect from the failure to appeal that
8 order.

9 THE COURT: But is that really what we're talking
10 about, a discharge of certain claims? We're talking about a
11 protocol that the Court established which wasn't appealed.

12 MR. BRIDGES: Your Honor, your order does many
13 things. We're talking about a few of them in one paragraph of
14 the order. And in that order -- in that paragraph, yes, it
15 creates a protocol for determining the colorability of some
16 claims, claims that rise to the level of gross negligence or
17 intentional misconduct. It does not create a protocol for
18 claims that fall below that threshold, claims for ordinary
19 negligence, as an example.

20 THE COURT: Okay.

21 MR. BRIDGES: For breach of contract that's not
22 intentional, is not grossly negligent, it's just a breach of
23 contract. It can even be faultless. There's still liability.
24 There's still a jury right under the Seventh Amendment for
25 faultless breach of contract.

1 The protocols in the order do not address such claims
2 other than to bar them. To discharge them. And thus, yes,
3 it's a release, it's a discharge of those claims. It can be
4 viewed as a permanent injunction against bringing such claims.
5 It's what's -- it's what's not allowed by the *Applewood Chair*
6 case and by *Pacific Lumber*.

7 THE COURT: All right. So you're arguing that was --
8 the wording of the order was not specific enough to apprise
9 affected parties of what they were releasing, they're
10 releasing claims based on ordinary negligence against Mr.
11 Seery? That's not specific enough?

12 MR. BRIDGES: Correct. Future unproved claims, the
13 factual basis for which has not happened yet. Those cannot be
14 and were not disclosed with any specificity in this order.

15 If we compare it to *Shoaf* and to *Espinosa*, in *Shoaf* what
16 we had was a guaranty, Shoaf's guaranty on a transaction that
17 was listed in the actual release, describing what the
18 transaction was that was being -- that the guaranty was being
19 released for.

20 In *Espinosa*, what we had was a student loan --

21 THE COURT: Right.

22 MR. BRIDGES: -- that was listed in the plan
23 specifically, as the only specific indebtedness.

24 Here, we don't have any of that specificity. What we have
25 is a notice to the entire world, Your Honor, that for an

1 unlimited period of time any claim for ordinary negligence,
2 for ordinary breach of contract or fiduciary duty against Mr.
3 Seery is barred if it relates to his CEO role. And his CEO
4 role means as a manager of property, exactly precisely what
5 959(a) is talking about.

6 Those jury rights (garbled) claims cannot be released,
7 discharged, expunged, done away with, in an order that isn't
8 explicit.

9 On top of that, even in an explicit order, 959(a) tells
10 the Court it cannot deprive a litigant of its jury trial
11 right.

12 THE COURT: Well, as anyone knows who's been around a
13 while in this case, my brain sometimes goes down an unexpected
14 trail, and maybe this one is one of those situations. Are
15 there contracts that your clients would rely on in potential
16 litigation?

17 MR. BRIDGES: Yes, Your Honor.

18 THE COURT: What are those contracts?

19 MR. BRIDGES: It is a management contract. I don't
20 think I can give you the specifics at this moment, but I
21 probably can before we're done here today. A management
22 contract in which the Debtor provides advisory and management
23 services to the DAF --

24 THE COURT: Well, you know, the shared services
25 agreements that we heard so much about in this case? A shared

1 service agreement? I can't remember, you know, which entities
2 have them and which do not at times. So, --

3 MR. BRIDGES: The shared services agreement is one of
4 those contracts, Your Honor.

5 THE COURT: Okay.

6 MR. BRIDGES: It's not the only one.

7 THE COURT: And what are the others?

8 MR. BRIDGES: There's -- the other is the investment
9 advisory agreement.

10 THE COURT: Those two?

11 MR. BRIDGES: (no response)

12 THE COURT: Those are the only two?

13 MR. BRIDGES: There may be one other, Your Honor.
14 I'm not sure.

15 THE COURT: Are they in evidence?

16 MR. BRIDGES: I can find out shortly.

17 THE COURT: Are they in evidence? We haven't talked
18 about evidence yet, but are they going to be in evidence,
19 potentially?

20 MR. BRIDGES: They are referenced in the District
21 Court case, the complaint, which is in evidence.

22 THE COURT: I'm asking, are --

23 MR. BRIDGES: But those contracts I don't believe are
24 listed as exhibits here in this motion, no.

25 THE COURT: They are not? Okay.

1 Well, what my brain is thinking about here is, of the
2 umpteen agreements I've seen -- more than umpteen -- of the
3 many, many agreements I've seen over time in this case, so
4 often there's a waiver of jury trial rights, as I recall, as
5 well as an arbitration clause. I just was curious, hmm, you
6 know, you talked a lot about your clients' jury trial rights:
7 do we know that these agreements have not waived those?

8 MR. BRIDGES: Your Honor, I think I can answer that
9 by the end of our hearing. I don't have an answer off the top
10 of my head. What I can tell you is a jury right has been
11 demanded in the federal court complaint, which is in evidence,
12 and that opposing counsel has brought no evidence indicating
13 that they have the defense of our having waived the right to a
14 jury trial here.

15 THE COURT: Okay. Well, I just --

16 MR. BRIDGES: Or arbitra...

17 THE COURT: -- would think that you would know that.
18 Does anyone know that on the Debtor's side off the top of your
19 head?

20 MR. POMERANTZ: I do not, Your Honor.

21 THE COURT: Uh-huh.

22 MR. POMERANTZ: And to Mr. Bridges' last point, we
23 have filed a motion to dismiss. We have not answered the
24 complaint. So any time to object to their jury trial right
25 would be in the context of the answer. So the implication

1 that we have not raised the issue and therefore it doesn't
2 exist is just not a correct implication and connection he's
3 trying to draw.

4 THE COURT: Okay. All right.

5 Well, let me also ask you about this. I'm obsessing a
6 little over the *Barton* doctrine and your insistence that it
7 does not provide authority or an analogy here.

8 Well, for one thing, is there anything in the Fifth
9 Circuit case *Sherman v. Ondova* that you think either helps you
10 or hurts you on that point? I'm intimately familiar with it,
11 although I haven't read it in a while, because it was my
12 opinion that the Fifth Circuit affirmed. And I spent a lot of
13 time thinking about that. It was a trustee, a traditional --
14 well, no, a Chapter 11 trustee and his counsel. But anything
15 from that case that you think is worthy of pointing out here?

16 MR. BRIDGES: No, Your Honor. I'm not -- nothing
17 comes to mind. That case is not fresh on my mind.

18 What I would tell you is that *Barton* doctrine and the
19 business judgment rule are incompatible, and the appointment
20 of a trustee never involves application of the business
21 judgment rule or deference to the Debtor or another party in
22 terms of making that appointment.

23 The *Barton* doctrine, as it applies to trustees, is viewed
24 as an extension, to some extent, of judicial immunity to the
25 trustee, who is chosen by, selected by the Court and assigned

1 by the Court to carry out certain functions. That --

2 THE COURT: Well, let me --

3 MR. BRIDGES: -- quasi-immunity --

4 THE COURT: -- stop you there. You say it's an
5 extension of immunity. But isn't it, by nature, really a
6 gatekeeping provision? It's a gatekeeping provision, right?
7 Before you even get to immunity, maybe, in a lawsuit, it's a
8 gatekeeping function that the Supreme Court has blessed, you
9 know, obviously in the context of a receiver, but appellate
10 courts have blessed it in the bankruptcy context. The
11 Bankruptcy Court can be the gatekeeper on whether the trustee
12 or someone I think in a similar position can get sued or not.

13 And then we had that Fifth Circuit case after *Ondova*. It
14 begins with a V, *Villegas* or something like that. Didn't
15 that, I don't know, further ratify, if you will, the whole
16 *Barton* doctrine by saying, oh, just because they're noncore
17 claims, state law or non-bankruptcy law claims, doesn't mean,
18 after *Stern*, the Bankruptcy Court still cannot serve the
19 gatekeeper function.

20 Tell me what you disagree. That's my kind of combined
21 reading of all of that.

22 MR. BRIDGES: Your Honor, I have to parse it out.
23 There's a lot to unpack there. If I can make sure to get in
24 the follow-ups, I can start with saying it's okay for the
25 Court in many instances to act as a gatekeeper.

1 THE COURT: Okay.

2 MR. BRIDGES: Both under *Barton* -- under *Barton*, or
3 when the *Barton* exception in 959(a) applies, under the Court's
4 general equitable powers, that gatekeeping functions are not
5 across-the-board prohibited, --

6 THE COURT: Okay.

7 MR. BRIDGES: -- and we aren't trying to argue that
8 they're prohibited across the board.

9 THE COURT: Okay.

10 MR. BRIDGES: Now, to try to dig into that a little
11 deeper, the order does two things: gatekeeping as to some
12 claims, and, frankly, discharging or barring other claims.
13 Those are two separate functions.

14 The first one, the gatekeeping, may be, in some
15 circumstances, which we'll come to, many circumstances, may be
16 allowable, may be even mandatory under *Barton*, not even
17 requiring an order from this Court, for the gatekeeping of
18 *Barton* to apply. But nonetheless, allowable in many instances
19 under the Court's general equity powers under 959(a). That
20 part is right about gatekeeping.

21 It does not create jurisdiction in this Court where 157(d)
22 deprives this Court of jurisdiction. Just because it's
23 related to bankruptcy isn't enough to say that the Court
24 therefore has jurisdiction if, one, if mandatory withdrawal of
25 the reference is required.

1 Furthermore, Your Honor, that gatekeeping function, under
2 the equity powers authorized by 959(a), will not allow a court
3 to discharge or -- or deprive, is the word I'm looking for --
4 deprive a litigant of their right to a trial -- a specific
5 kind of trial, a jury trial -- but a trial. And by crafting
6 an order that says certain kinds of claims that do (garbled)
7 jury rights are barred, rather than just providing a
8 gatekeeper provision, flat-out bars them, that doesn't -- that
9 doesn't comply with 959.

10 THE COURT: Okay.

11 MR. BRIDGES: Your Honor, if I could add one last
12 thing.

13 THE COURT: Go ahead.

14 MR. BRIDGES: The Supreme Court's *Stern* case points
15 out that -- that it's -- well, actually, it's the *Villegas*
16 case from the Fifth Circuit --

17 THE COURT: The one I mentioned.

18 MR. BRIDGES: -- points out that *Stern* -- *Stern* --
19 yes, you did. *Stern* did not create an exception to the *Barton*
20 doctrine. And that gives -- that endorses a *Barton* court's
21 ability to perform gatekeeping, even over claims that *Stern*
22 says there would not be jurisdiction over.

23 Contrast that with 959(a), which *Collier on Bankruptcy* and
24 the Fifth Circuit have held is an exception to the *Barton*
25 doctrine. Because of that exception, *Barton* no longer

1 applies, and what you're using in invoking a gatekeeper order
2 is the Court's inherent equitable powers, its general powers
3 in equity. And those equity powers are cabined. They're
4 broad, but they're cabined by 959(a)'s prohibition of doing
5 away with a litigant's right to a trial, a jury trial.

6 Now, I also -- counsel is telling me I should note for the
7 record that Mr. Mark Patrick is here as a representative of
8 our clients. But Your Honor, I'll -- I will quit now unless
9 you have further questions for me.

10 THE COURT: All right. I do not at this time. Mr.
11 Morris or Mr. Pomerantz, who's going to make the argument?

12 MR. POMERANTZ: It's me, Your Honor.

13 OPENING STATEMENT ON BEHALF OF THE DEBTOR

14 MR. POMERANTZ: And I'll start with the jury trial
15 right. In the last few minutes, we have been able to
16 determine that the Second Amended and Restated Investment
17 Advisory Agreement between the DAF and the Debtor has a broad
18 jury trial waiver under 14(f). And in addition, as I will
19 include in my discussion, there is no private right of action
20 under the Investment Advisers Act.

21 I think those two points are fatal to Movants' argument,
22 and probably I can get away with not even responding to the
23 others. But since I prepared a lengthy presentation to
24 address the issues that were raised today, and also the half
25 hour that Mr. Bridges spent with Your Honor on June 8th in

1 which was his first opening statement on the motion for
2 reconsideration, I'll now proceed.

3 THE COURT: All right.

4 MR. POMERANTZ: The arguments that the Movants made
5 in the original motion essentially boil down to one legal
6 proposition, that the Court did not have jurisdiction to enter
7 the July 16th order because those orders impermissibly
8 stripped the District Court from jurisdiction, in violation of
9 (inaudible) Supreme Court precedent and 28 U.S.C. Section
10 157(d).

11 As with all things Dondero, the arguments continue to
12 morph, and you heard argument at the contempt hearing on June
13 8th and further argument today that now the prospective
14 exculpation for negligence in the order is also unenforceable
15 and should be modified.

16 Movants continue to try to distance themselves from the
17 January 9th order and argue that it is not relevant because
18 they seek to pursue claims against Mr. Seery as CEO and not as
19 an independent director. Movants ignore, however, that the
20 January 9th order not only protects Mr. Seery in his role as
21 the independent director, but also as an agent of the board.
22 I will walk the Court through my arguments on that issue in a
23 few moments.

24 Of course, the Movants had no explanation, Your Honor, for
25 the question of why it took them until May of 2021, 10 months

1 after the entry of the July 16th order that appointed Mr.
2 Seery as CEO and CRO, and 16 months after the Court appointed
3 the independent board, with Mr. Dondero's blessing and
4 consent, as a substitute for what would have surely been the
5 imminent appointment of a Chapter 11 trustee.

6 Movants try to distance themselves from the prior orders
7 by essentially arguing that the DAF is a newcomer to the
8 Chapter 11 and is not under Mr. Dondero's control but is
9 rather managed separately and independently by Mr. Patrick,
10 who recently replaced Mr. Scott.

11 The Movants admit, as they must, that the DAF is the
12 parent and the sole shareholder of CLO Holdco and conducts its
13 business through CLO Holdco, and both entities conduct their
14 business through one individual. It was Grant Scott then;
15 it's Mark Patrick now. So even if Mr. Dondero does not
16 control the DAF and CLO Holdco, which issue was the subject of
17 lengthy testimony in connection with the DAF hearing, both the
18 DAF and the CLO Holdco are bound by the Debtor's res judicata
19 argument, which I will discuss shortly.

20 In any event, I really doubt the Court is convinced that
21 the DAF operates truly independently of Mr. Dondero any more
22 than the Court has been convinced that the Advisors, the
23 Funds, Dugaboy and Get Good, all operate independently from
24 Mr. Dondero. The only explanation for the delay is that Mr.
25 Dondero has been and continues to be unhappy with the Court's

1 rulings and has now hired a new set of lawyers in a desperate
2 attempt to evade this Court's jurisdiction. Having failed in
3 their attempt to recuse Your Honor from the case, this is
4 essentially their last hope.

5 And these new lawyers, Your Honor, have not only filed
6 this DAF lawsuit in the District Court which is the subject of
7 the contempt motion and today's motion, but they also filed
8 another lawsuit in the District Court on behalf of an entity
9 called PCMG, another Dondero entity, challenging yet another
10 of Mr. Seery's postpetition decisions.

11 And there's no doubt that this is only the beginning. Mr.
12 Dondero recently told Your Honor at a hearing that there were
13 many more sets of lawyers waiting in the wings. And as the
14 Court remarked at the hearing on the Trusts' motion to compel
15 compliance with Rule 2015.3, the Trusts were trying through
16 that motion to obtain information about the Debtor's control
17 entities so that they could file more lawsuits against the
18 Debtor, a concern that Mr. Draper unconvincingly denied.

19 I would like to focus the Court preliminarily on exactly
20 what the January 9th and July 16th orders do, because Movants
21 try to confuse things by casting the entire order with a broad
22 brush of their jurisdictional overreach arguments, and they
23 misinterpret Supreme Court and Fifth Circuit precedent.

24 I would like to put up on the screen the language of
25 Paragraph 10 of the January 9th order and Paragraph 35

1 (garbled) of the July 16th.

2 Your Honor is very familiar with these orders, I'm sure,
3 having dealt with them in connection with confirmation and in
4 prior proceedings. But to recap, the orders essentially do
5 three things.

6 First, they require the parties to first come to the
7 Bankruptcy Court before commencing or pursuing a claim against
8 certain parties.

9 Second, they provided the Court with the sole jurisdiction
10 to make a finding of whether the party has asserted a
11 colorable claim of negligence -- of willful misconduct or
12 gross negligence.

13 And lastly, the orders provided the Court with exclusive
14 jurisdiction over any claims that the Court determined were
15 colorable.

16 The protected parties under the January 9th order are the
17 independent directors, their agents and advisors, which, as I
18 mentioned earlier, includes Mr. Seery -- who, at least as of
19 March 2020, was acting as the agent on the board's behalf as
20 the CEO -- for any actions taken under their direction.

21 The protected parties under the July 16th order are Mr.
22 Seery, as the CEO and CRO, and his agents and advisors.

23 Movants spend a lot of time in their moving papers and
24 reply arguing that the Court may not assert exclusive
25 jurisdiction over any claims that pass through the gate. They

1 also spend a lot of time arguing that the Bankruptcy Court
2 does not even have jurisdiction at all to assert -- to
3 adjudicate claims against Mr. Seery because such claims are
4 subject to mandatory withdrawal under Section 157(d).

5 The Debtor doesn't agree, and has briefed why mandatory
6 withdrawal of the reference is inapplicable. The Debtor has
7 also filed in the District Court a motion to enforce the
8 reference in effect in this district which refers cases in
9 this district arising under, arising in, or related to Chapter
10 11 to the Bankruptcy Court.

11 The motion to enforce the reference, Your Honor, which
12 extensively briefs this issue, is contained in Exhibit 3 of
13 the Debtor's exhibits.

14 We were somewhat surprised that the complaint filed in the
15 District Court wasn't automatically referred to this Court
16 under the standing order in effect in this district, given the
17 related bankruptcy case, the Court's prior approval of the
18 HarbourVest settlement, and the appeal in the District Court
19 of the HarbourVest settlement.

20 When we dug a little further, we found out that Movants
21 filed a civil case cover sheet accompanying the complaint in
22 the District Court. They neglected in that initial filing to
23 point out that there was any related case to the lawsuit they
24 filed.

25 Mr. Bridges fell on his sword at the contempt hearing on

1 June 8th and took complete responsibility for the oversight.
2 I commend him for not trying to argue that the bankruptcy
3 case, the HarbourVest settlement, and the District Court
4 appeal are not related cases that would require disclosure, an
5 argument that surely would have been unsupportable.

6 But as I said at the contempt hearing, I find it curious
7 that such an important issue was overlooked, an issue which
8 would have likely changed the entire trajectory of the
9 proceedings and landed the DAF lawsuit in this Court rather
10 than the District Court.

11 And this Tuesday, Your Honor, Movants filed a revised
12 civil cover sheet with the District Court. Although they
13 referenced the bankruptcy case as a related case, they didn't
14 bother to mention the appeal already pending in the District
15 Court regarding the HarbourVest settlement -- surely, a
16 related case.

17 Your Honor also asked Mr. Bridges at the June 8th hearing
18 whether it was an oversight or intentional that he didn't
19 mention 28 U.S.C. Section 1334 as a basis for jurisdiction in
20 his complaint. Mr. Bridges had no answer for Your Honor then,
21 and has given no answer now. His only comment at the hearing
22 last time was that it must have been Ms. Sbaiti that wrote it
23 because he had no recollection of it.

24 So, Your Honor, it's no surprise that Movants conveniently
25 found themselves in the District Court, which was their

1 ultimate strategy from the get go.

2 In any event, Your Honor, we have briefed the withdrawal
3 of the reference issue. A response by the Movants is due --
4 CLO Holdco and DAF is due on June 29th. And we hope the
5 District Court will decide soon thereafter whether to enforce
6 the reference.

7 While I'm happy to argue why Movants' mandatory withdrawal
8 of the reference argument is [not] persuasive, I don't think
9 it's necessary, but I do, again, want to highlight that there
10 is no private right of action under the Investment Advisers
11 Act.

12 Your Honor, it's not really relevant to today's hearing,
13 since we have argued in opposition to the motion before Your
14 Honor that resolving the issue of the Bankruptcy Court's
15 jurisdiction to adjudicate claims contained in the complaint
16 as they relate to Mr. Seery is premature at this point. The
17 January 9th and July 16th orders first require the Court to
18 determine whether a claim is colorable. It's not until this
19 Court determines if a claim is colorable that the decision on
20 where the lawsuit should be tried is relevant.

21 Having said that, Your Honor, we read the Movants' reply
22 brief very carefully and noticed in Footnote 6 that the
23 Movants state that modifying the exclusive grant of
24 jurisdiction to adjudicate any claims that pass through the
25 gate to include the language "to the extent permissible by

1 law," in the same way the Debtor modified the plan, would
2 resolve the motion. So let's look at the provision as it
3 exists in the plans.

4 Ms. Canty, if you can put up the next demonstrative,
5 please.

6 This provision provides that the Bankruptcy Court will
7 have sole and exclusive jurisdiction to determine whether a
8 claim or cause of action is colorable, and, only to the extent
9 legally permissible and provided in Article XI, shall have
10 jurisdiction to determine -- to adjudicate the underlying
11 colorable claim or cause of action.

12 The Movants request in their reply brief in Footnote 6
13 that the July 16th order be given the plan treatment. That
14 treatment: sole authority to determine colorability and
15 jurisdiction, and, to the extent legally permissible, to
16 adjudicate underlying claim, only if jurisdiction existed.

17 After reviewing the reply brief and prior to the June 8th
18 hearing, we decided that we would agree to modify both the
19 January 9th and the July 16th orders to provide that the
20 Bankruptcy Court would only have jurisdiction to adjudicate
21 claims that pass through the colorability gate to the extent
22 permissible by law.

23 Prior to the June 8th hearing, Mr. Morris and I had a
24 conversation with Mr. Bridges. We conferred about a potential
25 resolution and a proposed modification. Mr. Bridges indicated

1 they were interested in exploring a resolution and wanted to
2 --

3 MR. BRIDGES: Objection, Your Honor.

4 THE COURT: There's an objection?

5 MR. BRIDGES: Objection, Your Honor. There's a Rule
6 408 settlement discussion. He's welcome to talk about the
7 results, but he shouldn't be talking about what was -- what
8 was proposed by opposing counsel in a settlement conversation.

9 THE COURT: Okay. I overrule.

10 MR. POMERANTZ: Your Honor, this was not --

11 THE COURT: I don't think this is a 408 issue.
12 Continue.

13 MR. BRIDGES: Thank you.

14 MR. POMERANTZ: The stipulation and order which we
15 provided to counsel is attached to my declaration, which is
16 found at Document 2418, and it was filed in connection with a
17 Notice of Revised Proposed Orders that we filed at Docket
18 2417. And I would like to put up on the screen the relevant
19 paragraphs of the order that we provided to the Movants.

20 So, you see, we agreed to modify each of the orders at the
21 end to do what the plan says. The Court would only have
22 jurisdiction for claims passing through the gate if the Court
23 had jurisdiction and it was legally permissible.

24 Movants' counsel, however, responded with a mark-up that
25 went beyond -- went beyond what Movants proposed in Footnote 6

1 and sought to fundamentally change the January 9th and July
2 16th orders in ways that were not acceptable to the Debtor and
3 not even contemplated by the original motion.

4 Ms. Canty, can you put up on the screen the relevant
5 paragraphs of the response we received?

6 Specifically, Your Honor, you see at the first part they
7 wanted to provide that the only -- the order only applied to
8 claims involving injury to the Debtor, presumably as opposed
9 to alleged injuries to affiliated funds or third parties.
10 They also provided that the Court's ability to make the
11 initial colorability determination was also qualified by "to
12 the extent permissible by law" in the way that the Court --
13 that the Debtor agreed to modify the ultimate adjudication
14 jurisdiction provision.

15 Your Honor, Movants haven't even talked about this back
16 and forth. They haven't talked about their about-face. And
17 I'll leave it for Your Honor to read their Footnote 6 that
18 said it would resolve their motion, the back and forth, our
19 proposal, and now Mr. Bridges' modified, morphed arguments
20 that now point out other issues.

21 In any event, Your Honor, we made the change, and we think
22 it should resolve the motion, or at least it resolves part of
23 the motion. There can't be any argument that the Court is
24 trying to exert exclusive jurisdiction on claims that pass
25 through the gate.

1 What apparently remains from the arguments raised by the
2 Movants is the argument that the Court does not even have
3 jurisdiction to act as a gatekeeper in the first place because
4 it doesn't have jurisdiction of the underlying lawsuit. And
5 on June 8th and today, they've added a new argument, that the
6 orders impermissibly exculpate Mr. Seery and others, violate
7 their jury trial rights, and are contrary to the Fifth Circuit
8 precedent.

9 Movants claims that the orders are a jurisdictional
10 overreach, a violation of constitutional proportions, a
11 violation of due process, and inconsistent with several U.S.
12 Supreme Court cases. But, of course, they cite no cases whose
13 facts are even remotely similar to this one. Instead, they
14 are content to rely on general statements regarding bankruptcy
15 jurisdiction, how it is derived from district court
16 jurisdiction and is constitutionally limited, legal
17 propositions which are not terribly controversial or even
18 applicable to these facts.

19 There are several arguments -- I mean, there are several
20 reasons, Your Honor, why Movants' arguments fail. Initially,
21 Movants have not cited any authority, any statute, or any rule
22 which would allow this Court to revisit the January 9th and
23 July 16th orders. As I will discuss in a moment, Your Honor,
24 *Republic v. Shoaf*, a case the Court is very familiar in and
25 relied on in connection with plan confirmation, bars a

1 collateral attack on these orders under the doctrine of res
2 judicata.

3 Similarly, as the Court remarked on June 8th, the Supreme
4 Court's *Espinosa* decision, which rejected an attack based upon
5 Federal Rule of Civil Procedure 60(b)(4) to a prior order that
6 may have been unlawful, prohibits the Court from now
7 reconsidering the January 9th and July 16th orders.

8 But even if Your Honor rules that res judicata does not
9 apply, there are two independent reasons why the orders were
10 not an unlawful extension of the Court's jurisdiction. The
11 first is because the Court had jurisdiction to enter both of
12 those orders as the ability to determine the colorability of
13 claims is within the jurisdiction of the Court. The second is
14 because the orders are justified by the *Barton* doctrine.

15 Lastly, Your Honor, Movants' argument that the Court may
16 not act as a gatekeeper to determine the colorability of a
17 claim for which it may not have jurisdiction is incorrect, and
18 as Your Honor has mentioned and as Mr. Bridges unconvincingly
19 tried to distinguish, the Fifth Circuit *Villegas v. Schmidt*
20 case is a case on point and resolves that issue.

21 Turning to res judicata, Your Honor, it prevents the Court
22 from revisiting these governance orders. CLO Holdco had
23 formal notice of the Seery CEO motion and the opportunity to
24 respond. It failed to do so. It is clearly bound.

25 As reflected on Debtor's Exhibit 4, CLO Holdco is a

1 wholly-owned subsidiary of the DAF. The DAF is its sole
2 shareholder. There is no dispute about that. Importantly, at
3 the time of both the January and July orders, Grant Scott was
4 the only human being authorized to act on behalf of CLO Holdco
5 and the DAF. The DAF did not respond to the Seery CEO motion,
6 either.

7 And why is that important, Your Honor? It's because
8 Movants argue in their reply that the DAF cannot be bound by
9 res judicata because they did not receive notice of the July
10 16th order. However, Your Honor, that is not the law. Res
11 judicata binds parties to the dispute and their privies, and
12 the DAF is bound to the prior orders even though it did not
13 receive notice.

14 There are several cases, Your Honor, that stand for this
15 unremarkable proposition. First I would point Your Honor to
16 the Fifth Circuit's opinion of *Astron Industrial Associates v.*
17 *Chrysler*, found at 405 F.2d 958, a Fifth Circuit case from
18 1968. In that case, Your Honor, the Fifth Circuit held that
19 the appellant was barred by the doctrine of res judicata from
20 bringing a claim because its parent, which was its sole
21 shareholder, would have been bound by res judicata.

22 *Astron* is consistent with the 1978 Fifth Circuit case of
23 *Pollard v. Cockrell*, 578 F.2d 1002 (1978). And the Northern
24 District of Texas in 2000 case of *Bank One v. Capital*
25 *Associates*, 2000 U.S. Dist. LEXIS 11652, found that a parent

1 and a sole shareholder of an entity couldn't assert res
2 judicata as a defense when those claims could have been
3 brought against its wholly-owned subsidiary.

4 And lastly, Your Honor, the 2011 Southern District of
5 Texas case, *West v. WRH Energy Partners*, 2011 LEXIS 5183, held
6 that res judicata applied with respect to a partnership's
7 general partner because the general partner was in privity
8 with the partnership.

9 These cases are spot on and make sense. DAF is CLO
10 Holdco's parent. Grant Scott was the only live person to
11 represent these entities in any capacity at the relevant
12 times. Accordingly, just as CLO Holdco is bound, DAF is
13 bound.

14 Allowing DAF to assert a claim when its wholly-owned and
15 controlled subsidiary is barred would allow entities to
16 transfer claims amongst their related entities in order to
17 relitigate them and they would never be finality. And, of
18 course, Jim Dondero, as we know, consented to the January 9th
19 order, which provided Mr. Seery protection in a variety of
20 capacities.

21 And as Your Honor has pointed out, and as Mr. Bridges
22 didn't have an answer for, neither CLO Holdco nor the DAF or
23 any other party appealed any of the governance orders. And
24 nobody challenged the validity of these orders at the
25 confirmation hearing, where the terms of these orders were

1 front and center.

2 And importantly, Your Honor, the orders are clear and
3 unambiguous. They require a Bankruptcy Court [sic] to seek
4 Bankruptcy Court approval before they commence or pursue an
5 action against the independent board, the CEO, CRO, or their
6 agents. And they clearly and unambiguously set the standard
7 of care for actions prospectively: gross negligence or
8 willful misconduct.

9 The Bankruptcy Court had jurisdiction to enter the
10 governance orders, which, as expressly indicated in the
11 orders, were core proceedings dealing with the administration
12 of the estate. No one challenged this finding of core
13 jurisdiction. And as I will discuss later, the failure to
14 challenge core jurisdiction is waived under applicable Supreme
15 Court and Fifth Circuit precedent.

16 Your Honor, the Court [sic] does not argue that Movants
17 have waived their right to seek adjudication of a lawsuit that
18 passes through the colorability gate by an Article III Court.
19 The issue is not before the Court, but the changes to the
20 order that the Debtor agreed to make clearly -- clearly will
21 provide Mr. Bridges' clients the ability to make that
22 determination.

23 The Debtor is, however, arguing that the Movants have
24 waived their right to contest the core jurisdiction of the
25 Bankruptcy Court to make the determination that the claims are

1 colorable in the first place, and to challenge the exculpation
2 provisions provided to the beneficiaries of those orders.

3 Accordingly, Your Honor, the elements of res judicata are
4 satisfied. Both proceedings involve the same parties. The
5 prior judgment was entered by a court of competent
6 jurisdiction. The prior order was a final judgment on its
7 merits. And they involved the same causes of action.

8 Importantly, the members of the independent board,
9 including Jim Seery, relied on the protections contained in
10 the January 9th and July 16th orders and would not have
11 accepted these appointments if the protections weren't
12 included. And how do we know this? Because each of them,
13 both Mr. Seery and Mr. Dubel, both testified at the
14 confirmation hearing on this very topic.

15 And I would like to put up on the screen an excerpt from
16 Mr. Seery's testimony at confirmation, which is testimony
17 included in the February 2nd, 2021 transcript, which is
18 Exhibit 2 of the Debtor's exhibits.

19 THE COURT: Okay.

20 MR. POMERANTZ: And I would like to just read this,
21 Your Honor.

22 "Q Okay. You mentioned that there were certain
23 provisions of the January 9th order that were important
24 to you and the other independent directors. Do I have
25 that right?"

1 MR. POMERANTZ: A little bit later on, Mr. Seery
2 testifies:

3 "A And then ultimately there'll be another provision
4 in the agreement here, I don't see it off the top of my
5 head, but a gatekeeper provision. And that provision"
6 --

7 "Q Hold on one second, Mr. Seery."

8 MR. POMERANTZ: Please scroll.

9 "Q So, Paragraph 4 and 5, were those -- were those --
10 were those provisions put in there at the insistence of
11 the prospective independent directors?

12 "A Yes.

13 "Q Okay. Can we go to Paragraph 10, please? There
14 you go."

15 Mr. Morris: Is this the other provision that you were
16 referring to?

17 "A This is -- it's become to be known as the
18 gatekeeper provision, but it's a provision that I
19 actually got from other cases -- again, another very
20 litigious case -- that I thought it was appropriate to
21 bring it into this case. And the concept here is that
22 when you are dealing with parties that seem to be
23 willing to engage in decade-long litigation and
24 multiple forums, not only domestically but even
25 throughout the world, it seemed important and prudent

1 to me and a requirement that I set out that somebody
2 would have to come to this Court, the Court with
3 jurisdiction over these matters, and determine whether
4 there was a colorable claim. And that colorable claim
5 would have to show gross negligence and willful
6 misconduct -- i.e., something that would not otherwise
7 be indemnifiable" --

8 MR. POMERANTZ: Hold on one second.

9 "A So, basically, it set an exculpation standard for
10 negligence. It exculpates the directors from
11 negligence, and if somebody wants to bring a cause
12 against the directors, they have to come to this Court
13 first to get a finding that there's a colorable claim
14 for gross negligence or willful misconduct."

15 "Q Would you have accepted the engagement as an
16 independent director without the Paragraphs 4, 5, and
17 10 that we just looked at?

18 "A No, these were very specific requests. The
19 language here has been smithed, to be sure, but I
20 provided the original language for Paragraph 10 and
21 insisted on the guaranty provisions above to ensure
22 that the indemnity would have some support.

23 "Q And ultimately did the Committee and the Debtor
24 agree to provide all the protections afforded by
25 Paragraphs 4, 5, and 10?

1 "A Yes."

2 MR. POMERANTZ: So, Your Honor, these -- this
3 testimony also applied to as well as the CEO.

4 The testimony was echoed by Mr. Dubel, another member of
5 the board. And I'm not going to put his testimony on the
6 screen, but it can be found at Pages 272 to 281 of Exhibit 2,
7 which is the February 2nd transcript.

8 Movants argue, however, that res judicata doesn't apply
9 because the Court didn't have jurisdiction to enter these
10 orders. And they argue that the order stripped the District
11 Court of this jurisdiction. As I previously described, the
12 Debtor is prepared to modify the governance orders to provide
13 that the Court shall retain jurisdiction to -- on claims that
14 pass through the gate only to the extent legally permissible.
15 The modification does not appear to be good enough for the
16 Movants. They continue to argue that the Bankruptcy Court
17 can't even act as the exclusive gatekeeper to determine
18 whether such actions are colorable as a prerequisite for
19 commencing or pursuing an action.

20 The problem Movants run into is the Fifth Circuit's
21 opinion of *Republic v. Shoaf* and various Supreme Court
22 decisions, including *Espinosa*.

23 In *Shoaf*, the Fifth Circuit held that a party cannot
24 subsequently challenge a confirmed plan that clearly and
25 unambiguously released a third party, even if the Bankruptcy

1 Court lacked jurisdiction to approve the release in the first
2 place. Movants' proper recourse was to appeal the governance
3 orders, not to seek to collaterally attack them.

4 In *Shoaf*, the Fifth Circuit held that the confirmed plan
5 was res judicata with respect to a suit by the creditor
6 against the guarantor. And in so ruling, the Fifth Circuit
7 says that the prong of res judicata standard that requires an
8 order, prior order to be made by a court of competent
9 jurisdiction is satisfied regardless of whether the issue was
10 actually litigated. This is because whenever a court enters
11 an order, it does so by implicitly making a finding of its
12 jurisdiction, a determination that can't be attacked. And in
13 fact, in the January 9th and the July 16th orders, it wasn't
14 implicit, the Court's jurisdiction; it was set out that the
15 Court had core jurisdiction.

16 Movants try to brush *Shoaf* aside, arguing that is the only
17 case the Debtor cites to support res judicata argument and is
18 a narrow opinion that has been questioned and distinguished.
19 That's just not correct, Your Honor. Movants ignore that we
20 have cited two United States Supreme Court cases, *Stoll v.*
21 *Gottlieb* and *Chicot County Drainage District*, upon which the
22 Fifth Circuit based its *Shoaf* decision. In each case, the
23 U.S. Supreme Court gave res judicata effect to a Bankruptcy
24 Court order that made a ruling party -- that a ruling party
25 later claimed was beyond the Court's jurisdiction to do so.

1 In *Stoll*, it was a release of guaranty without jurisdiction,
2 like *Shoaf*. In *Chicot*, it was an extinguishment of a bond
3 claim without jurisdiction.

4 Similarly, Your Honor, the U.S. Supreme Court held in
5 *Espinosa* that a party was not entitled to reconsideration of a
6 Bankruptcy Court order under **Federal Rule of Civil Procedure**
7 **60(b)(4)** discharging a student loan without making the
8 required statutory finding of undue hardship in an adversary
9 proceeding. And the Supreme Court reasoned in that opinion as
10 follows: A judgment is not void, for example, simply because
11 it may have been erroneous. Similarly, a motion under
12 60(b)(4) is not a substitute for a timely appeal. Instead,
13 60(b)(4) applies only in the rare instance where a judgment is
14 premised either on a certain type of jurisdictional error or a
15 violation of due process that deprives a party of notice or
16 the opportunity to be heard.

17 Federal courts considering Rule 60(b)(4) motions that
18 assert a judgment is void because of a jurisdictional defect
19 generally have reserved it only for the exceptional case in
20 which the court that rendered the judgment lacked even an
21 arguable basis for jurisdiction. This case is not the
22 exceptional -- exceptional circumstance that was referred to
23 by *Espinosa*.

24 In addition, we argue in our brief, and I'll get to in a
25 few moments, that both of the orders are justified under the

1 *Barton* doctrine.

2 Actually, before I go to that, Your Honor, I think Movants
3 are really trying to distinguish *Espinosa* by arguing that the
4 Court's order exculpating Mr. Seery for negligence liability
5 did not provide people, mom-and-pop investors, with the due
6 process informing them that they would not be able to assert
7 duty claims based upon mere negligence. I think that's the
8 core of Mr. Bridges' argument, that, hey, you entered an
9 order, you gave this exculpation, it was inappropriate, and it
10 couldn't be done.

11 There are several problems with Movants' argument. First,
12 Movants mischaracterize both the facts and the law in
13 connection with the Debtor's relationship with its investors.
14 The Debtor is the registered investment advisor for HCLOF as
15 well as approximately 15 to 18 CLOs. The only investor in
16 HCLOF other than the Debtor is CLO Holdco. The investors in
17 the CLOs are the retail funds advised by the Dondero advisors
18 and the other -- and other institutional investors.
19 Accordingly, the thousands of investors, the mom-and-pop
20 investors whose due process rights have allegedly been
21 trampled by the January 9th and July 16th orders, are not
22 investors in any funds managed by the Debtor.

23 And, of course, I have mentioned, as I've mentioned
24 before, no non -- non-Dondero investor, be it a mom-and-pop
25 investor, another institutional investor, anyone unrelated to

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

In Re: Highland Capital Management, L.P § Case No. **19-34054-SGJ11**

Charitable DAF Fund, L.P et al

Appellant

§

vs.

§

21-03067

Highland Capital Management, L.P

§

Appellee

§

3:23-CV-01503-B

[167] Order granting Defendant Highland Capital Management, L.P.'s Renewed motion to dismiss adversary proceeding (related document # [122](#)) Entered on 6/25/2023.

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APPELLANT RECORD

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

In re:	§ Chapter 11
	§
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§ Case No. 19-34054-sgj11
	§
Debtor.	§
	§
CHARITABLE DAF FUND, L.P. AND CLO	§
HOLDCO, LTD., DIRECTLY AND DERIVATIVELY	§
	§
Plaintiffs,	§ Adversary Proceeding No.
	§
vs.	§ 21-03067-sgj11
	§
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§
HIGHLAND HCF ADVISOR, LTD., AND	§
HIGHLAND CLO FUNDING LTD., NOMINALLY	§
	§
Defendant.	§
	§

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**APPELLANTS' SECOND AMENDED STATEMENT OF ISSUES
AND DESIGNATION OF RECORD ON APPEAL**

Pursuant to Rules 8009(a)(1)(A)-(B) and (a)(4) of the Federal Rules of Bankruptcy Procedure, The Charitable DAF Fund, L.P. and CLO Holdco, Ltd. ("Appellants") hereby designate the following items to be included in the record and identify the following issues with respect to

their appeal of the Order Granting Defendant Highland Capital Management, L.P.'s "Renewed Motion to Dismiss Complaint" [Adv. Proc. Doc. No. 122] which was entered by the United States Bankruptcy Court for the Northern District of Texas on June 25, 2023.

I. STATEMENT OF ISSUES TO BE PRESENTED ON APPEAL

- Whether the Bankruptcy Court had jurisdiction to rule on Highland Capital Management L.P.'s Renewed Motion to Dismiss Complaint
- Whether the Renewed Motion to Dismiss Complaint was improperly granted

II. DESIGNATION OF ITEMS TO BE INCLUDED IN THE RECORD

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000001

1. Notice of Appeal for Bankruptcy Case Adversary Proceeding No. 21-03067-sgj11 [Doc. 168].

000042

2. The judgment, order, or decree appealed from: Memorandum Opinion and Order Granting Defendant Highland Capital Management, L.P.'s "Renewed Motion to Dismiss Complaint" [Adv. Proc. Doc. No. 122] [Doc. 167].

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3. Docket Sheet kept by the Bankruptcy Clerk.

4. Documents listed below and as described in the Docket Sheet for Bankruptcy Case Proceeding No. 21-03067-sgj.

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No.	Date Filed	Docket No.	Description/Document Text
1	9/29/21	1	(36 pgs; 3 docs) Adversary case 21-03067. ORDER REFERRING CASE NUMBER 21-CV-0842-B from U.S District Court for the Northern District of Texas, Dallas Division to U.S. Bankruptcy Court for Northern District of Texas, Dallas Division. Complaint by Charitable DAF Fund, LP, CLO Holdco, Ltd. against Highland Capital Management, LP, Highland HCF Advisor Ltd., Highland CLO Funding, Ltd. Fee Amount \$350 (Attachments: # 1 Original Complaint # 2 Docket Sheet from 3:20-cv-0842-B) Nature(s) of suit: 02 (Other (e.g. other actions that would have been brought in state court if unrelated to bankruptcy)). (Okafor, M.)
2	9/29/21	2	(1 pg) Supplemental Document (cover sheet) by CLO Holdco Ltd., Charitable DAF Fund (RE: related document(s)1 Adversary case 21-03067) [ORIGINALLY FILED IN 21-CV-0842 AS #2 ON 04/13/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)

Vol. 2 000139 000232 000239 000270 Thru Vol. 6	3	9/29/21	6	(93 pgs; 6 docs) MOTION for Leave to File First Amended Complaint filed by CLO Holdco Ltd., Charitable DAF Fund LP (Attachments: # 1 Exh 1_First Amended Complaint # 2 Exh 2_Motion for Authorization to Retain James Seery # 3 Exh 3_Order Approving Retention of James Seery # 4 Exh 4_Order Approving Settlement # 5 Proposed Order) (Bridges, Jonathan) (Entered: 04/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #6 ON 04/19/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
	4	9/29/21	22	(7 pgs; 2 docs) MOTION for an Order to Enforce the Order of Reference filed by Highland Capital Management LP. (Attachments: # 1 Exhibit(s) A--Proposed Order) (Annable, Zachery) Modified text on 5/20/2021 (mjr). (Entered: 05/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #22 ON 05/19/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
	5	9/29/21	23	(31 pgs) Brief/Memorandum in Support filed by Highland Capital Management LP re: 22 MOTION for an Order to Enforce the Order of Reference. (Annable, Zachery) Modified text on 5/20/2021 (mjr).(Entered: 05/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #23 ON 05/19/2021 IN U.S.DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
	6	9/29/21	24	(926 pgs; 29 docs) Appendix in Support filed by Highland Capital Management LP re: 23 Brief/Memorandum in Support. (Attachments: # 1 Appendix 1 # 2 Appendix 2 # 3 Appendix 3 # 4 Appendix 4 # 5 Appendix 5 # 6 Appendix 6 # 7 Appendix 7 # 8 Appendix 8 # 9 Appendix 9 # 10 Appendix10 # 11 Appendix 11 # 12 Appendix 12 # 13 Appendix 13 # 14 Appendix 14 # 15 Appendix 15 # 16 Appendix 16 # 17 Appendix 17 # 18 Appendix 18 # 19 Appendix 19 # 20 Appendix 20 # 21 Appendix 21# 22 Appendix 22 # 23 Appendix 23 # 24 Appendix 24 # 25 Appendix 25 # 26 Appendix 26 # 27 Appendix 27 # 28 Appendix 28) (Annable, Zachery) Modified linkage and text on 5/20/2021 (mjr). (Entered:05/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #24 ON 05/19/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
Vol. 7 001196	7	9/29/21	26	(7 pgs; 2 docs) MOTION to Dismiss Complaint filed by Highland Capital Management LP (Attachments: # 1 Exhibit(s) A--Proposed Order) (Annable, Zachery) Modified text on 5/28/2021 (jmg).(Entered: 05/27/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #26 ON 05/27/2021 IN U.S.DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)

Vol. 7 001203 thru Vol. 8	8	9/29/21	28	(508 pgs; 14 docs) Appendix in Support filed by Highland Capital Management LP (Attachments: # 1 Appendix 1 # 2 Appendix 2 # 3 Appendix 3 # 4 Appendix 4 # 5 Appendix 5 # 6 Appendix 6 # 7 Appendix 7 # 8 Appendix 8 # 9 Appendix 9 # 10 Appendix 10 # 11 Appendix 11 # 12 Appendix 12 # 13 Appendix 13) (Annable, Zachery) (Entered: 05/27/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #28 ON 05/27/2021 IN U.S. DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
Vol. 9 001711	9	9/29/21	33	(1 pg) Amended Civil Cover Sheet by CLO Holdco Ltd, Charitable DAF Fund LP. Amendment to 2 Supplemental Document. (Sbaiti, Mazin) Modified text on 6/23/2021 (mjr). (Entered: 06/22/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #33 ON 06/22/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001712	10	9/29/21	36	(26 pgs) RESPONSE filed by CLO Holdco Ltd, Charitable DAF Fund LP re: 22 MOTION for an Order to Enforce the Order of Reference (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #36 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001738	11	9/29/21	37	(22 pgs) Appendix in Support filed by CLO Holdco Ltd, Charitable DAF Fund LP re 36 Response/Objection Response to Motion for an Order to Enforce the Order of Reference (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #37 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001760	12	9/29/21	38	(45 pgs) RESPONSE filed by CLO Holdco Ltd, Charitable DAF Fund LP re: 26 MOTION to Dismiss (Defendant Highland Capital Management, L.P.'s Motion to Dismiss Complaint) (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #38 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001805	13	9/29/21	39	(88 pgs) Appendix in Support filed by CLO Holdco Ltd, Charitable DAF Fund LP re 38 Response/Objection to Defendant Highland Capital Management, L.P.'s Motion to Dismiss Complaint (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #39 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001893	14	9/29/21	42	(12 pgs) REPLY filed by Highland Capital Management LP re: 22 MOTION for an Order to Enforce the Order of Reference (Annable, Zachery) (Entered: 07/13/2021) [ORIGINALLY FILED IN 21-CV-0842AS #42 ON 07/13/2021 IN U.S.

			DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
VOL. 9	15	9/29/21	43 (852 pgs) Appendix in Support filed by Highland Capital Management LP re: 42 Reply. (Annable, Zachery) Modified text on 7/14/2021 (mjr). (Entered: 07/13/2021) [ORIGINALLY FILED IN 21-CV-0842AS #43 ON 07/13/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001905 thru Vol. 13	16	9/29/21	45 (21 pgs) REPLY filed by Highland Capital Management LP re: 26 MOTION to Dismiss (Defendant Highland Capital Management, L.P.'s Motion to Dismiss Complaint) (Annable, Zachery) (Entered:07/13/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #44 ON 07/13/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002757	17	9/29/21	57 (7 pgs; 2 docs) MOTION to Dismiss and Joinder in Motion to Dismiss of Highland Capital Management, L.P. filed by Highland CLO Funding Ltd. (Attachments: # 1 Proposed Order) Attorney Paul R Bessette added to party Highland CLO Funding Ltd (pty:dft) (Bessette, Paul) (Entered: 08/30/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #57 ON 08/30/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002778	18	9/29/23	58 (12 pgs) Brief/Memorandum in Support filed by Highland CLO Funding Ltd. re 57 MOTION to Dismiss and Joinder in Motion to Dismiss of Highland Capital Management, L.P. (Bessette, Paul) (Entered: 08/30/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #58 ON 08/30/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002785	19	9/29/23	59 (80 pgs; 5 docs) Appendix in Support filed by Highland CLO Funding Ltd re 58 Brief/Memorandum in Support of Motion (Attachments: # 1 Exhibit(s) A - Jackson v Dear # 2 Exhibit(s) B - Prudential Assurance v. Newman # 3 Exhibit(s) C - Harbourvest Settlement Agreement # 4 Exhibit(s) D - Boleat Declaration) (Bessette, Paul) (Entered: 08/30/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #59 ON 08/30/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002797	20	9/29/21	64 (1 pg) ORDER OF REFERENCE: Pursuant to 28 U.S.C. § 157 and this District's Miscellaneous Order No. 33, this case is hereby REFERRED to Judge Stacey G. C. Jernigan of the United States Bankruptcy Court for the Northern District of Texas, Dallas Division, to be adjudicated as a matter related to the consolidated Chapter 11 Bankruptcy of Highland Capital Management, L.P., Chapter 11 Case No.19-34054. (Ordered by Judge Jane J. Boyle
002877			

Vol. 14				on 9/20/2021) (svc) (Entered: 09/20/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #64 ON 09/20/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002878	21	10/19/21	66	(5 pgs) Notice of hearing filed by Defendant Highland Capital Management, LP (RE: related document(s) 26 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP, 47 Motion to strike document filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 55 Motion to abate filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) Hearing to be held on 11/23/2021 at 09:30 AM at https://us-courts.webex.com/meet/jerniga for 26 and for 47 and for 55, (Annable, Zachery)
002883 thru Vol. 16	22	11/22/21	71	(509 pgs; 2 docs) Witness and Exhibit List <i>for Hearing on November 23, 2021</i> filed by Defendant Highland Capital Management, LP (RE: related document(s) 26 Motion to dismiss adversary proceeding). (Attachments: # 1 Exhibits 1-13) (Hayward, Melissa)
Vol. 17	23	11/22/21	72	(2 pgs) Witness List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 26 Motion to dismiss adversary proceeding, 47 Motion to strike (related document(s): 43 Document), 55 Motion to abate (related document(s) 1 Complaint), 69 Motion to abate <i>Plaintiffs' Amended Motion to Stay All Proceedings</i> (related document(s) 55 Motion to abate (related document(s) 1 Complaint))). (Sbaiti, Mazin)
003392				
003394	24	11/22/21	73	(189 pgs; 4 docs) Exhibit List <i>for November 23, 2021 hearing</i> filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 47 Motion to strike (related document(s): 43 Document), 55 Motion to abate (related document(s) 1 Complaint)). (Attachments: # 1 Exhibit 1_Defendant's Memorandum of Law in Support of Motion for Reconsideration # 2 Exhibit 2_Highland Memorandum in Support of Motion to Dismiss # 3 Exhibit 3_Order (I) Confirming Fifth Amended Plan of Reorganization of Highland) (Sbaiti, Mazin)
003583	25	12/7/21	80	(2 pgs) Order granting Highland CLO Funding, Ltd.'s motion to dismiss adversary as a party with prejudice (related document 57) Entered on 12/7/2021. (Okafor, Marcey) Modified text on 3/11/2022 (Okafor, Marcey).
003585	26	3/11/22	99	(26 pgs) Memorandum of Opinion and order granting motion to dismiss the adversary proceeding (RE: related document(s) 26 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP). Entered on 3/11/2022 (Okafor, Marcey)
003611	27	3/11/22	100	(26 pgs) Order granting motion to dismiss adversary proceeding with prejudice (related document #26) Entered on 3/11/2022. (Okafor, Marcey)

Vol. 18 003637	28	3/21/22	104	(29 pgs) Notice of appeal. Fee Amount \$298 filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 100 Order on motion to dismiss adversary proceeding). Appellant Designation due by 04/4/2022. (Sbaiti, Mazin)
003666	29	5/26/22	120	(177 pgs; 2 docs) Support/supplemental document <i>Motion to Supplement Appellate Record</i> filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 111 Appellant designation). (Attachments: # 1 Amended Transcript of January 14, 2021 Hearing) (Sbaiti, Mazin)
003843	30	6/9/22	121	(1 pg) DISTRICT COURT Order: Case 3:22-00695-B is hereby transferred to the docket of the Honorable Judge Jane J. Boyle for consolidation with The Charitable DAF Fund LP, et al. v. Highland Capital Management LP, Case No. 3:21-cv-3129-N. Judge Karen Gren Scholer no longer assigned to case.(RE: related document(s) 86 Notice of appeal filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 104 Notice of appeal filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Entered on 6/9/2022 (Whitaker, Sheniqua) (Entered: 06/10/2022)
003844	31	10/24/22	122	(7 pgs) Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP (Annable, Zachery)
003851	32	10/14/22	123	(31 pgs) Brief in support filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Annable, Zachery)
Vol. 19 003882 Thru Vol 20	33	10/14/22	124	(513 pgs; 15 docs) Support/supplemental document (<i>Appendix in Support of Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7 # 8 Exhibit 8 # 9 Exhibit 9 # 10 Exhibit 10 # 11 Exhibit 11 # 12 Exhibit 12 # 13 Exhibit 13 # 14 Exhibit 14) (Annable, Zachery)
Vol. 21 004395	34	10/27/22	126	(5 pgs) Notice of hearing (<i>Notice of Hearing and Briefing Schedule on Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP). Hearing to be held on 12/8/2022 at 09:30 AM at https://us-courts.webex.com/meet/jerniga for 122. (Annable, Zachery)

Vol. 21 004400 004410 004442 Thru Vol. 22	35	11/18/22	128	(10 pgs) Motion for withdrawal of reference. Fee amount \$188, filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (Sbaiti, Mazin)
	36	11/18/22	129	(32 pgs) Response opposed to (related document(s): 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP) filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Sbaiti, Mazin)
	37	11/18/22	130	(254 pgs; 2 docs) Response opposed to (related document(s): 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP) filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Attachments: # 1 Appendix) (Sbaiti, Mazin)
Vol. 22 004696 004717 004732 004737 004742	38	9/2/22	131	(21 pgs) DISTRICT COURT MEMORANDUM OPINION AND ORDER: The Court REVERSES and REMANDS the bankruptcy court's Motion to Dismiss Order and AFFIRMS the bankruptcy courts Motion to Stay Order. re: appeal on Civil Action number: Case 3:22-00695-B consolidated with 3:21-CV-3129-B, (RE: related document(s) 81 Order on motion to abate, 100 Order on motion to dismiss adversary proceeding). Entered on 9/2/2022 (Whitaker, Sheniqua) (Entered: 11/29/2022)
	39	12/2/22	133	(15 pgs) Reply to (related document(s): 129 Response filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 130 Response filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) filed by Defendant Highland Capital Management, LP. (Annable, Zachery)
	40	12/7/22	135	(5 pgs) Notice of hearing filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP). Hearing to be held on 1/25/2023 at 01:30 PM at https://us-courts.webex.com/meet/jerniga for 122, (Annable, Zachery)
	41	12/7/22	136	(5 pgs) Notice of hearing filed by Defendant Highland Capital Management, LP (RE: related document(s) 128 Motion for withdrawal of reference filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Status Conference to be held on 1/25/2023 at 01:30 PM at https://us-courts.webex.com/meet/jerniga . (Annable, Zachery).
	42	12/9/22	138	(3 pgs) Response opposed to (related document(s): 128 Motion for withdrawal of reference. Fee amount \$188, filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) filed by Defendant Highland Capital Management, LP. (Annable, Zachery)

Vol. 22 004745	43	12/9/22	139	(25 pgs) Brief in support filed by Defendant Highland Capital Management, LP (RE: related document(s) 138 Response). (Annable, Zachery)
Vol. 23 004770	44	12/9/22	140	(280 pgs; 8 docs) Support/supplemental document (<i>Appendix in Support of Highland Capital Management, L.P.'s Response to Renewed Motion to Withdraw the Reference</i>) filed by Defendant Highland Capital Management, LP (RE: related document(s) 138 Response). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7) (Annable, Zachery)
Vol. 24 005050	45	12/16/22	144	(6 pgs) Reply to (related document(s): 138 Response filed by Defendant Highland Capital Management, LP) filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Sbaiti, Mazin)
005056 Thru Vol. 25.	46	1/23/23	145	(514 pgs; 15 docs) Witness and Exhibit List filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7 # 8 Exhibit 8 # 9 Exhibit 9 # 10 Exhibit 10 # 11 Exhibit 11 # 12 Exhibit 12 # 13 Exhibit 13 # 14 Exhibit 14) (Annable, Zachery)
Vol. 26 005570	47	1/23/23	146	(280 pgs; 8 docs) Witness and Exhibit List filed by Defendant Highland Capital Management, LP (RE: related document(s) 128 Motion for withdrawal of reference. Fee amount \$188.). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7) (Annable, Zachery)
Vol. 27 005850	48	1/23/23	147	(221 pgs; 7 docs) Witness and Exhibit List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Attachments: # 1 Exhibit 1_Excerpts from July 14, 2020 Hearing Transcript # 2 Exhibit 2_HCLOF Members Agreement Relating to the Company # 3 Exhibit 3_HarbourVest Settlement Agreement # 4 Exhibit 4_Order Approving Debtor's Settlement with HarbourVest # 5 Exhibit 5_HCLOF Offering # 6 Exhibit 6 Amended and Restated Investment Advisory Agreement) (Sbaiti, Mazin)
006071	49	1/23/23	148	(3 pgs) Witness and Exhibit List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 128 Motion for withdrawal of reference. Fee amount \$188.). (Phillips, Louis)
Vol. 28 006074	50	1/25/23	150	(56 pgs; 2 docs) Amended Witness and Exhibit List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 147 List (witness/exhibit/generic), 149 List (witness/exhibit/generic)). (Attachments: # 1 Exh 7_Testimony of Mark Patrick at June 8, 2021 hearing) (Sbaiti, Mazin)

Vol. 28 006130	51	1/25/23	152	(3 pgs) Notice of Appearance and Request for Notice by Louis M. Phillips filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Phillips, Louis)
	52	1/25/23	154	(1 pg) Court admitted exhibits date of hearing January 25, 2023 (RE: related document(s) 128 Motion for withdrawal of reference, filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) (COURT ADMITTED DEFENDANT'S EXHIBITS #1, #2, #3, #4, #5 & #6 OFFERED BY ATTY GREG DEMO). (Edmond, Michael) (Entered: 01/27/2023)
Vol. 32 006925 006942 006960	53	2/6/23	158	Report and recommendation to the U.S. District Court by U.S. Bankruptcy Judge. (RE: related document(s) 128 Motion for withdrawal of reference filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Entered on 2/6/2023 (Okafor, Marcey)
	54	2/6/23	161	(18 pgs) DISTRICT COURT Notice of transmission of report and recommendation in re: renewed motion to withdraw reference. Civil Case # 3:22-cv-02802-S. (RE: related document(s) 158 Report and recommendation to the U.S. District Court by U.S. Bankruptcy Judge. (RE: related document(s) 128 Motion for withdrawal of reference filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Entered on 2/6/2023) (Whitaker, Sheniqua)
	55	4/3/23	165	(1 pg) DISTRICT COURT ORDER: The Court GRANTS the 11 Joint Motion to Transfer Proceeding and Consolidate Before Original Court and the above-numbered case (3:22-cv-02802-S) is transferred to the docket of the Honorable Judge Jane Boyle: Civil case 3:21-cv-00842-B (order referring case). (RE: related document(s) 1 Complaint filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 143 Notice of transmission of motion to withdraw reference). Entered on 4/3/2023 (Whitaker, Sheniqua) Modified on 4/10/2023 (Whitaker, Sheniqua). (Entered: 04/10/2023)

TRANSCRIPTS

006961	56	11/24/21	78	(104 pgs) Transcript regarding Hearing Held 11-23-2021 RE: Motion Hearing. THIS TRANSCRIPT WILL BE MADE ELECTRONICALLY AVAILABLE TO THE GENERAL PUBLIC 90 DAYS AFTER THE DATE OF FILING. TRANSCRIPT RELEASE DATE IS 02/22/2022. Until that time the transcript may be viewed at the Clerk's Office or a copy may be obtained from the official court transcriber. Court Reporter/Transcriber Liberty Transcripts/Dipti Patel, Telephone number 847-848-4907. (RE: related document(s) 75 Hearing held on 11/23/2021. (RE: related document(s) 55 MOTION to Stay filed by CLO Holdco Ltd, Charitable DAF Fund LP (Sbaiti, Mazin) (Entered: 08/26/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #55 ON 08/26/2021 IN U.S.
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			<p>DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)) (Appearances: J. Pomerantz and J. Morris for Highland Defendants; J. Jordan and P. Bessett for HCLOF; M. Sbaiti for Plaintiffs. Nonevidentiary hearing. Motion denied. Mr. Pomerantz to upload order.), 76 Hearing held on 11/23/2021. (RE: related document(s) 47 Motion to strike 43 Appendix in support filed by CLO Holdco, Ltd., Charitable DAF Fund, LP (Bridges, Jonathan) Modified text on 7/16/2021 (mjr). (Entered: 07/15/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #47 ON 07/15/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)) (Appearances: J. Pomerantz and J. Morris for Highland Defendants; J. Jordan and P. Bessett for HCLOF; M. Sbaiti for Plaintiffs. Nonevidentiary hearing. Motion denied (Plaintiffs acknowledged complained-of Appendices it did not relate to Motion to Dismiss). Mr. Pomerantz to upload order.)). Transcript to be made available to the public on 02/22/2022. (Patel, Dipti)</p>
57	2/21/23	164	<p>164 (112 pgs) Transcript regarding Hearing Held 1/25/23 RE: HEARING ON DEFENDANT HIGHLAND CAPITAL MANAGEMENT L.P.'S RENEWED MOTION TO DISMISS COMPLAINT (122) AND STATUS CONFERENCE RE: MOTION FOR WITHDRAWAL OF REFERENCE FILED BY PLAINTIFF CLO HOLDCO, LTD., PLAINTIFF CHARITABLE DAF FUND, LP (128). THIS TRANSCRIPT WILL BE MADE ELECTRONICALLY AVAILABLE TO THE GENERAL PUBLIC 90 DAYS AFTER THE DATE OF FILING. TRANSCRIPT RELEASE DATE IS 05/22/2023. Until that time the transcript may be viewed at the Clerk's Office or a copy may be obtained from the official court transcriber. Court Reporter/Transcriber Dipti Patel, Telephone number 847-848-4907. (RE: related document(s) 155 Hearing held on 1/25/2023. (RE: related document(s) 122 Motion to dismiss adversary proceeding, (Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint) filed by Defendant Highland Capital Management, LP filed by Defendant Highland Capital Management, LP) (Appearances: J. Morris and G. Demo for Movants; L. Phillips and M. Sbaiti for Plaintiffs. Evidentiary hearing (appendices). Court took matter under advisement.), 156 Hearing held on 1/25/2023. (RE: related document(s) 128 Motion for withdrawal of reference. Fee amount \$188, filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) (Appearances: J. Morris and G. Demo for Movants; L. Phillips and M. Sbaiti for Plaintiffs. Evidentiary hearing (appendices). Court announced it will recommend denial to District Court. Court is working on Report & Recommendation.)). Transcript to be made available to the public on 05/22/2023. (Patel, Dipti)</p>

Dated: July 14, 2023

Respectfully submitted,

SBAITI & COMPANY PLLC

/s/ Mazin A. Sbaiti

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was filed electronically through the Court's ECF system, which provides notice to all parties of interest, on this 14th day of July, 2023.

/s/ Mazin A. Sbaiti

Mazin A. Sbaiti

1 Mr. Dondero, has ever appeared in this Court to challenge the
2 Debtor's activities.

3 But more fundamentally, Your Honor, the Debtor does not
4 owe fiduciary duties to investors in any of the funds that the
5 Debtor advises. The fiduciary duty that the Debtor owes is to
6 the funds themselves, not the investors in the funds.

7 And while Movants point to Mr. Seery's prior testimony to
8 support the argument that the Debtor owes a duty to investors,
9 Mr. Seery was not testifying as a lawyer and his testimony
10 just cannot change the law.

11 As to each of the funds that the Debtor manages, HCLOF and
12 the CLOs, they were each provided with actual notice of the
13 January 16th -- the July 16th order and didn't object. And as
14 Your Honor will recall, the Trustees for the CLOs, the party
15 that could potentially have claims for breach of fiduciary
16 duty, they participated in the January 9th hearing. They came
17 to the Court and were concerned about the protocols that the
18 Debtor was agreeing to with the Committee. We revised them.
19 The Trustees didn't object. They didn't object then; they
20 didn't object now. And, in fact, they consented to the
21 assumption of the contracts between the Debtor and the CLOs.

22 So the argument that the orders, by having this
23 exculpation for future conduct, violated due process rights of
24 anyone and is the type -- essentially, the type of order that
25 *Espinosa* would have contemplated could be attacked, is --

1 relies on faulty legal and factual premises. No duty to
2 investors. No private right of action. And both -- and all
3 the funds received due process.

4 In addition, Your Honor, as we argue in our brief and I'll
5 get to in a few moments, both of the orders are justified
6 under the *Barton* doctrine, as Mr. Seery is entitled to
7 protection based upon how courts around the country have
8 interpreted the *Barton* doctrine. As such, Mr. Seery is
9 performing his role both as an agent of the independent board
10 under the January 9th order, as a CEO under the July 16th
11 order, as a quasi-judicial officer. And as Your Honor
12 examined in the *Ondova* opinion which you mentioned, trustees
13 are entitled to qualified immunity for damage to third parties
14 resulting from simple negligence, provided that the trustee is
15 operating within the scope of his duties and is not acting in
16 an *ultra vires* manner.

17 So, exculpating the independent directors, their agents,
18 and the CEO in the January 9th and July 16th orders was a
19 recognition by this Court that they would be entitled to
20 qualified immunity, much in the same way trustees are.

21 No doubt that Movants contend that this was error and that
22 the Court overreached. However, the remedy for that overreach
23 was an appeal, not a reconsideration 16 months later. The
24 Court's orders based upon the determination that in this
25 highly contentious case that these court officers needed to be

1 protected from negligence suits is not the exceptional case
2 where the Court lacked any arguable basis for jurisdiction.
3 Accordingly, this Court must follow *Espinosa*, *Shoaf*, *Stoll*,
4 and *Chicot* and reject the attack on the prior court orders.

5 The only case Movants cite to challenge the Supreme
6 Court's decision -- to challenge the Supreme Court precedent I
7 mentioned and the Fifth Circuit's *Shoaf* decision is the
8 *Applewood* case. *Applewood* is totally consistent with *Shoaf*.
9 *Applewood* also involved a plan that purported to release a
10 guaranty claim that the guarantor argued was res judicata in
11 subsequent litigation regarding the guaranty. The Fifth
12 Circuit held in that case that the plan was not res judicata.
13 It made that ruling because the plan did not contain clear and
14 unambiguous language releasing the guaranty. In that way, the
15 Fifth Circuit distinguished *Shoaf*.

16 *Applewood* and *Shoaf* are consistent. A Bankruptcy Court
17 order will be given res judicata effect, even if the Court
18 didn't have jurisdiction to enter it, if the order was clear
19 and unambiguous. In *Shoaf*, the release was. In *Applewood*, it
20 wasn't.

21 Movants argued on June 8th and argue now that the
22 *Applewood* case really argues -- really deals with prospective
23 exculpation of claims. I went back and read Mr. Bridges'
24 comments carefully of June 8th. He said *Applewood*,
25 exculpation. Well, that's just not correct. *Applewood* is all

1 about requiring specificity of a (garbled) to give it res
2 judicata effect. Claims that existed at that time, were they
3 described clearly and unambiguously? Yes? *Shoaf* applies.
4 No? *Applewood* does -- applies.

5 So how should the Court apply these principles here? The
6 Court approved a procedure for certain claims in the
7 governance orders. The procedure: come to Bankruptcy Court
8 before pursuing a claim against the independent directors and
9 Seery or their agents so that the Court can make a
10 colorability determination. Clear and unambiguous. The
11 governance orders each provide that the Bankruptcy Court had
12 jurisdiction to enter the orders, and the orders were not
13 appealed.

14 Movants attempt to confuse the Court and argue *Applewood*
15 is on point because the January 9th and July 16th orders do
16 not clearly identify specific claims that Movants now have
17 that are being released. And because they're not specific,
18 then basically it's an ambiguous release and *Applewood*
19 applies.

20 The problem with the Movants' argument is that neither the
21 January 9th or July 16th orders released claims that existed
22 at that time. If they did, and if there wasn't an adequate
23 description, I might agree with Mr. Bridges that *Applewood*
24 applied. But there were no claims. It was prospective. It
25 was a standard of care. The Court clearly and unambiguously

1 said what the standard of care would be going forward.

2 Clearly, under *Shoaf* and Supreme Court precedent, they are
3 entitled to res judicata because it's a clear and unambiguous
4 provision. *Applewood* just simply doesn't apply.

5 Mr. Phillips at the last hearing made an impassioned plea
6 to the Court for a narrow interpretation of the exculpation
7 provisions in the January 9th and July 16th orders, and he
8 argued that the Court could not possibly have intended for the
9 exculpation for negligence to apply on a go forward basis. He
10 thus argued to the Court that the Court should construe the
11 exculpation narrowly and only apply it to potential claims of
12 harm caused to the Debtor, as opposed to harm caused to third
13 parties, which he said included thousands of innocent
14 investors.

15 Of course, Mr. Phillips made those arguments unburdened by
16 the actual facts and the prior proceedings which led to the
17 entry of these orders, because, as he was the first to admit,
18 he only became involved in the case a month ago.

19 As the Court recalls, and as reinforced by Mr. Seery's and
20 Mr. Dubel's testimony I just mentioned, the exculpation
21 provisions were included precisely to prevent Mr. Dondero,
22 through any one of the entities he's owned and controlled, the
23 Movants being two of those, from asserting baseless claims
24 against the beneficiaries of those orders, exactly the
25 situation Mr. Seery now finds himself in.

1 And, again, it bears emphasizing: throughout this case,
2 not one of the purported public investors Mr. Phillips
3 lamented would be prevented from holding Mr. Seery responsible
4 for his conduct has ever appeared in this case to object about
5 anything. And none of the directors of the funds, the funds
6 where the Debtor acts as an investment adviser, have ever
7 stepped foot in this court, either.

8 Even if the Court declines to apply res judicata, Your
9 Honor, to prevent challenges to the governance orders, the
10 Court has the jurisdiction, had the jurisdiction to include
11 the gatekeeping provisions in those orders. The Bankruptcy
12 Court derives its jurisdiction from 28 U.S.C. Section 157, and
13 bankruptcy jurisdiction is divided into two parts: core
14 matters, which are those arising in or arising under Title 11,
15 and noncore matters, those matters which are related to a
16 Chapter 11 case.

17 Bankruptcy Courts may enter final orders in core
18 proceedings, and with the consent of parties, noncore
19 proceedings. If a party does not consent to a final judgment
20 in the noncore matters or waives its right to consent, then
21 the Bankruptcy Court -- or does not waive its right to
22 consent, then the Bankruptcy Court issues a report and
23 recommendation to the District Court.

24 The seminal Fifth Circuit case on bankruptcy court
25 jurisdiction is the 1987 case of *Wood v. Wood*, 825 F.2d 90.

1 There, the Fifth Circuit held that the Bankruptcy Court has
2 related to jurisdiction over matters if the outcome of that
3 proceeding could conceivably have any effect on the estate
4 being administered in the bankruptcy.

5 More recently, the Fifth Circuit, in the 2005 case, in
6 *Stonebridge Tech's*, elaborated on when a matter has a
7 conceivable effect on the estate such as to confer Bankruptcy
8 Court jurisdiction. There, the Fifth Circuit held that an
9 action is related to bankruptcy if the outcome could alter the
10 debtor's rights, liabilities, options, or freedom of action,
11 either positively or negatively, and which in any way impacts
12 upon the handling and the administration of the bankruptcy
13 estate. It is against this backdrop, Your Honor, that the
14 Court should evaluate its jurisdiction to have entered the
15 orders.

16 So, again, what did the orders do? They established
17 governance over the Chapter 11 debtor with new independent
18 directors being approved. They established the procedures and
19 protocols of how transactions were going to be presented to
20 and approved by the Committee. They vested in the Committee
21 certain related-party claims, and they provided for the
22 procedures parties would have to follow to assert any claims
23 against the independent directors and the CRO and the agents
24 and advisors.

25 Your Honor, it's hard to imagine that there is a more core

1 order than the entry of these orders. At the time the orders
2 were entered, the Court was well aware of the potential for
3 acrimony from Mr. Dondero and his related entities, and
4 included the gatekeeper provisions to prevent the Debtor's
5 estate from being embroiled in frivolous litigation against
6 the board and the CEO.

7 Such protections were clearly within the Court's
8 jurisdiction, both to protect the administration of the estate
9 but also under applicable Fifth Circuit law dealing with
10 vexatious litigants, as set forth in the *Baum* and *Carroll*
11 cases that the Court cited in its confirmation order.

12 Not that it was hard to predict, but the last several
13 months have reinforced how important the gatekeeping
14 provisions in the order are and how important similar
15 provisions in the plan are.

16 The Court heard extensive testimony at the confirmation
17 hearing regarding the havoc continued litigation by Mr.
18 Dondero and his related entities would cause, which
19 predictions have unfortunately been borne out by the
20 unprecedented blizzard of litigation involving Mr. Dondero and
21 his related entities that has consumed the Court over the last
22 several months and caused the estate to incur millions of
23 dollars in fees that could have been used to pay its
24 creditors.

25 And these attacks are continuing. As I mentioned before,

1 in addition to the DAF lawsuit, Sbaiti & Co. filed an action
2 against the Debtor on behalf of PCMG, another related entity,
3 alleging postpetition mismanagement of the Select Fund.

4 And to complete the hat trick, they are the lawyers
5 seeking to sue Acis in the Southern District of New York for
6 allegedly post-confirmation matters.

7 The Court knew then and certainly knows now that the
8 potential for sizable indemnification claims could consume the
9 estate. The Court used that as the potential basis for
10 determining that the orders were within its jurisdiction, just
11 as it used that potential to justify the exculpation
12 provisions in the plan as being consistent with *Pacific*
13 *Lumber*.

14 Movants also ignore the cases -- and we cited in our
15 opposition -- where courts in this district, including Judge
16 Lynn in *Pilgrim's Pride* in 2010 and Judge Houser in the *CHC*
17 *Group* in 2016, approved gatekeeper provisions that provided
18 the Bankruptcy Court with exclusive jurisdiction to adjudicate
19 claims against postpetition fiduciaries.

20 Movants also ignore cases outside this district, including
21 *General Motors* and *Madoff*, which we cited in our brief as
22 examples of cases where Bankruptcy Courts have been used as
23 gatekeepers to determine if claims are colorable or being
24 asserted against the correct entity.

25 And there's another reason, Your Honor, why Movants may

1 now not contest the Court's jurisdiction to have entered those
2 orders. Each of those orders, as I said before, include a
3 finding that the Court had core jurisdiction to enter the
4 orders. No party contested that finding or refused to consent
5 to the core jurisdiction.

6 Under well-established Supreme Court precedent, parties
7 can waive their right to challenge the Bankruptcy Court's
8 jurisdiction, core jurisdiction, by failing to object. In
9 *Wellness v. Sharif* in 2015, the Supreme Court expressly held
10 that Article III was not violated if parties knowingly and
11 voluntarily consented to adjudication of *Stern v. Marshall*-
12 type alter ego claims, and that the consent need not be
13 express, so long as it was knowing and voluntary.

14 And *Wellness* confirmed the pre-*Stern* opinion of the Fifth
15 Circuit in the 1995 *McFarland* case, which held that a person
16 who fails to object to the Bankruptcy Court's assumption of
17 core jurisdiction is deemed to have consented to the entry of
18 a final order by the Bankruptcy Court.

19 Your Honor, I'd now like to turn to the *Barton* doctrine.
20 The Court also has jurisdiction to have entered the orders
21 based upon the *Barton* doctrine. The *Barton* doctrine dates
22 back to an old United States Supreme Court case and provides
23 as a general rule that, before a suit may be brought against a
24 trustee, consent from the appointing court must be obtained.

25 Movants essentially make two arguments why the *Barton*

1 doctrine doesn't apply.

2 First, Movants, without citing any authority, argue that
3 it does not apply to Mr. Seery because he is not a trustee or
4 receiver and was not appointed by the Court. Although the
5 doctrine was originally applied to receivers, it has been
6 extended over time to cover various court-appointed
7 fiduciaries and their agents in bankruptcy cases, including
8 debtors in possession, officers and directors of the debtor,
9 and the general partner of the debtor. And although Mr.
10 Bridges says he couldn't find one case that applied the *Barton*
11 doctrine to a court-retained professional, I will now talk
12 about several such cases.

13 In *Helmer v. Pogue*, a 2012 case cited in our brief, the
14 District Court for the Northern District of Alabama
15 extensively analyzed the *Barton* doctrine jurisprudence from
16 the Eleventh Circuit and beyond and concluded that it applied
17 to debtors in possession. The *Helmer* Court relied in part on
18 a prior 2000 decision of the Eleventh Circuit in *Carter v.*
19 *Rodgers*, which held that the doctrine applies to both court-
20 appointed and court-approved officers of the debtor, which is
21 consistent with the law in other circuits.

22 And subsequently, the Eleventh Circuit again considered --
23 and in that case, the distinction of a court-appointed as a
24 court-retained professional was -- was not persuasive to the
25 Court, and the Court held that a court-retained professional

1 can still have *Barton* protection, notwithstanding that he
2 wasn't appointed, the argument that Mr. Bridges tries to make.

3 And subsequently, --

4 THE COURT: I wonder, was that -- was that Judge
5 Clifton Jessup, by chance? Or maybe Bennett?

6 MR. POMERANTZ: Your Honor, this was -- this was the
7 Eleventh Circuit *Carter v. Rodgers*, so I think Judge Jessup
8 was --

9 THE COURT: Oh, I thought you were still talking
10 about the Alabama case. No?

11 MR. POMERANTZ: Yeah, the Alabama -- well, the
12 Alabama case referred to the Eleventh Circuit case, *Carter v.*
13 *Rodgers*, --

14 THE COURT: Okay.

15 MR. POMERANTZ: -- and the appointment and -- or
16 retention issue was discussed in the *Carter v. Rodgers* case.

17 THE COURT: Okay.

18 MR. POMERANTZ: And subsequently, the Eleventh
19 Circuit again considered the contours of the *Barton* doctrine
20 in *CDC Corp.*, a 2015 case, 2015 U.S. App. LEXIS 9718. In that
21 case, which Your Honor referenced in your *Ondova* opinion,
22 which I will discuss in a few moments, the Eleventh Circuit
23 held that a debtor's general counsel who had been approved by
24 the Court, who was appointed by a chief restructuring officer
25 who was also approved by the Court, was covered by the *Barton*

1 doctrine for acts taken in furtherance of the administration
2 of the estate and the liquidation of the assets.

3 And the Eleventh Circuit last year, in *Tufts v. Hay*, 977
4 F.3d 204, reaffirmed that court-approved counsel who function
5 as the equivalent of court-appointed officers are entitled to
6 protection under *Barton*. While the Court in that case
7 ultimately ruled that counsel could be sued without first
8 going to the Bankruptcy Court, it did so because it determined
9 that the suit between two sets of lawyers would not have any
10 effect on the administration of the estate.

11 So, Your Honor, not only is there authority, there is
12 overwhelming authority that Mr. Seery is entitled to the
13 protections.

14 In *Gordon v. Nick*, a District -- a case from 1998 from the
15 Fourth Circuit, the Court that the *Barton* doctrine applied to
16 a lawsuit against a general partner who was responsible for
17 administering the bankruptcy estate.

18 And as I mentioned, Your Honor, and as Your Honor
19 mentioned, Your Honor had reason to look at the *Barton*
20 doctrine in length and in depth in the 2017 *Ondova* opinion.
21 And in the course of the opinion, Your Honor discussed one of
22 the policy rationales for the doctrine, which you took from
23 the Seventh Circuit's *Linton* opinion, and you said as follows:
24 "Finally, another policy concern underlying the doctrine is a
25 concern for the overall integrity of the bankruptcy process

1 and the threat of trustees being distracted from or
2 intimidated from doing their jobs. For example, losers in the
3 bankruptcy process might turn to other courts to try to become
4 winners there by alleging the trustee did a negligent job."

5 Here, the independent board was approved by the Court as
6 an alternative to the appointment of a Chapter 11 trustee.
7 And it and its agent, including Mr. Seery as the CEO, even
8 before the July 16th order, were provided protections in the
9 form of the gatekeeper order and exculpation.

10 I'm sure the Court has a good recollection of the January
11 9th hearing -- we've talked about it a lot in the proceedings
12 before Your Honor -- where the Debtor and the Committee
13 presented the governance resolution to Your Honor. And as
14 Your Honor will recall, the appointment of the board was a
15 hotly-contested issue among the Debtor and the Committee and
16 was heavily negotiated. And the appointment of the
17 independent board was even contested by the United States
18 Trustee at a hearing on January 20th, 2020.

19 I refer the Court to the transcripts of the hearings on
20 January 9th and January 20th of 2020, which clearly
21 demonstrate that appointing this board and giving it the
22 rights and protections and its agents the rights and
23 protections was not your typical corporate governance issue,
24 but it was essentially the Court's alternative to appointing a
25 trustee. And recognizing that the members of the independent

1 board were essentially officers of the Court, the Court
2 approved the gatekeeper provision, requiring parties first to
3 come and seek the Court's permission before suing them, in
4 order to prevent them from being harassed by frivolous
5 litigation.

6 And the independent board was given the responsibility in
7 the January 9th order to retain a CEO it deemed appropriate,
8 and it did so by retaining Mr. Seery.

9 Recognizing the *Barton* doctrine as it applies to Mr. Seery
10 is consistent with a legion of cases throughout the United
11 States, and Movants' argument that Mr. Seery is not court-
12 appointed is just wrong.

13 Second, Your Honor, Movants cite without any authority,
14 argue that even if the *Barton* doctrine applied there is an
15 exception which would allow it to pursue a claim against Mr.
16 Seery without leave of the Court.

17 The Debtor agrees the 28 U.S.C. § 959 is an exception to
18 the *Barton* doctrine. Section 959(a) provides that trustees,
19 receivers, or managers of any property, including debtors in
20 possession, may be sued without leave of the court appointing
21 them with respect to any of their acts or transactions in
22 carrying on business connected with such property.

23 As the Court also pointed out at the June 8th hearing, and
24 Mr. Bridges alluded to in his argument, the last sentence of
25 959(a) provides that such actions -- clearly referring to

1 actions that may be pursued without leave of the appointing
2 court -- shall be subject to the general equity power of such
3 court, so far as the same may be necessary to the ends of
4 justice.

5 And Mr. Bridges made a plea, saying you can't take away my
6 jury trial right there. You just cannot do that. Well, I
7 have two answers to that, Your Honor. One, they relinquished
8 their jury trial right. We've established that. Okay?

9 The second is allowing Your Honor to act as a gatekeeper
10 has nothing to do with their jury trial right. Allowing Your
11 Honor to act as a gatekeeper allows you to determine whether
12 the action could go forward, and it'll either go forward in
13 Your Honor's court or some other court.

14 And the argument that the exculpation was essentially a
15 violation of 959 is just -- is just -- it just is twisting
16 what happened. You have an exculpation provision. We already
17 went through the authority the Court had to give an
18 exculpation. With respect to these litigants who are before
19 Your Honor -- we're not talking about anyone else who's coming
20 in to try to get relief from the order; we're talking about
21 these litigants -- we've already established that they were
22 here, they're bound by res judicata. So their 959 argument
23 goes away.

24 And as the Court -- and separate and apart from that, the
25 issue at issue in the District Court litigation is -- is not

1 even subject to 959.

2 Mr. Bridges says, well, of course it is because it deals
3 with the administration of the estate. I'd like to refer to
4 what the Court said -- this Court said in its *Ondova* opinion:
5 The exception generally applies to situations in which the
6 trustee is operating a business and some stranger to the
7 bankruptcy process might be harmed, such as a negligence claim
8 in a slip-and-fall case, and is inapplicable to suits based
9 upon actions taken to further the administering or liquidating
10 the bankruptcy estate.

11 And your *Ondova* opinion is consistent with the Third and
12 Eleventh Circuit opinions Your Honor cited in your opinion, as
13 well as numerous other --

14 (Interruption.)

15 MR. POMERANTZ: -- from the -- from around the
16 country, including cases from the First, Second, Sixth,
17 Seventh, and Ninth Circuits. And I'm not going to give all
18 the cites to those cases, but it's not a -- it's not a
19 remarkable proposition that Your Honor relied on in *Ondova*.

20 In addition, several of these cases, including the
21 Eleventh Circuit's *Carter* opinion, have been cited with
22 approval by the Fifth Circuit in *National Business Association*
23 *v. Lightfoot*, a 2008 unpublished opinion for this very point.
24 The *Barton* exception of 959 does not apply to actions taken in
25 the administration of the case and the liquidation of assets

1 in the estate.

2 Suffice it to say that it's clear that the Section 959
3 exception to *Barton* has no applicability in this case.
4 Movants, hardly strangers to the bankruptcy case, want to sue
5 Mr. Seery for acts taken relating to a settlement of very
6 complex and significant claims against the estate. They want
7 to sue a court-appointed fiduciary for doing his job,
8 resolving claims against the estate and his management of the
9 bankruptcy estate. And they want to do this outside of the
10 Bankruptcy Court.

11 Settlement of the HarbourVest claim, which is where this
12 claim arises under -- whether it's a collateral attack now or
13 not, and we say it is, is for another issue -- but it clearly
14 arises in the context of settlement of the HarbourVest claim,
15 is the quintessential act to further the administration and
16 liquidation of the bankruptcy estate, and certainly doesn't
17 fall within the 959 exception.

18 Movants seem to be arguing that 959(a) makes a distinction
19 between claims against Mr. Seery that damaged the Debtor and
20 claims against Mr. Seery that damaged third parties. However,
21 the Movants make up that distinction, and it's not in the
22 statute, it's not in the case law. The focus is not on who
23 the conduct damages, but it's rather on whether the conduct
24 was taken in connection with the administration or the
25 liquidation of the estate.

1 And even if the Debtor is wrong, Your Honor, which it's
2 not, the savings clause allows the Court to determine whether
3 leave to be -- sue will be granted. Given that these claims
4 are asserted by Dondero-related entities, if not controlled
5 entities, no serious argument exists that the equities do not
6 permit this Court to determine if leave to sue is appropriate.

7 Accordingly, Movants' argument that the orders create this
8 tension with 959 is simply an over-dramatization. And in any
9 event, Your Honor, there's a basis independent of *Barton* that
10 supports the jurisdiction to enter the orders, as I mentioned.

11 But even if the orders only relied on *Barton*, there is an
12 easy fix to Movants' concerns: let them come to court and
13 argue that the type of suit they are bringing allegedly falls
14 within the exception of 959.

15 Your Honor, Movants argue that the Bankruptcy Court may
16 not act as a gatekeeper if it would not have jurisdiction to
17 deal with the underlying action. They essentially argue that
18 an Article I judge may not pass on the colorability of a
19 claim, that it should be decided by an Article III judge.
20 This is the same argument, Your Honor, that Your Honor
21 rejected in connection with plan confirmation and which I
22 touched on earlier.

23 And the reason why Your Honor rejected it is because
24 there's no law to support it. In fact, there is Fifth Circuit
25 law that holds to the contrary. And we talked about a little

1 bit the Fifth Circuit case decided is *Villegas v. Schmidt* in
2 2015. And *Villegas* is a simple case. Schmidt was appointed
3 trustee over a debtor and liquidated its estate and the
4 Bankruptcy Court approved his final fees. Four years later,
5 Villegas and the prior debtor sued Schmidt in District Court,
6 the district in which the Bankruptcy Court was pending,
7 arguing that he was negligent in the performance of his
8 duties. The District Court dismissed the case because
9 Villegas failed to obtain Bankruptcy Court approval to bring
10 the suit under the *Barton* doctrine.

11 On appeal, Villegas argued *Barton* didn't apply for two
12 reasons. First, that *Stern v. Marshall* created an exception
13 to the *Barton* doctrine for claims that the Bankruptcy Court
14 would not have the jurisdiction to adjudicate. And second,
15 that *Barton* did not apply if the suit is brought in the
16 District Court, which exercises supervisory authority over the
17 Bankruptcy Court that appointed the trustee. Pretty much the
18 argument that was made by Movants at the contempt hearing.

19 The Fifth Circuit rejected both arguments. It held that
20 the existence of a *Stern* claim does not impact the Bankruptcy
21 Court's authority because *Stern* did not overrule *Barton* and
22 the Supreme Court had cautioned circuit courts against
23 interpreting later cases as impliedly overruling prior cases.

24 More importantly, the Fifth Circuit pointed to a post-
25 *Stern* 2014 case, *Executive Benefits v. Arkison*, 573 U.S. 25

1 (2014), which held that *Stern* does not decide how a Bankruptcy
2 Court or District Courts should proceed when a *Stern* creditor
3 is identified, as support for the argument that *Barton* is
4 still good law, even dealing with a *Stern* claim.

5 Second, the Fifth Circuit, joining every circuit to have
6 addressed the issue, ruled that the District Court and the
7 Bankruptcy Court are distinct from one another and the
8 Bankruptcy Court has the exclusive authority to determine the
9 colorability of *Barton* claims and that the supervisory
10 District Court does not.

11 Movants didn't address *Villegas* in their reply. Briefly
12 tried to distinguish it, unconvincingly, today. The bottom
13 line is *Villegas* is directly applicable. Your Honor cited it
14 in the *Ondova* opinion for precisely the proposition that
15 *Barton* applies whether or not the Court has authority to
16 adjudicate the claim.

17 Accordingly, Your Honor, it was within the Court's
18 jurisdiction to require a party to seek approval of Your Honor
19 on the colorability of a claim before an action may be
20 commenced or pursued against the protected parties, even if
21 Your Honor wouldn't have authority to adjudicate the claim at
22 the end of the day.

23 In fact, some courts have even addressed the proper
24 procedure for doing so, requiring the putative plaintiff to
25 not only seek leave of Bankruptcy Court but also to provide a

1 draft complaint and a basis for the Court to determine if the
2 claim is colorable.

3 Movants have done neither, and they should not be
4 permitted to modify the final orders of the Court as a
5 workaround.

6 Your Honor, that concludes my presentation. I'm happy to
7 answer any questions Your Honor may have.

8 THE COURT: All right. Not at this time. All right.
9 I'm going to figure out, do we need a break or not, depending
10 on what Mr. Bridges tells me. I assume we're just doing this
11 on argument today. I think that's what I heard. No witnesses
12 or exhibits.

13 MR. BRIDGES: That is correct, Your Honor.

14 THE COURT: Okay. Mr. Bridges, how long do you
15 expect your rebuttal to take so I can figure out does the
16 Court need a break?

17 MR. BRIDGES: Fifteen minutes plus whatever it takes
18 to submit agreed-to exhibits.

19 THE COURT: Okay. Let's take a five-minute bathroom
20 break. We'll come back. It's -- what time is it? It's 1:11
21 Central time. We'll come back in five minutes.

22 THE CLERK: All rise.

23 (A recess ensued from 1:11 p.m. until 1:17 p.m.)

24 THE CLERK: All rise.

25 THE COURT: All right. Please be seated. We're

1 going back on the record in the Highland matters.

2 Mr. Bridges, time for your rebuttal. I want to ask you a
3 question right off the bat. Mr. Pomerantz pointed out
4 something that was on my list that I forgot to ask you when
5 you made your initial presentation. What is the authority
6 you're relying on? You did not cite a statute or a rule *per*
7 *se*, but I guess we can probably all agree that Bankruptcy Rule
8 9024 and Federal Rule 60 is the authority that would govern
9 your motion, correct?

10 MR. BRIDGES: I don't agree, Your Honor. I don't
11 believe this is a final order that we're contesting here. And
12 I think that's demonstrated by the Court's final confirmation
13 -- plan -- plan confirmation order that seeks to modify this
14 order or will modify this order upon being -- being effective.
15 So I don't think so.

16 In the alternative, if we are challenging a final order,
17 then I think you're right as to the rules that would be
18 controlling.

19 THE COURT: All right. Well, let me back up. Why
20 exactly do you say this would be an interlocutory order as
21 opposed to a final order?

22 MR. BRIDGES: Because of its nature, Your Honor.
23 While the appointment in the order or the approval of the
24 appointment in the order might, as a separate component of the
25 order, have -- have finality, the provisions -- the provisions

1 in it relating to gatekeeping and exculpation are, we think,
2 by their very nature, quite obviously interlocutory and not
3 permanent. They don't seem to indicate an intention by any of
4 the parties that, 30 years from now, if Mr. Seery is still CEO
5 at Highland, long after the bankruptcy case has ended, that
6 nonetheless parties would be prohibited from bringing claims,
7 strangers to this action would be prohibited from bringing
8 claims related to his CEO role.

9 I think the nature of it demonstrates that, the
10 modifications to it, and even the inclusion of it in the final
11 plan confirmation, as well as -- can't read that.

12 THE COURT: Can you give me some authority? Because
13 as we know, there's a lot of authority out there in the
14 bankruptcy universe on what discrete orders are interlocutory
15 in nature that a bankruptcy judge might routinely enter and
16 which ones are final. You know, it would just probably, if I
17 flipped open *Collier's*, I could -- you know, it would be mind-
18 numbing.

19 So what authority can you rely on? I mean, is there any
20 authority that says an employment order is not a final order?
21 That would be shocking to me if you have cases to that effect,
22 but, I mean, of course, sometimes we do interim on short
23 notice and then final. But this would be shocking to me if
24 there is case authority to support the argument this is not a
25 final order. But I learn something new every day, so maybe I

1 would be shocked and there is.

2 MR. BRIDGES: Your Honor, I'd point you to *In re*
3 *Smyth*, 207 F.3d 758, and *In re Royal Manor*, 525 B.K. 338
4 [sic], for the proposition that retaining a bankruptcy
5 professional is an interlocutory order.

6 THE COURT: Okay. Stop for a moment. The *Smyth*
7 case. Which court is that?

8 MR. BRIDGES: Fifth Circuit.

9 THE COURT: Okay. So tell me the facts. I'm
10 surprised I don't know about this case. But, again, I don't
11 know every case. So, it held that an employment order is an
12 interlocutory order?

13 MR. BRIDGES: Appointing counsel. A professional in
14 the bankruptcy context, Your Honor.

15 THE COURT: Counsel for a debtor-in-possession? An
16 order approving counsel was an interlocutory order?

17 MR. BRIDGES: Yes, or the Trustee's counsel.

18 THE COURT: Or the Trustee's counsel? Okay. What
19 were the circumstances? Was this on an expedited basis and
20 there wasn't a follow-up final order, or what?

21 MR. BRIDGES: Your Honor, I don't have -- I don't
22 have that at the tip of my memory. I'm sorry.

23 THE COURT: Okay. And the other one, 525 B.R. 338,
24 what court was that?

25 MR. BRIDGES: It's a Bankruptcy Court within the

1 Sixth Circuit. I'm not certain which district.

2 THE COURT: All right. Well, maybe one of you two
3 over there can look them up and give me the context, because
4 that is surprising authority. Or other lawyers on the WebEx
5 maybe can do some quickie research.

6 Okay. We'll come back to that. But assuming that this
7 was a final order, which I have just been presuming it was,
8 Rule 60 is the authority you're going under? 9024 and Rule
9 60, correct?

10 MR. BRIDGES: Your Honor, we have not invoked those
11 rules. Alternatively, I think you're right that they would
12 control if we are wrong about the interlocutory nature of the
13 order.

14 THE COURT: Well, you have to be going under certain
15 -- some kind of authority when you file a motion. So I'm --

16 MR. BRIDGES: As an alternative --

17 THE COURT: I'm approaching this exactly, I assure
18 you, as the District Court or a Court of Appeals would. You
19 know, you start out, what is the legal authority that is being
20 invoked here?

21 MR. BRIDGES: Well, --

22 THE COURT: So I just assume Rule 60. I can't, you
23 know, come up with anything else that would be the authority.

24 MR. BRIDGES: Yes, Your Honor. You also have
25 inherent power to modify orders that are in violation of the

1 law. And we pointed you to --

2 THE COURT: Now, is that right? Is that really
3 right? Why do we have Rule 60 if I can just willy-nilly, oh,
4 I feel like I got that wrong two years ago? I can't do that,
5 can I? Rule 60 is the template for when a court can do that.
6 Parties are entitled to rely on orders of courts. And that's
7 why we have Rule 60, right? So, --

8 MR. BRIDGES: Your Honor, I think -- I think that
9 we're miscommunicating. I'm trying not to rely on Rule 60 in
10 the first instance because in the first instance we view this
11 as not a final order. So, in the first instance, --

12 THE COURT: I got that. And I've got my law clerks
13 looking up your cases to see if they convince me. But I'm
14 asking you to go to layer two. Assuming I don't agree with
15 you these are final orders, what is your authority for the
16 relief you're seeking?

17 MR. BRIDGES: Yes, Your Honor. Rule 60 would apply
18 in the alternative.

19 THE COURT: All right.

20 MR. BRIDGES: That's correct.

21 THE COURT: So, which provision? Which provision of
22 Rule 60? (b) what?

23 MR. BRIDGES: Your Honor, I'm not prepared to concede
24 any of them. I don't have the rule in front of me.

25 THE COURT: You're not prepared to concede what?

1 MR. BRIDGES: Any of the provisions of Rule 60. Just
2 (b) (1), (b) (2), especially, but I'm -- I'm -- Rule 60 is our
3 basis, as is the particulars (b) (1), (2), (6) --

4 (Garbled audio.)

5 THE COURT: Okay. You're breaking up. Can you
6 restate?

7 MR. BRIDGES: (b) (1), (2), and (6), as -- as well as
8 any other provision, Your Honor, of Rule 60.

9 THE COURT: Okay. Well, so (1), mistake,
10 inadvertence, surprise, excusable neglect. Which one of
11 those?

12 MR. BRIDGES: All of the above, Your Honor.

13 THE COURT: Surprise? Who's surprised?

14 MR. BRIDGES: Your Honor, I think every potential
15 litigant who discovers that your order purports to bar
16 prospective unaccrued claims at the time the order issued
17 would be surprised.

18 Frankly, I think Mr. Seery would be surprised, given his
19 testimony that he owes fiduciary duty -- duties that he must
20 abide by and that he appears to have, as I continue to
21 represent to clients, to advisees, and to the SEC, that those
22 duties are owing.

23 THE COURT: Okay. I'm giving you one more chance
24 here to make clear on the record what provision of Rule 60(b)
25 are you relying on, okay? I need to know. It's not in your

1 pleading.

2 MR. BRIDGES: Your Honor, --

3 THE COURT: So tell me specifically. I can only --

4 MR. BRIDGES: -- (b) (1) --

5 THE COURT: -- come up with a result here if I know
6 exactly what's being presented.

7 MR. BRIDGES: Your Honor, (b) (1), (b) (2), and (b) (6)
8 --

9 THE COURT: Which, okay, there are multiple parts to
10 (1). You're saying somebody's surprised by the ruling. I
11 don't know who. Really, all that matters is your client, the
12 Movants. You're saying, even though they participated, --

13 MR. BRIDGES: Yes, Your Honor.

14 THE COURT: -- got notice, they're somehow surprised?
15 Why are they surprised?

16 MR. BRIDGES: Yes, Your Honor.

17 THE COURT: Do you have evidence of their surprise?

18 MR. BRIDGES: Your Honor, our brief shows the
19 intentions of all involved were not the interpretation of that
20 order being advanced at this -- at this point in time. And
21 so, yes, I believe that is evidence. The transcripts of the
22 hearings I believe evidence that as well, that the
23 understanding of everyone involved was not that future --
24 unspecified future claims that had not accrued yet would be
25 released under (b) (1). Yes, Your Honor.

1 THE COURT: Okay.

2 MR. BRIDGES: Under (b) (2), --

3 THE COURT: I don't have any evidence of that. All I
4 have is the clear wording of the order. Okay. Let me just --
5 just let me go through this.

6 Assuming Rule 60 (1) through (6) are what you're arguing
7 here, what about Rule 60(c): a motion under Rule 60(b) must
8 be made within a reasonable time? We're now 11 months --

9 MR. BRIDGES: Your Honor, --

10 THE COURT: We're now 11 months past the July 2020
11 order. What is your authority for this being a reasonable
12 time?

13 MR. BRIDGES: Yes, Your Honor. If I may back up one
14 step before answering your question. Under (b) (2), we're
15 relying on newly-discovered evidence that was discovered in
16 late March and caused both the filing of this motion and the
17 filing of the District Court action.

18 Under (b) (4), we believe that the order is --

19 THE COURT: Let me stop. Let me stop. What is my
20 evidence that you're putting in the record that's newly
21 discovered?

22 MR. BRIDGES: The evidence is detailed in the
23 complaint that is in the record. You know, --

24 THE COURT: That's not evidence.

25 MR. BRIDGES: -- honestly, Your Honor, --

1 THE COURT: That is not evidence. Okay? A lawyer-
2 drafted complaint in another court is not evidence. Okay?

3 MR. BRIDGES: Your Honor, I think, to be technical,
4 that there is not a record yet, that we have evidence yet to
5 be admitted on our exhibit list. I believe in this
6 circumstance -- I understand that, in general, allegations in
7 a pleading are not evidence. In this instance, when we're
8 talking about whether or not new facts led to the filing of a
9 lawsuit, I do believe that the allegations in the lawsuit are
10 evidence of those new facts.

11 THE COURT: All right. Go on.

12 MR. BRIDGES: Under (b) (4), we believe the order is,
13 in part, void. It is void because of the jurisdictional and
14 other defects noted in our argument.

15 And also, under (b) (6) (garbled) ground for relief that
16 we're appealing to the equitable powers of this Court to
17 correct errors and manifest injustice towards not just the
18 litigants here but to correct the order of the Court to make
19 it comply with -- with the law, with the statutes promulgated
20 by Congress and to respect the jurisdiction of the District
21 Court.

22 THE COURT: All right. Do you agree with Mr.
23 Pomerantz that the case law standard for Rule 60(b) (4) is
24 exceptional circumstances? It's only applied so that a
25 judgment is voided in exceptional circumstances. Do you

1 disagree with that case authority?

2 MR. BRIDGES: I would -- I would agree, in part, that
3 unusual circumstances is not the ordinary case. I'm not
4 entirely sure what you mean by exceptional, but I think we're
5 on the same page.

6 THE COURT: Okay. It's not what I mean. That's just
7 the case law standard. And I'm asking, do you agree with Mr.
8 Pomerantz that that is the standard set forth in case law when
9 applying 60(b)(4)? There have to be some sort of exceptional
10 circumstances where there's just basically no chance the Court
11 had authority to do what it did.

12 MR. BRIDGES: Out of the ordinary would be the phrase
13 I would use, Your Honor.

14 THE COURT: Okay. So I guess then I'll go from
15 there. Is it your argument that gatekeeping provisions in the
16 bankruptcy world are out of the ordinary?

17 MR. BRIDGES: The exculpation of Mr. Seery for
18 liability falling short of gross negligence or intentional
19 wrongdoing in connection with his continuing to conduct the
20 business of the Debtor as an investment advisor subject to the
21 Advisers Act, yes, I would say that is out of the ordinary,
22 that it is extraordinary, that it is --

23 THE COURT: Okay. What is your authority or evidence
24 on that? Because this Court approves exculpation provisions
25 regularly in connection with employment orders, and pretty

1 much every judge I know does. In fact, I'm wondering why this
2 isn't just a term of compensation. You know, he's going to do
3 x, y, z in the case. His compensation is going to be a, b, c,
4 d, e. And by the way, we're going to set a standard of
5 liability for his performance as CEO or investment banker,
6 financial advisor, whatever, so that no one can sue him
7 regarding his performance of his job duties unless it rises to
8 the level of gross negligence, willful misconduct.

9 It's a term of employment that, from my vantage point,
10 seems to be employed all the time. So it would be anything
11 but exceptional circumstances. Do you have authority or
12 evidence --

13 MR. BRIDGES: Your Honor, frankly, --

14 THE COURT: -- to the contrary?

15 MR. BRIDGES: Your Honor, frankly, I'm astonished at
16 your view of that situation, that it would merely be a term of
17 his employment, that vitiates the entire fiduciary duty
18 standard created by the Advisers Act that tells him, with
19 hundreds of millions of dollars of assets under management for
20 people he's advising as a registered investment advisor,
21 people he's advising who believe that he has a fiduciary duty
22 to them and that it's enforceable, that the SEC, who monitors,
23 believes he has an enforceable fiduciary duty to those people,
24 and that he's testified that he has fiduciary duties to those
25 people, and that Your Honor is saying no, just as a regular

1 term of employment we have undone the Advisers Act's
2 imposition of an unwaivable fiduciary duty.

3 Your Honor, the order is void to the extent that it
4 attempts to do so.

5 This is not an ordinary employment agreement, Your Honor.
6 This is an attempt to exculpate someone from the key thing
7 that our entire investment system depends upon, regulation by
8 the SEC and the requirement in investment advisors to act as
9 fiduciaries when they manage the money of another.

10 It would be the equivalent of telling lawyers who are
11 appointed in a bankruptcy proceeding that they don't have any
12 duties to their client, or at least not fiduciary duties.
13 That the lawyers merely owe a duty not to be grossly negligent
14 to their clients. That's not an ordinary term of employment,
15 Your Honor.

16 THE COURT: All right. So I guess we're back to my
17 question, was this brought within a reasonable time under Rule
18 60(c)?

19 MR. BRIDGES: It was brought very quickly after the
20 new evidence was discovered at the end of March, Your Honor,
21 yes.

22 THE COURT: Okay. Well, I guess I'll just ask you
23 one more question before you continue on with your rebuttal
24 argument. I mean, again, I want your best argument of why
25 *Villegas* doesn't absolutely permit the gatekeeping provisions

1 that you're challenging. And many cases were cited by Mr.
2 Pomerantz in his brief where courts have extended the *Barton*
3 doctrine to persons other than trustees. And so what is your
4 best rebuttal to that?

5 MR. BRIDGES: Your Honor, we've already given it.
6 I'm afraid --

7 THE COURT: Okay. If you don't want to say more, --

8 MR. BRIDGES: -- what I have is not --

9 THE COURT: -- I'm not going to make you say more.

10 MR. BRIDGES: I --

11 THE COURT: I'm just telling you what's on my brain.

12 MR. BRIDGES: I do. I want to -- I am apologizing in
13 advance for repeating, but yes, *Villegas, Villegas*, however
14 that case is pronounced, says that *Stern* is not an exception
15 to the *Barton* doctrine.

16 THE COURT: Uh-huh.

17 MR. BRIDGES: 959(a) is an exception to the *Barton*
18 doctrine. You are not operating under the *Barton* doctrine
19 here. Even counsel's brief, the Debtor's brief, doesn't say
20 *Barton* applies. It says it's consistent with *Barton*.

21 Your Honor, in our previous hearing, you directed me to
22 the second sentence of 959(a) because you believe it's what
23 empowers you to do the gatekeeping. It limits the gatekeeping
24 that you can do by protecting jury rights, the right to trial,
25 says you cannot discharge, undo, deprive a litigant of their

1 right to a trial, a jury trial.

2 THE COURT: Well, you mentioned it again, jury trial
3 rights. Do you have any argument --

4 MR. BRIDGES: Yes, Your Honor.

5 THE COURT: -- of why that hasn't flown out the
6 window?

7 MR. BRIDGES: Yes, Your Honor. I am told that
8 Section 14(f) that counsel for the Debtor referred to is not a
9 waiver of jury rights at all. It is an arbitration agreement.
10 Your Honor is probably familiar how arbitration agreements
11 work, is that they need not be elected. They need not be
12 invoked by the parties. When they are, they create a
13 situation where arbitration may be required. But a waiver of
14 a jury right outside of arbitration is not part of this
15 arbitration clause, or of any. The issue is not briefed or in
16 evidence before the Court. We're relying on representations
17 of counsel as to what that provision contains. That Mr. Seery
18 wasn't even a party to that agreement, the advisory agreement,
19 with the Charitable DAF. The arbitration agreement is subject
20 to defenses that are not at issue here before the Court. That
21 Movants' rights, their contractual rights to invoke the
22 arbitration clause, also appear to be terminated by the
23 orders' assertion of sole jurisdiction in this matter.

24 Your Honor, yes, our jury rights survive Section 14(f) in
25 the advisory agreement with the DAF for all of those potential

1 reasons.

2 On top of that, it doesn't go to all of our causes of
3 action. It goes to the contract cause of action. And to the
4 extent they can argue that the other claims are subject to
5 arbitration, that also is a defense and -- defensible and
6 complex issue requiring the application of the Federal
7 Arbitration Act, requiring consideration of the Federal
8 Arbitration Act, which this Court doesn't have jurisdiction to
9 do under 157(d).

10 THE COURT: What? Repeat that.

11 MR. BRIDGES: Yes. This Court does not have
12 jurisdiction to determine whether or not arbitration --
13 arbitration is enforceable due to the mandatory withdrawal of
14 the reference provisions of 157(d).

15 THE COURT: That's just not consistent with Fifth
16 Circuit authority. *National Gypsum*. What are some of these
17 other arbitration cases? I've written an article on it. I
18 can't remember them. That's just not right. Bankruptcy
19 courts look at arbitration clauses all the time. Motions to
20 compel arbitration.

21 MR. BRIDGES: Your Honor, under 157(d), in the
22 circumstances of this case, if the Court is going to take into
23 consideration an arbitration clause under the Federal
24 Arbitration Act, when that clause is not in evidence and is
25 not before the Court, then Movants respectfully move to

1 withdraw the reference of your consideration of that issue and
2 of any proceeding and ask that you would issue only a report
3 and recommendation rather than an order on that issue.

4 THE COURT: Okay. I regret that we even got off on
5 this trail. I'm sorry. So just proceed with your rebuttal
6 argument as you had envisioned it, Mr. Bridges.

7 MR. BRIDGES: Thank you, Your Honor.

8 Debtor's counsel says there's no private right of action
9 under the Advisers Act. That is both inaccurate and
10 misleading. The Advisory Act creates, imposes fiduciary
11 duties that state law provides the cause of action for. It is
12 a state law breach of fiduciary duty claim regarding --
13 regarding fiduciary duties imposed as a matter of law by the
14 Investment Advisers Act that is Count One in the District
15 Court action.

16 Furthermore, that Act does create a private right of
17 action for rescission. That would be rescission of the
18 advisory agreement with the Charitable DAF, not rescission of
19 the HarbourVest settlement.

20 Second, Your Honor, the notion that this Court has related
21 to jurisdiction is irrelevant and beside the point. I would
22 like to note for the record that the District Court civil
23 cover sheet that omitted to state that this was a related
24 action has been corrected, has been amended, and that that has
25 taken place.

1 Counsel for the Debtor also appears to agree with us that
2 the order ought to be modified for having asserted exclusive
3 jurisdiction over colorable claims to the extent it's not
4 legally permissible to do. And in trying to invoke the
5 discussions between us as to how the orders might be fixed,
6 what counsel does is tries to cabin the legally-permissible
7 caveat to just the second half of the paragraph at issue. It
8 is both -- both portions, the gatekeeping and the subsequent
9 hearing of the claims, that should be limited to the extent it
10 would be impermissible legally for this Court to make those
11 decisions.

12 On top of that, Your Honor, merely stating "to the extent
13 legally permissible" would result in a considerable amount of
14 ambiguity in the order that would lead it, I fear, to be
15 unenforceable as a matter of law.

16 Next, Your Honor, when Debtor's counsel talks about the
17 authority in this case, it feels like we're ships passing in
18 the night. He says that we're wrong in asserting that no case
19 we can find involves both the *Barton* doctrine and the
20 application of the business judgment rule where the Court is
21 asked to defer, and he mentions cases that apply the *Barton*
22 doctrine to an approval rather than an appointment. The Court
23 is asked to --

24 (Garbled audio.)

25 THE COURT: I lost you for a moment. Could you

1 repeat the last 30 seconds?

2 MR. BRIDGES: Thank you, Your Honor. Yes. He points
3 -- opposing counsel points us to case law where the *Barton*
4 doctrine has been applied despite the Bankruptcy Court having
5 merely approved rather than appointed the trustee or the, I'm
6 sorry, the professional. But in doing so, he doesn't
7 reference any case that has done so in the context of business
8 judgment rule deference. It's like we're ships passing in the
9 night.

10 What we're saying isn't that a mere approval can never
11 rise to the level of the *Barton* doctrine. What we're saying
12 is that, in combination with the business judgment rule
13 deference, the two cannot go together. There's no authority
14 for saying that they do.

15 We -- I further feel like we're ships passing in the night
16 when he talks about *Shoaf*. Counsel says that in *Shoaf* there
17 was a confirmed final plan and it specifically identified the
18 released guaranty. And yeah, that distinguishes it from this
19 case, just as it distinguished -- just as the *Applewood Chair*
20 case distinguished it when there's not that specific
21 identification. And here, we don't even have a final plan
22 confirmation at the time these orders are being issued.
23 Without that express -- express notion of what the claims are
24 being discharged, *Shoaf* doesn't apply.

25 There, there was a guaranty to a party on a specific

1 indebtedness that was listed, identified with specificity, and
2 disappeared as a result of the judgment, as a result of the
3 judgment in the underlying case. Here, we're talking about
4 any potential claim that might arise in the future. As of the
5 July order's issuance, it didn't apply on its -- either it
6 didn't apply to future claims that had not yet accrued or else
7 in violation of *Applewood Chair*, it was releasing claims
8 without identifying them.

9 Who does Seery owe a fiduciary duty to? Is it, as
10 Debtor's counsel says, only to the funds and not to the
11 investors, or does he also owe those duties to the investors
12 as well? Your Honor, that is going to be a hotly-contested
13 issue in this litigation, and it involves -- it requires
14 consideration of the Advisers Act and the multitude of
15 accompanying regulations. To just state that his fiduciary
16 duties are limited in a way that couldn't affect anyone that
17 is -- whose claims are precluded by the July order is both
18 wrong on the law and is invoking something that will be a
19 hotly-contested issue that falls under 157(d), where, again,
20 this Court doesn't have the jurisdiction to decide that, other
21 than in a report and recommendation.

22 The order is legally infirm because it's issued without
23 jurisdiction for doing that as well.

24 Finally, Your Honor, I think (garbled) wrong direction
25 with a statement that suggests that Mr. Seery is an agent of

1 the independent directors under the January order. He is, in
2 fact, not an independent agent -- not an agent of any of the
3 independent directors, but, at most, of the company that is
4 controlled by the board, not -- not of individual directors
5 who could confer on him -- who could confer on him any
6 immunity that they have obtained from the January order just
7 by having appointed him.

8 The proposed order from the other side failed to address
9 either the ambiguity in the order or its attempt to exculpate
10 Mr. Seery from the liability, including liability for which
11 there is a jury trial right, and it is not a fix to the
12 problem for that reason.

13 In order to make the order enforceable and to fix its
14 infirmities, the Court would have to do significantly more.
15 It would have to both apply the caveat from the final
16 confirmation plan order, rope that caveat to the first part of
17 the relevant paragraph, as well as the second part, and it
18 would have to provide directive clarity to be enforceable
19 rather than too vague.

20 Your Honor, I think that's all I have.

21 THE COURT: Okay. Just FYI, my law clerk pulled the
22 *Smyth* case from 21 years ago from the Fifth Circuit. And
23 while it more prominently deals with the issue of whether
24 trustees -- in this case, it was a Chapter 11 trustee -- could
25 be subjected to personal liability for damages to the

1 bankruptcy estate --

2 (Echoing.)

3 THE COURT: Someone, put your phone on mute. I don't
4 know who that is.

5 It dealt with, you know, the standard of liability, that
6 the trustee could not be sued for matters not to the level of
7 gross negligence.

8 But it does say, in the very last paragraph, to my shock
9 and amazement, that -- it's just one sentence in a 10-page
10 opinion -- orders appointing counsel -- and it was talking
11 about the trustee's lawyer he hired to handle appeals to the
12 Fifth Circuit -- orders appointing counsel under the
13 Bankruptcy Code are interlocutory and are not generally
14 considered final and appealable. And it cites one case from
15 1993, the Middle District of Florida. Live and learn. There
16 is one sentence in that opinion that says that. But I don't
17 know that it's hugely impactful here, but I did not know about
18 that opinion and I'm rather surprised.

19 All right. You were going to walk me through evidence,
20 you said?

21 MR. BRIDGES: Well, do I -- Your Honor, do you want
22 to do that first before I submit --

23 THE COURT: Yes, please.

24 MR. BRIDGES: -- my rebuttal argument?

25 THE COURT: Please.

1 MR. BRIDGES: Okay.

2 THE COURT: Uh-huh.

3 MR. BRIDGES: Your Honor, we would submit and offer
4 Exhibits 1 through 44, with the exception of those that have
5 been withdrawn, that are 2, 13 --

6 THE COURT: Okay. Slow down. Slow down. I need to
7 get to the docket entry number we're talking about. Are we
8 talking -- are your -- the Debtor's exhibits are at 2412. But
9 Nate, I misplaced my notes. Where are Charitable DAF and
10 Holdco's?

11 THE CLERK: I have 2411.

12 THE COURT: 2411? Is that it?

13 MR. BRIDGES: 2420, Your Honor.

14 THE COURT: 2420? Okay. Give me a minute. (Pause.)
15 2420?

16 MR. BRIDGES: Yes, Your Honor.

17 THE COURT: Okay, I'm there. And it's which
18 exhibits?

19 MR. BRIDGES: It's Exhibits 1 through 44, Your
20 Honor, with four exceptions. We have agreed to withdraw
21 Exhibit 2, 13, 14, and 29.

22 THE COURT: All right.

23 MR. BRIDGES: Also, Your Honor, we'd like to submit
24 Debtor's Exhibit 1, which is under Exhibit 49 on our list,
25 would be anything offered by the other side. But we'd like

1 to make sure that Debtor's Exhibit 1 gets in the record as
2 well.

3 THE COURT: Let me back up. When I pull up the
4 docket entry you just told me, I have Exhibits 44, 45, and 46
5 only. Am I misreading this?

6 MR. BRIDGES: I have a chart showing Exhibits 1
7 through 49 titled Docket 2420 filed 6/7/21.

8 THE COURT: Okay. The docket entry number you told
9 me, 2420, it only has three exhibits: 44, 45, and 46. So,
10 first off, I understand -- are you offering 45 and 46 or not?

11 MR. BRIDGES: No, Your Honor.

12 THE COURT: Okay. So you said you were offering 1
13 through 44 minus certain ones. 44 is here.

14 MR. BRIDGES: Yes.

15 THE COURT: But I've got to go back to a different
16 docket number.

17 THE CLERK: It's actually 2411.

18 THE COURT: It's at 2411. That has all the others?

19 THE CLERK: Yes.

20 THE COURT: Okay.

21 So, Mr. Pomerantz, do you have any objection to Exhibits
22 1 through 44, which he's excepted out 2, 13, 14, and 29, and
23 then he's added Debtor's Exhibit 1? Any objection?

24 MR. POMERANTZ: I don't believe so. I just would
25 confirm with John Morris, who has been focused on the

1 exhibits, just to confirm.

2 THE COURT: Mr. Morris?

3 MR. MORRIS: No objection, Your Honor. It's fine.

4 THE COURT: Okay. They're admitted.

5 (Movants' Exhibits 1, 3 through 12, 15 through 28, and 30
6 through 44 are received into evidence. Debtor's Exhibit 1 is
7 received into evidence.)

8 THE COURT: So, any --

9 MR. BRIDGES: Thank you, Your Honor.

10 THE COURT: Anything you wanted to call to my
11 attention about these?

12 MR. BRIDGES: Your Honor, the things that we
13 mentioned in the argument, for sure, but especially that the
14 word "trustee" is not used in the January hearing's
15 transcript, nor is it under discussion in that transcript
16 that it would be a trustee-like role being played by the
17 Strand directors, as well as the transcript of the July
18 hearing on the order at issue here, Your Honor, where you are
19 asked to defer both in that transcript and in the motion, the
20 motion that was at issue in that hearing, you are asked to
21 defer to the business judgment of the company.

22 And finally, Your Honor, I'd ask you to look at the
23 allegations in the District Court complaint.

24 THE COURT: All right.

25 Mr. Pomerantz or Morris, let's see what exhibits you're

1 wanting the Court to consider. Your exhibits, it looks like,
2 are at Docket Entry 2412.

3 MR. MORRIS: As subsequently amended at 2423.

4 THE COURT: Oh. All right. So which ones are you
5 offering?

6 MR. MORRIS: We're offering all of the exhibits on
7 2423, which is 1 through 17.

8 (Echoing.)

9 THE COURT: Whoops. We got some distortion there.
10 Say again?

11 MR. MORRIS: Yeah. All of the exhibits that are on
12 2423, which are Exhibits 1 through 17. But I want to make
13 sure that, as I did earlier, that that has the exhibits that
14 we're relying on. Does that --

15 (Pause.)

16 THE COURT: Okay. Let me make sure I know what's
17 going on here. You're double-checking your exhibits, Mr.
18 Morris?

19 MR. MORRIS: Yes, Your Honor.

20 THE COURT: Okay.

21 (Pause.)

22 MR. MORRIS: Your Honor, we start with Docket No.
23 2419, --

24 THE COURT: Okay.

25 MR. MORRIS: -- which was the amended exhibit list.

1 And that actually had Exhibits 1 through 17. And then that
2 was amended at Docket 2423. So, the exhibits on both of
3 those lists.

4 THE COURT: Well, they're one and the same, it looks
5 like, right?

6 MR. MORRIS: Yes.

7 THE COURT: Okay. So you're offering those?

8 MR. MORRIS: I think -- yeah.

9 THE COURT: Any objection?

10 MR. BRIDGES: No objection.

11 THE COURT: All right. They're admitted.

12 (Debtor's Exhibits 1 through 17 are received into
13 evidence.)

14 MR. POMERANTZ: Your Honor, if I may take a few
15 moments to respond to Mr. Bridges' reply?

16 THE COURT: All right. Is he still within his hour
17 and a half?

18 THE CLERK: At an hour and one minute.

19 THE COURT: Okay. All right. You have a little
20 time left, so go ahead.

21 MR. POMERANTZ: Thank you, Your Honor.

22 So look, I -- it sort of was really not fair to us. Mr.
23 Bridges was really making things up on the fly. He was
24 changing the theories of his case and responding to Your
25 Honor. But I'm going to do my best to respond to the

1 arguments made, many of which I sort of anticipated.

2 I'll first start with the issue that Your Honor raised,
3 which was whether this is under Rule 60 or not. Mr. Bridges
4 identified a couple of cases, said that the order was
5 interlocutory, said that somehow the orders have anything to
6 do with a plan confirmation order. They do not. Your Honor
7 didn't hear that argument at the plan confirmation. The
8 January 9th and July 16th orders are old and cold. There's
9 an exculpation provision in the plan. There's a gatekeeper
10 in the plan. The provisions do not overlap entirely. The
11 gatekeeper applies prospectively. The exculpation provision
12 includes additional parties.

13 So the arguments that basically the plan had anything to
14 do -- and the fact that the plan is not a final order -- has
15 anything to do with the January 9th and July 16th orders is
16 just wrong. It's just wrong.

17 More fundamentally, Your Honor, as Your Honor pointed
18 out, the *Smyth* case is a professional employment order. And
19 ironically, if you abide by the *Smyth* case, that order is
20 never appealable because it's interlocutory.

21 But more fundamentally, Your Honor, that's dealing with
22 327 professionals. And again, there's not much analysis in
23 the *Smyth* case, but we're not dealing with a 327
24 professional. We're dealing with orders that were approved
25 under 363.

1 So the premise of the argument that Rule 60(b) -- 60
2 doesn't apply and they have other arguments just doesn't make
3 any sense.

4 Okay. So now that gets us to Rule 60. And Your Honor,
5 Your Honor hit the nail on the head. They haven't presented
6 any evidence. Allegations in a complaint aren't evidence.
7 They can't stand up there and say surprise evidence. They
8 had the opportunity -- and this hearing's been continued a
9 few weeks -- they had the opportunity to bring it up, and
10 it's -- they had the opportunity to claim that there was
11 surprise, but they just didn't. Okay?

12 So to go on to the Rule 60 arguments. Surprise.
13 Surprise and reasonable delay are really -- go hand in hand
14 with Mr. Bridges' argument. He says, well, we didn't find
15 out that -- months after the order was entered that he
16 violated a duty to us, so we are surprised by that, and it's
17 a reasonable time. Well, Your Honor, the order provided for
18 an exculpation. CLO Holdco and DAF knew that it applied to
19 an exculpation. They were bound. They knew based upon that
20 order that they would not be able to bring claims for normal
21 negligence. There is no surprise.

22 If you take Mr. Bridges' argument to its conclusion, he
23 could wait until the end of the statute of limitations after
24 an order and have come in four years from now and say, Your
25 Honor, we just found out facts so we should go back four

1 years before. That, Your Honor, that's not how the surprise
2 works. That's not how the reasonable time works.

3 Mr. Bridges did not contest that they're bound by res
4 judicata. He did not contest that the exculpation itself was
5 clear and unambiguous. Of course he argued Your Honor
6 couldn't enter an order saying there was exculpation, again,
7 with no authority. And he seemed surprised, as I suspect he
8 should, since he's not a bankruptcy lawyer, that retention
9 orders, whether it's investment bankers, financial advisors,
10 include exculpations all the time. So there's no grounds
11 under surprise.

12 There's no grounds -- the motions are late under 60(c).

13 And they're not void. I went through a painstaking
14 analysis, Your Honor, and I described in detail what the
15 *Espinosa* case held, and the exceptional circumstances which
16 Mr. Bridges tried to get away from as much as he could.
17 Maybe he can try to get away from language in a district
18 Court opinion, in a Bankruptcy Court opinion, in a Circuit
19 Court opinion. You can't get away from language in a Supreme
20 Court opinion. The Supreme Court opinion said exceptional
21 circumstances, where there was arguably no basis for
22 jurisdiction for what the Court did. They have not even come
23 close to convincing Your Honor that there was absolutely no
24 basis.

25 Now, they disagree. We granted, we think it's a good-

1 faith disagreement, but they haven't come close to
2 establishing the *Espinosa* standard, so their motion under 60
3 does not -- it fails.

4 And I don't think -- look, these are good lawyers. Mr.
5 Bridges and Mr. Sbaiti are good lawyers. They didn't just
6 inadvertently not mention Rule 60. They never mentioned it
7 because they knew they had no claim under Rule 60.

8 Your Honor, Mr. Bridges has made comments about the
9 fiduciary duty of Mr. Seery, about what the Investor's Act
10 provides. He's just wrong on the law. Now, Your Honor
11 doesn't have to decide that. Whichever court adjudicates the
12 DAF lawsuit will have to decide it. But there is no private
13 cause of action for damages. There are no fiduciary duties to
14 the investors.

15 And what Mr. Bridges doesn't even mention, in that the
16 investment agreement that's so prominent in his complaint,
17 they waived claims other than willful misconduct and gross
18 negligence against Highland. They waived those claims. So
19 for Mr. Bridges to come in here and argue that there's some
20 surprise, when he hasn't even bothered to look at the document
21 that's underlying the contractual relationship between the DAF
22 and the Debtor, is -- you know, I'll just say it's
23 inadvertence.

24 Your Honor, Mr. Bridges tried to argue that Mr. Seery is
25 not a beneficiary of the January 9th order. He's not an

1 agent. Well, again, Your Honor, Mr. Bridges wasn't there.
2 Your Honor and we were. On January 9th, an independent board
3 was picked, and at the time Mr. Dondero ceased to become the
4 CEO. So you have three gentlemen coming in -- Mr. Seery, Mr.
5 Dubel, and Mr. Nelms -- coming in to run Highland, in a very
6 chaotic time. They had to act through their agents. There
7 was no expectation that this board was going to actually run
8 the day-to-day operations of the Debtor. Of course not. They
9 needed someone to run. And they picked Mr. Seery. And the
10 argument that well, he's an agent of the company, he's not an
11 agent of the board, that just doesn't make sense. The
12 independent board had to act. The directors had to act. And
13 the directors, how do they deal with that? They acted through
14 Mr. Seery. So he is most certainly governed by the January
15 9th order.

16 Your Honor, I want to talk about the jury trial right.
17 Mr. Bridges said that Paragraph 14 is an arbitration clause
18 and not a jury trial waiver. Now, again, I will forgive Mr.
19 Bridges because I assume he didn't read the provision, okay,
20 and he -- somebody told him that, and that person just got it
21 wrong. But what I would like to do is read for Your Honor
22 Paragraph 14(f). It doesn't have to do with arbitration.
23 It's a waiver of jury trial. 14(f), Jurisdiction Venue,
24 Waiver of Jury Trial. The parties hereby agree that any
25 action, claim, litigation, or proceeding of any kind

1 whatsoever against any other party in any way arising from or
2 relating to this agreement and all contemplated transactions,
3 including claims sounding in contract, equity, tort, fraud,
4 statute defined as a dispute shall be submitted exclusively to
5 the U.S. District Court for the Northern District of Texas, or
6 if such court does not have subject matter jurisdiction, the
7 courts of the State of Texas, City of Dallas County, and any
8 appellate court thereof, defined as the enforcement court.

9 Each party ethically and unconditionally submits to the
10 exclusive personal and subject matter jurisdiction of the
11 enforcement court for any dispute and agrees to bring any
12 dispute only in the enforcement court. Each party further
13 agrees it shall not commence any dispute in any forum,
14 including administrative, arbitration, or litigation, other
15 than the enforcement court. Each party agrees that a final
16 judgment in any such action, litigation, or proceeding is
17 conclusive and may be enforced through other jurisdictions by
18 suit on the judgment or in any manner provided by law.

19 And then the kick, Your Honor, all caps, as jury trial
20 waiver always are: Each party irrevocably and unconditionally
21 waives to the fullest extent permitted by law any right it may
22 have to a trial by jury in any legal action, proceeding, cause
23 of action, or counterclaim arising out of or relating to this
24 agreement, including any exhibits, schedules, and appendices
25 attached to this agreement or the transactions contemplated

1 hereby. Each party certifies and acknowledges that no
2 representative of the owner of the other party has represented
3 expressly or otherwise that the other party won't seek to
4 enforce the foregoing waiver in the event of a legal action.
5 It has considered the implications of this waiver, it makes
6 this waiver knowingly and voluntarily, and it has been induced
7 to enter into this agreement by, among other things, the
8 mutual waivers and certifications in this section.

9 Your Honor, I will forgive Mr. Bridges. I assume he just
10 did not read that. But to represent to the Court that that
11 language does not contain a jury trial waiver is -- is just
12 wrong.

13 THE COURT: All right. I'm going to stop right
14 there. And you were reading from the Second Amended and
15 Restated Shared Services Agreement between Highland --

16 MR. POMERANTZ: Not shared services. I'm reading
17 from the Second Amended and Restated Investment Advisory
18 Agreement --

19 THE COURT: Investment --

20 MR. POMERANTZ: -- between the Charitable DAF, the
21 Charitable DAF GP, and Highland Capital Management. The
22 agreement whereby the Debtor was the investment advisor to the
23 Charitable DAF Fund and the Charitable DAF GP.

24 THE COURT: All right. Well, Mr. Bridges, I'm going
25 to bounce quickly back to you. This is your chance to defend

1 your honor.

2 MR. BRIDGES: Yeah, we're -- we're looking at a
3 different agreement, where -- where literally the words that
4 were read to you are not in the agreement in front of us and
5 it is news to me. So, Your Honor, this is a problem --

6 THE COURT: What is the agreement you're looking at?

7 MR. BRIDGES: It is the Amended -- I assume that
8 means First Amended -- Restated Advisory Agreement.

9 MR. POMERANTZ: Your Honor, we are happy to file this
10 agreement with the Court so the Court has the benefit of it in
11 connection with Your Honor's ruling.

12 THE COURT: Okay. I would like you to do that. Uh-
13 huh.

14 MR. BRIDGES: I'd like -- I'd like to request -- I'll
15 withdraw that.

16 THE COURT: Okay. Go on, Mr. Pomerantz.

17 MR. POMERANTZ: Mr. Bridges, if you could put us on
18 mute. If you could put us on mute, Mr. Bridges, so I don't
19 hear your feedback. Thank you.

20 Mr. Bridges also complains about the language "to the
21 extent permissible by law." As Your Honor knows and as has
22 been my practice over 30 years, that language is probably in
23 every plan where there's a retention of jurisdiction: to the
24 extent permissible by law. And Mr. Bridges says that this
25 will create ambiguity in the order that couldn't be enforced.

1 There's no basis for that. Our including the language "to the
2 extent permissible by law" in the orders, as we are prepared
3 to do, is consistent with the plan confirmation order where we
4 addressed that issue. And we addressed that issue because we
5 didn't want to put Your Honor in a position where thereby Your
6 Honor may have an action before Your Honor that passes the
7 colorability gate that Your Honor may not be able to assert
8 jurisdiction. And since jurisdiction can't be waived in that
9 regard, we will agree to amend that.

10 There's nothing ambiguous about that, and there's no
11 reason, though, that clause has to modify the Court's ability
12 to act as a gatekeeper, because, as we've argued *ad nauseam*,
13 gatekeeper provisions where the Court has that ability is not
14 only part of general bankruptcy jurisprudence but also part of
15 the Bankruptcy Code.

16 Counsel says that *Barton* doesn't apply because the
17 business judgment of Your Honor was used in retaining Mr.
18 Seery as opposed to in some other capacity. There's no basis
19 for that, Your Honor. A court-appointed -- a court-approved
20 CEO, CRO, professional, they are all entitled to protection
21 under the *Barton* act. And the argument -- and again, this is
22 separate and apart from whether he's entitled to protection
23 under the January 9th order. But the argument that because it
24 was the business judgment -- again, business judgment in doing
25 something that Your Honor expressly contemplated under the

1 January 9th corporate governance order -- there's just no law
2 to support that. And I guess he's trying to get around the
3 plethora of cases that deal with the situation where *Barton*
4 has been extended.

5 Your Honor, Mr. Bridges, again, in arguing that we're
6 ships passing in the night on *Shoaf* and *Applewood* and
7 *Espinosa*, no, we're not ships passing in the night. We have a
8 difference in agreement on what these cases stand for. These
9 cases stand for the proposition that a clear and unambiguous
10 provision, plain and simple, if it's clear and unambiguous, it
11 will be given res judicata effect. The release in *Shoaf*,
12 clear and unambiguous. The release in *Applewood*, not. The
13 issue here is the exculpation language. That was clear and
14 unambiguous. It applied prospectively. The argument makes no
15 sense that we didn't identify -- we didn't identify claims
16 that might arise in the future, so therefore an exculpation
17 clause doesn't apply? That doesn't make any sense.

18 Your Honor clearly exculpated parties. Mr. Dondero knew
19 it. CLO Holdco knew it. The DAF knew it. So the issue Your
20 Honor has to decide is whether that exculpation was a clear
21 and unambiguous provision such that it should be entitled to
22 res judicata effect. And we submit that the answer is
23 unequivocally yes.

24 That's all I have, Your Honor.

25 THE COURT: All right. Well, --

1 MR. MORRIS: Your Honor? I apologize.

2 THE COURT: Okay.

3 MR. MORRIS: This is John Morris.

4 THE COURT: Yes?

5 MR. MORRIS: I just want to, with respect to the
6 exhibits, I know there was no objection, but I had cited to
7 Docket Nos. 2419 and 2423. The original exhibit list is at
8 Docket No. 2412. So it's the three of those lists together.
9 2412, as amended by 2419, as amended by 2423. Thank you very
10 much.

11 THE COURT: All right. Thank you. All right.

12 MR. BRIDGES: Your Honor, I still have no objection
13 to that, but may I have the last word on my motion?

14 THE COURT: Is there time left?

15 THE CLERK: Yes.

16 THE COURT: Okay. Go ahead.

17 MR. BRIDGES: I just need a minute, Your Honor. They
18 agreed to change the order. They proposed it to us. They
19 proposed it in a proposed order to you. They can't also say
20 that it cannot be changed.

21 Secondly, Your Honor, in *Milic v. McCarthy*, 469 F.Supp.3d
22 580, the Eastern District of Virginia points out that the
23 Fourth Circuit treats appointment of estate professionals as
24 interlocutory orders as well.

25 That's all. Thank you, Your Honor.

1 THE COURT: All right. Here's what we're going to
2 do. We've been going a very long time. I'm going to take a
3 break to look through these exhibits, see if there's anything
4 in there that I haven't looked at before and that might affect
5 the decision here. So we will come back at 3:00 o'clock
6 Central Time -- it's 2:22 right now -- and I will give you my
7 bench ruling on this. All right.

8 So, Mike, they can all stay on the line, right?

9 Okay. You can stay on, and we'll be back at 3:00 o'clock.

10 THE CLERK: All rise.

11 (A recess ensued from 2:22 p.m. to 3:04 p.m.)

12 THE CLERK: All rise.

13 THE COURT: All right. Please be seated. All right.
14 Everyone presented and accounted for. We're going back on the
15 record.

16 MR. POMERANTZ: Your Honor, before you start, this is
17 Jeff Pomerantz. We had sent to your clerk, and hopefully it
18 got to you, a copy of the Second Amended and Restated
19 Investment Advisory Agreement. We also copied Mr. Sbaiti with
20 it as well. And we would also like to move that into
21 evidence, just so that it's part of the Court's record.

22 THE COURT: All right.

23 MR. BRIDGES: We would object to that, Your Honor.
24 We haven't had an opportunity to even verify its authenticity
25 yet.

1 THE COURT: All right. Well, I'll tell you what.
2 I'm going to address this in my ruling. So it's not going to
3 be part of the record for this decision, and yet -- well, I'll
4 get to it.

5 All right. So we're back on the record in Case Number 19-
6 34054, Highland Capital. The Court has deliberated, after
7 hearing a lot of argument and allowing in a lot of documentary
8 evidence, and the Court concludes that the motion of CLO
9 Holdco, Ltd. and The Charitable DAF to modify the retention
10 order of James Seery, which was entered almost a year ago, on
11 July 16th, 2020, should be denied.

12 This is the Court's oral bench ruling, but the Court
13 reserves discretion to supplement or amend in a more fulsome
14 written order what I'm going to announce right now, pursuant
15 to Rule 7052.

16 First, what is the Movants' authority to request the
17 modification of a bankruptcy court order that has been in
18 place for so many months, which was issued after reasonable
19 notice to the Movants, and after a hearing, which was not
20 objected to by the Movants, or appealed, when the Movants were
21 represented by sophisticated counsel, I might add, and which
22 order was relied upon by parties in this case, most notably
23 Mr. Seery and the Debtor, and in fact was entered after
24 significant negotiations involving a sophisticated court-
25 appointed Unsecured Creditors' Committee with sophisticated

1 professionals and sophisticated members, and after negotiation
2 with an independent board of directors, court-appointed, one
3 of whose members is a retired bankruptcy judge? What is the
4 Movants' authority?

5 Movants fumbled a little on that question, in that the
6 exact authority wasn't set forth in the motion. But Movants'
7 primary argument is that Movants think the Seery retention
8 order was an interlocutory order and that the Court simply has
9 the inherent authority to modify it as an interlocutory order.

10 The Court disagrees with this analysis. I do not think
11 the Fifth Circuit's *Smyth* case dictates that the Seery
12 retention order is still interlocutory. The Seery retention
13 order was an order entered pursuant to Section 363 of the
14 Bankruptcy Code, not a Section 327 professionals to a debtor-
15 in-possession, professionals to a trustee employment order
16 such as the one involved in the *Smyth* case.

17 But even if the Seery retention order is interlocutory --
18 the Court feels strongly that it's not, but even if it is --
19 the Court believes it would be an abuse of this Court's
20 inherent discretion or authority to modify that order almost a
21 year after the fact and under the circumstances of this case.

22 Now, assuming Rule 60(b) applies to the Movants' request,
23 the Court determines that the Movants have not made their
24 motion anywhere close to within a reasonable time, as Rule
25 60(c) requires, nor do I think the Movants have demonstrated

1 any exceptional circumstances to declare the order or any of
2 its provisions void. The Movants have put on no evidence that
3 constitutes surprise or constitutes newly-disputed evidence.
4 So why are there no exceptional circumstances here such that
5 the Court might find, you know, a void order or void
6 provisions of an order?

7 First, this Court concludes that there's no credible
8 argument that the Court overreached its jurisdiction with the
9 gatekeeping provisions in the order. Gatekeeping provisions
10 are not only very common in the bankruptcy world -- in
11 retention orders and in plan confirmation orders, for example
12 -- but they are wholly consistent with the *Barton* case, the
13 U.S. Supreme Court's *Barton's* case, and its progeny that has
14 become known collectively as the *Barton* doctrine. Gatekeeping
15 provisions are wholly consistent with 28 U.S.C. Section
16 959(a)'s complete language.

17 The Fifth Circuit has blessed gatekeeping provisions in
18 all sorts of contexts. It has blessed them in the situation
19 of when *Stern* claims are involved in the *Villegas* case. It
20 even blessed Bankruptcy Courts' gatekeeping functions a long
21 time ago, in 1988, in a case that I don't think anyone
22 mentioned in the briefing, but as I've said, my brain
23 sometimes goes down trails, and I'm thinking of the *Louisiana*
24 *World Exposition* case in 1988, when the Fifth Circuit blessed
25 there a procedure where an unsecured creditors' committee can

1 bring causes of action against persons, such as officers and
2 directors or other third parties, if they first come to the
3 Bankruptcy Court and show a colorable claim. They have to
4 come to the Bankruptcy Court, show they have a colorable claim
5 and they're the ones that should be able to pursue them. Not
6 exactly on point, but it's just one of many cases that one
7 could cite that certainly approve gatekeeper functions of
8 various sorts of Bankruptcy Courts.

9 It doesn't matter which court might ultimately adjudicate
10 the claims; the Bankruptcy Court can be the gatekeeper.

11 And the Court agrees with the many cases cited from
12 outside this circuit, such as the case in Alabama, in the
13 Eleventh Circuit, and there was another circuit-level case, at
14 least one other, that have held that the *Barton* doctrine
15 should be extended to other types of case fiduciaries, such as
16 debtor-in-possession management, among others.

17 Finally, as I pointed out in my confirmation ruling in
18 this case, gatekeeping provisions are commonplace for all
19 types of courts, not just Bankruptcy Courts, when vexatious
20 litigants are involved. I have commented before that we seem
21 to have vexatious litigation behavior with regard to Mr.
22 Dondero and his many controlled entities.

23 Now, as far as the Movants' argument that there was not
24 just improper gatekeeping provisions but actually an improper
25 discharge in the Seery retention order of negligence claims or

1 other claims that don't rise to the level of gross negligence
2 or willful misconduct, again, I reiterate there's nothing
3 exceptional in the bankruptcy world about exculpation
4 provisions like this. They absolutely are a term of
5 employment very often. Just like compensation, they're
6 frequently requested, negotiated, and approved. They are
7 normal in the corporate governance world, generally. They are
8 normal in corporate contracts between sophisticated parties.
9 And most importantly of all, even if this Court overreached
10 with the exculpation provisions in the Seery retention order,
11 even if it did, res judicata bars the attack of these
12 provisions at this late stage, under cases such as *Shoaf*,
13 *Republic Supply v. Shoaf* from the Fifth Circuit, the *Espinosa*
14 case from the U.S. Supreme Court, and even *Applewood*, since
15 the Court finds the language in this order was clear,
16 specific, and unambiguous with regard to the gatekeeping
17 provisions and the exculpation provisions.

18 Last, and this is the part where I said I'm going to get
19 to this agreement that has been submitted, the Second Amended
20 and Restated Investment Advisor Agreement or whatever the
21 title is. I am more than a little disturbed that so much of
22 the theme of the Movants' pleadings and arguments, and I think
23 even representations to the District Court, have been they
24 have these sacred jury trial rights, these inviolate jury
25 trial rights, and an Article I Court like this Court should

1 have no business through a gatekeeping provision impinging on
2 the possible pursuit of an action where there's a jury trial
3 right.

4 I was surprised initially when I thought about this. I
5 thought, wow, I've seen so many agreements over the months. I
6 can't say every one of them waived the jury trial right, but I
7 just remembered seeing that a lot, and seeing arbitration
8 provisions, and so that's why I asked. It just was lingering
9 in my brain. So I'm going to look at what is submitted. I'm
10 not relying on that as part of my ruling. As you just heard,
11 I had a multi-part ruling, and whether there's a jury trial
12 right or not is irrelevant to how I'm choosing to rule on this
13 motion. But I do want to see the agreement, and then I want
14 Movants within 10 days to respond with a post-hearing trial
15 brief either saying you agree that this is the controlling
16 document or you don't agree and explain the oversight, okay?
17 Because it feels like a gross omission here to have such a
18 strong theme in your argument -- we have a jury trial right,
19 we have a jury trial right, by God, the gatekeeping
20 provisions, among other things, impinge on our sacred pursuit
21 of our jury trial right -- and then maybe it was very
22 conspicuous in the controlling agreement that you'd waived
23 that, the Movants had waived that.

24 So, anyway, I'm requiring some post-hearing briefing, if
25 you will, on whether omissions, misrepresentations were made

1 to the Court.

2 Anyway, so I reserve the right to supplement or amend this
3 ruling with a more fulsome written order. I am asking Mr.
4 Pomerantz to upload a form of order that is consistent with
5 this ruling, and --

6 MR. POMERANTZ: Your Honor, we will do so. I do have
7 one thing to bring to the Court's attention, unrelated to the
8 motion, before Your Honor leaves the bench.

9 THE COURT: All right. So just a couple of follow-up
10 things. Have you -- I'm not clear I heard what you said about
11 this agreement. Did you email it to my courtroom deputy or
12 did you file it on the docket?

13 MR. POMERANTZ: We emailed it to your courtroom
14 deputy. We're happy to file it on the docket. And we also
15 provided a copy to Mr. Sbaiti.

16 I would note for the Court that it's signed both by The
17 Charitable DAFs by Grant Scott, just for what it's worth.

18 THE COURT: Okay. All right. Well, I'm trying to
19 think what I want -- I do want you to file it on the docket,
20 and I'm trying to think of what you label it. Just call it
21 Post-Hearing Submission or something and link it to the motion
22 that we adjudicated here today. And then, again, you've got
23 10 days, Mr. Bridges, to say whatever you want to say about
24 that agreement.

25 I guess the last thing I wanted to say is we sure devoted

1 a lot of time to this motion today. We have -- this is a
2 recurring pattern, I guess you can say. We have a lot of
3 things that we devote a lot of time to in this case that I get
4 surprised, but it is what it is. You file a motion. I'm
5 going to give it all the attention Movants and Respondents
6 think it warrants. I'm going to develop a full record,
7 because, you know, there's a recurring pattern of appeals
8 right now, 11 or 12 appeals, I think, not to mention motions
9 to withdraw the reference. If we're going to have higher
10 courts involved in the administration of this case, I'm going
11 to make a very thorough record so nobody is confused about
12 what we did, what I considered, what my reasoning was.

13 So I kind of think it's unfortunate for us to have to
14 spend case resources and so much time and fees on things like
15 this, but I'm going to make sure a Court of Appeals is not
16 ever confused about what happened and what we did. So that's
17 just the way it's going to be. And I feel like we have no
18 choice, given, again, the pattern of appeals.

19 All right. So, with that, Mr. Pomerantz, you had one
20 other case matter, you said?

21 MR. POMERANTZ: Yes. But before I get to that, Your
22 Honor, I assume that, in response to the Movants' submission
23 on the agreement, that we would have right at four or seven
24 days to respond if we deem it's appropriate?

25 THE COURT: I think that's reasonable. That's

1 reasonable.

2 MR. POMERANTZ: Okay. Thank you, Your Honor.

3 THE COURT: So let me think of how I want to do this.
4 I'll just do a short scheduling order of sorts that just, it
5 says in one or two paragraphs, at the hearing on this motion,
6 the Court raised questions about the jury trial rights and the
7 Debtor has now submitted the controlling agreements, I'm
8 giving the Movants 10 days to respond to whether this is
9 indeed a controlling agreement, and why, if it is, the Movants
10 have heretofore taken the position they have jury trial
11 rights. And then I will give you seven days thereafter to
12 reply, and then the Court will set a further status conference
13 if it determines it's necessary. Okay?

14 So, Nate, we'll do a short little order to that effect.
15 Okay?

16 MR. POMERANTZ: Thank you, Your Honor.

17 I -- again, before I raise the other issue, I want to pick
18 up on a comment Your Honor just made towards the end. I know
19 the Court has been frustrated with the time and effort we've
20 been spending. The Debtor and the creditors have been
21 extremely frustrated, because in addition to the time and
22 effort everyone's spending, we're spending millions of
23 dollars, millions of dollars on litigation that --

24 THE COURT: It's one of the reasons you needed an
25 exit loan, right?

1 MR. POMERANTZ: Right. No, exactly. That's
2 frivolous, that we think is made in bad faith.

3 And Your Honor, and everyone else who's hearing this on
4 behalf of Mr. Dondero, should understand we're looking into
5 what appropriate authority Your Honor would have to shift some
6 of the costs. Your Honor did that in the contempt motion.
7 Your Honor can surely do that in connection with the notes
8 litigation. But all this other stuff that is requiring us to
9 spend hundreds and hundreds of hours and spend millions of
10 dollars, we are clearly looking into whether it would be
11 appropriate and what authority there is. I just wanted to let
12 Your Honor know that.

13 And in connection with that, the last point, Your Honor, I
14 can't actually even believe I'm saying this, but there was
15 another lawsuit filed -- we just found out in the break -- on
16 Wednesday night by the Sbaiti firm on behalf of Dugaboy in the
17 District Court.

18 Now, to make matters worse, Your Honor, the litigation
19 relates to alleged improper management by the Debtor of Multi-
20 Strat. If Your Honor will recall, at many times I've told
21 this Court what Dugaboy's claims they filed in this case.
22 Dugaboy has a claim that is filed in this case for
23 mismanagement postpetition of Multi-Strat. Now the Sbaiti
24 firm, in addition to representing CLO Holdco, in addition to
25 representing the DAF, and whatever the Plaintiffs' lawyers are

1 in that other District Court, PCMG, and in connection with the
2 Acis matter, they've decided they haven't had enough. They've
3 now filed another motion that -- you know, why they filed it
4 in District Court and there's a proof of claim on the same
5 issues, I don't know. But I thought Your Honor should know.
6 I'm not asking Your Honor to do anything about it. But we
7 will act aggressively, strongly, and promptly.

8 Thank you, Your Honor.

9 THE COURT: All right. Well, you've reminded me of
10 what came out earlier today about the entity -- I left my
11 notepad in my chambers -- PMC or PMG or something.

12 Mr. Bridges, we're not going to have a hearing right now
13 on me doing anything, but what are you thinking? What are you
14 doing?

15 MR. BRIDGES: Your Honor, I'm not trying to duck your
16 question. I literally have no involvement with any other
17 claim, and we would have to ask Mr. Sbaiti to answer your
18 questions.

19 THE COURT: All right. Is he there?

20 MR. BRIDGES: He is.

21 THE COURT: I'll listen.

22 MR. BRIDGES: I'll switch seats and give him this
23 chair.

24 MR. SBAITI: Sorry, Your Honor. We had two computers
25 going and weren't able to use the sound on one, so we ended up

1 turning that off.

2 Your Honor, I'm not sure what the question is about when
3 you say what are we thinking. We have a client that's asked
4 us to file something, and when we're advised by bankruptcy
5 counsel that it's not prohibited for us to do so, and don't
6 know why we're precluded from doing so, and when the time
7 comes I'm sure we'll be able to explain to Your Honor --
8 someone will be able to explain to Your Honor why what we're
9 doing, despite Mr. Pomerantz's exacerbation, or excuse me,
10 exasperation, why that wasn't improper. It's our belief that
11 it wasn't improper or a violation of the Court's rule.

12 THE COURT: Just give me a quick shorthand *Readers'*
13 *Digest* of why you don't think it's improper.

14 MR. SBAITI: Sure. My understanding is, Your Honor,
15 there's not a rule that says we can't file it against the
16 Debtor for postpetition actions. So that, that's as -- that's
17 as much as I understand. And I'm going to -- I'm not trying
18 to duck it, either. And if I'm wrong about that and someone
19 wants to correct me on our side offline and if we have to
20 explain to the Court why that's so or what rule has been
21 violated, I'm sure we'll be able to put together something for
22 that. But that's what I've been advised.

23 THE COURT: Have you done thorough --

24 MR. POMERANTZ: Your Honor, I think what --

25 MR. SBAITI: (garbled), Your Honor.

1 THE COURT: Have you done thorough research yourself?
2 Your Rule 11 signature is on the line, not some bankruptcy
3 counsel you talked to. Have you done the research yourself?

4 MR. SBAITI: Well, Your Honor, I've relied on the
5 research and advice of people who are experts, and I believe
6 my Rule 11 obligations also allow me to do that, so yes.

7 MR. POMERANTZ: Your Honor, I think we're entitled to
8 know if it's Mr. Draper's firm who has been representing
9 Dugaboy. He's the bankruptcy counsel. I don't think it's an
10 attorney-client privilege issue. If Mr. Sbaiti is going to be
11 here and sort of say, hey, bankruptcy counsel said it was
12 okay, I think we would like to know and I'm sure Your Honor
13 would like to know who is that bankruptcy counsel.

14 THE COURT: Yes. Fair enough. Mr. Sbaiti?

15 MR. SBAITI: Your Honor, in consultation with Mr.
16 Draper and with consultation with other counsel that we've
17 spoken to, that has been our understanding.

18 THE COURT: Who's the other counsel?

19 MR. SBAITI: Well, we've talked to Mr. Rukavina about
20 some of these things for the PCMG and the Acis case. We've
21 talked to the people who, when they tell us you can't do this
22 because they're bankruptcy counsel for our client, then we
23 don't do something. So, and I'm not trying to throw anybody
24 under the bus, but my understanding of what goes on in
25 Bankruptcy Court is incredibly limited, so, you know, and if

1 it's a mistake then I'll own it, if I have a mistaken
2 understanding, but I also wasn't anticipating having to make a
3 presentation about this right here right now, so --

4 THE COURT: Well, you're filing lawsuits that involve
5 this bankruptcy case during the hearing, so --

6 MR. SBAITI: Oh, we didn't file it during the
7 hearing, Your Honor. It was filed last night, I believe.

8 THE COURT: Okay. Well, I assume that you're going
9 to go back and hit the books, hit the computer, and be
10 prepared to defend your actions, because your bankruptcy
11 experts, they may think they know a lot, but the judge is not
12 very happy about what she's hearing.

13 MR. POMERANTZ: Your Honor, if I may ask when Your
14 Honor intends to issue the contempt ruling in connection with
15 the June 8th hearing? I strongly believe -- and, obviously,
16 this has nothing to do with the contempt hearing; this
17 happened after -- but I strongly believe that sending a
18 message that Your Honor is inclined to hold counsel in
19 contempt, which obviously is one of the violators we said
20 should be held in contempt, it may be important to do that
21 sooner rather than later so that people know that Your Honor
22 is serious.

23 THE COURT: All right. Well, I understand and
24 respect that request. And let me tell you all, I had a seven-
25 day -- okay. You all were here on that motion June 8th. I

1 had a seven-day, all-day, every-day, 9:00 to 5:00, 45-minute
2 lunch break, in-person hearing with a dozen or so live
3 witnesses that I just finished Tuesday at 5:00 o'clock. So
4 you all were here on the 8th, and then -- what day was that --
5 what was -- Tuesday, I finished. Tuesday was the 22nd. So I
6 started on the 14th, okay? So you all were here on the 8th
7 and I had a live jury trial -- I mean, not jury trial, a live
8 bench trial -- live human beings in the courtroom, beginning
9 June 14th. So you're here the 8th. June 14th through 22nd, I
10 did my trial. And here we are on the 25th. And guess what, I
11 have another live human-being bench trial next week, Monday
12 through Friday.

13 So we've been working in other things like this in between
14 those two. So I'm telling you that not to whine, I'm just
15 telling you that, that's the only reason I didn't get out a
16 quick ruling on this, okay?

17 MR. POMERANTZ: And Your Honor, I was not at all
18 making that comment to imply anything about the Court.

19 THE COURT: Well, --

20 MR. POMERANTZ: The time and effort that you have
21 given to this case is extraordinary, --

22 THE COURT: Okay.

23 MR. POMERANTZ: -- so please don't misunderstand my
24 comment.

25 THE COURT: Okay. And I didn't mean to express

1 annoyance or anything like that. I guess what I'm trying to
2 do is I don't want anyone to mistake the delay in ruling on
3 the contempt motion to mean I'm just not that -- you know, I'm
4 not prioritizing it, other things are more serious to me or
5 important to me, or I'm going to take two months to get to it.
6 It's literally been I've been in trial almost all day long
7 every day since you were here. But trust me, I'm about as
8 upset as upset can be about what I heard on June 8th, and I'm
9 going to get to that ruling, and I know what I'm going to do.
10 And, well, like I said, it's just a matter of figuring out
11 dollars and whom, okay? There's going to be contempt. I just
12 haven't put it on paper because I've been in court all day and
13 I haven't come up with a dollar figure. Okay?

14 So I hope -- I don't know if that matters very much, but
15 it should.

16 All right. We stand adjourned.

17 (Proceedings concluded at 3:35 p.m.)

18 --oOo--

19

20 CERTIFICATE

21 I certify that the foregoing is a correct transcript from
22 the electronic sound recording of the proceedings in the
above-entitled matter.

23 **/s/ Kathy Rehling**

06/29/2021

24

25 _____
Kathy Rehling, CETD-444
Certified Electronic Court Transcriber

Date

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Excerpt

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EXHIBIT 7

SECOND AMENDED AND RESTATED
INVESTMENT ADVISORY AGREEMENT

THIS SECOND AMENDED AND RESTATED INVESTMENT ADVISORY AGREEMENT (this “**Agreement**”), dated to be effective from January 1, 2017 (the “**Effective Date**”) is entered into by and between **Charitable DAF Fund, L.P.**, a Cayman Islands exempted limited partnership (the “**Fund**”), **Charitable DAF GP, LLC**, a limited liability company organized under the laws of the State of Delaware (the “**General Partner**”), the general partner of the Fund, and **Highland Capital Management, L.P.**, a limited partnership organized under the laws of the State of Delaware (the “**Investment Advisor**”). Each of the signatories hereto is sometimes referred to herein individually as a “**Party**” and collectively as the “**Parties**.”

RECITALS

WHEREAS, the Fund, the General Partner and the Investment Advisor entered into that certain Investment Advisory Agreement dated January 1, 2012 (the “**Original Agreement**”);

WHEREAS, the Parties amended and restated the Original Agreement in its entirety on the terms set forth in that certain Amended and Restated Investment Advisory Agreement dated July 1, 2014 (the “**Existing Agreement**”);

WHEREAS, the parties desire to amend and restate the Existing Agreement in its entirety with the terms as set forth in this Agreement effective as of the Effective Date;

NOW, THEREFORE, in consideration of the mutual covenants herein contained and for other good and valuable consideration, the receipt of which is hereby acknowledged, the Parties hereby agree, and the Existing Agreement is hereby amended and restated in its entirety, as follows:

1. Investment Advisory Services. Subject to Section 7, the Investment Advisor shall act as investment advisor to the Fund, the General Partner with respect to the Fund and its subsidiaries and shall provide investment advice with respect to the investment and reinvestment of the cash, Financial Instruments and other properties comprising the assets and liabilities of the Fund and its subsidiaries.

2. Custody. The Financial Instruments shall be held in the custody of Jefferies & Company, Inc. or one or more banks selected by the General Partner (each such bank, a “Custodian”). The General Partner will notify the Investment Advisor promptly of the proposed selection of any other Custodians. The Custodian shall at all times be responsible for the physical custody of the Financial Instruments; for the collection of interest, dividends, and other income attributable to the Financial Instruments; and for the exercise of rights and tenders on the Financial Instruments after consultation with and as then directed by the General Partner. At no time shall the Investment Advisor have possession of or maintain custody over any of the Financial Instruments. The Investment Advisor shall not be responsible for any loss incurred by reason of any act or omission of the Custodian.

3. Authority of the Investment Advisor. Subject to Section 7 of this Agreement, the Investment Advisor shall advise the General Partner on behalf of the Fund and/or its subsidiaries with respect to:

(a) investing, directly or indirectly, on margin or otherwise, in all types of securities and other financial instruments of United States and non-U.S. entities, including, without limitation, capital stock; all manner of equity securities (whether registered or unregistered, traded or privately offered, American Depositary Receipts, common or preferred); physical commodities; shares of beneficial interest; partnership interests, limited liability company interests and similar financial instruments; secured and unsecured debt (both corporate and sovereign, bank debt, vendor claims and/or other contractual claims); bonds, notes and debentures (whether subordinated, convertible or otherwise); currencies; interest rate, currency, equity and other derivative products, including, without limitation, (i) future contracts (and options thereon) relating to stock indices, currencies, United States Government securities, securities of non-U.S. governments, other financial instruments and all other commodities, (ii) swaps and contracts for difference, options, swaptions, rights, warrants, when-issued securities, caps, collars, floors, forward rate agreements, and repurchase and reverse repurchase agreements and other cash equivalents, (iii) spot and forward currency transactions and (iv) agreements relating to or securing such transactions; leases, including, without limitation, equipment lease certificates; equipment trust certificates; mortgage-backed securities and other similar instruments (including, without limitation, fixed-rate, pass-throughs, adjustable rate mortgages, collateralized mortgage obligations, stripped mortgage-backed securities and REMICs); loans; credit paper; accounts and notes receivable and payable held by trade or other creditors; trade acceptances and claims; contract and other claims; executory contracts; participations; mutual funds, exchange traded funds and similar financial instruments; money market funds and instruments; obligations of the United States, any state thereof, non-U.S. governments and instrumentalities of any of them; commercial paper; certificates of deposit; bankers' acceptances; trust receipts; letters of credit; choses in action; puts; calls; other obligations and instruments or evidences of indebtedness of whatever kind or nature; and real estate and any kind of interests in real estate; in each case, of any person, corporation, government or other entity whatsoever, whether or not publicly traded or readily marketable (each of such items, "**Financial Instruments**"), and the sale of Financial Instruments short and covering such sales.

- (b) engaging in such other lawful Financial Instruments transactions;
- (c) research and analysis;
- (d) purchasing Financial Instruments and holding them for investment;
- (e) entering into contracts for or in connection with investments in Financial Instruments;
- (f) investing in other pooled investment vehicles, which investments shall be subject in each case to the terms and conditions of the respective governing document for each such vehicle;

The Investment Advisor shall submit such periodic reports to the General Partner regarding the Investment Advisor's activities hereunder as the General Partner may reasonably request and a representative of the Investment Advisor shall be available to meet with the General Partner and/or any other representative of the Fund or its subsidiaries as reasonably requested by the General Partner.

In furtherance of the foregoing, the General Partner hereby appoints the Investment Advisor as the Fund's attorney-in-fact, with full power of authority to act in the Fund's name and on its behalf with respect to the Fund, as follows:

(a) to purchase or otherwise trade in Financial Instruments that have been approved by the General Partner;

(b) to execute and combine purchase or sale orders on behalf of the Fund with orders for Other Accounts and allocate the Financial Instruments or other assets so purchased or sold, on an average-price basis or in any other manner deemed fair and equitable to the Investment Advisor in its sole discretion, among such accounts; *provided, however*, that such purchase or sale orders shall be market rates;

(c) to direct the Custodian to deliver funds or the Financial Instruments, but only in the course of effecting trading and investment transactions for the Fund and subject to such restrictions as may be contained in the custody agreement between the Custodian and the Fund;

(d) to enter into contracts, provide certifications or take any other actions necessary to effect any of the foregoing transactions; and

(e) to select brokers on the basis of best execution and in consideration of relevant factors, including, but not limited to, price quotes; the size of the transaction; the nature of the market for the security; the timing of the transaction; the difficulty of execution; the broker-dealer's expertise in the relevant market or sector; the extent to which the broker-dealer makes market in the security or has an access to such market; the broker-dealer's skill in positioning the relevant market; the broker-dealer's facilities, reliability, promptness and financial stability; the broker-dealer's reputation for diligence and integrity (including in correcting errors); confidentiality considerations; the quality and usefulness of research services and investment ideas presented by the broker-dealer; and other factors deemed appropriate by the Investment Advisor.

5. Valuation of Financial Instruments. Financial Instruments will be valued in accordance with the then current valuation policy of the Investment Advisor, a copy of which will be provided to the General Partner upon request.

6. Status of the Investment Advisor. The Investment Advisor shall, for all purposes, be an independent contractor and not an employee of the General Partner or the Fund or its subsidiaries, nor shall anything herein be construed as making the Fund or its subsidiaries or the General Partner, a partner, member or co-venturer with the Investment Advisor or any of its affiliates or clients. The Investment Advisor shall have no authority to act for, represent, bind or obligate the Fund or its subsidiaries or the General Partner except as specifically provided herein.

7. Investments. ALL ULTIMATE INVESTMENT DECISIONS WITH RESPECT TO THE FUND AND ITS SUBSIDIARIES SHALL AT ALL TIMES REST SOLELY WITH THE GENERAL PARTNER AND/OR THE OFFICERS/DIRECTORS OF THE APPLICABLE SUBSIDIARY, IT BEING EXPRESSLY UNDERSTOOD THAT THE GENERAL PARTNER AND/OR THE OFFICERS/DIRECTORS OF THE APPLICABLE SUBSIDIARY SHALL BE FREE TO ACCEPT AND OR REJECT ANY OF THE ADVICE RENDERED BY THE INVESTMENT MANAGER HEREUNDER FOR ANY REASON OR FOR NO REASON.

8. Reimbursement by the General Partner. The Investment Advisor may retain, in connection with its responsibilities hereunder, the services of others to assist in the investment advice to be given to the General Partner with respect to the Fund and/or its subsidiaries (any such appointee, a “***Sub-Advisor***”), including, but not limited to, any affiliate of the Investment Advisor, but payment for any such services shall be assumed by the Investment Advisor, and, therefore, neither the General Partner nor the Fund or any of its subsidiaries shall have any liability therefor; *provided, however*, that the Investment Advisor, in its sole discretion, may retain the services of independent third party professionals, including, without limitation, attorneys, accountants and consultants, to advise and assist it in connection with the performance of its activities on behalf of the General Partner with respect to the Fund and/or its subsidiaries hereunder, and the Fund shall bear full responsibility therefor and the expense of any fees and disbursements arising therefrom.

9. Expenses.

(a) The Fund shall pay or reimburse the Investment Advisor and its affiliates for all expenses related to the services hereunder, including, but not limited to, investment-related expenses, brokerage commissions and other transaction costs, expenses related to clearing and settlement charges, professional fees relating to legal, auditing or valuation services, any governmental, regulatory, licensing, filing or registration fees incurred in compliance with the rules of any self-regulatory organization or any federal, state or local laws, research-related expenses (including, without limitation, news and quotation equipment and services, investment and trading-related software, including, without limitation, trade order management software (i.e., software used to route trade orders)), accounting (including accounting software), tax preparation expenses, costs and expenses associated with reporting and providing information to the Fund, any taxes imposed upon the Fund (including, but not limited to, collateralized debt obligations managed by the Investment Advisor or its affiliates), fees relating to valuing the Financial Instruments, and extraordinary expenses. In no event shall any of the foregoing costs or expenses include any salaries, occupational expense or general overhead of the Investment Advisor. For the avoidance of doubt, (i) the cost of all third party expenses incurred in connection with this Agreement shall not exceed standard market rates (which may include standard soft dollar arrangements) and (ii) to the extent any of the foregoing expenses were incurred on behalf of, or benefit of a number of Investment Advisor’s advised accounts, such expenses shall be allocated pro rata among such accounts.

(b) To the extent that expenses to be borne by the Fund are paid by the Investment Advisor or by any Sub-Advisor, the Fund shall reimburse the Investment Advisor (or Sub-Advisors, as applicable) for such expenses so long as such expenses are at market rates.

10. Fees.

(a) The Fund shall pay the Investment Advisor a quarterly fee (the “**Management Fee**”) equal to 2.0% per annum (0.5% per quarter) of the Net Assets (as defined below) of the Fund, payable in advance at and calculated as of the first business day of each calendar quarter. For purposes of calculating the Management Fee, the Net Assets of the Fund will be determined before giving effect to any of the following amounts payable by the Fund generally or in respect of any Investment which are effective as of the date on which such determination is made: (i) any fee payable to the Investment Advisor as of the date on which such determination is made; (ii) any capital withdrawals or distributions payable by the Fund which are effective as of the date on which such determination is made; and (iii) withholding or other taxes, expenses of processing withdrawals and other items payable, any increases or decreases in any reserves, holdback or other amounts specially allocated ending as of the date on which such determination is made. The Management Fee shall be prorated for partial periods and any applicable excess fees should be returned to the Fund by the Investment Advisor. Capital contributions made to the Fund after the commencement of a calendar quarter shall be subject to a prorated Management Fee based on the number of days remaining during such quarter.

(b) Subject to clauses (c) and (d) below, at the end of each Calculation Period (as defined below), an amount equal to 20% of the net capital appreciation of the Fund’s Investments (as defined below) after deducting the Management Fee shall be paid to the Investment Advisor (the “**Performance Fee**”); *provided, however*, that the net capital appreciation upon which the calculation of the Performance is based shall be reduced to the extent of any unrecovered balance remaining in the Loss Recovery Account (as defined below) maintained on the books and records of the Fund. The amount of the unrecovered balance remaining in the Loss Recovery Account at the time of calculating the Performance Fee shall be the amount existing immediately prior to its reduction pursuant to the second clause of the second sentence of clause (c) below.

(c) There shall be established on the books of the Fund a memorandum account (the “**Loss Recovery Account**”), the opening balance of which shall be zero. At the end of each Calculation Period, the balance in the Loss Recovery Account shall be adjusted as follows: first, if there has been, in the aggregate, net capital depreciation of the Fund’s Investments (as adjusted pursuant to the last sentence of this paragraph) since the end of the immediately preceding Calculation Period (or with respect to the initial Calculation Period, since the Effective Date), an amount equal to such net capital depreciation shall be credited to the Loss Recovery Account, and, second, if there has been, in the aggregate, net capital appreciation of the Fund’s investments (as adjusted pursuant to the last sentence of this paragraph) since the end of the immediately preceding Calculation Period, an amount equal to such net capital appreciation, before taking into account any Performance Fee to be paid to the Investment Advisor, shall be debited to and reduce any unrecovered balance in the Loss Recovery Account, but not below zero. Solely for purposes of this paragraph, in determining the Loss Recovery Account, net capital appreciation and net capital

depreciation for any applicable Calculation Period shall be calculated by taking into account the amount of the Management Fee paid for such period.

(d) In the event that all or a portion of the Fund's capital is distributed or withdrawn while there exists an unrecovered balance in the Loss Recovery Account, the unrecovered balance in the Loss Recovery Account shall be reduced as of the beginning of the next Calculation Period by an amount equal to the product obtained by multiplying the balance in such Loss Recovery Account by a fraction, the numerator of which is the amount distributed or withdrawn with respect to the immediately preceding distribution or withdrawal date, and the denominator of which is the total fair value of the Fund's Investment immediately prior to such distribution or withdrawal.

(e) For purposes of this Section 10, the net capital appreciation and net capital depreciation of the Fund's Investments for any given period will be calculation in accordance with the then current valuation policy of the Investment Advisor, a copy of which will be provided upon the General Partner's request. As soon as reasonably practicable following the end of a Calculation Period, the Investment Advisor shall deliver, or cause to be delivered, to the General Partner a statement showing the calculation of the Performance Fee, if any, with respect to such Calculation Period. The Performance Fee, if any, shall be payable within three (3) business days of the General Partner's receipt of such statement.

(f) Payments due to the Investment Advisor shall be made by wire transfer to:

Bank Name: Compass Bank
ABA#: 113010547
FBO: Highland Capital Management, L.P. (Master Operating Account)
Acct#: 0025876342

(g) For purposes of this Section 10, the following terms have the definitions set forth below:

"Calculation Period" means the period commencing on the Effective Date (in the case of the initial Calculation Period) and thereafter each period commencing as of the day following the last day of the preceding Calculation Period, and ending as of the close of business on the first to occur of the following: (i) the last day of a calendar year; (ii) the distribution or withdrawal of capital of the Fund (but only with respect to such distributed or withdrawn amount); (iii) the permitted transfer of all or any portion of a partner's interest in the Fund; and (iv) the final capital distribution of the Fund following its dissolution;

"Investments" means all investments, securities, cash, receivables, financial instruments, contracts and other assets, whether tangible or intangible, owned by the Fund;

“**Net Assets**” means, with respect to the Fund as of any date, the excess of the total fair value of all Investments over the total liabilities, debts and obligations of the Fund, in each case, calculated on an accrual basis in accordance with accounting principles generally accepted in the United States and the then current valuation policy of the Service Provider, a copy of which will be provided to the General Partner upon request; and

“**Services Agreement**” means that certain Second Amended and Restated Service Agreement, dated effective as of the Effective Date, by and among the Parties, as amended, restated, modified and supplemented from time to time.

11. Exculpation; Indemnification.

(a) Whether or not herein expressly so provided, every provision of this Agreement relating to the conduct or affecting the liability of or affording protection to the Investment Advisor, its members or any of their respective affiliates and their respective partners, members, officers, directors, employees, shareholders and agents (including parties acting as agents for the execution of transactions) (each, a “**Covered Person**” and collectively, “**Covered Persons**”) shall be subject to the provisions of this Section.

(b) To the fullest extent permitted by law, no Covered Person shall be liable to the General Partner or the Fund or any of its subsidiaries or anyone for any reason whatsoever (including but not limited to (i) any act or omission by any Covered Person in connection with the conduct of the business of the General Partner or the Fund, that is determined by such Covered Person in good faith to be in or not opposed to the best interests of the General Partner or the Fund, (ii) any act or omission by any Covered Person based on the suggestions of any professional advisor of the General Partner or the Fund or any of its subsidiaries whom such Covered Person believes is authorized to make such suggestions on behalf of the General Partner or the Fund or any of its subsidiaries, (iii) any act or omission by the General Partner or the Fund or any of its subsidiaries, or (iv) any mistake, negligence, misconduct or bad faith of any broker or other agent of the General Partner or the Fund or any of its subsidiaries selected by Covered Person with reasonable care), unless any act or omission by such Covered Person constitutes willful misconduct or gross negligence by such Covered Person (as determined by a non-appealable judgment of a court of competent jurisdiction).

(c) Covered Persons may consult with legal counsel or accountants selected by such Covered Person and any act or omission by such Covered Person on behalf of the General Partner or the Fund or any of its subsidiaries or in furtherance of the business of the General Partner or the Fund or any of its subsidiaries in good faith in reliance on and in accordance with the advice of such counsel or accountants shall be full justification for the act or omission, and such Covered Person shall be fully protected in so acting or omitting to act if the counsel or accountants were selected with reasonable care.

(d) To the fullest extent permitted by law, the General Partner and the Fund and its subsidiaries shall indemnify and hold harmless Covered Persons (the “**Indemnified**

Party”), from and against any and all claims, liabilities, damages, losses, costs and expenses, including amounts paid in satisfaction of judgments, in compromises and settlements, as fines and penalties and legal or other costs and expenses of investigating or defending against any claim or alleged claim, of any nature whatsoever, known or unknown, liquidated or unliquidated, that are incurred by any Indemnified Party and arise out of or in connection with the business of the General Partner or the Fund or any of its subsidiaries, any investment made under or in connection with this Agreement, or the performance by the Indemnified Party of Covered Person’s responsibilities hereunder and against all taxes, charges, duties or levies incurred by such Covered Person or any Indemnified Party in connection with the General Partner or the Fund or any of its subsidiaries, provided that an Indemnified Party shall not be entitled to indemnification hereunder to the extent the Indemnified Party’s conduct constitutes willful misconduct or gross negligence (as determined by a non-appealable judgment of a court of competent jurisdiction). The termination of any proceeding by settlement, judgment, order or upon a plea of nolo contendere or its equivalent shall not, of itself, create a presumption that the Indemnified Party’s conduct constituted willful misconduct or gross negligence.

(e) Expenses incurred by an Indemnified Party in defense or settlement of any claim that shall be subject to a right of indemnification hereunder, shall be advanced by the General Partner prior to the final disposition thereof upon receipt of an undertaking by or on behalf of the Indemnified Party to repay the amount advanced to the extent that it shall be determined ultimately that the Indemnified Party is not entitled to be indemnified hereunder.

(f) The right of any Indemnified Party to the indemnification provided herein shall be cumulative of, and in addition to, any and all rights to which the Indemnified Party may otherwise be entitled by contract or as a matter of law or equity and shall be extended to the Indemnified Party’s successors, assigns and legal representatives.

(g) The provisions of this Section are expressly intended to confer benefits upon Covered Persons and such provisions shall remain operative and in full force and effect regardless of the expiration or any termination of this Agreement.

(h) In no event shall any Covered Person be liable for special, exemplary, punitive, indirect, or consequential loss, or damage of any kind whatsoever, including without limitation lost profits.

(i) No Covered Person shall be liable hereunder for any settlement of any action or claim effected without its written consent thereto.

(j) Pursuant to the exculpation and indemnification provisions described above, the Investment Advisor and each Indemnified Party will generally not be liable to the General Partner or the Fund for any act or omission (or alleged act or omission), absent bad faith, willful misconduct, fraud or gross negligence, and the General Partner and the Fund will generally be required to indemnify such persons against any Losses they may incur by reason of any act or omission (or alleged act or omission) related to the General Partner, the Fund or its subsidiaries, absent bad faith, willful misconduct, fraud or gross negligence. As a result of these provisions, the General Partner, the Fund and its subsidiaries, as applicable (not the Investment

Advisor or any other Indemnified Party) will be responsible for any Losses resulting from trading errors and similar human errors, absent bad faith, willful misconduct, fraud or gross negligence or the ability to waive or limit such Losses under applicable law. Trading errors might include, for example, keystroke errors that occur when entering trades into an electronic trading system or typographical or drafting errors related to derivatives contracts or similar agreements. Given the volume of transactions executed by the Investment Advisor and its affiliates on behalf of the Fund and/or its subsidiaries, the General Partner acknowledges that trading errors (and similar errors) will occur and that the General Partner will be responsible for any resulting Losses, even if such Losses result from the negligence (but not gross negligence) of the Investment Advisor or its affiliates.

12. Activities of the Investment Advisor and Others. The Investment Advisor, and its affiliates may engage, simultaneously with their investment management activities on behalf of the Fund, in other businesses, and may render services similar to those described in this Agreement to other individuals, companies, trusts or persons, and shall not by reason of such engaging in other businesses or rendering of services for others be deemed to be acting in conflict with the interests of the Fund. Notwithstanding the foregoing, the Investment Advisor and its affiliates shall devote as much time to provide advisory service to the General Partner with respect to the management of the Fund's assets as the Investment Advisor deems necessary and appropriate. In addition, the Investment Advisor or any of its affiliates, in their individual capacities, may engage in securities transactions which may be different than, and contrary to, the investment advice provided by the Investment Advisor to the General Partner with respect to the Fund. The Investment Advisor may give advice and recommend securities to, or buy securities for, accounts and other clients, which advice or securities may differ from advice given to, or securities recommended or bought for, the Fund, even though their investment objectives may be the same or similar. The Investment Advisor may recommend transactions in securities and other assets in which the Investment Advisor has an interest, including securities or other assets issued by affiliates of the Investment Manager. Each of the General Partner and the Fund acknowledges that it has received, reviewed and had an opportunity with respect to (a) a copy of Part 2 of the Investment Advisor's Form ADV, and (b) the supplemental disclosures attached hereto as Exhibit A, each of which further describes conflicts of interest relating to the Investment Advisor, its affiliates and their respective advised accounts.

13. Term. This Agreement shall remain in effect through an initial term concluding December 31, 2017 and shall be automatically extended for additional one-year terms thereafter, except that it may be terminated by the Investment Advisor, on the one hand, or by the General Partner and the Fund, on the other hand, upon at least 90 days' prior written notice to the General Partner or the Investment Advisor, as the case may be, prior to General Partner's fiscal year-end.

14. Miscellaneous.

(a) Notices. Any notice, consent or other communication made or given in connection with this Agreement shall be in writing and shall be deemed to have been duly given when delivered by hand or facsimile or five days after mailed by certified mail, return receipt requested, as follows:

If to the Investment Advisor, to:

Highland Capital Management, L.P.
300 Crescent Court, Suite 700
Dallas, Texas 75201
Telephone Number: (972) 628-4100
Facsimile Number: (972) 628-4147

If to the General Partner or the Fund, to:

Charitable DAF GP, LLC
4140 Park Lake Avenue, Suite 600
Raleigh, North Carolina 27612
Attention: Grant Scott
Telephone Number: (919) 854-1407
Facsimile Number: (919) 854-1401

(b) Entire Agreement. This Agreement contains all of the terms agreed upon or made by the parties relating to the subject matter of this Agreement, and supersedes all prior and contemporaneous agreements, negotiations, correspondence, undertakings and communications of the parties, oral or written, respecting such subject matter.

(c) Amendments and Waivers. No provision of this Agreement may be amended, modified, waived or discharged except as agreed to in writing by the parties. No amendment to this Agreement may be made without first obtaining the required approval from the Fund. The failure of a party to insist upon strict adherence to any term of this Agreement on any occasion shall not be considered a waiver thereof or deprive that party of the right thereafter to insist upon strict adherence to that term or any other term of this Agreement.

(d) Binding Effect; Assignment. This Agreement shall be binding upon and inure to the benefit of the General Partner, the Fund, the Investment Advisor, each Indemnified Party and their respective successors and permitted assigns. Any person that is not a signatory to this Agreement but is nevertheless conferred any rights or benefits hereunder (*e.g.*, officers, partners and personnel of the Investment Advisor and others who are entitled to indemnification hereunder) shall be entitled to such rights and benefits as if such person were a signatory hereto, and the rights and benefits of such person hereunder may not be impaired without such person's express written consent. No party to this Agreement may assign (as such term is defined under the U.S. Investment Advisers Act of 1940, as amended) all or any portion of its rights, obligations or liabilities under this Agreement without the prior written consent of the other parties to this Agreement; provided; however, that the Investment Advisor may assign all or any portion of its rights, obligations and liabilities hereunder to any of its affiliates at its discretion.

(e) Governing Law. Notwithstanding the place where this Agreement may be executed by any of the parties thereto, the parties expressly agree that all terms and provisions hereof shall be governed by and construed in accordance with the laws of the State of Texas applicable to agreements made and to be performed in that State.

(f) Jurisdiction; Venue; Waiver of Jury Trial. The Parties hereby agree that any action, claim, litigation, or proceeding of any kind whatsoever against any other Party in any way arising from or relating to this Agreement and all contemplated transactions, including claims sounding in contract, equity, tort, fraud and statute (“*Dispute*”) shall be submitted exclusively to the U.S. District Court for the Northern District of Texas or, if such court does not have subject matter jurisdiction, the courts of the State of Texas sitting in Dallas County, and any appellate court thereof (“*Enforcement Court*”). Each Party irrevocably and unconditionally submits to the exclusive personal and subject matter jurisdiction of the Enforcement Court for any Dispute and agrees to bring any Dispute only in the Enforcement Court. Each Party further agrees it shall not commence any Dispute in any forum, including administrative, arbitration, or litigation, other than the Enforcement Court. Each Party agrees that a final judgment in any such action, litigation, or proceeding is conclusive and may be enforced in other jurisdictions by suit on the judgment or in any other manner provided by law.

EACH PARTY IRREVOCABLY AND UNCONDITIONALLY WAIVES, TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW, ANY RIGHT IT MAY HAVE TO A TRIAL BY JURY IN ANY LEGAL ACTION, PROCEEDING, CAUSE OF ACTION OR COUNTERCLAIM ARISING OUT OF OR RELATING TO THIS AGREEMENT, INCLUDING ANY EXHIBITS, SCHEDULES, AND APPENDICES ATTACHED TO THIS AGREEMENT, OR THE TRANSACTIONS CONTEMPLATED HEREBY. EACH PARTY CERTIFIES AND ACKNOWLEDGES THAT (A) NO REPRESENTATIVE OF THE OTHER PARTY HAS REPRESENTED, EXPRESSLY OR OTHERWISE, THAT THE OTHER PARTY WOULD NOT SEEK TO ENFORCE THE FOREGOING WAIVER IN THE EVENT OF A LEGAL ACTION, (B) IT HAS CONSIDERED THE IMPLICATIONS OF THIS WAIVER, (C) IT MAKES THIS WAIVER KNOWINGLY AND VOLUNTARILY, AND (D) IT HAS BEEN INDUCED TO ENTER INTO THIS AGREEMENT BY, AMONG OTHER THINGS, THE MUTUAL WAIVERS AND CERTIFICATIONS IN THIS SECTION.

Nothing in this Section 14(f) shall be construed to limit either party’s right to obtain equitable or injunctive relief in a court of competent jurisdiction in appropriate circumstances.

(g) Headings. The headings contained in this Agreement are intended solely for convenience and shall not affect the rights of the parties to this Agreement.

(h) Counterparts. This Agreement may be signed in any number of counterparts with the same effect as if the signatures to each counterpart were upon a single instrument, and all such counterparts together shall be deemed an original of this Agreement.

(i) Survival. The provisions of Sections 8, 9, 10, 11 and 14 hereof shall survive the termination of this Agreement.

(j) Pronouns. All pronouns shall be deemed to refer to the masculine, feminine, neuter, singular or plural as the identity of the person or persons’ firm or company may require in the context thereof.

(k) Arm's-Length Agreement. The General Partner and the Fund have approved this Agreement and reviewed the activities described in Section 12 and in the Investment Advisor's Form ADV and the risks related thereto.

[Signature Page to Follow]

IN WITNESS WHEREOF the parties hereto have caused this Agreement to be executed to be effective from the date first written above.

HIGHLAND CAPITAL MANAGEMENT, L.P.

By: Strand Advisors, Inc., its general partner

By: 

Name: James Dondero

Title: President

Date: 6/21/17

CHARITABLE DAF GP, LLC

By: _____

Name: Grant J. Scott

Title: Managing Member

Date:

CHARITABLE DAF FUND, L.P.

By: Charitable DAF GP, LLC, its general partner

By: _____

Name: Grant J. Scott

Title: Managing Member

Date:

IN WITNESS WHEREOF the parties hereto have caused this Agreement to be executed to be effective from the date first written above.

HIGHLAND CAPITAL MANAGEMENT, L.P.

By: Strand Advisors, Inc., its general partner

By: _____

Name: James Dondero

Title: President

Date:

CHARITABLE DAF GP, LLC

By: _____

Name: Grant J. Scott

Title: Managing Member

Date: 6/21/2017

CHARITABLE DAF FUND, L.P.

By: Charitable DAF GP, LLC, its general partner

By: _____

Name: Grant J. Scott

Title: Managing Member

Date: 6/21/2017

EXHIBIT A

Supplemental Disclosures

Potential Conflicts of Interest

The scope of the activities of Highland Capital Management, L.P. (the “*Investment Adviser*”), its affiliates, and the funds and clients managed or advised by the Investment Adviser or any of its affiliates may give rise to conflicts of interest or other restrictions and/or limitations imposed on Charitable DAF Fund, L.P. and its subsidiaries (collectively, the “*Fund*”) in the future that cannot be foreseen or mitigated at this time. The following briefly summarizes some of these conflicts, but is not intended to be an exhaustive list of all such conflicts. Additional conflicts are described in the Investment Adviser’s Form ADV. You are urged to review the Investment Adviser’s Form ADV in its entirety prior to investing in the Fund.¹

Highland Group & Highland Accounts. None of the Investment Adviser, its affiliates and their respective officers, directors, shareholders, members, partners, personnel and employees (collectively, the “*Highland Group*”) is precluded from engaging in or owning an interest in other business ventures or investment activities of any kind, whether or not such ventures are competitive with the Fund. The Investment Adviser is permitted to manage other client accounts, and does manage other client accounts, some of which may have objectives similar or identical to those of the Fund, including other collective investment vehicles that may be managed by the Highland Group and in which the Investment Adviser or any of its affiliates may have an equity interest.

The Fund will be subject to a number of actual and potential conflicts of interest involving the Highland Group including, among other things, the fact that: (i) the Highland Group conducts substantial investment activities for accounts, funds, collateralized debt obligations and collateralized loan obligations that invest in leveraged loans (collectively, “*CDOs*”) and other vehicles managed by members of the Highland Group (collectively, “*Highland Accounts*”) in which the Fund has no interest; (ii) the Highland Group advises Highland Accounts, which utilize the same, similar or different methodologies as the Fund and may have financial incentives (including, without limitation, as it relates to the composition of investors in such funds and accounts or to the Highland Group’s compensation arrangements) to favor certain Highland Accounts over the Fund; (iii) the Highland Group may use the strategy described herein in certain Highland Accounts; (iv) the Investment Adviser may give advice and recommend securities to, or buy or sell securities for, the Fund, which advice or securities may differ from advice given to, or securities recommended or bought or sold for, Highland Accounts; (v) the Investment Adviser has the discretion, to the extent permitted under applicable law, to use its affiliates as service providers to the Fund and its portfolio investments; (vi) certain investors affiliated with the Highland Group may choose to personally invest only in certain funds advised by the Highland Group and the amounts invested by them in such funds is expected to vary significantly; (vii) the Highland Group and Highland Accounts may actively engage in transactions in the same securities sought by the

¹ The Investment Adviser’s latest Form ADV filed and Part 2 Brochures can be accessed here: https://adviserinfo.sec.gov/IAPD/IAPDFirmSummary.aspx?ORG_PK=110126

Fund and, therefore, may compete with the Fund for investment opportunities or may hold positions opposite to positions maintained by the Fund; (viii) the Fund may invest in CDOs and Highland Accounts managed by members of the Highland Group; and (ix) the Investment Adviser will devote to the Fund only as much time as the Investment Adviser deems necessary and appropriate to manage the Fund's business.

The Investment Adviser undertakes to resolve conflicts in a fair and equitable basis, which in some instances may mean a resolution that would not maximize the benefit to the Fund's investors.

Allocation of Trading Opportunities. It is the policy of the Investment Adviser to allocate investment opportunities fairly and equitably over time. This means that such opportunities will be allocated among those accounts for which participation in the respective opportunity is considered appropriate, taking into account, among other considerations: (i) fiduciary duties owed to the accounts; (ii) the primary mandate of the accounts; (iii) the capital available to the accounts; (iv) any restrictions on the accounts and the investment opportunity; (v) the sourcing of the investment, size of the investment and amount of follow-on available related to the investment; (vi) whether the risk-return profile of the proposed investment is consistent with the account's objectives and program, whether such objectives are considered in light of the specific investment under consideration or in the context of the portfolio's overall holdings; (vii) the potential for the proposed investment to create an imbalance in the account's portfolio (taking into account expected inflows and outflows of capital); (viii) liquidity requirements of the account; (ix) potentially adverse tax consequences; (x) regulatory and other restrictions that would or could limit an account's ability to participate in a proposed investment; and (xi) the need to re-size risk in the account's portfolio.

The Investment Adviser has the authority to allocate trades to multiple Highland Accounts on an average price basis or on another basis it deems fair and equitable. Similarly, if an order for any accounts cannot be fully allocated under prevailing market conditions, the Investment Adviser may allocate the trades among different accounts on a basis it considers fair and equitable over time. One or more of the foregoing considerations may (and are often expected to) result in allocations among the Fund and one or more Highland Accounts on other than a *pari passu* basis. The Investment Adviser will allocate investment opportunities across its accounts for which the opportunities are appropriate, consistent with (i) its internal conflict of interest and allocation policies and (ii) the requirements of the U.S. Investment Advisers Act of 1940, as amended. The Investment Adviser will seek to allocate investment opportunities among such entities in a manner that is fair and equitable over time and consistent with its allocation policy. However, there is no assurance that such investment opportunities will be allocated to the Fund fairly or equitably in the short-term or over time and there can be no assurance that the Fund will be able to participate in all investment opportunities that are suitable for it.

The Investment Adviser and/or its affiliates may open "average price" accounts with brokers. In an "average price" account, purchase and sale orders placed during a trading day for the Fund, the Highland Accounts or affiliates of the Investment Adviser are combined, and securities bought and sold pursuant to such orders are allocated among such accounts on an average price basis.

Highland Group Trading. As part of their regular business, the members of the Highland Group hold, purchase, sell, trade or take other related actions both for their respective accounts and for the accounts of their respective clients, on a principal or agency basis, with respect to loans, securities and other investments and financial instruments of all types. The members of the Highland Group also provide investment advisory services, among other services, and engage in private equity, real estate and capital markets oriented investment activities. The members of the Highland Group will not be restricted in their performance of any such services or in the types of debt or equity investments which they may make. The members of the Highland Group may have economic interests in or other relationships with obligors or issuers in whose obligations or securities or credit exposures the Fund may invest. In particular, such persons may make and/or hold an investment in an obligor's or issuer's securities that may be *pari passu*, senior or junior in ranking to an investment in such obligor's or issuer's securities made and/or held by the Fund or in which partners, security holders, members, officers, directors, agents, personnel or employees of such persons serve on boards of directors or otherwise have ongoing relationships. Each of such ownership and other relationships may result in securities laws restrictions on transactions in such securities by the Fund and otherwise create conflicts of interest for the Fund. In such instances, the members of the Highland Group may in their discretion make investment recommendations and decisions that may be the same as or different from those made with respect to the Fund's investments. In connection with any such activities described above, the members of the Highland Group may hold, purchase, sell, trade or take other related actions in securities or investments of a type that may be suitable to investments for the Fund. The members of the Highland Group will not be required to offer such securities or investments to the Fund or provide notice of such activities to the Fund. In addition, in managing the Fund's portfolio, the Investment Adviser may take into account its relationship or the relationships of its affiliates with obligors and their respective affiliates, which may create conflicts of interest. Furthermore, in connection with actions taken in the ordinary course of business of the Investment Adviser in accordance with its fiduciary duties to its other clients, the Investment Adviser may take, or be required to take, actions which adversely affect the interests of the Fund.

The Highland Group has invested and may continue to invest in investments that would also be appropriate for the Fund. Such investments may be different from those made by the Fund. The Highland Group does not have any duty, in making or maintaining such investments, to act in a way that is favorable to the Fund or to offer any such opportunity to the Fund, subject to the Investment Adviser's internal allocation policy. The investment policies, fee arrangements and other circumstances applicable to such other accounts and investments may vary from those applicable to the Fund and its investments. The Highland Group may also provide advisory or other services for a customary fee with respect to investments made or held by the Fund, and neither the Fund nor its investors shall have any right to such fees. The Highland Group may also have ongoing relationships with, render services to or engage in transactions with other clients who make investments of a similar nature to those of the Fund, and with companies whose securities or properties are acquired by the Fund.

As further described below, in connection with the foregoing activities the Highland Group may from time to time come into possession of material nonpublic information that limits the ability of the Investment Adviser to effect a transaction for the Fund, and the Fund's investments may be constrained as a consequence of the Investment Adviser's inability to use such information for

advisory purposes or otherwise to effect transactions that otherwise may have been initiated on behalf of its clients, including the Fund.

Although the professional staff of the Investment Adviser will devote as much time to the Fund as the Investment Adviser deems appropriate to perform its duties in accordance with the Fund's advisory agreement and in accordance with reasonable commercial standards, the staff may have conflicts in allocating its time and services among the Fund and the Investment Adviser's other accounts.

Various Activities of the Investment Adviser and its Affiliates. The directors, officers, personnel, employees and agents of the Investment Adviser and its affiliates may, subject to applicable law, serve as directors (whether supervisory or managing), officers, personnel, employees, partners, agents, nominees or signatories or provide banking, agency, insurance and/or other services, and receive arm's length fees in connection with such services, for the Fund or its investments or other entities that operate in the same or a related line of business as the, for other clients managed by the Investment Adviser or its affiliates, or for any obligor or issuer in respect of the CDOs, and the Fund shall have no right to any such fees. In serving in these multiple capacities, they may have obligations to such other clients or investors in those entities, the fulfillment of which may not be in the best interests of the Fund. The Fund may compete with other Highland Accounts for capital and investment opportunities.

There is no limitation or restriction on the Investment Adviser or any of its affiliates with regard to acting as investment adviser or collateral manager (or in a similar role) to other parties or persons. This and other future activities of the Investment Adviser and/or its affiliates may give rise to additional conflicts of interest. Such conflicts may relate to obligations that the Investment Adviser's investment committee, the Investment Adviser or its affiliates have to other clients.

The Investment Adviser and its affiliates may participate in creditors or other committees with respect to the bankruptcy, restructuring or workout of an investment of the Fund or another account. In such circumstances, the Investment Adviser or its affiliates may take positions on behalf of themselves or another account that are adverse to the interests of the Fund.

The Investment Adviser and/or its affiliates may act as an underwriter, arranger or placement agent, or otherwise participate in the origination, structuring, negotiation, syndication or offering of CDOs, Highland Accounts and other investments purchased by the Fund. Such transactions shall be subject to fees that are intended to be no greater than arm's-length fees, and the Fund shall have no right to any such fees. There is no expectation for preferential access to transactions involving CDOs and Highland Accounts that are underwritten, originated, arranged or placed by the Investment Adviser and/or its affiliates and the Fund shall not have any right to any such fees.

Investments in Highland Accounts Managed by the Investment Manager or its Affiliates. The Fund may invest a significant portion of its capital in Highland Accounts. The Investment Adviser or its affiliates will receive senior and subordinated management fees and, in some cases, a performance-based allocation or fee with respect to its role as general partner and/or manager of the Highland Accounts. If the Fund invests in Highland Accounts in secondary transactions, the Fund will indirectly pay the fees (senior and subordinated) of such Highland Accounts and any

carried interest. If the Fund provides all of the equity for a Highland Account, there may be no third party with whom the amount of such fees, expenses and carried interest can be negotiated on an arm's-length basis. The Investment Adviser or its affiliates will have conflicting division of loyalties and responsibilities regarding the Fund and a Highland Account, and certain other conflicts of interest would be inherent in the situation. There can be no assurance that the interests of the Fund would not be subordinated to those of a Highland Account or to other interests of the Investment Adviser.

Multiple Levels of Fees. The Investment Adviser and the Highland Accounts are expected to impose management fees, other administrative fees, carried interest and other performance allocations on realized and unrealized appreciation in the value of the assets managed and other income. This may result in greater expense than if investors in the Fund were able to invest directly in the Highland Accounts or their respective underlying investments. Investors in the Fund should take into account that the return on their investment will be reduced to the extent of both levels of fees. The general partner or manager of a Highland Account may receive the economic benefit of certain fees from its portfolio companies for services and in connection with unconsummated transactions (e.g., break-up, placement, monitoring, directors', organizational and set-up fees and financial advisory fees).

Cross Transactions and Principal Transactions. The Investment Adviser may effect client cross-transactions where the Investment Adviser causes a transaction to be effected between the Fund and another client advised by it or any of its affiliates. The Investment Adviser may engage in a client cross-transaction involving the Fund any time that the Investment Adviser believes such transaction to be fair to the Fund and such other client.

The Investment Adviser may effect principal transactions where the Fund acquires securities from or sells securities to the Investment Adviser and/or its affiliates, in each case in accordance with applicable law, which will include the Investment Adviser obtaining independent consent on behalf of the Fund prior to engaging in any such principal transaction between the Fund and the Investment Adviser or its affiliates.

The Investment Adviser may advise the Fund to acquire or dispose of securities in cross trades between the Fund and other clients of the Investment Adviser or its affiliates in accordance with applicable legal and regulatory requirements. In addition, the Fund may invest in securities of obligors or issuers in which the Investment Adviser and/or its affiliates have a debt, equity or participation interest, and the holding and sale of such investments by the Fund may enhance the profitability of the Investment Adviser's own investments in such companies. Moreover, the Fund may invest in assets originated by the Investment Adviser or its affiliates. In each such case, the Investment Adviser and such affiliates may have a potentially conflicting division of loyalties and responsibilities regarding the Fund and the other parties to such trade. Under certain circumstances, the Investment Adviser and its affiliates may determine that it is appropriate to avoid such conflicts by selling a security at a fair value that has been calculated pursuant to the Investment Adviser's valuation procedures to another client managed or advised by the Investment Adviser or such affiliates. In addition, the Investment Adviser may enter into agency cross-transactions where it or any of its affiliates acts as broker for the Fund and for the other party to the transaction, to the extent permitted under applicable law. The Investment Adviser may obtain independent consent

in writing on behalf of the Fund, which consent may be provided by the managing member of the General Partner or any other independent party on behalf of the Fund, if any such transaction requires the consent of the Fund under Section 206(3) of the U.S. Investment Advisers Act of 1940, as amended.

Material Non-Public Information. There are generally no ethical screens or information barriers among the Investment Adviser and certain of its affiliates of the type that many firms implement to separate persons who make investment decisions from others who might possess material, non-public information that could influence such decisions. If the Investment Adviser, any of its personnel or its affiliates were to receive material non-public information about a particular obligor or issuer, or have an interest in causing the Fund to acquire a particular security, the Investment Adviser may be prevented from advising the Fund to purchase or sell such asset due to internal restrictions imposed on the Investment Adviser. Notwithstanding the maintenance of certain internal controls relating to the management of material nonpublic information, it is possible that such controls could fail and result in the Investment Adviser, or one of its investment professionals, buying or selling an asset while, at least constructively, in possession of material non-public information. Inadvertent trading on material nonpublic information could have adverse effects on the Investment Adviser's reputation, result in the imposition of regulatory or financial sanctions, and as a consequence, negatively impact the Investment Adviser's ability to perform its portfolio management services to the Fund. In addition, while the Investment Adviser and certain of its affiliates currently operate without information barriers on an integrated basis, such entities could be required by certain regulations, or decide that it is advisable, to establish information barriers. In such event, the Investment Adviser's ability to operate as an integrated platform could also be impaired, which would limit the Investment Adviser's access to personnel of its affiliates and potentially impair its ability to manage the Fund's investments.

Conflicts Relating to Equity and Debt Ownership by the Fund and Affiliates. In certain circumstances, the Fund and other client accounts may invest in securities or other instruments of the same issuer (or affiliated group of issuers) having a different seniority in the issuer's capital structure. If the issuer becomes insolvent, restructures or suffers financial distress, there may be a conflict between the interests in the Fund and those other accounts insofar as the issuer may be unable (or in the case of a restructuring prior to bankruptcy may be expected to be unable) to satisfy the claims of all classes of its creditors and security holders and the Fund and such other accounts may have competing claims for the remaining assets of such issuers. Under these circumstances it may not be feasible for the Investment Adviser to reconcile the conflicting interests in the Fund and such other accounts in a way that protects the Fund's interests. Additionally, the Investment Adviser or its nominees may in the future hold board or creditors' committee memberships which may require them to vote or take other actions in such capacities that might be conflicting with respect to certain funds managed by the Investment Adviser in that such votes or actions may favor the interests of one account over another account. Furthermore, the Investment Adviser's fiduciary responsibilities in these capacities might conflict with the best interests of the investors.

Other Fees. The Investment Adviser and its affiliates are permitted to receive consulting fees, investment banking fees, advisory fees, breakup fees, director's fees, closing fees, transaction fees and similar fees in connection with actual or contemplated investments. Such fees will not reduce

or offset the Management Fee. Conflicts of interest may also arise due to the allocation of such fees to or among co-investors.

Soft Dollars. The Investment Adviser's authority to use "soft dollar" credits generated by the Fund's securities transactions to pay for expenses that might otherwise have been borne by the Investment Adviser may give the Investment Adviser an incentive to select brokers or dealers for transactions, or to negotiate commission rates or other execution terms, in a manner that takes into account the soft dollar benefits received by the Investment Adviser rather than giving exclusive consideration to the interests of the Fund.

EXHIBIT 8

Conformed to Federal Register version

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 276

[Release No. IA-5248; File No. S7-07-18]

RIN: 3235-AM36

Commission Interpretation Regarding Standard of Conduct for Investment Advisers

AGENCY: Securities and Exchange Commission.

ACTION: Interpretation.

SUMMARY: The Securities and Exchange Commission (the “SEC” or the “Commission”) is publishing an interpretation of the standard of conduct for investment advisers under the Investment Advisers Act of 1940 (the “Advisers Act” or the “Act”).

DATES: Effective July 12, 2019.

FOR FURTHER INFORMATION CONTACT: Olawalé Oriola, Senior Counsel; Matthew Cook, Senior Counsel; or Jennifer Songer, Branch Chief, at (202) 551-6787 or *IArules@sec.gov*, Investment Adviser Regulation Office, Division of Investment Management, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-8549.

SUPPLEMENTARY INFORMATION: The Commission is publishing an interpretation of the standard of conduct for investment advisers under the Advisers Act [15 U.S.C. 80b].¹

¹ 15 U.S.C. 80b. Unless otherwise noted, when we refer to the Advisers Act, or any paragraph of the Advisers Act, we are referring to 15 U.S.C. 80b of the United States Code, at which the Advisers Act is codified, and when we refer to rules under the Advisers Act, or any paragraph of these rules, we are referring to title 17, part 275 of the Code of Federal Regulations [17 CFR 275], in which these rules are published.

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I. INTRODUCTION

Under federal law, an investment adviser is a fiduciary.² The fiduciary duty an investment adviser owes to its client under the Advisers Act, which comprises a duty of care and a duty of loyalty, is important to the Commission’s investor protection efforts. Also important to the Commission’s investor protection efforts is the standard of conduct that a broker-dealer owes to a retail customer when it makes a recommendation of any securities transaction or investment strategy involving securities.³ Both investment advisers and broker-dealers play an important

² *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 194 (1963) (“SEC v. Capital Gains”); *see also* *infra* footnotes 34–44 and accompanying text; Investment Adviser Codes of Ethics, Investment Advisers Act Release No. 2256 (July 2, 2004); Compliance Programs of Investment Companies and Investment Advisers, Investment Advisers Act Release No. 2204 (Dec. 17, 2003); Electronic Filing by Investment Advisers; Proposed Amendments to Form ADV, Investment Advisers Act Release No. 1862 (Apr. 5, 2000). Investment advisers also have antifraud liability with respect to prospective clients under section 206 of the Advisers Act.

³ *See* Regulation Best Interest, Exchange Act Release No. 34-86031 (June 5, 2019) (“Reg. BI Adoption”). This final interpretation regarding the standard of conduct for investment advisers under the Advisers Act (“Final Interpretation”) interprets section 206 of the Advisers Act, which is applicable to both SEC- and

role in our capital markets and our economy more broadly. Investment advisers and broker-dealers have different types of relationships with investors, offer different services, and have different compensation models. This variety is important because it presents investors with choices regarding the types of relationships they can have, the services they can receive, and how they can pay for those services.

On April 18, 2018, the Commission proposed rules and forms intended to enhance the required standard of conduct for broker-dealers⁴ and provide retail investors with clear and succinct information regarding the key aspects of their brokerage and advisory relationships.⁵ In connection with the publication of these proposals, the Commission published for comment a separate proposed interpretation regarding the standard of conduct for investment advisers under the Advisers Act (“Proposed Interpretation”).⁶ We stated in the Proposed Interpretation, and we continue to believe, that it is appropriate and beneficial to address in one release and reaffirm—and in some cases clarify—certain aspects of the fiduciary duty that an investment adviser owes

state-registered investment advisers, as well as other investment advisers that are exempt from registration or subject to a prohibition on registration under the Advisers Act. This Final Interpretation is intended to highlight the principles relevant to an adviser’s fiduciary duty. It is not, however, intended to be the exclusive resource for understanding these principles. Separately, in various circumstances, case law, statutes (such as the Employee Retirement Income Security Act of 1974 (“ERISA”)), and state law impose obligations on investment advisers. In some cases, these standards may differ from the standard enforced by the Commission.

⁴ Regulation Best Interest, Exchange Act Release No. 83062 (Apr. 18, 2018) (“Reg. BI Proposal”).

⁵ Form CRS Relationship Summary; Amendments to Form ADV; Required Disclosures in Retail Communications and Restrictions on the use of Certain Names or Titles, Investment Advisers Act Release No. 4888 (Apr. 18, 2018) (“Relationship Summary Proposal”).

⁶ Proposed Commission Interpretation Regarding Standard of Conduct for Investment Advisers; Request for Comment on Enhancing Investment Adviser Regulation, Investment Advisers Act Release No. 4889 (Apr. 18, 2018).

to its clients under section 206 of the Advisers Act.⁷ After considering the comments received, we are publishing this Final Interpretation with some clarifications to address comments.⁸

A. Overview of Comments

We received over 150 comment letters on our Proposed Interpretation from individuals, investment advisers, trade or professional organizations, law firms, consumer advocacy groups, and bar associations.⁹ Although many commenters generally agreed that the Proposed Interpretation was useful,¹⁰ some noted the challenges inherent in a Commission interpretation covering the broad scope of the fiduciary duty that an investment adviser owes to its clients under the Advisers Act.¹¹ Some of these commenters suggested modifications to or withdrawal

⁷ Further, the Commission recognizes that many advisers provide impersonal investment advice. *See, e.g.*, Advisers Act rule 203A-3 (defining “impersonal investment advice” in the context of defining “investment adviser representative” as “investment advisory services provided by means of written material or oral statements that do not purport to meet the objectives or needs of specific individuals or accounts”). This Final Interpretation does not address the extent to which the Advisers Act applies to different types of impersonal investment advice.

⁸ In the Proposed Interpretation, the Commission also requested comment on: licensing and continuing education requirements for personnel of SEC-registered investment advisers; delivery of account statements to clients with investment advisory accounts; and financial responsibility requirements for SEC-registered investment advisers, including fidelity bonds. We are continuing to evaluate the comments received in response.

⁹ Comment letters submitted in File No. S7-09-18 are available on the Commission’s website at <https://www.sec.gov/comments/s7-09-18/s70918.htm>. We also considered those comments submitted in File No. S7-08-18 (Comments on Relationship Summary Proposal) and File No. S7-07-18 (Comments on Reg. BI Proposal). Those comments are available on the Commission’s website at <https://www.sec.gov/comments/s7-08-18/s70818.htm> and <https://www.sec.gov/comments/s7-07-18/s70718.htm>.

¹⁰ *See, e.g.*, Comment Letter of North American Securities Administrators Association (Aug. 23, 2018) (“NASAA Letter”) (stating that the Proposed Interpretation is a “useful resource”); Comment Letter of Invesco (Aug. 7, 2018) (“Invesco Letter”) (agreeing that “there are benefits to having a clear statement regarding the fiduciary duty that applies to an investment adviser”).

¹¹ *See, e.g.*, Comment Letter of Pickard Djinis and Pisarri LLP (Aug. 7, 2018) (“Pickard Letter”) (noting the Commission’s “efforts to synthesize case law, legislative history, academic literature, prior Commission releases and other sources to produce a comprehensive explanation of the fiduciary standard of conduct”); Comment Letter of Dechert LLP (Aug. 7, 2018) (“Dechert Letter”) (“It is crucial that any universal interpretation of an adviser’s fiduciary duty be based on sound and time-tested principles. Given the difficulty of defining and encompassing all of an adviser’s responsibilities to its clients, while also accommodating the diversity of advisory arrangements, interpretive issues will arise in the future.”); Comment Letter of the Hedge Funds Subcommittee of the Federal Regulation of Securities Committee of the Business Law Section of the American Bar Association (Aug. 24, 2018) (“ABA Letter”) (“We note at

of the Proposed Interpretation.¹² Although most commenters agreed that an investment adviser’s fiduciary duty comprises a duty of care and a duty of loyalty, as described in the Proposed Interpretation, they had differing views on aspects of the fiduciary duty and in some cases sought clarification on its application.¹³

Some commenters requested that we adopt rule text instead.¹⁴ The relationship between an investment adviser and its client has long been based on fiduciary principles not generally set forth in specific statute or rule text. We believe that this principles-based approach should continue as it expresses broadly the standard to which investment advisers are held while allowing them flexibility to meet that standard in the context of their specific services. In our view, adopting rule text is not necessary to achieve our goal in this Final Interpretation of reaffirming and in some cases clarifying certain aspects of the fiduciary duty.

the outset that it is difficult to capture the nature of an investment adviser’s fiduciary duty in a broad statement that has universal applicability.”).

¹² See, e.g., Comment Letter of L.A. Schnase (Jul. 30, 2018) (urging the Commission not to issue the Proposed Interpretation in final form, or at least not without substantial rewriting or reshaping); Comment Letter of Money Management Institute (Aug. 7, 2018) (“MMI Letter”) (urging the Commission to “revise the interpretation so that it reflects the common law principles in which an investment adviser’s fiduciary duty is grounded”); Dechert Letter (recommending that we withdraw the Proposed Interpretation and instead rely on existing authority and sources of law, as well as existing Commission practices for providing interpretive guidance, in order to define the source and scope of an investment adviser’s fiduciary duty).

¹³ See, e.g., Comment Letter of Cambridge Investment Research Inc. (Aug. 7, 2018) (“Cambridge Letter”) (stating that “greater clarity on all aspects of an investment adviser’s fiduciary duty will improve the ability to craft such policies and procedures, as well as support the elimination of confusion for retail clients and investment professionals”); Comment Letter of Institutional Limited Partners Association (Aug. 6, 2018) (“ILPA Letter 1”) (“Interpretation will provide more certainty regarding the fiduciary duties owed by private fund advisers to their clients.”); Comment Letter of New York City Bar Association (Jun. 26, 2018) (“NY City Bar Letter”) (stating that the uniform interpretation of an investment adviser’s fiduciary duty is necessary).

¹⁴ Some commenters suggested that we codify the Proposed Interpretation. See, e.g., Comment Letter of Roy Tanga (Apr. 25, 2018); Comment Letter of Financial Engines (Aug. 6, 2018) (“Financial Engines Letter”); ILPA Letter 1; Comment Letter of AARP (Aug. 7, 2018) (“AARP Letter”); Comment Letter of Gordon Donohue (Aug. 6, 2018); Comment Letter of Financial Planning Coalition (Aug. 7, 2018) (“FPC Letter”).

II. INVESTMENT ADVISERS' FIDUCIARY DUTY

The Advisers Act establishes a federal fiduciary duty for investment advisers.¹⁵ This fiduciary duty is based on equitable common law principles and is fundamental to advisers' relationships with their clients under the Advisers Act.¹⁶ The investment adviser's fiduciary duty is broad and applies to the entire adviser-client relationship.¹⁷ The fiduciary duty to which advisers are subject is not specifically defined in the Advisers Act or in Commission rules, but reflects a Congressional recognition "of the delicate fiduciary nature of an investment advisory relationship" as well as a Congressional intent to "eliminate, or at least to expose, all conflicts of interest which might incline an investment adviser—consciously or unconsciously—to render advice which was not disinterested."¹⁸ An adviser's fiduciary duty is imposed under the

¹⁵ *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 17 (1979) ("Transamerica Mortgage v. Lewis") ("§ 206 establishes federal fiduciary standards to govern the conduct of investment advisers.") (quotation marks omitted); *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462, 471, n.11 (1977) (in discussing SEC v. Capital Gains, stating that the Supreme Court's reference to fraud in the "equitable" sense of the term was "premised on its recognition that Congress intended the Investment Advisers Act to establish federal fiduciary standards for investment advisers"); SEC v. Capital Gains, *supra* footnote 2; Amendments to Form ADV, Investment Advisers Act Release No. 3060 (July 28, 2010) ("Investment Advisers Act Release 3060") ("Under the Advisers Act, an adviser is a fiduciary whose duty is to serve the best interests of its clients, which includes an obligation not to subrogate clients' interests to its own," citing Proxy Voting by Investment Advisers, Investment Advisers Act Release No. 2106 (Jan. 31, 2003) ("Investment Advisers Act Release 2106")).

¹⁶ See SEC v. Capital Gains, *supra* footnote 2 (discussing the history of the Advisers Act, and how equitable principles influenced the common law of fraud and changed the suits brought against a fiduciary, "which Congress recognized the investment adviser to be").

¹⁷ The Commission has previously recognized the broad scope of section 206 of the Advisers Act in a variety of contexts. See, e.g., Investment Advisers Act Release 2106, *supra* footnote 15; Timbervest, LLC, et al., Advisers Act Release No. 4197 (Sept. 17, 2015) (Commission Opinion) ("[O]nce an investment advisory relationship is formed, the Advisers Act does not permit an adviser to exploit that fiduciary relationship by defrauding his client in any investment transaction connected to the advisory relationship."); see also SEC v. Lauer, 2008 WL 4372896, at 24 (S.D. Fla. Sept. 24, 2008) ("Unlike the antifraud provisions of the Securities Act and the Exchange Act, Section 206 of the Advisers Act does not require that the activity be 'in the offer or sale of any' security or 'in connection with the purchase or sale of any security.'"); Thomas P. Lemke & Gerald T. Lins, Regulation of Investment Advisers (2013 ed.), at § 2:30 ("[T]he SEC has ... applied [sections 206(1) and 206(2)] where fraud arose from an investment advisory relationship, even though the wrongdoing did not specifically involve securities.").

¹⁸ See SEC v. Capital Gains, *supra* footnote 2; see also In the Matter of Arleen W. Hughes, Exchange Act Release No. 4048 (Feb. 18, 1948) ("Arleen Hughes") (Commission Opinion) (discussing the relationship of

Advisers Act in recognition of the nature of the relationship between an investment adviser and a client and the desire “so far as is presently practicable to eliminate the abuses” that led to the enactment of the Advisers Act.¹⁹ It is made enforceable by the antifraud provisions of the Advisers Act.²⁰

An investment adviser’s fiduciary duty under the Advisers Act comprises a duty of care and a duty of loyalty.²¹ This fiduciary duty requires an adviser “to adopt the principal’s goals,

trust and confidence between the client and a dual registrant and stating that the registrant was a fiduciary and subject to liability under the antifraud provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934).

¹⁹ See SEC v. Capital Gains, *supra* footnote 2 (noting that the “declaration of policy” in the original bill, which became the Advisers Act, declared that “the national public interest and the interest of investors are adversely affected . . . when the business of investment advisers is so conducted as to defraud or mislead investors, or to enable such advisers to relieve themselves of their fiduciary obligations to their clients. It is hereby declared that the policy and purposes of this title, in accordance with which the provisions of this title shall be interpreted, *are to mitigate and, so far as is presently practicable to eliminate* the abuses enumerated in this section”) (citing S. 3580, 76th Cong., 3d Sess., § 202 and Investment Trusts and Investment Companies, Report of the Securities and Exchange Commission, Pursuant to Section 30 of the Public Utility Holding Company Act of 1935, on Investment Counsel, Investment Management, Investment Supervisory, and Investment Advisory Services, H.R. Doc. No. 477, 76th Cong. 2d Sess., 1, at 28) (emphasis added).

²⁰ *Id.*; Transamerica Mortgage v. Lewis, *supra* footnote 15 (“[T]he Act’s legislative history leaves no doubt that Congress intended to impose enforceable fiduciary obligations.”). Some commenters questioned the standard to which the Advisers Act holds investment advisers. See, e.g., Comment Letter of Stark & Stark, PC (undated) (“The duty of care at common law and under the Advisers Act only requires that advisers not be negligent in performing their duties.”) (internal citation omitted); Comment Letter of Institutional Limited Partners Association (Nov. 21, 2018) (“ILPA Letter 2”) (“The Advisers Act standard is a lower simple ‘negligence’ standard.”). Claims arising under Advisers Act section 206(2) are not scienter-based and can be adequately pled with only a showing of negligence. *Robare Group, Ltd., et al. v. SEC*, 922 F.3d 468, 472 (D.C. Cir. 2019) (“Robare v. SEC”); *SEC v. Steadman*, 967 F.2d 636, 643, n.5 (D.C. Cir. 1992) (citing SEC v. Capital Gains, *supra* footnote 2) (“[A] violation of § 206(2) of the Investment Advisers Act may rest on a finding of simple negligence.”); *SEC v. DiBella*, 587 F.3d 553, 567 (2d Cir. 2009) (“the government need not show intent to make out a section 206(2) violation”); *SEC v. Gruss*, 859 F. Supp. 2d 653, 669 (S.D.N.Y. 2012) (“Claims arising under Section 206(2) are not scienter-based and can be adequately pled with only a showing of negligence.”). However, claims arising under Advisers Act section 206(1) require scienter. See, e.g., *Robare v. SEC*; *SEC v. Moran*, 922 F. Supp. 867, 896 (S.D.N.Y. 1996); *Carroll v. Bear, Stearns & Co.*, 416 F. Supp. 998, 1001 (S.D.N.Y. 1976).

²¹ See, e.g., Investment Advisers Act Release 2106, *supra* footnote 15. These duties were generally recognized by commenters. See, e.g., Comment Letter of Consumer Federation of America (Aug. 7, 2018) (“CFA Letter”); Comment Letter of the Investment Adviser Association (Aug. 6, 2018) (“IAA Letter”); Comment Letter of Investments & Wealth Institute (Aug. 6, 2018); Comment Letter of Raymond James (Aug. 7, 2018); FPC Comment Letter. But see Dechert Letter (questioning the sufficiency of support for a duty of care).

objectives, or ends.”²² This means the adviser must, at all times, serve the best interest of its client and not subordinate its client’s interest to its own. In other words, the investment adviser cannot place its own interests ahead of the interests of its client. This combination of care and loyalty obligations has been characterized as requiring the investment adviser to act in the “best interest” of its client at all times.²³ In our view, an investment adviser’s obligation to act in the best interest of its client is an overarching principle that encompasses both the duty of care and the duty of loyalty. As discussed in more detail below, in our view, the duty of care requires an investment adviser to provide investment advice in the best interest of its client, based on the client’s objectives. Under its duty of loyalty, an investment adviser must eliminate or make full and fair disclosure of all conflicts of interest which might incline an investment adviser—consciously or unconsciously—to render advice which is not disinterested such that a client can provide informed consent to the conflict.²⁴ We believe this is another part of an investment adviser’s obligation to act in the best interest of its client.

A. Application of Duty Determined by Scope of Relationship

An adviser’s fiduciary duty is imposed under the Advisers Act in recognition of the

²² Arthur B. Laby, *The Fiduciary Obligations as the Adoption of Ends*, 56 Buffalo Law Review 99 (2008); see also Restatement (Third) of Agency, §2.02 Scope of Actual Authority (2006) (describing a fiduciary’s authority in terms of the fiduciary’s reasonable understanding of the principal’s manifestations and objectives).

²³ Investment Advisers Act Release 3060, *supra* footnote 15 (adopting amendments to Form ADV and stating that “under the Advisers Act, an adviser is a fiduciary whose duty is to serve the best interests of its clients, which includes an obligation not to subrogate clients’ interests to its own,” citing Investment Advisers Act Release 2106, *supra* footnote 15). See *SEC v. Tambone*, 550 F.3d 106, 146 (1st Cir. 2008) (“SEC v. Tambone”) (“Section 206 imposes a fiduciary duty on investment advisers to act at all times in the best interest of the fund...”); *SEC v. Moran*, 944 F. Supp. 286, 297 (S.D.N.Y. 1996) (“SEC v. Moran”) (“Investment advisers are entrusted with the responsibility and duty to act in the best interest of their clients.”). Although most commenters agreed that an adviser has an obligation to act in its client’s best interest, some questioned whether the Proposed Interpretation appropriately considered the best interest obligation as part of the duty of care, or whether it instead should be considered part of the duty of loyalty. See, e.g., MMI Letter; Comment Letter of Investment Company Institute (Aug. 7, 2018) (“ICI Letter”).

²⁴ See *infra* footnotes 67-70 and accompanying text for a more detailed discussion of informed consent and how it is generally considered on an objective basis and may be inferred.

nature of the relationship between an adviser and its client—a relationship of trust and confidence.²⁵ The adviser’s fiduciary duty is principles-based and applies to the entire relationship between the adviser and its client. The fiduciary duty follows the contours of the relationship between the adviser and its client, and the adviser and its client may shape that relationship by agreement, provided that there is full and fair disclosure and informed consent.²⁶ With regard to the scope of the adviser-client relationship, we recognize that investment advisers provide a wide range of services, from a single financial plan for which a client may pay a one-time fee, to ongoing portfolio management for which a client may pay a periodic fee based on the value of assets in the portfolio. Investment advisers also serve a large variety of clients, from retail clients with limited assets and investment knowledge and experience to institutional clients with very large portfolios and substantial knowledge, experience, and analytical resources.²⁷ In our experience, the principles-based fiduciary duty imposed by the Advisers Act has provided sufficient flexibility to serve as an effective standard of conduct for investment advisers, regardless of the services they provide or the types of clients they serve.

Although all investment advisers owe each of their clients a fiduciary duty under the Advisers Act, that fiduciary duty must be viewed in the context of the agreed-upon scope of the

²⁵ See, e.g., Hearings on S. 3580 before Subcommittee of the Senate Committee on Banking and Currency, 76th Cong., 3d Sess. (leading investment advisers emphasized their relationship of “trust and confidence” with their clients); SEC v. Capital Gains, *supra* footnote 2 (citing same).

²⁶ Several commenters asked that we clarify that an adviser and its client can tailor the scope of the relationship to which the fiduciary duty applies through contract. See, e.g., MMI Letter; Financial Engines Letter; ABA Letter.

²⁷ This Final Interpretation also applies to automated advisers, which are often colloquially referred to as “robo-advisers.” Automated advisers, like all SEC-registered investment advisers, are subject to all of the requirements of the Advisers Act, including the requirement that they provide advice consistent with the fiduciary duty they owe to their clients. See Division of Investment Management, Robo Advisers, IM Guidance Update No. 2017-02 (Feb. 2017), available at <https://www.sec.gov/investment/im-guidance-2017-02.pdf> (describing Commission staff’s guidance as to three distinct areas under the Advisers Act that automated advisers should consider, due to the nature of their business model, in seeking to comply with their obligations under the Advisers Act).

relationship between the adviser and the client. In particular, the specific obligations that flow from the adviser's fiduciary duty depend upon what functions the adviser, as agent, has agreed to assume for the client, its principal. For example, the obligations of an adviser providing comprehensive, discretionary advice in an ongoing relationship with a retail client (*e.g.*, monitoring and periodically adjusting a portfolio of equity and fixed income investments with limited restrictions on allocation) will be significantly different from the obligations of an adviser to a registered investment company or private fund where the contract defines the scope of the adviser's services and limitations on its authority with substantial specificity (*e.g.*, a mandate to manage a fixed income portfolio subject to specified parameters, including concentration limits and credit quality and maturity ranges).²⁸

While the application of the investment adviser's fiduciary duty will vary with the scope of the relationship, the relationship in all cases remains that of a fiduciary to the client. In other words, an adviser's federal fiduciary duty may not be waived, though it will apply in a manner that reflects the agreed-upon scope of the relationship.²⁹ A contract provision purporting to waive the adviser's federal fiduciary duty generally, such as (i) a statement that the adviser will not act as a fiduciary, (ii) a blanket waiver of all conflicts of interest, or (iii) a waiver of any

²⁸ See, *e.g.*, *infra* text following footnote 35.

²⁹ Because an adviser's federal fiduciary obligations are enforceable through section 206 of the Advisers Act, we would view a waiver of enforcement of section 206 as implicating section 215(a) of the Advisers Act, which provides that "any condition, stipulation or provision binding any person to waive compliance with any provision of this title. . . shall be void." See also Restatement (Third) of Agency, § 8.06 Principal's Consent (2006) ("[T]he law applicable to relationships of agency as defined in § 1.01 imposes mandatory limits on the circumstances under which an agent may be empowered to take disloyal action. These limits serve protective and cautionary purposes. Thus, an agreement that contains general or broad language purporting to release an agent in advance from the agent's general fiduciary obligation to the principal is not likely to be enforceable. This is because a broadly sweeping release of an agent's fiduciary duty may not reflect an adequately informed judgment on the part of the principal; if effective, the release would expose the principal to the risk that the agent will exploit the agent's position in ways not foreseeable by the principal at the time the principal agreed to the release. In contrast, when a principal consents to specific transactions or to specified types of conduct by the agent, the principal has a focused opportunity to assess risks that are more readily identifiable.").

specific obligation under the Advisers Act, would be inconsistent with the Advisers Act,³⁰ regardless of the sophistication of the client.³¹

³⁰ See sections 206 and 215(a). Commenters generally agreed that a client cannot waive an investment adviser's fiduciary duty through agreement. See Dechert Letter; Comment Letter of Ropes & Gray LLP (Aug. 7, 2018) ("Ropes & Gray Letter"), at n.20; see also *supra* footnote 29. In the Proposed Interpretation, we stated that "the investment adviser cannot disclose or negotiate away, and the investor cannot waive, the federal fiduciary duty." One commenter disputed this broad statement, believing that it called into question "the ability of an investment adviser and client to define the scope of the adviser's services and duties." ABA Letter; see also Financial Engines Letter. We have modified this statement to clarify that a general waiver of the fiduciary duty would violate that duty and to provide examples of such a general waiver.

³¹ Some commenters mentioned a 2007 No-Action Letter in which staff indicated that whether a clause in an advisory agreement that purports to limit an adviser's liability under that agreement (a so-called "hedge clause") would violate sections 206(1) and 206(2) of the Advisers Act depends on all of the surrounding facts and circumstances. Heitman Capital Management, LLC, SEC Staff No-Action Letter (Feb. 12, 2007) ("Heitman Letter"). A few commenters indicated that the Heitman Letter expanded the ability of investment advisers to private funds, and potentially other sophisticated clients, to disclaim their fiduciary duties under state law in an advisory agreement. See, e.g., ILPA Letter 1; ILPA Letter 2. The commenters' descriptions of the Heitman Letter suggest that it may have been applied incorrectly. The Heitman Letter does not address the scope or substance of an adviser's federal fiduciary duty; rather, it addresses the extent to which hedge clauses may be misleading in violation of the Advisers Act's antifraud provisions. Another commenter agreed with this reading of the Heitman Letter. See Comment Letter of American Investment Council (Feb. 25, 2019). In response to these comments, we express below the Commission's views about an adviser's obligations under sections 206(1) and 206(2) of the Advisers Act with respect to the use of hedge clauses. Accordingly, because we are expressing our views in this Final Interpretation, the Heitman Letter is withdrawn.

This Final Interpretation makes clear that an adviser's federal fiduciary duty may not be waived, though its application may be shaped by agreement. This Final Interpretation does not take a position on the scope or substance of any fiduciary duty that applies to an adviser under applicable state law. See *supra* footnote 3. The question of whether a hedge clause violates the Advisers Act's antifraud provisions depends on all of the surrounding facts and circumstances, including the particular circumstances of the client (e.g., sophistication). In our view, however, there are few (if any) circumstances in which a hedge clause in an agreement with a retail client would be consistent with those antifraud provisions, where the hedge clause purports to relieve the adviser from liability for conduct as to which the client has a non-waivable cause of action against the adviser provided by state or federal law. Such a hedge clause generally is likely to mislead those retail clients into not exercising their legal rights, in violation of the antifraud provisions, even where the agreement otherwise specifies that the client may continue to retain its non-waivable rights. Whether a hedge clause in an agreement with an institutional client would violate the Advisers Act's antifraud provisions will be determined based on the particular facts and circumstances. To the extent that a hedge clause creates a conflict of interest between an adviser and its client, the adviser must address the conflict as required by its duty of loyalty.

B. Duty of Care

As fiduciaries, investment advisers owe their clients a duty of care.³² The Commission has discussed the duty of care and its components in a number of contexts.³³ The duty of care includes, among other things: (i) the duty to provide advice that is in the best interest of the client, (ii) the duty to seek best execution of a client's transactions where the adviser has the responsibility to select broker-dealers to execute client trades, and (iii) the duty to "provide advice and monitoring over the course of the relationship."

1. Duty to Provide Advice that is in the Best Interest of the Client

The duty of care includes a duty to provide investment advice that is in the best interest of the client, including a duty to provide advice that is suitable for the client.³⁴ In order to

³² See Investment Advisers Act Release 2106, *supra* footnote 15 (stating that under the Advisers Act, "an adviser is a fiduciary that owes each of its clients duties of care and loyalty with respect to all services undertaken on the client's behalf, including proxy voting," which is the subject of the release, and citing SEC v. Capital Gains *supra* footnote 2, to support this point). This Final Interpretation does not address the specifics of how an investment adviser might satisfy its fiduciary duty when voting proxies. See also Restatement (Third) of Agency, § 8.08 (discussing the duty of care that an agent owes its principal as a matter of common law); Tamar Frankel & Arthur B. Laby, *The Regulation of Money Managers* (updated 2017) ("Advice can be divided into three stages. The first determines the needs of the particular client. The second determines the portfolio strategy that would lead to meeting the client's needs. The third relates to the choice of securities that the portfolio would contain. The duty of care relates to each of the stages and depends on the depth or extent of the advisers' obligation towards their clients.").

³³ See, e.g., Suitability of Investment Advice Provided by Investment Advisers; Custodial Account Statements for Certain Advisory Clients, Investment Advisers Act Release No. 1406 (Mar. 16, 1994) ("Investment Advisers Act Release 1406") (stating that advisers have a duty of care and discussing advisers' suitability obligations); Interpretive Release Concerning the Scope of Section 28(e) of the Securities Exchange Act of 1934 and Related Matters, Exchange Act Release No. 23170 (Apr. 28, 1986) ("Exchange Act Release 23170") ("an adviser, as a fiduciary, owes its clients a duty of obtaining the best execution on securities transactions"). We highlight certain contexts, but not all, in which the Commission has addressed the duty of care. See, e.g., Investment Advisers Act Release 2106, *supra* footnote 15.

³⁴ In 1994, the Commission proposed a rule that would have made express the fiduciary obligation of investment advisers to make only suitable recommendations to a client. Investment Advisers Act Release 1406, *supra* footnote 33. Although never adopted, the rule was designed, among other things, to reflect the Commission's interpretation of an adviser's *existing* suitability obligation under the Advisers Act. In addition, we do not cite Investment Advisers Act Release 1406 as the source of authority for the view we express here, which at least one comment letter suggested, but cite it merely to show that the Commission has long held this view. See Comment Letter of the Managed Funds Association and the Alternative Investment Management Association (Aug. 7, 2018) (indicating that the Commission's failure to adopt the proposed suitability rule means "investment advisers are not subject to an express 'suitability' standard

provide such advice, an adviser must have a reasonable understanding of the client's objectives. The basis for such a reasonable understanding generally would include, for retail clients, an understanding of the investment profile, or for institutional clients, an understanding of the investment mandate.³⁵ The duty to provide advice that is in the best interest of the client based on a reasonable understanding of the client's objectives is a critical component of the duty of care.

Reasonable Inquiry into Client's Objectives

How an adviser develops a reasonable understanding will vary based on the specific facts and circumstances, including the nature of the client, the scope of the adviser-client relationship, and the nature and complexity of the anticipated investment advice.

In order to develop a reasonable understanding of a retail client's objectives, an adviser should, at a minimum, make a reasonable inquiry into the client's financial situation, level of financial sophistication, investment experience, and financial goals (which we refer to collectively as the retail client's "investment profile"). For example, an adviser undertaking to formulate a comprehensive financial plan for a retail client would generally need to obtain a

under existing regulation"). We believe that this obligation to make only suitable recommendations to a client is part of an adviser's fiduciary duty to act in the best interest of its client. Accordingly, an adviser must provide investment advice that is suitable for its client in providing advice that is in the best interest of its client. *See* SEC v. Tambone, *supra* footnote 23 ("Section 206 imposes a fiduciary duty on investment advisers to act at all times in the best interest of the fund...."); SEC v. Moran, *supra* footnote 23 ("Investment advisers are entrusted with the responsibility and duty to act in the best interest of their clients.").

³⁵ Several commenters stated that the duty to make a reasonable inquiry into a client's investment profile may not apply in the institutional client context. *See, e.g.,* Comment Letter of BlackRock, Inc. (Aug. 7, 2018); Comment Letter of Teachers Insurance and Annuity Association of America (Aug. 7, 2018); Comment Letter of Allianz Global Investors U.S. LLC (Aug. 7, 2018) ("Allianz Letter"); Comment Letter of John Hancock Life Insurance Company (U.S.A.) (Aug. 3, 2018). Accordingly, we are describing the duty as a duty to have a reasonable understanding of the client's objectives. While not every client will have an investment profile, every client will have objectives. For example, an institutional client's objectives may be ascertained through its investment mandate.

range of personal and financial information about the client such as current income, investments, assets and debts, marital status, tax status, insurance policies, and financial goals.³⁶

In addition, it will generally be necessary for an adviser to a retail client to update the client's investment profile in order to maintain a reasonable understanding of the client's objectives and adjust the advice to reflect any changed circumstances.³⁷ The frequency with which the adviser must update the client's investment profile in order to consider changes to any advice the adviser provides would itself turn on the facts and circumstances, including whether the adviser is aware of events that have occurred that could render inaccurate or incomplete the investment profile on which the adviser currently bases its advice. For instance, in the case of a financial plan where the investment adviser also provides advice on an ongoing basis, a change in the relevant tax law or knowledge that the client has retired or experienced a change in marital status could trigger an obligation to make a new inquiry.

By contrast, in providing investment advice to institutional clients, the nature and extent of the reasonable inquiry into the client's objectives generally is shaped by the specific investment mandates from those clients. For example, an investment adviser engaged to advise on an institutional client's investment grade bond portfolio would need to gain a reasonable understanding of the client's objectives within that bond portfolio, but not the client's objectives

³⁶ Investment Advisers Act Release 1406, *supra* footnote 33. After making a reasonable inquiry into the client's investment profile, it generally would be reasonable for an adviser to rely on information provided by the client (or the client's agent) regarding the client's financial circumstances, and an adviser should not be held to have given advice not in its client's best interest if it is later shown that the client had misled the adviser concerning the information on which the advice was based.

³⁷ Such updating would not be needed with one-time investment advice. In the Proposed Interpretation, we stated that an adviser "must" update a client's investment profile in order to adjust the advice to reflect any changed circumstances. We believe that any obligation to update a client's investment profile, like the nature and extent of the reasonable inquiry into a retail client's objectives, turns on what is reasonable under the circumstances. Accordingly, we have revised the wording of this statement in this Final Interpretation.

within its entire investment portfolio. Similarly, an investment adviser whose client is a registered investment company or a private fund would need to have a reasonable understanding of the fund's investment guidelines and objectives. For advisers acting on specific investment mandates for institutional clients, particularly funds, we believe that the obligation to update the client's objectives would not be applicable except as may be set forth in the advisory agreement.

Reasonable belief that advice is in the best interest of the client

An investment adviser must have a reasonable belief that the advice it provides is in the best interest of the client based on the client's objectives. The formation of a reasonable belief would involve considering, for example, whether investments are recommended only to those clients who can and are willing to tolerate the risks of those investments and for whom the potential benefits may justify the risks.³⁸ Whether the advice is in a client's best interest must be evaluated in the context of the portfolio that the adviser manages for the client and the client's objectives.

For example, when an adviser is advising a retail client with a conservative investment objective, investing in certain derivatives may be in the client's best interest when they are used to hedge interest rate risk or other risks in the client's portfolio, whereas investing in certain directionally speculative derivatives on their own may not. For that same client, investing in a particular security on margin may not be in the client's best interest, even if investing in that same security without the use of margin may be in the client's best interest. However, for

³⁸ Item 8 of Part 2A of Form ADV requires an investment adviser to describe its methods of analysis and investment strategies and disclose that investing in securities involves risk of loss which clients should be prepared to bear. This item also requires that an adviser explain the material risks involved for each significant investment strategy or method of analysis it uses and particular type of security it recommends, with more detail if those risks are significant or unusual. Accordingly, investment advisers are required to identify and explain certain risks involved in their investment strategies and the types of securities they recommend. An investment adviser needs to consider those same risks in determining the clients to which the adviser recommends those investments.

example, when advising a financially sophisticated client, such as a fund or other sophisticated client that has an appropriate risk tolerance, it may be in the best interest of the client to invest in such derivatives or in securities on margin, or to invest in other complex instruments or other products that may have limited liquidity.

Similarly, when an adviser is assessing whether high risk products—such as penny stocks or other thinly-traded securities—are in a retail client’s best interest, the adviser should generally apply heightened scrutiny to whether such investments fall within the retail client’s risk tolerance and objectives. As another example, complex products such as inverse or leveraged exchange-traded products that are designed primarily as short-term trading tools for sophisticated investors may not be in the best interest of a retail client absent an identified, short-term, client-specific trading objective and, to the extent that such products are in the best interest of a retail client initially, they would require daily monitoring by the adviser.³⁹

A reasonable belief that investment advice is in the best interest of a client also requires that an adviser conduct a reasonable investigation into the investment sufficient not to base its advice on materially inaccurate or incomplete information.⁴⁰ We have taken enforcement action where an investment adviser did not independently or reasonably investigate securities before recommending them to clients.⁴¹

³⁹ See Exchange-Traded Funds, Securities Act Release No. 10515 (June 28, 2018); SEC staff and FINRA, Investor Alert, Leveraged and Inverse ETFs: Specialized Products with Extra Risks for Buy-and-Hold Investors (Aug. 1, 2009); SEC Office of Investor Education and Advocacy, Investor Bulletin: Exchange-Traded Funds (ETFs) (Aug. 2012); see also FINRA Regulatory Notice 09-31, Non-Traditional ETFs – FINRA Reminds Firms of Sales Practice Obligations Relating to Leveraged and Inverse Exchange-Traded Funds (June 2009).

⁴⁰ See, e.g., Concept Release on the U.S. Proxy System, Investment Advisers Act Release No. 3052 (July 14, 2010) (indicating that a fiduciary “has a duty of care requiring it to make a reasonable investigation to determine that it is not basing its recommendations on materially inaccurate or incomplete information”).

⁴¹ See, e.g., In the Matter of Larry C. Grossman, Investment Advisers Act Release No. 4543 (Sept. 30, 2016) (Commission Opinion) (“*In re Grossman*”) (in connection with imposing liability on a principal of a

The cost (including fees and compensation) associated with investment advice would generally be one of many important factors—such as an investment product’s or strategy’s investment objectives, characteristics (including any special or unusual features), liquidity, risks and potential benefits, volatility, likely performance in a variety of market and economic conditions, time horizon, and cost of exit—to consider when determining whether a security or investment strategy involving a security or securities is in the best interest of the client. When considering similar investment products or strategies, the fiduciary duty does not necessarily require an adviser to recommend the lowest cost investment product or strategy.

Moreover, an adviser would not satisfy its fiduciary duty to provide advice that is in the client’s best interest by simply advising its client to invest in the lowest cost (to the client) or least remunerative (to the investment adviser) investment product or strategy without any further analysis of other factors in the context of the portfolio that the adviser manages for the client and the client’s objective. Rather, the adviser could recommend a higher-cost investment or strategy if the adviser reasonably concludes that there are other factors about the investment or strategy that outweigh cost and make the investment or strategy in the best interest of the client, in light of that client’s objectives. For example, it might be consistent with an adviser’s fiduciary duty to advise a client with a high risk tolerance and significant investment experience to invest in a private equity fund with relatively higher fees and significantly less liquidity as compared with a fund that invests in publicly-traded companies if the private equity fund was in the client’s best

registered investment adviser for recommending offshore private investment funds to clients), *stayed in part*, Investment Advisers Act No. 4563 (Nov. 1, 2016), *response to remand*, Investment Advisers Act Release No. 4871 (Mar. 29, 2018) (reinstating the Sept. 30, 2016 opinion and order, except with respect to the disgorgement and prejudgment interest in light of the Supreme Court’s decision in *Kokesh v. SEC*, 137 S. Ct. 1635 (2017)).

interest because it provided exposure to an asset class that was appropriate in the context of the client's overall portfolio.

An adviser's fiduciary duty applies to all investment advice the investment adviser provides to clients, including advice about investment strategy, engaging a sub-adviser, and account type.⁴² Advice about account type includes advice about whether to open or invest through a certain type of account (*e.g.*, a commission-based brokerage account or a fee-based advisory account) and advice about whether to roll over assets from one account (*e.g.*, a retirement account) into a new or existing account that the adviser or an affiliate of the adviser manages.⁴³ In providing advice about account type, an adviser should consider all types of accounts offered by the adviser and acknowledge to a client when the account types the adviser offers are not in the client's best interest.⁴⁴

⁴² In addition, with respect to prospective clients, investment advisers have antifraud liability under section 206 of the Advisers Act, which, among other things, applies to transactions, practices, or courses of business which operate as a fraud or deceit upon prospective clients, including those regarding investment strategy, engaging a sub-adviser, and account type. We believe that, in order to avoid liability under this antifraud provision, an investment adviser should have sufficient information about the prospective client and its objectives to form a reasonable basis for advice before providing any advice about these matters. At the point in time at which the prospective client becomes a client of the investment adviser (*e.g.*, at account opening), the fiduciary duty applies. Accordingly, while advice to prospective clients about these matters must comply with the antifraud provisions under section 206 of the Advisers Act, the adviser must also satisfy its fiduciary duty with respect to any such advice (*e.g.*, regarding account type) when a prospective client becomes a client.

⁴³ We consider advice about "rollovers" to include advice about account type, in addition to any advice regarding the investments or investment strategy with respect to the assets to be rolled over, as the advice necessarily includes the advice about the account type into which assets are to be rolled over. As noted below, as a general matter, an adviser's duty to monitor extends to all personalized advice it provides to the client, including, for example, in an ongoing relationship, an evaluation of whether a client's account or program type (for example, a wrap account) continues to be in the client's best interest. See *infra* text accompanying footnote 52.

⁴⁴ Accordingly, in providing advice to a client or customer about account type, a financial professional who is dually licensed (*i.e.*, an associated person of a broker-dealer and a supervised person of an investment adviser (regardless of whether the professional works for a dual registrant, affiliated firms, or unaffiliated firms)) should consider all types of accounts offered (*i.e.*, both brokerage accounts and advisory accounts) when determining whether the advice is in the client's best interest. A financial professional who is only a supervised person of an investment adviser (regardless of whether that advisory firm is a dual registrant or affiliated with a broker-dealer) may only recommend an advisory account the adviser offers when the account is in the client's best interest. If a financial professional who is only a supervised person of an

2. Duty to Seek Best Execution

An investment adviser's duty of care includes a duty to seek best execution of a client's transactions where the adviser has the responsibility to select broker-dealers to execute client trades (typically in the case of discretionary accounts).⁴⁵ In meeting this obligation, an adviser must seek to obtain the execution of transactions for each of its clients such that the client's total cost or proceeds in each transaction are the most favorable under the circumstances. An adviser fulfills this duty by seeking to obtain the execution of securities transactions on behalf of a client with the goal of maximizing value for the client under the particular circumstances occurring at the time of the transaction. Maximizing value encompasses more than just minimizing cost. When seeking best execution, an adviser should consider "the full range and quality of a broker's services in placing brokerage including, among other things, the value of research provided as well as execution capability, commission rate, financial responsibility, and responsiveness" to the adviser.⁴⁶ In other words, the "determinative factor" is not the lowest possible commission cost, "but whether the transaction represents the best qualitative execution."⁴⁷ Further, an

investment adviser chooses to advise a client to consider a non-advisory account (or to speak with other personnel at a dual registrant or affiliate about a non-advisory account), that advice should be in the best interest of the client. This same framework applies in the case of a prospective client, but any advice or recommendation given to a prospective client would be subject to the antifraud provisions of the federal securities laws. *See supra* footnote 42 and Reg. BI Adoption, *supra* footnote 3.

⁴⁵ *See* Commission Guidance Regarding Client Commission Practices Under Section 28(e) of the Securities Exchange Act of 1934, Exchange Act Release No. 54165 (July 18, 2006) (stating that investment advisers have "best execution obligations"); Investment Advisers Act Release 3060, *supra* footnote 15 (discussing an adviser's best execution obligations in the context of directed brokerage arrangements and disclosure of soft dollar practices); *see also* Advisers Act rule 206(3)-2(c) (referring to adviser's duty of best execution of client transactions).

⁴⁶ Exchange Act Release 23170, *supra* footnote 33.

⁴⁷ *Id.*

investment adviser should “periodically and systematically” evaluate the execution it is receiving for clients.⁴⁸

3. Duty to Provide Advice and Monitoring over the Course of the Relationship

An investment adviser’s duty of care also encompasses the duty to provide advice and monitoring at a frequency that is in the best interest of the client, taking into account the scope of the agreed relationship.⁴⁹ For example, when the adviser has an ongoing relationship with a client and is compensated with a periodic asset-based fee, the adviser’s duty to provide advice and monitoring will be relatively extensive as is consistent with the nature of the relationship.⁵⁰ Conversely, absent an express agreement regarding the adviser’s monitoring obligation, when the adviser and the client have a relationship of limited duration, such as for the provision of a

⁴⁸ *Id.* The Advisers Act does not prohibit advisers from using an affiliated broker to execute client trades. However, the adviser’s use of such an affiliate involves a conflict of interest that must be fully and fairly disclosed and the client must provide informed consent to the conflict. *See also* Interpretation of Section 206(3) of the Investment Advisers Act of 1940, Investment Advisers Act Release No. 1732 (Jul. 17, 1998) (discussing application of section 206(3) of the Advisers Act to certain principal and agency transactions). Two commenters requested that we prescribe specific obligations related to best execution. Comment Letter of the Healthy Markets Association (Aug. 7, 2018); Comment Letter of ICE Data Services (Aug. 7, 2018). However, prescribing specific requirements of how an adviser might satisfy its best execution obligations is outside of the scope of this Final Interpretation.

⁴⁹ *Cf.* SEC v. Capital Gains, *supra* footnote 2 (describing advisers’ “basic function” as “furnishing to clients on a personal basis competent, unbiased, and continuous advice regarding the sound management of their investments” (quoting Investment Trusts and Investment Companies, Report of the Securities and Exchange Commission, Pursuant to Section 30 of the Public Utility Holding Company Act of 1935, on Investment Counsel, Investment Management, Investment Supervisory, and Investment Advisory Services, H.R. Doc. No. 477, 76th Cong. 2d Sess., 1, at 28)). *Cf.* Barbara Black, *Brokers and Advisers-What’s in a Name?*, 32 Fordham Journal of Corporate and Financial Law XI (2005) (“[W]here the investment adviser’s duties include management of the account, [the adviser] is under an obligation to monitor the performance of the account and to make appropriate changes in the portfolio.”); Arthur B. Laby, *Fiduciary Obligations of Broker-Dealers and Investment Advisers*, 55 Villanova Law Review 701 (2010) (“Laby Villanova Article”) (stating that the scope of an adviser’s activity can be altered by contract and that an adviser’s fiduciary duty would be commensurate with the scope of the relationship) (internal citations omitted).

⁵⁰ However, an adviser and client may scope the frequency of the adviser’s monitoring (*e.g.*, agreement to monitor quarterly or monthly and as appropriate in between based on market events), provided that there is full and fair disclosure and informed consent. We consider the frequency of monitoring, as well as any other material facts relating to the agreed frequency, such as whether there will also be interim monitoring when there are market events relevant to the client’s portfolio, to be a material fact relating to the advisory relationship about which an adviser must make full and fair disclosure and obtain informed consent as required by its fiduciary duty.

one-time financial plan for a one-time fee, the adviser is unlikely to have a duty to monitor. In other words, in the absence of any agreed limitation or expansion, the scope of the duty to monitor will be indicated by the duration and nature of the agreed advisory arrangement.⁵¹ As a general matter, an adviser's duty to monitor extends to all personalized advice it provides to the client, including, for example, in an ongoing relationship, an evaluation of whether a client's account or program type (for example, a wrap account) continues to be in the client's best interest.⁵²

C. Duty of Loyalty

The duty of loyalty requires that an adviser not subordinate its clients' interests to its own.⁵³ In other words, an investment adviser must not place its own interest ahead of its client's interests.⁵⁴ To meet its duty of loyalty, an adviser must make full and fair disclosure to its clients

⁵¹ See also Laby Villanova Article, *supra* footnote 49, at 728 (2010) ("If an adviser has agreed to provide continuous supervisory services, the scope of the adviser's fiduciary duty entails a continuous, ongoing duty to supervise the client's account, regardless of whether any trading occurs. This feature of the adviser's duty, even in a non-discretionary account, contrasts sharply with the duty of a broker administering a non-discretionary account, where no duty to monitor is required.") (internal citations omitted).

⁵² Investment advisers also may consider whether written policies and procedures relating to monitoring would be appropriate under Advisers Act rule 206(4)-7, which requires any investment adviser registered or required to be registered under the Advisers Act to adopt and implement written policies and procedures reasonably designed to prevent violation of the Advisers Act and the rules thereunder by the adviser and its supervised persons.

⁵³ Investment Advisers Act Release 3060, *supra* footnote 15 (adopting amendments to Form ADV and stating that "[u]nder the Advisers Act, an adviser is a fiduciary whose duty is to serve the best interests of its clients, which includes an obligation not to subrogate clients' interests to its own," citing Investment Advisers Act Release 2106, *supra* footnote 15). The duty of loyalty applies not just to advice regarding potential investments, but to all advice the investment adviser provides to an existing client, including advice about investment strategy, engaging a sub-adviser, and account type. See *supra* text accompanying footnotes 42-43.

⁵⁴ For example, an adviser cannot favor its own interests over those of a client, whether by favoring its own accounts or by favoring certain client accounts that pay higher fee rates to the adviser over other client accounts. The Commission has brought numerous enforcement actions against advisers that allocated trades to their own accounts and allocated less favorable or unprofitable trades to their clients' accounts. See, e.g., *SEC v. Strategic Capital Management, LLC and Michael J. Breton*, Litigation Release No. 23867 (June 23, 2017) (partial settlement) (adviser placed trades through a master brokerage account and then allocated profitable trades to adviser's account while placing unprofitable trades into the client accounts in

of all material facts relating to the advisory relationship.⁵⁵ Material facts relating to the advisory relationship include the capacity in which the firm is acting with respect to the advice provided. This will be particularly relevant for firms or individuals that are dually registered as broker-dealers and investment advisers and who serve the same client in both an advisory and a brokerage capacity. Thus, such firms and individuals generally should provide full and fair disclosure about the circumstances in which they intend to act in their brokerage capacity and the circumstances in which they intend to act in their advisory capacity. This disclosure may be accomplished through a variety of means, including, among others, written disclosure at the beginning of a relationship that clearly sets forth when the dual registrant would act in an advisory capacity and how it would provide notification of any changes in capacity.⁵⁶ Similarly, a dual registrant acting in its advisory capacity should disclose any circumstances under which its advice will be limited to a menu of certain products offered through its affiliated broker-dealer or affiliated investment adviser.

violation of fiduciary duty and contrary to disclosures). In the Proposed Interpretation, we stated that the duty of loyalty requires an adviser to “put its client’s interest first.” One commenter suggested that the requirement of an adviser to put its client’s interest “first” is very different from a requirement not to “subordinate” or “subrogate” clients’ interests, and is inconsistent with how the duty of loyalty had been applied in the past. *See* Comment Letter of the Asset Management Group of the Securities Industry and Financial Markets Association (Aug. 7, 2018) (“SIFMA AMG Letter”). Accordingly, we have revised the description of the duty of loyalty in this Final Interpretation to be more consistent with how we have previously described the duty. *See* Investment Advisers Act Release 3060, *supra* footnote 15 (“Under the Advisers Act, an adviser is a fiduciary whose duty is to serve the best interests of its clients, which includes an obligation not to subrogate clients’ interests to its own.”) (citing Investment Advisers Act Release 2106, *supra* footnote 15). In practice, referring to putting a client’s interest first is a plain English formulation commonly used by investment advisers to explain their duty of loyalty in a way that may be more understandable to retail clients.

⁵⁵ *See* SEC v. Capital Gains, *supra* footnote 2 (“Failure to disclose material facts must be deemed fraud or deceit within its intended meaning.”); Investment Advisers Act Release 3060, *supra* footnote 15 (“as a fiduciary, an adviser has an ongoing obligation to inform its clients of any material information that could affect the advisory relationship”); *see also* General Instruction 3 to Part 2 of Form ADV (“Under federal and state law, you are a fiduciary and must make full disclosure to your clients of all material facts relating to the advisory relationship.”).

⁵⁶ *See also* Reg. BI Adoption, *supra* footnote 3, at 99.

In addition, an adviser must eliminate or at least expose through full and fair disclosure all conflicts of interest which might incline an investment adviser—consciously or unconsciously—to render advice which was not disinterested.⁵⁷ We believe that while full and fair disclosure of all material facts relating to the advisory relationship or of conflicts of interest and a client’s informed consent prevent the presence of those material facts or conflicts themselves from violating the adviser’s fiduciary duty, such disclosure and consent do not themselves satisfy the adviser’s duty to act in the client’s best interest.⁵⁸ To illustrate what

⁵⁷ In the Proposed Interpretation, we stated that an adviser must seek to avoid conflicts of interest with its clients. Proposed Interpretation, *supra* footnote 6. Some commenters requested clarity on what it means to “seek to avoid” conflicts of interest. *See, e.g.*, Comment Letter of Schulte Roth & Zabel LLP (Aug. 8, 2018); ABA Letter (stating that this wording could be read to require an adviser to first seek to avoid a conflict, before addressing a conflict through disclosure, rather than being able to provide full and fair disclosure of a conflict, and only seek avoidance if the conflict cannot be addressed through disclosure). The Commission first used this phrasing when adopting amendments to the Form ADV Part 2 instructions. *See* Investment Advisers Act Release 3060, *supra* footnote 15 and General Instruction 3 to Part 2 of Form ADV (“As a fiduciary, you also must seek to avoid conflicts of interest with your clients, and, at a minimum, make full disclosure of all material conflicts of interest between you and your clients that could affect the advisory relationship.”). The release adopting this instruction clarifies the Commission’s intent that it capture the fiduciary duty described in SEC v. Capital Gains and Arleen Hughes. *See* Investment Advisers Act Release 3060, *supra* footnote 15, at n.4 and accompanying text (citing SEC v. Capital Gains, *supra* footnote 2, and Arleen Hughes, *supra* footnote 18, as the basis of this language). Both of these cases emphasized that the adviser, as a fiduciary, should seek to avoid conflicts, but at a minimum must make full and fair disclosure of the conflict and obtain the client’s informed consent. *See* SEC v. Capital Gains, *supra* footnote 2 (“The Advisers Act thus reflects . . . a congressional intent to eliminate, or at least to expose, all conflicts of interest which might incline an investment adviser—consciously or unconsciously—to render advice which was not disinterested.”); Arleen Hughes, *supra* footnote 18 (“Since loyalty to his trust is the first duty which a fiduciary owes to his principal, it is the general rule that a fiduciary must not put himself into a position where his own interests may come in conflict with those of his principal” but if a fiduciary “chooses to assume a role in which she is motivated by conflicting interests, . . . she may do so if, but only if, she obtains her client’s consent after disclosure . . .”). We believe the Commission’s reference to “seek to avoid” conflicts in the Form ADV Part 2 instructions is consistent with the Final Interpretation’s statement that an adviser “must eliminate or at least expose all conflicts of interest which might incline an investment adviser—consciously or unconsciously—to render advice which was not disinterested” as well as the substantively identical statements in SEC v. Capital Gains, *supra* footnote 2, and Arleen Hughes, *supra* footnote 18. While an adviser may satisfy its duty of loyalty by making full and fair disclosure of conflicts of interest and obtaining the client’s informed consent, an adviser is prohibited from overreaching or taking unfair advantage of a client’s trust.

⁵⁸ As noted above, an investment adviser’s obligation to act in the best interest of its client is an overarching principle that encompasses both the duty of care and the duty of loyalty. *See* SEC v. Tambone, *supra* footnote 23 (stating that Advisers Act section 206 “imposes a fiduciary duty on investment advisers to act at all times in the best interest of the fund . . . and includes an obligation to provide ‘full and fair disclosure of all material facts’”) (emphasis added) (citing SEC v. Capital Gains, *supra* footnote 2). We describe

constitutes full and fair disclosure, we are providing the following guidance on (i) the appropriate level of specificity, including the appropriateness of stating that an adviser “may” have a conflict, and (ii) considerations for disclosure regarding conflicts related to the allocation of investment opportunities among eligible clients.

In order for disclosure to be full and fair, it should be sufficiently specific so that a client is able to understand the material fact or conflict of interest and make an informed decision whether to provide consent.⁵⁹ For example, it would be inadequate to disclose that the adviser has “other clients” without describing how the adviser will manage conflicts between clients if and when they arise, or to disclose that the adviser has “conflicts” without further description.

above in this Final Interpretation how the application of an investment adviser’s fiduciary duty to its client will vary with the scope of the advisory relationship. *See supra* section II.A.

⁵⁹ Arleen Hughes, *supra* footnote 18, at 4 and 8 (stating, “[s]ince loyalty to his trust is the first duty which a fiduciary owes to his principal, it is the general rule that a fiduciary must not put himself into a position where his own interests may come in conflict with those of his principal. To prevent any conflict and the possible subordination of this duty to act solely for the benefit of his principal, a fiduciary at common law is forbidden to deal as an adverse party with his principal. An exception is made, however, where the principal gives his informed consent to such dealings,” and adding that, “[r]egistrant has an affirmative obligation to disclose all material facts to her clients in a manner which is clear enough so that a client is fully apprised of the facts and is in a position to give his informed consent.”); *see also Hughes v. Securities and Exchange Commission*, 174 F.2d 969 (1949) (affirming the SEC decision in Arleen Hughes); General Instruction 3 to Part 2 of Form ADV (stating that an adviser’s disclosure obligation “requires that [the adviser] provide the client with sufficiently specific facts so that the client is able to understand the conflicts of interest [the adviser has] and the business practices in which [the adviser] engage[s], and can give informed consent to such conflicts or practices or reject them”); Investment Advisers Act Release 3060, *supra* footnote 15; Restatement (Third) of Agency §8.06 (“Conduct by an agent that would otherwise constitute a breach of duty as stated in §§ 8.01, 8.02, 8.03, 8.04, and 8.05 [referencing the fiduciary duty] does not constitute a breach of duty if the principal consents to the conduct, provided that (a) in obtaining the principal’s consent, the agent (i) acts in good faith, (ii) discloses all material facts that the agent knows, has reason to know, or should know would reasonably affect the principal’s judgment unless the principal has manifested that such facts are already known by the principal or that the principal does not wish to know them, and (iii) otherwise deals fairly with the principal; and (b) the principal’s consent concerns either a specific act or transaction, or acts or transactions of a specified type that could reasonably be expected to occur in the ordinary course of the agency relationship.”). *See infra* footnotes 67-70 and accompanying text for a more detailed discussion of informed consent and how it is generally considered on an objective basis and may be inferred.

Similarly, disclosure that an adviser “may” have a particular conflict, without more, is not adequate when the conflict actually exists.⁶⁰ For example, we would consider the use of “may” inappropriate when the conflict exists with respect to some (but not all) types or classes of clients, advice, or transactions without additional disclosure specifying the types or classes of clients, advice, or transactions with respect to which the conflict exists. In addition, the use of “may” would be inappropriate if it simply precedes a list of all possible or potential conflicts regardless of likelihood and obfuscates actual conflicts to the point that a client cannot provide informed consent. On the other hand, the word “may” could be appropriately used to disclose to a client a potential conflict that does not currently exist but might reasonably present itself in the future.⁶¹

Whether the disclosure is full and fair will depend upon, among other things, the nature of the client, the scope of the services, and the material fact or conflict. Full and fair disclosure for an institutional client (including the specificity, level of detail, and explanation of terminology) can differ, in some cases significantly, from full and fair disclosure for a retail client because institutional clients generally have a greater capacity and more resources than

⁶⁰ We have brought enforcement actions in such cases. *See, e.g.*, In the Matter of The Robare Group, Ltd., et al., Investment Advisers Act Release No. 4566 (Nov. 7, 2016) (Commission Opinion) (finding, among other things, that adviser’s disclosure that it *may* receive a certain type of compensation was inadequate because it did not reveal that the adviser actually had an arrangement pursuant to which it received fees that presented a potential conflict of interest); *aff’d in part and rev’d in part on other grounds Robare v. SEC*, *supra* footnote 20; *In re Grossman*, *supra* footnote 41 (indicating that “the use of the prospective ‘may’ in [the relevant Form ADV disclosures] is misleading because it suggested the mere possibility that [the broker] would make a referral and/or be paid ‘referral fees’ at a later point, when in fact a commission-sharing arrangement was already in place and generating income”). *Cf. Dolphin & Bradbury, Inc. v. SEC*, 512 F.3d 634, 640 (D.C. Cir. 2008) (“The Commission noted the critical distinction between disclosing the risk that a future event *might* occur and disclosing actual knowledge the event *will* occur.”) (emphasis in original). For Form ADV Part 2 purposes, advisers are instructed that when they have a conflict or engage in a practice with respect to some (but not all) types or classes of clients, advice, or transactions, to indicate as such rather than disclosing that they “may” have the conflict or engage in the practice. General Instruction 2 to Part 2 of Form ADV.

⁶¹ We have added this example of a circumstance where “may” could be appropriately used in response to the request of some commenters. *See, e.g.*, Pickard Letter; ICI Letter; Ropes & Gray Letter; IAA Letter.

retail clients to analyze and understand complex conflicts and their ramifications.⁶²

Nevertheless, regardless of the nature of the client, the disclosure must be clear and detailed enough for the client to make an informed decision to consent to the conflict of interest or reject it.

When allocating investment opportunities among eligible clients, an adviser may face conflicts of interest either between its own interests and those of a client or among different clients.⁶³ If so, the adviser must eliminate or at least expose through full and fair disclosure the conflicts associated with its allocation policies, including how the adviser will allocate investment opportunities, such that a client can provide informed consent.⁶⁴ When allocating investment opportunities, an adviser is permitted to consider the nature and objectives of the client and the scope of the relationship.⁶⁵ An adviser need not have *pro rata* allocation policies, or any particular method of allocation, but, as with other conflicts and material facts, the

⁶² Arleen Hughes, *supra* footnote 18 (the “method and extent of disclosure depends upon the particular client involved,” and an unsophisticated client may require “a more extensive explanation than the informed investor”).

⁶³ See Restatement (Third) of Agency, § 8.01 General Fiduciary Principle (2006) (“Unless the principal consents, the general fiduciary principle, as elaborated by the more specific duties of loyalty stated in §§ 8.02 to 8.05, also requires that an agent refrain from using the agent’s position or the principal’s property to benefit the agent or a third party.”).

⁶⁴ The Commission has brought numerous enforcement actions alleging that advisers unfairly allocated client trades to preferred clients without making full and fair disclosure. See Staff of the U.S. Securities and Exchange Commission, *Study on Investment Advisers and Broker-Dealers As Required by Section 913 of the Dodd-Frank Wall Street Reform and Consumer Protection Act* (Jan. 2011), available at <https://www.sec.gov/news/studies/2011/913studyfinal.pdf>, at 23–24 (citing enforcement actions). This Final Interpretation sets forth the Commission’s views regarding what constitutes full and fair disclosure. See, e.g., *supra* text accompanying footnote 59; see also Barry Barbash and Jai Massari, *The Investment Advisers Act of 1940: Regulation by Accretion*, 39 Rutgers Law Journal 627 (2008) (stating that under section 206 of the Advisers Act and traditional notions of fiduciary and agency law, an adviser must not give preferential treatment to some clients or systematically exclude eligible clients from participating in specific opportunities without providing the clients with appropriate disclosure regarding the treatment).

⁶⁵ An adviser and a client may even agree that certain investment opportunities or categories of investment opportunities will not be allocated or offered to a client.

adviser's allocation practices must not prevent it from providing advice that is in the best interest of its clients.⁶⁶

While most commenters agreed that informed consent is a component of the fiduciary duty, a few commenters objected to what they saw as subjectivity in the use of the term “informed” to describe a client's consent to a disclosed conflict.⁶⁷ The fact that disclosure must be full and fair such that a client can provide informed consent does not require advisers to make an affirmative determination that a particular client understood the disclosure and that the client's consent to the conflict of interest was informed. Rather, disclosure should be designed to put a client in a position to be able to understand and provide informed consent to the conflict of interest. A client's informed consent can be either explicit or, depending on the facts and circumstances, implicit.⁶⁸ We believe, however, that it would not be consistent with an adviser's fiduciary duty to infer or accept client consent where the adviser was aware, or reasonably should have been aware, that the client did not understand the nature and import of the conflict.⁶⁹

⁶⁶ In the Proposed Interpretation, we stated that “in allocating investment opportunities among eligible clients, an adviser must treat all clients fairly.” Some commenters interpreted this statement to mean that it would be impermissible for an adviser to allocate a particular investment to one eligible client instead of a second eligible client, even when the second client had received full and fair disclosure and provided informed consent to such an investment being allocated to the first client. *See, e.g.*, Ropes & Gray Letter; SIFMA AMG Letter. We have removed that sentence from this Final Interpretation and replaced it with this discussion that clarifies our views regarding allocation of investment opportunities.

⁶⁷ *See, e.g.*, Comment Letter of LPL Financial LLC (Aug. 7, 2018); Ropes & Gray Letter.

⁶⁸ We do not interpret an adviser's fiduciary duty to require that full and fair disclosure or informed consent be achieved in a written advisory contract or otherwise in writing. For example, an adviser could provide a client full and fair disclosure of all material facts relating to the advisory relationship as well as full and fair disclosure of all conflicts of interest which might incline the adviser, consciously or unconsciously, to render advice that was not disinterested, through a combination of Form ADV and other disclosure and the client could implicitly consent by entering into or continuing the investment advisory relationship with the adviser.

⁶⁹ *See* Arleen Hughes, *supra* footnote 18 (“Registrant cannot satisfy this duty by executing an agreement with her clients which the record shows some clients do not understand and which, in any event, does not contain the essential facts which she must communicate.”). In the Proposed Interpretation, we stated that inferring or accepting client consent to a conflict would not be consistent with the fiduciary duty where “the material facts concerning the conflict could not be fully and fairly disclosed.” Some commenters expressed

In some cases, conflicts may be of a nature and extent that it would be difficult to provide disclosure to clients that adequately conveys the material facts or the nature, magnitude, and potential effect of the conflict sufficient for a client to consent to or reject it.⁷⁰ In other cases, disclosure may not be specific enough for a client to understand whether and how the conflict could affect the advice it receives. For retail clients in particular, it may be difficult to provide disclosure regarding complex or extensive conflicts that is sufficiently specific, but also understandable. In all of these cases where an investment adviser cannot fully and fairly disclose a conflict of interest to a client such that the client can provide informed consent, the adviser should either *eliminate* the conflict or adequately *mitigate* (*i.e.*, modify practices to reduce) the conflict such that full and fair disclosure and informed consent are possible.

Full and fair disclosure of all material facts relating to the advisory relationship, and all conflicts of interest which might incline an investment adviser—consciously or unconsciously—to render advice which was not disinterested, can help clients and prospective clients in evaluating and selecting investment advisers. Accordingly, we require advisers to deliver to their clients a “brochure,” under Part 2A of Form ADV, which sets out minimum disclosure requirements, including disclosure of certain conflicts.⁷¹ Investment advisers are required to

agreement with this statement. *See, e.g.*, CFA Letter (agreeing that “advisers should be precluded from inferring or accepting client consent to a conflict” where the material facts concerning the conflict could not be fully and fairly disclosed). Other commenters expressed doubt that such disclosure could be impossible. *See, e.g.*, Allianz Letter (“[W]e have not encountered a situation in which we could not fully and fairly disclose the material facts, including the nature, extent, magnitude and potential effects of the conflict.”). In response to commenters, we have replaced the general statement about an inability to fully and fairly disclose material facts about the conflict with more specific examples of how advisers can make such full and fair disclosure. *See supra* text accompanying footnotes 59-66.

⁷⁰ As discussed above, institutional clients generally have a greater capacity and more resources than retail clients to analyze and understand complex conflicts and their ramifications. *See supra* text accompanying footnote 62.

⁷¹ Investment Advisers Act Release 3060, *supra* footnote 15; General Instruction 3 to Part 2 of Form ADV (“Under federal and state law, you are a fiduciary and must make full disclosure to your clients of all material facts relating to the advisory relationship. As a fiduciary, you also must seek to avoid conflicts of

deliver the brochure to a prospective client at or before entering into a contract so that the prospective client can use the information contained in the brochure to decide whether or not to enter into the advisory relationship.⁷² In a concurrent release, we are requiring all investment advisers to deliver to retail investors, at or before the time the adviser enters into an investment advisory agreement, a relationship summary, which would include, among other things, a plain English summary of certain of the firm's conflicts of interest, and would encourage retail investors to inquire about those conflicts.⁷³

III. ECONOMIC CONSIDERATIONS

As noted above, this Final Interpretation is intended to reaffirm, and in some cases clarify, certain aspects of an investment adviser's fiduciary duty under the Advisers Act. The Final Interpretation does not itself create any new legal obligations for advisers. Nonetheless, the Commission recognizes that to the extent an adviser's practices are not consistent with the Final Interpretation provided above, the Final Interpretation could have potential economic effects. We discuss these potential effects below.

interest with your clients, and, at a minimum, make full disclosure of all material conflicts of interest between you and your clients that could affect the advisory relationship. This obligation requires that you provide the client with sufficiently specific facts so that the client is able to understand the conflicts of interest you have and the business practices in which you engage, and can give informed consent to such conflicts or practices or reject them.”). *See also* Robare v. SEC, *supra* footnote 20 (“[R]egardless of what Form ADV requires, [investment advisers have] a fiduciary duty to fully and fairly reveal conflicts of interest to their clients.”).

⁷² Investment Advisers Act rule 204-3. *See* Investment Advisers Act Release 3060, *supra* footnote 15 (adopting amendments to Form ADV and stating that, “A client may use this disclosure to select his or her own adviser and evaluate the adviser’s business practices and conflicts on an ongoing basis. As a result, the disclosure clients and prospective clients receive is critical to their ability to make an informed decision about whether to engage an adviser and, having engaged the adviser, to manage that relationship.”). To the extent that the information required for inclusion in the brochure does not satisfy an adviser’s disclosure obligation, the adviser “may have to disclose to clients information not specifically required by Part 2 of Form ADV or in more detail than the brochure items might otherwise require” and this disclosure may be made “in [the] brochure or by some other means.” General Instruction 3 to Part 2 of Form ADV.

⁷³ Form CRS Relationship Summary; Amendments to Form ADV; Required Disclosures in Retail Communications and Restrictions on the use of Certain Names or Titles, Investment Advisers Act Release No. 5247 (June 5, 2019) (“Relationship Summary Adoption”).

A. Background

The Commission's interpretation of the standard of conduct for investment advisers under the Advisers Act set forth in this Final Interpretation would affect investment advisers and their associated persons as well as the clients of those investment advisers, and the market for financial advice more broadly.⁷⁴ As of December 31, 2018, there were 13,299 investment advisers registered with the Commission with over \$84 trillion in assets under management as well as 17,268 investment advisers registered with states with approximately \$334 billion in assets under management and 3,911 investment advisers who submit Form ADV as exempt reporting advisers.⁷⁵ As of December 31, 2018, there are approximately 41 million client accounts advised by SEC-registered investment advisers.⁷⁶

These investment advisers currently incur ongoing costs related to their compliance with their legal and regulatory obligations, including costs related to understanding the standard of conduct. We believe, based on the Commission's experience, that the interpretations set forth in this Final Interpretation are generally consistent with investment advisers' current understanding of their fiduciary duty under the Advisers Act.⁷⁷ However, we recognize that as the scope of the

⁷⁴ See Relationship Summary Proposal, *supra* footnote 5, at section IV.A (discussing the market for financial advice generally).

⁷⁵ Data on investment advisers is based on staff analysis of Form ADV, particularly Item 5.F.(2)(c) of Part 1A for Regulatory Assets under Management. Because this Final Interpretation interprets an adviser's fiduciary duty under section 206 of the Advisers Act, this interpretation would be applicable to both SEC- and state-registered investment advisers, as well as other investment advisers that are exempt from registration or subject to a prohibition on registration under the Advisers Act.

⁷⁶ Item 5.F.(2)(f) of Part 1A of Form ADV.

⁷⁷ See *supra* section II.B.i. For example, some commenters asked that we clarify from the Proposed Interpretation that an adviser and its client can tailor the scope of the relationship to which the fiduciary duty applies, through contract. See, e.g., MMI Letter; Financial Engines Letter; ABA Letter. See *supra* footnotes 67–69 and accompanying text, including clarifications addressing these commenters' concerns. More generally, some commenters requested clarifications from the Proposed Interpretation, and we are issuing this Final Interpretation to address those issues raised by commenters, as discussed in more detail above.

adviser-client relationship varies and in many cases can be broad, there may be certain current circumstances where investment advisers interpret their fiduciary duty to require something less, and other current circumstances where they interpret their fiduciary duty to require something more, than this Final Interpretation. We lack data to identify which investment advisers currently understand their fiduciary duty to require something different from the standard of conduct articulated in this Final Interpretation. Based on our experience over decades of interacting with the investment management industry as its primary regulator, however, we generally believe that it is not a significant portion of the market.

One commenter suggested that the Proposed Interpretation's discussion of how an adviser fulfills its fiduciary duty appeared to be based in the context of having as a client an individual investor, and not a fund.⁷⁸ This commenter indicated its concerns about the ability of a fund manager to infer consent from a client that is a fund, and that issues regarding inferring consent from funds could significantly increase compliance costs for venture capital funds.⁷⁹ Our discussion above in this Final Interpretation includes clarifications to address comments, and expressly acknowledges that while all investment advisers owe each of their clients a fiduciary duty, the specific application of the investment adviser's fiduciary duty must be viewed in the context of the agreed-upon scope of the adviser-client relationship.⁸⁰ This Final Interpretation, as compared to the Proposed Interpretation, includes significantly more examples of the application of the fiduciary duty to institutional clients, and clarifies the Commission's interpretation of what constitutes full and fair disclosure and informed consent, acknowledging a number of comments

⁷⁸ See Comment Letter of National Venture Capital Association (Aug. 7, 2018) ("NVCA Letter").

⁷⁹ *Id.*

⁸⁰ See *supra* section II.A.

on this topic.⁸¹ We believe that these clarifications will help address some of this commenter's concerns with respect to increased compliance costs for venture capital funds, in part by clarifying how the fiduciary duty can apply to institutional clients. We continue to believe, based on our experience with investment advisers to different types of clients, that advisers understand their fiduciary duty to be generally consistent with the standards of this Final Interpretation.

B. Potential Economic Effects

Based on our experience as the long-standing regulator of the investment adviser industry, the Commission's interpretation of the fiduciary duty under section 206 of the Advisers Act described in this Final Interpretation generally reaffirms the current practices of investment advisers. Therefore, we expect there to be no significant economic effects from this Final Interpretation. However, as with other circumstances in which the Commission speaks to the legal obligations of regulated entities, we acknowledge that affected firms, including those whose practices are consistent with the Commission's interpretation, incur costs to evaluate the Commission's interpretation and assess its applicability to them. Further, to the extent certain investment advisers currently understand the practices necessary to comply with their fiduciary duty to be different from those discussed in this Final Interpretation, there could be some economic effects, which we discuss below.

Clients of investment advisers

The typical relationship between an investment adviser and a client is a principal-agent relationship, where the principal (the client) hires an agent (the investment adviser) to perform

⁸¹ In particular, this Final Interpretation expressly notes our belief that a client generally may provide its informed consent implicitly "by entering into or continuing the investment advisory relationship with the adviser" after disclosure of a conflict of interest. *See supra* footnote 68.

some service (investment advisory services) on the principal's behalf.⁸² Because investors and investment advisers are likely to have different preferences and goals, the investment adviser relationship is subject to agency problems, including those resulting from conflicts: that is, investment advisers may take actions that increase their well-being at the expense of investors, thereby imposing agency costs on investors.⁸³ A fiduciary duty, such as the duty investment advisers owe their clients, can mitigate these agency problems and reduce agency costs by deterring investment advisers from taking actions that expose them to legal liability.⁸⁴

To the extent this Final Interpretation causes a change in behavior of those investment advisers, if any, who currently interpret their fiduciary duty to require something different from this Final Interpretation, we expect a potential reduction in agency problems and, consequently, a reduction of agency costs to the client.⁸⁵ For example, an adviser that, as part of its duty of loyalty, fully and fairly discloses⁸⁶ a conflict of interest and receives informed consent from its client with respect to the conflict may reduce agency costs by increasing the client's awareness of the conflict and improving the client's ability to monitor the adviser with respect to this conflict. Alternatively, the client may choose to not consent given the information the adviser

⁸² See, e.g., James A. Brickley, Clifford W. Smith, Jr. & Jerold L. Zimmerman, *Managerial Economics and Organizational Architecture* (2004), at 265 ("An agency relationship consists of an agreement under which one party, the principal, engages another party, the agent, to perform some service on the principal's behalf."); see also Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 *Journal of Financial Economics* 305-360 (1976) ("Jensen and Meckling").

⁸³ See, e.g., Jensen and Meckling, *supra* footnote 82.

⁸⁴ See, e.g., Frank H. Easterbrook & Daniel R. Fischel, *Contract and Fiduciary Duty*, 36 *Journal of Law & Economics* 425-46 (1993).

⁸⁵ To the extent that this Final Interpretation clarifies the fiduciary duty for investment advisers, one commenter suggested it may then clarify what clients expect of their investment advisers. See Cambridge Letter (stating that "greater clarity on all aspects of an investment adviser's fiduciary duty will improve the ability to craft such policies and procedures, as well as support the elimination of confusion for retail clients and investment professionals").

⁸⁶ As discussed above, whether such a disclosure is full and fair will depend upon, among other things, the nature of the client, the scope of the services, and the conflict. See *supra* section II.C.

discloses about a conflict of interest if the perceived risk associated with the conflict is too significant, and instead try to renegotiate the contract with the adviser or look for an alternative adviser or other financial professional. In addition, the obligation to fully and fairly disclose a current conflict may cause the adviser to take other actions, for example eliminating or adequately mitigating (*i.e.*, modifying practices to reduce) that conflict rather than taking the risk that the client will not provide informed consent or will look for an alternative adviser or other financial professional. The extent to which agency costs would be reduced by such a disclosure is difficult to assess given that we are unable to ascertain the total number of investment advisers that currently interpret their fiduciary duty to require something different from the Commission's interpretation,⁸⁷ and consequently we are not able to estimate the agency costs such advisers currently impose on investors. In addition, we believe that there may be potential benefits for clients of those investment advisers, if any, to the extent this Final Interpretation is effective at strengthening investment advisers' understanding of their obligations to their clients. Further, to the extent that this Final Interpretation enhances the understanding of any investment advisers of their duty of care, it may potentially raise the quality of investment advice and also lead to increased compliance with the duty to monitor, for example whether advice about an account or program type remains in the client's best interest, thereby increasing the likelihood that the advice fits with a client's objectives.

In addition, to the extent that this Final Interpretation causes some investment advisers to properly identify circumstances in which conflicts may be of a nature and extent that it would be

⁸⁷ One commenter did not agree that the discussion of fiduciary obligations in the Proposed Interpretation applied to advisers to funds as well as advisers to retail investors. *See* NVCA Letter. As discussed above, this Final Interpretation has clarified the discussion to address this commenter's concerns and acknowledges that the application of the fiduciary duty of an adviser to a retail client would be different from the specific application of the fiduciary duty of an adviser to a registered investment company or private fund.

difficult to provide disclosure to clients that adequately conveys the material facts or nature, magnitude, and potential effect of the conflict sufficient for clients to consent to it or reject it, or in which the disclosure may not be specific enough for clients to understand whether and how the conflict could affect the advice they receive, this Final Interpretation may lead those investment advisers to take additional steps to improve their disclosures or to determine whether adequately mitigating (*i.e.*, modifying practices to reduce) the conflict may be appropriate such that full and fair disclosure and informed consent are possible. This Final Interpretation may also cause some investment advisers to conclude in some circumstances that they cannot fully and fairly disclose a conflict of interest to a client such that the client can provide informed consent. We would expect that these advisers would either eliminate the conflict or adequately mitigate (*i.e.*, modify practices to reduce) the conflict such that full and fair disclosure and informed consent would be possible. Thus, to the extent this Final Interpretation would cause investment advisers to better understand their obligations and therefore to modify their business practices in ways that (i) reduce the likelihood that conflicts and other agency costs will cause an adviser to place its interests ahead of the interests of the client or (ii) help those advisers to provide full and fair disclosure, it would be expected to ameliorate the agency conflict between investment advisers and their clients. In turn, this may improve the quality of advice that the clients receive and therefore produce higher overall returns for clients and increase the efficiency of portfolio allocation. However, as discussed above, we would generally expect these effects to be minimal because we believe that the interpretations we are setting forth in this Final Interpretation are generally consistent with investment advisers' current understanding of their fiduciary duty under the Advisers Act. Finally, this Final Interpretation would also benefit

clients of investment advisers to the extent it assists the Commission in its oversight of investment advisers' compliance with their regulatory obligations.

Investment advisers and the market for investment advice

In general, we expect this Final Interpretation to affirm investment advisers' understanding of the fiduciary duty they owe their clients under the Advisers Act, reduce uncertainty for advisers, and facilitate their compliance. Further, by addressing in one release certain aspects of the fiduciary duty that an investment adviser owes to its clients under the Advisers Act, this Final Interpretation could reduce investment advisers' costs associated with comprehensively assessing their compliance obligations. We acknowledge that, as with other circumstances in which the Commission speaks to the legal obligations of regulated entities, affected firms, including those whose practices are consistent with the Commission's interpretation, incur costs to evaluate the Commission's interpretation and assess its applicability to them. Moreover, as discussed above, there may be certain investment advisers who currently understand their fiduciary duty to require something different from the fiduciary duty described in this Final Interpretation. Those investment advisers would experience an increase in their compliance costs as they change their systems, processes, disclosures, and behavior, and train their supervised persons, to align with this Final Interpretation. However, this increase in costs would be mitigated by potential benefits in efficiency for investment advisers that are able to understand aspects of their fiduciary duty by reference to a single Commission release that reaffirms—and in some cases clarifies—certain aspects of the fiduciary duty.⁸⁸ In addition, and as discussed above, in the case of an investment adviser that believed it owed its clients a lower

⁸⁸ As noted above, *supra* footnote 3, this Final Interpretation is intended to highlight the principles relevant to an adviser's fiduciary duty. It is not, however, intended to be the exclusive resource for understanding these principles.

standard of conduct, there will be client benefits from the ensuing adaptation of a higher standard of conduct and related change in policies and procedures.

Moreover, to the extent any investment advisers that understood their fiduciary duty to require something different from the fiduciary duty described in this Final Interpretation change their behavior to align with this Final Interpretation, there could also be some economic effects on the market for investment advice. For example, any improved compliance may not only reduce agency costs in current investment advisory relationships and increase the value of those relationships to current clients, it may also increase trust in the market for investment advice among all investors, which may result in more investors seeking advice from investment advisers. This may, in turn, benefit investors by improving the efficiency of their portfolio allocation. To the extent it is costly or difficult, at least in the short term, to expand the supply of investment advisory services to meet an increase in demand, any such new demand for investment advisory services could put some upward price pressure on fees. At the same time, however, if any such new demand increases the overall profitability of investment advisory services, then we expect it would encourage entry by new investment advisers—or hiring of new representatives by current investment advisers—such that competition would increase over time. Indeed, the recent growth in the investment adviser segment of the market, both in terms of number of firms and number of representatives,⁸⁹ may suggest that the costs of expanding the supply of investment advisory services are currently relatively low.

Additionally, we acknowledge that to the extent certain investment advisers recognize, as a result of this Final Interpretation, that their fiduciary duty is stricter than the fiduciary duty as they currently interpret it, it could potentially affect competition. Specifically, this Final

⁸⁹ See Relationship Summary Proposal, *supra* footnote 5, at section IV.A.1.d.

Interpretation of certain aspects of the standard of conduct for investment advisers may result in additional compliance costs for investment advisers seeking to meet their fiduciary duty. This increase in compliance costs, in turn, may discourage competition for client segments that generate lower revenues, such as clients with relatively low levels of financial assets, which could reduce the supply of investment advisory services and raise fees for these client segments. However, the investment advisers who already are complying with the understanding of their fiduciary duty reflected in this Final Interpretation, and who may therefore currently have a comparative cost disadvantage, could find it more profitable to compete for the clients of those investment advisers who would face higher compliance costs as a result of this Final Interpretation, which would mitigate negative effects on the supply of investment advisory services. Further, as noted above, there has been a recent growth trend in the supply of investment advisory services, which is likely to mitigate any potential negative supply effects from this Final Interpretation.⁹⁰

One commenter discussed that, in its view, any statement in the Proposed Interpretation that certain circumstances may require the elimination of material conflicts, rather than full and fair disclosure or the mitigation of such conflicts, could lead to an effect on the market and costs to advisers, if such a requirement would cause advisers who had not shared that interpretation to change their business models or product offerings or the ways in which they interact with

⁹⁰ Beyond having an effect on competition in the market for investment adviser services, it is possible that this Final Interpretation could affect competition between investment advisers and other providers of financial advice, such as broker-dealers, banks, and insurance companies. This may be the case if certain investors base their choice between an investment adviser and another provider of financial advice, at least in part, on their perception of the standards of conduct each owes to their customers. To the extent that this Final Interpretation increases investors' trust in investment advisers' overall compliance with their standard of conduct, certain of these investors may become more willing to hire an investment adviser rather than one of their non-investment adviser competitors. As a result, investment advisers as a group may become more competitive compared to that of other types of providers of financial advice. On the other hand, if this Final Interpretation raises costs for investment advisers, they could become less competitive with other financial advice providers.

clients.⁹¹ We disagree that this Final Interpretation includes a requirement to eliminate conflicts of interest. As discussed in more detail above, elimination of a conflict is one method of addressing that conflict; when appropriate advisers may also address the conflict by providing full and fair disclosure such that a client can provide informed consent to the conflict.⁹² Further, we believe that any potential costs or market effects resulting from investment advisers addressing conflicts of interest may be decreased by the flexibility advisers have to meet their federal fiduciary duty in the context of the specific scope of services that they provide to their clients, as discussed in this Final Interpretation.

The commenter also drew particular attention to the question of whether the Commission's discussion of the fiduciary duty in the Proposed Interpretation applied to advisers to institutional clients as well as those to retail clients. The same commenter indicated that failing to accommodate the application of the concepts in the Proposed Interpretation to sophisticated clients could risk changing the marketplace or limiting investment opportunities for sophisticated clients, increasing compliance burdens for advisers to sophisticated clients, or chilling innovation. As explained above, this Final Interpretation, as compared to the Proposed Interpretation, discusses in more detail the ability of investment advisers and different types of clients to shape the scope of the relationship to which the fiduciary duty applies.⁹³ In particular, this Final Interpretation acknowledges that while advisers owe each of their clients a fiduciary duty, the specific obligations of, for example, an adviser providing comprehensive, discretionary advice in an ongoing relationship with a retail client will be significantly different from the

⁹¹ See Dechert Letter.

⁹² See *supra* section II.C.

⁹³ See *supra* footnotes 78-81 and accompanying text.

obligations of an adviser to an institutional client, such as a registered investment company or private fund, where the contract defines the scope of the adviser's services and limitations on its authority with substantial specificity.⁹⁴

Finally, to the extent this Final Interpretation causes some investment advisers to reassess their compliance with their duty of loyalty, it could lead to a reduction in the expected profitability of advice relating to particular investments for which compliance costs would increase following the reassessment.⁹⁵ As a result, the number of investment advisers willing to advise a client to make these investments may be reduced. A decline in the supply of investment adviser advice regarding these types of investments could affect efficiency for investors; it could reduce the efficiency of portfolio allocation for those investors who might otherwise benefit from investment adviser advice regarding these types of investments and are no longer able to receive such advice. At the same time, if providing full and fair disclosure and appropriate monitoring for highly complex products (*e.g.*, those with a complex payout structure, such as those that include variable or contingent payments or payments to multiple parties) results in these products becoming less profitable for investment advisers, investment advisers may be discouraged from supplying advice regarding such products. However, investors may benefit from (1) no longer receiving inadequate disclosure or monitoring for such products, (2) potentially receiving advice regarding other, less complex or expensive products that may be more efficient for the investor, and (3) only receiving recommendations for highly complex or high cost products for which an

⁹⁴ See *supra* section II.A.

⁹⁵ For example, such products could include highly complex, high cost products with risk and return characteristics that are hard for retail investors to fully understand, or where the investment adviser and its representatives receive complicated payments from affiliates that create conflicts of interest that are difficult for retail investors to fully understand.

investment adviser can provide full and fair disclosure regarding its conflicts and appropriate monitoring.

List of Subjects in 17 CFR Part 276

Securities.

Amendments to the Code of Federal Regulations

For the reasons set out above, the Commission is amending Title 17, chapter II of the Code of Federal Regulations as set forth below:

PART 276—INTERPRETATIVE RELEASES RELATING TO THE INVESTMENT ADVISERS ACT OF 1940 AND GENERAL RULES AND REGULATIONS THEREUNDER

1. Part 276 is amended by adding Release No. IA–5428 and the release date of June 5, 2019, to the end of the list of interpretive releases to read as follows”

Subject	Release No.	Date	Fed. Reg. Vol. and Page
* * * * *			
Commission Interpretation Regarding Standard of Conduct for Investment Advisers	IA-5248	June 5, 2019	[Insert FR Volume Number] FR [Insert FR Page Number]

By the Commission.

Dated: June 5, 2019.

Vanessa A. Countryman,

Acting Secretary.

EXHIBIT 9

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

In re:	§	Case No. 18-30264-SGJ-11
	§	Case No. 18-30265-SGJ-11
ACIS CAPITAL MANAGEMENT, L.P. and	§	
ACIS CAPITAL MANAGEMENT GP, LLC,	§	(Jointly Administered Under Case No.
	§	18-30264-SGJ-11)
	§	
Debtors.	§	Chapter 11

**JOINT OBJECTION OF HIGHLAND CAPITAL MANAGEMENT, L.P. AND
HIGHLAND CLO FUNDING, LTD. TO FINAL APPROVAL OF DISCLOSURE
STATEMENT AND TO CONFIRMATION OF THE JOINT PLAN FOR ACIS CAPITAL
MANAGEMENT, L.P. AND ACIS CAPITAL MANAGEMENT GP, LLC**

Highland Capital Management, L.P. (“**Highland**”) and Highland CLO Funding, Ltd. (“**HCLOF**”) hereby file their joint objection (the “**Objection**”) to final approval of the disclosure statement [Doc. No. 442] (as amended, the “**Disclosure Statement**”) and to confirmation of the *First Amended Joint Plan for Acis Capital Management, L.P. and Acis*

Capital Management GP, LLC [Doc. No. 441] (as amended, the “**Plan**”),¹ and respectfully state as follows:²

I. PRELIMINARY STATEMENT

“If at first you don’t succeed, try, try again.” –*William Edward Hickson*

1. In proposing Plans A, B and C, it would appear that the Chapter 11 Trustee has taken this old adage to heart. Although originally penned as a motivator to would-be teachers, in the context of these bankruptcy proceedings, this approach by the Chapter 11 Trustee has proven to be a colossal waste of time and resources at a cost to the estates that eclipses not only the value of the estates’ assets, but the very pre-petition claims the Chapter 11 Trustee is purportedly responsible for paying. The result of this case appears to be nothing more than functionally administratively insolvent estates with mountains of administrative claims continuing to accrue daily.

2. By their literal interpretation, the Chapter 11 Trustee’s Plans, supported by unequivocal admissions in his pleadings, establish that post-petition, he has intentionally breached pre-petition contractual obligations of the Debtors to create a purported \$100 million post-petition claim against the estates for an entity that had no claims against the estates when the Orders for Relief were entered. By his own account, he has rendered the estates administratively insolvent. Having thus admitted to putting the estates into this predicament—which under almost every other measure would be considered a flagrant breach of fiduciary

¹ Defined terms herein shall be as set forth in the Plan unless otherwise provided herein.

² HCLOF has filed no proof of claim in these cases, seeks no monetary relief from the Debtors, and has moved to amend its pending adversary proceeding claim to reflect that it no longer seeks the equitable claims that it sought previously (such claims are moot in any event). Nonetheless, HCLOF objects on the basis that the proposed plans propose either to take its property or alter its contractual and legal rights. HCLOF asserts no creditor standing in any of the objections set forth herein, and makes these objections as a party in interest given the substantial harm the plans propose to impose on it.

II. RELEVANT BACKGROUND

5. On May 4, 2018, the Chapter 7 Trustee filed an *Expedited Motion to Convert Cases to Chapter 11* [Doc. No. 171] (the “**Motion to Convert**”). Also on May 4, 2018, Terry filed an *Emergency Motion for an Order Appointing Trustee for the Chapter 11 Estates of Acis*

Capital Management, L.P. and Acis Capital Management GP, LLC Pursuant to Bankruptcy Code Section 1104(a) [Doc. No. 173] (the “**Motion to Appoint Chapter 11 Trustee**”).

6. On May 11, 2018, after a hearing on the matter, the Court entered orders granting the Motion to Convert [Doc. No. 205] and the Motion to Appoint Chapter 11 Trustee [Doc. No. 206]. Thereafter, the United States Trustee appointed Robin Phelan as Chapter 11 Trustee (the “**Chapter 11 Trustee**”).³

7. On July 5, 2018, the Chapter 11 Trustee filed the initial Plan [Doc. No. 383], which proposed three (3) alternatives – Plans A, B and C. In summary, Plan A of the Chapter 11 Trustee’s Plan proposes to transfer HCLOF’s Equity Notes, along with the portfolio management agreements (the “**PMAs**”) to which Acis LP is a counter-party, to a third party “plan funder,” which is Oaktree. Through this transaction, the Chapter 11 Trustee claims that all creditors will be satisfied in full. Alternatively, the Chapter 11 Trustee has proposed Plans B and C, which are effectively identical in their treatment of creditors and call for Acis LP to retain the PMAs and pay out creditors from future cash flow streams therefrom, as well as potential recoveries from estates’ causes of action. Both Plans B and C require radical modification to of the CLO Indentures, ostensibly to ensure the future income stream to the estates.

8. On July 13, 2018, the Chapter 11 Trustee filed (i) the Disclosure Statement [Doc. No. 405]; (ii) the *First Modification to the Joint Plan for Acis Capital Management, L.P. and Acis Capital Management GP, LLC* [Doc. No. 406]; and (iii) the *Motion for Entry of Order (A) Conditionally Approving Disclosure Statement; (B) Scheduling Combined Hearing on Final Approval of Disclosure Statement and Confirmation of Plan, and Setting Related Deadlines; (C)*

³ Mr. Phelan was initially appointed on May 11, 2018 as the Chapter 11 Trustee of Acis LP and was appointed on May 16, 2018 as the Chapter 11 Trustee of Acis GP.

Approving Forms for Voting and Notice; and (D) Granting Related Relief [Doc. No. 407] (the “**Motion for Conditional Approval**”).

9. On July 24, 2018, Highland and HCLOF filed respective objections to the Motion for Conditional Approval, [Doc. No. 431] and [Doc. No. 432]. On July 28, 2018, Highland filed a supplement to such objection [Doc. No. 440]. In each objection, Highland and HCLOF reserved rights to object to the final approval of the Disclosure Statement.

10. On July 29, 2018, the Chapter 11 Trustee amended the Plan and Disclosure Statement following an expedited hearing on the Motion for Conditional Approval held earlier that day. Thereafter, on July 30, 2018, the Court entered the *Order (I) Conditionally Approving Disclosure Statement, (II) Scheduling Combined Hearing on Final Approval of Disclosure Statement and Confirmation of Plan, and Setting Related Deadlines, (III) Approving Forms for Voting and Notice, and (IV) Approving Related Matters* [Doc. No. 446] (the “**Conditional Approval Order**”), conditionally approving the Disclosure Statement, setting an August 21, 2018 combined hearing for final approval of the Disclosure Statement and confirmation of the Plan, and setting related deadlines, including a compressed and expedited discovery schedule (the “**Discovery Schedule**”).

11. The Conditional Approval Order required the Chapter 11 Trustee to file a “**Limited Issues Brief**” on or before 4:00 p.m. on August 10, 2018, addressing: (a) issues related to section 1142 of the Bankruptcy Code in connection with the proposed transfer of HCLOF’s subordinated notes under the Plan A alternative, and (b) issues related to sections 365 and 1123(a)(5)(F) of the Bankruptcy Code in connection with the proposed modification of the existing Indentures under the proposed Plan B and Plan C (collectively, the “**Limited Issues**”).

Also as per the Conditional Approval Order, the deadline for parties to respond to the Limited Issues Brief is 4:00 p.m. on August 16, 2018.

12. Per the Discovery Schedule, the Chapter 11 Trustee filed the Limited Issues Brief on August 10, 2018 [Doc. No. 493]. Highland and/or HCLOF intend to timely respond to the Limited Issues Brief per the Discovery Schedule. As such, while certain Limited Issues are mentioned herein, Highland and HCLOF reserve all rights on those issues for subsequent objection. Per the Discovery Schedule, this joint objection is to cover matters other than the Limited Issues; provided, however, discovery is actually occurring after the deadline to file this objection. Thus, Highland and HCLOF reserve their rights to supplement these objections.

III. **OBJECTION**

13. In order to confirm the Plan, the Chapter 11 Trustee bears the burden of establishing the various provisions of Bankruptcy Code section 1129 by a preponderance of the evidence. *See In re Couture Hotel Corp.*, 536 B.R. 712, 732 (Bankr. N.D. Tex. 2015). The Plan is deficient on almost every applicable subsection of 1129 and, as a result, the Plan is unconfirmable as a matter of law.

A. The Bankruptcy Court Lacks Subject Matter Jurisdiction to Confirm the Plan

14. The Bankruptcy Court lacks subject matter jurisdiction over this proceeding and, therefore, proceeding with confirmation of any plan will be void *ab initio*. This Court should have dismissed the involuntary petitions that were filed by Joshua Terry in bad faith, and because this Court lacks subject matter jurisdiction over essentially a two-party dispute subject to arbitration. *See* Brief of Appellant Neutra (Case No. 3:18-cv-01056 (N.D. Tex.), [Doc. No. 11].

15. Even assuming this Court has subject matter over this proceeding, the Plans violate the strictures of that jurisdiction in at least two critical and insurmountable ways:

- a. Plan A is premised on the taking of non-estate property without its owners consent; and
- b. Plans B and C are premised on radically altering non-estate executory contracts.

16. The Court's lack of subject matter jurisdiction is so fundamental, that frankly the Court need look no further. The Chapter 11 Trustee has presented the Court with patently unconfirmable Plans. Section 1129(a)(1) and (a)(2) require, respectively, that the plan and the plan proponent, comply with the applicable provisions of the Bankruptcy Code. The Chapter 11 Trustee's Plan A, however, asks this Court to exceed its constitutional and statutory authority to infringe upon the rights of a non-creditor and effect a taking of non-estate property (the "**Equity Notes**") via an equitable subrogation theory that is completely contrary to the law, and convert that non-estate property into "property of the estate," so that he can then sell it to a third party (Oaktree). This Court cannot approve this scheme because it has no jurisdiction to do so. Confirming Plan B or C likewise would require the Court to exceed its authority because both plans are premised on the nonconsensual alteration of non-executory contracts. Worse yet, the amendments will be to the detriment of third parties who are not creditors of these estates and who are not remotely implicated in these proceedings. This Court simply has no such jurisdiction.

17. It is fundamental that bankruptcy courts do not have subject matter jurisdiction over property that does not belong to a debtor's estate. *See TMT Procurement Corp. v. Vantage Drilling Co. (In re TMT Procurement Corp.)*, 764 F.3d 512, 525 (5th Cir. 2014) (bankruptcy court did not have in rem jurisdiction over assets that were not "property of the estate"); *see also Scott v. Bierman*, 429 F. App'x. 225, 231 (4th Cir. 2011) ("[A] bankruptcy court's jurisdiction does not extend to property not part of a debtor's estate."); *see also NovaCare Holdings, Inc. v. Mariner Post-Acute Network, Inc. (In re Mariner Post-Acute Network, Inc.)*, 267 B.R. 46, 59

19. Before the Court can order a transfer of the Equity Notes to Oaktree, it would necessarily have to find that they constitute “property of the estate.” If the Court cannot conclude that the Equity Notes are property of the estate, then it will lack jurisdiction to order their transfer by any means. *See, e.g., In re Murchison*, 54 B.R. 721, 725 (Bankr. N.D. Tex. 1985). (finding that the court was without jurisdiction to approve the sale of property that was not property of the estate: “Because the criterion of § 541(a)(1) has not been satisfied, § 363(b)(1) cannot apply.”).⁴

⁴ Bankruptcy courts have been held to be without jurisdiction to order the sale of non-estate assets, even where the sale was entirely consensual. *See, e.g., First Nat'l Bank v. Community Trust Bank*, No. 05-1610, [2006 WL 724882](#), at *4 (W.D. La. Mar. 21, 2006) (“Since the property was not part of the bankruptcy estate, the Bankruptcy Court had no authority or jurisdiction to order the consensual sale and, therefore, the sale was void”).

21. Neither the Chapter 11 Trustee nor his proposed transferee, Oaktree, dispute that the Equity Notes are the property of HCLOF. *See* July 6, 2018 Hrg. Tr. at 71:19-25; 119:11-18. Nor has the Chapter 11 Trustee obtained an interest in the Equity Notes via any of the Bankruptcy Code sections enumerated in section 541(a)(3). Thus, for the Equity Notes to be “property of the estate,” they would necessarily have to be “property that the estate[s] acquire after the commencement of the case” under section 541(a)(7).⁵

22. Upon first blush, that would seem to require only that the Chapter 11 Trustee prevail upon his equitable subrogation theory, thereby converting the Equity Notes into “property of the estate.” However, even if the Chapter 11 Trustee successfully can obtain ownership of the Equity Notes, such property acquired post-petition is not “property of the estate” under section 541(a)(7).

23. Under controlling Fifth Circuit law, section 541(a)(7) only applies to “property interest that are themselves traceable to ‘property of the estate’ or generated in the normal course of the debtor’s business.” *In re TMT Procurement Corp.*, 764 F.3d at 524-25 (“As we previously recognized in *In re McLain*, ‘Congress enacted § 541(a)(7) to clarify its intention that § 541 be an all-embracing definition and to ensure that property interests created with or by property of the estate are themselves property of the estate’) (citing *In re McLain*, 516 F.3d 301 (5th Cir. 2008)) (emphasis added); *see also In re Cent. Med. Ctr.*, 122 B.R. 568 (Bankr. E.D. Mo. 1990) (“Congress did not intend Section 541 ‘to enlarge a debtor’s rights against others beyond those

⁵ The Chapter 11 Trustee also does not, and cannot, dispute the axiom that the debtor in possession or trustee steps into the shoes of a debtor and possesses no greater rights than that of the debtor. *See Majestic Star Casino, LLC v. Barden Dev., Inc. (In re Majestic Star Casino, LLC)*, 716 F.3d 736, 748 (3d Cir. 2013) (“It is a given that the trustee or debtor-in-possession can assert no greater rights than the debtor himself had on the date the bankruptcy case was commenced.”) (internal alterations omitted)); *In re Gibraltar Res., Inc.*, 197 B.R. 246, 253 (Bankr. N.D. Tex. 1996) (“the general rule is that a trustee has no greater rights than the debtor and stands in the shoes of the debtor”); *In re Brooks*, 60 B.R. 155, 160 (Bankr. N.D. Tex. 1986) (“Of course, a bankruptcy trustee can acquire no greater rights in property than the debtor possessed.”) (citation omitted)). The Debtors had no right to sell the Equity Notes before the commencement of these bankruptcy cases and have no such rights now.

25. The Fifth Circuit, vacating the district court's order, rejected the debtors' argument that the shares were property of the estate under section 541(a)(7). In doing so, the Fifth Circuit made clear that: "[T]he Vantage Shares are not 'property of the estate' under § 541(a)(7) because they were not created with or by property of the estate, they were not acquired in the estate's normal course of business, and they are not traceable to or arise out of any pre-petition interest included in the bankruptcy estate." *Id.* at 525 (rejecting also the argument that the tracing limitation did not apply to corporate debtors in chapter 11 bankruptcies).

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enumerated sections in Section 541(a)(3). Nor are the Equity Notes traceable to any property of the estate. Therefore, the Plan cannot be confirmed. *See In re Cent. Med. Ctr.*, 122 B.R. at 573 (holding that the plan failed to satisfy section 1129(a) “[b]ecause the Plan violates Section 541(a) due to its improper expansion of the estate’s interest” in certain funds in which it only had a reversionary interest at the commencement of the case; the plan “baldly seeks to divest the bondholders of property which is rightfully theirs.”).

B. Sections 1129(a)(1), (3) – The Plan Violates the Bankruptcy Code and Violates Other Applicable Law

27. Bankruptcy Code section 1129(a)(1) requires that a plan comply “with the applicable provisions of this title,” and section 1129(a)(3) states that a plan cannot be proposed “by any means forbidden by law.” As to section 1129(a)(1), the Plan violates well-accepted tenets of bankruptcy law because the Chapter 11 Trustee seeks to (i) take possession of non-estate property and (ii) fundamentally alter non-debtor executory contracts. These are included among the Limited Issues and will be set forth in the response to the Limited Issues Brief.

28. As to section 1129(a)(3), despite the Chapter 11 Trustee’s obfuscations regarding “transfers” and other similar self-serving characterizations, the practical reality is that the Plan A transaction effects a sale of the Equity Notes to Oaktree. The Equity Notes are undoubtedly securities. *See Reves v. Ernst & Young*, 494 U.S. 56, 65 (1990); *Arco Capital Corps. Ltd. v. Deutsche Bank AG*, 949 F. Supp. 2d 532, 542-43 (S.D.N.Y. 2013) (finding sale of CLO notes to be a sale of a security under *Morrison v. Nat’l Australian Bank Ltd.*, 561 U.S. 247 (2010)). Any sale of securities must comport with the requirements of federal securities laws, including the Securities Act of 1933 (the “’33 Act”).⁶

⁶ Moreover, none of the Indentures or other relevant documents permit the Chapter 11 Trustee, on behalf of Acis, or otherwise, to market HCLOF’s Equity Notes for sale. The Chapter 11 Trustee cannot sell the Equity Notes in violation of the terms of the Indentures, and seek at the same time to retain the benefits of the Indentures.

31. The mechanism set forth in the Plan for the transfer of the Equity Notes makes plain that Oaktree is not the initial transferee (or subrogee). Instead, the initial transferee are the bankruptcy estates. As described, the estates will then transfer the notes to Oaktree. Because Oaktree will not be receiving the Equity Notes in exchange for claims or interests that Oaktree has against the Debtors, the section 1145(a) exemption cannot, and does not, apply.

⁷ In any litigation or enforcement action, it would be the Chapter 11 Trustee's burden to show the applicability of an exemption to this requirement. *E.g.*, *SEC v. Carrillo Huettell LLP*, No. 13 Civ. 1735(GBD)(JCF), 2017 WL 213067, at *3 n.7 (S.D.N.Y. Jan. 17, 2017). The Chapter 11 Trustee has not argued that any of these exemptions apply. *See* 15 U.S.C. § 77d (providing exemptions to registration requirements).

Collier on Bankr. ¶ 1145.02 (16th ed. 2018). This exemption requires that (1) the debtor own the security on the date the bankruptcy petition was filed; (2) any exempt securities are not securities of the debtor’s affiliates; (3) the issuer of the securities is in full compliance with registration and disclosure laws; and (4) the volume of the securities sold be limited to less than 4% of shares outstanding. 11 U.S.C. § 1145(a)(3).

33. The Chapter 11 Trustee’s Plan A transaction clearly does not qualify for this exemption. First, neither the Chapter 11 Trustee nor the Debtors owned the Equity Notes on the date the bankruptcy petition was filed, nor do they own them now. Second, the proposed sale would be far in excess of the 4% threshold permitted by the exemption. Because the section 1145 exemptions do not apply, the Chapter 11 Trustee will be in violation of the ’33 Act.

34. In addition to violating the ’33 Act, the Plan violates the Investment Advisors Act of 1940 (the “IAA”). It is clear that the Chapter 11 Trustee owes fiduciary duties to HCLOF and its investors. In agreeing to manage the CLO investments, Acis LP represented to the CLOs that it is “registered as an investment adviser” under the IAA and agreed to perform its portfolio management services consistent with the IAA. *See, e.g.*, 2013-1 PMA § 17(b)(i). The IAA imposes a fiduciary duty on Acis LP to act for the benefit of the CLO and its investors, including Equity Noteholders like HCLOF. *See Transamerica Mortg. Advisors v. Lewis*, 444 U.S. 11, 36 (1979) (“Congress intended to impose enforceable fiduciary obligations” in passing the Act); 15 U.S.C. § 80b-6.⁸ The scope of Acis LP’s (and thus the Chapter 11 Trustee’s) fiduciary duties is broad. The Chapter 11 Trustee’s obligations include a duty to refrain from conduct that directly harms the CLOs, as well as the more general duty of undivided loyalty. *See Bullmore v. Banc of*

⁸ Acis LP also owes fiduciary duties as an investment advisor under New York’s common law. *See Bullmore v. Ernst & Young Cayman Islands*, 846 N.Y.S.2d 145, 148 (N.Y. App. Div. 2007) (“Professionals such as investment advisors, who owe fiduciary duties to their clients, ‘may be subject to tort liability for failure to exercise reasonable care, irrespective of their contractual duties . . .’) (citations omitted).

Am. Sec. LLC, 485 F. Supp. 2d 464, 471 (S.D.N.Y. 2007) (applying New York law). Each of the plans proposed by the Chapter 11 Trustee rest upon a flagrant violation of Acis LP's fiduciary duties: Plan A proposes to sell HCLOF's property without its consent and Plan B and Plan C propose to impermissibly modify the Indentures to strip HCLOF and the other noteholders of their right to call a redemption. These issues will be more thoroughly addressed in HCLOF and Highland's response to the Chapter 11 Trustee's Limited Issues Brief.

35. Moreover, the Chapter 11 Trustee cannot disclaim the duties he owes to the CLOs and the investors under the contracts and securities laws, including the IAA. In one analogous case, *In re New Center Hospital*, 200 B.R. 592 (E.D. Mich. 1996), the chapter 11 trustee sought to escape the duties of the debtor-hospital as the administrator of an employee benefit plan governed by ERISA. The chapter 11 trustee argued that if he were to administer the plan, he would be required to act solely in the interest of the ERISA plan beneficiaries which would be in conflict with his duties to the bankruptcy estates; therefore, he could not serve as an ERISA fiduciary and a bankruptcy estate fiduciary at the same time. *Id.* The district court rejected this argument and overturned the decision of the bankruptcy court, concluding that, "[t]he Bankruptcy Trustee assumes the position of the debtor as to that debtor's many obligations. Courts have held that statutory obligations that bind the debtor will subsequently bind the bankruptcy estate." *Id.* (internal citations omitted). Likewise, the Chapter 11 Trustee is bound to perform the obligations and duties of Acis LP under relevant contract and applicable law, including the IAA. Because the Chapter 11 Trustee has put forth a Plan that violates such duties, he cannot meet the section 1129(a)(3) standard that the Plan is not "forbidden by law."

C. Section 1129(a)(3) – The Plan Was Not Proposed in Good Faith

36. Bankruptcy Code section 1129(a)(3) further provides that a plan must be proposed in good faith. The Chapter 11 Trustee, as proponent of the Plan, bears the burden of

demonstrating that it was filed in good faith. *In re Barnes*, 309 B.R. 888, 892 (Bankr. N.D. Tex. 2003). A good faith plan “must fairly achieve a result consistent with the [Bankruptcy] Code.” *Id.* (quoting *In re Block Shim Dev. Co. – Irving*, 939 F.2d 289, 292 (5th Cir. 1991)). Good faith itself is “evaluated in light of the totality of the circumstances surrounding establishment of [the] plan, mindful of the purposes underlying the Bankruptcy Code.” *In re Village at Camp Bowie I, L.P.*, 710 F.3d 239, 247 (5th Cir. 2013). The ultimate goal of the analysis is to determine the “subjective motive” of a plan proponent. *In re Texas Star Refreshments, LLC*, 494 B.R. 684, 694 (Bankr. N.D. Tex. 2013).

37. The record demonstrates there was virtually no negotiation of the economic terms of the Oaktree proposal, and in particular there was no effort by the Chapter 11 Trustee to secure the highest possible price for the Equity Notes.⁹ The purported consideration for the PMAs was clearly based not on any actual metric of value for those contract rights, but on an amount necessary to pay Josh Terry’s claim. Certainly as to the Equity Notes, this was not a negotiation between a willing seller and a willing buyer – the seller was not even present. It is instead a scheme, concocted in bad faith, to take property from one party and provide a windfall to other parties.

38. Moreover, improper motives have tainted these bankruptcy cases from the beginning. Joshua Terry initiated these proceedings on the eve of a state court hearing to consider the very relief he then requested from this Court. From the very beginning, Terry has made clear his motivation for initiating the involuntary bankruptcy: to prevent Acis LP from

⁹ The Chapter 11 Trustee has testified that he engaged in no substantive negotiation concerning the sale price of the Equity Notes. *See* Transcript of July 6, 2018 hearing at 75:14-16; 76:6-8:

MR. MALONEY. Was there any negotiation over the price formula that they were proposing for the subordinated notes?

MR. PHELAN. No . . .

. . .

Q. Now you didn’t ask that they increase that at all?

A. No.

meeting its contractual obligation to effectuate the reset requested by the equity—so that the Debtors could continue to earn management fees they are not entitled to.¹⁰

39. The Chapter 11 Trustee has adopted Terry’s cause.

40. At the end of the day, these bankruptcy cases and the Plan amount to nothing but a free option play by Terry, the Chapter 11 Trustee, and Oaktree to monetize PMAs with less than nominal value, at the expense of Highland (who is effectively funding the administrative expenses of these cases on account of the substantial management fees being withheld from it) and HCLOF (who is being denied its contractual rights with non-debtor parties and stripped of its own property against its will to fund that payment). The Chapter 11 Trustee has nothing to lose from this strategy – he can turn an asset with little or no value into a big pay day for Terry and himself. Oaktree similarly has nothing to lose – if it doesn’t end up getting the Equity Notes, it walks away with all its expenses paid and a \$2.5 million break-up fee for its time.

41. In these circumstances, the Court should not make a good faith finding.

D. Section 1129(a)(5) – The Plan Does Not Properly Disclose or Address Insider Issues

42. Bankruptcy Code section 1129(a)(5)(A)(i) requires a plan proponent to disclose “The identity and affiliations of any individual proposed to serve, after confirmation of the plan, as a director, officer, or voting trustee of the debtor, an affiliate of the debtor participating in a joint plan with the debtor, or a successor to the debtor under the plan.” Under both Plan B and Plan C, Terry is slated to receive 100% of the equity in the Reorganized Debtor (as well as, inexplicably, any residual assets of the Acis Trust upon payment in full of all creditors). Terry therefore clearly comes within the definition of individuals described in section 1129(a)(5)(A)(i).

¹⁰ Among the things acknowledged by Terry at the involuntary trial in March 2018 was the fact that he “had no issues with the rest or refinance transaction. [Rather,] the issue was that these collateral-management agreements were transferred for no consideration to Acis.” March 21, 2018 Hrg. Tr. At 132:16-19. Note, however, that fees would not continue to be payable under the PMAs following a reset in any circumstance. *See also Id.* at 27:22-28:1: “Q: And you knew there was an extreme likelihood that the [reset] transaction was not going forward as a result of the bankruptcy filing, correct? MR. TERRY: Yes, that was our goal on filing the involuntary petitions.”

While Terry's identity is disclosed in Plans B and C, his affiliations are not. Specifically, the Chapter 11 Trustee makes no effort to describe Terry's relationship and affiliations with other parties in interest in this case including (without limitation) Oaktree, Brigade Capital Management, L.P., and Cortland Capital Markets Services LLC. Furthermore, the Chapter 11 Trustee does not disclose or otherwise describe the post-petition affiliation between Terry and the Chapter 11 Trustee himself. Discovery in this matter has revealed, and evidence at the confirmation hearing will further demonstrate, that Terry has essentially acted as the co-trustee in this case. This includes: taking it upon himself to market the Debtors' assets, introducing the Chapter 11 Trustee to Oaktree, participating in most substantive communications with Oaktree, and participating in the formulation of a Plan that (under Plans B and C) hands control of the Debtors over to him. On this record, it is clear that Terry's affiliations have not been disclosed, in violation of section 1129(a)(5)(A)(i).

43. While Terry's undisclosed affiliations is a significant issue in and of itself, the relationship between Terry and the Chapter 11 Trustee raises yet another, troubling issue. The facts of this case lead inexorably to the conclusion that Terry is an insider of the Plan proponent (i.e., the Chapter 11 Trustee). The term "insider" is defined in Bankruptcy Code section 101(31) to "include" parties who have certain officer, director, or ownership interests in a debtor. However, the concept of a non-statutory insider has been recognized by many courts, including the Supreme Court. *See U.S. Bank N.A. v. Village at Lakeside, LLC*, 138 S. Ct. 960 (2018). The Fifth Circuit has identified the following factors to consider when determining whether a party is non-statutory insider: (1) the closeness of the relationship between the party and the debtor; and (2) whether the transactions between the party and the debtor were conducted at arms-length. *Browning Interests v. Allison (In re Holloway)*, 955 F.2d 1008, 1011 (5th Cir. 1992).

Importantly, cases recognize that control over the debtor is not a requirement for determining non-statutory insider status. *See, e.g., In re The Village at Lakeridge, LLC*, 814 F.3d 993, 1001 (9th Cir. 2016); *Anstine v. Carl Zeiss Meditec AG (In re U.S. Med., Inc.)*, 531 F.3d 1272, 1277 n.5 (10th Cir. 2008).

44. The ultimate point of analyzing whether any party is an insider is to determine whether such party is using “their privileged position to disadvantage non-insider creditors.” *See In re South Beach Secs., Inc.*, 376 B.R. 881, 888 (Bankr. N.D. Ill. 2007). Insider status is also critical for determining whether a party’s desire to obtain, or maintain, control over a debtor is motivating the party. *See In re Rexford Props., LLC*, 557 B.R. 788, 799 (Bankr. C.D. Cal. 2016) (noting that insiders seeking to retain ownership of the reorganized debtor were “influenced by totally different considerations from those motivating the other creditors.”) (quoting *In re Featherworks Corp.*, 25 B.R. 634, 640 (1st Cir. BAP 1982)).

45. In this case, the Chapter 11 Trustee is the proponent of the Plan. Plan proponent insiders should be scrutinized because they, like a debtor insider, may be using a plan process to benefit their “privileged position.” For example, in *In re Allegheny Int’l, Inc.*, 118 B.R. 282 (Bankr. W.D. Pa. 1982), the court found that a non-debtor plan proponent (Japonica Partners, L.P.) was considered an insider because Japonica during the case had access to “voluminous and thorough” information available only to insiders. Moreover, the court noted that while Japonica “did not have actual control or legal decision making power [over the debtor] . . . [Japonica] attempted to influence, in not very subtle ways, decisions made by the debtor.” *Id.* at 298.

46. Terry’s actions fit perfectly into such a non-statutory insider analysis. A review of the Plan makes plain Terry’s favorable treatment. His claim is separately classified, the claim is treated the same as an entirely secured claim would be, despite the fact that Terry did not even

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E. Sections 1129(a)(7) and 1129(b) – The Plan Is Not In the Best Interest of Creditors and Is Not Fair And Equitable

48. Bankruptcy Code sections 1129(a)(7) and 1129(b) require that a plan be in the best interest of creditors and otherwise fair and equitable. First and foremost, Plans A, B, and C are premised on actions that are not supported by the law. How could it ever be in the best interest of creditors for a plan proponent to act outside the law? The Plan is a legal fallacy and, even if confirmed, will be the subject of years of litigation and ever-increasing administrative expense claims. That is not in the creditors' best interests.

49. Also, included in a best interest of creditors analysis is a determination that creditors who have not accepted the plan will receive no less under the Plan than they would in a hypothetical Chapter 7 liquidation. *In re Briscoe Enters., Ltd. II*, 994 F.2d 1160, 1167 (5th Cir. 1993). This requires a valuation analysis comparing what the creditor would receive if the property were sold today versus the value such creditor would receive as a creditor in a Chapter 7 case. *Id.*

50. The Chapter 11 Trustee cannot meet his burden on this valuation issue with respect to HCLOF.¹¹ It is undisputable that HCLOF was not a creditor as of the Petition Date. That is, the basis for the Chapter 11 Trustee asserting that HCLOF is a creditor is the equitable relief sought in an adversary proceeding brought by HCLOF against the Chapter 11 Trustee after the Petition Date. In a hypothetical Chapter 7 case, there would simply be an orderly liquidation and therefore no need to twist the law of equitable relief and subrogation to support a plan process and HCLOF would keep its subordinated notes. As such, any liquidation analysis by the Chapter 11 Trustee is a non-sequitur from the beginning because it would be based on the facially incorrect assumption that HCLOF was a creditor on the Petition Date. Moreover, even if

¹¹ As noted, HCLOF asserts no creditor standing.

that flaw is simply ignored (and there is no reason to do so), the valuation numbers do not add up. The Plan proposes to pay HCLOF amounts based entirely on a May 2018 letter sent by Highland. Evidence has shown in this case that circumstances have changed dramatically since May 2018, and further, that HCLOF values its Equity Notes much higher than what is being proposed under the Plan. The Chapter 11 Trustee bears the burden of rebutting that valuation evidence and, based on the record of this case, he will not be able to meet such burden. In fact, the Chapter 11 Trustee has not even substantively included HCLOF in its analysis purporting to satisfy section 1129(a)(7)¹² and he has advanced no expert witness to address the valuation issues necessary to do so at the confirmation hearing. Therefore, the Chapter 11 Trustee cannot satisfy the required test under section 1129(a)(7).

F. Sections 1129(a)(8), (10) and 1129(b) – The Plan Does Not Meet the Requirements for Cram Down

51. Bankruptcy Code sections 1129(a)(8) requires that each impaired class vote in favor of a plan. Bankruptcy Code section 1129(a)(10) permits a plan proponent to cram down a plan on non-voting classes, as long as one class of impaired creditors votes in favor of the plan. Insider votes are not counted for the purposes of consent under 1129(a)(10). Section 1129(b), in turn, requires in a cram down plan that the plan not unfairly discriminate and is fair and equitable to the non-voting creditors. Based on the record of this case, it is assumed that Class 3 (the Terry Secured Claim) will be the only class with the claim amount and numerosity to be deemed (according to the Chapter 11 Trustee) a consenting class. Therefore, in order to meet the cram down confirmation requirements, the Chapter 11 Trustee has the burden of showing that: (i) Terry is impaired; (ii) Terry is not an insider; and (iii) cramming the Plan down solely on

¹² The Chapter 11 Trustee's liquidation analysis is attached as Exhibit 2-D to the Disclosure Statement. The amount of the Class 2 HCLOF claim is listed as "TBD." *Id.*

engage in all manner of mischief in order to craft around the requirement that substantially similar claims be classified together.¹³

H. Section 1129(a)(11) – The Plan is Not Feasible

58. Bankruptcy Code section 1129(a)(11) has been interpreted to require a finding that a plan is economically feasible. This requires the Chapter 11 Trustee to demonstrate that the plan has a “reasonable assurance of commercial viability.” *In re Briscoe Enters., Ltd. II*, 994 F.2d at 1166. Moreover, the Chapter 11 Trustee must “present proof through reasonable projections that there will be sufficient cash flow to fund the [Plan].” *See In re Couture Hotel Corp.*, 536 B.R. 712, 737 (Bankr. N.D. Tex. 2015).

59. On the record before the Court, the Chapter 11 Trustee has failed to demonstrate sufficient funds to meet all the obligations set forth in the Plan. That includes the very substantial administrative expense burden that appears to have surpassed the total claims alleged by the Chapter 11 Trustee to be payable in this case.

I. The Plan Cannot Effect an Assumption and Assignment of the PMAs Without Consent.

60. The Plan A transaction cannot be confirmed because it proposes to assume and assign the PMAs to Oaktree (*see* Plan § 2.17(c)) in violation of section 365(c)(1) of the Bankruptcy Code and without the requisite consent. *See* 11 U.S.C. § 365(c)(1) (trustee “may not

¹³ HCLOF and Highland object to the Chapter 11 Trustee’s apparent attempt to litigate the fraudulent transfer claims currently pending in the adversary proceeding as part of the plan confirmation process. As set forth in their separately-filed joint motion to strike the expert report of Kevin Haggard of Miller Buckfire, any such attempts are procedurally improper and inconsistent with the parties’ understanding and agreed-upon schedule. Highland and HCLOF have a right under the Bankruptcy Code and applicable rules to litigate the fraudulent transfer claims in a proceeding subject to the heightened procedural protections available in an adversary proceeding—not in the context of a harried and accelerated confirmation process (a process of the Trustee’s own making). *See In re Mansaray-Ruffin*, 530 F.3d 230, 242 (3d Cir. 2008) (“[W]here the Rules require an adversary proceeding—which entails a fundamentally different, and heightened, level of procedural protections—to resolve a particular issue, a creditor has the due process right not to have that issue without one.”). The Court should not condone this type of “litigation by ambush.” *See In re Vidal*, No. 12-11758 BLS, 2013 WL 441605, at *5 (Bankr. D. Del. Feb. 5, 2013) (applying *Mansaray-Ruffin* to avoid “lien-stripping by ambush”).

assume or assign any executory contract . . . if applicable law excuses a party, other than the debtor, to such contract . . . from accepting performance from or rendering performance to an entity other than the debtor . . . and such party does not consent to such assumption or assignment”); *In re Cedar Chem. Corp.*, 294 B.R. 224, 232 (Bankr. S.D.N.Y. 2003) (“a contract otherwise unassignable under § 365(c)(1) can be assumed and assigned if the non-debtor party consents”). The IAA and New York state law provide the relevant “applicable law” prohibiting assignment and excusing HCLOF from accepting performance from anyone other than Acis and/or Highland.

61. The IAA prohibits the assumption and assignment of the PMAs to Oaktree without, among other things, the Equity Noteholders’ consent. Section 205(a)(2) of the IAA prohibits investment advisers (i.e., Acis LP) from entering into an investment advisory contract with a client (here, the CLOs) that “fails to provide, in substance, that no assignment of such contract shall be made by the investment adviser without the consent of the other party by the contract.” 15 U.S.C. § 80b-5(a)(2). Section 202(a)(1) of the IAA defines “assignment” generally to include “any direct or indirect transfer . . . of an investment advisory contract” by an adviser. 15 U.S.C. § 80b-2(a)(1) (emphasis added).

62. Section 14 of the PMAs (titled “Delegations/Assignments”) provides the provisions intended to satisfy section 205(a)(2) of the IAA. Those sections, in relevant part, prohibit Acis from assigning its responsibilities under the PMAs without the written consent of each relevant CLO, at least a majority of the Equity Notes of each CLO, at least a majority of the Controlling Class (as defined in the indentures), and satisfaction of the Global Rating Agency Condition. *See, e.g.*, 2013-1 PMA, § 14(a). Acis cannot transfer, either directly or indirectly, its responsibilities under the PMAs without first satisfying the requisite conditions, including

It is well settled that when an executory contract is of such a nature as to be based upon personal services or skills, or upon personal trust or confidence, the debtor-in-possession or trustee is unable to assume or assign the rights of the bankrupt in such contract. . . . It is patently unfair in such cases to require a non-debtor third party to accept performance from anyone other than the original contract vendee,

unless the contract clearly provides for the right to assign to another contract vendee.

In re Grove Rich Realty Corp., 200 B.R. 502, 510 (Bankr. E.D.N.Y. 1996); *see also Donald Rubin, Inc. v. Schwartz*, 559 N.Y.S. 2d 307, 310 (N.Y. App. Div. 1990) (describing a consulting agreement as being “in the nature of a personal services contract”); *Carbo Indus., Inc. v. Coastal Ref & Mktg., Inc.*, 154 F. App’x 218, 220 (2d Cir. 2005) (“this case does not fall within the limited exception developed for ‘personal services contracts’—*e.g.*, consulting contracts.”) (citing *Donald Rubin*, 559 N.Y.S. 2d at 310) (emphasis added).

67. As has been previously explained, HCLOF and its investors invested in reliance on the skill and expertise of Highland to manage the CLOs. In this case, a witness put on by the Chapter 11 Trustee – Zach Alpern of Stifel, Niocolas – testified to the fact investors pick sub-advisors based on the fact that different advisors “have different styles and make different creditor choices.”¹⁴ Mr. Alpern further testified that “equity holders make an informed decision when they make their investment and their opinion of the advisor is one of the considerations that they may make at the time of their investment, and it’s a consideration that they probably take into account whether they hold or sell that investment.”¹⁵

68. Replacing Acis/Highland with Oaktree/Brigade frustrates the investment objective of the parties, denies them the benefit of their bargain, and undermines and violates the IAA as well as black-letter New York law relating to personal service contracts. The assumption and assignment of the PMAs cannot be approved.

¹⁴ See Transcript of August 1, 2018 hearing on the Chapter 11 Trustee’s *Emergency Motion to Approve Replacement Sub-Advisory and Shared Services Providers, Brigade Capital Management, LP and Cortland Capital Markets Services LLC*, at 67:24-25.

¹⁵ *Id.* at 69:9-14.

CERTIFICATE OF SERVICE

This is to certify that on August 13, 2018, a true and correct copy of the foregoing was served electronically via the Court's ECF system on those parties registered to receive such service.

/s/ Melina Bales

Melina Bales

EXHIBIT 10

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**PLAINTIFFS' RESPONSE TO DEFENDANT HIGHLAND CAPITAL
MANAGEMENT, L.P.'S MOTION FOR AN ORDER TO ENFORCE
THE ORDER OF REFERENCE AND CROSS MOTION**

I.

PRELIMINARY STATEMENT

Plaintiffs The Charitable DAF Fund, L.P. and CLO Holdco Ltd. oppose Defendant Highland Capital Management, L.P.'s Motion for an Order to Enforce the Order of Reference.

This action primarily involves fiduciary duties imposed upon Registered Investment Advisers by the Investment Advisers Act of 1940 ("Advisers Act") and corresponding state law claims for breach of those duties. It also involves causes of action under the civil RICO statute, for which breaches of Advisers Act fiduciary duties serve as the predicate act. As a result, presiding over this action will require extensive consideration of federal laws regulating interstate commerce, which renders withdrawal of the reference to bankruptcy court mandatory under **28 U.S.C. § 157(d)** ("The district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.").

No authority requires this Court to refer this action to the bankruptcy court, only to have it return on a motion for withdrawal of the reference. The opposite is true. *In re Harrah's Entm't*, No. 95-3925, **1996 U.S. Dist. LEXIS 18097**, at *11 (E.D. La. 1996) (Clement, J.) ("Although 'related to' bankruptcy jurisdiction exists over the non-debtor plaintiffs' non-bankruptcy federal securities claims against non-debtor defendants, placing that bankruptcy jurisdiction in the bankruptcy court is inappropriate because plaintiffs would be entitled to a mandatory withdrawal

of the reference. Rather than *waste judicial resources* on a meaningless referral to bankruptcy court, the Court will retain jurisdiction over this suit.” (emphasis added)). Defendant’s arguments to the contrary are unsupported by law.

Defendant’s attempts to smear Plaintiffs with 12 pages of irrelevant facts and a 926-page appendix provide no additional support for the Motion. This action involves matters well outside the experience of bankruptcy courts and requires adjudication in an Article III court.

Because the reasons for denying Defendant’s Motion are also reasons that this Court should withdraw the reference under **28 U.S.C. § 157(d)**, and because deciding the same issue twice would be inefficient and unnecessary, Plaintiffs cross-move for withdrawal of the reference.

II.

BACKGROUND

Defendant’s factual assertions include considerable bluster and vitriol, unsupported by the lengthy materials in its appendix. Importantly, the opening sentence under the heading “Factual Background” is unsupported and false. Memorandum of Law [Doc. 23] ¶ 7. Plaintiffs are not controlled or directed by James Dondero; Plaintiffs are both controlled and directed by Mark Patrick. APP_16-17, 22; *see also* APP_10-14; *see generally* APP_1-22. And Patrick’s testimony to this extent went unchallenged in a hearing before the bankruptcy court earlier this month. *Id.*

Of equal importance is Defendant’s assertion that all aspects of the Harbourvest settlement, including the valuation of the assets involved, were fully disclosed. Memorandum of Law [Doc. 23] ¶ 12. This statement is unsupported by the appendix cite accompanying it, which at most constitutes a self-serving denial. And it is a hotly contested issue between the parties. The impetus to this action, in fact, was Plaintiffs having learned that the value of the assets transferred in the Harbourvest settlement was *not* as represented. Original Complaint (“Complaint” [Doc. 1]), ¶¶ 36-

48. Plaintiffs disagree with much of the remainder of what Defendant presents as “fact” in its Memorandum of Law. But Plaintiffs respectfully submit that none of it is relevant to resolution of the present Motion. And so, for brevity’s sake, Plaintiffs have not elected to engage in a blow-by-blow effort to litigate those issues.

Instead, Plaintiffs’ brief will focus on the nature of their causes of action as that pertains to which court—district or bankruptcy—should preside over them.

III.

ARGUMENT & AUTHORITY

Plaintiffs respectfully submit that Defendant’s Motion should be denied and Plaintiffs’ cross-motion granted for the reasons provided below:

A. The Motion Should Be Denied Because Withdrawal of the Reference Is Mandatory

Because the Complaint relies extensively on and largely is predicated on the Investment Advisers Act of 1940, withdrawal of the reference to the bankruptcy court is mandatory here under **28 U.S.C. § 157(d)**. That statute requires withdrawal of the reference when a proceeding “requires consideration” of non-bankruptcy federal laws regulating interstate commerce:

The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown. The district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.

28 U.S.C. § 157(d); *cf. TMT Procurement Corp. v. Vantage Drilling Co. (In re TMT Procurement Corp.)*, **764 F.3d 512, 523** & n.40 (5th Cir. 2014) (noting bankruptcy court’s “more limited jurisdiction” as a result of its “limited power” under **28 U.S.C. § 157**); *LightSquared Inc. v. Deere & Co.*, **2014 U.S. Dist. LEXIS 14752** (S.D.N.Y. 2014) (quoting *Investor Prot. Corp. v. Bernard*

L. Madoff Inv. Sec. LLC, 454 B.R. 307, 312 (S.D.N.Y. 2011), for the proposition that, “[i]n determining whether withdrawal is mandatory, the Court ‘need not evaluate the merits of the parties’ claims; rather, it is sufficient for the Court to determine that the proceeding will involve consideration of federal non-bankruptcy law’”; *In re Cont’l Airlines Corp.*, 50 B.R. 342, 360 (S.D. Tex. 1985), *aff’d*, 790 F.2d 5th Cir. 1986) (“While that second clause [of § 157(d)] might not apply when some ‘other law’ *only tangentially affects the proceeding*, it surely does apply when federal labor legislation *will likely be material* to the proceeding’s resolution.”) (emphasis added).

Plainly here, the claims in the Complaint at least involve federal laws “regulating organizations or activities affecting interstate commerce.” The Advisers Act and the RICO statute are such laws, and at least the first and fourth counts of the Complaint sound under them. *See, e.g.*, Complaint ¶¶ 57 & n.5, 66, 69, 74 & n.6, 89 (explicitly invoking various provisions of the Advisers Act and accompanying regulations), 114, 117, 131, 132 (invoking the RICO statute). Defendant’s entire argument against withdrawal of the reference thus turns on whether these laws “must be considered.”

It is remarkable that Defendant suggests these statutes need not be considered. The briefing already puts at issue significant, hotly contested issues regarding the interplay of bankruptcy law and the Advisers Act, including

1. Whether Defendant owed fiduciary duties under the Advisers Act that are unwaivable;
2. To whom such duties are owed and whether they were violated;
3. Whether such Advisers Act fiduciary duties can be terminated by a blanket release in a bankruptcy settlement;
4. Whether *res judicata* applies to bar claims for breach of Advisers Act duties that had not yet accrued at the time of the action alleged to have barred them;

5. Whether a contractual jury waiver is enforceable as to claims for breach of unwaivable Advisers Act fiduciary duties;
6. Whether such waivers can be enforced as to non-parties to the waiver;
7. Whether breach of Advisers Act fiduciary duties can serve as a predicate for civil RICO liability under the RICO statute, among other significant legal issues.

Presiding over this action most certainly will require consideration of all these issues.

Before joining the Fifth Circuit, Judge Clement addressed a motion similar to Defendant's during her time in the Eastern District of Louisiana. There, in *In re Harrah's Entm't*, 1996 U.S. Dist. LEXIS 18097, at *7-8 (E.D. La. 1996), she denied a motion to refer a federal securities action to bankruptcy court, despite finding that the bankruptcy court had related-to jurisdiction. Judge Clement wrote,

Although "related to" bankruptcy jurisdiction exists over the non-debtor plaintiffs' non-bankruptcy federal securities claims against non-debtor defendants, placing that bankruptcy jurisdiction in the bankruptcy court is inappropriate because plaintiffs would be entitled to a mandatory withdrawal of the reference. Rather than waste judicial resources on a meaningless referral to bankruptcy court, the Court will retain jurisdiction over this suit.

Id. at *11.

Judge Clement rejected the argument Defendant parrots here that the case would "only involve the simple application of established federal securities laws." *Id.* at *7. Instead, she relied on alleged "violations of several federal securities laws" and the plaintiff's attempt "to hold defendants directly liable and secondarily liable based on a 'controlling person' theory for certain acts and omissions." *Id.* Without any need to analyze how "established" the applicable law might be, Judge Clement concluded, [t]his federal securities litigation involves more than simple application of federal securities laws and will be complicated enough to warrant mandatory withdrawal under § 157(d)." *Id.* (citing *Rannd Res. v. Von Harten (In re Rannd Res.)*, 175 B.R.

393, 396 (D. Nev. 1994), for the proposition that withdrawal of the reference is mandatory where resolution requires more than simple application of federal securities laws, even though that court’s determination was based solely on a review of the complaint’s alleged violations of § 12(2) of the Securities Act of 1933, § 10 of the Securities Exchange Act of 1934, and Rule 10b-5).

This authority applies here. In the Complaint, Plaintiffs allege violations of federal securities law (the Advisers Act), as well as the RICO statute. Deciding even the pending motion to dismiss will require far more than simple application of these laws. Nothing more is necessary to satisfy § 157(d). *Cf. In re IQ Telecomms., Inc.*, 70 B.R. 742, 745 (N.D. Ill. 1987) (“Nevertheless, Central’s second amended complaint easily meets [the § 157(d)] standard. Count 2 of the complaint consists of 76 pages and alleges that 29 individuals and entities violated RICO by engaging in a pattern of mail fraud, 18 U.S.C. § 1341, wire fraud, 18 U.S.C. § 1343, and 139 specific instances of bankruptcy fraud, 18 U.S.C. § 152.”).

Although it is unnecessary here to demonstrate that Plaintiffs’ Advisers Act allegations will require application of *underdeveloped* law, that is certainly the case. As the Third Circuit pointed out in 2013, there is considerable “confusion” in the case law stemming from the fact that federal law (the Advisers Act) provides “the duty and the standard to which investment advisers are to be held,” but “the cause of action is presented as springing from state law.” *Belmont v. MB Inv. Partners, Inc.*, 708 F.3d 470, 502 (3d Cir. 2013). The *Belmont* court further suggests the “confusion [that this situation] engenders may explain why there has been *little development in either state or federal law* on the applicable standards.” *Id.* (emphasis added). “Half a century later,” the *Belmont* court tells us, “courts still look primarily to *Capital Gains Research [Inc.]*, 375 U.S. 180, 192 (1963),] for a description of an investment adviser’s fiduciary duties.” *Id.* at 503;

see also Plaintiffs' Response to Motion to Dismiss (addressing Defendant's erroneous argument that the Advisers Act creates no private right of action).

This observation is bolstered by the necessity of relying extensively on SEC regulations and rulings in the Complaint. *See* Complaint ¶ 57 & n.5 (invoking Investment Advisers Act Release Nos. 3060 (July 28, 2010), and 2106 (Jan. 31, 2003), 66 (17 C.F.R. 275.206(4)-7), 69 (27 C.F.R. part 275 and Rule 10b5-1), 74 & n.6 (Advisers Act Release No. 4197 (Sept. 17, 2015))).

None of the cases Defendant cites even remotely suggests that this type of complicated litigation involving underdeveloped securities laws does not require "consideration" of federal laws. In its lead case, *Beta Operating Co., LLC v. Aera Energy, LLC (In re Mem'l Prod. Partners, L.P.)*, No. H-18-411, [2018 U.S. Dist. LEXIS 161159](#) (S.D. Tex. 2018), the court only held that a state-law contract claim did not require substantial reliance on federal law merely because it involved a trust created under federal law (the OCSLA). *Id.* at *16-17. Moreover, the court's determination appears to have relied primarily, if not solely, on the fact that the bankruptcy court had already submitted a memorandum opinion on the defendant's summary judgment motion, disposing of the case without the need to rely on non-bankruptcy federal law. *Id.* at *14-15, 17.

Next, Defendant cites *UPH Holdings, Inc. v. Sprint Nextel Corp.*, No. A-13-CA-748-SS, [2013 U.S. Dist. LEXIS 189349](#) (W.D. Tex. 2013), which is, at most, only slightly on point. There, the court declined to withdraw the reference with regard to a turnover action under the Bankruptcy Code, with little analysis other than having repeated the parties' arguments. Thus, it is difficult to draw any significance from the decision. But the court seems to rely on the fact that "the primary dispute center[ed] around the existence of a 'regulatory black hole,' a span of time during which the rules concerning how to set [a telecom] intercarrier compensation rate were left undetermined." *Id.* at *6. And for that reason, the court seemed to believe there was little non-bankruptcy federal

law to consider. *Id.* at 7. Here, in contrast, the causes of action do not arise under the Bankruptcy Code, and there is an extensive regulatory scheme that, plainly, must be considered.

The other cases Defendant cites add little to the analysis, except that *S. Pac. Transp. Co. v. Voluntary Purchasing Gps.*, 252 B.R. 373, 382 (E.D. Tex. 2000), holds against Defendant's position, having determined that even the court's "limited" role in approving a CERCLA settlement "necessarily involves the substantial and material consideration of CERCLA and not merely its straightforward application to the facts of this case." *Id.* at 384. The court's reason for this conclusion: its decision "will require the court to examine the unique facts of the case in light of those CERCLA provisions which create the causes of action at issue." *Id.* Of course, the same examination will be necessary here.

Notably, in *S. Pac. Transp.*, the court also stated, "[i]t is well settled that CERCLA is a statute 'rooted in the commerce clause' and is precisely 'the type of law . . . Congress had in mind when it enacted the statutory withdrawal provision [in § 157(d)].'" *Id.* at 382 (quoting *In re Nat'l Gypsum Co.*, 134 B.R. 188, 191 (N.D. Tex. 1991), (alterations in original)). The court could just as easily have been talking about the Advisers Act. See 15 U.S.C. § 80b-1 ("Upon the basis of facts disclosed by the record and report of the Securities and Exchange Commission made pursuant to section 30 of the Public Utility Holding Company Act of 1935, and facts otherwise disclosed and ascertained, it is hereby found that investment advisers are of national concern, in that, among other things—(1) their advice, counsel, publications, writings, analyses, and reports are furnished and distributed, and their contracts, subscription agreements, and other arrangements with clients are negotiated and performed, by the use of the mails and means and instrumentalities of interstate commerce; (2) their advice, counsel, publications, writings, analyses, and reports customarily relate to the purchase and sale of securities traded on national securities exchanges and in interstate

over-the-counter markets, securities issued by companies engaged in business in interstate commerce, and securities issued by national banks and member banks of the Federal Reserve System; and (3) the foregoing transactions occur in such volume as substantially to affect interstate commerce, national securities exchanges, and other securities markets, the national banking system and the national economy.”).

In sum, the Complaint alleges violations of non-bankruptcy federal law. In presiding over the case—indeed, in addressing the currently pending Motion to Dismiss—this Court will have to substantially and materially consider those laws and their interplay with bankruptcy law. Under § 157(d), this requires withdrawal of the reference, and Defendant’s motion should be denied.

B. Automatic Referral Is Unnecessary and Would Be Inefficient

As noted previously, Judge Clement’s ruling in *In re Harrah’s Entm’t*, 1996 U.S. Dist. LEXIS 18097 (E.D. La. 1996), establishes that reference to the bankruptcy court—only to have the reference withdrawn—is unnecessary:

Although “related to” bankruptcy jurisdiction exists over the non-debtor plaintiffs’ non-bankruptcy federal securities claims against non-debtor defendants, placing that bankruptcy jurisdiction in the bankruptcy court is inappropriate because plaintiffs would be entitled to a mandatory withdrawal of the reference. *Rather than waste judicial resources on a meaningless referral to bankruptcy court, the Court will retain jurisdiction over this suit.*

Id. at *11 (emphasis added).

Defendant nonetheless argues this Court must do precisely that. Plaintiffs submit this is both wrong and tenuous, because at this stage of the bankruptcy proceedings—post confirmation—it is unclear that the bankruptcy court has jurisdiction at all.

1. The causes of action asserted by the Plaintiffs do not “arise under,” or “arise in” Title 11 and are not “core” proceedings.

In the Complaint, Plaintiffs do not seek relief that would undo or reverse any settlement approved by the bankruptcy court. Neither do they attempt an end run around the provisions of any approval, Defendant’s protestations notwithstanding. A proper jurisdictional analysis demonstrates Plaintiffs’ causes of action asserted here are not core proceedings within the bankruptcy court’s jurisdiction, for the reasons addressed below.

First of all, “the ‘core proceeding’ analysis is properly applied not to the case as a whole, but as to each cause of action within a case.” *Legal Xtranet, Inc. v. AT&T Mgmt. Servs., L.P. (In re Legal Xtranet, Inc.)*, 453 B.R. 699, 708–09 (Bankr. W.D. Tex. 2011); *Davis v. Life Inv’rs Ins. Co. of Am.*, 282 B.R. 186, 193 n. 4 (S.D. Miss.2002); see also *In re Exide Techs.*, 544 F.3d 196, 206 (3d Cir. 2008) (“A single cause of action may include both core and non-core claims. The mere fact that a non-core claim is filed with a core claim will not mean the second claim becomes ‘core.’”).

Second, the Fifth Circuit has explained that “§ 157 equates core proceedings with the categories of ‘arising under’ and ‘arising in’ proceedings; therefore, a proceeding is core under section 157 if it invokes a substantive right provided by title 11[, it ‘arises under’ the Bankruptcy Code,] or if it is a proceeding that, by its nature, could arise only in the context of a bankruptcy case[, it ‘arises in’ a bankruptcy case].” *United States. Brass Corp. v. Travelers Ins. Grp., Inc. (In re United States Brass Corp.)*, 301 F.3d 296, 304 (5th Cir. 2002); *TXMS Real Estate Invs., Inc. v. Senior Care Ctrs., LLC (In re Senior Care Centers, LLC)*, 622 B.R. 680, 692–93 (Bankr. N.D. Tex. 2020); *Stern v. Marshall*, 564 U.S. 462, 476 (2011).

Third, none of the Plaintiffs’ five causes of action—breach of fiduciary duty under the Advisers Act, breach of contract related to the HCLOF Company Agreement, negligence, RICO, and tortious interference—arise under title 11. That is, none of the substantive rights of recovery are created by federal bankruptcy law. And plainly so. Because “[a]rising under’ jurisdiction [only] involve[s] cause[s] of action created or determined by a statutory provision of title 11,” this is indisputably the case. *Wood v. Wood (In re Wood)*, 825 F.2d 90, 97 (5th Cir.1987) (noting that a proceeding does not “arise under” Title 11 if it does not invoke a substantive right, created by federal bankruptcy law, that could not exist outside of bankruptcy).

Fourth and finally, for similar reasons, none of Plaintiffs’ causes of action “arise in” a bankruptcy case. “Claims that ‘arise in’ a bankruptcy case are claims that by their nature, *not their particular factual circumstance*, could *only* arise in the context of a bankruptcy case.” *Legal Xtranet, Inc.*, 453 B.R. at 708–09 (emphasis added) (citing *Stoe v. Flaherty*, 436 F.3d 209, 216 (3d Cir. 2006)). Defendants contend that, because the factual circumstances giving rise to the causes of action included the HarbourVest Settlement, which was approved by the bankruptcy court, this somehow transforms these causes of action into core claims. *See* Memorandum of Law ¶ 36. But it is the nature of the causes of action that determines whether they are core, not their “particular factual circumstance.”

To illustrate the point, in *Gupta v. Quincy Med. Ctr.*, 858 F.3d 657, 660 (1st Cir. 2017), the bankruptcy court issued a sale order which approved an asset purchase agreement whereby the purchaser became obligated to make certain payments to employees. The purchaser failed to make these payments so the employees sued the purchaser in bankruptcy court, and the bankruptcy rendered a judgment in favor of the employees. On appeal, the district court concluded that the bankruptcy court lacked subject matter jurisdiction over the claims—claims plainly related to and

existing only because of the approved sale order that gave rise to them. The First Circuit affirmed, explaining as follows:

[T]he fact that a matter would not have arisen had there not been a bankruptcy case does not ipso facto mean that the proceeding qualifies as an ‘arising in’ proceeding. Instead, the fundamental question is whether the proceeding by its nature, *not its particular factual circumstance*, could arise only in the context of a bankruptcy case. In other words, it is not enough that Appellants’ claims arose in the context of a bankruptcy case or even that those claims exist only because Debtors (Appellants’ former employer) declared bankruptcy; rather, “arising in” jurisdiction exists only if Appellants’ claims are the type of claims that can only exist in a bankruptcy case.

Id. at 664–65 (emphasis added).

Like the claims in *Gupta*, the Plaintiffs’ causes of action here arose in the context of a transaction approved in a bankruptcy case. But obviously, the causes of action are not “the type of claims that can only exist in a bankruptcy case.” And that ends the analysis. Because Plaintiffs’ causes of action do arise under the Bankruptcy Code, and because they are not claims that could only arise in the context of bankruptcy, this action is not a core proceeding.

2. The Bankruptcy Court has limited post-confirmation “related to” jurisdiction.

Plaintiffs do not contest that this action is related to the bankruptcy case in some fashion. That is why they amended the Civil Cover Sheet to note the bankruptcy matter. But “related to” jurisdiction is a term of art with differing requirements depending on the status of the bankruptcy case. In its current, post-confirmation status, Plaintiffs submit that the bankruptcy court lacks even “related to” jurisdiction over this action.

“Related to” jurisdiction is meant to avoid piecemeal adjudication and promote judicial economy by aiding in the efficient and expeditious resolution of all matters connected to the debtor’s estate. *See Feld v. Zale Corp. (In re Zale Corp.)*, 62 F.3d 746, 752 (5th Cir.1995). Importantly, proceedings merely “related to” a case under title 11 are considered “non-core”

proceedings. *Stern*, 564 U.S. at 477; Collier on Bankruptcy ¶ 3.02[2], p. 3–26, n.5 (16th ed. 2010) (“The terms ‘non-core’ and ‘related’ are synonymous.”). The jurisdictional standard for related to jurisdiction varies depending on whether the proceeding at issue was commenced pre or post confirmation. See *Beitel v. OCA, Inc. (In re OCA, Inc.)*, 551 F.3d 359, 367 at n.10 (5th Cir. 2008). And “after confirmation of a reorganization plan, a stricter post-confirmation standard applies.” See *Bank of La. v. Craig’s Stores of Tex., Inc. (In re Craig’s Stores of Tex., Inc.)*, 266 F.3d 388, 390–91 (5th Cir.2001) (explaining this distinction).

Essentially, “after a debtor’s reorganization plan has been confirmed, the debtor’s estate, and thus bankruptcy jurisdiction, ceases to exist, other than for matters pertaining to the implementation or execution of the plan.” *Id.* 266 F.3d at 390; *Faulkner v. Eagle View Capital Mgmt. (In re The Heritage Org., L.L.C.)*, 454 B.R. 353, 358 (Bankr. N.D. Tex. 2011).

Here, on February 22, 2021, the Bankruptcy Court entered the *Order (I) Confirming the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (as Modified) and (II) Granting Related Relief* [Bankruptcy Court Dkt. No. 1943]. The Complaint was filed on April 12, 2021. Thus, the proceeding was commenced post confirmation.

Defendant does not argue that this action involves “matters pertaining to the implementation or execution of the plan,” as required under *Craig’s Stores*. It does not even cite to that authority. Certainly Plaintiffs can think of no way that their action affects plan implementation or execution. Thus, it seems, Defendant’s argument for bankruptcy court jurisdiction fails entirely.

While Defendant does argue that the bankruptcy court has “related to” jurisdiction as a result of a judgment potentially reducing available cash to pay creditors under the Confirmed Plan, Memorandum of Law ¶ 39, this is precisely the argument that the Fifth Circuit rejected in *Craig’s*

Stores. See *Coho Oil & Gas, Inc. v. Finley Res., Inc. (In re Coho Energy, Inc.)*, 309 B.R. 217, 220 (Bankr. N.D. Tex. 2004) (recognizing the rejection of this argument). As the Fifth Circuit explained: “while Craig’s insists that the status of its contract with the Bank will affect its distribution to creditors under the plan, the same could be said of any other post-confirmation contractual relations in which Craig’s is engaged.” 266 F.3d at 391. And that type of effect does not meet the threshold for post-confirmation related-to jurisdiction.

Defendant also contends that there is post-confirmation “related to” jurisdiction because the lawsuit will delay payments to creditors under the Confirmed Plan. *Id.* But this is just a re-packaged reduction-in-assets argument. The same would be true of any post-confirmation lawsuit against Defendant and does not meet the “more exacting theory of post-confirmation bankruptcy jurisdiction” required by *Craig’s Stores*.

Defendant may argue that the bankruptcy court’s confirmation order has not yet gone effective due to having been appealed. But even if this distinction matters, at minimum, there ought to be a sliding scale toward narrower application of “related to” jurisdiction once the bankruptcy court has issued a final confirmation order. See *Montana v. Goldin (In re Pegasus Gold Corp.)*, 394 F.3d 1189, 1194 (9th Cir. 2005) (stating “post-confirmation bankruptcy court jurisdiction is necessarily more limited than pre-confirmation jurisdiction, and ... the *Pacor* formulation [used to analyze related-to jurisdiction] may be somewhat overbroad in the post-confirmation context”); *Faulkner v. Kornman*, No. 10-301, 2015 Bankr. LEXIS 700 (Bankr. S.D. Tex. 2015) (stating “[t]he general rule is that post-confirmation subject matter jurisdiction is limited”); *Triad Guar. Ins. v. Am. Home Mortg. Inv. Corp (In re Am. Home Mortg. Holding)*, 477 B.R. 517, 529-30 (Bankr. D. Del. 2012) (stating “[a]fter confirmation... the test for ‘related to ’jurisdiction becomes more

stringent if the plaintiff *files* its action after the confirmation date”) (emphasis in original); cf. *rabbd*

v. Rochford, 947 F.2d 829, 832 n.1 (7th Cir. 1991) (noting that “after a bankruptcy is over, it may well be more appropriate to bring suit in district court”).

Finally, the retention of jurisdiction in the confirmed plan does nothing to alter the forgoing analysis. *Travelers Indem. Co. v. Bailey*, 557 U.S. 137, 151 (2009). A bankruptcy court may not “retain” jurisdiction it does not have. *Celotex Corp. v. Edwards*, 514 U.S. 300, 307 (1995). “[N]either the parties nor the bankruptcy court can create § 1334 jurisdiction by simply inserting a retention of jurisdiction provision in a plan of reorganization if jurisdiction otherwise is lacking.” *Valley Historic Ltd. P’ship. v. Bank of N.Y.*, 486 F.3d 831, 837 (4th Cir. 2007); see also *Zerand–Bernal Group, Inc. v. Cox*, 23 F.3d 159, 164 (7th Cir. 1994) (“[O]rders approving [a] bankruptcy sale [or] . . . plan of reorganization . . . [cannot] confer jurisdiction. A court cannot write its own jurisdictional ticket.”).

C. The Res Judicata Argument Is Not Relevant to the Relief Sought in This Motion

Defendant’s *res-judicata* argument does not belong in this Motion. It has no bearing on the issue presented here. This is because, to begin with, *res judicata* is always addressed by the second court in the second action. See, e.g., *Memphis-Shelby Cty. Airport Auth. v. Braniff Airways, Inc. (In re Braniff Airways, Inc.)*, 783 F.2d 1283 (5th Cir. 1986); *Davis v. Dall. Area Rapid Transit*, 383 F.3d 309 (5th Cir. 2004); *Travelers Ins. Co. v. St. Jude Hosp.*, 37 F.3d 193 (5th Cir. 1994); *Applewood Chair Co. v. Three Rivers Planning & Dev. Dist. (In re Applewood Chair Co.)*, 203 F.3d 914 (5th Cir. 2000); *Risby v. United States*, No. 3:04-CV-1414-H, 2006 U.S. Dist. LEXIS 8798 (N.D. Tex. 2006); *Chalmers v. Gavin*, 2002 U.S. Dist. LEXIS 5636, 2002 WL 511512 (N.D. Tex. Apr. 2, 2002); *Reynolds v. Tombone*, Civil No. 3:96-CV-3330-BC, 1999 U.S. Dist. LEXIS

9995 (N.D. Tex. June 24, 1999). Moreover, *res judicata* is not a basis for referring a matter to the bankruptcy court, and Defendant offers no authority for the notion that it is.

Instead of arguing that its *res judicata* affirmative defense should result in referral to the bankruptcy court, Defendant argues that “the Complaint . . . must be dismissed on the basis of *res judicata*. Memorandum of Law at 24; *see also id.* at 23 (subheading: “The Complaint Is Barred by the Doctrine of Res Judicata”). But dismissal is the relief sought in Defendant’s pending Motion to Dismiss, which raises the same *res judicata* arguments asserted here. Plaintiffs therefore will address *res judicata* in their concurrently filed response to the Motion to Dismiss.

D. The Local Rule 3.3 Argument Is Unavailing

Defendant argues that Plaintiffs failed to disclose the related bankruptcy case by omitting it on the Civil Cover Sheet accompanying the Complaint, although Defendant does not request that the Court take any action as a result of the omission.

Plaintiffs submit that the omission was inadvertent, harmless, and has been corrected. The omission was inadvertent in that Plaintiffs intended to identify the Highland bankruptcy on the Civil Cover Sheet but inadvertently failed to do so and have since submitted an amended Civil Cover Sheet correcting the error. [Doc. 33]. The omission was harmless because the Complaint discloses both the bankruptcy and its relationship to the present action, a disclosure that was supplemented by Plaintiffs’ Motion for Leave to Amend, which provides additional detail regarding the related bankruptcy case and attaches two orders issued in that case. Complaint ¶¶ 15-36; Motion for Leave and Exhibits [Docs. 6, 6-1, 6-2].

Defendant refers the Court to *Kuzmin v. Thermaflo.*, No. 2:07-cv-00554-TJW, 2009 U.S. Dist. LEXIS 42810, at *4-7 (E.D. Tex. May 20, 2009), for the proposition that failing to disclose a related case is a violation of the Local Rules. In *Kuzmin*, however, the plaintiff was faulted for

numerous failings, including (1) the failure to submit a Civil Cover Sheet at all, (2) the failure, upon receiving notice of the deficiency, to provide sufficient information for the clerk to identify the related action, and (3) filing a third action without any information indicating it was related to the previous two. *Id.* at *5. The court continued, finding that plaintiff's counsel in that case had also committed violations of the mandate for professionalism in the Texas Lawyer's Creed by failing to communicate about the filings with known counsel for the opposition. *Id.* at *6-12.

Plaintiffs respectfully submit that the *Kuzmin* case is inapposite. Plaintiffs here did not fail to submit a Civil Cover Sheet. They corrected the omission after it was brought to their attention, and their original filing did disclose, in the text of the Complaint, the information that was inadvertently omitted from the Civil Cover Sheet. Further, Plaintiffs here communicated promptly with counsel for the Defendant regarding the action and the related bankruptcy case by asking the Defendant's counsel in the related action if they would accept service of the Complaint and whether they objected to Plaintiffs' Motion for Leave to Amend.

These circumstances, Plaintiffs submit, do not rise to the level of a violation of Local Rule 3.3 or, alternatively, they constitute a harmless, corrected error at most. Plaintiffs ask the Court to treat them as no worse than Defendant's failure to include a certificate of conference with this Motion (Local Rule 7(h)), or its failure to confer with Plaintiffs' counsel before filing it (Local Rule 7(a)), or its failure to paginate its appendix consecutively (Local Rule 7(i)).

Finally, Plaintiffs submit that the omission complained of does not justify or even relate to the relief sought in this Motion.

E. The Litigious-Nature Argument Is Likewise Unavailing

Defendant's claims regarding James Dondero's litigiousness are likewise unconnected to the relief they are requesting here. Dondero is not a party to this case. Neither does he control either Plaintiff. APP_16-17.

For this argument, Defendant relies solely on *Burch v. Freedom Mortg. Corp. (In re Burch)*, 835 F. App'x 741 (5th Cir. 2021), and 28 U.S.C. § 1927 ("Any attorney or other person . . . who so multiples the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct."). Neither authority addresses whether jurisdiction appropriately lies here or in the bankruptcy court. It appears that they are cited here merely to raise the specter of potential sanctions.

Plaintiffs respectfully submit that their claims here have merit and are not frivolous. And Defendant's contrary position can and should be addressed in connection with Defendant's pending motion under Rule 12(b)(6) rather than in connection with this Motion.

F. Plaintiffs' Cross-Motion Should Be Granted

For the same reasons Defendant's Motion should be denied, Plaintiffs' cross-motion should be granted. Presiding over this action will require consideration of non-bankruptcy federal laws regulating interstate commerce, as well as their interplay with the Bankruptcy Code. Thus, the mandatory-withdrawal-of-the-reference provision of 28 U.S.C. § 157(d) applies.

Moreover, the bankruptcy court's jurisdiction is limited, both by § 157(d) and by plan confirmation. *See TMT Procurement Corp. v. Vantage Drilling Co. (In re TMT Procurement Corp.)*, 764 F.3d 512, 523 & n.40 (5th Cir. 2014) (noting bankruptcy court's "more limited jurisdiction" as a result of its "limited power" under 28 U.S.C. § 157); *Bank of La. v. Craig's*

Stores of Tex., Inc. (In re Craig's Stores of Tex., Inc.), 266 F.3d 388, 390–91 (5th Cir.2001) (explaining that, “after confirmation of a reorganization plan, a stricter post-confirmation standard applies,” and “after a debtor’s reorganization plan has been confirmed, the debtor’s estate, and thus bankruptcy jurisdiction, ceases to exist, other than for matters pertaining to the implementation or execution of the plan.”).

No authority requires this Court to refer this action to the bankruptcy court, only to have it return on a motion for withdrawal of the reference. The opposite is true. *In re Harrah's Entm't*, No. 95-3925, 1996 U.S. Dist. LEXIS 18097, at *11 (E.D. La. 1996) (Clement, J.). Thus, this Court should deny Defendant’s Motion, withdraw the reference under § 157(d), and retain jurisdiction over this action.

VI.

CONCLUSION

For all of these reasons, Plaintiffs respectfully submit Defendant’s Motion should be denied.

Dated: June 29, 2021

Respectfully submitted,

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EXHIBIT 11

At all relevant times, HCM was headed by CEO and potential party James P. Seery (“Seery”). Seery negotiated a settlement with the several Harbourvest² entities who owned 49.98% of HCLOF. The deal had HCM (or its designee) purchasing the Harbourvest membership interests in HCLOF for \$22.5 million. Recent revelations, however, show that the sale was predicated upon a sales price that was vastly below the Net Asset Value (“NAV”) of those interests. Upon information and belief, the NAV of HCLOF’s assets had risen precipitously, but was not disclosed to Harbourvest nor to Plaintiffs.

Under the Advisers Act, Defendants have a non-waivable duty of loyalty and candor, which includes its duty not to inside trade with its own investors, *i.e.*, not to trade with an investor to which HCM and Seery had access to superior non-public information. Upon information and belief, HCM’s internal compliance policies required by the Advisers Act would not generally have allowed a trade of this nature to go forward—meaning, the trade either was approved in spite of compliance rules preventing it, or the compliance protocols themselves were disabled or amended to a level that leaves Defendants HCM and HCLOF exposed to liability. Thus, Defendants have created an unacceptable perpetuation of exposure to liability.

Additionally, Defendants are liable for a pattern of conduct that gives rise to liability for their conduct of the enterprise consisting of HCM in relation to HCFA and HCLOF, through a pattern of concealment, misrepresentation, and violations of the securities rules. In the alternative, HCFA and HCM, are guilty of self-dealing, violations of the Advisers Act, and tortious interference by (a) not disclosing that Harbourvest had agreed to sell at a price well below the current NAV, and (b) diverting the Harbourvest opportunity to themselves.

² “Harbourvest” refers to the collective of Harbourvest Dover Street IX Investment, L.P., Harbourvest 2017 Global AIF, L.P., Harbourvest 2017 Global Fund, L.P., HV International VIII Secondary, L.P., and Harbourvest Skew Base AIF, L.P. Each was a member of Defendant Highland CLO Funding, Ltd.

For these reasons, judgment should be issued in Plaintiffs' favor.

II.

PARTIES

1. Plaintiff CLO Holdco, Ltd. is a limited company incorporated under the laws of the Cayman Islands.

2. Plaintiff Charitable DAF Fund, L.P., ("DAF") is a limited partnership formed under the laws of the Cayman Islands.

3. Defendant Highland Capital Management, L.P. is a limited partnership with its principal place of business at 300 Crescent Court, Suite 700, Dallas, Texas 75201. It may be served at its principal place of business or through its principal officer, James P. Seery, Jr., or through the Texas Secretary of State, or through any other means authorized by federal or state law.

4. Defendant Highland HCF Advisor, Ltd. is a limited company incorporated under the laws of the Cayman Islands. Its principal place of business is 300 Crescent Court, Suite 700, Dallas, Texas 75201. It is a registered investment adviser ("RIA") subject to the laws and regulations of the Investment Advisers Act of 1940 (the "Adviser's Act"). It is a wholly-owned subsidiary of Highland Capital Management, L.P.

5. Nominal Defendant Highland CLO Funding, Ltd. is a limited company incorporated under the laws of the Island of Guernsey. Its registered office is at First Floor, Dorey Court, Admiral Park, St. Peter Port, Guernsey GY1 6HJ, Channel Islands. Its principal place of business is 300 Crescent Court, Suite 700, Dallas, Texas 75201.

6. Potential party James P. Seery, Jr. ("Seery") is an officer and/or director and/or control person of Defendants Highland Capital Management, L.P., Highland CLO Funding, Ltd., and Highland HCF Advisor, Ltd., and is a citizen of and domiciled in Floral Park, New York.

III.

JURISDICTION AND VENUE

7. This Court has subject matter jurisdiction over this dispute under 28 U.S.C. § 1331 as one or more rights and/or causes of action arise under the laws of the United States. This Court has supplemental subject matter jurisdiction over all other claims under 28 U.S.C. § 1367.

8. Personal jurisdiction is proper over the Defendants because they reside and/or have continual contacts with the state of Texas, having regularly submitted to jurisdiction here. Jurisdiction is also proper under 18 U.S.C. § 1965(d).

9. Venue is proper in this Court under 28 U.S.C. § 1391(b) and (c) because one or more Defendants reside in this district and/or a substantial part of the events or omissions giving rise to the claim occurred or a substantial part of property that is the subject of the action is situated in this district. Venue in this district is further provided under 18 U.S.C. § 1965(d).

IV.

RELEVANT BACKGROUND

HCLOF IS FORMED

10. Plaintiff DAF is a charitable fund that helps several causes throughout the country, including providing funding for humanitarian issues (such as veteran's welfare associations and women's shelters), public works (such as museums, parks and zoos), and education (such as specialty schools in underserved communities). Its mission is critical.

11. Since 2012, DAF was advised by its registered investment adviser, Highland Capital Management, L.P., and its various subsidiaries, about where to invest. This relationship was governed by an Investment advisory Agreement.

12. At one point in 2017, HCM advised DAF to acquire 143,454,001 shares of HCLOF, with HCFA (a subsidiary of HCM) serving as the portfolio manager. DAF did so via a holding entity, Plaintiff CLO Holdco, Ltd.

13. On November 15, 2017, through a Subscription and Transfer Agreement, the DAF entered into an agreement with others to sell and transfer shares in HCLOF, wherein the DAF retained 49.02% in CLO Holdco.

14. Pursuant to that agreement, Harbourvest acquired the following interests in the following entities:

Harbourvest Dover Street IX Investment, L.P., acquired 35.49%;

Harbourvest 2017 Global AIF, L.P., acquired 2.42%;

Harbourvest 2017 lobal Fund, L.P., acquired 4.85%;

HV International VIII Secondary, L.P., acquired 6.5%; and

Harbourvest Skew Base AIF, L.P., acquired 0.72%;

for a total of 49.98% (altogether, the “Harbourvest interests”).

15. On or about October 16, 2019, Highland Capital Management filed for Chapter 11 bankruptcy in Delaware Bankruptcy Court, which was later transferred to the Northern District of Texas Bankruptcy Court, in the case styled *In Re: Highland Capital Management, L.P., Debtor*, Cause No. 19-34054, (the “HCM Bankruptcy” and the Court is the “Bankruptcy Court”).

The Harbourvest Settlement with Highland Capital Management in Bankruptcy

16. On April 8, 2020, Harbourvest submitted its proofs of claim in the HCM bankruptcy proceeding. Annexed to its proofs of claims was an explanation of the Proof of Claim and the basis therefor setting out various pre-petition allegations of wrongdoing by HCM. *See, e.g.*, Case No. 19-bk-34054, Doc. 1631-5.

17. The debtor, HCM, made an omnibus response to the proofs of claims, stating they were duplicative of each other, overstated, late, and otherwise meritless.

18. Harbourvest responded to the omnibus objections on September 11, 2020. *See* Cause No. 19-bk-34054, Doc. 1057.

19. Harbourvest represented that it had invested in HCLOF, purchasing 49.98% of HCLOF's outstanding shares.

20. Plaintiff CLO Holdco was and is also a 49.02% holder of HCLOF's member interests.

21. In its Omnibus Response, Harbourvest explained that its claims included unliquidated legal claims for fraud, fraud in the inducement, RICO violations under 18 U.S.C. 1964, among others (the "Harbourvest Claims"). *See* Cause No. 19-bk-34054, Doc. 1057.

22. The Harbourvest Claims centered on allegations that when Harbourvest was intending to invest in a pool of Collateralized Loan Obligations, or CLOs, that were then-managed by Acis Capital Management ("Acis"), a subsidiary of HCM, HCM failed to disclose key facts about ongoing litigation with a former employee, Josh Terry.

23. Harbourvest contended that HCM never sufficiently disclosed the underlying facts about the litigation with Terry, and HCM's then-intended strategy to fight Terry caused HCLOF to incur around \$15 million in legal fees and costs. It contended that had it known the nature of the lawsuit and how it would eventually turn out, Harbourvest never would have invested in HCLOF. *See* Cause No. 19-bk-34054, Doc. 1057.

24. HCLOF's portfolio manager is HCFA. HCM is the parent of HCFA and is managed by its General Partner, Strand Management, who employs Seery and acts on behalf of HCM.

25. Before acceding to the Harbourvest interests, HCM was a 0.6% holder of HCLOF interests.

26. While even assuming Harbourvest's underlying claims were valid as far as the lost \$15 million went, the true damage of the legal fees to Harbourvest would have been 49.98% of the HCLOF losses (i.e., less than \$7.5 million). Harbourvest claimed that it had lost over \$100 million in the HCLOF transaction due to fraud, which, after trebling under the racketeering statute, it claimed it was entitled to over \$300 million in damages.

27. In truth, as of September 2020, Harbourvest had indeed lost some \$52 million due to the alleged diminishing value of the HCLOF assets (largely due to the underperformance of the Acis entities³)—and the values were starting to recover.

28. HCM denied the allegations in the Bankruptcy Court. Other than the claim for waste of corporate assets of \$15 million, HCM at all times viewed the Harbourvest legal claims as being worth near zero and having no merit.

29. On December 23, 2020, HCM moved the Court to approve a settlement between itself and Harbourvest. No discovery had taken place between the parties, and Plaintiff did not have any notice of the settlement terms or other factors prior to the motion's filing (or even during its pendency) in order to investigate its rights.

30. HCM set the hearing right after the Christmas and New Year's holidays, almost ensuring that no party would have the time to scrutinize the underpinnings of the deal.

31. On January 14, 2021, the Bankruptcy Court held an evidentiary hearing and approved the settlement in a bench ruling, overruling the objections to the settlement.

³ Acis was being managed by Joshua Terry. JP Morgan had listed the four ACIS entities under his management as the four worst performers of the 1200 CLOs it evaluated.

32. An integral part of the settlement was allowing \$45 million in unsecured claims that, at the time of the agreement, were expected to net Harbourvest around 70 cents on the dollar. In other words, Harbourvest was expected to recover around \$31,500,000 from the allowed claims.

33. As part of the consideration for the \$45 million in allowed claims, Harbourvest agreed to transfer all of its interests in HCLOF to HCM or its designee.

34. HCM and Seery rationalized the settlement value by allocating \$22.5 million of the net value of the \$45 million in unsecured claims as consideration to purchase Harbourvest's interests in HCLOF, meaning, if 70% of the unsecured claims—i.e., \$31.5 million—was realized, because \$22.5 million of that would be allocated to the purchase price of the Harbourvest interests in HCLOF, the true “settlement” for Harbourvest's legal claims was closer to \$9 million.

35. Plaintiffs here are taking no position at this time about the propriety of settling the Harbourvest legal claims for \$9 million. That is for another day.

36. At the core of this lawsuit is the fact that HCM purchased the Harbourvest interests in HCLOF for \$22.5 million knowing that they were worth far more than that.

37. It has recently come to light that, upon information and belief, the Harbourvest interests, as of December 31, 2020, were worth in excess of \$41,750,000, and they have continued to go up in value.

38. On November 30, 2020, which was less than a month prior to the filing of the Motion to Approve the Settlement, the net asset value of those interests was over \$34.5 million. Plaintiffs were never made aware of that.

39. The change is due to how the net asset value, or NAV, was calculated. The means and methods for calculating the “net asset value” of the assets of HCLOF are subject to and

governed by the regulations passed by the SEC pursuant to the Adviser's Act, and by HCM's internal policies and procedures.

40. Typically, the value of the securities reflected by a market price quote.

41. However, the underlying securities in HCLOF are not liquid and had not been traded in a long while.

42. There not having been any contemporaneous market quotations that could be used in good faith to set the marks⁴ meant that other prescribed methods of assessing the value of the interests, such as the NAV, would have been the proper substitutes.

43. Seery testified that the fair market value of the Harbourvest HCLOF interests was \$22.5 million. Even allowing some leeway there, it was off the mark by a mile.

44. Given the artifice described herein, Seery and the entity Defendants had to know that the representation of the fair market value was false. But it does not appear that they disclosed it to Harbourvest to whom they owed fiduciary duties as the RIA in charge of HCLOF, and they certainly did not disclose the truth to the Plaintiff.

45. It is either the case that (i) Defendants conducted the proper analysis to obtain a current value of the assets but decided to use a far lower valuation in order to whitewash the settlement or enrich the bankruptcy estate; *or* (ii) Defendants never conducted the proper current valuation, and therefore baselessly represented what the current value of the assets was, despite knowingly having no reasonable basis for making such a claim.

46. For years HCM had such internal procedures and compliance protocols. HCM was not allowed by its own compliance officers to trade with an investor where HCM had superior knowledge about the value of the assets, for example. While Plaintiff has no reason to believe that

⁴ The term "mark" is shorthand for an estimated or calculated value for a non-publicly traded instrument.

those procedures were scrapped in recent months, it can only assume that they were either overridden improperly or circumvented wholesale.

47. Upon finalizing the Harbourvest Settlement Agreement and making representations to the Bankruptcy Court to the Plaintiffs about the value of the Harbourvest Interests, Seery and HCM had a duty to use current values and not rely on old valuations of the assets or the HCLOF interests.

48. Given Defendants' actual or constructive knowledge that they were purchasing Harbourvest's Interests in HCLOF for a less than 50% of what those interests were worth—Defendants owed Plaintiff a fiduciary duty not to purchase them for themselves.

49. Defendants should have either had HCLOF repurchase the interests with cash, or offer those interests to Plaintiff and the other members *pro rata*, before HCM agreed to purchase them all lock, stock and barrel, for no up-front cash.

50. Indeed, had Plaintiff been offered those interests, it would have happily purchased them and therefore would have infused over \$20 million in cash into the estate for the purpose of executing the Harbourvest Settlement.

51. That Defendants (and to perhaps a lesser extent, the Unsecured Creditors Committee (the "UCC")) agreed to pay \$22.5 million for the HCLOF assets, where they had previously not consented to any such expenditure by the estate on behalf of HCLOF, strongly indicates their awareness that they were purchasing assets for far below market value.

52. The above is the most reasonable and plausible explanation for why Defendants and the UCC forwent raising as much as \$22.5 million in cash now in favor of hanging on to the HCLOF assets.

53. Indeed, in January 2021 Seery threatened Ethen Powell that “[Judge Jernigan] is laughing at you” and “we are coming after you” in response to the latter’s attempt to exercise his right as beneficial holder of the CLO, and pointing out a conflict of interest in Seery’s plan to liquidate the funds.

54. HCM’s threat, made by Seery, is tantamount to not only a declaration that he intends to liquidate the funds regardless of whether the investors want to do so, and whether it is in their best interests, but also that HCM intends to leverage what it views as the Bankruptcy Court’s sympathy to evade accountability.

V.

CAUSES OF ACTION

FIRST CAUSE OF ACTION *Breaches of Fiduciary Duty*

55. Plaintiffs respectfully incorporate the foregoing factual averments as if fully set forth herein and further alleges the following:

56. HCM is a registered investment advisor and acts on behalf of HCFA. Both are fiduciaries to Plaintiffs.

57. The Advisers Act establishes an unwaivable federal fiduciary duty for investment advisers.⁵

⁵ See e.g., *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 194 (1963); *Transamerica Mortg. Advisors (tama) v. Lewis*, 444 U.S. 11, 17 (1979) (“§ 206 establishes ‘federal fiduciary standards’ to govern the conduct of investment advisers.”); *Santa Fe Indus. v. Green*, 430 U.S. 462, 471, n.11 (1977) (in discussing *SEC v. Capital Gains*, stating that the Supreme Court’s reference to fraud in the “equitable” sense of the term was “premised on its recognition that Congress intended the Investment Advisers Act to establish federal fiduciary standards for investment advisers”). See also Investment Advisers Act Release No. 3060 (July 28, 2010) (“Under the Advisers Act, an adviser is a fiduciary whose duty is to serve the best interests of its clients, which includes an obligation not to subrogate clients’ interests to its own”) (citing Proxy Voting by Investment Advisers, Investment Advisers Act Release No. 2106 (Jan. 31, 2003)).

58. HCM and the DAF entered into an Amended and Restated Investment Advisory Agreement, executed between them on July 1, 2014 (the “RIA Agreement”). It renews annually and continued until the end of January 2021.

59. In addition to being the RIA to the DAF, HCM was appointed the DAF’s attorney-in-fact for certain actions, such as “to purchase or otherwise trade in Financial Instruments that have been approved by the General Partner.” RIA Agreement ¶ 4.

60. The RIA Agreement further commits HCM to value financial assets “in accordance with the then current valuation policy of the Investment Advisor [HCM], a copy of which will provided to the General Partner upon request.” RIA Agreement ¶ 5.

61. While HCM contracted for the recognition that it would be acting on behalf of others and could be in conflict with advice given the DAF, (RIA Agreement ¶ 12), nowhere did it purport to waive the fiduciary duties owed to the DAF not to trade as a principal in a manner that harmed the DAF.

62. HCFA owed a fiduciary duty to Holdco as an investor in HCLOF and to which HCFA was the portfolio manager. HCM owed a fiduciary duty to the DAF (and to Holdco as its subsidiary) pursuant to a written Advisory Agreement HCM and the DAF had where HCM agreed to provide sound investment advice and management functions.

63. As a registered investment adviser, HCM’s fiduciary duty is broad and applies to the entire advisor-client relationship.

64. The core of the fiduciary duty is to act in the best interest of their investors—the advisor must put the ends of the client before its own ends or the ends of a third party.

65. This is manifested in a duty of loyalty and a duty of utmost care. It also means that the RIA has to follow the terms of the company agreements and the regulations that apply to the investment vehicle.

66. The fiduciary duty that HCM and Seery owed to Plaintiff is predicated on trust and confidence. Section 204A of the Advisers Act requires investment advisors (whether SEC-registered or not) to establish, maintain, and enforce written policies and procedures reasonably designed to prevent the RIA from trading on material, non-public information. *See* 17 C.F.R. § 275.206(4)-7. That means that Plaintiff should be able to take Defendants at their word and not have to second guess or dig behind representations made by them.

67. The simple thesis of this claim is that Defendants HCFA and HCM breached their fiduciary duties by (i) insider trading with Harbourvest and concealing the rising NAV of the underlying assets—i.e., trading with Harbourvest on superior, non-public information that was neither revealed to Harbourvest nor to Plaintiff; (ii) concealing the value of the Harbourvest Interests; and (iii) diverting the investment opportunity in the Harbourvest entities to HCM (or its designee) without offering it to or making it available to Plaintiff or the DAF.

68. HCM, as part of its contractual advisory function with Plaintiffs, had expressly recommended the HCLOF investment to the DAF. Thus, diverting the opportunity for returns on its investment was an additional breach of fiduciary duty.

69. This violated a multitude of regulations under 27 C.F.R. part 275, in addition to Rules 10b-5 and 10b5-1. 17 CFR 240.10b5-1 (“Rule 10b5-1”) explains that one who trades while possessing non-public information is liable for insider trading, and they do not necessarily have to have *used* the specific inside information.

70. It also violated HCM’s own internal policies and procedures.

71. Also, the regulations impose obligations on Defendants to calculate a *current* valuation when communicating with an investor, such as what may or may not be taken into account, and what cannot pass muster as a current valuation. Upon information and belief, these regulations were not followed by the Defendants.

72. HCM's internal policies and procedures, which it promised to abide by both in the RIA Agreement and in its Form ADV SEC filing, provided for the means of properly calculating the value of the assets.

73. HCM either did not follow these policies, changed them to be out of compliance both with the Adviser Act regulations and its Form ADV representations, and/or simply misrepresented or concealed their results.

74. In so doing, because the fiduciary duty owed to Plaintiff is a broad one, and because Defendants' malfeasance directly implicates its relationship with Plaintiff, Defendants have breached the Advisers Act's fiduciary duties owed to Plaintiff as part of their fiduciary relationship.⁶

75. At no time between agreeing with Harbourvest to the purchase of its interests and the court approval did Defendants disclose to either Harbourvest or to Plaintiff (and the Bankruptcy Court for that matter) that the purchase was at below 50% the current net asset value as well, and when they failed to offer Plaintiff (and the other members of HCLOF) their right to purchase the interests pro rata at such advantageous valuations. Plaintiff's lost opportunity to

⁶ See Advisers Act Release No. 4197 (Sept. 17, 2015) (Commission Opinion) (“[O]nce an investment Advisory relationship is formed, the Advisers Act does not permit an adviser to exploit that fiduciary relationship by defrauding his client in any investment transaction connected to the Advisory relationship.”); see also *SEC v. Lauer*, No. 03-80612-CIV, 2008 U.S. Dist. LEXIS 73026, at 90 (S.D. Fla. Sept. 24, 2008) (“Unlike the antifraud provisions of the Securities Act and the Exchange Act, Section 206 of the Advisers Act does not require that the activity be ‘in the offer or sale of any’ security or ‘in connection with the purchase or sale of any security.’”).

purchase has harmed Plaintiff. Plaintiff had been led to believe by the Defendants that the value of what was being purchased in the Harbourvest settlement by HCM (or its designee) was at fair market value. This representation, repeated again in the Bankruptcy Court during the Harbourvest confirmation, implicitly suggested that a proper current valuation had been performed.

76. Defendant's principal, Seery, testified in January 2021 that the then-current fair market value of Harbourvest's 49.98% interest in HCLOF was worth around \$22.5 million. But by then, it was worth almost double that amount and has continued to appreciate. Seery knew or should have known that fact because the value of some of the HCLOF assets had increased, and he had a duty to know the current value. His lack of actual knowledge, while potentially not overtly fraudulent, would nonetheless amount to a breach of fiduciary duty for acting without proper diligence and information that was plainly available.

77. Furthermore, HCLOF holds equity in MGM Studios and debt in CCS Medical via various CLO positions. But Seery, in his role as CEO of HCM, was made aware during an advisors meeting in December 2020 that Highland would have to restrict its trading in MGM because of its insider status due to activities that were likely to apply upward pressure on MGM's share price.

78. Furthermore, Seery controlled the Board of CCS Medical. And in or around October 2020, Seery was advocating an equatization that would have increased the value of the CCS securities by 25%, which was not reflected in the HCM report of the NAV of HCLOF's holdings.

79. Seery's knowledge is imputed to HCM.

80. Moreover, it is a breach of fiduciary duty to commit corporate waste, which is effectively what disposing of the HCLOF assets would constitute in a rising market, where there

is no demand for disposition by the investors (save for HCM, whose proper 0.6% interest could easily be sold to the DAF at fair value).

81. As holder of 0.6% of the HCLOF interests, and now assignee of the 49.98% Harbourvest Interests), HCM has essentially committed self-dealing by threatening to liquidate HCLOF now that it may be compelled to do so under its proposed liquidation plan, which perhaps inures to the short term goals of HCM but to the pecuniary detriment of the other holders of HCLOF whose upside will be prematurely truncated.

82. Seery and HCM should not be allowed to benefit from the breach of their fiduciary duties because doing so would also cause Plaintiffs irreparable harm. The means and methods of disposal would likely render the full scope of damages to the DAF not susceptible to specific calculation—particularly as they would relate to calculating the lost opportunity cost. Seery and HCM likely do not have the assets to pay a judgment to Plaintiffs that would be rendered, simply taking the lost appreciation of the HCLOF assets.

83. Defendants are thus liable for diverting a corporate opportunity or asset that would or should have been offered to Plaintiff and the other investors. Because federal law makes the duties invoked herein unwaivable, it is preposterous that HCM, as a 0.6% holder of HCLOF, deemed itself entitled to the all of the value and optionality of the below-market Harbourvest purchase.

84. Defendants cannot rely on any contractual provision that purports to waive this violation. Nothing in any agreement purports to permit, authorize or otherwise sanitize Defendants' self-dealing. All such provisions are void.

85. In the fourth quarter of 2020, Seery and HCM notified staff that they would be terminated on December 31, 2020. That termination was postponed to February 28, 2021.

Purchasing the Harbourvest assets without staffing necessary to be a functioning Registered Investment Advisor was a strategic reversal from prior filings that outlined canceling the CLO management contracts and allowing investors to replace Highland as manager.

86. Seery's compensation agreement with the UCC incentivizes him to expedite recoveries and to prevent transparency regarding the Harbourvest settlement.

87. What is more, Seery had previously testified that the management contracts for the funds—HCLOF included—were unprofitable, and that he intended to transfer them. But he later rejected offers to purchase those management contracts for fair value and instead decided to continue to manage the funds—which is what apparently gave rise to the Harbourvest Settlement, among others. He simultaneously rejected an offer for the Harbourvest assets of \$24 million, stating that they were worth much more than that.

88. Because of Defendants' malfeasance, Plaintiffs have lost over \$25 million in damages—a number that continues to rise—and the Defendants should not be able to obtain a windfall.

89. For the same reason, Defendants' malfeasance has also exposed HCLOF to a massive liability from Harbourvest since the assignment of those interests is now one that is likely unenforceable under the Advisers Act, Section 47(b), if there was unequal information.

90. HCM and HCFA are liable as principals for breach of fiduciary duty, as are the principals and compliance staff of each entity.

91. Plaintiffs seek disgorgement, damages, exemplary damages, attorneys' fees and costs. To the extent the Court determines that this claim had to have been brought derivatively on behalf of HCLOF, then Plaintiffs represent that any pre-suit demand would have been futile since asking HCM to bring suit against its principal, Seery, would have been futile.

SECOND CAUSE OF ACTION
Breach of HCLOF Company Agreement
(By Holdco against HCLOF, HCM and HCFA)

92. Plaintiffs respectfully incorporate the foregoing factual averments as if fully set forth herein and further alleges the following:

93. On November 15, 2017, the members of HCLOF, along with HCLOF and HCFA, executed the *Members Agreement Relating to the Company* (the “Company Agreement”).

94. The Company Agreement governs the rights and duties of the members of HCLOF.

95. Section 6.2 of HCLOF Company Agreement provides that when a member “other than ... CLO Holdco [Plaintiff] or a Highland Affiliate,” intends to sell its interest in HCLOF to a third party (i.e., not to an affiliate of the selling member), then the other members have the first right of refusal to purchase those interests pro rata for the same price that the member has agreed to sell.

96. Here, despite the fact that Harbourvest agreed to sell its interests in HCLOF for \$22.5 million when they were worth more than double that, Defendants did not offer Plaintiff the chance to buy its pro rata share of those interests at the same agreed price of \$22.5 million (adjusted pro rata).

97. The transfer and sale of the interests to HCM were accomplished as part of the Harbourvest Settlement which was approved by the Bankruptcy Court.

98. Plaintiff was not informed of the fact that Harbourvest had offered its shares to Defendant HCM for \$22.5 million—which was under 50% of their true value.

99. Plaintiff was not offered the right to purchase its pro rata share of the Harbourvest interests prior to the agreement being struck or prior to court approval being sought.

100. Had Plaintiff been allowed to do so, it would have obtained the interests with a net equity value over their purchase price worth in excess of \$20 million.

101. No discovery or opportunity to investigate was afforded Plaintiff prior to lodging an objection in the Bankruptcy Court.

102. Plaintiff is entitled to specific performance or, alternatively, disgorgement, constructive trust, damages, attorneys' fees and costs.

THIRD CAUSE OF ACTION
Negligence
(By the DAF and CLO Holdco against HCM and HCFA)

103. Plaintiffs respectfully incorporate the foregoing factual averments as if fully set forth herein, and further alleges the following:

104. Plaintiffs incorporate the foregoing causes of action and note that all the foregoing violations were breaches of the common law duty of care imposed by law on each of Seery, HCFA and HCM.

105. Each of these Defendants should have known that their actions were violations of the Advisers Act, HCM's internal policies and procedures, the Company Agreement, or all three.

106. Seery and HCM owed duties of care to Plaintiffs to follow HCM's internal policies and procedures regarding both the propriety and means of trading with a customer [Harbourvest], the propriety and means of trading as a principal in an account but in a manner adverse to another customer [the DAF and Holdco], and the proper means of valuing the CLOs and other assets held by HCLOF.

107. It would be foreseeable that failing to disclose the current value of the assets in the HCLOF would impact Plaintiffs negatively in a variety of ways.

108. It would be reasonably foreseeable that failing to correctly and accurately calculate the current net asset value of the market value of the interests would cause Plaintiffs to value the Harbourvest Interests differently.

109. It would be reasonably foreseeable that referring to old and antiquated market quotations and/or valuations of the HCLOF assets or interests would result in a mis-valuation of HCLOF and, therefore, a mis-valuation of the Harbourvest Interests.

110. Likewise, it would have been foreseeable that Plaintiff's failure to give Plaintiff the opportunity to purchase the Harbourvest shares at a \$22.5 million valuation would cause Plaintiff damages. Defendants knew that the value of those assets was rising. They further knew or should have known that whereas those assets were sold to HCM for an allowance of claims to be funded in the future, selling them to Plaintiff would have provided the estate with cash funds.

111. Defendants' negligence foreseeably and directly caused Plaintiff harm.

112. Plaintiff is thus entitled to damages.

FOURTH CAUSE OF ACTION
Racketeering Influenced Corrupt Organizations Act
(CLO Holdco and DAF against HCM)

113. Plaintiffs respectfully incorporate the foregoing factual averments as if fully set forth herein, and further alleges the following:

114. Defendants are liable for violations of the Racketeer Influenced and Corrupt Organizations ("RICO") Act, 18 U.S.C. § 1961 *et seq.*, for the conduct of an enterprise through a pattern of racketeering activity.

115. HCLOF constitutes an enterprise under the RICO Act. Additionally, or in the alternative, HCM, HCLA, and HCLOF constituted an association-in-fact enterprise. The purpose of the association-in-fact was the perpetuation of Seery's position at HCM and using the

Harbourvest settlement as a vehicle to enrich persons other than the HCLOF investors, including Holdco and the DAF, and the perpetuation of HCM's holdings in collateralized loan obligations owned by HCLOF, while attempting to deny Plaintiffs the benefit of its rights of ownership.

116. The association-in-fact was bound by informal and formal connections for years prior to the elicited purpose, and then changed when HCM joined it in order to achieve the association's illicit purpose. For example, HCM is the parent and control person over HCFA, which is the portfolio manager of HCLOF pursuant to a contractual agreement—both are registered investment advisors and provide advisory and management services to HCLOF.

117. Defendants injured Plaintiffs through their continuous course of conduct of the HCM-HCLA-HCLOF association-in-fact enterprise. HCM's actions (performed through Seery and others) constitute violations of the federal wire fraud, mail fraud, fraud in connection with a case under Title 11, and/or securities fraud laws, pursuant to 18 U.S.C. § 1961(1)(B) and (D).

118. HCM operated in such a way as to violate insider trading rules and regulations when it traded with Harbourvest while it had material, non-public information that it had not supplied to Harbourvest or to Plaintiffs.

119. In or about November 2020, HCM and Harbourvest entered into discussions about settling the Harbourvest Claims. Seery's conduct of HCLOF and HCLA on behalf of HCM through the interstate mails and/or wires caused HCM to agree to the purchase of Harbourvest's interests in HCLOF.

120. On or about each of September 30, 2020, through December 31, 2020, Seery, through his conduct of the enterprise, utilized the interstate wires and/or mails to obtain or arrive at valuations of the HCLOF interests. Seery's conduct of the enterprise caused them to cease

sending the valuation reports to Plaintiffs, which eventually allowed Plaintiffs to be misled into believing that Seery had properly valued the interests.

121. On or about September 30, 2020, Seery transmitted or caused to be transmitted though the interstate wires information to HCLOF investors from HCM (via HCFA), including Harbourvest, regarding the value of HCLOF interests and underlying assets.

122. Additionally, Seery operated HCM in such a way that he concealed the true value of the HCLOF interests by utilizing the interstate wires and mails to transmit communications to the court in the form of written representations on or about December 23, 2020, and then further transmitted verbal representations of the current market value (the vastly understated one) on January 14, 2021, during live testimony.

123. However, Harbourvest was denied the full picture and the true value of the underlying portfolio. At the end of October and November of 2020, HCM had updated the net asset values of the HCLOF portfolio. According to sources at HCM at the time, the HCLOF assets were worth north of \$72,969,492 as of November 30, 2020. Harbourvest's share of that would have been \$36,484,746.

124. The HCLOF net asset value had reached \$86,440,024 as of December 31, 2021, which means that by the time Seery was testifying in the Bankruptcy Court on January 14, 2021, the fair market value of the Harbourvest Assets was \$22.5 million, when it was actually closer to \$43,202,724. Seery, speaking on behalf of HCM, knew of the distinction in value.

125. On January 14, 2021, Seery also testified that he (implying HCM, HCLA and HCLOF) had valued the Harbourvest Assets at their current valuation and at fair market value. This was not true because the valuation that was used and testified to was ancient. The ostensible purpose of this concealment was to induce Plaintiff and other interest holdings to take no action.

126. In supporting HCM’s motion to the Bankruptcy Court to approve the Harbourvest Settlement, Seery omitted the fact that HCM was purchasing the interests at a massive discount, which would violate the letter and spirit of the Adviser’s Act.

127. Seery was informed in late December 2020 at an in-person meeting in Dallas to which Seery had to fly that HCLOF and HCM had to suspend trading in MGM Studios’ securities because Seery had learned from James Dondero, who was on the Board of MGM, of a potential purchase of the company. The news of the MGM purchase should have caused Seery to revalue the HCLOF investment in MGM.

128. In or around October 2020, Seery (who controls the Board of CSS Medical) was pursuing “equatization” of CSS Medical’s debt, which would have increased the value of certain securities by 25%. In several communications through the U.S. interstate wires and/or mails, and with Plaintiffs, and the several communications with Harbourvest during the negotiations of the settlement, Seery failed to disclose these changes which were responsible in part for the ever-growing value of the HCLOF CLO portfolio.

129. Seery was at all relevant times operating as an agent of HCM.

130. This series of related violations of the wire fraud, mail fraud, and securities fraud laws, in connection with the HCM bankruptcy, constitute a continuing pattern and practice of racketeering for the purpose of winning a windfall for HCM and himself--a nearly \$30,000,000 payday under the confirmation agreement.

131. The federal RICO statute makes it actionable for one’s conduct of an enterprise to include “fraud in connection with a [bankruptcy case]”. The Advisers’ Act antifraud provisions require full transparency and accountability to an advisers’ investors and clients and does not require a showing of reliance or materiality. The wire fraud provision likewise is violated when,

as here, the interstate wires are used as part of a “scheme or artifice ... for obtaining money or property by means of false ... pretenses, [or] representations[.]”

132. Accordingly, because Defendants’ conduct violated the wire fraud and mail fraud laws, and the Advisers’ Act antifraud provisions, and their acts and omissions were in connection with the HCM Bankruptcy proceedings under Title 11, they are sufficient to bring such conduct within the purview of the RICO civil action provisions, **18 U.S.C. § 1964**.

133. Plaintiffs are thus entitled to damages, treble damages, attorneys’ fees and costs of suit, in addition to all other injunctive or equitable relief to which they are justly entitled.

FIFTH CAUSE OF ACTION
Tortious Interference
(CLO Holdco against HCM)

134. Plaintiff respectfully incorporates the foregoing factual averments as if fully set forth herein and further alleges the following:

135. At all relevant times, HCM owned a 0.6% interest in HCLOF.

136. At all relevant times, Seery and HCM knew that Plaintiff had specific rights in HCLOF under the Company Agreement, § 6.2.

137. Section 6.2 of HCLOF Company agreement provides that when a member “other than ... CLO Holdco [Plaintiff] or a Highland Affiliate,” intends to sell its interest in HCLOF to a third party (i.e., not an affiliate of the member), then the other members have the first right of refusal to purchase those interests pro rata for the same price that the member has agreed to sell.

138. HCM, through Seery, tortiously interfered with Plaintiff’s contractual rights with HCLOF by, among other things, diverting the Harbourvest Interests in HCLOF to HCM without giving HCLOF or Plaintiff the option to purchase those assets at the same favorable price that HCM obtained them.

139. HCM and Seery tortiously interfered with Plaintiff's contractual rights with HCLOF by, among other things, misrepresenting the fair market value as \$22.5 million and concealing the current value of those interests.

140. But for HCM and Seery's tortious interference, Plaintiff would have been able to acquire the Harbourvest Interests at a highly favorable price. HCM and Seery's knowledge of the rights and intentional interference with these rights has caused damage to Plaintiff CLO Holdco.

141. Plaintiff is therefore entitled to damages from HCM and Seery, as well as exemplary damages.

VI.

JURY DEMAND

142. Plaintiff demands trial by jury on all claims so triable.

VII.

PRAYER FOR RELIEF

143. Wherefore, for the foregoing reasons, Plaintiffs respectfully pray that the Court enter judgment in its favor and against Defendants, jointly and severally, for:

- a. Actual damages;
- b. Disgorgement;
- c. Treble damages;
- d. Exemplary and punitive damages;
- e. Attorneys' fees and costs as allowed by common law, statute or contract;
- f. A constructive trust to avoid dissipation of assets;
- g. All such other relief to which Plaintiff is justly entitled.

Dated: April 12, 2021

Respectfully submitted,

SBAITI & COMPANY PLLC

/s/ Mazin A. Sbaiti

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EXHIBIT 12

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 275

[Release No. IA-2628; File No. S7-25-06]

RIN 3235-AJ67

Prohibition of Fraud by Advisers to Certain Pooled Investment Vehicles

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Securities and Exchange Commission is adopting a new rule that prohibits advisers to pooled investment vehicles from making false or misleading statements to, or otherwise defrauding, investors or prospective investors in those pooled vehicles. This rule is designed to clarify, in light of a recent court opinion, the Commission’s ability to bring enforcement actions under the Investment Advisers Act of 1940 against investment advisers who defraud investors or prospective investors in a hedge fund or other pooled investment vehicle.

EFFECTIVE DATE: September 10, 2007.

FOR FURTHER INFORMATION CONTACT: David W. Blass, Assistant Director, Daniel S. Kahl, Branch Chief, or Vivien Liu, Senior Counsel, at 202-551-6787, Division of Investment Management, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-5041.

SUPPLEMENTARY INFORMATION: The Commission is adopting new rule 206(4)-8 under the Investment Advisers Act of 1940 (“Advisers Act”).¹

¹ 15 U.S.C. 80b. Unless otherwise noted, when we refer to the Advisers Act, or any paragraph of the Advisers Act, we are referring to 15 U.S.C. 80b of the United States Code, at which the Advisers Act is codified.

I. INTRODUCTION

On December 13, 2006, we proposed a new rule under the Advisers Act that would prohibit advisers to pooled investment vehicles from defrauding investors or prospective investors in pooled investment vehicles they advise.² We proposed the rule in response to the opinion of the Court of Appeals for the District of Columbia Circuit in Goldstein v. SEC, which created some uncertainty regarding the application of sections 206(1) and 206(2) of the Advisers Act in certain cases where investors in a pool are defrauded by an investment adviser to that pool.³ In addressing the scope of the exemption from registration in section 203(b)(3) of the Advisers Act and the meaning of “client” as used in that section, the Court of Appeals expressed the view that, for purposes of sections 206(1) and (2) of the Advisers Act, the “client” of an investment adviser managing a pool is the pool itself, not an investor in the pool. As a result, it was unclear whether the Commission could continue to rely on sections 206(1) and (2) of the Advisers Act to bring enforcement actions in certain cases where investors in a pool are defrauded by an investment adviser to that pool.⁴

² Prohibition of Fraud by Advisers to Certain Pooled Investment Vehicles; Accredited Investors in Certain Private Investment Vehicles, Investment Advisers Act Release No. 2576 (Dec. 27, 2006) [72 FR 400 (Jan. 4, 2007)] (the “Proposing Release”). In the Proposing Release, we also proposed two new rules that would define the term “accredited natural person” under Regulation D and section 4(6) of the Securities Act of 1933 [15 USC 77d(6)] (“Securities Act”). As proposed, these rules would add to the existing definition of “accredited investor” and apply to private offerings of certain unregistered investment pools. On May 23, 2007, we voted to propose more general amendments to the definition of accredited investor. Proposed Modernization of Smaller Company Capital-Raising and Disclosure Requirements, Securities Act Release No. (, 2007) [72 FR (, 2007)]. We plan to defer consideration of our proposal to define the term accredited natural person until we have had the opportunity to evaluate fully the comments we received on that proposal together with those we receive on our May 2007 proposal.

³ 451 F.3d 873 (D.C. Cir. 2006) (“Goldstein”).

⁴ Prior to the issuance of the Goldstein decision, we brought enforcement actions against advisers alleging false and misleading statements to investors under sections 206(1) and (2) of the Advisers Act. See, e.g., SEC v. Kirk S. Wright, International Management Associates, LLC, Litigation Release No. 19581 (Feb. 28, 2006); SEC v. Wood River Capital Management, LLC,

In its opinion, the Court of Appeals distinguished sections 206(1) and (2) from section 206(4) of the Advisers Act, which is not limited to conduct aimed at clients or prospective clients of investment advisers.⁵ Section 206(4) provides us with rulemaking authority to define, and prescribe means reasonably designed to prevent, fraud by advisers.⁶ We proposed rule 206(4)-8 under this authority.

We received 45 comment letters in response to our proposal.⁷ Most commenters generally supported the proposal. Eighteen endorsed the rule as proposed, noting that the rule would strengthen the antifraud provisions of the Advisers Act or that the rule would clarify the Commission's enforcement authority with respect to advisers.⁸ Others, however, urged that we

Litigation Release No. 19428 (Oct. 13, 2005); SEC v. Samuel Israel III; Daniel E. Marino; Bayou Management, LLC; Bayou Accredited Fund, LLC; Bayou Affiliates Fund, LLC; Bayou No Leverage Fund, LLC; and Bayou Superfund, LLC, Litigation Release No. 19406 (Sept. 29, 2005); SEC v. Beacon Hill Asset Management LLC, Litigation Release No. 18745A (June 16, 2004).

⁵ See Goldstein, *supra* note 3, at note 6. See also United States v. Elliott, 62 F.3d 1304, 1311 (11th Cir. 1995).

⁶ Section 206(4) of the Advisers Act makes it unlawful for an investment adviser to “engage in any act, practice, or course of business which is fraudulent, deceptive, or manipulative” and authorizes us “by rules and regulations [to] define, and prescribe means reasonably designed to prevent, such acts, practices, and courses of business as are fraudulent, deceptive, or manipulative.”

⁷ We received over 600 comment letters that addressed the proposed amendments to the term “accredited natural person” under Regulation D and section 4(6) of the Securities Act. All of the public comments we received are available for inspection in our Public Reference Room at 100 F Street, NE, Washington DC, 20549 in File No. S7-25-06, or may be viewed at www.sec.gov/comments/s7-25-06/s72506.shtml.

⁸ *E.g.*, Letter of the Alternative Investments Compliance Association (Mar. 5, 2007); Letter of the CFA Center for Financial Market Integrity (Mar. 9, 2007) (“CFA Center Letter”); Letter of the Coalition of Private Investment Companies (Mar. 9, 2007); Letter of the Commonwealth of Massachusetts (Mar. 9, 2007) (“Massachusetts Letter”); Letter of the Department of Banking of the State of Connecticut (Mar. 8, 2007); Letter of the North America Securities Administrators Association (Apr. 2, 2007) (“NASAA Letter”); and Letter of the U.S. Chamber of Commerce (Mar. 9, 2007). Another commenter observed that the proposed rules are broadly similar to current U.K. legislation and regulations. See Letter of Alternative Investment Management Association (Mar. 9, 2007) (“AIMA Letter”).

make revisions that would restrict the scope of the rule to more narrowly define the conduct or acts it prohibits.⁹

Today, we are adopting new rule 206(4)-8 as proposed. The rule prohibits advisers from (i) making false or misleading statements to investors or prospective investors in hedge funds and other pooled investment vehicles they advise, or (ii) otherwise defrauding these investors. The rule clarifies that an adviser's duty to refrain from fraudulent conduct under the federal securities laws extends to the relationship with ultimate investors and that the Commission may bring enforcement actions under the Advisers Act against investment advisers who defraud investors or prospective investors in those pooled investment vehicles.

II. DISCUSSION

Rule 206(4)-8 prohibits advisers to pooled investment vehicles from (i) making false or misleading statements to investors or prospective investors in those pools or (ii) otherwise defrauding those investors or prospective investors. We will enforce the rule through civil and administrative enforcement actions against advisers who violate it.

Section 206(4) authorizes the Commission to adopt rules and regulations that “define, and prescribe means reasonably designed to prevent, such acts, practices, and courses of business as are fraudulent, deceptive, or manipulative.” In adopting rule 206(4)-8, we intend to employ all of the broad authority that Congress provided us in section 206(4) and direct it at adviser conduct affecting an investor or potential investor in a pooled investment vehicle.

⁹ E.g., Letter of American Bar Association (Mar. 12, 2007) (“ABA Letter”); Letter of Davis Polk & Wardwell (Mar. 9, 2007) (“Davis Polk Letter”); Letter of Dechert LLP (Mar. 8, 2007) (“Dechert Letter”); Letter of New York City Bar (Mar. 8, 2007) (“NYCB Letter”); Letter of Schulte Roth & Zabel LLP (Mar. 9, 2007) (“Schulte Roth Letter”); and Letter of Sullivan & Cromwell LLP (Mar. 9, 2007) (“Sullivan & Cromwell Letter”).

A. Scope of Rule 206(4)-8

Some commenters questioned the scope of the rule, arguing that the Commission should define fraud.¹⁰ We believe that we have done so, only more broadly than some commenters would have us do. As the Proposing Release indicated, our intent is to prohibit all fraud on investors in pools managed by investment advisers. Congress expected that we would use the authority provided by section 206(4) to “promulgate general antifraud rules capable of flexibility.”¹¹ The terms material false statements or omissions and “acts, practices, and courses of business as are fraudulent, deceptive, or manipulative” encompass the well-developed body of law under the antifraud provisions of the federal securities laws. The legal authorities identifying the types of acts, practices, and courses of business that are fraudulent, deceptive, or manipulative under the federal securities laws are numerous, and we believe that the conduct prohibited by rule 206(4)-8 is sufficiently clear and well understood.¹²

¹⁰ E.g., ABA Letter, supra note 9; Letter of Debevoise & Plimpton LLP (Mar. 14, 2007); and NYCB Letter, supra note 9.

¹¹ S.Rep. No. 1760, 86th Cong., 2d. Sess. (June 28, 1960) at 4. See rule 206(4)-1(a)(5) [17 CFR. 275.206(4)-1(a)(5)] under the Advisers Act; rule 17j-1(b) [17 CFR 270.17j-1(b)] under the Investment Company Act of 1940 [15 U.S.C. 80a-1] (“Investment Company Act”); and rule 13e-3(b)(1) [17 CFR 240.13e-3(b)(1)] under the Securities Exchange Act of 1934 [15 U.S.C. 77a] (“Exchange Act”).

¹² Loss, Seligman, & Paredes, Securities Regulation, Chap. 9 (Fraud) (Fourth Ed. 2006); Hazen, Treatise on The Law of Securities Regulation, Vol. 3, Ch. 12 (Manipulation and Fraud – Civil Liability; Implied Private Remedies; SEC Rule 10b-5; Fraud in Connection With the Purchase or Sale of Securities; Improper Trading on Nonpublic Material Information) (Fifth Ed. 2005). See, e.g., Superintendent of Insurance of New York v. Bankers Life & Casualty Co., 404 U.S. 6, 11 n. 7 (1971) (“We believe that section 10(b) and Rule 10b-5 prohibit *all* fraudulent schemes in connection with the purchase or sale of securities, whether the artifices employed involve a garden type variety of fraud, or present a unique form of deception. Novel or atypical methods should not provide immunity from the securities laws.” (quoting A. T. Brod & Co. v. Perlow, 375 F.2d 393, 397 (CA2 1967))); Santa Fe Industries, Inc. v. Green, 430 U.S. 462, 477 (1977) (“No doubt Congress meant to prohibit the full range of ingenious devices that might be used to manipulate securities prices.”). Moreover, the established legal principles are sufficiently flexible to encompass future novel factual scenarios. United States v. Brown, 555 F.2d 336, 339-40 (2d Cir. 1977) (“The fact that there is no litigated fact pattern precisely in point may constitute a tribute to the cupidity and ingenuity of the malefactors involved but hardly provides an escape from the penal sanctions of the securities fraud provisions here involved.”).

1. Investors and Prospective Investors

Rule 206(4)-8 prohibits investment advisers from making false or misleading statements to, or engaging in other fraud on, investors or prospective investors in a pooled investment vehicle they manage. The scope of the rule is modeled on that of sections 206(1) and (2) of the Advisers Act, which make unlawful fraud by advisers against clients or prospective clients. Rule 206(4)-8 prohibits false or misleading statements made, for example, to existing investors in account statements as well as to prospective investors in private placement memoranda, offering circulars, or responses to “requests for proposals,” electronic solicitations, and personal meetings arranged through capital introduction services.

Some commenters argued that the rule should not prohibit fraud against prospective investors in a pooled investment vehicle, asserting that such fraud does not actually harm investors until they, in fact, make an investment.¹³ We disagree. False or misleading statements and other frauds by advisers are no less objectionable when made in an attempt to draw in new investors than when made to existing investors.¹⁴ For similar policy reasons that we believe led Congress to apply the protections of sections 206(1) and (2) to prospective clients, we have decided to apply those of rule 206(4)-8 to prospective investors.¹⁵ We believe that prohibiting false or misleading statements made to, or other fraud on, any prospective investors is a means reasonably designed to prevent fraud.

¹³ Davis Polk Letter, supra note 9; Dechert Letter, supra note 9; NYCB Letter, supra note 9; Letter of the Securities Industry and Financial Markets Association (Mar. 9, 2007); Sullivan & Cromwell Letter, supra note 9.

¹⁴ See CFA Center Letter, supra note 8.

¹⁵ We have used the term “prospective investor” to give the term similar scope to the term “prospective client” in sections 206(1) and (2). See, e.g., In the Matter of Ralph Harold Seipel, 38 S.E.C. 256, 257-58 (1958) (the solicitation of clients is part of the activity of an investment adviser and it is immaterial for purposes of an enforcement action under sections 206(1) and (2) that an adviser engaging in fraudulent solicitations was not successful in his efforts to obtain clients).

2. Unregistered Investment Advisers

Rule 206(4)-8 applies to both registered and unregistered investment advisers.¹⁶ As we noted in the Proposing Release, many of our enforcement cases against advisers to pooled investment vehicles have been brought against advisers that are not registered under the Advisers Act, and we believe it is critical that we continue to be in a position to bring actions against unregistered advisers that manage pools and that defraud investors in those pools.¹⁷ The two commenters that expressed an explicit view on this aspect of the proposal supported our application of the rule to advisers that are not registered with the Commission.¹⁸

3. Pooled Investment Vehicles

The rule we are adopting today applies to investment advisers with respect to any “pooled investment vehicle” they advise. The rule defines a pooled investment vehicle¹⁹ as any investment company defined in section 3(a) of the Investment Company Act²⁰ and any privately offered pooled investment vehicle that is excluded from the definition of investment company by reason of either section 3(c)(1) or 3(c)(7) of the Investment Company Act.²¹ As a result, the rule

¹⁶ A few commenters requested that we clarify how we intend to apply rule 206(4)-8 to offshore advisers’ interaction with non-U.S. investors. See AIMA Letter, supra note 8; Letter of Jones Day (Mar. 9, 2007); Sullivan & Cromwell Letter, supra note 9. Our adoption of this rule will not alter our jurisdictional authority.

¹⁷ Proposing Release, supra note 2, at note 14.

¹⁸ Massachusetts Letter, supra note 8; NASAA Letter, supra note 8.

¹⁹ Rule 206(4)-8(b).

²⁰ 15 U.S.C. 80a-3(a). Unless otherwise noted, when we refer to the Investment Company Act, or any paragraph of the Investment Company Act, we are referring to 15 U.S.C. 80a of the United States Code, at which the Company Act is codified.

²¹ Section 3(c)(1) of the Investment Company Act excludes from the definition of investment company an issuer the securities (other than short-term paper) of which are beneficially owned by not more than 100 persons and that is not making or proposing to make a public offering of its securities. Section 3(c)(7) of the Investment Company Act excludes from the definition of investment company an issuer the outstanding securities of which are owned exclusively by persons who, at the time of acquisition of such securities, are “qualified purchasers” and that is not making or proposing to make a public offering of its securities. “Qualified purchaser” is

applies to advisers to hedge funds, private equity funds, venture capital funds, and other types of privately offered pools that invest in securities, as well as advisers to investment companies that are registered with us.²²

Several commenters supported applying the protection of the new antifraud rule to investors in all these kinds of pooled investment vehicles, noting, for example, that every investor, not just the wealthy or sophisticated that typically invest in private pools, should be protected from fraud.²³ Some other commenters urged us not to apply the rule to advisers to registered investment companies, arguing that the rule is unnecessary because other provisions of the federal securities laws prohibiting fraud are available to the Commission to address these matters.²⁴ They expressed concern that application of another antifraud provision with different elements would be burdensome. These commenters claimed that the rule would, for example, make it necessary for advisers to conduct extensive reviews of all communications with clients. But the other antifraud provisions available to us contain different elements because they were not specifically designed to address frauds by investment advisers with respect to investors in pooled investment vehicles. In some cases, the other antifraud provisions may not permit us to

defined in section 2(a)(51) of the Investment Company Act generally to include a natural person (or a company owned by two or more related natural persons) who owns not less than \$5,000,000 in investments; a person, acting for its own account or accounts of other qualified purchasers, who owns and invests on a discretionary basis, not less than \$25,000,000; and a trust whose trustee, and each of its settlors, is a qualified purchaser.

²² We have brought enforcement actions under the Advisers Act against advisers to these types of funds. See, e.g., In the Matter of Askin Capital Management, L.P and David J. Askin, Investment Advisers Act Release No. 1492 (May 23, 1995) (hedge fund); In the Matter of Thayer Capital Partners, Investment Advisers Act Release No. 2276 (Aug. 12, 2004) (private equity fund); SEC v. Michael A. Liberty, Litigation Release No. 19601 (Mar. 8, 2006) (venture capital fund).

²³ E.g., NASAA Letter, supra note 8.

²⁴ E.g., ABA Letter, supra note 9; Letter of Investment Adviser Association (Mar. 9, 2007); Letter of Investment Company Institute (Mar. 9, 2007) (“ICI Letter”); Sullivan & Cromwell Letter, supra note 9. Commenters noted in particular that section 34(b) of the Investment Company Act already prohibits an adviser from making fraudulent material statements or omissions in a fund’s registration statement or in required records.

proceed against the adviser.²⁵ As a result, the existing antifraud provisions may not be available to us in all cases. As we discussed above, before the Goldstein decision we had brought actions against advisers to mutual funds under sections 206(1) and (2) for defrauding investors in mutual funds.²⁶ Because, before the Goldstein decision, advisers to pooled investment vehicles operated with the understanding that the Advisers Act prohibited the conduct that this rule prohibits, we believe that advisers that are attentive to their traditional compliance responsibilities will not need to alter their business practices or take additional steps and incur new costs as a result of this rule's adoption.

B. Prohibition on False or Misleading Statements

Rule 206(4)-8(a)(1) prohibits any investment adviser to a pooled investment vehicle from making an untrue statement of a material fact to any investor or prospective investor in the pooled investment vehicle, or omitting to state a material fact necessary in order to make the statements made to any investor or prospective investor in the pooled investment vehicle, in the light of the circumstances under which they were made, not misleading.²⁷

The provision is very similar to those in many of our antifraud laws and rules that, depending upon the circumstances, may also be applicable to the same investor

²⁵ This may be the case with respect to section 34(b) of the Investment Company Act, for example, if the adviser's fraudulent statements are not made in a document described in that section, or with respect to rule 10b-5 under the Exchange Act, where the fraudulent conduct does not relate to a misstatement or omission in connection with the purchase or sale of any security.

²⁶ See, e.g., In the Matter of Van Kampen Investment Advisory Corp., Investment Advisers Act Release No. 1819 (Sept. 8, 1999); In the Matter of The Dreyfus Corporation, Investment Advisers Act Release No. 1870 (May 10, 2000); In the Matter of Federated Investment Management Company, Investment Advisers Act Release No. 2448 (Nov. 28, 2005).

²⁷ A fact is material if there is a substantial likelihood that a reasonable investor in making an investment decision would consider it as having significantly altered the total mix of information available. Basic, Inc. v. Levinson, 485 U.S. 224, 231-32 (1988); TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976). See also In the Matter of Van Kampen Investment Advisory Corp., *supra* note 26; In the Matter of the Dreyfus Corporation, *supra* note 26.

communications.²⁸ Sections 206(1) and (2) have imposed similar obligations on advisers since 1940 and, before Goldstein, were commonly accepted as imposing similar requirements on communications with investors in a fund. For these reasons, and because the nature of the duty to communicate without false statements is so well developed in current law, we believe that commenters' concerns about the breadth of the prohibition or any chilling effect the new rule might have on investor communications are misplaced.²⁹ Advisers to pooled investment vehicles attentive to their traditional compliance responsibilities will not need to alter their communications with investors.

Rule 206(4)-8(a)(1) prohibits advisers to pooled investment vehicles from making any materially false or misleading statements to investors in the pool regardless of whether the pool is offering, selling, or redeeming securities. While the new rule differs in this aspect from rule 10b-5 under the Exchange Act, the conduct prohibited is similar. The new rule prohibits, for example, materially false or misleading statements regarding investment strategies the pooled investment vehicle will pursue, the experience and credentials of the adviser (or its associated persons), the risks associated with an investment in the pool, the performance of the pool or other funds advised by the adviser, the valuation of the pool or investor accounts in it, and practices

²⁸ See, e.g., sections 12 and 17 of the Securities Act [15 U.S.C. 77l, 77q]; section 14 of the Exchange Act [15 U.S.C. 78n]; section 34 of the Investment Company Act; rules 156, 159, and 610 under the Securities Act [17 CFR 230.156, 230.159, 230.610]; rules 10b-5, 13e-3, 13e-4, and 15c1-2 under the Exchange Act [17 CFR 240.10b-5, 240.13e-3, 240.13e-4, 240.15c1-2]; and rule 17j-1 under the Investment Company Act [17 CFR 270.17j-1].

²⁹ Letter of Managed Funds Association (Mar. 9, 2007) ("MFA Letter"); NYCB Letter, supra note 9; Davis Polk Letter, supra note 9; Dechert Letter, supra note 9; Letter of Seward & Kissel LLP (Mar. 8, 2007) ("Seward & Kissel Letter").

the adviser follows in the operation of its advisory business such as how the adviser allocates investment opportunities.³⁰

C. Prohibition of Other Frauds

Rule 206(4)-8(a)(2) makes it a fraudulent, deceptive, or manipulative act, practice, or course of business for any investment adviser to a pooled investment vehicle to “otherwise engage in any act, practice, or course of business that is fraudulent, deceptive, or manipulative with respect to any investor or prospective investor in the pooled investment vehicle.”³¹ As we noted in the Proposing Release, the wording of this provision is drawn from the first sentence of section 206(4) and is designed to apply more broadly to deceptive conduct that may not involve statements.³²

Some commenters asserted that section 206(4) provides us authority only to adopt prophylactic rules that explicitly identify conduct that would be fraudulent under the new rule.³³ We believe our authority is broader. We do not believe that the commenters’ suggested approach would be consistent with the purposes of the Advisers Act or the protection of investors. That approach would have us adopt the rule prohibiting fraudulent communications but not fraudulent conduct.³⁴ But, section 206(4) itself specifically authorizes us to adopt rules defining and prescribing “acts, practices and courses of business,” (*i.e.*, conduct), and does not explicitly refer to communications, which, nonetheless, represent a form of an act, practice, or

³⁰ We have previously brought enforcement actions alleging these or similar types of frauds. See Proposing Release, supra note 2, at note 29.

³¹ Rule 206(4)-8(a)(2).

³² See Section II.C of the Proposing Release, supra note 2.

³³ ABA Letter, supra note 9; ICI Letter, supra note 24; Schulte Roth Letter, supra note 9; Sullivan & Cromwell Letter, supra note 9.

³⁴ See, e.g., ABA Letter, supra note 9.

course of business. In addition, rule 206(4)-8 as adopted would provide greater protection to investors in pooled investment vehicles.

Alternatively, commenters would have us adopt a rule prohibiting identified known fraudulent conduct or would have us provide detailed commentary describing specific forms of fraudulent conduct that the rule would prohibit.³⁵ Either approach would fail to prohibit fraudulent conduct we did not identify, and could provide a roadmap for those wishing to engage in fraudulent conduct. This approach would be inconsistent with our historical application of the federal securities laws under which broad prohibitions have been applied against specific harmful activity.

D. Other Matters

We noted in the Proposing Release that, unlike violations of rule 10b-5 under the Exchange Act, the Commission would not need to demonstrate that an adviser violating rule 206(4)-8 acted with scienter.³⁶ Commenters questioned whether the rule should encompass negligent conduct, arguing that it would “expand the concept of fraud itself beyond its original meaning.”³⁷ We read the language of section 206(4) as not by its terms limited to knowing or deliberate conduct. For example, section 206(4) encompasses “acts, practices, and courses of business as are . . . deceptive,” thereby reaching conduct that is negligently deceptive as well as conduct that is recklessly or deliberately deceptive. In addition, the Court of Appeals for the District of Columbia Circuit concluded that “scienter is not required under section 206(4).”³⁸

³⁵ Id.

³⁶ Section II.B of the Proposing Release, supra note 2.

³⁷ See ABA Letter, supra note 9 at page 3.

³⁸ SEC v. Steadman, 967 F.2d 636, at 647 (D.C. Cir. 1992). The court in Steadman analogized section 206(4) of the Advisers Act to section 17(a)(3) of the Securities Act, which the Supreme Court had held did not require a finding of scienter, id. (citing Aaron v. SEC, 446 U.S. 680 (1980)). In discussing section 17(a)(3) and its lack of a scienter requirement, the Steadman court

We believe use of a negligence standard also is appropriate as a method reasonably designed to prevent fraud. As the Supreme Court noted in U.S. v. O’Hagan, “[a] prophylactic measure, because its mission is to prevent, typically encompasses more than the core activity prohibited.”³⁹ In O’Hagan, the Court held that under section 14(e) “the Commission may prohibit acts, not themselves fraudulent under the common law or §10(b), if the prohibition is ‘reasonably designed to prevent . . . acts and practices [that] are fraudulent.’”⁴⁰ Along these lines, the prohibitions in rule 206(4)-8 are reasonably designed to prevent fraud. We believe that, by taking sufficient care to avoid negligent conduct, advisers will be more likely to avoid reckless deception. Since the Commission clearly is authorized to prescribe conduct that goes beyond fraud as a means reasonably designed to prevent fraud, prohibiting deceptive conduct done negligently is a way to accomplish this objective.

Rule 206(4)-8 does not create under the Advisers Act a fiduciary duty to investors or prospective investors in a pooled investment vehicle not otherwise imposed by law. Nor does the rule alter any duty or obligation an adviser has under the Advisers Act, any other federal law or regulation, or any state law or regulation (including state securities laws) to investors in a pooled investment vehicle it advises.⁴¹ The rule, for example, will permit us to bring an enforcement action against an investment adviser that violates a fiduciary duty imposed by other law if the violation of such law or obligation also constitutes an act, practice, or course of

observed that, similarly, a violation of section 206(2) of the Advisers Act could rest on a finding of simple negligence. Id. at 643, note 5. But see Aaron at 690-91 (citing Ernst & Ernst v. Hochfelder, 425 U.S. 185, 199 (1976)); cf. S. Rep. No. 1760, 86th Cong., 2d Sess. (June 28, 1960) at 8 and H. R. Rep. 2179, 86th Cong., 2d Sess. (Aug. 26, 1960) at 8 (comparing section 206(4) to section 15(c)(2) of the Exchange Act).

³⁹ U.S. v. O’Hagan, 521 U.S. 642, 672-73 (1997).

⁴⁰ Id. at 673.

⁴¹ For example, under the Uniform Limited Partnership Act, advisers who serve as general partners owe fiduciary duties to the limited partners. UNIF. LIMITED PARTNERSHIP ACT § 408 (2001).

business that is fraudulent, deceptive, or manipulative within the meaning of the rule and section 206(4).⁴²

Finally, the rule does not create a private right of action.⁴³

III. PAPERWORK REDUCTION ACT

The Paperwork Reduction Act of 1995 does not apply because rule 206(4)-8 does not impose a new “collection of information” within the meaning of the Paperwork Reduction Act of 1995. The rule does not create any filing, reporting, recordkeeping, or disclosure requirements for investment advisers subject to the rule. Accordingly, there is no “collection of information” under the Paperwork Reduction Act that requires the approval of the Office of Management and Budget under 44 U.S.C. 3501.

IV. COST-BENEFIT ANALYSIS

The Commission is sensitive to costs imposed by our rules and the benefits that derive from them. In the Proposing Release, we encouraged commenters to discuss any potential costs and benefits that we did not consider in our discussion. Three commenters addressed the issue of cost. Two of them stated their belief that the rule would increase advisers’ costs of compliance, by, for example, making it necessary for advisers to conduct extensive reviews of all communications with clients.⁴⁴ One stated that the rule would achieve a reasonable balance of

⁴² For example, if an adviser has a duty from a source other than the rule to make a material disclosure to an investor in a fund and negligently or deliberately fails to make the disclosure, the rule would apply to the failure.

⁴³ The Supreme Court has held that “there exists a limited private remedy under the Investment Advisers Act of 1940 to void an investment adviser’s contract, but that the Act confers no other private causes of action, legal or equitable.” Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11 at 24 (1979) (footnote omitted).

⁴⁴ NYCB Letter, supra note 9; Seward & Kissel Letter, supra note 29.

providing important benefits to investors at an acceptable cost.⁴⁵ None of the three commenters, however, provided analysis or empirical data in connection with their statements.

The rule makes it a fraudulent, deceptive, or manipulative act, practice, or course of business within the meaning of section 206(4) for any investment adviser to a pooled investment vehicle to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, to any investor or prospective investor in the pooled investment vehicle. The rule also makes it a fraudulent, deceptive, or manipulative act, practice, or course of business within the meaning of section 206(4) for any investment adviser to a pooled investment vehicle to otherwise engage in any act, practice, or course of business that is fraudulent, deceptive, or manipulative with respect to any investor or prospective investor in the pooled investment vehicle. For the reasons discussed, we do not believe that the rule will require advisers to incur new or additional costs.

Investment advisers to pooled investment vehicles should not be making untrue statements or omitting material facts or otherwise be engaged in fraud with respect to investors or prospective investors in pooled investment vehicles today, because federal authorities, state authorities, and private litigants often can, and do, seek redress from the adviser for the untrue statements or omissions or other frauds. In most cases, the conduct that the rule prohibits is already prohibited by federal securities statutes,⁴⁶ other federal statutes (including federal wire fraud statutes),⁴⁷ as well as state law.⁴⁸

⁴⁵ CFA Center Letter, supra note 8.

⁴⁶ See, e.g., section 10(b) of the Exchange Act [15 U.S.C. 78j(b)] and section 17(a) of the Securities Act [15 U.S.C. 77q] which would apply when the false statements are made “in connection with the purchase or sale of a security” or involve the “offer or sale” of a security, and section 34(b) of the Investment Company Act which makes it unlawful “to make any untrue statement of a

We recognize that there are costs involved in assuring that communications to investors and prospective investors do not contain untrue or misleading statements and preventing other frauds. Advisers have incurred, and will continue to incur, these costs due to the prohibitions and deterrent effect of the law and rules that apply under these circumstances. While each of the provisions noted above may have different limitation periods, apply in different factual circumstances, or require the government (or a private litigant) to prove different states of mind than the rule, as discussed above we believe that the multiple prohibitions against fraud, and the consequences under both criminal and civil law for fraud, should currently cause an adviser to take the precautions it deems necessary to refrain from such conduct.

Furthermore, prior to Goldstein, advisers operated with the understanding that the Advisers Act prohibited the same conduct that would be prohibited by the rule. Accordingly, we do not believe that advisers to pooled investment vehicles attentive to their traditional compliance responsibilities will need to take steps or alter their business practices in such a way that will require them to incur new or additional costs as a result of the adoption of the rule.

material fact in any registration statement, application, report, account, record, or other document filed or transmitted pursuant to [the Investment Company Act]”

⁴⁷ See, e.g., 18 U.S.C. 1341 (Frauds and Swindles) and 18 U.S.C. 1343 (Fraud by wire, radio, or television) which make it a criminal offense to use the mails or to communicate by means of wire, having devised a scheme to defraud or for obtaining money or property by means of false or fraudulent pretenses, and 18 U.S.C. 1957 (Engaging in monetary transactions in property derived from specified unlawful activity) which makes it a criminal racketeering offense to engage or attempt to engage in a transaction in criminally derived property of a value greater than \$10,000.

⁴⁸ See, e.g., Metro Communications Corp. BVI v. Advanced Mobilecomm Technologies, 854 A.2d 121, 156 (Del. Ch. 2004) (court held that plaintiff-former member of LLC had sufficiently alleged a common law fraud claim based on allegation that a series of reports by LLC’s managers contained misleading statements; court stated that “[i]n the usual fraud case, the speaking party who is subject to an accusation of fraud is on the opposite side of a commercial transaction from the plaintiff, who alleges that but for the material misstatements or omissions of the speaking party he would not have contracted with the speaking party”).

We also recognize that the rule may cause some advisers to pay more attention to the information they present to better guard against making an untrue or misleading statement to an investor or prospective investor and to reevaluate measures that are intended to prevent fraud. As a consequence, some advisers might seek guidance, legal or otherwise, and more closely review the information that they disseminate to investors and prospective investors and the antifraud related policies and procedures they have implemented. While increased concern about making false statements or committing fraud could be attributable to the new rule, advisers should already be incurring these costs to ensure truthfulness and prevent fraud, regardless of the rule, because of the myriad of laws or regulations that may already apply.

The principal benefit of the rule is that it clearly enables the Commission to bring enforcement actions under the Advisers Act, if an adviser to a pooled investment vehicle disseminates false or misleading information to investors or prospective investors or otherwise commits fraud with respect to any investor or prospective investor. As noted above, the existing antifraud provisions may not be available to us in all cases. Through our enforcement actions we are able to protect fund investor assets by stopping ongoing frauds,⁴⁹ barring persons that have committed certain specified violations or offenses from being associated with an investment adviser,⁵⁰ imposing penalties,⁵¹ seeking court orders to protect fund assets,⁵² and to order disgorgement of ill-gotten gains.⁵³ Moreover, we believe that rule 206(4)-8 will deter advisers to pooled investment vehicles from engaging in fraudulent conduct with respect to investors in

⁴⁹ See section 203(k) of the Advisers Act (Commission authority to issue cease and desist orders).

⁵⁰ See section 203(f) of the Advisers Act (Commission authority to bar a person from being associated with an investment adviser).

⁵¹ See section 203(i) of the Advisers Act (Commission authority to impose civil penalties).

⁵² See section 209(d) of the Advisers Act (Commission authority to seek injunctions and restraining orders in federal court).

⁵³ See section 203(j) of the Advisers Act (Commission authority to order disgorgement).

those pools and will provide investors with greater confidence when investing in pooled investment vehicles.

V. REGULATORY FLEXIBILITY ACT ANALYSIS

The Commission certified, pursuant to section 605(b) of the Regulatory Flexibility Act, that rule 206(4)-8 will not have a significant economic impact on a substantial number of small entities.⁵⁴ This certification was included in the Proposing Release.⁵⁵ While we encouraged written comment regarding this certification, none of the commenters responded to this request.

VI. STATUTORY AUTHORITY

We are adopting new rule 206(4)-8 pursuant to our authority set forth in sections 206(4) and 211(a) of the Advisers Act (15 U.S.C. 80b-6(4) and 80b-11(a)).

List of Subjects

17 CFR Part 275

Reporting and recordkeeping requirements, Securities.

VII. TEXT OF RULES

For the reasons set out in the preamble, Title 17, Chapter II of the Code of Federal Regulations is amended as follows:

PART 275 – RULES AND REGULATIONS, INVESTMENT ADVISERS ACT OF 1940

1. The authority citation for Part 275 continues to read in part as follows:

Authority: 15 U.S.C. 80b-2(a)(11)(F), 80b-2(a)(17), 80b-3, 80b-4, 80b-4a, 80b-6(4), 80b-6a, and 80b-11, unless otherwise noted.

* * * * *

⁵⁴ 5 U.S.C. 605(b).

⁵⁵ Section VII.A of the Proposing Release, supra note 2.

2. Section 275.206(4)-8 is added to read as follows:

§206(4)-8 Pooled investment vehicles.

(a) Prohibition. It shall constitute a fraudulent, deceptive, or manipulative act, practice, or course of business within the meaning of section 206(4) of the Act (15 U.S.C. 80b-6(4)) for any investment adviser to a pooled investment vehicle to:

(1) Make any untrue statement of a material fact or to omit to state a material fact necessary to make the statements made, in the light of the circumstances under which they were made, not misleading, to any investor or prospective investor in the pooled investment vehicle; or

(2) Otherwise engage in any act, practice, or course of business that is fraudulent, deceptive, or manipulative with respect to any investor or prospective investor in the pooled investment vehicle.

(b) Definition. For purposes of this section “pooled investment vehicle” means any investment company as defined in section 3(a) of the Investment Company Act of 1940 (15 U.S.C. 80a-3(a)) or any company that would be an investment company under section 3(a) of that Act but for the exclusion provided from that definition by either section 3(c)(1) or section 3(c)(7) of that Act (15 U.S.C. 80a-3(c)(1) or (7)).

By the Commission.

Nancy M. Morris
Secretary

August 3, 2007

002756

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

In Re: Highland Capital Management, L.P § Case No. **19-34054-SGJ11**

Charitable DAF Fund, L.P et al

Appellant

§

vs.

§

21-03067

Highland Capital Management, L.P

§

Appellee

§

3:23-CV-01503-B

[167] Order granting Defendant Highland Capital Management, L.P.'s Renewed motion to dismiss adversary proceeding (related document # [122](#)) Entered on 6/25/2023.

Volume 14

APPELLANT RECORD

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

In re:	§ Chapter 11
	§
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§ Case No. 19-34054-sgj11
	§
Debtor.	§
	§
CHARITABLE DAF FUND, L.P. AND CLO	§
HOLDCO, LTD., DIRECTLY AND DERIVATIVELY	§
	§
Plaintiffs,	§ Adversary Proceeding No.
	§
vs.	§ 21-03067-sgj11
	§
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§
HIGHLAND HCF ADVISOR, LTD., AND	§
HIGHLAND CLO FUNDING LTD., NOMINALLY	§
	§
Defendant.	§
	§

INDEX

**APPELLANTS' SECOND AMENDED STATEMENT OF ISSUES
AND DESIGNATION OF RECORD ON APPEAL**

Pursuant to Rules 8009(a)(1)(A)-(B) and (a)(4) of the Federal Rules of Bankruptcy Procedure, The Charitable DAF Fund, L.P. and CLO Holdco, Ltd. ("Appellants") hereby designate the following items to be included in the record and identify the following issues with respect to

their appeal of the Order Granting Defendant Highland Capital Management, L.P.'s "Renewed Motion to Dismiss Complaint" [Adv. Proc. Doc. No. 122] which was entered by the United States Bankruptcy Court for the Northern District of Texas on June 25, 2023.

I. STATEMENT OF ISSUES TO BE PRESENTED ON APPEAL

- Whether the Bankruptcy Court had jurisdiction to rule on Highland Capital Management L.P.'s Renewed Motion to Dismiss Complaint
- Whether the Renewed Motion to Dismiss Complaint was improperly granted

II. DESIGNATION OF ITEMS TO BE INCLUDED IN THE RECORD

Vol. 1
000001

1. Notice of Appeal for Bankruptcy Case Adversary Proceeding No. 21-03067-sgj11 [Doc. 168].

000042

2. The judgment, order, or decree appealed from: Memorandum Opinion and Order Granting Defendant Highland Capital Management, L.P.'s "Renewed Motion to Dismiss Complaint" [Adv. Proc. Doc. No. 122] [Doc. 167].

000080

3. Docket Sheet kept by the Bankruptcy Clerk.

4. Documents listed below and as described in the Docket Sheet for Bankruptcy Case Proceeding No. 21-03067-sgj.

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No.	Date Filed	Docket No.	Description/Document Text
1	9/29/21	1	(36 pgs; 3 docs) Adversary case 21-03067. ORDER REFERRING CASE NUMBER 21-CV-0842-B from U.S District Court for the Northern District of Texas, Dallas Division to U.S. Bankruptcy Court for Northern District of Texas, Dallas Division. Complaint by Charitable DAF Fund, LP, CLO Holdco, Ltd. against Highland Capital Management, LP, Highland HCF Advisor Ltd., Highland CLO Funding, Ltd. Fee Amount \$350 (Attachments: # 1 Original Complaint # 2 Docket Sheet from 3:20-cv-0842-B) Nature(s) of suit: 02 (Other (e.g. other actions that would have been brought in state court if unrelated to bankruptcy)). (Okafor, M.)
2	9/29/21	2	(1 pg) Supplemental Document (cover sheet) by CLO Holdco Ltd., Charitable DAF Fund (RE: related document(s)1 Adversary case 21-03067) [ORIGINALLY FILED IN 21-CV-0842 AS #2 ON 04/13/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)

Vol. 2 000139 000232 000239 000270 Thru Vol. 6	3	9/29/21	6	(93 pgs; 6 docs) MOTION for Leave to File First Amended Complaint filed by CLO Holdco Ltd., Charitable DAF Fund LP (Attachments: # 1 Exh 1_First Amended Complaint # 2 Exh 2_Motion for Authorization to Retain James Seery # 3 Exh 3_Order Approving Retention of James Seery # 4 Exh 4_Order Approving Settlement # 5 Proposed Order) (Bridges, Jonathan) (Entered: 04/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #6 ON 04/19/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
	4	9/29/21	22	(7 pgs; 2 docs) MOTION for an Order to Enforce the Order of Reference filed by Highland Capital Management LP. (Attachments: # 1 Exhibit(s) A--Proposed Order) (Annable, Zachery) Modified text on 5/20/2021 (mjr). (Entered: 05/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #22 ON 05/19/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
	5	9/29/21	23	(31 pgs) Brief/Memorandum in Support filed by Highland Capital Management LP re: 22 MOTION for an Order to Enforce the Order of Reference. (Annable, Zachery) Modified text on 5/20/2021 (mjr).(Entered: 05/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #23 ON 05/19/2021 IN U.S.DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
	6	9/29/21	24	(926 pgs; 29 docs) Appendix in Support filed by Highland Capital Management LP re: 23 Brief/Memorandum in Support. (Attachments: # 1 Appendix 1 # 2 Appendix 2 # 3 Appendix 3 # 4 Appendix 4 # 5 Appendix 5 # 6 Appendix 6 # 7 Appendix 7 # 8 Appendix 8 # 9 Appendix 9 # 10 Appendix10 # 11 Appendix 11 # 12 Appendix 12 # 13 Appendix 13 # 14 Appendix 14 # 15 Appendix 15 # 16 Appendix 16 # 17 Appendix 17 # 18 Appendix 18 # 19 Appendix 19 # 20 Appendix 20 # 21 Appendix 21# 22 Appendix 22 # 23 Appendix 23 # 24 Appendix 24 # 25 Appendix 25 # 26 Appendix 26 # 27 Appendix 27 # 28 Appendix 28) (Annable, Zachery) Modified linkage and text on 5/20/2021 (mjr). (Entered:05/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #24 ON 05/19/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
Vol. 7 001196	7	9/29/21	26	(7 pgs; 2 docs) MOTION to Dismiss Complaint filed by Highland Capital Management LP (Attachments: # 1 Exhibit(s) A--Proposed Order) (Annable, Zachery) Modified text on 5/28/2021 (jmg).(Entered: 05/27/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #26 ON 05/27/2021 IN U.S.DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)

Vol. 7 001203 thru Vol 8	8	9/29/21	28	(508 pgs; 14 docs) Appendix in Support filed by Highland Capital Management LP (Attachments: # 1 Appendix 1 # 2 Appendix 2 # 3 Appendix 3 # 4 Appendix 4 # 5 Appendix 5 # 6 Appendix 6 # 7 Appendix 7 # 8 Appendix 8 # 9 Appendix 9 # 10 Appendix 10 # 11 Appendix 11 # 12 Appendix 12 # 13 Appendix 13) (Annable, Zachery) (Entered: 05/27/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #28 ON 05/27/2021 IN U.S. DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
Vol. 9 001711	9	9/29/21	33	(1 pg) Amended Civil Cover Sheet by CLO Holdco Ltd, Charitable DAF Fund LP. Amendment to 2 Supplemental Document. (Sbaiti, Mazin) Modified text on 6/23/2021 (mjr). (Entered: 06/22/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #33 ON 06/22/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001712	10	9/29/21	36	(26 pgs) RESPONSE filed by CLO Holdco Ltd, Charitable DAF Fund LP re: 22 MOTION for an Order to Enforce the Order of Reference (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #36 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001738	11	9/29/21	37	(22 pgs) Appendix in Support filed by CLO Holdco Ltd, Charitable DAF Fund LP re 36 Response/Objection Response to Motion for an Order to Enforce the Order of Reference (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #37 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001760	12	9/29/21	38	(45 pgs) RESPONSE filed by CLO Holdco Ltd, Charitable DAF Fund LP re: 26 MOTION to Dismiss (Defendant Highland Capital Management, L.P.'s Motion to Dismiss Complaint) (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #38 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001805	13	9/29/21	39	(88 pgs) Appendix in Support filed by CLO Holdco Ltd, Charitable DAF Fund LP re 38 Response/Objection to Defendant Highland Capital Management, L.P.'s Motion to Dismiss Complaint (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #39 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001893	14	9/29/21	42	(12 pgs) REPLY filed by Highland Capital Management LP re: 22 MOTION for an Order to Enforce the Order of Reference (Annable, Zachery) (Entered: 07/13/2021) [ORIGINALLY FILED IN 21-CV-0842AS #42 ON 07/13/2021 IN U.S.

			DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
VOL. 9	15	9/29/21	43 (852 pgs) Appendix in Support filed by Highland Capital Management LP re: 42 Reply. (Annable, Zachery) Modified text on 7/14/2021 (mjr). (Entered: 07/13/2021) [ORIGINALLY FILED IN 21-CV-0842AS #43 ON 07/13/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001905 thru Vol. 13	16	9/29/21	45 (21 pgs) REPLY filed by Highland Capital Management LP re: 26 MOTION to Dismiss (Defendant Highland Capital Management, L.P.'s Motion to Dismiss Complaint) (Annable, Zachery) (Entered: 07/13/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #44 ON 07/13/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002757	17	9/29/21	57 (7 pgs; 2 docs) MOTION to Dismiss and Joinder in Motion to Dismiss of Highland Capital Management, L.P. filed by Highland CLO Funding Ltd. (Attachments: # 1 Proposed Order) Attorney Paul R Bessette added to party Highland CLO Funding Ltd (pty:dft) (Bessette, Paul) (Entered: 08/30/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #57 ON 08/30/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002778	18	9/29/23	58 (12 pgs) Brief/Memorandum in Support filed by Highland CLO Funding Ltd. re 57 MOTION to Dismiss and Joinder in Motion to Dismiss of Highland Capital Management, L.P. (Bessette, Paul) (Entered: 08/30/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #58 ON 08/30/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002785	19	9/29/23	59 (80 pgs; 5 docs) Appendix in Support filed by Highland CLO Funding Ltd re 58 Brief/Memorandum in Support of Motion (Attachments: # 1 Exhibit(s) A - Jackson v Dear # 2 Exhibit(s) B - Prudential Assurance v. Newman # 3 Exhibit(s) C - Harbourvest Settlement Agreement # 4 Exhibit(s) D - Boleat Declaration) (Bessette, Paul) (Entered: 08/30/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #59 ON 08/30/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002797	20	9/29/21	64 (1 pg) ORDER OF REFERENCE: Pursuant to 28 U.S.C. § 157 and this District's Miscellaneous Order No. 33, this case is hereby REFERRED to Judge Stacey G. C. Jernigan of the United States Bankruptcy Court for the Northern District of Texas, Dallas Division, to be adjudicated as a matter related to the consolidated Chapter 11 Bankruptcy of Highland Capital Management, L.P., Chapter 11 Case No.19-34054. (Ordered by Judge Jane J. Boyle
002877			

Vol. 14 002878 002883 thru Vol. 16				on 9/20/2021) (svc) (Entered: 09/20/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #64 ON 09/20/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
	21	10/19/21	66	(5 pgs) Notice of hearing filed by Defendant Highland Capital Management, LP (RE: related document(s) 26 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP, 47 Motion to strike document filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 55 Motion to abate filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) Hearing to be held on 11/23/2021 at 09:30 AM at https://us-courts.webex.com/meet/jerniga for 26 and for 47 and for 55, (Annable, Zachery)
	22	11/22/21	71	(509 pgs; 2 docs) Witness and Exhibit List <i>for Hearing on November 23, 2021</i> filed by Defendant Highland Capital Management, LP (RE: related document(s) 26 Motion to dismiss adversary proceeding). (Attachments: # 1 Exhibits 1-13) (Hayward, Melissa)
Vol. 17 003392 003394 003583 003585 003611	23	11/22/21	72	(2 pgs) Witness List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 26 Motion to dismiss adversary proceeding, 47 Motion to strike (related document(s): 43 Document), 55 Motion to abate (related document(s) 1 Complaint), 69 Motion to abate <i>Plaintiffs' Amended Motion to Stay All Proceedings</i> (related document(s) 55 Motion to abate (related document(s) 1 Complaint))). (Sbaiti, Mazin)
	24	11/22/21	73	(189 pgs; 4 docs) Exhibit List <i>for November 23, 2021 hearing</i> filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 47 Motion to strike (related document(s): 43 Document), 55 Motion to abate (related document(s) 1 Complaint)). (Attachments: # 1 Exhibit 1_Defendant's Memorandum of Law in Support of Motion for Reconsideration # 2 Exhibit 2_Highland Memorandum in Support of Motion to Dismiss # 3 Exhibit 3_Order (I) Confirming Fifth Amended Plan of Reorganization of Highland) (Sbaiti, Mazin)
	25	12/7/21	80	(2 pgs) Order granting Highland CLO Funding, Ltd.'s motion to dismiss adversary as a party with prejudice (related document 57) Entered on 12/7/2021. (Okafor, Marcey) Modified text on 3/11/2022 (Okafor, Marcey).
	26	3/11/22	99	(26 pgs) Memorandum of Opinion and order granting motion to dismiss the adversary proceeding (RE: related document(s) 26 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP). Entered on 3/11/2022 (Okafor, Marcey)
	27	3/11/22	100	(26 pgs) Order granting motion to dismiss adversary proceeding with prejudice (related document #26) Entered on 3/11/2022. (Okafor, Marcey)

Vol. 18 003637	28	3/21/22	104	(29 pgs) Notice of appeal. Fee Amount \$298 filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 100 Order on motion to dismiss adversary proceeding). Appellant Designation due by 04/4/2022. (Sbaiti, Mazin)
003666	29	5/26/22	120	(177 pgs; 2 docs) Support/supplemental document <i>Motion to Supplement Appellate Record</i> filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 111 Appellant designation). (Attachments: # 1 Amended Transcript of January 14, 2021 Hearing) (Sbaiti, Mazin)
003843	30	6/9/22	121	(1 pg) DISTRICT COURT Order: Case 3:22-00695-B is hereby transferred to the docket of the Honorable Judge Jane J. Boyle for consolidation with The Charitable DAF Fund LP, et al. v. Highland Capital Management LP, Case No. 3:21-cv-3129-N. Judge Karen Gren Scholer no longer assigned to case.(RE: related document(s) 86 Notice of appeal filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 104 Notice of appeal filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Entered on 6/9/2022 (Whitaker, Sheniqua) (Entered: 06/10/2022)
003844	31	10/24/22	122	(7 pgs) Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP (Annable, Zachery)
003851	32	10/14/22	123	(31 pgs) Brief in support filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Annable, Zachery)
Vol. 19 003882 Thru Vol 20	33	10/14/22	124	(513 pgs; 15 docs) Support/supplemental document (<i>Appendix in Support of Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7 # 8 Exhibit 8 # 9 Exhibit 9 # 10 Exhibit 10 # 11 Exhibit 11 # 12 Exhibit 12 # 13 Exhibit 13 # 14 Exhibit 14) (Annable, Zachery)
Vol. 21 004395	34	10/27/22	126	(5 pgs) Notice of hearing (<i>Notice of Hearing and Briefing Schedule on Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP). Hearing to be held on 12/8/2022 at 09:30 AM at https://us-courts.webex.com/meet/jerniga for 122. (Annable, Zachery)

Vol. 21 004400 004410 004442 Thru Vol. 22	35	11/18/22	128	(10 pgs) Motion for withdrawal of reference. Fee amount \$188, filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (Sbaiti, Mazin)
	36	11/18/22	129	(32 pgs) Response opposed to (related document(s): 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP) filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Sbaiti, Mazin)
	37	11/18/22	130	(254 pgs; 2 docs) Response opposed to (related document(s): 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP) filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Attachments: # 1 Appendix) (Sbaiti, Mazin)
Vol. 22 004696 004717 004732 004737 004742	38	9/2/22	131	(21 pgs) DISTRICT COURT MEMORANDUM OPINION AND ORDER: The Court REVERSES and REMANDS the bankruptcy court's Motion to Dismiss Order and AFFIRMS the bankruptcy courts Motion to Stay Order. re: appeal on Civil Action number: Case 3:22-00695-B consolidated with 3:21-CV-3129-B, (RE: related document(s) 81 Order on motion to abate, 100 Order on motion to dismiss adversary proceeding). Entered on 9/2/2022 (Whitaker, Sheniqua) (Entered: 11/29/2022)
	39	12/2/22	133	(15 pgs) Reply to (related document(s): 129 Response filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 130 Response filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) filed by Defendant Highland Capital Management, LP. (Annable, Zachery)
	40	12/7/22	135	(5 pgs) Notice of hearing filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP). Hearing to be held on 1/25/2023 at 01:30 PM at https://us-courts.webex.com/meet/jerniga for 122, (Annable, Zachery)
	41	12/7/22	136	(5 pgs) Notice of hearing filed by Defendant Highland Capital Management, LP (RE: related document(s) 128 Motion for withdrawal of reference filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Status Conference to be held on 1/25/2023 at 01:30 PM at https://us-courts.webex.com/meet/jerniga . (Annable, Zachery).
	42	12/9/22	138	(3 pgs) Response opposed to (related document(s): 128 Motion for withdrawal of reference. Fee amount \$188, filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) filed by Defendant Highland Capital Management, LP. (Annable, Zachery)

Vol. 22 004745	43	12/9/22	139	(25 pgs) Brief in support filed by Defendant Highland Capital Management, LP (RE: related document(s) 138 Response). (Annable, Zachery)
Vol. 23 004770	44	12/9/22	140	(280 pgs; 8 docs) Support/supplemental document (<i>Appendix in Support of Highland Capital Management, L.P.'s Response to Renewed Motion to Withdraw the Reference</i>) filed by Defendant Highland Capital Management, LP (RE: related document(s) 138 Response). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7) (Annable, Zachery)
Vol. 24 005050	45	12/16/22	144	(6 pgs) Reply to (related document(s): 138 Response filed by Defendant Highland Capital Management, LP) filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Sbaiti, Mazin)
005056 Thru Vol. 25.	46	1/23/23	145	(514 pgs; 15 docs) Witness and Exhibit List filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7 # 8 Exhibit 8 # 9 Exhibit 9 # 10 Exhibit 10 # 11 Exhibit 11 # 12 Exhibit 12 # 13 Exhibit 13 # 14 Exhibit 14) (Annable, Zachery)
Vol. 26 005570	47	1/23/23	146	(280 pgs; 8 docs) Witness and Exhibit List filed by Defendant Highland Capital Management, LP (RE: related document(s) 128 Motion for withdrawal of reference. Fee amount \$188.). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7) (Annable, Zachery)
Vol. 27 005850	48	1/23/23	147	(221 pgs; 7 docs) Witness and Exhibit List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Attachments: # 1 Exhibit 1_Excerpts from July 14, 2020 Hearing Transcript # 2 Exhibit 2_HCLOF Members Agreement Relating to the Company # 3 Exhibit 3_HarbourVest Settlement Agreement # 4 Exhibit 4_Order Approving Debtor's Settlement with HarbourVest # 5 Exhibit 5_HCLOF Offering # 6 Exhibit 6 Amended and Restated Investment Advisory Agreement) (Sbaiti, Mazin)
006071	49	1/23/23	148	(3 pgs) Witness and Exhibit List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 128 Motion for withdrawal of reference. Fee amount \$188.). (Phillips, Louis)
Vol. 28 006074	50	1/25/23	150	(56 pgs; 2 docs) Amended Witness and Exhibit List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 147 List (witness/exhibit/generic), 149 List (witness/exhibit/generic)). (Attachments: # 1 Exh 7_Testimony of Mark Patrick at June 8, 2021 hearing) (Sbaiti, Mazin)

Vol. 28 006130	51	1/25/23	152	(3 pgs) Notice of Appearance and Request for Notice by Louis M. Phillips filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Phillips, Louis)
	52	1/25/23	154	(1 pg) Court admitted exhibits date of hearing January 25, 2023 (RE: related document(s) 128 Motion for withdrawal of reference, filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) (COURT ADMITTED DEFENDANT'S EXHIBITS #1, #2, #3, #4, #5 & #6 OFFERED BY ATTY GREG DEMO). (Edmond, Michael) (Entered: 01/27/2023)
Vol. 32 006925 006942 006960	53	2/6/23	158	Report and recommendation to the U.S. District Court by U.S. Bankruptcy Judge. (RE: related document(s) 128 Motion for withdrawal of reference filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Entered on 2/6/2023 (Okafor, Marcey)
	54	2/6/23	161	(18 pgs) DISTRICT COURT Notice of transmission of report and recommendation in re: renewed motion to withdraw reference. Civil Case # 3:22-cv-02802-S. (RE: related document(s) 158 Report and recommendation to the U.S. District Court by U.S. Bankruptcy Judge. (RE: related document(s) 128 Motion for withdrawal of reference filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Entered on 2/6/2023) (Whitaker, Sheniqua)
	55	4/3/23	165	(1 pg) DISTRICT COURT ORDER: The Court GRANTS the 11 Joint Motion to Transfer Proceeding and Consolidate Before Original Court and the above-numbered case (3:22-cv-02802-S) is transferred to the docket of the Honorable Judge Jane Boyle: Civil case 3:21-cv-00842-B (order referring case). (RE: related document(s) 1 Complaint filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 143 Notice of transmission of motion to withdraw reference). Entered on 4/3/2023 (Whitaker, Sheniqua) Modified on 4/10/2023 (Whitaker, Sheniqua). (Entered: 04/10/2023)

TRANSCRIPTS

006961	56	11/24/21	78	(104 pgs) Transcript regarding Hearing Held 11-23-2021 RE: Motion Hearing. THIS TRANSCRIPT WILL BE MADE ELECTRONICALLY AVAILABLE TO THE GENERAL PUBLIC 90 DAYS AFTER THE DATE OF FILING. TRANSCRIPT RELEASE DATE IS 02/22/2022. Until that time the transcript may be viewed at the Clerk's Office or a copy may be obtained from the official court transcriber. Court Reporter/Transcriber Liberty Transcripts/Dipti Patel, Telephone number 847-848-4907. (RE: related document(s) 75 Hearing held on 11/23/2021. (RE: related document(s) 55 MOTION to Stay filed by CLO Holdco Ltd, Charitable DAF Fund LP (Sbaiti, Mazin) (Entered: 08/26/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #55 ON 08/26/2021 IN U.S.
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			<p>DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)) (Appearances: J. Pomerantz and J. Morris for Highland Defendants; J. Jordan and P. Bessett for HCLOF; M. Sbaiti for Plaintiffs. Nonevidentiary hearing. Motion denied. Mr. Pomerantz to upload order.), 76 Hearing held on 11/23/2021. (RE: related document(s) 47 Motion to strike 43 Appendix in support filed by CLO Holdco, Ltd., Charitable DAF Fund, LP (Bridges, Jonathan) Modified text on 7/16/2021 (mjr). (Entered: 07/15/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #47 ON 07/15/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)) (Appearances: J. Pomerantz and J. Morris for Highland Defendants; J. Jordan and P. Bessett for HCLOF; M. Sbaiti for Plaintiffs. Nonevidentiary hearing. Motion denied (Plaintiffs acknowledged complained-of Appendices it did not relate to Motion to Dismiss). Mr. Pomerantz to upload order.)). Transcript to be made available to the public on 02/22/2022. (Patel, Dipti)</p>
57	2/21/23	164	<p>164 (112 pgs) Transcript regarding Hearing Held 1/25/23 RE: HEARING ON DEFENDANT HIGHLAND CAPITAL MANAGEMENT L.P.'S RENEWED MOTION TO DISMISS COMPLAINT (122) AND STATUS CONFERENCE RE: MOTION FOR WITHDRAWAL OF REFERENCE FILED BY PLAINTIFF CLO HOLDCO, LTD., PLAINTIFF CHARITABLE DAF FUND, LP (128). THIS TRANSCRIPT WILL BE MADE ELECTRONICALLY AVAILABLE TO THE GENERAL PUBLIC 90 DAYS AFTER THE DATE OF FILING. TRANSCRIPT RELEASE DATE IS 05/22/2023. Until that time the transcript may be viewed at the Clerk's Office or a copy may be obtained from the official court transcriber. Court Reporter/Transcriber Dipti Patel, Telephone number 847-848-4907. (RE: related document(s) 155 Hearing held on 1/25/2023. (RE: related document(s) 122 Motion to dismiss adversary proceeding, (Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint) filed by Defendant Highland Capital Management, LP filed by Defendant Highland Capital Management, LP) (Appearances: J. Morris and G. Demo for Movants; L. Phillips and M. Sbaiti for Plaintiffs. Evidentiary hearing (appendices). Court took matter under advisement.), 156 Hearing held on 1/25/2023. (RE: related document(s) 128 Motion for withdrawal of reference. Fee amount \$188, filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) (Appearances: J. Morris and G. Demo for Movants; L. Phillips and M. Sbaiti for Plaintiffs. Evidentiary hearing (appendices). Court announced it will recommend denial to District Court. Court is working on Report & Recommendation.)). Transcript to be made available to the public on 05/22/2023. (Patel, Dipti)</p>

Dated: July 14, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was filed electronically through the Court's ECF system, which provides notice to all parties of interest, on this 14th day of July, 2023.

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

CHARITABLE DAF FUND, L.P., AND CLO
HOLDCO LTD.,

Plaintiff,

VS.

HIGHLAND CAPITAL MANAGEMENT, L.P.,
HIGHLAND HCF ADVISOR, LTD., AND
HIGHLAND CLO FUNDING, LTD.

Defendants.

§ § § § § § § § § § § § § § § §

Case No. 3:21-cv-00842-B

DEBTOR'S REPLY IN SUPPORT OF MOTION TO DISMISS COMPLAINT

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Highland Capital Management, L.P., a defendant in the above-captioned case (the “Debtor” or “Highland”), submits this reply (the “Reply”) in support of the *Debtor’s Motion to Dismiss the Original Complaint* (the “Motion”).

I. PRELIMINARY STATEMENT

1. In their response [Docket No. 38] (the “Response”), Plaintiffs attempt to cure the deficiencies in their Complaint by mischaracterizing the facts of the Prior Proceeding and misleading the Court as to the relevant issues. Plaintiffs contend that their Claims are not barred by *res judicata* or judicial estoppel because (i) the Settlement does not “release” the Claims, and (ii) Plaintiffs were not “successful” and the objections were not decided on the “merits.” That the Settlement does not “release” the Debtor from liability has no bearing on whether the Claims arise from the same core facts as those in the Prior Proceeding. That Plaintiffs did not succeed on their objections has no relevance to whether Plaintiffs’ Claims are inconsistent with positions taken by Plaintiffs during the Settlement hearing. Plaintiffs’ assertion that their state fiduciary claim can be predicated on the Advisers Act fails because (i) there is no duty to CLOH; (ii) a private right of action under the Advisers Act does not exist, and (iii) Plaintiffs fail to allege any state law claim. Plaintiffs’ claim for breach of the Members Agreement fails because the Agreement and Settlement Order, by their plain terms, authorize the Transfer of HCLOF assets. Plaintiffs’ new theory of their breach of contract claim that the Settlement violated the “good faith” clause of the Agreement, and constituted a “sale” to the Debtor because HCMLPI did not “pay” for the HCLOF interests is frivolous. In support of their negligence and tortious interference claims, Plaintiffs recite the elements thereof, while disregarding the Debtor’s arguments for dismissal. In support of their RICO claim, Plaintiffs restate the same conclusory allegations that are insufficient to support the heightened pleading standard under RICO. To the extent their RICO claim is premised

on securities laws, any such claim fails because RICO forecloses securities fraud as a “predicate” act.

II. PLAINTIFFS’ CLAIMS ARE BARRED BY *RES JUDICATA*

A. Plaintiffs’ Argument that Settlement Does Not “Release” Claims Is Without Merit

2. Plaintiffs argue that their Claims are not barred because the Settlement Order does not “release” Plaintiffs’ Claims. Response at 6-7. Plaintiffs’ citation to *Applewood Chair Co. v. Three Rivers Planning & Dev. Dist. (In re Applewood Chair Co.)*, 203 F.3d 914 (5th Cir. 2000) is misguided. There, the court addressed whether a plan discharged creditors’ claims against guarantors under section 524 of the Bankruptcy Code. Here, Plaintiffs do not seek to hold guarantors liable for any of the Debtor’s debt, and section 524 of the Bankruptcy Code is not at issue. The relevant question is whether all claims against the debtor Highland were fully and finally resolved, and as set forth below and in the Motion, they were.

B. The Settlement Is a Final Order That Resolved the Claims and Issues on the Merits

3. Plaintiffs’ contention that the Settlement Order “overrules objections *en masse* without addressing the merits thereof” is simply false. *See* Response at 7. The Bankruptcy Court overruled the objections after Plaintiffs had the opportunity to litigate their Claims and withdrew the objection. Plaintiffs’ cite to *Applewood* is inapplicable for the reasons discussed *supra*. Plaintiffs’ citation to *Risby v. United States*, CIV.A.3:04-CV-1414-H, 2006 WL 770428 (N.D. Tex. Mar. 7, 2006) is misplaced. The court found that the government failed to establish that a claim for the return of property was barred by *res judicata* where it “has not demonstrated the finality” of the order at issue, and where the “procedural posture” of such an order was “not clear.” *Id.* at *5. The court found that if the issue was “still pending on remand,” or had been previously held as “moot,” the judgment “would not be final.” *Id.* at *6. Here, unlike in *Risby*, the Settlement Order is clear and unambiguous. It is a final order entered after an evidentiary hearing on the

proposed Settlement in which CLOH objected and fully participated. The order is not pending before a court on remand, nor were the issues at hand ever deemed “moot.”

4. Plaintiffs contend that because CLOH’s withdrawal of its objection was not “with prejudice,” it is not barred by *res judicata*. Response at 8. Plaintiffs misrepresent the facts. Counsel for CLOH voluntarily withdrew its objection on the record after extensive litigation on the issue. Plaintiffs’ citations to *Chalmers v. Gavin*, No. 3:01–CV–528–H, 2002 WL 511512, at * 3 (N.D. Tex. Apr. 2, 2002) and *Reynolds v. Tombone*, No. 3:96-CV-3330-BC, 1999 WL 439088, at *2 (N.D. Tex. June 24, 1999) are inapplicable. In *Chalmers*, the court held that *res judicata* did not bar plaintiff from litigating his state law claims brought in a prior civil rights action where the court “explicitly dismissed” the claim “without prejudice to [p]laintiff refiling his complaint after the Texas courts had been given an opportunity to address the state law issues raised in the complaint.” 2002 WL 511512, at * 3. In *Reynolds*, the court held that *res judicata* did not bar an indigent plaintiff’s motion for return of property where it was “not adjudicated on the merits” and was dismissed without prejudice pending compliance with the *in forma pauperis* provisions pertaining to prisoner litigation.” *Id.* at *12 and n.5.

5. Plaintiffs’ contention that the bankruptcy court generally has “discretion” to “overrule an objection,” Response at 8, is irrelevant, as are the cases Plaintiffs rely on in support thereof. They involve direct appeals of 9019 settlements, where the reviewing court simply notes the standard by which the bankruptcy court generally reviews such settlements. *See Official Comm. of Unsecured Creditors v. Moeller (In re Age Ref., Inc.)*, 801 F.3d 530, 541 (5th Cir. 2015) (reviewing direct appeal of a 9019 settlement for abuse of discretion, noting that “[i]n evaluating a Rule 9019 settlement, a bankruptcy court *need not* ‘conduct a mini-trial to determine the probable outcome of any claims waived in the settlement.’ [] The bankruptcy court must ‘apprise [itself] of

the relevant facts and law so that [it] can make an informed and intelligent decision.”¹ None of these cases are relevant to Plaintiffs’ argument that their Claims are not barred by *res judicata*.

6. When evaluating the Settlement, the Bankruptcy Court determined that the Settlement was fair and reasonable and in the best interest of the estate. The Bankruptcy Court was presented with evidence regarding the merits of the Claims asserted by HarbourVest and the value of the assets being conveyed to the estate. At no point did Plaintiffs raise the contention that if the Debtor performed pursuant to the Settlement, they would sue the Debtor for its conduct, giving rise to the possibility of a large administrative claim. To the extent there were any valid claims (there are not), the Bankruptcy Court may have made a different determination with respect to the Settlement. Plaintiffs sat on their hands until months after the Settlement Order was entered and now attempt to retroactively gut the value of the Settlement. This gamesmanship is improper and is foreclosed by *res judicata*.

C. The Bankruptcy Court Possessed Jurisdiction to Hear the Claims

7. Plaintiffs contend without any legal support that the Bankruptcy Court lacked the power under 28 U.S.C. § 157(d) to hear the Claims. *See* Response at 9-10. Plaintiffs request that if the Court finds that, in accordance with the *Debtor’s Motion for an Order to Enforce the Order of Reference* [Docket No. 22], “mandatory withdrawal applies, then it cannot find that the bankruptcy court’s [] final judgment was rendered on Plaintiffs’ causes of action and had jurisdiction to do so.” *Id.* Plaintiffs conflate two separate issues pending before this Court: (i) whether the Complaint should be mandatorily withdrawn from this Court pursuant to 28 U.S.C. § 157(a), and (ii) whether the Claims in the Complaint are barred by *res judicata*. The concept of

¹ *See also In re Alfonso*, No. 16-51448-RBK, 2019 WL 4254329 (Bankr. W.D. Tex. Sept. 6, 2019) (same); *Conn. Gen. Life Ins. Co. v. United Cos. Fin. Corp. (In re Foster Mortg. Corp.)*, 68 F.3d 914, 917 (5th Cir. 1995) (same).

mandatory withdrawal has nothing to do with this Motion, and Plaintiffs' arguments with respect to same should be summarily rejected by the Court.²

D. The Claims Arise from the Same Common Nucleus of Operative Facts as Those Raised in the Prior Proceeding

8. Plaintiffs argue that this lawsuit and the matters adjudicated in the motion to approve the Settlement do not arise from the same nucleus of operative facts. Plaintiffs assert that a "different legal duty is implicated" in the current action than in the Prior Proceeding, Response at 10, but offer no support for this contention other than one case, *Travelers Ins. Co. v. St. Jude Hosp. of Kenner, Louisiana, Inc.*, 37 F.3d 193, 196 (5th Cir. 1994), which is inapposite. *Travelers* dealt with Louisiana's "entity theory of partnership," and whether a creditor's claim against a partner for his share of a judgment against the partnership arises out of the same nucleus of operative facts as the partnership's debt. *Id.* at 196. In holding that that *res judicata* did not bar an action to collect against the partner, the court reasoned that the claim "does not rest on an identical obligation" where the creditor was not pursuing a new theory of recovery or seeking to "relitigate" any issues raised in the prior proceeding, but instead, "sought merely to collect a pre-existing judgment in its favor." *Id.* Here, by contrast, Plaintiffs do not seek to bring claims against the Debtor to collect on a pre-existing judgment. Plaintiffs seek to relitigate the same Claims and issues raised in the Prior Proceeding, including whether Plaintiffs held a valid right of first refusal, a specious argument they asserted and then withdrew after they were shown it was baseless.

9. Plaintiffs also assert a due process argument that is nothing short of frivolous. They contend that they "only" had "22 days" to bring the Claims and that this is a violation of their "due

² The Court should first decide the *Debtor's Motion for an Order to Enforce the Order of Reference* because if it grants that motion, this Motion will properly be before the Bankruptcy Court. See *Payne v. Doe*, 2017 U.S. Dist. LEXIS 49875, at *4-5 (E.D. Va. Mar. 31, 2017) ("[M]andatory abstention argument is addressed first [before *res judicata*] because in the event mandatory abstention is warranted, it is unnecessary to reach or decide the remaining issues.")

process rights.” Response at 11-12. The Debtor does not argue that Plaintiffs should have brought the Claims *prior* to the Settlement hearing. Rather, the Debtor argues in its Motion that the Claims arise from the same common nucleus of operative facts as those claims and issues raised during the Prior Proceeding and are thus barred by *res judicata*. Motion ¶¶ 15-22. The valuation issues asserted in the Complaint were central to the Prior Proceeding through objections, motion practice, testimony, and extensive discovery. *See id.* ¶ 20; *see also* Complaint ¶ 34 (“HCM rationalized the settlement value by allocating \$22.5 million of the net value of the \$45 million in unsecured claims as consideration to purchase HarbourVest’s interests in HCLOF”); *id.* ¶ 43 (“Seery testified that the fair market value of the HarbourVest HCLOF interests was \$22.5 million”). Plaintiffs’ citation to *Benson and Ford, Inc. v. Wanda Petroleum Co.*, 833 F.2d 1172 (5th Cir. 1987), in support of their due process argument provides no support. There, the court found that a party was not prohibited from bringing an action where, in the prior suit, they did not “control” the litigation and their interests were not “adequately” represented. *Id.* at 1174-75. Unlike in *Benson*, Plaintiffs fully participated in, and had control over their role in, protecting their interests throughout the Settlement hearing where the very same matters were adjudicated.³

10. Plaintiffs’ position that the “first time” they learned about the valuation of the HLCOF interests was during the Settlement hearing is demonstrably false. The Settlement Agreement disclosed (i) the valuation and (ii) the method of valuation. *See* Appx. 2, 3. Plaintiffs were aware of the core facts underlying their current Claims throughout the Prior Proceeding and had a full and fair opportunity to investigate and litigate them. This is precisely the type of situation contemplated by the doctrine of *res judicata*. *In re Paige*, 610 F.3d 865, 874 (5th Cir.

³ For these same reasons, Plaintiffs’ statute of limitations argument is of no moment, *see* Response at 11-12, and should be summarily disregarded by the Court.

2010); *Hall v. Hodgkins*, 305 Fed.Appx. 224, 229 (5th Cir. 2008).⁴ The Claims and issues arise from the same nucleus of operative facts as those raised in the Prior Proceeding and are foreclosed by *res judicata*.

III PLAINTIFFS' CLAIMS ARE BARRED BY JUDICIAL ESTOPPEL

11. Plaintiffs maintain that the Debtor “has not met its burden” of showing that the Claims are barred by judicial estoppel because (i) there has been “no decision on the merits” on Plaintiffs’ Claims, and (ii) “withdrawing an objection and then raising the argument later” does not constitute an “inconsistent position” and Plaintiffs were “clearly not successful” on the objection. Response at 13. Plaintiffs’ arguments are without merit.

12. Both prongs of judicial estoppel are satisfied here. *In re Coastal Plains Inc.*, 179 F.3d 197, 206 (5th Cir. 1999). Plaintiffs’ Claims are clearly inconsistent with the positions Plaintiffs assumed during the Prior Proceeding. During the Settlement hearing, Plaintiff CLOH expressly stated on the record that it withdrew its objection premised on the alleged “Right of First Refusal” under the Members Agreement after it “had an opportunity to review the reply briefing” and based on its “analysis” of applicable law. Appx. 9 at 7:20-8:6. Plaintiffs’ current Claim for breach of contract is premised on this same “Right of First Refusal” under the Members Agreement. Complaint ¶¶ 92-102. Plaintiffs offer no legal basis in support of the notion that because they “withdrew an objection” during a hearing, this somehow does not constitute an

⁴ Plaintiffs argue that the Court should “refuse” to take judicial notice of the Record. Response at 11, n. 2. In deciding whether claims are barred by *res judicata* on a 12(b)(6) motion, it is proper for the Court to consider the Record submitted by the Debtor. *Anderson v. Wells Fargo Bank, N.A.*, 953 F.3d 311, 314 (5th Cir. 2020); *Meyers v. Textron, Inc.*, 540 F. App'x 408, 409 (5th Cir. 2013). Plaintiffs’ case cites are misplaced. *Reneker v. Offill*, Civil Action No. 3:08-CV-1394-D, 2010 U.S. Dist. LEXIS 38526, at *12 (N.D. Tex. Apr. 19, 2010) did not involve a 12(b)(6) motion premised on *res judicata*. The court held that where facts are in dispute, “courts must limit their inquiry to the facts stated in the complaint.” Here, for purposes of the Motion, the Debtor does not dispute the facts alleged in the Complaint. The Debtor relies on public documents to show the four elements of *res judicata*. Plaintiffs’ cites to *Lovelace v. Software Spectrum*, 78 F.3d 1015, 1018 (5th Cir. 1996) and *Taylor v. Charter Med. Corp.*, 162 F.3d 827, 829-30 (5th Cir. 1998) are distinguishable for these same reasons.

“inconsistent” position if this same issue is raised in a subsequent proceeding. This is the type of “self-contradiction” and forum shopping that the doctrine of judicial estoppel is designed to prevent. *In re Save Our Springs (S.O.S.) All., Inc.*, 393 B.R. 452, 458 (Bankr. W.D. Tex. 2008) (judicial estoppel barred party from bringing position where party “expressly” assumed contradictory position “on the record” in a prior hearing); *Hall v. GE Plastic Pac. PTE Ltd.*, 327 F.3d 391, 398 (5th Cir. 2003).

13. The Bankruptcy Court accepted Plaintiffs’ withdrawal of its objection premised on the Members Agreement. This was a central issue in the Prior Proceeding. Appx. 6 ¶¶ 3, 6, 9-22; Appx. 7 at 140:7-25. The Bankruptcy Court expressly stated that such a withdrawal “eliminates one of the major arguments” related to the proposed Settlement. Appx. 9 at 8:1-10; *Save Our Springs*, 393 B.R. at 460 (bankruptcy court accepted party’s position in prior proceeding where “a significant amount of the Court’s time and attention” at the hearing “were devoted to resolving the issues” raised by that party). The Order explicitly authorized the transfer of the HCLOF assets because of concerns that Mr. Dondero and his entities would “go to a different court somehow to challenge the transfer.” Appx. 9 at 156:19-20. Plaintiffs’ argument that it was not “successful” on its objection has no bearing on judicial estoppel. *In re Coastal Plains, Inc.*, 179 F.3d 197, 206 (5th Cir. 1999); *Hall*, 327 F.3d at 398. The Claims are barred by the doctrine of judicial estoppel.

IV. PLAINTIFFS FAIL TO STATE CLAIMS FOR RELIEF

A. Plaintiffs Fail to State a Claim for Breach of Fiduciary Duty

14. There is no duty owed to CLOH. Rule 206 of the Advisers Act creates a fiduciary duty to an investment adviser’s “client” (*i.e.* a counterparty to the investment management agreement) but not an underlying investor in the “client.” *Goldstein v. SEC*, 451 F.3d 873,

881(D.C. Cir. 2006).⁵ The Debtor has never had a management agreement with CLOH; CLOH is a shell entity through which DAF invested in HCLOF. The Debtor does not “owe[] a fiduciary duty to [CLOH] as an investor in HCLOF [i.e., the “client”].” Complaint ¶ 62.

15. Plaintiffs acknowledge that there is no private right of action under the Advisers Act for breach of duty. Response at 16. As a fallback, they attempt to manufacture a breach of fiduciary duty claim under Texas state law premised on an imagined duty imported from the Advisers Act, but they offer no credible legal support thereof. Plaintiffs broadly contend that “[u]nder Texas law, an investment advisor / advisee client relationship is considered a formal fiduciary relationship because it is a principal and agent relationship.” Response at 16. This does not address Plaintiffs’ argument that such a state-law claim can be premised specifically on the Advisers Act. Plaintiffs’ citation to *Accord Lampkin v. UBS Painewebber, Inc. (In re Enron Corp. Sec., Derivative & “ERISA” Litig.)*, 238 F. Supp. 3d 799, 851 (S.D. Tex. 2017) lends no support for their argument either. That case dealt with federal claims—not state law claims—and fiduciary duties owed by investment *brokers*—not investment advisors. *See id.*

16. Plaintiffs’ cite to *Laird v. Integrated Res.*, 897 F.2d 826, 834 (5th Cir. 1990), Response at 16, is also misplaced. *Laird* involves federal claims under RICO, the Advisers Act, and the SEC, but not state-law fiduciary claims. Plaintiffs mischaracterize *Douglass v. Beakley*, 900 F. Supp. 2d 736, 751-52, n.16 (N.D. Tex. 2012) in support of their argument that “although the Advisers Act does not itself create a cause of action, it is still actionable through state law fiduciary claims.” Response at 16. In *Douglass*, the court held that a plaintiff stated a state law fiduciary claim because they adequately pled such a claim under state law, not because it was

⁵ See also *SEC v. Northshore Asset Mgmt.*, 2008 U.S. Dist. LEXIS 36160, at *18-20 (S.D.N.Y. May 5, 2008); *SEC v. Trabulse*, 526 F.Supp.2d 1008, 1016 (N.D. Cal. 2007).

premised on the Advisers Act. *See id.* at 751-52. The court noted that *Transamerica* set forth the “federal fiduciary standards” under the Advisers Act, *see id.* at 751-52, n.16, but did not state that the state law fiduciary claim was “predicated on the Advisers Act.” Response at 16-17. Here, unlike in *Douglass*, Plaintiffs fail to adequately plead a state-law claim for breach of fiduciary duty.⁶

17. Plaintiffs fail to plausibly allege breach of fiduciary duty premised on either state or securities laws. Plaintiffs’ conclusory allegations regarding its state law claim fail to sufficiently allege the: (1) nature of the fiduciary relationship; (2) the breach; and (3) any actual injury to Plaintiffs as a result of any purported breach. Complaint ¶¶ 5-91. *In re ATP Oil & Gas Corp.*, 711 Fed. App’x 216, 221 (5th Cir. 2017). Plaintiffs’ allegation of damages in the form of lost opportunity, *see* Complaint ¶ 88, is equally deficient. *See Little v. KPMG LLP*, No. SA-07-CA-621-FB, 2008 WL 576226, at *5 (W.D. Tex. Jan. 22, 2008) (rejecting damages claim consisting of “lost profits they would have received” had they know about the conduct at issue, noting that allegations are “speculative and conjectural.”) To the extent Plaintiffs’ fiduciary claim is premised on fraud, Plaintiffs necessarily fail to satisfy the heightened pleading standard required under Rule 9(b). The allegations fail to state with particularity the specific omissions by the Debtor, nor do they give rise to any “strong inference of scienter” or deceptive motive on the part of the Debtor. Plaintiffs’ vague allegations regarding the Debtor’s “diversion of corporate

⁶ Plaintiffs’ remaining cites are unhelpful. *See Strougo ex rel. Brazil Fund v. Scudder, Stevens & Clark, Inc.*, 964 F.Supp. 783, 799 (S.D.N.Y. 1997), (plaintiff sufficiently plead a state-law fiduciary claim under Maryland law; not because claim arose from Advisers Act); *Goldenson v. Steffens*, No. 2:10-cv-00440-JAW, 2014 U.S. Dist. LEXIS 201258, at *137 (D. Me. Mar. 7, 2014) (“at a conceptual level, it is possible that the IAA could create a fiduciary duty”); *State ex rel. Udall v. Colonial Penn Ins. Co.*, 112 N.M. 12 (applying NM law where there was contract between parties); *Belmont v. MB Inv. Partners, Inc.*, 708 F.3d 470, 502-06 (3d Cir. 2013) (applying PA law: “[w]e need not resolve whether the Investors’ fiduciary claims can properly be brought as a matter of state law”). Contrary to Plaintiffs’ contention, Rule 206(4)-8 of the Advisers Act “does not create under the Advisers Act a fiduciary duty to investors or prospective investors in a pooled investment vehicle not otherwise imposed by law” or “a private right of action.” Inv. Adv. Act Rel. No. 2628 (Aug. 3, 2007).

opportunity” is insufficient. *See Southland Sec. Corp. v. INSpire Ins. Sols., Inc.*, 365 F.3d 353, 368 (5th Cir. 2004) (plaintiff must plead “more than allegations of motive and opportunity to withstand dismissal” for claim of securities fraud).

B. Plaintiffs Fail to State a Claim for Breach of Members Agreement

18. Plaintiffs note that Sections 6.1 and 6.2 of the Agreement “allow sales by members of their interests in HCLOF to ‘affiliates’ of Members, but not members themselves, without certain conditions precedent.” Response at 23. Plaintiffs fail to address the fact that the Settlement Order explicitly authorized the transfer of the interests to “a wholly-owned and controlled subsidiary of the Debtor” “without the need to obtain the consent of any party or to first offer such interests to any other investor in HCLOF.” Appx. 10 ¶ 6. Moreover, the “conditions precedent, *i.e.*, that “other members have to be afforded the right to purchase their pro-rata portion,” do not apply in these circumstances. Pursuant to Section 6.2 of the Members Agreement, the “Right of First Refusal” does not apply where the Transfer of the HCLOF interests is to “affiliates of an initial Member” from Members other than CLOH. Appx. 13. This is exactly what is contemplated by the Settlement and authorized by the Bankruptcy Court. HarbourVest transferred its interest in HCLOF to the HCMLPI, an “Affiliate” of the Debtor, an “initial Member.” In contending that (i) such an argument is “outside the scope of a 12(b)(6)” motion and (ii) the Transfer was made in “bad faith,” Response at 23-24, Plaintiffs willfully ignore the express ruling of the Bankruptcy Court. The Debtor’s argument that the Members Agreement was not violated is well within the scope of the Debtor’s 12(b)(6) Motion. The terms of the Settlement Order and Members Agreement are appropriately considered by the Court in assessing the Motion because: (i) they were referenced in the Complaint, (ii) they are central to Plaintiffs’ Claims, and (iii) the Debtor attached them to the Motion. *See In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 205 (5th Cir. 2007); *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498–99 (5th Cir. 2000).

19. Plaintiffs argue for the first time in their Response that HCMLPI “was not a party to” the Settlement and “did not pay for those interests,” and that the Settlement “constitutes a sale to *Highland*,” in violation of the “good faith” clause of the Members Agreement. Response at 24. This is nonsense. There is no basis to argue that the Debtor violated the “good faith” clause by complying with a federal court order. Pursuant to the Settlement Order, HarbourVest transferred its interests in HCLOF to HCMLPI, consistent with the Members Agreement. Plaintiffs fail to offer any legal or factual basis in support of their newly asserted theory of their breach of contract claim. Based on the clear and unambiguous terms of the Members Agreement and Settlement Order, Plaintiffs’ claim for breach of the Members Agreement fails as a matter of law.

20. Plaintiffs fail to sufficiently allege damages. Damages in the form of lost profits must be plead with “reasonable certainty.” *Baumstimler v. Rankin*, 677 F.2d 1061, 1072 (5th Cir. 1982).⁷ Plaintiffs’ cite to *Basic Capital Mgmt. v. Dynex Commer., Inc.*, 402 S.W.3d 257, 268 (Tex. App.—Dallas 2013) is distinguishable. There, the court held that the evidence supported an award for lost opportunity resulting from a lender’s breach of a commitment to provide investors with \$160 million in financing to purchase commercial properties, where, as a result of such breach, the trusts could no longer purchase those properties because they did not have financing. *Id.* at 266-77. Here, unlike in *Basic Capital*, there was no contract between Plaintiffs and the Debtor pursuant to which the Plaintiffs were to purchase the HCLOF interests. Plaintiffs’ contention that “had plaintiff been allowed to do so, it would have obtained the interests” in HCLOF, Complaint. ¶ 100, is precisely the type of conclusory allegation of lost profits rejected by courts. *I Love Omni, LLC v. Omnitrition Int’l, Inc.*, No. 3:16-CV-2410-G, 2017 WL 3086035, at

⁷ See also *Little*, 2008 WL 576226, at *5.

*4 (N.D. Tex. July 20, 2017) (allegations of “lost business” and “lost income” fail “to allege the damages [] suffered with any specific factual support.”)

C. Plaintiffs Fail to State a Claim for Tortious Interference with Contract

21. Plaintiffs maintain that since the Debtor’s “entire premise” for dismissing Plaintiffs’ tortious interference claim is “predicated on the non-existence of an enforceable contract,” this claim survives. Response at 25. The Debtor does not premise its dismissal of this claim on the non-existence or enforceability of the Members Agreement. The Debtor argues that the claim for tortious interference with contract should be dismissed precisely because Plaintiffs: (i) “fail to sufficiently allege how the Debtor intentionally interfered with the Members Agreement,” (ii) “fail to allege proximate causation,” or (iii) “actual damages,” and (iv) have admitted in court that the Settlement did not violate the Members Agreement. Motion at 25-25.

D. Plaintiffs Fail to Plead a Claim for Negligence

22. Plaintiffs recite the elements of a negligence claim, stating that the Debtor has waived its argument for dismissal thereof because “it has not shown which elements have not been met.” Response at 25. In its Motion, the Debtor argues that Plaintiffs’ negligence claim is deficient regarding “duty” and “proximate cause.” Motion at 24. Plaintiffs’ allegations of a long chain of attenuated events surrounding the Settlement which they contend “proximately” caused their harm are too speculative to show that the Debtor’s actions were the “cause in fact” or “substantial factor” in bringing about any injury. *Reneker*, 2009 WL 3365616, at *6 (dismissing negligence claim where allegations of “proximate cause” “depend on an attenuated chain of causation which speculates,” as to uncertain events).

E. Plaintiffs Fail to State a Claim under RICO

23. Plaintiffs contend they adequately pled a pattern of racketeering activity through (i) “wire and mail fraud,” and (ii) violations of the securities laws, including the Advisers Act.

Response at 28-31. Plaintiffs list a series of allegations, only a few of which even mention the terms “wires” and “mails.” *Id.* at 28-29. These are the same conclusory allegations that fail to meet the heightened pleading standard under RICO. Motion at ¶ 29. Plaintiffs fail to plead with particularity: (i) the specific acts of communication by mail or interstate wire undertaken by the Debtor in furtherance of the alleged fraudulent scheme, or (ii) details about the contents of any of these alleged communications, when they were made, to whom, or where they were directed. Complaint ¶¶ 113-33; *Merrill Lynch, Pierce, Fenner, & Smith, Inc. v. Young*, No. 91 Civ. 2923, 1994 WL 88129, at *11 (S.D.N.Y. Mar. 14, 1994). Plaintiffs fail to plead a “pattern” of any alleged racketeering activity because there is no specific “threat of repetition” or threat or long-term criminal conduct. Plaintiffs complain of a single transaction—the transfer of interests as part of the Settlement. There is nothing to support the allegation that the Debtor “operates as part of a long-term association that exists for criminal purposes.” *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 239 (1989). The allegations concern short-term conduct from September 2020 to January 2021 leading up to one discreet activity—the Settlement. Plaintiffs’ allegations premised on wire or mail fraud fail to meet the heightened pleading standard in support of a RICO claim. *In re Burzynski*, 989 F.2d 733, 742 (5th Cir. 1993).⁸ Moreover, RICO prohibits securities fraud as a predicate act. 18 U.S.C.A. § 1964(c). Plaintiffs allege as predicate acts the violation of securities laws and the Advisers Act in connection with a sale of a security, Complaint ¶¶ 131-33, and the RICO claim should also be dismissed on this basis. *Affco Invs. 2001, L.L.C. v. Proskauer Rose, L.L.P.*, 625 F.3d 185, 191 (5th Cir. 2010).

⁸ *R.A.G.S. Couture, Inc. v. Hyatt*, 774 F.2d 1350 (5th Cir. 1985) is misguided; a plaintiff sufficiently alleged “two acts of mail fraud” in the complaint. *Id.* at 1354. Here, the allegations do not allege *any* predicate acts under RICO. *R.A.G.S.* was also overturned by *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 235 (1989); see also *Smith v. Cooper/T. Smith Corp.*, 886 F.2d 755, 756 (5th Cir. 1989).

24. Plaintiffs fail to rebut the argument that they fail to allege an “association in fact.” They argue that: (i) HCLOF is a vehicle “run by HCFA and Highland;” (ii) the association was “ongoing” since 2017; and (iii) they “functioned as a continuing unit given their hierarchical” structure. Response at 25. The allegations fail to show that Defendants existed as a continuing unit separate from the alleged RICO violations or identify the roles of each of the entities and how each participated in the alleged enterprise. Plaintiffs’ cite to *Crowe v. Henry*, 43 F.3d 198 (5th Cir. 1995) is inapposite. There, the plaintiff plead an “association-in-fact” enterprise where the allegations show that the venture existed “*separate and apart* from the pattern of racketeering.” *Id.* at 205. Here, Plaintiffs allege the opposite—that the “purpose of the association-in-fact” was the perpetuation of the alleged racketeering activity. Complaint ¶¶ 115-17. Plaintiffs also fail to plead causation or damages. Allegations that Plaintiffs “would have paid cash” for the HCLOF interests are premised on a series of attenuated events that are too speculative to support a RICO claim. *In re Oil Spill by Oil Rig Deepwater Horizon in Gulf of Mexico, on Apr. 20, 2010*, 802 F. Supp. 2d 725, 729 (E.D. La. 2011).⁹

CONCLUSION

WHEREFORE, the Debtor respectfully requests that the Court (i) grant its Motion and enter an order in the form annexed to the Motion as Exhibit A, and (ii) grant any further relief as the Court deems just and proper.

⁹ See also *In re Taxable Mun. Bond Sec. Litig.*, 51 F.3d 518, 523 (5th Cir.1995); *Steele v. Hospital Corp. of Am.*, 36 F.3d 69, 70 (9th Cir.1994).

Dated: July 13, 2021

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Motion to Dismiss”).

RELIEF REQUESTED

1. HCLOF requests that this Court issue the proposed form of order attached to this Motion as Exhibit A pursuant to Rule 12(b) of the Federal Rules of Civil Procedure. For the reasons that are more fully set forth in HCLOF’s Brief in Support of Motion to Dismiss and Joinder in Motion to Dismiss of Highland Capital Management, L.P., filed contemporaneously herewith, HCLOF respectfully requests that the Court (a) dismiss the Complaint as against HCLOF, and (b) grant HCLOF such other and further relief as is just.

2. Subject to and without waiver of its personal jurisdiction defense, HCLOF also joins in the HCM Motion to Dismiss and HCM’s related filings with the Court, and incorporates the arguments, evidence and authorities herein as if fully set forth in this motion.

CONCLUSION

For the foregoing reasons, HCLOF respectfully requests that the Court (i) enter the proposed order substantially in the form attached as Exhibit A, and (ii) grant HCLOF such other and further relief as is just.

Dated: August 30, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing document was served electronically by the Court's ECF system on August 30, 2021.

/s/ Paul R. Bessette

Paul R. Bessette

Exhibit A – Proposed Order

002783

So ordered this _____ day of _____, 2021.

The Honorable Jane J. Boyle
United States District Judge

[Docket No. 26] (the “HCM Motion to Dismiss”).

INTRODUCTION

The Complaint alleges no wrongful conduct, breach of contract, or statutory liability against HCLOF. It pleads for no legal or equitable relief against HCLOF. Count II (breach of contract) names HCLOF in the caption, but does not allege that HCLOF breached any contract. The other counts (breach of fiduciary duty, negligence, RICO, and tortious interference) do not name HCLOF, and like Count II, they do not allege that HCLOF did anything wrong. With no allegations against HCLOF, HCLOF is entitled to dismissal for failure to state a claim for relief under **Federal Rule of Civil Procedure 12(b)(6)**.

To the extent that Count I (breach of fiduciary duty) pleads for relief against defendants HCM and Highland HCF Advisor, Ltd. (“HCFA”) as a result of acts that harmed HCLOF (*i.e.*, shareholder derivative claims), Plaintiffs have not pleaded a predicate for derivative standing. HCLOF is a separate entity formed in Guernsey and controlled by independent directors. Under Guernsey law, derivative standing requires that the alleged wrongdoers (HCM and HCFA) control the company they harmed (HCLOF). The Complaint is deficient because Plaintiffs do not allege that HCM or HCFA are authorized to make decisions to sue or not sue on behalf of HCLOF, as required for derivative standing. Moreover, HCLOF has not been harmed; Plaintiffs’ claim that HCM or HCFA exposed HCLOF to “massive liability” to Harbourvest is unfounded, as Harbourvest has released HCLOF from any such claims. Plaintiffs are not alleging derivative claims on behalf of HCLOF, but instead are alleging direct claims by either Harbourvest or Plaintiffs against HCM or HCFA.

Additionally, this Court lacks personal jurisdiction over HCLOF for purposes of litigating Plaintiffs’ claims. HCLOF is a Guernsey company whose two directors transact substantially all of its business from Guernsey. It did not conduct activities in Texas and the Complaint alleges no

conduct by HCLOF within Texas (or the United States). The Court should dismiss the Complaint as to HCLOF for failure to establish personal jurisdiction.

No one benefits by keeping HCLOF in this case. It is not alleged to have done anything wrong, and HCLOF's presence is unnecessary for the fiduciary duty, contract, RICO, negligence and tortious interference claims Plaintiffs allege against HCM and HCFA. To the contrary, Plaintiffs suffer from forcing HCLOF to spend money on this case, because Plaintiffs are 49 percent shareholders of HCLOF.

Finally, subject to and without waiver of its personal jurisdiction defense, HCLOF also joins in the HCM Motion to Dismiss and incorporates the arguments set forth in HCM's memorandum of law supporting the HCM Motion to Dismiss [Docket No. 27] and related filings.

ARGUMENT

I. The Complaint Should Be Dismissed Against HCLOF Under Rule 12(b)(6) Because It Does Not Allege any Claims Against HCLOF or Request Relief From HCLOF.

The Complaint requests no legal or equitable relief against HCLOF. Its prayer for relief lies against "Defendants," a term the Complaint defines to include defendants HCM and HCFA, but not HCLOF. As will be seen, none of the allegations in the Complaint's five counts purport to assert, or otherwise give rise to, liability as against HCLOF.

In Count I (breach of fiduciary duty), the Complaint alleges that "Defendants" (defined as HCM and HCFA, not HCLOF) and potential defendant James P. Seery, Jr. ("Seery") breached fiduciary duties owed to DAF and CLO Holdco (Count I, paragraphs 56, 67). Nowhere does the Complaint allege that HCLOF breached a fiduciary duty.

Count II (breach of contract) indicates in its title that it is "by Holdco against HCLOF, HCM and HCFA," but its factual allegations claim only that "Defendants" (again, defined to

exclude HCLOF) failed to offer CLO Holdco a pro rata share of Harbourvest's interests in HCLOF (Count II, paragraphs 96, 99). HCLOF is not alleged to have breached any contract.

Count III (negligence) indicates in its title that it lies "against HCM and HCFA." It alleges that Seery, HCFA and HCM were negligent (Count III, paragraphs 104-106) and that "Defendants" (defined to exclude HCLOF) were negligent and caused harm to CLO Holdco (Count III, paragraph 111).

Count IV (RICO) indicates in its title that it lies "against HCM." It alleges that HCM, HCFA, and Seery committed RICO violations, including federal wire fraud, mail fraud, bankruptcy fraud, and securities fraud (Count IV, paragraphs 117, 120). HCLOF is not alleged to have committed any RICO predicate acts.

Count V (tortious interference) also indicates in its title that it lies against HCM. It alleges that HCM, through Seery, tortuously interfered with CLO Holdco's contractual rights (Count V, paragraphs 138-39). It does not allege any wrongful conduct by HCLOF (Count V, paragraph 141).

With no claims against HCLOF, HCLOF is entitled to dismissal under **Federal Rule of Civil Procedure 12(b)(6)**.

II. The Complaint Should Be Dismissed Against HCLOF Under Rule 12(b)(6) Because Plaintiffs Lack Derivative Standing to Sue for Breach of Fiduciary Duty.

Although the thrust of Count I (breach of fiduciary duty) alleges a direct fiduciary relationship between HCM and DAF pursuant to a Restated Investment Advisory Agreement and federal securities law, Complaint paragraphs 78, 80, 81, and 83 vaguely allege that HCM, HCFA and/or Seery committed corporate waste, self-dealing and diversion of a corporate opportunity that harmed HCLOF. These claims are held by HCLOF against its fiduciaries and can only be brought by Plaintiffs if they properly plead derivative standing to bring such claims.

A derivative claim alleges harm to the corporation, such that all shareholders are equally harmed in their capacities as shareholders. *See, e.g., Smith v. Waste Mgt. Inc.*, 407 F.3d 381, 384 (5th Cir. 2005) (test for derivative claim is “Who suffered the alleged harm—the corporation or the suing stockholder individually—and who would receive the benefit of the recovery or other remedy?”). This principle applies under Guernsey law, the law governing HCLOF. *See, e.g., Jackson v. Dear and Others* (2013) 10/2013, 26 March 2013 ¶ 6 (“[W]here a company suffers loss as a result of an actionable wrong done to it, the cause of action is vested in the company and the company alone can sue.”). (Appendix Exhibit A)

A. Under Guernsey Law, Plaintiffs Lack Standing to Bring a Derivative Claim for Alleged Wrongs Suffered by HCLOF.

Courts within the Fifth Circuit and elsewhere analyze standing as a matter of substantive law of the state of incorporation. *See, e.g., In re Parkcentral Global Litigation*, 884 F.Supp. 2d 464, 471-72 (N.D. Tex. 2012) (Lynn, J.) (analyzing derivative standing under Delaware law); *Schwartz v. TXU Corp.*, 2005 WL 3148350 (N.D. Tex. 2005, remanded on other grounds, 162 Fed. Appx. 376) (5th Cir. 2006)) (Kinhead, J.) (analyzing derivative standing under Texas law).

As the Complaint correctly states, HCLOF is organized under the laws of the Bailiwick of Guernsey. Complaint, ¶ 5. Guernsey law provides, “[W]here a company suffers loss as a result of an actionable wrong done to it, the cause of action is vested in the company and the company alone can sue.” *Jackson v. Dear, supra*. To qualify for an exception to this longstanding Guernsey rule, a plaintiff must establish that the wrongdoers remain in control—that is, that wrongdoer control of the company prevented the company from bringing the lawsuit in its own name. *Jackson v. Dear, supra* (“The two basic requirements at common law for a derivative action were: (i) that the alleged wrong or breach of duty was by a director and was incapable of being ratified by a simple majority of the members (e.g. a fraudulent breach by a director or the deliberate misappropriation of

company assets, but not a bona fide misuse of powers or an incidental profit making); and (ii) that the alleged wrongdoers are in control of the company, so that the company, which is the ‘proper plaintiff cannot claim by itself.’”). *See also Prudential Assurance Co. Ltd. v. Newman Industries Ltd.* (No. 2) [1982], 1 All E.R. 354, 366-67, [1982] Ch. 204, 211 (“There is an exception to the rule where what has been done amounts to fraud and the wrongdoers are themselves in control of the company.... The reason for this is that, if they were denied that right, their grievance could never reach the court because the wrongdoers themselves, being in control, would not allow the company to sue.”). (Appendix Exhibit B)

Plaintiffs do not allege that HCM, Seery, or HCFA control HCLOF, or prevented HCLOF from bringing the lawsuit in its own name. They instead allege that “any pre-suit demand would have been futile since asking HCM to bring suit against its principal, Seery, would have been futile.” Complaint, ¶ 91. That allegation is a *non sequitur*, because HCLOF is under the direct corporate control, not of HCM, but of two independent directors unaffiliated with either HCM or Seery. While portfolio management is vested in HCFA, *see* Complaint ¶ 24, Plaintiffs do not allege that HCFA or HCM have the corporate authority to file suit (or decline to file suit) against HCM, HCFA, or Seery. With no allegation of wrongdoer control, Plaintiffs have failed to plead a basis of derivative standing to sue for wrongs under Guernsey law. Count I, to the extent it alleges derivative claims, should be dismissed under Federal Rule 12(b)(6) for lack of standing.

B. Any Derivative Claims Should Be Dismissed Because No Actual Harm to HCLOF Is Alleged or Could Ever Ripen to Actual Harm.

Standing is not the only flaw in Plaintiffs’ derivative theories. The only potential harm to HCLOF that Plaintiffs identify is alleged in paragraph 89: “Defendants’ malfeasance has also exposed HCLOF to a massive liability from Harbourvest since the assignment of those interests is

now one that is likely unenforceable under the Advisers Act, Section 47(b), if there was unequal information.”

This Complaint’s premise of potential harm to HCLOF through “massive liability” to Harbourvest is contradicted by judicially-noticeable documents. In the settlement agreement between HCM and Harbourvest discussed at paragraphs 29 through 35 of the Complaint, Harbourvest broadly released HCLOF from any claims, known or unknown, that were or could have been asserted in, in connection with, or with respect to, HCM’s bankruptcy case. *See* Case No. 19-bk-34054, Docket No. 1631-1, section 2(a). (Appendix Exhibit C)¹ With no allegation of actual damage to HCLOF—and with such damage foreclosed by the settlement repeatedly referred to in the Complaint—Plaintiffs’ derivative claims should be dismissed under Federal Rule 12(b)(6) for this independent reason.

C. Plaintiffs Do Not Allege a Derivative Claim for Harm to HCLOF.

Plaintiffs conflate *assets of* HCLOF with *equity interests in* HCLOF. They complain that *equity interests in* HCLOF held by Harbourvest were sold for less than their fair value. *See, e.g.*, Complaint ¶¶ 36 (“At the core of this lawsuit is the fact that HCM purchased the Harbourvest interests in HCLOF for \$22.5 million knowing that they were worth far more than that.”), 43, 48, 67, 76. These allegations, if they could be proven, might establish harm to Harbourvest for receiving less than it should have received. Or they may establish harm to the Plaintiffs, for

¹ In evaluating a motion to dismiss, the Court may consider documents referred to in a complaint that are central to the plaintiff’s claims. *See, e.g., Dawes v. City of Dallas*, 2020 WL 3603090 *3 (N.D. Tex. July 2, 2020) (“a court may consider documents that are referred to in a complaint and are central to a plaintiff’s claims”). The Harbourvest settlement, referred to in at least seven paragraphs of the Complaint, is central to Plaintiffs’ claims. Alternatively, “Judicial notice may be taken of matters of public record. *Walker v. Beaumont Indep. School Dist.*, 938 F.3d 724, 735 (5th Cir. 2019) (citing *Firefighters’ Retirement Sys., v. EisnerAmper*, 898 F.3d 553, 558 n.2 (5th Cir. 2018)). The Harbourvest settlement, which is archived as Document Number 1631-1 on the bankruptcy court’s docket, and which was approved by the bankruptcy court, is part of the public record.

depriving them of the right to purchase Harbourvest's interests for "less than 50% of what those interests were worth." *See* Complaint ¶ 48. But they do not establish harm to HCLOF, which is a prerequisite to any derivative claim.

Because no harm is alleged to have befallen HCLOF, Plaintiffs lack a derivative claim to bring on behalf of HCLOF. With no colorable derivative claim on behalf of HCLOF—and no claim alleged against HCLOF—there is no reason to keep HCLOF in this case as a "nominal defendant." HCLOF should be dismissed.

III. The Complaint Should Be Dismissed Against HCLOF Under Rule 12(b)(2) Because the Court Lacks Personal Jurisdiction Over HCLOF.

The Plaintiff "ha[s] the initial burden to plead and prove the requisite contacts with the United States" to support the exercise of personal jurisdiction over HCLOF. *Nagravision SA v. Gotech Int'l Tech. Ltd.*, 882 F.3d 494, 499 (5th Cir. 2018). "Once a motion to dismiss for lack of personal jurisdiction has been presented to a district court by a nonresident defendant, the party who seeks to invoke the jurisdiction of the district court bears the burden of establishing contacts by the nonresident defendant sufficient to invoke the jurisdiction of the court." *WNS, Inc. v. Farrow*, 884 F.2d 200, 203 (5th Cir. 1989).

In the Complaint, Plaintiffs blandly allege that personal jurisdiction lies "because [Defendants] reside and/or have continual contacts with the state of Texas, having regularly submitted to jurisdiction here." Complaint, ¶ 8. They further allege, "Jurisdiction is proper under 18 U.S.C. § 1965(d)." *Id.* These allegations are insufficient to plead personal jurisdiction.

A. Plaintiff Has Not Established Contacts That Render HCLOF Subject to Personal Jurisdiction of this Court.

1. The Court Lacks General Personal Jurisdiction Over HCLOF.

"General jurisdiction is established where the defendant has 'continuous and systematic' contacts with the forum state." *Dontos v. Vendomation NZ Ltd.*, 582 Fed. Appx. 338, 342 (5th Cir.

2014) (quoting *Choice Healthcare, Inc. v. Kaiser Found. Health Plan of Colo.*, 615 F.3d 364, 368 (5th Cir. 2010)); *Maruyama U.S. Inc. v. Frazier Corporation*, 2016 WL 836205 *3 (N.D. Tex. Feb. 12, 2016) (Ramirez, M.J.). “To establish general jurisdiction, a nonresident defendant’s contacts with the forum state ‘must be substantial; random, fortuitous, or attenuated contacts are not sufficient.’” *Innova Hosp. San Antonio L.P. v. Blue Cross & Blue Shield of Ga., Inc.*, 995 F.Supp. 2d 587, 616 (N.D. Tex. 2014).

HCLOF is a Guernsey company, *see* Complaint ¶ 5, with its principal place of business in Guernsey. Its two independent directors reside in and transact substantially all of HCLOF’s business from the Channel Islands of Jersey and Guernsey. HCLOF does not conduct business in the United States, and its connection with the United States is limited to this litigation and other litigation arising from the acts of its portfolio managers. *See* Declaration of Richard Boléat (Appendix Exhibit D).²

Plaintiffs have not pleaded any continuous and specific contacts by HCLOF within Texas, or even the United States. Indeed, the Complaint is devoid of *any* allegations of activity by HCLOF within the United States. The actors in the Complaint are HCM, Seery, HCFA or Plaintiffs; throughout the Complaint, HCLOF is a passive entity.

2. The Court Lacks Specific Personal Jurisdiction Over HCLOF.

Plaintiffs have alleged no facts to support finding specific personal jurisdiction over HCLOF related to the claims raised in the Complaint. “Courts may exercise specific jurisdiction if a nonresident defendant ‘purposefully avails himself of the privileges of conducting activities in

² “In resolving a [personal] jurisdiction issue, the court may review pleadings, affidavits, interrogatories, depositions, oral testimony, exhibits, any part of the record, and any combination thereof.... Allegations in plaintiff’s complaint are taken as true except to the extent that they are contradicted by defendant’s affidavits.” *International Truck and Engine Corp. v. Quintana*, 259 F.Supp. 2d 553, 556-57 (N.D. Tex. 2003) (citations omitted).

the forum state’ and ‘the controversy arises out of or is related to the defendant’s contacts with the forum state.’” *Innova Hosp.*, 995 F. Supp. 2d at 618 (quoting *Choice Healthcare*, 615 F.3d at 369)); see also *Freudensprung v. Offshore Tech. Servs., Inc.*, 379 F.3d 327, 344 (5th Cir. 2004) (“[The Fifth Circuit] has repeatedly held that the combination of mailing payments to the forum state, engaging in communications related to the execution and performance of the contract, and the existence of a contract between the nonresident defendant and a resident of the forum are insufficient to establish the minimum contacts necessary to support the exercise of specific personal jurisdiction over the nonresident defendant.” (collecting cases)).

Plaintiffs have alleged no contacts with the United States from which the claims raised in the Complaint arise or relate. Indeed, there are no alleged actions of HCLOF, of any kind, giving rise to claims pleaded in the Complaint. For these reasons, the Complaint should be dismissed as to HCLOF.

B. 18 U.S.C. § 1965(d) Does Not Confer Personal Jurisdiction Over HCLOF.

Contrary to Plaintiff’s claim in Complaint paragraph 8, 18 U.S.C. § 1965(d) does not confer personal jurisdiction over HCLOF. The provision, titled “venue and process” in the chapter addressing RICO claims, merely sets forth the proper place for service of a RICO proceeding. It does not purport to confer personal jurisdiction where none is otherwise recognized. Besides, the RICO claims are not alleged against HCLOF. This statute has no bearing on jurisdiction over HCLOF.

JOINDER IN HCM’S MOTION TO DISMISS

Subject to and without waiver of its personal jurisdiction defense, HCLOF also joins in the HCM Motion to Dismiss and accompanying filings with the Court, and incorporates them herein as if fully set forth.

CONCLUSION

For these reasons, the Complaint should be dismissed as to HCLOF.

Dated: August 30, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing document was served electronically by the Court's ECF system on August 30, 2021.

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Counsel for Highland CLO Funding, Ltd.

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

**CHARITABLE DAF FUND, L.P.,
and CLO HOLDCO, LTD.,
*directly and derivatively,***

PLAINTIFFS,

v.

**HIGHLAND CAPITAL MANAGEMENT,
L.P., HIGHLAND HCF ADVISOR, LTD.,
and HIGHLAND CLO FUNDING, LTD.,
Nominally,**

DEFENDANTS.

Case No. 3:21-cv-00842-b

**APPENDIX IN SUPPORT OF
HIGHLAND CLO FUNDING, LTD.'S MOTION TO DISMISS**

Highland CLO Funding, Ltd. ("HCLOF") files this appendix in support of its motion to dismiss the complaint against HCLOF in the above-captioned case.

Exhibit A	<i>Jackson v. Dear and Others</i> (2013) 10/2013, 26, March 2013
Exhibit B	<i>Prudential Assurance Co. Ltd. v. Newman Industries Ltd.</i> (No. 2) [1982], 1 All E.R. 354, 366-67
Exhibit C	HCM-Harbourvest Settlement Agreement
Exhibit D	Declaration of Richard Boléat

Dated: August 30, 2021

Respectfully submitted,

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Counsel for Highland CLO Funding, Ltd.

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing document was served electronically by the Court's ECF system on August 30, 2021.

/s/ Paul R. Bessette

Paul R. Bessette

Judgment 10/2013

**Jackson and Dear et al
Royal Court
26th March 2013**

Derivative action – strike out application.

**IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY
(ORDINARY DIVISION)**

Between:

ALEXANDER JACKSON

Plaintiff

- and -

PATRICK DEAR (1)

READE GRIFFITH (2)

RUPERT DOREY (3)

DAVID JEFFREYS (4)

BYRON KNIEF (5)

GREVILLE WARD (6)

TETRAGON FINANCIAL GROUP LIMITED (7)

TETRAGON FINANCIAL GROUP

MASTER FUND LIMITED (8)

Defendants

**J U D G M E N T O N S T R I K E O U T
A P P L I C A T I O N**

of Lieutenant Bailiff Patrick John Talbot QC

**Date of hearings: 12th and 13th October, 28th, 29th and 30th November and
1st and 2nd December 2011**

Judgment handed down: 26th March 2013

Advocate Jeremy Le Tissier appeared on behalf of the Plaintiff

Advocate Christian Hay appeared on behalf of the First and Second Defendants
("the Executive Directors")

Advocate Tim Corfield appeared on behalf of the Third, Fourth, Fifth and Sixth Defendants
(together referred to as "the Independent Directors")

Advocate Simon Davies appeared on behalf of the Seventh and Eighth Defendants (together
referred to as "Tetragon")

1. These proceedings are, it is believed, the first derivative action placed on the court rôle of the Royal Court of Guernsey. They relate to a real estate joint venture transaction called the GreenOak Real Estate Transaction (“**the GORE Transaction**”), into which Tetragon, both of which are Guernsey companies, entered on about 29 July 2010. At the heart of the Plaintiff’s claim is the board meetings of both companies held on that day and the resolution passed that day by a 6-1 majority which approved Tetragon entering into the GORE Transaction, the 6 being the First to Sixth Defendants and the 1 being the Plaintiff. Accordingly, the Plaintiff was the only director who opposed Tetragon doing so.
2. The Plaintiff, who was then a director of Tetragon, expressed disapproval of the then proposed transaction, both in correspondence and in e-mails to his fellow directors of Tetragon and their advisers in the months preceding 29 July 2010 and also during a joint board meeting of both Tetragon companies held, largely as a telephone directors’ meeting, on 29 July 2010. The board meeting appears to have taken about two hours, and, in due course, it was resolved at the meeting, by a resolution of all directors except the Plaintiff, that Tetragon should enter into the GORE Transaction. In other words, the Executive Directors and the Independent Directors voted in favour of the resolution and the Plaintiff voted against the resolution.
3. In the derivative action, the Plaintiff seeks to contend, on behalf of Tetragon, that the Executive Directors and the Independent Directors broke their directors’ duties, and acted negligently, in deciding that Tetragon should enter into the GORE Transaction. As part of the Plaintiff’s claims, on behalf of Tetragon, against the Executive Directors only he also contends that they broke their fiduciary duties to Tetragon in voting in favour of the GORE Transaction.
4. Historically, the courts in England took a restrictive approach to allowing derivative claims. In the words of Lord Eldon in *Carlen v Drury* (1812)1 Ves & B 154:

“This court is not to be required on each occasion to take the management of every playhouse and brewhouse in the kingdom.”
5. Over the years the attitude of the English courts to derivative actions developed and there is a valuable exposition of this development in the judgment of Lord Millett in ***Waddington Ltd v Chan Chun Hoo*** (2008) 9 HKCFA 63.
6. The shortest way to describe the development is to cite further from Lord Millett’s judgment.

“The common law derivative action

*47. A company is a legal entity separate and distinct from its members. It has its own assets and liabilities and its own creditors. The company’s property belongs to the company and not to its shareholders. If the company has a cause of action, this represents a legal chose in action which represents part of its assets. Accordingly, where a company suffers loss as a result of an actionable wrong done to it, the cause of action is vested in the company and the company alone can sue. This is the first rule in *Foss v. Harbottle* (1843) 2 Hare 461. No action lies at the suit of a shareholder suing as such, though exceptionally he may be permitted to bring a derivative action in right of the company and recover damages on its behalf: see *Wallersteiner v. Moir*(No.2) [1975] 1 QB 373 CA at p.390; *Prudential Assurance Co. Ltd v. Newman Industries Ltd* (No.2) [1982] Ch 204 CA (“Prudential”) at p.210; *Johnson v. Gore Wood & Co.* [2002] 2 AC 1 at p.61 et seq.*

48. *The injustice which would result if a derivative action were not available where the company is controlled by the alleged wrongdoers is vividly described by Lord Denning MR in Wallersteiner v. Moir (No.2) (supra) at p.390:*

“But suppose [the company] is defrauded by insiders who control its affairs - by directors who hold a majority of the shares - who then can sue for damages? Those directors are themselves the wrongdoers. If a board meeting is held, they will not authorise the proceedings to be taken by the company against themselves. If a general meeting is called, they will vote down any suggestion that the company should sue them themselves. Yet the company is the one person who is damnified. It is the one person who should sue. In one way or another some means must be found for the company to sue. Otherwise the law would fail in its purpose. Injustice would be done without redress.” (my emphasis)

49. *Sir James Wigram V-C recognised the problem in Foss v. Harbottle itself. He suggested that proceedings could be brought by the individual shareholders in their private characters seeking the protection of the rights to which they were entitled in their corporate character. This suggestion was adopted, and it became accepted practice for minority shareholders to file a bill in the Companies Court and ask for leave to use the name of the company to bring an action: see Atwool v. Merryweather(1867-8) LR 5 Eq pp 464-7n. If they made out a reasonable case for being allowed to do so, the court would appoint them as representatives of the company to bring proceedings in the name of the company against the wrongdoers. If the action was successful, any damages recoverable were payable to the company.*

50. *The need to apply to the court for leave to use the company’s name provided a useful filter to prevent frivolous and abusive actions or actions which it was not in the interests of the company to bring. It also gave the court an opportunity to adjourn the proceedings in order to discover whether the impugned transactions, if capable of ratification by the company (not for example being ultra vires or a fraud on the minority), would be ratified by the independent shareholders.*

51. *This filter was soon abandoned. The minority shareholders were permitted to bring an action against the wrongdoers without the leave of the court, joining the company as defendant in order to receive any damages that might be awarded: see Menier v. Hooper’s Telegraph Works (1874) 9 Ch App 350. Since the company was a defendant it could not also be a plaintiff, and accordingly the action was traditionally framed as an action by the plaintiff “on behalf of himself and all other shareholders in the company except the defendants”. In reality, as every one appreciated, the action was brought on behalf of the company in which the cause of action was vested. This form of action was described by Lord Davey in Burland v. Earle [1902] AC 83 at p.93 as a “mere matter of procedure in order to give a remedy for a wrong which would otherwise escape redress”.*

52. *By the 1980’s the absence of any appropriate filter to prevent unmeritorious claims or claims which it was not in the interests of the company to pursue was having unfortunate results. A defendant’s only recourse was to apply to strike out the action under RSC O.18 r.19 or to have the plaintiff’s right to bring a derivative action determined as a preliminary issue. Matters came to a head in Prudential, where the determination of the preliminary issue threatened to subject the company to a 30-day action in*

order to decide whether the plaintiffs were entitled to bring a 30-day action. There was, as the Court of Appeal observed, a dilemma, for at the time of the application the alleged fraud had not been proved. Either the court must assume the truth of every allegation in the statement of claim as in a true demurrer, in which case the company and its innocent shareholders might be subjected to groundless claims, or the action had to be fought to a conclusion before the plaintiffs' right to bring a derivative action could be established. Neither course was acceptable.

53. The solution which the Court of Appeal found in Prudential was to require the plaintiff, whether at the trial of a preliminary issue or on an application to strike out the proceedings, to establish a prima facie case both that the company was entitled to the relief claimed and that the plaintiff was entitled to bring the claim on its behalf by way of a derivative action. In an appropriate case the court could adjourn the proceedings in order to ascertain whether the independent shareholders considered that it was in the interests of the company to pursue the claim.

54. This approach was followed in Smith v. Croft (No.2) [1988] Ch 114 and was subsequently adopted by the Rules Committee when the Rules of the Supreme Court were amended by adding O.15 r.12A (later CPR r.19.9 and now s.260 of the Companies Act 2006). This imposed a requirement for the plaintiff in a derivative action to obtain the leave of the court to continue the action, thereby providing the filter which had been discarded more than a century earlier. The plaintiff has consistently been required on the application for leave to establish a prima facie case both that the company would be likely to succeed if it brought the action itself and that the case falls within an exception to the rule in Foss v. Harbottle."

7. It was accepted before me that the Royal Court would entertain a derivative action. Furthermore, it was not really argued before me on behalf of the Defendants that the Royal Court would not entertain a double or other multiple derivative action. Like Lord Millett in Waddington Ltd v Chan Chun Hoo, at paragraphs 61-80, I am convinced that public policy requires the Royal Court to entertain double derivative actions and I find that our customary law allows such actions to be brought. On this point I also draw attention to the very recent judgment of Mr Justice Briggs in Universal Project Management v Fort Gilkicker [2013] EWHC 348 where the learned judge, who at paragraph 34 had described derivative actions as the means by which a court may do justice in cases of wrongdoer control, said, at paragraphs 45-47:

"First, there was before 2006 a common law procedural device called the derivative action by which the court could permit a person or persons with the closest sufficient interest to litigate on behalf of a company by seeking for the company relief in respect of a cause of action vested in it. Those persons would usually be a minority of the company's members, but might, if the company was wholly owned by another company, be a minority of the holding company's members. These were not separate derivative actions, but simply examples of the efficient application of the procedural device, designed to avoid injustice, to different factual circumstances." (See also paragraph 26 of the judgment.)

8. It therefore follows that the English common law, primarily under the 'fraud on a minority' exception to the rule in Foss v Harbottle (1843) 2 Hare 461, per Wigram V.-C., allowed shareholders under certain, limited circumstances to bring claims on behalf of their companies. The two basic requirements at common law for a derivative action were: (i) that the alleged wrong or breach of duty was by a director and was incapable of

being ratified by a simple majority of the members (e.g. a fraudulent breach by a director or the deliberate misappropriation of company assets, but not a bona fide misuse of powers or an incidental profit making); and (ii) that the alleged wrongdoers are in control of the company, so that the company, which is the “proper plaintiff” cannot claim by itself.

9. The original Cause was lodged on 25 February 2011 and the strike-out application was served on 28 April 2011. It is clear that the application was made under rule 52 of the Royal Court Civil Rules 2007 and the inherent jurisdiction of the Court and was founded on a claim that the Cause disclosed no reasonable ground for bringing the action and should be struck out as an abuse of process since the Plaintiff was unable to satisfy the proper test relating to the bringing of derivative actions, a matter to which I shall refer later.
10. During the lengthy oral hearings in October to December 2011 the oral and written arguments of the parties ranged widely across legal authorities and textbook writings within the Commonwealth, and covered, *inter alia*, (i) the approach which Counsel submitted that the Royal Court should take on applications to strike out derivative and double derivative actions generally, including the correct evidential approach for the Court to take on such applications, (ii) the current state of the company law of Guernsey on the rule in *Foss v Harbottle* relating to the conduct of the internal affairs of Guernsey companies, the law relating to ratification by shareholders of decisions of the boards of directors of Guernsey companies and legal issues relating to the meaning and effect of Rule 3.01 of the Guernsey Authorised Closed Ended Investment Scheme Rules (“the Scheme Rules”) and of section 298 of the Companies (Guernsey) Law, 2008, which is the latest consolidation of Guernsey company law statutes. In connection with the customary or common law relating to companies within the Bailiwick I was reminded by Advocate Le Tissier for the Plaintiff that Lieutenant Bailiff Southwell QC had said in *Flightlease Holdings (Guernsey) Ltd v Flightlease (Ireland) Ltd* (2009) that

“the concept of a limited company was imported into Guernsey law from English law [and] ... since its importation into Guernsey in the late 1880s, it has naturally been appropriate to look to English law to help in the solution of problems concerning companies which are not covered by Guernsey statutes or customary law.”

I respectfully agree and propose to take the same approach on this application.

11. It is important for me at the outset to state, as Mr Le Tissier also submitted, that, whatever the correct test may be for me to apply on the Defendants’ strike out application, I should be careful not to conduct a mini-trial or to allow the application to become satellite litigation. I believe that that object was attained during the long oral hearings and in preparing this judgment I have re-read all the transcripts and the long and helpful written submissions of Counsel, together with the affidavit evidence lodged for both sides to the application and am satisfied that I have neither conducted a mini-trial nor allowed satellite litigation to arise. I am particularly aware as well that I heard the application at a very early stage of the proceedings, before any Defences have been lodged, and before disclosure of documents and lodging of witness statements or, with the exception of a report from Mr Graham Harrison for the Plaintiff filed in late November 2011, upon which much submission was made, before any experts’ reports have been prepared; this is an important point for me to bear in mind throughout this judgment since experience tells us that much could change after disclosure of documents.
12. Both sides clearly, and I think understandably, regard the application as extremely important to them and, bearing in mind the financial extent of the GORE Transaction,

they have committed large resources in terms of time and money towards the arguments presented to the Court for and against the application. But I hope they will forgive me if in this judgment I do not do full justice to all the arguments of Counsel, which proved most helpful to me; for I am conscious that I should only determine those questions which I consider necessary for me to decide in order for me to decide whether or not to strike out the Cause. The original Cause was amended in draft on two later occasions during the oral hearings and in this judgment all later references to the Cause should be treated as being to the second draft Cause, which was presented to me by Mr Le Tissier, according to my note, on 12 October 2011, and upon the basis of which all Counsel were happy to proceed for the purposes of the application.

13. Before turning to an analysis of the Cause I must decide two important questions which will partly govern the way in which I approach the allegations of breach of duty and negligence in the Cause.
14. First, does the full rigour of the rule in **Foss v Harbottle** apply in Guernsey or, as the Plaintiff contends, has the rule been relaxed here, as it has been in England as a result of section 260(3) of the Companies Act 2006, so as to allow derivative actions where the alleged cause of action of a company is in negligence or breach of duty and where there is no element of actual or equitable fraud alleged?
15. In my judgment, the rule applies in Guernsey as it did in England before the change in the law brought into English law by section 260(3). My reasons are these. First, although the substantive and procedural changes brought into English law by sections 260 to 263 by the 2006 Act must have been available to the States and the Law Officers when the proposals which led to the 2008 Law were before the States, no proposal was made for similar changes to be introduced in our law by the 2008 Law, where no mention appears of either the rule in **Foss v Harbottle** or derivative actions and no equivalent of sections 260 to 263 appear at all. Secondly, although I was reminded by Mr Le Tissier of the guidance of the Court of Appeal in **Morton v Paint** (1996) 21 GLJ 61 and of some criticism of the limited effect, in particular, of the fraud on the minority exception to the rule in textbooks and learned articles and in the Report of the Law Commission which led to the English statutory changes, I was not satisfied either that this criticism was entirely widespread or that it was clear which way Guernsey law should proceed, taking into account Lord Lowry's five "*aids to navigation*" in the House of Lords case of **C v Director of Public Prosecutions** [1996] 1 AC 1. For, after all, the Plaintiff only seeks the inclusion into Guernsey law of the substantive change made in section 260(3) and not the detailed procedural changes contained in sections 261 and 263, in particular, which impose a preliminary stage, in two parts, where a Plaintiff for derivative relief is obliged to require the permission of the High Court to bring the derivative action before the action can be instituted. The procedural changes are very detailed and complex. In my judgment, such a limited inclusion of section 260(3) into our law cannot be justified. I consider that such a change would require an amendment of the Companies Law and that I should introduce such a change by some sort of judicial law-making. I add that I also agree with the submission of Mr Davies relating to **Morton v Paint** which appears at paragraph 7.5 of his Outline of Applicable Law.
16. On the topic of the aids to navigation towards a change of the law, I am doubtful whether or not the proposal for which Mr Le Tissier contends in this part of his case would find favour with the States and so I am wary of imposing my own remedy by importing either section 260(3) alone or the entire English code on derivative actions in sections 260 to 264 of the Companies Act 2006 and caution must, as I see it, prevail since the States have legislated in the field of company law soon after the passing of the 2006 Act leaving the rule in **Foss v Harbottle** untouched. It might also well be said that to accede to the Plaintiff's suggested change to our law I would be setting aside a

fundamental doctrine of Guernsey company law. Finally, paragraph 7.12 of Mr Davies' Outline of Applicable Law gives, as he there submitted, an idea of the wide consultation process which was apparently gone through before the Companies Law 2008 was brought into Guernsey's statute law. In my judgment, any change in our law to replace the rule in **Foss v Harbottle** so as to allow cases in negligence or breach of duty as a new exception to the rule must be a matter for the States to consider, and not for me to decide is necessary or appropriate.

17. If I were wrong on this point, I would not have been able to agree that only section 260(3) had become part of Guernsey law some time before the passing of the Companies Law 2008 but would have been forced to conclude that it was a case of 'All or Nothing' and that all the statutory code had then come into our law. As the Defendants rightly submit, the new English statutory code relating to the bringing of derivative actions is "*a composite whole*".
18. Secondly, I must rule on the submissions of the parties about the correct test to apply on the strike out application.
19. The Plaintiff seemed to me to be contending that all that he needed to establish was that his case as set out in the Cause was an arguable case and that therefore, in accordance with established law in Guernsey on strike out applications under what is now rule 52 of the Royal Court Civil Rules 2007, he should be permitted to have a full trial of the derivative action on behalf of Tetragon against the Executive Directors and the Independent Directors on all the different bases on which his case is put in the Cause. He cited a large amount of cases in support of the arguable test, but, understandably since this is the first derivative action known to have been started in the Royal Court, none of them relates to a derivative action. Furthermore, little of Mr Jackson's affidavit evidence dealt with the facts leading up to the Board meetings on 29 July 2010, including the negotiations which the Second Defendant largely conducted leading to the term sheet signed on 18 May 2010 and the later negotiations which produced amendments to the terms on the term sheet.
20. In support of the application to strike out the Defendants submit that, in accordance with the approach taken by Wigram V.-C in **Foss v Harbottle** itself, the Court of Appeal in **Prudential Assurance Co. Ltd v Newman Industries No. 2** [1982] Ch. 204 and Knox J. in **Smith v Croft No. 2** [1988] Ch. 114 the Plaintiff must first establish that he has a *prima facie* case on all or any of the seven alleged causes of action pleaded in the Cause and, to the extent that there is such a *prima facie* case established, that any of such causes of action come within an exception to the rule in **Foss v Harbottle** – see also paragraph 17 of the judgment of Briggs J. in **Universal Project Management v Fort Gilkicker**. Accordingly, the Defendants argue that the usual demurrer approach to strike out applications on the ground that a Cause does not disclose a reasonable cause of action is not the correct test to apply when a defendant applies in the Royal Court to strike out a derivative action and drew my attention to the helpful list of six general principles governing derivative actions provided by Lord Justice Peter Gibson in **Barrett v Duckett** [1995] BCC 362, which I think it would be helpful to include at this stage.

"The general principles governing actions in respect of wrongs done to a company or irregularities in the conduct of its affairs are not in dispute:

1. The proper plaintiff is prima facie the company.

2. Where the wrong or irregularity might be made binding on the company by a simple majority of its members, no individual shareholder is allowed to maintain an action in respect of that matter.

3. *There are however recognised exceptions, one of which is where the wrongdoer has control which is or would be exercised to prevent a proper action being brought against the wrongdoer: in such a case the shareholder may bring a derivative action (his rights being derived from the company) on behalf of the company.*

4. *When a challenge is made to the right claimed by a shareholder to bring a derivative action on behalf of the company, it is the duty of the Court to decide as a preliminary issue the question whether or not the plaintiff should be allowed to sue in that capacity.*

5. *In taking that decision it is not enough for the Court to say that there is no plain and obvious case for striking out; it is for the shareholder to establish to the satisfaction of the Court that he should be allowed to sue on behalf of the company.*

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

21. I accept the Defendants’ submissions as being the correct test on their application to strike out the Cause. In my view, the valiant contentions of Mr Le Tissier simply do not apply to an application to strike out a derivative action where very different considerations apply than in an orthodox strike out application and the two-stage *prima facie* test is so long-standing under common law as really to preclude much argument to the contrary, absent statutory provision like those in sections 261 and 263 of the Companies Act 2006, but even there a *prima facie* test of a special nature is required to be satisfied by a claimant seeking relief in a derivative action – see especially **Prudential Assurance Co. Ltd v Newman Industries No. 2** at pp. 211A-B and 221H-222B for further details of the reasoning of the Court of Appeal. The same test has also been adopted recently in the Grand Court of the Cayman Islands by Foster J. in **Renova Resources v Gilbertson** [2009] CILR 268, where the learned judge, rightly in my view, said that a *prima facie* case was more than a good arguable case – paragraph 33. At paragraph 35 he provided a further analysis of a *prima facie* case, with which I respectfully agree:

“35 *The purpose of requiring the plaintiff to obtain leave to continue the derivative action, as I understand it, is to prevent the expense and time of (and to protect the defendants against) vexatious or unfounded litigation which has little or no prospect of success or which is clearly brought by an aggrieved shareholder for his own reasons rather than in the interests of the company. The phrase “prima facie” has various shades of meaning but literally means “at first sight.” Given that there is not to be a mini-trial of the plaintiff’s case, it seems to me that I must form a view of the plaintiff’s case based on my first impressions, having regard to my assessment of all the evidence before me, including that submitted by the defendants. For the plaintiff to obtain leave to continue with the action, I consider that I must be satisfied in the exercise of my discretion that its case is not spurious or unfounded, that it is a serious as opposed to a speculative case, that it is a case brought bona fide on reasonable grounds, on behalf of and in the interests of the company and that it is sufficiently strong to justify granting leave for the action to continue rather than dismissing it at this preliminary stage.”*

22. I now turn back to the facts, which are largely agreed. There may be an element of overlap between the summary included above, but I have decided to give as full a recital of the facts so that the appropriate test in relation each part of the Cause can be addressed against the background of the full facts, in so far as it has been possible at this early procedural stage of the proceedings. I shall do so partially by reliance on the Defendants' Recap Note of the first two days of the oral hearing, *i.e.* 12 and 13 October 2011, and their Remainder of the Facts document which completed their analysis of the facts. I have found these documents particularly helpful, but I have also checked the central documents to ensure that the references are accurate and I have removed, I believe, all comments from the Defendants' Notes which are not strictly factual.
23. In the past decade, the Plaintiff and the Executive Directors have collaborated in two main business ventures. First, in 2002, they founded Polygon and the Polygon Global Opportunities Master Fund. As that fund grew, they built up business in London and New York and elsewhere. They did so through two subsidiaries of the fund's investment manager Polygon Investments Limited ("PIL"). In 2005, they founded the Seventh and Eighth Defendants, Tetragon Financial Group Limited ("TFG") and Tetragon Financial Group Master Fund Limited (the "Master Fund") (together, Tetragon or the "Fund") and also its investment manager, Tetragon Financial Management ("TFM"). Tetragon is a closed-ended investment company under the Protection of Investors (Bailiwick of Guernsey) Law, 1987. It is managed on a day to day basis by TFM under the terms of an investment management agreement (the "IMA"), to which I shall refer below.
24. In 2008, the Plaintiff was asked by The Executive Directors to resign from the Polygon manager. The Plaintiff agreed to 'exit his interests' in Polygon in favour of The Executive Directors but remained in the Tetragon business and became a director of the Fund and continued as a member of TFM's Investment Committee.
25. In 2009, a related-party transaction took place, which was referred to as the "LCM Transaction", and to which I shall refer later.
26. In 2010, TFM considered a second related-party transaction, the GORE Transaction. The GORE Transaction was a related-party transaction because of Polygon's participation in the joint venture. The First and Second Defendants were interested in the GORE Transaction by virtue of their ownership of Polygon; so was the Plaintiff (though his interest was by then a declining economic interest).
27. Under the terms of the IMA, TFM had two options where a significant related-party transaction was under consideration. It could either submit it to the board of Tetragon and obtain approval from a majority of the directors not interested in the transaction, or it could obtain a fairness opinion from a recognised bank or firm. In this case, it is common ground that TFM did both. A fairness opinion was obtained from Houlihan Lokey, to which I refer in detail below, and approval was sought and obtained at the board meeting on 29 July 2010 from all the Independent Directors.
28. At that time, Tetragon's Board comprised Tetragon's three founders, the Plaintiff and the Executive Directors, and the Independent Directors. Mr Ward had become an Independent Director on 30 April 2010 in place of Mr Olesky.
29. The affidavit evidence from the Defendants shows that the Independent Directors are experienced professional men and that the purpose of their appointment was to protect the interests of non-voting shareholders in TFG. Two of them are Guernsey residents, one is English and the other is a United States citizen. The Independent Directors were separately advised by US lawyers Simpson Thacher and by Carey Olsen in relation to

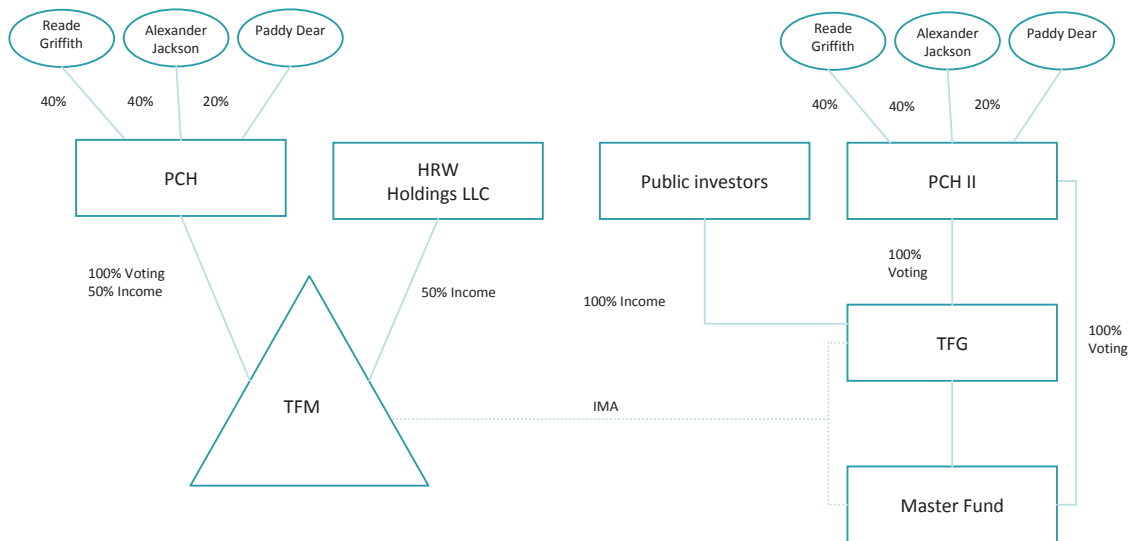
the GORE Transaction and Tetragon was represented by US lawyers Cravath Swaine & Moore and by Ogier.

30. The Independent Directors swore affidavits confirming that they were alive to the interests of the Executive Directors in the GORE Transaction. The clear effect of this evidence is that in the knowledge that the Executive Directors were interested through their interests in Polygon in the GORE Transaction, and with the benefit of independent legal advice in the US and Guernsey, and with the benefit of a fairness opinion from Houlihan Lokey, all of the Independent Directors voted in favour of the GORE Transaction. The Plaintiff also accepts that Independent Directors acted at all material times in good faith; there is no allegation against the Independent Directors which is based on actual or equitable fraud or breach of fiduciary duty.

31. It also appears that the Plaintiff and all the other members of the Board, i.e. the Executive Directors and the Independent Directors, received the same documents and electronic materials in the run-up to the board meeting held on 29 July 2010.

The Structure of Tetragon

a. Tetragon's structure diagram



32. The Tetragon structure diagram, which is a useful tool, was helpfully explained to me during Mr Davies' oral submissions. I draw from those submissions and from the Recap Note itself for the following explanation.
33. It is the Master Fund which makes investments; TFG's only investment is in shares in the Master Fund and TFG feeds funds through to the Master Fund.
34. Tetragon has ten voting shares, which are held by Polygon Credit Holdings II Limited, ("PCH II"), a Cayman Islands company, which is owned by the three founders, the Executive Directors and the Plaintiff. The Plaintiff and the Second Defendant each own 40% and the First Defendant owns 20%. PCH II is not a Defendant in these proceedings, but Mr Davies accepted that, if the derivative action were not struck out, PCH II would have to be joined so as to be bound by any judgment after the full trial.
35. Public investors hold TFG's non-voting shares. Most of them hold through Euroclear and so their identity is not visible to Tetragon. In 2007, there was an IPO of 30 million non-voting shares which was over-subscribed. TFG's shares are traded on the NYSE Euronext Amsterdam stock exchange. As a listed entity, TFG is subject to disclosure obligations, including as regards process and directors' interests. At the time of the IPO, 70 million shares held by existing investors were exchanged into interests in the listed entity. Overall, the IPO concerned some U.S.\$1.35 billion investor funds, new and existing. Mr Côté refers to the IPO in this first affidavit at paragraph 22.
36. Following the IPO, Tetragon's website has contained all of Tetragon's up-to-date disclosures. What is now available to prospective investors is real-time disclosure on the website – paragraph 48 of Mr Côté's first affidavit. TFM, the investment manager, is a Delaware limited partnership. TFM manages Tetragon's investments in return for a flat fee of 1.5% of Tetragon's net asset value, plus a 25% performance fee on any increase in net asset value above a hurdle rate (which at the time of the IPO was approximately 8% and which fluctuates based on LIBOR).
37. 50% of the economics in TFM are owned by a Delaware corporation called HRW Holdings, which is owned in turn by David Wishnow, Michael Rosenberg and Jeffrey Herlyn. Each of them swore affidavits supporting the position of Tetragon on the strike out application. Mr Wishnow's relevant financial interests are in TFM, and he is also (like Mr Rosenberg and Mr Herlyn) a non-voting shareholder in Tetragon. His view, having participated in the negotiation of the GORE term sheet, and having witnessed and supported the presentation of the transaction to Tetragon's board, is that the GORE Transaction was in Tetragon's interests.
38. Messrs. Wishnow, Rosenberg and Herlyn have no interest in Polygon. They are members of TFM's Investment and Risk Committees and they have not been joined as Defendants in these proceedings; it is clear that they thought the GORE Transaction was in Tetragon's best interests.
39. The balance of 50% of the economics in TFM is beneficially owned by the Second Defendant, the Plaintiff and the First Defendant through another Polygon Cayman Islands entity, PCH. PCH holds all the voting shares in TFM, and 50% of the economics.
40. In voting terms, the Second Defendant and the Plaintiff each has a 40% interest in PCH, and the First Defendant 20%. In economic terms, because of the 50% economic interest which PCH has in TFM, the Second Defendant and the Plaintiff each have a 20% interest and the First Defendant has a 10% interest in TFM.

45. Article 6(a) states that TFG's share capital is U.S.\$1 million divided into ten "voting shares" and 999,999,990 unclassified shares. Article 6(b) provides:

"Unclassified shares may be issued as Non-Voting Shares."

All ten Voting Shares have been issued and all of them are owned by PCH II. It is also common ground that more than 100 million non-voting (unclassified) shares have been issued.

46. Dividends are dealt with at Articles 106 and 107:

"The Directors may, upon the recommendation of the Manager, declare periodic dividends from time to time in respect of Non-Voting Shares, in accordance with the respective rights of the Members, subject to the approval of the Voting Shares by Resolution... No dividends shall be declared or paid on the Voting Shares."

47. By Article 138, on a winding up the maximum that PCH II could realise is less than one US cent.

48. All the voting shares carry the right to vote. Article 12 provides that the non-voting shareholders can only vote where the resolution at issue will, if passed, adversely affect the rights attaching to the non-voting shares.

49. So, as the Defendants accurately put it, the voting shares afford control but with no economic interest, and the non-voting shares offer economic participation but no control. This is the structure into which non-voting shareholders in TFG (and persons acquiring interests in such shares on the Amsterdam Stock Exchange) enter.

50. I shall now address Articles concerning the Board. The provisions concerning the Board begin at Article 80 which provides that the number of directors shall be seven unless otherwise determined by Resolution of the Voting Shares. At all times up until the approval of the GORE Transaction on 29 July 2010, there was a board of seven directors. The Plaintiff was removed as a director of Tetragon on 24 January 2011 and thereafter there have been six directors.

51. Article 81 provides that

"[E]xcept as provided not less than a majority of Directors shall be Independent Directors."

52. Article 83 is the general provision that the business of the company shall be managed by the directors, but

"subject ... to any directions given by Resolution of the holders of Voting Shares".

53. Article 91 is a very important Article dealing with directors' interests. It states:

"Provided that he has disclosed to the Directors the nature and extent of any interests of his in accordance with the Companies Law, a Director, notwithstanding his office: (a) may be a party to, or otherwise interested in,

any transaction or arrangement with the Company or in which the Company is otherwise interested”.

54. Article 91 (c) provides that a director

“shall not ... by reason of his office, be accountable to the Company for any benefit which he derives from any such office ... or from any such transaction or arrangement ... and no such transaction or arrangement shall be void or voidable on the ground of any such interest or benefit or because such Director is present at or participates in the meeting of the Directors or a committee thereof that approves such transaction or arrangement, provided that [the interest] and the material facts as to the interest ... have been disclosed or are known to the Directors ... and the Directors ... in good faith authorise the transaction or arrangement”.

55. Article 91 (c) (ii) provides that the approval of the board must include the votes of a majority of the directors who are not interested in the transaction.

“or such transaction is otherwise found by the Directors (before or after the fact) to be fair to the Company as of the time it is authorised”.

56. Both those routes were followed in relation to the GORE Transaction. The GORE Transaction was approved by a majority of the directors not interested in the transaction at the board meeting on 29 July 2010, *i.e.* by all four Independent Directors, and on 7 June 2011, the then directors, who by then did not include the Plaintiff, resolved that the GORE Transaction was fair to Tetragon.

57. Article 92(a) provides:

“For the purposes of the preceding Article: a general notice given to the Directors that a Director is to be regarded as having an interest of the nature and extent specified in the notice in any transaction or arrangement with a specified person or class of persons shall be deemed to be sufficient disclosure of his interest in any such transaction or arrangement”.

58. Article 93 provides that

“the affirmative vote of five Directors shall constitute a resolution of the Directors”.

59. Article 94 provides that

“The quorum for the transaction of the business of the Directors shall be five”.

60. Article 99 is also an important article and provides that directors can vote, and have their vote counted, on transactions they are interested in as long as they have disclosed their interest in accordance with the articles and the Companies Law.

61. Broadly speaking these provisions reflect sections 162, 166 and 167 of the Companies Law regarding disclosure of interests and entitlement to vote. Section 162 provides that immediately after becoming aware of the fact that he is interested in a transaction or proposed transaction with the company a director must make disclosure to the board of directors on either of the two alternative bases set out in paragraphs (i) and (ii) of the

section.

62. The Recap Note, with the definitions used in this judgment, provided as follows:

“At the time the GORE Transaction was considered, the Board consisted of seven directors, of whom at least four had to be independent. Five directors are required, first for an affirmative vote, secondly for a quorum, and thirdly to pass a written resolution. The point to note here is the central role played by the Independent Directors in the management of the company. As a practical matter, the relevant business of the company cannot be conducted without the participation of at least two of the Independent Directors and no resolutions are going to be passed without the support of at least two. Under Article 91, the power to decide whether a related-party transaction is to be approved rests on the route followed on 29 July 2010: with the directors who had no interest in the underlying transaction. In the case of GORE, that was the Independent Directors. The minimum requirement for approval was the votes of three of the four Independent Directors, i.e., majority Independent Director approval. On the other route, where the directors additionally needed to determine the fairness of the transaction to the company, (i.e. the route subsequently taken on 7 June 2011), the minimum requirement for approval was again the three of the four Independent Directors (if five votes from the then six directors was to be achieved).”

63. As I have mentioned, the Cause is concerned with a decision reached by the Board, including each of the four Independent Directors, first on 29 July 2010 and then again on 7 June 2011. After a period of negotiation, which seems to have commenced in about January/February 2010, with the benefit of independent legal advice from Simpson Thacher and Carey Olsen, considerable additional materials were provided to them for them to review and after considering a fairness opinion from Houlihan Lokey, obtained by TFM under the terms of the IMA, and after questioning Houlihan Lokey during the board meeting, the Independent Directors decided on 29 July 2010 that the GORE Transaction should be approved.

The Investment Management Agreement

64. The IMA is an agreement governed by New York law. The first and second parties to the IMA are the Seventh and Eighth Defendants, Tetragon. The fourth party is TFM, the Investment Manager, which was then known as Polygon Credit Management LP, but has since changed its name to Tetragon Financial Management LP, i.e. TFM. Details of the provisions of the IMA are pleaded in paragraphs 27 and 28 of the Cause.

65. By Clause 2 TFM was appointed as exclusive investment manager to the Funds (Clause 2 (a)). Clause 2 (b) provides:

“Subject to Clause 4 hereof, the Manager shall have full power and discretionary authority on behalf of and for the account of the Funds to manage and invest cash and other assets of the Funds pursuant to and in accordance with the investment objective of the Funds”.

66. Clause 4 (a) of the IMA provides that

“the Manager shall have the authority ... to determine the investment strategy to be pursued in furtherance of the investment objective of the Funds”.

It is common ground that Tetragon's investment objective is and always has been "to generate distributable income and capital appreciation", which I described during oral argument as a very broad objective indeed.

67. Clause 4 (c) provides:

"In carrying out its duties under this Agreement, the Manager shall have due regard to the investment objective to generate distributable income and capital appreciation".

68. Much mention was made in argument of Clause 4(d) of the IMA, which provides as follows:

"The Manager is authorized to enter into transactions on behalf of the Funds with persons who are Affiliates of the Manager". ("Affiliates" is defined by reference to the U.S. Securities Act and it was not disputed that for these purposes Polygon would be an "Affiliate of the Manager".)

69. Under clause 4(d) TFM is authorised to enter into transactions

"provided that in connection with any such transaction that exceeds \$5 million of aggregate investment the Manager informs the Boards of Directors of the Offshore Fund and the Master Fund and obtains either (i) the approval of a majority of the members of the Boards of Directors that do not have a material interest in such transaction (whether as part of a board resolution or otherwise) or (ii) an opinion from a recognized investment bank, auditing firm or other appropriate professional firm substantively to the effect that the financial terms of the transaction are fair to the Funds from a financial point of view".

70. So, where a related-party transaction might exceed US \$5 million, TFM may either obtain board approval from a majority of the disinterested directors, or itself obtain a fairness opinion, or, as in this case, both.

The LCM Transaction

71. I was introduced by Mr Davies in his oral submissions on 12 and 13 October 2011 in more detail to the first related-party transaction into which Tetragon entered in November 2009, the LCM Transaction, under which Tetragon acquired an operating business. Previously it seems that Tetragon had been holding investment securities, which primarily were CLOs, collateralised loan obligations. The LCM Transaction is not directly at issue in these proceedings but a number of its features were similar to those of the GORE Transaction. The Plaintiff ultimately voted in favour of the LCM Transaction at the Board meeting when it was approved by all of the directors.

72. The similar features were shown to have included these:

- i. Each transaction represented, for Tetragon, the acquisition of an interest in an operating business.
- ii. Each transaction involved related-party aspects, with Polygon receiving equity in exchange for the provision of infrastructure and service at cost.

- iii. A fairness opinion was obtained by TFM from the same provider, Houlihan Lokey.
 - iv. TFM also submitted each transaction to Tetragon's board for majority approval by those with no interest in it, who on each occasion were the Independent Directors.
 - v. External US lawyers were retained for the Independent Directors.
 - vi. During negotiations the Plaintiff on each occasion argued that the transaction was outside Tetragon's investment objectives.
73. LCM was owned by Calyon, which is the investment banking arm of the Credit Agricole group. While it was part of Calyon, LCM had used Calyon's infrastructure including offices, non-investment staff (*i.e.*, legal, compliance, financial control, computer systems and technology) in managing the loan assets. If Tetragon acquired LCM from Calyon, that infrastructure would no longer be available to LCM from Calyon and so LCM would need either to develop its own 'infrastructure capability' or source it from a third party.
74. When the LCM acquisition opportunity arose, the Second Defendant and the First Defendant proposed that the same Polygon entities should make infrastructure services available to LCM at cost, in exchange for the right to receive a percentage of LCM's profits.
75. Because Polygon was owned by the Executive Directors, and because the Plaintiff had a continuing but declining interest (see above), the related-party provisions of the IMA came into play. As with the GORE Transaction, TFM both obtained Board approval (on 3 November 2009) and obtained a fairness opinion which was submitted to the Board as one part of the materials to be considered by them in deciding whether or not to enter the LCM Transaction.
76. As with the GORE Transaction, external US lawyers Simpson Thacher were retained to assist the Independent Directors.
77. In the event, all of the members of Tetragon's Board, including the Plaintiff, voted in favour of the LCM Transaction, but originally, as I have mentioned, the Plaintiff had opposed it. In a letter dated 20 October 2009 to the Board, the Plaintiff set out his objections "*I write to express my strong opposition. It is wrong to divert 16.5% of the operating profits from LCM to two entities that are owned by Reade Griffith and Paddy Dear.*" The Plaintiff also complained that the proposed investment represented a significant departure from Tetragon's investment objectives. In his letter the Plaintiff accepted that the investment mandate was broad but said that he had some doubts as to whether it was broad enough to encompass the purchase of an operating business.
78. Another complaint in common with the GORE Transaction was the Plaintiff's allegation of what he called 'double-dipping', *i.e.* that Tetragon was unnecessarily paying two sets of fees. He alleged:

"The Related-party Transaction cannot withstand scrutiny. It is double dipping and an unlawful diversion of profits to a related-party. Our shareholders are essentially being charged twice for the same services by a related-party. Any shareholder or regulator who heard about this will be outraged for very good reason."

But on 3 November 2009 the Plaintiff voted in favour of Tetragon entering the LCM Transaction.

The GORE Transaction

79. The negotiations which led to Polygon and Tetragon entering into the GORE Transaction began in about January/February 2010. To a large extent the Second Defendant conducted those parts of the negotiations which were with the 'GORE Founders'. Later, after the original version of the Term Sheet, which comprised the detailed terms which had been negotiated, had been prepared, which was by 18 May 2010, and especially between about 16 June 2010 and 28 July 2010, the proposed transaction was reviewed by members of the Board before the Board meeting was held on 29 July 2010. During that period the Plaintiff raised objections to the proposed GORE Transaction and was represented by lawyers, The Nelson Law Firm, Fladgate LLP in London and Appleby in Guernsey.
80. There can, in my judgment, be absolutely no doubt that each of the Plaintiff and the Independent Directors of Tetragon had the opportunity to use, and did use, the services of skilled lawyers during the period of negotiations and that the lawyers for the parties reviewed all aspects of the proposed transactions most carefully.
81. It is also noteworthy, I think, that no allegations are made by the Plaintiff that any negligent advice was given to the Independent Directors by either Simpson Thacher or Carey Olsen or to Tetragon or TFM by either Cravath Swaine & Moore or Ogier. So, the Plaintiff's derivative action is directed against the Executive Directors and the Independent Directors, and not against either TFM or Mr Wishnow, Mr Herlyn or Mr Rosenberg of TFM or Houlihan Lokey or any of the lawyers and other advisers used by TFM, the Independent Directors or Tetragon.
82. The three real estate specialists at the heart of the proposed GORE Transaction, John Carrafiell, Sonny Kalsi and Fred Schmidt, (together "the GORE Founders",) had previously worked at Morgan Stanley. The Second Defendant knew Mr Carrafiell personally and all members of the Investment Committee of TFM met the GORE Founders in February 2010.
83. The Plaintiff's first impression of the proposed GORE Transaction appears to have been a favourable one. In his e-mail dated 25 February 2010 and sent by him to the other members of the Investment Committee of TFM he set out his reaction:

"It could be an exciting deal to do. ... I think that these are exactly the type of deals that Tetragon should be looking at." In this e-mail he added: *"From TFG's point of view a big stake in there [sic] firm is exciting."*
84. The GORE Transaction was referred to its Board for approval because of Polygon's participation and because it was recognised that the Second Defendant and the First Defendant owned Polygon. This was the same review and approval process as had been followed for the LCM Transaction.

85. The first communication from TFM to the Board in connection with the approval was an e-mail from Mike Adams, Associate Counsel for TFM, to Tetragon's Board dated 22 June 2010. The Investment Committee of TFM had met on 18 June 2010 and, whilst at that meeting the Plaintiff had objected to the proposed GORE Transaction, the majority of the committee had agreed with it. Attached to Mr Adams' e-mail were:

- i. a letter from the Second Defendant to the Board dated 18 June 2010,
- ii. a confidential presentation from TFM to the Directors,
- iii. extracts from the IMA and the articles of both Tetragon companies, the Term Sheet, and
- iv. a business plan.

86. The Second Defendant's letter of 18 June 2010 included the following:

"Tetragon has continually sought to realise TFG's potential to become a broad-based financial services firm, capable of pursuing attractive investment opportunities."

The Second Defendant then set out his belief that Tetragon

"can function not only as an investment holding company, but also as a company."

He also referred to the LCM transaction as a

"... first natural step in realising its potential ... receives very positive feedback from shareholders and analysts."

He also considered that

"... there's an opportunity to further fulfil TFG's potential"

and he said that TFM was very excited to present a proposed real estate joint venture, which he believed would build on recent success.

87. The Second Defendant continued:

"Due to the fact that various Polygon entities will be involved in the Transaction (including entities owned by Paddy and myself as well as owned by Paddy, Alex and myself), the three of us may be considered to have an "interest" in the proposed Transaction." "...As you will recall under the articles and the IMA, these sorts of related party transactions need to be approved by the boards, including a majority of the disinterested directors, or the directors need to find that the affiliate transaction is fair to each of the companies, or be otherwise authorised."

In the final paragraph of his letter the Second Defendant said:

"... there will be a detailed discussion of the related party matters. We understand the board should take whatever time the directors consider is necessary to evaluate the terms of the related party aspects of the joint venture and to consult with outside advisers as appropriate."

88. The presentation from TFM to the Board which was attached to Mr Adams' e-mail summarised the principal terms of the GORE venture; the headings used included: *"Why*

Real Estate”, “*Why Green Oak*”, “*Why with Polygon*”, etc. The summary paragraph of the presentation stated:

“Given that Polygon and the other infrastructure providers are related parties to TFG and TFGMFL it is important that the relationships of the joint venture partners be thoroughly disclosed and properly thought through, and we look forward to working with the Boards of Directors on that aspect of the transaction”.

89. The GORE Term Sheet, a document upon which great attention was given during the argument of Counsel, was also attached to Mr Adams’ e-mail of 22 June 2010. The Term Sheet is helpfully pleaded in depth in paragraphs 37 and 43-50 of the Cause.

90. The parties to the Term Sheet were identified as:

- i. the three real estate professionals who were going to form GreenOak Real Estate, *i.e.* the GORE Founders;
- ii. the Polygon holding company which was going to receive an equity interest in GORE and which was going to provide working capital for the joint venture;
- iii. the two Polygon “*Infrastructure Providers*”: the US and UK partnerships which were going to participate because the joint venture would require an operational centre and trading and support facilities; and
- iv. Tetragon which was going to provide working capital and a financing commitment in exchange for an equity interest.

91. The GORE Founders’ interest in the venture was described and it was stated that between them they would own 77% of the joint venture vehicle. Polygon was to receive 13% and Tetragon 10% and their interests were to be non-dilutable. The GORE Founders would also receive a 3.6% interest in Polygon HoldCo. (There were forfeiture provisions if a GORE Founder were to leave.)

92. Under the heading “*Options in TFG*” the Term Sheet provided that the GORE Founders would receive options on 3% of Tetragon’s shares at a strike price of US \$5.50, vesting only after five years. The shares were to be issued for cash. There was a further forfeiture provision to the extent that a GORE Founder was not active in the business at the vesting date of the options. Changes in Tetragon’s favour were negotiated to this aspect of the GORE Transaction after the Term sheet was signed as shown in the Defendants’ Counsel’s summary headed “*Changes to the GORE Transaction post Term Sheet*”. The negotiated change was that the TFG options were only to vest after five years and following the GORE Founders’ repayment of all working capital loans and were conditional on the GORE Founders being actively involved in the management of the real estate business.

93. The Term Sheet also provided that the GORE Founders would manage the venture, subject to the Board which was to include one appointee from each of Polygon and Tetragon. Reference was also made to an Infrastructure Services Agreement under which PIP LP and PIP LLP were to provide operational, financial control, trade settlement, marketing, legal, compliance, payroll and other infrastructural services to GORE at cost.

94. Under the heading “*Co-investment of TFG Master Fund*” the Term Sheet provided that Tetragon was to make available US \$100 million which could be drawn by GORE for co-investment purposes, subject to various constraints including a condition that the amount drawn down in respect of any given investment programme could not be more than 9% of the total equity contributed to that programme, and that those co-investments were on the

best terms made available to any other investor in a given opportunity, which was referred to in the proceedings as a “*most favoured nation*” clause.

95. A further change was made to the proposed GORE Transaction after the Term Sheet was signed to ensure that Tetragon did not find itself committed only to less attractive investments, allowing it to choose (if it wished) to increase its participation in any investment up to the maximum of 9%.
96. The Term Sheet also provided that working capital loans were to be made by both Polygon Holdco and Tetragon of US \$10 million each.
97. Under the heading “*Time Commitments and Exclusivity*” each GORE Founder agreed to devote his whole time and attention to the business of GORE.
98. Finally, there was a “*Condition Precedent*” set out in these terms in the Term Sheet, which was signed by the Second Defendant on 18 May 2010, *i.e.* about ten weeks before 29 July 2010:

“The obligations of the Parties set forth in this Term Sheet shall be subject to Tetragon obtaining the requisite approval from the Board of Directors of Tetragon.”

Accordingly, the Term Sheet acknowledged that its terms would not be binding unless and until Tetragon Board approval was obtained.

99. The “*Exclusivity*” and “*Documentation/Binding Effect*” section of the Term Sheet referred to a 60-day exclusivity period in which an initial business plan was to be formally agreed between the parties and if the initial business plan was not agreed within this period, the Term Sheet “*shall automatically terminate and no Party shall have any liability or obligation to any other Party*”. (This provision was not enforced by any party in the period of the first 60 days of the GORE Transaction.)
100. On 2 July 2010, Mr Adams circulated by e-mail to the directors of Tetragon a further background presentation headed “*GreenOak Real Estate Advisers*”, which provided information about the GORE Founders and their credentials and about the market environment and also dealt with the TFM rationale underlying the proposed GORE Transaction.
101. Also on 2 July 2010, Mr Adams sent to the Board under separate cover a document containing extracts from Tetragon’s IPO Prospectus, the Tetragon website, Tetragon’s 2009 annual report and various other materials relating to Tetragon’s investment objective and its strategy, asset selection and uses of cash. Under the heading “*Risk Factors*” from the IPO Prospectus the following extract appeared:

“The Issuer and the Master Fund have approved a very broad investment objective and the Investment Manager will have substantial discretion when making investment decisions.”

The Board were reminded of disclosure material about the ability of TFM to change the investment strategy and to expand asset classes and investment vehicles over time.

102. On 6 July 2010 the Plaintiff wrote to the other members of the Tetragon Board expressing his opposition to the proposed GORE Transaction. The letter is addressed to the Directors as a whole, care of Gary Horowitz at Simpson Thacher, the US lawyers for the Independent Directors. (Mr Horowitz was the partner advising the Independent Directors.)

103. The Plaintiff expressed his opposition to the proposed joint venture amongst Tetragon and certain affiliates, and in the introduction he listed four specific complaints:

- i. First, that Tetragon should not be investing in real estate. The Plaintiff asserted that: *“My consent is required to change the general nature of Tetragon’s business”* and *“I do not intend to provide my consent”*.
- ii. Secondly, he referred to the track record of the GORE Founders.
- iii. Thirdly, he said: *“The Price Tetragon is Paying is High; the Terms are Poor”*. He predicted that Tetragon’s stock price would fall if the GORE joint venture went forward, which at the time when the evidence for the Defendants was sworn and the oral hearings held, had turned out to be an inaccurate prediction on his part. For example, whereas Tetragon’s stock price was US \$4.27 when the GORE Transaction was announced, it had risen to US \$7.80 by the time the Cause was issued seven months later.
- iv. Fourthly, he raised the related-party issue as between Polygon and Tetragon.

104. Accordingly, by 6 July 2010 the Plaintiff had informed the Executive Directors and the Independent Directors in some detail of the grounds of his opposition to the then proposed GORE Transaction. Furthermore, in his letter of 6 July 2010 the Plaintiff had made some other contentions in his position as a shareholder in PCH II; he argued that under the Memorandum and Articles of Association of PCH II any change in the general nature of Tetragon’s business was something which required his approval as the Class B shareholder in PCH II.

105. All the other directors of Tetragon were, therefore, on notice that the Plaintiff strongly objected to the proposed GORE Transaction, both as a director of Tetragon and as a PCH II shareholder.

106. On the same day, 6 July 2010, the Plaintiff’s New York lawyers, The Nelson Law Firm, wrote a letter to the Executive Directors, which was copied to Simpson Thacher, the US lawyers for the Independent Directors. The letter threatened legal action in the event that the GORE Transaction proceeded. It accused the Executive Directors of breaches of fiduciary duty, and described the GORE transaction as *“... a thinly-veiled effort to funnel Tetragon’s assets to Polygon to support its elaborate infrastructure”*. The Nelson Law Firm letter was also copied to Mr Côté of PIP LLP (General Counsel to TFM), Cravath Swaine & Moore LLP (the Fund’s U.S. Counsel), Fladgate LLP (the Plaintiff’s London lawyers), the directors c/o Simpson Thacher (the Independent Directors’ US lawyers) and the Plaintiff himself.

At the end of their letter The Nelson Law Firm said:

“On behalf of The Plaintiff, we therefore demand that PCH II cause Tetragon to reject the proposed GORE joint venture and terminate any further discussions with Polygon, GORE or any of its principals in contemplation thereof. Any failure by you to cause Tetragon to reject the GORE joint venture forthwith will subject you to liability for breach of your duty to The Plaintiff as the sole Class B shareholder of PCH II and for breach of contract. You should be aware that The Plaintiff intends to take all lawful actions necessary to enforce his rights.”

(It is to be noted that it does not seem to be part of the Plaintiff’s case in the Cause that the Executive Directors committed breaches of PCH II’s Articles.)

107. On 8 July 2010 Tetragon’s US law firm, Cravath Swaine & Moore, responded to The Nelson Law Firm’s letter dated 6 July 2010 and explained why, in their view, the Plaintiff did not in fact have a right of veto at a PCH II level:

“You are wrong in asserting that The Plaintiff’s consent to the investment transactions with respect of GreenOak Real Estate is required pursuant to Article 36 of the articles of PCH II. You don’t even explain why the articles restrict actions taken by separate legal entities, which are not bound by and do not have rights or obligations under such articles. That is not surprising. Article 36(a) does not impose any limits on the businesses which may be pursued by Tetragon. Such limits, if any, are confined to the organisational documents of Tetragon and the IMA... The PCH II articles only apply to actions taken by PCH II, and Article 36(a) only gives the Plaintiff rights with respect to PCH II not Tetragon.”

108. On 15 July 2010, TFM sent additional material to Simpson Thacher relating to the share option valuation in response to the Independent Directors’ request, promising some information on the GORE Founders’ track record and scheduling a board call. Attached to that document was a Board Information Pack, the introduction to which stated:

“The following slides have been compiled in response to questions raised by the Board of TFG when considering the proposed investment in GORE... How should we approach the valuation of the 3% options being awarded by TFG as part of the consideration for the transaction; anticipated fee flows and cash flow implications?”

TFM next dealt with valuation of the options and the reasons, as they saw them, for the options, saying that they were intended to be a low cost means of aligning interests of the GORE Founders with those of Tetragon’s shareholders, which only pay out if GORE and TFG are successful and were intended to incentivise everyone to work together to improve the share price of GORE. So, TFM explained, if Tetragon’s value increased as a result of the GORE venture being successful, it would only be then that the options would become exercisable; and in order to achieve that, the GORE Founders would have to work hard and be successful. Then the valuation of the options was explained and fee flows considered. TFM also explained the then current management fee structure.

109. Under the heading “GORE investments”, TFM said that if the GORE Transaction proceeded, GORE would receive management fees and, in that context as well, Tetragon has most favoured nation status and so would incur a management fee equal to the lowest management fee applicable to any other equity investor in the relevant programme. The fee structure set out and considered by the Board and their advisers, including the Plaintiff and his advisers, was, it seems, in general terms at least, the same as the structure agreed to by the Plaintiff in relation to LCM, when one of his original objections to the had been to such so-called “double-dipping”.
110. A section followed in which TFM explained that the proposed investment in the GORE Transaction would leave plenty of money left in Tetragon to pursue its other initiatives, to pay dividends and to pay operating expenses.
111. On 16 July 2010, additional information relating to the GORE Founders was sent by e-mail from Simpson Thacher to the Independent Directors including relating to information to the track record of the three GORE Founders. On 13 July 2010, Simpson Thacher had also circulated further materials to the Independent Directors, including the news reports relating to Mr Kalsi’s leave from Morgan Stanley.
112. The Independent Directors were therefore made aware, prior to the Board meeting on 29 July 2010, of information relating to Mr Kalsi and his circumstances.

113. On 21 July 2010, the Plaintiff's Guernsey lawyers, Appleby, wrote directly to Simpson Thacher's letter dated 8 July 2010. The Plaintiff's three main concerns were said to be (i) the disclosure of interests, (ii) the Prospectus and straying from the path of CLOs, which he said were a core part of the Tetragon business, and (iii) Rule 3.01 of the Scheme Rules. First, Appleby mentioned commercial reasons why Tetragon should not proceed and then noted that there were "*specific legal reasons why the Directors must be prudent in considering the transaction*". In the next paragraph of their letter Appleby contended that there would be a change in investment objectives if the proposed GORE Transaction proceeded which should be put to non-voting shareholders for their approval, and in their final paragraph they stated, somewhat surprisingly I think, that the letter was "*written entirely without prejudice*".
114. It must, in my judgment, have been made clear to the Independent Directors, and to the Executive Directors, from the Plaintiff's objections and his US and Guernsey lawyers' arguments about the proposed GORE Transaction, that they should take all necessary steps to satisfy themselves of the validity of the commercial arguments put by TFM for Tetragon to invest in the GORE Transaction and to obtain legal advice from both their US lawyers and their Guernsey lawyers. The affidavits of the Independent Directors demonstrated that this correspondence did, in fact, heighten the level of concern and attention given by them and their advisers to the proposed GORE Transaction.
115. One of the ingredients in the consideration by all the Tetragon directors of the GORE Transaction and in the Independent Directors' evaluation of the related-party components was the so-called fairness opinion obtained by TFM from Houlihan Lokey under the terms of the IMA. The Plaintiff argued that the instructions to Houlihan Lokey should have come from the Independent Directors or the whole board of Tetragon rather than from TFM; but, since the IMA makes it clear that the Investment Manager, *i.e.* TFM, should obtain a fairness opinion, it is clear to me that there is no merit in this point.
116. The Fairness Opinion was one of the components of the process which the Board, including the Plaintiff and the Independent Directors, went through before voting on investment by Tetragon in the GORE Transaction. The Fairness Opinion was addressed to TFG.
117. At the top of the second page of the Fairness Opinion, the Polygon element was referred to: "*as to which we express no opinion*". Both before and at the board meeting on 29 July 2010 the Plaintiff was critical of the fact that Houlihan Lokey did not undertake any comparison of the benefits receivable under the transaction by, on the one hand, Tetragon, and, on the other hand, Polygon. However, as the Defendants rightly submitted, the IMA did not require any comparative analysis to be undertaken. The effect of clause 4(d) of the IMA was that if TFM was going to proceed with a related-party transaction without going to the Board of Tetragon, then what was required under the IMA was

"an opinion from a recognized investment bank, auditing firm or other appropriate professional firm substantively to the effect that the financial terms of the transaction are fair to the Funds from a financial point of view."

118. In The Fairness Opinion Houlihan Lokey also stated:

"You have requested that Houlihan Lokey... provide an opinion... as to whether, as of the date hereof, the Aggregate Consideration to be received in the Transaction pursuant to the Term Sheet is fair to TFG from a financial point of view after giving effect to the Transaction and the Polygon Transaction."

The Fairness Opinion later stated:

“Based upon and subject to the foregoing, and in reliance thereon, it is our opinion that, as of the date hereof, Aggregate Consideration to be received in the Transaction pursuant to the Term Sheet is fair to TFG from a financial point of view after giving effect to the Transaction and the Polygon Transaction.”

119. On 26 July 2010, notice was given of the board meeting of Tetragon to be held on 29 July 2010 and an agenda was circulated. Point C of the agenda read: *“Update on GreenOak Real Estate business proposal”*. Whereas approval of the GORE Transaction was not expressly listed on the agenda, in the light of what had preceded the board meeting, the directors including the Plaintiff were, in my view, adequately put on notice that it would be discussed and that, if the directors agreed, put to the vote. In any event, In an e-mail exchange between the Plaintiff and Mr Adams dated 27 July 2010, the Plaintiff asked whether the GORE Transaction was going to be considered, Mr Adams confirmed that it was on the agenda, and the Plaintiff responded: *“OK thanks”*.
120. After the agenda was circulated, on 27 July 2010 Mr Adams distributed various further materials to Tetragon’s Board. The e-mail attached a further set of slides called the *“GreenOak Real Estate Opportunity Further Board Information Pack”* which had been compiled in response to further questions raised by the Board of Tetragon.
121. The additional slides considered six main issues:
- *“Transaction Origination and GreenOak Founders Background”*
 - *“Deal Terms”*
 - *“Valuation of TFG options”*
 - *“Controls”*
 - *“Background and information on GP Co-Investment”*
 - *“Anticipated fee flows and waterfall of distributions”*.

Further information was provided about the GORE Founders. The *“GreenOak Real Estate Opportunity Further Board Information Pack”* included a section called *“Deal Terms: Comparative of relative value received”*. The slides also set out TFM’s view that the terms of the GORE Transaction were not, in terms of comparative relative value, unduly favourable to Polygon and set out what Tetragon was getting and what it was giving. The slides also included the calculations underlying those figures. The directors addressed themselves to the issue of relative comparative value and took due account of the related-party issue. In relation to the options, the Board were informed that two exercises had been conducted, that TFM had sought to value them and that Houlihan Lokey had valued them. The slides analysed the different approaches adopted.

122. The Plaintiff wrote two further e-mails to the Independent Directors. The first was dated 28 July 2010, the day before the scheduled board meeting, and was addressed to the four Independent Directors and Mr Horowitz. The Plaintiff attacked the fairness opinion. He contended:
- that Houlihan Lokey was wrong not to place any value on Tetragon’s US \$100 million co-investment commitment;
 - that the value they had put on the Tetragon share options was wrong. The Plaintiff argues that the price of US\$5.50 was *“completely wrong”*. He

described it as a “ridiculously low price”.

The Plaintiff also argued that the Independent Directors should have engaged a separate financial institution.

123. Very early on the morning of the 29 July 2010, the day of the board meeting, a further e-mail was sent by the Plaintiff addressed to the Independent Directors and the First Defendant and copied to Simpson Thacher. The Plaintiff attached a four page spreadsheet analysis and commentary setting out his assessment and valuation of the respective contributions of Tetragon and Polygon.
124. The board meeting at the heart of these proceedings took place, as has been mentioned by me several times, on 29 July 2010. Several lawyers attended, including two lawyers from Cravath Swaine & Moore for Tetragon, two lawyers from Simpson Thacher for the Independent Directors, two lawyers from Ogier for Tetragon including Advocate Simpson and two representatives from State Street Fund Services, Tetragon’s company secretary. Mr Côté, Mr Adams and Mr Robinson were in attendance, all of whom are internal lawyers from TFM.
125. The meeting was chaired by one of the Independent Directors, the Third Defendant Mr Rupert Dorey. All three principals of the Investment were in attendance, *i.e.* Mr Wishnow, Mr Herlyn and Mr Rosenberg. Declarations of interest were recorded and it seems that there was no suggestion made by the Plaintiff during the meeting that the disclosures were to any extent inadequate, or that it was improper for the Executive Directors to participate in the discussion of the GORE Transaction and the vote to approve it. On about 25 November 2011 the Plaintiff disclosed that he had secretly taped a large part of the Board meeting and rather late in the day a transcript was produced of this tape, which proved useful and assisted all parties and the Court in following the course of the meeting, which seems to me to have been conducted professionally and courteously and without anyone hurrying matters on unduly or seeking to limit discussion by the Board before any vote to approve the GORE Transaction. Although this tape was available to the Plaintiff and his lawyers at the time of the resumed hearing on 12 and 13 October 2011, no mention of it was made until about 25 November 2011, just before the oral hearing resumed. In the event, the transcript of the tape proved to be the best place for me to visit in order to form a view of the Board meeting against the allegations made by the Plaintiff in the Cause.
126. On the following day 30 July 2010 there was the exchange of friendly e-mails between the Plaintiff and Mr Dorey. The Plaintiff wrote the following words which made a great deal of impact on me when I read them and which, in my judgment, probably represent the feelings of the Plaintiff at the end of the Board meeting on 29 July 2010 as well as anything could:
- “Rupert, thank you for your comments. While I do not agree with the final decision, I do appreciate the time all of you spent listening to and considering my comments on the transaction. The transaction was quite complicated and needed a lot of analysis which I hope I helped with. I left the meeting feeling that I had done everything that needed to be done and said what needed to be said. We reached different conclusions, but guess that will happen from time to time.”*
127. On 2 September 2010 draft minutes of the Board meeting held on 29 July 2010 were circulated by Mr Adams for comments by the directors. The Plaintiff objected to them. His original comments included a suggestion that: *“The minutes should include that the related party instructed Houlihan Lokey”*.

128. In response to the Plaintiff's comments on the draft minutes, Cravath Swaine & Moore, Ogier and Simpson Thacher sent a joint reply by e-mail to the Plaintiff on 23 September 2010. They said:

"Our three firms were represented at the meeting and we believe that the minutes already accurately reflect the discussion which took place at the meeting, including with respect to the legal standards governing the Board's consideration and approval of the GORE transactions. As such, no changes in this regard need to be made to the minutes."

129. On 10 November 2010, Mr Dorey sought confirmation that the minutes of the Board meeting of 29 July 2010 could be signed. The Plaintiff again objected, but gave no specific objections to the draft, which Mr Dorey then requested on 11 November 2010. On 12 November 2010 the Plaintiff identified two changes which he wanted to propose

"Paragraph (5) on page 4 needs to be deleted. The board never discussed the arms-length requirement."

Paragraph (3) of page 4 needs to reflect that Houlihan Lokey did not examine the GORE/Polygon transaction and therefore did not and could not give the board an opinion on whether TFG was getting as good a deal as Polygon was getting. It should also be clear that Houlihan Lokey was not engaged by the Master Fund. [The Executive Directors engaged them and gave them all of their instructions.]"

130. On 17 December 2010, Appleby sent letters before action to Tetragon, for the attention of the First to Sixth Defendants, setting out the basis of the Plaintiff's claim against the director Defendants. The letter before action was passed on to the First to Sixth Defendants by Tetragon, as appears from Ogier's letter to Appleby dated 5 January 2011.
131. The Cause was presented on 25 February 2011; attached to it was a helpful diagram explaining the complicated corporate structure of the corporations involved in the GORE Transaction. I have considered this diagram as well as the two structure plans included within this judgment and hope that in this judgment I have adequately described those companies or corporations which were centrally involved in Tetragon entering into the GORE Transaction.
132. As one would expect, the lodging of the Cause had been preceded by correspondence between Advocate Jeremy Le Tissier of Appleby, on behalf of the Plaintiff, and Ogier, the Advocates for Tetragon. Advocate Simon Davies of Ogier represented Tetragon on the hearings before me and, by arrangement agreed between himself and Advocate Christian Hay of Collas Crill, who appeared for the Executive Directors, and Advocate Tim Corfield of Carey Olsen, who appeared for the Independent Directors, made the principal written and oral submissions on behalf of all the Defendants. This course enabled the Defendants' submissions to be made with very little duplication.
133. By order of the Deputy Bailiff dated 13 May 2011, the Defendants' obligation to table defences to the Cause was stayed pending determination of their strike-out application.
134. By letter dated 7 March 2011 Ogier gave Appleby notice of Tetragon's intention to apply, with the Executive Directors and the Independent Directors, to strike out the Cause and informed them that Tetragon opposed the claims which the Plaintiff was bringing derivatively for Tetragon and considered the claims *"without merit or prospects of success"*. In due course, on 28 April 2011 the Defendants issued the strike out application.

135. Since I think it would be helpful, and since I have concluded that the test adopted taken by the Court of Appeal in *Prudential v Newman Industries* is the test which I must apply on this application, I now remind myself of the test which I must apply to the application. The Plaintiff must first establish that he has a *prima facie* case on all or any of the seven alleged causes of action pleaded in the Cause and, to the extent that there is such a *prima facie* case established, that any of such causes of action come within the exception to the rule in *Foss v Harbottle*. If and to the extent that he cannot do so, either all or such relevant part of the Cause which does not ‘pass the test’ must be struck out as an abuse of process. I should not apply any lesser test, for instance whether the Plaintiff has satisfied me that all or part of his case is arguable or tenable or stands a reasonable chance of success and I have not allowed myself to be distracted by any argument of Mr Le Tissier, however attractively it may have been put, that some lesser test ‘will do’. The *prima facie* case test is understandably quite a high hurdle for the Plaintiff to get over and the reason for that is, I believe, the Courts’ traditional view in England, at least before the changes introduced by the Companies Act 2006 and quite possibly thereafter too, that the right to bring a derivative action is to be regarded as an exceptional right.
136. For the reasons which follow I have decided that the Plaintiff cannot achieve the standard required by the test which I must apply to his case on any part of his derivative action and also that, since Mr Le Tissier accepted, as I think he had to accept, during his oral submissions in reply that the Plaintiff’s case for relief under the oppressed minority provisions of the Companies Law depended on the same facts as his ‘true’ derivative action claims, it must follow that the Plaintiff’s alternative claim under the Companies Law for minority shareholders’ relief or the equivalent falls to be struck out as well.
137. The primary conclusion which I came to when reviewing the relevant facts of the case at this preliminary stage was that the starting point was that, as Lewison J. put it in *Iesini v Westrip Holdings Ltd* [2010] BCC 420, Courts are ill-equipped to enter the commercial arena and decide commercial issues; the converse to this point is the first rule in *Foss v Harbottle* itself which, as a general rule, leave matters of a commercial nature, sometimes in the earlier cases called matters of internal administration or internal management, to the directors to decide. This point came out of the documents, as I read them, loud and clear in this case. Although I cannot decide the point and the proper test to be applied does not require or allow me to do so, but only, I think, to form a provisional view, the approach taken by the Plaintiff when objecting to the GORE Transaction at all times up to and after the Board meeting certainly suggests to me that he seemed to understand that the majority decision taken by all the other directors of Tetragon on 29 July 2010 to approve the GORE Transaction was taken by them on commercial grounds after considering his objections carefully and after taking into account the very considerable body of materials supplied to all directors and the exchanges between their lawyers and that he was bound by it under the internal rules of Tetragon, that is to say, under Tetragon’s constitution as provided in the Articles. The Plaintiff’s e-mail to the Third Defendant on 30 July 2010, the very next day after the board meeting on 29 July 2010, in my view, demonstrates the point I am making quite well.
138. Turning now to the Cause, which I have read several times and taken into account most carefully in preparing this judgment, I remind myself that it is the second draft amended version, handed up by Mr Le Tissier on 12 October 2011, which is the version of the Cause to which all submissions were finally directed.
139. In section D of the Cause the Plaintiff claims that the Executive Directors are obliged to account to Tetragon for the benefits derived by them from the GORE Transaction since they had breached their duty of full and frank disclosure to Tetragon. The case is that they had not disclosed the nature and extent of their interests so as to come within the protection given by article 91(c). The pleading is short and the Cause does not set out in full detail the whole range of correspondence, e-mails and presentations which I have mentioned above.

Under this head of claim I have considered articles 91 and 92 and the terms of section 162 of the Companies Law.

140. The central point, in my judgment, is whether or not the Executive Directors, and especially Mr Griffith, disclosed sufficient details of their interests in the GORE Transaction to enable the other directors to understand what their interests were and the extent of their interests. As Vinelott J. was satisfied in *Movitex Ltd v Bulfield* [1986] 2 BCC when examining the articles of the company in question, I am also satisfied first that the effect of articles 91 and 92 of Tetragon's articles is to exclude the no conflicts rule which otherwise affects self-dealing by a director.
141. I am satisfied that the Executive Directors disclosed their ownership of Polygon and that they owned almost 100% of it, subject to the Plaintiff's declining interest in one part of the Polygon structures. I agree with the submissions set out in paragraph 3 of the Outline of Tetragon's submissions of 30 November 2011 in relation to the heads of claim in the Cause. In my judgment, the disclosure in the Second Defendant's letter of 18 June 2010 and the further oral disclosures made at the board meeting, tempered, as Mr Davies put it in his Outline, by the directors' prior familiarity with Polygon and its ownership, was adequate disclosure to satisfy the articles and section 162. As to Mr Le Tissier's argument that such disclosure was not made immediately and therefore did not satisfy the strict requirement of section 162, I reject this argument for the reasons submitted by Advocate Hay for the Executive Directors in his written submissions of 30 November 2011 as further developed in his oral submissions. In particular, I accept Mr Hay's submissions on both section 162 and the compliance by his clients with the disclosure requirements of article 91. Further, I accept Mr Hay's practical, common-sense interpretation of the requirement in section 162 for the disclosure to be made '*immediately*', i.e. that it meant the final oral disclosure at the board meeting on 29 July 2010 when considered against the background of the previous disclosure, and I am satisfied that his analysis of the disclosure by the Executive Directors, under the headings of mode, timing and nature of disclosure, demonstrates clearly that the Plaintiff cannot show a *prima facie* case of breach by them of their duties of disclosure leading to an obligation to account, as relied on by him under section D of the Cause. It follows that I am also of the view that the Plaintiff has not established a *prima facie* case that the Executive Directors should, in the context of this area of company law, be regarded as '*wrongdoers*' thus bringing into play a consideration of the exceptions to the rule in *Foss v Harbottle*, in particular the fraud on the minority exception.
142. If I were wrong in this conclusion, I would also have decided that the Plaintiff was not able to pursue this head of claim since the resolution of the board of directors of Tetragon on 7 June 2011 that the GORE Transaction was fair to Tetragon as of the time that it was authorised on 29 July 2010 complied with the part of article 91 which absolves a director from a liability to account for profits if the transaction in question is found by the board of directors, before or after the fact, to be fair to the company as of the time that it was authorised.
143. In section E of the Cause the Plaintiff argues that the Executive Directors are liable to account to Tetragon for profits derived by them from the GORE Transaction for breaching their duties to Tetragon by placing themselves in a conflict of interest. The head of claim is developed in paragraphs 92 to 94 of the Cause and the Plaintiff claims in paragraph 95 that there had been no authorisation or approval by Tetragon of such breaches.
144. For the reasons given under head D above, I conclude that the Plaintiff has failed to establish a *prima facie* case under head E and this claim must be struck out as well. In particular, against the background of the disclosure by the Executive Directors of the details of the proposed GORE Transaction (see especially paragraph 140 above) the Plaintiff cannot, in my judgment, establish such a case.

145. I now turn to section B of the Cause where the Plaintiff claims that the GORE Transaction was not in the best interests of Tetragon and that the Executive Directors and the Independent Directors acted in breach of their duty to act in the best interests of Tetragon in passing the resolution to approve Tetragon entering into the GORE Transaction at the board meeting on 29 July 2010. The point is pleaded in detail at paragraphs 77 to 81 of the Cause.
146. I am not satisfied that the Plaintiff can establish a *prima facie* case under this head of a breach of duty by any of the Executive Directors and the Independent Directors. The duty in question is, in my judgment, properly to be examined subjectively. The Court should not attempt to substitute its view of whether a reasonable director would or would not have concluded that the GORE Transaction was in the best interests of Tetragon for the views of the directors. Furthermore, it is not suggested by the Plaintiff that any of the Executive Directors and the Independent Directors acted in bad faith. Their position was, and remains, that the GORE Transaction was in the best interests of Tetragon and that they voted in favour of Tetragon entering into it for that reason, just as much as the Plaintiff voted against the resolution since he was of the view that GORE Transaction was not in the best interests of Tetragon. Nor, in my judgment, can the Plaintiff establish to the required standard of a *prima facie* case that any of the Executive Directors and the Independent Directors failed to consider or understand the objections which he and his lawyers had raised either before or at the board meeting before the vote took place. I am persuaded, on the necessarily provisional basis at this stage of the proceedings, that this head of claim raises commercial issues and that the Plaintiff cannot show a *prima facie* case of breach of this duty. As the Defendants submitted, and as is often discussed in the case on this area of the law, such questions involve commercial judgement on the part of directors and the Courts are, as a general rule, ill-equipped to enter into consideration of such matters.
147. In summary, there is, in my judgment, no evidence before the Court to establish a *prima facie* case under head B. The Plaintiff did obtain, at a rather late stage of the application, a written report from Mr Graham Harrison, an expert in the area of investments occupied by Tetragon. But I was not persuaded that I could safely accept his evidence as determinative of the required test under this head of claim, or, indeed, of any head of claim since, for no fault of Mr Harrison's, he was instructed to produce his report on the basis of what I consider to have been far too limited a selection of facts and documents.
148. Under head F in the Cause, the Plaintiff claims that each of the Executive Directors and the Independent Directors acted negligently or, as it is pleaded, in breach of the duty to act to act with reasonable care, skill and diligence. The details of the claim are pleaded in paragraphs 97 to 99 of the Cause. It is clear from the opening words in paragraph 97, and it was also made clear in argument, that the facts underlying this claim were essentially the same as those relied upon by the Plaintiff under heads D, E and B of the Cause.
149. I am not persuaded that the Plaintiff has established a *prima facie* case under head F. As the Defendants submitted under paragraph 19 of Mr Davies' Outline document,

"[T]he directors spent five weeks analysing the transaction and reviewing materials prepared by [TFM] among others. It is common ground that they sought and received independent legal advice. The fact that they reached one conclusion, while [the Plaintiff] reached another, does not found a claim in negligence."

I entirely agree with this submission.

150. I also agree that, in a case like this case, where the Plaintiff does not suggest that the company should seek to rescind its entry into the transaction in question, it is to be expected that the case in damages should be carefully and fully pleaded. When the original version of the Cause was lodged, the case in damages was, in my view, rather minimally pleaded and

the argument of Mr Le Tissier was that the loss to Tetragon from entering into the GORE Transaction would be found out on the carrying out of an inquiry as to damages. I thought then that this was a case of putting the cart before the horse and that, on an application to strike out a derivative action, the Plaintiff would be expected to plead his (or, to be more precise, Tetragon's) case in damages, and to support it in evidence, sufficiently fully as to be able to establish a *prima facie* case. I still hold this view, but no more than provisionally, although the case in damages has been more fully pleaded in the Cause, the draft of which was presented on 12 October 2011, which I think was amended to include the views of Mr Harrison and a Mr Deetz, who helped the Plaintiff and his advisers in presenting a case to the Court, but who did not give evidence himself. But, since I have held that the Plaintiff has not on the facts shown a *prima facie* case of negligent breach of duty against any of the Executive Directors or the Independent Directors, it is not, in my view, either necessary or appropriate for me to deal further, at this preliminary stage of the proceedings, with the pleaded case in damages.

151. I now turn to heads of claim A and AA in the Cause, which are developed in paragraphs 63 to 76 of the Cause. The Scheme Rules are rules issued by the Guernsey Financial Services Commission ("the GFSC") and they impose requirements for the disclosure of information to investors and for notification in certain circumstances to the GFSC itself.
152. Under rule 3.01 of the Scheme Rules "*relevant persons*" as defined in subsection 1 are prohibited from doing certain things unless the arm's length requirement in subsection 9 is satisfied. This requirement is that the relevant arrangements must be at least as favourable to Tetragon as would be any comparable arrangement effected on normal commercial terms negotiated at arm's length with an independent party. Under subsection 1 it is the obligation of the directors to take "*all reasonable steps to ensure*" that the relevant persons do not breach the arm's length requirement. Attention was drawn to subsections 4 and 5 of rule 3.01.
153. Interesting and lengthy argument was put to me by both parties on the impact, if any, of the Scheme Rules to the GORE Transaction. I do not find it necessary for me to decide these questions on this application. The Plaintiff's arguments that rule 3.01 was engaged were, in my judgment, *possibly* correct, but, in the light of my conclusion on the application of the proper test on this application to which I now turn, I shall not decide the questions relating to the application of rule 3.01.
154. I agree with the submissions of the Defendants at paragraph 14 of Mr Davies' Outline document and in paragraphs 4 to 22 of his further Outline document of, I think, 1 or 2 December 2011, and I have decided that if the Scheme Rules were engaged, the Plaintiff has not established a *prima facie* case of breach of the rules by any of the Executive Directors or the Independent Directors. I am satisfied that the Plaintiff has not shown to the required standard of a *prima facie* case that they failed to take reasonable steps to ensure that the arm's length requirement was met.
155. The important points of evidence to note are, in my judgment, that the Independent Directors sought legal advice from Simpson Thacher, and more importantly on this aspect of the case, from their Guernsey Advocates Carey Olsen, and also sought the views of TFM and Houlihan Lokey. Furthermore, as is made clear from pages 170-180 of the transcript of the Board meeting on 29 July 2010, issues relating to the Scheme Rules were raised and discussed during the meeting itself, including a passage where Mr Simpson of Ogier referred the directors, including, of course, the Plaintiff, to the requirements of rule 3.01. Further, in my judgment, the Plaintiff's case under this head is, at most, well described as a mere technicality and he has not satisfied me, in any event, that there is *prima facie* case that Tetragon has suffered any loss by virtue of the alleged breaches of rule 3.01.

156. A further claim, as developed in paragraphs 74 to 76 of the Cause, the claim under head AA of the Cause, was added to the draft Cause in the 2nd amended draft. The claim is alleged to arise under section 34 of the Protection of Investors (Bailiwick of Guernsey) Law, 1987. The Plaintiff, who was intimately involved in the events leading up to the board meeting on 29 July 2010 in his capacity as a director of Tetragon, claims to be entitled as an investor in Tetragon, *i.e.* as a person adversely affected by the alleged breaches by the Executive Directors and the Independent Directors; (*ex hypothesi* he must, I think, on his own case also have been in such breach of duty to Tetragon.)
157. I found this argument surprising and a little difficult to follow. But, in any event, I was persuaded that, in the event that I had found that the Plaintiff had not established a *prima facie* case of a breach of rule 3.01, the case under section 34 cannot possibly get off the ground. In such circumstances, I consider the claim now to be virtually hopeless and it should be struck out of the Cause. In any event, although the claim under section 34 was made by the Plaintiff personally, it was made clear in paragraph 76 of the Cause that any damages recovered by the Plaintiff “*shall accrue for the benefit of [Tetragon]*” and I formed the view that the claim was realistically part of the derivative claims put forward by him on behalf of Tetragon, and not a personal claim of any substance.
158. I now turn to head of claim C in the Cause as developed in paragraphs 82 to 87 of the Cause for damages from the Executive Directors and the Independent Directors for breach of section 298 of the Companies Law, which relates to the provision of a certificate within a Guernsey company’s records, in circumstances where the terms of the section so require.
159. This is also, in my view, an almost hopeless claim for the fundamental reason that the Companies Law provides no civil remedy for a Guernsey company when such a breach has been established. Accordingly, any such breach cannot, in my judgment, sound in damages at the suit of Tetragon. The claim under head C must, therefore, be struck out on this ground alone. If I were wrong, I would have decided that the preponderance of the evidence went to show that the provisions of section 298 were complied with in relation to the option price included within the terms of the GORE Transaction and that the Plaintiff was not able to establish a *prima facie* case that the statute had not been complied with by the board of directors. I would also mention, in passing from the point, that the Plaintiff himself was a director of Tetragon during the period from 29 July 2010 to about 24 January 2011 and it would have been his responsibility as well as that of the rest of the Board to have ensured that section 298 had been complied with.
160. Since I have decided (i) that the entire Cause should be struck out as the Plaintiff has not satisfied me that he has a *prima facie* case under any of the derivative claims in the Cause and (ii) that his alleged personal claim under section 34 of the Protection of Investors (Bailiwick of Guernsey) Law, 1987 was almost hopeless, I have not proceeded to deal with the detailed submissions of both sides relating to matters which would only arise on the second stage of the test set out in *Prudential Assurance v Newman Industries*. The second stage of the test would only come into play if a court were to find that a *prima facie* case had been established, in which event the court would then proceed to decide whether or not any of the claims set out in the pleading of the case, *i.e.* in our procedure under the Cause, were able to stand free from the application of the rule in *Foss v Harbottle* as a result of an exception to the rule applying. No such point requires a decision in this case since the Plaintiff has not satisfied the first limb of the test and I have accordingly struck out all of the derivative claims. On this basis the arguments based on ratification do not require a decision from me either.
161. As I did in my judgment on the injunction application, I apologise to the parties and to Counsel that it has taken me such a very long time to deliver this judgment and thank them for their patience and polite enquiries in the meantime.

PATRICK TALBOT QC
Lieutenant Bailiff
26 March 2013

*204 Prudential Assurance Co. Ltd. v Newman Industries Ltd. and Others (No. 2)



Positive/Neutral Judicial Consideration

Court

Court of Appeal (Civil Division)

Judgment Date

5 October 1981

Report Citation

[1976 P. No. 112]; [1982] 2 W.L.R. 31

[1982] Ch. 204



Court of Appeal

Cumming-Bruce , Templeman and Brightman L.JJ.

1981 March 23, 24, 25, 26, 27, 30, 31; April 1, 2, 3, 6, 7, 8, 9, 13, 14, 15, 28, 29, 30; May 1, 5, 6, 11, 12, 13, 14, 15, 18, 19, 20, 21, 22; June 2, 3, 4, 5, 10, 11, 22; July 27, 28, 30, 31; Oct. 5

Company—Shareholder—Rights against company directors—Minority shareholder's action—Directors advising acquisition of another company's assets—Majority of shareholders voting to acquire assets—Directors having no control over voting rights—Whether minority shareholder entitled to bring action on behalf of itself, company and other shareholders suffering damage—Whether right to bring derivative action to be determined as preliminary issue

The plaintiffs, P Ltd., held 3.2 per cent. of the issued ordinary shares in N Ltd., the first defendant. B, the second defendant, was at the material time the chairman and chief executive of N Ltd. and the third defendant, L, was a non-executive director and its vice-chairman. B was also the non-executive chairman of the fourth defendant, T.P.G., and its vice-chairman and chief executive.

Between 1972 and the end of 1974, T.P.G. acquired the assets of S Ltd. whose shares were beneficially owned by B and L and which owned 35 per cent. of T.P.G.'s shares and some of N Ltd.'s shares. T.P.G. increased its holding in Ltd. to 25 per cent. and also acquired shares in various other companies which it financed by the issue of its own shares and bank loans. By January 1975, T.P.G. was in serious financial difficulties and the "January agreements" were entered into whereby, undisclosed to the board of N Ltd., N Ltd. agreed to buy T.P.G.'s holdings in two companies for £85,000 and £146,000 respectively, and under the agreement, unbeknown to the board, N Ltd. paid £215,950.

B then prepared a memorandum ("the strategy document") which recommended that the board of N Ltd. should purchase from T.P.G. all its assets, except its shareholding in N Ltd. and a loan from S Ltd. of £100,000, in consideration of N Ltd. assuming T.P.G.'s liabilities and paying T.P.G. the sum of £350,000. At a board meeting all the directors except M agreed to accept the proposals in principle. On M's suggestion a report was obtained from N Ltd.'s auditors. The January agreements were concealed from the auditors who valued the assets as £325,000 and the board of N Ltd. accepted that valuation as a basis of negotiation.

On June 3, 1975, B signed the agreement on behalf of N Ltd. ("the June agreement") for the purchase of the assets of T.P.G. for £325,000 which was conditional, as required by Stock Exchange regulations, on the approval of the shareholders of N Ltd. and T.P.G. Extraordinary general meetings *205 of both companies were convened. The notice which convened the extraordinary general meeting of N Ltd. contained a letter signed by B, with documents annexed ("the circular") which recommended shareholders to vote in favour of the proposal and which referred to a payment of £216,000 by N Ltd. as being an advance payment for the purchase of T.P.G.'s assets. All the members of a committee of the board approved the letter apart from M. The extraordinary general meeting was postponed as a result of the pressure by M, the plaintiffs and other institutional investors in order that a report be prepared by a merchant bank, but before the report was ready, the meeting was held on July 29, 1975, and a resolution passed approving the purchase of T.P.G.'s assets by N Ltd.

By an amended writ and statement of claim, the plaintiffs claimed, inter alia, declaratory relief and as against B, L and T.P.G. damages on behalf of the plaintiffs, N Ltd. and all the shareholders of N Ltd. on July 29, 1975, who like the plaintiffs had suffered damage and were entitled to relief. The plaintiffs were claiming in a direct capacity, in a derivative action on behalf of N Ltd. and in a representative capacity on behalf of the shareholders.

By a summons of May 10, 1979, the defendants applied to have heard as a preliminary issue whether the plaintiffs as a minority shareholder in N Ltd. were entitled to maintain the claim against them. On June 18, 1979, Vinelott J. refused the application and dismissed the summons.

On the hearing of the action in February 1980, Vinelott J. held, inter alia, that B and L, in order to benefit T.P.G. had conspired to injure N Ltd. and indirectly its shareholders whereby the shareholders had suffered damage and that, on the evidence, the interests of justice required that the plaintiffs as a minority shareholder in N Ltd. should be permitted to prosecute an action on behalf of the company.

On appeal by B and L:-

Held, allowing the appeal in part, (1) that on the evidence the serious findings against B and L of conspiracy and fraudulent conduct were not substantiated other than that they dishonestly concealed the January agreements and payments thereunder from the directors and shareholders of N Ltd. in order to facilitate the acceptance of the proposals in the strategy document; and that the dishonest concealment involved and included a misleading statement in the circular of the origin and purpose of the payment by N Ltd. of £216,000 to T.P.G. whereby the assets purchased by N Ltd. were overvalued by £45,000, thereby causing damage to N Ltd. by that amount (post, pp. 232B-D, 234D-E).

(2) That where fraud was practised on a company, it was the company that prima facie should bring the action and it was only in circumstances where the board of the company was under the control of the fraudsters that a derivative action should be brought; that the question whether a company was under the control of those practising an alleged fraud on it should be determined before a derivative action was heard and, accordingly, the judge erred in not determining as a preliminary issue whether the plaintiffs should be allowed to proceed in their derivative action (post, pp. 211A, B, 221A-B); but that, since the action had been heard and N Ltd. had indicated that it would, as a party to the action, take the benefit of an order made in its favour, the question *206 whether the plaintiffs had status to bring the derivative action did not arise for determination (post, p. 220C-F).

Per curiam. It is doubtful whether it is a practical test of an exception to the rule in *Foss v. Harbottle* (1843) 2 Hare 461 that the justice of the case requires the bringing of a derivative action (post, pp. 221F - 222B). The right to bring a derivative action should not be determined as a preliminary issue on the hypothesis that all the allegations in the statement of claim of "fraud" and "control" are facts. Whatever may be the properly defined boundaries of the exception to the rule, the plaintiff before proceeding with his action ought at least to be required to establish a prima facie case that the company is entitled

to the relief claimed and the action falls within the proper boundaries of the exception to the rule in *Foss v. Harbottle* (post, pp. 221F - 222B).

(3) That the plaintiffs' personal action, to which the representative action was linked, was an action to recover damages on the basis that the company in which the plaintiffs were interested had suffered damage; that, since the plaintiffs' right as holders of shares was merely a right of participation in the company on the terms of the articles of association, any damage done to the company had not affected that right and, accordingly, the action was misconceived (post, pp. 222F - 223B).

Order of Vinelott J. [1981] Ch. 257; [1980] 3 W.L.R. 543; [1980] 2 All E.R. 841 varied in part.

The following cases are referred to in the judgment:

Atwood v. Merryweather (1867) L.R. 5 Eq. 464; 37 L.J.Ch. 35 .
Baillie v. Oriental Telephone and Electric Co. Ltd. [1915] 1 Ch. 503, C.A. .
Clinch v. Financial Corporation (1868) L.R. 5 Eq. 450 .
Cotter v. National Union of Seamen [1929] 2 Ch. 58, C.A. .
East Pant Du United Lead Mining Co. Ltd. v. Merryweather (1864) 2 Hem. & M. 254 .
Edwards v. Halliwell [1950] 2 All E.R. 1064, C.A. .
Foss v. Harbottle (1843) 2 Hare 461 .
Gray v. Lewis (1873) L.R. 8 Ch.App. 1035 .
Heyting v. Dupont [1963] 1 W.L.R. 1192; [1963] 3 All E.R. 97 ; [1964] 1 W.L.R. 843; [1964] 2 All E.R. 273, C.A. .
Russell v. Wakefield Waterworks Co. (1875) L.R. 20 Eq. 474 .

The following additional cases were cited in argument:

Cockburn v. Thompson (1809) 16 Ves.Jun. 321 .
Wallworth v. Holt (1841) 4 Myl. & Cr. 619.

APPEAL from Vinelott J.

The plaintiffs, Prudential Assurance Co. Ltd., held 3.2 per cent. of the issued ordinary shares of the first defendant, Newman Industries Ltd. The second defendant, Alan Frank Bartlett, was at the material time the chairman and chief executive of Newman and the third defendant, John Knox Laughton, was a non-executive director and its vice-chairman. Mr. Bartlett was also the non-executive chairman of the fourth defendant, Thomas Poole & Gladstone China Ltd. (T.P.G.) and Mr. Laughton its vice-chairman and chief executive.

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Between 1972 and the end of 1974, T.P.G. acquired interests in various companies including the assets of Strongpoint Ltd., whose shares were beneficially owned by Mr. Bartlett and Mr. Laughton and which owned 35 per cent. of the shares of T.P.G. and a number of Newman shares. T.P.G. also increased its holding in Newman to 25 per cent. and acquired shares in Alfred Clough Ltd., S. Newman Ltd. (a private company), Dover Engineering Ltd., Metropole Industries Ltd. and Agar Cross Ltd. T.P.G. also formed a new company, Smithamcote Ltd., to acquire shares in two other companies in exchange for shares in Smithamcote. T.P.G. took 49 per cent. of voting shares of Smithamcote and sold to Smithamcote for £100,000 (which remained outstanding as a debt due from Smithamcote) shares of an investment company into which had been put T.P.G.'s minority holding of shares of S. Newman Ltd. T.P.G.'s acquisitions were financed by the issue of its own shares and loans from banks. By January 1975 it was in serious financial difficulty and, in those circumstances, the "January agreements" were entered into by which, undisclosed to the Newman board, Newman agreed to buy T.P.G.'s shareholdings in Metropole and Dover for £85,000 and £146,000 respectively. The amount was above the value of those shares on the Stock Exchange and, under the agreements, Newman paid £215,950 unknown to the Newman board, although the sum mentioned in the circular referred to below was £216,000.

Mr. Bartlett then prepared a memorandum ("the strategy document"), which made a recommendation to the Newman board, inter alia, that Newman should purchase from T.P.G. all its assets, except its shareholding in Newman and a loan from Strongpoint of £100,000, in consideration for Newman assuming T.P.G.'s liabilities and paying to T.P.G. the sum of £350,000. At a board meeting all the directors, except Mr. Angus Murray, agreed to accept the recommendation in principle and, on Mr. Murray's suggestion, a report was to be obtained from Newman's auditors, Deloitte & Co. Mr. Cooper of Deloitte made a valuation of the net assets to be acquired by Newman but, in making that valuation, the January agreements were concealed from him, and, after

speaking to Mr. Laughton, he increased his provisional assessment of the assets from £235,000 to £325,000. The board accepted that valuation as a basis for negotiation. On June 3, Mr. Bartlett signed on behalf of Newman an agreement for the purchase of the assets of T.P.G. for £325,000 ("the June agreement") but the agreement was conditional on the approval of Newman and T.P.G. As the agreement was between companies having among their directors the same people, the Stock Exchange regulations required that the agreement be approved at extraordinary general meetings of Newman and T.P.G. With the notice convening the extraordinary general meeting of Newman, a letter signed by Mr. Bartlett with documents annexed ("the circular") was sent to the shareholders. The letter stated that the directors of the Newman board recommended that the shareholders voted in favour of the proposal. The letter had been approved by the members of a committee of the board except for Mr. Murray, who objected to it on the basis that not all the directors had considered and approved the proposals. The extraordinary general meeting was postponed as a result of pressure from Mr. Murray, the plaintiffs and other institutional investors, so that *208 a report could be prepared by the merchant bankers, Schroder, Wagg & Co. The report could not be produced in time, and a resolution was passed at an extraordinary general meeting of Newman held on July 29, 1975, approving the purchase of T.P.G.'s assets by Newman.

By an amended writ and statement of claim, the plaintiffs, Prudential Assurance Co. Ltd., sued (i) on behalf of themselves and all the shareholders of Newman other than Mr. Bartlett and T.P.G.; (ii) in the plaintiffs' personal capacity; and (iii) on behalf of all the shareholders of Newman on July 29, 1975, who like the plaintiffs had suffered damage and were entitled to damages. They claimed, inter alia, a declaration that the circular sent by Newman to their shareholders and signed by Mr. Bartlett, was and had at all times been misleading and/or tricky; damages against Mr. Bartlett and Mr. Laughton for conspiracy and breach of duty; and further or in the alternative as against the fourth defendant T.P.G., a declaration that in entering into the agreement of June 3, 1975, or in the alternative in receiving the money under the terms of the agreement, when it knew or ought reasonably to have known that for Newman to enter into the agreement, upon the terms on which it did so, involved a conspiracy and breach of duty on the part of Mr. Bartlett and Mr. Laughton, T.P.G. (a) acquired the benefit of the agreement as constructive trustees of Newman and, accordingly, held the benefit of the agreement on trust for Newman, and (b) was liable to account to Newman for the full amount of the loss suffered by Newman as a result of the acquisition of the benefit.

By their defence the defendants denied the allegations made by the plaintiffs and claimed that the plaintiffs were not entitled to any of the relief claimed. They sought to have heard as a preliminary issue whether the plaintiffs, as a minority shareholder in Newman, were entitled under the rule in *Foss v. Harbottle (1843) 2 Hare 461* to maintain the claim against them. On June 18, 1979, Vinelott J. refused the defendants' application: see [1981] Ch. 229, 233.

Vinelott J. found that Mr. Bartlett and Mr. Laughton had conspired to injure Newman and indirectly the shareholders with the result that Newman had acquired T.P.G.'s assets for £445,000 more than Newman need have paid for them. He held that since the plaintiffs' personal, derivative and representative claims were all founded on the conspiracy to injure Newman, there was no objection to them being joined in one action and, although Mr. Bartlett and Mr. Laughton did not have control of Newman, it was doubtful whether the shareholders would have the independent advice which would enable them to exercise a proper judgment on whether Newman should bring an action and, in those circumstances, justice required the court to entertain the action of a minority shareholder.

The defendants Mr. Bartlett and Mr. Laughton appealed. On July 27, 28, 30, 31 the Court of Appeal delivered a reserved judgment divided into seven chapters under the headings: (1) Introduction; (2) The position of Newman Ltd. and T.P.G. Ltd. on March 31, 1973; (3) Events after March 31, 1973; (4) The proceedings; (5) The law; (6) The examination *209 of the judgment of Vinelott J.; and (7) Conclusions. Only chapters 5 and 7 are included in this report.

On July 31, no order was made by the court and the matter was adjourned for argument on the form of the order and costs. On October 5 the parties stated that all outstanding matters between them had been settled.

The second and third defendants, Mr. Bartlett and Mr. Laughton, appeared in person on the hearing of the appeal.

Leonard Caplan Q.C., Peter Curry Q.C. and Philip Heslop for the plaintiffs.

Robert Reid Q.C. and David Hodge for the first defendant.

The fourth defendant did not appear and was not represented on the hearing of the appeal.

Judith Jackson, on October 5, for the second and third defendants.

Jules Sher Q.C. and *Charles Turnbull*, on October 5, for the fourth defendant.

Caplan Q.C. for the plaintiffs. The rule in *Foss v. Harbottle (1843) 2 Hare 461* is a rule of procedure and not of substantive law. A minority shareholder can sue the company where the needs of justice so require. The rule is of respectable antiquity and on the facts of the present case, the plaintiffs were entitled to prosecute an action on behalf of the company as a minority shareholder in the interests of justice.

[On June 10, 1981, the court stated that argument on the exception to the rule in *Foss v. Harbottle* was not open to the plaintiffs as a demurrer because the preliminary issue was not the subject of appeal in the court. The preliminary point had been overtaken by the decision in the trial before Vinelott J. [1981] Ch. 257. For these reasons, the court did not wish to hear further argument on the matter.]

Cur. adv. vult.

July 27, 28, 30, 31. CUMMING-BRUCE, TEMPLEMAN and BRIGHTMAN L.JJ.

took it in turns to read the following judgment of the court. In the course of the introduction their Lordships said:

The great length of this judgment has naturally caused us to consider whether it would be sensible to hand down a typed or printed version, as an alternative to the many hours in court which will inevitably be spent on delivering our judgment. We have rejected this obvious and convenient expedient for two reasons. First, the appellants have been found guilty by the trial judge of a civil conspiracy in circumstances which, subject to stricter procedures, could equally well have led to their conviction on a charge of criminal conspiracy. In such circumstances we think that whichever way our verdict may go we should express our conclusions orally in open court. Secondly, the delay which would be caused by typing or printing and then proof-reading a written judgment suitable for handing down would postpone judgment over the Long Vacation. When men's reputations are at stake, we do not think it is right to impose an avoidable two months delay. [Having read chapters one to four, they continued:]

***210 Chapter 5 - The law**

As we have indicated, when, on January 9, 1976, the writ was issued the plaintiffs, Prudential Assurance Co. Ltd., sued only in their personal capacity and sought only to establish that the June agreement had not been duly approved at a valid meeting. When the writ was first amended in red on March 8, 1976, the title of the plaintiffs was altered so as to indicate that it was suing on behalf of Newman, the first defendant, using the time-honoured formula for this purpose "On behalf of themselves and all other shareholders, etc...." The writ was also amended by adding Mr. Laughton and T.P.G. as defendants. The writ was expanded by claiming as against T.P.G. rescission of the agreement and damages; and also, as against Mr. Bartlett and Mr. Laughton, damages for breach of duty and damages for conspiracy.

As we have already related, it was a matter of debate in the court below whether the action as reconstituted was exclusively a "derivative" action for an injury allegedly done to Newman, as counsel for Mr. Bartlett and Mr. Laughton assumed, or was additionally a "personal" action for injury allegedly done to the plaintiffs and other shareholders. Whether the action as then constituted and the claim as then formulated could properly be regarded as pursuing both derivative and personal remedies is not a matter which we need to consider.

A derivative action is an exception to the elementary principle that A cannot, as a general rule, bring an action against B to recover damages or secure other relief on behalf of C for an injury done by B to C. C is the proper plaintiff because C is the party injured, and, therefore, the person in whom the cause of action is vested. This is sometimes referred to as the rule in *Foss v. Harbottle (1843) 2 Hare 461* when applied to corporations, but it has a wider scope and is fundamental to any rational system of jurisprudence. The rule in *Foss v. Harbottle* also embraces a related principle, that an individual shareholder cannot bring an action in the courts to complain of an irregularity (as distinct from an illegality) in the conduct of the company's internal affairs if the irregularity is one which can be cured by a vote of the company in general meeting. We are not concerned with this aspect of the rule.

The classic definition of the rule in *Foss v. Harbottle* is stated in the judgment of Jenkins L.J. in *Edwards v. Halliwell [1950] 2 All E.R. 1064* as follows. (1) The proper plaintiff in an action in respect of a wrong alleged to be done to a corporation is, prima facie, the corporation. (2) Where the alleged wrong is a transaction which might be made binding on the corporation and on all its members by a simple majority of the members, no individual member of the corporation is allowed to maintain an action in respect of that matter because, if the majority confirms the transaction, cadit quaestio; or, if the majority challenges the transaction, there is no valid reason why the company should not sue. (3) There is no room for the operation of the rule

if the alleged wrong is ultra vires the corporation, because the majority of members cannot confirm the transaction. (4) There is also no room for the operation of the rule if the transaction complained of could be validly done or sanctioned only by a special resolution or the like, because a simple majority cannot confirm *211 a transaction which requires the concurrence of a greater majority. (5) There is an exception to the rule where what has been done amounts to fraud and the wrongdoers are themselves in control of the company. In this case the rule is relaxed in favour of the aggrieved minority, who are allowed to bring a minority shareholders' action on behalf of themselves and all others. The reason for this is that, if they were denied that right, their grievance could never reach the court because the wrongdoers themselves, being in control, would not allow the company to sue.

By their summons issued on May 10, 1979, Mr. Bartlett and Mr. Laughton invoked the rule in *Foss v. Harbottle*. After some 2½ days of argument Vinelott J. dismissed the summons on June 18, 1979, not on the ground that the plaintiffs were entitled to bring a derivative action but on the ground that it was more convenient to decide that issue after the action had been tried. For reasons which we explain later we have no doubt whatever that that was a wrong decision.

Although not a party to the summons of May 10, Newman supported it. Newman was represented by leading counsel, who made a forceful statement on day 1 to the effect that, although the action was brought for the benefit of Newman, "it is the concern of the board that the company shall not be killed by kindness." He added that not only was it the view of the board that the action was one which they did not wish to pursue on behalf of the company but that it was quite contrary to the interests of the company that the transaction should now be the subject of any rescission or criticism. He said: "I am therefore concerned ... that this action ... shall not proceed - a fortiori ... it should be disposed of as quickly as possible." This protest was repeated at the close of the plaintiffs' case on day 34, when counsel formally withdrew in order to avoid needless expense. This is what counsel then told the court:

"My clients, Newman Industries Ltd., are necessary formal parties to this action, but they are neither prosecuting it as a corporate entity nor now defending it in a combative role. The circumstances of the case ... as far as my researches go are unique. They are unique from the company's point of view in this particular material respect in that, although the action is framed in part as a minority shareholder's action, there is in fact no shareholding or board control vested in the personal defendants. Indeed, as regards the Newman board Mr. Laughton has not been a director since before the commencement of this action, and Mr. Bartlett, although holding such office, has at all material times been but one only of a number of directors comprising the present Newman board. As I indicated briefly to your Lordship at the commencement of this trial, my learned junior and I were at pains to defend it by decision of the independent board, that is to say Mr. Bartlett taking no part in that decision. The independent board, so I have it, was motivated by the desire and wish that your Lordship might be afforded every assistance which a substantial public quoted company might be expected to render a court concerned with its affairs.... The independent board itself has throughout maintained the view that, whilst it was powerless to prevent the Prudential from pursuing the action, it was not one it, the independent board, *212 wished to adopt on Newman's behalf, nor had it been approached by any shareholder requesting that it should. It has been and in fact remains the view of the independent board that any advantage to the company which this action could procure for it is vastly outweighed by harm being inflicted upon it by the action continuing with the consequent adverse publicity and other side effects."

Observe what was being said on behalf of Newman to the judge: "any advantage to the company which this action could procure is *vastly outweighed* by harm being inflicted upon it." This was an apparently responsible statement made by eminent leading counsel on the instructions of persons said to be the independent members of the board. The judge does not refer to this statement in his judgment; he does not say that he did not believe it; he does not say that he regarded the independent members of the board as acting under the influence of Mr. Bartlett. He does not seem to have asked himself the all-important question: "Ought I to be trying a derivative action?"

The assertion by Newman's counsel that the independent board "was powerless to prevent the Prudential from pursuing the action" may have been based on the supposition that the plaintiffs had on the facts alleged in the statement of claim a personal cause of action for damages against Mr. Bartlett and Mr. Laughton independently of Newman's cause of action for damages. This supposition, if it existed, was erroneous for reasons which we explain later. It would have been open to Newman to have issued its own summons before the trial in order to test the right of the Prudential to pursue a derivative action, and to have supported it with evidence proving the objectiveness of the board's view and explaining the potential injury to Newman which would be caused by the proceedings.

At the end of the day the judge found that a fraud had been committed by Mr. Bartlett and Mr. Laughton against Newman. The judge then addressed his mind to the question whether the right of a shareholder to sue in a case of fraud extended beyond a

case of voting control by the wrongdoers. It was not pleaded, and could not be alleged, that Mr. Bartlett and Mr. Laughton had voting control. The conclusion reached by the judge was that a shareholder was entitled to prosecute an action on behalf of the company if "the interests of justice do require that a minority action should be permitted" see [1981] Ch. 257, 327; and that this was established in the instant case because the judge was satisfied on the evidence as a whole:

"that there was no way in which Prudential could have ensured that the question whether proceedings should be brought by Newman would be fairly put to the shareholders or even that a full investigation would be made into all the circumstances surrounding the transaction including in particular Mr. Cooper's valuation."

In widening the scope of the accepted exception to the rule in *Foss v. Harbottle* by holding that a derivative action can be maintained whenever the interests of justice so require, the judge, at pp. 322-323, drew attention to references to "the justice of the case" which appear in some of the *213 reported authorities on this topic: *Russell v. Wakefield Waterworks Co. (1875) L.R. 20 Eq. 474*, 480 and *Edwards v. Halliwell [1950] 2 All E.R. 1064*, 1067; to which may be added *Baillie v. Oriental Telephone and Electric Co. Ltd. [1915] 1 Ch. 503*, 518; *Cotter v. National Union of Seamen [1929] 2 Ch. 58*, 69 and *Heyting v. Dupont [1964] 1 W.L.R. 843*, 851.

We turn now to certain of the authorities, starting with *Foss v. Harbottle*, 2 Hare 461. It came before Sir James Wigram V.-C., on demurrer. The facts are narrated in that report at intimidating length and can be summarised as follows. The company concerned was the Victoria Park Company, which had been incorporated by Act of Parliament in 1837 to develop certain plots of land. There were eight promoters, Harbottle, Adshead, Byrom, Westhead, Bealey, Denison, Bunting and Lane. The directors were the first five of these gentlemen.

Lane was the architect and Bunting the solicitor. Foss and Turton were the complaining shareholders. They filed a bill on behalf of themselves and all other shareholders in the company (except the defendants) against the eight promoters, including the assignees of three of them who had become bankrupt. It was alleged that the plots had been bought by the company in pursuance of an arrangement fraudulently concocted between seven of the promoters to enable them to derive a personal benefit from the establishment of the company and the sale to it of the plots at exorbitant prices. It was further alleged, at pp. 478-479, 480:

"... the defendants concealed from the plaintiffs ... the several fraudulent and improper acts of the ... defendants, and the plaintiffs ... had only recently ascertained the particulars thereof ... and they were unable to set forth the same more particularly, - the defendants having refused to make any discovery thereof, or to allow the plaintiffs to inspect the books, accounts, or papers of the company ... and that at [general meetings of the company] false and delusive statements respecting the circumstances and prospects of the company were made by the directors to the proprietors who attended such meetings, and the truth of the several fraudulent and improper acts and proceedings therein complained of was not disclosed."

The bill charged that, in the circumstances, the defendants were jointly and severally liable to make good to the company the losses incurred in consequence of the wrongful and fraudulent acts and proceedings to which they were parties or privies. The defendants (except Byrom, who took no part) demurred to the bill on the ground that the corporation was not before the court, and that the defect could not be cured by making the corporation a defendant because the plaintiffs were not entitled to represent the corporation.

For the purposes of the application Wigram V.-C. made the assumption that the company was entitled, as matters then stood, to complain of the transactions mentioned in the bill. He continued at pp. 490-491, 492:

"... the bill ... is brought by two individual corporators, professedly on behalf of themselves and all the other members of the corporation, *214 except those who committed the injuries complained of, - the plaintiffs assuming to themselves the right and power in that manner to sue on behalf of and represent the corporation itself.

"It was not, nor could it successfully be argued, that it was a matter of course for any individual members of a corporation thus to assume to themselves the right of suing in the name of the corporation. In law, the corporation, and the aggregate members of the corporation, are not the same thing for purposes like this; and the only question can be, whether the facts alleged in this case justify a departure from the rule which prima facie would require that the corporation should sue in its own name and in its corporate character, or in the name of some one whom the law has appointed to be its representative.... If a case should arise of injury to a corporation by some of its members, for which no adequate remedy remained, except

that of a suit by individual corporators in their private characters, and asking in such character the protection of those rights to which in their corporate character they were entitled, I cannot but think that the principle so forcibly laid down by Lord Cottenham in *Wallworth v. Holt*, and other cases, would apply, and the claims of justice would be found superior to any difficulties arising out of technical rules respecting the mode in which corporations are required to sue.

"But, on the other hand, it must not be without reasons of a very urgent character that established rules of law and practice are to be departed from, - rules, which, though in a sense technical, are founded on general principles of justice and convenience; and the question is, whether a case is stated in this bill, entitling the plaintiffs to sue in their private characters."

Wigram V.-C. then proceeded to answer this question in the negative, for the reasons indicated in the following extracts from his judgment, at pp. 492-493:

"... the directors are made the governing body, subject to the superior control of the proprietors assembled in general meetings; and, as I understand the Act, the proprietors so assembled have power, due notice being given of the purposes of the meeting, to originate proceedings for any purpose within the scope of the company's powers, as well as to control the directors in any acts which they may have originated.... The first ground of complaint is one which, though it might prima facie entitle the corporation to rescind the transactions complained of, does not absolutely and of necessity fall under the description of a void transaction. The corporation might elect to adopt those transactions, and hold the directors bound by them. In other words, the transactions admit of confirmation at the option of the corporation...."

Wigram V.-C. then considered the second ground of complaint (which we need not deal with) and continued, at pp. 493, 494-495:

"... whilst the supreme governing body, the proprietors at a special *215 general meeting assembled, retain the power of exercising the functions conferred upon them by the act of incorporation, it cannot be competent to individual corporators to sue in the manner proposed by the plaintiffs on the present record ... the majority of the proprietors at a special general meeting assembled, independently of any general rules of law upon the subject, by the very terms of the incorporation in the present case, has power to bind the whole body, and every individual corporator must be taken to have come into the corporation upon the terms of being liable to be so bound. How then can this court act in a suit constituted as this is, if it is to be assumed, for the purposes of the argument, that the powers of the body of the proprietors are still in existence, and may lawfully be exercised for a purpose like that I have suggested? Whilst the court may be declaring the acts complained of to be void at the suit of the present plaintiffs, who in fact may be the only proprietors who disapprove of them, the governing body of proprietors may defeat the decree by lawfully resolving upon the confirmation of the very acts which are the subject of the suit. The very fact that the governing body of proprietors assembled at the special general meeting may so bind even a reluctant minority, is decisive to show that the frame of this suit cannot be sustained whilst that body retains its functions. In order then that this suit may be sustained, it must be shown either that there is no such power as I have supposed remaining in the proprietors, or, at least, that all means have been resorted to and found ineffectual to set that body in motion: this latter point is nowhere suggested in the bill: there is no suggestion that an attempt has been made by any proprietor to set the body of proprietors in motion, or to procure a meeting to be convened for the purpose of revoking the acts complained of. The question then is, whether this bill is so framed as of necessity to exclude the supposition that the supreme body of proprietors is now in a condition to confirm the transactions in question; or, if those transactions are to be impeached in a court of justice, whether the proprietors have not power to set the corporation in motion for the purpose of vindicating its own rights."

These questions were answered against the plaintiffs.

The next case which falls for consideration related to the fraudulent promotion of some worthless lead mines. There were in fact two actions. It is important to observe that in the first action there was a motion to strike out, but no such motion in the second action, which proceeded to trial. The first action is reported as *East Pant Du United Lead Mining Co. Ltd. v. Merryweather (1864) 2 Hem. & M. 254*. It was alleged that Merryweather, a director of the company, acting in concert with one of his co-directors, Whitworth, had fraudulently sold the mines to the company for £4,000 cash, which they shared between themselves, and 600 shares, to be allotted to Merryweather. In June 1864 a bill was filed in the name of the company against Merryweather to set aside the sale. In August the defendant moved to strike out the bill by way of demurrer. The court adjourned the application in order to allow an opportunity for a general meeting to be held. The meeting was held in October. A *216 resolution was

proposed for adopting the proceedings and continuing the action. Whitworth proposed an amendment to stay the action and refer the dispute to arbitration. The amendment was put to the vote, and a poll was taken. Out of 668 votes cast 324 were against the stay and 344 were in favour of the stay, but of the latter 78 votes were cast by Merryweather and 28 votes by Whitworth; if Merryweather had not voted, the motion would have been supported by only 266 votes and would have been lost. It was argued by counsel for the company, at p. 257:

"If a minority of a company were allowed to file a bill in the company's name, charging fraud against some of the majority, and alleging that those persons were not to be considered as shareholders or entitled to vote, and thus endeavouring to turn their minority into a majority so as to acquire the right to use the name of the company, any company's affairs might be made the subject of litigation, upon allegations of fraud which might be entirely false; and yet, as this could not be proved till the hearing, irremediable mischief might be done in the meantime."

Page Wood V.-C. acceded to the motion, expressing his reasons, at p. 261:

"Then comes the question, has the company now sanctioned the suit? To decide that it has done so, would be to discard Mr. Merryweather's votes, and to do that would, in effect, be to decide now on this application the question at issue in the suit. But if I assume, as upon this motion I must assume, that Mr. Merryweather was entitled to the 600 shares which he actually holds in the company, the further question occurs, has he a right to vote in respect of such shares upon a question in which he is personally interested? Now as to the management of the company by the board, no director is entitled to vote as a director in respect of any contract in which he is interested; but the case is different when he acts as one of the whole body of shareholders. The shareholders of one company may have dealings with interests in other companies, and therefore it would be manifestly unfair to prevent an individual shareholder from voting as a shareholder in the affairs of the company. At a general meeting, therefore, Mr. Merryweather's votes must be held to be good, so long as he continues to hold his shares. Further than this, the court cannot be asked now to give an opinion, for to do so would be to decide the very question at issue in the cause."

A shareholder then began another action in December, suing on behalf of himself and all other shareholders (except Merryweather and Whitworth) against Merryweather, Whitworth and the company. This is reported as *Atwool v. Merryweather* in a footnote to *Clinch v. Financial Corporation (1868) L.R. 5 Eq. 450*, 464, and more fully in *37 L.J.Ch. 35*. On this occasion the defendant did not move to strike out the bill. The action was fought to a finish. Page Wood V.-C. held, first, that the contract was a complete fraud, and secondly, that there was not such a defect in the constitution of the suit as would be fatal according to the authority of *Foss v. Harbottle*. Page Wood V.-C. referred to the fact that there was *217 plainly a majority of shareholders, independent of those implicated in the fraud, who supported the bill.

The principles which seem to emerge from these two cases are (i) that if the defendant against whom fraud is alleged applies to strike out the action in limine, it will not be assumed that he was guilty of fraud so as to disentitle him from casting his votes at a general meeting against the action; but, (ii) that if the action is in fact fought to a conclusion, and the court finds the defendant guilty of fraud, it will in those circumstances discount the votes of those implicated in the fraud in reaching a conclusion whether the plaintiff is authorised to sue on the company's behalf. What the two cases leave open is the question in what circumstances the alleged delinquent, or the company, can halt the proceedings in limine.

Vinelott J. placed considerable reliance on this case in widening the accepted exception to the rule in *Foss v. Harbottle*. He said [1981] Ch. 257, 320:

"... *Atwool v. Merryweather*, L.R. 5 Eq. 464 shows that the court has jurisdiction to entertain a claim by a minority shareholder and to make an order in favour of the defendant company even where the other defendants, alone or together with the plaintiffs, do not have a majority of votes in general meeting and where the other shareholders are not parties. If that is so, then as I see it, the exception can only be founded on a general jurisdiction of the court to make an order for recovery of property or damages in favour of a defendant company against co-defendants where the jurisdiction is invoked by a minority shareholder."

We doubt whether *Atwool v. Merryweather* goes so far in support of the judge's conclusion. It was not a case in which the company or the delinquents sought to stop the action in limine. The action had been fought to a conclusion, the liability of

the defendant directors had been established, and nothing, therefore, remained except for the company to reap the benefit of the judgment. The court could hardly deny the right of the plaintiff to an order in favour of the company to give effect to its proved rights, in the face of a resolution which, excluding the votes of the proven fraudsters, was a majority resolution. Page Wood V.-C. said, at p. 468:

"having it plainly before me that I have a majority of the shareholders, independent of those implicated in the fraud, supporting the bill, it would be idle to go through the circuitous course of saying that leave must be obtained to file a bill for the company, and pro forma have a totally different litigation."

There is a clear distinction to be drawn between the application of the rule in *Foss v. Harbottle* when it is sought to stay proceedings in limine, and its application when nothing remains but to enforce a judgment in a derivative action which has been permitted to proceed.

A simple application of the first aspect of the rule in *Foss v. Harbottle* is to be found in *Gray v. Lewis* (1873) L.R. 8 Ch.App. 1035 . The facts, shortly stated, were as follows: Charles Lafitte & Co. Ltd. ("the company") was incorporated in December 1865 to purchase the right to extend to this *218 country the business of Charles Lafitte & Co. of Paris ("the partnership"). The plaintiff Gray subscribed for shares. The company never acquired anything from the partnership, and was ordered to be wound up in November 1866. Shortly thereafter Gray filed a bill on behalf of himself and all other shareholders in the company, against the company, its directors, its liquidator and the National Bank, alleging that the assets of the company had been misapplied by the National Bank and by the directors of the company, and seeking an order that the bank and the directors of the company might be declared liable to make "good to the shareholders of the company" the loss sustained "by the shareholders." Sir Richard Malins V.-C. made a decree declaring that the bank and the directors were liable to replace the money, and directed that the amount found due should be paid into court. The National Bank, and Lewis and Henshaw, two of the directors, appealed. The appeal of the National Bank was compromised with the concurrence of the liquidator, on the basis (clearly unobjectionable) that the National Bank should discharge the debts of the company. The appeal by Lewis and Henshaw came before the Court of Appeal in Chancery, and was allowed. The reasons were put trenchantly by James L.J., with whom Mellish L.J. agreed, in these words at p. 1050:

"The bill should not have been filed by a shareholder on behalf of himself and all other shareholders. It is very important, in order to avoid oppressive litigation, to adhere to the rule laid down in *Mozley v. Alston* (1847) 1 Ph. 790 and *Foss v. Harbottle*, 2 Hare 464 , which cases have always been considered as settling the law of this court, that where there is a corporate body capable of filing a bill for itself to recover property either from its directors or officers, or from any other person, that corporate body is the proper plaintiff, and the only proper plaintiff. One object of incorporating bodies of this kind was, in my opinion, to avoid the multiplicity of suits which might have arisen where one shareholder was allowed to file a bill on behalf of himself and a great number of other shareholders. The shareholder who first filed a bill might dismiss it, and if he was a poor man the defendant would be unable to obtain his costs, then another shareholder might file a bill, and so on. It was also stated to us in the course of the argument that even after the plaintiff had dismissed his bill against a particular defendant a fresh bill might be filed against the defendant so dismissed. Therefore there might be as many bills as there are shareholders multiplied into the number of defendants. The result would be fearful, and I think the defendant has a right to have the case made against him by the real body who are entitled to complain of what he has done.

"Now in this case I am of opinion that the only person - if you may call it a person - having a right to complain was the incorporated society called Charles Laffitte & Co. In its corporate character it was liable to be sued, and was entitled to sue; and if the company sued in its corporate character, the defendant might allege a release or a compromise by the company in its corporate character - a defence which would not be open in a suit where a plaintiff is suing on behalf of himself and other shareholders. I think it is of the utmost *219 importance to maintain the rule laid down in *Mozley v. Alston* and *Foss v. Harbottle*, to which, as I understand, the only exception is where the corporate body has got into the hands of directors and of the majority, which directors and majority are using their powers for the purpose of doing something fraudulent against the minority, who are overwhelmed by them, as in *Atwool v. Merryweather*, L.R. 5 Eq. 464 , where Page Wood V.-C. under those circumstances, sustained a bill by a shareholder on behalf of himself and others, and there it was after an attempt had been made to obtain a proper authority from the corporate body itself in public meeting assembled."

This case highlights what the rule in *Foss v. Harbottle* is primarily concerned with, namely, is a plaintiff shareholder entitled to prosecute an action on behalf of the company for a wrong done to it, or ought the action to be struck out on the footing that it is for the company and not for a shareholder to sue? That is what *Foss v. Harbottle* itself was about, and what the first *East*

Pant Ducae, 2 Hem. & M. 254, was about. The second *East Pant Du* case, *Atwool v. Merryweather*, L.R. 5 Eq. 464, raised a related but different question, namely, if at the end of the day fraud is proved, are the circumstances such that the company is capable of condoning the fraud? Clearly not, if the fraud will only be confirmed by a majority by the use of the fraudsters' own voting power.

It is commonly said that an exception to the rule in *Foss v. Harbottle* arises if the corporation is "controlled" by persons implicated in the fraud complained of, who will not permit the name of the company to be used as plaintiffs in the suit: see *Russell v. Wakefield Waterworks Co.*, L.R. 20 Eq. 474, 482. But this proposition leaves two questions at large, first, what is meant by "control," which embraces a broad spectrum extending from an overall absolute majority of votes at one end, to a majority of votes at the other end made up of those likely to be cast by the delinquent himself plus those voting with him as a result of influence or apathy. Secondly, what course is to be taken by the court if, as happened in *Foss v. Harbottle*, in the *East Pant Du* case and in the instant case, but did not happen in *Atwool v. Merryweather*, the court is confronted by a motion on the part of the delinquent or by the company, seeking to strike out the action? For at the time of the application the existence of the fraud is unproved. It is at this point that a dilemma emerges. If, upon such an application, the plaintiff can require the court to assume as a fact every allegation in the statement of claim, as in a true demurrer, the plaintiff will frequently be able to outmanoeuvre the primary purpose of the rule in *Foss v. Harbottle* by alleging fraud and "control" by the fraudster. If on the other hand the plaintiff has to prove fraud and "control" before he can establish his title to prosecute his action, then the action may need to be fought to a conclusion before the court can decide whether or not the plaintiff should be permitted to prosecute it. In the latter case the purpose of the rule in *Foss v. Harbottle* disappears. Either the fraud has not been proved, so cadit quaestio; or the fraud has been proved and the delinquent is accountable unless there is a valid decision of the board or a valid decision of the company in general meeting, reached without impropriety or unfairness, to condone the fraud.

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We think that this brief look at the authorities is sufficient for present purposes. For it so happens that this court cannot properly on this appeal decide the scope of the exception to the rule in *Foss v. Harbottle*. The reason is this. Vinelott J. permitted the action by the plaintiffs on behalf of Newman to proceed, and there was no appeal from that decision. In the result he found that Newman was entitled as against Mr. Bartlett and Mr. Laughton to damages for conspiracy and breach of fiduciary duty, and he directed an inquiry as to damages subject to a stay in case of an appeal. Thereafter, Newman had three choices, subject to the operation of the stay. First, it might do nothing. In this case the plaintiffs would be entitled, if they so desired, to issue a summons to proceed with the inquiry. Secondly, Newman might decide for some proper reason, assuming that a proper reason might exist, and duly resolve at a proper board or general meeting, to proceed no further with the claim against Mr. Bartlett and Mr. Laughton. In this event, assuming that the resolution of the board or of the company in general meeting was in all respects proper, the plaintiffs would be unable to proceed with the inquiry because a valid release could be pleaded by Mr. Bartlett and Mr. Laughton. Thirdly, Newman might adopt the order which the plaintiffs had obtained on its behalf and pursue the inquiry accordingly. This would occasion no procedural problem nor even any special procedural step. Any party, plaintiff or defendant, can issue a summons to proceed upon an order. It would not be necessary for Newman to apply to be made a plaintiff, or to start a fresh action and rely upon the principle of res judicata, as was suggested at one time in the course of the argument. The order has been made. Newman is a party to the action. Newman can enforce the order. If this course were adopted, the rule in *Foss v. Harbottle* is irrelevant. The rule has no room to operate where the company itself is proceeding with an action, or to enforce a judgment, pursuant to a valid board or company resolution.

Newman by its counsel, acting (as we must assume) upon due authority conferred by the company, stated before us that if the finding of fraud stood it would accept the benefit of the order made in its favour. That is the end of *Foss v. Harbottle* so far as this appeal is concerned. It is plainly impossible for Mr. Bartlett or Mr. Laughton to prevent the board of Newman instructing its solicitors to proceed with the inquiry, and recovering from Mr. Bartlett and Mr. Laughton what may be certified to be due.

It was in the light of these considerations that we declined to hear any argument from Mr. Caplan and Mr. Curry on the topic of *Foss v. Harbottle*. However desirable it might be in the public interest that we should express our conclusions on Vinelott J.'s analysis of the rule in *Foss v. Harbottle* and what he saw as the exception to it, it was necessary for us to bear in mind that the rule had ceased to be of the slightest relevance to the case. It would have been a grave injustice to all parties to increase the already horrendous costs of this litigation by allowing time for argument on an interesting but irrelevant point. Such consideration of the law as appears in this judgment is, apart from a few *221 missions made by Mr. Bartlett, merely a reflection of our own thoughts without the benefit of sustained argument.

In the result it would be improper for us to express any concluded view on the proper scope of the exception or exceptions to the rule in *Foss v. Harbottle*. We desire, however, to say two things. First, as we have already said, we have no doubt whatever that

Vinelott J. erred in dismissing the summons of May 10, 1979. He ought to have determined as a preliminary issue whether the plaintiffs were entitled to sue on behalf of Newman by bringing a derivative action. It cannot have been right to have subjected the company to a 30-day action (as it was then estimated to be) in order to enable him to decide whether the plaintiffs were entitled in law to subject the company to a 30-day action. Such an approach defeats the whole purpose of the rule in *Foss v. Harbottle* and sanctions the very mischief that the rule is designed to prevent. By the time a derivative action is concluded, the rule in *Foss v. Harbottle* can have little, if any, role to play. Either the wrong is proved, thereby establishing conclusively the rights of the company; or the wrong is not proved, so cadit quaestio. In the present case a board, of which all the directors save one were disinterested, with the benefit of the Schroder-Harman report, had reached the conclusion before the start of the action that the prosecution of the action was likely to do more harm than good. That might prove a sound or unsound assessment, but it was the commercial assessment of an apparently independent board. Obviously the board would not have expected at that stage to be as well informed about the affairs of the company as it might be after 36 days of evidence in court and an intense examination of some 60 files of documents. But the board clearly doubted whether there were sufficient reasons for supposing that the company would at the end of the day be in a position to count its blessings; and clearly feared, as counsel said, that it might be killed by kindness. Whether in the events which have happened Newman (more exactly the disinterested body of shareholders) will feel that it has all been well worth while, or must lick its wounds and render no thanks to those who have interfered in its affairs, is not a question which we can answer. But we think it is within the bounds of possibility that if the preliminary issue had been argued, a judge might have reached the considered view that the prosecution of this great action should be left to the decision of the board or of a specially convened meeting of the shareholders, albeit less well informed than a judge after a 72-day action.

So much for the summons of May 10. The second observation which we wish to make is merely a comment on Vinelott J.'s decision that there is an exception to the rule in *Foss v. Harbottle* whenever the justice of the case so requires. We are not convinced that this is a practical test, particularly if it involves a full-dress trial before the test is applied. On the other hand we do not think that the right to bring a derivative action should be decided as a preliminary issue upon the hypothesis that all the allegations in the statement of claim of "fraud" and "control" are facts, as they would be on the trial of a preliminary point of law. In our view, whatever may be the properly defined boundaries of the exception to the rule, the plaintiff ought at least to be required before proceeding *222 with his action to establish a prima facie case (i) that the company is entitled to the relief claimed, and (ii) that the action falls within the proper boundaries of the exception to the rule in *Foss v. Harbottle*. On the latter issue it may well be right for the judge trying the preliminary issue to grant a sufficient adjournment to enable a meeting of shareholders to be convened by the board, so that he can reach a conclusion in the light of the conduct of, and proceedings at, that meeting.

We turn to the personal action. In the statement of claim, as amended on day 12, the plaintiffs pleaded that Mr. Bartlett and Mr. Laughton

"in breach ... of their obligation to the shareholders ... conspired together to benefit T.P.G. at the expense of ... the shareholders," and that "in furtherance of such conspiracy and in breach of ... their obligation to the shareholders ... the defendants Bartlett and Laughton procured the circular to be ... distributed ... well knowing and intending it to be misleading and tricky"; and "by reason of the foregoing the defendants Bartlett and Laughton are in breach of ... their obligation to the shareholders."

In the amended prayer the plaintiffs in their personal capacity as a shareholder in Newman claimed damages for conspiracy against Mr. Bartlett and Mr. Laughton, and a declaration to the like effect on behalf of all other shareholders who had suffered damages and were on the register on July 29, 1975 (the date of the adjourned extraordinary general meeting). Counsel for the plaintiffs agreed before us that no facts are relied upon in support of the personal claim which are not relied upon in support of the derivative claim.

Vinelott J. upheld the plaintiffs' personal claim, and also the representative claim with which it was linked. He began with the proposition, which accorded with his findings, that Newman had been induced by fraud to approve an agreement under which Newman paid more (he thought about £445,000 more) than the value of the assets acquired and thus £445,000 more than it needed to pay; therefore Newman's indebtedness to its bankers immediately after the transaction (about £5m.) was £445,000 more than it would have been but for the fraud; therefore the fraud caused a reduction in net profits, which must have affected the quoted price of Newman shares; therefore, the plaintiffs suffered some damage in consequence of the conspiracy and that was sufficient to complete the cause of action, the quantum of damages being left to an inquiry.

In our judgment the personal claim is misconceived. It is of course correct, as the judge found and Mr. Bartlett did not dispute, that he and Mr. Laughton, in advising the shareholders to support the resolution approving the agreement, owed the shareholders a duty to give such advice in good faith and not fraudulently. It is also correct that if directors convene a meeting on the basis of a fraudulent circular, a shareholder will have a right of action to recover any loss which he has been personally caused in consequence of the fraudulent circular; this might include the expense of attending the meeting. But what he cannot do is to recover damages merely because the company in which he is interested has suffered damage. He cannot recover a sum equal to the diminution in the *223 market value of his shares, or equal to the likely diminution in dividend, because such a "loss" is merely a reflection of the loss suffered by the company. The shareholder does not suffer any personal loss. His only "loss" is through the company, in the diminution in the value of the net assets of the company, in which he has (say) a 3 per cent. shareholding. The plaintiff's shares are merely a right of participation in the company on the terms of the articles of association. The shares themselves, his right of participation, are not directly affected by the wrongdoing. The plaintiff still holds all the shares as his own absolutely unencumbered property. The deceit practised upon the plaintiff does not affect the shares; it merely enables the defendant to rob the company. A simple illustration will prove the logic of this approach. Suppose that the sole asset of a company is a cash box containing £100,000. The company has an issued share capital of 100 shares, of which 99 are held by the plaintiff. The plaintiff holds the key of the cash box. The defendant by a fraudulent misrepresentation persuades the plaintiff to part with the key. The defendant then robs the company of all its money. The effect of the fraud and the subsequent robbery, assuming that the defendant successfully flees with his plunder, is (i) to denude the company of all its assets; and (ii) to reduce the sale value of the plaintiff's shares from a figure approaching £100,000 to nil. There are two wrongs, the deceit practised on the plaintiff and the robbery of the company. But the deceit on the plaintiff causes the plaintiff no loss which is separate and distinct from the loss to the company. The deceit was merely a step in the robbery. The plaintiff obviously cannot recover personally some £100,000 damages in addition to the £100,000 damages recoverable by the company.

Counsel for the plaintiffs sought to answer this objection by agreeing that there cannot be double recovery from the defendants, but suggesting that the personal action will lie if the company's remedy is for some reason not pursued. But how can the failure of the company to pursue its remedy against the robber entitle the shareholder to recover for himself? What happens if the robbery takes place in year 1, the shareholder sues in year 2, and the company makes up its mind in year 3 to pursue its remedy? Is the shareholder's action stayed, if still on foot? Supposing judgment has already been recovered by the shareholder and satisfied, what then?

A personal action could have the most unexpected consequences. If a company with assets of £500m. and an issued share capital of £50m. were defrauded of £500,000 the effect on dividends and share prices would not be discernible. If a company with assets of £10m. were defrauded, there would be no effect on share prices until the fraud was discovered; if it were first reported that the company had been defrauded of £500,000 and subsequently reported that the company had discovered oil in property acquired by the company as part of the fraud and later still reported that the initial loss to the company could not have exceeded £50,000, the effect on share prices would be bewildering and the effect on dividends would either be negligible or beneficial.

The plaintiffs in this action were never concerned to recover in the personal action. The plaintiffs were only interested in the personal action *224 as a means of circumventing the rule in *Foss v. Harbottle*. The plaintiffs succeeded. A personal action would subvert the rule in *Foss v. Harbottle* and that rule is not merely a tiresome procedural obstacle placed in the path of a shareholder by a legalistic judiciary. The rule is the consequence of the fact that a corporation is a separate legal entity. Other consequences are limited liability and limited rights. The company is liable for its contracts and torts; the shareholder has no such liability. The company acquires causes of action for breaches of contract and for torts which damage the company. No cause of action vests in the shareholder. When the shareholder acquires a share he accepts the fact that the value of his investment follows the fortunes of the company and that he can only exercise his influence over the fortunes of the company by the exercise of his voting rights in general meeting. The law confers on him the right to ensure that the company observes the limitations of its memorandum of association and the right to ensure that other shareholders observe the rule, imposed upon them by the articles of association. If it is right that the law has conferred or should in certain restricted circumstances confer further rights on a shareholder the scope and consequences of such further rights require careful consideration. In this case it is neither necessary nor desirable to draw any general conclusions.

The rule in *Foss v. Harbottle* is founded on principle but it also operates fairly by preserving the rights of the majority. We were invited to give judicial approval to the public spirit of the plaintiffs who, it was said, are pioneering a method of controlling companies in the public interest without involving regulation by a statutory body. In our view the voluntary regulation of companies is a matter for the City. The compulsory regulation of companies is a matter for Parliament. We decline to draw general conclusions from the exceptional circumstances of the present case. But the results of the present action give food for thought. Vinelott J. thought it possible that Newman had suffered damage amounting to £445,000 by the fraud of Mr. Bartlett

and Mr. Laughton. Counsel for Newman submitted in the court below that damage to Newman by the prosecution of the action exceeded the benefits liable to be derived from the action. The costs of the proceedings at the end of the trial were said in newspaper reports to be in the region of £750,000. If the judge's order is upheld and if the damages suffered by Newman are assessed at £445,000 and the costs at £750,000 then those damages and about 95 per cent. of the costs will fall on T.P.G. pursuant to the judge's order except in so far as they are recovered from Mr. Bartlett and Mr. Laughton. If Newman recover any damages they must indemnify the plaintiffs thereout against the difference between the costs of the plaintiffs paid by T.P.G. and (with small exceptions) the costs of the plaintiffs on a common fund basis. Part of Newman's costs must be borne by Newman in any event. Part of the plaintiffs' costs must be borne by the plaintiffs in any event.

If this appeal succeeds the burden of the costs on the plaintiffs will be enormous. The innocent shareholders of Newman, T.P.G. and the plaintiffs may well wonder, whether this appeal succeeds or not, if there is not something to be said after all for the old fashioned rule in *Foss v. Harbottle*. *225 [Their Lordships then read Chapter 6 in which they examined the judgment of Vinelott J. and continued:]

Chapter 7 - Conclusions

The problems involved in this case were caused by the fact that the Prudential were the wrong plaintiffs.

If, indeed, Mr. Bartlett and Mr. Laughton defrauded Newman then the proper plaintiff was Newman. In an action by Newman against Mr. Bartlett and Mr. Laughton for defrauding the company, and against T.P.G. for enjoying the fruits of the fraud, the circular would be largely evidential. The principal frauds pleaded would have been frauds practised on the directors and practised on Mr. Cooper. Each fraudulent representation or fraudulent concealment would have been pleaded with particularity. Furthermore, in an action by Newman against Mr. Bartlett and Mr. Laughton all the documents necessary to enable Newman to plead its case and to make sensible discovery would have been in the possession of Newman at the outset. Newman would have known which documents held by T.P.G. were relevant to be discovered. Newman would then have been in a position to determine which of the discovered documents were sufficiently important to produce to the court.

Mr. Caplan frankly admitted that the plaintiffs pleaded and relied upon the circular because that was the only document revealed to the plaintiffs as a shareholder and the only document upon which they could make out a case on the pleadings prior to discovery. Mr. Caplan also frankly admitted that conspiracy was only pleaded because the plaintiffs thought that a direct action could not succeed in the absence of a plea of conspiracy. The direct action was only pleaded because it was feared that the derivative action might be defeated by the rule in *Foss v. Harbottle*, 2 Hare 461 .

In these circumstances discovery was a shambles, there was no proper selection of documents to be used at the trial because no one knew what to select and what to discard, and the pleadings were never adequately clarified or timeously amended. The complications and obscurities of the statement of claim and the reliance on the circular and the enormous weight of the discovered documents made it impossible for the defendants adequately to prepare for the trial or to foresee the course or length of the trial or to cope with the many trials of strength with regard to their recollection and probity.

The obscurities and confusion of the pleadings, the mass of documentary evidence, the fact that the Prudential, not being the proper plaintiffs, had no knowledge of what had gone on inside Newman and the assumed need to prove conspiracy led to the plaintiffs submitting that every Newman and T.P.G. document and every act or omission by Mr. Bartlett or Mr. Laughton was a badge of fraud, and to submit that Mr. Cooper's valuation was only explicable by cunning on the part of Mr. Laughton and incompetence on the part of Mr. Cooper, and that the directors of Newman were bemused and the advisers of Newman blinded.

The task of the judge was made very difficult because the pleadings of the plaintiffs were concentrated on the circular for tactical reasons *226 connected with the personal action; the statement of claim was vague and obscure; the real issues were buried under general assertions of trickiness. The defendants' advisers, no doubt overwhelmed by the number of ingenious accusations of fraud which emerged, were not able adequately to assist the judge by defining those accusations which were material and sounded in damages, those accusations which were relevant but which did not give rise to any damage, and those accusations which were wholly irrelevant save as to credit.

As the case proceeded and the nature of the plaintiffs' accusations were gradually disclosed, it is not surprising that the judge decided to intervene and himself to ask questions in order to clarify the evidence being given by the witnesses. But we must criticise some of the interventions of the judge. When Mr. Murray was giving evidence, some of the interventions appeared only capable of being answered in a way which would confirm the views already formed by the judge. In the case of the evidence

of Mr. Bartlett and Mr. Cooper some of the judge's interventions indicated that he had already formed a hostile view of the explanations that the witnesses were trying to give. Experienced counsel represented the plaintiffs and Mr. Bartlett. The judge should have allowed Mr. Scott to elucidate from his witnesses the evidence that they were trying to give, without interruption save in so far as it was necessary for clarification. and it was for Mr. Scott and Mr. Caplan to make their points in cross-examination. It is not appropriate for leading questions to be put from the Bench.

The judge found a conspiracy which had never been pleaded, and fraudulent conduct which had never been particularised. The plaintiffs, in this court, attempted to overwhelm us with 30 or more accusations of fraud, but in the end fell back on six claims which they submitted had been pleaded and found proven. Of those six the second was abandoned in the course of the submissions of Mr. Caplan.

The first claim concerns the commercial reasons. Those reasons must be read in the context of the information furnished by the circular with regard to the size of the minority shareholdings which were to be acquired in associated companies, the activities and trading results of the principal associated companies and the management influence said to have been obtained by the vendor T.P.G. through those minority shareholdings. So read, the commercial reasons informed the Newman shareholders that Newman would benefit from a development and expansion of Newman's international trade which would result from a partnership between Newman and the associated companies secured by the acquisition of T.P.G.'s minority shareholdings. In effect, Mr. Bartlett was imparting to the Newman shareholders his belief that he could influence the management of the affairs of Newman and the associated companies for the benefit of all concerned. So he believed. Therefore, to this limited extent the circular was not misleading or tricky to the knowledge of Mr. Bartlett and Mr. Laughton. But it does not follow, because there were valid commercial reasons for the transaction, that Mr. Bartlett and Mr. Laughton, as directors of Newman, recommended the transaction to the Newman shareholders in the bona fide belief that it was a transaction into *227 which Newman ought to enter. On this aspect we express our conclusion later.

The second claim was abandoned. The third claim was that the circular was tricky and misleading in concealing that the attributed values of quoted associated companies were much higher than their current stock market values: see statement of claim added by amendment after the trial began, and the judgment [1981] Ch. 257, 294, 297.

The argument is that appendix 3 of the circular ought to have included a comparison between the stock market price and Mr. Cooper's value of each quoted shareholding in Metropole, Dover, Agar Cross and Clough.

The exact charge against Mr. Bartlett and Mr. Laughton is still not spelled out. The claim may mean that Mr. Bartlett and Mr. Laughton believed that Mr. Cooper's value exceeded a fair value for Newman to pay. It may mean that Mr. Bartlett and Mr. Laughton knew and believed that it was excessive for Newman to pay a price significantly in excess of the stock market price. It may mean that Mr. Bartlett and Mr. Laughton believed that Mr. Cooper's value represented a fair price for Newman to pay but realised that nevertheless the shareholders of Newman ought to have an opportunity of comparing the Stock Exchange price with Mr. Cooper's value. Whichever charge is made we consider that it has not been proved.

There is no evidence that Mr. Bartlett or Mr. Laughton thought that the value of the shares of Clough, Dover, Agar Cross and Metropole suggested in Mr. Laughton's letter to Mr. Cooper of April 11, 1975, was excessive for Newman to pay. There is no evidence that they were afraid of revealing Stock Exchange prices. Mr. Bartlett gave evidence that he did not believe that Stock Exchange prices were a reliable guide to the value of the shareholdings, carrying with them the opportunities and potentialities for which they had been purchased and which Newman acquired from T.P.G. Neither Mr. Cooper nor Schroders appear to have taken the view that Stock Exchange prices were a reliable guide. It was impossible for Mr. Bartlett to explain to the shareholders in the circular that Clough was a buy or sell situation together with the reasons. It was impossible to reveal to the shareholders the plans of Mr. Laughton and Mr. Bartlett with regard to Dover, Metropole and Agar Cross.

The fourth claim was that the circular was tricky and misleading in the indication that the £100,000 Smithamcote loan was worth its face value: statement of claim, paragraph 16; judgment [1981] Ch. 257, 296. The evidence is that Mr. Bartlett and Mr. Laughton believed that the loan was worth the S. Newman Ltd. shares and that the S. Newman Ltd. shares were worth more than £100,000.

The fifth claim is that the circular was tricky and misleading in the indication that the £30,000 Abbott debt was worth its face value: statement of claim, paragraph 16A added after the trial began, and judgment at p. 297. The evidence is that Mr. Bartlett and Mr. Laughton believed the Abbott loan to be worth £30,000 and that T.P.G. was willing to give Newman a guarantee of payment of principal and interest.

It did not occur to Mr. Cooper to reduce the value of the debt because of the terms of the payment or the rate of interest. That being so, it is *228 not permissible to infer that Mr. Bartlett or Mr. Laughton considered that the value of the loan ought to be reduced and fraudulently concealed their belief.

The sixth claim is that the circular was tricky and misleading in that it concealed the January agreements: statement of claim, paragraph 18A.

We have already indicated that there was ample evidence to justify the finding of the judge that the January agreements, and the payments thereunder, were dishonestly concealed from the directors of Newman (to the extent that we have indicated) and from the shareholders of Newman with the object, inter alia, of facilitating the acceptance of the proposals set forth in the strategy document, and that this dishonest concealment involved and included a misleading statement in the circular of the origin and purpose of the payment of £216,000 by Newman to T.P.G.

As Mr. Angus Murray made plain in his evidence, he was always puzzled because it was difficult, in discussions with Mr. Bartlett, to discover whether, as he spoke, he was wearing a Newman or a T.P.G. hat. T.P.G. was a dealing and investment holding company. Newman was a trading company. If T.P.G. identified and developed a commercial opportunity, the moment might come when it would be sensible, in the interests of the companies, for Newman to take over the T.P.G. interest in a particular company. Hence Mr. Bartlett's proposals for "restructure" of Newman and T.P.G. interests in associated companies in early December 1974. and in its development of opportunities by improving the management of associates T.P.G. introduced into its associated companies those directors of Newman who were most suited to bring T.P.G.'s plans to fruition. Further, the T.P.G. holding in Newman shares, and the option held by Newman over shares of T.P.G., had the double effect that T.P.G. had a financial interest in the success of Newman, and Newman could use T.P.G.'s shareholding to protect Newman from a takeover by a third party at a time when its shares were unduly depressed on the market as a consequence of the general financial climate which had nothing to do with the profitability or assets of Newman. The period at the end of 1974, when T.P.G. was in serious liquidity trouble, coincided with the occasion when Mr. Bartlett genuinely regarded Newman as needing strengthening through diversification as Newman's existing manufacturing activities showed signs of contraction. Mr. Bartlett and Mr. Laughton were optimists, and Mr. Bartlett was always eager to impress his personal commercial judgment upon his colleagues on the Newman board. He met his match in Mr. Angus Murray, who was a concerned about the administrative capacity and organisation in Newman, worried about the risk of muddle through the close relationship of Newman and T.P.G., and rightly cautious about the risk of overstressing Newman's resources. He knew very little about the T.P.G. shareholdings, or about the reasons of Mr. Laughton in selecting them. In this his position was vastly different from that of Mr. Bartlett, Mr. Laughton, Mr. Bush and Mr. Baldwin, and from officials such as Mr. Gollop who understood the opportunities presented to Newman when the chance for stepping into T.P.G.'s shoes presented itself to Newman in February 1975. The first *229 serious Newman boardroom conflict was manifested on January 2, 1975. The evidence proves that Mr. Bartlett, with Mr. Laughton's support, then used every weapon available to carry the board with him as far as he could. He kept Mr. Murray in the dark and proceeded to enter into the January agreements and to arrange payments of the consideration to T.P.G. which in the event amounted to £216,000, knowing full well that Mr. Murray would have tried to prevent it had he known what was happening. Once embarked on this course Mr. Bartlett and Mr. Laughton could or would not disclose to Mr. Murray and the Newman board as a board what they had done, and Mr. Bartlett ended by confusing the history of the £216,000 to Mr. Fryer of the Stock Exchange and misrepresenting it to the shareholders on July 8.

But these deceptions of Mr. Murray and of the shareholders at the extraordinary general meeting were not because they believed that the net consideration of £350 to £325,000 was too high. We are satisfied that throughout Mr. Bartlett believed that his original figure was about right and was content to rely upon his expectation that Deloitte would, after their independent investigation, arrive at much the same conclusion.

The judge accepted the plaintiffs' submission that Mr. Bartlett and Mr. Laughton must have known, and did know, that £350 to £325,000 was much too much. So he never had to consider the question whether the explanation of the facts lay in an attempt by Mr. Bartlett, with Mr. Laughton's concurrence, to keep Mr. Murray in the dark and thus carry the rest of the board with him.

So what the judge would have found about this explanation must remain unknown. But we are ourselves satisfied that this is the inference that should be drawn from the evidence of primary fact about the concealment of the January agreements and the advance payments of £216,000 made pursuant thereto.

Turning from the plaintiffs' claims as submitted in this court to the issues which we indicated in chapter 6, the first issue is whether Mr. Bartlett and Mr. Laughton genuinely believed that it was in Newman's interest to accept the proposals contained

in the strategy document. The evidence establishes that the transaction recommended in the strategy document, namely, the purchase by Newman of the undertaking of T.P.G. with certain exceptions, was a gamble from the start. In our judgment Mr. Angus Murray was quite right in 1975 in urging that it was not a gamble which Newman ought to take. The question, however, is whether Mr. Bartlett and Mr. Laughton genuinely believed that it was a gamble which it was in the interests of Newman to take, or whether they merely put forward the strategy document because T.P.G. needed to be rescued from a gamble which had failed. If Mr. Bartlett and Mr. Laughton urged Newman to gamble on the strategy document transaction not because they believed Newman should take the gamble but only because they could see no other way of rescuing T.P.G., then Mr. Bartlett and Mr. Laughton were fraudulent; it would matter not that they hoped the gamble would succeed and were content for the price to be assessed by an independent valuer. If, on the other hand, they believed that the strategy document recommendation was for the benefit of Newman because it represented *230 a golden opportunity for Newman to reap the benefit of T.P.G.'s initiative at a fair price, then they were not fraudulent.

Quite rightly, counsel for the plaintiffs emphasised, both here and below, the financial difficulties which faced T.P.G. It does not follow that Mr. Bartlett and Mr. Laughton were guilty of fraud or breach of duty because the transaction benefited T.P.G. more than Newman, or even that it was inspired as a rescue operation for T.P.G. If a conflict of interest and duty arises because a transaction is proposed between two companies, and directors of one company are also directors of the other company, there are two, and only two, possible legal views on the legal viability of the transaction. Either the transaction is one which the directors can properly propose to each company, *despite* their conflict of interest and duty, or it is one which they cannot properly propose *because* of their conflict of interest and duty. The second view is basically correct in the case of overlapping trusteeships. The first view is rightly accepted as correct in the present case.

If, as we must assume, the transaction could properly go ahead despite the conflict of interest and duty, then Mr. Bartlett and Mr. Laughton were entitled to propose the transaction in order to benefit T.P.G.; and similarly they were entitled to propose the transaction in order to benefit Newman. Indeed, they were not entitled to propose the transaction except for the purpose of benefiting both Newman and T.P.G.

The court cannot and will not enter into an inquiry in order to discover whether the transaction would benefit one company more than the other, or whether Mr. Bartlett and Mr. Laughton believed it would. If such an inquiry were relevant, it would mean that the court would have to hold such a transaction void unless the transaction would be, or was thought to be, of equal benefit (whatever that might mean) to each company. Such an inquiry would be quite impracticable. It also follows that the transaction is capable of being upheld although initiated as a rescue operation for T.P.G. Every contract of sale must be initiated either by the vendor or by the purchaser. If a sale is legally viable between a particular vendor and a particular purchaser, the existence and nature and weight of the pressures affecting the initiator may explain the existence of a fraud but do not justify an inference of fraud.

The judge's findings that there was a conspiracy to benefit T.P.G. at the expense of Newman appear to indicate that he believed that the strategy document was not bona fide propounded by Mr. Bartlett and Mr. Laughton in the interests of Newman. But this and other indications in the judgment to the like effect are contradicted by the judge's comment [1981] Ch. 257, 330, that Mr. Bartlett

"may well have believed that it would be for the ultimate benefit of Newman that it should be placed in relation to the network of associated companies in the central position which was originally to have been occupied by T.P.G."

We need not resolve these contradictions in the judgment because we do not consider that a dishonest motive on the part of Mr. Bartlett and Mr. *231 Laughton in urging the adoption of the recommendations contained in the strategy document can now sound in damages.

Even if the recommendation by Mr. Bartlett and Mr. Laughton that Newman should gamble on the strategy document proposal was not bona fide made in the interests of Newman, in the result Newman did gamble, and gambled successfully. For obvious reasons Newman decided to keep the fruits of the gamble rather than demand repayment of the stake and hand over the fruits. If a punter is induced by fraud to bet on a horse and the horse loses, then the punter can recover his stake from the fraudster. But if the horse wins, then the punter cannot both keep his winnings and claim back his stake. In the present case Newman decided to keep its winnings. It is true that the purchase of the Smithamcote shares shows a loss against the value attributed to the Smithamcote shares by Mr. Cooper, but the transaction offered by T.P.G. and accepted by Newman was one transaction in which Newman gambled £1.5 million and obtained advantages which it has elected to keep. If Newman were induced to purchase the T.P.G. assets by fraud, then Newman, on discovering the fraud, could rescind the contract of purchase and claim damages, or,

alternatively, claim damages for the fraud without rescission. But Newman having abandoned the remedy of rescission because the gamble paid off, has suffered no damage as a result of that fraud.

The second issue is whether Mr. Bartlett and Mr. Laughton believed that £350,000 was a fair price for Newman to pay for the acquisition of T.P.G.'s undertaking. The net consideration of £350,000 was based on assets worth £1.5 million subject to liabilities of £1,150,000. If Mr. Bartlett and Mr. Laughton thought that the assets were not worth £1.5 million but were only worth, for example, £1.3 million, then irrespective of any fraud involved in inducing Newman to gamble at all, Mr. Bartlett and Mr. Laughton were guilty of fraud in advising Newman to pay a price which to the knowledge of Mr. Bartlett and Mr. Laughton exceeded the price which Newman should be advised to pay. The fact that the gamble succeeded and that Newman intend to keep its winnings is irrelevant. Newman, on this hypothesis, lost £200,000 because they paid £200,000 more than Mr. Bartlett and Mr. Laughton knew to be a fair price for Newman to pay to acquire the assets.

In our judgment, however, there was no, or no sufficient, evidence from which the judge could properly find that Mr. Bartlett and Mr. Laughton did not genuinely believe that the assets were worth £1.5 million subject to an independent valuation.

There was no challenge to Mr. Bartlett's explanation of the origin of the figure of £350,000 in the strategy document or in the origin of the pro forma balance sheet. There was no, or no sufficient, evidence to support the theory of a conspiracy to procure a persuadable accountant instead of a non-persuadable merchant banker to act as valuer and then to persuade the valuer to accept inflated values for the Smithamcote shares, the Smithamcote loan and the Abbott loan, which were not capable of being inflated. There is no evidence that Mr. Laughton did not genuinely believe in the values he put forward in his letter dated April 11, 1975. All the events which we have chronicled and all the *232 contemporaneous written evidence go to show that Mr. Bartlett and Mr. Laughton were confident rather than crooked and that Mr. Laughton's disappointment when Mr. Cooper first put forward a net consideration of less than £350,000 was genuine. The theory that Mr. Laughton then over-persuaded Mr. Cooper over the telephone is not supported by any evidence and was contradicted by Mr. Cooper. The theory that Mr. Cooper was over-persuaded was then fortified by the theory that Mr. Cooper was not competent.

The third issue is whether Mr. Bartlett or Mr. Laughton made false representations to, or knowingly concealed facts from, Mr. Cooper which might influence his valuation.

There is no, or no sufficient, evidence of any false representations to, or deliberate concealment from, Mr. Cooper in relation to any matter other than the January agreements and the payments thereunder. Again the plaintiffs' theories are unsupported by the contemporaneous evidence. We have dealt fully with the facts and inferences which are relevant to the January agreements and to the payments thereunder.

It must now be accepted that the January agreements and the payments thereunder were dishonestly concealed from the board of Newman to the extent indicated. They were not disclosed to Mr. Cooper. They should have been disclosed to Mr. Cooper because by accepting and retaining £215,950 in advance under the January agreements T.P.G. was adhering to the prices specified in the January agreements. Thus Mr. Bartlett should have mentioned the January agreements in the body of the strategy document, should have mentioned the January agreements to the board and should have told Mr. Cooper the facts concerning the January agreements and the payments. The January agreements and the payments should have been disclosed also because Mr. Laughton, who had agreed on behalf of T.P.G. to sell 800,000 Dover shares for £146,000 and to sell the Metropole shares for £85,000, had written to Mr. Cooper on April 11, 1975, saying that 832,000 Dover shares were worth £240,000 and that the Metropole shares were worth £350,000. The last payment of the instalments of the aggregate sum of £215,950 was made after Mr. Cooper had been instructed. Mr. Laughton should have told Mr. Cooper that £215,950 had been paid in advance when he was putting forward his arguments that £75,000 should be included in Mr. Cooper's valuation under the heading of interest. When Mr. Cooper later found out about the payment of £215,950 he was allowed to believe that the payments had been made on account of the strategy document transaction. Then Mr. Bartlett lied about the origin and purpose of the payments in advance to the shareholders at the extraordinary general meeting. He did that in order to conceal the existence of the January agreements, but there was no point in concealing the January agreements unless they were thought to be relevant or possibly relevant to the strategy document proposals and to the value of the assets. If Mr. Bartlett had been truthful at the extraordinary general meeting then at the very least there would, or might, have been a demand for Mr. Cooper to reconsider his valuation in the light of the January agreements and the payments thereunder. When the circular was prepared Mr. Bartlett knew that the January agreements *233 were material because in evidence he said that the position was that if the strategy document proposals had not been accepted by the shareholders, then the January agreements would have been put forward. When the circular was prepared Mr. Bartlett and Mr. Laughton must have known that the statement that £216,000 was an advance payment for the strategy document transaction was at best a half-truth. They were originally payments on account of the January agreements and those payments had never been formally ratified and continued as payments on account of the strategy document proposal.

If the circular had been revised so as to disclose the January agreements and the payments, then Mr. Cooper, as a member of Deloitte's considering and playing a prominent part in the production of the circular, would have had at least an opportunity to inquire about the January agreements and to reconsider his valuation in the light of those agreements.

The judge appears to have found that Mr. Bartlett and Mr. Laughton dishonestly concealed the January agreements and the payments thereunder from Mr. Cooper, because in his judgment Vinelott J. said:

"Mr. Cooper was not told of the sale in January of the shares in Metropole to Newman at the price of £85,000. He agreed that if he had known of this sale he would have found it impossible to attribute any value to the shares of Metropole except the agreed £85,000."

The judge made a similar comment about the Dover shares.

It is unsatisfactory that because the statement of claim was directed wholly to the circular, Mr. Bartlett and Mr. Laughton were not directly accused, and the judge did not directly hold, that Mr. Bartlett and Mr. Laughton dishonestly concealed the January agreements and the payments thereunder from Mr. Cooper. But we consider that the dishonest concealment from the board and the shareholders (amply proved) necessarily involved dishonest concealment from Mr. Cooper, even if Mr. Bartlett and Mr. Laughton did not appreciate wholly or at all the significance to Mr. Cooper of the January agreements in connection with value. Mr. Bartlett's untrue statements to the shareholders at the extraordinary general meeting and his acquiescence in misleading Mr. Cooper and in the form of the circular support the inference that from start to finish Mr. Bartlett and Mr. Laughton were dishonest in concealing the agreements from everybody concerned, namely, the board, Mr. Cooper and the shareholders. Although the statement of claim was directed in terms solely to the circular, Mr. Bartlett and Mr. Laughton must have appreciated, once the statement of claim raised the issue of the January agreements, that they were accused of concealing the January agreements and the payments thereunder at all times from January 7, 1975, until completion of the sale in July 1975, including concealment from Mr. Cooper. Mr. Bartlett gave evidence to explain why the January agreements and the payments thereunder were not disclosed and that explanation was not accepted by the judge.

It is not possible to be certain whether and to what extent Mr. Cooper's valuation would have been affected by a disclosure of the January agreements and payments. It was only after some tendentious *234 cross-examination by Mr. Caplan and some forceful intervention by the judge that Mr. Cooper was persuaded to reach the conclusion which the judge had already reached, and to make the remarks upon which the judge relied.

Nevertheless we think that Mr. Cooper must have been impressed, and ought to have been impressed, by the fact that T.P.G. had accepted the prices specified in the January agreements as fair and reasonable values for the Dover and Metropole shares, provided that the £215,950 was paid by instalments beginning in January. and £215,950 was paid in advance by Newman and accepted by T.P.G. between January and April 1975. Had Mr. Cooper known the facts he would have valued the Dover shares at £150,000, i.e. the January price of £146,000 for 800,000 Dover shares adjusted for the fact that Mr. Cooper was valuing 832,000 shares. He would have valued the Metropole shares at £85,000, the January price, instead of £100,000. This would have reduced the net consideration by £45,000, originally from £225,000 to £180,000.

On this basis the damage caused to Newman by the dishonest concealment of the January agreements and the payments thereunder from Mr. Cooper was £45,000. The damages are not affected by the fact that Newman have accepted the transaction from T.P.G. and have kept their winnings instead of reclaiming their stake.

In the result we consider that the evidence, the statement of claim and the judgment of Vinelott J. establish Newman's entitlement to damages for dishonest concealment of the January agreements. That concealment caused foreseeable loss to Newman of £45,000. Where such dishonest concealment causes foreseeable loss, a cause of action in fraud is established, even though the defendants did not deliberately intend to cause the loss. This fraud having been established, we do not consider that the uncertain character of the pleadings requires this court to relieve Mr. Bartlett or Mr. Laughton from the consequences of that fraud.

No amount of further evidence by Mr. Laughton or any other witness could explain away the admitted fact that T.P.G. had accepted £215,950 as advance consideration under the January agreements, that Mr. Angus Murray and Mr. Cooper knew nothing of the January agreements or the payments thereunder and that Mr. Bartlett, with the acquiescence and knowledge of Mr. Laughton, lied to the shareholders about the nature of the payments.

The issue of fraud in connection with the January agreements was clearly raised by the pleadings, albeit that the express allegation was directed to the circular. The dishonest concealment of the January agreements was, we think, clearly established by the evidence. We have commented adversely on the manner in which the whole action was clouded by the pleadings and the presentation of the case, but we do not consider that these defects enable Mr. Bartlett and Mr. Laughton to escape from the consequences of the one relevant fraud which was pleaded, proved, argued and decided.

We wish to hear argument in due course about costs in the court below and in this court. T.P.G. may wish to ask this court to review the order for costs against them made by the judge. We also wish to hear *235 argument about the plaintiffs' costs and their possible responsibility for Newman's costs in the light of the plaintiffs' responsibility for pleading the personal action and thereby prevailing upon the judge to hear the derivative action despite the protests of Newman. We also wish to hear arguments as to whether the enormous costs incurred by the plaintiffs as a result of their own pleadings and presentation of the case ought to be visited upon Mr. Bartlett and Mr. Laughton. We also wish to hear argument whether in the exceptional circumstances of the present case Mr. Bartlett and Mr. Laughton are entitled to be relieved by the plaintiffs in respect of the costs, or part of the costs, which were incurred by Mr. Bartlett and Mr. Laughton themselves in repelling the indiscriminate attacks which were made upon them, in a case in which the dishonesty which alone founds our finding of damages was never clearly pleaded. We may have to consider whether it was practicable for the defendants to consider paying something into court, if they were so minded - not £450,000, but perhaps £45,000 or thereabouts - and so save themselves the risk of paying lawyers' costs due to one side or the other of half a million or more. At present we know nothing about the costs of this lamentable litigation, and we wish to know about the figures involved on all sides as costs in the High Court and this court. We expect all parties to present those figures when we hear the argument about costs on the date arranged for restoring the appeal in order to settle the order of the court, and to decide upon the proper orders for costs. We wish to hear argument as to whether the £45,000 should be paid by T.P.G., who benefited from the fraud, or by Mr. Bartlett and Mr. Laughton.

We would add this. The plaintiffs have painted Mr. Bartlett and Mr. Laughton as crooks, deliberately milking Newman of vast sums of money for their own benefit. This very serious allegation, persisted in to the end in this court, has not been proved. Mr. Bartlett and Mr. Laughton have successfully established that that case was based on a series of misunderstandings. The plaintiffs have proved that in order to win the boardroom battle in January, and to carry through a transaction which has proved to be advantageous to Newman, Mr. Bartlett and Mr. Laughton kept Mr. Angus Murray in the dark about the January agreements and the advance payments made thereunder. Once embarked on this course of concealment they could not, or would not, make a belated disclosure of the matters they had concealed, and so were led into two further concealments - from Mr. Cooper and ultimately from the shareholders. It was foreseeable that as a consequence of the non-disclosure to Mr. Cooper his valuation would be too high, and though £45,000 is not a great amount in relation to £1.5 million, it is significant enough to escape the description of minimal.

We are sorry that Mr. Laughton was not here to hear this court pronounce that all but one of the serious allegations made against him were not proved.

Before we rise we would say one thing. It is proposed to restore the case in order to determine the form of the order and to hear the submissions of the parties about costs, and the date that is provisionally arranged is October 2. It is difficult to predict how long the submissions *236 of the parties will be. There are five parties concerned and the submissions may be fairly long. Mr. Bartlett and Mr. Laughton in the court below evidently spent a small fortune on their own costs and we know nothing about their present financial position; but if it is practicable for them, they may think that there would be great advantage in their instructing their solicitors again to instruct counsel, who are already familiar with the case, in order to argue those questions of costs which Mr. Bartlett and Mr. Laughton wish to submit, and also to make any submissions which are appropriate on how the liability for the £45,000 should fall as between T.P.G., who enjoyed the cash consideration from the purchase, and the two personal defendants. Whether it will be practicable for Mr. Bartlett and Mr. Laughton to dig again into their pockets for the purpose of legal representation on the order for costs we do not know. As we have said, we do not know what the figures are. It may be that the figures altogether might run into, not five figures but six. So that if it is practicable for the two gentlemen we have mentioned to make a further investment - whether it would be properly described as commercial judgment or a gamble we know not - that might be to their advantage.

*

October 5. On the resumed hearing, counsel announced that the parties had agreed the terms of a settlement and by consent the following order was made.

Representation

Solicitors: C. F. Whitehorn ; Macfarlanes .

Representation

Solicitors: Simmons & Simmons ; C. F. Whitehorn ; Macfarlanes ; Hopkins, Fuller .

Hearing adjourned. Appeal allowed in part. Respondent's notice dismissed. Order of Vinelott J. varied to extent stated in judgment. Leave granted to fourth defendant to proceed with appeal from judgment of Vinelott J. in terms of amended notice of appeal. On basis that all parties had agreed terms of settlement on all matters (including any party's rights to damages, costs or any other relief) no further order made. All further proceedings stayed. (L. G. S.)

(c) Incorporated Council of Law Reporting for England & Wales

EXHIBIT 1

SETTLEMENT AGREEMENT

This Settlement Agreement (the “Agreement”) is entered into as of December 23, 2020, between Highland Capital Management, L.P. (the “Debtor”), on the one hand, and HarbourVest 2017 Global Fund L.P., HarbourVest 2017 Global AIF L.P., HarbourVest Dover Street IX Investment L.P., HV International VIII Secondary L.P., HarbourVest Skew Base AIF L.P., and HarbourVest Partners L.P. (each, a “HarbourVest Party,” and collectively, “HarbourVest”), on the other hand. Each of the foregoing are sometimes referred to herein collectively as the “Parties” and individually as a “Party.”

RECITALS

WHEREAS, on October 16, 2019 (the “Petition Date”), the Debtor filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code (the “Bankruptcy Case”) in the Bankruptcy Court for the District of Delaware, Case No. 19-12239 (CSS) (the “Delaware Bankruptcy Court”);

WHEREAS, on December 4, 2019, the Delaware Bankruptcy Court entered an order transferring venue of the Debtor’s case to the Bankruptcy Court for the Northern District of Texas, Dallas Division, Case No. 19-34054-sgj (the “Bankruptcy Court”);

WHEREAS, prior to the Petition Date, HarbourVest invested in Highland CLO Funding, Ltd. f/k/a Acis Loan Funding, Ltd. (“HCLOF”) and acquired an a 49.98% ownership interest in HCLOF (the “HarbourVest Interests”);

WHEREAS, the portfolio manager for HCLOF is Highland HCF Advisor, Ltd., a subsidiary of the Debtor;

WHEREAS, on April 8, 2020, HarbourVest filed proofs of claim in the Bankruptcy Case, which are listed on the Debtor’s claims register as claim numbers 143, 147, 149, 150, 153, and 154 (the “HarbourVest Claims”), asserting claims against the Debtor relating to its investment in HCLOF;

WHEREAS, on July 30, 2020, the Debtor filed the *Debtor’s First Omnibus Objection to Certain (a) Duplicate Claims; (b) Overstated Claims; (c) Late-Filed Claims; (d) Satisfied Claims; (e) No Liability Claims; and (f) Insufficient-Documentation Claims* [Docket No. 906], in which the Debtor objected to the HarbourVest Claims;

WHEREAS, on September 11, 2020, HarbourVest filed the *HarbourVest Response to Debtor’s First Omnibus Objection to Creation (a) Duplicate Claims; (b) Overstated Claims; (c) Late-Filed Claims; (d) Satisfied Claims; (e) No Liability Claims; and (f) Insufficient-Documentation Claims* [Docket No. 1057] (the “HarbourVest Response”);

WHEREAS, on October 18, 2020, HarbourVest filed the *Motion of HarbourVest Pursuant to Rule 3018(a) of the Federal Rules of Bankruptcy Procedure for Temporary Allowance of Claims for Purposes of Voting to Accept or Reject the Plan* [Docket No. 1207] (the “3018 Motion” and together with the HarbourVest Response, the “HarbourVest Pleadings”);

WHEREAS, in the HarbourVest Pleadings, HarbourVest asserted, among other things, that the HarbourVest Claims included claims against the Debtor arising from fraudulent inducement, fraudulent concealment, fraudulent misrepresentation, breach of fiduciary duty, breach of securities laws, and misuse of assets and sought damages in excess of \$300,000,000;

WHEREAS, the Debtor disputes the HarbourVest Claims;

WHEREAS, on November 24, 2020, the Debtor filed the *Fifth Amended Plan of Reorganization for Highland Capital Management, L.P.* [Docket No. 1472] (as amended, the “Plan”).¹

WHEREAS, the Parties desire to enter into this Agreement which incorporates, formalizes, and finalizes the full and final resolution of the HarbourVest Claims and HarbourVest Pleadings; and

WHEREAS, this Agreement will be presented to the Bankruptcy Court for approval pursuant to **Federal Rule of Bankruptcy Procedure 9019** (“Rule 9019”).

NOW THEREFORE, in consideration of the above recitals, the covenants, conditions, and promises made herein, and other good and valuable consideration, the receipt of which is hereby acknowledged, the Parties agree as follows:

1. Settlement of Claims.

(a) In full and complete satisfaction of the HarbourVest Claims, HarbourVest will receive:

(i) an allowed, nonpriority general unsecured claim in the aggregate amount of \$45,000,000 (the “Allowed GUC Claim”); and

(ii) an allowed subordinated claim in the aggregate amount of \$35,000,000 (the “Allowed Subordinated Claim” and together with the Allowed GUC Claim, the “Allowed Claims”).

(b) On the Effective Date, HarbourVest will transfer all of its rights, title, and interest in the HarbourVest Interests to the Debtor or its nominee pursuant to the terms of the *Transfer Agreement for Ordinary Shares of Highland CLO Funding, Ltd.*, attached hereto as Exhibit A (the “Transfer Agreements”) and the Debtor or its nominee will become a shareholder of HCLOF with respect to the HarbourVest Interests. The terms of the Transfer Agreements are incorporated into this Agreement by reference.

2. Releases.

(a) Upon the Effective Date, and to the maximum extent permitted by law, each HarbourVest Party on behalf of itself and each of its current and former advisors, trustees, directors, officers, managers, members, partners, employees, beneficiaries, shareholders, agents,

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

participants, subsidiaries, parents, successors, designees, and assigns hereby forever, finally, fully, unconditionally, and completely releases, relieves, acquits, remises, and exonerates, and covenants never to sue, the Debtor, HCLOF, HCLOF's current and former directors, and the Debtor's current and former advisors, trustees, directors, officers, managers, members, partners, employees, beneficiaries, shareholders, agents, participants, subsidiaries, parents, affiliates, successors, designees, and assigns, except as expressly set forth below (the "Debtor Released Parties"), for and from any and all claims, debts, liabilities, demands, obligations, promises, acts, agreements, liens, losses, costs and expenses (including, without limitation, attorney's fees and related costs), damages, injuries, suits, actions, and causes of action of whatever kind or nature, whether known or unknown, suspected or unsuspected, matured or unmatured, liquidated or unliquidated, contingent or fixed, at law or in equity, statutory or otherwise, including, without limitation, any claims, defenses, and affirmative defenses, whether known or unknown, including, without limitation, those which were or could have been asserted in, in connection with, or with respect to the Bankruptcy Case (collectively, the "HarbourVest Released Claims").

(b) Upon the Effective Date, and to the maximum extent permitted by law, the Debtor hereby forever, finally, fully, unconditionally, and completely releases, relieves, acquits, remises, and exonerates, and covenants never to sue (i) each HarbourVest Party and (ii) each HarbourVest Party's current and former advisors, trustees, directors, officers, managers, members, partners, employees, beneficiaries, shareholders, agents, participants, subsidiaries, parents, affiliates, successors, designees, and assigns (the "HarbourVest Released Parties"), for and from any and all claims, debts, liabilities, demands, obligations, promises, acts, agreements, liens, losses, costs and expenses (including, without limitation, attorney's fees and related costs), damages, injuries, suits, actions, and causes of action of whatever kind or nature, whether known or unknown, suspected or unsuspected, matured or unmatured, liquidated or unliquidated, contingent or fixed, at law or in equity, statutory or otherwise, including, without limitation, any claims, defenses, and affirmative defenses, whether known or unknown, which were or could have been asserted in, in connection with, or with respect to the Bankruptcy Case (collectively, the "Debtor Released Claims"); *provided, however*, that notwithstanding anything herein to the contrary, the release contained in this Section 2(b) will apply to the HarbourVest Released Parties set forth in subsection (b)(ii) only with respect to Debtor Released Claims arising from or relating to HarbourVest's ownership of the HarbourVest Interests.

(c) Notwithstanding anything in this Agreement to the contrary, the releases set forth herein will not apply with respect to (i) the Allowed Claims, (ii) the claims of Charlotte Investor IV, L.P., or (iii) the duties, rights, or obligations of any Party under this Agreement or the Transfer Agreements.

3. **Agreement Subject to Bankruptcy Court Approval.** The effectiveness of this Agreement and the Parties' obligations hereunder are conditioned in all respects on the approval of this Agreement by the Bankruptcy Court. The Parties agree to cooperate and use reasonable efforts to have this Agreement approved by the Bankruptcy Court. The "Effective Date" will be the date of an order entered by the Bankruptcy Court approving this Agreement pursuant to a motion filed under Rule 9019.

4. **Representations and Warranties.** Subject in all respects to Section 3 hereof:

(a) each HarbourVest Party represents and warrants that (i) it has full authority to enter into this Agreement and to release the HarbourVest Released Claims and has not sold, transferred, or assigned any HarbourVest Released Claim to any other person or entity, (ii) no person or entity other than such HarbourVest Party has been, is, or will be authorized to bring, pursue, or enforce any HarbourVest Released Claim on behalf of, for the benefit of, or in the name of (whether directly or derivatively) of such HarbourVest Party; and (iii) HarbourVest owns all of the HCLOF Interests free and clear of any claims or interests; and

(b) the Debtor represents and warrants to HarbourVest that (i) it has full authority to enter into this Agreement and to release the Debtor Released Claims and (ii) no person or entity other than the Debtor has been, is, or will be authorized to bring, pursue, or enforce any Debtor Released Claim on behalf of, for the benefit of, or in the name of (whether directly or derivatively) of the Debtor Party.

5. **Plan Support.**

(a) Each HarbourVest Party hereby agrees that it will (a) vote all HarbourVest Claims held by such HarbourVest Party to accept the Plan, by delivering its duly executed and completed ballots accepting the Plan on a timely basis; and (b) not (i) change, withdraw, or revoke such vote (or cause or direct such vote to be changed withdrawn or revoked); (ii) exercise any right or remedy for the enforcement, collection, or recovery of any claim against the Debtor except in a manner consistent with this Agreement or the Plan, (iii) object to, impede, or take any action other action to interfere with, delay or postpone acceptance or confirmation of the Plan; (iv) directly or indirectly solicit, propose, file, support, participate in the formulation of or vote for, any restructuring, sale of assets (including pursuant to **11 U.S.C. § 363**), merger, workout, or plan of reorganization of the Debtor other than the Plan; or (v) otherwise take any action that would in any material respect interfere with, delay, or postpone the consummation of the Plan; provided, however, that such vote may be revoked (and, upon such revocation, deemed void ab initio) by such HarbourVest Party at any time following the termination of this agreement or the occurrence of a Support Termination Event (it being understood that any termination of this agreement shall entitle each HarbourVest Party to change its vote in accordance with section 1127(d) of the Bankruptcy Code), notwithstanding any voting deadline established by the Bankruptcy Court including without limitation the January 5, 2021, 5:00 p.m. (prevailing Central Time) deadline established by the *Order Approving Form of Ballots, Voting Deadline and Solicitation Procedures* [Docket No. 1476].

(b) In full resolution of the 3018 Motion, HarbourVest will have a general unsecured claim for voting purposes only in the amount of \$45,000,000.

(c) The obligations of the HarbourVest Parties under this Section 5 shall automatically terminate upon the occurrence of any of the following (each a “Support Termination Event”): (i) the effective date of the Plan, (ii) the withdrawal of the Plan, (iii) the entry of an order by the Bankruptcy Court (A) converting the Bankruptcy Case to a case under chapter 7 of the Bankruptcy Code or (B) appointing an examiner with expanded powers beyond those set forth in sections 1106(a)(3) and (4) of the Bankruptcy Code or a trustee in Bankruptcy

Case, or (iv) the failure of the Court to enter an order approving the terms of this Agreement and the settlement described herein pursuant to Rule 9019 prior to confirmation of the Plan.

6. **No Admission of Liability.** The Parties acknowledge that there is a bona fide dispute with respect to the HarbourVest Claims. Nothing in this Agreement will imply, an admission of liability, fault or wrongdoing by the Debtor, HarbourVest, or any other person, and the execution of this Agreement does not constitute an admission of liability, fault, or wrongdoing on the part of the Debtor, HarbourVest, or any other person.

7. **Successors-in-Interest.** This Agreement shall be binding upon and shall inure to the benefit of each of the Parties and their successors, and assigns.

8. **Notice.** Each notice and other communication hereunder will be in writing and will be sent by email and delivered or mailed by registered mail, receipt requested, and will be deemed to have been given on the date of its delivery, if delivered, and on the fifth full business day following the date of the mailing, if mailed to each of the Parties thereto at the following respective addresses or such other address as may be specified in any notice delivered or mailed as set forth below:

HARBOURVEST

HarbourVest Partners L.P.
Attention: Michael J. Pugatch
One Financial Center
Boston, MA 02111
Telephone No. 617-348-3712
E-mail: mpugatch@harbourvest.com

with a copy (which shall not constitute notice) to:

Debevoise & Plimpton LLP
Attention: M. Natasha Labovitz, Esq.
919 Third Avenue
New York, NY 10022
Telephone No. 212-909-6649
E-mail: nlabovitz@debevoise.com

THE DEBTOR

Highland Capital Management, L.P.
300 Crescent Court, Suite 700
Dallas, Texas 75201
Attention: James P. Seery, Jr.
Telephone No.: 972-628-4100
Facsimile No.: 972-628-4147
E-mail: jpseeryjr@gmail.com

with a copy (which shall not constitute notice) to:

Pachulski Stang Ziehl & Jones LLP
Attention: Jeffrey Pomerantz, Esq.
10100 Santa Monica Blvd., 13th Floor
Los Angeles, CA 90067
Telephone No.: 310-277-6910
Facsimile No.: 310-201-0760
E-mail: jpomerantz@pszjlaw.com

9. **Advice of Counsel.** Each Party represents that it has: (a) been adequately represented by independent legal counsel of its own choice, throughout all of the negotiations that preceded the execution of this Agreement; (b) executed this Agreement upon the advice of such counsel; (c) read this Agreement, and understands and assents to all the terms and conditions contained herein without any reservations; and (d) had the opportunity to have this Agreement and all the terms and conditions contained herein explained by independent counsel, who has answered any and all questions asked of such counsel, or which could have been asked of such counsel, including, but not limited to, with regard to the meaning and effect of any of the provisions of this Agreement.

10. **Entire Agreement.** This Agreement and the Transfer Agreement contain the entire agreement and understanding concerning the subject matter of this Agreement, and supersede and replace all prior negotiations and agreements, written or oral and executed or unexecuted, concerning such subject matter. Each of the Parties acknowledges that no other Party, nor any agent of or attorney for any such Party, has made any promise, representation or warranty, express or implied, written or oral, not otherwise contained in this Agreement to induce any Party to execute this Agreement. The Parties further acknowledge that they are not executing this Agreement in reliance on any promise, representation or warranty not contained in this Agreement, and that any such reliance would be unreasonable. This Agreement will not be waived or modified except by an agreement in writing signed by each Party or duly authorized representative of each Party.

11. **No Party Deemed Drafter.** The Parties acknowledge that the terms of this Agreement are contractual and are the result of arms'-length negotiations between the Parties and their chosen counsel. Each Party and its counsel cooperated in the drafting and preparation of this Agreement. In any construction to be made of this Agreement, the Agreement will not be construed against any Party.

12. **Future Cooperation.** The Parties agree to cooperate and execute such further documentation as is reasonably necessary to effectuate the intent of this Agreement.

13. **Counterparts.** This Agreement may be executed in counterparts with the same force and effect as if executed in one complete document. Each Party's signature hereto will signify acceptance of, and agreement to, the terms and provisions contained in this Agreement. Photographic, electronic, and facsimile copies of signed counterparts may be used in lieu of the originals of this Agreement for any purpose.

14. **Governing Law; Venue; Attorneys' Fees and Costs.** The Parties agree that this Agreement will be governed by and will be construed according to the laws of the State of Texas without regard to conflict-of-law principles. Each of the Parties hereby submits to the exclusive jurisdiction of the Bankruptcy Court during the pendency of the Bankruptcy Case and thereafter to the exclusive jurisdiction of the state and federal courts located in the Northern District of Texas, Dallas Division, with respect to any disputes arising from or out of this Agreement. In any action to enforce this Agreement, the prevailing party shall be entitled to recover its reasonable and necessary attorneys' fees and costs (including experts).

[Remainder of Page Intentionally Blank]

IT IS HEREBY AGREED.

HIGHLAND CAPITAL MANAGEMENT, L.P.

By: /s/ James P. Seery, Jr.
Name: James P. Seery, Jr.
Its: CEO/CRO

HarbourVest 2017 Global Fund L.P., by HarbourVest 2017 Global Associates L.P., its General Partner, by HarbourVest GP LLC, its General Partner, by HarbourVest Partners, LLC, its Managing Member

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

HarbourVest 2017 Global AIF L.P., by HarbourVest Partners (Ireland) Limited, its Alternative Investment Fund Manager, by HarbourVest Partners L.P., its Duly Appointed Investment Manager, by HarbourVest Partners, LLC, its General Partner

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

HarbourVest Dover Street IX Investment L.P., by HarbourVest Partners L.P., its Duly Appointed Investment Manager, by HarbourVest Partners, LLC, its General Partner

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

HarbourVest Partners L.P., on behalf of funds and accounts under management, by HarbourVest Partners, LLC, its General Partner

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

**HarbourVest Skew Base AIF L.P., by HarbourVest Partners (Ireland) Limited, its
Alternative Investment Fund Manager, by HarbourVest Partners L.P., its Duly Appointed
Investment Manager, by HarbourVest Partners, LLC, its General Partner**

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

**HV International VIII Secondary L.P., by HIPEP VIII Associates L.P., its General
Partner, by HarbourVest GP LLC, its General Partner, by HarbourVest Partners, LLC,
its Managing Member**

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

Exhibit A

TRANSFER AGREEMENT
FOR ORDINARY SHARES OF
HIGHLAND CLO FUNDING, LTD.

This Transfer Agreement, dated as of December [REDACTED], 2020 (this “**Transfer Agreement**”), is entered into by and among Highland CLO Funding, Ltd. (the “**Fund**”), Highland HCF Advisor, Ltd. (the “**Portfolio Manager**”), HCMLP Investments, LLC (the “**Transferee**”) and each of the following: HarbourVest Dover Street IX Investment L.P., HarbourVest 2017 Global AIF L.P., HarbourVest 2017 Global Fund L.P., HV International VIII Secondary L.P., and HarbourVest Skew Base AIF L.P. (collectively, the “**Transferors**”).

WHEREAS, each Transferor is the record, legal and beneficial owner of the number of ordinary shares (“**Shares**”) of the Fund set forth opposite such Transferor’s name on Exhibit A hereto (with respect to each Transferor, the “**Transferred Shares**”).

WHEREAS the Transferee is an affiliate and wholly owned subsidiary of Highland Capital Management, L.P. (“**HCMLP**”) which is one of the initial members of the Fund.

WHEREAS, each Transferor wishes to transfer and assign 100% of its rights, title and interest as a shareholder in the Fund, including the Transferred Shares (the “**Interest**”) on the terms set forth in this Transfer Agreement.

WHEREAS, subject to and in connection with the approval of that certain Settlement Agreement, dated on or about the date hereof, by and among HCMLP and the Transferors (the “**Settlement Agreement**”), the Transferee desires that the Interest be transferred to Transferee and that thereafter the Transferee will become a Shareholder and the Transferors will no longer be Shareholders.

WHEREAS, the Portfolio Manager desires to consent to such transfers and to the admission of Transferee as a Shareholder on the terms set forth herein, and the Transferors and Transferee agree to such terms.

WHEREAS, the Fund desires to amend its records to reflect the foregoing transfers.

NOW, THEREFORE, the parties hereto agree as follows:

1. Transfer of Shares and Advisory Board

- a. Each Transferor hereby transfers and assigns all of its rights, title, and interest in its Interest to the Transferee, and the Transferee wishes to be admitted to the Fund as a Shareholder.
- b. In connection with the transfer of the Interest as contemplated herein, the Transferee shall be granted the right to appoint a representative to the Fund’s advisory board (the “**Advisory Board**”) to replace the Transferors’ appointed representative to the Advisory Board.

- c. Transferee hereby assumes all of Transferor's rights and obligations in respect of the Interest effective as of the Effective Date (as defined below) and acknowledge that thereafter Transferee shall be subject to the applicable terms and provisions of the Members' Agreement dated as of November 15, 2017 (the "**Members' Agreement**"), the Articles of Incorporation adopted November 15, 2017 (the "**Articles**") and the Subscription and transfer Agreement, dated as of November 15, 2017 among each Transferor, the Fund and the Portfolio Manager (the "**Subscription Agreement**", and together with the Members' Agreement and the Articles, the "**Fund Agreements**") with respect to the Interest. Transferee does not assume any liability or responsibility for any obligations or liabilities incurred by any Transferor prior to the Effective Date of the transfer.
 - d. Following the transfer, each Transferor shall have no further rights or obligations to any party hereunder in respect of the Interest under the Fund Agreements.
 - e. This Transfer Agreement, and the parties' obligations hereunder, are conditioned in all respects on the approval by the Bankruptcy Court for the Northern District of Texas, Dallas Division pursuant to **Federal Rule of Bankruptcy Procedure 9019** of (i) this Transfer Agreement and (ii) the Settlement Agreement, and each of the parties agree that no further action shall be required from any party for the transfer of the Interest to be effective except as described herein.
2. Transferee's Representations and Warranties. The Transferee represents and warrants to the Transferors, the Portfolio Manager, and the Fund as follows:
- a. This Transfer Agreement constitutes a valid and binding obligation of the Transferee, enforceable against it in accordance with its terms;
 - b. This Transfer Agreement has been duly and validly executed and delivered by or on behalf of the Transferee and such execution and delivery have been duly authorized by all necessary trust action of the Transferee;
 - c. The Transferee acknowledges receipt of, has read, and is familiar with, the Fund's Offering Memorandum for Placing Shares dated November 15, 2017 (the "**Offering Memorandum**") and the Fund Agreements;
 - d. The Transferee hereby accepts and receives the Interest from the Transferors for investment, and not with a view to the sale or distribution of any part thereof, and the Transferee has no present intention of selling, granting participations in, or otherwise distributing the same, but subject nevertheless to any requirement of law that the disposition of the Transferee's property shall at all times be within such Transferee's control; and
 - e. The Transferee is an "Eligible U.S. Investor" as defined in the Offering Memorandum.

3. Transferors' Representations and Warranties. Each Transferor represents and warrants to the Transferee, the Portfolio Manager, and the Fund as follows:
 - a. This Transfer Agreement constitutes a valid and binding obligation of the Transferor, enforceable against it in accordance with its terms;
 - b. This Transfer Agreement has been duly authorized, and duly and validly executed and delivered by the Transferor and such execution and delivery have been duly authorized by all necessary action of the Transferor; and
 - c. As of the date hereof, the Transferor has good and valid title to the Transferor's Interest, free and clear of any liens, vesting requirements or claims by others.
4. Consent to Transfer. Based in part on the representations and warranties of the Transferors and the Transferee which are included herein, and on the terms contained herein, the Portfolio Manager and the Fund hereby consent to the transfers of the Interest, the admission of the Transferee as a Shareholder and the Transferee's appointment of a representative to the Advisory Board, the Portfolio Manager's execution of this Transfer Agreement constituting its prior written consent to the transfers of the Interest for the purposes of article 18.1 of the Articles and this Transfer Agreement constituting express notice in writing to the Fund of the assignment set out at clause 1(c) above for the purposes of the Law of Property (Miscellaneous Provisions) (Guernsey) Law, 1979 (as amended).
5. Completion: As of the date of approval by the Bankruptcy Court for the Northern District of Texas, Dallas Division pursuant to Federal Rule of Bankruptcy Procedure 9019 of (i) this Transfer Agreement and (ii) the Settlement Agreement (the "**Effective Date**"):
 - a. each Transferor shall deliver or cause to be delivered to the Transferee a transfer instrument relating to the Transferred Shares duly executed and completed by that Transferor in favor of the Transferee; and
 - b. the Transferee shall deliver to the Transferors and the Fund a duly executed and dated Adherence Agreement (as defined in the Members' Agreement).

Prior to the Effective Date the Transferee shall procure that:

 - c. the board of directors of the Fund shall hold a meeting at which the transfer of the Shares to the Transferee shall be approved and registration in the register of members of the Fund shall be effected on the Effective Date.
6. Miscellaneous.
 - a. Each of the parties hereto agree to execute any further instruments and perform any further acts which are or may become reasonably necessary to carry out the intent of this Transfer Agreement or are reasonably requested by the Portfolio Manager, the Fund or a Transferor to complete the transfer of the Interest.

- b. The parties to this Transfer Agreement acknowledge that the terms of this Transfer Agreement are the result of arms'-length negotiations between the parties and their respective counsel. Each party and its counsel cooperated in the drafting and preparation of this Transfer Agreement. In any construction to be made of this Transfer Agreement, the language or drafting of this Transfer Agreement will not be construed against any party.
- c. This Transfer Agreement shall be governed by, and construed and enforced in accordance with, the internal substantive laws of the state of Delaware, without giving effect to conflicts of law principles.
- d. The representations, warranties and covenants of the Transferors and the Transferee shall remain in full force and effect following the transfer of the Interest, and the Fund and the Portfolio Manager thereafter may rely on all such representations, warranties and covenants.
- e. This Transfer Agreement may be executed in multiple counterparts, each of which shall be deemed to be an original, but all of which together shall constitute one and the same instrument. Photographic, electronic, and facsimile copies of signed counterparts may be used in lieu of the originals of this Transfer Agreement for any purpose.
- f. Captions of sections have been added only for convenience and shall not be deemed to be a part of this Transfer Agreement.
- g. This Transfer Agreement is among the parties hereto. No Person that is not a party hereto shall have any right herein as a third-party beneficiary or otherwise except as expressly contemplated hereby.

[Remainder of Page Intentionally Blank]

[Additional Signatures on Following Page]

IN WITNESS WHEREOF, the undersigned have executed this Transfer Agreement as of the date first above written.

TRANSFERORS:

HarbourVest Dover Street IX Investment L.P.

By: HarbourVest Partners L.P., its Duly Appointed Investment Manager

By: HarbourVest Partners, LLC

By: _____

Name: Michael Pugatch

Title: Managing Director

HV International VIII Secondary L.P.

By: HIPEP VIII Associates L.P.
Its General Partner

By: HarbourVest GP LLC
Its General Partner

By: HarbourVest Partners, LLC
Its Managing Member

By: _____

Name: Michael Pugatch

Title: Managing Director

HarbourVest 2017 Global AIF L.P.

By: HarbourVest Partners (Ireland) Limited
Its Alternative Investment Fund Manager

By: HarbourVest Partners L.P.
Its Duly Appointed Investment Manager

By: HarbourVest Partners, LLC
Its General Partner

By: _____

Name: Michael Pugatch

Title: Managing Director

HarbourVest Skew Base AIF L.P.

By: HarbourVest Partners (Ireland) Limited
Its Alternative Investment Fund Manager

By: HarbourVest Partners L.P.
Its Duly Appointed Investment Manager

By: HarbourVest Partners, LLC
Its General Partner

By: _____

Name: Michael Pugatch

Title: Managing Director

Exhibit A

<u>Transferee Name</u>	<u>Number of Shares</u>	<u>Percentage</u>
HarbourVest Dover Street IX Investment L.P.	[REDACTED]	[REDACTED]
HarbourVest 2017 Global AIF L.P.	[REDACTED]	[REDACTED]
HarbourVest 2017 Global Fund L.P.	[REDACTED]	[REDACTED]
HV International VIII Secondary L.P.	[REDACTED]	[REDACTED]
HarbourVest Skew Base AIF L.P.	[REDACTED]	[REDACTED]


Exhibit D

002874

continuous or systematic contacts with the United States, and its directors have not traveled to the United States in connection with HCLOF's business.

5. HCLOF's connection with the United States is limited to this litigation and other litigation arising from the acts of its portfolio managers.

Dated: 30 August 2021



Richard Doreau

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CHARITABLE DAF FUND, L.P., and §
CLO HOLDCO, LTD., §

Plaintiffs, §

v. §

CIVIL ACTION NO. 3:21-CV-0842-B

HIGHLAND CAPITAL §
MANAGEMENT, L.P., HIGHLAND §
HCF ADVISOR, LTD., and §
HIGHLAND CLO FUNDING, LTD., §

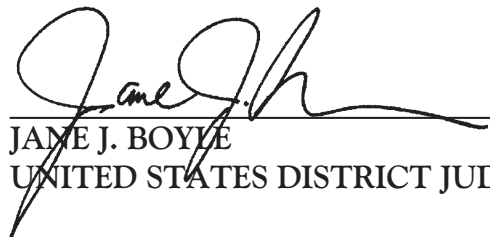
Defendants. §

ORDER OF REFERENCE

Pursuant to 28 U.S.C. § 157 and this District's Miscellaneous Order No. 33, this case is hereby **REFERRED** to Judge Stacey G. C. Jernigan of the United States Bankruptcy Court for the Northern District of Texas, Dallas Division, to be adjudicated as a matter related to the consolidated Chapter 11 Bankruptcy of Highland Capital Management, L.P., Chapter 11 Case No. 19-34054. The Clerk of this Court and the Clerk of the Bankruptcy Court to which this case is hereby referred are directed to take such actions as are necessary and appropriate to cause this matter to be docketed as an Adversary Proceeding associated with the consolidated Chapter 11 Bankruptcy of Highland Capital Management, L.P., Case No. 19-34054.

SO ORDERED.

SIGNED: September 20, 2021.


JANE J. BOYLE
UNITED STATES DISTRICT JUDGE

PACHULSKI STANG ZIEHL & JONES LLP
Jeffrey N. Pomerantz (CA Bar No. 143717) (*admitted pro hac vice*)
John A. Morris (NY Bar No. 266326) (*admitted pro hac vice*)
Gregory V. Demo (NY Bar No. 5371992) (*admitted pro hac vice*)
Hayley R. Winograd (NY Bar No. 5612569) (*admitted pro hac vice*)
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FACSIMILE: (972) 755-7110

Counsel for Highland Capital Management, L.P.

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

In re:	§	
	§	Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P., ¹	§	
	§	Case No. 19-34054-sgj11
Reorganized Debtor.	§	
CHARITABLE DAF FUND, L.P., AND CLO	§	
HOLDCO, LTD., DIRECTLY AND	§	
DERIVATELY,	§	
Plaintiffs,	§	Adversary Proceeding No.
	§	
vs.	§	21-03067-sgj
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	
HIGHLAND HCF ADVISOR, LTD., AND	§	
HIGHLAND CLO FUNDING LTD.,	§	
NOMINALLY,	§	
Defendants.	§	

¹ The Reorganized Debtor's last four digits of its taxpayer identification number are (6725). The headquarters and service address for the above-captioned Reorganized Debtor is 100 Crescent Court, Suite 1850, Dallas, TX 75201.

NOTICE OF HEARING

PLEASE TAKE NOTICE that the following motions (collectively, the “Motions”) pending in the above-referenced adversary proceeding have been scheduled for hearing on **Tuesday, November 23, 2021 at 9:30 a.m. (Central Time)** (the “Hearing”):

1. *Plaintiffs’ Motion to Stay All Proceedings* [AP **Docket No. 55**];
2. *Motion to Strike Reply Appendix* [AP **Docket No. 47**]; and
3. *Defendant Highland Capital Management, L.P.’s Motion to Dismiss Complaint* [AP **Docket No. 26**].

The Hearing on the Motions will be held via WebEx videoconference before The Honorable Stacey G. C. Jernigan, United States Bankruptcy Judge. The WebEx video participation/attendance link for the Hearing is: <https://us-courts.webex.com/meet/jerniga>.

A copy of the WebEx Hearing Instructions for the Hearing is attached hereto as **Exhibit A**; alternatively, the WebEx Hearing Instructions for the Hearing may be obtained from Judge Jernigan’s hearing/calendar site at: <https://www.txnb.uscourts.gov/judges-info/hearing-dates/judge-jernigans-hearing-dates>.

[Remainder of Page Intentionally Left Blank]

Dated: October 19, 2021.

PACHULSKI STANG ZIEHL & JONES LLP

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John A. Morris (NY Bar No. 266326)
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-and-

HAYWARD PLLC

/s/ Zachery Z. Annable

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Texas Bar No. 24053075
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Fax: (972) 755-7110

Counsel for Highland Capital Management, L.P.

EXHIBIT A

002881

WebEx Hearing Instructions Judge Stacey G. Jernigan

Pursuant to General Order 2020-14 issued by the Court on May 20, 2020, all hearings before Judge Stacey G. Jernigan are currently being conducted by WebEx videoconference unless ordered otherwise.

For WebEx Video Participation/Attendance:

Link: <https://us-courts.webex.com/meet/jerniga>

For WebEx Telephonic Only Participation/Attendance:

Dial-In: 1.650.479.3207

Meeting ID: 479 393 582

Participation/Attendance Requirements:

- Counsel and other parties in interest who plan to actively participate in the hearing are encouraged to attend the hearing in the WebEx video mode using the WebEx video link above. Counsel and other parties in interest who will not be seeking to introduce any evidence at the hearing and who wish to attend the hearing in a telephonic only mode may attend the hearing in the WebEx telephonic only mode using the WebEx dial-in and meeting ID above.
- Attendees should join the WebEx hearing at least 10 minutes prior to the hearing start time. Please be advised that a hearing may already be in progress. During hearings, participants are required to keep their lines on mute at all times that they are not addressing the Court or otherwise actively participating in the hearing. The Court reserves the right to disconnect or place on permanent mute any attendee that causes any disruption to the proceedings. For general information and tips with respect to WebEx participation and attendance, please see Clerk's Notice 20-04: https://www.txnb.uscourts.gov/sites/txnb/files/hearings/Webex%20Information%20and%20Tips_0.pdf
- **Witnesses are required to attend the hearing in the WebEx video mode and live testimony will only be accepted from witnesses who have the WebEx video function activated.** Telephonic testimony without accompanying video will not be accepted by the Court.
- All WebEx hearing attendees are required to comply with Judge Jernigan's Telephonic and Videoconference Hearing Policy (included within Judge Jernigan's Judge-Specific Guidelines): <https://www.txnb.uscourts.gov/content/judge-stacey-g-c-jernigan>

Exhibit Requirements:

- Any party intending to introduce documentary evidence at the hearing must file an exhibit list in the case with a true and correct copy of each designated exhibit filed as a separate, individual attachment thereto so that the Court and all participants have ready access to all designated exhibits.
- If the number of pages of such exhibits exceeds 100, then such party must also deliver two (2) sets of such exhibits in exhibit binders to the Court by no later than twenty-four (24) hours in advance of the hearing.

Notice of Hearing Content and Filing Requirements:

IMPORTANT: For all hearings that will be conducted by WebEx only:

- The Notice of Hearing filed in the case and served on parties in interest must: (1) provide notice that the hearing will be conducted by WebEx videoconference only, (2) provide notice of the above WebEx video participation/attendance link, and (3) attach a copy of these WebEx Hearing Instructions or provide notice that they may be obtained from Judge Jernigan's hearing/calendar site: <https://www.txnb.uscourts.gov/judges-info/hearing-dates/judge-jernigans-hearing-dates>.
- When electronically filing the Notice of Hearing via CM/ECF select "at <https://us-courts.webex.com/meet/jerniga>" as the location of the hearing (note: this option appears immediately after the first set of Wichita Falls locations). Do not select Judge Jernigan's Dallas courtroom as the location for the hearing.

002882

Highland Capital Management, L.P. (the “Debtor”) submits the following witness and exhibit list with respect to *Defendant Highland Capital Management, L.P.’s Motion to Dismiss Complaint* [Docket No. 26], which the Court has set for hearing at 9:30 a.m. (Central Time) on November 23, 2021 (the “Hearing”) in the above-styled adversary proceeding (the “Adversary Proceeding”).

A. Witnesses:

1. Any witness identified by or called by any other party; and
2. Any witness necessary for rebuttal.

B. Exhibits:

Number	Exhibit	Offered	Admitted
1.	HarbourVest 2017 Global Fund L.P. Proof of Claim No. 143, HarbourVest 2017 Global AIF L.P., Proof of Claim No. 147, HarbourVest Dover Street IX Investment L.P., Proof of Claim No. 150, HV International VIII Secondary L.P., Proof of Claim No. 153, HarbourVest Skew Base AIF L.P., Proof of Claim No. 154, and HarbourVest Partners L.P., Proof of Claim No. 149.		
2.	<i>Motion for Entry of an Order Approving Settlement with HarbourVest (Claim Nos. 143, 147, 149, 150, 153, 154) and Authorizing Actions Consistent Therewith</i> [Case No. 19-34054, Docket No. 1625]		
3.	<i>Settlement Agreement and Transfer Agreement for Ordinary Shares of Highland CLO Funding, Ltd.</i> [Case No. 19-34054, Docket No. 1631-1]		
4.	<i>James Dondero’s Objection to the Debtor’s Motion for Entry of an Order Approving Settlement with HarbourVest</i> , [Case No. 19-34054, Docket No. 1697]		
5.	<i>The Dugaboy Investment Trust and Get Good Trust’s Objection to the Debtor’s Motion for Entry of an Order Approving Settlement with HarbourVest (Claim Nos. 143, 147, 149, 150, 153, 154) and Authorizing Actions Consistent Therewith</i> [Case No. 19-34054, Docket No. 1706]		
6.	<i>CLO Holdco, LTD.’s Objection to HarbourVest Settlement</i> [Case No. 19-34054, Docket No. 1707]		

Number	Exhibit	Offered	Admitted
7.	Deposition Transcript of Michael Pugatch, January 11, 2021		
8.	<i>Omnibus Reply in Support of Debtor's Motion for Entry of an Order Approving Settlement with HarbourVest (Claim Nos. 143, 147, 149, 150, 153, 154) and Authorizing Actions Consistent Therewith</i> [Case No. 19-34054, Docket No. 1731]		
9.	Hearing Transcript, January 14, 2021 [Case No. 19-34054]		
10.	<i>Order Approving Debtor's Settlement with HarbourVest (Claim Nos. 143, 147, 149, 150, 153, 154) and Authorizing Actions Consistent Therewith</i> [Case No. 19-34054, Docket No. 1788]		
11.	<i>Original Complaint</i> [Docket No. 1]		
12.	Deposition Transcript of Grant Scott, January 21, 2021		
13.	Members Agreement, November 15, 2017		
14.	Any document entered or filed in the Reorganized Debtor's Bankruptcy Case, including any exhibits thereto		
15.	All exhibits necessary for impeachment and/or rebuttal purposes		
16.	All exhibits identified by or offered by any other party at the Hearing		

Dated: November 22, 2021.

PACHULSKI STANG ZIEHL & JONES LLP

Jeffrey N. Pomerantz (CA Bar No. 143717)
Robert J. Feinstein (NY Bar No. 1767805)
John A. Morris (NY Bar No. 266326)
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-and-

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/s/ Melissa S. Hayward

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Counsel for Highland Capital Management, L.P.

EXHIBIT 1

002887

CLAIM 143

Fill in this information to identify the case:

Debtor Highland Capital Management, L.P.

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

Case number 19-34054

Official Form 410
Proof of Claim

04/19

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

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

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

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

Part 1: Identify the Claim

1. Who is the current creditor?	<u>HarbourVest 2017 Global Fund L.P.</u> Name of the current creditor (the person or entity to be paid for this claim)	
	Other names the creditor used with the debtor _____	
2. Has this claim been acquired from someone else?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. From whom? _____	
3. Where should notices and payments to the creditor be sent?	Where should notices to the creditor be sent? <u>HarbourVest 2017 Global Fund L.P.</u> <u>Attn: Erica Weisgerber</u> <u>Debevoise and Plimpton LLP</u> <u>919 Third Avenue</u> <u>New York, NY 10022, U.S.A.</u> Contact phone <u>2129096000</u> Contact email <u>eweisgerber@debevoise.com</u> Uniform claim identifier for electronic payments in chapter 13 (if you use one): _____	Where should payments to the creditor be sent? (if different) <u>See summary page</u> Contact phone <u>6173483773</u> Contact email <u>agoren@harbourvest.com</u>
4. Does this claim amend one already filed?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Claim number on court claims registry (if known) _____ Filed on _____ MM / DD / YYYY	
5. Do you know if anyone else has filed a proof of claim for this claim?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Who made the earlier filing? _____	



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

6. Do you have any number you use to identify the debtor?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Last 4 digits of the debtor's account or any number you use to identify the debtor: ____
7. How much is the claim? \$ <u>See Annex</u>	Does this amount include interest or other charges? <input type="checkbox"/> No <input type="checkbox"/> Yes. Attach statement itemizing interest, fees, expenses, or other charges required by Bankruptcy Rule 3001(c)(2)(A).
8. What is the basis of the claim?	Examples: Goods sold, money loaned, lease, services performed, personal injury or wrongful death, or credit card. Attach redacted copies of any documents supporting the claim required by Bankruptcy Rule 3001(c). Limit disclosing information that is entitled to privacy, such as health care information. <u>See Annex</u>
9. Is all or part of the claim secured?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. The claim is secured by a lien on property. Nature or property: <input type="checkbox"/> Real estate: If the claim is secured by the debtor's principle residence, file a <i>Mortgage Proof of Claim Attachment</i> (Official Form 410-A) with this <i>Proof of Claim</i> . <input type="checkbox"/> Motor vehicle <input type="checkbox"/> Other. Describe: _____ Basis for perfection: _____ Attach redacted copies of documents, if any, that show evidence of perfection of a security interest (for example, a mortgage, lien, certificate of title, financing statement, or other document that shows the lien has been filed or recorded.) Value of property: \$ _____ Amount of the claim that is secured: \$ _____ Amount of the claim that is unsecured: \$ _____ (The sum of the secured and unsecured amount should match the amount in line 7.) Amount necessary to cure any default as of the date of the petition: \$ _____ Annual Interest Rate (when case was filed) _____ % <input type="checkbox"/> Fixed <input type="checkbox"/> Variable
10. Is this claim based on a lease?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Amount necessary to cure any default as of the date of the petition. \$ _____
11. Is this claim subject to a right of setoff?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Identify the property: _____



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

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

☒ No

☐ Yes. Check all that apply:

	Amount entitled to priority
<input type="checkbox"/> Domestic support obligations (including alimony and child support) under 11 U.S.C. § 507(a)(1)(A) or (a)(1)(B).	\$ _____
<input type="checkbox"/> Up to \$3,025* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use. 11 U.S.C. § 507(a)(7).	\$ _____
<input type="checkbox"/> Wages, salaries, or commissions (up to \$13,650*) earned within 180 days before the bankruptcy petition is filed or the debtor's business ends, whichever is earlier. 11 U.S.C. § 507(a)(4).	\$ _____
<input type="checkbox"/> Taxes or penalties owed to governmental units. 11 U.S.C. § 507(a)(8).	\$ _____
<input type="checkbox"/> Contributions to an employee benefit plan. 11 U.S.C. § 507(a)(5).	\$ _____
<input type="checkbox"/> Other. Specify subsection of 11 U.S.C. § 507(a)() that applies.	\$ _____

* Amounts are subject to adjustment on 4/01/22 and every 3 years after that for cases begun on or after the date of adjustment.

13. Is all or part of the claim pursuant to 11 U.S.C. § 503(b)(9)?

☒ No

☐ Yes. Indicate the amount of your claim arising from the value of any goods received by the debtor within 20 days before the date of commencement of the above case, in which the goods have been sold to the Debtor in the ordinary course of such Debtor's business. Attach documentation supporting such claim.

\$ _____

Part 3: Sign Below

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

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

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

Check the appropriate box:

- ☐ I am the creditor.
- ☒ I am the creditor's attorney or authorized agent.
- ☐ I am the trustee, or the debtor, or their authorized agent. Bankruptcy Rule 3004.
- ☐ I am a guarantor, surety, endorser, or other codebtor. Bankruptcy Rule 3005.

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

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

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

Executed on date 04/08/2020
MM / DD / YYYY

/s/Michael Pugatch
Signature

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

Name Michael Pugatch
First name Middle name Last name

Title Managing Director - Company: HarbourVest 2017 Global Fund L.P., by Harbo

Company by HarbourVest GP LLC, its General Partner, by HarbourVest Partners, LL
Identify the corporate servicer as the company if the authorized agent is a servicer.

Address

Contact phone _____ Email _____



For phone assistance: Domestic (877) 573-3984 | International (310) 751-1829

Debtor: 19-34054 - Highland Capital Management, L.P. District: Northern District of Texas, Dallas Division		
Creditor: HarbourVest 2017 Global Fund L.P. Attn: Erica Weisgerber Debevoise and Plimpton LLP 919 Third Avenue New York, NY, 10022 U.S.A. Phone: 2129096000 Phone 2: Fax: Email: eweisgerber@debevoise.com	Has Supporting Documentation: Yes, supporting documentation successfully uploaded Related Document Statement:	
	Has Related Claim: No Related Claim Filed By:	
	Filing Party: Authorized agent	
Disbursement/Notice Parties: HarbourVest 2017 Global Fund L.P. c/o HarbourVest Partners, LLC One Financial Center Boston, MA, 02111 U.S.A. Phone: 6173483773 Phone 2: Fax: E-mail: agoren@harbourvest.com DISBURSEMENT ADDRESS		
Other Names Used with Debtor:	Amends Claim: No Acquired Claim: No	
Basis of Claim: See Annex	Last 4 Digits: No	Uniform Claim Identifier:
Total Amount of Claim: See Annex	Includes Interest or Charges: None	
Has Priority Claim: No	Priority Under:	
Has Secured Claim: No Amount of 503(b)(9): No Based on Lease: No Subject to Right of Setoff: No	Nature of Secured Amount: Value of Property: Annual Interest Rate: Arrearage Amount: Basis for Perfection: Amount Unsecured:	
Submitted By: Michael Pugatch on 08-Apr-2020 4:40:16 p.m. Eastern Time Title: Managing Director - Company: HarbourVest 2017 Global Fund L.P., by HarbourVest 2017 Global Associates L.P., its Gen Partner Company: by HarbourVest GP LLC, its General Partner, by HarbourVest Partners, LLC, its Managing Member		

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

In re:

Highland Capital Management, L.P.

Debtor.

Chapter 11

Case No. 19-34054 (SGJ)

ANNEX TO PROOF OF CLAIM

1. This annex (the “Annex”) is part of and is incorporated by reference into the attached proof of claim (together with the Annex, the “Proof of Claim”) and describes in more detail the claims of HarbourVest 2017 Global Fund L.P. (the “Claimant”) against the debtor Highland Capital Management, L.P. (the “Debtor”).

2. The Claimant is a limited partner in one of the Debtor’s managed vehicles, Highland CLO Funding, Ltd. (“HCLOF”). Acis Capital Management GP, L.L.C. and Acis Capital Management L.P. (together, “Acis”), the portfolio manager for HCLOF, filed for chapter 11 in the United States Bankruptcy Court for the Northern District of Texas (the “Court”) on January 30, 2018. The Acis bankruptcy filing resulted from a dispute between Debtor and its former employee, Joshua Terry, who served as portfolio manager for Debtor’s collateral loan obligations funds (“CLO”) business. *See, e.g., Findings of Fact and Conclusions of Law in Support of Orders for Relief Issued After Trial on Contested Involuntary Bankruptcy Petition (“Involuntary Petition Ruling”)* [Case No. 18-30264 (SGJ), **Dkt. No. 118**]. As noted in more detail in the Court’s *Bench Ruling and Memorandum of Law in Support of: (A) Final Approval of Disclosure Statement; and (B) Confirmation of Chapter 11 Trustee’s Third Amended Joint Plan (“Confirmation Ruling”)* [Case No. 18-30264 (SGJ), **Dkt. No 827**] and related filings in the Acis

002893

bankruptcy cases, there has been extensive litigation regarding alleged improper conduct associated with the management of, and transactions relating to, Acis, including transactions with and related to HCLOF. *See, e.g., id.; Second Amended Complaint* [Case No. 18-03078(SGJ), Dkt. No. 157].

3. Due to the Acis bankruptcy and certain conduct alleged to have been undertaken by the Debtor (to whom Acis subcontracted its functions) and Debtor's employees (who were officers, employees, and agents of Acis), the Claimant has suffered significant harm. Such harm includes, but is not limited to, financial harm resulting from, among other things (i) court orders in the Acis bankruptcy that prevented certain CLOs in which HCLOF was invested from being refinanced or reset and court orders that otherwise regulated the activity of HCLOF; and (ii) significant fees and expenses related to the Acis bankruptcy that were charged to HCLOF. *See, e.g., Involuntary Petition Ruling* ¶ 27; *see also Confirmation Ruling*.

4. Claimant hereby files this Claim to assert any and all of its rights to payment, remedies, and other claims (including contingent or unliquidated claims) against the Debtor in connection with and relating to the foregoing harm, including for any amounts due or owed under the various agreements with the Debtor in connection with HCLOF (including, but not limited to, the Subscription and Transfer Agreement for Ordinary Shares Highland CLO Funding, Ltd., dated as of November 15, 2017, the Members Agreement Relating to the Company, dated as of November 15, 2017, the Highland CLO Funding, Ltd. Offering Memorandum dated November 15, 2017), and any and all legal and equitable claims or causes of action relating to the foregoing harm.

5. The Claimant has not attached the documentation supporting this Claim to this Proof of Claim because the documentation is voluminous and the Debtor has copies of such

documents. However, any requested relevant documents will be provided to the Official Committee of Unsecured Creditors, the Court, the United States Trustee and the Debtor in the event of a dispute regarding this Proof of Claim and will be made available for review by other parties in interest as appropriate upon reasonable request and after consultation with the Debtor and execution of appropriate confidentiality agreements.

6. This Proof of Claim is filed with a full reservation of rights, including the right to amend, update, modify, supplement or otherwise revise this Proof of Claim in any respect at any time. The filing of this Proof of Claim is not and should not be construed to be: (a) a waiver or release of any of the Claimant's rights against any person, entity or property accruing to it against the Debtor and its estate; (b) a waiver of the Claimant's rights to assert that **28 U.S.C. § 157(b)(2)(C)** is unconstitutional; (c) a consent or submission by the Claimant, or waiver of the Claimant's rights to object, to the jurisdiction of this Court with respect to the subject matter of any of the claims described herein, or any objection or other proceeding commenced with respect to any of the claims described herein, or any other proceeding commenced in the Debtor's chapter 11 case against or otherwise involving the Claimant; (d) a waiver or release of any right of the Claimant, or consent by the Claimant, to a trial by jury in this or any other court or proceeding; (e) a waiver or release of, or any limitation on, any right of the Claimant to have orders entered only after *de novo* review by a United States District Judge; (f) an election of remedies; or (g) a waiver of, or any other limitation on, any right of the Claimant to request withdrawal of the reference with respect to any matter, including, without limitation, any matter relating to this Proof of Claim.

7. Claimant's express reservation of all rights and causes of action, includes, without limitation, contingent or unliquidated rights that it or its affiliates may have against the Debtor,

as well as defenses, offsets and counterclaims. This description and classification of claims by the Claimant is not a concession or admission as to the correct characterization or treatment of any such claims or a waiver of any rights of the Claimant.

8. Furthermore, the Claimant expressly reserves its rights to (a) file additional proofs of claim for additional claims that may be based on the same or additional documents or facts or other liability or indebtedness of the Debtor to the Claimant under contract or otherwise; (b) assert claims for cure of defaults in any agreement that the Debtor or any trustee appointed in this chapter 11 case may seek to assume; (c) assert any and all other claims, causes of action, defenses, offsets or counterclaims against the Debtor or any other parties; (d) file a request for payment of an administrative expense under 11 U.S.C. §§ 503 and 507 for any or all of the claims or rights of payment described above and any additional amounts; and (e) seek recovery through any relevant third parties, including any of the Debtor's insurance coverage providers.

9. This Proof of Claim does not encompass all claims that the Claimant or its affiliates may have that arise after the Petition Date and are entitled to administrative priority, and the Claimant expressly reserves its right to file such claim or any similar claim at the appropriate time, including any such post-petition claims arising under these service contracts.

10. This Proof of Claim is filed without prejudice to the filing by the Claimant of additional proofs of claim or requests for payment with respect to any other indebtedness, liability or obligation of the Debtor. The Claimant does not, by this Proof of Claim or any amendment or other action, waive any rights with respect to any scheduled claim.

11. The Claimant reserves the right to withdraw, amend, clarify, modify or supplement this Proof of Claim to assert additional claims, causes of action or additional grounds for this Proof of Claim (including adding any additional contracts, agreements, obligations or

other relationships between the Claimant and the Debtor), as well as the right to file any separate or additional proofs of claim with respect to the claims set forth herein or otherwise, including for the purpose of fixing and liquidating any contingent or unliquidated claim set forth herein, or to file additional proofs of claim in respect of additional amounts or for any other reason.

12. In executing and filing this Proof of Claim, the Claimant does not submit to the jurisdiction of the Bankruptcy Court for the Northern District of Texas for any purpose other than with respect to this Proof of Claim against the Debtor, and does not waive or release any rights or remedies against any other person or entity that may be liable for all or part of this Proof of Claim.

13. The Claimant otherwise reserves its rights, and nothing herein shall prejudice the Claimant's rights, under any order of the Court previously entered in this chapter 11 case.

14. Payments on account of this Proof of Claim should be sent to the Claimant at the address specified for notices to the Claimant in Part 1.3 of the Proof of Claim.

CLAIM 147

Fill in this information to identify the case:

Debtor Highland Capital Management, L.P.

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

Case number 19-34054

Official Form 410
Proof of Claim

04/19

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

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

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

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

Part 1: Identify the Claim

1. Who is the current creditor?	<u>HarbourVest 2017 Global AIF L.P.</u> Name of the current creditor (the person or entity to be paid for this claim)	
	Other names the creditor used with the debtor _____	
2. Has this claim been acquired from someone else?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. From whom? _____	
3. Where should notices and payments to the creditor be sent?	Where should notices to the creditor be sent? <u>HarbourVest 2017 Global AIF L.P.</u> <u>Attn: Erica Weisgerber</u> <u>Debevoise and Plimpton LLP</u> <u>919 Third Avenue</u> <u>New York, NY 10022, U.S.A.</u> Contact phone <u>2129096000</u> Contact email <u>eweisgerber@debevoise.com</u>	Where should payments to the creditor be sent? (if different) <u>See summary page</u> Contact phone <u>6173483773</u> Contact email <u>agoren@harbourvest.com</u>
	Federal Rule of Bankruptcy Procedure (FRBP) 2002(g) Uniform claim identifier for electronic payments in chapter 13 (if you use one): _____	
4. Does this claim amend one already filed?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Claim number on court claims registry (if known) _____ Filed on _____ MM / DD / YYYY	
5. Do you know if anyone else has filed a proof of claim for this claim?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Who made the earlier filing? _____	



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

6. Do you have any number you use to identify the debtor?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Last 4 digits of the debtor's account or any number you use to identify the debtor: ____
7. How much is the claim? \$ <u>See Annex</u>	Does this amount include interest or other charges? <input type="checkbox"/> No <input type="checkbox"/> Yes. Attach statement itemizing interest, fees, expenses, or other charges required by Bankruptcy Rule 3001(c)(2)(A).
8. What is the basis of the claim?	Examples: Goods sold, money loaned, lease, services performed, personal injury or wrongful death, or credit card. Attach redacted copies of any documents supporting the claim required by Bankruptcy Rule 3001(c). Limit disclosing information that is entitled to privacy, such as health care information. <u>See Annex</u>
9. Is all or part of the claim secured?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. The claim is secured by a lien on property. Nature or property: <input type="checkbox"/> Real estate: If the claim is secured by the debtor's principle residence, file a <i>Mortgage Proof of Claim Attachment</i> (Official Form 410-A) with this <i>Proof of Claim</i> . <input type="checkbox"/> Motor vehicle <input type="checkbox"/> Other. Describe: _____ Basis for perfection: _____ Attach redacted copies of documents, if any, that show evidence of perfection of a security interest (for example, a mortgage, lien, certificate of title, financing statement, or other document that shows the lien has been filed or recorded.) Value of property: \$ _____ Amount of the claim that is secured: \$ _____ Amount of the claim that is unsecured: \$ _____ (The sum of the secured and unsecured amount should match the amount in line 7.) Amount necessary to cure any default as of the date of the petition: \$ _____ Annual Interest Rate (when case was filed) _____ % <input type="checkbox"/> Fixed <input type="checkbox"/> Variable
10. Is this claim based on a lease?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Amount necessary to cure any default as of the date of the petition. \$ _____
11. Is this claim subject to a right of setoff?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Identify the property: _____

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

☒ No

☐ Yes. Check all that apply:

	Amount entitled to priority
<input type="checkbox"/> Domestic support obligations (including alimony and child support) under 11 U.S.C. § 507(a)(1)(A) or (a)(1)(B).	\$ _____
<input type="checkbox"/> Up to \$3,025* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use. 11 U.S.C. § 507(a)(7).	\$ _____
<input type="checkbox"/> Wages, salaries, or commissions (up to \$13,650*) earned within 180 days before the bankruptcy petition is filed or the debtor's business ends, whichever is earlier. 11 U.S.C. § 507(a)(4).	\$ _____
<input type="checkbox"/> Taxes or penalties owed to governmental units. 11 U.S.C. § 507(a)(8).	\$ _____
<input type="checkbox"/> Contributions to an employee benefit plan. 11 U.S.C. § 507(a)(5).	\$ _____
<input type="checkbox"/> Other. Specify subsection of 11 U.S.C. § 507(a)() that applies.	\$ _____

* Amounts are subject to adjustment on 4/01/22 and every 3 years after that for cases begun on or after the date of adjustment.

13. Is all or part of the claim pursuant to 11 U.S.C. § 503(b)(9)?

☒ No

☐ Yes. Indicate the amount of your claim arising from the value of any goods received by the debtor within 20 days before the date of commencement of the above case, in which the goods have been sold to the Debtor in the ordinary course of such Debtor's business. Attach documentation supporting such claim.

\$ _____

Part 3: Sign Below

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

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

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Check the appropriate box:

- ☐ I am the creditor.
- ☒ I am the creditor's attorney or authorized agent.
- ☐ I am the trustee, or the debtor, or their authorized agent. Bankruptcy Rule 3004.
- ☐ I am a guarantor, surety, endorser, or other codebtor. Bankruptcy Rule 3005.

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

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

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

Executed on date 04/08/2020
MM / DD / YYYY

/s/Michael Pugatch
Signature

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

Name Michael Pugatch
First name Middle name Last name

Title Managing Director-Company: HarbourVest 2017 Global AIF L.P., by HarbourV

Company Inv Fund Mgr, by HarbourVest Partners L.P., its Duly Appointed Investme
Identify the corporate servicer as the company if the authorized agent is a servicer.

Address

Contact phone _____ Email _____



For phone assistance: Domestic (877) 573-3984 | International (310) 751-1829

Debtor: 19-34054 - Highland Capital Management, L.P. District: Northern District of Texas, Dallas Division		
Creditor: HarbourVest 2017 Global AIF L.P. Attn: Erica Weisgerber Debevoise and Plimpton LLP 919 Third Avenue New York, NY, 10022 U.S.A. Phone: 2129096000 Phone 2: Fax: Email: eweisgerber@debevoise.com	Has Supporting Documentation: Yes, supporting documentation successfully uploaded Related Document Statement:	
	Has Related Claim: No Related Claim Filed By:	
	Filing Party: Authorized agent	
Disbursement/Notice Parties: HarbourVest 2017 Global AIF L.P. c/o HarbourVest Partners, LLC One Financial Center Boston, MA, 02111 Phone: 6173483773 Phone 2: Fax: E-mail: agoren@harbourvest.com DISBURSEMENT ADDRESS		
Other Names Used with Debtor:	Amends Claim: No Acquired Claim: No	
Basis of Claim: See Annex	Last 4 Digits: No	Uniform Claim Identifier:
Total Amount of Claim: See Annex	Includes Interest or Charges: None	
Has Priority Claim: No	Priority Under:	
Has Secured Claim: No Amount of 503(b)(9): No Based on Lease: No Subject to Right of Setoff: No	Nature of Secured Amount: Value of Property: Annual Interest Rate: Arrearage Amount: Basis for Perfection: Amount Unsecured:	
Submitted By: Michael Pugatch on 08-Apr-2020 4:49:59 p.m. Eastern Time Title: Managing Director-Company: HarbourVest 2017 Global AIF L.P., by HarbourVest Partners Ireland Limited, its Alternative Company: Inv Fund Mgr, by HarbourVest Partners L.P., its Duly Appointed Investment Manager, by HarbourVest Partners, LLC, its Gen Ptr		

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In re:

Highland Capital Management, L.P.

Debtor.

Chapter 11

Case No. 19-34054 (SGJ)

ANNEX TO PROOF OF CLAIM

1. This annex (the “Annex”) is part of and is incorporated by reference into the attached proof of claim (together with the Annex, the “Proof of Claim”) and describes in more detail the claims of HarbourVest 2017 Global AIF L.P. (the “Claimant”) against the debtor Highland Capital Management, L.P. (the “Debtor”).

2. The Claimant is a limited partner in one of the Debtor’s managed vehicles, Highland CLO Funding, Ltd. (“HCLOF”). Acis Capital Management GP, L.L.C. and Acis Capital Management L.P. (together, “Acis”), the portfolio manager for HCLOF, filed for chapter 11 in the United States Bankruptcy Court for the Northern District of Texas (the “Court”) on January 30, 2018. The Acis bankruptcy filing resulted from a dispute between Debtor and its former employee, Joshua Terry, who served as portfolio manager for Debtor’s collateral loan obligations funds (“CLO”) business. *See, e.g., Findings of Fact and Conclusions of Law in Support of Orders for Relief Issued After Trial on Contested Involuntary Bankruptcy Petition (“Involuntary Petition Ruling”)* [Case No. 18-30264 (SGJ), **Dkt. No. 118**]. As noted in more detail in the Court’s *Bench Ruling and Memorandum of Law in Support of: (A) Final Approval of Disclosure Statement; and (B) Confirmation of Chapter 11 Trustee’s Third Amended Joint Plan (“Confirmation Ruling”)* [Case No. 18-30264 (SGJ), **Dkt. No 827**] and related filings in the Acis

bankruptcy cases, there has been extensive litigation regarding alleged improper conduct associated with the management of, and transactions relating to, Acis, including transactions with and related to HCLOF. *See, e.g., id.; Second Amended Complaint* [Case No. 18-03078(SGJ), **Dkt. No. 157**].

3. Due to the Acis bankruptcy and certain conduct alleged to have been undertaken by the Debtor (to whom Acis subcontracted its functions) and Debtor's employees (who were officers, employees, and agents of Acis), the Claimant has suffered significant harm. Such harm includes, but is not limited to, financial harm resulting from, among other things (i) court orders in the Acis bankruptcy that prevented certain CLOs in which HCLOF was invested from being refinanced or reset and court orders that otherwise regulated the activity of HCLOF; and (ii) significant fees and expenses related to the Acis bankruptcy that were charged to HCLOF. *See, e.g., Involuntary Petition Ruling* ¶ 27; *see also Confirmation Ruling*.

4. Claimant hereby files this Claim to assert any and all of its rights to payment, remedies, and other claims (including contingent or unliquidated claims) against the Debtor in connection with and relating to the foregoing harm, including for any amounts due or owed under the various agreements with the Debtor in connection with HCLOF (including, but not limited to, the Subscription and Transfer Agreement for Ordinary Shares Highland CLO Funding, Ltd., dated as of November 15, 2017, the Members Agreement Relating to the Company, dated as of November 15, 2017, the Highland CLO Funding, Ltd. Offering Memorandum dated November 15, 2017), and any and all legal and equitable claims or causes of action relating to the foregoing harm.

5. The Claimant has not attached the documentation supporting this Claim to this Proof of Claim because the documentation is voluminous and the Debtor has copies of such

documents. However, any requested relevant documents will be provided to the Official Committee of Unsecured Creditors, the Court, the United States Trustee and the Debtor in the event of a dispute regarding this Proof of Claim and will be made available for review by other parties in interest as appropriate upon reasonable request and after consultation with the Debtor and execution of appropriate confidentiality agreements.

6. This Proof of Claim is filed with a full reservation of rights, including the right to amend, update, modify, supplement or otherwise revise this Proof of Claim in any respect at any time. The filing of this Proof of Claim is not and should not be construed to be: (a) a waiver or release of any of the Claimant's rights against any person, entity or property accruing to it against the Debtor and its estate; (b) a waiver of the Claimant's rights to assert that **28 U.S.C. § 157(b)(2)(C)** is unconstitutional; (c) a consent or submission by the Claimant, or waiver of the Claimant's rights to object, to the jurisdiction of this Court with respect to the subject matter of any of the claims described herein, or any objection or other proceeding commenced with respect to any of the claims described herein, or any other proceeding commenced in the Debtor's chapter 11 case against or otherwise involving the Claimant; (d) a waiver or release of any right of the Claimant, or consent by the Claimant, to a trial by jury in this or any other court or proceeding; (e) a waiver or release of, or any limitation on, any right of the Claimant to have orders entered only after *de novo* review by a United States District Judge; (f) an election of remedies; or (g) a waiver of, or any other limitation on, any right of the Claimant to request withdrawal of the reference with respect to any matter, including, without limitation, any matter relating to this Proof of Claim.

7. Claimant's express reservation of all rights and causes of action, includes, without limitation, contingent or unliquidated rights that it or its affiliates may have against the Debtor,

as well as defenses, offsets and counterclaims. This description and classification of claims by the Claimant is not a concession or admission as to the correct characterization or treatment of any such claims or a waiver of any rights of the Claimant.

8. Furthermore, the Claimant expressly reserves its rights to (a) file additional proofs of claim for additional claims that may be based on the same or additional documents or facts or other liability or indebtedness of the Debtor to the Claimant under contract or otherwise; (b) assert claims for cure of defaults in any agreement that the Debtor or any trustee appointed in this chapter 11 case may seek to assume; (c) assert any and all other claims, causes of action, defenses, offsets or counterclaims against the Debtor or any other parties; (d) file a request for payment of an administrative expense under 11 U.S.C. §§ 503 and 507 for any or all of the claims or rights of payment described above and any additional amounts; and (e) seek recovery through any relevant third parties, including any of the Debtor's insurance coverage providers.

9. This Proof of Claim does not encompass all claims that the Claimant or its affiliates may have that arise after the Petition Date and are entitled to administrative priority, and the Claimant expressly reserves its right to file such claim or any similar claim at the appropriate time, including any such post-petition claims arising under these service contracts.

10. This Proof of Claim is filed without prejudice to the filing by the Claimant of additional proofs of claim or requests for payment with respect to any other indebtedness, liability or obligation of the Debtor. The Claimant does not, by this Proof of Claim or any amendment or other action, waive any rights with respect to any scheduled claim.

11. The Claimant reserves the right to withdraw, amend, clarify, modify or supplement this Proof of Claim to assert additional claims, causes of action or additional grounds for this Proof of Claim (including adding any additional contracts, agreements, obligations or

other relationships between the Claimant and the Debtor), as well as the right to file any separate or additional proofs of claim with respect to the claims set forth herein or otherwise, including for the purpose of fixing and liquidating any contingent or unliquidated claim set forth herein, or to file additional proofs of claim in respect of additional amounts or for any other reason.

12. In executing and filing this Proof of Claim, the Claimant does not submit to the jurisdiction of the Bankruptcy Court for the Northern District of Texas for any purpose other than with respect to this Proof of Claim against the Debtor, and does not waive or release any rights or remedies against any other person or entity that may be liable for all or part of this Proof of Claim.

13. The Claimant otherwise reserves its rights, and nothing herein shall prejudice the Claimant's rights, under any order of the Court previously entered in this chapter 11 case.

14. Payments on account of this Proof of Claim should be sent to the Claimant at the address specified for notices to the Claimant in Part 1.3 of the Proof of Claim.

CLAIM 150

Fill in this information to identify the case:

Debtor Highland Capital Management, L.P.

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

Case number 19-34054

Official Form 410
Proof of Claim

04/19

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

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

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

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

Part 1: Identify the Claim

1. Who is the current creditor?	<u>HarbourVest Dover Street IX Investment L.P.</u> Name of the current creditor (the person or entity to be paid for this claim)	
	Other names the creditor used with the debtor _____	
2. Has this claim been acquired from someone else?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. From whom? _____	
3. Where should notices and payments to the creditor be sent?	Where should notices to the creditor be sent? See summary page	Where should payments to the creditor be sent? (if different) See summary page
Federal Rule of Bankruptcy Procedure (FRBP) 2002(g)		
	Contact phone <u>2129096000</u> Contact email <u>eweisgerber@debevoise.com</u>	Contact phone <u>6173483773</u> Contact email <u>agoren@harbourvest.com</u>
Uniform claim identifier for electronic payments in chapter 13 (if you use one): _____		
4. Does this claim amend one already filed?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Claim number on court claims registry (if known) _____ Filed on _____ MM / DD / YYYY	
5. Do you know if anyone else has filed a proof of claim for this claim?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Who made the earlier filing? _____	



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

6. Do you have any number you use to identify the debtor?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Last 4 digits of the debtor's account or any number you use to identify the debtor: ____
7. How much is the claim? \$ <u>See Annex</u>	Does this amount include interest or other charges? <input type="checkbox"/> No <input type="checkbox"/> Yes. Attach statement itemizing interest, fees, expenses, or other charges required by Bankruptcy Rule 3001(c)(2)(A).
8. What is the basis of the claim?	Examples: Goods sold, money loaned, lease, services performed, personal injury or wrongful death, or credit card. Attach redacted copies of any documents supporting the claim required by Bankruptcy Rule 3001(c). Limit disclosing information that is entitled to privacy, such as health care information. <u>See Annex</u>
9. Is all or part of the claim secured?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. The claim is secured by a lien on property. Nature or property: <input type="checkbox"/> Real estate: If the claim is secured by the debtor's principle residence, file a <i>Mortgage Proof of Claim Attachment</i> (Official Form 410-A) with this <i>Proof of Claim</i> . <input type="checkbox"/> Motor vehicle <input type="checkbox"/> Other. Describe: _____ Basis for perfection: _____ Attach redacted copies of documents, if any, that show evidence of perfection of a security interest (for example, a mortgage, lien, certificate of title, financing statement, or other document that shows the lien has been filed or recorded.) Value of property: \$ _____ Amount of the claim that is secured: \$ _____ Amount of the claim that is unsecured: \$ _____ (The sum of the secured and unsecured amount should match the amount in line 7.) Amount necessary to cure any default as of the date of the petition: \$ _____ Annual Interest Rate (when case was filed) _____ % <input type="checkbox"/> Fixed <input type="checkbox"/> Variable
10. Is this claim based on a lease?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Amount necessary to cure any default as of the date of the petition. \$ _____
11. Is this claim subject to a right of setoff?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Identify the property: _____



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

☒ No

☐ Yes. Check all that apply:

	Amount entitled to priority
<input type="checkbox"/> Domestic support obligations (including alimony and child support) under 11 U.S.C. § 507(a)(1)(A) or (a)(1)(B).	\$ _____
<input type="checkbox"/> Up to \$3,025* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use. 11 U.S.C. § 507(a)(7).	\$ _____
<input type="checkbox"/> Wages, salaries, or commissions (up to \$13,650*) earned within 180 days before the bankruptcy petition is filed or the debtor's business ends, whichever is earlier. 11 U.S.C. § 507(a)(4).	\$ _____
<input type="checkbox"/> Taxes or penalties owed to governmental units. 11 U.S.C. § 507(a)(8).	\$ _____
<input type="checkbox"/> Contributions to an employee benefit plan. 11 U.S.C. § 507(a)(5).	\$ _____
<input type="checkbox"/> Other. Specify subsection of 11 U.S.C. § 507(a)() that applies.	\$ _____

* Amounts are subject to adjustment on 4/01/22 and every 3 years after that for cases begun on or after the date of adjustment.

13. Is all or part of the claim pursuant to 11 U.S.C. § 503(b)(9)?

☒ No

☐ Yes. Indicate the amount of your claim arising from the value of any goods received by the debtor within 20 days before the date of commencement of the above case, in which the goods have been sold to the Debtor in the ordinary course of such Debtor's business. Attach documentation supporting such claim.

\$ _____

Part 3: Sign Below

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

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

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

Check the appropriate box:

- ☐ I am the creditor.
- ☒ I am the creditor's attorney or authorized agent.
- ☐ I am the trustee, or the debtor, or their authorized agent. Bankruptcy Rule 3004.
- ☐ I am a guarantor, surety, endorser, or other codebtor. Bankruptcy Rule 3005.

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

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

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

Executed on date 04/08/2020
MM / DD / YYYY

/s/Michael Pugatch
Signature

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

Name Michael Pugatch
First name Middle name Last name

Title Managing Director-Company: HarbourVest Dover Street IX Investment L.P.,

Company Inv Fund Mgr, by HarbourVest Partners L.P., its Duly Appointed Investme
Identify the corporate servicer as the company if the authorized agent is a servicer.

Address

Contact phone _____ Email _____



For phone assistance: Domestic (877) 573-3984 | International (310) 751-1829

Debtor: 19-34054 - Highland Capital Management, L.P. District: Northern District of Texas, Dallas Division		
Creditor: HarbourVest Dover Street IX Investment L.P. Attn: Erica Weisgerber Debevoise and Plimpton LLP 919 Third Avenue New York, NY, 10022 U.S.A. Phone: 2129096000 Phone 2: Fax: Email: eweisgerber@debevoise.com	Has Supporting Documentation: Yes, supporting documentation successfully uploaded Related Document Statement:	
	Has Related Claim: No Related Claim Filed By:	
	Filing Party: Authorized agent	
Disbursement/Notice Parties: HarbourVest Dover Street IX Investment L.P. c/o HarbourVest Partners, LLC One Financial Center Boston, MA, 02111 U.S.A. Phone: 6173483773 Phone 2: Fax: E-mail: agoren@harbourvest.com DISBURSEMENT ADDRESS		
Other Names Used with Debtor:	Amends Claim: No Acquired Claim: No	
Basis of Claim: See Annex	Last 4 Digits: No	Uniform Claim Identifier:
Total Amount of Claim: See Annex	Includes Interest or Charges: None	
Has Priority Claim: No	Priority Under:	
Has Secured Claim: No Amount of 503(b)(9): No Based on Lease: No Subject to Right of Setoff: No	Nature of Secured Amount: Value of Property: Annual Interest Rate: Arrearage Amount: Basis for Perfection: Amount Unsecured:	
Submitted By: Michael Pugatch on 08-Apr-2020 4:59:00 p.m. Eastern Time Title: Managing Director-Company: HarbourVest Dover Street IX Investment L.P., by HarbourVest Partners Ireland Limited, its Alter Company: Inv Fund Mgr, by HarbourVest Partners L.P., its Duly Appointed Investment Manager, by HarbourVest Partners, LLC, its Gen Ptr		

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In re:

Highland Capital Management, L.P.

Debtor.

Chapter 11

Case No. 19-34054 (SGJ)

ANNEX TO PROOF OF CLAIM

1. This annex (the “Annex”) is part of and is incorporated by reference into the attached proof of claim (together with the Annex, the “Proof of Claim”) and describes in more detail the claims of HarbourVest Dover Street IX Investment L.P. (the “Claimant”) against the debtor Highland Capital Management, L.P. (the “Debtor”).

2. The Claimant is a limited partner in one of the Debtor’s managed vehicles, Highland CLO Funding, Ltd. (“HCLOF”). Acis Capital Management GP, L.L.C. and Acis Capital Management L.P. (together, “Acis”), the portfolio manager for HCLOF, filed for chapter 11 in the United States Bankruptcy Court for the Northern District of Texas (the “Court”) on January 30, 2018. The Acis bankruptcy filing resulted from a dispute between Debtor and its former employee, Joshua Terry, who served as portfolio manager for Debtor’s collateral loan obligations funds (“CLO”) business. *See, e.g., Findings of Fact and Conclusions of Law in Support of Orders for Relief Issued After Trial on Contested Involuntary Bankruptcy Petition (“Involuntary Petition Ruling”)* [Case No. 18-30264 (SGJ), **Dkt. No. 118**]. As noted in more detail in the Court’s *Bench Ruling and Memorandum of Law in Support of: (A) Final Approval of Disclosure Statement; and (B) Confirmation of Chapter 11 Trustee’s Third Amended Joint Plan (“Confirmation Ruling”)* [Case No. 18-30264 (SGJ), **Dkt. No 827**] and related filings in the Acis

bankruptcy cases, there has been extensive litigation regarding alleged improper conduct associated with the management of, and transactions relating to, Acis, including transactions with and related to HCLOF. *See, e.g., id.; Second Amended Complaint* [Case No. 18-03078(SGJ), Dkt. No. 157].

3. Due to the Acis bankruptcy and certain conduct alleged to have been undertaken by the Debtor (to whom Acis subcontracted its functions) and Debtor's employees (who were officers, employees, and agents of Acis), the Claimant has suffered significant harm. Such harm includes, but is not limited to, financial harm resulting from, among other things (i) court orders in the Acis bankruptcy that prevented certain CLOs in which HCLOF was invested from being refinanced or reset and court orders that otherwise regulated the activity of HCLOF; and (ii) significant fees and expenses related to the Acis bankruptcy that were charged to HCLOF. *See, e.g., Involuntary Petition Ruling* ¶ 27; *see also Confirmation Ruling*.

4. Claimant hereby files this Claim to assert any and all of its rights to payment, remedies, and other claims (including contingent or unliquidated claims) against the Debtor in connection with and relating to the foregoing harm, including for any amounts due or owed under the various agreements with the Debtor in connection with HCLOF (including, but not limited to, the Subscription and Transfer Agreement for Ordinary Shares Highland CLO Funding, Ltd., dated as of November 15, 2017, the Members Agreement Relating to the Company, dated as of November 15, 2017, the Highland CLO Funding, Ltd. Offering Memorandum dated November 15, 2017), and any and all legal and equitable claims or causes of action relating to the foregoing harm.

5. The Claimant has not attached the documentation supporting this Claim to this Proof of Claim because the documentation is voluminous and the Debtor has copies of such

documents. However, any requested relevant documents will be provided to the Official Committee of Unsecured Creditors, the Court, the United States Trustee and the Debtor in the event of a dispute regarding this Proof of Claim and will be made available for review by other parties in interest as appropriate upon reasonable request and after consultation with the Debtor and execution of appropriate confidentiality agreements.

6. This Proof of Claim is filed with a full reservation of rights, including the right to amend, update, modify, supplement or otherwise revise this Proof of Claim in any respect at any time. The filing of this Proof of Claim is not and should not be construed to be: (a) a waiver or release of any of the Claimant's rights against any person, entity or property accruing to it against the Debtor and its estate; (b) a waiver of the Claimant's rights to assert that **28 U.S.C. § 157(b)(2)(C)** is unconstitutional; (c) a consent or submission by the Claimant, or waiver of the Claimant's rights to object, to the jurisdiction of this Court with respect to the subject matter of any of the claims described herein, or any objection or other proceeding commenced with respect to any of the claims described herein, or any other proceeding commenced in the Debtor's chapter 11 case against or otherwise involving the Claimant; (d) a waiver or release of any right of the Claimant, or consent by the Claimant, to a trial by jury in this or any other court or proceeding; (e) a waiver or release of, or any limitation on, any right of the Claimant to have orders entered only after *de novo* review by a United States District Judge; (f) an election of remedies; or (g) a waiver of, or any other limitation on, any right of the Claimant to request withdrawal of the reference with respect to any matter, including, without limitation, any matter relating to this Proof of Claim.

7. Claimant's express reservation of all rights and causes of action, includes, without limitation, contingent or unliquidated rights that it or its affiliates may have against the Debtor,

as well as defenses, offsets and counterclaims. This description and classification of claims by the Claimant is not a concession or admission as to the correct characterization or treatment of any such claims or a waiver of any rights of the Claimant.

8. Furthermore, the Claimant expressly reserves its rights to (a) file additional proofs of claim for additional claims that may be based on the same or additional documents or facts or other liability or indebtedness of the Debtor to the Claimant under contract or otherwise; (b) assert claims for cure of defaults in any agreement that the Debtor or any trustee appointed in this chapter 11 case may seek to assume; (c) assert any and all other claims, causes of action, defenses, offsets or counterclaims against the Debtor or any other parties; (d) file a request for payment of an administrative expense under 11 U.S.C. §§ 503 and 507 for any or all of the claims or rights of payment described above and any additional amounts; and (e) seek recovery through any relevant third parties, including any of the Debtor's insurance coverage providers.

9. This Proof of Claim does not encompass all claims that the Claimant or its affiliates may have that arise after the Petition Date and are entitled to administrative priority, and the Claimant expressly reserves its right to file such claim or any similar claim at the appropriate time, including any such post-petition claims arising under these service contracts.

10. This Proof of Claim is filed without prejudice to the filing by the Claimant of additional proofs of claim or requests for payment with respect to any other indebtedness, liability or obligation of the Debtor. The Claimant does not, by this Proof of Claim or any amendment or other action, waive any rights with respect to any scheduled claim.

11. The Claimant reserves the right to withdraw, amend, clarify, modify or supplement this Proof of Claim to assert additional claims, causes of action or additional grounds for this Proof of Claim (including adding any additional contracts, agreements, obligations or

other relationships between the Claimant and the Debtor), as well as the right to file any separate or additional proofs of claim with respect to the claims set forth herein or otherwise, including for the purpose of fixing and liquidating any contingent or unliquidated claim set forth herein, or to file additional proofs of claim in respect of additional amounts or for any other reason.

12. In executing and filing this Proof of Claim, the Claimant does not submit to the jurisdiction of the Bankruptcy Court for the Northern District of Texas for any purpose other than with respect to this Proof of Claim against the Debtor, and does not waive or release any rights or remedies against any other person or entity that may be liable for all or part of this Proof of Claim.

13. The Claimant otherwise reserves its rights, and nothing herein shall prejudice the Claimant's rights, under any order of the Court previously entered in this chapter 11 case.

14. Payments on account of this Proof of Claim should be sent to the Claimant at the address specified for notices to the Claimant in Part 1.3 of the Proof of Claim.

CLAIM 153

Fill in this information to identify the case:

Debtor Highland Capital Management, L.P.

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

Case number 19-34054

Official Form 410
Proof of Claim

04/19

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

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

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

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

Part 1: Identify the Claim

1. Who is the current creditor?	<u>HV International VIII Secondary L.P.</u> Name of the current creditor (the person or entity to be paid for this claim)	
	Other names the creditor used with the debtor _____	
2. Has this claim been acquired from someone else?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. From whom? _____	
3. Where should notices and payments to the creditor be sent?	Where should notices to the creditor be sent? <u>HV International VIII Secondary L.P.</u> <u>Attn: Erica Weisgerber</u> <u>Debevoise and Plimpton LLP</u> <u>919 Third Avenue</u> <u>New York, NY 10022, U.S.A.</u> Contact phone <u>2129096000</u> Contact email <u>eweisgerber@debevoise.com</u>	Where should payments to the creditor be sent? (if different) <u>See summary page</u> Contact phone <u>6173483773</u> Contact email <u>agoren@harbourvest.com</u>
	Federal Rule of Bankruptcy Procedure (FRBP) 2002(g)	
	Uniform claim identifier for electronic payments in chapter 13 (if you use one): _____	
4. Does this claim amend one already filed?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Claim number on court claims registry (if known) _____ Filed on _____ MM / DD / YYYY	
5. Do you know if anyone else has filed a proof of claim for this claim?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Who made the earlier filing? _____	



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

6. Do you have any number you use to identify the debtor?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Last 4 digits of the debtor's account or any number you use to identify the debtor: ____
7. How much is the claim? \$ <u>See Annex</u>	Does this amount include interest or other charges? <input type="checkbox"/> No <input type="checkbox"/> Yes. Attach statement itemizing interest, fees, expenses, or other charges required by Bankruptcy Rule 3001(c)(2)(A).
8. What is the basis of the claim?	Examples: Goods sold, money loaned, lease, services performed, personal injury or wrongful death, or credit card. Attach redacted copies of any documents supporting the claim required by Bankruptcy Rule 3001(c). Limit disclosing information that is entitled to privacy, such as health care information. <u>See Annex</u>
9. Is all or part of the claim secured?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. The claim is secured by a lien on property. Nature or property: <input type="checkbox"/> Real estate: If the claim is secured by the debtor's principle residence, file a <i>Mortgage Proof of Claim Attachment</i> (Official Form 410-A) with this <i>Proof of Claim</i> . <input type="checkbox"/> Motor vehicle <input type="checkbox"/> Other. Describe: _____ Basis for perfection: _____ Attach redacted copies of documents, if any, that show evidence of perfection of a security interest (for example, a mortgage, lien, certificate of title, financing statement, or other document that shows the lien has been filed or recorded.) Value of property: \$ _____ Amount of the claim that is secured: \$ _____ Amount of the claim that is unsecured: \$ _____ (The sum of the secured and unsecured amount should match the amount in line 7.) Amount necessary to cure any default as of the date of the petition: \$ _____ Annual Interest Rate (when case was filed) _____ % <input type="checkbox"/> Fixed <input type="checkbox"/> Variable
10. Is this claim based on a lease?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Amount necessary to cure any default as of the date of the petition. \$ _____
11. Is this claim subject to a right of setoff?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Identify the property: _____



<p>12. Is all or part of the claim entitled to priority under 11 U.S.C. § 507(a)?</p> <p>A claim may be partly priority and partly nonpriority. For example, in some categories, the law limits the amount entitled to priority.</p>	<p><input checked="" type="checkbox"/> No</p> <p><input type="checkbox"/> Yes. Check all that apply:</p> <table><tr><td><input type="checkbox"/> Domestic support obligations (including alimony and child support) under 11 U.S.C. § 507(a)(1)(A) or (a)(1)(B).</td><td>Amount entitled to priority</td></tr><tr><td><input type="checkbox"/> Up to \$3,025* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use. 11 U.S.C. § 507(a)(7).</td><td>\$ _____</td></tr><tr><td><input type="checkbox"/> Wages, salaries, or commissions (up to \$13,650*) earned within 180 days before the bankruptcy petition is filed or the debtor's business ends, whichever is earlier. 11 U.S.C. § 507(a)(4).</td><td>\$ _____</td></tr><tr><td><input type="checkbox"/> Taxes or penalties owed to governmental units. 11 U.S.C. § 507(a)(8).</td><td>\$ _____</td></tr><tr><td><input type="checkbox"/> Contributions to an employee benefit plan. 11 U.S.C. § 507(a)(5).</td><td>\$ _____</td></tr><tr><td><input type="checkbox"/> Other. Specify subsection of 11 U.S.C. § 507(a)() that applies.</td><td>\$ _____</td></tr></table>	<input type="checkbox"/> Domestic support obligations (including alimony and child support) under 11 U.S.C. § 507(a)(1)(A) or (a)(1)(B).	Amount entitled to priority	<input type="checkbox"/> Up to \$3,025* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use. 11 U.S.C. § 507(a)(7).	\$ _____	<input type="checkbox"/> Wages, salaries, or commissions (up to \$13,650*) earned within 180 days before the bankruptcy petition is filed or the debtor's business ends, whichever is earlier. 11 U.S.C. § 507(a)(4).	\$ _____	<input type="checkbox"/> Taxes or penalties owed to governmental units. 11 U.S.C. § 507(a)(8).	\$ _____	<input type="checkbox"/> Contributions to an employee benefit plan. 11 U.S.C. § 507(a)(5).	\$ _____	<input type="checkbox"/> Other. Specify subsection of 11 U.S.C. § 507(a)() that applies.	\$ _____
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<input type="checkbox"/> Other. Specify subsection of 11 U.S.C. § 507(a)() that applies.	\$ _____												
<p>* Amounts are subject to adjustment on 4/01/22 and every 3 years after that for cases begun on or after the date of adjustment.</p>													
<p>13. Is all or part of the claim pursuant to 11 U.S.C. § 503(b)(9)?</p>	<p><input checked="" type="checkbox"/> No</p> <p><input type="checkbox"/> Yes. Indicate the amount of your claim arising from the value of any goods received by the debtor within 20 days before the date of commencement of the above case, in which the goods have been sold to the Debtor in the ordinary course of such Debtor's business. Attach documentation supporting such claim.</p> <p>\$ _____</p>												

Part 3: Sign Below

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

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

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

Check the appropriate box:

- ☐ I am the creditor.
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- ☐ I am the trustee, or the debtor, or their authorized agent. Bankruptcy Rule 3004.
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I understand that an authorized signature on this *Proof of Claim* serves as an acknowledgement that when calculating the amount of the claim, the creditor gave the debtor credit for any payments received toward the debt.

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

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

Executed on date 04/08/2020
MM / DD / YYYY

/s/Michael Pugatch
Signature

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

Name Michael Pugatch
First name Middle name Last name

Title Managing Director-Company: HV International VIII Secondary L.P., by HII

Company by HarbourVest GP LLC, its General Partner, by HarbourVest Partners, LL
Identify the corporate servicer as the company if the authorized agent is a servicer.

Address

Contact phone _____ Email _____



For phone assistance: Domestic (877) 573-3984 | International (310) 751-1829

Debtor: 19-34054 - Highland Capital Management, L.P. District: Northern District of Texas, Dallas Division		
Creditor: HV International VIII Secondary L.P. Attn: Erica Weisgerber Debevoise and Plimpton LLP 919 Third Avenue New York, NY, 10022 U.S.A. Phone: 2129096000 Phone 2: Fax: Email: eweisgerber@debevoise.com	Has Supporting Documentation: Yes, supporting documentation successfully uploaded Related Document Statement:	
	Has Related Claim: No Related Claim Filed By:	
	Filing Party: Authorized agent	
Disbursement/Notice Parties: HV International VIII Secondary L.P. c/o HarbourVest Partners, LLC One Financial Center Boston, MA, 02111 U.S.A. Phone: 6173483773 Phone 2: Fax: E-mail: agoren@harbourvest.com DISBURSEMENT ADDRESS		
Other Names Used with Debtor:	Amends Claim: No Acquired Claim: No	
Basis of Claim: See Annex	Last 4 Digits: No	Uniform Claim Identifier:
Total Amount of Claim: See Annex	Includes Interest or Charges: None	
Has Priority Claim: No	Priority Under:	
Has Secured Claim: No Amount of 503(b)(9): No Based on Lease: No Subject to Right of Setoff: No	Nature of Secured Amount: Value of Property: Annual Interest Rate: Arrearage Amount: Basis for Perfection: Amount Unsecured:	
Submitted By: Michael Pugatch on 08-Apr-2020 5:16:54 p.m. Eastern Time Title: Managing Director-Company: HV International VIII Secondary L.P., by HIPEP VIII Associates L.P., its General Partner, Company: by HarbourVest GP LLC, its General Partner, by HarbourVest Partners, LLC, its Managing Member		

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

In re:

Highland Capital Management, L.P.

Debtor.

Chapter 11

Case No. 19-34054 (SGJ)

ANNEX TO PROOF OF CLAIM

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2. The Claimant is a limited partner in one of the Debtor’s managed vehicles, Highland CLO Funding, Ltd. (“HCLOF”). Acis Capital Management GP, L.L.C. and Acis Capital Management L.P. (together, “Acis”), the portfolio manager for HCLOF, filed for chapter 11 in the United States Bankruptcy Court for the Northern District of Texas (the “Court”) on January 30, 2018. The Acis bankruptcy filing resulted from a dispute between Debtor and its former employee, Joshua Terry, who served as portfolio manager for Debtor’s collateral loan obligations funds (“CLO”) business. *See, e.g., Findings of Fact and Conclusions of Law in Support of Orders for Relief Issued After Trial on Contested Involuntary Bankruptcy Petition (“Involuntary Petition Ruling”)* [Case No. 18-30264 (SGJ), **Dkt. No. 118**]. As noted in more detail in the Court’s *Bench Ruling and Memorandum of Law in Support of: (A) Final Approval of Disclosure Statement; and (B) Confirmation of Chapter 11 Trustee’s Third Amended Joint Plan (“Confirmation Ruling”)* [Case No. 18-30264 (SGJ), **Dkt. No 827**] and related filings in the Acis

bankruptcy cases, there has been extensive litigation regarding alleged improper conduct associated with the management of, and transactions relating to, Acis, including transactions with and related to HCLOF. *See, e.g., id.; Second Amended Complaint* [Case No. 18-03078(SGJ), Dkt. No. 157].

3. Due to the Acis bankruptcy and certain conduct alleged to have been undertaken by the Debtor (to whom Acis subcontracted its functions) and Debtor's employees (who were officers, employees, and agents of Acis), the Claimant has suffered significant harm. Such harm includes, but is not limited to, financial harm resulting from, among other things (i) court orders in the Acis bankruptcy that prevented certain CLOs in which HCLOF was invested from being refinanced or reset and court orders that otherwise regulated the activity of HCLOF; and (ii) significant fees and expenses related to the Acis bankruptcy that were charged to HCLOF. *See, e.g., Involuntary Petition Ruling* ¶ 27; *see also Confirmation Ruling*.

4. Claimant hereby files this Claim to assert any and all of its rights to payment, remedies, and other claims (including contingent or unliquidated claims) against the Debtor in connection with and relating to the foregoing harm, including for any amounts due or owed under the various agreements with the Debtor in connection with HCLOF (including, but not limited to, the Subscription and Transfer Agreement for Ordinary Shares Highland CLO Funding, Ltd., dated as of November 15, 2017, the Members Agreement Relating to the Company, dated as of November 15, 2017, the Highland CLO Funding, Ltd. Offering Memorandum dated November 15, 2017), and any and all legal and equitable claims or causes of action relating to the foregoing harm.

5. The Claimant has not attached the documentation supporting this Claim to this Proof of Claim because the documentation is voluminous and the Debtor has copies of such

documents. However, any requested relevant documents will be provided to the Official Committee of Unsecured Creditors, the Court, the United States Trustee and the Debtor in the event of a dispute regarding this Proof of Claim and will be made available for review by other parties in interest as appropriate upon reasonable request and after consultation with the Debtor and execution of appropriate confidentiality agreements.

6. This Proof of Claim is filed with a full reservation of rights, including the right to amend, update, modify, supplement or otherwise revise this Proof of Claim in any respect at any time. The filing of this Proof of Claim is not and should not be construed to be: (a) a waiver or release of any of the Claimant's rights against any person, entity or property accruing to it against the Debtor and its estate; (b) a waiver of the Claimant's rights to assert that **28 U.S.C. § 157(b)(2)(C)** is unconstitutional; (c) a consent or submission by the Claimant, or waiver of the Claimant's rights to object, to the jurisdiction of this Court with respect to the subject matter of any of the claims described herein, or any objection or other proceeding commenced with respect to any of the claims described herein, or any other proceeding commenced in the Debtor's chapter 11 case against or otherwise involving the Claimant; (d) a waiver or release of any right of the Claimant, or consent by the Claimant, to a trial by jury in this or any other court or proceeding; (e) a waiver or release of, or any limitation on, any right of the Claimant to have orders entered only after *de novo* review by a United States District Judge; (f) an election of remedies; or (g) a waiver of, or any other limitation on, any right of the Claimant to request withdrawal of the reference with respect to any matter, including, without limitation, any matter relating to this Proof of Claim.

7. Claimant's express reservation of all rights and causes of action, includes, without limitation, contingent or unliquidated rights that it or its affiliates may have against the Debtor,

as well as defenses, offsets and counterclaims. This description and classification of claims by the Claimant is not a concession or admission as to the correct characterization or treatment of any such claims or a waiver of any rights of the Claimant.

8. Furthermore, the Claimant expressly reserves its rights to (a) file additional proofs of claim for additional claims that may be based on the same or additional documents or facts or other liability or indebtedness of the Debtor to the Claimant under contract or otherwise; (b) assert claims for cure of defaults in any agreement that the Debtor or any trustee appointed in this chapter 11 case may seek to assume; (c) assert any and all other claims, causes of action, defenses, offsets or counterclaims against the Debtor or any other parties; (d) file a request for payment of an administrative expense under 11 U.S.C. §§ 503 and 507 for any or all of the claims or rights of payment described above and any additional amounts; and (e) seek recovery through any relevant third parties, including any of the Debtor's insurance coverage providers.

9. This Proof of Claim does not encompass all claims that the Claimant or its affiliates may have that arise after the Petition Date and are entitled to administrative priority, and the Claimant expressly reserves its right to file such claim or any similar claim at the appropriate time, including any such post-petition claims arising under these service contracts.

10. This Proof of Claim is filed without prejudice to the filing by the Claimant of additional proofs of claim or requests for payment with respect to any other indebtedness, liability or obligation of the Debtor. The Claimant does not, by this Proof of Claim or any amendment or other action, waive any rights with respect to any scheduled claim.

11. The Claimant reserves the right to withdraw, amend, clarify, modify or supplement this Proof of Claim to assert additional claims, causes of action or additional grounds for this Proof of Claim (including adding any additional contracts, agreements, obligations or

other relationships between the Claimant and the Debtor), as well as the right to file any separate or additional proofs of claim with respect to the claims set forth herein or otherwise, including for the purpose of fixing and liquidating any contingent or unliquidated claim set forth herein, or to file additional proofs of claim in respect of additional amounts or for any other reason.

12. In executing and filing this Proof of Claim, the Claimant does not submit to the jurisdiction of the Bankruptcy Court for the Northern District of Texas for any purpose other than with respect to this Proof of Claim against the Debtor, and does not waive or release any rights or remedies against any other person or entity that may be liable for all or part of this Proof of Claim.

13. The Claimant otherwise reserves its rights, and nothing herein shall prejudice the Claimant's rights, under any order of the Court previously entered in this chapter 11 case.

14. Payments on account of this Proof of Claim should be sent to the Claimant at the address specified for notices to the Claimant in Part 1.3 of the Proof of Claim.

CLAIM 154

Fill in this information to identify the case:

Debtor Highland Capital Management, L.P.

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

Case number 19-34054

Official Form 410
Proof of Claim

04/19

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

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

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

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

Part 1: Identify the Claim

1. Who is the current creditor?	<u>HarbourVest Skew Base AIF L.P.</u> Name of the current creditor (the person or entity to be paid for this claim)	
	Other names the creditor used with the debtor _____	
2. Has this claim been acquired from someone else?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. From whom? _____	
3. Where should notices and payments to the creditor be sent?	Where should notices to the creditor be sent? <u>HarbourVest Skew Base AIF L.P.</u> <u>Attn: Erica Weisgerber</u> <u>Debevoise and Plimpton LLP</u> <u>919 Third Avenue</u> <u>New York, NY 10022, U.S.A.</u> Contact phone <u>2129096000</u> Contact email <u>eweisgerber@debevoise.com</u>	Where should payments to the creditor be sent? (if different) <u>See summary page</u> Contact phone <u>6173483773</u> Contact email <u>agoren@harbourvest.com</u>
	Uniform claim identifier for electronic payments in chapter 13 (if you use one): _____	
4. Does this claim amend one already filed?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Claim number on court claims registry (if known) _____ Filed on _____ MM / DD / YYYY	
5. Do you know if anyone else has filed a proof of claim for this claim?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Who made the earlier filing? _____	



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

6. Do you have any number you use to identify the debtor?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Last 4 digits of the debtor's account or any number you use to identify the debtor: ____
7. How much is the claim? \$ <u>See Annex</u>	Does this amount include interest or other charges? <input type="checkbox"/> No <input type="checkbox"/> Yes. Attach statement itemizing interest, fees, expenses, or other charges required by Bankruptcy Rule 3001(c)(2)(A).
8. What is the basis of the claim?	Examples: Goods sold, money loaned, lease, services performed, personal injury or wrongful death, or credit card. Attach redacted copies of any documents supporting the claim required by Bankruptcy Rule 3001(c). Limit disclosing information that is entitled to privacy, such as health care information. <u>See Annex</u>
9. Is all or part of the claim secured?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. The claim is secured by a lien on property. Nature or property: <input type="checkbox"/> Real estate: If the claim is secured by the debtor's principle residence, file a <i>Mortgage Proof of Claim Attachment</i> (Official Form 410-A) with this <i>Proof of Claim</i> . <input type="checkbox"/> Motor vehicle <input type="checkbox"/> Other. Describe: _____ Basis for perfection: _____ Attach redacted copies of documents, if any, that show evidence of perfection of a security interest (for example, a mortgage, lien, certificate of title, financing statement, or other document that shows the lien has been filed or recorded.) Value of property: \$ _____ Amount of the claim that is secured: \$ _____ Amount of the claim that is unsecured: \$ _____ (The sum of the secured and unsecured amount should match the amount in line 7.) Amount necessary to cure any default as of the date of the petition: \$ _____ Annual Interest Rate (when case was filed) _____ % <input type="checkbox"/> Fixed <input type="checkbox"/> Variable
10. Is this claim based on a lease?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Amount necessary to cure any default as of the date of the petition. \$ _____
11. Is this claim subject to a right of setoff?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Identify the property: _____



12. Is all or part of the claim entitled to priority under 11 U.S.C. § 507(a)? A claim may be partly priority and partly nonpriority. For example, in some categories, the law limits the amount entitled to priority.	<div style="display: flex; justify-content: space-between;"><div><input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Check all that apply:</div><div style="text-align: right; background-color: #f2f2f2; padding: 5px;">Amount entitled to priority</div></div> <div style="margin-top: 10px;"><div style="display: flex; justify-content: space-between;"><input type="checkbox"/> Domestic support obligations (including alimony and child support) under 11 U.S.C. § 507(a)(1)(A) or (a)(1)(B).<div style="width: 150px; border-bottom: 1px solid black;"></div></div><div style="display: flex; justify-content: space-between;"><input type="checkbox"/> Up to \$3,025* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use. 11 U.S.C. § 507(a)(7).<div style="width: 150px; border-bottom: 1px solid black;"></div></div><div style="display: flex; justify-content: space-between;"><input type="checkbox"/> Wages, salaries, or commissions (up to \$13,650*) earned within 180 days before the bankruptcy petition is filed or the debtor's business ends, whichever is earlier. 11 U.S.C. § 507(a)(4).<div style="width: 150px; border-bottom: 1px solid black;"></div></div><div style="display: flex; justify-content: space-between;"><input type="checkbox"/> Taxes or penalties owed to governmental units. 11 U.S.C. § 507(a)(8).<div style="width: 150px; border-bottom: 1px solid black;"></div></div><div style="display: flex; justify-content: space-between;"><input type="checkbox"/> Contributions to an employee benefit plan. 11 U.S.C. § 507(a)(5).<div style="width: 150px; border-bottom: 1px solid black;"></div></div><div style="display: flex; justify-content: space-between;"><input type="checkbox"/> Other. Specify subsection of 11 U.S.C. § 507(a)() that applies.<div style="width: 150px; border-bottom: 1px solid black;"></div></div></div>
* Amounts are subject to adjustment on 4/01/22 and every 3 years after that for cases begun on or after the date of adjustment.	
13. Is all or part of the claim pursuant to 11 U.S.C. § 503(b)(9)?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Indicate the amount of your claim arising from the value of any goods received by the debtor within 20 days before the date of commencement of the above case, in which the goods have been sold to the Debtor in the ordinary course of such Debtor's business. Attach documentation supporting such claim. \$ _____

Part 3: Sign Below

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

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

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

Check the appropriate box:

- ☐ I am the creditor.
- ☒ I am the creditor's attorney or authorized agent.
- ☐ I am the trustee, or the debtor, or their authorized agent. Bankruptcy Rule 3004.
- ☐ I am a guarantor, surety, endorser, or other codebtor. Bankruptcy Rule 3005.

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

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

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

Executed on date 04/08/2020
MM / DD / YYYY

/s/Michael Pugatch
Signature

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

Name Michael Pugatch
First name Middle name Last name

Title Managing Director-Company: HarbourVest Skew Base AIF L.P., by HarbourVest

Company Fund Manager, by HarbourVest Partners L.P., its Duly Appointed Investme
Identify the corporate servicer as the company if the authorized agent is a servicer.

Address _____

Contact phone _____ Email _____



For phone assistance: Domestic (877) 573-3984 | International (310) 751-1829

Debtor: 19-34054 - Highland Capital Management, L.P. District: Northern District of Texas, Dallas Division		
Creditor: HarbourVest Skew Base AIF L.P. Attn: Erica Weisgerber Debevoise and Plimpton LLP 919 Third Avenue New York, NY, 10022 U.S.A. Phone: 2129096000 Phone 2: Fax: Email: eweisgerber@debevoise.com	Has Supporting Documentation: Yes, supporting documentation successfully uploaded Related Document Statement:	
	Has Related Claim: No Related Claim Filed By:	
	Filing Party: Authorized agent	
Disbursement/Notice Parties: HarbourVest Skew Base AIF L.P. c/o HarbourVest Partners, LLC One Financial Center Boston, MA, 02111 Phone: 6173483773 Phone 2: Fax: E-mail: agoren@harbourvest.com DISBURSEMENT ADDRESS		
Other Names Used with Debtor:	Amends Claim: No Acquired Claim: No	
Basis of Claim: See Annex	Last 4 Digits: No	Uniform Claim Identifier:
Total Amount of Claim: See Annex	Includes Interest or Charges: None	
Has Priority Claim: No	Priority Under:	
Has Secured Claim: No Amount of 503(b)(9): No Based on Lease: No Subject to Right of Setoff: No	Nature of Secured Amount: Value of Property: Annual Interest Rate: Arrearage Amount: Basis for Perfection: Amount Unsecured:	
Submitted By: Michael Pugatch on 08-Apr-2020 5:11:50 p.m. Eastern Time Title: Managing Director-Company: HarbourVest Skew Base AIF L.P., by HarbourVest Partners Ireland Limited, its Alternative Inv Company: Fund Manager, by HarbourVest Partners L.P., its Duly Appointed Investment Manager, by HarbourVest Partners, LLC, its Gen Ptr		

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

In re:

Highland Capital Management, L.P.

Debtor.

Chapter 11

Case No. 19-34054 (SGJ)

ANNEX TO PROOF OF CLAIM

1. This annex (the “Annex”) is part of and is incorporated by reference into the attached proof of claim (together with the Annex, the “Proof of Claim”) and describes in more detail the claims of HarbourVest Skew Base AIF L.P. (the “Claimant”) against the debtor Highland Capital Management, L.P. (the “Debtor”).

2. The Claimant is a limited partner in one of the Debtor’s managed vehicles, Highland CLO Funding, Ltd. (“HCLOF”). Acis Capital Management GP, L.L.C. and Acis Capital Management L.P. (together, “Acis”), the portfolio manager for HCLOF, filed for chapter 11 in the United States Bankruptcy Court for the Northern District of Texas (the “Court”) on January 30, 2018. The Acis bankruptcy filing resulted from a dispute between Debtor and its former employee, Joshua Terry, who served as portfolio manager for Debtor’s collateral loan obligations funds (“CLO”) business. *See, e.g., Findings of Fact and Conclusions of Law in Support of Orders for Relief Issued After Trial on Contested Involuntary Bankruptcy Petition* (“Involuntary Petition Ruling”) [Case No. 18-30264 (SGJ), **Dkt. No. 118**]. As noted in more detail in the Court’s *Bench Ruling and Memorandum of Law in Support of: (A) Final Approval of Disclosure Statement; and (B) Confirmation of Chapter 11 Trustee’s Third Amended Joint Plan* (“Confirmation Ruling”) [Case No. 18-30264 (SGJ), **Dkt. No 827**] and related filings

002933

in the Acis bankruptcy cases, there has been extensive litigation regarding alleged improper conduct associated with the management of, and transactions relating to, Acis, including transactions with and related to HCLOF. *See, e.g., id.; Second Amended Complaint* [Case No. 18-03078(SGJ), Dkt. No. 157].

3. Due to the Acis bankruptcy and certain conduct alleged to have been undertaken by the Debtor (to whom Acis subcontracted its functions) and Debtor's employees (who were officers, employees, and agents of Acis), the Claimant has suffered significant harm. Such harm includes, but is not limited to, financial harm resulting from, among other things (i) court orders in the Acis bankruptcy that prevented certain CLOs in which HCLOF was invested from being refinanced or reset and court orders that otherwise regulated the activity of HCLOF; and (ii) significant fees and expenses related to the Acis bankruptcy that were charged to HCLOF. *See, e.g., Involuntary Petition Ruling* ¶ 27; *see also Confirmation Ruling*.

4. Claimant hereby files this Claim to assert any and all of its rights to payment, remedies, and other claims (including contingent or unliquidated claims) against the Debtor in connection with and relating to the foregoing harm, including for any amounts due or owed under the various agreements with the Debtor in connection with HCLOF (including, but not limited to, the Subscription and Transfer Agreement for Ordinary Shares Highland CLO Funding, Ltd., dated as of November 15, 2017, the Members Agreement Relating to the Company, dated as of November 15, 2017, the Highland CLO Funding, Ltd. Offering Memorandum dated November 15, 2017), and any and all legal and equitable claims or causes of action relating to the foregoing harm.

5. The Claimant has not attached the documentation supporting this Claim to this Proof of Claim because the documentation is voluminous and the Debtor has copies of such

documents. However, any requested relevant documents will be provided to the Official Committee of Unsecured Creditors, the Court, the United States Trustee and the Debtor in the event of a dispute regarding this Proof of Claim and will be made available for review by other parties in interest as appropriate upon reasonable request and after consultation with the Debtor and execution of appropriate confidentiality agreements.

6. This Proof of Claim is filed with a full reservation of rights, including the right to amend, update, modify, supplement or otherwise revise this Proof of Claim in any respect at any time. The filing of this Proof of Claim is not and should not be construed to be: (a) a waiver or release of any of the Claimant's rights against any person, entity or property accruing to it against the Debtor and its estate; (b) a waiver of the Claimant's rights to assert that **28 U.S.C. § 157(b)(2)(C)** is unconstitutional; (c) a consent or submission by the Claimant, or waiver of the Claimant's rights to object, to the jurisdiction of this Court with respect to the subject matter of any of the claims described herein, or any objection or other proceeding commenced with respect to any of the claims described herein, or any other proceeding commenced in the Debtor's chapter 11 case against or otherwise involving the Claimant; (d) a waiver or release of any right of the Claimant, or consent by the Claimant, to a trial by jury in this or any other court or proceeding; (e) a waiver or release of, or any limitation on, any right of the Claimant to have orders entered only after *de novo* review by a United States District Judge; (f) an election of remedies; or (g) a waiver of, or any other limitation on, any right of the Claimant to request withdrawal of the reference with respect to any matter, including, without limitation, any matter relating to this Proof of Claim.

7. Claimant's express reservation of all rights and causes of action, includes, without limitation, contingent or unliquidated rights that it or its affiliates may have against the Debtor,

as well as defenses, offsets and counterclaims. This description and classification of claims by the Claimant is not a concession or admission as to the correct characterization or treatment of any such claims or a waiver of any rights of the Claimant.

8. Furthermore, the Claimant expressly reserves its rights to (a) file additional proofs of claim for additional claims that may be based on the same or additional documents or facts or other liability or indebtedness of the Debtor to the Claimant under contract or otherwise; (b) assert claims for cure of defaults in any agreement that the Debtor or any trustee appointed in this chapter 11 case may seek to assume; (c) assert any and all other claims, causes of action, defenses, offsets or counterclaims against the Debtor or any other parties; (d) file a request for payment of an administrative expense under 11 U.S.C. §§ 503 and 507 for any or all of the claims or rights of payment described above and any additional amounts; and (e) seek recovery through any relevant third parties, including any of the Debtor's insurance coverage providers.

9. This Proof of Claim does not encompass all claims that the Claimant or its affiliates may have that arise after the Petition Date and are entitled to administrative priority, and the Claimant expressly reserves its right to file such claim or any similar claim at the appropriate time, including any such post-petition claims arising under these service contracts.

10. This Proof of Claim is filed without prejudice to the filing by the Claimant of additional proofs of claim or requests for payment with respect to any other indebtedness, liability or obligation of the Debtor. The Claimant does not, by this Proof of Claim or any amendment or other action, waive any rights with respect to any scheduled claim.

11. The Claimant reserves the right to withdraw, amend, clarify, modify or supplement this Proof of Claim to assert additional claims, causes of action or additional grounds for this Proof of Claim (including adding any additional contracts, agreements, obligations or

other relationships between the Claimant and the Debtor), as well as the right to file any separate or additional proofs of claim with respect to the claims set forth herein or otherwise, including for the purpose of fixing and liquidating any contingent or unliquidated claim set forth herein, or to file additional proofs of claim in respect of additional amounts or for any other reason.

12. In executing and filing this Proof of Claim, the Claimant does not submit to the jurisdiction of the Bankruptcy Court for the Northern District of Texas for any purpose other than with respect to this Proof of Claim against the Debtor, and does not waive or release any rights or remedies against any other person or entity that may be liable for all or part of this Proof of Claim.

13. The Claimant otherwise reserves its rights, and nothing herein shall prejudice the Claimant's rights, under any order of the Court previously entered in this chapter 11 case.

14. Payments on account of this Proof of Claim should be sent to the Claimant at the address specified for notices to the Claimant in Part 1.3 of the Proof of Claim.

CLAIM 149

Fill in this information to identify the case:

Debtor Highland Capital Management, L.P.

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

Case number 19-34054

Official Form 410
Proof of Claim

04/19

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

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

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

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

Part 1: Identify the Claim

1. Who is the current creditor?	<u>HarbourVest Partners L.P. on behalf of funds and accounts under management</u> Name of the current creditor (the person or entity to be paid for this claim)	
	Other names the creditor used with the debtor _____	
2. Has this claim been acquired from someone else?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. From whom? _____	
3. Where should notices and payments to the creditor be sent?	Where should notices to the creditor be sent? See summary page	Where should payments to the creditor be sent? (if different) See summary page
Federal Rule of Bankruptcy Procedure (FRBP) 2002(g)		
	Contact phone <u>2129096000</u> Contact email <u>eweisgerber@debevoise.com</u>	Contact phone <u>6173483773</u> Contact email <u>agoren@harbourvest.com</u>
Uniform claim identifier for electronic payments in chapter 13 (if you use one): _____		
4. Does this claim amend one already filed?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Claim number on court claims registry (if known) _____ Filed on _____ MM / DD / YYYY	
5. Do you know if anyone else has filed a proof of claim for this claim?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Who made the earlier filing? _____	



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

6. Do you have any number you use to identify the debtor?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Last 4 digits of the debtor's account or any number you use to identify the debtor: ____
7. How much is the claim? \$ <u>See Annex</u>	Does this amount include interest or other charges? <input type="checkbox"/> No <input type="checkbox"/> Yes. Attach statement itemizing interest, fees, expenses, or other charges required by Bankruptcy Rule 3001(c)(2)(A).
8. What is the basis of the claim?	Examples: Goods sold, money loaned, lease, services performed, personal injury or wrongful death, or credit card. Attach redacted copies of any documents supporting the claim required by Bankruptcy Rule 3001(c). Limit disclosing information that is entitled to privacy, such as health care information. <u>See Annex</u>
9. Is all or part of the claim secured?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. The claim is secured by a lien on property. Nature or property: <input type="checkbox"/> Real estate: If the claim is secured by the debtor's principle residence, file a <i>Mortgage Proof of Claim Attachment</i> (Official Form 410-A) with this <i>Proof of Claim</i> . <input type="checkbox"/> Motor vehicle <input type="checkbox"/> Other. Describe: _____ Basis for perfection: _____ Attach redacted copies of documents, if any, that show evidence of perfection of a security interest (for example, a mortgage, lien, certificate of title, financing statement, or other document that shows the lien has been filed or recorded.) Value of property: \$ _____ Amount of the claim that is secured: \$ _____ Amount of the claim that is unsecured: \$ _____ (The sum of the secured and unsecured amount should match the amount in line 7.) Amount necessary to cure any default as of the date of the petition: \$ _____ Annual Interest Rate (when case was filed) _____ % <input type="checkbox"/> Fixed <input type="checkbox"/> Variable
10. Is this claim based on a lease?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Amount necessary to cure any default as of the date of the petition. \$ _____
11. Is this claim subject to a right of setoff?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Identify the property: _____



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

☒ No

☐ Yes. Check all that apply:

	Amount entitled to priority
<input type="checkbox"/> Domestic support obligations (including alimony and child support) under 11 U.S.C. § 507(a)(1)(A) or (a)(1)(B).	\$ _____
<input type="checkbox"/> Up to \$3,025* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use. 11 U.S.C. § 507(a)(7).	\$ _____
<input type="checkbox"/> Wages, salaries, or commissions (up to \$13,650*) earned within 180 days before the bankruptcy petition is filed or the debtor's business ends, whichever is earlier. 11 U.S.C. § 507(a)(4).	\$ _____
<input type="checkbox"/> Taxes or penalties owed to governmental units. 11 U.S.C. § 507(a)(8).	\$ _____
<input type="checkbox"/> Contributions to an employee benefit plan. 11 U.S.C. § 507(a)(5).	\$ _____
<input type="checkbox"/> Other. Specify subsection of 11 U.S.C. § 507(a)() that applies.	\$ _____

* Amounts are subject to adjustment on 4/01/22 and every 3 years after that for cases begun on or after the date of adjustment.

13. Is all or part of the claim pursuant to 11 U.S.C. § 503(b)(9)?

☒ No

☐ Yes. Indicate the amount of your claim arising from the value of any goods received by the debtor within 20 days before the date of commencement of the above case, in which the goods have been sold to the Debtor in the ordinary course of such Debtor's business. Attach documentation supporting such claim.

\$ _____

Part 3: Sign Below

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

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

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

Check the appropriate box:

- ☐ I am the creditor.
- ☒ I am the creditor's attorney or authorized agent.
- ☐ I am the trustee, or the debtor, or their authorized agent. Bankruptcy Rule 3004.
- ☐ I am a guarantor, surety, endorser, or other codebtor. Bankruptcy Rule 3005.

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

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

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

Executed on date 04/08/2020
MM / DD / YYYY

/s/Michael Pugatch
Signature

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

Name Michael Pugatch
First name Middle name Last name

Title Managing Director

Company HarbourVest Partners L.P., on behalf of funds and accounts under manage
Identify the corporate servicer as the company if the authorized agent is a servicer.

Address

Contact phone _____ Email _____



For phone assistance: Domestic (877) 573-3984 | International (310) 751-1829

Debtor: 19-34054 - Highland Capital Management, L.P. District: Northern District of Texas, Dallas Division		
Creditor: HarbourVest Partners L.P. on behalf of funds and accounts under management Attn: Erica Weisgerber Debevoise and Plimpton LLP 919 Third Avenue New York, NY, 10022 U.S.A. Phone: 2129096000 Phone 2: Fax: Email: eweisgerber@debevoise.com	Has Supporting Documentation: Yes, supporting documentation successfully uploaded Related Document Statement:	
	Has Related Claim: No Related Claim Filed By:	
	Filing Party: Authorized agent	
Disbursement/Notice Parties: HarbourVest Partners L.P. c/o HarbourVest Partners, LLC One Financial Center Boston, MA, 02111 U.S.A. Phone: 6173483773 Phone 2: Fax: E-mail: agoren@harbourvest.com DISBURSEMENT ADDRESS		
Other Names Used with Debtor:	Amends Claim: No Acquired Claim: No	
Basis of Claim: See Annex	Last 4 Digits: No	Uniform Claim Identifier:
Total Amount of Claim: See Annex	Includes Interest or Charges: None	
Has Priority Claim: No	Priority Under:	
Has Secured Claim: No Amount of 503(b)(9): No Based on Lease: No Subject to Right of Setoff: No	Nature of Secured Amount: Value of Property: Annual Interest Rate: Arrearage Amount: Basis for Perfection: Amount Unsecured:	
Submitted By: Michael Pugatch on 08-Apr-2020 5:06:59 p.m. Eastern Time Title: Managing Director Company: HarbourVest Partners L.P., on behalf of funds and accounts under management, by HarbourVest Partners, LLC, its Gen Partner		

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

In re:

Highland Capital Management, L.P.

Debtor.

Chapter 11

Case No. 19-34054 (SGJ)

ANNEX TO PROOF OF CLAIM

1. This annex (the “Annex”) is part of and is incorporated by reference into the attached proof of claim (together with the Annex, the “Proof of Claim”) and describes in more detail the claims of HarbourVest Partners L.P. on behalf of funds and accounts under management (the “Claimant”) against the debtor Highland Capital Management, L.P. (the “Debtor”).

2. The Claimant manages investment funds that are limited partners in one of the Debtor’s managed vehicles, Highland CLO Funding, Ltd. (“HCLOF”). Acis Capital Management GP, L.L.C. and Acis Capital Management L.P. (together, “Acis”), the portfolio manager for HCLOF, filed for chapter 11 in the United States Bankruptcy Court for the Northern District of Texas (the “Court”) on January 30, 2018. The Acis bankruptcy filing resulted from a dispute between Debtor and its former employee, Joshua Terry, who served as portfolio manager for Debtor’s collateral loan obligations funds (“CLO”) business. *See, e.g., Findings of Fact and Conclusions of Law in Support of Orders for Relief Issued After Trial on Contested Involuntary Bankruptcy Petition* (“Involuntary Petition Ruling”) [Case No. 18-30264 (SGJ), **Dkt. No. 118**]. As noted in more detail in the Court’s *Bench Ruling and Memorandum of Law in Support of: (A) Final Approval of Disclosure Statement; and (B) Confirmation of Chapter 11 Trustee’s Third*

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Amended Joint Plan (“Confirmation Ruling”) [Case No. 18-30264 (SGJ), Dkt. No. 827] and related filings in the Acis bankruptcy cases, there has been extensive litigation regarding alleged improper conduct associated with the management of, and transactions relating to, Acis, including transactions with and related to HCLOF. *See, e.g., id.; Second Amended Complaint* [Case No. 18-03078(SGJ), Dkt. No. 157].

3. Due to the Acis bankruptcy and certain conduct alleged to have been undertaken by the Debtor (to whom Acis subcontracted its functions) and Debtor’s employees (who were officers, employees, and agents of Acis), the Claimant has suffered significant harm. Such harm includes, but is not limited to, financial harm resulting from, among other things (i) court orders in the Acis bankruptcy that prevented certain CLOs in which HCLOF was invested from being refinanced or reset and court orders that otherwise regulated the activity of HCLOF; and (ii) significant fees and expenses related to the Acis bankruptcy that were charged to HCLOF. *See, e.g., Involuntary Petition Ruling* ¶ 27; *see also Confirmation Ruling*.

4. Claimant hereby files this Claim to assert any and all of its rights to payment, remedies, and other claims (including contingent or unliquidated claims) against the Debtor in connection with and relating to the foregoing harm, including for any amounts due or owed under the various agreements with the Debtor in connection with HCLOF (including, but not limited to, the Subscription and Transfer Agreement for Ordinary Shares Highland CLO Funding, Ltd., dated as of November 15, 2017, the Members Agreement Relating to the Company, dated as of November 15, 2017, the Highland CLO Funding, Ltd. Offering Memorandum dated November 15, 2017), and any and all legal and equitable claims or causes of action relating to the foregoing harm.

5. The Claimant has not attached the documentation supporting this Claim to this Proof of Claim because the documentation is voluminous and the Debtor has copies of such documents. However, any requested relevant documents will be provided to the Official Committee of Unsecured Creditors, the Court, the United States Trustee and the Debtor in the event of a dispute regarding this Proof of Claim and will be made available for review by other parties in interest as appropriate upon reasonable request and after consultation with the Debtor and execution of appropriate confidentiality agreements.

6. This Proof of Claim is filed with a full reservation of rights, including the right to amend, update, modify, supplement or otherwise revise this Proof of Claim in any respect at any time. The filing of this Proof of Claim is not and should not be construed to be: (a) a waiver or release of any of the Claimant's rights against any person, entity or property accruing to it against the Debtor and its estate; (b) a waiver of the Claimant's rights to assert that 28 U.S.C. § 157(b)(2)(C) is unconstitutional; (c) a consent or submission by the Claimant, or waiver of the Claimant's rights to object, to the jurisdiction of this Court with respect to the subject matter of any of the claims described herein, or any objection or other proceeding commenced with respect to any of the claims described herein, or any other proceeding commenced in the Debtor's chapter 11 case against or otherwise involving the Claimant; (d) a waiver or release of any right of the Claimant, or consent by the Claimant, to a trial by jury in this or any other court or proceeding; (e) a waiver or release of, or any limitation on, any right of the Claimant to have orders entered only after *de novo* review by a United States District Judge; (f) an election of remedies; or (g) a waiver of, or any other limitation on, any right of the Claimant to request withdrawal of the reference with respect to any matter, including, without limitation, any matter relating to this Proof of Claim.

7. Claimant's express reservation of all rights and causes of action, includes, without limitation, contingent or unliquidated rights that it or its affiliates may have against the Debtor, as well as defenses, offsets and counterclaims. This description and classification of claims by the Claimant is not a concession or admission as to the correct characterization or treatment of any such claims or a waiver of any rights of the Claimant.

8. Furthermore, the Claimant expressly reserves its rights to (a) file additional proofs of claim for additional claims that may be based on the same or additional documents or facts or other liability or indebtedness of the Debtor to the Claimant under contract or otherwise; (b) assert claims for cure of defaults in any agreement that the Debtor or any trustee appointed in this chapter 11 case may seek to assume; (c) assert any and all other claims, causes of action, defenses, offsets or counterclaims against the Debtor or any other parties; (d) file a request for payment of an administrative expense under 11 U.S.C. §§ 503 and 507 for any or all of the claims or rights of payment described above and any additional amounts; and (e) seek recovery through any relevant third parties, including any of the Debtor's insurance coverage providers.

9. This Proof of Claim does not encompass all claims that the Claimant or its affiliates may have that arise after the Petition Date and are entitled to administrative priority, and the Claimant expressly reserves its right to file such claim or any similar claim at the appropriate time, including any such post-petition claims arising under these service contracts.

10. This Proof of Claim is filed without prejudice to the filing by the Claimant of additional proofs of claim or requests for payment with respect to any other indebtedness, liability or obligation of the Debtor. The Claimant does not, by this Proof of Claim or any amendment or other action, waive any rights with respect to any scheduled claim.

11. The Claimant reserves the right to withdraw, amend, clarify, modify or supplement this Proof of Claim to assert additional claims, causes of action or additional grounds for this Proof of Claim (including adding any additional contracts, agreements, obligations or other relationships between the Claimant and the Debtor), as well as the right to file any separate or additional proofs of claim with respect to the claims set forth herein or otherwise, including for the purpose of fixing and liquidating any contingent or unliquidated claim set forth herein, or to file additional proofs of claim in respect of additional amounts or for any other reason.

12. In executing and filing this Proof of Claim, the Claimant does not submit to the jurisdiction of the Bankruptcy Court for the Northern District of Texas for any purpose other than with respect to this Proof of Claim against the Debtor, and does not waive or release any rights or remedies against any other person or entity that may be liable for all or part of this Proof of Claim.

13. The Claimant otherwise reserves its rights, and nothing herein shall prejudice the Claimant's rights, under any order of the Court previously entered in this chapter 11 case.

14. Payments on account of this Proof of Claim should be sent to the Claimant at the address specified for notices to the Claimant in Part 1.3 of the Proof of Claim.

EXHIBIT 2

PACHULSKI STANG ZIEHL & JONES LLP
Jeffrey N. Pomerantz (CA Bar No. 143717) (*admitted pro hac vice*)
Ira D. Kharasch (CA Bar No. 109084) (*admitted pro hac vice*)
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Counsel for the Debtor and Debtor-in-Possession

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

In re:	§	
	§	Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P., ¹	§	
	§	Case No. 19-34054-sgj11
	§	
Debtor.	§	

**DEBTOR'S MOTION FOR ENTRY OF AN ORDER APPROVING
SETTLEMENT WITH HARBOURVEST (CLAIM NOS. 143, 147, 149, 150, 153, 154)
AND AUTHORIZING ACTIONS CONSISTENT THEREWITH**

TO THE HONORABLE STACEY G. C. JERNIGAN,
UNITED STATES BANKRUPTCY JUDGE:

¹ The last four digits of the Debtor's taxpayer identification number are 6725. The headquarters and service address for the Debtor is 300 Crescent Court, Suite 700, Dallas, TX 75201.



Highland Capital Management, L.P., the above-captioned debtor and debtor-in-possession (“Highland” or the “Debtor”), files this motion (the “Motion”) for entry of an order, substantially in the form attached hereto as **Exhibit A**, pursuant to Rule 9019 of the **Federal Rules of Bankruptcy Procedure** (the “Bankruptcy Rules”), approving a settlement agreement (the “Settlement Agreement”),² a copy of which is attached as Exhibit 1 to the *Declaration of John A. Morris in Support of the Debtor’s Motion for Entry of an Order Approving Settlement with HarbourVest (Claim Nos. 143, 147, 149, 150, 153, 154) and Authorizing Actions Consistent Therewith* being filed simultaneously with this Motion (“Morris Dec.”), that, among other things, fully and finally resolves the proofs of claim filed by HarbourVest 2017 Global Fund L.P., HarbourVest 2017 Global AIF L.P., HarbourVest Dover Street IX Investment L.P., HV International VIII Secondary L.P., HarbourVest Skew Base AIF L.P., and HarbourVest Partners L.P. (collectively, “HarbourVest”). In support of this Motion, the Debtor represents as follows:

JURISDICTION

1. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2). Venue in this District is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

2. The statutory predicates for the relief sought herein are sections 105(a) and 363 of title 11 of the United States Code (the “Bankruptcy Code”), and Rule 9019 of the Bankruptcy Rules.

² All capitalized terms used but not defined herein shall have the meanings given to them in the Settlement Agreement.

RELEVANT BACKGROUND

A. Procedural Background

3. On October 16, 2019 (the “Petition Date”), the Debtor filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code in the Bankruptcy Court for the District of Delaware, Case No. 19-12239 (CSS) (the “Delaware Court”).

4. On October 29, 2019, the official committee of unsecured creditors (the “Committee”) was appointed by the U.S. Trustee in the Delaware Court.

5. On December 4, 2019, the Delaware Court entered an order transferring venue of the Debtor’s case to this Court [Docket No. 186].³

6. On December 27, 2019, the Debtor filed that certain *Motion of the Debtor for Approval of Settlement with the Official Committee of Unsecured Creditors Regarding Governance of the Debtor and Procedures for Operations in the Ordinary Course* [Docket No. 281] (the “Settlement Motion”). This Court approved the Settlement Motion on January 9, 2020 [Docket No. 339] (the “Settlement Order”).

7. In connection with the Settlement Order, an independent board of directors was constituted at the Debtor’s general partner, Strand Advisors, Inc., and certain operating protocols were instituted.

8. On July 16, 2020, this Court entered an order appointing James P. Seery, Jr., as the Debtor’s chief executive officer and chief restructuring officer [Docket No. 854].

9. The Debtor has continued in the possession of its property and has continued to operate and manage its business as a debtor-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No trustee or examiner has been appointed in this chapter 11 case.

³ All docket numbers refer to the docket maintained by this Court.

B. Overview of HarbourVest's Claims

10. HarbourVest's claims against the Debtor's estate arise from its \$80 million investment in Highland CLO Funding, f/k/a Acis Loan Funding, Ltd. ("HCLOF"), pursuant to which HarbourVest obtained a 49 percent interest in HCLOF (the "Investment").

11. In brief, HarbourVest contends that it was fraudulently induced into entering into the Investment based on the Debtor's misrepresentations and omissions concerning certain material facts, including that the Debtor: (1) failed to disclose that it never intended to pay an arbitration award obtained by a former portfolio manager, (2) failed to disclose that it engaged in a series of fraudulent transfers for the purpose of preventing the former portfolio manager from collecting on his arbitration award and misrepresented the reasons changing the portfolio manager for HCLOF immediately prior to the Investment, (3) indicated that the dispute with the former portfolio manager would not impact investment activities, and (4) expressed confidence in the ability of HCLOF to reset or redeem the collateralized loan obligations ("CLOs") under its control.

12. HarbourVest seeks to rescind its Investment and claims damages in excess of \$300 million based on theories of fraud, fraudulent inducement, fraudulent concealment, fraudulent misrepresentation, negligent misrepresentation, and breach of fiduciary duty (under Guernsey law), and on alleged violations of state securities laws and the Racketeer Influenced Corrupt Organization Act ("RICO").

13. HarbourVest's allegations are summarized below.⁴

⁴ Solely for purposes of this Motion, and not for any other reason, the facts set forth herein are adopted largely from the *HarbourVest Response to Debtor's First Omnibus Objection to Certain (A) Duplicate Claims; (B) Overstated Claims; (C) Late-Filed Claims; (D) Satisfied Claims; (E) No-Liability Claims; and (F) Insufficient-Documentation Claims* [Docket No. 1057] (the "Response").

C. Summary of HarbourVest's Factual Allegations

14. At the time HarbourVest made its Investment, the Debtor was embroiled in an arbitration against Joshua Terry ("Mr. Terry"), a former employee of the Debtor and limited partner of Acis Capital Management, L.P. ("Acis LP"). Through Acis LP, Mr. Terry managed Highland's CLO business, including CLO-related investments held by Acis Loan Funding, Ltd. ("Acis Funding").

15. The litigation between Mr. Terry and the Debtor began in 2016, after the Debtor terminated Mr. Terry and commenced an action against him in Texas state court. Mr. Terry asserted counterclaims for wrongful termination and for the wrongful taking of his ownership interest in Acis LP and subsequently had certain claims referred to arbitration where he obtained an award of approximately \$8 million (the "Arbitration Award") on October 20, 2017.

16. HarbourVest alleges that the Debtor responded to the Arbitration Award by engaging in a series of fraudulent transfers and corporate restructurings, the true purposes of which were fraudulently concealed from HarbourVest.

17. For example, according to HarbourVest, the Debtor changed the name of the target fund from Acis Funding to "Highland CLO Funding, Ltd." ("HCLOF") and "swapped out" Acis LP for Highland HCF Advisor, Ltd. as portfolio manager (the "Structural Changes"). The Debtor allegedly told HarbourVest that it made these changes because of the "reputational harm" to Acis LP resulting from the Arbitration Award. The Debtor further told HarbourVest that in lieu of redemptions, resetting the CLOs was necessary, and that it would be easier to reset them under the "Highland" CLO brand instead of the Acis CLO brand.

18. In addition, HarbourVest also alleges that the Debtor had no intention of allowing Mr. Terry to collect on his Arbitration Award, and orchestrated a scheme to "denude"

Acis of assets by fraudulently transferring virtually all of its assets and attempting to transfer its profitable portfolio management contracts to non-Acis, Debtor-related entities.

19. Unaware of the fraudulent transfers or the true purposes of the Structural Changes, and in reliance on representations made by the Debtor, HarbourVest closed on its Investment in HCLOF on November 15, 2017.

20. After discovering the transfers that occurred between Highland and Acis between October and December 2017 following the Arbitration Award (the “Transfers”), on January 24, 2018, Terry moved for a temporary restraining order (the “TRO”) from the Texas state court on the grounds that the Transfers were pursued for the purpose of rendering Acis LP judgment-proof. The state court granted the TRO, enjoining the Debtor from transferring any CLO management contracts or other assets away from Acis LP.

21. On January 30, 2018, Mr. Terry filed involuntary bankruptcy petitions against Acis LP and its general partner, Acis Capital Management GP, LLC. *See In re Acis Capital Management, L.P.*, Case No. 18-30264-sgj11 (Bankr. N.D. Tex. 2018) and *In re Acis Capital Management GP, LLC*, Case No. 18-30265-sgj11 (Bankr. N.D. Tex. 2018) (collectively, the “Acis Bankruptcy Case”). The Bankruptcy Court overruled the Debtor’s objection, granted the involuntary petitions, and appointed a chapter 11 trustee (the “Acis Trustee”). A long sequence of events subsequently transpired, all of which relate to HarbourVest’s claims, including:

- On May 31, 2018, the Court issued a *sua sponte* TRO preventing any actions in furtherance of the optional redemptions or other liquidation of the Acis CLOs.
- On June 14, 2018, HCLOF withdrew optional redemption notices.
- The TRO expired on June 15, 2018, and HCLOF noticed the Acis Trustee that it was requesting an optional redemption.

agreements with the Debtor in connection with relating to” the Operative Documents “and any and all legal and equitable claims or causes of action relating to the forgoing harm.” *See, e.g.*, Morris Dec. Exhibit 2 ¶4.

25. Highland subsequently objected to HarbourVest’s Proofs of Claim on the grounds that they were no-liability claims. [Docket No. 906] (the “Claim Objection”).

26. On September 11, 2020, HarbourVest filed its Response. The Response articulated specified claims under U.S. federal and state and Guernsey law, including claims for fraud, fraudulent concealment, fraudulent inducement, fraudulent misrepresentation, negligent misrepresentation (collectively, the “Fraud Claims”), U.S. State and Federal Securities Law Claims (the “Securities Claims”), violations of the Federal Racketeer Influenced and Corrupt Organizations Act (“RICO”), breach of fiduciary duty and misuse of fund assets, and an unfair prejudice claim under Guernsey law (collectively, with the Proofs of Claim, the “HarbourVest Claims”).

27. On October 18, 2020, HarbourVest filed its *Motion of HarbourVest Pursuant to Rule 3018 of the Federal Rules of Bankruptcy Procedure for Temporary Allowance of Claims for Purposes of Voting to Accept or Reject the Plan* [Docket No. 1207] (the “3018 Motion”). In its 3018 Motion, HarbourVest sought for its Claims to be temporarily allowed for voting purposes in the amount of more than \$300 million (based largely on a theory of treble damages).

E. Settlement Discussions

28. In October, the parties discussed the possibility of resolving the Rule 3018 Motion.

29. In November, the parties broadened the discussions in an attempt to reach a global resolution of the HarbourVest Claims. In the pursuit thereof, the parties and their

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

In Re: Highland Capital Management, L.P § Case No. **19-34054-SGJ11**

Charitable DAF Fund, L.P et al

Appellant

§

vs.

§

21-03067

Highland Capital Management, L.P

§

Appellee

§

3:23-CV-01503-B

[167] Order granting Defendant Highland Capital Management, L.P.'s Renewed motion to dismiss adversary proceeding (related document # [122](#)) Entered on 6/25/2023.

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APPELLANT RECORD

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

In re:	§ Chapter 11
	§
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§ Case No. 19-34054-sgj11
	§
Debtor.	§
	§
CHARITABLE DAF FUND, L.P. AND CLO	§
HOLDCO, LTD., DIRECTLY AND DERIVATIVELY	§
	§
Plaintiffs,	§ Adversary Proceeding No.
	§
vs.	§ 21-03067-sgj11
	§
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§
HIGHLAND HCF ADVISOR, LTD., AND	§
HIGHLAND CLO FUNDING LTD., NOMINALLY	§
	§
Defendant.	§
	§

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**APPELLANTS' SECOND AMENDED STATEMENT OF ISSUES
AND DESIGNATION OF RECORD ON APPEAL**

Pursuant to Rules 8009(a)(1)(A)-(B) and (a)(4) of the Federal Rules of Bankruptcy Procedure, The Charitable DAF Fund, L.P. and CLO Holdco, Ltd. ("Appellants") hereby designate the following items to be included in the record and identify the following issues with respect to

their appeal of the Order Granting Defendant Highland Capital Management, L.P.'s "Renewed Motion to Dismiss Complaint" [Adv. Proc. Doc. No. 122] which was entered by the United States Bankruptcy Court for the Northern District of Texas on June 25, 2023.

I. STATEMENT OF ISSUES TO BE PRESENTED ON APPEAL

- Whether the Bankruptcy Court had jurisdiction to rule on Highland Capital Management L.P.'s Renewed Motion to Dismiss Complaint
- Whether the Renewed Motion to Dismiss Complaint was improperly granted

II. DESIGNATION OF ITEMS TO BE INCLUDED IN THE RECORD

Vol. 1
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1. Notice of Appeal for Bankruptcy Case Adversary Proceeding No. 21-03067-sgj11 [Doc. 168].

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2. The judgment, order, or decree appealed from: Memorandum Opinion and Order Granting Defendant Highland Capital Management, L.P.'s "Renewed Motion to Dismiss Complaint" [Adv. Proc. Doc. No. 122] [Doc. 167].

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3. Docket Sheet kept by the Bankruptcy Clerk.

4. Documents listed below and as described in the Docket Sheet for Bankruptcy Case Proceeding No. 21-03067-sgj.

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No.	Date Filed	Docket No.	Description/Document Text
1	9/29/21	1	(36 pgs; 3 docs) Adversary case 21-03067. ORDER REFERRING CASE NUMBER 21-CV-0842-B from U.S District Court for the Northern District of Texas, Dallas Division to U.S. Bankruptcy Court for Northern District of Texas, Dallas Division. Complaint by Charitable DAF Fund, LP, CLO Holdco, Ltd. against Highland Capital Management, LP, Highland HCF Advisor Ltd., Highland CLO Funding, Ltd. Fee Amount \$350 (Attachments: # 1 Original Complaint # 2 Docket Sheet from 3:20-cv-0842-B) Nature(s) of suit: 02 (Other (e.g. other actions that would have been brought in state court if unrelated to bankruptcy)). (Okafor, M.)
2	9/29/21	2	(1 pg) Supplemental Document (cover sheet) by CLO Holdco Ltd., Charitable DAF Fund (RE: related document(s)1 Adversary case 21-03067) [ORIGINALLY FILED IN 21-CV-0842 AS #2 ON 04/13/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)

Vol. 2 000139 000232 000239 000270 Thru Vol. 6	3	9/29/21	6	(93 pgs; 6 docs) MOTION for Leave to File First Amended Complaint filed by CLO Holdco Ltd., Charitable DAF Fund LP (Attachments: # 1 Exh 1_First Amended Complaint # 2 Exh 2_Motion for Authorization to Retain James Seery # 3 Exh 3_Order Approving Retention of James Seery # 4 Exh 4_Order Approving Settlement # 5 Proposed Order) (Bridges, Jonathan) (Entered: 04/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #6 ON 04/19/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
	4	9/29/21	22	(7 pgs; 2 docs) MOTION for an Order to Enforce the Order of Reference filed by Highland Capital Management LP. (Attachments: # 1 Exhibit(s) A--Proposed Order) (Annable, Zachery) Modified text on 5/20/2021 (mjr). (Entered: 05/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #22 ON 05/19/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
	5	9/29/21	23	(31 pgs) Brief/Memorandum in Support filed by Highland Capital Management LP re: 22 MOTION for an Order to Enforce the Order of Reference. (Annable, Zachery) Modified text on 5/20/2021 (mjr).(Entered: 05/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #23 ON 05/19/2021 IN U.S.DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
	6	9/29/21	24	(926 pgs; 29 docs) Appendix in Support filed by Highland Capital Management LP re: 23 Brief/Memorandum in Support. (Attachments: # 1 Appendix 1 # 2 Appendix 2 # 3 Appendix 3 # 4 Appendix 4 # 5 Appendix 5 # 6 Appendix 6 # 7 Appendix 7 # 8 Appendix 8 # 9 Appendix 9 # 10 Appendix10 # 11 Appendix 11 # 12 Appendix 12 # 13 Appendix 13 # 14 Appendix 14 # 15 Appendix 15 # 16 Appendix 16 # 17 Appendix 17 # 18 Appendix 18 # 19 Appendix 19 # 20 Appendix 20 # 21 Appendix 21# 22 Appendix 22 # 23 Appendix 23 # 24 Appendix 24 # 25 Appendix 25 # 26 Appendix 26 # 27 Appendix 27 # 28 Appendix 28) (Annable, Zachery) Modified linkage and text on 5/20/2021 (mjr). (Entered:05/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #24 ON 05/19/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
Vol. 7 001196	7	9/29/21	26	(7 pgs; 2 docs) MOTION to Dismiss Complaint filed by Highland Capital Management LP (Attachments: # 1 Exhibit(s) A--Proposed Order) (Annable, Zachery) Modified text on 5/28/2021 (jmg).(Entered: 05/27/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #26 ON 05/27/2021 IN U.S.DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)

Vol. 7 001203 thru Vol. 8	8	9/29/21	28	(508 pgs; 14 docs) Appendix in Support filed by Highland Capital Management LP (Attachments: # 1 Appendix 1 # 2 Appendix 2 # 3 Appendix 3 # 4 Appendix 4 # 5 Appendix 5 # 6 Appendix 6 # 7 Appendix 7 # 8 Appendix 8 # 9 Appendix 9 # 10 Appendix 10 # 11 Appendix 11 # 12 Appendix 12 # 13 Appendix 13) (Annable, Zachery) (Entered: 05/27/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #28 ON 05/27/2021 IN U.S. DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
Vol. 9 001711	9	9/29/21	33	(1 pg) Amended Civil Cover Sheet by CLO Holdco Ltd, Charitable DAF Fund LP. Amendment to 2 Supplemental Document. (Sbaiti, Mazin) Modified text on 6/23/2021 (mjr). (Entered: 06/22/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #33 ON 06/22/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001712	10	9/29/21	36	(26 pgs) RESPONSE filed by CLO Holdco Ltd, Charitable DAF Fund LP re: 22 MOTION for an Order to Enforce the Order of Reference (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #36 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001738	11	9/29/21	37	(22 pgs) Appendix in Support filed by CLO Holdco Ltd, Charitable DAF Fund LP re 36 Response/Objection Response to Motion for an Order to Enforce the Order of Reference (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #37 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001760	12	9/29/21	38	(45 pgs) RESPONSE filed by CLO Holdco Ltd, Charitable DAF Fund LP re: 26 MOTION to Dismiss (Defendant Highland Capital Management, L.P.'s Motion to Dismiss Complaint) (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #38 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001805	13	9/29/21	39	(88 pgs) Appendix in Support filed by CLO Holdco Ltd, Charitable DAF Fund LP re 38 Response/Objection to Defendant Highland Capital Management, L.P.'s Motion to Dismiss Complaint (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #39 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001893	14	9/29/21	42	(12 pgs) REPLY filed by Highland Capital Management LP re: 22 MOTION for an Order to Enforce the Order of Reference (Annable, Zachery) (Entered: 07/13/2021) [ORIGINALLY FILED IN 21-CV-0842AS #42 ON 07/13/2021 IN U.S.

			DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
VOL. 9	15	9/29/21	43 (852 pgs) Appendix in Support filed by Highland Capital Management LP re: 42 Reply. (Annable, Zachery) Modified text on 7/14/2021 (mjr). (Entered: 07/13/2021) [ORIGINALLY FILED IN 21-CV-0842AS #43 ON 07/13/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001905 thru vol. 13	16	9/29/21	45 (21 pgs) REPLY filed by Highland Capital Management LP re: 26 MOTION to Dismiss (Defendant Highland Capital Management, L.P.'s Motion to Dismiss Complaint) (Annable, Zachery) (Entered: 07/13/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #44 ON 07/13/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002757	17	9/29/21	57 (7 pgs; 2 docs) MOTION to Dismiss and Joinder in Motion to Dismiss of Highland Capital Management, L.P. filed by Highland CLO Funding Ltd. (Attachments: # 1 Proposed Order) Attorney Paul R Bessette added to party Highland CLO Funding Ltd (pty:dft) (Bessette, Paul) (Entered: 08/30/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #57 ON 08/30/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002778	18	9/29/23	58 (12 pgs) Brief/Memorandum in Support filed by Highland CLO Funding Ltd. re 57 MOTION to Dismiss and Joinder in Motion to Dismiss of Highland Capital Management, L.P. (Bessette, Paul) (Entered: 08/30/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #58 ON 08/30/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002785	19	9/29/23	59 (80 pgs; 5 docs) Appendix in Support filed by Highland CLO Funding Ltd re 58 Brief/Memorandum in Support of Motion (Attachments: # 1 Exhibit(s) A - Jackson v Dear # 2 Exhibit(s) B - Prudential Assurance v. Newman # 3 Exhibit(s) C - Harbourvest Settlement Agreement # 4 Exhibit(s) D - Boleat Declaration) (Bessette, Paul) (Entered: 08/30/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #59 ON 08/30/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002797	20	9/29/21	64 (1 pg) ORDER OF REFERENCE: Pursuant to 28 U.S.C. § 157 and this District's Miscellaneous Order No. 33, this case is hereby REFERRED to Judge Stacey G. C. Jernigan of the United States Bankruptcy Court for the Northern District of Texas, Dallas Division, to be adjudicated as a matter related to the consolidated Chapter 11 Bankruptcy of Highland Capital Management, L.P., Chapter 11 Case No.19-34054. (Ordered by Judge Jane J. Boyle
002877			

Vol. 14				on 9/20/2021) (svc) (Entered: 09/20/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #64 ON 09/20/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002878	21	10/19/21	66	(5 pgs) Notice of hearing filed by Defendant Highland Capital Management, LP (RE: related document(s) 26 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP, 47 Motion to strike document filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 55 Motion to abate filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) Hearing to be held on 11/23/2021 at 09:30 AM at https://us-courts.webex.com/meet/jerniga for 26 and for 47 and for 55, (Annable, Zachery)
002883 thru Vol. 16	22	11/22/21	71	(509 pgs; 2 docs) Witness and Exhibit List <i>for Hearing on November 23, 2021</i> filed by Defendant Highland Capital Management, LP (RE: related document(s) 26 Motion to dismiss adversary proceeding). (Attachments: # 1 Exhibits 1-13) (Hayward, Melissa)
Vol. 17	23	11/22/21	72	(2 pgs) Witness List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 26 Motion to dismiss adversary proceeding, 47 Motion to strike (related document(s): 43 Document), 55 Motion to abate (related document(s) 1 Complaint), 69 Motion to abate <i>Plaintiffs' Amended Motion to Stay All Proceedings</i> (related document(s) 55 Motion to abate (related document(s) 1 Complaint))). (Sbaiti, Mazin)
003392				
003394	24	11/22/21	73	(189 pgs; 4 docs) Exhibit List <i>for November 23, 2021 hearing</i> filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 47 Motion to strike (related document(s): 43 Document), 55 Motion to abate (related document(s) 1 Complaint)). (Attachments: # 1 Exhibit 1_Defendant's Memorandum of Law in Support of Motion for Reconsideration # 2 Exhibit 2_Highland Memorandum in Support of Motion to Dismiss # 3 Exhibit 3_Order (I) Confirming Fifth Amended Plan of Reorganization of Highland) (Sbaiti, Mazin)
003583	25	12/7/21	80	(2 pgs) Order granting Highland CLO Funding, Ltd.'s motion to dismiss adversary as a party with prejudice (related document 57) Entered on 12/7/2021. (Okafor, Marcey) Modified text on 3/11/2022 (Okafor, Marcey).
003585	26	3/11/22	99	(26 pgs) Memorandum of Opinion and order granting motion to dismiss the adversary proceeding (RE: related document(s) 26 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP). Entered on 3/11/2022 (Okafor, Marcey)
003611	27	3/11/22	100	(26 pgs) Order granting motion to dismiss adversary proceeding with prejudice (related document #26) Entered on 3/11/2022. (Okafor, Marcey)

Vol. 18 003637	28	3/21/22	104	(29 pgs) Notice of appeal. Fee Amount \$298 filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 100 Order on motion to dismiss adversary proceeding). Appellant Designation due by 04/4/2022. (Sbaiti, Mazin)
003666	29	5/26/22	120	(177 pgs; 2 docs) Support/supplemental document <i>Motion to Supplement Appellate Record</i> filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 111 Appellant designation). (Attachments: # 1 Amended Transcript of January 14, 2021 Hearing) (Sbaiti, Mazin)
003843	30	6/9/22	121	(1 pg) DISTRICT COURT Order: Case 3:22-00695-B is hereby transferred to the docket of the Honorable Judge Jane J. Boyle for consolidation with The Charitable DAF Fund LP, et al. v. Highland Capital Management LP, Case No. 3:21-cv-3129-N. Judge Karen Gren Scholer no longer assigned to case.(RE: related document(s) 86 Notice of appeal filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 104 Notice of appeal filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Entered on 6/9/2022 (Whitaker, Sheniqua) (Entered: 06/10/2022)
003844	31	10/24/22	122	(7 pgs) Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP (Annable, Zachery)
003851	32	10/14/22	123	(31 pgs) Brief in support filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Annable, Zachery)
Vol. 19 003882 Thru Vol 20	33	10/14/22	124	(513 pgs; 15 docs) Support/supplemental document (<i>Appendix in Support of Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7 # 8 Exhibit 8 # 9 Exhibit 9 # 10 Exhibit 10 # 11 Exhibit 11 # 12 Exhibit 12 # 13 Exhibit 13 # 14 Exhibit 14) (Annable, Zachery)
Vol. 21 004395	34	10/27/22	126	(5 pgs) Notice of hearing (<i>Notice of Hearing and Briefing Schedule on Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP). Hearing to be held on 12/8/2022 at 09:30 AM at https://us-courts.webex.com/meet/jerniga for 122. (Annable, Zachery)

Vol. 21 004400 004410 004442 Thru Vol. 22	35	11/18/22	128	(10 pgs) Motion for withdrawal of reference. Fee amount \$188, filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (Sbaiti, Mazin)
	36	11/18/22	129	(32 pgs) Response opposed to (related document(s): 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP) filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Sbaiti, Mazin)
	37	11/18/22	130	(254 pgs; 2 docs) Response opposed to (related document(s): 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP) filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Attachments: # 1 Appendix) (Sbaiti, Mazin)
Vol. 22 004696 004717 004732 004737 004742	38	9/2/22	131	(21 pgs) DISTRICT COURT MEMORANDUM OPINION AND ORDER: The Court REVERSES and REMANDS the bankruptcy court's Motion to Dismiss Order and AFFIRMS the bankruptcy courts Motion to Stay Order. re: appeal on Civil Action number: Case 3:22-00695-B consolidated with 3:21-CV-3129-B, (RE: related document(s) 81 Order on motion to abate, 100 Order on motion to dismiss adversary proceeding). Entered on 9/2/2022 (Whitaker, Sheniqua) (Entered: 11/29/2022)
	39	12/2/22	133	(15 pgs) Reply to (related document(s): 129 Response filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 130 Response filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) filed by Defendant Highland Capital Management, LP. (Annable, Zachery)
	40	12/7/22	135	(5 pgs) Notice of hearing filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP). Hearing to be held on 1/25/2023 at 01:30 PM at https://us-courts.webex.com/meet/jerniga for 122, (Annable, Zachery)
	41	12/7/22	136	(5 pgs) Notice of hearing filed by Defendant Highland Capital Management, LP (RE: related document(s) 128 Motion for withdrawal of reference filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Status Conference to be held on 1/25/2023 at 01:30 PM at https://us-courts.webex.com/meet/jerniga . (Annable, Zachery).
	42	12/9/22	138	(3 pgs) Response opposed to (related document(s): 128 Motion for withdrawal of reference. Fee amount \$188, filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) filed by Defendant Highland Capital Management, LP. (Annable, Zachery)

Vol. 22 004745	43	12/9/22	139	(25 pgs) Brief in support filed by Defendant Highland Capital Management, LP (RE: related document(s) 138 Response). (Annable, Zachery)
Vol. 23 004770	44	12/9/22	140	(280 pgs; 8 docs) Support/supplemental document (<i>Appendix in Support of Highland Capital Management, L.P.'s Response to Renewed Motion to Withdraw the Reference</i>) filed by Defendant Highland Capital Management, LP (RE: related document(s) 138 Response). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7) (Annable, Zachery)
Vol. 24 005050	45	12/16/22	144	(6 pgs) Reply to (related document(s): 138 Response filed by Defendant Highland Capital Management, LP) filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Sbaiti, Mazin)
005056 Thru Vol. 25.	46	1/23/23	145	(514 pgs; 15 docs) Witness and Exhibit List filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7 # 8 Exhibit 8 # 9 Exhibit 9 # 10 Exhibit 10 # 11 Exhibit 11 # 12 Exhibit 12 # 13 Exhibit 13 # 14 Exhibit 14) (Annable, Zachery)
Vol. 26 005570	47	1/23/23	146	(280 pgs; 8 docs) Witness and Exhibit List filed by Defendant Highland Capital Management, LP (RE: related document(s) 128 Motion for withdrawal of reference. Fee amount \$188.). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7) (Annable, Zachery)
Vol. 27 005850	48	1/23/23	147	(221 pgs; 7 docs) Witness and Exhibit List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Attachments: # 1 Exhibit 1_Excerpts from July 14, 2020 Hearing Transcript # 2 Exhibit 2_HCLOF Members Agreement Relating to the Company # 3 Exhibit 3_HarbourVest Settlement Agreement # 4 Exhibit 4_Order Approving Debtor's Settlement with HarbourVest # 5 Exhibit 5_HCLOF Offering # 6 Exhibit 6 Amended and Restated Investment Advisory Agreement) (Sbaiti, Mazin)
006071	49	1/23/23	148	(3 pgs) Witness and Exhibit List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 128 Motion for withdrawal of reference. Fee amount \$188.). (Phillips, Louis)
Vol. 28 006074	50	1/25/23	150	(56 pgs; 2 docs) Amended Witness and Exhibit List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 147 List (witness/exhibit/generic), 149 List (witness/exhibit/generic)). (Attachments: # 1 Exh 7_Testimony of Mark Patrick at June 8, 2021 hearing) (Sbaiti, Mazin)

Vol. 28 006130	51	1/25/23	152	(3 pgs) Notice of Appearance and Request for Notice by Louis M. Phillips filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Phillips, Louis)
	52	1/25/23	154	(1 pg) Court admitted exhibits date of hearing January 25, 2023 (RE: related document(s) 128 Motion for withdrawal of reference, filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) (COURT ADMITTED DEFENDANT'S EXHIBITS #1, #2, #3, #4, #5 & #6 OFFERED BY ATTY GREG DEMO). (Edmond, Michael) (Entered: 01/27/2023)
Vol. 32 006925 006942 006960	53	2/6/23	158	Report and recommendation to the U.S. District Court by U.S. Bankruptcy Judge. (RE: related document(s) 128 Motion for withdrawal of reference filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Entered on 2/6/2023 (Okafor, Marcey)
	54	2/6/23	161	(18 pgs) DISTRICT COURT Notice of transmission of report and recommendation in re: renewed motion to withdraw reference. Civil Case # 3:22-cv-02802-S. (RE: related document(s) 158 Report and recommendation to the U.S. District Court by U.S. Bankruptcy Judge. (RE: related document(s) 128 Motion for withdrawal of reference filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Entered on 2/6/2023) (Whitaker, Sheniqua)
	55	4/3/23	165	(1 pg) DISTRICT COURT ORDER: The Court GRANTS the 11 Joint Motion to Transfer Proceeding and Consolidate Before Original Court and the above-numbered case (3:22-cv-02802-S) is transferred to the docket of the Honorable Judge Jane Boyle: Civil case 3:21-cv-00842-B (order referring case). (RE: related document(s) 1 Complaint filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 143 Notice of transmission of motion to withdraw reference). Entered on 4/3/2023 (Whitaker, Sheniqua) Modified on 4/10/2023 (Whitaker, Sheniqua). (Entered: 04/10/2023)

TRANSCRIPTS

006961	56	11/24/21	78	(104 pgs) Transcript regarding Hearing Held 11-23-2021 RE: Motion Hearing. THIS TRANSCRIPT WILL BE MADE ELECTRONICALLY AVAILABLE TO THE GENERAL PUBLIC 90 DAYS AFTER THE DATE OF FILING. TRANSCRIPT RELEASE DATE IS 02/22/2022. Until that time the transcript may be viewed at the Clerk's Office or a copy may be obtained from the official court transcriber. Court Reporter/Transcriber Liberty Transcripts/Dipti Patel, Telephone number 847-848-4907. (RE: related document(s) 75 Hearing held on 11/23/2021. (RE: related document(s) 55 MOTION to Stay filed by CLO Holdco Ltd, Charitable DAF Fund LP (Sbaiti, Mazin) (Entered: 08/26/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #55 ON 08/26/2021 IN U.S.
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			<p>DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)) (Appearances: J. Pomerantz and J. Morris for Highland Defendants; J. Jordan and P. Bessett for HCLOF; M. Sbaiti for Plaintiffs. Nonevidentiary hearing. Motion denied. Mr. Pomerantz to upload order.), 76 Hearing held on 11/23/2021. (RE: related document(s) 47 Motion to strike 43 Appendix in support filed by CLO Holdco, Ltd., Charitable DAF Fund, LP (Bridges, Jonathan) Modified text on 7/16/2021 (mjr). (Entered: 07/15/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #47 ON 07/15/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)) (Appearances: J. Pomerantz and J. Morris for Highland Defendants; J. Jordan and P. Bessett for HCLOF; M. Sbaiti for Plaintiffs. Nonevidentiary hearing. Motion denied (Plaintiffs acknowledged complained-of Appendices it did not relate to Motion to Dismiss). Mr. Pomerantz to upload order.)). Transcript to be made available to the public on 02/22/2022. (Patel, Dipti)</p>
57	2/21/23	164	<p>164 (112 pgs) Transcript regarding Hearing Held 1/25/23 RE: HEARING ON DEFENDANT HIGHLAND CAPITAL MANAGEMENT L.P.'S RENEWED MOTION TO DISMISS COMPLAINT (122) AND STATUS CONFERENCE RE: MOTION FOR WITHDRAWAL OF REFERENCE FILED BY PLAINTIFF CLO HOLDCO, LTD., PLAINTIFF CHARITABLE DAF FUND, LP (128). THIS TRANSCRIPT WILL BE MADE ELECTRONICALLY AVAILABLE TO THE GENERAL PUBLIC 90 DAYS AFTER THE DATE OF FILING. TRANSCRIPT RELEASE DATE IS 05/22/2023. Until that time the transcript may be viewed at the Clerk's Office or a copy may be obtained from the official court transcriber. Court Reporter/Transcriber Dipti Patel, Telephone number 847-848-4907. (RE: related document(s) 155 Hearing held on 1/25/2023. (RE: related document(s) 122 Motion to dismiss adversary proceeding, (Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint) filed by Defendant Highland Capital Management, LP filed by Defendant Highland Capital Management, LP) (Appearances: J. Morris and G. Demo for Movants; L. Phillips and M. Sbaiti for Plaintiffs. Evidentiary hearing (appendices). Court took matter under advisement.), 156 Hearing held on 1/25/2023. (RE: related document(s) 128 Motion for withdrawal of reference. Fee amount \$188, filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) (Appearances: J. Morris and G. Demo for Movants; L. Phillips and M. Sbaiti for Plaintiffs. Evidentiary hearing (appendices). Court announced it will recommend denial to District Court. Court is working on Report & Recommendation.)). Transcript to be made available to the public on 05/22/2023. (Patel, Dipti)</p>

Dated: July 14, 2023

Respectfully submitted,

SBAITI & COMPANY PLLC

/s/ Mazin A. Sbaiti

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Counsel for Appellants

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was filed electronically through the Court's ECF system, which provides notice to all parties of interest, on this 14th day of July, 2023.

/s/ Mazin A. Sbaiti

Mazin A. Sbaiti

counsel participated in several conference calls where they engaged in a spirited exchange of perspectives concerning the facts and the law.

30. During follow up meetings, the parties' interests became more defined. Specifically, HarbourVest sought to maximize its recovery while fully extracting itself from the Investment, while the Debtor sought to minimize the HarbourVest Claims consistent with its perceptions of the facts and law.

31. After the parties' interests became more defined, the principals engaged in a series of direct, arm's-length, telephonic negotiations that ultimately lead to the settlement, whose terms are summarized below.

F. Summary of Settlement Terms

32. The Settlement Agreement contains the following material terms, among others:

- HarbourVest shall transfer its entire interest in HCLOF to an entity to be designated by the Debtor;⁵
- HarbourVest shall receive an allowed, general unsecured, non-priority claim in the amount of \$45 million and shall vote its Class 8 claim in that amount to support the Plan;
- HarbourVest shall receive a subordinated, allowed, general unsecured, non-priority claim in the amount of \$35 million and shall vote its Class 9 claim in that amount to support the Plan;
- HarbourVest will support confirmation of the Debtor's Plan, including, but not limited to, voting its claims in support of the Plan;
- The HarbourVest Claims shall be allowed in the aggregate amount of \$45 million for voting purposes;
- HarbourVest will support the Debtor's pursuit of its pending Plan of Reorganization; and
- The parties shall exchange mutual releases.

⁵ The NAV for HarbourVest's 49.98% interest in HCLOF was estimated to be approximately \$22 million as of December 1, 2020.

See generally Morris Dec. Exhibit 1.

BASIS FOR RELIEF REQUESTED

33. Bankruptcy Rule 9019 governs the procedural prerequisites to approval of a settlement, providing that:

On motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement. Notice shall be given to creditors, the United States trustee, the debtor, and indenture trustees as provided in Rule 2002 and to any other entity as the court may direct.

FED. R. BANKR. P. 9019(a).

34. Settlements in bankruptcy are favored as a means of minimizing litigation, expediting the administration of the bankruptcy estate, and providing for the efficient resolution of bankruptcy cases. See *Myers v. Martin (In re Martin)*, 91 F.3d 389, 393 (3d Cir. 1996); *Rivercity v. Herpel (In re Jackson Brewing Co.)*, 624 F.2d 599, 602 (5th Cir. 1980). Pursuant to Bankruptcy Rule 9019(a), a bankruptcy court may approve a compromise or settlement as long as the proposed settlement is fair, reasonable, and in the best interest of the estate. See *In re Age Ref. Inc.*, 801 F.3d 530, 540 (5th Cir. 2015). Ultimately, “approval of a compromise is within the sound discretion of the bankruptcy court.” See *United States v. AWECO, Inc. (In re AWECO, Inc.)*, 725 F.2d 293, 297 (5th Cir. 1984); *Jackson Brewing*, 624 F.2d at 602–03.

35. In making this determination, the United States Court of Appeals for the Fifth Circuit applies a three-part test, “with a focus on comparing ‘the terms of the compromise with the rewards of litigation.’” *Official Comm. of Unsecured Creditors v. Cajun Elec. Power Coop. (In re Cajun Elec. Power Coop.)*, 119 F.3d 349, 356 (5th Cir. 1997) (citing *Jackson Brewing*, 624 F.2d at 602). The Fifth Circuit has instructed courts to consider the following factors: “(1) The probability of success in the litigation, with due consideration for the uncertainty of law and fact, (2) The complexity and likely duration of the litigation and any

attendant expense, inconvenience and delay, and (3) All other factors bearing on the wisdom of the compromise.” *Id.* Under the rubric of the third factor referenced above, the Fifth Circuit has specified two additional factors that bear on the decision to approve a proposed settlement. First, the court should consider “the paramount interest of creditors with proper deference to their reasonable views.” *Id.*; *Conn. Gen. Life Ins. Co. v. United Cos. Fin. Corp. (In re Foster Mortgage Corp.)*, 68 F.3d 914, 917 (5th Cir. 1995). Second, the court should consider the “extent to which the settlement is truly the product of arms-length bargaining, and not of fraud or collusion.” *Age Ref. Inc.*, 801 F.3d at 540; *Foster Mortgage Corp.*, 68 F.3d at 918 (citations omitted).

36. There is ample basis to approve the proposed Settlement Agreement based on the Rule 9019 factors set forth by the Fifth Circuit.

37. First, although the Debtor believes that it has valid defenses to the HarbourVest Claims, there is no guarantee that the Debtor would succeed in its litigation with HarbourVest. Indeed, to establish its defenses, the Debtor would be required to rely, at least in part, on the credibility of witnesses whose veracity has already been called into question by this Court. Moreover, it will be difficult to dispute that the Transfers precipitated the Acis Bankruptcy, and, ultimately, the imposition of the Bankruptcy Court’s TRO that restricted HCLOF’s ability to reset or redeem the CLOs and that is at the core of the HarbourVest Claims.

38. The second factor—the complexity, duration, and costs of litigation—also weighs heavily in favor of approving the Settlement Agreement. As this Court is aware, the events forming the basis of the HarbourVest Claims—including the Terry Litigation and Acis Bankruptcy—proceeded *for years* in this Court and in multiple other forums, and has already cost the Debtor’s estate millions of dollars in legal fees. If the Settlement Agreement is not approved, then the parties will expend significant resources litigating a host of fact-intensive

issues including, among other things, the substance and materiality of the Debtor's alleged fraudulent statements and omissions and whether HarbourVest reasonably relied on those statements and omissions.

39. Third, approval of the Settlement Agreement is justified by the paramount interest of creditors. Specifically, the settlement will enable the Debtor to: (a) avoid incurring substantial litigation costs; (b) avoid the litigation risk associated with HarbourVest's \$300 million claim; and (c) through the plan support provisions, increase the likelihood that the Debtor's pending plan of reorganization will be confirmed.

40. Finally, the Settlement Agreement was unquestionably negotiated at arm's-length. The terms of the settlement are the result of numerous, ongoing discussions and negotiations between the parties and their counsel and represent neither party's "best case scenario." Indeed, the Settlement Agreement should be approved as a rational exercise of the Debtor's business judgment made after due deliberation of the facts and circumstances concerning HarbourVest's Claims.

NO PRIOR REQUEST

41. No previous request for the relief sought herein has been made to this, or any other, Court.

NOTICE

42. Notice of this Motion shall be given to the following parties or, in lieu thereof, to their counsel, if known: (a) counsel for HarbourVest; (b) the Office of the United States Trustee; (c) the Office of the United States Attorney for the Northern District of Texas; (d) the Debtor's principal secured parties; (e) counsel to the Committee; and (f) parties requesting notice pursuant to Bankruptcy Rule 2002. The Debtor submits that, in light of the nature of the relief requested, no other or further notice need be given.

WHEREFORE, the Debtor respectfully requests entry of an order, substantially in the form attached hereto as Exhibit A, (a) granting the relief requested herein, and (b) granting such other relief as is just and proper.

Dated: December 23, 2020.

PACHULSKI STANG ZIEHL & JONES LLP

Jeffrey N. Pomerantz (CA Bar No. 143717)
Ira D. Kharasch (CA Bar No. 109084)
John A. Morris (NY Bar No. 266326)
Gregory V. Demo (NY Bar No. 5371992)
Hayley R. Winograd (NY Bar No. 5612569)
10100 Santa Monica Blvd., 13th Floor
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Telephone: (310) 277-6910
Facsimile: (310) 201-0760
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ikharasch@pszjlaw.com
jmorris@pszjlaw.com
gdemo@pszjlaw.com
hwinograd@pszjlaw.com

-and-

HAYWARD & ASSOCIATES PLLC

/s/ Zachery Z. Annable

Melissa S. Hayward
Texas Bar No. 24044908
MHayward@HaywardFirm.com
Zachery Z. Annable
Texas Bar No. 24053075
ZAnnable@HaywardFirm.com
10501 N. Central Expy, Ste. 106
Dallas, Texas 75231
Tel: (972) 755-7100
Fax: (972) 755-7110

Counsel for the Debtor and Debtor-in-Possession

EXHIBIT 3

SETTLEMENT AGREEMENT

This Settlement Agreement (the “Agreement”) is entered into as of December 23, 2020, between Highland Capital Management, L.P. (the “Debtor”), on the one hand, and HarbourVest 2017 Global Fund L.P., HarbourVest 2017 Global AIF L.P., HarbourVest Dover Street IX Investment L.P., HV International VIII Secondary L.P., HarbourVest Skew Base AIF L.P., and HarbourVest Partners L.P. (each, a “HarbourVest Party,” and collectively, “HarbourVest”), on the other hand. Each of the foregoing are sometimes referred to herein collectively as the “Parties” and individually as a “Party.”

RECITALS

WHEREAS, on October 16, 2019 (the “Petition Date”), the Debtor filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code (the “Bankruptcy Case”) in the Bankruptcy Court for the District of Delaware, Case No. 19-12239 (CSS) (the “Delaware Bankruptcy Court”);

WHEREAS, on December 4, 2019, the Delaware Bankruptcy Court entered an order transferring venue of the Debtor’s case to the Bankruptcy Court for the Northern District of Texas, Dallas Division, Case No. 19-34054-sgj (the “Bankruptcy Court”);

WHEREAS, prior to the Petition Date, HarbourVest invested in Highland CLO Funding, Ltd. f/k/a Acis Loan Funding, Ltd. (“HCLOF”) and acquired an a 49.98% ownership interest in HCLOF (the “HarbourVest Interests”);

WHEREAS, the portfolio manager for HCLOF is Highland HCF Advisor, Ltd., a subsidiary of the Debtor;

WHEREAS, on April 8, 2020, HarbourVest filed proofs of claim in the Bankruptcy Case, which are listed on the Debtor’s claims register as claim numbers 143, 147, 149, 150, 153, and 154 (the “HarbourVest Claims”), asserting claims against the Debtor relating to its investment in HCLOF;

WHEREAS, on July 30, 2020, the Debtor filed the *Debtor’s First Omnibus Objection to Certain (a) Duplicate Claims; (b) Overstated Claims; (c) Late-Filed Claims; (d) Satisfied Claims; (e) No Liability Claims; and (f) Insufficient-Documentation Claims* [**Docket No. 906**], in which the Debtor objected to the HarbourVest Claims;

WHEREAS, on September 11, 2020, HarbourVest filed the *HarbourVest Response to Debtor’s First Omnibus Objection to Creation (a) Duplicate Claims; (b) Overstated Claims; (c) Late-Filed Claims; (d) Satisfied Claims; (e) No Liability Claims; and (f) Insufficient-Documentation Claims* [**Docket No. 1057**] (the “HarbourVest Response”);

WHEREAS, on October 18, 2020, HarbourVest filed the *Motion of HarbourVest Pursuant to Rule 3018(a) of the Federal Rules of Bankruptcy Procedure for Temporary Allowance of Claims for Purposes of Voting to Accept or Reject the Plan* [**Docket No. 1207**] (the “3018 Motion” and together with the HarbourVest Response, the “HarbourVest Pleadings”);

WHEREAS, in the HarbourVest Pleadings, HarbourVest asserted, among other things, that the HarbourVest Claims included claims against the Debtor arising from fraudulent inducement, fraudulent concealment, fraudulent misrepresentation, breach of fiduciary duty, breach of securities laws, and misuse of assets and sought damages in excess of \$300,000,000;

WHEREAS, the Debtor disputes the HarbourVest Claims;

WHEREAS, on November 24, 2020, the Debtor filed the *Fifth Amended Plan of Reorganization for Highland Capital Management, L.P.* [**Docket No. 1472**] (as amended, the “Plan”).¹

WHEREAS, the Parties desire to enter into this Agreement which incorporates, formalizes, and finalizes the full and final resolution of the HarbourVest Claims and HarbourVest Pleadings; and

WHEREAS, this Agreement will be presented to the Bankruptcy Court for approval pursuant to **Federal Rule of Bankruptcy Procedure 9019** (“Rule 9019”).

NOW THEREFORE, in consideration of the above recitals, the covenants, conditions, and promises made herein, and other good and valuable consideration, the receipt of which is hereby acknowledged, the Parties agree as follows:

1. Settlement of Claims.

(a) In full and complete satisfaction of the HarbourVest Claims, HarbourVest will receive:

(i) an allowed, nonpriority general unsecured claim in the aggregate amount of \$45,000,000 (the “Allowed GUC Claim”); and

(ii) an allowed subordinated claim in the aggregate amount of \$35,000,000 (the “Allowed Subordinated Claim” and together with the Allowed GUC Claim, the “Allowed Claims”).

(b) On the Effective Date, HarbourVest will transfer all of its rights, title, and interest in the HarbourVest Interests to the Debtor or its nominee pursuant to the terms of the *Transfer Agreement for Ordinary Shares of Highland CLO Funding, Ltd.*, attached hereto as Exhibit A (the “Transfer Agreements”) and the Debtor or its nominee will become a shareholder of HCLOF with respect to the HarbourVest Interests. The terms of the Transfer Agreements are incorporated into this Agreement by reference.

2. Releases.

(a) Upon the Effective Date, and to the maximum extent permitted by law, each HarbourVest Party on behalf of itself and each of its current and former advisors, trustees, directors, officers, managers, members, partners, employees, beneficiaries, shareholders, agents,

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

participants, subsidiaries, parents, successors, designees, and assigns hereby forever, finally, fully, unconditionally, and completely releases, relieves, acquits, remises, and exonerates, and covenants never to sue, the Debtor, HCLOF, HCLOF's current and former directors, and the Debtor's current and former advisors, trustees, directors, officers, managers, members, partners, employees, beneficiaries, shareholders, agents, participants, subsidiaries, parents, affiliates, successors, designees, and assigns, except as expressly set forth below (the "Debtor Released Parties"), for and from any and all claims, debts, liabilities, demands, obligations, promises, acts, agreements, liens, losses, costs and expenses (including, without limitation, attorney's fees and related costs), damages, injuries, suits, actions, and causes of action of whatever kind or nature, whether known or unknown, suspected or unsuspected, matured or unmatured, liquidated or unliquidated, contingent or fixed, at law or in equity, statutory or otherwise, including, without limitation, any claims, defenses, and affirmative defenses, whether known or unknown, including, without limitation, those which were or could have been asserted in, in connection with, or with respect to the Bankruptcy Case (collectively, the "HarbourVest Released Claims").

(b) Upon the Effective Date, and to the maximum extent permitted by law, the Debtor hereby forever, finally, fully, unconditionally, and completely releases, relieves, acquits, remises, and exonerates, and covenants never to sue (i) each HarbourVest Party and (ii) each HarbourVest Party's current and former advisors, trustees, directors, officers, managers, members, partners, employees, beneficiaries, shareholders, agents, participants, subsidiaries, parents, affiliates, successors, designees, and assigns (the "HarbourVest Released Parties"), for and from any and all claims, debts, liabilities, demands, obligations, promises, acts, agreements, liens, losses, costs and expenses (including, without limitation, attorney's fees and related costs), damages, injuries, suits, actions, and causes of action of whatever kind or nature, whether known or unknown, suspected or unsuspected, matured or unmatured, liquidated or unliquidated, contingent or fixed, at law or in equity, statutory or otherwise, including, without limitation, any claims, defenses, and affirmative defenses, whether known or unknown, which were or could have been asserted in, in connection with, or with respect to the Bankruptcy Case (collectively, the "Debtor Released Claims"); *provided, however*, that notwithstanding anything herein to the contrary, the release contained in this Section 2(b) will apply to the HarbourVest Released Parties set forth in subsection (b)(ii) only with respect to Debtor Released Claims arising from or relating to HarbourVest's ownership of the HarbourVest Interests.

(c) Notwithstanding anything in this Agreement to the contrary, the releases set forth herein will not apply with respect to (i) the Allowed Claims, (ii) the claims of Charlotte Investor IV, L.P., or (iii) the duties, rights, or obligations of any Party under this Agreement or the Transfer Agreements.

3. **Agreement Subject to Bankruptcy Court Approval.** The effectiveness of this Agreement and the Parties' obligations hereunder are conditioned in all respects on the approval of this Agreement by the Bankruptcy Court. The Parties agree to cooperate and use reasonable efforts to have this Agreement approved by the Bankruptcy Court. The "Effective Date" will be the date of an order entered by the Bankruptcy Court approving this Agreement pursuant to a motion filed under Rule 9019.

4. **Representations and Warranties.** Subject in all respects to Section 3 hereof:

(a) each HarbourVest Party represents and warrants that (i) it has full authority to enter into this Agreement and to release the HarbourVest Released Claims and has not sold, transferred, or assigned any HarbourVest Released Claim to any other person or entity, (ii) no person or entity other than such HarbourVest Party has been, is, or will be authorized to bring, pursue, or enforce any HarbourVest Released Claim on behalf of, for the benefit of, or in the name of (whether directly or derivatively) of such HarbourVest Party; and (iii) HarbourVest owns all of the HCLOF Interests free and clear of any claims or interests; and

(b) the Debtor represents and warrants to HarbourVest that (i) it has full authority to enter into this Agreement and to release the Debtor Released Claims and (ii) no person or entity other than the Debtor has been, is, or will be authorized to bring, pursue, or enforce any Debtor Released Claim on behalf of, for the benefit of, or in the name of (whether directly or derivatively) of the Debtor Party.

5. **Plan Support.**

(a) Each HarbourVest Party hereby agrees that it will (a) vote all HarbourVest Claims held by such HarbourVest Party to accept the Plan, by delivering its duly executed and completed ballots accepting the Plan on a timely basis; and (b) not (i) change, withdraw, or revoke such vote (or cause or direct such vote to be changed withdrawn or revoked); (ii) exercise any right or remedy for the enforcement, collection, or recovery of any claim against the Debtor except in a manner consistent with this Agreement or the Plan, (iii) object to, impede, or take any action other action to interfere with, delay or postpone acceptance or confirmation of the Plan; (iv) directly or indirectly solicit, propose, file, support, participate in the formulation of or vote for, any restructuring, sale of assets (including pursuant to **11 U.S.C. § 363**), merger, workout, or plan of reorganization of the Debtor other than the Plan; or (v) otherwise take any action that would in any material respect interfere with, delay, or postpone the consummation of the Plan; provided, however, that such vote may be revoked (and, upon such revocation, deemed void ab initio) by such HarbourVest Party at any time following the termination of this agreement or the occurrence of a Support Termination Event (it being understood that any termination of this agreement shall entitle each HarbourVest Party to change its vote in accordance with section 1127(d) of the Bankruptcy Code), notwithstanding any voting deadline established by the Bankruptcy Court including without limitation the January 5, 2021, 5:00 p.m. (prevailing Central Time) deadline established by the *Order Approving Form of Ballots, Voting Deadline and Solicitation Procedures* [**Docket No. 1476**].

(b) In full resolution of the 3018 Motion, HarbourVest will have a general unsecured claim for voting purposes only in the amount of \$45,000,000.

(c) The obligations of the HarbourVest Parties under this Section 5 shall automatically terminate upon the occurrence of any of the following (each a “Support Termination Event”): (i) the effective date of the Plan, (ii) the withdrawal of the Plan, (iii) the entry of an order by the Bankruptcy Court (A) converting the Bankruptcy Case to a case under chapter 7 of the Bankruptcy Code or (B) appointing an examiner with expanded powers beyond those set forth in sections 1106(a)(3) and (4) of the Bankruptcy Code or a trustee in Bankruptcy

Case, or (iv) the failure of the Court to enter an order approving the terms of this Agreement and the settlement described herein pursuant to Rule 9019 prior to confirmation of the Plan.

6. **No Admission of Liability.** The Parties acknowledge that there is a bona fide dispute with respect to the HarbourVest Claims. Nothing in this Agreement will imply, an admission of liability, fault or wrongdoing by the Debtor, HarbourVest, or any other person, and the execution of this Agreement does not constitute an admission of liability, fault, or wrongdoing on the part of the Debtor, HarbourVest, or any other person.

7. **Successors-in-Interest.** This Agreement shall be binding upon and shall inure to the benefit of each of the Parties and their successors, and assigns.

8. **Notice.** Each notice and other communication hereunder will be in writing and will be sent by email and delivered or mailed by registered mail, receipt requested, and will be deemed to have been given on the date of its delivery, if delivered, and on the fifth full business day following the date of the mailing, if mailed to each of the Parties thereto at the following respective addresses or such other address as may be specified in any notice delivered or mailed as set forth below:

HARBOURVEST

HarbourVest Partners L.P.
Attention: Michael J. Pugatch
One Financial Center
Boston, MA 02111
Telephone No. 617-348-3712
E-mail: mpugatch@harbourvest.com

with a copy (which shall not constitute notice) to:

Debevoise & Plimpton LLP
Attention: M. Natasha Labovitz, Esq.
919 Third Avenue
New York, NY 10022
Telephone No. 212-909-6649
E-mail: nlabovitz@debevoise.com

THE DEBTOR

Highland Capital Management, L.P.
300 Crescent Court, Suite 700
Dallas, Texas 75201
Attention: James P. Seery, Jr.
Telephone No.: 972-628-4100
Facsimile No.: 972-628-4147
E-mail: jpseeryjr@gmail.com

with a copy (which shall not constitute notice) to:

Pachulski Stang Ziehl & Jones LLP
Attention: Jeffrey Pomerantz, Esq.
10100 Santa Monica Blvd., 13th Floor
Los Angeles, CA 90067
Telephone No.: 310-277-6910
Facsimile No.: 310-201-0760
E-mail: jpomerantz@pszjlaw.com

9. **Advice of Counsel.** Each Party represents that it has: (a) been adequately represented by independent legal counsel of its own choice, throughout all of the negotiations that preceded the execution of this Agreement; (b) executed this Agreement upon the advice of such counsel; (c) read this Agreement, and understands and assents to all the terms and conditions contained herein without any reservations; and (d) had the opportunity to have this Agreement and all the terms and conditions contained herein explained by independent counsel, who has answered any and all questions asked of such counsel, or which could have been asked of such counsel, including, but not limited to, with regard to the meaning and effect of any of the provisions of this Agreement.

10. **Entire Agreement.** This Agreement and the Transfer Agreement contain the entire agreement and understanding concerning the subject matter of this Agreement, and supersede and replace all prior negotiations and agreements, written or oral and executed or unexecuted, concerning such subject matter. Each of the Parties acknowledges that no other Party, nor any agent of or attorney for any such Party, has made any promise, representation or warranty, express or implied, written or oral, not otherwise contained in this Agreement to induce any Party to execute this Agreement. The Parties further acknowledge that they are not executing this Agreement in reliance on any promise, representation or warranty not contained in this Agreement, and that any such reliance would be unreasonable. This Agreement will not be waived or modified except by an agreement in writing signed by each Party or duly authorized representative of each Party.

11. **No Party Deemed Drafter.** The Parties acknowledge that the terms of this Agreement are contractual and are the result of arms'-length negotiations between the Parties and their chosen counsel. Each Party and its counsel cooperated in the drafting and preparation of this Agreement. In any construction to be made of this Agreement, the Agreement will not be construed against any Party.

12. **Future Cooperation.** The Parties agree to cooperate and execute such further documentation as is reasonably necessary to effectuate the intent of this Agreement.

13. **Counterparts.** This Agreement may be executed in counterparts with the same force and effect as if executed in one complete document. Each Party's signature hereto will signify acceptance of, and agreement to, the terms and provisions contained in this Agreement. Photographic, electronic, and facsimile copies of signed counterparts may be used in lieu of the originals of this Agreement for any purpose.

14. **Governing Law; Venue; Attorneys' Fees and Costs.** The Parties agree that this Agreement will be governed by and will be construed according to the laws of the State of Texas without regard to conflict-of-law principles. Each of the Parties hereby submits to the exclusive jurisdiction of the Bankruptcy Court during the pendency of the Bankruptcy Case and thereafter to the exclusive jurisdiction of the state and federal courts located in the Northern District of Texas, Dallas Division, with respect to any disputes arising from or out of this Agreement. In any action to enforce this Agreement, the prevailing party shall be entitled to recover its reasonable and necessary attorneys' fees and costs (including experts).

[Remainder of Page Intentionally Blank]

IT IS HEREBY AGREED.

HIGHLAND CAPITAL MANAGEMENT, L.P.

By: /s/ James P. Seery, Jr.
Name: James P. Seery, Jr.
Its: CEO/CRO

HarbourVest 2017 Global Fund L.P., by HarbourVest 2017 Global Associates L.P., its General Partner, by HarbourVest GP LLC, its General Partner, by HarbourVest Partners, LLC, its Managing Member

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

HarbourVest 2017 Global AIF L.P., by HarbourVest Partners (Ireland) Limited, its Alternative Investment Fund Manager, by HarbourVest Partners L.P., its Duly Appointed Investment Manager, by HarbourVest Partners, LLC, its General Partner

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

HarbourVest Dover Street IX Investment L.P., by HarbourVest Partners L.P., its Duly Appointed Investment Manager, by HarbourVest Partners, LLC, its General Partner

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

HarbourVest Partners L.P., on behalf of funds and accounts under management, by HarbourVest Partners, LLC, its General Partner

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

**HarbourVest Skew Base AIF L.P., by HarbourVest Partners (Ireland) Limited, its
Alternative Investment Fund Manager, by HarbourVest Partners L.P., its Duly Appointed
Investment Manager, by HarbourVest Partners, LLC, its General Partner**

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

**HV International VIII Secondary L.P., by HIPEP VIII Associates L.P., its General
Partner, by HarbourVest GP LLC, its General Partner, by HarbourVest Partners, LLC,
its Managing Member**

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

Exhibit A

TRANSFER AGREEMENT
FOR ORDINARY SHARES OF
HIGHLAND CLO FUNDING, LTD.

This Transfer Agreement, dated as of December [REDACTED], 2020 (this “**Transfer Agreement**”), is entered into by and among Highland CLO Funding, Ltd. (the “**Fund**”), Highland HCF Advisor, Ltd. (the “**Portfolio Manager**”), HCMLP Investments, LLC (the “**Transferee**”) and each of the following: HarbourVest Dover Street IX Investment L.P., HarbourVest 2017 Global AIF L.P., HarbourVest 2017 Global Fund L.P., HV International VIII Secondary L.P., and HarbourVest Skew Base AIF L.P. (collectively, the “**Transferors**”).

WHEREAS, each Transferor is the record, legal and beneficial owner of the number of ordinary shares (“**Shares**”) of the Fund set forth opposite such Transferor’s name on Exhibit A hereto (with respect to each Transferor, the “**Transferred Shares**”).

WHEREAS the Transferee is an affiliate and wholly owned subsidiary of Highland Capital Management, L.P. (“**HCMLP**”) which is one of the initial members of the Fund.

WHEREAS, each Transferor wishes to transfer and assign 100% of its rights, title and interest as a shareholder in the Fund, including the Transferred Shares (the “**Interest**”) on the terms set forth in this Transfer Agreement.

WHEREAS, subject to and in connection with the approval of that certain Settlement Agreement, dated on or about the date hereof, by and among HCMLP and the Transferors (the “**Settlement Agreement**”), the Transferee desires that the Interest be transferred to Transferee and that thereafter the Transferee will become a Shareholder and the Transferors will no longer be Shareholders.

WHEREAS, the Portfolio Manager desires to consent to such transfers and to the admission of Transferee as a Shareholder on the terms set forth herein, and the Transferors and Transferee agree to such terms.

WHEREAS, the Fund desires to amend its records to reflect the foregoing transfers.

NOW, THEREFORE, the parties hereto agree as follows:

1. Transfer of Shares and Advisory Board

- a. Each Transferor hereby transfers and assigns all of its rights, title, and interest in its Interest to the Transferee, and the Transferee wishes to be admitted to the Fund as a Shareholder.
- b. In connection with the transfer of the Interest as contemplated herein, the Transferee shall be granted the right to appoint a representative to the Fund’s advisory board (the “**Advisory Board**”) to replace the Transferors’ appointed representative to the Advisory Board.

- c. Transferee hereby assumes all of Transferor's rights and obligations in respect of the Interest effective as of the Effective Date (as defined below) and acknowledge that thereafter Transferee shall be subject to the applicable terms and provisions of the Members' Agreement dated as of November 15, 2017 (the "**Members' Agreement**"), the Articles of Incorporation adopted November 15, 2017 (the "**Articles**") and the Subscription and transfer Agreement, dated as of November 15, 2017 among each Transferor, the Fund and the Portfolio Manager (the "**Subscription Agreement**", and together with the Members' Agreement and the Articles, the "**Fund Agreements**") with respect to the Interest. Transferee does not assume any liability or responsibility for any obligations or liabilities incurred by any Transferor prior to the Effective Date of the transfer.
 - d. Following the transfer, each Transferor shall have no further rights or obligations to any party hereunder in respect of the Interest under the Fund Agreements.
 - e. This Transfer Agreement, and the parties' obligations hereunder, are conditioned in all respects on the approval by the Bankruptcy Court for the Northern District of Texas, Dallas Division pursuant to **Federal Rule of Bankruptcy Procedure 9019** of (i) this Transfer Agreement and (ii) the Settlement Agreement, and each of the parties agree that no further action shall be required from any party for the transfer of the Interest to be effective except as described herein.
2. Transferee's Representations and Warranties. The Transferee represents and warrants to the Transferors, the Portfolio Manager, and the Fund as follows:
- a. This Transfer Agreement constitutes a valid and binding obligation of the Transferee, enforceable against it in accordance with its terms;
 - b. This Transfer Agreement has been duly and validly executed and delivered by or on behalf of the Transferee and such execution and delivery have been duly authorized by all necessary trust action of the Transferee;
 - c. The Transferee acknowledges receipt of, has read, and is familiar with, the Fund's Offering Memorandum for Placing Shares dated November 15, 2017 (the "**Offering Memorandum**") and the Fund Agreements;
 - d. The Transferee hereby accepts and receives the Interest from the Transferors for investment, and not with a view to the sale or distribution of any part thereof, and the Transferee has no present intention of selling, granting participations in, or otherwise distributing the same, but subject nevertheless to any requirement of law that the disposition of the Transferee's property shall at all times be within such Transferee's control; and
 - e. The Transferee is an "Eligible U.S. Investor" as defined in the Offering Memorandum.

3. Transferors' Representations and Warranties. Each Transferor represents and warrants to the Transferee, the Portfolio Manager, and the Fund as follows:
 - a. This Transfer Agreement constitutes a valid and binding obligation of the Transferor, enforceable against it in accordance with its terms;
 - b. This Transfer Agreement has been duly authorized, and duly and validly executed and delivered by the Transferor and such execution and delivery have been duly authorized by all necessary action of the Transferor; and
 - c. As of the date hereof, the Transferor has good and valid title to the Transferor's Interest, free and clear of any liens, vesting requirements or claims by others.
4. Consent to Transfer. Based in part on the representations and warranties of the Transferors and the Transferee which are included herein, and on the terms contained herein, the Portfolio Manager and the Fund hereby consent to the transfers of the Interest, the admission of the Transferee as a Shareholder and the Transferee's appointment of a representative to the Advisory Board, the Portfolio Manager's execution of this Transfer Agreement constituting its prior written consent to the transfers of the Interest for the purposes of article 18.1 of the Articles and this Transfer Agreement constituting express notice in writing to the Fund of the assignment set out at clause 1(c) above for the purposes of the Law of Property (Miscellaneous Provisions) (Guernsey) Law, 1979 (as amended).
5. Completion: As of the date of approval by the Bankruptcy Court for the Northern District of Texas, Dallas Division pursuant to Federal Rule of Bankruptcy Procedure 9019 of (i) this Transfer Agreement and (ii) the Settlement Agreement (the "**Effective Date**"):
 - a. each Transferor shall deliver or cause to be delivered to the Transferee a transfer instrument relating to the Transferred Shares duly executed and completed by that Transferor in favor of the Transferee; and
 - b. the Transferee shall deliver to the Transferors and the Fund a duly executed and dated Adherence Agreement (as defined in the Members' Agreement).

Prior to the Effective Date the Transferee shall procure that:

 - c. the board of directors of the Fund shall hold a meeting at which the transfer of the Shares to the Transferee shall be approved and registration in the register of members of the Fund shall be effected on the Effective Date.
6. Miscellaneous.
 - a. Each of the parties hereto agree to execute any further instruments and perform any further acts which are or may become reasonably necessary to carry out the intent of this Transfer Agreement or are reasonably requested by the Portfolio Manager, the Fund or a Transferor to complete the transfer of the Interest.

- b. The parties to this Transfer Agreement acknowledge that the terms of this Transfer Agreement are the result of arms'-length negotiations between the parties and their respective counsel. Each party and its counsel cooperated in the drafting and preparation of this Transfer Agreement. In any construction to be made of this Transfer Agreement, the language or drafting of this Transfer Agreement will not be construed against any party.
- c. This Transfer Agreement shall be governed by, and construed and enforced in accordance with, the internal substantive laws of the state of Delaware, without giving effect to conflicts of law principles.
- d. The representations, warranties and covenants of the Transferors and the Transferee shall remain in full force and effect following the transfer of the Interest, and the Fund and the Portfolio Manager thereafter may rely on all such representations, warranties and covenants.
- e. This Transfer Agreement may be executed in multiple counterparts, each of which shall be deemed to be an original, but all of which together shall constitute one and the same instrument. Photographic, electronic, and facsimile copies of signed counterparts may be used in lieu of the originals of this Transfer Agreement for any purpose.
- f. Captions of sections have been added only for convenience and shall not be deemed to be a part of this Transfer Agreement.
- g. This Transfer Agreement is among the parties hereto. No Person that is not a party hereto shall have any right herein as a third-party beneficiary or otherwise except as expressly contemplated hereby.

[Remainder of Page Intentionally Blank]

IN WITNESS WHEREOF, the undersigned have executed this Transfer Agreement as of the date first above written.

TRANSFeree:

HCMLP Investments, LLC

By: Highland Capital Management, L.P.

Its: Member

By: _____

Name: James P. Seery, Jr.

Title: Chief Executive Officer

PORTFOLIO MANAGER:

Highland HCF Advisor, Ltd.

By: _____

Name: James P. Seery, Jr.

Title: President

FUND:

Highland CLO Funding, Ltd.

By: _____

Name:

Title:

[Additional Signatures on Following Page]

HarbourVest 2017 Global Fund L.P.

By: HarbourVest 2017 Global Associates L.P.
Its General Partner

By: HarbourVest GP LLC
Its General Partner

By: HarbourVest Partners, LLC
Its Managing Member

By: _____

Name: Michael Pugatch

Title: Managing Director

Exhibit A

<u>Transferee Name</u>	<u>Number of Shares</u>	<u>Percentage</u>
HarbourVest Dover Street IX Investment L.P.	[REDACTED]	[REDACTED]
HarbourVest 2017 Global AIF L.P.	[REDACTED]	[REDACTED]
HarbourVest 2017 Global Fund L.P.	[REDACTED]	[REDACTED]
HV International VIII Secondary L.P.	[REDACTED]	[REDACTED]
HarbourVest Skew Base AIF L.P.	[REDACTED]	[REDACTED]

EXHIBIT 4

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ATTORNEYS FOR JAMES DONDERO

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

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

**JAMES DONDERO’S OBJECTION TO DEBTOR’S MOTION FOR ENTRY
OF AN ORDER APPROVING SETTLEMENT WITH HARBOURVEST**

[Relates to **Docket No. 1625**]

James Dondero (“Respondent”), a creditor, indirect equity security holder, and party in interest in the above-captioned bankruptcy case, hereby files this Objection to *Debtor’s Motion for Entry of an Order Approving Settlement with HarbourVest (Claim Nos. 143, 147, 149, 150, 153, 154)* [**Docket No. 1625**] (the “Motion”) filed by Highland Capital Management, L.P. (the “Debtor”). Through the Motion, the Debtor seeks approval of its compromise with HarbourVest 2017 Global Fund L.P., HarbourVest 2017 Global AIF L.P., HarbourVest Dover Street IX Investment L.P., HV International VIII Secondary L.P., HarbourVest Skew Base AIF L.P., and HarbourVest Partners L.P. (collectively, “HarbourVest”) pursuant to Rule 9019 of the Federal



Rules of Bankruptcy Procedure (the “Bankruptcy Rules”). In support of this objection, Respondent respectfully represents as follows:

I. INTRODUCTION

1. Under Bankruptcy Rule 9019, the Bankruptcy Court is tasked with making an independent judgment on the merits of a proposed settlement to ensure that the proposed settlement is “fair, equitable, and in the best interest of the estate.”¹ While Respondent recognizes the Debtor’s efforts in arranging a settlement, there are at least three significant issues with the terms of the settlement that merit denial of the Motion: (i) the proposed settlement is not reasonable or in the best interest of the estate given the weakness of the HarbourVest Claim (as hereinafter defined); (ii) the proposed settlement is a blatant attempt to purchase votes in support of Debtor’s plan by giving HarbourVest a significant claim to which it would not otherwise be entitled; and (iii) the proposed settlement seeks to improperly classify the HarbourVest Claim² in two separate classes in order to gerrymander an affirmative vote on its reorganization plan. Moreover, the proposed settlement does not satisfy the factors for approval fixed by case law. On information and belief, Debtor’s CEO/CRO, Mr. Seery, has previously asserted on multiple occasions that the HarbourVest Claim had no value and that the Debtor could resolve such claim for no more than \$5 million. While Respondent and Mr. Seery have had a number of disagreements in this case, Respondent agrees with Mr. Seery’s initial conclusion that the HarbourVest Claim is substantially without merit. Respondent understands that any settlement will not necessarily provide the best possible outcome for the Debtor, but in this instance the proposed settlement far exceeds the bounds of reasonableness and, on its face, is an attempt by the Debtor to purchase votes in favor

¹ See *In re Jackson Brewing Co.*, 624 F.2d 599, 602 (5th Cir. 1980).

² While HarbourVest has filed a number of claims, each filed claim is exactly the same except in the name of the claimant. See Claim Nos. 143, 147, 149, 150, 153, and 154.

of confirmation of its Plan. Given the Debtor's prior positions as to the merits of HarbourVest Claim it is necessary for the Court to closely scrutinize the settlement to determine why the Debtor now believes granting HarbourVest a net claim of nearly \$60 million³ resulting from HarbourVest's investment in a non-debtor entity (which was and is managed by a non-debtor) to be in the best interest of the estate. Upon close scrutiny, Respondent believes the Court will find that the proposed settlement is not reasonable or in the best interest of the estate and the Motion therefore should be denied.

II. BACKGROUND

2. On October 16, 2019 (the "Petition Date"), the Debtor filed a voluntary petition for relief under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code") in the U.S. Bankruptcy Court for the District of Delaware, Case No. 19-12239 (CSS) (the "Delaware Court").

3. On October 29, 2019, the Official Committee of Unsecured Creditors (the "Committee") was appointed by the U.S. Trustee in Delaware.

4. On December 4, 2019, the Delaware Court entered an order transferring venue of the Debtor's Bankruptcy Case to this Court [Docket No. 186].

5. On December 27, 2019, the Debtor filed that certain *Motion of the Debtor for Approval of Settlement with the Official Committee of Unsecured Creditors Regarding Governance of the Debtor and Procedures for Operations in the Ordinary Course* [Docket No. 281] (the "Settlement Motion"). This Court approved the Settlement Motion on January 9, 2020 [Docket No. 339] (the "Settlement Order").

³ The proposed settlement provides that HarbourVest shall receive an allowed general unsecured (Class 8) claim in the amount of \$45 million and an allowed subordinated general unsecured (Class 9) claim in the amount of \$35 million. As part of the settlement, HarbourVest will then transfer its entire interest in Highland CLO Funding, Ltd. ("HCLOF") to an entity to be designated by the Debtor. The Debtor states that the value of this interest is approximately \$22 million as of December 1, 2020.

6. In connection with the Settlement Order, an independent board of directors was appointed on January 9, 2020, for the Debtor's general partner, Strand Advisors, Inc. (the "Board"). The members of the Board are James P. Seery, Jr., John S. Dubel, and Russell F. Nelms.

7. On July 16, 2020, this Court entered an order authorizing the Debtor to employ James P. Seery, Jr. as Chief Executive Officer and Chief Restructuring Officer of the Debtor. *See* Docket No. 854.

8. On April 8, 2020, HarbourVest filed Proofs of Claim Numbers 143, 149, 149, 150, 153, and 154 (collectively, the "HarbourVest Claim")⁴.

9. On July 30, 2020, the Debtor filed *Debtor's First Omnibus Objection to Certain (A) Duplicate Claims; (B) Overstated Claims; (C) Late-Filed Claims; (D) Satisfied Claims; (E) No Liability Claims; and (F) Insufficient-Documentation Claims* [Docket No. 906] (the "Debtor Objection"), which contained an objection to the HarbourVest Claim.

10. On September 11, 2020, HarbourVest filed *HarbourVest Response to Debtor's First Omnibus Objection to Certain (A) Duplicate Claims; (B) Overstated Claims; (C) Late-Filed Claims; (D) Satisfied Claims; (E) No Liability Claims; and (F) Insufficient-Documentation Claims* [Docket No. 1057] (the "HarbourVest Response").

11. On December 23, 2020, the Debtor filed the Motion seeking approval of a proposed settlement of the HarbourVest Claim under Rule 9019. Docket No. 1625.

III. LEGAL STANDARD

12. The merits of a proposed compromise should be judged under the criteria set forth in *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414 (1968). *TMT Trailer* requires that a compromise must be "fair and equitable." *TMT Trailer*, 390

⁴ While HarbourVest has filed a number of claims, each filed claim is exactly the same except in the name of the claimant. *See* Claim Nos. 143, 147, 149, 150, 153, and 154.

U.S. at 424; *In re AWECO, Inc.*, 725 F.2d 293, 298 (5th Cir. 1984). The terms “fair and equitable,” commonly referred to as the “absolute priority rule,” mean that (i) senior interests are entitled to full priority over junior interests; and (ii) the compromise is reasonable in relation to the likely rewards of litigation. *In re Cajun Electric Power Coop.*, 119 F.3d 349, 355 (5th Cir. 1997); *In re Jackson Brewing Co.*, 624 F.2d 599, 602 (5th Cir. 1980).

13. In determining whether a proposed compromise is fair and equitable, a Court should consider the following factors:

- (i) the probabilities of ultimate success should the claim be litigated;
- (ii) the complexity, expense, and likely duration of litigating the claim;
- (iii) the difficulties of collecting a judgment rendered from such litigation; and,
- (iv) all other factors relevant to a full and fair assessment of the wisdom of the compromise.

TMT Trailer, 390 U.S. at 424.

14. In considering whether to approve a proposed compromise, the bankruptcy judge “may not simply accept the trustee’s word that the settlement is reasonable, nor may he merely ‘rubber stamp’ the trustee’s proposal.” *In re Am. Res. Corp.*, 841 F.2d 159, 162 (7th Cir. 1987). “[T]he bankruptcy judge must apprise himself of all facts necessary to evaluate the settlement and make an informed and independent judgment about the settlement.” *See TMT Trailer*, 390 U.S. at 424, 434.

15. While the trustee’s business judgment is entitled to a certain deference, “business judgment is not alone determinative of the issue of court approval.” *See In re Endoscopy Ctr. of S. Nev., LLC*, 451 B.R. 527, 536 (Bankr. D. Nev. 2011). Further, the business judgment rule does not provide a debtor with “unfettered freedom” to do as it wishes. *See In re Pilgrim’s Pride Corp.*, 403 B.R. 413, 426 (Bankr. N.D. Tex. 2009) (“[A]s a fiduciary holding its estate in trust and responsible

to the court, a debtor in possession must administer its case and conduct its business in a fashion amenable to the scrutiny to be expected from creditor and court oversight.”). The Court must conduct an “intelligent, objective and educated evaluation”⁵ of the proposed settlement “to ensure that the settlement is fair, equitable, and in the best interest of the estate and creditors.” *See In re Mirant Corp.*, 348 B.R. 725, 739 (Bankr. N.D. Tex. 2006) (quoting *Conn. Gen. Life Ins. Co. v. Foster Mortgage Corp. (In re Foster Mortgage Corp.)*, 68 F.3d 914, 917 (5th Cir. 1995)).

IV. ARGUMENT AND AUTHORITIES

16. As discussed in detail below, there are three significant issues with the terms of the settlement that merit denial of the Motion: (i) the proposed settlement is not reasonable or in the best interest of the estate given the weakness of the HarbourVest Claim; (ii) the proposed settlement is a blatant attempt to purchase votes in support of Debtor’s plan by giving HarbourVest a substantial claim to which it is not entitled; and (iii) the proposed settlement seeks to improperly classify HarbourVest’s one claim in two separate classes in order to gerrymander an affirmative vote on its reorganization plan. For these and certain additional reasons as discussed below, the Motion should be denied.

A. Through its Claim, HarbourVest Seeks to Revisit this Court’s Orders in the Acis Case

17. As an initial matter, through its proofs of claim, HarbourVest appears to be second guessing the Court’s judgment in the Chapter 11 case of Acis Capital Management, LP and Acis Capital Management GP, LLC (collectively, “Acis”) and seeking to revisit the Court’s orders entered in that case years ago. HarbourVest appears to be arguing that the TRO and injunction

⁵ *In re Jackson Brewing Co.*, 624 F.2d 599, 602 (5th Cir. 1980) (“To assure a proper compromise the bankruptcy judge, must be apprised of all the necessary facts for an intelligent, objective and educated evaluation. He must compare the terms of the compromise with the likely rewards of litigation.”).

entered in the Acis case that prevented redemptions or resets in the CLOs are now the root cause of the decrease in value of its investment in HCLOF.

18. Specifically, the claim states that HarbourVest incurred “financial harm resulting from, among other things (i) court orders in the Acis bankruptcy that prevented certain CLOs in which HCLOF was invested from being refinanced or reset and court orders that otherwise regulated the activity of HCLOF.”⁶

19. Essentially, HarbourVest is saying that the orders entered in the Acis case did not actually protect the investors and their investments, but instead were a triggering cause for the alleged diminution in value of its investment in HCLOF. Nevertheless, even though the value of HCLOF dropped dramatically only after the Effective Date of Acis’s Plan, years later and despite the lack of Debtor involvement in managing HarbourVest’s investment, HarbourVest now seeks to impute liability to the Debtor through a flimsy narrative designed to recoup investment losses unrelated to the Debtor and for which the Debtor owed HarbourVest no duty.

20. That HarbourVest now, years later, seeks to revisit this Court’s Acis orders raises a number of issues, including those as to HarbourVest’s involvement (or lack thereof) in the Acis case, whether the orders, Plan, or Confirmation Order in the Acis case may bar some of the relief requested by HarbourVest here, and questions related to the merits of the HarbourVest Claim and the legal grounds allegedly supporting it.

⁶ See Proof of Claim 143, para. 3 (“Due to the Acis bankruptcy and certain conduct alleged to have been undertaken by the Debtor (to whom Acis subcontracted its functions) and Debtor’s employees (who were officers, employees, and agents of Acis), the Claimant has suffered significant harm. Such harm includes, but is not limited to, financial harm resulting from, among other things (i) court orders in the Acis bankruptcy that prevented certain CLOs in which HCLOF was invested from being refinanced or reset and court orders that otherwise regulated the activity of HCLOF; and (ii) significant fees and expenses related to the Acis bankruptcy that were charged to HCLOF.”).

B. The HarbourVest Claim Lacks Merit and the Proposed Settlement is Not Reasonable

21. Based on the HarbourVest Claim and its filed response to the Debtor's objection, Respondent believes that the HarbourVest claim is meritless and the proposed settlement is not reasonable, fair and equitable, or in the best interest of the estate.

22. First, the proposed settlement is concerning particularly because HarbourVest's bare bones proof of claim contains very little in terms of allegations of specific conduct against the Debtor that would give rise to a \$60 million claim against this estate. While HarbourVest's response to the Debtor's claim objection is lengthy, it contains very little in real substance supporting its right to such a claim against the estate. The response also omits a number of key facts that are relevant and potentially fatal to its claim for damages against the Debtor's estate. Among them is the fact that Acis (and thereafter Reorganized Acis), along with Mr. Joshua Terry, managed HarbourVest's investment for years after it was made.⁷ Despite this fact, HarbourVest's alleged damages appear to be based largely on the difference between the value of its initial investment at confirmation of Acis's Plan and the current value of the investment—which amount was directly determined by the performance of the CLOs that Acis managed during this time.⁸ Neither the claim nor the response directly address the implications of Acis's management of the CLOs during the period following HarbourVest's investment. Nor does HarbourVest address or discuss performance of the CLOs, the market forces that may have caused HarbourVest's investment to lose value, or other factors influencing the current value of its investment. The

⁷ See, e.g., HarbourVest Proof of Claim 143, p. 5 ("The Claimant is a limited partner in one of the Debtor's managed vehicles, Highland CLO Funding, Ltd. ("HCLOF"). Acis Capital Management GP, L.L.C. and Acis Capital Management L.P. (together, "Acis"), the portfolio manager for HCLOF, filed for chapter 11 in the United States Bankruptcy Court for the Northern District of Texas (the "Court") on January 30, 2018.").

⁸ See HarbourVest Response, **Docket No. 1057**, para. 40 ("HarbourVest has been injured from the Investment: not only has the Investment failed to accrue value, its value plummeted. The Investment's current value is far less than HarbourVest's initial contribution.").

speculative nature of the damages and the lack of specificity of the HarbourVest Claim and the role of Acis in the loss of value to HarbourVest all call into question the reliability of the allegations and the legal basis for the claim amount awarded in the settlement.

23. Also absent from Harbourvest's papers is any discussion of any contract or agreement between (i) HarbourVest and the Debtor; and (ii) any agreement that was executed in conjunction with HarbourVest's initial investment. While the proof of claim references a number of agreements, there is no explanation in the claim or in HarbourVest's response to the Debtor's claim objection of how these agreements give rise to liability against the *Debtor*. For example, neither the claim nor the HarbourVest Response (which includes more than 600 pages of attachments) attach *any* written agreement between HarbourVest and any other party. While HarbourVest has alleged a number of claims sounding in tort, many of those claims cannot exist absent a contract or other express relationship between the parties. Moreover, the terms of the relevant contracts themselves likely contain a number of provisions that may call into question Debtor's liability or would be otherwise relevant to merits of the HarbourVest Claim. For example, HarbourVest in its papers appears to assert or imply that the Debtor made a number of false or fraudulent representations to solicit HarbourVest's investment, but then fails to discuss or even identify the applicable agreements it alleges it was induced into signing in connection with its investment (this despite the substantial value of the investment when the Acis plan was confirmed).

24. Given these issues, among many others, the HarbourVest Claim is unsustainable both from a liability and damages standpoint and there are many very high hurdles HarbourVest would have to clear in seeking to prove liability against the Debtor and in proving its damages. For a long period of time, its investment was managed by Acis and the investment's performance was directly tied to Acis's inadequate performance as portfolio manager. Further, the value of

C. The Proposed Settlement is an Improper Attempt by the Debtor to Purchase Votes in Support of its Plan and the Separate Classification of the HarbourVest Claim Constitutes Gerrymandering in Violation of 11 U.S.C. § 1122

27. Section 1122 of the Bankruptcy Code provides as follows:

(a) Except as provided in subsection (b) of this section, a plan may place a claim or an interest in a particular class only if such claim or interest is substantially similar to the other claims or interests of such class.

(b) A plan may designate a separate class of claims consisting only of every unsecured claim that is less than or reduced to an amount that the court approves as reasonable and necessary for administrative convenience.

11 U.S.C. § 1122.

28. “Chapter 11 requires classification of claims against a debtor for two reasons. Each class of creditors will be treated in the debtor's plan of reorganization based upon the similarity of its members' priority status and other legal rights against the debtor's assets. Proper classification is essential to ensure that creditors with claims of similar priority against the debtor's assets are treated similarly.” *In re Greystone III Joint Venture*, 995 F.2d 1274, 1277 (5th Cir. 1991).

29. “Section 1122 consequently must contemplate some limits on classification of claims of similar priority. A fair reading of both subsections suggests that ordinarily substantially similar claims, those which share common priority and rights against the debtor’s estate, should be placed in the same class.” *Id.* at 1278.

30. The Fifth Circuit has stated that there is “one clear rule that emerges from otherwise muddled caselaw on § 1122 claims classification: thou shalt not classify similar claims differently in order to gerrymander an affirmative vote on a reorganization plan.” *Id.* at 1279. The Court observed:

There must be some limit on a debtor’s power to classify creditors in such a manner. . . . Unless there is some requirement of keeping similar claims together, nothing would stand in the way of a debtor seeking out a few impaired creditors (or even one such creditor) who will vote for the plan and placing them in their own class.

In re Greystone III Joint Venture, 995 F.2d 1274, 1279 (5th Cir. 1991) (quoting *In re U.S. Truck Co.*, 800 F.2d 581, 586 (6th Cir. 1986)).

32. There are a number of other reasons for the Court to closely scrutinize the proposed settlement that may warrant denial of the Motion.

JAMES DONDERO'S OBJECTION TO THE DEBTOR'S MOTION FOR ENTRY OF AN ORDER APPROVING SETTLEMENT WITH HARBOURVEST

claims, should invite close scrutiny. Under these facts, the potential allowance of an \$80 million claim (less the value of its share in HCLOF, which may suffer by continued management by Acis) against the estate for an investment which was not held or managed by the Debtor would be a huge undue windfall.

34. Second, the Motion states that HarbourVest will vote its proposed allowed Class 8 (proposed at \$45 million) and Class 9 (proposed at \$35 million) claims in support of confirmation. There are at least two potential issues with this proposal. First, the deadline for parties to submit ballots was January 5, 2021, and as of the close of business on January 5, the HarbourVest Claim has not been allowed for voting purposes.⁹ Second, the Motion and proposed settlement agreement state that the HarbourVest Claim will be allowed for voting purposes only as a general unsecured claim in the amount of \$45 million. It is unclear how HarbourVest can, or would be authorized to, vote its purported Class 8 and 9 Claims in support of the Plan after the voting deadline and when the settlement provides only for a voting claim in Class 8.

35. Third, while the Motion addresses the factor of probability of success in the litigation, it does not discuss in detail the cost of doing so in relation to the amount to be paid to HarbourVest under the settlement or the likelihood that the Debtor will succeed in the litigation. In addition, unlike the claims filed by Acis and UBS, the HarbourVest Claim does not arise from pending litigation. At this point, relatively little litigation has occurred and the parties have not addressed threshold issues that might dramatically narrow the scope of the HarbourVest Claim. Rule 9019 requires an analysis as to whether the probability of success in litigation is outweighed by the consideration achieved under the settlement. *See In re Jackson Brewing Co.*, 624 F.2d 599, 602 (5th Cir. 1980) (The Court must “compare the terms of the compromise with the likely rewards

⁹ The hearing on the 3018 and 9019 motions are set concurrently with confirmation.

EXHIBIT 5

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

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

**OBJECTION TO DEBTOR’S MOTION FOR ENTRY OF AN ORDER APPROVING
 SETTLEMENT WITH HARBOURVEST (CLAIM NOS. 143, 147, 149, 150, 153, 154)
 AND AUTHORIZING ACTIONS CONSISTENT THEREWITH**

The Dugaboy Investment Trust and Get Good Trust (jointly, “Objectors”), submit this Objection for the purpose of objecting to the *Debtor’s Motion for Entry of an Order Approving Settlement with HarbourVest (Claim Nos. 143, 147, 149, 150, 153, 154) and Authorizing Actions Consistent Therewith* [Dkt. #1625] (the “Motion”) filed by Highland Capital Management, L.P. (the “Debtor”). Through the Motion, the Debtor seeks approval of its compromise with HarbourVest 2017 Global Fund L.P., HarbourVest 2017 Global AIF L.P., HarbourVest Dover Street IX Investment L.P., HV International VIII Secondary L.P., HarbourVest Skew Base AIF L.P., and HarbourVest Partners L.P. (collectively, “HarbourVest”) pursuant to Rule 9019 of the



Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”). In support of this objection, Objectors respectfully represent as follows:

I. INTRODUCTION

1. Objectors recognize that Courts favorably view settlements and, as a matter of course, generally approve settlements as being in the best interest of the bankruptcy estate. The settlement proposed herein, however, is different than other settlements inasmuch as it represents a 180 degree departure from the Debtor’s own analysis of the Claim of HarbourVest and the fact that the settlement is tied to HarbourVest approving the Debtor’s plan. Little or no information is provided by the Debtor as to why its initial analysis was flawed and what information or legal principal it discovered to change a zero claim into a massive claim that will have a significant impact on the recovery to creditors.

II. BACKGROUND

2. On October 16, 2019 (the “Petition Date”), the Debtor filed a voluntary petition for relief under chapter 11 of title 11 of the United States Code (the “Bankruptcy Code”) in the U.S. Bankruptcy Court for the District of Delaware, Case No. 19-12239 (CSS) (the “Delaware Court”).

3. On October 29, 2019, the Official Committee of Unsecured Creditors (the “Committee”) was appointed by the U.S. Trustee in Delaware.

4. On December 4, 2019, the venue of this case was transferred. [Dkt. #186].

5. On July 16, 2020, this Court entered an order authorizing the Debtor to employ James P. Seery, Jr. as Chief Executive Officer and Chief Restructuring Officer of the Debtor. [See Dkt. #854].

6. On April 8, 2020, HarbourVest filed Proofs of Claim Numbers 143, 149, 149, 150, 153, and 154 (collectively, the “HarbourVest Claim”)¹.

7. On July 30, 2020, the Debtor filed *Debtor’s First Omnibus Objection to Certain (A) Duplicate Claims; (B) Overstated Claims; (C) Late-Filed Claims; (D) Satisfied Claims; (E) No Liability Claims; and (F) Insufficient-Documentation Claims* [Dkt. #906] (the “Debtor Objection”), which contained an objection to the HarbourVest Claim.

8. On September 11, 2020, HarbourVest filed *HarbourVest Response to Debtor’s First Omnibus Objection to Certain (A) Duplicate Claims; (B) Overstated Claims; (C) Late-Filed Claims; (D) Satisfied Claims; (E) No Liability Claims; and (F) Insufficient-Documentation Claims* [Dkt. #1057] (the “HarbourVest Response”).

9. The Debtor, in its *Disclosure Statement for the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.* [Dkt. #1473 pgs. 40-41], described its position relative to the HarbourVest Claim as follows:

The Debtor intends to **vigorously** defend the HarbourVest Claims on various grounds The HarbourVest Entities invested approximately \$80,000,000.00 in HCLOF but seek an allowed claim in excess of 300 million dollars (after giving effect to treble damages for the alleged RICO violations)

10. On December 23, 2020, the Debtor filed the Motion seeking approval of a proposed settlement of the HarbourVest Claim under Rule 9019. [Dkt. # 1625].

11. The proposed settlement provides HarbourVest with the following:

- a. An allowed, general unsecured claim in the amount of \$45,000,000.00 [Dkt. #1625 pg. 9 pp.f]; and

¹ While HarbourVest has filed a number of claims, each filed claim is exactly the same except in the name of the claimant. See Claim Nos. 143, 147, 149, 150, 153, and 154.

- b. A \$35,000,000 claim in Class 9 [Dkt. #1625 pg. 9 pp.f].
12. An integral element of the settlement requires that HarbourVest will “support confirmation of the Debtor’s Plan including, but not limited to, voting its claims in support of the Plan.”
13. The settlement also contains a provision that HarbourVest will transfer its entire interest in HCLOF to an entity to be designated by the Debtor. It is unclear whether HarbourVest has a right to transfer the interest and secondly, what the Debtor will do with the interest [Dkt. #1625 pp.f].
14. The sole support for the Motion is the Declaration of John Morris [Dkt. #1631] which fails to account for the enormous change in the Debtor’s position between November 24, 2020 when the Disclosure Statement was approved and December 23, 2020 when the Motion was filed, a period of less than thirty (30) days.
15. The Declaration of John Morris [Dkt. #1631] also contains no information as to the potential cost of the litigation, whether HarbourVest can transfer the interest or reasons, other than conclusory reasons, as to why the settlement is beneficial to the estate. The Debtor makes the assertion that the interest it is acquiring was worth \$22,000,000.00 as of December 1, 2020 without advising as to the basis for the valuation. Is it a book value and, if not, what was the methodology employed to arrive at the valuation? The Court has no basis to evaluate the settlement without essential information as to 1) how the asset being acquired is valued; 2) can the Debtor acquire the interest; and 3) how will the Debtor bring value to the estate in connection with the interest inasmuch as the Debtor has discretion as to where to place the asset to be acquired.

A. LEGAL STANDARDS

16. The law relative to approval of motions pursuant to BR 9019 is well settled. The settlement must be fair and equitable. *See In re Jackson Brewing Co.*, 624 F.2d 599, 602 (5th Cir. 1980). The factors the Court should consider are the following:

- (i) the probabilities of ultimate success should the claim be litigated;
- (ii) the complexity, expense, and likely duration of litigating the claim;
- (iii) the difficulties of collecting a judgment rendered from such litigation; and,
- (iv) all other factors relevant to a full and fair assessment of the wisdom of the compromise.

Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414 (1968).

17. Although the Debtor’s business judgment is entitled to a certain deference, “business judgment” is not alone determinative of the issue of court approval. *See In re Endoscopy Ctr. of S. Nev., LLC*, 451 B.R. 527, 536 (Bankr. D. Nev. 2011). However, notwithstanding the business judgment rule, a debtor does not have unfettered freedom to do what it wishes. *See In re Pilgrim’s Pride Corp.*, 403 B.R. 413, 426 (Bankr. N.D. Tex. 2009) (“[A]s a fiduciary holding its estate in trust and responsible to the court, a debtor in possession must administer its case and conduct its business in a fashion amenable to the scrutiny to be expected from creditor and court oversight.”).

B. ISSUES WITH THE SETTLEMENT

18. Objectors believe that the following issues are not explained or addressed in the Motion and, thus, the Motion should be denied:

- a) The settlement represents a radical change in the Debtor's position that was set forth in its Disclosure Statement. While the Debtor asserts that its position is

based on its fear of parties' oral testimony, the size of the transactions at issue make the case a document case, as opposed to who said what, when and how. A review of the applicable documents to determine whether they support the Debtor's initial position is warranted, as opposed to stating that the case is based upon the credibility of a witness. This settlement is not the settlement of an automobile accident where the parties are disputing who ran a red light;

- b) The settlement requires HarbourVest to support and vote in favor of the Debtor's Plan. On its face this appears to be vote buying. The settlement should not be conditioned upon HarbourVest's support or non-support of the Plan and its vote in favor or against the Plan; and
- c) No information is provided as to whether the Debtor can acquire the interest in HCLOF, liquidate the interest, who will receive the interest, or how will the estate benefit from the interest to be acquired.

CONCLUSION

The settlement with HarbourVest has too many questions to be approved on the record before this Court and the parties, due to the Notice of the Motion, the holidays and the press of other litigation in this case, do not have the time to adequately investigate the propriety of the settlement.

January 8, 2021

Respectfully submitted,

/s/Douglas S. Draper.

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CERTIFICATE OF SERVICE

I do hereby certify that on the 8th day of January, 2021, a copy of the above and foregoing *Objection To Debtor's Motion For Entry Of An Order Approving Settlement With Harbourvest (Claim Nos. 143, 147, 149, 150, 153, 154) And Authorizing Actions Consistent Therewith* has been served electronically to all parties entitled to receive electronic notice in this matter through the Court's ECF system as follows:

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ATTORNEYS FOR CLO HOLDCO, LTD.

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

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

CLO HOLDCO, LTD.'S OBJECTION TO HARBOURVEST SETTLEMENT

TO THE HONORABLE STACEY G. JERNIGAN, U.S. BANKRUPTCY JUDGE:

CLO Holdco, Ltd. ("**CLO Holdco**") respectfully files this *Objection to Harbourvest Settlement* (the "**Harbourvest Settlement Objection**") which seeks entry of an order from this Court denying the Debtor's *Motion for Entry of an Order Approving Settlement with Harbourvest (Claims Nos. 143, 147, 149, 150, 153, 154) and Authorizing Actions Consistent Therewith* (the "**Harbourvest Settlement Motion**") for the reasons stated below. In support of the Harbourvest Settlement Objection, CLO Holdco respectfully states as follows:

I.
BACKGROUND

A. TRANSFERRING SHARES IN HCLOF



3. Section 6 of the Member Agreement addresses the "Transfer or Disposals of Shares." MEMBER AGREEMENT, § 6. The Member Agreement places strict restrictions on the sale or transfer of shares to entities other than the initial Member's own affiliates. *See id.* at §§ 6.1, 6.2. Before a Member can transfer its interests to a party other than its own affiliates it must: (i) obtain the prior written consent of the Portfolio Manager; and (ii) "offer to the other Members a right to purchase the Shares, on a pro rata basis with respect to their current Shares, at the same price (which must be cash) as such Shares are proposed to be purchased by the prospective third party purchaser pursuant to an irrevocable offer letter" (the "**Right of First Refusal**"). *Id.* As further stated in section 6.2 of the Member Agreement, "The other Members will have 30 days following receipt of the letter to determine whether to purchase their entire pro rata portion of the Shares proposed to be 'Transferred.'" *Id.* at § 6.2.

4. On December 23, 2020, the Debtor filed the Harbourvest Settlement Motion. On the following day, the Debtor filed a copy of the Settlement Agreement referenced in the

Harbourvest Settlement Motion (the "**Settlement Agreement**") [Dkt. No. 3]. In the Settlement Agreement, Harbourvest represents and warrants that it is authorized to transfer its interest in HCLOF to the Transferee, HCMLP Investments, LLC (the "**Transferee**"). SETTLEMENT AGREEMENT, Ex. A. § 3. Further, the Transferee and Debtor agree to be bound by the terms and conditions of the Member Agreement. *Id.* at § 1.c.

5. In exchange for conveniently classified allowed claims under the Debtor's *Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.* (the "**Plan**") [Dkt. No. 1472], Harbourvest agrees to vote in favor of the Plan and to transfer all of its interests in HCLOF to the Transferee. SETTLEMENT AGREEMENT, § 1.

6. As detailed below, CLO Holdco objects to the Harbourvest Settlement Motion because Harbourvest has no authority to transfer its interests in HCLOF without first complying with the Right of First Refusal. The only way to effectuate such a transfer without first providing other members the Right of First Refusal is an intentionally inaccurate interpretation of the Member Agreement's contractual provisions that would render specific passages redundant and meaningless. More simply put, the only way Harbourvest and the Debtor could effectuate the Settlement Agreement is by violating fundamental tenets of contract interpretation.

II.

ARGUMENTS AND AUTHORITIES

A. CONTRACT INTERPRETATION – AVOIDING REDUNDANCIES AND SURPLUS LANGUAGE

7. The Fifth Circuit recognizes fundamental tenets of contract interpretation, and notes that "contracts should be read as a whole, viewing particular language in the context in which it appears. *Woolley v. Clifford Chance Rogers & Wells, L.L.P.*, 51 F. App'x 930 (5th Cir. 2002) (citing Restatement (Second) of Contracts § 202 (1981)). The Fifth Circuit has applied substantially the same tenets of contract interpretation across the laws of various jurisdictions, and consistently reasons that "[a]ll parts of the agreement are to be reconciled, if possible, in order to avoid an

inconsistency. A specific provision will not be set aside in favor of a catch-all clause." *Broad v. Rockwell Int'l Corp.*, 642 F.2d 929, 947 (5th Cir. 1981) (internal citations omitted); and see *Hawthorne Land Co. v. Equilon Pipeline Co., LLC*, 309 F.3d 888, 892–93 (5th Cir. 2002); *Luv N' Care, Ltd. v. Grupo Rimar*, 844 F.3d 442, 447 (5th Cir. 2016); *Wooley*, 51 F.Appx. at 930.

8. Reconciliation of terms that would otherwise render other parts of a contract redundant is fundamental to proper contract interpretation. *Hawthorne Land*, 309 F.3d at 892-93. As the Fifth Circuit explained in *Hawthorne Land*, "each provision of a contract must be read in light of the other provisions so that each is given the meaning suggested by the contract as a whole. A contract should be interpreted so as to avoid neutralizing or ignoring a provision or treating it as surplusage." *Id.* (internal citations and quotations omitted). In other words, provisions of a contract should be read to create harmony, not internal inconsistencies, redundancies, and unnecessary surplus language. See, e.g., *Luv N' Care*, 844 F.3d at 447 (overturning district court on appeal by interpreting contract in manner that eliminated perceived redundancy).

B. ANALYZING THE MEMBER AGREEMENT

9. Section 6.1 of the Member Agreement will almost certainly be cited by the Debtor and Harbourvest as authority for their entry into the Settlement Agreement, regardless of whether other Members or the Portfolio Manager consent. It states, in pertinent part, that:

No Member shall sell, pledge, charge, mortgage, assign, assign by way of security, transfer, convey, exchange or otherwise dispose of its Shares or its commitment to settle purchases of Shares under the Subscription and Transfer Agreement (each a "Transfer"), other than to an Affiliate of an initial Member party hereto, without the prior written consent of the Portfolio Manager...

MEMBER AGREEMENT, § 6.1. Harbourvest will likely stress that under the terms of the Member Agreement, it can transfer its interests so long as the transfer is to "an Affiliate of an initial Member." Indeed, the Debtor will no doubt point out to this Court that Harbourvest is

should not be discarded as mere surplusage, and the Member Agreement should be interpreted in a manner that gives weight to that provision. *Hawthorne Land*, 309 F.3d at 892-93.

13. If the Member Agreement is read to literally allow all "Transfers to Affiliates of an initial Member" there would be no reason to expressly set forth allowed transfers between specific Members and other Member's Affiliates. If the Member Agreement sought to list all allowed transfers between Members and their Affiliates, it should have similarly noted that any Member could transfer its interest to any Harbourvest Member entity, as each Harbourvest Member entity is an Affiliate of the other Harbourvest Member entities. Alternatively, if the specific enumeration of CLO Holdco and the Highland Principals' transfer rights was surplusage, it would presumably have listed other parties' rights, or had inclusive language such as "including but not limited to" or "for example." The Member Agreement lacks such language and, as a result, should be interpreted in a manner that both gives weight to the specific provision while reconciling other provisions of the contract.

(ii) Absurd Results – Disparate Transfer Rights Between Members

14. Note that the Member Agreement does not generally allow a transfer of interests from Member to Member unless specifically enumerated. Section 6.2 specifically allows only CLO Holdco and the Highland Principals to make transfers to other Members, but those other Members include only the Debtor or another Highland Principal. MEMBER AGREEMENT, § 6.2. It does not allow the Debtor to transfer interests to any Member, and does not expressly allow any Member, other than limited transfers by CLO Holdco and the Highland Principals, to transfer interests to any other Member. *Id.* For instance, if the Debtor wished to transfer its interests to CLO Holdco, it would first have to offer all of the other Members their Right of First Refusal. *Id.*

15. Similarly, if Harbourvest wished to transfer its interest to CLO Holdco, it could not do so without first providing the Right of First Refusal to all other Members. *Id.* As noted above,

however, allowing a Member to transfer its interest to an Affiliate of any initial Member would allow all of the Members to transfer their interests to any Harbourvest Member entity, as the Harbourvest Members are Affiliates of each other. Given the specific enumeration of CLO Holdco and the Highland Principals' rights to inter-Member transfers, it would be inconsistent to expand that specific provision to allow all transfers by all Members to any Harbourvest entity without first providing a Right of First Refusal.

16. Such a reading would lead to absurd results. It would grant similarly situated Members profoundly disparate rights under the agreement, and could easily lead to manipulation. For instance, because the Harbourvest Members are technically Affiliates of an initial Member (each other), they could obtain control of all of the interests in HCLOF without any Member receiving a Right of First Refusal for any transfer. No other Member could do that. For instance, if CLO Holdco wished to acquire other Members' interests, the transferring member (including Harbourvest) would have to offer a Right of First Refusal in every instance. To resolve that potential disparate treatment—though CLO Holdco and Harbourvest own nearly identical ownership interests in HCLOF—CLO Holdco would have to form an Affiliate and acquire interests through the Affiliate. That simply cannot be the intended result of the Member Agreement.

17. Instead, the Member Agreement must be read to require Harbourvest to provide a Right of First Refusal to the other Members of HCLOF before transferring its interests to either the Debtor or the Transferee.

C. THE RIGHT OF FIRST REFUSAL IN BANKRUPTCY

18. Most cases addressing third party rights of first refusal in bankruptcy involve the assignment of leases and landlords' rights of first refusal. In those cases, courts analyze whether such a provision in the debtor's contract is a defacto restriction on assignment that may be excised

from the agreement. This case is very different. Here, it is a creditor that owes a right of first refusal to another non-debtor entity.

19. Even so, at least one court has issued telling commentary on a bankruptcy court's ability to excise provisions of a bargained-for contract, stating "A bankruptcy court's authority to excise a bargained for element of a contract is questionable and modification of a nondebtor contracting party's rights is not to be taken lightly." *In re E-Z Serve Convenience Stores, Inc.*, 289 B.R. 45, 51-52 (Bankr. M.D.N.C. 2003) (citing *In re Joshua Slocum Ltd.*, 922 F.2d 1081, 1091 (3d Cir. 1991)). CLO Holdco was unable to find any case that would allow a bankruptcy court to invalidate or otherwise excise a third party's right of first refusal in what largely amounts to a non-debtor contract.

20. As the Member Agreement requires Harbourvest to provide a Right of First Refusal to the non-Debtor Members under section 6.2 of the Agreement, and such Members have 30 days to review and determine whether to purchase their pro-rata shares offered by Harbourvest, Harbourvest lacks contractual authority to enter into the Settlement Agreement.

D. HARBOURVEST'S LACK OF AUTHORITY PRECLUDES ENFORCEMENT OF SETTLEMENT

21. Harbourvest has not completed its conditions precedent to the transfer of its interest to Transferee under the Member Agreement. As detailed above, and in section 6.2 of the Agreement, Harbourvest must effectuate the Right of First Refusal before it can transfer its interests in HCLOF. MEMBER AGREEMENT, § 6.2. Harbourvest is, in essence, bound by the condition precedent of effectuating the Right of First Refusal before it is authorized under the Member Agreement to enter into the Settlement Agreement.

22. Courts should not enforce a settlement agreement where a party has a condition precedent to entry into the agreement and fails to satisfy that condition. *In re De La Fuente*, 409 B.R. 842, 846 (Bankr. S.D. Tex. 2009). As noted in part in *De La Fuente*, the court would not recognize

or enforce a settlement where the parties were subject to conditions precedent before the settlement could be effective, and the conditions precedent were not satisfied. This Court should similarly deny Harbourvest's proposed settlement, as it would deny the Members' Right of First Refusal, which is the benefit of their bargain under the Member Agreement.

**III.
PRAYER FOR RELIEF**

WHEREFORE, CLO Holdco requests that this Court grant the Objection and enter an order denying the Harbourvest Settlement Motion.

DATED: January 8, 2020

Respectfully submitted,

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By: /s/ John J. Kane

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EXHIBIT 7

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

5 IN RE:

6 CHAPTER 11

7 CASE NO.

8 HIGHLAND CAPITAL 19-34054-
9 MANAGEMENT, L.P. SGJLL

10

Debtor.

11

12

13 Confidential - Under Protective Order

14 REMOTE DEPOSITION OF

15 MICHAEL PUGATCH

16 Zoom Videoconference

17 01/11/2021

18 1:07 P.M. (EDT)

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REPORTED BY: AMANDA GORRONO, CLR

CLR NO. 052005-01

JOB NO. 188591

<p>Page 2</p> <p>1</p> <p>2 01/11/2021</p> <p>3 1:07 P.M. (EDT)</p> <p>4</p> <p>5</p> <p>6 REMOTE ORAL DEPOSITION OF MICHAEL</p> <p>7 PUGATCH, held virtually via Zoom</p> <p>8 Videoconferencing, pursuant to the</p> <p>9 Federal Rules of Civil Procedure before</p> <p>10 Amanda Gorrone, Certified Live Note</p> <p>11 Reporter, and Notary Public of the State</p> <p>12 of New York.</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	<p>Page 3</p> <p>1</p> <p>2 A P P E A R A N C E S: (Via Remote)</p> <p>3 PACHULSKI STANG ZIEHL & JONES</p> <p>4 Attorneys for Debtor</p> <p>5 780 Third Avenue</p> <p>6 New York, New York 10017</p> <p>7 BY: JOHN MORRIS, ESQ.</p> <p>8 HAYLEY WINOGRAD, ESQ.</p> <p>9</p> <p>10 BONDS ELLIS EPPICH SCHAFFER JONES</p> <p>11 Attorneys for Jim Dondero</p> <p>12 420 Throckmorton Street</p> <p>13 Fort Worth, Texas 76102</p> <p>14 BY: JOHN WILSON, ESQ.</p> <p>15 BRYAN ASSINK, ESQ.</p> <p>16</p> <p>17 DEBEVOISE & PLIMPTON</p> <p>18 Attorneys for HarbourVest</p> <p>19 919 Third Avenue</p> <p>20 New York, New York 10022</p> <p>21 BY: ERICA WEISGERBER, ESQ.</p> <p>22 M. NATASHA LABOVITZ, ESQ.</p> <p>23 EMILY HUSH, ESQ.</p> <p>24 DANIEL STROIK, ESQ.</p> <p>25</p>
<p>Page 4</p> <p>1</p> <p>2 A P P E A R A N C E S: (Via Remote)</p> <p>3 KANE RUSSELL COLEMAN & LOGAN</p> <p>4 Attorneys for CLO Holdco Limited</p> <p>5 Bank of America Plaza</p> <p>6 901 Main Street</p> <p>7 Dallas, Texas 75202</p> <p>8 BY: JOHN KANE, ESQ.</p> <p>9</p> <p>10 HELLER, DRAPER, HAYDEN, PATRICK, & HORN</p> <p>11 Attorneys for The Dugaboy Investment</p> <p>12 Trust and the Get Good Trust</p> <p>13 650 Poydras Street</p> <p>14 New Orleans, Louisiana 70130</p> <p>15 BY: DOUGLAS DRAPER, ESQ.</p> <p>16</p> <p>17 LATHAM & WATKINS</p> <p>18 Attorney For UBS</p> <p>19 885 Third Avenue</p> <p>20 New York, New York</p> <p>21 BY: SHANNON MCLAUGHLIN, ESQ.</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	<p>Page 5</p> <p>1</p> <p>2 A P P E A R A N C E S: (Via Remote)</p> <p>3 KING & SPALDING</p> <p>4 Attorney for Highland CLO Funding, Ltd.</p> <p>5 1180 Peachtree Street, NE</p> <p>6 Atlanta, Georgia 30309</p> <p>7 BY: MARK MALONEY, ESQ.</p> <p>8</p> <p>9</p> <p>10</p> <p>11 ALSO PRESENT:</p> <p>12 ALIZA GOREN, ESQ.</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>

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<p style="text-align: right;">Page 8</p> <p>1</p> <p>2 MR. WILSON: I'm John Wilson</p> <p>3 with the firm of Bonds Ellis Eppich</p> <p>4 Schafer Jones LP. And I represent Jim</p> <p>5 Dondero.</p> <p>6 MR. MORRIS: John Morris and</p> <p>7 Hayley Winograd of Pachulski Stang</p> <p>8 Ziehl & Jones for the Debtor.</p> <p>9 MS. WEISGERBER: Erica</p> <p>10 Weisgerber from Debevoise & Plimpton</p> <p>11 for HarbourVest.</p> <p>12 MR. KANE: John Kane of Kane</p> <p>13 Russell Coleman & Logan, for CLO</p> <p>14 Holdco Limited.</p> <p>15 MR. DRAPER: Douglas Draper of</p> <p>16 Heller Draper & Horn, for The Dugaboy</p> <p>17 Investment Trust and the Get Good</p> <p>18 Trust.</p> <p>19 MS. McLAUGHLIN: Shannon</p> <p>20 McLaughlin from Latham & Watkins LLP</p> <p>21 for UBS.</p> <p>22 MR. MALONEY: Mark Maloney from</p> <p>23 King & Spalding, on behalf of Highland</p> <p>24 CLO Funding Limited.</p> <p>25 MS. WEISGERBER: I'm joined on</p>	<p style="text-align: right;">Page 9</p> <p>1</p> <p>2 the line by my colleagues from</p> <p>3 Debevoise, Natasha Labovitz and Emily</p> <p>4 Hush, and Aliza Goren from HarbourVest</p> <p>5 is on the line, as well.</p> <p>6 MR. WILSON: As a preliminary</p> <p>7 matter, the witness' counsel has</p> <p>8 produced some documents to us that</p> <p>9 they've requested be subject to the</p> <p>10 confidentially order or a brief</p> <p>11 protective order entered at Document</p> <p>12 Number 382, in this case.</p> <p>13 And she's also requested that</p> <p>14 all counsel and participants in this</p> <p>15 deposition agree to be bound by the</p> <p>16 terms of that order, because some of</p> <p>17 the documents that were produced are</p> <p>18 stamped "confidential," and they want</p> <p>19 to maintain that confidentially.</p> <p>20 Do we have an agreement of all</p> <p>21 counsel and participants on the</p> <p>22 deposition to be bound by the terms of</p> <p>23 that agreed protective order?</p> <p>24 (All agreed.)</p> <p>25 MS. WEISGERBER: Okay. I think</p>

<p style="text-align: right;">Page 10</p> <p>1 Confidential - Pugatch</p> <p>2 that was everyone. Thank you all for</p> <p>3 confirming. And the deposition will</p> <p>4 be marked "confidential" until and</p> <p>5 unless HarbourVest designates the</p> <p>6 testimony otherwise.</p> <p>7 MR. WILSON: And that's fine.</p> <p>8 (Whereupon, a request for</p> <p>9 Transcript be marked Confidential</p> <p>10 under the Protective Order was made.)</p> <p>11 MICHAEL PUGATCH,</p> <p>12 called as a witness, having been</p> <p>13 first duly affirmed by a Notary Public of</p> <p>14 the State of New York, was examined and</p> <p>15 testified as follows:</p> <p>16 EXAMINATION</p> <p>17 BY MR. WILSON:</p> <p>18 Q. All right. Mr. Pugatch, how do</p> <p>19 you pronounce your name? I'm sorry.</p> <p>20 A. Yep, you've got it. Pugatch.</p> <p>21 Q. Pugatch. Okay. Can you state</p> <p>22 your full name for the record?</p> <p>23 A. Yeah. Michael Pugatch.</p> <p>24 Q. Okay. And you've been</p> <p>25 designated by HarbourVest to discuss some</p>	<p style="text-align: right;">Page 11</p> <p>1 Confidential - Pugatch</p> <p>2 matters related to the 9019 motion. And</p> <p>3 specifically we asked that HarbourVest</p> <p>4 produce a witness who could talk about the</p> <p>5 negotiations of the settlement with the</p> <p>6 Debtor, and also the factual allegations</p> <p>7 underlying HarbourVest's Proof of Claim,</p> <p>8 and those described in HarbourVest's</p> <p>9 response to the claim objection, including</p> <p>10 without limitation, its investment with</p> <p>11 Acis/HCLOF in the alleged representations</p> <p>12 made by the Debtor and/or Acis/HCLOF to</p> <p>13 HarbourVest, and any and all agreements</p> <p>14 entered into between HarbourVest and any</p> <p>15 other party related to its investment.</p> <p>16 Do you agree that you're the</p> <p>17 best person to talk about these matters on</p> <p>18 behalf of HarbourVest?</p> <p>19 A. Yes. Yes.</p> <p>20 Q. Okay. Have you given a</p> <p>21 deposition before?</p> <p>22 A. I have.</p> <p>23 Q. Okay. So you understand how it</p> <p>24 works that you're under oath, and that I'm</p> <p>25 going to be asking questions and you're</p>
<p style="text-align: right;">Page 12</p> <p>1 Confidential - Pugatch</p> <p>2 going to be giving answers. If at any</p> <p>3 time I ask a question that you don't</p> <p>4 understand, or we've had some problems</p> <p>5 with sometimes connectivity issues with</p> <p>6 Zoom. But yeah, any time that you don't</p> <p>7 understand my question or you didn't catch</p> <p>8 it, I'll be happy to repeat it.</p> <p>9 Also, one thing I found with</p> <p>10 Zoom is that it's easier to talk over</p> <p>11 people. I'll try not to talk over you. I</p> <p>12 would ask that you try to ensure that I've</p> <p>13 finished asking my question before you</p> <p>14 start your answer. And I will likewise</p> <p>15 try to ensure that you've finished your</p> <p>16 answer before start my next question.</p> <p>17 And at any time during this</p> <p>18 deposition if you feel the need to take a</p> <p>19 break, that's totally okay with me. The</p> <p>20 one thing that I would ask is if I've just</p> <p>21 asked a question, that you answer the</p> <p>22 question before requesting the break.</p> <p>23 And if we have that agreement</p> <p>24 and the ground rules, then I think I'm</p> <p>25 ready to start asking you my questions.</p>	<p style="text-align: right;">Page 13</p> <p>1 Confidential - Pugatch</p> <p>2 A. Sounds good.</p> <p>3 Q. What's your current address?</p> <p>4 A. 47 Wayne Road in Needham,</p> <p>5 Massachusetts.</p> <p>6 Q. Okay. And where are you located</p> <p>7 today?</p> <p>8 A. At that address.</p> <p>9 Q. Okay. That's your home address?</p> <p>10 A. Correct.</p> <p>11 Q. And is anyone in the room with</p> <p>12 you there?</p> <p>13 A. No.</p> <p>14 Q. And did you talk with anyone</p> <p>15 about your deposition today?</p> <p>16 A. Only counsel.</p> <p>17 Q. Okay. And did you go over the</p> <p>18 facts of the underlying investment and the</p> <p>19 settlement negotiations with your counsel?</p> <p>20 MS. WEISGERBER: I'm going to</p> <p>21 object on privilege grounds. He</p> <p>22 can – he prepared for the deposition</p> <p>23 with counsel. I don't think you can</p> <p>24 inquire into specifics of the</p> <p>25 preparation.</p>

<p style="text-align: right;">Page 14</p> <p>1 Confidential - Pugatch</p> <p>2 MR. WILSON: Okay. Well, you</p> <p>3 know, he was designated to talk about</p> <p>4 these matters, and I'm just asking if</p> <p>5 he discussed these matters with his</p> <p>6 counsel his before his testimony.</p> <p>7 That's all. I'm not asking the</p> <p>8 substance of those communications.</p> <p>9 MS. WEISGERBER: You're asking</p> <p>10 about conversations with counsel. How</p> <p>11 about you just ask if he's prepared to</p> <p>12 talk about those topics today?</p> <p>13 MR. WILSON: Okay.</p> <p>14 BY MR. WILSON:</p> <p>15 Q. Are you prepared to talk about</p> <p>16 those topics today?</p> <p>17 A. Yes.</p> <p>18 Q. Okay. Now, HarbourVest has</p> <p>19 filed several proofs of claim in this</p> <p>20 matter, and it looks like those are</p> <p>21 numbered 143 on behalf of HarbourVest,</p> <p>22 217 Global Fund L.P., and 144 HarbourVest</p> <p>23 2017 Global AIF, 149 HarbourVest Partners</p> <p>24 L.P., 150 HarbourVest Dover Street, IX</p> <p>25 Investment L.P., 153 HarbourVest – or I'm</p>	<p style="text-align: right;">Page 15</p> <p>1 Confidential - Pugatch</p> <p>2 sorry, HV International VIII Secondary</p> <p>3 L.P., and 154 HarbourVest Skew Base AIF</p> <p>4 LP.</p> <p>5 And you're here to talk on</p> <p>6 behalf of all of those entities, and you</p> <p>7 have, for purpose of this settlement and</p> <p>8 you're – the 9019 motion, these proofs of</p> <p>9 claim are all lumped together as one</p> <p>10 claim; is that correct?</p> <p>11 MS. WEISGERBER: I'm just going</p> <p>12 to object quickly and clarify that</p> <p>13 he's not here as a 30(b)(6) witness,</p> <p>14 but he is here as someone from</p> <p>15 HarbourVest who signed those proofs of</p> <p>16 claim. So with that, I'll let you</p> <p>17 continue.</p> <p>18 A. I'll just answered the question,</p> <p>19 yes, as a representative on behalf of all</p> <p>20 of those entities. I would defer to</p> <p>21 counsel, from a legal perspective, whether</p> <p>22 these are treated as a single or separate</p> <p>23 claims.</p> <p>24 MR. WILSON: Okay. And we can</p> <p>25 move on for now.</p>
<p style="text-align: right;">Page 16</p> <p>1 Confidential - Pugatch</p> <p>2 I'm going to submit the first</p> <p>3 exhibit. It's going to be Exhibit</p> <p>4 No. 1 to the deposition. I'm sending</p> <p>5 it by E-mail, and I'm also going to</p> <p>6 use a share screen.</p> <p>7 (Whereupon, Exhibit 1, Proof of</p> <p>8 Claim 143 filed 4/08/2020 nine pages,</p> <p>9 was marked for identification.)</p> <p>10 MR. WILSON: So this document</p> <p>11 right here is Claim Number 143 filed</p> <p>12 on April 8, 2020, and this one is</p> <p>13 filed on behalf of HarbourVest 2017</p> <p>14 Global Fund L.P.</p> <p>15 If we go down, scroll to the</p> <p>16 annex to proof of claim, it's Page 5</p> <p>17 of the document. It says that the</p> <p>18 Claimant is a limited partner in one</p> <p>19 of the Debtor's managed vehicles,</p> <p>20 Highland CLO Funding, Ltd.</p> <p>21 And I'm going to now send out an</p> <p>22 E-mail with Exhibit No. 2. I'm going</p> <p>23 to pull this Exhibit No. 2 document up</p> <p>24 on the share screen, as well. I guess</p> <p>25 that's right.</p>	<p style="text-align: right;">Page 17</p> <p>1 Confidential - Pugatch</p> <p>2 (Whereupon, Exhibit 2, Proof of</p> <p>3 Claim 149 filed 4/08/2020 nine pages,</p> <p>4 was marked for identification.)</p> <p>5 BY MR. WILSON:</p> <p>6 Q. Can you see the official proof,</p> <p>7 official form 410 proof of claim on your</p> <p>8 screen?</p> <p>9 A. The first one that you shared?</p> <p>10 Q. I'm now on Exhibit No. 2. Is it</p> <p>11 showing up on your screen?</p> <p>12 A. No.</p> <p>13 Q. Okay. Actually, I'm sorry. Is</p> <p>14 it now showing up on your screen?</p> <p>15 A. Now, it's showing up, yep.</p> <p>16 Q. Okay. So this one is Proof of</p> <p>17 Claim 149, filed on the same date. And</p> <p>18 this one's filed on behalf HarbourVest</p> <p>19 Partners L.P. And I'm going to scroll</p> <p>20 down to the annex to proof of claim, which</p> <p>21 looks largely like the annex to the</p> <p>22 previous proof of claim we looked at.</p> <p>23 But this one says, in Paragraph</p> <p>24 No. 2, the Claimant manages investment</p> <p>25 funds that are limited partners in one of</p>

<p style="text-align: right;">Page 18</p> <p>1 Confidential - Pugatch</p> <p>2 the Debtor's managed vehicles, Highland</p> <p>3 CLO Funding, Ltd.</p> <p>4 And can you tell me why this</p> <p>5 HarbourVest Partners L.P. filed a separate</p> <p>6 proof of claim, from the entities that</p> <p>7 were investors in HCLOF?</p> <p>8 A. I would only be able to answer</p> <p>9 that, based on conversations with counsel.</p> <p>10 Q. But in any event, HarbourVest</p> <p>11 Partners L.P. did not invest in HCLOF,</p> <p>12 correct?</p> <p>13 A. Not directly on behalf of</p> <p>14 itself, no.</p> <p>15 Q. All right. I'm going to stop</p> <p>16 that share screen.</p> <p>17 MR. WILSON: And this is going</p> <p>18 to be Exhibit Number 3.</p> <p>19 (Whereupon, Exhibit 3,</p> <p>20 Declaration of Michael Pugatch in</p> <p>21 Support of Motion of HarbourVest</p> <p>22 Pursuant to Rule 3018(a), was marked</p> <p>23 for identification.)</p> <p>24 MR. WILSON: And Exhibit No. 3</p> <p>25 that I've just submitted via E-mail,</p>	<p style="text-align: right;">Page 19</p> <p>1 Confidential - Pugatch</p> <p>2 and I'm about to put it up on the</p> <p>3 screen, is the Declaration of</p> <p>4 HarbourVest. Let me get it up here,</p> <p>5 so you can see it. This is the</p> <p>6 declaration of Michael Pugatch in</p> <p>7 support of motion of HarbourVest</p> <p>8 pursuant to Rule 3018(a).</p> <p>9 BY MR. WILSON:</p> <p>10 Q. Have you seen this document</p> <p>11 before?</p> <p>12 A. Yes.</p> <p>13 Q. And, in fact, this is your</p> <p>14 declaration; is that correct?</p> <p>15 A. Yes.</p> <p>16 Q. And at the first line of this,</p> <p>17 of Paragraph 1 says that you're the</p> <p>18 managing director of HarbourVest Partners</p> <p>19 LLC?</p> <p>20 A. Correct.</p> <p>21 Q. And how is HarbourVest Partners</p> <p>22 LLC connected to these claims?</p> <p>23 A. That is the corporate entity or</p> <p>24 managing member of all of the underlying</p> <p>25 funds that are managed on behalf of</p>
<p style="text-align: right;">Page 20</p> <p>1 Confidential - Pugatch</p> <p>2 HarbourVest Partners L.P.</p> <p>3 Q. And you're the managing director</p> <p>4 of that entity?</p> <p>5 A. A managing director to that</p> <p>6 entity, yes.</p> <p>7 Q. You said "a managing director,"</p> <p>8 are there others?</p> <p>9 A. Yes.</p> <p>10 Q. Who are the others?</p> <p>11 A. There are over 50 managing</p> <p>12 directors at HarbourVest Partners LLC.</p> <p>13 Q. And are you the managing</p> <p>14 director that has charge of this</p> <p>15 particular HarbourVest investment, the one</p> <p>16 in HCLOF?</p> <p>17 A. Yes.</p> <p>18 MR. WILSON: All right. I beg</p> <p>19 your patience. I'm trying to conduct</p> <p>20 this deposition solo. I've got a lot</p> <p>21 of stuff I've got to go through. So</p> <p>22 I'll do my best to do it efficiently.</p> <p>23 But this next exhibit I'm going</p> <p>24 to submit is going to be Exhibit No.</p> <p>25 4. I'm sending it in the E-mail now.</p>	<p style="text-align: right;">Page 21</p> <p>1 Confidential - Pugatch</p> <p>2 (Whereupon, Exhibit 4, Member</p> <p>3 Agreement 28 pages, was marked for</p> <p>4 identification.)</p> <p>5 BY MR. WILSON:</p> <p>6 Q. Can you see this on your share</p> <p>7 screen?</p> <p>8 A. I can.</p> <p>9 Q. This is the Members Agreement</p> <p>10 relating to the Company.</p> <p>11 A. (Nods.)</p> <p>12 Q. I'm just going to scroll down.</p> <p>13 Okay. So this is the signature page for</p> <p>14 the HarbourVest entities that were</p> <p>15 invested in this company. And it says</p> <p>16 that you were the authorized person to</p> <p>17 sign on behalf of the first two entities:</p> <p>18 HarbourVest Dover Street, HarbourVest 2017</p> <p>19 Global, and then the next one here it says</p> <p>20 you're managing director. And here we see</p> <p>21 that HarbourVest Partners LLC.</p> <p>22 And if we scroll down, we see</p> <p>23 that you're the managing director of</p> <p>24 HarbourVest Partners LLC, again, on behalf</p> <p>25 of HV International, and that you're an</p>

<p style="text-align: right;">Page 22</p> <p>1 Confidential - Pugatch</p> <p>2 authorized person on behalf of HarbourVest</p> <p>3 Skew Base.</p> <p>4 So you signed all these</p> <p>5 agreements on behalf of the HarbourVest</p> <p>6 entities, when HarbourVest made its</p> <p>7 investment in HCLOF. Would that be</p> <p>8 correct?</p> <p>9 A. Correct.</p> <p>10 Q. Okay. Sorry that was</p> <p>11 cumbersome, but I needed to get through</p> <p>12 it.</p> <p>13 MR. WILSON: I'm going to now</p> <p>14 stop that share screen. And I'll need</p> <p>15 to go to Exhibit No. 5. I'm E-mailing</p> <p>16 out Exhibit No. 5 right now.</p> <p>17 (Whereupon, Exhibit 5,</p> <p>18 HarbourVest Response to Debtor's First</p> <p>19 Omnibus Objection 617 pages, was</p> <p>20 marked for identification.)</p> <p>21 BY MR. WILSON:</p> <p>22 Q. This is -- I'll do another share</p> <p>23 screen -- this is Docket 1057 filed in the</p> <p>24 Highland bankruptcy. And this is</p> <p>25 HarbourVest Response to Debtor's First</p>	<p style="text-align: right;">Page 23</p> <p>1 Confidential - Pugatch</p> <p>2 Omnibus Objection.</p> <p>3 Did you participate in the</p> <p>4 creation of this document?</p> <p>5 A. Yes.</p> <p>6 Q. So you had an opportunity to</p> <p>7 review this document, before it was filed?</p> <p>8 A. Correct.</p> <p>9 Q. And you agree with the</p> <p>10 statements and the positions taken in this</p> <p>11 document?</p> <p>12 A. I do.</p> <p>13 Q. All right. So what this says in</p> <p>14 Paragraph 8, that by the summer of 2017,</p> <p>15 HarbourVest was engaged in preliminary</p> <p>16 discussions with Highland, regarding the</p> <p>17 investment.</p> <p>18 First off, why was HarbourVest</p> <p>19 engaged in preliminary discussions with</p> <p>20 Highland?</p> <p>21 A. Highland had approached</p> <p>22 HarbourVest with an investment</p> <p>23 opportunity. This was really borne out of</p> <p>24 discussions that we had with them around a</p> <p>25 couple of investment opportunities, that</p>
<p style="text-align: right;">Page 24</p> <p>1 Confidential - Pugatch</p> <p>2 this opportunity with HCLOF being the one</p> <p>3 that by the summer of 2017, as stated</p> <p>4 here, was in, was advancing through</p> <p>5 discussions.</p> <p>6 Q. And which individuals at</p> <p>7 Highland were you engaged in discussions</p> <p>8 with? By "you," I mean HarbourVest.</p> <p>9 A. Yeah, I mean, originally it was</p> <p>10 through a couple of members of their</p> <p>11 investor relations team. My first point</p> <p>12 of contact was with Brad Eden, and then</p> <p>13 subsequently progressed to a larger subset</p> <p>14 of employees of Highland.</p> <p>15 Q. And who on behalf of HarbourVest</p> <p>16 was engaging in these discussions?</p> <p>17 A. It was primarily myself, my</p> <p>18 colleague, or two -- two colleagues</p> <p>19 primarily, alongside myself.</p> <p>20 Q. I'm sorry. I didn't catch the</p> <p>21 last part.</p> <p>22 A. Sorry. Myself and two other</p> <p>23 colleagues primarily.</p> <p>24 Q. And who are these two other</p> <p>25 colleagues?</p>	<p style="text-align: right;">Page 25</p> <p>1 Confidential - Pugatch</p> <p>2 A. Dustin Willard and then a more</p> <p>3 junior member of the HarbourVest team.</p> <p>4 Q. When you say "the HarbourVest</p> <p>5 team," what does that mean?</p> <p>6 A. So the broader investment team</p> <p>7 and specifically in this context, the</p> <p>8 secondary investment team at HarbourVest,</p> <p>9 that this was an opportunity for.</p> <p>10 Q. So who made the final decision,</p> <p>11 on behalf of HarbourVest, to make this</p> <p>12 investment?</p> <p>13 A. Ultimately it was a decision</p> <p>14 made by the investment committee of</p> <p>15 HarbourVest.</p> <p>16 Q. And who's on that investment</p> <p>17 committee?</p> <p>18 A. It's a four-member committee</p> <p>19 comprised of managing directors within the</p> <p>20 firm.</p> <p>21 Q. And who are those managing</p> <p>22 directors?</p> <p>23 A. I don't recall at the time who</p> <p>24 the members were. I can tell you the</p> <p>25 members now, of that committee. It has</p>

<p style="text-align: right;">Page 26</p> <p>1 Confidential - Pugatch</p> <p>2 changed or evolved over time.</p> <p>3 Q. And that committee included you?</p> <p>4 A. I was involved in the</p> <p>5 decisionmaking of that, yes, correct.</p> <p>6 Q. So you were part of the four-man</p> <p>7 committee that made this decision?</p> <p>8 A. Yes.</p> <p>9 Q. All right. I'm going to go back</p> <p>10 to what we've marked as Exhibit 3, which</p> <p>11 is your declaration. And it says in</p> <p>12 Paragraph 2, that HarbourVest is a passive</p> <p>13 minority investor in Highland CLO funds,</p> <p>14 HCLOF, and by the way, I haven't stated</p> <p>15 this before, but in this deposition if I</p> <p>16 say HCLOF, I'm going to be referring to</p> <p>17 Highland CLO funds.</p> <p>18 But it says that the vehicle is</p> <p>19 managed by Highland Capital Management,</p> <p>20 L.P.</p> <p>21 And why do you say that that</p> <p>22 vehicle was managed by Highland Capital</p> <p>23 Management, L.P.?</p> <p>24 A. I believe that is the named</p> <p>25 investment manager of HCLOF, per the</p>	<p style="text-align: right;">Page 27</p> <p>1 Confidential - Pugatch</p> <p>2 organization documents of that vehicle.</p> <p>3 Q. You believe that that was the</p> <p>4 investment manager on the organization</p> <p>5 documents, which –</p> <p>6 A. Of the various transaction</p> <p>7 documents that we entered into, in</p> <p>8 connection with our investment.</p> <p>9 Q. Would those have been the</p> <p>10 documents that you had entered on November</p> <p>11 the 15 of 2017?</p> <p>12 A. Yes.</p> <p>13 Q. Okay. It says that HarbourVest</p> <p>14 initially invested \$73,522,928 for roughly</p> <p>15 49 percent interest in HCLOF; and more</p> <p>16 specifically, that would be a 49.98</p> <p>17 percent interest in HCLOF, correct?</p> <p>18 A. Sounds right, yes.</p> <p>19 Q. Okay. And then HarbourVest</p> <p>20 contributed an additional \$4,998,501</p> <p>21 following a capital call, and it's</p> <p>22 received three dividends, each totally</p> <p>23 \$1,570,429.</p> <p>24 Is all of that correct?</p> <p>25 A. Yes.</p>
<p style="text-align: right;">Page 28</p> <p>1 Confidential - Pugatch</p> <p>2 Q. And has HarbourVest received any</p> <p>3 additional dividends, since the making of</p> <p>4 this declaration?</p> <p>5 A. No, we have not.</p> <p>6 Q. Now, I want to skip down to</p> <p>7 Paragraph 3, where it says that</p> <p>8 HarbourVest expected proceeds from the</p> <p>9 original HCLOF investment were projected</p> <p>10 to exceed 135 million.</p> <p>11 Do you agree with that?</p> <p>12 A. That was the original projected</p> <p>13 value of the investment, yes.</p> <p>14 Q. Well, whose expectation was</p> <p>15 that?</p> <p>16 A. Those were figures, as I recall,</p> <p>17 that were originally provided to us by</p> <p>18 Highland to form the basis of our due</p> <p>19 diligence that we went through, and</p> <p>20 penultimately were included as part of our</p> <p>21 investment thesis in making the</p> <p>22 investment.</p> <p>23 Q. So your testimony is that</p> <p>24 Highland told you that your investment</p> <p>25 would be worth over \$135 million?</p>	<p style="text-align: right;">Page 29</p> <p>1 Confidential - Pugatch</p> <p>2 A. Yes.</p> <p>3 MS. WEISGERBER: Objection to</p> <p>4 the form. Misstates testimony.</p> <p>5 Go ahead, Mike.</p> <p>6 A. That was, that was part of our</p> <p>7 original due diligence, on the investment</p> <p>8 opportunity.</p> <p>9 Q. When you say part of your due</p> <p>10 diligence, are you saying that the number</p> <p>11 originated from Highland or that the</p> <p>12 number originated from your due diligence</p> <p>13 operations?</p> <p>14 MS. WEISGERBER: Objection to</p> <p>15 form.</p> <p>16 A. The number originally came from</p> <p>17 Highland and formed the basis upon which</p> <p>18 we conducted due diligence on the</p> <p>19 investment opportunity.</p> <p>20 Q. And after performing due</p> <p>21 diligence, you were satisfied that that</p> <p>22 was a reasonable projection?</p> <p>23 A. Yes.</p> <p>24 Q. And what was the, what was the</p> <p>25 estimated date, in which the value of your</p>

<p style="text-align: right;">Page 30</p> <p>1 Confidential - Pugatch</p> <p>2 investment would exceed the \$135 million?</p> <p>3 MS. WEISGERBER: Objection to</p> <p>4 form.</p> <p>5 A. I don't recall exactly. That</p> <p>6 would have been over, over several years.</p> <p>7 And again, this was the -- this was the</p> <p>8 projected value based on the original</p> <p>9 investment or the assets that were held by</p> <p>10 HCLOF, at the time of our investment.</p> <p>11 Q. Now, when you talk about a</p> <p>12 portfolio manager -- I'm sorry, when you</p> <p>13 talk about investment manager, are you</p> <p>14 referring to the portfolio manager?</p> <p>15 A. No.</p> <p>16 Q. So what's the difference in an</p> <p>17 investment manager and a portfolio</p> <p>18 manager?</p> <p>19 A. So in the context of this</p> <p>20 investment, the investment manager. We --</p> <p>21 we had -- HarbourVest had an investment</p> <p>22 with HCLOF. Highland was the investment</p> <p>23 manager of HCLOF that in turn held equity</p> <p>24 positions in a variety of CLOs, which had</p> <p>25 various portfolio managers associated with</p>	<p style="text-align: right;">Page 31</p> <p>1 Confidential - Pugatch</p> <p>2 those, all Highland affiliates.</p> <p>3 Q. And so who was the portfolio</p> <p>4 manager for the HarbourVest investment in</p> <p>5 HCLOF?</p> <p>6 MS. WEISGERBER: Objection to</p> <p>7 form.</p> <p>8 A. There were various underling</p> <p>9 portfolio managers, depending on the</p> <p>10 underlying CLO position.</p> <p>11 Q. Well, who was the initial</p> <p>12 portfolio manager?</p> <p>13 A. So, again it would depend on</p> <p>14 which underlying assets we're talking</p> <p>15 about. HCLOF was a diversified portfolio</p> <p>16 of multiple underlying CLO equity</p> <p>17 positions, all with portfolio managers</p> <p>18 that were Highland affiliates, as we</p> <p>19 understood it.</p> <p>20 Q. Well, I'm going to go back to</p> <p>21 Exhibit 1, Paragraph 2, this says, in the</p> <p>22 second sentence, "Acis Capital Management</p> <p>23 GP, LLC, and Acis Capital Management,</p> <p>24 L.P., together Acis, the portfolio manager</p> <p>25 for HCLOF," and then it continues on,</p>
<p style="text-align: right;">Page 32</p> <p>1 Confidential - Pugatch</p> <p>2 "filed for Chapter 11."</p> <p>3 Is this proof of claim correct,</p> <p>4 when it states that Acis Capital</p> <p>5 Management GP, LLC, and Acis Capital</p> <p>6 Management, L.P., were the portfolio</p> <p>7 manager for HCLOF?</p> <p>8 MS. WEISGERBER: Objection to</p> <p>9 form.</p> <p>10 A. I know that there was an issue</p> <p>11 with the portfolio manager for at least</p> <p>12 the Acis CLOs that were held by HCLOF.</p> <p>13 Q. Well, how do you distinguish</p> <p>14 between the Acis CLOs and the Highland</p> <p>15 CLOs? Is that based on who was managing</p> <p>16 them?</p> <p>17 MS. WEISGERBER: Objection to</p> <p>18 form.</p> <p>19 A. Again, they were all underlying</p> <p>20 investments of HCLOF. We didn't</p> <p>21 distinguish the portfolio manager, if you</p> <p>22 will, of those vehicles, other than again</p> <p>23 they were Highland affiliates.</p> <p>24 Q. But it's fair to say that Acis</p> <p>25 was managing at least a portion of the</p>	<p style="text-align: right;">Page 33</p> <p>1 Confidential - Pugatch</p> <p>2 HCLOF investment, correct?</p> <p>3 A. Correct. The underlying</p> <p>4 investments held by HCLOF, correct.</p> <p>5 Q. And did anything -- from the</p> <p>6 time that you -- well, let's just go to</p> <p>7 the -- I think we had the members</p> <p>8 agreement up a second ago. This would</p> <p>9 have been Exhibit 4.</p> <p>10 Yeah, right here. No. 14,</p> <p>11 Highland HCF Advisor, Ltd. is listed as</p> <p>12 the portfolio manager on the members</p> <p>13 agreement.</p> <p>14 Is that accurate, that Highland</p> <p>15 HCF Advisor, Ltd. was the portfolio</p> <p>16 manager?</p> <p>17 MS. WEISGERBER: Objection to</p> <p>18 form. Can you state as of what date</p> <p>19 you're asking, Counsel?</p> <p>20 MR. WILSON: Well, the date of</p> <p>21 this memorandum is, it says right</p> <p>22 here, 15 November 2017.</p> <p>23 BY MR. WILSON:</p> <p>24 Q. So as of the date November 15,</p> <p>25 2017, who was the portfolio manager for</p>

<p style="text-align: right;">Page 34</p> <p>1 Confidential - Pugatch</p> <p>2 this investment?</p> <p>3 A. I don't recall the specific</p> <p>4 names of the various entities that sat</p> <p>5 below the HCLOF level or below Highland</p> <p>6 Capital, as the investment manager of</p> <p>7 HCLOF.</p> <p>8 Q. Well, are you familiar with a</p> <p>9 company called Brigade?</p> <p>10 A. Yes.</p> <p>11 Q. And was that company a</p> <p>12 sub-manager of this investment?</p> <p>13 MS. WEISGERBER: Objection to</p> <p>14 form.</p> <p>15 A. Not at the time of our</p> <p>16 investment.</p> <p>17 Q. Not at the time. Well, when did</p> <p>18 the portfolio managers begin to change in</p> <p>19 this investment?</p> <p>20 MS. WEISGERBER: Objection to</p> <p>21 form.</p> <p>22 A. Do you mean subsequent to our</p> <p>23 investment?</p> <p>24 Q. Yes.</p> <p>25 A. So as I understand it in</p>	<p style="text-align: right;">Page 35</p> <p>1 Confidential - Pugatch</p> <p>2 connection with the Acis bankruptcy that</p> <p>3 took place, there was a change in the</p> <p>4 underlying either portfolio manager of</p> <p>5 certain of the CLOs, the Acis-managed CLOs</p> <p>6 or Acis-branded CLOs, I should say, and/or</p> <p>7 sub-advisor of those CLOs.</p> <p>8 Q. And was that at the direction of</p> <p>9 the Chapter 11 trustee?</p> <p>10 MS. WEISGERBER: Objection.</p> <p>11 A. That's my understanding.</p> <p>12 Q. And so when this investment was</p> <p>13 initially made, was Highland HCF Advisor,</p> <p>14 Ltd. the portfolio manager of the entire</p> <p>15 investment?</p> <p>16 MS. WEISGERBER: Objection to</p> <p>17 form.</p> <p>18 A. I don't recall the specifics</p> <p>19 underneath the HCLOF entity.</p> <p>20 Q. Well, there aren't any other</p> <p>21 portfolio managers listed on this</p> <p>22 document, that I can see.</p> <p>23 Is there any place in this</p> <p>24 document that you can point me to that</p> <p>25 would identify another portfolio manager?</p>
<p style="text-align: right;">Page 36</p> <p>1 Confidential - Pugatch</p> <p>2 MS. WEISGERBER: Objection to</p> <p>3 form. The document speaks for itself.</p> <p>4 A. Again, I think we may be</p> <p>5 distinguishing here between portfolio</p> <p>6 manager at the HCLOF level and portfolio</p> <p>7 manager sub-advisor, again, I'm not sure</p> <p>8 the proper terminology as it relates to</p> <p>9 each of the underlying CLOs that were</p> <p>10 partially owned by HCLOF.</p> <p>11 Q. Well, after the Acis bankruptcy</p> <p>12 was filed, and after the Chapter 11</p> <p>13 trustee appointed Acis as a portfolio</p> <p>14 manager of at least part of HCLOF, did</p> <p>15 Highland HCF Advisor continue to serve as</p> <p>16 portfolio manager?</p> <p>17 MS. WEISGERBER: Objection to</p> <p>18 form.</p> <p>19 A. All of HarbourVest's interaction</p> <p>20 was with Highland as the investment</p> <p>21 manager of HCLOF. My understanding of the</p> <p>22 change in those entities related to the</p> <p>23 portfolio management of the underlying</p> <p>24 Acis CLOs, not a change in the portfolio</p> <p>25 manager, at the HCLOF level.</p>	<p style="text-align: right;">Page 37</p> <p>1 Confidential - Pugatch</p> <p>2 Q. Well, Highland is listed as a</p> <p>3 member under this -- Highland Capital</p> <p>4 Management LLP is listed as a member under</p> <p>5 this Member Agreement; is that correct?</p> <p>6 MS. WEISGERBER: Objection to</p> <p>7 form.</p> <p>8 A. If that's what the document</p> <p>9 says, yes.</p> <p>10 Q. I'm going to look -- let me stop</p> <p>11 my share screen for a second.</p> <p>12 All right. I'm now at the top</p> <p>13 of Page 5 of this Exhibit 4, where it</p> <p>14 says, "Dover IX shall mean HarbourVest</p> <p>15 Dover Street IX Investment L.P."</p> <p>16 And Dover IX was the largest</p> <p>17 single investor of the HarbourVest Group;</p> <p>18 is that correct?</p> <p>19 A. Correct.</p> <p>20 Q. All right. I'm now going to go</p> <p>21 down to Paragraph 5. I'm sorry, it's not</p> <p>22 Paragraph 5. Paragraph 4, where it says</p> <p>23 "Composition of Advisory Board" in</p> <p>24 Paragraph 4.1, The Company shall establish</p> <p>25 an Advisory Board composed of two</p>

<p style="text-align: right;">Page 38</p> <p>1 Confidential - Pugatch</p> <p>2 individuals, one of whom shall be a</p> <p>3 representative of CLO Holdco and one of</p> <p>4 whom shall be a representative of</p> <p>5 Dover IX.</p> <p>6 And did this Advisory Board get</p> <p>7 created?</p> <p>8 A. I believe it was created, yes.</p> <p>9 Q. And who was the representative</p> <p>10 for CLO Holdco on the Advisory Board?</p> <p>11 A. I don't know.</p> <p>12 Q. Who was the representative for</p> <p>13 Dover IX on the Advisory Board?</p> <p>14 A. I can't recall whether it was</p> <p>15 myself or one other colleague who jointly</p> <p>16 manages this investment with me.</p> <p>17 Q. You don't recall if you were on</p> <p>18 the Advisory Board?</p> <p>19 A. The Advisory Board never met</p> <p>20 formally under its capacity as an Advisory</p> <p>21 Board.</p> <p>22 Q. Well, if you look down in</p> <p>23 Paragraph 4.3, I've got my mouse pointed</p> <p>24 here, I don't know if you can see it.</p> <p>25 About two-thirds of the way down in this</p>	<p style="text-align: right;">Page 39</p> <p>1 Confidential - Pugatch</p> <p>2 paragraph it says, "The consent of the</p> <p>3 Advisory Board shall be required to</p> <p>4 approve the following actions," and then</p> <p>5 it lists a number of things.</p> <p>6 Did the Advisory Board not have</p> <p>7 to – was it not required that the</p> <p>8 Advisory Board ever meet, because they</p> <p>9 didn't take any of these actions?</p> <p>10 MS. WEISGERBER: Objection.</p> <p>11 Objection to form.</p> <p>12 A. There may have been one or two</p> <p>13 actions taken by the Advisory Board, I'm</p> <p>14 looking at the list here to see what those</p> <p>15 may even have been, during the duration of</p> <p>16 our investment; but if so, those would</p> <p>17 have been written resolutions or written</p> <p>18 consents, as opposed to any meeting that</p> <p>19 was convened amongst the entire Advisory</p> <p>20 Board.</p> <p>21 Q. Okay. And the entire Advisory</p> <p>22 Board is just two individuals, correct?</p> <p>23 A. Correct, that's my</p> <p>24 understanding.</p> <p>25 Q. Okay. And if you go up a few</p>
<p style="text-align: right;">Page 40</p> <p>1 Confidential - Pugatch</p> <p>2 sentences above that in Paragraph 4.3 it</p> <p>3 says, The portfolio manager shall not act</p> <p>4 contrary to advice of the Advisory Board</p> <p>5 with respect to any action or</p> <p>6 determination expressly conditioned herein</p> <p>7 or in the offering memorandum on the</p> <p>8 consider approval of the Advisory Board.</p> <p>9 So the portfolio manager did not</p> <p>10 have the authority to disregard the advice</p> <p>11 of the Advisory Board; is that correct?</p> <p>12 MS. WEISGERBER: Objection to</p> <p>13 form; misstates the document.</p> <p>14 A. With respect to the limited role</p> <p>15 that the Advisory Board would have to</p> <p>16 play, yes, that would be my read.</p> <p>17 Q. Now, what is your understanding</p> <p>18 of a reset transaction?</p> <p>19 A. Has to do with a refinancing and</p> <p>20 reset of the investment period of an</p> <p>21 underlying CLO.</p> <p>22 Q. And would a reset transaction be</p> <p>23 contained within this – these actions</p> <p>24 that the Advisory Board's consent is</p> <p>25 required to approve?</p>	<p style="text-align: right;">Page 41</p> <p>1 Confidential - Pugatch</p> <p>2 A. No, it would not.</p> <p>3 MS. WEISGERBER: Objection.</p> <p>4 MR. MALONEY: Join.</p> <p>5 Q. It would not?</p> <p>6 A. It would not.</p> <p>7 Q. Well, if a reset was to be</p> <p>8 proposed, who would have the discretion to</p> <p>9 make that decision to enter a reset</p> <p>10 transaction?</p> <p>11 MS. WEISGERBER: Objection to</p> <p>12 form and foundation.</p> <p>13 MR. MALONEY: Join.</p> <p>14 A. That would be Highland as the</p> <p>15 manager of HCLOF, who owns the equity</p> <p>16 position to the underlying CLOs.</p> <p>17 Q. So you're saying that Highland</p> <p>18 would have the exclusive authority to</p> <p>19 enter a reset transaction?</p> <p>20 A. Correct.</p> <p>21 MS. WEISGERBER: Objection to</p> <p>22 form.</p> <p>23 MR. MALONEY: Join.</p> <p>24 Q. What if HarbourVest objected to</p> <p>25 a reset transaction? Would it have any</p>

<p style="text-align: right;">Page 42</p> <p>1 Confidential - Pugatch</p> <p>2 rights or remedies, in your understanding?</p> <p>3 MS. WEISGERBER: I'm going to</p> <p>4 object to form. And also just object</p> <p>5 to the extent that this is calling for</p> <p>6 legal conclusions.</p> <p>7 Mike --</p> <p>8 MR. WILSON: I've ask the</p> <p>9 witness, within his understanding of</p> <p>10 the way this investment worked.</p> <p>11 MS. WEISGERBER: If you have an</p> <p>12 understanding separate from any other</p> <p>13 conversations with counsel, Mike, you</p> <p>14 can certainly answer.</p> <p>15 A. Within my understanding,</p> <p>16 HarbourVest would not have had any ability</p> <p>17 or rights to object to a reset or for</p> <p>18 similar actions by Highland, as the</p> <p>19 manager of the HCLOF.</p> <p>20 Q. Okay. And just to, just for</p> <p>21 clarity, in 4.2 it says that, All actions</p> <p>22 taken by the Advisory Board shall be (i)</p> <p>23 by a unanimous vote of all of the members</p> <p>24 of the Advisory Board in attendance; or</p> <p>25 (ii), by written consent in lieu of a</p>	<p style="text-align: right;">Page 43</p> <p>1 Confidential - Pugatch</p> <p>2 meeting signed by all of the members of</p> <p>3 the Advisory Board.</p> <p>4 And we've talked about how there</p> <p>5 were two members, one of which represented</p> <p>6 CLO Holdco and one of which represented</p> <p>7 HarbourVest, and it was your testimony</p> <p>8 that you don't recall a meeting ever being</p> <p>9 conducted that you believed that there had</p> <p>10 been some written consents issued by the</p> <p>11 Advisory Board; is that correct?</p> <p>12 MS. WEISGERBER: Objection to</p> <p>13 form.</p> <p>14 A. That is my recollection, yes.</p> <p>15 Q. I'm sorry? I didn't hear your</p> <p>16 answer.</p> <p>17 A. That is my recollection, yes.</p> <p>18 Q. Okay. So what is the Advisory</p> <p>19 Board's general function in your</p> <p>20 understanding?</p> <p>21 MS. WEISGERBER: Objection to</p> <p>22 form.</p> <p>23 You can answer, Mike, if you</p> <p>24 know, other than, you know, legal</p> <p>25 conclusions, things like that, legal</p>
<p style="text-align: right;">Page 44</p> <p>1 Confidential - Pugatch</p> <p>2 advice.</p> <p>3 And also, Mike, you're welcome</p> <p>4 to look at the document, I think John</p> <p>5 is E-mailing you the documents as</p> <p>6 well. I don't know if you have the</p> <p>7 full document in front of you.</p> <p>8 THE WITNESS: Yeah, I can pull</p> <p>9 it up here.</p> <p>10 A. I mean, my understanding is the</p> <p>11 Advisory Board, the Advisory Board's</p> <p>12 involvement is as spelled as in Section</p> <p>13 4.3 of the agreement that you have on the</p> <p>14 screen. And that is the extent of the</p> <p>15 role that the Advisory Board would play.</p> <p>16 Q. Well, but as a practical matter,</p> <p>17 what did that entail?</p> <p>18 MS. WEISGERBER: Objection to</p> <p>19 form.</p> <p>20 A. Again, as a practical matter,</p> <p>21 the listed items, which I can't see, that</p> <p>22 are off the screen further down in 4.3 are</p> <p>23 the items that would require approval by</p> <p>24 the Advisory Board.</p> <p>25 Q. But other than those items, the</p>	<p style="text-align: right;">Page 45</p> <p>1 Confidential - Pugatch</p> <p>2 Advisory Board was not a routine part of</p> <p>3 the decision-making of the portfolio</p> <p>4 manager?</p> <p>5 MS. WEISGERBER: Objection to</p> <p>6 form.</p> <p>7 A. Not at all.</p> <p>8 Q. Did you say "not at all"?</p> <p>9 A. Not at all, no.</p> <p>10 Q. I'm going to refer back to</p> <p>11 Exhibit 5, which was Document -- or Docket</p> <p>12 1057. I'll put that back on the share</p> <p>13 screen. I wanted you to scroll, sorry.</p> <p>14 It's a long document.</p> <p>15 I want you to look at</p> <p>16 Paragraph 37, which should be on your</p> <p>17 screen. And it says that these are</p> <p>18 misrepresentations that HarbourVest</p> <p>19 alleges were made by Highland. And the</p> <p>20 first bullet point states that, "Highland</p> <p>21 never informed HarbourVest that Highland</p> <p>22 had no intention of paying the Arbitration</p> <p>23 Award and was undertaking steps to ensure</p> <p>24 that Mr. Terry could not collect on his</p> <p>25 judgment."</p>

<p style="text-align: right;">Page 46</p> <p>1 Confidential - Pugatch</p> <p>2 Now, Mr. Terry did not have an</p> <p>3 arbitration award against Highland; is</p> <p>4 that correct?</p> <p>5 MS. WEISGERBER: Objection to</p> <p>6 form and foundation.</p> <p>7 A. My understanding is there was an</p> <p>8 Arbitration Award, awarded for the benefit</p> <p>9 of Mr. Terry.</p> <p>10 Q. But that award was against Acis,</p> <p>11 correct?</p> <p>12 MS. WEISGERBER: Objection to</p> <p>13 form.</p> <p>14 A. I don't know all of the details.</p> <p>15 I do know that Acis was a subsidiary of</p> <p>16 Highland, and there was an arbitration</p> <p>17 award that was for the benefit of</p> <p>18 Mr. Terry.</p> <p>19 Q. But you would agree with me that</p> <p>20 if, if Highland, or I'm sorry if Mr. Terry</p> <p>21 had an arbitration award against Acis,</p> <p>22 then Highland would not have any</p> <p>23 obligation to pay that award?</p> <p>24 MR. MORRIS: Objection to the</p> <p>25 form of the question.</p>	<p style="text-align: right;">Page 47</p> <p>1 Confidential - Pugatch</p> <p>2 MS. WEISGERBER: Objection to</p> <p>3 the form. Objection to the extent</p> <p>4 that it calls for a legal conclusion.</p> <p>5 I don't -- Mike, if you have a</p> <p>6 layman's understanding of the answer</p> <p>7 to that question, you're welcome to</p> <p>8 answer. But if not, don't answer.</p> <p>9 A. My understanding was Acis was a</p> <p>10 controlled subsidiary of Highland's.</p> <p>11 Q. Okay. Well, the next bullet</p> <p>12 point says that, "Highland did not inform</p> <p>13 HarbourVest that it undertook the</p> <p>14 transfers to siphon assets away from Acis,</p> <p>15 L.P., and that such transfers would</p> <p>16 prevent Mr. Terry from collecting on the</p> <p>17 Arbitration Award."</p> <p>18 So if your understanding was</p> <p>19 that Highland was responsible for the</p> <p>20 arbitration award, then why is it relevant</p> <p>21 that Highland siphoned assets away from</p> <p>22 Acis, L.P.?</p> <p>23 MS. WEISGERBER: Objection to</p> <p>24 form. Misstates testimony.</p> <p>25 Can you clarify that question,</p>
<p style="text-align: right;">Page 48</p> <p>1 Confidential - Pugatch</p> <p>2 John? I think the beginning of it was</p> <p>3 a little muddled.</p> <p>4 BY MR. WILSON:</p> <p>5 Q. Well, this objection says that</p> <p>6 Highland had -- or response to objection,</p> <p>7 says that Highland had no intention of</p> <p>8 paying the arbitration award, but that</p> <p>9 seems to conflict with the next bullet</p> <p>10 point that says that it undertook</p> <p>11 transfers to siphon assets away from Acis,</p> <p>12 L.P., to prevent Mr. Terry from collecting</p> <p>13 on the arbitration award.</p> <p>14 So where were those assets being</p> <p>15 siphoned to?</p> <p>16 MS. WEISGERBER: Objection to</p> <p>17 form and foundation.</p> <p>18 If you're capable of answering</p> <p>19 that question, Mike, you can.</p> <p>20 A. I don't know the specific</p> <p>21 details of where those assets were</p> <p>22 siphoned off to, other than it was to</p> <p>23 another Highland affiliate.</p> <p>24 Q. The next sentence says that,</p> <p>25 "Highland simply did not inform</p>	<p style="text-align: right;">Page 49</p> <p>1 Confidential - Pugatch</p> <p>2 HarbourVest and represented to HarbourVest</p> <p>3 that the reason for changing the portfolio</p> <p>4 manager for HCLOF was because Acis was</p> <p>5 toxic in the industry."</p> <p>6 Do you see that?</p> <p>7 A. Yes.</p> <p>8 Q. And it seems when I read these</p> <p>9 documents that have been filed in the</p> <p>10 Highland bankruptcy, and also the Acis</p> <p>11 bankruptcy, that there's a difference in</p> <p>12 position as to which entity, being either</p> <p>13 Highland or HarbourVest, had the belief</p> <p>14 that the Acis name was toxic. Can you</p> <p>15 shed any light on that?</p> <p>16 MS. WEISGERBER: Objection to</p> <p>17 form.</p> <p>18 A. I can unequivocally say that the</p> <p>19 idea to change the portfolio manager or</p> <p>20 the idea that the Acis brand was toxic did</p> <p>21 not come from HarbourVest.</p> <p>22 Q. That was not at HarbourVest's</p> <p>23 suggestion or insistence?</p> <p>24 A. Absolutely not.</p> <p>25 Q. Well, whose suggestion was it</p>

<p style="text-align: right;">Page 50</p> <p>1 Confidential - Pugatch</p> <p>2 that the Acis name was toxic?</p> <p>3 A. Somebody at Highland.</p> <p>4 Q. Do you know who?</p> <p>5 A. I don't recall the conversation</p> <p>6 where that first came up or who said, or</p> <p>7 who at Highland said that.</p> <p>8 Q. But that conversation did occur</p> <p>9 prior to HarbourVest's investment?</p> <p>10 A. Yes.</p> <p>11 Q. So Acis was previously the</p> <p>12 portfolio manager for HCLOF prior to</p> <p>13 November 15, 2017, and now November 17 --</p> <p>14 or 15th, 2017, the portfolio manager was</p> <p>15 changed.</p> <p>16 And what is HarbourVest's</p> <p>17 position as to why that change in</p> <p>18 portfolio manager damaged it?</p> <p>19 MS. WEISGERBER: Objection;</p> <p>20 form, objection to the extent it calls</p> <p>21 for a legal conclusion.</p> <p>22 Mike, you can answer --</p> <p>23 MR. WILSON: I'm not asking for</p> <p>24 a -- with all due respect, I'm not</p> <p>25 asking for a legal conclusion. I'm</p>	<p style="text-align: right;">Page 51</p> <p>1 Confidential - Pugatch</p> <p>2 asking for his understanding why the</p> <p>3 change in the portfolio manager</p> <p>4 damaged HarbourVest.</p> <p>5 MS. WEISGERBER: Same objection.</p> <p>6 You can provide any</p> <p>7 non-privileged answer that you have,</p> <p>8 Mike, if any.</p> <p>9 A. Ultimately my understanding is</p> <p>10 that that change in portfolio manager and</p> <p>11 the subsequent litigation between Acis,</p> <p>12 Highland, and Josh Terry led to material</p> <p>13 diminution in value, as it relates to the</p> <p>14 underlying assets of HCLOF stemming from</p> <p>15 Highland's decision not to comply with the</p> <p>16 arbitration award to Mr. Terry.</p> <p>17 Q. Okay. Now, if you go up to</p> <p>18 Page 4 in this document, it says that on</p> <p>19 October 27th, and this is Paragraph 11</p> <p>20 now, "On October 27, 2017, Acis' portfolio</p> <p>21 management rights for HCLOF were</p> <p>22 transferred to Highland HCF"; is that</p> <p>23 correct?</p> <p>24 A. That sounds right, yes.</p> <p>25 Q. And this is over two weeks prior</p>
<p style="text-align: right;">Page 52</p> <p>1 Confidential - Pugatch</p> <p>2 to HarbourVest's investment, correct?</p> <p>3 A. Correct.</p> <p>4 Q. So HarbourVest had full</p> <p>5 knowledge that that the portfolio manager</p> <p>6 of HCLOF was being changed prior to its</p> <p>7 investment, correct?</p> <p>8 A. Correct.</p> <p>9 MS. WEISGERBER: Objection to</p> <p>10 form.</p> <p>11 And just to clarify, you're</p> <p>12 asking him, HarbourVest, he's</p> <p>13 testifying on behalf of himself. I</p> <p>14 could just take a standing objection</p> <p>15 to that because I know sometimes</p> <p>16 you're just saying HarbourVest meaning</p> <p>17 Mike, so...</p> <p>18 BY MR. WILSON:</p> <p>19 Q. Okay. And just to be clear,</p> <p>20 HCLOF changed its portfolio manager on</p> <p>21 October 27, 2017, but after the Acis</p> <p>22 bankruptcy was initiated the Chapter 11</p> <p>23 trustee made changes to the portfolio</p> <p>24 manager, correct?</p> <p>25 MS. WEISGERBER: Objection to</p>	<p style="text-align: right;">Page 53</p> <p>1 Confidential - Pugatch</p> <p>2 form, foundation.</p> <p>3 A. I know there were changes</p> <p>4 subsequent to the Acis bankruptcy, to the</p> <p>5 underlying management of the Acis CLOs.</p> <p>6 Q. All right. I'm going to go back</p> <p>7 to Paragraph 37, and I want to look at</p> <p>8 these next two bullet points.</p> <p>9 It says that, in the third</p> <p>10 bullet point, that "Highland indicated to</p> <p>11 HarbourVest that the dispute with</p> <p>12 Mr. Terry (which appeared on a litigation</p> <p>13 schedule presented to HarbourVest during</p> <p>14 diligence) would have no impact on</p> <p>15 investment activities."</p> <p>16 And that would be the opinion of</p> <p>17 Highland, correct?</p> <p>18 MS. WEISGERBER: Objection to</p> <p>19 form. The opinion of Highland? Is</p> <p>20 that what you meant to ask?</p> <p>21 MR. WILSON: Right.</p> <p>22 BY MR. WILSON:</p> <p>23 Q. That's Highland expressing its</p> <p>24 opinion to HarbourVest, correct?</p> <p>25 MS. WEISGERBER: Objection to</p>

<p style="text-align: right;">Page 54</p> <p>1 Confidential - Pugatch</p> <p>2 form.</p> <p>3 A. I would just say Highland</p> <p>4 presented that as facts to HarbourVest.</p> <p>5 Q. Okay. And the next one, it says</p> <p>6 that "Highland expressed confidence in the</p> <p>7 ability of HCLOF to reset or redeem the</p> <p>8 CLOs notwithstanding that Highland was</p> <p>9 using HCLOF as part of its scheme to avoid</p> <p>10 the pending Arbitration Award."</p> <p>11 That's again an opinion, right,</p> <p>12 that Highland expressed confidence in the</p> <p>13 ability of HCLOF?</p> <p>14 MS. WEISGERBER: Objection to</p> <p>15 form. Objection to the extent it</p> <p>16 calls for a legal conclusion.</p> <p>17 A. Ultimately, their ability, or</p> <p>18 HCLOF's ability to reset or redeem the</p> <p>19 CLOs would be subject to market conditions</p> <p>20 and the ability to actually affect those</p> <p>21 transactions, but they expressed their,</p> <p>22 you know, their belief or view in HCLOF's</p> <p>23 ability to do that notwithstanding the,</p> <p>24 that change in portfolio manager.</p> <p>25 Q. Well, in Paragraph 39 on that</p>	<p style="text-align: right;">Page 55</p> <p>1 Confidential - Pugatch</p> <p>2 same page, it says, "In reliance on</p> <p>3 Highland's misrepresentations and</p> <p>4 omissions, HarbourVest invested in HCLOF."</p> <p>5 Now, HarbourVest is a</p> <p>6 sophisticated investor, correct?</p> <p>7 A. Correct.</p> <p>8 Q. And if we were to go to</p> <p>9 Paragraph 36, it says, right here in the</p> <p>10 middle, "These facts were material:</p> <p>11 indeed, HarbourVest expressed concern and</p> <p>12 requested further information regarding</p> <p>13 the Transfers, the Arbitration Award, and</p> <p>14 their implications for HCLOF, and the</p> <p>15 investment's closing date was delayed."</p> <p>16 And the closing date was</p> <p>17 ultimately November 15, 2017, correct?</p> <p>18 A. Correct.</p> <p>19 Q. What was the initial closing</p> <p>20 date that had to be delayed?</p> <p>21 A. I believe it was scheduled for</p> <p>22 November 1st.</p> <p>23 Q. So HarbourVest had full</p> <p>24 knowledge of these facts that it, that it</p> <p>25 lays out here forming the basis of the</p>
<p style="text-align: right;">Page 56</p> <p>1 Confidential - Pugatch</p> <p>2 alleged misrepresentations, and they</p> <p>3 requested further information regarding</p> <p>4 those facts.</p> <p>5 Did they receive any further</p> <p>6 information?</p> <p>7 MR. MORRIS: Objection to the</p> <p>8 form of the question.</p> <p>9 MS. WEISGERBER: Objection to</p> <p>10 form. Misstates testimony.</p> <p>11 A. We did have subsequent</p> <p>12 conversations and, I believe, receive</p> <p>13 subsequent information describing the</p> <p>14 intent around, and the, you know, new</p> <p>15 structure, pro forma structure, of the</p> <p>16 action that Highland had undertaken. And</p> <p>17 part of the reason for the delay in the</p> <p>18 closing was to ensure that we had adequate</p> <p>19 time to diligence those changes, ask</p> <p>20 questions, in connection with a thorough</p> <p>21 due diligence process, and ensure that the</p> <p>22 underlying legal structure was still</p> <p>23 sound.</p> <p>24 Q. And HarbourVest was investing</p> <p>25 over \$73 million, correct?</p>	<p style="text-align: right;">Page 57</p> <p>1 Confidential - Pugatch</p> <p>2 A. Right.</p> <p>3 Q. And HarbourVest had made</p> <p>4 investments of this nature previously,</p> <p>5 correct?</p> <p>6 A. We did.</p> <p>7 MS. WEISGERBER: Objection to</p> <p>8 form.</p> <p>9 A. HarbourVest has made hundreds of</p> <p>10 investment over its years, yes.</p> <p>11 Q. And HarbourVest has conducted</p> <p>12 due diligence regarding its investments in</p> <p>13 the past, correct?</p> <p>14 A. Correct.</p> <p>15 Q. And HarbourVest received</p> <p>16 additional information on items of concern</p> <p>17 and reviewed that information and</p> <p>18 satisfied itself that this was an</p> <p>19 appropriate investment, correct?</p> <p>20 MS. WEISGERBER: Objection to</p> <p>21 form. Misstates testimony.</p> <p>22 A. On the back of</p> <p>23 misrepresentations by Highland, yes.</p> <p>24 MR. WILSON: Well, I think</p> <p>25 that's nonresponsive and I object.</p>

<p style="text-align: right;">Page 58</p> <p>1 Confidential - Pugatch</p> <p>2 Q. I'm just, I'm just, reading from</p> <p>3 your pleading that you filed in the</p> <p>4 bankruptcy, where you say that these were</p> <p>5 material facts, and HarbourVest sought</p> <p>6 more information regarding these facts.</p> <p>7 And then you've testified that they</p> <p>8 performed additional due diligence</p> <p>9 regarding that information they received,</p> <p>10 and then they determined that the</p> <p>11 investment was appropriate, correct?</p> <p>12 MS. WEISGERBER: Objection to</p> <p>13 form. Misstates testimony.</p> <p>14 Go ahead, Mike.</p> <p>15 A. Yeah, that is correct, on the</p> <p>16 back of the additional information we</p> <p>17 received from Highland.</p> <p>18 And I would add, with, you know,</p> <p>19 with the benefit of external advisors and</p> <p>20 outside counsel reviewing those structural</p> <p>21 changes, as well.</p> <p>22 Q. All right. Thank you.</p> <p>23 Now, going back to your</p> <p>24 declaration, which we've marked as</p> <p>25 Exhibit 3, Paragraph 3 says that "The</p>	<p style="text-align: right;">Page 59</p> <p>1 Confidential - Pugatch</p> <p>2 unaudited net asset value of HCLOF, as of</p> <p>3 August 31, 2020, was \$44,587,820."</p> <p>4 And is that a – is that a book</p> <p>5 value, I guess?</p> <p>6 A. That is a fair market value, in</p> <p>7 accordance with the valuation policy of</p> <p>8 HCLOF.</p> <p>9 Q. Do you happen to know the net</p> <p>10 asset value of HCLOF as of February 1,</p> <p>11 2019? And I don't want an exact number, I</p> <p>12 just want an approximation.</p> <p>13 A. No, I do not.</p> <p>14 Q. Do you know where I could get</p> <p>15 that information?</p> <p>16 A. Presumably from the Debtor.</p> <p>17 Q. We'll come back to this in a</p> <p>18 minute, but I'm going to –</p> <p>19 MS. WEISGERBER: I think we've</p> <p>20 been going about an hour, John, if we</p> <p>21 can take a quick break.</p> <p>22 MR. WILSON: Yeah, a break is</p> <p>23 fine.</p> <p>24 MS. WEISGERBER: Actually,</p> <p>25 Mike...</p>
<p style="text-align: right;">Page 60</p> <p>1 Confidential - Pugatch</p> <p>2 MR. WILSON: I'm sorry? I</p> <p>3 didn't hear you.</p> <p>4 MS. WEISGERBER: It can be up to</p> <p>5 Mike.</p> <p>6 Mike, do you want to take a</p> <p>7 quick break? Do you want to keep</p> <p>8 going?</p> <p>9 MR. WILSON: No, we can, if</p> <p>10 y'all need a break, we can take a</p> <p>11 break, like 10, 15 minutes.</p> <p>12 THE WITNESS: Yeah, why don't we</p> <p>13 take a break, please.</p> <p>14 MR. WILSON: What do y'all</p> <p>15 prefer? 10, 15?</p> <p>16 MS. WEISGERBER: Ten minutes is</p> <p>17 fine.</p> <p>18 Mike, is that good with you.</p> <p>19 THE WITNESS: Yeah, ten-minute</p> <p>20 break is fine.</p> <p>21 MR. WILSON: Okay. Well, we'll</p> <p>22 break till, let's say, 1:20 central</p> <p>23 time.</p> <p>24 THE WITNESS: Perfect.</p> <p>25 MR. WILSON: All right. Thanks</p>	<p style="text-align: right;">Page 61</p> <p>1 Confidential - Pugatch</p> <p>2 guys.</p> <p>3 (Recess taken.)</p> <p>4 MR. WILSON: Yes, I just sent</p> <p>5 out an E-mail with Exhibit 6, and I'm</p> <p>6 going to pull that up on the screen</p> <p>7 share, as well.</p> <p>8 (Whereupon, Exhibit 6, Offering</p> <p>9 Memorandum 122 pages, was marked for</p> <p>10 identification.)</p> <p>11 BY MR. WILSON:</p> <p>12 Q. All right. So this is the</p> <p>13 Offering Memorandum, and I'm looking at</p> <p>14 the bottom of Page 1 – I mean, the top of</p> <p>15 Page 1, I'm sorry.</p> <p>16 The Company that was being</p> <p>17 invested in is Highland CLO Funding, Ltd.</p> <p>18 Do you see that, Mr. Pugatch?</p> <p>19 MS. WEISGERBER: Objection to</p> <p>20 form.</p> <p>21 A. I do. Okay.</p> <p>22 Q. And then this document defines</p> <p>23 Highland, as Highland Capital Management,</p> <p>24 L.P. Do you see that?</p> <p>25 A. Yes.</p>

<p style="text-align: right;">Page 62</p> <p>1 Confidential - Pugatch</p> <p>2 Q. Okay. Now, if we go down to, I</p> <p>3 guess it's Page 8 of this document, and</p> <p>4 this first full paragraph at the top, it</p> <p>5 says, "No voting member of the Advisory</p> <p>6 Board shall be a controlled affiliate of</p> <p>7 Highland."</p> <p>8 Do you see that?</p> <p>9 A. I do.</p> <p>10 Q. And then it also says that, "It</p> <p>11 being understood that none of CLO Holdco</p> <p>12 Ltd., it's wholly-owned subsidiaries, or</p> <p>13 any of their respective directors or</p> <p>14 trustees shall be deemed to be a</p> <p>15 controlled affiliate of Highland, due to</p> <p>16 their preexisting non-discretionary</p> <p>17 advisory relationship with Highland."</p> <p>18 Do you see that?</p> <p>19 A. Yes.</p> <p>20 Q. So there were no affiliates of</p> <p>21 Highland on the Advisory Board, correct?</p> <p>22 MS. WEISGERBER: Objection to</p> <p>23 form.</p> <p>24 A. For voting purposes under the</p> <p>25 document, that is how this reads, correct.</p>	<p style="text-align: right;">Page 63</p> <p>1 Confidential - Pugatch</p> <p>2 MR. WILSON: All right. I'm</p> <p>3 going to turn to the next exhibit.</p> <p>4 And this is going to be Exhibit No. 7</p> <p>5 coming in the E-mail. I'm also going</p> <p>6 to put Exhibit No. 7 on the screen.</p> <p>7 (Whereupon, Exhibit 7, Share</p> <p>8 Subscription and Transfer Agreement 31</p> <p>9 pages, was marked for identification.)</p> <p>10 Q. All right. Do you see that?</p> <p>11 The "Subscription and Transfer Agreement</p> <p>12 For Ordinary Shares"?</p> <p>13 A. Yep.</p> <p>14 Q. All right. So what this</p> <p>15 document says is that, it repeats that</p> <p>16 Highland HCLF Advisory Ltd. is the</p> <p>17 portfolio manager. Highland CLO Funding</p> <p>18 Ltd. is the fund, and CLO Holdco Ltd. is</p> <p>19 the existing shareholder.</p> <p>20 And if we go down to the bottom</p> <p>21 half of this page, it says that</p> <p>22 HarbourVest was acquiring its shares in</p> <p>23 this investment from CLO Holdco, correct?</p> <p>24 A. Yes.</p> <p>25 MS. WEISGERBER: Objection to</p>
<p style="text-align: right;">Page 64</p> <p>1 Confidential - Pugatch</p> <p>2 form.</p> <p>3 Q. And prior to the date of this</p> <p>4 document, which I believe is November 15,</p> <p>5 2017, CLO Holdco held 100 percent of the</p> <p>6 shares of HCLOF, correct?</p> <p>7 MS. WEISGERBER: Objection to</p> <p>8 form, foundation.</p> <p>9 A. I don't recall. I know they</p> <p>10 were the largest, the largest investor. I</p> <p>11 don't recall if it was 100 percent.</p> <p>12 Q. Well, if you look at the chart</p> <p>13 below Paragraph A, it says that CLO Holdco</p> <p>14 Ltd. immediately prior to the placing on</p> <p>15 100 percent share percentage.</p> <p>16 Do you have any reason to</p> <p>17 disagree with that?</p> <p>18 A. No.</p> <p>19 MS. WEISGERBER: Objection to</p> <p>20 form.</p> <p>21 Q. All right. Now, below CLO</p> <p>22 Holdco Ltd., these are the five</p> <p>23 HarbourVest entities that have filed</p> <p>24 proofs of claim in this bankruptcy,</p> <p>25 correct?</p>	<p style="text-align: right;">Page 65</p> <p>1 Confidential - Pugatch</p> <p>2 MS. WEISGERBER: Objection to</p> <p>3 form.</p> <p>4 A. Those are the five HarbourVest</p> <p>5 entities with a direct investment in</p> <p>6 HCLOF.</p> <p>7 Q. And each one of those entities</p> <p>8 has filed a proof of claim in this</p> <p>9 bankruptcy, correct?</p> <p>10 A. Yes.</p> <p>11 Q. And the largest – I think we</p> <p>12 discussed this earlier, but Dover Street</p> <p>13 IX is the largest of those investors, with</p> <p>14 a 35.49 percent share percentage, correct?</p> <p>15 MS. WEISGERBER: Objection to</p> <p>16 form.</p> <p>17 A. Correct.</p> <p>18 Q. And if you take the total of</p> <p>19 those investments of the HarbourVest</p> <p>20 entities, you get a 49.98 percent total.</p> <p>21 Is that your understanding?</p> <p>22 MS. WEISGERBER: Objection to</p> <p>23 form.</p> <p>24 A. I know it has 49 percent, and</p> <p>25 some percentage. I'll take your math as</p>

<p style="text-align: right;">Page 66</p> <p>1 Confidential - Pugatch</p> <p>2 correct.</p> <p>3 Q. And 49.98 percent is larger than</p> <p>4 the next largest shareholder, which is CLO</p> <p>5 Holdco which is 49.02 percent, correct?</p> <p>6 MS. WEISGERBER: Objection to</p> <p>7 form.</p> <p>8 A. In taking all of the HarbourVest</p> <p>9 entities, collectively, yes, correct.</p> <p>10 Q. And so I want to go back to</p> <p>11 earlier where we saw in documents filed by</p> <p>12 HarbourVest, where it refers to itself as</p> <p>13 a passive investor. What do you, I</p> <p>14 apologize if I've already asked you this</p> <p>15 question, but what do you mean by passive</p> <p>16 investor?</p> <p>17 A. Meaning we were a minority</p> <p>18 investor in HCLOF. HCLOF was fully</p> <p>19 controlled by Highland as the investment</p> <p>20 manager. So HarbourVest did not have any</p> <p>21 governance, rights, or control as it</p> <p>22 related to the ongoing investment</p> <p>23 management and decisionmaking of HCLOF.</p> <p>24 Q. HarbourVest has the largest</p> <p>25 percentage of the shares of any of these</p>	<p style="text-align: right;">Page 67</p> <p>1 Confidential - Pugatch</p> <p>2 investors, correct?</p> <p>3 MS. WEISGERBER: Objection to</p> <p>4 form.</p> <p>5 A. Taken collectively, yes.</p> <p>6 Q. And HarbourVest owned one of the</p> <p>7 two spots on the Advisory Board, correct?</p> <p>8 MS. WEISGERBER: Objection to</p> <p>9 form.</p> <p>10 A. Correct.</p> <p>11 Q. And if you look down below the</p> <p>12 HarbourVest entities on this chart, you</p> <p>13 see that Highland Capital Management, L.P.</p> <p>14 is purchasing a .63 percent interest,</p> <p>15 correct?</p> <p>16 MS. WEISGERBER: Objection to</p> <p>17 form. The document speaks for itself.</p> <p>18 A. According to the document, yes.</p> <p>19 Q. Do you have any reason to</p> <p>20 disagree with that document?</p> <p>21 MS. WEISGERBER: Objection to</p> <p>22 form.</p> <p>23 A. I do not.</p> <p>24 MR. WILSON: All right. I'm</p> <p>25 going to stop that screen share. I'm</p>
<p style="text-align: right;">Page 68</p> <p>1 Confidential - Pugatch</p> <p>2 going to E-mail out the next exhibit.</p> <p>3 This was Exhibit 8 that I just sent,</p> <p>4 and I'll pull it up on the screen</p> <p>5 share.</p> <p>6 (Whereupon, Exhibit 8, E-mail</p> <p>7 08/15/2017, was marked for</p> <p>8 identification.)</p> <p>9 Q. Now, I'll represent to you that</p> <p>10 I received this document this morning from</p> <p>11 your counsel. Do you recognize this</p> <p>12 E-mail? Have you seen it before?</p> <p>13 A. Yes, I have.</p> <p>14 Q. And this E-mail is sent by Brad</p> <p>15 Eden. I think you mentioned that he was</p> <p>16 one of the representatives that was</p> <p>17 involved in the pre-investment discussions</p> <p>18 with Highland?</p> <p>19 A. Correct.</p> <p>20 Q. And I think you told me that</p> <p>21 Dustin Willard was involved in those</p> <p>22 discussions on the HarbourVest side,</p> <p>23 correct?</p> <p>24 A. Correct.</p> <p>25 Q. And so this is an E-mail sent on</p>	<p style="text-align: right;">Page 69</p> <p>1 Confidential - Pugatch</p> <p>2 August 15, 2017 from Brad Eden to Dustin</p> <p>3 Willard. Are you familiar with Thomas</p> <p>4 Surgent?</p> <p>5 A. Yes.</p> <p>6 Q. Was he involved in those</p> <p>7 discussions with you and HarbourVest as</p> <p>8 well?</p> <p>9 A. In some of those discussions,</p> <p>10 yes.</p> <p>11 Q. Okay. So when it says, "Dustin,</p> <p>12 attached is a legal summary. Of course,</p> <p>13 Thomas is available to answer any</p> <p>14 follow-up questions." Do you know if</p> <p>15 Thomas was consulted with any follow-up</p> <p>16 questions?</p> <p>17 A. I recall --</p> <p>18 MS. WEISGERBER: Objection to</p> <p>19 form.</p> <p>20 A. -- having follow-up</p> <p>21 conversations with Highland, I don't --</p> <p>22 around these legal summaries. I don't</p> <p>23 recall with whom.</p> <p>24 Q. Okay. And just to show you the</p> <p>25 attachment that's referenced in the</p>

<p style="text-align: right;">Page 70</p> <p>1 Confidential - Pugatch</p> <p>2 E-mail, this says that SEC financial</p> <p>3 crisis matter crusader, Terry, Daugherty</p> <p>4 and UBS. So and then I guess these are --</p> <p>5 this is information provided by Highland</p> <p>6 to HarbourVest regarding these matters.</p> <p>7 Why were these particular matters</p> <p>8 addressed in this E-mail, to your</p> <p>9 knowledge?</p> <p>10 MS. WEISGERBER: Objection to</p> <p>11 form and foundation.</p> <p>12 A. These were all outstanding</p> <p>13 litigation matters that we had become</p> <p>14 aware of in connection with our diligence</p> <p>15 that we asked for a further explanation</p> <p>16 from Highland on the underlying substance.</p> <p>17 Q. Now, did you become</p> <p>18 independently aware of these in the course</p> <p>19 of your due diligence, or were these</p> <p>20 brought to your attention by Highland</p> <p>21 first?</p> <p>22 A. I don't know.</p> <p>23 MS. WEISGERBER: Objection to</p> <p>24 form.</p> <p>25 Q. You don't know?</p>	<p style="text-align: right;">Page 71</p> <p>1 Confidential - Pugatch</p> <p>2 A. (Nods.)</p> <p>3 Q. Okay. And particularly with</p> <p>4 respect to Mr. Terry, is it your opinion</p> <p>5 that there are any material</p> <p>6 misrepresentations made in this summary?</p> <p>7 MS. WEISGERBER: Objection to</p> <p>8 form. Objection to the extent it</p> <p>9 calls for a legal conclusion.</p> <p>10 Mike, to the extent you have an</p> <p>11 answer that does not infringe on</p> <p>12 conversations with counsel, you can</p> <p>13 provide it.</p> <p>14 A. Yeah, I would say our</p> <p>15 understanding or interpretation of that,</p> <p>16 or the answer to that question would be</p> <p>17 based on conversations with counsel.</p> <p>18 Q. Well, this document was provided</p> <p>19 to you in the course of the discussions</p> <p>20 prior to HarbourVest's investment, and</p> <p>21 you've stated that Highland, or you've</p> <p>22 taken the position that Highland made</p> <p>23 material misrepresentations to</p> <p>24 HarbourVest, in the course of these</p> <p>25 discussions.</p>
<p style="text-align: right;">Page 72</p> <p>1 Confidential - Pugatch</p> <p>2 Does this document evidence</p> <p>3 those material misrepresentations?</p> <p>4 MS. WEISGERBER: Objection to</p> <p>5 form. Objection to the extent it</p> <p>6 calls for a legal conclusion.</p> <p>7 A. Yeah, same answer as previous.</p> <p>8 Q. Well, I'm not asking you for a</p> <p>9 legal conclusion. I'm asking you are</p> <p>10 there misrepresentations in this document</p> <p>11 that you claim Highland made?</p> <p>12 MS. WEISGERBER: Same</p> <p>13 objections.</p> <p>14 I think misrepresentations calls</p> <p>15 for a legal conclusion regarding legal</p> <p>16 misrepresentations, actionable</p> <p>17 misrepresentations. So if he doesn't</p> <p>18 have any non-privileged testimony to</p> <p>19 give, he can't give any testimony.</p> <p>20 MR. WILSON: Well, I'm here</p> <p>21 today to investigate HarbourVest's</p> <p>22 claim and one of the basis of</p> <p>23 HarbourVest's claim is</p> <p>24 misrepresentation. So I'm trying to</p> <p>25 figure out what those</p>	<p style="text-align: right;">Page 73</p> <p>1 Confidential - Pugatch</p> <p>2 misrepresentations were.</p> <p>3 And I would ask that the witness</p> <p>4 tell me if there's a misrepresentation</p> <p>5 in this document that was provided in</p> <p>6 this E-mail.</p> <p>7 MS. WEISGERBER: Same</p> <p>8 objections.</p> <p>9 Mike, if you have a general</p> <p>10 understanding of, generally,</p> <p>11 misrepresentations that HarbourVest</p> <p>12 believes were made in connection or</p> <p>13 regarding the Terry litigation,</p> <p>14 et cetera, you can provide that</p> <p>15 information.</p> <p>16 THE WITNESS: Yeah, sure.</p> <p>17 A. So in general, my understanding</p> <p>18 and the way that Highland had</p> <p>19 characterized the ongoing litigation with</p> <p>20 Mr. Terry was that it was nothing more</p> <p>21 than an employment dispute with a former</p> <p>22 employee and that, you know, the</p> <p>23 arbitration -- well, actually, it was</p> <p>24 before the Arbitration Board, but the</p> <p>25 ongoing litigation had no impact, bearing,</p>

<p style="text-align: right;">Page 74</p> <p>1 Confidential - Pugatch</p> <p>2 or ultimate result on the underlying CLOs</p> <p>3 that Highland managed, including the Acis</p> <p>4 CLOs.</p> <p>5 Q. So you're saying that</p> <p>6 Highland –</p> <p>7 MR. MORRIS: John, I'm sorry to</p> <p>8 interrupt. Before you go on, somebody</p> <p>9 with the initials DSD just joined the</p> <p>10 deposition. Can you please identify</p> <p>11 yourself?</p> <p>12 MR. DRAPER: This is Douglas</p> <p>13 Draper. I just changed machines.</p> <p>14 MR. MORRIS: Okay. No problem,</p> <p>15 Doug. Thank you.</p> <p>16 BY MR. WILSON:</p> <p>17 Q. So, and I'm not trying to put</p> <p>18 words in your mouth, but is the gist of</p> <p>19 what you're telling me that Highland</p> <p>20 represented that this was a minor dispute</p> <p>21 with a former employee and it would not</p> <p>22 affect its CLO business?</p> <p>23 A. Correct.</p> <p>24 MS. WEISGERBER: Objection to</p> <p>25 form.</p>	<p style="text-align: right;">Page 75</p> <p>1 Confidential - Pugatch</p> <p>2 A. Correct.</p> <p>3 Q. Well, are there any more</p> <p>4 specific E-mails or written</p> <p>5 communications, that you're aware of, that</p> <p>6 would contain misrepresentations by</p> <p>7 Highland to HarbourVest?</p> <p>8 MS. WEISGERBER: Objection to</p> <p>9 form.</p> <p>10 Are you asking about from</p> <p>11 today's production, or are you asking</p> <p>12 about just, in general?</p> <p>13 MR. WILSON: Well, you produced</p> <p>14 two E-mails to us today. I'm just</p> <p>15 asking if there's anything else he's</p> <p>16 aware of where there's written</p> <p>17 misrepresentations from Highland to</p> <p>18 HarbourVest.</p> <p>19 MS. WEISGERBER: Mike, if you</p> <p>20 have an answer separate from</p> <p>21 conversations with lawyers, et cetera,</p> <p>22 you can certainly answer.</p> <p>23 A. Yeah, my understanding of the</p> <p>24 documents I reviewed that were part of the</p> <p>25 production to you earlier today, there is</p>
<p style="text-align: right;">Page 76</p> <p>1 Confidential - Pugatch</p> <p>2 another document that would also include</p> <p>3 misrepresentations on the part of this,</p> <p>4 the Terry lawsuit and ultimate impact on</p> <p>5 the CLO business.</p> <p>6 BY MR. WILSON:</p> <p>7 Q. And what document is that?</p> <p>8 A. That was the E-mail, E-mail with</p> <p>9 an attachment around a response to a Wall</p> <p>10 Street Journal article and some of the</p> <p>11 content in the E-mail itself.</p> <p>12 Q. Okay. We'll look at that one.</p> <p>13 What was the – HarbourVest had</p> <p>14 seen the Terry Arbitration Award, correct?</p> <p>15 MS. WEISGERBER: Objection to</p> <p>16 form.</p> <p>17 Q. Prior to making its investment</p> <p>18 in HCLOF?</p> <p>19 A. We were aware of the existence</p> <p>20 and the outcome of the Arbitration Award.</p> <p>21 Q. Had you read the Arbitration</p> <p>22 Award?</p> <p>23 A. No.</p> <p>24 Q. Well, how did you know the</p> <p>25 substance of the Arbitration Award without</p>	<p style="text-align: right;">Page 77</p> <p>1 Confidential - Pugatch</p> <p>2 reading it?</p> <p>3 MS. WEISGERBER: Objection to</p> <p>4 form.</p> <p>5 A. We were informed by Highland of</p> <p>6 the outcome of the ongoing litigation and</p> <p>7 the outcome of the Arbitration Award.</p> <p>8 Q. Was that part of the</p> <p>9 documentation that you requested Highland</p> <p>10 provide you to continue your due</p> <p>11 diligence, before making the investment?</p> <p>12 MS. WEISGERBER: Objection to</p> <p>13 form.</p> <p>14 A. We certainly requested more</p> <p>15 color around the outcome of that, and any</p> <p>16 impact that it could have to HCLOF or the</p> <p>17 ongoing viability of Highland's CLO</p> <p>18 business.</p> <p>19 Q. And what, what were you provided</p> <p>20 with respect to the Terry Arbitration</p> <p>21 Award?</p> <p>22 MS. WEISGERBER: Objection to</p> <p>23 form.</p> <p>24 A. The existence of that award, the</p> <p>25 quantum of that award, the judgment of</p>

<p style="text-align: right;">Page 78</p> <p>1 Confidential - Pugatch</p> <p>2 just under \$8 million in connection with</p> <p>3 that award. That was the information that</p> <p>4 was disclosed at – and represented as a</p> <p>5 settlement or, you know, arbitration</p> <p>6 ruling, in connection with the employee</p> <p>7 litigation, wrongful termination suit.</p> <p>8 Q. So did HarbourVest not request a</p> <p>9 copy of the Arbitration Award to review?</p> <p>10 MS. WEISGERBER: Objection to</p> <p>11 form.</p> <p>12 A. We did not specifically, no.</p> <p>13 Q. And so, to this day, have you</p> <p>14 read the Arbitration Award?</p> <p>15 A. I have not.</p> <p>16 MS. WEISGERBER: Objection to</p> <p>17 form.</p> <p>18 Q. You have not?</p> <p>19 A. I have not.</p> <p>20 MR. WILSON: Okay. I think my</p> <p>21 last E-mail went out with Exhibit 9 on</p> <p>22 it. I will pull that up.</p> <p>23 Q. Can you see that on the screen</p> <p>24 share?</p> <p>25 A. Yes.</p>	<p style="text-align: right;">Page 79</p> <p>1 Confidential - Pugatch</p> <p>2 (Whereupon, Exhibit 9,</p> <p>3 11/29/2017 E-mail with cover letter</p> <p>4 Highland Capital Management, was</p> <p>5 marked for identification.)</p> <p>6 Q. Okay. So I think this is out of</p> <p>7 order, but this should have been first in</p> <p>8 the exhibit. But this is an E-mail from</p> <p>9 Hunter Covitz to Dustin Willard, Michael</p> <p>10 Pugatch and Nick Bellisario, carbon copies</p> <p>11 to Trey Parker and Brad Eden.</p> <p>12 And Trey Parker and Brad Eden</p> <p>13 are Highland affiliates, right?</p> <p>14 A. Yes.</p> <p>15 Q. And we've talked about Dustin</p> <p>16 Willard. Who's Nick Bellisario?</p> <p>17 A. He was another member of the</p> <p>18 HarbourVest team.</p> <p>19 Q. And was he on the, the</p> <p>20 four-member board that you talked about</p> <p>21 earlier, that made the investment</p> <p>22 decision?</p> <p>23 A. No, he was the junior member of</p> <p>24 the investment team that I alluded to.</p> <p>25 Q. Okay. And this, this E-mail</p>
<p style="text-align: right;">Page 80</p> <p>1 Confidential - Pugatch</p> <p>2 came out about two weeks after the</p> <p>3 HarbourVest investment, correct?</p> <p>4 A. Correct.</p> <p>5 Q. And it's your opinion or</p> <p>6 position that this E-mail contains</p> <p>7 misrepresentations that Highland made to</p> <p>8 HarbourVest?</p> <p>9 MS. WEISGERBER: Objection to</p> <p>10 form. Objection to the extent it</p> <p>11 calls for a legal conclusion.</p> <p>12 A. Yes.</p> <p>13 Q. And there was a Wall Street</p> <p>14 Journal article that had come out shortly</p> <p>15 before this E-mail, correct?</p> <p>16 A. Correct.</p> <p>17 Q. And how did you became aware of</p> <p>18 that Wall Street Journal article?</p> <p>19 A. I certainly would have seen it.</p> <p>20 I may have been sent it separately by</p> <p>21 Highland, I don't recall.</p> <p>22 Q. You don't recall if you saw it</p> <p>23 independently or Highland telling you</p> <p>24 about it?</p> <p>25 A. I don't.</p>	<p style="text-align: right;">Page 81</p> <p>1 Confidential - Pugatch</p> <p>2 Q. And what did you – what was</p> <p>3 your reaction to receiving these E-mails</p> <p>4 from Highland regarding that article?</p> <p>5 MS. WEISGERBER: Objection to</p> <p>6 form.</p> <p>7 A. The article or the accusations</p> <p>8 in the article were something that</p> <p>9 required more explanation from our</p> <p>10 perspective.</p> <p>11 Q. And attached to this E-mail</p> <p>12 was – we just scrolled through it a</p> <p>13 second ago – but a letter from James</p> <p>14 Dondero that was sent to the</p> <p>15 editor-in-chief of the Wall Street</p> <p>16 Journal, Mr. Gerard Baker, on November</p> <p>17 28th.</p> <p>18 And did you read this</p> <p>19 attachment?</p> <p>20 A. Yes.</p> <p>21 Q. And did this attachment to this</p> <p>22 E-mail aleve your concerns that you had</p> <p>23 regarding the article?</p> <p>24 MS. WEISGERBER: Objection to</p> <p>25 form.</p>

<p style="text-align: right;">Page 82</p> <p>1 Confidential - Pugatch</p> <p>2 A. I wouldn't say alleviated the</p> <p>3 concerns but certainly provided an</p> <p>4 explanation or refute to some of the</p> <p>5 claims made in the, in the article.</p> <p>6 Q. And do you contend that this</p> <p>7 letter that was written to Gerard Baker</p> <p>8 and provided later to HarbourVest was a</p> <p>9 material misrepresentation?</p> <p>10 MS. WEISGERBER: Objection to</p> <p>11 form.</p> <p>12 Don't answer that, Mike. It</p> <p>13 calls for a legal conclusion.</p> <p>14 MR. WILSON: I'm asking for his</p> <p>15 understanding.</p> <p>16 Q. Do you contend that there's</p> <p>17 misrepresentations in this letter?</p> <p>18 MS. WEISGERBER: Material</p> <p>19 misrepresentations absolutely calls</p> <p>20 for a legal conclusion, John.</p> <p>21 MR. WILSON: Well, I've</p> <p>22 shortened it to misrepresentations.</p> <p>23 So I just want to know if he thinks</p> <p>24 there's anything that's misrepresented</p> <p>25 in this letter.</p>	<p style="text-align: right;">Page 83</p> <p>1 Confidential - Pugatch</p> <p>2 MS. WEISGERBER: Same</p> <p>3 objections.</p> <p>4 Mike, if you have an</p> <p>5 understanding, separate from</p> <p>6 conversations with lawyers, you can</p> <p>7 answer.</p> <p>8 A. I would need to reread the</p> <p>9 letter to definitively answer that outside</p> <p>10 of conversations with counsel.</p> <p>11 Q. But to be clear, this letter was</p> <p>12 issued two weeks after HarbourVest's</p> <p>13 investment, correct?</p> <p>14 A. Correct.</p> <p>15 MS. WEISGERBER: Objection;</p> <p>16 asked and answered.</p> <p>17 MR. WILSON: I'm going to now</p> <p>18 send out the next exhibit, which is</p> <p>19 going to be Exhibit No. 10.</p> <p>20 (Whereupon, Exhibit 10, 2004</p> <p>21 Examination of Investor in Highland</p> <p>22 CLO Funding Ltd. 10/10/2018, was</p> <p>23 marked for identification.)</p> <p>24 MR. WILSON: It just went</p> <p>25 through. So I'm going to pull it up</p>
<p style="text-align: right;">Page 84</p> <p>1 Confidential - Pugatch</p> <p>2 on my screen share.</p> <p>3 So this Exhibit 10, the document</p> <p>4 I received this morning, filed in the</p> <p>5 Acis bankruptcy, it looks like, well,</p> <p>6 let's see, dated in, dated October 10,</p> <p>7 2018.</p> <p>8 BY MR. WILSON:</p> <p>9 Q. Have you seen this document</p> <p>10 before?</p> <p>11 A. Yes.</p> <p>12 Q. And it's a motion for 2004</p> <p>13 Examination of Investor in Highland CLO</p> <p>14 Funding, Ltd., correct?</p> <p>15 A. Sorry. Was there a question,</p> <p>16 John?</p> <p>17 Q. Yeah. I was just asking you to</p> <p>18 confirm that this was the motion for 2004</p> <p>19 Examination of Investor in Highland CLO</p> <p>20 Funding?</p> <p>21 A. Yes.</p> <p>22 Q. And so if I scroll down to</p> <p>23 Paragraph 6, which is on, it looks like</p> <p>24 it's on Page 4. In the second sentence,</p> <p>25 it says that "Although HCLOF/ALF was a one</p>	<p style="text-align: right;">Page 85</p> <p>1 Confidential - Pugatch</p> <p>2 time wholly-owned by an affiliate of</p> <p>3 Highland, it did an offering memorandum in</p> <p>4 November of 2017 and as a result, is now</p> <p>5 owned 49.985% by certain affiliates of a</p> <p>6 large investor and manager of private</p> <p>7 equity funds."</p> <p>8 And that's defined as investor.</p> <p>9 So the Investor is the HarbourVest</p> <p>10 entities collectively, correct?</p> <p>11 A. Correct.</p> <p>12 Q. All right. And then the next</p> <p>13 sentence, says that "Despite its large</p> <p>14 ownership percentage in HCLOF in the</p> <p>15 alleged millions in losses that will</p> <p>16 result if the Acis CLOs are not reset to</p> <p>17 make them consistent with prevailing</p> <p>18 market conditions the Investor has not yet</p> <p>19 appeared in this case or taken any</p> <p>20 position in this bankruptcy case."</p> <p>21 Do you see that?</p> <p>22 A. I do.</p> <p>23 Q. Is that correct?</p> <p>24 MS. WEISGERBER: Objection to</p> <p>25 form.</p>

<p style="text-align: right;">Page 86</p> <p>1 Confidential - Pugatch</p> <p>2 A. Is what correct?</p> <p>3 Q. Well, I guess, I'm most</p> <p>4 concerned with this last part of the</p> <p>5 sentence. It starts with "The Investor</p> <p>6 has not yet appeared in this case or taken</p> <p>7 any position in the bankruptcy case."</p> <p>8 Do you agree with that?</p> <p>9 MS. WEISGERBER: Objection to</p> <p>10 form.</p> <p>11 Mike, if you want to look at the</p> <p>12 whole document, you're welcome to.</p> <p>13 This is not a document that's a</p> <p>14 HarbourVest-prepared document.</p> <p>15 BY MR. WILSON:</p> <p>16 Q. Maybe a better way of asking the</p> <p>17 question is: As of the date of this</p> <p>18 document, which was in October of 2018,</p> <p>19 had HarbourVest appeared in the Acis</p> <p>20 bankruptcy?</p> <p>21 A. No, we did not.</p> <p>22 Q. And had they asserted any</p> <p>23 positions regarding the Acis bankruptcy?</p> <p>24 A. Not through the court.</p> <p>25 MS. WEISGERBER: Objection to</p>	<p style="text-align: right;">Page 87</p> <p>1 Confidential - Pugatch</p> <p>2 form.</p> <p>3 Q. Okay. Had Highland encouraged</p> <p>4 HarbourVest to participate in the Acis</p> <p>5 bankruptcy?</p> <p>6 MS. WEISGERBER: Objection to</p> <p>7 form.</p> <p>8 A. No.</p> <p>9 Q. They did not?</p> <p>10 MS. WEISGERBER: Objection to</p> <p>11 form.</p> <p>12 Q. Highland did not encourage</p> <p>13 HarbourVest to participate in the Acis</p> <p>14 bankruptcy?</p> <p>15 A. When you say "participate," can</p> <p>16 you define that, please.</p> <p>17 Q. Well, appear in the case, as</p> <p>18 stated in this motion.</p> <p>19 A. No, they had not.</p> <p>20 Q. Did Harbour – I'm sorry – did</p> <p>21 Highland keep HarbourVest apprised of the</p> <p>22 events that occurred in the Acis</p> <p>23 bankruptcy?</p> <p>24 MS. WEISGERBER: Objection to</p> <p>25 form. I'm just going to restate my</p>
<p style="text-align: right;">Page 88</p> <p>1 Confidential - Pugatch</p> <p>2 objection to the extent you're asking</p> <p>3 questions about HarbourVest. This is</p> <p>4 Mr. Pugatch answering, based on his</p> <p>5 knowledge.</p> <p>6 A. We were kept informed from time</p> <p>7 to time throughout the Acis bankruptcy</p> <p>8 proceeding.</p> <p>9 Q. Well, did you, in fact, have</p> <p>10 weekly conference calls with Highland</p> <p>11 representatives regarding the Acis</p> <p>12 bankruptcy?</p> <p>13 MS. WEISGERBER: Objection to</p> <p>14 form.</p> <p>15 A. I don't recall them being</p> <p>16 weekly, no.</p> <p>17 Q. You can agree with me you</p> <p>18 participated in the conference calls with</p> <p>19 Highland regarding the Acis bankruptcy?</p> <p>20 A. Yes.</p> <p>21 MS. WEISGERBER: Same objection.</p> <p>22 Q. And on what, on what –</p> <p>23 MR. WILSON: Sorry. Strike</p> <p>24 that.</p> <p>25 Q. With what regularity would you</p>	<p style="text-align: right;">Page 89</p> <p>1 Confidential - Pugatch</p> <p>2 estimate those conference calls occurred,</p> <p>3 if it's not weekly?</p> <p>4 MS. WEISGERBER: Objection to</p> <p>5 form.</p> <p>6 A. From memory, maybe once, once a</p> <p>7 month on average. Sometimes more</p> <p>8 frequently, sometimes less frequently.</p> <p>9 Q. Did Highland provide you with</p> <p>10 documents and evidence that were filed in</p> <p>11 the Acis bankruptcy?</p> <p>12 MS. WEISGERBER: Objection to</p> <p>13 form.</p> <p>14 We're really starting to get</p> <p>15 pretty far afield here, John, from</p> <p>16 HarbourVest. You know, I'm not sure</p> <p>17 where you're going with this. This is</p> <p>18 a settlement motion that's teed up for</p> <p>19 the court.</p> <p>20 You're welcome to keep going,</p> <p>21 but at some point we're going to cut</p> <p>22 it off.</p> <p>23 MR. WILSON: Well, I think – I</p> <p>24 don't think I'm going to go too far</p> <p>25 down this path, but I think this</p>

<p style="text-align: right;">Page 90</p> <p>1 Confidential - Pugatch</p> <p>2 directly relates to the claims that</p> <p>3 HarbourVest has made. But I'll repeat</p> <p>4 my question.</p> <p>5 BY MR. WILSON:</p> <p>6 Q. Did Highland provide HarbourVest</p> <p>7 with documents and evidence that were</p> <p>8 filed in the Acis bankruptcy?</p> <p>9 MS. WEISGERBER: Objection to</p> <p>10 form.</p> <p>11 A. I don't recall what documents</p> <p>12 Highland may have provided to us, at that</p> <p>13 point in time.</p> <p>14 Q. I don't want you to recall</p> <p>15 specific documents that were provided, but</p> <p>16 did, did Highland provide documents from</p> <p>17 the Acis bankruptcy to HarbourVest?</p> <p>18 MS. WEISGERBER: Objection to</p> <p>19 form. Asked and answered.</p> <p>20 A. I don't recall.</p> <p>21 Q. You don't recall?</p> <p>22 A. (Nods.)</p> <p>23 Q. Would you dispute that between</p> <p>24 2018 and 2019 that Highland provided over</p> <p>25 40,000 pages of documents related to the</p>	<p style="text-align: right;">Page 91</p> <p>1 Confidential - Pugatch</p> <p>2 Acis bankruptcy to HarbourVest?</p> <p>3 MS. WEISGERBER: Objection to</p> <p>4 form, foundation.</p> <p>5 A. I don't know and I don't recall.</p> <p>6 Q. And the Acis plan became</p> <p>7 effective on February 1st, 2019. Is that</p> <p>8 your understanding?</p> <p>9 A. I believe so, yes.</p> <p>10 Q. And do you -- I asked you this</p> <p>11 earlier, but I'm going to ask again. Do</p> <p>12 you have any understanding of what the</p> <p>13 value of HCLOF was, at that date?</p> <p>14 A. I don't recall.</p> <p>15 MS. WEISGERBER: Objection to</p> <p>16 form.</p> <p>17 Q. You don't?</p> <p>18 A. I don't recall, no.</p> <p>19 Q. And there was an injunction put</p> <p>20 in place in the Acis bankruptcy that</p> <p>21 prevented certain actions with respect to</p> <p>22 HCLOF, correct?</p> <p>23 MS. WEISGERBER: Objection to</p> <p>24 form, foundation.</p> <p>25 MR. MALONEY: Join.</p>
<p style="text-align: right;">Page 92</p> <p>1 Confidential - Pugatch</p> <p>2 A. Yes.</p> <p>3 Q. Now, I'm going to go back up to</p> <p>4 Paragraph 2. This says that Acis LP</p> <p>5 manages the Acis CLOs, that certain</p> <p>6 portfolio management agreement between</p> <p>7 Acis, and then it goes on. So what are</p> <p>8 the Acis CLOs, as it relates to the</p> <p>9 investment that HarbourVest made?</p> <p>10 MR. MALONEY: Objection to the</p> <p>11 form of the question.</p> <p>12 MS. WEISGERBER: Objection to</p> <p>13 form.</p> <p>14 A. The Acis CLOs -- or HCLOF owned</p> <p>15 equity in certain of the Acis CLOs as a</p> <p>16 portion of its investment portfolio.</p> <p>17 Q. And I think you were trying to</p> <p>18 distinguish earlier between who the</p> <p>19 portfolio manager was. And that would</p> <p>20 depend on whether it was an Acis CLO or a</p> <p>21 Highland CLO; is that correct?</p> <p>22 MR. MALONEY: Objection to form.</p> <p>23 MS. WEISGERBER: Objection to</p> <p>24 form, misstates testimony.</p> <p>25 A. I was referencing the portfolio</p>	<p style="text-align: right;">Page 93</p> <p>1 Confidential - Pugatch</p> <p>2 manager of the underlying CLOs, yes.</p> <p>3 Q. But we can agree that Acis had</p> <p>4 responsibility for managing at least a</p> <p>5 portion of HCLOF, correct?</p> <p>6 A. Highland --</p> <p>7 MR. WILSON: Objection to form.</p> <p>8 MR. MALONEY: Objection to form</p> <p>9 as well, foundation, and legal</p> <p>10 conclusion.</p> <p>11 (Reporter clarification.)</p> <p>12 A. It's my understanding it's</p> <p>13 Highlands' subsidiaries, yes.</p> <p>14 Q. Okay. Well, I'm going to go</p> <p>15 down to Paragraph 4, at the top of your</p> <p>16 screen here where it says, "Recently</p> <p>17 William Scott, the director of HCLOF,</p> <p>18 testified that he wants to reset the Acis</p> <p>19 CLOs to bring them in line with current</p> <p>20 market interest rates, that the inability</p> <p>21 to do the reset is causing damages to</p> <p>22 HCLOF in the amount of approximately</p> <p>23 \$295,000 per week."</p> <p>24 Is that an accurate statement?</p> <p>25 MS. WEISGERBER: Objection to</p>

<p style="text-align: right;">Page 94</p> <p>1 Confidential - Pugatch</p> <p>2 form and foundation.</p> <p>3 MR. MALONEY: Mark Maloney.</p> <p>4 Object to form and foundation.</p> <p>5 A. I don't know. You'd have to ask</p> <p>6 William Scott.</p> <p>7 Q. Well, were you aware, I mean,</p> <p>8 there's a citation to a, well, I don't</p> <p>9 know if there's a citation on this one.</p> <p>10 But it says that he recently testified.</p> <p>11 Were you aware that he testified that he</p> <p>12 wanted to reset the Acis CLOs?</p> <p>13 MS. WEISGERBER: Same objection.</p> <p>14 We're really getting far afield.</p> <p>15 MR. WILSON: I'm just asking if</p> <p>16 he was aware that this statement</p> <p>17 occurred.</p> <p>18 A. At some point in time, yes, I</p> <p>19 became aware of that.</p> <p>20 Q. Okay. Do you agree that the</p> <p>21 inability to do a reset was causing</p> <p>22 damages in the amount of \$295,000 per</p> <p>23 week?</p> <p>24 MS. WEISGERBER: Objection to</p> <p>25 form and foundation. This is not a</p>	<p style="text-align: right;">Page 95</p> <p>1 Confidential - Pugatch</p> <p>2 HarbourVest-prepared document.</p> <p>3 MR. WILSON: Well, I understand</p> <p>4 that. I'm just asking if he agrees</p> <p>5 with it.</p> <p>6 A. I don't have enough information</p> <p>7 to assess that, specifically the \$295,000</p> <p>8 per week number.</p> <p>9 Q. I want to go down to Paragraph 7</p> <p>10 of this document, and this is going to be</p> <p>11 at the top of Page 5. It says</p> <p>12 "Mr. Ellington also testified that because</p> <p>13 it would be putting in additional capital</p> <p>14 in connection with any reset CLOs, the</p> <p>15 Investor," and we discussed that that's</p> <p>16 HarbourVest, "had the ability to start</p> <p>17 'calling the shots' and dictate the terms</p> <p>18 of any reset transactions."</p> <p>19 Do you agree with that?</p> <p>20 A. No.</p> <p>21 MS. WEISGERBER: Objection to</p> <p>22 form.</p> <p>23 Q. I want to go down to Paragraph</p> <p>24 9.</p> <p>25 It says, "The Trustee also needs</p>
<p style="text-align: right;">Page 96</p> <p>1 Confidential - Pugatch</p> <p>2 information regarding whether the Investor</p> <p>3 presently has any concerns about pursuing</p> <p>4 reset transactions with the Reorganized</p> <p>5 Acis and Brigade, under the plan now that</p> <p>6 Acis has been able to successfully serve</p> <p>7 as the portfolio manager for the Acis CLOs</p> <p>8 on a post-petition basis, and there are no</p> <p>9 impediments to the ability of the</p> <p>10 Reorganized Acis and Brigade to pursue a</p> <p>11 reset on the Acis CLOs."</p> <p>12 Do you know whether the Investor</p> <p>13 had any concerns about pursuing a reset?</p> <p>14 MS. WEISGERBER: Objection to</p> <p>15 form, foundation.</p> <p>16 A. The context of a reset or</p> <p>17 refinancing of the various CLOs in HCLOF</p> <p>18 was part of the original investment</p> <p>19 thesis. So there would not have been</p> <p>20 concerns about the ability to do so. Our</p> <p>21 concerns were more in the inability to do</p> <p>22 so, as a result of the Acis bankruptcy.</p> <p>23 Q. But here, you've got the Trustee</p> <p>24 representing in Paragraph 5, that</p> <p>25 according to the Trustee's Second Amended</p>	<p style="text-align: right;">Page 97</p> <p>1 Confidential - Pugatch</p> <p>2 Joint Plan, it provides for such a reset</p> <p>3 to be performed by the Reorganized Acis</p> <p>4 and supervised by Brigade Capital</p> <p>5 Management.</p> <p>6 And it appears to me that the</p> <p>7 Trustee is trying to get the Investor's</p> <p>8 position on whether a reset should be</p> <p>9 pursued. And I'm just asking you whether</p> <p>10 HarbourVest objected to a reset at this</p> <p>11 time?</p> <p>12 MS. WEISGERBER: I'm going to</p> <p>13 object to all of the colloquy before.</p> <p>14 I'm going to object to any extent</p> <p>15 Mike's being asked about what the</p> <p>16 Trustee wanted or viewed. If you want</p> <p>17 to ask your question in isolation, go</p> <p>18 ahead.</p> <p>19 Q. What was HarbourVest's position</p> <p>20 regarding a reset, as of the date that</p> <p>21 this was filed, and I'll look again,</p> <p>22 October 10, 2018?</p> <p>23 MS. WEISGERBER: Objection to</p> <p>24 form. Objection to the extent it's</p> <p>25 asking HarbourVest's position. And I</p>

<p style="text-align: right;">Page 98</p> <p>1 Confidential - Pugatch</p> <p>2 cannot conceive how this is relevant</p> <p>3 to the 9019 motion before the court</p> <p>4 right now.</p> <p>5 Nonetheless, Mike, if you have</p> <p>6 an answer, on behalf of yourself, you</p> <p>7 can answer.</p> <p>8 A. HarbourVest was a passive</p> <p>9 minority investor in HCLOF. It had no</p> <p>10 ability to control the underlying</p> <p>11 portfolio management or ability to reset,</p> <p>12 refinance, or call in any of the equity of</p> <p>13 the underlying CLOs. That was all under</p> <p>14 the purview of Highland.</p> <p>15 Q. Did you understand that</p> <p>16 Mr. Ellington had given sworn testimony</p> <p>17 that the Investor is the party calling the</p> <p>18 shots for HCLOF, with respect to any reset</p> <p>19 transactions?</p> <p>20 MS. WEISGERBER: Objection to</p> <p>21 form.</p> <p>22 A. I did become aware of it, yes.</p> <p>23 Q. When did you become aware of</p> <p>24 that?</p> <p>25 A. At some point subsequent to that</p>	<p style="text-align: right;">Page 99</p> <p>1 Confidential - Pugatch</p> <p>2 testimony being given.</p> <p>3 Q. But was it when you read this</p> <p>4 motion that we're looking at as</p> <p>5 Exhibit 10?</p> <p>6 MS. WEISGERBER: Objection to</p> <p>7 form.</p> <p>8 A. It may have been. I don't</p> <p>9 recall the exact time or medium that I</p> <p>10 became aware of that.</p> <p>11 Q. Was a deposition given as a</p> <p>12 result of this motion?</p> <p>13 MS. WEISGERBER: Objection to</p> <p>14 form. If you have the whole document,</p> <p>15 Mike, that may make sense.</p> <p>16 MR. WILSON: Well, this motion</p> <p>17 at the top says it's a Motion for 2004</p> <p>18 Examination of Investor. And then</p> <p>19 attached to this motion are some</p> <p>20 document requests, and then deposition</p> <p>21 topics for a corporate representative</p> <p>22 of the Investor, and then a proposed</p> <p>23 order.</p> <p>24 BY MR. WILSON:</p> <p>25 Q. Do you recall whether a</p>
<p style="text-align: right;">Page 100</p> <p>1 Confidential - Pugatch</p> <p>2 deposition was given, after this motion</p> <p>3 was filed?</p> <p>4 A. Yes.</p> <p>5 Q. And who was the designated</p> <p>6 deponent?</p> <p>7 A. I was.</p> <p>8 Q. And were documents produced, as</p> <p>9 a result of this?</p> <p>10 A. Yes, there were.</p> <p>11 Q. And were you asked at that</p> <p>12 deposition what the Investor's position on</p> <p>13 a reset was?</p> <p>14 MS. WEISGERBER: Objection to</p> <p>15 form.</p> <p>16 If you recall.</p> <p>17 A. I don't recall specifically that</p> <p>18 question being asked.</p> <p>19 Q. Well, do you know what</p> <p>20 the Debtor's position -- I'm sorry, the</p> <p>21 Debtor's -- the Investor's position on a</p> <p>22 reset was as of that day?</p> <p>23 MS. WEISGERBER: Objection to</p> <p>24 form. Asked and answered.</p> <p>25 A. I would just say again, in</p>	<p style="text-align: right;">Page 101</p> <p>1 Confidential - Pugatch</p> <p>2 general, the original investment thesis</p> <p>3 here was predicated on a refinancing reset</p> <p>4 of the various CLOs, and we were not in</p> <p>5 control as a passive minority investor</p> <p>6 here to --</p> <p>7 Q. Well, you said you weren't in</p> <p>8 control, but what would HarbourVest's</p> <p>9 preference have been?</p> <p>10 MS. WEISGERBER: Objection to</p> <p>11 form.</p> <p>12 A. I do not recall.</p> <p>13 MS. WEISGERBER: If you recall.</p> <p>14 A. I don't recall the specifics</p> <p>15 around what Acis CLO were referring to</p> <p>16 here or what the specific implications of</p> <p>17 a reset were at that time; but regardless,</p> <p>18 that was a decision for the investment</p> <p>19 manager of HCLO.</p> <p>20 Q. But was it your opinion, your</p> <p>21 personal opinion, that a reset was</p> <p>22 appropriate?</p> <p>23 MS. WEISGERBER: Objection to</p> <p>24 form.</p> <p>25 A. Again, we were not the portfolio</p>

<p style="text-align: right;">Page 102</p> <p>1 Confidential - Pugatch</p> <p>2 manager of HCLOF. We were not in control</p> <p>3 of those decisions or making</p> <p>4 recommendations on those decisions. That</p> <p>5 was the delegated authority of Highland,</p> <p>6 as the investment manager.</p> <p>7 Q. I'm not asking for that. I'm</p> <p>8 asking for your personal feelings toward a</p> <p>9 reset.</p> <p>10 MS. WEISGERBER: Same objection.</p> <p>11 He's only answering on behalf of</p> <p>12 himself, and it's been asked and</p> <p>13 answered three times since.</p> <p>14 MR. WILSON: Well, he hasn't</p> <p>15 answered the question. He's just told</p> <p>16 me they don't have the authority to do</p> <p>17 the reset.</p> <p>18 MS. WEISGERBER: And he told you</p> <p>19 the other information he'd be required</p> <p>20 to even have an opinion on it. So</p> <p>21 same objection stands. It's not a</p> <p>22 specific enough question for him.</p> <p>23 Mike, you're welcome, if you</p> <p>24 have, if you have an answer, you're</p> <p>25 welcome to give it.</p>	<p style="text-align: right;">Page 103</p> <p>1 Confidential - Pugatch</p> <p>2 A. Yeah, the investment guidelines</p> <p>3 of HCLOF, from the documents that we</p> <p>4 signed at the time we entered into the</p> <p>5 transaction, laid out the specific, again,</p> <p>6 investment guidelines that HCLOF would be</p> <p>7 guided under, including the opportunity to</p> <p>8 refinance or reset various CLOs over time,</p> <p>9 in accordance with Highland's, you know,</p> <p>10 expectations and ultimate decision to do</p> <p>11 so.</p> <p>12 Q. But did you believe, at this</p> <p>13 time, that a reset was appropriate?</p> <p>14 MS. WEISGERBER: Objection to</p> <p>15 form. This is asked and answered</p> <p>16 several times now, I think we should</p> <p>17 move on. He's given you an answer.</p> <p>18 MR. WILSON: Well, I want to</p> <p>19 know what his personal opinion was</p> <p>20 about whether the reset was</p> <p>21 appropriate.</p> <p>22 A. What reset are you referring to?</p> <p>23 Q. A reset as of October 10, 2018.</p> <p>24 At that time, did you believe that a reset</p> <p>25 was appropriate?</p>
<p style="text-align: right;">Page 104</p> <p>1 Confidential - Pugatch</p> <p>2 A. A reset of what?</p> <p>3 MS. WEISGERBER: Same objection.</p> <p>4 Q. A reset as been discussed all</p> <p>5 through this motion, the same reset we're</p> <p>6 talking about.</p> <p>7 MS. WEISGERBER: Objection.</p> <p>8 Same objections. I just don't see how</p> <p>9 he could possibly answer this vague</p> <p>10 question.</p> <p>11 Q. Okay. So William Scott,</p> <p>12 director of HCLOF, testified that he</p> <p>13 wanted to reset the Acis CLOs because if</p> <p>14 they don't, they are losing \$295,000 a</p> <p>15 week.</p> <p>16 Did you think that a reset was</p> <p>17 appropriate in line with what Mr. Scott</p> <p>18 believed?</p> <p>19 MR. MALONEY: Objection to form,</p> <p>20 foundation.</p> <p>21 MS. WEISGERBER: Same</p> <p>22 objections. And asked and answered</p> <p>23 numerous times.</p> <p>24 A. We were not managing the</p> <p>25 portfolio. We were an investor in a</p>	<p style="text-align: right;">Page 105</p> <p>1 Confidential - Pugatch</p> <p>2 company, an investment company that was</p> <p>3 managing this. We were not, I was not</p> <p>4 proximate enough to any of the underlying</p> <p>5 happenings of the look through CLO</p> <p>6 positions of HCLOF to have an informed</p> <p>7 view on this, at this time.</p> <p>8 Q. Is your testimony that you did</p> <p>9 not have an opinion as to whether the Acis</p> <p>10 CLO should be reset in late 2018?</p> <p>11 MS. WEISGERBER: Objection to</p> <p>12 form. Misstates testimony.</p> <p>13 A. My view is that the original</p> <p>14 investment guidelines here called for a</p> <p>15 reset or refinance of the CLOs and that</p> <p>16 Highland was subsequently in full control</p> <p>17 of whether or not to pursue this, and we,</p> <p>18 HarbourVest, as an investor had no ability</p> <p>19 to object or to force that on a go-forward</p> <p>20 basis.</p> <p>21 MR. WILSON: Objection.</p> <p>22 Nonresponsive.</p> <p>23 Q. I want to know your personal</p> <p>24 opinion of whether you thought a reset was</p> <p>25 appropriate in October of 2018.</p>

<p style="text-align: right;">Page 106</p> <p>1 Confidential - Pugatch</p> <p>2 MR. MORRIS: Objection to the</p> <p>3 form of the question. That's been</p> <p>4 asked and answered.</p> <p>5 MR. WILSON: He has yet to give</p> <p>6 his answer to –</p> <p>7 MR. MORRIS: He just told you he</p> <p>8 didn't have enough information. He</p> <p>9 just told you that, crystal clear.</p> <p>10 MR. WILSON: Well, I'm not going</p> <p>11 to argue with you, John, but I just</p> <p>12 want an answer to my question.</p> <p>13 His answer, he wouldn't agree</p> <p>14 with my, with my summation that he had</p> <p>15 no opinion, so I just want to know</p> <p>16 what his opinion is.</p> <p>17 MS. WEISGERBER: Same</p> <p>18 objections.</p> <p>19 You're not giving him enough</p> <p>20 information to answer the question,</p> <p>21 and at this point, it would be</p> <p>22 speculation. We can just keep going</p> <p>23 in circles on this, but your –</p> <p>24 MR. WILSON: His opinion would</p> <p>25 be speculation?</p>	<p style="text-align: right;">Page 107</p> <p>1 Confidential - Pugatch</p> <p>2 MS. WEISGERBER: He said that,</p> <p>3 he actually testified at some point</p> <p>4 that he doesn't recall specifics of</p> <p>5 the time, so that was another piece of</p> <p>6 the puzzle.</p> <p>7 I mean, I don't want to be</p> <p>8 coaching the witness or giving</p> <p>9 testimony here, but I think you're not</p> <p>10 listening to the things he's saying,</p> <p>11 John, just because you don't like it.</p> <p>12 BY MR. WILSON:</p> <p>13 Q. Mr. Pugatch, did you have an</p> <p>14 opinion, in October of 2019, about whether</p> <p>15 the Acis CLOs should be reset?</p> <p>16 MS. WEISGERBER: Objection to</p> <p>17 form.</p> <p>18 A. I don't recall any definitive</p> <p>19 opinion I would have had, but as stated,</p> <p>20 was not proximate enough to have an</p> <p>21 informed opinion, in any event.</p> <p>22 Q. And to your knowledge, have the</p> <p>23 Acis CLOs ever been reset?</p> <p>24 MS. WEISGERBER: Objection to</p> <p>25 form, foundation.</p>
<p style="text-align: right;">Page 108</p> <p>1 Confidential - Pugatch</p> <p>2 A. I do not believe that any of the</p> <p>3 Acis CLOs were ever reset.</p> <p>4 Q. All right. So who negotiated</p> <p>5 this claim, the settlement of this claim</p> <p>6 on behalf of HarbourVest?</p> <p>7 A. I did.</p> <p>8 Q. And who negotiated for the</p> <p>9 Debtor?</p> <p>10 A. Jim Seery.</p> <p>11 Q. And when did those negotiations</p> <p>12 begin?</p> <p>13 A. It started sometime in November,</p> <p>14 I believe.</p> <p>15 Q. And are you aware that Jim Seery</p> <p>16 has ever taken the position that the</p> <p>17 HarbourVest claim was worthless?</p> <p>18 MS. WEISGERBER: Objection to</p> <p>19 form, foundation.</p> <p>20 A. No, I'm not aware of that.</p> <p>21 Q. Has Jim Seery ever offered</p> <p>22 \$5 million to settle the HarbourVest</p> <p>23 claim?</p> <p>24 A. Not to my knowledge.</p> <p>25 MS. WEISGERBER: Objection to</p>	<p style="text-align: right;">Page 109</p> <p>1 Confidential - Pugatch</p> <p>2 form.</p> <p>3 MR. WILSON: I'm going to send</p> <p>4 out Exhibit 11.</p> <p>5 (Whereupon, Exhibit 11,</p> <p>6 Declaration of John A. Morris in</p> <p>7 Support of the Debtor's Motion For</p> <p>8 Entry of an Order Approving Settlement</p> <p>9 With Harbourvest (Claim Nos. 143, 147,</p> <p>10 149, 150, 153, 154) and Authorizing</p> <p>11 Actions, 82 pages, was marked for</p> <p>12 identification.)</p> <p>13 BY MR. WILSON:</p> <p>14 Q. I want pull this up on the</p> <p>15 screen share. This Exhibit 11 is the</p> <p>16 Declaration of John Morris in Support of</p> <p>17 the Debtor's 9019 Motion, bears</p> <p>18 Document 1631. And attached to this</p> <p>19 exhibit is a trim cut copy of the</p> <p>20 Settlement Agreement executed December 23,</p> <p>21 2020.</p> <p>22 And the Settlement Agreement has</p> <p>23 Paragraph 1, Settlement of Claims, that</p> <p>24 HarbourVest is going to receive a</p> <p>25 \$45 million unsecured, general unsecured</p>

<p style="text-align: right;">Page 110</p> <p>1 Confidential - Pugatch</p> <p>2 claim, and a \$35 million subordinated</p> <p>3 claim.</p> <p>4 And then Part B of that</p> <p>5 paragraph states that HarbourVest is going</p> <p>6 to transfer all its rights, titles, and</p> <p>7 interests to its investment in CLOF to the</p> <p>8 Debtor or its nominee.</p> <p>9 Is that your understanding of</p> <p>10 the general terms of this settlement?</p> <p>11 MS. WEISGERBER: Objection to</p> <p>12 form.</p> <p>13 A. Yes, it is.</p> <p>14 Q. Okay. And also in Paragraph 5,</p> <p>15 Each HarbourVest party agrees that it will</p> <p>16 vote all of HarbourVest claims held by</p> <p>17 such HarbourVest party to accept the plan.</p> <p>18 And I won't read all of that.</p> <p>19 But the gist of this paragraph is that</p> <p>20 HarbourVest is going to vote for the</p> <p>21 Debtor's proposed plan; is that correct?</p> <p>22 MS. WEISGERBER: Objection to</p> <p>23 form.</p> <p>24 A. Yes, correct.</p> <p>25 Q. And how did that term come to be</p>	<p style="text-align: right;">Page 111</p> <p>1 Confidential - Pugatch</p> <p>2 in this Settlement Agreement?</p> <p>3 MS. WEISGERBER: Objection to</p> <p>4 form.</p> <p>5 A. I believe it was put there as</p> <p>6 part of the drafting of the ultimate</p> <p>7 agreement to the fund.</p> <p>8 Q. Well, whose suggestion was it</p> <p>9 that it be added to the drafting?</p> <p>10 MS. WEISGERBER: Objection to</p> <p>11 form.</p> <p>12 A. I believe that it came from</p> <p>13 Debtor's counsel, as they took the lead on</p> <p>14 drafting the documentation here.</p> <p>15 Q. Did Jim Seery ever tell you that</p> <p>16 it was important to him that HarbourVest</p> <p>17 vote in support of the plan?</p> <p>18 MS. WEISGERBER: Objection to</p> <p>19 form.</p> <p>20 A. I don't recall that ever being</p> <p>21 discussed. Certainly it was not the</p> <p>22 prominent feature of any of the</p> <p>23 discussions or negotiations that I ever</p> <p>24 had with Jim.</p> <p>25 Q. Okay.</p>
<p style="text-align: right;">Page 112</p> <p>1 Confidential - Pugatch</p> <p>2 MR. WILSON: I'm going to take a</p> <p>3 ten-minute break, and I think I'm</p> <p>4 almost ready to wrap up. So I want to</p> <p>5 stop my screen share. And let's,</p> <p>6 well, let's start back at 2:30, and I</p> <p>7 think I'll be quick. Thank you.</p> <p>8 (Recess taken.)</p> <p>9 BY MR. WILSON:</p> <p>10 Q. Mr. Pugatch, earlier you</p> <p>11 testified that consistent with your</p> <p>12 declaration you filed that as of August</p> <p>13 31, 2020, the value of HCLOF was</p> <p>14 \$44.5 million. And then if we look at --</p> <p>15 I don't remember which --</p> <p>16 Okay. So this would have been</p> <p>17 Exhibit 7. I'll do a share screen.</p> <p>18 As of November 15, 2017 these</p> <p>19 shares were purchased at \$1.02 and change</p> <p>20 apiece, and there were a total number of</p> <p>21 143 million shares.</p> <p>22 Was the value of this investment</p> <p>23 roughly \$150 million, as of November 15,</p> <p>24 2017?</p> <p>25 MS. WEISGERBER: Objection to</p>	<p style="text-align: right;">Page 113</p> <p>1 Confidential - Pugatch</p> <p>2 form. Foundation.</p> <p>3 MR. MALONEY: Join.</p> <p>4 MS. WEISGERBER: I don't know,</p> <p>5 Mike, if you're comfortable doing that</p> <p>6 math or what.</p> <p>7 A. Yes, approximately that's</p> <p>8 correct.</p> <p>9 Q. Okay. And you know, and I've</p> <p>10 read your papers and you talk about</p> <p>11 attorneys' fees that you say weren't</p> <p>12 appropriate to be charged to HCLOF and</p> <p>13 that part of it, but as to the loss of</p> <p>14 value of the actual investment, what's</p> <p>15 your understanding of what led to that?</p> <p>16 MS. WEISGERBER: Objection to</p> <p>17 form. Objection to the extent it</p> <p>18 calls for a legal conclusion.</p> <p>19 Mike, to the extent you have a</p> <p>20 nonlegal opinion on that, that's not</p> <p>21 based on conversations with counsel,</p> <p>22 you can answer.</p> <p>23 A. Yeah, I think a lot of the value</p> <p>24 erosion was due to the inability to</p> <p>25 refinance, reset a number of the</p>

<p style="text-align: right;">Page 114</p> <p>1 Confidential - Pugatch</p> <p>2 underlying CLOs that was part of the</p> <p>3 original investment thesis here, largely</p> <p>4 as a result of the ongoing litigation,</p> <p>5 that Highland was involved in, and the</p> <p>6 subsequent Acis bankruptcy.</p> <p>7 Q. And so during the period of time</p> <p>8 when the injunction prohibited certain</p> <p>9 actions with respect to this investment,</p> <p>10 is it your opinion that this investment</p> <p>11 was losing value?</p> <p>12 MR. MALONEY: Objection.</p> <p>13 MS. WEISGERBER: Objection to</p> <p>14 form.</p> <p>15 A. Can you repeat the question,</p> <p>16 John?</p> <p>17 Q. Well, I guess I want to know,</p> <p>18 like, in a, on a timeline kind of basis,</p> <p>19 do you think that the significant</p> <p>20 reduction of value occurred prior to or</p> <p>21 after the confirmation of the Acis plan on</p> <p>22 February 1, 2019?</p> <p>23 MS. WEISGERBER: Objection to</p> <p>24 form. Objection to the extent it</p> <p>25 calls for a legal conclusion.</p>	<p style="text-align: right;">Page 115</p> <p>1 Confidential - Pugatch</p> <p>2 You can give your lay opinion,</p> <p>3 if you have one, Mike.</p> <p>4 A. I think it's all been as a</p> <p>5 result of the events leading up to the</p> <p>6 Acis bankruptcy, including the inability</p> <p>7 to refinance or reset the CLOs which would</p> <p>8 have been to the benefit of the CLO equity</p> <p>9 holders including HCLOF.</p> <p>10 Q. And so what, what was the cause</p> <p>11 of the inability to reset?</p> <p>12 MS. WEISGERBER: Same</p> <p>13 objections: form, foundation, legal</p> <p>14 conclusion.</p> <p>15 If you have a non-privileged</p> <p>16 answer, Mike, go ahead.</p> <p>17 A. Yeah, my understanding was</p> <p>18 originally the TRO, preventing Highland</p> <p>19 and HCLOF from pursuing that, and then</p> <p>20 subsequent to the Acis bankruptcy ruling,</p> <p>21 a similar injunction that remained around</p> <p>22 the inability for the equity holders of</p> <p>23 those CLOs to redeem or refinances or</p> <p>24 reset.</p> <p>25 Q. So do you -- is there any</p>
<p style="text-align: right;">Page 116</p> <p>1 Confidential - Pugatch</p> <p>2 component, in your opinion, of the loss of</p> <p>3 value of these investments due to</p> <p>4 portfolio mismanagement?</p> <p>5 MS. WEISGERBER: Objection to</p> <p>6 form, foundation, legal conclusion, or</p> <p>7 expert opinion, calling for</p> <p>8 speculation.</p> <p>9 If you have a view, Mike.</p> <p>10 A. Yeah. Can you be more specific</p> <p>11 with the question, John?</p> <p>12 Q. Well, I'll ask it a different</p> <p>13 way.</p> <p>14 Do you think that portfolio</p> <p>15 mismanagement was a portion of the cause</p> <p>16 of the reduction in value?</p> <p>17 MS. WEISGERBER: Same objection.</p> <p>18 A. I can't speculate as to, you</p> <p>19 know, the underlying management decisions</p> <p>20 around the CLOs, but what I do know is</p> <p>21 that the mismanagement and</p> <p>22 misrepresentations at the HCLOF level,</p> <p>23 that would ultimately result in the Acis</p> <p>24 bankruptcy and subsequent to that, the TRO</p> <p>25 and the inability to refinance or reset</p>	<p style="text-align: right;">Page 117</p> <p>1 Confidential - Pugatch</p> <p>2 that has been the, far and away, the</p> <p>3 largest contributor to loss of value</p> <p>4 within the portfolio.</p> <p>5 Q. One of the allegations that</p> <p>6 HarbourVest has made is that Highland</p> <p>7 improperly changed the portfolio manager.</p> <p>8 Is it your opinion that if that had not</p> <p>9 been done, the portfolio manager had not</p> <p>10 been changed at the inception of</p> <p>11 HarbourVest's investment, that that would</p> <p>12 have preserved any value of this fund?</p> <p>13 MR. MORRIS: Objection to the</p> <p>14 form of the question.</p> <p>15 MS. WEISGERBER: Same objection.</p> <p>16 Calling for speculation, hypothetical</p> <p>17 lay opinion.</p> <p>18 If you have testimony, go ahead,</p> <p>19 Mike.</p> <p>20 A. Sorry, could you just repeat the</p> <p>21 question, John? I want to make sure I'm</p> <p>22 answering it correctly.</p> <p>23 Q. I guess I just want to know, and</p> <p>24 I think you kind of hinted at this a</p> <p>25 little bit earlier today, but I guess what</p>

<p style="text-align: right;">Page 118</p> <p>1 Confidential - Pugatch</p> <p>2 I really want to know is do you think that</p> <p>3 the particular portfolio manager made a</p> <p>4 difference in the loss of value that HCLOF</p> <p>5 suffered?</p> <p>6 MS. WEISGERBER: Same</p> <p>7 objections.</p> <p>8 A. Again, it sounds like you're</p> <p>9 asking a different question there than</p> <p>10 what I thought I understood your question</p> <p>11 to be initially. What I would say to that</p> <p>12 is the decision originally to change the</p> <p>13 portfolio manager, and ultimately the</p> <p>14 events that took place following the</p> <p>15 Arbitration Award for Mr. Terry, resulted</p> <p>16 in the subsequent Acis bankruptcy, which</p> <p>17 in turn has led to the destruction of</p> <p>18 value, because of the inability to</p> <p>19 refinance or reset, the underlying CLOs.</p> <p>20 Q. So HarbourVest is not alleging</p> <p>21 that the portfolio manager made any</p> <p>22 particular decisions or participated in</p> <p>23 any mismanagement that led to reduction in</p> <p>24 value?</p> <p>25 MS. WEISGERBER: Objection to</p>	<p style="text-align: right;">Page 119</p> <p>1 Confidential - Pugatch</p> <p>2 form.</p> <p>3 A. When you're asking about</p> <p>4 portfolio manager, are we referring to the</p> <p>5 portfolio manager at the underlying CLO</p> <p>6 level or at the HCLOF level? I think</p> <p>7 there are two different levels here of</p> <p>8 portfolio management.</p> <p>9 Q. Well, I'm talking about the</p> <p>10 portfolio manager, and you can tell me</p> <p>11 which one it is, but which portfolio</p> <p>12 manager has the ability to, to impact the</p> <p>13 performance of these funds?</p> <p>14 MR. MORRIS: Objection.</p> <p>15 A. If you're referring to HCLOF,</p> <p>16 the --</p> <p>17 MS. WEISGERBER: Objection to</p> <p>18 form.</p> <p>19 A. -- investment manager, or the</p> <p>20 portfolio manager of HCLOF has the ability</p> <p>21 to drive value creation by virtue of its</p> <p>22 equity position in the underlying CLOs.</p> <p>23 Q. Well, which portfolio manager</p> <p>24 makes the day-to-day decisions about</p> <p>25 selling assets, trading assets, that, that</p>
<p style="text-align: right;">Page 120</p> <p>1 Confidential - Pugatch</p> <p>2 I guess --</p> <p>3 A. If you're referring to</p> <p>4 underlaying credits, that would be the</p> <p>5 portfolio manager in each of the</p> <p>6 individual CLOs. The impact in value to</p> <p>7 the equity investment in the CLOs is a</p> <p>8 decision at the HCLOF level, where the</p> <p>9 majority of that value erosion has</p> <p>10 resulted from the inability to refinance</p> <p>11 or reset those CLO entities.</p> <p>12 Q. And that's what we're talking</p> <p>13 about when you said that they, that</p> <p>14 Highland changed the portfolio manager,</p> <p>15 you're talking about at the HCLOF level,</p> <p>16 right?</p> <p>17 MS. WEISGERBER: Objection to</p> <p>18 form.</p> <p>19 A. Well, I was responding to the</p> <p>20 question that I thought you asked. I</p> <p>21 wasn't necessarily stating that.</p> <p>22 Q. I guess all I'm really trying to</p> <p>23 do here is just understand HarbourVest's</p> <p>24 position. And it sounds to me, and</p> <p>25 correct me if I'm wrong, it sounds to me</p>	<p style="text-align: right;">Page 121</p> <p>1 Confidential - Pugatch</p> <p>2 that what you're saying is that the</p> <p>3 diminution of value wasn't attributable to</p> <p>4 poor investment decisions by a portfolio</p> <p>5 manager, as much as it was the</p> <p>6 consequences in the Acis bankruptcy of the</p> <p>7 change in portfolio manager; is that fair?</p> <p>8 MS. WEISGERBER: Objection to</p> <p>9 form. Misstates testimony.</p> <p>10 A. Yes, it is. That is my general</p> <p>11 understanding, yes.</p> <p>12 MR. WILSON: Okay. No further</p> <p>13 questions.</p> <p>14 MR. MORRIS: All right. Well,</p> <p>15 thank you very much.</p> <p>16 THE REPORTER: Does anybody have</p> <p>17 any other questions?</p> <p>18 MR. KANE: Yes. This is John</p> <p>19 Kane with CLO Holdco. I'll jump on</p> <p>20 video. I've got some questions, but</p> <p>21 I'm going to be relatively short. If</p> <p>22 anybody else has a little bit heavier</p> <p>23 schedule, let me know.</p> <p>24 All right. I'll take that as a</p> <p>25 go-ahead.</p>

<p style="text-align: right;">Page 122</p> <p>1 Confidential - Pugatch</p> <p>2 EXAMINATION</p> <p>3 BY MR. KANE:</p> <p>4 Q. This is John Kane. I represent</p> <p>5 CLO Holdco.</p> <p>6 Hi, Mike Pugatch. It's nice to</p> <p>7 talk to you.</p> <p>8 A. Likewise.</p> <p>9 Q. I just wanted to briefly</p> <p>10 confirm. I believe you testified you</p> <p>11 participated in negotiations that lead to</p> <p>12 the Settlement Agreement, that is part of</p> <p>13 the 9019 motion, before the bankruptcy</p> <p>14 court; is that correct?</p> <p>15 A. Correct.</p> <p>16 Q. And did you actively negotiate</p> <p>17 the terms of that Settlement Agreement?</p> <p>18 A. Yes.</p> <p>19 Q. As in dollar amounts, what the</p> <p>20 consideration exchanged, how it would</p> <p>21 work, that kind of stuff, obviously with</p> <p>22 the assistance of counsel?</p> <p>23 A. Yes. All of that. The</p> <p>24 negotiations were, you know, over the</p> <p>25 course of a number of weeks and a number</p>	<p style="text-align: right;">Page 123</p> <p>1 Confidential - Pugatch</p> <p>2 of conversations directly with the Debtor,</p> <p>3 with counsel, all-hands calls, et cetera.</p> <p>4 Q. Okay. And as part of that in</p> <p>5 the Settlement Agreement, you say the</p> <p>6 HarbourVest entities were members in HCLOF</p> <p>7 are in essence selling their shares to the</p> <p>8 Debtor, and also in exchange getting some</p> <p>9 claims back in the Debtor's plan. Is that</p> <p>10 a fair summary?</p> <p>11 MS. WEISGERBER: Objection to</p> <p>12 form. Compound question.</p> <p>13 Q. Let me ask it a different way.</p> <p>14 A. Can you re-ask that, please?</p> <p>15 Q. Yeah. I'm happy to do that.</p> <p>16 Why don't you describe for me</p> <p>17 how you would summarize that settlement?</p> <p>18 A. Largely, as I think you just</p> <p>19 described it, which was in exchange for,</p> <p>20 in exchange for the, both the unsecured</p> <p>21 creditors' claim, and subordinated</p> <p>22 creditors' claim, that settlement value is</p> <p>23 in exchange for us transferring the</p> <p>24 interest in HCLOF to the Debtor, as part</p> <p>25 of that overall negotiating package.</p>
<p style="text-align: right;">Page 124</p> <p>1 Confidential - Pugatch</p> <p>2 Q. And what would you estimate, I</p> <p>3 going to have to imagine, let me rephrase</p> <p>4 the question.</p> <p>5 Have you guys done kind of an</p> <p>6 internal best guess of what your unsecured</p> <p>7 and subordinated claims would be, under</p> <p>8 the plan, the value?</p> <p>9 MS. WEISGERBER: Objection.</p> <p>10 Objection to form.</p> <p>11 A. Just to be clear, John, are you</p> <p>12 referring to the expected recovery value</p> <p>13 of our claims?</p> <p>14 Q. Yes, sir.</p> <p>15 MS. WEISGERBER: Objection to</p> <p>16 form. Can we just clarify, so you're</p> <p>17 talking about what they'll recover</p> <p>18 ultimately? Is that the question,</p> <p>19 John? I'm confused myself. I just</p> <p>20 want to be sure I am following.</p> <p>21 MR. KANE: Yeah. So I'm asking</p> <p>22 Mike how much he believes, based on</p> <p>23 his analysis, that HarbourVest is</p> <p>24 likely to recover from the \$45 million</p> <p>25 allowed general unsecured claim and</p>	<p style="text-align: right;">Page 125</p> <p>1 Confidential - Pugatch</p> <p>2 \$35 million allowed subordinated</p> <p>3 claim, if the settlement is approved</p> <p>4 and the plan is confirmed.</p> <p>5 MS. WEISGERBER: Objection to</p> <p>6 form.</p> <p>7 But you can answer, if you have</p> <p>8 an answer, Mike.</p> <p>9 A. We do have a sense. It's really</p> <p>10 a range of projected outcomes, as you can</p> <p>11 imagine, based on the recoveries, largely</p> <p>12 informed by conversations with the Debtor.</p> <p>13 Q. And what is that range of value?</p> <p>14 MS. WEISGERBER: Objection to</p> <p>15 form.</p> <p>16 A. Our understanding, again, based</p> <p>17 on those conversations, is that the</p> <p>18 general unsecured claim could be valued in</p> <p>19 a 75 to 80 cents on the dollar recovery.</p> <p>20 And then a, you know, that the junior</p> <p>21 class claim is really sort of upside</p> <p>22 potential, to the extent there is more</p> <p>23 recovery or more asset value of the</p> <p>24 estate, for the benefit of creditors over</p> <p>25 time.</p>

<p style="text-align: right;">Page 126</p> <p>1 Confidential - Pugatch</p> <p>2 Q. What is your understanding of</p> <p>3 the current value of the HarbourVest</p> <p>4 shares in HCLOF that would be transferred</p> <p>5 under this Agreement?</p> <p>6 A. It's roughly \$22.5 million of</p> <p>7 their value.</p> <p>8 Q. So doing a little bit of, you</p> <p>9 know, back-of-the-table-cloth math, how do</p> <p>10 you allocate value between the releases</p> <p>11 that you are receiving and the shares that</p> <p>12 you are transferring?</p> <p>13 MR. KANE: I'm sorry. Let me</p> <p>14 rephrase that. Let me ask that</p> <p>15 question differently.</p> <p>16 Q. In addition to the claims under</p> <p>17 the plan, HarbourVest is providing the</p> <p>18 Debt – sorry, in addition to the shares</p> <p>19 that are being transferred, HarbourVest is</p> <p>20 providing to the Debtor certain releases</p> <p>21 for its litigation claims; is that</p> <p>22 correct?</p> <p>23 MS. WEISGERBER: Objection to</p> <p>24 form.</p> <p>25 A. Correct.</p>	<p style="text-align: right;">Page 127</p> <p>1 Confidential - Pugatch</p> <p>2 Q. So how has HarbourVest allocated</p> <p>3 value, as far as this Settlement Agreement</p> <p>4 is concerned?</p> <p>5 And to make sure we're on the</p> <p>6 same page about what I'm asking,</p> <p>7 HarbourVest is trading a bundle of sticks,</p> <p>8 right? And there's really two things</p> <p>9 within that bundle of sticks, and please</p> <p>10 confirm that's correct, you're trading</p> <p>11 shares, and in addition, releases; is that</p> <p>12 right? In exchange you're getting back</p> <p>13 claims that have a potential future value.</p> <p>14 So, how have you allocated value</p> <p>15 among the shares transferred and the</p> <p>16 releases that are being granted?</p> <p>17 MR. MORRIS: Objection.</p> <p>18 MS. WEISGERBER: Objection.</p> <p>19 You can go ahead, Mike.</p> <p>20 A. Yeah. So ultimately we looked</p> <p>21 at it as a package, and so it was less</p> <p>22 about the attribution of value between the</p> <p>23 two different sticks, as you described it,</p> <p>24 and more about the overall package value</p> <p>25 in exchange for the transfer of our</p>
<p style="text-align: right;">Page 128</p> <p>1 Confidential - Pugatch</p> <p>2 interest and the release of the claims</p> <p>3 that we had outstanding as the Debtor.</p> <p>4 MR. KANE: Now, I want to turn</p> <p>5 your attention to what I've included</p> <p>6 in the chat. You can pull it down</p> <p>7 pretty easily if you want. But it</p> <p>8 would be Holdco Depo Exhibit 2. If</p> <p>9 that would be easier than a screen</p> <p>10 share, if you'd like, I'm happy to do</p> <p>11 that as well.</p> <p>12 MS. WEISGERBER: Which document</p> <p>13 is it, John? Because I just can't</p> <p>14 pull stuff off the Zoom right now.</p> <p>15 MR. KANE: Oh, I'm sorry. It's</p> <p>16 the Settlement Agreement with the</p> <p>17 attached exhibits. I can share my</p> <p>18 screen so we're all on the same page.</p> <p>19 Just to confirm we're looking at</p> <p>20 the same thing, here's the Settlement</p> <p>21 Agreement. There's a docket entry at</p> <p>22 the top so you can see it, 1631 filed</p> <p>23 by the Debtor 12/24/20.</p> <p>24 This is Exhibit 1 to the</p> <p>25 Declaration of John Morris in Support</p>	<p style="text-align: right;">Page 129</p> <p>1 Confidential - Pugatch</p> <p>2 of Debtor's Motion for an Entry</p> <p>3 Approving Settlement with HarbourVest.</p> <p>4 BY MR. KANE:</p> <p>5 Q. Now, this Settlement Agreement</p> <p>6 is a document that you assisted in</p> <p>7 negotiations; is that correct?</p> <p>8 A. Correct.</p> <p>9 Q. Okay. And here in Section 1B,</p> <p>10 this addresses the transfer of the shares</p> <p>11 of the HarbourVest entities to a Debtor</p> <p>12 affiliate; is that correct?</p> <p>13 MS. WEISGERBER: Objection to</p> <p>14 form.</p> <p>15 A. Correct.</p> <p>16 Q. Is that your understanding,</p> <p>17 Mr. Pugatch?</p> <p>18 A. Yes, correct.</p> <p>19 Q. Okay. Thank you. Section 4A,</p> <p>20 and is this your understanding that</p> <p>21 HarbourVest is representing that it has</p> <p>22 the authority to enter into this agreement</p> <p>23 and to transfer the shares to the Debtor's</p> <p>24 affiliate if this is approved?</p> <p>25 MS. WEISGERBER: Objection to</p>

<p style="text-align: right;">Page 130</p> <p>1 Confidential - Pugatch</p> <p>2 form. The document speaks for itself.</p> <p>3 Is that a question, John?</p> <p>4 MR. KANE: Yeah. I asked if</p> <p>5 that was his understanding, that this</p> <p>6 is a representation by HarbourVest</p> <p>7 that it has the authority to transfer</p> <p>8 the shares if the Settlement Agreement</p> <p>9 is approved.</p> <p>10 MS. WEISGERBER: Objection to</p> <p>11 form. Objection to the extent it</p> <p>12 calls for a legal conclusion.</p> <p>13 To the extent you have a</p> <p>14 nonlegal conclusion, non-privileged</p> <p>15 understanding, Mike, you can share</p> <p>16 that.</p> <p>17 A. Yeah, I'm just saying I can only</p> <p>18 answer that based on conversations with</p> <p>19 counsel.</p> <p>20 MR. KANE: Okay. I won't push</p> <p>21 that. That's fine.</p> <p>22 Q. If we keep going down here as</p> <p>23 part of this attachment, there's a</p> <p>24 Transfer Agreement, Exhibit A to the</p> <p>25 Settlement Agreement. Are you familiar</p>	<p style="text-align: right;">Page 131</p> <p>1 Confidential - Pugatch</p> <p>2 with this document?</p> <p>3 A. Yes. I've seen it.</p> <p>4 Q. And did you assist with the</p> <p>5 preparation or negotiation of this</p> <p>6 Agreement?</p> <p>7 A. Yes.</p> <p>8 Q. Okay. Did you understand that</p> <p>9 HarbourVest would need the consent of the</p> <p>10 HCLOF portfolio advisor to effectuate the</p> <p>11 transfer?</p> <p>12 MS. WEISGERBER: Objection to</p> <p>13 form. Objection to the extent it</p> <p>14 calls for a legal conclusion.</p> <p>15 Mike, if you have a view other</p> <p>16 than from privileged conversation, you</p> <p>17 can answer, otherwise do not answer.</p> <p>18 A. Yeah, I'm sorry. I can only</p> <p>19 answer that based on conversation with</p> <p>20 counsel and the read of the document.</p> <p>21 Q. So to make sure I understand</p> <p>22 that, you have no independent</p> <p>23 understanding of whether or not consent</p> <p>24 was required from the portfolio manager</p> <p>25 before you could effectuate a transfer; is</p>
<p style="text-align: right;">Page 132</p> <p>1 Confidential - Pugatch</p> <p>2 that correct?</p> <p>3 MS. WEISGERBER: Same objection.</p> <p>4 I think you can give your</p> <p>5 general understanding, but then not</p> <p>6 get into specific conversations.</p> <p>7 A. My understanding of that is</p> <p>8 based on conversations with counsel, but</p> <p>9 yes, that is my understanding, John.</p> <p>10 Q. Okay. I'm going to highlight a</p> <p>11 passage here. Can you see this</p> <p>12 highlighted area? "Whereas, the Portfolio</p> <p>13 Manager desires to consent to such</p> <p>14 transfers and to the admission of</p> <p>15 Transferee as a shareholder..."</p> <p>16 Were you aware of that</p> <p>17 provision?</p> <p>18 MS. WEISGERBER: Objection to</p> <p>19 form.</p> <p>20 A. Yes. It's in the document.</p> <p>21 Q. Do you have any understanding of</p> <p>22 why that provision was included in this</p> <p>23 agreement?</p> <p>24 MS. WEISGERBER: Objection to</p> <p>25 form. Objection to the extent it</p>	<p style="text-align: right;">Page 133</p> <p>1 Confidential - Pugatch</p> <p>2 calls for a privileged conversation.</p> <p>3 A. As I answered before, based on</p> <p>4 conversations with counsel, my</p> <p>5 understanding is that consent is requiring</p> <p>6 in connection to transfer.</p> <p>7 Q. I'd like to turn your attention</p> <p>8 now – this is a document you've seen</p> <p>9 before during your deposition. This is</p> <p>10 the member's agreement related to the</p> <p>11 Company for HCLOF. This is previously</p> <p>12 produced by the Debtor, that's why it's</p> <p>13 got the Bates stamp on it. This is dated</p> <p>14 November 15, 2017.</p> <p>15 Are you familiar with this</p> <p>16 document?</p> <p>17 A. Yes.</p> <p>18 Q. Do you see on Line 14, in the</p> <p>19 between, on Page 1 shows Highland HCF</p> <p>20 Advisor, Ltd. as the portfolio manager?</p> <p>21 A. Yes, I see that.</p> <p>22 Q. I know there was quite a bit</p> <p>23 of – quite a few questions about this</p> <p>24 earlier, but you understand that Highland</p> <p>25 HCF Advisor, Ltd. is still the HCLOF</p>

<p style="text-align: right;">Page 134</p> <p>1 Confidential - Pugatch</p> <p>2 portfolio manager?</p> <p>3 MS. WEISGERBER: Objection to</p> <p>4 form.</p> <p>5 A. Honestly, I don't have -- I</p> <p>6 don't have enough information to answer</p> <p>7 that definitively.</p> <p>8 Q. Okay. Going back to the</p> <p>9 Settlement Agreement, there's a reference</p> <p>10 in here to a defined term, "portfolio</p> <p>11 manager."</p> <p>12 Do you see that?</p> <p>13 A. Yep.</p> <p>14 Q. And is this the same one that's</p> <p>15 listed in the Member Agreement, Highland</p> <p>16 HCF Advisor, Ltd.?</p> <p>17 A. I believe that seems to be the</p> <p>18 position, yes.</p> <p>19 Q. Okay. So when we're talking</p> <p>20 about down here, "Whereas, the Portfolio</p> <p>21 Manager desires to consent," this consent</p> <p>22 provision is referring to the same</p> <p>23 definition of portfolio manager that's</p> <p>24 included in this Member Agreement; is that</p> <p>25 correct?</p>	<p style="text-align: right;">Page 135</p> <p>1 Confidential - Pugatch</p> <p>2 MR. MORRIS: Objection to the</p> <p>3 form.</p> <p>4 MS. WEISGERBER: Objection --</p> <p>5 same objections. Objection to the</p> <p>6 extent it calls for privileged</p> <p>7 information.</p> <p>8 A. That sounds like a legal</p> <p>9 conclusion.</p> <p>10 Q. I would have thought it was</p> <p>11 reading, Mr. Pugatch.</p> <p>12 A. Well, if you're asking me to</p> <p>13 definitively confirm that, that sounds</p> <p>14 like a legal interpretation.</p> <p>15 Q. Let me ask that a different way.</p> <p>16 Do you understand that the</p> <p>17 portfolio manager is listed as Highland</p> <p>18 HCF Advisor, Ltd. in the Member Agreement?</p> <p>19 A. Yes.</p> <p>20 Q. And in this Transfer Agreement,</p> <p>21 the portfolio manager is listed as</p> <p>22 Highland HCF Advisor, Ltd.?</p> <p>23 A. Yes.</p> <p>24 Q. And those are the same entities?</p> <p>25 A. Yes.</p>
<p style="text-align: right;">Page 136</p> <p>1 Confidential - Pugatch</p> <p>2 Q. All right. Are you familiar</p> <p>3 with Section 6 of this Member Agreement?</p> <p>4 A. (Nods.)</p> <p>5 Q. Have you ever read this</p> <p>6 document?</p> <p>7 A. I have.</p> <p>8 Q. Okay. And can you give me your</p> <p>9 understanding of what must take place</p> <p>10 under this document for HarbourVest to</p> <p>11 transfer its shares?</p> <p>12 MS. WEISGERBER: Object to the</p> <p>13 form. Object to the extent it calls</p> <p>14 for a legal conclusion. Object to the</p> <p>15 extent it calls for any privileged</p> <p>16 information or conversations.</p> <p>17 Mike, to the extent you have an</p> <p>18 independent understanding, separate</p> <p>19 from conversations with counsel, you</p> <p>20 can answer the question.</p> <p>21 A. I would say my understanding of</p> <p>22 what's required in connection with the</p> <p>23 transfer is based on conversations with</p> <p>24 counsel.</p> <p>25 Q. Do you believe that the</p>	<p style="text-align: right;">Page 137</p> <p>1 Confidential - Pugatch</p> <p>2 HarbourVest entities can transfer its</p> <p>3 shares without obtaining the consent of</p> <p>4 the portfolio manager?</p> <p>5 MS. WEISGERBER: Objection to</p> <p>6 form. Objection to the extent it</p> <p>7 calls for a legal conclusion.</p> <p>8 Same instruction, Mike, as to</p> <p>9 privileged conversations.</p> <p>10 A. Again, my view on that would be</p> <p>11 based on conversations with counsel.</p> <p>12 Q. Are you aware of whether</p> <p>13 HarbourVest provided any notice to other</p> <p>14 members of its intent to transfer its</p> <p>15 shares to the Debtor's affiliate under the</p> <p>16 Settlement Agreement, other than the</p> <p>17 filing of the 9019 motion?</p> <p>18 MS. WEISGERBER: Same objection.</p> <p>19 But there is a factual question in</p> <p>20 there if you can answer it, Mike, but</p> <p>21 no privileged conversation.</p> <p>22 A. Yeah, I'm not aware of that.</p> <p>23 Q. Did you provide members 30 days</p> <p>24 after the receipt of notice of</p> <p>25 HarbourVest's intent to transfer its</p>

<p style="text-align: right;">Page 138</p> <p>1 Confidential - Pugatch</p> <p>2 shares to the Debtor's affiliate and</p> <p>3 provide those members with an opportunity</p> <p>4 to purchase their pro rata amount of the</p> <p>5 shares?</p> <p>6 MS. WEISGERBER: Same objection.</p> <p>7 A. No.</p> <p>8 Q. And just to make sure I'm not</p> <p>9 asking this question in a way that you</p> <p>10 don't understand what I'm asking: Do you</p> <p>11 see this highlighted provision here?</p> <p>12 A. Yes.</p> <p>13 Q. I'm asking whether HarbourVest</p> <p>14 provided members 30 days after the receipt</p> <p>15 of a notice letter and an opportunity to</p> <p>16 purchase their entire pro rata share of</p> <p>17 the shares proposed to be transferred by</p> <p>18 the HarbourVest entities?</p> <p>19 MS. WEISGERBER: Objection to</p> <p>20 form. Objection to the extent it</p> <p>21 calls for privileged conversations or</p> <p>22 a legal conclusion. Objection to the</p> <p>23 extent it's asking about one piece of</p> <p>24 the document.</p> <p>25 And you're welcome to look at</p>	<p style="text-align: right;">Page 139</p> <p>1 Confidential - Pugatch</p> <p>2 the full document if you'd like, Mike.</p> <p>3 I think it was one of the ones that</p> <p>4 was E-mailed as well, or maybe you</p> <p>5 were able to pull it down.</p> <p>6 THE WITNESS: Yeah, no, I was.</p> <p>7 Thank you.</p> <p>8 A. And I'm sorry, John, could you</p> <p>9 just repeat the question?</p> <p>10 BY MR. KANE:</p> <p>11 Q. Yeah, sure, absolutely. And I'm</p> <p>12 not calling for any conversations with</p> <p>13 counsel. I'm asking you if you know</p> <p>14 whether HarbourVest did something or not.</p> <p>15 So let's -- let's keep it to that, because</p> <p>16 I --</p> <p>17 MR. KANE: Erica, I appreciate</p> <p>18 your concerns, but I really don't want</p> <p>19 to have any disclosures from Mike</p> <p>20 about his discussions with you on</p> <p>21 whether something needed to be done or</p> <p>22 not. I'm asking simply the facts of</p> <p>23 whether HarbourVest did it or not.</p> <p>24 Q. So did HarbourVest provide</p> <p>25 notice, 30 days' notice, to the members</p>
<p style="text-align: right;">Page 140</p> <p>1 Confidential - Pugatch</p> <p>2 listed under this Member Agreement of</p> <p>3 HarbourVest's intent to transfer the</p> <p>4 shares that are the subject to the</p> <p>5 Settlement Agreement?</p> <p>6 A. No.</p> <p>7 Q. Has HarbourVest provided any</p> <p>8 members with a right of first refusal and</p> <p>9 a cash purchase price for which it would</p> <p>10 sell its shares instead of transferring</p> <p>11 those shares to the Debtor or the Debtor's</p> <p>12 affiliate under the Settlement Agreement?</p> <p>13 MS. WEISGERBER: Same</p> <p>14 objections. Objection to form.</p> <p>15 Objection to extent it calls for a</p> <p>16 legal conclusion or privileged</p> <p>17 conversations, including -- regarding</p> <p>18 the specifics of that provision.</p> <p>19 I don't think that's a purely</p> <p>20 factual question.</p> <p>21 Q. Did HarbourVest offer to sell</p> <p>22 the shares to the other members? That's</p> <p>23 not a factual question?</p> <p>24 MS. WEISGERBER: Objection --</p> <p>25 A. On the basis of that factual</p>	<p style="text-align: right;">Page 141</p> <p>1 Confidential - Pugatch</p> <p>2 question, no.</p> <p>3 Q. So let me ask this question</p> <p>4 again, I don't recall if I got an answer</p> <p>5 or not.</p> <p>6 Did HarbourVest affirmatively</p> <p>7 seek to obtain the consent of Highland HCF</p> <p>8 Advisors to transfer its shares to the</p> <p>9 Debtor affiliate under the Settlement</p> <p>10 Agreement?</p> <p>11 MS. WEISGERBER: Same</p> <p>12 objections. Same instruction</p> <p>13 regarding the privileged conversation.</p> <p>14 A. I mean, as a Highland-affiliated</p> <p>15 entity, the Debtor, who's obviously the</p> <p>16 other party here involved in the transfer,</p> <p>17 you know, was involved in these</p> <p>18 discussions.</p> <p>19 Q. I'm sorry. Would you mind</p> <p>20 clarifying? Did you say that Highland HCF</p> <p>21 Advisors was involved in those discussions</p> <p>22 or the Debtor was involved in those</p> <p>23 discussions and you assume Highland HCF</p> <p>24 Advisors was?</p> <p>25 MS. WEISGERBER: Objection to</p>

<p style="text-align: right;">Page 142</p> <p>1 Confidential - Pugatch</p> <p>2 form. Misstates testimony.</p> <p>3 A. Sorry, could you just repeat the</p> <p>4 question, please, John?</p> <p>5 Q. Yes, Mr. Pugatch.</p> <p>6 I'm actually just trying to get</p> <p>7 some clarification from you, because I</p> <p>8 don't think I understood your answer</p> <p>9 about -- I had asked just -- again, I</p> <p>10 don't want any correspondence with your</p> <p>11 counsel or what your counsel advised, I'm</p> <p>12 asking: Do you know whether HarbourVest</p> <p>13 sought written consent from Highland HCF</p> <p>14 Advisor for its -- or to transfer its</p> <p>15 shares to the Debtor or the Debtor's</p> <p>16 affiliate under the Settlement Agreement?</p> <p>17 MS. WEISGERBER: Same objection.</p> <p>18 A. My understanding is HarbourVest</p> <p>19 did not explicitly have those</p> <p>20 conversations or seek that consent.</p> <p>21 Q. Okay. Are you aware of whether</p> <p>22 HarbourVest received any written consent</p> <p>23 from Highland HCF Advisors, other than</p> <p>24 what's in the Transfer Agreement attached</p> <p>25 to the Settlement Agreement?</p>	<p style="text-align: right;">Page 143</p> <p>1 Confidential - Pugatch</p> <p>2 A. I am not.</p> <p>3 MS. WEISGERBER: Same objection.</p> <p>4 Q. Do you know if HarbourVest has</p> <p>5 any written consent? Not just to seek it,</p> <p>6 but do you know if HarbourVest has a piece</p> <p>7 of paper, other than the transfer</p> <p>8 agreement, in which Highland HCF advisors</p> <p>9 provided its consent to the transfer of</p> <p>10 shares to the Debtor's affiliate?</p> <p>11 MS. WEISGERBER: Same</p> <p>12 objections.</p> <p>13 A. I would have to speak with</p> <p>14 counsel. I am not aware of that directly,</p> <p>15 no.</p> <p>16 Q. Are you aware of whether</p> <p>17 HarbourVest had any correspondence with</p> <p>18 HCLOF representatives about effectuating</p> <p>19 the transfer of the shares to the Debtor's</p> <p>20 affiliate under the Settlement Agreement?</p> <p>21 MS. WEISGERBER: Same objection.</p> <p>22 You can answer.</p> <p>23 A. We have had discussions with</p> <p>24 them, yes.</p> <p>25 Q. Did HCLOF representatives</p>
<p style="text-align: right;">Page 144</p> <p>1 Confidential - Pugatch</p> <p>2 provide consent, whether written or</p> <p>3 otherwise, to the transfer?</p> <p>4 A. I am not aware that that consent</p> <p>5 has been provided as of yet.</p> <p>6 Q. Are you aware of whether any</p> <p>7 HarbourVest representatives have had</p> <p>8 conversations with the Debtor's</p> <p>9 representatives about the necessity of</p> <p>10 consent to the transfer of their shares?</p> <p>11 MS. WEISGERBER: Objection to</p> <p>12 form --</p> <p>13 MR. KANE: I'll re-ask the</p> <p>14 question. I want to clarify that</p> <p>15 point.</p> <p>16 BY MR. KANE:</p> <p>17 Q. Mr. Pugatch, are you aware of</p> <p>18 whether any HarbourVest representatives</p> <p>19 had conversations with the Debtor's</p> <p>20 representatives about the necessity of</p> <p>21 obtaining the HCLOF portfolio manager's</p> <p>22 written consent before transferring the</p> <p>23 shares to the Debtor's representative or</p> <p>24 affiliate under the terms of the</p> <p>25 Settlement Agreement?</p>	<p style="text-align: right;">Page 145</p> <p>1 Confidential - Pugatch</p> <p>2 MS. WEISGERBER: Objection to</p> <p>3 form.</p> <p>4 And, John, I'm sorry to do this,</p> <p>5 can you just clarify what you mean by</p> <p>6 "representative"?</p> <p>7 MR. KANE: Yeah. I mean,</p> <p>8 anybody that has agency authority to</p> <p>9 act on behalf of the Debtor in</p> <p>10 negotiations, in the preparation of</p> <p>11 the documents, in negotiation of the</p> <p>12 terms of the Settlement Agreement.</p> <p>13 I mean, I think that it's, you</p> <p>14 know, a pretty broad term here.</p> <p>15 MS. WEISGERBER: Objection to</p> <p>16 form. Objection to the extent it</p> <p>17 calls for discussions with counsel.</p> <p>18 As a factual matter, if you have</p> <p>19 an answer, you can give it.</p> <p>20 A. I'm aware of conversations that</p> <p>21 have taken place about all of the terms of</p> <p>22 the Transfer Agreement in connection with</p> <p>23 the settlement, with all parties.</p> <p>24 Q. Is it your understanding based</p> <p>25 on those conversations that written</p>

<p style="text-align: right;">Page 146</p> <p>1 Confidential - Pugatch</p> <p>2 consent of the portfolio manager as</p> <p>3 defined in the Transfer Agreement was</p> <p>4 required before the shares could be</p> <p>5 transferred under the Settlement</p> <p>6 Agreement?</p> <p>7 MS. WEISGERBER: Objection to</p> <p>8 the form. Objection to the extent it</p> <p>9 calls for a legal conclusion or</p> <p>10 privileged conversation. And I think</p> <p>11 that one does, John.</p> <p>12 A. Yeah, I can only answer that</p> <p>13 based on conversation with lawyers.</p> <p>14 Q. Wasn't the question whether --</p> <p>15 I'm sorry. Maybe I forgot my own</p> <p>16 question.</p> <p>17 But I thought it was based on</p> <p>18 your conversations with the Debtor's</p> <p>19 representative, was it your understanding,</p> <p>20 not based on your conversation with</p> <p>21 counsel.</p> <p>22 MS. WEISGERBER: Can you repeat</p> <p>23 the whole question because I</p> <p>24 definitely misunderstood it then too.</p> <p>25 Q. Okay. Based on your</p>	<p style="text-align: right;">Page 147</p> <p>1 Confidential - Pugatch</p> <p>2 conversations with the Debtor's</p> <p>3 representatives, was it your understanding</p> <p>4 that the consent of the portfolio manager</p> <p>5 was required for the shares to be</p> <p>6 transferred from the HarbourVest entities</p> <p>7 to the Debtor's affiliate under the terms</p> <p>8 of the Settlement Agreement?</p> <p>9 MS. WEISGERBER: Okay. Same</p> <p>10 objections. Also objection to the</p> <p>11 extent there is a common interest</p> <p>12 privilege.</p> <p>13 A. I don't recall having that</p> <p>14 explicit conversation with representative</p> <p>15 of the Debtor.</p> <p>16 MR. KANE: I'll pass the</p> <p>17 witness.</p> <p>18 Thank you, Mr. Pugatch.</p> <p>19 MR. MORRIS: Anybody else?</p> <p>20 Thank you, all.</p> <p>21 MS. WEISGERBER: Can we --</p> <p>22 before we break, could we have a</p> <p>23 two-minute break and then come back</p> <p>24 before we conclude.</p> <p>25 BY MS. WEISGERBER:</p>
<p style="text-align: right;">Page 148</p> <p>1 Confidential - Pugatch</p> <p>2 Q. Mr. Pugatch, during Mr. Wilson's</p> <p>3 questioning, I believe his last question</p> <p>4 related to identifying as between two</p> <p>5 choices the primary source or the cause of</p> <p>6 HarbourVest's damages.</p> <p>7 In your opinion, is -- are</p> <p>8 HarbourVest damages attributable to any</p> <p>9 one cause?</p> <p>10 A. No, I would say there were</p> <p>11 multiple root causes of the damages and</p> <p>12 diminution in value that was suffered in</p> <p>13 connection with the investment.</p> <p>14 MS. WEISGERBER: Okay. I don't</p> <p>15 have any further questions.</p> <p>16 MR. WILSON: I think I'd like to</p> <p>17 ask a couple more.</p> <p>18 BY MR. WILSON:</p> <p>19 Q. Mr. Pugatch, I think you</p> <p>20 testified earlier that the investment in</p> <p>21 HCLOF was comprised of multiple CLOs,</p> <p>22 correct?</p> <p>23 A. Correct.</p> <p>24 Q. And some of those CLOs were</p> <p>25 managed by Acis, to your understanding?</p>	<p style="text-align: right;">Page 149</p> <p>1 Confidential - Pugatch</p> <p>2 MS. WEISGERBER: Objection.</p> <p>3 A. Correct.</p> <p>4 MS. WEISGERBER: Just to</p> <p>5 clarify, John, is this within the</p> <p>6 scope of the questions I asked</p> <p>7 Mr. Pugatch?</p> <p>8 MR. WILSON: I believe it is.</p> <p>9 I'm going to be really short. But</p> <p>10 so --</p> <p>11 MS. WEISGERBER: I would like to</p> <p>12 have a standing objection to the</p> <p>13 extent it's not within the scope of</p> <p>14 the questions that was asked to</p> <p>15 Mr. Pugatch.</p> <p>16 BY MR. WILSON:</p> <p>17 Q. So some of those CLOs you</p> <p>18 contend are managed by Acis?</p> <p>19 MS. WEISGERBER: Objection to</p> <p>20 form.</p> <p>21 A. A majority.</p> <p>22 Q. And just generally, do you</p> <p>23 contend that Highland managed the balance</p> <p>24 of those CLOs?</p> <p>25 MR. MORRIS: Objection to the</p>

<p style="text-align: right;">Page 150</p> <p>1 Confidential - Pugatch</p> <p>2 form of the question.</p> <p>3 MS. WEISGERBER: Objection.</p> <p>4 Same objection.</p> <p>5 A. Yes.</p> <p>6 Q. Yes. Okay. Thank you.</p> <p>7 And I just had two more</p> <p>8 questions.</p> <p>9 So, if there was going to be a</p> <p>10 reset, that would have to be done at the</p> <p>11 CLO level, each CLO would have to be</p> <p>12 reset?</p> <p>13 MR. MORRIS: Objection.</p> <p>14 MS. WEISGERBER: Objection to</p> <p>15 form.</p> <p>16 A. That is correct.</p> <p>17 Q. And do you know of any specific</p> <p>18 CLO that requested a reset but was not</p> <p>19 granted a reset?</p> <p>20 MR. MORRIS: Objection to form.</p> <p>21 MS. WEISGERBER: Same objection.</p> <p>22 And foundation.</p> <p>23 A. When you say "CLOs who requested</p> <p>24 a reset," can be more clear, please?</p> <p>25 Q. We just talked about how this</p>	<p style="text-align: right;">Page 151</p> <p>1 Confidential - Pugatch</p> <p>2 investment is comprised of multiple CLOs</p> <p>3 and each one of those CLOs would have to</p> <p>4 be reset, according to its own terms, I</p> <p>5 guess. Do you know of any one of those</p> <p>6 CLOs that requested a reset?</p> <p>7 MR. MORRIS: Objection to the</p> <p>8 form of the question.</p> <p>9 MS. WEISGERBER: Same objection.</p> <p>10 A. I'm aware of Highland having in</p> <p>11 its capacity as manager of the HCLOF</p> <p>12 having requested or pursued resets of</p> <p>13 certain of the Acis HCLOs.</p> <p>14 Q. Your understanding is that</p> <p>15 Highland requested a reset of the Acis</p> <p>16 CLOs?</p> <p>17 MS. WEISGERBER: Objection to</p> <p>18 form.</p> <p>19 A. I'm sorry. I'm trying to</p> <p>20 understand what you said.</p> <p>21 MS. WEISGERBER: I'm really</p> <p>22 wondering how this relates at all to</p> <p>23 the scope of the questions I asked Mr.</p> <p>24 Pugatch on follow up.</p> <p>25 I think it's time to wrap this</p>
<p style="text-align: right;">Page 152</p> <p>1 Confidential - Pugatch</p> <p>2 up, John.</p> <p>3 MR. WILSON: This was my last</p> <p>4 question, I just need an answer to it.</p> <p>5 And I think he tried to answer, but I</p> <p>6 didn't understand what he said.</p> <p>7 MS. WEISGERBER: Objection. Can</p> <p>8 you re-ask the question so we have a</p> <p>9 clear question.</p> <p>10 MR. WILSON: Well, Madam Court</p> <p>11 Reporter, can you read back his last</p> <p>12 response?</p> <p>13 (Record read.)</p> <p>14 BY MR. WILSON:</p> <p>15 Q. Can you repeat what you intended</p> <p>16 to answer to the last question?</p> <p>17 MS. WEISGERBER: Same objection.</p> <p>18 If you recall, Mike.</p> <p>19 A. I'm sorry, John. Can you just</p> <p>20 repeat the question, please, make sure I'm</p> <p>21 answering what you want me to answer.</p> <p>22 Q. My question is the same as it's</p> <p>23 been: Are you aware of any CLO that</p> <p>24 requested a reset and was not granted one?</p> <p>25 MS. WEISGERBER: Objection to</p>	<p style="text-align: right;">Page 153</p> <p>1 Confidential - Pugatch</p> <p>2 form. Objection to foundation.</p> <p>3 MR. MORRIS: Objection to the</p> <p>4 form of the question.</p> <p>5 A. Again, my understanding is the</p> <p>6 CLOs do not request the reset. Highland,</p> <p>7 as manager of HCLOF in its capacity as</p> <p>8 majority equity owner of certain of the</p> <p>9 CLOs, have requested a reset post our</p> <p>10 original investment.</p> <p>11 Q. Okay.</p> <p>12 MR. WILSON: I'll pass the</p> <p>13 witness.</p> <p>14 MS. WEISGERBER: I think we're</p> <p>15 done.</p> <p>16 THE REPORTER: Will everyone put</p> <p>17 their orders on the record, please?</p> <p>18 MR. MORRIS: John Morris for the</p> <p>19 Debtor. Expedited, please.</p> <p>20 MR. WILSON: John Wilson. I'm</p> <p>21 not sure what arrangements my office</p> <p>22 has previously made, but we want an</p> <p>23 expedited transcript, as well.</p> <p>24 THE REPORTER: Do you want a</p> <p>25 rough too?</p>

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1 Confidential - Pugatch
2 MR. WILSON: Yes, please.
3 MR. MORRIS: Yes, please.
4 MS. WEISGERBER: Same for
5 HarbourVest, please.
6 MR. MALONEY: I don't need an
7 expedited transcript. I'd just be
8 happy to get one regular copy. I'll
9 take whatever you would produce in the
10 ordinary course. Same as what
11 everyone else ordered.
12 (Time Noted: 4:35 p.m. EDT.)
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1
2 CERTIFICATE OF SHORTHAND REPORTER-NOTARY
3 PUBLIC
4 I, Amanda Gorrone, the officer
5 before whom the foregoing deposition
6 was taken, do hereby certify that the
7 foregoing transcript is a true and
8 correct record of the testimony given;
9 that said testimony was taken by me
10 stenographically and thereafter
11 reduced to typewriting under my
12 direction; and that I am neither
13 counsel for, related to, nor employed
14 by any of the parties to this case and
15 have no interest, financial or
16 otherwise, in its outcome.
17 IN WITNESS WHEREOF, I have
18 hereunto set my hand this 12th day of
19 January, 2021.
20
21 _____
22 AMANDA GORRONE, CLR
23 CLR NO: 052005 - 01
24 Notary Public in and for the State of New
25 York
County of Suffolk

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1
2 ACKNOWLEDGEMENT OF DEPONENT
3
4 I, MICHAEL PUGATCH, do hereby
5 acknowledge that I have read and
6 examined the foregoing testimony, and
7 the same is a true, correct and
8 complete transcription of the
9 testimony given by me, and any
10 corrections appear on the attached
11 Errata sheet signed by me.
12
13
14 _____
15 (DATE) (SIGNATURE)
16
17
18
19
20
21
22
23
24
25

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1 ERRATA SHEET
2 Case Name:
3 Deposition Date:
4 Deponent:
5 Pg. No. Now Reads Should Read Reason
6 _____
7 _____
8 _____
9 _____
10 _____
11 _____
12 _____
13 _____
14 _____
15 _____
16 _____
17 _____
18 _____
19 _____
20
21 _____
22 Signature of Deponent
23 SUBSCRIBED AND SWORN BEFORE ME
24 THIS ____ DAY OF _____, 20__.
25 (Notary Public) MY COMMISSION EXPIRES: _____

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EXHIBIT 8

003075

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Counsel for the Debtor and Debtor-in-Possession

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

In re:	)	Chapter 11
)	
HIGHLAND CAPITAL MANAGEMENT, L.P., ¹	)	Case No. 19-34054-sgj11
)	
Debtor.	)	Re: Docket Nos. 1625, 1697, 1706,
	)	1707

**DEBTOR'S OMNIBUS REPLY IN SUPPORT OF DEBTOR'S MOTION FOR
ENTRY OF AN ORDER APPROVING SETTLEMENT WITH HARBOURVEST
(CLAIM NOS. 143, 147, 149, 150, 153, 154), AND AUTHORIZING ACTIONS
CONSISTENT THEREWITH**

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



The above-captioned debtor and debtor-in-possession (the “Debtor”) hereby submits this reply (the “Reply”) in support of its *Motion for Entry of an Order Approving Settlement with HarbourVest (Claim No.143,147, 149, 150, 153, 154), and Authorizing Actions Consistent Therewith [Docket No. 1625]* (the “Motion”).² In further support of the Motion, the Debtor respectfully states as follows:

PRELIMINARY STATEMENT

1. If granted, the Motion will resolve a \$300 million general unsecured claim against the Debtor’s estate for less than \$16.8 million in actual value.³ The settlement is another solid achievement for the Debtor and – not surprisingly – is opposed by no one except Mr. Dondero and entities affiliated with him.

2. As discussed in the Motion, in November 2017, HarbourVest invested \$80 million in exchange for a 49.98% membership interest in HCLOF – an entity managed by a subsidiary of the Debtor. The balance of HCLOF’s interests are held by CLO Holdco, Ltd. (an entity affiliated with Mr. Dondero), the Debtor, and certain of the Debtor’s employees. Subsequent to its investment in HCLOF, HarbourVest incurred substantial losses on its investment in HCLOF and filed claims against the Debtor’s estate.

3. HarbourVest asserts claims for fraud, fraudulent inducement, fraudulent concealment, fraudulent misrepresentation, negligent misrepresentation, breach of fiduciary duty

² All capitalized terms used but not defined herein have the meanings given to them in the Motion.

³ Under the proposed settlement, HarbourVest would receive an allowed, general unsecured claim of \$45 million and an allowed, subordinated claim of \$35 million. Based on the estimated recovery for general unsecured creditors of 87.44% (which is a recovery based on certain outdated assumptions discussed *infra*), HarbourVest’s \$45 million general unsecured claim is estimated to be worth approximately \$39.3 million and the \$35 million subordinated claim, which is junior to the general unsecured claim, is currently estimated to have value only if there are litigation recoveries. In addition, HarbourVest is transferring to an affiliate of the Debtor its interest in HCLOF, which is estimated to be worth approximately \$22.5 million. Thus, HarbourVest’s estimated recovery on its general unsecured and subordinated claims is estimated at approximately \$16.8 million on a net economic basis. This estimate, however, is dated and is based on the claims that were settled as of the filing of the Debtor’s plan in November 2020.

and unfair prejudice (under Guernsey law), violations of state securities laws, and RICO. In furtherance of these claims, HarbourVest alleges it was misled by the Debtor and its employees, including Mr. Scott Ellington (then the Debtor's general counsel), and that subsequent to investing in HCLOF, Mr. Dondero and the Debtor used HCLOF both as a piggybank to fund the litigation against Acis Capital Management, L.P. ("Acis") and as a scapegoat for the Debtor's litigation strategy, in each case to HarbourVest's substantial detriment.

4. Specifically, HarbourVest alleges that:

- the Debtor and its employees, including Mr. Ellington, misled HarbourVest about its intentions with respect to Mr. Terry's arbitration award against Acis and orchestrated a series of fraudulent transfers and corporate restructurings, the true purpose of which was to denude Acis of assets and make it judgment proof;
- the Debtor and its employees, including Mr. Ellington, misled HarbourVest as to the intent and true purpose of these restructurings and led HarbourVest to believe that Mr. Terry's claims against Acis were meritless and a simple employment dispute that would not affect HarbourVest's investment;
- the Debtor, through Mr. Dondero, improperly exercised control over or misled HCLOF's Guernsey-based board of directors to cause HCLOF to engage in unnecessary, unwarranted, and resource-draining litigation against Acis;
- the Debtor improperly caused HCLOF to pay substantial legal fees of various entities in the Acis bankruptcy that were unwarranted, imprudent, and not properly chargeable to HCLOF; and
- the Debtor used HarbourVest as a scapegoat in its litigation against Acis by asserting that the Debtor's improper conduct and scorched-earth litigation strategy was at HarbourVest's request, which was untrue.

5. The Debtor believed, and continues to believe, that it has viable defenses to HarbourVest's claims. Nevertheless, those defenses would be subject to substantial factual disputes and would require expensive and time-consuming litigation that would likely be resolved only after a lengthy trial all while the Debtor (or its successor) assumes the risk that the defenses might fail. The evidence will show that the proposed settlement is the product of substantial, arm's length – and sometimes quite heated – negotiations between and among the

principals and their counsel. The evidence will also show that one of HarbourVest's primary concerns in settling its claim was that part of that settlement would include the extrication of HarbourVest from the Highland web of entities and the related litigation. The proposed settlement accomplishes that and does so in compliance with HCLOF's governing agreements.

6. Pursuant to the proposed settlement, (a) HarbourVest will receive (i) an allowed, general unsecured claim in the amount of \$45 million, and (ii) an allowed, subordinated claim in the amount of \$35 million; (b) HarbourVest will transfer its 49.98% interest in HCLOF (valued at approximately \$22.5 million) to a wholly-owned subsidiary of the Debtor; and (c) the parties will exchange mutual and general releases. The Debtor believes that the proposed settlement is reasonable and results from the valid and proper exercise of its business judgment. And the Debtor's creditors apparently agree. None of the major parties-in-interest or creditors in this case has objected to the Motion: not the Committee, the Redeemer Committee, Acis, Patrick Daugherty, or UBS.

7. In distinction, the only objecting parties are Mr. Dondero, his family trusts (the Dugaboy Investment Trust ("Dugaboy") and Get Good Trust ("Get Good," and together with Dugaboy, the "Trusts")), and CLO Holdco (a wholly-owned subsidiary of Mr. Dondero's Charitable Donor Advised Fund, L.P. (the "DAF")) (collectively, the "Objectors"). Each of the Objectors has only the most tenuous economic interest in and connection to the Debtor's settlement with HarbourVest. Each of the Objectors is also controlled directly or indirectly by Mr. Dondero who has coordinated each of the Objectors litigation strategies against the Debtor.⁴ Mr. Dondero's efforts to litigate every issue in this case – directly and by proxy – should be rebuffed, and the objections overruled. The following is a brief summary of the objections.

⁴ See *Debtor's Amended Witness and Exhibit List with Respect to Evidentiary Hearing to be Held on January 8, 2021* [Adv. Pro. 20-3190-sgj, Docket No. 46], Exhibit Q.

<u>Pleading</u>	<u>Objection/Reservation</u>	<u>Response</u>
<i>Objection of James Dondero</i> [Docket No. 1697] (the “ <u>Dondero Objection</u> ”)	Because HarbourVest was damaged by the injunction entered in Acis, the settlement seeks to revisit this Court’s rulings in Acis.	Mr. Dondero is misdirecting the Court. HarbourVest’s claim arises from the misrepresentations of Mr. Dondero, Mr. Ellington, and others, not this Court’s rulings in Acis, including the failure to disclose the fraudulent transfer of assets.
	The settlement is not fair and equitable because it does not address (1) Acis’s mismanagement, (2) how the Debtor is liable for HarbourVest’s damages, (3) the success on the merits, (4) the costs of litigation, and (5) the Debtor’s ability to realize the value of the HCLOF interests in light of the Acis injunction.	Mr. Dondero ignores the dangers of the litigation and HarbourVest’s claims against the estate for misrepresentation and overestimates the ability to resolve the litigation. The Debtor has assessed the value of the HCLOF interests in light of all factors, including the Acis injunction.
	The HarbourVest settlement represents a substantial windfall to HarbourVest.	Mr. Dondero ignores the economics of this case, which have value breaking in Class 8 (General Unsecured Claims). The value of the settlement is not \$60 million; it is approximately \$16.8 million against a claim of \$300 million. There is no windfall.
	The HarbourVest settlement is improper gerrymandering because it provides HarbourVest with a general unsecured claim and a subordinated claim in order to secure votes for the plan.	The HarbourVest settlement provides for the resolution of HarbourVest’s claim. It is nonsensical to think that the Debtor would reach a settlement with HarbourVest that would include HarbourVest’s rejection of the Debtor’s plan, and there is nothing wrong with requiring acceptance of a plan as part of a settlement. Further, the Debtor does not need HarbourVest’s Class 9 vote to confirm a plan.
<i>Objection of the Dugaboy Investment Trust and Get Good Trust</i> [Docket No. 1706] (the “ <u>Trusts Objection</u> ”)	The settlement represents a radical change in the Debtor’s earlier position on the HarbourVest settlement.	Mr. Dondero ignores the dangers of the litigation and HarbourVest’s claims against the estate for misrepresentation and overestimates the ability to resolve the litigation.
	The settlement appears to buy HarbourVest’s vote.	The HarbourVest settlement provides for the resolution of HarbourVest’s claim. It is nonsensical to think that the Debtor would reach a settlement with HarbourVest that would include HarbourVest’s rejection of the Debtor’s plan, and there is nothing wrong with requiring acceptance of a plan as part of a settlement. Further, the Debtor does not need HarbourVest’s Class 9 vote to confirm a plan.
	No information is provided as to whether the Debtor can acquire HarbourVest’s interest in HCLOF or the value of that interest to the estate.	As discussed below, the HCLOF interest will be transferred to a wholly-owned subsidiary of the Debtor. Mr. Seery will testify as to the benefit of the HCLOF interests to the estate.
<i>Objection of CLO Holdco</i> [Docket No. 1707] (“ <u>CLOH Objection</u> ”)	HarbourVest cannot transfer its interests in HCLOF unless it complies with the right of first refusal.	CLO Holdco misinterprets the operative agreements and tries to create ambiguity where none exists.

8. These objections are just the latest objections filed by Mr. Dondero and his related entities to any attempt by the Debtor to resolve this case,⁵ including the Debtor's settlement with Acis [Docket No. 1087] and the seven separate objections filed by Mr. Dondero and his related entities to the *Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.* [Docket No. 1472] (the "Plan").⁶ It will not shock this Court to hear that each of the Objectors is also objecting to the Plan. In contradistinction, the Debtor has heard this Court's admonishments about old Highland's culture of litigation as evidenced by this case, Acis's bankruptcy, and beyond. Although the Debtor has vigorously contested claims when appropriate, the Debtor has also sought to settle claims and limit the senseless fighting. The Debtor has successfully resolved the largest claims against the estate, including the claims of the Redeemer Committee, Acis, and, as recently announced to this Court, UBS. The Debtor would ask this Court to see through the pretense of the Dondero-related entities' objections to the HarbourVest settlement and approve it as a valid exercise of the Debtor's business judgment.

⁵ As an example of Mr. Dondero's litigiousness, on January 12, 2021, Mr. Dondero filed notice that he will be appealing the preliminary injunction entered against him earlier on January 12, 2021.

⁶ (1) *James Dondero's Objection to Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.* [Docket No. 1661]; (2) *Objection to Confirmation of the Debtor's Fifth Amended Plan of Reorganization* (filed by Get Good Trust, The Dugaboy Investment Trust) [Docket No. 1667]; (3) *Senior Employees' Limited Objection to Debtor's Fifth Amended Plan of Reorganization* (filed by Scott Ellington, Thomas Surgent, Frank Waterhouse, Isaac Leventon) [Docket No. 1669]; (4) *Objection to Confirmation of Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.* (filed by Highland Capital Management Fund Advisors, L.P., Highland Fixed Income Fund, Highland Funds I and its series, Highland Funds II and its series, Highland Global Allocation Fund, Highland Healthcare Opportunities Fund, Highland Income Fund, Highland Merger Arbitrage Fund, Highland Opportunistic Credit Fund, Highland Small-Cap Equity Fund, Highland Socially Responsible Equity Fund, Highland Total Return Fund, Highland/iBoxx Senior Loan ETF, NexPoint Advisors, L.P., NexPoint Capital, Inc., NexPoint Real Estate Strategies Fund, NexPoint Strategic Opportunities Fund) [Docket No. 1670]; (5) *NexPoint Real Estate Partners LLC's Objection to Debtor's Fifth Amended Plan of Reorganization* (filed by NexPoint Real Estate Partners LLC f/k/a HCRE Partners LLC) [Docket No. 1673]; (6) *CLO Holdco, Ltd.'s Joinder to Objection to Confirmation of Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. and Supplemental Objections to Plan Confirmation* [Docket No. 1675]; and (7) *NexBank's Objection to Debtor's Fifth Amended Plan of Reorganization* (filed by NexBank Title, Inc., NexBank Securities, Inc., NexBank Capital, Inc., and NexBank) [Docket No. 1676].

REPLY

A. Standing

9. **James Dondero.** In the Dondero Objection, Mr. Dondero asserts he is a “creditor, indirect equity security holder, and party in interest” in the Debtor’s bankruptcy. While that claim is ostensibly true, it is tenuous at best. On April 8, 2020, Mr. Dondero filed three unliquidated, contingent claims that he promised to update “in the next ninety days.”⁷ More than nine months later, Mr. Dondero has yet to “update” those claims to assert an actual claim against the Debtor’s estate.⁸

10. Mr. Dondero’s claim as an “indirect equity security holder” is also a stretch. Mr. Dondero holds no direct equity interest in the Debtor. Mr. Dondero instead owns 100% of Strand Advisors, Inc. (“Strand”), the Debtor’s general partner. Strand, however, holds only 0.25% of the total limited partnership interests in the Debtor through its ownership of Class A limited partnership interests. The Class A limited partnership interests are junior in priority of distribution to the Debtor’s Class B and Class C limited partnership interests. The Class A interests are also junior to all other claims filed against the Debtor. Finally, Mr. Dondero’s recovery on his indirect equity interest is junior to any claims against Strand itself. Consequently, before Mr. Dondero can recover on his “indirect” equity interest, the Debtor’s estate must be solvent, priority distributions to Class B and Class C creditors must be satisfied, and all claims against Strand must be satisfied.

11. **Dugaboy and Get Good.** Dugaboy and Get Good are sham Dondero “trusts” with only the most attenuated standing. Dugaboy has filed three proofs of claim [Claim Nos. 113; 131; 177]. In two of these claims, Dugaboy argues that (1) the Debtor is liable to Dugaboy

⁷ Mr. Dondero filed two other proofs of claim that he has since withdrawn with prejudice. See **Docket No. 1460**.

⁸ Without knowing the nature of the “updates,” the Debtor does not concede that any “updates” would have been procedurally proper and reserves the right to object to any proposed amendment to Mr. Dondero’s claims.

for its postpetition mismanagement of the Highland Multi Strategy Credit Fund, L.P., and (2) this Court should pierce the corporate veil and allow Dugaboy to sue the Debtor for a claim it ostensibly has against the Highland Select Equity Master Fund, L.P. – a Debtor-managed investment vehicle. The Debtor believes that each of the foregoing claims is frivolous and has objected to them. [Docket No. 906].

12. In its third claim, Dugaboy asserts a claim against the Debtor arising from its Class A limited partnership interest in the Debtor (which represents just 0.1866% of the total limited partnership interests in the Debtor). Similarly, Get Good filed three proofs of claim [Claim Nos. 120; 128; 129] arising from its prior ownership of limited partnership interests in the Debtor. Because each these claims arises from an equity interest, the Debtor will seek to subordinate them under 11 U.S.C. § 510 at the appropriate time. As set forth above, these interests are out of the money and are not expected to receive any economic recovery.

13. Consequently, Mr. Dondero, Dugaboy, and Get Good’s standing to object to the HarbourVest settlement is attenuated and their chances of recovery in this case are extremely speculative at best. *See In re Kutner*, 3 B.R. 422, 425 (Bankr. N.D. Tex. 1980) (finding that a party had standing only when it had a “pecuniary interest . . . directly affected by the bankruptcy proceeding”); *see also In re Flintkote Co.*, 486 B.R. 99, 114-15 (Bankr. D. Del. 2012), *aff’d*, 526 B.R. 515 (D. Del. 2014) (a claim that is speculative cannot confer party in interest standing). Mr. Dondero, Dugaboy, and Get Good’s minimal interest in the estate should not allow them to overrule the estate’s business judgment or veto settlements with creditors, especially when no actual creditors and constituents have objected. “[A] bankruptcy judge must not blindly follow the hue and cry of the most vocal special interest groups; rather, [the judge] should consider all salient factors . . . and . . . act to further the diverse interests of the debtor, creditors and equity

holders, alike.” *In re Lionel*, 722 F.2d 1063, 1071 (2d Cir. 1983).

B. Mr. Dondero’s Objection and his “Trusts” Objection Are Without Merit

14. As discussed in the Motion, under applicable Fifth Circuit precedent, a bankruptcy court may approve a compromise or settlement as long as the proposed settlement is fair, reasonable, and in the best interest of the estate. *See, e.g., In re Age Ref. Inc.*, 801 F.3d 530, 540 (5th Cir. 2015). In making this determination, courts look to the following factors:

- probability of success in the litigation, with due consideration for the uncertainty of law and fact;
- complexity and likely duration of the litigation and any attendant expense, inconvenience and delay; and
- all other factors bearing on the wisdom of the compromise, including (i) “the paramount interest of creditors with proper deference to their reasonable views” and (ii) whether the settlement is the product of arm’s length bargaining and not of fraud or collusion.

Official Comm. of Unsecured Creditors v. Cajun Elec. Power Coop. (In re Cajun Elec. Power Coop.), 119 F.3d 349, 356 (5th Cir. 1997) (citations omitted). *See also Age Ref. Inc.*, 801 F.3d at 540; *Conn. Gen. Life Ins. Co. v. United Cos. Fin. Corp. (In re Foster Mortgage Corp.)*, 68 F.3d 914, 918 (5th Cir. 1995).

15. **The Settlement Seeks to Revisit the Acis Orders.** In the Dondero Objection, Mr. Dondero argues that HarbourVest’s claim is based on the financial harm caused to HarbourVest from Acis’s bankruptcy and the orders entered in the Acis bankruptcy. Mr. Dondero extrapolates from this that HarbourVest is seeking to challenge this Court’s rulings in Acis. (Dondero Obj., ¶¶ 17-20) Mr. Dondero misinterprets HarbourVest’s claims and the dangers such claims pose to the Debtor’s estate.

16. HarbourVest’s claims are for fraud, fraudulent inducement, fraudulent concealment, fraudulent misrepresentation, negligent misrepresentation, breach of fiduciary duty

and unfair prejudice (under Guernsey law), violations of state securities laws, and RICO. HarbourVest is not arguing that Acis or this Court caused its damages; HarbourVest is arguing that *the Debtor* – led by Mr. Dondero – (a) misled HarbourVest as to the nature of Mr. Terry’s claims against the Debtor and the litigation with Acis, (b) knowingly and intentionally failed to disclose that the Debtor was engaged in the fraudulent transfer of assets to prevent Mr. Terry from collecting his judgment, and (c) that *the Debtor* – under the control of Mr. Dondero – improperly engaged in a crusade against Mr. Terry and Acis, which substantially damaged HarbourVest and its investment in HCLOF, in each case in order to induce HarbourVest to invest in HCLOF.

17. Again, HarbourVest does not contend that Acis caused its damages. Rather, HarbourVest contends that the fraudulent transfer of assets as part of the Debtor’s crusade against Mr. Terry and Acis and the false statements and omissions about those matters caused HarbourVest to make an investment it would never have made had Mr. Dondero and the Debtor been honest and transparent. The Acis litigation – in HarbourVest’s estimation – never should have happened. Acis did not cause HarbourVest’s damages. Mr. Dondero’s crusade against Mr. Terry and the Debtor’s allegedly fraudulent statements to HarbourVest about the fraudulent transfers, Mr. Terry and Acis caused HarbourVest’s damages.

18. **The HarbourVest Claim Lacks Merit.** In their objections, Mr. Dondero and the Trusts argue that the HarbourVest settlement is not fair and equitable and not in the best interests of the estate because (a) it does not address the Debtor’s arguments against the HarbourVest claims and (b) there is a lack of pending litigation seeking to narrow the claims against the estate. These arguments only summarily address the first two factors of *Cajun Electric*, which deal with success in the litigation, and, in doing so, mischaracterize the dangers to the Debtor’s estate

posed by HarbourVest's claims. (Dondero Obj., ¶¶ 21-25; Trusts Obj., ¶ 18(a))

19. Both the Dondero Objection and – to a much lesser extent - the “Trusts” Objection allege that (a) HarbourVest's losses were caused by Acis and its (mis)management of HCLOF's investments (Dondero Obj., ¶¶ 22, 24), (b) there is no contract that supports HarbourVest's claims (Dondero Obj. ¶ 23; Trusts Obj., ¶ 18(a)), (c) there is no causal connection between HarbourVest's losses and the Debtor's conduct (Dondero Obj., ¶ 24), and (d) the Debtor should litigate all or a portion of HarbourVest's claim before settling (Dondero Obj., ¶ 25). Again, though, as set forth above, both Mr. Dondero and the “Trusts” seek to shift the cause of HarbourVest's damages away from the Debtor's misrepresentations and to Mr. Terry's management of HCLOF's investments. This is simple misdirection.

20. HarbourVest's claims are that it invested in HCLOF based on the Debtor's fraudulent misrepresentations. Fraudulent misrepresentation sounds in tort, not contract. *See, e.g., Clark v. Constellation Brands, Inc.*, 348 Fed. Appx. 19, 21 (5th Cir. 2009) (referring to party's claim based on fraudulent misrepresentation as a tort); *Eastman Chem. Co. v. Niro, Inc.*, 80 F. Supp. 2d 712, 717 (S.D. Tex. 2000) (noting that party had common law duty not to commit intentional tort of fraudulent misrepresentation). There is thus no need for HarbourVest to point to a contractual provision to support its claim.⁹ Moreover, in order to defend against HarbourVest's claims, the Debtor would need to elicit evidence showing that its employees did not make misrepresentations to HarbourVest. Such a defense would require the Debtor to rely on the veracity of Mr. Ellington's testimony, among others. That is a high hurdle, and no reasonable person would expect the Debtor to stake the resolution of HarbourVest's \$300 million claim on the Debtor's ability to convince this Court that Mr. Ellington was telling HarbourVest

⁹ Subsequent to filing the Motion, the Objectors requested all agreements between HarbourVest, HCLOF, and the Debtor, and such agreements were provided.

the truth. This is especially true in light of the evidence supporting Mr. Ellington's recent termination for cause and the evidence recently provided by HarbourVest supporting its claim for fraudulent misrepresentations.

21. Finally, neither Mr. Dondero nor the "Trusts" even address the third factor analyzed by the Fifth Circuit: all other factors bearing on the wisdom of the compromise, including "the paramount interest of creditors with proper deference to their reasonable views." This is telling because no creditor or party in interest has objected to the settlement. Mr. Dondero and his proxies' preference for constant litigation should not outweigh the preference of the Debtor and its creditors for a reasonable and expeditious settlement of HarbourVest's claims.

22. **The HarbourVest Settlement Is a Windfall to HarbourVest.** Both the Dondero Objection and the "Trusts" Objection argue that the HarbourVest settlement represents a substantial windfall to HarbourVest. Both Mr. Dondero and the "Trusts" ignore the facts. Specifically, Mr. Dondero argues that HarbourVest is receiving \$60 million dollars in *actual* value for its claims. Mr. Dondero's contention, however, wrongly assumes that both the \$45 million general unsecured claim and the \$35 million subordinated claim provided to HarbourVest under the settlement will be paid 100% in full and that HarbourVest will receive \$80 million in cash. From that \$80 million, Mr. Dondero subtracts \$20 million, which represents the value Mr. Dondero ascribes to HarbourVest's interests in HCLOF that are being transferred to the Debtor. Mr. Dondero's math ignores the reality of this case.

23. The Debtor very clearly disclosed in the projections filed with the *Disclosure Statement for the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.*, [Docket No. 1473] (the "Projections") that general unsecured claims would receive an 87.44% recovery *only if* the claims of UBS, HarbourVest, Integrated Financial Associates, Inc., Mr.

Daugherty, and the Hunter Mountain Investment Trust were zero. Because of the Debtor's success in settling litigation, that assumption is proving to be inaccurate. Regardless, even if general unsecured claims receive a recovery of 87.44%, because the subordinated claims are junior to the general unsecured claims, the subordinated claims' projected recovery is currently zero. As such, assuming the HCLOF's interests are worth \$22.5 million,¹⁰ the actual recovery to HarbourVest will be less than \$16.8 million. This is not a windfall. HarbourVest's investment in HCLOF was \$80 million and its claim against the estate was over \$300 million. The settlement represents a substantial discount.

24. **Improper Gerrymandering and/or Vote Buying.** Each of Mr. Dondero and the Trusts argue in one form or another that the HarbourVest settlement is improper as it provides HarbourVest a windfall on its claims in exchange for HarbourVest voting to approve the Plan. These unsubstantiated allegations of vote buying should be disregarded. As an initial matter, and as set forth above, HarbourVest is *not* getting a windfall. HarbourVest is accepting a substantial discount in the settlement. HarbourVest's incentive to support the Plan comes from HarbourVest's determination that the Plan is in its best interests. There is also nothing shocking about a settling creditor supporting a plan. Indeed, it would be nonsensical for a creditor to settle its claims and then object to the plan that would pay those claims.

25. More importantly, HarbourVest's votes in Class 9 (Subordinated Claims) are not needed to confirm the Plan. As will be set forth in the voting declaration, Class 2 (Frontier Secured Claim), Class 7 (Convenience Claims), and Class 8 (General Unsecured Claims) have voted in favor of the Plan.¹¹ In brief, the Plan was approved without HarbourVest's Class 9 vote,

¹⁰ It is currently anticipated that Mr. James P. Seery, Jr., the Debtor's chief executive officer and chief restructuring officer, will testify as to the value of the HCLOF interests to the Debtor's estate.

¹¹ The Debtor anticipates that Mr. Dondero and his related entities will argue that neither Class 7 nor Class 8 voted to accept the Plan because of the votes cast against the Plan in those Classes by current and former Debtor

and the Debtor, therefore, has no need to “buy” HarbourVest’s Class 9 claims. Accordingly, any claims of gerrymandering or vote buying are without merit.

C. CLOH Objection

26. CLO Holdco (and to a much lesser extent, the “Trusts”) object to HarbourVest’s transfer of its interests in HCLOF as part of the settlement. Currently, the settlement contemplates that HarbourVest will transfer 100% of its collective interests in HCLOF to HCMLP Investments, LLC (“HCMLPI”), a wholly-owned subsidiary of the Debtor. As set forth in the *Transfer Agreement for Ordinary Shares of Highland CLO Funding, Ltd.* (which was appended as Exhibit A to the Settlement Agreement) [Docket No. 1631-1], each of the Debtor, HarbourVest, Highland HCF Advisors, Ltd. (HCLOF’s investment manager) (“HHCFA”), and HCLOF agree that HarbourVest is entitled to transfer its interests to HCMLPI pursuant to that certain *Members Agreement Relating to the Company*, dated November 15, 2017 (the “Members Agreement”),¹² without offering that interest to other investors in HCLOF.

27. The *only* party to object to the transfer of HarbourVest’s interests in HCLOF to HCMLPI is CLO Holdco. CLO Holdco holds approximately a 49.02% interest in HCLOF and is the wholly-owned subsidiary of the DAF, Mr. Dondero’s donor-advised fund. CLO Holdco argues that the Member Agreement requires HarbourVest to offer its interest first to the other investors in HCLOF before it can transfer its interests to HCMLPI. In so arguing, CLO Holdco attempts to create ambiguity in an unambiguous contract and to use that ambiguity to disrupt the Debtor’s settlement with HarbourVest.

28. As an initial matter, the Debtor and CLO Holdco agree that the transfer of HarbourVest’s interests in HCLOF to HCMLPI is governed by Article 6 (Transfers or Disposals

employees, including Mr. Ellington and Mr. Isaac Leventon. The Debtor will demonstrate at confirmation that those objections are without merit and that Class 7 and Class 8 voted to accept the Plan.

¹² A true and accurate copy of the Members Agreement is attached hereto as Exhibit A.

of Shares) of the Members Agreement (an agreement governed by Guernsey law). (CLOH Obj., ¶ 3) The parties diverge, however, as to how to interpret Article 6. The Debtor, as set forth below, believes Article 6 is clear in that it allows HarbourVest to transfer its interests in HCLOF to any “Affiliate of an initial Member party” without requiring the right of first refusal in Section 6.2 of the Members Agreement. CLO Holdco’s position appears to be that the Members Agreement, despite its clear language, should be interpreted as limiting transfers to an “initial Member’s *own* affiliates” and that any other transfer requires the consent of HHCFA and satisfaction of the right of first refusal. (*Id.* (emphasis added)) CLO Holdco’s reading is contrary to the actual language of the Members Agreement.

29. First, Section 6.1 of the Members Agreement provides, in pertinent part:

[REDACTED]

(Members Agmt, § 6.1 (emphasis added)) Under the Members Agreement, “Affiliate” is defined, in pertinent part, as “[REDACTED]

[REDACTED]

(*Id.*, § 1.1) A “Member” in turn is a [REDACTED].” The “initial Member[s]” are the initial Members of HCLOF listed on the first page of the Members Agreement and include the Debtor, HarbourVest, and CLO Holdco.

30. As such, under the plain language of Section 6.1, HarbourVest is entitled – without the consent of any party – to “Transfer” its interests in HCLOF to an “Affiliate” of any of the Debtor, HarbourVest, or CLO Holdco. And that is exactly what is contemplated by the settlement. HarbourVest is transferring its interests to HCMLPI, a wholly owned and controlled subsidiary of the Debtor, and therefore an “Affiliate” of the Debtor. That transfer is indisputably

allowed under Section 6.1; it is a transfer to an “Affiliate of an initial Member.” CLO Holdco may, tongue in cheek, call this structure “convenient” but that sarcasm is an attempt to avoid the fact that the Members Agreement clearly allows HarbourVest to transfer its interest to HCMLPI without the consent of any party.¹³ The fact that CLO Holdco does not now like the language it previously agreed to when CLO Holdco and the Debtor were both controlled by Mr. Dondero is not a reason to re-write Section 6.1 of the Members Agreement.

31. Second, Section 6.2 of the Members Agreement is also unambiguous and, by its plain language, allows HarbourVest to “Transfer” its interests in HCLOF to “Affiliates of an initial Member” (*i.e.*, HCMLPI) without having to first offer those interests to the other Members (such obligation, the “ROFO”). CLO Holdco attempts to create ambiguity in Section 6.2 by arguing that it must be read in conjunction with Section 6.1 and that interpreting the plain language of Section 6.2 to allow HarbourVest to transfer its interests to HCMLPI without restriction makes certain other language surplus and meaningless. (CLOH Obj., ¶ 11-13) Again, CLO Holdco is attempting to create controversy and ambiguity where none exists.

32. Section 6.2 of the Members Agreement provides, in pertinent part:

[REDACTED]

(Members Agmt., § 6.2 (emphasis added)) Like Section 6.1, Section 6.2 is clear on its face. It exempts from the requirement to comply with the ROFO two categories of “Transfers”: (1) Transfers to “affiliates of an initial Member” from Members *other than* CLO Holdco and the

¹³ Although HHCFA’s consent is not necessary for HarbourVest to transfer its interests to HCMLPI, HHCFA will consent to the transfer.

“Highland Principals” (*i.e.*, the Debtor and certain of its employees)¹⁴ and (2) Transfers from CLO Holdco or a Highland Principal to the Debtor, the Debtor’s “Affiliates,” or another Highland Principal. The fact that a narrower exemption is provided to CLO Holdco and the Debtor than to HarbourVest (or any other Member) under Section 6.2 is of no moment; the language says what it says and was agreed to by all Members, including CLO Holdco, when they executed the Members Agreement.

33. In addition, and although not relevant, the language of Section 6.2 makes sense in the context of the deal. Although CLO Holdco and the Debtor may have disclaimed an “Affiliate” relationship, they are related through Mr. Dondero and invest side by side with the Debtor in multiple deals.¹⁵ The different standards in Section 6.2 serve to ensure that HarbourVest’s (or any successor to HarbourVest) right to Transfer its shares without satisfying the ROFO is limited to three parties: (i) HarbourVest’s Affiliates, (ii) the Debtor’s Affiliates, and (iii) CLO Holdco’s Affiliates. This restriction keeps the relative voting power of each Member static and ensures that CLO Holdco and the Debtor, together, will *always* have more than fifty percent of HCLOF’s total interests and that HarbourVest will *always* have less than fifty percent. This counterintuitively also explains the greater restrictions placed on CLO Holdco and the “Highland Principals.” The Highland Principals include certain Debtor employees. Those employees – as well as CLO Holdco and the Debtor – are prohibited from transferring their HCLOF interests outside of the Dondero family. This restriction makes sense. If, for example, a Debtor employee wanted to transfer its interests to an Affiliate of HarbourVest, HarbourVest could have more than fifty percent of the HCLOF interests because of the thinness

¹⁴ “Highland Principals” means:

[REDACTED]

(Members Agmt., § 1.1)

¹⁵ There can be no real dispute that Mr. Dondero effectively controls CLO Holdco.

of the Dondero-family's majority (approximately 0.2%). At the time the Members Agreement was executed, CLO Holdco and the Debtor were under common control. Section 6.2 preserves those related entities' control over HCLOF by restricting transactions that would transfer that control unless the ROFO is complied with.

34. As such, and notwithstanding CLO Holdco's protestations, Section 6.1 and Section 6.2 are consistent as written and clear on their face. This consistency is further evidenced by HCLOF's Articles of Incorporation¹⁶ and HCLOF's offering memorandum, which each include language identical to Section 6.1 and 6.2 of the Members Agreement.¹⁷ It seems highly unlikely, if not implausible, that sophisticated parties such as CLO Holdco would include the exact same language in six separate places over three documents without a reason for that language and without the intent that such language be interpreted as it is clearly written – not as CLO Holdco now wants it to be interpreted. Accordingly, since HarbourVest is transferring its interests to HCMLPI, an Affiliate of an initial Member, the plain language of Section 6.2

¹⁶ See Articles of Incorporation, adopted November 15, 2017, a true and correct copy of which is attached hereto as Exhibit B.

[REDACTED]

(Articles of Incorporation, § 18.1)

[REDACTED]

(*Id.*, § 18.2)

¹⁷ See Offering Memorandum, dated November 15, 2017, a true and correct copy of which is attached hereto as Exhibit C.

[REDACTED]

(Offering Memorandum, page 89)

exempts HarbourVest from having to comply with the ROFO.

35. Third, and finally, CLO Holdco makes the nonsensical argument that because Section 6.2 provides different treatment to similarly situated Members that this Court should re-write Section 6.2. (CLOH Obj., ¶¶ 15-17) Contracts provide different treatment to ostensibly similarly situated parties all the time and no one objects that that creates an absurd result. It just means that different parties bargained for and received different rights.

36. CLO Holdco's attempt to justify why this Court should re-write the Members Agreement to correct the "disparate treatment" is also unavailing. As an example of the absurd result caused by the "disparate treatment," CLO Holdco states: "[B]ecause the HarbourVest Members are technically Affiliates of an initial member (each other), they could obtain control of all of the interests in HCLOF without any Member receiving a Right of First Refusal for any transfer." (*Id.*, ¶ 16) The scenario posited by CLO Holdco, however, is *exactly* the scenario prevented by the clear language of Section 6.2. For HarbourVest to obtain control of HCLOF, it would – as a matter of mathematical necessity – need the interests held by CLO Holdco (49.02%) and/or the Highland Principals (1% in the aggregate). Section 6.2, however, *expressly* prohibits CLO Holdco and the Highland Principals from transferring their interests to HarbourVest or its Affiliates without satisfying the ROFO. As set forth above, it is Section 6.2 that prevents control from being transferred away from the Dondero family without compliance with the ROFO. In fact, Section 6.2 would only break down if the limiting language in Section 6.2 were read out of it in the manner advocated by CLO Holdco.

37. Ultimately, Article 6 of the Members Agreement is clear as written and expressly allows HarbourVest to transfer its interests to HCMLPI. If CLO Holdco had an objection to the rights provided to HarbourVest under the Members Agreement, CLO Holdco

should have raised that objection three and a half years ago before agreeing to the Members Agreement. CLO Holdco should not be allowed to create ambiguity in an unambiguous contract or to re-write that agreement to impose additional restrictions on HarbourVest. *See Clardy Mfg. Co. v. Marine Midland Bus. Loans Inc.*, 88 F.3d 347, 352 (5th Cir. 1996) (enforcing the “unambiguous language in a contract as written,” noting that where a contract is unambiguous, a party may not create ambiguity or “give the contract a meaning different from that which its language imports”) (internal quotations omitted); *Texas v. Am. Tobacco Co.*, 463 F.3d 399, 407 (5th Cir. 2006) (“Courts interpreting unambiguous contracts are confined to the four corners of the document, and cannot look to extrinsic evidence to create an ambiguity.”).

38. It should go without saying, but CLO Holdco (and the other parties to the Members Agreement) should also be required to satisfy their obligations under the Members Agreement and execute the “Adherence Agreement” as required by Section 6.6 of the Members Agreement in connection with the Transfer of HarbourVest’s interests to HCMLPI or any other permitted Transfer.

39. Finally, and notably, although CLO Holdco spends considerable time arguing that HarbourVest should be required to comply with the ROFO, nowhere in the CLOH Objection does CLO Holdco state that it wishes to purchase HarbourVest’s interests in HCLOF. This omission is telling. CLO Holdco and the other Objectors have no interest in actually exercising their alleged right of first refusal contained in the Members Agreement. Rather, their only interest is in causing the Debtor to spend time and money responding to a legion of related (and coordinated) objections.¹⁸

¹⁸ See Debtor’s Amended Witness and Exhibit List with Respect to Evidentiary Hearing to be Held on January 8, 2021 [Adv. Pro. 20-3190-sgj, Docket No. 46], Exhibit Q; Exhibit T (email from Mr. Dondero as forwarded to Mr. Ellington stating “Holy bananas..... make sure we object [to the HarbourVest Settlement]”); Exhibit Y.

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WHEREFORE, for the reasons set forth above and in the Motion, the Debtor respectfully requests that the Court grant the Motion.

Dated: January 13, 2021

PACHULSKI STANG ZIEHL & JONES LLP

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Ira D. Kharasch (CA Bar No. 109084) (*pro hac vice*)
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EXHIBIT 9

003098

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

In Re:) **Case No. 19-34054-sgj-11**
) Chapter 11
)
HIGHLAND CAPITAL) Dallas, Texas
MANAGEMENT, L.P.,) Thursday, January 14, 2021
) 9:30 a.m. Docket
Debtor.)
) - MOTION TO PREPAY LOAN
) [1590]
) - MOTION TO COMPROMISE
) CONTROVERSY [1625]
) - MOTION TO ALLOW CLAIMS OF
) HARBOURVEST [1207]

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE STACEY G.C. JERNIGAN,
UNITED STATES BANKRUPTCY JUDGE.

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003100

1 DALLAS, TEXAS - JANUARY 14, 2021 - 9:41 A.M.

2 THE CLERK: All rise. The United States Bankruptcy
3 Court for the Northern District of Texas, Dallas Division, is
4 now in session, the Honorable Stacey Jernigan presiding.

5 THE COURT: Good morning. Please be seated. All
6 right. We're a little late getting started because we had
7 lots of reading material for the Court today. All right.
8 This is Judge Jernigan, and we have a couple of Highland
9 settings. The HarbourVest matters are the primary thing we
10 have set today, and then we also have a Debtor's motion
11 pursuant to protocols for authority for Highland Multi-Strat
12 to prepay a loan.

13 All right. Well, let's get a few appearances. First, for
14 the Debtor team, who do we have appearing this morning?

15 MR. POMERANTZ: Good morning, Your Honor. It's Jeff
16 Pomerantz, John Morris, and Greg Demo here on behalf of the
17 Debtor.

18 THE COURT: Okay. Thank you.

19 All right. We have objections on HarbourVest. Who do we
20 have appearing for Mr. Dondero this morning?

21 MR. WILSON: Your Honor, it's John Wilson, and I'm
22 also joined by Michael Lynn, John Bonds, and Bryan Assink.

23 THE COURT: Okay. I'm sorry. Could -- the court
24 reporter does yeoman's work in this case. Let me just make
25 sure we got all three of those names. Say again, Mr. Wilson.

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1 MR. WILSON: John Bonds and Michael Lynn and Bryan
2 Assink.

3 THE COURT: Oh, okay. So, see, I thought I heard
4 somebody Wilson in all of that, which was why I was pressing
5 the issue.

6 All right. Is Mr. Dondero present on the video for
7 today's hearing?

8 MR. WILSON: I believe he is, Your Honor.

9 THE COURT: Mr. Dondero, could you confirm that you
10 are out there? (No response.) Okay. My court reporter says
11 he sees the name out there. Is he in your office?

12 MR. WILSON: Your Honor, he is appearing remotely
13 from my office. I'm not sure exactly where he's appearing
14 from.

15 THE COURT: Okay. Well, Mr. Dondero, if you're out
16 there and you're speaking up to confirm you're present, we're
17 not hearing you. Maybe your device is on mute. So please
18 unmute yourself.

19 (No response.)

20 THE COURT: All right. I'm going to take some other
21 appearances and you -- you need to try to communicate with
22 your client and let him know I need to confirm he's present.
23 Okay?

24 All right. Meanwhile, let's go to our other Objectors.
25 CLO Holdco. Who do we have appearing today?

1 MR. KANE: John Kane; Kane Russell Coleman & Logan;
2 on behalf of CLO Holdco.

3 THE COURT: All right. Thank you, Mr. Kane.

4 We had an objection from Dugaboy Investment Trust and Get
5 Good Trust. Who do we have appearing?

6 MR. DRAPER: Douglas Draper, Your Honor, for -- for
7 Draper.

8 THE COURT: All right. Thank you, Mr. Draper.

9 All right. I think those were the only written objections
10 we had. Mr. Pomerantz, do you confirm, we don't have any
11 other objectors for the motions set, correct?

12 MR. POMERANTZ: Your Honor, there was those three.

13 THE COURT: I'm sorry. I didn't catch your full
14 sentence.

15 MR. POMERANTZ: That is correct, Your Honor. There
16 were three objections to the motion.

17 THE COURT: Okay. Mr. Clemente, you're there for the
18 Creditors' Committee?

19 MR. CLEMENTE: Yes. Good morning, Your Honor. Matt
20 Clemente on behalf of the Official Committee of Unsecured
21 Creditors.

22 THE COURT: All right. Good morning. Thank you.
23 All right. We have a lot of other folks on the video. I'm
24 not going to go ahead and take a roll call of other lawyers.

25 MS. WEISGERBER: Your Honor?

1 THE COURT: Yes?

2 MS. WEISGERBER: Excuse me, Your Honor. It's Erica
3 Weisgerber from Debevoise on behalf of HarbourVest.

4 THE COURT: Okay.

5 MS. WEISGERBER: And I'm joined by Natasha Labovitz
6 and Dan Stroik --

7 THE COURT: Okay.

8 MS. WEISGERBER: -- from Debevoise as well.

9 THE COURT: Thank you. I was neglectful in not
10 getting your appearance, because, of course, you're at the
11 front and center of this motion to compromise, and I did see
12 that you filed a reply brief yesterday afternoon. Okay.
13 Thank you.

14 All right. Do we have -- do we have Mr. Dondero on the
15 line? I'm going to check again.

16 (No response.)

17 THE COURT: Mr. Dondero's counsel, I cannot hear you,
18 so please unmute your device.

19 MR. WILSON: Your Honor, it appears to me that Mr.
20 Dondero's device was unmuted as soon as you asked if he was
21 available. I sent him a communication a second ago asking if
22 he's having technical difficulties. I have not received a
23 response, so I --

24 MR. DONDERO: Hello. Can anybody hear me?

25 THE COURT: Oh.

1 MR. WILSON: Okay. I hear him.

2 THE COURT: Mr. Dondero?

3 MR. DONDERO: Hello?

4 THE COURT: Is that you?

5 MR. DONDERO: Yeah, it is. I've been on. I've heard
6 everything since the beginning. It's just we've had technical
7 difficulties. I couldn't use the Highland offices. We've
8 been trying to set up something else.

9 THE COURT: All right.

10 MR. DONDERO: But I'm on now, if -- yes.

11 THE COURT: All right. Very good. Well, I'm glad
12 we've got you.

13 All right. Well, Mr. Pomerantz, how did you want to
14 proceed this morning?

15 MR. POMERANTZ: Your Honor, we could take up the
16 HarbourVest motion first, and I will turn it over to John
17 Morris. He and Greg Demo will be handling that. And then
18 after that we can handle the other motion, which is unopposed.

19 THE COURT: All right. Mr. Morris?

20 MR. KANE: Your Honor, this is -- sorry. This is
21 John Kane for CLO Holdco. Just very briefly, if I may. And
22 this will affect, I think, the Debtor's case in chief, so I'll
23 expedite things a little bit, I believe.

24 CLO Holdco has had an opportunity to review the reply
25 briefing, and after doing so has gone back and scrubbed the

1 HCLOF corporate documents. Based on our analysis of Guernsey
2 law and some of the arguments of counsel in those pleadings
3 and our review of the appropriate documents, I obtained
4 authority from my client, Grant Scott, as Trustee for CLO
5 Holdco, to withdraw the CLO Holdco objection based on the
6 interpretation of the member agreement.

7 THE COURT: All right. Well, thank you for that, Mr.
8 Kane. I think that -- that eliminates one of the major
9 arguments that we had anticipated this morning. So, thank you
10 for that.

11 Any other housekeeping matters that maybe someone had that
12 I didn't ask about?

13 MS. MATSUMURA: Yes, Your Honor. This is Rebecca
14 Matsumura from King & Spalding representing Highland CLO
15 Funding, Ltd. I just wanted to put on the record, we -- our
16 client had requested that some of its organizational documents
17 be filed under seal. But we have given permission for the
18 parties to present the relevant excerpts, to the extent it's
19 still relevant after Mr. Kane's announcement, in court. And
20 we'd just ask that the underlying documents remain sealed, but
21 we're not going to object if they show them on a PowerPoint or
22 anything like that.

23 So, to the extent that you had that on your radar, I just
24 wanted to clear that up for the proceedings.

25 THE COURT: All right. Well, I did sign an order

1 late last night. I don't know if it's popped up on the
2 docket.

3 MS. MATSUMURA: Yes, Your Honor. That's what this
4 referred to. That was what -- these are the documents that
5 were being sealed. And so I just wanted to note, if you --
6 you know, if the Debtor puts up an excerpt of those documents
7 and you're like, wait a minute, didn't I seal those, that we
8 were the party that requested them be under seal and we're
9 fine with them being shown in court, as long as the underlying
10 documents aren't publicly accessible.

11 THE COURT: Okay. Got you. Thank you.

12 All right. Any other housekeeping matters?

13 MR. MORRIS: Yes, Your Honor. This is John Morris
14 from Pachulski Stang for the Debtor. Good morning.

15 THE COURT: Good morning.

16 MR. MORRIS: The only other matter that I wanted to
17 raise, and I can do it now or I can do it later, or Your Honor
18 may tell me that it's not appropriate to do at this time, is
19 to schedule the Debtor's motion to hold Mr. Dondero in
20 contempt for violation of the TRO.

21 THE COURT: All right. Well, let's do that at the
22 conclusion today. And please make sure I do it. I think I
23 was going to address this last Friday, and we went very late
24 and it slipped off my radar screen. But I did see from my
25 courtroom deputy that you all were reaching out to her

1 yesterday to get this set, and then Mr. Dondero's counsel
2 reached out to her and said, We're going to file an objection
3 to a setting next Wednesday, or I think you had asked for a
4 setting next Tuesday or Wednesday.

5 MR. MORRIS: I did.

6 THE COURT: And I don't -- I don't know if that
7 response/objection was ever filed last night. I haven't seen
8 it if it was. So, we'll -- please, make sure I don't forget.
9 We'll take that up at the end of today's matters. All right.
10 Well, --

11 MR. MORRIS: All right. So, --

12 MS. WEISGERBER: Your Honor, one last housekeeping
13 item from -- I'm joined this morning by Michael Pugatch of
14 HarbourVest, who will present some testimony this morning. I
15 just want to confirm he's on the line and confirm no
16 objections to him sitting in for the rest of the hearing.

17 THE COURT: All right. Mr. Pugatch, this is Judge
18 Jernigan. Could you respond? Are you there with us?

19 MR. PUGATCH: Yes. Good morning, Your Honor. Mike
20 Pugatch from HarbourVest here.

21 THE COURT: All right. Very good. I think we had
22 you testify once before in the Acis matter, if I'm not
23 mistaken. Maybe. Maybe not. Maybe I saw a video deposition.
24 I can't remember.

25 All right. So, we're going to let Mr. Pugatch sit in on

1 this. Anyone want to say anything about that? I consider him
2 a party representative, so I don't -- I don't think anyone
3 could invoke the Rule.

4 All right. Very good. Well, let's go forward if there
5 are no more housekeeping matters.

6 MR. MORRIS: Okay.

7 THE COURT: Mr. Morris?

8 MR. MORRIS: Thank you. Thank you very much, Your
9 Honor. John Morris; Pachulski Stang Ziehl & Jones; for the
10 Debtor.

11 It's a rather straightforward motion today. It's a motion
12 under Rule 9019, pursuant to which the Debtor requests the
13 Court's authority and approval to enter into a settlement
14 agreement with HarbourVest that will resolve a number of
15 claims that HarbourVest has filed against the Debtor.

16 What I -- the way I propose to proceed this morning, Your
17 Honor, is to give what I hope is an informative but relatively
18 brief opening statement. I'll defer to HarbourVest and its
19 counsel as to whether they want to make a presentation in
20 advance of the offer of evidence. Any objecting party, I
21 suppose, should then be given the opportunity to present their
22 case to the Court. Then the Debtor will call Jim Seery, the
23 Debtor's CEO and CRO. We will offer documents into evidence.
24 I would propose then that the objecting parties take the
25 opportunity to ask Mr. Seery any questions they'd like on the

1 matter.

2 After the Debtor rests, I think HarbourVest would like to
3 put Mr. Pugatch on the stand to offer some testimony on their
4 behalf. And I think that that will conclude the case. We can
5 finish up with some closing arguments as to what we believe
6 the evidence showed, but that's the way that I'd like to
7 proceed, if that's okay with the Court.

8 THE COURT: All right. That sounds fine.

9 OPENING STATEMENT ON BEHALF OF THE DEBTOR

10 MR. MORRIS: Okay. So, as I said, Your Honor, this
11 is a -- this should be a very straightforward motion under
12 Rule 9019. The standard is well-known to the Court. There
13 are four elements to a 9019 motion. The Debtor clearly has
14 the burden of proof on each one. And we easily meet that
15 burden, Your Honor.

16 The standard, just to be clear, the first part is that we
17 have to establish a probability of success, with due
18 consideration for uncertainty of law and fact. The second one
19 is the complexity, likely duration, expense and inconvenience
20 of the litigation. The third part of the test is the
21 paramount interest of creditors. And the fourth part of the
22 test is whether or not the proposed settlement was reached
23 after arm's-length negotiations.

24 The Debtor believes that it easily meets this standard,
25 and frankly, is a little bit frustrated that it's being forced

1 to incur the expense by Mr. Dondero in going through this
2 process.

3 A plain reading, a fair reading of the economics here
4 relative to the claim shows that this is a very reasonable
5 settlement. I don't need to go beyond that, Your Honor. I
6 don't even need to use the word reasonable. It surely meets
7 the lowest standard.

8 We've prepared a couple of demonstrative exhibits, Your
9 Honor. I'm going to use them with Mr. Seery. But I'd like to
10 just put one up on the screen now, if I may.

11 Ms. Canty, can you please put up Demonstrative Exhibit #3?

12 Demonstrative Exhibit #3 is an outline of the economics of
13 the settlement. It includes the various pieces, the
14 components that the parties have agreed to. And it shows, at
15 least from the Debtor's perspective, just what HarbourVest is
16 being given here.

17 Up on the screen is a demonstrative exhibit. It has
18 citations to the evidence that will be admitted by the Court.
19 The first line shows that HarbourVest will receive a \$45
20 million allowed general unsecured nonpriority claim. And that
21 -- that can be found at Debtor's Exhibit EE, Exhibit 1, at
22 Page 2.

23 That claim is discounted by the expected recovery that
24 general unsecured creditors are supposed to get. As of
25 November, in the liquidation analysis that was part of the

1 disclosure statement -- that's the citation in the footnote --
2 the Debtor believed that unsecured creditors were estimated to
3 recover approximately eighty-seven and a half cents on the
4 dollar. And so we just did the arithmetic there to get to the
5 net economic value of the proposed general unsecured claim.

6 And from that, we reduced \$22-1/2 million because that is
7 the net asset value of HarbourVest's interest in HCLOF, which,
8 pursuant to the settlement agreement, it will transfer back to
9 the Debtor, so that the net economic value is approximately
10 \$16.8 million.

11 You will hear testimony from Mr. Seery that this number
12 is, in fact, overstated, and it's overstated because, since
13 the time the disclosure statement was filed in November, a
14 number of events have occurred that will -- that have caused
15 the estimated recovery percentage to be reduced from
16 approximately 87-1/2 percent to something lower than that. We
17 don't have the exact number, Your Honor, but Mr. Seery will --
18 and the evidence will show that there's been more expenses,
19 that there's been some resolution of certain claims. There's
20 been some positive issues, too. But that number is probably
21 in the 70s somewhere.

22 And in any event, I think the point here is, Your Honor,
23 HarbourVest invested \$80 million in HCLOF, which was going to
24 participate in the investment in CLOs. They filed a claim for
25 \$300 million, through treble damages and other claims. But

1 the net economic impact of this is going to be somewhere
2 probably in between \$12 and \$14 million. I'll let Mr. Seery
3 give more precision to that. And it represents less than -- a
4 less than five percent recovery on the total claim.

5 And we think it's important for the Court to keep that in
6 mind. What are the economics here? Are we overpaying? Is
7 this an unreasonable settlement? And I think the evidence
8 will show that the Debtor is not, but that this settlement
9 that you see before you was the product of arm's length, and
10 I'm going to go in reverse order of the four-part test under
11 9019.

12 So, the last part is whether or not the settlement, the
13 proposed settlement was the product of arm's-length
14 negotiation. You'll hear lots of evidence that this
15 settlement that's up on the screen right now very much was the
16 product of arm's-length negotiation.

17 The third part of the test, Your Honor, is whether it
18 meets the paramount interest of creditors. You know,
19 regrettably, Mr. Dondero is the only purported creditor who is
20 objecting here. He may have done so through different
21 vehicles, but every objecting party here is a debtor [sic]
22 owned and controlled by Mr. Dondero. No other creditor -- not
23 the Creditors' Committee, UBS, Acis, Mr. Terry, Mr. Daugherty
24 -- nobody is objecting to this settlement except for Mr.
25 Dondero. And we believe that that highlights the Debtor's

1 ability to meet the third prong of the test, and that is these
2 are -- this settlement is in the paramount interest of
3 creditors.

4 Again, going in reverse, the second part of the test is
5 the complexity, duration, and expense of litigation. There
6 will be no disputed evidence that we meet -- the Debtor easily
7 meets this prong of the test. The evidence is going to show
8 that HarbourVest's claim is based on fraud, fraud in the
9 inducement, fraudulent statements and omissions, the kind of
10 case, Your Honor, that I'm sure you're familiar with that is
11 incredibly fact-intensive, that will be incredibly difficult
12 to navigate through. It will be prolonged, it will be
13 expensive, because you're necessarily relying on he said/she
14 said, basically. And so we're going to have to get testimony
15 from every person that spoke in connection with the events
16 leading up to the transaction. So we think the second prong
17 will be easily met, Your Honor.

18 And then the last prong -- the first prong, if you will --
19 is the likelihood of success on the merits. We think that the
20 settlement, the economic recovery that's up on the screen
21 here, which ultimately will be less than five percent of the
22 claimed amount, in and of itself shows that the settlement is
23 consistent with the Debtor's perception of its likely success
24 on the merits. I'm certain that HarbourVest disagrees, but
25 that's okay, we're here today and that's the Debtor's view,

1 and the Court is here to assess the Debtor's business judgment
2 and whether the Debtor has properly analyzed the issues and
3 gone through the process. And the evidence will show
4 conclusively that it will. That it has.

5 Mr. Seery will testify at some length as to the risks that
6 he saw. I think that you'll hear counsel for Mr. Dondero ask
7 both Mr. Seery and Mr. Pugatch a number of questions designed
8 to elicit testimony about this defense or that defense. And
9 it's a little -- it's a little ironic, Your Honor, because,
10 really, every defense that they're going to try to suggest to
11 the Court was a valid defense is a defense that the Debtor
12 considered. In fact, it's, you know, it's a little spooky,
13 how they've -- how they've been able to identify kind of the
14 arguments that the Debtor had already considered in the
15 prosecution of their objections here.

16 But be that as it may, the evidence will conclusively show
17 that the Debtor acted consistent with its fiduciary duties,
18 acted in the best interests of the Debtor's estate, acted
19 completely appropriately here in getting yet another very
20 solid achievement for the Debtor, leaving very few claims that
21 are disputed at this point, all but one of which I believe are
22 in the hands of Mr. Dondero.

23 So, that's what we think that the evidence will show.

24 I do want to express my appreciation to Mr. Kane for
25 reflecting on the arguments that we made with respect to the

1 ability of the Debtor to engage in the transfer or the
2 acquisition of the asset from HarbourVest. I would -- I would
3 respectfully request that we just enter into a short
4 stipulation on the record reflecting that the Debtor's
5 acquisition of HarbourVest's interests in HCLOF is compliant
6 with all of the applicable agreements between the parties.

7 And with that, Your Honor, I look forward to putting Mr.
8 Seery on the stand and presenting the Debtor's case.

9 THE COURT: All right. Other opening statements?

10 OPENING STATEMENT ON BEHALF OF CLO HOLDCO, LTD.

11 MR. KANE: Yes, Your Honor. Sorry. John Kane on
12 behalf of CLO Holdco.

13 In response to Mr. Morris, I'm not going to enter into a
14 stipulation on behalf of my client, but the Debtor is
15 compliant with all aspects of the contract. We withdrew our
16 objection, and we believe that's sufficient.

17 THE COURT: All right. Well, I'm content with that.
18 Other opening statements?

19 OPENING STATEMENT ON BEHALF OF HARBOURVEST

20 MS. WEISGERBER: Your Honor, Erica Weisgerber on
21 behalf of HarbourVest.

22 HarbourVest joins in Mr. Morris's comments in support of
23 the settlement, and we believe that the question of whether
24 the settlement between HarbourVest and the Debtor satisfies
25 the Rule 9019 standard is not even a close one.

1 Some Objectors have made arguments about the merits of
2 HarbourVest's claims, which is why we're here. As Your Honor
3 will hear this morning, HarbourVest has meaningful and
4 meritorious claims against Highland, but made the business
5 decision to avoid the time, expense, and inherent risk of
6 litigation in the interest of preserving value, both for
7 itself and for the estate.

8 Today, Michael Pugatch, a managing director of
9 HarbourVest, will testify before the Court. He'll explain
10 that HarbourVest claims against Highland arise out of certain
11 misrepresentations and omissions by Highland to HarbourVest in
12 connection with HarbourVest's purchase of an interest in
13 HCLOF, one of Highland's managed funds. Those
14 misrepresentations and omissions, as Your Honor will hear,
15 relate to Highland's litigation with its former employee,
16 Joshua Terry, and transfers that were conducted in 2017 to
17 strip Acis of value and prevent Mr. Terry from collecting on
18 an \$8 million judgment.

19 Mr. Pugatch will further explain that HarbourVest would
20 not have invested in HCLOF had it known the underlying facts
21 about those Acis transfers.

22 Mr. Pugatch will also testify that not only did
23 HarbourVest not know about those transfers, it learned about
24 those transfers when it was accused of orchestrating the
25 transfers itself in the Acis bankruptcy. Your Honor will hear

1 that the Acis trustee sought extensive discovery from
2 HarbourVest after numerous accusations that HarbourVest was
3 behind the transfers.

4 Mr. Pugatch will also testify that Highland charged legal
5 fees for itself and its affiliates to HCLOF, essentially
6 forcing HCLOF to fund the litigation involving the Acis
7 bankruptcy and Mr. Terry.

8 In total, HarbourVest's claims for damages are over a
9 hundred million dollars in investment-related losses, lost
10 profits, legal fees inappropriately charged to HCLOF, its own
11 legal fees. And that's before interest or trebling damages.

12 But HarbourVest stands ready to litigate its claims, but
13 following hard-fought and extensive negotiations with the
14 Debtors, the parties reached the settlement that's now before
15 the Court. Mr. Pugatch's testimony regarding the strong
16 factual bases for HarbourVest's claims against Highland and
17 its recoverable damages will further underscore the risks that
18 the Debtors faced if they chose to litigate these claims, and
19 why this settlement is fair, equitable, and in the best
20 interest of the estate.

21 THE COURT: All right. Thank you, Counsel.

22 Other opening statements?

23 OPENING STATEMENT ON BEHALF OF GET GOOD AND DUGABOY TRUSTS

24 MR. DRAPER: Your Honor, this is Douglas Draper on
25 behalf of one of the Objectors. I'd like to just make a few

1 comments with respect to what I've heard and what the Court is
2 going to hear.

3 The first issue I'd like to address is the comment by
4 counsel for the Debtor that no other party has objected. The
5 9019 motion is one of the issues that this Court has to rule
6 on, whether or not there was an objection or not. So the fact
7 that this may be -- bankruptcy is not a popularity contest and
8 not an issue of who votes for what and doesn't vote. This,
9 along with the 1129(a) tests, are clearly within your
10 province, and you need to listen carefully because you'll have
11 to make your own independent analysis whether my objection is
12 correct or incorrect.

13 Two other points I'd like to make that I think are very
14 salient. Number one is, if you look at the Debtor's
15 disclosure statement, it basically took the position that the
16 HarbourVest claim is of little or no value. And lo and
17 behold, thirty days later, there's a settlement that brings
18 about a significant recovery to HarbourVest. The timing is
19 interesting, and I think the Court needs to pay careful
20 attention to what transpired between the two dates.

21 And then the last point I'd like to make is, as you listen
22 to the evidence, and what I learned abundantly clear from
23 hearing the depositions, is that the claim of HarbourVest, if
24 there is a claim at all, is probably one hundred percent --
25 should be subordinated in that it appears to arise out of the

1 purchase or sale of a security. And, again, I would ask the
2 Court to listen carefully to this because that's what it
3 appears to be and that's what the evidence is going to show to
4 the Court.

5 THE COURT: All right. Mr. Draper, let me clarify
6 something I'm not sure if I heard you say or not. Were you
7 saying that the Court still needs to drill down on the issue
8 of whether the Debtor can acquire HarbourVest's interest in
9 HCLOF?

10 MR. DRAPER: No.

11 THE COURT: Okay. I was confused whether you were
12 saying I needed to take an independent look at that, now that
13 the objection has been withdrawn of Holdco. You are not
14 pressing that issue?

15 MR. DRAPER: No, I am not. Basically, I think it's
16 the fairness of the settlement. I think the transferability
17 of the interest is separate and apart from the fairness of the
18 settlement itself. I think the fairness -- the
19 transferability was a contractual issue between two parties
20 that the Court does not have to drill down on.

21 THE COURT: All right. I have another question for
22 you. I want to clarify your client's standing. Tell me --
23 I'm looking through a chart I printed out a while back. I
24 guess Dugaboy Investment Trust filed a couple of proofs of
25 claim; is that right?

1 MR. DRAPER: Yes.

2 THE COURT: Okay. What --

3 MR. DRAPER: And objections are pending.

4 THE COURT: Pardon?

5 MR. DRAPER: Objections to those claims are pending
6 before the Court, Your Honor, --

7 THE COURT: Okay.

8 MR. DRAPER: -- and have not been litigated.

9 THE COURT: And what about Get Good Trust?

10 MR. DRAPER: Get Good Trust has a proof of claim also
11 that objections are pending to. Pending.

12 THE COURT: Okay. I don't want to get too
13 sidetracked here, but I know standing was -- was mentioned as
14 a legal argument today. What is the basis for those proofs of
15 claim?

16 MR. DRAPER: The first one is, with respect to the
17 proof of claim for Dugaboy, there is an investment that
18 Dugaboy made that was then funneled, we believe, up to the
19 Debtor. And the -- the loan that exists, we believe is a
20 Debtor loan, as opposed to a loan to the entity that we made
21 the loans to.

22 And, again, it's a matter that the Court is going to hear.
23 The claim may or may not be allowed. It has not been
24 disallowed yet.

25 The second part to the Dugaboy ownership is we own an

1 interest in the Debtor. And so we are, in fact, a party in
2 interest.

3 THE COURT: Okay.

4 MR. DRAPER: It may be a small interest, but it is an
5 interest.

6 THE COURT: It has a limited partnership interest in
7 the Debtor?

8 MR. DRAPER: Yes.

9 THE COURT: Is that correct?

10 MR. DRAPER: Yes.

11 THE COURT: Okay. Well, I'll move forward. Thank
12 you.

13 Does that cover -- any other opening statements? I think
14 that covered everyone who was -- who filed some sort of
15 pleading today. No.

16 MR. WILSON: Your Honor, John Wilson on behalf of --

17 THE COURT: I'm sorry. I'm sorry.

18 MR. WILSON: -- Mr. Dondero.

19 THE COURT: I missed Mr. Dondero's counsel. I knew
20 we had visited at some point this morning. I just got
21 confused there. Go ahead, Mr. Wilson.

22 MR. WILSON: No problem, Your Honor. I was just
23 going to say that we will reserve our comments until after the
24 conclusion of the testimony.

25 THE COURT: All right. Very well.

1 Mr. Morris, you may call your first witness.

2 MR. MORRIS: Thank you, Your Honor. Before I do,
3 just two very, very quick points.

4 THE COURT: Okay.

5 MR. MORRIS: To be clear, Dugaboy's interest in the
6 Debtor is 0.1866 percent. Less than two-tenths of one
7 percent.

8 Secondly, the argument that Mr. Draper just made with
9 respect to subordination is one that appears in nobody's
10 papers. And, in fact, not only doesn't it appear in anybody's
11 papers, but Mr. Dondero, I believe, specifically took issue
12 with the fact that a portion of the consideration that
13 HarbourVest would receive would be on a subordinated basis,
14 and he would -- and I think he took the position there is no
15 basis to give them a subordinated claim.

16 So, I just wanted to point those items out to the Court,
17 not that I think either one makes a large difference today,
18 but I do want to deal with the facts.

19 THE COURT: Thank you.

20 MR. MORRIS: The Debtor would call -- you're welcome,
21 Your Honor. The Debtor calls Mr. James Seery.

22 THE COURT: All right. Mr. Seery, welcome back to
23 virtual court. If you could say, "Testing, one, two" so I can
24 see you and swear you in.

25 MR. SEERY: Testing, one, two.

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1 THE COURT: All right. I heard you but I'm not yet
2 seeing your video. Is your video turned on?

3 MR. SEERY: Video is on. Yes, Your Honor.

4 THE COURT: Okay. I see you now. Please raise your
5 right hand.

6 JAMES SEERY, DEBTOR'S WITNESS, SWORN

7 THE COURT: Thank you. Mr. Morris?

8 MR. MORRIS: Thank you, Your Honor.

9 DIRECT EXAMINATION

10 BY MR. MORRIS:

11 Q Good morning, Mr. Seery. Can you hear me?

12 A I can. Thank you, Mr. Morris.

13 Q Okay. Let's just cut to the chase here. Are you familiar
14 with HarbourVest's claims filed against the Debtor?

15 A I am, yes.

16 Q And did you personally review them?

17 A I did, yes.

18 Q Do you recall that over the summer the Debtor objected to
19 HarbourVest's claim?

20 A Yes, we did.

21 Q Why -- can you explain to the judge why Harbour -- why the
22 Debtor objected to HarbourVest's claim last summer?

23 A Sure. The HarbourVest claims, I believe there are about
24 six of them, initially were filed, and they were -- they were
25 relatively vague in terms of what the specifics of the claims

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1 were.

2 So, we saw the claims but didn't, frankly, pay a lot of
3 attention to the underlying transaction that was referred to
4 in the proofs of claim and the losses that HarbourVest had
5 claimed to suffer -- to suffer with respect to their purchase
6 of securities related to HCLOF and the damages caused by the
7 Acis case. So we filed a pretty pro forma objection. I
8 believe it was a simply stated objection that we didn't have
9 any record that there was anything in the Debtor's books and
10 records that they had a valid claim for any amount against the
11 Debtor.

12 Q Are you aware that HarbourVest subsequently filed a
13 response to the Debtor's objection to their claims?

14 A Yes. Yes, I am aware.

15 Q And did you familiarize yourself with that particular
16 response?

17 A I did indeed. It was a pretty extensive response, really
18 developing the full panoply of their claims, which included
19 claims for expenses relating to the Acis case, which
20 HarbourVest viewed as being improperly charged to HCLOF by its
21 manager, which is effectively Highland. Those expenses,
22 HarbourVest took the view, were excessive, had nothing to do
23 with the investment, and were simply a pursuit of a personal
24 vendetta against Mr. Terry and his interests by Mr. Dondero,
25 and using HCLOF's money to actually pursue those interests.

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1 In addition, and this was the first time we saw that,
2 HarbourVest brought forth its claims that it was entitled to
3 effectively rescind the transaction. And I say rescind the
4 transaction: In security parlance, they claim that they were
5 induced by fraud, I think as most are -- to enter into the
6 transaction.

7 As most are aware, the liability limitations in the OMs
8 and the exculpation in the documents are pretty broad, and
9 HarbourVest's position was that they weren't going to be
10 subject to those limitations because the actual transaction
11 that they entered into was a fraud on them, designed by Mr.
12 Dondero, Mr. Ellington, and the Highland team.

13 Q All right. Let's talk about your understanding, the
14 Debtor's understanding of the factual background to
15 HarbourVest's claim. What is your understanding of the
16 investment that HarbourVest made?

17 A Well, HarbourVest made an investment in the Highland CLO
18 business. The Highland CLO business was -- was Acis. And
19 effectively, the business had been separated, but in name
20 only. Acis was just a shell, with a few partners --
21 obviously, Mr. Terry as well -- but it was all Highland
22 personnel doing all the work.

23 And what they were trying to do with Acis was, in essence,
24 resuscitate a business that had been in a bit of a decline
25 from its pre-crisis heyday.

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1 They were looking to take additional outside capital.

2 They would -- they would pay down or take money out of the
3 transaction, Highland would, or ultimately Mr. Dondero, and
4 they would -- they would seek to invest in Acis CLOs,
5 Highland's 1.0 CLOs. And then with respect to the Acis CLOs,
6 and potentially new CLOs, but with the Acis CLOs, they'd seek
7 to reset those and capture what they thought would be an
8 opportunity in the market to -- to really use the assets that
9 were there, not have to gather assets in the warehouse but be
10 able to use those assets to reset them to market prices for
11 the liabilities and then make money on the equity.

12 Q Do you have an understanding --

13 A Then --

14 Q I'm sorry. Go ahead.

15 A Why don't I continue? So, the transaction, they found
16 HarbourVest as a potential investor, and the basis of the
17 transaction was that they would make an investment into Acis.

18 Shortly before the transaction, and while they were doing
19 diligence, Mr. Terry received his arbitration award. I
20 believe that was in October of 2017. The transaction with
21 HarbourVest closed in mid- to late November of 2017. But Mr.
22 Terry was not an integral part. Indeed, he wasn't going to be
23 a key man. He had been long gone from Highland by that time.

24 What the -- I think you asked me originally what the basis
25 of their claim was. The transaction went forward, and the

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1 basis of their claim is that they really were never -- nothing
2 was disclosed to them about the nature of the dispute with Mr.
3 Terry other than in the highest-level terms; the animosity
4 with respect to which that dispute was held by Highland and
5 potentially Mr. Terry; and really, how those costs would be
6 borne and risks be borne by the investment that they were
7 making.

8 That was, in essence, the transaction and the high-level
9 view of their claim.

10 Q Okay. Just a few very specific facts. Do you have an
11 understanding as to how much HarbourVest invested and what
12 they got in exchange for that investment?

13 A Yeah. HarbourVest invested in a couple tranches, and I
14 forget the exact dates, but approximately \$75 million
15 originally, and then they added another five. Some
16 distributions were made in the first half of 2018, putting
17 their net investment in the mid-seventies on the investment,
18 which now is worth about 22-1/2 million bucks.

19 Q And what percentage interest in HCLOF did HarbourVest
20 acquire, to the best of your knowledge?

21 A They have 49.98 percent of HCLOF. HCLOF, just to refresh
22 -- the Court is, I think, well aware of this, but to refresh,
23 is a Guernsey entity. Not -- not atypical for structures of
24 this type to use offshore jurisdictions and sell the
25 securities under -- at least to U.S. -- can't sell them to

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1 U.S. investors unless they qualify, and these are sold under
2 Reg S to -- to investors that otherwise qualify. And
3 HarbourVest was investing in that transaction through the
4 Guernsey structure.

5 Q And do you have an understanding as to who owned the 50-
6 plus percent of HCLOF that HarbourVest was not going to
7 acquire?

8 A Yeah. There's -- you can tell by the name. HCLOF is
9 Highland CLO Funding. This is a Highland vehicle. So
10 Highland owned and controlled the vehicle. The DAF, which is
11 -- which is Dondero-controlled trusts, have the -- 49 percent.
12 Highland has, I believe, around .63-65 percent directly. And
13 then Highland employees at the time who were involved in the
14 business owned another small percentage.

15 So the majority was going to be controlled by Highland
16 through its control of DAF and its control of the employees
17 that worked for it. HarbourVest would be a minority investor.

18 Q Okay. And I believe you testified that the investment was
19 made in mid-November; is that right?

20 A That's correct. I think it was the 15th, may have been
21 the 17th of November.

22 Q And do you recall when in October the Terry arbitration
23 award was rendered?

24 A It was about a month before. I think it was right around
25 the 20th, the 17th to the 20th. I may be slightly wrong on

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1 each of those dates.

2 Q Okay. What is your understanding as to what happened
3 after the issuance of the award that is the basis or at least
4 one of the bases for HarbourVest's claim?

5 A I don't think there's -- I don't think there's any
6 dispute. And there certainly are judicial findings. Dondero
7 and Highland went about stripping Acis of all of its assets.
8 So, remember that Acis is not a separate standalone company,
9 in any event. It's controlled and dominated completely by
10 Highland at the time. But it did have contracts. And those
11 contracts had value.

12 So the first idea was to strip out the management contract
13 and put it into a separate vehicle, which we called HCF
14 Advisor, which Highland still owns. The second piece was to
15 strip out some valuable assets, the risk retention piece,
16 which was a loan that in essence was equity that Highland had
17 put into Acis but structured as a loan, as many of the
18 transactions we'll see down the road are, in order to deal
19 with some -- avoid taxes in any way possible. And that
20 structure, that value moved value out of Acis for the express
21 purpose of trying to run, in essence, the Highland business
22 back in Highland.

23 Remember, as I said, Acis is just a Highland business
24 moved to a separate shell. When Mr. Terry got his arbitration
25 award against Acis and was seeking to enforce it, it was

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1 pretty straightforward, let's take all the assets -- Dondero
2 scheme -- let's take all the assets and move them back into
3 Highland so Terry can't get anything.

4 Q And how does that scheme relate to the HarbourVest claim,
5 to the best of your knowledge?

6 A Well, HarbourVest -- HarbourVest's position is that they
7 invested in Acis and -- and whether Acis was called Acis or
8 called Highland, it doesn't really matter; there were valuable
9 assets in the -- in the entity that they were going to be
10 investing in through the equity in these CLOs and some of the
11 debt securities in those CLOs.

12 And then the stripping out and the fraudulent conveyances
13 out of Acis caused them damages because that's what left the
14 damage to Mr. Terry.

15 The quick math on Acis, by the way, is Acis has probably
16 lost, total damages, 175 million bucks. And that's pretty
17 easy. DAF lost 50. HarbourVest lost 50. Fifteen million of
18 fees charged to HCLOF. Another five million of fees, at
19 least, incurred by Mr. Terry. Ten million that went to Mr.
20 Terry, 15 to Highland fees, another five, plus Mr. Terry's
21 settlement in this case, over eight million bucks.

22 So HarbourVest's position, which, on a factual basis, you
23 know, is problematic for the estate, is, wait a second, we
24 invested in this vehicle with Highland. That was supposed to
25 invest in Highland CLOs. They were called Acis, but they were

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1 Highland CLOs. And then you went about causing tremendous
2 damage to that vehicle that we ultimately were investing in,
3 and then charge us for the pleasure.

4 Q You used the phrase earlier "OM," I believe.

5 A Offering memorandum.

6 Q Offering memorandum? Can you just explain to the Court
7 your understanding of what an offering memorandum is?

8 A Typically, under U.S. law, and foreign jurisdictions have
9 similar laws, you have to have a document that explains the
10 securities that you're selling. And it goes into extreme
11 detail about the securities and the risks related to those
12 securities.

13 And the idea is not to have a document that tells you
14 whether it's a good investment or a bad investment, but it's a
15 document that discloses to the potential investor all of the
16 risks with respect to that security or related to the
17 investment over the duration of the security. It doesn't
18 predict the future, but it's supposed to make sure that it
19 gives you a very clean view of the past and a very clean view
20 of what the facts from the past are and how they would
21 implicate the future of the investment.

22 Q And in the course of its diligence, did the Debtor have an
23 opportunity to review the offering memorandum in the context
24 of the claims that were being asserted by HarbourVest?

25 A Oh, absolutely. It was originally effectively -- it's an

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1 HCLOF offering memorandum. But as I said, HCLOF was managed
2 and controlled by Highland, and Highland originally prepared
3 it. And then, of course, in connection with -- with this
4 dispute and these claims, we reviewed it, both myself and my
5 legal team.

6 Q All right.

7 MR. MORRIS: Your Honor, the offering memorandum is
8 on the Debtor's exhibit list, and I think this is an
9 appropriate time to move into evidence Debtor's Exhibits A
10 through EE, all of which appear at **Docket No. 1732**.

11 THE COURT: 1732?

12 MR. MORRIS: It's the Debtor's Second Amended Witness
13 and Exhibit List.

14 THE COURT: All right. Any objection to admission of
15 A through EE?

16 MR. DRAPER: Douglas Draper. No objection, Your
17 Honor.

18 THE COURT: All right. Mr. --

19 MR. MORRIS: May I proceed?

20 THE COURT: Yeah. Mr. Wilson, did you want to
21 confirm no objection?

22 (Echoing.)

23 THE COURT: All right. Hearing no objection,
24 Debtor's A through EE are admitted.

25 (Debtor's Exhibits A through EE are received into

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1 evidence.)

2 THE COURT: Go ahead, Mr. Morris.

3 MR. MORRIS: Thank you, Your Honor. The offering
4 memorandum itself is one of the documents that we filed under
5 seal, and we did so at the request of counsel to HCLOF. But
6 HCLOF has consented to our sharing up on the screen certain
7 very limited provisions of the document, without waiving the
8 request that the agreement otherwise be maintained under seal.

9 THE COURT: All right.

10 MR. MORRIS: So may I proceed on that basis, Your
11 Honor?

12 THE COURT: You may. Uh-huh.

13 MR. MORRIS: Okay. Ms. Canty, can you please put up
14 on the screen Demonstrative Exhibit #1? Okay. Can we just --
15 is there a way to just expand that just a bit, Ms. Canty?
16 Thank you very much. And if we could just scroll it up?
17 Thank you very much. Perfect.

18 Okay. So, Your Honor, this, as the footnote says, is an
19 excerpt from the offering memorandum that can be found at
20 Debtor's Exhibit AA. Double A. And this particular portion
21 of the offering memorandum is at Page 35.

22 THE COURT: Okay.

23 BY MR. MORRIS:

24 Q Mr. Seery, have you seen this portion of the offering
25 memorandum before?

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1 A Yes, I have. But before I continue, I just -- I should
2 have checked. Are you able to hear me clearly? Am I speaking
3 too quickly or am I cutting out? I just want to make sure.
4 I'm using a different set of audio today.

5 THE COURT: All right.

6 MR. MORRIS: That's fine.

7 THE COURT: I hear you very well.

8 MR. MORRIS: Yeah.

9 THE COURT: So I think we're good right now. Thank
10 you.

11 THE WITNESS: Yeah. Thank you, Your Honor. I was
12 just checking.

13 THE COURT: Okay.

14 THE WITNESS: In response to your question, Mr.
15 Morris, yes, I have seen this before.

16 BY MR. MORRIS:

17 Q Okay. And can you -- did you form a view in doing the due
18 diligence as to the adequacy of this disclosure?

19 A Yes, I did.

20 Q Can you share your -- or share with Judge Jernigan the
21 Debtor's view as to the adequacy of this disclosure concerning
22 the litigation between Highland and Acis?

23 A With respect to the litigation between Highland and Acis,
24 or, really, between Acis, Highland, and Highland's principals
25 and Acis's principal, totally inadequate. The disclosure here

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1 is very high-level. And if there were no other litigation
2 going on, it might serve to suffice. It basically says, In
3 our business, because we invest in distressed loans, there's a
4 lot of litigation around distressed investments, and that's
5 what we have. And then it says, We've talked with the
6 investor about other things and we're -- we think that's
7 enough.

8 Q Is there anything in this portion or anywhere in the
9 offering memorandum that you're aware of that disclosed to
10 HarbourVest that in the weeks leading up to the investment
11 Highland was engaged in the fraudulent transfer of assets away
12 from Acis?

13 A No. And I apologize, because I think it's -- I've
14 conflated two provisions. This one only deals with the very
15 high-level nature of the business. It doesn't give any
16 indication that there's any material litigation going on
17 elsewhere with respect to Acis.

18 I believe there's another provision that says, We -- we
19 have talked to -- oh, here -- I'm sorry. It is here.
20 Shareholders have had an opportunity to discuss with Highland
21 to their satisfaction all litigation matters against Highland
22 and its affiliates unrelated to its distressed business.

23 That, in my opinion, is wholly inadequate.

24 Q Okay.

25 MR. MORRIS: And let's put up -- actually, let's just

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1 move on.

2 BY MR. MORRIS:

3 Q Let's go to the settlement itself.

4 MR. MORRIS: Can we put back up Demonstrative Exhibit
5 #3?

6 BY MR. MORRIS:

7 Q Mr. Seery, can you see that?

8 A Yes, I can.

9 Q Does this generally describe the net economic recovery of
10 the HarbourVest settlement based on estimated recoveries for
11 general unsecured creditors as of November 2020?

12 A As of November 2020, it does. And you alluded to this in
13 your opening, but to be clear, the numbers have shifted.
14 Costs have increased. The -- so the -- effectively, the
15 numerator, in terms of distributable value that we estimate,
16 is lower. And settlements, the denominator, have also
17 increased. So the claims against the estate that have been
18 recognized have increased. And that, that probably takes it
19 down closer, in our view, to about seventy cents distribution,
20 a number closer to nine to ten million, maybe a little bit
21 less.

22 However, there's also some additional value that we -- we
23 believe we will recover directly. There are north of \$150
24 million of intercompany notes owed by Dondero entities to
25 Highland. A number of those notes are demand notes, and we've

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1 already made demand. We'll be initiating actions next week.
2 So those are -- those value, we believe, we'll recover
3 directly from Mr. Dondero and from related entities.

4 To the extent those related entities don't have value, we
5 feel very strongly about our ability to pierce the veil and
6 reach in to Mr. Dondero. And then his assets, either his
7 personal assets or the assets that he claims are in trusts.

8 In addition, there are a significant amount of notes that
9 were extended in two -- I believe around 2017, for no
10 consideration. Those notes were demand notes, I believe, and
11 then extended it 30 years. So they have 2047 maturities.
12 Those were probably going to have to be subject to fraudulent
13 conveyance type actions or -- or some sort of sale at a very
14 discounted value because third parties wouldn't want long-
15 dated notes with Mr. Dondero as the counterparty for very much
16 money.

17 Those -- they defaulted on some of those parties, so we
18 effectively turned them into demand notes. We've accelerated,
19 and we'll be bringing actions against those entities next week
20 as well.

21 So I think (garbled) have come up, so I apologize. One
22 way of saying I think the sixteen and a half is a bit high
23 right now, based upon what we know, but the value is going to
24 be higher than our estimate a couple of weeks ago because we
25 do believe we'll be able to recover on the notes.

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1 One additional caveat, just to be fully transparent here.
2 This summary with the 16.8 doesn't include the subordinated
3 piece of this -- of this claim and our resolution. That --
4 recovery of that piece will be dependent upon the success of
5 litigations.

6 In order for the subordinated piece to get paid, all
7 general unsecured claims in Class -- Classes 7 and 8 will have
8 to be paid in full. And then -- and then the subordinated
9 class in Class 9, which we believe UBS will have a piece of,
10 and HarbourVest will have a piece of by this settlement, those
11 will be able to recover, and those will be based upon other
12 claims of action against -- primarily against related parties.

13 Q And then that last point, is that what's reflected in
14 Footnote 3 on this page?

15 A That's correct, yes.

16 Q Okay. And just for the record, there's a reduction in
17 value of \$22-1/2 million. Do you see that?

18 A Yes.

19 Q And can you just explain to the Court what that is and how
20 that value was arrived at?

21 A Yes. I may be getting slightly ahead of you, Mr. Morris.
22 But to give the Court a reflection of the transaction -- and
23 we can go into the details in a moment -- ultimately, the
24 transaction we structured we think is very fair both
25 economically to the Debtor, but there -- there is some

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1 complexity to it to satisfy some of HarbourVest's concerns
2 that they be able to effectively rescind the transaction, at
3 least from an optical perspective. Value was important, but
4 optics were as well. The twenty-two and a half is the current
5 -- actually, the November value of HCL -- the HarbourVest
6 interests in HCLOF. And that's based upon Highland's
7 evaluation of those interests.

8 So we do believe that that is a fair value as of that
9 date. It has not gone down. It hasn't gone up explosively,
10 either, but it hasn't gone down. We think that's good, real
11 value. That value is in the Acis CLOs, the equity in those
12 CLOs, which is 2 through 6, that we -- we will be working with
13 the HCLOF folks to get Mr. Terry to monetize those assets and
14 those longer-dated CLOs.

15 In addition, I think it's 85 percent of the equity in Acis
16 7 -- Acis 7 is managed by Highland -- that is also beyond its
17 reinvestment period. And in talking to the directors -- and
18 they're new directors, and I'll get to that in a minute, for
19 HCLOF -- they'll seek to push Highland, which is the
20 reorganized Highland, to monetize that asset, with due regard
21 to fair value.

22 In addition, Harbour -- HCLOF owned a significant amount
23 of the preferred or equity pieces, if you will, in the
24 Highland CLO, 1.0 CLOs. As we've talked about, those are not
25 really CLOs. Those are effectively closed-end funds with

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1 illiquid assets, primarily illiquid assets in them. We've had
2 some dispute in front of the Court about selling the liquid
3 assets in them, which we can go into it another time. Those
4 are being liquidated in the market at fair value.

5 But HCLOF also is a significant holder of those preferred
6 shares, and those directors would -- have indicated to me that
7 they would like to see those interests also monetized.

8 Q All right. Let's shift gears for a moment to talk about
9 the diligence that the Debtor did before entering into this
10 agreement. Can you just describe for the Court generally the
11 diligence that was undertaken at your direction?

12 A Well, when we first received the reply to our objection,
13 we dug into that reply and the specifics in it very
14 aggressively. So we reviewed all of the underlying documents
15 related to the original transaction. We discussed with
16 counsel the legal basis for the HarbourVest claims. We
17 interviewed our own HCMLP employees who were involved in the
18 transaction and tested their recollection, specifically around
19 who dealt with HarbourVest, who had the discussions with
20 HarbourVest, what was disclosed to HarbourVest with respect to
21 the Terry dispute and the Acis litigation.

22 We also had done, as I think the Court is well aware from
23 prior 9019 testimony, extensive work around the transfers and
24 the issues related to Acis. So we were familiar with their
25 impact on HCLOF.

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1 We also did extensive work valuing the remaining HCLOF
2 interests to get a good feel of not only how much HarbourVest
3 originally invested, but how much they actually lost in this
4 transaction. And as I said, their original investment was
5 around, in total, in two tranches, about \$80 million, of which
6 they got about \$5 million back, and they've lost \$22 million.
7 So it -- I mean, remaining with \$22 million. So they've lost,
8 you know, in excess of \$50 million.

9 Q Do you recall whether the Debtor reviewed and analyzed all
10 of the documents that were cited in HarbourVest's response to
11 the Debtor's objection to the HarbourVest proofs of claim?

12 A Yeah. I think -- I forget, to be honest, which -- exactly
13 what documents were in there. But we went through their
14 objection with a fine-toothed comb, not only with respect to
15 the issues related to the Acis case, but also their references
16 to Guernsey law, other U.S. law, any of the documents between
17 the parties. And obviously, as I mentioned before, the
18 offering memorandum.

19 MR. MORRIS: Your Honor, I would just note for the
20 record that Debtor's Exhibits I through X are all of the
21 documents that are cited in HarbourVest's response to the
22 Debtor's objection to the HarbourVest proofs of claim, and
23 those are the documents that Mr. Seery just referred to.

24 THE COURT: All right.

25 MR. MORRIS: Just, they're in evidence now, and I

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1 just wanted the Court to understand why they're in evidence.

2 THE COURT: Okay. Thank you.

3 MR. MORRIS: You're welcome.

4 BY MR. MORRIS:

5 Q Let's talk about the Debtor and whether or not it had or
6 has any viable defenses. Did the Debtor form any views as to
7 whether or not it had any defenses to the HarbourVest claims?

8 A Yes, we did.

9 Q Can you describe for the Court the defenses that were
10 reviewed and analyzed by the Debtor?

11 A Yeah. I think we -- we had very significant defenses.
12 So, first and foremost, with respect to the original proof of
13 claim, as I mentioned earlier, it alluded to the expenses and
14 the overcharge. And I think with respect to the 15 million of
15 fees that were charged to HCLOF by Highland, we didn't have a
16 lot of defenses to that claim.

17 It's pretty clear, by any fair view of the Acis case, that
18 HCLOF, as the investor in the Acis CLOs and the Highland CLOs,
19 had no real responsibility for fighting with Acis and Josh
20 Terry and shouldn't have been charged those fees. I don't --
21 I don't think there's a legitimate investor that would
22 actually think that that was an appropriate amount to be
23 charged to a fund.

24 However, the claim was not as broad -- the proof of claim
25 was not as fulsome in terms of discussing and only vaguely

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1 referred to other damages. So we did -- we did, as a
2 threshold matter, think about whether we could argue that it
3 was time-barred because they had not met their obligations to
4 fully disclose under the proof of claim.

5 Secondly, we considered the defenses to the overall claim
6 of fraudulent inducement. Our perspective was that if we
7 could stop the claim of fraudulent inducement, the damages
8 would likely be limited to the 15 and maybe some -- some other
9 damages. With respect to the 15, again, the problem that we
10 had when we got past -- past motions for summary judgment is
11 the factual predicate for our defense was going to be that we
12 divulged these things to HarbourVest and that they did not
13 reasonably -- it was -- reasonably rely on some failure to
14 divulge because they're a sophisticated investor.

15 The problem with that defense is that our witnesses, which
16 really would have primarily been Mr. Dondero and Mr.
17 Ellington, and one other employee who runs the CLO business,
18 Mr. Covitz, would not be pretty good. They've been -- two of
19 them have been in front of this Court and they're not viewed
20 favorably and their testimony would be challenged and
21 potentially suspect.

22 So that gave us a real focus on trying to make sure that
23 we could, if we had to litigate, that we would litigate around
24 the fraudulent inducement.

25 As I said, reasonable reliance, what was disclosed, lack

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1 of digging into the public record, because you don't have to
2 go far on Google to find "fraud" within two words of
3 "Highland," and the tremendous, you know, litigious nature of
4 Highland. You know, even at that point, when this investment
5 was made, aside from Mr. Terry's arbitration, which by that
6 point, at least by the time (inaudible) was public, there was,
7 you know, significant public disclosure around the Credit
8 Strat and the litigation, the Crusader litigation, the UBS
9 litigation, the, gosh knows, the Daugherty litigation.

10 So our defense was going to be that you should have
11 figured this out, you're a sophisticated investor, and you
12 should have been able to figure out that there was significant
13 risk that, with respect to Mr. Terry, that Mr. Dondero would
14 not stop litigating and that those costs would put significant
15 risk on the investment.

16 The problem with that, as I mentioned earlier, is that the
17 OM is wholly deficient. If you have a typical risk factor in
18 the offering memorandum, you would have disclosed that there
19 was a litigation with Mr. Terry, a former partner in the
20 business, and that the Debtor had no intention of settling it.
21 There was no intention of settling. That litigation would go
22 on. It could go on for years and it could result in
23 bankruptcy or attachments and other risks to the business, and
24 that the investor should be fully aware that the Offeror does
25 not intend to be involved in any -- or the manager, in any

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1 settlement with Mr. Terry, and the fact it undermined the
2 investment. That wasn't there.

3 But that was our preliminary focus, to try to stop fraud
4 in the inducement. And then we -- we had specific facts
5 related to that. You know, once they knew about the
6 bankruptcy in HarbourVest of -- I'm sorry, of Acis,
7 HarbourVest made a second funding, which was there was a -- it
8 was an initial \$75 million draw, and then a second, I believe,
9 about a \$5 million draw, which was in -- I believe in
10 February. And they made it without -- without objection, and
11 that was after the commencement of the bankruptcy.

12 In addition, they were -- they were active in the
13 bankruptcy, so the -- some of the things that happened in the
14 bankruptcy, there were many opportunities to settle that case,
15 from our examination, all of which were turned down to -- by
16 Mr. Dondero. But you don't see HarbourVest pounding the table
17 to settle, either, either with respect to the Oaktree
18 transaction or any other transaction.

19 Now, HarbourVest's defense to that is, well, we were
20 taking advice and all of our information from Highland, and we
21 were getting that information directly from senior folks at
22 Highland why -- what the value was and why we shouldn't do
23 those things. We thought that that would mitigate some of the
24 arguments that -- some of the damages that we might have, I'm
25 sorry, if we -- if we lost.

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1 But the focus at that point, you know, our legal strategy,
2 was can we stop HarbourVest at the very forefront to say,
3 You've got to come into the factual realm and get out of the
4 fraud in the inducement realm. And then the defenses and the
5 exculpations and the liability limitations in the documents
6 would also come into play.

7 So that -- those are some of the defenses that we focused
8 on and our analytical thinking around them.

9 Q So, if the Debtor had viable defenses, why is it settling?

10 A Well, this is a significant claim. And we -- we looked at
11 it with respect to both the impact on the case, but, really,
12 the merits of the claim.

13 As I said, there's really little dispute that the legal
14 fees should not have been charged to HarbourVest. We think
15 based upon the testimony in Acis, the suspect credibility of
16 those who would have been our witnesses, and the experience in
17 Acis that the Court has had in terms of the completely hell-
18 bent on litigation, it would be hard for anyone to justifiably
19 defend those fees being charged. So, as an initial matter, we
20 had exposure there.

21 In addition, if HarbourVest got by our defense of -- was
22 able, for example, to claim fraud in the inducement, then we
23 were open to significant damages.

24 We really didn't put much value, frankly, on the RICO part
25 of it. We think that that's waved around often to show treble

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1 damages. Although in this case certainly somebody could lay
2 out the predicate acts and put forth a RICO-type argument, we
3 just didn't think that that had real merit in this commercial
4 dispute, even with a fraud claim.

5 But even without the trebling of the damages, there's no
6 dispute that HarbourVest lost more than \$50 million in this
7 investment. You know, we -- we thought about that risk as
8 well.

9 In addition, because the case would really be fact-based,
10 even if we had a high degree of confidence based upon our
11 discussions with our employees and the factual testimony, it
12 was going to be expensive to litigate this case, and time-
13 consuming.

14 And so we looked at the economic value, the potential
15 risks, and the actual value that we were giving up, and found
16 this to be an extremely, extremely reasonable settlement.

17 Importantly, and I think what drove it, you -- one of --
18 one of the things that drove it is another one of our defenses
19 on why, notwithstanding their -- what they held out as
20 meritorious claims, I don't think HarbourVest really wanted to
21 publicly litigate this claim. And we were aggressive in our
22 discussions with HarbourVest of how we would litigate it,
23 which would be quite publicly.

24 Now, that may or may not be fair, but that does put risk
25 on the counterparty. And so I think that helped drive the

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1 settlement.

2 In addition, the structure of the settlement we think is
3 extremely favorable to the Debtor and to the estate because,
4 rather than taking the full claim and putting it into a senior
5 unsecured position, we have bifurcated it. We did think about
6 whether this was a claim that could be subordinated under 510.
7 There won't be any arguments, I would be surprised if there's
8 arguments today that we didn't actually give to the Highland
9 employees who have given them to Mr. Dondero's respective
10 counsel.

11 We did structure it in a way that we thought gave
12 HarbourVest the opportunity to effectively claim a rescission,
13 even though that's not really what it is, and then be able to
14 claim that their recovery is based on the bankruptcy, which it
15 is, but not really dilute all the other stakeholders in the
16 case.

17 (Pause.)

18 THE COURT: Mr. Morris? Anything else?

19 MR. MORRIS: I can hear you, Your Honor.

20 THE COURT: Okay.

21 MR. MORRIS: I can hear you.

22 THE COURT: Okay. Now can you --

23 MR. MORRIS: I got cut off from Mr. Seery for a
24 moment.

25 THE COURT: Okay.

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1 BY MR. MORRIS:

2 Q Okay. I appreciate that. Are you done giving the
3 Debtor's basis for entering into this settlement, Mr. Seery,
4 if you can hear me?

5 A I think so, but I think as the Court has probably seen, I
6 can go on.

7 Q Yes.

8 A So I will try to be -- I'll try to be more concise. But
9 this was a -- this was a difficult settlement. We felt good
10 about our defenses. Felt that we could -- we could try them.
11 But it would be extremely expensive, time-consuming, and there
12 would be a lot of risk. And settling at a level which we
13 believe is actually below the damages that were clearly caused
14 only by the fees was a -- was a -- is a -- is a very
15 reasonable settlement.

16 Q Okay. Let's just talk about the process by which we got
17 to the settlement. Do you recall generally when the
18 settlement negotiations have -- were commenced?

19 A I believe it was -- was late summer, early -- early fall.

20 Q Okay. Before I move on, I just want to go back to the
21 Acis matter that you were talking about, one last issue. Do
22 you know how, if at all, the injunction that was entered in
23 the Acis bankruptcy impacted or related to the HarbourVest
24 claims?

25 A Yeah. I -- yes, I do. And I believe it -- it did. I

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1 think there's an argument, and we analyzed it thoroughly, that
2 the injunction effectively caused a lot of the damages.
3 Because if you look at the values of the equity that
4 HarbourVest had, the -- and HCLOF had in the CLOs, it went
5 down dramatically after the Trustee in the Acis case took over
6 and then subsequently, when the case was reorganized and Mr.
7 Terry took over, you know, with Brigade as the sub-advisor.

8 Now, that would -- you know, we would -- we could
9 certainly attempt to throw, in our defense, the causation at
10 Mr. Terry's feet or at Mr. Phelan's feet. HarbourVest's
11 retort is that none of this would have occurred but for the
12 burn-it-down litigation that Mr. Dondero engaged in with
13 Highland.

14 In addition, in Mr. Terry's defense, you know, he did try
15 multiple times with HCLOF, tried to petition, if you will, the
16 HCLOF entity to -- and directors, former directors, to reset
17 the CLOs to make them more economically viable, based upon the
18 current level of asset returns versus the debt costs in the
19 CLOs. And that was rejected by the HCLOF and the Debtor as
20 the controlling party of HCLOF. So, we thought about those
21 risks.

22 You know, similarly, the economic values in Acis 7 went
23 down pretty significantly from that date as well. So I think
24 there's -- there are some defenses, but that's really Mr.
25 Terry's issue, not our issue. So we thought about those

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1 issues, we analyzed them, and we certainly did all the work
2 around month-to-month reductions in NAVs and how different
3 events in the Acis case might have -- might have caused those
4 and was that some sort of break from the original
5 transgression that HarbourVest claims, which was the
6 fraudulent inducement.

7 Q Do you recall that in November HarbourVest's motion under
8 3018 was scheduled to be heard?

9 A Yes.

10 Q And can you just tell the Court your understanding of what
11 the 3018 motion was about?

12 A Well, the 3018 motion was going to be on voting. And we
13 took the view that it really was not -- it shouldn't have been
14 that big an issue and HarbourVest should have been content
15 with just taking their actual losses of roughly a \$50-\$60
16 million claim for voting purposes and then we would move on.

17 HarbourVest was very insistent that they have a \$300
18 million claim, because they took the position -- and with
19 extensive documentation; not only the pleadings they filed,
20 but also detailed decks that were prepared by their counsel,
21 which they had presented to us on the merits of their claim --
22 that they were going to litigate for -- the 3018 and for the
23 full \$300 million value.

24 And that became the genesis, if you will, of the
25 negotiations to settle.

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1 So, we started talking about the 3018. It was very
2 contentious. My apologies to Ms. Weisgerber and her counsel,
3 her partners, because it was a significant and contentious
4 negotiating call. But the reasons for that I think were that
5 -- their insistence on litigating the 3018 and our view that
6 this was just, you know, another -- another of a series of
7 delays and costs in this case that we really were hoping to
8 avoid.

9 That led to Mr. Pugatch and I stepping away from counsel,
10 no offense to counsel, you know, ours and his, to begin
11 negotiations around the potential for a settlement. First, it
12 started with a 3018, and then, you know, argued that we would,
13 if we got past the 3018, we were going to litigate this,
14 because we effectively had -- thought we could get everyone
15 else done at -- in and around that time. And I think we were
16 also probably a little bit optimistic about UBS at that time
17 and the mediation, which subsequently we have settled. But
18 that was the genesis of those settlements.

19 Q And how did the structure, how did the Debtor and
20 HarbourVest derive at the structure whereby there is a general
21 unsecured claim, there is a subordinated piece, and there's
22 the takeback of the HCLOF interest?

23 A Well, as I outlined, we -- we aggressively set forth our
24 various defenses. Their position was that they -- they should
25 never have been in this transaction before. And they --

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1 HarbourVest is, in essence, a fund of funds, and they have
2 investors, and it certainly wouldn't be their, I'm sure, the
3 best-performing asset in their portfolio, to have made this
4 investment and lost \$50 million over this period of time. So
5 they felt strongly that they should never have been in this
6 investment, and but for the failure to disclose and the
7 improper disclosures, they would not have been in this
8 investment.

9 So, optically, getting out of it was important to them,
10 and that led to our idea and construction of a subordinated
11 claim and the transfer of the HCLOF interests to the estate.

12 Importantly, the HCLOF interests, as I mentioned, are --
13 the investments are in the Acis CLOs controlled by Acis and
14 Mr. Terry. The reorganized Acis. As well as the 1.0 CLOs and
15 the Acis 7.

16 So we were keenly focused on, if we were going to get that
17 interest, would we then have the majority control in HCLOF,
18 which we will, and would we be able to drive the recoveries,
19 as opposed to what Highland typically does in these
20 investments is use other people's money, drive down the value,
21 and then try to buy back the interest on the cheap.

22 Q Just in terms of timing, because I think there was a
23 suggestion in one of the openings that there was something
24 untoward about the timing here: At the time the liquidation
25 analysis was prepared on November 24th, had the Debtor reached

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1 any agreement in principle with HarbourVest?

2 A If we had, it would have been reflected, so I don't -- I
3 don't think we were agreed by then. I don't recall the
4 specific dates, but if we had, it would have -- it would have
5 been reflected.

6 Q If I can refresh your recollection that the motion was
7 filed on December 24th, does that help form your understanding
8 or refresh your recollection that there was no agreement in
9 principle on November 24th?

10 A Yeah. Well, I'm quite sure there was no agreement in
11 principle or we would have reflected it minimally by a
12 footnote. There's -- there's no chance. It's a material
13 reduction in the claims pool that we were previously telling
14 people that, at least for purposes of distribution, like UBS
15 and a couple others we said we thought we would get to zero
16 on. So we didn't calculate in that amount. So I'm quite sure
17 we didn't have a deal when we filed the disclosure statement.

18 In terms of the timing, anyone who's done this business
19 for any degree of time knows that the crucible of bankruptcy
20 brings people to the settlement when they see something
21 happening in the case, and not before. I think HarbourVest
22 looked at our -- this is my supposition -- HarbourVest looked
23 at our plan, our ability to get this done, our settlement with
24 Redeemer, our settlement with Mr. Terry and Acis, and saw that
25 this plan was coming together, and if they didn't think about

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1 the settlement, they were going to think about not only the
2 risks that we laid forth for them with respect our defenses,
3 but also the opportunity to litigate with the Claimant Trustee
4 over a long period of time, which couldn't have been
5 particularly appetizing.

6 Q Can you describe for the Court the role played by the
7 independent board of Strand, the general partner of the
8 Debtor, in analyzing and participating in the approval
9 process?

10 A Yes. I think, as the Court is aware and I've testified
11 before, Mr. Russell Nelms and Mr. John Dubel are fellow
12 independent directors with me, appointed pursuant to the Court
13 order. They are kept abreast of every detail, and -- along
14 the way, not just in a summary form at the end. We have
15 reviewed and analyzed collectively each of the issues. Mr.
16 Dubel has extensive experience in these types of litigation
17 matters. Obviously, Mr. Nelms, from his -- both his practice
18 and his time on the bench, has a keen insight into how to
19 resolve and what the risks and benefits are from settling
20 litigation. So I consult them every step of the way.

21 Q And as part of this process, did the Debtor reach out to
22 the directors of HCLOF?

23 A Yes, we did. So, we reached out and we've had several
24 conversations on video chats with the directors. The
25 directors of HCLOF are two new gentlemen, Mr. Richard Boleat

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

In Re: Highland Capital Management, L.P § Case No. **19-34054-SGJ11**

Charitable DAF Fund, L.P et al

Appellant

§

vs.

§

21-03067

Highland Capital Management, L.P

§

Appellee

§

3:23-CV-01503-B

[167] Order granting Defendant Highland Capital Management, L.P.'s Renewed motion to dismiss adversary proceeding (related document # [122](#)) Entered on 6/25/2023.

Volume 16

APPELLANT RECORD

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

In re:	§ Chapter 11
	§
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§ Case No. 19-34054-sgj11
	§
Debtor.	§
	§
CHARITABLE DAF FUND, L.P. AND CLO	§
HOLDCO, LTD., DIRECTLY AND DERIVATIVELY	§
	§
Plaintiffs,	§ Adversary Proceeding No.
	§
vs.	§ 21-03067-sgj11
	§
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§
HIGHLAND HCF ADVISOR, LTD., AND	§
HIGHLAND CLO FUNDING LTD., NOMINALLY	§
	§
Defendant.	§
	§

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**APPELLANTS' SECOND AMENDED STATEMENT OF ISSUES
AND DESIGNATION OF RECORD ON APPEAL**

Pursuant to Rules 8009(a)(1)(A)-(B) and (a)(4) of the Federal Rules of Bankruptcy Procedure, The Charitable DAF Fund, L.P. and CLO Holdco, Ltd. ("Appellants") hereby designate the following items to be included in the record and identify the following issues with respect to

their appeal of the Order Granting Defendant Highland Capital Management, L.P.'s "Renewed Motion to Dismiss Complaint" [Adv. Proc. Doc. No. 122] which was entered by the United States Bankruptcy Court for the Northern District of Texas on June 25, 2023.

I. STATEMENT OF ISSUES TO BE PRESENTED ON APPEAL

- Whether the Bankruptcy Court had jurisdiction to rule on Highland Capital Management L.P.'s Renewed Motion to Dismiss Complaint
- Whether the Renewed Motion to Dismiss Complaint was improperly granted

II. DESIGNATION OF ITEMS TO BE INCLUDED IN THE RECORD

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1. Notice of Appeal for Bankruptcy Case Adversary Proceeding No. 21-03067-sgj11 [Doc. 168].

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2. The judgment, order, or decree appealed from: Memorandum Opinion and Order Granting Defendant Highland Capital Management, L.P.'s "Renewed Motion to Dismiss Complaint" [Adv. Proc. Doc. No. 122] [Doc. 167].

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3. Docket Sheet kept by the Bankruptcy Clerk.

4. Documents listed below and as described in the Docket Sheet for Bankruptcy Case Proceeding No. 21-03067-sgj.

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No.	Date Filed	Docket No.	Description/Document Text
1	9/29/21	1	(36 pgs; 3 docs) Adversary case 21-03067. ORDER REFERRING CASE NUMBER 21-CV-0842-B from U.S District Court for the Northern District of Texas, Dallas Division to U.S. Bankruptcy Court for Northern District of Texas, Dallas Division. Complaint by Charitable DAF Fund, LP, CLO Holdco, Ltd. against Highland Capital Management, LP, Highland HCF Advisor Ltd., Highland CLO Funding, Ltd. Fee Amount \$350 (Attachments: # 1 Original Complaint # 2 Docket Sheet from 3:20-cv-0842-B) Nature(s) of suit: 02 (Other (e.g. other actions that would have been brought in state court if unrelated to bankruptcy)). (Okafor, M.)
2	9/29/21	2	(1 pg) Supplemental Document (cover sheet) by CLO Holdco Ltd., Charitable DAF Fund (RE: related document(s)1 Adversary case 21-03067) [ORIGINALLY FILED IN 21-CV-0842 AS #2 ON 04/13/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)

Vol. 2 000139 000232 000239 000270 Thru Vol. 6	3	9/29/21	6	(93 pgs; 6 docs) MOTION for Leave to File First Amended Complaint filed by CLO Holdco Ltd., Charitable DAF Fund LP (Attachments: # 1 Exh 1_First Amended Complaint # 2 Exh 2_Motion for Authorization to Retain James Seery # 3 Exh 3_Order Approving Retention of James Seery # 4 Exh 4_Order Approving Settlement # 5 Proposed Order) (Bridges, Jonathan) (Entered: 04/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #6 ON 04/19/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
	4	9/29/21	22	(7 pgs; 2 docs) MOTION for an Order to Enforce the Order of Reference filed by Highland Capital Management LP. (Attachments: # 1 Exhibit(s) A--Proposed Order) (Annable, Zachery) Modified text on 5/20/2021 (mjr). (Entered: 05/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #22 ON 05/19/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
	5	9/29/21	23	(31 pgs) Brief/Memorandum in Support filed by Highland Capital Management LP re: 22 MOTION for an Order to Enforce the Order of Reference. (Annable, Zachery) Modified text on 5/20/2021 (mjr).(Entered: 05/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #23 ON 05/19/2021 IN U.S.DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
	6	9/29/21	24	(926 pgs; 29 docs) Appendix in Support filed by Highland Capital Management LP re: 23 Brief/Memorandum in Support. (Attachments: # 1 Appendix 1 # 2 Appendix 2 # 3 Appendix 3 # 4 Appendix 4 # 5 Appendix 5 # 6 Appendix 6 # 7 Appendix 7 # 8 Appendix 8 # 9 Appendix 9 # 10 Appendix10 # 11 Appendix 11 # 12 Appendix 12 # 13 Appendix 13 # 14 Appendix 14 # 15 Appendix 15 # 16 Appendix 16 # 17 Appendix 17 # 18 Appendix 18 # 19 Appendix 19 # 20 Appendix 20 # 21 Appendix 21# 22 Appendix 22 # 23 Appendix 23 # 24 Appendix 24 # 25 Appendix 25 # 26 Appendix 26 # 27 Appendix 27 # 28 Appendix 28) (Annable, Zachery) Modified linkage and text on 5/20/2021 (mjr). (Entered:05/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #24 ON 05/19/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
Vol. 7 001196	7	9/29/21	26	(7 pgs; 2 docs) MOTION to Dismiss Complaint filed by Highland Capital Management LP (Attachments: # 1 Exhibit(s) A--Proposed Order) (Annable, Zachery) Modified text on 5/28/2021 (jmg).(Entered: 05/27/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #26 ON 05/27/2021 IN U.S.DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)

Vol. 7 001203 thru Vol. 8	8	9/29/21	28	(508 pgs; 14 docs) Appendix in Support filed by Highland Capital Management LP (Attachments: # 1 Appendix 1 # 2 Appendix 2 # 3 Appendix 3 # 4 Appendix 4 # 5 Appendix 5 # 6 Appendix 6 # 7 Appendix 7 # 8 Appendix 8 # 9 Appendix 9 # 10 Appendix 10 # 11 Appendix 11 # 12 Appendix 12 # 13 Appendix 13) (Annable, Zachery) (Entered: 05/27/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #28 ON 05/27/2021 IN U.S. DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
Vol. 9 001711	9	9/29/21	33	(1 pg) Amended Civil Cover Sheet by CLO Holdco Ltd, Charitable DAF Fund LP. Amendment to 2 Supplemental Document. (Sbaiti, Mazin) Modified text on 6/23/2021 (mjr). (Entered: 06/22/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #33 ON 06/22/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001712	10	9/29/21	36	(26 pgs) RESPONSE filed by CLO Holdco Ltd, Charitable DAF Fund LP re: 22 MOTION for an Order to Enforce the Order of Reference (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #36 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001738	11	9/29/21	37	(22 pgs) Appendix in Support filed by CLO Holdco Ltd, Charitable DAF Fund LP re 36 Response/Objection Response to Motion for an Order to Enforce the Order of Reference (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #37 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001760	12	9/29/21	38	(45 pgs) RESPONSE filed by CLO Holdco Ltd, Charitable DAF Fund LP re: 26 MOTION to Dismiss (Defendant Highland Capital Management, L.P.'s Motion to Dismiss Complaint) (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #38 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001805	13	9/29/21	39	(88 pgs) Appendix in Support filed by CLO Holdco Ltd, Charitable DAF Fund LP re 38 Response/Objection to Defendant Highland Capital Management, L.P.'s Motion to Dismiss Complaint (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #39 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001893	14	9/29/21	42	(12 pgs) REPLY filed by Highland Capital Management LP re: 22 MOTION for an Order to Enforce the Order of Reference (Annable, Zachery) (Entered: 07/13/2021) [ORIGINALLY FILED IN 21-CV-0842AS #42 ON 07/13/2021 IN U.S.

			DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
VOL. 9	15	9/29/21	43 (852 pgs) Appendix in Support filed by Highland Capital Management LP re: 42 Reply. (Annable, Zachery) Modified text on 7/14/2021 (mjr). (Entered: 07/13/2021) [ORIGINALLY FILED IN 21-CV-0842AS #43 ON 07/13/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001905 thru Vol. 13	16	9/29/21	45 (21 pgs) REPLY filed by Highland Capital Management LP re: 26 MOTION to Dismiss (Defendant Highland Capital Management, L.P.'s Motion to Dismiss Complaint) (Annable, Zachery) (Entered: 07/13/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #44 ON 07/13/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002757	17	9/29/21	57 (7 pgs; 2 docs) MOTION to Dismiss and Joinder in Motion to Dismiss of Highland Capital Management, L.P. filed by Highland CLO Funding Ltd. (Attachments: # 1 Proposed Order) Attorney Paul R Bessette added to party Highland CLO Funding Ltd (pty:dft) (Bessette, Paul) (Entered: 08/30/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #57 ON 08/30/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002778	18	9/29/23	58 (12 pgs) Brief/Memorandum in Support filed by Highland CLO Funding Ltd. re 57 MOTION to Dismiss and Joinder in Motion to Dismiss of Highland Capital Management, L.P. (Bessette, Paul) (Entered: 08/30/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #58 ON 08/30/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002785	19	9/29/23	59 (80 pgs; 5 docs) Appendix in Support filed by Highland CLO Funding Ltd re 58 Brief/Memorandum in Support of Motion (Attachments: # 1 Exhibit(s) A - Jackson v Dear # 2 Exhibit(s) B - Prudential Assurance v. Newman # 3 Exhibit(s) C - Harbourvest Settlement Agreement # 4 Exhibit(s) D - Boleat Declaration) (Bessette, Paul) (Entered: 08/30/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #59 ON 08/30/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002797	20	9/29/21	64 (1 pg) ORDER OF REFERENCE: Pursuant to 28 U.S.C. § 157 and this District's Miscellaneous Order No. 33, this case is hereby REFERRED to Judge Stacey G. C. Jernigan of the United States Bankruptcy Court for the Northern District of Texas, Dallas Division, to be adjudicated as a matter related to the consolidated Chapter 11 Bankruptcy of Highland Capital Management, L.P., Chapter 11 Case No.19-34054. (Ordered by Judge Jane J. Boyle
002877			

Vol. 14 002878 002883 thru Vol. 16				on 9/20/2021) (svc) (Entered: 09/20/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #64 ON 09/20/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
	21	10/19/21	66	(5 pgs) Notice of hearing filed by Defendant Highland Capital Management, LP (RE: related document(s) 26 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP, 47 Motion to strike document filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 55 Motion to abate filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) Hearing to be held on 11/23/2021 at 09:30 AM at https://us-courts.webex.com/meet/jerniga for 26 and for 47 and for 55, (Annable, Zachery)
	22	11/22/21	71	(509 pgs; 2 docs) Witness and Exhibit List <i>for Hearing on November 23, 2021</i> filed by Defendant Highland Capital Management, LP (RE: related document(s) 26 Motion to dismiss adversary proceeding). (Attachments: # 1 Exhibits 1-13) (Hayward, Melissa)
Vol. 17 003392 003394 003583 003585 003611	23	11/22/21	72	(2 pgs) Witness List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 26 Motion to dismiss adversary proceeding, 47 Motion to strike (related document(s): 43 Document), 55 Motion to abate (related document(s) 1 Complaint), 69 Motion to abate <i>Plaintiffs' Amended Motion to Stay All Proceedings</i> (related document(s) 55 Motion to abate (related document(s) 1 Complaint))). (Sbaiti, Mazin)
	24	11/22/21	73	(189 pgs; 4 docs) Exhibit List <i>for November 23, 2021 hearing</i> filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 47 Motion to strike (related document(s): 43 Document), 55 Motion to abate (related document(s) 1 Complaint)). (Attachments: # 1 Exhibit 1_Defendant's Memorandum of Law in Support of Motion for Reconsideration # 2 Exhibit 2_Highland Memorandum in Support of Motion to Dismiss # 3 Exhibit 3_Order (I) Confirming Fifth Amended Plan of Reorganization of Highland) (Sbaiti, Mazin)
	25	12/7/21	80	(2 pgs) Order granting Highland CLO Funding, Ltd.'s motion to dismiss adversary as a party with prejudice (related document 57) Entered on 12/7/2021. (Okafor, Marcey) Modified text on 3/11/2022 (Okafor, Marcey).
	26	3/11/22	99	(26 pgs) Memorandum of Opinion and order granting motion to dismiss the adversary proceeding (RE: related document(s) 26 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP). Entered on 3/11/2022 (Okafor, Marcey)
	27	3/11/22	100	(26 pgs) Order granting motion to dismiss adversary proceeding with prejudice (related document #26) Entered on 3/11/2022. (Okafor, Marcey)

Vol. 18 003637	28	3/21/22	104	(29 pgs) Notice of appeal. Fee Amount \$298 filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 100 Order on motion to dismiss adversary proceeding). Appellant Designation due by 04/4/2022. (Sbaiti, Mazin)
003666	29	5/26/22	120	(177 pgs; 2 docs) Support/supplemental document <i>Motion to Supplement Appellate Record</i> filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 111 Appellant designation). (Attachments: # 1 Amended Transcript of January 14, 2021 Hearing) (Sbaiti, Mazin)
003843	30	6/9/22	121	(1 pg) DISTRICT COURT Order: Case 3:22-00695-B is hereby transferred to the docket of the Honorable Judge Jane J. Boyle for consolidation with The Charitable DAF Fund LP, et al. v. Highland Capital Management LP, Case No. 3:21-cv-3129-N. Judge Karen Gren Scholer no longer assigned to case.(RE: related document(s) 86 Notice of appeal filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 104 Notice of appeal filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Entered on 6/9/2022 (Whitaker, Sheniqua) (Entered: 06/10/2022)
003844	31	10/24/22	122	(7 pgs) Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP (Annable, Zachery)
003851	32	10/14/22	123	(31 pgs) Brief in support filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Annable, Zachery)
Vol. 19 003882 Thru Vol 20	33	10/14/22	124	(513 pgs; 15 docs) Support/supplemental document (<i>Appendix in Support of Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7 # 8 Exhibit 8 # 9 Exhibit 9 # 10 Exhibit 10 # 11 Exhibit 11 # 12 Exhibit 12 # 13 Exhibit 13 # 14 Exhibit 14) (Annable, Zachery)
Vol. 21 004395	34	10/27/22	126	(5 pgs) Notice of hearing (<i>Notice of Hearing and Briefing Schedule on Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP). Hearing to be held on 12/8/2022 at 09:30 AM at https://us-courts.webex.com/meet/jerniga for 122. (Annable, Zachery)

Vol. 21 004400 004410 004442 Thru Vol. 22	35	11/18/22	128	(10 pgs) Motion for withdrawal of reference. Fee amount \$188, filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (Sbaiti, Mazin)
	36	11/18/22	129	(32 pgs) Response opposed to (related document(s): 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP) filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Sbaiti, Mazin)
	37	11/18/22	130	(254 pgs; 2 docs) Response opposed to (related document(s): 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP) filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Attachments: # 1 Appendix) (Sbaiti, Mazin)
Vol. 22 004696 004717 004732 004737 004742	38	9/2/22	131	(21 pgs) DISTRICT COURT MEMORANDUM OPINION AND ORDER: The Court REVERSES and REMANDS the bankruptcy court's Motion to Dismiss Order and AFFIRMS the bankruptcy courts Motion to Stay Order. re: appeal on Civil Action number: Case 3:22-00695-B consolidated with 3:21-CV-3129-B, (RE: related document(s) 81 Order on motion to abate, 100 Order on motion to dismiss adversary proceeding). Entered on 9/2/2022 (Whitaker, Sheniqua) (Entered: 11/29/2022)
	39	12/2/22	133	(15 pgs) Reply to (related document(s): 129 Response filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 130 Response filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) filed by Defendant Highland Capital Management, LP. (Annable, Zachery)
	40	12/7/22	135	(5 pgs) Notice of hearing filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP). Hearing to be held on 1/25/2023 at 01:30 PM at https://us-courts.webex.com/meet/jerniga for 122, (Annable, Zachery)
	41	12/7/22	136	(5 pgs) Notice of hearing filed by Defendant Highland Capital Management, LP (RE: related document(s) 128 Motion for withdrawal of reference filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Status Conference to be held on 1/25/2023 at 01:30 PM at https://us-courts.webex.com/meet/jerniga . (Annable, Zachery).
	42	12/9/22	138	(3 pgs) Response opposed to (related document(s): 128 Motion for withdrawal of reference. Fee amount \$188, filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) filed by Defendant Highland Capital Management, LP. (Annable, Zachery)

Vol. 22 004745	43	12/9/22	139	(25 pgs) Brief in support filed by Defendant Highland Capital Management, LP (RE: related document(s) 138 Response). (Annable, Zachery)
Vol. 23 004770	44	12/9/22	140	(280 pgs; 8 docs) Support/supplemental document (<i>Appendix in Support of Highland Capital Management, L.P.'s Response to Renewed Motion to Withdraw the Reference</i>) filed by Defendant Highland Capital Management, LP (RE: related document(s) 138 Response). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7) (Annable, Zachery)
Vol. 24 005050	45	12/16/22	144	(6 pgs) Reply to (related document(s): 138 Response filed by Defendant Highland Capital Management, LP) filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Sbaiti, Mazin)
005056 Thru Vol. 25.	46	1/23/23	145	(514 pgs; 15 docs) Witness and Exhibit List filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7 # 8 Exhibit 8 # 9 Exhibit 9 # 10 Exhibit 10 # 11 Exhibit 11 # 12 Exhibit 12 # 13 Exhibit 13 # 14 Exhibit 14) (Annable, Zachery)
Vol. 26 005570	47	1/23/23	146	(280 pgs; 8 docs) Witness and Exhibit List filed by Defendant Highland Capital Management, LP (RE: related document(s) 128 Motion for withdrawal of reference. Fee amount \$188.). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7) (Annable, Zachery)
Vol. 27 005850	48	1/23/23	147	(221 pgs; 7 docs) Witness and Exhibit List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Attachments: # 1 Exhibit 1_Excerpts from July 14, 2020 Hearing Transcript # 2 Exhibit 2_HCLOF Members Agreement Relating to the Company # 3 Exhibit 3_HarbourVest Settlement Agreement # 4 Exhibit 4_Order Approving Debtor's Settlement with HarbourVest # 5 Exhibit 5_HCLOF Offering # 6 Exhibit 6 Amended and Restated Investment Advisory Agreement) (Sbaiti, Mazin)
006071	49	1/23/23	148	(3 pgs) Witness and Exhibit List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 128 Motion for withdrawal of reference. Fee amount \$188.). (Phillips, Louis)
Vol. 28 006074	50	1/25/23	150	(56 pgs; 2 docs) Amended Witness and Exhibit List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 147 List (witness/exhibit/generic), 149 List (witness/exhibit/generic)). (Attachments: # 1 Exh 7_Testimony of Mark Patrick at June 8, 2021 hearing) (Sbaiti, Mazin)

Vol. 28 006130	51	1/25/23	152	(3 pgs) Notice of Appearance and Request for Notice by Louis M. Phillips filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Phillips, Louis)
	52	1/25/23	154	(1 pg) Court admitted exhibits date of hearing January 25, 2023 (RE: related document(s) 128 Motion for withdrawal of reference, filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) (COURT ADMITTED DEFENDANT'S EXHIBITS #1, #2, #3, #4, #5 & #6 OFFERED BY ATTY GREG DEMO). (Edmond, Michael) (Entered: 01/27/2023)
Vol. 32 006925 006942 006960	53	2/6/23	158	Report and recommendation to the U.S. District Court by U.S. Bankruptcy Judge. (RE: related document(s) 128 Motion for withdrawal of reference filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Entered on 2/6/2023 (Okafor, Marcey)
	54	2/6/23	161	(18 pgs) DISTRICT COURT Notice of transmission of report and recommendation in re: renewed motion to withdraw reference. Civil Case # 3:22-cv-02802-S. (RE: related document(s) 158 Report and recommendation to the U.S. District Court by U.S. Bankruptcy Judge. (RE: related document(s) 128 Motion for withdrawal of reference filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Entered on 2/6/2023) (Whitaker, Sheniqua)
	55	4/3/23	165	(1 pg) DISTRICT COURT ORDER: The Court GRANTS the 11 Joint Motion to Transfer Proceeding and Consolidate Before Original Court and the above-numbered case (3:22-cv-02802-S) is transferred to the docket of the Honorable Judge Jane Boyle: Civil case 3:21-cv-00842-B (order referring case). (RE: related document(s) 1 Complaint filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 143 Notice of transmission of motion to withdraw reference). Entered on 4/3/2023 (Whitaker, Sheniqua) Modified on 4/10/2023 (Whitaker, Sheniqua). (Entered: 04/10/2023)

TRANSCRIPTS

006961	56	11/24/21	78	(104 pgs) Transcript regarding Hearing Held 11-23-2021 RE: Motion Hearing. THIS TRANSCRIPT WILL BE MADE ELECTRONICALLY AVAILABLE TO THE GENERAL PUBLIC 90 DAYS AFTER THE DATE OF FILING. TRANSCRIPT RELEASE DATE IS 02/22/2022. Until that time the transcript may be viewed at the Clerk's Office or a copy may be obtained from the official court transcriber. Court Reporter/Transcriber Liberty Transcripts/Dipti Patel, Telephone number 847-848-4907. (RE: related document(s) 75 Hearing held on 11/23/2021. (RE: related document(s) 55 MOTION to Stay filed by CLO Holdco Ltd, Charitable DAF Fund LP (Sbaiti, Mazin) (Entered: 08/26/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #55 ON 08/26/2021 IN U.S.
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			<p>DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)) (Appearances: J. Pomerantz and J. Morris for Highland Defendants; J. Jordan and P. Bessett for HCLOF; M. Sbaiti for Plaintiffs. Nonevidentiary hearing. Motion denied. Mr. Pomerantz to upload order.), 76 Hearing held on 11/23/2021. (RE: related document(s) 47 Motion to strike 43 Appendix in support filed by CLO Holdco, Ltd., Charitable DAF Fund, LP (Bridges, Jonathan) Modified text on 7/16/2021 (mjr). (Entered: 07/15/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #47 ON 07/15/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)) (Appearances: J. Pomerantz and J. Morris for Highland Defendants; J. Jordan and P. Bessett for HCLOF; M. Sbaiti for Plaintiffs. Nonevidentiary hearing. Motion denied (Plaintiffs acknowledged complained-of Appendices it did not relate to Motion to Dismiss). Mr. Pomerantz to upload order.)). Transcript to be made available to the public on 02/22/2022. (Patel, Dipti)</p>
57	2/21/23	164	<p>164 (112 pgs) Transcript regarding Hearing Held 1/25/23 RE: HEARING ON DEFENDANT HIGHLAND CAPITAL MANAGEMENT L.P.'S RENEWED MOTION TO DISMISS COMPLAINT (122) AND STATUS CONFERENCE RE: MOTION FOR WITHDRAWAL OF REFERENCE FILED BY PLAINTIFF CLO HOLDCO, LTD., PLAINTIFF CHARITABLE DAF FUND, LP (128). THIS TRANSCRIPT WILL BE MADE ELECTRONICALLY AVAILABLE TO THE GENERAL PUBLIC 90 DAYS AFTER THE DATE OF FILING. TRANSCRIPT RELEASE DATE IS 05/22/2023. Until that time the transcript may be viewed at the Clerk's Office or a copy may be obtained from the official court transcriber. Court Reporter/Transcriber Dipti Patel, Telephone number 847-848-4907. (RE: related document(s) 155 Hearing held on 1/25/2023. (RE: related document(s) 122 Motion to dismiss adversary proceeding, (Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint) filed by Defendant Highland Capital Management, LP filed by Defendant Highland Capital Management, LP) (Appearances: J. Morris and G. Demo for Movants; L. Phillips and M. Sbaiti for Plaintiffs. Evidentiary hearing (appendices). Court took matter under advisement.), 156 Hearing held on 1/25/2023. (RE: related document(s) 128 Motion for withdrawal of reference. Fee amount \$188, filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) (Appearances: J. Morris and G. Demo for Movants; L. Phillips and M. Sbaiti for Plaintiffs. Evidentiary hearing (appendices). Court announced it will recommend denial to District Court. Court is working on Report & Recommendation.)). Transcript to be made available to the public on 05/22/2023. (Patel, Dipti)</p>

Dated: July 14, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was filed electronically through the Court's ECF system, which provides notice to all parties of interest, on this 14th day of July, 2023.

/s/ Mazin A. Sbaiti

Mazin A. Sbaiti

Seery - Direct

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1 and Mr. Dicky Burwood. They are extremely professional. They
2 are exceptionally well-informed. They are truly careful, and
3 I would say very experienced professional not only directors,
4 but experienced in -- in these matters, both in respect of
5 structured finance as well as these types of vehicles and
6 litigation.

7 They were appointed by the old directors, Scott and
8 Bestwick, and they have been in control. They have outside
9 counsel, which is King & Spalding in the U.S. They have
10 Guernsey counsel. They have accountants and professional
11 advisors, and are being, in my opinion, exceptionally careful.
12 I've got -- very quickly developed a lot of respect for them,
13 and we consulted with them on this settlement and how it would
14 work.

15 They've been very clear that they represent HCLOF and they
16 work for the benefit of the equity, whomever owns it, and
17 taking a view that they would like to see these assets
18 monetized swiftly, with due regard to value, for the benefit
19 of the equity.

20 Q And is it your understanding that the directors of HCLOF
21 approved of this transaction?

22 A They -- I don't know that their approval was required.
23 It's really -- there are a number of hoops to jump through
24 under the documentation, including opinion of outside counsel
25 that we received from WilmerHale in terms of the effectiveness

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Seery - Direct

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1 of the transfer under the documents. We had a negotiation
2 with -- with those directors, and making sure that we did
3 everything correct -- correctly, excuse me -- with respect to
4 the requirements for the transfer under the documents. And
5 they've indicated their support and acknowledgement that we're
6 doing it correctly.

7 I don't know if it's fair to say they approved it. I'd
8 just have to go check the documents. But they certainly
9 support it. And I think they generally support our position
10 with respect to how to move forward with the assets.

11 Q I appreciate that. I guess I meant approval with a small
12 a and not a capital A.

13 You mentioned WilmerHale. Who do they represent in all of
14 this?

15 A WilmerHale is the Debtor's outside corporate counsel, in
16 particular with respect to the fund issues that we don't
17 handle in-house. We have significant support for fund issues
18 from the expertise of Mr. Surgent, who's been the CCO, and he
19 is also a lawyer, with respect to, you know, some of the
20 difficult fund issues that Highland has. But when we use
21 outside counsel, we use WilmerHale for that, and they've been
22 -- they've been exceptional.

23 Q Okay. Just the last two points that were made in Mr.
24 Dondero's objection, I believe. Did the Debtor overpay in
25 this settlement in order to gain the support of HarbourVest in

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Seery - Direct

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1 connection with its -- with the Debtor's attempt to get its
2 plan confirmed?

3 A Not in any way. My -- I believe the settlement is
4 extremely reasonable. As I testified, it's -- it's less than
5 the -- the actual value going out, depending on unless there's
6 successful litigation, and there well could be, is less than
7 on a pro forma basis the fees that were taken and charged to
8 HCLOF. We didn't do this for votes. We will have Class 2,
9 Class 7, Class 8, and Class 9. So I don't think that's a --
10 there's no vote purchasing, I think you called it. No, not at
11 all.

12 Q Yeah. Well, on that topic, I think the phrase that was
13 used was gerrymandering. Are you aware of the argument that's
14 been made that the subordinated claim was dropped in there in
15 order to gerrymander a positive vote for the impaired class of
16 Class 9, I believe?

17 A In a word, I would say that's preposterous. The -- as I
18 said, we have a number of classes that will vote for the plan.
19 The plan is -- the plan is a monetization plan. And if -- if
20 the creditors determine that they don't want to pursue this
21 plan, we'll go forward with another -- we'll try to get
22 another plan. We tried to have a grand bargain plan. We
23 tried to have a pot plan, as I've testified previously. I'm
24 quite certain that I've done more work on that than anyone
25 else, including Mr. Dondero and anybody who works for him.

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Seery - Direct

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1 And he hasn't been willing to do that.

2 This is a -- this is a plan that's come together. We
3 think it's going to be in the best interests of the estate.
4 That'll be confirmation next week. Or two weeks, I guess.
5 But I don't see how this is any way related -- this settlement
6 is not any way related to the voting on that -- on that -- on
7 that plan.

8 Q Just to put the finest point on it, is the Debtor relying
9 on Class 9 to be the impaired consenting class?

10 A No. I think -- I think what I've -- as I said, I believe
11 we already have the votes in Class -- I think it's 2 or 3, 7,
12 8, and -- and 9 will vote in favor as well. So that won't be
13 an issue.

14 MR. MORRIS: Your Honor, I have no further questions
15 of Mr. Seery.

16 THE COURT: All right. Pass the witness. I'll ask
17 HarbourVest counsel first: Do you have any questions of Mr.
18 Seery?

19 MS. WEISGERBER: No, Your Honor.

20 THE COURT: All right. Thank you.

21 What about cross-examination? Mr. Dondero's counsel?

22 CROSS-EXAMINATION

23 BY MR. WILSON:

24 Q Mr. Seery, how are you doing today?

25 A I'm well, thank you.

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1 Q I'm John Wilson, and I represent Jim Dondero. I have a
2 few questions for you today.

3 Now, the HarbourVest proof of claims were filed on April
4 8th, 2020; is that your recollection?

5 A I believe that's correct. I don't recall the specific
6 date.

7 Q Okay. And do you know when you first became aware of the
8 HarbourVest claims?

9 A I believe it was early in the summer when we filed the
10 omnibus objection. It may have been in late spring, shortly
11 after that. I don't recall the specific date of the filing.

12 Q And before the time of the filing of the omnibus
13 objection, did Highland educate itself regarding the
14 HarbourVest proof of claims?

15 A I'm sorry, could you say that again? I didn't quite
16 understand it.

17 Q Before the omnibus objection was filed, did HarbourVest --
18 I'm sorry, did Highland educate itself on the HarbourVest
19 proof of claims?

20 A Not especially, no.

21 Q Okay. And -- but at some point, Highland did investigate
22 those proofs of claim, correct?

23 A That's correct.

24 Q And when would you -- when do you recall that that
25 investigation began?

1 A I don't recall the date, but the triggering event was
2 HarbourVest's response to our omnibus objection.

3 Q Okay. And that would have been filed September 11th of
4 2020?

5 A I'll take your representation. I don't -- I don't recall
6 the specific date.

7 Q Okay. And so when you began to investigate the
8 HarbourVest claims, what was your initial reaction?

9 A My initial reaction was that the -- the larger claims that
10 they were asserting -- the fraud in the inducement, the RICO
11 -- that those claims were, in my view, attorney-made and that
12 when we dug in and did the work, we saw that HarbourVest
13 clearly lost north of \$50 million on the investment. We had
14 just started to uncover the fee issue and saw the risk we had
15 there.

16 But I thought the bulk of those claims were attorney-made.
17 Clever, but attorney-made, as opposed to what I would think
18 are more legitimate. And so we started to develop our
19 defenses around that.

20 Q And was your initial reaction that the HarbourVest claims
21 were largely worthless?

22 A I think with respect to the claim around the fees, I
23 believed there was significant risk. With respect to the
24 other claims, I thought our defenses would make them
25 worthless, yes.

1 Q And did you ever represent to any party that the
2 HarbourVest claim was worth, at most, \$5 million?

3 A I think I represented often, including to HarbourVest,
4 that it was worth nothing. I don't recall if I specifically
5 said \$5 million. \$5 million would have been a nominal amount
6 to -- which is litigation costs. So it may -- it may have
7 been in my models that I put in that as a settlement amount,
8 but I -- I thought that there were valid and good defenses to
9 those larger claims.

10 Q And you recognize that HarbourVest was a large,
11 sophisticated investor, correct?

12 A Yes. I think they manage north of -- right around a
13 hundred billion dollars.

14 Q And you recognize that HarbourVest routinely structured
15 complex customized investments, correct?

16 A I believe that -- I don't know the intricate part of their
17 businesses, but as a fund of funds who does creative
18 investments, I think that they do do quite a bit of that.
19 This, I believe, was their first investment in the CLO space.

20 Q And it was not -- or I should say, you did not believe
21 that HarbourVest was simply a passive investor in HCLOF,
22 correct?

23 A I don't think that that's true, no.

24 Q You don't -- you don't believe that you denied their claim
25 to be a passive investor?

1 A Oh, I think -- I'm sure that in defense of their claims I
2 would argue that they were -- they were more than a passive
3 investor. But it was pretty clear when you look at the
4 structure of what they invested that there was an intent that
5 they be passive on their part. They didn't take a majority
6 interest.

7 In fact, Highland made it clear in the structure of the
8 deal that they couldn't -- it would be hard for them to get a
9 majority interest because Highland entities would control that
10 and Dondero-controlled entities or individuals would control
11 the majority.

12 I think that they -- they had hoped to be a passive
13 investor.

14 Q But was it not your position that HarbourVest was actually
15 an active, involved investor?

16 A I think our defense was going to be that they knew exactly
17 what was going on, that they participated, that they were
18 active, and that, indeed, that they were in and around some of
19 the subsequent issues in the Acis case.

20 Q And you understood that HarbourVest played a material role
21 in the various outcomes in the Acis bankruptcy case, correct?

22 A I don't believe that to be correct, no.

23 Q Have you ever made that representation to anyone before?

24 A Not -- not that I recall.

25 Q Well, do you recall giving statements to a reporter named

1 Syed Khaderi?

2 A I've never spoken to a reporter named Syed Khaderi in my
3 life.

4 Q Well, did you participate in the preparation of statements
5 to be given to Syed Khaderi?

6 A I've never heard of Syed Khaderi, nor have I participated
7 in any preparation of statements. I don't know who that is.

8 MR. WILSON: All right. I'm going to have Bryan
9 Assink put on the screen a document.

10 And Bryan, can you go to Page 7? Bottom of -- the top of
11 Page 7. Well, actually, before you do that, go to the very
12 top of the document.

13 BY MR. WILSON:

14 Q Now, Mr. Seery, are you familiar with Lucy Bannon?

15 A Yes.

16 Q And who is Lucy Bannon?

17 A She is the Highland public relations person.

18 MR. WILSON: Okay. Now go back to Page 7.

19 BY MR. WILSON:

20 Q Now, do you -- do you see on your screen an email of
21 September 14th from Syed Khaderi that says, Hi, Lucy, how are
22 you?

23 A Yes.

24 Q Have you seen this email before?

25 A Not that I recall, no.

Seery - Cross

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1 Q All right. It continues on that, I saw the filing on
2 Friday about HarbourVest claims against Highland for a CLO
3 investment, and I'm looking to put out a report tomorrow
4 morning London time. Ahead of that, I wanted to check if
5 Highland would like to comment on the matter.

6 MR. MORRIS: Your Honor, this is -- the Debtor
7 respectfully objects. A, this document is not in evidence.
8 B, it's rank hearsay.

9 THE COURT: Response, Mr. Wilson?

10 MR. WILSON: Your Honor, I am attempting to
11 authenticate this document, but I'm using it in rebuttal to
12 the testimony that Mr. Seery just offered.

13 THE COURT: All right. I'll allow it. Overrule the
14 objection.

15 MR. WILSON: All right. Thank you, Your Honor.

16 BY MR. WILSON:

17 Q All right. Now, if we -- and oh, that September 14th
18 date, that was three days after the September 11th date that
19 we discussed was the date that HarbourVest filed its response
20 to the omnibus objection, correct?

21 A Yes. If that's the date that they filed it, then I -- if
22 you're representing that, I concede that the 14th is three
23 days after the 11th.

24 Q All right. And if you go back to the first page of this,
25 it looks like, on the following day, Lucy Bannon sends an

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1 email to you, and is that your email address,
2 jpseeryjr@gmail.com?

3 A That's correct, yes.

4 Q And do you recall receiving this email from Lucy Bannon?

5 MR. MORRIS: Your Honor, I renew my objection that
6 this is hearsay. He's not rebutting anything that Mr. Seery
7 testified to. He testified that he'd never heard of the
8 gentleman at the bottom of the document. There's nothing in
9 this document that rebuts Mr. Seery's testimony at all.

10 THE COURT: Response, Mr. Wilson?

11 MR. WILSON: Well, I'm not -- I'm not trying to rebut
12 his statement that he hadn't -- that he hadn't heard of Syed
13 Khaderi. My rebuttal is attempted to -- attempting to show
14 that he has made various statements that he denied.

15 THE COURT: I'll overrule the objection.

16 BY MR. WILSON:

17 Q All right. So, back to this exhibit, Mr. Seery. You
18 recall receiving this email from Lucy Bannon on Tuesday,
19 September 15, 2020?

20 A Not specifically. But to be clear, I recall talking to
21 Lucy Bannon about the HCMLP dispute with HarbourVest.

22 Q Okay. And --

23 MR. WILSON: Bryan, can you go down to the next page?
24 Scroll down to where -- the James Seery email.

25 BY MR. WILSON:

Seery - Cross

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1 Q Do you see this email on your screen that's dated
2 September 15, 2020 at 10:33 p.m.?

3 A Yes, I do.

4 Q And do you recall sending this email to Lucy?

5 A Not specifically, no.

6 Q Well, do you deny that you sent this email to Lucy?

7 A It appears to be my email.

8 MR. WILSON: Your Honor, we would move to admit this
9 document into evidence as Dondero Exhibit Letter N.

10 THE COURT: Any objections?

11 MR. MORRIS: I would consent to the admission of Mr.
12 Seery's email, but the balance of it ought to be excluded as
13 hearsay.

14 THE COURT: What about that?

15 MR. WILSON: Well, Your Honor, I think that this
16 document -- and I'll get into this in a little more detail in
17 a second -- but I think this document is a combination of the
18 work product of Lucy Bannon and Mr. Seery in preparing a
19 response for the reporter who requested comment from Highland.

20 THE COURT: Okay. I --

21 MR. MORRIS: Your Honor, um, --

22 THE COURT: Go ahead.

23 MR. MORRIS: I just -- I do question how they got
24 this document, but that's for another day. That's number one.
25 Number two, in addition to the hearsay argument, I just --

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1 relevance grounds.

2 THE COURT: Okay. I'll allow the portion that is the
3 communication of Seery, that portion of Exhibit N. All right?

4 MR. WILSON: Okay. With due -- thank you, Your
5 Honor. With due respect, I -- to use that portion, I need to
6 refer to the portion below it, because he says, Good to submit
7 with your final edit/revisions. And so we need to know what
8 those final edit/revisions are, which are contained in the
9 email directly below that on the document that was four
10 minutes earlier in time.

11 THE COURT: All right. Fair enough. That'll be
12 allowed.

13 MR. WILSON: All right. Thank you, Your Honor.

14 (James Dondero's Exhibit N is received into evidence as
15 specified.)

16 MR. WILSON: So, Bryan, now can you scroll to the
17 next page? Oh, actually, let's just -- let's just stop at the
18 top -- at the bottom of the page. What's this statement?

19 BY MR. WILSON:

20 Q So, to be clear, Mr. Seery, when -- in response to Mr.
21 Khaderi's request for information and comment, you prepared
22 actually two responses, and one of those was a statement on
23 the record attributed to a spokesperson for HCMLP or something
24 along those lines. And then --

25 MR. WILSON: Can you scroll down to that next page?

1 BY MR. WILSON:

2 Q And this says -- I think part of this got cut off for some
3 reason, but it looks like the official statement is in
4 quotation marks. It says, "We dispute the allegations made in
5 the filing and believe the underlying claims are invalid and
6 will be found to be without merit. Our focus continues to be
7 treating all valid claims in a transparent, orderly, and
8 equitable manner, and vigorously disputing meritless in the
9 court. That focus will assure that HCMLP's reorganization
10 process -- progress is towards an efficient and equitable
11 resolution."

12 And then below that there's another section of this email
13 that says, Background/Clarification, Not for Attribution. And
14 do you know the purpose of this second section of the
15 response?

16 A Do I know the purpose of that? Yes.

17 Q And what would that purpose be?

18 A Ms. Bannon was speaking on background to reporters. As I
19 said earlier, I've -- I never heard of the gentleman from
20 London. If he's at the bottom of the email, I didn't pay any
21 mind, never heard of him. Nor have I heard it since. Ms.
22 Bannon didn't ever reference the specific person.

23 But she is the public relations person. So, as I
24 testified earlier, she does communicate with the press. And
25 as I previously testified when Mr. Morris questioned me, one

1 of our tactics and our defenses for HarbourVest was going to
2 be that we were going to be very public and aggressive about
3 the investment and it would have a negative impact or negative
4 perspective for viewers, in our opinion, about HarbourVest's
5 investment.

6 Q All right. Well, look with me in the middle of that
7 paragraph right after the closed parenthetical, where it says,
8 "But it's important to note the background of HarbourVest's
9 active and deep involvement in the investment of which it now
10 complains."

11 And so it was your position that HarbourVest had an active
12 and deep involvement in the investment, correct?

13 A No. I don't think that's correct. Ms. Bannon prepared
14 the statement, it was a litigation defense on background, and
15 that's our -- that was our position for this purpose. It was
16 not my view that they were active and deeply involved. They
17 were certainly involved. There's no doubt about it. But they
18 got all their information, in our estimation and our research,
19 from Highland.

20 Q But in any event, you would agree with me that four
21 minutes after receiving this email, you approved this
22 statement to go out to the reporter, correct?

23 A No, that's not correct. That's -- this portion is on
24 background. That statement doesn't go out. The previous
25 statement was the official statement. This is the background

1 discussion that she would have. So, no, she was not
2 authorized in any way whatsoever to send that out. She was
3 authorized to have conversations with those general facts.

4 MR. WILSON: Okay. Bryan, go to the top, or the
5 bottom of the page immediately preceding that. That's it.
6 Yes, that's it right there.

7 BY MR. WILSON:

8 Q Now, you'll see that this email from Lucy Bannon on
9 September 15, 2020 at 10:29 p.m. starts off, "Jim, let me know
10 what you think of the below. And, again, the first would be
11 on the record and the second will be sent for information
12 purposes to ensure accuracy, not for attribution."

13 So the intent was that this -- that this entire statement
14 be sent to the reporter, correct?

15 A I don't believe that's correct. I think when she goes on
16 background she doesn't send them a written doc. It's got to
17 be clear to the reporter, at least my understanding is that
18 what on background means -- I've been involved with this
19 before -- is that typically that's done orally. I don't know
20 if she's done it in a written statement before. I have never
21 seen that done in a written statement before. You give the
22 official statement and then you walk the reporter through your
23 other views on background. And you're not quoted. And it's
24 usually attributed to a source with knowledge.

25 Q Okay. We'll come back to that in a minute. The next

1 sentence after the one I just read to you --

2 MR. WILSON: Go back to where we were on the
3 background.

4 BY MR. WILSON:

5 Q Now, we just read you the sentence that starts with, "Then
6 it's important." The following sentence says, "HarbourVest
7 was not simply invested in HCLOF as an ignorant,
8 unsophisticated, passive investor, but was an active and
9 informed participant in the inception of its investment
10 through all of the Acis bankruptcy proceedings, and
11 HarbourVest played a material role in various outcomes related
12 to that case and its impact on HCLOF."

13 And is it -- did you not just tell me before we
14 investigated this document that HarbourVest did not play a
15 material role in the various outcomes of the Acis bankruptcy?

16 A I don't know exactly what I said, but I think that's
17 correct, after we'd done the research on it, yeah.

18 Q But you took the position in this email that you approved
19 to go out to a reporter that says that -- that HarbourVest was
20 an active and informed participant in the inception of -- of
21 its investment through all of the Acis bankruptcy proceedings
22 and played a material role in various outcomes related to that
23 case and its impact on HCLOF. Can we agree with that?

24 A Yes.

25 Q And then the final sentence of this paragraph says that,

1 We believe that neither the facts nor the law support
2 HarbourVest's, quote, We-were-too-lazy-to-know allegations.

3 Whose words were those, "We-were-too-lazy-to-know
4 allegations"?

5 A I don't recall. They may be mine. It's aggressive the
6 way I am, so that -- that may well be the case.

7 MR. WILSON: All right. Go -- go down to the next
8 page.

9 BY MR. WILSON:

10 Q And with respect your comment that that second paragraph
11 would not have gone to the reporter, look at this email in the
12 middle of the page from Lucy Bannon to Syed Khaderi, September
13 16, 2020, at 1:51 a.m. And --

14 MR. MORRIS: Your Honor, this I will object to as
15 hearsay. There is no witness here to testify to anything on
16 this document.

17 THE COURT: All right. How about that?

18 MR. WILSON: Well, it's -- well, scroll up just a
19 little bit. This email at the top of the page is three
20 minutes after the one in the middle of the page, where Lucy
21 Bannon is forwarding this to James Seery, saying, See below
22 for responses sent to *Creditflux*. Will follow up with the
23 story when it runs or with any other updates.

24 MR. MORRIS: Your Honor, these --

25 MR. WILSON: So I think this --

1 MR. MORRIS: These documents don't appear on the
2 witness list. They're not being offered to impeach anything.
3 They're just -- he's taking discovery as we sit here.

4 MR. WILSON: Your Honor, in response, I'm simply
5 trying to rebut the statements that Mr. Seery made. In fact,
6 he told me just a minute ago that that second paragraph would
7 not have gone out to the reporter. However, this email from
8 Lucy Bannon to Syed Khaderi directly rebuts that statement.

9 THE COURT: But your whole purpose in this line of
10 questioning, with an undisclosed document, is to rebut the
11 earlier testimony he gave before you even put this exhibit in
12 front of him.

13 MR. WILSON: I'm trying to rebut multiple statements
14 that Mr. Seery has made today, and I think it -- you know, if
15 he's going to testify that this information did not go out to
16 a reporter, I think I'm allowed to rebut that to demonstrate
17 that it did.

18 THE COURT: All right. Why didn't you disclose this
19 in advance? It's feeling less and less like an impeachment
20 document the more we go through it.

21 MR. WILSON: Your Honor, I did not -- I did not
22 actually have this document at the time we filed our witness
23 and exhibit list, but I would also say that I didn't have any
24 purpose to use it if I didn't need it for rebuttal.

25 THE COURT: Okay. First off, you're supposed to

1 disclose all exhibits you anticipate using except those for
2 purposes of impeachment. Okay? Not rebuttal, to be
3 technical.

4 So, if you didn't disclose this exhibit, the only way you
5 can use it, subject to other possible objections, is if you're
6 impeaching a statement. And I'm just saying I think we're
7 going beyond trying to impeach the original statement and now
8 we're trying to impeach statements he's made after seeing
9 portions of the document.

10 What did you mean, you didn't have this document in time
11 to disclose it?

12 MR. WILSON: Well, I actually just received this
13 document this morning, Your Honor.

14 THE COURT: Where did you receive it from?

15 MR. MORRIS: From who?

16 MR. WILSON: I -- I honestly do not know the source
17 of this document, although it was provided to me by my client.

18 MR. MORRIS: Your client being Mr. Dondero?

19 THE COURT: Could you answer that, Mr. Wilson?

20 MR. WILSON: Yes, that's -- yes, that's correct.

21 THE COURT: All right. I will -- that's --

22 MR. MORRIS: Your Honor, I'd like to --

23 THE COURT: That's a different can of worms. But for
24 now, I sustain the objection. You're done questioning on this
25 document.

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1 MR. WILSON: That's fine, Your Honor. I can move on.

2 BY MR. WILSON:

3 Q Now, Mr. Seery, you would agree with me that whether or
4 not HarbourVest played an active role in the Acis bankruptcy,
5 it was kept apprised of the -- of the ongoing in the
6 bankruptcy? (Pause.) I'm sorry. Could you hear that?

7 A Yes. My understanding is that -- that they were.

8 Q And in fact, did Highland have weekly conference calls
9 with HarbourVest during the Acis bankruptcy to discuss what
10 was going on in the bankruptcy?

11 A I don't know if they were weekly. I've been told that
12 they had regular calls updating HarbourVest, yes.

13 Q Okay. And did Highland produce over 40,000 pages of
14 documents to HarbourVest related to the Acis bankruptcy?

15 A I'm not aware of that, no.

16 Q Have those documents been provided to you?

17 A I hope not.

18 Q So, in your role --

19 A I'm sorry. I don't -- I didn't receive 40,000 documents
20 from anybody.

21 Q Well, did you receive any number of documents that were
22 provided by Highland to HarbourVest during the Acis
23 bankruptcy?

24 A I wasn't involved in this during the Acis bankruptcy. I'm
25 sorry.

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1 Q Well, I'm referring to, after you became involved in this
2 Highland bankruptcy, whether you were provided with these
3 documents that were sent from Highland to HarbourVest.

4 A I don't -- I don't know what the documents are. I've
5 reviewed tons of documents with respect to the HarbourVest
6 claims, but I don't know of the documents to which you're
7 referring.

8 Q Okay. And after you performed your investigation into the
9 HarbourVest claim, what was your opinion as to the cause in
10 the reduction in value of HarbourVest's investment in HCLOF?

11 A I think the main cause of the reduction in the investment
12 was the imposition of the Trustee and the failure of Highland
13 HCLOF and then subsequently with the injunction to reset the
14 CLOs.

15 You know, these are -- these are some of the worst-
16 performing CLOs in the market because they weren't reset. And
17 when the liabilities of the CLOs are set at a level to match
18 assets, and then liability -- the assets run off, and the
19 asset financings or the new deals come in at much lower
20 levels, and the obligations of the CLO are not reset, the
21 arbitrage that is the CLO shrinks. And that's what happened
22 to these CLOs.

23 Q And during the course of the Acis bankruptcy, Acis and
24 Brigade were given management responsibilities over the CLOs
25 and HCLOF, correct?

1 A I believe that the Trustee had the overall, and then
2 subsequently, with the confirmation of the plan, they took it
3 over. So I think that ultimately Mr. Terry had the management
4 authority, full management authority, and some advice through
5 Brigade. But I think technically it wasn't actually during
6 the Chapter 7. The Chapter 7 proceeding, I believe that Mr.
7 Phelan had the actual authority.

8 (Echoing.)

9 Q I'm sorry. And so your testimony is that Mr. Phelan had
10 the actual authority but he delegated that authority to Josh
11 Terry and Brigade?

12 A I think that's fair, yes.

13 Q And do you know when that occurred?

14 A I believe that the control of the CLOs was in July of
15 2018, and then the ultimate confirmation of the case was at
16 the very beginning of '19.

17 Q So, after being instituted as portfolio manager, and
18 during the time when Acis and Brigade were working under the
19 direction of the Trustee, who would have receive the fees for
20 managing those portfolios?

21 A I believe -- I don't know. I believe the -- that the Acis
22 estate would have received those fees.

23 Q And who -- and so is that your testimony, that prior to
24 confirmation the Acis estate would have received the
25 management fees?

Seery - Cross

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1 A I believe that -- I believe they would have if they were
2 the manager, yeah.

3 Q Okay. And who would have received the fees after
4 confirmation?

5 A Acis.

6 Q Okay. And who would have had the discretion to set the
7 amount of those management fees?

8 A They would be agreed to in the -- in the investment
9 management agreement.

10 Q They would be agreed to?

11 A Yes. As far as I've seen, I've -- I haven't seen
12 unilateral ability of a manager to set fees at its -- at its
13 whim.

14 Q So is it your understanding that Acis and Brigade ended up
15 charging substantially more fees than Highland had charged
16 when it was under Highland's management?

17 A I think the fees were -- the fees were -- the fees were
18 set by the agreement.

19 MR. MORRIS: Your Honor, I just object to the line of
20 questioning on relevance grounds. This is a 9019 hearing,
21 Your Honor. How -- I just don't think this has any relevance
22 at all.

23 THE COURT: All right. Mr. Wilson, what is the
24 relevance?

25 MR. WILSON: The relevance is that Mr. Seery has

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1 testified that these Acis CLOs were among the worst-performing
2 in the market, and frankly, we would agree with that, and I'm
3 trying to get his understanding as to why, because I think
4 there's direct relevance in the reason that the value of the
5 HarbourVest investment diminished.

6 MR. MORRIS: I don't think that was his testimony,
7 Your Honor. But at the end of the day, Your Honor has heard
8 the litany of reasons why the Debtor is entering into this
9 agreement. I just, I just think it's irrelevant, Your Honor.

10 THE COURT: All right. Mr. Wilson, I barely think
11 this is relevant. I mean, I'm going to give you some benefit
12 of the doubt on that because of, you know, the testimony that
13 HarbourVest lost \$50 million of value and --

14 (Echoing.)

15 THE COURT: -- maybe that shouldn't, you know, lie at
16 the feet of Highland. I think the compromise reflects that
17 they don't -- it doesn't lie entirely at the feet of Highland.
18 But, you know, maybe two or three more questions.

19 MR. WILSON: Yes. Thank you, Your Honor. And I
20 didn't have very much more on this point. But to be a hundred
21 percent honest, I can't remember my question right before the
22 objection.

23 THE WITNESS: I think you were asking me about the
24 fees and somehow alluding or implying that the manager could
25 unilaterally set fees.

1 The fees are set in the investment management contract.

2 The manager doesn't get to wake up on Wednesday and say, you
3 know, I'd like another half a basis point. It doesn't work
4 that way.

5 BY MR. WILSON:

6 Q But you would agree with me that the fees and expenses
7 charged to an investment would impact the performance of that
8 investment in the market?

9 A Absolutely.

10 Q Would you also agree with me that there was one CLO -- and
11 I think you referred to it in your direct testimony -- but CLO
12 7, which continued to be managed by Highland?

13 A That's correct.

14 Q And is it fair to say that CLO 7 exceeded the performance
15 of the CLOs that were managed by Acis and Brigade?

16 A I think that's fair. I don't -- I don't recall the
17 magnitude, but I think it's outperformed those -- those CLOs,
18 yes.

19 Q All right. Well, thank you. I want to turn your
20 attention to the portion of the settlement agreement that
21 deals with voting of the HarbourVest claim. How did
22 HarbourVest's commitment to vote for the plan become a part of
23 the settlement?

24 A Pretty straightforward negotiation. We -- in negotiating
25 the settlement, one of the key factors was the cost and

1 expense of the litigation, in addition to the risk on the --
2 on the fees, and whether we could wrap this up in a global
3 settlement now. So in my experience, it's fairly typical, we
4 would try to do this in every settlement, have the settling
5 party, be that the claimant, agree to support the case and the
6 plan.

7 You know, we did not do that with the Committee members,
8 although we wanted to. (Echoing) I frankly still wish I had.
9 Those little -- little bits that have been difficult
10 (echoing). The Committee members have a different interest in
11 (echoing) than their more global interest for creditors at
12 large, which is more difficult than traditionally in
13 bankruptcy cases, less likely to have a Committee member, a
14 sitting Committee member, actually support the (echoing) of
15 the plan.

16 THE COURT: Mr. Wilson, could you be careful to put
17 your device on mute every time you're not talking? Because
18 we're getting some feedback loop from you when Mr. Seery
19 answers your questions. Okay?

20 (Echoing continues.)

21 THE COURT: Like right now. I'm hearing feedback of
22 my own voice through your speakers.

23 Right, Mike? Isn't that what --

24 A VOICE: I am, too.

25 THE COURT: Yes. Okay. So please be sure you put

1 your device on mute whenever you are not speaking. All right.
2 Go ahead.

3 BY MR. WILSON:

4 Q I mean, I think you just answered this question, but there
5 was -- there was no similar voting provision in the Acis or
6 the Redeemer settlements, correct?

7 A There is not, no. And just as a -- by way of explanation,
8 if it's okay, the reason was my counsel advised against it. I
9 did ask for it.

10 Q Your counsel advised against putting that voting
11 requirement in the Acis and Redeemer settlements?

12 A For the reasons I stated. And in my experience, that's
13 consistent, where sitting members of Committees don't
14 generally sign up to resolve their own claims and support the
15 plan because of their larger fiduciary duties to the creditor
16 body as a whole.

17 Q And during the settlement negotiations of the HarbourVest
18 claim, was this commitment to vote a topic of discussion?

19 A Not -- not particularly, no. It was pretty clear that
20 HarbourVest, if they were going to agree to the settlement and
21 the numbers, could see structure. Obviously, it wanted to
22 understand what the potential distributions would be under the
23 plan, but this was not a hotly-negotiated point.

24 Q And would you consider HarbourVest's commitment to vote
25 for the plan an important part of the settlement?

1 A I think it's an important part of the settlement, that the
2 part of the settlement is the subordinated claim. We could
3 put that into presumably any plan. But our plan does -- does
4 have a Class 9 for that. So I think it's a -- it's a part of
5 the settlement that is important or we wouldn't have included
6 it. It clearly wraps everything up and moves us towards
7 confirmation.

8 Q And would you have made the deal with HarbourVest if they
9 had pushed back on the commitment to vote for the plan?

10 A Yeah, I would have.

11 Q All right. Thank you.

12 MR. WILSON: No further questions.

13 THE COURT: All right. Mr. Draper, anything from
14 you?

15 MR. DRAPER: Yes, Your Honor.

16 CROSS-EXAMINATION

17 BY MR. DRAPER:

18 Q Mr. Seery, I may not understand the settlement, and I
19 apologize, but the way I think the settlement reads, the
20 interest that you're acquiring, you have the right to place in
21 any entity. Is that my -- is that correct?

22 A I don't recall the -- the specifics, but just from a
23 structural standpoint, we wanted to be able to put it into a
24 subsidiary as opposed to putting it directly in HCMLP. If we
25 couldn't do that, we would -- we would put it into HCMLP. So

1 there wasn't a -- I don't recall the actual specifics, but we
2 certainly thought about holding that interest in a -- in a
3 subsidiary, just to have a cleaner hold.

4 Q Why aren't you putting it into the Debtor so the Court and
5 the estate have jurisdiction over that?

6 A I think the Court certainly has jurisdiction over an
7 entity that the estate owns a hundred percent of. I don't
8 think that's -- that's even a close call. So the important --

9 Q Now, --

10 A Can I finish?

11 Q Sure.

12 A You asked me why. To the extent that somebody thinks that
13 problematic, I will consent to the Court having complete
14 jurisdiction over it, since I control it a hundred percent.

15 Q No. The real reason is, if I remember correctly, Mr.
16 Dondero and Judge Lynn filed a motion to have some say or some
17 information as to sales by subsidiaries, and I think you took
18 the position that they weren't entitled to it. And so my
19 concern was that putting this in a subsidiary in a sense gave
20 you unfettered control without any review of the item.

21 A I don't -- I don't think that's the case where we --
22 there's a directly-held subsidiary where we own a hundred
23 percent of it. I don't think that that's the case.

24 Q Okay. But you're willing to (a) put this into the Debtor,
25 number one; and number two, have the estate and have the Court

1 have complete control over the disposition of it and its
2 actions, correct?

3 A That's not correct, no.

4 Q What -- what is incorrect about my statement?

5 A The debtor-in-possession has control of its assets. The
6 Court doesn't have complete control over its assets. There's
7 --

8 Q Well, --

9 A -- issues -- hold on a second. This is not -- this is not
10 a game and a trap. We put it in a subsidiary for specific
11 reasons. You asked why. I'm giving you the why. It's not to
12 hide it from anybody. We're not going to sell the asset
13 unless somebody comes up with a great price for it. We're
14 going to monetize the assets. We're going to control HCLOF by
15 a majority.

16 Q But, again, the issue is, if it's in the estate, the Court
17 has supervision over it. If it's not in the estate, the Court
18 has no supervision of it.

19 A I don't think that's correct, because the Court has
20 supervision over the estate, which owns a hundred percent of
21 the special-purpose entity that will own the shares.

22 Q Okay. All right. Now, let's talk about the \$15 million
23 that you discussed and the legal fees that were incurred. Is
24 that the total amount that was spent, or is -- or is that --
25 was the total amount \$30 million and HarbourVest was only

1 responsible for one half of it or functionally took the brunt
2 of one half of it?

3 A I think the total amount is between \$15 and \$20 million.
4 I don't have the exact numbers.

5 Q So, in fact, the HarbourVest loss due to its ownership
6 would have been one half of that, not \$15 million?

7 A Well, the vehicle lost the money. HarbourVest owned 49.98
8 percent of it, and Highland controlled the rest. So if you
9 allocate it that way, I suppose that would be a -- that's how
10 you would divide it, in -- roughly in half, yes.

11 Q And so HarbourVest's actual dollar loss due to the legal
12 fees is really the 49-point-whatever percent of \$15 million,
13 not \$15 million?

14 A I don't know if -- I certainly would argue that. I don't
15 think that HarbourVest has that position.

16 Q Okay. Now, in connection -- you were asked a question
17 about the documentation that was provided by Highland to
18 HarbourVest both during the bankruptcy of Acis and before.
19 You have control over the Harbour -- over the Highland server,
20 correct?

21 A I'm sorry. Can -- can we do two things? One is, Mr.
22 Draper, I can't see you, so it would be better if I could see
23 you during the questioning.

24 Q Okay.

25 A And could you repeat the question?

1 Q All right. I'll be happy to. You were asked a question
2 about the documentation that was provided by Highland to
3 HarbourVest during the Acis bankruptcy and meetings that took
4 place between the parties. Correct?

5 A Yes.

6 Q And you stated you were unaware of the material that was
7 sent over?

8 A I think I testified that I didn't receive the 40,000
9 documents that were mentioned.

10 Q Did you do any search or order a search of the Highland
11 server to see what material was sent over by any party to
12 HarbourVest to analyze what -- what information they had
13 available to them and what was provided to them?

14 A Yes, we did a search.

15 Q And did you review the documentation that was sent over?

16 A The -- the documentation that we looked at was very
17 specific to the investment and to the OM. So we didn't look
18 for the -- the supposed 40,000 documents, no.

19 Q Did you look for the material that was provided to them
20 during the Acis bankruptcy and the periodic meetings that you
21 discussed? Or that you testified to earlier?

22 A The answer is no.

23 Q One last question. I think, and just so I understand your
24 testimony, you've broken out the HarbourVest claim into two
25 pieces. One is the legal fee amount that we've just

1 discussed, and I gather the other piece of that is the fraud
2 in the inducement to enter into the CLO purchase?

3 A It's -- it's more -- it's much more than that.

4 Q Okay. Well, let me say it in a different way. The other
5 part of it is the losses as a result of the fraud in the
6 inducement to purchase the interest?

7 A I don't think that's -- that's fair. If I could explain?

8 Q Sure.

9 A Yeah. The legal fee piece is pretty clear. The other
10 piece starts with fraud in the inducement, but it's extensive
11 fraud claims. Fraud in the inducement, as I testified
12 earlier, would get them around the exculpation and liability
13 limitations in the OM. You don't get around all of those with
14 just the fraud. And so that's -- that's the split of that
15 claim. So the fraud in the inducement contains fraud
16 allegations. Even if you didn't have inducement, you'd have
17 other potential fraud claims.

18 Q But let me state it in a different fashion. But for the
19 investment, the fraud that you allege wouldn't have occurred?

20 A I -- HarbourVest alleges it.

21 Q No, I'm just -- in your analysis of the claim, but for the
22 inducement, the rest of the damages wouldn't have flowed?

23 A That's HarbourVest's position, yes. But for the fraud,
24 they wouldn't have made the investment.

25 Q All right.

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1 MR. DRAPER: I have nothing further for this witness.

2 THE COURT: All right. Any redirect, Mr. Morris?

3 MR. MORRIS: Just a few very questions, Your Honor.

4 Just a very few questions.

5 REDIRECT EXAMINATION

6 BY MR. MORRIS:

7 Q Mr. Seery, you were asked about that document that Lucy
8 prepared. Do you remember that?

9 A Yes, I do.

10 Q In your experience, don't defendants often deny liability
11 before entering into settlements, or even worse, getting
12 adverse judgments entered against them?

13 A Of course. Yes.

14 Q Okay. And in response to Mr. Draper's questions, isn't
15 the Guernsey claim another claim that the Debtor took into
16 account in assessing the potential risks of this settlement?

17 A There's a number of claims contained in it. As I
18 mentioned earlier, I mentioned the RICO claim. But there is a
19 Guernsey shadow director claim, which is not dissimilar to
20 U.S. claims that somebody effectively controls an enterprise,
21 notwithstanding them not having the official role.

22 Q Okay.

23 MR. MORRIS: I have nothing further, Your Honor.

24 THE COURT: All right. Any recross on that redirect?

25 All right.

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1 MR. WILSON: No, Your Honor.

2 MR. DRAPER: No, Your Honor.

3 THE COURT: Thank you. Mr. Seery, that concludes
4 your testimony. Thank you.

5 THE WITNESS: Thank you, Your Honor.

6 THE COURT: We need to take a bathroom break. Before
7 we do, I just want to be clear with what we have left. As I
8 understood it, we were having Mr. Pugatch from HarbourVest.
9 Mr. Morris, will that conclude the Debtor's evidence?
10 (Pause.) Okay. You were on mute, but I think you were saying
11 yes.

12 MR. MORRIS: Sorry. But to be clear, Debevoise is
13 going to be putting their witness on the stand.

14 THE COURT: Okay.

15 MR. MORRIS: But it's part of the evidence in support
16 of the motion.

17 THE COURT: All right. Do the Objectors have any
18 witnesses today?

19 MR. WILSON: Your Honor, Mr. Dondero intends to
20 examine Mr. Pugatch, but if he's going to be called by his
21 counsel, then we will do that as a cross-examination.

22 THE COURT: All right.

23 MR. DRAPER: This is Douglas Draper. I have no
24 witnesses.

25 THE COURT: Okay. All right. Well, I'm asking --

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1 well, I do want to ask: Can we get a time estimate
2 potentially for Mr. Pugatch?

3 MS. WEISGERBER: For my examination, Your Honor,
4 twenty minutes, perhaps.

5 THE COURT: Okay.

6 MS. WEISGERBER: Or less.

7 THE COURT: All right. Well, let me tell you what
8 we're going to do. We're going to take a ten-minute bathroom
9 break. But I have a 1:30 hearing and I have a 2:00 o'clock.
10 Well, I have a 1:30 docket, multiple matters, and a 2:00
11 o'clock docket. So, you know, I'm really intending that we
12 get finished in time to give me and my staff a little bit of a
13 lunch break before launching into the 1:30 docket, so I'm
14 hopeful we can get done around 1:00-ish. If we can't, then
15 we're going to have to reconvene, I'm going to say probably
16 3:00-ish Central time. So let's hope we can get through
17 everything. All right? Ten-minute break.

18 THE CLERK: All rise.

19 (A recess ensued from 11:58 a.m. until 12:08 p.m.)

20 THE CLERK: All rise.

21 THE COURT: All right. Please be seated. We're
22 going back on the record in the Highland matters. Do we have
23 everyone? It looks like we do. Ms. Weisgerber is going to
24 call the next witness; is that correct?

25 MS. WEISGERBER: Yes, Your Honor. We call Michael

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1 Pugatch of HarbourVest to the stand.

2 THE COURT: All right. Mr. Pugatch, if you could
3 turn on your video and say, "Testing one, two."

4 MR. PUGATCH: Two.

5 THE COURT: All right. There you are. Please raise
6 your right hand.

7 MICHAEL PUGATCH, HARBOURVEST'S WITNESS, SWORN

8 THE COURT: Thank you. You may proceed.

9 MS. WEISGERBER: Thank you, Your Honor.

10 DIRECT EXAMINATION

11 BY MS. WEISGERBER:

12 Q Good morning. Can you please state your name for the
13 record?

14 A Sure. It's Michael Pugatch.

15 Q And where do you work, Mr. Pugatch?

16 A HarbourVest Partners.

17 Q And what is your title?

18 A I'm a managing director in our secondary investment
19 group.

20 Q Did HarbourVest file claims in the Highland bankruptcy,
21 Mr. Pugatch?

22 A We did, yes. Several claims, in fact.

23 Q What was the basis for those claims?

24 A Yeah. Among other things, fraudulent inducement based on
25 misrepresentations and omissions on the part of Highland in

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1 connection with our original investment, mismanagement at the
2 HCLOF level, including inappropriate fees that were charged
3 to investors, among a number of other items as well.

4 Q Can you explain what you mean by misrepresentations made
5 to HarbourVest by Highland?

6 A Yeah, sure. So, you know, based on a number of
7 statements that were made to us around the litigation
8 involving Mr. Terry, some of the intentions found, the
9 structural changes that came to light with respect to HCLOF
10 and our investment, as well as the fact that the arbitration
11 award specifically against Mr. Terry would have no impact or
12 implication on Highland's sale or business.

13 Q And can you explain what you mean by omissions made by
14 Highland to HarbourVest?

15 A Sure. So I would say, really, the implications behind
16 the structural changes that were made at the time of our
17 investment into HCLOF. Also, the intention, clear intentions
18 that Highland had to never, in fact, pay the arbitration
19 award that came to light during our due diligence period to
20 Mr. -- to Mr. Terry as part of the investment. And
21 ultimately the -- what Highland went about doing in terms of
22 stripping assets of Acis that led to the material value
23 declines and destruction of value that we've experienced
24 since our investment.

25 Q You mentioned a diligence period. Did HarbourVest

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1 conduct diligence on the investment?

2 A We did. We conducted very detailed due diligence, as we
3 do for all of our investments. That diligence period lasted
4 several months ahead of our investment decision.

5 Q And did HarbourVest conduct that diligence by itself?

6 A No. So, in addition to internal investment professionals
7 at HarbourVest, we engage with outside advisors, both
8 consultants as well as legal advisors, in connection with
9 that due diligence.

10 Q And did Highland answer all of HarbourVest's questions
11 during that diligence period?

12 A They did. And they were numerous. But yes, they
13 answered all the questions that we had for them.

14 Q Was the Terry dispute part of HarbourVest's diligence?

15 A It was. That came up as one of the outstanding items of
16 litigation as part of our due diligence.

17 Q I'm going to ask my colleague to pull up on the screen an
18 exhibit that was on our exhibit list as Items -- Exhibits 34
19 and 35. It's an August 15, 2017 email from Brad Eden to
20 Dustin Willard. Mr. Pugatch, do you recognize this document?

21 A I do, yes.

22 Q And what is it?

23 A This was an email sent to us during our due diligence
24 period in response to a request for more information on the
25 outstanding litigation that Highland was involved with.

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1 MS. WEISGERBER: And if my colleague can just scroll
2 to the attachment to that email.

3 BY MS. WEISGERBER:

4 Q And do you recall the attachment as well, Mr. Pugatch?

5 A Yes, I do.

6 MS. WEISGERBER: And if you can scroll back up to the
7 first email.

8 BY MS. WEISGERBER:

9 Q Who is Dustin Willard?

10 A Yes. Dustin is a colleague of mine at HarbourVest who
11 worked closely with me on this investment.

12 Q And you said that this document was shared with
13 HarbourVest during the diligence period before the HCLOF
14 investment?

15 A It was, correct.

16 Q Is it typical during diligence to receive a description
17 of litigation such as this?

18 A It is. It's a question that we always ask. Certainly a
19 component of our diligence to understand any outstanding
20 litigation on the part of our counterparty or manager that
21 we're investing in.

22 MS. WEISGERBER: Your Honor, I'd move to offer this
23 exhibit into evidence.

24 THE COURT: Any objection?

25 MR. DRAPER: No objection, Your Honor.

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1 MR. MORRIS: No objection from the Debtor, Your
2 Honor.

3 THE COURT: All right. What is the letter or number
4 for this exhibit?

5 MS. WEISGERBER: It's HarbourVest Exhibit 34.

6 THE COURT: All right. So HarbourVest Exhibit 34 is
7 admitted.

8 (HarbourVest's Exhibit 34 is received into evidence.)

9 THE COURT: And I need to be clear where it appears
10 on the docket. Can someone tell me?

11 MS. WEISGERBER: So, it's identified on our exhibit
12 list, not -- it's not attached to the exhibits. It is on the
13 docket. We were -- when we initially filed the exhibit list,
14 we were working out confidentiality issues. But it was
15 subsequently filed with our reply last night. It's at Docket
16 No. 1735 --

17 THE COURT: All right.

18 MS. WEISGERBER: -- at Pages A -- Pages A345 to A350.

19 THE COURT: All right. Very well. Thank you.

20 BY MS. WEISGERBER:

21 Q Mr. Pugatch, we'll just scroll down to the second page of
22 the attachment. Can you describe generally what the
23 litigation says regarding the Terry dispute?

24 A Yes. Generally speaking, this dispute was described as
25 an employee dispute, employment agreement dispute, with Mr.

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1 Terry, who was a former employee of Highland involved in
2 their CLO business, and is described by Highland to us really
3 having to do with a series of false claims, in their opinion,
4 but having to do with a disgruntled former employee.

5 Q And did it strike you as an unusual or significant
6 dispute?

7 A No. I would say we often -- we'll see, you know, former
8 employees with, you know, claims against a former employer in
9 connection with wrongful termination. I wouldn't say it's
10 extremely common, but certainly not entirely out of the
11 ordinary. And based on the explanations that we'd received
12 from Highland, seemed to be more of an ordinary-course type
13 former employee litigation suit.

14 Q Based on what you now know about the Terry dispute, do
15 you believe that this was an adequate disclosure regarding
16 the dispute?

17 A I would say very clearly not, you know, based on the
18 facts that came to light subsequently, the various rulings in
19 connection with the Acis bankruptcy case. What was very
20 clearly not stated are the actual facts and implications of
21 the ongoing litigation with Mr. Terry.

22 MS. WEISGERBER: I'd ask my colleague to put up the
23 next exhibit. Okay. So, this is on a HarbourVest exhibit
24 list, which is Document No. 1723. It's Exhibit 36 on that.
25 Same issue with respect to initially not filed, but it is on

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1 the docket at our response last evening at ECF No. 1735 at
2 Page A351.

3 THE COURT: Page what?

4 MS. WEISGERBER: A351.

5 THE COURT: A351. Thank you.

6 MS. WEISGERBER: You're welcome.

7 BY MS. WEISGERBER:

8 Q Mr. Pugatch, I just put up a November 29, 2017 email from
9 Hunter Covitz to Dustin Willard, Michael Pugatch, and Nick
10 Bellisario. Do you recall this document?

11 A I do, yes.

12 Q And what is this document?

13 A This was an email sent to us by Highland a couple weeks
14 after we closed on our investment on the (inaudible) in
15 response to a *Wall Street Journal* article that had come out
16 regarding Highland, a number of actions that they had taken,
17 and what Highland was articulating to us, a number of false
18 claims that had been made about Highland's prior actions, and
19 specifically trying to explain some of that and also share
20 with HarbourVest a letter that was being sent to the editor
21 of the *Wall Street Journal* highlighting, in their view, some
22 of the inaccuracies around the reporting.

23 Q And did you receive this document?

24 A We did, yes.

25 MS. WEISGERBER: I'd move to offer this, so

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1 HarbourVest Exhibit 36, into evidence.

2 THE COURT: Any objections?

3 MR. WILSON: Your Honor, John Wilson. I would object
4 as to the relevance of this document.

5 THE COURT: All right. What's your response?

6 MS. WEISGERBER: Your Honor, it shows
7 misrepresentations that the witness will testify how it
8 relates back to prior representations prior to HarbourVest's
9 investment, as well as misrepresentations at that time.

10 THE COURT: Okay. I overrule the objection. I'm
11 going to admit it.

12 (HarbourVest's Exhibit 36 is received into evidence.)

13 BY MS. WEISGERBER:

14 Q Mr. Pugatch, can you describe generally -- we spoke about
15 this a little bit -- just what this communication from
16 Highland was conveying to HarbourVest at the time?

17 A Yes. Specifically, again, responding to this *Wall Street*
18 *Journal* article that had been published, trying to defend,
19 again, Highland's own views why there were inaccuracies in
20 the reporting. But importantly, from our perspective, trying
21 to reassure us as to the fact that, you know, these
22 accusations would have no bearing and any results from it
23 would have no bearing on their ongoing business or
24 partnership or the investment that we had made in HCLOF.

25 MS. WEISGERBER: And if you can scroll to the second

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1 page.

2 BY MS. WEISGERBER:

3 Q We'll just look at the last paragraph of another email
4 from Mr. Covitz. Can you just read that first sentence of
5 the last paragraph?

6 A Sure. (reading) While the dispute has no impact on our
7 investment activities, as always, we welcome any questions
8 you may have.

9 Q Mr. Pugatch, was this email and the discussion regarding
10 the Terry dispute consistent with the representations made to
11 you prior to HarbourVest's investment into HCLOF?

12 A It was, yes. Both the message, the lack of any impact
13 that ultimately the dispute with Mr. Terry, the arbitration
14 award would have around Highland's ongoing CLO business, or
15 HCLOF specifically, was all, you know, very clear in this
16 document, but all consistent with the representations that
17 had been made to us leading up to our investment in the
18 middle of November 2017 as well.

19 Q Thank you.

20 MS. WEISGERBER: And you can take down the exhibit,
21 Emily. Thank you.

22 BY MS. WEISGERBER:

23 Q You mentioned, Mr. Pugatch, an arbitration award to Mr.
24 Terry. How did you learn about that arbitration award?

25 A That was initially disclosed to us by Highland as we were

1 in the late stages of our diligence and closing process on
2 the investment into HCLOF.

3 Q And generally, what did Highland tell you about the
4 arbitration award?

5 A We were aware of its existence. We were aware of the
6 quantum of the award, I think it was around an \$8 million
7 arbitration award in the favor of Mr. Terry, and that was
8 following the litigation around the wrongful termination and
9 employee dispute that Highland had described to us
10 previously.

11 Q Did you ask to see a copy of the arbitration award?

12 A No, we did not.

13 Q Why not?

14 A Ultimately, we -- you know, the explanations that
15 Highland had provided to us all seemed very reasonable. We
16 relied on their representations that this was, again, nothing
17 more than a dispute with a former disgruntled employee, in
18 their words, that had no bearing or, you know, would not have
19 any bearing on our investment in HCLOF or their ongoing CLO
20 business, which all very clearly was not the case, as
21 we've -- as we've learned over the last several years.

22 Q Following learning about the arbitration award, did
23 HarbourVest do other diligence?

24 A We did. So, in addition to asking questions related to
25 the arbitration award and any impact that it would have, we

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1 also spent some time diligencing a couple of structural
2 changes that were proposed by Highland, and, in fact, ended
3 up delaying the closing of our investment by about two weeks
4 as we vetted some of those structural changes that Highland
5 had proposed. Vetted those both, you know, internally with
6 Highland directly and with external counsel in order to make
7 sure that those structural changes were in fact legally sound
8 in ultimately making our investment.

9 Q And were those changes proposed following the arbitration
10 award?

11 A They were, yes.

12 Q Did Highland tell you the reason for the structural
13 changes?

14 A Yeah. So, so some of this -- and specifically, this
15 involved a change of the portfolio manager at the HCLOF level
16 that was really in connection with a rebranding as Highland
17 was going through a rebuild of its CLO business and wanting
18 to align, from a brand perspective, their business on an
19 ongoing basis with the Highland brand as opposed to the Acis
20 brand. But more specifically, in the case of a late change
21 from a structured standpoint, the -- part of the intention
22 and the investment thesis of HCLOF was to pursue a reset, a
23 refinancing of all the underlying CLOs as they approached the
24 end of their investment period or came out of their
25 investment period.

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1 And in connection with that, in light of the arbitration
2 award, Highland's view was that there may be difficulties in
3 the market in resetting certain of those Acis CLOs with the
4 Acis brand associated with them, given, again, the existence
5 of the arbitration award and concerns in the market around
6 the Acis brand reputation.

7 Q And what did they tell you was the market view of Acis,
8 or the Acis brand?

9 A Yeah. Their view or their concern was that the, you
10 know, because of the existence of that arbitration award, the
11 brand would be viewed as toxic.

12 Q Didn't this put you on notice that perhaps there was
13 something wrong with the structural changes?

14 A I mean, we -- I mean, short answer, no. We ultimately
15 asked questions, we diligenced the legal structure, but
16 relied on the representations that were made to us by
17 Highland around the rationale for the structural changes,
18 that these are all changes that were within a Highland-
19 managed vehicle or sat below the vehicle that we were
20 investing in, and so ultimately were in Highland's purview,
21 was the representations that we relied on.

22 Q And did HarbourVest alone do that diligence of the
23 structural changes?

24 A So, no. I mean, in connection with the diligence that we
25 did internally and with Highland directly, we engaged with

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1 outside counsel who was working with us at the time to vet
2 those structural changes as well.

3 Q Did HarbourVest rely on Highland's representations
4 regarding the arbitration award and the structural changes in
5 making its investment in HCLOF?

6 A We did, absolutely.

7 Q If Highland had disclosed the nature of the structural
8 changes, of removing Acis as the portfolio manager and
9 related transfers, would HarbourVest have proceeded with its
10 investment?

11 A Definitively, no, we would not have.

12 Q Why not?

13 A I think the reality is if we had understood the intent,
14 you know, that Highland was ultimately undertaking here, we
15 would not have wanted to be any part of this, and certainly
16 getting dragged into all of this, the hassle, the value
17 destruction that we've seen on behalf of the investors and
18 the funds that we manage. And I would say, lastly, we just
19 full stop would not have done business with a firm who
20 engages with this type of behavior, had we actually known the
21 truth.

22 Q Mr. Pugatch, are you familiar with the bankruptcy that
23 followed of Acis?

24 A Yes.

25 Q And what was your -- or, did HarbourVest participate in

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1 that bankruptcy?

2 A So, initially, no. Subsequently, we ended up getting
3 dragged into that on account of a number of misstatements by
4 Highland about the role that HarbourVest had played as part
5 of our investment into HCLOF and some of that structure and
6 the structural changes that I alluded to.

7 Q How did HarbourVest learn about those misstatements in
8 the bankruptcy about HarbourVest's role?

9 A So, ultimately, those came to light on -- you know, on
10 account of the ongoing proceedings within the Acis bankruptcy
11 process, and specifically brought to light to us by the Acis
12 trustee at the time, who decided to pursue, you know, further
13 diligence or discovery around the claims that Highland had
14 made around HarbourVest's involvement in those changes.

15 Q And what is your understanding of what the allegations
16 were that caused the Acis trustee to investigate HarbourVest?

17 A Sure. So, you know, our understanding was that Highland
18 had made statements, again, false statements that HarbourVest
19 had actually instructed some of those structural changes,
20 that we were the ones that had said that we would not do
21 business with Acis and had ordered some of the underlying
22 transfer of assets or, again, structural changes, that, you
23 know, very clearly I would say were not the case. Also, that
24 HarbourVest was -- was calling the shots as it relates to any
25 of the ongoing management or future resets of the CLOs.

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1 Q Did HarbourVest instruct any of those structural changes
2 or transfers to occur?

3 A We did not. Absolutely not.

4 Q Why didn't HarbourVest itself appear in the Acis
5 bankruptcy and file a claim?

6 A Yeah. HarbourVest's role, again, in HCLOF, we were a
7 passive investor in a Highland-managed company. We had no
8 direct interaction with or relationship with Acis. There was
9 really no reason for us to be directly involved until we were
10 subsequently dragged into involvement on account of those
11 misstatements. And then at that point our focus really
12 pivoted to, you know, whether we needed to defend ourselves
13 against those accusations that had been made by Highland and
14 after a request for further information in discovery by the
15 Acis trustee.

16 Q Did HCLOF participate in the Acis bankruptcy?

17 A They did, yes.

18 Q Did HCLOF incur fees for participating in the Acis
19 bankruptcy?

20 A Yes. In fact, very meaningful fees, to the tune of well
21 in excess of \$15 million of legal fees, as we understand it,
22 that have been incurred, largely in connection with the
23 ongoing Acis bankruptcy and Highland's continued pursuit of
24 and in connection with the litigation with Mr. Terry, which
25 we firmly believe was entirely inappropriate that HCLOF and

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1 ultimately investors in HCLOF bear those expenses, which were
2 not just expenses of HCLOF but of Highland and a number of
3 other Highland affiliates.

4 Q Do those expenses form a basis of separate claims filed
5 by HarbourVest against Highland?

6 A They do, yes. One of the multiple claims that we had
7 filed against Highland.

8 Q And a few more questions, just for the record, Mr.
9 Pugatch. How much did HarbourVest initially invest in HCLOF?

10 A Sure. So, our initial investment in November of 2017 was
11 right about \$73-1/2 million, I believe.

12 Q Did HarbourVest invest any additional money in HCLOF?

13 A We did. There was a subsequent capital call investment
14 of about \$5 million, bringing our total investment to just
15 under \$80 million in aggregate.

16 Q When HarbourVest initially made the investment, did it
17 anticipate making a profit on it?

18 A We did, yes.

19 Q How much did HarbourVest anticipate earning from the
20 investment?

21 A Yeah. So, our -- based on the original \$73-1/2 million
22 investment, we had expected a total return of about \$137
23 million on that -- on that investment.

24 Q What was that projection based on?

25 A So, that projection was based on materials that we had

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1 received from Highland, their internal projection models on
2 the future performance of the underlying CLOs that we were
3 acquiring exposure to through our investment in HCLOF, and
4 was one of the inputs or formed the basis in connection with
5 our diligence that we ultimately ran different sensitivities
6 -- projections around and helped employ -- helped inform our
7 investment thesis.

8 Q Do you know the current value of HarbourVest's investment
9 in HCLOF?

10 A Yes. The current value is right around \$22-1/2 million.

11 Q So roughly how much has the investment itself decreased
12 from HarbourVest's initial investment?

13 A So, net of what was about \$4-1/2 million of distributions
14 that we received early on in the investment, we've lost, to
15 date, in excess of \$50 million on our original investment.

16 Q And just for -- to close out, Mr. Pugatch, knowing all
17 that you know, if HarbourVest had known that -- about the
18 nature of the transfers by Acis or Highland's intent with
19 respect to the arbitration award, would HarbourVest have made
20 this investment?

21 A No. The reality is, had we known the truth, or even had
22 a sense of the truth, the true intentions behind some of
23 those transfers and ultimately what would have happened, we
24 never would have made this investment, full stop.

25 Q Thank you, Mr. Pugatch.

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1 THE COURT: All right. I didn't hear you, Ms.
2 Weisgerber. Do you pass the witness?

3 MS. WEISGERBER: Yes, I pass the witness.

4 THE COURT: All right. Thank you.

5 Mr. Morris, any examination from you?

6 MR. MORRIS: No, thank you, Your Honor.

7 THE COURT: All right.

8 (Interruption.)

9 THE COURT: All right. I'm not sure whose voice that
10 was, but please, again, mute your devices when you're not
11 talking.

12 Any cross-examination of Mr. Pugatch? I'll start with
13 you, Mr. Wilson.

14 MR. WILSON: Yes, Your Honor.

15 THE COURT: Okay.

16 CROSS-EXAMINATION

17 BY MR. WILSON:

18 Q How are you -- I guess we're afternoon now. How are you
19 this afternoon, Mr. Pugatch?

20 A I'm doing well. Yourself?

21 Q I'm doing well as well. Do you recall that on Monday of
22 this week I took your deposition?

23 A Yes, I do.

24 Q And so you understand that my name is John Wilson and I
25 represent Jim Dondero, who has filed an objection to the 9019

1 motion filed by the Debtor?

2 I've got a few questions for you today. Has HarbourVest
3 been around for over 35 years?

4 A We have, yes.

5 Q And does HarbourVest have ten offices around the world?

6 A Correct, yes.

7 Q And does HarbourVest employ over 150 investment
8 professionals?

9 A Yes.

10 Q Does HarbourVest have over \$74 billion in assets under
11 management?

12 A Correct, yes.

13 Q And is HarbourVest's client base largely comprised of
14 institutional investors?

15 A Also correct.

16 Q And you would agree with me that HarbourVest is a
17 sophisticated investor, right?

18 A I would, yes.

19 Q How long have you worked for HarbourVest?

20 A I've been employed by HarbourVest for 17 years now.

21 Q And how long have you been a managing director?

22 A I've been a managing director for approximately six
23 years.

24 Q And you were, in fact, the managing director for the
25 investment that HarbourVest made in Highland CLO Funding,

1 Ltd., which has been referred to today as HCLOF, correct?

2 A I was, correct.

3 Q And HarbourVest, I think you just testified, invested
4 approximately \$73 million as its initial investment in HCLOF?

5 A Yes, correct.

6 Q And before HarbourVest made that investment, it had made
7 many investments of this type, correct?

8 A Yeah. We've made hundreds of investments into
9 partnerships over our history, correct.

10 Q So HarbourVest was well-experienced in evaluating and
11 deciding whether to invest in large investments, correct?

12 A It was, yes.

13 Q Now, in your -- and by your, I mean HarbourVest -- in the
14 response to the Debtor's omnibus objection, it says that by
15 summer 2017 HarbourVest was engaged in preliminary
16 discussions with Highland regarding the investment. Is that
17 a correct statement?

18 A Correct, yes.

19 Q And, in fact, those talks began in the second quarter of
20 2017, correct?

21 A Yes.

22 Q And so the investment closed ultimately on November 15th,
23 2017?

24 A Yes, that's correct.

25 Q So it's fair to say that HarbourVest considered and

1 evaluated this transaction for over six months before
2 investing its \$73 million, right?

3 A From the time of the initial conversations that we had
4 with Highland, yes.

5 Q And one of the reasons that it took over six months to
6 complete the investment is that HarbourVest performs due
7 diligence before it makes an investment, correct?

8 A Correct.

9 Q And when you're performing due diligence -- well, first
10 off, you would agree with me that that's a common practice
11 amongst sophisticated investors such as HarbourVest, correct?

12 A To perform due diligence?

13 Q Yes.

14 A Yes.

15 Q And describe -- describe what HarbourVest does in a
16 general sense when it performs its due diligence.

17 A Sure. So, we spend time with the manager -- in this
18 case, Highland -- certainly around the investment thesis, the
19 opportunity, receive materials around the underlying assets.
20 We take that and perform our own independent due diligence
21 around the value of those assets, perform due diligence on
22 the manager itself, the go-forward opportunity. In many
23 cases, and certainly in this case, engage with outside
24 advisors to assist with that due diligence. It's a very
25 robust and thorough process.

1 Q And by outside advisors, are you referring to the outside
2 counsel that you testified about earlier?

3 A Yes. Both outside counsel and outside consultants.

4 Q Okay. And so did you say that it's typical to engage
5 outside counsel when performing due diligence?

6 A Yes.

7 Q And which outside counsel did you retain with respect to
8 this due diligence?

9 A Debevoise and Plimpton as well as Milbank.

10 Q And during the course of HarbourVest's due diligence, did
11 it identify some items of concern?

12 A As with any investment, there are always items that are
13 identified that require further diligence, risks that are
14 identified that we look to mitigate through our due
15 diligence, et cetera.

16 Q And if Harbour -- I'm sorry, did you say something else?

17 A No.

18 Q You were finished? Okay. Now, if HarbourVest identifies
19 an item of concern, is it typical to request additional
20 information regarding those items of concern?

21 A It is, yes.

22 Q And so that actually happened with respect to the HCLOF
23 investment, correct?

24 A In certain cases, yes.

25 Q HarbourVest identified several litigation matters that it

1 had questions about, correct?

2 A Correct. As we would with any investment.

3 Q And it went back to Highland and asked them to explain
4 their position on those litigation matters?

5 A Correct.

6 Q And one of those litigation matters was the Joshua Terry
7 litigation, correct?

8 A Yes.

9 Q And at the time that HarbourVest was considering this
10 investment, beginning in the second quarter and continuing
11 through the summer, that Josh Terry litigation had not
12 resulted in an award or a final judgment, correct?

13 A Correct.

14 Q And I think we looked earlier at a document that your
15 counsel admitted as HarbourVest Exhibits 34 and 35. There
16 was an email from a HarbourVest -- or, I'm sorry, from a
17 Highland representative to a HarbourVest representative that
18 was discussing Highland's position on the litigation,
19 including the Terry litigation, correct?

20 A Are you referring to the document that we looked at
21 earlier?

22 Q I am. And I can put it on the screen if we need to.

23 A No. Right, I recall that, and yes, that's correct.

24 Q Okay. And just to be clear, that document, which stated
25 Highland's positions on the -- and summaries of the

1 litigation, was issued months before the arbitration award to
2 Josh Terry, correct?

3 A I don't remember the exact timing, but it was certainly
4 during our due diligence period and prior to the arbitration
5 award, yes.

6 Q Well, it seems to me that that email that you -- your
7 counsel admitted as an exhibit was issued in August of 2017.
8 Does that sound right to you?

9 A If that's what the email said, yes.

10 Q And if the Terry arbitration award came out in October,
11 then you would agree with me that that is several months
12 prior to the -- or at least two months prior to the
13 arbitration award?

14 A Yes.

15 Q And so when HarbourVest made requests of Highland to
16 provide information regarding its items of concern, Highland
17 complied with those requests, correct?

18 A It did, correct.

19 Q And was there ever a time when HarbourVest requested
20 Highland to provide information and that information was not
21 provided?

22 A Our requests for information, or at least, you know,
23 responses or color to a question, were always met either
24 with, you know, written or verbal communication back to us,
25 yeah.

1 Q And you would agree with me that, in fact, HarbourVest
2 delayed the closing of the investment by two weeks to
3 continue its due diligence, correct?

4 A Correct, related to the structural changes that were made
5 close to closing. That's right.

6 Q And after conducting that due diligence, HarbourVest
7 satisfied itself that the investment was sound?

8 A That the legal structure that had been put in place in
9 connection with those proposed changes by Highland was -- was
10 legally sound, yes, and on the back of, again, statements and
11 misrepresentations on the part of Highland around the nature
12 and potential impact to their ongoing CLO business and HCLOF.

13 MR. WILSON: Well, I'm going to object to the latter
14 part of your response as nonresponsive.

15 THE COURT: Sustained.

16 BY MR. WILSON:

17 Q Now, after you conducted the due diligence, HarbourVest
18 made the investment of \$73 million on November 15th, 2017,
19 correct?

20 A Correct.

21 Q And so I think you testified earlier that prior to that
22 investment HarbourVest had become aware that that Josh Terry
23 litigation had resulted in an arbitration award, correct?

24 A Yes.

25 Q But I think you've also testified that HarbourVest did

1 not request that Highland provide a copy of the arbitration
2 award, correct?

3 A That's correct.

4 Q And you further testified that you were represented by
5 outside counsel at the time, correct?

6 A Correct.

7 Q And as of Monday of this week, you had not reviewed that
8 arbitration award; is that correct?

9 A That's correct.

10 Q Have you reviewed that arbitration award since Monday of
11 this week?

12 A I have not.

13 Q But in any event, you testified that Highland told you
14 about the award?

15 A Yes.

16 Q And they told you the amount of the award?

17 A Yes.

18 Q And then they told you that the award had been converted
19 to a judgment?

20 A When you say the award had been converted to a judgment,
21 can you be more specific?

22 Q Well, I don't know how familiar you are with the
23 litigation process, but in this instance, that award was
24 taken to a court and the court entered a judgment on the
25 arbitration award. Did you -- were you aware of that?

1 A I don't recall the specific legal terms of judgment
2 against it. I was award of the existence of the arbitration
3 award and the -- and the obligation for Highland to comply
4 with that arbitration award.

5 Q And HarbourVest did not make an appearance in the Acis
6 bankruptcy, right?

7 A We did not.

8 Q But you were aware of the Acis bankruptcy, correct?

9 A Yes.

10 Q And you were kept apprised of the Acis bankruptcy by
11 Highland individuals, correct?

12 A We had conversations with a couple of Highland
13 individuals throughout the Acis bankruptcy process, yes.

14 Q Right. And in fact, you testified that you participated
15 in regular conference calls with Highland regarding that
16 bankruptcy?

17 A That's correct, yes.

18 Q And do you recall having been provided with over 40,000
19 documents by Highland related to the Acis bankruptcy?

20 A I do not recall that, no.

21 Q Would those documents have been provided to your outside
22 counsel, had you received them?

23 A I don't know the answer to that.

24 Q Did the outside counsel that represented you in the due
25 diligence continue to represent you throughout the Acis

1 bankruptcy?

2 A They did. One of the counsels did, correct.

3 Q And which counsel was that?

4 A Debevoise.

5 Q So was your counsel actively involved with monitoring the
6 Acis bankruptcy?

7 A They were, yes, particularly after we were ultimately
8 accused of having something to do with the original structure
9 and -- as a result of misstatements by Highland.

10 Q Did your counsel attend hearings in the Acis bankruptcy?

11 A I don't recall.

12 Q Are you familiar with the PACER system?

13 A I am not.

14 Q Now, I think that HarbourVest has been described as a
15 passive investor. You recall that description of HarbourVest
16 in this instance?

17 A Yes.

18 Q But, in fact, HarbourVest invested substantial assets
19 such that it owned a 49.98 percent share of HCLOF. Would you
20 agree with that?

21 A That's correct.

22 Q And in fact, the next largest investor was CLO Holdco,
23 which owned 49.02 percent of the shares, correct?

24 A That sounds right.

25 Q And there was an advisory board that was created pursuant

1 to the formation documents of this investment, correct?

2 A That's correct.

3 Q And in fact, that advisory board only had two members,
4 and one was a representative of HarbourVest and one was a
5 representative of CLO Holdco, correct?

6 A Correct.

7 Q And the advisor -- I'm sorry, the portfolio manager was
8 not allowed to disregard the recommendations of the advisory
9 board, correct?

10 A With respect to the limited set of items that the
11 advisory board could opine on, that is correct.

12 Q All right. I want to go over a couple of the
13 misrepresentations that HarbourVest has identified in its
14 filings related to its claim. The first one is -- and just
15 for the record, I'm reading from **Docket No. 1057** filed on
16 September 11, 2020, HarbourVest Response to Debtor's First
17 Omnibus Objection.

18 But the first misrepresentation identified in that
19 document says that Highland never informed HarbourVest that
20 Highland had no intention of paying the arbitration award.
21 And was -- was Highland obligated to pay the Josh Terry
22 arbitration award against Acis?

23 MR. MORRIS: Objection to the question to the extent
24 it calls for a legal conclusion.

25 THE COURT: Sustained.

1 MS. WEISGERBER: Join in that objection.

2 THE COURT: Sustained. I think --

3 BY MR. WILSON:

4 Q Your understanding was --

5 MR. WILSON: I'm sorry, Judge?

6 THE COURT: I sustained the objection as calling for
7 a legal conclusion. So, next question.

8 MR. WILSON: Yes, I -- I heard that. Thank you, Your
9 Honor.

10 BY MR. WILSON:

11 Q In your understanding, was Highland responsible for
12 paying the arbitration award to Josh Terry?

13 A My understanding is on the account of the fact that Acis
14 --

15 MS. WEISGERBER: Objection, Your Honor. Objection,
16 Your Honor, same basis.

17 THE COURT: Sustained. It was essentially the same
18 question.

19 MR. WILSON: Well, Your Honor, I didn't ask --

20 THE COURT: It was essentially the same question, Mr.
21 Wilson. Move on.

22 MR. WILSON: Okay.

23 BY MR. WILSON:

24 Q The next misrepresentation identified by HarbourVest said
25 that Highland did not inform HarbourVest that it undertook

1 the transfers to siphon assets away from Acis, LP and that
2 such transfers would prevent Mr. Terry from collecting on the
3 arbitration award. So the basis for that allegation would be
4 that Highland was siphoning assets from Acis to avoid having
5 Acis pay the arbitration award, correct?

6 A That -- that would be the implication, yes.

7 Q Okay. And then that misrepresentation continues on and
8 says that Highland represented to HarbourVest that it was
9 changing the portfolio manager because Acis was toxic. And
10 do you recall that representation being made to you?

11 A Yes, I do.

12 Q And would you agree with me that whether or not Acis is
13 toxic in the industry would be an opinion?

14 A I suppose it would be an opinion, but by the manager of
15 the vehicle responsible for managing the HCLOF investment and
16 the underlying CLOs. Yeah, we viewed the Acis name and the
17 Highland name as synonymous, if you will. I mean, Acis was a
18 subsidiary of Highland. For all intents and purposes, it was
19 the same from our perspective as we made the investment into
20 HCLOF.

21 Q So did HarbourVest have an independent understanding of
22 whether or not the Acis name was toxic in the industry?

23 A We did not, no. We relied on Highland's views of that as
24 manager of HCLOF.

25 MR. WILSON: Your Honor, just a brief housekeeping

1 item. Did you say that we need to be done at 1:00 o'clock?

2 THE COURT: Well, I said I really wanted you to be
3 done by 1:00 o'clock because I have a 1:30 docket and a 2:00
4 o'clock docket and I'd rather not have to hang up 70-
5 something people and reconnect them again at 3:00 o'clock.
6 How close are you to being finished?

7 MR. WILSON: Well, --

8 THE COURT: This is going at a very slow pace.

9 MR. WILSON: Well, I apologize for that, Your Honor.
10 I think I've got at least ten more minutes, but -- but I know
11 we also have closing remarks. And I was just going to ask if
12 Your Honor had a preference of --

13 THE COURT: Keep going.

14 MR. WILSON: -- of breaking now --

15 THE COURT: Keep -- let's --

16 MR. WILSON: -- or keep going? Okay.

17 THE COURT: Let's talk fast and try to get through.
18 You know, even if I'm sacrificing lunch today, I don't want
19 to inconvenience 75 people this way. So we'll just probably
20 start our 1:30 hearing a little late and inconvenience those
21 people.

22 All right. Go ahead.

23 MR. WILSON: All right. Thank you, Your Honor.

24 BY MR. WILSON:

25 Q Did Acis form its -- I can't recall if you answered this

1 question, but did Acis form its own opinion on whether or not
2 -- I'm sorry, strike that. Did HarbourVest form its own
3 opinion on whether or not the Acis name was toxic in the
4 industry?

5 MS. WEISGERBER: Objection, --

6 THE WITNESS: We did not. We didn't have a basis.

7 THE COURT: I'm sorry, did I have an objection?

8 BY MR. WILSON:

9 Q You did not --

10 THE COURT: Did I have an objection?

11 MS. WEISGERBER: Yeah. Objection. Yes. Objection,
12 asked and answered, Your Honor.

13 THE COURT: Overruled. He can answer.

14 BY MR. WILSON:

15 Q Okay. But --

16 A We did not.

17 Q Did Highland have the ability to investigate the Acis
18 name and make its own determination of whether that name was
19 toxic? I'm sorry, I think I'm misspeaking. HarbourVest.

20 A HarbourVest had the ability to do that, yes.

21 Q I apologize I misspoke. I meant HarbourVest. Did
22 HarbourVest have the ability to investigate that name and
23 determine if it was toxic?

24 A It was irrelevant to our investment thesis. And as I
25 said before, Acis was a subsidiary of Highland. We viewed

1 them as interchangeable in the context of our investment.

2 Q Okay. The next misrepresentation that you refer to says
3 that Highland indicated to HarbourVest that the dispute with
4 Mr. Terry would have no impact on its investment activities.
5 Would you agree with me that that is also an opinion?

6 A It was a statement that --

7 MS. WEISGERBER: Your Honor, I'm going to object to
8 the extent these questions are seeking a legal conclusion
9 regarding, you know, if something's an opinion or not.

10 THE COURT: Okay. Overruled. He can answer.

11 THE WITNESS: It was -- it was a statement that was
12 made to us by Highland and represented in multiple different
13 formats as fact. And a representation that we relied on in
14 connection with our investment.

15 BY MR. WILSON:

16 Q And finally, the misrepresentation, the last
17 misrepresentation identified, is that Highland expressed
18 confidence in the ability of HCLOF to reset or redeem the
19 CLOs. Would you agree with me that that statement is an
20 opinion?

21 A On the basis that it was the core investment thesis of
22 the -- of the investment of HCLOF. Again, whether that's
23 legally viewed as an opinion or a fact, it was -- it was
24 certainly the investment thesis that we made the investment
25 predicated upon.

1 Q And you just testified that you thought that Acis and
2 Highland were interchangeable from the perspective of the
3 investment opportunity, correct?

4 A Correct.

5 Q But you also accepted Highland's recommendation because
6 HarbourVest agreed that the change in the -- to a Highland
7 manager made commercial sense, correct?

8 A We took at face value what Highland recommended because
9 this all had to do with the structuring of an entity that
10 they fully managed with respect to multiple underlying
11 subsidiaries that weren't managed by Highland.

12 Q But would you agree that, at the time, you -- HarbourVest
13 thought that made commercial sense?

14 A It did not seem unreasonable to us based on the
15 explanation we were given.

16 Q Okay.

17 MR. WILSON: I want to refer to HarbourVest Exhibit
18 39.

19 (Pause.)

20 THE COURT: What are we waiting on? What are we
21 waiting on?

22 MR. WILSON: I'm trying to get the document on the
23 screen, Your Honor.

24 (Pause.)

25 THE COURT: We can't hear you. We can't hear you.

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1 MR. WILSON: I'm sorry. I'm sorry, Your Honor. I'm
2 speaking with my --

3 THE COURT: Okay.

4 MR. WILSON: -- co-counsel here.

5 THE COURT: All right.

6 (Pause.)

7 MS. WEISGERBER: Mr. Wilson, is it 39 or 38 that
8 you're referring to?

9 MR. WILSON: 39. HarbourVest 9019 motion on the
10 main -- on the Dondero file. And then there's the -- it's --
11 it's John -- and then there's the HarbourVest, and then the
12 exhibits are all in one file.

13 MS. WEISGERBER: Mr. Wilson, I'll just note that 39
14 was subject to confidentiality based on HCLOF's request.
15 HCLOF's counsel is present. I think they know it's an
16 excerpt. But I'd just -- that for HCLOF's counsel.

17 MR. WILSON: Well, is there an objection to showing
18 this document on the screen? Yes. All right. We're not
19 going to put Document 39 on the screen.

20 A VOICE: Yes.

21 MR. WILSON: All right. Scroll down to the next
22 page.

23 BY MR. WILSON:

24 Q This is a -- this is a document that was produced to us
25 this week, the Highland production. It appears to be a

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1 Highland CLO Funding, Ltd. Statement of Operations for the
2 Year Ended 31 December 2017. Do you see at the top of that --
3 at the top of that document where it says total investment
4 income of \$26 million?

5 A I do, yes.

6 Q And total expenses were roughly \$1.8 million?

7 A Yes.

8 Q And then net change and unrealized depreciation on
9 investments and net realized loss on investments was \$4.26
10 million cumulative, resulting in a net increase in net assets
11 resulting from operations of \$20.224 million. Do you agree
12 with that?

13 A Yes.

14 Q Okay.

15 MR. WILSON: Go to the next one.

16 BY MR. WILSON:

17 Q And you understand that, in the course of the Acis
18 bankruptcy, the portfolio managers for certain of the CLOs
19 were changed by the Trustee, correct?

20 A Yes, around the underlying CLOs. That's -- that's my
21 understanding, yes.

22 Q And, in fact, Mr. Seery testified earlier today that that
23 occurred in the summer of 2018, correct?

24 MR. WILSON: Scroll.

25 THE WITNESS: I don't recall the timing, but that's

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1 what he testified to.

2 BY MR. WILSON:

3 Q Well, this document is HarbourVest Exhibit 40, and this is
4 the statement of operations for the financial year ended 31
5 December 2018. Here, the total investment income is only
6 \$11.1 million. Do you see that?

7 A I do.

8 Q And do you see where the expenses have increased to \$13.6
9 million?

10 A I do, yes.

11 MR. WILSON: Okay. Scroll down some more.

12 BY MR. WILSON:

13 Q And do you see where it says net change and unrealized
14 loss on investments of \$48.47 million?

15 A Yes.

16 Q And so after Acis and Brigade took over the managements of
17 these CLOs, we had a net decrease in net assets resulting from
18 operations of \$52.483 million in the year 2018, correct?

19 MS. WEISGERBER: Objection, Your Honor. Assumes a
20 fact not in evidence.

21 THE COURT: Overruled. He --

22 MR. WILSON: Your Honor, --

23 THE COURT: We're just looking at this statement and
24 testifying about it says, so I overrule the objection.

25 MR. WILSON: Thank you, Your Honor. Thank you, Your

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1 Honor. I'm now going to turn to HarbourVest Exhibit 41. All
2 right. I'll --

3 BY MR. WILSON:

4 Q Did you answer the question, Mr. Pugatch?

5 A No, I -- I would agree with the second part of your
6 statement that for the year 2018 the -- the loss was \$52
7 million. I don't -- I don't believe that jives with the first
8 part of your statement that that was after Acis and Brigade
9 took over. As I understand, that was in the middle of the
10 year.

11 Q But in any event, Acis and Brigade had been managing this
12 for at least six months of 2018 when that loss occurred,
13 correct?

14 A They had been managing a portion of the underlying CLO
15 portfolio held by Highland CLO Funding.

16 Q All right. We're now looking at Exhibit #41, which is the
17 Draft Unaudited Statement of Comprehensive Income, 31 December
18 2019. Total income has now dropped to \$4.664 million.

19 MR. WILSON: And scroll down.

20 BY MR. WILSON:

21 Q Expenditures are at \$3.645 million. And then it says
22 investment gains and losses net out to \$11.493 million, a
23 negative \$11.493 million. And --

24 MR. WILSON: Scroll down to the --

25 BY MR. WILSON:

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1 Q And so would you agree with me that in the year 2019,
2 HCLOF showed a net loss of \$10.476 million?

3 A Yes, that's what the financial statements say.

4 Q And in this year, the Acis CLOs were solely managed by
5 Acis and Brigade, correct?

6 A The Acis CLOs were. Yes, correct.

7 Q All right.

8 MR. WILSON: Now, go to 42.

9 BY MR. WILSON:

10 Q Now, this is HarbourVest #42.

11 MR. WILSON: Go down to the next page.

12 BY MR. WILSON:

13 Q And this is the Highland CLO Funding, Ltd. Unaudited
14 Condensed Statement of Operations for the Financial Period
15 Ended 30 June 2020. And so this is just half a year of
16 operations. And would you -- and this actually has a
17 comparison between 2019 and 2020. But do you see where it
18 says investment income has dropped from a million dollars in
19 the first half of 2019 to \$381,000 in the first half of 2020?

20 A Yes.

21 MR. WILSON: Okay. Scroll down.

22 BY MR. WILSON:

23 Q And do you see where, in the first half of 2019, total
24 expenses were \$1.85 million, and then in the first half of
25 2020 total expenses were \$2.16 million? Do you see that?

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1 A I do.

2 Q And if you go down below that, where it says Net Realized
3 and Unrealized Gain/Loss on Investments, the first half of
4 2019 HCLOF lost \$12 million, and in the first half of 2020 it
5 lost \$39.472 million?

6 MR. MORRIS: Your Honor, I'm going to object. It's
7 John Morris for the Debtor. I'm happy to stipulate. In fact,
8 he can offer this document into evidence. There's no
9 foundation that Mr. Pugatch has any particularized knowledge
10 about any of the numbers behind this. All he's asking him to
11 do is to confirm what the document says. It says what it
12 says. But this -- I'll object on that basis, Your Honor.

13 THE COURT: All right. Mr. Wilson, what about it?
14 You're just getting him to read numbers off of these exhibits.

15 MR. WILSON: Well, --

16 THE COURT: Shall we just --

17 MR. WILSON: -- I understood --

18 THE COURT: -- by stipulation get them into evidence?

19 MR. WILSON: Well, --

20 MR. MORRIS: No objection, Your Honor.

21 MS. WEISGERBER: No objection.

22 THE COURT: All right. So these are exhibits what?
23 We've gone through 39, 41, and I don't know what else. 40,
24 maybe?

25 MR. WILSON: It was Exhibits 39, 40, 41, and 42 that

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1 were on the HarbourVest exhibit list.

2 THE COURT: All right. Those will be admitted, and
3 we've already discussed what docket entry number they appear
4 at.

5 (HarbourVest's Exhibits 39 through 42 are received into
6 evidence.)

7 THE COURT: All right. Anything else? You told me
8 you had 10 more minutes about 15 minutes ago.

9 MR. WILSON: Well, I'm sorry if I -- I think I had
10 said I had at least ten more minutes, and I was looking at the
11 -- it was 10:50 [sic] and you wanted to quit at 1:00. So I do
12 have longer than that. I'm sorry, Your Honor.

13 THE COURT: Well, --

14 MR. WILSON: But --

15 THE COURT: -- I feel like I'm being --

16 MR. WILSON: -- I'll try to proffer --

17 THE COURT: Okay, Mr. Wilson, let me just tell you
18 something. I feel like I'm being disrespected now, and the
19 parties are. We really need to pick up the pace. I've told
20 you I've got a 1:30 docket -- with four or five matters on it,
21 by the way. I've got a 2:00 o'clock docket. I'm starting
22 them late. No one advised my courtroom deputy that we were
23 going to need all day today for this, okay? So you've got
24 five more minutes to wrap it up, and then, of course, I have
25 to go to Mr. Draper and see if he has cross. All right? So

1 please don't test my patience any more. Five minutes to
2 finish.

3 MR. DRAPER: Judge, I have no questions.

4 THE COURT: I didn't hear you, Mr. Draper. What did
5 you say?

6 MR. DRAPER: I have no questions.

7 THE COURT: All right. Very good.

8 MR. WILSON: I apologize, Your Honor. I was actually
9 trying to be respectful of your time when I informed you that
10 I had at least ten more minutes left at 12:50, but I will try
11 to be as expedient as I can as I finish up.

12 BY MR. WILSON:

13 Q And I don't see you on my screen.

14 MR. WILSON: You can take that document down.

15 THE WITNESS: Here.

16 BY MR. WILSON:

17 Q Mr. Pugatch, do you have an opinion as to what caused
18 these incredible losses of value at HCLOF?

19 MS. WEISGERBER: Objection to the extent it calls for
20 a legal conclusion.

21 THE COURT: Overruled. He can answer.

22 THE WITNESS: I would say that there's no one cause
23 for the decline in value. I can point to a number of
24 different things, including the exorbitant fees that were
25 charged to HCLOF, including the inability to be able to re --

1 refinance the CLOs on the part of HCLOF, all of which stems
2 from the actions that Highland took prior to our investment in
3 HCLOF.

4 BY MR. WILSON:

5 Q And you've -- I think it's been referenced several times
6 in HarbourVest's arguments that -- that the reset was a
7 fundamental -- the inability to get a reset was a fundamental
8 cause of the loss in value. Is that -- is that HarbourVest's
9 position?

10 A That -- that is a part of the -- the cause in the
11 declining value of the CLOs, yes.

12 Q And you would agree with me that a reset is fundamentally
13 a reset of interest rates, correct?

14 A Of the interest rates of the liabilities of the -- the
15 timing for repayment of those liabilities, yes.

16 Q Now, just say with -- for the sake of a hypothetical
17 example. If you had a home that was valued at \$5 million, or
18 let's just say \$500,000, let's make it more realistic. If you
19 had a \$500,000 home and you had a mortgage on that home at
20 five percent interest, your inability to refinance that home
21 at a lower interest rate would not affect the underlying value
22 of that home, correct?

23 MS. WEISGERBER: Objection, Your Honor. Hypothetical.
24 And objection to relevance as well.

25 THE COURT: Sustained.

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1 MS. WEISGERBER: Calls for speculation.

2 THE COURT: Sustained.

3 BY MR. WILSON:

4 Q Is there any reason to believe that the change in the
5 interest rate would have prevented the massive losses of
6 investment value that occurred in HCLOF?

7 MS. WEISGERBER: Object on the same grounds.

8 THE COURT: Sustained.

9 THE WITNESS: The short -- the short answer is yes,
10 with a -- with the amount of leverage --

11 MS. WEISGERBER: I --

12 THE WITNESS: -- that exists. Oh, sorry.

13 MS. WEISGERBER: The objection was sustained.

14 THE COURT: Yeah, I sustained the objection. That
15 means you don't answer.

16 THE WITNESS: I'm sorry, Your Honor.

17 BY MR. WILSON:

18 Q So, would you agree with me that if the expenses and the
19 fees charged by the portfolio manager increased dramatically,
20 that would -- that would impact the value of the investment,
21 correct?

22 MS. WEISGERBER: Objection on the same grounds, and
23 relevance. This is a 9019 hearing, Your Honor. We are not
24 here to try every minutia. And in fact, we're trying to avoid
25 a trial on the merits. And it feels like we're getting a bit

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1 far afield now.

2 THE COURT: I sustain.

3 MR. WILSON: All right. I'll pass the witness.

4 THE COURT: All right. Mr. Draper said he had no
5 cross. So, any redirect, Ms. Weisgerber?

6 MS. WEISGERBER: No, Your Honor.

7 THE COURT: All right. Mr. Morris, did you have any
8 redirect?

9 MR. MORRIS: I do not, Your Honor. I have a very
10 brief closing and then some additional remarks if -- if we
11 finish.

12 THE COURT: All right. So, Mr. Pugatch, that
13 concludes your testimony. Thank you. You're excused if you
14 want to be.

15 All right. So, as I understood it, there would be no more
16 evidence after this.

17 MR. WILSON: Well, Your Honor, along those lines, as
18 a housekeeping measure, I think everything on my exhibit list
19 is included on someone else's exhibit list, but just for belt
20 and suspenders I would move to admit all of the exhibits on
21 the -- on Mr. Dondero's exhibit list.

22 THE COURT: Well, is that agreed or not? Because we
23 didn't have a witness to get them in.

24 MR. MORRIS: No objection, Your Honor.

25 THE COURT: Any objection? All right. If there's no

1 objection, I'll --

2 MR. MORRIS: Your Honor, --

3 THE COURT: I'm sorry. Was there an objection? I
4 will admit Dondero Exhibits A through M, and those appear at
5 Docket Entry 1721, correct, Mr. Wilson?

6 MR. WILSON: That is correct, Your Honor.

7 THE COURT: All right.

8 MR. WILSON: That is correct, Your Honor.

9 (James Dondero's Exhibits A through M are received into
10 evidence.)

11 MR. WILSON: And one final matter is, during the
12 examination of Mr. Seery, you at least partially admitted
13 Dondero's Exhibit N, and I was wondering if we need to -- how
14 we'd need to submit that for the record.

15 THE COURT: Okay. First, I'm confused. I think you
16 said Mr. Terry's testimony. You --

17 MR. WILSON: I said Seery. I'm sorry.

18 THE COURT: Oh, Seery?

19 MR. WILSON: Or I may have said Terry, but I meant to
20 say Seery.

21 THE COURT: Okay. Maybe you said it. Okay. During
22 Mr. Seery's testimony -- oh, the email that I admitted a
23 portion of?

24 MR. WILSON: That is -- that's correct, Your Honor.

25 THE COURT: What -- what are you asking? It's not in

1 your notebook. Are you asking do you need to separately
2 submit it or what?

3 MR. WILSON: Yeah, I was just asking what the Court's
4 preference on how we submit that for the -- put it in the
5 record.

6 THE COURT: Okay. That was so garbled I didn't hear
7 you. You need to file that on the docket as a supplemental
8 exhibit that was admitted, okay?

9 MR. WILSON: Okay. Thank you, Your Honor.

10 THE COURT: All right. Closing arguments? Mr.
11 Morris?

12 CLOSING ARGUMENT ON BEHALF OF THE DEBTOR

13 MR. MORRIS: Yes, very briefly, Your Honor. The
14 Debtor easily meets the standard here. The settlement
15 consideration relative to the claim establishes and reflects
16 the likelihood of success on the merits.

17 You know, I've never -- I did hear Mr. Pugatch in the
18 deposition the other day, but I otherwise haven't heard from
19 him. I found him to be incredibly credible, Your Honor, and I
20 regret the fact that he and HarbourVest are being blamed twice
21 here. The fact that they got 40,000 documents or didn't read
22 the arbitration award, it's just -- it's a shame that they're
23 being dragged through this yet again.

24 The fact is, Your Honor, there is no evidence that they
25 made the disclosures that HarbourVest claims -- complains

1 about. They just don't. The fraudulent transfers led to the
2 bankruptcy, led to the appointment of a trustee, led to --
3 right? So, so it's -- that's why -- but they're getting
4 something for their claim.

5 It was a hard negotiation, Your Honor. There is no
6 dispute that if we litigated this it would be complex. It
7 would fact-intensive. The Debtor would be forced to rely upon
8 witnesses who are no longer employed by it. That it would be
9 expensive, for sure. There's no dispute about any of that.
10 There's no dispute that the creditor body has spoken loudly
11 here by unanimously refraining from objecting except for Mr.
12 Dondero and the entities controlled by him.

13 And you heard Mr. Seery's testimony. I think he
14 exhaustively informed the Court as to the process by which the
15 transaction was analyzed and negotiated, and there's no
16 evidence to the contrary that this was an arm's-length
17 negotiation.

18 Unless Your Honor has any questions, we would request that
19 the motion be granted.

20 THE COURT: Thank you. Ms. Weisgerber, your closing
21 argument?

22 CLOSING ARGUMENT ON BEHALF OF HARBOURVEST

23 MS. WEISGERBER: Sure. Thank you, Your Honor. I'll
24 also be brief. We again join in Mr. Morris's arguments and
25 comments.

1 The Court has now heard testimony from Mr. Pugatch
2 regarding the factual detail underlying HarbourVest's claims.
3 The Court has also heard about the significant damages that
4 HarbourVest stands to recover for those claims. And
5 HarbourVest came to this Court ready to litigate. It would --
6 it's ready to do so if needed. It believes it would prevail
7 on its claims if it had to do so.

8 But the Court also heard from Mr. Seery about his
9 understanding of HarbourVest's claims, his calculus, and his
10 decision to settle them. And we submit that nothing further
11 is needed by this Court in order to approve the settlement.
12 This is a question of the Debtor's business judgment. We're
13 not here to have a trial on the merits of HarbourVest's
14 claims. The Objectors have made various arguments, including
15 about the cause of HarbourVest's damages. But even the nature
16 of the legal claims that HarbourVest is asserting, some do not
17 require a loss causation. So we submit that's not even
18 relevant to the merits of the claims.

19 The settlement is clearly in the best interest of the
20 estate, and we respectfully request that the Court approve it.

21 THE COURT: Thank you. All right. Mr. Wilson, your
22 closing argument?

23 MR. LYNN: Michael Lynn. I will give the closing
24 argument, if that's satisfactory to the Court.

25 THE COURT: All right. Go ahead.

1 CLOSING ARGUMENT ON BEHALF OF JAMES DONDERO

2 MR. LYNN: Good afternoon, Your Honor. I just want
3 to make a few points, and I'll try to do it as quickly as
4 possible.

5 First, I feel compelled to address the argument of the
6 Debtor that Mr. Dondero is repeating his litigious behavior
7 from the Acis case. I don't know about the Acis case. I
8 wasn't involved except very, very peripherally. But with
9 respect to this case, we have only taken positions in court
10 that we believed -- that is, his lawyers -- believed were
11 warranted by law, facts as we knew them, and that are
12 consistent with professionalism. I'd be glad to explain any
13 position we took.

14 Often, through the Debtor's very persuasive powers, we
15 never had the chance to explain our position previously to the
16 Court. In fact, for the most part, as today, we have been
17 reactive rather than commencing proceedings. In fact, during
18 the first seven months of this case, we only appeared in court
19 a few times, when we felt we had to -- for example, when
20 discovery was being sought by the Creditors' Committee that we
21 feared might invade privilege. Then, much to the Debtor's
22 fury, we opposed the Acis 9019. We did so because we thought
23 it was too much.

24 Since, as the Court can see, the principal instigators of
25 litigation have been the Debtor, and to a lesser extent, the

1 Committee.

2 Indeed, in an apparent effort to drown Mr. Dondero and his
3 counsel in litigation, the Debtor has repeatedly sought court
4 action on a very short fuse, claiming need for expedited
5 hearing.

6 Perhaps the most startling example of this is the recent
7 contempt motion, for which there is no good reason for a quick
8 hearing. Resolution of that motion is not necessary to reach
9 the confirmation hearing. The motion could be heard after the
10 confirmation hearing. There is no need to put Mr. Dondero and
11 his professionals in a position where they have to respond in
12 a couple of days, two business days, and then will have two
13 days to prepare for trial.

14 Second, Your Honor, Mr. Seery has repeatedly asserted,
15 contrary to today's motion, that the HarbourVest claim was of
16 no merit. That is why, when he came in to settle for tens of
17 millions of dollars, we opposed this motion. It appears that
18 the motion is occurring without any cross-party discovery.
19 There is no consideration, apparently, of trying dispositive
20 -- dispositive motions first. There is no consideration for
21 junior classes of equity, which Mr. Seery has previously
22 opined were in the money. This, even though there's no reason
23 that this settlement is necessary pre-confirmation, unless Mr.
24 Seery wants HarbourVest's vote.

25 Third, for whatever reason, that seems to be the driving

1 factor for settling. On its face, the vote seems to be a key
2 factor of the settlement. About the longest provision of the
3 settlement agreement relates to voting. The motion itself --
4 in the motion itself, five of seven bullet points cited by the
5 Debtor for approval of the settlement deal with and emphasize
6 support of the plan or the vote that is to be cast for the
7 plan.

8 If the settlement is a good deal, it didn't need to have
9 as one of its parts the requirement that HarbourVest vote for
10 the plan.

11 Your Honor, I'll stop there. I know Your Honor would like
12 to get just a few minutes before your 1:30 docket. I've been
13 there and I understand that, and I do apologize for taking the
14 time we have, but I think that responsibility is shared with
15 the Debtor and HarbourVest.

16 Thank you, Your Honor.

17 THE COURT: All right. Thank you for that.

18 Mr. Draper, any closing argument from you?

19 CLOSING ARGUMENT ON BEHALF OF GET GOOD AND DUGABOY TRUSTS

20 MR. DRAPER: Yes, I have three comments. The first
21 is the claim -- the loss claim, absent the fraud claim, is, at
22 best, \$7 million. I think Mr. Seery's argument that a hundred
23 -- one hundred percent is attributable to there is just wrong.
24 If he and I both invested in a company 50-50 and it goes
25 broke, we only lost 50 cents each.

1 Number two, I think the Court heard the evidence. I think
2 this is, at best, a subordinated claim under 5 -- under the
3 Bankruptcy Code. It's really a "But for the
4 misrepresentations, we wouldn't have invested."

5 And the last one is the -- Judge Lynn represented the
6 voting, so I won't deal with that. But the one that troubles
7 me the most is the fact that this asset that is ultimately
8 being paid for in claim dollars that's being transferred over
9 to the Debtor and being put it outside the estate, outside the
10 purview of this Court, and placed in some subsidiary, this --
11 this transaction, if it is approved, must -- should contain a
12 provision that the asset that's being acquired come into the
13 Debtor and be owned by the Debtor.

14 THE COURT: All right.

15 MR. DRAPER: I have nothing further, Your Honor.

16 THE COURT: Thank you, Mr. Draper.

17 Mr. Morris, you get the last word since it's your motion.

18 MR. MORRIS: Very quickly, Your Honor. The
19 subordination argument doesn't hold water. This is not a
20 claim against the Debtor for the security; it's a claim for
21 fraud. Okay? So, so 510(b), if it was a claim against HCLOF,
22 that might make sense, but this is a claim against the Debtor.
23 And it's a Debtor -- it's a claim for fraud. That's number
24 one.

25 Number two, we need to keep this exactly as it's been

1 structured in order to avoid litigation. Mr. Seery told the
2 Court. I'm sure the Court can make its own assessment as to
3 Mr. Seery's credibility as to whether or not the Debtor is
4 intending to somehow get this asset beyond the Court.

5 But there are reasons why we've done this, Your Honor.
6 They could have made an objection on that basis. In fact, if
7 they did, it would be overruled, because there's no -- there's
8 no basis for this Court to find that somehow the Debtor and
9 Mr. Seery are doing something untoward to get assets away from
10 this Court's jurisdiction.

11 You know, I don't know what to say about Mr. Lynn's
12 commentary. Much of it had nothing to do with any evidence in
13 the record.

14 The fact remains, Your Honor, that this settlement is
15 fair. It's reasonable. It's in the best interest of the
16 estate. And we would respectfully request that the Court
17 grant the motion.

18 THE COURT: All right. Thank you. Well, I
19 appreciate all the arguments and evidence I have heard today.
20 I'm going to be brief in my ruling here, but I reserve the
21 right to supplement in a more fulsome written order, which I'm
22 going to instruct Mr. Morris to submit. I am approving the
23 motion to compromise the HarbourVest claim today, and I guess
24 subsumed in that is granting the motion to allow their claim
25 for 3018 voting purposes.

1 I in all ways find this compromise to meet the required
2 legal standard set forth in such cases as *TMT Trailer Ferry*,
3 *AWECO*, and *Foster Mortgage*, numerous other Fifth Circuit
4 cases.

5 First, I'm going to specifically say for the record that I
6 found both witnesses today, Mr. Seery and Mr. Pugatch, to be
7 very credible. Very credible testimony and meaningful
8 testimony was provided to the Court today. And based on that
9 testimony, I find, first, that this compromise was the product
10 of arm's-length negotiations. It was a hard-fought
11 negotiation, as far as I'm concerned. The Debtor objected to
12 these numerous HarbourVest proofs of claim. The Debtor did
13 not want to allow HarbourVest a significant claim for voting
14 purposes. I duly note the statements made in the disclosure
15 statement before this compromise was reached suggesting, you
16 know, the Debtor didn't think HarbourVest should have a large
17 claim.

18 That is consistent with everything I typically see in a
19 bankruptcy case when there's a claim objection. The objector
20 vehemently denies the claimant should have a proof of claim,
21 and then people sit down and think about the risks and rewards
22 of litigating things. And I believe very fervently that's
23 what happened here. There were good-faith, arm's-length
24 negotiations that resulted in this proposed compromise.

25 I find the compromise -- and I'll add to that point, on

1 the good-faith point, I find nothing sinister or improper
2 about the fact that the compromise includes a commitment of
3 HarbourVest to vote in favor of the plan. Again, we see this
4 a lot. You know, there's even a buzz word that doesn't even
5 exist in the Bankruptcy Code: "plan support agreement." You
6 know, we see those a lot -- you know, oftentimes negotiated
7 before the case, but sometimes after. You know, it may be
8 improper in certain situations, but there was nothing here
9 that troubles me about that component of the compromise.

10 I find the compromise to meet the paramount interest of
11 creditors here. Notably, we have very large creditors in this
12 case who have not objected. The *Foster Mortgage* case from the
13 Fifth Circuit tells me I am supposed to consider support or
14 opposition of creditors. No opposition of UBS. No opposition
15 of the Redeemer Committee Crusader Fund. No opposition from
16 Josh Terry or Acis. No opposition from Daugherty.

17 But moreover, when considering the paramount interest of
18 creditors, I find this compromise to be in all ways fair and
19 equitable and in the best interest of the estate, and
20 certainly within the range of reasonableness. The evidence
21 showed that HarbourVest asserted over \$300 million. Over \$300
22 million. Granted, that was based on all kinds of legal
23 theories that would be contested and expensive to litigate,
24 but the evidence also showed that they invested over \$70
25 million. You know, close to \$75 million. I forget the exact

1 number. \$75 or \$80 million, somewhere in that range. And now
2 the credible evidence is that investment is worth about \$22
3 million.

4 So, certainly, while the claim may not have, at the
5 ultimate end of the day in litigation, resulted in a \$300
6 million proof of claim, certainly, certainly there were strong
7 arguments for a very sizeable claim, more than this compromise
8 amount. So it's certainly fair and equitable and reasonable
9 when considering the complexity and duration of further
10 litigation, the risks and rewards, the expense, delay, and
11 likely success.

12 A couple of last things I'm going to say are these. I
13 understand, you know, there is vehement disagreement on the
14 part of our Objectors to the notion that Highland might have
15 caused a \$50 million loss to HarbourVest. But I will tell
16 you, for what it's worth -- I want the record clear that this
17 is part of my evaluation of the reasonableness of the
18 settlement -- my reaction is that, indeed, Highland's
19 litigation strategy in the Acis case caused HCLOF to lose a
20 huge portion of its value, to the detriment of HarbourVest.
21 You know, whether all evidence at the end of the day would
22 convince me of that, I don't know, but that's -- that is
23 definitely this judge's impression.

24 I'm very sympathetic to HarbourVest. It appears in all
25 ways from the record, not just the record before me today, but

1 the record in the Acis case that I presided over, that
2 Highland back then would have rather spent HarbourVest's
3 investment for HCLOF legal fees than let Josh Terry get paid
4 on his judgment. They were perfectly happy to direct the
5 spending of other people's money, is what the record suggested
6 to me.

7 And then, you know, I have alluded to this very recently,
8 as recently as last Friday: I can still remember Mr.
9 Ellington sitting on the witness stand over here to my left
10 and telling the Court, telling the parties under oath, that
11 HarbourVest -- he didn't use its name back then, okay? For
12 the first phase of the Acis case, or most of the Acis case, we
13 were told it was an investor from Boston. And at some point
14 someone even said their name begins with H. I mean, it seemed
15 almost humorous. But Mr. Ellington said it was they,
16 HarbourVest, the undisclosed investor, who was insistent that
17 the Acis name was toxic, and so that's what all of this had
18 been about: the rebranding, the wanting to extract or move
19 things away from Acis.

20 So, you know, I have heard for the -- well, at least the
21 second time today, from Mr. Pugatch, what I perceive to be
22 very credible testimony that that's just not the way it
23 happened.

24 And I guess the last thing I want to say here today, and
25 you know, I guess I have multiple reasons for saying this, not

1 just in connection with approving the settlement, you know,
2 I've heard about how the Acis CLOs, the HCLOF CLOs have lost,
3 you know, a crazy amount of value, that they underperform in
4 the market, that, you know, during the Acis/Brigade tenure
5 and, you know, they should have been reset. You know, I hope
6 those who have not been around as long as some of us in this
7 whole saga know that the -- Mr. Terry, Mr. Phelan, I think
8 Brigade, they all desperately wanted to reset these things,
9 but it was HCLOF, I believe directed by Highland, that wanted
10 to redeem, wanted to liquidate, take the pot of money,
11 warehouse it, and then do their own thing.

12 And there was, I think, from my vantage point, a
13 monumental effort to try to get everyone to the table to do
14 reasonable resets that would be good for the stakeholders at
15 HCLOF and be good for the creditors of Acis, including Josh
16 Terry. That was always the balancing act that most of us were
17 focused on during the Acis bankruptcy. But Highland, I
18 believe, directing HCLOF's strategy, just did not want the
19 resets to happen.

20 So, again, part of me, I suppose, just wants to make the
21 record clear on something that I fear not everyone is clear
22 about. And I say that because the comment was made that the
23 injunctions, the preliminary injunctions sought by the Acis
24 trustee caused the plummet in value, and I think that's just
25 not an accurate statement. I think litigation strategies are

1 what caused the plummet in value, and that's why I think
2 ultimately HarbourVest would potentially have a meritorious
3 claim here in a significant amount if this litigation were to
4 go forward.

5 So, I approve this under 9019. And again, Mr. Morris,
6 you'll upload an order.

7 It is now 1:41, so let's as quickly as possible hear the
8 other motion that I don't think had any objections. Mr.
9 Morris?

10 MR. MORRIS: Your Honor, just -- yes, just very
11 quickly, just four things.

12 With respect to the order, I just want to make it clear
13 that we are going to include a provision that specifically
14 authorizes the Debtor to engage in -- to receive from
15 HarbourVest the asset, you know, the HCLOF interest, and that
16 that's consistent with its obligations under the agreement.

17 The objection has been withdrawn, I think the evidence is
18 what it is, and we want to make sure that nobody thinks that
19 they're going to go to a different court somehow to challenge
20 the transfer. So I just want to put the Court on notice and
21 everybody on notice that we are going to put in a specific
22 finding as to that.

23 THE COURT: All right. Fair --

24 MR. MORRIS: Number two is --

25 THE COURT: Fair enough. I do specifically approve

1 that mechanism and find it is appropriate and supported by the
2 underlying agreements.

3 And just so you know, I spent some time noodling this
4 yesterday before I knew it was going to be settled, so I'm not
5 just casually doing that. I think it's fine.

6 Okay. Next?

7 MR. MORRIS: Thank you very much, Your Honor. Number
8 two, with respect to the motion to pay, there is no objection.
9 If we can just submit an order. Or if Your Honor has other
10 guidance for us, we're happy to take it.

11 THE COURT: Okay. Does anyone have anything they
12 want to say about that motion?

13 Again, I looked at it. I didn't see any objections. I
14 didn't see any problem with it. It's -- you know, you're
15 going through this exercise because of the earlier protocol
16 order.

17 MR. MORRIS: Correct.

18 THE COURT: All right. Well, if there's nothing,
19 then, I will approve that, finding there is good cause to
20 grant that motion.

21 MR. MORRIS: Okay.

22 THE COURT: All right. Is the only other
23 housekeeping matter --

24 MR. MORRIS: I --

25 THE COURT: -- we have the contempt motion?

1 MR. MORRIS: It is, and I do -- I do have to point
2 out how troubled the Debtor is to learn that Mr. Dondero was
3 still receiving documents from Highland as late as this
4 morning. It's got to be a violation of both the TRO -- I
5 guess it's now the preliminary injunction.

6 I would respectfully request -- I know that time is what
7 it is -- but maybe Mr. Dondero can answer now where he got the
8 document, who he got the document from, what other documents
9 he's gotten from the Debtor since Your Honor ordered him not
10 to communicate with the Debtor's employees.

11 This is not saying hello in the hallway. I mean, this is
12 just -- it is really troubling, Your Honor, and it's why we
13 need the contempt motion heard as soon as possible.

14 THE COURT: Well, Mr. Wilson, do you want to address
15 that? I think the words I heard were that you just got the
16 document this morning, and you got it from Mr. Dondero, but we
17 don't know where and when Mr. Dondero got it. Mr. Wilson, are
18 you there?

19 MR. LYNN: I'm afraid I'm back, Your Honor.

20 THE COURT: Okay.

21 MR. LYNN: I am not sure whether Mr. Dondero had it
22 in his files from some -- from back before he was asked not to
23 communicate with members or with employees of the Debtor. I
24 believe -- I believe he's with us, though I don't think he's
25 available by video.

1 Are you there, Mr. Dondero?

2 THE COURT: We can't hear you, Mr. Dondero.

3 MR. DONDERO: Judge?

4 THE COURT: Oh, go ahead.

5 MR. DONDERO: Can you hear me now?

6 THE COURT: Yes.

7 MR. DONDERO: Yes, I -- I -- when I moved offices, I
8 found it in a stack of paper, and --

9 MR. LYNN: I understand it shows that his microphone
10 is working.

11 THE COURT: Okay. Go ahead.

12 MR. DONDERO: Can you hear me?

13 THE COURT: Yes, go ahead.

14 MR. DONDERO: Yeah, I -- I'm sitting in new offices.
15 I've got everything in boxes. I was going through everything
16 yesterday, and I found those emails in a stack of papers and I
17 sent them over because I thought they would be relevant
18 relative to Seery's initial impression.

19 THE COURT: Okay. Well, let's talk about the timing
20 of this hearing. Mr. Morris, I'm going to -- I'm going to ask
21 you why --

22 MR. LYNN: Michael Lynn, Your Honor. I don't want to
23 waste the Court's time. We have not made available anything
24 to the Court objecting to the expedited hearing on the
25 contempt motion. We've been here.

1 I would say to Your Honor that if Mr. Dondero is indeed in
2 contempt, or was in contempt toward the motion, which has
3 nothing to do with the document that was presented as Dondero
4 Exhibit N, there is no need to hear this on an expedited
5 basis.

6 Every time we turn around, Your Honor, the Debtor is
7 asking that something be heard on an expedited basis. And we
8 have not opposed that. We have not fought that, to speak of,
9 to date. But this is getting a little ridiculous. We're
10 within days of confirmation of the Debtor's plan, and it is
11 simply a means of causing pain and suffering to Mr. Dondero
12 and those who are working with him and for him. And he does
13 have employees at NexPoint who are assisting him.

14 So we most strongly object to being put on a schedule
15 where we are expected to get a response to the contempt motion
16 on file by Monday, today being Thursday, and a weekend
17 intervening. And we strongly object to any setting of this
18 contempt motion on Tuesday or Wednesday. It is absurd, and it
19 is done solely, solely, Your Honor, to cause pain.

20 THE COURT: All right.

21 MR. MORRIS: Your Honor, if I may?

22 THE COURT: Please.

23 MR. MORRIS: Just very briefly, we had a hearing the
24 other day. The evidence is the exact same. The evidence is
25 crystal clear that the violations are meaningful, they're

1 substantial, and they are repeated.

2 After the TRO was entered into, Mr. Dondero and only Mr.
3 Dondero chose to interfere with the Debtor's business. Mr.
4 Dondero and only Mr. Dondero chose to communicate with the
5 Debtor's employees, not about saying hello in the hallway but
6 about coordinating a legal defense strategy against the
7 Debtor.

8 The need is immediate, Your Honor, and I would
9 respectfully request that the hearing be set for Tuesday or
10 Wednesday. They've had this motion now since the 7th of
11 January. They had a full evidentiary hearing, so they know
12 most of the evidence that's going to be presented. They have
13 a whole team of -- they have an army of lawyers, Your Honor,
14 and half a dozen firms working on behalf of Mr. Dondero and
15 his interests. For him to cry here, for him to cry that this
16 is too much is really -- it's obscene. It just is.

17 THE COURT: All right. I'm going to say a couple --

18 MR. LYNN: That is absurd.

19 THE COURT: I'm going to say a couple of things. One
20 is that I -- well, the one time I remember getting reversed
21 for holding someone in contempt of court, the District Court
22 felt like I had not given enough notice of that. The District
23 Courts, what they think is reasonable notice, is sometimes
24 very different from what the bankruptcy judges think. We're
25 used to going very lickety-split fast in the bankruptcy

1 courts. And the Courts of Appeals, District Court, Courts of
2 Appeals obviously, for good reason, are very concerned about
3 due process in this kind of context. So I'm sensitive to
4 that.

5 I'm also sensitive to the fact that it is monetary damages
6 that are being sought here to purge the contempt. Okay? The
7 shifting of attorneys' fees is basically what I understand is
8 being sought at this point. You know, we have a preliminary
9 injunction halting behavior at this point, and so I think
10 that's another reason I'm hesitant to give an emergency
11 hearing. I feel like monetary damages can wait and we can
12 give 21-plus days' notice of the hearing.

13 But I'm going to throw this out there as well. If I do
14 feel like there is a showing of contempt, if I do feel like
15 the phone -- as I told you the other day, I'm very, very
16 fixated on the phone that may have been destroyed or thrown
17 away, maybe at Mr. Dondero's suggestion. I mean, the
18 potential monetary sanction here may be very, very large if
19 the evidence plays out in the way I fear it might play out.
20 So I need to make sure everybody has adequate time to prepare
21 for that hearing and make sure I get all the evidence I need
22 to see. All right? Contempt of court is very, very, very,
23 very serious, and I don't think anyone would deny that.

24 So, with that, it was filed what day? January 4th? Is
25 that what I heard? Or --

1 MR. MORRIS: January 7th, I believe, Your Honor.

2 THE COURT: January 7th? All right. Well, Traci,
3 are you there? Hopefully, you're not in a hunger coma at this
4 point.

5 THE CLERK: I am here.

6 THE COURT: Okay. We have -- we're going to have to
7 go to that first week of February, right? Because we've got
8 the confirmation hearing that, you know, late in January, and
9 then --

10 THE CLERK: Yes. Uh-huh.

11 THE COURT: Okay. Do you have an available date to
12 give right now?

13 THE CLERK: How about -- if you're willing to hear
14 them on Friday, February 5th.

15 THE COURT: Okay. I can do that. February 5th at
16 9:30. Any -- anybody want to argue about that?

17 MR. MORRIS: Thank you, Your Honor. That's
18 acceptable to the Debtor.

19 THE COURT: Okay. Mr. Lynn, is that good with you?

20 MR. LYNN: We'll do that, Your Honor. I would say,
21 by the way, that I'll be happy to buy Mr. Seery, out of my own
22 pocket, five cell phones, which ought to make up for the one
23 that was lost, though I recognize that those cell phones will
24 not have on them the privileged information, the conversations
25 between his lawyers and Mr. Dondero that I imagine he was

1 looking forward to seeing.

2 THE COURT: Well, I wouldn't want him to see that
3 information, but I do think he's entitled to any nonprivileged
4 information, texting, or calls that are on that phone. So,
5 again, I'm either going to hear good explanations for that or
6 not, but it's something very concerning to me.

7 All right. So we have a game plan.

8 I'm going to ask, Did we have good-faith negotiations
9 between Dondero and the Committee and anything positive to
10 report? I'll ask Mr. Lynn and Mr. Clemente to weigh in.

11 MR. CLEMENTE: Yes, Your Honor. I'll go first, Your
12 Honor. Mr. Lynn and I have exchanged several emails over the
13 weekend, and the message that I sent to Mr. Lynn was very
14 clear. There had been a term sheet that Mr. Seery had sent
15 back to Mr. Dondero. I had asked Mr. Lynn to take a pencil
16 out and be very specific as to what it was Mr. Dondero was
17 prepared to do in connection with the pot plan. I instructed
18 him that some of the issues that the Committee still has is
19 obviously the overall value, along with the concept that's
20 signing up to a promise from Mr. Dondero to comply with
21 (indiscernible) as part of that value. As Your Honor may
22 understand, the Committee is obviously very skeptical of Mr.
23 Dondero's future performance under an agreement that he enters
24 into.

25 Those are but a couple of issues, Your Honor, that I

1 advised Mr. Lynn were very concerning to the Committee. And I
2 suggested to him that if he wanted to move things forward, the
3 best way to do it would be to come to us with a fulsome term
4 sheet that explained exactly what it was in clear and precise
5 detail that Mr. Dondero was proposing, and that would be the
6 best way to move the process forward, Your Honor.

7 THE COURT: All right. Mr. Lynn, anything to add to
8 that?

9 MR. LYNN: Well, Your Honor, my experience in
10 negotiations is that it is useful to agree on substantive
11 terms, or at least be in the ballpark, before term sheets are
12 exchanged. Long ago, a term sheet was prepared and presented
13 to the Committee. Ultimately, I think it was rejected, though
14 I don't know if we ever received a formal rejection.

15 I explained in my emails, which I'm happy to share with
16 the Court if Your Honor wants to see them, why I was reluctant
17 to try to put into a term sheet form the proposal that I
18 suggested to Mr. Clemente. As I said, I'm more than happy to
19 provide you with that email chain and let you form your own
20 judgment, Your Honor, as to whether we're proceeding in good
21 faith.

22 THE COURT: All right. Well I'm not going to ask --

23 MR. POMERANTZ: Your Honor? Your Honor, this is Jeff
24 Pomerantz.

25 THE COURT: -- to see any of that. Mr. Pomerantz?

1 MR. POMERANTZ: May I just be heard real quickly?

2 THE COURT: Sure.

3 MR. POMERANTZ: Your Honor, we also took Your Honor's
4 comments to heart. We, Mr. Seery and I, had an over-an-hour
5 conversation with Mr. Lynn and with Mr. Bonds. We provided
6 them with our thoughts as to what they needed to do in order
7 to move forward. Of course, it's not really the Debtor to
8 agree. It's the creditors to agree. But as Mr. Seery has
9 testified many times before and as I have told the Court, we
10 would support a plan that the Committee and Mr. Dondero could
11 get behind.

12 So we again -- I'm not going to divulge the nature of
13 those communications, but we suggested several things that Mr.
14 Dondero could do in order to move the ball forward, and
15 unfortunately, we have not seen any of those things done thus
16 far. So we are, at this point, not optimistic that there will
17 be a grand bargain plan.

18 THE COURT: All right.

19 MR. DONDERO: Your Honor, could I comment for a
20 second? This is Mr. Dondero.

21 THE COURT: If you and your counsel want you to
22 comment, you can comment.

23 MR. DONDERO: I'd love to do a pot plan. I would
24 love to reach some kind of settlement and everybody move on
25 with their lives. The estate started with \$360 million of

1 third-party assets and \$90 million of notes. The \$360 million
2 of third-party assets are down to \$130 million.

3 MR. POMERANTZ: Again, Your Honor, I must interrupt.
4 I did this at the last hearing, and it's not my practice to
5 interrupt, but issues regarding what the value is or not, it's
6 going to require a response, and that's not really before Your
7 Honor. I think before Your Honor is --

8 MR. DONDERO: Okay.

9 MR. POMERANTZ: -- have there been negotiations?
10 Have they been in good faith? If Mr. Dondero wanted to
11 address that, that's fine, but I object to having any
12 discussion at this point, especially with Mr. Dondero not even
13 under oath, on what the nature of the value of the assets and
14 why they have changed and what not.

15 THE COURT: Well, --

16 MR. POMERANTZ: It's just not appropriate.

17 THE COURT: I understand --

18 MR. DONDERO: Okay. Can I --

19 THE COURT: Stop.

20 MR. DONDERO: Can I -- can I finish?

21 THE COURT: Let me please respond to that. I
22 understand your concern, but I've heard from Mr. Seery
23 testimony many months ago about the value plummeting during
24 the case. And I asked why, and I got some explanations. This
25 is not evidence. This is just, you know, this is not going to

1 be binding in any way. Mr. Dondero can speak as to what he
2 thinks, you know, the situation is.

3 Go ahead, Mr. Dondero.

4 MR. DONDERO: Okay. I'm not trying to fixate on the
5 numbers. And as far as the third-party assets are, we would
6 be willing to pay -- I would be willing to pay for those. I'd
7 be willing to pay more, and even some value for the affiliate
8 notes that were really part of compensation agreements
9 throughout the history of Highland and avoid the POC
10 arguments. I'd be willing to pay for the assets and I'd be
11 willing to pay even more than that.

12 I have no transparency in terms of what the assets are,
13 and there's no fulsome discussion in terms of, well, here are
14 the assets, here are the notes, here's what we think the
15 values are, can you get to this number? It's just a -- you --
16 the -- it -- I don't view there is good-faith negotiations
17 going on because it's always just a: You need to put a big
18 number on a piece of paper; otherwise, you're going to get run
19 over.

20 And there's no back and forth going on, but it's not due
21 to a lack of willingness on my part. And maybe there needs to
22 be a committee set up. Maybe there needs to be, I don't know,
23 a mediator or an examiner or somebody to try and push through
24 the pot plan, but there's nothing happening. People are not
25 returning the judge's calls, I mean, Mr. Lynn's calls, or my

1 calls. They're -- there's -- despite efforts of our -- of my
2 own and a willingness of my own, there's no negotiations of
3 any sort going on at the moment.

4 THE COURT: All right. I don't want anyone to
5 respond to that. I know people have different views of what's
6 going on. But let me just say a couple of things, and then
7 we're done.

8 We do have a Committee in this case. We have a Committee
9 with very sophisticated members and very sophisticated
10 professionals. Okay? That's who I wanted you to be talking
11 to before the end of the day Tuesday.

12 We have had co-mediators in this case. Okay? And, you
13 know, I identified very sophisticated human beings for that
14 role. Okay? And in fact, there ended up being settlements
15 that flowed out of the co-mediator process.

16 We're now 15 months into the case. There are major,
17 significant compromises now: HarbourVest, UBS, Acis, Terry,
18 and Redeemer Committee. I hate to use a worn-out metaphor,
19 but the train is leaving the station. We've got confirmation.
20 I've pushed out two weeks. I mean, you all are either going
21 to get there in the next few days or we're just going to go
22 forward with I think what everyone, you know, would rather be
23 a pot plan, but if we can't get there, we're just going to
24 have to consider the plan that's on the table now. Okay?

25 You know, the Committee, again, they're sophisticated.

1 They can compare apples to oranges and decide whether the plan
2 on the table, with its risks of future litigation and
3 recoveries, whether it's better or worse than whatever
4 consideration you're offering, Mr. Dondero.

5 And you know, as we all know, there is distrust here,
6 there, and everywhere among these parties. So I can totally
7 understand them, you know, taking a hard line: We either get
8 all cash or we're just not going to mess with it. We don't
9 want to risk broken promises. We'd rather just do litigation.

10 So, anyway, that's as much as I'm going to say except I am
11 going to further direct good-faith negotiations. It sounds
12 like to me a written term sheet might be the appropriate next
13 step, given where I've heard things are at the moment. But,
14 you know, I guess we don't have any hearings between now and
15 the 26th, right? No Highland hearings that I can think of
16 between now and the 26th.

17 MR. POMERANTZ: I don't think so.

18 MR. MORRIS: I think that's correct, Your Honor.

19 THE COURT: So you have all this time --

20 MR. MORRIS: At the moment.

21 THE COURT: You have all this time to negotiate and
22 simultaneously get ready for the confirmation hearing without
23 any other battles. So I know you will use the time well.

24 All right. We're adjourned.

25 THE CLERK: All rise.

MR. BONDS: Thank you, Your Honor.

(Proceedings concluded at 2:04 p.m.)

--oOo--

CERTIFICATE

I certify that the foregoing is a correct transcript from
the electronic sound recording of the proceedings in the
above-entitled matter.

/s/ Kathy Rehling

01/16/2021

Kathy Rehling, CETD-444
Certified Electronic Court Transcriber

Date

003269

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003272



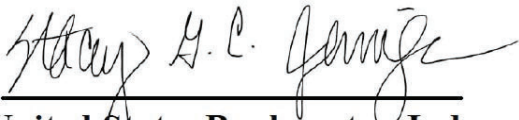
CLERK, U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS

ENTERED

THE DATE OF ENTRY IS ON
THE COURT'S DOCKET

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

Signed January 20, 2021


United States Bankruptcy Judge

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

In re:

HIGHLAND CAPITAL MANAGEMENT, L.P.,¹

Debtor.

§
§
§
§
§
§

Chapter 11

Case No. 19-34054-sgj11

**ORDER APPROVING DEBTOR'S SETTLEMENT
WITH HARBOURVEST (CLAIM NOS. 143, 147, 149, 150, 153, 154) AND
AUTHORIZING ACTIONS CONSISTENT THEREWITH**

This matter having come before the Court on *Debtor's Motion for Entry of an Order Approving Settlement with HarbourVest (Claim Nos. 143, 147, 149, 150, 153, 154) and Authorizing Actions Consistent Therewith* [Docket No. 1625] (the "Motion"),² filed by Highland Capital Management, L.P., the debtor and debtor-in-possession (the "Debtor") in the above-captioned chapter 11 case (the "Bankruptcy Case"); and this Court having considered (a) the

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

² Capitalized terms used but not otherwise defined herein have the meanings ascribed to them in the Motion.



arguments made during the Hearing; and this Court having jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334; and this Court having found that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2); and this Court having found that venue of this proceeding and the Motion in this District is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and this Court having found that the relief requested in the Motion is in the best interests of the Debtor's estate, its creditors, and other parties-in-interest; and this Court having found the Settlement Agreement fair and equitable; and this Court having analyzed, for the reasons stated on the record, (1) the probability of success in litigating the claims subject to the Settlement Agreement, with due consideration for the uncertainty in fact and law, (2) the complexity and likely duration of litigation and any attendant expense, inconvenience, and delay, and (3) all other factors bearing on the wisdom of the compromise, including: (i) the best interests of the creditors, with proper deference to their reasonable views, and (ii) the extent to which the settlement is truly the product of arms-length bargaining, and not of fraud or collusion; and this Court having found that the Debtor's notice of the Motion and opportunity for a hearing on the Motion were appropriate under the circumstances and that no other notice need be provided; and this Court having determined that the legal and factual bases set forth in the Motion establish good cause for the relief granted herein; and upon all of the proceedings had before this Court; and after due deliberation and sufficient cause appearing therefor, it is hereby **ORDERED** that:

1. The Motion is **GRANTED** as set forth herein.
2. All objections to the Motion are overruled.
3. The Settlement Agreement, attached hereto as **Exhibit 1**, is approved in all respects pursuant to Rule 9019 of the Federal Rules of Bankruptcy Procedure.

4. All objections to the proofs of claim subject to the Motion³ are overruled as moot in light of the Court's approval of the Settlement Agreement.

5. The Debtor, HarbourVest, and all other parties are authorized to take any and all actions necessary and desirable to implement the Settlement Agreement without need of further approval or notice.

6. Pursuant to the express terms of the *Members Agreement Relating to the Company*, dated November 15, 2017, HarbourVest is authorized to transfer its interests in HCLOF to a wholly-owned and controlled subsidiary of the Debtor pursuant to the terms of the *Transfer Agreement for Ordinary Shares of Highland CLO Funding, Ltd.* without the need to obtain the consent of any party or to offer such interests first to any other investor in HCLOF.

7. The Court shall retain exclusive jurisdiction to hear and determine all matters arising from the implementation of this Order.

###End of Order###

³ This includes the *Debtor's First Omnibus Objection to Certain (A) Duplicate Claims; (B) Overstated Claims; (C) Late-Filed Claims; (D) Satisfied Claims; (E) No-Liability Claims; and (F) Insufficient-Documentation Claims* [Docket No. 906].

EXHIBIT 1

SETTLEMENT AGREEMENT

This Settlement Agreement (the “Agreement”) is entered into as of December 23, 2020, between Highland Capital Management, L.P. (the “Debtor”), on the one hand, and HarbourVest 2017 Global Fund L.P., HarbourVest 2017 Global AIF L.P., HarbourVest Dover Street IX Investment L.P., HV International VIII Secondary L.P., HarbourVest Skew Base AIF L.P., and HarbourVest Partners L.P. (each, a “HarbourVest Party,” and collectively, “HarbourVest”), on the other hand. Each of the foregoing are sometimes referred to herein collectively as the “Parties” and individually as a “Party.”

RECITALS

WHEREAS, on October 16, 2019 (the “Petition Date”), the Debtor filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code (the “Bankruptcy Case”) in the Bankruptcy Court for the District of Delaware, Case No. 19-12239 (CSS) (the “Delaware Bankruptcy Court”);

WHEREAS, on December 4, 2019, the Delaware Bankruptcy Court entered an order transferring venue of the Debtor’s case to the Bankruptcy Court for the Northern District of Texas, Dallas Division, Case No. 19-34054-sgj (the “Bankruptcy Court”);

WHEREAS, prior to the Petition Date, HarbourVest invested in Highland CLO Funding, Ltd. f/k/a Acis Loan Funding, Ltd. (“HCLOF”) and acquired an a 49.98% ownership interest in HCLOF (the “HarbourVest Interests”);

WHEREAS, the portfolio manager for HCLOF is Highland HCF Advisor, Ltd., a subsidiary of the Debtor;

WHEREAS, on April 8, 2020, HarbourVest filed proofs of claim in the Bankruptcy Case, which are listed on the Debtor’s claims register as claim numbers 143, 147, 149, 150, 153, and 154 (the “HarbourVest Claims”), asserting claims against the Debtor relating to its investment in HCLOF;

WHEREAS, on July 30, 2020, the Debtor filed the *Debtor’s First Omnibus Objection to Certain (a) Duplicate Claims; (b) Overstated Claims; (c) Late-Filed Claims; (d) Satisfied Claims; (e) No Liability Claims; and (f) Insufficient-Documentation Claims* [**Docket No. 906**], in which the Debtor objected to the HarbourVest Claims;

WHEREAS, on September 11, 2020, HarbourVest filed the *HarbourVest Response to Debtor’s First Omnibus Objection to Creation (a) Duplicate Claims; (b) Overstated Claims; (c) Late-Filed Claims; (d) Satisfied Claims; (e) No Liability Claims; and (f) Insufficient-Documentation Claims* [**Docket No. 1057**] (the “HarbourVest Response”);

WHEREAS, on October 18, 2020, HarbourVest filed the *Motion of HarbourVest Pursuant to Rule 3018(a) of the Federal Rules of Bankruptcy Procedure for Temporary Allowance of Claims for Purposes of Voting to Accept or Reject the Plan* [**Docket No. 1207**] (the “3018 Motion” and together with the HarbourVest Response, the “HarbourVest Pleadings”);

WHEREAS, in the HarbourVest Pleadings, HarbourVest asserted, among other things, that the HarbourVest Claims included claims against the Debtor arising from fraudulent inducement, fraudulent concealment, fraudulent misrepresentation, breach of fiduciary duty, breach of securities laws, and misuse of assets and sought damages in excess of \$300,000,000;

WHEREAS, the Debtor disputes the HarbourVest Claims;

WHEREAS, on November 24, 2020, the Debtor filed the *Fifth Amended Plan of Reorganization for Highland Capital Management, L.P.* [**Docket No. 1472**] (as amended, the “Plan”).¹

WHEREAS, the Parties desire to enter into this Agreement which incorporates, formalizes, and finalizes the full and final resolution of the HarbourVest Claims and HarbourVest Pleadings; and

WHEREAS, this Agreement will be presented to the Bankruptcy Court for approval pursuant to **Federal Rule of Bankruptcy Procedure 9019** (“Rule 9019”).

NOW THEREFORE, in consideration of the above recitals, the covenants, conditions, and promises made herein, and other good and valuable consideration, the receipt of which is hereby acknowledged, the Parties agree as follows:

1. Settlement of Claims.

(a) In full and complete satisfaction of the HarbourVest Claims, HarbourVest will receive:

(i) an allowed, nonpriority general unsecured claim in the aggregate amount of \$45,000,000 (the “Allowed GUC Claim”); and

(ii) an allowed subordinated claim in the aggregate amount of \$35,000,000 (the “Allowed Subordinated Claim” and together with the Allowed GUC Claim, the “Allowed Claims”).

(b) On the Effective Date, HarbourVest will transfer all of its rights, title, and interest in the HarbourVest Interests to the Debtor or its nominee pursuant to the terms of the *Transfer Agreement for Ordinary Shares of Highland CLO Funding, Ltd.*, attached hereto as Exhibit A (the “Transfer Agreements”) and the Debtor or its nominee will become a shareholder of HCLOF with respect to the HarbourVest Interests. The terms of the Transfer Agreements are incorporated into this Agreement by reference.

2. Releases.

(a) Upon the Effective Date, and to the maximum extent permitted by law, each HarbourVest Party on behalf of itself and each of its current and former advisors, trustees, directors, officers, managers, members, partners, employees, beneficiaries, shareholders, agents,

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

participants, subsidiaries, parents, successors, designees, and assigns hereby forever, finally, fully, unconditionally, and completely releases, relieves, acquits, remises, and exonerates, and covenants never to sue, the Debtor, HCLOF, HCLOF's current and former directors, and the Debtor's current and former advisors, trustees, directors, officers, managers, members, partners, employees, beneficiaries, shareholders, agents, participants, subsidiaries, parents, affiliates, successors, designees, and assigns, except as expressly set forth below (the "Debtor Released Parties"), for and from any and all claims, debts, liabilities, demands, obligations, promises, acts, agreements, liens, losses, costs and expenses (including, without limitation, attorney's fees and related costs), damages, injuries, suits, actions, and causes of action of whatever kind or nature, whether known or unknown, suspected or unsuspected, matured or unmatured, liquidated or unliquidated, contingent or fixed, at law or in equity, statutory or otherwise, including, without limitation, any claims, defenses, and affirmative defenses, whether known or unknown, including, without limitation, those which were or could have been asserted in, in connection with, or with respect to the Bankruptcy Case (collectively, the "HarbourVest Released Claims").

(b) Upon the Effective Date, and to the maximum extent permitted by law, the Debtor hereby forever, finally, fully, unconditionally, and completely releases, relieves, acquits, remises, and exonerates, and covenants never to sue (i) each HarbourVest Party and (ii) each HarbourVest Party's current and former advisors, trustees, directors, officers, managers, members, partners, employees, beneficiaries, shareholders, agents, participants, subsidiaries, parents, affiliates, successors, designees, and assigns (the "HarbourVest Released Parties"), for and from any and all claims, debts, liabilities, demands, obligations, promises, acts, agreements, liens, losses, costs and expenses (including, without limitation, attorney's fees and related costs), damages, injuries, suits, actions, and causes of action of whatever kind or nature, whether known or unknown, suspected or unsuspected, matured or unmatured, liquidated or unliquidated, contingent or fixed, at law or in equity, statutory or otherwise, including, without limitation, any claims, defenses, and affirmative defenses, whether known or unknown, which were or could have been asserted in, in connection with, or with respect to the Bankruptcy Case (collectively, the "Debtor Released Claims"); *provided, however*, that notwithstanding anything herein to the contrary, the release contained in this Section 2(b) will apply to the HarbourVest Released Parties set forth in subsection (b)(ii) only with respect to Debtor Released Claims arising from or relating to HarbourVest's ownership of the HarbourVest Interests.

(c) Notwithstanding anything in this Agreement to the contrary, the releases set forth herein will not apply with respect to (i) the Allowed Claims, (ii) the claims of Charlotte Investor IV, L.P., or (iii) the duties, rights, or obligations of any Party under this Agreement or the Transfer Agreements.

3. **Agreement Subject to Bankruptcy Court Approval.** The effectiveness of this Agreement and the Parties' obligations hereunder are conditioned in all respects on the approval of this Agreement by the Bankruptcy Court. The Parties agree to cooperate and use reasonable efforts to have this Agreement approved by the Bankruptcy Court. The "Effective Date" will be the date of an order entered by the Bankruptcy Court approving this Agreement pursuant to a motion filed under Rule 9019.

4. **Representations and Warranties.** Subject in all respects to Section 3 hereof:

(a) each HarbourVest Party represents and warrants that (i) it has full authority to enter into this Agreement and to release the HarbourVest Released Claims and has not sold, transferred, or assigned any HarbourVest Released Claim to any other person or entity, (ii) no person or entity other than such HarbourVest Party has been, is, or will be authorized to bring, pursue, or enforce any HarbourVest Released Claim on behalf of, for the benefit of, or in the name of (whether directly or derivatively) of such HarbourVest Party; and (iii) HarbourVest owns all of the HCLOF Interests free and clear of any claims or interests; and

(b) the Debtor represents and warrants to HarbourVest that (i) it has full authority to enter into this Agreement and to release the Debtor Released Claims and (ii) no person or entity other than the Debtor has been, is, or will be authorized to bring, pursue, or enforce any Debtor Released Claim on behalf of, for the benefit of, or in the name of (whether directly or derivatively) of the Debtor Party.

5. **Plan Support.**

(a) Each HarbourVest Party hereby agrees that it will (a) vote all HarbourVest Claims held by such HarbourVest Party to accept the Plan, by delivering its duly executed and completed ballots accepting the Plan on a timely basis; and (b) not (i) change, withdraw, or revoke such vote (or cause or direct such vote to be changed withdrawn or revoked); (ii) exercise any right or remedy for the enforcement, collection, or recovery of any claim against the Debtor except in a manner consistent with this Agreement or the Plan, (iii) object to, impede, or take any action other action to interfere with, delay or postpone acceptance or confirmation of the Plan; (iv) directly or indirectly solicit, propose, file, support, participate in the formulation of or vote for, any restructuring, sale of assets (including pursuant to 11 U.S.C. § 363), merger, workout, or plan of reorganization of the Debtor other than the Plan; or (v) otherwise take any action that would in any material respect interfere with, delay, or postpone the consummation of the Plan; provided, however, that such vote may be revoked (and, upon such revocation, deemed void ab initio) by such HarbourVest Party at any time following the termination of this agreement or the occurrence of a Support Termination Event (it being understood that any termination of this agreement shall entitle each HarbourVest Party to change its vote in accordance with section 1127(d) of the Bankruptcy Code), notwithstanding any voting deadline established by the Bankruptcy Court including without limitation the January 5, 2021, 5:00 p.m. (prevailing Central Time) deadline established by the *Order Approving Form of Ballots, Voting Deadline and Solicitation Procedures* [Docket No. 1476].

(b) In full resolution of the 3018 Motion, HarbourVest will have a general unsecured claim for voting purposes only in the amount of \$45,000,000.

(c) The obligations of the HarbourVest Parties under this Section 5 shall automatically terminate upon the occurrence of any of the following (each a “Support Termination Event”): (i) the effective date of the Plan, (ii) the withdrawal of the Plan, (iii) the entry of an order by the Bankruptcy Court (A) converting the Bankruptcy Case to a case under chapter 7 of the Bankruptcy Code or (B) appointing an examiner with expanded powers beyond those set forth in sections 1106(a)(3) and (4) of the Bankruptcy Code or a trustee in Bankruptcy

Case, or (iv) the failure of the Court to enter an order approving the terms of this Agreement and the settlement described herein pursuant to Rule 9019 prior to confirmation of the Plan.

6. **No Admission of Liability.** The Parties acknowledge that there is a bona fide dispute with respect to the HarbourVest Claims. Nothing in this Agreement will imply, an admission of liability, fault or wrongdoing by the Debtor, HarbourVest, or any other person, and the execution of this Agreement does not constitute an admission of liability, fault, or wrongdoing on the part of the Debtor, HarbourVest, or any other person.

7. **Successors-in-Interest.** This Agreement shall be binding upon and shall inure to the benefit of each of the Parties and their successors, and assigns.

8. **Notice.** Each notice and other communication hereunder will be in writing and will be sent by email and delivered or mailed by registered mail, receipt requested, and will be deemed to have been given on the date of its delivery, if delivered, and on the fifth full business day following the date of the mailing, if mailed to each of the Parties thereto at the following respective addresses or such other address as may be specified in any notice delivered or mailed as set forth below:

HARBOURVEST

HarbourVest Partners L.P.
Attention: Michael J. Pugatch
One Financial Center
Boston, MA 02111
Telephone No. 617-348-3712
E-mail: mpugatch@harbourvest.com

with a copy (which shall not constitute notice) to:

Debevoise & Plimpton LLP
Attention: M. Natasha Labovitz, Esq.
919 Third Avenue
New York, NY 10022
Telephone No. 212-909-6649
E-mail: nlabovitz@debevoise.com

THE DEBTOR

Highland Capital Management, L.P.
300 Crescent Court, Suite 700
Dallas, Texas 75201
Attention: James P. Seery, Jr.
Telephone No.: 972-628-4100
Facsimile No.: 972-628-4147
E-mail: jpseeryjr@gmail.com

with a copy (which shall not constitute notice) to:

Pachulski Stang Ziehl & Jones LLP
Attention: Jeffrey Pomerantz, Esq.
10100 Santa Monica Blvd., 13th Floor
Los Angeles, CA 90067
Telephone No.: 310-277-6910
Facsimile No.: 310-201-0760
E-mail: jpomerantz@pszjlaw.com

9. **Advice of Counsel.** Each Party represents that it has: (a) been adequately represented by independent legal counsel of its own choice, throughout all of the negotiations that preceded the execution of this Agreement; (b) executed this Agreement upon the advice of such counsel; (c) read this Agreement, and understands and assents to all the terms and conditions contained herein without any reservations; and (d) had the opportunity to have this Agreement and all the terms and conditions contained herein explained by independent counsel, who has answered any and all questions asked of such counsel, or which could have been asked of such counsel, including, but not limited to, with regard to the meaning and effect of any of the provisions of this Agreement.

10. **Entire Agreement.** This Agreement and the Transfer Agreement contain the entire agreement and understanding concerning the subject matter of this Agreement, and supersede and replace all prior negotiations and agreements, written or oral and executed or unexecuted, concerning such subject matter. Each of the Parties acknowledges that no other Party, nor any agent of or attorney for any such Party, has made any promise, representation or warranty, express or implied, written or oral, not otherwise contained in this Agreement to induce any Party to execute this Agreement. The Parties further acknowledge that they are not executing this Agreement in reliance on any promise, representation or warranty not contained in this Agreement, and that any such reliance would be unreasonable. This Agreement will not be waived or modified except by an agreement in writing signed by each Party or duly authorized representative of each Party.

11. **No Party Deemed Drafter.** The Parties acknowledge that the terms of this Agreement are contractual and are the result of arms'-length negotiations between the Parties and their chosen counsel. Each Party and its counsel cooperated in the drafting and preparation of this Agreement. In any construction to be made of this Agreement, the Agreement will not be construed against any Party.

12. **Future Cooperation.** The Parties agree to cooperate and execute such further documentation as is reasonably necessary to effectuate the intent of this Agreement.

13. **Counterparts.** This Agreement may be executed in counterparts with the same force and effect as if executed in one complete document. Each Party's signature hereto will signify acceptance of, and agreement to, the terms and provisions contained in this Agreement. Photographic, electronic, and facsimile copies of signed counterparts may be used in lieu of the originals of this Agreement for any purpose.

14. **Governing Law; Venue; Attorneys' Fees and Costs.** The Parties agree that this Agreement will be governed by and will be construed according to the laws of the State of Texas without regard to conflict-of-law principles. Each of the Parties hereby submits to the exclusive jurisdiction of the Bankruptcy Court during the pendency of the Bankruptcy Case and thereafter to the exclusive jurisdiction of the state and federal courts located in the Northern District of Texas, Dallas Division, with respect to any disputes arising from or out of this Agreement. In any action to enforce this Agreement, the prevailing party shall be entitled to recover its reasonable and necessary attorneys' fees and costs (including experts).

[Remainder of Page Intentionally Blank]

IT IS HEREBY AGREED.

HIGHLAND CAPITAL MANAGEMENT, L.P.

By: /s/ James P. Seery, Jr.
Name: James P. Seery, Jr.
Its: CEO/CRO

HarbourVest 2017 Global Fund L.P., by HarbourVest 2017 Global Associates L.P., its General Partner, by HarbourVest GP LLC, its General Partner, by HarbourVest Partners, LLC, its Managing Member

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

HarbourVest 2017 Global AIF L.P., by HarbourVest Partners (Ireland) Limited, its Alternative Investment Fund Manager, by HarbourVest Partners L.P., its Duly Appointed Investment Manager, by HarbourVest Partners, LLC, its General Partner

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

HarbourVest Dover Street IX Investment L.P., by HarbourVest Partners L.P., its Duly Appointed Investment Manager, by HarbourVest Partners, LLC, its General Partner

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

HarbourVest Partners L.P., on behalf of funds and accounts under management, by HarbourVest Partners, LLC, its General Partner

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

**HarbourVest Skew Base AIF L.P., by HarbourVest Partners (Ireland) Limited, its
Alternative Investment Fund Manager, by HarbourVest Partners L.P., its Duly Appointed
Investment Manager, by HarbourVest Partners, LLC, its General Partner**

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

**HV International VIII Secondary L.P., by HIPEP VIII Associates L.P., its General
Partner, by HarbourVest GP LLC, its General Partner, by HarbourVest Partners, LLC,
its Managing Member**

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

Exhibit A

**TRANSFER AGREEMENT
FOR ORDINARY SHARES OF
HIGHLAND CLO FUNDING, LTD.**

This Transfer Agreement, dated as of January ____, 2021 (this “**Transfer Agreement**”), is entered into by and among Highland CLO Funding, Ltd. (the “**Fund**”), Highland HCF Advisor, Ltd. (the “**Portfolio Manager**”), HCMLP Investments, LLC (the “**Transferee**”) and each of the following: HarbourVest Dover Street IX Investment L.P., HarbourVest 2017 Global AIF L.P., HarbourVest 2017 Global Fund L.P., HV International VIII Secondary L.P., and HarbourVest Skew Base AIF L.P. (collectively, the “**Transferors**”).

WHEREAS, each Transferor is the record, legal and beneficial owner of the number of ordinary shares (“**Shares**”) of the Fund set forth opposite such Transferor’s name on Exhibit A hereto (with respect to each Transferor, the “**Transferred Shares**”).

WHEREAS the Transferee is an affiliate and wholly owned subsidiary of Highland Capital Management, L.P. (“**HCMLP**”) which is one of the initial members of the Fund.

WHEREAS, each Transferor wishes to transfer and assign 100% of its rights, title and interest as a shareholder in the Fund, including the Transferred Shares (the “**Interest**”) on the terms set forth in this Transfer Agreement.

WHEREAS, subject to and in connection with the approval of that certain Settlement Agreement, dated on or about the date hereof, by and among HCMLP and the Transferors (the “**Settlement Agreement**”), the Transferee desires that the Interest be transferred to Transferee and that thereafter the Transferee will become a Shareholder and the Transferors will no longer be Shareholders.

WHEREAS, the Portfolio Manager desires to consent to such transfers and to the admission of Transferee as a Shareholder on the terms set forth herein, and the Transferors and Transferee agree to such terms.

WHEREAS, the Fund desires to amend its records to reflect the foregoing transfers.

NOW, THEREFORE, the parties hereto agree as follows:

1. Transfer of Shares and Advisory Board

- a. Each Transferor hereby transfers and assigns all of its rights, title, and interest in its Interest to the Transferee, and the Transferee wishes to be admitted to the Fund as a Shareholder.
- b. In connection with the transfer of the Interest as contemplated herein, the Transferee shall be granted the right to appoint a representative to the Fund’s advisory board (the “**Advisory Board**”) to replace the Transferors’ appointed representative to the Advisory Board.

- c. Transferee hereby assumes all of Transferor's rights and obligations in respect of the Interest effective as of the Effective Date (as defined below) and acknowledge that thereafter Transferee shall be subject to the applicable terms and provisions of the Members' Agreement dated as of November 15, 2017 (the "**Members' Agreement**"), the Articles of Incorporation adopted November 15, 2017 (the "**Articles**") and the Subscription and transfer Agreement, dated as of November 15, 2017 among each Transferor, the Fund and the Portfolio Manager (the "**Subscription Agreement**", and together with the Members' Agreement and the Articles, the "**Fund Agreements**") with respect to the Interest. Transferee does not assume any liability or responsibility for any obligations or liabilities incurred by any Transferor prior to the Effective Date of the transfer.
 - d. Following the transfer, each Transferor shall have no further rights or obligations to any party hereunder in respect of the Interest under the Fund Agreements.
 - e. This Transfer Agreement, and the parties' obligations hereunder, are conditioned in all respects on the approval by the Bankruptcy Court for the Northern District of Texas, Dallas Division pursuant to **Federal Rule of Bankruptcy Procedure 9019** of (i) this Transfer Agreement and (ii) the Settlement Agreement, and each of the parties agree that no further action shall be required from any party for the transfer of the Interest to be effective except as described herein.
2. Transferee's Representations and Warranties. The Transferee represents and warrants to the Transferors, the Portfolio Manager, and the Fund as follows:
- a. This Transfer Agreement constitutes a valid and binding obligation of the Transferee, enforceable against it in accordance with its terms;
 - b. This Transfer Agreement has been duly and validly executed and delivered by or on behalf of the Transferee and such execution and delivery have been duly authorized by all necessary trust action of the Transferee;
 - c. The Transferee acknowledges receipt of, has read, and is familiar with, the Fund's Offering Memorandum for Placing Shares dated November 15, 2017 (the "**Offering Memorandum**") and the Fund Agreements;
 - d. The Transferee hereby accepts and receives the Interest from the Transferors for investment, and not with a view to the sale or distribution of any part thereof, and the Transferee has no present intention of selling, granting participations in, or otherwise distributing the same, but subject nevertheless to any requirement of law that the disposition of the Transferee's property shall at all times be within such Transferee's control; and
 - e. The Transferee is an "Eligible U.S. Investor" as defined in the Offering Memorandum.

3. Transferors' Representations and Warranties. Each Transferor represents and warrants to the Transferee, the Portfolio Manager, and the Fund as follows:
 - a. This Transfer Agreement constitutes a valid and binding obligation of the Transferor, enforceable against it in accordance with its terms;
 - b. This Transfer Agreement has been duly authorized, and duly and validly executed and delivered by the Transferor and such execution and delivery have been duly authorized by all necessary action of the Transferor; and
 - c. As of the date hereof, the Transferor has good and valid title to the Transferor's Interest, free and clear of any liens, vesting requirements or claims by others.
4. Consent to Transfer. Based in part on the representations and warranties of the Transferors and the Transferee which are included herein, and on the terms contained herein, the Portfolio Manager and the Fund hereby consent to the transfers of the Interest, the admission of the Transferee as a Shareholder and the Transferee's appointment of a representative to the Advisory Board, the Portfolio Manager's execution of this Transfer Agreement constituting its prior written consent to the transfers of the Interest for the purposes of article 18.1 of the Articles and this Transfer Agreement constituting express notice in writing to the Fund of the assignment set out at clause 1(c) above for the purposes of the Law of Property (Miscellaneous Provisions) (Guernsey) Law, 1979 (as amended).
5. Completion: As of the date of approval by the Bankruptcy Court for the Northern District of Texas, Dallas Division pursuant to Federal Rule of Bankruptcy Procedure 9019 of (i) this Transfer Agreement and (ii) the Settlement Agreement (the "**Effective Date**"):
 - a. each Transferor shall deliver or cause to be delivered to the Transferee a transfer instrument relating to the Transferred Shares duly executed and completed by that Transferor in favor of the Transferee; and
 - b. the Transferee shall deliver to the Transferors and the Fund a duly executed and dated Adherence Agreement (as defined in the Members' Agreement).

Prior to the Effective Date the Transferee shall procure that:

 - c. the board of directors of the Fund shall hold a meeting at which the transfer of the Shares to the Transferee shall be approved and registration in the register of members of the Fund shall be effected on the Effective Date.
6. Miscellaneous.
 - a. Each of the parties hereto agree to execute any further instruments and perform any further acts which are or may become reasonably necessary to carry out the intent of this Transfer Agreement or are reasonably requested by the Portfolio Manager, the Fund or a Transferor to complete the transfer of the Interest.

- b. The parties to this Transfer Agreement acknowledge that the terms of this Transfer Agreement are the result of arms'-length negotiations between the parties and their respective counsel. Each party and its counsel cooperated in the drafting and preparation of this Transfer Agreement. In any construction to be made of this Transfer Agreement, the language or drafting of this Transfer Agreement will not be construed against any party.
- c. This Transfer Agreement shall be governed by, and construed and enforced in accordance with, the internal substantive laws of the state of Delaware, without giving effect to conflicts of law principles.
- d. The representations, warranties and covenants of the Transferors and the Transferee shall remain in full force and effect following the transfer of the Interest, and the Fund and the Portfolio Manager thereafter may rely on all such representations, warranties and covenants.
- e. This Transfer Agreement may be executed in multiple counterparts, each of which shall be deemed to be an original, but all of which together shall constitute one and the same instrument. Photographic, electronic, and facsimile copies of signed counterparts may be used in lieu of the originals of this Transfer Agreement for any purpose.
- f. Captions of sections have been added only for convenience and shall not be deemed to be a part of this Transfer Agreement.
- g. This Transfer Agreement is among the parties hereto. No Person that is not a party hereto shall have any right herein as a third-party beneficiary or otherwise except as expressly contemplated hereby.

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HarbourVest 2017 Global Fund L.P.

By: HarbourVest 2017 Global Associates L.P.
Its General Partner

By: HarbourVest GP LLC
Its General Partner

By: HarbourVest Partners, LLC
Its Managing Member

By: _____

Name: Michael Pugatch

Title: Managing Director

[Signature Page to Transfer of Ordinary Shares of Highland CLO Funding, Ltd.]

Exhibit A

<u>Transferee Name</u>	<u>Number of Shares</u>	<u>Percentage</u>
HarbourVest Dover Street IX Investment L.P.	54,355,482.14	71.0096%
HarbourVest 2017 Global AIF L.P.	7,426,940.38	9.7025%
HarbourVest 2017 Global Fund L.P.	3,713,508.46	4.8513%
HV International VIII Secondary L.P.	9,946,780.11	12.9944%
HarbourVest Skew Base AIF L.P.	1,103,956.03	1.4422%

EXHIBIT 11

At all relevant times, HCM was headed by CEO and potential party James P. Seery (“Seery”). Seery negotiated a settlement with the several Harbourvest² entities who owned 49.98% of HCLOF. The deal had HCM (or its designee) purchasing the Harbourvest membership interests in HCLOF for \$22.5 million. Recent revelations, however, show that the sale was predicated upon a sales price that was vastly below the Net Asset Value (“NAV”) of those interests. Upon information and belief, the NAV of HCLOF’s assets had risen precipitously, but was not disclosed to Harbourvest nor to Plaintiffs.

Under the Advisers Act, Defendants have a non-waivable duty of loyalty and candor, which includes its duty not to inside trade with its own investors, *i.e.*, not to trade with an investor to which HCM and Seery had access to superior non-public information. Upon information and belief, HCM’s internal compliance policies required by the Advisers Act would not generally have allowed a trade of this nature to go forward—meaning, the trade either was approved in spite of compliance rules preventing it, or the compliance protocols themselves were disabled or amended to a level that leaves Defendants HCM and HCLOF exposed to liability. Thus, Defendants have created an unacceptable perpetuation of exposure to liability.

Additionally, Defendants are liable for a pattern of conduct that gives rise to liability for their conduct of the enterprise consisting of HCM in relation to HCFA and HCLOF, through a pattern of concealment, misrepresentation, and violations of the securities rules. In the alternative, HCFA and HCM, are guilty of self-dealing, violations of the Advisers Act, and tortious interference by (a) not disclosing that Harbourvest had agreed to sell at a price well below the current NAV, and (b) diverting the Harbourvest opportunity to themselves.

² “Harbourvest” refers to the collective of Harbourvest Dover Street IX Investment, L.P., Harbourvest 2017 Global AIF, L.P., Harbourvest 2017 Global Fund, L.P., HV International VIII Secondary, L.P., and Harbourvest Skew Base AIF, L.P. Each was a member of Defendant Highland CLO Funding, Ltd.

For these reasons, judgment should be issued in Plaintiffs' favor.

II.

PARTIES

1. Plaintiff CLO Holdco, Ltd. is a limited company incorporated under the laws of the Cayman Islands.

2. Plaintiff Charitable DAF Fund, L.P., ("DAF") is a limited partnership formed under the laws of the Cayman Islands.

3. Defendant Highland Capital Management, L.P. is a limited partnership with its principal place of business at 300 Crescent Court, Suite 700, Dallas, Texas 75201. It may be served at its principal place of business or through its principal officer, James P. Seery, Jr., or through the Texas Secretary of State, or through any other means authorized by federal or state law.

4. Defendant Highland HCF Advisor, Ltd. is a limited company incorporated under the laws of the Cayman Islands. Its principal place of business is 300 Crescent Court, Suite 700, Dallas, Texas 75201. It is a registered investment adviser ("RIA") subject to the laws and regulations of the Investment Advisers Act of 1940 (the "Adviser's Act"). It is a wholly-owned subsidiary of Highland Capital Management, L.P.

5. Nominal Defendant Highland CLO Funding, Ltd. is a limited company incorporated under the laws of the Island of Guernsey. Its registered office is at First Floor, Dorey Court, Admiral Park, St. Peter Port, Guernsey GY1 6HJ, Channel Islands. Its principal place of business is 300 Crescent Court, Suite 700, Dallas, Texas 75201.

6. Potential party James P. Seery, Jr. ("Seery") is an officer and/or director and/or control person of Defendants Highland Capital Management, L.P., Highland CLO Funding, Ltd., and Highland HCF Advisor, Ltd., and is a citizen of and domiciled in Floral Park, New York.

III.

JURISDICTION AND VENUE

7. This Court has subject matter jurisdiction over this dispute under 28 U.S.C. § 1331 as one or more rights and/or causes of action arise under the laws of the United States. This Court has supplemental subject matter jurisdiction over all other claims under 28 U.S.C. § 1367.

8. Personal jurisdiction is proper over the Defendants because they reside and/or have continual contacts with the state of Texas, having regularly submitted to jurisdiction here. Jurisdiction is also proper under 18 U.S.C. § 1965(d).

9. Venue is proper in this Court under 28 U.S.C. § 1391(b) and (c) because one or more Defendants reside in this district and/or a substantial part of the events or omissions giving rise to the claim occurred or a substantial part of property that is the subject of the action is situated in this district. Venue in this district is further provided under 18 U.S.C. § 1965(d).

IV.

RELEVANT BACKGROUND

HCLOF IS FORMED

10. Plaintiff DAF is a charitable fund that helps several causes throughout the country, including providing funding for humanitarian issues (such as veteran's welfare associations and women's shelters), public works (such as museums, parks and zoos), and education (such as specialty schools in underserved communities). Its mission is critical.

11. Since 2012, DAF was advised by its registered investment adviser, Highland Capital Management, L.P., and its various subsidiaries, about where to invest. This relationship was governed by an Investment advisory Agreement.

12. At one point in 2017, HCM advised DAF to acquire 143,454,001 shares of HCLOF, with HCFA (a subsidiary of HCM) serving as the portfolio manager. DAF did so via a holding entity, Plaintiff CLO Holdco, Ltd.

13. On November 15, 2017, through a Subscription and Transfer Agreement, the DAF entered into an agreement with others to sell and transfer shares in HCLOF, wherein the DAF retained 49.02% in CLO Holdco.

14. Pursuant to that agreement, Harbourvest acquired the following interests in the following entities:

Harbourvest Dover Street IX Investment, L.P., acquired 35.49%;

Harbourvest 2017 Global AIF, L.P., acquired 2.42%;

Harbourvest 2017 lobal Fund, L.P., acquired 4.85%;

HV International VIII Secondary, L.P., acquired 6.5%; and

Harbourvest Skew Base AIF, L.P., acquired 0.72%;

for a total of 49.98% (altogether, the “Harbourvest interests”).

15. On or about October 16, 2019, Highland Capital Management filed for Chapter 11 bankruptcy in Delaware Bankruptcy Court, which was later transferred to the Northern District of Texas Bankruptcy Court, in the case styled *In Re: Highland Capital Management, L.P., Debtor*, Cause No. 19-34054, (the “HCM Bankruptcy” and the Court is the “Bankruptcy Court”).

The Harbourvest Settlement with Highland Capital Management in Bankruptcy

16. On April 8, 2020, Harbourvest submitted its proofs of claim in the HCM bankruptcy proceeding. Annexed to its proofs of claims was an explanation of the Proof of Claim and the basis therefor setting out various pre-petition allegations of wrongdoing by HCM. *See, e.g.*, Case No. 19-bk-34054, Doc. 1631-5.

17. The debtor, HCM, made an omnibus response to the proofs of claims, stating they were duplicative of each other, overstated, late, and otherwise meritless.

18. Harbourvest responded to the omnibus objections on September 11, 2020. *See* Cause No. 19-bk-34054, [Doc. 1057](#).

19. Harbourvest represented that it had invested in HCLOF, purchasing 49.98% of HCLOF's outstanding shares.

20. Plaintiff CLO Holdco was and is also a 49.02% holder of HCLOF's member interests.

21. In its Omnibus Response, Harbourvest explained that its claims included unliquidated legal claims for fraud, fraud in the inducement, RICO violations under 18 U.S.C. 1964, among others (the "Harbourvest Claims"). *See* Cause No. 19-bk-34054, [Doc. 1057](#).

22. The Harbourvest Claims centered on allegations that when Harbourvest was intending to invest in a pool of Collateralized Loan Obligations, or CLOs, that were then-managed by Acis Capital Management ("Acis"), a subsidiary of HCM, HCM failed to disclose key facts about ongoing litigation with a former employee, Josh Terry.

23. Harbourvest contended that HCM never sufficiently disclosed the underlying facts about the litigation with Terry, and HCM's then-intended strategy to fight Terry caused HCLOF to incur around \$15 million in legal fees and costs. It contended that had it known the nature of the lawsuit and how it would eventually turn out, Harbourvest never would have invested in HCLOF. *See* Cause No. 19-bk-34054, [Doc. 1057](#).

24. HCLOF's portfolio manager is HCFA. HCM is the parent of HCFA and is managed by its General Partner, Strand Management, who employs Seery and acts on behalf of HCM.

25. Before acceding to the Harbourvest interests, HCM was a 0.6% holder of HCLOF interests.

26. While even assuming Harbourvest's underlying claims were valid as far as the lost \$15 million went, the true damage of the legal fees to Harbourvest would have been 49.98% of the HCLOF losses (i.e., less than \$7.5 million). Harbourvest claimed that it had lost over \$100 million in the HCLOF transaction due to fraud, which, after trebling under the racketeering statute, it claimed it was entitled to over \$300 million in damages.

27. In truth, as of September 2020, Harbourvest had indeed lost some \$52 million due to the alleged diminishing value of the HCLOF assets (largely due to the underperformance of the Acis entities³)—and the values were starting to recover.

28. HCM denied the allegations in the Bankruptcy Court. Other than the claim for waste of corporate assets of \$15 million, HCM at all times viewed the Harbourvest legal claims as being worth near zero and having no merit.

29. On December 23, 2020, HCM moved the Court to approve a settlement between itself and Harbourvest. No discovery had taken place between the parties, and Plaintiff did not have any notice of the settlement terms or other factors prior to the motion's filing (or even during its pendency) in order to investigate its rights.

30. HCM set the hearing right after the Christmas and New Year's holidays, almost ensuring that no party would have the time to scrutinize the underpinnings of the deal.

31. On January 14, 2021, the Bankruptcy Court held an evidentiary hearing and approved the settlement in a bench ruling, overruling the objections to the settlement.

³ Acis was being managed by Joshua Terry. JP Morgan had listed the four ACIS entities under his management as the four worst performers of the 1200 CLOs it evaluated.

32. An integral part of the settlement was allowing \$45 million in unsecured claims that, at the time of the agreement, were expected to net Harbourvest around 70 cents on the dollar. In other words, Harbourvest was expected to recover around \$31,500,000 from the allowed claims.

33. As part of the consideration for the \$45 million in allowed claims, Harbourvest agreed to transfer all of its interests in HCLOF to HCM or its designee.

34. HCM and Seery rationalized the settlement value by allocating \$22.5 million of the net value of the \$45 million in unsecured claims as consideration to purchase Harbourvest's interests in HCLOF, meaning, if 70% of the unsecured claims—i.e., \$31.5 million—was realized, because \$22.5 million of that would be allocated to the purchase price of the Harbourvest interests in HCLOF, the true “settlement” for Harbourvest's legal claims was closer to \$9 million.

35. Plaintiffs here are taking no position at this time about the propriety of settling the Harbourvest legal claims for \$9 million. That is for another day.

36. At the core of this lawsuit is the fact that HCM purchased the Harbourvest interests in HCLOF for \$22.5 million knowing that they were worth far more than that.

37. It has recently come to light that, upon information and belief, the Harbourvest interests, as of December 31, 2020, were worth in excess of \$41,750,000, and they have continued to go up in value.

38. On November 30, 2020, which was less than a month prior to the filing of the Motion to Approve the Settlement, the net asset value of those interests was over \$34.5 million. Plaintiffs were never made aware of that.

39. The change is due to how the net asset value, or NAV, was calculated. The means and methods for calculating the “net asset value” of the assets of HCLOF are subject to and

governed by the regulations passed by the SEC pursuant to the Adviser's Act, and by HCM's internal policies and procedures.

40. Typically, the value of the securities reflected by a market price quote.

41. However, the underlying securities in HCLOF are not liquid and had not been traded in a long while.

42. There not having been any contemporaneous market quotations that could be used in good faith to set the marks⁴ meant that other prescribed methods of assessing the value of the interests, such as the NAV, would have been the proper substitutes.

43. Seery testified that the fair market value of the Harbourvest HCLOF interests was \$22.5 million. Even allowing some leeway there, it was off the mark by a mile.

44. Given the artifice described herein, Seery and the entity Defendants had to know that the representation of the fair market value was false. But it does not appear that they disclosed it to Harbourvest to whom they owed fiduciary duties as the RIA in charge of HCLOF, and they certainly did not disclose the truth to the Plaintiff.

45. It is either the case that (i) Defendants conducted the proper analysis to obtain a current value of the assets but decided to use a far lower valuation in order to whitewash the settlement or enrich the bankruptcy estate; *or* (ii) Defendants never conducted the proper current valuation, and therefore baselessly represented what the current value of the assets was, despite knowingly having no reasonable basis for making such a claim.

46. For years HCM had such internal procedures and compliance protocols. HCM was not allowed by its own compliance officers to trade with an investor where HCM had superior knowledge about the value of the assets, for example. While Plaintiff has no reason to believe that

⁴ The term "mark" is shorthand for an estimated or calculated value for a non-publicly traded instrument.

those procedures were scrapped in recent months, it can only assume that they were either overridden improperly or circumvented wholesale.

47. Upon finalizing the Harbourvest Settlement Agreement and making representations to the Bankruptcy Court to the Plaintiffs about the value of the Harbourvest Interests, Seery and HCM had a duty to use current values and not rely on old valuations of the assets or the HCLOF interests.

48. Given Defendants' actual or constructive knowledge that they were purchasing Harbourvest's Interests in HCLOF for a less than 50% of what those interests were worth—Defendants owed Plaintiff a fiduciary duty not to purchase them for themselves.

49. Defendants should have either had HCLOF repurchase the interests with cash, or offer those interests to Plaintiff and the other members *pro rata*, before HCM agreed to purchase them all lock, stock and barrel, for no up-front cash.

50. Indeed, had Plaintiff been offered those interests, it would have happily purchased them and therefore would have infused over \$20 million in cash into the estate for the purpose of executing the Harbourvest Settlement.

51. That Defendants (and to perhaps a lesser extent, the Unsecured Creditors Committee (the "UCC")) agreed to pay \$22.5 million for the HCLOF assets, where they had previously not consented to any such expenditure by the estate on behalf of HCLOF, strongly indicates their awareness that they were purchasing assets for far below market value.

52. The above is the most reasonable and plausible explanation for why Defendants and the UCC forwent raising as much as \$22.5 million in cash now in favor of hanging on to the HCLOF assets.

53. Indeed, in January 2021 Seery threatened Ethen Powell that “[Judge Jernigan] is laughing at you” and “we are coming after you” in response to the latter’s attempt to exercise his right as beneficial holder of the CLO, and pointing out a conflict of interest in Seery’s plan to liquidate the funds.

54. HCM’s threat, made by Seery, is tantamount to not only a declaration that he intends to liquidate the funds regardless of whether the investors want to do so, and whether it is in their best interests, but also that HCM intends to leverage what it views as the Bankruptcy Court’s sympathy to evade accountability.

V.

CAUSES OF ACTION

FIRST CAUSE OF ACTION *Breaches of Fiduciary Duty*

55. Plaintiffs respectfully incorporate the foregoing factual averments as if fully set forth herein and further alleges the following:

56. HCM is a registered investment advisor and acts on behalf of HCFA. Both are fiduciaries to Plaintiffs.

57. The Advisers Act establishes an unwaivable federal fiduciary duty for investment advisers.⁵

⁵ See e.g., *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 194 (1963); *Transamerica Mortg. Advisors (tama) v. Lewis*, 444 U.S. 11, 17 (1979) (“§ 206 establishes ‘federal fiduciary standards’ to govern the conduct of investment advisers.”); *Santa Fe Indus. v. Green*, 430 U.S. 462, 471, n.11 (1977) (in discussing *SEC v. Capital Gains*, stating that the Supreme Court’s reference to fraud in the “equitable” sense of the term was “premised on its recognition that Congress intended the Investment Advisers Act to establish federal fiduciary standards for investment advisers”). See also Investment Advisers Act Release No. 3060 (July 28, 2010) (“Under the Advisers Act, an adviser is a fiduciary whose duty is to serve the best interests of its clients, which includes an obligation not to subrogate clients’ interests to its own”) (citing Proxy Voting by Investment Advisers, Investment Advisers Act Release No. 2106 (Jan. 31, 2003)).

58. HCM and the DAF entered into an Amended and Restated Investment Advisory Agreement, executed between them on July 1, 2014 (the “RIA Agreement”). It renews annually and continued until the end of January 2021.

59. In addition to being the RIA to the DAF, HCM was appointed the DAF’s attorney-in-fact for certain actions, such as “to purchase or otherwise trade in Financial Instruments that have been approved by the General Partner.” RIA Agreement ¶ 4.

60. The RIA Agreement further commits HCM to value financial assets “in accordance with the then current valuation policy of the Investment Advisor [HCM], a copy of which will provided to the General Partner upon request.” RIA Agreement ¶ 5.

61. While HCM contracted for the recognition that it would be acting on behalf of others and could be in conflict with advice given the DAF, (RIA Agreement ¶ 12), nowhere did it purport to waive the fiduciary duties owed to the DAF not to trade as a principal in a manner that harmed the DAF.

62. HCFA owed a fiduciary duty to Holdco as an investor in HCLOF and to which HCFA was the portfolio manager. HCM owed a fiduciary duty to the DAF (and to Holdco as its subsidiary) pursuant to a written Advisory Agreement HCM and the DAF had where HCM agreed to provide sound investment advice and management functions.

63. As a registered investment adviser, HCM’s fiduciary duty is broad and applies to the entire advisor-client relationship.

64. The core of the fiduciary duty is to act in the best interest of their investors—the advisor must put the ends of the client before its own ends or the ends of a third party.

65. This is manifested in a duty of loyalty and a duty of utmost care. It also means that the RIA has to follow the terms of the company agreements and the regulations that apply to the investment vehicle.

66. The fiduciary duty that HCM and Seery owed to Plaintiff is predicated on trust and confidence. Section 204A of the Advisers Act requires investment advisors (whether SEC-registered or not) to establish, maintain, and enforce written policies and procedures reasonably designed to prevent the RIA from trading on material, non-public information. *See* 17 C.F.R. § 275.206(4)-7. That means that Plaintiff should be able to take Defendants at their word and not have to second guess or dig behind representations made by them.

67. The simple thesis of this claim is that Defendants HCFA and HCM breached their fiduciary duties by (i) insider trading with Harbourvest and concealing the rising NAV of the underlying assets—i.e., trading with Harbourvest on superior, non-public information that was neither revealed to Harbourvest nor to Plaintiff; (ii) concealing the value of the Harbourvest Interests; and (iii) diverting the investment opportunity in the Harbourvest entities to HCM (or its designee) without offering it to or making it available to Plaintiff or the DAF.

68. HCM, as part of its contractual advisory function with Plaintiffs, had expressly recommended the HCLOF investment to the DAF. Thus, diverting the opportunity for returns on its investment was an additional breach of fiduciary duty.

69. This violated a multitude of regulations under 27 C.F.R. part 275, in addition to Rules 10b-5 and 10b5-1. 17 CFR 240.10b5-1 (“Rule 10b5-1”) explains that one who trades while possessing non-public information is liable for insider trading, and they do not necessarily have to have *used* the specific inside information.

70. It also violated HCM’s own internal policies and procedures.

71. Also, the regulations impose obligations on Defendants to calculate a *current* valuation when communicating with an investor, such as what may or may not be taken into account, and what cannot pass muster as a current valuation. Upon information and belief, these regulations were not followed by the Defendants.

72. HCM's internal policies and procedures, which it promised to abide by both in the RIA Agreement and in its Form ADV SEC filing, provided for the means of properly calculating the value of the assets.

73. HCM either did not follow these policies, changed them to be out of compliance both with the Adviser Act regulations and its Form ADV representations, and/or simply misrepresented or concealed their results.

74. In so doing, because the fiduciary duty owed to Plaintiff is a broad one, and because Defendants' malfeasance directly implicates its relationship with Plaintiff, Defendants have breached the Advisers Act's fiduciary duties owed to Plaintiff as part of their fiduciary relationship.⁶

75. At no time between agreeing with Harbourvest to the purchase of its interests and the court approval did Defendants disclose to either Harbourvest or to Plaintiff (and the Bankruptcy Court for that matter) that the purchase was at below 50% the current net asset value as well, and when they failed to offer Plaintiff (and the other members of HCLOF) their right to purchase the interests pro rata at such advantageous valuations. Plaintiff's lost opportunity to

⁶ See Advisers Act Release No. 4197 (Sept. 17, 2015) (Commission Opinion) (“[O]nce an investment Advisory relationship is formed, the Advisers Act does not permit an adviser to exploit that fiduciary relationship by defrauding his client in any investment transaction connected to the Advisory relationship.”); see also *SEC v. Lauer*, No. 03-80612-CIV, 2008 U.S. Dist. LEXIS 73026, at 90 (S.D. Fla. Sept. 24, 2008) (“Unlike the antifraud provisions of the Securities Act and the Exchange Act, Section 206 of the Advisers Act does not require that the activity be ‘in the offer or sale of any’ security or ‘in connection with the purchase or sale of any security.’”).

purchase has harmed Plaintiff. Plaintiff had been led to believe by the Defendants that the value of what was being purchased in the Harbourvest settlement by HCM (or its designee) was at fair market value. This representation, repeated again in the Bankruptcy Court during the Harbourvest confirmation, implicitly suggested that a proper current valuation had been performed.

76. Defendant's principal, Seery, testified in January 2021 that the then-current fair market value of Harbourvest's 49.98% interest in HCLOF was worth around \$22.5 million. But by then, it was worth almost double that amount and has continued to appreciate. Seery knew or should have known that fact because the value of some of the HCLOF assets had increased, and he had a duty to know the current value. His lack of actual knowledge, while potentially not overtly fraudulent, would nonetheless amount to a breach of fiduciary duty for acting without proper diligence and information that was plainly available.

77. Furthermore, HCLOF holds equity in MGM Studios and debt in CCS Medical via various CLO positions. But Seery, in his role as CEO of HCM, was made aware during an advisors meeting in December 2020 that Highland would have to restrict its trading in MGM because of its insider status due to activities that were likely to apply upward pressure on MGM's share price.

78. Furthermore, Seery controlled the Board of CCS Medical. And in or around October 2020, Seery was advocating an equatization that would have increased the value of the CCS securities by 25%, which was not reflected in the HCM report of the NAV of HCLOF's holdings.

79. Seery's knowledge is imputed to HCM.

80. Moreover, it is a breach of fiduciary duty to commit corporate waste, which is effectively what disposing of the HCLOF assets would constitute in a rising market, where there

is no demand for disposition by the investors (save for HCM, whose proper 0.6% interest could easily be sold to the DAF at fair value).

81. As holder of 0.6% of the HCLOF interests, and now assignee of the 49.98% Harbourvest Interests), HCM has essentially committed self-dealing by threatening to liquidate HCLOF now that it may be compelled to do so under its proposed liquidation plan, which perhaps inures to the short term goals of HCM but to the pecuniary detriment of the other holders of HCLOF whose upside will be prematurely truncated.

82. Seery and HCM should not be allowed to benefit from the breach of their fiduciary duties because doing so would also cause Plaintiffs irreparable harm. The means and methods of disposal would likely render the full scope of damages to the DAF not susceptible to specific calculation—particularly as they would relate to calculating the lost opportunity cost. Seery and HCM likely do not have the assets to pay a judgment to Plaintiffs that would be rendered, simply taking the lost appreciation of the HCLOF assets.

83. Defendants are thus liable for diverting a corporate opportunity or asset that would or should have been offered to Plaintiff and the other investors. Because federal law makes the duties invoked herein unwaivable, it is preposterous that HCM, as a 0.6% holder of HCLOF, deemed itself entitled to the all of the value and optionality of the below-market Harbourvest purchase.

84. Defendants cannot rely on any contractual provision that purports to waive this violation. Nothing in any agreement purports to permit, authorize or otherwise sanitize Defendants' self-dealing. All such provisions are void.

85. In the fourth quarter of 2020, Seery and HCM notified staff that they would be terminated on December 31, 2020. That termination was postponed to February 28, 2021.

Purchasing the Harbourvest assets without staffing necessary to be a functioning Registered Investment Advisor was a strategic reversal from prior filings that outlined canceling the CLO management contracts and allowing investors to replace Highland as manager.

86. Seery's compensation agreement with the UCC incentivizes him to expedite recoveries and to prevent transparency regarding the Harbourvest settlement.

87. What is more, Seery had previously testified that the management contracts for the funds—HCLOF included—were unprofitable, and that he intended to transfer them. But he later rejected offers to purchase those management contracts for fair value and instead decided to continue to manage the funds—which is what apparently gave rise to the Harbourvest Settlement, among others. He simultaneously rejected an offer for the Harbourvest assets of \$24 million, stating that they were worth much more than that.

88. Because of Defendants' malfeasance, Plaintiffs have lost over \$25 million in damages—a number that continues to rise—and the Defendants should not be able to obtain a windfall.

89. For the same reason, Defendants' malfeasance has also exposed HCLOF to a massive liability from Harbourvest since the assignment of those interests is now one that is likely unenforceable under the Advisers Act, Section 47(b), if there was unequal information.

90. HCM and HCFA are liable as principals for breach of fiduciary duty, as are the principals and compliance staff of each entity.

91. Plaintiffs seek disgorgement, damages, exemplary damages, attorneys' fees and costs. To the extent the Court determines that this claim had to have been brought derivatively on behalf of HCLOF, then Plaintiffs represent that any pre-suit demand would have been futile since asking HCM to bring suit against its principal, Seery, would have been futile.

SECOND CAUSE OF ACTION
Breach of HCLOF Company Agreement
(By Holdco against HCLOF, HCM and HCFA)

92. Plaintiffs respectfully incorporate the foregoing factual averments as if fully set forth herein and further alleges the following:

93. On November 15, 2017, the members of HCLOF, along with HCLOF and HCFA, executed the *Members Agreement Relating to the Company* (the “Company Agreement”).

94. The Company Agreement governs the rights and duties of the members of HCLOF.

95. Section 6.2 of HCLOF Company Agreement provides that when a member “other than ... CLO Holdco [Plaintiff] or a Highland Affiliate,” intends to sell its interest in HCLOF to a third party (i.e., not to an affiliate of the selling member), then the other members have the first right of refusal to purchase those interests pro rata for the same price that the member has agreed to sell.

96. Here, despite the fact that Harbourvest agreed to sell its interests in HCLOF for \$22.5 million when they were worth more than double that, Defendants did not offer Plaintiff the chance to buy its pro rata share of those interests at the same agreed price of \$22.5 million (adjusted pro rata).

97. The transfer and sale of the interests to HCM were accomplished as part of the Harbourvest Settlement which was approved by the Bankruptcy Court.

98. Plaintiff was not informed of the fact that Harbourvest had offered its shares to Defendant HCM for \$22.5 million—which was under 50% of their true value.

99. Plaintiff was not offered the right to purchase its pro rata share of the Harbourvest interests prior to the agreement being struck or prior to court approval being sought.

100. Had Plaintiff been allowed to do so, it would have obtained the interests with a net equity value over their purchase price worth in excess of \$20 million.

101. No discovery or opportunity to investigate was afforded Plaintiff prior to lodging an objection in the Bankruptcy Court.

102. Plaintiff is entitled to specific performance or, alternatively, disgorgement, constructive trust, damages, attorneys' fees and costs.

THIRD CAUSE OF ACTION
Negligence
(By the DAF and CLO Holdco against HCM and HCFA)

103. Plaintiffs respectfully incorporate the foregoing factual averments as if fully set forth herein, and further alleges the following:

104. Plaintiffs incorporate the foregoing causes of action and note that all the foregoing violations were breaches of the common law duty of care imposed by law on each of Seery, HCFA and HCM.

105. Each of these Defendants should have known that their actions were violations of the Advisers Act, HCM's internal policies and procedures, the Company Agreement, or all three.

106. Seery and HCM owed duties of care to Plaintiffs to follow HCM's internal policies and procedures regarding both the propriety and means of trading with a customer [Harbourvest], the propriety and means of trading as a principal in an account but in a manner adverse to another customer [the DAF and Holdco], and the proper means of valuing the CLOs and other assets held by HCLOF.

107. It would be foreseeable that failing to disclose the current value of the assets in the HCLOF would impact Plaintiffs negatively in a variety of ways.

108. It would be reasonably foreseeable that failing to correctly and accurately calculate the current net asset value of the market value of the interests would cause Plaintiffs to value the Harbourvest Interests differently.

109. It would be reasonably foreseeable that referring to old and antiquated market quotations and/or valuations of the HCLOF assets or interests would result in a mis-valuation of HCLOF and, therefore, a mis-valuation of the Harbourvest Interests.

110. Likewise, it would have been foreseeable that Plaintiff's failure to give Plaintiff the opportunity to purchase the Harbourvest shares at a \$22.5 million valuation would cause Plaintiff damages. Defendants knew that the value of those assets was rising. They further knew or should have known that whereas those assets were sold to HCM for an allowance of claims to be funded in the future, selling them to Plaintiff would have provided the estate with cash funds.

111. Defendants' negligence foreseeably and directly caused Plaintiff harm.

112. Plaintiff is thus entitled to damages.

FOURTH CAUSE OF ACTION
Racketeering Influenced Corrupt Organizations Act
(CLO Holdco and DAF against HCM)

113. Plaintiffs respectfully incorporate the foregoing factual averments as if fully set forth herein, and further alleges the following:

114. Defendants are liable for violations of the Racketeer Influenced and Corrupt Organizations ("RICO") Act, 18 U.S.C. § 1961 *et seq.*, for the conduct of an enterprise through a pattern of racketeering activity.

115. HCLOF constitutes an enterprise under the RICO Act. Additionally, or in the alternative, HCM, HCLA, and HCLOF constituted an association-in-fact enterprise. The purpose of the association-in-fact was the perpetuation of Seery's position at HCM and using the

Harbourvest settlement as a vehicle to enrich persons other than the HCLOF investors, including Holdco and the DAF, and the perpetuation of HCM's holdings in collateralized loan obligations owned by HCLOF, while attempting to deny Plaintiffs the benefit of its rights of ownership.

116. The association-in-fact was bound by informal and formal connections for years prior to the elicited purpose, and then changed when HCM joined it in order to achieve the association's illicit purpose. For example, HCM is the parent and control person over HCFA, which is the portfolio manager of HCLOF pursuant to a contractual agreement—both are registered investment advisors and provide advisory and management services to HCLOF.

117. Defendants injured Plaintiffs through their continuous course of conduct of the HCM-HCLA-HCLOF association-in-fact enterprise. HCM's actions (performed through Seery and others) constitute violations of the federal wire fraud, mail fraud, fraud in connection with a case under Title 11, and/or securities fraud laws, pursuant to 18 U.S.C. § 1961(1)(B) and (D).

118. HCM operated in such a way as to violate insider trading rules and regulations when it traded with Harbourvest while it had material, non-public information that it had not supplied to Harbourvest or to Plaintiffs.

119. In or about November 2020, HCM and Harbourvest entered into discussions about settling the Harbourvest Claims. Seery's conduct of HCLOF and HCLA on behalf of HCM through the interstate mails and/or wires caused HCM to agree to the purchase of Harbourvest's interests in HCLOF.

120. On or about each of September 30, 2020, through December 31, 2020, Seery, through his conduct of the enterprise, utilized the interstate wires and/or mails to obtain or arrive at valuations of the HCLOF interests. Seery's conduct of the enterprise caused them to cease

sending the valuation reports to Plaintiffs, which eventually allowed Plaintiffs to be misled into believing that Seery had properly valued the interests.

121. On or about September 30, 2020, Seery transmitted or caused to be transmitted though the interstate wires information to HCLOF investors from HCM (via HCFA), including Harbourvest, regarding the value of HCLOF interests and underlying assets.

122. Additionally, Seery operated HCM in such a way that he concealed the true value of the HCLOF interests by utilizing the interstate wires and mails to transmit communications to the court in the form of written representations on or about December 23, 2020, and then further transmitted verbal representations of the current market value (the vastly understated one) on January 14, 2021, during live testimony.

123. However, Harbourvest was denied the full picture and the true value of the underlying portfolio. At the end of October and November of 2020, HCM had updated the net asset values of the HCLOF portfolio. According to sources at HCM at the time, the HCLOF assets were worth north of \$72,969,492 as of November 30, 2020. Harbourvest's share of that would have been \$36,484,746.

124. The HCLOF net asset value had reached \$86,440,024 as of December 31, 2021, which means that by the time Seery was testifying in the Bankruptcy Court on January 14, 2021, the fair market value of the Harbourvest Assets was \$22.5 million, when it was actually closer to \$43,202,724. Seery, speaking on behalf of HCM, knew of the distinction in value.

125. On January 14, 2021, Seery also testified that he (implying HCM, HCLA and HCLOF) had valued the Harbourvest Assets at their current valuation and at fair market value. This was not true because the valuation that was used and testified to was ancient. The ostensible purpose of this concealment was to induce Plaintiff and other interest holdings to take no action.

126. In supporting HCM’s motion to the Bankruptcy Court to approve the Harbourvest Settlement, Seery omitted the fact that HCM was purchasing the interests at a massive discount, which would violate the letter and spirit of the Adviser’s Act.

127. Seery was informed in late December 2020 at an in-person meeting in Dallas to which Seery had to fly that HCLOF and HCM had to suspend trading in MGM Studios’ securities because Seery had learned from James Dondero, who was on the Board of MGM, of a potential purchase of the company. The news of the MGM purchase should have caused Seery to revalue the HCLOF investment in MGM.

128. In or around October 2020, Seery (who controls the Board of CSS Medical) was pursuing “equatization” of CSS Medical’s debt, which would have increased the value of certain securities by 25%. In several communications through the U.S. interstate wires and/or mails, and with Plaintiffs, and the several communications with Harbourvest during the negotiations of the settlement, Seery failed to disclose these changes which were responsible in part for the ever-growing value of the HCLOF CLO portfolio.

129. Seery was at all relevant times operating as an agent of HCM.

130. This series of related violations of the wire fraud, mail fraud, and securities fraud laws, in connection with the HCM bankruptcy, constitute a continuing pattern and practice of racketeering for the purpose of winning a windfall for HCM and himself--a nearly \$30,000,000 payday under the confirmation agreement.

131. The federal RICO statute makes it actionable for one’s conduct of an enterprise to include “fraud in connection with a [bankruptcy case]”. The Advisers’ Act antifraud provisions require full transparency and accountability to an advisers’ investors and clients and does not require a showing of reliance or materiality. The wire fraud provision likewise is violated when,

as here, the interstate wires are used as part of a “scheme or artifice ... for obtaining money or property by means of false ... pretenses, [or] representations[.]”

132. Accordingly, because Defendants’ conduct violated the wire fraud and mail fraud laws, and the Advisers’ Act antifraud provisions, and their acts and omissions were in connection with the HCM Bankruptcy proceedings under Title 11, they are sufficient to bring such conduct within the purview of the RICO civil action provisions, **18 U.S.C. § 1964.**

133. Plaintiffs are thus entitled to damages, treble damages, attorneys’ fees and costs of suit, in addition to all other injunctive or equitable relief to which they are justly entitled.

FIFTH CAUSE OF ACTION
Tortious Interference
(CLO Holdco against HCM)

134. Plaintiff respectfully incorporates the foregoing factual averments as if fully set forth herein and further alleges the following:

135. At all relevant times, HCM owned a 0.6% interest in HCLOF.

136. At all relevant times, Seery and HCM knew that Plaintiff had specific rights in HCLOF under the Company Agreement, § 6.2.

137. Section 6.2 of HCLOF Company agreement provides that when a member “other than ... CLO Holdco [Plaintiff] or a Highland Affiliate,” intends to sell its interest in HCLOF to a third party (i.e., not an affiliate of the member), then the other members have the first right of refusal to purchase those interests pro rata for the same price that the member has agreed to sell.

138. HCM, through Seery, tortiously interfered with Plaintiff’s contractual rights with HCLOF by, among other things, diverting the Harbourvest Interests in HCLOF to HCM without giving HCLOF or Plaintiff the option to purchase those assets at the same favorable price that HCM obtained them.

139. HCM and Seery tortiously interfered with Plaintiff's contractual rights with HCLOF by, among other things, misrepresenting the fair market value as \$22.5 million and concealing the current value of those interests.

140. But for HCM and Seery's tortious interference, Plaintiff would have been able to acquire the Harbourvest Interests at a highly favorable price. HCM and Seery's knowledge of the rights and intentional interference with these rights has caused damage to Plaintiff CLO Holdco.

141. Plaintiff is therefore entitled to damages from HCM and Seery, as well as exemplary damages.

VI.

JURY DEMAND

142. Plaintiff demands trial by jury on all claims so triable.

VII.

PRAYER FOR RELIEF

143. Wherefore, for the foregoing reasons, Plaintiffs respectfully pray that the Court enter judgment in its favor and against Defendants, jointly and severally, for:

- a. Actual damages;
- b. Disgorgement;
- c. Treble damages;
- d. Exemplary and punitive damages;
- e. Attorneys' fees and costs as allowed by common law, statute or contract;
- f. A constructive trust to avoid dissipation of assets;
- g. All such other relief to which Plaintiff is justly entitled.

Dated: April 12, 2021

Respectfully submitted,

SBAITI & COMPANY PLLC

/s/ Mazin A. Sbaiti

Mazin A. Sbaiti

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Counsel for Plaintiffs

EXHIBIT 12

003323

GRANT SCOTT - 1/21/2021

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

IN RE:)	
	)	Chapter 11
HIGHLAND CAPITAL MANAGEMENT,)	
L.P.	)	Case No.
	)	19-34054-sgj11
Debtor.)	
-----)	
HIGHLAND CAPITAL MANAGEMENT,)	
L.P.,)	
Plaintiff,)	
	)	Adversary
vs.	)	Proceeding No.
	)	21-03000-sgj
HIGHLAND CAPITAL MANAGEMENT)	
FUND ADVISORS, L.P.; NEXPOINT)	
ADVISORS, L.P.; HIGHLAND)	
INCOME FUND; NEXPOINT)	
STRATEGIC OPPORTUNITIES FUND;)	
NEXPOINT CAPITAL, INC.; and)	
CLO HoldCo, LTD.,)	
)	
Defendants.)	

VIDEOCONFERENCE DEPOSITION OF Grant SCOTT

Thursday, 21st of January, 2021

Reported by: Lisa A. Wheeler, RPR, CRR

Job No: 188910

<p style="text-align: right;">Page 2</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 January 21, 2021</p> <p>3 2:02 p.m.</p> <p>4</p> <p>5</p> <p>6 Videoconference deposition of Grant</p> <p>7 SCOTT, pursuant to the Federal Rules of</p> <p>8 Civil Procedure before Lisa A. Wheeler,</p> <p>9 RPR, CRR, a Notary Public of the State of</p> <p>10 North Carolina. The court reporter</p> <p>11 reported the proceeding remotely and the</p> <p>12 witness was present via videoconference.</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	<p style="text-align: right;">Page 3</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 REMOTE APPEARANCES:</p> <p>3 PACHULSKI STANG ZIEHL & JONES</p> <p>4 Attorneys for Debtor</p> <p>5 780 Third Avenue</p> <p>6 New York, NY 10017</p> <p>7 BY: JOHN MORRIS, ESQ.</p> <p>8</p> <p>9 LATHAM & WATKINS</p> <p>10 Attorneys for UBS</p> <p>11 885 Third Avenue</p> <p>12 New York, NY 10022</p> <p>13 BY: SHANNON McLAUGHLIN, ESQ.</p> <p>14</p> <p>15 SIDLEY AUSTIN</p> <p>16 Attorneys for the Creditors Committee</p> <p>17 2021 McKinney Avenue</p> <p>18 Dallas, TX 75201</p> <p>19 BY: PENNY REID, ESQ.</p> <p>20 ALYSSA RUSSELL, ESQ.</p> <p>21 PAIGE MONTGOMERY, ESQ.</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>
<p style="text-align: right;">Page 4</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 REMOTE APPEARANCES: (Continued)</p> <p>3 KING & SPALDING</p> <p>4 Attorneys for Highland CLO Funding, Ltd.</p> <p>5 500 West 2nd Street</p> <p>6 Austin, TX 78701</p> <p>7 BY: REBECCA MATSUMURA, ESQ.</p> <p>8</p> <p>9 K&L GATES</p> <p>10 Attorneys for Highland Capital Management</p> <p>11 Fund Advisors, L.P., et al.</p> <p>12 4350 Lassiter at North Hills Avenue</p> <p>13 Raleigh, NC 27609</p> <p>14 BY: A. LEE HOGEWOOD, III, ESQ.</p> <p>15 EMILY MATHER, ESQ.</p> <p>16</p> <p>17 HELLER DRAPER & HORN</p> <p>18 Attorneys for The Dugaboy Investment Trust</p> <p>19 and The Get Good Trust</p> <p>20 650 Poydras Street</p> <p>21 New Orleans, LA 70130</p> <p>22 BY: MICHAEL LANDIS, ESQ.</p> <p>23</p> <p>24</p> <p>25</p>	<p style="text-align: right;">Page 5</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 REMOTE APPEARANCES: (Continued)</p> <p>3 KANE RUSSELL COLEMAN & LOGAN</p> <p>4 Attorneys for Defendant CLO HoldCo Limited</p> <p>5 Bank of America Plaza</p> <p>6 901 Main Street</p> <p>7 Dallas, TX 75202</p> <p>8 BY: BRIAN CLARK, ESQ.</p> <p>9 JOHN KANE, ESQ.</p> <p>10</p> <p>11 ALSO PRESENT: La Asia Canty</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>

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1 GRANT SCOTT - 1/21/2021

2 G R A N T S C O T T ,

3 called as a witness, having been duly sworn

4 by a Notary Public, was examined and

5 testified as follows:

6 MR. MORRIS: Good afternoon. My

7 name is John Morris. I'm an attorney with

8 Pachulski Stang Ziehl & Jones, a law firm

9 who represents the debtor in the bankruptcy

10 known as In Re: Highland Capital

11 Management, L.P., and we're here today for

12 the deposition of Grant Scott.

13 Before I begin, I would just like to

14 have confirmation on the record that

15 everybody here who's representing their

16 respective parties agrees that this

17 deposition can be used in evidence in any

18 subsequent hearing, notwithstanding the

19 fact that it's being conducted remotely,

20 and that the witness is not in the same

21 room as the court reporter.

22 Does anybody have an objection to

23 the admissibility of the transcript subject

24 to any reservation of -- of actual

25 objections on the record to using this

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1 GRANT SCOTT - 1/21/2021

2 the -- the deposition six to eight years ago,

3 do you have a recollection as to what that was

4 about?

5 A. Yeah. It was a -- it was a patent I

6 wrote for Samsung Electronics.

7 Q. Okay.

8 A. And as being the person that I --

9 that wrote it and the patent was in litigation,

10 not -- not being handled by me, but by virtue

11 of having written the patent, I was -- I was

12 deposed --

13 Q. Okay. So you --

14 A. -- on the -- on the patent.

15 Q. Okay. So you've had a little bit of

16 experience with depositions. But just

17 generally speaking, I'm going to ask you a

18 series of questions. It's very important that

19 you allow me to finish my question before you

20 begin your answer.

21 Is that fair?

22 A. Absolutely.

23 Q. And I will certainly try to extend

24 the same courtesy to you, but if I -- if I step

25 on your words, will you let me know that?

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1 GRANT SCOTT - 1/21/2021

2 transcript going forward?

3 Okay. Nobody's spoken up, so I --

4 I'd like to begin.

5 EXAMINATION

6 BY MR. MORRIS:

7 Q. Good afternoon, Mr. Scott. As I

8 mentioned, my name is John Morris, and we're

9 here for your deposition today. Have you ever

10 been deposed before?

11 A. On two occasions.

12 Q. And -- and when did the -- when did

13 those depositions take place?

14 A. This past October and maybe six to

15 eight years ago.

16 Q. Okay. Can you just tell me

17 generally what the subject matter was of the

18 deposition this past October.

19 A. It was relating to Jim Dondero's --

20 it was a family law issue in -- in -- with

21 respect to Jim Dondero.

22 Q. Okay. And did you testify in a

23 courtroom, or was it a deposition like this?

24 A. I -- right here, actually.

25 Q. Okay. Super. And -- and what about

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1 GRANT SCOTT - 1/21/2021

2 A. Okay.

3 Q. And if there's anything that I ask

4 that you don't understand, will you let me know

5 that as well?

6 A. Yes. I'll try -- I'll do my best.

7 Q. Okay. So this is a virtual

8 deposition. We're not in the same room. I am

9 going to be showing you documents today. The

10 documents will be put up on the screen. This

11 isn't a -- a trick of any kind. If at any time

12 you see a document up on the screen and either

13 you believe or you have any reason to want to

14 read other portions of the document, will you

15 let me know that?

16 A. Yes, I -- yes, I will. Uh-huh.

17 Q. With respect to the Dondero family

18 matter, I really don't want to go into the

19 substance of that, but I do want to know

20 whether you testified voluntarily in that

21 matter or whether you -- whether you testified

22 pursuant to subpoena.

23 A. I would have done that, but the

24 first time I found out about it was a -- was a

25 subpoena that I received. I wasn't given the

<p style="text-align: right;">Page 10</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 choice.</p> <p>3 Q. Okay. And do you recall who served</p> <p>4 the subpoena on you? Actually, let me ask a</p> <p>5 different question because I'm really not</p> <p>6 interested in the -- in the details.</p> <p>7 Did Mr. Dondero serve that subpoena</p> <p>8 on you or did somebody else?</p> <p>9 A. His counsel for his ex-wife.</p> <p>10 Q. Mr. -- so -- so the lawyer acting on</p> <p>11 behalf of Mr. Dondero's ex-wife served you with</p> <p>12 the subpoena?</p> <p>13 A. Correct.</p> <p>14 Q. Okay. You're familiar with an</p> <p>15 entity called CLO HoldCo Limited; is that</p> <p>16 right?</p> <p>17 A. Yes.</p> <p>18 Q. Do you know what that entity is?</p> <p>19 A. Yes.</p> <p>20 Q. What -- what -- can you describe for</p> <p>21 me what CLO HoldCo Limited is.</p> <p>22 A. It's a holding company of assets</p> <p>23 including collateralized loan obligation-type</p> <p>24 assets. That's a portion of the overall</p> <p>25 portfolio. It's an organization that is</p>	<p style="text-align: right;">Page 11</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 integrated with other entities as part of a</p> <p>3 charitable -- loosely what we -- what we refer</p> <p>4 to as a charitable foundation equivalent.</p> <p>5 Yeah.</p> <p>6 Q. All right. We'll -- we'll get into</p> <p>7 some detail about the corporate structure in a</p> <p>8 moment. Do you personally play any role at CLO</p> <p>9 HoldCo Limited?</p> <p>10 A. Yes. My technical title is</p> <p>11 director, but I -- I don't necessarily know</p> <p>12 specifically what that title means other than I</p> <p>13 act, as I understand it, as -- as a trustee for</p> <p>14 those -- for those assets.</p> <p>15 Q. And where did you get that</p> <p>16 understanding?</p> <p>17 A. Approximately ten years ago from the</p> <p>18 group that -- that set up the hierarchy.</p> <p>19 Q. And which group set up the</p> <p>20 hierarchy?</p> <p>21 A. Employees at Jim Don- -- as I</p> <p>22 understand it, employees of Highland along with</p> <p>23 outside counsel, as I understand it, and also,</p> <p>24 I guess, input from -- from Jim Dondero.</p> <p>25 Q. At the time that you assumed the</p>
<p style="text-align: right;">Page 12</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 role of director of CLO HoldCo Limited, was</p> <p>3 that entity already in existence?</p> <p>4 A. I believe so. I'm not certain. I'm</p> <p>5 not certain.</p> <p>6 Q. What are your duties and</p> <p>7 responsibilities as a director of CLO HoldCo</p> <p>8 Limited?</p> <p>9 A. Well, my day-to-day responsibilities</p> <p>10 are to interface with -- with the manager of</p> <p>11 the -- of the assets of CLO. I do have some</p> <p>12 role in -- with respect to some of the entities</p> <p>13 that are -- I -- I have a limited role with</p> <p>14 respect to a subset of the charitable</p> <p>15 foundations that receive money from the CLO</p> <p>16 HoldCo structure, which is commonly referred to</p> <p>17 as the DAF. There's -- sometimes those are</p> <p>18 used interchangeably.</p> <p>19 Q. What terms are used interchangeably?</p> <p>20 A. Well, the DAF and CLO HoldCo are</p> <p>21 frequently -- by -- by other people they're --</p> <p>22 it's the short -- it's the -- I guess it's</p> <p>23 easier to use the acronym DAF than CLO HoldCo</p> <p>24 Limited, so I'm frequently having to -- there</p> <p>25 is a DAF entity so -- that's above -- above CLO</p>	<p style="text-align: right;">Page 13</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 in terms of the management, and so it's</p> <p>3 frequently confusing and I'm having to clarify</p> <p>4 at times which entity we're talking about,</p> <p>5 but -- but other parties frequently use those</p> <p>6 terms interchangeably.</p> <p>7 Q. Okay.</p> <p>8 MR. MORRIS: Lisa, when we use the</p> <p>9 phrase DAF, because you'll hear that a lot,</p> <p>10 it's all caps, D-A-F.</p> <p>11 BY MR. MORRIS:</p> <p>12 Q. You mentioned that you interface</p> <p>13 with the manager of assets of CLOs. Do I have</p> <p>14 that right?</p> <p>15 A. Well, of all the assets.</p> <p>16 Q. Okay. Who is the manager of the</p> <p>17 assets that you're referring to?</p> <p>18 A. Highland Capital Management.</p> <p>19 Q. Highland Capital Management manages</p> <p>20 all of the assets -- withdrawn.</p> <p>21 Is it your understanding that</p> <p>22 Highland Capital Management manages all the</p> <p>23 assets that are owned by CLO HoldCo Limited?</p> <p>24 A. Yes.</p> <p>25 Q. Who makes the investment decisions</p>

<p style="text-align: right;">Page 14</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 on behalf of CLO HoldCo Limited?</p> <p>3 A. Highland -- those managers that you</p> <p>4 mentioned.</p> <p>5 Q. Okay. I didn't mention anybody in</p> <p>6 particular.</p> <p>7 A. Oh, I'm sorry. The -- the -- the</p> <p>8 money manager -- could you repeat that</p> <p>9 question? I'm sorry. I'm so sorry.</p> <p>10 Q. Can you just -- can you just</p> <p>11 identify for me the person who makes investment</p> <p>12 decisions on behalf of CLO HoldCo Limited.</p> <p>13 A. It's -- well, it's -- it's persons</p> <p>14 as I understand it. I inter- -- interface with</p> <p>15 a -- with a group, but it's -- it's Highland</p> <p>16 Capital employee -- Highland Capital Management</p> <p>17 employees.</p> <p>18 Q. Okay. Can you just name any of</p> <p>19 them, please.</p> <p>20 A. Hunter Covitz, Jim Dondero. Mark</p> <p>21 Okada's no longer there, but I believe he was</p> <p>22 involved, and there are others that I interface</p> <p>23 with.</p> <p>24 Q. Can you -- can you recall the name</p> <p>25 of anybody other than Mr. Okada and Mr. Dondero</p>	<p style="text-align: right;">Page 15</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 and Mr. Covitz?</p> <p>3 A. Yeah. Over the years I've worked</p> <p>4 with Tim Cournoyer, Thomas Surgent, but I</p> <p>5 think -- I think that's the core -- the core</p> <p>6 group.</p> <p>7 Q. All right. And is there anybody</p> <p>8 within that core group who has the final</p> <p>9 decision-making authority concerning the</p> <p>10 investments in CLO HoldCo Limited?</p> <p>11 A. I don't -- I don't know. I'm sorry.</p> <p>12 Say that again. I just want to -- I'm sorry.</p> <p>13 I'm trying to be -- I'm not trying to -- I'm</p> <p>14 trying to be --</p> <p>15 Q. I understand. And --</p> <p>16 A. Sorry. If you could just repeat it.</p> <p>17 Q. Sure. Is there any particular</p> <p>18 person who has the final decision-making</p> <p>19 authority for investments that are being made</p> <p>20 on behalf of CLO HoldCo Limited?</p> <p>21 A. Amongst that group I am -- I am not</p> <p>22 sure.</p> <p>23 Q. Okay. So are there any other</p> <p>24 directors of CLO HoldCo besides yourself?</p> <p>25 A. No.</p>
<p style="text-align: right;">Page 16</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 Q. Is it fair to say that you do not</p> <p>3 make decisions, investment decisions, on behalf</p> <p>4 of CLO HoldCo Limited?</p> <p>5 A. Yes.</p> <p>6 Q. Does CLO HoldCo Limited have any</p> <p>7 employees that you know of?</p> <p>8 A. No.</p> <p>9 Q. Does CLO HoldCo have any --</p> <p>10 withdrawn.</p> <p>11 Does CLO HoldCo Limited have any</p> <p>12 officers that you know of?</p> <p>13 A. No.</p> <p>14 Q. So am I correct that you're the only</p> <p>15 representative in the world of CLO HoldCo in</p> <p>16 terms of being a director, officer, or</p> <p>17 employee?</p> <p>18 A. Yes.</p> <p>19 Q. Do you receive any compensation from</p> <p>20 CLO HoldCo for your services as the director?</p> <p>21 A. I do now.</p> <p>22 Q. When did that begin?</p> <p>23 A. I believe in the middle of 2012.</p> <p>24 Q. Okay. And had you served as a</p> <p>25 director prior to that time without</p>	<p style="text-align: right;">Page 17</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 compensation?</p> <p>3 A. Yes.</p> <p>4 Q. And have you been the sole director</p> <p>5 of CLO HoldCo Limited since the time of your</p> <p>6 appointment approximately ten years ago?</p> <p>7 A. Yes.</p> <p>8 Q. Nobody else has served in that</p> <p>9 capacity; is that right?</p> <p>10 A. That is correct.</p> <p>11 Q. There have been no employees or</p> <p>12 officers of that entity during the time that</p> <p>13 you've served as director, correct?</p> <p>14 A. Yes.</p> <p>15 Q. Do you know who formed CLO HoldCo</p> <p>16 Limited?</p> <p>17 A. I do not.</p> <p>18 Q. Do you know why CLO HoldCo Limited</p> <p>19 was formed?</p> <p>20 A. I believe so.</p> <p>21 Q. Can you explain to me why -- your</p> <p>22 understanding as to why CLO HoldCo was formed.</p> <p>23 A. So as I understand things, Jim</p> <p>24 Dondero wanted to create a charitable</p> <p>25 foundation-like entity or entities, and tax</p>

<p style="text-align: right;">Page 18</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 people particularly, I guess, finance people,</p> <p>3 lawyers, they created this network of entities</p> <p>4 to carry out that charitable goal. At one</p> <p>5 point, I thought it was a novel type of</p> <p>6 institution, if you want to call it, or a</p> <p>7 novel -- novel type of group of entities, but</p> <p>8 over time, I came to understand that although</p> <p>9 not cookie cutter, it -- it follows a general</p> <p>10 arrangement of entities for legal and tax</p> <p>11 purposes, compliance purposes, IRS purposes,</p> <p>12 various insulating purposes to maintain -- or</p> <p>13 to meet the necessary requisites to carry out</p> <p>14 that charitable function.</p> <p>15 Q. When did you come to that</p> <p>16 understanding?</p> <p>17 A. Over the last couple of years. I</p> <p>18 periodically have to refresh my recollection.</p> <p>19 It's -- it's fairly complex.</p> <p>20 Q. Okay. In your capacity as the sole</p> <p>21 director of CLO HoldCo Limited, do you report</p> <p>22 to anybody?</p> <p>23 A. No.</p> <p>24 Q. Other than interfacing with the</p> <p>25 manager of the assets of the CLO, do you have</p>	<p style="text-align: right;">Page 19</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 any other duties and responsibilities as a</p> <p>3 director of CLO HoldCo Limited?</p> <p>4 A. Yes. Sorry. My mouth is a little</p> <p>5 dry.</p> <p>6 Q. By the way, if you ever need to take</p> <p>7 a break, just let me know.</p> <p>8 A. Okay. Thank you. Now I forgot your</p> <p>9 question. The -- the -- the --</p> <p>10 Q. I understand.</p> <p>11 A. The answer -- the -- the answer is</p> <p>12 yes. I -- why don't you ask -- ask your</p> <p>13 question again. I'm sorry.</p> <p>14 Q. Sure. Other than interfacing with</p> <p>15 the manager of the assets of the CLO, do you</p> <p>16 have any other duties and responsibilities as</p> <p>17 the sole director of CLO HoldCo Limited?</p> <p>18 A. Yes. So Highland Capital because of</p> <p>19 its -- the way it's set up to manage or service</p> <p>20 CLO HoldCo and the DAF, it has a relatively</p> <p>21 large group of people that I have to interface</p> <p>22 with to do everything from -- everything from</p> <p>23 soup to nuts. Finances and the money</p> <p>24 management is one aspect, but most of my</p> <p>25 time -- on a day-to-day or week-to-week basis,</p>
<p style="text-align: right;">Page 20</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 most of my time is spent working with the</p> <p>3 various compliance and other people for</p> <p>4 addressing issues of get- -- you know, getting</p> <p>5 taxes filed. It runs -- it runs the gamut of</p> <p>6 every aspect of the organization being -- being</p> <p>7 handled by Highland.</p> <p>8 Q. Okay.</p> <p>9 A. You know, unlike -- unlike my</p> <p>10 financial -- unlike a financial planner that</p> <p>11 might, you know, manage assets, they -- they do</p> <p>12 it all, and I interface with them regularly to</p> <p>13 maintain -- mostly to deal with compliance</p> <p>14 issues.</p> <p>15 Q. Who's the com- -- is there a person</p> <p>16 who's in charge of compliance?</p> <p>17 A. I believe Thomas Surgent. I</p> <p>18 mentioned him. I believe he also has that</p> <p>19 role, but it's -- you know, they do have</p> <p>20 turnover, I guess, in that. It's -- I guess</p> <p>21 they refer to it as the back office. I've</p> <p>22 heard that term be used, but -- basically, it's</p> <p>23 a large number of people that have changed over</p> <p>24 time, but it's -- it's more -- I believe it's</p> <p>25 more than one collectively.</p>	<p style="text-align: right;">Page 21</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 Q. How much time do you devote -- you</p> <p>3 know, can you estimate either on a weekly or a</p> <p>4 monthly basis how many -- how much time do you</p> <p>5 devote to serving as the director of CLO HoldCo</p> <p>6 Limited?</p> <p>7 A. I thought about that. Well, let --</p> <p>8 let's put it this way: There was the</p> <p>9 prebankruptcy time I spent per day, and then</p> <p>10 there was the postbankruptcy time I've spent</p> <p>11 per -- per -- or per week -- excuse me, or</p> <p>12 per -- I've estimated it as probably a day --</p> <p>13 it's so intermittent it's -- it's hard, okay?</p> <p>14 It's -- I don't dedicate my Mondays to only</p> <p>15 doing that and then Tuesday through Friday I</p> <p>16 don't, right? I -- it's -- I have to piece</p> <p>17 together everything that occurs during the</p> <p>18 week. There might be some weeks where I don't</p> <p>19 have any contact. There might be every day of</p> <p>20 the week I have multiple contact. There may be</p> <p>21 days where from morning to night there is so</p> <p>22 much contact, it precludes me from doing</p> <p>23 anything else meaningfully. So -- but I would</p> <p>24 estimate it's probably three or four -- maybe</p> <p>25 three days, four days a month when things are</p>

<p style="text-align: right;">Page 22</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 going well.</p> <p>3 Q. And -- and I think you -- you</p> <p>4 testified just now that there was kind of a</p> <p>5 difference between prebankruptcy and</p> <p>6 postbankruptcy. Do I have that right?</p> <p>7 A. Yes.</p> <p>8 Q. And can you tell me -- is it fair to</p> <p>9 say that before the bankruptcy, you didn't</p> <p>10 devote much time to CLO HoldCo, or do I have</p> <p>11 that wrong?</p> <p>12 A. Well, I -- just the time that --</p> <p>13 that I mentioned just -- I'm sorry. The -- the</p> <p>14 time I just mentioned now when you asked me,</p> <p>15 that was the pre period. Excuse me. I haven't</p> <p>16 talked about the postbankruptcy period.</p> <p>17 Q. So are you -- are you -- are you</p> <p>18 devoting more time or less time since the</p> <p>19 bankruptcy?</p> <p>20 A. Much more.</p> <p>21 Q. Much more since the bankruptcy</p> <p>22 filing?</p> <p>23 A. Yes.</p> <p>24 Q. And so why did the bankruptcy filing</p> <p>25 cause you to spend more time as a director of</p>	<p style="text-align: right;">Page 23</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 CLO HoldCo Limited?</p> <p>3 A. Well, initially, and this would</p> <p>4 be -- this would be late 2019, it was --</p> <p>5 aft- -- after the bankruptcy was -- was filed</p> <p>6 and I obtained counsel, who are on the phone</p> <p>7 now -- or in this deposition now, excuse me,</p> <p>8 that was -- that transition occurred because</p> <p>9 CLO was a debtor -- excuse me, a creditor to --</p> <p>10 to the debtor and had to take steps to</p> <p>11 establish its -- its claim. So if I understand</p> <p>12 the -- things correctly, the -- the debtor</p> <p>13 identified as part of the filing -- I don't</p> <p>14 know how bankruptcy works, but if I under- --</p> <p>15 if my recollection is correct, there's a</p> <p>16 hierarchy from biggest to smallest, and we were</p> <p>17 relatively high up. And when I say we or I,</p> <p>18 I -- I just mean CLO was relatively high up.</p> <p>19 And so initially, for the first period of so</p> <p>20 many months, the -- the exclusive focus was on</p> <p>21 our position as a creditor -- a creditor having</p> <p>22 a certain claim against a debtor.</p> <p>23 Q. Can you describe for me your</p> <p>24 understanding of the nature of the claim</p> <p>25 against the debtor.</p>
<p style="text-align: right;">Page 24</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 A. It was various obligations that were</p> <p>3 owed to -- to CLO, things that had been</p> <p>4 previously donated or -- or agreements that had</p> <p>5 been set up that transferred certain assets,</p> <p>6 and it was basically the -- the -- the amounts</p> <p>7 were derived from those sorts of transactions.</p> <p>8 Q. Okay. You're a patent lawyer; is</p> <p>9 that right?</p> <p>10 A. I -- I'm exclusively a patent</p> <p>11 attorney, yes.</p> <p>12 Q. Have you been a patent lawyer on an</p> <p>13 exclusive basis since the time you graduated</p> <p>14 from law school?</p> <p>15 A. From law school, yes.</p> <p>16 Q. Can you just describe for me</p> <p>17 generally your educational background.</p> <p>18 A. So I'm an electrical engineer by</p> <p>19 training. I graduated from the University of</p> <p>20 Virginia in 1984. I then went to graduate</p> <p>21 school at the University of Illinois. I</p> <p>22 received my master's degree in 1986, and then I</p> <p>23 immediately joined IBM Research at the Thomas</p> <p>24 Watson Institute in New York where I was a --</p> <p>25 my title was research scientist, but I was -- I</p>	<p style="text-align: right;">Page 25</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 guess I was more of a research engineer, if</p> <p>3 that matters. And I did that until I</p> <p>4 transitioned -- or I began law school in the</p> <p>5 fall of 1988, and then I graduated law school</p> <p>6 in May of 1991.</p> <p>7 Q. And where did you go to law school?</p> <p>8 A. University of North Carolina.</p> <p>9 Q. Do you have any formal training in</p> <p>10 investing or finance?</p> <p>11 A. I do not.</p> <p>12 Q. Do you hold yourself out as an</p> <p>13 expert in any field of investment?</p> <p>14 A. None -- none at all.</p> <p>15 Q. Have you had any formal training</p> <p>16 with respect to compliance issues? You</p> <p>17 mentioned compliance issues earlier.</p> <p>18 A. No.</p> <p>19 Q. Now, do you have any knowledge about</p> <p>20 compliance rules or regulations?</p> <p>21 A. Minimal that I've -- that have</p> <p>22 occurred organically but -- but generally, no.</p> <p>23 Q. You don't hold yourself out as an</p> <p>24 expert in com- -- in the area of compliance,</p> <p>25 correct?</p>

<p style="text-align: right;">Page 26</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 A. No. No. I'm -- no.</p> <p>3 Q. Do you have any particular</p> <p>4 investment philosophy or strategy?</p> <p>5 MR. CLARK: I'm going to object to</p> <p>6 the form of the question. And, John,</p> <p>7 can -- can we get an agreement that -- I</p> <p>8 know you were objecting just simply on the</p> <p>9 form basis yesterday -- that objection to</p> <p>10 form is sufficient today?</p> <p>11 MR. MORRIS: Sure.</p> <p>12 MR. CLARK: Okay. And I object to</p> <p>13 form. Grant, you can answer to the extent</p> <p>14 you can.</p> <p>15 THE WITNESS: I forget the question</p> <p>16 now that you interrupted. I'm sorry.</p> <p>17 BY MR. MORRIS:</p> <p>18 Q. So -- so -- and I'm going to ask a</p> <p>19 different question because in hindsight, that's</p> <p>20 a good objection.</p> <p>21 In your capacity as the director</p> <p>22 of -- withdrawn.</p> <p>23 Do the employees of Highland that</p> <p>24 you identified earlier, do they make investment</p> <p>25 decisions on behalf of CLO HoldCo Limited</p>	<p style="text-align: right;">Page 27</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 without your prior knowledge on occasion?</p> <p>3 A. On occasion, they do.</p> <p>4 Q. So there's no rule that your prior</p> <p>5 approval is needed before investments are made,</p> <p>6 right?</p> <p>7 A. I don't know whether they have an</p> <p>8 internal guideline as to the amount that</p> <p>9 triggers when they get in touch with me or</p> <p>10 whether it's a new -- a change, something new,</p> <p>11 or -- versus recurring. So I don't -- I don't</p> <p>12 know what they use internally for that metric.</p> <p>13 Q. Okay. Are you aware of any</p> <p>14 guideline that was ever used by the Highland</p> <p>15 employees whereby they were required to obtain</p> <p>16 your consent prior to effectuating transactions</p> <p>17 on behalf of CLO HoldCo Limited?</p> <p>18 A. I understand there was one or more,</p> <p>19 but I do not know that.</p> <p>20 Q. Okay. Did you ever see such a</p> <p>21 policy or list of rules that would require your</p> <p>22 prior consent before the Highland employees</p> <p>23 effectuated transactions on behalf of CLO</p> <p>24 HoldCo Limited?</p> <p>25 A. Possibly some time ago, but I -- I</p>
<p style="text-align: right;">Page 28</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 don't recall.</p> <p>3 Q. Okay. So -- withdrawn. I'll --</p> <p>4 I'll go on.</p> <p>5 How did you come to be the director</p> <p>6 of CLO HoldCo?</p> <p>7 A. I was asked either by Jim Dondero</p> <p>8 or -- directly or indirectly by -- by Jim</p> <p>9 Dondero.</p> <p>10 Q. And who is Jim Dondero?</p> <p>11 A. Well, at the time, he was the head</p> <p>12 or one of the heads of Highland Capital</p> <p>13 Management, a friend of mine.</p> <p>14 Q. How long have you known Mr. Dondero?</p> <p>15 A. Since high school so that -- 1976.</p> <p>16 Q. Where did you and Mr. Dondero grow</p> <p>17 up?</p> <p>18 A. In northern New Jersey.</p> <p>19 Q. Do you consider him among the</p> <p>20 closest friends you have?</p> <p>21 A. I think he is my closest friend.</p> <p>22 Q. Did you two go to college together?</p> <p>23 A. We actually -- for the last -- last</p> <p>24 two years I was at UVA, University of Virginia,</p> <p>25 excuse me, he and I were -- were at UVA. So we</p>	<p style="text-align: right;">Page 29</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 did not start out at UVA initially, but -- but</p> <p>3 we both transferred -- I transferred my</p> <p>4 sophomore year. I was actually a chemical</p> <p>5 engineer at the University of Delaware when I</p> <p>6 transferred in, and then he transferred in his</p> <p>7 junior year. So we were there at college for</p> <p>8 two years.</p> <p>9 Q. And -- and based on your</p> <p>10 relationship with him, is it your understanding</p> <p>11 that one of the reasons he chose to transfer to</p> <p>12 UVA is -- is to -- because you were there?</p> <p>13 A. Oh, no. He transferred -- he --</p> <p>14 he -- he transferred there because of the -- so</p> <p>15 he went to the University of -- he -- he went</p> <p>16 to Virginia Tech University, which is more</p> <p>17 known as being an engineering school, which I</p> <p>18 might have wanted to go to, and less a finance</p> <p>19 business school. And if I understand things</p> <p>20 correctly, and I believe I do, he transferred</p> <p>21 to UVA because of the well-known</p> <p>22 business/finance program, accounting program.</p> <p>23 Q. And did you -- did you and</p> <p>24 Mr. Dondero become roommates at UVA?</p> <p>25 A. We weren't roommates, but we lived</p>

<p style="text-align: right;">Page 30</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 in the -- we were housemates. I'm sorry. We</p> <p>3 were housemates.</p> <p>4 Q. So you shared a house together. How</p> <p>5 would you describe your relationship with</p> <p>6 Mr. Dondero today?</p> <p>7 A. It's -- it's been strained a while,</p> <p>8 for some time, but -- but generally, very good.</p> <p>9 Good to very good.</p> <p>10 Q. Without -- without getting personal</p> <p>11 here, can you just generally identify the</p> <p>12 source of the strain that you described.</p> <p>13 A. This -- I think it would be fair to</p> <p>14 say that this bankruptcy, particularly events</p> <p>15 in 2020 so some months after the bankruptcy was</p> <p>16 declared, things have become -- we -- we still</p> <p>17 have a close friendship, but -- but things</p> <p>18 are -- are a bit -- are a bit more difficult.</p> <p>19 Q. Were you ever married?</p> <p>20 A. I've never been married.</p> <p>21 Q. Did you serve as Mr. Dondero's best</p> <p>22 man at his wedding?</p> <p>23 A. I did.</p> <p>24 Q. Is it fair to say that -- that</p> <p>25 Mr. Dondero trusts you?</p>	<p style="text-align: right;">Page 31</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 MR. CLARK: Objection, form.</p> <p>3 BY MR. MORRIS:</p> <p>4 Q. Withdrawn.</p> <p>5 Do you believe that Mr. Dondero</p> <p>6 trusts you?</p> <p>7 A. I do.</p> <p>8 Q. Over the years, is it fair to say</p> <p>9 that Mr. Dondero has confided in you?</p> <p>10 MR. CLARK: Objection, form.</p> <p>11 BY MR. MORRIS:</p> <p>12 Q. You can answer if you understand it.</p> <p>13 A. I think so.</p> <p>14 Q. I -- I -- what's your answer? You</p> <p>15 think so?</p> <p>16 A. Maybe you can de- -- I think of</p> <p>17 confide as -- could you define confide, please.</p> <p>18 Q. Sure. Is it -- is it fair to say</p> <p>19 that over the -- let me -- you've known</p> <p>20 Mr. Dondero for almost 45 years, right?</p> <p>21 A. Yes.</p> <p>22 Q. And you consider him to be your</p> <p>23 closest friend in the world, right?</p> <p>24 A. Yes.</p> <p>25 Q. And is it fair to say over the</p>
<p style="text-align: right;">Page 32</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 course of those 45 years, Mr. Dondero has</p> <p>3 shared confidential information with you that</p> <p>4 he didn't want you to reveal publicly to other</p> <p>5 people?</p> <p>6 A. Yes.</p> <p>7 Q. And is it your understanding that</p> <p>8 because of the nature of your relationship with</p> <p>9 him, he asked you to serve as the director of</p> <p>10 CLO HoldCo Limited?</p> <p>11 A. Yes. I believe it's because he --</p> <p>12 he trusted -- trusted me with -- with assets</p> <p>13 relating to his charitable vision. I -- I --</p> <p>14 yeah. Yes.</p> <p>15 Q. And is it your understanding that he</p> <p>16 thought you would help him execute his</p> <p>17 charitable vision?</p> <p>18 A. That was the point of attraction</p> <p>19 initially. It wasn't for money. I wasn't</p> <p>20 being paid. That was -- the charitable mission</p> <p>21 was the attraction.</p> <p>22 Q. Does Mr. Dondero play any role in</p> <p>23 the management of the CLO HoldCo Limited asset</p> <p>24 pool?</p> <p>25 MR. CLARK: Objection, form.</p>	<p style="text-align: right;">Page 33</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 A. I'm sorry. Could you repeat that?</p> <p>3 My -- my screen went small and then big again.</p> <p>4 I was distracted.</p> <p>5 Q. What role does Mr. Dondero play with</p> <p>6 respect to the management of the CLO HoldCo</p> <p>7 Limited asset pool?</p> <p>8 MR. CLARK: Objection, form.</p> <p>9 A. He is with the company that manages</p> <p>10 that asset pool. He's one of the people I</p> <p>11 named previously as managing those assets.</p> <p>12 Q. He is -- he -- he is the -- do you</p> <p>13 understand that he has the final</p> <p>14 decision-making power with respect to the</p> <p>15 management of the assets that are held by CLO</p> <p>16 HoldCo Limited?</p> <p>17 MR. CLARK: Objection, form.</p> <p>18 A. I believe I ansel -- answered that</p> <p>19 previously. I -- I don't know who has -- for</p> <p>20 certainty I do not know who has that within</p> <p>21 that company. I don't. If -- if -- I -- I</p> <p>22 don't know, consistent with my prior answer.</p> <p>23 Q. Did you ever ask anybody who had the</p> <p>24 final decision-making authority for investments</p> <p>25 on behalf of CLO HoldCo Limited?</p>

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2 A. I -- I did not.

3 Q. Did you ever make a decision on

4 behalf of -- withdrawn.

5 In your capacity as a director --

6 withdrawn.

7 In your capacity as the sole

8 director of CLO HoldCo Limited, can you think

9 of any decision that you've ever made that

10 Mr. Dondero disagreed with?

11 A. Since -- prior to the bankruptcy,

12 no, not that I'm aware of.

13 Q. And since the bankruptcy?

14 A. There are decisions that I've made

15 that he's disagreed with.

16 Q. Can you identify them?

17 A. Yes.

18 Q. Please do so.

19 A. Okay. So the reason I'm pausing is

20 I'm trying to put these in chronological order

21 and, at the same time, identify maybe some of

22 the more important ones versus the lesser

23 important ones. One of the decisions I made

24 related to a request that I received from the

25 independent board of Highland. I don't know

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2 A. I don't know when he became aware of

3 that decision. I'm not sure I ever volunteered

4 that the decision was even made, but at some

5 point, it became an issue because he found out

6 through -- if I understand the sequence of

7 events correctly, he found out possibly through

8 his counsel because there was ultimately

9 litigation about that issue. It became known

10 to everyone at some point what I had done, I --

11 I think. And subsequent to that, it became an

12 issue because of CLO HoldCo having fairly

13 significant cash flow issues with respect to

14 its expenses and obligations, including payment

15 of management fees as well as some of the

16 scheduled charitable giving that was -- that

17 was by contract already predefined. My

18 decision to tuck that money -- or to agree

19 to -- my agreement to let that money be tucked

20 away created some -- created some -- created

21 some problems --

22 Q. And -- and --

23 A. -- for CLO HoldCo.

24 Q. Okay. And I just want you to focus

25 specifically on my question, and that is, what

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2 how the request was transmitted to me, but I

3 believe the way it played out is as follows: I

4 believe I was asked to call Jim Seery, and the

5 other -- and Russell Nelms, and the third

6 independent director, I believe his name is

7 John. I -- I forget right now what his last

8 name is. They were in New York, said they were

9 in a conference room. I called in. They were

10 very pleasant. They identified who they were,

11 and they had a request, and the request was

12 that I agree to a transfer -- or that I -- that

13 I agree to allow certain assets that were not

14 Highland's assets but they were CLO's as- --

15 assets -- apparently, there was no dispute

16 about that at any point in time, but that I

17 agree to allow certain assets that were due CLO

18 to be transferred to the registry of the

19 bankruptcy court. And either on that call I

20 immediately agreed or ended the call, called my

21 attorney, and then immediately agreed. It was

22 a very -- I accommodated the request quickly.

23 Q. Okay. And can you just tell me at

24 what point in time you spoke with Mr. Dondero,

25 and what did he say that you recall?

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2 did Mr. Dondero say to you that -- that causes

3 you to testify as you did, that this is one

4 issue that he didn't agree with?

5 A. I believe his concern was that

6 because it was money that was undisputably to

7 flow to CLO HoldCo that -- which had many, many

8 other nonliquid assets -- this was a form of a

9 liquid asset. It was cash in effect, proceeds.

10 -- that the money should have been allowed to

11 flow to be available for obligations. He

12 didn't under- -- I -- I -- I don't know what he

13 was thinking, but the -- the issue was that the

14 decision to put it into escrow was -- was --

15 was in- -- incorrect, that there was no basis

16 for it.

17 Q. That -- that's an issue where after

18 learning of your decision, he didn't agree with

19 it; is that fair?

20 A. That's right.

21 Q. Okay. Can you think of any decision

22 that you've ever made on behalf of CLO HoldCo

23 Limited where Mr. Dondero had advance knowledge

24 of what you were going to do and he objected to

25 it, but you nevertheless overruled his

<p style="text-align: right;">Page 38</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 objection and went ahead and did what -- did</p> <p>3 what you thought was right?</p> <p>4 A. Okay. Let me -- let me -- I have --</p> <p>5 I'm sorry.</p> <p>6 Q. We're here.</p> <p>7 A. Oh, I'm sorry. I'm having some</p> <p>8 issues with my screen. So that may have</p> <p>9 occurred with respect to the original proof of</p> <p>10 claim. Then there was a subsequent amendment</p> <p>11 to the proof of claim, and I -- I believe it --</p> <p>12 I believe that he might have been aware of both</p> <p>13 of those and was in disagreement with -- with</p> <p>14 those. But after working with my attorney, we</p> <p>15 just -- you know, we did what we thought was</p> <p>16 right, and I still think what we did was right.</p> <p>17 There was an issue with respect to Har- --</p> <p>18 HarbourVest that occurred relatively recently</p> <p>19 where he objected to a decision that I had</p> <p>20 made. As I understand it, I could have</p> <p>21 contacted my attorney and changed the decision,</p> <p>22 but I didn't, and I still think that was the</p> <p>23 right decision.</p> <p>24 We have filed plan objections. I</p> <p>25 can't say if he has any -- in that regard, I --</p>	<p style="text-align: right;">Page 39</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 I -- I don't know what his thoughts are on</p> <p>3 objections. They would not have been</p> <p>4 communicated with -- by me to him, but my</p> <p>5 attorney might have consulted with his</p> <p>6 attorney, and there -- they may know what that</p> <p>7 difference is, but I -- that was just another</p> <p>8 big decision. I -- I -- maybe that --</p> <p>9 Q. All right. Let me see if I can --</p> <p>10 let me see if I can summarize this. So two</p> <p>11 proofs of claim. Is it fair to say that</p> <p>12 Mr. Dondero saw those proofs of claim before</p> <p>13 they were filed?</p> <p>14 MR. CLARK: Objection, form.</p> <p>15 BY MR. MORRIS:</p> <p>16 Q. Withdrawn.</p> <p>17 A. It --</p> <p>18 Q. Do -- do you know whether</p> <p>19 Mr. Dondero saw the proofs of claim before they</p> <p>20 were filed?</p> <p>21 A. I don't believe he did.</p> <p>22 Q. What -- what steps in filing the</p> <p>23 proofs of claim did he object to that you</p> <p>24 overruled? Did he think there was -- something</p> <p>25 should be different about them?</p>
<p style="text-align: right;">Page 40</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 A. So we had to interface with Highland</p> <p>3 employees at some point to get information to</p> <p>4 support our proof of claim, and my guess, and</p> <p>5 it's just a guess, is that he was aware of</p> <p>6 those inquiries. I -- I'm sorry. I shouldn't</p> <p>7 speculate. I don't know. But he -- with</p> <p>8 respect to the original proof of claim, I'm --</p> <p>9 I'm not aware of what specifically he was</p> <p>10 objecting to or was -- thought should have been</p> <p>11 different, but the -- with respect to the</p> <p>12 amended proof of claim, which reduced the</p> <p>13 original proof of claim to zero, I think that's</p> <p>14 where he had a -- an issue.</p> <p>15 Q. And did you speak with him about</p> <p>16 that topic prior to the time the amended claim</p> <p>17 was filed, or did you only speak with him after</p> <p>18 it was filed?</p> <p>19 A. I'm not sure the timing of that.</p> <p>20 Q. And with respect to HarbourVest, did</p> <p>21 he ask you to object to the settlement on</p> <p>22 behalf of CLO HoldCo Limited, and is that</p> <p>23 something that you declined to do?</p> <p>24 MR. CLARK: Objection, form.</p> <p>25 A. I'm -- I'm sorry. I was confused</p>	<p style="text-align: right;">Page 41</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 with the word. Could you please repeat that?</p> <p>3 Q. Yes. You mentioned HarbourVest</p> <p>4 before, right?</p> <p>5 A. Yes.</p> <p>6 Q. And you mentioned that there was an</p> <p>7 issue with Mr. Dondero and you concerning</p> <p>8 HarbourVest; is that right?</p> <p>9 A. Yes.</p> <p>10 Q. And did that have to do with whether</p> <p>11 or not CLO HoldCo Limited would -- would object</p> <p>12 to the debtor's motion to get the HarbourVest</p> <p>13 settlement approved?</p> <p>14 A. Would -- would get the</p> <p>15 HarbourVest --</p> <p>16 Q. Settlement approved by the court.</p> <p>17 A. I'm not trying to be difficult.</p> <p>18 I'm -- I'm -- could you just repeat that one</p> <p>19 more time? I'm --</p> <p>20 Q. What was -- what was --</p> <p>21 A. There was --</p> <p>22 Q. Let me try again.</p> <p>23 A. Okay.</p> <p>24 Q. What was the issue with respect to</p> <p>25 HarbourVest that he objected to and -- and you</p>

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2 overrode his objection and did what you thought

3 was right anyway?

4 A. Okay. Okay. That's -- that's

5 easier for me to understand. I'm sorry. So I

6 had worked with my attorney or he did the work

7 and consulted with -- we consulted, but we had

8 filed an objection, motion objecting to the

9 settlement, if I understand the terminology and

10 nomenclature correctly. Okay. He had -- we

11 had come to an agreement that we had a very

12 valid argument. That argument was evidenced

13 by, I guess it was, our motion that was

14 submitted to the court. On the day of the

15 hearing to resolve this issue, we pulled our

16 request, and that was because I believed it did

17 not have a good-faith basis in law to move

18 forward on.

19 Q. And did you discuss that issue with

20 Mr. Dondero before informing the court that CLO

21 HoldCo Limited was withdrawing its objection,

22 or did he learn about that for the first time

23 during the hearing --

24 MR. CLARK: Objection, form.

25 BY MR. MORRIS:

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2 A. -- thought, okay?

3 THE REPORTER: I didn't --

4 A. Okay. So he --

5 Q. It was a recommendation.

6 A. Yeah. So he -- he called me with a

7 recommendation. It was highly urgent. You

8 know, I was coming out of the men's room, had

9 my phone with me. I got the call.

10 MR. CLARK: Hey, Grant, I -- Grant,

11 I just want to caution you not to -- to --

12 and I don't think counsel is looking for

13 this but not to disclose the -- the

14 substance of any of your communications

15 with counsel, okay?

16 THE WITNESS: Thank you.

17 A. So --

18 THE WITNESS: Thank you. I'm -- I'm

19 sorry.

20 BY MR. MORRIS:

21 Q. It's -- it's really a very simple

22 question. Do you recall --

23 A. He made a recommendation. I -- I --

24 I think I can answer your question without

25 going off tangent. I'm sorry. So he -- my

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2 Q. -- if you know?

3 A. I -- I understand that he learned it

4 during the hearing. I don't know the -- I -- I

5 don't know the -- whether there was any -- I --

6 I don't know for certain on the second half of

7 your question.

8 Q. Let me -- let me try it -- let me

9 try it this way: Did you speak with

10 Mr. Dondero about your decision to withdraw the

11 objection to the HarbourVest settlement prior

12 to the time your counsel made the announcement

13 in court?

14 A. I don't -- I don't believe so. No.

15 No. No. I'm sorry. No.

16 Q. And did --

17 A. Okay. No. Here -- here's where

18 I'm -- I can clarify, okay? I'm sorry. I can

19 clarify.

20 Q. That's all right.

21 A. I gave the decision to my

22 attorney -- I -- I agreed with the

23 recommendation of my attorney, okay? It wasn't

24 my --

25 Q. Did you have a good --

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2 attorney made a recommendation. I agreed with

3 it. We with- -- I -- I told him to withdraw --

4 or I authorized him to withdraw.

5 Q. Okay.

6 A. Then I received a communication, and

7 I -- I guess the most likely scenario is the

8 motion had been withdrawn by the time Jim

9 Dondero found out.

10 Q. And -- and did he write to you, or

11 did he call you? Did he send you a text?

12 A. He called me.

13 Q. What did he say?

14 A. He was asking why, and I explained,

15 and I said I agreed with the decision and I was

16 sticking with the decision.

17 Q. Let's just -- let's just move on to

18 a new topic, and let's talk about the structure

19 of -- of CLO HoldCo. Are you generally

20 familiar with the ownership structure of CLO

21 HoldCo?

22 A. Yeah. I mean, in terms --

23 Q. Are -- are you -- are you generally

24 familiar with it? It's not a test. I'm just

25 asking do you have a general familiarity --

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<p>1 GRANT SCOTT - 1/21/2021</p> <p>2 A. With CLO HoldCo or the entities</p> <p>3 associated with CLO HoldCo?</p> <p>4 Q. The latter.</p> <p>5 A. Yes, I believe so.</p> <p>6 Q. All right. I've prepared what's</p> <p>7 called a demonstrative exhibit. It's just --</p> <p>8 A. Yes.</p> <p>9 Q. -- just -- it's a document that, I</p> <p>10 think, reflects facts, but I want to ask you</p> <p>11 about it.</p> <p>12 MR. MORRIS: La Asia, can we please</p> <p>13 put up Exhibit 1.</p> <p>14 (SCOTT EXHIBIT 1, Organizational</p> <p>15 Structure: CLO HoldCo, Ltd., was marked</p> <p>16 for identification.)</p> <p>17 BY MR. MORRIS:</p> <p>18 Q. Okay. Can you see that, Mr. Scott?</p> <p>19 A. Yes, I can.</p> <p>20 Q. Okay. So I think I took the</p> <p>21 information from resolutions that were attached</p> <p>22 to the CLO HoldCo proof of claim, and that's</p> <p>23 why you got that little footnote there at the</p> <p>24 bottom of the page. But let's start in the</p> <p>25 lower right-hand corner and see if this chart</p>	<p>1 GRANT SCOTT - 1/21/2021</p> <p>2 comports with your understanding of the facts.</p> <p>3 Do you know that CLO HoldCo Limited</p> <p>4 was formed in the Cayman Islands?</p> <p>5 A. Yes.</p> <p>6 Q. And to the best of your knowledge,</p> <p>7 is CLO HoldCo Limited 100 percent owned by the</p> <p>8 Charitable DAF Fund, L.P.? If you're not sure,</p> <p>9 just say you're not sure if you don't know.</p> <p>10 It's not a test.</p> <p>11 A. So the -- the -- the familiarity</p> <p>12 I -- I'm -- I'm familiar with the different --</p> <p>13 I'm confused with the arrangement of the boxes</p> <p>14 and the ownership interest versus managerial</p> <p>15 interest. I believe that's -- that's right.</p> <p>16 Q. Okay. And -- and you're the sole</p> <p>17 director of CLO HoldCo Limited, right?</p> <p>18 A. Yes.</p> <p>19 Q. And this whole structure was -- the</p> <p>20 idea for this structure, to the best of your</p> <p>21 knowledge, was to implement Mr. Dondero's plan</p> <p>22 for charitable giving; is that fair?</p> <p>23 A. Yes. Ultimately, yes.</p> <p>24 Q. And is it fair to say then that</p> <p>25 he -- he made the decision to establish this</p>
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<p>1 GRANT SCOTT - 1/21/2021</p> <p>2 particular structure, to the best of your</p> <p>3 knowledge?</p> <p>4 A. I -- I didn't -- I'm sorry. I</p> <p>5 didn't hear you very well.</p> <p>6 Q. To the best of your knowledge, did</p> <p>7 Mr. Dondero make the decisions to establish the</p> <p>8 structure that's reflected on this page?</p> <p>9 A. Oh, I don't know if he made the</p> <p>10 decision to establish this structure, although</p> <p>11 it's -- it's -- I'm sorry. Strike that. I --</p> <p>12 if -- if what you're saying is did he approve</p> <p>13 of this structure, to my knowledge, yes.</p> <p>14 Q. Okay. Do you hold any position with</p> <p>15 respect to Charitable DAF Fund, L.P.?</p> <p>16 A. I -- I -- your chart says no. I --</p> <p>17 I -- I thought I had a role there, too.</p> <p>18 Q. I don't know. I don't have</p> <p>19 information on that. That's why I'm asking the</p> <p>20 question.</p> <p>21 A. I -- I -- I believe -- yes, I</p> <p>22 believe I have the same role as I do in -- in</p> <p>23 CLO HoldCo.</p> <p>24 Q. And that would be director?</p> <p>25 A. Yes.</p>	<p>1 GRANT SCOTT - 1/21/2021</p> <p>2 Q. And to the best of your knowledge,</p> <p>3 is the Charitable DAF GP, LLC, the general</p> <p>4 partner of Charitable DAF Fund, L.P.?</p> <p>5 A. Yes.</p> <p>6 Q. And is it your understanding that</p> <p>7 you are the managing member of Charitable DAF</p> <p>8 GP, LLC?</p> <p>9 A. Yes.</p> <p>10 Q. Does Charitable DAF GP, LLC, have</p> <p>11 any employees?</p> <p>12 A. No.</p> <p>13 Q. Does Charitable DAF GP, LLC, have</p> <p>14 any officers or directors?</p> <p>15 A. No.</p> <p>16 Q. Are you the only person affiliated</p> <p>17 with Charitable DAF GP, LLC, to the best of</p> <p>18 your --</p> <p>19 A. I believe so.</p> <p>20 Q. Do you receive any compensation for</p> <p>21 serving as the managing member of Charitable</p> <p>22 DAF GP, LLC?</p> <p>23 A. No. The -- I don't interact with it</p> <p>24 very often. It's -- no, I don't receive any</p> <p>25 compensation.</p>

<p style="text-align: right;">Page 50</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 Q. Can you tell me in your capacity as</p> <p>3 the managing member of Charitable DAF GP, LLC,</p> <p>4 what's the nature of that entity's business?</p> <p>5 A. It -- it doesn't perform any</p> <p>6 day-to-day operations. My understanding is --</p> <p>7 is that it's -- it's there for purposes of</p> <p>8 compliance. I can't recall the last time I had</p> <p>9 any activity with respect to that.</p> <p>10 Q. How about the Charitable DAF Fund,</p> <p>11 L.P.? I apologize if I've asked you these</p> <p>12 questions.</p> <p>13 A. It -- it's the same. I -- I -- my</p> <p>14 activity is almost exclusively CLO HoldCo.</p> <p>15 Q. All right. Let me just ask the</p> <p>16 questions nevertheless. Does Charitable DAF</p> <p>17 Fund, L.P., have any employees?</p> <p>18 A. Employees? No.</p> <p>19 Q. Does it have any officers and</p> <p>20 directors?</p> <p>21 A. No.</p> <p>22 Q. Are you the sole director of</p> <p>23 Charitable DAF Fund, L.P.?</p> <p>24 A. Yes, I believe so.</p> <p>25 Q. So if we -- if we put under</p>	<p style="text-align: right;">Page 51</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 Charitable DAF Fund, L.P., Grant Scott,</p> <p>3 director, and we put under CLO HoldCo Limited</p> <p>4 Grant Scott, director, would everything on the</p> <p>5 right side of that page be accurate, to the</p> <p>6 best of your --</p> <p>7 A. I believe so.</p> <p>8 Q. Well, let's move to the left side of</p> <p>9 the page. Have you heard of the entity</p> <p>10 Charitable DAF HoldCo Limited?</p> <p>11 A. Yes.</p> <p>12 Q. Are you the sole director of</p> <p>13 Charitable DAF HoldCo Limited?</p> <p>14 A. Yes.</p> <p>15 Q. How did you become -- how did you</p> <p>16 come to be the char- -- the sole director of</p> <p>17 Charitable DAF HoldCo Limited?</p> <p>18 A. That was when it was established.</p> <p>19 Q. And did Mr. Dondero ask you to serve</p> <p>20 in that capacity?</p> <p>21 A. Yes.</p> <p>22 Q. And did Mr. Dondero ask you to serve</p> <p>23 as the managing member of Charitable DA- -- DAF</p> <p>24 GP, LLC?</p> <p>25 A. Yes.</p>
<p style="text-align: right;">Page 52</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 Q. And did Mr. Dondero ask you to serve</p> <p>3 as the director of Charitable DAF, L.P. --</p> <p>4 withdrawn.</p> <p>5 Did Mr. Dondero ask you to serve as</p> <p>6 director of Charitable DAF Fund, L.P.?</p> <p>7 A. Yes.</p> <p>8 Q. To the best of your knowledge, does</p> <p>9 Charitable DAF HoldCo Limited own 99 percent of</p> <p>10 the limited partnership interests in Charitable</p> <p>11 DAF Fund, L.P.?</p> <p>12 A. Yes. The -- the feed -- the -- the</p> <p>13 feeds -- the -- the three horizontal blocks</p> <p>14 there that identify Highland Dallas Foundation,</p> <p>15 Kansas City, Santa Barbara -- there's a fourth</p> <p>16 of -- relatively de minimus in terms of</p> <p>17 participation. There's a fourth entity that's</p> <p>18 missing. It's Dallas -- I forget the name.</p> <p>19 That -- that -- that structure is -- is a bit</p> <p>20 dated --</p> <p>21 Q. Okay.</p> <p>22 A. -- as it -- as is shown.</p> <p>23 Q. Okay. So I will tell you and we can</p> <p>24 look the documents if you want, but attached to</p> <p>25 CLO HoldCo Limited's claim are a number of</p>	<p style="text-align: right;">Page 53</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 resolutions, and there's one that I have in</p> <p>3 mind that shows Charitable DAF HoldCo Limited</p> <p>4 holding 99 percent of the limited partnership</p> <p>5 interests of Charitable DAF Fund, L.P., and</p> <p>6 there's another that shows it being a hundred</p> <p>7 percent. Do you -- do you know which is</p> <p>8 accurate at least at this time?</p> <p>9 A. There's a 1 percent/99 percent</p> <p>10 division, and I am -- I believe it's the 99</p> <p>11 percent, but I'm -- I'm getting confused by</p> <p>12 the -- by the arrangement. I'm so used to</p> <p>13 another arrangement. I -- I believe the 99</p> <p>14 percent is correct.</p> <p>15 Q. Okay. Do you have any understanding</p> <p>16 as to who owns the other 1 percent of the</p> <p>17 limited partnership interests of Charitable DAF</p> <p>18 Fund, L.P.?</p> <p>19 A. No. This -- this is confusing to</p> <p>20 me. No.</p> <p>21 Q. Okay. There are, at least on this</p> <p>22 page, three foundations that I think you've</p> <p>23 identified. Are those three foundations</p> <p>24 together with the fourth that you mentioned the</p> <p>25 owners of the Charitable DAF HoldCo Limited?</p>

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2 A. Owners?

3 Q. Yes.

4 MR. CLARK: Objection, form.

5 A. They -- they only participate in the

6 money that flows up to them.

7 Q. And what does that mean exactly?

8 A. What's that?

9 Q. What does that -- what do you mean

10 by that? Do the foundations fund Charitable

11 DAF Fund HoldCo Limited?

12 A. Initially. Initially, as I

13 understand it, the money flows downward into

14 the Charitable DAF HoldCo Limited before it

15 ultimately makes its way to CLO HoldCo, and

16 then each of those three entities, the various

17 foundations, obtain participation interest in

18 the money that flows back to them.

19 Q. And -- and is that par- -- are those

20 participation interests in Charitable -- you

21 know what, let -- let me just pull up one

22 document and see if that helps.

23 MR. MORRIS: Can we put up -- I

24 think it's Exhibit Number 5.

25 (SCOTT EXHIBIT 2, Unanimous Written

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2 Dallas Foundation?

3 A. Yes, selected by them.

4 Q. Selected by whom?

5 A. By that foundation.

6 Q. Are you -- are you a director of all

7 of the four foundations that feed into the

8 Charitable DAF HoldCo Limited entities that --

9 A. No.

10 Q. Which of the four foundations are

11 you a director of?

12 A. This and the Santa Barbara -- I'm

13 sorry, Santa Barbara and Kansas City.

14 Q. So is -- there's one that you're not

15 a director of; is that right?

16 A. Yes.

17 Q. And which one is that?

18 A. The -- could you go back to the --

19 Q. Yeah.

20 MR. MORRIS: Go back to the

21 demonstrative.

22 A. It's the Highland Dallas Foundation

23 and Santa Barbara Foundation.

24 Q. Those are the two that you're a

25 director of?

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2 Consent of Directors In Lieu of Meeting,

3 was marked for identification.)

4 MR. MORRIS: I apologize. Let's go

5 to --

6 MS. CANTY: I'm sorry, John. I

7 can't hear you. Was that not the exhibit?

8 MR. MORRIS: 4.

9 MS. CANTY: Okay.

10 THE REPORTER: And Mr. Morris, you

11 are -- Mr. Morris, you are breaking up just

12 a little bit at the end of your questions.

13 BY MR. MORRIS:

14 Q. Okay. Do you see the document on

15 the screen, sir?

16 A. Yes, I do.

17 Q. Okay. And so this is a unanimous

18 written consent of the directors of the

19 Highland Dallas Foundation. That's one of the

20 entities that was on the chart.

21 MR. MORRIS: Can we scroll down to

22 the -- the bottom of the document where the

23 signature lines are. Right there.

24 BY MR. MORRIS:

25 Q. Are you a director of the Highland

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2 A. Yes.

3 Q. To the best of your knowledge, does

4 Mr. Dondero serve as the president for each of

5 the foundations that we're talking about?

6 A. Yes.

7 Q. To the best of your knowledge, is

8 Mr. Dondero a director of each of the

9 foundations that we're talking about?

10 A. Say that again. I'm sorry.

11 Q. Is he also a director of each of the

12 foundations?

13 A. Yes.

14 Q. Do you know whether any of the

15 foundations has any employees?

16 A. I believe they do, but I -- I -- I

17 can't say for certain.

18 Q. Does -- withdrawn.

19 Do you know if there are any

20 officers of any of the four foundations other

21 than Mr. Dondero's service as president?

22 A. I'm sorry. Say that one more time,

23 please.

24 Q. Yes. Do you know whether any of the

25 four foundations has any officers other than

<p style="text-align: right;">Page 58</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 Mr. Dondero's service as president?</p> <p>3 A. No.</p> <p>4 Q. You don't know, or they do not?</p> <p>5 A. I -- I don't believe anyone else</p> <p>6 has. I -- actually, I should say I don't -- I</p> <p>7 don't recall. I -- I don't know. I don't -- I</p> <p>8 don't know.</p> <p>9 Q. As a director of the Dallas and</p> <p>10 Santa Barbara foundations, are you aware of any</p> <p>11 officers serving for either of those</p> <p>12 foundations other than Mr. Dondero?</p> <p>13 A. No.</p> <p>14 Q. Do you know who the beneficial owner</p> <p>15 of the Charitable DAF HoldCo Limited entity is?</p> <p>16 A. The beneficial owner?</p> <p>17 Q. Correct.</p> <p>18 A. The various -- various trusts that</p> <p>19 were used to -- that were the vehicles by which</p> <p>20 the money originally was established within --</p> <p>21 within -- within CLO HoldCo.</p> <p>22 Q. Would that be -- would one of them</p> <p>23 be the Get Good Nonexempt Trust?</p> <p>24 A. Yes.</p> <p>25 Q. And you're a trustee of the Get Good</p>	<p style="text-align: right;">Page 59</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 Nonexempt Trust, right?</p> <p>3 A. Yes.</p> <p>4 Q. When did you become a trustee of the</p> <p>5 Get Good Nonexempt Trust?</p> <p>6 A. Many years ago. I -- I don't</p> <p>7 remember.</p> <p>8 Q. Are there any other trustees of the</p> <p>9 Get Good Nonexempt Trust?</p> <p>10 A. No.</p> <p>11 Q. Does the Get Good Nonexempt Trust</p> <p>12 have any officers, directors, or employees?</p> <p>13 A. No.</p> <p>14 MR. CLARK: Objection, form. Sorry.</p> <p>15 BY MR. MORRIS:</p> <p>16 Q. Withdrawn.</p> <p>17 Do you know whether the Get Good</p> <p>18 Nonexempt Trust has any officers, directors, or</p> <p>19 employees?</p> <p>20 A. It does not.</p> <p>21 Q. And I apologize if I asked this, but</p> <p>22 are you the only trustee of the Get Good</p> <p>23 Nonexempt Trust?</p> <p>24 A. Yes.</p> <p>25 Q. Is the Dugaboy Investment Trust also</p>
<p style="text-align: right;">Page 60</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 one of the trusts that has an interest in</p> <p>3 Charitable DAF HoldCo Limited?</p> <p>4 A. Yes.</p> <p>5 Q. Are you a trustee of the Dugaboy</p> <p>6 Investment Trust?</p> <p>7 A. I am not.</p> <p>8 Q. Do you know who is?</p> <p>9 A. I believe it's his sister.</p> <p>10 Q. And is that -- you're referring to</p> <p>11 Mr. Dondero's sister?</p> <p>12 A. I'm sorry. Yes.</p> <p>13 Q. And what's the basis for your</p> <p>14 understanding that Mr. Dondero's sive -- sister</p> <p>15 serves as the trustee of the Dugaboy Investment</p> <p>16 Trust?</p> <p>17 A. Many years ago there was a -- there</p> <p>18 was a clerical error that identified me as the</p> <p>19 trustee of the Dugaboy. That error was present</p> <p>20 for approximately two weeks or a week and a</p> <p>21 half before it was detected and corrected, and</p> <p>22 so I know from that correction that it's Nancy</p> <p>23 Dondero.</p> <p>24 Q. Are there any other trusts that have</p> <p>25 an interest in Charitable DAF HoldCo Limited</p>	<p style="text-align: right;">Page 61</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 besides those trusts, to the best of your</p> <p>3 knowledge?</p> <p>4 A. No.</p> <p>5 Q. Is it your understanding based on</p> <p>6 what we've just talked about that the Get Good</p> <p>7 Nonexempt Trust and the Dugaboy Investment</p> <p>8 Trust are the indirect beneficiaries of CLO</p> <p>9 HoldCo Limited?</p> <p>10 A. Yes.</p> <p>11 Q. Can you tell me who the</p> <p>12 beneficiaries are of the Get Good trust?</p> <p>13 A. I mean, Jim Dondero.</p> <p>14 Q. And -- and what is that -- is that</p> <p>15 based on the trust agreement -- your knowledge</p> <p>16 of the trust agreement?</p> <p>17 A. Yes.</p> <p>18 Q. Do you have an understanding of who</p> <p>19 the beneficiary is of the Dugaboy Investment</p> <p>20 Trust?</p> <p>21 A. I don't know anything about that</p> <p>22 trust.</p> <p>23 MR. MORRIS: Okay. All right.</p> <p>24 Let's take a short break and reconvene at</p> <p>25 3:30 Eastern Time. We've been going for a</p>

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2 while.

3 MR. CLARK: Thank you.

4 MR. MORRIS: Okay. Thank you.

5 (Whereupon, there was a recess in

6 the proceedings from 3:20 p.m. to

7 3:31 p.m.)

8 BY MR. MORRIS:

9 Q. Mr. Scott, earlier I think you

10 testified that you interfaced with the folks at

11 Highland in connection with your duties as the

12 director of CLO HoldCo Limited, right?

13 A. Yes.

14 Q. Are you aware of any written

15 agreement between Highland Capital Management

16 and CLO HoldCo Limited?

17 A. Yes, the various servicer

18 agreements.

19 Q. Okay. Are you aware that

20 Mr. Dondero resigned from his position at

21 Highland Capital Management sometime in

22 October?

23 A. No.

24 Q. Have you communicated with anybody

25 at Highland Capital Management about the

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2 Do you recall the subject matter of

3 your discussions with Mr. Throckmorton?

4 MR. CLARK: Objection, form.

5 BY MR. MORRIS:

6 Q. Withdrawn.

7 Do you recall your -- the subject

8 matter of your communications with

9 Mr. Throckmorton?

10 MR. CLARK: Objection, form.

11 BY MR. MORRIS:

12 Q. You can answer.

13 A. I -- I regularly interface with

14 Mr. Throckmorton regarding approvals of

15 expenses, and he's my sort of -- he's my point

16 person for approving wire transfers and things

17 of that nature.

18 Q. How about Mr. Patrick, what -- what

19 area of responsibility does he have with

20 respect to CLO HoldCo Limited?

21 A. He -- he doesn't, to my knowledge.

22 Q. Do you recall the nature of the

23 substance of any communications that you've had

24 with Mr. Patrick since -- you know, the last

25 two or three months?

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2 affairs of CLO HoldCo Limited at any time since

3 October?

4 A. Yes.

5 Q. Anybody other than Jim Seery?

6 A. Yes.

7 Q. Okay. Let's start with Mr. Seery.

8 You've spoken with him before, right?

9 A. Yes.

10 Q. Do you have his phone number?

11 A. Yes.

12 Q. How many times have you spoken with

13 Mr. Seery, to the best of your recollection,

14 just generally? It's not a test.

15 A. Three, maybe four times.

16 Q. Okay. Can you identify by name

17 anybody else at Highland that you've spoken

18 with since -- in the last two or three months?

19 A. I spoke to Jim Dondero. I've spoken

20 with Mike Throckmorton. The usual suspects, so

21 to speak. Mark Patrick, Mel- -- Melissa

22 Schroth.

23 Q. Can you recall anybody else?

24 A. No. No. Sorry.

25 Q. Did you -- did you -- withdrawn.

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2 A. Yes. Or -- yes.

3 Q. And what -- what are the nature of

4 those conversations or the substance?

5 A. He was -- he was one of the

6 individuals that helped to establish the

7 hierarchy for the -- what I keep referring to

8 as the charitable foundation.

9 Q. And -- and do you recall why you

10 spoke to him in the last -- or -- withdrawn.

11 Do you recall the nature of your

12 communications in the last two or three months

13 with Mr. Patrick?

14 A. I --

15 MR. CLARK: And hold on, Grant. I'm

16 going to caution -- my understanding -- I

17 believe Mr. Patrick's an attorney, and so

18 I'm going to caution you that you shouldn't

19 disclose the substance of -- of those

20 communications based on the attorney-client

21 privilege.

22 MR. MORRIS: Well, I'm -- I -- I am

23 the lawyer for the company so -- I guess

24 there are other people on the phone and I

25 appreciate that, but let's see if we can --

<p style="text-align: right;">Page 66</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 I don't mean to be contentious here, so it</p> <p>3 wouldn't -- I -- I'd be part of the</p> <p>4 privilege anyway.</p> <p>5 BY MR. MORRIS:</p> <p>6 Q. But in any event, can you tell me</p> <p>7 generally -- I'm just looking for general</p> <p>8 subject matter of your conversations with</p> <p>9 Mr. Patrick.</p> <p>10 A. I asked him how I would go about</p> <p>11 re- -- resigning my position.</p> <p>12 Q. And when did that conversation take</p> <p>13 place?</p> <p>14 A. Within the last two weeks.</p> <p>15 Q. Have you made a decision to resign?</p> <p>16 A. No.</p> <p>17 Q. I think you mentioned Melissa</p> <p>18 Schroth. Do I have that right?</p> <p>19 A. Yes.</p> <p>20 Q. Can you describe generally the</p> <p>21 communications you had with Ms. Schroth in the</p> <p>22 last few months.</p> <p>23 A. They -- she has e-mailed me certain</p> <p>24 documents that I needed to sign. I had a</p> <p>25 conversation with her about -- about some</p>	<p style="text-align: right;">Page 67</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 home -- home improvements, home construction</p> <p>3 with respect to Jim Dondero's home in Colorado,</p> <p>4 and that's -- I -- I think that's -- that's it.</p> <p>5 Q. Okay. Do you recall communicating</p> <p>6 with anybody at Highland in the last three</p> <p>7 months other than Mr. Dondero,</p> <p>8 Mr. Throckmorton, Mr. Patrick, and Ms. Schroth?</p> <p>9 A. I -- I spoke with Jim Seery this</p> <p>10 week.</p> <p>11 Q. Anybody else?</p> <p>12 A. I don't -- I don't know.</p> <p>13 Q. Okay.</p> <p>14 A. I don't think so.</p> <p>15 Q. In your communications with</p> <p>16 Mr. Seery, did you two ever discuss his reasons</p> <p>17 for making any trade on behalf of any CLO?</p> <p>18 A. No.</p> <p>19 Q. In your discussions with Mr. Seery,</p> <p>20 did you ever tell him that you believed that</p> <p>21 Highland Capital Management had breached any</p> <p>22 agreement in relation to any CLO?</p> <p>23 A. Have I had that discussion with Jim</p> <p>24 Seery?</p> <p>25 Q. Yes.</p>
<p style="text-align: right;">Page 68</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 A. No.</p> <p>3 Q. In your discussions with Mr. Seery,</p> <p>4 did you ever tell him that you thought Highland</p> <p>5 Capital Management was in default under any</p> <p>6 agreement in relation to the CLOs?</p> <p>7 A. No.</p> <p>8 Q. I want to focus in particular on the</p> <p>9 shared services agreement. In -- in your</p> <p>10 discussions with Mr. Seery, did you ever tell</p> <p>11 him that you believed that Highland Capital</p> <p>12 Management was in default or in breach of its</p> <p>13 shared services agreement with CLO HoldCo</p> <p>14 Limited?</p> <p>15 A. No.</p> <p>16 Q. In your communications with</p> <p>17 Mr. Seery, did you ever indicate any concern on</p> <p>18 the part of CLO HoldCo Limited with respect to</p> <p>19 Highland Capital's Man- -- Highland Capital</p> <p>20 Management's performance under the shared</p> <p>21 services agreement?</p> <p>22 A. No.</p> <p>23 Q. As you sit here today, do you have</p> <p>24 any reason to believe that Highland Capital</p> <p>25 Management has done anything wrong in</p>	<p style="text-align: right;">Page 69</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 connection with its performance as the</p> <p>3 portfolio manager of the CLOs in which CLO</p> <p>4 HoldCo Limited has invested?</p> <p>5 MR. CLARK: Object to form.</p> <p>6 A. In terms of the -- are you saying --</p> <p>7 please say that again. I'm sorry.</p> <p>8 Q. That's okay. I ask long questions</p> <p>9 sometimes so forgive me, but I'm trying to</p> <p>10 get -- I'm trying to be precise so that's why</p> <p>11 it's difficult sometimes. But let me try</p> <p>12 again.</p> <p>13 Does CLO HoldCo Limited contend that</p> <p>14 Highland Capital Management has done anything</p> <p>15 wrong in the performance of its duties as</p> <p>16 portfolio manager of the CLOs in which CLO</p> <p>17 HoldCo has invested?</p> <p>18 MR. CLARK: Objection, form.</p> <p>19 A. Yes. It's -- it's outlined in our</p> <p>20 objections to -- to the plan.</p> <p>21 Q. Okay. Any -- are you aware of</p> <p>22 anything that's not contained within CLO Holdco</p> <p>23 Limited's objection to the plan?</p> <p>24 MR. CLARK: Objection, form.</p> <p>25 A. I don't know if this is responsive</p>

<p style="text-align: right;">Page 70</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 to your quest -- request, but two -- two</p> <p>3 issues, I believe, also pose an in- -- a</p> <p>4 problem for CLO HoldCo. One is we are paying</p> <p>5 for services. I think I referred to the</p> <p>6 services as being soup to nuts, but we are not</p> <p>7 getting the full services. We haven't been for</p> <p>8 some time. So we're likely overpaying. There</p> <p>9 was a Highland Select Equity issue, 11-month</p> <p>10 payment that was delayed which I was unaware of</p> <p>11 was due. Normally, I would have interfaced</p> <p>12 with someone at Highland about that, but my</p> <p>13 attorney -- but my -- my attorney had to make a</p> <p>14 request for payment, and that payment was</p> <p>15 ultimately made. I -- other than that, I -- I</p> <p>16 don't -- I don't know. I don't believe so.</p> <p>17 Q. I want to distinguish between the</p> <p>18 shared services agreement between Highland</p> <p>19 Capital Management and CLO HoldCo Limited on</p> <p>20 the one hand and on the other hand the</p> <p>21 management agreements pursuant to which</p> <p>22 Highland Capital Management manages certain</p> <p>23 CLOs that CLO HoldCo invests in.</p> <p>24 You understand the distinction that</p> <p>25 I'm making?</p>	<p style="text-align: right;">Page 71</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 A. Now I do. I'm sorry. I didn't</p> <p>3 appreciate that.</p> <p>4 Q. Okay. So let's just take each of</p> <p>5 those pieces one at a time. You mentioned your</p> <p>6 concern about services. That's a concern that</p> <p>7 arises under the shared services agreement,</p> <p>8 right?</p> <p>9 A. Yes.</p> <p>10 Q. And you mentioned something about a</p> <p>11 delayed payment having to do with Highland</p> <p>12 Select. Do I have that generally right?</p> <p>13 A. Correct.</p> <p>14 Q. And is that a concern that you have</p> <p>15 that arises under the shared services</p> <p>16 agreement?</p> <p>17 A. It's not the agreement with respect</p> <p>18 to the CLOs as I understand it.</p> <p>19 Q. Okay. So then let's turn to that</p> <p>20 second bucket. You were aware -- you are</p> <p>21 aware, are you not, that Highland Capital</p> <p>22 Management has certain agreements with CLOs</p> <p>23 pursuant to which it manages the assets that</p> <p>24 are owned by the CLOs?</p> <p>25 A. I'm so sorry. Could you please --</p>
<p style="text-align: right;">Page 72</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 Q. I'll try again.</p> <p>3 A. I'm just -- I'm sorry. I was</p> <p>4 distracted and -- and I -- I'm sorry for asking</p> <p>5 you to repeat it again. Please --</p> <p>6 Q. Okay.</p> <p>7 A. Please re- --</p> <p>8 Q. Are you aware that CLO HoldCo</p> <p>9 Limited has made investments in certain CLOs?</p> <p>10 A. Oh, yes, certainly.</p> <p>11 Q. And are you aware that those CLOs</p> <p>12 are managed by Highland Capital Management?</p> <p>13 A. Yes. As the -- as the servicer,</p> <p>14 yes.</p> <p>15 Q. Okay. Have you ever seen any of the</p> <p>16 agreements pursuant to which Highland Capital</p> <p>17 Management acts as a servicer?</p> <p>18 A. I've seen a few, yes.</p> <p>19 Q. Does CLO HoldCo Limited contend that</p> <p>20 it is a party to any agreement between Highland</p> <p>21 Capital Management and the CLOs?</p> <p>22 MR. CLARK: Object to form. And I</p> <p>23 just want to note for the record that</p> <p>24 Mr. Scott is here testifying in his</p> <p>25 individual capacity, I believe, not as a</p>	<p style="text-align: right;">Page 73</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 corporate representative.</p> <p>3 MR. MORRIS: Fair enough. But he is</p> <p>4 the only representative so...</p> <p>5 MR. CLARK: Fair enough. I just</p> <p>6 want that made -- stated for the record,</p> <p>7 but I also object as to form.</p> <p>8 MR. MORRIS: Got it.</p> <p>9 A. It's a third-party beneficiary under</p> <p>10 the agreements.</p> <p>11 Q. And is that because of something you</p> <p>12 read in the document, or is that just your</p> <p>13 belief and understanding?</p> <p>14 A. My belief and understanding.</p> <p>15 Q. And is that belief and understanding</p> <p>16 based on anything other than conversations with</p> <p>17 counsel?</p> <p>18 A. In -- in -- recently it has, but I</p> <p>19 don't recall from previous interactions over</p> <p>20 the years how we discussed that or how I came</p> <p>21 to -- to understand that.</p> <p>22 Q. Does HCLO [sic] HoldCo -- did -- in</p> <p>23 your capacity as the sole director of HCLO</p> <p>24 HoldCo Limited, are you aware of anything that</p> <p>25 Highland Capital Management has done wrong in</p>

<p style="text-align: right;">Page 74</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 connection with the services provided under the</p> <p>3 CLO management agreements?</p> <p>4 MR. CLARK: Objection, form.</p> <p>5 A. I -- I don't -- I don't -- I</p> <p>6 don't -- your answer's no.</p> <p>7 Q. In your capacity as the director of</p> <p>8 CLO HoldCo Limited, are you aware of any</p> <p>9 default or breach under the CLO management</p> <p>10 agreements that -- that Highland Capital</p> <p>11 Management has caused?</p> <p>12 MR. CLARK: Objection, form.</p> <p>13 A. We have raised the issue about</p> <p>14 ongoing sales in various -- I'm not sure</p> <p>15 whether they represent a technical breach,</p> <p>16 though.</p> <p>17 Q. Okay. Are you aware of any</p> <p>18 technical breach?</p> <p>19 MR. CLARK: Objection, form.</p> <p>20 A. No.</p> <p>21 Q. I'm sorry. You said, no, sir?</p> <p>22 A. My answer's no.</p> <p>23 Q. Thank you. Do you know who made the</p> <p>24 decision to cause the CLO HoldCo Limited entity</p> <p>25 to invest in the CLOs that are managed by</p>	<p style="text-align: right;">Page 75</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 Highland Capital?</p> <p>3 A. The select -- ultimately, I had to.</p> <p>4 Q. I thought you testified earlier that</p> <p>5 you didn't make decisions as to investment. Do</p> <p>6 I have that wrong?</p> <p>7 A. The selection.</p> <p>8 Q. Okay.</p> <p>9 A. I -- I'm --</p> <p>10 Q. So -- so explain to me --</p> <p>11 A. I have to approve -- I have to</p> <p>12 approve the selection. I'm sorry. But the</p> <p>13 people making -- I was putting that in the camp</p> <p>14 of the people that make the selection.</p> <p>15 Q. Okay. Do you know if -- do you know</p> <p>16 if there are CLOs in the world that exist that</p> <p>17 aren't managed by Highland Capital Management?</p> <p>18 MR. CLARK: Objection, form.</p> <p>19 A. Are there CLOs in the -- in the</p> <p>20 world that are not --</p> <p>21 Q. Yes.</p> <p>22 A. Yes. It's -- it's a well-known --</p> <p>23 it's a well-known --</p> <p>24 Q. In your capacity as the director of</p> <p>25 CLO HoldCo Limited, did you ever consider</p>
<p style="text-align: right;">Page 76</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 making an investment in a CLO that wasn't</p> <p>3 managed by Highland?</p> <p>4 A. No.</p> <p>5 Q. Is there any particular reason why</p> <p>6 you haven't given that any consideration?</p> <p>7 A. That hasn't been my role. That's</p> <p>8 not my expertise. That's been something</p> <p>9 Highland has done and, quite frankly, over the</p> <p>10 years brilliantly so, no.</p> <p>11 Q. You're aware that HCM, L.P., has</p> <p>12 filed for bankruptcy, right?</p> <p>13 A. Yes.</p> <p>14 Q. When did you learn that Highland had</p> <p>15 filed for bankruptcy?</p> <p>16 A. After the fact sometime in late --</p> <p>17 late 2019.</p> <p>18 Q. Since the bankruptcy filing, have</p> <p>19 you made any attempt to sell CLO HoldCo</p> <p>20 Limited's position in any of the CLOs that are</p> <p>21 managed by Highland?</p> <p>22 A. No.</p> <p>23 Q. So notwithstanding the bankruptcy</p> <p>24 filing, you as the director haven't made any</p> <p>25 attempt to transfer out of the CLOs that are</p>	<p style="text-align: right;">Page 77</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 managed by Highland, correct?</p> <p>3 A. Correct.</p> <p>4 Q. Did you ever give any thought to</p> <p>5 exiting the CLO vehicles that were managed by</p> <p>6 Highland in light of its bankruptcy filing?</p> <p>7 A. No.</p> <p>8 Q. Have you ever discussed with</p> <p>9 Mr. Seery anything having to do with the</p> <p>10 management -- withdrawn.</p> <p>11 Have you ever discussed with</p> <p>12 Mr. Seery any aspect of the debtor's management</p> <p>13 of the CLOs in which CLO HoldCo Limited is</p> <p>14 invested?</p> <p>15 A. No.</p> <p>16 Q. You mentioned earlier a request to</p> <p>17 stop trading. Do I have that right?</p> <p>18 A. Yes.</p> <p>19 Q. Okay. And are you aware that a</p> <p>20 letter was written purportedly on behalf of CLO</p> <p>21 HoldCo Limited in which a request to stop</p> <p>22 trading was made?</p> <p>23 A. As a cos- -- yeah. Yes.</p> <p>24 Q. Okay. Have you ever seen that</p> <p>25 letter before?</p>

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2 A. Yes.

3 MR. MORRIS: Can we put up on the

4 screen -- I think it's now Exhibit 6. It's

5 Exhibit DDDD.

6 (SCOTT EXHIBIT 3, Letter to James A.

7 Wright, III, et al., from Gregory Demo,

8 December 24, 2020, with Exhibit A

9 Attachment, was marked for identification.)

10 MR. MORRIS: Can we scroll down to,

11 I guess, what's Exhibit A. Ri- -- right

12 there.

13 BY MR. MORRIS:

14 Q. You see this is a letter Dece- --

15 dated December 22nd?

16 A. Yes.

17 Q. In the first paragraph there there's

18 a reference to the entities on whose behalf

19 this letter is being sent.

20 Do you see that?

21 A. Yes.

22 Q. Okay. So this letter was sent on

23 December 22nd. Did you see a copy of it before

24 it was sent?

25 A. A -- a draft -- an earlier draft of

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2 that the entities other than CLO HoldCo Limited

3 that are listed in the first paragraph made a

4 motion in the court asking the court for an

5 order that would have prevented Highland from

6 making any transactions for a limited period of

7 time?

8 A. Yes.

9 Q. Did you know that motion was being

10 made prior to the time that it was made?

11 A. I'm not sure.

12 Q. Did you ever think about whether CLO

13 HoldCo Limited should join that particular

14 motion?

15 A. I believe we were -- my attorney was

16 aware of it. I don't recall our discussion

17 about it. We were aware -- when I say we, I

18 mean collectively -- and did not join it.

19 Q. Okay. Can you tell me why you did

20 not join it.

21 MR. CLARK: And, again, Grant, to --

22 to the extent it's based on communications

23 with counsel, you're free to say that

24 but -- but not to disclose any substance of

25 communications with counsel.

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2 this I did.

3 Q. Okay. Did you provide any comments

4 to it?

5 A. I did.

6 MR. CLARK: Well, hold on. Grant,

7 let me caution you. To the extent you

8 provided comments to counsel, we're going

9 to assert the attorney-client privilege on

10 those comments.

11 MR. MORRIS: It's just a yes-or-no

12 question. I'm not looking for the

13 specifics.

14 MR. CLARK: Thank you.

15 A. Yes.

16 Q. Are you aware that earlier letters

17 were -- withdrawn.

18 Are you aware that prior to December

19 22nd, the entities other than CLO HoldCo

20 Limited that are listed in this pers- -- first

21 paragraph had sent a letter making the same

22 request?

23 A. With respect to a letter, no. No,

24 I -- I did not.

25 Q. Are you aware as you sit here now

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2 A. The subject of this letter on the

3 22nd which yielded the original letter you

4 briefly showed me on the 24th as well as an

5 additional letter on the 28th identified two

6 points as I understand it. The first point is

7 what I believe is the somewhat innocuous

8 request to halt sales, not a demand in any way.

9 And the second more substantive issue has to do

10 with steps to remove Highland or a subsequent

11 derived entity from Highland from the various

12 services agreements that you had previously --

13 we had previously discussed. Neither of those

14 issues met the require- -- neither of those

15 issues led us to believe that a motion such as

16 what you've just mentioned was -- was right --

17 Q. Okay.

18 A. -- because no -- no decision has

19 been made on that.

20 Q. Okay.

21 MR. MORRIS: So I want to go back to

22 my question and move to strike as

23 nonresponsive, and I'll just ask my

24 question again.

25 BY MR. MORRIS:

<p style="text-align: right;">Page 82</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 Q. Why did CLO HoldCo Limited decide</p> <p>3 not to participate in the earlier motion that</p> <p>4 was brought by the other entities that are</p> <p>5 identified in Paragraph 1 that asked the court</p> <p>6 to stop Highland from engaging in trades?</p> <p>7 A. John, I'm so sorry. There was a</p> <p>8 feedback loop that came up when you started to</p> <p>9 re- -- re- -- recite -- restate your question.</p> <p>10 I'm sorry.</p> <p>11 Q. That's okay. Why did CLO HoldCo</p> <p>12 Limited decide not to join in the earlier</p> <p>13 motion where the entities listed in Paragraph 1</p> <p>14 asked the court to order Highland not to make</p> <p>15 any further trades? Why did they not join that</p> <p>16 motion?</p> <p>17 A. The -- the issue didn't rise to</p> <p>18 the -- I don't believe we had formulated a</p> <p>19 legal basis sufficient to justify such steps.</p> <p>20 We hadn't laid the foundation necessary to --</p> <p>21 to do that.</p> <p>22 Q. Are you aware of what the court</p> <p>23 decided?</p> <p>24 A. By virtue of the original letter you</p> <p>25 sent me dated the -- or show -- showed</p>	<p style="text-align: right;">Page 83</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 initially dated the 24th, I have a general</p> <p>3 understanding of what they decided.</p> <p>4 Q. Did you -- did you ever review the</p> <p>5 transcript of the hearing where the other</p> <p>6 parties asked the court to stop Highland from</p> <p>7 engaging in any further trades on the CLOs?</p> <p>8 A. I did not.</p> <p>9 Q. Is there anything different about</p> <p>10 the request in this letter, to the best of your</p> <p>11 knowledge, from the request that was made of</p> <p>12 the court just six days earlier?</p> <p>13 MR. CLARK: Objection, form.</p> <p>14 A. Yes. There's a -- in -- in my -- my</p> <p>15 view there's a substantial difference between</p> <p>16 filing an action converting a request into</p> <p>17 essentially a demand versus a gentle request</p> <p>18 with multiple caveats, that that request is not</p> <p>19 a demand.</p> <p>20 Q. Okay. Let me ask you this: Are you</p> <p>21 aware -- what -- when did you first learn that</p> <p>22 Highland was making trades in its capacity as</p> <p>23 the servicer of the CLOs? When -- when did you</p> <p>24 first learn that Highland was doing that? Ten</p> <p>25 years ago, right? I mean --</p>
<p style="text-align: right;">Page 84</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 A. Oh. Oh. Oh, I'm -- yeah. Yeah.</p> <p>3 Oh, yes. I'm sorry. Of course.</p> <p>4 Q. Right? I mean, Highland has been</p> <p>5 making trades on behalf of CLOs for years,</p> <p>6 right?</p> <p>7 A. Yes.</p> <p>8 Q. And Highland was making trades on</p> <p>9 behalf of CLOs throughout 2020, to the best of</p> <p>10 your knowledge, right?</p> <p>11 A. Yes.</p> <p>12 Q. And you know when Jim Dondero was</p> <p>13 still with Highland, he was making trades on</p> <p>14 behalf of CLO -- on behalf of the CLOs, right?</p> <p>15 A. Yes.</p> <p>16 Q. And you never objected when Jim</p> <p>17 Dondero was doing it; is that right?</p> <p>18 A. That is correct.</p> <p>19 Q. Okay. So what changed that caused</p> <p>20 you in your capacity as the director of CLO</p> <p>21 HoldCo to request a full stoppage of trading?</p> <p>22 A. It was my understanding that because</p> <p>23 of the bankruptcy and the removal of Jim</p> <p>24 Dondero that the replacement decision-makers</p> <p>25 did not have the expertise where I felt</p>	<p style="text-align: right;">Page 85</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 comfortable with them making those decisions,</p> <p>3 but...</p> <p>4 Q. I thought you testified earlier that</p> <p>5 you weren't aware that Mr. Dondero left</p> <p>6 Highland. Am I mistaken in my recollection?</p> <p>7 A. I think you said in October, and</p> <p>8 I -- as I -- there's some con- -- I have</p> <p>9 confusion about when he left versus when he was</p> <p>10 still there but other -- but he was not making</p> <p>11 those trades.</p> <p>12 Q. Okay. Fair enough. The bankruptcy</p> <p>13 has nothing to do with your desire to stop</p> <p>14 trading, right, because Highland traded for a</p> <p>15 year after the bankruptcy and never took any</p> <p>16 action to try to stop Highland from trading on</p> <p>17 behalf of the CLOs, fair?</p> <p>18 A. The -- Highland as of right now</p> <p>19 isn't the same entity it was -- well, the</p> <p>20 decision-making team -- the -- the financial</p> <p>21 decision-making team for CLO Holdco's is no</p> <p>22 longer the team I have worked with, and upon</p> <p>23 discussion with counsel, we agreed -- I agreed</p> <p>24 to this letter, which I did, to just maintain</p> <p>25 the status quo.</p>

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2 Q. How did you form your opinion that

3 the debtor doesn't have the expertise to

4 execute trades on behalf of the CLOs today?

5 What's the basis for that belief?

6 A. I -- as I understood it, the -- the

7 people historically making that decision were

8 no longer making that decision.

9 Q. Who besides Mr. Dondero --

10 withdrawn.

11 Who are you referring to?

12 A. Well, Mr. Dondero is one. I don't

13 know the names, but I -- I understood it to

14 mean that the group previously responsible, for

15 exam- -- for example, Hunter Covitz, including

16 Hun- -- him, were no longer involved in the

17 decision-making process, but...

18 Q. How did you -- how -- how -- who

19 gave you the information that led you to

20 conclude that Hunter Covitz was no longer

21 involved in the decision-making process?

22 A. Specifically him and that name being

23 mentioned, I -- I -- I wasn't informed of his

24 speci- -- him -- him being removed. I was

25 under the impression that the team that had

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2 updated my contacts to -- to add his name so

3 now I have his name. And during that

4 conversation he informed me that he did have

5 that expertise --

6 Q. And --

7 A. -- without me making any inquiry.

8 He volunteered that.

9 Q. But you hadn't made any inquiry

10 prior to the time that you authorized the

11 sending of this letter; is that fair?

12 A. That's correct.

13 Q. Do you know whether Mr. Seery, in

14 fact, engaged in transactions on behalf of the

15 debtor since he was appointed back in January?

16 A. I do not.

17 Q. Did you ask that question prior to

18 the time you authorized the sending of this

19 letter?

20 A. I did not.

21 Q. Can you identify a single

22 transaction that Jim Seery has ever made that

23 you disagree with?

24 A. No.

25 Q. Can you identify any transaction

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2 previously been doing that was no longer doing

3 it.

4 Q. And what gave you that impression?

5 A. Was communications I had with my

6 attorney.

7 Q. Okay. Is there any source for your

8 information that led you to conclude that the

9 team was no longer there that was able to

10 engage in the trades on behalf of the CLOs

11 other than your attorneys?

12 A. Well, this -- this letter -- I -- I

13 think the answer is no.

14 Q. Thank you. Do you know if Jim -- do

15 you have an opinion or a view as to whether Jim

16 Seery is qualified to make trades?

17 A. This --

18 MR. CLARK: Objection, form.

19 A. I don't know -- I spoke to Jim Seery

20 earlier this week. You -- you asked me whether

21 I had his number. I said I did. That's only

22 because he called me. My phone rang with his

23 number. It was a number I did not recognize,

24 it was not in my contacts, but he left me a

25 voice mail so I called him back. Then I

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2 that the debtor made on behalf of any of the

3 CLOs since the time that you understand

4 Mr. Dondero left Highland that you disagree

5 with?

6 A. No.

7 Q. Did you have any discussion with any

8 representative of any of the entities listed on

9 this document where they told you they believe

10 Jim Seery didn't have the expertise to engage

11 in transactions on behalf of the whole -- of

12 the CLOs?

13 A. You -- your question -- I'm -- I'm

14 sorry. I'm trying to be -- I'm trying to be a

15 hundred perc- -- I'm trying to be accurate

16 here.

17 Q. Let me interrupt you and just say,

18 I'm very grateful for your testimony. I know

19 this is not easy, and I do believe that you're

20 earnestly and honestly trying to answer the

21 questions the best you can. So no apologies

22 necessary anymore. If you need me to repeat

23 the question or rephrase it, just say that,

24 okay?

25 A. Please -- yes.

<p style="text-align: right;">Page 90</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 Q. Okay.</p> <p>3 A. Please -- please repeat that.</p> <p>4 Q. Did you ever communicate with any</p> <p>5 employee, officer, director, representative of</p> <p>6 any of the entities that are on this page</p> <p>7 concerning the debtor's ability to service the</p> <p>8 CLOs?</p> <p>9 A. I believe so.</p> <p>10 Q. And can you identify the person or</p> <p>11 persons?</p> <p>12 A. I think it's Jim Dondero.</p> <p>13 Q. Anybody else other than Mr. Dondero?</p> <p>14 A. No.</p> <p>15 Q. When did you have that conversation</p> <p>16 or those conversations with Mr. Dondero?</p> <p>17 A. This letter is dated the 22nd --</p> <p>18 Q. Correct.</p> <p>19 A. -- right?</p> <p>20 Q. Yes.</p> <p>21 A. I believe that's the Tuesday before</p> <p>22 Christmas, and this would have been on the</p> <p>23 21st, the Monday.</p> <p>24 Q. What do you recall about your</p> <p>25 conversation on the 21st regarding the</p>	<p style="text-align: right;">Page 91</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 substance of this particular letter?</p> <p>3 A. Jim Dondero described why he</p> <p>4 believed sales being made on an ongoing basis</p> <p>5 after a request was made to stop was im- --</p> <p>6 improper.</p> <p>7 Q. Do you -- do you rely on what</p> <p>8 Mr. Dondero said to you during that phone call</p> <p>9 on December 21st in -- in deciding to join in</p> <p>10 this particular letter?</p> <p>11 A. No.</p> <p>12 Q. Did you only then rely on the</p> <p>13 information you obtained from counsel?</p> <p>14 A. Yes. I -- I -- I -- I considered</p> <p>15 this letter to be nearly the most gentle</p> <p>16 request imaginable amongst lawyers to maintain</p> <p>17 the status quo.</p> <p>18 Q. And the request that's made in this</p> <p>19 letter is perfectly consistent with what</p> <p>20 Mr. Dondero told you on the 21st of December,</p> <p>21 correct?</p> <p>22 A. I don't -- no.</p> <p>23 Q. How --</p> <p>24 MR. MORRIS: Can we go to the end of</p> <p>25 this letter, please. All right. Right</p>
<p style="text-align: right;">Page 92</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 there.</p> <p>3 BY MR. MORRIS:</p> <p>4 Q. Do you see the request that's in the</p> <p>5 last sentence?</p> <p>6 A. Yes.</p> <p>7 Q. Is that the same thing that</p> <p>8 Mr. Dondero told you should happen, that --</p> <p>9 that there should be no further CLO</p> <p>10 transactions at least until the issues raised</p> <p>11 and addressed by the debtor's plan were</p> <p>12 resolved substantively?</p> <p>13 A. Yes.</p> <p>14 Q. Is there anything that he said</p> <p>15 that's inconsistent with the request that's</p> <p>16 made here?</p> <p>17 MR. CLARK: Objection, form.</p> <p>18 A. This -- and can you -- can you show</p> <p>19 me earlier parts?</p> <p>20 Q. Of course. You know what, I'll</p> <p>21 withdraw the question.</p> <p>22 And let me see if I can do it this</p> <p>23 way: In your discussion with Mr. Dondero, did</p> <p>24 he indicate that he had seen a draft of this</p> <p>25 letter?</p>	<p style="text-align: right;">Page 93</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 A. No. And I didn't -- I didn't have a</p> <p>3 discussion with him. I -- I merely listened to</p> <p>4 him. There was no -- I -- I had no input to</p> <p>5 the conversation.</p> <p>6 Q. Okay. I -- I did -- I didn't --</p> <p>7 I -- I appreciate that. So he called you; is</p> <p>8 that right?</p> <p>9 A. We -- we called in.</p> <p>10 Q. Oh, was it --</p> <p>11 A. I --</p> <p>12 Q. Was it --</p> <p>13 A. I don't know --</p> <p>14 Q. Was it --</p> <p>15 A. I don't know the sequence of the</p> <p>16 calls. I'm sorry.</p> <p>17 Q. Was there anybody on the call other</p> <p>18 than you and Mr. Dondero, the call that you're</p> <p>19 describing on December 21st?</p> <p>20 A. Yes, my attorney and an attorney --</p> <p>21 I believe the attorney that signed this letter.</p> <p>22 Q. Okay. And I just want to focus on</p> <p>23 what Mr. Dondero said. Did he -- did he say</p> <p>24 during the call that Highland should not be</p> <p>25 engaging in any further CLO transactions?</p>

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2 A. He took a more -- if I can

3 characterize his mental -- I looked at the

4 issue of maintaining the status quo since there

5 was somebody that was complaining about it,

6 that that -- because it -- it isn't assets of

7 Highland, it doesn't adversely affect Highland.

8 If -- if stopping the sales -- you know, my --

9 my thought was -- is if stopping the sales

10 reduces the likelihood of litigation

11 disputes -- you already saw that there was the

12 one from middle of December. I -- I thought

13 that would be the more appropriate way to go.

14 I didn't think there'd be any harm.

15 Q. And was that your --

16 A. I think -- I think Jim Dondero had a

17 more legalistic view of its impro- -- im- --

18 improper nature.

19 Q. And did he share that view with you?

20 A. On Monday, yes.

21 Q. Can you describe for me your

22 recollection of what he said about the

23 legalistic view?

24 A. Just the mention of -- all I recall

25 is in terms of -- the law associated with it

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2 transactions before they made a request six

3 days after the court threw out their suit as

4 frivolous? I'll withdraw that. That's too

5 much.

6 A few days later did you authorize

7 the sending of another letter to the debtor in

8 which you suggested that the -- the entities on

9 behoove -- on -- on whose behalf the letter was

10 sent might take steps to terminate the CLO

11 management agreements?

12 A. I did not see -- so there is a --

13 there is a December 28th letter.

14 MR. MORRIS: Let's just go to the

15 next letter, and -- and let's just call

16 that up.

17 BY MR. MORRIS:

18 Q. I think it's -- I think it's

19 actually dated December 23rd. It was the next

20 day.

21 A. Yes.

22 (SCOTT EXHIBIT 4, Letter to James A.

23 Wright, III, et al., from Gregory Demo,

24 December 24, 2020, with Exhibit A

25 Attachment, was marked for identification.)

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2 was -- the Advisers Act was mentioned --

3 Q. Did you have --

4 A. -- but I don't -- I don't know what

5 that is. You know, I don't know what that is.

6 Q. And you -- and -- and you never --

7 it never occurred to you to pick up the phone

8 and -- and to speak with Mr. Seery to see why

9 it was he thought he should be engaging in

10 transactions?

11 A. No. And -- but I -- my lack of

12 volunteering a phone call to Jim Seery isn't --

13 it's -- it's because of -- I -- I thought any

14 phone call by me to Jim Seery would be

15 inappropriate because he's represented by

16 counsel. I mean, we were working on claims

17 against him --

18 Q. Okay.

19 A. -- right, so...

20 Q. Did you -- did you -- did you think

21 to instruct your lawyers to reach out to

22 Mr. Seery to actually speak to him instead of

23 just sending a letter like this and to -- and

24 to ask -- and to maybe inquire as to why he

25 thought it was appropriate to engage in

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2 BY MR. MORRIS:

3 Q. And do you recall that the next day

4 CLO HoldCo Limited joined in another letter to

5 the debtors? Do you have that recollection?

6 A. Yes. Not -- not be- -- yes, I do,

7 but -- yes, I do.

8 Q. Did you see this letter before it

9 was sent?

10 A. I don't believe so.

11 Q. Did you authorize the sending of

12 this letter?

13 A. I gave -- I relied on my attorney to

14 guide me through this process.

15 Q. I appreciate that.

16 A. I let him make that call on this

17 letter, which is -- copies most of the prior

18 letter and then adds another issue.

19 Q. Okay. Do you have an understanding

20 of what that issue is?

21 A. Yes.

22 Q. And what is your understanding of

23 what that additional issue is?

24 A. Somewhere in this letter of the 23rd

25 there's an -- there's an -- an inclusion of

<p style="text-align: right;">Page 98</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 a -- a statement of an -- a future intent.</p> <p>3 Q. A future intent to do what?</p> <p>4 A. To remove Highland as the servicer</p> <p>5 of the agreements you talked to me about</p> <p>6 previously.</p> <p>7 Q. Can you tell me whether there's a</p> <p>8 factual basis on which CLO HoldCo Limited</p> <p>9 believes that the debtor should be removed as</p> <p>10 the servicer of the portfolio manager of the</p> <p>11 CLOs?</p> <p>12 A. Yes. There are -- there are</p> <p>13 multiple bases to consider subject to all the</p> <p>14 other conditional language in the request of</p> <p>15 these letters to consider that going forward</p> <p>16 but no decision. That intent is an intent to</p> <p>17 evaluate, not an intent to take any action. I</p> <p>18 haven't authorized any action. I don't feel</p> <p>19 comfortable with my knowledge base at this</p> <p>20 time, but it's something being explored.</p> <p>21 Q. So knowing everything that you know</p> <p>22 as of today, you have not yet formed a decision</p> <p>23 as to whether CLO HoldCo Limited will take any</p> <p>24 steps to terminate Highland's portfolio</p> <p>25 management agreements, correct?</p>	<p style="text-align: right;">Page 99</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 A. I don't -- I don't want to be</p> <p>3 difficult, but I'm -- I'm confused yet again</p> <p>4 with your question. But I have not -- there --</p> <p>5 there are a number of cr- -- a number of issues</p> <p>6 that with my nonfinance background would</p> <p>7 suggest to me that they -- they may be bases</p> <p>8 for -- for cause, to -- to assert a cause. And</p> <p>9 I've been conferring with my attorney about</p> <p>10 that, but it's very preliminary and no -- no</p> <p>11 decision has been made. I -- no decision is</p> <p>12 being made.</p> <p>13 Q. So what -- what are the factors that</p> <p>14 are causing you to consider possibly seeking to</p> <p>15 begin the process of terminating the CLO</p> <p>16 management agreements?</p> <p>17 A. Well, I guess I would break them</p> <p>18 down into maybe two categories, maybe more.</p> <p>19 The one that resonates most with me -- I don't</p> <p>20 know -- maybe because even though I'm a patent</p> <p>21 attorney, I guess at one point I was an</p> <p>22 attorney. But the thing that resonates most</p> <p>23 with me --</p> <p>24 Q. You are an attorney.</p> <p>25 A. -- at the moment -- well, now you</p>
<p style="text-align: right;">Page 100</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 know why I'm a patent attorney and not one of</p> <p>3 you guys. But the thing that resonates with me</p> <p>4 the most from a legal substantive, black letter</p> <p>5 law sort of issue is the plan for</p> <p>6 reorganization, which we've objected to. I've</p> <p>7 re- -- I've reviewed the objection, and that</p> <p>8 sets forth our -- that sets forth my position,</p> <p>9 and I consider that to be quite material. The</p> <p>10 others are issues of practical effects of</p> <p>11 what's happened thus far with the bankruptcy,</p> <p>12 the termination of the experts with a long</p> <p>13 track record of success, the soon-to-be</p> <p>14 termination of all employees, the cancellation</p> <p>15 of various representation agreements, things of</p> <p>16 that nature looked at from an additive sort of</p> <p>17 perspective.</p> <p>18 Q. You know that -- can we refer to the</p> <p>19 counterparties under the CLO management</p> <p>20 agreements as the issuers? Are you familiar</p> <p>21 with that term?</p> <p>22 A. I -- I am familiar with the term</p> <p>23 issuers, yes.</p> <p>24 Q. Okay. And do you understand --</p> <p>25 A. There's an agreement between the --</p>	<p style="text-align: right;">Page 101</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 I'm sorry.</p> <p>3 Q. There's an agreement between the</p> <p>4 issuers and Highland pursuant to which Highland</p> <p>5 manages the CLO assets, right?</p> <p>6 A. With res- -- yes.</p> <p>7 Q. Okay. And do you understand what's</p> <p>8 going to happen to those management contracts</p> <p>9 in connection with the plan of reorganization?</p> <p>10 A. Partially.</p> <p>11 Q. What's your partial understanding?</p> <p>12 A. Well, I -- I wouldn't want to</p> <p>13 characterize it as a partial understanding. I</p> <p>14 mean, with respect to part of the agreement.</p> <p>15 Q. Okay.</p> <p>16 A. Okay. Our plan objection lays out</p> <p>17 our basis for objecting to steps that Highland</p> <p>18 is actively taking to preclude us from the full</p> <p>19 rights that we have as third-party</p> <p>20 beneficiaries under that agreement, and they're</p> <p>21 not de minimus. They're quite material. They</p> <p>22 relate to cause issues and no-cause issues, for</p> <p>23 example, as out- -- as outlined in our --</p> <p>24 our -- our objections.</p> <p>25 Q. Okay. Did you ever make any attempt</p>

<p style="text-align: right;">Page 102</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 to speak with any issuer concerning Highland's</p> <p>3 performance under the CLO management</p> <p>4 agreements?</p> <p>5 A. No.</p> <p>6 Q. Why not?</p> <p>7 A. I -- I don't have any facts --</p> <p>8 understand I -- I get all of the reports</p> <p>9 periodically from Highland -- from Highland.</p> <p>10 I -- I don't have a basis that I'm aware of to</p> <p>11 complain about performance issues. This is a</p> <p>12 legal issue that I'm talking about.</p> <p>13 Q. So you have no basis to suggest that</p> <p>14 Highland hasn't performed under the CLO</p> <p>15 management agreements, correct?</p> <p>16 A. Well, Highland as of right now,</p> <p>17 the -- the issue really is as -- as to what's</p> <p>18 next, not -- not -- I -- I don't -- I don't</p> <p>19 believe I have facts that support a com- --</p> <p>20 a -- an issue right now. It's -- it's --</p> <p>21 it's -- it's going forward that is the problem.</p> <p>22 Q. I --</p> <p>23 A. That's -- you know, that's --</p> <p>24 Q. Have you given any thought to</p> <p>25 speaking with the issuers to try to get their</p>	<p style="text-align: right;">Page 103</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 views as to what they think is going to happen</p> <p>3 in the future?</p> <p>4 A. No.</p> <p>5 Q. They're the -- they're the actual</p> <p>6 direct beneficiaries under the CLO management</p> <p>7 agreements, to the best of your understanding,</p> <p>8 right?</p> <p>9 A. Yes. Their rights may not be</p> <p>10 impacted; it's CLO Holdco's rights that are</p> <p>11 going to be adversely impacted. So it's -- I</p> <p>12 don't know that our view is in alignment with</p> <p>13 their view. But to answer your question, no,</p> <p>14 we did not contact them.</p> <p>15 Q. Do you have any knowledge or</p> <p>16 information as to any assertion by the issuers</p> <p>17 that Highland is in breach of any of the CLO</p> <p>18 management agreements?</p> <p>19 A. No.</p> <p>20 Q. Do you have any knowledge or</p> <p>21 information as to whether or not any of the</p> <p>22 issuers believe that Highland is in default</p> <p>23 under the CLO management agreements?</p> <p>24 A. No, I don't have any of those facts.</p> <p>25 Q. Are you aware that the issuers are</p>
<p style="text-align: right;">Page 104</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 negotiating with Highland to permit Highland to</p> <p>3 assume the CLO management agreements and to</p> <p>4 continue operating under them?</p> <p>5 A. I believe so --</p> <p>6 Q. Is that --</p> <p>7 A. -- but they're --</p> <p>8 Q. Go ahead. I'm sorry.</p> <p>9 A. As I understand it, Highland</p> <p>10 wants -- Highland or its subsidiary -- or</p> <p>11 its -- its -- its postbankruptcy relative --</p> <p>12 post- -- excuse me, that Highland</p> <p>13 postbankruptcy -- or postplan confirmation</p> <p>14 wants to move forward, substitute itself for</p> <p>15 the prior issuer -- no, sorry, substitute</p> <p>16 itself for the prior servicer under those</p> <p>17 agreements to assume those agreements but in</p> <p>18 the process of assuming those agreements,</p> <p>19 carving out a bunch of provisions that from a</p> <p>20 legal standpoint and a potentially future</p> <p>21 practical and monetary standpoint are quite</p> <p>22 substantial, and that has to relate to the</p> <p>23 removal rights based on cause and without</p> <p>24 cause. As I understand it, that's all set</p> <p>25 forth in our plan objection.</p>	<p style="text-align: right;">Page 105</p> <p>1 GRANT SCOTT - 1/21/2021</p> <p>2 Q. Okay. Are you aware of a third</p> <p>3 letter that was sent to Highland on behalf of</p> <p>4 CLO HoldCo and the other entities that are</p> <p>5 listed in this document?</p> <p>6 A. The December 28th letter, is that</p> <p>7 what you mean?</p> <p>8 Q. It's actually December 31st, if I</p> <p>9 can refresh your recollection.</p> <p>10 MR. MORRIS: Can we put up Exhibit</p> <p>11 F?</p> <p>12 (SCOTT EXHIBIT 5, Letter to Jeffrey</p> <p>13 N. Pomerantz from R. Charles Miller,</p> <p>14 December 31, 2020, was marked for</p> <p>15 identification.)</p> <p>16 BY MR. MORRIS:</p> <p>17 Q. You remember that there was a letter</p> <p>18 dated on or about December 31st that was</p> <p>19 sent -- oh, actually, you know, I apologize.</p> <p>20 If we scroll down to the -- to the next -- to</p> <p>21 the first box, there actually is no mention of</p> <p>22 CLO HoldCo.</p> <p>23 Are you aware that Mr. Dondero was</p> <p>24 evicted from Highland's offices as of the end</p> <p>25 of the year?</p>

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2 A. I -- I didn't know the time, but I

3 understand he's no longer there.

4 Q. Does CLO HoldCo Limited contend that

5 it was damaged in any way by Mr. Dondero's

6 eviction from the Highland suite of offices?

7 MR. CLARK: Objection, form.

8 A. I -- I don't have any information to

9 support that as of this time.

10 Q. It's not -- it's not a belief that

11 you hold today?

12 A. I don't have a belief of that, yes.

13 MR. MORRIS: All right. Let's take

14 a short break. I may be done. I -- I'm

15 grateful, Mr. Scott, and don't want to

16 abuse your time. Give me -- let -- just

17 let -- let's come back at 4:50, just eight

18 minutes, and if I have anything further, it

19 will be brief.

20 (Whereupon, there was a recess in

21 the proceedings from 4:42 p.m. to

22 4:49 p.m.)

23 MR. MORRIS: Okay. Mr. Scott, thank

24 you very much for your time. I have no

25 further questions.

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2 C E R T I F I C A T E

3 STATE OF NORTH CAROLINA)

4) ss.:

5 COUNTY OF WAKE)

6

7 I, LISA A. WHEELER, RPR, CRR, a

8 Notary Public within and for the State of New

9 York, do hereby certify:

10 That GRANT SCOTT, the witness whose

11 deposition is hereinbefore set forth, having

12 produced satisfactory evidence of

13 identification and having been first duly sworn

14 by me, according to the emergency video

15 notarization requirements contained in G.S.

16 10B-25, and that such deposition is a true

17 record of the testimony given by such witness.

18 I further certify that I am not

19 related to any of the parties to this action by

20 blood or marriage; and that I am in no way

21 interested in the outcome of this matter.

22 IN WITNESS WHEREOF, I have hereunto

23 set my hand this 21st day of January, 2021.

24 *Lisa Wheeler*

25 LISA A. WHEELER, RPR, CRR

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2 THE WITNESS: Thank you.

3 MR. CLARK: We will reserve our

4 questions.

5 THE WITNESS: I appreciate it, John.

6 MR. MORRIS: Take care. Thanks for

7 your time and your -- and your diligence.

8 I do appreciate it. Take care, guys.

9 THE REPORTER: Okay.

10 MR. CLARK: Thank you.

11 MR. HOGEWOOD: No questions from us.

12 (Time Noted: 4:50 p.m.)

13

14

15 -----

16 GRANT SCOTT

17

18 Subscribed and sworn to before me

19 this day of 2021.

20

21 -----

22

23

24

25

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2 -----I N D E X-----

3 PAGE

4 EXAMINATION BY MR. MORRIS 7

5

6

7 -----EXHIBITS-----

8 PAGE

9 EXHIBIT 1 Organizational Structure: 46

10 CLO HoldCo, Ltd.

11 EXHIBIT 2 Unanimous Written Consent of 54

12 Directors In Lieu of Meeting

13

14 EXHIBIT 3 Letter to James A. Wright, 78

15 III, et al., from Gregory

16 Demo, December 24, 2020, with

17 Exhibit A Attachment

18

19 EXHIBIT 4 Letter to James A. Wright, 96

20 III, et al. From Gregory

21 Demo, December 24, 2020, with

22 Exhibit A Attachment

23

24 EXHIBIT 5 Letter to Jeffrey N. 105

25 Pomerantz from R. Charles

Miller, December 31, 2020

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EXHIBIT 13

003363

Between

CLO HOLDCO, LTD.

And

HARBOURVEST DOVER STREET IX INVESTMENT L.P.

And

HARBOURVEST 2017 GLOBAL AIF L.P.

And

HARBOURVEST 2017 GLOBAL FUND L.P.

And

HV INTERNATIONAL VIII SECONDARY L.P.

And

HARBOURVEST SKEW BASE AIF L.P.

And

HIGHLAND CAPITAL MANAGEMENT, L.P.

And

LEE BLACKWELL PARKER, III

And

QUEST IRA, INC., FBO LEE B. PARKER III, ACCT. # 3058311

And

QUEST IRA, INC., FBO HUNTER COVITZ, ACCT. # 1469811

And

QUEST IRA, INC., FBO JON POGLITSCH, ACCT. # 1470612

And

QUEST IRA, INC., FBO NEIL DESAI, ACCT. # 3059211

And

HIGHLAND CLO FUNDING, LTD.

And

HIGHLAND HCF ADVISOR, LTD.

MEMBERS AGREEMENT RELATING TO THE COMPANY

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1.7 unless otherwise stated, a reference to a Clause or a Schedule is a reference to a Clause or a Schedule to this Agreement; and

1.8 Clause headings are for ease of reference only and do not affect the construction of any provision.

2. THE BUSINESS OF THE COMPANY

2.1 The Parties hereby agree that the objects and purpose of the Company shall be to carry on the Business.

2.2 The Parties shall so far as they are able (including without limitation by the exercise of votes which they directly or indirectly control at meetings of the Directors or general meetings of the Company) procure that (i) the Company's principal activities shall be the pursuit of the objects and purposes described in Clause 2.1 conducted in accordance with the provisions hereof and with the Offering Memorandum, the Subscription and Transfer Agreement and Articles of the Company and (ii) the Parties shall not take any action inconsistent with the provisions of the Offering Memorandum, including, without limitation the investment strategy set forth in the "Summary" and the applicable restrictions during and after the Investment Period and the suspension or termination of the Investment Period following a Key Person Event.

2.3 The Members shall (so long as they hold shares in the capital of the Company) use all reasonable endeavours to promote and develop the Business of the Company.

3. VOTING RIGHTS

3.1 The Parties agree that the following provisions of this Clause 3 shall apply during such period or periods as the Members parties hereto are Members.

3.2 The Parties shall procure that the Company shall not take any action at any meeting requiring the sanction of an ordinary or special resolution or by written resolution, in each case of the Directors or of the Members, without the affirmative vote or prior written consent, as applicable, of the Members totalling in the aggregate more than seventy-five percent (75%) of the Company, including, but not limited to, the following actions:

3.2.1 any issuance of new shares of the Company or a new class of shares of the Company or payment of any dividend by issuance of new shares of the Company, other than issuances of Shares pursuant to the Offering Memorandum and the Subscription and Transfer Agreement;

3.2.2 any alteration or cancellation of any rights of any Shares or of the Share capital of the Company,

3.2.3 any conversion or redemption of Shares, except pursuant to Clause 5.5,

3.2.4 any payment of commission in consideration for subscribing or agreeing to subscribe for any shares in the Company,

3.2.5 the creation of any lien on any Shares, except pursuant to the remedies in Clause 5.3. or

3.2.6 the suspension of the calculation of the NAV; other than a temporary suspension of the calculation of the NAV and NAV per Share by the Board of Directors during any period if it determines in good faith that such a suspension is warranted by extraordinary circumstances, including: (i) during any period when any market on which the Company's investments are quoted, traded or dealt in is closed, other than for ordinary holidays and weekends, or during periods in which dealings are restricted or suspended; (ii) during the existence of any state of affairs, including as a result of political, economic, military or monetary events or any circumstances outside the control of the Portfolio Manager or the Company, as a result of which,

in the reasonable opinion of the Portfolio Manager, the determination of the value of the assets of the Company, would not be reasonably practicable or would be seriously prejudicial to the Members taken as a whole; (iii) during any breakdown in the means of communication normally employed in determining the price or value of the Company's assets or liabilities, or of current prices in any market as aforesaid, or when for any other reason the prices or values of any assets or liabilities of the Company cannot reasonably be accurately ascertained within a reasonable time frame; (iv) during any period when the transfer of funds involved in the realization or acquisition of any investments cannot, in the reasonable opinion of the Portfolio Manager, be effected at normal rates of exchange; or (v) automatically upon liquidation of the Company.

4. **ADVISORY BOARD.**

- 4.1 **Composition of Advisory Board.** The Company shall establish an advisory board (the "**Advisory Board**") composed of two individuals, one of whom shall be a representative of CLO Holdco and one of whom shall be a representative of Dover IX (or, in each case, or any permitted successor to the interest in the Company of such Member). No voting member of the Advisory Board shall be a controlled Affiliate of the Portfolio Manager (including, for the avoidance of doubt, following a permitted transfer of CLO Holdco's interest to an Affiliate of the Portfolio Manager, if applicable), it being understood that for the purposes of this sentence none of CLO Holdco, its wholly-owned subsidiaries nor any of their respective directors or trustees shall be deemed to be a controlled Affiliate of the Portfolio Manager due to their pre-existing non-discretionary advisory relationship with the Portfolio Manager. None of the members of the Advisory Board shall receive any compensation (other than reimbursement for reasonable and documented out-of-pocket expenses) in connection with their position on the Advisory Board. The Company shall bear any fees, costs and expenses related to the Advisory Board.
- 4.2 **Meetings of Advisory Board; Written Consents.** The Advisory Board shall meet with the Portfolio Manager at such times as requested by the Portfolio Manager from time to time. The quorum for a meeting of the Advisory Board shall be all of its members entitled to vote. All actions taken by the Advisory Board shall be (i) by a unanimous vote of all of the members of the Advisory Board in attendance in a meeting at which a quorum is present and entitled to vote and not abstaining from voting or (ii) by a written consent in lieu of a meeting signed by all of the members of the Advisory Board entitled to consent and not abstaining from consenting. Meetings of the Advisory Board may be held in person, by telephone or by other electronic device.
- 4.3 **Functions of Advisory Board.** The Advisory Board shall provide (or determine not to provide) any consents or approvals expressly contemplated by this Agreement and the Offering Memorandum to be provided by the Advisory Board and, at the request of the Portfolio Manager in its sole discretion, provide general advice (which, for the avoidance of doubt, shall be non-binding) to the Portfolio Manager or the Company with regard to Company activities and operations and other matters. For the avoidance of doubt, no consent or approval of the Advisory Board shall be required for any action or determination expressly permitted or contemplated hereunder or in the Offering Memorandum and not conditioned on such a consent or approval. The Portfolio Manager shall not act contrary to the advice of the Advisory Board with respect to any action or determination expressly conditioned herein or in the Offering Memorandum on the consent or approval of the Advisory Board. Without limiting the foregoing, the Advisory Board shall be authorized to give any approval or consent required or deemed necessary or advisable under the Advisers Act on behalf of the Company and the Members, including under Section 206(3) of the Advisers Act. The Portfolio Manager may from time to time in its discretion request the Advisory Board to review and ratify certain Company matters. The consent of the Advisory Board shall be required to approve the following actions: (i) any extension of the Investment Period; (ii) any extension of the Term (other than an automatic extension following an extension of the Investment Period that has been approved by the Advisory Board); (iii) any allotment of additional equity securities by the Company; and (iv) any investment in a Related Obligation or any other transaction between the Company or any entity in which the Company holds a direct or indirect interest, on the one hand, and Highland or any of its Affiliates, on the other hand and (v) other matters as set forth in the Offering

- ## 5. DEFAULTING MEMBERS

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- 5.4 The Portfolio Manager, on behalf of the Company, may (at the sole cost of the Defaulting Member) borrow funds from any person (other than the Defaulting Member or its Affiliates) to cover such shortfall and/or advance all or a portion of the Defaulting Member's Outstanding Settlement Amount to the Company on behalf of the Defaulting Member, and such advance shall be repaid by the Defaulting Member to the Portfolio Manager, on behalf of the Company, with interest for the account of the Portfolio Manager, on behalf of the Company, on the amount outstanding from time to time commencing on the date of the advance at the Default Interest Rate. To the extent the Portfolio Manager, on behalf of the Company, advances funds to the Company on behalf of a Defaulting Member, all distributions from the Company that would otherwise be made to the Defaulting Member shall be paid to the Portfolio Manager, on behalf of the Company, (with any such amounts being applied first against accrued but unpaid interest and then against principal), until all amounts payable by the Defaulting Member to the Portfolio Manager, on behalf of the Company, under this Clause 5.4 (including interest) have been paid in full.
- 5.5 The Portfolio Manager, on behalf of the Company, may elect, upon notice to the Defaulting Member, to redeem the Defaulting Member's shares in an amount equal to 50% of the outstanding amount existing as of the date of the default at a price of \$0.0001 per Share. Thereupon, the commitment of the Defaulting Member under the Subscription and Transfer Agreement shall be zero, the Defaulting Member shall not be obligated to make any further settlements, the voting capital of such Defaulting Member and of each other Member shall be re-determined as of the date of such default to reflect the new commitment of the Defaulting Member, and the Portfolio Manager shall revise the books and records of the Company to reflect the reduction of the commitment of the Defaulting Member. The Members agree (x) that the damages suffered by the Company as the result of a failure by a Member to settle a commitment to purchase Shares that is required by this Agreement cannot be estimated with reasonable accuracy and (y) that the foregoing provisions of this Clause 5.5 shall act as liquidated damages for the default by the Defaulting Member (which each Member hereby agrees are reasonable).
- 5.6 The Board may offer to the non-Defaulting Members (pro rata in accordance with their respective Commitments) the option of purchasing the Defaulting Member's unsettled Shares on the terms set forth in the applicable Settlement Notice (as defined in the Subscription and Transfer Agreement).
- 5.7 At the election of the Board, distributions of dividends otherwise payable to the Defaulting Member under the Articles shall not be paid to the Defaulting Member, but instead shall be applied against the amount of the Outstanding Settlement Amount (plus interest at the Default Interest Rate and related costs); provided that any amounts so applied shall be deemed to have been distributed to the Defaulting Member under the Articles.
- 5.8 The Portfolio Manager may send an amended or new Settlement Notice to the Members other than the Defaulting Member in an amount equal to the Defaulting Member's Outstanding Settlement Amount and otherwise in accordance with the Subscription and Transfer Agreement.
- 5.9 Each Defaulting Member further appoints the Portfolio Manager as agent and attorney-in-fact for the Defaulting Member and hereby grants to the Portfolio Manager an irrevocable power of attorney to take all actions necessary on its behalf to sell, assign, or transfer the commitment to purchase unsettled Shares of such Defaulting Member pursuant to Clause 5.6 or as necessary on its behalf to effect the other remedies or rights set forth in this Clause 5; provided that the Portfolio Manager shall not bind any Defaulting Member to an indemnification or other similar obligation which guarantees the financial performance of the Company or which exceeds the ability of the Defaulting Member to provide indemnification under applicable law.

6. TRANSFERS OR DISPOSALS OF SHARES

- 6.1 No Member shall sell, pledge, charge, mortgage, assign, assign by way of security, transfer, convey, exchange or otherwise dispose of its Shares or its commitment to settle purchases of Shares under the Subscription and Transfer Agreement (each a **"Transfer"**), other than to an Affiliate of an initial Member party hereto, without the prior written consent of the Portfolio

Manager, which consent shall be in the sole discretion of the Portfolio Manager; provided that no such Transfer shall be made unless in the opinion of counsel reasonably satisfactory to the Portfolio Manager (who may be counsel for the Company, and which requirement for an opinion may be waived, in whole or in part, in the sole discretion of the Portfolio Manager) that:

- 6.1.1 such Transfer would not require registration under the Securities Act or any state securities or "Blue Sky" laws or other laws applicable to the Shares to be assigned or transferred and is conducted in conformance with the restrictions set forth in the Offering Memorandum;
 - 6.1.2 such Transfer would not be reasonably likely to cause the Company to be subject to tax in any jurisdiction other than of its incorporation on a net income basis, not be reasonably likely to cause the Company to become subject to registration as an investment company under the Investment Company Act of 1940, as amended;
 - 6.1.3 such Transfer would not cause the Company to be considered to be an entity whose underlying assets are considered to include "plan assets" by reason of investment by an "employee benefit plan" or "plan" in such entity pursuant to the U.S. Plan Assets Regulations; and
 - 6.1.4 such sale, assignment, disposition or transfer would not to cause all or any portion of the assets of the Company to constitute "plan assets" under ERISA or the Code.
- 6.2 Prior to making any Transfer of Shares (other than Transfers to Affiliates of an initial Member or, in the case of CLO Holdco or a Highland Principal, to Highland, its Affiliates or another Highland Principal) a Member must first offer to the other Members a right to purchase the Shares, on a pro rata basis with respect to their current Shares, at the same price (which must be cash) as such Shares are proposed to be purchased by the prospective third party purchaser pursuant to an irrevocable offer letter. The other Members will have 30 days following receipt of the letter to determine whether to purchase their entire pro rata portion of the Shares proposed to be Transferred. If the other Members do not accept the offer, the Member may (subject to complying with the other Transfer restrictions in this Agreement) Transfer the applicable Shares that such Members have not elected to purchase to a third party at a price equal to or greater than the price described in the offer letter, provided that if the Member has not (a) entered into a definitive agreement to effect such sale within 90 days after the expiration of the period that the other Members have to accept the offer in the offer letter or (b) consummated the sale within 120 day after the entry into the definitive agreement to consummate the sale, it must comply with these right of first refusal procedures again. Any Member (other than the Member proposing to Transfer its Shares) may assign its right to purchase its pro rata portion of the Shares to any other Member (subject to complying with the other Transfer restrictions in this Agreement), any initial Member (other than the Member proposing to Transfer its Shares) may assign its right to purchase its pro rata portion of the Shares to an Affiliate (subject to complying with the other Transfer restrictions in this Agreement), and CLO Holdco and the Highland Principals (unless such Member is the Member proposing the Transfer its Shares) may assign its right to purchase its pro rata portion of the Shares to Highland, an Affiliate of Highland or other Highland Principals (subject to complying with the other Transfer restrictions in this Agreement).
- 6.3 No Highland Principal may transfer his or its interests in the Company other than (i) to a trust or other tax or estate planning vehicle or (ii) to the Portfolio Manager, its Affiliates or another Highland Principal upon the termination of such Highland Principal's (or the beneficial owner of such Highland Principal, if applicable) employment by Highland Capital Management, L.P.
- 6.4 Any transferor of any Share shall remain bound by the terms of this Agreement applicable to it prior to such transfer and that nothing in this Agreement shall constitute a waiver of any rights a Party to this Agreement may have by reason of a breach of this Agreement by a transferor prior to transfer. The transferor and/or the transferee shall bear all costs of any Transfer.
- 6.5 The Parties agree not to Transfer their Shares to any person unless such transferee agrees to be bound by the terms of this Agreement.
- 6.6 All Adherence Agreements executed pursuant to this Clause shall be executed by the transferee or allottee and each Party.

7. CONFIDENTIALITY

- 7.1 Each Party agrees to keep any information received by it pursuant to this Agreement or relating to the Business as confidential and not (save with the relevant Party's consent or as may be required by Law or the rules of any regulatory authority or any stock exchange) disclose to any person such information.
- 7.2 Notwithstanding the foregoing, the Parties agree that the HarbourVest Entities may disclose to their limited partners and prospective limited partners (including any agents of such limited partners or prospective limited partners), clients and applicable governmental agencies (a) the name and address of the Company, (b) the capital commitment and the remaining capital commitment, (c) the net asset value of such HarbourVest Entity's interest in the Company, (d) the amount of distributions that have been made to such HarbourVest Entity by the Company and the amount of contributions that have been made by such HarbourVest Entity to the Company, (e) such ratios and performance information calculated by such HarbourVest Entity using the information in clauses (a) through (d) above, including the ratio of net asset value plus distributions to contributions (i.e., the "multiple") and such HarbourVest Entity's internal rate of return with respect to its investment in the Company, and (f) tax information with respect to the Company.

8. DIVIDENDS

- 8.1 The Company agrees that it shall not, and the Portfolio Manager agrees it shall not cause the Company to, make any dividends except pursuant to the section titled “Summary—Dividend Policy” of the Offering Memorandum.

9. TERM OF THE COMPANY

- 9.1 Each Party agrees to cause the winding up and dissolution of the Company after the ten year anniversary of the date hereof (the “**Term**”); provided that the Portfolio Manager, in its reasonable discretion, may postpone dissolution of the Company for up to 180 days in order to facilitate orderly liquidation of the investments; provided, further, that the Term shall be automatically extended for any amount of time for which the Investment Period may be extended.
- 9.2 Notwithstanding the foregoing, the Term may be extended with the consent of the Portfolio Manager and the Advisory Board for up to two successive periods of one year each.

10. ERISA MATTERS

- 10.1 The Portfolio Manager, the Company and each Member shall use their reasonable best efforts to conduct the affairs and operations of the Company so as to limit investment in the Company by “benefit plan investors” (within the meaning of the DOL Regulations as modified by section 3(42) of ERISA) to less than the U.S. Plan Threshold. In the event the U.S. Plan Threshold is met or exceeded, the Portfolio Manager, on behalf of the Company, may require any Non-Qualified Holder that is a U.S. Plan Investor to sell or transfer their Shares to a person qualified to own the same that is not a U.S. Plan Investor within 30 days and within such 30 days and to provide the Company with satisfactory evidence of such sale or transfer such that such sale or transfer, together with other sale or transfers pursuant to this Clause, would result in the investment in the Company by “benefit plan investors” (within the meaning of the DOL Regulations as modified by section 3(42) of ERISA) to be less than the U.S. Plan Threshold. Where the conditions above are not satisfied within 30 days after the serving of the notice to transfer, such Non-Qualified Holder will be deemed, upon the expiration of such 30 days, to have forfeited their Shares.

11. TAX MATTERS

- 11.1 PFIC. For each fiscal year of the Company, the Company will no later than 120 days after the end of such fiscal year, commencing with the first fiscal year for which the Company is determined to be a PFIC (a “passive foreign investment company”), furnish to each of the

HarbourVest Entities (x) all information necessary to permit such HarbourVest Entity or any of its partners to complete United States Internal Revenue Service Form 8621 with respect to their interests in the Company and (y) a PFIC Annual Information Statement under section 1295(b) of the Code with respect to the Company; provided that if the Company is unable to furnish such final information and Statement within such 120 days, then the Company shall use its reasonable best efforts to furnish estimates of such information and Statement on or before the 120th day after the end of such fiscal year.

- 11.2 CFC. The Company shall furnish to each of the HarbourVest Entities within 120 days after the end of each fiscal year of the Company, a United States Internal Revenue Service Form 5471 for such fiscal year, completed for all information concerning the Company required to be filed by such HarbourVest Entity or any of its partners (i.e., all portions applicable to the relevant category of filer other than page 1 items A-D and page 2 Schedule B), to the extent such Form 5471 is required to be filed by such HarbourVest Entity or any of its partners; provided that if the Company is unable to furnish such final information within such 120 days, then the Company shall use its reasonable best efforts to furnish estimates of such information on or before the 120th day after the end of each fiscal year.
- 11.3 Other Tax Information. The Company shall furnish to each of the HarbourVest Entities (a) within 120 days after the end of each fiscal year of the Company such other information reasonably requested by the HarbourVest Entities that any HarbourVest Entity may require in order for it or any of its partners to comply with its U.S. federal income tax reporting obligations with respect to its interest in the Company; provided that if the Company is unable to furnish such final information within such 120 days, then the Company shall use its reasonable best efforts to furnish estimates of such information on or before the 120th day after the end of such fiscal year and (b) promptly upon request such other information reasonably requested by such HarbourVest Entity in order to withhold tax or to file tax returns and reports or to furnish tax information to any of its partners with respect to the Company.
- 11.4 Withholding and Other Taxes. The Company will use reasonable best efforts to acquire investments that will not result in withholding or other taxes being imposed directly or indirectly on the Company by any jurisdiction with respect to income or distributions from such investments.

12. AMENDMENTS TO CERTAIN AGREEMENTS

- 12.1 The Portfolio Manager and the Company shall not amend or terminate, or agree to amend or terminate, the Memorandum or Articles of Incorporation of the Company or that certain Portfolio Management Agreement between the Portfolio Manager and the Company dated as of the date hereof (the "**Management Agreement**") without the consent of the Parties.
- 12.2 The Portfolio Manager agrees that it shall not assign its rights, duties and obligations under the Management Agreement without the consent of the Members totalling in the aggregate more than seventy-five percent (75%) of the Company. Notwithstanding the foregoing, the Portfolio Manager may, without the consent of the Members, assign any of its rights or obligations under the Management Agreement to an Affiliate; provided that such Affiliate (A) has demonstrated ability, whether as an entity or by its personnel, to professionally and competently perform duties similar to those imposed upon the Portfolio Manager pursuant to the Management Agreement, (B) has the legal right and capacity to act as Portfolio Manager thereunder and (C) shall not cause the Company or the pool of collateral to become required to register under the provisions of the Investment Company Act and such action does not cause the company to be subject to tax in any jurisdiction outside of its jurisdiction of incorporation.
- 12.3 The Company agrees that it shall not hire any portfolio manager without the consent of the Parties and such new portfolio manager shall be required to join and abide by this Agreement.

13. FINANCIAL REPORTS

- 13.1 The books and records of account of the Company shall be audited as of the end of each fiscal year of the Company by a nationally recognized independent public accounting firm selected by

the Portfolio Manager that is registered with, and subject to regular inspection as of the commencement of the professional engagement period, and as of each calendar year-end, by, the Public Company Accounting Oversight Board in accordance with its rules. During the Term, the Portfolio Manager or the Company shall prepare and mail, deliver by fax, email or other electronic means or otherwise make available a financial report (audited in the case of a report sent as of the end of a fiscal year and unaudited in the case of a report sent as of the end of a quarter) to each Member on or before the 120th day after the end of each fiscal year and the 45th day after the end of each of the first three quarters of each fiscal year, setting forth for such fiscal year or quarter (a) the assets and liabilities of the Company as of the end of such fiscal year or quarter; (b) the net profit or net loss of the Company for such fiscal year or quarter; and (c) such Member's closing capital account balance as of the end of such fiscal year or quarter; provided that if the Portfolio Manager or the Company is unable to furnish final information with respect to any of the above, then the Portfolio Manager or the Company shall use its reasonable best efforts to furnish estimates of such information on or before the 120th day after the end of each fiscal year and the 45th day after the end of the first three quarters of each fiscal year. On or before the 60th day after the end of each fiscal year, the Portfolio Manager or the Company shall provide to each Member an unaudited draft of the financial report for such fiscal year.

- 13.2 After the end of each fiscal year or quarter, the Portfolio Manager or the Company shall cause to be delivered to the Advisory Board a reasonably detailed summary of the expenses incurred by the Company during such period.

14. TERMINATION AND LIQUIDATION

- 14.1 Save as provided for in Clause 13.2, this Agreement shall terminate:
- 14.1.1 when one Party holds all the Shares;
 - 14.1.2 when a resolution is passed by the Company's Members or creditors, or an order made by a court or other competent body or person instituting a process that shall lead to the Company being wound up and its assets being distributed among the Company's creditors, Members or other contributors; or
 - 14.1.3 with the written consent of all the Parties.
- 14.2 The following provisions of this Agreement remain in full force after termination: Clause 1 (Interpretation), Clause 7 (Confidentiality), this Clause, Clause 14 (Whole Agreement), Clause 16 (Assignments), Clause 17 (Variation and Waiver), Clause 18 (Service of Notice), Clause 19 (General) and Clause 21 (Governing Law and Jurisdiction).
- 14.3 Termination of this Agreement shall not affect any rights or liabilities that the Parties may have accrued under it.
- 14.4 Where the Company is to be wound up and its assets distributed, the Parties shall agree a suitable basis for dealing with the interests and assets of the Company and shall endeavour to ensure that:
- 14.4.1 all existing contracts of the Company are performed to the extent that there are sufficient resources;
 - 14.4.2 the Company shall not enter into any new contractual obligations;
 - 14.4.3 the Company is dissolved and its assets are distributed as soon as practical; and
 - 14.4.4 any other proprietary information belonging to or originating from a Party shall be returned to it by the other Parties.

15. WHOLE AGREEMENT

15.1 This Agreement, and any documents referred to in it, constitute the whole agreement between the Parties and supersede any arrangements, understanding or previous agreement between them relating to the subject matter they cover.

15.2 Each Party acknowledges that in entering into this Agreement, and any documents referred to in it, it does not rely on, and shall have no remedy in respect of, any statement, representation, assurance or warranty of any person other than as expressly set out in this Agreement or those documents.

15.3 Nothing in this Clause 14 operates to limit or exclude any liability for fraud.

16. STATUS OF AGREEMENT

16.1 Each Party shall, to the extent that it is able to do so, exercise its voting rights and other powers in relation to the Company to procure that the provisions of this Agreement are properly and promptly observed and given full force and effect according to the spirit and intention of the Agreement.

16.2 If any provision in the memorandum of incorporation of the Company or the Articles conflicts with any provision of this Agreement, the provisions of this Agreement shall prevail as between the Parties. Each of the Parties shall, to the extent that it is able to do so, exercise its voting rights and other powers in relation to the Company to procure the modification of the memorandum of association of the Company or the Articles (as the case may be) in order to eliminate the conflict, but this Agreement shall not itself constitute a modification of the memorandum of association of the Company or the Articles.

17. ASSIGNMENTS

Save as expressly permitted by this Agreement, no person may assign, or grant any security interest over, any of its rights under this Agreement or any document referred to in it without the prior written consent of the Parties.

18. VARIATION AND WAIVER

18.1 A variation of this Agreement shall be in writing and signed by or on behalf of the Parties.

18.2 A waiver of any right under this Agreement is only effective if it is in writing and it applies only to the person to which the waiver is addressed and the circumstances for which it is given.

18.3 A person that waives a right in relation to one person, or takes or fails to take any action against that person, does not affect its rights against any other person.

19. SERVICE OF NOTICE

19.1 Any notice required to be given by any of the Parties may be sent by post or facsimile to the address and facsimile number of the addressee as set out in this Agreement, in either case marked for the attention of the relevant person named below, or to such other address and/or facsimile number and/or marked for the attention of such other person as the addressee may from time to time have notified for the purposes of this Clause.

19.1.1 to the Company:
Address:
First Floor, Dorey Court, Admiral Park
St Peter Port, Guernsey GY1 6HJ
Channel Islands

19.1.2 to CLO Holdco:

Address:
c/o Highland Capital Management, L.P.
300 Crescent Court, Suite 700
Dallas, TX 75201
Attn: General Counsel
Tel: +1 (972) 628-4100
Email: Notices@highlandcapital.com

- 19.1.3 to any HarbourVest Entity:
Address:
c/o HarbourVest Partners, LLC
One Financial Center, 44th Floor
Boston, MA 02111
USA
Attn: Michael Pugatch
Tel: +1 (617) 348-3712
F
Email: mpugatch@harbourvest.com
- 19.1.4 to any other Party: by post or hand delivery only to the address specified in the register of members of the Company.

- 19.2 Communications sent by post shall be deemed to have been received 24 hours after posting. Communications sent by facsimile transmission shall be deemed to have been received at the time the transmission has been received by the addressee **PROVIDED THAT** if the facsimile transmission, where permitted, is received after 5.00pm or on a day which is not a Business Day, it shall be deemed to have been received 11.00am the Business Day following thereafter.
- 19.3 In proving service by post it shall only be necessary to prove that the notice was contained in an envelope which was duly addressed and posted in accordance with this Clause and in the case of facsimile transmission it shall be necessary to prove that the facsimile was duly transmitted to the correct number.

20. GENERAL

- 20.1 Each of the Parties hereby agree not to enter into or abide by any agreement whether written or oral with any one or more of the other Parties in respect of the voting of Shares or the submission of Member resolutions to any Members for voting by them, or otherwise to direct or influence, or attempt to direct or influence, the day-to-day management of the Company, either directly or indirectly, other than in order to comply with the other terms of this Agreement or the Articles. In this regard, each of the Parties agrees to not to direct or influence or to attempt to direct or influence any of the Directors through any employment relationship that the Directors may have outside of the Company other than in order to comply with the other terms of this Agreement or the Articles. Each of the Parties hereby agree that this provision shall continue to apply to them whether or not they are or remain a Member.
- 20.2 Unless otherwise provided, all costs in connection with the negotiation, preparation, execution and performance of this Agreement, shall be borne by the Party that incurred the costs.
- 20.3 The Parties are not in partnership with each other and there is no relationship of principal and agent between them.
- 20.4 All transactions entered into between any Party and the Company shall be conducted in good faith and on the basis set out or referred to in this Agreement or, if not provided for in this Agreement, as may be agreed by the Parties and, in the absence of such agreement, on an arm's length basis.
- 20.5 Each Party shall at all times act in good faith towards the other Parties and shall use all reasonable endeavours to ensure that this Agreement is observed.

20.6 Each Party shall promptly execute and deliver all such documents, and do all such things, as the other Parties may from time to time reasonably require for the purpose of giving full effect to the provisions of this Agreement.

20.7 This Agreement may be executed in any number of counterparts, each of which is an original and which together have the same effect as if each Party had signed the same document. This Agreement may not be amended except with the consent of each Party.

21. STATUS OF AGREEMENT

21.1 The Parties shall, when necessary, exercise their powers of voting and any other rights and powers they have to amend, waive or suspend a conflicting provision in the Articles to the extent necessary to permit the Company and its Business to be administered as provided in this Agreement.

21.2 If there is an inconsistency between any of the provisions of this agreement and the provisions of the Articles, the provisions of this agreement shall prevail as between the Parties.

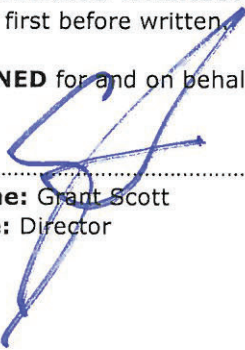
22. GOVERNING LAW AND JURISDICTION

This Agreement shall be governed by and construed in accordance with the laws of the Island of Guernsey and each of the Parties submits to the non-exclusive jurisdiction of the Royal Courts of the Island of Guernsey.

[Signature Page Follows.]

IN WITNESS WHEREOF the Parties hereto have caused this Agreement to be executed the day and year first before written.

SIGNED for and on behalf of **CLO HOLDCO, LTD.**

By:.....


Name: Grant Scott

Title: Director

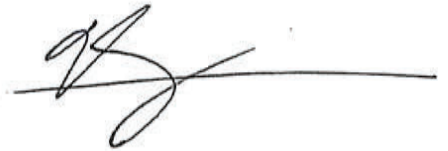
SIGNED for and on behalf of
QUEST IRA, INC.
FBO LEE B. PARKER III, ACCT. # 3058311

By:.....
Name:
Title:

SIGNED for and on behalf of
QUEST IRA, INC.
FBO HUNTER COVITZ, ACCT. # 1469811

By: 
Name: Emmanuel Magee
Title: Transaction Supervisor

Read & approved



SIGNED for and on behalf of
QUEST IRA, INC.
FBO JON POGLITSCH, ACCT. # 1470612

By:.....
Name:
Title:

SIGNED for and on behalf of
QUEST IRA, INC.
FBO NEIL DESAI, ACCT. # 3059211

By:.....
Name:
Title:

SIGNED for and on behalf of
HIGHLAND CAPITAL MANAGEMENT, L.P.

By: Strand Advisors, Inc.,
its General Partner



By:

Name: James Dondero

Title: President

SCHEDULE

Adherence Agreement

THIS ADHERENCE AGREEMENT is made on [●] 200[●]

BETWEEN:

- (1) [●] of [●] (the "**Covenantor**");
- (2) CLO HOLDCO, LTD. of [] (a "**Member**");
- (3) [●] of [] (a "**Member**");
- (4) [●] of [] (a "**Member**");
- (5) HIGHLAND CLO FUNDING, LTD., with registration number 60120 whose registered office is at First Floor, Dorey Court, Admiral Park, St Peter Port, Guernsey GY1 6HJ, Channel Islands (the "**Company**")
- (6) HIGHLAND HCF ADVISOR, LTD., registered address is at Maples Corporate Services Limited, PO Box 309, Ugland House, Grand Cayman, KY1-1104, Cayman Islands (the "**Portfolio Manager**").

RECITAL

This Agreement is supplemental to the members agreement made on November 15 2017 between the Members, the Portfolio Manager and the Company (the "**Members Agreement**").

IT IS HEREBY AGREED as follows:

1. The Covenantor hereby confirms that he has been supplied with a copy of the Members Agreement and hereby covenants with each of the parties thereto to observe, perform and be bound by all the terms of the Members Agreement as if it were a party thereto.
2. Each of the other parties to the Members Agreement hereby covenants with the Covenantor that the Covenantor shall be entitled to the benefit of the terms of the Members Agreement as if he were a party thereto.
3. This Agreement shall be governed by and construed in accordance with Guernsey law.

IN WITNESS of which this Agreement has been executed by the Covenantor and each of the parties to the Members Agreement on the date shown above.

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

In Re: Highland Capital Management, L.P § Case No. **19-34054-SGJ11**

Charitable DAF Fund, L.P et al

Appellant

§

vs.

§

21-03067

Highland Capital Management, L.P

§

Appellee

§

3:23-CV-01503-B

[167] Order granting Defendant Highland Capital Management, L.P.'s Renewed motion to dismiss adversary proceeding (related document # [122](#)) Entered on 6/25/2023.

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APPELLANT RECORD

SBAITI & COMPANY PLLC
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Jonathan Bridges (TX Bar No. 24028835)
J.P. Morgan Chase Tower
2200 Ross Avenue, Suite 4900W
Dallas, TX 75201
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*Counsel for The Charitable DAF Fund, L.P.
and CLO Holdco, Ltd.*

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

In re:	§ Chapter 11
	§
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§ Case No. 19-34054-sgj11
	§
Debtor.	§
	§
CHARITABLE DAF FUND, L.P. AND CLO	§
HOLDCO, LTD., DIRECTLY AND DERIVATIVELY	§
	§
Plaintiffs,	§ Adversary Proceeding No.
	§
vs.	§ 21-03067-sgj11
	§
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§
HIGHLAND HCF ADVISOR, LTD., AND	§
HIGHLAND CLO FUNDING LTD., NOMINALLY	§
	§
Defendant.	§
	§

INDEX

**APPELLANTS' SECOND AMENDED STATEMENT OF ISSUES
AND DESIGNATION OF RECORD ON APPEAL**

Pursuant to Rules 8009(a)(1)(A)-(B) and (a)(4) of the Federal Rules of Bankruptcy Procedure, The Charitable DAF Fund, L.P. and CLO Holdco, Ltd. ("Appellants") hereby designate the following items to be included in the record and identify the following issues with respect to

their appeal of the Order Granting Defendant Highland Capital Management, L.P.'s "Renewed Motion to Dismiss Complaint" [Adv. Proc. Doc. No. 122] which was entered by the United States Bankruptcy Court for the Northern District of Texas on June 25, 2023.

I. STATEMENT OF ISSUES TO BE PRESENTED ON APPEAL

- Whether the Bankruptcy Court had jurisdiction to rule on Highland Capital Management L.P.'s Renewed Motion to Dismiss Complaint
- Whether the Renewed Motion to Dismiss Complaint was improperly granted

II. DESIGNATION OF ITEMS TO BE INCLUDED IN THE RECORD

Vol. 1
000001

1. Notice of Appeal for Bankruptcy Case Adversary Proceeding No. 21-03067-sgj11 [Doc. 168].

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2. The judgment, order, or decree appealed from: Memorandum Opinion and Order Granting Defendant Highland Capital Management, L.P.'s "Renewed Motion to Dismiss Complaint" [Adv. Proc. Doc. No. 122] [Doc. 167].

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3. Docket Sheet kept by the Bankruptcy Clerk.

4. Documents listed below and as described in the Docket Sheet for Bankruptcy Case Proceeding No. 21-03067-sgj.

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No.	Date Filed	Docket No.	Description/Document Text
1	9/29/21	1	(36 pgs; 3 docs) Adversary case 21-03067. ORDER REFERRING CASE NUMBER 21-CV-0842-B from U.S District Court for the Northern District of Texas, Dallas Division to U.S. Bankruptcy Court for Northern District of Texas, Dallas Division. Complaint by Charitable DAF Fund, LP, CLO Holdco, Ltd. against Highland Capital Management, LP, Highland HCF Advisor Ltd., Highland CLO Funding, Ltd. Fee Amount \$350 (Attachments: # 1 Original Complaint # 2 Docket Sheet from 3:20-cv-0842-B) Nature(s) of suit: 02 (Other (e.g. other actions that would have been brought in state court if unrelated to bankruptcy)). (Okafor, M.)
2	9/29/21	2	(1 pg) Supplemental Document (cover sheet) by CLO Holdco Ltd., Charitable DAF Fund (RE: related document(s)1 Adversary case 21-03067) [ORIGINALLY FILED IN 21-CV-0842 AS #2 ON 04/13/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)

Vol. 2 000139 000232 000239 000270 Thru Vol. 6	3	9/29/21	6	(93 pgs; 6 docs) MOTION for Leave to File First Amended Complaint filed by CLO Holdco Ltd., Charitable DAF Fund LP (Attachments: # 1 Exh 1_First Amended Complaint # 2 Exh 2_Motion for Authorization to Retain James Seery # 3 Exh 3_Order Approving Retention of James Seery # 4 Exh 4_Order Approving Settlement # 5 Proposed Order) (Bridges, Jonathan) (Entered: 04/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #6 ON 04/19/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
	4	9/29/21	22	(7 pgs; 2 docs) MOTION for an Order to Enforce the Order of Reference filed by Highland Capital Management LP. (Attachments: # 1 Exhibit(s) A--Proposed Order) (Annable, Zachery) Modified text on 5/20/2021 (mjr). (Entered: 05/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #22 ON 05/19/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
	5	9/29/21	23	(31 pgs) Brief/Memorandum in Support filed by Highland Capital Management LP re: 22 MOTION for an Order to Enforce the Order of Reference. (Annable, Zachery) Modified text on 5/20/2021 (mjr).(Entered: 05/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #23 ON 05/19/2021 IN U.S.DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
	6	9/29/21	24	(926 pgs; 29 docs) Appendix in Support filed by Highland Capital Management LP re: 23 Brief/Memorandum in Support. (Attachments: # 1 Appendix 1 # 2 Appendix 2 # 3 Appendix 3 # 4 Appendix 4 # 5 Appendix 5 # 6 Appendix 6 # 7 Appendix 7 # 8 Appendix 8 # 9 Appendix 9 # 10 Appendix10 # 11 Appendix 11 # 12 Appendix 12 # 13 Appendix 13 # 14 Appendix 14 # 15 Appendix 15 # 16 Appendix 16 # 17 Appendix 17 # 18 Appendix 18 # 19 Appendix 19 # 20 Appendix 20 # 21 Appendix 21# 22 Appendix 22 # 23 Appendix 23 # 24 Appendix 24 # 25 Appendix 25 # 26 Appendix 26 # 27 Appendix 27 # 28 Appendix 28) (Annable, Zachery) Modified linkage and text on 5/20/2021 (mjr). (Entered:05/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #24 ON 05/19/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
Vol. 7 001196	7	9/29/21	26	(7 pgs; 2 docs) MOTION to Dismiss Complaint filed by Highland Capital Management LP (Attachments: # 1 Exhibit(s) A--Proposed Order) (Annable, Zachery) Modified text on 5/28/2021 (jmg).(Entered: 05/27/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #26 ON 05/27/2021 IN U.S.DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)

Vol. 7 001203 thru Vol. 8	8	9/29/21	28	(508 pgs; 14 docs) Appendix in Support filed by Highland Capital Management LP (Attachments: # 1 Appendix 1 # 2 Appendix 2 # 3 Appendix 3 # 4 Appendix 4 # 5 Appendix 5 # 6 Appendix 6 # 7 Appendix 7 # 8 Appendix 8 # 9 Appendix 9 # 10 Appendix 10 # 11 Appendix 11 # 12 Appendix 12 # 13 Appendix 13) (Annable, Zachery) (Entered: 05/27/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #28 ON 05/27/2021 IN U.S. DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
Vol. 9 001711	9	9/29/21	33	(1 pg) Amended Civil Cover Sheet by CLO Holdco Ltd, Charitable DAF Fund LP. Amendment to 2 Supplemental Document. (Sbaiti, Mazin) Modified text on 6/23/2021 (mjr). (Entered: 06/22/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #33 ON 06/22/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001712	10	9/29/21	36	(26 pgs) RESPONSE filed by CLO Holdco Ltd, Charitable DAF Fund LP re: 22 MOTION for an Order to Enforce the Order of Reference (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #36 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001738	11	9/29/21	37	(22 pgs) Appendix in Support filed by CLO Holdco Ltd, Charitable DAF Fund LP re 36 Response/Objection Response to Motion for an Order to Enforce the Order of Reference (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #37 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001760	12	9/29/21	38	(45 pgs) RESPONSE filed by CLO Holdco Ltd, Charitable DAF Fund LP re: 26 MOTION to Dismiss (Defendant Highland Capital Management, L.P.'s Motion to Dismiss Complaint) (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #38 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001805	13	9/29/21	39	(88 pgs) Appendix in Support filed by CLO Holdco Ltd, Charitable DAF Fund LP re 38 Response/Objection to Defendant Highland Capital Management, L.P.'s Motion to Dismiss Complaint (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #39 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001893	14	9/29/21	42	(12 pgs) REPLY filed by Highland Capital Management LP re: 22 MOTION for an Order to Enforce the Order of Reference (Annable, Zachery) (Entered: 07/13/2021) [ORIGINALLY FILED IN 21-CV-0842AS #42 ON 07/13/2021 IN U.S.

			DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
VOL. 9	15	9/29/21	43 (852 pgs) Appendix in Support filed by Highland Capital Management LP re: 42 Reply. (Annable, Zachery) Modified text on 7/14/2021 (mjr). (Entered: 07/13/2021) [ORIGINALLY FILED IN 21-CV-0842AS #43 ON 07/13/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001905 thru Vol. 13	16	9/29/21	45 (21 pgs) REPLY filed by Highland Capital Management LP re: 26 MOTION to Dismiss (Defendant Highland Capital Management, L.P.'s Motion to Dismiss Complaint) (Annable, Zachery) (Entered: 07/13/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #44 ON 07/13/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002757	17	9/29/21	57 (7 pgs; 2 docs) MOTION to Dismiss and Joinder in Motion to Dismiss of Highland Capital Management, L.P. filed by Highland CLO Funding Ltd. (Attachments: # 1 Proposed Order) Attorney Paul R Bessette added to party Highland CLO Funding Ltd (pty:dft) (Bessette, Paul) (Entered: 08/30/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #57 ON 08/30/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002778	18	9/29/23	58 (12 pgs) Brief/Memorandum in Support filed by Highland CLO Funding Ltd. re 57 MOTION to Dismiss and Joinder in Motion to Dismiss of Highland Capital Management, L.P. (Bessette, Paul) (Entered: 08/30/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #58 ON 08/30/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002785	19	9/29/23	59 (80 pgs; 5 docs) Appendix in Support filed by Highland CLO Funding Ltd re 58 Brief/Memorandum in Support of Motion (Attachments: # 1 Exhibit(s) A - Jackson v Dear # 2 Exhibit(s) B - Prudential Assurance v. Newman # 3 Exhibit(s) C - Harbourvest Settlement Agreement # 4 Exhibit(s) D - Boleat Declaration) (Bessette, Paul) (Entered: 08/30/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #59 ON 08/30/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002797	20	9/29/21	64 (1 pg) ORDER OF REFERENCE: Pursuant to 28 U.S.C. § 157 and this District's Miscellaneous Order No. 33, this case is hereby REFERRED to Judge Stacey G. C. Jernigan of the United States Bankruptcy Court for the Northern District of Texas, Dallas Division, to be adjudicated as a matter related to the consolidated Chapter 11 Bankruptcy of Highland Capital Management, L.P., Chapter 11 Case No.19-34054. (Ordered by Judge Jane J. Boyle
002877			

Vol. 14 002878 002883 thru Vol. 16				on 9/20/2021) (svc) (Entered: 09/20/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #64 ON 09/20/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
	21	10/19/21	66	(5 pgs) Notice of hearing filed by Defendant Highland Capital Management, LP (RE: related document(s) 26 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP, 47 Motion to strike document filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 55 Motion to abate filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) Hearing to be held on 11/23/2021 at 09:30 AM at https://us-courts.webex.com/meet/jerniga for 26 and for 47 and for 55, (Annable, Zachery)
	22	11/22/21	71	(509 pgs; 2 docs) Witness and Exhibit List <i>for Hearing on November 23, 2021</i> filed by Defendant Highland Capital Management, LP (RE: related document(s) 26 Motion to dismiss adversary proceeding). (Attachments: # 1 Exhibits 1-13) (Hayward, Melissa)
Vol. 17 003392 003394 003583 003585 003611	23	11/22/21	72	(2 pgs) Witness List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 26 Motion to dismiss adversary proceeding, 47 Motion to strike (related document(s): 43 Document), 55 Motion to abate (related document(s) 1 Complaint), 69 Motion to abate <i>Plaintiffs' Amended Motion to Stay All Proceedings</i> (related document(s) 55 Motion to abate (related document(s) 1 Complaint))). (Sbaiti, Mazin)
	24	11/22/21	73	(189 pgs; 4 docs) Exhibit List <i>for November 23, 2021 hearing</i> filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 47 Motion to strike (related document(s): 43 Document), 55 Motion to abate (related document(s) 1 Complaint)). (Attachments: # 1 Exhibit 1_Defendant's Memorandum of Law in Support of Motion for Reconsideration # 2 Exhibit 2_Highland Memorandum in Support of Motion to Dismiss # 3 Exhibit 3_Order (I) Confirming Fifth Amended Plan of Reorganization of Highland) (Sbaiti, Mazin)
	25	12/7/21	80	(2 pgs) Order granting Highland CLO Funding, Ltd.'s motion to dismiss adversary as a party with prejudice (related document 57) Entered on 12/7/2021. (Okafor, Marcey) Modified text on 3/11/2022 (Okafor, Marcey).
	26	3/11/22	99	(26 pgs) Memorandum of Opinion and order granting motion to dismiss the adversary proceeding (RE: related document(s) 26 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP). Entered on 3/11/2022 (Okafor, Marcey)
	27	3/11/22	100	(26 pgs) Order granting motion to dismiss adversary proceeding with prejudice (related document #26) Entered on 3/11/2022. (Okafor, Marcey)

Vol. 18 003637	28	3/21/22	104	(29 pgs) Notice of appeal. Fee Amount \$298 filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 100 Order on motion to dismiss adversary proceeding). Appellant Designation due by 04/4/2022. (Sbaiti, Mazin)
003666	29	5/26/22	120	(177 pgs; 2 docs) Support/supplemental document <i>Motion to Supplement Appellate Record</i> filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 111 Appellant designation). (Attachments: # 1 Amended Transcript of January 14, 2021 Hearing) (Sbaiti, Mazin)
003843	30	6/9/22	121	(1 pg) DISTRICT COURT Order: Case 3:22-00695-B is hereby transferred to the docket of the Honorable Judge Jane J. Boyle for consolidation with The Charitable DAF Fund LP, et al. v. Highland Capital Management LP, Case No. 3:21-cv-3129-N. Judge Karen Gren Scholer no longer assigned to case.(RE: related document(s) 86 Notice of appeal filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 104 Notice of appeal filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Entered on 6/9/2022 (Whitaker, Sheniqua) (Entered: 06/10/2022)
003844	31	10/24/22	122	(7 pgs) Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP (Annable, Zachery)
003851	32	10/14/22	123	(31 pgs) Brief in support filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Annable, Zachery)
Vol. 19 003882 Thru Vol 20	33	10/14/22	124	(513 pgs; 15 docs) Support/supplemental document (<i>Appendix in Support of Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7 # 8 Exhibit 8 # 9 Exhibit 9 # 10 Exhibit 10 # 11 Exhibit 11 # 12 Exhibit 12 # 13 Exhibit 13 # 14 Exhibit 14) (Annable, Zachery)
Vol. 21 004395	34	10/27/22	126	(5 pgs) Notice of hearing (<i>Notice of Hearing and Briefing Schedule on Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP). Hearing to be held on 12/8/2022 at 09:30 AM at https://us-courts.webex.com/meet/jerniga for 122. (Annable, Zachery)

Vol. 21 004400 004410 004442 Thru Vol. 22	35	11/18/22	128	(10 pgs) Motion for withdrawal of reference. Fee amount \$188, filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (Sbaiti, Mazin)
	36	11/18/22	129	(32 pgs) Response opposed to (related document(s): 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP) filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Sbaiti, Mazin)
	37	11/18/22	130	(254 pgs; 2 docs) Response opposed to (related document(s): 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP) filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Attachments: # 1 Appendix) (Sbaiti, Mazin)
Vol. 22 004696 004717 004732 004737 004742	38	9/2/22	131	(21 pgs) DISTRICT COURT MEMORANDUM OPINION AND ORDER: The Court REVERSES and REMANDS the bankruptcy court's Motion to Dismiss Order and AFFIRMS the bankruptcy courts Motion to Stay Order. re: appeal on Civil Action number: Case 3:22-00695-B consolidated with 3:21-CV-3129-B, (RE: related document(s) 81 Order on motion to abate, 100 Order on motion to dismiss adversary proceeding). Entered on 9/2/2022 (Whitaker, Sheniqua) (Entered: 11/29/2022)
	39	12/2/22	133	(15 pgs) Reply to (related document(s): 129 Response filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 130 Response filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) filed by Defendant Highland Capital Management, LP. (Annable, Zachery)
	40	12/7/22	135	(5 pgs) Notice of hearing filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP). Hearing to be held on 1/25/2023 at 01:30 PM at https://us-courts.webex.com/meet/jerniga for 122, (Annable, Zachery)
	41	12/7/22	136	(5 pgs) Notice of hearing filed by Defendant Highland Capital Management, LP (RE: related document(s) 128 Motion for withdrawal of reference filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Status Conference to be held on 1/25/2023 at 01:30 PM at https://us-courts.webex.com/meet/jerniga . (Annable, Zachery).
	42	12/9/22	138	(3 pgs) Response opposed to (related document(s): 128 Motion for withdrawal of reference. Fee amount \$188, filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) filed by Defendant Highland Capital Management, LP. (Annable, Zachery)

Vol. 22 004745	43	12/9/22	139	(25 pgs) Brief in support filed by Defendant Highland Capital Management, LP (RE: related document(s) 138 Response). (Annable, Zachery)
Vol. 23 004770	44	12/9/22	140	(280 pgs; 8 docs) Support/supplemental document (<i>Appendix in Support of Highland Capital Management, L.P.'s Response to Renewed Motion to Withdraw the Reference</i>) filed by Defendant Highland Capital Management, LP (RE: related document(s) 138 Response). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7) (Annable, Zachery)
Vol. 24 005050	45	12/16/22	144	(6 pgs) Reply to (related document(s): 138 Response filed by Defendant Highland Capital Management, LP) filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Sbaiti, Mazin)
005056 Thru Vol. 25.	46	1/23/23	145	(514 pgs; 15 docs) Witness and Exhibit List filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7 # 8 Exhibit 8 # 9 Exhibit 9 # 10 Exhibit 10 # 11 Exhibit 11 # 12 Exhibit 12 # 13 Exhibit 13 # 14 Exhibit 14) (Annable, Zachery)
Vol. 26 005570	47	1/23/23	146	(280 pgs; 8 docs) Witness and Exhibit List filed by Defendant Highland Capital Management, LP (RE: related document(s) 128 Motion for withdrawal of reference. Fee amount \$188.). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7) (Annable, Zachery)
Vol. 27 005850	48	1/23/23	147	(221 pgs; 7 docs) Witness and Exhibit List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Attachments: # 1 Exhibit 1_Excerpts from July 14, 2020 Hearing Transcript # 2 Exhibit 2_HCLOF Members Agreement Relating to the Company # 3 Exhibit 3_HarbourVest Settlement Agreement # 4 Exhibit 4_Order Approving Debtor's Settlement with HarbourVest # 5 Exhibit 5_HCLOF Offering # 6 Exhibit 6 Amended and Restated Investment Advisory Agreement) (Sbaiti, Mazin)
006071	49	1/23/23	148	(3 pgs) Witness and Exhibit List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 128 Motion for withdrawal of reference. Fee amount \$188.). (Phillips, Louis)
Vol. 28 006074	50	1/25/23	150	(56 pgs; 2 docs) Amended Witness and Exhibit List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 147 List (witness/exhibit/generic), 149 List (witness/exhibit/generic)). (Attachments: # 1 Exh 7_Testimony of Mark Patrick at June 8, 2021 hearing) (Sbaiti, Mazin)

Vol. 28 006130	51	1/25/23	152	(3 pgs) Notice of Appearance and Request for Notice by Louis M. Phillips filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Phillips, Louis)
	52	1/25/23	154	(1 pg) Court admitted exhibits date of hearing January 25, 2023 (RE: related document(s) 128 Motion for withdrawal of reference, filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) (COURT ADMITTED DEFENDANT'S EXHIBITS #1, #2, #3, #4, #5 & #6 OFFERED BY ATTY GREG DEMO). (Edmond, Michael) (Entered: 01/27/2023)
Vol. 32 006925 006942 006960	53	2/6/23	158	Report and recommendation to the U.S. District Court by U.S. Bankruptcy Judge. (RE: related document(s) 128 Motion for withdrawal of reference filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Entered on 2/6/2023 (Okafor, Marcey)
	54	2/6/23	161	(18 pgs) DISTRICT COURT Notice of transmission of report and recommendation in re: renewed motion to withdraw reference. Civil Case # 3:22-cv-02802-S. (RE: related document(s) 158 Report and recommendation to the U.S. District Court by U.S. Bankruptcy Judge. (RE: related document(s) 128 Motion for withdrawal of reference filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Entered on 2/6/2023) (Whitaker, Sheniqua)
	55	4/3/23	165	(1 pg) DISTRICT COURT ORDER: The Court GRANTS the 11 Joint Motion to Transfer Proceeding and Consolidate Before Original Court and the above-numbered case (3:22-cv-02802-S) is transferred to the docket of the Honorable Judge Jane Boyle: Civil case 3:21-cv-00842-B (order referring case). (RE: related document(s) 1 Complaint filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 143 Notice of transmission of motion to withdraw reference). Entered on 4/3/2023 (Whitaker, Sheniqua) Modified on 4/10/2023 (Whitaker, Sheniqua). (Entered: 04/10/2023)

TRANSCRIPTS

006961	56	11/24/21	78	(104 pgs) Transcript regarding Hearing Held 11-23-2021 RE: Motion Hearing. THIS TRANSCRIPT WILL BE MADE ELECTRONICALLY AVAILABLE TO THE GENERAL PUBLIC 90 DAYS AFTER THE DATE OF FILING. TRANSCRIPT RELEASE DATE IS 02/22/2022. Until that time the transcript may be viewed at the Clerk's Office or a copy may be obtained from the official court transcriber. Court Reporter/Transcriber Liberty Transcripts/Dipti Patel, Telephone number 847-848-4907. (RE: related document(s) 75 Hearing held on 11/23/2021. (RE: related document(s) 55 MOTION to Stay filed by CLO Holdco Ltd, Charitable DAF Fund LP (Sbaiti, Mazin) (Entered: 08/26/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #55 ON 08/26/2021 IN U.S.
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			<p>DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)) (Appearances: J. Pomerantz and J. Morris for Highland Defendants; J. Jordan and P. Bessett for HCLOF; M. Sbaiti for Plaintiffs. Nonevidentiary hearing. Motion denied. Mr. Pomerantz to upload order.), 76 Hearing held on 11/23/2021. (RE: related document(s) 47 Motion to strike 43 Appendix in support filed by CLO Holdco, Ltd., Charitable DAF Fund, LP (Bridges, Jonathan) Modified text on 7/16/2021 (mjr). (Entered: 07/15/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #47 ON 07/15/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)) (Appearances: J. Pomerantz and J. Morris for Highland Defendants; J. Jordan and P. Bessett for HCLOF; M. Sbaiti for Plaintiffs. Nonevidentiary hearing. Motion denied (Plaintiffs acknowledged complained-of Appendices it did not relate to Motion to Dismiss). Mr. Pomerantz to upload order.)). Transcript to be made available to the public on 02/22/2022. (Patel, Dipti)</p>
57	2/21/23	164	<p>164 (112 pgs) Transcript regarding Hearing Held 1/25/23 RE: HEARING ON DEFENDANT HIGHLAND CAPITAL MANAGEMENT L.P.'S RENEWED MOTION TO DISMISS COMPLAINT (122) AND STATUS CONFERENCE RE: MOTION FOR WITHDRAWAL OF REFERENCE FILED BY PLAINTIFF CLO HOLDCO, LTD., PLAINTIFF CHARITABLE DAF FUND, LP (128). THIS TRANSCRIPT WILL BE MADE ELECTRONICALLY AVAILABLE TO THE GENERAL PUBLIC 90 DAYS AFTER THE DATE OF FILING. TRANSCRIPT RELEASE DATE IS 05/22/2023. Until that time the transcript may be viewed at the Clerk's Office or a copy may be obtained from the official court transcriber. Court Reporter/Transcriber Dipti Patel, Telephone number 847-848-4907. (RE: related document(s) 155 Hearing held on 1/25/2023. (RE: related document(s) 122 Motion to dismiss adversary proceeding, (Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint) filed by Defendant Highland Capital Management, LP filed by Defendant Highland Capital Management, LP) (Appearances: J. Morris and G. Demo for Movants; L. Phillips and M. Sbaiti for Plaintiffs. Evidentiary hearing (appendices). Court took matter under advisement.), 156 Hearing held on 1/25/2023. (RE: related document(s) 128 Motion for withdrawal of reference. Fee amount \$188, filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) (Appearances: J. Morris and G. Demo for Movants; L. Phillips and M. Sbaiti for Plaintiffs. Evidentiary hearing (appendices). Court announced it will recommend denial to District Court. Court is working on Report & Recommendation.)). Transcript to be made available to the public on 05/22/2023. (Patel, Dipti)</p>

Dated: July 14, 2023

Respectfully submitted,

SBAITI & COMPANY PLLC

/s/ Mazin A. Sbaiti

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Counsel for Appellants

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was filed electronically through the Court's ECF system, which provides notice to all parties of interest, on this 14th day of July, 2023.

/s/ Mazin A. Sbaiti

Mazin A. Sbaiti

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*Counsel for The Charitable DAF Fund, L.P.
and CLO Holdco, Ltd.*

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

In re:	§	Chapter 11
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	Case No. 19-34054-sgj11
	§	
Debtor.	§	
	§	
CHARITABLE DAF FUND, L.P. AND CLO	§	
HOLDCO, LTD., DIRECTLY AND DERIVATIVELY	§	
	§	
Plaintiffs,	§	Adversary Proceeding No.
	§	
vs.	§	21-03067-sgj11
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	
HIGHLAND HCF ADVISOR, LTD., AND	§	
HIGHLAND CLO FUNDING LTD., NOMINALLY	§	
	§	
Defendant.	§	
	§	

PLAINTIFFS' LIST OF POTENTIAL WITNESSES

Plaintiffs respectfully submit their list of potential witnesses. In the event that the hearing on November 23, 2021 on Plaintiffs' Motion to Stay All Proceedings, Plaintiffs' Motion to Strike Reply Appendix, and Defendant Highland Capital Management, L.P.'s Motion to Dismiss Complaint ends up requiring testimony, Plaintiffs reserve the right to call the following witnesses:

- Steven Hastings, a financial expert who would testify that the value of the HCLOF interests owned by HarbourVest at the time of the settlement hearing were worth far in excess of the \$22.5 million reported at the hearing.
- Jane Jarcho, an expert in the industry and regulations of investment funds, and a former SEC enforcement attorney, would testify to the veracity of the allegations constituting violations of the Investment Advisers Act.

Dated: November 22, 2021

Respectfully submitted,

SBAITI & COMPANY PLLC

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Counsel for Plaintiffs

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

In re:	§	Chapter 11
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	Case No. 19-34054-sgj11
	§	
Debtor.	§	
	§	
<hr/>		
CHARITABLE DAF FUND, L.P. AND CLO	§	
HOLDCO, LTD., DIRECTLY AND DERIVATIVELY	§	
	§	
Plaintiffs,	§	Adversary Proceeding No.
	§	
vs.	§	21-03067-sgj11
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	
HIGHLAND HCF ADVISOR, LTD., AND	§	
HIGHLAND CLO FUNDING LTD., NOMINALLY	§	
	§	
Defendant.	§	
	§	

- *Plaintiffs' Motion to Stay All Proceedings* [AP Doc. 55]
- *Motion to Strike Reply Appendix* [AP Doc. 47]

- Defendant Highland Capital Management, L.P.'s Motion to Dismiss Complaint [AP Doc. 26]

Exh. No.	Description	Offered	Admitted
1	Defendant Highland Capital Management, L.P.'s Memorandum of Law in Support of Motion for Reconsideration in <i>The Charitable DAF Fund, L.P. v. Highland Capital Management, L.P.</i> , Case No. 3:21-cv-01710-N, In the United States District Court for the Northern District of Texas, Dallas Division [Doc. 9]		
2	Defendant Highland Capital Management, L.P.'s Memorandum of Law in Support of Its Motion to Dismiss in <i>The Charitable DAF Fund, L.P. v. Highland Capital Management, L.P.</i> , Case No. 3:21-cv-01710-N, In the United States District Court for the Northern District of Texas, Dallas Division [Doc. 12]		
3	Order (I) Confirming the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (As Modified) and (II) Granting Related Relief [Doc. 1943]		
4	Any document entered or filed in the Reorganized Debtor's Bankruptcy Case, including any exhibits thereto		
5	All exhibits necessary for impeachment and/or rebuttal purposes		
6	All exhibits identified by or offered by any other party at the hearing		

Dated: November 22, 2021

Respectfully submitted,

SBAITI & COMPANY PLLC

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TABLE OF AUTHORITIES

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Highland Capital Management, L.P. (“Highland”), the reorganized debtor and the putative defendant in the above-captioned action (the “Action”), submits this Memorandum of Law in support of its motion for reconsideration of the Stay Order (as defined below) that was recently entered by the Court without notice to, or opposition by, Highland (the “Motion”). In support of its Motion, Highland states as follows:

I. PRELIMINARY STATEMENT¹

1. Highland is a reorganized debtor, having emerged from bankruptcy on August 11, 2021, when its Plan went effective.

2. The Charitable DAF Fund, L.P. (“Plaintiff”), a “trust” that exists for the benefit of James Dondero, Highland’s former owner who is waging a never-ending grudge match against Highland’s stakeholders, commenced this action on July 22, 2021, but never served its Complaint.² Instead, on August 26, 2021, without notice to Highland, it filed *Plaintiffs’ Motion to Stay All Proceedings* [Docket No. 6] (the “Stay Motion”). On September 7, 2021, this Court entered an electronic order granting the unopposed Stay Motion [Docket No. 7] (the “Stay Order”).

3. The Stay Motion was just another piece of Mr. Dondero’s coordinated litigation strategy against Highland, its stakeholders, and its judicially approved fiduciaries to waste resources, delay adjudication of pending disputes, and impede the wind-down of Highland’s estate pursuant to the terms of its confirmed Plan.³

¹ All capitalized terms used but not defined in this section have the meanings given to them below.

² Plaintiff filed the Complaint ostensibly to recover damages it incurred from Highland’s mismanagement of the Highland Multi Strategy Credit Fund, L.P. (“MSCF”) during Highland’s bankruptcy. Plaintiff has no interest in MSCF.

³ Exhibit 1 (Appx. 1-15) to the Appendix lists the substantial litigation commenced or caused by Mr. Dondero and his controlled entities in furtherance of his strategy of harassment. As set forth in Exhibit 2 to the Appendix (Appx. 16-19), **the Stay Motion is one of nineteen motions for a continuance, stay, or abatement (exclusive of the motions to stay the Confirmation Order) filed by Mr. Dondero and his controlled entities since the entry of the Confirmation Order** – each of which seeks to delay final resolution of several pending lawsuits and appeals, most of which (like this action) they commenced.

4. Pursuant to **Federal Rule of Civil Procedure 59(a)** (“Rule 59”), the Court should reopen the Stay Order, amend its findings, and enter a new order denying the Stay Motion because the Stay Motion was never served (and Highland was therefore never given an opportunity to respond to the relief requested in the Stay Motion) and Plaintiff has mischaracterized the underlying facts.

5. In context, Plaintiff failed to satisfy its heavy burden of showing the extraordinary remedy of a stay is warranted. Indeed, Plaintiff did not even address the four-pronged test routinely applied to a request for a stay pending appeal in the Fifth Circuit. For example, (i) Plaintiff *cannot* succeed on the merits because it is not a party to the underlying appeal, (ii) there is no irreparable harm in the absence of a stay, and (iii) a stay would not serve the public interest.

6. Plaintiff did not object to or appeal the Confirmation Order, yet Plaintiff’s Stay Motion is premised on the pending appeals to which it is not a party. Further, and significantly, the Bankruptcy Court, the United States District Court, and the Fifth Circuit Court of Appeals previously denied the motions to stay the Confirmation Order that were filed by the actual Appellants (each of which is owned and/or controlled by Mr. Dondero).⁴ There is no basis for Plaintiff to effectively obtain a stay of the Confirmation Order – particularly after the actual Appellants were unable to obtain a stay pending their own appeal of the Confirmation Order. Finally, Plaintiff’s reliance on certain Plan provisions, such as the Injunction Provision referenced above, is misplaced. While Highland maintains that this Action ultimately belongs in the Bankruptcy Court based on, among other reasons, the Injunction Provision, the extraordinary remedy of a stay pending appeal of the Confirmation Order has no application, or relevance, to the

⁴ The only parties appealing the Confirmation Order are the Appellants, which are Mr. Dondero and entities he owns and/or controls. Ex. 3, Appx. 40. (“[T]he Bankruptcy Court considers them all to be marching pursuant to the orders of Mr. Dondero”).

II. RELEVANT BACKGROUND

B. The Plan and Confirmation Order

003402

Injunction

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

Confirmation Order at 76-78 (Ex. 3, Appx. 96-98), and Ex. A (Plan) at 50-51 (Ex. 3, 167-168) (emphasis added).⁶ No appellant has appealed or challenged the foregoing language in the Injunction Provision. Plaintiff is an “Enjoined Party”⁷ under the Plan, and by their express terms, the Confirmation Order and Plan expressly enjoin Plaintiff from continuing the Action.

⁶ The Injunction Provision also included a permanent injunction which enjoined “all Enjoined Parties. . . from taking any actions to interfere with the implementation or consummation of the Plan” (the “Permanent Injunction”) and a “gatekeeper” provision that prohibited all “Enjoined Parties” from pursuing claims against certain “Protected Parties” unless the Bankruptcy Court first found those claims to be colorable (the “Gatekeeper Provision”). Ex. 3, Appx. 74. While the Gatekeeper Provision also prevents Plaintiff from proceeding with the Action in this Court, it is the language in the Injunction Provision set forth above –which is not involved in the Appeal – that independently prohibits pursuit of this Action.

⁷ “Enjoined Party” means, *inter alia*, “(i) all Entities who have held, hold, or may hold Claims against or Equity Interests in the Debtor (whether or not proof of such Claims or Equity Interests has been filed and whether or not such Entities vote in favor of, against or abstain from voting on the Plan or are presumed to have accepted or deemed to have rejected the Plan), (ii) James Dondero (“Dondero”), (iii) any Entity that has appeared and/or filed any motion, objection, or other pleading in this Chapter 11 Case regardless of the capacity in which such Entity appeared and any other party in interest, (iv) any Related Entity, and (v) the Related Persons of each of the foregoing.” Ex. 3, Appx. 125. Plaintiff satisfies sections (i), (iii), (iv), and (v) of the definition of “Enjoined Party.”

10. The Injunction Provision, however, does not leave putative claimants, like Plaintiff, without a course to pursue their claims. The Plan includes a mechanism allowing holders of claims arising after the Petition Date but prior to the Effective Date to assert claims. They may, at their election, file an application with the Bankruptcy Court seeking an allowed administrative claim. Article II of the Plan provides, in relevant part:

Administrative Expense Claims

On the later of the Effective Date or the date on which an Administrative Expense Claim becomes an Allowed Administrative Expense Claim, or, in each such case, as soon as practicable thereafter, each Holder of an Allowed Administrative Expense Claim (other than Professional Fee Claims) will receive, in full satisfaction, settlement, discharge and release of, and in exchange for, such Allowed Administrative Expense Claim either (i) payment in full in Available Cash for the unpaid portion of such Allowed Administrative Expense Claim; or (ii) such other less favorable treatment as agreed to in writing by the Debtor or the Reorganized Debtor, as applicable, and such Holder; provided, however, that Administrative Expense Claims incurred by the Debtor in the ordinary course of business may be paid in the ordinary course of business in the discretion of the Debtor in accordance with such applicable terms and conditions relating thereto without further notice to or order of the Bankruptcy Court. All statutory fees payable under 28 U.S.C. § 1930(a) shall be paid as such fees become due.

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

Plan at 16-17 (Ex. 4, Appx. 204-205). If Plaintiff wish to continue its Action, the Confirmation Order mandates that it do so by filing for an administrative claim.⁸

⁸ Under the Plan, the Administrative Expense Claim Bar Date passed on September 25, 2021, so Plaintiff would, in fact, be required to request an order from the Bankruptcy Court permitting it to file a late claim. Highland reserves the right to contest any such request.

14. On March 16, 2021, the Bankruptcy Court entered an *Order Certifying Appeals of the Confirmation Order for Direct Appeal to the United States Court of Appeals for the Fifth Circuit* [Bankr. **Dkt. No. 2034**] (the “Certification Order”). (Ex. 13, Appx. 382-384).

15. On March 24, 2021, the Bankruptcy Court entered orders¹¹ denying the Bankruptcy Court Stay Motions (the “First Stay Denials”), finding, among other things, that Appellants “did not meet their burden of proof on the four-factor test articulated in case law to obtain a discretionary stay pending appeal.” [Bankr. **Dkt. No. 2095 at 3**]. (Ex. 15, Appx. 392).

16. In April 2021, Appellants filed motions for a stay pending appeal of the Confirmation Order in the District Court for the Northern District of Texas, Dallas Division (the “District Court”) (collectively, the “District Court Stay Motions”).¹²

17. Appellants subsequently filed petitions for direct appeal of the Confirmation Order to the Fifth Circuit.¹³ On May 4, 2021, the Fifth Circuit entered an Order granting the Advisors’ Petition for direct appeal,¹⁴ and on June 2, 2021, the Fifth Circuit entered an Order granting the remaining Appellants’ Petitions for direct appeal (collectively, the “Appeal”).¹⁵

18. Shortly after the District Court Stay Motions became ripe, on May 19, 2021, the Advisors filed a stay motion in the Fifth Circuit pending appeal of the Confirmation Order based on arguments identical to those asserted in the District Court Stay Motions (the “Fifth Circuit Stay”).

¹¹ See Bankruptcy Docket Nos. 2084 and 2095, respectively. Exs. 14-15, Appx. 385-393.

¹² See Case Nos. 3:21-cv-550 (**Docket No. 5**) Ex. 16, Appx. 394-398; 3:21-cv-538 (**Docket No. 2**) Ex. 17, Appx. 399-403; 3:21-cv-539, and 3:21-cv-546.

¹³ See Case No. 21-90011, Documents 515826308, 515803515, 515824511, 515824443. Exs. 18-21, Appx. 404-953.

¹⁴ See Case No. 21-90011, Document 515847079. Ex. 22, Appx. 954-957.

¹⁵ See Case No. 21-90011, Document 515884578. Ex. 23, Appx. 958-961.

Motion”).¹⁶ On June 21, 2021, the Fifth Circuit denied the Fifth Circuit Stay Motion (the “Second Stay Denial”).¹⁷

19. On June 23, 2021, the District Court entered its Order denying the District Court Stay Motions [Dist. Ct. **Docket No. 28**] (Ex. 26, Appx. 999-1002) (the “Third Stay Denial,” and together with the First Stay Orders and Second Stay Order, the “Stay Denials”) on the ground that “the Fifth Circuit has already reviewed and denied a motion with identical arguments.” *Id.* at 3.

E. Plaintiff Commences the Action but Never Serves Highland, and the Plan Goes Effective

20. On July 22, 2021, Plaintiff commenced the Action by filing its *Original Complaint*. [**Docket No. 1**] (the “Complaint”). Plaintiff never served the Complaint.

21. On August 11, 2021, the Plan became Effective (as defined in the Plan), and Highland became the Reorganized Debtor (as defined in the Plan). *See Notice of Occurrence of Effective Date of Confirmed Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.* [Bankr. **Dkt. No. 2700**] (Ex. 27, Appx. 1003-1007).

F. Plaintiff Moves for a Stay of the Action

22. On August 26, 2021, Plaintiff filed the Stay Motion, requesting a stay of the Action pending resolution of the Fifth Circuit Appeal of the Confirmation Order. In support of its Motion, Plaintiff contended that the Appeal “includes direct challenges to the validity” of the Plan’s exculpation and injunction provisions, that these “provisions are currently in force and prohibit Plaintiffs from continuing this [A]ction,” and the “most efficient course of action” is for a stay. Stay Motion at 4. As discussed below, even if this Court determines that the Appeal of the Confirmation Order is somehow relevant, the Motion would still be denied as no aspect of the

¹⁶ See Case No. 21-10449, Document 515869234. Ex. 24, Appx. 962-995.

¹⁷ See Case No. 21-10449, Document 515906886. Ex. 25, Appx. 996-998.

Appeal challenges the provisions of the Injunction Provision that enjoin Plaintiff from prosecuting the Action in this Court.

23. For the reasons that follow, the Court should (a) re-open the Order, amend the findings and conclusions, and issue a new order denying the Stay Motion, and (b) grant such other and further relief as the Court deems just and proper.

III. ARGUMENT

Plaintiff Failed to Demonstrate a Stay Was Warranted

24. As set forth herein, there was no factual, legal, or equitable basis for the Stay Motion and, pursuant to Rule 59, this Court should re-open the Order, amend the findings and conclusions, and issue a new order denying the Stay Motion.

25. Plaintiff failed to address, let alone satisfy, the strict four-pronged test required for a stay pending appeal in the Fifth Circuit. A stay pending appeal is warranted only if a movant establishes the following four elements: (1) substantial likelihood of success on the merits of its appeal; (2) irreparable injury if the stay is not granted; (3) the stay will not substantially harm other parties; and (4) the stay would serve the public interest. *See Belcher v. Birmingham Trust Nat’l Bank*, 395 F.2d 685, 686-87 (5th Cir. 1968); *In re First S. Sav. Assoc.*, 820 F.2d 700, 704 (5th Cir. 1987). The moving party “bears the burden of establishing its need,” and must “make out a clear case of hardship or inequity in being required to go forward.” *Earl v. Boeing Co.*, 4:19-CV-507, 2021 WL 1080689, at *3 (E.D. Tex. Mar. 18, 2021) (internal quotations omitted).

26. For obvious reasons, Plaintiff ignored these four factors in its Motion. Plaintiff did not object to or appeal the Confirmation Order. Instead, Plaintiff sought a stay of the Action premised on a pending Appeal (a) in which (i) it is not a party and (ii) there is no challenge to the portion of the Injunction Provision prohibiting Plaintiff from proceeding with the Action in this Court, and (b) where three different courts, including this Court and the Fifth Circuit, issued the

Stay Denials against the Appellants when they requested stays pending this same Appeal. Plaintiff has no standing to seek a stay of an order pending an Appeal to which they are not a party and, therefore, cannot satisfy the “likelihood of success” element. Plaintiff equally fails to show any irreparable injury in the absence of a stay or that a stay would serve the public interest.

27. Moreover, Plaintiff’s vague and conclusory assertion that “many complex legal questions exist” in the Fifth Circuit Appeal that “may affect the viability of this Action” also does not support the imposition of a stay. Motion at 4. Again, three courts, including the Fifth Circuit, have already rejected Stay Motions premised on this Appeal.

28. Finally, Plaintiff’s reliance on the Appellants’ challenges to Injunction Provision are misguided. *See* Motion at 4. As set forth above, the Appellants are challenging the Permanent Injunction and the Gatekeeper Provision in their appeal of the Confirmation Order – not the provisions of the Injunction Provision relevant to the Motion, *i.e.*, the provision enjoining Plaintiff from continuing the Action in this Court. Highland maintains that the Action belongs in the Bankruptcy Court for many reasons, including the Injunction Provision, and that if Plaintiff wishes to pursue remedies that it should do so by seeking leave to file a late claim against Highland’s bankruptcy estate as required by the Plan and Confirmation Order. However, pursuant to this very provision, the remedy of a stay of proceedings is an entirely distinct procedural device that has no application to the Plan or the Appeal.

29. To the extent Plaintiff relies on the exculpation provision, such reliance is irrelevant for purposes of the Motion.¹⁸ Plaintiff otherwise failed to demonstrate why the extraordinary remedy of a stay of this Action is warranted or appropriate

¹⁸ That provision deals with the exculpation from liability of Highland’s independent directors, their agents, and their advisors. *See* Plan, Art. IX.C. Neither Highland nor the viability of this Action is implicated by such a provision.

CONCLUSION

WHEREFORE, Highland respectfully requests that the Court (a) re-open the Stay Order, amend the findings and conclusions, and issue a new order denying the Stay Motion, and (b) grant such other and further relief as the Court deems just and proper.

Dated: October 5, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that, on October 5, 2021, a true and correct copy of the foregoing Memorandum of Law was served electronically upon all parties registered to receive electronic notice in this case via the Court's CM/ECF system.

/s/ Zachery Z. Annable

Zachery Z. Annable

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

THE CHARITABLE DAF FUND, L.P.,

Plaintiff,

vs.

HIGHLAND CAPITAL MANAGEMENT, L.P.,

Defendant.

Case No. 3:21-cv-01710-N

**HIGHLAND’S MEMORANDUM OF LAW
IN SUPPORT OF ITS MOTION TO DISMISS**



1. Highland is a reorganized debtor, having emerged from bankruptcy on August 11, 2021, when its Plan went effective.

3. Highland is simultaneously filing its *Motion for Reconsideration of Stay Order* and supporting documentation (together, the “Reconsideration Motion”). For the reasons set forth in the Reconsideration Motion and herein, Highland respectfully requests that the Court (a) grant the Reconsideration Motion and enter a new order vacating the Stay Order and denying the Stay Motion, and (b) then grant this Motion to Dismiss.

¹ Concurrently herewith, Highland is filing the *Appendix in Support of Highland Capital Management, L.P.’s Motion for Reconsideration of a Stay Order* (the “Appendix”). Citations to the Appendix are notated as follows: Ex. #, Appx. #.

003413

II. RELEVANT BACKGROUND

6. On October 16, 2019 (the “Petition Date”), Highland commenced a voluntary case under chapter 11 of title 11 of the United States Code (the “Bankruptcy Code”) in the United States Bankruptcy Court for the District of Delaware (the “Bankruptcy Case”).

7. On February 22, 2021, the Bankruptcy Court for the Northern District of Texas, Dallas Division (the “Bankruptcy Court”) entered its *Order (i) Confirming the Fifth Amended Plan of Reorganization (as Modified) and (ii) Granting Related Relief* [Bankr. **Dkt. No. 1943**] (Ex. 1, Appx. 1-162) (the “Confirmation Order”) which confirmed the *Fifth Amended Plan of Reorganization of Highland Capital Management, L.P (as Modified)* (Ex. 2, Appx. 163-229) (the “Plan”). Pursuant to the Plan, as of the Effective Date (as defined in the Plan), Enjoined Parties (as defined in the Plan) are prohibited from pursuing or continuing actions of any kind against

Highland (the “Injunction Provision”). The Plan and the Confirmation Order each provide, in pertinent part:

Injunction

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

The injunctions set forth herein shall extend to, and apply to any act of the type set forth in any of clauses (i)-(v) of the immediately preceding paragraph against any successors of the Debtor, including, but not limited to, the Reorganized Debtor, the Litigation SubTrust, and the Claimant Trust and their respective property and interests in property.

...

The Bankruptcy Court will have sole and exclusive jurisdiction to determine whether a claim or cause of action is colorable and, only to the extent legally permissible and as provided for in ARTICLE XI, shall have jurisdiction to adjudicate the underlying colorable claim or cause of action.

Ex. 1, Appx. 77-79, and Ex. 2, Appx. 220-221 (emphasis added). By their terms, the Confirmation Order and Plan expressly enjoin Plaintiff from continuing the Action.

8. The Injunction Provision, however, does not leave putative claimants without a course to pursue their claims. The Plan includes a mechanism allowing holders of claims arising after the Petition Date but prior to the Effective Date to assert claims. They may, at their election,

file an application with the Bankruptcy Court seeking an allowed administrative claim. Article II of the Plan provides, in relevant part:

Administrative Expensive Claims

On the later of the Effective Date or the date on which an Administrative Expense Claim becomes an Allowed Administrative Expense Claim, or, in each such case, as soon as practicable thereafter, each Holder of an Allowed Administrative Expense Claim (other than Professional Fee Claims) will receive, in full satisfaction, settlement, discharge and release of, and in exchange for, such Allowed Administrative Expense Claim either (i) payment in full in Available Cash for the unpaid portion of such Allowed Administrative Expense Claim; or (ii) such other less favorable treatment as agreed to in writing by the Debtor or the Reorganized Debtor, as applicable, and such Holder; provided, however, that Administrative Expense Claims incurred by the Debtor in the ordinary course of business may be paid in the ordinary course of business in the discretion of the Debtor in accordance with such applicable terms and conditions relating thereto without further notice to or order of the Bankruptcy Court. All statutory fees payable under 28 U.S.C. § 1930(a) shall be paid as such fees become due.

If an Administrative Expense Claim (other than a Professional Fee Claim) is not paid by the Debtor in the ordinary course, the Holder of such Administrative Expense Claim must File, on or before the applicable Administrative Expense Claims Bar Date, and serve on the Debtor or Reorganized Debtor, as applicable, and such other Entities who are designated by the Bankruptcy Rules, the Confirmation Order or other order of the Bankruptcy Court, an application for allowance and payment of such Administrative Expense Claim.

Ex. 2, Appx. 185-186. If Plaintiff wished to continue its Action, the Confirmation Order mandates that it do so by filing for an administrative claim.³

C. Plaintiff Commences the Action but Never Serves Highland, and the Plan Goes Effective

11. On July 22, 2021, Plaintiff commenced the Action by filing its *Original Complaint*. [Docket No. 1] (the “Complaint”). Plaintiff never served the Complaint.

12. On August 11, 2021, the Plan became Effective (as defined in the Plan), and Highland became the Reorganized Debtor (as defined in the Plan). *See Notice of Occurrence of Effective Date*

³ Under the Plan, the Administrative Expense Claim Bar Date passed on September 25, 2021, so Plaintiff would, in fact, be required to request an order from the Bankruptcy Court permitting it to file a late claim. Highland reserves the right to contest any such request.

of Confirmed Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. [Bankr. Dkt. No. 2700] (Ex. 3, Appx. 230-234).

D. Plaintiff Obtains an Unopposed Stay of the Action and Highland Seeks Reconsideration

9. On August 26, 2021, Plaintiff filed the Stay Motion, requesting a stay of the Action pending resolution of the Fifth Circuit Appeal of the Confirmation Order. In support of its Motion, Plaintiff contended that the Appeal “includes direct challenges to the validity” of the Plan’s exculpation and injunction provisions, that these “provisions are currently in force and prohibit Plaintiffs from continuing this [A]ction,” and the “most efficient course of action” is for a stay. Stay Motion at 4.

10. On September 7, 2021, this Court entered the Stay Order. Highland is simultaneously filing its Reconsideration Motion.

III. ARGUMENT

A. The Confirmation Order Should Be Enforced and the Action Should Be Dismissed

11. Dismissal of the Action is warranted under the Confirmation Order and the Plan for two reasons: (i) Plaintiffs are enjoined from pursuing the Action against Highland, and (ii) the claims, to the extent valid, constitute post-petition administrative claims which Plaintiff, if it elects, can assert against Highland in the Bankruptcy Court pursuant to the procedure set forth in the Plan and Confirmation Order.

1. Plaintiff Is Enjoined from Continuing the Action

12. Pursuant to the Confirmation Order and the Plan, as of the Effective Date, Plaintiff is enjoined from conducting or continuing any suit or proceeding of any kind against Highland. See Docket No. 1943 (Confirmation Order) at 76-78 at 76-78 (Ex. 1, Appx. 77-79), and Ex. A (Plan) at 50-51 (Ex. 2, Appx. 219-220).

13. The parties are bound by the Confirmation Order. *See U.S. v. Ramirez*, 291 B.R. 386, 392 (N.D. TX. 2002) (stating that a “confirmed Chapter 11 plan constitute[s] a binding contract”). Accordingly, this Court should enforce the Confirmation Order and dismiss this Action on the basis that the Confirmation Order prohibits the continuation of this Action in this Court. The Bankruptcy Court has jurisdiction over any claims against Highland.

2. The Claims Asserted Should Be Adjudicated by the Bankruptcy Court Pursuant to the Procedure for Asserting Administrative Claims in the Plan

14. The claims asserted in the Action constitute alleged administrative claims that should be adjudicated in the Bankruptcy Court, if at all, and for this additional reason, dismissal of the Action is warranted.

15. As noted *supra*, the Action arises from actions taken by Highland post-petition. The Action is nothing more than a request for payment of an unliquidated and disputed administrative claim which will be subject to allowance or disallowance under the Bankruptcy Code and in accordance with the Plan, and once paid or disallowed, will be discharged. A request for payment of an administrative claim is a core proceeding under 28 U.S.C. § 157(B)(2)(A) and (O), and arises in and under title 11. Thus, the Action is a post-petition claim, and should be filed as a request for an allowed administrative claim in the Bankruptcy Court in accordance with Bankruptcy Code section 503. *See In re Endeavour Highrise L.P.*, 425 B.R. 402, 419 (Bankr. S.D. Tex. 2010) (“[A] party asserting a post-petition claim should file an application with the court and request an order establishing the claim as an allowed administrative claim or an allowed post-petition claim pursuant to a particular statute”).

16. Article II of the Plan provides the methodology for the filing and allowance of administrative claims. A holder of a claim that arises post-petition files a request for payment of an administrative claim under section 503 of the Bankruptcy Code and such claim will be afforded

“administrative priority” if the claim arose post-petition and as a result of actions taken by the debtor that benefitted the estate. *See Matter of Whistler Energy II, L.L.C.*, 931 F.3d 432, 441–42 (5th Cir. 2019) (noting that administrative claims “under section 503(b)(1)(A) ... must have arisen post-petition and as a result of actions taken by the trustee [or debtor-in-possession] that benefitted the estate,” and an administrative priority claim “must have arisen from a transaction with the debtor in possession,” as opposed to the pre-petition debtor); *In re Am. Plumbing & Mech., Inc.*, 323 B.R. 442, 459 and n.23 (Bankr. W.D. Tex. 2005) citing *Toma Steel Supply, Inc. v. TransAmerican Natural Gas Corp. (In Matter of TransAmerican Natural Gas Corp.)*, 978 F.2d 1409, 1416 (5th Cir. 1992).

17. In order to enforce the terms of the Plan and Confirmation Order, this Action should be dismissed so that Plaintiff, if it so chooses, can refile its claims with the Bankruptcy Court.

CONCLUSION

WHEREFORE, Highland respectfully requests that the Court (a) grant the Motion and dismiss the Action, and (b) grant such other and further relief as the Court deems just and proper.

Dated: October 5, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that, on October 5, 2021, a true and correct copy of the foregoing Memorandum of Law was served electronically upon all parties registered to receive electronic notice in this case via the Court's CM/ECF system.

/s/ Zachery Z. Annable

Zachery Z. Annable



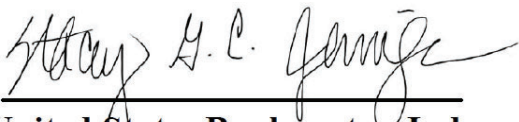
CLERK, U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS

ENTERED

THE DATE OF ENTRY IS ON
THE COURT'S DOCKET

The following constitutes the ruling of the court and has the force and effect therein described.

Signed February 22, 2021


United States Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In re:

HIGHLAND CAPITAL MANAGEMENT, L.P.,¹

Debtor.

) Chapter 11

) Case No. 19-34054-sgj11

**ORDER (I) CONFIRMING THE FIFTH AMENDED
PLAN OF REORGANIZATION OF HIGHLAND CAPITAL
MANAGEMENT, L.P. (AS MODIFIED) AND (II) GRANTING RELATED RELIEF**

The Bankruptcy Court² having:

- a. entered, on November 24, 2020, the *Order (A) Approving the Adequacy of the Disclosure Statement, (B) Scheduling A Hearing to Confirm the Fifth Amended Plan of Reorganization (C) Establishing Deadline for Filing Objections to Confirmation of Plan, (D) Approving Form of Ballots, Voting Deadline and Solicitation Procedures, and (E) Approving Form and Manner of Notice [Docket No. 1476]* (the “Disclosure Statement Order”), pursuant to which the Bankruptcy Court approved the adequacy of the *Disclosure Statement Relating to the Fifth*

¹ The Debtor’s last four digits of its taxpayer identification number are (6725). The headquarters and service address for the above-captioned Debtor is 300 Crescent Court, Suite 700, Dallas, TX 75201.

² Capitalized terms used but not otherwise defined herein have the meanings given to them in the Plan (as defined below). The rules of interpretation set forth in Article I of the Plan apply to this Confirmation Order.

Amended Plan of Reorganization of Highland Capital Management, L.P. [Docket No. 1473] (the “Disclosure Statement”) under section 1125 of the Bankruptcy Code and authorized solicitation of the Disclosure Statement;

- b. set January 5, 2021, at 5:00 p.m. prevailing Central Time (the “Objection Deadline”), as the deadline for filing objections to confirmation of the *Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (As Modified)* [Docket No. 1808] (as amended, supplemented or modified, the “Plan”);
- c. set January 5, 2021, at 5:00 p.m. prevailing Central Time, as the deadline for voting on the Plan (the “Voting Deadline”) in accordance with the Disclosure Statement Order;
- d. initially set January 13, 2021, at 9:30 a.m. prevailing Central Time, as the date and time to commence the hearing to consider confirmation of the Plan pursuant to Bankruptcy Rules 3017 and 3018, sections 1126, 1128, and 1129 of the Bankruptcy Code, and the Disclosure Statement Order, which hearing was continued to January 26, 2021, at 9:30 a.m. prevailing Central Time and further continued to February 2, 2021;
- e. reviewed: (i) the Plan; (ii) the Disclosure Statement; and (iii) *Notice of (I) Entry of Order Approving Disclosure Statement; (II) Hearing to Confirm; and (III) Related Important Dates* (the “Confirmation Hearing Notice”), the form of which is attached as Exhibit 1-B to the Disclosure Statement Order;
- f. reviewed: (i) the *Debtor’s Notice of Filing of Plan Supplement for the Third Amended Plan of Reorganization of Highland Capital Management, L.P.* [Docket No. 1389] filed November 13, 2020; (ii) *Debtor’s Notice of Filing of Plan Supplement for the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.* [Docket No. 1606] filed on December 18, 2020; (iii) the *Debtor’s Notice of Filing of Plan Supplement for the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.* [Docket No. 1656] filed on January 4, 2021; (iv) *Notice of Filing Plan Supplement to the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (with Technical Modifications)* dated January 22, 2021 [Docket No. 1811]; and (v) *Debtor’s Notice of Filing of Plan Supplement to the Fifth Amended Plan of Reorganization of Highland of Highland Capital Management, L.P. (As Modified)* on February 1, 2021 [Docket No. 1875]; (collectively, the documents listed in (i) through (v) of this paragraph, the “Plan Supplements”);
- g. reviewed: (i) the *Notice of (I) Executory Contracts and Unexpired Leases to be Assumed by the Debtor Pursuant to the Fifth Amended Plan, (II) Cure Amounts, if Any, and (III) Related Procedures in Connection Therewith* filed on December 30, 2020 [Docket No. 1648]; (ii) the *Second Notice of (I) Executory Contracts and*

Unexpired Leases to be Assumed by the Debtor Pursuant to the Fifth Amended Plan, (II) Cure Amounts, if Any, and (III) Related Procedures in Connection Therewith filed on January 11, 2021 [[Docket No. 1719](#)]; (iii) the *Third Notice of (I) Executory Contracts and Unexpired Leases to be Assumed by the Debtor Pursuant to the Fifth Amended Plan, (II) Cure Amounts, if Any, and (III) Related Procedures in Connection Therewith* filed on January 15, 2021 [[Docket No. 1749](#)]; (iv) the *Notice of Withdrawal of Certain Executory Contracts and Unexpired Leases from List of Executory Contracts and Unexpired Leases to be Assumed by the Debtor Pursuant to the Fifth Amended Plan* [[Docket No. 1791](#)]; (v) the *Fourth Notice of (I) Executory Contracts and Unexpired Leases to be Assumed by the Debtor Pursuant to the Fifth Amended Plan (II) Cure Amounts, if Any, and (III) Released Procedures in Connection Therewith* filed on January 27, 2021 [[Docket No. 1847](#)]; (vi) the *Notice of Hearing on Agreed Motion to (I) Assume Nonresidential Real Property Lease with Crescent TC Investors, L.P. Upon Confirmation of Plan and (II) Extend Assumption Deadline* filed on January 28, 2021 [[Docket No. 1857](#)]; and (vii) the *Fifth Notice of (I) Executory Contracts and Unexpired Leases to be Assumed by the Debtor Pursuant to the Fifth Amended Plan (II) Cure Amounts, if Any, and (III) Released Procedures in Connection Therewith* filed on February 1, 2021 [[Docket No. 1873](#)] (collectively, the documents referred to in (i) to (vii) are referred to as “List of Assumed Contracts”);

- h. reviewed: (i) the *Debtor’s Memorandum of Law in Support of Confirmation of the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.* [[Docket No. 1814](#)] (the “Confirmation Brief”); (ii) the *Debtor’s Omnibus Reply to Objections to Confirmation of the Fifth Amended Chapter 11 Plan of Reorganization of Highland Capital Management*; [[Docket No. 1807](#)]; and (iii) the *Certification of Patrick M. Leathem With Respect to the Tabulation of Votes on the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.* [[Docket No. 1772](#)] and *Supplemental Certification of Patrick M. Leathem With Respect to the Tabulation of Votes on the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.* [[Docket No. 1887](#)] filed on February 3, 2021 (together, the “Voting Certifications”).
- i. reviewed: (i) the *Notice of Affidavit of Publication* dated December 3, 2020 [[Docket No. 1505](#)]; (ii) the *Certificate of Service* dated December 23, 2020 [[Docket No. 1630](#)]; (iii) the *Supplemental Certificate of Service* dated December 24, 2020 [[Docket No. 1637](#)]; (iv) the *Second Supplemental Certificate of Service* dated December 31, 2020 [[Docket No. 1653](#)]; (v) the *Certificate of Service* dated December 23, 2020 [[Docket No. 1627](#)]; (vi) the *Certificate of Service* dated January 6, 2021 [[Docket No. 1696](#)]; (vii) the *Certificate of Service* dated January 7, 2021 [[Docket No. 1699](#)]; (viii) the *Certificate of Service* dated January 7, 2021 [[Docket No 1700](#)]; (ix) the *Certificate of Service* dated January 15, 2021 [[Docket No. 1761](#)]; (x) the *Certificate of Service* dated January 19, 2021 [[Docket No. 1775](#)]; (xi) the

Certificate of Service dated January 20, 2021 [Docket No. 1787]; (xii) the *Certificate of Service* dated January 26, 2021 [Docket No. 1844]; (xiii) the *Certificate of Service* dated January 27, 2021 [Docket No. 1854]; (xiv) the *Certificate of Service* dated February 1, 2021 [Docket No. 1879]; (xv) the *Certificates of Service* dated February 3, 2021 [Docket No. 1891 and 1893]; and (xvi) the *Certificates of Service* dated February 5, 2021 [Docket Nos. 1906, 1907, 1908 and 1909] (collectively, the “Affidavits of Service and Publication”);

- j. reviewed all filed³ pleadings, exhibits, statements, and comments regarding approval of the Disclosure Statement and confirmation of the Plan, including all objections, statements, and reservations of rights;
- k. conducted a hearing to consider confirmation of the Plan, which commenced on February 2, 2021, at 9:30 a.m. prevailing Central Time and concluded on February 3, 2021, and issued its oral ruling on February 8, 2021 (collectively, the “Confirmation Hearing”);
- l. heard the statements and arguments made by counsel in respect of confirmation of the Plan and having considered the record of this Chapter 11 Case and taken judicial notice of all papers and pleadings filed in this Chapter 11 Case; and
- m. considered all oral representations, testimony, documents, filings, and other evidence regarding confirmation of the Plan, including (a) all of the exhibits admitted into evidence;⁴ (b) the sworn testimony of (i) James P. Seery, Jr., the Debtor’s Chief Executive Officer and Chief Restructuring Officer and a member of the Board of Directors of Strand Advisors, Inc. (“Strand”), the Debtor’s general partner; (ii) John S. Dubel, a member of the Board of Strand; (iii) Marc Tauber, a Vice President at Aon Financial Services; and (iv) Robert Jason Post, the Chief Compliance Officer of NexPoint Advisors, LP (collectively, the “Witnesses”); (c) the credibility of the Witnesses; and (d) the Voting Certifications.

NOW, THEREFORE, after due deliberation thereon and good cause appearing therefor, the Bankruptcy Court hereby makes and issues the following findings of fact and conclusions of law:

³ Unless otherwise indicated, use of the term “filed” herein refers also to the service of the applicable document filed on the docket in this Chapter 11 Case, as applicable.

⁴ The Court admitted the following exhibits into evidence: (a) all of the Debtor’s exhibits lodged at Docket No. 1822 (except TTTTT, which was withdrawn by the Debtor); (b) all of the Debtor’s exhibits lodged at Docket No. 1866; (c) all of the Debtor’s exhibits lodged at Docket No. 1877; (d) all of the Debtor’s exhibits lodged at Docket No. 1895; and (e) Exhibits 6-12 and 15-17 offered by Mr. James Dondero and lodged at Docket No. 1874.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. **Findings of Fact and Conclusions of Law.** The findings and conclusions set forth herein, together with the findings of fact and conclusions of law set forth in the record during the Confirmation Hearing, constitute the Bankruptcy Court’s findings of fact and conclusions of law pursuant to **Federal Rule of Civil Procedure 52**, made applicable to this proceeding pursuant to Bankruptcy Rules 7052 and 9014. To the extent any of the following findings of fact constitute conclusions of law, they are adopted as such. To the extent that any of the following conclusions of law constitute findings of fact, they are adopted as such.

2. **Introduction and Summary of the Plan.** Prior to addressing the specific requirements under the Bankruptcy Code and Bankruptcy Rules with respect to the confirmation of the Plan, the Bankruptcy Court believes it would be useful to first provide the following background of the Debtor’s Chapter 11 Case, the parties involved therewith, and some of the major events that have transpired culminating in the filing and solicitation of the Plan of this very unusual case. Before the Bankruptcy Court is the *Debtor’s Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.*, filed on November 24, 2020, as modified on January 22, 2021 and again on February 1, 2021. The parties have repeatedly referred to the Plan as an “asset monetization plan” because it involves the orderly wind-down of the Debtor’s estate, including the sale of assets and certain of its funds over time, with the Reorganized Debtor continuing to manage certain other funds, subject to the oversight of the Claimant Trust Oversight Board. The Plan provides for a Claimant Trust to, among other things, manage and monetize the Claimant Trust Assets for the benefit of the Debtor’s economic stakeholders. The Claimant Trustee is responsible

for this process, among other duties specified in the Plan's Claimant Trust Agreement. There is also anticipated to be a Litigation Sub-trust established for the purpose of pursuing certain avoidance or other causes of action for the benefit of the Debtor's economic constituents.

3. **Confirmation Requirements Satisfied.** The Plan is supported by the Committee and all claimants with Convenience Claims (*i.e.*, general unsecured claims under \$1 million) who voted in Class 7. Claimants with Class 8 General Unsecured Claims, however, voted to reject the Plan because, although the Plan was accepted by 99.8% of the amount of Claims in that class, only 17 claimants voted to accept the Plan while 27 claimants voted to reject the Plan. As a result of such votes, and because Mr. Dondero and the Dondero Related Entities (as defined below) objected to the Plan on a variety of grounds primarily relating to the Plan's release, exculpation and injunction provisions, the Bankruptcy Court heard two full days of evidence on February 2 and 3, 2021, and considered testimony from five witnesses and thousands of pages of documentary evidence in determining whether the Plan satisfies the confirmation standards required under the Bankruptcy Code. The Bankruptcy Court finds and concludes that the Plan meets all of the relevant requirements of sections 1123, 1124, and 1129, and other applicable provisions of the Bankruptcy Code, as more fully set forth below with respect to each of the applicable confirmation requirements.

4. **Not Your Garden Variety Debtor.** The Debtor's case is not a garden variety chapter 11 case. The Debtor is a multibillion-dollar global investment adviser registered with the SEC, pursuant to the Investment Advisers Act of 1940. It was founded in 1993 by James Dondero and Mark Okada. Mark Okada resigned from his role with Highland prior to the

bankruptcy case being filed on October 16, 2019 (the “Petition Date”). Mr. Dondero controlled the Debtor as of the Petition Date but agreed to relinquish control of it on or about January 9, 2020, pursuant to an agreement reached with the Committee, as described below. Although Mr. Dondero remained with the Debtor as an unpaid employee/portfolio manager after January 9, 2020, his employment with the Debtor terminated on October 9, 2020. Mr. Dondero continues to work for and/or control numerous non-debtor entities in the complex Highland enterprise.

5. **The Debtor.** The Debtor is headquartered in Dallas, Texas. As of the Petition Date, the Debtor employed approximately 76 employees. The Debtor is privately-owned: (a) 99.5% by the Hunter Mountain Investment Trust; (b) 0.1866% by The Dugaboy Investment Trust, a trust created to manage the assets of Mr. Dondero and his family; (c) 0.0627% by Mark Okada, personally and through family trusts; and (d) 0.25% by Strand, the Debtor’s general partner.

6. **The Highland Enterprise.** Pursuant to various contractual arrangements, the Debtor provides money management and advisory services for billions of dollars of assets, including collateralized loan obligation vehicles (“CLOs”), and other investments. Some of these assets are managed by the Debtor pursuant to shared services agreements with certain affiliated entities, including other affiliated registered investment advisors. In fact, there are approximately 2,000 entities in the byzantine complex of entities under the Highland umbrella. None of these affiliated entities filed for chapter 11 protection. Most, but not all, of these entities are not subsidiaries (direct or indirect) of the Debtor. Many of the Debtor’s affiliated companies are

offshore entities, organized in jurisdictions such as the Cayman Islands and Guernsey. *See* Disclosure Statement, at 17-18.

7. **Debtor’s Operational History.** The Debtor’s primary means of generating revenue has historically been from fees collected for the management and advisory services provided to funds that it manages, plus fees generated for services provided to its affiliates. For additional liquidity, the Debtor, prior to the Petition Date, would sell liquid securities in the ordinary course, primarily through a brokerage account at Jefferies, LLC. The Debtor would also, from time to time, sell assets at non-Debtor subsidiaries and cause those proceeds to be distributed to the Debtor in the ordinary course of business. The Debtor’s current Chief Executive Officer, James P. Seery, Jr., credibly testified at the Confirmation Hearing that the Debtor was “run at a deficit for a long time and then would sell assets or defer employee compensation to cover its deficits.” The Bankruptcy Court cannot help but wonder if that was necessitated because of enormous litigation fees and expenses incurred by the Debtor due to its culture of litigation—as further addressed below.

8. **Not Your Garden Variety Creditor’s Committee.** The Debtor and this chapter 11 case are not garden variety for so many reasons. One of the most obvious standouts in this case is the creditor constituency. The Debtor did not file for bankruptcy because of any of the typical reasons that large companies file chapter 11. For example, the Debtor did not have a large, asset-based secured lender with whom it was in default; it only had relatively insignificant secured indebtedness owing to Jeffries, with whom it had a brokerage account, and one other entity, Frontier State Bank. The Debtor also did not have problems with its trade vendors or landlords.

The Debtor also did not suffer any type of catastrophic business calamity. In fact, the Debtor filed for Chapter 11 protection six months before the onset of the COVID-19 pandemic. Rather, the Debtor filed for Chapter 11 protection due to a myriad of massive, unrelated, business litigation claims that it faced—many of which had finally become liquidated (or were about to become liquidated) after a decade or more of contentious litigation in multiple forums all over the world. The Committee in this case has referred to the Debtor—under its former chief executive, Mr. Dondero—as a “serial litigator.” The Bankruptcy Court agrees with that description. By way of example, the members of the Committee (and their history of litigation with the Debtor and others in the Highland complex) are as follows:

- a. **The Redeemer Committee of the Highland Crusader Fund (the “Redeemer Committee”).** This Committee member obtained an arbitration award against the Debtor in the amount of \$190,824,557, inclusive of interest, approximately five months before the Petition Date, from a panel of the American Arbitration Association. It was on the verge of having that award confirmed by the Delaware Chancery Court immediately prior to the Petition Date, after years of disputes that started in late 2008 (and included legal proceedings in Bermuda). This creditor’s claim was settled during this Chapter 11 Case in the amount of approximately \$137,696,610 (subject to other adjustments and details not relevant for this purpose).
- b. **Acis Capital Management, L.P., and Acis Capital Management GP, LLC (“Acis”).** Acis was formerly in the Highland complex of companies, but was not affiliated with Highland as of the Petition Date. This Committee member and its now-owner, Joshua Terry, were involved in litigation with the Debtor dating back to 2016. Acis was forced by Mr. Terry (who was a former Highland portfolio manager) into an involuntary chapter 11 bankruptcy in the Bankruptcy Court for the Northern District of Texas, Dallas Division before the Bankruptcy Court in 2018, after Mr. Terry obtained an approximately \$8 million arbitration award and judgment against Acis. Mr. Terry ultimately was awarded the equity ownership of Acis by the Bankruptcy Court in the Acis bankruptcy case. Acis subsequently asserted a multi-million dollar claim against Highland in the Bankruptcy Court for Highland’s alleged denuding of Acis to defraud its creditors—primarily Mr. Terry. The litigation involving Acis and Mr. Terry dates back to mid-2016 and has

- It is fair to say that the members of the Committee in this case all have wills of steel. They fought hard before and during this Chapter 11 Case. The members of the Committee, all of whom have volunteered to serve on the Claimant Trust Oversight Board post-confirmation, are highly sophisticated and have had highly sophisticated professionals representing them. They have represented their constituency in this case as fiduciaries extremely well.

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10. **Other Claims Asserted.** Other than the Claims just described, most of the other Claims in this Chapter 11 Case are Claims asserted against the Debtor by: (a) entities in the Highland complex—most of which entities the Bankruptcy Court finds to be controlled by Mr. Dondero; (b) employees who contend that are entitled to large bonuses or other types of deferred compensation; and (c) numerous law firms that worked for the Debtor prior to the Petition Date and had outstanding amounts due for their prepetition services.

11. **Not Your Garden Variety Post-Petition Corporate Governance Structure.** Yet another reason this is not your garden variety chapter 11 case is its post-petition corporate governance structure. Immediately from its appointment, the Committee's relationship with the Debtor was contentious at best. First, the Committee moved for a change of venue from

⁵ This order is hereinafter referred to as the “January 9 Order” and was entered by the Court on January 9, 2020 [Docket No. 339] pursuant to the *Motion of the Debtor to Approve Settlement with Official Committee of Unsecured Creditors Regarding the Governance of the Debtor and Procedures for Operation in the Ordinary Course* [Docket No. 281] (the “Settlement Motion”).

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13. **Appointment of Independent Directors.** As part of the Bankruptcy Court-approved settlement, three eminently qualified independent directors were chosen to lead Highland through its Chapter 11 Case. They are: James P. Seery, Jr., John S. Dubel (each chosen by the Committee), and Retired Bankruptcy Judge Russell Nelms. These three individuals are each technically independent directors of Strand (Mr. Dondero had previously been the sole director of Strand and, thus, the sole person in ultimate control of the Debtor). The three independent board members' resumes are in evidence. The Bankruptcy Court later approved Mr. Seery's appointment as the Debtor's Chief Executive Officer, Chief Restructuring Officer, and Foreign Representative. Suffice it to say that this settlement and the appointment of the independent directors changed the entire trajectory of the case and saved the Debtor from the appointment of a trustee. The Bankruptcy Court and the Committee each trusted the independent directors. They were the right solution at the right time. Because of the unique character of the Debtor's business, the Bankruptcy Court believed the appointment of three qualified independent directors was a far better outcome for creditors than the appointment of a conventional chapter 11 trustee. Each of the independent directors brought unique qualities to the table. Mr. Seery, in particular, knew and had vast experience at prominent firms with high-yield and distressed investing similar to the Debtor's business. Mr. Dubel had 40 years of experience restructuring large complex businesses and serving on boards in this context. And Retired Judge Nelms had not only vast bankruptcy experience but seemed particularly well-suited to help the Debtor maneuver through conflicts and ethical quandaries. By way of comparison, in the chapter 11 case of Acis, the former affiliate of Highland that the Bankruptcy Court presided over and which company was

14. **Conditions Required by Independent Directors.** Given the experiences in Acis and the Debtor's culture of constant litigation, it was not as easy to get such highly qualified persons to serve as independent board members and, later, as the Debtor's Chief Executive Officer, as it would be in an ordinary chapter 11 case. The independent board members were stepping into a morass of problems. Naturally, they were worried about getting sued no matter how defensible their efforts—given the litigation culture that enveloped Highland historically. Based on the record of this Case and the proceedings in the Acis chapter 11 case, it seemed as though everything always ended in litigation at Highland. The Bankruptcy Court heard credible testimony that none of the independent directors would have taken on the role of independent director without (1) an adequate directors and officers' ("D&O") insurance policy protecting them; (2) indemnification from Strand that would be guaranteed by the Debtor; (3) exculpation for mere negligence claims; and (4) a gatekeeper provision prohibiting the commencement of litigation against the independent directors without the Bankruptcy Court's prior authority. This gatekeeper provision was also

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were Mr. Dondero [Docket No. 1661] and entities that the Bankruptcy Court finds are owned and/or controlled by him and that filed the following objections:

18. **Remote Interest of Outstanding Confirmation Objectors.** To be specific about the remoteness of Mr. Dondero's and the Dondero Related Entities' interests, the Bankruptcy Court will address them each separately. First, Mr. Dondero has a pending objection to the Plan. Mr. Dondero's only economic interest with regard to the Debtor is an unliquidated indemnification claim (and, based on everything the Bankruptcy Court has heard, his indemnification claims would be highly questionable at this juncture). Mr. Dondero owns no equity in the Debtor directly. Mr. Dondero owns the Debtor's general partner, Strand, which in turn owns a quarter percent of the total equity in the Debtor. Second, a joint objection has been filed by The Dugaboy Trust ("Dugaboy") and the Get Good Trust ("Get Good"). The Dugaboy Trust was created to manage the assets of Mr. Dondero and his family and owns a 0.1866% limited partnership interest in the Debtor. *See* Disclosure Statement at 7, n.3. The Bankruptcy Court is not clear what economic interest the Get Good Trust has, but it likewise seems to be related to Mr. Dondero. Get Good

filed three proofs of claim relating to a pending federal tax audit of the Debtor's 2008 return, which the Debtor believes arise from Get Good's equity security interests and are subject to subordination as set forth in its Confirmation Brief. Dugaboy filed three claims against the Debtor: (a) an administrative claim relating to the Debtor's alleged postpetition management of Multi-Strat Credit Fund, L.P., (b) a prepetition claim against a subsidiary of the Debtor for which it seeks to pierce the corporate veil, each of which the Debtor maintains are frivolous in the Confirmation Brief, and (c) a claim arising from its equity security interest in the Debtor, which the Debtor asserts should be subordinated. Another group of objectors that has joined together in one objection is what the Bankruptcy Court will refer to as the "Highland Advisors and Funds." *See Docket No. 1863*. The Bankruptcy Court understands they assert disputed administrative expense claims against the estate that were filed shortly before the Confirmation Hearing on January 23, 2021 [*Docket No. 1826*], and during the Confirmation Hearing on February 3, 2021 [*Docket No. 1888*]. At the Confirmation Hearing, Mr. Post testified on behalf of the Highland Advisors and Funds that the Funds have independent board members that run the Funds, but the Bankruptcy Court was not convinced of their independence from Mr. Dondero because none of the so-called independent board members have ever testified before the Bankruptcy Court and all have been engaged with the Highland complex for many years. Notably, the Court questions Mr. Post's credibility because, after more than 12 years of service, he abruptly resigned from the Debtor in October 2020 at the exact same time that Mr. Dondero resigned at the Board of Directors' request, and he is currently employed by Mr. Dondero. Moreover, Dustin Norris, a witness in a prior proceeding (whose testimony was made part of the record at the Confirmation Hearing), recently

testified on behalf of the Highland Advisors and Funds in another proceeding that Mr. Dondero owned and/or controlled these entities. Finally, various NexBank entities objected to the Plan. The Bankruptcy Court does not believe they have liquidated claims against the Debtor. Mr. Dondero appears to be in control of these entities as well.

19. **Background Regarding Dondero Objecting Parties.** To be clear, the Bankruptcy Court has allowed all these objectors to fully present arguments and evidence in opposition to confirmation, even though their economic interests in the Debtor appear to be extremely remote and the Bankruptcy Court questions their good faith. Specifically, the Bankruptcy Court considers them all to be marching pursuant to the orders of Mr. Dondero. In the recent past, Mr. Dondero has been subject to a temporary restraining order and preliminary injunction by the Bankruptcy Court for interfering with Mr. Seery's management of the Debtor in specific ways that were supported by evidence. Around the time that this all came to light and the Bankruptcy Court began setting hearings on the alleged interference, Mr. Dondero's company phone, which he had been asked to turn in to Highland, mysteriously went missing. The Bankruptcy Court merely mentions this in this context as one of many reasons that the Bankruptcy Court has to question the good faith of Mr. Dondero and his affiliates in raising objections to confirmation of the Plan.

20. **Other Confirmation Objections.** Other than the objections filed by Mr. Dondero and the Dondero Related Entities, the only other pending objection to the Plan is the *United States Trustee's Limited Objection to Confirmation of Debtor's Fifth Amended Plan of Reorganization* [Docket No. 1671], which objected to the Plan's exculpation, injunction, and

Debtor release provisions. In juxtaposition, to these pending objections, the Bankruptcy Court notes that the Debtor resolved the following objections to the Plan:

22. **Jurisdiction and Venue.** The Bankruptcy Court has jurisdiction over the Debtor's Chapter 11 Case pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). Venue of this proceeding and this Chapter 11 Case is proper in this district and in the Bankruptcy Court pursuant to 28 U.S.C. §§ 1408 and 1409.

23. **Chapter 11 Petition.** On the Petition Date, the Debtor commenced a voluntary case under chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware, which case was transferred to the Bankruptcy Court on December 19, 2019. The Debtor continues to operate its business and manage its property as debtor in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No trustee or examiner has been appointed in this Chapter 11 Case. The Office of the United States Trustee appointed the Committee on October 29, 2019.

24. **Judicial Notice.** The Bankruptcy Court takes judicial notice of the docket in this Chapter 11 Case maintained by the clerk of the Bankruptcy Court and the court-appointed claims agent, Kurtzman Carson Consultants LLC ("KCC"), including, without limitation, all pleadings, notices, and other documents filed, all orders entered, and all evidence and arguments made, proffered or adduced at the hearings held before the Bankruptcy Court during this Chapter 11 Case, including, without limitation, the hearing to consider the adequacy of the Disclosure Statement and the Confirmation Hearing, as well as all pleadings, notices, and other documents filed, all orders entered, and all evidence and arguments made, proffered, or adduced at hearings held before the Bankruptcy Court or the District Court for the Northern District of Texas in

connection with an adversary proceeding or appellate proceeding, respectively, related to this Chapter 11 Case.

25. **Plan Supplement Documents.** Prior to the Confirmation Hearing, the Debtor filed each of the Plan Supplements. The Plan Supplements contain, among other documents, the Retained Causes of Action, the Claimant Trust Agreement, the Litigation Sub-Trust Agreement, the Senior Employee Stipulation, the Related Entity List, the Schedule of Employees, the Reorganized Limited Partnership Agreement, supplements to the Liquidation Analysis/Financial Projections, the Schedule of Contracts and Leases to be Assumed, and the other Plan Documents set forth therein (collectively, the “Plan Supplement Documents”).

26. **Retained Causes of Action Adequately Preserved.** The Bankruptcy Court finds that the list of Retained Causes of Action included in the Plan Supplements sufficiently describes all potential Retained Causes of Action, provides all persons with adequate notice of any Causes of Action regardless of whether any specific claim to be brought in the future is listed therein or whether any specific potential defendant or other party is listed therein, and satisfies applicable law in all respects to preserve all of the Retained Causes of Action. The definition of the Causes of Action and Schedule of Retained Causes of Action, and their inclusion in the Plan, specifically and unequivocally preserve the Causes of Action for the benefit of the Reorganized Debtor, the Claimant Trust, or the Litigation Sub-Trust, as applicable.

27. **Plan Modifications Are Non-Material.** In addition to the Plan Supplements, the Debtor made certain non-material modifications to the Plan, which are reflected in (i) the *Redline of Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.*

(as Modified) filed on January 22, 2021 [Docket No. 1809], and (ii) Exhibit B to the *Debtor's Notice of Filing of Plan Supplement to Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (as Modified)* filed on February 1, 2021 [Docket No. 1875] (collectively, the “Plan Modifications”). Section 1127(a) of the Bankruptcy Code provides that a plan proponent may modify its plan at any time before confirmation so long as such modified plan meets the requirements of sections 1122 and 1123 of the Bankruptcy Code. None of the modifications set forth in the Plan Supplements or the Plan Modifications require any further solicitation pursuant to sections 1125, 1126, or 1127 of the Bankruptcy Code and Bankruptcy Rule 3019, because, among other things, they do not materially adversely change the treatment of the claims of any creditors or interest holders who have not accepted, in writing, such supplements and modifications. Among other things, there were changes to the projections that the Debtor filed shortly before the Confirmation Hearing (which included projected distributions to creditors and a comparison of projected distributions under the Plan to potential distributions under a hypothetical chapter 7 liquidation). The Plan Supplements and Plan Modifications did not mislead or prejudice any creditors or interest holders nor do they require that Holders of Claims or Equity Interests be afforded an opportunity to change previously cast votes to accept or reject the Plan. Specifically, the Amended Liquidation Analysis/Financial Projections filed on February 1, 2021 [Docket No. 1875] do not constitute any material adverse change to the treatment of any creditors or interest holders but, rather, simply update the estimated distributions based on Claims that were settled in the interim and provide updated financial data. The filing and notice of the Plan Supplements and Plan Modifications were appropriate and complied with the requirements of

section 1127(a) of the Bankruptcy Code and the Bankruptcy Rules, and no other solicitation or disclosure or further notice is or shall be required. The Plan Supplements and Plan Modifications each became part of the Plan pursuant section 1127(a) of the Bankruptcy Code. The Debtor or Reorganized Debtor, as applicable, is authorized to modify the Plan or Plan Supplement Documents following entry of this Confirmation Order in a manner consistent with section 1127(b) of the Bankruptcy Code, the Plan, and, if applicable, the terms of the applicable Plan Supplement Document.

28. **Notice of Transmittal, Mailing and Publication of Materials.** As is evidenced by the Voting Certifications and the Affidavits of Service and Publication, the transmittal and service of the Plan, the Disclosure Statement, Ballots, and Confirmation Hearing Notice were adequate and sufficient under the circumstances, and all parties required to be given notice of the Confirmation Hearing (including the deadline for filing and serving objections to the confirmation of the Plan) have been given due, proper, timely, and adequate notice in accordance with the Disclosure Statement Order and in compliance with the Bankruptcy Code, the Bankruptcy Rules, the Local Rules, and applicable non-bankruptcy law, and such parties have had an opportunity to appear and be heard with respect thereto. No other or further notice is required. The publication of the Confirmation Hearing Notice, as set forth in the *Notice of Affidavit of Publication* dated December 3, 2020 [Docket No. 1505], complied with the Disclosure Statement Order.

29. **Voting.** The Bankruptcy Court has reviewed and considered the Voting Certifications. The procedures by which the Ballots for acceptance or rejection of the Plan were

31. **Plan Compliance with Bankruptcy Code (11 U.S.C. § 1129(a)(1)).** As set forth below, the Plan complies with all of the applicable provisions of the Bankruptcy Code, thereby satisfying section 1129(a)(1) of the Bankruptcy Code.

33. **Classification of Secured Claims.** Class 1 (Jefferies Secured Claim) and Class 2 (Frontier Secured Claim) each constitute separate secured claims held by Jefferies LLC and Frontier State Bank, respectively, and it is proper and consistent with section 1122 of the Bankruptcy Code to separately classify the claims of these secured creditors. Class 3 (Other

35. **Classification of Unsecured Claims.** Class 6 (PTO Claims) consists solely of the claims of the Debtor's employees for unpaid paid time off in excess of the \$13,650 statutory cap amount under sections 507(a)(4) and (a)(5) of the Bankruptcy Code and are dissimilar from other unsecured claims in Class 7 and Class 8. Class 7 (Convenience Claims) allows holders of eligible and liquidated Claims (below a certain threshold dollar amount) to receive a cash payout of the lesser of 85% of the Allowed amount of the creditor's Claim or such holder's *pro rata* share of the Convenience Claims Cash Pool. Class 7 (Convenience Claims) are provided for administrative convenience purposes in order to allow creditors, most of whom are either trade creditors or holders of professional claims, to receive treatment provided under Class 7 in lieu of the treatment of Class 8 (General Unsecured Claims). The Plan also provides for reciprocal "opt out" mechanisms to allow holders of Class 7 Claims to elect to receive the treatment for Class 8 Claims. Class 8 creditors primarily constitute the litigation claims of the Debtor. Class 8 Creditors

36. **Classification of Equity Interests.** The Plan properly separately classifies the Equity Interests in Class 10 (Class B/C Limited Partnership Interests) from the Equity Interests in Class 11 (Class A Limited Partnership Interests) because they represent different types of equity security interests in the Debtor and different payment priorities.

37. **Elimination of Vacant Classes.** Section III.C of the Plan provides for the elimination of Classes that do not have at least one holder of a Claim or Equity Interest that is

U.S.C. §§ 1122, 1123(a)(1). Section 1123(a)(1) of the Bankruptcy Code requires that the Plan specify the classification of claims and equity security interests pursuant to section 1122 of the Bankruptcy Code, other than claims specified in sections 507(a)(2), 507(a)(3), or 507(a)(8) of the Bankruptcy Code. In addition to Administrative Claims, Professional Fee Claims, and Priority Tax Claims, each of which need not be classified pursuant to section 1123(a)(1) of the Bankruptcy

42. **Implementation of the Plan (11 U.S.C. § 1123(a)(5)).** Article IV of the

Plan sets forth the means for implementation of the Plan which includes, but is not limited to, the establishment of: (i) the Claimant Trust; (ii) the Litigation Sub-Trust; (iii) the Reorganized Debtor; and (iv) New GP LLC, in the manner set forth in the Plan Documents, the forms of which are included in the Plan Supplements.

- a. **The Claimant Trust.** The Claimant Trust Agreement provides for the management of the Claimant Trust, as well as the Reorganized Debtor with the Claimant Trust serving as the managing member of New GP LLC (a wholly-owned subsidiary of the Claimant Trust that will manage the Reorganized Debtor as its general partner). The Claimant Trust, the Claimant Trustee, the management and monetization of the Claimant Trust Assets, and the management of the Reorganized Debtor (through the Claimant Trust's role as managing member of New GP LLC) and the Litigation Sub-Trust will all be managed and overseen by the Claimant Trust Oversight Committee. Additionally, the Plan provides for the transfer to the Claimant Trust of all of the Debtor's rights, title, and interest in and to all of the Claimant Trust Assets in accordance with section 1141 of the Bankruptcy Code and for the Claimant Trust Assets to automatically vest in the Claimant Trust free and clear of all Claims, Liens, encumbrances, or interests subject only to the Claimant Trust Interests and the Claimant Trust Expenses, as provided for in the Claimant Trust Agreement. The Claimant Trust will administer the Claimant Trust Assets as provided under the Plan and the Claimant Trust Agreement contained in the Plan Supplements.
- b. **The Litigation Sub-Trust.** The Plan and the Litigation Sub-Trust Agreement provide for the transfer to the Litigation Sub-Trust all of the Claimant Trust's rights, title, and interest in and to all of the Estate Claims (as transferred to the Claimant Trust by the Debtor) in accordance with section 1141 of the Bankruptcy Code and for the Estate Claims to automatically vest in the Litigation Sub-Trust free and clear of all Claims, Liens, encumbrances, or interests subject only to the Litigation Sub-Trust Interests and the Litigation Sub-Trust Expenses, as provided for in the Litigation Sub-Trust Agreement. The Litigation Trustee is charged with investigating, pursuing, and otherwise resolving any Estate Claims (including those with respect to which the Committee has standing to pursue prior to the Effective Date pursuant to the January 9 Order) pursuant to the terms of the Litigation Sub-Trust Agreement and the Plan, regardless of whether any litigation with respect to any Estate Claim was commenced by the Debtor or the Committee prior to the Effective Date.

43. **Non-Voting Equity Securities (11 U.S.C. § 1123(a)(6)).** The Debtor is

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Confirmation Hearing and in the Confirmation Brief. Mr. Kirschner shall be paid \$40,000 per month for the first three months and \$20,000 per month thereafter, plus a success fee related to litigation recoveries. The Committee and the Debtor had arm's lengths negotiations regarding the post-Effective Date corporate governance structure of the Reorganized Debtor and believe that the selection of the Claimant Trustee, the Litigation Trustee, and the Claimant Trust Oversight Committee are in the best interests of the Debtor's economic stakeholders. Section 1123(a)(7) of the Bankruptcy Code is satisfied.

46. Debtor's Compliance with Bankruptcy Code (11 U.S.C. § 1129(a)(2)).

Pursuant to section 1129(a)(2) of the Bankruptcy Code, the Debtor has complied with the applicable provisions of the Bankruptcy Code, including sections 1122, 1123, 1124, 1125, and 1126 of the Bankruptcy Code, the Bankruptcy Rules, and the Disclosure Statement Order governing notice, disclosure, and solicitation in connection with the Plan, the Disclosure Statement, the Plan Supplements, and all other matters considered by the Bankruptcy Court in connection with this Chapter 11 Case.

47. Debtor's Solicitation Complied with Bankruptcy Code and Disclosure

Statement Order. Before the Debtor solicited votes on the Plan, the Bankruptcy Court entered the Disclosure Statement Order. In accordance with the Disclosure Statement Order and evidenced by the Affidavits of Service and Publication, the Debtor appropriately served (i) the Solicitation Packages (as defined in the Disclosure Statement Order) on the Holders of Claims in Classes 2, 7, 8 and 9 and Holders of Equity Interests in Classes 10 and 11 who were entitled to vote on the Plan; and (ii) the Notice of Nonvoting Status (as defined in the Disclosure Statement Order) and the

a. The Independent Board determined that it should consider all potential restructuring alternatives, including pursuit of a traditional restructuring and the continuation of the Debtor's business, a potential sale of the Debtor's assets in one or more transactions, an asset monetization plan similar to that described in the Plan, and a so-called "grand bargain" plan that would involve Mr. Dondero's sponsorship of a plan with a substantial equity infusion.

- b. The Debtor subsequently engaged in arm's-length, good faith negotiations with the Committee over an asset monetization Plan commencing in June 2020, which negotiations occurred over the next several months.
- c. Negotiations between the Debtor and the Committee were often contentious over disputes, including, but not limited to, the post-confirmation corporate governance structure and the scope of releases contemplated by the Plan.
- d. While negotiations with the Committee progressed, the Independent Board engaged in discussions with Mr. Dondero regarding a potential "grand bargain" plan which contemplated a significant equity infusion by Mr. Dondero, and which Mr. Seery personally spent hundreds of hours pursuing over many months.
- e. On August 3, 2020, the Bankruptcy Court entered the *Order Directing Mediation* [Docket No. 912] pursuant to which the Bankruptcy Court ordered the Debtor, the Committee, UBS, Acis, the Redeemer Committee, and Mr. Dondero into mediation. As a result of this mediation, the Debtor negotiated the settlement of the claims of Acis and Mr. Terry, which the Bankruptcy Court approved on October 28, 2020 [Docket No. 1302].
- f. On August 12, 2020, the Debtor filed its *Chapter 11 Plan of Reorganization of Highland Capital Management, L.P.* [Docket No. 944] (the "Initial Plan") and related disclosure statement (the "Initial Disclosure Statement") which were not supported by either the Committee or Mr. Dondero. The Independent Board filed the Initial Plan and Initial Disclosure Statement in order to act as a catalyst for continued discussions with the Committee while it simultaneously worked with Mr. Dondero on the "grand bargain" plan.
- g. The Bankruptcy Court conducted a contested hearing on the Initial Disclosure Statement on October 27, 2020. The Committee and other parties objected to approval of the Disclosure Statement at the Initial Disclosure Statement hearing, which was eventually continued to November 23, 2020.
- h. Following the Initial Disclosure Statement hearing, the Debtor continued to negotiate with the Committee and ultimately resolved the remaining material disputes and led to the Bankruptcy Court's approval of the Disclosure Statement on November 23, 2020.
- i. Even after obtaining the Bankruptcy Court's approval of the Disclosure Statement, the Debtor and the Committee continued to negotiate with Mr. Dondero and the Committee over a potential "pot plan" as an alternative to the Plan on file with the Bankruptcy Court, but such efforts were unsuccessful. This history conclusively demonstrates that the Plan is being proposed in good faith within the meaning of section 1129(a)(3).

49. **Payments for Services or Costs and Expenses (11 U.S.C. § 1129(a)(4)).**

Article II.B of the Plan provides that Professionals will file all final requests for payment of Professional Fee Claims no later than 60 days after the Effective Date, thereby providing an adequate period of time for interested parties to review such claims. The procedures set forth in the Plan for the Bankruptcy Court's approval of the fees, costs, and expenses to be paid in connection with this chapter 11 Case, or in connection with the Plan and incident to this Chapter 11 Case, satisfy the objectives of and are in compliance with section 1129(a)(4) of the Bankruptcy Code.

50. **Directors, Officers, and Insiders (11 U.S.C. § 1129(a)(5)).** Article IV.B

of the Plan provides for the appointment of the Claimant Trustee, Litigation Trustee, and the Claimant Trust Oversight Committee and the members thereto. For the reasons more fully explained in paragraphs 44-45 of this Confirmation Order with respect to the requirement of section 1123(a)(7) of the Bankruptcy Code, the Debtor has disclosed the nature of compensation of any insider to be employed or retained by the Reorganized Debtor, if applicable, and compensation for any such insider. The appointment of such individuals is consistent with the interests of Claims and Equity Interests and with public policy. Thus, the Plan satisfies section 1129(a)(5) of the Bankruptcy Code.

51. **No Rate Changes (11 U.S.C. § 1129(a)(6)).** The Plan does not provide for

any rate change that requires regulatory approval. Section 1129(a)(6) of the Bankruptcy Code is thus not applicable.

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acceleration of term notes owed to the Debtor by the following Dondero Related Entities: NexPoint Advisors, L.P.; Highland Capital Management Services, Inc.; and HCRE Partners, LLC (n/k/a NexPoint Real Estate Partners, LLC). Under the Plan, as of the Confirmation Date, (a) Class 7 General Unsecured Creditors are projected to receive 85% on account of their claims; and (b) Class 8 General Unsecured Creditors are projected to receive at least approximately 71% on account of their Claims. Under a hypothetical chapter 7 liquidation, all general unsecured creditors are projected to receive approximately 55% on account of their Claims. The Bankruptcy Court finds that the distributions that Class 7 and 8 General Unsecured Creditors are projected to receive under the Plan substantially exceeds that which they would receive under a chapter 7 liquidation based on Mr. Seery's testimony, including the following credible reasons he posited, among others:

- a. The nature of the Debtor's assets is complex. Certain assets relate to complicated real estate structures and private equity investments in operating businesses. Mr. Seery's extensive experience with the Debtor during the thirteen months since his appointment as an Independent Director and later Chief Executive Officer and Chief Restructuring Officer, provides him with a substantial learning curve in connection with the disposition of the Debtor's assets and are reasonably expected to result in him being able to realize tens of millions of dollars more value than would a chapter 7 trustee.
- b. Assuming that a hypothetical chapter 7 trustee could even operate the Debtor's business under chapter 7 of the Bankruptcy Code and hire the necessary personnel with the relevant knowledge and experience to assist him or her in selling the Debtor's assets, a chapter 7 trustee would likely seek to dispose of the Debtor's assets in a forced sale liquidation which would generate substantially less value for the Debtor's creditors than the asset monetization plan contemplated by the Plan.
- c. A chapter 7 trustee would be unlikely to retain the Debtor's existing professionals to assist in its efforts to monetize assets, resulting in delays, increased expenses, and reduced asset yields for the chapter 7 estate.

53. **Acceptance by Certain Classes (11 U.S.C. § 1129(a)(8)).** Classes 1, 3, 4,

54. Treatment of Administrative, Priority, Priority Tax Claims, and

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certain Texas taxing authorities satisfies the requirements of sections 1129(a)(9) of the Bankruptcy Code.

55. **Acceptance by Impaired Class (11 U.S.C. § 1129(a)(10)).** Class 2 (Frontier Secured Claims) and Class 7 (Convenience Claims) are each Impaired Classes of Claims that voted to accept the Plan, determined without including any acceptance of the Plan by any insider. Therefore, the requirement of section 1129(a)(10) of the Bankruptcy Code is satisfied.

56. **Feasibility (11 U.S.C. § 1129(a)(11)).** Article IV of the Plan provides for the implementation of the Plan through the Claimant Trust, the Litigation Sub-Trust, and the Reorganized Debtor. The Plan provides that the Claimant Trust, among other things, will monetize and distribute the Debtor's remaining assets. The Disclosure Statement, the Amended Liquidation Analysis/Financial Projections, and the other evidence presented at the Confirmation Hearing provide a reasonable probability of success that the Debtor will be able to effectuate the provisions of the Plan. The Plan contemplates the establishment of the Claimant Trust upon the Effective Date, which will monetize the Estate's assets for the benefit of creditors. Mr. Seery testified that the Class 2 Frontier Secured Claim will be paid over time pursuant to the terms of the New Frontier Note and the Reorganized Debtor will have sufficient assets to satisfy its obligations under this note. The Claims of the Holders of Class 7 Claims (as well as those Class 8 creditors who validly opted to receive the treatment of Class 7 Claims) are expected to be satisfied shortly after the Effective Date. Holders of Class 8 Claims (including any holders of Class 7 Claims who opted to receive the treatment provided to Class 8 Claims) are not guaranteed any recovery and will

periodically receive pro rata distributions as assets are monetized pursuant to the Plan and the Claimant Trust Agreement. Thus, section 1129(a)(11) of the Bankruptcy Code is satisfied.

57. **Payment of Fees (11 U.S.C. § 1129(a)(12)).** All fees payable under 28 U.S.C. § 1930 have been paid or will be paid on or before the Effective Date pursuant to Article XII.A of the Plan, thus satisfying the requirement of section 1129(a)(12) of the Bankruptcy Code. The Debtor has agreed that the Reorganized Debtor, the Claimant Trust, and the Litigation Sub-Trust shall be jointly and severally liable for payment of quarterly fees to the Office of the United States Trustee pursuant to 28 U.S.C. § 1930 through the entry of the Final Decree for the Debtor or the dismissal or conversion of the Chapter 11 Case.

58. **Retiree Benefits.** The Plan provides for the assumption of the Pension Plan (to the extent such Pension Plan provides “retiree benefits” and is governed by section 1114 of the Bankruptcy Code). Thus, the Plan complies with section 1129(a)(13) of the Bankruptcy Code, to the extent applicable.

59. **Miscellaneous Provisions (11 U.S.C. §§ 1129(a)(14)-(16)).** Sections 1129(a)(14)-(16) of the Bankruptcy Code are inapplicable as the Debtor (i) has no domestic support obligations (section 1129(a)(14)), (ii) is not an individual (section 1129(a)(15)), and (iii) is not a nonprofit corporation (section 1129(a)(16)).

60. **No Unfair Discrimination; Fair and Equitable Treatment (11 U.S.C. § 1129(b)).** The classification and treatment of Claims and Equity Interests in Classes 8, 10 and 11, which have not accepted the Plan, is proper pursuant to section 1122 of the Bankruptcy Code, does

- Accordingly, the Plan does not violate the absolute priority rule, does not discriminate unfairly, and is fair and equitable with respect to each Class that has rejected the Plan. Thus, the Plan satisfies the requirements of section 1129(b) of the Bankruptcy Code with respect to Classes 8, 10, and 11.

61. **Only One Plan (11 U.S.C. § 1129(c)).** The Plan is the only chapter 11 plan confirmed in this Chapter 11 Case, and the requirements of section 1129(c) of the Bankruptcy Code are therefore satisfied.

62. **Principal Purpose (11 U.S.C. § 1129(d)).** Mr. Seery testified that the principal purpose of the Plan is neither the avoidance of taxes nor the avoidance of the application of section 5 of the Securities Act of 1933, and no governmental unit has objected to the confirmation of the Plan on any such grounds. Accordingly, section 1129(d) of the Bankruptcy Code is inapplicable.

63. **Satisfaction of Confirmation Requirements.** Based upon the foregoing, the Plan satisfies the requirements for confirmation set forth in section 1129 of the Bankruptcy Code and should be confirmed.

64. **Good Faith Solicitation (11 U.S.C. § 1125(e)).** The Debtor, the Independent Directors, and the Debtor's employees, advisors, Professionals, and agents have acted in good faith within the meaning of section 1125(e) of the Bankruptcy Code and in compliance with the applicable provisions of the Bankruptcy Code and Bankruptcy Rules in connection with all of their respective activities relating to the solicitation of acceptances of the Plan and their participation in the activities described in section 1125 of the Bankruptcy Code, and they are entitled to the protections afforded by section 1125(e) of the Bankruptcy Code.

65. **Discharge (11 U.S.C. § 1141(d)(3)).** The Debtor is entitled to a discharge of debts pursuant to section 1141(d)(3)(B) of the Bankruptcy Code. Under the Plan, the Claimant Trust or Reorganized Debtor, as applicable, will continue to manage funds and conduct business

in the same manner as the Debtor did prior to Plan confirmation, which includes the management of the CLOs, Multi-Strat, Restoration Capital, the Select Fund and the Korea Fund. Although the Plan projects that it will take approximately two years to monetize the Debtor's assets for fair value, Mr. Seery testified that while the Reorganized Debtor and Claimant Trust will be monetizing their assets, there is no specified time frame by which this process must conclude. Mr. Seery's credible testimony demonstrates that the Debtor will continue to engage in business after consummation of the Plan, within the meaning of Section 1141(d)(3)(b) and that the Debtor is entitled to a discharge pursuant to section 1141(d)(1) of the Bankruptcy Code.

66. **Retention of Jurisdiction.** The Bankruptcy Court may properly retain jurisdiction over the matters set forth in Article XI of the Plan and/or section 1142 of the Bankruptcy Code to the maximum extent under applicable law.

67. **Additional Plan Provisions (11 U.S.C. § 1123(b)).** The Plan's provisions are appropriate, in the best interests of the Debtor and its Estate, and consistent with the applicable provisions of the Bankruptcy Code, Bankruptcy Rules, and Local Rules.

68. **Executory Contracts and Unexpired Leases (11 U.S.C. § 1123(b)(2)).** The Debtor has exercised reasonable business judgment with respect to the rejection of the Executory Contracts and Unexpired Leases pursuant the terms of the Plan and this Confirmation Order, and such rejections are justified and appropriate in this Chapter 11 Case. The Debtor also filed the List of Assumed Contracts, which contain notices to the applicable counterparties to the contracts set forth on Exhibit "FF" to Plan Supplement filed on February 1, 2021 [Docket No. 1875] and which exhibit sets forth the list of executory contracts and unexpired leases to be

(11 U.S.C. § 1123(b)(3)). All of the settlements and compromises pursuant to and in connection with the Plan, comply with the requirements of section 1123(b)(3) of the Bankruptcy Code and Bankruptcy Rule 9019.

Debtor Release, Exculpation, and Injunction provisions provided in the Plan (i) are within the jurisdiction of the Bankruptcy Court under 28 U.S.C. § 1334; (ii) are integral elements of the transactions incorporated into the Plan, and inextricably bound with the other provisions of the Plan; (iii) confer material benefit on, and are in the best interests of, the Debtor, its Estate, and its

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fraud, or gross negligence of such applicable Released Party as determined by Final Order of the Bankruptcy Court or any other court of competent jurisdiction. The Debtor Release also contains conditions to such releases as set forth in Article X.D of the Plan with respect to employees (the “Release Conditions”). Until the an employee satisfies the Release Conditions or the Release Conditions otherwise terminate, any claims against such employee will be tolled so that if the Release Conditions are not met the Litigation Trustee may pursue claims against an employee at a later date. The evidence before the Bankruptcy Court, including, but not limited to Mr. Seery’s testimony, demonstrates that the Debtor is not aware of any claims against any of the Released Parties, that the Released Parties have been instrumental in assisting the Debtor’s efforts toward confirmation of the Plan and that, therefore, the releases are a *quid pro quo* for the Released Parties’ significant contributions to a highly complex and contentious restructuring. The Committee, whose members hold approximately \$200 million in claims against the Estate, is highly sophisticated and is represented by highly sophisticated professionals, and has actively and vigorously negotiated the terms of the Debtor Release, which was the subject of significant controversy at the Initial Disclosure Statement hearing held by the Bankruptcy Court on October 27, 2020.

72. **Exculpation.** Section IX.C of the Plan provides for the exculpation of certain Exculpated Parties to the extent provided therein (the “Exculpation Provision”). As explained below, the Exculpation Provision is appropriate under the unique circumstances of this litigious Chapter 11 Case and consistent with applicable Fifth Circuit precedent. First, with respect to the Independent Directors, their agents, and their advisors, including any employees acting at

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74. **The Exculpation Provision Complies with Applicable Law.** Separate and apart from the *res judicata* effect of the January 9 Order and the July 16 Order, the Bankruptcy Court also finds and concludes that the Exculpation Provision is consistent with applicable law, including *In re Pacific Lumber Co.*, 584 F.3d 229 (5th Cir. 2009), for several reasons:

- a. First, the statutory basis for *Pacific Lumber*'s denial of exculpation for certain parties other than a creditors' committee and its members is that section 524(e) of the Bankruptcy Code "only releases the debtor, not co-liable third parties." *Pacific Lumber*, 253 F.3d at 253. However, *Pacific Lumber* does not prohibit all exculpations under the Bankruptcy Code and the court in such case specifically approved the exculpations of a creditors' committee and its members on the grounds that "11 U.S.C. § 1103(c), which lists the creditors' committee's powers, implies committee members have qualified immunity for actions within the scope of their duties.... [I]f members of the committee can be sued by persons unhappy with the committee's performance during the case or unhappy with the outcome of the case, it will be extremely difficult to find members to serve on an official committee." *Pacific Lumber*, 253 F.3d at 253 (quoting Lawrence P. King, et al, Collier on Bankruptcy, ¶ 1103.05[4][b] (15th Ed. 2008)). *Pacific Lumber*'s rationale for permitted exculpation of creditors' committees and their members (which was clearly policy-based and based on a creditors' committee qualified immunity flowing from their duties under section 1103(c) of the Bankruptcy Code and their disinterestedness and importance in chapter 11 cases) does not preclude exculpation to other parties in a particular chapter 11 case that perform similar roles to a creditors' committee and its members. The Independent Directors, and by extension the Chief Executive Officer and Chief Restructuring Officer, were not

- ⁹ The same reasoning applies to the inclusion of Strand in the Exculpation Provision because Strand is the general partner of the Debtor through which each of the Independent Board members act.

75. **Injunction.** Section IX.D of the Plan provides for a Plan injunction to implement and enforce the Plan’s release, discharge and release provisions (the “Injunction Provision”). The Injunction Provision is necessary to implement the provisions in the Plan. Mr. Seery testified that the Claimant Trustee will monetize the Debtor’s assets in order to maximize their value. In order to accomplish this goal, the Claimant Trustee needs to be able to pursue this objective without the interference and harassment of Mr. Dondero and his related entities, including the Dondero Related Entities. Mr. Seery also testified that if the Claimant Trust was subject to interference by Mr. Dondero, it would take additional time to monetize the Debtor’s assets and those assets could be monetized for less money to the detriment of the Debtor’s creditors. The Bankruptcy Court finds and concludes that the Injunction Provision is consistent with and permissible under Bankruptcy Code sections 1123(a), 1123(a)(6), 1141(a) and (c), and 1142. The Bankruptcy Court rejects assertions by certain objecting parties that the Injunction Provision constitutes a “third-party release.” The Injunction Provision is appropriate under the circumstances of this Chapter 11 Case and complies with applicable bankruptcy law. The Bankruptcy Court also concludes that the terms “implementation” and “consummation” are neither vague nor ambiguous

76. **Gatekeeper Provision.** Section IX.F of the Plan contains a provision contained in paragraph AA of this Confirmation Order and which the Debtor has referred to as a gatekeeper provision (the “Gatekeeper Provision”). The Gatekeeper Provision requires that Enjoined Parties first seek approval of the Bankruptcy Court before they may commence an action against Protected Parties. Thereafter, if the Bankruptcy Court determines that the action is

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as frivolous and a waste of the Bankruptcy Court’s time [Docket No. 1528] which was denied by the Court [Docket No. 1605]; (iv) multiple plan confirmation objections focused on ensuring the Dondero Related Entities be able to continue their litigation against the Debtor and its successors post-confirmation [Docket Nos. 1661, 1667, 1670, 1673, 1676, 1677 and 1868]; (v) objections to the approval of the Debtor’s settlements with Acis and HarbourVest and subsequent appeals of the Bankruptcy Court’s order approving each of those settlements [Docket Nos. 1347 and 1870]; and (vi) a complaint and injunction sought against Mr. Dondero’s affiliated entities to prevent them from violating the January 9 Order and entry of a restraining order against those entities [Adv Proc. No. 21-03000 Docket No 1] (collectively, the “Dondero Post-Petition Litigation”).

78. **Findings Regarding Dondero Post-Petition Litigation.** The Bankruptcy Court finds that the Dondero Post-Petition Litigation was a result of Mr. Dondero failing to obtain creditor support for his plan proposal and consistent with his comments, as set forth in Mr. Seery’s credible testimony, that if Mr. Dondero’s plan proposal was not accepted, he would “burn down the place.” The Bankruptcy Court concludes that without appropriate protections in place, in the form of the Gatekeeper Provision, Mr. Dondero and his related entities will likely commence litigation against the Protected Parties after the Effective Date and do so in jurisdictions other than the Bankruptcy Court in an effort to obtain a forum which Mr. Dondero perceives will be more hospitable to his claims. The Bankruptcy Court also finds, based upon Mr. Seery’s testimony, that the threat of continued litigation by Mr. Dondero and his related entities after the Effective Date will impede efforts by the Claimant Trust to monetize assets for the benefit of creditors and result

81. **Jurisdiction to Implement Gatekeeper Provision.** The Bankruptcy Court finds that it will have jurisdiction after the Effective Date to implement the Gatekeeper Provision as post-confirmation bankruptcy court jurisdiction has been interpreted by the Fifth Circuit under *United States Brass Corp. v. Travelers Ins. Group, Inc. (In re United States Brass Corp.)*, 301 F.3d 296 (5th Cir. 2002) and *EOP-Colonnade of Dallas Ltd. P'Ship v. Faulkner (In re Stonebridge Techs., Inc.)*, 430 F.3d 260 (5th Cir. 2005). Based upon the rationale of the Fifth Circuit in *Villegas v. Schmidt*, 788 F.3d 156, 158-59 (5th Cir. 2015), the Bankruptcy Court's jurisdiction to act as a gatekeeper does not violate *Stern v. Marshall*. The Bankruptcy Court's determination of whether

E. Deemed Acceptance of Plan. In accordance with section 1127 of the Bankruptcy Code and Bankruptcy Rule 3019, all Holders of Claims and Equity Interests who voted to accept the Plan (or whom are conclusively presumed to accept the Plan) are deemed to have accepted the Plan as modified by the Plan Modifications. No holder of a Claim shall be permitted to change its vote as a consequence of the Plan Modifications.

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Interests. On the Effective Date, all Class A Limited Partnership Interests, including the Class A Limited Partnership Interests held by Strand, as general partner, and Class B/C Limited Partnerships in the Debtor will be deemed cancelled, and all obligations or debts owed by, or Claims against, the Debtor on account of, or based upon, such Class A Limited Partnership Interests and Class B/C Limited Partnership Interests shall be deemed as cancelled, released, and discharged, including all obligations or duties by the Debtor relating to the Equity Interests in any of the Debtor's formation documents, including the Limited Partnership Agreement. As of the Effective Date and pursuant to the Plan, new Class A Limited Partnership Interests in the Reorganized Debtor will be issued to the Claimant Trust and New GP LLC. The Claimant Trust, as limited partner, will ratify New GP LLC's appointment as general partner of the Reorganized Debtor, and on and following the Effective Date, the Claimant Trust will be the Reorganized Debtor's limited partner and New GP LLC will be its general partner. The Claimant Trust, as limited partner, and New GP LLC, as general partner, will execute the Reorganized Limited Partnership Agreement, which will amend and restate, in all respects, the Debtor's current Limited

L. Transfer of Assets to Claimant Trust. On or prior to the Effective Date, the Debtor shall irrevocably transfer and shall be deemed to have irrevocably transferred to the Claimant Trust all of its rights, title, and interest in and to all of the Claimant Trust Assets, and in accordance with section 1141 of the Bankruptcy Code, the Claimant Trust Assets shall automatically vest in the Claimant Trust free and clear of all Claims, Liens, encumbrances, or interests subject only to the Claimant Trust Interests and the Claimant Trust Expenses, as provided for in the Claimant Trust Agreement, and such transfer shall be exempt from any stamp, real estate transfer, mortgage from any stamp, transfer, reporting, sales, use, or other similar tax. Following the Effective Date, the Claimant Trust will administer the Claimant Trust Assets pursuant to the Plan and the Claimant Trust Agreement.

M. Transfer of Estate Claims to Litigation Sub-Trust. On or prior to the Effective Date, the Claimant Trust shall irrevocably transfer and shall be deemed to have irrevocably transferred to the Litigation Sub-Trust all of the Claimant Trust's rights, title, and interest in and to all of the Estate Claims as successor in interest to the Debtor, and in accordance with section 1141 of the Bankruptcy Code, the Estate Claims shall automatically vest in the Litigation Sub-Trust free and clear of all Claims, Liens, encumbrances, or interests subject only to the Litigation Sub-Trust Interests and Litigation Sub-Trust Expenses. The Litigation Trustee will

be authorized to investigate, pursue, and otherwise resolve the Estate Claims pursuant to the terms of the Litigation Sub-Trust Agreement and the Plan, including as successor in interest to the Debtor or Committee, as applicable, in any litigation commenced prior to the Effective Date in which Estate Claims are asserted.

N. Compromise of Controversies. In consideration for the distributions and other benefits, including releases, provided under the Plan, the provisions of the Plan constitute a good faith compromise and settlement of all Claims, Equity Interests, and controversies resolved under the Plan and the entry of this Confirmation Order constitutes approval of such compromise and settlement under Bankruptcy Rule 9019.

O. Objections to Claims. The Claims Objection Deadline shall be the date that is 180 days after the Effective Date, *provided, however*, that the Claims Objection Deadline may be extended by the Bankruptcy Court upon a motion by the Claimant Trustee and as otherwise provided under the Plan.

P. Assumption of Contracts and Leases. Effective as of the date of this Confirmation Order, each of the Assumed Contacts shall be assumed by the Debtor without the need for any further notice to or action, order, or approval of the Bankruptcy Court, under section 365 of the Bankruptcy Code and the payment of Cures, if any, shall be paid in accordance with the Plan. Each Assumed Contract shall include all modifications, amendments, supplements, restatements, or other agreements related thereto, and all rights related thereto, if any, including all easements, licenses, permits, rights, privileges, immunities, options, rights of first refusal, and any other interests. Modifications, amendments, supplements, and restatements to any of the

Issuer Executory Contracts (collectively, the “Portfolio Manager”) will pay to the Issuers¹² a cumulative amount of \$525,000 (the “Cure Amount”) as follows:

T. Release of Debtor Claims against Issuer Released Parties. Upon entry of this Order, and to the maximum extent permitted by law, the Debtor hereby forever, finally, fully, unconditionally, and completely releases, relieves, acquits, remises, and exonerates, and covenants never to sue [(i) each Issuer and (ii) Wendy Ebanks, (iii) Yun Zheng, (iv) Laura Chisholm, (v) Mora Goddard, (vi) Stacy Bodden, (vii) Suzan Merren (viii) Scott Dakers, (ix) Samit Ghosh, (x) Inderjit Singh, (xi) Ellen Christian, (xii) Andrew Dean, (xiii) Betsy Mortel, (xiv) David Hogan, (xv) Cleveland Stewart, (xvi) Rachael Rankin, (xvii) Otelia Scott, (xviii) Martin Couch, (xx) Feronia Bartley-Davis, (xxi) Charlotte Cloete, (xxii) Christina McLean, (xxiii) Karen Ellerbe,

U. Authorization to Consummate. The Debtor is authorized to consummate the Plan after the entry of this Confirmation Order subject to satisfaction or waiver of the conditions precedent to the Effective Date of the Plan set forth in Article VIII.A of the Plan. The Plan shall not become effective unless and until the conditions set forth in Article VIII.A of the Plan have been satisfied, or otherwise waived pursuant to Article VIII.B of the Plan.

V. Professional Compensation. All requests for payment of Professional Fees shall be made by the Professional to the Board of Directors of the Company. Claims for services rendered and reimbursement of expenses incurred prior to the Effective Date of the Plan shall be made by the Professional to the Board of Directors of the Company.

must be filed no **later than sixty (60) days after the Effective Date**. The Bankruptcy Court shall determine the Allowed amounts of such Professional Fee Claims after notice and an opportunity for hearing in accordance with the procedures established by the Bankruptcy Code and the Bankruptcy Court. The Debtor shall fund the Professional Fee Reserve as provided under the Plan. The Reorganized Debtor shall pay Professional Fee Claims in Cash in the amounts the Bankruptcy Court allows. The Debtor is authorized to pay the pre-Effective Date fees and expenses of all ordinary course professionals in the ordinary course of business without the need for further Bankruptcy Court order or approval. From and after the Effective Date, any requirement that Professionals comply with sections 327 through 331 and 1103 (if applicable) of the Bankruptcy Code in seeking retention or compensation for services rendered after such date shall terminate, and the Reorganized Debtor or Claimant Trustee, as applicable, may employ and pay any Professional or Entity employed in the ordinary course of the Debtor's business without any further notice to or action, order, or approval of the Bankruptcy Court.

W. Release, Exculpation, Discharge, and Injunction Provisions. The following release, exculpation, discharge, and injunction provisions set forth in the Plan are approved and authorized in their entirety, and such provisions are effective and binding on all parties and Entities to the extent provided therein.

X. Discharge of Claims and Termination of Interests. To the fullest extent provided under section 1141(d)(1)(A) and other applicable provisions of the Bankruptcy Code, except as otherwise expressly provided by the Plan or this Confirmation Order, all consideration distributed under the Plan will be in exchange for, and in complete satisfaction, settlement,

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AA. Injunction. Upon entry of this Confirmation Order, all Enjoined Parties are and shall be permanently enjoined, on and after the Effective Date, from taking any actions to interfere with the implementation or consummation of the Plan. Except as expressly provided in the Plan, this Confirmation Order, or a separate order of the Bankruptcy Court, all Enjoined Parties are and shall be permanently enjoined, on and after the Effective Date, with respect to any Claims and Equity Interests, from directly or indirectly (i) commencing, conducting, or continuing in any manner, any suit, action, or other proceeding of any kind (including any proceeding in a judicial, arbitral, administrative or other forum) against or affecting the Debtor or the property of the Debtor, (ii) enforcing, levying, attaching (including any prejudgment attachment), collecting, or otherwise recovering, enforcing, or attempting to recover or enforce, by any manner or means, any judgment, award, decree, or order against the Debtor or the property of the Debtor, (iii) creating, perfecting, or otherwise enforcing in any manner, any security interest, lien or encumbrance of any kind against the Debtor or the property of the Debtor, (iv) asserting any right of setoff, directly or indirectly, against any obligation due to the Debtor or against property or interests in property of the Debtor, except to the limited extent permitted under Sections 553 and 1141 of the Bankruptcy Code, and (v) acting or proceeding in any manner,

EE. Exemption from Transfer Taxes. Pursuant to section 1146(a) of the Bankruptcy Code, any transfers (whether from the Debtor to the Reorganized Debtor or to any other Person) of property under the Plan or pursuant to: (a) the issuance, distribution, transfer, or exchange of any debt, equity security, or other interest in the Debtor or the Reorganized Debtor; (b) the Restructuring transactions pursuant to the Plan; (c) the creation, modification, consolidation, termination, refinancing, and/or recording of any mortgage, deed of trust, or other security interest, or the securing of additional indebtedness by such or other means; (d) the making, assignment, or recording of any lease or sublease; or (e) the making, delivery, or recording of any deed or other instrument of transfer under, in furtherance of, or in connection with, the Plan,

FF. Cancellation of Notes, Certificates and Instruments. Except for the purpose of evidencing a right to a distribution under the Plan and except as otherwise set forth in the Plan or as otherwise provided in this Confirmation Order, on the Effective Date, all agreements, instruments, Securities and other documents evidencing any prepetition Claim or Equity Interest and any rights of any Holder in respect thereof shall be deemed cancelled, discharged, and of no force or effect. The holders of or parties to such cancelled instruments, Securities, and other documentation will have no rights arising from or related to such instruments, Securities, or other documentation or the cancellation thereof, except the rights provided for pursuant to the Plan, and the obligations of the Debtor thereunder or in any way related thereto will be fully released, terminated, extinguished and discharged, in each case without further notice to or order of the

LL. Substantial Consummation. On the Effective Date, the Plan shall be deemed to be substantially consummated under sections 1101 and 1127 of the Bankruptcy Code.

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applicable nonbankruptcy law. In the event the 2020 taxes are paid after February 1, 2021, the Tax Authorities may assert any rights and amounts they claim are owed with respect to penalties and interest that have accrued through the date of payment and the Debtor and Reorganized Debtor reserve any all rights and defenses in connection therewith.

RR. Resolution of Objections of Scott Ellington and Isaac Leventon.

Pursuant to Bankruptcy Rule 9019(a), the Senior Employees' Settlement is approved in all respects. The Debtor may, only with the consent of the Committee, elect Option B for a Senior Employee Claimant by written notice to such Senior Employee Claimant on or before the occurrence of the Effective Date. If the Debtor does not elect Option B, then Option A will govern the treatment of the Liquidated Bonus Claims.

- a. Notwithstanding any language in the Plan, the Disclosure Statement, or this Confirmation Order to the contrary, if Option A applies to the Liquidated Bonus Claims of a Senior Employee Claimant, then the Liquidated Bonus Claims of such Senior Employee Claimant will receive the treatment described in paragraph 82(e) hereof, and if the Debtor timely elects Option B with respect to the Liquidated Bonus Claims of a Senior Employee Claimant, then the Liquidated Bonus Claims of such Senior Employee will receive the treatment described in paragraph 82(f) hereof.
- b. The Senior Employees' Settlement is hereby approved, without prejudice to the respective rights of Mr. Ellington and Mr. Leventon to assert all their remaining Claims against the Debtor's estate, including, but not limited to, their Class 6 PTO Claims, their remaining Class 8 General Unsecured Claims, any indemnification claims, and any Administrative Expense Claims that they may assert and is without prejudice to the rights of any party in interest to object to any such Claims.
- c. Pursuant to Bankruptcy Rule 3018(a), Mr. Ellington and Mr. Leventon were permitted to change their votes on the Plan. Accordingly, Mr. Ellington's votes on his Ballots in Class 7 and Class 8 of the Plan were changed from a rejection of the Plan to acceptance of the Plan, and Mr. Leventon's votes on his Ballots in Class 7 and Class 8 of the Plan were, changed from rejections of the Plan to acceptances of the Plan.
- d. The Senior Employees' Objection is deemed withdrawn.

SS. No Release of Claims Against Senior Employee Claimants. For the avoidance of doubt, the Senior Employees' Settlement, as approved herein, shall not, and shall not be deemed to, release any Claims or Causes of Action held by the Debtor against either Senior

Employee Claimant nor shall either Senior Employee Claimant be, or be deemed to be, a “Released Party” under the Plan.

TT. Resolution of Objection of Internal Revenue Service. Notwithstanding any other provision or term of the Plan or Confirmation Order, the following Default Provision shall control as to the United States of America, Internal Revenue Service (“IRS”) and all of its claims, including any administrative claim (the “IRS Claim”):

(a) Notwithstanding any other provision in the Plan, if the Debtor, the Reorganized Debtor, or any successor in interest fails to pay when due any payment required to be made on federal taxes, the IRS Claim, or other payment required to be made to the IRS under the terms and provisions of this Plan, the Confirmation Order, or the Internal Revenue Code (26 U.S.C.), or fails to timely file any required federal tax return, or if any other event of default as set forth in the Plan occurs, the IRS shall be entitled to give the Debtor, the Reorganized Debtor and/or any successor in interest and their counsel of record, by United States Certified Mail, written notice of the failure and/or default with demand that it be cured, and if the failure and/or default is not cured within 14 days of the date of said notice and demand, then the following shall apply to the IRS:

(1) The administrative collection powers and the rights of the IRS shall be reinstated as they existed prior to the filing of the bankruptcy petition, including, but not limited to, the assessment of taxes, the filing of a notice of Federal tax lien and the powers of levy, seizure, and collection as provided under the Internal Revenue Code;

(2) The automatic stay of **11 U.S.C. § 362** and any injunction of the Plan or in the Confirmation Order shall, with regard to the IRS only, lift or terminate without further notice or hearing by the Bankruptcy Court, and the entire prepetition liability owed to the IRS, together with any unpaid postpetition tax liabilities, may become due and payable immediately; and

(3) The IRS shall have the right to proceed to collect from the Debtor, the Reorganized Debtor or any successor in interest any of the prepetition tax liabilities and related penalties and interest through administrative or judicial collection procedures available under the United States Code as if no bankruptcy petition had been filed and as if no plan had been confirmed.

(b) If the IRS declares the Debtor, the Reorganized Debtor, or any successor-in-interest to be in default of the Debtor’s, the Reorganized Debtor’s and/ or any successor- in-interest’s obligations under the Plan, then entire prepetition liability of an IRS’ Allowed Claim, together with any unpaid postpetition tax liabilities shall become due and payable

ZZ. Miscellaneous. After the Effective Date, the Debtor or Reorganized Debtor, as applicable, shall have no obligation to file with the Bankruptcy Court or serve on any parties reports that the Debtor or Reorganized Debtor, as applicable, were obligated to file under the Bankruptcy Code or a court order, including monthly operating reports (even for those periods for which a monthly operating report was not filed before the Effective Date), ordinary course professional reports, reports to any parties otherwise required under the “first” and “second” day orders entered in this Chapter 11 Case (including any cash collateral financing orders entered in this Chapter 11 Case) and monthly or quarterly reports for Professionals; *provided, however*, that

the Debtor or Reorganized Debtor, as applicable, will comply with the U.S. Trustee's post confirmation reporting requirements.

###END OF ORDER###

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Unless the context otherwise requires, the following terms shall have the following meanings when used in capitalized form herein:

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8. “*Assets*” means all of the rights, titles, and interest of the Debtor, Reorganized Debtor, or Claimant Trust, in and to property of whatever type or nature, including, without limitation, real, personal, mixed, intellectual, tangible, and intangible property, the Debtor’s books and records, and the Causes of Action.

10. “*Avoidance Actions*” means any and all avoidance, recovery, subordination or other actions or remedies that may be brought by and on behalf of the Debtor or its Estate under the Bankruptcy Code or applicable nonbankruptcy law, including, without limitation, actions or remedies arising under sections 502, 510, 544, 545, and 547-553 of the Bankruptcy Code or under similar state or federal statutes and common law, including fraudulent transfer laws

12. “*Bankruptcy Code*” means title 11 of the United States Code, 11 U.S.C. §§ 101-1532, as amended from time to time and as applicable to the Chapter 11 Case.

14. “*Bankruptcy Rules*” means the Federal Rules of Bankruptcy Procedure and the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the Northern District of Texas, Dallas Division, in each case as amended from time to time and as applicable to the Chapter 11 Case.

15. “*Bar Date*” means the applicable deadlines set by the Bankruptcy Court for the filing of Proofs of Claim against the Debtor as set forth in the Bar Date Order, which deadlines may be or have been extended for certain Claimants by order of the Bankruptcy Court.

16. “*Bar Date Order*” means the *Order (I) Establishing Bar Dates for Filing Proofs of Claim and (II) Approving the Form and Manner of Notice Thereof* [D.I. 488].

17. “*Business Day*” means any day, other than a Saturday, Sunday or “legal holiday” (as defined in Bankruptcy Rule 9006(a)).

18. “*Cash*” means the legal tender of the United States of America or the equivalent thereof.

19. “*Causes of Action*” means any action, claim, cross-claim, third-party claim, cause of action, controversy, demand, right, Lien, indemnity, contribution, guaranty, suit, obligation, liability, debt, damage, judgment, account, defense, remedy, offset, power, privilege, license and franchise of any kind or character whatsoever, in each case whether known, unknown, contingent or non-contingent, matured or unmatured, suspected or unsuspected, liquidated or unliquidated, disputed or undisputed, foreseen or unforeseen, direct or indirect, choate or inchoate, secured or unsecured, assertable directly or derivatively (including, without limitation, under alter ego theories), whether arising before, on, or after the Petition Date, in contract or in tort, in law or in equity or pursuant to any other theory of law. For the avoidance of doubt, Cause of Action includes, without limitation,: (a) any right of setoff, counterclaim or recoupment and any claim for breach of contract or for breach of duties imposed by law or in equity; (b) the right to object to Claims or Equity Interests; (c) any claim pursuant to section 362 or chapter 5 of the Bankruptcy Code; (d) any claim or defense including fraud, mistake, duress and usury, and any other defenses set forth in section 558 of the Bankruptcy Code; (e) any claims under any state or foreign law, including, without limitation, any fraudulent transfer or similar claims; (f) the Avoidance Actions, and (g) the Estate Claims. The Causes of Action include, without limitation, the Causes of Action belonging to the Debtor’s Estate listed on the schedule of Causes of Action to be filed with the Plan Supplement.

20. “*CEO/CRO*” means James P. Seery, Jr., the Debtor’s chief executive officer and chief restructuring officer.

21. “*Chapter 11 Case*” means the Debtor’s case under chapter 11 of the Bankruptcy Code commenced on the Petition Date in the Delaware Bankruptcy Court and transferred to the Bankruptcy Court on December 4, 2019, and styled *In re Highland Capital Management, L.P.*, Case No. 19-34054-sgj-11.

22. “*Claim*” means any “claim” against the Debtor as defined in section 101(5) of the Bankruptcy Code.

23. “*Claims Objection Deadline*” means the date that is 180 days after the Confirmation Date; *provided, however*, the Claims Objection Deadline may be extended by the Bankruptcy Court upon a motion by the Claimant Trustee.

26. “*Claimant Trust Assets*” means (i) other than the Reorganized Debtor Assets (which are expressly excluded from this definition), all other Assets of the Estate, including, but not limited to, all Causes of Action, Available Cash, any proceeds realized or received from such Assets, all rights of setoff, recoupment, and other defenses with respect, relating to, or arising from such Assets, (ii) any Assets transferred by the Reorganized Debtor to the Claimant Trust on or after the Effective Date, (iii) the limited partnership interests in the Reorganized Debtor, and (iv) the ownership interests in New GP LLC. For the avoidance of doubt, any Causes of Action that, for any reason, are not capable of being transferred to the Claimant Trust shall constitute Reorganized Debtor Assets.

28. “*Claimant Trustee*” means James P. Seery, Jr., the Debtor’s chief executive officer and chief restructuring officer, or such other Person identified in the Plan Supplement who will act as the trustee of the Claimant Trust in accordance with the Plan, the Confirmation Order, and Claimant Trust Agreement or any replacement trustee pursuant to (and in accordance with) the Claimant Trust Agreement. The Claimant Trustee shall be responsible for, among other things, monetizing the Estate’s investment assets, resolving Claims (other than those Claims assigned to the Litigation Sub-Trust for resolution), and, as the sole officer of New GP LLC, winding down the Reorganized Debtor’s business operations.

30. “*Claimant Trust Interests*” means the non-transferable interests in the Claimant Trust that are issued to the Claimant Trust Beneficiaries pursuant to this Plan; *provided, however*, Holders of Class A Limited Partnership Interests, Class B Limited Partnership Interests, and Class C Limited Partnership Interests will not be deemed to hold Claimant Trust Interests

32. “*Class*” means a category of Holders of Claims or Equity Interests as set forth in ARTICLE III hereof pursuant to section 1122(a) of the Bankruptcy Code.

34. “*Class B Limited Partnership Interest*” means the Class B Limited Partnership Interests as defined in the Limited Partnership Agreement held by Hunter Mountain Investment Trust.

36. “*Class C Limited Partnership Interest*” means the Class C Limited Partnership Interests as defined in the Limited Partnership Agreement held by Hunter Mountain Investment Trust.

38. “*Confirmation Date*” means the date on which the clerk of the Bankruptcy Court enters the Confirmation Order on the docket of the Bankruptcy Court.

40. “*Confirmation Order*” means the order of the Bankruptcy Court confirming this Plan pursuant to section 1129 of the Bankruptcy Code.

41. “*Convenience Claim*” means any prepetition, liquidated, and unsecured Claim against the Debtor that as of the Confirmation Date is less than or equal to \$1,000,000 or any General Unsecured Claim that makes the Convenience Class Election. For the avoidance of doubt, the Reduced Employee Claims will be Convenience Claims.

42. “*Convenience Claim Pool*” means the \$13,150,000 in Cash that shall be available upon the Effective Date for distribution to Holders of Convenience Claims under the Plan as set forth herein. Any Cash remaining in the Convenience Claim Pool after all distributions on account of Convenience Claims have been made will be transferred to the Claimant Trust and administered as a Claimant Trust Asset.

43. “*Convenience Class Election*” means the option provided to each Holder of a General Unsecured Claim that is a liquidated Claim as of the Confirmation Date on their Ballot to elect to reduce their claim to \$1,000,000 and receive the treatment provided to Convenience Claims.

44. “*Contingent Claimant Trust Interests*” means the contingent Claimant Trust Interests to be distributed to Holders of Class A Limited Partnership Interests, Holders of Class B Limited Partnership Interests, and Holders of Class C Limited Partnership Interests in accordance with this Plan, the rights of which shall not vest, and consequently convert to Claimant Trust Interests, unless and until the Claimant Trustee Files a certification that all holders of Allowed General Unsecured Claims have been paid indefeasibly in full, plus, to the extent all Allowed unsecured Claims, excluding Subordinated Claims, have been paid in full, all accrued and unpaid post-petition interest from the Petition Date at the Federal Judgment Rate and all Disputed Claims in Class 8 and Class 9 have been resolved. As set forth in the Claimant Trust Agreement, the Contingent Claimant Trust Interests distributed to the Holders of Class A Limited Partnership Interests will be subordinated to the Contingent Claimant Trust Interests distributed to the Holders of Class B/C Limited Partnership Interests.

45. “*Debtor*” means Highland Capital Management, L.P. in its capacity as debtor and debtor in possession in the Chapter 11 Case.

46. “*Delaware Bankruptcy Court*” means the United States Bankruptcy Court for the District of Delaware.

47. “*Disclosure Statement*” means that certain *Disclosure Statement for Debtor’s Fifth Amended Chapter 11 Plan of Reorganization*, as amended, supplemented, or modified from time to time, which describes this Plan, including all exhibits and schedules thereto and references therein that relate to this Plan.

48. “*Disputed*” means with respect to any Claim or Equity Interest, any Claim or Equity Interest that is not yet Allowed.

49. “*Disputed Claims Reserve*” means the appropriate reserve(s) or account(s) to be established on the Initial Distribution Date and maintained by the Claimant Trustee for distributions on account of Disputed Claims that may subsequently become an Allowed Claim.

50. “*Disputed Claims Reserve Amount*” means, for purposes of determining the Disputed Claims Reserve, the Cash that would have otherwise been distributed to a Holder of a Disputed Claim at the time any distributions of Cash are made to the Holders of Allowed Claims. The amount of the Disputed Claim upon which the Disputed Claims Reserve is calculated shall be: (a) the amount set forth on either the Schedules or the filed Proof of Claim, as applicable; (b) the amount agreed to by the Holder of the Disputed Claim and the Claimant Trustee or Reorganized

Debtor, as applicable; (c) the amount ordered by the Bankruptcy Court if it enters an order disallowing, in whole or in part, a Disputed Claim; or (d) as otherwise ordered by the Bankruptcy Court, including an order estimating the Disputed Claim.

51. “*Distribution Agent*” means the Claimant Trustee, or any party designated by the Claimant Trustee to serve as distribution agent under this Plan.

52. “*Distribution Date*” means the date or dates determined by the Reorganized Debtor or the Claimant Trustee, as applicable, on or after the Initial Distribution Date upon which the Distribution Agent shall make distributions to holders of Allowed Claims and Interests entitled to receive distributions under the Plan.

53. “*Distribution Record Date*” means the date for determining which Holders of Claims and Equity Interests are eligible to receive distributions hereunder, which date shall be the Effective Date or such later date determined by the Bankruptcy Court.

54. “*Effective Date*” means the Business Day that this Plan becomes effective as provided in ARTICLE VIII hereof.

55. “*Employees*” means the employees of the Debtor set forth in the Plan Supplement.

56. “*Enjoined Parties*” means (i) all Entities who have held, hold, or may hold Claims against or Equity Interests in the Debtor (whether or not proof of such Claims or Equity Interests has been filed and whether or not such Entities vote in favor of, against or abstain from voting on the Plan or are presumed to have accepted or deemed to have rejected the Plan), (ii) James Dondero (“Dondero”), (iii) any Entity that has appeared and/or filed any motion, objection, or other pleading in this Chapter 11 Case regardless of the capacity in which such Entity appeared and any other party in interest, (iv) any Related Entity, and (v) the Related Persons of each of the foregoing.

57. “*Entity*” means any “entity” as defined in section 101(15) of the Bankruptcy Code and also includes any Person or any other entity.

58. “*Equity Interest*” means any Equity Security in the Debtor, including, without limitation, all issued, unissued, authorized or outstanding partnership interests, shares, of stock or limited company interests, the Class A Limited Partnership Interests, the Class B Limited Partnership Interests, and the Class C Limited Partnership Interests.

59. “*Equity Security*” means an “equity security” as defined in section 101(16) of the Bankruptcy Code.

60. “*Estate*” means the bankruptcy estate of the Debtor created by virtue of section 541 of the Bankruptcy Code upon the commencement of the Chapter 11 Case.

61. “*Estate Claims*” has the meaning given to it in Exhibit A to the *Notice of Final Term Sheet* [D.I. 354].

64. “*Exhibit*” means an exhibit annexed hereto or to the Disclosure Statement (as such exhibits are amended, modified or otherwise supplemented from time to time), which are incorporated by reference herein.

66. “*File*” or “*Filed*” or “*Filing*” means file, filed or filing with the Bankruptcy Court or its authorized designee in the Chapter 11 Case.

68. “*Frontier Secured Claim*” means the loan from Frontier State Bank to the Debtor in the principal amount of \$7,879,688.00 made pursuant to that certain First Amended and Restated Loan Agreement, dated March 29, 2018.

83. “*Litigation Trustee*” means the trustee appointed by the Committee and reasonably acceptable to the Debtor who shall be responsible for investigating, litigating, and settling the Estate Claims for the benefit of the Claimant Trust in accordance with the terms and conditions set forth in the Litigation Sub-Trust Agreement.

85. “*New Frontier Note*” means that promissory note to be provided to the Allowed Holders of Class 2 Claims under this Plan and any other documents or security agreements securing the obligations thereunder.

87. “*New GP LLC Documents*” means the charter, operating agreement, and other formational documents of New GP LLC.

89. “*Other Unsecured Claim*” means any Secured Claim other than the Jefferies Secured Claim and the Frontier Secured Claim.

91. “Petition *Date*” means October 16, 2019.

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and schedules thereto, either in its present form or as the same may be altered, amended, modified or otherwise supplemented from time to time.

93. “*Plan Distribution*” means the payment or distribution of consideration to Holders of Allowed Claims and Allowed Equity Interests under this Plan.

94. “*Plan Documents*” means any of the documents, other than this Plan, but including, without limitation, the documents to be filed with the Plan Supplement, to be executed, delivered, assumed, or performed in connection with the occurrence of the Effective Date, and as may be modified consistent with the terms hereof with the consent of the Committee.

95. “*Plan Supplement*” means the ancillary documents necessary for the implementation and effectuation of the Plan, including, without limitation, (i) the form of Claimant Trust Agreement, (ii) the forms of New GP LLC Documents, (iii) the form of Reorganized Limited Partnership Agreement, (iv) the Sub-Servicer Agreement (if applicable), (v) the identity of the initial members of the Claimant Trust Oversight Committee, (vi) the form of Litigation Sub-Trust Agreement; (vii) the schedule of retained Causes of Action; (viii) the New Frontier Note, (ix) the schedule of Employees; (x) the form of Senior Employee Stipulation,; and (xi) the schedule of Executory Contracts and Unexpired Leases to be assumed pursuant to this Plan, which, in each case, will be in form and substance reasonably acceptable to the Debtor and the Committee.

96. “*Priority Non-Tax Claim*” means a Claim entitled to priority pursuant to section 507(a) of the Bankruptcy Code, including any Claims for paid time-off entitled to priority under section 507(a)(4) of the Bankruptcy Code, other than a Priority Tax Claim or an Administrative Claim.

97. “*Pro Rata*” means the proportion that (a) the Allowed amount of a Claim or Equity Interest in a particular Class bears to (b) the aggregate Allowed amount of all Claims or Equity Interests in such Class.

98. “*Professional*” means (a) any Entity employed in the Chapter 11 Case pursuant to section 327, 328 363 or 1103 of the Bankruptcy Code or otherwise and (b) any Entity seeking compensation or reimbursement of expenses in connection with the Chapter 11 Case pursuant to sections 327, 328, 330, 331, 363, 503(b), 503(b)(4) and 1103 of the Bankruptcy Code.

99. “*Professional Fee Claim*” means a Claim under sections 328, 330(a), 331, 363, 503 or 1103 of the Bankruptcy Code, with respect to a particular Professional, for compensation for services rendered or reimbursement of costs, expenses or other charges incurred after the Petition Date and prior to and including the Effective Date.

100. “*Professional Fee Claims Bar Date*” means with respect to Professional Fee Claims, the Business Day which is sixty (60) days after the Effective Date or such other date as approved by order of the Bankruptcy Court.

101. “*Professional Fee Claims Objection Deadline*” means, with respect to any Professional Fee Claim, thirty (30) days after the timely Filing of the applicable request for payment of such Professional Fee Claim.

104. “*Priority Tax Claim*” means any Claim of a Governmental Unit of the kind specified in section 507(a)(8) of the Bankruptcy Code.

106. “*PTO Claims*” means any Claim for paid time off in favor of any Debtor employee in excess of the amount that would qualify as a Priority Non-Tax Claim under section 507(a)(4) of the Bankruptcy Code.

108. “*Reinstated*” means, with respect to any Claim or Equity Interest, (a) leaving unaltered the legal, equitable, and contractual rights to which a Claim entitles the Holder of such Claim or Equity Interest in accordance with section 1124 of the Bankruptcy Code or (b) notwithstanding any contractual provision or applicable law that entitles the Holder of such Claim or Equity Interest to demand or receive accelerated payment of such Claim or Equity Interest after the occurrence of a default: (i) curing any such default that occurred before or after the Petition Date, other than a default of a kind specified in section 365(b)(2) of the Bankruptcy Code or of a kind that section 365(b)(2) of the Bankruptcy Code expressly does not require to be cured; (ii) reinstating the maturity of such Claim or Equity Interest as such maturity existed before such default; (iii) compensating the Holder of such Claim or Equity Interest for any damages incurred as a result of any reasonable reliance by such Holder on such contractual provision or such applicable law; (iv) if such Claim or Equity Interest arises from any failure to perform a nonmonetary obligation, other than a default arising from failure to operate a non-residential real property lease subject to section 365(b)(1)(A) of the Bankruptcy Code, compensating the Holder

110. “*Related Entity*” means, without duplication, (a) Dondero, (b) Mark Okada (“Okada”), (c) Grant Scott (“Scott”), (d) Hunter Covitz (“Covitz”), (e) any entity or person that was an insider of the Debtor on or before the Petition Date under Section 101(31) of the Bankruptcy Code, including, without limitation, any entity or person that was a non-statutory insider, (f) any entity that, after the Effective Date, is an insider or Affiliate of one or more of Dondero, Okada, Scott, Covitz, or any of their respective insiders or Affiliates, including, without limitation, The Dugaboy Investment Trust, (g) the Hunter Mountain Investment Trust and any of its direct or indirect parents, (h) the Charitable Donor Advised Fund, L.P., and any of its direct or indirect subsidiaries, and (i) Affiliates of the Debtor and any other Entities listed on the Related Entity List.

112. “*Related Persons*” means, with respect to any Person, such Person’s predecessors, successors, assigns (whether by operation of law or otherwise), and each of their respective present, future, or former officers, directors, employees, managers, managing members, members, financial advisors, attorneys, accountants, investment bankers, consultants, professionals, advisors, shareholders, principals, partners, subsidiaries, divisions, management companies, heirs, agents, and other representatives, in each case solely in their capacity as such.

114. “*Reorganized Debtor*” means the Debtor, as reorganized pursuant to this Plan on and after the Effective Date.

116. “*Reorganized Limited Partnership Agreement*” means that certain Fifth Amended and Restated Agreement of Limited Partnership of Highland Capital Management, L.P., by and among the Claimant Trust, as limited partner, and New GP LLC, as general partner, Filed with the Plan Supplement.

130. “*Subordinated Claimant Trust Interests*” means the Claimant Trust Interests to be distributed to Holders of Allowed Subordinated Claims under the Plan, which such interests shall be subordinated in right and priority to the Claimant Trust Interests distributed to Holders of Allowed General Unsecured Claims as provided in the Claimant Trust Agreement.

131. “*Trust Distribution*” means the transfer of Cash or other property by the Claimant Trustee to the Claimant Trust Beneficiaries.

132. “*Trustees*” means, collectively, the Claimant Trustee and Litigation Trustee.

133. “*UBS*” means, collectively, UBS Securities LLC and UBS AG London Branch.

134. “*Unexpired Lease*” means a lease to which the Debtor is a party that is subject to assumption or rejection under section 365 of the Bankruptcy Code.

135. “*Unimpaired*” means, with respect to a Class of Claims or Equity Interests that is not impaired within the meaning of section 1124 of the Bankruptcy Code.

136. “*Voting Deadline*” means the date and time by which all Ballots to accept or reject the Plan must be received in order to be counted under the under the Order of the Bankruptcy Court approving the Disclosure Statement as containing adequate information pursuant to section 1125(a) of the Bankruptcy Code and authorizing the Debtor to solicit acceptances of the Plan.

137. “*Voting Record Date*” means November 23, 2020.

ARTICLE II.
ADMINISTRATIVE EXPENSES AND PRIORITY TAX CLAIMS

A. Administrative Expense Claims

On the later of the Effective Date or the date on which an Administrative Expense Claim becomes an Allowed Administrative Expense Claim, or, in each such case, as soon as practicable thereafter, each Holder of an Allowed Administrative Expense Claim (other than Professional Fee Claims) will receive, in full satisfaction, settlement, discharge and release of, and in exchange for, such Allowed Administrative Expense Claim either (i) payment in full in Available Cash for the unpaid portion of such Allowed Administrative Expense Claim; or (ii) such other less favorable treatment as agreed to in writing by the Debtor or the Reorganized Debtor, as applicable, and such Holder; *provided, however*, that Administrative Expense Claims incurred by the Debtor in the ordinary course of business may be paid in the ordinary course of business in the discretion of the Debtor in accordance with such applicable terms and conditions relating thereto without further notice to or order of the Bankruptcy Court. All statutory fees payable under 28 U.S.C. § 1930(a) shall be paid as such fees become due.

If an Administrative Expense Claim (other than a Professional Fee Claim) is not paid by the Debtor in the ordinary course, the Holder of such Administrative Expense Claim must File, on

B. Professional Fee Claims

Professionals or other Entities asserting a Professional Fee Claim for services rendered on or prior to the Effective Date must File, on or before the Professional Fee Claims Bar Date, and serve on the Debtor or Reorganized Debtor, as applicable, and such other Entities who are designated as requiring such notice by the Bankruptcy Rules, the Confirmation Order or other order of the Bankruptcy Court, an application for final allowance of such Professional Fee Claim.

On the Effective Date, the Claimant Trustee shall establish the Professional Fee Reserve. The Professional Fee Reserve shall vest in the Claimant Trust and shall be maintained by the Claimant Trustee in accordance with the Plan and Claimant Trust Agreement. The Claimant Trust shall fund the Professional Fee Reserve on the Effective Date in an estimated amount determined by the Debtor in good faith prior to the Confirmation Date and that approximates the total projected amount of unpaid Professional Fee Claims on the Effective Date. Following the payment of all Allowed Professional Fee Claims, any excess funds in the Professional Fee Reserve shall be released to the Claimant Trust to be used for other purposes consistent with the Plan and the Claimant Trust Agreement.

On or as soon as reasonably practicable after the later of (i) the Initial Distribution Date if such Priority Tax Claim is an Allowed Priority Tax Claim as of the Effective Date or (ii) the date on which such Priority Tax Claim becomes an Allowed Priority Tax Claim, each Holder of an Allowed Priority Tax Claim will receive in full satisfaction, settlement, discharge and release of, and in exchange for, such Allowed Priority Tax Claim, at the election of the Debtor: (a) Cash in an amount of a total value as of the Effective Date of the Plan equal to the amount of such Allowed

A. Summary

The categories of Claims and Equity Interests listed below classify Claims and Equity Interests for all purposes including, without limitation, confirmation and distribution pursuant to the Plan and pursuant to sections 1122 and 1123(a)(1) of the Bankruptcy Code. The Plan deems a Claim or Equity Interest to be classified in a particular Class only to the extent that the Claim or Equity Interest qualifies within the description of that Class and will be deemed classified in a different Class to the extent that any remainder of such Claim or Equity Interest qualifies within the description of such different Class. A Claim or Equity Interest is in a particular Class only to the extent that any such Claim or Equity Interest is Allowed in that Class and has not been paid, released or otherwise settled (in each case, by the Debtor or any other Entity) prior to the Effective Date.

Class	Claim	Status	Voting Rights
1	Jefferies Secured Claim	Unimpaired	Deemed to Accept
2	Frontier Secured Claim	Impaired	Entitled to Vote
3	Other Secured Claims	Unimpaired	Deemed to Accept
4	Priority Non-Tax Claim	Unimpaired	Deemed to Accept
5	Retained Employee Claim	Unimpaired	Deemed to Accept
6	PTO Claims	Unimpaired	Deemed to Accept
7	Convenience Claims	Impaired	Entitled to Vote
8	General Unsecured Claims	Impaired	Entitled to Vote
9	Subordinated Claims	Impaired	Entitled to Vote
10	Class B/C Limited Partnership Interests	Impaired	Entitled to Vote
11	Class A Limited Partnership Interests	Impaired	Entitled to Vote

4. Class 4 – Priority Non-Tax Claims

- *Classification:* Class 4 consists of the Priority Non-Tax Claims.
- *Allowance and Treatment:* On or as soon as reasonably practicable after the later of (i) the Initial Distribution Date if such Class 4 Claim is Allowed on the Effective Date or (ii) the date on which such Class 4 Claim becomes an Allowed Class 4 Claim, each Holder of an Allowed Class 4 Claim will receive in full satisfaction, settlement, discharge and release of, and in exchange for, its Allowed Claim 4 Claim Cash equal to the amount of such Allowed Class 4 Claim.
- *Impairment and Voting:* Class 4 is Unimpaired, and the Holders of Class 4 Claims are conclusively deemed to have accepted this Plan pursuant to section 1126(f) of the Bankruptcy Code. Therefore, the Holders of Class 4 Claims are not entitled to vote to accept or reject this Plan and will not be solicited.

5. Class 5 – Retained Employee Claims

- *Classification:* Class 5 consists of the Retained Employee Claims.
- *Allowance and Treatment:* On or as soon as reasonably practicable after the Effective Date, each Allowed Class 5 Claim will be Reinstated.
- *Impairment and Voting:* Class 5 is Unimpaired, and the Holders of Class 5 Claims are conclusively deemed to have accepted this Plan pursuant to section 1126(f) of the Bankruptcy Code. Therefore, the Holders of Class 5 Claims are not entitled to vote to accept or reject this Plan and will not be solicited.

6. Class 6 – PTO Claims

- *Classification:* Class 6 consists of the PTO Claims.
- *Allowance and Treatment:* On or as soon as reasonably practicable after the later of (i) the Initial Distribution Date if such Class 6 Claim is Allowed on the Effective Date or (ii) the date on which such Class 6 Claim becomes an Allowed Class 6 Claim, each Holder of an Allowed Class 6 Claim will receive in full satisfaction, settlement, discharge and release of, and in exchange for, its Allowed Claim 6 Claim Cash equal to the amount of such Allowed Class 6 Claim.
- *Impairment and Voting:* Class 6 is Unimpaired, and the Holders of Class 6 Claims are conclusively deemed to have accepted this Plan pursuant to section 1126(f) of the Bankruptcy Code. Therefore, the Holders of Class 6

Claims are not entitled to vote to accept or reject this Plan and will not be solicited.

7. Class 7 – Convenience Claims

- *Classification:* Class 7 consists of the Convenience Claims.
- *Allowance and Treatment:* On or as soon as reasonably practicable after the later of (i) the Initial Distribution Date if such Class 7 Claim is Allowed on the Effective Date or (ii) the date on which such Class 7 Claim becomes an Allowed Class 7 Claim, each Holder of an Allowed Class 7 Claim will receive in full satisfaction, settlement, discharge and release of, and in exchange for, its Allowed Class 7 Claim (1) the treatment provided to Allowed Holders of Class 8 General Unsecured Claims if the Holder of such Class 7 Claim makes the GUC Election or (2) an amount in Cash equal to the lesser of (a) 85% of the Allowed amount of such Holder's Class 7 Claim or (b) such Holder's Pro Rata share of the Convenience Claims Cash Pool.
- *Impairment and Voting:* Class 7 is Impaired, and the Holders of Class 7 Claims are entitled to vote to accept or reject this Plan.

8. Class 8 – General Unsecured Claims

- *Classification:* Class 8 consists of the General Unsecured Claims.
- *Treatment:* On or as soon as reasonably practicable after the Effective Date, each Holder of an Allowed Class 8 Claim, in full satisfaction, settlement, discharge and release of, and in exchange for, such Claim shall receive (i) its Pro Rata share of the Claimant Trust Interests, (ii) such other less favorable treatment as to which such Holder and the Claimant Trustee shall have agreed upon in writing, or (iii) the treatment provided to Allowed Holders of Class 7 Convenience Claims if the Holder of such Class 8 General Unsecured Claim is eligible and makes a valid Convenience Class Election.

Notwithstanding anything to the contrary herein, after the Effective Date and subject to the other provisions of this Plan, the Debtor, the Reorganized Debtor, and the Claimant Trust, as applicable, will have and will retain any and all rights and defenses under bankruptcy or nonbankruptcy law that the Debtor had with respect to any General Unsecured Claim, except with respect to any General Unsecured Claim Allowed by Final Order of the Bankruptcy Court.

- *Impairment and Voting:* Class 8 is Impaired, and the Holders of Class 8 Claims are entitled to vote to accept or reject this Plan.

9. Class 9 – Subordinated Claims

- *Classification:* Class 9 consists of the Subordinated Claims.

Treatment: On the Effective Date, Holders of Subordinated Claims shall receive either (i) their Pro Rata share of the Subordinated Claimant Trust Interests or, (ii) such other less favorable treatment as to which such Holder and the Claimant Trustee may agree upon in writing.

Notwithstanding anything to the contrary herein, after the Effective Date and subject to the other provisions of this Plan, the Debtor, the Reorganized Debtor, and the Claimant Trust, as applicable, will have and will retain any and all rights and defenses under bankruptcy or nonbankruptcy law that the Debtor had with respect to any Subordinated Claim, except with respect to any Subordinated Claim Allowed by Final Order of the Bankruptcy Court.

- *Impairment and Voting:* Class 9 is Impaired, and the Holders of Class 9 Claims are entitled to vote to accept or reject this Plan.

10. Class 10 – Class B/C Limited Partnership Interests

- *Classification:* Class 10 consists of the Class B/C Limited Partnership Interests.
- *Treatment:* On or as soon as reasonably practicable after the Effective Date, each Holder of an Allowed Class 10 Claim, in full satisfaction, settlement, discharge and release of, and in exchange for, such Claim shall receive (i) its Pro Rata share of the Contingent Claimant Trust Interests or (ii) such other less favorable treatment as to which such Holder and the Claimant Trustee shall have agreed upon in writing.

Notwithstanding anything to the contrary herein, after the Effective Date and subject to the other provisions of this Plan, the Debtor, the Reorganized Debtor, and the Claimant Trust, as applicable, will have and will retain any and all rights and defenses under bankruptcy or nonbankruptcy law that the Debtor had with respect to any Class B/C Limited Partnership Interest Claim, except with respect to any Class B/C Limited Partnership Interest Claim Allowed by Final Order of the Bankruptcy Court.

- *Impairment and Voting:* Class 10 is Impaired, and the Holders of Class 10 Claims are entitled to vote to accept or reject this Plan.

11. Class 11 – Class A Limited Partnership Interests

- *Classification:* Class 11 consists of the Class A Limited Partnership Interests.

- *Impairment and Voting:* Class 11 is Impaired, and the Holders of Class 11 Claims are entitled to vote to accept or reject this Plan.

Except as otherwise provided in the Plan, nothing under the Plan will affect the Debtor's rights in respect of any Unimpaired Claims, including, without limitation, all rights in respect of legal and equitable defenses to or setoffs or recoupments against any such Unimpaired Claims.

The allowance, classification, and treatment of all Claims under the Plan shall take into account and conform to the contractual, legal, and equitable subordination rights relating thereto, whether arising under general principles of equitable subordination, section 510(b) of the Bankruptcy Code, or otherwise. Upon written notice and hearing, the Debtor, the Reorganized Debtor, and the Claimant Trustee reserve the right to seek entry of an order by the Bankruptcy Court to re-classify or to subordinate any Claim in accordance with any contractual, legal, or equitable subordination relating thereto, and the treatment afforded any Claim under the Plan that becomes a subordinated Claim at any time shall be modified to reflect such subordination.

As discussed in the Disclosure Statement, the Plan will be implemented through (i) the Claimant Trust, (ii) the Litigation Sub-Trust, and (iii) the Reorganized Debtor.

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Although the Reorganized Debtor will manage the wind down of the Managed Funds, it is currently anticipated that neither the Reorganized Debtor nor the Claimant Trust will assume or assume and assign the contracts between the Debtor and certain Related Entities pursuant to which the Debtor provides shared services and sub-advisory services to those Related Entities. The Debtor believes that the continued provision of the services under such contracts will not be cost effective.

B. The Claimant Trust²

On or prior to the Effective Date, the Debtor and the Claimant Trustee shall execute the Claimant Trust Agreement and shall take all steps necessary to establish the Claimant Trust and the Litigation Sub-Trust in accordance with the Plan in each case for the benefit of the Claimant Trust Beneficiaries. Additionally, on or prior to the Effective Date, the Debtor shall irrevocably transfer and shall be deemed to have irrevocably transferred to the Claimant Trust all of its rights, title, and interest in and to all of the Claimant Trust Assets, and in accordance with section 1141 of the Bankruptcy Code, the Claimant Trust Assets shall automatically vest in the Claimant Trust free and clear of all Claims, Liens, encumbrances, or interests subject only to the Claimant Trust Interests and the Claimant Trust Expenses, as provided for in the Claimant Trust Agreement, and

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On the Effective Date, the Claimant Trustee and Litigation Trustee shall execute the Litigation Sub-Trust Agreement and shall take all steps necessary to establish the Litigation Sub-Trust. Upon the creation of the Litigation Sub-Trust, the Claimant Trust shall irrevocably transfer and assign to the Litigation Sub-Trust the Estate Claims. The Claimant Trust shall be governed by the Claimant Trust Agreement and administered by the Claimant Trustee. The powers, rights, and responsibilities of the Claimant Trustee shall be specified in the Claimant Trust Agreement and shall include the authority and responsibility to, among other things, take the actions set forth in this ARTICLE IV, subject to any required reporting to the Claimant Trust Oversight Committee as may be set forth in the Claimant Trust Agreement. The Claimant Trust shall hold and distribute the Claimant Trust Assets (including the proceeds from the Estate Claims, if any) in accordance with the provisions of the Plan and the Claimant Trust Agreement; *provided* that the Claimant Trust Oversight Committee may direct the Claimant Trust to reserve Cash from distributions as necessary to fund the Claimant Trust and Litigation Sub-Trust. Other rights and duties of the Claimant Trustee and the Claimant Trust Beneficiaries shall be as set forth in the Claimant Trust Agreement. After the Effective Date, neither the Debtor nor the Reorganized Debtor shall have any interest in the Claimant Trust Assets.

2. Claimant Trust Oversight Committee

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The independent member(s) of the Claimant Trust Oversight Committee may be entitled to compensation for their services as set forth in the Claimant Trust Agreement. Any member of the Claimant Trust Oversight Committee may be removed, and successor chosen, in the manner set forth in the Claimant Trust Agreement.

The Claimant Trust shall be established for the purpose of (i) managing and monetizing the Claimant Trust Assets, subject to the terms of the Claimant Trust Agreement and the oversight of the Claimant Trust Oversight Committee, (ii) serving as the limited partner of, and holding the limited partnership interests in, the Reorganized Debtor, (iii) serving as the sole member and manager of New GP LLC, the Reorganized Debtor's general partner, (iv) in its capacity as the sole member and manager of New GP LLC, overseeing the management and monetization of the Reorganized Debtor Assets pursuant to the terms of the Reorganized Limited Partnership Agreement; and (v) administering the Disputed Claims Reserve and serving as Distribution Agent with respect to Disputed Claims in Class 7 or Class 8.

The purpose of the Reorganized Debtor is discussed at greater length in ARTICLE IV.C.

The Litigation Sub-Trust shall be established for the purpose of investigating, prosecuting, settling, or otherwise resolving the Estate Claims. Any proceeds therefrom shall be distributed by the Litigation Sub-Trust to the Claimant Trust for distribution to the Claimant Trust Beneficiaries pursuant to the terms of the Claimant Trust Agreement.

The Claimant Trust Agreement generally will provide for, among other things:

In furtherance of, and consistent with the purpose of, the Claimant Trust and the Plan, the Trustees, for the benefit of the Claimant Trust, shall, subject to reporting and oversight by the Claimant Trust Oversight Committee as set forth in the Claimant Trust Agreement: (i) hold the Claimant Trust Assets for the benefit of the Claimant Trust Beneficiaries, (ii) make Distributions to the Claimant Trust Beneficiaries as provided herein and in the Claimant Trust Agreement, and (iii) have the sole power and authority to prosecute and resolve any Causes of Action and objections to Claims and Equity Interests (other than those assigned to the Litigation Sub-Trust), without approval of the Bankruptcy Court. Except as otherwise provided in the Claimant Trust Agreement, the Claimant Trustee shall be responsible for all decisions and duties with respect to the Claimant Trust and the Claimant Trust Assets; *provided, however*, that the prosecution and resolution of any Estate Claims included in the Claimant Trust Assets shall be the responsibility of the Litigation Trustee. The Litigation Sub-Trust Agreement generally will provide for, among other things:

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(ii) the retention of employees, counsel, accountants, financial advisors, or other professionals and the payment of their reasonable compensation; and

(iii) the investigation and prosecution of Estate Claims, which may include the prosecution, settlement, abandonment, or dismissal of any such Estate Claims, subject to reporting and oversight as set forth in the Litigation Sub-Trust Agreement.

The Trustees, on behalf of the Claimant Trust and Litigation Sub-Trust, as applicable, may each employ, without further order of the Bankruptcy Court, employees and other professionals (including those previously retained by the Debtor and the Committee) to assist in carrying out the Trustees' duties hereunder and may compensate and reimburse the reasonable expenses of these professionals without further Order of the Bankruptcy Court from the Claimant Trust Assets in accordance with the Plan and the Claimant Trust Agreement.

The Claimant Trust Agreement and Litigation Sub-Trust Agreement may include reasonable and customary provisions that allow for indemnification by the Claimant Trust in favor of the Claimant Trustee, Litigation Trustee, and the Claimant Trust Oversight Committee. Any such indemnification shall be the sole responsibility of the Claimant Trust and payable solely from the Claimant Trust Assets.

6. Compensation and Duties of Trustees.

The salient terms of each Trustee's employment, including such Trustee's duties and compensation shall be set forth in the Claimant Trust Agreement and the Litigation Sub-Trust Agreement, as appropriate. The Trustees shall each be entitled to reasonable compensation in an amount consistent with that of similar functionaries in similar types of bankruptcy cases.

7. Cooperation of Debtor and Reorganized Debtor.

To effectively investigate, prosecute, compromise and/or settle the Claims and/or Causes of Action that constitute Claimant Trust Assets (including Estate Claims), the Claimant Trustee, Litigation Trustee, and each of their professionals may require reasonable access to the Debtor's and Reorganized Debtor's documents, information, and work product relating to the Claimant Trust Assets. Accordingly, the Debtor and the Reorganized Debtor, as applicable, shall reasonably cooperate with the Claimant Trustee and Litigation Trustee, as applicable, in their prosecution of Causes of Action and in providing the Claimant Trustee and Litigation Trustee with copies of documents and information in the Debtor's possession, custody, or control on the Effective Date that either Trustee indicates relates to the Estate Claims or other Causes of Action.

The Debtor and Reorganized Debtor shall preserve all records, documents or work product (including all electronic records, documents, or work product) related to the Claims and Causes of Action, including Estate Claims, until the earlier of (a) the dissolution of the Reorganized Debtor or (b) termination of the Claimant Trust and Litigation Sub-Trust.

8. United States Federal Income Tax Treatment of the Claimant Trust.

Unless the IRS requires otherwise, for all United States federal income tax purposes, the parties shall treat the transfer of the Claimant Trust Assets to the Claimant Trust as: (a) a transfer

(a) The Claimant Trustee shall file tax returns for the Claimant Trust treating the Claimant Trust as a grantor trust pursuant to Treasury Regulation section 1.671-4(a). The Claimant Trustee may file an election pursuant to Treasury Regulation 1.468B-9(c) to treat the Disputed Claims Reserve as a disputed ownership fund, in which case the Claimant Trustee will file federal income tax returns and pay taxes for the Disputed Claims Reserve as a separate taxable entity.

(c) The Claimant Trustee shall determine the fair market value of the Claimant Trust Assets as of the Effective Date and notify the applicable Claimant Trust Beneficiaries of such valuation, and such valuation shall be used consistently for all federal income tax purposes.

10. Claimant Trust Assets.

From and after the Effective Date, the Trustees, in accordance with section 1123(b)(3) and (4) of the Bankruptcy Code, and on behalf of the Claimant Trust, shall each serve as a representative of the Estate with respect to any and all Claimant Trust Assets, including the Causes of Action and Estate Claims, as appropriate, and shall retain and possess the right to (a) commence, pursue, settle, compromise, or abandon, as appropriate, any and all Causes of Action in any court or other tribunal and (b) sell, liquidate, or otherwise monetize all Claimant Trust Assets.

C. The Reorganized Debtor

Each of the Debtor, the Reorganized Debtor, and the Trustees, as applicable, may take any and all actions to execute, deliver, File or record such contracts, instruments, releases and other agreements or documents and take such actions as may be necessary or appropriate to effectuate and implement the provisions of this Plan, the Claimant Trust Agreement, the Reorganized Limited Partnership Agreement, or the New GP LLC Documents, as applicable, in the name of and on behalf of the Debtor, the Reorganized Debtor, or the Trustees, as applicable, and in each case without further notice to or order of the Bankruptcy Court, act or action under applicable law, regulation, order, or rule or any requirement of further action, vote or other approval or authorization by the security holders, officers, or directors of the Debtor or the Reorganized Debtor, as applicable, or by any other Person.

All matters provided for in this Plan involving the legal or corporate structure of the Debtor, the Reorganized Debtor, or the Claimant Trust, as applicable, and any legal or corporate action required by the Debtor, the Reorganized Debtor, or the Claimant Trust, as applicable, in connection with this Plan, will be deemed to have occurred and will be in full force and effect in all respects, in each case without further notice to or order of the Bankruptcy Court, act or action under applicable law, regulation, order, or rule or any requirement of further action, vote or other approval or authorization by the security holders, partners, directors, managers, or members of the Debtor, the Reorganized Debtor, or the Claimant Trust, as applicable, or by any other Person. On the Effective Date, the appropriate officers of the Debtor and the Reorganized Debtor, as applicable, as well as the Trustees, are authorized to issue, execute, deliver, and consummate the transactions contemplated by, the contracts, agreements, documents, guarantees, pledges, consents, securities, certificates, resolutions and instruments contemplated by or described in this Plan in the name of and on behalf of the Debtor and the Reorganized Debtor, as well as the Trustees, in each case without further notice to or order of the Bankruptcy Court, act or action under applicable law, regulation, order, or rule or any requirement of further action, vote or other approval or authorization by any Person. The appropriate officer of the Debtor, the Reorganized Debtor, as well as the Trustees, will be authorized to certify or attest to any of the foregoing actions.

I. Treatment of Vacant Classes

Any Claim or Equity Interest in a Class considered vacant under ARTICLE III.C of this Plan shall receive no Plan Distributions.

J. Plan Documents

The documents, if any, to be Filed as part of the Plan Documents, including any documents filed with the Plan Supplement, and any amendments, restatements, supplements, or other modifications to such documents, and any consents, waivers, or other deviations under or from any such documents, shall be incorporated herein by this reference (including to the applicable definitions in ARTICLE I hereof) and fully enforceable as if stated in full herein.

The Debtor and the Committee are currently working to finalize the forms of certain of the Plan Documents to be filed with the Plan Supplement. To the extent that the Debtor and the Committee cannot agree as to the form and content of such Plan Documents, they intend to submit the issue to non-binding mediation pursuant to the *Order Directing Mediation* entered on August 3, 2020 [D.I. 912].

K. Highland Capital Management, L.P. Retirement Plan and Trust

The Highland Capital Management, L.P. Retirement Plan And Trust (“Pension Plan”) is a single-employer defined benefit pension plan covered by Title IV of the Employee Retirement Income Security Act of 1974, as amended (“ERISA”). 29 U.S.C. §§ 1301-1461. The Debtor is the contributing sponsor and, as such, the PBGC asserts that the Debtor is liable along with any members of the contributing sponsor’s controlled-group within the meaning of 29 U.S.C. §§ 1301(a)(13), (14) with respect to the Pension Plan.

Upon the Effective Date, the Reorganized Debtor shall be deemed to have assumed the Pension Plan and shall comply with all applicable statutory provisions of ERISA and the Internal Revenue Code (the “IRC”), including, but not limited to, satisfying the minimum funding standards pursuant to 26 U.S.C. §§ 412, 430, and 29 U.S.C. §§ 1082, 1083; paying the PBGC premiums in accordance with 29 U.S.C. §§ 1306 and 1307; and administering the Pension Plan in accordance with its terms and the provisions of ERISA and the IRC. In the event that the Pension Plan terminates after the Plan of Reorganization Effective Date, the PBGC asserts that the Reorganized Debtor and each of its controlled group members will be responsible for the liabilities imposed by Title IV of ERISA.

Notwithstanding any provision of the Plan, the Confirmation Order, or the Bankruptcy Code (including section 1141 thereof) to the contrary, neither the Plan, the Confirmation Order, or the Bankruptcy Code shall be construed as discharging, releasing, exculpating or relieving the Debtor, the Reorganized Debtor, or any person or entity in any capacity, from any liability or responsibility, if any, with respect to the Pension Plan under any law, governmental policy, or regulatory provision. PBGC and the Pension Plan shall not be enjoined or precluded from enforcing such liability or responsibility against any person or entity as a result of any of the provisions of the Plan, the Confirmation Order, or the Bankruptcy Code. The Debtor reserves the right to contest any such liability or responsibility.

ARTICLE V.

A. Assumption, Assignment, or Rejection of Executory Contracts and Unexpired Leases

Unless an Executory Contract or Unexpired Lease: (i) was previously assumed or rejected by the Debtor pursuant to this Plan on or prior to the Confirmation Date; (ii) previously expired or terminated pursuant to its own terms or by agreement of the parties thereto; (iii) is the subject of a motion to assume filed by the Debtor on or before the Confirmation Date; (iv) contains a change of control or similar provision that would be triggered by the Chapter 11 Case (unless such provision has been irrevocably waived); or (v) is specifically designated as a contract or lease to be assumed in the Plan or the Plan Supplement, on the Confirmation Date, each Executory Contract and Unexpired Lease shall be deemed rejected pursuant to section 365 of the Bankruptcy Code, without the need for any further notice to or action, order, or approval of the Bankruptcy Court, unless such Executory Contract or Unexpired Lease is listed in the Plan Supplement.

At any time on or prior to the Confirmation Date, the Debtor may (i) amend the Plan Supplement in order to add or remove a contract or lease from the list of contracts to be assumed or (ii) assign (subject to applicable law) any Executory Contract or Unexpired Lease, as determined by the Debtor in consultation with the Committee, or the Reorganized Debtor, as applicable.

The Confirmation Order will constitute an order of the Bankruptcy Court approving the above-described assumptions, rejections, and assumptions and assignments. Except as otherwise provided herein or agreed to by the Debtor and the applicable counterparty, each assumed Executory Contract or Unexpired Lease shall include all modifications, amendments, supplements, restatements, or other agreements related thereto, and all rights related thereto. Modifications, amendments, supplements, and restatements to prepetition Executory Contracts and Unexpired Leases that have been executed by the Debtor during the Chapter 11 Case shall not be deemed to alter the prepetition nature of the Executory Contract or Unexpired Lease or the validity, priority, or amount of any Claims that may arise in connection therewith. To the extent applicable, no change of control (or similar provision) will be deemed to occur under any such Executory Contract or Unexpired Lease.

If certain, but not all, of a contract counterparty's Executory Contracts and/or Unexpired Leases are rejected pursuant to the Plan, the Confirmation Order shall be a determination that such counterparty's Executory Contracts and/or Unexpired Leases that are being assumed pursuant to the Plan are severable agreements that are not integrated with those Executory Contracts and/or Unexpired Leases that are being rejected pursuant to the Plan. Parties seeking to contest this finding with respect to their Executory Contracts and/or Unexpired Leases must file a timely objection to the Plan on the grounds that their agreements are integrated and not severable, and any such dispute shall be resolved by the Bankruptcy Court at the Confirmation Hearing (to the extent not resolved by the parties prior to the Confirmation Hearing).

Notwithstanding anything herein to the contrary, the Debtor shall assume or reject that certain real property lease with Crescent TC Investors L.P. ("Landlord") for the Debtor's headquarters located at 200/300 Crescent Ct., Suite #700, Dallas, Texas 75201 (the "Lease") in accordance with the notice to Landlord, procedures and timing required by 11 U.S.C. §365(d)(4).

as modified by that certain *Agreed Order Granting Motion to Extend Time to Assume or Reject Unexpired Nonresidential Real Property Lease* [Docket No. 1122].

B. Claims Based on Rejection of Executory Contracts or Unexpired Leases

Any Executory Contract or Unexpired Lease not assumed or rejected on or before the Confirmation Date shall be deemed rejected, pursuant to the Confirmation Order. Any Person asserting a Rejection Claim shall File a proof of claim within thirty days of the Confirmation Date. Any Rejection Claims that are not timely Filed pursuant to this Plan shall be forever disallowed and barred. If one or more Rejection Claims are timely Filed, the Claimant Trustee may File an objection to any Rejection Claim.

Rejection Claims shall be classified as General Unsecured Claims and shall be treated in accordance with ARTICLE III of this Plan.

C. Cure of Defaults for Assumed or Assigned Executory Contracts and Unexpired Leases

Any monetary amounts by which any Executory Contract or Unexpired Lease to be assumed or assigned hereunder is in default shall be satisfied, under section 365(b)(1) of the Bankruptcy Code, by the Debtor upon assumption or assignment thereof, by payment of the default amount in Cash as and when due in the ordinary course or on such other terms as the parties to such Executory Contracts may otherwise agree. The Debtor may serve a notice on the Committee and parties to Executory Contracts or Unexpired Leases to be assumed or assigned reflecting the Debtor's or Reorganized Debtor's intention to assume or assign the Executory Contract or Unexpired Lease in connection with this Plan and setting forth the proposed cure amount (if any).

If a dispute regarding (1) the amount of any payments to cure a default, (2) the ability of the Debtor, the Reorganized Debtor, or any assignee to provide "adequate assurance of future performance" (within the meaning of section 365 of the Bankruptcy Code) under the Executory Contract or Unexpired Lease to be assumed or assigned or (3) any other matter pertaining to assumption or assignment, the cure payments required by section 365(b)(1) of the Bankruptcy Code will be made following the entry of a Final Order or orders resolving the dispute and approving the assumption or assignment.

Assumption or assignment of any Executory Contract or Unexpired Lease pursuant to the Plan or otherwise and full payment of any applicable cure amounts pursuant to this ARTICLE V.C shall result in the full release and satisfaction of any cure amounts, Claims, or defaults, whether monetary or nonmonetary, including defaults of provisions restricting the change in control or ownership interest composition or other bankruptcy-related defaults, arising under any assumed or assigned Executory Contract or Unexpired Lease at any time prior to the effective date of assumption or assignment. Any and all Proofs of Claim based upon Executory Contracts or Unexpired Leases that have been assumed or assigned in the Chapter 11 Case, including pursuant to the Confirmation Order, and for which any cure amounts have been fully paid pursuant to this ARTICLE V.C, shall be deemed disallowed and expunged as of the Confirmation Date without the need for any objection thereto or any further notice to or action, order, or approval of the Bankruptcy Court.

ARTICLE VI.

PROVISIONS GOVERNING DISTRIBUTIONS

A. Dates of Distributions

Except as otherwise provided in this Plan, on the Effective Date or as soon as reasonably practicable thereafter (or if a Claim is not an Allowed Claim or Equity Interest on the Effective Date, on the date that such Claim or Equity Interest becomes an Allowed Claim or Equity Interest, or as soon as reasonably practicable thereafter), each Holder of an Allowed Claim or Equity Interest against the Debtor shall receive the full amount of the distributions that this Plan provides for Allowed Claims or Allowed Equity Interests in the applicable Class and in the manner provided herein. If any payment or act under this Plan is required to be made or performed on a date that is not on a Business Day, then the making of such payment or the performance of such act may be completed on the next succeeding Business Day, but shall be deemed to have been completed as of the required date. If and to the extent there are Disputed Claims or Equity Interests, distributions on account of any such Disputed Claims or Equity Interests shall be made pursuant to the provisions provided in this Plan. Except as otherwise provided in this Plan, Holders of Claims and Equity Interests shall not be entitled to interest, dividends or accruals on the distributions provided for therein, regardless of whether distributions are delivered on or at any time after the Effective Date.

Upon the Effective Date, all Claims and Equity Interests against the Debtor shall be deemed fixed and adjusted pursuant to this Plan and none of the Debtor, the Reorganized Debtor, or the Claimant Trust will have liability on account of any Claims or Equity Interests except as set forth in this Plan and in the Confirmation Order. All payments and all distributions made by the Distribution Agent under this Plan shall be in full and final satisfaction, settlement and release of all Claims and Equity Interests against the Debtor and the Reorganized Debtor.

At the close of business on the Distribution Record Date, the transfer ledgers for the Claims against the Debtor and the Equity Interests in the Debtor shall be closed, and there shall be no further changes in the record holders of such Claims and Equity Interests. The Debtor, the Reorganized Debtor, the Trustees, and the Distribution Agent, and each of their respective agents, successors, and assigns shall have no obligation to recognize the transfer of any Claims against the Debtor or Equity Interests in the Debtor occurring after the Distribution Record Date and shall be entitled instead to recognize and deal for all purposes hereunder with only those record holders stated on the transfer ledgers as of the close of business on the Distribution Record Date irrespective of the number of distributions to be made under this Plan to such Persons or the date of such distributions.

B. Distribution Agent

Except as provided herein, all distributions under this Plan shall be made by the Claimant Trustee, as Distribution Agent, or by such other Entity designated by the Claimant Trustee, as a Distribution Agent on the Effective Date or thereafter. The Reorganized Debtor will be the Distribution Agent with respect to Claims in Class 1 through Class 7.

The Distribution Agent shall not have any obligation to make a particular distribution to a specific Holder of an Allowed Claim if such Holder is also the Holder of a Disputed Claim.

Distributions of Cash may be made by wire transfer from a domestic bank, except that Cash payments made to foreign creditors may be made in such funds and by such means as the Distribution Agent determines are necessary or customary in a particular foreign jurisdiction.

On or prior to the Initial Distribution Date, the Claimant Trustee shall establish, fund and maintain the Disputed Claims Reserve(s) in the appropriate Disputed Claims Reserve Amounts on account of any Disputed Claims.

The Disputed Claims Reserve shall at all times hold Cash in an amount no less than the Disputed Claims Reserve Amount. To the extent a Disputed Claim becomes an Allowed Claim pursuant to the terms of this Plan, within 30 days of the date on which such Disputed Claim becomes an Allowed Claim pursuant to the terms of this Plan, the Claimant Trustee shall distribute from the Disputed Claims Reserve to the Holder thereof any prior distributions, in Cash, that would have been made to such Allowed Claim if it had been Allowed as of the Effective Date. For the avoidance of doubt, each Holder of a Disputed Claim that subsequently becomes an Allowed Claim will also receive its Pro Rata share of the Claimant Trust Interests. If, upon the resolution of all Disputed Claims any Cash remains in the Disputed Claims Reserve, such Cash shall be transferred to the Claimant Trust and be deemed a Claimant Trust Asset.

Whenever this Plan would otherwise call for, with respect to a particular Person, payment of a fraction of a dollar, the actual payment or distribution shall reflect a rounding of such fraction to the nearest whole dollar (up or down), with half dollars being rounded down. To the extent that Cash to be distributed under this Plan remains undistributed as a result of the aforementioned rounding, such Cash or stock shall be treated as “Unclaimed Property” under this Plan.

In connection with this Plan, to the extent applicable, the Distribution Agent shall comply with all tax withholding and reporting requirements imposed on them by any Governmental Unit, and all distributions made pursuant to this Plan shall be subject to such withholding and reporting requirements. The Distribution Agent shall be entitled to deduct any U.S. federal, state or local withholding taxes from any Cash payments made with respect to Allowed Claims, as appropriate. As a condition to receiving any distribution under this Plan, the Distribution Agent may require that the Holder of an Allowed Claim entitled to receive a distribution pursuant to this Plan provide such Holder's taxpayer identification number and such other information and certification as may be deemed necessary for the Distribution Agent to comply with applicable tax reporting and withholding laws. If a Holder fails to comply with such a request within one year, such distribution shall be deemed an unclaimed distribution. Any amounts withheld pursuant hereto shall be deemed to have been distributed to and received by the applicable recipient for all purposes of this Plan.

The Distribution Agent may, to the extent permitted under applicable law, set off against any Allowed Claim and any distributions to be made pursuant to this Plan on account of such Allowed Claim, the claims, rights and causes of action of any nature that the Debtor, the Reorganized Debtor, or the Distribution Agent may hold against the Holder of such Allowed Claim that are not otherwise waived, released or compromised in accordance with this Plan; *provided, however*, that neither such a setoff nor the allowance of any Claim hereunder shall constitute a waiver or release by the Debtor, the Reorganized Debtor, or the Claimant Trustee of any such claims, rights and causes of action that the Debtor, the Reorganized Debtor, or Claimant Trustee possesses against such Holder. Any Holder of an Allowed Claim subject to such setoff reserves the right to challenge any such setoff in the Bankruptcy Court or any other court with jurisdiction with respect to such challenge.

As a condition precedent to receiving any distribution pursuant to this Plan on account of an Allowed Claim evidenced by negotiable instruments, securities, or notes canceled pursuant to ARTICLE IV of this Plan, the Holder of such Claim will tender the applicable negotiable instruments, securities, or notes evidencing such Claim (or a sworn affidavit identifying the negotiable instruments, securities, or notes formerly held by such Holder and certifying that they have been lost), to the Distribution Agent unless waived in writing by the Distribution Agent.

D. Allowance of Claims and Equity Interests

Following the date on which a Disputed Claim or Disputed Equity Interest becomes an Allowed Claim or Equity Interest after the Distribution Date, the Distribution Agent shall make a distribution to the Holder of such Allowed Claim or Equity Interest in accordance with the Plan.

1. Allowance of Claims

After the Effective Date and subject to the other provisions of this Plan, the Reorganized Debtor or the Claimant Trust, as applicable, will have and will retain any and all rights and defenses under bankruptcy or nonbankruptcy law that the Debtor had with respect to any Claim. Except as expressly provided in this Plan or in any order entered in the Chapter 11 Case prior to the Effective Date (including, without limitation, the Confirmation Order), no Claim or Equity Interest will become an Allowed Claim or Equity Interest unless and until such Claim or Equity Interest is deemed Allowed under this Plan or the Bankruptcy Code or the Bankruptcy Court has entered an order, including, without limitation, the Confirmation Order, in the Chapter 11 Case allowing such Claim or Equity Interest.

2. Estimation

Subject to the other provisions of this Plan, the Debtor, prior to the Effective Date, and the Reorganized Debtor or the Claimant Trustee, as applicable, after the Effective Date, may, at any time, request that the Bankruptcy Court estimate (a) any Disputed Claim or Disputed Equity Interest pursuant to applicable law and in accordance with this Plan and (b) any contingent or unliquidated Claim pursuant to applicable law, including, without limitation, section 502(c) of the Bankruptcy Code, and the Bankruptcy Court will retain jurisdiction under 28 U.S.C. §§ 157 and 1334 to estimate any Disputed Claim or Disputed Equity Interest, contingent Claim or unliquidated Claim, including during the litigation concerning any objection to any Claim or Equity Interest or during the pendency of any appeal relating to any such objection. All of the aforementioned objection, estimation and resolution procedures are cumulative and not exclusive of one another. Claims or Equity Interests may be estimated and subsequently compromised, settled, withdrawn or resolved by any mechanism approved by the Bankruptcy Court. The rights and objections of all parties are reserved in connection with any such estimation proceeding.

3. Disallowance of Claims

Any Claims or Equity Interests held by Entities from which property is recoverable under sections 542, 543, 550, or 553 of the Bankruptcy Code, or that are a transferee of a transfer avoidable under sections 522(f), 522(h), 544, 545, 547, 548, 549, or 724(a) of the Bankruptcy Code, shall be deemed disallowed pursuant to section 502(d) of the Bankruptcy Code, and holders of such Claims or Interests may not receive any distributions on account of such Claims or Interests until such time as such Causes of Action against that Entity have been settled or a Bankruptcy Court Order with respect thereto has been entered and all sums due, if any, to the Reorganized Debtor or the Claimant Trust, as applicable, by that Entity have been turned over or paid to the Reorganized Debtor or the Claimant Trust, as applicable.

EXCEPT AS OTHERWISE PROVIDED HEREIN OR AS AGREED TO BY THE DEBTOR, REORGANIZED DEBTOR, OR CLAIMANT TRUSTEE, AS APPLICABLE,

A. Conditions Precedent to the Effective Date

- This Plan and the Plan Documents, including the Claimant Trust Agreement and the Reorganized Limited Partnership Agreement, and all schedules, documents, supplements and exhibits to this Plan shall have been Filed in form and substance reasonably acceptable to the Debtor and the Committee.
- The Confirmation Order shall have become a Final Order and shall be in form and substance reasonably acceptable to the Debtor and the Committee. The Confirmation Order shall provide that, among other things, (i) the Debtor, the Reorganized Debtor, the Claimant Trustee, or the Litigation Trustee are authorized to take all actions necessary or appropriate to effectuate and consummate this Plan, including, without limitation, (a) entering into, implementing, effectuating, and consummating the contracts, instruments, releases, and other agreements or documents created in connection with or described in this Plan, (b) assuming the Executory Contracts and Unexpired Leases set forth in the Plan Supplement, (c) making all distributions and issuances as required under this Plan; and (d) entering into any transactions as set forth in the Plan Documents; (ii) the provisions of the Confirmation Order and this Plan are nonseverable and mutually dependent; (iii) the implementation of this Plan in accordance with its terms is authorized; (iv) pursuant to section 1146 of the Bankruptcy Code, the delivery of any deed or other instrument or transfer order, in furtherance of, or in connection with this Plan, including any deeds, bills of sale, or assignments executed in connection with any disposition or transfer of Assets contemplated under this Plan, shall not be subject to any Stamp or Similar Tax; and (v) the vesting of the Claimant Trust Assets in the Claimant Trust and the Reorganized Debtor Assets in the Reorganized Debtor, in each case as of the Effective Date free and clear of liens and claims to the fullest extent permissible under applicable law pursuant to section 1141(c) of the Bankruptcy Code except with respect to such Liens, Claims, charges and other encumbrances that are specifically preserved under this Plan upon the Effective Date.
- All documents and agreements necessary to implement this Plan, including without limitation, the Reorganized Limited Partnership Agreement, the Claimant Trust

- ## B. Waiver of Conditions

C. Dissolution of the Committee

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A. General

B. Discharge of Claims

C. Exculpation

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On and after the Effective Date, each Released Party is deemed to be, hereby conclusively, absolutely, unconditionally, irrevocably, and forever released and discharged by the Debtor and the Estate, in each case on behalf of themselves and their respective successors, assigns, and representatives, including, but not limited to, the Claimant Trust and the Litigation Sub-Trust from any and all Causes of Action, including any derivative claims, asserted on behalf of the Debtor, whether known or unknown, foreseen or unforeseen, matured or unmatured, existing or hereafter arising, in law, equity, contract, tort or otherwise, that the Debtor or the Estate would have been legally entitled to assert in their own right (whether individually or collectively) or on behalf of the holder of any Claim against, or Interest in, a Debtor or other Person.

Notwithstanding anything contained herein to the contrary, the foregoing release does not release: (i) any obligations of any party under the Plan or any document, instrument, or agreement executed to implement the Plan, (ii) the rights or obligations of any current employee of the Debtor under any employment agreement or plan, (iii) the rights of the Debtor with respect to any confidentiality provisions or covenants restricting competition in favor of the Debtor under any employment agreement with a current or former employee of the Debtor, (iv) any Avoidance Actions, or (v) any Causes of Action arising from willful misconduct, criminal misconduct, actual fraud, or gross negligence of such applicable Released Party as determined by Final Order of the Bankruptcy Court or any other court of competent jurisdiction.

- sues, attempts to sue, or threatens or works with or assists any entity or person to sue, attempt to sue, or threaten the Reorganized Debtor, the Claimant Trust, the Litigation

without limitation, Causes of Action not specifically identified or of which the Debtor may presently be unaware or that may arise or exist by reason of additional facts or circumstances unknown to the Debtor at this time or facts or circumstances that may change or be different from those the Debtor now believes to exist) and, therefore, no preclusion doctrine, including, without limitation, the doctrines of res judicata, collateral estoppel, issue preclusion, claim preclusion, waiver, estoppel (judicial, equitable or otherwise) or laches will apply to such Causes of Action as a consequence of the confirmation, effectiveness, or consummation of this Plan based on the Disclosure Statement, this Plan or the Confirmation Order, except where such Causes of Action have been expressly released in this Plan or any other Final Order (including, without limitation, the Confirmation Order). In addition, the right of the Reorganized Debtor or the Claimant Trust to pursue or adopt any claims alleged in any lawsuit in which the Debtor is a plaintiff, defendant or an interested party, against any Entity, including, without limitation, the plaintiffs or co-defendants in such lawsuits, is expressly reserved.

F. Injunction

Upon entry of the Confirmation Order, all Enjoined Parties are and shall be permanently enjoined, on and after the Effective Date, from taking any actions to interfere with the implementation or consummation of the Plan.

Except as expressly provided in the Plan, the Confirmation Order, or a separate order of the Bankruptcy Court, all Enjoined Parties are and shall be permanently enjoined, on and after the Effective Date, with respect to any Claims and Equity Interests, from directly or indirectly (i) commencing, conducting, or continuing in any manner any suit, action, or other proceeding of any kind (including any proceeding in a judicial, arbitral, administrative or other forum) against or affecting the Debtor or the property of the Debtor, (ii) enforcing, levying, attaching (including any prejudgment attachment), collecting, or otherwise recovering, enforcing, or attempting to recover or enforce, by any manner or means, any judgment, award, decree, or order against the Debtor or the property of the Debtor, (iii) creating, perfecting, or otherwise enforcing in any manner, any security interest, lien or encumbrance of any kind against the Debtor or the property of the Debtor, (iv) asserting any right of setoff, directly or indirectly, against any obligation due to the Debtor or against property or interests in property of the Debtor, except to the limited extent permitted under Sections 553 and 1141 of the Bankruptcy Code, and (v) acting or proceeding in any manner, in any place whatsoever, that does not conform to or comply with the provisions of the Plan.

The injunctions set forth herein shall extend to, and apply to any act of the type set forth in any of clauses (i)-(v) of the immediately preceding paragraph against any successors of the Debtor, including, but not limited to, the Reorganized Debtor, the Litigation Sub-Trust, and the Claimant Trust and their respective property and interests in property.

Subject in all respects to ARTICLE XII.D, no Enjoined Party may commence or pursue a claim or cause of action of any kind against any Protected Party that arose or arises from or is related to the Chapter 11 Case, the negotiation of the Plan, the administration of the Plan or property to be distributed under the Plan, the wind down of the business of the Debtor or Reorganized Debtor, the administration of the Claimant Trust or the Litigation Sub-Trust, or the transactions in furtherance of the foregoing without the Bankruptcy Court

ARTICLE II. Unless otherwise provided in this Plan, in the Confirmation Order, or in a Final Order of the Bankruptcy Court, (i) all injunctions and stays entered during the Chapter 11 Case and in existence on the Confirmation Date shall remain in full force and effect in accordance with their terms; and (ii) the automatic stay arising under section 362 of the Bankruptcy Code shall remain in full force and effect subject to Section 362(c) of the Bankruptcy Code, and to the extent necessary if the Debtor does not receive a discharge, the Court will enter an equivalent order under Section 105.

Unless otherwise provided in this Plan, in the Confirmation Order, or in a Final Order of the Bankruptcy Court, the restrictions set forth in paragraphs 9 and 10 of the *Order Approving Settlement with Official Committee of Unsecured Creditors Regarding Governance of the Debtor and Procedures for Operations in the Ordinary Course*, entered by the Bankruptcy Court on January 9, 2020 [D.I. 339] shall remain in full force and effect following the Effective Date.

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ARTICLE XI.

RETENTION OF JURISDICTION

Pursuant to sections 105 and 1142 of the Bankruptcy Code and notwithstanding the entry of the Confirmation Order and the occurrence of the Effective Date, the Bankruptcy Court shall, after the Effective Date, retain such jurisdiction over the Chapter 11 Case and all Entities with respect to all matters related to the Chapter 11 Case, the Reorganized Debtor, the Claimant Trust, and this Plan to the maximum extent legally permissible, including, without limitation, jurisdiction to:

- allow, disallow, determine, liquidate, classify, estimate or establish the priority, secured, unsecured, or subordinated status of any Claim or Equity Interest, including, without limitation, the resolution of any request for payment of any Administrative Expense Claim and the resolution of any and all objections to the allowance or priority of any Claim or Equity Interest;
- grant or deny any applications for allowance of compensation or reimbursement of expenses authorized pursuant to the Bankruptcy Code or this Plan, for periods ending on or before the Effective Date; *provided, however*, that, from and after the Effective Date, the Reorganized Debtor shall pay Professionals in the ordinary course of business for any work performed after the Effective Date subject to the terms of this Plan and the Confirmation Order, and such payment shall not be subject to the approval of the Bankruptcy Court;
- resolve any matters related to the assumption, assignment or rejection of any Executory Contract or Unexpired Lease to which the Debtor is party or with respect to which the Debtor, Reorganized Debtor, or Claimant Trust may be liable and to adjudicate and, if necessary, liquidate, any Claims arising therefrom, including, without limitation, any dispute regarding whether a contract or lease is or was executory or expired;
- make any determination with respect to a claim or cause of action against a Protected Party as set forth in ARTICLE IX;
- resolve any claim or cause of action against an Exculpated Party or Protected Party arising from or related to the Chapter 11 Case, the negotiation of this Plan, the administration of the Plan or property to be distributed under the Plan, the wind down of the business of the Debtor or Reorganized Debtor, or the transactions in furtherance of the foregoing;
- if requested by the Reorganized Debtor or the Claimant Trustee, authorize, approve, and allow any sale, disposition, assignment or other transfer of the Reorganized Debtor Assets or Claimant Trust Assets, including any break-up compensation or expense reimbursement that may be requested by a purchaser thereof; *provided, however*, that neither the Reorganized Debtor nor the Claimant Trustee shall be required to seek such authority or approval from the Bankruptcy Court unless otherwise specifically required by this Plan or the Confirmation Order;

- if requested by the Reorganized Debtor or the Claimant Trustee, authorize, approve, and allow any borrowing or the incurrence of indebtedness, whether secured or unsecured by the Reorganized Debtor or Claimant Trust; *provided, however*, that neither the Reorganized Debtor nor the Claimant Trustee shall be required to seek such authority or approval from the Bankruptcy Court unless otherwise specifically required by this Plan or the Confirmation Order;
- resolve any issues related to any matters adjudicated in the Chapter 11 Case;
- ensure that distributions to Holders of Allowed Claims and Allowed Equity Interests are accomplished pursuant to the provisions of this Plan;
- decide or resolve any motions, adversary proceedings, contested or litigated matters and any other Causes of Action (including Estate Claims) that are pending as of the Effective Date or that may be commenced in the future, including approval of any settlements, compromises, or other resolutions as may be requested by the Debtor, the Reorganized Debtor, the Claimant Trustee, or the Litigation Trustee whether under Bankruptcy Rule 9019 or otherwise, and grant or deny any applications involving the Debtor that may be pending on the Effective Date or instituted by the Reorganized Debtor, the Claimant Trustee, or Litigation Trustee after the Effective Date, provided that the Reorganized Debtor, the Claimant Trustee, and the Litigation Trustee shall reserve the right to commence actions in all appropriate forums and jurisdictions;
- enter such orders as may be necessary or appropriate to implement, effectuate, or consummate the provisions of this Plan, the Plan Documents, and all other contracts, instruments, releases, and other agreements or documents adopted in connection with this Plan, the Plan Documents, or the Disclosure Statement;
- resolve any cases, controversies, suits or disputes that may arise in connection with the implementation, effectiveness, consummation, interpretation, or enforcement of this Plan or any Entity's obligations incurred in connection with this Plan;
- issue injunctions and enforce them, enter and implement other orders or take such other actions as may be necessary or appropriate to restrain interference by any Entity with implementation, effectiveness, consummation, or enforcement of this Plan, except as otherwise provided in this Plan;
- enforce the terms and conditions of this Plan and the Confirmation Order;
- resolve any cases, controversies, suits or disputes with respect to the release, exculpation, indemnification, and other provisions contained herein and enter such orders or take such others actions as may be necessary or appropriate to implement or enforce all such releases, injunctions and other provisions;
- enter and implement such orders or take such others actions as may be necessary or appropriate if the Confirmation Order is modified, stayed, reversed, revoked or vacated;

A. Payment of Statutory Fees and Filing of Reports

B. Modification of Plan

C. Revocation of Plan

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If there is a dispute regarding whether a contract or lease is or was executory at the time of its assumption under this Plan, the Debtor, the Reorganized Debtor, or the Claimant Trustee, as applicable, shall have thirty (30) days following entry of a Final Order resolving such dispute to alter their treatment of such contract.

The Debtor, the Reorganized Debtor, or the Claimant Trustee, as applicable, all Holders of Claims and Equity Interests receiving distributions hereunder, and all other Entities shall, from time to time, prepare, execute and deliver any agreements or documents and take any other actions as may be necessary or advisable to effectuate the provisions and intent of this Plan or the Confirmation Order. On or before the Effective Date, the Debtor shall File with the Bankruptcy Court all agreements and other documents that may be necessary or appropriate to effectuate and further evidence the terms and conditions hereof.

If, prior to the Confirmation Date, any term or provision of this Plan is determined by the Bankruptcy Court to be invalid, void, or unenforceable, the Bankruptcy Court will have the power to alter and interpret such term or provision to make it valid or enforceable to the maximum extent practicable, consistent with the original purpose of the term or provision held to be invalid, void, or unenforceable, and such term or provision will then be applicable as altered or interpreted. Notwithstanding any such holding, alteration or interpretation, the remainder of the terms and provisions of this Plan will remain in full force and effect and will in no way be affected, impaired, or invalidated by such holding, alteration, or interpretation. The Confirmation Order will constitute a judicial determination and will provide that each term and provision of this Plan, as it may have been altered or interpreted in accordance with the foregoing, is valid and enforceable pursuant to its terms.

All notices, requests, and demands to or upon the Debtor, the Reorganized Debtor, or the Claimant Trustee to be effective shall be in writing and, unless otherwise expressly provided herein, shall be deemed to have been duly given or made when actually delivered addressed as follows:

Highland Claimant Trust
c/o Highland Capital Management, L.P.
300 Crescent Court, Suite 700

evidence and implement the provisions of and the distributions to be made under this Plan; (ii) the maintenance or creation of security or any Lien as contemplated by this Plan; and (iii) assignments, sales, or transfers executed in connection with any transaction occurring under this Plan.

M. Governing Law

Except to the extent that the Bankruptcy Code, the Bankruptcy Rules or other federal law is applicable, or to the extent that an exhibit or schedule to this Plan provides otherwise, the rights and obligations arising under this Plan shall be governed by, and construed and enforced in accordance with, the laws of Texas, without giving effect to the principles of conflicts of law of such jurisdiction; *provided, however*, that corporate governance matters relating to the Debtor, the Reorganized Debtor, New GP LLC, or the Claimant Trust, as applicable, shall be governed by the laws of the state of organization of the Debtor, the Reorganized Debtor, New GP LLC, or the Claimant Trustee, as applicable.

N. Tax Reporting and Compliance

The Debtor is hereby authorized to request an expedited determination under section 505(b) of the Bankruptcy Code of the tax liability of the Debtor is for all taxable periods ending after the Petition Date through, and including, the Effective Date.

O. Exhibits and Schedules

All exhibits and schedules to this Plan, if any, including the Exhibits and the Plan Documents, are incorporated and are a part of this Plan as if set forth in full herein.

P. Controlling Document

In the event of an inconsistency between this Plan and any other instrument or document created or executed pursuant to this Plan, or between this Plan and the Disclosure Statement, this Plan shall control. The provisions of this Plan, the Disclosure Statement, and any Plan Document, on the one hand, and of the Confirmation Order, on the other hand, shall be construed in a manner consistent with each other so as to effectuate the purposes of each; *provided, however*, that if there is determined to be any inconsistency between any provision of this Plan, the Disclosure Statement, and any Plan Document, on the one hand, and any provision of the Confirmation Order, on the other hand, that cannot be so reconciled, then, solely to the extent of such inconsistency, the provisions of the Confirmation Order shall govern, and any such provisions of the Confirmation Order shall be deemed a modification of this Plan, the Disclosure Statement, and the Plan Documents, as applicable.

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Exhibit B

Schedule of CLO Management Agreements and Related Contracts to Be Assumed

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Schedule of CLO Management Agreements and Related Contracts to Be Assumed

1. Servicing Agreement, dated December 20, 2007, by and among Greenbriar CLO, Ltd., and Highland Capital Management, L.P.
2. Investment Management Agreement, dated November 1, 2007, by and between Longhorn Credit Funding, LLC, and Highland Capital Management, L.P. (as amended)
3. Reference Portfolio Management Agreement, dated August 1, 2016, by and between Highland Capital Management, L.P., and Valhalla CLO, Ltd.
4. Collateral Servicing Agreement, dated December 20, 2006, by and among Highland Park CDO I, Ltd., and Highland Capital Management, L.P.
5. Portfolio Management Agreement, dated March 15, 2005, by and among Southfork CLO Ltd., and Highland Capital Management, L.P.
6. Amended and Restated Portfolio Management Agreement, dated November 30, 2005, by and among Jaspar CLO Ltd., and Highland Capital Management, L.P.
7. Servicing Agreement, dated May 31, 2007, by and among Westchester CLO, Ltd., and Highland Capital Management, L.P.
8. Servicing Agreement, dated May 10, 2006, by and among Rockwall CDO Ltd. and Highland Capital Management, L.P. (as amended)
9. Portfolio Management Agreement, dated December 8, 2005, by and between Liberty CLO, Ltd., and Highland Capital Management, L.P.
10. Servicing Agreement, dated March 27, 2008, by and among Aberdeen Loan Funding, Ltd., and Highland Capital Management, L.P.
11. Servicing Agreement, dated May 9, 2007, by and among Rockwall CDO II Ltd. and Highland Capital Management, L.P.
12. Collateral Management Agreement, by and between, Highland Loan Funding V Ltd. and Highland Capital Management, L.P., dated August 1, 2001.
13. Collateral Management Agreement, dated August 18, 1999, by and between Highland Legacy Limited and Highland Capital Management, L.P.
14. Servicing Agreement, dated November 30, 2006, by and among Grayson CLO Ltd., and Highland Capital Management, L.P. (as amended)
15. Servicing Agreement, dated October 25, 2007, by and among Stratford CLO Ltd., and Highland Capital Management, L.P.
16. Servicing Agreement, dated August 3, 2006, by and among Red River CLO Ltd., and Highland Capital Management, L.P. (as amended)
17. Servicing Agreement, dated December 21, 2006, by and among Brentwood CLO, Ltd., and Highland Capital Management, L.P.
18. Servicing Agreement, dated March 13, 2007, by and among Eastland CLO Ltd., and Highland Capital Management, L.P.

19. Portfolio Management, Agreement, dated October 13, 2005, by and among Gleneagles CLO, Ltd., and Highland Capital Management, L.P.
20. Members' Agreement and Amendment, dated November 15, 2017, by and between Highland CLO Funding, Ltd. and Highland Capital Management, L.P.
21. Collateral Management Agreement, dated May 19, 1998, by and between Pam Capital Funding LP, Ranger Asset Mgt LP and Highland Capital Management, L.P.
22. Collateral Management Agreement, dated August 6, 1997, by and between Pamco Cayman Ltd., Ranger Asset Mgt LP and Highland Capital Management, L.P.
23. Amendment No. 1 to Servicing Agreement, October 2, 2007, between Highland Capital Management, L.P. and Red River CLO Ltd. et al
24. Interim Collateral Management Agreement, June 15, 2005, between Highland Capital Management, L.P. and Rockwall CDO Ltd
25. Amendment No. 1 to Servicing Agreement, October 2, 2007, between Highland Capital Management, L.P. and Rockwall CDO Ltd
26. Collateral Servicing Agreement dated December 20, 2006, between Highland Capital Management, L.P. and Highland Park CDO I, Ltd.; The Bank of New York Trust Company, National Association
27. Representations and Warranties Agreement, dated December 20, 2006, between Highland Capital Management, L.P. and Highland Park CDO I, Ltd.
28. Collateral Administration Agreement, dated March 27, 2008, between Highland Capital Management, L.P. and Aberdeen Loan Funding, Ltd.; State Street Bank and Trust Company
29. Collateral Administration Agreement, dated December 20, 2007, between Highland Capital Management, L.P. and Greenbriar CLO, Ltd.; State Street Bank and Trust Company
30. Collateral Acquisition Agreement, dated March 13, 2007, between Highland Capital Management, L.P. and Eastland CLO, Ltd
31. Collateral Administration Agreement, dated March 13, 2007, between Highland Capital Management, L.P. and Eastland CLO, Ltd. and Investors Bank and Trust Company
32. Collateral Administration Agreement, dated October 13, 2005, between Highland Capital Management, L.P. and Gleneagles CLO, Ltd.; JPMorgan Chase Bank, National Association
33. Collateral Acquisition Agreement, dated November 30, 2006, between Highland Capital Management, L.P. and Grayson CLO, Ltd.
34. Collateral Administration Agreement, dated November 30, 2006, between Highland Capital Management, L.P. and Grayson CLO, Ltd.; Investors Bank & Trust Company
35. Collateral Acquisition Agreement, dated August 3, 2006, between Highland Capital Management, L.P. and Red River CLO, Ltd.

36. Collateral Administration Agreement, dated August 3, 2006, between Highland Capital Management, L.P. and Red River CLO, Ltd.; U.S. Bank National Association
37. Master Warehousing and Participation Agreement, dated April 19, 2006, between Highland Capital Management, L.P. and Red River CLO Ltd.; Highland Special Opportunities Holding Company
38. Master Warehousing and Participation Agreement, dated February 2, 2006, between Highland Capital Management, L.P. and Red River CLO Ltd.; MMP-5 Funding, LLC; IXIS Financial Products Inc.
39. Master Warehousing and Participation Agreement (Amendment No. 2), dated May 5, 2006, between Highland Capital Management, L.P. and Red River CLO Ltd.; MMP-5 Funding, LLC; IXIS Financial Products Inc.
40. Master Warehousing and Participation Agreement (Amendment No. 1), dated April 12, 2006, between Highland Capital Management, L.P. and Red River CLO Ltd.; MMP-5 Funding, LLC; IXIS Financial Products Inc.
41. Master Warehousing and Participation Agreement (Amendment No. 3), dated June 22, 2006, between Highland Capital Management, L.P. and Red River CLO Ltd.; MMP-5 Funding, LLC; IXIS Financial Products Inc.
42. Master Warehousing and Participation Agreement (Amendment No. 4), dated July 17, 2006, between Highland Capital Management, L.P. and Red River CLO Ltd.; MMP-5 Funding, LLC; IXIS Financial Products Inc.
43. Collateral Administration Agreement, dated February 2, 2006, between Highland Capital Management, L.P. and Red River CLO Ltd.; U.S. Bank National Association; IXIS Financial Products Inc.
44. Collateral Administration Agreement, dated April 18, 2006, between Highland Capital Management, L.P. and Red River CLO Ltd.; Highland Special Opportunities Holding Company; U.S. Bank National Association
45. Master Participation Agreement, dated June 5, 2006, between Highland Capital Management, L.P. and Red River CLO Ltd.; Grand Central Asset Trust
46. A&R Asset Acquisition Agreement, dated July 18, 2001, between Highland Capital Management, L.P. and Salomon Smith Barney Inc.; Highland Loan Funding V Ltd.
47. A&R Master Participation Agreement, dated July 18, 2001, between Highland Capital Management, L.P. and Salomon Brothers Holding Company; Highland Loan Funding V Ltd.
48. Collateral Acquisition Agreement, dated June 29, 2005, between Highland Capital Management, L.P. and Jasper CLO Ltd.
49. Collateral Administration Agreement, dated June 29, 2005, between Highland Capital Management, L.P. and Jasper CLO Ltd.; JPMorgan Chase Bank, National Association
50. Master Warehousing and Participation Agreement, dated March 24, 2005, between Highland Capital Management, L.P. and Jasper CLO Ltd; MMP-5 Funding, LLC; and IXIS Financial Products Inc.

ENTERED

Stacy L. C. Jorgensen
United States Bankruptcy Judge

003583

Dismiss”) is hereby GRANTED. Nothing in this Order shall otherwise affect the disposition of the pending motion to dismiss filed by defendants Highland Capital Management, L.P. and Highland HCF Advisor, Ltd.

It is hereby ordered and adjudged that HCLOF is DISMISSED with prejudice from the above-captioned case, with all costs to be borne by parties incurring them.

###END OF DOCUMENT###



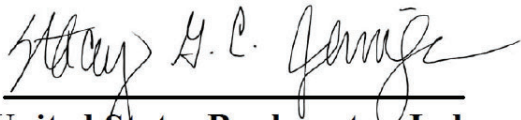
CLERK, U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS

ENTERED

THE DATE OF ENTRY IS ON
THE COURT'S DOCKET

The following constitutes the ruling of the court and has the force and effect therein described.

Signed March 11, 2022


United States Bankruptcy Judge

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

IN RE:	§	
	§	
HIGHLAND CAPITAL MANAGEMENT	§	CASE NO. 19-34054-SGJ-11
L.P.,	§	(CHAPTER 11)
REORGANIZED DEBTOR.	§	
	§	
CHARITABLE DAF FUND, L.P., AND CLO	§	
HOLDCO LTD.,	§	
	§	
PLAINTIFFS,	§	
	§	
VS.	§	ADVERSARY NO. 21-03067
	§	
HIGHLAND CAPITAL MANAGEMENT,	§	
L.P., HIGHLAND HCF ADVISOR, LTD.,	§	
AND HIGHLAND CLO FUNDING, LTD.,	§	
	§	
DEFENDANTS.	§	

**MEMORANDUM OPINION AND ORDER GRANTING MOTION TO DISMISS THE
ADVERSARY PROCEEDING**

003585

I. INTRODUCTION

The above-referenced adversary proceeding (the “Adversary Proceeding”) is related to the bankruptcy case of Highland Capital Management, L.P. (the “Bankruptcy Case”).¹ Highland Capital Management, L.P. (“Highland,” the “Debtor,” or sometimes the “Reorganized Debtor”) filed a voluntary Chapter 11 petition on October 16, 2019, in the United States Bankruptcy Court for the District of Delaware. That court subsequently transferred venue of the Bankruptcy Case to the Northern District of Texas, Dallas Division (the “Bankruptcy Court”), on December 4, 2019.

Before the court is Highland’s motion to dismiss (the “Motion to Dismiss”) the Adversary Proceeding. Highland obtained confirmation of a reorganization plan on February 22, 2021, and the plan went effective on August 11, 2021. The Adversary Proceeding was filed in April 2021 (*i.e.*, after confirmation but before the effective date of Highland’s Chapter 11 plan). There were originally three Defendants named in the Adversary Proceeding: (i) Highland, and (ii) two non-Debtor affiliates which Highland controls that are called Highland HCF Advisor, Ltd. (“HHCFA”) and Highland CLO Funding Ltd. (“HCLOF”). Defendant HCLOF was later dismissed by agreement with the Plaintiffs.² Highland’s CEO, James P. Seery (“Mr. Seery”), was named in the Complaint initiating the Adversary Proceeding (the “Complaint”) as a “potential” Defendant but has not been added. The Plaintiffs are two entities that are allegedly controlled and/or directed by James Dondero, Highland’s founder and former CEO (“Mr. Dondero”): (i) Charitable DAF Fund, L.P. (the “DAF”), which is a Cayman Island-based hedge fund designated as a “donor-advised fund,” originally seeded with funds from Highland, and (ii) CLO Holdco, Ltd. (“CLO Holdco”),

¹ Bankruptcy Case No. 19-34054.

² At the hearing held on the Motion to Dismiss, the parties announced an agreement that HCLOF would be dismissed from the Adversary Proceeding with prejudice. HCLOF was apparently only named nominally in the Adversary Proceeding and no actual relief was sought against it. An order dismissing HCLOF was entered on December 7, 2021. Highland and HHCFA were unaffected by the dismissal order.

which is also a Cayman Island-based entity, wholly owned and controlled by the DAF. Until at least mid-January 2021, Grant Scott, Mr. Dondero's life-long friend and college roommate, was the sole director of the DAF and also of CLO Holdco (neither of which otherwise had any officers or employees).

The Complaint, which was originally filed in the United States District Court for the Northern District of Texas, Dallas Division ("District Court"), but was referred to the Bankruptcy Court (as further described herein), asserts claims against Highland and HHCFA under the Racketeer Influenced and Corrupt Organizations statute (15 U.S.C. § 1961, et seq. ("RICO")), Breach of Fiduciary Duty, Breach of Contract, Negligence, and Tortious Interference with Contract—all relating to the Debtor's pursuit and effectuation *during the Bankruptcy Case* of a compromise and settlement agreement with a creditor known as HarbourVest, which *agreement was fully vetted and approved by the Bankruptcy Court* (after notice to creditors and parties in interest), pursuant to Federal Rule of Bankruptcy Procedure 9019. Accepting all facts pleaded as true and construing the Complaint in the light most favorable to the Plaintiffs, this court concludes that all of the claims in the Complaint are precluded by the doctrines of collateral estoppel and judicial estoppel. Thus, the Complaint, in its entirety, must be dismissed.

In order to understand the conclusion of this court, one must review matters that happened during the Bankruptcy Case. Although a court generally limits its inquiry on a motion to dismiss to the plaintiff's complaint or any documents attached to the complaint, a court may also take judicial notice of matters that are part of the public record when considering a motion to dismiss. *See T.L. Dallas (Special Risks), Ltd. v. Elton Porter Marine Ins.*, No. 4:07-cv-0419, 2008 WL 7627807, at *2 (S.D. Tex. 2008); *Cade v. Henderson*, No. CIV A 01-943, 2001 WL 1012251, at *2 (E.D. La. Aug. 31, 2001). The relevant public record here includes: (a) the HarbourVest

Settlement Motion,³ and the exhibits admitted into evidence in support; (b) the Transfer Agreement;⁴ (c) Mr. Dondero's Objection to the HarbourVest Settlement;⁵ (d) the Objection to the HarbourVest Settlement of Dugaboy Investment Trust and Get Good Trust (*i.e.*, Mr. Dondero's family trusts),⁶ (e) CLO Holdco's Objection to the HarbourVest Settlement,⁷ (f) the Omnibus Replies;⁸ (g) the January 14, 2021 Hearing Transcript at which the Bankruptcy Court considered and approved the HarbourVest Settlement;⁹ and (h) the HarbourVest Settlement Order.¹⁰

II. BACKGROUND

The creditor HarbourVest was actually a collective of investors that, in 2017, invested approximately \$80 million into the entity known as HCLOF (*i.e.*, the previously dismissed nominal Defendant), thereby acquiring a 49.98% interest in it. HarbourVest filed six proofs of claim against the Debtor in the Bankruptcy Case, totaling \$300 million, alleging that the Debtor had committed fraud back in 2017, in connection with its encouraging HarbourVest to invest in and acquire that 49.98% interest in HCLOF. As alluded to earlier, the Debtor and HarbourVest eventually negotiated a settlement of HarbourVest's proofs of claim.

³ Debtor's Motion for an Entry of an Order Approving Settlement with HarbourVest (Claim Nos. 143, 147, 149, 150, 153, 154) and Authorizing Actions Consistent Therewith, DE # 1625 (the "Settlement Motion"). Note: all references herein to "DE # ____" shall refer to the docket entry number at which a pleading appears in the docket maintained in the Highland main bankruptcy case. All references to "DE # ____ in the AP" refer to the docket entry number at which a pleading appears in the docket maintained in the Adversary Proceeding.

⁴ Declaration of John A. Morris in Support of the Debtor's Motion for Entry of an Order Approving Settlement with HarbourVest (Claim Nos. 143, 147, 149, 150, 153, 154) and Authorizing Actions Consistent Therewith, DE # 1631, Exhibit 1.

⁵ James Dondero's Objection to Debtor's Motion for Entry of an Order Approving Settlement with HarbourVest, DE # 1697.

⁶ Objection to Debtor's Motion for an Entry of an Order Approving Settlement with HarbourVest (Claim Nos. 143, 147, 149, 150, 153, 154) and Authorizing Actions Consistent Therewith, DE # 1706.

⁷ CLO Holdco, Ltd.'s Objection to HarbourVest Settlement, DE # 1707.

⁸ Debtor's Omnibus Reply in Support of the Debtor's Motion for Entry of an Order Approving Settlement with HarbourVest (Claim Nos. 143, 147, 149, 150, 153, 154) and Authorizing Actions Consistent Therewith, DE # 1731; HarbourVest Reply in Support of Debtor's Motion for Entry of an Order Approving Settlement with HarbourVest and Authorizing Actions Consistent Therewith, DE # 1734.

⁹ Transcript of Hearing Held 1/14/2021, DE # 1765.

¹⁰ *Order Approving Debtor's Settlement with Harbourvest (Claims Nos. 143, 147, 149, 150, 153, 154) and Authorizing Actions Consistent Therewith*, DE # 1788 (the "HarbourVest Settlement Order").

In December 2020, the Debtor filed a motion in the Bankruptcy Court for an order approving its settlement with HarbourVest (the “HarbourVest Settlement”), pursuant to which, *inter alia*, HarbourVest would significantly reduce its \$300 million of alleged claims against the Debtor and transfer its 49.98% interest in HCLOF to an entity designated by the Debtor (the “Transfer”). At the time of the Transfer, the Debtor already owned a 0.6% interest in HCLOF, so the Transfer would give it a controlling interest ($49.98\% + 0.6\% = 50.58\%$) in HCLOF.

CLO Holdco objected to the proposed HarbourVest Settlement, presumably at the direction of its parent, the DAF. CLO Holdco owned (and still owns) 49.02% of HCLOF. CLO Holdco challenged the HarbourVest Settlement on the grounds that: (i) CLO Holdco had a “Right of First Refusal” to acquire HarbourVest’s interest in HCLOF pursuant to the HCLOF Members Agreement among the Debtor, HarbourVest, and CLO Holdco (“HCLOF Members Agreement”), and (ii) HarbourVest had no right to transfer its interest without complying with the purported “Right of First Refusal.” Two other objections were lodged against the proposed HarbourVest Settlement, one by Mr. Dondero and the other by Mr. Dondero’s two family trusts: The Dugaboy Investment Trust (“Dugaboy”) and The Get Good Trust (“Get Good” and, together with Dugaboy, the “Dondero Family Trusts”). Mr. Dondero objected on the grounds that (a) the HarbourVest Settlement was not reasonable or in the best interests of the estate because the Debtor was grossly over-compensating HarbourVest, and (b) it amounted to a blatant attempt to purchase HarbourVest’s votes in support of the Debtor’s plan. The Dondero Family Trusts raised separate concerns regarding: (a) whether HarbourVest had the right to effectuate the Transfer, and (b) the valuation methodology the Debtor used for the HCLOF interests. Each of the objecting parties had a right to take discovery concerning the HarbourVest Settlement, including the valuation of the HCLOF interests and the Transfer.

The court held an evidentiary hearing, on January 14, 2021, on the HarbourVest Settlement and heard argument in support of the parties' objections and defenses. Highland's current CEO, Mr. Seery, and a HarbourVest representative, Michael Pugatch ("Mr. Pugatch"), were each called to testify. During the hearing, surprisingly, ***CLO Holdco voluntarily withdrew its objection, which had been premised on its alleged "Right of First Refusal,"*** based on CLO Holdco's "interpretation of the [HCLOF] member agreement."¹¹ Subsequent to CLO Holdco withdrawing its objection at the hearing, the Bankruptcy Court asked counsel for the Dondero Family Trusts whether they planned to press the issue of the transferability of HarbourVest's interest in HCLOF. In response, counsel responded: "No, I am not. Basically, I think it's the fairness of the settlement. I think the transferability of the interest is separate and apart from the fairness of the settlement itself. I think the fairness -- the transferability was a contractual issue between two parties that the Court does not have to drill down on." Transcript of Hearing Held 1/14/2021, DE # 1765, at 22:5-20.

At the conclusion of the hearing, the Bankruptcy Court overruled the remaining objections (*i.e.*, of Mr. Dondero and the Dondero Family Trusts) and approved the HarbourVest Settlement as fair and equitable and in the best interests of the bankruptcy estate. The HarbourVest Settlement Order made clear that HarbourVest could transfer its interest in HCLOF "without the need to obtain the consent of any party or to offer such interests first to any other investor in HCLOF."¹²

In summary, pursuant to the HarbourVest Settlement that the Bankruptcy Court approved, HarbourVest, in pertinent part, would (a) transfer its interest in HCLOF to the Debtor or its nominee, (b) be allowed a general unsecured claim against the Debtor in the amount of \$45 million,

¹¹ Transcript of Hearing Held 1/14/2021, DE # 1765, at 7:20-8:6.

¹² HarbourVest Settlement Order, DE # 1788.

and (c) be allowed a subordinated, general unsecured claim against the Debtor in the amount of \$35 million. The HarbourVest Settlement was essentially a rescission of the investment HarbourVest had made in HCLOF and also provided HarbourVest allowed, reduced claims against Highland in settlement of its alleged \$300 million of damages.

The HarbourVest Settlement Order was appealed by the Dondero Family Trusts, with notice of the appeal being filed in the Bankruptcy Court on February 5, 2021. The Dondero Family Trusts argue on appeal that the Debtor overpaid for the HCLOF interests, and the HarbourVest Settlement was an attempt to gerrymander the Debtor's plan and purchase votes. No stay pending appeal has been approved and the HarbourVest Settlement was implemented. The appeal remains pending before Judge Sam Lindsay in the District Court.¹³

On April 12, 2021, the Plaintiffs, DAF and CLO Holdco, filed the Complaint initiating this Adversary Proceeding in the District Court. The action was assigned to Judge Jane Boyle. *The subject matter of the Adversary Proceeding is entirely centered around the bona fides and permissibility of aspects of the HarbourVest Settlement.* Despite the full vetting in the Bankruptcy Court of the HarbourVest Settlement and an order approving the HarbourVest Settlement—which, by the way, was not appealed by Plaintiffs DAF or CLO Holdco—various torts and other causes of action are now being alleged by DAF and CLO Holdco against the Debtor *relating entirely to the HarbourVest Settlement.* As earlier alluded to, the Complaint raises claims that Highland, while a debtor-in-possession, committed: (1) breach of fiduciary duties to the Plaintiffs; (2) breach of the HCLOF Members Agreement; (3) negligence; (4) RICO violations; and (5) tortious interference.

¹³ Case No. 3:21-cv-00261-L.

On September 20, 2021, Judge Boyle issued an Order of Reference¹⁴ referring this action to be adjudicated as an adversary proceeding related to the Bankruptcy Case, pursuant **28 U.S.C. § 157** and the Standing Order of Reference of Bankruptcy Cases and Proceedings (Misc. Rule No. 33), for the Northern District of Texas, dated August 3, 1984. Thus, the Complaint is now pending before the Bankruptcy Court.

In its claim for breach of fiduciary duty (**Count 1**), Plaintiffs allege that the Debtor violated its “broad” duties to Plaintiffs under the “Investment Advisers Act of 1940” and the Debtor’s “internal policies and procedures” by: (i) engaging in “insider trading with HarbourVest”; (ii) “concealing” the value of the HarbourVest interest; and (iii) “diverting” the investment opportunity in the HarbourVest entities to the Debtor without offering it to Plaintiffs.

In support of its claim for breach of the HCLOF Members Agreement (**Count 2**), Plaintiffs allege that the Debtor breached the “Right of First Refusal” provision therein, by diverting the investment opportunity away from CLO Holdco to the Debtor.

In its negligence claim (**Count 3**), Plaintiffs assert that the Debtor’s actions violated the HCLOF Members Agreement and the Debtor’s internal policies by failing to accurately calculate the HCLOF interests and failing to give Plaintiffs the Right of First Refusal to purchase the interests.

In their RICO Claim (**Count 4**), Plaintiffs allege that Defendant Highland and two affiliated entities were an “association-in-fact” engaged in a pattern of racketeering activity for this same underlying conduct; namely, failing to disclose the valuation of HCLOF’s interest and, ultimately, effectuating the HarbourVest Settlement.

¹⁴ District Court Order of Reference, DE # 64 in the AP.

Finally, Plaintiffs' tortious interference claim (**Count 5**) is premised on the Debtor's alleged interference with Plaintiff's "Right of First Refusal" under the Members Agreement.

Highland, in response to the Complaint, filed its Motion to Dismiss on May 27, 2021. In the Motion to Dismiss, Highland argues that, based on the previous HarbourVest Settlement contested proceeding, the Plaintiffs' claims are precluded or barred by the doctrines of res judicata, collateral estoppel,¹⁵ and judicial estoppel. Alternatively, Highland also alleges that each of the claims in the Complaint should be dismissed for failing to sufficiently state claims for relief under Rule 12(b)(6). The Motion to Dismiss seeks to have the Complaint dismissed in its entirety.

The Bankruptcy Court held a hearing on Highland's Motion to Dismiss the Adversary Proceeding now before the court. At the conclusion of the Motion to Dismiss hearing, the court took the matter under advisement.

III. Legal Analysis

A. Jurisdiction and Authority

Bankruptcy subject matter jurisdiction exists in this matter, pursuant to 28 U.S.C. § 1334(b). This Adversary Proceeding is, at a minimum, "related to" the Highland Bankruptcy Case. Moreover, it "arises in" a bankruptcy case (making it "core"), in that a claim is being asserted against a debtor (which was not yet a "reorganized debtor" at the time the action was filed) and involves actions of a debtor-in-possession in administering its case. It involves orders of this Bankruptcy Court and activities and litigation over which the Bankruptcy Court presided. This Bankruptcy Court has authority to exercise bankruptcy subject matter jurisdiction here, pursuant to 28 U.S.C. § 157(a) and (b)(2)(A), (B), and (O), and the Standing Order of Reference of

¹⁵ The court notes that Highland, in the Brief in Support of the Motion to Dismiss, lists collateral estoppel, in its summary of arguments, as grounds for dismissal of the Complaint. However, nowhere else is collateral estoppel mentioned within the Motion to Dismiss and Brief in Support. Rather, Highland focuses only on res judicata and judicial estoppel.

Bankruptcy Cases and Proceedings (Misc. Rule No. 33), for the Northern District of Texas, dated August 3, 1984. The case was referred to the Bankruptcy Court by the District Court and there are no pending motions to withdraw the reference.

B. Legal Standard

To survive a motion to dismiss pursuant to Rule 12(b)(6), a plaintiff must plead “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009). “The plausibility standard is not akin to a ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted unlawfully.” *Id.* “Where a complaint pleads facts that are ‘merely consistent with’ a defendant’s liability, it ‘stops short of the line between possibility and plausibility of entitlement to relief.’” *Id.* Dismissal is proper under Rule 12(b)(6) when, taking the facts alleged in the complaint as true, it appears that the plaintiff “cannot prove any set of facts that would entitle it to the relief it seeks.” *C.C. Port, Ltd. v. Davis-Penn Mortg. Co.*, 61 F.3d 288, 289 (5th Cir. 1995). The court may take judicial notice of matters of public record when considering a motion to dismiss for failure to state a claim. *See T.L. Dallas (Special Risks), Ltd.*, 2008 WL 7627807, at *2; *Cade*, 2001 WL 1012251, at *2.

C. Res Judicata

The first preclusion doctrine argued by Highland in its Motion to Dismiss is res judicata.¹⁶ Res judicata, otherwise known as “claim preclusion,” literally means “the thing has been decided.”

¹⁶ As mentioned earlier, there is a pending appeal of the HarbourVest Settlement Order. This fact is irrelevant for purposes of Highland’s preclusion arguments. The federal rule and the rule in this circuit is that, *despite an appeal, final orders of a court still maintain full force and effect for res judicata and collateral estoppel purposes until reversed on appeal.* *Fid. Standard Life Ins. Co. v. First Nat’l Bank & Trust Co.*, 510 F.2d 272, 273 (5th Cir.1975)

“Though it is not often the case, a finding of res judicata is appropriate on a motion to dismiss when the res judicata bar is apparent from the face of the pleadings and judicially noticed facts.” *See Wade v. Household Fin. Corp. III*, No. 1:18-CV-570-RP, [2019 WL 433741](#), at *2 (W.D. Tex. Feb. 1, 2019). “Under res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action.” *Allen v. McCurry*, [449 U.S. 90, 94](#) (1980). The elements of res judicata are: “(1) the parties are identical or at least in privity; (2) the judgment in the prior action was rendered by a court of competent jurisdiction; (3) the prior action was concluded by a final judgment on the merits; and (4) the same claim or cause of action was involved in both suits.” *Comer v. Murphy Oil USA, Inc.*, [718 F.3d 460, 466](#) (5th Cir. 2013) (quoting *Test Masters Educ. Services, Inc. v. Singh*, [428 F.3d 559, 571](#) (5th Cir. 2005)). Dismissal under Rule 12(b)(6) is proper if the elements of res judicata are apparent based on the facts pleaded and judicially noticed. *See Hall v. Hodgkins*, [305 F. Appx. 224, 227–28](#) (5th Cir. 2008); *Mitchell v. Ocwen Loan Servicing, LLC*, No. 4:18-cv-00820-P, [2019 WL 5647599](#), at *3 (N.D. Tex. 2019). The fourth element of res judicata can be met where a claim or cause of action relates to the same “transaction, or series of transactions, out of which the [original] action arose.” *Ries v. Paige (In re Paige)*, [610 F.3d 865, 872](#) (5th Cir. 2010). “When applying this test, the primary question is whether the lawsuits were based on ‘the same nucleus of operative fact,’ regardless of the relief requested, or the claims brought. *Wade*, [2019 WL 433741](#), at *3.

Highland argues that, when taking judicial notice of the docket created in connection with the HarbourVest Settlement, it is apparent that the four elements of res judicata are met: (1) CLO

(“[a] case pending appeal is res judicata and entitled to full faith and credit unless and until reversed on appeal”); *S. Pac. Commc'ns Co. v. Am. Tel. & Tel. Co.*, [740 F.2d 1011, 1018](#) (D.C. Cir. 1984) (“[w]e note that the federal rule and the rule in this circuit is that collateral estoppel may be applied to a trial court finding even while the judgment is pending on appeal”); *see Huron Holding Corp. v. Lincoln Mine Operating Co.*, 312 U.S. 183, 189 (1941) (“To the same effect, in the federal courts the general rule has long been recognized that while an appeal with proper supersedeas stays execution of the judgment, it does not—until and unless reversed—detract from its decisiveness and finality”).

Holdco objected to the HarbourVest Settlement, and the DAF is in privity with CLO Holdco as its 100% parent; (2) the Bankruptcy Court was a court of competent jurisdiction over the HarbourVest Settlement; (3) the Bankruptcy Court entered a final order based upon the merits of the HarbourVest Settlement; and (4) the claims or causes of action arise out of the same “common nucleus of operative facts” as those raised at the HarbourVest Settlement hearing.

To be clear, Highland argues the fourth element of res judicata is met because the claims brought by the Plaintiffs in the Complaint are substantially similar to, and arise from the very same facts, as those allegations that the Plaintiffs put forth during the Bankruptcy Court hearing on the HarbourVest Settlement. In connection with the HarbourVest Settlement, Plaintiff CLO Holdco argued to the Bankruptcy Court that the Debtor: (i) violated the HCLOF Members Agreement by failing to offer such interests to Plaintiffs pursuant to a “Right of First Refusal” provision; and (ii) diverted the investment opportunity to the Debtor without offering it to Plaintiffs. And the other objectors (*i.e.*, the Dondero Family Trusts) argued to the Bankruptcy Court that the Debtor did not accurately value the HCLOF 49.98% interest that was being transferred by HarbourVest back to the Debtor. The Bankruptcy Court overruled all of these arguments.

This court agrees that the claims being brought in the Adversary Proceeding arise from the same “transaction or series of transactions” and are based on the “same nucleus of operative facts” as were litigated and adjudicated in the Bankruptcy Court in connection with the HarbourVest Settlement. The allegations take the form of causes of action for breach of fiduciary duties, breach of contract, RICO violations, and tort claims, but ***all include the very same underlying factual allegations as articulated in connection with the HarbourVest Settlement.***

However, while this court agrees with Highland that CLO Holdco’s claims arise from “the same common nucleus of operative fact” as the HarbourVest Settlement, this is not the end of the

court's analysis. "Even if the two actions are the same under the transactional test, res judicata does not bar this action unless" the Plaintiffs "could and should have" brought the claims in the Complaint in the prior proceeding. *Osherow v. Ernst & Young (In re Intelogic, Inc.)*, 200 F.3d 382, 388 (5th Cir. 2000). The Fifth Circuit has recognized procedural differences between contested matters under Bankruptcy Rule 9014, such as the HarbourVest Settlement hearing, and adversary proceedings. The Fifth Circuit noted that "[c]ounterclaims are only compulsory in 'adversary proceedings,'" as Bankruptcy Rule 7013 (which adopts Federal Rule of Civil Procedure 13) does not automatically apply to "contested matters" under Bankruptcy Rule 9014. *D-1 Enterprises, Inc. v. Commercial State Bank*, 864 F.2d 36, 39 (5th Cir. 1989). The Fifth Circuit proceeded to suggest, under the "quick motion-and hearing style" of contested matters, a party is not required, or even allowed, to bring all of its claims. *Howe v. Vaughn (Matter of Howe)*, 913 F.2d 1138, 1146 (5th Cir. 1990). The Fifth Circuit clarified that, whether the earlier proceeding that is being suggested as holding res judicata effect is a contested matter or an adversary is not dispositive; rather, it is a factor in determining whether the claim at issue could or should have been effectively litigated in the earlier proceeding. *See id.* at 1146 n.28; *see also Osherow*, 200 F.3d at 388 (the court weighed "whether the bankruptcy court possessed procedural mechanisms that would have allowed" the party to assert claims in the prior contested matter).

It is important to note that the Fifth Circuit has found, on numerous occasions in which the prior proceeding was a contested matter, versus an adversary proceeding, that res judicata still applied. *See, e.g., Osherow*, 200 F.3d at 388-91 (finding res judicata applied to malpractice claims that could have been asserted at a fee hearing); *In re Baudoin*, 981 F.2d 736, 744 (5th Cir. 1993) (ruling that res judicata barred lender liability claims based on loans that had been deemed allowed claims without objection in a previous bankruptcy); *Eubanks v. FDIC*, 977 F.2d 166, 174 (5th Cir.

1992) (barring a lender liability action which could have and should have been brought as an objection to the lender's claim in a prior bankruptcy proceeding); *Southmark Properties v. Charles House Corp.*, 742 F.2d 862, 869 (5th Cir. 1984) (applying res judicata to bar a claim that could have been raised as an objection to a claim asserted in a previous bankruptcy reorganization). These opinions came in the context of a cause of action not being asserted to contest a proof of claim in a bankruptcy case. The Fifth Circuit found that objections to claims in the bankruptcy process, generally contested matters, provide procedural mechanisms to bring a claim for affirmative relief under Bankruptcy Rule 3007, which allows the claim objection to be converted to an adversary proceeding.¹⁷ *Osherow*, 200 F.3d at 389-90.

But here, the Bankruptcy Court concludes that the Plaintiffs were not provided with procedural mechanisms needed in order to bring their causes of action in the Complaint during the HarbourVest Settlement contested matter. Despite the “transactional test” being met through a finding that the claims stem from “the same nucleus of operative facts,” the procedures of Bankruptcy Rule 9014 do not allow for claims of affirmative relief—whether it be RICO violations, breach of contract, breach of fiduciary duties, or tort claims—to be asserted in response to a Bankruptcy Rule 9019 motion to compromise a controversy. The Fifth Circuit has not addressed procedural mechanisms supporting res judicata in the context of a Bankruptcy Rule 9019 motion to compromise a controversy, where the bankruptcy court is limited to determining whether or not to “approve a compromise or settlement.” See *Fed. R. Bankr. P. 9019(a)*. Unlike in the context of claim objections, mentioned above, where counterclaims can allow the claim objection to be converted through Bankruptcy Rule 3007 to an adversary proceeding, such causes

¹⁷ The court in *Osherow* went on to find that Bankruptcy Rule 9014 gives discretion to the bankruptcy court to allow other rules in Part VII of the Bankruptcy Rules to apply to contested matters. In that case, it suggested the bankruptcy court could have stayed the proceedings and allowed discovery to be commenced under the Part VII Rules to develop the affirmative causes of action to raise in the claim objection.

of action have no mechanism to exist in the context of a Bankruptcy Rule 9019 motion. The bankruptcy court is limited to granting or denying a proposed settlement as relief in ruling on a Bankruptcy Rule 9019 motion—regardless of its findings on issues that may also serve for the foundation of the causes of action asserted in the subsequent hearing (*but see* “**Collateral Estoppel**” discussion below). Procedurally, this would not allow the subsequent causes of action to ever be raised, if res judicata were to apply to a contested matter under Bankruptcy Rule 9019, which does not allow for the assertion of counterclaims or other forms of affirmative relief.

Thus, the court finds that the Plaintiffs were not given the procedural mechanisms to bring the causes of action asserted in the Complaint during the pendency of the HarbourVest Settlement contested matter. The court finds that res judicata does not apply as a doctrine to preclude the claims asserted by the Plaintiffs in the Complaint.

D. Collateral Estoppel

On the contrary, collateral estoppel *does* have applicability here. Arguments potentially relevant to the collateral estoppel doctrine were made by the parties in their pleadings and at the hearing on the Motion to Dismiss (phrased in terms of res judicata), but collateral estoppel *per se* was not addressed independently.¹⁸ The Bankruptcy Court now addresses collateral estoppel *sua sponte*. Raising preclusion doctrines *sua sponte* is in the interest of judicial economy and is appropriate, especially where both actions are before the same court. *See Carbonell v. La. Dep't of Health & Human Res.*, 772 F.2d 185, 189 (5th Cir. 1985).

To be clear, “res judicata encompasses two separate, but linked, preclusive doctrines: (1) true res judicata or claim preclusion and (2) collateral estoppel or issue preclusion.” *Hous. Profl Towing Ass'n v. City of Hous.*, 812 F.3d 443, 447 (5th Cir. 2016) (quoting *Comer v. Murphy Oil*

¹⁸ As mentioned at footnote 15, Highland did make a passing reference to the collateral estoppel doctrine in its Brief in Support of its Motion to Dismiss.

USA, Inc., 718 F.3d 460, 466–67 (5th Cir. 2013)). Thus, while res judicata precludes relitigating claims or causes of action that were or could have been previously litigated in a prior action, collateral estoppel is referred to as “issue preclusion” and prevents relitigating the same **issues or facts** decided in a prior proceeding. Collateral estoppel precludes only the relitigation of issues or facts **actually litigated** in the original action, whether or not the second suit is based on the same cause of action. *Moch v. East Baton Rouge Parish School Board*, 548 F.2d 594, 596 (5th Cir. 1977). “[A] **right, question, or fact distinctly put in issue and directly determined** as a ground of recovery by a court of competent jurisdiction collaterally estops a party ... from relitigating the issue in a subsequent action,” if the party had reasonable notice and an opportunity to be heard against the claim. *Hardy v. Johns–Manville Sales Corp.*, 681 F.2d 334, 338 (5th Cir. 1982) (emphasis added). “Collateral estoppel applies when, in the initial litigation, (1) the issue at stake in the pending litigation is the same, (2) the issue was actually litigated, and (3) the determination of the issue in the initial litigation was a necessary part of the judgment.” *Harvey Specialty & Supply, Inc. v. Anson Flowline Equip. Inc.*, 434 F.3d 320, 323 (5th Cir. 2005). Each condition must be met in order for collateral estoppel to apply. “Collateral estoppel will apply in a second proceeding that involves separate claims if the claims involve the same issue . . . and the subject matter of the suits may be different as long as the requirements for collateral estoppel are met.” *In re Devoll*, No. 15-50122-CAG, 2015 WL 9460110, at *3 (Bankr. W.D. Tex. Dec. 23, 2015) (citation omitted).

So were each of these three collateral estoppel factors met? Were the **same** facts or issues **actually litigated** and was a determination of these facts and issues a **necessary part** of approving the HarbourVest Settlement? The Plaintiffs argued, in their response to the Motion to Dismiss, that the Bankruptcy Court did not resolve anything on the merits other than the approval of a

settlement, and that was done solely using its discretion to approve a settlement. The court thinks that this is a mischaracterization of the court's role in approving the HarbourVest Settlement.

In considering a proposed compromise and settlement agreement, a bankruptcy court must determine whether it is "fair and equitable." *Matter of Jackson Brewing*, 624 F.2d 599, 602 (5th Cir. 1980); *United States v. AWECO, Inc. (In re AWECO)*, 725 F.2d 293, 298 (5th Cir. 1984), cert. denied 105 S. Ct. 244 (1984). A bankruptcy court applies a three-part test set out in *Jackson Brewing* with a focus on comparing "the terms of the compromise with the likely rewards of litigation." A bankruptcy court must evaluate: (1) the probability of success in litigating the claim subject to settlement, with due consideration for the uncertainty in fact and law; (2) the complexity and likely duration of litigation and any attendant expense, inconvenience, and delay; and (3) all other factors bearing on the wisdom of the compromise. These "other" factors—sometimes called the *Foster Mortgage* factors¹⁹—include: (i) "the best interests of the creditors, 'with proper deference to their reasonable views'"; and (ii) "'the extent to which the settlement is truly the product of arms-length bargaining, and not of fraud or collusion.'" *Official Comm. of Unsecured Creditors v. Moeller (In re Age Ref., Inc.)*, 801 F.3d 530, 540 (5th Cir. 2015) (citations omitted).

In connection with evaluating the HarbourVest Settlement and whether it was "fair and equitable" and in the "best interests of creditors," and whether it was the "product of arms-length bargaining, and not of fraud or collusion," the Bankruptcy Court held a multi-hour hearing that included lengthy direct and cross-examination of multiple witnesses and documentary evidence. The Bankruptcy Court was required to "appraise [itself] of the relevant facts and law so that [it could] make an informed and intelligent decision." See *In re Cajun Elec. Power Coop.*, 119 F.3d 349, 356 (5th Cir. 1997). The hearing included considering the arguments and evidence regarding

¹⁹ *Connecticut Gen. Life Ins. v. United Cos. Fin. Corp. (In re Foster Mortgage Co.)*, 68 F.3d 914 (5th Cir. 1995).

the methodology for the valuation of the HCLOF interest and the existence or non-existence of a “Right of First Refusal.” The court heard credible testimony on, among other things, the value of the HCLOF interests from Mr. Seery and Mr. Pugatch. Both witnesses were subject to cross examination. The court heard how the value of the HCLOF interests plummeted nearly \$50 million, which was caused, at least in part, by the litigation strategies taken by Highland while it was still under the control of Mr. Dondero.²⁰ The Plaintiffs allege in the Complaint that Mr. Seery’s \$22.5 million value of the HCLOF interest was baseless. The Plaintiffs believed the interests had a net asset value (“NAV”) of at least \$34.5 million on November 30, 2020, and a value of \$41.75 million on December 31, 2020, leading up to the HarbourVest Settlement hearing. Further, the Plaintiffs allege in the Complaint that Mr. Seery was receiving insider information from Mr. Dondero in December 2020 regarding the HCLOF interests and used improper valuation methods. But, for whatever reason, the Plaintiffs decided not to ask questions of Mr. Seery at the hearing or further challenge Mr. Seery’s source or method of valuation for the HCLOF interests at the hearing.²¹ The allegations in the Complaint surrounding Mr. Seery’s method for valuation of the HCLOF interests were discoverable at the time of the HarbourVest Settlement hearing and directly relevant to the Bankruptcy Court’s analysis in approving the HarbourVest Settlement. The Bankruptcy Court found the testimony elicited from Mr. Seery by Highland and the objectors to be credible in ultimately finding a \$22.5 million value of the HCLOF interests was reasonable.

²⁰ Transcript of Hearing Held 1/14/2021, DE # 1765, at 96:20-97:24.

²¹ Mr. Dondero and CLO Holdco appeared at and examined the HarbourVest witness, Mr. Pugatch, at a deposition before the hearing on the HarbourVest Settlement. Declaration of John Morris, Exhs. 7 & 8 thereto [DE # 2237]. Moreover, it is rather astounding to this court for anyone to suggest that any human being (Mr. Seery or anyone else) knew more, or withheld, any information that wasn’t well known to Mr. Dondero and all principals/agents of DAF and CLO Holdco. Mr. Dondero and any personnel associated with DAF and CLO Holdco should have been as (or more) familiar with HCLOF’s assets and their potential value than any human beings on the planet—having managed these assets for years.

While a bankruptcy court does not delve into the merits of every possible claim that is waived or compromised through a settlement, here, (a) *consideration of the value that the estate was both receiving and paying*, as well as (b) the potential existence of a “Right of First Refusal” that might have prohibited the Transfer contemplated in the HarbourVest Settlement, were very much a focus of the hearing on the HarbourVest Settlement. These are the very same issues that are the gravamen of the Plaintiffs’ Complaint. They were very much “actually litigated.” The Bankruptcy Court would never have approved the HarbourVest Settlement if it thought the value being exchanged was not fair, or if it thought the HCLOF Interests could not be transferred and that someone might later sue the Debtor, claiming the Transfer was improper. All parties had the chance to argue and present evidence about this. The Bankruptcy Court made a ruling based on the evidence and argument.

Further, the Bankruptcy Court included in the HarbourVest Settlement Order language to specifically avoid any future assertions or litigation as to whether a “Right of First Refusal” prevented the transfer of HCLOF interests to Highland or a Highland designee/subsidiary:

Pursuant to the express terms of the *Members Agreement Relating to the Company*, dated November 15, 2017, ***HarbourVest is authorized to transfer its interests in HCLOF to a wholly-owned and controlled subsidiary of the Debtor*** pursuant to the terms of the *Transfer Agreement for Ordinary Shares of Highland CLO Funding, Ltd. without the need to obtain the consent of any party or to offer such interests first to any other investor in HCLOF*. (Emphasis added.)

The court included this express language to document its finding that no “Right of First Refusal” was enforceable under the HCLOF Members Agreement based on the court’s analysis of the underlying agreements, as well as representations made by CLO Holdco that it was withdrawing its objection (that was wholly based on the alleged “Right of First Refusal”). A possible “Right of First Refusal” was fully briefed by the Debtor and CLO Holdco (with whom the DAF is in privity,

as its 100% parent), and the merits of such was fully considered by this court in approving the HarbourVest Settlement.

Despite this court's conclusion that res judicata does not apply here because procedural mechanisms did not allow an assertion of causes of action in the context of a Bankruptcy Rule 9019 settlement, ***no barrier prevented the Plaintiffs from fully litigating the issues, rights, and facts at the HarbourVest Settlement hearing that form the gravamen of the Complaint.*** While the causes of action in the Complaint could not be brought in connection with the HarbourVest Settlement contested matter, the issues and facts underlying the causes of action in the Complaint were fully litigated and ruled on in connection with the HarbourVest Settlement. Those issues were raised in objections and subject to witness testimony at the HarbourVest Settlement hearing and were the primary considerations that had to be evaluated for the Bankruptcy Court to approve of the HarbourVest Settlement. The Complaint fails to allege any facts independent of: (a) an improper valuation by Mr. Seery or (b) a failure by Highland to honor a "Right of First Refusal" in favor of CLO Holdco to support relief under its causes of action. Count 1 in the Complaint alleges that Highland breached a fiduciary duty to the Plaintiffs through diverting a corporate opportunity by not ***first offering*** the HCLOF interests to the Plaintiffs. While labeled as a claim for a "breach of fiduciary" duty, as opposed to a "breach of contract," the arguments are the same. Both counts argue that the HCLOF interests should have been offered to the Plaintiffs who held a superior right to purchase the interests. Again, this argument was presented in CLO Holdco's objection to the HarbourVest Settlement, which was withdrawn by CLO Holdco during the hearing. The Plaintiffs do not get a second bite of the apple at litigating a purported superior right, by dressing it up as different cause of action, when the issue at stake has already been litigated. Thus, both the HarbourVest Settlement and Complaint involve the same issues.

In summary, the first and second elements of collateral estoppel are met. The issues of valuation and a “Right of First Refusal” were one and the same as those articulated in the Complaint and were “actually litigated” in connection with the HarbourVest Settlement.

Going through the third prong of collateral estoppel, it is also met. The facts regarding valuation of the HCLOF interests and whether Highland was required to offer the HarbourVest’s HCLOF interests to CLO Holdco were very much *necessary* or *essential* to the Bankruptcy Court’s ruling approving the HarbourVest Settlement. The Bankruptcy Court was required to consider the value of the HCLOF interests to determine whether the consideration the estate was receiving in the compromise was fair and equitable. Further, the court noted at the settlement hearing that the “Right of First Refusal” was one of the “major arguments” in connection with the HarbourVest Settlement and the court included language in the HarbourVest Settlement Order specifically finding no such right existed. The court would not have approved the HarbourVest Settlement if it thought that it could not be accomplished or would result in Highland later being sued. This would not have been in the best interests of the estate. Thus, the HCLOF interest valuation and the ability or propriety of Highland transferring the HCLOF interest were “a necessary part of the judgment.”

Further, the Plaintiffs do not dispute CLO Holdco is in privity with DAF, as DAF is the parent and controlling entity of CLO Holdco. Instead, CLO Holdco argues that it somehow was not a party to the ongoing dispute between Highland and HarbourVest that led to the HarbourVest Settlement (although it was allowed to file objections and take discovery).

Bankruptcy is a collective proceeding that allows creditors to object and raise any argument they think the court should consider that bear on the wisdom of the compromise. Generally, for a party to be bound by orders issued by the bankruptcy court, the party must receive adequate notice of the proceedings for due process reasons. *In re Reagor-Dykes Motors, LP*, 613 B.R. 878, 885

(Bankr. N.D. Tex. 2020); *In re Grumman Olson Indus., Inc.*, 467 B.R. 694, 706 (S.D.N.Y. 2012); *see also Richards v. Jefferson Cty., Ala.*, 517 U.S. 793, 799, 116 S.Ct. 1761, 135 L.Ed.2d 76 (1996) (“Additionally, where a special remedial scheme exists expressly foreclosing successive litigation by nonlitigants, as for example in bankruptcy or probate, legal proceedings may terminate pre-existing rights if the scheme is otherwise consistent with due process.”). The Bankruptcy Rules and bankruptcy jurisprudence provide for due process protection for settlements under Rule 9019(a) by requiring that a debtor in possession give creditors and parties in interest “adequate notice and opportunity to be heard before their interests may be adversely affected.” *In re Reagor-Dykes Motors*, 613 B.R. at 885 (citing *W. Auto Supply Co. v. Savage Arms, Inc. (In re Savage Indus., Inc.)*, 43 F.3d 714, 720 (1st Cir. 1994)). Rule 9019(a) further protects interested parties “[b]y requiring court approval following a hearing before any compromise or settlement may be enforced” to ensure a transparent settlement process and provide “other creditors an opportunity to voice their concerns.” *In re Reagor-Dykes Motors, LP*, 613 B.R. at 886 (citing *In re Big Apple Volkswagen, LLC*, 571 B.R. 43, 57 (S.D.N.Y. 2017)). The Plaintiffs were properly noticed, as well as appeared and participated, in the Rule 9019 process.

Thus, the court concludes all three elements of collateral estoppel are met with regard to the fact issues of value of the HCLOF interests and any “Right of First Refusal” (and the ability/propriety of transferring the HCLOF interests). ***All of the causes of action in the Complaint (Counts 1-5) revolve around these two issues that were previously fully litigated.*** Thus, all causes of action asserted in the Complaint are precluded by the doctrine of collateral estoppel.

E. Judicial Estoppel

The final preclusion doctrine, asserted by Highland, is judicial estoppel. Judicial estoppel is “a common law doctrine by which a party who has assumed one position in [their] pleadings may be estopped from assuming an inconsistent position.” *Brandon v. Interfirst Corp.*, 858 F.2d 266, 268 (5th Cir. 1988). The doctrine is made “to protect the integrity of the judicial process” by “prevent[ing] parties from playing fast and loose with the courts to suit the exigencies of self interest.” *Id.* “[A] party cannot advance one argument and then, for convenience or gamesmanship after that argument has served its purpose, advance a different and inconsistent argument.” *Hotard v. State Farm Fire & Cas. Co.*, 286 F.3d 814, 818 (5th Cir. 2002). “Statements made in a previous suit by an attorney before the court can be imputed to a party and subject to judicial estoppel.” *Hall v. GE Plastic Pacific PTE Ltd.*, 327 F.3d 391, 396 (5th Cir. 2003). In order for a party to be estopped, two elements must be satisfied: (1) it must be shown “the position of the party to be estopped is clearly inconsistent with its previous one; and (2) that party must have convinced the court to accept that previous position. *In re Coastal Plains Inc.*, 179 F.3d 197, 206 (5th Cir. 1999).

The Plaintiffs argue, first, that withdrawing an objection and then raising the same argument later is not taking an “inconsistent position.” Second, the Plaintiffs argue that, since the HarbourVest Settlement was approved and the objection was *unsuccessful*, CLO Holdco could not “have convinced the court to accept that previous position.”

Highland argues that CLO Holdco’s withdrawal of its objection at the HarbourVest hearing, that was premised on a “Right of First Refusal” under the HCLOF Members Agreement, is, in fact, directly at odds with the Complaint, which asserts claims for violations of the same “Right of First Refusal.” Further, Highland argues that the Bankruptcy Court, in ruling on the HarbourVest Settlement, relied on the withdrawal of that objection—noting that the withdrawal “eliminate[d] one of the major arguments” being heard in connection with the HarbourVest

Settlement. Highland cites Fifth Circuit authority noting that the “judicial acceptance” requirement does not mean that the party against whom the judicial estoppel doctrine is to be invoked must have prevailed on the merits.” *Hall*, 327 F.3d at 398.

Here, the court believes that the first prong of judicial estoppel is met. At the HarbourVest Settlement hearing, CLO Holdco withdrew its objection, stating that it had determined it had no “Right of First Refusal,” based on its “interpretation of the member agreement.” Now Plaintiffs claim in their Complaint that CLO Holdco’s “Right of First Refusal” was violated by the HarbourVest Settlement. These positions are clearly inconsistent. If that weren’t enough, when asked by Debtor’s counsel at the HarbourVest Settlement hearing to enter a stipulation reflecting the HarbourVest Settlement was compliant with all applicable agreements between CLO Holdco and the Debtor, counsel for CLO Holdco stated: “I’m not going to enter into a stipulation on behalf of my client, but *the Debtor is compliant with all aspects of the contract*. We withdrew our objection, and we believe that’s sufficient.”²² This statement cannot conceivably coexist with the current assertion of a “Right of First Refusal.” Moreover, to the extent Plaintiffs argue that CLO Holdco merely withdrew an objection pertaining to an alleged “Right of First Refusal” *in the HCLOF Members Agreement* (and not an objection arguing that Highland had some non-contractual obligation to offer the HarbourVest Interest to CLO Holdco first, based on “fiduciary duty” concepts), this is “no more than ineffectual hair splitting.” *See Systems. Ahrens v. Perot Sys. Corp.*, 39 F.Supp.2d 773, 778 (N.D.Tex.1999) (in response to plaintiffs arguing a position taken in one suit could coexist with a position taken in a subsequent suit, despite each position being non-qualified, unconditional statements). It would seem to be the classic example of playing fast and loose with the court.

²² Transcript of Hearing Held 1/14/2021, DE # 1765, at 17:24-18:16 (emphasis added).

The court also believes that the second prong of judicial estoppel is met. The Fifth Circuit has held that judicial estoppel may be applied whenever a party makes an argument “with the explicit intent to induce the district court’s reliance.” *Hidden Oaks Ltd. v. City of Austin*, 138 F.3d 1036, 1047 (5th Cir. 1998). Further, the success requirement is satisfied when a court “necessarily accepted, and relied on” a party’s position in making a determination. *Ahrens v. Perot Systems Corporation*, 205 F.3d 831, 836 (5th Cir. 2000). Here, while the Plaintiffs did not succeed in stopping the approval of the HarbourVest Settlement, that is not the proper inquiry. Instead, what matters is that the Bankruptcy Court carefully considered CLO Holdco’s “Right of First Refusal” argument set out in its lengthy, written objection to the HarbourVest Settlement and perceived it as one of the major arguments that was relevant to the HarbourVest Settlement. At the HarbourVest Settlement hearing, the Plaintiffs stated: “CLO Holdco has had an opportunity to review the reply briefing, and after doing so has gone back and scrubbed the HCLOF corporate documents. Based on our analysis of Guernsey law and some of the arguments of counsel in those pleadings and our review of the appropriate documents, I obtained authority from my client, Grant Scott, as Trustee for CLO Holdco, to withdraw the CLO Holdco objection based on the interpretation of the member agreement.”²³ The Bankruptcy Court relied upon that withdrawal of CLO Holdco’s objection in making the determination to approve of the HarbourVest Settlement and, specifically, that Highland would not be running afoul of any obligation in entering into the HarbourVest Settlement. There is no question that, by withdrawing the objection, CLO Holdco caused the court to rely upon its withdrawal in making such determination. Thus, the Plaintiffs “convinced the court to accept that previous position.”

²³ *Id.* at 7:24-8:6.

The Bankruptcy Court concludes both elements of judicial estoppel are met. Counts 2 and 5 of the Complaint are based solely upon a “Right of First Refusal” under the HCLOF Members Agreement. Thus, judicial estoppel bars Counts 2 and 5 of the Complaint.

IV. Conclusion

Based upon the facts alleged in the Complaint, the judicially noticed docket entries from the HarbourVest Settlement, and the arguments presented to the court, the court rules that, together, collateral estoppel and judicial estoppel preclude all claims brought in the Complaint. Therefore, the Motion to Dismiss is *granted* and the Complaint is dismissed in its entirety with prejudice.

Because this court believes the doctrines of collateral estoppel and judicial estoppel bar the claims of the Plaintiffs as a matter of law, the court—for the sake of efficiency and judicial economy—will forego addressing the other arguments of Highland. Specifically, Highland has argued that, even if all of the Plaintiffs’ claims are not barred as a matter of law by preclusion or estoppel theories, Plaintiffs have failed to state plausible claims upon which relief can be granted with regard to the all of counts in the Complaint based on the RICO statute, Breach of Fiduciary Duty, Breach of Contract, Negligence, and Tortious Interference with Contract. While this court is inclined to agree with these arguments, the court will refrain from addressing them until such time as any higher court may instruct this court to address them.

Accordingly, it is

ORDERED that the Motion to Dismiss is **GRANTED** as to all causes of action (Counts 1-5) asserted in the Complaint with prejudice.

###END OF MEMORANDUM OPINION AND ORDER###



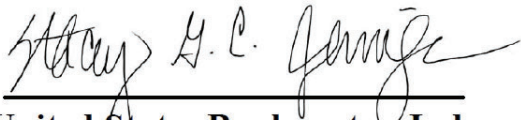
CLERK, U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS

ENTERED

THE DATE OF ENTRY IS ON
THE COURT'S DOCKET

The following constitutes the ruling of the court and has the force and effect therein described.

Signed March 11, 2022


United States Bankruptcy Judge

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

IN RE:	§	
	§	
HIGHLAND CAPITAL MANAGEMENT	§	CASE NO. 19-34054-SGJ-11
L.P.,	§	(CHAPTER 11)
REORGANIZED DEBTOR.	§	
	§	
CHARITABLE DAF FUND, L.P., AND CLO	§	
HOLDSCO LTD.,	§	
	§	
PLAINTIFFS,	§	
	§	
VS.	§	ADVERSARY NO. 21-03067
	§	
HIGHLAND CAPITAL MANAGEMENT,	§	
L.P., HIGHLAND HCF ADVISOR, LTD.,	§	
AND HIGHLAND CLO FUNDING, LTD.,	§	
	§	
DEFENDANTS.	§	

**MEMORANDUM OPINION AND ORDER GRANTING MOTION TO DISMISS THE
ADVERSARY PROCEEDING**

003611

I. INTRODUCTION

The above-referenced adversary proceeding (the “Adversary Proceeding”) is related to the bankruptcy case of Highland Capital Management, L.P. (the “Bankruptcy Case”).¹ Highland Capital Management, L.P. (“Highland,” the “Debtor,” or sometimes the “Reorganized Debtor”) filed a voluntary Chapter 11 petition on October 16, 2019, in the United States Bankruptcy Court for the District of Delaware. That court subsequently transferred venue of the Bankruptcy Case to the Northern District of Texas, Dallas Division (the “Bankruptcy Court”), on December 4, 2019.

Before the court is Highland’s motion to dismiss (the “Motion to Dismiss”) the Adversary Proceeding. Highland obtained confirmation of a reorganization plan on February 22, 2021, and the plan went effective on August 11, 2021. The Adversary Proceeding was filed in April 2021 (*i.e.*, after confirmation but before the effective date of Highland’s Chapter 11 plan). There were originally three Defendants named in the Adversary Proceeding: (i) Highland, and (ii) two non-Debtor affiliates which Highland controls that are called Highland HCF Advisor, Ltd. (“HHCFA”) and Highland CLO Funding Ltd. (“HCLOF”). Defendant HCLOF was later dismissed by agreement with the Plaintiffs.² Highland’s CEO, James P. Seery (“Mr. Seery”), was named in the Complaint initiating the Adversary Proceeding (the “Complaint”) as a “potential” Defendant but has not been added. The Plaintiffs are two entities that are allegedly controlled and/or directed by James Dondero, Highland’s founder and former CEO (“Mr. Dondero”): (i) Charitable DAF Fund, L.P. (the “DAF”), which is a Cayman Island-based hedge fund designated as a “donor-advised fund,” originally seeded with funds from Highland, and (ii) CLO Holdco, Ltd. (“CLO Holdco”),

¹ Bankruptcy Case No. 19-34054.

² At the hearing held on the Motion to Dismiss, the parties announced an agreement that HCLOF would be dismissed from the Adversary Proceeding with prejudice. HCLOF was apparently only named nominally in the Adversary Proceeding and no actual relief was sought against it. An order dismissing HCLOF was entered on December 7, 2021. Highland and HHCFA were unaffected by the dismissal order.

which is also a Cayman Island-based entity, wholly owned and controlled by the DAF. Until at least mid-January 2021, Grant Scott, Mr. Dondero’s life-long friend and college roommate, was the sole director of the DAF and also of CLO Holdco (neither of which otherwise had any officers or employees).

The Complaint, which was originally filed in the United States District Court for the Northern District of Texas, Dallas Division (“District Court”), but was referred to the Bankruptcy Court (as further described herein), asserts claims against Highland and HHCFA under the Racketeer Influenced and Corrupt Organizations statute (15 U.S.C. § 1961, et seq. (“RICO”)), Breach of Fiduciary Duty, Breach of Contract, Negligence, and Tortious Interference with Contract—all relating to the Debtor’s pursuit and effectuation *during the Bankruptcy Case* of a compromise and settlement agreement with a creditor known as HarbourVest, which *agreement was fully vetted and approved by the Bankruptcy Court* (after notice to creditors and parties in interest), pursuant to Federal Rule of Bankruptcy Procedure 9019. Accepting all facts pleaded as true and construing the Complaint in the light most favorable to the Plaintiffs, this court concludes that all of the claims in the Complaint are precluded by the doctrines of collateral estoppel and judicial estoppel. Thus, the Complaint, in its entirety, must be dismissed.

In order to understand the conclusion of this court, one must review matters that happened during the Bankruptcy Case. Although a court generally limits its inquiry on a motion to dismiss to the plaintiff’s complaint or any documents attached to the complaint, a court may also take judicial notice of matters that are part of the public record when considering a motion to dismiss. *See T.L. Dallas (Special Risks), Ltd. v. Elton Porter Marine Ins.*, No. 4:07–cv–0419, 2008 WL 7627807, at *2 (S.D. Tex. 2008); *Cade v. Henderson*, No. CIV A 01-943, 2001 WL 1012251, at *2 (E.D. La. Aug. 31, 2001). The relevant public record here includes: (a) the HarbourVest

Settlement Motion,³ and the exhibits admitted into evidence in support; (b) the Transfer Agreement;⁴ (c) Mr. Dondero's Objection to the HarbourVest Settlement;⁵ (d) the Objection to the HarbourVest Settlement of Dugaboy Investment Trust and Get Good Trust (*i.e.*, Mr. Dondero's family trusts),⁶ (e) CLO Holdco's Objection to the HarbourVest Settlement,⁷ (f) the Omnibus Replies;⁸ (g) the January 14, 2021 Hearing Transcript at which the Bankruptcy Court considered and approved the HarbourVest Settlement;⁹ and (h) the HarbourVest Settlement Order.¹⁰

II. BACKGROUND

The creditor HarbourVest was actually a collective of investors that, in 2017, invested approximately \$80 million into the entity known as HCLOF (*i.e.*, the previously dismissed nominal Defendant), thereby acquiring a 49.98% interest in it. HarbourVest filed six proofs of claim against the Debtor in the Bankruptcy Case, totaling \$300 million, alleging that the Debtor had committed fraud back in 2017, in connection with its encouraging HarbourVest to invest in and acquire that 49.98% interest in HCLOF. As alluded to earlier, the Debtor and HarbourVest eventually negotiated a settlement of HarbourVest's proofs of claim.

³ Debtor's Motion for an Entry of an Order Approving Settlement with HarbourVest (Claim Nos. 143, 147, 149, 150, 153, 154) and Authorizing Actions Consistent Therewith, DE # 1625 (the "Settlement Motion"). Note: all references herein to "DE # ____" shall refer to the docket entry number at which a pleading appears in the docket maintained in the Highland main bankruptcy case. All references to "DE # ____ in the AP" refer to the docket entry number at which a pleading appears in the docket maintained in the Adversary Proceeding.

⁴ Declaration of John A. Morris in Support of the Debtor's Motion for Entry of an Order Approving Settlement with HarbourVest (Claim Nos. 143, 147, 149, 150, 153, 154) and Authorizing Actions Consistent Therewith, DE # 1631, Exhibit 1.

⁵ James Dondero's Objection to Debtor's Motion for Entry of an Order Approving Settlement with HarbourVest, DE # 1697.

⁶ Objection to Debtor's Motion for an Entry of an Order Approving Settlement with HarbourVest (Claim Nos. 143, 147, 149, 150, 153, 154) and Authorizing Actions Consistent Therewith, DE # 1706.

⁷ CLO Holdco, Ltd.'s Objection to HarbourVest Settlement, DE # 1707.

⁸ Debtor's Omnibus Reply in Support of the Debtor's Motion for Entry of an Order Approving Settlement with HarbourVest (Claim Nos. 143, 147, 149, 150, 153, 154) and Authorizing Actions Consistent Therewith, DE # 1731; HarbourVest Reply in Support of Debtor's Motion for Entry of an Order Approving Settlement with HarbourVest and Authorizing Actions Consistent Therewith, DE # 1734.

⁹ Transcript of Hearing Held 1/14/2021, DE # 1765.

¹⁰ *Order Approving Debtor's Settlement with Harbourvest (Claims Nos. 143, 147, 149, 150, 153, 154) and Authorizing Actions Consistent Therewith*, DE # 1788 (the "HarbourVest Settlement Order").

In December 2020, the Debtor filed a motion in the Bankruptcy Court for an order approving its settlement with HarbourVest (the “HarbourVest Settlement”), pursuant to which, *inter alia*, HarbourVest would significantly reduce its \$300 million of alleged claims against the Debtor and transfer its 49.98% interest in HCLOF to an entity designated by the Debtor (the “Transfer”). At the time of the Transfer, the Debtor already owned a 0.6% interest in HCLOF, so the Transfer would give it a controlling interest ($49.98\% + 0.6\% = 50.58\%$) in HCLOF.

CLO Holdco objected to the proposed HarbourVest Settlement, presumably at the direction of its parent, the DAF. CLO Holdco owned (and still owns) 49.02% of HCLOF. CLO Holdco challenged the HarbourVest Settlement on the grounds that: (i) CLO Holdco had a “Right of First Refusal” to acquire HarbourVest’s interest in HCLOF pursuant to the HCLOF Members Agreement among the Debtor, HarbourVest, and CLO Holdco (“HCLOF Members Agreement”), and (ii) HarbourVest had no right to transfer its interest without complying with the purported “Right of First Refusal.” Two other objections were lodged against the proposed HarbourVest Settlement, one by Mr. Dondero and the other by Mr. Dondero’s two family trusts: The Dugaboy Investment Trust (“Dugaboy”) and The Get Good Trust (“Get Good” and, together with Dugaboy, the “Dondero Family Trusts”). Mr. Dondero objected on the grounds that (a) the HarbourVest Settlement was not reasonable or in the best interests of the estate because the Debtor was grossly over-compensating HarbourVest, and (b) it amounted to a blatant attempt to purchase HarbourVest’s votes in support of the Debtor’s plan. The Dondero Family Trusts raised separate concerns regarding: (a) whether HarbourVest had the right to effectuate the Transfer, and (b) the valuation methodology the Debtor used for the HCLOF interests. Each of the objecting parties had a right to take discovery concerning the HarbourVest Settlement, including the valuation of the HCLOF interests and the Transfer.

The court held an evidentiary hearing, on January 14, 2021, on the HarbourVest Settlement and heard argument in support of the parties' objections and defenses. Highland's current CEO, Mr. Seery, and a HarbourVest representative, Michael Pugatch ("Mr. Pugatch"), were each called to testify. During the hearing, surprisingly, ***CLO Holdco voluntarily withdrew its objection, which had been premised on its alleged "Right of First Refusal,"*** based on CLO Holdco's "interpretation of the [HCLOF] member agreement."¹¹ Subsequent to CLO Holdco withdrawing its objection at the hearing, the Bankruptcy Court asked counsel for the Dondero Family Trusts whether they planned to press the issue of the transferability of HarbourVest's interest in HCLOF. In response, counsel responded: "No, I am not. Basically, I think it's the fairness of the settlement. I think the transferability of the interest is separate and apart from the fairness of the settlement itself. I think the fairness -- the transferability was a contractual issue between two parties that the Court does not have to drill down on." Transcript of Hearing Held 1/14/2021, DE # 1765, at 22:5-20.

At the conclusion of the hearing, the Bankruptcy Court overruled the remaining objections (*i.e.*, of Mr. Dondero and the Dondero Family Trusts) and approved the HarbourVest Settlement as fair and equitable and in the best interests of the bankruptcy estate. The HarbourVest Settlement Order made clear that HarbourVest could transfer its interest in HCLOF "without the need to obtain the consent of any party or to offer such interests first to any other investor in HCLOF."¹²

In summary, pursuant to the HarbourVest Settlement that the Bankruptcy Court approved, HarbourVest, in pertinent part, would (a) transfer its interest in HCLOF to the Debtor or its nominee, (b) be allowed a general unsecured claim against the Debtor in the amount of \$45 million,

¹¹ Transcript of Hearing Held 1/14/2021, DE # 1765, at 7:20-8:6.

¹² HarbourVest Settlement Order, DE # 1788.

and (c) be allowed a subordinated, general unsecured claim against the Debtor in the amount of \$35 million. The HarbourVest Settlement was essentially a rescission of the investment HarbourVest had made in HCLOF and also provided HarbourVest allowed, reduced claims against Highland in settlement of its alleged \$300 million of damages.

The HarbourVest Settlement Order was appealed by the Dondero Family Trusts, with notice of the appeal being filed in the Bankruptcy Court on February 5, 2021. The Dondero Family Trusts argue on appeal that the Debtor overpaid for the HCLOF interests, and the HarbourVest Settlement was an attempt to gerrymander the Debtor's plan and purchase votes. No stay pending appeal has been approved and the HarbourVest Settlement was implemented. The appeal remains pending before Judge Sam Lindsay in the District Court.¹³

On April 12, 2021, the Plaintiffs, DAF and CLO Holdco, filed the Complaint initiating this Adversary Proceeding in the District Court. The action was assigned to Judge Jane Boyle. ***The subject matter of the Adversary Proceeding is entirely centered around the bona fides and permissibility of aspects of the HarbourVest Settlement.*** Despite the full vetting in the Bankruptcy Court of the HarbourVest Settlement and an order approving the HarbourVest Settlement—which, by the way, was not appealed by Plaintiffs DAF or CLO Holdco—various torts and other causes of action are now being alleged by DAF and CLO Holdco against the Debtor ***relating entirely to the HarbourVest Settlement.*** As earlier alluded to, the Complaint raises claims that Highland, while a debtor-in-possession, committed: (1) breach of fiduciary duties to the Plaintiffs; (2) breach of the HCLOF Members Agreement; (3) negligence; (4) RICO violations; and (5) tortious interference.

¹³ Case No. 3:21-cv-00261-L.

On September 20, 2021, Judge Boyle issued an Order of Reference¹⁴ referring this action to be adjudicated as an adversary proceeding related to the Bankruptcy Case, pursuant **28 U.S.C. § 157** and the Standing Order of Reference of Bankruptcy Cases and Proceedings (Misc. Rule No. 33), for the Northern District of Texas, dated August 3, 1984. Thus, the Complaint is now pending before the Bankruptcy Court.

In its claim for breach of fiduciary duty (**Count 1**), Plaintiffs allege that the Debtor violated its “broad” duties to Plaintiffs under the “Investment Advisers Act of 1940” and the Debtor’s “internal policies and procedures” by: (i) engaging in “insider trading with HarbourVest”; (ii) “concealing” the value of the HarbourVest interest; and (iii) “diverting” the investment opportunity in the HarbourVest entities to the Debtor without offering it to Plaintiffs.

In support of its claim for breach of the HCLOF Members Agreement (**Count 2**), Plaintiffs allege that the Debtor breached the “Right of First Refusal” provision therein, by diverting the investment opportunity away from CLO Holdco to the Debtor.

In its negligence claim (**Count 3**), Plaintiffs assert that the Debtor’s actions violated the HCLOF Members Agreement and the Debtor’s internal policies by failing to accurately calculate the HCLOF interests and failing to give Plaintiffs the Right of First Refusal to purchase the interests.

In their RICO Claim (**Count 4**), Plaintiffs allege that Defendant Highland and two affiliated entities were an “association-in-fact” engaged in a pattern of racketeering activity for this same underlying conduct; namely, failing to disclose the valuation of HCLOF’s interest and, ultimately, effectuating the HarbourVest Settlement.

¹⁴ District Court Order of Reference, DE # 64 in the AP.

Finally, Plaintiffs' tortious interference claim (**Count 5**) is premised on the Debtor's alleged interference with Plaintiff's "Right of First Refusal" under the Members Agreement.

Highland, in response to the Complaint, filed its Motion to Dismiss on May 27, 2021. In the Motion to Dismiss, Highland argues that, based on the previous HarbourVest Settlement contested proceeding, the Plaintiffs' claims are precluded or barred by the doctrines of res judicata, collateral estoppel,¹⁵ and judicial estoppel. Alternatively, Highland also alleges that each of the claims in the Complaint should be dismissed for failing to sufficiently state claims for relief under Rule 12(b)(6). The Motion to Dismiss seeks to have the Complaint dismissed in its entirety.

The Bankruptcy Court held a hearing on Highland's Motion to Dismiss the Adversary Proceeding now before the court. At the conclusion of the Motion to Dismiss hearing, the court took the matter under advisement.

III. Legal Analysis

A. Jurisdiction and Authority

Bankruptcy subject matter jurisdiction exists in this matter, pursuant to 28 U.S.C. § 1334(b). This Adversary Proceeding is, at a minimum, "related to" the Highland Bankruptcy Case. Moreover, it "arises in" a bankruptcy case (making it "core"), in that a claim is being asserted against a debtor (which was not yet a "reorganized debtor" at the time the action was filed) and involves actions of a debtor-in-possession in administering its case. It involves orders of this Bankruptcy Court and activities and litigation over which the Bankruptcy Court presided. This Bankruptcy Court has authority to exercise bankruptcy subject matter jurisdiction here, pursuant to 28 U.S.C. § 157(a) and (b)(2)(A), (B), and (O), and the Standing Order of Reference of

¹⁵ The court notes that Highland, in the Brief in Support of the Motion to Dismiss, lists collateral estoppel, in its summary of arguments, as grounds for dismissal of the Complaint. However, nowhere else is collateral estoppel mentioned within the Motion to Dismiss and Brief in Support. Rather, Highland focuses only on res judicata and judicial estoppel.

Bankruptcy Cases and Proceedings (Misc. Rule No. 33), for the Northern District of Texas, dated August 3, 1984. The case was referred to the Bankruptcy Court by the District Court and there are no pending motions to withdraw the reference.

B. Legal Standard

To survive a motion to dismiss pursuant to Rule 12(b)(6), a plaintiff must plead “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009). “The plausibility standard is not akin to a ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted unlawfully.” *Id.* “Where a complaint pleads facts that are ‘merely consistent with’ a defendant’s liability, it ‘stops short of the line between possibility and plausibility of entitlement to relief.’” *Id.* Dismissal is proper under Rule 12(b)(6) when, taking the facts alleged in the complaint as true, it appears that the plaintiff “cannot prove any set of facts that would entitle it to the relief it seeks.” *C.C. Port, Ltd. v. Davis-Penn Mortg. Co.*, 61 F.3d 288, 289 (5th Cir. 1995). The court may take judicial notice of matters of public record when considering a motion to dismiss for failure to state a claim. *See T.L. Dallas (Special Risks), Ltd.*, 2008 WL 7627807, at *2; *Cade*, 2001 WL 1012251, at *2.

C. Res Judicata

The first preclusion doctrine argued by Highland in its Motion to Dismiss is res judicata.¹⁶ Res judicata, otherwise known as “claim preclusion,” literally means “the thing has been decided.”

¹⁶ As mentioned earlier, there is a pending appeal of the HarbourVest Settlement Order. This fact is irrelevant for purposes of Highland’s preclusion arguments. The federal rule and the rule in this circuit is that, *despite an appeal, final orders of a court still maintain full force and effect for res judicata and collateral estoppel purposes until reversed on appeal.* *Fid. Standard Life Ins. Co. v. First Nat’l Bank & Trust Co.*, 510 F.2d 272, 273 (5th Cir.1975)

“Though it is not often the case, a finding of res judicata is appropriate on a motion to dismiss when the res judicata bar is apparent from the face of the pleadings and judicially noticed facts.” *See Wade v. Household Fin. Corp. III*, No. 1:18-CV-570-RP, [2019 WL 433741](#), at *2 (W.D. Tex. Feb. 1, 2019). “Under res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action.” *Allen v. McCurry*, [449 U.S. 90, 94](#) (1980). The elements of res judicata are: “(1) the parties are identical or at least in privity; (2) the judgment in the prior action was rendered by a court of competent jurisdiction; (3) the prior action was concluded by a final judgment on the merits; and (4) the same claim or cause of action was involved in both suits.” *Comer v. Murphy Oil USA, Inc.*, [718 F.3d 460, 466](#) (5th Cir. 2013) (quoting *Test Masters Educ. Services, Inc. v. Singh*, [428 F.3d 559, 571](#) (5th Cir. 2005)). Dismissal under Rule 12(b)(6) is proper if the elements of res judicata are apparent based on the facts pleaded and judicially noticed. *See Hall v. Hodgkins*, [305 F. Appx. 224, 227–28](#) (5th Cir. 2008); *Mitchell v. Ocwen Loan Servicing, LLC*, No. 4:18-cv-00820-P, [2019 WL 5647599](#), at *3 (N.D. Tex. 2019). The fourth element of res judicata can be met where a claim or cause of action relates to the same “transaction, or series of transactions, out of which the [original] action arose.” *Ries v. Paige (In re Paige)*, [610 F.3d 865, 872](#) (5th Cir. 2010). “When applying this test, the primary question is whether the lawsuits were based on ‘the same nucleus of operative fact,’ regardless of the relief requested, or the claims brought. *Wade*, [2019 WL 433741](#), at *3.

Highland argues that, when taking judicial notice of the docket created in connection with the HarbourVest Settlement, it is apparent that the four elements of res judicata are met: (1) CLO

(“[a] case pending appeal is res judicata and entitled to full faith and credit unless and until reversed on appeal”); *S. Pac. Commc'ns Co. v. Am. Tel. & Tel. Co.*, [740 F.2d 1011, 1018](#) (D.C. Cir. 1984) (“[w]e note that the federal rule and the rule in this circuit is that collateral estoppel may be applied to a trial court finding even while the judgment is pending on appeal”); *see Huron Holding Corp. v. Lincoln Mine Operating Co.*, 312 U.S. 183, 189 (1941) (“To the same effect, in the federal courts the general rule has long been recognized that while an appeal with proper supersedeas stays execution of the judgment, it does not—until and unless reversed—detract from its decisiveness and finality”).

Holdco objected to the HarbourVest Settlement, and the DAF is in privity with CLO Holdco as its 100% parent; (2) the Bankruptcy Court was a court of competent jurisdiction over the HarbourVest Settlement; (3) the Bankruptcy Court entered a final order based upon the merits of the HarbourVest Settlement; and (4) the claims or causes of action arise out of the same “common nucleus of operative facts” as those raised at the HarbourVest Settlement hearing.

To be clear, Highland argues the fourth element of res judicata is met because the claims brought by the Plaintiffs in the Complaint are substantially similar to, and arise from the very same facts, as those allegations that the Plaintiffs put forth during the Bankruptcy Court hearing on the HarbourVest Settlement. In connection with the HarbourVest Settlement, Plaintiff CLO Holdco argued to the Bankruptcy Court that the Debtor: (i) violated the HCLOF Members Agreement by failing to offer such interests to Plaintiffs pursuant to a “Right of First Refusal” provision; and (ii) diverted the investment opportunity to the Debtor without offering it to Plaintiffs. And the other objectors (*i.e.*, the Dondero Family Trusts) argued to the Bankruptcy Court that the Debtor did not accurately value the HCLOF 49.98% interest that was being transferred by HarbourVest back to the Debtor. The Bankruptcy Court overruled all of these arguments.

This court agrees that the claims being brought in the Adversary Proceeding arise from the same “transaction or series of transactions” and are based on the “same nucleus of operative facts” as were litigated and adjudicated in the Bankruptcy Court in connection with the HarbourVest Settlement. The allegations take the form of causes of action for breach of fiduciary duties, breach of contract, RICO violations, and tort claims, but ***all include the very same underlying factual allegations as articulated in connection with the HarbourVest Settlement.***

However, while this court agrees with Highland that CLO Holdco’s claims arise from “the same common nucleus of operative fact” as the HarbourVest Settlement, this is not the end of the

court's analysis. "Even if the two actions are the same under the transactional test, res judicata does not bar this action unless" the Plaintiffs "could and should have" brought the claims in the Complaint in the prior proceeding. *Osherow v. Ernst & Young (In re Intelogic, Inc.)*, 200 F.3d 382, 388 (5th Cir. 2000). The Fifth Circuit has recognized procedural differences between contested matters under Bankruptcy Rule 9014, such as the HarbourVest Settlement hearing, and adversary proceedings. The Fifth Circuit noted that "[c]ounterclaims are only compulsory in 'adversary proceedings,'" as Bankruptcy Rule 7013 (which adopts Federal Rule of Civil Procedure 13) does not automatically apply to "contested matters" under Bankruptcy Rule 9014. *D-1 Enterprises, Inc. v. Commercial State Bank*, 864 F.2d 36, 39 (5th Cir. 1989). The Fifth Circuit proceeded to suggest, under the "quick motion-and hearing style" of contested matters, a party is not required, or even allowed, to bring all of its claims. *Howe v. Vaughn (Matter of Howe)*, 913 F.2d 1138, 1146 (5th Cir. 1990). The Fifth Circuit clarified that, whether the earlier proceeding that is being suggested as holding res judicata effect is a contested matter or an adversary is not dispositive; rather, it is a factor in determining whether the claim at issue could or should have been effectively litigated in the earlier proceeding. *See id.* at 1146 n.28; *see also Osherow*, 200 F.3d at 388 (the court weighed "whether the bankruptcy court possessed procedural mechanisms that would have allowed" the party to assert claims in the prior contested matter).

It is important to note that the Fifth Circuit has found, on numerous occasions in which the prior proceeding was a contested matter, versus an adversary proceeding, that res judicata still applied. *See, e.g., Osherow*, 200 F.3d at 388-91 (finding res judicata applied to malpractice claims that could have been asserted at a fee hearing); *In re Baudoin*, 981 F.2d 736, 744 (5th Cir. 1993) (ruling that res judicata barred lender liability claims based on loans that had been deemed allowed claims without objection in a previous bankruptcy); *Eubanks v. FDIC*, 977 F.2d 166, 174 (5th Cir.

1992) (barring a lender liability action which could have and should have been brought as an objection to the lender's claim in a prior bankruptcy proceeding); *Southmark Properties v. Charles House Corp.*, 742 F.2d 862, 869 (5th Cir. 1984) (applying res judicata to bar a claim that could have been raised as an objection to a claim asserted in a previous bankruptcy reorganization). These opinions came in the context of a cause of action not being asserted to contest a proof of claim in a bankruptcy case. The Fifth Circuit found that objections to claims in the bankruptcy process, generally contested matters, provide procedural mechanisms to bring a claim for affirmative relief under Bankruptcy Rule 3007, which allows the claim objection to be converted to an adversary proceeding.¹⁷ *Osherow*, 200 F.3d at 389-90.

But here, the Bankruptcy Court concludes that the Plaintiffs were not provided with procedural mechanisms needed in order to bring their causes of action in the Complaint during the HarbourVest Settlement contested matter. Despite the “transactional test” being met through a finding that the claims stem from “the same nucleus of operative facts,” the procedures of Bankruptcy Rule 9014 do not allow for claims of affirmative relief—whether it be RICO violations, breach of contract, breach of fiduciary duties, or tort claims—to be asserted in response to a Bankruptcy Rule 9019 motion to compromise a controversy. The Fifth Circuit has not addressed procedural mechanisms supporting res judicata in the context of a Bankruptcy Rule 9019 motion to compromise a controversy, where the bankruptcy court is limited to determining whether or not to “approve a compromise or settlement.” See *Fed. R. Bankr. P. 9019(a)*. Unlike in the context of claim objections, mentioned above, where counterclaims can allow the claim objection to be converted through Bankruptcy Rule 3007 to an adversary proceeding, such causes

¹⁷ The court in *Osherow* went on to find that Bankruptcy Rule 9014 gives discretion to the bankruptcy court to allow other rules in Part VII of the Bankruptcy Rules to apply to contested matters. In that case, it suggested the bankruptcy court could have stayed the proceedings and allowed discovery to be commenced under the Part VII Rules to develop the affirmative causes of action to raise in the claim objection.

of action have no mechanism to exist in the context of a Bankruptcy Rule 9019 motion. The bankruptcy court is limited to granting or denying a proposed settlement as relief in ruling on a Bankruptcy Rule 9019 motion—regardless of its findings on issues that may also serve for the foundation of the causes of action asserted in the subsequent hearing (*but see* “**Collateral Estoppel**” discussion below). Procedurally, this would not allow the subsequent causes of action to ever be raised, if res judicata were to apply to a contested matter under Bankruptcy Rule 9019, which does not allow for the assertion of counterclaims or other forms of affirmative relief.

Thus, the court finds that the Plaintiffs were not given the procedural mechanisms to bring the causes of action asserted in the Complaint during the pendency of the HarbourVest Settlement contested matter. The court finds that res judicata does not apply as a doctrine to preclude the claims asserted by the Plaintiffs in the Complaint.

D. Collateral Estoppel

On the contrary, collateral estoppel *does* have applicability here. Arguments potentially relevant to the collateral estoppel doctrine were made by the parties in their pleadings and at the hearing on the Motion to Dismiss (phrased in terms of res judicata), but collateral estoppel *per se* was not addressed independently.¹⁸ The Bankruptcy Court now addresses collateral estoppel *sua sponte*. Raising preclusion doctrines *sua sponte* is in the interest of judicial economy and is appropriate, especially where both actions are before the same court. *See Carbonell v. La. Dep't of Health & Human Res.*, 772 F.2d 185, 189 (5th Cir. 1985).

To be clear, “res judicata encompasses two separate, but linked, preclusive doctrines: (1) true res judicata or claim preclusion and (2) collateral estoppel or issue preclusion.” *Hous. Profl Towing Ass'n v. City of Hous.*, 812 F.3d 443, 447 (5th Cir. 2016) (quoting *Comer v. Murphy Oil*

¹⁸ As mentioned at footnote 15, Highland did make a passing reference to the collateral estoppel doctrine in its Brief in Support of its Motion to Dismiss.

USA, Inc., 718 F.3d 460, 466–67 (5th Cir. 2013)). Thus, while res judicata precludes relitigating claims or causes of action that were or could have been previously litigated in a prior action, collateral estoppel is referred to as “issue preclusion” and prevents relitigating the same **issues or facts** decided in a prior proceeding. Collateral estoppel precludes only the relitigation of issues or facts **actually litigated** in the original action, whether or not the second suit is based on the same cause of action. *Moch v. East Baton Rouge Parish School Board*, 548 F.2d 594, 596 (5th Cir. 1977). “[A] **right, question, or fact distinctly put in issue and directly determined** as a ground of recovery by a court of competent jurisdiction collaterally estops a party ... from relitigating the issue in a subsequent action,” if the party had reasonable notice and an opportunity to be heard against the claim. *Hardy v. Johns–Manville Sales Corp.*, 681 F.2d 334, 338 (5th Cir. 1982) (emphasis added). “Collateral estoppel applies when, in the initial litigation, (1) the issue at stake in the pending litigation is the same, (2) the issue was actually litigated, and (3) the determination of the issue in the initial litigation was a necessary part of the judgment.” *Harvey Specialty & Supply, Inc. v. Anson Flowline Equip. Inc.*, 434 F.3d 320, 323 (5th Cir. 2005). Each condition must be met in order for collateral estoppel to apply. “Collateral estoppel will apply in a second proceeding that involves separate claims if the claims involve the same issue . . . and the subject matter of the suits may be different as long as the requirements for collateral estoppel are met.” *In re Devoll*, No. 15-50122-CAG, 2015 WL 9460110, at *3 (Bankr. W.D. Tex. Dec. 23, 2015) (citation omitted).

So were each of these three collateral estoppel factors met? Were the **same** facts or issues **actually litigated** and was a determination of these facts and issues a **necessary part** of approving the HarbourVest Settlement? The Plaintiffs argued, in their response to the Motion to Dismiss, that the Bankruptcy Court did not resolve anything on the merits other than the approval of a

settlement, and that was done solely using its discretion to approve a settlement. The court thinks that this is a mischaracterization of the court's role in approving the HarbourVest Settlement.

In considering a proposed compromise and settlement agreement, a bankruptcy court must determine whether it is "fair and equitable." *Matter of Jackson Brewing*, 624 F.2d 599, 602 (5th Cir. 1980); *United States v. AWECO, Inc. (In re AWECO)*, 725 F.2d 293, 298 (5th Cir. 1984), cert. denied 105 S. Ct. 244 (1984). A bankruptcy court applies a three-part test set out in *Jackson Brewing* with a focus on comparing "the terms of the compromise with the likely rewards of litigation." A bankruptcy court must evaluate: (1) the probability of success in litigating the claim subject to settlement, with due consideration for the uncertainty in fact and law; (2) the complexity and likely duration of litigation and any attendant expense, inconvenience, and delay; and (3) all other factors bearing on the wisdom of the compromise. These "other" factors—sometimes called the *Foster Mortgage* factors¹⁹—include: (i) "the best interests of the creditors, 'with proper deference to their reasonable views'"; and (ii) "'the extent to which the settlement is truly the product of arms-length bargaining, and not of fraud or collusion.'" *Official Comm. of Unsecured Creditors v. Moeller (In re Age Ref., Inc.)*, 801 F.3d 530, 540 (5th Cir. 2015) (citations omitted).

In connection with evaluating the HarbourVest Settlement and whether it was "fair and equitable" and in the "best interests of creditors," and whether it was the "product of arms-length bargaining, and not of fraud or collusion," the Bankruptcy Court held a multi-hour hearing that included lengthy direct and cross-examination of multiple witnesses and documentary evidence. The Bankruptcy Court was required to "appraise [itself] of the relevant facts and law so that [it could] make an informed and intelligent decision." See *In re Cajun Elec. Power Coop.*, 119 F.3d 349, 356 (5th Cir. 1997). The hearing included considering the arguments and evidence regarding

¹⁹ *Connecticut Gen. Life Ins. v. United Cos. Fin. Corp. (In re Foster Mortgage Co.)*, 68 F.3d 914 (5th Cir. 1995).

the methodology for the valuation of the HCLOF interest and the existence or non-existence of a “Right of First Refusal.” The court heard credible testimony on, among other things, the value of the HCLOF interests from Mr. Seery and Mr. Pugatch. Both witnesses were subject to cross examination. The court heard how the value of the HCLOF interests plummeted nearly \$50 million, which was caused, at least in part, by the litigation strategies taken by Highland while it was still under the control of Mr. Dondero.²⁰ The Plaintiffs allege in the Complaint that Mr. Seery’s \$22.5 million value of the HCLOF interest was baseless. The Plaintiffs believed the interests had a net asset value (“NAV”) of at least \$34.5 million on November 30, 2020, and a value of \$41.75 million on December 31, 2020, leading up to the HarbourVest Settlement hearing. Further, the Plaintiffs allege in the Complaint that Mr. Seery was receiving insider information from Mr. Dondero in December 2020 regarding the HCLOF interests and used improper valuation methods. But, for whatever reason, the Plaintiffs decided not to ask questions of Mr. Seery at the hearing or further challenge Mr. Seery’s source or method of valuation for the HCLOF interests at the hearing.²¹ The allegations in the Complaint surrounding Mr. Seery’s method for valuation of the HCLOF interests were discoverable at the time of the HarbourVest Settlement hearing and directly relevant to the Bankruptcy Court’s analysis in approving the HarbourVest Settlement. The Bankruptcy Court found the testimony elicited from Mr. Seery by Highland and the objectors to be credible in ultimately finding a \$22.5 million value of the HCLOF interests was reasonable.

²⁰ Transcript of Hearing Held 1/14/2021, DE # 1765, at 96:20-97:24.

²¹ Mr. Dondero and CLO Holdco appeared at and examined the HarbourVest witness, Mr. Pugatch, at a deposition before the hearing on the HarbourVest Settlement. Declaration of John Morris, Exhs. 7 & 8 thereto [DE # 2237]. Moreover, it is rather astounding to this court for anyone to suggest that any human being (Mr. Seery or anyone else) knew more, or withheld, any information that wasn’t well known to Mr. Dondero and all principals/agents of DAF and CLO Holdco. Mr. Dondero and any personnel associated with DAF and CLO Holdco should have been as (or more) familiar with HCLOF’s assets and their potential value than any human beings on the planet—having managed these assets for years.

While a bankruptcy court does not delve into the merits of every possible claim that is waived or compromised through a settlement, here, (a) *consideration of the value that the estate was both receiving and paying*, as well as (b) the potential existence of a “Right of First Refusal” that might have prohibited the Transfer contemplated in the HarbourVest Settlement, were very much a focus of the hearing on the HarbourVest Settlement. These are the very same issues that are the gravamen of the Plaintiffs’ Complaint. They were very much “actually litigated.” The Bankruptcy Court would never have approved the HarbourVest Settlement if it thought the value being exchanged was not fair, or if it thought the HCLOF Interests could not be transferred and that someone might later sue the Debtor, claiming the Transfer was improper. All parties had the chance to argue and present evidence about this. The Bankruptcy Court made a ruling based on the evidence and argument.

Further, the Bankruptcy Court included in the HarbourVest Settlement Order language to specifically avoid any future assertions or litigation as to whether a “Right of First Refusal” prevented the transfer of HCLOF interests to Highland or a Highland designee/subsidiary:

Pursuant to the express terms of the *Members Agreement Relating to the Company*, dated November 15, 2017, ***HarbourVest is authorized to transfer its interests in HCLOF to a wholly-owned and controlled subsidiary of the Debtor*** pursuant to the terms of the *Transfer Agreement for Ordinary Shares of Highland CLO Funding, Ltd. without the need to obtain the consent of any party or to offer such interests first to any other investor in HCLOF.* (Emphasis added.)

The court included this express language to document its finding that no “Right of First Refusal” was enforceable under the HCLOF Members Agreement based on the court’s analysis of the underlying agreements, as well as representations made by CLO Holdco that it was withdrawing its objection (that was wholly based on the alleged “Right of First Refusal”). A possible “Right of First Refusal” was fully briefed by the Debtor and CLO Holdco (with whom the DAF is in privity,

as its 100% parent), and the merits of such was fully considered by this court in approving the HarbourVest Settlement.

Despite this court's conclusion that res judicata does not apply here because procedural mechanisms did not allow an assertion of causes of action in the context of a Bankruptcy Rule 9019 settlement, ***no barrier prevented the Plaintiffs from fully litigating the issues, rights, and facts at the HarbourVest Settlement hearing that form the gravamen of the Complaint.*** While the causes of action in the Complaint could not be brought in connection with the HarbourVest Settlement contested matter, the issues and facts underlying the causes of action in the Complaint were fully litigated and ruled on in connection with the HarbourVest Settlement. Those issues were raised in objections and subject to witness testimony at the HarbourVest Settlement hearing and were the primary considerations that had to be evaluated for the Bankruptcy Court to approve of the HarbourVest Settlement. The Complaint fails to allege any facts independent of: (a) an improper valuation by Mr. Seery or (b) a failure by Highland to honor a "Right of First Refusal" in favor of CLO Holdco to support relief under its causes of action. Count 1 in the Complaint alleges that Highland breached a fiduciary duty to the Plaintiffs through diverting a corporate opportunity by not ***first offering*** the HCLOF interests to the Plaintiffs. While labeled as a claim for a "breach of fiduciary" duty, as opposed to a "breach of contract," the arguments are the same. Both counts argue that the HCLOF interests should have been offered to the Plaintiffs who held a superior right to purchase the interests. Again, this argument was presented in CLO Holdco's objection to the HarbourVest Settlement, which was withdrawn by CLO Holdco during the hearing. The Plaintiffs do not get a second bite of the apple at litigating a purported superior right, by dressing it up as different cause of action, when the issue at stake has already been litigated. Thus, both the HarbourVest Settlement and Complaint involve the same issues.

In summary, the first and second elements of collateral estoppel are met. The issues of valuation and a “Right of First Refusal” were one and the same as those articulated in the Complaint and were “actually litigated” in connection with the HarbourVest Settlement.

Going through the third prong of collateral estoppel, it is also met. The facts regarding valuation of the HCLOF interests and whether Highland was required to offer the HarbourVest’s HCLOF interests to CLO Holdco were very much *necessary* or *essential* to the Bankruptcy Court’s ruling approving the HarbourVest Settlement. The Bankruptcy Court was required to consider the value of the HCLOF interests to determine whether the consideration the estate was receiving in the compromise was fair and equitable. Further, the court noted at the settlement hearing that the “Right of First Refusal” was one of the “major arguments” in connection with the HarbourVest Settlement and the court included language in the HarbourVest Settlement Order specifically finding no such right existed. The court would not have approved the HarbourVest Settlement if it thought that it could not be accomplished or would result in Highland later being sued. This would not have been in the best interests of the estate. Thus, the HCLOF interest valuation and the ability or propriety of Highland transferring the HCLOF interest were “a necessary part of the judgment.”

Further, the Plaintiffs do not dispute CLO Holdco is in privity with DAF, as DAF is the parent and controlling entity of CLO Holdco. Instead, CLO Holdco argues that it somehow was not a party to the ongoing dispute between Highland and HarbourVest that led to the HarbourVest Settlement (although it was allowed to file objections and take discovery).

Bankruptcy is a collective proceeding that allows creditors to object and raise any argument they think the court should consider that bear on the wisdom of the compromise. Generally, for a party to be bound by orders issued by the bankruptcy court, the party must receive adequate notice of the proceedings for due process reasons. *In re Reagor-Dykes Motors, LP*, 613 B.R. 878, 885

(Bankr. N.D. Tex. 2020); *In re Grumman Olson Indus., Inc.*, 467 B.R. 694, 706 (S.D.N.Y. 2012); *see also Richards v. Jefferson Cty., Ala.*, 517 U.S. 793, 799, 116 S.Ct. 1761, 135 L.Ed.2d 76 (1996) (“Additionally, where a special remedial scheme exists expressly foreclosing successive litigation by nonlitigants, as for example in bankruptcy or probate, legal proceedings may terminate pre-existing rights if the scheme is otherwise consistent with due process.”). The Bankruptcy Rules and bankruptcy jurisprudence provide for due process protection for settlements under Rule 9019(a) by requiring that a debtor in possession give creditors and parties in interest “adequate notice and opportunity to be heard before their interests may be adversely affected.” *In re Reagor-Dykes Motors*, 613 B.R. at 885 (citing *W. Auto Supply Co. v. Savage Arms, Inc. (In re Savage Indus., Inc.)*, 43 F.3d 714, 720 (1st Cir. 1994)). Rule 9019(a) further protects interested parties “[b]y requiring court approval following a hearing before any compromise or settlement may be enforced” to ensure a transparent settlement process and provide “other creditors an opportunity to voice their concerns.” *In re Reagor-Dykes Motors, LP*, 613 B.R. at 886 (citing *In re Big Apple Volkswagen, LLC*, 571 B.R. 43, 57 (S.D.N.Y. 2017)). The Plaintiffs were properly noticed, as well as appeared and participated, in the Rule 9019 process.

Thus, the court concludes all three elements of collateral estoppel are met with regard to the fact issues of value of the HCLOF interests and any “Right of First Refusal” (and the ability/propriety of transferring the HCLOF interests). ***All of the causes of action in the Complaint (Counts 1-5) revolve around these two issues that were previously fully litigated.*** Thus, all causes of action asserted in the Complaint are precluded by the doctrine of collateral estoppel.

E. Judicial Estoppel

The final preclusion doctrine, asserted by Highland, is judicial estoppel. Judicial estoppel is “a common law doctrine by which a party who has assumed one position in [their] pleadings may be estopped from assuming an inconsistent position.” *Brandon v. Interfirst Corp.*, 858 F.2d 266, 268 (5th Cir. 1988). The doctrine is made “to protect the integrity of the judicial process” by “prevent[ing] parties from playing fast and loose with the courts to suit the exigencies of self interest.” *Id.* “[A] party cannot advance one argument and then, for convenience or gamesmanship after that argument has served its purpose, advance a different and inconsistent argument.” *Hotard v. State Farm Fire & Cas. Co.*, 286 F.3d 814, 818 (5th Cir. 2002). “Statements made in a previous suit by an attorney before the court can be imputed to a party and subject to judicial estoppel.” *Hall v. GE Plastic Pacific PTE Ltd.*, 327 F.3d 391, 396 (5th Cir. 2003). In order for a party to be estopped, two elements must be satisfied: (1) it must be shown “the position of the party to be estopped is clearly inconsistent with its previous one; and (2) that party must have convinced the court to accept that previous position. *In re Coastal Plains Inc.*, 179 F.3d 197, 206 (5th Cir. 1999).

The Plaintiffs argue, first, that withdrawing an objection and then raising the same argument later is not taking an “inconsistent position.” Second, the Plaintiffs argue that, since the HarbourVest Settlement was approved and the objection was *unsuccessful*, CLO Holdco could not “have convinced the court to accept that previous position.”

Highland argues that CLO Holdco’s withdrawal of its objection at the HarbourVest hearing, that was premised on a “Right of First Refusal” under the HCLOF Members Agreement, is, in fact, directly at odds with the Complaint, which asserts claims for violations of the same “Right of First Refusal.” Further, Highland argues that the Bankruptcy Court, in ruling on the HarbourVest Settlement, relied on the withdrawal of that objection—noting that the withdrawal “eliminate[d] one of the major arguments” being heard in connection with the HarbourVest

Settlement. Highland cites Fifth Circuit authority noting that the “judicial acceptance” requirement does not mean that the party against whom the judicial estoppel doctrine is to be invoked must have prevailed on the merits.” *Hall*, 327 F.3d at 398.

Here, the court believes that the first prong of judicial estoppel is met. At the HarbourVest Settlement hearing, CLO Holdco withdrew its objection, stating that it had determined it had no “Right of First Refusal,” based on its “interpretation of the member agreement.” Now Plaintiffs claim in their Complaint that CLO Holdco’s “Right of First Refusal” was violated by the HarbourVest Settlement. These positions are clearly inconsistent. If that weren’t enough, when asked by Debtor’s counsel at the HarbourVest Settlement hearing to enter a stipulation reflecting the HarbourVest Settlement was compliant with all applicable agreements between CLO Holdco and the Debtor, counsel for CLO Holdco stated: “I’m not going to enter into a stipulation on behalf of my client, but *the Debtor is compliant with all aspects of the contract*. We withdrew our objection, and we believe that’s sufficient.”²² This statement cannot conceivably coexist with the current assertion of a “Right of First Refusal.” Moreover, to the extent Plaintiffs argue that CLO Holdco merely withdrew an objection pertaining to an alleged “Right of First Refusal” *in the HCLOF Members Agreement* (and not an objection arguing that Highland had some non-contractual obligation to offer the HarbourVest Interest to CLO Holdco first, based on “fiduciary duty” concepts), this is “no more than ineffectual hair splitting.” *See Systems. Ahrens v. Perot Sys. Corp.*, 39 F.Supp.2d 773, 778 (N.D.Tex.1999) (in response to plaintiffs arguing a position taken in one suit could coexist with a position taken in a subsequent suit, despite each position being non-qualified, unconditional statements). It would seem to be the classic example of playing fast and loose with the court.

²² Transcript of Hearing Held 1/14/2021, DE # 1765, at 17:24-18:16 (emphasis added).

The court also believes that the second prong of judicial estoppel is met. The Fifth Circuit has held that judicial estoppel may be applied whenever a party makes an argument “with the explicit intent to induce the district court’s reliance.” *Hidden Oaks Ltd. v. City of Austin*, 138 F.3d 1036, 1047 (5th Cir. 1998). Further, the success requirement is satisfied when a court “necessarily accepted, and relied on” a party’s position in making a determination. *Ahrens v. Perot Systems Corporation*, 205 F.3d 831, 836 (5th Cir. 2000). Here, while the Plaintiffs did not succeed in stopping the approval of the HarbourVest Settlement, that is not the proper inquiry. Instead, what matters is that the Bankruptcy Court carefully considered CLO Holdco’s “Right of First Refusal” argument set out in its lengthy, written objection to the HarbourVest Settlement and perceived it as one of the major arguments that was relevant to the HarbourVest Settlement. At the HarbourVest Settlement hearing, the Plaintiffs stated: “CLO Holdco has had an opportunity to review the reply briefing, and after doing so has gone back and scrubbed the HCLOF corporate documents. Based on our analysis of Guernsey law and some of the arguments of counsel in those pleadings and our review of the appropriate documents, I obtained authority from my client, Grant Scott, as Trustee for CLO Holdco, to withdraw the CLO Holdco objection based on the interpretation of the member agreement.”²³ The Bankruptcy Court relied upon that withdrawal of CLO Holdco’s objection in making the determination to approve of the HarbourVest Settlement and, specifically, that Highland would not be running afoul of any obligation in entering into the HarbourVest Settlement. There is no question that, by withdrawing the objection, CLO Holdco caused the court to rely upon its withdrawal in making such determination. Thus, the Plaintiffs “convinced the court to accept that previous position.”

²³ *Id.* at 7:24-8:6.

The Bankruptcy Court concludes both elements of judicial estoppel are met. Counts 2 and 5 of the Complaint are based solely upon a “Right of First Refusal” under the HCLOF Members Agreement. Thus, judicial estoppel bars Counts 2 and 5 of the Complaint.

IV. Conclusion

Based upon the facts alleged in the Complaint, the judicially noticed docket entries from the HarbourVest Settlement, and the arguments presented to the court, the court rules that, together, collateral estoppel and judicial estoppel preclude all claims brought in the Complaint. Therefore, the Motion to Dismiss is *granted* and the Complaint is dismissed in its entirety with prejudice.

Because this court believes the doctrines of collateral estoppel and judicial estoppel bar the claims of the Plaintiffs as a matter of law, the court—for the sake of efficiency and judicial economy—will forego addressing the other arguments of Highland. Specifically, Highland has argued that, even if all of the Plaintiffs’ claims are not barred as a matter of law by preclusion or estoppel theories, Plaintiffs have failed to state plausible claims upon which relief can be granted with regard to the all of counts in the Complaint based on the RICO statute, Breach of Fiduciary Duty, Breach of Contract, Negligence, and Tortious Interference with Contract. While this court is inclined to agree with these arguments, the court will refrain from addressing them until such time as any higher court may instruct this court to address them.

Accordingly, it is

ORDERED that the Motion to Dismiss is **GRANTED** as to all causes of action (Counts 1-5) asserted in the Complaint with prejudice.

###END OF MEMORANDUM OPINION AND ORDER###

**UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF
TEXAS, DALLAS DIVISION**

In Re: Highland Capital Management, L.P § Case No. **19-34054-SGJ11**

Charitable DAF Fund, L.P et al

Appellant

§

vs.

§

21-03067

Highland Capital Management, L.P

§

Appellee

§

3:23-CV-01503-B

[167] Order granting Defendant Highland Capital Management, L.P.'s Renewed motion to dismiss adversary proceeding (related document # [122](#)) Entered on 6/25/2023.

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APPELLANT RECORD

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**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

In re:	§ Chapter 11
	§
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§ Case No. 19-34054-sgj11
	§
Debtor.	§
	§
CHARITABLE DAF FUND, L.P. AND CLO	§
HOLDCO, LTD., DIRECTLY AND DERIVATIVELY	§
	§
Plaintiffs,	§ Adversary Proceeding No.
	§
vs.	§ 21-03067-sgj11
	§
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§
HIGHLAND HCF ADVISOR, LTD., AND	§
HIGHLAND CLO FUNDING LTD., NOMINALLY	§
	§
Defendant.	§
	§

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**APPELLANTS' SECOND AMENDED STATEMENT OF ISSUES
AND DESIGNATION OF RECORD ON APPEAL**

Pursuant to Rules 8009(a)(1)(A)-(B) and (a)(4) of the Federal Rules of Bankruptcy Procedure, The Charitable DAF Fund, L.P. and CLO Holdco, Ltd. ("Appellants") hereby designate the following items to be included in the record and identify the following issues with respect to

their appeal of the Order Granting Defendant Highland Capital Management, L.P.'s "Renewed Motion to Dismiss Complaint" [Adv. Proc. Doc. No. 122] which was entered by the United States Bankruptcy Court for the Northern District of Texas on June 25, 2023.

I. STATEMENT OF ISSUES TO BE PRESENTED ON APPEAL

- Whether the Bankruptcy Court had jurisdiction to rule on Highland Capital Management L.P.'s Renewed Motion to Dismiss Complaint
- Whether the Renewed Motion to Dismiss Complaint was improperly granted

II. DESIGNATION OF ITEMS TO BE INCLUDED IN THE RECORD

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1. Notice of Appeal for Bankruptcy Case Adversary Proceeding No. 21-03067-sgj11 [Doc. 168].

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2. The judgment, order, or decree appealed from: Memorandum Opinion and Order Granting Defendant Highland Capital Management, L.P.'s "Renewed Motion to Dismiss Complaint" [Adv. Proc. Doc. No. 122] [Doc. 167].

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3. Docket Sheet kept by the Bankruptcy Clerk.

4. Documents listed below and as described in the Docket Sheet for Bankruptcy Case Proceeding No. 21-03067-sgj.

Vol. 2

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No.	Date Filed	Docket No.	Description/Document Text
1	9/29/21	1	(36 pgs; 3 docs) Adversary case 21-03067. ORDER REFERRING CASE NUMBER 21-CV-0842-B from U.S District Court for the Northern District of Texas, Dallas Division to U.S. Bankruptcy Court for Northern District of Texas, Dallas Division. Complaint by Charitable DAF Fund, LP, CLO Holdco, Ltd. against Highland Capital Management, LP, Highland HCF Advisor Ltd., Highland CLO Funding, Ltd. Fee Amount \$350 (Attachments: # 1 Original Complaint # 2 Docket Sheet from 3:20-cv-0842-B) Nature(s) of suit: 02 (Other (e.g. other actions that would have been brought in state court if unrelated to bankruptcy)). (Okafor, M.)
2	9/29/21	2	(1 pg) Supplemental Document (cover sheet) by CLO Holdco Ltd., Charitable DAF Fund (RE: related document(s)1 Adversary case 21-03067) [ORIGINALLY FILED IN 21-CV-0842 AS #2 ON 04/13/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)

Vol. 2 000139 000232 000239 000270 Thru Vol. 6	3	9/29/21	6	(93 pgs; 6 docs) MOTION for Leave to File First Amended Complaint filed by CLO Holdco Ltd., Charitable DAF Fund LP (Attachments: # 1 Exh 1_First Amended Complaint # 2 Exh 2_Motion for Authorization to Retain James Seery # 3 Exh 3_Order Approving Retention of James Seery # 4 Exh 4_Order Approving Settlement # 5 Proposed Order) (Bridges, Jonathan) (Entered: 04/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #6 ON 04/19/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
	4	9/29/21	22	(7 pgs; 2 docs) MOTION for an Order to Enforce the Order of Reference filed by Highland Capital Management LP. (Attachments: # 1 Exhibit(s) A--Proposed Order) (Annable, Zachery) Modified text on 5/20/2021 (mjr). (Entered: 05/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #22 ON 05/19/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
	5	9/29/21	23	(31 pgs) Brief/Memorandum in Support filed by Highland Capital Management LP re: 22 MOTION for an Order to Enforce the Order of Reference. (Annable, Zachery) Modified text on 5/20/2021 (mjr).(Entered: 05/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #23 ON 05/19/2021 IN U.S.DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
	6	9/29/21	24	(926 pgs; 29 docs) Appendix in Support filed by Highland Capital Management LP re: 23 Brief/Memorandum in Support. (Attachments: # 1 Appendix 1 # 2 Appendix 2 # 3 Appendix 3 # 4 Appendix 4 # 5 Appendix 5 # 6 Appendix 6 # 7 Appendix 7 # 8 Appendix 8 # 9 Appendix 9 # 10 Appendix10 # 11 Appendix 11 # 12 Appendix 12 # 13 Appendix 13 # 14 Appendix 14 # 15 Appendix 15 # 16 Appendix 16 # 17 Appendix 17 # 18 Appendix 18 # 19 Appendix 19 # 20 Appendix 20 # 21 Appendix 21# 22 Appendix 22 # 23 Appendix 23 # 24 Appendix 24 # 25 Appendix 25 # 26 Appendix 26 # 27 Appendix 27 # 28 Appendix 28) (Annable, Zachery) Modified linkage and text on 5/20/2021 (mjr). (Entered:05/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #24 ON 05/19/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
Vol. 7 001196	7	9/29/21	26	(7 pgs; 2 docs) MOTION to Dismiss Complaint filed by Highland Capital Management LP (Attachments: # 1 Exhibit(s) A--Proposed Order) (Annable, Zachery) Modified text on 5/28/2021 (jmg).(Entered: 05/27/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #26 ON 05/27/2021 IN U.S.DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)

Vol. 7 001203 thru Vol. 8	8	9/29/21	28	(508 pgs; 14 docs) Appendix in Support filed by Highland Capital Management LP (Attachments: # 1 Appendix 1 # 2 Appendix 2 # 3 Appendix 3 # 4 Appendix 4 # 5 Appendix 5 # 6 Appendix 6 # 7 Appendix 7 # 8 Appendix 8 # 9 Appendix 9 # 10 Appendix 10 # 11 Appendix 11 # 12 Appendix 12 # 13 Appendix 13) (Annable, Zachery) (Entered: 05/27/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #28 ON 05/27/2021 IN U.S. DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
Vol. 9 001711	9	9/29/21	33	(1 pg) Amended Civil Cover Sheet by CLO Holdco Ltd, Charitable DAF Fund LP. Amendment to 2 Supplemental Document. (Sbaiti, Mazin) Modified text on 6/23/2021 (mjr). (Entered: 06/22/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #33 ON 06/22/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001712	10	9/29/21	36	(26 pgs) RESPONSE filed by CLO Holdco Ltd, Charitable DAF Fund LP re: 22 MOTION for an Order to Enforce the Order of Reference (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #36 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001738	11	9/29/21	37	(22 pgs) Appendix in Support filed by CLO Holdco Ltd, Charitable DAF Fund LP re 36 Response/Objection Response to Motion for an Order to Enforce the Order of Reference (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #37 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001760	12	9/29/21	38	(45 pgs) RESPONSE filed by CLO Holdco Ltd, Charitable DAF Fund LP re: 26 MOTION to Dismiss (Defendant Highland Capital Management, L.P.'s Motion to Dismiss Complaint) (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #38 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001805	13	9/29/21	39	(88 pgs) Appendix in Support filed by CLO Holdco Ltd, Charitable DAF Fund LP re 38 Response/Objection to Defendant Highland Capital Management, L.P.'s Motion to Dismiss Complaint (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #39 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001893	14	9/29/21	42	(12 pgs) REPLY filed by Highland Capital Management LP re: 22 MOTION for an Order to Enforce the Order of Reference (Annable, Zachery) (Entered: 07/13/2021) [ORIGINALLY FILED IN 21-CV-0842AS #42 ON 07/13/2021 IN U.S.

			DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
VOL. 9	15	9/29/21	43 (852 pgs) Appendix in Support filed by Highland Capital Management LP re: 42 Reply. (Annable, Zachery) Modified text on 7/14/2021 (mjr). (Entered: 07/13/2021) [ORIGINALLY FILED IN 21-CV-0842AS #43 ON 07/13/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001905 thru Vol. 13	16	9/29/21	45 (21 pgs) REPLY filed by Highland Capital Management LP re: 26 MOTION to Dismiss (Defendant Highland Capital Management, L.P.'s Motion to Dismiss Complaint) (Annable, Zachery) (Entered: 07/13/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #44 ON 07/13/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002757	17	9/29/21	57 (7 pgs; 2 docs) MOTION to Dismiss and Joinder in Motion to Dismiss of Highland Capital Management, L.P. filed by Highland CLO Funding Ltd. (Attachments: # 1 Proposed Order) Attorney Paul R Bessette added to party Highland CLO Funding Ltd (pty:dft) (Bessette, Paul) (Entered: 08/30/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #57 ON 08/30/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002778	18	9/29/23	58 (12 pgs) Brief/Memorandum in Support filed by Highland CLO Funding Ltd. re 57 MOTION to Dismiss and Joinder in Motion to Dismiss of Highland Capital Management, L.P. (Bessette, Paul) (Entered: 08/30/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #58 ON 08/30/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002785	19	9/29/23	59 (80 pgs; 5 docs) Appendix in Support filed by Highland CLO Funding Ltd re 58 Brief/Memorandum in Support of Motion (Attachments: # 1 Exhibit(s) A - Jackson v Dear # 2 Exhibit(s) B - Prudential Assurance v. Newman # 3 Exhibit(s) C - Harbourvest Settlement Agreement # 4 Exhibit(s) D - Boleat Declaration) (Bessette, Paul) (Entered: 08/30/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #59 ON 08/30/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002797	20	9/29/21	64 (1 pg) ORDER OF REFERENCE: Pursuant to 28 U.S.C. § 157 and this District's Miscellaneous Order No. 33, this case is hereby REFERRED to Judge Stacey G. C. Jernigan of the United States Bankruptcy Court for the Northern District of Texas, Dallas Division, to be adjudicated as a matter related to the consolidated Chapter 11 Bankruptcy of Highland Capital Management, L.P., Chapter 11 Case No.19-34054. (Ordered by Judge Jane J. Boyle
002877			

Vol. 14				on 9/20/2021) (svc) (Entered: 09/20/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #64 ON 09/20/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002878	21	10/19/21	66	(5 pgs) Notice of hearing filed by Defendant Highland Capital Management, LP (RE: related document(s) 26 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP, 47 Motion to strike document filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 55 Motion to abate filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) Hearing to be held on 11/23/2021 at 09:30 AM at https://us-courts.webex.com/meet/jerniga for 26 and for 47 and for 55, (Annable, Zachery)
002883 thru Vol. 16	22	11/22/21	71	(509 pgs; 2 docs) Witness and Exhibit List <i>for Hearing on November 23, 2021</i> filed by Defendant Highland Capital Management, LP (RE: related document(s) 26 Motion to dismiss adversary proceeding). (Attachments: # 1 Exhibits 1-13) (Hayward, Melissa)
Vol. 17	23	11/22/21	72	(2 pgs) Witness List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 26 Motion to dismiss adversary proceeding, 47 Motion to strike (related document(s): 43 Document), 55 Motion to abate (related document(s) 1 Complaint), 69 Motion to abate <i>Plaintiffs' Amended Motion to Stay All Proceedings</i> (related document(s) 55 Motion to abate (related document(s) 1 Complaint))). (Sbaiti, Mazin)
003392				
003394	24	11/22/21	73	(189 pgs; 4 docs) Exhibit List <i>for November 23, 2021 hearing</i> filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 47 Motion to strike (related document(s): 43 Document), 55 Motion to abate (related document(s) 1 Complaint)). (Attachments: # 1 Exhibit 1_Defendant's Memorandum of Law in Support of Motion for Reconsideration # 2 Exhibit 2_Highland Memorandum in Support of Motion to Dismiss # 3 Exhibit 3_Order (I) Confirming Fifth Amended Plan of Reorganization of Highland) (Sbaiti, Mazin)
003583	25	12/7/21	80	(2 pgs) Order granting Highland CLO Funding, Ltd.'s motion to dismiss adversary as a party with prejudice (related document 57) Entered on 12/7/2021. (Okafor, Marcey) Modified text on 3/11/2022 (Okafor, Marcey).
003585	26	3/11/22	99	(26 pgs) Memorandum of Opinion and order granting motion to dismiss the adversary proceeding (RE: related document(s) 26 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP). Entered on 3/11/2022 (Okafor, Marcey)
003611	27	3/11/22	100	(26 pgs) Order granting motion to dismiss adversary proceeding with prejudice (related document #26) Entered on 3/11/2022. (Okafor, Marcey)

Vol. 18 003637	28	3/21/22	104	(29 pgs) Notice of appeal. Fee Amount \$298 filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 100 Order on motion to dismiss adversary proceeding). Appellant Designation due by 04/4/2022. (Sbaiti, Mazin)
003666	29	5/26/22	120	(177 pgs; 2 docs) Support/supplemental document <i>Motion to Supplement Appellate Record</i> filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 111 Appellant designation). (Attachments: # 1 Amended Transcript of January 14, 2021 Hearing) (Sbaiti, Mazin)
003843	30	6/9/22	121	(1 pg) DISTRICT COURT Order: Case 3:22-00695-B is hereby transferred to the docket of the Honorable Judge Jane J. Boyle for consolidation with The Charitable DAF Fund LP, et al. v. Highland Capital Management LP, Case No. 3:21-cv-3129-N. Judge Karen Gren Scholer no longer assigned to case.(RE: related document(s) 86 Notice of appeal filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 104 Notice of appeal filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Entered on 6/9/2022 (Whitaker, Sheniqua) (Entered: 06/10/2022)
003844	31	10/24/22	122	(7 pgs) Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP (Annable, Zachery)
003851	32	10/14/22	123	(31 pgs) Brief in support filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Annable, Zachery)
Vol. 19 003882 Thru Vol 20	33	10/14/22	124	(513 pgs; 15 docs) Support/supplemental document (<i>Appendix in Support of Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7 # 8 Exhibit 8 # 9 Exhibit 9 # 10 Exhibit 10 # 11 Exhibit 11 # 12 Exhibit 12 # 13 Exhibit 13 # 14 Exhibit 14) (Annable, Zachery)
Vol. 21 004395	34	10/27/22	126	(5 pgs) Notice of hearing (<i>Notice of Hearing and Briefing Schedule on Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP). Hearing to be held on 12/8/2022 at 09:30 AM at https://us-courts.webex.com/meet/jerniga for 122. (Annable, Zachery)

Vol. 21 004400 004410 004442 Thru Vol. 22	35	11/18/22	128	(10 pgs) Motion for withdrawal of reference. Fee amount \$188, filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (Sbaiti, Mazin)
	36	11/18/22	129	(32 pgs) Response opposed to (related document(s): 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP) filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Sbaiti, Mazin)
	37	11/18/22	130	(254 pgs; 2 docs) Response opposed to (related document(s): 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP) filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Attachments: # 1 Appendix) (Sbaiti, Mazin)
Vol. 22 004696 004717 004732 004737 004742	38	9/2/22	131	(21 pgs) DISTRICT COURT MEMORANDUM OPINION AND ORDER: The Court REVERSES and REMANDS the bankruptcy court's Motion to Dismiss Order and AFFIRMS the bankruptcy courts Motion to Stay Order. re: appeal on Civil Action number: Case 3:22-00695-B consolidated with 3:21-CV-3129-B, (RE: related document(s) 81 Order on motion to abate, 100 Order on motion to dismiss adversary proceeding). Entered on 9/2/2022 (Whitaker, Sheniqua) (Entered: 11/29/2022)
	39	12/2/22	133	(15 pgs) Reply to (related document(s): 129 Response filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 130 Response filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) filed by Defendant Highland Capital Management, LP. (Annable, Zachery)
	40	12/7/22	135	(5 pgs) Notice of hearing filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP). Hearing to be held on 1/25/2023 at 01:30 PM at https://us-courts.webex.com/meet/jerniga for 122, (Annable, Zachery)
	41	12/7/22	136	(5 pgs) Notice of hearing filed by Defendant Highland Capital Management, LP (RE: related document(s) 128 Motion for withdrawal of reference filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Status Conference to be held on 1/25/2023 at 01:30 PM at https://us-courts.webex.com/meet/jerniga . (Annable, Zachery).
	42	12/9/22	138	(3 pgs) Response opposed to (related document(s): 128 Motion for withdrawal of reference. Fee amount \$188, filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) filed by Defendant Highland Capital Management, LP. (Annable, Zachery)

Vol. 22 004745	43	12/9/22	139	(25 pgs) Brief in support filed by Defendant Highland Capital Management, LP (RE: related document(s) 138 Response). (Annable, Zachery)
Vol. 23 004770	44	12/9/22	140	(280 pgs; 8 docs) Support/supplemental document (<i>Appendix in Support of Highland Capital Management, L.P.'s Response to Renewed Motion to Withdraw the Reference</i>) filed by Defendant Highland Capital Management, LP (RE: related document(s) 138 Response). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7) (Annable, Zachery)
Vol. 24 005050	45	12/16/22	144	(6 pgs) Reply to (related document(s): 138 Response filed by Defendant Highland Capital Management, LP) filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Sbaiti, Mazin)
005056 Thru Vol. 25.	46	1/23/23	145	(514 pgs; 15 docs) Witness and Exhibit List filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7 # 8 Exhibit 8 # 9 Exhibit 9 # 10 Exhibit 10 # 11 Exhibit 11 # 12 Exhibit 12 # 13 Exhibit 13 # 14 Exhibit 14) (Annable, Zachery)
Vol. 26 005570	47	1/23/23	146	(280 pgs; 8 docs) Witness and Exhibit List filed by Defendant Highland Capital Management, LP (RE: related document(s) 128 Motion for withdrawal of reference. Fee amount \$188.). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7) (Annable, Zachery)
Vol. 27 005850	48	1/23/23	147	(221 pgs; 7 docs) Witness and Exhibit List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Attachments: # 1 Exhibit 1_Excerpts from July 14, 2020 Hearing Transcript # 2 Exhibit 2_HCLOF Members Agreement Relating to the Company # 3 Exhibit 3_HarbourVest Settlement Agreement # 4 Exhibit 4_Order Approving Debtor's Settlement with HarbourVest # 5 Exhibit 5_HCLOF Offering # 6 Exhibit 6 Amended and Restated Investment Advisory Agreement) (Sbaiti, Mazin)
006071	49	1/23/23	148	(3 pgs) Witness and Exhibit List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 128 Motion for withdrawal of reference. Fee amount \$188.). (Phillips, Louis)
Vol. 28 006074	50	1/25/23	150	(56 pgs; 2 docs) Amended Witness and Exhibit List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 147 List (witness/exhibit/generic), 149 List (witness/exhibit/generic)). (Attachments: # 1 Exh 7_Testimony of Mark Patrick at June 8, 2021 hearing) (Sbaiti, Mazin)

Vol. 28 006130	51	1/25/23	152	(3 pgs) Notice of Appearance and Request for Notice by Louis M. Phillips filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Phillips, Louis)
	52	1/25/23	154	(1 pg) Court admitted exhibits date of hearing January 25, 2023 (RE: related document(s) 128 Motion for withdrawal of reference, filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) (COURT ADMITTED DEFENDANT'S EXHIBITS #1, #2, #3, #4, #5 & #6 OFFERED BY ATTY GREG DEMO). (Edmond, Michael) (Entered: 01/27/2023)
Vol. 32 006925 006942 006960	53	2/6/23	158	Report and recommendation to the U.S. District Court by U.S. Bankruptcy Judge. (RE: related document(s) 128 Motion for withdrawal of reference filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Entered on 2/6/2023 (Okafor, Marcey)
	54	2/6/23	161	(18 pgs) DISTRICT COURT Notice of transmission of report and recommendation in re: renewed motion to withdraw reference. Civil Case # 3:22-cv-02802-S. (RE: related document(s) 158 Report and recommendation to the U.S. District Court by U.S. Bankruptcy Judge. (RE: related document(s) 128 Motion for withdrawal of reference filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Entered on 2/6/2023) (Whitaker, Sheniqua)
	55	4/3/23	165	(1 pg) DISTRICT COURT ORDER: The Court GRANTS the 11 Joint Motion to Transfer Proceeding and Consolidate Before Original Court and the above-numbered case (3:22-cv-02802-S) is transferred to the docket of the Honorable Judge Jane Boyle: Civil case 3:21-cv-00842-B (order referring case). (RE: related document(s) 1 Complaint filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 143 Notice of transmission of motion to withdraw reference). Entered on 4/3/2023 (Whitaker, Sheniqua) Modified on 4/10/2023 (Whitaker, Sheniqua). (Entered: 04/10/2023)

TRANSCRIPTS

006961	56	11/24/21	78	(104 pgs) Transcript regarding Hearing Held 11-23-2021 RE: Motion Hearing. THIS TRANSCRIPT WILL BE MADE ELECTRONICALLY AVAILABLE TO THE GENERAL PUBLIC 90 DAYS AFTER THE DATE OF FILING. TRANSCRIPT RELEASE DATE IS 02/22/2022. Until that time the transcript may be viewed at the Clerk's Office or a copy may be obtained from the official court transcriber. Court Reporter/Transcriber Liberty Transcripts/Dipti Patel, Telephone number 847-848-4907. (RE: related document(s) 75 Hearing held on 11/23/2021. (RE: related document(s) 55 MOTION to Stay filed by CLO Holdco Ltd, Charitable DAF Fund LP (Sbaiti, Mazin) (Entered: 08/26/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #55 ON 08/26/2021 IN U.S.
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			<p>DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)) (Appearances: J. Pomerantz and J. Morris for Highland Defendants; J. Jordan and P. Bessett for HCLOF; M. Sbaiti for Plaintiffs. Nonevidentiary hearing. Motion denied. Mr. Pomerantz to upload order.), 76 Hearing held on 11/23/2021. (RE: related document(s) 47 Motion to strike 43 Appendix in support filed by CLO Holdco, Ltd., Charitable DAF Fund, LP (Bridges, Jonathan) Modified text on 7/16/2021 (mjr). (Entered: 07/15/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #47 ON 07/15/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)) (Appearances: J. Pomerantz and J. Morris for Highland Defendants; J. Jordan and P. Bessett for HCLOF; M. Sbaiti for Plaintiffs. Nonevidentiary hearing. Motion denied (Plaintiffs acknowledged complained-of Appendices it did not relate to Motion to Dismiss). Mr. Pomerantz to upload order.)). Transcript to be made available to the public on 02/22/2022. (Patel, Dipti)</p>
57	2/21/23	164	<p>164 (112 pgs) Transcript regarding Hearing Held 1/25/23 RE: HEARING ON DEFENDANT HIGHLAND CAPITAL MANAGEMENT L.P.'S RENEWED MOTION TO DISMISS COMPLAINT (122) AND STATUS CONFERENCE RE: MOTION FOR WITHDRAWAL OF REFERENCE FILED BY PLAINTIFF CLO HOLDCO, LTD., PLAINTIFF CHARITABLE DAF FUND, LP (128). THIS TRANSCRIPT WILL BE MADE ELECTRONICALLY AVAILABLE TO THE GENERAL PUBLIC 90 DAYS AFTER THE DATE OF FILING. TRANSCRIPT RELEASE DATE IS 05/22/2023. Until that time the transcript may be viewed at the Clerk's Office or a copy may be obtained from the official court transcriber. Court Reporter/Transcriber Dipti Patel, Telephone number 847-848-4907. (RE: related document(s) 155 Hearing held on 1/25/2023. (RE: related document(s) 122 Motion to dismiss adversary proceeding, (Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint) filed by Defendant Highland Capital Management, LP filed by Defendant Highland Capital Management, LP) (Appearances: J. Morris and G. Demo for Movants; L. Phillips and M. Sbaiti for Plaintiffs. Evidentiary hearing (appendices). Court took matter under advisement.), 156 Hearing held on 1/25/2023. (RE: related document(s) 128 Motion for withdrawal of reference. Fee amount \$188, filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) (Appearances: J. Morris and G. Demo for Movants; L. Phillips and M. Sbaiti for Plaintiffs. Evidentiary hearing (appendices). Court announced it will recommend denial to District Court. Court is working on Report & Recommendation.)). Transcript to be made available to the public on 05/22/2023. (Patel, Dipti)</p>

Dated: July 14, 2023

Respectfully submitted,

SBAITI & COMPANY PLLC

/s/ Mazin A. Sbaiti

Mazin A. Sbaiti

Texas Bar No. 24058096

Jonathan Bridges

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Counsel for Appellants

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was filed electronically through the Court's ECF system, which provides notice to all parties of interest, on this 14th day of July, 2023.

/s/ Mazin A. Sbaiti

Mazin A. Sbaiti

2. Position of appellant(s) in the adversary proceeding or bankruptcy case that is the subject of this appeal:

For appeals in an adversary proceeding:

- ☒ Plaintiff
☐ Defendant
☐ Other (describe)

For appeals in a bankruptcy case and not in an adversary proceeding:

- ☐ Debtor
☐ Creditor
☐ Trustee
☐ Other (describe)

Part 2: Identify the subject of this appeal

1. Describe the judgment, order, or decree appealed from:

Order Granting Motion to Dismiss the Adversary Proceeding [Doc. 100]

2. State the date on which the judgment, order, or decree was entered: March 11, 2022

Part 3: Identify the other parties to the appeal

List the names of all parties to the judgment, order, or decree appealed from and the names, addresses, and telephone numbers of their attorneys:

1. *Party/Appellee:* Debtor: Highland Capital Management, L.P.
Non-Debtor: Highland HCF Advisor, Ltd.

Attorney:

PACHULSKI STANG ZIEHL & JONES LLP

Jeffery N. Pomerantz

Ira D. Kharasch

John A. Morris

Gregory V. Demo

Hayley R. Winograd

780 Third Avenue, 34th Floor

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And

Hayward & Associates PLLC
Melissa S. Hayward
Zachery Z. Annable
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Dallas, TX 75231
Telephone: (972) 755-7100
Fax: (972) 755-7110

2. *Party/Appellants*: Plaintiffs: The Charitable DAF Fund, L.P.
CLO Holdco, Ltd.

Attorney:

SBAITI & COMPANY PLLC
Mazin A. Sbaiti (TX Bar No. 24058096)
Jonathan Bridges (TX Bar No. 24028835)
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Dallas, TX 75201
T: (214) 432-2899
F: (214) 853-4367

Part 4: Optional election to have appeal heard by District Court (applicable only in certain districts): Not applicable.

Dated: March 21, 2022

Respectfully submitted,

SBAITI & COMPANY PLLC

/s/ Mazin A. Sbaiti

Mazin A. Sbaiti

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Counsel for Plaintiffs



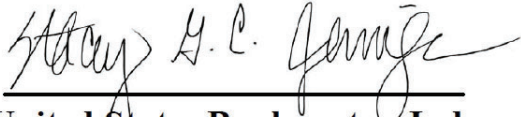
CLERK, U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS

ENTERED

THE DATE OF ENTRY IS ON
THE COURT'S DOCKET

The following constitutes the ruling of the court and has the force and effect therein described.

Signed March 11, 2022


United States Bankruptcy Judge

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

IN RE:	§	
	§	
HIGHLAND CAPITAL MANAGEMENT	§	CASE NO. 19-34054-SGJ-11
L.P.,	§	(CHAPTER 11)
REORGANIZED DEBTOR.	§	
	§	
CHARITABLE DAF FUND, L.P., AND CLO	§	
HOLDCO LTD.,	§	
	§	
PLAINTIFFS,	§	
	§	
VS.	§	ADVERSARY NO. 21-03067
	§	
HIGHLAND CAPITAL MANAGEMENT,	§	
L.P., HIGHLAND HCF ADVISOR, LTD.,	§	
AND HIGHLAND CLO FUNDING, LTD.,	§	
	§	
DEFENDANTS.	§	

**MEMORANDUM OPINION AND ORDER GRANTING MOTION TO DISMISS THE
ADVERSARY PROCEEDING**

003640

I. INTRODUCTION

The above-referenced adversary proceeding (the “Adversary Proceeding”) is related to the bankruptcy case of Highland Capital Management, L.P. (the “Bankruptcy Case”).¹ Highland Capital Management, L.P. (“Highland,” the “Debtor,” or sometimes the “Reorganized Debtor”) filed a voluntary Chapter 11 petition on October 16, 2019, in the United States Bankruptcy Court for the District of Delaware. That court subsequently transferred venue of the Bankruptcy Case to the Northern District of Texas, Dallas Division (the “Bankruptcy Court”), on December 4, 2019.

Before the court is Highland’s motion to dismiss (the “Motion to Dismiss”) the Adversary Proceeding. Highland obtained confirmation of a reorganization plan on February 22, 2021, and the plan went effective on August 11, 2021. The Adversary Proceeding was filed in April 2021 (*i.e.*, after confirmation but before the effective date of Highland’s Chapter 11 plan). There were originally three Defendants named in the Adversary Proceeding: (i) Highland, and (ii) two non-Debtor affiliates which Highland controls that are called Highland HCF Advisor, Ltd. (“HHCFA”) and Highland CLO Funding Ltd. (“HCLOF”). Defendant HCLOF was later dismissed by agreement with the Plaintiffs.² Highland’s CEO, James P. Seery (“Mr. Seery”), was named in the Complaint initiating the Adversary Proceeding (the “Complaint”) as a “potential” Defendant but has not been added. The Plaintiffs are two entities that are allegedly controlled and/or directed by James Dondero, Highland’s founder and former CEO (“Mr. Dondero”): (i) Charitable DAF Fund, L.P. (the “DAF”), which is a Cayman Island-based hedge fund designated as a “donor-advised fund,” originally seeded with funds from Highland, and (ii) CLO Holdco, Ltd. (“CLO Holdco”),

¹ Bankruptcy Case No. 19-34054.

² At the hearing held on the Motion to Dismiss, the parties announced an agreement that HCLOF would be dismissed from the Adversary Proceeding with prejudice. HCLOF was apparently only named nominally in the Adversary Proceeding and no actual relief was sought against it. An order dismissing HCLOF was entered on December 7, 2021. Highland and HHCFA were unaffected by the dismissal order.

which is also a Cayman Island-based entity, wholly owned and controlled by the DAF. Until at least mid-January 2021, Grant Scott, Mr. Dondero's life-long friend and college roommate, was the sole director of the DAF and also of CLO Holdco (neither of which otherwise had any officers or employees).

The Complaint, which was originally filed in the United States District Court for the Northern District of Texas, Dallas Division ("District Court"), but was referred to the Bankruptcy Court (as further described herein), asserts claims against Highland and HHCFA under the Racketeer Influenced and Corrupt Organizations statute (15 U.S.C. § 1961, et seq. ("RICO")), Breach of Fiduciary Duty, Breach of Contract, Negligence, and Tortious Interference with Contract—all relating to the Debtor's pursuit and effectuation *during the Bankruptcy Case* of a compromise and settlement agreement with a creditor known as HarbourVest, which *agreement was fully vetted and approved by the Bankruptcy Court* (after notice to creditors and parties in interest), pursuant to Federal Rule of Bankruptcy Procedure 9019. Accepting all facts pleaded as true and construing the Complaint in the light most favorable to the Plaintiffs, this court concludes that all of the claims in the Complaint are precluded by the doctrines of collateral estoppel and judicial estoppel. Thus, the Complaint, in its entirety, must be dismissed.

In order to understand the conclusion of this court, one must review matters that happened during the Bankruptcy Case. Although a court generally limits its inquiry on a motion to dismiss to the plaintiff's complaint or any documents attached to the complaint, a court may also take judicial notice of matters that are part of the public record when considering a motion to dismiss. *See T.L. Dallas (Special Risks), Ltd. v. Elton Porter Marine Ins.*, No. 4:07-cv-0419, 2008 WL 7627807, at *2 (S.D. Tex. 2008); *Cade v. Henderson*, No. CIV A 01-943, 2001 WL 1012251, at *2 (E.D. La. Aug. 31, 2001). The relevant public record here includes: (a) the HarbourVest

Settlement Motion,³ and the exhibits admitted into evidence in support; (b) the Transfer Agreement;⁴ (c) Mr. Dondero's Objection to the HarbourVest Settlement;⁵ (d) the Objection to the HarbourVest Settlement of Dugaboy Investment Trust and Get Good Trust (*i.e.*, Mr. Dondero's family trusts),⁶ (e) CLO Holdco's Objection to the HarbourVest Settlement,⁷ (f) the Omnibus Replies;⁸ (g) the January 14, 2021 Hearing Transcript at which the Bankruptcy Court considered and approved the HarbourVest Settlement;⁹ and (h) the HarbourVest Settlement Order.¹⁰

II. BACKGROUND

The creditor HarbourVest was actually a collective of investors that, in 2017, invested approximately \$80 million into the entity known as HCLOF (*i.e.*, the previously dismissed nominal Defendant), thereby acquiring a 49.98% interest in it. HarbourVest filed six proofs of claim against the Debtor in the Bankruptcy Case, totaling \$300 million, alleging that the Debtor had committed fraud back in 2017, in connection with its encouraging HarbourVest to invest in and acquire that 49.98% interest in HCLOF. As alluded to earlier, the Debtor and HarbourVest eventually negotiated a settlement of HarbourVest's proofs of claim.

³ Debtor's Motion for an Entry of an Order Approving Settlement with HarbourVest (Claim Nos. 143, 147, 149, 150, 153, 154) and Authorizing Actions Consistent Therewith, DE # 1625 (the "Settlement Motion"). Note: all references herein to "DE # ____" shall refer to the docket entry number at which a pleading appears in the docket maintained in the Highland main bankruptcy case. All references to "DE # ____ in the AP" refer to the docket entry number at which a pleading appears in the docket maintained in the Adversary Proceeding.

⁴ Declaration of John A. Morris in Support of the Debtor's Motion for Entry of an Order Approving Settlement with HarbourVest (Claim Nos. 143, 147, 149, 150, 153, 154) and Authorizing Actions Consistent Therewith, DE # 1631, Exhibit 1.

⁵ James Dondero's Objection to Debtor's Motion for Entry of an Order Approving Settlement with HarbourVest, DE # 1697.

⁶ Objection to Debtor's Motion for an Entry of an Order Approving Settlement with HarbourVest (Claim Nos. 143, 147, 149, 150, 153, 154) and Authorizing Actions Consistent Therewith, DE # 1706.

⁷ CLO Holdco, Ltd.'s Objection to HarbourVest Settlement, DE # 1707.

⁸ Debtor's Omnibus Reply in Support of the Debtor's Motion for Entry of an Order Approving Settlement with HarbourVest (Claim Nos. 143, 147, 149, 150, 153, 154) and Authorizing Actions Consistent Therewith, DE # 1731; HarbourVest Reply in Support of Debtor's Motion for Entry of an Order Approving Settlement with HarbourVest and Authorizing Actions Consistent Therewith, DE # 1734.

⁹ Transcript of Hearing Held 1/14/2021, DE # 1765.

¹⁰ *Order Approving Debtor's Settlement with Harbourvest (Claims Nos. 143, 147, 149, 150, 153, 154) and Authorizing Actions Consistent Therewith*, DE # 1788 (the "HarbourVest Settlement Order").

In December 2020, the Debtor filed a motion in the Bankruptcy Court for an order approving its settlement with HarbourVest (the “HarbourVest Settlement”), pursuant to which, *inter alia*, HarbourVest would significantly reduce its \$300 million of alleged claims against the Debtor and transfer its 49.98% interest in HCLOF to an entity designated by the Debtor (the “Transfer”). At the time of the Transfer, the Debtor already owned a 0.6% interest in HCLOF, so the Transfer would give it a controlling interest ($49.98\% + 0.6\% = 50.58\%$) in HCLOF.

CLO Holdco objected to the proposed HarbourVest Settlement, presumably at the direction of its parent, the DAF. CLO Holdco owned (and still owns) 49.02% of HCLOF. CLO Holdco challenged the HarbourVest Settlement on the grounds that: (i) CLO Holdco had a “Right of First Refusal” to acquire HarbourVest’s interest in HCLOF pursuant to the HCLOF Members Agreement among the Debtor, HarbourVest, and CLO Holdco (“HCLOF Members Agreement”), and (ii) HarbourVest had no right to transfer its interest without complying with the purported “Right of First Refusal.” Two other objections were lodged against the proposed HarbourVest Settlement, one by Mr. Dondero and the other by Mr. Dondero’s two family trusts: The Dugaboy Investment Trust (“Dugaboy”) and The Get Good Trust (“Get Good” and, together with Dugaboy, the “Dondero Family Trusts”). Mr. Dondero objected on the grounds that (a) the HarbourVest Settlement was not reasonable or in the best interests of the estate because the Debtor was grossly over-compensating HarbourVest, and (b) it amounted to a blatant attempt to purchase HarbourVest’s votes in support of the Debtor’s plan. The Dondero Family Trusts raised separate concerns regarding: (a) whether HarbourVest had the right to effectuate the Transfer, and (b) the valuation methodology the Debtor used for the HCLOF interests. Each of the objecting parties had a right to take discovery concerning the HarbourVest Settlement, including the valuation of the HCLOF interests and the Transfer.

The court held an evidentiary hearing, on January 14, 2021, on the HarbourVest Settlement and heard argument in support of the parties' objections and defenses. Highland's current CEO, Mr. Seery, and a HarbourVest representative, Michael Pugatch ("Mr. Pugatch"), were each called to testify. During the hearing, surprisingly, ***CLO Holdco voluntarily withdrew its objection, which had been premised on its alleged "Right of First Refusal,"*** based on CLO Holdco's "interpretation of the [HCLOF] member agreement."¹¹ Subsequent to CLO Holdco withdrawing its objection at the hearing, the Bankruptcy Court asked counsel for the Dondero Family Trusts whether they planned to press the issue of the transferability of HarbourVest's interest in HCLOF. In response, counsel responded: "No, I am not. Basically, I think it's the fairness of the settlement. I think the transferability of the interest is separate and apart from the fairness of the settlement itself. I think the fairness -- the transferability was a contractual issue between two parties that the Court does not have to drill down on." Transcript of Hearing Held 1/14/2021, DE # 1765, at 22:5-20.

At the conclusion of the hearing, the Bankruptcy Court overruled the remaining objections (*i.e.*, of Mr. Dondero and the Dondero Family Trusts) and approved the HarbourVest Settlement as fair and equitable and in the best interests of the bankruptcy estate. The HarbourVest Settlement Order made clear that HarbourVest could transfer its interest in HCLOF "without the need to obtain the consent of any party or to offer such interests first to any other investor in HCLOF."¹²

In summary, pursuant to the HarbourVest Settlement that the Bankruptcy Court approved, HarbourVest, in pertinent part, would (a) transfer its interest in HCLOF to the Debtor or its nominee, (b) be allowed a general unsecured claim against the Debtor in the amount of \$45 million,

¹¹ Transcript of Hearing Held 1/14/2021, DE # 1765, at 7:20-8:6.

¹² HarbourVest Settlement Order, DE # 1788.

and (c) be allowed a subordinated, general unsecured claim against the Debtor in the amount of \$35 million. The HarbourVest Settlement was essentially a rescission of the investment HarbourVest had made in HCLOF and also provided HarbourVest allowed, reduced claims against Highland in settlement of its alleged \$300 million of damages.

The HarbourVest Settlement Order was appealed by the Dondero Family Trusts, with notice of the appeal being filed in the Bankruptcy Court on February 5, 2021. The Dondero Family Trusts argue on appeal that the Debtor overpaid for the HCLOF interests, and the HarbourVest Settlement was an attempt to gerrymander the Debtor's plan and purchase votes. No stay pending appeal has been approved and the HarbourVest Settlement was implemented. The appeal remains pending before Judge Sam Lindsay in the District Court.¹³

On April 12, 2021, the Plaintiffs, DAF and CLO Holdco, filed the Complaint initiating this Adversary Proceeding in the District Court. The action was assigned to Judge Jane Boyle. *The subject matter of the Adversary Proceeding is entirely centered around the bona fides and permissibility of aspects of the HarbourVest Settlement.* Despite the full vetting in the Bankruptcy Court of the HarbourVest Settlement and an order approving the HarbourVest Settlement—which, by the way, was not appealed by Plaintiffs DAF or CLO Holdco—various torts and other causes of action are now being alleged by DAF and CLO Holdco against the Debtor *relating entirely to the HarbourVest Settlement.* As earlier alluded to, the Complaint raises claims that Highland, while a debtor-in-possession, committed: (1) breach of fiduciary duties to the Plaintiffs; (2) breach of the HCLOF Members Agreement; (3) negligence; (4) RICO violations; and (5) tortious interference.

¹³ Case No. 3:21-cv-00261-L.

On September 20, 2021, Judge Boyle issued an Order of Reference¹⁴ referring this action to be adjudicated as an adversary proceeding related to the Bankruptcy Case, pursuant **28 U.S.C. § 157** and the Standing Order of Reference of Bankruptcy Cases and Proceedings (Misc. Rule No. 33), for the Northern District of Texas, dated August 3, 1984. Thus, the Complaint is now pending before the Bankruptcy Court.

In its claim for breach of fiduciary duty (**Count 1**), Plaintiffs allege that the Debtor violated its “broad” duties to Plaintiffs under the “Investment Advisers Act of 1940” and the Debtor’s “internal policies and procedures” by: (i) engaging in “insider trading with HarbourVest”; (ii) “concealing” the value of the HarbourVest interest; and (iii) “diverting” the investment opportunity in the HarbourVest entities to the Debtor without offering it to Plaintiffs.

In support of its claim for breach of the HCLOF Members Agreement (**Count 2**), Plaintiffs allege that the Debtor breached the “Right of First Refusal” provision therein, by diverting the investment opportunity away from CLO Holdco to the Debtor.

In its negligence claim (**Count 3**), Plaintiffs assert that the Debtor’s actions violated the HCLOF Members Agreement and the Debtor’s internal policies by failing to accurately calculate the HCLOF interests and failing to give Plaintiffs the Right of First Refusal to purchase the interests.

In their RICO Claim (**Count 4**), Plaintiffs allege that Defendant Highland and two affiliated entities were an “association-in-fact” engaged in a pattern of racketeering activity for this same underlying conduct; namely, failing to disclose the valuation of HCLOF’s interest and, ultimately, effectuating the HarbourVest Settlement.

¹⁴ District Court Order of Reference, DE # 64 in the AP.

Finally, Plaintiffs' tortious interference claim (**Count 5**) is premised on the Debtor's alleged interference with Plaintiff's "Right of First Refusal" under the Members Agreement.

Highland, in response to the Complaint, filed its Motion to Dismiss on May 27, 2021. In the Motion to Dismiss, Highland argues that, based on the previous HarbourVest Settlement contested proceeding, the Plaintiffs' claims are precluded or barred by the doctrines of res judicata, collateral estoppel,¹⁵ and judicial estoppel. Alternatively, Highland also alleges that each of the claims in the Complaint should be dismissed for failing to sufficiently state claims for relief under Rule 12(b)(6). The Motion to Dismiss seeks to have the Complaint dismissed in its entirety.

The Bankruptcy Court held a hearing on Highland's Motion to Dismiss the Adversary Proceeding now before the court. At the conclusion of the Motion to Dismiss hearing, the court took the matter under advisement.

III. Legal Analysis

A. Jurisdiction and Authority

Bankruptcy subject matter jurisdiction exists in this matter, pursuant to 28 U.S.C. § 1334(b). This Adversary Proceeding is, at a minimum, "related to" the Highland Bankruptcy Case. Moreover, it "arises in" a bankruptcy case (making it "core"), in that a claim is being asserted against a debtor (which was not yet a "reorganized debtor" at the time the action was filed) and involves actions of a debtor-in-possession in administering its case. It involves orders of this Bankruptcy Court and activities and litigation over which the Bankruptcy Court presided. This Bankruptcy Court has authority to exercise bankruptcy subject matter jurisdiction here, pursuant to 28 U.S.C. § 157(a) and (b)(2)(A), (B), and (O), and the Standing Order of Reference of

¹⁵ The court notes that Highland, in the Brief in Support of the Motion to Dismiss, lists collateral estoppel, in its summary of arguments, as grounds for dismissal of the Complaint. However, nowhere else is collateral estoppel mentioned within the Motion to Dismiss and Brief in Support. Rather, Highland focuses only on res judicata and judicial estoppel.

Bankruptcy Cases and Proceedings (Misc. Rule No. 33), for the Northern District of Texas, dated August 3, 1984. The case was referred to the Bankruptcy Court by the District Court and there are no pending motions to withdraw the reference.

B. Legal Standard

To survive a motion to dismiss pursuant to Rule 12(b)(6), a plaintiff must plead “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009). “The plausibility standard is not akin to a ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted unlawfully.” *Id.* “Where a complaint pleads facts that are ‘merely consistent with’ a defendant’s liability, it ‘stops short of the line between possibility and plausibility of entitlement to relief.’” *Id.* Dismissal is proper under Rule 12(b)(6) when, taking the facts alleged in the complaint as true, it appears that the plaintiff “cannot prove any set of facts that would entitle it to the relief it seeks.” *C.C. Port, Ltd. v. Davis-Penn Mortg. Co.*, 61 F.3d 288, 289 (5th Cir. 1995). The court may take judicial notice of matters of public record when considering a motion to dismiss for failure to state a claim. *See T.L. Dallas (Special Risks), Ltd.*, 2008 WL 7627807, at *2; *Cade*, 2001 WL 1012251, at *2.

C. Res Judicata

The first preclusion doctrine argued by Highland in its Motion to Dismiss is res judicata.¹⁶ Res judicata, otherwise known as “claim preclusion,” literally means “the thing has been decided.”

¹⁶ As mentioned earlier, there is a pending appeal of the HarbourVest Settlement Order. This fact is irrelevant for purposes of Highland’s preclusion arguments. The federal rule and the rule in this circuit is that, *despite an appeal, final orders of a court still maintain full force and effect for res judicata and collateral estoppel purposes until reversed on appeal*. *Fid. Standard Life Ins. Co. v. First Nat’l Bank & Trust Co.*, 510 F.2d 272, 273 (5th Cir.1975)

“Though it is not often the case, a finding of res judicata is appropriate on a motion to dismiss when the res judicata bar is apparent from the face of the pleadings and judicially noticed facts.” *See Wade v. Household Fin. Corp. III*, No. 1:18-CV-570-RP, [2019 WL 433741](#), at *2 (W.D. Tex. Feb. 1, 2019). “Under res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action.” *Allen v. McCurry*, [449 U.S. 90, 94](#) (1980). The elements of res judicata are: “(1) the parties are identical or at least in privity; (2) the judgment in the prior action was rendered by a court of competent jurisdiction; (3) the prior action was concluded by a final judgment on the merits; and (4) the same claim or cause of action was involved in both suits.” *Comer v. Murphy Oil USA, Inc.*, [718 F.3d 460, 466](#) (5th Cir. 2013) (quoting *Test Masters Educ. Services, Inc. v. Singh*, [428 F.3d 559, 571](#) (5th Cir. 2005)). Dismissal under Rule 12(b)(6) is proper if the elements of res judicata are apparent based on the facts pleaded and judicially noticed. *See Hall v. Hodgkins*, [305 F. Appx. 224, 227–28](#) (5th Cir. 2008); *Mitchell v. Ocwen Loan Servicing, LLC*, No. 4:18-cv-00820-P, [2019 WL 5647599](#), at *3 (N.D. Tex. 2019). The fourth element of res judicata can be met where a claim or cause of action relates to the same “transaction, or series of transactions, out of which the [original] action arose.” *Ries v. Paige (In re Paige)*, [610 F.3d 865, 872](#) (5th Cir. 2010). “When applying this test, the primary question is whether the lawsuits were based on ‘the same nucleus of operative fact,’ regardless of the relief requested, or the claims brought. *Wade*, [2019 WL 433741](#), at *3.

Highland argues that, when taking judicial notice of the docket created in connection with the HarbourVest Settlement, it is apparent that the four elements of res judicata are met: (1) CLO

(“[a] case pending appeal is res judicata and entitled to full faith and credit unless and until reversed on appeal”); *S. Pac. Commc'ns Co. v. Am. Tel. & Tel. Co.*, [740 F.2d 1011, 1018](#) (D.C. Cir. 1984) (“[w]e note that the federal rule and the rule in this circuit is that collateral estoppel may be applied to a trial court finding even while the judgment is pending on appeal”); *see Huron Holding Corp. v. Lincoln Mine Operating Co.*, 312 U.S. 183, 189 (1941) (“To the same effect, in the federal courts the general rule has long been recognized that while an appeal with proper supersedeas stays execution of the judgment, it does not—until and unless reversed—detract from its decisiveness and finality”).

Holdco objected to the HarbourVest Settlement, and the DAF is in privity with CLO Holdco as its 100% parent; (2) the Bankruptcy Court was a court of competent jurisdiction over the HarbourVest Settlement; (3) the Bankruptcy Court entered a final order based upon the merits of the HarbourVest Settlement; and (4) the claims or causes of action arise out of the same “common nucleus of operative facts” as those raised at the HarbourVest Settlement hearing.

To be clear, Highland argues the fourth element of res judicata is met because the claims brought by the Plaintiffs in the Complaint are substantially similar to, and arise from the very same facts, as those allegations that the Plaintiffs put forth during the Bankruptcy Court hearing on the HarbourVest Settlement. In connection with the HarbourVest Settlement, Plaintiff CLO Holdco argued to the Bankruptcy Court that the Debtor: (i) violated the HCLOF Members Agreement by failing to offer such interests to Plaintiffs pursuant to a “Right of First Refusal” provision; and (ii) diverted the investment opportunity to the Debtor without offering it to Plaintiffs. And the other objectors (*i.e.*, the Dondero Family Trusts) argued to the Bankruptcy Court that the Debtor did not accurately value the HCLOF 49.98% interest that was being transferred by HarbourVest back to the Debtor. The Bankruptcy Court overruled all of these arguments.

This court agrees that the claims being brought in the Adversary Proceeding arise from the same “transaction or series of transactions” and are based on the “same nucleus of operative facts” as were litigated and adjudicated in the Bankruptcy Court in connection with the HarbourVest Settlement. The allegations take the form of causes of action for breach of fiduciary duties, breach of contract, RICO violations, and tort claims, but ***all include the very same underlying factual allegations as articulated in connection with the HarbourVest Settlement.***

However, while this court agrees with Highland that CLO Holdco’s claims arise from “the same common nucleus of operative fact” as the HarbourVest Settlement, this is not the end of the

court's analysis. "Even if the two actions are the same under the transactional test, res judicata does not bar this action unless" the Plaintiffs "could and should have" brought the claims in the Complaint in the prior proceeding. *Osherow v. Ernst & Young (In re Intelogic, Inc.)*, 200 F.3d 382, 388 (5th Cir. 2000). The Fifth Circuit has recognized procedural differences between contested matters under Bankruptcy Rule 9014, such as the HarbourVest Settlement hearing, and adversary proceedings. The Fifth Circuit noted that "[c]ounterclaims are only compulsory in 'adversary proceedings,'" as Bankruptcy Rule 7013 (which adopts Federal Rule of Civil Procedure 13) does not automatically apply to "contested matters" under Bankruptcy Rule 9014. *D-1 Enterprises, Inc. v. Commercial State Bank*, 864 F.2d 36, 39 (5th Cir. 1989). The Fifth Circuit proceeded to suggest, under the "quick motion-and hearing style" of contested matters, a party is not required, or even allowed, to bring all of its claims. *Howe v. Vaughn (Matter of Howe)*, 913 F.2d 1138, 1146 (5th Cir. 1990). The Fifth Circuit clarified that, whether the earlier proceeding that is being suggested as holding res judicata effect is a contested matter or an adversary is not dispositive; rather, it is a factor in determining whether the claim at issue could or should have been effectively litigated in the earlier proceeding. *See id.* at 1146 n.28; *see also Osherow*, 200 F.3d at 388 (the court weighed "whether the bankruptcy court possessed procedural mechanisms that would have allowed" the party to assert claims in the prior contested matter).

It is important to note that the Fifth Circuit has found, on numerous occasions in which the prior proceeding was a contested matter, versus an adversary proceeding, that res judicata still applied. *See, e.g., Osherow*, 200 F.3d at 388-91 (finding res judicata applied to malpractice claims that could have been asserted at a fee hearing); *In re Baudoin*, 981 F.2d 736, 744 (5th Cir. 1993) (ruling that res judicata barred lender liability claims based on loans that had been deemed allowed claims without objection in a previous bankruptcy); *Eubanks v. FDIC*, 977 F.2d 166, 174 (5th Cir.

1992) (barring a lender liability action which could have and should have been brought as an objection to the lender's claim in a prior bankruptcy proceeding); *Southmark Properties v. Charles House Corp.*, 742 F.2d 862, 869 (5th Cir. 1984) (applying res judicata to bar a claim that could have been raised as an objection to a claim asserted in a previous bankruptcy reorganization). These opinions came in the context of a cause of action not being asserted to contest a proof of claim in a bankruptcy case. The Fifth Circuit found that objections to claims in the bankruptcy process, generally contested matters, provide procedural mechanisms to bring a claim for affirmative relief under Bankruptcy Rule 3007, which allows the claim objection to be converted to an adversary proceeding.¹⁷ *Osherow*, 200 F.3d at 389-90.

But here, the Bankruptcy Court concludes that the Plaintiffs were not provided with procedural mechanisms needed in order to bring their causes of action in the Complaint during the HarbourVest Settlement contested matter. Despite the “transactional test” being met through a finding that the claims stem from “the same nucleus of operative facts,” the procedures of Bankruptcy Rule 9014 do not allow for claims of affirmative relief—whether it be RICO violations, breach of contract, breach of fiduciary duties, or tort claims—to be asserted in response to a Bankruptcy Rule 9019 motion to compromise a controversy. The Fifth Circuit has not addressed procedural mechanisms supporting res judicata in the context of a Bankruptcy Rule 9019 motion to compromise a controversy, where the bankruptcy court is limited to determining whether or not to “approve a compromise or settlement.” See *Fed. R. Bankr. P. 9019(a)*. Unlike in the context of claim objections, mentioned above, where counterclaims can allow the claim objection to be converted through Bankruptcy Rule 3007 to an adversary proceeding, such causes

¹⁷ The court in *Osherow* went on to find that Bankruptcy Rule 9014 gives discretion to the bankruptcy court to allow other rules in Part VII of the Bankruptcy Rules to apply to contested matters. In that case, it suggested the bankruptcy court could have stayed the proceedings and allowed discovery to be commenced under the Part VII Rules to develop the affirmative causes of action to raise in the claim objection.

of action have no mechanism to exist in the context of a Bankruptcy Rule 9019 motion. The bankruptcy court is limited to granting or denying a proposed settlement as relief in ruling on a Bankruptcy Rule 9019 motion—regardless of its findings on issues that may also serve for the foundation of the causes of action asserted in the subsequent hearing (*but see* “**Collateral Estoppel**” discussion below). Procedurally, this would not allow the subsequent causes of action to ever be raised, if res judicata were to apply to a contested matter under Bankruptcy Rule 9019, which does not allow for the assertion of counterclaims or other forms of affirmative relief.

Thus, the court finds that the Plaintiffs were not given the procedural mechanisms to bring the causes of action asserted in the Complaint during the pendency of the HarbourVest Settlement contested matter. The court finds that res judicata does not apply as a doctrine to preclude the claims asserted by the Plaintiffs in the Complaint.

D. Collateral Estoppel

On the contrary, collateral estoppel *does* have applicability here. Arguments potentially relevant to the collateral estoppel doctrine were made by the parties in their pleadings and at the hearing on the Motion to Dismiss (phrased in terms of res judicata), but collateral estoppel *per se* was not addressed independently.¹⁸ The Bankruptcy Court now addresses collateral estoppel *sua sponte*. Raising preclusion doctrines *sua sponte* is in the interest of judicial economy and is appropriate, especially where both actions are before the same court. *See Carbonell v. La. Dep't of Health & Human Res.*, 772 F.2d 185, 189 (5th Cir. 1985).

To be clear, “res judicata encompasses two separate, but linked, preclusive doctrines: (1) true res judicata or claim preclusion and (2) collateral estoppel or issue preclusion.” *Hous. Profl Towing Ass'n v. City of Hous.*, 812 F.3d 443, 447 (5th Cir. 2016) (quoting *Comer v. Murphy Oil*

¹⁸ As mentioned at footnote 15, Highland did make a passing reference to the collateral estoppel doctrine in its Brief in Support of its Motion to Dismiss.

USA, Inc., 718 F.3d 460, 466–67 (5th Cir. 2013)). Thus, while res judicata precludes relitigating claims or causes of action that were or could have been previously litigated in a prior action, collateral estoppel is referred to as “issue preclusion” and prevents relitigating the same **issues or facts** decided in a prior proceeding. Collateral estoppel precludes only the relitigation of issues or facts **actually litigated** in the original action, whether or not the second suit is based on the same cause of action. *Moch v. East Baton Rouge Parish School Board*, 548 F.2d 594, 596 (5th Cir. 1977). “[A] **right, question, or fact distinctly put in issue and directly determined** as a ground of recovery by a court of competent jurisdiction collaterally estops a party ... from relitigating the issue in a subsequent action,” if the party had reasonable notice and an opportunity to be heard against the claim. *Hardy v. Johns–Manville Sales Corp.*, 681 F.2d 334, 338 (5th Cir. 1982) (emphasis added). “Collateral estoppel applies when, in the initial litigation, (1) the issue at stake in the pending litigation is the same, (2) the issue was actually litigated, and (3) the determination of the issue in the initial litigation was a necessary part of the judgment.” *Harvey Specialty & Supply, Inc. v. Anson Flowline Equip. Inc.*, 434 F.3d 320, 323 (5th Cir. 2005). Each condition must be met in order for collateral estoppel to apply. “Collateral estoppel will apply in a second proceeding that involves separate claims if the claims involve the same issue . . . and the subject matter of the suits may be different as long as the requirements for collateral estoppel are met.” *In re Devoll*, No. 15-50122-CAG, 2015 WL 9460110, at *3 (Bankr. W.D. Tex. Dec. 23, 2015) (citation omitted).

So were each of these three collateral estoppel factors met? Were the **same** facts or issues **actually litigated** and was a determination of these facts and issues a **necessary part** of approving the HarbourVest Settlement? The Plaintiffs argued, in their response to the Motion to Dismiss, that the Bankruptcy Court did not resolve anything on the merits other than the approval of a

settlement, and that was done solely using its discretion to approve a settlement. The court thinks that this is a mischaracterization of the court's role in approving the HarbourVest Settlement.

In considering a proposed compromise and settlement agreement, a bankruptcy court must determine whether it is "fair and equitable." *Matter of Jackson Brewing*, 624 F.2d 599, 602 (5th Cir. 1980); *United States v. AWECO, Inc. (In re AWECO)*, 725 F.2d 293, 298 (5th Cir. 1984), cert. denied 105 S. Ct. 244 (1984). A bankruptcy court applies a three-part test set out in *Jackson Brewing* with a focus on comparing "the terms of the compromise with the likely rewards of litigation." A bankruptcy court must evaluate: (1) the probability of success in litigating the claim subject to settlement, with due consideration for the uncertainty in fact and law; (2) the complexity and likely duration of litigation and any attendant expense, inconvenience, and delay; and (3) all other factors bearing on the wisdom of the compromise. These "other" factors—sometimes called the *Foster Mortgage* factors¹⁹—include: (i) "the best interests of the creditors, 'with proper deference to their reasonable views'"; and (ii) "'the extent to which the settlement is truly the product of arms-length bargaining, and not of fraud or collusion.'" *Official Comm. of Unsecured Creditors v. Moeller (In re Age Ref., Inc.)*, 801 F.3d 530, 540 (5th Cir. 2015) (citations omitted).

In connection with evaluating the HarbourVest Settlement and whether it was "fair and equitable" and in the "best interests of creditors," and whether it was the "product of arms-length bargaining, and not of fraud or collusion," the Bankruptcy Court held a multi-hour hearing that included lengthy direct and cross-examination of multiple witnesses and documentary evidence. The Bankruptcy Court was required to "appraise [itself] of the relevant facts and law so that [it could] make an informed and intelligent decision." See *In re Cajun Elec. Power Coop.*, 119 F.3d 349, 356 (5th Cir. 1997). The hearing included considering the arguments and evidence regarding

¹⁹ *Connecticut Gen. Life Ins. v. United Cos. Fin. Corp. (In re Foster Mortgage Co.)*, 68 F.3d 914 (5th Cir. 1995).

the methodology for the valuation of the HCLOF interest and the existence or non-existence of a “Right of First Refusal.” The court heard credible testimony on, among other things, the value of the HCLOF interests from Mr. Seery and Mr. Pugatch. Both witnesses were subject to cross examination. The court heard how the value of the HCLOF interests plummeted nearly \$50 million, which was caused, at least in part, by the litigation strategies taken by Highland while it was still under the control of Mr. Dondero.²⁰ The Plaintiffs allege in the Complaint that Mr. Seery’s \$22.5 million value of the HCLOF interest was baseless. The Plaintiffs believed the interests had a net asset value (“NAV”) of at least \$34.5 million on November 30, 2020, and a value of \$41.75 million on December 31, 2020, leading up to the HarbourVest Settlement hearing. Further, the Plaintiffs allege in the Complaint that Mr. Seery was receiving insider information from Mr. Dondero in December 2020 regarding the HCLOF interests and used improper valuation methods. But, for whatever reason, the Plaintiffs decided not to ask questions of Mr. Seery at the hearing or further challenge Mr. Seery’s source or method of valuation for the HCLOF interests at the hearing.²¹ The allegations in the Complaint surrounding Mr. Seery’s method for valuation of the HCLOF interests were discoverable at the time of the HarbourVest Settlement hearing and directly relevant to the Bankruptcy Court’s analysis in approving the HarbourVest Settlement. The Bankruptcy Court found the testimony elicited from Mr. Seery by Highland and the objectors to be credible in ultimately finding a \$22.5 million value of the HCLOF interests was reasonable.

²⁰ Transcript of Hearing Held 1/14/2021, DE # 1765, at 96:20-97:24.

²¹ Mr. Dondero and CLO Holdco appeared at and examined the HarbourVest witness, Mr. Pugatch, at a deposition before the hearing on the HarbourVest Settlement. Declaration of John Morris, Exhs. 7 & 8 thereto [DE # 2237]. Moreover, it is rather astounding to this court for anyone to suggest that any human being (Mr. Seery or anyone else) knew more, or withheld, any information that wasn’t well known to Mr. Dondero and all principals/agents of DAF and CLO Holdco. Mr. Dondero and any personnel associated with DAF and CLO Holdco should have been as (or more) familiar with HCLOF’s assets and their potential value than any human beings on the planet—having managed these assets for years.

While a bankruptcy court does not delve into the merits of every possible claim that is waived or compromised through a settlement, here, (a) *consideration of the value that the estate was both receiving and paying*, as well as (b) the potential existence of a “Right of First Refusal” that might have prohibited the Transfer contemplated in the HarbourVest Settlement, were very much a focus of the hearing on the HarbourVest Settlement. These are the very same issues that are the gravamen of the Plaintiffs’ Complaint. They were very much “actually litigated.” The Bankruptcy Court would never have approved the HarbourVest Settlement if it thought the value being exchanged was not fair, or if it thought the HCLOF Interests could not be transferred and that someone might later sue the Debtor, claiming the Transfer was improper. All parties had the chance to argue and present evidence about this. The Bankruptcy Court made a ruling based on the evidence and argument.

Further, the Bankruptcy Court included in the HarbourVest Settlement Order language to specifically avoid any future assertions or litigation as to whether a “Right of First Refusal” prevented the transfer of HCLOF interests to Highland or a Highland designee/subsidiary:

Pursuant to the express terms of the *Members Agreement Relating to the Company*, dated November 15, 2017, ***HarbourVest is authorized to transfer its interests in HCLOF to a wholly-owned and controlled subsidiary of the Debtor*** pursuant to the terms of the *Transfer Agreement for Ordinary Shares of Highland CLO Funding, Ltd. without the need to obtain the consent of any party or to offer such interests first to any other investor in HCLOF.* (Emphasis added.)

The court included this express language to document its finding that no “Right of First Refusal” was enforceable under the HCLOF Members Agreement based on the court’s analysis of the underlying agreements, as well as representations made by CLO Holdco that it was withdrawing its objection (that was wholly based on the alleged “Right of First Refusal”). A possible “Right of First Refusal” was fully briefed by the Debtor and CLO Holdco (with whom the DAF is in privity,

as its 100% parent), and the merits of such was fully considered by this court in approving the HarbourVest Settlement.

Despite this court's conclusion that res judicata does not apply here because procedural mechanisms did not allow an assertion of causes of action in the context of a Bankruptcy Rule 9019 settlement, *no barrier prevented the Plaintiffs from fully litigating the issues, rights, and facts at the HarbourVest Settlement hearing that form the gravamen of the Complaint*. While the causes of action in the Complaint could not be brought in connection with the HarbourVest Settlement contested matter, the issues and facts underlying the causes of action in the Complaint were fully litigated and ruled on in connection with the HarbourVest Settlement. Those issues were raised in objections and subject to witness testimony at the HarbourVest Settlement hearing and were the primary considerations that had to be evaluated for the Bankruptcy Court to approve of the HarbourVest Settlement. The Complaint fails to allege any facts independent of: (a) an improper valuation by Mr. Seery or (b) a failure by Highland to honor a "Right of First Refusal" in favor of CLO Holdco to support relief under its causes of action. Count 1 in the Complaint alleges that Highland breached a fiduciary duty to the Plaintiffs through diverting a corporate opportunity by not *first offering* the HCLOF interests to the Plaintiffs. While labeled as a claim for a "breach of fiduciary" duty, as opposed to a "breach of contract," the arguments are the same. Both counts argue that the HCLOF interests should have been offered to the Plaintiffs who held a superior right to purchase the interests. Again, this argument was presented in CLO Holdco's objection to the HarbourVest Settlement, which was withdrawn by CLO Holdco during the hearing. The Plaintiffs do not get a second bite of the apple at litigating a purported superior right, by dressing it up as different cause of action, when the issue at stake has already been litigated. Thus, both the HarbourVest Settlement and Complaint involve the same issues.

In summary, the first and second elements of collateral estoppel are met. The issues of valuation and a “Right of First Refusal” were one and the same as those articulated in the Complaint and were “actually litigated” in connection with the HarbourVest Settlement.

Going through the third prong of collateral estoppel, it is also met. The facts regarding valuation of the HCLOF interests and whether Highland was required to offer the HarbourVest’s HCLOF interests to CLO Holdco were very much *necessary* or *essential* to the Bankruptcy Court’s ruling approving the HarbourVest Settlement. The Bankruptcy Court was required to consider the value of the HCLOF interests to determine whether the consideration the estate was receiving in the compromise was fair and equitable. Further, the court noted at the settlement hearing that the “Right of First Refusal” was one of the “major arguments” in connection with the HarbourVest Settlement and the court included language in the HarbourVest Settlement Order specifically finding no such right existed. The court would not have approved the HarbourVest Settlement if it thought that it could not be accomplished or would result in Highland later being sued. This would not have been in the best interests of the estate. Thus, the HCLOF interest valuation and the ability or propriety of Highland transferring the HCLOF interest were “a necessary part of the judgment.”

Further, the Plaintiffs do not dispute CLO Holdco is in privity with DAF, as DAF is the parent and controlling entity of CLO Holdco. Instead, CLO Holdco argues that it somehow was not a party to the ongoing dispute between Highland and HarbourVest that led to the HarbourVest Settlement (although it was allowed to file objections and take discovery).

Bankruptcy is a collective proceeding that allows creditors to object and raise any argument they think the court should consider that bear on the wisdom of the compromise. Generally, for a party to be bound by orders issued by the bankruptcy court, the party must receive adequate notice of the proceedings for due process reasons. *In re Reagor-Dykes Motors, LP*, 613 B.R. 878, 885

(Bankr. N.D. Tex. 2020); *In re Grumman Olson Indus., Inc.*, 467 B.R. 694, 706 (S.D.N.Y. 2012); *see also Richards v. Jefferson Cty., Ala.*, 517 U.S. 793, 799, 116 S.Ct. 1761, 135 L.Ed.2d 76 (1996) (“Additionally, where a special remedial scheme exists expressly foreclosing successive litigation by nonlitigants, as for example in bankruptcy or probate, legal proceedings may terminate pre-existing rights if the scheme is otherwise consistent with due process.”). The Bankruptcy Rules and bankruptcy jurisprudence provide for due process protection for settlements under Rule 9019(a) by requiring that a debtor in possession give creditors and parties in interest “adequate notice and opportunity to be heard before their interests may be adversely affected.” *In re Reagor-Dykes Motors*, 613 B.R. at 885 (citing *W. Auto Supply Co. v. Savage Arms, Inc. (In re Savage Indus., Inc.)*, 43 F.3d 714, 720 (1st Cir. 1994)). Rule 9019(a) further protects interested parties “[b]y requiring court approval following a hearing before any compromise or settlement may be enforced” to ensure a transparent settlement process and provide “other creditors an opportunity to voice their concerns.” *In re Reagor-Dykes Motors, LP*, 613 B.R. at 886 (citing *In re Big Apple Volkswagen, LLC*, 571 B.R. 43, 57 (S.D.N.Y. 2017)). The Plaintiffs were properly noticed, as well as appeared and participated, in the Rule 9019 process.

Thus, the court concludes all three elements of collateral estoppel are met with regard to the fact issues of value of the HCLOF interests and any “Right of First Refusal” (and the ability/propriety of transferring the HCLOF interests). ***All of the causes of action in the Complaint (Counts 1-5) revolve around these two issues that were previously fully litigated.*** Thus, all causes of action asserted in the Complaint are precluded by the doctrine of collateral estoppel.

E. Judicial Estoppel

The final preclusion doctrine, asserted by Highland, is judicial estoppel. Judicial estoppel is “a common law doctrine by which a party who has assumed one position in [their] pleadings may be estopped from assuming an inconsistent position.” *Brandon v. Interfirst Corp.*, 858 F.2d 266, 268 (5th Cir. 1988). The doctrine is made “to protect the integrity of the judicial process” by “prevent[ing] parties from playing fast and loose with the courts to suit the exigencies of self interest.” *Id.* “[A] party cannot advance one argument and then, for convenience or gamesmanship after that argument has served its purpose, advance a different and inconsistent argument.” *Hotard v. State Farm Fire & Cas. Co.*, 286 F.3d 814, 818 (5th Cir. 2002). “Statements made in a previous suit by an attorney before the court can be imputed to a party and subject to judicial estoppel.” *Hall v. GE Plastic Pacific PTE Ltd.*, 327 F.3d 391, 396 (5th Cir. 2003). In order for a party to be estopped, two elements must be satisfied: (1) it must be shown “the position of the party to be estopped is clearly inconsistent with its previous one; and (2) that party must have convinced the court to accept that previous position. *In re Coastal Plains Inc.*, 179 F.3d 197, 206 (5th Cir. 1999).

The Plaintiffs argue, first, that withdrawing an objection and then raising the same argument later is not taking an “inconsistent position.” Second, the Plaintiffs argue that, since the HarbourVest Settlement was approved and the objection was *unsuccessful*, CLO Holdco could not “have convinced the court to accept that previous position.”

Highland argues that CLO Holdco’s withdrawal of its objection at the HarbourVest hearing, that was premised on a “Right of First Refusal” under the HCLOF Members Agreement, is, in fact, directly at odds with the Complaint, which asserts claims for violations of the same “Right of First Refusal.” Further, Highland argues that the Bankruptcy Court, in ruling on the HarbourVest Settlement, relied on the withdrawal of that objection—noting that the withdrawal “eliminate[d] one of the major arguments” being heard in connection with the HarbourVest

Settlement. Highland cites Fifth Circuit authority noting that the “judicial acceptance” requirement does not mean that the party against whom the judicial estoppel doctrine is to be invoked must have prevailed on the merits.” *Hall*, 327 F.3d at 398.

Here, the court believes that the first prong of judicial estoppel is met. At the HarbourVest Settlement hearing, CLO Holdco withdrew its objection, stating that it had determined it had no “Right of First Refusal,” based on its “interpretation of the member agreement.” Now Plaintiffs claim in their Complaint that CLO Holdco’s “Right of First Refusal” was violated by the HarbourVest Settlement. These positions are clearly inconsistent. If that weren’t enough, when asked by Debtor’s counsel at the HarbourVest Settlement hearing to enter a stipulation reflecting the HarbourVest Settlement was compliant with all applicable agreements between CLO Holdco and the Debtor, counsel for CLO Holdco stated: “I’m not going to enter into a stipulation on behalf of my client, but *the Debtor is compliant with all aspects of the contract*. We withdrew our objection, and we believe that’s sufficient.”²² This statement cannot conceivably coexist with the current assertion of a “Right of First Refusal.” Moreover, to the extent Plaintiffs argue that CLO Holdco merely withdrew an objection pertaining to an alleged “Right of First Refusal” *in the HCLOF Members Agreement* (and not an objection arguing that Highland had some non-contractual obligation to offer the HarbourVest Interest to CLO Holdco first, based on “fiduciary duty” concepts), this is “no more than ineffectual hair splitting.” *See Systems. Ahrens v. Perot Sys. Corp.*, 39 F.Supp.2d 773, 778 (N.D.Tex.1999) (in response to plaintiffs arguing a position taken in one suit could coexist with a position taken in a subsequent suit, despite each position being non-qualified, unconditional statements). It would seem to be the classic example of playing fast and loose with the court.

²² Transcript of Hearing Held 1/14/2021, DE # 1765, at 17:24-18:16 (emphasis added).

The court also believes that the second prong of judicial estoppel is met. The Fifth Circuit has held that judicial estoppel may be applied whenever a party makes an argument “with the explicit intent to induce the district court’s reliance.” *Hidden Oaks Ltd. v. City of Austin*, 138 F.3d 1036, 1047 (5th Cir. 1998). Further, the success requirement is satisfied when a court “necessarily accepted, and relied on” a party’s position in making a determination. *Ahrens v. Perot Systems Corporation*, 205 F.3d 831, 836 (5th Cir. 2000). Here, while the Plaintiffs did not succeed in stopping the approval of the HarbourVest Settlement, that is not the proper inquiry. Instead, what matters is that the Bankruptcy Court carefully considered CLO Holdco’s “Right of First Refusal” argument set out in its lengthy, written objection to the HarbourVest Settlement and perceived it as one of the major arguments that was relevant to the HarbourVest Settlement. At the HarbourVest Settlement hearing, the Plaintiffs stated: “CLO Holdco has had an opportunity to review the reply briefing, and after doing so has gone back and scrubbed the HCLOF corporate documents. Based on our analysis of Guernsey law and some of the arguments of counsel in those pleadings and our review of the appropriate documents, I obtained authority from my client, Grant Scott, as Trustee for CLO Holdco, to withdraw the CLO Holdco objection based on the interpretation of the member agreement.”²³ The Bankruptcy Court relied upon that withdrawal of CLO Holdco’s objection in making the determination to approve of the HarbourVest Settlement and, specifically, that Highland would not be running afoul of any obligation in entering into the HarbourVest Settlement. There is no question that, by withdrawing the objection, CLO Holdco caused the court to rely upon its withdrawal in making such determination. Thus, the Plaintiffs “convinced the court to accept that previous position.”

²³ *Id.* at 7:24-8:6.

The Bankruptcy Court concludes both elements of judicial estoppel are met. Counts 2 and 5 of the Complaint are based solely upon a “Right of First Refusal” under the HCLOF Members Agreement. Thus, judicial estoppel bars Counts 2 and 5 of the Complaint.

IV. Conclusion

Based upon the facts alleged in the Complaint, the judicially noticed docket entries from the HarbourVest Settlement, and the arguments presented to the court, the court rules that, together, collateral estoppel and judicial estoppel preclude all claims brought in the Complaint. Therefore, the Motion to Dismiss is **granted** and the Complaint is dismissed in its entirety with prejudice.

Because this court believes the doctrines of collateral estoppel and judicial estoppel bar the claims of the Plaintiffs as a matter of law, the court—for the sake of efficiency and judicial economy—will forego addressing the other arguments of Highland. Specifically, Highland has argued that, even if all of the Plaintiffs’ claims are not barred as a matter of law by preclusion or estoppel theories, Plaintiffs have failed to state plausible claims upon which relief can be granted with regard to the all of counts in the Complaint based on the RICO statute, Breach of Fiduciary Duty, Breach of Contract, Negligence, and Tortious Interference with Contract. While this court is inclined to agree with these arguments, the court will refrain from addressing them until such time as any higher court may instruct this court to address them.

Accordingly, it is

ORDERED that the Motion to Dismiss is **GRANTED** as to all causes of action (Counts 1-5) asserted in the Complaint with prejudice.

###END OF MEMORANDUM OPINION AND ORDER###

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

MOTION TO SUPPLEMENT APPELLATE RECORD

PAGE 1
003666

Currently before the District Court is the appeal of the bankruptcy court's dismissal of the adversary proceeding. One of the bases cited by the bankruptcy court for imposing judicial estoppel is a transcript of a hearing that occurred before the bankruptcy court, on January 14, 2021.¹ In the transcript of that hearing, counsel for the debtor, Mr. Morris, is quoted as stating (in relevant part),

I would respectfully request that we just enter into a short stipulation on the record reflecting that the Debtor's acquisition of Harbourvest's interests in HCLOF is compliant with all of the applicable agreements between the parties.²

Immediately thereafter, prior counsel for CLO Holdco, Ltd., is quoted as responding:

In response to Mr. Morris, I'm not going to enter into a stipulation on behalf of my client, but the Debtor is compliant with all aspects of the contract. We withdrew our objection, and we believe that's sufficient.³

The bankruptcy court's dismissal of the entire adversary on judicial estoppel grounds hinges in on the sentence "but the Debtor is compliant with all aspects of the contract" as a judicial admission which has been contradicted by the filing of the underlying suit.

Undersigned counsel requested the original recording of the hearing to verify the transcription. That recording was delivered on May 25, 2022. The recording makes clear that the word "but" at the beginning of "but the Debtor is compliant with all aspects of the contract" was wrongfully transcribed. The recording makes clear that what Mr. Kane said in actuality was:

In response to Mr. Morris, I'm not going to enter into a stipulation on behalf of my client **that** the Debtor is compliant with all aspects of the contract. We withdrew our objection, and we believe that's sufficient (emphasis added).

¹ See APP_000053.

² APP_001020.

³ Compare APP_000053 (Order) with APP_001020 (Tr. Of Hearing).

It is this correction—seemingly minor, but in the context of the opinion, is of significant consequence—that Appellants ask this for.

Federal Rule of Appellate Procedure 10(e) allows a court to correct a transcription error to ensure that the record accurately reflects what occurred in the lower court:

(e) Correction or Modification of the Record.

(1) If any difference arises about whether the record truly discloses what occurred in the district court, the difference must be submitted to and settled by that court and the record conformed accordingly.

(2) If anything material to either party is omitted from or misstated in the record by error or accident, the omission or misstatement may be corrected and a supplemental record may be certified and forwarded:

(A) on stipulation of the parties;

(B) by the district court before or after the record has been forwarded;
or

(C) by the court of appeals.

FED. R. APP. P. 10(e)(1)-(2)(A).

The bankruptcy court issued a corrected transcript on May 26, 2022. *See In re Highland Capital Management, L.P.*, No. 19-bk-34054, **Docket No. 3348**. Movants respectfully request that this corrected transcript be made part of the appellate record.

Dated: May 26, 2022

Respectfully submitted,

SBAITI & COMPANY PLLC

/s/ Mazin A. Sbaiti

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CERTIFICATE OF CONFERENCE

Undersigned counsel attempted to meet and confer with counsel for the debtor via email on May 25, 2022. Counsel for the debtor related that they would confirm whether they opposed or consented. At the time of preparation of this brief, 6:00 pm on May 26, 2022, we have not heard back. Should they respond we will supplement or amend this certificate.

/s/ Mazin A. Sbaiti

Mazin A. Sbaiti

Amended 05/26/2022

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In Re:) **Case No. 19-34054-sgj-11**
) Chapter 11
)
HIGHLAND CAPITAL) Dallas, Texas
MANAGEMENT, L.P.,) Thursday, January 14, 2021
) 9:30 a.m. Docket
Debtor.)
) - MOTION TO PREPAY LOAN
) [1590]
) - MOTION TO COMPROMISE
) CONTROVERSY [1625]
) - MOTION TO ALLOW CLAIMS OF
) HARBOURVEST [1207]

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE STACEY G.C. JERNIGAN,
UNITED STATES BANKRUPTCY JUDGE.

WEBEX APPEARANCES:

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003670

1	APPEARANCES, cont'd.:
---	-----------------------

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19		UNITED STATES BANKRUPTCY COURT
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		(214) 753-2062

21 Transcribed by: Kathy Rehling
22 311 Paradise Cove
 Shady Shores, TX 76208
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25 Proceedings recorded by electronic sound recording;
transcript produced by transcription service.

1 | DALLAS, TEXAS - JANUARY 14, 2021 - 9:41 A.M.

2 THE CLERK: All rise. The United States Bankruptcy
3 Court for the Northern District of Texas, Dallas Division, is
4 now in session, the Honorable Stacey Jernigan presiding.

5 THE COURT: Good morning. Please be seated. All
6 right. We're a little late getting started because we had
7 lots of reading material for the Court today. All right.
8 This is Judge Jernigan, and we have a couple of Highland
9 settings. The HarbourVest matters are the primary thing we
10 have set today, and then we also have a Debtor's motion
11 pursuant to protocols for authority for Highland Multi-Strat
12 to prepay a loan.

13 All right. Well, let's get a few appearances. First, for
14 the Debtor team, who do we have appearing this morning?

15 MR. POMERANTZ: Good morning, Your Honor. It's Jeff
16 Pomerantz, John Morris, and Greg Demo here on behalf of the
17 Debtor.

18 THE COURT: Okay. Thank you.

19 All right. We have objections on HarbourVest. Who do we
20 have appearing for Mr. Dondero this morning?

21 MR. WILSON: Your Honor, it's John Wilson, and I'm
22 also joined by Michael Lynn, John Bonds, and Bryan Assink.

23 THE COURT: Okay. I'm sorry. Could -- the court
24 reporter does yeoman's work in this case. Let me just make
25 sure we got all three of those names. Say again, Mr. Wilson.

1 MR. WILSON: John Bonds and Michael Lynn and Bryan
2 Assink.

3 THE COURT: Oh, okay. So, see, I thought I heard
4 somebody Wilson in all of that, which was why I was pressing
5 the issue.

6 All right. Is Mr. Dondero present on the video for
7 today's hearing?

8 MR. WILSON: I believe he is, Your Honor.

9 THE COURT: Mr. Dondero, could you confirm that you
10 are out there? (No response.) Okay. My court reporter says
11 he sees the name out there. Is he in your office?

12 MR. WILSON: Your Honor, he is appearing remotely
13 from my office. I'm not sure exactly where he's appearing
14 from.

15 THE COURT: Okay. Well, Mr. Dondero, if you're out
16 there and you're speaking up to confirm you're present, we're
17 not hearing you. Maybe your device is on mute. So please
18 unmute yourself.

19	(No response.)
----	----------------

20 THE COURT: All right. I'm going to take some other
21 appearances and you -- you need to try to communicate with
22 your client and let him know I need to confirm he's present.
23 Okay?

24 All right. Meanwhile, let's go to our other Objectors.

25 CLO Holdco. Who do we have appearing today?

1 MR. KANE: John Kane; Kane Russell Coleman & Logan;
2 on behalf of CLO Holdco.

3 THE COURT: All right. Thank you, Mr. Kane.

4 We had an objection from Dugaboy Investment Trust and Get
5 Good Trust. Who do we have appearing?

6 MR. DRAPER: Douglas Draper, Your Honor, for -- for
7 Draper.

8 THE COURT: All right. Thank you, Mr. Draper.

9 All right. I think those were the only written objections
10 we had. Mr. Pomerantz, do you confirm, we don't have any
11 other objectors for the motions set, correct?

12 MR. POMERANTZ: Your Honor, there was those three.

13 THE COURT: I'm sorry. I didn't catch your full
14 sentence.

15 MR. POMERANTZ: That is correct, Your Honor. There
16 were three objections to the motion.

17 THE COURT: Okay. Mr. Clemente, you're there for the
18 Creditors' Committee?

19 MR. CLEMENTE: Yes. Good morning, Your Honor. Matt
20 Clemente on behalf of the Official Committee of Unsecured
21 Creditors.

22 THE COURT: All right. Good morning. Thank you.
23 All right. We have a lot of other folks on the video. I'm
24 not going to go ahead and take a roll call of other lawyers.

25 MS. WEISGERBER: Your Honor?

1 THE COURT: Yes?

2 MS. WEISGERBER: Excuse me, Your Honor. It's Erica
3 Weisgerber from Debevoise on behalf of HarbourVest.

4 THE COURT: Okay.

5 MS. WEISGERBER: And I'm joined by Natasha Labovitz
6 and Dan Stroik --

7 THE COURT: Okay.

8 MS. WEISGERBER: -- from Debevoise as well.

9 THE COURT: Thank you. I was neglectful in not
10 getting your appearance, because, of course, you're at the
11 front and center of this motion to compromise, and I did see
12 that you filed a reply brief yesterday afternoon. Okay.
13 Thank you.

14 All right. Do we have -- do we have Mr. Dondero on the
15 line? I'm going to check again.

16	(No response.)
----	----------------

17 THE COURT: Mr. Dondero's counsel, I cannot hear you,
18 so please unmute your device.

19 MR. WILSON: Your Honor, it appears to me that Mr.
20 Dondero's device was unmuted as soon as you asked if he was
21 available. I sent him a communication a second ago asking if
22 he's having technical difficulties. I have not received a
23 response, so I --

24 MR. DONDERO: Hello. Can anybody hear me?

25 THE COURT: Oh.

1 MR. WILSON: Okay. I hear him.

2 THE COURT: Mr. Dondero?

3 MR. DONDERO: Hello?

4 THE COURT: Is that you?

5 MR. DONDERO: Yeah, it is. I've been on. I've heard
6 everything since the beginning. It's just we've had technical
7 difficulties. I couldn't use the Highland offices. We've
8 been trying to set up something else.

9 THE COURT: All right.

10 MR. DONDERO: But I'm on now, if -- yes.

11 THE COURT: All right. Very good. Well, I'm glad
12 we've got you.

13 All right. Well, Mr. Pomerantz, how did you want to
14 proceed this morning?

15 MR. POMERANTZ: Your Honor, we could take up the
16 HarbourVest motion first, and I will turn it over to John
17 Morris. He and Greg Demo will be handling that. And then
18 after that we can handle the other motion, which is unopposed.

19 THE COURT: All right. Mr. Morris?

20 MR. KANE: Your Honor, this is -- sorry. This is
21 John Kane for CLO Holdco. Just very briefly, if I may. And
22 this will affect, I think, the Debtor's case in chief, so I'll
23 expedite things a little bit, I believe.

24 CLO Holdco has had an opportunity to review the reply
25 briefing, and after doing so has gone back and scrubbed the

1 HCLC corporate documents. Based on our analysis of Guernsey
2 law and some of the arguments of counsel in those pleadings
3 and our review of the appropriate documents, I obtained
4 authority from my client, Grant Scott, as Trustee for CLO
5 Holdco, to withdraw the CLO Holdco objection based on the
6 interpretation of the member agreement.

7 THE COURT: All right. Well, thank you for that, Mr.
8 Kane. I think that -- that eliminates one of the major
9 arguments that we had anticipated this morning. So, thank you
10 for that.

11 Any other housekeeping matters that maybe someone had that
12 I didn't ask about?

13 MS. MATSUMURA: Yes, Your Honor. This is Rebecca
14 Matsumura from King & Spalding representing Highland CLO
15 Funding, Ltd. I just wanted to put on the record, we -- our
16 client had requested that some of its organizational documents
17 be filed under seal. But we have given permission for the
18 parties to present the relevant excerpts, to the extent it's
19 still relevant after Mr. Kane's announcement, in court. And
20 we'd just ask that the underlying documents remain sealed, but
21 we're not going to object if they show them on a PowerPoint or
22 anything like that.

23 So, to the extent that you had that on your radar, I just
24 wanted to clear that up for the proceedings.

25 THE COURT: All right. Well, I did sign an order

1 | late last night. I don't know if it's popped up on the
2 | docket.

3 MS. MATSUMURA: Yes, Your Honor. That's what this
4 referred to. That was what -- these are the documents that
5 were being sealed. And so I just wanted to note, if you --
6 you know, if the Debtor puts up an excerpt of those documents
7 and you're like, wait a minute, didn't I seal those, that we
8 were the party that requested them be under seal and we're
9 fine with them being shown in court, as long as the underlying
10 documents aren't publicly accessible.

11 THE COURT: Okay. Got you. Thank you.

12 || All right. Any other housekeeping matters?

13 MR. MORRIS: Yes, Your Honor. This is John Morris
14 from Pachulski Stang for the Debtor. Good morning.

15 THE COURT: Good morning.

16 MR. MORRIS: The only other matter that I wanted to
17 raise, and I can do it now or I can do it later, or Your Honor
18 may tell me that it's not appropriate to do at this time, is
19 to schedule the Debtor's motion to hold Mr. Dondero in
20 contempt for violation of the TRO.

21 THE COURT: All right. Well, let's do that at the
22 conclusion today. And please make sure I do it. I think I
23 was going to address this last Friday, and we went very late
24 and it slipped off my radar screen. But I did see from my
25 courtroom deputy that you all were reaching out to her

1 yesterday to get this set, and then Mr. Dondero's counsel
2 reached out to her and said, We're going to file an objection
3 to a setting next Wednesday, or I think you had asked for a
4 setting next Tuesday or Wednesday.

5 MR. MORRIS: I did.

6 THE COURT: And I don't -- I don't know if that
7 response/objection was ever filed last night. I haven't seen
8 it if it was. So, we'll -- please, make sure I don't forget.
9 We'll take that up at the end of today's matters. All right.
10 Well, --

11 MR. MORRIS: All right. So, --

12 MS. WEISGERBER: Your Honor, one last housekeeping
13 item from -- I'm joined this morning by Michael Pugatch of
14 HarbourVest, who will present some testimony this morning. I
15 just want to confirm he's on the line and confirm no
16 objections to him sitting in for the rest of the hearing.

17 THE COURT: All right. Mr. Pugatch, this is Judge
18 Jernigan. Could you respond? Are you there with us?

19 MR. PUGATCH: Yes. Good morning, Your Honor. Mike
20 Pugatch from HarbourVest here.

21 THE COURT: All right. Very good. I think we had
22 you testify once before in the Acis matter, if I'm not
23 mistaken. Maybe. Maybe not. Maybe I saw a video deposition.
24 I can't remember.

25 All right. So, we're going to let Mr. Pugatch sit in on

1 this. Anyone want to say anything about that? I consider him
2 a party representative, so I don't -- I don't think anyone
3 could invoke the Rule.

4 All right. Very good. Well, let's go forward if there
5 are no more housekeeping matters.

6 MR. MORRIS: Okay.

7 THE COURT: Mr. Morris?

8 MR. MORRIS: Thank you. Thank you very much, Your
9 Honor. John Morris; Pachulski Stang Ziehl & Jones; for the
10 Debtor.

11 It's a rather straightforward motion today. It's a motion
12 under Rule 9019, pursuant to which the Debtor requests the
13 Court's authority and approval to enter into a settlement
14 agreement with HarbourVest that will resolve a number of
15 claims that HarbourVest has filed against the Debtor.

16 What I -- the way I propose to proceed this morning, Your
17 Honor, is to give what I hope is an informative but relatively
18 brief opening statement. I'll defer to HarbourVest and its
19 counsel as to whether they want to make a presentation in
20 advance of the offer of evidence. Any objecting party, I
21 suppose, should then be given the opportunity to present their
22 case to the Court. Then the Debtor will call Jim Seery, the
23 Debtor's CEO and CRO. We will offer documents into evidence.
24 I would propose then that the objecting parties take the
25 opportunity to ask Mr. Seery any questions they'd like on the

1 matter.

2 After the Debtor rests, I think HarbourVest would like to
3 put Mr. Pugatch on the stand to offer some testimony on their
4 behalf. And I think that that will conclude the case. We can
5 finish up with some closing arguments as to what we believe
6 the evidence showed, but that's the way that I'd like to
7 proceed, if that's okay with the Court.

8 THE COURT: All right. That sounds fine.

9 OPENING STATEMENT ON BEHALF OF THE DEBTOR

10 MR. MORRIS: Okay. So, as I said, Your Honor, this
11 is a -- this should be a very straightforward motion under
12 Rule 9019. The standard is well-known to the Court. There
13 are four elements to a 9019 motion. The Debtor clearly has
14 the burden of proof on each one. And we easily meet that
15 burden, Your Honor.

16 The standard, just to be clear, the first part is that we
17 have to establish a probability of success, with due
18 consideration for uncertainty of law and fact. The second one
19 is the complexity, likely duration, expense and inconvenience
20 of the litigation. The third part of the test is the
21 paramount interest of creditors. And the fourth part of the
22 test is whether or not the proposed settlement was reached
23 after arm's-length negotiations.

24 The Debtor believes that it easily meets this standard,
25 and frankly, is a little bit frustrated that it's being forced

1 | to incur the expense by Mr. Dondero in going through this
2 | process.

3 A plain reading, a fair reading of the economics here
4 relative to the claim shows that this is a very reasonable
5 settlement. I don't need to go beyond that, Your Honor. I
6 don't even need to use the word reasonable. It surely meets
7 the lowest standard.

8 We've prepared a couple of demonstrative exhibits, Your
9 Honor. I'm going to use them with Mr. Seery. But I'd like to
10 just put one up on the screen now, if I may.

11 Ms. Canty, can you please put up Demonstrative Exhibit #3?

12 Demonstrative Exhibit #3 is an outline of the economics of
13 the settlement. It includes the various pieces, the
14 components that the parties have agreed to. And it shows, at
15 least from the Debtor's perspective, just what HarbourVest is
16 being given here.

17 Up on the screen is a demonstrative exhibit. It has
18 citations to the evidence that will be admitted by the Court.
19 The first line shows that HarbourVest will receive a \$45
20 million allowed general unsecured nonpriority claim. And that
21 -- that can be found at Debtor's Exhibit EE, Exhibit 1, at
22 Page 2.

23 That claim is discounted by the expected recovery that
24 general unsecured creditors are supposed to get. As of
25 November, in the liquidation analysis that was part of the

1 disclosure statement -- that's the citation in the footnote --
2 the Debtor believed that unsecured creditors were estimated to
3 recover approximately eighty-seven and a half cents on the
4 dollar. And so we just did the arithmetic there to get to the
5 net economic value of the proposed general unsecured claim.

6 And from that, we reduced \$22-1/2 million because that is
7 the net asset value of HarbourVest's interest in HCLOF, which,
8 pursuant to the settlement agreement, it will transfer back to
9 the Debtor, so that the net economic value is approximately
10 \$16.8 million.

11 You will hear testimony from Mr. Seery that this number
12 is, in fact, overstated, and it's overstated because, since
13 the time the disclosure statement was filed in November, a
14 number of events have occurred that will -- that have caused
15 the estimated recovery percentage to be reduced from
16 approximately 87-1/2 percent to something lower than that. We
17 don't have the exact number, Your Honor, but Mr. Seery will --
18 and the evidence will show that there's been more expenses,
19 that there's been some resolution of certain claims. There's
20 been some positive issues, too. But that number is probably
21 in the 70s somewhere.

22 And in any event, I think the point here is, Your Honor,
23 HarbourVest invested \$80 million in HCLOF, which was going to
24 participate in the investment in CLOs. They filed a claim for
25 \$300 million, through treble damages and other claims. But

1 the net economic impact of this is going to be somewhere
2 probably in between \$12 and \$14 million. I'll let Mr. Seery
3 give more precision to that. And it represents less than -- a
4 less than five percent recovery on the total claim.

5 And we think it's important for the Court to keep that in
6 mind. What are the economics here? Are we overpaying? Is
7 this an unreasonable settlement? And I think the evidence
8 will show that the Debtor is not, but that this settlement
9 that you see before you was the product of arm's length, and
10 I'm going to go in reverse order of the four-part test under
11 9019.

12 So, the last part is whether or not the settlement, the
13 proposed settlement was the product of arm's-length
14 negotiation. You'll hear lots of evidence that this
15 settlement that's up on the screen right now very much was the
16 product of arm's-length negotiation.

17 The third part of the test, Your Honor, is whether it
18 meets the paramount interest of creditors. You know,
19 regrettably, Mr. Dondero is the only purported creditor who is
20 objecting here. He may have done so through different
21 vehicles, but every objecting party here is a debtor [sic]
22 owned and controlled by Mr. Dondero. No other creditor -- not
23 the Creditors' Committee, UBS, Acis, Mr. Terry, Mr. Daugherty
24 -- nobody is objecting to this settlement except for Mr.
25 Dondero. And we believe that that highlights the Debtor's

1 | ability to meet the third prong of the test, and that is these
2 | are -- this settlement is in the paramount interest of
3 | creditors.

4 Again, going in reverse, the second part of the test is
5 the complexity, duration, and expense of litigation. There
6 will be no disputed evidence that we meet -- the Debtor easily
7 meets this prong of the test. The evidence is going to show
8 that HarbourVest's claim is based on fraud, fraud in the
9 inducement, fraudulent statements and omissions, the kind of
10 case, Your Honor, that I'm sure you're familiar with that is
11 incredibly fact-intensive, that will be incredibly difficult
12 to navigate through. It will be prolonged, it will be
13 expensive, because you're necessarily relying on he said/she
14 said, basically. And so we're going to have to get testimony
15 from every person that spoke in connection with the events
16 leading up to the transaction. So we think the second prong
17 will be easily met, Your Honor.

18 And then the last prong -- the first prong, if you will --
19 is the likelihood of success on the merits. We think that the
20 settlement, the economic recovery that's up on the screen
21 here, which ultimately will be less than five percent of the
22 claimed amount, in and of itself shows that the settlement is
23 consistent with the Debtor's perception of its likely success
24 on the merits. I'm certain that HarbourVest disagrees, but
25 that's okay, we're here today and that's the Debtor's view,

1 and the Court is here to assess the Debtor's business judgment
2 and whether the Debtor has properly analyzed the issues and
3 gone through the process. And the evidence will show
4 conclusively that it will. That it has.

5 Mr. Seery will testify at some length as to the risks that
6 he saw. I think that you'll hear counsel for Mr. Dondero ask
7 both Mr. Seery and Mr. Pugatch a number of questions designed
8 to elicit testimony about this defense or that defense. And
9 it's a little -- it's a little ironic, Your Honor, because,
10 really, every defense that they're going to try to suggest to
11 the Court was a valid defense is a defense that the Debtor
12 considered. In fact, it's, you know, it's a little spooky,
13 how they've -- how they've been able to identify kind of the
14 arguments that the Debtor had already considered in the
15 prosecution of their objections here.

16 But be that as it may, the evidence will conclusively show
17 that the Debtor acted consistent with its fiduciary duties,
18 acted in the best interests of the Debtor's estate, acted
19 completely appropriately here in getting yet another very
20 solid achievement for the Debtor, leaving very few claims that
21 are disputed at this point, all but one of which I believe are
22 in the hands of Mr. Dondero.

23 So, that's what we think that the evidence will show.

24 I do want to express my appreciation to Mr. Kane for
25 reflecting on the arguments that we made with respect to the

1 ability of the Debtor to engage in the transfer or the
2 acquisition of the asset from HarbourVest. I would -- I would
3 respectfully request that we just enter into a short
4 stipulation on the record reflecting that the Debtor's
5 acquisition of HarbourVest's interests in HCLOF is compliant
6 with all of the applicable agreements between the parties.

7 And with that, Your Honor, I look forward to putting Mr.
8 Seery on the stand and presenting the Debtor's case.

9 THE COURT: All right. Other opening statements?

10 OPENING STATEMENT ON BEHALF OF CLO HOLDCO, LTD.

11 MR. KANE: Yes, Your Honor. Sorry. John Kane on
12 behalf of CLO Holdco.

13 In response to Mr. Morris, I'm not going to enter into a
14 stipulation on behalf of my client that the Debtor is
15 compliant with all aspects of the contract. We withdrew our
16 objection, and we believe that's sufficient.

17 THE COURT: All right. Well, I'm content with that.

18 Other opening statements?

19 | OPENING STATEMENT ON BEHALF OF HARBOURVEST

20 MS. WEISGERBER: Your Honor, Erica Weisgerber on
21 behalf of HarbourVest.

22 HarbourVest joins in Mr. Morris's comments in support of
23 the settlement, and we believe that the question of whether
24 the settlement between HarbourVest and the Debtor satisfies
25 the Rule 9019 standard is not even a close one.

1 Some Objectors have made arguments about the merits of
2 HarbourVest's claims, which is why we're here. As Your Honor
3 will hear this morning, HarbourVest has meaningful and
4 meritorious claims against Highland, but made the business
5 decision to avoid the time, expense, and inherent risk of
6 litigation in the interest of preserving value, both for
7 itself and for the estate.

8 Today, Michael Pugatch, a managing director of
9 HarbourVest, will testify before the Court. He'll explain
10 that HarbourVest claims against Highland arise out of certain
11 misrepresentations and omissions by Highland to HarbourVest in
12 connection with HarbourVest's purchase of an interest in
13 HCLOF, one of Highland's managed funds. Those
14 misrepresentations and omissions, as Your Honor will hear,
15 relate to Highland's litigation with its former employee,
16 Joshua Terry, and transfers that were conducted in 2017 to
17 strip Acis of value and prevent Mr. Terry from collecting on
18 an \$8 million judgment.

19 Mr. Pugatch will further explain that HarbourVest would
20 not have invested in HCLOF had it known the underlying facts
21 about those Acis transfers.

22 Mr. Pugatch will also testify that not only did
23 HarbourVest not know about those transfers, it learned about
24 those transfers when it was accused of orchestrating the
25 transfers itself in the Acis bankruptcy. Your Honor will hear

1 | comments with respect to what I've heard and what the Court is
2 | going to hear.

3 The first issue I'd like to address is the comment by
4 counsel for the Debtor that no other party has objected. The
5 9019 motion is one of the issues that this Court has to rule
6 on, whether or not there was an objection or not. So the fact
7 that this may be -- bankruptcy is not a popularity contest and
8 not an issue of who votes for what and doesn't vote. This,
9 along with the 1129(a) tests, are clearly within your
10 province, and you need to listen carefully because you'll have
11 to make your own independent analysis whether my objection is
12 correct or incorrect.

Two other points I'd like to make that I think are very salient. Number one is, if you look at the Debtor's disclosure statement, it basically took the position that the HarbourVest claim is of little or no value. And lo and behold, thirty days later, there's a settlement that brings about a significant recovery to HarbourVest. The timing is interesting, and I think the Court needs to pay careful attention to what transpired between the two dates.

21 And then the last point I'd like to make is, as you listen
22 to the evidence, and what I learned abundantly clear from
23 hearing the depositions, is that the claim of HarbourVest, if
24 there is a claim at all, is probably one hundred percent --
25 should be subordinated in that it appears to arise out of the

1 purchase or sale of a security. And, again, I would ask the
2 Court to listen carefully to this because that's what it
3 appears to be and that's what the evidence is going to show to
4 the Court.

5 THE COURT: All right. Mr. Draper, let me clarify
6 something I'm not sure if I heard you say or not. Were you
7 saying that the Court still needs to drill down on the issue
8 of whether the Debtor can acquire HarbourVest's interest in
9 HCLOF?

10 MR. DRAPER: No.

11 THE COURT: Okay. I was confused whether you were
12 saying I needed to take an independent look at that, now that
13 the objection has been withdrawn of Holdco. You are not
14 pressing that issue?

15 MR. DRAPER: No, I am not. Basically, I think it's
16 the fairness of the settlement. I think the transferability
17 of the interest is separate and apart from the fairness of the
18 settlement itself. I think the fairness -- the
19 transferability was a contractual issue between two parties
20 that the Court does not have to drill down on.

21 THE COURT: All right. I have another question for
22 you. I want to clarify your client's standing. Tell me --
23 I'm looking through a chart I printed out a while back. I
24 guess Dugaboy Investment Trust filed a couple of proofs of
25 claim; is that right?

1 MR. DRAPER: Yes.

2 THE COURT: Okay. What --

3 MR. DRAPER: And objections are pending.

4 THE COURT: Pardon?

5 MR. DRAPER: Objections to those claims are pending
6 before the Court, Your Honor, --

7 THE COURT: Okay.

8 MR. DRAPER: -- and have not been litigated.

9 THE COURT: And what about Get Good Trust?

10 MR. DRAPER: Get Good Trust has a proof of claim also
11 that objections are pending to. Pending.

12 THE COURT: Okay. I don't want to get too
13 sidetracked here, but I know standing was -- was mentioned as
14 a legal argument today. What is the basis for those proofs of
15 claim?

16 MR. DRAPER: The first one is, with respect to the
17 proof of claim for Dugaboy, there is an investment that
18 Dugaboy made that was then funneled, we believe, up to the
19 Debtor. And the -- the loan that exists, we believe is a
20 Debtor loan, as opposed to a loan to the entity that we made
21 the loans to.

22 And, again, it's a matter that the Court is going to hear.
23 The claim may or may not be allowed. It has not been
24 disallowed yet.

25 The second part to the Dugaboy ownership is we own an

1 interest in the Debtor. And so we are, in fact, a party in
2 interest.

3 THE COURT: Okay.

4 MR. DRAPER: It may be a small interest, but it is an
5 interest.

6 THE COURT: It has a limited partnership interest in
7 the Debtor?

8 MR. DRAPER: Yes.

9 THE COURT: Is that correct?

10 MR. DRAPER: Yes.

11 THE COURT: Okay. Well, I'll move forward. Thank
12 you.

13 Does that cover -- any other opening statements? I think
14 that covered everyone who was -- who filed some sort of
15 pleading today. No.

16 MR. WILSON: Your Honor, John Wilson on behalf of --

17 THE COURT: I'm sorry. I'm sorry.

18 MR. WILSON: -- Mr. Dondero.

19 THE COURT: I missed Mr. Dondero's counsel. I knew
20 we had visited at some point this morning. I just got
21 confused there. Go ahead, Mr. Wilson.

22 MR. WILSON: No problem, Your Honor. I was just
23 going to say that we will reserve our comments until after the
24 conclusion of the testimony.

25 THE COURT: All right. Very well.

1 Mr. Morris, you may call your first witness.

2 MR. MORRIS: Thank you, Your Honor. Before I do,
3 just two very, very quick points.

4 THE COURT: Okay.

5 MR. MORRIS: To be clear, Dugaboy's interest in the
6 Debtor is 0.1866 percent. Less than two-tenths of one
7 percent.

8 Secondly, the argument that Mr. Draper just made with
9 respect to subordination is one that appears in nobody's
10 papers. And, in fact, not only doesn't it appear in anybody's
11 papers, but Mr. Dondero, I believe, specifically took issue
12 with the fact that a portion of the consideration that
13 HarbourVest would receive would be on a subordinated basis,
14 and he would -- and I think he took the position there is no
15 basis to give them a subordinated claim.

16 So, I just wanted to point those items out to the Court,
17 not that I think either one makes a large difference today,
18 but I do want to deal with the facts.

19 THE COURT: Thank you.

20 MR. MORRIS: The Debtor would call -- you're welcome,
21 Your Honor. The Debtor calls Mr. James Seery.

22 THE COURT: All right. Mr. Seery, welcome back to
23 virtual court. If you could say, "Testing, one, two" so I can
24 see you and swear you in.

25 MR. SEERY: Testing, one, two.

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1 THE COURT: All right. I heard you but I'm not yet
2 seeing your video. Is your video turned on?

3 MR. SEERY: Video is on. Yes, Your Honor.

4 THE COURT: Okay. I see you now. Please raise your
5 right hand.

6 JAMES SEERY, DEBTOR'S WITNESS, SWORN

7 THE COURT: Thank you. Mr. Morris?

8 MR. MORRIS: Thank you, Your Honor.

9 DIRECT EXAMINATION

10 BY MR. MORRIS:

11 Q Good morning, Mr. Seery. Can you hear me?

12 A I can. Thank you, Mr. Morris.

13 Q Okay. Let's just cut to the chase here. Are you familiar
14 with HarbourVest's claims filed against the Debtor?

15 A I am, yes.

16 Q And did you personally review them?

17 A I did, yes.

18 Q Do you recall that over the summer the Debtor objected to
19 HarbourVest's claim?

20 A Yes, we did.

21 Q Why -- can you explain to the judge why Harbour -- why the
22 Debtor objected to HarbourVest's claim last summer?

23 A Sure. The HarbourVest claims, I believe there are about
24 six of them, initially were filed, and they were -- they were
25 relatively vague in terms of what the specifics of the claims

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1 In addition, and this was the first time we saw that,
2 HarbourVest brought forth its claims that it was entitled to
3 effectively rescind the transaction. And I say rescind the
4 transaction: In security parlance, they claim that they were
5 induced by fraud, I think as most are -- to enter into the
6 transaction.

7 As most are aware, the liability limitations in the OMs
8 and the exculpation in the documents are pretty broad, and
9 HarbourVest's position was that they weren't going to be
10 subject to those limitations because the actual transaction
11 that they entered into was a fraud on them, designed by Mr.
12 Dondero, Mr. Ellington, and the Highland team.

13 Q All right. Let's talk about your understanding, the
14 Debtor's understanding of the factual background to
15 HarbourVest's claim. What is your understanding of the
16 investment that HarbourVest made?

17 A Well, HarbourVest made an investment in the Highland CLO
18 business. The Highland CLO business was -- was Acis. And
19 effectively, the business had been separated, but in name
20 only. Acis was just a shell, with a few partners --
21 obviously, Mr. Terry as well -- but it was all Highland
22 personnel doing all the work.

23 And what they were trying to do with Acis was, in essence,
24 resuscitate a business that had been in a bit of a decline
25 from its pre-crisis heyday.

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1 pretty straightforward, let's take all the assets -- Dondero
2 scheme -- let's take all the assets and move them back into
3 Highland so Terry can't get anything.

4 Q And how does that scheme relate to the HarbourVest claim,
5 to the best of your knowledge?

6 A Well, HarbourVest -- HarbourVest's position is that they
7 invested in Acis and -- and whether Acis was called Acis or
8 called Highland, it doesn't really matter; there were valuable
9 assets in the -- in the entity that they were going to be
10 investing in through the equity in these CLOs and some of the
11 debt securities in those CLOs.

12 And then the stripping out and the fraudulent conveyances
13 out of Acis caused them damages because that's what left the
14 damage to Mr. Terry.

15 The quick math on Acis, by the way, is Acis has probably
16 lost, total damages, 175 million bucks. And that's pretty
17 easy. DAF lost 50. HarbourVest lost 50. Fifteen million of
18 fees charged to HCLOF. Another five million of fees, at
19 least, incurred by Mr. Terry. Ten million that went to Mr.
20 Terry, 15 to Highland fees, another five, plus Mr. Terry's
21 settlement in this case, over eight million bucks.

22 So HarbourVest's position, which, on a factual basis, you
23 know, is problematic for the estate, is, wait a second, we
24 invested in this vehicle with Highland. That was supposed to
25 invest in Highland CLOs. They were called Acis, but they were

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Seery - Direct

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1 A Yes, I have. But before I continue, I just -- I should
2 have checked. Are you able to hear me clearly? Am I speaking
3 too quickly or am I cutting out? I just want to make sure.
4 I'm using a different set of audio today.

5 THE COURT: All right.

6 MR. MORRIS: That's fine.

7 THE COURT: I hear you very well.

8 MR. MORRIS: Yeah.

9 THE COURT: So I think we're good right now. Thank
10 you.

11 THE WITNESS: Yeah. Thank you, Your Honor. I was
12 just checking.

13 THE COURT: Okay.

14 THE WITNESS: In response to your question, Mr.
15 Morris, yes, I have seen this before.

16 BY MR. MORRIS:

17 Q Okay. And can you -- did you form a view in doing the due
18 diligence as to the adequacy of this disclosure?

19 A Yes, I did.

20 Q Can you share your -- or share with Judge Jernigan the
21 Debtor's view as to the adequacy of this disclosure concerning
22 the litigation between Highland and Acis?

23 A With respect to the litigation between Highland and Acis,
24 or, really, between Acis, Highland, and Highland's principals
25 and Acis's principal, totally inadequate. The disclosure here

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Seery - Direct

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1 is very high-level. And if there were no other litigation
2 going on, it might serve to suffice. It basically says, In
3 our business, because we invest in distressed loans, there's a
4 lot of litigation around distressed investments, and that's
5 what we have. And then it says, We've talked with the
6 investor about other things and we're -- we think that's
7 enough.

8 Q Is there anything in this portion or anywhere in the
9 offering memorandum that you're aware of that disclosed to
10 HarbourVest that in the weeks leading up to the investment
11 Highland was engaged in the fraudulent transfer of assets away
12 from Acis?

13 A No. And I apologize, because I think it's -- I've
14 conflated two provisions. This one only deals with the very
15 high-level nature of the business. It doesn't give any
16 indication that there's any material litigation going on
17 elsewhere with respect to Acis.

18 I believe there's another provision that says, We -- we
19 have talked to -- oh, here -- I'm sorry. It is here.
20 Shareholders have had an opportunity to discuss with Highland
21 to their satisfaction all litigation matters against Highland
22 and its affiliates unrelated to its distressed business.

23 That, in my opinion, is wholly inadequate.

24 Q Okay.

25 MR. MORRIS: And let's put up -- actually, let's just

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1 already made demand. We'll be initiating actions next week.
2 So those are -- those value, we believe, we'll recover
3 directly from Mr. Dondero and from related entities.

4 To the extent those related entities don't have value, we
5 feel very strongly about our ability to pierce the veil and
6 reach in to Mr. Dondero. And then his assets, either his
7 personal assets or the assets that he claims are in trusts.

8 In addition, there are a significant amount of notes that
9 were extended in two -- I believe around 2017, for no
10 consideration. Those notes were demand notes, I believe, and
11 then extended it 30 years. So they have 2047 maturities.
12 Those were probably going to have to be subject to fraudulent
13 conveyance type actions or -- or some sort of sale at a very
14 discounted value because third parties wouldn't want long-
15 dated notes with Mr. Dondero as the counterparty for very much
16 money.

17 Those -- they defaulted on some of those parties, so we
18 effectively turned them into demand notes. We've accelerated,
19 and we'll be bringing actions against those entities next week
20 as well.

21 So I think (garbled) have come up, so I apologize. One
22 way of saying I think the sixteen and a half is a bit high
23 right now, based upon what we know, but the value is going to
24 be higher than our estimate a couple of weeks ago because we
25 do believe we'll be able to recover on the notes.

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Seery - Direct

1 One additional caveat, just to be fully transparent here.
2 This summary with the 16.8 doesn't include the subordinated
3 piece of this -- of this claim and our resolution. That --
4 recovery of that piece will be dependent upon the success of
5 litigations.

6 In order for the subordinated piece to get paid, all
7 general unsecured claims in Class -- Classes 7 and 8 will have
8 to be paid in full. And then -- and then the subordinated
9 class in Class 9, which we believe UBS will have a piece of,
10 and HarbourVest will have a piece of by this settlement, those
11 will be able to recover, and those will be based upon other
12 claims of action against -- primarily against related parties.

13 Q And then that last point, is that what's reflected in
14 Footnote 3 on this page?

15 | A That's correct, yes.

16 Q Okay. And just for the record, there's a reduction in
17 value of \$22-1/2 million. Do you see that?

18	A	Yes.
----	---	------

19 Q And can you just explain to the Court what that is and how
20 that value was arrived at?

21 A Yes. I may be getting slightly ahead of you, Mr. Morris.
22 But to give the Court a reflection of the transaction -- and
23 we can go into the details in a moment -- ultimately, the
24 transaction we structured we think is very fair both
25 economically to the Debtor, but there -- there is some

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1 complexity to it to satisfy some of HarbourVest's concerns
2 that they be able to effectively rescind the transaction, at
3 least from an optical perspective. Value was important, but
4 optics were as well. The twenty-two and a half is the current
5 -- actually, the November value of HCL -- the HarbourVest
6 interests in HCLOF. And that's based upon Highland's
7 evaluation of those interests.

8 So we do believe that that is a fair value as of that
9 date. It has not gone down. It hasn't gone up explosively,
10 either, but it hasn't gone down. We think that's good, real
11 value. That value is in the Acis CLOs, the equity in those
12 CLOs, which is 2 through 6, that we -- we will be working with
13 the HCLOF folks to get Mr. Terry to monetize those assets and
14 those longer-dated CLOs.

15 In addition, I think it's 85 percent of the equity in Acis
16 7 -- Acis 7 is managed by Highland -- that is also beyond its
17 reinvestment period. And in talking to the directors -- and
18 they're new directors, and I'll get to that in a minute, for
19 HCLOF -- they'll seek to push Highland, which is the
20 reorganized Highland, to monetize that asset, with due regard
21 to fair value.

22 In addition, Harbour -- HCLOF owned a significant amount
23 of the preferred or equity pieces, if you will, in the
24 Highland CLO, 1.0 CLOs. As we've talked about, those are not
25 really CLOs. Those are effectively closed-end funds with

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1 just wanted the Court to understand why they're in evidence.

2 THE COURT: Okay. Thank you.

3 MR. MORRIS: You're welcome.

4 BY MR. MORRIS:

5 Q Let's talk about the Debtor and whether or not it had or
6 has any viable defenses. Did the Debtor form any views as to
7 whether or not it had any defenses to the HarbourVest claims?

8 A Yes, we did.

9 Q Can you describe for the Court the defenses that were
10 reviewed and analyzed by the Debtor?

11 A Yeah. I think we -- we had very significant defenses.
12 So, first and foremost, with respect to the original proof of
13 claim, as I mentioned earlier, it alluded to the expenses and
14 the overcharge. And I think with respect to the 15 million of
15 fees that were charged to HCLOF by Highland, we didn't have a
16 lot of defenses to that claim.

17 It's pretty clear, by any fair view of the Acis case, that
18 HCLOF, as the investor in the Acis CLOs and the Highland CLOs,
19 had no real responsibility for fighting with Acis and Josh
20 Terry and shouldn't have been charged those fees. I don't --
21 I don't think there's a legitimate investor that would
22 actually think that that was an appropriate amount to be
23 charged to a fund.

24 However, the claim was not as broad -- the proof of claim
25 was not as fulsome in terms of discussing and only vaguely

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1 of digging into the public record, because you don't have to
2 go far on Google to find "fraud" within two words of
3 "Highland," and the tremendous, you know, litigious nature of
4 Highland. You know, even at that point, when this investment
5 was made, aside from Mr. Terry's arbitration, which by that
6 point, at least by the time (inaudible) was public, there was,
7 you know, significant public disclosure around the Credit
8 Strat and the litigation, the Crusader litigation, the UBS
9 litigation, the, gosh knows, the Daugherty litigation.

10 So our defense was going to be that you should have
11 figured this out, you're a sophisticated investor, and you
12 should have been able to figure out that there was significant
13 risk that, with respect to Mr. Terry, that Mr. Dondero would
14 not stop litigating and that those costs would put significant
15 risk on the investment.

16 The problem with that, as I mentioned earlier, is that the
17 OM is wholly deficient. If you have a typical risk factor in
18 the offering memorandum, you would have disclosed that there
19 was a litigation with Mr. Terry, a former partner in the
20 business, and that the Debtor had no intention of settling it.
21 There was no intention of settling. That litigation would go
22 on. It could go on for years and it could result in
23 bankruptcy or attachments and other risks to the business, and
24 that the investor should be fully aware that the Offeror does
25 not intend to be involved in any -- or the manager, in any

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1 settlement with Mr. Terry, and the fact it undermined the
2 investment. That wasn't there.

3 But that was our preliminary focus, to try to stop fraud
4 in the inducement. And then we -- we had specific facts
5 related to that. You know, once they knew about the
6 bankruptcy in HarbourVest of -- I'm sorry, of Acis,
7 HarbourVest made a second funding, which was there was a -- it
8 was an initial \$75 million draw, and then a second, I believe,
9 about a \$5 million draw, which was in -- I believe in
10 February. And they made it without -- without objection, and
11 that was after the commencement of the bankruptcy.

12 In addition, they were -- they were active in the
13 bankruptcy, so the -- some of the things that happened in the
14 bankruptcy, there were many opportunities to settle that case,
15 from our examination, all of which were turned down to -- by
16 Mr. Dondero. But you don't see HarbourVest pounding the table
17 to settle, either, either with respect to the Oaktree
18 transaction or any other transaction.

19 Now, HarbourVest's defense to that is, well, we were
20 taking advice and all of our information from Highland, and we
21 were getting that information directly from senior folks at
22 Highland why -- what the value was and why we shouldn't do
23 those things. We thought that that would mitigate some of the
24 arguments that -- some of the damages that we might have, I'm
25 sorry, if we -- if we lost.

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Seery - Direct

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1 damages. Although in this case certainly somebody could lay
2 out the predicate acts and put forth a RICO-type argument, we
3 just didn't think that that had real merit in this commercial
4 dispute, even with a fraud claim.

5 But even without the trebling of the damages, there's no
6 dispute that HarbourVest lost more than \$50 million in this
7 investment. You know, we -- we thought about that risk as
8 well.

9 In addition, because the case would really be fact-based,
10 even if we had a high degree of confidence based upon our
11 discussions with our employees and the factual testimony, it
12 was going to be expensive to litigate this case, and time-
13 consuming.

14 And so we looked at the economic value, the potential
15 risks, and the actual value that we were giving up, and found
16 this to be an extremely, extremely reasonable settlement.

17 Importantly, and I think what drove it, you -- one of --
18 one of the things that drove it is another one of our defenses
19 on why, notwithstanding their -- what they held out as
20 meritorious claims, I don't think HarbourVest really wanted to
21 publicly litigate this claim. And we were aggressive in our
22 discussions with HarbourVest of how we would litigate it,
23 which would be quite publicly.

24 Now, that may or may not be fair, but that does put risk
25 on the counterparty. And so I think that helped drive the

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Seery - Direct

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1 BY MR. MORRIS:

2 Q Okay. I appreciate that. Are you done giving the
3 Debtor's basis for entering into this settlement, Mr. Seery,
4 if you can hear me?

5 A I think so, but I think as the Court has probably seen, I
6 can go on.

7 Q Yes.

8 A So I will try to be -- I'll try to be more concise. But
9 this was a -- this was a difficult settlement. We felt good
10 about our defenses. Felt that we could -- we could try them.
11 But it would be extremely expensive, time-consuming, and there
12 would be a lot of risk. And settling at a level which we
13 believe is actually below the damages that were clearly caused
14 only by the fees was a -- was a -- is a -- is a very
15 reasonable settlement.

16 Q Okay. Let's just talk about the process by which we got
17 to the settlement. Do you recall generally when the
18 settlement negotiations have -- were commenced?

19 A I believe it was -- was late summer, early -- early fall.

20 Q Okay. Before I move on, I just want to go back to the
21 Acis matter that you were talking about, one last issue. Do
22 you know how, if at all, the injunction that was entered in
23 the Acis bankruptcy impacted or related to the HarbourVest
24 claims?

25 A Yeah. I -- yes, I do. And I believe it -- it did. I

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Seery - Direct

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1 think there's an argument, and we analyzed it thoroughly, that
2 the injunction effectively caused a lot of the damages.
3 Because if you look at the values of the equity that
4 HarbourVest had, the -- and HCLOF had in the CLOs, it went
5 down dramatically after the Trustee in the Acis case took over
6 and then subsequently, when the case was reorganized and Mr.
7 Terry took over, you know, with Brigade as the sub-advisor.

8 Now, that would -- you know, we would -- we could
9 certainly attempt to throw, in our defense, the causation at
10 Mr. Terry's feet or at Mr. Phelan's feet. HarbourVest's
11 retort is that none of this would have occurred but for the
12 burn-it-down litigation that Mr. Dondero engaged in with
13 Highland.

14 In addition, in Mr. Terry's defense, you know, he did try
15 multiple times with HCLOF, tried to petition, if you will, the
16 HCLOF entity to -- and directors, former directors, to reset
17 the CLOs to make them more economically viable, based upon the
18 current level of asset returns versus the debt costs in the
19 CLOs. And that was rejected by the HCLOF and the Debtor as
20 the controlling party of HCLOF. So, we thought about those
21 risks.

22 You know, similarly, the economic values in Acis 7 went
23 down pretty significantly from that date as well. So I think
24 there's -- there are some defenses, but that's really Mr.
25 Terry's issue, not our issue. So we thought about those

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1 issues, we analyzed them, and we certainly did all the work
2 around month-to-month reductions in NAVs and how different
3 events in the Acis case might have -- might have caused those
4 and was that some sort of break from the original
5 transgression that HarbourVest claims, which was the
6 fraudulent inducement.

7 Q Do you recall that in November HarbourVest's motion under
8 3018 was scheduled to be heard?

9 A Yes.

10 Q And can you just tell the Court your understanding of what
11 the 3018 motion was about?

12 A Well, the 3018 motion was going to be on voting. And we
13 took the view that it really was not -- it shouldn't have been
14 that big an issue and HarbourVest should have been content
15 with just taking their actual losses of roughly a \$50-\$60
16 million claim for voting purposes and then we would move on.

17 HarbourVest was very insistent that they have a \$300
18 million claim, because they took the position -- and with
19 extensive documentation; not only the pleadings they filed,
20 but also detailed decks that were prepared by their counsel,
21 which they had presented to us on the merits of their claim --
22 that they were going to litigate for -- the 3018 and for the
23 full \$300 million value.

24 And that became the genesis, if you will, of the
25 negotiations to settle.

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9 That led to Mr. Pugatch and I stepping away from counsel,
10 no offense to counsel, you know, ours and his, to begin
11 negotiations around the potential for a settlement. First, it
12 started with a 3018, and then, you know, argued that we would,
13 if we got past the 3018, we were going to litigate this,
14 because we effectively had -- thought we could get everyone
15 else done at -- in and around that time. And I think we were
16 also probably a little bit optimistic about UBS at that time
17 and the mediation, which subsequently we have settled. But
18 that was the genesis of those settlements.

19 Q And how did the structure, how did the Debtor and
20 HarbourVest derive at the structure whereby there is a general
21 unsecured claim, there is a subordinated piece, and there's
22 the takeback of the HCLOF interest?

23 A Well, as I outlined, we -- we aggressively set forth our
24 various defenses. Their position was that they -- they should
25 never have been in this transaction before. And they --

Seery - Direct

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1 HarbourVest is, in essence, a fund of funds, and they have
2 investors, and it certainly wouldn't be their, I'm sure, the
3 best-performing asset in their portfolio, to have made this
4 investment and lost \$50 million over this period of time. So
5 they felt strongly that they should never have been in this
6 investment, and but for the failure to disclose and the
7 improper disclosures, they would not have been in this
8 investment.

9 So, optically, getting out of it was important to them,
10 and that led to our idea and construction of a subordinated
11 claim and the transfer of the HCLOF interests to the estate.

12 Importantly, the HCLOF interests, as I mentioned, are --
13 the investments are in the Acis CLOs controlled by Acis and
14 Mr. Terry. The reorganized Acis. As well as the 1.0 CLOs and
15 the Acis 7.

16 So we were keenly focused on, if we were going to get that
17 interest, would we then have the majority control in HCLOF,
18 which we will, and would we be able to drive the recoveries,
19 as opposed to what Highland typically does in these
20 investments is use other people's money, drive down the value,
21 and then try to buy back the interest on the cheap.

22 Q Just in terms of timing, because I think there was a
23 suggestion in one of the openings that there was something
24 untoward about the timing here: At the time the liquidation
25 analysis was prepared on November 24th, had the Debtor reached

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Seery - Direct

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1 any agreement in principle with HarbourVest?

2 A If we had, it would have been reflected, so I don't -- I
3 don't think we were agreed by then. I don't recall the
4 specific dates, but if we had, it would have -- it would have
5 been reflected.

6 Q If I can refresh your recollection that the motion was
7 filed on December 24th, does that help form your understanding
8 or refresh your recollection that there was no agreement in
9 principle on November 24th?

10 A Yeah. Well, I'm quite sure there was no agreement in
11 principle or we would have reflected it minimally by a
12 footnote. There's -- there's no chance. It's a material
13 reduction in the claims pool that we were previously telling
14 people that, at least for purposes of distribution, like UBS
15 and a couple others we said we thought we would get to zero
16 on. So we didn't calculate in that amount. So I'm quite sure
17 we didn't have a deal when we filed the disclosure statement.

18 In terms of the timing, anyone who's done this business
19 for any degree of time knows that the crucible of bankruptcy
20 brings people to the settlement when they see something
21 happening in the case, and not before. I think HarbourVest
22 looked at our -- this is my supposition -- HarbourVest looked
23 at our plan, our ability to get this done, our settlement with
24 Redeemer, our settlement with Mr. Terry and Acis, and saw that
25 this plan was coming together, and if they didn't think about

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Seery - Direct

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1 the settlement, they were going to think about not only the
2 risks that we laid forth for them with respect our defenses,
3 but also the opportunity to litigate with the Claimant Trustee
4 over a long period of time, which couldn't have been
5 particularly appetizing.

6 Q Can you describe for the Court the role played by the
7 independent board of Strand, the general partner of the
8 Debtor, in analyzing and participating in the approval
9 process?

10 A Yes. I think, as the Court is aware and I've testified
11 before, Mr. Russell Nelms and Mr. John Dubel are fellow
12 independent directors with me, appointed pursuant to the Court
13 order. They are kept abreast of every detail, and -- along
14 the way, not just in a summary form at the end. We have
15 reviewed and analyzed collectively each of the issues. Mr.
16 Dubel has extensive experience in these types of litigation
17 matters. Obviously, Mr. Nelms, from his -- both his practice
18 and his time on the bench, has a keen insight into how to
19 resolve and what the risks and benefits are from settling
20 litigation. So I consult them every step of the way.

21 Q And as part of this process, did the Debtor reach out to
22 the directors of HCLOF?

23 A Yes, we did. So, we reached out and we've had several
24 conversations on video chats with the directors. The
25 directors of HCLOF are two new gentlemen, Mr. Richard Boleat

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7 They were appointed by the old directors, Scott and
8 Bestwick, and they have been in control. They have outside
9 counsel, which is King & Spalding in the U.S. They have
10 Guernsey counsel. They have accountants and professional
11 advisors, and are being, in my opinion, exceptionally careful.
12 I've got -- very quickly developed a lot of respect for them,
13 and we consulted with them on this settlement and how it would
14 work.

15 They've been very clear that they represent HCLOF and they
16 work for the benefit of the equity, whomever owns it, and
17 taking a view that they would like to see these assets
18 monetized swiftly, with due regard to value, for the benefit
19 of the equity.

20 Q And is it your understanding that the directors of HCLOF
21 approved of this transaction?

22 A They -- I don't know that their approval was required.
23 It's really -- there are a number of hoops to jump through
24 under the documentation, including opinion of outside counsel
25 that we received from WilmerHale in terms of the effectiveness

Seery - Direct

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1 of the transfer under the documents. We had a negotiation
2 with -- with those directors, and making sure that we did
3 everything correct -- correctly, excuse me -- with respect to
4 the requirements for the transfer under the documents. And
5 they've indicated their support and acknowledgement that we're
6 doing it correctly.

7 I don't know if it's fair to say they approved it. I'd
8 just have to go check the documents. But they certainly
9 support it. And I think they generally support our position
10 with respect to how to move forward with the assets.

11 Q I appreciate that. I guess I meant approval with a small
12 a and not a capital A.

13 You mentioned WilmerHale. Who do they represent in all of
14 this?

15 A WilmerHale is the Debtor's outside corporate counsel, in
16 particular with respect to the fund issues that we don't
17 handle in-house. We have significant support for fund issues
18 from the expertise of Mr. Surgent, who's been the CCO, and he
19 is also a lawyer, with respect to, you know, some of the
20 difficult fund issues that Highland has. But when we use
21 outside counsel, we use WilmerHale for that, and they've been
22 -- they've been exceptional.

23 Q Okay. Just the last two points that were made in Mr.
24 Dondero's objection, I believe. Did the Debtor overpay in
25 this settlement in order to gain the support of HarbourVest in

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Seery - Direct

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1 And he hasn't been willing to do that.

2 This is a -- this is a plan that's come together. We
3 think it's going to be in the best interests of the estate.
4 That'll be confirmation next week. Or two weeks, I guess.
5 But I don't see how this is any way related -- this settlement
6 is not any way related to the voting on that -- on that -- on
7 that plan.

8 Q Just to put the finest point on it, is the Debtor relying
9 on Class 9 to be the impaired consenting class?

10 A No. I think -- I think what I've -- as I said, I believe
11 we already have the votes in Class -- I think it's 2 or 3, 7,
12 8, and -- and 9 will vote in favor as well. So that won't be
13 an issue.

14 MR. MORRIS: Your Honor, I have no further questions
15 of Mr. Seery.

16 THE COURT: All right. Pass the witness. I'll ask
17 HarbourVest counsel first: Do you have any questions of Mr.
18 Seery?

19 MS. WEISGERBER: No, Your Honor.

20 THE COURT: All right. Thank you.

21 What about cross-examination? Mr. Dondero's counsel?

22 CROSS-EXAMINATION

23 BY MR. WILSON:

24 Q Mr. Seery, how are you doing today?

25 A I'm well, thank you.

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Seery - Cross

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1 A I don't recall the date, but the triggering event was
2 HarbourVest's response to our omnibus objection.

3 Q Okay. And that would have been filed September 11th of
4 2020?

5 A I'll take your representation. I don't -- I don't recall
6 the specific date.

7 Q Okay. And so when you began to investigate the
8 HarbourVest claims, what was your initial reaction?

9 A My initial reaction was that the -- the larger claims that
10 they were asserting -- the fraud in the inducement, the RICO
11 -- that those claims were, in my view, attorney-made and that
12 when we dug in and did the work, we saw that HarbourVest
13 clearly lost north of \$50 million on the investment. We had
14 just started to uncover the fee issue and saw the risk we had
15 there.

16 But I thought the bulk of those claims were attorney-made.
17 Clever, but attorney-made, as opposed to what I would think
18 are more legitimate. And so we started to develop our
19 defenses around that.

20 Q And was your initial reaction that the HarbourVest claims
21 were largely worthless?

22 A I think with respect to the claim around the fees, I
23 believed there was significant risk. With respect to the
24 other claims, I thought our defenses would make them
25 worthless, yes.

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Seery - Cross

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1 Q And did you ever represent to any party that the
2 HarbourVest claim was worth, at most, \$5 million?

3 A I think I represented often, including to HarbourVest,
4 that it was worth nothing. I don't recall if I specifically
5 said \$5 million. \$5 million would have been a nominal amount
6 to -- which is litigation costs. So it may -- it may have
7 been in my models that I put in that as a settlement amount,
8 but I -- I thought that there were valid and good defenses to
9 those larger claims.

10 Q And you recognize that HarbourVest was a large,
11 sophisticated investor, correct?

12 A Yes. I think they manage north of -- right around a
13 hundred billion dollars.

14 Q And you recognize that HarbourVest routinely structured
15 complex customized investments, correct?

16 A I believe that -- I don't know the intricate part of their
17 businesses, but as a fund of funds who does creative
18 investments, I think that they do do quite a bit of that.
19 This, I believe, was their first investment in the CLO space.

20 Q And it was not -- or I should say, you did not believe
21 that HarbourVest was simply a passive investor in HCLOF,
22 correct?

23 A I don't think that that's true, no.

24 Q You don't -- you don't believe that you denied their claim
25 to be a passive investor?

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1 A Oh, I think -- I'm sure that in defense of their claims I
2 would argue that they were -- they were more than a passive
3 investor. But it was pretty clear when you look at the
4 structure of what they invested that there was an intent that
5 they be passive on their part. They didn't take a majority
6 interest.

7 In fact, Highland made it clear in the structure of the
8 deal that they couldn't -- it would be hard for them to get a
9 majority interest because Highland entities would control that
10 and Dondero-controlled entities or individuals would control
11 the majority.

12 I think that they -- they had hoped to be a passive
13 investor.

14 Q But was it not your position that HarbourVest was actually
15 an active, involved investor?

16 A I think our defense was going to be that they knew exactly
17 what was going on, that they participated, that they were
18 active, and that, indeed, that they were in and around some of
19 the subsequent issues in the Acis case.

20 Q And you understood that HarbourVest played a material role
21 in the various outcomes in the Acis bankruptcy case, correct?

22 A I don't believe that to be correct, no.

23 Q Have you ever made that representation to anyone before?

24 A Not -- not that I recall.

25 Q Well, do you recall giving statements to a reporter named

Seery - Cross

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1 Syed Khaderi?

2 A I've never spoken to a reporter named Syed Khaderi in my
3 life.

4 Q Well, did you participate in the preparation of statements
5 to be given to Syed Khaderi?

6 A I've never heard of Syed Khaderi, nor have I participated
7 in any preparation of statements. I don't know who that is.

8 MR. WILSON: All right. I'm going to have Bryan
9 Assink put on the screen a document.

10 And Bryan, can you go to Page 7? Bottom of -- the top of
11 Page 7. Well, actually, before you do that, go to the very
12 top of the document.

13 BY MR. WILSON:

14 Q Now, Mr. Seery, are you familiar with Lucy Bannon?

15 A Yes.

16 Q And who is Lucy Bannon?

17 A She is the Highland public relations person.

18 MR. WILSON: Okay. Now go back to Page 7.

19 BY MR. WILSON:

20 Q Now, do you -- do you see on your screen an email of
21 September 14th from Syed Khaderi that says, Hi, Lucy, how are
22 you?

23 A Yes.

24 Q Have you seen this email before?

25 A Not that I recall, no.

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Seery - Cross

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1 Q All right. It continues on that, I saw the filing on
2 Friday about HarbourVest claims against Highland for a CLO
3 investment, and I'm looking to put out a report tomorrow
4 morning London time. Ahead of that, I wanted to check if
5 Highland would like to comment on the matter.

6 MR. MORRIS: Your Honor, this is -- the Debtor
7 respectfully objects. A, this document is not in evidence.
8 B, it's rank hearsay.

9 THE COURT: Response, Mr. Wilson?

10 MR. WILSON: Your Honor, I am attempting to
11 authenticate this document, but I'm using it in rebuttal to
12 the testimony that Mr. Seery just offered.

13 THE COURT: All right. I'll allow it. Overrule the
14 objection.

15 MR. WILSON: All right. Thank you, Your Honor.

16 BY MR. WILSON:

17 Q All right. Now, if we -- and oh, that September 14th
18 date, that was three days after the September 11th date that
19 we discussed was the date that HarbourVest filed its response
20 to the omnibus objection, correct?

21 A Yes. If that's the date that they filed it, then I -- if
22 you're representing that, I concede that the 14th is three
23 days after the 11th.

24 Q All right. And if you go back to the first page of this,
25 it looks like, on the following day, Lucy Bannon sends an

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Seery - Cross

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1 email to you, and is that your email address,
2 jpseeryjr@gmail.com?

3 A That's correct, yes.

4 Q And do you recall receiving this email from Lucy Bannon?

5 MR. MORRIS: Your Honor, I renew my objection that
6 this is hearsay. He's not rebutting anything that Mr. Seery
7 testified to. He testified that he'd never heard of the
8 gentleman at the bottom of the document. There's nothing in
9 this document that rebuts Mr. Seery's testimony at all.

10 THE COURT: Response, Mr. Wilson?

11 MR. WILSON: Well, I'm not -- I'm not trying to rebut
12 his statement that he hadn't -- that he hadn't heard of Syed
13 Khaderi. My rebuttal is attempted to -- attempting to show
14 that he has made various statements that he denied.

15 THE COURT: I'll overrule the objection.

16 BY MR. WILSON:

17 Q All right. So, back to this exhibit, Mr. Seery. You
18 recall receiving this email from Lucy Bannon on Tuesday,
19 September 15, 2020?

20 A Not specifically. But to be clear, I recall talking to
21 Lucy Bannon about the HCMLP dispute with HarbourVest.

22 Q Okay. And --

23 MR. WILSON: Bryan, can you go down to the next page?
24 Scroll down to where -- the James Seery email.

25 BY MR. WILSON:

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Seery - Cross

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1 Q Do you see this email on your screen that's dated
2 September 15, 2020 at 10:33 p.m.?

3 A Yes, I do.

4 Q And do you recall sending this email to Lucy?

5 A Not specifically, no.

6 Q Well, do you deny that you sent this email to Lucy?

7 A It appears to be my email.

8 MR. WILSON: Your Honor, we would move to admit this
9 document into evidence as Dondero Exhibit Letter N.

10 THE COURT: Any objections?

11 MR. MORRIS: I would consent to the admission of Mr.
12 Seery's email, but the balance of it ought to be excluded as
13 hearsay.

14 THE COURT: What about that?

15 MR. WILSON: Well, Your Honor, I think that this
16 document -- and I'll get into this in a little more detail in
17 a second -- but I think this document is a combination of the
18 work product of Lucy Bannon and Mr. Seery in preparing a
19 response for the reporter who requested comment from Highland.

20 THE COURT: Okay. I --

21 MR. MORRIS: Your Honor, um, --

22 THE COURT: Go ahead.

23 MR. MORRIS: I just -- I do question how they got
24 this document, but that's for another day. That's number one.
25 Number two, in addition to the hearsay argument, I just --

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2 THE COURT: Okay. I'll allow the portion that is the
3 communication of Seery, that portion of Exhibit N. All right?

11 THE COURT: All right. Fair enough. That'll be
12 allowed.

14 (James Dondero's Exhibit N is received into evidence as
15 specified.)

19 BY MR. WILSON:

25 MR. WILSON: Can you scroll down to that next page?

Seery - Cross

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1 BY MR. WILSON:

2 Q And this says -- I think part of this got cut off for some
3 reason, but it looks like the official statement is in
4 quotation marks. It says, "We dispute the allegations made in
5 the filing and believe the underlying claims are invalid and
6 will be found to be without merit. Our focus continues to be
7 treating all valid claims in a transparent, orderly, and
8 equitable manner, and vigorously disputing meritless in the
9 court. That focus will assure that HCMLP's reorganization
10 process -- progress is towards an efficient and equitable
11 resolution."

12 And then below that there's another section of this email
13 that says, Background/Clarification, Not for Attribution. And
14 do you know the purpose of this second section of the
15 response?

16 A Do I know the purpose of that? Yes.

17 Q And what would that purpose be?

18 A Ms. Bannon was speaking on background to reporters. As I
19 said earlier, I've -- I never heard of the gentleman from
20 London. If he's at the bottom of the email, I didn't pay any
21 mind, never heard of him. Nor have I heard it since. Ms.
22 Bannon didn't ever reference the specific person.

23 But she is the public relations person. So, as I
24 testified earlier, she does communicate with the press. And
25 as I previously testified when Mr. Morris questioned me, one

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Seery - Cross

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1 discussion that she would have. So, no, she was not
2 authorized in any way whatsoever to send that out. She was
3 authorized to have conversations with those general facts.

4 MR. WILSON: Okay. Bryan, go to the top, or the
5 bottom of the page immediately preceding that. That's it.
6 Yes, that's it right there.

7 BY MR. WILSON:

8 Q Now, you'll see that this email from Lucy Bannon on
9 September 15, 2020 at 10:29 p.m. starts off, "Jim, let me know
10 what you think of the below. And, again, the first would be
11 on the record and the second will be sent for information
12 purposes to ensure accuracy, not for attribution."

13 So the intent was that this -- that this entire statement
14 be sent to the reporter, correct?

15 A I don't believe that's correct. I think when she goes on
16 background she doesn't send them a written doc. It's got to
17 be clear to the reporter, at least my understanding is that
18 what on background means -- I've been involved with this
19 before -- is that typically that's done orally. I don't know
20 if she's done it in a written statement before. I have never
21 seen that done in a written statement before. You give the
22 official statement and then you walk the reporter through your
23 other views on background. And you're not quoted. And it's
24 usually attributed to a source with knowledge.

25 Q Okay. We'll come back to that in a minute. The next

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Seery - Cross

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1 We believe that neither the facts nor the law support
2 HarbourVest's, quote, We-were-too-lazy-to-know allegations.

3 Whose words were those, "We-were-too-lazy-to-know
4 allegations"?

5 A I don't recall. They may be mine. It's aggressive the
6 way I am, so that -- that may well be the case.

7 MR. WILSON: All right. Go -- go down to the next
8 page.

9 BY MR. WILSON:

10 Q And with respect your comment that that second paragraph
11 would not have gone to the reporter, look at this email in the
12 middle of the page from Lucy Bannon to Syed Khaderi, September
13 16, 2020, at 1:51 a.m. And --

14 MR. MORRIS: Your Honor, this I will object to as
15 hearsay. There is no witness here to testify to anything on
16 this document.

17 THE COURT: All right. How about that?

18 MR. WILSON: Well, it's -- well, scroll up just a
19 little bit. This email at the top of the page is three
20 minutes after the one in the middle of the page, where Lucy
21 Bannon is forwarding this to James Seery, saying, See below
22 for responses sent to *Creditflux*. Will follow up with the
23 story when it runs or with any other updates.

24 MR. MORRIS: Your Honor, these --

25 MR. WILSON: So I think this --

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Seery - Cross

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1 MR. MORRIS: These documents don't appear on the
2 witness list. They're not being offered to impeach anything.
3 They're just -- he's taking discovery as we sit here.

4 MR. WILSON: Your Honor, in response, I'm simply
5 trying to rebut the statements that Mr. Seery made. In fact,
6 he told me just a minute ago that that second paragraph would
7 not have gone out to the reporter. However, this email from
8 Lucy Bannon to Syed Khaderi directly rebuts that statement.

9 THE COURT: But your whole purpose in this line of
10 questioning, with an undisclosed document, is to rebut the
11 earlier testimony he gave before you even put this exhibit in
12 front of him.

13 MR. WILSON: I'm trying to rebut multiple statements
14 that Mr. Seery has made today, and I think it -- you know, if
15 he's going to testify that this information did not go out to
16 a reporter, I think I'm allowed to rebut that to demonstrate
17 that it did.

18 THE COURT: All right. Why didn't you disclose this
19 in advance? It's feeling less and less like an impeachment
20 document the more we go through it.

21 MR. WILSON: Your Honor, I did not -- I did not
22 actually have this document at the time we filed our witness
23 and exhibit list, but I would also say that I didn't have any
24 purpose to use it if I didn't need it for rebuttal.

25 THE COURT: Okay. First off, you're supposed to

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1 disclose all exhibits you anticipate using except those for
2 purposes of impeachment. Okay? Not rebuttal, to be
3 technical.

4 So, if you didn't disclose this exhibit, the only way you
5 can use it, subject to other possible objections, is if you're
6 impeaching a statement. And I'm just saying I think we're
7 going beyond trying to impeach the original statement and now
8 we're trying to impeach statements he's made after seeing
9 portions of the document.

10 What did you mean, you didn't have this document in time
11 to disclose it?

12 MR. WILSON: Well, I actually just received this
13 document this morning, Your Honor.

14 THE COURT: Where did you receive it from?

15 MR. MORRIS: From who?

16 MR. WILSON: I -- I honestly do not know the source
17 of this document, although it was provided to me by my client.

18 MR. MORRIS: Your client being Mr. Dondero?

19 THE COURT: Could you answer that, Mr. Wilson?

20 MR. WILSON: Yes, that's -- yes, that's correct.

21 THE COURT: All right. I will -- that's --

22 MR. MORRIS: Your Honor, I'd like to --

23 THE COURT: That's a different can of worms. But for
24 now, I sustain the objection. You're done questioning on this
25 document.

Seery - Cross

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1 A I believe that the Trustee had the overall, and then
2 subsequently, with the confirmation of the plan, they took it
3 over. So I think that ultimately Mr. Terry had the management
4 authority, full management authority, and some advice through
5 Brigade. But I think technically it wasn't actually during
6 the Chapter 7. The Chapter 7 proceeding, I believe that Mr.
7 Phelan had the actual authority.

8 (Echoing.)

9 Q I'm sorry. And so your testimony is that Mr. Phelan had
10 the actual authority but he delegated that authority to Josh
11 Terry and Brigade?

12 A I think that's fair, yes.

13 Q And do you know when that occurred?

14 A I believe that the control of the CLOs was in July of
15 2018, and then the ultimate confirmation of the case was at
16 the very beginning of '19.

17 Q So, after being instituted as portfolio manager, and
18 during the time when Acis and Brigade were working under the
19 direction of the Trustee, who would have receive the fees for
20 managing those portfolios?

21 A I believe -- I don't know. I believe the -- that the Acis
22 estate would have received those fees.

23 Q And who -- and so is that your testimony, that prior to
24 confirmation the Acis estate would have received the
25 management fees?

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Seery - Cross

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1 A I believe that -- I believe they would have if they were
2 the manager, yeah.

3 Q Okay. And who would have received the fees after
4 confirmation?

5 A Acis.

6 Q Okay. And who would have had the discretion to set the
7 amount of those management fees?

8 A They would be agreed to in the -- in the investment
9 management agreement.

10 Q They would be agreed to?

11 A Yes. As far as I've seen, I've -- I haven't seen
12 unilateral ability of a manager to set fees at its -- at its
13 whim.

14 Q So is it your understanding that Acis and Brigade ended up
15 charging substantially more fees than Highland had charged
16 when it was under Highland's management?

17 A I think the fees were -- the fees were -- the fees were
18 set by the agreement.

19 MR. MORRIS: Your Honor, I just object to the line of
20 questioning on relevance grounds. This is a 9019 hearing,
21 Your Honor. How -- I just don't think this has any relevance
22 at all.

23 THE COURT: All right. Mr. Wilson, what is the
24 relevance?

25 MR. WILSON: The relevance is that Mr. Seery has

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1 testified that these Acis CLOs were among the worst-performing
2 in the market, and frankly, we would agree with that, and I'm
3 trying to get his understanding as to why, because I think
4 there's direct relevance in the reason that the value of the
5 HarbourVest investment diminished.

6 MR. MORRIS: I don't think that was his testimony,
7 Your Honor. But at the end of the day, Your Honor has heard
8 the litany of reasons why the Debtor is entering into this
9 agreement. I just, I just think it's irrelevant, Your Honor.

10 THE COURT: All right. Mr. Wilson, I barely think
11 this is relevant. I mean, I'm going to give you some benefit
12 of the doubt on that because of, you know, the testimony that
13 HarbourVest lost \$50 million of value and --

14 (Echoing.)

15 THE COURT: -- maybe that shouldn't, you know, lie at
16 the feet of Highland. I think the compromise reflects that
17 they don't -- it doesn't lie entirely at the feet of Highland.
18 But, you know, maybe two or three more questions.

19 MR. WILSON: Yes. Thank you, Your Honor. And I
20 didn't have very much more on this point. But to be a hundred
21 percent honest, I can't remember my question right before the
22 objection.

23 THE WITNESS: I think you were asking me about the
24 fees and somehow alluding or implying that the manager could
25 unilaterally set fees.

Seery - Cross

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1 A I think it's an important part of the settlement, that the
2 part of the settlement is the subordinated claim. We could
3 put that into presumably any plan. But our plan does -- does
4 have a Class 9 for that. So I think it's a -- it's a part of
5 the settlement that is important or we wouldn't have included
6 it. It clearly wraps everything up and moves us towards
7 confirmation.

8 Q And would you have made the deal with HarbourVest if they
9 had pushed back on the commitment to vote for the plan?

10 A Yeah, I would have.

11 Q All right. Thank you.

12 MR. WILSON: No further questions.

13 THE COURT: All right. Mr. Draper, anything from
14 you?

15 MR. DRAPER: Yes, Your Honor.

16 CROSS-EXAMINATION

17 BY MR. DRAPER:

18 Q Mr. Seery, I may not understand the settlement, and I
19 apologize, but the way I think the settlement reads, the
20 interest that you're acquiring, you have the right to place in
21 any entity. Is that my -- is that correct?

22 A I don't recall the -- the specifics, but just from a
23 structural standpoint, we wanted to be able to put it into a
24 subsidiary as opposed to putting it directly in HCMLP. If we
25 couldn't do that, we would -- we would put it into HCMLP. So

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Seery - Cross

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1 there wasn't a -- I don't recall the actual specifics, but we
2 certainly thought about holding that interest in a -- in a
3 subsidiary, just to have a cleaner hold.

4 Q Why aren't you putting it into the Debtor so the Court and
5 the estate have jurisdiction over that?

6 A I think the Court certainly has jurisdiction over an
7 entity that the estate owns a hundred percent of. I don't
8 think that's -- that's even a close call. So the important --

9 Q Now, --

10 A Can I finish?

11 Q Sure.

12 A You asked me why. To the extent that somebody thinks that
13 problematic, I will consent to the Court having complete
14 jurisdiction over it, since I control it a hundred percent.

15 Q No. The real reason is, if I remember correctly, Mr.
16 Dondero and Judge Lynn filed a motion to have some say or some
17 information as to sales by subsidiaries, and I think you took
18 the position that they weren't entitled to it. And so my
19 concern was that putting this in a subsidiary in a sense gave
20 you unfettered control without any review of the item.

21 A I don't -- I don't think that's the case where we --
22 there's a directly-held subsidiary where we own a hundred
23 percent of it. I don't think that that's the case.

24 Q Okay. But you're willing to (a) put this into the Debtor,
25 number one; and number two, have the estate and have the Court

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Seery - Cross

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1 have complete control over the disposition of it and its
2 actions, correct?

3 A That's not correct, no.

4 Q What -- what is incorrect about my statement?

5 A The debtor-in-possession has control of its assets. The
6 Court doesn't have complete control over its assets. There's
7 --

8 Q Well, --

9 A -- issues -- hold on a second. This is not -- this is not
10 a game and a trap. We put it in a subsidiary for specific
11 reasons. You asked why. I'm giving you the why. It's not to
12 hide it from anybody. We're not going to sell the asset
13 unless somebody comes up with a great price for it. We're
14 going to monetize the assets. We're going to control HCLOF by
15 a majority.

16 Q But, again, the issue is, if it's in the estate, the Court
17 has supervision over it. If it's not in the estate, the Court
18 has no supervision of it.

19 A I don't think that's correct, because the Court has
20 supervision over the estate, which owns a hundred percent of
21 the special-purpose entity that will own the shares.

22 Q Okay. All right. Now, let's talk about the \$15 million
23 that you discussed and the legal fees that were incurred. Is
24 that the total amount that was spent, or is -- or is that --
25 was the total amount \$30 million and HarbourVest was only

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Seery - Cross

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1 responsible for one half of it or functionally took the brunt
2 of one half of it?

3 A I think the total amount is between \$15 and \$20 million.
4 I don't have the exact numbers.

5 Q So, in fact, the HarbourVest loss due to its ownership
6 would have been one half of that, not \$15 million?

7 A Well, the vehicle lost the money. HarbourVest owned 49.98
8 percent of it, and Highland controlled the rest. So if you
9 allocate it that way, I suppose that would be a -- that's how
10 you would divide it, in -- roughly in half, yes.

11 Q And so HarbourVest's actual dollar loss due to the legal
12 fees is really the 49-point-whatever percent of \$15 million,
13 not \$15 million?

14 A I don't know if -- I certainly would argue that. I don't
15 think that HarbourVest has that position.

16 Q Okay. Now, in connection -- you were asked a question
17 about the documentation that was provided by Highland to
18 HarbourVest both during the bankruptcy of Acis and before.
19 You have control over the Harbour -- over the Highland server,
20 correct?

21 A I'm sorry. Can -- can we do two things? One is, Mr.
22 Draper, I can't see you, so it would be better if I could see
23 you during the questioning.

24 Q Okay.

25 A And could you repeat the question?

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Seery - Cross

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1 Q All right. I'll be happy to. You were asked a question
2 about the documentation that was provided by Highland to
3 HarbourVest during the Acis bankruptcy and meetings that took
4 place between the parties. Correct?

5 A Yes.

6 Q And you stated you were unaware of the material that was
7 sent over?

8 A I think I testified that I didn't receive the 40,000
9 documents that were mentioned.

10 Q Did you do any search or order a search of the Highland
11 server to see what material was sent over by any party to
12 HarbourVest to analyze what -- what information they had
13 available to them and what was provided to them?

14 A Yes, we did a search.

15 Q And did you review the documentation that was sent over?

16 A The -- the documentation that we looked at was very
17 specific to the investment and to the OM. So we didn't look
18 for the -- the supposed 40,000 documents, no.

19 Q Did you look for the material that was provided to them
20 during the Acis bankruptcy and the periodic meetings that you
21 discussed? Or that you testified to earlier?

22 A The answer is no.

23 Q One last question. I think, and just so I understand your
24 testimony, you've broken out the HarbourVest claim into two
25 pieces. One is the legal fee amount that we've just

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1 discussed, and I gather the other piece of that is the fraud
2 in the inducement to enter into the CLO purchase?

3 A It's -- it's more -- it's much more than that.

4 Q Okay. Well, let me say it in a different way. The other
5 part of it is the losses as a result of the fraud in the
6 inducement to purchase the interest?

7 A I don't think that's -- that's fair. If I could explain?

8 Q Sure.

9 A Yeah. The legal fee piece is pretty clear. The other
10 piece starts with fraud in the inducement, but it's extensive
11 fraud claims. Fraud in the inducement, as I testified
12 earlier, would get them around the exculpation and liability
13 limitations in the OM. You don't get around all of those with
14 just the fraud. And so that's -- that's the split of that
15 claim. So the fraud in the inducement contains fraud
16 allegations. Even if you didn't have inducement, you'd have
17 other potential fraud claims.

18 Q But let me state it in a different fashion. But for the
19 investment, the fraud that you allege wouldn't have occurred?

20 A I -- HarbourVest alleges it.

21 Q No, I'm just -- in your analysis of the claim, but for the
22 inducement, the rest of the damages wouldn't have flowed?

23 A That's HarbourVest's position, yes. But for the fraud,
24 they wouldn't have made the investment.

25 Q All right.

Seery - Redirect

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1 MR. DRAPER: I have nothing further for this witness.

2 THE COURT: All right. Any redirect, Mr. Morris?

3 MR. MORRIS: Just a few very questions, Your Honor.

4 Just a very few questions.

5 REDIRECT EXAMINATION

6 BY MR. MORRIS:

7 Q Mr. Seery, you were asked about that document that Lucy
8 prepared. Do you remember that?

9 A Yes, I do.

10 Q In your experience, don't defendants often deny liability
11 before entering into settlements, or even worse, getting
12 adverse judgments entered against them?

13 A Of course. Yes.

14 Q Okay. And in response to Mr. Draper's questions, isn't
15 the Guernsey claim another claim that the Debtor took into
16 account in assessing the potential risks of this settlement?

17 A There's a number of claims contained in it. As I
18 mentioned earlier, I mentioned the RICO claim. But there is a
19 Guernsey shadow director claim, which is not dissimilar to
20 U.S. claims that somebody effectively controls an enterprise,
21 notwithstanding them not having the official role.

22 Q Okay.

23 MR. MORRIS: I have nothing further, Your Honor.

24 THE COURT: All right. Any recross on that redirect?

25 All right.

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Seery - Redirect

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1 MR. WILSON: No, Your Honor.

2 MR. DRAPER: No, Your Honor.

3 THE COURT: Thank you. Mr. Seery, that concludes
4 your testimony. Thank you.

5 THE WITNESS: Thank you, Your Honor.

6 THE COURT: We need to take a bathroom break. Before
7 we do, I just want to be clear with what we have left. As I
8 understood it, we were having Mr. Pugatch from HarbourVest.
9 Mr. Morris, will that conclude the Debtor's evidence?

10 (Pause.) Okay. You were on mute, but I think you were saying
11 yes.

12 MR. MORRIS: Sorry. But to be clear, Debevoise is
13 going to be putting their witness on the stand.

14 THE COURT: Okay.

15 MR. MORRIS: But it's part of the evidence in support
16 of the motion.

17 THE COURT: All right. Do the Objectors have any
18 witnesses today?

19 MR. WILSON: Your Honor, Mr. Dondero intends to
20 examine Mr. Pugatch, but if he's going to be called by his
21 counsel, then we will do that as a cross-examination.

22 THE COURT: All right.

23 MR. DRAPER: This is Douglas Draper. I have no
24 witnesses.

25 THE COURT: Okay. All right. Well, I'm asking --

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1 well, I do want to ask: Can we get a time estimate
2 potentially for Mr. Pugatch?

3 MS. WEISGERBER: For my examination, Your Honor,
4 twenty minutes, perhaps.

5 THE COURT: Okay.

6 MS. WEISGERBER: Or less.

7 THE COURT: All right. Well, let me tell you what
8 we're going to do. We're going to take a ten-minute bathroom
9 break. But I have a 1:30 hearing and I have a 2:00 o'clock.
10 Well, I have a 1:30 docket, multiple matters, and a 2:00
11 o'clock docket. So, you know, I'm really intending that we
12 get finished in time to give me and my staff a little bit of a
13 lunch break before launching into the 1:30 docket, so I'm
14 hopeful we can get done around 1:00-ish. If we can't, then
15 we're going to have to reconvene, I'm going to say probably
16 3:00-ish Central time. So let's hope we can get through
17 everything. All right? Ten-minute break.

18 THE CLERK: All rise.

19 (A recess ensued from 11:58 a.m. until 12:08 p.m.)

20 THE CLERK: All rise.

21 THE COURT: All right. Please be seated. We're
22 going back on the record in the Highland matters. Do we have
23 everyone? It looks like we do. Ms. Weisgerber is going to
24 call the next witness; is that correct?

25 MS. WEISGERBER: Yes, Your Honor. We call Michael

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1 Pugatch of HarbourVest to the stand.

2 THE COURT: All right. Mr. Pugatch, if you could
3 turn on your video and say, "Testing one, two."

4 MR. PUGATCH: Two.

5 THE COURT: All right. There you are. Please raise
6 your right hand.

7 MICHAEL PUGATCH, HARBOURVEST'S WITNESS, SWORN

8 THE COURT: Thank you. You may proceed.

9 MS. WEISGERBER: Thank you, Your Honor.

10 DIRECT EXAMINATION

11 BY MS. WEISGERBER:

12 Q Good morning. Can you please state your name for the
13 record?

14 A Sure. It's Michael Pugatch.

15 Q And where do you work, Mr. Pugatch?

16 A HarbourVest Partners.

17 Q And what is your title?

18 A I'm a managing director in our secondary investment
19 group.

20 Q Did HarbourVest file claims in the Highland bankruptcy,
21 Mr. Pugatch?

22 A We did, yes. Several claims, in fact.

23 Q What was the basis for those claims?

24 A Yeah. Among other things, fraudulent inducement based on
25 misrepresentations and omissions on the part of Highland in

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Pugatch - Direct

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1 connection with our original investment, mismanagement at the
2 HCLOF level, including inappropriate fees that were charged
3 to investors, among a number of other items as well.

4 Q Can you explain what you mean by misrepresentations made
5 to HarbourVest by Highland?

6 A Yeah, sure. So, you know, based on a number of
7 statements that were made to us around the litigation
8 involving Mr. Terry, some of the intentions found, the
9 structural changes that came to light with respect to HCLOF
10 and our investment, as well as the fact that the arbitration
11 award specifically against Mr. Terry would have no impact or
12 implication on Highland's sale or business.

13 Q And can you explain what you mean by omissions made by
14 Highland to HarbourVest?

15 A Sure. So I would say, really, the implications behind
16 the structural changes that were made at the time of our
17 investment into HCLOF. Also, the intention, clear intentions
18 that Highland had to never, in fact, pay the arbitration
19 award that came to light during our due diligence period to
20 Mr. -- to Mr. Terry as part of the investment. And
21 ultimately the -- what Highland went about doing in terms of
22 stripping assets of Acis that led to the material value
23 declines and destruction of value that we've experienced
24 since our investment.

25 Q You mentioned a diligence period. Did HarbourVest

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1 conduct diligence on the investment?

2 A We did. We conducted very detailed due diligence, as we
3 do for all of our investments. That diligence period lasted
4 several months ahead of our investment decision.

5 Q And did HarbourVest conduct that diligence by itself?

6 A No. So, in addition to internal investment professionals
7 at HarbourVest, we engage with outside advisors, both
8 consultants as well as legal advisors, in connection with
9 that due diligence.

10 Q And did Highland answer all of HarbourVest's questions
11 during that diligence period?

12 A They did. And they were numerous. But yes, they
13 answered all the questions that we had for them.

14 Q Was the Terry dispute part of HarbourVest's diligence?

15 A It was. That came up as one of the outstanding items of
16 litigation as part of our due diligence.

17 Q I'm going to ask my colleague to pull up on the screen an
18 exhibit that was on our exhibit list as Items -- Exhibits 34
19 and 35. It's an August 15, 2017 email from Brad Eden to
20 Dustin Willard. Mr. Pugatch, do you recognize this document?

21 A I do, yes.

22 Q And what is it?

23 A This was an email sent to us during our due diligence
24 period in response to a request for more information on the
25 outstanding litigation that Highland was involved with.

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Pugatch - Direct

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1 MR. MORRIS: No objection from the Debtor, Your
2 Honor.

3 THE COURT: All right. What is the letter or number
4 for this exhibit?

5 MS. WEISGERBER: It's HarbourVest Exhibit 34.

6 THE COURT: All right. So HarbourVest Exhibit 34 is
7 admitted.

8 (HarbourVest's Exhibit 34 is received into evidence.)

9 THE COURT: And I need to be clear where it appears
10 on the docket. Can someone tell me?

11 MS. WEISGERBER: So, it's identified on our exhibit
12 list, not -- it's not attached to the exhibits. It is on the
13 docket. We were -- when we initially filed the exhibit list,
14 we were working out confidentiality issues. But it was
15 subsequently filed with our reply last night. It's at Docket
16 No. 1735 --

17 THE COURT: All right.

18 MS. WEISGERBER: -- at Pages A -- Pages A345 to A350.

19 THE COURT: All right. Very well. Thank you.

20 BY MS. WEISGERBER:

21 Q Mr. Pugatch, we'll just scroll down to the second page of
22 the attachment. Can you describe generally what the
23 litigation says regarding the Terry dispute?

24 A Yes. Generally speaking, this dispute was described as
25 an employee dispute, employment agreement dispute, with Mr.

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1 HarbourVest Exhibit 36, into evidence.

2 THE COURT: Any objections?

3 MR. WILSON: Your Honor, John Wilson. I would object
4 as to the relevance of this document.

5 THE COURT: All right. What's your response?

6 MS. WEISGERBER: Your Honor, it shows
7 misrepresentations that the witness will testify how it
8 relates back to prior representations prior to HarbourVest's
9 investment, as well as misrepresentations at that time.

10 THE COURT: Okay. I overrule the objection. I'm
11 going to admit it.

12 (HarbourVest's Exhibit 36 is received into evidence.)

13 BY MS. WEISGERBER:

14 Q Mr. Pugatch, can you describe generally -- we spoke about
15 this a little bit -- just what this communication from
16 Highland was conveying to HarbourVest at the time?

17 A Yes. Specifically, again, responding to this *Wall Street*
18 *Journal* article that had been published, trying to defend,
19 again, Highland's own views why there were inaccuracies in
20 the reporting. But importantly, from our perspective, trying
21 to reassure us as to the fact that, you know, these
22 accusations would have no bearing and any results from it
23 would have no bearing on their ongoing business or
24 partnership or the investment that we had made in HCLOF.

25 MS. WEISGERBER: And if you can scroll to the second

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1 in the late stages of our diligence and closing process on
2 the investment into HCLOF.

3 Q And generally, what did Highland tell you about the
4 arbitration award?

5 A We were aware of its existence. We were aware of the
6 quantum of the award, I think it was around an \$8 million
7 arbitration award in the favor of Mr. Terry, and that was
8 following the litigation around the wrongful termination and
9 employee dispute that Highland had described to us
10 previously.

11 Q Did you ask to see a copy of the arbitration award?

12 | A No, we did not.

13	Q	Why not?
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14 A Ultimately, we -- you know, the explanations that
15 Highland had provided to us all seemed very reasonable. We
16 relied on their representations that this was, again, nothing
17 more than a dispute with a former disgruntled employee, in
18 their words, that had no bearing or, you know, would not have
19 any bearing on our investment in HCLOF or their ongoing CLO
20 business, which all very clearly was not the case, as
21 we've -- as we've learned over the last several years.

22 Q Following learning about the arbitration award, did
23 HarbourVest do other diligence?

24 A We did. So, in addition to asking questions related to
25 the arbitration award and any impact that it would have, we

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8 in ultimately making our investment.

10	award?
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11 | A They were, yes.

13 | changes?

25 investment period.

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1 And in connection with that, in light of the arbitration
2 award, Highland's view was that there may be difficulties in
3 the market in resetting certain of those Acis CLOs with the
4 Acis brand associated with them, given, again, the existence
5 of the arbitration award and concerns in the market around
6 the Acis brand reputation.

7 Q And what did they tell you was the market view of Acis,
8 or the Acis brand?

9 A Yeah. Their view or their concern was that the, you
10 know, because of the existence of that arbitration award, the
11 brand would be viewed as toxic.

12 Q Didn't this put you on notice that perhaps there was
13 something wrong with the structural changes?

14 A I mean, we -- I mean, short answer, no. We ultimately
15 asked questions, we diligenced the legal structure, but
16 relied on the representations that were made to us by
17 Highland around the rationale for the structural changes,
18 that these are all changes that were within a Highland-
19 managed vehicle or sat below the vehicle that we were
20 investing in, and so ultimately were in Highland's purview,
21 was the representations that we relied on.

22 Q And did HarbourVest alone do that diligence of the
23 structural changes?

24 A So, no. I mean, in connection with the diligence that we
25 did internally and with Highland directly, we engaged with

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1 Q Did HarbourVest instruct any of those structural changes
2 or transfers to occur?

3 | A We did not. Absolutely not.

4 Q Why didn't HarbourVest itself appear in the Acis
5 bankruptcy and file a claim?

6 A Yeah. HarbourVest's role, again, in HCLOF, we were a
7 passive investor in a Highland-managed company. We had no
8 direct interaction with or relationship with Acis. There was
9 really no reason for us to be directly involved until we were
10 subsequently dragged into involvement on account of those
11 misstatements. And then at that point our focus really
12 pivoted to, you know, whether we needed to defend ourselves
13 against those accusations that had been made by Highland and
14 after a request for further information in discovery by the
15 Acis trustee.

16	Q	Did HCLOF participate in the Acis bankruptcy?
----	---	---

17 | A They did, yes.

18 Q Did HCLOF incur fees for participating in the Acis
19 bankruptcy?

20 A Yes. In fact, very meaningful fees, to the tune of well
21 in excess of \$15 million of legal fees, as we understand it,
22 that have been incurred, largely in connection with the
23 ongoing Acis bankruptcy and Highland's continued pursuit of
24 and in connection with the litigation with Mr. Terry, which
25 we firmly believe was entirely inappropriate that HCLOF and

6 A They do, yes. One of the multiple claims that we had
7 filed against Highland.

10 A Sure. So, our initial investment in November of 2017 was
11 right about \$73-1/2 million, I believe.

13 A We did. There was a subsequent capital call investment
14 of about \$5 million, bringing our total investment to just
15 under \$80 million in aggregate.

18 | A We did, yes.

21 A Yeah. So, our -- based on the original \$73-1/2 million
22 investment, we had expected a total return of about \$137
23 million on that -- on that investment.

25 | A So, that projection was based on materials that we had

Pugatch - Cross

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1 THE COURT: All right. I didn't hear you, Ms.
2 Weisgerber. Do you pass the witness?

3 MS. WEISGERBER: Yes, I pass the witness.

4 THE COURT: All right. Thank you.

5 Mr. Morris, any examination from you?

6 MR. MORRIS: No, thank you, Your Honor.

7 THE COURT: All right.

8 (Interruption.)

9 THE COURT: All right. I'm not sure whose voice that
10 was, but please, again, mute your devices when you're not
11 talking.

12 Any cross-examination of Mr. Pugatch? I'll start with
13 you, Mr. Wilson.

14 MR. WILSON: Yes, Your Honor.

15 THE COURT: Okay.

16 CROSS-EXAMINATION

17 BY MR. WILSON:

18 Q How are you -- I guess we're afternoon now. How are you
19 this afternoon, Mr. Pugatch?

20 A I'm doing well. Yourself?

21 Q I'm doing well as well. Do you recall that on Monday of
22 this week I took your deposition?

23 A Yes, I do.

24 Q And so you understand that my name is John Wilson and I
25 represent Jim Dondero, who has filed an objection to the 9019

003782

1 motion filed by the Debtor?

2 I've got a few questions for you today. Has HarbourVest
3 been around for over 35 years?

4 A We have, yes.

5 Q And does HarbourVest have ten offices around the world?

6 A Correct, yes.

7 Q And does HarbourVest employ over 150 investment
8 professionals?

9 A Yes.

10 Q Does HarbourVest have over \$74 billion in assets under
11 management?

12 A Correct, yes.

13 Q And is HarbourVest's client base largely comprised of
14 institutional investors?

15 A Also correct.

16 Q And you would agree with me that HarbourVest is a
17 sophisticated investor, right?

18 A I would, yes.

19 Q How long have you worked for HarbourVest?

20 A I've been employed by HarbourVest for 17 years now.

21 Q And how long have you been a managing director?

22 A I've been a managing director for approximately six
23 years.

24 Q And you were, in fact, the managing director for the
25 investment that HarbourVest made in Highland CLO Funding,

7 || A We did not.

9	A	Yes.
---	---	------

12 A We had conversations with a couple of Highland
13 individuals throughout the Acis bankruptcy process, yes.

17 | A That's correct, yes.

20 | A I do not recall that, no.

23 | A I don't know the answer to that.

003791

2 Q Okay. The next misrepresentation that you refer to says
3 that Highland indicated to HarbourVest that the dispute with
4 Mr. Terry would have no impact on its investment activities.
5 Would you agree with me that that is also an opinion?

7 MS. WEISGERBER: Your Honor, I'm going to object to
8 the extent these questions are seeking a legal conclusion
9 regarding, you know, if something's an opinion or not.

11 THE WITNESS: It was -- it was a statement that was
12 made to us by Highland and represented in multiple different
13 formats as fact. And a representation that we relied on in
14 connection with our investment.

16 Q And finally, the misrepresentation, the last
17 misrepresentation identified, is that Highland expressed
18 confidence in the ability of HCLOF to reset or redeem the
19 CLOs. Would you agree with me that that statement is an
20 opinion?

003798

2 BY MR. WILSON:

3 Q Well, this document is HarbourVest Exhibit 40, and this is
4 the statement of operations for the financial year ended 31
5 December 2018. Here, the total investment income is only
6 \$11.1 million. Do you see that?

7 || A I do.

8 Q And do you see where the expenses have increased to \$13.6
9 million?

10 || A I do, yes.

11 MR. WILSON: Okay. Scroll down some more.

12 BY MR. WILSON:

13 Q And do you see where it says net change and unrealized
14 loss on investments of \$48.47 million?

15	A	Yes.
----	---	------

16 Q And so after Acis and Brigade took over the managements of
17 these CLOs, we had a net decrease in net assets resulting from
18 operations of \$52.483 million in the year 2018, correct?

19 MS. WEISGERBER: Objection, Your Honor. Assumes a
20 fact not in evidence.

21 THE COURT: Overruled. He --

22 MR. WILSON: Your Honor, --

23 THE COURT: We're just looking at this statement and
24 testifying about it says, so I overrule the objection.

25 MR. WILSON: Thank you, Your Honor. Thank you, Your

1 refinance the CLOs on the part of HCLOF, all of which stems
2 from the actions that Highland took prior to our investment in
3 HCLOF.

4 BY MR. WILSON:

5 Q And you've -- I think it's been referenced several times
6 in HarbourVest's arguments that -- that the reset was a
7 fundamental -- the inability to get a reset was a fundamental
8 cause of the loss in value. Is that -- is that HarbourVest's
9 position?

10 A That -- that is a part of the -- the cause in the
11 declining value of the CLOs, yes.

12 Q And you would agree with me that a reset is fundamentally
13 a reset of interest rates, correct?

14 A Of the interest rates of the liabilities of the -- the
15 timing for repayment of those liabilities, yes.

16 Q Now, just say with -- for the sake of a hypothetical
17 example. If you had a home that was valued at \$5 million, or
18 let's just say \$500,000, let's make it more realistic. If you
19 had a \$500,000 home and you had a mortgage on that home at
20 five percent interest, your inability to refinance that home
21 at a lower interest rate would not affect the underlying value
22 of that home, correct?

23 MS. WEISGERBER: Objection, Your Honor. Hypothetical.
24 And objection to relevance as well.

25 THE COURT: Sustained.

1 objection, I'll --

2 || MR. MORRIS: Your Honor, --

3 THE COURT: I'm sorry. Was there an objection? I
4 will admit Dondero Exhibits A through M, and those appear at
5 Docket Entry 1721, correct, Mr. Wilson?

6 || MR. WILSON: That is correct, Your Honor.

7 THE COURT: All right.

8 MR. WILSON: That is correct, Your Honor.

9 (James Dondero's Exhibits A through M are received into
10 evidence.)

11 MR. WILSON: And one final matter is, during the
12 examination of Mr. Seery, you at least partially admitted
13 Dondero's Exhibit N, and I was wondering if we need to -- how
14 we'd need to submit that for the record.

15 THE COURT: Okay. First, I'm confused. I think you
16 said Mr. Terry's testimony. You --

17 MR. WILSON: I said Seery. I'm sorry.

18 THE COURT: Oh, Seery?

19 MR. WILSON: Or I may have said Terry, but I meant to
20 say Seery.

21 THE COURT: Okay. Maybe you said it. Okay. During
22 Mr. Seery's testimony -- oh, the email that I admitted a
23 portion of?

24 MR. WILSON: That is -- that's correct, Your Honor.

25 THE COURT: What -- what are you asking? It's not in

1 | your notebook. Are you asking do you need to separately
2 | submit it or what?

3 MR. WILSON: Yeah, I was just asking what the Court's
4 preference on how we submit that for the -- put it in the
5 record.

6 THE COURT: Okay. That was so garbled I didn't hear
7 you. You need to file that on the docket as a supplemental
8 exhibit that was admitted, okay?

9 MR. WILSON: Okay. Thank you, Your Honor.

10 THE COURT: All right. Closing arguments? Mr.
11 Morris?

12 CLOSING ARGUMENT ON BEHALF OF THE DEBTOR

13 MR. MORRIS: Yes, very briefly, Your Honor. The
14 Debtor easily meets the standard here. The settlement
15 consideration relative to the claim establishes and reflects
16 the likelihood of success on the merits.

17 You know, I've never -- I did hear Mr. Pugatch in the
18 deposition the other day, but I otherwise haven't heard from
19 him. I found him to be incredibly credible, Your Honor, and I
20 regret the fact that he and HarbourVest are being blamed twice
21 here. The fact that they got 40,000 documents or didn't read
22 the arbitration award, it's just -- it's a shame that they're
23 being dragged through this yet again.

24 The fact is, Your Honor, there is no evidence that they
25 made the disclosures that HarbourVest claims -- complains

1 about. They just don't. The fraudulent transfers led to the
2 bankruptcy, led to the appointment of a trustee, led to --
3 right? So, so it's -- that's why -- but they're getting
4 something for their claim.

5 It was a hard negotiation, Your Honor. There is no
6 dispute that if we litigated this it would be complex. It
7 would fact-intensive. The Debtor would be forced to rely upon
8 witnesses who are no longer employed by it. That it would be
9 expensive, for sure. There's no dispute about any of that.
10 There's no dispute that the creditor body has spoken loudly
11 here by unanimously refraining from objecting except for Mr.
12 Dondero and the entities controlled by him.

13 And you heard Mr. Seery's testimony. I think he
14 exhaustively informed the Court as to the process by which the
15 transaction was analyzed and negotiated, and there's no
16 evidence to the contrary that this was an arm's-length
17 negotiation.

18 Unless Your Honor has any questions, we would request that
19 the motion be granted.

20 THE COURT: Thank you. Ms. Weisgerber, your closing
21 argument?

22 CLOSING ARGUMENT ON BEHALF OF HARBOURVEST

23 MS. WEISGERBER: Sure. Thank you, Your Honor. I'll
24 also be brief. We again join in Mr. Morris's arguments and
25 comments.

1 The Court has now heard testimony from Mr. Pugatch
2 regarding the factual detail underlying HarbourVest's claims.
3 The Court has also heard about the significant damages that
4 HarbourVest stands to recover for those claims. And
5 HarbourVest came to this Court ready to litigate. It would --
6 it's ready to do so if needed. It believes it would prevail
7 on its claims if it had to do so.

8 But the Court also heard from Mr. Seery about his
9 understanding of HarbourVest's claims, his calculus, and his
10 decision to settle them. And we submit that nothing further
11 is needed by this Court in order to approve the settlement.
12 This is a question of the Debtor's business judgment. We're
13 not here to have a trial on the merits of HarbourVest's
14 claims. The Objectors have made various arguments, including
15 about the cause of HarbourVest's damages. But even the nature
16 of the legal claims that HarbourVest is asserting, some do not
17 require a loss causation. So we submit that's not even
18 relevant to the merits of the claims.

19 The settlement is clearly in the best interest of the
20 estate, and we respectfully request that the Court approve it.

21 THE COURT: Thank you. All right. Mr. Wilson, your
22 closing argument?

23 MR. LYNN: Michael Lynn. I will give the closing
24 argument, if that's satisfactory to the Court.

25 THE COURT: All right. Go ahead.

CLOSING ARGUMENT ON BEHALF OF JAMES DONDERO

MR. LYNN: Good afternoon, Your Honor. I just want to make a few points, and I'll try to do it as quickly as possible.

First, I feel compelled to address the argument of the Debtor that Mr. Dondero is repeating his litigious behavior from the Acis case. I don't know about the Acis case. I wasn't involved except very, very peripherally. But with respect to this case, we have only taken positions in court that we believed -- that is, his lawyers -- believed were warranted by law, facts as we knew them, and that are consistent with professionalism. I'd be glad to explain any position we took.

Often, through the Debtor's very persuasive powers, we never had the chance to explain our position previously to the Court. In fact, for the most part, as today, we have been reactive rather than commencing proceedings. In fact, during the first seven months of this case, we only appeared in court a few times, when we felt we had to -- for example, when discovery was being sought by the Creditors' Committee that we feared might invade privilege. Then, much to the Debtor's fury, we opposed the Acis 9019. We did so because we thought it was too much.

Since, as the Court can see, the principal instigators of litigation have been the Debtor, and to a lesser extent, the

1 | Committee.

2 Indeed, in an apparent effort to drown Mr. Dondero and his
3 counsel in litigation, the Debtor has repeatedly sought court
4 action on a very short fuse, claiming need for expedited
5 hearing.

6 Perhaps the most startling example of this is the recent
7 contempt motion, for which there is no good reason for a quick
8 hearing. Resolution of that motion is not necessary to reach
9 the confirmation hearing. The motion could be heard after the
10 confirmation hearing. There is no need to put Mr. Dondero and
11 his professionals in a position where they have to respond in
12 a couple of days, two business days, and then will have two
13 days to prepare for trial.

14 Second, Your Honor, Mr. Seery has repeatedly asserted,
15 contrary to today's motion, that the HarbourVest claim was of
16 no merit. That is why, when he came in to settle for tens of
17 millions of dollars, we opposed this motion. It appears that
18 the motion is occurring without any cross-party discovery.
19 There is no consideration, apparently, of trying dispositive
20 -- dispositive motions first. There is no consideration for
21 junior classes of equity, which Mr. Seery has previously
22 opined were in the money. This, even though there's no reason
23 that this settlement is necessary pre-confirmation, unless Mr.
24 Seery wants HarbourVest's vote.

25 Third, for whatever reason, that seems to be the driving

1 factor for settling. On its face, the vote seems to be a key
2 factor of the settlement. About the longest provision of the
3 settlement agreement relates to voting. The motion itself --
4 in the motion itself, five of seven bullet points cited by the
5 Debtor for approval of the settlement deal with and emphasize
6 support of the plan or the vote that is to be cast for the
7 plan.

8 If the settlement is a good deal, it didn't need to have
9 as one of its parts the requirement that HarbourVest vote for
10 the plan.

11 Your Honor, I'll stop there. I know Your Honor would like
12 to get just a few minutes before your 1:30 docket. I've been
13 there and I understand that, and I do apologize for taking the
14 time we have, but I think that responsibility is shared with
15 the Debtor and HarbourVest.

16 Thank you, Your Honor.

17 THE COURT: All right. Thank you for that.

18 Mr. Draper, any closing argument from you?

19 CLOSING ARGUMENT ON BEHALF OF GET GOOD AND DUGABOY TRUSTS

20 MR. DRAPER: Yes, I have three comments. The first
21 is the claim -- the loss claim, absent the fraud claim, is, at
22 best, \$7 million. I think Mr. Seery's argument that a hundred
23 -- one hundred percent is attributable to there is just wrong.
24 If he and I both invested in a company 50-50 and it goes
25 broke, we only lost 50 cents each.

1 Number two, I think the Court heard the evidence. I think
2 this is, at best, a subordinated claim under 5 -- under the
3 Bankruptcy Code. It's really a "But for the
4 misrepresentations, we wouldn't have invested."

5 And the last one is the -- Judge Lynn represented the
6 voting, so I won't deal with that. But the one that troubles
7 me the most is the fact that this asset that is ultimately
8 being paid for in claim dollars that's being transferred over
9 to the Debtor and being put it outside the estate, outside the
10 purview of this Court, and placed in some subsidiary, this --
11 this transaction, if it is approved, must -- should contain a
12 provision that the asset that's being acquired come into the
13 Debtor and be owned by the Debtor.

14 THE COURT: All right.

15 MR. DRAPER: I have nothing further, Your Honor.

16 THE COURT: Thank you, Mr. Draper.

17 Mr. Morris, you get the last word since it's your motion.

18 MR. MORRIS: Very quickly, Your Honor. The
19 subordination argument doesn't hold water. This is not a
20 claim against the Debtor for the security; it's a claim for
21 fraud. Okay? So, so 510(b), if it was a claim against HCLOF,
22 that might make sense, but this is a claim against the Debtor.
23 And it's a Debtor -- it's a claim for fraud. That's number
24 one.

25 Number two, we need to keep this exactly as it's been

1 structured in order to avoid litigation. Mr. Seery told the
2 Court. I'm sure the Court can make its own assessment as to
3 Mr. Seery's credibility as to whether or not the Debtor is
4 intending to somehow get this asset beyond the Court.

5 But there are reasons why we've done this, Your Honor.
6 They could have made an objection on that basis. In fact, if
7 they did, it would be overruled, because there's no -- there's
8 no basis for this Court to find that somehow the Debtor and
9 Mr. Seery are doing something untoward to get assets away from
10 this Court's jurisdiction.

11 You know, I don't know what to say about Mr. Lynn's
12 commentary. Much of it had nothing to do with any evidence in
13 the record.

14 The fact remains, Your Honor, that this settlement is
15 fair. It's reasonable. It's in the best interest of the
16 estate. And we would respectfully request that the Court
17 grant the motion.

18 THE COURT: All right. Thank you. Well, I
19 appreciate all the arguments and evidence I have heard today.
20 I'm going to be brief in my ruling here, but I reserve the
21 right to supplement in a more fulsome written order, which I'm
22 going to instruct Mr. Morris to submit. I am approving the
23 motion to compromise the HarbourVest claim today, and I guess
24 subsumed in that is granting the motion to allow their claim
25 for 3018 voting purposes.

1 I in all ways find this compromise to meet the required
2 legal standard set forth in such cases as *TMT Trailer Ferry*,
3 *AWECO*, and *Foster Mortgage*, numerous other Fifth Circuit
4 cases.

5 First, I'm going to specifically say for the record that I
6 found both witnesses today, Mr. Seery and Mr. Pugatch, to be
7 very credible. Very credible testimony and meaningful
8 testimony was provided to the Court today. And based on that
9 testimony, I find, first, that this compromise was the product
10 of arm's-length negotiations. It was a hard-fought
11 negotiation, as far as I'm concerned. The Debtor objected to
12 these numerous HarbourVest proofs of claim. The Debtor did
13 not want to allow HarbourVest a significant claim for voting
14 purposes. I duly note the statements made in the disclosure
15 statement before this compromise was reached suggesting, you
16 know, the Debtor didn't think HarbourVest should have a large
17 claim.

18 That is consistent with everything I typically see in a
19 bankruptcy case when there's a claim objection. The objector
20 vehemently denies the claimant should have a proof of claim,
21 and then people sit down and think about the risks and rewards
22 of litigating things. And I believe very fervently that's
23 what happened here. There were good-faith, arm's-length
24 negotiations that resulted in this proposed compromise.

25 I find the compromise -- and I'll add to that point, on

1 the good-faith point, I find nothing sinister or improper
2 about the fact that the compromise includes a commitment of
3 HarbourVest to vote in favor of the plan. Again, we see this
4 a lot. You know, there's even a buzz word that doesn't even
5 exist in the Bankruptcy Code: "plan support agreement." You
6 know, we see those a lot -- you know, oftentimes negotiated
7 before the case, but sometimes after. You know, it may be
8 improper in certain situations, but there was nothing here
9 that troubles me about that component of the compromise.

10 I find the compromise to meet the paramount interest of
11 creditors here. Notably, we have very large creditors in this
12 case who have not objected. The *Foster Mortgage* case from the
13 Fifth Circuit tells me I am supposed to consider support or
14 opposition of creditors. No opposition of UBS. No opposition
15 of the Redeemer Committee Crusader Fund. No opposition from
16 Josh Terry or Acis. No opposition from Daugherty.

17 But moreover, when considering the paramount interest of
18 creditors, I find this compromise to be in all ways fair and
19 equitable and in the best interest of the estate, and
20 certainly within the range of reasonableness. The evidence
21 showed that HarbourVest asserted over \$300 million. Over \$300
22 million. Granted, that was based on all kinds of legal
23 theories that would be contested and expensive to litigate,
24 but the evidence also showed that they invested over \$70
25 million. You know, close to \$75 million. I forget the exact

1 number. \$75 or \$80 million, somewhere in that range. And now
2 the credible evidence is that investment is worth about \$22
3 million.

4 So, certainly, while the claim may not have, at the
5 ultimate end of the day in litigation, resulted in a \$300
6 million proof of claim, certainly, certainly there were strong
7 arguments for a very sizeable claim, more than this compromise
8 amount. So it's certainly fair and equitable and reasonable
9 when considering the complexity and duration of further
10 litigation, the risks and rewards, the expense, delay, and
11 likely success.

12 A couple of last things I'm going to say are these. I
13 understand, you know, there is vehement disagreement on the
14 part of our Objectors to the notion that Highland might have
15 caused a \$50 million loss to HarbourVest. But I will tell
16 you, for what it's worth -- I want the record clear that this
17 is part of my evaluation of the reasonableness of the
18 settlement -- my reaction is that, indeed, Highland's
19 litigation strategy in the Acis case caused HCLOF to lose a
20 huge portion of its value, to the detriment of HarbourVest.
21 You know, whether all evidence at the end of the day would
22 convince me of that, I don't know, but that's -- that is
23 definitely this judge's impression.

24 I'm very sympathetic to HarbourVest. It appears in all
25 ways from the record, not just the record before me today, but

1 the record in the Acis case that I presided over, that
2 Highland back then would have rather spent HarbourVest's
3 investment for HCLOF legal fees than let Josh Terry get paid
4 on his judgment. They were perfectly happy to direct the
5 spending of other people's money, is what the record suggested
6 to me.

7 And then, you know, I have alluded to this very recently,
8 as recently as last Friday: I can still remember Mr.
9 Ellington sitting on the witness stand over here to my left
10 and telling the Court, telling the parties under oath, that
11 HarbourVest -- he didn't use its name back then, okay? For
12 the first phase of the Acis case, or most of the Acis case, we
13 were told it was an investor from Boston. And at some point
14 someone even said their name begins with H. I mean, it seemed
15 almost humorous. But Mr. Ellington said it was they,
16 HarbourVest, the undisclosed investor, who was insistent that
17 the Acis name was toxic, and so that's what all of this had
18 been about: the rebranding, the wanting to extract or move
19 things away from Acis.

20 So, you know, I have heard for the -- well, at least the
21 second time today, from Mr. Pugatch, what I perceive to be
22 very credible testimony that that's just not the way it
23 happened.

24 And I guess the last thing I want to say here today, and
25 you know, I guess I have multiple reasons for saying this, not

20 So, again, part of me, I suppose, just wants to make the
21 record clear on something that I fear not everyone is clear
22 about. And I say that because the comment was made that the
23 injunctions, the preliminary injunctions sought by the Acis
24 trustee caused the plummet in value, and I think that's just
25 not an accurate statement. I think litigation strategies are

1 | what caused the plummet in value, and that's why I think
2 | ultimately HarbourVest would potentially have a meritorious
3 | claim here in a significant amount if this litigation were to
4 | go forward.

5 So, I approve this under 9019. And again, Mr. Morris,
6 you'll upload an order.

7 It is now 1:41, so let's as quickly as possible hear the
8 other motion that I don't think had any objections. Mr.
9 Morris?

10 MR. MORRIS: Your Honor, just -- yes, just very
11 quickly, just four things.

12 With respect to the order, I just want to make it clear
13 that we are going to include a provision that specifically
14 authorizes the Debtor to engage in -- to receive from
15 HarbourVest the asset, you know, the HCLOF interest, and that
16 that's consistent with its obligations under the agreement.

17 The objection has been withdrawn, I think the evidence is
18 what it is, and we want to make sure that nobody thinks that
19 they're going to go to a different court somehow to challenge
20 the transfer. So I just want to put the Court on notice and
21 everybody on notice that we are going to put in a specific
22 finding as to that.

23 THE COURT: All right. Fair --

24 MR. MORRIS: Number two is --

25 THE COURT: Fair enough. I do specifically approve

1 MR. MORRIS: It is, and I do -- I do have to point
2 out how troubled the Debtor is to learn that Mr. Dondero was
3 still receiving documents from Highland as late as this
4 morning. It's got to be a violation of both the TRO -- I
5 guess it's now the preliminary injunction.

6 I would respectfully request -- I know that time is what
7 it is -- but maybe Mr. Dondero can answer now where he got the
8 document, who he got the document from, what other documents
9 he's gotten from the Debtor since Your Honor ordered him not
10 to communicate with the Debtor's employees.

11 This is not saying hello in the hallway. I mean, this is
12 just -- it is really troubling, Your Honor, and it's why we
13 need the contempt motion heard as soon as possible.

14 THE COURT: Well, Mr. Wilson, do you want to address
15 that? I think the words I heard were that you just got the
16 document this morning, and you got it from Mr. Dondero, but we
17 don't know where and when Mr. Dondero got it. Mr. Wilson, are
18 you there?

19 MR. LYNN: I'm afraid I'm back, Your Honor.

20 THE COURT: Okay.

21 MR. LYNN: I am not sure whether Mr. Dondero had it
22 in his files from some -- from back before he was asked not to
23 communicate with members or with employees of the Debtor. I
24 believe -- I believe he's with us, though I don't think he's
25 available by video.

1 || Are you there, Mr. Dondero?

2 THE COURT: We can't hear you, Mr. Dondero.

3 MR. DONDERO: Judge?

4 THE COURT: Oh, go ahead.

5 MR. DONDERO: Can you hear me now?

6 THE COURT: Yes.

7 MR. DONDERO: Yes, I -- I -- when I moved offices, I
8 found it in a stack of paper, and --

9 MR. LYNN: I understand it shows that his microphone
10 is working.

11 THE COURT: Okay. Go ahead.

12 MR. DONDERO: Can you hear me?

13 THE COURT: Yes, go ahead.

14 MR. DONDERO: Yeah, I -- I'm sitting in new offices.
15 I've got everything in boxes. I was going through everything
16 yesterday, and I found those emails in a stack of papers and I
17 sent them over because I thought they would be relevant
18 relative to Seery's initial impression.

19 THE COURT: Okay. Well, let's talk about the timing
20 of this hearing. Mr. Morris, I'm going to -- I'm going to ask
21 you why --

22 MR. LYNN: Michael Lynn, Your Honor. I don't want to
23 waste the Court's time. We have not made available anything
24 to the Court objecting to the expedited hearing on the
25 contempt motion. We've been here.

1 I would say to Your Honor that if Mr. Dondero is indeed in
2 contempt, or was in contempt toward the motion, which has
3 nothing to do with the document that was presented as Dondero
4 Exhibit N, there is no need to hear this on an expedited
5 basis.

6 Every time we turn around, Your Honor, the Debtor is
7 asking that something be heard on an expedited basis. And we
8 have not opposed that. We have not fought that, to speak of,
9 to date. But this is getting a little ridiculous. We're
10 within days of confirmation of the Debtor's plan, and it is
11 simply a means of causing pain and suffering to Mr. Dondero
12 and those who are working with him and for him. And he does
13 have employees at NexPoint who are assisting him.

14 So we most strongly object to being put on a schedule
15 where we are expected to get a response to the contempt motion
16 on file by Monday, today being Thursday, and a weekend
17 intervening. And we strongly object to any setting of this
18 contempt motion on Tuesday or Wednesday. It is absurd, and it
19 is done solely, solely, Your Honor, to cause pain.

20 THE COURT: All right.

21 MR. MORRIS: Your Honor, if I may?

22 THE COURT: Please.

23 MR. MORRIS: Just very briefly, we had a hearing the
24 other day. The evidence is the exact same. The evidence is
25 crystal clear that the violations are meaningful, they're

1 || substantial, and they are repeated.

2 After the TRO was entered into, Mr. Dondero and only Mr.
3 Dondero chose to interfere with the Debtor's business. Mr.
4 Dondero and only Mr. Dondero chose to communicate with the
5 Debtor's employees, not about saying hello in the hallway but
6 about coordinating a legal defense strategy against the
7 Debtor.

8 The need is immediate, Your Honor, and I would
9 respectfully request that the hearing be set for Tuesday or
10 Wednesday. They've had this motion now since the 7th of
11 January. They had a full evidentiary hearing, so they know
12 most of the evidence that's going to be presented. They have
13 a whole team of -- they have an army of lawyers, Your Honor,
14 and half a dozen firms working on behalf of Mr. Dondero and
15 his interests. For him to cry here, for him to cry that this
16 is too much is really -- it's obscene. It just is.

17 THE COURT: All right. I'm going to say a couple --

18 MR. LYNN: That is absurd.

19 THE COURT: I'm going to say a couple of things. One
20 is that I -- well, the one time I remember getting reversed
21 for holding someone in contempt of court, the District Court
22 felt like I had not given enough notice of that. The District
23 Courts, what they think is reasonable notice, is sometimes
24 very different from what the bankruptcy judges think. We're
25 used to going very lickety-split fast in the bankruptcy

1 courts. And the Courts of Appeals, District Court, Courts of
2 Appeals obviously, for good reason, are very concerned about
3 due process in this kind of context. So I'm sensitive to
4 that.

5 I'm also sensitive to the fact that it is monetary damages
6 that are being sought here to purge the contempt. Okay? The
7 shifting of attorneys' fees is basically what I understand is
8 being sought at this point. You know, we have a preliminary
9 injunction halting behavior at this point, and so I think
10 that's another reason I'm hesitant to give an emergency
11 hearing. I feel like monetary damages can wait and we can
12 give 21-plus days' notice of the hearing.

13 But I'm going to throw this out there as well. If I do
14 feel like there is a showing of contempt, if I do feel like
15 the phone -- as I told you the other day, I'm very, very
16 fixated on the phone that may have been destroyed or thrown
17 away, maybe at Mr. Dondero's suggestion. I mean, the
18 potential monetary sanction here may be very, very large if
19 the evidence plays out in the way I fear it might play out.
20 So I need to make sure everybody has adequate time to prepare
21 for that hearing and make sure I get all the evidence I need
22 to see. All right? Contempt of court is very, very, very,
23 very serious, and I don't think anyone would deny that.

24 So, with that, it was filed what day? January 4th? Is
25 that what I heard? Or --

1 MR. MORRIS: January 7th, I believe, Your Honor.

2 THE COURT: January 7th? All right. Well, Traci,
3 are you there? Hopefully, you're not in a hunger coma at this
4 point.

5 THE CLERK: I am here.

6 THE COURT: Okay. We have -- we're going to have to
7 go to that first week of February, right? Because we've got
8 the confirmation hearing that, you know, late in January, and
9 then --

10 THE CLERK: Yes. Uh-huh.

11 THE COURT: Okay. Do you have an available date to
12 give right now?

13 THE CLERK: How about -- if you're willing to hear
14 them on Friday, February 5th.

15 THE COURT: Okay. I can do that. February 5th at
16 9:30. Any -- anybody want to argue about that?

17 MR. MORRIS: Thank you, Your Honor. That's
18 acceptable to the Debtor.

19 THE COURT: Okay. Mr. Lynn, is that good with you?

20 MR. LYNN: We'll do that, Your Honor. I would say,
21 by the way, that I'll be happy to buy Mr. Seery, out of my own
22 pocket, five cell phones, which ought to make up for the one
23 that was lost, though I recognize that those cell phones will
24 not have on them the privileged information, the conversations
25 between his lawyers and Mr. Dondero that I imagine he was

1 looking forward to seeing.

2 THE COURT: Well, I wouldn't want him to see that
3 information, but I do think he's entitled to any nonprivileged
4 information, texting, or calls that are on that phone. So,
5 again, I'm either going to hear good explanations for that or
6 not, but it's something very concerning to me.

7 All right. So we have a game plan.

8 I'm going to ask, Did we have good-faith negotiations
9 between Dondero and the Committee and anything positive to
10 report? I'll ask Mr. Lynn and Mr. Clemente to weigh in.

11 MR. CLEMENTE: Yes, Your Honor. I'll go first, Your
12 Honor. Mr. Lynn and I have exchanged several emails over the
13 weekend, and the message that I sent to Mr. Lynn was very
14 clear. There had been a term sheet that Mr. Seery had sent
15 back to Mr. Dondero. I had asked Mr. Lynn to take a pencil
16 out and be very specific as to what it was Mr. Dondero was
17 prepared to do in connection with the pot plan. I instructed
18 him that some of the issues that the Committee still has is
19 obviously the overall value, along with the concept that's
20 signing up to a promise from Mr. Dondero to comply with
21 (indiscernible) as part of that value. As Your Honor may
22 understand, the Committee is obviously very skeptical of Mr.
23 Dondero's future performance under an agreement that he enters
24 into.

25 Those are but a couple of issues, Your Honor, that I

1 advised Mr. Lynn were very concerning to the Committee. And I
2 suggested to him that if he wanted to move things forward, the
3 best way to do it would be to come to us with a fulsome term
4 sheet that explained exactly what it was in clear and precise
5 detail that Mr. Dondero was proposing, and that would be the
6 best way to move the process forward, Your Honor.

7 THE COURT: All right. Mr. Lynn, anything to add to
8 that?

9 MR. LYNN: Well, Your Honor, my experience in
10 negotiations is that it is useful to agree on substantive
11 terms, or at least be in the ballpark, before term sheets are
12 exchanged. Long ago, a term sheet was prepared and presented
13 to the Committee. Ultimately, I think it was rejected, though
14 I don't know if we ever received a formal rejection.

15 I explained in my emails, which I'm happy to share with
16 the Court if Your Honor wants to see them, why I was reluctant
17 to try to put into a term sheet form the proposal that I
18 suggested to Mr. Clemente. As I said, I'm more than happy to
19 provide you with that email chain and let you form your own
20 judgment, Your Honor, as to whether we're proceeding in good
21 faith.

22 THE COURT: All right. Well I'm not going to ask --

23 MR. POMERANTZ: Your Honor? Your Honor, this is Jeff
24 Pomerantz.

25 THE COURT: -- to see any of that. Mr. Pomerantz?

1 MR. POMERANTZ: May I just be heard real quickly?

2 THE COURT: Sure.

3 MR. POMERANTZ: Your Honor, we also took Your Honor's
4 comments to heart. We, Mr. Seery and I, had an over-an-hour
5 conversation with Mr. Lynn and with Mr. Bonds. We provided
6 them with our thoughts as to what they needed to do in order
7 to move forward. Of course, it's not really the Debtor to
8 agree. It's the creditors to agree. But as Mr. Seery has
9 testified many times before and as I have told the Court, we
10 would support a plan that the Committee and Mr. Dondero could
11 get behind.

12 So we again -- I'm not going to divulge the nature of
13 those communications, but we suggested several things that Mr.
14 Dondero could do in order to move the ball forward, and
15 unfortunately, we have not seen any of those things done thus
16 far. So we are, at this point, not optimistic that there will
17 be a grand bargain plan.

18 THE COURT: All right.

19 MR. DONDERO: Your Honor, could I comment for a
20 second? This is Mr. Dondero.

21 THE COURT: If you and your counsel want you to
22 comment, you can comment.

23 MR. DONDERO: I'd love to do a pot plan. I would
24 love to reach some kind of settlement and everybody move on
25 with their lives. The estate started with \$360 million of

1 | third-party assets and \$90 million of notes. The \$360 million
2 | of third-party assets are down to \$130 million.

3 MR. POMERANTZ: Again, Your Honor, I must interrupt.
4 I did this at the last hearing, and it's not my practice to
5 interrupt, but issues regarding what the value is or not, it's
6 going to require a response, and that's not really before Your
7 Honor. I think before Your Honor is --

8 MR. DONDERO: Okay.

9 MR. POMERANTZ: -- have there been negotiations?

10 Have they been in good faith? If Mr. Dondero wanted to

11 address that, that's fine, but I object to having any

12 discussion at this point, especially with Mr. Dondero not even

13 under oath, on what the nature of the value of the assets and

14 why they have changed and what not.

15 THE COURT: Well, --

16 MR. POMERANTZ: It's just not appropriate.

17 THE COURT: I understand --

18 MR. DONDERO: Okay. Can I --

19 THE COURT: Stop.

20 MR. DONDERO: Can I -- can I finish?

21 THE COURT: Let me please respond to that. I
22 understand your concern, but I've heard from Mr. Seery
23 testimony many months ago about the value plummeting during
24 the case. And I asked why, and I got some explanations. This
25 is not evidence. This is just, you know, this is not going to

1 | be binding in any way. Mr. Dondero can speak as to what he
2 | thinks, you know, the situation is.

3 || Go ahead, Mr. Dondero.

4 MR. DONDERO: Okay. I'm not trying to fixate on the
5 numbers. And as far as the third-party assets are, we would
6 be willing to pay -- I would be willing to pay for those. I'd
7 be willing to pay more, and even some value for the affiliate
8 notes that were really part of compensation agreements
9 throughout the history of Highland and avoid the POC
10 arguments. I'd be willing to pay for the assets and I'd be
11 willing to pay even more than that.

12 I have no transparency in terms of what the assets are,
13 and there's no fulsome discussion in terms of, well, here are
14 the assets, here are the notes, here's what we think the
15 values are, can you get to this number? It's just a -- you --
16 the -- it -- I don't view there is good-faith negotiations
17 going on because it's always just a: You need to put a big
18 number on a piece of paper; otherwise, you're going to get run
19 over.

20 And there's no back and forth going on, but it's not due
21 to a lack of willingness on my part. And maybe there needs to
22 be a committee set up. Maybe there needs to be, I don't know,
23 a mediator or an examiner or somebody to try and push through
24 the pot plan, but there's nothing happening. People are not
25 returning the judge's calls, I mean, Mr. Lynn's calls, or my

1 calls. They're -- there's -- despite efforts of our -- of my
2 own and a willingness of my own, there's no negotiations of
3 any sort going on at the moment.

4 THE COURT: All right. I don't want anyone to
5 respond to that. I know people have different views of what's
6 going on. But let me just say a couple of things, and then
7 we're done.

8 We do have a Committee in this case. We have a Committee
9 with very sophisticated members and very sophisticated
10 professionals. Okay? That's who I wanted you to be talking
11 to before the end of the day Tuesday.

12 We have had co-mediators in this case. Okay? And, you
13 know, I identified very sophisticated human beings for that
14 role. Okay? And in fact, there ended up being settlements
15 that flowed out of the co-mediator process.

16 We're now 15 months into the case. There are major,
17 significant compromises now: HarbourVest, UBS, Acis, Terry,
18 and Redeemer Committee. I hate to use a worn-out metaphor,
19 but the train is leaving the station. We've got confirmation.
20 I've pushed out two weeks. I mean, you all are either going
21 to get there in the next few days or we're just going to go
22 forward with I think what everyone, you know, would rather be
23 a pot plan, but if we can't get there, we're just going to
24 have to consider the plan that's on the table now. Okay?

25 You know, the Committee, again, they're sophisticated.

1 They can compare apples to oranges and decide whether the plan
2 on the table, with its risks of future litigation and
3 recoveries, whether it's better or worse than whatever
4 consideration you're offering, Mr. Dondero.

5 And you know, as we all know, there is distrust here,
6 there, and everywhere among these parties. So I can totally
7 understand them, you know, taking a hard line: We either get
8 all cash or we're just not going to mess with it. We don't
9 want to risk broken promises. We'd rather just do litigation.

10 So, anyway, that's as much as I'm going to say except I am
11 going to further direct good-faith negotiations. It sounds
12 like to me a written term sheet might be the appropriate next
13 step, given where I've heard things are at the moment. But,
14 you know, I guess we don't have any hearings between now and
15 the 26th, right? No Highland hearings that I can think of
16 between now and the 26th.

17 MR. POMERANTZ: I don't think so.

18 MR. MORRIS: I think that's correct, Your Honor.

19 THE COURT: So you have all this time --

20 MR. MORRIS: At the moment.

21 THE COURT: You have all this time to negotiate and
22 simultaneously get ready for the confirmation hearing without
23 any other battles. So I know you will use the time well.

24 All right. We're adjourned.

25 THE CLERK: All rise.

MR. BONDS: Thank you, Your Honor.

(Proceedings concluded at 2:04 p.m.)

— — ○ ○ — —

CERTIFICATE

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

/s/ Kathy Rehling

01/16/2021

/s/ Kathy Rehling

As Amended 05/26/2022

Kathy Rehling, CETD-444
Certified Electronic Court Transcriber

Date _____

003840

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United States District Court
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CHARITABLE DAF FUND, L.P. *and*
CLO HOLDCO, LTD.,

v.

HIGHLAND CAPITAL
MANAGEMENT, L.P., *et al.*

§
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CIVIL ACTION NO. 3:22-CV-695-S

ORDER

The above-numbered case is hereby transferred to the docket of the Honorable Judge Jane J. Boyle for consolidation with *The Charitable DAF Fund LP, et al. v. Highland Capital Management LP*, Case No. 3:21-cv-3129-N. All future pleadings shall be filed under case number 3:21-cv-3129-B.

SO ORDERED.

SIGNED June 9, 2022.


KAREN GREN SCHOLER
UNITED STATES DISTRICT JUDGE

003843

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

Defendants.

Adv. Pro. No. 21-03067-sgj

003844

**DEFENDANT HIGHLAND CAPITAL MANAGEMENT, L.P.'S
RENEWED MOTION TO DISMISS COMPLAINT**

Highland Capital Management, L.P. (“Highland”), a defendant in the above-captioned adversary proceeding, by and through its undersigned counsel, files this renewed motion (the “Motion”) seeking entry of an order dismissing the *Original Complaint* [Docket No. 1] (the “Complaint”) filed by Plaintiffs Charitable DAF Fund, L.P. (the “DAF”) and CLO Holdco, Ltd. (“CLOH”) (together, “Plaintiffs”). In support of its Motion, Highland states as follows:

JURISDICTION AND VENUE

1. This Court has jurisdiction over the Motion pursuant to 28 U.S.C. §§ 157 and 1334.
2. This is a core proceeding pursuant to 28 U.S.C. 157(b).
3. Venue is proper in this district pursuant to 28 U.S.C. § 1409.

RELIEF REQUESTED

4. Highland requests that this Court issue the proposed form of order attached as **Exhibit A** (the “Proposed Order”) pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, made applicable herein by Rule 7012 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”).

5. For the reasons set forth more fully in the *Memorandum of Law in Support of Defendant Highland Capital Management, L.P.’s Renewed Motion to Dismiss Complaint* (the “Memorandum of Law”) filed contemporaneously with this Motion, Highland requests that the Court: (a) dismiss the Complaint in its entirety and (b) grant Highland such other and further relief as the Court deems just and proper under the circumstances.

6. In accordance with Rule 7007-1(g) of the *Local Bankruptcy Rules of the United States Bankruptcy Court for the Northern District of Texas*, contemporaneously herewith and in support of this Motion, Highland is filing: (a) its Memorandum of Law, and (b) the *Appendix in*

Support of Defendant Highland Capital Management L.P.’s Renewed Motion to Dismiss the Complaint (the “Appendix”) together with the exhibits annexed thereto.

7. Based on the exhibits annexed to the Appendix, and the arguments contained in the Memorandum of Law, Highland is entitled to the relief requested herein as set forth in the Proposed Order.

8. Notice of this Motion has been provided to all parties. Highland submits that no other or further notice need be provided.

WHEREFORE, Highland respectfully requests that the Court (i) enter the Proposed Order substantially in the formed annexed hereto as **Exhibit A** granting the relief requested herein, and (ii) grant Highland such other and further relief as the Court may deem proper.

[Remainder of Page Intentionally Blank]

Dated: October 14, 2022

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EXHIBIT A

003848

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

In re:)	
	)	Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P., ¹)	
	)	Case No. 19-34054-sgj11
Reorganized Debtor.)	
In re: CHARITABLE DAF FUND, L.P., AND)	
CLO HOLDCO LTD.,	)	Adv. Pro. No. 21-03067-sgj
Plaintiffs,)	
vs.)	
)	
HIGHLAND CAPITAL MANAGEMENT, L.P.,)	
HIGHLAND HCF ADVISOR, LTD., AND)	
HIGHLAND CLO FUNDING, LTD.)	
Defendants.)	

**ORDER GRANTING DEFENDANT HIGHLAND CAPITAL MANAGEMENT, L.P.’S
RENEWED MOTION TO DISMISS COMPLAINT**

¹ The Reorganized Debtor’s last four digits of its taxpayer identification number are (8357). The headquarters and service address for the Reorganized Debtor is 100 Crescent Court, Suite 1850, Dallas, TX 75201.

Before the Court is *Defendant Highland Capital Management L.P.’s Renewed Motion to Dismiss Complaint* [Docket No. __] (the “Motion”). Having considered: (a) the Motion; (b) the *Memorandum of Law in Support of Defendant Highland Capital Management, L.P.’s Renewed Motion to Dismiss Complaint* [Docket No. __] (the “Memorandum of Law”);² and (c) the *Appendix in Support of Defendant Highland Capital Management, L.P.’s Renewed Motion to Dismiss Complaint* [Docket No. __] (the “Appendix”) and the exhibits annexed thereto; and this Court having jurisdiction over this matter pursuant to 28 U.S.C. § 1334 and 28 U.S.C. § 157; and this Court having found that venue of this proceeding and the Motion in this District is proper pursuant to 28 U.S.C. § 1409; and this Court having found that (a) Counts 2 and 5 are barred by judicial estoppel, and (b) the Complaint should be dismissed in its entirety because the Complaint fails to allege any Claim for relief that is plausible for relief under Rule 12(b)(6) of the Federal Rules of Civil Procedure, made applicable in this adversary proceeding pursuant to Rule 7012 of the Federal Rules of Bankruptcy Procedure; and this Court having found that the Highland’s notice of the Motion and opportunity for a hearing on the Motion were appropriate under the circumstances and that no other notice need be provided; and this Court having determined that the legal and factual bases set forth in the Motion establish good cause for the relief granted herein; and upon all of the proceedings had before this Court; and after due deliberation and sufficient cause appearing therefor and for the reasons set forth in the record on this Motion, it is **HEREBY ORDERED THAT:**

1. The Motion is **GRANTED** as set forth herein.
2. The Complaint is dismissed in its entirety.

###End of Order###

² Capitalized terms not otherwise defined in this Order shall have the meanings ascribed to them in the Memorandum of Law.

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**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

In re:)	
	)	Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P., ¹)	
	)	Case No. 19-34054-sgj11
Reorganized Debtor.)	
In re: CHARITABLE DAF FUND, L.P., AND)	
CLO HOLDCO LTD.,	)	Adv. Pro. No. 21-03067-sgj
Plaintiffs,)	
vs.)	
)	
HIGHLAND CAPITAL MANAGEMENT, L.P.,)	
HIGHLAND HCF ADVISOR, LTD., AND)	
HIGHLAND CLO FUNDING, LTD.)	
Defendants.)	

**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT HIGHLAND
CAPITAL MANAGEMENT, L.P.’S RENEWED MOTION TO DISMISS COMPLAINT**

¹ The Reorganized Debtor’s last four digits of its taxpayer identification number are (8357). The headquarters and service address for the Reorganized Debtor is 100 Crescent Court, Suite 1850, Dallas, TX 75201.

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Highland Capital Management, L.P., a defendant in the above-captioned case (the “Debtor” or “Highland,” as applicable), submits this memorandum of law in support of Highland’s *Renewed Motion to Dismiss Complaint* (the “Motion”).²

I. INTRODUCTION³

1. This matter comes back to the Court on remand from the United States District Court for the Northern District of Texas (the “District Court”). On September 2, 2022, the District Court entered its memorandum opinion and order (the “Decision”)⁴ on Plaintiffs’ appeal of this Court’s order (the “MTD Order”)⁵ granting Highland’s motion to dismiss this action (the “Original MTD”).⁶ In short, the District Court (i) reversed this Court’s finding that collateral estoppel barred Plaintiffs’ claims and (ii) remanded the judicial estoppel finding for a determination as to whether Plaintiffs’ withdrawal of its objection to the Settlement on a claimed Right of First Refusal was “inadvertent.” *Decision* at 17.

2. There can be no credible dispute that Plaintiff CLOH’s withdrawal of its objection to the Settlement was “advertent” and, therefore, that judicial estoppel bars Counts 2 and 5 of the Complaint. In addition, all Counts of Plaintiffs’ Complaint⁷ should be dismissed on the substantive grounds Highland advanced in the Original MTD and renews and restates herein.

3. In January 2021, the Debtor moved for an order approving its Settlement with HarbourVest pursuant to which, *inter alia*, HarbourVest settled its claims against the Debtor and

² Concurrently herewith, Highland is filing the *Appendix in Support of Defendant Highland Capital Management, L.P.’s Renewed Motion to Dismiss Complaint* (the “Appendix”). Citations to the Appendix are notated as follows: Ex. #, Appx. #.

³ Capitalized terms not defined in this Preliminary Statement shall have the meanings ascribed to them below.

⁴ *Charitable DAF Fund, L.P. v. Highland Cap. Mgmt., L.P.*, No. 3:21-cv-03129-B (N.D. Tex. Sept. 2, 2022) (slip op.), District Court Docket No. 28 (also available at 2022 U.S. Dist. LEXIS 159461), **Ex. 12, Appx. 437-458**.

⁵ District Court Docket No. 100 (slip op.) (also available at 2022 Bankr. LEXIS 659).

⁶ Docket No. 26. Unless otherwise indicated, “Docket No.” refers to the docket maintained in this Adversary Proceeding.

⁷ Docket No. 1-1.

transferred its interest in HCLOF, to a subsidiary of the Debtor (the “Prior Proceeding”). **Ex. 2, Appx. 62-75.** CLOH objected to the Settlement, presumably at the direction of its parent, the “Charitable” DAF Fund, L.P. (the “DAF”) ⁸ (**Ex. 6, Appx. 123-133**) on the grounds that: (i) it had a “Right of First Refusal” to acquire HarbourVest’s interest in HCLOF and (ii) HarbourVest could not transfer its interest without complying with that purported right. *Id.* Two other objections were lodged, one by Mr. Dondero and the other by his Trusts.⁹ **Exs. 4-5, Appx. 96-122.** Each objecting party had the right to, and took advantage of, discovery, and the Court held an evidentiary hearing on the proposed Settlement and heard argument in support of parties’ objections and defenses. During the hearing, CLOH voluntarily withdrew its objection premised on the “Right of First Refusal,” after which the Court overruled the remaining objections and approved the Settlement.¹⁰

4. Three months later, Plaintiffs—with a new trustee and new counsel—filed their Complaint asserting that the Debtor violated the “Right of First Refusal,” breached the Members Agreement, and otherwise violated its alleged duties to Plaintiffs. But, as discussed below, Plaintiffs are judicially estopped from arguing the “Right of First Refusal” was violated. CLOH asserted this very argument during the Prior Proceeding, and knowingly, voluntarily, and advertently withdraw it after due deliberation of the underlying facts, relevant documents, and

⁸ The Court observed at the time that DAF, the parent of CLOH, “was seeded with contributions from Highland, is managed/advised by Highland, and [its] independent trustee is a long-time friend of Highland’s chief executive officer[, Mr. Dondero.” *In re Acis Cap. Mgmt., L.P.*, 2019 Bankr. LEXIS 292, at *19 (Bankr. N.D. Tex. Jan. 31, 2019) (emphasis in original). Mark Patrick—Mr. Dondero’s employee and senior tax counsel of more than a decade—subsequently was appointed trustee of the DAF but this Court has found, and the District Court affirmed, that James Dondero (“Mr. Dondero”) exerted significant control over both Mr. Patrick and the DAF. *Charitable DAF Fund, L.P. v. Highland Cap. Mgmt., L.P.*, 2022 U.S. Dist. LEXIS 175778, at *17-23 (N.D. Tex. Sept. 28, 2022); see also *Charitable DAF Fund, L.P. v. Highland Cap. Mgmt., L.P. (In re Highland Cap. Mgmt., L.P.)*, 2022 Bankr. LEXIS 2780, at *5 n.5 (Bankr. N.D. Tex. Sept. 30, 2022).

⁹ “Trusts” means The Dugaboy Investment Trust and The Get Good Trust, Mr. Dondero’s family “trusts:”

¹⁰ The Trusts appealed the Settlement, claiming (ironically and cynically) that the Debtor overpaid. On September 26, 2022, the District Court denied the appeal for lack of standing and affirmed this Court’s order approving the Settlement. See 3:21-cv-00261-L, Docket No. 38.

applicable law. Judicial estoppel thus bars Counts 2 and 5 of the Complaint. Plaintiffs also fail to state any claims on which relief can be granted, and the Complaint must be dismissed under Rule 12(b)(6), applicable here via Bankruptcy Rule 7012.

II. FACTUAL BACKGROUND

A. Highland Settles with HarbourVest

5. Highland CLO Funding, Ltd. (“HCLOF”) is a Guernsey-based investment vehicle managed by its Guernsey-based board of directors. Highland HCF Advisors, Ltd. (“HCFA”), a wholly-owned subsidiary of Highland, is its portfolio manager.¹¹ Prior to the commencement of the Bankruptcy Case, HarbourVest¹² invested approximately \$80 million in HCLOF. Following its investment, CLO Holdco, Ltd. (“CLOH”) held 49.02% of HCLOF’s interests, HarbourVest held 49.98%, and the remaining 1% was held by the Debtor and certain Debtor employees. After the Debtor filed bankruptcy, HarbourVest filed claims against the Debtor in excess of \$300 million, alleging that it was fraudulently induced into its investment by factual misrepresentations and omissions made by Mr. Dondero and certain of his employees prior to the bankruptcy. (HarbourVest proofs of claim). **Ex. 1, Appx. 1-61**

6. On December 23, 2020, the Debtor filed its motion [**Docket No. 1625**] (the “Settlement Motion”) seeking Bankruptcy Court approval of its settlement with HarbourVest (the “Settlement”). **Ex. 2, Appx. 62-75**. Pursuant to the Settlement, HarbourVest was to transfer its interest in HCLOF to the Debtor’s nominee (the “Transfer”) in exchange for allowed claims against the estate and certain other consideration. **Ex. 2 ¶ 32, Appx. 71-72; Ex. 3, Appx. 76-95**.

¹¹ HCLOF is past its investment period, and HCFA’s role is limited to advising on the liquidation of HCLOF’s portfolio and the recovery of cash for distributions to HCLOF’s members.

¹² “HarbourVest” means, collectively, HarbourVest 2017 Global Fund L.P., HarbourVest 2017 Global AIF L.P., HarbourVest Dover Street IX Investment L.P., HV International VIII Secondary L.P., HarbourVest Skew Base AIF L.P., and HarbourVest Partners L.P.

The Transfer was a necessary component of the Settlement—HarbourVest was essentially seeking rescission of its investment in HCLOF—and the Settlement Motion disclosed all aspects of the Settlement and Transfer, including (i) what HarbourVest was transferring; (ii) the valuation (and method of valuation) of the interests being transferred; (iii) the method of transfer; and (iv) the claims against Highland that HarbourVest would receive. **Ex. 2 ¶ 32 & n.5, Appx. 71-72; Ex. 3, ¶ 1(b), Appx. 78.**

B. CLOH, Dondero and Dondero-Controlled Trusts Object to the Settlement Motion

7. On January 6, 2021, Mr. Dondero filed his objection to the Settlement [**Docket No. 1697**] (“Dondero’s Objection”). **Ex. 4, Appx. 96-111.** On January 8, 2021, the Trusts filed their objection [**Docket No. 1706**] (the “Trusts’ Objection”). **Ex. 5, Appx. 112-122.**

8. CLOH also objected to the Settlement on January 8, 2021 [**Docket No. 1707**] (“CLOH’s Objection”). **Ex. 6, Appx. 123-133.** CLOH challenged HarbourVest’s right to effectuate the Transfer contending that: (i) CLOH and the other members of HCLOF had a “Right of First Refusal” under the Members Agreement, *id.* ¶ 3, **Appx. 125**, and (ii) “HarbourVest has no authority to transfer its interest in HCLOF without first complying with the Right of First Refusal.” *Id.* ¶ 6, **Appx. 126.** CLOH offered a lengthy, but faulty, analysis of the Members Agreement, including CLOH’s purported “Right of First Refusal” under Article 6 thereof. *See id.* ¶¶ 9-22, **Appx. 127-132.**

9. After filing their objections, CLOH and Mr. Dondero exercised their right to conduct discovery under Bankruptcy Rule 9014(c) and deposed Michael Pugatch, a representative of HarbourVest [**Docket No. 1705**]. **Ex. 7, Appx. 134-188.** CLOH never contended that: (i) the Debtor had a fiduciary duty to offer the HCLOF interests to CLOH (and it did not) or (ii) the Investment Advisers Act of 1940 (the “IAA”) was implicated by the Settlement (and it is not).

10. On January 13, 2021, the Debtor filed its reply [**Docket No. 1731**] (the “Omnibus Reply”) (**Ex. 8, Appx. 189-211**), in which it established that the Members Agreement did not impede the Settlement and rebutted CLOH’s argument that the Transfer could not be completed without complying with the “Right of First Refusal” under Article 6, *id.* ¶¶ **26-39, Appx. 203-209**.

11. Subsequently, at the January 14, 2021, hearing, CLOH *voluntarily withdrew* its objection after considering the Debtor’s analysis of the Members Agreement and applicable law. CLOH’s counsel unequivocally stated on the record:

CLO Holdco has had an opportunity to review the reply briefing, and after doing so has gone back and scrubbed the HCLOF corporate documents. ***Based on our analysis of Guernsey law and some of the arguments of counsel on those pleadings and our review of the appropriate documents***, I obtained authority from my client, Grant Scott, as trustee for CLO Holdco, ***to withdraw the CLO Holdco objection based on the interpretation of the Members Agreement***.

Ex. 9 at 7:20-8:6, Appx. 219-220 (emphasis added).

12. The Debtor called two witnesses in support of the Settlement Motion—its court-appointed Chief Executive Officer, James P. Seery, Jr., and Mr. Pugatch. Counsel for Mr. Dondero and the Trusts cross-examined the Debtor’s witnesses but did not inquire about the value of the HCLOF interests, the Debtor’s purported fiduciary obligations, or the Transfer. **Ex. 9 at 87:18-89:21, Appx. 299-301**. At the conclusion of the hearing, in reliance on CLOH’s withdrawal of its Objection, and the evidence admitted at the hearing, the Court entered an order overruling the remaining objections and approving the Settlement [**Docket No. 1788**] (the “Settlement Order”). **Ex. 10, Appx. 386-409**. The Settlement Order *expressly* authorized the transfer of HarbourVest’s interest in HCLOF to a Debtor subsidiary providing, in relevant part, that “[p]ursuant to the express terms of the [Members Agreement] ... HarbourVest is authorized to transfer its interest in HCLOF to a wholly-owned and controlled subsidiary of the Debtor ... ***without the need to obtain the consent of any party or to offer such interests first to any other investor in HCLOF.***” *Id.* ¶ 6,

Appx. 390 (emphasis added).¹³ This Court included this language because of concerns that Mr. Dondero would “go to a different court somehow to challenge the transfer.” **Ex. 9 at 156:17-22, Appx. 368.**¹⁴

C. Plaintiffs File this Adversary Case

13. With a new trustee and new counsel, on April 12, 2021, Plaintiffs effectively resurrected the CLOH Objection by filing their Complaint in the District Court, in which they, *inter alia*, challenged the Transfer premised on the “Right of First Refusal.” **Ex. 11, Appx. 410-436.** The District Court subsequently referred the case to this Court. [**Docket No. 1-1**]. The Complaint raises claims for: (i) breach of fiduciary duty (Count 1); (ii) breach of the Members Agreement (Count 2); (iii) RICO violations (Count 3); (iv) negligence (Count 4); (v) tortious interference (Count 5) (each, a “Count” and collectively, the “Counts”). In Count 1 (breach of fiduciary duty), Plaintiffs allege that the Debtor violated its “broad” duties to Plaintiffs under the IAA and the Debtor’s “internal policies and procedures” by: (i) engaging in “insider trading with HarbourVest”; (ii) “concealing” the value of the HarbourVest interest; and (iii) “diverting” the investment opportunity in the HarbourVest entities to the Debtor without offering it to Plaintiffs. *Id.* ¶¶ 67-74.¹⁵ In Count 3 (RICO), Plaintiffs allege that the Debtor and two affiliated entities were an “association-in-fact” engaged in a pattern of racketeering activity for this same underlying conduct; namely, failing to disclose the valuation of HCLOF’s interest and ultimately effectuating the HarbourVest Settlement. *Id.* ¶¶ 113-133.

¹³ See also **Ex. 9 at 156:10-25; 157:5.**

¹⁴ *Id.* at **156:10-25; 157:1-5, Appx. 368-369** (emphasis added).

¹⁵ Ironically (and cynically), Plaintiffs’ baseless insider trading allegations are premised on Mr. Dondero’s unsolicited disclosure of alleged material non-public information regarding MGM Holdings. Mr. Dondero’s disclosure to Mr. Seery violated the injunction issued by this Court and presumably violated Mr. Dondero’s duties and obligations as a director of MGM Holdings.

14. Plaintiffs' state-law Counts rest on the same underlying allegations. In support of Count 2 for breach of the Members Agreement, Plaintiffs again allege that the Debtor breached the "Right of First Refusal." **Complaint ¶¶ 92-102.** In Count 4 (negligence), Plaintiffs assert that the Debtor's actions violated the Members Agreement and the Debtor's internal policies by failing to accurately calculate the HCLOF interests and failing to give Plaintiffs the Right of First Refusal to purchase the interests. *Id.* ¶¶ 103-112. Count 5 (tortious interference) is again premised on the Debtor's alleged interference with Plaintiffs' "Right of First Refusal" under the Members Agreement. *Id.* ¶¶ 134-141.

D. Highland's Motion to Dismiss and the Decision

15. On May 27, 2021, Highland filed the Original MTD, which this Court granted on the grounds of collateral and judicial estoppel.¹⁶ MTD Order at 22, 26. Plaintiffs appealed the MTD Order to the District Court and that appeal was consolidated with Plaintiffs' appeal of this Court's order denying their motion for a stay. *See* 3:21-cv-03129-B, **Docket No. 20.**¹⁷ On September 2, 2022, the District Court issued the Decision in which it reversed and remanded the MTD Order.¹⁸ The District Court reversed this Court's finding that Plaintiffs' claims were barred by collateral estoppel. On judicial estoppel, the District Court affirmed this Court's findings that the first two elements of judicial estoppel were satisfied (Decision at 14-17) but remanded solely for a determination on whether Plaintiffs' inconsistent position was "inadvertent." *Id.* at 17-18.

III. ARGUMENT

16. Counts 2 and 5 are barred by judicial estoppel, and Plaintiff fails to state claims for relief under Rule 12(b)(6) as to all Counts of the Complaint.

¹⁶ Because this Court granted the Original MTD on these bases, it "refrain[ed] from addressing" Highland's motion to dismiss on Rule 12(b)(6) grounds. MTD Order at 26.

¹⁷ Defendant HCLOF was voluntarily dismissed from this case on December 7, 2021. **Docket No. 80.**

¹⁸ Plaintiffs did not appeal the Decision.

A. Legal Standard

17. To survive a motion to dismiss pursuant to Rule 12(b)(6), a plaintiff must plead “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009) (citing *Twombly*, 550 U.S. at 556). “The plausibility standard is not akin to a ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted unlawfully.” *Id.* (quoting *Twombly*, 550 U.S. at 556). “Where a complaint pleads facts that are ‘merely consistent with’ a defendant’s liability, it ‘stops short of the line between possibility and plausibility of entitlement to relief.’” *Id.* (quoting *Twombly*, 550 U.S. at 557). “When well-pleaded facts fail to meet th[e] [Twombly] standard, ‘the complaint has alleged—but it has not shown—that the pleader is entitled to relief.’” Decision at 5 (quoting *Iqbal*, 556 U.S. at 679). Dismissal is proper under Rule 12(b)(6) when, taking the facts alleged in the complaint as true, it appears that the plaintiff “cannot prove any set of facts that would entitle it to the relief it seeks.” *C.C. Port, Ltd. v. Davis-Penn Mortg. Co.*, 61 F.3d 288, 289 (5th Cir. 1995). The Court may take judicial notice of matters of public record when considering a motion to dismiss for failure to state a claim.¹⁹

B. Counts 2 And 5 are Barred by Judicial Estoppel

18. Counts 2 and 5, for breach of the Members Agreement and tortious interference with the Members Agreement, are barred by judicial estoppel. Judicial estoppel is “a common law doctrine by which a party who has assumed one position in [its] pleadings may be estopped from

¹⁹ See *T.L. Dallas (Special Risks), Ltd. v. Elton Porter Marine Ins.*, 2008 U.S. Dist. LEXIS 112613, at *5 (S.D. Tex. May 22, 2008); *Cade v. Henderson*, 2001 U.S. Dist. LEXIS 13685, at *6-7 (E.D. La. Aug. 31, 2001), *aff’d sub nom Cade v. USPS*, 45 Fed. App’x 323 (5th Cir. 2002).

assuming an inconsistent position.” *Brandon v. Interfirst Corp.*, 858 F.2d 266, 268 (5th Cir. 1988); Decision at 14. The purpose of the doctrine is “to protect the integrity of the judicial process” by “prevent[ing] parties from playing fast and loose with the courts to suit the exigencies of self-interest.” *Brandon*, 858 F.2d 266, 268 (internal quotations omitted); *United States v. McCaskey*, 9 F.3d 368, 378 (5th Cir. 1993); Decision at 14.

19. As set out in the Decision: “A court examines three criteria when determining the applicability of judicial estoppel: ‘(1) the party against whom judicial estoppel is sought has asserted a legal position which is plainly inconsistent with a prior position; (2) a court accepted the prior position; and (3) the party did not act inadvertently.’” Decision at 14 (quoting *Reed v. City of Arlington*, 650 F.3d 571, 574 (5th Cir. 2011) (*en banc*)).²⁰ As discussed *supra*, the District Court affirmed this Court’s determination on the first two criteria but remanded for a determination as to whether Plaintiffs’ change of position was “inadvertent.” *Id.* at 18. Thus, the only issue before this Court on a judicial estoppel determination is the element of “inadvertence”—an issue not raised by Plaintiffs in their prior briefing to this Court.

20. A failure to disclose is considered “‘inadvertent’ only when, in general, the *debtor* either lacks knowledge of the undisclosed claims *or* has no motive for their concealment.” *Superior Crewboats, Inc. v. Primary P & I Underwriters (In re Superior Crewboats, Inc.)*, 374 F.3d 330 (5th Cir. 2004); *see also Jethroe v. Omnova Sols., Inc.*, 412 F.3d 598, 600-01 (5th Cir. 2005) (“To establish that [debtor’s] failure to disclose was inadvertent, [debtor] may prove either

²⁰ In the Fifth Circuit, the element of “inadvertence” is generally applied in a bankruptcy context where a debtor, post-discharge, seeks to assert a claim that had or could have been addressed within the bankruptcy. Thus, it is unclear whether the element of “inadvertence” applies in this case, which relates to a *non-debtor plaintiff’s* change of position in an adversary proceeding. *See Gabarick v. Laurin Mar. (Am.) Inc.*, 753 F.3d 550, 553 n.3 (5th Cir. 2014) (rejecting appellant’s argument that the third factor of “inadvertence” applies in a non-bankruptcy case, noting, “we apply [inadvertence] only when the judicial estoppel is based on the non-disclosure of a claim in a prior bankruptcy proceeding.”); *Hall v. GE Plastic Pac. PTE Ltd.*, 327 F.3d 391, 396 (5th Cir. 2003) (applying two-factor test to judicial estoppel determination in non-bankruptcy case, namely, (a) whether position was inconsistent, and (b) whether court relied on such position). Regardless, there can be no viable dispute that Plaintiffs’ conduct was “adventent.”

that she did not know of the inconsistent position or that she had no motive to conceal it from the court ... at the time she filed her bankruptcy petition.”)

21. Plaintiffs’ inconsistent position with regard to their Claims premised on the “Right of First Refusal” was not “inadvertent.” Plaintiffs knew of and analyzed the factual and legal issues concerning Counts 2 and 5 when they unequivocally withdrew their Objection to the Transfer in the Prior Proceeding; indeed, CLOH’s thorough, multi-page objection to the Transfer was premised on an alleged violation of the “Right of First Refusal.” *See Ex. 6 ¶¶ 3, 6, Appx. 125-126.*

22. After “review[ing] the reply briefing,” “scrubb[ing] the HCLOF corporate documents,” analyzing Guernsey law, and reviewing the “appropriate documents,” CLOH, on the record, withdrew its Objection to the Transfer premised on the “Right of First Refusal” “based on the interpretation of the Members Agreement.” *See Ex. 9 at 7:20-8:6, Appx. 219-220.* Thus, Plaintiffs²¹ knew of the underlying facts and legal issues underlying Counts 2 and 5 when CLOH withdrew its Objection in the Prior Proceeding. Based on the record, CLOH’s inconsistent positions regarding the “Right of First Refusal” under the Members Agreement are deliberate, directed, and advertent. They cannot possibly be deemed “inadvertent.” *See Superior Crewboats, Inc.*, 374 F.3d at 335-36 (debtors’ non-disclosure of a viable personal injury claim in schedules filed in their no asset bankruptcy case was not “inadvertent” where debtors “were aware of the facts underlying the claim” for months, noting, “[a]lleged confusion as to a limitations period does not evince a lack of knowledge as to the existence of the claim.”); *Jethroe*, 412 F.3d at 601 (failure to disclose claim was not “inadvertent” where party was aware of “the facts giving rise to them”

²¹ It is indisputable that the DAF is in privity with CLOH and therefore cannot be heard to argue that only CLOH should be bound by judicial estoppel for filing and then withdrawing its objection. *Charitable DAF Fund L.P.*, 2022 U.S. Dist. LEXIS 175778, at *12-13 (“DAF is in privity with CLO Holdco because it controls and owns 100% of CLO Holdco ... [DAF] had a fair chance to challenge the gatekeeping orders or [is] in privity with an entity that did.”)

at the time she filed her bankruptcy petition); *U.S. ex rel. Long v. GSDMIdea City, L.L.C.*, 798 F.3d 265, 272 (5th Cir. 2015) (failure to disclose claims was not “inadvertent” where party “was aware of the facts underlying his claims as early as 2010 and [] filed this lawsuit in 2011,” noting that, inadvertence through lack of knowledge cannot be shown “as long as the debtor has enough information to suggest that he may have a potential claim; the debtor need not know all of the underlying facts or even the legal basis of the claim.”).

23. Accordingly, Plaintiffs’ inconsistent legal positions with regard to the Transfer violating the “Right of First Refusal” in the Members Agreement were in no way, shape, or form the result of “inadvertence.”²²

24. Any claim of inadvertence is also belied by Plaintiffs’ self-evident financial interest in the way that they have chosen to proceed here. In the (unlikely) event they succeed on their claims for breach of contract or tortious interference, Plaintiffs would have “reaped a windfall” in withdrawing their Right of First Refusal objection. *See Superior Crewboats*, 337 F.3d at 336. Had Plaintiffs acquired the Interests, they would have had to pay tens of millions of dollars to HarbourVest.²³ Those Interests would have been speculative, illiquid, hard to value (by their own admission), and subject to portfolio performance risk. By contrast, in the Complaint, Plaintiffs now seek monetary recovery or specific performance. *See Complaint* ¶ 143 (ad damnum). But

²² Plaintiffs’ allegation in support of Count 2 that “Plaintiff was not informed of the fact that HarbourVest had offered its shares to Defendant HCM for \$22.5 million ...” (*Complaint* ¶ 98) is irrelevant, inaccurate, and contradicted by the record. The allegation is irrelevant because the “Right of First Refusal” is not dependent on the value of the shares. The allegation is inaccurate because HarbourVest did not “offer” its interest in HCLOF to Highland. Rather, pursuant to the Settlement, HarbourVest *transferred* its interest in HCLOF to Highland’s nominee in exchange for allowed claims against the estate and other consideration given to resolve HarbourVest’s claim for, among other things, rescission of its investment in HCLOF. *Ex. 2* ¶ 32, *Appx. 71-72*; *Ex. 3, Appx. 76-95*. Finally, the allegation is contradicted by the record because the Settlement Motion expressly stated that the net asset value of the interest was “estimated to be approximately \$22 million as of December 1, 2020.” *Ex. 2* ¶ 32 & n.5, *Appx. 71-72*; *Ex. 3, ¶ 1(b), Appx. 78*.

²³ HarbourVest received a total of \$80 million in allowed claims in the Settlement. Presumably, Plaintiffs would have had to have paid that much for the Interests.

HCLOF's investments have been (with limited exception) reduced to cash or equivalents. Accordingly, the only current risk with respect to the Interests is litigation risk—a risk generally created by Plaintiffs.²⁴ Their financial interest in bringing the claim in this posture—they allowed the Debtor to assume the speculative risk yet now seek to seize the non-speculative reward—on its own vitiates any claim of inadvertence. *See Superior Crewboats*, 337 F.3d at 336 (debtors “had the requisite motivation to conceal the claim as they would certainly reap a windfall had they been able to recover on the undisclosed claim”). For this additional reason, Counts 2 and 5 are barred by judicial estoppel.

25. Accordingly, Plaintiffs' inconsistent position is not the result of “inadvertence,” and Counts 2 and 5 should, therefore, be dismissed on grounds of judicial estoppel.

C. Plaintiffs Fail to State a Claim under RICO in Count 4

26. To state a RICO claim, a plaintiff must allege: “1) the conduct; 2) of an enterprise; 3) through a pattern; 4) of racketeering activity.” *Montesano v. Seafirst Commercial Corp.*, 818 F.2d 423, 424 (5th Cir. 1987). To defeat a motion to dismiss, “a RICO plaintiff must allege facts sufficient to establish each of the essential elements of his or her RICO claim.” *Robinson v. Standard Mortg. Corp.*, 191 F. Supp. 3d 630, 638 (E.D. La. 2016). The RICO claim must be plead “with sufficient particularity” under Rule 9(b). *Tel-Phonic Servs., Inc. v. TBS Int’l, Inc.*, 975 F.2d 1134, 1138 (5th Cir. 1992); *see also MWK Recruiting, Inc. v. Jowers*, 2020 U.S. Dist. LEXIS 229755, at *23 (W.D. Tex. Dec. 8, 2020). “Rule 9(b) requires allegations of the particulars of time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation and what [they] obtained thereby.” *Tel-Phonic Servs.*, 975 F.2d at 1134 (internal quotations omitted). “[T]o establish a RICO claim based on a pattern of mail or wire

²⁴ *See, e.g.*, Bankr. Docket Nos. 3507, 3550.

fraud, the plaintiff must plead that the defendant act[ed] knowingly with the specific intent to deceive for the purpose of causing pecuniary loss to another or bringing about some financial gain to [themselves].” *Ranieri v. AdvoCare Int’l, L.P.*, 336 F. Supp. 3d 701, 715 (N.D. Tex. 2018) (internal quotations omitted).

1. Plaintiffs Fail to Allege a Pattern of Racketeering Activity

27. “A pattern of racketeering activity consists of two or more predicate criminal acts that are (1) related and (2) amount to or pose a threat of continued criminal activity.” *D&T Partners v. Baymark Partners LP*, 2022 U.S. Dist. LEXIS 83140, at *15 (N.D. Tex. May 9, 2022) (quoting *St. Germain v. Howard*, 556 F.3d 261, 263 (5th Cir. 2009)). Plaintiffs allege three predicate offenses: (i) wire fraud, (ii) mail fraud, and (iii) violation of the IAA’s antifraud provisions. **See Complaint ¶¶ 130-132.** Plaintiffs fail to sufficiently plead any predicate act.

28. First, alleged violations of securities laws cannot be predicate acts for a RICO claim. *See* 18 U.S.C. § 1964(c); *Affco Invs. 2001, L.L.C. v. Proskauer Rose, L.L.P.*, 625 F.3d 185, 191 (5th Cir. 2010). Thus, to the extent that Plaintiffs’ RICO claims, however pitched, allege “conduct that would have been actionable as fraud in connection with the purchase or sale of securities” (18 U.S.C. § 1964(c)), the claims are barred by statute. “Courts have interpreted the scope of § 1964(c)’s so-called ‘securities fraud exception’ broadly to apply even where a plaintiff does not expressly plead securities fraud as the predicate act, where a plaintiff could not have even brought a securities fraud claim against the particular defendant, and where a plaintiff pleads securities fraud violations but fails to state a claim for relief.” *Woods v. Michael*, No. 20-80651-CV, 2021 U.S. Dist. LEXIS 26563, at *8 (S.D. Fla. Feb. 9, 2021). Plaintiffs’ RICO claim is wholly predicated on violations of the securities laws: “Defendants’ conduct violated the wire fraud and mail fraud laws, and the [IAA’s] antifraud provisions.” **Complaint ¶ 132.** Because the RICO claim is improperly founded on alleged securities fraud, it must be dismissed.

29. Second, the Complaint fails to state a claim for mail or wire fraud. To state a claim for mail fraud, a plaintiff must allege: “(1) a scheme to defraud, (2) which involves the use of the mails, (3) for the purpose of executing the scheme.” *United States v. Gray*, 96 F.3d 769, 773 (5th Cir. 1996). The elements of wire fraud are the same but apply to “wire communications in furtherance of the scheme.” *Id.* “[B]oth RICO mail and wire fraud require evidence of intent to defraud, i.e., evidence of a scheme to defraud by false or fraudulent representations.” *St. Paul Mercury Ins. Co. v. Williamson*, 224 F.3d 425, 441 (5th Cir. 2000); *Robinson*, 191 F. Supp. 3d at 639–40 (“[A] scheme to defraud must involve fraudulent misrepresentations or omissions”). Accordingly, the specificity requirements and heightened pleading standards of Rule 9(b) apply. *See MWK Recruiting*, 2020 U.S. Dist. LEXIS 229755, at *23-24 (claim failed to allege time or location of fraudulent occurrences). The Complaint fails to satisfy Rule 9(b).

30. The thrust of Plaintiffs’ claim is that the Debtor operated in such a way as to “violate insider trading rules and regulations when it traded with HarbourVest” by concealing “non-public information that it had not supplied” to Plaintiffs. **Complaint ¶ 118.** Plaintiffs’ RICO claim is nothing more than a series of conclusory allegations predicated on allegations of mail, wire, and securities fraud. *See id.* ¶¶ 113-133. The Complaint only vaguely alleges, for instance, that Mr. Seery (i) “utilized the interstate wires and/or mails to obtain or arrive at valuations of the HCLOF interests,” *id.* ¶ 120; (ii) “transmitted or caused to be transmitted through the interstate wires information to HCLOF investors from HCM,” *id.* ¶ 121 and (iii) “operated [the Debtor] in such a way that he concealed the true value of the HCLOF interests by utilizing the interstate wires and mails to transmit communications to the court in the form of written representations...” *id.* ¶ 122. Plaintiffs do not plead with particularity details about the contents of those alleged communications, when the Debtor had them, to whom, or where such communications were

directed. *See Merrill Lynch, Pierce, Fenner & Smith v. Young*, 91 Civ. 2923 (CSH), 1994 U.S. Dist. LEXIS 2929, at *22-27 (S.D.N.Y. Mar. 15, 1994); *Tel-Phonic Servs.*, 975 F.2d at 1138. Plaintiffs only generally allege that Mr. Seery testified about the valuation of the HCLOF interests (Complaint ¶ 125) but provide no details about mail or wire fraud.

31. The Complaint therefore “does not identify specific acts of communication by mail or by interstate wires” undertaken by the Debtor “in furtherance of a fraudulent scheme” as required by Rule 9(b). *See Merrill Lynch*, 1994 U.S. Dist. LEXIS 2929, at *31-32; *Tel-Phonic Servs.*, 975 F.2d at 1134 (Rule 9(b) requires pleading particulars of time, place, content and maker of the misrepresentation). Plaintiffs’ allegations are insufficient to state a plausible claim for relief under RICO. *See Robinson*, 191 F. Supp. 3d at 640 (dismissing RICO claims where plaintiff provided no factual details); *see also MWK Recruiting*, 2020 U.S. Dist. LEXIS 229755 at *23-24.

32. Finally, Plaintiffs also fail to plead a “pattern of racketeering activity.” “To prove a pattern of racketeering activity, a plaintiff must show at least two predicate acts of racketeering that are related and amount to or pose a threat of continued criminal activity.” *MWK Recruiting*, 2020 U.S. Dist. LEXIS 229755, at *25 (quoting *Tel-Phonic Servs.*, 975 F.2d at 1139-40 (W.D. Tex. Dec. 8, 2020)). To constitute a “pattern,” the activities must show “continuity.” *Tel-Phonic Servs.*, 975 F.2d at 1140. “Continuity” refers “either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition.” *Id.* at 1139-40. “Predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement.” *Id.* (quoting *H. J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 241 (1989)); *see also Calcasieu Marine Nat’l Bank v. Grant*, 943 F.2d 1453, 1464 (5th Cir.1991) (“Short-term criminal conduct is not the concern of RICO.”)

33. Here, the Complaint does not allege “continuity.” There is no specific “threat of repetition” or distinct threat of long-term criminal conduct. Nor do the allegations suggest the Debtor is “operating as part of a long-term association that exists for criminal purposes.” *See Partain v. City of S. Padre Island*, 2018 U.S. Dist. LEXIS 220850, at *43 (S.D. Tex. Dec. 5, 2018) (quoting *H. J. Inc.*, 492 U.S. at 242-43). Plaintiffs’ RICO bald allegations concern only non-specific conduct allegedly occurring in a limited period, September 2020 to January 2021, concerning one transaction—the HarbourVest Settlement. *See, e.g., Complaint* ¶¶ 119-128. Such allegations concern short-term, discrete transactions, and do not show a “pattern of activity,” or threat of “continuing racketeering activity.” *See Calcasieu*, 943 F.2d at 1464.

2. Plaintiffs Fails to Allege a RICO Association-in-Fact Enterprise

34. A RICO “enterprise” can be either a legal entity or an “association in fact” enterprise. 18 U.S.C. 1961(4). “A RICO association in fact enterprise must be shown to have continuity.” *Calcasieu*, 943 F.2d at 1461. “The linchpin of enterprise status is the continuity or ongoing nature of the association.” *Bordelon v. Wells Fargo Fin. La., LLC*, 2018 U.S. Dist. LEXIS 124877, at *8 (E.D. La. July 25, 2018) (internal quotation marks omitted).

The enterprise must have continuity of its structure and personnel, which links the defendants, and a common or shared purpose. . . . An association in fact enterprise (1) must have an existence separate and apart from the pattern of racketeering, (2) must be an ongoing organization and (3) its members must function as a continuing unit as shown by a hierarchical or consensual decision making structure.

Calcasieu, 943 F.2d at 1461 (internal quotations omitted). That is, an “association in fact enterprise must have an existence separate and apart from the pattern of racketeering.” *Id.*

35. Plaintiffs argue that the Defendants, together, constitute an “association-in fact” enterprise because “the purpose of the association-in-fact was the perpetuation of Seery’s position at HCM and using the HarbourVest settlement as a vehicle to enrich persons other than the HCLOF investors, including [Plaintiffs].” **Complaint** ¶ 115. However, these allegations fail to show that

Defendants functioned as a continuing unit, separate and apart from the alleged RICO violation, and fail to allege that Defendants are an “enterprise” within the purview of RICO. *See Montesano*, 818 F.2d at 427 (association-in-fact enterprise not pled under RICO where plaintiffs alleged only that defendants “conspired in this one instance”).

36. Plaintiffs also fail to identify the roles of the two affiliates of the Debtor, HCFA and HCLOF, and how they, with the Debtor, participated in the alleged criminal enterprise.²⁵ *See Allstate Ins. Co. v. Donovan*, 2012 U.S. Dist. LEXIS 92401, at *31-32 (S.D. Tex. July 3, 2012) (complaint lacked factual allegations scheme formation, who was in charge, how each defendant participated, and whether there were communications or understanding among the defendants advancing the fraud).

3. Plaintiffs Fail to Allege Causation

37. Plaintiffs also fail to plausibly allege causation. RICO provides civil remedies to “[a]ny person injured in [their] business or property *by reason of* a violation of section 1962.” 18 U.S.C. § 1964(c) (emphasis added). “An injured party must show that the violation was the but-for and proximate cause of the injury.” *Robinson*, 191 F. Supp. 3d at 645 (internal quotations omitted). Causation requires “[a] direct relationship between the fraud and the injury.” *In re Oil Spill by the Oil Rig “Deepwater Horizon”*, 802 F. Supp. 2d 725, 730 (E.D. La. 2011).

38. Here, Plaintiffs fail to allege that the Debtor’s actions induced them to act or that any Debtor’s actions were the proximate cause of any cognizable injury. Plaintiffs generally allege that “had Plaintiff been offered those [HCLOF] interests, it would have happily purchased them and therefore would have infused over \$20 million in cash into the estate for the purpose of executing the HarbourVest Settlement.” **Complaint ¶ 50**. Such conclusory and speculative

²⁵ Highland and Mr. Seery are subject to this Court’s oversight. Mr. Seery was specifically appointed by this Court to oversee the Debtor. The Debtor and Mr. Seery were thus risibly unlikely participants in a RICO enterprise.

“would have” allegations are insufficient to show proximate and but-for causation.²⁶ *See Robinson*, 191 F. Supp. 3d at 645 (allegations failed to state causation where plaintiff’s “after-the-fact” and “bare assertion that she would have acted differently” had she known of certain facts were insufficient “absent additional factual allegations to support or explain this assertion,”); *In re Oil Spill by Oil Rig Deepwater Horizon*, 802 F. Supp. 2d at 729 (no causation where economic harms suffered by plaintiffs were “too remote” and causation theory “depends on a series of speculative assumptions to link the alleged fraud” with the harm).

39. Plaintiffs’ RICO claim fails every element and should be dismissed.

D. Plaintiffs Fail to State a Claim for Breach of Fiduciary Duty in Count 1

40. Plaintiffs fail to state a claim for breach of fiduciary duty. Plaintiffs’ fiduciary duty claim is premised on the Debtor’s alleged: (i) insider trading; (ii) concealment of the value of the HarbourVest interests; and (iii) diversion of an investment opportunity from Plaintiffs to the Debtor, in violation of Section 10(b) of the Securities and Exchange Act of 1934 and the IAA. ***See Complaint ¶¶ 67-80.*** Where, as here, a plaintiff’s breach of fiduciary duty claim is premised on theories of securities fraud, Rule 9(b)’s heightened pleadings standards apply. *See Tighe Inv. Co. v. Chase Bank of Tex., N.A.*, 2004 U.S. Dist. LEXIS 27582, at *4 (N.D. Tex. Nov. 15, 2004). “Section 10(b) of the Securities and Exchange Act of 1934 makes unlawful the use of ‘any manipulative or deceptive device or contrivance’ in contravention of SEC rules.” *Alabama Farm Bureau Mut. Cas. Co. v. Am. Fid. Life Ins. Co.*, 606 F.2d 602, 608 (5th Cir. 1979). “A cause of action lies under Rule 10b-5 ‘only if the conduct alleged can be fairly viewed as manipulative or deceptive’ within the meaning of the statute.” *Id.* (quoting *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462, 473 (1977)). To state a securities-fraud claim under section 10(b) and Rule 10b-5,

²⁶ At no time prior to filing the Complaint did CLOH indicate it wanted to acquire the Interests or state that it was interested in, willing, or able to purchase the HarbourVest interests.

plaintiffs must plead: “(1) a misstatement or omission; (2) of a material fact; (3) made with scienter; (4) on which the plaintiffs relied; and (5) that proximately caused the plaintiffs' injuries.” *Southland Sec. Corp. v. INSpire Ins. Sols., Inc.*, 365 F.3d 353, 368 (5th Cir. 2004). “A fact is material if there is ‘a substantial likelihood that, under all the circumstances, the omitted fact would have assumed actual significance in the deliberations of the reasonable shareholder.’” *Id.* (quoting *Grigsby v. CMI Corp.*, 765 F.2d 1369, 1373 (9th Cir. 1985)). “[S]cienter is a crucial element of the securities fraud claims.” *Tuchman v. DSC Communications Corp.*, 14 F.3d 1061, 1067 (5th Cir. 1994).

41. Plaintiffs’ allegations underlying their breach of fiduciary duty claim are premised on largely the same conclusory allegations as those underlying their fraud-based RICO claim. *See Complaint ¶¶ 67-91*. Because Plaintiffs fail to properly plead securities fraud, any fiduciary claim premised on such allegations necessarily fails as well. *See Town North Bank, N.A. v. Shay Fin. Servs.*, 2014 U.S. Dist. LEXIS 137551, at *74 (N.D. Tex. Sep. 30, 2014). Plaintiffs fail to plead with particularity that any alleged omissions by the Debtor assumed any real significance for the Plaintiffs. *See, e.g., Complaint ¶¶ 82-89* (speculating about Plaintiffs’ “lost opportunity cost,” and vaguely asserting that “Defendants’ malfeasance” has “exposed HCLOF to a massive liability from HarbourVest”). These allegations also fail to give rise to a “strong interference of scienter” sufficient to state a claim under Rule 10(b). *See In re Enron Corp. Sec., Derivative & ERISA Litig.*, 258 F. Supp. 2d 576, 635 (S.D. Tex. 2003); *Southland*, 365 F.3d at 368 (plaintiff must plead “more than allegations of motive and opportunity to withstand dismissal” for claim of securities fraud). Plaintiffs’ allegations regarding proximate cause are equally deficient. *See Complaint ¶¶ 88-89* (vaguely alleging that because of Defendants’ actions, “Plaintiffs have lost over \$25 million”).

42. Plaintiffs also fail to allege any breach of fiduciary claims premised on state law. Texas law²⁷ provides “[t]he elements of a breach of fiduciary duty claim are: (1) a fiduciary relationship between the plaintiff and defendant; (2) the defendant must have breached his fiduciary duty to the plaintiff; and (3) the defendant’s breach must result in injury to the plaintiff or benefit to the defendant.” *Matter of ATP Oil & Gas Corp.*, 711 F. App’x 216, 221 (5th Cir. 2017) (internal quotations omitted). “The plaintiff must plead some facts as to the nature of the relationship to state a plausible claim that that a fiduciary duty has been breached.” *Matter of Life Partners Holdings, Inc.*, 926 F.3d 103, 125 (5th Cir. 2019).

43. The Complaint fails to sufficiently allege facts regarding the nature of the relationship between Plaintiffs and the Debtor. *See* **Complaint ¶¶ 62-63** (generally alleging simply that (i) the Debtor “owed a fiduciary duty to [Plaintiffs]” pursuant to which the Debtor “agreed to provide sound investment advice, and (ii) this fiduciary relationship is “broad and applies to the entire advisors-client relationship”). The Complaint also fails to adequately allege that any state law or Guernsey fiduciary duty existed, let alone was breached for the same reasons. *Matter of Life Partners Holdings, Inc.*, 926 F.3d 103, 125 (5th Cir. 2019) (no allegation of “the nature of the fiduciary duty owed” to plaintiff). The allegations of the Debtor’s breach of its “internal policies and procedures” or the diversion of “corporate opportunities” are vague and conclusory. **Complaint ¶¶ 72-89**. *See In re Soporex, Inc.*, 463 B.R. 344, 417 (Bankr. N.D. Tex. 2011).

44. Plaintiffs allege the Debtor breached its “unwaivable” fiduciary obligation under the IAA by, among other things, “diverting a corporate opportunity.” **Complaint ¶¶ 82-84**. This

²⁷ Plaintiffs allege breach of fiduciary duty under state law; however, HCLOF is a Guernsey entity and the Members Agreement is governed by Guernsey law. *See* Ex. 13 at 14. Under the internal affairs doctrine, Guernsey law controls on issues of fiduciary duties to the members. *See Pridgin v. Safety-Kleen Corp.*, 2021 U.S. Dist. LEXIS 240210, at *6 (N.D. Tex. Dec. 16, 2021).

Count is purportedly premised on the IAA because (i) the Debtor was the DAF's investment adviser under an advisory agreement and (ii) HCFA is HCLOF's investment adviser under a separate advisory agreement.²⁸ However, under clear Supreme Court precedent, the IAA does not provide a private right of action to sue for damages arising from breach of fiduciary duty.²⁹ *Transamerica Mtg. Advisors, Inc. v. Lewis*, 444 U.S. 11 (1979) (holding there is no private right of action under Section 206 of the IAA); *see also Charitable DAF Fund, L.P.*, 2022 Bankr. LEXIS 2780, at *13, n. 23 ("The court notes that the ... Supreme Court has held [in *Transamerica*] that there is not a private right of action for damages under the [IAA]."); *NexPoint Diversified Real Estate Tr.*, 2022 U.S. Dist. LEXIS 142029, at *8 ("Plaintiff has not adequately pleaded a claim ... under the IAA ... there is no private right of action to bring a claim pursuant to [Section 206 of the IAA].")³⁰

45. Even if there were a right of action under the IAA, Plaintiffs' allegations would still be deficient for failure to plead "duty" or "breach." The Debtor owed no duty to offer the Interests to Plaintiffs. The Transfer was effectuated in compliance with the Members Agreement and "Right of First Refusal." The DAF's advisory agreement included full and clear disclosure that the Debtor could compete with the DAF for investments with no obligation to offer those investments to the DAF.³¹ *SEC v. Cap. Gains Research Bureau, Inc.*, 375 U.S. 180, 181-82 (1963) (finding disclosure of an adviser's "practice of purchasing shares ... for his own account" satisfied the

²⁸ Plaintiffs cite to Section 47(b) of the IAA for the proposition that the Transfer is unenforceable. **Complaint ¶ 89.** There is no Section 47(b) in the IAA.

²⁹ A party can seek to void an investment management agreement under Section 215 of the IAA if the agreement's formation or performance would violate the IAA. *NexPoint Diversified Real Estate Tr. v. Acis Cap. Mgmt., L.P.*, 2022 U.S. Dist. LEXIS 142029, at *9-10 (S.D.N.Y. Aug. 9, 2022). Plaintiffs have not pled such claim nor could they.

³⁰ *NexPoint Advisors, L.P. v. Highland Cap. Mgmt., L.P. (In re Highland Cap. Mgmt., L.P.)*, 2022 U.S. App. LEXIS 25107, at *26 (5th Cir. Sept. 7, 2022).

³¹ *See, e.g., Ex. 14 at Appx. 504* ("The Fund will be subject to a number of actual and potential conflicts of interest ... including ... that ... Highland ... may actively engage in transactions in the same securities sought by the Fund and, therefore, may compete with the Fund for investment opportunities...").

adviser's fiduciary obligations under the IAA); *Dugaboy Inv. Trust v. Highland Cap. Mgmt., L.P.*, 2022 U.S. Dist. LEXIS 172351, at *10-11 (N.D. Tex. Sept. 22, 2022) (addressing argument that fiduciary obligations under the IAA cannot be waived and finding no breach of duty when conflict disclosed). Defendants also owed no duty to CLOH as an investor in HCLOF; there is no fiduciary relationship between an adviser to a fund and the fund's investors. *Goldstein v. SEC*, 451 F.3d 873, 879 (D.C. Cir. 2006).

46. There was also no corporate opportunity to divert. HarbourVest asserted a claim against the Debtor seeking, among other things, effectively the rescission of its investment in HCLOF, an investment allegedly induced by fraud. The Settlement effectuated that remedy. Because HarbourVest had no claims against Plaintiffs, there was no taking of a corporate opportunity. The Debtor was resolving a claim against the Debtor, not purchasing a security for cash, and could not transfer its liability to HarbourVest to Plaintiffs.

47. Accordingly, Count 1, for breach of fiduciary duty, should be dismissed.

E. Plaintiffs Fail to State a Claim for Breach of Members Agreement in Count 2

48. In addition to Count 2 being barred by judicial estoppel, Plaintiffs fail to plead sufficient facts to state a breach of the Members Agreement's Right of First Refusal. **Complaint ¶¶ 92-102.** Further, Plaintiffs' claim of breach is contradicted by the Members Agreement itself. Section 6.1 of the Members Agreement (**Ex. 13, § 6.1, Appx. 468-469**) grants members the unconditional right to transfer its interests to an "Affiliate of an initial Member." Section 6.2 (**Id., § 6.2, Appx. 469**) sets forth the Right of First Refusal and has two exceptions: (i) transfers to "affiliates of an initial Member" from Members *other than* CLOH and the "Highland Principals" and (ii) transfers from CLOH or a Highland Principal to (a) the Debtor, (b) the Debtor's "Affiliates," or (c) another Highland Principal. Under the Members Agreement, "Affiliate" is defined as, "with respect to a person, (i) any other person who, directly or indirectly, is in control

of, or controlled by, or is under common control with, such person ...” *Id.* § 1.1, Appx. 463. A “Member” is a “holder of shares in the Company.” *Id.*, § 1.1, Appx. 464. The “initial Member[s]” are the initial Members of HCLOF listed on the first page of the Members Agreement and include the Debtor, HarbourVest, and CLOH. *Id.*, § 6.2, Appx. 469. Since HarbourVest transferred its interests directly to the Debtor’s wholly-owned subsidiary—an Affiliate of an initial Member—the transfer was permitted, without restriction, under section 6.1 and satisfied the exception to the Right of First Refusal in section 6.2. *See* Ex. 13, Appx. 459-487; Ex. 8 ¶¶ 28-35, Appx. 203-208.

49. Plaintiffs also fail to plead actual damages resulting from the alleged breach of the Members Agreement, other than contending, that “had plaintiff been allowed to do so, it would have obtained the interests” in HCLOF. *E.g.*, **Complaint** ¶ 100. Such conclusory allegations ignore the fact that CLOH elected not to make an offer to purchase the HCLOF interests³² and, in any event, are insufficient to state a claim. *See Snowden v. Wells Fargo Bank, N.A.*, 2019 WL 587304, at *6 (N.D. Tex. Jan. 18, 2019), *adopted by* 2019 U.S. Dist. LEXIS 22982 (N.D. Tex. Feb. 12, 2019) (actual damages inadequately pled); *Little v. KPMG LLP*, 2008 U.S. Dist. LEXIS 26281, at *15 (W.D. Tex. Jan. 22, 2008) (lost profits claim “speculative and conjectural.”)

F. Plaintiffs Fail to State a Claim for Negligence in Count 3

50. The Complaint fails to state a claim for negligence. First, this Count is barred by the Plan.³³ Highland has been exculpated from all claims for “conduct occurring on or after [October 16, 2019] in connection with or arising out of (i) the ... administration of the Chapter 11 Case ... and (v) any negotiations, transactions, and documentation in connection with the foregoing” unless such conduct constituted “bad faith, gross negligence, criminal misconduct, or

³² *See* note 26 *supra*.

³³ “Plan” means the *Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (as Modified)* [Bankr. Docket No. 1808].

willful misconduct.”³⁴ The negotiation and consummation of the Settlement were part of the “administration of the Chapter 11 Case,” and Highland, therefore, has been exculpated from Plaintiffs’ claim for negligence. *NexPoint Advisors, L.P.*, 2022 U.S. App. LEXIS 25107, at *33. Second, even absent exculpation, Plaintiffs fail to state a claim. “The elements of a negligence claim under Texas law are: ‘(1) a legal duty on the part of the defendant; (2) breach of that duty; and (3) damages proximately resulting from that breach.’” *Sivertsen v. Citibank, N.A. as Tr. for Registered Holders of WAMU Asset-Back Certificates WAMU Series No. 2007-HE2 Tr.*, 390 F. Supp. 3d 769, 789 (E.D. Tex. 2019). The negligence allegations (**Complaint ¶¶ 106-107**) are speculative, conclusory, and fail to allege proximate cause; the claim must be dismissed. *See Rodgers v. City of Lancaster Police*, 2017 U.S. Dist. LEXIS 14588, *37 (N.D. Tex. Jan. 6, 2017). To the extent Plaintiffs’ negligence claim is premised on a breach of the Members Agreement, the advisory agreement with DAF, or the IAA, they are duplicative of Plaintiffs’ other Counts and fail for the reasons set forth above.

G. Plaintiffs Fail to State a Claim for Tortious Interference with Contract in Count 5

51. Plaintiffs’ tortious interference claim is premised on the Debtor’s alleged violation of the Members Agreement and concealment of the value of HCLOF. **Complaint ¶¶ 134-141**. The elements of tortious interference with contract are: “(1) the existence of a contract subject to interference, (2) willful and intentional interference, (3) that proximately causes damage, and (4) actual damage or loss.” *Specialties of Mexico Inc. v. Masterfoods USA*, 2010 U.S. Dist. LEXIS 58782, at *15 (S.D. Tex. June 14, 2010). Plaintiffs fail to allege how the Debtor intentionally interfered with the Members Agreement, and Plaintiffs have conceded—and are judicially estopped from arguing otherwise—that the transfer of the HCLOF interests did not violate the

³⁴ Plan, Art. I.B.62; Art. IX.C, *aff’d* 2022 U.S. App. LEXIS 25107, at *33.

Members Agreement. Plaintiffs also fail to allege proximate causation or any actual damages sustained as a result of the alleged interference. This claim should be dismissed.

IV. CONCLUSION

WHEREFORE, Highland respectfully requests that the Court grant the Motion, enter an order in the form annexed to the Motion as **Exhibit A**, and grant such further relief as the Court deems just and proper.

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Dated: October 14, 2022

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**UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF
TEXAS, DALLAS DIVISION**

In Re: Highland Capital Management, L.P § Case No. **19-34054-SGJ11**

Charitable DAF Fund, L.P et al

Appellant

§

vs.

§

21-03067

Highland Capital Management, L.P

§

Appellee

§

3:23-CV-01503-B

[167] Order granting Defendant Highland Capital Management, L.P.'s Renewed motion to dismiss adversary proceeding (related document # [122](#)) Entered on 6/25/2023.

Volume 19

APPELLANT RECORD

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**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

In re:	§ Chapter 11
	§
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§ Case No. 19-34054-sgj11
	§
Debtor.	§
	§
CHARITABLE DAF FUND, L.P. AND CLO	§
HOLDCO, LTD., DIRECTLY AND DERIVATIVELY	§
	§
Plaintiffs,	§ Adversary Proceeding No.
	§
vs.	§ 21-03067-sgj11
	§
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§
HIGHLAND HCF ADVISOR, LTD., AND	§
HIGHLAND CLO FUNDING LTD., NOMINALLY	§
	§
Defendant.	§
	§

INDEX

**APPELLANTS' SECOND AMENDED STATEMENT OF ISSUES
AND DESIGNATION OF RECORD ON APPEAL**

Pursuant to Rules 8009(a)(1)(A)-(B) and (a)(4) of the Federal Rules of Bankruptcy Procedure, The Charitable DAF Fund, L.P. and CLO Holdco, Ltd. ("Appellants") hereby designate the following items to be included in the record and identify the following issues with respect to

their appeal of the Order Granting Defendant Highland Capital Management, L.P.'s "Renewed Motion to Dismiss Complaint" [Adv. Proc. Doc. No. 122] which was entered by the United States Bankruptcy Court for the Northern District of Texas on June 25, 2023.

I. STATEMENT OF ISSUES TO BE PRESENTED ON APPEAL

- Whether the Bankruptcy Court had jurisdiction to rule on Highland Capital Management L.P.'s Renewed Motion to Dismiss Complaint
- Whether the Renewed Motion to Dismiss Complaint was improperly granted

II. DESIGNATION OF ITEMS TO BE INCLUDED IN THE RECORD

Vol. 1
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1. Notice of Appeal for Bankruptcy Case Adversary Proceeding No. 21-03067-sgj11 [Doc. 168].

000042

2. The judgment, order, or decree appealed from: Memorandum Opinion and Order Granting Defendant Highland Capital Management, L.P.'s "Renewed Motion to Dismiss Complaint" [Adv. Proc. Doc. No. 122] [Doc. 167].

000080

3. Docket Sheet kept by the Bankruptcy Clerk.

4. Documents listed below and as described in the Docket Sheet for Bankruptcy Case Proceeding No. 21-03067-sgj.

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No.	Date Filed	Docket No.	Description/Document Text
1	9/29/21	1	(36 pgs; 3 docs) Adversary case 21-03067. ORDER REFERRING CASE NUMBER 21-CV-0842-B from U.S District Court for the Northern District of Texas, Dallas Division to U.S. Bankruptcy Court for Northern District of Texas, Dallas Division. Complaint by Charitable DAF Fund, LP, CLO Holdco, Ltd. against Highland Capital Management, LP, Highland HCF Advisor Ltd., Highland CLO Funding, Ltd. Fee Amount \$350 (Attachments: # 1 Original Complaint # 2 Docket Sheet from 3:20-cv-0842-B) Nature(s) of suit: 02 (Other (e.g. other actions that would have been brought in state court if unrelated to bankruptcy)). (Okafor, M.)
2	9/29/21	2	(1 pg) Supplemental Document (cover sheet) by CLO Holdco Ltd., Charitable DAF Fund (RE: related document(s)1 Adversary case 21-03067) [ORIGINALLY FILED IN 21-CV-0842 AS #2 ON 04/13/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)

Vol. 2 000139 000232 000239 000270 Thru Vol. 6	3	9/29/21	6	(93 pgs; 6 docs) MOTION for Leave to File First Amended Complaint filed by CLO Holdco Ltd., Charitable DAF Fund LP (Attachments: # 1 Exh 1_First Amended Complaint # 2 Exh 2_Motion for Authorization to Retain James Seery # 3 Exh 3_Order Approving Retention of James Seery # 4 Exh 4_Order Approving Settlement # 5 Proposed Order) (Bridges, Jonathan) (Entered: 04/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #6 ON 04/19/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
	4	9/29/21	22	(7 pgs; 2 docs) MOTION for an Order to Enforce the Order of Reference filed by Highland Capital Management LP. (Attachments: # 1 Exhibit(s) A--Proposed Order) (Annable, Zachery) Modified text on 5/20/2021 (mjr). (Entered: 05/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #22 ON 05/19/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
	5	9/29/21	23	(31 pgs) Brief/Memorandum in Support filed by Highland Capital Management LP re: 22 MOTION for an Order to Enforce the Order of Reference. (Annable, Zachery) Modified text on 5/20/2021 (mjr).(Entered: 05/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #23 ON 05/19/2021 IN U.S.DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
	6	9/29/21	24	(926 pgs; 29 docs) Appendix in Support filed by Highland Capital Management LP re: 23 Brief/Memorandum in Support. (Attachments: # 1 Appendix 1 # 2 Appendix 2 # 3 Appendix 3 # 4 Appendix 4 # 5 Appendix 5 # 6 Appendix 6 # 7 Appendix 7 # 8 Appendix 8 # 9 Appendix 9 # 10 Appendix10 # 11 Appendix 11 # 12 Appendix 12 # 13 Appendix 13 # 14 Appendix 14 # 15 Appendix 15 # 16 Appendix 16 # 17 Appendix 17 # 18 Appendix 18 # 19 Appendix 19 # 20 Appendix 20 # 21 Appendix 21# 22 Appendix 22 # 23 Appendix 23 # 24 Appendix 24 # 25 Appendix 25 # 26 Appendix 26 # 27 Appendix 27 # 28 Appendix 28) (Annable, Zachery) Modified linkage and text on 5/20/2021 (mjr). (Entered:05/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #24 ON 05/19/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
Vol. 7 001196	7	9/29/21	26	(7 pgs; 2 docs) MOTION to Dismiss Complaint filed by Highland Capital Management LP (Attachments: # 1 Exhibit(s) A--Proposed Order) (Annable, Zachery) Modified text on 5/28/2021 (jmg).(Entered: 05/27/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #26 ON 05/27/2021 IN U.S.DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)

Vol. 7 001203 thru Vol. 8	8	9/29/21	28	(508 pgs; 14 docs) Appendix in Support filed by Highland Capital Management LP (Attachments: # 1 Appendix 1 # 2 Appendix 2 # 3 Appendix 3 # 4 Appendix 4 # 5 Appendix 5 # 6 Appendix 6 # 7 Appendix 7 # 8 Appendix 8 # 9 Appendix 9 # 10 Appendix 10 # 11 Appendix 11 # 12 Appendix 12 # 13 Appendix 13) (Annable, Zachery) (Entered: 05/27/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #28 ON 05/27/2021 IN U.S. DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
Vol. 9 001711	9	9/29/21	33	(1 pg) Amended Civil Cover Sheet by CLO Holdco Ltd, Charitable DAF Fund LP. Amendment to 2 Supplemental Document. (Sbaiti, Mazin) Modified text on 6/23/2021 (mjr). (Entered: 06/22/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #33 ON 06/22/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001712	10	9/29/21	36	(26 pgs) RESPONSE filed by CLO Holdco Ltd, Charitable DAF Fund LP re: 22 MOTION for an Order to Enforce the Order of Reference (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #36 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001738	11	9/29/21	37	(22 pgs) Appendix in Support filed by CLO Holdco Ltd, Charitable DAF Fund LP re 36 Response/Objection Response to Motion for an Order to Enforce the Order of Reference (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #37 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001760	12	9/29/21	38	(45 pgs) RESPONSE filed by CLO Holdco Ltd, Charitable DAF Fund LP re: 26 MOTION to Dismiss (Defendant Highland Capital Management, L.P.'s Motion to Dismiss Complaint) (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #38 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001805	13	9/29/21	39	(88 pgs) Appendix in Support filed by CLO Holdco Ltd, Charitable DAF Fund LP re 38 Response/Objection to Defendant Highland Capital Management, L.P.'s Motion to Dismiss Complaint (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #39 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001893	14	9/29/21	42	(12 pgs) REPLY filed by Highland Capital Management LP re: 22 MOTION for an Order to Enforce the Order of Reference (Annable, Zachery) (Entered: 07/13/2021) [ORIGINALLY FILED IN 21-CV-0842AS #42 ON 07/13/2021 IN U.S.

			DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
VOL. 9	15	9/29/21	43 (852 pgs) Appendix in Support filed by Highland Capital Management LP re: 42 Reply. (Annable, Zachery) Modified text on 7/14/2021 (mjr). (Entered: 07/13/2021) [ORIGINALLY FILED IN 21-CV-0842AS #43 ON 07/13/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001905 thru Vol. 13	16	9/29/21	45 (21 pgs) REPLY filed by Highland Capital Management LP re: 26 MOTION to Dismiss (Defendant Highland Capital Management, L.P.'s Motion to Dismiss Complaint) (Annable, Zachery) (Entered: 07/13/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #44 ON 07/13/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002757	17	9/29/21	57 (7 pgs; 2 docs) MOTION to Dismiss and Joinder in Motion to Dismiss of Highland Capital Management, L.P. filed by Highland CLO Funding Ltd. (Attachments: # 1 Proposed Order) Attorney Paul R Bessette added to party Highland CLO Funding Ltd (pty:dft) (Bessette, Paul) (Entered: 08/30/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #57 ON 08/30/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002778	18	9/29/23	58 (12 pgs) Brief/Memorandum in Support filed by Highland CLO Funding Ltd. re 57 MOTION to Dismiss and Joinder in Motion to Dismiss of Highland Capital Management, L.P. (Bessette, Paul) (Entered: 08/30/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #58 ON 08/30/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002785	19	9/29/23	59 (80 pgs; 5 docs) Appendix in Support filed by Highland CLO Funding Ltd re 58 Brief/Memorandum in Support of Motion (Attachments: # 1 Exhibit(s) A - Jackson v Dear # 2 Exhibit(s) B - Prudential Assurance v. Newman # 3 Exhibit(s) C - Harbourvest Settlement Agreement # 4 Exhibit(s) D - Boleat Declaration) (Bessette, Paul) (Entered: 08/30/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #59 ON 08/30/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002797	20	9/29/21	64 (1 pg) ORDER OF REFERENCE: Pursuant to 28 U.S.C. § 157 and this District's Miscellaneous Order No. 33, this case is hereby REFERRED to Judge Stacey G. C. Jernigan of the United States Bankruptcy Court for the Northern District of Texas, Dallas Division, to be adjudicated as a matter related to the consolidated Chapter 11 Bankruptcy of Highland Capital Management, L.P., Chapter 11 Case No.19-34054. (Ordered by Judge Jane J. Boyle
002877			

Vol. 14				on 9/20/2021) (svc) (Entered: 09/20/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #64 ON 09/20/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002878	21	10/19/21	66	(5 pgs) Notice of hearing filed by Defendant Highland Capital Management, LP (RE: related document(s) 26 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP, 47 Motion to strike document filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 55 Motion to abate filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) Hearing to be held on 11/23/2021 at 09:30 AM at https://us-courts.webex.com/meet/jerniga for 26 and for 47 and for 55, (Annable, Zachery)
002883 thru Vol. 16	22	11/22/21	71	(509 pgs; 2 docs) Witness and Exhibit List <i>for Hearing on November 23, 2021</i> filed by Defendant Highland Capital Management, LP (RE: related document(s) 26 Motion to dismiss adversary proceeding). (Attachments: # 1 Exhibits 1-13) (Hayward, Melissa)
Vol. 17	23	11/22/21	72	(2 pgs) Witness List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 26 Motion to dismiss adversary proceeding, 47 Motion to strike (related document(s): 43 Document), 55 Motion to abate (related document(s) 1 Complaint), 69 Motion to abate <i>Plaintiffs' Amended Motion to Stay All Proceedings</i> (related document(s) 55 Motion to abate (related document(s) 1 Complaint))). (Sbaiti, Mazin)
003392				
003394	24	11/22/21	73	(189 pgs; 4 docs) Exhibit List <i>for November 23, 2021 hearing</i> filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 47 Motion to strike (related document(s): 43 Document), 55 Motion to abate (related document(s) 1 Complaint)). (Attachments: # 1 Exhibit 1_Defendant's Memorandum of Law in Support of Motion for Reconsideration # 2 Exhibit 2_Highland Memorandum in Support of Motion to Dismiss # 3 Exhibit 3_Order (I) Confirming Fifth Amended Plan of Reorganization of Highland) (Sbaiti, Mazin)
003583	25	12/7/21	80	(2 pgs) Order granting Highland CLO Funding, Ltd.'s motion to dismiss adversary as a party with prejudice (related document 57) Entered on 12/7/2021. (Okafor, Marcey) Modified text on 3/11/2022 (Okafor, Marcey).
003585	26	3/11/22	99	(26 pgs) Memorandum of Opinion and order granting motion to dismiss the adversary proceeding (RE: related document(s) 26 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP). Entered on 3/11/2022 (Okafor, Marcey)
003611	27	3/11/22	100	(26 pgs) Order granting motion to dismiss adversary proceeding with prejudice (related document #26) Entered on 3/11/2022. (Okafor, Marcey)

Vol. 18 003637 003666 003843 003844 003851	28	3/21/22	104	(29 pgs) Notice of appeal. Fee Amount \$298 filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 100 Order on motion to dismiss adversary proceeding). Appellant Designation due by 04/4/2022. (Sbaiti, Mazin)
	29	5/26/22	120	(177 pgs; 2 docs) Support/supplemental document <i>Motion to Supplement Appellate Record</i> filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 111 Appellant designation). (Attachments: # 1 Amended Transcript of January 14, 2021 Hearing) (Sbaiti, Mazin)
	30	6/9/22	121	(1 pg) DISTRICT COURT Order: Case 3:22-00695-B is hereby transferred to the docket of the Honorable Judge Jane J. Boyle for consolidation with The Charitable DAF Fund LP, et al. v. Highland Capital Management LP, Case No. 3:21-cv-3129-N. Judge Karen Gren Scholer no longer assigned to case.(RE: related document(s) 86 Notice of appeal filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 104 Notice of appeal filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Entered on 6/9/2022 (Whitaker, Sheniqua) (Entered: 06/10/2022)
	31	10/24/22	122	(7 pgs) Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP (Annable, Zachery)
	32	10/14/22	123	(31 pgs) Brief in support filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Annable, Zachery)
Vol. 19 003882 Thru Vol 20	33	10/14/22	124	(513 pgs; 15 docs) Support/supplemental document (<i>Appendix in Support of Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7 # 8 Exhibit 8 # 9 Exhibit 9 # 10 Exhibit 10 # 11 Exhibit 11 # 12 Exhibit 12 # 13 Exhibit 13 # 14 Exhibit 14) (Annable, Zachery)
Vol. 21 004395	34	10/27/22	126	(5 pgs) Notice of hearing (<i>Notice of Hearing and Briefing Schedule on Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP). Hearing to be held on 12/8/2022 at 09:30 AM at https://us-courts.webex.com/meet/jerniga for 122. (Annable, Zachery)

Vol. 21 004400 004410 004442 Thru Vol. 22	35	11/18/22	128	(10 pgs) Motion for withdrawal of reference. Fee amount \$188, filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (Sbaiti, Mazin)
	36	11/18/22	129	(32 pgs) Response opposed to (related document(s): 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP) filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Sbaiti, Mazin)
	37	11/18/22	130	(254 pgs; 2 docs) Response opposed to (related document(s): 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP) filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Attachments: # 1 Appendix) (Sbaiti, Mazin)
Vol. 22 004696 004717 004732 004737 004742	38	9/2/22	131	(21 pgs) DISTRICT COURT MEMORANDUM OPINION AND ORDER: The Court REVERSES and REMANDS the bankruptcy court's Motion to Dismiss Order and AFFIRMS the bankruptcy courts Motion to Stay Order. re: appeal on Civil Action number: Case 3:22-00695-B consolidated with 3:21-CV-3129-B, (RE: related document(s) 81 Order on motion to abate, 100 Order on motion to dismiss adversary proceeding). Entered on 9/2/2022 (Whitaker, Sheniqua) (Entered: 11/29/2022)
	39	12/2/22	133	(15 pgs) Reply to (related document(s): 129 Response filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 130 Response filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) filed by Defendant Highland Capital Management, LP. (Annable, Zachery)
	40	12/7/22	135	(5 pgs) Notice of hearing filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP). Hearing to be held on 1/25/2023 at 01:30 PM at https://us-courts.webex.com/meet/jerniga for 122, (Annable, Zachery)
	41	12/7/22	136	(5 pgs) Notice of hearing filed by Defendant Highland Capital Management, LP (RE: related document(s) 128 Motion for withdrawal of reference filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Status Conference to be held on 1/25/2023 at 01:30 PM at https://us-courts.webex.com/meet/jerniga . (Annable, Zachery).
	42	12/9/22	138	(3 pgs) Response opposed to (related document(s): 128 Motion for withdrawal of reference. Fee amount \$188, filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) filed by Defendant Highland Capital Management, LP. (Annable, Zachery)

Vol. 22 004745	43	12/9/22	139	(25 pgs) Brief in support filed by Defendant Highland Capital Management, LP (RE: related document(s) 138 Response). (Annable, Zachery)
Vol. 23 004770	44	12/9/22	140	(280 pgs; 8 docs) Support/supplemental document (<i>Appendix in Support of Highland Capital Management, L.P.'s Response to Renewed Motion to Withdraw the Reference</i>) filed by Defendant Highland Capital Management, LP (RE: related document(s) 138 Response). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7) (Annable, Zachery)
Vol. 24 005050	45	12/16/22	144	(6 pgs) Reply to (related document(s): 138 Response filed by Defendant Highland Capital Management, LP) filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Sbaiti, Mazin)
005056 Thru Vol. 25.	46	1/23/23	145	(514 pgs; 15 docs) Witness and Exhibit List filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7 # 8 Exhibit 8 # 9 Exhibit 9 # 10 Exhibit 10 # 11 Exhibit 11 # 12 Exhibit 12 # 13 Exhibit 13 # 14 Exhibit 14) (Annable, Zachery)
Vol. 26 005570	47	1/23/23	146	(280 pgs; 8 docs) Witness and Exhibit List filed by Defendant Highland Capital Management, LP (RE: related document(s) 128 Motion for withdrawal of reference. Fee amount \$188.). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7) (Annable, Zachery)
Vol. 27 005850	48	1/23/23	147	(221 pgs; 7 docs) Witness and Exhibit List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Attachments: # 1 Exhibit 1_Excerpts from July 14, 2020 Hearing Transcript # 2 Exhibit 2_HCLOF Members Agreement Relating to the Company # 3 Exhibit 3_HarbourVest Settlement Agreement # 4 Exhibit 4_Order Approving Debtor's Settlement with HarbourVest # 5 Exhibit 5_HCLOF Offering # 6 Exhibit 6 Amended and Restated Investment Advisory Agreement) (Sbaiti, Mazin)
006071	49	1/23/23	148	(3 pgs) Witness and Exhibit List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 128 Motion for withdrawal of reference. Fee amount \$188.). (Phillips, Louis)
Vol. 28 006074	50	1/25/23	150	(56 pgs; 2 docs) Amended Witness and Exhibit List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 147 List (witness/exhibit/generic), 149 List (witness/exhibit/generic)). (Attachments: # 1 Exh 7_Testimony of Mark Patrick at June 8, 2021 hearing) (Sbaiti, Mazin)

Vol. 28 006130	51	1/25/23	152	(3 pgs) Notice of Appearance and Request for Notice by Louis M. Phillips filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Phillips, Louis)
	52	1/25/23	154	(1 pg) Court admitted exhibits date of hearing January 25, 2023 (RE: related document(s) 128 Motion for withdrawal of reference, filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) (COURT ADMITTED DEFENDANT'S EXHIBITS #1, #2, #3, #4, #5 & #6 OFFERED BY ATTY GREG DEMO). (Edmond, Michael) (Entered: 01/27/2023)
Vol. 32 006925 006942 006960	53	2/6/23	158	Report and recommendation to the U.S. District Court by U.S. Bankruptcy Judge. (RE: related document(s) 128 Motion for withdrawal of reference filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Entered on 2/6/2023 (Okafor, Marcey)
	54	2/6/23	161	(18 pgs) DISTRICT COURT Notice of transmission of report and recommendation in re: renewed motion to withdraw reference. Civil Case # 3:22-cv-02802-S. (RE: related document(s) 158 Report and recommendation to the U.S. District Court by U.S. Bankruptcy Judge. (RE: related document(s) 128 Motion for withdrawal of reference filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Entered on 2/6/2023) (Whitaker, Sheniqua)
	55	4/3/23	165	(1 pg) DISTRICT COURT ORDER: The Court GRANTS the 11 Joint Motion to Transfer Proceeding and Consolidate Before Original Court and the above-numbered case (3:22-cv-02802-S) is transferred to the docket of the Honorable Judge Jane Boyle: Civil case 3:21-cv-00842-B (order referring case). (RE: related document(s) 1 Complaint filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 143 Notice of transmission of motion to withdraw reference). Entered on 4/3/2023 (Whitaker, Sheniqua) Modified on 4/10/2023 (Whitaker, Sheniqua). (Entered: 04/10/2023)

TRANSCRIPTS

006961	56	11/24/21	78	(104 pgs) Transcript regarding Hearing Held 11-23-2021 RE: Motion Hearing. THIS TRANSCRIPT WILL BE MADE ELECTRONICALLY AVAILABLE TO THE GENERAL PUBLIC 90 DAYS AFTER THE DATE OF FILING. TRANSCRIPT RELEASE DATE IS 02/22/2022. Until that time the transcript may be viewed at the Clerk's Office or a copy may be obtained from the official court transcriber. Court Reporter/Transcriber Liberty Transcripts/Dipti Patel, Telephone number 847-848-4907. (RE: related document(s) 75 Hearing held on 11/23/2021. (RE: related document(s) 55 MOTION to Stay filed by CLO Holdco Ltd, Charitable DAF Fund LP (Sbaiti, Mazin) (Entered: 08/26/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #55 ON 08/26/2021 IN U.S.
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			<p>DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)) (Appearances: J. Pomerantz and J. Morris for Highland Defendants; J. Jordan and P. Bessett for HCLOF; M. Sbaiti for Plaintiffs. Nonevidentiary hearing. Motion denied. Mr. Pomerantz to upload order.), 76 Hearing held on 11/23/2021. (RE: related document(s) 47 Motion to strike 43 Appendix in support filed by CLO Holdco, Ltd., Charitable DAF Fund, LP (Bridges, Jonathan) Modified text on 7/16/2021 (mjr). (Entered: 07/15/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #47 ON 07/15/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)) (Appearances: J. Pomerantz and J. Morris for Highland Defendants; J. Jordan and P. Bessett for HCLOF; M. Sbaiti for Plaintiffs. Nonevidentiary hearing. Motion denied (Plaintiffs acknowledged complained-of Appendices it did not relate to Motion to Dismiss). Mr. Pomerantz to upload order.)). Transcript to be made available to the public on 02/22/2022. (Patel, Dipti)</p>
57	2/21/23	164	<p>164 (112 pgs) Transcript regarding Hearing Held 1/25/23 RE: HEARING ON DEFENDANT HIGHLAND CAPITAL MANAGEMENT L.P.'S RENEWED MOTION TO DISMISS COMPLAINT (122) AND STATUS CONFERENCE RE: MOTION FOR WITHDRAWAL OF REFERENCE FILED BY PLAINTIFF CLO HOLDCO, LTD., PLAINTIFF CHARITABLE DAF FUND, LP (128). THIS TRANSCRIPT WILL BE MADE ELECTRONICALLY AVAILABLE TO THE GENERAL PUBLIC 90 DAYS AFTER THE DATE OF FILING. TRANSCRIPT RELEASE DATE IS 05/22/2023. Until that time the transcript may be viewed at the Clerk's Office or a copy may be obtained from the official court transcriber. Court Reporter/Transcriber Dipti Patel, Telephone number 847-848-4907. (RE: related document(s) 155 Hearing held on 1/25/2023. (RE: related document(s) 122 Motion to dismiss adversary proceeding, (Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint) filed by Defendant Highland Capital Management, LP filed by Defendant Highland Capital Management, LP) (Appearances: J. Morris and G. Demo for Movants; L. Phillips and M. Sbaiti for Plaintiffs. Evidentiary hearing (appendices). Court took matter under advisement.), 156 Hearing held on 1/25/2023. (RE: related document(s) 128 Motion for withdrawal of reference. Fee amount \$188, filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) (Appearances: J. Morris and G. Demo for Movants; L. Phillips and M. Sbaiti for Plaintiffs. Evidentiary hearing (appendices). Court announced it will recommend denial to District Court. Court is working on Report & Recommendation.)). Transcript to be made available to the public on 05/22/2023. (Patel, Dipti)</p>

Dated: July 14, 2023

Respectfully submitted,

SBAITI & COMPANY PLLC

/s/ Mazin A. Sbaiti

Mazin A. Sbaiti

Texas Bar No. 24058096

Jonathan Bridges

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Counsel for Appellants

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was filed electronically through the Court's ECF system, which provides notice to all parties of interest, on this 14th day of July, 2023.

/s/ Mazin A. Sbaiti

Mazin A. Sbaiti

PACHULSKI STANG ZIEHL & JONES LLP
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John A. Morris (NY Bar No. 2405397) (*admitted pro hac vice*)
Gregory V. Demo (NY Bar No. 5371992) (*admitted pro hac vice*)
Hayley R. Winograd (NY Bar No. 5612569) (*admitted pro hac vice*)
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Counsel for Highland Capital Management, L.P.

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

In re:	)	Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P., ¹	)	Case No. 19-34054-sgj11
Reorganized Debtor.)	
In re: CHARITABLE DAF FUND, L.P., AND CLO HOLDCO LTD.,	)	Adv. Pro. No. 21-03067-sgj
Plaintiffs,)	
vs.)	
HIGHLAND CAPITAL MANAGEMENT, L.P., HIGHLAND HCF ADVISOR, LTD., AND HIGHLAND CLO FUNDING, LTD.)	
Defendants.)	

¹ The Reorganized Debtor's last four digits of its taxpayer identification number are (8357). The headquarters and service address for the Reorganized Debtor is 100 Crescent Court, Suite 1850, Dallas, TX 75201.

**APPENDIX IN SUPPORT OF DEFENDANT HIGHLAND CAPITAL
MANAGEMENT, L.P.'S RENEWED MOTION TO DISMISS COMPLAINT**

<u>Ex.</u>	<u>Description</u>	<u>Appx. #</u>
1.	HarbourVest 2017 Global Fund L.P. Proof of Claim No. 143, HarbourVest 2017 Global AIF L.P., Proof of Claim No. 147, HarbourVest Dover Street IX Investment L.P., Proof of Claim No. 150, HV International VIII Secondary L.P., Proof of Claim No. 153, HarbourVest Skew Base AIF L.P., Proof of Claim No. 154, and HarbourVest Partners L.P., Proof of Claim No. 149.	1-61
2.	<i>Motion for Entry of an Order Approving Settlement with HarbourVest (Claim Nos. 143, 147, 149, 150, 153, 154) and Authorizing Actions Consistent Therewith</i> [Docket No. 1625]	62-75
3.	<i>Settlement Agreement and Transfer Agreement for Ordinary Shares of Highland CLO Funding, Ltd.</i> [Docket No. 1631-1]	76-95
4.	<i>James Dondero's Objection to the Debtor's Motion for Entry of an Order Approving Settlement with HarbourVest,</i> [Docket No. 1697]	96-111
5.	<i>The Dugaboy Investment Trust and Get Good Trust's Objection to the Debtor's Motion for Entry of an Order Approving Settlement with HarbourVest (Claim Nos. 143, 147, 149, 150, 153, 154) and Authorizing Actions Consistent Therewith</i> [Docket No. 1706]	112-122
6.	<i>CLO Holdco, Ltd.'s Objection to HarbourVest Settlement</i> [Docket No. 1707]	123-133
7.	Deposition Transcript of Michael Pugatch, January 21, 2021	134-188
8.	<i>Debtor's Omnibus Reply in Support of Debtor's Motion for Entry of an Order Approving Settlement with HarbourVest (Claim Nos. 143, 147, 149, 150, 153, 154) and Authorizing Actions Consistent Therewith</i> [Docket No. 1731]	189-211
9.	Hearing Transcript, January 14, 2021	212-385
10.	<i>Order Approving Debtor's Settlement with HarbourVest (Claim Nos. 143, 147, 149, 150, 153, 154) and Authorizing Actions Consistent Therewith</i> [Docket No. 1788]	386-409
11.	<i>Original Complaint</i> , Case No. 21-cv-00842-B, Docket No. 1 (N.D. Tex. Apr. 12, 2021)	410-436
12.	<i>Memorandum Opinion and Order</i> , Case No. 21-cv-03129-B, Docket No. 28 (N.D. Tex. September 2, 2021)	437-458
13.	Members Agreement, November 15, 2017	459-487
14.	Second Amended and Restated Investment Advisory Agreement	488-510

Dated: October 14, 2022

PACHULSKI STANG ZIEHL & JONES LLP

Jeffrey N. Pomerantz (CA Bar No. 143717)
John A. Morris (NY Bar No. 2405397)
Gregory V. Demo (NY Bar No. 5371992)
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-and-

HAYWARD PLLC

/s/ Zachery Z. Annable

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Counsel for Highland Capital Management, L.P.

EXHIBIT 1

003885

CLAIM 143

Fill in this information to identify the case:

Debtor Highland Capital Management, L.P.

United States Bankruptcy Court for the: Northern District of Texas
(State)

Case number 19-34054

Official Form 410
Proof of Claim

04/19

Read the instructions before filling out this form. This form is for making a claim for payment in a bankruptcy case. Do not use this form to make a request for payment of an administrative expense. Make such a request according to **11 U.S.C. § 503**.

Filers must leave out or redact information that is entitled to privacy on this form or on any attached documents. Attach redacted copies or any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, judgments, mortgages, and security agreements. **Do not send original documents**; they may be destroyed after scanning. If the documents are not available, explain in an attachment.

A person who files a fraudulent claim could be fined up to \$500,000, imprisoned for up to 5 years, or both. **18 U.S.C. §§ 152, 157, and 3571**.

Fill in all the information about the claim as of the date the case was filed. That date is on the notice of bankruptcy (Form 309) that you received.

Part 1: Identify the Claim

1. Who is the current creditor?	<u>HarbourVest 2017 Global Fund L.P.</u> Name of the current creditor (the person or entity to be paid for this claim) Other names the creditor used with the debtor _____	
2. Has this claim been acquired from someone else?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. From whom? _____	
3. Where should notices and payments to the creditor be sent?	Where should notices to the creditor be sent? <u>HarbourVest 2017 Global Fund L.P.</u> <u>Attn: Erica Weisgerber</u> <u>Debevoise and Plimpton LLP</u> <u>919 Third Avenue</u> <u>New York, NY 10022, U.S.A.</u> Contact phone <u>2129096000</u> Contact email <u>eweisgerber@debevoise.com</u> Uniform claim identifier for electronic payments in chapter 13 (if you use one): _____	Where should payments to the creditor be sent? (if different) <u>See summary page</u> Contact phone <u>6173483773</u> Contact email <u>agoren@harbourvest.com</u>
4. Does this claim amend one already filed?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Claim number on court claims registry (if known) _____ Filed on _____ MM / DD / YYYY	
5. Do you know if anyone else has filed a proof of claim for this claim?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Who made the earlier filing? _____	

Part 2: Give Information About the Claim as of the Date the Case Was Filed

6. Do you have any number you use to identify the debtor?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Last 4 digits of the debtor's account or any number you use to identify the debtor: ____ _
7. How much is the claim? \$ <u>See Annex</u>	Does this amount include interest or other charges? <input type="checkbox"/> No <input type="checkbox"/> Yes. Attach statement itemizing interest, fees, expenses, or other charges required by Bankruptcy Rule 3001(c)(2)(A).
8. What is the basis of the claim?	Examples: Goods sold, money loaned, lease, services performed, personal injury or wrongful death, or credit card. Attach redacted copies of any documents supporting the claim required by Bankruptcy Rule 3001(c). Limit disclosing information that is entitled to privacy, such as health care information. <u>See Annex</u>
9. Is all or part of the claim secured?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. The claim is secured by a lien on property. Nature or property: <input type="checkbox"/> Real estate: If the claim is secured by the debtor's principle residence, file a <i>Mortgage Proof of Claim Attachment</i> (Official Form 410-A) with this <i>Proof of Claim</i> . <input type="checkbox"/> Motor vehicle <input type="checkbox"/> Other. Describe: _____ Basis for perfection: _____ Attach redacted copies of documents, if any, that show evidence of perfection of a security interest (for example, a mortgage, lien, certificate of title, financing statement, or other document that shows the lien has been filed or recorded.) Value of property: \$ _____ Amount of the claim that is secured: \$ _____ Amount of the claim that is unsecured: \$ _____ (The sum of the secured and unsecured amount should match the amount in line 7.) Amount necessary to cure any default as of the date of the petition: \$ _____ Annual Interest Rate (when case was filed) _____ % <input type="checkbox"/> Fixed <input type="checkbox"/> Variable
10. Is this claim based on a lease?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Amount necessary to cure any default as of the date of the petition. \$ _____
11. Is this claim subject to a right of setoff?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Identify the property: _____

12. Is all or part of the claim entitled to priority under 11 U.S.C. § 507(a)?

- ☒ No
☐ Yes. Check all that apply:

Amount entitled to priority

A claim may be partly priority and partly nonpriority. For example, in some categories, the law limits the amount entitled to priority.

- ☐ Domestic support obligations (including alimony and child support) under 11 U.S.C. § 507(a)(1)(A) or (a)(1)(B).
☐ Up to \$3,025* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use. 11 U.S.C. § 507(a)(7).
☐ Wages, salaries, or commissions (up to \$13,650*) earned within 180 days before the bankruptcy petition is filed or the debtor's business ends, whichever is earlier. 11 U.S.C. § 507(a)(4).
☐ Taxes or penalties owed to governmental units. 11 U.S.C. § 507(a)(8).
☐ Contributions to an employee benefit plan. 11 U.S.C. § 507(a)(5).
☐ Other. Specify subsection of 11 U.S.C. § 507(a)() that applies.

\$ _____
\$ _____
\$ _____
\$ _____
\$ _____
\$ _____

* Amounts are subject to adjustment on 4/01/22 and every 3 years after that for cases begun on or after the date of adjustment.

13. Is all or part of the claim pursuant to 11 U.S.C. § 503(b)(9)?

- ☒ No
☐ Yes. Indicate the amount of your claim arising from the value of any goods received by the debtor within 20 days before the date of commencement of the above case, in which the goods have been sold to the Debtor in the ordinary course of such Debtor's business. Attach documentation supporting such claim.

\$ _____

Part 3: Sign Below

The person completing this proof of claim must sign and date it. FRBP 9011(b).

If you file this claim electronically, FRBP 5005(a)(2) authorizes courts to establish local rules specifying what a signature is.

A person who files a fraudulent claim could be fined up to \$500,000, imprisoned for up to 5 years, or both. 18 U.S.C. §§ 152, 157, and 3571.

Check the appropriate box:

- ☐ I am the creditor.
☒ I am the creditor's attorney or authorized agent.
☐ I am the trustee, or the debtor, or their authorized agent. Bankruptcy Rule 3004.
☐ I am a guarantor, surety, endorser, or other codebtor. Bankruptcy Rule 3005.

I understand that an authorized signature on this *Proof of Claim* serves as an acknowledgement that when calculating the amount of the claim, the creditor gave the debtor credit for any payments received toward the debt.

I have examined the information in this *Proof of Claim* and have reasonable belief that the information is true and correct.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on date 04/08/2020
MM / DD / YYYY

/s/Michael Pugatch
Signature

Print the name of the person who is completing and signing this claim:

Name Michael Pugatch
First name Middle name Last name

Title Managing Director - Company: HarbourVest 2017 Global Fund L.P., by Harbo

Company by HarbourVest GP LLC, its General Partner, by HarbourVest Partners, LL
Identify the corporate servicer as the company if the authorized agent is a servicer.

Address

Contact phone _____

1024601200010200000000000055
1024601200010200000000000055

For phone assistance: Domestic (877) 573-3984 | International (310) 751-1829

Debtor: 19-34054 - Highland Capital Management, L.P. District: Northern District of Texas, Dallas Division		
Creditor: HarbourVest 2017 Global Fund L.P. Attn: Erica Weisgerber Debevoise and Plimpton LLP 919 Third Avenue New York, NY, 10022 U.S.A. Phone: 2129096000 Phone 2: Fax: Email: eweisgerber@debevoise.com	Has Supporting Documentation: Yes, supporting documentation successfully uploaded Related Document Statement:	
	Has Related Claim: No Related Claim Filed By:	
	Filing Party: Authorized agent	
Disbursement/Notice Parties: HarbourVest 2017 Global Fund L.P. c/o HarbourVest Partners, LLC One Financial Center Boston, MA, 02111 U.S.A. Phone: 6173483773 Phone 2: Fax: E-mail: agoren@harbourvest.com DISBURSEMENT ADDRESS		
Other Names Used with Debtor:	Amends Claim: No Acquired Claim: No	
Basis of Claim: See Annex	Last 4 Digits: No	Uniform Claim Identifier:
Total Amount of Claim: See Annex	Includes Interest or Charges: None	
Has Priority Claim: No	Priority Under:	
Has Secured Claim: No Amount of 503(b)(9): No Based on Lease: No Subject to Right of Setoff: No	Nature of Secured Amount: Value of Property: Annual Interest Rate: Arrearage Amount: Basis for Perfection: Amount Unsecured:	
Submitted By: Michael Pugatch on 08-Apr-2020 4:40:16 p.m. Eastern Time Title: Managing Director - Company: HarbourVest 2017 Global Fund L.P., by HarbourVest 2017 Global Associates L.P., its Gen Partner Company: by HarbourVest GP LLC, its General Partner, by HarbourVest Partners, LLC, its Managing Member		

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In re:

Highland Capital Management, L.P.

Debtor.

Chapter 11

Case No. 19-34054 (SGJ)

ANNEX TO PROOF OF CLAIM

1. This annex (the “Annex”) is part of and is incorporated by reference into the attached proof of claim (together with the Annex, the “Proof of Claim”) and describes in more detail the claims of HarbourVest 2017 Global Fund L.P. (the “Claimant”) against the debtor Highland Capital Management, L.P. (the “Debtor”).

2. The Claimant is a limited partner in one of the Debtor’s managed vehicles, Highland CLO Funding, Ltd. (“HCLOF”). Acis Capital Management GP, L.L.C. and Acis Capital Management L.P. (together, “Acis”), the portfolio manager for HCLOF, filed for chapter 11 in the United States Bankruptcy Court for the Northern District of Texas (the “Court”) on January 30, 2018. The Acis bankruptcy filing resulted from a dispute between Debtor and its former employee, Joshua Terry, who served as portfolio manager for Debtor’s collateral loan obligations funds (“CLO”) business. *See, e.g., Findings of Fact and Conclusions of Law in Support of Orders for Relief Issued After Trial on Contested Involuntary Bankruptcy Petition* (“Involuntary Petition Ruling”) [Case No. 18-30264 (SGJ), **Dkt. No. 118**]. As noted in more detail in the Court’s *Bench Ruling and Memorandum of Law in Support of: (A) Final Approval of Disclosure Statement; and (B) Confirmation of Chapter 11 Trustee’s Third Amended Joint Plan* (“Confirmation Ruling”) [Case No. 18-30264 (SGJ), **Dkt. No 827**] and related filings in the Acis

003891

bankruptcy cases, there has been extensive litigation regarding alleged improper conduct associated with the management of, and transactions relating to, Acis, including transactions with and related to HCLOF. *See, e.g., id.; Second Amended Complaint* [Case No. 18-03078(SGJ), **Dkt. No. 157**].

3. Due to the Acis bankruptcy and certain conduct alleged to have been undertaken by the Debtor (to whom Acis subcontracted its functions) and Debtor's employees (who were officers, employees, and agents of Acis), the Claimant has suffered significant harm. Such harm includes, but is not limited to, financial harm resulting from, among other things (i) court orders in the Acis bankruptcy that prevented certain CLOs in which HCLOF was invested from being refinanced or reset and court orders that otherwise regulated the activity of HCLOF; and (ii) significant fees and expenses related to the Acis bankruptcy that were charged to HCLOF. *See, e.g., Involuntary Petition Ruling* ¶ 27; *see also Confirmation Ruling*.

4. Claimant hereby files this Claim to assert any and all of its rights to payment, remedies, and other claims (including contingent or unliquidated claims) against the Debtor in connection with and relating to the foregoing harm, including for any amounts due or owed under the various agreements with the Debtor in connection with HCLOF (including, but not limited to, the Subscription and Transfer Agreement for Ordinary Shares Highland CLO Funding, Ltd., dated as of November 15, 2017, the Members Agreement Relating to the Company, dated as of November 15, 2017, the Highland CLO Funding, Ltd. Offering Memorandum dated November 15, 2017), and any and all legal and equitable claims or causes of action relating to the foregoing harm.

5. The Claimant has not attached the documentation supporting this Claim to this Proof of Claim because the documentation is voluminous and the Debtor has copies of such

documents. However, any requested relevant documents will be provided to the Official Committee of Unsecured Creditors, the Court, the United States Trustee and the Debtor in the event of a dispute regarding this Proof of Claim and will be made available for review by other parties in interest as appropriate upon reasonable request and after consultation with the Debtor and execution of appropriate confidentiality agreements.

6. This Proof of Claim is filed with a full reservation of rights, including the right to amend, update, modify, supplement or otherwise revise this Proof of Claim in any respect at any time. The filing of this Proof of Claim is not and should not be construed to be: (a) a waiver or release of any of the Claimant's rights against any person, entity or property accruing to it against the Debtor and its estate; (b) a waiver of the Claimant's rights to assert that 28 U.S.C. § 157(b)(2)(C) is unconstitutional; (c) a consent or submission by the Claimant, or waiver of the Claimant's rights to object, to the jurisdiction of this Court with respect to the subject matter of any of the claims described herein, or any objection or other proceeding commenced with respect to any of the claims described herein, or any other proceeding commenced in the Debtor's chapter 11 case against or otherwise involving the Claimant; (d) a waiver or release of any right of the Claimant, or consent by the Claimant, to a trial by jury in this or any other court or proceeding; (e) a waiver or release of, or any limitation on, any right of the Claimant to have orders entered only after *de novo* review by a United States District Judge; (f) an election of remedies; or (g) a waiver of, or any other limitation on, any right of the Claimant to request withdrawal of the reference with respect to any matter, including, without limitation, any matter relating to this Proof of Claim.

7. Claimant's express reservation of all rights and causes of action, includes, without limitation, contingent or unliquidated rights that it or its affiliates may have against the Debtor,

as well as defenses, offsets and counterclaims. This description and classification of claims by the Claimant is not a concession or admission as to the correct characterization or treatment of any such claims or a waiver of any rights of the Claimant.

8. Furthermore, the Claimant expressly reserves its rights to (a) file additional proofs of claim for additional claims that may be based on the same or additional documents or facts or other liability or indebtedness of the Debtor to the Claimant under contract or otherwise; (b) assert claims for cure of defaults in any agreement that the Debtor or any trustee appointed in this chapter 11 case may seek to assume; (c) assert any and all other claims, causes of action, defenses, offsets or counterclaims against the Debtor or any other parties; (d) file a request for payment of an administrative expense under 11 U.S.C. §§ 503 and 507 for any or all of the claims or rights of payment described above and any additional amounts; and (e) seek recovery through any relevant third parties, including any of the Debtor's insurance coverage providers.

9. This Proof of Claim does not encompass all claims that the Claimant or its affiliates may have that arise after the Petition Date and are entitled to administrative priority, and the Claimant expressly reserves its right to file such claim or any similar claim at the appropriate time, including any such post-petition claims arising under these service contracts.

10. This Proof of Claim is filed without prejudice to the filing by the Claimant of additional proofs of claim or requests for payment with respect to any other indebtedness, liability or obligation of the Debtor. The Claimant does not, by this Proof of Claim or any amendment or other action, waive any rights with respect to any scheduled claim.

11. The Claimant reserves the right to withdraw, amend, clarify, modify or supplement this Proof of Claim to assert additional claims, causes of action or additional grounds for this Proof of Claim (including adding any additional contracts, agreements, obligations or

other relationships between the Claimant and the Debtor), as well as the right to file any separate or additional proofs of claim with respect to the claims set forth herein or otherwise, including for the purpose of fixing and liquidating any contingent or unliquidated claim set forth herein, or to file additional proofs of claim in respect of additional amounts or for any other reason.

12. In executing and filing this Proof of Claim, the Claimant does not submit to the jurisdiction of the Bankruptcy Court for the Northern District of Texas for any purpose other than with respect to this Proof of Claim against the Debtor, and does not waive or release any rights or remedies against any other person or entity that may be liable for all or part of this Proof of Claim.

13. The Claimant otherwise reserves its rights, and nothing herein shall prejudice the Claimant's rights, under any order of the Court previously entered in this chapter 11 case.

14. Payments on account of this Proof of Claim should be sent to the Claimant at the address specified for notices to the Claimant in Part 1.3 of the Proof of Claim.

CLAIM 147

Fill in this information to identify the case:

Debtor Highland Capital Management, L.P.

United States Bankruptcy Court for the: Northern District of Texas
(State)

Case number 19-34054

Official Form 410
Proof of Claim

04/19

Read the instructions before filling out this form. This form is for making a claim for payment in a bankruptcy case. Do not use this form to make a request for payment of an administrative expense. Make such a request according to **11 U.S.C. § 503**.

Filers must leave out or redact information that is entitled to privacy on this form or on any attached documents. Attach redacted copies or any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, judgments, mortgages, and security agreements. **Do not send original documents**; they may be destroyed after scanning. If the documents are not available, explain in an attachment.

A person who files a fraudulent claim could be fined up to \$500,000, imprisoned for up to 5 years, or both. **18 U.S.C. §§ 152, 157, and 3571.**

Fill in all the information about the claim as of the date the case was filed. That date is on the notice of bankruptcy (Form 309) that you received.

Part 1: Identify the Claim

1. Who is the current creditor?	<u>HarbourVest 2017 Global AIF L.P.</u> Name of the current creditor (the person or entity to be paid for this claim) Other names the creditor used with the debtor _____	
2. Has this claim been acquired from someone else?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. From whom? _____	
3. Where should notices and payments to the creditor be sent?	Where should notices to the creditor be sent? <u>HarbourVest 2017 Global AIF L.P.</u> <u>Attn: Erica Weisgerber</u> <u>Debevoise and Plimpton LLP</u> <u>919 Third Avenue</u> <u>New York, NY 10022, U.S.A.</u> Contact phone <u>2129096000</u> Contact email <u>eweisgerber@debevoise.com</u> Uniform claim identifier for electronic payments in chapter 13 (if you use one): _____	Where should payments to the creditor be sent? (if different) <u>See summary page</u> Contact phone <u>6173483773</u> Contact email <u>agoren@harbourvest.com</u>
4. Does this claim amend one already filed?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Claim number on court claims registry (if known) _____ Filed on _____ MM / DD / YYYY	
5. Do you know if anyone else has filed a proof of claim for this claim?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Who made the earlier filing? _____	

Part 2: Give Information About the Claim as of the Date the Case Was Filed

6. Do you have any number you use to identify the debtor?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Last 4 digits of the debtor's account or any number you use to identify the debtor: ____ _
7. How much is the claim? \$ <u>See Annex</u>	Does this amount include interest or other charges? <input type="checkbox"/> No <input type="checkbox"/> Yes. Attach statement itemizing interest, fees, expenses, or other charges required by Bankruptcy Rule 3001(c)(2)(A).
8. What is the basis of the claim?	Examples: Goods sold, money loaned, lease, services performed, personal injury or wrongful death, or credit card. Attach redacted copies of any documents supporting the claim required by Bankruptcy Rule 3001(c). Limit disclosing information that is entitled to privacy, such as health care information. <u>See Annex</u>
9. Is all or part of the claim secured?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. The claim is secured by a lien on property. Nature or property: <input type="checkbox"/> Real estate: If the claim is secured by the debtor's principle residence, file a <i>Mortgage Proof of Claim Attachment</i> (Official Form 410-A) with this <i>Proof of Claim</i> . <input type="checkbox"/> Motor vehicle <input type="checkbox"/> Other. Describe: _____ Basis for perfection: _____ Attach redacted copies of documents, if any, that show evidence of perfection of a security interest (for example, a mortgage, lien, certificate of title, financing statement, or other document that shows the lien has been filed or recorded.) Value of property: \$ _____ Amount of the claim that is secured: \$ _____ Amount of the claim that is unsecured: \$ _____ (The sum of the secured and unsecured amount should match the amount in line 7.) Amount necessary to cure any default as of the date of the petition: \$ _____ Annual Interest Rate (when case was filed) _____ % <input type="checkbox"/> Fixed <input type="checkbox"/> Variable
10. Is this claim based on a lease?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Amount necessary to cure any default as of the date of the petition. \$ _____
11. Is this claim subject to a right of setoff?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Identify the property: _____

<p>12. Is all or part of the claim entitled to priority under 11 U.S.C. § 507(a)?</p> <p>A claim may be partly priority and partly nonpriority. For example, in some categories, the law limits the amount entitled to priority.</p>	<table style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 20%; vertical-align: top;"> <input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. <i>Check all that apply:</i> </td> <td style="width: 60%; vertical-align: top;"> <div style="border: 1px solid black; padding: 5px; margin-bottom: 5px;"> <input type="checkbox"/> Domestic support obligations (including alimony and child support) under 11 U.S.C. § 507(a)(1)(A) or (a)(1)(B). </div> <div style="border: 1px solid black; padding: 5px; margin-bottom: 5px;"> <input type="checkbox"/> Up to \$3,025* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use. 11 U.S.C. § 507(a)(7). </div> <div style="border: 1px solid black; padding: 5px; margin-bottom: 5px;"> <input type="checkbox"/> Wages, salaries, or commissions (up to \$13,650*) earned within 180 days before the bankruptcy petition is filed or the debtor's business ends, whichever is earlier. 11 U.S.C. § 507(a)(4). </div> <div style="border: 1px solid black; padding: 5px; margin-bottom: 5px;"> <input type="checkbox"/> Taxes or penalties owed to governmental units. 11 U.S.C. § 507(a)(8). </div> <div style="border: 1px solid black; padding: 5px; margin-bottom: 5px;"> <input type="checkbox"/> Contributions to an employee benefit plan. 11 U.S.C. § 507(a)(5). </div> <div style="border: 1px solid black; padding: 5px;"> <input type="checkbox"/> Other. Specify subsection of 11 U.S.C. § 507(a)() that applies. </div> </td> <td style="width: 20%; vertical-align: top; text-align: right; padding: 5px;"> <div style="background-color: #f0f0f0; padding: 5px; border: 1px solid black; margin-bottom: 5px;">Amount entitled to priority</div> <div style="border-bottom: 1px solid black; margin-bottom: 5px;">\$</div> <div style="border-bottom: 1px solid black; margin-bottom: 5px;">\$</div> <div style="border-bottom: 1px solid black; margin-bottom: 5px;">\$</div> <div style="border-bottom: 1px solid black; margin-bottom: 5px;">\$</div> <div style="border-bottom: 1px solid black; margin-bottom: 5px;">\$</div> <div style="border-bottom: 1px solid black; margin-bottom: 5px;">\$</div> </td> </tr> </table> <p style="font-size: small; margin-top: 10px;">* Amounts are subject to adjustment on 4/01/22 and every 3 years after that for cases begun on or after the date of adjustment.</p>	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. <i>Check all that apply:</i>	<div style="border: 1px solid black; padding: 5px; margin-bottom: 5px;"> <input type="checkbox"/> Domestic support obligations (including alimony and child support) under 11 U.S.C. § 507(a)(1)(A) or (a)(1)(B). </div> <div style="border: 1px solid black; padding: 5px; margin-bottom: 5px;"> <input type="checkbox"/> Up to \$3,025* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use. 11 U.S.C. § 507(a)(7). </div> <div style="border: 1px solid black; padding: 5px; margin-bottom: 5px;"> <input type="checkbox"/> Wages, salaries, or commissions (up to \$13,650*) earned within 180 days before the bankruptcy petition is filed or the debtor's business ends, whichever is earlier. 11 U.S.C. § 507(a)(4). </div> <div style="border: 1px solid black; padding: 5px; margin-bottom: 5px;"> <input type="checkbox"/> Taxes or penalties owed to governmental units. 11 U.S.C. § 507(a)(8). </div> <div style="border: 1px solid black; padding: 5px; margin-bottom: 5px;"> <input type="checkbox"/> Contributions to an employee benefit plan. 11 U.S.C. § 507(a)(5). </div> <div style="border: 1px solid black; padding: 5px;"> <input type="checkbox"/> Other. Specify subsection of 11 U.S.C. § 507(a)() that applies. </div>	<div style="background-color: #f0f0f0; padding: 5px; border: 1px solid black; margin-bottom: 5px;">Amount entitled to priority</div> <div style="border-bottom: 1px solid black; margin-bottom: 5px;">\$</div> <div style="border-bottom: 1px solid black; margin-bottom: 5px;">\$</div> <div style="border-bottom: 1px solid black; margin-bottom: 5px;">\$</div> <div style="border-bottom: 1px solid black; margin-bottom: 5px;">\$</div> <div style="border-bottom: 1px solid black; margin-bottom: 5px;">\$</div> <div style="border-bottom: 1px solid black; margin-bottom: 5px;">\$</div>
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<p>13. Is all or part of the claim pursuant to 11 U.S.C. § 503(b)(9)?</p>	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Indicate the amount of your claim arising from the value of any goods received by the debtor within 20 days before the date of commencement of the above case, in which the goods have been sold to the Debtor in the ordinary course of such Debtor's business. Attach documentation supporting such claim.	<div style="border-bottom: 1px solid black; margin-top: 20px;">\$</div>		

Part 3: Sign Below

The person completing this proof of claim must sign and date it.
FRBP 9011(b).

If you file this claim electronically, **FRBP 5005(a)(2)** authorizes courts to establish local rules specifying what a signature is.

A person who files a fraudulent claim could be fined up to \$500,000, imprisoned for up to 5 years, or both.
18 U.S.C. §§ 152, 157, and 3571.

Check the appropriate box:

- ☐ I am the creditor.
- ☒ I am the creditor's attorney or authorized agent.
- ☐ I am the trustee, or the debtor, or their authorized agent. Bankruptcy Rule 3004.
- ☐ I am a guarantor, surety, endorser, or other codebtor. Bankruptcy Rule 3005.

I understand that an authorized signature on this *Proof of Claim* serves as an acknowledgement that when calculating the amount of the claim, the creditor gave the debtor credit for any payments received toward the debt.

I have examined the information in this *Proof of Claim* and have reasonable belief that the information is true and correct.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on date 04/08/2020
MM / DD / YYYY

/s/ Michael Pugatch
Signature

Print the name of the person who is completing and signing this claim:

Name	<u>Michael Pugatch</u>		
	First name	Middle name	Last name

Title	<u>Managing Director-Company: HarbourVest 2017 Global AIF L.P., by HarbourVest</u>
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Company Inv Fund Mgr, by HarbourVest Partners L.P., its Duly Appointed Investme
Identify the corporate servicer as the company if the authorized agent is a servicer.

Address

Contact phone

"1x}HV4\$(Γ%«
10216mail20001080000000000050

For phone assistance: Domestic (877) 573-3984 | International (310) 751-1829

Debtor: 19-34054 - Highland Capital Management, L.P. District: Northern District of Texas, Dallas Division		
Creditor: HarbourVest 2017 Global AIF L.P. Attn: Erica Weisgerber Debevoise and Plimpton LLP 919 Third Avenue New York, NY, 10022 U.S.A. Phone: 2129096000 Phone 2: Fax: Email: eweisgerber@debevoise.com		Has Supporting Documentation: Yes, supporting documentation successfully uploaded Related Document Statement: Has Related Claim: No Related Claim Filed By: Filing Party: Authorized agent
Disbursement/Notice Parties: HarbourVest 2017 Global AIF L.P. c/o HarbourVest Partners, LLC One Financial Center Boston, MA, 02111 Phone: 6173483773 Phone 2: Fax: E-mail: agoren@harbourvest.com DISBURSEMENT ADDRESS		
Other Names Used with Debtor:		Amends Claim: No Acquired Claim: No
Basis of Claim: See Annex	Last 4 Digits: No	Uniform Claim Identifier:
Total Amount of Claim: See Annex		Includes Interest or Charges: None
Has Priority Claim: No		Priority Under:
Has Secured Claim: No Amount of 503(b)(9): No Based on Lease: No Subject to Right of Setoff: No		Nature of Secured Amount: Value of Property: Annual Interest Rate: Arrearage Amount: Basis for Perfection: Amount Unsecured:
Submitted By: Michael Pugatch on 08-Apr-2020 4:49:59 p.m. Eastern Time Title: Managing Director-Company: HarbourVest 2017 Global AIF L.P., by HarbourVest Partners Ireland Limited, its Alternative Company: Inv Fund Mgr, by HarbourVest Partners L.P., its Duly Appointed Investment Manager, by HarbourVest Partners, LLC, its Gen Ptr		

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In re:

Highland Capital Management, L.P.

Debtor.

Chapter 11

Case No. 19-34054 (SGJ)

ANNEX TO PROOF OF CLAIM

1. This annex (the “Annex”) is part of and is incorporated by reference into the attached proof of claim (together with the Annex, the “Proof of Claim”) and describes in more detail the claims of HarbourVest 2017 Global AIF L.P. (the “Claimant”) against the debtor Highland Capital Management, L.P. (the “Debtor”).

2. The Claimant is a limited partner in one of the Debtor’s managed vehicles, Highland CLO Funding, Ltd. (“HCLOF”). Acis Capital Management GP, L.L.C. and Acis Capital Management L.P. (together, “Acis”), the portfolio manager for HCLOF, filed for chapter 11 in the United States Bankruptcy Court for the Northern District of Texas (the “Court”) on January 30, 2018. The Acis bankruptcy filing resulted from a dispute between Debtor and its former employee, Joshua Terry, who served as portfolio manager for Debtor’s collateral loan obligations funds (“CLO”) business. *See, e.g., Findings of Fact and Conclusions of Law in Support of Orders for Relief Issued After Trial on Contested Involuntary Bankruptcy Petition (“Involuntary Petition Ruling”) [Case No. 18-30264 (SGJ), Dkt. No. 118]*. As noted in more detail in the Court’s *Bench Ruling and Memorandum of Law in Support of: (A) Final Approval of Disclosure Statement; and (B) Confirmation of Chapter 11 Trustee’s Third Amended Joint Plan (“Confirmation Ruling”) [Case No. 18-30264 (SGJ), Dkt. No 827]* and related filings in the Acis

bankruptcy cases, there has been extensive litigation regarding alleged improper conduct associated with the management of, and transactions relating to, Acis, including transactions with and related to HCLOF. *See, e.g., id.; Second Amended Complaint* [Case No. 18-03078(SGJ), Dkt. No. 157].

3. Due to the Acis bankruptcy and certain conduct alleged to have been undertaken by the Debtor (to whom Acis subcontracted its functions) and Debtor's employees (who were officers, employees, and agents of Acis), the Claimant has suffered significant harm. Such harm includes, but is not limited to, financial harm resulting from, among other things (i) court orders in the Acis bankruptcy that prevented certain CLOs in which HCLOF was invested from being refinanced or reset and court orders that otherwise regulated the activity of HCLOF; and (ii) significant fees and expenses related to the Acis bankruptcy that were charged to HCLOF. *See, e.g., Involuntary Petition Ruling* ¶ 27; *see also Confirmation Ruling*.

4. Claimant hereby files this Claim to assert any and all of its rights to payment, remedies, and other claims (including contingent or unliquidated claims) against the Debtor in connection with and relating to the foregoing harm, including for any amounts due or owed under the various agreements with the Debtor in connection with HCLOF (including, but not limited to, the Subscription and Transfer Agreement for Ordinary Shares Highland CLO Funding, Ltd., dated as of November 15, 2017, the Members Agreement Relating to the Company, dated as of November 15, 2017, the Highland CLO Funding, Ltd. Offering Memorandum dated November 15, 2017), and any and all legal and equitable claims or causes of action relating to the foregoing harm.

5. The Claimant has not attached the documentation supporting this Claim to this Proof of Claim because the documentation is voluminous and the Debtor has copies of such

documents. However, any requested relevant documents will be provided to the Official Committee of Unsecured Creditors, the Court, the United States Trustee and the Debtor in the event of a dispute regarding this Proof of Claim and will be made available for review by other parties in interest as appropriate upon reasonable request and after consultation with the Debtor and execution of appropriate confidentiality agreements.

6. This Proof of Claim is filed with a full reservation of rights, including the right to amend, update, modify, supplement or otherwise revise this Proof of Claim in any respect at any time. The filing of this Proof of Claim is not and should not be construed to be: (a) a waiver or release of any of the Claimant's rights against any person, entity or property accruing to it against the Debtor and its estate; (b) a waiver of the Claimant's rights to assert that 28 U.S.C. § 157(b)(2)(C) is unconstitutional; (c) a consent or submission by the Claimant, or waiver of the Claimant's rights to object, to the jurisdiction of this Court with respect to the subject matter of any of the claims described herein, or any objection or other proceeding commenced with respect to any of the claims described herein, or any other proceeding commenced in the Debtor's chapter 11 case against or otherwise involving the Claimant; (d) a waiver or release of any right of the Claimant, or consent by the Claimant, to a trial by jury in this or any other court or proceeding; (e) a waiver or release of, or any limitation on, any right of the Claimant to have orders entered only after *de novo* review by a United States District Judge; (f) an election of remedies; or (g) a waiver of, or any other limitation on, any right of the Claimant to request withdrawal of the reference with respect to any matter, including, without limitation, any matter relating to this Proof of Claim.

7. Claimant's express reservation of all rights and causes of action, includes, without limitation, contingent or unliquidated rights that it or its affiliates may have against the Debtor,

as well as defenses, offsets and counterclaims. This description and classification of claims by the Claimant is not a concession or admission as to the correct characterization or treatment of any such claims or a waiver of any rights of the Claimant.

8. Furthermore, the Claimant expressly reserves its rights to (a) file additional proofs of claim for additional claims that may be based on the same or additional documents or facts or other liability or indebtedness of the Debtor to the Claimant under contract or otherwise; (b) assert claims for cure of defaults in any agreement that the Debtor or any trustee appointed in this chapter 11 case may seek to assume; (c) assert any and all other claims, causes of action, defenses, offsets or counterclaims against the Debtor or any other parties; (d) file a request for payment of an administrative expense under 11 U.S.C. §§ 503 and 507 for any or all of the claims or rights of payment described above and any additional amounts; and (e) seek recovery through any relevant third parties, including any of the Debtor's insurance coverage providers.

9. This Proof of Claim does not encompass all claims that the Claimant or its affiliates may have that arise after the Petition Date and are entitled to administrative priority, and the Claimant expressly reserves its right to file such claim or any similar claim at the appropriate time, including any such post-petition claims arising under these service contracts.

10. This Proof of Claim is filed without prejudice to the filing by the Claimant of additional proofs of claim or requests for payment with respect to any other indebtedness, liability or obligation of the Debtor. The Claimant does not, by this Proof of Claim or any amendment or other action, waive any rights with respect to any scheduled claim.

11. The Claimant reserves the right to withdraw, amend, clarify, modify or supplement this Proof of Claim to assert additional claims, causes of action or additional grounds for this Proof of Claim (including adding any additional contracts, agreements, obligations or

other relationships between the Claimant and the Debtor), as well as the right to file any separate or additional proofs of claim with respect to the claims set forth herein or otherwise, including for the purpose of fixing and liquidating any contingent or unliquidated claim set forth herein, or to file additional proofs of claim in respect of additional amounts or for any other reason.

12. In executing and filing this Proof of Claim, the Claimant does not submit to the jurisdiction of the Bankruptcy Court for the Northern District of Texas for any purpose other than with respect to this Proof of Claim against the Debtor, and does not waive or release any rights or remedies against any other person or entity that may be liable for all or part of this Proof of Claim.

13. The Claimant otherwise reserves its rights, and nothing herein shall prejudice the Claimant's rights, under any order of the Court previously entered in this chapter 11 case.

14. Payments on account of this Proof of Claim should be sent to the Claimant at the address specified for notices to the Claimant in Part 1.3 of the Proof of Claim.

CLAIM 150

Fill in this information to identify the case:

Debtor Highland Capital Management, L.P.

United States Bankruptcy Court for the: Northern District of Texas
(State)

Case number 19-34054

Official Form 410
Proof of Claim

04/19

Read the instructions before filling out this form. This form is for making a claim for payment in a bankruptcy case. Do not use this form to make a request for payment of an administrative expense. Make such a request according to **11 U.S.C. § 503**.

Filers must leave out or redact information that is entitled to privacy on this form or on any attached documents. Attach redacted copies or any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, judgments, mortgages, and security agreements. **Do not send original documents**; they may be destroyed after scanning. If the documents are not available, explain in an attachment.

A person who files a fraudulent claim could be fined up to \$500,000, imprisoned for up to 5 years, or both. **18 U.S.C. §§ 152, 157, and 3571**.

Fill in all the information about the claim as of the date the case was filed. That date is on the notice of bankruptcy (Form 309) that you received.

Part 1: Identify the Claim

1. Who is the current creditor?	<u>HarbourVest Dover Street IX Investment L.P.</u> Name of the current creditor (the person or entity to be paid for this claim) Other names the creditor used with the debtor _____	
2. Has this claim been acquired from someone else?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. From whom? _____	
3. Where should notices and payments to the creditor be sent?	Where should notices to the creditor be sent? See summary page	Where should payments to the creditor be sent? (if different) See summary page
Federal Rule of Bankruptcy Procedure (FRBP) 2002(g) Contact phone <u>2129096000</u> Contact phone <u>6173483773</u> Contact email <u>eweisgerber@debevoise.com</u> Contact email <u>agoren@harbourvest.com</u> Uniform claim identifier for electronic payments in chapter 13 (if you use one): _____		
4. Does this claim amend one already filed?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Claim number on court claims registry (if known) _____ Filed on _____ MM / DD / YYYY	
5. Do you know if anyone else has filed a proof of claim for this claim?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Who made the earlier filing? _____	

Part 2: Give Information About the Claim as of the Date the Case Was Filed

6. Do you have any number you use to identify the debtor?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Last 4 digits of the debtor's account or any number you use to identify the debtor: ____ _
7. How much is the claim? \$ <u>See Annex</u>	Does this amount include interest or other charges? <input type="checkbox"/> No <input type="checkbox"/> Yes. Attach statement itemizing interest, fees, expenses, or other charges required by Bankruptcy Rule 3001(c)(2)(A).
8. What is the basis of the claim?	Examples: Goods sold, money loaned, lease, services performed, personal injury or wrongful death, or credit card. Attach redacted copies of any documents supporting the claim required by Bankruptcy Rule 3001(c). Limit disclosing information that is entitled to privacy, such as health care information. <u>See Annex</u>
9. Is all or part of the claim secured?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. The claim is secured by a lien on property. Nature or property: <input type="checkbox"/> Real estate: If the claim is secured by the debtor's principle residence, file a <i>Mortgage Proof of Claim Attachment</i> (Official Form 410-A) with this <i>Proof of Claim</i> . <input type="checkbox"/> Motor vehicle <input type="checkbox"/> Other. Describe: _____ Basis for perfection: _____ Attach redacted copies of documents, if any, that show evidence of perfection of a security interest (for example, a mortgage, lien, certificate of title, financing statement, or other document that shows the lien has been filed or recorded.) Value of property: \$ _____ Amount of the claim that is secured: \$ _____ Amount of the claim that is unsecured: \$ _____ (The sum of the secured and unsecured amount should match the amount in line 7.) Amount necessary to cure any default as of the date of the petition: \$ _____ Annual Interest Rate (when case was filed) _____ % <input type="checkbox"/> Fixed <input type="checkbox"/> Variable
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<p>13. Is all or part of the claim pursuant to 11 U.S.C. § 503(b)(9)?</p>	<table border="0" style="width: 100%;"> <tr> <td style="width: 20px; vertical-align: top;"> <input checked="" type="checkbox"/> No </td> <td style="width: 80%;"></td> </tr> <tr> <td style="vertical-align: top;"> <input type="checkbox"/> Yes. Indicate the amount of your claim arising from the value of any goods received by the debtor within 20 days before the date of commencement of the above case, in which the goods have been sold to the Debtor in the ordinary course of such Debtor's business. Attach documentation supporting such claim. </td> <td style="vertical-align: bottom; padding-top: 20px;"> \$ _____ </td> </tr> </table>	<input checked="" type="checkbox"/> No		<input type="checkbox"/> Yes. Indicate the amount of your claim arising from the value of any goods received by the debtor within 20 days before the date of commencement of the above case, in which the goods have been sold to the Debtor in the ordinary course of such Debtor's business. Attach documentation supporting such claim.	\$ _____														
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Part 3: Sign Below

The person completing this proof of claim must sign and date it.
FRBP 9011(b).

If you file this claim electronically, **FRBP 5005(a)(2)** authorizes courts to establish local rules specifying what a signature is.

A person who files a fraudulent claim could be fined up to \$500,000, imprisoned for up to 5 years, or both.
18 U.S.C. §§ 152, 157, and 3571.

Check the appropriate box:

- ☐ I am the creditor.
- ☒ I am the creditor's attorney or authorized agent.
- ☐ I am the trustee, or the debtor, or their authorized agent. Bankruptcy Rule 3004.
- ☐ I am a guarantor, surety, endorser, or other codebtor. Bankruptcy Rule 3005.

I understand that an authorized signature on this *Proof of Claim* serves as an acknowledgement that when calculating the amount of the claim, the creditor gave the debtor credit for any payments received toward the debt.

I have examined the information in this *Proof of Claim* and have reasonable belief that the information is true and correct.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on date 04/08/2020
MM / DD / YYYY

/s/ Michael Pugatch
Signature

Print the name of the person who is completing and signing this claim:

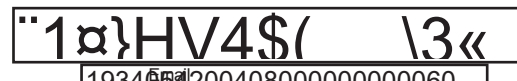
Name	<u>Michael Pugatch</u>		
	First name	Middle name	Last name

Title	<u>Managing Director-Company: HarbourVest Dover Street IX Investment L.P.,</u>
-------	--

Company Inv Fund Mgr, by HarbourVest Partners L.P., its Duly Appointed Investme
Identify the corporate servicer as the company if the authorized agent is a servicer.

Address

Contact phone



For phone assistance: Domestic (877) 573-3984 | International (310) 751-1829

Debtor: 19-34054 - Highland Capital Management, L.P. District: Northern District of Texas, Dallas Division		
Creditor: HarbourVest Dover Street IX Investment L.P. Attn: Erica Weisgerber Debevoise and Plimpton LLP 919 Third Avenue New York, NY, 10022 U.S.A. Phone: 2129096000 Phone 2: Fax: Email: eweisgerber@debevoise.com		Has Supporting Documentation: Yes, supporting documentation successfully uploaded Related Document Statement: Has Related Claim: No Related Claim Filed By: Filing Party: Authorized agent
Disbursement/Notice Parties: HarbourVest Dover Street IX Investment L.P. c/o HarbourVest Partners, LLC One Financial Center Boston, MA, 02111 U.S.A. Phone: 6173483773 Phone 2: Fax: E-mail: agoren@harbourvest.com DISBURSEMENT ADDRESS		
Other Names Used with Debtor:		Amends Claim: No Acquired Claim: No
Basis of Claim: See Annex	Last 4 Digits: No	Uniform Claim Identifier:
Total Amount of Claim: See Annex	Includes Interest or Charges: None	
Has Priority Claim: No		Priority Under:
Has Secured Claim: No Amount of 503(b)(9): No Based on Lease: No Subject to Right of Setoff: No		Nature of Secured Amount: Value of Property: Annual Interest Rate: Arrearage Amount: Basis for Perfection: Amount Unsecured:
Submitted By: Michael Pugatch on 08-Apr-2020 4:59:00 p.m. Eastern Time Title: Managing Director-Company: HarbourVest Dover Street IX Investment L.P., by HarbourVest Partners Ireland Limited, its Alter Company: Inv Fund Mgr, by HarbourVest Partners L.P., its Duly Appointed Investment Manager, by HarbourVest Partners, LLC, its Gen Ptr		

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In re:

Highland Capital Management, L.P.

Debtor.

Chapter 11

Case No. 19-34054 (SGJ)

ANNEX TO PROOF OF CLAIM

1. This annex (the “Annex”) is part of and is incorporated by reference into the attached proof of claim (together with the Annex, the “Proof of Claim”) and describes in more detail the claims of HarbourVest Dover Street IX Investment L.P. (the “Claimant”) against the debtor Highland Capital Management, L.P. (the “Debtor”).

2. The Claimant is a limited partner in one of the Debtor’s managed vehicles, Highland CLO Funding, Ltd. (“HCLOF”). Acis Capital Management GP, L.L.C. and Acis Capital Management L.P. (together, “Acis”), the portfolio manager for HCLOF, filed for chapter 11 in the United States Bankruptcy Court for the Northern District of Texas (the “Court”) on January 30, 2018. The Acis bankruptcy filing resulted from a dispute between Debtor and its former employee, Joshua Terry, who served as portfolio manager for Debtor’s collateral loan obligations funds (“CLO”) business. *See, e.g., Findings of Fact and Conclusions of Law in Support of Orders for Relief Issued After Trial on Contested Involuntary Bankruptcy Petition* (“Involuntary Petition Ruling”) [Case No. 18-30264 (SGJ), **Dkt. No. 118**]. As noted in more detail in the Court’s *Bench Ruling and Memorandum of Law in Support of: (A) Final Approval of Disclosure Statement; and (B) Confirmation of Chapter 11 Trustee’s Third Amended Joint Plan* (“Confirmation Ruling”) [Case No. 18-30264 (SGJ), **Dkt. No 827**] and related filings in the Acis

bankruptcy cases, there has been extensive litigation regarding alleged improper conduct associated with the management of, and transactions relating to, Acis, including transactions with and related to HCLOF. *See, e.g., id.; Second Amended Complaint* [Case No. 18-03078(SGJ), Dkt. No. 157].

3. Due to the Acis bankruptcy and certain conduct alleged to have been undertaken by the Debtor (to whom Acis subcontracted its functions) and Debtor's employees (who were officers, employees, and agents of Acis), the Claimant has suffered significant harm. Such harm includes, but is not limited to, financial harm resulting from, among other things (i) court orders in the Acis bankruptcy that prevented certain CLOs in which HCLOF was invested from being refinanced or reset and court orders that otherwise regulated the activity of HCLOF; and (ii) significant fees and expenses related to the Acis bankruptcy that were charged to HCLOF. *See, e.g., Involuntary Petition Ruling* ¶ 27; *see also Confirmation Ruling*.

4. Claimant hereby files this Claim to assert any and all of its rights to payment, remedies, and other claims (including contingent or unliquidated claims) against the Debtor in connection with and relating to the foregoing harm, including for any amounts due or owed under the various agreements with the Debtor in connection with HCLOF (including, but not limited to, the Subscription and Transfer Agreement for Ordinary Shares Highland CLO Funding, Ltd., dated as of November 15, 2017, the Members Agreement Relating to the Company, dated as of November 15, 2017, the Highland CLO Funding, Ltd. Offering Memorandum dated November 15, 2017), and any and all legal and equitable claims or causes of action relating to the foregoing harm.

5. The Claimant has not attached the documentation supporting this Claim to this Proof of Claim because the documentation is voluminous and the Debtor has copies of such

documents. However, any requested relevant documents will be provided to the Official Committee of Unsecured Creditors, the Court, the United States Trustee and the Debtor in the event of a dispute regarding this Proof of Claim and will be made available for review by other parties in interest as appropriate upon reasonable request and after consultation with the Debtor and execution of appropriate confidentiality agreements.

6. This Proof of Claim is filed with a full reservation of rights, including the right to amend, update, modify, supplement or otherwise revise this Proof of Claim in any respect at any time. The filing of this Proof of Claim is not and should not be construed to be: (a) a waiver or release of any of the Claimant's rights against any person, entity or property accruing to it against the Debtor and its estate; (b) a waiver of the Claimant's rights to assert that 28 U.S.C. § 157(b)(2)(C) is unconstitutional; (c) a consent or submission by the Claimant, or waiver of the Claimant's rights to object, to the jurisdiction of this Court with respect to the subject matter of any of the claims described herein, or any objection or other proceeding commenced with respect to any of the claims described herein, or any other proceeding commenced in the Debtor's chapter 11 case against or otherwise involving the Claimant; (d) a waiver or release of any right of the Claimant, or consent by the Claimant, to a trial by jury in this or any other court or proceeding; (e) a waiver or release of, or any limitation on, any right of the Claimant to have orders entered only after *de novo* review by a United States District Judge; (f) an election of remedies; or (g) a waiver of, or any other limitation on, any right of the Claimant to request withdrawal of the reference with respect to any matter, including, without limitation, any matter relating to this Proof of Claim.

7. Claimant's express reservation of all rights and causes of action, includes, without limitation, contingent or unliquidated rights that it or its affiliates may have against the Debtor,

as well as defenses, offsets and counterclaims. This description and classification of claims by the Claimant is not a concession or admission as to the correct characterization or treatment of any such claims or a waiver of any rights of the Claimant.

8. Furthermore, the Claimant expressly reserves its rights to (a) file additional proofs of claim for additional claims that may be based on the same or additional documents or facts or other liability or indebtedness of the Debtor to the Claimant under contract or otherwise; (b) assert claims for cure of defaults in any agreement that the Debtor or any trustee appointed in this chapter 11 case may seek to assume; (c) assert any and all other claims, causes of action, defenses, offsets or counterclaims against the Debtor or any other parties; (d) file a request for payment of an administrative expense under 11 U.S.C. §§ 503 and 507 for any or all of the claims or rights of payment described above and any additional amounts; and (e) seek recovery through any relevant third parties, including any of the Debtor's insurance coverage providers.

9. This Proof of Claim does not encompass all claims that the Claimant or its affiliates may have that arise after the Petition Date and are entitled to administrative priority, and the Claimant expressly reserves its right to file such claim or any similar claim at the appropriate time, including any such post-petition claims arising under these service contracts.

10. This Proof of Claim is filed without prejudice to the filing by the Claimant of additional proofs of claim or requests for payment with respect to any other indebtedness, liability or obligation of the Debtor. The Claimant does not, by this Proof of Claim or any amendment or other action, waive any rights with respect to any scheduled claim.

11. The Claimant reserves the right to withdraw, amend, clarify, modify or supplement this Proof of Claim to assert additional claims, causes of action or additional grounds for this Proof of Claim (including adding any additional contracts, agreements, obligations or

other relationships between the Claimant and the Debtor), as well as the right to file any separate or additional proofs of claim with respect to the claims set forth herein or otherwise, including for the purpose of fixing and liquidating any contingent or unliquidated claim set forth herein, or to file additional proofs of claim in respect of additional amounts or for any other reason.

12. In executing and filing this Proof of Claim, the Claimant does not submit to the jurisdiction of the Bankruptcy Court for the Northern District of Texas for any purpose other than with respect to this Proof of Claim against the Debtor, and does not waive or release any rights or remedies against any other person or entity that may be liable for all or part of this Proof of Claim.

13. The Claimant otherwise reserves its rights, and nothing herein shall prejudice the Claimant's rights, under any order of the Court previously entered in this chapter 11 case.

14. Payments on account of this Proof of Claim should be sent to the Claimant at the address specified for notices to the Claimant in Part 1.3 of the Proof of Claim.

CLAIM 153

Fill in this information to identify the case:

Debtor Highland Capital Management, L.P.

United States Bankruptcy Court for the: Northern District of Texas
(State)

Case number 19-34054

Official Form 410
Proof of Claim

04/19

Read the instructions before filling out this form. This form is for making a claim for payment in a bankruptcy case. Do not use this form to make a request for payment of an administrative expense. Make such a request according to **11 U.S.C. § 503**.

Filers must leave out or redact information that is entitled to privacy on this form or on any attached documents. Attach redacted copies or any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, judgments, mortgages, and security agreements. **Do not send original documents**; they may be destroyed after scanning. If the documents are not available, explain in an attachment.

A person who files a fraudulent claim could be fined up to \$500,000, imprisoned for up to 5 years, or both. **18 U.S.C. §§ 152, 157, and 3571**.

Fill in all the information about the claim as of the date the case was filed. That date is on the notice of bankruptcy (Form 309) that you received.

Part 1: Identify the Claim

1. Who is the current creditor?	<u>HV International VIII Secondary L.P.</u> Name of the current creditor (the person or entity to be paid for this claim) Other names the creditor used with the debtor _____	
2. Has this claim been acquired from someone else?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. From whom? _____	
3. Where should notices and payments to the creditor be sent?	Where should notices to the creditor be sent? <u>HV International VIII Secondary L.P.</u> <u>Attn: Erica Weisgerber</u> <u>Debevoise and Plimpton LLP</u> <u>919 Third Avenue</u> <u>New York, NY 10022, U.S.A.</u> Contact phone <u>2129096000</u> Contact email <u>eweisgerber@debevoise.com</u> Uniform claim identifier for electronic payments in chapter 13 (if you use one): _____	Where should payments to the creditor be sent? (if different) <u>See summary page</u> Contact phone <u>6173483773</u> Contact email <u>agoren@harbourvest.com</u>
4. Does this claim amend one already filed?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Claim number on court claims registry (if known) _____ Filed on _____ MM / DD / YYYY	
5. Do you know if anyone else has filed a proof of claim for this claim?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Who made the earlier filing? _____	

Part 2: Give Information About the Claim as of the Date the Case Was Filed

6. Do you have any number you use to identify the debtor?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Last 4 digits of the debtor's account or any number you use to identify the debtor: ____ _
7. How much is the claim? \$ <u>See Annex</u>	Does this amount include interest or other charges? <input type="checkbox"/> No <input type="checkbox"/> Yes. Attach statement itemizing interest, fees, expenses, or other charges required by Bankruptcy Rule 3001(c)(2)(A).
8. What is the basis of the claim?	Examples: Goods sold, money loaned, lease, services performed, personal injury or wrongful death, or credit card. Attach redacted copies of any documents supporting the claim required by Bankruptcy Rule 3001(c). Limit disclosing information that is entitled to privacy, such as health care information. <u>See Annex</u>
9. Is all or part of the claim secured?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. The claim is secured by a lien on property. Nature or property: <input type="checkbox"/> Real estate: If the claim is secured by the debtor's principle residence, file a <i>Mortgage Proof of Claim Attachment</i> (Official Form 410-A) with this <i>Proof of Claim</i> . <input type="checkbox"/> Motor vehicle <input type="checkbox"/> Other. Describe: _____ Basis for perfection: _____ Attach redacted copies of documents, if any, that show evidence of perfection of a security interest (for example, a mortgage, lien, certificate of title, financing statement, or other document that shows the lien has been filed or recorded.) Value of property: \$ _____ Amount of the claim that is secured: \$ _____ Amount of the claim that is unsecured: \$ _____ (The sum of the secured and unsecured amount should match the amount in line 7.) Amount necessary to cure any default as of the date of the petition: \$ _____ Annual Interest Rate (when case was filed) _____ % <input type="checkbox"/> Fixed <input type="checkbox"/> Variable
10. Is this claim based on a lease?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Amount necessary to cure any default as of the date of the petition. \$ _____
11. Is this claim subject to a right of setoff?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Identify the property: _____

For phone assistance: Domestic (877) 573-3984 | International (310) 751-1829

Debtor: 19-34054 - Highland Capital Management, L.P. District: Northern District of Texas, Dallas Division		
Creditor: HV International VIII Secondary L.P. Attn: Erica Weisgerber Debevoise and Plimpton LLP 919 Third Avenue New York, NY, 10022 U.S.A. Phone: 2129096000 Phone 2: Fax: Email: eweisgerber@debevoise.com	Has Supporting Documentation: Yes, supporting documentation successfully uploaded Related Document Statement:	
	Has Related Claim: No Related Claim Filed By:	
	Filing Party: Authorized agent	
Disbursement/Notice Parties: HV International VIII Secondary L.P. c/o HarbourVest Partners, LLC One Financial Center Boston, MA, 02111 U.S.A. Phone: 6173483773 Phone 2: Fax: E-mail: agoren@harbourvest.com DISBURSEMENT ADDRESS		
Other Names Used with Debtor:	Amends Claim: No Acquired Claim: No	
Basis of Claim: See Annex	Last 4 Digits: No	Uniform Claim Identifier:
Total Amount of Claim: See Annex	Includes Interest or Charges: None	
Has Priority Claim: No	Priority Under:	
Has Secured Claim: No Amount of 503(b)(9): No Based on Lease: No Subject to Right of Setoff: No	Nature of Secured Amount: Value of Property: Annual Interest Rate: Arrearage Amount: Basis for Perfection: Amount Unsecured:	
Submitted By: Michael Pugatch on 08-Apr-2020 5:16:54 p.m. Eastern Time Title: Managing Director-Company: HV International VIII Secondary L.P., by HIPEP VIII Associates L.P., its General Partner, Company: by HarbourVest GP LLC, its General Partner, by HarbourVest Partners, LLC, its Managing Member		

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In re:

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Debtor.

Chapter 11

Case No. 19-34054 (SGJ)

ANNEX TO PROOF OF CLAIM

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2. The Claimant is a limited partner in one of the Debtor’s managed vehicles, Highland CLO Funding, Ltd. (“HCLOF”). Acis Capital Management GP, L.L.C. and Acis Capital Management L.P. (together, “Acis”), the portfolio manager for HCLOF, filed for chapter 11 in the United States Bankruptcy Court for the Northern District of Texas (the “Court”) on January 30, 2018. The Acis bankruptcy filing resulted from a dispute between Debtor and its former employee, Joshua Terry, who served as portfolio manager for Debtor’s collateral loan obligations funds (“CLO”) business. *See, e.g., Findings of Fact and Conclusions of Law in Support of Orders for Relief Issued After Trial on Contested Involuntary Bankruptcy Petition* (“Involuntary Petition Ruling”) [Case No. 18-30264 (SGJ), **Dkt. No. 118**]. As noted in more detail in the Court’s *Bench Ruling and Memorandum of Law in Support of: (A) Final Approval of Disclosure Statement; and (B) Confirmation of Chapter 11 Trustee’s Third Amended Joint Plan* (“Confirmation Ruling”) [Case No. 18-30264 (SGJ), **Dkt. No 827**] and related filings in the Acis

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bankruptcy cases, there has been extensive litigation regarding alleged improper conduct associated with the management of, and transactions relating to, Acis, including transactions with and related to HCLOF. *See, e.g., id.; Second Amended Complaint* [Case No. 18-03078(SGJ), **Dkt. No. 157**].

3. Due to the Acis bankruptcy and certain conduct alleged to have been undertaken by the Debtor (to whom Acis subcontracted its functions) and Debtor's employees (who were officers, employees, and agents of Acis), the Claimant has suffered significant harm. Such harm includes, but is not limited to, financial harm resulting from, among other things (i) court orders in the Acis bankruptcy that prevented certain CLOs in which HCLOF was invested from being refinanced or reset and court orders that otherwise regulated the activity of HCLOF; and (ii) significant fees and expenses related to the Acis bankruptcy that were charged to HCLOF. *See, e.g., Involuntary Petition Ruling* ¶ 27; *see also Confirmation Ruling*.

4. Claimant hereby files this Claim to assert any and all of its rights to payment, remedies, and other claims (including contingent or unliquidated claims) against the Debtor in connection with and relating to the foregoing harm, including for any amounts due or owed under the various agreements with the Debtor in connection with HCLOF (including, but not limited to, the Subscription and Transfer Agreement for Ordinary Shares Highland CLO Funding, Ltd., dated as of November 15, 2017, the Members Agreement Relating to the Company, dated as of November 15, 2017, the Highland CLO Funding, Ltd. Offering Memorandum dated November 15, 2017), and any and all legal and equitable claims or causes of action relating to the foregoing harm.

5. The Claimant has not attached the documentation supporting this Claim to this Proof of Claim because the documentation is voluminous and the Debtor has copies of such

documents. However, any requested relevant documents will be provided to the Official Committee of Unsecured Creditors, the Court, the United States Trustee and the Debtor in the event of a dispute regarding this Proof of Claim and will be made available for review by other parties in interest as appropriate upon reasonable request and after consultation with the Debtor and execution of appropriate confidentiality agreements.

6. This Proof of Claim is filed with a full reservation of rights, including the right to amend, update, modify, supplement or otherwise revise this Proof of Claim in any respect at any time. The filing of this Proof of Claim is not and should not be construed to be: (a) a waiver or release of any of the Claimant's rights against any person, entity or property accruing to it against the Debtor and its estate; (b) a waiver of the Claimant's rights to assert that 28 U.S.C. § 157(b)(2)(C) is unconstitutional; (c) a consent or submission by the Claimant, or waiver of the Claimant's rights to object, to the jurisdiction of this Court with respect to the subject matter of any of the claims described herein, or any objection or other proceeding commenced with respect to any of the claims described herein, or any other proceeding commenced in the Debtor's chapter 11 case against or otherwise involving the Claimant; (d) a waiver or release of any right of the Claimant, or consent by the Claimant, to a trial by jury in this or any other court or proceeding; (e) a waiver or release of, or any limitation on, any right of the Claimant to have orders entered only after *de novo* review by a United States District Judge; (f) an election of remedies; or (g) a waiver of, or any other limitation on, any right of the Claimant to request withdrawal of the reference with respect to any matter, including, without limitation, any matter relating to this Proof of Claim.

7. Claimant's express reservation of all rights and causes of action, includes, without limitation, contingent or unliquidated rights that it or its affiliates may have against the Debtor,

as well as defenses, offsets and counterclaims. This description and classification of claims by the Claimant is not a concession or admission as to the correct characterization or treatment of any such claims or a waiver of any rights of the Claimant.

8. Furthermore, the Claimant expressly reserves its rights to (a) file additional proofs of claim for additional claims that may be based on the same or additional documents or facts or other liability or indebtedness of the Debtor to the Claimant under contract or otherwise; (b) assert claims for cure of defaults in any agreement that the Debtor or any trustee appointed in this chapter 11 case may seek to assume; (c) assert any and all other claims, causes of action, defenses, offsets or counterclaims against the Debtor or any other parties; (d) file a request for payment of an administrative expense under 11 U.S.C. §§ 503 and 507 for any or all of the claims or rights of payment described above and any additional amounts; and (e) seek recovery through any relevant third parties, including any of the Debtor's insurance coverage providers.

9. This Proof of Claim does not encompass all claims that the Claimant or its affiliates may have that arise after the Petition Date and are entitled to administrative priority, and the Claimant expressly reserves its right to file such claim or any similar claim at the appropriate time, including any such post-petition claims arising under these service contracts.

10. This Proof of Claim is filed without prejudice to the filing by the Claimant of additional proofs of claim or requests for payment with respect to any other indebtedness, liability or obligation of the Debtor. The Claimant does not, by this Proof of Claim or any amendment or other action, waive any rights with respect to any scheduled claim.

11. The Claimant reserves the right to withdraw, amend, clarify, modify or supplement this Proof of Claim to assert additional claims, causes of action or additional grounds for this Proof of Claim (including adding any additional contracts, agreements, obligations or

other relationships between the Claimant and the Debtor), as well as the right to file any separate or additional proofs of claim with respect to the claims set forth herein or otherwise, including for the purpose of fixing and liquidating any contingent or unliquidated claim set forth herein, or to file additional proofs of claim in respect of additional amounts or for any other reason.

12. In executing and filing this Proof of Claim, the Claimant does not submit to the jurisdiction of the Bankruptcy Court for the Northern District of Texas for any purpose other than with respect to this Proof of Claim against the Debtor, and does not waive or release any rights or remedies against any other person or entity that may be liable for all or part of this Proof of Claim.

13. The Claimant otherwise reserves its rights, and nothing herein shall prejudice the Claimant's rights, under any order of the Court previously entered in this chapter 11 case.

14. Payments on account of this Proof of Claim should be sent to the Claimant at the address specified for notices to the Claimant in Part 1.3 of the Proof of Claim.

CLAIM 154

Fill in this information to identify the case:

Debtor Highland Capital Management, L.P.

United States Bankruptcy Court for the: Northern District of Texas
(State)

Case number 19-34054

Official Form 410
Proof of Claim

04/19

Read the instructions before filling out this form. This form is for making a claim for payment in a bankruptcy case. Do not use this form to make a request for payment of an administrative expense. Make such a request according to **11 U.S.C. § 503**.

Filers must leave out or redact information that is entitled to privacy on this form or on any attached documents. Attach redacted copies or any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, judgments, mortgages, and security agreements. **Do not send original documents**; they may be destroyed after scanning. If the documents are not available, explain in an attachment.

A person who files a fraudulent claim could be fined up to \$500,000, imprisoned for up to 5 years, or both. **18 U.S.C. §§ 152, 157, and 3571**.

Fill in all the information about the claim as of the date the case was filed. That date is on the notice of bankruptcy (Form 309) that you received.

Part 1: Identify the Claim

1. Who is the current creditor?	<u>HarbourVest Skew Base AIF L.P.</u> Name of the current creditor (the person or entity to be paid for this claim) Other names the creditor used with the debtor _____	
2. Has this claim been acquired from someone else?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. From whom? _____	
3. Where should notices and payments to the creditor be sent?	Where should notices to the creditor be sent? <u>HarbourVest Skew Base AIF L.P.</u> <u>Attn: Erica Weisgerber</u> <u>Debevoise and Plimpton LLP</u> <u>919 Third Avenue</u> <u>New York, NY 10022, U.S.A.</u> Contact phone <u>2129096000</u> Contact email <u>eweisgerber@debevoise.com</u> Uniform claim identifier for electronic payments in chapter 13 (if you use one): _____	Where should payments to the creditor be sent? (if different) <u>See summary page</u> Contact phone <u>6173483773</u> Contact email <u>agoren@harbourvest.com</u>
4. Does this claim amend one already filed?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Claim number on court claims registry (if known) _____ Filed on _____ MM / DD / YYYY	
5. Do you know if anyone else has filed a proof of claim for this claim?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Who made the earlier filing? _____	

Part 2: Give Information About the Claim as of the Date the Case Was Filed

6. Do you have any number you use to identify the debtor?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Last 4 digits of the debtor's account or any number you use to identify the debtor: ____ _
7. How much is the claim? \$ <u>See Annex</u>	Does this amount include interest or other charges? <input type="checkbox"/> No <input type="checkbox"/> Yes. Attach statement itemizing interest, fees, expenses, or other charges required by Bankruptcy Rule 3001(c)(2)(A).
8. What is the basis of the claim?	Examples: Goods sold, money loaned, lease, services performed, personal injury or wrongful death, or credit card. Attach redacted copies of any documents supporting the claim required by Bankruptcy Rule 3001(c). Limit disclosing information that is entitled to privacy, such as health care information. <u>See Annex</u>
9. Is all or part of the claim secured?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. The claim is secured by a lien on property. Nature or property: <input type="checkbox"/> Real estate: If the claim is secured by the debtor's principle residence, file a <i>Mortgage Proof of Claim Attachment</i> (Official Form 410-A) with this <i>Proof of Claim</i> . <input type="checkbox"/> Motor vehicle <input type="checkbox"/> Other. Describe: _____ Basis for perfection: _____ Attach redacted copies of documents, if any, that show evidence of perfection of a security interest (for example, a mortgage, lien, certificate of title, financing statement, or other document that shows the lien has been filed or recorded.) Value of property: \$ _____ Amount of the claim that is secured: \$ _____ Amount of the claim that is unsecured: \$ _____ (The sum of the secured and unsecured amount should match the amount in line 7.) Amount necessary to cure any default as of the date of the petition: \$ _____ Annual Interest Rate (when case was filed) _____ % <input type="checkbox"/> Fixed <input type="checkbox"/> Variable
10. Is this claim based on a lease?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Amount necessary to cure any default as of the date of the petition. \$ _____
11. Is this claim subject to a right of setoff?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Identify the property: _____

<p>12. Is all or part of the claim entitled to priority under 11 U.S.C. § 507(a)?</p> <p>A claim may be partly priority and partly nonpriority. For example, in some categories, the law limits the amount entitled to priority.</p>	<table style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 20%; vertical-align: top;"> <input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. <i>Check all that apply:</i> </td> <td style="width: 60%; vertical-align: top;"> <div style="border: 1px solid black; padding: 5px; margin-bottom: 5px;"> <input type="checkbox"/> Domestic support obligations (including alimony and child support) under 11 U.S.C. § 507(a)(1)(A) or (a)(1)(B). </div> <div style="border: 1px solid black; padding: 5px; margin-bottom: 5px;"> <input type="checkbox"/> Up to \$3,025* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use. 11 U.S.C. § 507(a)(7). </div> <div style="border: 1px solid black; padding: 5px; margin-bottom: 5px;"> <input type="checkbox"/> Wages, salaries, or commissions (up to \$13,650*) earned within 180 days before the bankruptcy petition is filed or the debtor's business ends, whichever is earlier. 11 U.S.C. § 507(a)(4). </div> <div style="border: 1px solid black; padding: 5px; margin-bottom: 5px;"> <input type="checkbox"/> Taxes or penalties owed to governmental units. 11 U.S.C. § 507(a)(8). </div> <div style="border: 1px solid black; padding: 5px; margin-bottom: 5px;"> <input type="checkbox"/> Contributions to an employee benefit plan. 11 U.S.C. § 507(a)(5). </div> <div style="border: 1px solid black; padding: 5px;"> <input type="checkbox"/> Other. Specify subsection of 11 U.S.C. § 507(a)() that applies. </div> </td> <td style="width: 20%; vertical-align: top; text-align: right; padding: 5px;"> <div style="background-color: #f0f0f0; padding: 5px; border: 1px solid black; font-weight: bold;">Amount entitled to priority</div> \$ _____ \$ _____ \$ _____ \$ _____ \$ _____ \$ _____ </td> </tr> </table> <p style="font-size: small; margin-top: 10px;">* Amounts are subject to adjustment on 4/01/22 and every 3 years after that for cases begun on or after the date of adjustment.</p>	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. <i>Check all that apply:</i>	<div style="border: 1px solid black; padding: 5px; margin-bottom: 5px;"> <input type="checkbox"/> Domestic support obligations (including alimony and child support) under 11 U.S.C. § 507(a)(1)(A) or (a)(1)(B). </div> <div style="border: 1px solid black; padding: 5px; margin-bottom: 5px;"> <input type="checkbox"/> Up to \$3,025* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use. 11 U.S.C. § 507(a)(7). </div> <div style="border: 1px solid black; padding: 5px; margin-bottom: 5px;"> <input type="checkbox"/> Wages, salaries, or commissions (up to \$13,650*) earned within 180 days before the bankruptcy petition is filed or the debtor's business ends, whichever is earlier. 11 U.S.C. § 507(a)(4). </div> <div style="border: 1px solid black; padding: 5px; margin-bottom: 5px;"> <input type="checkbox"/> Taxes or penalties owed to governmental units. 11 U.S.C. § 507(a)(8). </div> <div style="border: 1px solid black; padding: 5px; margin-bottom: 5px;"> <input type="checkbox"/> Contributions to an employee benefit plan. 11 U.S.C. § 507(a)(5). </div> <div style="border: 1px solid black; padding: 5px;"> <input type="checkbox"/> Other. Specify subsection of 11 U.S.C. § 507(a)() that applies. </div>	<div style="background-color: #f0f0f0; padding: 5px; border: 1px solid black; font-weight: bold;">Amount entitled to priority</div> \$ _____ \$ _____ \$ _____ \$ _____ \$ _____ \$ _____
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<p>13. Is all or part of the claim pursuant to 11 U.S.C. § 503(b)(9)?</p>	<table style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 20%; vertical-align: top;"> <input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Indicate the amount of your claim arising from the value of any goods received by the debtor within 20 days before the date of commencement of the above case, in which the goods have been sold to the Debtor in the ordinary course of such Debtor's business. Attach documentation supporting such claim. </td> <td style="width: 80%; vertical-align: top;"> <div style="border: 1px solid black; height: 40px; margin-top: 10px;"></div> </td> </tr> </table> <p style="margin-top: 10px;">\$ _____</p>	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Indicate the amount of your claim arising from the value of any goods received by the debtor within 20 days before the date of commencement of the above case, in which the goods have been sold to the Debtor in the ordinary course of such Debtor's business. Attach documentation supporting such claim.	<div style="border: 1px solid black; height: 40px; margin-top: 10px;"></div>
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Part 3: Sign Below

The person completing this proof of claim must sign and date it.
FRBP 9011(b).

If you file this claim electronically, **FRBP 5005(a)(2)** authorizes courts to establish local rules specifying what a signature is.

A person who files a fraudulent claim could be fined up to \$500,000, imprisoned for up to 5 years, or both.
18 U.S.C. §§ 152, 157, and 3571.

Check the appropriate box:

- ☐ I am the creditor.
- ☒ I am the creditor's attorney or authorized agent.
- ☐ I am the trustee, or the debtor, or their authorized agent. Bankruptcy Rule 3004.
- ☐ I am a guarantor, surety, endorser, or other codebtor. Bankruptcy Rule 3005.

I understand that an authorized signature on this *Proof of Claim* serves as an acknowledgement that when calculating the amount of the claim, the creditor gave the debtor credit for any payments received toward the debt.

I have examined the information in this *Proof of Claim* and have reasonable belief that the information is true and correct.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on date 04/08/2020
MM / DD / YYYY

/s/ Michael Pugatch
Signature

Print the name of the person who is completing and signing this claim:

Name	<u>Michael Pugatch</u>		
	First name	Middle name	Last name

Title	<u>Managing Director-Company: HarbourVest Skew Base AIF L.P., by HarbourVest</u>
-------	--

Company Fund Manager, by HarbourVest Partners L.P., its Duly Appointed Investme
Identify the corporate servicer as the company if the authorized agent is a servicer.

Address

Contact phone



For phone assistance: Domestic (877) 573-3984 | International (310) 751-1829

Debtor: 19-34054 - Highland Capital Management, L.P. District: Northern District of Texas, Dallas Division		
Creditor: HarbourVest Skew Base AIF L.P. Attn: Erica Weisgerber Debevoise and Plimpton LLP 919 Third Avenue New York, NY, 10022 U.S.A. Phone: 2129096000 Phone 2: Fax: Email: eweisgerber@debevoise.com	Has Supporting Documentation: Yes, supporting documentation successfully uploaded Related Document Statement:	
	Has Related Claim: No Related Claim Filed By:	
	Filing Party: Authorized agent	
Disbursement/Notice Parties: HarbourVest Skew Base AIF L.P. c/o HarbourVest Partners, LLC One Financial Center Boston, MA, 02111 Phone: 6173483773 Phone 2: Fax: E-mail: agoren@harbourvest.com DISBURSEMENT ADDRESS		
Other Names Used with Debtor:	Amends Claim: No Acquired Claim: No	
Basis of Claim: See Annex	Last 4 Digits: No	Uniform Claim Identifier:
Total Amount of Claim: See Annex	Includes Interest or Charges: None	
Has Priority Claim: No	Priority Under:	
Has Secured Claim: No Amount of 503(b)(9): No Based on Lease: No Subject to Right of Setoff: No	Nature of Secured Amount: Value of Property: Annual Interest Rate: Arrearage Amount: Basis for Perfection: Amount Unsecured:	
Submitted By: Michael Pugatch on 08-Apr-2020 5:11:50 p.m. Eastern Time Title: Managing Director-Company: HarbourVest Skew Base AIF L.P., by HarbourVest Partners Ireland Limited, its Alternative Inv Company: Fund Manager, by HarbourVest Partners L.P., its Duly Appointed Investment Manager, by HarbourVest Partners, LLC, its Gen Ptr		

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In re:

Highland Capital Management, L.P.

Debtor.

Chapter 11

Case No. 19-34054 (SGJ)

ANNEX TO PROOF OF CLAIM

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as well as defenses, offsets and counterclaims. This description and classification of claims by the Claimant is not a concession or admission as to the correct characterization or treatment of any such claims or a waiver of any rights of the Claimant.

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12. In executing and filing this Proof of Claim, the Claimant does not submit to the jurisdiction of the Bankruptcy Court for the Northern District of Texas for any purpose other than with respect to this Proof of Claim against the Debtor, and does not waive or release any rights or remedies against any other person or entity that may be liable for all or part of this Proof of Claim.

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CLAIM 149

Fill in this information to identify the case:

Debtor Highland Capital Management, L.P.

United States Bankruptcy Court for the: Northern District of Texas
(State)

Case number 19-34054

Official Form 410
Proof of Claim

04/19

Read the instructions before filling out this form. This form is for making a claim for payment in a bankruptcy case. Do not use this form to make a request for payment of an administrative expense. Make such a request according to **11 U.S.C. § 503**.

Filers must leave out or redact information that is entitled to privacy on this form or on any attached documents. Attach redacted copies or any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, judgments, mortgages, and security agreements. **Do not send original documents**; they may be destroyed after scanning. If the documents are not available, explain in an attachment.

A person who files a fraudulent claim could be fined up to \$500,000, imprisoned for up to 5 years, or both. **18 U.S.C. §§ 152, 157, and 3571**.

Fill in all the information about the claim as of the date the case was filed. That date is on the notice of bankruptcy (Form 309) that you received.

Part 1: Identify the Claim

1. Who is the current creditor?	<u>HarbourVest Partners L.P. on behalf of funds and accounts under management</u> Name of the current creditor (the person or entity to be paid for this claim)	
	Other names the creditor used with the debtor _____	
2. Has this claim been acquired from someone else?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. From whom? _____	
3. Where should notices and payments to the creditor be sent?	Where should notices to the creditor be sent? See summary page	Where should payments to the creditor be sent? (if different) See summary page
Federal Rule of Bankruptcy Procedure (FRBP) 2002(g)		
	Contact phone <u>2129096000</u> Contact email <u>eweisgerber@debevoise.com</u>	Contact phone <u>6173483773</u> Contact email <u>agoren@harbourvest.com</u>
Uniform claim identifier for electronic payments in chapter 13 (if you use one): _____		
4. Does this claim amend one already filed?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Claim number on court claims registry (if known) _____ Filed on _____ MM / DD / YYYY	
5. Do you know if anyone else has filed a proof of claim for this claim?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Who made the earlier filing? _____	

Part 2: Give Information About the Claim as of the Date the Case Was Filed

6. Do you have any number you use to identify the debtor?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Last 4 digits of the debtor's account or any number you use to identify the debtor: ____ _
7. How much is the claim? \$ <u>See Annex</u>	Does this amount include interest or other charges? <input type="checkbox"/> No <input type="checkbox"/> Yes. Attach statement itemizing interest, fees, expenses, or other charges required by Bankruptcy Rule 3001(c)(2)(A).
8. What is the basis of the claim?	Examples: Goods sold, money loaned, lease, services performed, personal injury or wrongful death, or credit card. Attach redacted copies of any documents supporting the claim required by Bankruptcy Rule 3001(c). Limit disclosing information that is entitled to privacy, such as health care information. <u>See Annex</u>
9. Is all or part of the claim secured?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. The claim is secured by a lien on property. Nature or property: <input type="checkbox"/> Real estate: If the claim is secured by the debtor's principle residence, file a <i>Mortgage Proof of Claim Attachment</i> (Official Form 410-A) with this <i>Proof of Claim</i> . <input type="checkbox"/> Motor vehicle <input type="checkbox"/> Other. Describe: _____ Basis for perfection: _____ Attach redacted copies of documents, if any, that show evidence of perfection of a security interest (for example, a mortgage, lien, certificate of title, financing statement, or other document that shows the lien has been filed or recorded.) Value of property: \$ _____ Amount of the claim that is secured: \$ _____ Amount of the claim that is unsecured: \$ _____ (The sum of the secured and unsecured amount should match the amount in line 7.) Amount necessary to cure any default as of the date of the petition: \$ _____ Annual Interest Rate (when case was filed) _____ % <input type="checkbox"/> Fixed <input type="checkbox"/> Variable
10. Is this claim based on a lease?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Amount necessary to cure any default as of the date of the petition. \$ _____
11. Is this claim subject to a right of setoff?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Identify the property: _____

For phone assistance: Domestic (877) 573-3984 | International (310) 751-1829

Debtor: 19-34054 - Highland Capital Management, L.P. District: Northern District of Texas, Dallas Division		
Creditor: HarbourVest Partners L.P. on behalf of funds and accounts under management Attn: Erica Weisgerber Debevoise and Plimpton LLP 919 Third Avenue New York, NY, 10022 U.S.A. Phone: 2129096000 Phone 2: Fax: Email: eweisgerber@debevoise.com	Has Supporting Documentation: Yes, supporting documentation successfully uploaded Related Document Statement:	
	Has Related Claim: No Related Claim Filed By:	
	Filing Party: Authorized agent	
Disbursement/Notice Parties: HarbourVest Partners L.P. c/o HarbourVest Partners, LLC One Financial Center Boston, MA, 02111 U.S.A. Phone: 6173483773 Phone 2: Fax: E-mail: agoren@harbourvest.com DISBURSEMENT ADDRESS		
Other Names Used with Debtor:	Amends Claim: No Acquired Claim: No	
Basis of Claim: See Annex	Last 4 Digits: No	Uniform Claim Identifier:
Total Amount of Claim: See Annex	Includes Interest or Charges: None	
Has Priority Claim: No	Priority Under:	
Has Secured Claim: No Amount of 503(b)(9): No Based on Lease: No Subject to Right of Setoff: No	Nature of Secured Amount: Value of Property: Annual Interest Rate: Arrearage Amount: Basis for Perfection: Amount Unsecured:	
Submitted By: Michael Pugatch on 08-Apr-2020 5:06:59 p.m. Eastern Time Title: Managing Director Company: HarbourVest Partners L.P., on behalf of funds and accounts under management, by HarbourVest Partners, LLC, its Gen Partner		

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In re:

Highland Capital Management, L.P.

Debtor.

Chapter 11

Case No. 19-34054 (SGJ)

ANNEX TO PROOF OF CLAIM

1. This annex (the “Annex”) is part of and is incorporated by reference into the attached proof of claim (together with the Annex, the “Proof of Claim”) and describes in more detail the claims of HarbourVest Partners L.P. on behalf of funds and accounts under management (the “Claimant”) against the debtor Highland Capital Management, L.P. (the “Debtor”).

2. The Claimant manages investment funds that are limited partners in one of the Debtor’s managed vehicles, Highland CLO Funding, Ltd. (“HCLOF”). Acis Capital Management GP, L.L.C. and Acis Capital Management L.P. (together, “Acis”), the portfolio manager for HCLOF, filed for chapter 11 in the United States Bankruptcy Court for the Northern District of Texas (the “Court”) on January 30, 2018. The Acis bankruptcy filing resulted from a dispute between Debtor and its former employee, Joshua Terry, who served as portfolio manager for Debtor’s collateral loan obligations funds (“CLO”) business. *See, e.g., Findings of Fact and Conclusions of Law in Support of Orders for Relief Issued After Trial on Contested Involuntary Bankruptcy Petition* (“Involuntary Petition Ruling”) [Case No. 18-30264 (SGJ), **Dkt. No. 118**]. As noted in more detail in the Court’s *Bench Ruling and Memorandum of Law in Support of: (A) Final Approval of Disclosure Statement; and (B) Confirmation of Chapter 11 Trustee’s Third*

Amended Joint Plan (“Confirmation Ruling”) [Case No. 18-30264 (SGJ), **Dkt. No. 827**] and related filings in the Acis bankruptcy cases, there has been extensive litigation regarding alleged improper conduct associated with the management of, and transactions relating to, Acis, including transactions with and related to HCLOF. *See, e.g., id.; Second Amended Complaint* [Case No. 18-03078(SGJ), **Dkt. No. 157**].

3. Due to the Acis bankruptcy and certain conduct alleged to have been undertaken by the Debtor (to whom Acis subcontracted its functions) and Debtor’s employees (who were officers, employees, and agents of Acis), the Claimant has suffered significant harm. Such harm includes, but is not limited to, financial harm resulting from, among other things (i) court orders in the Acis bankruptcy that prevented certain CLOs in which HCLOF was invested from being refinanced or reset and court orders that otherwise regulated the activity of HCLOF; and (ii) significant fees and expenses related to the Acis bankruptcy that were charged to HCLOF. *See, e.g., Involuntary Petition Ruling ¶ 27; see also Confirmation Ruling.*

4. Claimant hereby files this Claim to assert any and all of its rights to payment, remedies, and other claims (including contingent or unliquidated claims) against the Debtor in connection with and relating to the foregoing harm, including for any amounts due or owed under the various agreements with the Debtor in connection with HCLOF (including, but not limited to, the Subscription and Transfer Agreement for Ordinary Shares Highland CLO Funding, Ltd., dated as of November 15, 2017, the Members Agreement Relating to the Company, dated as of November 15, 2017, the Highland CLO Funding, Ltd. Offering Memorandum dated November 15, 2017), and any and all legal and equitable claims or causes of action relating to the foregoing harm.

5. The Claimant has not attached the documentation supporting this Claim to this Proof of Claim because the documentation is voluminous and the Debtor has copies of such documents. However, any requested relevant documents will be provided to the Official Committee of Unsecured Creditors, the Court, the United States Trustee and the Debtor in the event of a dispute regarding this Proof of Claim and will be made available for review by other parties in interest as appropriate upon reasonable request and after consultation with the Debtor and execution of appropriate confidentiality agreements.

6. This Proof of Claim is filed with a full reservation of rights, including the right to amend, update, modify, supplement or otherwise revise this Proof of Claim in any respect at any time. The filing of this Proof of Claim is not and should not be construed to be: (a) a waiver or release of any of the Claimant's rights against any person, entity or property accruing to it against the Debtor and its estate; (b) a waiver of the Claimant's rights to assert that 28 U.S.C. § 157(b)(2)(C) is unconstitutional; (c) a consent or submission by the Claimant, or waiver of the Claimant's rights to object, to the jurisdiction of this Court with respect to the subject matter of any of the claims described herein, or any objection or other proceeding commenced with respect to any of the claims described herein, or any other proceeding commenced in the Debtor's chapter 11 case against or otherwise involving the Claimant; (d) a waiver or release of any right of the Claimant, or consent by the Claimant, to a trial by jury in this or any other court or proceeding; (e) a waiver or release of, or any limitation on, any right of the Claimant to have orders entered only after *de novo* review by a United States District Judge; (f) an election of remedies; or (g) a waiver of, or any other limitation on, any right of the Claimant to request withdrawal of the reference with respect to any matter, including, without limitation, any matter relating to this Proof of Claim.

7. Claimant's express reservation of all rights and causes of action, includes, without limitation, contingent or unliquidated rights that it or its affiliates may have against the Debtor, as well as defenses, offsets and counterclaims. This description and classification of claims by the Claimant is not a concession or admission as to the correct characterization or treatment of any such claims or a waiver of any rights of the Claimant.

8. Furthermore, the Claimant expressly reserves its rights to (a) file additional proofs of claim for additional claims that may be based on the same or additional documents or facts or other liability or indebtedness of the Debtor to the Claimant under contract or otherwise; (b) assert claims for cure of defaults in any agreement that the Debtor or any trustee appointed in this chapter 11 case may seek to assume; (c) assert any and all other claims, causes of action, defenses, offsets or counterclaims against the Debtor or any other parties; (d) file a request for payment of an administrative expense under 11 U.S.C. §§ 503 and 507 for any or all of the claims or rights of payment described above and any additional amounts; and (e) seek recovery through any relevant third parties, including any of the Debtor's insurance coverage providers.

9. This Proof of Claim does not encompass all claims that the Claimant or its affiliates may have that arise after the Petition Date and are entitled to administrative priority, and the Claimant expressly reserves its right to file such claim or any similar claim at the appropriate time, including any such post-petition claims arising under these service contracts.

10. This Proof of Claim is filed without prejudice to the filing by the Claimant of additional proofs of claim or requests for payment with respect to any other indebtedness, liability or obligation of the Debtor. The Claimant does not, by this Proof of Claim or any amendment or other action, waive any rights with respect to any scheduled claim.

11. The Claimant reserves the right to withdraw, amend, clarify, modify or supplement this Proof of Claim to assert additional claims, causes of action or additional grounds for this Proof of Claim (including adding any additional contracts, agreements, obligations or other relationships between the Claimant and the Debtor), as well as the right to file any separate or additional proofs of claim with respect to the claims set forth herein or otherwise, including for the purpose of fixing and liquidating any contingent or unliquidated claim set forth herein, or to file additional proofs of claim in respect of additional amounts or for any other reason.

12. In executing and filing this Proof of Claim, the Claimant does not submit to the jurisdiction of the Bankruptcy Court for the Northern District of Texas for any purpose other than with respect to this Proof of Claim against the Debtor, and does not waive or release any rights or remedies against any other person or entity that may be liable for all or part of this Proof of Claim.

13. The Claimant otherwise reserves its rights, and nothing herein shall prejudice the Claimant's rights, under any order of the Court previously entered in this chapter 11 case.

14. Payments on account of this Proof of Claim should be sent to the Claimant at the address specified for notices to the Claimant in Part 1.3 of the Proof of Claim.

EXHIBIT 2

003946

PACHULSKI STANG ZIEHL & JONES LLP

Jeffrey N. Pomerantz (CA Bar No. 143717) (*admitted pro hac vice*)
Ira D. Kharasch (CA Bar No. 109084) (*admitted pro hac vice*)
John A. Morris (NY Bar No. 266326) (*admitted pro hac vice*)
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Counsel for the Debtor and Debtor-in-Possession

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

In re:	§	
	§	Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P., ¹	§	
	§	Case No. 19-34054-sgj11
Debtor.	§	

**DEBTOR'S MOTION FOR ENTRY OF AN ORDER APPROVING
SETTLEMENT WITH HARBOURVEST (CLAIM NOS. 143, 147, 149, 150, 153, 154)
AND AUTHORIZING ACTIONS CONSISTENT THEREWITH**

TO THE HONORABLE STACEY G. C. JERNIGAN,
UNITED STATES BANKRUPTCY JUDGE:

¹ The last four digits of the Debtor's taxpayer identification number are 6725. The headquarters and service address for the Debtor is 300 Crescent Court, Suite 700, Dallas, TX 75201.



Highland Capital Management, L.P., the above-captioned debtor and debtor-in-possession (“Highland” or the “Debtor”), files this motion (the “Motion”) for entry of an order, substantially in the form attached hereto as **Exhibit A**, pursuant to Rule 9019 of the **Federal Rules of Bankruptcy Procedure** (the “Bankruptcy Rules”), approving a settlement agreement (the “Settlement Agreement”),² a copy of which is attached as Exhibit 1 to the *Declaration of John A. Morris in Support of the Debtor’s Motion for Entry of an Order Approving Settlement with HarbourVest (Claim Nos. 143, 147, 149, 150, 153, 154) and Authorizing Actions Consistent Therewith* being filed simultaneously with this Motion (“Morris Dec.”), that, among other things, fully and finally resolves the proofs of claim filed by HarbourVest 2017 Global Fund L.P., HarbourVest 2017 Global AIF L.P., HarbourVest Dover Street IX Investment L.P., HV International VIII Secondary L.P., HarbourVest Skew Base AIF L.P., and HarbourVest Partners L.P. (collectively, “HarbourVest”). In support of this Motion, the Debtor represents as follows:

JURISDICTION

1. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2). Venue in this District is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

2. The statutory predicates for the relief sought herein are sections 105(a) and 363 of title 11 of the United States Code (the “Bankruptcy Code”), and Rule 9019 of the Bankruptcy Rules.

² All capitalized terms used but not defined herein shall have the meanings given to them in the Settlement Agreement.

RELEVANT BACKGROUND

A. Procedural Background

3. On October 16, 2019 (the “Petition Date”), the Debtor filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code in the Bankruptcy Court for the District of Delaware, Case No. 19-12239 (CSS) (the “Delaware Court”).

4. On October 29, 2019, the official committee of unsecured creditors (the “Committee”) was appointed by the U.S. Trustee in the Delaware Court.

5. On December 4, 2019, the Delaware Court entered an order transferring venue of the Debtor’s case to this Court [Docket No. 186].³

6. On December 27, 2019, the Debtor filed that certain *Motion of the Debtor for Approval of Settlement with the Official Committee of Unsecured Creditors Regarding Governance of the Debtor and Procedures for Operations in the Ordinary Course* [Docket No. 281] (the “Settlement Motion”). This Court approved the Settlement Motion on January 9, 2020 [Docket No. 339] (the “Settlement Order”).

7. In connection with the Settlement Order, an independent board of directors was constituted at the Debtor’s general partner, Strand Advisors, Inc., and certain operating protocols were instituted.

8. On July 16, 2020, this Court entered an order appointing James P. Seery, Jr., as the Debtor’s chief executive officer and chief restructuring officer [Docket No. 854].

9. The Debtor has continued in the possession of its property and has continued to operate and manage its business as a debtor-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No trustee or examiner has been appointed in this chapter 11 case.

³ All docket numbers refer to the docket maintained by this Court.

B. Overview of HarbourVest's Claims

10. HarbourVest's claims against the Debtor's estate arise from its \$80 million investment in Highland CLO Funding, f/k/a Acis Loan Funding, Ltd. ("HCLOF"), pursuant to which HarbourVest obtained a 49 percent interest in HCLOF (the "Investment").

11. In brief, HarbourVest contends that it was fraudulently induced into entering into the Investment based on the Debtor's misrepresentations and omissions concerning certain material facts, including that the Debtor: (1) failed to disclose that it never intended to pay an arbitration award obtained by a former portfolio manager, (2) failed to disclose that it engaged in a series of fraudulent transfers for the purpose of preventing the former portfolio manager from collecting on his arbitration award and misrepresented the reasons changing the portfolio manager for HCLOF immediately prior to the Investment, (3) indicated that the dispute with the former portfolio manager would not impact investment activities, and (4) expressed confidence in the ability of HCLOF to reset or redeem the collateralized loan obligations ("CLOs") under its control.

12. HarbourVest seeks to rescind its Investment and claims damages in excess of \$300 million based on theories of fraud, fraudulent inducement, fraudulent concealment, fraudulent misrepresentation, negligent misrepresentation, and breach of fiduciary duty (under Guernsey law), and on alleged violations of state securities laws and the Racketeer Influenced Corrupt Organization Act ("RICO").

13. HarbourVest's allegations are summarized below.⁴

⁴ Solely for purposes of this Motion, and not for any other reason, the facts set forth herein are adopted largely from the *HarbourVest Response to Debtor's First Omnibus Objection to Certain (A) Duplicate Claims; (B) Overstated Claims; (C) Late-Filed Claims; (D) Satisfied Claims; (E) No-Liability Claims; and (F) Insufficient-Documentation Claims* [Docket No. 1057] (the "Response").

C. Summary of HarbourVest's Factual Allegations

14. At the time HarbourVest made its Investment, the Debtor was embroiled in an arbitration against Joshua Terry ("Mr. Terry"), a former employee of the Debtor and limited partner of Acis Capital Management, L.P. ("Acis LP"). Through Acis LP, Mr. Terry managed Highland's CLO business, including CLO-related investments held by Acis Loan Funding, Ltd. ("Acis Funding").

15. The litigation between Mr. Terry and the Debtor began in 2016, after the Debtor terminated Mr. Terry and commenced an action against him in Texas state court. Mr. Terry asserted counterclaims for wrongful termination and for the wrongful taking of his ownership interest in Acis LP and subsequently had certain claims referred to arbitration where he obtained an award of approximately \$8 million (the "Arbitration Award") on October 20, 2017.

16. HarbourVest alleges that the Debtor responded to the Arbitration Award by engaging in a series of fraudulent transfers and corporate restructurings, the true purposes of which were fraudulently concealed from HarbourVest.

17. For example, according to HarbourVest, the Debtor changed the name of the target fund from Acis Funding to "Highland CLO Funding, Ltd." ("HCLOF") and "swapped out" Acis LP for Highland HCF Advisor, Ltd. as portfolio manager (the "Structural Changes"). The Debtor allegedly told HarbourVest that it made these changes because of the "reputational harm" to Acis LP resulting from the Arbitration Award. The Debtor further told HarbourVest that in lieu of redemptions, resetting the CLOs was necessary, and that it would be easier to reset them under the "Highland" CLO brand instead of the Acis CLO brand.

18. In addition, HarbourVest also alleges that the Debtor had no intention of allowing Mr. Terry to collect on his Arbitration Award, and orchestrated a scheme to "denude"

Acis of assets by fraudulently transferring virtually all of its assets and attempting to transfer its profitable portfolio management contracts to non-Acis, Debtor-related entities.

19. Unaware of the fraudulent transfers or the true purposes of the Structural Changes, and in reliance on representations made by the Debtor, HarbourVest closed on its Investment in HCLOF on November 15, 2017.

20. After discovering the transfers that occurred between Highland and Acis between October and December 2017 following the Arbitration Award (the “Transfers”), on January 24, 2018, Terry moved for a temporary restraining order (the “TRO”) from the Texas state court on the grounds that the Transfers were pursued for the purpose of rendering Acis LP judgment-proof. The state court granted the TRO, enjoining the Debtor from transferring any CLO management contracts or other assets away from Acis LP.

21. On January 30, 2018, Mr. Terry filed involuntary bankruptcy petitions against Acis LP and its general partner, Acis Capital Management GP, LLC. *See In re Acis Capital Management, L.P.*, Case No. 18-30264-sgj11 (Bankr. N.D. Tex. 2018) and *In re Acis Capital Management GP, LLC*, Case No. 18-30265-sgj11 (Bankr. N.D. Tex. 2018) (collectively, the “Acis Bankruptcy Case”). The Bankruptcy Court overruled the Debtor’s objection, granted the involuntary petitions, and appointed a chapter 11 trustee (the “Acis Trustee”). A long sequence of events subsequently transpired, all of which relate to HarbourVest’s claims, including:

- On May 31, 2018, the Court issued a *sua sponte* TRO preventing any actions in furtherance of the optional redemptions or other liquidation of the Acis CLOs.
- On June 14, 2018, HCLOF withdrew optional redemption notices.
- The TRO expired on June 15, 2018, and HCLOF noticed the Acis Trustee that it was requesting an optional redemption.

- HCLOF's request was withdrawn on July 6, 2018, and on June 21, 2018, the Acis Trustee sought an injunction preventing Highland/HCLOF from seeking further redemptions (the "Preliminary Injunction").
- The Court granted the Preliminary Injunction on July 10, 2018, pending the Acis Trustee's attempts to confirm a plan or resolve the Acis Bankruptcy.
- On August 30, 2018, the Court denied confirmation of the First Amended Joint Plan for Acis, and held that the Preliminary Injunction must stay in place on the ground that the "evidence thus far has been compelling that numerous transfers after the Josh Terry judgment denuded Acis of value."
- After the Debtor made various statements implicating HarbourVest in the Transfers, the Acis Trustee investigated HarbourVest's involvement in such Transfers, including extensive discovery and taking a 30(b)(6) deposition of HarbourVest's managing director, Michael Pugatch, on November 17, 2018.
- On March 20, 2019, HCLOF sent a letter to Acis LP stating that it was not interested in pursuing, or able to pursue, a CLO reset transaction.

**D. The Parties' Pleadings and Positions Concerning HarbourVest's
Proofs of Claim**

22. On April 8, 2020, HarbourVest filed proofs of claim against Highland that were subsequently denoted by the Debtor's claims agents as claim numbers 143, 147, 149, 150, 153, and 154, respectively (collectively, the "Proofs of Claim"). Morris Dec. Exhibits 2-7.

23. The Proofs of Claim assert, among other things, that HarbourVest suffered significant harm due to conduct undertaken by the Debtor and the Debtor's employees, including "financial harm resulting from (i) court orders in the Acis Bankruptcy that prevented certain CLOs in which HCLOF was invested from being refinanced or reset and court orders that otherwise relegated the activity of HCLOF [*i.e.*, the Preliminary Injunction]; and (ii) significant fees and expenses related to the Acis Bankruptcy that were charged to HCLOF." *See, e.g.*, Morris Dec. Exhibit 2 ¶3.

24. HarbourVest also asserted "any and all of its right to payment, remedies, and other claims (including contingent or unliquidated claims) against the Debtor in connection with and relating to the forgoing harm, including for any amounts due or owed under the various

agreements with the Debtor in connection with relating to” the Operative Documents “and any and all legal and equitable claims or causes of action relating to the forgoing harm.” *See, e.g.*, Morris Dec. Exhibit 2 ¶4.

25. Highland subsequently objected to HarbourVest’s Proofs of Claim on the grounds that they were no-liability claims. [Docket No. 906] (the “Claim Objection”).

26. On September 11, 2020, HarbourVest filed its Response. The Response articulated specified claims under U.S. federal and state and Guernsey law, including claims for fraud, fraudulent concealment, fraudulent inducement, fraudulent misrepresentation, negligent misrepresentation (collectively, the “Fraud Claims”), U.S. State and Federal Securities Law Claims (the “Securities Claims”), violations of the Federal Racketeer Influenced and Corrupt Organizations Act (“RICO”), breach of fiduciary duty and misuse of fund assets, and an unfair prejudice claim under Guernsey law (collectively, with the Proofs of Claim, the “HarbourVest Claims”).

27. On October 18, 2020, HarbourVest filed its *Motion of HarbourVest Pursuant to Rule 3018 of the Federal Rules of Bankruptcy Procedure for Temporary Allowance of Claims for Purposes of Voting to Accept or Reject the Plan* [Docket No. 1207] (the “3018 Motion”). In its 3018 Motion, HarbourVest sought for its Claims to be temporarily allowed for voting purposes in the amount of more than \$300 million (based largely on a theory of treble damages).

E. Settlement Discussions

28. In October, the parties discussed the possibility of resolving the Rule 3018 Motion.

29. In November, the parties broadened the discussions in an attempt to reach a global resolution of the HarbourVest Claims. In the pursuit thereof, the parties and their

counsel participated in several conference calls where they engaged in a spirited exchange of perspectives concerning the facts and the law.

30. During follow up meetings, the parties' interests became more defined. Specifically, HarbourVest sought to maximize its recovery while fully extracting itself from the Investment, while the Debtor sought to minimize the HarbourVest Claims consistent with its perceptions of the facts and law.

31. After the parties' interests became more defined, the principals engaged in a series of direct, arm's-length, telephonic negotiations that ultimately lead to the settlement, whose terms are summarized below.

F. Summary of Settlement Terms

32. The Settlement Agreement contains the following material terms, among others:

- HarbourVest shall transfer its entire interest in HCLOF to an entity to be designated by the Debtor;⁵
- HarbourVest shall receive an allowed, general unsecured, non-priority claim in the amount of \$45 million and shall vote its Class 8 claim in that amount to support the Plan;
- HarbourVest shall receive a subordinated, allowed, general unsecured, non-priority claim in the amount of \$35 million and shall vote its Class 9 claim in that amount to support the Plan;
- HarbourVest will support confirmation of the Debtor's Plan, including, but not limited to, voting its claims in support of the Plan;
- The HarbourVest Claims shall be allowed in the aggregate amount of \$45 million for voting purposes;
- HarbourVest will support the Debtor's pursuit of its pending Plan of Reorganization; and
- The parties shall exchange mutual releases.

⁵ The NAV for HarbourVest's 49.98% interest in HCLOF was estimated to be approximately \$22 million as of December 1, 2020.

See generally Morris Dec. Exhibit 1.

BASIS FOR RELIEF REQUESTED

33. Bankruptcy Rule 9019 governs the procedural prerequisites to approval of a settlement, providing that:

On motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement. Notice shall be given to creditors, the United States trustee, the debtor, and indenture trustees as provided in Rule 2002 and to any other entity as the court may direct.

FED. R. BANKR. P. 9019(a).

34. Settlements in bankruptcy are favored as a means of minimizing litigation, expediting the administration of the bankruptcy estate, and providing for the efficient resolution of bankruptcy cases. *See Myers v. Martin (In re Martin)*, 91 F.3d 389, 393 (3d Cir. 1996); *Rivercity v. Herpel (In re Jackson Brewing Co.)*, 624 F.2d 599, 602 (5th Cir. 1980). Pursuant to Bankruptcy Rule 9019(a), a bankruptcy court may approve a compromise or settlement as long as the proposed settlement is fair, reasonable, and in the best interest of the estate. *See In re Age Ref. Inc.*, 801 F.3d 530, 540 (5th Cir. 2015). Ultimately, “approval of a compromise is within the sound discretion of the bankruptcy court.” *See United States v. AWECO, Inc. (In re AWECO, Inc.)*, 725 F.2d 293, 297 (5th Cir. 1984); *Jackson Brewing*, 624 F.2d at 602–03.

35. In making this determination, the United States Court of Appeals for the Fifth Circuit applies a three-part test, “with a focus on comparing ‘the terms of the compromise with the rewards of litigation.’” *Official Comm. of Unsecured Creditors v. Cajun Elec. Power Coop. (In re Cajun Elec. Power Coop.)*, 119 F.3d 349, 356 (5th Cir. 1997) (citing *Jackson Brewing*, 624 F.2d at 602). The Fifth Circuit has instructed courts to consider the following factors: “(1) The probability of success in the litigation, with due consideration for the uncertainty of law and fact, (2) The complexity and likely duration of the litigation and any

attendant expense, inconvenience and delay, and (3) All other factors bearing on the wisdom of the compromise.” *Id.* Under the rubric of the third factor referenced above, the Fifth Circuit has specified two additional factors that bear on the decision to approve a proposed settlement. First, the court should consider “the paramount interest of creditors with proper deference to their reasonable views.” *Id.*; *Conn. Gen. Life Ins. Co. v. United Cos. Fin. Corp. (In re Foster Mortgage Corp.)*, 68 F.3d 914, 917 (5th Cir. 1995). Second, the court should consider the “extent to which the settlement is truly the product of arms-length bargaining, and not of fraud or collusion.” *Age Ref. Inc.*, 801 F.3d at 540; *Foster Mortgage Corp.*, 68 F.3d at 918 (citations omitted).

36. There is ample basis to approve the proposed Settlement Agreement based on the Rule 9019 factors set forth by the Fifth Circuit.

37. First, although the Debtor believes that it has valid defenses to the HarbourVest Claims, there is no guarantee that the Debtor would succeed in its litigation with HarbourVest. Indeed, to establish its defenses, the Debtor would be required to rely, at least in part, on the credibility of witnesses whose veracity has already been called into question by this Court. Moreover, it will be difficult to dispute that the Transfers precipitated the Acis Bankruptcy, and, ultimately, the imposition of the Bankruptcy Court’s TRO that restricted HCLOF’s ability to reset or redeem the CLOs and that is at the core of the HarbourVest Claims.

38. The second factor—the complexity, duration, and costs of litigation—also weighs heavily in favor of approving the Settlement Agreement. As this Court is aware, the events forming the basis of the HarbourVest Claims—including the Terry Litigation and Acis Bankruptcy—proceeded *for years* in this Court and in multiple other forums, and has already cost the Debtor’s estate millions of dollars in legal fees. If the Settlement Agreement is not approved, then the parties will expend significant resources litigating a host of fact-intensive

issues including, among other things, the substance and materiality of the Debtor's alleged fraudulent statements and omissions and whether HarbourVest reasonably relied on those statements and omissions.

39. Third, approval of the Settlement Agreement is justified by the paramount interest of creditors. Specifically, the settlement will enable the Debtor to: (a) avoid incurring substantial litigation costs; (b) avoid the litigation risk associated with HarbourVest's \$300 million claim; and (c) through the plan support provisions, increase the likelihood that the Debtor's pending plan of reorganization will be confirmed.

40. Finally, the Settlement Agreement was unquestionably negotiated at arm's-length. The terms of the settlement are the result of numerous, ongoing discussions and negotiations between the parties and their counsel and represent neither party's "best case scenario." Indeed, the Settlement Agreement should be approved as a rational exercise of the Debtor's business judgment made after due deliberation of the facts and circumstances concerning HarbourVest's Claims.

NO PRIOR REQUEST

41. No previous request for the relief sought herein has been made to this, or any other, Court.

NOTICE

42. Notice of this Motion shall be given to the following parties or, in lieu thereof, to their counsel, if known: (a) counsel for HarbourVest; (b) the Office of the United States Trustee; (c) the Office of the United States Attorney for the Northern District of Texas; (d) the Debtor's principal secured parties; (e) counsel to the Committee; and (f) parties requesting notice pursuant to Bankruptcy Rule 2002. The Debtor submits that, in light of the nature of the relief requested, no other or further notice need be given.

WHEREFORE, the Debtor respectfully requests entry of an order, substantially in the form attached hereto as Exhibit A, (a) granting the relief requested herein, and (b) granting such other relief as is just and proper.

Dated: December 23, 2020.

PACHULSKI STANG ZIEHL & JONES LLP

Jeffrey N. Pomerantz (CA Bar No. 143717)
Ira D. Kharasch (CA Bar No. 109084)
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-and-

HAYWARD & ASSOCIATES PLLC

/s/ Zachery Z. Annable

Melissa S. Hayward
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Zachery Z. Annable
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Dallas, Texas 75231
Tel: (972) 755-7100
Fax: (972) 755-7110

Counsel for the Debtor and Debtor-in-Possession

EXHIBIT 3

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SETTLEMENT AGREEMENT

This Settlement Agreement (the “Agreement”) is entered into as of December 23, 2020, between Highland Capital Management, L.P. (the “Debtor”), on the one hand, and HarbourVest 2017 Global Fund L.P., HarbourVest 2017 Global AIF L.P., HarbourVest Dover Street IX Investment L.P., HV International VIII Secondary L.P., HarbourVest Skew Base AIF L.P., and HarbourVest Partners L.P. (each, a “HarbourVest Party,” and collectively, “HarbourVest”), on the other hand. Each of the foregoing are sometimes referred to herein collectively as the “Parties” and individually as a “Party.”

RECITALS

WHEREAS, on October 16, 2019 (the “Petition Date”), the Debtor filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code (the “Bankruptcy Case”) in the Bankruptcy Court for the District of Delaware, Case No. 19-12239 (CSS) (the “Delaware Bankruptcy Court”);

WHEREAS, on December 4, 2019, the Delaware Bankruptcy Court entered an order transferring venue of the Debtor’s case to the Bankruptcy Court for the Northern District of Texas, Dallas Division, Case No. 19-34054-sgj (the “Bankruptcy Court”);

WHEREAS, prior to the Petition Date, HarbourVest invested in Highland CLO Funding, Ltd. f/k/a Acis Loan Funding, Ltd. (“HCLOF”) and acquired an a 49.98% ownership interest in HCLOF (the “HarbourVest Interests”);

WHEREAS, the portfolio manager for HCLOF is Highland HCF Advisor, Ltd., a subsidiary of the Debtor;

WHEREAS, on April 8, 2020, HarbourVest filed proofs of claim in the Bankruptcy Case, which are listed on the Debtor’s claims register as claim numbers 143, 147, 149, 150, 153, and 154 (the “HarbourVest Claims”), asserting claims against the Debtor relating to its investment in HCLOF;

WHEREAS, on July 30, 2020, the Debtor filed the *Debtor’s First Omnibus Objection to Certain (a) Duplicate Claims; (b) Overstated Claims; (c) Late-Filed Claims; (d) Satisfied Claims; (e) No Liability Claims; and (f) Insufficient-Documentation Claims* [Docket No. 906], in which the Debtor objected to the HarbourVest Claims;

WHEREAS, on September 11, 2020, HarbourVest filed the *HarbourVest Response to Debtor’s First Omnibus Objection to Creation (a) Duplicate Claims; (b) Overstated Claims; (c) Late-Filed Claims; (d) Satisfied Claims; (e) No Liability Claims; and (f) Insufficient-Documentation Claims* [Docket No. 1057] (the “HarbourVest Response”);

WHEREAS, on October 18, 2020, HarbourVest filed the *Motion of HarbourVest Pursuant to Rule 3018(a) of the Federal Rules of Bankruptcy Procedure for Temporary Allowance of Claims for Purposes of Voting to Accept or Reject the Plan* [Docket No. 1207] (the “3018 Motion” and together with the HarbourVest Response, the “HarbourVest Pleadings”);

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WHEREAS, in the HarbourVest Pleadings, HarbourVest asserted, among other things, that the HarbourVest Claims included claims against the Debtor arising from fraudulent inducement, fraudulent concealment, fraudulent misrepresentation, breach of fiduciary duty, breach of securities laws, and misuse of assets and sought damages in excess of \$300,000,000;

WHEREAS, the Debtor disputes the HarbourVest Claims;

WHEREAS, on November 24, 2020, the Debtor filed the *Fifth Amended Plan of Reorganization for Highland Capital Management, L.P.* [Docket No. 1472] (as amended, the “Plan”).¹

WHEREAS, the Parties desire to enter into this Agreement which incorporates, formalizes, and finalizes the full and final resolution of the HarbourVest Claims and HarbourVest Pleadings; and

WHEREAS, this Agreement will be presented to the Bankruptcy Court for approval pursuant to **Federal Rule of Bankruptcy Procedure 9019** (“Rule 9019”).

NOW THEREFORE, in consideration of the above recitals, the covenants, conditions, and promises made herein, and other good and valuable consideration, the receipt of which is hereby acknowledged, the Parties agree as follows:

1. **Settlement of Claims.**

(a) In full and complete satisfaction of the HarbourVest Claims, HarbourVest will receive:

(i) an allowed, nonpriority general unsecured claim in the aggregate amount of \$45,000,000 (the “Allowed GUC Claim”); and

(ii) an allowed subordinated claim in the aggregate amount of \$35,000,000 (the “Allowed Subordinated Claim” and together with the Allowed GUC Claim, the “Allowed Claims”).

(b) On the Effective Date, HarbourVest will transfer all of its rights, title, and interest in the HarbourVest Interests to the Debtor or its nominee pursuant to the terms of the *Transfer Agreement for Ordinary Shares of Highland CLO Funding, Ltd.*, attached hereto as Exhibit A (the “Transfer Agreements”) and the Debtor or its nominee will become a shareholder of HCLOF with respect to the HarbourVest Interests. The terms of the Transfer Agreements are incorporated into this Agreement by reference.

2. **Releases.**

(a) Upon the Effective Date, and to the maximum extent permitted by law, each HarbourVest Party on behalf of itself and each of its current and former advisors, trustees, directors, officers, managers, members, partners, employees, beneficiaries, shareholders, agents,

¹ All capitalized terms used but not defined herein shall have the meanings given to them in the Plan.

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participants, subsidiaries, parents, successors, designees, and assigns hereby forever, finally, fully, unconditionally, and completely releases, relieves, acquits, remises, and exonerates, and covenants never to sue, the Debtor, HCLOF, HCLOF's current and former directors, and the Debtor's current and former advisors, trustees, directors, officers, managers, members, partners, employees, beneficiaries, shareholders, agents, participants, subsidiaries, parents, affiliates, successors, designees, and assigns, except as expressly set forth below (the "Debtor Released Parties"), for and from any and all claims, debts, liabilities, demands, obligations, promises, acts, agreements, liens, losses, costs and expenses (including, without limitation, attorney's fees and related costs), damages, injuries, suits, actions, and causes of action of whatever kind or nature, whether known or unknown, suspected or unsuspected, matured or unmatured, liquidated or unliquidated, contingent or fixed, at law or in equity, statutory or otherwise, including, without limitation, any claims, defenses, and affirmative defenses, whether known or unknown, including, without limitation, those which were or could have been asserted in, in connection with, or with respect to the Bankruptcy Case (collectively, the "HarbourVest Released Claims").

(b) Upon the Effective Date, and to the maximum extent permitted by law, the Debtor hereby forever, finally, fully, unconditionally, and completely releases, relieves, acquits, remises, and exonerates, and covenants never to sue (i) each HarbourVest Party and (ii) each HarbourVest Party's current and former advisors, trustees, directors, officers, managers, members, partners, employees, beneficiaries, shareholders, agents, participants, subsidiaries, parents, affiliates, successors, designees, and assigns (the "HarbourVest Released Parties"), for and from any and all claims, debts, liabilities, demands, obligations, promises, acts, agreements, liens, losses, costs and expenses (including, without limitation, attorney's fees and related costs), damages, injuries, suits, actions, and causes of action of whatever kind or nature, whether known or unknown, suspected or unsuspected, matured or unmatured, liquidated or unliquidated, contingent or fixed, at law or in equity, statutory or otherwise, including, without limitation, any claims, defenses, and affirmative defenses, whether known or unknown, which were or could have been asserted in, in connection with, or with respect to the Bankruptcy Case (collectively, the "Debtor Released Claims"); *provided, however*, that notwithstanding anything herein to the contrary, the release contained in this Section 2(b) will apply to the HarbourVest Released Parties set forth in subsection (b)(ii) only with respect to Debtor Released Claims arising from or relating to HarbourVest's ownership of the HarbourVest Interests.

(c) Notwithstanding anything in this Agreement to the contrary, the releases set forth herein will not apply with respect to (i) the Allowed Claims, (ii) the claims of Charlotte Investor IV, L.P., or (iii) the duties, rights, or obligations of any Party under this Agreement or the Transfer Agreements.

3. **Agreement Subject to Bankruptcy Court Approval.** The effectiveness of this Agreement and the Parties' obligations hereunder are conditioned in all respects on the approval of this Agreement by the Bankruptcy Court. The Parties agree to cooperate and use reasonable efforts to have this Agreement approved by the Bankruptcy Court. The "Effective Date" will be the date of an order entered by the Bankruptcy Court approving this Agreement pursuant to a motion filed under Rule 9019.

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4. **Representations and Warranties.** Subject in all respects to Section 3 hereof:

(a) each HarbourVest Party represents and warrants that (i) it has full authority to enter into this Agreement and to release the HarbourVest Released Claims and has not sold, transferred, or assigned any HarbourVest Released Claim to any other person or entity, (ii) no person or entity other than such HarbourVest Party has been, is, or will be authorized to bring, pursue, or enforce any HarbourVest Released Claim on behalf of, for the benefit of, or in the name of (whether directly or derivatively) of such HarbourVest Party; and (iii) HarbourVest owns all of the HCLOF Interests free and clear of any claims or interests; and

(b) the Debtor represents and warrants to HarbourVest that (i) it has full authority to enter into this Agreement and to release the Debtor Released Claims and (ii) no person or entity other than the Debtor has been, is, or will be authorized to bring, pursue, or enforce any Debtor Released Claim on behalf of, for the benefit of, or in the name of (whether directly or derivatively) of the Debtor Party.

5. **Plan Support.**

(a) Each HarbourVest Party hereby agrees that it will (a) vote all HarbourVest Claims held by such HarbourVest Party to accept the Plan, by delivering its duly executed and completed ballots accepting the Plan on a timely basis; and (b) not (i) change, withdraw, or revoke such vote (or cause or direct such vote to be changed withdrawn or revoked); (ii) exercise any right or remedy for the enforcement, collection, or recovery of any claim against the Debtor except in a manner consistent with this Agreement or the Plan, (iii) object to, impede, or take any action other action to interfere with, delay or postpone acceptance or confirmation of the Plan; (iv) directly or indirectly solicit, propose, file, support, participate in the formulation of or vote for, any restructuring, sale of assets (including pursuant to **11 U.S.C. § 363**), merger, workout, or plan of reorganization of the Debtor other than the Plan; or (v) otherwise take any action that would in any material respect interfere with, delay, or postpone the consummation of the Plan; provided, however, that such vote may be revoked (and, upon such revocation, deemed void ab initio) by such HarbourVest Party at any time following the termination of this agreement or the occurrence of a Support Termination Event (it being understood that any termination of this agreement shall entitle each HarbourVest Party to change its vote in accordance with section 1127(d) of the Bankruptcy Code), notwithstanding any voting deadline established by the Bankruptcy Court including without limitation the January 5, 2021, 5:00 p.m. (prevailing Central Time) deadline established by the *Order Approving Form of Ballots, Voting Deadline and Solicitation Procedures* [**Docket No. 1476**].

(b) In full resolution of the 3018 Motion, HarbourVest will have a general unsecured claim for voting purposes only in the amount of \$45,000,000.

(c) The obligations of the HarbourVest Parties under this Section 5 shall automatically terminate upon the occurrence of any of the following (each a “Support Termination Event”): (i) the effective date of the Plan, (ii) the withdrawal of the Plan, (iii) the entry of an order by the Bankruptcy Court (A) converting the Bankruptcy Case to a case under chapter 7 of the Bankruptcy Code or (B) appointing an examiner with expanded powers beyond those set forth in sections 1106(a)(3) and (4) of the Bankruptcy Code or a trustee in Bankruptcy

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Case, or (iv) the failure of the Court to enter an order approving the terms of this Agreement and the settlement described herein pursuant to Rule 9019 prior to confirmation of the Plan.

6. **No Admission of Liability.** The Parties acknowledge that there is a bona fide dispute with respect to the HarbourVest Claims. Nothing in this Agreement will imply, an admission of liability, fault or wrongdoing by the Debtor, HarbourVest, or any other person, and the execution of this Agreement does not constitute an admission of liability, fault, or wrongdoing on the part of the Debtor, HarbourVest, or any other person.

7. **Successors-in-Interest.** This Agreement shall be binding upon and shall inure to the benefit of each of the Parties and their successors, and assigns.

8. **Notice.** Each notice and other communication hereunder will be in writing and will be sent by email and delivered or mailed by registered mail, receipt requested, and will be deemed to have been given on the date of its delivery, if delivered, and on the fifth full business day following the date of the mailing, if mailed to each of the Parties thereto at the following respective addresses or such other address as may be specified in any notice delivered or mailed as set forth below:

HARBOURVEST

HarbourVest Partners L.P.
Attention: Michael J. Pugatch
One Financial Center
Boston, MA 02111
Telephone No. 617-348-3712
E-mail: mpugatch@harbourvest.com

with a copy (which shall not constitute notice) to:

Debevoise & Plimpton LLP
Attention: M. Natasha Labovitz, Esq.
919 Third Avenue
New York, NY 10022
Telephone No. 212-909-6649
E-mail: nlabovitz@debevoise.com

THE DEBTOR

Highland Capital Management, L.P.
300 Crescent Court, Suite 700
Dallas, Texas 75201
Attention: James P. Seery, Jr.
Telephone No.: 972-628-4100
Facsimile No.: 972-628-4147
E-mail: jpseeryjr@gmail.com

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with a copy (which shall not constitute notice) to:

Pachulski Stang Ziehl & Jones LLP
Attention: Jeffrey Pomerantz, Esq.
10100 Santa Monica Blvd., 13th Floor
Los Angeles, CA 90067
Telephone No.: 310-277-6910
Facsimile No.: 310-201-0760
E-mail: jpomerantz@pszjlaw.com

9. **Advice of Counsel.** Each Party represents that it has: (a) been adequately represented by independent legal counsel of its own choice, throughout all of the negotiations that preceded the execution of this Agreement; (b) executed this Agreement upon the advice of such counsel; (c) read this Agreement, and understands and assents to all the terms and conditions contained herein without any reservations; and (d) had the opportunity to have this Agreement and all the terms and conditions contained herein explained by independent counsel, who has answered any and all questions asked of such counsel, or which could have been asked of such counsel, including, but not limited to, with regard to the meaning and effect of any of the provisions of this Agreement.

10. **Entire Agreement.** This Agreement and the Transfer Agreement contain the entire agreement and understanding concerning the subject matter of this Agreement, and supersede and replace all prior negotiations and agreements, written or oral and executed or unexecuted, concerning such subject matter. Each of the Parties acknowledges that no other Party, nor any agent of or attorney for any such Party, has made any promise, representation or warranty, express or implied, written or oral, not otherwise contained in this Agreement to induce any Party to execute this Agreement. The Parties further acknowledge that they are not executing this Agreement in reliance on any promise, representation or warranty not contained in this Agreement, and that any such reliance would be unreasonable. This Agreement will not be waived or modified except by an agreement in writing signed by each Party or duly authorized representative of each Party.

11. **No Party Deemed Drafter.** The Parties acknowledge that the terms of this Agreement are contractual and are the result of arms'-length negotiations between the Parties and their chosen counsel. Each Party and its counsel cooperated in the drafting and preparation of this Agreement. In any construction to be made of this Agreement, the Agreement will not be construed against any Party.

12. **Future Cooperation.** The Parties agree to cooperate and execute such further documentation as is reasonably necessary to effectuate the intent of this Agreement.

13. **Counterparts.** This Agreement may be executed in counterparts with the same force and effect as if executed in one complete document. Each Party's signature hereto will signify acceptance of, and agreement to, the terms and provisions contained in this Agreement. Photographic, electronic, and facsimile copies of signed counterparts may be used in lieu of the originals of this Agreement for any purpose.

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14. **Governing Law; Venue; Attorneys' Fees and Costs.** The Parties agree that this Agreement will be governed by and will be construed according to the laws of the State of Texas without regard to conflict-of-law principles. Each of the Parties hereby submits to the exclusive jurisdiction of the Bankruptcy Court during the pendency of the Bankruptcy Case and thereafter to the exclusive jurisdiction of the state and federal courts located in the Northern District of Texas, Dallas Division, with respect to any disputes arising from or out of this Agreement. In any action to enforce this Agreement, the prevailing party shall be entitled to recover its reasonable and necessary attorneys' fees and costs (including experts).

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EXECUTION VERSION

IT IS HEREBY AGREED.

HIGHLAND CAPITAL MANAGEMENT, L.P.

By: /s/ James P. Seery, Jr.
Name: James P. Seery, Jr.
Its: CEO/CRO

HarbourVest 2017 Global Fund L.P., by HarbourVest 2017 Global Associates L.P., its General Partner, by HarbourVest GP LLC, its General Partner, by HarbourVest Partners, LLC, its Managing Member

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

HarbourVest 2017 Global AIF L.P., by HarbourVest Partners (Ireland) Limited, its Alternative Investment Fund Manager, by HarbourVest Partners L.P., its Duly Appointed Investment Manager, by HarbourVest Partners, LLC, its General Partner

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

HarbourVest Dover Street IX Investment L.P., by HarbourVest Partners L.P., its Duly Appointed Investment Manager, by HarbourVest Partners, LLC, its General Partner

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

HarbourVest Partners L.P., on behalf of funds and accounts under management, by HarbourVest Partners, LLC, its General Partner

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

EXECUTION VERSION

**HarbourVest Skew Base AIF L.P., by HarbourVest Partners (Ireland) Limited, its
Alternative Investment Fund Manager, by HarbourVest Partners L.P., its Duly Appointed
Investment Manager, by HarbourVest Partners, LLC, its General Partner**

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

**HV International VIII Secondary L.P., by HIPEP VIII Associates L.P., its General
Partner, by HarbourVest GP LLC, its General Partner, by HarbourVest Partners, LLC,
its Managing Member**

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

Exhibit A

003970

TRANSFER AGREEMENT
FOR ORDINARY SHARES OF
HIGHLAND CLO FUNDING, LTD.

This Transfer Agreement, dated as of December [REDACTED], 2020 (this “**Transfer Agreement**”), is entered into by and among Highland CLO Funding, Ltd. (the “**Fund**”), Highland HCF Advisor, Ltd. (the “**Portfolio Manager**”), HCMLP Investments, LLC (the “**Transferee**”) and each of the following: HarbourVest Dover Street IX Investment L.P., HarbourVest 2017 Global AIF L.P., HarbourVest 2017 Global Fund L.P., HV International VIII Secondary L.P., and HarbourVest Skew Base AIF L.P. (collectively, the “**Transferors**”).

WHEREAS, each Transferor is the record, legal and beneficial owner of the number of ordinary shares (“**Shares**”) of the Fund set forth opposite such Transferor’s name on Exhibit A hereto (with respect to each Transferor, the “**Transferred Shares**”).

WHEREAS the Transferee is an affiliate and wholly owned subsidiary of Highland Capital Management, L.P. (“**HCMLP**”) which is one of the initial members of the Fund.

WHEREAS, each Transferor wishes to transfer and assign 100% of its rights, title and interest as a shareholder in the Fund, including the Transferred Shares (the “**Interest**”) on the terms set forth in this Transfer Agreement.

WHEREAS, subject to and in connection with the approval of that certain Settlement Agreement, dated on or about the date hereof, by and among HCMLP and the Transferors (the “**Settlement Agreement**”), the Transferee desires that the Interest be transferred to Transferee and that thereafter the Transferee will become a Shareholder and the Transferors will no longer be Shareholders.

WHEREAS, the Portfolio Manager desires to consent to such transfers and to the admission of Transferee as a Shareholder on the terms set forth herein, and the Transferors and Transferee agree to such terms.

WHEREAS, the Fund desires to amend its records to reflect the foregoing transfers.

NOW, THEREFORE, the parties hereto agree as follows:

1. Transfer of Shares and Advisory Board

- a. Each Transferor hereby transfers and assigns all of its rights, title, and interest in its Interest to the Transferee, and the Transferee wishes to be admitted to the Fund as a Shareholder.
- b. In connection with the transfer of the Interest as contemplated herein, the Transferee shall be granted the right to appoint a representative to the Fund’s advisory board (the “**Advisory Board**”) to replace the Transferors’ appointed representative to the Advisory Board.

- c. Transferee hereby assumes all of Transferor's rights and obligations in respect of the Interest effective as of the Effective Date (as defined below) and acknowledge that thereafter Transferee shall be subject to the applicable terms and provisions of the Members' Agreement dated as of November 15, 2017 (the "**Members' Agreement**"), the Articles of Incorporation adopted November 15, 2017 (the "**Articles**") and the Subscription and transfer Agreement, dated as of November 15, 2017 among each Transferor, the Fund and the Portfolio Manager (the "**Subscription Agreement**", and together with the Members' Agreement and the Articles, the "**Fund Agreements**") with respect to the Interest. Transferee does not assume any liability or responsibility for any obligations or liabilities incurred by any Transferor prior to the Effective Date of the transfer.
 - d. Following the transfer, each Transferor shall have no further rights or obligations to any party hereunder in respect of the Interest under the Fund Agreements.
 - e. This Transfer Agreement, and the parties' obligations hereunder, are conditioned in all respects on the approval by the Bankruptcy Court for the Northern District of Texas, Dallas Division pursuant to **Federal Rule of Bankruptcy Procedure 9019** of (i) this Transfer Agreement and (ii) the Settlement Agreement, and each of the parties agree that no further action shall be required from any party for the transfer of the Interest to be effective except as described herein.
2. Transferee's Representations and Warranties. The Transferee represents and warrants to the Transferors, the Portfolio Manager, and the Fund as follows:
- a. This Transfer Agreement constitutes a valid and binding obligation of the Transferee, enforceable against it in accordance with its terms;
 - b. This Transfer Agreement has been duly and validly executed and delivered by or on behalf of the Transferee and such execution and delivery have been duly authorized by all necessary trust action of the Transferee;
 - c. The Transferee acknowledges receipt of, has read, and is familiar with, the Fund's Offering Memorandum for Placing Shares dated November 15, 2017 (the "**Offering Memorandum**") and the Fund Agreements;
 - d. The Transferee hereby accepts and receives the Interest from the Transferors for investment, and not with a view to the sale or distribution of any part thereof, and the Transferee has no present intention of selling, granting participations in, or otherwise distributing the same, but subject nevertheless to any requirement of law that the disposition of the Transferee's property shall at all times be within such Transferee's control; and
 - e. The Transferee is an "Eligible U.S. Investor" as defined in the Offering Memorandum.

3. Transferors' Representations and Warranties. Each Transferor represents and warrants to the Transferee, the Portfolio Manager, and the Fund as follows:

- a. This Transfer Agreement constitutes a valid and binding obligation of the Transferor, enforceable against it in accordance with its terms;
- b. This Transfer Agreement has been duly authorized, and duly and validly executed and delivered by the Transferor and such execution and delivery have been duly authorized by all necessary action of the Transferor; and
- c. As of the date hereof, the Transferor has good and valid title to the Transferor's Interest, free and clear of any liens, vesting requirements or claims by others.

4. Consent to Transfer. Based in part on the representations and warranties of the Transferors and the Transferee which are included herein, and on the terms contained herein, the Portfolio Manager and the Fund hereby consent to the transfers of the Interest, the admission of the Transferee as a Shareholder and the Transferee's appointment of a representative to the Advisory Board, the Portfolio Manager's execution of this Transfer Agreement constituting its prior written consent to the transfers of the Interest for the purposes of article 18.1 of the Articles and this Transfer Agreement constituting express notice in writing to the Fund of the assignment set out at clause 1(c) above for the purposes of the Law of Property (Miscellaneous Provisions) (Guernsey) Law, 1979 (as amended).

5. Completion: As of the date of approval by the Bankruptcy Court for the Northern District of Texas, Dallas Division pursuant to Federal Rule of Bankruptcy Procedure 9019 of (i) this Transfer Agreement and (ii) the Settlement Agreement (the "**Effective Date**"):

- a. each Transferor shall deliver or cause to be delivered to the Transferee a transfer instrument relating to the Transferred Shares duly executed and completed by that Transferor in favor of the Transferee; and
- b. the Transferee shall deliver to the Transferors and the Fund a duly executed and dated Adherence Agreement (as defined in the Members' Agreement).

Prior to the Effective Date the Transferee shall procure that:

- c. the board of directors of the Fund shall hold a meeting at which the transfer of the Shares to the Transferee shall be approved and registration in the register of members of the Fund shall be effected on the Effective Date.

6. Miscellaneous.

- a. Each of the parties hereto agree to execute any further instruments and perform any further acts which are or may become reasonably necessary to carry out the intent of this Transfer Agreement or are reasonably requested by the Portfolio Manager, the Fund or a Transferor to complete the transfer of the Interest.

- b. The parties to this Transfer Agreement acknowledge that the terms of this Transfer Agreement are the result of arms'-length negotiations between the parties and their respective counsel. Each party and its counsel cooperated in the drafting and preparation of this Transfer Agreement. In any construction to be made of this Transfer Agreement, the language or drafting of this Transfer Agreement will not be construed against any party.
- c. This Transfer Agreement shall be governed by, and construed and enforced in accordance with, the internal substantive laws of the state of Delaware, without giving effect to conflicts of law principles.
- d. The representations, warranties and covenants of the Transferors and the Transferee shall remain in full force and effect following the transfer of the Interest, and the Fund and the Portfolio Manager thereafter may rely on all such representations, warranties and covenants.
- e. This Transfer Agreement may be executed in multiple counterparts, each of which shall be deemed to be an original, but all of which together shall constitute one and the same instrument. Photographic, electronic, and facsimile copies of signed counterparts may be used in lieu of the originals of this Transfer Agreement for any purpose.
- f. Captions of sections have been added only for convenience and shall not be deemed to be a part of this Transfer Agreement.
- g. This Transfer Agreement is among the parties hereto. No Person that is not a party hereto shall have any right herein as a third-party beneficiary or otherwise except as expressly contemplated hereby.

[Remainder of Page Intentionally Blank]

IN WITNESS WHEREOF, the undersigned have executed this Transfer Agreement as of the date first above written.

TRANSFeree:

HCMLP Investments, LLC

By: Highland Capital Management, L.P.

Its: Member

By: _____

Name: James P. Seery, Jr.

Title: Chief Executive Officer

PORTFOLIO MANAGER:

Highland HCF Advisor, Ltd.

By: _____

Name: James P. Seery, Jr.

Title: President

FUND:

Highland CLO Funding, Ltd.

By: _____

Name:

Title:

[Additional Signatures on Following Page]

IN WITNESS WHEREOF, the undersigned have executed this Transfer Agreement as of
the date first above written.

TRANSFERORS:

HarbourVest Dover Street IX Investment L.P.

By: HarbourVest Partners L.P., its Duly Appointed
Investment Manager

By: HarbourVest Partners, LLC

By: _____

Name: Michael Pugatch

Title: Managing Director

HV International VIII Secondary L.P.

By: HIPEP VIII Associates L.P.
Its General Partner

By: HarbourVest GP LLC
Its General Partner

By: HarbourVest Partners, LLC
Its Managing Member

By: _____

Name: Michael Pugatch

Title: Managing Director

HarbourVest 2017 Global AIF L.P.

By: HarbourVest Partners (Ireland) Limited
Its Alternative Investment Fund Manager

By: HarbourVest Partners L.P.
Its Duly Appointed Investment Manager

By: HarbourVest Partners, LLC
Its General Partner

By: _____

Name: Michael Pugatch

Title: Managing Director

HarbourVest Skew Base AIF L.P.

By: HarbourVest Partners (Ireland) Limited
Its Alternative Investment Fund
Manager

By: HarbourVest Partners L.P.
Its Duly Appointed Investment
Manager

By: HarbourVest Partners, LLC
Its General Partner

By: _____

Name: Michael Pugatch

Title: Managing Director

HarbourVest 2017 Global Fund L.P.

By: HarbourVest 2017 Global Associates L.P.
Its General Partner

By: HarbourVest GP LLC
Its General Partner

By: HarbourVest Partners, LLC
Its Managing Member

By: _____

Name: Michael Pugatch

Title: Managing Director

Exhibit A

<u>Transferee Name</u>	<u>Number of Shares</u>	<u>Percentage</u>
HarbourVest Dover Street IX Investment L.P.	[REDACTED]	[REDACTED]
HarbourVest 2017 Global AIF L.P.	[REDACTED]	[REDACTED]
HarbourVest 2017 Global Fund L.P.	[REDACTED]	[REDACTED]
HV International VIII Secondary L.P.	[REDACTED]	[REDACTED]
HarbourVest Skew Base AIF L.P.	[REDACTED]	[REDACTED]

EXHIBIT 4

003980

D. Michael Lynn
State Bar I.D. No. 12736500
John Y. Bonds, III
State Bar I.D. No. 02589100
John T. Wilson, IV
State Bar I.D. No. 24033344
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ATTORNEYS FOR JAMES DONDERO

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

IN RE:

**HIGHLAND CAPITAL MANAGEMENT,
L.P.,**

Debtor.

§
§
§
§
§
§

Case No. 19-34054

Chapter 11

**JAMES DONDERO'S OBJECTION TO DEBTOR'S MOTION FOR ENTRY
OF AN ORDER APPROVING SETTLEMENT WITH HARBOURVEST**

[Relates to Docket No. 1625]

James Dondero ("Respondent"), a creditor, indirect equity security holder, and party in interest in the above-captioned bankruptcy case, hereby files this Objection to *Debtor's Motion for Entry of an Order Approving Settlement with HarbourVest (Claim Nos. 143, 147, 149, 150, 153, 154)* [Docket No. 1625] (the "Motion") filed by Highland Capital Management, L.P. (the "Debtor"). Through the Motion, the Debtor seeks approval of its compromise with HarbourVest 2017 Global Fund L.P., HarbourVest 2017 Global AIF L.P., HarbourVest Dover Street IX Investment L.P., HV International VIII Secondary L.P., HarbourVest Skew Base AIF L.P., and HarbourVest Partners L.P. (collectively, "HarbourVest") pursuant to Rule 9019 of the Federal



Rules of Bankruptcy Procedure (the “Bankruptcy Rules”). In support of this objection, Respondent respectfully represents as follows:

I. INTRODUCTION

1. Under Bankruptcy Rule 9019, the Bankruptcy Court is tasked with making an independent judgment on the merits of a proposed settlement to ensure that the proposed settlement is “fair, equitable, and in the best interest of the estate.”¹ While Respondent recognizes the Debtor’s efforts in arranging a settlement, there are at least three significant issues with the terms of the settlement that merit denial of the Motion: (i) the proposed settlement is not reasonable or in the best interest of the estate given the weakness of the HarbourVest Claim (as hereinafter defined); (ii) the proposed settlement is a blatant attempt to purchase votes in support of Debtor’s plan by giving HarbourVest a significant claim to which it would not otherwise be entitled; and (iii) the proposed settlement seeks to improperly classify the HarbourVest Claim² in two separate classes in order to gerrymander an affirmative vote on its reorganization plan. Moreover, the proposed settlement does not satisfy the factors for approval fixed by case law. On information and belief, Debtor’s CEO/CRO, Mr. Seery, has previously asserted on multiple occasions that the HarbourVest Claim had no value and that the Debtor could resolve such claim for no more than \$5 million. While Respondent and Mr. Seery have had a number of disagreements in this case, Respondent agrees with Mr. Seery’s initial conclusion that the HarbourVest Claim is substantially without merit. Respondent understands that any settlement will not necessarily provide the best possible outcome for the Debtor, but in this instance the proposed settlement far exceeds the bounds of reasonableness and, on its face, is an attempt by the Debtor to purchase votes in favor

¹ See *In re Jackson Brewing Co.*, 624 F.2d 599, 602 (5th Cir. 1980).

² While HarbourVest has filed a number of claims, each filed claim is exactly the same except in the name of the claimant. See Claim Nos. 143, 147, 149, 150, 153, and 154.

of confirmation of its Plan. Given the Debtor's prior positions as to the merits of HarbourVest Claim it is necessary for the Court to closely scrutinize the settlement to determine why the Debtor now believes granting HarbourVest a net claim of nearly \$60 million³ resulting from HarbourVest's investment in a non-debtor entity (which was and is managed by a non-debtor) to be in the best interest of the estate. Upon close scrutiny, Respondent believes the Court will find that the proposed settlement is not reasonable or in the best interest of the estate and the Motion therefore should be denied.

II. BACKGROUND

2. On October 16, 2019 (the "Petition Date"), the Debtor filed a voluntary petition for relief under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code") in the U.S. Bankruptcy Court for the District of Delaware, Case No. 19-12239 (CSS) (the "Delaware Court").

3. On October 29, 2019, the Official Committee of Unsecured Creditors (the "Committee") was appointed by the U.S. Trustee in Delaware.

4. On December 4, 2019, the Delaware Court entered an order transferring venue of the Debtor's Bankruptcy Case to this Court [Docket No. 186].

5. On December 27, 2019, the Debtor filed that certain *Motion of the Debtor for Approval of Settlement with the Official Committee of Unsecured Creditors Regarding Governance of the Debtor and Procedures for Operations in the Ordinary Course* [Docket No. 281] (the "Settlement Motion"). This Court approved the Settlement Motion on January 9, 2020 [Docket No. 339] (the "Settlement Order").

³ The proposed settlement provides that HarbourVest shall receive an allowed general unsecured (Class 8) claim in the amount of \$45 million and an allowed subordinated general unsecured (Class 9) claim in the amount of \$35 million. As part of the settlement, HarbourVest will then transfer its entire interest in Highland CLO Funding, Ltd. ("HCLOF") to an entity to be designated by the Debtor. The Debtor states that the value of this interest is approximately \$22 million as of December 1, 2020.

6. In connection with the Settlement Order, an independent board of directors was appointed on January 9, 2020, for the Debtor's general partner, Strand Advisors, Inc. (the "Board"). The members of the Board are James P. Seery, Jr., John S. Dubel, and Russell F. Nelms.

7. On July 16, 2020, this Court entered an order authorizing the Debtor to employ James P. Seery, Jr. as Chief Executive Officer and Chief Restructuring Officer of the Debtor. *See* Docket No. 854.

8. On April 8, 2020, HarbourVest filed Proofs of Claim Numbers 143, 149, 149, 150, 153, and 154 (collectively, the "HarbourVest Claim")⁴.

9. On July 30, 2020, the Debtor filed *Debtor's First Omnibus Objection to Certain (A) Duplicate Claims; (B) Overstated Claims; (C) Late-Filed Claims; (D) Satisfied Claims; (E) No Liability Claims; and (F) Insufficient-Documentation Claims* [Docket No. 906] (the "Debtor Objection"), which contained an objection to the HarbourVest Claim.

10. On September 11, 2020, HarbourVest filed *HarbourVest Response to Debtor's First Omnibus Objection to Certain (A) Duplicate Claims; (B) Overstated Claims; (C) Late-Filed Claims; (D) Satisfied Claims; (E) No Liability Claims; and (F) Insufficient-Documentation Claims* [Docket No. 1057] (the "HarbourVest Response").

11. On December 23, 2020, the Debtor filed the Motion seeking approval of a proposed settlement of the HarbourVest Claim under Rule 9019. Docket No. 1625.

III. LEGAL STANDARD

12. The merits of a proposed compromise should be judged under the criteria set forth in *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414 (1968). *TMT Trailer* requires that a compromise must be "fair and equitable." *TMT Trailer*, 390

⁴ While HarbourVest has filed a number of claims, each filed claim is exactly the same except in the name of the claimant. *See* Claim Nos. 143, 147, 149, 150, 153, and 154.

U.S. at 424; *In re AWECO, Inc.*, 725 F.2d 293, 298 (5th Cir. 1984). The terms “fair and equitable,” commonly referred to as the “absolute priority rule,” mean that (i) senior interests are entitled to full priority over junior interests; and (ii) the compromise is reasonable in relation to the likely rewards of litigation. *In re Cajun Electric Power Coop.*, 119 F.3d 349, 355 (5th Cir. 1997); *In re Jackson Brewing Co.*, 624 F.2d 599, 602 (5th Cir. 1980).

13. In determining whether a proposed compromise is fair and equitable, a Court should consider the following factors:

- (i) the probabilities of ultimate success should the claim be litigated;
- (ii) the complexity, expense, and likely duration of litigating the claim;
- (iii) the difficulties of collecting a judgment rendered from such litigation; and,
- (iv) all other factors relevant to a full and fair assessment of the wisdom of the compromise.

TMT Trailer, 390 U.S. at 424.

14. In considering whether to approve a proposed compromise, the bankruptcy judge “may not simply accept the trustee’s word that the settlement is reasonable, nor may he merely ‘rubber stamp’ the trustee’s proposal.” *In re Am. Res. Corp.*, 841 F.2d 159, 162 (7th Cir. 1987). “[T]he bankruptcy judge must apprise himself of all facts necessary to evaluate the settlement and make an informed and independent judgment about the settlement.” *See TMT Trailer*, 390 U.S. at 424, 434.

15. While the trustee’s business judgment is entitled to a certain deference, “business judgment is not alone determinative of the issue of court approval.” *See In re Endoscopy Ctr. of S. Nev., LLC*, 451 B.R. 527, 536 (Bankr. D. Nev. 2011). Further, the business judgment rule does not provide a debtor with “unfettered freedom” to do as it wishes. *See In re Pilgrim’s Pride Corp.*, 403 B.R. 413, 426 (Bankr. N.D. Tex. 2009) (“[A]s a fiduciary holding its estate in trust and responsible

to the court, a debtor in possession must administer its case and conduct its business in a fashion amenable to the scrutiny to be expected from creditor and court oversight.”). The Court must conduct an “intelligent, objective and educated evaluation”⁵ of the proposed settlement “to ensure that the settlement is fair, equitable, and in the best interest of the estate and creditors.” See *In re Mirant Corp.*, 348 B.R. 725, 739 (Bankr. N.D. Tex. 2006) (quoting *Conn. Gen. Life Ins. Co. v. Foster Mortgage Corp. (In re Foster Mortgage Corp.)*, 68 F.3d 914, 917 (5th Cir. 1995)).

IV. ARGUMENT AND AUTHORITIES

16. As discussed in detail below, there are three significant issues with the terms of the settlement that merit denial of the Motion: (i) the proposed settlement is not reasonable or in the best interest of the estate given the weakness of the HarbourVest Claim; (ii) the proposed settlement is a blatant attempt to purchase votes in support of Debtor’s plan by giving HarbourVest a substantial claim to which it is not entitled; and (iii) the proposed settlement seeks to improperly classify HarbourVest’s one claim in two separate classes in order to gerrymander an affirmative vote on its reorganization plan. For these and certain additional reasons as discussed below, the Motion should be denied.

A. Through its Claim, HarbourVest Seeks to Revisit this Court’s Orders in the Acis Case

17. As an initial matter, through its proofs of claim, HarbourVest appears to be second guessing the Court’s judgment in the Chapter 11 case of Acis Capital Management, LP and Acis Capital Management GP, LLC (collectively, “Acis”) and seeking to revisit the Court’s orders entered in that case years ago. HarbourVest appears to be arguing that the TRO and injunction

⁵ *In re Jackson Brewing Co.*, 624 F.2d 599, 602 (5th Cir. 1980) (“To assure a proper compromise the bankruptcy judge, must be apprised of all the necessary facts for an intelligent, objective and educated evaluation. He must compare the terms of the compromise with the likely rewards of litigation.”).

entered in the Acis case that prevented redemptions or resets in the CLOs are now the root cause of the decrease in value of its investment in HCLOF.

18. Specifically, the claim states that HarbourVest incurred “financial harm resulting from, among other things (i) court orders in the Acis bankruptcy that prevented certain CLOs in which HCLOF was invested from being refinanced or reset and court orders that otherwise regulated the activity of HCLOF.”⁶

19. Essentially, HarbourVest is saying that the orders entered in the Acis case did not actually protect the investors and their investments, but instead were a triggering cause for the alleged diminution in value of its investment in HCLOF. Nevertheless, even though the value of HCLOF dropped dramatically only after the Effective Date of Acis’s Plan, years later and despite the lack of Debtor involvement in managing HarbourVest’s investment, HarbourVest now seeks to impute liability to the Debtor through a flimsy narrative designed to recoup investment losses unrelated to the Debtor and for which the Debtor owed HarbourVest no duty.

20. That HarbourVest now, years later, seeks to revisit this Court’s Acis orders raises a number of issues, including those as to HarbourVest’s involvement (or lack thereof) in the Acis case, whether the orders, Plan, or Confirmation Order in the Acis case may bar some of the relief requested by HarbourVest here, and questions related to the merits of the HarbourVest Claim and the legal grounds allegedly supporting it.

⁶ See Proof of Claim 143, para. 3 (“Due to the Acis bankruptcy and certain conduct alleged to have been undertaken by the Debtor (to whom Acis subcontracted its functions) and Debtor’s employees (who were officers, employees, and agents of Acis), the Claimant has suffered significant harm. Such harm includes, but is not limited to, financial harm resulting from, among other things (i) court orders in the Acis bankruptcy that prevented certain CLOs in which HCLOF was invested from being refinanced or reset and court orders that otherwise regulated the activity of HCLOF; and (ii) significant fees and expenses related to the Acis bankruptcy that were charged to HCLOF.”).

B. The HarbourVest Claim Lacks Merit and the Proposed Settlement is Not Reasonable

21. Based on the HarbourVest Claim and its filed response to the Debtor's objection, Respondent believes that the HarbourVest claim is meritless and the proposed settlement is not reasonable, fair and equitable, or in the best interest of the estate.

22. First, the proposed settlement is concerning particularly because HarbourVest's bare bones proof of claim contains very little in terms of allegations of specific conduct against the Debtor that would give rise to a \$60 million claim against this estate. While HarbourVest's response to the Debtor's claim objection is lengthy, it contains very little in real substance supporting its right to such a claim against the estate. The response also omits a number of key facts that are relevant and potentially fatal to its claim for damages against the Debtor's estate. Among them is the fact that Acis (and thereafter Reorganized Acis), along with Mr. Joshua Terry, managed HarbourVest's investment for years after it was made.⁷ Despite this fact, HarbourVest's alleged damages appear to be based largely on the difference between the value of its initial investment at confirmation of Acis's Plan and the current value of the investment—which amount was directly determined by the performance of the CLOs that Acis managed during this time.⁸ Neither the claim nor the response directly address the implications of Acis's management of the CLOs during the period following HarbourVest's investment. Nor does HarbourVest address or discuss performance of the CLOs, the market forces that may have caused HarbourVest's investment to lose value, or other factors influencing the current value of its investment. The

⁷ See, e.g., HarbourVest Proof of Claim 143, p. 5 ("The Claimant is a limited partner in one of the Debtor's managed vehicles, Highland CLO Funding, Ltd. ("HCLOF"). Acis Capital Management GP, L.L.C. and Acis Capital Management L.P. (together, "Acis"), the portfolio manager for HCLOF, filed for chapter 11 in the United States Bankruptcy Court for the Northern District of Texas (the "Court") on January 30, 2018.").

⁸ See HarbourVest Response, **Docket No. 1057**, para. 40 ("HarbourVest has been injured from the Investment: not only has the Investment failed to accrue value, its value plummeted. The Investment's current value is far less than HarbourVest's initial contribution.").

speculative nature of the damages and the lack of specificity of the HarbourVest Claim and the role of Acis in the loss of value to HarbourVest all call into question the reliability of the allegations and the legal basis for the claim amount awarded in the settlement.

23. Also absent from Harbourvest's papers is any discussion of any contract or agreement between (i) HarbourVest and the Debtor; and (ii) any agreement that was executed in conjunction with HarbourVest's initial investment. While the proof of claim references a number of agreements, there is no explanation in the claim or in HarbourVest's response to the Debtor's claim objection of how these agreements give rise to liability against the *Debtor*. For example, neither the claim nor the HarbourVest Response (which includes more than 600 pages of attachments) attach *any* written agreement between HarbourVest and **any other party**. While HarbourVest has alleged a number of claims sounding in tort, many of those claims cannot exist absent a contract or other express relationship between the parties. Moreover, the terms of the relevant contracts themselves likely contain a number of provisions that may call into question Debtor's liability or would be otherwise relevant to merits of the HarbourVest Claim. For example, HarbourVest in its papers appears to assert or imply that the Debtor made a number of false or fraudulent representations to solicit HarbourVest's investment, but then fails to discuss or even identify the applicable agreements it alleges it was induced into signing in connection with its investment (this despite the substantial value of the investment when the Acis plan was confirmed).

24. Given these issues, among many others, the HarbourVest Claim is unsustainable both from a liability and damages standpoint and there are many very high hurdles HarbourVest would have to clear in seeking to prove liability against the Debtor and in proving its damages. For a long period of time, its investment was managed by Acis and the investment's performance was directly tied to Acis's inadequate performance as portfolio manager. Further, the value of

HarbourVest's investment is also directly tied to various market forces that may have impacted its value. The HarbourVest Claim is largely lacking in relevant facts and omits much salient information, such as who it contracted with in connection with its investment, the terms of such agreements, who controlled its investment during the entire period from November 2017 to the present, and the performance of its investment during the last two years. Given these issues, HarbourVest will be unable to demonstrate a causal connection between any conduct of the Debtor and the alleged damages it suffered from a reduction in value of its investment.

25. Because of the speculative nature of the HarbourVest Claim, and the fact that very little pleading or litigation has occurred, the proposed settlement in granting such a large claim is unreasonable, not fair and equitable, and not in the best interest of the estate. The lack of pending litigation, narrowing of threshold questions, and lack of detail in HarbourVest Claim make it impossible to determine whether the huge claim awarded under the proposed settlement is justified under the facts. Accordingly, the Motion should be denied.

C. The Proposed Settlement is an Improper Attempt by the Debtor to Purchase Votes in Support of its Plan and the Separate Classification of the HarbourVest Claim Constitutes Gerrymandering in Violation of 11 U.S.C. § 1122

26. The proposed settlement is a flagrant attempt by the Debtor to purchase votes in support of its Plan by giving HarbourVest a significant claim to which it has not shown itself entitled. Moreover, the separate classification of the HarbourVest Claim into two separate classes constitutes impermissible gerrymandering in violation of section 1122 of the Bankruptcy Code. The proposed settlement essentially gives HarbourVest a claim it is not entitled to in exchange for votes in two separate classes. This is not a proper basis for a settlement and the Court should deny the Motion.

27. Section 1122 of the Bankruptcy Code provides as follows:

(a) Except as provided in subsection (b) of this section, a plan may place a claim or an interest in a particular class only if such claim or interest is substantially similar to the other claims or interests of such class.

(b) A plan may designate a separate class of claims consisting only of every unsecured claim that is less than or reduced to an amount that the court approves as reasonable and necessary for administrative convenience.

11 U.S.C. § 1122.

28. “Chapter 11 requires classification of claims against a debtor for two reasons. Each class of creditors will be treated in the debtor's plan of reorganization based upon the similarity of its members' priority status and other legal rights against the debtor's assets. Proper classification is essential to ensure that creditors with claims of similar priority against the debtor's assets are treated similarly.” *In re Greystone III Joint Venture*, 995 F.2d 1274, 1277 (5th Cir. 1991).

29. “Section 1122 consequently must contemplate some limits on classification of claims of similar priority. A fair reading of both subsections suggests that ordinarily substantially similar claims, those which share common priority and rights against the debtor’s estate, should be placed in the same class.” *Id.* at 1278.

30. The Fifth Circuit has stated that there is “one clear rule that emerges from otherwise muddled caselaw on § 1122 claims classification: thou shalt not classify similar claims differently in order to gerrymander an affirmative vote on a reorganization plan.” *Id.* at 1279. The Court observed:

There must be some limit on a debtor’s power to classify creditors in such a manner. . . . Unless there is some requirement of keeping similar claims together, nothing would stand in the way of a debtor seeking out a few impaired creditors (or even one such creditor) who will vote for the plan and placing them in their own class.

In re Greystone III Joint Venture, 995 F.2d 1274, 1279 (5th Cir. 1991) (quoting *In re U.S. Truck Co.*, 800 F.2d 581, 586 (6th Cir. 1986)).

31. Here, the HarbourVest settlement and the classification of the HarbourVest Claim under the Plan blatantly violate the Fifth Circuit’s “one rule” concerning the classification of claims under section 1122. To the extent that HarbourVest even has a legitimate claim, not only should its claim be classified together with other unsecured creditors, its claim should be classified solely in one class. To allow the Debtor to do otherwise as proposed is improper gerrymandering in order to obtain a consenting class in express violation of section 1122.

D. There Are Other Reasons for the Court to Closely Scrutinize the Proposed Settlement that May Warrant Denial of the Motion

32. There are a number of other reasons for the Court to closely scrutinize the proposed settlement that may warrant denial of the Motion.

33. First, the granting to HarbourVest of a claim in the total amount of \$80 million potentially allows HarbourVest to achieve a significant windfall at the expense of other creditors and equity holders. The Debtor has asserted numerous times that the estate is solvent and, for this reason, the purported subordinated claim of \$35 million (if allowed and approved) may be worth just as much as its general unsecured claim. This is a huge figure in this case, outshined only by the Redeemer Committee, which has an actual arbitration award obtained after lengthy litigation. By contrast, the HarbourVest Claim contains only a few paragraphs of generalized allegations that essentially argue that the Debtor’s alleged actions related to the Acis bankruptcy, and this Court’s orders in the Acis case, are a “but for” cause of the loss of its investment. While the HarbourVest Response is lengthy, it lacks necessary details for the Court to determine whether HarbourVest *may* be entitled to the relief requested by the Motion. The other significant creditors in this case—*inter alia*, Redeemer, UBS and Acis—all had pending claims that were litigated. Nor is HarbourVest a trade creditor, vendor, or other contract counter-party of the Debtor. The HarbourVest Claim is thus uniquely situated in this case and, given the size and the nature of its

claims, should invite close scrutiny. Under these facts, the potential allowance of an \$80 million claim (less the value of its share in HCLOF, which may suffer by continued management by Acis) against the estate for an investment which was not held or managed by the Debtor would be a huge undue windfall.

34. Second, the Motion states that HarbourVest will vote its proposed allowed Class 8 (proposed at \$45 million) and Class 9 (proposed at \$35 million) claims in support of confirmation. There are at least two potential issues with this proposal. First, the deadline for parties to submit ballots was January 5, 2021, and as of the close of business on January 5, the HarbourVest Claim has not been allowed for voting purposes.⁹ Second, the Motion and proposed settlement agreement state that the HarbourVest Claim will be allowed for voting purposes only as a general unsecured claim in the amount of \$45 million. It is unclear how HarbourVest can, or would be authorized to, vote its purported Class 8 and 9 Claims in support of the Plan after the voting deadline and when the settlement provides only for a voting claim in Class 8.

35. Third, while the Motion addresses the factor of probability of success in the litigation, it does not discuss in detail the cost of doing so in relation to the amount to be paid to HarbourVest under the settlement or the likelihood that the Debtor will succeed in the litigation. In addition, unlike the claims filed by Acis and UBS, the HarbourVest Claim does not arise from pending litigation. At this point, relatively little litigation has occurred and the parties have not addressed threshold issues that might dramatically narrow the scope of the HarbourVest Claim. Rule 9019 requires an analysis as to whether the probability of success in litigation is outweighed by the consideration achieved under the settlement. *See In re Jackson Brewing Co.*, 624 F.2d 599, 602 (5th Cir. 1980) (The Court must “compare the terms of the compromise with the likely rewards

⁹ The hearing on the 3018 and 9019 motions are set concurrently with confirmation.

of litigation.”). Given the excessive amount to be paid under the settlement and the weakness of the HarbourVest Claim, this factor weighs in favor of denial of the Motion.

36. Fourth, it is unclear from the settlement papers whether the transfer by HarbourVest of its interest in HCLOF to the Debtor or an entity the Debtor designates will cause the value of the investment to be received by the Debtor’s estate. Further, the interest of HCLOF being conveyed under the proposed settlement may be subject to the Acis plan injunction, which could potentially prevent the Debtor’s estate from realizing the value of this interest. In the event the Court is inclined to approve the settlement, the order should make clear that the available value of the investment should be realized by the Debtor’s estate.

CONCLUSION

For the reasons set forth above, Respondent respectfully requests that the Court enter an order denying the Motion and providing Respondent such other and further relief to which he may be justly entitled.

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Dated: January 6, 2021

Respectfully submitted,

/s/ D. Michael Lynn

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State Bar I.D. No. 02589100
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ATTORNEYS FOR JAMES DONDERO

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that, on January 6, 2021, a true and correct copy of the foregoing document was served via the Court's CM/ECF system on counsel for the Debtor and on all other parties requesting or consenting to such service in this case.

/s/ Bryan C. Assink

Bryan C. Assink

EXHIBIT 5

003996

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UNITED STATES BANKRUPTCY COURT FOR THE
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE:

*

Chapter 11

*

*

Case No. 19-34054sgj11

HIGHLAND CAPITAL MANAGEMENT, L.P.

*

*

Debtor

*

**OBJECTION TO DEBTOR'S MOTION FOR ENTRY OF AN ORDER APPROVING
SETTLEMENT WITH HARBOURVEST (CLAIM NOS. 143, 147, 149, 150, 153, 154)
AND AUTHORIZING ACTIONS CONSISTENT THEREWITH**

The Dugaboy Investment Trust and Get Good Trust (jointly, "Objectors"), submit this Objection for the purpose of objecting to the *Debtor's Motion for Entry of an Order Approving Settlement with HarbourVest (Claim Nos. 143, 147, 149, 150, 153, 154) and Authorizing Actions Consistent Therewith* [Dkt. #1625] (the "Motion") filed by Highland Capital Management, L.P. (the "Debtor"). Through the Motion, the Debtor seeks approval of its compromise with HarbourVest 2017 Global Fund L.P., HarbourVest 2017 Global AIF L.P., HarbourVest Dover Street IX Investment L.P., HV International VIII Secondary L.P., HarbourVest Skew Base AIF L.P., and HarbourVest Partners L.P. (collectively, "HarbourVest") pursuant to Rule 9019 of the



Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”). In support of this objection, Objectors respectfully represent as follows:

I. INTRODUCTION

1. Objectors recognize that Courts favorably view settlements and, as a matter of course, generally approve settlements as being in the best interest of the bankruptcy estate. The settlement proposed herein, however, is different than other settlements inasmuch as it represents a 180 degree departure from the Debtor’s own analysis of the Claim of HarbourVest and the fact that the settlement is tied to HarbourVest approving the Debtor’s plan. Little or no information is provided by the Debtor as to why its initial analysis was flawed and what information or legal principal it discovered to change a zero claim into a massive claim that will have a significant impact on the recovery to creditors.

II. BACKGROUND

2. On October 16, 2019 (the “Petition Date”), the Debtor filed a voluntary petition for relief under chapter 11 of title 11 of the United States Code (the “Bankruptcy Code”) in the U.S. Bankruptcy Court for the District of Delaware, Case No. 19-12239 (CSS) (the “Delaware Court”).

3. On October 29, 2019, the Official Committee of Unsecured Creditors (the “Committee”) was appointed by the U.S. Trustee in Delaware.

4. On December 4, 2019, the venue of this case was transferred. [Dkt. #186].

5. On July 16, 2020, this Court entered an order authorizing the Debtor to employ James P. Seery, Jr. as Chief Executive Officer and Chief Restructuring Officer of the Debtor. [See Dkt. #854].

6. On April 8, 2020, HarbourVest filed Proofs of Claim Numbers 143, 149, 149, 150, 153, and 154 (collectively, the “HarbourVest Claim”)¹.

7. On July 30, 2020, the Debtor filed *Debtor’s First Omnibus Objection to Certain (A) Duplicate Claims; (B) Overstated Claims; (C) Late-Filed Claims; (D) Satisfied Claims; (E) No Liability Claims; and (F) Insufficient-Documentation Claims* [Dkt. #906] (the “Debtor Objection”), which contained an objection to the HarbourVest Claim.

8. On September 11, 2020, HarbourVest filed *HarbourVest Response to Debtor’s First Omnibus Objection to Certain (A) Duplicate Claims; (B) Overstated Claims; (C) Late-Filed Claims; (D) Satisfied Claims; (E) No Liability Claims; and (F) Insufficient-Documentation Claims* [Dkt. #1057] (the “HarbourVest Response”).

9. The Debtor, in its *Disclosure Statement for the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.* [Dkt. #1473 pgs. 40-41], described its position relative to the HarbourVest Claim as follows:

The Debtor intends to **vigorously** defend the HarbourVest Claims on various grounds The HarbourVest Entities invested approximately \$80,000,000.00 in HCLOF but seek an allowed claim in excess of 300 million dollars (after giving effect to treble damages for the alleged RICO violations)

10. On December 23, 2020, the Debtor filed the Motion seeking approval of a proposed settlement of the HarbourVest Claim under Rule 9019. [Dkt. # 1625].

11. The proposed settlement provides HarbourVest with the following:

- a. An allowed, general unsecured claim in the amount of \$45,000,000.00 [Dkt. #1625 pg. 9 pp.f]; and

¹ While HarbourVest has filed a number of claims, each filed claim is exactly the same except in the name of the claimant. See Claim Nos. 143, 147, 149, 150, 153, and 154.

b. A \$35,000,000 claim in Class 9 [Dkt. #1625 pg. 9 pp.f].

12. An integral element of the settlement requires that HarbourVest will “support confirmation of the Debtor’s Plan including, but not limited to, voting its claims in support of the Plan.”

13. The settlement also contains a provision that HarbourVest will transfer its entire interest in HCLOF to an entity to be designated by the Debtor. It is unclear whether HarbourVest has a right to transfer the interest and secondly, what the Debtor will do with the interest [Dkt. #1625 pp.f].

14. The sole support for the Motion is the Declaration of John Morris [Dkt. #1631] which fails to account for the enormous change in the Debtor’s position between November 24, 2020 when the Disclosure Statement was approved and December 23, 2020 when the Motion was filed, a period of less than thirty (30) days.

15. The Declaration of John Morris [Dkt. #1631] also contains no information as to the potential cost of the litigation, whether HarbourVest can transfer the interest or reasons, other than conclusory reasons, as to why the settlement is beneficial to the estate. The Debtor makes the assertion that the interest it is acquiring was worth \$22,000,000.00 as of December 1, 2020 without advising as to the basis for the valuation. Is it a book value and, if not, what was the methodology employed to arrive at the valuation? The Court has no basis to evaluate the settlement without essential information as to 1) how the asset being acquired is valued; 2) can the Debtor acquire the interest; and 3) how will the Debtor bring value to the estate in connection with the interest inasmuch as the Debtor has discretion as to where to place the asset to be acquired.

A. LEGAL STANDARDS

16. The law relative to approval of motions pursuant to BR 9019 is well settled. The settlement must be fair and equitable. *See In re Jackson Brewing Co.*, 624 F.2d 599, 602 (5th Cir. 1980). The factors the Court should consider are the following:

- (i) the probabilities of ultimate success should the claim be litigated;
- (ii) the complexity, expense, and likely duration of litigating the claim;
- (iii) the difficulties of collecting a judgment rendered from such litigation; and,
- (iv) all other factors relevant to a full and fair assessment of the wisdom of the compromise.

Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414 (1968).

17. Although the Debtor's business judgment is entitled to a certain deference, "business judgment" is not alone determinative of the issue of court approval. *See In re Endoscopy Ctr. of S. Nev., LLC*, 451 B.R. 527, 536 (Bankr. D. Nev. 2011). However, notwithstanding the business judgment rule, a debtor does not have unfettered freedom to do what it wishes. *See In re Pilgrim's Pride Corp.*, 403 B.R. 413, 426 (Bankr. N.D. Tex. 2009) ("[A]s a fiduciary holding its estate in trust and responsible to the court, a debtor in possession must administer its case and conduct its business in a fashion amenable to the scrutiny to be expected from creditor and court oversight.").

B. ISSUES WITH THE SETTLEMENT

18. Objectors believe that the following issues are not explained or addressed in the Motion and, thus, the Motion should be denied:

- a) The settlement represents a radical change in the Debtor's position that was set forth in its Disclosure Statement. While the Debtor asserts that its position is

based on its fear of parties' oral testimony, the size of the transactions at issue make the case a document case, as opposed to who said what, when and how. A review of the applicable documents to determine whether they support the Debtor's initial position is warranted, as opposed to stating that the case is based upon the credibility of a witness. This settlement is not the settlement of an automobile accident where the parties are disputing who ran a red light;

- b) The settlement requires HarbourVest to support and vote in favor of the Debtor's Plan. On its face this appears to be vote buying. The settlement should not be conditioned upon HarbourVest's support or non-support of the Plan and its vote in favor or against the Plan; and
- c) No information is provided as to whether the Debtor can acquire the interest in HCLOF, liquidate the interest, who will receive the interest, or how will the estate benefit from the interest to be acquired.

CONCLUSION

The settlement with HarbourVest has too many questions to be approved on the record before this Court and the parties, due to the Notice of the Motion, the holidays and the press of other litigation in this case, do not have the time to adequately investigate the propriety of the settlement.

January 8, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that on the 8th day of January, 2021, a copy of the above and foregoing *Objection To Debtor's Motion For Entry Of An Order Approving Settlement With Harbourvest (Claim Nos. 143, 147, 149, 150, 153, 154) And Authorizing Actions Consistent Therewith* has been served electronically to all parties entitled to receive electronic notice in this matter through the Court's ECF system as follows:

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EXHIBIT 6

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ATTORNEYS FOR CLO HOLDCO, LTD.

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

In re:	§	
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	Case No. 19-34054-SGJ
	§	
Debtor.	§	Chapter 11
	§	

CLO HOLDCO, LTD.'S OBJECTION TO HARBOURVEST SETTLEMENT

TO THE HONORABLE STACEY G. JERNIGAN, U.S. BANKRUPTCY JUDGE:

CLO Holdco, Ltd. ("**CLO Holdco**") respectfully files this *Objection to Harbourvest Settlement* (the "**Harbourvest Settlement Objection**") which seeks entry of an order from this Court denying the Debtor's *Motion for Entry of an Order Approving Settlement with Harbourvest (Claims Nos. 143, 147, 149, 150, 153, 154) and Authorizing Actions Consistent Therewith* (the "**Harbourvest Settlement Motion**") for the reasons stated below. In support of the Harbourvest Settlement Objection, CLO Holdco respectfully states as follows:

**I.
BACKGROUND**

A. TRANSFERRING SHARES IN HCLOF



1. CLO Holdco owns 75,061,630.55 shares, or about 49.02% of Highland CLO Funding, Ltd. ("**HCLOF**"). Other shareholders include Harbourvest 2017 Global AIF L.P., Harbourvest Global Fund L.P., Harbourvest Dover Street IX Investment L.P., and Harbourvest Skew Base AIF L.P., and HV International VIII Secondary L.P. (collectively, "**Harbourvest**"). Harbourvest owns approximately 49.98% of HCLOF. The remaining 1% is owned by the Debtor and a five other investors.

2. HCLOF is governed by a *Members Agreement Relating to the Company* dated November 15, 2017 by and between each of the members of HCLOF, including Harbourvest, the Debtor, and CLO Holdco (the "**Member Agreement**"). A copy of that agreement is attached hereto as **Exhibit A**.

3. Section 6 of the Member Agreement addresses the "Transfer or Disposals of Shares." MEMBER AGREEMENT, § 6. The Member Agreement places strict restrictions on the sale or transfer of shares to entities other than the initial Member's own affiliates. *See id.* at §§ 6.1, 6.2. Before a Member can transfer its interests to a party other than its own affiliates it must: (i) obtain the prior written consent of the Portfolio Manager; and (ii) "offer to the other Members a right to purchase the Shares, on a pro rata basis with respect to their current Shares, at the same price (which must be cash) as such Shares are proposed to be purchased by the prospective third party purchaser pursuant to an irrevocable offer letter" (the "**Right of First Refusal**"). *Id.* As further stated in section 6.2 of the Member Agreement, "The other Members will have 30 days following receipt of the letter to determine whether to purchase their entire pro rata portion of the Shares proposed to be Transferred." *Id.* at § 6.2.

B. THE HARBOURVEST SETTLEMENT

4. On December 23, 2020, the Debtor filed the Harbourvest Settlement Motion. On the following day, the Debtor filed a copy of the Settlement Agreement referenced in the

Harbourvest Settlement Motion (the "**Settlement Agreement**") [Dkt. No. 3]. In the Settlement Agreement, Harbourvest represents and warrants that it is authorized to transfer its interest in HCLOF to the Transferee, HCMLP Investments, LLC (the "**Transferee**"). SETTLEMENT AGREEMENT, Ex. A. § 3. Further, the Transferee and Debtor agree to be bound by the terms and conditions of the Member Agreement. *Id.* at § 1.c.

5. In exchange for conveniently classified allowed claims under the Debtor's *Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.* (the "**Plan**") [Dkt. No. 1472], Harbourvest agrees to vote in favor of the Plan and to transfer all of its interests in HCLOF to the Transferee. SETTLEMENT AGREEMENT, § 1.

6. As detailed below, CLO Holdco objects to the Harbourvest Settlement Motion because Harbourvest has no authority to transfer its interests in HCLOF without first complying with the Right of First Refusal. The only way to effectuate such a transfer without first providing other members the Right of First Refusal is an intentionally inaccurate interpretation of the Member Agreement's contractual provisions that would render specific passages redundant and meaningless. More simply put, the only way Harbourvest and the Debtor could effectuate the Settlement Agreement is by violating fundamental tenets of contract interpretation.

II. ARGUMENTS AND AUTHORITIES

A. CONTRACT INTERPRETATION – AVOIDING REDUNDANCIES AND SURPLUS LANGUAGE

7. The Fifth Circuit recognizes fundamental tenets of contract interpretation, and notes that "contracts should be read as a whole, viewing particular language in the context in which it appears. *Woolley v. Clifford Chance Rogers & Wells, L.L.P.*, 51 F. App'x 930 (5th Cir. 2002) (citing Restatement (Second) of Contracts § 202 (1981)). The Fifth Circuit has applied substantially the same tenets of contract interpretation across the laws of various jurisdictions, and consistently reasons that "[a]ll parts of the agreement are to be reconciled, if possible, in order to avoid an

inconsistency. A specific provision will not be set aside in favor of a catch-all clause." *Broad v. Rockwell Int'l Corp.*, 642 F.2d 929, 947 (5th Cir. 1981) (internal citations omitted); and see *Hawthorne Land Co. v. Equilon Pipeline Co., LLC*, 309 F.3d 888, 892–93 (5th Cir. 2002); *Luv N' Care, Ltd. v. Grupo Rimar*, 844 F.3d 442, 447 (5th Cir. 2016); *Wooley*, 51 F.Appx. at 930.

8. Reconciliation of terms that would otherwise render other parts of a contract redundant is fundamental to proper contract interpretation. *Hawthorne Land*, 309 F.3d at 892-93. As the Fifth Circuit explained in *Hawthorne Land*, "each provision of a contract must be read in light of the other provisions so that each is given the meaning suggested by the contract as a whole. A contract should be interpreted so as to avoid neutralizing or ignoring a provision or treating it as surplusage." *Id.* (internal citations and quotations omitted). In other words, provisions of a contract should be read to create harmony, not internal inconsistencies, redundancies, and unnecessary surplus language. See, e.g., *Luv N' Care*, 844 F.3d at 447 (overturning district court on appeal by interpreting contract in manner that eliminated perceived redundancy).

B. ANALYZING THE MEMBER AGREEMENT

9. Section 6.1 of the Member Agreement will almost certainly be cited by the Debtor and Harbourvest as authority for their entry into the Settlement Agreement, regardless of whether other Members or the Portfolio Manager consent. It states, in pertinent part, that:

No Member shall sell, pledge, charge, mortgage, assign, assign by way of security, transfer, convey, exchange or otherwise dispose of its Shares or its commitment to settle purchases of Shares under the Subscription and Transfer Agreement (each a "Transfer"), other than to an Affiliate of an initial Member party hereto, without the prior written consent of the Portfolio Manager...

MEMBER AGREEMENT, § 6.1. Harbourvest will likely stress that under the terms of the Member Agreement, it can transfer its interests so long as the transfer is to "an Affiliate of an initial Member." Indeed, the Debtor will no doubt point out to this Court that Harbourvest is

conveniently transferring its interests in HCLOF to an Affiliate of the Debtor, and that the Debtor is an initial Member listed in the Member Agreement.

10. Section 6.1, however, must be read in the context of the Member Agreement, and in conjunction with the transfer restrictions found in section 6.2. Read together it is clear that the consent exception allowing a transfer in 6.1 was intended to allow a Member to transfer its shares to *its* own Affiliate, without required consents and effectuating a Right of First Refusal. Doing so would allow inter-company transfers within a corporate structure without the need for complicated procedures. Applying Fifth Circuit precedent, this interpretation fits squarely within the agreement and gives weight to the terms of section 6.2 of the Member Agreement, as explained below.

(i) Surplusage – Specific Allowance of Transfers by CLO Holdco to Debtor Affiliates

11. Recall that both CLO Holdco and the Debtor are initial Members to the Member Agreement. MEMBER AGREEMENT, p. 3. Section 6.2 of the Member Agreement states, in pertinent part, that "Prior to making any Transfer of Shares (other than Transfers to Affiliates of an initial Member or, *in the case of CLO Holdco or a Highland Principal, to Highland, its Affiliates or another Highland Principal*) a Member must first..." comply with the Right of First Refusal. *Id.* at § 6.2 (emphasis added). The italicized language above is important for two reasons: (i) it specifically enumerates that CLO Holdco can transfer its interests to Debtor Affiliates without having to pursue the Right of First Refusal; and (ii) it allows only limited transfers between Members, as opposed to between a Member and an Affiliate of an initial Member.

12. If, as the Debtor and Harbourvest will likely argue, Members are allowed to transfer their interests to any Affiliates of any other initial Members, there is absolutely no need for the Member Agreement to specifically authorize CLO Holdco to transfer its interests to the Debtor's Affiliates. Per Fifth Circuit fundamentals of contract interpretation, that purported redundancy

should not be discarded as mere surplusage, and the Member Agreement should be interpreted in a manner that gives weight to that provision. *Hawthorne Land*, 309 F.3d at 892-93.

13. If the Member Agreement is read to literally allow all "Transfers to Affiliates of an initial Member" there would be no reason to expressly set forth allowed transfers between specific Members and other Member's Affiliates. If the Member Agreement sought to list all allowed transfers between Members and their Affiliates, it should have similarly noted that any Member could transfer its interest to any Harbourvest Member entity, as each Harbourvest Member entity is an Affiliate of the other Harbourvest Member entities. Alternatively, if the specific enumeration of CLO Holdco and the Highland Principals' transfer rights was surplusage, it would presumably have listed other parties' rights, or had inclusive language such as "including but not limited to" or "for example." The Member Agreement lacks such language and, as a result, should be interpreted in a manner that both gives weight to the specific provision while reconciling other provisions of the contract.

(ii) Absurd Results – Disparate Transfer Rights Between Members

14. Note that the Member Agreement does not generally allow a transfer of interests from Member to Member unless specifically enumerated. Section 6.2 specifically allows only CLO Holdco and the Highland Principals to make transfers to other Members, but those other Members include only the Debtor or another Highland Principal. MEMBER AGREEMENT, § 6.2. It does not allow the Debtor to transfer interests to any Member, and does not expressly allow any Member, other than limited transfers by CLO Holdco and the Highland Principals, to transfer interests to any other Member. *Id.* For instance, if the Debtor wished to transfer its interests to CLO Holdco, it would first have to offer all of the other Members their Right of First Refusal. *Id.*

15. Similarly, if Harbourvest wished to transfer its interest to CLO Holdco, it could not do so without first providing the Right of First Refusal to all other Members. *Id.* As noted above,

however, allowing a Member to transfer its interest to an Affiliate of any initial Member would allow all of the Members to transfer their interests to any Harbourvest Member entity, as the Harbourvest Members are Affiliates of each other. Given the specific enumeration of CLO Holdco and the Highland Principals' rights to inter-Member transfers, it would be inconsistent to expand that specific provision to allow all transfers by all Members to any Harbourvest entity without first providing a Right of First Refusal.

16. Such a reading would lead to absurd results. It would grant similarly situated Members profoundly disparate rights under the agreement, and could easily lead to manipulation. For instance, because the Harbourvest Members are technically Affiliates of an initial Member (each other), they could obtain control of all of the interests in HCLOF without any Member receiving a Right of First Refusal for any transfer. No other Member could do that. For instance, if CLO Holdco wished to acquire other Members' interests, the transferring member (including Harbourvest) would have to offer a Right of First Refusal in every instance. To resolve that potential disparate treatment—though CLO Holdco and Harbourvest own nearly identical ownership interests in HCLOF—CLO Holdco would have to form an Affiliate and acquire interests through the Affiliate. That simply cannot be the intended result of the Member Agreement.

17. Instead, the Member Agreement must be read to require Harbourvest to provide a Right of First Refusal to the other Members of HCLOF before transferring its interests to either the Debtor or the Transferee.

C. THE RIGHT OF FIRST REFUSAL IN BANKRUPTCY

18. Most cases addressing third party rights of first refusal in bankruptcy involve the assignment of leases and landlords' rights of first refusal. In those cases, courts analyze whether such a provision in the debtor's contract is a defacto restriction on assignment that may be excised

from the agreement. This case is very different. Here, it is a creditor that owes a right of first refusal to another non-debtor entity.

19. Even so, at least one court has issued telling commentary on a bankruptcy court's ability to excise provisions of a bargained-for contract, stating "A bankruptcy court's authority to excise a bargained for element of a contract is questionable and modification of a nondebtor contracting party's rights is not to be taken lightly." *In re E-Z Serve Convenience Stores, Inc.*, 289 B.R. 45, 51-52 (Bankr. M.D.N.C. 2003) (citing *In re Joshua Slocum Ltd.*, 922 F.2d 1081, 1091 (3d Cir. 1991)). CLO Holdco was unable to find any case that would allow a bankruptcy court to invalidate or otherwise excise a third party's right of first refusal in what largely amounts to a non-debtor contract.

20. As the Member Agreement requires Harbourvest to provide a Right of First Refusal to the non-Debtor Members under section 6.2 of the Agreement, and such Members have 30 days to review and determine whether to purchase their pro-rata shares offered by Harbourvest, Harbourvest lacks contractual authority to enter into the Settlement Agreement.

D. HARBOURVEST'S LACK OF AUTHORITY PRECLUDES ENFORCEMENT OF SETTLEMENT

21. Harbourvest has not completed its conditions precedent to the transfer of its interest to Transferee under the Member Agreement. As detailed above, and in section 6.2 of the Agreement, Harbourvest must effectuate the Right of First Refusal before it can transfer its interests in HCLOF. MEMBER AGREEMENT, § 6.2. Harbourvest is, in essence, bound by the condition precedent of effectuating the Right of First Refusal before it is authorized under the Member Agreement to enter into the Settlement Agreement.

22. Courts should not enforce a settlement agreement where a party has a condition precedent to entry into the agreement and fails to satisfy that condition. *In re De La Fuente*, 409 B.R. 842, 846 (Bankr. S.D. Tex. 2009). As noted in part in *De La Fuente*, the court would not recognize

or enforce a settlement where the parties were subject to conditions precedent before the settlement could be effective, and the conditions precedent were not satisfied. This Court should similarly deny Harbourvest's proposed settlement, as it would deny the Members' Right of First Refusal, which is the benefit of their bargain under the Member Agreement.

**III.
PRAYER FOR RELIEF**

WHEREFORE, CLO Holdco requests that this Court grant the Objection and enter an order denying the Harbourvest Settlement Motion.

DATED: January 8, 2020

Respectfully submitted,

KANE RUSSELL COLEMAN LOGAN PC

By: /s/ John J. Kane
Joseph M. Coleman
State Bar No. 04566100
John J. Kane
State Bar No. 24066794

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ATTORNEYS FOR CLO HOLDCO, LTD.

CERTIFICATE OF SERVICE

I hereby certify that on January 8, 2020, a true and correct copy of the foregoing CLO Holdco Objection was served via the Court's electronic case filing (ECF) system upon all parties receiving such service in this bankruptcy case; and via e-mail upon the United States Trustee at Lisa.L.Lambert@usdoj.gov and upon the following parties:

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ZAnnable@HaywardFirm.com

/s/ John J. Kane

John J. Kane

EXHIBIT 7

004018

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE:

CHAPTER 11

CASE NO.

HIGHLAND CAPITAL 19-34054-
MANAGEMENT, L.P. SGJLL

Debtor.

Confidential - Under Protective Order

REMOTE DEPOSITION OF
MICHAEL PUGATCH
Zoom Videoconference
01/11/2021
1:07 P.M. (EDT)

REPORTED BY: AMANDA GORRONO, CLR
CLR NO. 052005-01
JOB NO. 188591

Page 2	Page 3
<p>1</p> <p>2 01/11/2021</p> <p>3 1:07 P.M. (EDT)</p> <p>4</p> <p>5</p> <p>6 REMOTE ORAL DEPOSITION OF MICHAEL</p> <p>7 PUGATCH, held virtually via Zoom</p> <p>8 Videoconferencing, pursuant to the</p> <p>9 Federal Rules of Civil Procedure before</p> <p>10 Amanda Gorrono, Certified Live Note</p> <p>11 Reporter, and Notary Public of the State</p> <p>12 of New York.</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	<p>1</p> <p>2 A P P E A R A N C E S: (Via Remote)</p> <p>3 PACHULSKI STANG ZIEHL & JONES</p> <p>4 Attorneys for Debtor</p> <p>5 780 Third Avenue</p> <p>6 New York, New York 10017</p> <p>7 BY: JOHN MORRIS, ESQ.</p> <p>8 HAYLEY WINOGRAD, ESQ.</p> <p>9</p> <p>10 BONDS ELLIS EPPICH SCHAFFER JONES</p> <p>11 Attorneys for Jim Dondero</p> <p>12 420 Throckmorton Street</p> <p>13 Fort Worth, Texas 76102</p> <p>14 BY: JOHN WILSON, ESQ.</p> <p>15 BRYAN ASSINK, ESQ.</p> <p>16</p> <p>17 DEBEVOISE & PLIMPTON</p> <p>18 Attorneys for HarbourVest</p> <p>19 919 Third Avenue</p> <p>20 New York, New York 10022</p> <p>21 BY: ERICA WEISGERBER, ESQ.</p> <p>22 M. NATASHA LABOVITZ, ESQ.</p> <p>23 EMILY HUSH, ESQ.</p> <p>24 DANIEL STROIK, ESQ.</p> <p>25</p>
Page 4	Page 5
<p>1</p> <p>2 A P P E A R A N C E S: (Via Remote)</p> <p>3 KANE RUSSELL COLEMAN & LOGAN</p> <p>4 Attorneys for CLO Holdco Limited</p> <p>5 Bank of America Plaza</p> <p>6 901 Main Street</p> <p>7 Dallas, Texas 75202</p> <p>8 BY: JOHN KANE, ESQ.</p> <p>9</p> <p>10 HELLER, DRAPER, HAYDEN, PATRICK, & HORN</p> <p>11 Attorneys for The Dugaboy Investment</p> <p>12 Trust and the Get Good Trust</p> <p>13 650 Poydras Street</p> <p>14 New Orleans, Louisiana 70130</p> <p>15 BY: DOUGLAS DRAPER, ESQ.</p> <p>16</p> <p>17 LATHAM & WATKINS</p> <p>18 Attorney For UBS</p> <p>19 885 Third Avenue</p> <p>20 New York, New York</p> <p>21 BY: SHANNON MCLAUGHLIN, ESQ.</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	<p>1</p> <p>2 A P P E A R A N C E S: (Via Remote)</p> <p>3 KING & SPALDING</p> <p>4 Attorney for Highland CLO Funding, Ltd.</p> <p>5 1180 Peachtree Street, NE</p> <p>6 Atlanta, Georgia 30309</p> <p>7 BY: MARK MALONEY, ESQ.</p> <p>8</p> <p>9</p> <p>10</p> <p>11 ALSO PRESENT:</p> <p>12 ALIZA GOREN, ESQ.</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>

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WITNESS EXAMINATION BY PG

4 MICHAEL PUGATCH MR. WILSON 10, 148

MR. KANE 122

5 MS. WEISGERBER 147

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EXHIBITS

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EXHIBIT

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10 4/08/2020 nine pages.....

11 Exhibit 2 Proof of Claim 149 filed 17

12 4/08/2020 nine pages.....

13 Exhibit 3 Declaration of Michael 18

14 Pugatch in Support of

15 Motion of HarbourVest

16 Pursuant to Rule 3018(a)...

17 Exhibit 4 Member Agreement 28 pages.. 21

18 Exhibit 5 HarbourVest Response to 22

19 Debtor's First Omnibus

20 Objection 617 pages.....

21 Exhibit 6 Offering Memorandum 122 61

22 pages.....

23 Exhibit 7 Share Subscription and 63

24 Transfer Agreement 31

25 pages.....

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2 Exhibit 8 E-mail 08/15/2017..... 68

3 Exhibit 9 11/29/2017 E-mail with 79

4 cover letter Highland

5 Capital Management.....

6 Exhibit 10 2004 Examination of 83

7 Investor in Highland CLO

8 Funding Ltd. 10/10/2018....

9 Exhibit 11 Declaration of John A. 109

10 Morris in Support of the

11 Debtor's Motion For Entry

12 of an Order Approving

13 Settlement With

14 Harbourvest (Claim Nos.

15 143, 147, 149, 150, 153,

16 154) and Authorizing

17 Actions, 82 pages.....

18

19

20 REQUESTS

21 DESCRIPTION PG

22 Transcript be marked Confidential 10

23 under the Protective Order.....

24

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Page 8

1

2 MR. WILSON: I'm John Wilson

3 with the firm of Bonds Ellis Eppich

4 Schafer Jones LP. And I represent Jim

5 Dondero.

6 MR. MORRIS: John Morris and

7 Hayley Winograd of Pachulski Stang

8 Ziehl & Jones for the Debtor.

9 MS. WEISGERBER: Erica

10 Weisgerber from Debevoise & Plimpton

11 for HarbourVest.

12 MR. KANE: John Kane of Kane

13 Russell Coleman & Logan, for CLO

14 Holdco Limited.

15 MR. DRAPER: Douglas Draper of

16 Heller Draper & Horn, for The Dugaboy

17 Investment Trust and the Get Good

18 Trust.

19 MS. McLAUGHLIN: Shannon

20 McLaughlin from Latham & Watkins LLP

21 for UBS.

22 MR. MALONEY: Mark Maloney from

23 King & Spalding, on behalf of Highland

24 CLO Funding Limited.

25 MS. WEISGERBER: I'm joined on

Page 9

1

2 the line by my colleagues from

3 Debevoise, Natasha Labovitz and Emily

4 Hush, and Aliza Goren from HarbourVest

5 is on the line, as well.

6 MR. WILSON: As a preliminary

7 matter, the witness' counsel has

8 produced some documents to us that

9 they've requested be subject to the

10 confidentially order or a brief

11 protective order entered at Document

12 Number 382, in this case.

13 And she's also requested that

14 all counsel and participants in this

15 deposition agree to be bound by the

16 terms of that order, because some of

17 the documents that were produced are

18 stamped "confidential," and they want

19 to maintain that confidentiality.

20 Do we have an agreement of all

21 counsel and participants on the

22 deposition to be bound by the terms of

23 that agreed protective order?

24 (All agreed.)

25 MS. WEISGERBER: Okay. I think

<p style="text-align: right;">Page 10</p> <p>1 Confidential - Pugatch 2 that was everyone. Thank you all for 3 confirming. And the deposition will 4 be marked "confidential" until and 5 unless HarbourVest designates the 6 testimony otherwise. 7 MR. WILSON: And that's fine. 8 (Whereupon, a request for 9 Transcript be marked Confidential 10 under the Protective Order was made.) 11 MICHAEL PUGATCH, 12 called as a witness, having been 13 first duly affirmed by a Notary Public of 14 the State of New York, was examined and 15 testified as follows: 16 EXAMINATION 17 BY MR. WILSON: 18 Q. All right. Mr. Pugatch, how do 19 you pronounce your name? I'm sorry. 20 A. Yep, you've got it. Pugatch. 21 Q. Pugatch. Okay. Can you state 22 your full name for the record? 23 A. Yeah. Michael Pugatch. 24 Q. Okay. And you've been 25 designated by HarbourVest to discuss some</p>	<p style="text-align: right;">Page 11</p> <p>1 Confidential - Pugatch 2 matters related to the 9019 motion. And 3 specifically we asked that HarbourVest 4 produce a witness who could talk about the 5 negotiations of the settlement with the 6 Debtor, and also the factual allegations 7 underlying HarbourVest's Proof of Claim, 8 and those described in HarbourVest's 9 response to the claim objection, including 10 without limitation, its investment with 11 Acis/HCLOF in the alleged representations 12 made by the Debtor and/or Acis/HCLOF to 13 HarbourVest, and any and all agreements 14 entered into between HarbourVest and any 15 other party related to its investment. 16 Do you agree that you're the 17 best person to talk about these matters on 18 behalf of HarbourVest? 19 A. Yes. Yes. 20 Q. Okay. Have you given a 21 deposition before? 22 A. I have. 23 Q. Okay. So you understand how it 24 works that you're under oath, and that I'm 25 going to be asking questions and you're</p>
<p style="text-align: right;">Page 12</p> <p>1 Confidential - Pugatch 2 going to be giving answers. If at any 3 time I ask a question that you don't 4 understand, or we've had some problems 5 with sometimes connectivity issues with 6 Zoom. But yeah, any time that you don't 7 understand my question or you didn't catch 8 it, I'll be happy to repeat it. 9 Also, one thing I found with 10 Zoom is that it's easier to talk over 11 people. I'll try not to talk over you. I 12 would ask that you try to ensure that I've 13 finished asking my question before you 14 start your answer. And I will likewise 15 try to ensure that you've finished your 16 answer before start my next question. 17 And at any time during this 18 deposition if you feel the need to take a 19 break, that's totally okay with me. The 20 one thing that I would ask is if I've just 21 asked a question, that you answer the 22 question before requesting the break. 23 And if we have that agreement 24 and the ground rules, then I think I'm 25 ready to start asking you my questions.</p>	<p style="text-align: right;">Page 13</p> <p>1 Confidential - Pugatch 2 A. Sounds good. 3 Q. What's your current address? 4 A. 47 Wayne Road in Needham, 5 Massachusetts. 6 Q. Okay. And where are you located 7 today? 8 A. At that address. 9 Q. Okay. That's your home address? 10 A. Correct. 11 Q. And is anyone in the room with 12 you there? 13 A. No. 14 Q. And did you talk with anyone 15 about your deposition today? 16 A. Only counsel. 17 Q. Okay. And did you go over the 18 facts of the underlying investment and the 19 settlement negotiations with your counsel? 20 MS. WEISGERBER: I'm going to 21 object on privilege grounds. He 22 can -- he prepared for the deposition 23 with counsel. I don't think you can 24 inquire into specifics of the 25 preparation.</p>

<p style="text-align: right;">Page 14</p> <p>1 Confidential - Pugatch</p> <p>2 MR. WILSON: Okay. Well, you</p> <p>3 know, he was designated to talk about</p> <p>4 these matters, and I'm just asking if</p> <p>5 he discussed these matters with his</p> <p>6 counsel his before his testimony.</p> <p>7 That's all. I'm not asking the</p> <p>8 substance of those communications.</p> <p>9 MS. WEISGERBER: You're asking</p> <p>10 about conversations with counsel. How</p> <p>11 about you just ask if he's prepared to</p> <p>12 talk about those topics today?</p> <p>13 MR. WILSON: Okay.</p> <p>14 BY MR. WILSON:</p> <p>15 Q. Are you prepared to talk about</p> <p>16 those topics today?</p> <p>17 A. Yes.</p> <p>18 Q. Okay. Now, HarbourVest has</p> <p>19 filed several proofs of claim in this</p> <p>20 matter, and it looks like those are</p> <p>21 numbered 143 on behalf of HarbourVest,</p> <p>22 217 Global Fund L.P., and 144 HarbourVest</p> <p>23 2017 Global AIF, 149 HarbourVest Partners</p> <p>24 L.P., 150 HarbourVest Dover Street, IX</p> <p>25 Investment L.P., 153 HarbourVest -- or I'm</p>	<p style="text-align: right;">Page 15</p> <p>1 Confidential - Pugatch</p> <p>2 sorry, HV International VIII Secondary</p> <p>3 L.P., and 154 HarbourVest Skew Base AIF</p> <p>4 LP.</p> <p>5 And you're here to talk on</p> <p>6 behalf of all of those entities, and you</p> <p>7 have, for purpose of this settlement and</p> <p>8 you're -- the 9019 motion, these proofs of</p> <p>9 claim are all lumped together as one</p> <p>10 claim; is that correct?</p> <p>11 MS. WEISGERBER: I'm just going</p> <p>12 to object quickly and clarify that</p> <p>13 he's not here as a 30(b)(6) witness,</p> <p>14 but he is here as someone from</p> <p>15 HarbourVest who signed those proofs of</p> <p>16 claim. So with that, I'll let you</p> <p>17 continue.</p> <p>18 A. I'll just answered the question,</p> <p>19 yes, as a representative on behalf of all</p> <p>20 of those entities. I would defer to</p> <p>21 counsel, from a legal perspective, whether</p> <p>22 these are treated as a single or separate</p> <p>23 claims.</p> <p>24 MR. WILSON: Okay. And we can</p> <p>25 move on for now.</p>
<p style="text-align: right;">Page 16</p> <p>1 Confidential - Pugatch</p> <p>2 I'm going to submit the first</p> <p>3 exhibit. It's going to be Exhibit</p> <p>4 No. 1 to the deposition. I'm sending</p> <p>5 it by E-mail, and I'm also going to</p> <p>6 use a share screen.</p> <p>7 (Whereupon, Exhibit 1, Proof of</p> <p>8 Claim 143 filed 4/08/2020 nine pages,</p> <p>9 was marked for identification.)</p> <p>10 MR. WILSON: So this document</p> <p>11 right here is Claim Number 143 filed</p> <p>12 on April 8, 2020, and this one is</p> <p>13 filed on behalf of HarbourVest 2017</p> <p>14 Global Fund L.P.</p> <p>15 If we go down, scroll to the</p> <p>16 annex to proof of claim, it's Page 5</p> <p>17 of the document. It says that the</p> <p>18 Claimant is a limited partner in one</p> <p>19 of the Debtor's managed vehicles,</p> <p>20 Highland CLO Funding, Ltd.</p> <p>21 And I'm going to now send out an</p> <p>22 E-mail with Exhibit No. 2. I'm going</p> <p>23 to pull this Exhibit No. 2 document up</p> <p>24 on the share screen, as well. I guess</p> <p>25 that's right.</p>	<p style="text-align: right;">Page 17</p> <p>1 Confidential - Pugatch</p> <p>2 (Whereupon, Exhibit 2, Proof of</p> <p>3 Claim 149 filed 4/08/2020 nine pages,</p> <p>4 was marked for identification.)</p> <p>5 BY MR. WILSON:</p> <p>6 Q. Can you see the official proof,</p> <p>7 official form 410 proof of claim on your</p> <p>8 screen?</p> <p>9 A. The first one that you shared?</p> <p>10 Q. I'm now on Exhibit No. 2. Is it</p> <p>11 showing up on your screen?</p> <p>12 A. No.</p> <p>13 Q. Okay. Actually, I'm sorry. Is</p> <p>14 it now showing up on your screen?</p> <p>15 A. Now, it's showing up, yep.</p> <p>16 Q. Okay. So this one is Proof of</p> <p>17 Claim 149, filed on the same date. And</p> <p>18 this one's filed on behalf HarbourVest</p> <p>19 Partners L.P. And I'm going to scroll</p> <p>20 down to the annex to proof of claim, which</p> <p>21 looks largely like the annex to the</p> <p>22 previous proof of claim we looked at.</p> <p>23 But this one says, in Paragraph</p> <p>24 No. 2, the Claimant manages investment</p> <p>25 funds that are limited partners in one of</p>

<p style="text-align: right;">Page 18</p> <p>1 Confidential - Pugatch 2 the Debtor's managed vehicles, Highland 3 CLO Funding, Ltd. 4 And can you tell me why this 5 HarbourVest Partners L.P. filed a separate 6 proof of claim, from the entities that 7 were investors in HCLOF? 8 A. I would only be able to answer 9 that, based on conversations with counsel. 10 Q. But in any event, HarbourVest 11 Partners L.P. did not invest in HCLOF, 12 correct? 13 A. Not directly on behalf of 14 itself, no. 15 Q. All right. I'm going to stop 16 that share screen. 17 MR. WILSON: And this is going 18 to be Exhibit Number 3. 19 (Whereupon, Exhibit 3, 20 Declaration of Michael Pugatch in 21 Support of Motion of HarbourVest 22 Pursuant to Rule 3018(a), was marked 23 for identification.) 24 MR. WILSON: And Exhibit No. 3 25 that I've just submitted via E-mail,</p>	<p style="text-align: right;">Page 19</p> <p>1 Confidential - Pugatch 2 and I'm about to put it up on the 3 screen, is the Declaration of 4 HarbourVest. Let me get it up here, 5 so you can see it. This is the 6 declaration of Michael Pugatch in 7 support of motion of HarbourVest 8 pursuant to Rule 3018(a). 9 BY MR. WILSON: 10 Q. Have you seen this document 11 before? 12 A. Yes. 13 Q. And, in fact, this is your 14 declaration; is that correct? 15 A. Yes. 16 Q. And at the first line of this, 17 of Paragraph 1 says that you're the 18 managing director of HarbourVest Partners 19 LLC? 20 A. Correct. 21 Q. And how is HarbourVest Partners 22 LLC connected to these claims? 23 A. That is the corporate entity or 24 managing member of all of the underlying 25 funds that are managed on behalf of</p>
<p style="text-align: right;">Page 20</p> <p>1 Confidential - Pugatch 2 HarbourVest Partners L.P. 3 Q. And you're the managing director 4 of that entity? 5 A. A managing director to that 6 entity, yes. 7 Q. You said "a managing director," 8 are there others? 9 A. Yes. 10 Q. Who are the others? 11 A. There are over 50 managing 12 directors at HarbourVest Partners LLC. 13 Q. And are you the managing 14 director that has charge of this 15 particular HarbourVest investment, the one 16 in HCLOF? 17 A. Yes. 18 MR. WILSON: All right. I beg 19 your patience. I'm trying to conduct 20 this deposition solo. I've got a lot 21 of stuff I've got to go through. So 22 I'll do my best to do it efficiently. 23 But this next exhibit I'm going 24 to submit is going to be Exhibit No. 25 4. I'm sending it in the E-mail now.</p>	<p style="text-align: right;">Page 21</p> <p>1 Confidential - Pugatch 2 (Whereupon, Exhibit 4, Member 3 Agreement 28 pages, was marked for 4 identification.) 5 BY MR. WILSON: 6 Q. Can you see this on your share 7 screen? 8 A. I can. 9 Q. This is the Members Agreement 10 relating to the Company. 11 A. (Nods.) 12 Q. I'm just going to scroll down. 13 Okay. So this is the signature page for 14 the HarbourVest entities that were 15 invested in this company. And it says 16 that you were the authorized person to 17 sign on behalf of the first two entities: 18 HarbourVest Dover Street, HarbourVest 2017 19 Global, and then the next one here it says 20 you're managing director. And here we see 21 that HarbourVest Partners LLC. 22 And if we scroll down, we see 23 that you're the managing director of 24 HarbourVest Partners LLC, again, on behalf 25 of HV International, and that you're an</p>

<p style="text-align: right;">Page 22</p> <p>1 Confidential - Pugatch</p> <p>2 authorized person on behalf of HarbourVest</p> <p>3 Skew Base.</p> <p>4 So you signed all these</p> <p>5 agreements on behalf of the HarbourVest</p> <p>6 entities, when HarbourVest made its</p> <p>7 investment in HCLOF. Would that be</p> <p>8 correct?</p> <p>9 A. Correct.</p> <p>10 Q. Okay. Sorry that was</p> <p>11 cumbersome, but I needed to get through</p> <p>12 it.</p> <p>13 MR. WILSON: I'm going to now</p> <p>14 stop that share screen. And I'll need</p> <p>15 to go to Exhibit No. 5. I'm E-mailing</p> <p>16 out Exhibit No. 5 right now.</p> <p>17 (Whereupon, Exhibit 5,</p> <p>18 HarbourVest Response to Debtor's First</p> <p>19 Omnibus Objection 617 pages, was</p> <p>20 marked for identification.)</p> <p>21 BY MR. WILSON:</p> <p>22 Q. This is – I'll do another share</p> <p>23 screen – this is Docket 1057 filed in the</p> <p>24 Highland bankruptcy. And this is</p> <p>25 HarbourVest Response to Debtor's First</p>	<p style="text-align: right;">Page 23</p> <p>1 Confidential - Pugatch</p> <p>2 Omnibus Objection.</p> <p>3 Did you participate in the</p> <p>4 creation of this document?</p> <p>5 A. Yes.</p> <p>6 Q. So you had an opportunity to</p> <p>7 review this document, before it was filed?</p> <p>8 A. Correct.</p> <p>9 Q. And you agree with the</p> <p>10 statements and the positions taken in this</p> <p>11 document?</p> <p>12 A. I do.</p> <p>13 Q. All right. So what this says in</p> <p>14 Paragraph 8, that by the summer of 2017,</p> <p>15 HarbourVest was engaged in preliminary</p> <p>16 discussions with Highland, regarding the</p> <p>17 investment.</p> <p>18 First off, why was HarbourVest</p> <p>19 engaged in preliminary discussions with</p> <p>20 Highland?</p> <p>21 A. Highland had approached</p> <p>22 HarbourVest with an investment</p> <p>23 opportunity. This was really borne out of</p> <p>24 discussions that we had with them around a</p> <p>25 couple of investment opportunities, that</p>
<p style="text-align: right;">Page 24</p> <p>1 Confidential - Pugatch</p> <p>2 this opportunity with HCLOF being the one</p> <p>3 that by the summer of 2017, as stated</p> <p>4 here, was in, was advancing through</p> <p>5 discussions.</p> <p>6 Q. And which individuals at</p> <p>7 Highland were you engaged in discussions</p> <p>8 with? By "you," I mean HarbourVest.</p> <p>9 A. Yeah, I mean, originally it was</p> <p>10 through a couple of members of their</p> <p>11 investor relations team. My first point</p> <p>12 of contact was with Brad Eden, and then</p> <p>13 subsequently progressed to a larger subset</p> <p>14 of employees of Highland.</p> <p>15 Q. And who on behalf of HarbourVest</p> <p>16 was engaging in these discussions?</p> <p>17 A. It was primarily myself, my</p> <p>18 colleague, or two – two colleagues</p> <p>19 primarily, alongside myself.</p> <p>20 Q. I'm sorry. I didn't catch the</p> <p>21 last part.</p> <p>22 A. Sorry. Myself and two other</p> <p>23 colleagues primarily.</p> <p>24 Q. And who are these two other</p> <p>25 colleagues?</p>	<p style="text-align: right;">Page 25</p> <p>1 Confidential - Pugatch</p> <p>2 A. Dustin Willard and then a more</p> <p>3 junior member of the HarbourVest team.</p> <p>4 Q. When you say "the HarbourVest</p> <p>5 team," what does that mean?</p> <p>6 A. So the broader investment team</p> <p>7 and specifically in this context, the</p> <p>8 secondary investment team at HarbourVest,</p> <p>9 that this was an opportunity for.</p> <p>10 Q. So who made the final decision,</p> <p>11 on behalf of HarbourVest, to make this</p> <p>12 investment?</p> <p>13 A. Ultimately it was a decision</p> <p>14 made by the investment committee of</p> <p>15 HarbourVest.</p> <p>16 Q. And who's on that investment</p> <p>17 committee?</p> <p>18 A. It's a four-member committee</p> <p>19 comprised of managing directors within the</p> <p>20 firm.</p> <p>21 Q. And who are those managing</p> <p>22 directors?</p> <p>23 A. I don't recall at the time who</p> <p>24 the members were. I can tell you the</p> <p>25 members now, of that committee. It has</p>

<p style="text-align: right;">Page 26</p> <p>1 Confidential - Pugatch</p> <p>2 changed or evolved over time.</p> <p>3 Q. And that committee included you?</p> <p>4 A. I was involved in the</p> <p>5 decisionmaking of that, yes, correct.</p> <p>6 Q. So you were part of the four-man</p> <p>7 committee that made this decision?</p> <p>8 A. Yes.</p> <p>9 Q. All right. I'm going to go back</p> <p>10 to what we've marked as Exhibit 3, which</p> <p>11 is your declaration. And it says in</p> <p>12 Paragraph 2, that HarbourVest is a passive</p> <p>13 minority investor in Highland CLO funds,</p> <p>14 HCLOF, and by the way, I haven't stated</p> <p>15 this before, but in this deposition if I</p> <p>16 say HCLOF, I'm going to be referring to</p> <p>17 Highland CLO funds.</p> <p>18 But it says that the vehicle is</p> <p>19 managed by Highland Capital Management,</p> <p>20 L.P.</p> <p>21 And why do you say that that</p> <p>22 vehicle was managed by Highland Capital</p> <p>23 Management, L.P.?</p> <p>24 A. I believe that is the named</p> <p>25 investment manager of HCLOF, per the</p>	<p style="text-align: right;">Page 27</p> <p>1 Confidential - Pugatch</p> <p>2 organization documents of that vehicle.</p> <p>3 Q. You believe that that was the</p> <p>4 investment manager on the organization</p> <p>5 documents, which –</p> <p>6 A. Of the various transaction</p> <p>7 documents that we entered into, in</p> <p>8 connection with our investment.</p> <p>9 Q. Would those have been the</p> <p>10 documents that you had entered on November</p> <p>11 the 15 of 2017?</p> <p>12 A. Yes.</p> <p>13 Q. Okay. It says that HarbourVest</p> <p>14 initially invested \$73,522,928 for roughly</p> <p>15 49 percent interest in HCLOF; and more</p> <p>16 specifically, that would be a 49.98</p> <p>17 percent interest in HCLOF, correct?</p> <p>18 A. Sounds right, yes.</p> <p>19 Q. Okay. And then HarbourVest</p> <p>20 contributed an additional \$4,998,501</p> <p>21 following a capital call, and it's</p> <p>22 received three dividends, each totally</p> <p>23 \$1,570,429.</p> <p>24 Is all of that correct?</p> <p>25 A. Yes.</p>
<p style="text-align: right;">Page 28</p> <p>1 Confidential - Pugatch</p> <p>2 Q. And has HarbourVest received any</p> <p>3 additional dividends, since the making of</p> <p>4 this declaration?</p> <p>5 A. No, we have not.</p> <p>6 Q. Now, I want to skip down to</p> <p>7 Paragraph 3, where it says that</p> <p>8 HarbourVest expected proceeds from the</p> <p>9 original HCLOF investment were projected</p> <p>10 to exceed 135 million.</p> <p>11 Do you agree with that?</p> <p>12 A. That was the original projected</p> <p>13 value of the investment, yes.</p> <p>14 Q. Well, whose expectation was</p> <p>15 that?</p> <p>16 A. Those were figures, as I recall,</p> <p>17 that were originally provided to us by</p> <p>18 Highland to form the basis of our due</p> <p>19 diligence that we went through, and</p> <p>20 penultimately were included as part of our</p> <p>21 investment thesis in making the</p> <p>22 investment.</p> <p>23 Q. So your testimony is that</p> <p>24 Highland told you that your investment</p> <p>25 would be worth over \$135 million?</p>	<p style="text-align: right;">Page 29</p> <p>1 Confidential - Pugatch</p> <p>2 A. Yes.</p> <p>3 MS. WEISGERBER: Objection to</p> <p>4 the form. Misstates testimony.</p> <p>5 Go ahead, Mike.</p> <p>6 A. That was, that was part of our</p> <p>7 original due diligence, on the investment</p> <p>8 opportunity.</p> <p>9 Q. When you say part of your due</p> <p>10 diligence, are you saying that the number</p> <p>11 originated from Highland or that the</p> <p>12 number originated from your due diligence</p> <p>13 operations?</p> <p>14 MS. WEISGERBER: Objection to</p> <p>15 form.</p> <p>16 A. The number originally came from</p> <p>17 Highland and formed the basis upon which</p> <p>18 we conducted due diligence on the</p> <p>19 investment opportunity.</p> <p>20 Q. And after performing due</p> <p>21 diligence, you were satisfied that that</p> <p>22 was a reasonable projection?</p> <p>23 A. Yes.</p> <p>24 Q. And what was the, what was the</p> <p>25 estimated date, in which the value of your</p>

<p style="text-align: right;">Page 30</p> <p>1 Confidential - Pugatch</p> <p>2 investment would exceed the \$135 million?</p> <p>3 MS. WEISGERBER: Objection to</p> <p>4 form.</p> <p>5 A. I don't recall exactly. That</p> <p>6 would have been over, over several years.</p> <p>7 And again, this was the -- this was the</p> <p>8 projected value based on the original</p> <p>9 investment or the assets that were held by</p> <p>10 HCLOF, at the time of our investment.</p> <p>11 Q. Now, when you talk about a</p> <p>12 portfolio manager -- I'm sorry, when you</p> <p>13 talk about investment manager, are you</p> <p>14 referring to the portfolio manager?</p> <p>15 A. No.</p> <p>16 Q. So what's the difference in an</p> <p>17 investment manager and a portfolio</p> <p>18 manager?</p> <p>19 A. So in the context of this</p> <p>20 investment, the investment manager. We --</p> <p>21 we had -- HarbourVest had an investment</p> <p>22 with HCLOF. Highland was the investment</p> <p>23 manager of HCLOF that in turn held equity</p> <p>24 positions in a variety of CLOs, which had</p> <p>25 various portfolio managers associated with</p>	<p style="text-align: right;">Page 31</p> <p>1 Confidential - Pugatch</p> <p>2 those, all Highland affiliates.</p> <p>3 Q. And so who was the portfolio</p> <p>4 manager for the HarbourVest investment in</p> <p>5 HCLOF?</p> <p>6 MS. WEISGERBER: Objection to</p> <p>7 form.</p> <p>8 A. There were various underling</p> <p>9 portfolio managers, depending on the</p> <p>10 underlying CLO position.</p> <p>11 Q. Well, who was the initial</p> <p>12 portfolio manager?</p> <p>13 A. So, again it would depend on</p> <p>14 which underlying assets we're talking</p> <p>15 about. HCLOF was a diversified portfolio</p> <p>16 of multiple underlying CLO equity</p> <p>17 positions, all with portfolio managers</p> <p>18 that were Highland affiliates, as we</p> <p>19 understood it.</p> <p>20 Q. Well, I'm going to go back to</p> <p>21 Exhibit 1, Paragraph 2, this says, in the</p> <p>22 second sentence, "Acis Capital Management</p> <p>23 GP, LLC, and Acis Capital Management,</p> <p>24 L.P., together Acis, the portfolio manager</p> <p>25 for HCLOF," and then it continues on,</p>
<p style="text-align: right;">Page 32</p> <p>1 Confidential - Pugatch</p> <p>2 "filed for Chapter 11."</p> <p>3 Is this proof of claim correct,</p> <p>4 when it states that Acis Capital</p> <p>5 Management GP, LLC, and Acis Capital</p> <p>6 Management, L.P., were the portfolio</p> <p>7 manager for HCLOF?</p> <p>8 MS. WEISGERBER: Objection to</p> <p>9 form.</p> <p>10 A. I know that there was an issue</p> <p>11 with the portfolio manager for at least</p> <p>12 the Acis CLOs that were held by HCLOF.</p> <p>13 Q. Well, how do you distinguish</p> <p>14 between the Acis CLOs and the Highland</p> <p>15 CLOs? Is that based on who was managing</p> <p>16 them?</p> <p>17 MS. WEISGERBER: Objection to</p> <p>18 form.</p> <p>19 A. Again, they were all underlying</p> <p>20 investments of HCLOF. We didn't</p> <p>21 distinguish the portfolio manager, if you</p> <p>22 will, of those vehicles, other than again</p> <p>23 they were Highland affiliates.</p> <p>24 Q. But it's fair to say that Acis</p> <p>25 was managing at least a portion of the</p>	<p style="text-align: right;">Page 33</p> <p>1 Confidential - Pugatch</p> <p>2 HCLOF investment, correct?</p> <p>3 A. Correct. The underlying</p> <p>4 investments held by HCLOF, correct.</p> <p>5 Q. And did anything -- from the</p> <p>6 time that you -- well, let's just go to</p> <p>7 the -- I think we had the members</p> <p>8 agreement up a second ago. This would</p> <p>9 have been Exhibit 4.</p> <p>10 Yeah, right here. No. 14,</p> <p>11 Highland HCF Advisor, Ltd. is listed as</p> <p>12 the portfolio manager on the members</p> <p>13 agreement.</p> <p>14 Is that accurate, that Highland</p> <p>15 HCF Advisor, Ltd. was the portfolio</p> <p>16 manager?</p> <p>17 MS. WEISGERBER: Objection to</p> <p>18 form. Can you state as of what date</p> <p>19 you're asking, Counsel?</p> <p>20 MR. WILSON: Well, the date of</p> <p>21 this memorandum is, it says right</p> <p>22 here, 15 November 2017.</p> <p>23 BY MR. WILSON:</p> <p>24 Q. So as of the date November 15,</p> <p>25 2017, who was the portfolio manager for</p>

<p style="text-align: right;">Page 34</p> <p>1 Confidential - Pugatch</p> <p>2 this investment?</p> <p>3 A. I don't recall the specific</p> <p>4 names of the various entities that sat</p> <p>5 below the HCLOF level or below Highland</p> <p>6 Capital, as the investment manager of</p> <p>7 HCLOF.</p> <p>8 Q. Well, are you familiar with a</p> <p>9 company called Brigade?</p> <p>10 A. Yes.</p> <p>11 Q. And was that company a</p> <p>12 sub-manager of this investment?</p> <p>13 MS. WEISGERBER: Objection to</p> <p>14 form.</p> <p>15 A. Not at the time of our</p> <p>16 investment.</p> <p>17 Q. Not at the time. Well, when did</p> <p>18 the portfolio managers begin to change in</p> <p>19 this investment?</p> <p>20 MS. WEISGERBER: Objection to</p> <p>21 form.</p> <p>22 A. Do you mean subsequent to our</p> <p>23 investment?</p> <p>24 Q. Yes.</p> <p>25 A. So as I understand it in</p>	<p style="text-align: right;">Page 35</p> <p>1 Confidential - Pugatch</p> <p>2 connection with the Acis bankruptcy that</p> <p>3 took place, there was a change in the</p> <p>4 underlying either portfolio manager of</p> <p>5 certain of the CLOs, the Acis-managed CLOs</p> <p>6 or Acis-branded CLOs, I should say, and/or</p> <p>7 sub-advisor of those CLOs.</p> <p>8 Q. And was that at the direction of</p> <p>9 the Chapter 11 trustee?</p> <p>10 MS. WEISGERBER: Objection.</p> <p>11 A. That's my understanding.</p> <p>12 Q. And so when this investment was</p> <p>13 initially made, was Highland HCF Advisor,</p> <p>14 Ltd. the portfolio manager of the entire</p> <p>15 investment?</p> <p>16 MS. WEISGERBER: Objection to</p> <p>17 form.</p> <p>18 A. I don't recall the specifics</p> <p>19 underneath the HCLOF entity.</p> <p>20 Q. Well, there aren't any other</p> <p>21 portfolio managers listed on this</p> <p>22 document, that I can see.</p> <p>23 Is there any place in this</p> <p>24 document that you can point me to that</p> <p>25 would identify another portfolio manager?</p>
<p style="text-align: right;">Page 36</p> <p>1 Confidential - Pugatch</p> <p>2 MS. WEISGERBER: Objection to</p> <p>3 form. The document speaks for itself.</p> <p>4 A. Again, I think we may be</p> <p>5 distinguishing here between portfolio</p> <p>6 manager at the HCLOF level and portfolio</p> <p>7 manager sub-advisor, again, I'm not sure</p> <p>8 the proper terminology as it relates to</p> <p>9 each of the underlying CLOs that were</p> <p>10 partially owned by HCLOF.</p> <p>11 Q. Well, after the Acis bankruptcy</p> <p>12 was filed, and after the Chapter 11</p> <p>13 trustee appointed Acis as a portfolio</p> <p>14 manager of at least part of HCLOF, did</p> <p>15 Highland HCF Advisor continue to serve as</p> <p>16 portfolio manager?</p> <p>17 MS. WEISGERBER: Objection to</p> <p>18 form.</p> <p>19 A. All of HarbourVest's interaction</p> <p>20 was with Highland as the investment</p> <p>21 manager of HCLOF. My understanding of the</p> <p>22 change in those entities related to the</p> <p>23 portfolio management of the underlying</p> <p>24 Acis CLOs, not a change in the portfolio</p> <p>25 manager, at the HCLOF level.</p>	<p style="text-align: right;">Page 37</p> <p>1 Confidential - Pugatch</p> <p>2 Q. Well, Highland is listed as a</p> <p>3 member under this -- Highland Capital</p> <p>4 Management LLP is listed as a member under</p> <p>5 this Member Agreement; is that correct?</p> <p>6 MS. WEISGERBER: Objection to</p> <p>7 form.</p> <p>8 A. If that's what the document</p> <p>9 says, yes.</p> <p>10 Q. I'm going to look -- let me stop</p> <p>11 my share screen for a second.</p> <p>12 All right. I'm now at the top</p> <p>13 of Page 5 of this Exhibit 4, where it</p> <p>14 says, "Dover IX shall mean HarbourVest</p> <p>15 Dover Street IX Investment L.P."</p> <p>16 And Dover IX was the largest</p> <p>17 single investor of the HarbourVest Group;</p> <p>18 is that correct?</p> <p>19 A. Correct.</p> <p>20 Q. All right. I'm now going to go</p> <p>21 down to Paragraph 5. I'm sorry, it's not</p> <p>22 Paragraph 5. Paragraph 4, where it says</p> <p>23 "Composition of Advisory Board" in</p> <p>24 Paragraph 4.1, The Company shall establish</p> <p>25 an Advisory Board composed of two</p>

<p style="text-align: right;">Page 38</p> <p>1 Confidential - Pugatch</p> <p>2 individuals, one of whom shall be a</p> <p>3 representative of CLO Holdco and one of</p> <p>4 whom shall be a representative of</p> <p>5 Dover IX.</p> <p>6 And did this Advisory Board get</p> <p>7 created?</p> <p>8 A. I believe it was created, yes.</p> <p>9 Q. And who was the representative</p> <p>10 for CLO Holdco on the Advisory Board?</p> <p>11 A. I don't know.</p> <p>12 Q. Who was the representative for</p> <p>13 Dover IX on the Advisory Board?</p> <p>14 A. I can't recall whether it was</p> <p>15 myself or one other colleague who jointly</p> <p>16 manages this investment with me.</p> <p>17 Q. You don't recall if you were on</p> <p>18 the Advisory Board?</p> <p>19 A. The Advisory Board never met</p> <p>20 formally under its capacity as an Advisory</p> <p>21 Board.</p> <p>22 Q. Well, if you look down in</p> <p>23 Paragraph 4.3, I've got my mouse pointed</p> <p>24 here, I don't know if you can see it.</p> <p>25 About two-thirds of the way down in this</p>	<p style="text-align: right;">Page 39</p> <p>1 Confidential - Pugatch</p> <p>2 paragraph it says, "The consent of the</p> <p>3 Advisory Board shall be required to</p> <p>4 approve the following actions," and then</p> <p>5 it lists a number of things.</p> <p>6 Did the Advisory Board not have</p> <p>7 to – was it not required that the</p> <p>8 Advisory Board ever meet, because they</p> <p>9 didn't take any of these actions?</p> <p>10 MS. WEISGERBER: Objection.</p> <p>11 Objection to form.</p> <p>12 A. There may have been one or two</p> <p>13 actions taken by the Advisory Board, I'm</p> <p>14 looking at the list here to see what those</p> <p>15 may even have been, during the duration of</p> <p>16 our investment; but if so, those would</p> <p>17 have been written resolutions or written</p> <p>18 consents, as opposed to any meeting that</p> <p>19 was convened amongst the entire Advisory</p> <p>20 Board.</p> <p>21 Q. Okay. And the entire Advisory</p> <p>22 Board is just two individuals, correct?</p> <p>23 A. Correct, that's my</p> <p>24 understanding.</p> <p>25 Q. Okay. And if you go up a few</p>
<p style="text-align: right;">Page 40</p> <p>1 Confidential - Pugatch</p> <p>2 sentences above that in Paragraph 4.3 it</p> <p>3 says, The portfolio manager shall not act</p> <p>4 contrary to advice of the Advisory Board</p> <p>5 with respect to any action or</p> <p>6 determination expressly conditioned herein</p> <p>7 or in the offering memorandum on the</p> <p>8 consider approval of the Advisory Board.</p> <p>9 So the portfolio manager did not</p> <p>10 have the authority to disregard the advice</p> <p>11 of the Advisory Board; is that correct?</p> <p>12 MS. WEISGERBER: Objection to</p> <p>13 form; misstates the document.</p> <p>14 A. With respect to the limited role</p> <p>15 that the Advisory Board would have to</p> <p>16 play, yes, that would be my read.</p> <p>17 Q. Now, what is your understanding</p> <p>18 of a reset transaction?</p> <p>19 A. Has to do with a refinancing and</p> <p>20 reset of the investment period of an</p> <p>21 underlying CLO.</p> <p>22 Q. And would a reset transaction be</p> <p>23 contained within this – these actions</p> <p>24 that the Advisory Board's consent is</p> <p>25 required to approve?</p>	<p style="text-align: right;">Page 41</p> <p>1 Confidential - Pugatch</p> <p>2 A. No, it would not.</p> <p>3 MS. WEISGERBER: Objection.</p> <p>4 MR. MALONEY: Join.</p> <p>5 Q. It would not?</p> <p>6 A. It would not.</p> <p>7 Q. Well, if a reset was to be</p> <p>8 proposed, who would have the discretion to</p> <p>9 make that decision to enter a reset</p> <p>10 transaction?</p> <p>11 MS. WEISGERBER: Objection to</p> <p>12 form and foundation.</p> <p>13 MR. MALONEY: Join.</p> <p>14 A. That would be Highland as the</p> <p>15 manager of HCLOF, who owns the equity</p> <p>16 position to the underlying CLOs.</p> <p>17 Q. So you're saying that Highland</p> <p>18 would have the exclusive authority to</p> <p>19 enter a reset transaction?</p> <p>20 A. Correct.</p> <p>21 MS. WEISGERBER: Objection to</p> <p>22 form.</p> <p>23 MR. MALONEY: Join.</p> <p>24 Q. What if HarbourVest objected to</p> <p>25 a reset transaction? Would it have any</p>

<p style="text-align: right;">Page 42</p> <p>1 Confidential - Pugatch</p> <p>2 rights or remedies, in your understanding?</p> <p>3 MS. WEISGERBER: I'm going to</p> <p>4 object to form. And also just object</p> <p>5 to the extent that this is calling for</p> <p>6 legal conclusions.</p> <p>7 Mike –</p> <p>8 MR. WILSON: I've ask the</p> <p>9 witness, within his understanding of</p> <p>10 the way this investment worked.</p> <p>11 MS. WEISGERBER: If you have an</p> <p>12 understanding separate from any other</p> <p>13 conversations with counsel, Mike, you</p> <p>14 can certainly answer.</p> <p>15 A. Within my understanding,</p> <p>16 HarbourVest would not have had any ability</p> <p>17 or rights to object to a reset or for</p> <p>18 similar actions by Highland, as the</p> <p>19 manager of the HCLOF.</p> <p>20 Q. Okay. And just to, just for</p> <p>21 clarity, in 4.2 it says that, All actions</p> <p>22 taken by the Advisory Board shall be (i)</p> <p>23 by a unanimous vote of all of the members</p> <p>24 of the Advisory Board in attendance; or</p> <p>25 (ii), by written consent in lieu of a</p>	<p style="text-align: right;">Page 43</p> <p>1 Confidential - Pugatch</p> <p>2 meeting signed by all of the members of</p> <p>3 the Advisory Board.</p> <p>4 And we've talked about how there</p> <p>5 were two members, one of which represented</p> <p>6 CLO Holdco and one of which represented</p> <p>7 HarbourVest, and it was your testimony</p> <p>8 that you don't recall a meeting ever being</p> <p>9 conducted that you believed that there had</p> <p>10 been some written consents issued by the</p> <p>11 Advisory Board; is that correct?</p> <p>12 MS. WEISGERBER: Objection to</p> <p>13 form.</p> <p>14 A. That is my recollection, yes.</p> <p>15 Q. I'm sorry? I didn't hear your</p> <p>16 answer.</p> <p>17 A. That is my recollection, yes.</p> <p>18 Q. Okay. So what is the Advisory</p> <p>19 Board's general function in your</p> <p>20 understanding?</p> <p>21 MS. WEISGERBER: Objection to</p> <p>22 form.</p> <p>23 You can answer, Mike, if you</p> <p>24 know, other than, you know, legal</p> <p>25 conclusions, things like that, legal</p>
<p style="text-align: right;">Page 44</p> <p>1 Confidential - Pugatch</p> <p>2 advice.</p> <p>3 And also, Mike, you're welcome</p> <p>4 to look at the document, I think John</p> <p>5 is E-mailing you the documents as</p> <p>6 well. I don't know if you have the</p> <p>7 full document in front of you.</p> <p>8 THE WITNESS: Yeah, I can pull</p> <p>9 it up here.</p> <p>10 A. I mean, my understanding is the</p> <p>11 Advisory Board, the Advisory Board's</p> <p>12 involvement is as spelled as in Section</p> <p>13 4.3 of the agreement that you have on the</p> <p>14 screen. And that is the extent of the</p> <p>15 role that the Advisory Board would play.</p> <p>16 Q. Well, but as a practical matter,</p> <p>17 what did that entail?</p> <p>18 MS. WEISGERBER: Objection to</p> <p>19 form.</p> <p>20 A. Again, as a practical matter,</p> <p>21 the listed items, which I can't see, that</p> <p>22 are off the screen further down in 4.3 are</p> <p>23 the items that would require approval by</p> <p>24 the Advisory Board.</p> <p>25 Q. But other than those items, the</p>	<p style="text-align: right;">Page 45</p> <p>1 Confidential - Pugatch</p> <p>2 Advisory Board was not a routine part of</p> <p>3 the decision-making of the portfolio</p> <p>4 manager?</p> <p>5 MS. WEISGERBER: Objection to</p> <p>6 form.</p> <p>7 A. Not at all.</p> <p>8 Q. Did you say "not at all"?</p> <p>9 A. Not at all, no.</p> <p>10 Q. I'm going to refer back to</p> <p>11 Exhibit 5, which was Document – or Docket</p> <p>12 1057. I'll put that back on the share</p> <p>13 screen. I wanted you to scroll, sorry.</p> <p>14 It's a long document.</p> <p>15 I want you to look at</p> <p>16 Paragraph 37, which should be on your</p> <p>17 screen. And it says that these are</p> <p>18 misrepresentations that HarbourVest</p> <p>19 alleges were made by Highland. And the</p> <p>20 first bullet point states that, "Highland</p> <p>21 never informed HarbourVest that Highland</p> <p>22 had no intention of paying the Arbitration</p> <p>23 Award and was undertaking steps to ensure</p> <p>24 that Mr. Terry could not collect on his</p> <p>25 judgment."</p>

<p style="text-align: right;">Page 46</p> <p>1 Confidential - Pugatch</p> <p>2 Now, Mr. Terry did not have an</p> <p>3 arbitration award against Highland; is</p> <p>4 that correct?</p> <p>5 MS. WEISGERBER: Objection to</p> <p>6 form and foundation.</p> <p>7 A. My understanding is there was an</p> <p>8 Arbitration Award, awarded for the benefit</p> <p>9 of Mr. Terry.</p> <p>10 Q. But that award was against Acis,</p> <p>11 correct?</p> <p>12 MS. WEISGERBER: Objection to</p> <p>13 form.</p> <p>14 A. I don't know all of the details.</p> <p>15 I do know that Acis was a subsidiary of</p> <p>16 Highland, and there was an arbitration</p> <p>17 award that was for the benefit of</p> <p>18 Mr. Terry.</p> <p>19 Q. But you would agree with me that</p> <p>20 if, if Highland, or I'm sorry if Mr. Terry</p> <p>21 had an arbitration award against Acis,</p> <p>22 then Highland would not have any</p> <p>23 obligation to pay that award?</p> <p>24 MR. MORRIS: Objection to the</p> <p>25 form of the question.</p>	<p style="text-align: right;">Page 47</p> <p>1 Confidential - Pugatch</p> <p>2 MS. WEISGERBER: Objection to</p> <p>3 the form. Objection to the extent</p> <p>4 that it calls for a legal conclusion.</p> <p>5 I don't -- Mike, if you have a</p> <p>6 layman's understanding of the answer</p> <p>7 to that question, you're welcome to</p> <p>8 answer. But if not, don't answer.</p> <p>9 A. My understanding was Acis was a</p> <p>10 controlled subsidiary of Highland's.</p> <p>11 Q. Okay. Well, the next bullet</p> <p>12 point says that, "Highland did not inform</p> <p>13 HarbourVest that it undertook the</p> <p>14 transfers to siphon assets away from Acis,</p> <p>15 L.P., and that such transfers would</p> <p>16 prevent Mr. Terry from collecting on the</p> <p>17 Arbitration Award."</p> <p>18 So if your understanding was</p> <p>19 that Highland was responsible for the</p> <p>20 arbitration award, then why is it relevant</p> <p>21 that Highland siphoned assets away from</p> <p>22 Acis, L.P.?</p> <p>23 MS. WEISGERBER: Objection to</p> <p>24 form. Misstates testimony.</p> <p>25 Can you clarify that question,</p>
<p style="text-align: right;">Page 48</p> <p>1 Confidential - Pugatch</p> <p>2 John? I think the beginning of it was</p> <p>3 a little muddled.</p> <p>4 BY MR. WILSON:</p> <p>5 Q. Well, this objection says that</p> <p>6 Highland had -- or response to objection,</p> <p>7 says that Highland had no intention of</p> <p>8 paying the arbitration award, but that</p> <p>9 seems to conflict with the next bullet</p> <p>10 point that says that it undertook</p> <p>11 transfers to siphon assets away from Acis,</p> <p>12 L.P., to prevent Mr. Terry from collecting</p> <p>13 on the arbitration award.</p> <p>14 So where were those assets being</p> <p>15 siphoned to?</p> <p>16 MS. WEISGERBER: Objection to</p> <p>17 form and foundation.</p> <p>18 If you're capable of answering</p> <p>19 that question, Mike, you can.</p> <p>20 A. I don't know the specific</p> <p>21 details of where those assets were</p> <p>22 siphoned off to, other than it was to</p> <p>23 another Highland affiliate.</p> <p>24 Q. The next sentence says that,</p> <p>25 "Highland simply did not inform</p>	<p style="text-align: right;">Page 49</p> <p>1 Confidential - Pugatch</p> <p>2 HarbourVest and represented to HarbourVest</p> <p>3 that the reason for changing the portfolio</p> <p>4 manager for HCLOF was because Acis was</p> <p>5 toxic in the industry."</p> <p>6 Do you see that?</p> <p>7 A. Yes.</p> <p>8 Q. And it seems when I read these</p> <p>9 documents that have been filed in the</p> <p>10 Highland bankruptcy, and also the Acis</p> <p>11 bankruptcy, that there's a difference in</p> <p>12 position as to which entity, being either</p> <p>13 Highland or HarbourVest, had the belief</p> <p>14 that the Acis name was toxic. Can you</p> <p>15 shed any light on that?</p> <p>16 MS. WEISGERBER: Objection to</p> <p>17 form.</p> <p>18 A. I can unequivocally say that the</p> <p>19 idea to change the portfolio manager or</p> <p>20 the idea that the Acis brand was toxic did</p> <p>21 not come from HarbourVest.</p> <p>22 Q. That was not at HarbourVest's</p> <p>23 suggestion or insistence?</p> <p>24 A. Absolutely not.</p> <p>25 Q. Well, whose suggestion was it</p>

<p style="text-align: right;">Page 50</p> <p>1 Confidential - Pugatch</p> <p>2 that the Acis name was toxic?</p> <p>3 A. Somebody at Highland.</p> <p>4 Q. Do you know who?</p> <p>5 A. I don't recall the conversation</p> <p>6 where that first came up or who said, or</p> <p>7 who at Highland said that.</p> <p>8 Q. But that conversation did occur</p> <p>9 prior to HarbourVest's investment?</p> <p>10 A. Yes.</p> <p>11 Q. So Acis was previously the</p> <p>12 portfolio manager for HCLOF prior to</p> <p>13 November 15, 2017, and now November 17 –</p> <p>14 or 15th, 2017, the portfolio manager was</p> <p>15 changed.</p> <p>16 And what is HarbourVest's</p> <p>17 position as to why that change in</p> <p>18 portfolio manager damaged it?</p> <p>19 MS. WEISGERBER: Objection;</p> <p>20 form, objection to the extent it calls</p> <p>21 for a legal conclusion.</p> <p>22 Mike, you can answer –</p> <p>23 MR. WILSON: I'm not asking for</p> <p>24 a – with all due respect, I'm not</p> <p>25 asking for a legal conclusion. I'm</p>	<p style="text-align: right;">Page 51</p> <p>1 Confidential - Pugatch</p> <p>2 asking for his understanding why the</p> <p>3 change in the portfolio manager</p> <p>4 damaged HarbourVest.</p> <p>5 MS. WEISGERBER: Same objection.</p> <p>6 You can provide any</p> <p>7 non-privileged answer that you have,</p> <p>8 Mike, if any.</p> <p>9 A. Ultimately my understanding is</p> <p>10 that that change in portfolio manager and</p> <p>11 the subsequent litigation between Acis,</p> <p>12 Highland, and Josh Terry led to material</p> <p>13 diminution in value, as it relates to the</p> <p>14 underlying assets of HCLOF stemming from</p> <p>15 Highland's decision not to comply with the</p> <p>16 arbitration award to Mr. Terry.</p> <p>17 Q. Okay. Now, if you go up to</p> <p>18 Page 4 in this document, it says that on</p> <p>19 October 27th, and this is Paragraph 11</p> <p>20 now, "On October 27, 2017, Acis' portfolio</p> <p>21 management rights for HCLOF were</p> <p>22 transferred to Highland HCF"; is that</p> <p>23 correct?</p> <p>24 A. That sounds right, yes.</p> <p>25 Q. And this is over two weeks prior</p>
<p style="text-align: right;">Page 52</p> <p>1 Confidential - Pugatch</p> <p>2 to HarbourVest's investment, correct?</p> <p>3 A. Correct.</p> <p>4 Q. So HarbourVest had full</p> <p>5 knowledge that that the portfolio manager</p> <p>6 of HCLOF was being changed prior to its</p> <p>7 investment, correct?</p> <p>8 A. Correct.</p> <p>9 MS. WEISGERBER: Objection to</p> <p>10 form.</p> <p>11 And just to clarify, you're</p> <p>12 asking him, HarbourVest, he's</p> <p>13 testifying on behalf of himself. I</p> <p>14 could just take a standing objection</p> <p>15 to that because I know sometimes</p> <p>16 you're just saying HarbourVest meaning</p> <p>17 Mike, so...</p> <p>18 BY MR. WILSON:</p> <p>19 Q. Okay. And just to be clear,</p> <p>20 HCLOF changed its portfolio manager on</p> <p>21 October 27, 2017, but after the Acis</p> <p>22 bankruptcy was initiated the Chapter 11</p> <p>23 trustee made changes to the portfolio</p> <p>24 manager, correct?</p> <p>25 MS. WEISGERBER: Objection to</p>	<p style="text-align: right;">Page 53</p> <p>1 Confidential - Pugatch</p> <p>2 form, foundation.</p> <p>3 A. I know there were changes</p> <p>4 subsequent to the Acis bankruptcy, to the</p> <p>5 underlying management of the Acis CLOs.</p> <p>6 Q. All right. I'm going to go back</p> <p>7 to Paragraph 37, and I want to look at</p> <p>8 these next two bullet points.</p> <p>9 It says that, in the third</p> <p>10 bullet point, that "Highland indicated to</p> <p>11 HarbourVest that the dispute with</p> <p>12 Mr. Terry (which appeared on a litigation</p> <p>13 schedule presented to HarbourVest during</p> <p>14 diligence) would have no impact on</p> <p>15 investment activities."</p> <p>16 And that would be the opinion of</p> <p>17 Highland, correct?</p> <p>18 MS. WEISGERBER: Objection to</p> <p>19 form. The opinion of Highland? Is</p> <p>20 that what you meant to ask?</p> <p>21 MR. WILSON: Right.</p> <p>22 BY MR. WILSON:</p> <p>23 Q. That's Highland expressing its</p> <p>24 opinion to HarbourVest, correct?</p> <p>25 MS. WEISGERBER: Objection to</p>

<p style="text-align: right;">Page 54</p> <p>1 Confidential - Pugatch</p> <p>2 form.</p> <p>3 A. I would just say Highland</p> <p>4 presented that as facts to HarbourVest.</p> <p>5 Q. Okay. And the next one, it says</p> <p>6 that "Highland expressed confidence in the</p> <p>7 ability of HCLOF to reset or redeem the</p> <p>8 CLOs notwithstanding that Highland was</p> <p>9 using HCLOF as part of its scheme to avoid</p> <p>10 the pending Arbitration Award."</p> <p>11 That's again an opinion, right,</p> <p>12 that Highland expressed confidence in the</p> <p>13 ability of HCLOF?</p> <p>14 MS. WEISGERBER: Objection to</p> <p>15 form. Objection to the extent it</p> <p>16 calls for a legal conclusion.</p> <p>17 A. Ultimately, their ability, or</p> <p>18 HCLOF's ability to reset or redeem the</p> <p>19 CLOs would be subject to market conditions</p> <p>20 and the ability to actually affect those</p> <p>21 transactions, but they expressed their,</p> <p>22 you know, their belief or view in HCLOF's</p> <p>23 ability to do that notwithstanding the,</p> <p>24 that change in portfolio manager.</p> <p>25 Q. Well, in Paragraph 39 on that</p>	<p style="text-align: right;">Page 55</p> <p>1 Confidential - Pugatch</p> <p>2 same page, it says, "In reliance on</p> <p>3 Highland's misrepresentations and</p> <p>4 omissions, HarbourVest invested in HCLOF."</p> <p>5 Now, HarbourVest is a</p> <p>6 sophisticated investor, correct?</p> <p>7 A. Correct.</p> <p>8 Q. And if we were to go to</p> <p>9 Paragraph 36, it says, right here in the</p> <p>10 middle, "These facts were material:</p> <p>11 indeed, HarbourVest expressed concern and</p> <p>12 requested further information regarding</p> <p>13 the Transfers, the Arbitration Award, and</p> <p>14 their implications for HCLOF, and the</p> <p>15 investment's closing date was delayed."</p> <p>16 And the closing date was</p> <p>17 ultimately November 15, 2017, correct?</p> <p>18 A. Correct.</p> <p>19 Q. What was the initial closing</p> <p>20 date that had to be delayed?</p> <p>21 A. I believe it was scheduled for</p> <p>22 November 1st.</p> <p>23 Q. So HarbourVest had full</p> <p>24 knowledge of these facts that it, that it</p> <p>25 lays out here forming the basis of the</p>
<p style="text-align: right;">Page 56</p> <p>1 Confidential - Pugatch</p> <p>2 alleged misrepresentations, and they</p> <p>3 requested further information regarding</p> <p>4 those facts.</p> <p>5 Did they receive any further</p> <p>6 information?</p> <p>7 MR. MORRIS: Objection to the</p> <p>8 form of the question.</p> <p>9 MS. WEISGERBER: Objection to</p> <p>10 form. Misstates testimony.</p> <p>11 A. We did have subsequent</p> <p>12 conversations and, I believe, receive</p> <p>13 subsequent information describing the</p> <p>14 intent around, and the, you know, new</p> <p>15 structure, pro forma structure, of the</p> <p>16 action that Highland had undertaken. And</p> <p>17 part of the reason for the delay in the</p> <p>18 closing was to ensure that we had adequate</p> <p>19 time to diligence those changes, ask</p> <p>20 questions, in connection with a thorough</p> <p>21 due diligence process, and ensure that the</p> <p>22 underlying legal structure was still</p> <p>23 sound.</p> <p>24 Q. And HarbourVest was investing</p> <p>25 over \$73 million, correct?</p>	<p style="text-align: right;">Page 57</p> <p>1 Confidential - Pugatch</p> <p>2 A. Right.</p> <p>3 Q. And HarbourVest had made</p> <p>4 investments of this nature previously,</p> <p>5 correct?</p> <p>6 A. We did.</p> <p>7 MS. WEISGERBER: Objection to</p> <p>8 form.</p> <p>9 A. HarbourVest has made hundreds of</p> <p>10 investment over its years, yes.</p> <p>11 Q. And HarbourVest has conducted</p> <p>12 due diligence regarding its investments in</p> <p>13 the past, correct?</p> <p>14 A. Correct.</p> <p>15 Q. And HarbourVest received</p> <p>16 additional information on items of concern</p> <p>17 and reviewed that information and</p> <p>18 satisfied itself that this was an</p> <p>19 appropriate investment, correct?</p> <p>20 MS. WEISGERBER: Objection to</p> <p>21 form. Misstates testimony.</p> <p>22 A. On the back of</p> <p>23 misrepresentations by Highland, yes.</p> <p>24 MR. WILSON: Well, I think</p> <p>25 that's nonresponsive and I object.</p>

<p style="text-align: right;">Page 58</p> <p>1 Confidential - Pugatch</p> <p>2 Q. I'm just, I'm just, reading from</p> <p>3 your pleading that you filed in the</p> <p>4 bankruptcy, where you say that these were</p> <p>5 material facts, and HarbourVest sought</p> <p>6 more information regarding these facts.</p> <p>7 And then you've testified that they</p> <p>8 performed additional due diligence</p> <p>9 regarding that information they received,</p> <p>10 and then they determined that the</p> <p>11 investment was appropriate, correct?</p> <p>12 MS. WEISGERBER: Objection to</p> <p>13 form. Misstates testimony.</p> <p>14 Go ahead, Mike.</p> <p>15 A. Yeah, that is correct, on the</p> <p>16 back of the additional information we</p> <p>17 received from Highland.</p> <p>18 And I would add, with, you know,</p> <p>19 with the benefit of external advisors and</p> <p>20 outside counsel reviewing those structural</p> <p>21 changes, as well.</p> <p>22 Q. All right. Thank you.</p> <p>23 Now, going back to your</p> <p>24 declaration, which we've marked as</p> <p>25 Exhibit 3, Paragraph 3 says that "The</p>	<p style="text-align: right;">Page 59</p> <p>1 Confidential - Pugatch</p> <p>2 unaudited net asset value of HCLOF, as of</p> <p>3 August 31, 2020, was \$44,587,820."</p> <p>4 And is that a -- is that a book</p> <p>5 value, I guess?</p> <p>6 A. That is a fair market value, in</p> <p>7 accordance with the valuation policy of</p> <p>8 HCLOF.</p> <p>9 Q. Do you happen to know the net</p> <p>10 asset value of HCLOF as of February 1,</p> <p>11 2019? And I don't want an exact number, I</p> <p>12 just want an approximation.</p> <p>13 A. No, I do not.</p> <p>14 Q. Do you know where I could get</p> <p>15 that information?</p> <p>16 A. Presumably from the Debtor.</p> <p>17 Q. We'll come back to this in a</p> <p>18 minute, but I'm going to --</p> <p>19 MS. WEISGERBER: I think we've</p> <p>20 been going about an hour, John, if we</p> <p>21 can take a quick break.</p> <p>22 MR. WILSON: Yeah, a break is</p> <p>23 fine.</p> <p>24 MS. WEISGERBER: Actually,</p> <p>25 Mike...</p>
<p style="text-align: right;">Page 60</p> <p>1 Confidential - Pugatch</p> <p>2 MR. WILSON: I'm sorry? I</p> <p>3 didn't hear you.</p> <p>4 MS. WEISGERBER: It can be up to</p> <p>5 Mike.</p> <p>6 Mike, do you want to take a</p> <p>7 quick break? Do you want to keep</p> <p>8 going?</p> <p>9 MR. WILSON: No, we can, if</p> <p>10 y'all need a break, we can take a</p> <p>11 break, like 10, 15 minutes.</p> <p>12 THE WITNESS: Yeah, why don't we</p> <p>13 take a break, please.</p> <p>14 MR. WILSON: What do y'all</p> <p>15 prefer? 10, 15?</p> <p>16 MS. WEISGERBER: Ten minutes is</p> <p>17 fine.</p> <p>18 Mike, is that good with you.</p> <p>19 THE WITNESS: Yeah, ten-minute</p> <p>20 break is fine.</p> <p>21 MR. WILSON: Okay. Well, we'll</p> <p>22 break till, let's say, 1:20 central</p> <p>23 time.</p> <p>24 THE WITNESS: Perfect.</p> <p>25 MR. WILSON: All right. Thanks</p>	<p style="text-align: right;">Page 61</p> <p>1 Confidential - Pugatch</p> <p>2 guys.</p> <p>3 (Recess taken.)</p> <p>4 MR. WILSON: Yes, I just sent</p> <p>5 out an E-mail with Exhibit 6, and I'm</p> <p>6 going to pull that up on the screen</p> <p>7 share, as well.</p> <p>8 (Whereupon, Exhibit 6, Offering</p> <p>9 Memorandum 122 pages, was marked for</p> <p>10 identification.)</p> <p>11 BY MR. WILSON:</p> <p>12 Q. All right. So this is the</p> <p>13 Offering Memorandum, and I'm looking at</p> <p>14 the bottom of Page 1 -- I mean, the top of</p> <p>15 Page 1, I'm sorry.</p> <p>16 The Company that was being</p> <p>17 invested in is Highland CLO Funding, Ltd.</p> <p>18 Do you see that, Mr. Pugatch?</p> <p>19 MS. WEISGERBER: Objection to</p> <p>20 form.</p> <p>21 A. I do. Okay.</p> <p>22 Q. And then this document defines</p> <p>23 Highland, as Highland Capital Management,</p> <p>24 L.P. Do you see that?</p> <p>25 A. Yes.</p>

<p style="text-align: right;">Page 62</p> <p>1 Confidential - Pugatch</p> <p>2 Q. Okay. Now, if we go down to, I</p> <p>3 guess it's Page 8 of this document, and</p> <p>4 this first full paragraph at the top, it</p> <p>5 says, "No voting member of the Advisory</p> <p>6 Board shall be a controlled affiliate of</p> <p>7 Highland."</p> <p>8 Do you see that?</p> <p>9 A. I do.</p> <p>10 Q. And then it also says that, "It</p> <p>11 being understood that none of CLO Holdco</p> <p>12 Ltd., it's wholly-owned subsidiaries, or</p> <p>13 any of their respective directors or</p> <p>14 trustees shall be deemed to be a</p> <p>15 controlled affiliate of Highland, due to</p> <p>16 their preexisting non-discretionary</p> <p>17 advisory relationship with Highland."</p> <p>18 Do you see that?</p> <p>19 A. Yes.</p> <p>20 Q. So there were no affiliates of</p> <p>21 Highland on the Advisory Board, correct?</p> <p>22 MS. WEISGERBER: Objection to</p> <p>23 form.</p> <p>24 A. For voting purposes under the</p> <p>25 document, that is how this reads, correct.</p>	<p style="text-align: right;">Page 63</p> <p>1 Confidential - Pugatch</p> <p>2 MR. WILSON: All right. I'm</p> <p>3 going to turn to the next exhibit.</p> <p>4 And this is going to be Exhibit No. 7</p> <p>5 coming in the E-mail. I'm also going</p> <p>6 to put Exhibit No. 7 on the screen.</p> <p>7 (Whereupon, Exhibit 7, Share</p> <p>8 Subscription and Transfer Agreement 31</p> <p>9 pages, was marked for identification.)</p> <p>10 Q. All right. Do you see that?</p> <p>11 The "Subscription and Transfer Agreement</p> <p>12 For Ordinary Shares"?</p> <p>13 A. Yep.</p> <p>14 Q. All right. So what this</p> <p>15 document says is that, it repeats that</p> <p>16 Highland HCLF Advisory Ltd. is the</p> <p>17 portfolio manager. Highland CLO Funding</p> <p>18 Ltd. is the fund, and CLO Holdco Ltd. is</p> <p>19 the existing shareholder.</p> <p>20 And if we go down to the bottom</p> <p>21 half of this page, it says that</p> <p>22 HarbourVest was acquiring its shares in</p> <p>23 this investment from CLO Holdco, correct?</p> <p>24 A. Yes.</p> <p>25 MS. WEISGERBER: Objection to</p>
<p style="text-align: right;">Page 64</p> <p>1 Confidential - Pugatch</p> <p>2 form.</p> <p>3 Q. And prior to the date of this</p> <p>4 document, which I believe is November 15,</p> <p>5 2017, CLO Holdco held 100 percent of the</p> <p>6 shares of HCLOF, correct?</p> <p>7 MS. WEISGERBER: Objection to</p> <p>8 form, foundation.</p> <p>9 A. I don't recall. I know they</p> <p>10 were the largest, the largest investor. I</p> <p>11 don't recall if it was 100 percent.</p> <p>12 Q. Well, if you look at the chart</p> <p>13 below Paragraph A, it says that CLO Holdco</p> <p>14 Ltd. immediately prior to the placing on</p> <p>15 100 percent share percentage.</p> <p>16 Do you have any reason to</p> <p>17 disagree with that?</p> <p>18 A. No.</p> <p>19 MS. WEISGERBER: Objection to</p> <p>20 form.</p> <p>21 Q. All right. Now, below CLO</p> <p>22 Holdco Ltd., these are the five</p> <p>23 HarbourVest entities that have filed</p> <p>24 proofs of claim in this bankruptcy,</p> <p>25 correct?</p>	<p style="text-align: right;">Page 65</p> <p>1 Confidential - Pugatch</p> <p>2 MS. WEISGERBER: Objection to</p> <p>3 form.</p> <p>4 A. Those are the five HarbourVest</p> <p>5 entities with a direct investment in</p> <p>6 HCLOF.</p> <p>7 Q. And each one of those entities</p> <p>8 has filed a proof of claim in this</p> <p>9 bankruptcy, correct?</p> <p>10 A. Yes.</p> <p>11 Q. And the largest – I think we</p> <p>12 discussed this earlier, but Dover Street</p> <p>13 IX is the largest of those investors, with</p> <p>14 a 35.49 percent share percentage, correct?</p> <p>15 MS. WEISGERBER: Objection to</p> <p>16 form.</p> <p>17 A. Correct.</p> <p>18 Q. And if you take the total of</p> <p>19 those investments of the HarbourVest</p> <p>20 entities, you get a 49.98 percent total.</p> <p>21 Is that your understanding?</p> <p>22 MS. WEISGERBER: Objection to</p> <p>23 form.</p> <p>24 A. I know it has 49 percent, and</p> <p>25 some percentage. I'll take your math as</p>

<p style="text-align: right;">Page 66</p> <p>1 Confidential - Pugatch</p> <p>2 correct.</p> <p>3 Q. And 49.98 percent is larger than</p> <p>4 the next largest shareholder, which is CLO</p> <p>5 Holdco which is 49.02 percent, correct?</p> <p>6 MS. WEISGERBER: Objection to</p> <p>7 form.</p> <p>8 A. In taking all of the HarbourVest</p> <p>9 entities, collectively, yes, correct.</p> <p>10 Q. And so I want to go back to</p> <p>11 earlier where we saw in documents filed by</p> <p>12 HarbourVest, where it refers to itself as</p> <p>13 a passive investor. What do you, I</p> <p>14 apologize if I've already asked you this</p> <p>15 question, but what do you mean by passive</p> <p>16 investor?</p> <p>17 A. Meaning we were a minority</p> <p>18 investor in HCLOF. HCLOF was fully</p> <p>19 controlled by Highland as the investment</p> <p>20 manager. So HarbourVest did not have any</p> <p>21 governance, rights, or control as it</p> <p>22 related to the ongoing investment</p> <p>23 management and decisionmaking of HCLOF.</p> <p>24 Q. HarbourVest has the largest</p> <p>25 percentage of the shares of any of these</p>	<p style="text-align: right;">Page 67</p> <p>1 Confidential - Pugatch</p> <p>2 investors, correct?</p> <p>3 MS. WEISGERBER: Objection to</p> <p>4 form.</p> <p>5 A. Taken collectively, yes.</p> <p>6 Q. And HarbourVest owned one of the</p> <p>7 two spots on the Advisory Board, correct?</p> <p>8 MS. WEISGERBER: Objection to</p> <p>9 form.</p> <p>10 A. Correct.</p> <p>11 Q. And if you look down below the</p> <p>12 HarbourVest entities on this chart, you</p> <p>13 see that Highland Capital Management, L.P.</p> <p>14 is purchasing a .63 percent interest,</p> <p>15 correct?</p> <p>16 MS. WEISGERBER: Objection to</p> <p>17 form. The document speaks for itself.</p> <p>18 A. According to the document, yes.</p> <p>19 Q. Do you have any reason to</p> <p>20 disagree with that document?</p> <p>21 MS. WEISGERBER: Objection to</p> <p>22 form.</p> <p>23 A. I do not.</p> <p>24 MR. WILSON: All right. I'm</p> <p>25 going to stop that screen share. I'm</p>
<p style="text-align: right;">Page 68</p> <p>1 Confidential - Pugatch</p> <p>2 going to E-mail out the next exhibit.</p> <p>3 This was Exhibit 8 that I just sent,</p> <p>4 and I'll pull it up on the screen</p> <p>5 share.</p> <p>6 (Whereupon, Exhibit 8, E-mail</p> <p>7 08/15/2017, was marked for</p> <p>8 identification.)</p> <p>9 Q. Now, I'll represent to you that</p> <p>10 I received this document this morning from</p> <p>11 your counsel. Do you recognize this</p> <p>12 E-mail? Have you seen it before?</p> <p>13 A. Yes, I have.</p> <p>14 Q. And this E-mail is sent by Brad</p> <p>15 Eden. I think you mentioned that he was</p> <p>16 one of the representatives that was</p> <p>17 involved in the pre-investment discussions</p> <p>18 with Highland?</p> <p>19 A. Correct.</p> <p>20 Q. And I think you told me that</p> <p>21 Dustin Willard was involved in those</p> <p>22 discussions on the HarbourVest side,</p> <p>23 correct?</p> <p>24 A. Correct.</p> <p>25 Q. And so this is an E-mail sent on</p>	<p style="text-align: right;">Page 69</p> <p>1 Confidential - Pugatch</p> <p>2 August 15, 2017 from Brad Eden to Dustin</p> <p>3 Willard. Are you familiar with Thomas</p> <p>4 Surgent?</p> <p>5 A. Yes.</p> <p>6 Q. Was he involved in those</p> <p>7 discussions with you and HarbourVest as</p> <p>8 well?</p> <p>9 A. In some of those discussions,</p> <p>10 yes.</p> <p>11 Q. Okay. So when it says, "Dustin,</p> <p>12 attached is a legal summary. Of course,</p> <p>13 Thomas is available to answer any</p> <p>14 follow-up questions." Do you know if</p> <p>15 Thomas was consulted with any follow-up</p> <p>16 questions?</p> <p>17 A. I recall –</p> <p>18 MS. WEISGERBER: Objection to</p> <p>19 form.</p> <p>20 A. – having follow-up</p> <p>21 conversations with Highland, I don't –</p> <p>22 around these legal summaries. I don't</p> <p>23 recall with whom.</p> <p>24 Q. Okay. And just to show you the</p> <p>25 attachment that's referenced in the</p>

<p style="text-align: right;">Page 70</p> <p>1 Confidential - Pugatch</p> <p>2 E-mail, this says that SEC financial</p> <p>3 crisis matter crusader, Terry, Daugherty</p> <p>4 and UBS. So and then I guess these are --</p> <p>5 this is information provided by Highland</p> <p>6 to HarbourVest regarding these matters.</p> <p>7 Why were these particular matters</p> <p>8 addressed in this E-mail, to your</p> <p>9 knowledge?</p> <p>10 MS. WEISGERBER: Objection to</p> <p>11 form and foundation.</p> <p>12 A. These were all outstanding</p> <p>13 litigation matters that we had become</p> <p>14 aware of in connection with our diligence</p> <p>15 that we asked for a further explanation</p> <p>16 from Highland on the underlying substance.</p> <p>17 Q. Now, did you become</p> <p>18 independently aware of these in the course</p> <p>19 of your due diligence, or were these</p> <p>20 brought to your attention by Highland</p> <p>21 first?</p> <p>22 A. I don't know.</p> <p>23 MS. WEISGERBER: Objection to</p> <p>24 form.</p> <p>25 Q. You don't know?</p>	<p style="text-align: right;">Page 71</p> <p>1 Confidential - Pugatch</p> <p>2 A. (Nods.)</p> <p>3 Q. Okay. And particularly with</p> <p>4 respect to Mr. Terry, is it your opinion</p> <p>5 that there are any material</p> <p>6 misrepresentations made in this summary?</p> <p>7 MS. WEISGERBER: Objection to</p> <p>8 form. Objection to the extent it</p> <p>9 calls for a legal conclusion.</p> <p>10 Mike, to the extent you have an</p> <p>11 answer that does not infringe on</p> <p>12 conversations with counsel, you can</p> <p>13 provide it.</p> <p>14 A. Yeah, I would say our</p> <p>15 understanding or interpretation of that,</p> <p>16 or the answer to that question would be</p> <p>17 based on conversations with counsel.</p> <p>18 Q. Well, this document was provided</p> <p>19 to you in the course of the discussions</p> <p>20 prior to HarbourVest's investment, and</p> <p>21 you've stated that Highland, or you've</p> <p>22 taken the position that Highland made</p> <p>23 material misrepresentations to</p> <p>24 HarbourVest, in the course of these</p> <p>25 discussions.</p>
<p style="text-align: right;">Page 72</p> <p>1 Confidential - Pugatch</p> <p>2 Does this document evidence</p> <p>3 those material misrepresentations?</p> <p>4 MS. WEISGERBER: Objection to</p> <p>5 form. Objection to the extent it</p> <p>6 calls for a legal conclusion.</p> <p>7 A. Yeah, same answer as previous.</p> <p>8 Q. Well, I'm not asking you for a</p> <p>9 legal conclusion. I'm asking you are</p> <p>10 there misrepresentations in this document</p> <p>11 that you claim Highland made?</p> <p>12 MS. WEISGERBER: Same</p> <p>13 objections.</p> <p>14 I think misrepresentations calls</p> <p>15 for a legal conclusion regarding legal</p> <p>16 misrepresentations, actionable</p> <p>17 misrepresentations. So if he doesn't</p> <p>18 have any non-privileged testimony to</p> <p>19 give, he can't give any testimony.</p> <p>20 MR. WILSON: Well, I'm here</p> <p>21 today to investigate HarbourVest's</p> <p>22 claim and one of the basis of</p> <p>23 HarbourVest's claim is</p> <p>24 misrepresentation. So I'm trying to</p> <p>25 figure out what those</p>	<p style="text-align: right;">Page 73</p> <p>1 Confidential - Pugatch</p> <p>2 misrepresentations were.</p> <p>3 And I would ask that the witness</p> <p>4 tell me if there's a misrepresentation</p> <p>5 in this document that was provided in</p> <p>6 this E-mail.</p> <p>7 MS. WEISGERBER: Same</p> <p>8 objections.</p> <p>9 Mike, if you have a general</p> <p>10 understanding of, generally,</p> <p>11 misrepresentations that HarbourVest</p> <p>12 believes were made in connection or</p> <p>13 regarding the Terry litigation,</p> <p>14 et cetera, you can provide that</p> <p>15 information.</p> <p>16 THE WITNESS: Yeah, sure.</p> <p>17 A. So in general, my understanding</p> <p>18 and the way that Highland had</p> <p>19 characterized the ongoing litigation with</p> <p>20 Mr. Terry was that it was nothing more</p> <p>21 than an employment dispute with a former</p> <p>22 employee and that, you know, the</p> <p>23 arbitration -- well, actually, it was</p> <p>24 before the Arbitration Board, but the</p> <p>25 ongoing litigation had no impact, bearing,</p>

<p style="text-align: right;">Page 74</p> <p>1 Confidential - Pugatch</p> <p>2 or ultimate result on the underlying CLOs</p> <p>3 that Highland managed, including the Acis</p> <p>4 CLOs.</p> <p>5 Q. So you're saying that</p> <p>6 Highland –</p> <p>7 MR. MORRIS: John, I'm sorry to</p> <p>8 interrupt. Before you go on, somebody</p> <p>9 with the initials DSD just joined the</p> <p>10 deposition. Can you please identify</p> <p>11 yourself?</p> <p>12 MR. DRAPER: This is Douglas</p> <p>13 Draper. I just changed machines.</p> <p>14 MR. MORRIS: Okay. No problem,</p> <p>15 Doug. Thank you.</p> <p>16 BY MR. WILSON:</p> <p>17 Q. So, and I'm not trying to put</p> <p>18 words in your mouth, but is the gist of</p> <p>19 what you're telling me that Highland</p> <p>20 represented that this was a minor dispute</p> <p>21 with a former employee and it would not</p> <p>22 affect its CLO business?</p> <p>23 A. Correct.</p> <p>24 MS. WEISGERBER: Objection to</p> <p>25 form.</p>	<p style="text-align: right;">Page 75</p> <p>1 Confidential - Pugatch</p> <p>2 A. Correct.</p> <p>3 Q. Well, are there any more</p> <p>4 specific E-mails or written</p> <p>5 communications, that you're aware of, that</p> <p>6 would contain misrepresentations by</p> <p>7 Highland to HarbourVest?</p> <p>8 MS. WEISGERBER: Objection to</p> <p>9 form.</p> <p>10 Are you asking about from</p> <p>11 today's production, or are you asking</p> <p>12 about just, in general?</p> <p>13 MR. WILSON: Well, you produced</p> <p>14 two E-mails to us today. I'm just</p> <p>15 asking if there's anything else he's</p> <p>16 aware of where there's written</p> <p>17 misrepresentations from Highland to</p> <p>18 HarbourVest.</p> <p>19 MS. WEISGERBER: Mike, if you</p> <p>20 have an answer separate from</p> <p>21 conversations with lawyers, et cetera,</p> <p>22 you can certainly answer.</p> <p>23 A. Yeah, my understanding of the</p> <p>24 documents I reviewed that were part of the</p> <p>25 production to you earlier today, there is</p>
<p style="text-align: right;">Page 76</p> <p>1 Confidential - Pugatch</p> <p>2 another document that would also include</p> <p>3 misrepresentations on the part of this,</p> <p>4 the Terry lawsuit and ultimate impact on</p> <p>5 the CLO business.</p> <p>6 BY MR. WILSON:</p> <p>7 Q. And what document is that?</p> <p>8 A. That was the E-mail, E-mail with</p> <p>9 an attachment around a response to a Wall</p> <p>10 Street Journal article and some of the</p> <p>11 content in the E-mail itself.</p> <p>12 Q. Okay. We'll look at that one.</p> <p>13 What was the – HarbourVest had</p> <p>14 seen the Terry Arbitration Award, correct?</p> <p>15 MS. WEISGERBER: Objection to</p> <p>16 form.</p> <p>17 Q. Prior to making its investment</p> <p>18 in HCLOF?</p> <p>19 A. We were aware of the existence</p> <p>20 and the outcome of the Arbitration Award.</p> <p>21 Q. Had you read the Arbitration</p> <p>22 Award?</p> <p>23 A. No.</p> <p>24 Q. Well, how did you know the</p> <p>25 substance of the Arbitration Award without</p>	<p style="text-align: right;">Page 77</p> <p>1 Confidential - Pugatch</p> <p>2 reading it?</p> <p>3 MS. WEISGERBER: Objection to</p> <p>4 form.</p> <p>5 A. We were informed by Highland of</p> <p>6 the outcome of the ongoing litigation and</p> <p>7 the outcome of the Arbitration Award.</p> <p>8 Q. Was that part of the</p> <p>9 documentation that you requested Highland</p> <p>10 provide you to continue your due</p> <p>11 diligence, before making the investment?</p> <p>12 MS. WEISGERBER: Objection to</p> <p>13 form.</p> <p>14 A. We certainly requested more</p> <p>15 color around the outcome of that, and any</p> <p>16 impact that it could have to HCLOF or the</p> <p>17 ongoing viability of Highland's CLO</p> <p>18 business.</p> <p>19 Q. And what, what were you provided</p> <p>20 with respect to the Terry Arbitration</p> <p>21 Award?</p> <p>22 MS. WEISGERBER: Objection to</p> <p>23 form.</p> <p>24 A. The existence of that award, the</p> <p>25 quantum of that award, the judgment of</p>

<p style="text-align: right;">Page 78</p> <p>1 Confidential - Pugatch</p> <p>2 just under \$8 million in connection with</p> <p>3 that award. That was the information that</p> <p>4 was disclosed at -- and represented as a</p> <p>5 settlement or, you know, arbitration</p> <p>6 ruling, in connection with the employee</p> <p>7 litigation, wrongful termination suit.</p> <p>8 Q. So did HarbourVest not request a</p> <p>9 copy of the Arbitration Award to review?</p> <p>10 MS. WEISGERBER: Objection to</p> <p>11 form.</p> <p>12 A. We did not specifically, no.</p> <p>13 Q. And so, to this day, have you</p> <p>14 read the Arbitration Award?</p> <p>15 A. I have not.</p> <p>16 MS. WEISGERBER: Objection to</p> <p>17 form.</p> <p>18 Q. You have not?</p> <p>19 A. I have not.</p> <p>20 MR. WILSON: Okay. I think my</p> <p>21 last E-mail went out with Exhibit 9 on</p> <p>22 it. I will pull that up.</p> <p>23 Q. Can you see that on the screen</p> <p>24 share?</p> <p>25 A. Yes.</p>	<p style="text-align: right;">Page 79</p> <p>1 Confidential - Pugatch</p> <p>2 (Whereupon, Exhibit 9,</p> <p>3 11/29/2017 E-mail with cover letter</p> <p>4 Highland Capital Management, was</p> <p>5 marked for identification.)</p> <p>6 Q. Okay. So I think this is out of</p> <p>7 order, but this should have been first in</p> <p>8 the exhibit. But this is an E-mail from</p> <p>9 Hunter Covitz to Dustin Willard, Michael</p> <p>10 Pugatch and Nick Bellisario, carbon copies</p> <p>11 to Trey Parker and Brad Eden.</p> <p>12 And Trey Parker and Brad Eden</p> <p>13 are Highland affiliates, right?</p> <p>14 A. Yes.</p> <p>15 Q. And we've talked about Dustin</p> <p>16 Willard. Who's Nick Bellisario?</p> <p>17 A. He was another member of the</p> <p>18 HarbourVest team.</p> <p>19 Q. And was he on the, the</p> <p>20 four-member board that you talked about</p> <p>21 earlier, that made the investment</p> <p>22 decision?</p> <p>23 A. No, he was the junior member of</p> <p>24 the investment team that I alluded to.</p> <p>25 Q. Okay. And this, this E-mail</p>
<p style="text-align: right;">Page 80</p> <p>1 Confidential - Pugatch</p> <p>2 came out about two weeks after the</p> <p>3 HarbourVest investment, correct?</p> <p>4 A. Correct.</p> <p>5 Q. And it's your opinion or</p> <p>6 position that this E-mail contains</p> <p>7 misrepresentations that Highland made to</p> <p>8 HarbourVest?</p> <p>9 MS. WEISGERBER: Objection to</p> <p>10 form. Objection to the extent it</p> <p>11 calls for a legal conclusion.</p> <p>12 A. Yes.</p> <p>13 Q. And there was a Wall Street</p> <p>14 Journal article that had come out shortly</p> <p>15 before this E-mail, correct?</p> <p>16 A. Correct.</p> <p>17 Q. And how did you became aware of</p> <p>18 that Wall Street Journal article?</p> <p>19 A. I certainly would have seen it.</p> <p>20 I may have been sent it separately by</p> <p>21 Highland, I don't recall.</p> <p>22 Q. You don't recall if you saw it</p> <p>23 independently or Highland telling you</p> <p>24 about it?</p> <p>25 A. I don't.</p>	<p style="text-align: right;">Page 81</p> <p>1 Confidential - Pugatch</p> <p>2 Q. And what did you -- what was</p> <p>3 your reaction to receiving these E-mails</p> <p>4 from Highland regarding that article?</p> <p>5 MS. WEISGERBER: Objection to</p> <p>6 form.</p> <p>7 A. The article or the accusations</p> <p>8 in the article were something that</p> <p>9 required more explanation from our</p> <p>10 perspective.</p> <p>11 Q. And attached to this E-mail</p> <p>12 was -- we just scrolled through it a</p> <p>13 second ago -- but a letter from James</p> <p>14 Dondero that was sent to the</p> <p>15 editor-in-chief of the Wall Street</p> <p>16 Journal, Mr. Gerard Baker, on November</p> <p>17 28th.</p> <p>18 And did you read this</p> <p>19 attachment?</p> <p>20 A. Yes.</p> <p>21 Q. And did this attachment to this</p> <p>22 E-mail aleve your concerns that you had</p> <p>23 regarding the article?</p> <p>24 MS. WEISGERBER: Objection to</p> <p>25 form.</p>

<p style="text-align: right;">Page 82</p> <p>1 Confidential - Pugatch</p> <p>2 A. I wouldn't say alleviated the</p> <p>3 concerns but certainly provided an</p> <p>4 explanation or refute to some of the</p> <p>5 claims made in the, in the article.</p> <p>6 Q. And do you contend that this</p> <p>7 letter that was written to Gerard Baker</p> <p>8 and provided later to HarbourVest was a</p> <p>9 material misrepresentation?</p> <p>10 MS. WEISGERBER: Objection to</p> <p>11 form.</p> <p>12 Don't answer that, Mike. It</p> <p>13 calls for a legal conclusion.</p> <p>14 MR. WILSON: I'm asking for his</p> <p>15 understanding.</p> <p>16 Q. Do you contend that there's</p> <p>17 misrepresentations in this letter?</p> <p>18 MS. WEISGERBER: Material</p> <p>19 misrepresentations absolutely calls</p> <p>20 for a legal conclusion, John.</p> <p>21 MR. WILSON: Well, I've</p> <p>22 shortened it to misrepresentations.</p> <p>23 So I just want to know if he thinks</p> <p>24 there's anything that's misrepresented</p> <p>25 in this letter.</p>	<p style="text-align: right;">Page 83</p> <p>1 Confidential - Pugatch</p> <p>2 MS. WEISGERBER: Same</p> <p>3 objections.</p> <p>4 Mike, if you have an</p> <p>5 understanding, separate from</p> <p>6 conversations with lawyers, you can</p> <p>7 answer.</p> <p>8 A. I would need to reread the</p> <p>9 letter to definitively answer that outside</p> <p>10 of conversations with counsel.</p> <p>11 Q. But to be clear, this letter was</p> <p>12 issued two weeks after HarbourVest's</p> <p>13 investment, correct?</p> <p>14 A. Correct.</p> <p>15 MS. WEISGERBER: Objection;</p> <p>16 asked and answered.</p> <p>17 MR. WILSON: I'm going to now</p> <p>18 send out the next exhibit, which is</p> <p>19 going to be Exhibit No. 10.</p> <p>20 (Whereupon, Exhibit 10, 2004</p> <p>21 Examination of Investor in Highland</p> <p>22 CLO Funding Ltd. 10/10/2018, was</p> <p>23 marked for identification.)</p> <p>24 MR. WILSON: It just went</p> <p>25 through. So I'm going to pull it up</p>
<p style="text-align: right;">Page 84</p> <p>1 Confidential - Pugatch</p> <p>2 on my screen share.</p> <p>3 So this Exhibit 10, the document</p> <p>4 I received this morning, filed in the</p> <p>5 Acis bankruptcy, it looks like, well,</p> <p>6 let's see, dated in, dated October 10,</p> <p>7 2018.</p> <p>8 BY MR. WILSON:</p> <p>9 Q. Have you seen this document</p> <p>10 before?</p> <p>11 A. Yes.</p> <p>12 Q. And it's a motion for 2004</p> <p>13 Examination of Investor in Highland CLO</p> <p>14 Funding, Ltd., correct?</p> <p>15 A. Sorry. Was there a question,</p> <p>16 John?</p> <p>17 Q. Yeah. I was just asking you to</p> <p>18 confirm that this was the motion for 2004</p> <p>19 Examination of Investor in Highland CLO</p> <p>20 Funding?</p> <p>21 A. Yes.</p> <p>22 Q. And so if I scroll down to</p> <p>23 Paragraph 6, which is on, it looks like</p> <p>24 it's on Page 4. In the second sentence,</p> <p>25 it says that "Although HCLOF/ALF was a one</p>	<p style="text-align: right;">Page 85</p> <p>1 Confidential - Pugatch</p> <p>2 time wholly-owned by an affiliate of</p> <p>3 Highland, it did an offering memorandum in</p> <p>4 November of 2017 and as a result, is now</p> <p>5 owned 49.985% by certain affiliates of a</p> <p>6 large investor and manager of private</p> <p>7 equity funds."</p> <p>8 And that's defined as investor.</p> <p>9 So the Investor is the HarbourVest</p> <p>10 entities collectively, correct?</p> <p>11 A. Correct.</p> <p>12 Q. All right. And then the next</p> <p>13 sentence, says that "Despite its large</p> <p>14 ownership percentage in HCLOF in the</p> <p>15 alleged millions in losses that will</p> <p>16 result if the Acis CLOs are not reset to</p> <p>17 make them consistent with prevailing</p> <p>18 market conditions the Investor has not yet</p> <p>19 appeared in this case or taken any</p> <p>20 position in this bankruptcy case."</p> <p>21 Do you see that?</p> <p>22 A. I do.</p> <p>23 Q. Is that correct?</p> <p>24 MS. WEISGERBER: Objection to</p> <p>25 form.</p>

<p style="text-align: right;">Page 86</p> <p>1 Confidential - Pugatch</p> <p>2 A. Is what correct?</p> <p>3 Q. Well, I guess, I'm most</p> <p>4 concerned with this last part of the</p> <p>5 sentence. It starts with "The Investor</p> <p>6 has not yet appeared in this case or taken</p> <p>7 any position in the bankruptcy case."</p> <p>8 Do you agree with that?</p> <p>9 MS. WEISGERBER: Objection to</p> <p>10 form.</p> <p>11 Mike, if you want to look at the</p> <p>12 whole document, you're welcome to.</p> <p>13 This is not a document that's a</p> <p>14 HarbourVest-prepared document.</p> <p>15 BY MR. WILSON:</p> <p>16 Q. Maybe a better way of asking the</p> <p>17 question is: As of the date of this</p> <p>18 document, which was in October of 2018,</p> <p>19 had HarbourVest appeared in the Acis</p> <p>20 bankruptcy?</p> <p>21 A. No, we did not.</p> <p>22 Q. And had they asserted any</p> <p>23 positions regarding the Acis bankruptcy?</p> <p>24 A. Not through the court.</p> <p>25 MS. WEISGERBER: Objection to</p>	<p style="text-align: right;">Page 87</p> <p>1 Confidential - Pugatch</p> <p>2 form.</p> <p>3 Q. Okay. Had Highland encouraged</p> <p>4 HarbourVest to participate in the Acis</p> <p>5 bankruptcy?</p> <p>6 MS. WEISGERBER: Objection to</p> <p>7 form.</p> <p>8 A. No.</p> <p>9 Q. They did not?</p> <p>10 MS. WEISGERBER: Objection to</p> <p>11 form.</p> <p>12 Q. Highland did not encourage</p> <p>13 HarbourVest to participate in the Acis</p> <p>14 bankruptcy?</p> <p>15 A. When you say "participate," can</p> <p>16 you define that, please.</p> <p>17 Q. Well, appear in the case, as</p> <p>18 stated in this motion.</p> <p>19 A. No, they had not.</p> <p>20 Q. Did Harbour – I'm sorry – did</p> <p>21 Highland keep HarbourVest apprised of the</p> <p>22 events that occurred in the Acis</p> <p>23 bankruptcy?</p> <p>24 MS. WEISGERBER: Objection to</p> <p>25 form. I'm just going to restate my</p>
<p style="text-align: right;">Page 88</p> <p>1 Confidential - Pugatch</p> <p>2 objection to the extent you're asking</p> <p>3 questions about HarbourVest. This is</p> <p>4 Mr. Pugatch answering, based on his</p> <p>5 knowledge.</p> <p>6 A. We were kept informed from time</p> <p>7 to time throughout the Acis bankruptcy</p> <p>8 proceeding.</p> <p>9 Q. Well, did you, in fact, have</p> <p>10 weekly conference calls with Highland</p> <p>11 representatives regarding the Acis</p> <p>12 bankruptcy?</p> <p>13 MS. WEISGERBER: Objection to</p> <p>14 form.</p> <p>15 A. I don't recall them being</p> <p>16 weekly, no.</p> <p>17 Q. You can agree with me you</p> <p>18 participated in the conference calls with</p> <p>19 Highland regarding the Acis bankruptcy?</p> <p>20 A. Yes.</p> <p>21 MS. WEISGERBER: Same objection.</p> <p>22 Q. And on what, on what –</p> <p>23 MR. WILSON: Sorry. Strike</p> <p>24 that.</p> <p>25 Q. With what regularity would you</p>	<p style="text-align: right;">Page 89</p> <p>1 Confidential - Pugatch</p> <p>2 estimate those conference calls occurred,</p> <p>3 if it's not weekly?</p> <p>4 MS. WEISGERBER: Objection to</p> <p>5 form.</p> <p>6 A. From memory, maybe once, once a</p> <p>7 month on average. Sometimes more</p> <p>8 frequently, sometimes less frequently.</p> <p>9 Q. Did Highland provide you with</p> <p>10 documents and evidence that were filed in</p> <p>11 the Acis bankruptcy?</p> <p>12 MS. WEISGERBER: Objection to</p> <p>13 form.</p> <p>14 We're really starting to get</p> <p>15 pretty far afield here, John, from</p> <p>16 HarbourVest. You know, I'm not sure</p> <p>17 where you're going with this. This is</p> <p>18 a settlement motion that's teed up for</p> <p>19 the court.</p> <p>20 You're welcome to keep going,</p> <p>21 but at some point we're going to cut</p> <p>22 it off.</p> <p>23 MR. WILSON: Well, I think – I</p> <p>24 don't think I'm going to go too far</p> <p>25 down this path, but I think this</p>

<p style="text-align: right;">Page 90</p> <p>1 Confidential - Pugatch</p> <p>2 directly relates to the claims that</p> <p>3 HarbourVest has made. But I'll repeat</p> <p>4 my question.</p> <p>5 BY MR. WILSON:</p> <p>6 Q. Did Highland provide HarbourVest</p> <p>7 with documents and evidence that were</p> <p>8 filed in the Acis bankruptcy?</p> <p>9 MS. WEISGERBER: Objection to</p> <p>10 form.</p> <p>11 A. I don't recall what documents</p> <p>12 Highland may have provided to us, at that</p> <p>13 point in time.</p> <p>14 Q. I don't want you to recall</p> <p>15 specific documents that were provided, but</p> <p>16 did, did Highland provide documents from</p> <p>17 the Acis bankruptcy to HarbourVest?</p> <p>18 MS. WEISGERBER: Objection to</p> <p>19 form. Asked and answered.</p> <p>20 A. I don't recall.</p> <p>21 Q. You don't recall?</p> <p>22 A. (Nods.)</p> <p>23 Q. Would you dispute that between</p> <p>24 2018 and 2019 that Highland provided over</p> <p>25 40,000 pages of documents related to the</p>	<p style="text-align: right;">Page 91</p> <p>1 Confidential - Pugatch</p> <p>2 Acis bankruptcy to HarbourVest?</p> <p>3 MS. WEISGERBER: Objection to</p> <p>4 form, foundation.</p> <p>5 A. I don't know and I don't recall.</p> <p>6 Q. And the Acis plan became</p> <p>7 effective on February 1st, 2019. Is that</p> <p>8 your understanding?</p> <p>9 A. I believe so, yes.</p> <p>10 Q. And do you – I asked you this</p> <p>11 earlier, but I'm going to ask again. Do</p> <p>12 you have any understanding of what the</p> <p>13 value of HCLOF was, at that date?</p> <p>14 A. I don't recall.</p> <p>15 MS. WEISGERBER: Objection to</p> <p>16 form.</p> <p>17 Q. You don't?</p> <p>18 A. I don't recall, no.</p> <p>19 Q. And there was an injunction put</p> <p>20 in place in the Acis bankruptcy that</p> <p>21 prevented certain actions with respect to</p> <p>22 HCLOF, correct?</p> <p>23 MS. WEISGERBER: Objection to</p> <p>24 form, foundation.</p> <p>25 MR. MALONEY: Join.</p>
<p style="text-align: right;">Page 92</p> <p>1 Confidential - Pugatch</p> <p>2 A. Yes.</p> <p>3 Q. Now, I'm going to go back up to</p> <p>4 Paragraph 2. This says that Acis LP</p> <p>5 manages the Acis CLOs, that certain</p> <p>6 portfolio management agreement between</p> <p>7 Acis, and then it goes on. So what are</p> <p>8 the Acis CLOs, as it relates to the</p> <p>9 investment that HarbourVest made?</p> <p>10 MR. MALONEY: Objection to the</p> <p>11 form of the question.</p> <p>12 MS. WEISGERBER: Objection to</p> <p>13 form.</p> <p>14 A. The Acis CLOs – or HCLOF owned</p> <p>15 equity in certain of the Acis CLOs as a</p> <p>16 portion of its investment portfolio.</p> <p>17 Q. And I think you were trying to</p> <p>18 distinguish earlier between who the</p> <p>19 portfolio manager was. And that would</p> <p>20 depend on whether it was an Acis CLO or a</p> <p>21 Highland CLO; is that correct?</p> <p>22 MR. MALONEY: Objection to form.</p> <p>23 MS. WEISGERBER: Objection to</p> <p>24 form, misstates testimony.</p> <p>25 A. I was referencing the portfolio</p>	<p style="text-align: right;">Page 93</p> <p>1 Confidential - Pugatch</p> <p>2 manager of the underlying CLOs, yes.</p> <p>3 Q. But we can agree that Acis had</p> <p>4 responsibility for managing at least a</p> <p>5 portion of HCLOF, correct?</p> <p>6 A. Highland –</p> <p>7 MR. WILSON: Objection to form.</p> <p>8 MR. MALONEY: Objection to form</p> <p>9 as well, foundation, and legal</p> <p>10 conclusion.</p> <p>11 (Reporter clarification.)</p> <p>12 A. It's my understanding it's</p> <p>13 Highlands' subsidiaries, yes.</p> <p>14 Q. Okay. Well, I'm going to go</p> <p>15 down to Paragraph 4, at the top of your</p> <p>16 screen here where it says, "Recently</p> <p>17 William Scott, the director of HCLOF,</p> <p>18 testified that he wants to reset the Acis</p> <p>19 CLOs to bring them in line with current</p> <p>20 market interest rates, that the inability</p> <p>21 to do the reset is causing damages to</p> <p>22 HCLOF in the amount of approximately</p> <p>23 \$295,000 per week."</p> <p>24 Is that an accurate statement?</p> <p>25 MS. WEISGERBER: Objection to</p>

<p style="text-align: right;">Page 94</p> <p>1 Confidential - Pugatch</p> <p>2 form and foundation.</p> <p>3 MR. MALONEY: Mark Maloney.</p> <p>4 Object to form and foundation.</p> <p>5 A. I don't know. You'd have to ask</p> <p>6 William Scott.</p> <p>7 Q. Well, were you aware, I mean,</p> <p>8 there's a citation to a, well, I don't</p> <p>9 know if there's a citation on this one.</p> <p>10 But it says that he recently testified.</p> <p>11 Were you aware that he testified that he</p> <p>12 wanted to reset the Acis CLOs?</p> <p>13 MS. WEISGERBER: Same objection.</p> <p>14 We're really getting far afield.</p> <p>15 MR. WILSON: I'm just asking if</p> <p>16 he was aware that this statement</p> <p>17 occurred.</p> <p>18 A. At some point in time, yes, I</p> <p>19 became aware of that.</p> <p>20 Q. Okay. Do you agree that the</p> <p>21 inability to do a reset was causing</p> <p>22 damages in the amount of \$295,000 per</p> <p>23 week?</p> <p>24 MS. WEISGERBER: Objection to</p> <p>25 form and foundation. This is not a</p>	<p style="text-align: right;">Page 95</p> <p>1 Confidential - Pugatch</p> <p>2 HarbourVest-prepared document.</p> <p>3 MR. WILSON: Well, I understand</p> <p>4 that. I'm just asking if he agrees</p> <p>5 with it.</p> <p>6 A. I don't have enough information</p> <p>7 to assess that, specifically the \$295,000</p> <p>8 per week number.</p> <p>9 Q. I want to go down to Paragraph 7</p> <p>10 of this document, and this is going to be</p> <p>11 at the top of Page 5. It says</p> <p>12 "Mr. Ellington also testified that because</p> <p>13 it would be putting in additional capital</p> <p>14 in connection with any reset CLOs, the</p> <p>15 Investor," and we discussed that that's</p> <p>16 HarbourVest, "had the ability to start</p> <p>17 'calling the shots' and dictate the terms</p> <p>18 of any reset transactions."</p> <p>19 Do you agree with that?</p> <p>20 A. No.</p> <p>21 MS. WEISGERBER: Objection to</p> <p>22 form.</p> <p>23 Q. I want to go down to Paragraph</p> <p>24 9.</p> <p>25 It says, "The Trustee also needs</p>
<p style="text-align: right;">Page 96</p> <p>1 Confidential - Pugatch</p> <p>2 information regarding whether the Investor</p> <p>3 presently has any concerns about pursuing</p> <p>4 reset transactions with the Reorganized</p> <p>5 Acis and Brigade, under the plan now that</p> <p>6 Acis has been able to successfully serve</p> <p>7 as the portfolio manager for the Acis CLOs</p> <p>8 on a post-petition basis, and there are no</p> <p>9 impediments to the ability of the</p> <p>10 Reorganized Acis and Brigade to pursue a</p> <p>11 reset on the Acis CLOs."</p> <p>12 Do you know whether the Investor</p> <p>13 had any concerns about pursuing a reset?</p> <p>14 MS. WEISGERBER: Objection to</p> <p>15 form, foundation.</p> <p>16 A. The context of a reset or</p> <p>17 refinancing of the various CLOs in HCLOF</p> <p>18 was part of the original investment</p> <p>19 thesis. So there would not have been</p> <p>20 concerns about the ability to do so. Our</p> <p>21 concerns were more in the inability to do</p> <p>22 so, as a result of the Acis bankruptcy.</p> <p>23 Q. But here, you've got the Trustee</p> <p>24 representing in Paragraph 5, that</p> <p>25 according to the Trustee's Second Amended</p>	<p style="text-align: right;">Page 97</p> <p>1 Confidential - Pugatch</p> <p>2 Joint Plan, it provides for such a reset</p> <p>3 to be performed by the Reorganized Acis</p> <p>4 and supervised by Brigade Capital</p> <p>5 Management.</p> <p>6 And it appears to me that the</p> <p>7 Trustee is trying to get the Investor's</p> <p>8 position on whether a reset should be</p> <p>9 pursued. And I'm just asking you whether</p> <p>10 HarbourVest objected to a reset at this</p> <p>11 time?</p> <p>12 MS. WEISGERBER: I'm going to</p> <p>13 object to all of the colloquy before.</p> <p>14 I'm going to object to any extent</p> <p>15 Mike's being asked about what the</p> <p>16 Trustee wanted or viewed. If you want</p> <p>17 to ask your question in isolation, go</p> <p>18 ahead.</p> <p>19 Q. What was HarbourVest's position</p> <p>20 regarding a reset, as of the date that</p> <p>21 this was filed, and I'll look again,</p> <p>22 October 10, 2018?</p> <p>23 MS. WEISGERBER: Objection to</p> <p>24 form. Objection to the extent it's</p> <p>25 asking HarbourVest's position. And I</p>

<p style="text-align: right;">Page 98</p> <p>1 Confidential - Pugatch</p> <p>2 cannot conceive how this is relevant</p> <p>3 to the 9019 motion before the court</p> <p>4 right now.</p> <p>5 Nonetheless, Mike, if you have</p> <p>6 an answer, on behalf of yourself, you</p> <p>7 can answer.</p> <p>8 A. HarbourVest was a passive</p> <p>9 minority investor in HCLOF. It had no</p> <p>10 ability to control the underlying</p> <p>11 portfolio management or ability to reset,</p> <p>12 refinance, or call in any of the equity of</p> <p>13 the underlying CLOs. That was all under</p> <p>14 the purview of Highland.</p> <p>15 Q. Did you understand that</p> <p>16 Mr. Ellington had given sworn testimony</p> <p>17 that the Investor is the party calling the</p> <p>18 shots for HCLOF, with respect to any reset</p> <p>19 transactions?</p> <p>20 MS. WEISGERBER: Objection to</p> <p>21 form.</p> <p>22 A. I did become aware of it, yes.</p> <p>23 Q. When did you become aware of</p> <p>24 that?</p> <p>25 A. At some point subsequent to that</p>	<p style="text-align: right;">Page 99</p> <p>1 Confidential - Pugatch</p> <p>2 testimony being given.</p> <p>3 Q. But was it when you read this</p> <p>4 motion that we're looking at as</p> <p>5 Exhibit 10?</p> <p>6 MS. WEISGERBER: Objection to</p> <p>7 form.</p> <p>8 A. It may have been. I don't</p> <p>9 recall the exact time or medium that I</p> <p>10 became aware of that.</p> <p>11 Q. Was a deposition given as a</p> <p>12 result of this motion?</p> <p>13 MS. WEISGERBER: Objection to</p> <p>14 form. If you have the whole document,</p> <p>15 Mike, that may make sense.</p> <p>16 MR. WILSON: Well, this motion</p> <p>17 at the top says it's a Motion for 2004</p> <p>18 Examination of Investor. And then</p> <p>19 attached to this motion are some</p> <p>20 document requests, and then deposition</p> <p>21 topics for a corporate representative</p> <p>22 of the Investor, and then a proposed</p> <p>23 order.</p> <p>24 BY MR. WILSON:</p> <p>25 Q. Do you recall whether a</p>
<p style="text-align: right;">Page 100</p> <p>1 Confidential - Pugatch</p> <p>2 deposition was given, after this motion</p> <p>3 was filed?</p> <p>4 A. Yes.</p> <p>5 Q. And who was the designated</p> <p>6 deponent?</p> <p>7 A. I was.</p> <p>8 Q. And were documents produced, as</p> <p>9 a result of this?</p> <p>10 A. Yes, there were.</p> <p>11 Q. And were you asked at that</p> <p>12 deposition what the Investor's position on</p> <p>13 a reset was?</p> <p>14 MS. WEISGERBER: Objection to</p> <p>15 form.</p> <p>16 If you recall.</p> <p>17 A. I don't recall specifically that</p> <p>18 question being asked.</p> <p>19 Q. Well, do you know what</p> <p>20 the Debtor's position -- I'm sorry, the</p> <p>21 Debtor's -- the Investor's position on a</p> <p>22 reset was as of that day?</p> <p>23 MS. WEISGERBER: Objection to</p> <p>24 form. Asked and answered.</p> <p>25 A. I would just say again, in</p>	<p style="text-align: right;">Page 101</p> <p>1 Confidential - Pugatch</p> <p>2 general, the original investment thesis</p> <p>3 here was predicated on a refinancing reset</p> <p>4 of the various CLOs, and we were not in</p> <p>5 control as a passive minority investor</p> <p>6 here to --</p> <p>7 Q. Well, you said you weren't in</p> <p>8 control, but what would HarbourVest's</p> <p>9 preference have been?</p> <p>10 MS. WEISGERBER: Objection to</p> <p>11 form.</p> <p>12 A. I do not recall.</p> <p>13 MS. WEISGERBER: If you recall.</p> <p>14 A. I don't recall the specifics</p> <p>15 around what Acis CLO were referring to</p> <p>16 here or what the specific implications of</p> <p>17 a reset were at that time; but regardless,</p> <p>18 that was a decision for the investment</p> <p>19 manager of HCLO.</p> <p>20 Q. But was it your opinion, your</p> <p>21 personal opinion, that a reset was</p> <p>22 appropriate?</p> <p>23 MS. WEISGERBER: Objection to</p> <p>24 form.</p> <p>25 A. Again, we were not the portfolio</p>

<p style="text-align: right;">Page 102</p> <p>1 Confidential - Pugatch</p> <p>2 manager of HCLOF. We were not in control</p> <p>3 of those decisions or making</p> <p>4 recommendations on those decisions. That</p> <p>5 was the delegated authority of Highland,</p> <p>6 as the investment manager.</p> <p>7 Q. I'm not asking for that. I'm</p> <p>8 asking for your personal feelings toward a</p> <p>9 reset.</p> <p>10 MS. WEISGERBER: Same objection.</p> <p>11 He's only answering on behalf of</p> <p>12 himself, and it's been asked and</p> <p>13 answered three times since.</p> <p>14 MR. WILSON: Well, he hasn't</p> <p>15 answered the question. He's just told</p> <p>16 me they don't have the authority to do</p> <p>17 the reset.</p> <p>18 MS. WEISGERBER: And he told you</p> <p>19 the other information he'd be required</p> <p>20 to even have an opinion on it. So</p> <p>21 same objection stands. It's not a</p> <p>22 specific enough question for him.</p> <p>23 Mike, you're welcome, if you</p> <p>24 have, if you have an answer, you're</p> <p>25 welcome to give it.</p>	<p style="text-align: right;">Page 103</p> <p>1 Confidential - Pugatch</p> <p>2 A. Yeah, the investment guidelines</p> <p>3 of HCLOF, from the documents that we</p> <p>4 signed at the time we entered into the</p> <p>5 transaction, laid out the specific, again,</p> <p>6 investment guidelines that HCLOF would be</p> <p>7 guided under, including the opportunity to</p> <p>8 refinance or reset various CLOs over time,</p> <p>9 in accordance with Highland's, you know,</p> <p>10 expectations and ultimate decision to do</p> <p>11 so.</p> <p>12 Q. But did you believe, at this</p> <p>13 time, that a reset was appropriate?</p> <p>14 MS. WEISGERBER: Objection to</p> <p>15 form. This is asked and answered</p> <p>16 several times now, I think we should</p> <p>17 move on. He's given you an answer.</p> <p>18 MR. WILSON: Well, I want to</p> <p>19 know what his personal opinion was</p> <p>20 about whether the reset was</p> <p>21 appropriate.</p> <p>22 A. What reset are you referring to?</p> <p>23 Q. A reset as of October 10, 2018.</p> <p>24 At that time, did you believe that a reset</p> <p>25 was appropriate?</p>
<p style="text-align: right;">Page 104</p> <p>1 Confidential - Pugatch</p> <p>2 A. A reset of what?</p> <p>3 MS. WEISGERBER: Same objection.</p> <p>4 Q. A reset as been discussed all</p> <p>5 through this motion, the same reset we're</p> <p>6 talking about.</p> <p>7 MS. WEISGERBER: Objection.</p> <p>8 Same objections. I just don't see how</p> <p>9 he could possibly answer this vague</p> <p>10 question.</p> <p>11 Q. Okay. So William Scott,</p> <p>12 director of HCLOF, testified that he</p> <p>13 wanted to reset the Acis CLOs because if</p> <p>14 they don't, they are losing \$295,000 a</p> <p>15 week.</p> <p>16 Did you think that a reset was</p> <p>17 appropriate in line with what Mr. Scott</p> <p>18 believed?</p> <p>19 MR. MALONEY: Objection to form,</p> <p>20 foundation.</p> <p>21 MS. WEISGERBER: Same</p> <p>22 objections. And asked and answered</p> <p>23 numerous times.</p> <p>24 A. We were not managing the</p> <p>25 portfolio. We were an investor in a</p>	<p style="text-align: right;">Page 105</p> <p>1 Confidential - Pugatch</p> <p>2 company, an investment company that was</p> <p>3 managing this. We were not, I was not</p> <p>4 proximate enough to any of the underlying</p> <p>5 happenings of the look through CLO</p> <p>6 positions of HCLOF to have an informed</p> <p>7 view on this, at this time.</p> <p>8 Q. Is your testimony that you did</p> <p>9 not have an opinion as to whether the Acis</p> <p>10 CLO should be reset in late 2018?</p> <p>11 MS. WEISGERBER: Objection to</p> <p>12 form. Misstates testimony.</p> <p>13 A. My view is that the original</p> <p>14 investment guidelines here called for a</p> <p>15 reset or refinance of the CLOs and that</p> <p>16 Highland was subsequently in full control</p> <p>17 of whether or not to pursue this, and we,</p> <p>18 HarbourVest, as an investor had no ability</p> <p>19 to object or to force that on a go-forward</p> <p>20 basis.</p> <p>21 MR. WILSON: Objection.</p> <p>22 Nonresponsive.</p> <p>23 Q. I want to know your personal</p> <p>24 opinion of whether you thought a reset was</p> <p>25 appropriate in October of 2018.</p>

<p style="text-align: right;">Page 106</p> <p>1 Confidential - Pugatch</p> <p>2 MR. MORRIS: Objection to the</p> <p>3 form of the question. That's been</p> <p>4 asked and answered.</p> <p>5 MR. WILSON: He has yet to give</p> <p>6 his answer to –</p> <p>7 MR. MORRIS: He just told you he</p> <p>8 didn't have enough information. He</p> <p>9 just told you that, crystal clear.</p> <p>10 MR. WILSON: Well, I'm not going</p> <p>11 to argue with you, John, but I just</p> <p>12 want an answer to my question.</p> <p>13 His answer, he wouldn't agree</p> <p>14 with my, with my summation that he had</p> <p>15 no opinion, so I just want to know</p> <p>16 what his opinion is.</p> <p>17 MS. WEISGERBER: Same</p> <p>18 objections.</p> <p>19 You're not giving him enough</p> <p>20 information to answer the question,</p> <p>21 and at this point, it would be</p> <p>22 speculation. We can just keep going</p> <p>23 in circles on this, but your –</p> <p>24 MR. WILSON: His opinion would</p> <p>25 be speculation?</p>	<p style="text-align: right;">Page 107</p> <p>1 Confidential - Pugatch</p> <p>2 MS. WEISGERBER: He said that,</p> <p>3 he actually testified at some point</p> <p>4 that he doesn't recall specifics of</p> <p>5 the time, so that was another piece of</p> <p>6 the puzzle.</p> <p>7 I mean, I don't want to be</p> <p>8 coaching the witness or giving</p> <p>9 testimony here, but I think you're not</p> <p>10 listening to the things he's saying,</p> <p>11 John, just because you don't like it.</p> <p>12 BY MR. WILSON:</p> <p>13 Q. Mr. Pugatch, did you have an</p> <p>14 opinion, in October of 2019, about whether</p> <p>15 the Acis CLOs should be reset?</p> <p>16 MS. WEISGERBER: Objection to</p> <p>17 form.</p> <p>18 A. I don't recall any definitive</p> <p>19 opinion I would have had, but as stated,</p> <p>20 was not proximate enough to have an</p> <p>21 informed opinion, in any event.</p> <p>22 Q. And to your knowledge, have the</p> <p>23 Acis CLOs ever been reset?</p> <p>24 MS. WEISGERBER: Objection to</p> <p>25 form, foundation.</p>
<p style="text-align: right;">Page 108</p> <p>1 Confidential - Pugatch</p> <p>2 A. I do not believe that any of the</p> <p>3 Acis CLOs were ever reset.</p> <p>4 Q. All right. So who negotiated</p> <p>5 this claim, the settlement of this claim</p> <p>6 on behalf of HarbourVest?</p> <p>7 A. I did.</p> <p>8 Q. And who negotiated for the</p> <p>9 Debtor?</p> <p>10 A. Jim Seery.</p> <p>11 Q. And when did those negotiations</p> <p>12 begin?</p> <p>13 A. It started sometime in November,</p> <p>14 I believe.</p> <p>15 Q. And are you aware that Jim Seery</p> <p>16 has ever taken the position that the</p> <p>17 HarbourVest claim was worthless?</p> <p>18 MS. WEISGERBER: Objection to</p> <p>19 form, foundation.</p> <p>20 A. No, I'm not aware of that.</p> <p>21 Q. Has Jim Seery ever offered</p> <p>22 \$5 million to settle the HarbourVest</p> <p>23 claim?</p> <p>24 A. Not to my knowledge.</p> <p>25 MS. WEISGERBER: Objection to</p>	<p style="text-align: right;">Page 109</p> <p>1 Confidential - Pugatch</p> <p>2 form.</p> <p>3 MR. WILSON: I'm going to send</p> <p>4 out Exhibit 11.</p> <p>5 (Whereupon, Exhibit 11,</p> <p>6 Declaration of John A. Morris in</p> <p>7 Support of the Debtor's Motion For</p> <p>8 Entry of an Order Approving Settlement</p> <p>9 With Harbourvest (Claim Nos. 143, 147,</p> <p>10 149, 150, 153, 154) and Authorizing</p> <p>11 Actions, 82 pages, was marked for</p> <p>12 identification.)</p> <p>13 BY MR. WILSON:</p> <p>14 Q. I want pull this up on the</p> <p>15 screen share. This Exhibit 11 is the</p> <p>16 Declaration of John Morris in Support of</p> <p>17 the Debtor's 9019 Motion, bears</p> <p>18 Document 1631. And attached to this</p> <p>19 exhibit is a trim cut copy of the</p> <p>20 Settlement Agreement executed December 23,</p> <p>21 2020.</p> <p>22 And the Settlement Agreement has</p> <p>23 Paragraph 1, Settlement of Claims, that</p> <p>24 HarbourVest is going to receive a</p> <p>25 \$45 million unsecured, general unsecured</p>

<p>Page 110</p> <p>1 Confidential - Pugatch</p> <p>2 claim, and a \$35 million subordinated</p> <p>3 claim.</p> <p>4 And then Part B of that</p> <p>5 paragraph states that HarbourVest is going</p> <p>6 to transfer all its rights, titles, and</p> <p>7 interests to its investment in CLOF to the</p> <p>8 Debtor or its nominee.</p> <p>9 Is that your understanding of</p> <p>10 the general terms of this settlement?</p> <p>11 MS. WEISGERBER: Objection to</p> <p>12 form.</p> <p>13 A. Yes, it is.</p> <p>14 Q. Okay. And also in Paragraph 5,</p> <p>15 Each HarbourVest party agrees that it will</p> <p>16 vote all of HarbourVest claims held by</p> <p>17 such HarbourVest party to accept the plan.</p> <p>18 And I won't read all of that.</p> <p>19 But the gist of this paragraph is that</p> <p>20 HarbourVest is going to vote for the</p> <p>21 Debtor's proposed plan; is that correct?</p> <p>22 MS. WEISGERBER: Objection to</p> <p>23 form.</p> <p>24 A. Yes, correct.</p> <p>25 Q. And how did that term come to be</p>	<p>Page 111</p> <p>1 Confidential - Pugatch</p> <p>2 in this Settlement Agreement?</p> <p>3 MS. WEISGERBER: Objection to</p> <p>4 form.</p> <p>5 A. I believe it was put there as</p> <p>6 part of the drafting of the ultimate</p> <p>7 agreement to the fund.</p> <p>8 Q. Well, whose suggestion was it</p> <p>9 that it be added to the drafting?</p> <p>10 MS. WEISGERBER: Objection to</p> <p>11 form.</p> <p>12 A. I believe that it came from</p> <p>13 Debtor's counsel, as they took the lead on</p> <p>14 drafting the documentation here.</p> <p>15 Q. Did Jim Seery ever tell you that</p> <p>16 it was important to him that HarbourVest</p> <p>17 vote in support of the plan?</p> <p>18 MS. WEISGERBER: Objection to</p> <p>19 form.</p> <p>20 A. I don't recall that ever being</p> <p>21 discussed. Certainly it was not the</p> <p>22 prominent feature of any of the</p> <p>23 discussions or negotiations that I ever</p> <p>24 had with Jim.</p> <p>25 Q. Okay.</p>
<p>Page 112</p> <p>1 Confidential - Pugatch</p> <p>2 MR. WILSON: I'm going to take a</p> <p>3 ten-minute break, and I think I'm</p> <p>4 almost ready to wrap up. So I want to</p> <p>5 stop my screen share. And let's,</p> <p>6 well, let's start back at 2:30, and I</p> <p>7 think I'll be quick. Thank you.</p> <p>8 (Recess taken.)</p> <p>9 BY MR. WILSON:</p> <p>10 Q. Mr. Pugatch, earlier you</p> <p>11 testified that consistent with your</p> <p>12 declaration you filed that as of August</p> <p>13 31, 2020, the value of HCLOF was</p> <p>14 \$44.5 million. And then if we look at --</p> <p>15 I don't remember which --</p> <p>16 Okay. So this would have been</p> <p>17 Exhibit 7. I'll do a share screen.</p> <p>18 As of November 15, 2017 these</p> <p>19 shares were purchased at \$1.02 and change</p> <p>20 apiece, and there were a total number of</p> <p>21 143 million shares.</p> <p>22 Was the value of this investment</p> <p>23 roughly \$150 million, as of November 15,</p> <p>24 2017?</p> <p>25 MS. WEISGERBER: Objection to</p>	<p>Page 113</p> <p>1 Confidential - Pugatch</p> <p>2 form. Foundation.</p> <p>3 MR. MALONEY: Join.</p> <p>4 MS. WEISGERBER: I don't know,</p> <p>5 Mike, if you're comfortable doing that</p> <p>6 math or what.</p> <p>7 A. Yes, approximately that's</p> <p>8 correct.</p> <p>9 Q. Okay. And you know, and I've</p> <p>10 read your papers and you talk about</p> <p>11 attorneys' fees that you say weren't</p> <p>12 appropriate to be charged to HCLOF and</p> <p>13 that part of it, but as to the loss of</p> <p>14 value of the actual investment, what's</p> <p>15 your understanding of what led to that?</p> <p>16 MS. WEISGERBER: Objection to</p> <p>17 form. Objection to the extent it</p> <p>18 calls for a legal conclusion.</p> <p>19 Mike, to the extent you have a</p> <p>20 nonlegal opinion on that, that's not</p> <p>21 based on conversations with counsel,</p> <p>22 you can answer.</p> <p>23 A. Yeah, I think a lot of the value</p> <p>24 erosion was due to the inability to</p> <p>25 refinance, reset a number of the</p>

<p style="text-align: right;">Page 114</p> <p>1 Confidential - Pugatch</p> <p>2 underlying CLOs that was part of the</p> <p>3 original investment thesis here, largely</p> <p>4 as a result of the ongoing litigation,</p> <p>5 that Highland was involved in, and the</p> <p>6 subsequent Acis bankruptcy.</p> <p>7 Q. And so during the period of time</p> <p>8 when the injunction prohibited certain</p> <p>9 actions with respect to this investment,</p> <p>10 is it your opinion that this investment</p> <p>11 was losing value?</p> <p>12 MR. MALONEY: Objection.</p> <p>13 MS. WEISGERBER: Objection to</p> <p>14 form.</p> <p>15 A. Can you repeat the question,</p> <p>16 John?</p> <p>17 Q. Well, I guess I want to know,</p> <p>18 like, in a, on a timeline kind of basis,</p> <p>19 do you think that the significant</p> <p>20 reduction of value occurred prior to or</p> <p>21 after the confirmation of the Acis plan on</p> <p>22 February 1, 2019?</p> <p>23 MS. WEISGERBER: Objection to</p> <p>24 form. Objection to the extent it</p> <p>25 calls for a legal conclusion.</p>	<p style="text-align: right;">Page 115</p> <p>1 Confidential - Pugatch</p> <p>2 You can give your lay opinion,</p> <p>3 if you have one, Mike.</p> <p>4 A. I think it's all been as a</p> <p>5 result of the events leading up to the</p> <p>6 Acis bankruptcy, including the inability</p> <p>7 to refinance or reset the CLOs which would</p> <p>8 have been to the benefit of the CLO equity</p> <p>9 holders including HCLOF.</p> <p>10 Q. And so what, what was the cause</p> <p>11 of the inability to reset?</p> <p>12 MS. WEISGERBER: Same</p> <p>13 objections: form, foundation, legal</p> <p>14 conclusion.</p> <p>15 If you have a non-privileged</p> <p>16 answer, Mike, go ahead.</p> <p>17 A. Yeah, my understanding was</p> <p>18 originally the TRO, preventing Highland</p> <p>19 and HCLOF from pursuing that, and then</p> <p>20 subsequent to the Acis bankruptcy ruling,</p> <p>21 a similar injunction that remained around</p> <p>22 the inability for the equity holders of</p> <p>23 those CLOs to redeem or refinance or</p> <p>24 reset.</p> <p>25 Q. So do you -- is there any</p>
<p style="text-align: right;">Page 116</p> <p>1 Confidential - Pugatch</p> <p>2 component, in your opinion, of the loss of</p> <p>3 value of these investments due to</p> <p>4 portfolio mismanagement?</p> <p>5 MS. WEISGERBER: Objection to</p> <p>6 form, foundation, legal conclusion, or</p> <p>7 expert opinion, calling for</p> <p>8 speculation.</p> <p>9 If you have a view, Mike.</p> <p>10 A. Yeah. Can you be more specific</p> <p>11 with the question, John?</p> <p>12 Q. Well, I'll ask it a different</p> <p>13 way.</p> <p>14 Do you think that portfolio</p> <p>15 mismanagement was a portion of the cause</p> <p>16 of the reduction in value?</p> <p>17 MS. WEISGERBER: Same objection.</p> <p>18 A. I can't speculate as to, you</p> <p>19 know, the underlying management decisions</p> <p>20 around the CLOs, but what I do know is</p> <p>21 that the mismanagement and</p> <p>22 misrepresentations at the HCLOF level,</p> <p>23 that would ultimately result in the Acis</p> <p>24 bankruptcy and subsequent to that, the TRO</p> <p>25 and the inability to refinance or reset</p>	<p style="text-align: right;">Page 117</p> <p>1 Confidential - Pugatch</p> <p>2 that has been the, far and away, the</p> <p>3 largest contributor to loss of value</p> <p>4 within the portfolio.</p> <p>5 Q. One of the allegations that</p> <p>6 HarbourVest has made is that Highland</p> <p>7 improperly changed the portfolio manager.</p> <p>8 Is it your opinion that if that had not</p> <p>9 been done, the portfolio manager had not</p> <p>10 been changed at the inception of</p> <p>11 HarbourVest's investment, that that would</p> <p>12 have preserved any value of this fund?</p> <p>13 MR. MORRIS: Objection to the</p> <p>14 form of the question.</p> <p>15 MS. WEISGERBER: Same objection.</p> <p>16 Calling for speculation, hypothetical</p> <p>17 lay opinion.</p> <p>18 If you have testimony, go ahead,</p> <p>19 Mike.</p> <p>20 A. Sorry, could you just repeat the</p> <p>21 question, John? I want to make sure I'm</p> <p>22 answering it correctly.</p> <p>23 Q. I guess I just want to know, and</p> <p>24 I think you kind of hinted at this a</p> <p>25 little bit earlier today, but I guess what</p>

<p style="text-align: right;">Page 118</p> <p>1 Confidential - Pugatch</p> <p>2 I really want to know is do you think that</p> <p>3 the particular portfolio manager made a</p> <p>4 difference in the loss of value that HCLOF</p> <p>5 suffered?</p> <p>6 MS. WEISGERBER: Same</p> <p>7 objections.</p> <p>8 A. Again, it sounds like you're</p> <p>9 asking a different question there than</p> <p>10 what I thought I understood your question</p> <p>11 to be initially. What I would say to that</p> <p>12 is the decision originally to change the</p> <p>13 portfolio manager, and ultimately the</p> <p>14 events that took place following the</p> <p>15 Arbitration Award for Mr. Terry, resulted</p> <p>16 in the subsequent Acis bankruptcy, which</p> <p>17 in turn has led to the destruction of</p> <p>18 value, because of the inability to</p> <p>19 refinance or reset, the underlying CLOs.</p> <p>20 Q. So HarbourVest is not alleging</p> <p>21 that the portfolio manager made any</p> <p>22 particular decisions or participated in</p> <p>23 any mismanagement that led to reduction in</p> <p>24 value?</p> <p>25 MS. WEISGERBER: Objection to</p>	<p style="text-align: right;">Page 119</p> <p>1 Confidential - Pugatch</p> <p>2 form.</p> <p>3 A. When you're asking about</p> <p>4 portfolio manager, are we referring to the</p> <p>5 portfolio manager at the underlying CLO</p> <p>6 level or at the HCLOF level? I think</p> <p>7 there are two different levels here of</p> <p>8 portfolio management.</p> <p>9 Q. Well, I'm talking about the</p> <p>10 portfolio manager, and you can tell me</p> <p>11 which one it is, but which portfolio</p> <p>12 manager has the ability to, to impact the</p> <p>13 performance of these funds?</p> <p>14 MR. MORRIS: Objection.</p> <p>15 A. If you're referring to HCLOF,</p> <p>16 the –</p> <p>17 MS. WEISGERBER: Objection to</p> <p>18 form.</p> <p>19 A. – investment manager, or the</p> <p>20 portfolio manager of HCLOF has the ability</p> <p>21 to drive value creation by virtue of its</p> <p>22 equity position in the underlying CLOs.</p> <p>23 Q. Well, which portfolio manager</p> <p>24 makes the day-to-day decisions about</p> <p>25 selling assets, trading assets, that, that</p>
<p style="text-align: right;">Page 120</p> <p>1 Confidential - Pugatch</p> <p>2 I guess –</p> <p>3 A. If you're referring to</p> <p>4 underlying credits, that would be the</p> <p>5 portfolio manager in each of the</p> <p>6 individual CLOs. The impact in value to</p> <p>7 the equity investment in the CLOs is a</p> <p>8 decision at the HCLOF level, where the</p> <p>9 majority of that value erosion has</p> <p>10 resulted from the inability to refinance</p> <p>11 or reset those CLO entities.</p> <p>12 Q. And that's what we're talking</p> <p>13 about when you said that they, that</p> <p>14 Highland changed the portfolio manager,</p> <p>15 you're talking about at the HCLOF level,</p> <p>16 right?</p> <p>17 MS. WEISGERBER: Objection to</p> <p>18 form.</p> <p>19 A. Well, I was responding to the</p> <p>20 question that I thought you asked. I</p> <p>21 wasn't necessarily stating that.</p> <p>22 Q. I guess all I'm really trying to</p> <p>23 do here is just understand HarbourVest's</p> <p>24 position. And it sounds to me, and</p> <p>25 correct me if I'm wrong, it sounds to me</p>	<p style="text-align: right;">Page 121</p> <p>1 Confidential - Pugatch</p> <p>2 that what you're saying is that the</p> <p>3 diminution of value wasn't attributable to</p> <p>4 poor investment decisions by a portfolio</p> <p>5 manager, as much as it was the</p> <p>6 consequences in the Acis bankruptcy of the</p> <p>7 change in portfolio manager; is that fair?</p> <p>8 MS. WEISGERBER: Objection to</p> <p>9 form. Misstates testimony.</p> <p>10 A. Yes, it is. That is my general</p> <p>11 understanding, yes.</p> <p>12 MR. WILSON: Okay. No further</p> <p>13 questions.</p> <p>14 MR. MORRIS: All right. Well,</p> <p>15 thank you very much.</p> <p>16 THE REPORTER: Does anybody have</p> <p>17 any other questions?</p> <p>18 MR. KANE: Yes. This is John</p> <p>19 Kane with CLO Holdco. I'll jump on</p> <p>20 video. I've got some questions, but</p> <p>21 I'm going to be relatively short. If</p> <p>22 anybody else has a little bit heavier</p> <p>23 schedule, let me know.</p> <p>24 All right. I'll take that as a</p> <p>25 go-ahead.</p>

<p style="text-align: right;">Page 122</p> <p>1 Confidential - Pugatch</p> <p>2 EXAMINATION</p> <p>3 BY MR. KANE:</p> <p>4 Q. This is John Kane. I represent</p> <p>5 CLO Holdco.</p> <p>6 Hi, Mike Pugatch. It's nice to</p> <p>7 talk to you.</p> <p>8 A. Likewise.</p> <p>9 Q. I just wanted to briefly</p> <p>10 confirm. I believe you testified you</p> <p>11 participated in negotiations that lead to</p> <p>12 the Settlement Agreement, that is part of</p> <p>13 the 9019 motion, before the bankruptcy</p> <p>14 court; is that correct?</p> <p>15 A. Correct.</p> <p>16 Q. And did you actively negotiate</p> <p>17 the terms of that Settlement Agreement?</p> <p>18 A. Yes.</p> <p>19 Q. As in dollar amounts, what the</p> <p>20 consideration exchanged, how it would</p> <p>21 work, that kind of stuff, obviously with</p> <p>22 the assistance of counsel?</p> <p>23 A. Yes. All of that. The</p> <p>24 negotiations were, you know, over the</p> <p>25 course of a number of weeks and a number</p>	<p style="text-align: right;">Page 123</p> <p>1 Confidential - Pugatch</p> <p>2 of conversations directly with the Debtor,</p> <p>3 with counsel, all-hands calls, et cetera.</p> <p>4 Q. Okay. And as part of that in</p> <p>5 the Settlement Agreement, you say the</p> <p>6 HarbourVest entities were members in HCLOF</p> <p>7 are in essence selling their shares to the</p> <p>8 Debtor, and also in exchange getting some</p> <p>9 claims back in the Debtor's plan. Is that</p> <p>10 a fair summary?</p> <p>11 MS. WEISGERBER: Objection to</p> <p>12 form. Compound question.</p> <p>13 Q. Let me ask it a different way.</p> <p>14 A. Can you re-ask that, please?</p> <p>15 Q. Yeah. I'm happy to do that.</p> <p>16 Why don't you describe for me</p> <p>17 how you would summarize that settlement?</p> <p>18 A. Largely, as I think you just</p> <p>19 described it, which was in exchange for,</p> <p>20 in exchange for the, both the unsecured</p> <p>21 creditors' claim, and subordinated</p> <p>22 creditors' claim, that settlement value is</p> <p>23 in exchange for us transferring the</p> <p>24 interest in HCLOF to the Debtor, as part</p> <p>25 of that overall negotiating package.</p>
<p style="text-align: right;">Page 124</p> <p>1 Confidential - Pugatch</p> <p>2 Q. And what would you estimate, I</p> <p>3 going to have to imagine, let me rephrase</p> <p>4 the question.</p> <p>5 Have you guys done kind of an</p> <p>6 internal best guess of what your unsecured</p> <p>7 and subordinated claims would be, under</p> <p>8 the plan, the value?</p> <p>9 MS. WEISGERBER: Objection.</p> <p>10 Objection to form.</p> <p>11 A. Just to be clear, John, are you</p> <p>12 referring to the expected recovery value</p> <p>13 of our claims?</p> <p>14 Q. Yes, sir.</p> <p>15 MS. WEISGERBER: Objection to</p> <p>16 form. Can we just clarify, so you're</p> <p>17 talking about what they'll recover</p> <p>18 ultimately? Is that the question,</p> <p>19 John? I'm confused myself. I just</p> <p>20 want to be sure I am following.</p> <p>21 MR. KANE: Yeah. So I'm asking</p> <p>22 Mike how much he believes, based on</p> <p>23 his analysis, that HarbourVest is</p> <p>24 likely to recover from the \$45 million</p> <p>25 allowed general unsecured claim and</p>	<p style="text-align: right;">Page 125</p> <p>1 Confidential - Pugatch</p> <p>2 \$35 million allowed subordinated</p> <p>3 claim, if the settlement is approved</p> <p>4 and the plan is confirmed.</p> <p>5 MS. WEISGERBER: Objection to</p> <p>6 form.</p> <p>7 But you can answer, if you have</p> <p>8 an answer, Mike.</p> <p>9 A. We do have a sense. It's really</p> <p>10 a range of projected outcomes, as you can</p> <p>11 imagine, based on the recoveries, largely</p> <p>12 informed by conversations with the Debtor.</p> <p>13 Q. And what is that range of value?</p> <p>14 MS. WEISGERBER: Objection to</p> <p>15 form.</p> <p>16 A. Our understanding, again, based</p> <p>17 on those conversations, is that the</p> <p>18 general unsecured claim could be valued in</p> <p>19 a 75 to 80 cents on the dollar recovery.</p> <p>20 And then a, you know, that the junior</p> <p>21 class claim is really sort of upside</p> <p>22 potential, to the extent there is more</p> <p>23 recovery or more asset value of the</p> <p>24 estate, for the benefit of creditors over</p> <p>25 time.</p>

<p style="text-align: right;">Page 126</p> <p>1 Confidential - Pugatch</p> <p>2 Q. What is your understanding of</p> <p>3 the current value of the HarbourVest</p> <p>4 shares in HCLOF that would be transferred</p> <p>5 under this Agreement?</p> <p>6 A. It's roughly \$22.5 million of</p> <p>7 their value.</p> <p>8 Q. So doing a little bit of, you</p> <p>9 know, back-of-the-table-cloth math, how do</p> <p>10 you allocate value between the releases</p> <p>11 that you are receiving and the shares that</p> <p>12 you are transferring?</p> <p>13 MR. KANE: I'm sorry. Let me</p> <p>14 rephrase that. Let me ask that</p> <p>15 question differently.</p> <p>16 Q. In addition to the claims under</p> <p>17 the plan, HarbourVest is providing the</p> <p>18 Debt – sorry, in addition to the shares</p> <p>19 that are being transferred, HarbourVest is</p> <p>20 providing to the Debtor certain releases</p> <p>21 for its litigation claims; is that</p> <p>22 correct?</p> <p>23 MS. WEISGERBER: Objection to</p> <p>24 form.</p> <p>25 A. Correct.</p>	<p style="text-align: right;">Page 127</p> <p>1 Confidential - Pugatch</p> <p>2 Q. So how has HarbourVest allocated</p> <p>3 value, as far as this Settlement Agreement</p> <p>4 is concerned?</p> <p>5 And to make sure we're on the</p> <p>6 same page about what I'm asking,</p> <p>7 HarbourVest is trading a bundle of sticks,</p> <p>8 right? And there's really two things</p> <p>9 within that bundle of sticks, and please</p> <p>10 confirm that's correct, you're trading</p> <p>11 shares, and in addition, releases; is that</p> <p>12 right? In exchange you're getting back</p> <p>13 claims that have a potential future value.</p> <p>14 So, how have you allocated value</p> <p>15 among the shares transferred and the</p> <p>16 releases that are being granted?</p> <p>17 MR. MORRIS: Objection.</p> <p>18 MS. WEISGERBER: Objection.</p> <p>19 You can go ahead, Mike.</p> <p>20 A. Yeah. So ultimately we looked</p> <p>21 at it as a package, and so it was less</p> <p>22 about the attribution of value between the</p> <p>23 two different sticks, as you described it,</p> <p>24 and more about the overall package value</p> <p>25 in exchange for the transfer of our</p>
<p style="text-align: right;">Page 128</p> <p>1 Confidential - Pugatch</p> <p>2 interest and the release of the claims</p> <p>3 that we had outstanding as the Debtor.</p> <p>4 MR. KANE: Now, I want to turn</p> <p>5 your attention to what I've included</p> <p>6 in the chat. You can pull it down</p> <p>7 pretty easily if you want. But it</p> <p>8 would be Holdco Depo Exhibit 2. If</p> <p>9 that would be easier than a screen</p> <p>10 share, if you'd like, I'm happy to do</p> <p>11 that as well.</p> <p>12 MS. WEISGERBER: Which document</p> <p>13 is it, John? Because I just can't</p> <p>14 pull stuff off the Zoom right now.</p> <p>15 MR. KANE: Oh, I'm sorry. It's</p> <p>16 the Settlement Agreement with the</p> <p>17 attached exhibits. I can share my</p> <p>18 screen so we're all on the same page.</p> <p>19 Just to confirm we're looking at</p> <p>20 the same thing, here's the Settlement</p> <p>21 Agreement. There's a docket entry at</p> <p>22 the top so you can see it, 1631 filed</p> <p>23 by the Debtor 12/24/20.</p> <p>24 This is Exhibit 1 to the</p> <p>25 Declaration of John Morris in Support</p>	<p style="text-align: right;">Page 129</p> <p>1 Confidential - Pugatch</p> <p>2 of Debtor's Motion for an Entry</p> <p>3 Approving Settlement with HarbourVest.</p> <p>4 BY MR. KANE:</p> <p>5 Q. Now, this Settlement Agreement</p> <p>6 is a document that you assisted in</p> <p>7 negotiations; is that correct?</p> <p>8 A. Correct.</p> <p>9 Q. Okay. And here in Section 1B,</p> <p>10 this addresses the transfer of the shares</p> <p>11 of the HarbourVest entities to a Debtor</p> <p>12 affiliate; is that correct?</p> <p>13 MS. WEISGERBER: Objection to</p> <p>14 form.</p> <p>15 A. Correct.</p> <p>16 Q. Is that your understanding,</p> <p>17 Mr. Pugatch?</p> <p>18 A. Yes, correct.</p> <p>19 Q. Okay. Thank you. Section 4A,</p> <p>20 and is this your understanding that</p> <p>21 HarbourVest is representing that it has</p> <p>22 the authority to enter into this agreement</p> <p>23 and to transfer the shares to the Debtor's</p> <p>24 affiliate if this is approved?</p> <p>25 MS. WEISGERBER: Objection to</p>

<p style="text-align: right;">Page 130</p> <p>1 Confidential - Pugatch</p> <p>2 form. The document speaks for itself.</p> <p>3 Is that a question, John?</p> <p>4 MR. KANE: Yeah. I asked if</p> <p>5 that was his understanding, that this</p> <p>6 is a representation by HarbourVest</p> <p>7 that it has the authority to transfer</p> <p>8 the shares if the Settlement Agreement</p> <p>9 is approved.</p> <p>10 MS. WEISGERBER: Objection to</p> <p>11 form. Objection to the extent it</p> <p>12 calls for a legal conclusion.</p> <p>13 To the extent you have a</p> <p>14 nonlegal conclusion, non-privileged</p> <p>15 understanding, Mike, you can share</p> <p>16 that.</p> <p>17 A. Yeah, I'm just saying I can only</p> <p>18 answer that based on conversations with</p> <p>19 counsel.</p> <p>20 MR. KANE: Okay. I won't push</p> <p>21 that. That's fine.</p> <p>22 Q. If we keep going down here as</p> <p>23 part of this attachment, there's a</p> <p>24 Transfer Agreement, Exhibit A to the</p> <p>25 Settlement Agreement. Are you familiar</p>	<p style="text-align: right;">Page 131</p> <p>1 Confidential - Pugatch</p> <p>2 with this document?</p> <p>3 A. Yes. I've seen it.</p> <p>4 Q. And did you assist with the</p> <p>5 preparation or negotiation of this</p> <p>6 Agreement?</p> <p>7 A. Yes.</p> <p>8 Q. Okay. Did you understand that</p> <p>9 HarbourVest would need the consent of the</p> <p>10 HCLOF portfolio advisor to effectuate the</p> <p>11 transfer?</p> <p>12 MS. WEISGERBER: Objection to</p> <p>13 form. Objection to the extent it</p> <p>14 calls for a legal conclusion.</p> <p>15 Mike, if you have a view other</p> <p>16 than from privileged conversation, you</p> <p>17 can answer, otherwise do not answer.</p> <p>18 A. Yeah, I'm sorry. I can only</p> <p>19 answer that based on conversation with</p> <p>20 counsel and the read of the document.</p> <p>21 Q. So to make sure I understand</p> <p>22 that, you have no independent</p> <p>23 understanding of whether or not consent</p> <p>24 was required from the portfolio manager</p> <p>25 before you could effectuate a transfer; is</p>
<p style="text-align: right;">Page 132</p> <p>1 Confidential - Pugatch</p> <p>2 that correct?</p> <p>3 MS. WEISGERBER: Same objection.</p> <p>4 I think you can give your</p> <p>5 general understanding, but then not</p> <p>6 get into specific conversations.</p> <p>7 A. My understanding of that is</p> <p>8 based on conversations with counsel, but</p> <p>9 yes, that is my understanding, John.</p> <p>10 Q. Okay. I'm going to highlight a</p> <p>11 passage here. Can you see this</p> <p>12 highlighted area? "Whereas, the Portfolio</p> <p>13 Manager desires to consent to such</p> <p>14 transfers and to the admission of</p> <p>15 Transferee as a shareholder..."</p> <p>16 Were you aware of that</p> <p>17 provision?</p> <p>18 MS. WEISGERBER: Objection to</p> <p>19 form.</p> <p>20 A. Yes. It's in the document.</p> <p>21 Q. Do you have any understanding of</p> <p>22 why that provision was included in this</p> <p>23 agreement?</p> <p>24 MS. WEISGERBER: Objection to</p> <p>25 form. Objection to the extent it</p>	<p style="text-align: right;">Page 133</p> <p>1 Confidential - Pugatch</p> <p>2 calls for a privileged conversation.</p> <p>3 A. As I answered before, based on</p> <p>4 conversations with counsel, my</p> <p>5 understanding is that consent is requiring</p> <p>6 in connection to transfer.</p> <p>7 Q. I'd like to turn your attention</p> <p>8 now – this is a document you've seen</p> <p>9 before during your deposition. This is</p> <p>10 the member's agreement related to the</p> <p>11 Company for HCLOF. This is previously</p> <p>12 produced by the Debtor, that's why it's</p> <p>13 got the Bates stamp on it. This is dated</p> <p>14 November 15, 2017.</p> <p>15 Are you familiar with this</p> <p>16 document?</p> <p>17 A. Yes.</p> <p>18 Q. Do you see on Line 14, in the</p> <p>19 between, on Page 1 shows Highland HCF</p> <p>20 Advisor, Ltd. as the portfolio manager?</p> <p>21 A. Yes, I see that.</p> <p>22 Q. I know there was quite a bit</p> <p>23 of – quite a few questions about this</p> <p>24 earlier, but you understand that Highland</p> <p>25 HCF Advisor, Ltd. is still the HCLOF</p>

<p style="text-align: right;">Page 134</p> <p>1 Confidential - Pugatch 2 portfolio manager? 3 MS. WEISGERBER: Objection to 4 form. 5 A. Honestly, I don't have -- I 6 don't have enough information to answer 7 that definitively. 8 Q. Okay. Going back to the 9 Settlement Agreement, there's a reference 10 in here to a defined term, "portfolio 11 manager." 12 Do you see that? 13 A. Yep. 14 Q. And is this the same one that's 15 listed in the Member Agreement, Highland 16 HCF Advisor, Ltd.? 17 A. I believe that seems to be the 18 position, yes. 19 Q. Okay. So when we're talking 20 about down here, "Whereas, the Portfolio 21 Manager desires to consent," this consent 22 provision is referring to the same 23 definition of portfolio manager that's 24 included in this Member Agreement; is that 25 correct?</p>	<p style="text-align: right;">Page 135</p> <p>1 Confidential - Pugatch 2 MR. MORRIS: Objection to the 3 form. 4 MS. WEISGERBER: Objection -- 5 same objections. Objection to the 6 extent it calls for privileged 7 information. 8 A. That sounds like a legal 9 conclusion. 10 Q. I would have thought it was 11 reading, Mr. Pugatch. 12 A. Well, if you're asking me to 13 definitively confirm that, that sounds 14 like a legal interpretation. 15 Q. Let me ask that a different way. 16 Do you understand that the 17 portfolio manager is listed as Highland 18 HCF Advisor, Ltd. in the Member Agreement? 19 A. Yes. 20 Q. And in this Transfer Agreement, 21 the portfolio manager is listed as 22 Highland HCF Advisor, Ltd.? 23 A. Yes. 24 Q. And those are the same entities? 25 A. Yes.</p>
<p style="text-align: right;">Page 136</p> <p>1 Confidential - Pugatch 2 Q. All right. Are you familiar 3 with Section 6 of this Member Agreement? 4 A. (Nods.) 5 Q. Have you ever read this 6 document? 7 A. I have. 8 Q. Okay. And can you give me your 9 understanding of what must take place 10 under this document for HarbourVest to 11 transfer its shares? 12 MS. WEISGERBER: Object to the 13 form. Object to the extent it calls 14 for a legal conclusion. Object to the 15 extent it calls for any privileged 16 information or conversations. 17 Mike, to the extent you have an 18 independent understanding, separate 19 from conversations with counsel, you 20 can answer the question. 21 A. I would say my understanding of 22 what's required in connection with the 23 transfer is based on conversations with 24 counsel. 25 Q. Do you believe that the</p>	<p style="text-align: right;">Page 137</p> <p>1 Confidential - Pugatch 2 HarbourVest entities can transfer its 3 shares without obtaining the consent of 4 the portfolio manager? 5 MS. WEISGERBER: Objection to 6 form. Objection to the extent it 7 calls for a legal conclusion. 8 Same instruction, Mike, as to 9 privileged conversations. 10 A. Again, my view on that would be 11 based on conversations with counsel. 12 Q. Are you aware of whether 13 HarbourVest provided any notice to other 14 members of its intent to transfer its 15 shares to the Debtor's affiliate under the 16 Settlement Agreement, other than the 17 filing of the 9019 motion? 18 MS. WEISGERBER: Same objection. 19 But there is a factual question in 20 there if you can answer it, Mike, but 21 no privileged conversation. 22 A. Yeah, I'm not aware of that. 23 Q. Did you provide members 30 days 24 after the receipt of notice of 25 HarbourVest's intent to transfer its</p>

<p style="text-align: right;">Page 138</p> <p>1 Confidential - Pugatch</p> <p>2 shares to the Debtor's affiliate and</p> <p>3 provide those members with an opportunity</p> <p>4 to purchase their pro rata amount of the</p> <p>5 shares?</p> <p>6 MS. WEISGERBER: Same objection.</p> <p>7 A. No.</p> <p>8 Q. And just to make sure I'm not</p> <p>9 asking this question in a way that you</p> <p>10 don't understand what I'm asking: Do you</p> <p>11 see this highlighted provision here?</p> <p>12 A. Yes.</p> <p>13 Q. I'm asking whether HarbourVest</p> <p>14 provided members 30 days after the receipt</p> <p>15 of a notice letter and an opportunity to</p> <p>16 purchase their entire pro rata share of</p> <p>17 the shares proposed to be transferred by</p> <p>18 the HarbourVest entities?</p> <p>19 MS. WEISGERBER: Objection to</p> <p>20 form. Objection to the extent it</p> <p>21 calls for privileged conversations or</p> <p>22 a legal conclusion. Objection to the</p> <p>23 extent it's asking about one piece of</p> <p>24 the document.</p> <p>25 And you're welcome to look at</p>	<p style="text-align: right;">Page 139</p> <p>1 Confidential - Pugatch</p> <p>2 the full document if you'd like, Mike.</p> <p>3 I think it was one of the ones that</p> <p>4 was E-mailed as well, or maybe you</p> <p>5 were able to pull it down.</p> <p>6 THE WITNESS: Yeah, no, I was.</p> <p>7 Thank you.</p> <p>8 A. And I'm sorry, John, could you</p> <p>9 just repeat the question?</p> <p>10 BY MR. KANE:</p> <p>11 Q. Yeah, sure, absolutely. And I'm</p> <p>12 not calling for any conversations with</p> <p>13 counsel. I'm asking you if you know</p> <p>14 whether HarbourVest did something or not.</p> <p>15 So let's -- let's keep it to that, because</p> <p>16 I --</p> <p>17 MR. KANE: Erica, I appreciate</p> <p>18 your concerns, but I really don't want</p> <p>19 to have any disclosures from Mike</p> <p>20 about his discussions with you on</p> <p>21 whether something needed to be done or</p> <p>22 not. I'm asking simply the facts of</p> <p>23 whether HarbourVest did it or not.</p> <p>24 Q. So did HarbourVest provide</p> <p>25 notice, 30 days' notice, to the members</p>
<p style="text-align: right;">Page 140</p> <p>1 Confidential - Pugatch</p> <p>2 listed under this Member Agreement of</p> <p>3 HarbourVest's intent to transfer the</p> <p>4 shares that are the subject to the</p> <p>5 Settlement Agreement?</p> <p>6 A. No.</p> <p>7 Q. Has HarbourVest provided any</p> <p>8 members with a right of first refusal and</p> <p>9 a cash purchase price for which it would</p> <p>10 sell its shares instead of transferring</p> <p>11 those shares to the Debtor or the Debtor's</p> <p>12 affiliate under the Settlement Agreement?</p> <p>13 MS. WEISGERBER: Same</p> <p>14 objections. Objection to form.</p> <p>15 Objection to extent it calls for a</p> <p>16 legal conclusion or privileged</p> <p>17 conversations, including -- regarding</p> <p>18 the specifics of that provision.</p> <p>19 I don't think that's a purely</p> <p>20 factual question.</p> <p>21 Q. Did HarbourVest offer to sell</p> <p>22 the shares to the other members? That's</p> <p>23 not a factual question?</p> <p>24 MS. WEISGERBER: Objection --</p> <p>25 A. On the basis of that factual</p>	<p style="text-align: right;">Page 141</p> <p>1 Confidential - Pugatch</p> <p>2 question, no.</p> <p>3 Q. So let me ask this question</p> <p>4 again, I don't recall if I got an answer</p> <p>5 or not.</p> <p>6 Did HarbourVest affirmatively</p> <p>7 seek to obtain the consent of Highland HCF</p> <p>8 Advisors to transfer its shares to the</p> <p>9 Debtor affiliate under the Settlement</p> <p>10 Agreement?</p> <p>11 MS. WEISGERBER: Same</p> <p>12 objections. Same instruction</p> <p>13 regarding the privileged conversation.</p> <p>14 A. I mean, as a Highland-affiliated</p> <p>15 entity, the Debtor, who's obviously the</p> <p>16 other party here involved in the transfer,</p> <p>17 you know, was involved in these</p> <p>18 discussions.</p> <p>19 Q. I'm sorry. Would you mind</p> <p>20 clarifying? Did you say that Highland HCF</p> <p>21 Advisors was involved in those discussions</p> <p>22 or the Debtor was involved in those</p> <p>23 discussions and you assume Highland HCF</p> <p>24 Advisors was?</p> <p>25 MS. WEISGERBER: Objection to</p>

<p style="text-align: right;">Page 142</p> <p>1 Confidential - Pugatch</p> <p>2 form. Misstates testimony.</p> <p>3 A. Sorry, could you just repeat the</p> <p>4 question, please, John?</p> <p>5 Q. Yes, Mr. Pugatch.</p> <p>6 I'm actually just trying to get</p> <p>7 some clarification from you, because I</p> <p>8 don't think I understood your answer</p> <p>9 about -- I had asked just -- again, I</p> <p>10 don't want any correspondence with your</p> <p>11 counsel or what your counsel advised, I'm</p> <p>12 asking: Do you know whether HarbourVest</p> <p>13 sought written consent from Highland HCF</p> <p>14 Advisor for its -- or to transfer its</p> <p>15 shares to the Debtor or the Debtor's</p> <p>16 affiliate under the Settlement Agreement?</p> <p>17 MS. WEISGERBER: Same objection.</p> <p>18 A. My understanding is HarbourVest</p> <p>19 did not explicitly have those</p> <p>20 conversations or seek that consent.</p> <p>21 Q. Okay. Are you aware of whether</p> <p>22 HarbourVest received any written consent</p> <p>23 from Highland HCF Advisors, other than</p> <p>24 what's in the Transfer Agreement attached</p> <p>25 to the Settlement Agreement?</p>	<p style="text-align: right;">Page 143</p> <p>1 Confidential - Pugatch</p> <p>2 A. I am not.</p> <p>3 MS. WEISGERBER: Same objection.</p> <p>4 Q. Do you know if HarbourVest has</p> <p>5 any written consent? Not just to seek it,</p> <p>6 but do you know if HarbourVest has a piece</p> <p>7 of paper, other than the transfer</p> <p>8 agreement, in which Highland HCF advisors</p> <p>9 provided its consent to the transfer of</p> <p>10 shares to the Debtor's affiliate?</p> <p>11 MS. WEISGERBER: Same</p> <p>12 objections.</p> <p>13 A. I would have to speak with</p> <p>14 counsel. I am not aware of that directly,</p> <p>15 no.</p> <p>16 Q. Are you aware of whether</p> <p>17 HarbourVest had any correspondence with</p> <p>18 HCLOF representatives about effectuating</p> <p>19 the transfer of the shares to the Debtor's</p> <p>20 affiliate under the Settlement Agreement?</p> <p>21 MS. WEISGERBER: Same objection.</p> <p>22 You can answer.</p> <p>23 A. We have had discussions with</p> <p>24 them, yes.</p> <p>25 Q. Did HCLOF representatives</p>
<p style="text-align: right;">Page 144</p> <p>1 Confidential - Pugatch</p> <p>2 provide consent, whether written or</p> <p>3 otherwise, to the transfer?</p> <p>4 A. I am not aware that that consent</p> <p>5 has been provided as of yet.</p> <p>6 Q. Are you aware of whether any</p> <p>7 HarbourVest representatives have had</p> <p>8 conversations with the Debtor's</p> <p>9 representatives about the necessity of</p> <p>10 consent to the transfer of their shares?</p> <p>11 MS. WEISGERBER: Objection to</p> <p>12 form --</p> <p>13 MR. KANE: I'll re-ask the</p> <p>14 question. I want to clarify that</p> <p>15 point.</p> <p>16 BY MR. KANE:</p> <p>17 Q. Mr. Pugatch, are you aware of</p> <p>18 whether any HarbourVest representatives</p> <p>19 had conversations with the Debtor's</p> <p>20 representatives about the necessity of</p> <p>21 obtaining the HCLOF portfolio manager's</p> <p>22 written consent before transferring the</p> <p>23 shares to the Debtor's representative or</p> <p>24 affiliate under the terms of the</p> <p>25 Settlement Agreement?</p>	<p style="text-align: right;">Page 145</p> <p>1 Confidential - Pugatch</p> <p>2 MS. WEISGERBER: Objection to</p> <p>3 form.</p> <p>4 And, John, I'm sorry to do this,</p> <p>5 can you just clarify what you mean by</p> <p>6 "representative"?</p> <p>7 MR. KANE: Yeah. I mean,</p> <p>8 anybody that has agency authority to</p> <p>9 act on behalf of the Debtor in</p> <p>10 negotiations, in the preparation of</p> <p>11 the documents, in negotiation of the</p> <p>12 terms of the Settlement Agreement.</p> <p>13 I mean, I think that it's, you</p> <p>14 know, a pretty broad term here.</p> <p>15 MS. WEISGERBER: Objection to</p> <p>16 form. Objection to the extent it</p> <p>17 calls for discussions with counsel.</p> <p>18 As a factual matter, if you have</p> <p>19 an answer, you can give it.</p> <p>20 A. I'm aware of conversations that</p> <p>21 have taken place about all of the terms of</p> <p>22 the Transfer Agreement in connection with</p> <p>23 the settlement, with all parties.</p> <p>24 Q. Is it your understanding based</p> <p>25 on those conversations that written</p>

<p style="text-align: right;">Page 146</p> <p>1 Confidential - Pugatch</p> <p>2 consent of the portfolio manager as</p> <p>3 defined in the Transfer Agreement was</p> <p>4 required before the shares could be</p> <p>5 transferred under the Settlement</p> <p>6 Agreement?</p> <p>7 MS. WEISGERBER: Objection to</p> <p>8 the form. Objection to the extent it</p> <p>9 calls for a legal conclusion or</p> <p>10 privileged conversation. And I think</p> <p>11 that one does, John.</p> <p>12 A. Yeah, I can only answer that</p> <p>13 based on conversation with lawyers.</p> <p>14 Q. Wasn't the question whether --</p> <p>15 I'm sorry. Maybe I forgot my own</p> <p>16 question.</p> <p>17 But I thought it was based on</p> <p>18 your conversations with the Debtor's</p> <p>19 representative, was it your understanding,</p> <p>20 not based on your conversation with</p> <p>21 counsel.</p> <p>22 MS. WEISGERBER: Can you repeat</p> <p>23 the whole question because I</p> <p>24 definitely misunderstood it then too.</p> <p>25 Q. Okay. Based on your</p>	<p style="text-align: right;">Page 147</p> <p>1 Confidential - Pugatch</p> <p>2 conversations with the Debtor's</p> <p>3 representatives, was it your understanding</p> <p>4 that the consent of the portfolio manager</p> <p>5 was required for the shares to be</p> <p>6 transferred from the HarbourVest entities</p> <p>7 to the Debtor's affiliate under the terms</p> <p>8 of the Settlement Agreement?</p> <p>9 MS. WEISGERBER: Okay. Same</p> <p>10 objections. Also objection to the</p> <p>11 extent there is a common interest</p> <p>12 privilege.</p> <p>13 A. I don't recall having that</p> <p>14 explicit conversation with representative</p> <p>15 of the Debtor.</p> <p>16 MR. KANE: I'll pass the</p> <p>17 witness.</p> <p>18 Thank you, Mr. Pugatch.</p> <p>19 MR. MORRIS: Anybody else?</p> <p>20 Thank you, all.</p> <p>21 MS. WEISGERBER: Can we --</p> <p>22 before we break, could we have a</p> <p>23 two-minute break and then come back</p> <p>24 before we conclude.</p> <p>25 BY MS. WEISGERBER:</p>
<p style="text-align: right;">Page 148</p> <p>1 Confidential - Pugatch</p> <p>2 Q. Mr. Pugatch, during Mr. Wilson's</p> <p>3 questioning, I believe his last question</p> <p>4 related to identifying as between two</p> <p>5 choices the primary source or the cause of</p> <p>6 HarbourVest's damages.</p> <p>7 In your opinion, is -- are</p> <p>8 HarbourVest damages attributable to any</p> <p>9 one cause?</p> <p>10 A. No, I would say there were</p> <p>11 multiple root causes of the damages and</p> <p>12 diminution in value that was suffered in</p> <p>13 connection with the investment.</p> <p>14 MS. WEISGERBER: Okay. I don't</p> <p>15 have any further questions.</p> <p>16 MR. WILSON: I think I'd like to</p> <p>17 ask a couple more.</p> <p>18 BY MR. WILSON:</p> <p>19 Q. Mr. Pugatch, I think you</p> <p>20 testified earlier that the investment in</p> <p>21 HCLOF was comprised of multiple CLOs,</p> <p>22 correct?</p> <p>23 A. Correct.</p> <p>24 Q. And some of those CLOs were</p> <p>25 managed by Acis, to your understanding?</p>	<p style="text-align: right;">Page 149</p> <p>1 Confidential - Pugatch</p> <p>2 MS. WEISGERBER: Objection.</p> <p>3 A. Correct.</p> <p>4 MS. WEISGERBER: Just to</p> <p>5 clarify, John, is this within the</p> <p>6 scope of the questions I asked</p> <p>7 Mr. Pugatch?</p> <p>8 MR. WILSON: I believe it is.</p> <p>9 I'm going to be really short. But</p> <p>10 so --</p> <p>11 MS. WEISGERBER: I would like to</p> <p>12 have a standing objection to the</p> <p>13 extent it's not within the scope of</p> <p>14 the questions that was asked to</p> <p>15 Mr. Pugatch.</p> <p>16 BY MR. WILSON:</p> <p>17 Q. So some of those CLOs you</p> <p>18 contend are managed by Acis?</p> <p>19 MS. WEISGERBER: Objection to</p> <p>20 form.</p> <p>21 A. A majority.</p> <p>22 Q. And just generally, do you</p> <p>23 contend that Highland managed the balance</p> <p>24 of those CLOs?</p> <p>25 MR. MORRIS: Objection to the</p>

<p style="text-align: right;">Page 150</p> <p>1 Confidential - Pugatch</p> <p>2 form of the question.</p> <p>3 MS. WEISGERBER: Objection.</p> <p>4 Same objection.</p> <p>5 A. Yes.</p> <p>6 Q. Yes. Okay. Thank you.</p> <p>7 And I just had two more</p> <p>8 questions.</p> <p>9 So, if there was going to be a</p> <p>10 reset, that would have to be done at the</p> <p>11 CLO level, each CLO would have to be</p> <p>12 reset?</p> <p>13 MR. MORRIS: Objection.</p> <p>14 MS. WEISGERBER: Objection to</p> <p>15 form.</p> <p>16 A. That is correct.</p> <p>17 Q. And do you know of any specific</p> <p>18 CLO that requested a reset but was not</p> <p>19 granted a reset?</p> <p>20 MR. MORRIS: Objection to form.</p> <p>21 MS. WEISGERBER: Same objection.</p> <p>22 And foundation.</p> <p>23 A. When you say "CLOs who requested</p> <p>24 a reset," can be more clear, please?</p> <p>25 Q. We just talked about how this</p>	<p style="text-align: right;">Page 151</p> <p>1 Confidential - Pugatch</p> <p>2 investment is comprised of multiple CLOs</p> <p>3 and each one of those CLOs would have to</p> <p>4 be reset, according to its own terms, I</p> <p>5 guess. Do you know of any one of those</p> <p>6 CLOs that requested a reset?</p> <p>7 MR. MORRIS: Objection to the</p> <p>8 form of the question.</p> <p>9 MS. WEISGERBER: Same objection.</p> <p>10 A. I'm aware of Highland having in</p> <p>11 its capacity as manager of the HCLOF</p> <p>12 having requested or pursued resets of</p> <p>13 certain of the Acis HCLOs.</p> <p>14 Q. Your understanding is that</p> <p>15 Highland requested a reset of the Acis</p> <p>16 CLOs?</p> <p>17 MS. WEISGERBER: Objection to</p> <p>18 form.</p> <p>19 A. I'm sorry. I'm trying to</p> <p>20 understand what you said.</p> <p>21 MS. WEISGERBER: I'm really</p> <p>22 wondering how this relates at all to</p> <p>23 the scope of the questions I asked Mr.</p> <p>24 Pugatch on follow up.</p> <p>25 I think it's time to wrap this</p>
<p style="text-align: right;">Page 152</p> <p>1 Confidential - Pugatch</p> <p>2 up, John.</p> <p>3 MR. WILSON: This was my last</p> <p>4 question, I just need an answer to it.</p> <p>5 And I think he tried to answer, but I</p> <p>6 didn't understand what he said.</p> <p>7 MS. WEISGERBER: Objection. Can</p> <p>8 you re-ask the question so we have a</p> <p>9 clear question.</p> <p>10 MR. WILSON: Well, Madam Court</p> <p>11 Reporter, can you read back his last</p> <p>12 response?</p> <p>13 (Record read.)</p> <p>14 BY MR. WILSON:</p> <p>15 Q. Can you repeat what you intended</p> <p>16 to answer to the last question?</p> <p>17 MS. WEISGERBER: Same objection.</p> <p>18 If you recall, Mike.</p> <p>19 A. I'm sorry, John. Can you just</p> <p>20 repeat the question, please, make sure I'm</p> <p>21 answering what you want me to answer.</p> <p>22 Q. My question is the same as it's</p> <p>23 been: Are you aware of any CLO that</p> <p>24 requested a reset and was not granted one?</p> <p>25 MS. WEISGERBER: Objection to</p>	<p style="text-align: right;">Page 153</p> <p>1 Confidential - Pugatch</p> <p>2 form. Objection to foundation.</p> <p>3 MR. MORRIS: Objection to the</p> <p>4 form of the question.</p> <p>5 A. Again, my understanding is the</p> <p>6 CLOs do not request the reset. Highland,</p> <p>7 as manager of HCLOF in its capacity as</p> <p>8 majority equity owner of certain of the</p> <p>9 CLOs, have requested a reset post our</p> <p>10 original investment.</p> <p>11 Q. Okay.</p> <p>12 MR. WILSON: I'll pass the</p> <p>13 witness.</p> <p>14 MS. WEISGERBER: I think we're</p> <p>15 done.</p> <p>16 THE REPORTER: Will everyone put</p> <p>17 their orders on the record, please?</p> <p>18 MR. MORRIS: John Morris for the</p> <p>19 Debtor. Expedited, please.</p> <p>20 MR. WILSON: John Wilson. I'm</p> <p>21 not sure what arrangements my office</p> <p>22 has previously made, but we want an</p> <p>23 expedited transcript, as well.</p> <p>24 THE REPORTER: Do you want a</p> <p>25 rough too?</p>

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1 Confidential - Pugatch
2 MR. WILSON: Yes, please.
3 MR. MORRIS: Yes, please.
4 MS. WEISGERBER: Same for
5 HarbourVest, please.
6 MR. MALONEY: I don't need an
7 expedited transcript. I'd just be
8 happy to get one regular copy. I'll
9 take whatever you would produce in the
10 ordinary course. Same as what
11 everyone else ordered.
12 (Time Noted: 4:35 p.m. EDT.)
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1
2 CERTIFICATE OF SHORTHAND REPORTER-NOTARY
3 PUBLIC
4 I, Amanda Gorrono, the officer
5 before whom the foregoing deposition
6 was taken, do hereby certify that the
7 foregoing transcript is a true and
8 correct record of the testimony given;
9 that said testimony was taken by me
10 stenographically and thereafter
11 reduced to typewriting under my
12 direction; and that I am neither
13 counsel for, related to, nor employed
14 by any of the parties to this case and
15 have no interest, financial or
16 otherwise, in its outcome.
17 IN WITNESS WHEREOF, I have
18 hereunto set my hand this 12th day of
19 January, 2021.
20
21 _____
22 AMANDA GORRONO, CLR
23 CLR NO: 052005 - 01
24 Notary Public in and for the State of New
25 York
County of Suffolk

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1
2 ACKNOWLEDGEMENT OF DEPONENT
3
4 I, MICHAEL PUGATCH, do hereby
5 acknowledge that I have read and
6 examined the foregoing testimony, and
7 the same is a true, correct and
8 complete transcription of the
9 testimony given by me, and any
10 corrections appear on the attached
11 Errata sheet signed by me.
12
13
14 _____
15 (DATE) (SIGNATURE)
16
17
18
19
20
21
22
23
24
25

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1 ERRATA SHEET
2 Case Name:
3 Deposition Date:
4 Deponent:
5 Pg. No. Now Reads Should Read Reason
6 _____
7 _____
8 _____
9 _____
10 _____
11 _____
12 _____
13 _____
14 _____
15 _____
16 _____
17 _____
18 _____
19 _____
20
21 _____
22 Signature of Deponent
23 SUBSCRIBED AND SWORN BEFORE ME
24 THIS ____ DAY OF _____, 20____.
25 (Notary Public) MY COMMISSION EXPIRES: _____

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EXHIBIT 8

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**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

In re:

HIGHLAND CAPITAL MANAGEMENT, L.P.,¹

Debtor.

)
) Chapter 11
)
) Case No. 19-34054-sgj11
)
) **Re: Docket Nos. 1625, 1697, 1706,**
) **1707**

**DEBTOR'S OMNIBUS REPLY IN SUPPORT OF DEBTOR'S MOTION FOR
ENTRY OF AN ORDER APPROVING SETTLEMENT WITH HARBOURVEST
(CLAIM NOS. 143, 147, 149, 150, 153, 154), AND AUTHORIZING ACTIONS
CONSISTENT THEREWITH**

¹ The Debtor's last four digits of its taxpayer identification number are (6725). The headquarters and service address for the above-captioned Debtor is 300 Crescent Court, Suite 700, Dallas, TX 75201.



The above-captioned debtor and debtor-in-possession (the “Debtor”) hereby submits this reply (the “Reply”) in support of its *Motion for Entry of an Order Approving Settlement with HarbourVest (Claim No.143,147, 149, 150, 153, 154), and Authorizing Actions Consistent Therewith* [Docket No. 1625] (the “Motion”).² In further support of the Motion, the Debtor respectfully states as follows:

PRELIMINARY STATEMENT

1. If granted, the Motion will resolve a \$300 million general unsecured claim against the Debtor’s estate for less than \$16.8 million in actual value.³ The settlement is another solid achievement for the Debtor and – not surprisingly – is opposed by no one except Mr. Dondero and entities affiliated with him.

2. As discussed in the Motion, in November 2017, HarbourVest invested \$80 million in exchange for a 49.98% membership interest in HCLOF – an entity managed by a subsidiary of the Debtor. The balance of HCLOF’s interests are held by CLO Holdco, Ltd. (an entity affiliated with Mr. Dondero), the Debtor, and certain of the Debtor’s employees. Subsequent to its investment in HCLOF, HarbourVest incurred substantial losses on its investment in HCLOF and filed claims against the Debtor’s estate.

3. HarbourVest asserts claims for fraud, fraudulent inducement, fraudulent concealment, fraudulent misrepresentation, negligent misrepresentation, breach of fiduciary duty

² All capitalized terms used but not defined herein have the meanings given to them in the Motion.

³ Under the proposed settlement, HarbourVest would receive an allowed, general unsecured claim of \$45 million and an allowed, subordinated claim of \$35 million. Based on the estimated recovery for general unsecured creditors of 87.44% (which is a recovery based on certain outdated assumptions discussed *infra*), HarbourVest’s \$45 million general unsecured claim is estimated to be worth approximately \$39.3 million and the \$35 million subordinated claim, which is junior to the general unsecured claim, is currently estimated to have value only if there are litigation recoveries. In addition, HarbourVest is transferring to an affiliate of the Debtor its interest in HCLOF, which is estimated to be worth approximately \$22.5 million. Thus, HarbourVest’s estimated recovery on its general unsecured and subordinated claims is estimated at approximately \$16.8 million on a net economic basis. This estimate, however, is dated and is based on the claims that were settled as of the filing of the Debtor’s plan in November 2020.

and unfair prejudice (under Guernsey law), violations of state securities laws, and RICO. In furtherance of these claims, HarbourVest alleges it was misled by the Debtor and its employees, including Mr. Scott Ellington (then the Debtor's general counsel), and that subsequent to investing in HCLOF, Mr. Dondero and the Debtor used HCLOF both as a piggybank to fund the litigation against Acis Capital Management, L.P. ("Acis") and as a scapegoat for the Debtor's litigation strategy, in each case to HarbourVest's substantial detriment.

4. Specifically, HarbourVest alleges that:

- the Debtor and its employees, including Mr. Ellington, misled HarbourVest about its intentions with respect to Mr. Terry's arbitration award against Acis and orchestrated a series of fraudulent transfers and corporate restructurings, the true purpose of which was to denude Acis of assets and make it judgment proof;
- the Debtor and its employees, including Mr. Ellington, misled HarbourVest as to the intent and true purpose of these restructurings and led HarbourVest to believe that Mr. Terry's claims against Acis were meritless and a simple employment dispute that would not affect HarbourVest's investment;
- the Debtor, through Mr. Dondero, improperly exercised control over or misled HCLOF's Guernsey-based board of directors to cause HCLOF to engage in unnecessary, unwarranted, and resource-draining litigation against Acis;
- the Debtor improperly caused HCLOF to pay substantial legal fees of various entities in the Acis bankruptcy that were unwarranted, imprudent, and not properly chargeable to HCLOF; and
- the Debtor used HarbourVest as a scapegoat in its litigation against Acis by asserting that the Debtor's improper conduct and scorched-earth litigation strategy was at HarbourVest's request, which was untrue.

5. The Debtor believed, and continues to believe, that it has viable defenses to HarbourVest's claims. Nevertheless, those defenses would be subject to substantial factual disputes and would require expensive and time-consuming litigation that would likely be resolved only after a lengthy trial all while the Debtor (or its successor) assumes the risk that the defenses might fail. The evidence will show that the proposed settlement is the product of substantial, arm's length – and sometimes quite heated – negotiations between and among the

principals and their counsel. The evidence will also show that one of HarbourVest's primary concerns in settling its claim was that part of that settlement would include the extrication of HarbourVest from the Highland web of entities and the related litigation. The proposed settlement accomplishes that and does so in compliance with HCLOF's governing agreements.

6. Pursuant to the proposed settlement, (a) HarbourVest will receive (i) an allowed, general unsecured claim in the amount of \$45 million, and (ii) an allowed, subordinated claim in the amount of \$35 million; (b) HarbourVest will transfer its 49.98% interest in HCLOF (valued at approximately \$22.5 million) to a wholly-owned subsidiary of the Debtor; and (c) the parties will exchange mutual and general releases. The Debtor believes that the proposed settlement is reasonable and results from the valid and proper exercise of its business judgment. And the Debtor's creditors apparently agree. None of the major parties-in-interest or creditors in this case has objected to the Motion: not the Committee, the Redeemer Committee, Acis, Patrick Daugherty, or UBS.

7. In distinction, the only objecting parties are Mr. Dondero, his family trusts (the Dugaboy Investment Trust ("Dugaboy") and Get Good Trust ("Get Good," and together with Dugaboy, the "Trusts")), and CLO Holdco (a wholly-owned subsidiary of Mr. Dondero's Charitable Donor Advised Fund, L.P. (the "DAF")) (collectively, the "Objectors"). Each of the Objectors has only the most tenuous economic interest in and connection to the Debtor's settlement with HarbourVest. Each of the Objectors is also controlled directly or indirectly by Mr. Dondero who has coordinated each of the Objectors litigation strategies against the Debtor.⁴ Mr. Dondero's efforts to litigate every issue in this case – directly and by proxy – should be rebuffed, and the objections overruled. The following is a brief summary of the objections.

⁴ See *Debtor's Amended Witness and Exhibit List with Respect to Evidentiary Hearing to be Held on January 8, 2021* [Adv. Pro. 20-3190-sgj, Docket No. 46], Exhibit Q.

<u>Pleading</u>	<u>Objection/Reservation</u>	<u>Response</u>
<i>Objection of James Dondero [Docket No. 1697] (the “Dondero Objection”)</i>	Because HarbourVest was damaged by the injunction entered in Acis, the settlement seeks to revisit this Court’s rulings in Acis.	Mr. Dondero is misdirecting the Court. HarbourVest’s claim arises from the misrepresentations of Mr. Dondero, Mr. Ellington, and others, not this Court’s rulings in Acis, including the failure to disclose the fraudulent transfer of assets.
	The settlement is not fair and equitable because it does not address (1) Acis’s mismanagement, (2) how the Debtor is liable for HarbourVest’s damages, (3) the success on the merits, (4) the costs of litigation, and (5) the Debtor’s ability to realize the value of the HCLOF interests in light of the Acis injunction.	Mr. Dondero ignores the dangers of the litigation and HarbourVest’s claims against the estate for misrepresentation and overestimates the ability to resolve the litigation. The Debtor has assessed the value of the HCLOF interests in light of all factors, including the Acis injunction.
	The HarbourVest settlement represents a substantial windfall to HarbourVest.	Mr. Dondero ignores the economics of this case, which have value breaking in Class 8 (General Unsecured Claims). The value of the settlement is not \$60 million; it is approximately \$16.8 million against a claim of \$300 million. There is no windfall.
	The HarbourVest settlement is improper gerrymandering because it provides HarbourVest with a general unsecured claim and a subordinated claim in order to secure votes for the plan.	The HarbourVest settlement provides for the resolution of HarbourVest’s claim. It is nonsensical to think that the Debtor would reach a settlement with HarbourVest that would include HarbourVest’s rejection of the Debtor’s plan, and there is nothing wrong with requiring acceptance of a plan as part of a settlement. Further, the Debtor does not need HarbourVest’s Class 9 vote to confirm a plan.
<i>Objection of the Dugaboy Investment Trust and Get Good Trust [Docket No. 1706] (the “Trusts Objection”)</i>	The settlement represents a radical change in the Debtor’s earlier position on the HarbourVest settlement.	Mr. Dondero ignores the dangers of the litigation and HarbourVest’s claims against the estate for misrepresentation and overestimates the ability to resolve the litigation.
	The settlement appears to buy HarbourVest’s vote.	The HarbourVest settlement provides for the resolution of HarbourVest’s claim. It is nonsensical to think that the Debtor would reach a settlement with HarbourVest that would include HarbourVest’s rejection of the Debtor’s plan, and there is nothing wrong with requiring acceptance of a plan as part of a settlement. Further, the Debtor does not need HarbourVest’s Class 9 vote to confirm a plan.
	No information is provided as to whether the Debtor can acquire HarbourVest’s interest in HCLOF or the value of that interest to the estate.	As discussed below, the HCLOF interest will be transferred to a wholly-owned subsidiary of the Debtor. Mr. Seery will testify as to the benefit of the HCLOF interests to the estate.
<i>Objection of CLO Holdco [Docket No. 1707] (“CLOH Objection”)</i>	HarbourVest cannot transfer its interests in HCLOF unless it complies with the right of first refusal.	CLO Holdco misinterprets the operative agreements and tries to create ambiguity where none exists.

8. These objections are just the latest objections filed by Mr. Dondero and his related entities to any attempt by the Debtor to resolve this case,⁵ including the Debtor's settlement with Acis [Docket No. 1087] and the seven separate objections filed by Mr. Dondero and his related entities to the *Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.* [Docket No. 1472] (the "Plan").⁶ It will not shock this Court to hear that each of the Objectors is also objecting to the Plan. In contradistinction, the Debtor has heard this Court's admonishments about old Highland's culture of litigation as evidenced by this case, Acis's bankruptcy, and beyond. Although the Debtor has vigorously contested claims when appropriate, the Debtor has also sought to settle claims and limit the senseless fighting. The Debtor has successfully resolved the largest claims against the estate, including the claims of the Redeemer Committee, Acis, and, as recently announced to this Court, UBS. The Debtor would ask this Court to see through the pretense of the Dondero-related entities' objections to the HarbourVest settlement and approve it as a valid exercise of the Debtor's business judgment.

⁵ As an example of Mr. Dondero's litigiousness, on January 12, 2021, Mr. Dondero filed notice that he will be appealing the preliminary injunction entered against him earlier on January 12, 2021.

⁶ (1) *James Dondero's Objection to Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.* [Docket No. 1661]; (2) *Objection to Confirmation of the Debtor's Fifth Amended Plan of Reorganization* (filed by Get Good Trust, The Dugaboy Investment Trust) [Docket No. 1667]; (3) *Senior Employees' Limited Objection to Debtor's Fifth Amended Plan of Reorganization* (filed by Scott Ellington, Thomas Surgent, Frank Waterhouse, Isaac Leventon) [Docket No. 1669]; (4) *Objection to Confirmation of Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.* (filed by Highland Capital Management Fund Advisors, L.P., Highland Fixed Income Fund, Highland Funds I and its series, Highland Funds II and its series, Highland Global Allocation Fund, Highland Healthcare Opportunities Fund, Highland Income Fund, Highland Merger Arbitrate Fund, Highland Opportunistic Credit Fund, Highland Small-Cap Equity Fund, Highland Socially Responsible Equity Fund, Highland Total Return Fund, Highland/iBoxx Senior Loan ETF, NexPoint Advisors, L.P., NexPoint Capital, Inc., NexPoint Real Estate Strategies Fund, NexPoint Strategic Opportunities Fund) [Docket No. 1670]; (5) *NexPoint Real Estate Partners LLC's Objection to Debtor's Fifth Amended Plan of Reorganization* (filed by NexPoint Real Estate Partners LLC f/k/a HCRE Partners LLC) [Docket No. 1673]; (6) *CLO Holdco, Ltd.'s Joinder to Objection to Confirmation of Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. and Supplemental Objections to Plan Confirmation* [Docket No. 1675]; and (7) *NexBank's Objection to Debtor's Fifth Amended Plan of Reorganization* (filed by NexBank Title, Inc., NexBank Securities, Inc., NexBank Capital, Inc., and NexBank) [Docket No. 1676].

REPLY

A. Standing

9. **James Dondero.** In the Dondero Objection, Mr. Dondero asserts he is a “creditor, indirect equity security holder, and party in interest” in the Debtor’s bankruptcy. While that claim is ostensibly true, it is tenuous at best. On April 8, 2020, Mr. Dondero filed three unliquidated, contingent claims that he promised to update “in the next ninety days.”⁷ More than nine months later, Mr. Dondero has yet to “update” those claims to assert an actual claim against the Debtor’s estate.⁸

10. Mr. Dondero’s claim as an “indirect equity security holder” is also a stretch. Mr. Dondero holds no direct equity interest in the Debtor. Mr. Dondero instead owns 100% of Strand Advisors, Inc. (“Strand”), the Debtor’s general partner. Strand, however, holds only 0.25% of the total limited partnership interests in the Debtor through its ownership of Class A limited partnership interests. The Class A limited partnership interests are junior in priority of distribution to the Debtor’s Class B and Class C limited partnership interests. The Class A interests are also junior to all other claims filed against the Debtor. Finally, Mr. Dondero’s recovery on his indirect equity interest is junior to any claims against Strand itself. Consequently, before Mr. Dondero can recover on his “indirect” equity interest, the Debtor’s estate must be solvent, priority distributions to Class B and Class C creditors must be satisfied, and all claims against Strand must be satisfied.

11. **Dugaboy and Get Good.** Dugaboy and Get Good are sham Dondero “trusts” with only the most attenuated standing. Dugaboy has filed three proofs of claim [Claim Nos. 113; 131; 177]. In two of these claims, Dugaboy argues that (1) the Debtor is liable to Dugaboy

⁷ Mr. Dondero filed two other proofs of claim that he has since withdrawn with prejudice. See **Docket No. 1460**.

⁸ Without knowing the nature of the “updates,” the Debtor does not concede that any “updates” would have been procedurally proper and reserves the right to object to any proposed amendment to Mr. Dondero’s claims.

for its postpetition mismanagement of the Highland Multi Strategy Credit Fund, L.P., and (2) this Court should pierce the corporate veil and allow Dugaboy to sue the Debtor for a claim it ostensibly has against the Highland Select Equity Master Fund, L.P. – a Debtor-managed investment vehicle. The Debtor believes that each of the foregoing claims is frivolous and has objected to them. [Docket No. 906].

12. In its third claim, Dugaboy asserts a claim against the Debtor arising from its Class A limited partnership interest in the Debtor (which represents just 0.1866% of the total limited partnership interests in the Debtor). Similarly, Get Good filed three proofs of claim [Claim Nos. 120; 128; 129] arising from its prior ownership of limited partnership interests in the Debtor. Because each these claims arises from an equity interest, the Debtor will seek to subordinate them under 11 U.S.C. § 510 at the appropriate time. As set forth above, these interests are out of the money and are not expected to receive any economic recovery.

13. Consequently, Mr. Dondero, Dugaboy, and Get Good’s standing to object to the HarbourVest settlement is attenuated and their chances of recovery in this case are extremely speculative at best. *See In re Kutner*, 3 B.R. 422, 425 (Bankr. N.D. Tex. 1980) (finding that a party had standing only when it had a “pecuniary interest . . . directly affected by the bankruptcy proceeding”); *see also In re Flintkote Co.*, 486 B.R. 99, 114-15 (Bankr. D. Del. 2012), *aff’d*, 526 B.R. 515 (D. Del. 2014) (a claim that is speculative cannot confer party in interest standing). Mr. Dondero, Dugaboy, and Get Good’s minimal interest in the estate should not allow them to overrule the estate’s business judgment or veto settlements with creditors, especially when no actual creditors and constituents have objected. “[A] bankruptcy judge must not blindly follow the hue and cry of the most vocal special interest groups; rather, [the judge] should consider all salient factors . . . and . . . act to further the diverse interests of the debtor, creditors and equity

holders, alike.” *In re Lionel*, 722 F.2d 1063, 1071 (2d Cir. 1983).

B. Mr. Dondero’s Objection and his “Trusts” Objection Are Without Merit

14. As discussed in the Motion, under applicable Fifth Circuit precedent, a bankruptcy court may approve a compromise or settlement as long as the proposed settlement is fair, reasonable, and in the best interest of the estate. *See, e.g., In re Age Ref. Inc.*, 801 F.3d 530, 540 (5th Cir. 2015). In making this determination, courts look to the following factors:

- probability of success in the litigation, with due consideration for the uncertainty of law and fact;
- complexity and likely duration of the litigation and any attendant expense, inconvenience and delay; and
- all other factors bearing on the wisdom of the compromise, including (i) “the paramount interest of creditors with proper deference to their reasonable views” and (ii) whether the settlement is the product of arm’s length bargaining and not of fraud or collusion.

Official Comm. of Unsecured Creditors v. Cajun Elec. Power Coop. (In re Cajun Elec. Power Coop.), 119 F.3d 349, 356 (5th Cir. 1997) (citations omitted). *See also Age Ref. Inc.*, 801 F.3d at 540; *Conn. Gen. Life Ins. Co. v. United Cos. Fin. Corp. (In re Foster Mortgage Corp.)*, 68 F.3d 914, 918 (5th Cir. 1995).

15. **The Settlement Seeks to Revisit the Acis Orders.** In the Dondero Objection, Mr. Dondero argues that HarbourVest’s claim is based on the financial harm caused to HarbourVest from Acis’s bankruptcy and the orders entered in the Acis bankruptcy. Mr. Dondero extrapolates from this that HarbourVest is seeking to challenge this Court’s rulings in Acis. (Dondero Obj., ¶¶ 17-20) Mr. Dondero misinterprets HarbourVest’s claims and the dangers such claims pose to the Debtor’s estate.

16. HarbourVest’s claims are for fraud, fraudulent inducement, fraudulent concealment, fraudulent misrepresentation, negligent misrepresentation, breach of fiduciary duty

and unfair prejudice (under Guernsey law), violations of state securities laws, and RICO. HarbourVest is not arguing that Acis or this Court caused its damages; HarbourVest is arguing that *the Debtor* – led by Mr. Dondero – (a) misled HarbourVest as to the nature of Mr. Terry’s claims against the Debtor and the litigation with Acis, (b) knowingly and intentionally failed to disclose that the Debtor was engaged in the fraudulent transfer of assets to prevent Mr. Terry from collecting his judgment, and (c) that *the Debtor* – under the control of Mr. Dondero – improperly engaged in a crusade against Mr. Terry and Acis, which substantially damaged HarbourVest and its investment in HCLOF, in each case in order to induce HarbourVest to invest in HCLOF.

17. Again, HarbourVest does not contend that Acis caused its damages. Rather, HarbourVest contends that the fraudulent transfer of assets as part of the Debtor’s crusade against Mr. Terry and Acis and the false statements and omissions about those matters caused HarbourVest to make an investment it would never have made had Mr. Dondero and the Debtor been honest and transparent. The Acis litigation – in HarbourVest’s estimation – never should have happened. Acis did not cause HarbourVest’s damages. Mr. Dondero’s crusade against Mr. Terry and the Debtor’s allegedly fraudulent statements to HarbourVest about the fraudulent transfers, Mr. Terry and Acis caused HarbourVest’s damages.

18. **The HarbourVest Claim Lacks Merit.** In their objections, Mr. Dondero and the Trusts argue that the HarbourVest settlement is not fair and equitable and not in the best interests of the estate because (a) it does not address the Debtor’s arguments against the HarbourVest claims and (b) there is a lack of pending litigation seeking to narrow the claims against the estate. These arguments only summarily address the first two factors of *Cajun Electric*, which deal with success in the litigation, and, in doing so, mischaracterize the dangers to the Debtor’s estate

posed by HarbourVest's claims. (Dondero Obj., ¶¶ 21-25; Trusts Obj., ¶ 18(a))

19. Both the Dondero Objection and – to a much lesser extent - the “Trusts” Objection allege that (a) HarbourVest's losses were caused by Acis and its (mis)management of HCLOF's investments (Dondero Obj., ¶¶ 22, 24), (b) there is no contract that supports HarbourVest's claims (Dondero Obj. ¶ 23; Trusts Obj., ¶ 18(a)), (c) there is no causal connection between HarbourVest's losses and the Debtor's conduct (Dondero Obj., ¶ 24), and (d) the Debtor should litigate all or a portion of HarbourVest's claim before settling (Dondero Obj., ¶ 25). Again, though, as set forth above, both Mr. Dondero and the “Trusts” seek to shift the cause of HarbourVest's damages away from the Debtor's misrepresentations and to Mr. Terry's management of HCLOF's investments. This is simple misdirection.

20. HarbourVest's claims are that it invested in HCLOF based on the Debtor's fraudulent misrepresentations. Fraudulent misrepresentation sounds in tort, not contract. *See, e.g., Clark v. Constellation Brands, Inc.*, 348 Fed. Appx. 19, 21 (5th Cir. 2009) (referring to party's claim based on fraudulent misrepresentation as a tort); *Eastman Chem. Co. v. Niro, Inc.*, 80 F. Supp. 2d 712, 717 (S.D. Tex. 2000) (noting that party had common law duty not to commit intentional tort of fraudulent misrepresentation). There is thus no need for HarbourVest to point to a contractual provision to support its claim.⁹ Moreover, in order to defend against HarbourVest's claims, the Debtor would need to elicit evidence showing that its employees did not make misrepresentations to HarbourVest. Such a defense would require the Debtor to rely on the veracity of Mr. Ellington's testimony, among others. That is a high hurdle, and no reasonable person would expect the Debtor to stake the resolution of HarbourVest's \$300 million claim on the Debtor's ability to convince this Court that Mr. Ellington was telling HarbourVest

⁹ Subsequent to filing the Motion, the Objectors requested all agreements between HarbourVest, HCLOF, and the Debtor, and such agreements were provided.

the truth. This is especially true in light of the evidence supporting Mr. Ellington's recent termination for cause and the evidence recently provided by HarbourVest supporting its claim for fraudulent misrepresentations.

21. Finally, neither Mr. Dondero nor the "Trusts" even address the third factor analyzed by the Fifth Circuit: all other factors bearing on the wisdom of the compromise, including "the paramount interest of creditors with proper deference to their reasonable views." This is telling because no creditor or party in interest has objected to the settlement. Mr. Dondero and his proxies' preference for constant litigation should not outweigh the preference of the Debtor and its creditors for a reasonable and expeditious settlement of HarbourVest's claims.

22. **The HarbourVest Settlement Is a Windfall to HarbourVest.** Both the Dondero Objection and the "Trusts" Objection argue that the HarbourVest settlement represents a substantial windfall to HarbourVest. Both Mr. Dondero and the "Trusts" ignore the facts. Specifically, Mr. Dondero argues that HarbourVest is receiving \$60 million dollars in *actual* value for its claims. Mr. Dondero's contention, however, wrongly assumes that both the \$45 million general unsecured claim and the \$35 million subordinated claim provided to HarbourVest under the settlement will be paid 100% in full and that HarbourVest will receive \$80 million in cash. From that \$80 million, Mr. Dondero subtracts \$20 million, which represents the value Mr. Dondero ascribes to HarbourVest's interests in HCLOF that are being transferred to the Debtor. Mr. Dondero's math ignores the reality of this case.

23. The Debtor very clearly disclosed in the projections filed with the *Disclosure Statement for the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.*, [Docket No. 1473] (the "Projections") that general unsecured claims would receive an 87.44% recovery *only if* the claims of UBS, HarbourVest, Integrated Financial Associates, Inc., Mr.

Daugherty, and the Hunter Mountain Investment Trust were zero. Because of the Debtor's success in settling litigation, that assumption is proving to be inaccurate. Regardless, even if general unsecured claims receive a recovery of 87.44%, because the subordinated claims are junior to the general unsecured claims, the subordinated claims' projected recovery is currently zero. As such, assuming the HCLOF's interests are worth \$22.5 million,¹⁰ the actual recovery to HarbourVest will be less than \$16.8 million. This is not a windfall. HarbourVest's investment in HCLOF was \$80 million and its claim against the estate was over \$300 million. The settlement represents a substantial discount.

24. **Improper Gerrymandering and/or Vote Buying.** Each of Mr. Dondero and the Trusts argue in one form or another that the HarbourVest settlement is improper as it provides HarbourVest a windfall on its claims in exchange for HarbourVest voting to approve the Plan. These unsubstantiated allegations of vote buying should be disregarded. As an initial matter, and as set forth above, HarbourVest is *not* getting a windfall. HarbourVest is accepting a substantial discount in the settlement. HarbourVest's incentive to support the Plan comes from HarbourVest's determination that the Plan is in its best interests. There is also nothing shocking about a settling creditor supporting a plan. Indeed, it would be nonsensical for a creditor to settle its claims and then object to the plan that would pay those claims.

25. More importantly, HarbourVest's votes in Class 9 (Subordinated Claims) are not needed to confirm the Plan. As will be set forth in the voting declaration, Class 2 (Frontier Secured Claim), Class 7 (Convenience Claims), and Class 8 (General Unsecured Claims) have voted in favor of the Plan.¹¹ In brief, the Plan was approved without HarbourVest's Class 9 vote,

¹⁰ It is currently anticipated that Mr. James P. Seery, Jr., the Debtor's chief executive officer and chief restructuring officer, will testify as to the value of the HCLOF interests to the Debtor's estate.

¹¹ The Debtor anticipates that Mr. Dondero and his related entities will argue that neither Class 7 nor Class 8 voted to accept the Plan because of the votes cast against the Plan in those Classes by current and former Debtor

and the Debtor, therefore, has no need to “buy” HarbourVest’s Class 9 claims. Accordingly, any claims of gerrymandering or vote buying are without merit.

C. CLOH Objection

26. CLO Holdco (and to a much lesser extent, the “Trusts”) object to HarbourVest’s transfer of its interests in HCLOF as part of the settlement. Currently, the settlement contemplates that HarbourVest will transfer 100% of its collective interests in HCLOF to HCMLP Investments, LLC (“HCMLPI”), a wholly-owned subsidiary of the Debtor. As set forth in the *Transfer Agreement for Ordinary Shares of Highland CLO Funding, Ltd.* (which was appended as Exhibit A to the Settlement Agreement) [**Docket No. 1631-1**], each of the Debtor, HarbourVest, Highland HCF Advisors, Ltd. (HCLOF’s investment manager) (“HHCFA”), and HCLOF agree that HarbourVest is entitled to transfer its interests to HCMLPI pursuant to that certain *Members Agreement Relating to the Company*, dated November 15, 2017 (the “Members Agreement”),¹² without offering that interest to other investors in HCLOF.

27. The *only* party to object to the transfer of HarbourVest’s interests in HCLOF to HCMLPI is CLO Holdco. CLO Holdco holds approximately a 49.02% interest in HCLOF and is the wholly-owned subsidiary of the DAF, Mr. Dondero’s donor-advised fund. CLO Holdco argues that the Member Agreement requires HarbourVest to offer its interest first to the other investors in HCLOF before it can transfer its interests to HCMLPI. In so arguing, CLO Holdco attempts to create ambiguity in an unambiguous contract and to use that ambiguity to disrupt the Debtor’s settlement with HarbourVest.

28. As an initial matter, the Debtor and CLO Holdco agree that the transfer of HarbourVest’s interests in HCLOF to HCMLPI is governed by Article 6 (Transfers or Disposals

employees, including Mr. Ellington and Mr. Isaac Leventon. The Debtor will demonstrate at confirmation that those objections are without merit and that Class 7 and Class 8 voted to accept the Plan.

¹² A true and accurate copy of the Members Agreement is attached hereto as Exhibit A.

of Shares) of the Members Agreement (an agreement governed by Guernsey law). (CLOH Obj., ¶ 3) The parties diverge, however, as to how to interpret Article 6. The Debtor, as set forth below, believes Article 6 is clear in that it allows HarbourVest to transfer its interests in HCLOF to any “Affiliate of an initial Member party” without requiring the right of first refusal in Section 6.2 of the Members Agreement. CLO Holdco’s position appears to be that the Members Agreement, despite its clear language, should be interpreted as limiting transfers to an “initial Member’s *own* affiliates” and that any other transfer requires the consent of HHCFA and satisfaction of the right of first refusal. (*Id.* (emphasis added)) CLO Holdco’s reading is contrary to the actual language of the Members Agreement.

29. First, Section 6.1 of the Members Agreement provides, in pertinent part:

[REDACTED]

(Members Agmt, § 6.1 (emphasis added)) Under the Members Agreement, “Affiliate” is defined, in pertinent part, as “[REDACTED]

[REDACTED]

(*Id.*, § 1.1) A “Member” in turn is a [REDACTED].” The “initial Member[s]” are the initial Members of HCLOF listed on the first page of the Members Agreement and include the Debtor, HarbourVest, and CLO Holdco.

30. As such, under the plain language of Section 6.1, HarbourVest is entitled – without the consent of any party – to “Transfer” its interests in HCLOF to an “Affiliate” of any of the Debtor, HarbourVest, or CLO Holdco. And that is exactly what is contemplated by the settlement. HarbourVest is transferring its interests to HCMLPI, a wholly owned and controlled subsidiary of the Debtor, and therefore an “Affiliate” of the Debtor. That transfer is indisputably

allowed under Section 6.1; it is a transfer to an “Affiliate of an initial Member.” CLO Holdco may, tongue in cheek, call this structure “convenient” but that sarcasm is an attempt to avoid the fact that the Members Agreement clearly allows HarbourVest to transfer its interest to HCMLPI without the consent of any party.¹³ The fact that CLO Holdco does not now like the language it previously agreed to when CLO Holdco and the Debtor were both controlled by Mr. Dondero is not a reason to re-write Section 6.1 of the Members Agreement.

31. Second, Section 6.2 of the Members Agreement is also unambiguous and, by its plain language, allows HarbourVest to “Transfer” its interests in HCLOF to “Affiliates of an initial Member” (*i.e.*, HCMLPI) without having to first offer those interests to the other Members (such obligation, the “ROFO”). CLO Holdco attempts to create ambiguity in Section 6.2 by arguing that it must be read in conjunction with Section 6.1 and that interpreting the plain language of Section 6.2 to allow HarbourVest to transfer its interests to HCMLPI without restriction makes certain other language surplus and meaningless. (CLOH Obj., ¶ 11-13) Again, CLO Holdco is attempting to create controversy and ambiguity where none exists.

32. Section 6.2 of the Members Agreement provides, in pertinent part:

[REDACTED]

(Members Agmt., § 6.2 (emphasis added)) Like Section 6.1, Section 6.2 is clear on its face. It exempts from the requirement to comply with the ROFO two categories of “Transfers”: (1) Transfers to “affiliates of an initial Member” from Members *other than* CLO Holdco and the

¹³ Although HHCFA’s consent is not necessary for HarbourVest to transfer its interests to HCMLPI, HHCFA will consent to the transfer.

“Highland Principals” (*i.e.*, the Debtor and certain of its employees)¹⁴ and (2) Transfers from CLO Holdco or a Highland Principal to the Debtor, the Debtor’s “Affiliates,” or another Highland Principal. The fact that a narrower exemption is provided to CLO Holdco and the Debtor than to HarbourVest (or any other Member) under Section 6.2 is of no moment; the language says what it says and was agreed to by all Members, including CLO Holdco, when they executed the Members Agreement.

33. In addition, and although not relevant, the language of Section 6.2 makes sense in the context of the deal. Although CLO Holdco and the Debtor may have disclaimed an “Affiliate” relationship, they are related through Mr. Dondero and invest side by side with the Debtor in multiple deals.¹⁵ The different standards in Section 6.2 serve to ensure that HarbourVest’s (or any successor to HarbourVest) right to Transfer its shares without satisfying the ROFO is limited to three parties: (i) HarbourVest’s Affiliates, (ii) the Debtor’s Affiliates, and (iii) CLO Holdco’s Affiliates. This restriction keeps the relative voting power of each Member static and ensures that CLO Holdco and the Debtor, together, will *always* have more than fifty percent of HCLOF’s total interests and that HarbourVest will *always* have less than fifty percent. This counterintuitively also explains the greater restrictions placed on CLO Holdco and the “Highland Principals.” The Highland Principals include certain Debtor employees. Those employees – as well as CLO Holdco and the Debtor – are prohibited from transferring their HCLOF interests outside of the Dondero family. This restriction makes sense. If, for example, a Debtor employee wanted to transfer its interests to an Affiliate of HarbourVest, HarbourVest could have more than fifty percent of the HCLOF interests because of the thinness

¹⁴ “Highland Principals” means: [REDACTED]

[REDACTED] (Members Agmt., § 1.1)

¹⁵ There can be no real dispute that Mr. Dondero effectively controls CLO Holdco.

of the Dondero-family's majority (approximately 0.2%). At the time the Members Agreement was executed, CLO Holdco and the Debtor were under common control. Section 6.2 preserves those related entities' control over HCLOF by restricting transactions that would transfer that control unless the ROFO is complied with.

34. As such, and notwithstanding CLO Holdco's protestations, Section 6.1 and Section 6.2 are consistent as written and clear on their face. This consistency is further evidenced by HCLOF's Articles of Incorporation¹⁶ and HCLOF's offering memorandum, which each include language identical to Section 6.1 and 6.2 of the Members Agreement.¹⁷ It seems highly unlikely, if not implausible, that sophisticated parties such as CLO Holdco would include the exact same language in six separate places over three documents without a reason for that language and without the intent that such language be interpreted as it is clearly written – not as CLO Holdco now wants it to be interpreted. Accordingly, since HarbourVest is transferring its interests to HCMLPI, an Affiliate of an initial Member, the plain language of Section 6.2

¹⁶ See Articles of Incorporation, adopted November 15, 2017, a true and correct copy of which is attached hereto as Exhibit B.

[REDACTED]

(Articles of Incorporation, § 18.1)

[REDACTED]

(*Id.*, § 18.2)

¹⁷ See Offering Memorandum, dated November 15, 2017, a true and correct copy of which is attached hereto as Exhibit C.

[REDACTED]

(Offering Memorandum, page 89)

exempts HarbourVest from having to comply with the ROFO.

35. Third, and finally, CLO Holdco makes the nonsensical argument that because Section 6.2 provides different treatment to similarly situated Members that this Court should re-write Section 6.2. (CLOH Obj., ¶¶ 15-17) Contracts provide different treatment to ostensibly similarly situated parties all the time and no one objects that that creates an absurd result. It just means that different parties bargained for and received different rights.

36. CLO Holdco's attempt to justify why this Court should re-write the Members Agreement to correct the "disparate treatment" is also unavailing. As an example of the absurd result caused by the "disparate treatment," CLO Holdco states: "[B]ecause the HarbourVest Members are technically Affiliates of an initial member (each other), they could obtain control of all of the interests in HCLOF without any Member receiving a Right of First Refusal for any transfer." (*Id.*, ¶ 16) The scenario posited by CLO Holdco, however, is *exactly* the scenario prevented by the clear language of Section 6.2. For HarbourVest to obtain control of HCLOF, it would – as a matter of mathematical necessity – need the interests held by CLO Holdco (49.02%) and/or the Highland Principals (1% in the aggregate). Section 6.2, however, *expressly* prohibits CLO Holdco and the Highland Principals from transferring their interests to HarbourVest or its Affiliates without satisfying the ROFO. As set forth above, it is Section 6.2 that prevents control from being transferred away from the Dondero family without compliance with the ROFO. In fact, Section 6.2 would only break down if the limiting language in Section 6.2 were read out of it in the manner advocated by CLO Holdco.

37. Ultimately, Article 6 of the Members Agreement is clear as written and expressly allows HarbourVest to transfer its interests to HCMLPI. If CLO Holdco had an objection to the rights provided to HarbourVest under the Members Agreement, CLO Holdco

should have raised that objection three and a half years ago before agreeing to the Members Agreement. CLO Holdco should not be allowed to create ambiguity in an unambiguous contract or to re-write that agreement to impose additional restrictions on HarbourVest. *See Clardy Mfg. Co. v. Marine Midland Bus. Loans Inc.*, 88 F.3d 347, 352 (5th Cir. 1996) (enforcing the “unambiguous language in a contract as written,” noting that where a contract is unambiguous, a party may not create ambiguity or “give the contract a meaning different from that which its language imports”) (internal quotations omitted); *Texas v. Am. Tobacco Co.*, 463 F.3d 399, 407 (5th Cir. 2006) (“Courts interpreting unambiguous contracts are confined to the four corners of the document, and cannot look to extrinsic evidence to create an ambiguity.”).

38. It should go without saying, but CLO Holdco (and the other parties to the Members Agreement) should also be required to satisfy their obligations under the Members Agreement and execute the “Adherence Agreement” as required by Section 6.6 of the Members Agreement in connection with the Transfer of HarbourVest’s interests to HCMLPI or any other permitted Transfer.

39. Finally, and notably, although CLO Holdco spends considerable time arguing that HarbourVest should be required to comply with the ROFO, nowhere in the CLOH Objection does CLO Holdco state that it wishes to purchase HarbourVest’s interests in HCLOF. This omission is telling. CLO Holdco and the other Objectors have no interest in actually exercising their alleged right of first refusal contained in the Members Agreement. Rather, their only interest is in causing the Debtor to spend time and money responding to a legion of related (and coordinated) objections.¹⁸

¹⁸ See *Debtor’s Amended Witness and Exhibit List with Respect to Evidentiary Hearing to be Held on January 8, 2021* [Adv. Pro. 20-3190-sgj, Docket No. 46], Exhibit Q; Exhibit T (email from Mr. Dondero as forwarded to Mr. Ellington stating “Holy bananas..... make sure we object [to the HarbourVest Settlement]”); Exhibit Y.

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WHEREFORE, for the reasons set forth above and in the Motion, the Debtor respectfully requests that the Court grant the Motion.

Dated: January 13, 2021

PACHULSKI STANG ZIEHL & JONES LLP

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EXHIBIT 9

004096

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In Re:) **Case No. 19-34054-sgj-11**
) Chapter 11
)
HIGHLAND CAPITAL) Dallas, Texas
MANAGEMENT, L.P.,) Thursday, January 14, 2021
) 9:30 a.m. Docket
Debtor.)
) - MOTION TO PREPAY LOAN
) [1590]
) - MOTION TO COMPROMISE
) CONTROVERSY [1625]
) - MOTION TO ALLOW CLAIMS OF
) HARBOURVEST [1207]
)

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE STACEY G.C. JERNIGAN,
UNITED STATES BANKRUPTCY JUDGE.

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004097

1 APPEARANCES, cont'd.:

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25 Proceedings recorded by electronic sound recording;
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1 DALLAS, TEXAS - JANUARY 14, 2021 - 9:41 A.M.

2 THE CLERK: All rise. The United States Bankruptcy
3 Court for the Northern District of Texas, Dallas Division, is
4 now in session, the Honorable Stacey Jernigan presiding.

5 THE COURT: Good morning. Please be seated. All
6 right. We're a little late getting started because we had
7 lots of reading material for the Court today. All right.
8 This is Judge Jernigan, and we have a couple of Highland
9 settings. The HarbourVest matters are the primary thing we
10 have set today, and then we also have a Debtor's motion
11 pursuant to protocols for authority for Highland Multi-Strat
12 to prepay a loan.

13 All right. Well, let's get a few appearances. First, for
14 the Debtor team, who do we have appearing this morning?

15 MR. POMERANTZ: Good morning, Your Honor. It's Jeff
16 Pomerantz, John Morris, and Greg Demo here on behalf of the
17 Debtor.

18 THE COURT: Okay. Thank you.

19 All right. We have objections on HarbourVest. Who do we
20 have appearing for Mr. Dondero this morning?

21 MR. WILSON: Your Honor, it's John Wilson, and I'm
22 also joined by Michael Lynn, John Bonds, and Bryan Assink.

23 THE COURT: Okay. I'm sorry. Could -- the court
24 reporter does yeoman's work in this case. Let me just make
25 sure we got all three of those names. Say again, Mr. Wilson.

1 MR. WILSON: John Bonds and Michael Lynn and Bryan
2 Assink.

3 THE COURT: Oh, okay. So, see, I thought I heard
4 somebody Wilson in all of that, which was why I was pressing
5 the issue.

6 All right. Is Mr. Dondero present on the video for
7 today's hearing?

8 MR. WILSON: I believe he is, Your Honor.

9 THE COURT: Mr. Dondero, could you confirm that you
10 are out there? (No response.) Okay. My court reporter says
11 he sees the name out there. Is he in your office?

12 MR. WILSON: Your Honor, he is appearing remotely
13 from my office. I'm not sure exactly where he's appearing
14 from.

15 THE COURT: Okay. Well, Mr. Dondero, if you're out
16 there and you're speaking up to confirm you're present, we're
17 not hearing you. Maybe your device is on mute. So please
18 unmute yourself.

19 (No response.)

20 THE COURT: All right. I'm going to take some other
21 appearances and you -- you need to try to communicate with
22 your client and let him know I need to confirm he's present.
23 Okay?

24 All right. Meanwhile, let's go to our other Objectors.
25 CLO Holdco. Who do we have appearing today?

1 MR. KANE: John Kane; Kane Russell Coleman & Logan;
2 on behalf of CLO Holdco.

3 THE COURT: All right. Thank you, Mr. Kane.

4 We had an objection from Dugaboy Investment Trust and Get
5 Good Trust. Who do we have appearing?

6 MR. DRAPER: Douglas Draper, Your Honor, for -- for
7 Draper.

8 THE COURT: All right. Thank you, Mr. Draper.

9 All right. I think those were the only written objections
10 we had. Mr. Pomerantz, do you confirm, we don't have any
11 other objectors for the motions set, correct?

12 MR. POMERANTZ: Your Honor, there was those three.

13 THE COURT: I'm sorry. I didn't catch your full
14 sentence.

15 MR. POMERANTZ: That is correct, Your Honor. There
16 were three objections to the motion.

17 THE COURT: Okay. Mr. Clemente, you're there for the
18 Creditors' Committee?

19 MR. CLEMENTE: Yes. Good morning, Your Honor. Matt
20 Clemente on behalf of the Official Committee of Unsecured
21 Creditors.

22 THE COURT: All right. Good morning. Thank you.
23 All right. We have a lot of other folks on the video. I'm
24 not going to go ahead and take a roll call of other lawyers.

25 MS. WEISGERBER: Your Honor?

6

1 THE COURT: Yes?

2 MS. WEISGERBER: Excuse me, Your Honor. It's Erica
3 Weisgerber from Debevoise on behalf of HarbourVest.

4 THE COURT: Okay.

5 MS. WEISGERBER: And I'm joined by Natasha Labovitz
6 and Dan Stroik --

7 THE COURT: Okay.

8 MS. WEISGERBER: -- from Debevoise as well.

9 THE COURT: Thank you. I was neglectful in not
10 getting your appearance, because, of course, you're at the
11 front and center of this motion to compromise, and I did see
12 that you filed a reply brief yesterday afternoon. Okay.
13 Thank you.

14 All right. Do we have -- do we have Mr. Dondero on the
15 line? I'm going to check again.

16 (No response.)

17 THE COURT: Mr. Dondero's counsel, I cannot hear you,
18 so please unmute your device.

19 MR. WILSON: Your Honor, it appears to me that Mr.
20 Dondero's device was unmuted as soon as you asked if he was
21 available. I sent him a communication a second ago asking if
22 he's having technical difficulties. I have not received a
23 response, so I --

24 MR. DONDERO: Hello. Can anybody hear me?

25 THE COURT: Oh.

004102

1 MR. WILSON: Okay. I hear him.

2 THE COURT: Mr. Dondero?

3 MR. DONDERO: Hello?

4 THE COURT: Is that you?

5 MR. DONDERO: Yeah, it is. I've been on. I've heard
6 everything since the beginning. It's just we've had technical
7 difficulties. I couldn't use the Highland offices. We've
8 been trying to set up something else.

9 THE COURT: All right.

10 MR. DONDERO: But I'm on now, if -- yes.

11 THE COURT: All right. Very good. Well, I'm glad
12 we've got you.

13 All right. Well, Mr. Pomerantz, how did you want to
14 proceed this morning?

15 MR. POMERANTZ: Your Honor, we could take up the
16 HarbourVest motion first, and I will turn it over to John
17 Morris. He and Greg Demo will be handling that. And then
18 after that we can handle the other motion, which is unopposed.

19 THE COURT: All right. Mr. Morris?

20 MR. KANE: Your Honor, this is -- sorry. This is
21 John Kane for CLO Holdco. Just very briefly, if I may. And
22 this will affect, I think, the Debtor's case in chief, so I'll
23 expedite things a little bit, I believe.

24 CLO Holdco has had an opportunity to review the reply
25 briefing, and after doing so has gone back and scrubbed the

1 HCLOF corporate documents. Based on our analysis of Guernsey
2 law and some of the arguments of counsel in those pleadings
3 and our review of the appropriate documents, I obtained
4 authority from my client, Grant Scott, as Trustee for CLO
5 Holdco, to withdraw the CLO Holdco objection based on the
6 interpretation of the member agreement.

7 THE COURT: All right. Well, thank you for that, Mr.
8 Kane. I think that -- that eliminates one of the major
9 arguments that we had anticipated this morning. So, thank you
10 for that.

11 Any other housekeeping matters that maybe someone had that
12 I didn't ask about?

13 MS. MATSUMURA: Yes, Your Honor. This is Rebecca
14 Matsumura from King & Spalding representing Highland CLO
15 Funding, Ltd. I just wanted to put on the record, we -- our
16 client had requested that some of its organizational documents
17 be filed under seal. But we have given permission for the
18 parties to present the relevant excerpts, to the extent it's
19 still relevant after Mr. Kane's announcement, in court. And
20 we'd just ask that the underlying documents remain sealed, but
21 we're not going to object if they show them on a PowerPoint or
22 anything like that.

23 So, to the extent that you had that on your radar, I just
24 wanted to clear that up for the proceedings.

25 THE COURT: All right. Well, I did sign an order

1 late last night. I don't know if it's popped up on the
2 docket.

3 MS. MATSUMURA: Yes, Your Honor. That's what this
4 referred to. That was what -- these are the documents that
5 were being sealed. And so I just wanted to note, if you --
6 you know, if the Debtor puts up an excerpt of those documents
7 and you're like, wait a minute, didn't I seal those, that we
8 were the party that requested them be under seal and we're
9 fine with them being shown in court, as long as the underlying
10 documents aren't publicly accessible.

11 THE COURT: Okay. Got you. Thank you.

12 All right. Any other housekeeping matters?

13 MR. MORRIS: Yes, Your Honor. This is John Morris
14 from Pachulski Stang for the Debtor. Good morning.

15 THE COURT: Good morning.

16 MR. MORRIS: The only other matter that I wanted to
17 raise, and I can do it now or I can do it later, or Your Honor
18 may tell me that it's not appropriate to do at this time, is
19 to schedule the Debtor's motion to hold Mr. Dondero in
20 contempt for violation of the TRO.

21 THE COURT: All right. Well, let's do that at the
22 conclusion today. And please make sure I do it. I think I
23 was going to address this last Friday, and we went very late
24 and it slipped off my radar screen. But I did see from my
25 courtroom deputy that you all were reaching out to her

10

1 yesterday to get this set, and then Mr. Dondero's counsel
2 reached out to her and said, We're going to file an objection
3 to a setting next Wednesday, or I think you had asked for a
4 setting next Tuesday or Wednesday.

5 MR. MORRIS: I did.

6 THE COURT: And I don't -- I don't know if that
7 response/objection was ever filed last night. I haven't seen
8 it if it was. So, we'll -- please, make sure I don't forget.
9 We'll take that up at the end of today's matters. All right.
10 Well, --

11 MR. MORRIS: All right. So, --

12 MS. WEISGERBER: Your Honor, one last housekeeping
13 item from -- I'm joined this morning by Michael Pugatch of
14 HarbourVest, who will present some testimony this morning. I
15 just want to confirm he's on the line and confirm no
16 objections to him sitting in for the rest of the hearing.

17 THE COURT: All right. Mr. Pugatch, this is Judge
18 Jernigan. Could you respond? Are you there with us?

19 MR. PUGATCH: Yes. Good morning, Your Honor. Mike
20 Pugatch from HarbourVest here.

21 THE COURT: All right. Very good. I think we had
22 you testify once before in the Acis matter, if I'm not
23 mistaken. Maybe. Maybe not. Maybe I saw a video deposition.
24 I can't remember.

25 All right. So, we're going to let Mr. Pugatch sit in on

004106

1 this. Anyone want to say anything about that? I consider him
2 a party representative, so I don't -- I don't think anyone
3 could invoke the Rule.

4 All right. Very good. Well, let's go forward if there
5 are no more housekeeping matters.

6 MR. MORRIS: Okay.

7 THE COURT: Mr. Morris?

8 MR. MORRIS: Thank you. Thank you very much, Your
9 Honor. John Morris; Pachulski Stang Ziehl & Jones; for the
10 Debtor.

11 It's a rather straightforward motion today. It's a motion
12 under Rule 9019, pursuant to which the Debtor requests the
13 Court's authority and approval to enter into a settlement
14 agreement with HarbourVest that will resolve a number of
15 claims that HarbourVest has filed against the Debtor.

16 What I -- the way I propose to proceed this morning, Your
17 Honor, is to give what I hope is an informative but relatively
18 brief opening statement. I'll defer to HarbourVest and its
19 counsel as to whether they want to make a presentation in
20 advance of the offer of evidence. Any objecting party, I
21 suppose, should then be given the opportunity to present their
22 case to the Court. Then the Debtor will call Jim Seery, the
23 Debtor's CEO and CRO. We will offer documents into evidence.
24 I would propose then that the objecting parties take the
25 opportunity to ask Mr. Seery any questions they'd like on the

1 matter.

2 After the Debtor rests, I think HarbourVest would like to
3 put Mr. Pugatch on the stand to offer some testimony on their
4 behalf. And I think that that will conclude the case. We can
5 finish up with some closing arguments as to what we believe
6 the evidence showed, but that's the way that I'd like to
7 proceed, if that's okay with the Court.

8 THE COURT: All right. That sounds fine.

9 OPENING STATEMENT ON BEHALF OF THE DEBTOR

10 MR. MORRIS: Okay. So, as I said, Your Honor, this
11 is a -- this should be a very straightforward motion under
12 Rule 9019. The standard is well-known to the Court. There
13 are four elements to a 9019 motion. The Debtor clearly has
14 the burden of proof on each one. And we easily meet that
15 burden, Your Honor.

16 The standard, just to be clear, the first part is that we
17 have to establish a probability of success, with due
18 consideration for uncertainty of law and fact. The second one
19 is the complexity, likely duration, expense and inconvenience
20 of the litigation. The third part of the test is the
21 paramount interest of creditors. And the fourth part of the
22 test is whether or not the proposed settlement was reached
23 after arm's-length negotiations.

24 The Debtor believes that it easily meets this standard,
25 and frankly, is a little bit frustrated that it's being forced

1 to incur the expense by Mr. Dondero in going through this
2 process.

3 A plain reading, a fair reading of the economics here
4 relative to the claim shows that this is a very reasonable
5 settlement. I don't need to go beyond that, Your Honor. I
6 don't even need to use the word reasonable. It surely meets
7 the lowest standard.

8 We've prepared a couple of demonstrative exhibits, Your
9 Honor. I'm going to use them with Mr. Seery. But I'd like to
10 just put one up on the screen now, if I may.

11 Ms. Canty, can you please put up Demonstrative Exhibit #3?

12 Demonstrative Exhibit #3 is an outline of the economics of
13 the settlement. It includes the various pieces, the
14 components that the parties have agreed to. And it shows, at
15 least from the Debtor's perspective, just what HarbourVest is
16 being given here.

17 Up on the screen is a demonstrative exhibit. It has
18 citations to the evidence that will be admitted by the Court.
19 The first line shows that HarbourVest will receive a \$45
20 million allowed general unsecured nonpriority claim. And that
21 -- that can be found at Debtor's Exhibit EE, Exhibit 1, at
22 Page 2.

23 That claim is discounted by the expected recovery that
24 general unsecured creditors are supposed to get. As of
25 November, in the liquidation analysis that was part of the

1 disclosure statement -- that's the citation in the footnote --
2 the Debtor believed that unsecured creditors were estimated to
3 recover approximately eighty-seven and a half cents on the
4 dollar. And so we just did the arithmetic there to get to the
5 net economic value of the proposed general unsecured claim.

6 And from that, we reduced \$22-1/2 million because that is
7 the net asset value of HarbourVest's interest in HCLOF, which,
8 pursuant to the settlement agreement, it will transfer back to
9 the Debtor, so that the net economic value is approximately
10 \$16.8 million.

11 You will hear testimony from Mr. Seery that this number
12 is, in fact, overstated, and it's overstated because, since
13 the time the disclosure statement was filed in November, a
14 number of events have occurred that will -- that have caused
15 the estimated recovery percentage to be reduced from
16 approximately 87-1/2 percent to something lower than that. We
17 don't have the exact number, Your Honor, but Mr. Seery will --
18 and the evidence will show that there's been more expenses,
19 that there's been some resolution of certain claims. There's
20 been some positive issues, too. But that number is probably
21 in the 70s somewhere.

22 And in any event, I think the point here is, Your Honor,
23 HarbourVest invested \$80 million in HCLOF, which was going to
24 participate in the investment in CLOs. They filed a claim for
25 \$300 million, through treble damages and other claims. But

1 the net economic impact of this is going to be somewhere
2 probably in between \$12 and \$14 million. I'll let Mr. Seery
3 give more precision to that. And it represents less than -- a
4 less than five percent recovery on the total claim.

5 And we think it's important for the Court to keep that in
6 mind. What are the economics here? Are we overpaying? Is
7 this an unreasonable settlement? And I think the evidence
8 will show that the Debtor is not, but that this settlement
9 that you see before you was the product of arm's length, and
10 I'm going to go in reverse order of the four-part test under
11 9019.

12 So, the last part is whether or not the settlement, the
13 proposed settlement was the product of arm's-length
14 negotiation. You'll hear lots of evidence that this
15 settlement that's up on the screen right now very much was the
16 product of arm's-length negotiation.

17 The third part of the test, Your Honor, is whether it
18 meets the paramount interest of creditors. You know,
19 regrettably, Mr. Dondero is the only purported creditor who is
20 objecting here. He may have done so through different
21 vehicles, but every objecting party here is a debtor [sic]
22 owned and controlled by Mr. Dondero. No other creditor -- not
23 the Creditors' Committee, UBS, Acis, Mr. Terry, Mr. Daugherty
24 -- nobody is objecting to this settlement except for Mr.
25 Dondero. And we believe that that highlights the Debtor's

1 ability to meet the third prong of the test, and that is these
2 are -- this settlement is in the paramount interest of
3 creditors.

4 Again, going in reverse, the second part of the test is
5 the complexity, duration, and expense of litigation. There
6 will be no disputed evidence that we meet -- the Debtor easily
7 meets this prong of the test. The evidence is going to show
8 that HarbourVest's claim is based on fraud, fraud in the
9 inducement, fraudulent statements and omissions, the kind of
10 case, Your Honor, that I'm sure you're familiar with that is
11 incredibly fact-intensive, that will be incredibly difficult
12 to navigate through. It will be prolonged, it will be
13 expensive, because you're necessarily relying on he said/she
14 said, basically. And so we're going to have to get testimony
15 from every person that spoke in connection with the events
16 leading up to the transaction. So we think the second prong
17 will be easily met, Your Honor.

18 And then the last prong -- the first prong, if you will --
19 is the likelihood of success on the merits. We think that the
20 settlement, the economic recovery that's up on the screen
21 here, which ultimately will be less than five percent of the
22 claimed amount, in and of itself shows that the settlement is
23 consistent with the Debtor's perception of its likely success
24 on the merits. I'm certain that HarbourVest disagrees, but
25 that's okay, we're here today and that's the Debtor's view,

1 and the Court is here to assess the Debtor's business judgment
2 and whether the Debtor has properly analyzed the issues and
3 gone through the process. And the evidence will show
4 conclusively that it will. That it has.

5 Mr. Seery will testify at some length as to the risks that
6 he saw. I think that you'll hear counsel for Mr. Dondero ask
7 both Mr. Seery and Mr. Pugatch a number of questions designed
8 to elicit testimony about this defense or that defense. And
9 it's a little -- it's a little ironic, Your Honor, because,
10 really, every defense that they're going to try to suggest to
11 the Court was a valid defense is a defense that the Debtor
12 considered. In fact, it's, you know, it's a little spooky,
13 how they've -- how they've been able to identify kind of the
14 arguments that the Debtor had already considered in the
15 prosecution of their objections here.

16 But be that as it may, the evidence will conclusively show
17 that the Debtor acted consistent with its fiduciary duties,
18 acted in the best interests of the Debtor's estate, acted
19 completely appropriately here in getting yet another very
20 solid achievement for the Debtor, leaving very few claims that
21 are disputed at this point, all but one of which I believe are
22 in the hands of Mr. Dondero.

23 So, that's what we think that the evidence will show.

24 I do want to express my appreciation to Mr. Kane for
25 reflecting on the arguments that we made with respect to the

1 ability of the Debtor to engage in the transfer or the
2 acquisition of the asset from HarbourVest. I would -- I would
3 respectfully request that we just enter into a short
4 stipulation on the record reflecting that the Debtor's
5 acquisition of HarbourVest's interests in HCLOF is compliant
6 with all of the applicable agreements between the parties.

7 And with that, Your Honor, I look forward to putting Mr.
8 Seery on the stand and presenting the Debtor's case.

9 THE COURT: All right. Other opening statements?

10 OPENING STATEMENT ON BEHALF OF CLO HOLDCO, LTD.

11 MR. KANE: Yes, Your Honor. Sorry. John Kane on
12 behalf of CLO Holdco.

13 In response to Mr. Morris, I'm not going to enter into a
14 stipulation on behalf of my client, but the Debtor is
15 compliant with all aspects of the contract. We withdrew our
16 objection, and we believe that's sufficient.

17 THE COURT: All right. Well, I'm content with that.
18 Other opening statements?

19 OPENING STATEMENT ON BEHALF OF HARBOURVEST

20 MS. WEISGERBER: Your Honor, Erica Weisgerber on
21 behalf of HarbourVest.

22 HarbourVest joins in Mr. Morris's comments in support of
23 the settlement, and we believe that the question of whether
24 the settlement between HarbourVest and the Debtor satisfies
25 the Rule 9019 standard is not even a close one.

1 Some Objectors have made arguments about the merits of
2 HarbourVest's claims, which is why we're here. As Your Honor
3 will hear this morning, HarbourVest has meaningful and
4 meritorious claims against Highland, but made the business
5 decision to avoid the time, expense, and inherent risk of
6 litigation in the interest of preserving value, both for
7 itself and for the estate.

8 Today, Michael Pugatch, a managing director of
9 HarbourVest, will testify before the Court. He'll explain
10 that HarbourVest claims against Highland arise out of certain
11 misrepresentations and omissions by Highland to HarbourVest in
12 connection with HarbourVest's purchase of an interest in
13 HCLOF, one of Highland's managed funds. Those
14 misrepresentations and omissions, as Your Honor will hear,
15 relate to Highland's litigation with its former employee,
16 Joshua Terry, and transfers that were conducted in 2017 to
17 strip Acis of value and prevent Mr. Terry from collecting on
18 an \$8 million judgment.

19 Mr. Pugatch will further explain that HarbourVest would
20 not have invested in HCLOF had it known the underlying facts
21 about those Acis transfers.

22 Mr. Pugatch will also testify that not only did
23 HarbourVest not know about those transfers, it learned about
24 those transfers when it was accused of orchestrating the
25 transfers itself in the Acis bankruptcy. Your Honor will hear

1 that the Acis trustee sought extensive discovery from
2 HarbourVest after numerous accusations that HarbourVest was
3 behind the transfers.

4 Mr. Pugatch will also testify that Highland charged legal
5 fees for itself and its affiliates to HCLOF, essentially
6 forcing HCLOF to fund the litigation involving the Acis
7 bankruptcy and Mr. Terry.

8 In total, HarbourVest's claims for damages are over a
9 hundred million dollars in investment-related losses, lost
10 profits, legal fees inappropriately charged to HCLOF, its own
11 legal fees. And that's before interest or trebling damages.

12 But HarbourVest stands ready to litigate its claims, but
13 following hard-fought and extensive negotiations with the
14 Debtors, the parties reached the settlement that's now before
15 the Court. Mr. Pugatch's testimony regarding the strong
16 factual bases for HarbourVest's claims against Highland and
17 its recoverable damages will further underscore the risks that
18 the Debtors faced if they chose to litigate these claims, and
19 why this settlement is fair, equitable, and in the best
20 interest of the estate.

21 THE COURT: All right. Thank you, Counsel.

22 Other opening statements?

23 OPENING STATEMENT ON BEHALF OF GET GOOD AND DUGABOY TRUSTS

24 MR. DRAPER: Your Honor, this is Douglas Draper on
25 behalf of one of the Objectors. I'd like to just make a few

1 comments with respect to what I've heard and what the Court is
2 going to hear.

3 The first issue I'd like to address is the comment by
4 counsel for the Debtor that no other party has objected. The
5 9019 motion is one of the issues that this Court has to rule
6 on, whether or not there was an objection or not. So the fact
7 that this may be -- bankruptcy is not a popularity contest and
8 not an issue of who votes for what and doesn't vote. This,
9 along with the 1129(a) tests, are clearly within your
10 province, and you need to listen carefully because you'll have
11 to make your own independent analysis whether my objection is
12 correct or incorrect.

13 Two other points I'd like to make that I think are very
14 salient. Number one is, if you look at the Debtor's
15 disclosure statement, it basically took the position that the
16 HarbourVest claim is of little or no value. And lo and
17 behold, thirty days later, there's a settlement that brings
18 about a significant recovery to HarbourVest. The timing is
19 interesting, and I think the Court needs to pay careful
20 attention to what transpired between the two dates.

21 And then the last point I'd like to make is, as you listen
22 to the evidence, and what I learned abundantly clear from
23 hearing the depositions, is that the claim of HarbourVest, if
24 there is a claim at all, is probably one hundred percent --
25 should be subordinated in that it appears to arise out of the

1 purchase or sale of a security. And, again, I would ask the
2 Court to listen carefully to this because that's what it
3 appears to be and that's what the evidence is going to show to
4 the Court.

5 THE COURT: All right. Mr. Draper, let me clarify
6 something I'm not sure if I heard you say or not. Were you
7 saying that the Court still needs to drill down on the issue
8 of whether the Debtor can acquire HarbourVest's interest in
9 HCLOF?

10 MR. DRAPER: No.

11 THE COURT: Okay. I was confused whether you were
12 saying I needed to take an independent look at that, now that
13 the objection has been withdrawn of Holdco. You are not
14 pressing that issue?

15 MR. DRAPER: No, I am not. Basically, I think it's
16 the fairness of the settlement. I think the transferability
17 of the interest is separate and apart from the fairness of the
18 settlement itself. I think the fairness -- the
19 transferability was a contractual issue between two parties
20 that the Court does not have to drill down on.

21 THE COURT: All right. I have another question for
22 you. I want to clarify your client's standing. Tell me --
23 I'm looking through a chart I printed out a while back. I
24 guess Dugaboy Investment Trust filed a couple of proofs of
25 claim; is that right?

1 MR. DRAPER: Yes.

2 THE COURT: Okay. What --

3 MR. DRAPER: And objections are pending.

4 THE COURT: Pardon?

5 MR. DRAPER: Objections to those claims are pending

6 before the Court, Your Honor, --

7 THE COURT: Okay.

8 MR. DRAPER: -- and have not been litigated.

9 THE COURT: And what about Get Good Trust?

10 MR. DRAPER: Get Good Trust has a proof of claim also
11 that objections are pending to. Pending.

12 THE COURT: Okay. I don't want to get too
13 sidetracked here, but I know standing was -- was mentioned as
14 a legal argument today. What is the basis for those proofs of
15 claim?

16 MR. DRAPER: The first one is, with respect to the
17 proof of claim for Dugaboy, there is an investment that
18 Dugaboy made that was then funneled, we believe, up to the
19 Debtor. And the -- the loan that exists, we believe is a
20 Debtor loan, as opposed to a loan to the entity that we made
21 the loans to.

22 And, again, it's a matter that the Court is going to hear.
23 The claim may or may not be allowed. It has not been
24 disallowed yet.

25 The second part to the Dugaboy ownership is we own an

1 interest in the Debtor. And so we are, in fact, a party in
2 interest.

3 THE COURT: Okay.

4 MR. DRAPER: It may be a small interest, but it is an
5 interest.

6 THE COURT: It has a limited partnership interest in
7 the Debtor?

8 MR. DRAPER: Yes.

9 THE COURT: Is that correct?

10 MR. DRAPER: Yes.

11 THE COURT: Okay. Well, I'll move forward. Thank
12 you.

13 Does that cover -- any other opening statements? I think
14 that covered everyone who was -- who filed some sort of
15 pleading today. No.

16 MR. WILSON: Your Honor, John Wilson on behalf of --

17 THE COURT: I'm sorry. I'm sorry.

18 MR. WILSON: -- Mr. Dondero.

19 THE COURT: I missed Mr. Dondero's counsel. I knew
20 we had visited at some point this morning. I just got
21 confused there. Go ahead, Mr. Wilson.

22 MR. WILSON: No problem, Your Honor. I was just
23 going to say that we will reserve our comments until after the
24 conclusion of the testimony.

25 THE COURT: All right. Very well.

1 Mr. Morris, you may call your first witness.

2 MR. MORRIS: Thank you, Your Honor. Before I do,
3 just two very, very quick points.

4 THE COURT: Okay.

5 MR. MORRIS: To be clear, Dugaboy's interest in the
6 Debtor is 0.1866 percent. Less than two-tenths of one
7 percent.

8 Secondly, the argument that Mr. Draper just made with
9 respect to subordination is one that appears in nobody's
10 papers. And, in fact, not only doesn't it appear in anybody's
11 papers, but Mr. Dondero, I believe, specifically took issue
12 with the fact that a portion of the consideration that
13 HarbourVest would receive would be on a subordinated basis,
14 and he would -- and I think he took the position there is no
15 basis to give them a subordinated claim.

16 So, I just wanted to point those items out to the Court,
17 not that I think either one makes a large difference today,
18 but I do want to deal with the facts.

19 THE COURT: Thank you.

20 MR. MORRIS: The Debtor would call -- you're welcome,
21 Your Honor. The Debtor calls Mr. James Seery.

22 THE COURT: All right. Mr. Seery, welcome back to
23 virtual court. If you could say, "Testing, one, two" so I can
24 see you and swear you in.

25 MR. SEERY: Testing, one, two.

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1 THE COURT: All right. I heard you but I'm not yet
2 seeing your video. Is your video turned on?

3 MR. SEERY: Video is on. Yes, Your Honor.

4 THE COURT: Okay. I see you now. Please raise your
5 right hand.

6 JAMES SEERY, DEBTOR'S WITNESS, SWORN

7 THE COURT: Thank you. Mr. Morris?

8 MR. MORRIS: Thank you, Your Honor.

9 DIRECT EXAMINATION

10 BY MR. MORRIS:

11 Q Good morning, Mr. Seery. Can you hear me?

12 A I can. Thank you, Mr. Morris.

13 Q Okay. Let's just cut to the chase here. Are you familiar
14 with HarbourVest's claims filed against the Debtor?

15 A I am, yes.

16 Q And did you personally review them?

17 A I did, yes.

18 Q Do you recall that over the summer the Debtor objected to
19 HarbourVest's claim?

20 A Yes, we did.

21 Q Why -- can you explain to the judge why Harbour -- why the
22 Debtor objected to HarbourVest's claim last summer?

23 A Sure. The HarbourVest claims, I believe there are about
24 six of them, initially were filed, and they were -- they were
25 relatively vague in terms of what the specifics of the claims

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1 were.

2 So, we saw the claims but didn't, frankly, pay a lot of
3 attention to the underlying transaction that was referred to
4 in the proofs of claim and the losses that HarbourVest had
5 claimed to suffer -- to suffer with respect to their purchase
6 of securities related to HCLOF and the damages caused by the
7 Acis case. So we filed a pretty pro forma objection. I
8 believe it was a simply stated objection that we didn't have
9 any record that there was anything in the Debtor's books and
10 records that they had a valid claim for any amount against the
11 Debtor.

12 Q Are you aware that HarbourVest subsequently filed a
13 response to the Debtor's objection to their claims?

14 A Yes. Yes, I am aware.

15 Q And did you familiarize yourself with that particular
16 response?

17 A I did indeed. It was a pretty extensive response, really
18 developing the full panoply of their claims, which included
19 claims for expenses relating to the Acis case, which
20 HarbourVest viewed as being improperly charged to HCLOF by its
21 manager, which is effectively Highland. Those expenses,
22 HarbourVest took the view, were excessive, had nothing to do
23 with the investment, and were simply a pursuit of a personal
24 vendetta against Mr. Terry and his interests by Mr. Dondero,
25 and using HCLOF's money to actually pursue those interests.

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1 In addition, and this was the first time we saw that,
2 HarbourVest brought forth its claims that it was entitled to
3 effectively rescind the transaction. And I say rescind the
4 transaction: In security parlance, they claim that they were
5 induced by fraud, I think as most are -- to enter into the
6 transaction.

7 As most are aware, the liability limitations in the OMs
8 and the exculpation in the documents are pretty broad, and
9 HarbourVest's position was that they weren't going to be
10 subject to those limitations because the actual transaction
11 that they entered into was a fraud on them, designed by Mr.
12 Dondero, Mr. Ellington, and the Highland team.

13 Q All right. Let's talk about your understanding, the
14 Debtor's understanding of the factual background to
15 HarbourVest's claim. What is your understanding of the
16 investment that HarbourVest made?

17 A Well, HarbourVest made an investment in the Highland CLO
18 business. The Highland CLO business was -- was Acis. And
19 effectively, the business had been separated, but in name
20 only. Acis was just a shell, with a few partners --
21 obviously, Mr. Terry as well -- but it was all Highland
22 personnel doing all the work.

23 And what they were trying to do with Acis was, in essence,
24 resuscitate a business that had been in a bit of a decline
25 from its pre-crisis heyday.

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1 They were looking to take additional outside capital.
2 They would -- they would pay down or take money out of the
3 transaction, Highland would, or ultimately Mr. Dondero, and
4 they would -- they would seek to invest in Acis CLOs,
5 Highland's 1.0 CLOs. And then with respect to the Acis CLOs,
6 and potentially new CLOs, but with the Acis CLOs, they'd seek
7 to reset those and capture what they thought would be an
8 opportunity in the market to -- to really use the assets that
9 were there, not have to gather assets in the warehouse but be
10 able to use those assets to reset them to market prices for
11 the liabilities and then make money on the equity.

12 Q Do you have an understanding --

13 A Then --

14 Q I'm sorry. Go ahead.

15 A Why don't I continue? So, the transaction, they found
16 HarbourVest as a potential investor, and the basis of the
17 transaction was that they would make an investment into Acis.

18 Shortly before the transaction, and while they were doing
19 diligence, Mr. Terry received his arbitration award. I
20 believe that was in October of 2017. The transaction with
21 HarbourVest closed in mid- to late November of 2017. But Mr.
22 Terry was not an integral part. Indeed, he wasn't going to be
23 a key man. He had been long gone from Highland by that time.

24 What the -- I think you asked me originally what the basis
25 of their claim was. The transaction went forward, and the

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1 basis of their claim is that they really were never -- nothing
2 was disclosed to them about the nature of the dispute with Mr.
3 Terry other than in the highest-level terms; the animosity
4 with respect to which that dispute was held by Highland and
5 potentially Mr. Terry; and really, how those costs would be
6 borne and risks be borne by the investment that they were
7 making.

8 That was, in essence, the transaction and the high-level
9 view of their claim.

10 Q Okay. Just a few very specific facts. Do you have an
11 understanding as to how much HarbourVest invested and what
12 they got in exchange for that investment?

13 A Yeah. HarbourVest invested in a couple tranches, and I
14 forget the exact dates, but approximately \$75 million
15 originally, and then they added another five. Some
16 distributions were made in the first half of 2018, putting
17 their net investment in the mid-seventies on the investment,
18 which now is worth about 22-1/2 million bucks.

19 Q And what percentage interest in HCLOF did HarbourVest
20 acquire, to the best of your knowledge?

21 A They have 49.98 percent of HCLOF. HCLOF, just to refresh
22 -- the Court is, I think, well aware of this, but to refresh,
23 is a Guernsey entity. Not -- not atypical for structures of
24 this type to use offshore jurisdictions and sell the
25 securities under -- at least to U.S. -- can't sell them to

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1 U.S. investors unless they qualify, and these are sold under
2 Reg S to -- to investors that otherwise qualify. And
3 HarbourVest was investing in that transaction through the
4 Guernsey structure.

5 Q And do you have an understanding as to who owned the 50-
6 plus percent of HCLOF that HarbourVest was not going to
7 acquire?

8 A Yeah. There's -- you can tell by the name. HCLOF is
9 Highland CLO Funding. This is a Highland vehicle. So
10 Highland owned and controlled the vehicle. The DAF, which is
11 -- which is Dondero-controlled trusts, have the -- 49 percent.
12 Highland has, I believe, around .63-65 percent directly. And
13 then Highland employees at the time who were involved in the
14 business owned another small percentage.

15 So the majority was going to be controlled by Highland
16 through its control of DAF and its control of the employees
17 that worked for it. HarbourVest would be a minority investor.

18 Q Okay. And I believe you testified that the investment was
19 made in mid-November; is that right?

20 A That's correct. I think it was the 15th, may have been
21 the 17th of November.

22 Q And do you recall when in October the Terry arbitration
23 award was rendered?

24 A It was about a month before. I think it was right around
25 the 20th, the 17th to the 20th. I may be slightly wrong on

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1 each of those dates.

2 Q Okay. What is your understanding as to what happened
3 after the issuance of the award that is the basis or at least
4 one of the bases for HarbourVest's claim?

5 A I don't think there's -- I don't think there's any
6 dispute. And there certainly are judicial findings. Dondero
7 and Highland went about stripping Acis of all of its assets.
8 So, remember that Acis is not a separate standalone company,
9 in any event. It's controlled and dominated completely by
10 Highland at the time. But it did have contracts. And those
11 contracts had value.

12 So the first idea was to strip out the management contract
13 and put it into a separate vehicle, which we called HCF
14 Advisor, which Highland still owns. The second piece was to
15 strip out some valuable assets, the risk retention piece,
16 which was a loan that in essence was equity that Highland had
17 put into Acis but structured as a loan, as many of the
18 transactions we'll see down the road are, in order to deal
19 with some -- avoid taxes in any way possible. And that
20 structure, that value moved value out of Acis for the express
21 purpose of trying to run, in essence, the Highland business
22 back in Highland.

23 Remember, as I said, Acis is just a Highland business
24 moved to a separate shell. When Mr. Terry got his arbitration
25 award against Acis and was seeking to enforce it, it was

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1 pretty straightforward, let's take all the assets -- Dondero
2 scheme -- let's take all the assets and move them back into
3 Highland so Terry can't get anything.

4 Q And how does that scheme relate to the HarbourVest claim,
5 to the best of your knowledge?

6 A Well, HarbourVest -- HarbourVest's position is that they
7 invested in Acis and -- and whether Acis was called Acis or
8 called Highland, it doesn't really matter; there were valuable
9 assets in the -- in the entity that they were going to be
10 investing in through the equity in these CLOs and some of the
11 debt securities in those CLOs.

12 And then the stripping out and the fraudulent conveyances
13 out of Acis caused them damages because that's what left the
14 damage to Mr. Terry.

15 The quick math on Acis, by the way, is Acis has probably
16 lost, total damages, 175 million bucks. And that's pretty
17 easy. DAF lost 50. HarbourVest lost 50. Fifteen million of
18 fees charged to HCLOF. Another five million of fees, at
19 least, incurred by Mr. Terry. Ten million that went to Mr.
20 Terry, 15 to Highland fees, another five, plus Mr. Terry's
21 settlement in this case, over eight million bucks.

22 So HarbourVest's position, which, on a factual basis, you
23 know, is problematic for the estate, is, wait a second, we
24 invested in this vehicle with Highland. That was supposed to
25 invest in Highland CLOs. They were called Acis, but they were

Seery - Direct

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1 Highland CLOs. And then you went about causing tremendous
2 damage to that vehicle that we ultimately were investing in,
3 and then charge us for the pleasure.

4 Q You used the phrase earlier "OM," I believe.

5 A Offering memorandum.

6 Q Offering memorandum? Can you just explain to the Court
7 your understanding of what an offering memorandum is?

8 A Typically, under U.S. law, and foreign jurisdictions have
9 similar laws, you have to have a document that explains the
10 securities that you're selling. And it goes into extreme
11 detail about the securities and the risks related to those
12 securities.

13 And the idea is not to have a document that tells you
14 whether it's a good investment or a bad investment, but it's a
15 document that discloses to the potential investor all of the
16 risks with respect to that security or related to the
17 investment over the duration of the security. It doesn't
18 predict the future, but it's supposed to make sure that it
19 gives you a very clean view of the past and a very clean view
20 of what the facts from the past are and how they would
21 implicate the future of the investment.

22 Q And in the course of its diligence, did the Debtor have an
23 opportunity to review the offering memorandum in the context
24 of the claims that were being asserted by HarbourVest?

25 A Oh, absolutely. It was originally effectively -- it's an

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Seery - Direct

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1 HCLOF offering memorandum. But as I said, HCLOF was managed
2 and controlled by Highland, and Highland originally prepared
3 it. And then, of course, in connection with -- with this
4 dispute and these claims, we reviewed it, both myself and my
5 legal team.

6 Q All right.

7 MR. MORRIS: Your Honor, the offering memorandum is
8 on the Debtor's exhibit list, and I think this is an
9 appropriate time to move into evidence Debtor's Exhibits A
10 through EE, all of which appear at **Docket No. 1732**.

11 THE COURT: 1732?

12 MR. MORRIS: It's the Debtor's Second Amended Witness
13 and Exhibit List.

14 THE COURT: All right. Any objection to admission of
15 A through EE?

16 MR. DRAPER: Douglas Draper. No objection, Your
17 Honor.

18 THE COURT: All right. Mr. --

19 MR. MORRIS: May I proceed?

20 THE COURT: Yeah. Mr. Wilson, did you want to
21 confirm no objection?

22 (Echoing.)

23 THE COURT: All right. Hearing no objection,
24 Debtor's A through EE are admitted.

25 (Debtor's Exhibits A through EE are received into

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**UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF
TEXAS, DALLAS DIVISION**

In Re: Highland Capital Management, L.P § Case No. **19-34054-SGJ11**

Charitable DAF Fund, L.P et al

Appellant

§

vs.

§

21-03067

Highland Capital Management, L.P

§

Appellee

§

3:23-CV-01503-B

[167] Order granting Defendant Highland Capital Management, L.P.'s Renewed motion to dismiss adversary proceeding (related document # [122](#)) Entered on 6/25/2023.

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APPELLANT RECORD

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**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

In re:	§ Chapter 11
	§
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§ Case No. 19-34054-sgj11
	§
Debtor.	§
	§
CHARITABLE DAF FUND, L.P. AND CLO	§
HOLDCO, LTD., DIRECTLY AND DERIVATIVELY	§
	§
Plaintiffs,	§ Adversary Proceeding No.
	§
vs.	§ 21-03067-sgj11
	§
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§
HIGHLAND HCF ADVISOR, LTD., AND	§
HIGHLAND CLO FUNDING LTD., NOMINALLY	§
	§
Defendant.	§
	§

INDEX

**APPELLANTS' SECOND AMENDED STATEMENT OF ISSUES
AND DESIGNATION OF RECORD ON APPEAL**

Pursuant to Rules 8009(a)(1)(A)-(B) and (a)(4) of the Federal Rules of Bankruptcy Procedure, The Charitable DAF Fund, L.P. and CLO Holdco, Ltd. ("Appellants") hereby designate the following items to be included in the record and identify the following issues with respect to

their appeal of the Order Granting Defendant Highland Capital Management, L.P.'s "Renewed Motion to Dismiss Complaint" [Adv. Proc. Doc. No. 122] which was entered by the United States Bankruptcy Court for the Northern District of Texas on June 25, 2023.

I. STATEMENT OF ISSUES TO BE PRESENTED ON APPEAL

- Whether the Bankruptcy Court had jurisdiction to rule on Highland Capital Management L.P.'s Renewed Motion to Dismiss Complaint
- Whether the Renewed Motion to Dismiss Complaint was improperly granted

II. DESIGNATION OF ITEMS TO BE INCLUDED IN THE RECORD

Vol. 1
000001

1. Notice of Appeal for Bankruptcy Case Adversary Proceeding No. 21-03067-sgj11 [Doc. 168].

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2. The judgment, order, or decree appealed from: Memorandum Opinion and Order Granting Defendant Highland Capital Management, L.P.'s "Renewed Motion to Dismiss Complaint" [Adv. Proc. Doc. No. 122] [Doc. 167].

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3. Docket Sheet kept by the Bankruptcy Clerk.

4. Documents listed below and as described in the Docket Sheet for Bankruptcy Case Proceeding No. 21-03067-sgj.

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No.	Date Filed	Docket No.	Description/Document Text
1	9/29/21	1	(36 pgs; 3 docs) Adversary case 21-03067. ORDER REFERRING CASE NUMBER 21-CV-0842-B from U.S District Court for the Northern District of Texas, Dallas Division to U.S. Bankruptcy Court for Northern District of Texas, Dallas Division. Complaint by Charitable DAF Fund, LP, CLO Holdco, Ltd. against Highland Capital Management, LP, Highland HCF Advisor Ltd., Highland CLO Funding, Ltd. Fee Amount \$350 (Attachments: # 1 Original Complaint # 2 Docket Sheet from 3:20-cv-0842-B) Nature(s) of suit: 02 (Other (e.g. other actions that would have been brought in state court if unrelated to bankruptcy)). (Okafor, M.)
2	9/29/21	2	(1 pg) Supplemental Document (cover sheet) by CLO Holdco Ltd., Charitable DAF Fund (RE: related document(s)1 Adversary case 21-03067) [ORIGINALLY FILED IN 21-CV-0842 AS #2 ON 04/13/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)

Vol. 2 000139 000232 000239 000270 Thru Vol. 6	3	9/29/21	6	(93 pgs; 6 docs) MOTION for Leave to File First Amended Complaint filed by CLO Holdco Ltd., Charitable DAF Fund LP (Attachments: # 1 Exh 1_First Amended Complaint # 2 Exh 2_Motion for Authorization to Retain James Seery # 3 Exh 3_Order Approving Retention of James Seery # 4 Exh 4_Order Approving Settlement # 5 Proposed Order) (Bridges, Jonathan) (Entered: 04/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #6 ON 04/19/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
	4	9/29/21	22	(7 pgs; 2 docs) MOTION for an Order to Enforce the Order of Reference filed by Highland Capital Management LP. (Attachments: # 1 Exhibit(s) A--Proposed Order) (Annable, Zachery) Modified text on 5/20/2021 (mjr). (Entered: 05/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #22 ON 05/19/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
	5	9/29/21	23	(31 pgs) Brief/Memorandum in Support filed by Highland Capital Management LP re: 22 MOTION for an Order to Enforce the Order of Reference. (Annable, Zachery) Modified text on 5/20/2021 (mjr).(Entered: 05/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #23 ON 05/19/2021 IN U.S.DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
	6	9/29/21	24	(926 pgs; 29 docs) Appendix in Support filed by Highland Capital Management LP re: 23 Brief/Memorandum in Support. (Attachments: # 1 Appendix 1 # 2 Appendix 2 # 3 Appendix 3 # 4 Appendix 4 # 5 Appendix 5 # 6 Appendix 6 # 7 Appendix 7 # 8 Appendix 8 # 9 Appendix 9 # 10 Appendix10 # 11 Appendix 11 # 12 Appendix 12 # 13 Appendix 13 # 14 Appendix 14 # 15 Appendix 15 # 16 Appendix 16 # 17 Appendix 17 # 18 Appendix 18 # 19 Appendix 19 # 20 Appendix 20 # 21 Appendix 21# 22 Appendix 22 # 23 Appendix 23 # 24 Appendix 24 # 25 Appendix 25 # 26 Appendix 26 # 27 Appendix 27 # 28 Appendix 28) (Annable, Zachery) Modified linkage and text on 5/20/2021 (mjr). (Entered:05/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #24 ON 05/19/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
Vol. 7 001196	7	9/29/21	26	(7 pgs; 2 docs) MOTION to Dismiss Complaint filed by Highland Capital Management LP (Attachments: # 1 Exhibit(s) A--Proposed Order) (Annable, Zachery) Modified text on 5/28/2021 (jmg).(Entered: 05/27/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #26 ON 05/27/2021 IN U.S.DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)

Vol. 7 001203 thru Vol 8	8	9/29/21	28	(508 pgs; 14 docs) Appendix in Support filed by Highland Capital Management LP (Attachments: # 1 Appendix 1 # 2 Appendix 2 # 3 Appendix 3 # 4 Appendix 4 # 5 Appendix 5 # 6 Appendix 6 # 7 Appendix 7 # 8 Appendix 8 # 9 Appendix 9 # 10 Appendix 10 # 11 Appendix 11 # 12 Appendix 12 # 13 Appendix 13) (Annable, Zachery) (Entered: 05/27/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #28 ON 05/27/2021 IN U.S. DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
Vol. 9 001711	9	9/29/21	33	(1 pg) Amended Civil Cover Sheet by CLO Holdco Ltd, Charitable DAF Fund LP. Amendment to 2 Supplemental Document. (Sbaiti, Mazin) Modified text on 6/23/2021 (mjr). (Entered: 06/22/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #33 ON 06/22/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001712	10	9/29/21	36	(26 pgs) RESPONSE filed by CLO Holdco Ltd, Charitable DAF Fund LP re: 22 MOTION for an Order to Enforce the Order of Reference (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #36 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001738	11	9/29/21	37	(22 pgs) Appendix in Support filed by CLO Holdco Ltd, Charitable DAF Fund LP re 36 Response/Objection Response to Motion for an Order to Enforce the Order of Reference (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #37 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001760	12	9/29/21	38	(45 pgs) RESPONSE filed by CLO Holdco Ltd, Charitable DAF Fund LP re: 26 MOTION to Dismiss (Defendant Highland Capital Management, L.P.'s Motion to Dismiss Complaint) (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #38 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001805	13	9/29/21	39	(88 pgs) Appendix in Support filed by CLO Holdco Ltd, Charitable DAF Fund LP re 38 Response/Objection to Defendant Highland Capital Management, L.P.'s Motion to Dismiss Complaint (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #39 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001893	14	9/29/21	42	(12 pgs) REPLY filed by Highland Capital Management LP re: 22 MOTION for an Order to Enforce the Order of Reference (Annable, Zachery) (Entered: 07/13/2021) [ORIGINALLY FILED IN 21-CV-0842AS #42 ON 07/13/2021 IN U.S.

			DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
VOL. 9	15	9/29/21	43 (852 pgs) Appendix in Support filed by Highland Capital Management LP re: 42 Reply. (Annable, Zachery) Modified text on 7/14/2021 (mjr). (Entered: 07/13/2021) [ORIGINALLY FILED IN 21-CV-0842AS #43 ON 07/13/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001905 thru Vol. 13	16	9/29/21	45 (21 pgs) REPLY filed by Highland Capital Management LP re: 26 MOTION to Dismiss (Defendant Highland Capital Management, L.P.'s Motion to Dismiss Complaint) (Annable, Zachery) (Entered: 07/13/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #44 ON 07/13/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002757	17	9/29/21	57 (7 pgs; 2 docs) MOTION to Dismiss and Joinder in Motion to Dismiss of Highland Capital Management, L.P. filed by Highland CLO Funding Ltd. (Attachments: # 1 Proposed Order) Attorney Paul R Bessette added to party Highland CLO Funding Ltd (pty:dft) (Bessette, Paul) (Entered: 08/30/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #57 ON 08/30/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002778	18	9/29/23	58 (12 pgs) Brief/Memorandum in Support filed by Highland CLO Funding Ltd. re 57 MOTION to Dismiss and Joinder in Motion to Dismiss of Highland Capital Management, L.P. (Bessette, Paul) (Entered: 08/30/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #58 ON 08/30/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002785	19	9/29/23	59 (80 pgs; 5 docs) Appendix in Support filed by Highland CLO Funding Ltd re 58 Brief/Memorandum in Support of Motion (Attachments: # 1 Exhibit(s) A - Jackson v Dear # 2 Exhibit(s) B - Prudential Assurance v. Newman # 3 Exhibit(s) C - Harbourvest Settlement Agreement # 4 Exhibit(s) D - Boleat Declaration) (Bessette, Paul) (Entered: 08/30/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #59 ON 08/30/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002797	20	9/29/21	64 (1 pg) ORDER OF REFERENCE: Pursuant to 28 U.S.C. § 157 and this District's Miscellaneous Order No. 33, this case is hereby REFERRED to Judge Stacey G. C. Jernigan of the United States Bankruptcy Court for the Northern District of Texas, Dallas Division, to be adjudicated as a matter related to the consolidated Chapter 11 Bankruptcy of Highland Capital Management, L.P., Chapter 11 Case No.19-34054. (Ordered by Judge Jane J. Boyle
002877			

Vol. 14				on 9/20/2021) (svc) (Entered: 09/20/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #64 ON 09/20/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002878	21	10/19/21	66	(5 pgs) Notice of hearing filed by Defendant Highland Capital Management, LP (RE: related document(s) 26 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP, 47 Motion to strike document filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 55 Motion to abate filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) Hearing to be held on 11/23/2021 at 09:30 AM at https://us-courts.webex.com/meet/jerniga for 26 and for 47 and for 55, (Annable, Zachery)
002883 thru Vol. 16	22	11/22/21	71	(509 pgs; 2 docs) Witness and Exhibit List <i>for Hearing on November 23, 2021</i> filed by Defendant Highland Capital Management, LP (RE: related document(s) 26 Motion to dismiss adversary proceeding). (Attachments: # 1 Exhibits 1-13) (Hayward, Melissa)
Vol. 17	23	11/22/21	72	(2 pgs) Witness List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 26 Motion to dismiss adversary proceeding, 47 Motion to strike (related document(s): 43 Document), 55 Motion to abate (related document(s) 1 Complaint), 69 Motion to abate <i>Plaintiffs' Amended Motion to Stay All Proceedings</i> (related document(s) 55 Motion to abate (related document(s) 1 Complaint))). (Sbaiti, Mazin)
003392				
003394	24	11/22/21	73	(189 pgs; 4 docs) Exhibit List <i>for November 23, 2021 hearing</i> filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 47 Motion to strike (related document(s): 43 Document), 55 Motion to abate (related document(s) 1 Complaint)). (Attachments: # 1 Exhibit 1_Defendant's Memorandum of Law in Support of Motion for Reconsideration # 2 Exhibit 2_Highland Memorandum in Support of Motion to Dismiss # 3 Exhibit 3_Order (I) Confirming Fifth Amended Plan of Reorganization of Highland) (Sbaiti, Mazin)
003583	25	12/7/21	80	(2 pgs) Order granting Highland CLO Funding, Ltd.'s motion to dismiss adversary as a party with prejudice (related document 57) Entered on 12/7/2021. (Okafor, Marcey) Modified text on 3/11/2022 (Okafor, Marcey).
003585	26	3/11/22	99	(26 pgs) Memorandum of Opinion and order granting motion to dismiss the adversary proceeding (RE: related document(s) 26 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP). Entered on 3/11/2022 (Okafor, Marcey)
003611	27	3/11/22	100	(26 pgs) Order granting motion to dismiss adversary proceeding with prejudice (related document #26) Entered on 3/11/2022. (Okafor, Marcey)

Vol. 18 003637	28	3/21/22	104	(29 pgs) Notice of appeal. Fee Amount \$298 filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 100 Order on motion to dismiss adversary proceeding). Appellant Designation due by 04/4/2022. (Sbaiti, Mazin)
003666	29	5/26/22	120	(177 pgs; 2 docs) Support/supplemental document <i>Motion to Supplement Appellate Record</i> filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 111 Appellant designation). (Attachments: # 1 Amended Transcript of January 14, 2021 Hearing) (Sbaiti, Mazin)
003843	30	6/9/22	121	(1 pg) DISTRICT COURT Order: Case 3:22-00695-B is hereby transferred to the docket of the Honorable Judge Jane J. Boyle for consolidation with The Charitable DAF Fund LP, et al. v. Highland Capital Management LP, Case No. 3:21-cv-3129-N. Judge Karen Gren Scholer no longer assigned to case.(RE: related document(s) 86 Notice of appeal filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 104 Notice of appeal filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Entered on 6/9/2022 (Whitaker, Sheniqua) (Entered: 06/10/2022)
003844	31	10/24/22	122	(7 pgs) Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP (Annable, Zachery)
003851	32	10/14/22	123	(31 pgs) Brief in support filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Annable, Zachery)
Vol. 19 003882 Thru Vol 20	33	10/14/22	124	(513 pgs; 15 docs) Support/supplemental document (<i>Appendix in Support of Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7 # 8 Exhibit 8 # 9 Exhibit 9 # 10 Exhibit 10 # 11 Exhibit 11 # 12 Exhibit 12 # 13 Exhibit 13 # 14 Exhibit 14) (Annable, Zachery)
Vol. 21 004395	34	10/27/22	126	(5 pgs) Notice of hearing (<i>Notice of Hearing and Briefing Schedule on Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP). Hearing to be held on 12/8/2022 at 09:30 AM at https://us-courts.webex.com/meet/jerniga for 122. (Annable, Zachery)

Vol. 21 004400 004410 004442 Thru Vol. 22	35	11/18/22	128	(10 pgs) Motion for withdrawal of reference. Fee amount \$188, filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (Sbaiti, Mazin)
	36	11/18/22	129	(32 pgs) Response opposed to (related document(s): 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP) filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Sbaiti, Mazin)
	37	11/18/22	130	(254 pgs; 2 docs) Response opposed to (related document(s): 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP) filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Attachments: # 1 Appendix) (Sbaiti, Mazin)
Vol. 22 004696 004717 004732 004737 004742	38	9/2/22	131	(21 pgs) DISTRICT COURT MEMORANDUM OPINION AND ORDER: The Court REVERSES and REMANDS the bankruptcy court's Motion to Dismiss Order and AFFIRMS the bankruptcy courts Motion to Stay Order. re: appeal on Civil Action number: Case 3:22-00695-B consolidated with 3:21-CV-3129-B, (RE: related document(s) 81 Order on motion to abate, 100 Order on motion to dismiss adversary proceeding). Entered on 9/2/2022 (Whitaker, Sheniqua) (Entered: 11/29/2022)
	39	12/2/22	133	(15 pgs) Reply to (related document(s): 129 Response filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 130 Response filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) filed by Defendant Highland Capital Management, LP. (Annable, Zachery)
	40	12/7/22	135	(5 pgs) Notice of hearing filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP). Hearing to be held on 1/25/2023 at 01:30 PM at https://us-courts.webex.com/meet/jerniga for 122, (Annable, Zachery)
	41	12/7/22	136	(5 pgs) Notice of hearing filed by Defendant Highland Capital Management, LP (RE: related document(s) 128 Motion for withdrawal of reference filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Status Conference to be held on 1/25/2023 at 01:30 PM at https://us-courts.webex.com/meet/jerniga . (Annable, Zachery).
	42	12/9/22	138	(3 pgs) Response opposed to (related document(s): 128 Motion for withdrawal of reference. Fee amount \$188, filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) filed by Defendant Highland Capital Management, LP. (Annable, Zachery)

Vol. 22 004745	43	12/9/22	139	(25 pgs) Brief in support filed by Defendant Highland Capital Management, LP (RE: related document(s) 138 Response). (Annable, Zachery)
Vol. 23 004770	44	12/9/22	140	(280 pgs; 8 docs) Support/supplemental document (<i>Appendix in Support of Highland Capital Management, L.P.'s Response to Renewed Motion to Withdraw the Reference</i>) filed by Defendant Highland Capital Management, LP (RE: related document(s) 138 Response). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7) (Annable, Zachery)
Vol. 24 005050	45	12/16/22	144	(6 pgs) Reply to (related document(s): 138 Response filed by Defendant Highland Capital Management, LP) filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Sbaiti, Mazin)
005056 Thru Vol. 25.	46	1/23/23	145	(514 pgs; 15 docs) Witness and Exhibit List filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7 # 8 Exhibit 8 # 9 Exhibit 9 # 10 Exhibit 10 # 11 Exhibit 11 # 12 Exhibit 12 # 13 Exhibit 13 # 14 Exhibit 14) (Annable, Zachery)
Vol. 26 005570	47	1/23/23	146	(280 pgs; 8 docs) Witness and Exhibit List filed by Defendant Highland Capital Management, LP (RE: related document(s) 128 Motion for withdrawal of reference. Fee amount \$188.). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7) (Annable, Zachery)
Vol. 27 005850	48	1/23/23	147	(221 pgs; 7 docs) Witness and Exhibit List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Attachments: # 1 Exhibit 1_Excerpts from July 14, 2020 Hearing Transcript # 2 Exhibit 2_HCLOF Members Agreement Relating to the Company # 3 Exhibit 3_HarbourVest Settlement Agreement # 4 Exhibit 4_Order Approving Debtor's Settlement with HarbourVest # 5 Exhibit 5_HCLOF Offering # 6 Exhibit 6 Amended and Restated Investment Advisory Agreement) (Sbaiti, Mazin)
006071	49	1/23/23	148	(3 pgs) Witness and Exhibit List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 128 Motion for withdrawal of reference. Fee amount \$188.). (Phillips, Louis)
Vol. 28 006074	50	1/25/23	150	(56 pgs; 2 docs) Amended Witness and Exhibit List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 147 List (witness/exhibit/generic), 149 List (witness/exhibit/generic)). (Attachments: # 1 Exh 7_Testimony of Mark Patrick at June 8, 2021 hearing) (Sbaiti, Mazin)

Vol. 28 006130	51	1/25/23	152	(3 pgs) Notice of Appearance and Request for Notice by Louis M. Phillips filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Phillips, Louis)
	52	1/25/23	154	(1 pg) Court admitted exhibits date of hearing January 25, 2023 (RE: related document(s) 128 Motion for withdrawal of reference, filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) (COURT ADMITTED DEFENDANT'S EXHIBITS #1, #2, #3, #4, #5 & #6 OFFERED BY ATTY GREG DEMO). (Edmond, Michael) (Entered: 01/27/2023)
Vol. 32 006925 006942 006960	53	2/6/23	158	Report and recommendation to the U.S. District Court by U.S. Bankruptcy Judge. (RE: related document(s) 128 Motion for withdrawal of reference filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Entered on 2/6/2023 (Okafor, Marcey)
	54	2/6/23	161	(18 pgs) DISTRICT COURT Notice of transmission of report and recommendation in re: renewed motion to withdraw reference. Civil Case # 3:22-cv-02802-S. (RE: related document(s) 158 Report and recommendation to the U.S. District Court by U.S. Bankruptcy Judge. (RE: related document(s) 128 Motion for withdrawal of reference filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Entered on 2/6/2023) (Whitaker, Sheniqua)
	55	4/3/23	165	(1 pg) DISTRICT COURT ORDER: The Court GRANTS the 11 Joint Motion to Transfer Proceeding and Consolidate Before Original Court and the above-numbered case (3:22-cv-02802-S) is transferred to the docket of the Honorable Judge Jane Boyle: Civil case 3:21-cv-00842-B (order referring case). (RE: related document(s) 1 Complaint filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 143 Notice of transmission of motion to withdraw reference). Entered on 4/3/2023 (Whitaker, Sheniqua) Modified on 4/10/2023 (Whitaker, Sheniqua). (Entered: 04/10/2023)

TRANSCRIPTS

006961	56	11/24/21	78	(104 pgs) Transcript regarding Hearing Held 11-23-2021 RE: Motion Hearing. THIS TRANSCRIPT WILL BE MADE ELECTRONICALLY AVAILABLE TO THE GENERAL PUBLIC 90 DAYS AFTER THE DATE OF FILING. TRANSCRIPT RELEASE DATE IS 02/22/2022. Until that time the transcript may be viewed at the Clerk's Office or a copy may be obtained from the official court transcriber. Court Reporter/Transcriber Liberty Transcripts/Dipti Patel, Telephone number 847-848-4907. (RE: related document(s) 75 Hearing held on 11/23/2021. (RE: related document(s) 55 MOTION to Stay filed by CLO Holdco Ltd, Charitable DAF Fund LP (Sbaiti, Mazin) (Entered: 08/26/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #55 ON 08/26/2021 IN U.S.
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			<p>DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)) (Appearances: J. Pomerantz and J. Morris for Highland Defendants; J. Jordan and P. Bessett for HCLOF; M. Sbaiti for Plaintiffs. Nonevidentiary hearing. Motion denied. Mr. Pomerantz to upload order.), 76 Hearing held on 11/23/2021. (RE: related document(s) 47 Motion to strike 43 Appendix in support filed by CLO Holdco, Ltd., Charitable DAF Fund, LP (Bridges, Jonathan) Modified text on 7/16/2021 (mjr). (Entered: 07/15/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #47 ON 07/15/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)) (Appearances: J. Pomerantz and J. Morris for Highland Defendants; J. Jordan and P. Bessett for HCLOF; M. Sbaiti for Plaintiffs. Nonevidentiary hearing. Motion denied (Plaintiffs acknowledged complained-of Appendices it did not relate to Motion to Dismiss). Mr. Pomerantz to upload order.)). Transcript to be made available to the public on 02/22/2022. (Patel, Dipti)</p>
57	2/21/23	164	<p>164 (112 pgs) Transcript regarding Hearing Held 1/25/23 RE: HEARING ON DEFENDANT HIGHLAND CAPITAL MANAGEMENT L.P.'S RENEWED MOTION TO DISMISS COMPLAINT (122) AND STATUS CONFERENCE RE: MOTION FOR WITHDRAWAL OF REFERENCE FILED BY PLAINTIFF CLO HOLDCO, LTD., PLAINTIFF CHARITABLE DAF FUND, LP (128). THIS TRANSCRIPT WILL BE MADE ELECTRONICALLY AVAILABLE TO THE GENERAL PUBLIC 90 DAYS AFTER THE DATE OF FILING. TRANSCRIPT RELEASE DATE IS 05/22/2023. Until that time the transcript may be viewed at the Clerk's Office or a copy may be obtained from the official court transcriber. Court Reporter/Transcriber Dipti Patel, Telephone number 847-848-4907. (RE: related document(s) 155 Hearing held on 1/25/2023. (RE: related document(s) 122 Motion to dismiss adversary proceeding, (Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint) filed by Defendant Highland Capital Management, LP filed by Defendant Highland Capital Management, LP) (Appearances: J. Morris and G. Demo for Movants; L. Phillips and M. Sbaiti for Plaintiffs. Evidentiary hearing (appendices). Court took matter under advisement.), 156 Hearing held on 1/25/2023. (RE: related document(s) 128 Motion for withdrawal of reference. Fee amount \$188, filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) (Appearances: J. Morris and G. Demo for Movants; L. Phillips and M. Sbaiti for Plaintiffs. Evidentiary hearing (appendices). Court announced it will recommend denial to District Court. Court is working on Report & Recommendation.)). Transcript to be made available to the public on 05/22/2023. (Patel, Dipti)</p>

Dated: July 14, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was filed electronically through the Court's ECF system, which provides notice to all parties of interest, on this 14th day of July, 2023.

/s/ Mazin A. Sbaiti

Mazin A. Sbaiti

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1 evidence.)

2 THE COURT: Go ahead, Mr. Morris.

3 MR. MORRIS: Thank you, Your Honor. The offering
4 memorandum itself is one of the documents that we filed under
5 seal, and we did so at the request of counsel to HCLOF. But
6 HCLOF has consented to our sharing up on the screen certain
7 very limited provisions of the document, without waiving the
8 request that the agreement otherwise be maintained under seal.

9 THE COURT: All right.

10 MR. MORRIS: So may I proceed on that basis, Your
11 Honor?

12 THE COURT: You may. Uh-huh.

13 MR. MORRIS: Okay. Ms. Canty, can you please put up
14 on the screen Demonstrative Exhibit #1? Okay. Can we just --
15 is there a way to just expand that just a bit, Ms. Canty?
16 Thank you very much. And if we could just scroll it up?
17 Thank you very much. Perfect.

18 Okay. So, Your Honor, this, as the footnote says, is an
19 excerpt from the offering memorandum that can be found at
20 Debtor's Exhibit AA. Double A. And this particular portion
21 of the offering memorandum is at Page 35.

22 THE COURT: Okay.

23 BY MR. MORRIS:

24 Q Mr. Seery, have you seen this portion of the offering
25 memorandum before?

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1 A Yes, I have. But before I continue, I just -- I should
2 have checked. Are you able to hear me clearly? Am I speaking
3 too quickly or am I cutting out? I just want to make sure.
4 I'm using a different set of audio today.

5 THE COURT: All right.

6 MR. MORRIS: That's fine.

7 THE COURT: I hear you very well.

8 MR. MORRIS: Yeah.

9 THE COURT: So I think we're good right now. Thank
10 you.

11 THE WITNESS: Yeah. Thank you, Your Honor. I was
12 just checking.

13 THE COURT: Okay.

14 THE WITNESS: In response to your question, Mr.
15 Morris, yes, I have seen this before.

16 BY MR. MORRIS:

17 Q Okay. And can you -- did you form a view in doing the due
18 diligence as to the adequacy of this disclosure?

19 A Yes, I did.

20 Q Can you share your -- or share with Judge Jernigan the
21 Debtor's view as to the adequacy of this disclosure concerning
22 the litigation between Highland and Acis?

23 A With respect to the litigation between Highland and Acis,
24 or, really, between Acis, Highland, and Highland's principals
25 and Acis's principal, totally inadequate. The disclosure here

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1 is very high-level. And if there were no other litigation
2 going on, it might serve to suffice. It basically says, In
3 our business, because we invest in distressed loans, there's a
4 lot of litigation around distressed investments, and that's
5 what we have. And then it says, We've talked with the
6 investor about other things and we're -- we think that's
7 enough.

8 Q Is there anything in this portion or anywhere in the
9 offering memorandum that you're aware of that disclosed to
10 HarbourVest that in the weeks leading up to the investment
11 Highland was engaged in the fraudulent transfer of assets away
12 from Acis?

13 A No. And I apologize, because I think it's -- I've
14 conflated two provisions. This one only deals with the very
15 high-level nature of the business. It doesn't give any
16 indication that there's any material litigation going on
17 elsewhere with respect to Acis.

18 I believe there's another provision that says, We -- we
19 have talked to -- oh, here -- I'm sorry. It is here.
20 Shareholders have had an opportunity to discuss with Highland
21 to their satisfaction all litigation matters against Highland
22 and its affiliates unrelated to its distressed business.

23 That, in my opinion, is wholly inadequate.

24 Q Okay.

25 MR. MORRIS: And let's put up -- actually, let's just

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1 move on.

2 BY MR. MORRIS:

3 Q Let's go to the settlement itself.

4 MR. MORRIS: Can we put back up Demonstrative Exhibit
5 #3?

6 BY MR. MORRIS:

7 Q Mr. Seery, can you see that?

8 A Yes, I can.

9 Q Does this generally describe the net economic recovery of
10 the HarbourVest settlement based on estimated recoveries for
11 general unsecured creditors as of November 2020?

12 A As of November 2020, it does. And you alluded to this in
13 your opening, but to be clear, the numbers have shifted.
14 Costs have increased. The -- so the -- effectively, the
15 numerator, in terms of distributable value that we estimate,
16 is lower. And settlements, the denominator, have also
17 increased. So the claims against the estate that have been
18 recognized have increased. And that, that probably takes it
19 down closer, in our view, to about seventy cents distribution,
20 a number closer to nine to ten million, maybe a little bit
21 less.

22 However, there's also some additional value that we -- we
23 believe we will recover directly. There are north of \$150
24 million of intercompany notes owed by Dondero entities to
25 Highland. A number of those notes are demand notes, and we've

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1 already made demand. We'll be initiating actions next week.
2 So those are -- those value, we believe, we'll recover
3 directly from Mr. Dondero and from related entities.

4 To the extent those related entities don't have value, we
5 feel very strongly about our ability to pierce the veil and
6 reach in to Mr. Dondero. And then his assets, either his
7 personal assets or the assets that he claims are in trusts.

8 In addition, there are a significant amount of notes that
9 were extended in two -- I believe around 2017, for no
10 consideration. Those notes were demand notes, I believe, and
11 then extended it 30 years. So they have 2047 maturities.
12 Those were probably going to have to be subject to fraudulent
13 conveyance type actions or -- or some sort of sale at a very
14 discounted value because third parties wouldn't want long-
15 dated notes with Mr. Dondero as the counterparty for very much
16 money.

17 Those -- they defaulted on some of those parties, so we
18 effectively turned them into demand notes. We've accelerated,
19 and we'll be bringing actions against those entities next week
20 as well.

21 So I think (garbled) have come up, so I apologize. One
22 way of saying I think the sixteen and a half is a bit high
23 right now, based upon what we know, but the value is going to
24 be higher than our estimate a couple of weeks ago because we
25 do believe we'll be able to recover on the notes.

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1 One additional caveat, just to be fully transparent here.
2 This summary with the 16.8 doesn't include the subordinated
3 piece of this -- of this claim and our resolution. That --
4 recovery of that piece will be dependent upon the success of
5 litigations.

6 In order for the subordinated piece to get paid, all
7 general unsecured claims in Class -- Classes 7 and 8 will have
8 to be paid in full. And then -- and then the subordinated
9 class in Class 9, which we believe UBS will have a piece of,
10 and HarbourVest will have a piece of by this settlement, those
11 will be able to recover, and those will be based upon other
12 claims of action against -- primarily against related parties.

13 Q And then that last point, is that what's reflected in
14 Footnote 3 on this page?

15 A That's correct, yes.

16 Q Okay. And just for the record, there's a reduction in
17 value of \$22-1/2 million. Do you see that?

18 A Yes.

19 Q And can you just explain to the Court what that is and how
20 that value was arrived at?

21 A Yes. I may be getting slightly ahead of you, Mr. Morris.
22 But to give the Court a reflection of the transaction -- and
23 we can go into the details in a moment -- ultimately, the
24 transaction we structured we think is very fair both
25 economically to the Debtor, but there -- there is some

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1 complexity to it to satisfy some of HarbourVest's concerns
2 that they be able to effectively rescind the transaction, at
3 least from an optical perspective. Value was important, but
4 optics were as well. The twenty-two and a half is the current
5 -- actually, the November value of HCL -- the HarbourVest
6 interests in HCLOF. And that's based upon Highland's
7 evaluation of those interests.

8 So we do believe that that is a fair value as of that
9 date. It has not gone down. It hasn't gone up explosively,
10 either, but it hasn't gone down. We think that's good, real
11 value. That value is in the Acis CLOs, the equity in those
12 CLOs, which is 2 through 6, that we -- we will be working with
13 the HCLOF folks to get Mr. Terry to monetize those assets and
14 those longer-dated CLOs.

15 In addition, I think it's 85 percent of the equity in Acis
16 7 -- Acis 7 is managed by Highland -- that is also beyond its
17 reinvestment period. And in talking to the directors -- and
18 they're new directors, and I'll get to that in a minute, for
19 HCLOF -- they'll seek to push Highland, which is the
20 reorganized Highland, to monetize that asset, with due regard
21 to fair value.

22 In addition, Harbour -- HCLOF owned a significant amount
23 of the preferred or equity pieces, if you will, in the
24 Highland CLO, 1.0 CLOs. As we've talked about, those are not
25 really CLOs. Those are effectively closed-end funds with

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1 illiquid assets, primarily illiquid assets in them. We've had
2 some dispute in front of the Court about selling the liquid
3 assets in them, which we can go into it another time. Those
4 are being liquidated in the market at fair value.

5 But HCLOF also is a significant holder of those preferred
6 shares, and those directors would -- have indicated to me that
7 they would like to see those interests also monetized.

8 Q All right. Let's shift gears for a moment to talk about
9 the diligence that the Debtor did before entering into this
10 agreement. Can you just describe for the Court generally the
11 diligence that was undertaken at your direction?

12 A Well, when we first received the reply to our objection,
13 we dug into that reply and the specifics in it very
14 aggressively. So we reviewed all of the underlying documents
15 related to the original transaction. We discussed with
16 counsel the legal basis for the HarbourVest claims. We
17 interviewed our own HCMLP employees who were involved in the
18 transaction and tested their recollection, specifically around
19 who dealt with HarbourVest, who had the discussions with
20 HarbourVest, what was disclosed to HarbourVest with respect to
21 the Terry dispute and the Acis litigation.

22 We also had done, as I think the Court is well aware from
23 prior 9019 testimony, extensive work around the transfers and
24 the issues related to Acis. So we were familiar with their
25 impact on HCLOF.

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1 We also did extensive work valuing the remaining HCLOF
2 interests to get a good feel of not only how much HarbourVest
3 originally invested, but how much they actually lost in this
4 transaction. And as I said, their original investment was
5 around, in total, in two tranches, about \$80 million, of which
6 they got about \$5 million back, and they've lost \$22 million.
7 So it -- I mean, remaining with \$22 million. So they've lost,
8 you know, in excess of \$50 million.

9 Q Do you recall whether the Debtor reviewed and analyzed all
10 of the documents that were cited in HarbourVest's response to
11 the Debtor's objection to the HarbourVest proofs of claim?

12 A Yeah. I think -- I forget, to be honest, which -- exactly
13 what documents were in there. But we went through their
14 objection with a fine-toothed comb, not only with respect to
15 the issues related to the Acis case, but also their references
16 to Guernsey law, other U.S. law, any of the documents between
17 the parties. And obviously, as I mentioned before, the
18 offering memorandum.

19 MR. MORRIS: Your Honor, I would just note for the
20 record that Debtor's Exhibits I through X are all of the
21 documents that are cited in HarbourVest's response to the
22 Debtor's objection to the HarbourVest proofs of claim, and
23 those are the documents that Mr. Seery just referred to.

24 THE COURT: All right.

25 MR. MORRIS: Just, they're in evidence now, and I

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1 just wanted the Court to understand why they're in evidence.

2 THE COURT: Okay. Thank you.

3 MR. MORRIS: You're welcome.

4 BY MR. MORRIS:

5 Q Let's talk about the Debtor and whether or not it had or
6 has any viable defenses. Did the Debtor form any views as to
7 whether or not it had any defenses to the HarbourVest claims?

8 A Yes, we did.

9 Q Can you describe for the Court the defenses that were
10 reviewed and analyzed by the Debtor?

11 A Yeah. I think we -- we had very significant defenses.
12 So, first and foremost, with respect to the original proof of
13 claim, as I mentioned earlier, it alluded to the expenses and
14 the overcharge. And I think with respect to the 15 million of
15 fees that were charged to HCLOF by Highland, we didn't have a
16 lot of defenses to that claim.

17 It's pretty clear, by any fair view of the Acis case, that
18 HCLOF, as the investor in the Acis CLOs and the Highland CLOs,
19 had no real responsibility for fighting with Acis and Josh
20 Terry and shouldn't have been charged those fees. I don't --
21 I don't think there's a legitimate investor that would
22 actually think that that was an appropriate amount to be
23 charged to a fund.

24 However, the claim was not as broad -- the proof of claim
25 was not as fulsome in terms of discussing and only vaguely

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1 referred to other damages. So we did -- we did, as a
2 threshold matter, think about whether we could argue that it
3 was time-barred because they had not met their obligations to
4 fully disclose under the proof of claim.

5 Secondly, we considered the defenses to the overall claim
6 of fraudulent inducement. Our perspective was that if we
7 could stop the claim of fraudulent inducement, the damages
8 would likely be limited to the 15 and maybe some -- some other
9 damages. With respect to the 15, again, the problem that we
10 had when we got past -- past motions for summary judgment is
11 the factual predicate for our defense was going to be that we
12 divulged these things to HarbourVest and that they did not
13 reasonably -- it was -- reasonably rely on some failure to
14 divulge because they're a sophisticated investor.

15 The problem with that defense is that our witnesses, which
16 really would have primarily been Mr. Dondero and Mr.
17 Ellington, and one other employee who runs the CLO business,
18 Mr. Covitz, would not be pretty good. They've been -- two of
19 them have been in front of this Court and they're not viewed
20 favorably and their testimony would be challenged and
21 potentially suspect.

22 So that gave us a real focus on trying to make sure that
23 we could, if we had to litigate, that we would litigate around
24 the fraudulent inducement.

25 As I said, reasonable reliance, what was disclosed, lack

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1 of digging into the public record, because you don't have to
2 go far on Google to find "fraud" within two words of
3 "Highland," and the tremendous, you know, litigious nature of
4 Highland. You know, even at that point, when this investment
5 was made, aside from Mr. Terry's arbitration, which by that
6 point, at least by the time (inaudible) was public, there was,
7 you know, significant public disclosure around the Credit
8 Strat and the litigation, the Crusader litigation, the UBS
9 litigation, the, gosh knows, the Daugherty litigation.

10 So our defense was going to be that you should have
11 figured this out, you're a sophisticated investor, and you
12 should have been able to figure out that there was significant
13 risk that, with respect to Mr. Terry, that Mr. Dondero would
14 not stop litigating and that those costs would put significant
15 risk on the investment.

16 The problem with that, as I mentioned earlier, is that the
17 OM is wholly deficient. If you have a typical risk factor in
18 the offering memorandum, you would have disclosed that there
19 was a litigation with Mr. Terry, a former partner in the
20 business, and that the Debtor had no intention of settling it.
21 There was no intention of settling. That litigation would go
22 on. It could go on for years and it could result in
23 bankruptcy or attachments and other risks to the business, and
24 that the investor should be fully aware that the Offeror does
25 not intend to be involved in any -- or the manager, in any

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1 settlement with Mr. Terry, and the fact it undermined the
2 investment. That wasn't there.

3 But that was our preliminary focus, to try to stop fraud
4 in the inducement. And then we -- we had specific facts
5 related to that. You know, once they knew about the
6 bankruptcy in HarbourVest of -- I'm sorry, of Acis,
7 HarbourVest made a second funding, which was there was a -- it
8 was an initial \$75 million draw, and then a second, I believe,
9 about a \$5 million draw, which was in -- I believe in
10 February. And they made it without -- without objection, and
11 that was after the commencement of the bankruptcy.

12 In addition, they were -- they were active in the
13 bankruptcy, so the -- some of the things that happened in the
14 bankruptcy, there were many opportunities to settle that case,
15 from our examination, all of which were turned down to -- by
16 Mr. Dondero. But you don't see HarbourVest pounding the table
17 to settle, either, either with respect to the Oaktree
18 transaction or any other transaction.

19 Now, HarbourVest's defense to that is, well, we were
20 taking advice and all of our information from Highland, and we
21 were getting that information directly from senior folks at
22 Highland why -- what the value was and why we shouldn't do
23 those things. We thought that that would mitigate some of the
24 arguments that -- some of the damages that we might have, I'm
25 sorry, if we -- if we lost.

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1 But the focus at that point, you know, our legal strategy,
2 was can we stop HarbourVest at the very forefront to say,
3 You've got to come into the factual realm and get out of the
4 fraud in the inducement realm. And then the defenses and the
5 exculpations and the liability limitations in the documents
6 would also come into play.

7 So that -- those are some of the defenses that we focused
8 on and our analytical thinking around them.

9 Q So, if the Debtor had viable defenses, why is it settling?

10 A Well, this is a significant claim. And we -- we looked at
11 it with respect to both the impact on the case, but, really,
12 the merits of the claim.

13 As I said, there's really little dispute that the legal
14 fees should not have been charged to HarbourVest. We think
15 based upon the testimony in Acis, the suspect credibility of
16 those who would have been our witnesses, and the experience in
17 Acis that the Court has had in terms of the completely hell-
18 bent on litigation, it would be hard for anyone to justifiably
19 defend those fees being charged. So, as an initial matter, we
20 had exposure there.

21 In addition, if HarbourVest got by our defense of -- was
22 able, for example, to claim fraud in the inducement, then we
23 were open to significant damages.

24 We really didn't put much value, frankly, on the RICO part
25 of it. We think that that's waved around often to show treble

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1 damages. Although in this case certainly somebody could lay
2 out the predicate acts and put forth a RICO-type argument, we
3 just didn't think that that had real merit in this commercial
4 dispute, even with a fraud claim.

5 But even without the trebling of the damages, there's no
6 dispute that HarbourVest lost more than \$50 million in this
7 investment. You know, we -- we thought about that risk as
8 well.

9 In addition, because the case would really be fact-based,
10 even if we had a high degree of confidence based upon our
11 discussions with our employees and the factual testimony, it
12 was going to be expensive to litigate this case, and time-
13 consuming.

14 And so we looked at the economic value, the potential
15 risks, and the actual value that we were giving up, and found
16 this to be an extremely, extremely reasonable settlement.

17 Importantly, and I think what drove it, you -- one of --
18 one of the things that drove it is another one of our defenses
19 on why, notwithstanding their -- what they held out as
20 meritorious claims, I don't think HarbourVest really wanted to
21 publicly litigate this claim. And we were aggressive in our
22 discussions with HarbourVest of how we would litigate it,
23 which would be quite publicly.

24 Now, that may or may not be fair, but that does put risk
25 on the counterparty. And so I think that helped drive the

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1 settlement.

2 In addition, the structure of the settlement we think is
3 extremely favorable to the Debtor and to the estate because,
4 rather than taking the full claim and putting it into a senior
5 unsecured position, we have bifurcated it. We did think about
6 whether this was a claim that could be subordinated under 510.
7 There won't be any arguments, I would be surprised if there's
8 arguments today that we didn't actually give to the Highland
9 employees who have given them to Mr. Dondero's respective
10 counsel.

11 We did structure it in a way that we thought gave
12 HarbourVest the opportunity to effectively claim a rescission,
13 even though that's not really what it is, and then be able to
14 claim that their recovery is based on the bankruptcy, which it
15 is, but not really dilute all the other stakeholders in the
16 case.

17 (Pause.)

18 THE COURT: Mr. Morris? Anything else?

19 MR. MORRIS: I can hear you, Your Honor.

20 THE COURT: Okay.

21 MR. MORRIS: I can hear you.

22 THE COURT: Okay. Now can you --

23 MR. MORRIS: I got cut off from Mr. Seery for a
24 moment.

25 THE COURT: Okay.

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1 BY MR. MORRIS:

2 Q Okay. I appreciate that. Are you done giving the
3 Debtor's basis for entering into this settlement, Mr. Seery,
4 if you can hear me?

5 A I think so, but I think as the Court has probably seen, I
6 can go on.

7 Q Yes.

8 A So I will try to be -- I'll try to be more concise. But
9 this was a -- this was a difficult settlement. We felt good
10 about our defenses. Felt that we could -- we could try them.
11 But it would be extremely expensive, time-consuming, and there
12 would be a lot of risk. And settling at a level which we
13 believe is actually below the damages that were clearly caused
14 only by the fees was a -- was a -- is a -- is a very
15 reasonable settlement.

16 Q Okay. Let's just talk about the process by which we got
17 to the settlement. Do you recall generally when the
18 settlement negotiations have -- were commenced?

19 A I believe it was -- was late summer, early -- early fall.

20 Q Okay. Before I move on, I just want to go back to the
21 Acis matter that you were talking about, one last issue. Do
22 you know how, if at all, the injunction that was entered in
23 the Acis bankruptcy impacted or related to the HarbourVest
24 claims?

25 A Yeah. I -- yes, I do. And I believe it -- it did. I

Seery - Direct

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1 think there's an argument, and we analyzed it thoroughly, that
2 the injunction effectively caused a lot of the damages.
3 Because if you look at the values of the equity that
4 HarbourVest had, the -- and HCLOF had in the CLOs, it went
5 down dramatically after the Trustee in the Acis case took over
6 and then subsequently, when the case was reorganized and Mr.
7 Terry took over, you know, with Brigade as the sub-advisor.

8 Now, that would -- you know, we would -- we could
9 certainly attempt to throw, in our defense, the causation at
10 Mr. Terry's feet or at Mr. Phelan's feet. HarbourVest's
11 retort is that none of this would have occurred but for the
12 burn-it-down litigation that Mr. Dondero engaged in with
13 Highland.

14 In addition, in Mr. Terry's defense, you know, he did try
15 multiple times with HCLOF, tried to petition, if you will, the
16 HCLOF entity to -- and directors, former directors, to reset
17 the CLOs to make them more economically viable, based upon the
18 current level of asset returns versus the debt costs in the
19 CLOs. And that was rejected by the HCLOF and the Debtor as
20 the controlling party of HCLOF. So, we thought about those
21 risks.

22 You know, similarly, the economic values in Acis 7 went
23 down pretty significantly from that date as well. So I think
24 there's -- there are some defenses, but that's really Mr.
25 Terry's issue, not our issue. So we thought about those

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1 issues, we analyzed them, and we certainly did all the work
2 around month-to-month reductions in NAVs and how different
3 events in the Acis case might have -- might have caused those
4 and was that some sort of break from the original
5 transgression that HarbourVest claims, which was the
6 fraudulent inducement.

7 Q Do you recall that in November HarbourVest's motion under
8 3018 was scheduled to be heard?

9 A Yes.

10 Q And can you just tell the Court your understanding of what
11 the 3018 motion was about?

12 A Well, the 3018 motion was going to be on voting. And we
13 took the view that it really was not -- it shouldn't have been
14 that big an issue and HarbourVest should have been content
15 with just taking their actual losses of roughly a \$50-\$60
16 million claim for voting purposes and then we would move on.

17 HarbourVest was very insistent that they have a \$300
18 million claim, because they took the position -- and with
19 extensive documentation; not only the pleadings they filed,
20 but also detailed decks that were prepared by their counsel,
21 which they had presented to us on the merits of their claim --
22 that they were going to litigate for -- the 3018 and for the
23 full \$300 million value.

24 And that became the genesis, if you will, of the
25 negotiations to settle.

Seery - Direct

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1 So, we started talking about the 3018. It was very
2 contentious. My apologies to Ms. Weisgerber and her counsel,
3 her partners, because it was a significant and contentious
4 negotiating call. But the reasons for that I think were that
5 -- their insistence on litigating the 3018 and our view that
6 this was just, you know, another -- another of a series of
7 delays and costs in this case that we really were hoping to
8 avoid.

9 That led to Mr. Pugatch and I stepping away from counsel,
10 no offense to counsel, you know, ours and his, to begin
11 negotiations around the potential for a settlement. First, it
12 started with a 3018, and then, you know, argued that we would,
13 if we got past the 3018, we were going to litigate this,
14 because we effectively had -- thought we could get everyone
15 else done at -- in and around that time. And I think we were
16 also probably a little bit optimistic about UBS at that time
17 and the mediation, which subsequently we have settled. But
18 that was the genesis of those settlements.

19 Q And how did the structure, how did the Debtor and
20 HarbourVest derive at the structure whereby there is a general
21 unsecured claim, there is a subordinated piece, and there's
22 the takeback of the HCLOF interest?

23 A Well, as I outlined, we -- we aggressively set forth our
24 various defenses. Their position was that they -- they should
25 never have been in this transaction before. And they --

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Seery - Direct

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1 HarbourVest is, in essence, a fund of funds, and they have
2 investors, and it certainly wouldn't be their, I'm sure, the
3 best-performing asset in their portfolio, to have made this
4 investment and lost \$50 million over this period of time. So
5 they felt strongly that they should never have been in this
6 investment, and but for the failure to disclose and the
7 improper disclosures, they would not have been in this
8 investment.

9 So, optically, getting out of it was important to them,
10 and that led to our idea and construction of a subordinated
11 claim and the transfer of the HCLOF interests to the estate.

12 Importantly, the HCLOF interests, as I mentioned, are --
13 the investments are in the Acis CLOs controlled by Acis and
14 Mr. Terry. The reorganized Acis. As well as the 1.0 CLOs and
15 the Acis 7.

16 So we were keenly focused on, if we were going to get that
17 interest, would we then have the majority control in HCLOF,
18 which we will, and would we be able to drive the recoveries,
19 as opposed to what Highland typically does in these
20 investments is use other people's money, drive down the value,
21 and then try to buy back the interest on the cheap.

22 Q Just in terms of timing, because I think there was a
23 suggestion in one of the openings that there was something
24 untoward about the timing here: At the time the liquidation
25 analysis was prepared on November 24th, had the Debtor reached

Seery - Direct

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1 any agreement in principle with HarbourVest?

2 A If we had, it would have been reflected, so I don't -- I
3 don't think we were agreed by then. I don't recall the
4 specific dates, but if we had, it would have -- it would have
5 been reflected.

6 Q If I can refresh your recollection that the motion was
7 filed on December 24th, does that help form your understanding
8 or refresh your recollection that there was no agreement in
9 principle on November 24th?

10 A Yeah. Well, I'm quite sure there was no agreement in
11 principle or we would have reflected it minimally by a
12 footnote. There's -- there's no chance. It's a material
13 reduction in the claims pool that we were previously telling
14 people that, at least for purposes of distribution, like UBS
15 and a couple others we said we thought we would get to zero
16 on. So we didn't calculate in that amount. So I'm quite sure
17 we didn't have a deal when we filed the disclosure statement.

18 In terms of the timing, anyone who's done this business
19 for any degree of time knows that the crucible of bankruptcy
20 brings people to the settlement when they see something
21 happening in the case, and not before. I think HarbourVest
22 looked at our -- this is my supposition -- HarbourVest looked
23 at our plan, our ability to get this done, our settlement with
24 Redeemer, our settlement with Mr. Terry and Acis, and saw that
25 this plan was coming together, and if they didn't think about

Seery - Direct

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1 the settlement, they were going to think about not only the
2 risks that we laid forth for them with respect our defenses,
3 but also the opportunity to litigate with the Claimant Trustee
4 over a long period of time, which couldn't have been
5 particularly appetizing.

6 Q Can you describe for the Court the role played by the
7 independent board of Strand, the general partner of the
8 Debtor, in analyzing and participating in the approval
9 process?

10 A Yes. I think, as the Court is aware and I've testified
11 before, Mr. Russell Nelms and Mr. John Dubel are fellow
12 independent directors with me, appointed pursuant to the Court
13 order. They are kept abreast of every detail, and -- along
14 the way, not just in a summary form at the end. We have
15 reviewed and analyzed collectively each of the issues. Mr.
16 Dubel has extensive experience in these types of litigation
17 matters. Obviously, Mr. Nelms, from his -- both his practice
18 and his time on the bench, has a keen insight into how to
19 resolve and what the risks and benefits are from settling
20 litigation. So I consult them every step of the way.

21 Q And as part of this process, did the Debtor reach out to
22 the directors of HCLOF?

23 A Yes, we did. So, we reached out and we've had several
24 conversations on video chats with the directors. The
25 directors of HCLOF are two new gentlemen, Mr. Richard Boleat

Seery - Direct

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1 and Mr. Dicky Burwood. They are extremely professional. They
2 are exceptionally well-informed. They are truly careful, and
3 I would say very experienced professional not only directors,
4 but experienced in -- in these matters, both in respect of
5 structured finance as well as these types of vehicles and
6 litigation.

7 They were appointed by the old directors, Scott and
8 Bestwick, and they have been in control. They have outside
9 counsel, which is King & Spalding in the U.S. They have
10 Guernsey counsel. They have accountants and professional
11 advisors, and are being, in my opinion, exceptionally careful.
12 I've got -- very quickly developed a lot of respect for them,
13 and we consulted with them on this settlement and how it would
14 work.

15 They've been very clear that they represent HCLOF and they
16 work for the benefit of the equity, whomever owns it, and
17 taking a view that they would like to see these assets
18 monetized swiftly, with due regard to value, for the benefit
19 of the equity.

20 Q And is it your understanding that the directors of HCLOF
21 approved of this transaction?

22 A They -- I don't know that their approval was required.
23 It's really -- there are a number of hoops to jump through
24 under the documentation, including opinion of outside counsel
25 that we received from WilmerHale in terms of the effectiveness

Seery - Direct

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1 of the transfer under the documents. We had a negotiation
2 with -- with those directors, and making sure that we did
3 everything correct -- correctly, excuse me -- with respect to
4 the requirements for the transfer under the documents. And
5 they've indicated their support and acknowledgement that we're
6 doing it correctly.

7 I don't know if it's fair to say they approved it. I'd
8 just have to go check the documents. But they certainly
9 support it. And I think they generally support our position
10 with respect to how to move forward with the assets.

11 Q I appreciate that. I guess I meant approval with a small
12 a and not a capital A.

13 You mentioned WilmerHale. Who do they represent in all of
14 this?

15 A WilmerHale is the Debtor's outside corporate counsel, in
16 particular with respect to the fund issues that we don't
17 handle in-house. We have significant support for fund issues
18 from the expertise of Mr. Surgent, who's been the CCO, and he
19 is also a lawyer, with respect to, you know, some of the
20 difficult fund issues that Highland has. But when we use
21 outside counsel, we use WilmerHale for that, and they've been
22 -- they've been exceptional.

23 Q Okay. Just the last two points that were made in Mr.
24 Dondero's objection, I believe. Did the Debtor overpay in
25 this settlement in order to gain the support of HarbourVest in

Seery - Direct

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1 connection with its -- with the Debtor's attempt to get its
2 plan confirmed?

3 A Not in any way. My -- I believe the settlement is
4 extremely reasonable. As I testified, it's -- it's less than
5 the -- the actual value going out, depending on unless there's
6 successful litigation, and there well could be, is less than
7 on a pro forma basis the fees that were taken and charged to
8 HCLOF. We didn't do this for votes. We will have Class 2,
9 Class 7, Class 8, and Class 9. So I don't think that's a --
10 there's no vote purchasing, I think you called it. No, not at
11 all.

12 Q Yeah. Well, on that topic, I think the phrase that was
13 used was gerrymandering. Are you aware of the argument that's
14 been made that the subordinated claim was dropped in there in
15 order to gerrymander a positive vote for the impaired class of
16 Class 9, I believe?

17 A In a word, I would say that's preposterous. The -- as I
18 said, we have a number of classes that will vote for the plan.
19 The plan is -- the plan is a monetization plan. And if -- if
20 the creditors determine that they don't want to pursue this
21 plan, we'll go forward with another -- we'll try to get
22 another plan. We tried to have a grand bargain plan. We
23 tried to have a pot plan, as I've testified previously. I'm
24 quite certain that I've done more work on that than anyone
25 else, including Mr. Dondero and anybody who works for him.

Seery - Direct

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1 And he hasn't been willing to do that.

2 This is a -- this is a plan that's come together. We
3 think it's going to be in the best interests of the estate.
4 That'll be confirmation next week. Or two weeks, I guess.
5 But I don't see how this is any way related -- this settlement
6 is not any way related to the voting on that -- on that -- on
7 that plan.

8 Q Just to put the finest point on it, is the Debtor relying
9 on Class 9 to be the impaired consenting class?

10 A No. I think -- I think what I've -- as I said, I believe
11 we already have the votes in Class -- I think it's 2 or 3, 7,
12 8, and -- and 9 will vote in favor as well. So that won't be
13 an issue.

14 MR. MORRIS: Your Honor, I have no further questions
15 of Mr. Seery.

16 THE COURT: All right. Pass the witness. I'll ask
17 HarbourVest counsel first: Do you have any questions of Mr.
18 Seery?

19 MS. WEISGERBER: No, Your Honor.

20 THE COURT: All right. Thank you.

21 What about cross-examination? Mr. Dondero's counsel?

22 CROSS-EXAMINATION

23 BY MR. WILSON:

24 Q Mr. Seery, how are you doing today?

25 A I'm well, thank you.

Seery - Cross

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1 Q I'm John Wilson, and I represent Jim Dondero. I have a
2 few questions for you today.

3 Now, the HarbourVest proof of claims were filed on April
4 8th, 2020; is that your recollection?

5 A I believe that's correct. I don't recall the specific
6 date.

7 Q Okay. And do you know when you first became aware of the
8 HarbourVest claims?

9 A I believe it was early in the summer when we filed the
10 omnibus objection. It may have been in late spring, shortly
11 after that. I don't recall the specific date of the filing.

12 Q And before the time of the filing of the omnibus
13 objection, did Highland educate itself regarding the
14 HarbourVest proof of claims?

15 A I'm sorry, could you say that again? I didn't quite
16 understand it.

17 Q Before the omnibus objection was filed, did HarbourVest --
18 I'm sorry, did Highland educate itself on the HarbourVest
19 proof of claims?

20 A Not especially, no.

21 Q Okay. And -- but at some point, Highland did investigate
22 those proofs of claim, correct?

23 A That's correct.

24 Q And when would you -- when do you recall that that
25 investigation began?

Seery - Cross

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1 A I don't recall the date, but the triggering event was
2 HarbourVest's response to our omnibus objection.

3 Q Okay. And that would have been filed September 11th of
4 2020?

5 A I'll take your representation. I don't -- I don't recall
6 the specific date.

7 Q Okay. And so when you began to investigate the
8 HarbourVest claims, what was your initial reaction?

9 A My initial reaction was that the -- the larger claims that
10 they were asserting -- the fraud in the inducement, the RICO
11 -- that those claims were, in my view, attorney-made and that
12 when we dug in and did the work, we saw that HarbourVest
13 clearly lost north of \$50 million on the investment. We had
14 just started to uncover the fee issue and saw the risk we had
15 there.

16 But I thought the bulk of those claims were attorney-made.
17 Clever, but attorney-made, as opposed to what I would think
18 are more legitimate. And so we started to develop our
19 defenses around that.

20 Q And was your initial reaction that the HarbourVest claims
21 were largely worthless?

22 A I think with respect to the claim around the fees, I
23 believed there was significant risk. With respect to the
24 other claims, I thought our defenses would make them
25 worthless, yes.

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Seery - Cross

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1 Q And did you ever represent to any party that the
2 HarbourVest claim was worth, at most, \$5 million?

3 A I think I represented often, including to HarbourVest,
4 that it was worth nothing. I don't recall if I specifically
5 said \$5 million. \$5 million would have been a nominal amount
6 to -- which is litigation costs. So it may -- it may have
7 been in my models that I put in that as a settlement amount,
8 but I -- I thought that there were valid and good defenses to
9 those larger claims.

10 Q And you recognize that HarbourVest was a large,
11 sophisticated investor, correct?

12 A Yes. I think they manage north of -- right around a
13 hundred billion dollars.

14 Q And you recognize that HarbourVest routinely structured
15 complex customized investments, correct?

16 A I believe that -- I don't know the intricate part of their
17 businesses, but as a fund of funds who does creative
18 investments, I think that they do do quite a bit of that.
19 This, I believe, was their first investment in the CLO space.

20 Q And it was not -- or I should say, you did not believe
21 that HarbourVest was simply a passive investor in HCLOF,
22 correct?

23 A I don't think that that's true, no.

24 Q You don't -- you don't believe that you denied their claim
25 to be a passive investor?

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Seery - Cross

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1 A Oh, I think -- I'm sure that in defense of their claims I
2 would argue that they were -- they were more than a passive
3 investor. But it was pretty clear when you look at the
4 structure of what they invested that there was an intent that
5 they be passive on their part. They didn't take a majority
6 interest.

7 In fact, Highland made it clear in the structure of the
8 deal that they couldn't -- it would be hard for them to get a
9 majority interest because Highland entities would control that
10 and Dondero-controlled entities or individuals would control
11 the majority.

12 I think that they -- they had hoped to be a passive
13 investor.

14 Q But was it not your position that HarbourVest was actually
15 an active, involved investor?

16 A I think our defense was going to be that they knew exactly
17 what was going on, that they participated, that they were
18 active, and that, indeed, that they were in and around some of
19 the subsequent issues in the Acis case.

20 Q And you understood that HarbourVest played a material role
21 in the various outcomes in the Acis bankruptcy case, correct?

22 A I don't believe that to be correct, no.

23 Q Have you ever made that representation to anyone before?

24 A Not -- not that I recall.

25 Q Well, do you recall giving statements to a reporter named

Seery - Cross

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1 Syed Khaderi?

2 A I've never spoken to a reporter named Syed Khaderi in my
3 life.

4 Q Well, did you participate in the preparation of statements
5 to be given to Syed Khaderi?

6 A I've never heard of Syed Khaderi, nor have I participated
7 in any preparation of statements. I don't know who that is.

8 MR. WILSON: All right. I'm going to have Bryan
9 Assink put on the screen a document.

10 And Bryan, can you go to Page 7? Bottom of -- the top of
11 Page 7. Well, actually, before you do that, go to the very
12 top of the document.

13 BY MR. WILSON:

14 Q Now, Mr. Seery, are you familiar with Lucy Bannon?

15 A Yes.

16 Q And who is Lucy Bannon?

17 A She is the Highland public relations person.

18 MR. WILSON: Okay. Now go back to Page 7.

19 BY MR. WILSON:

20 Q Now, do you -- do you see on your screen an email of
21 September 14th from Syed Khaderi that says, Hi, Lucy, how are
22 you?

23 A Yes.

24 Q Have you seen this email before?

25 A Not that I recall, no.

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Seery - Cross

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1 Q All right. It continues on that, I saw the filing on
2 Friday about HarbourVest claims against Highland for a CLO
3 investment, and I'm looking to put out a report tomorrow
4 morning London time. Ahead of that, I wanted to check if
5 Highland would like to comment on the matter.

6 MR. MORRIS: Your Honor, this is -- the Debtor
7 respectfully objects. A, this document is not in evidence.
8 B, it's rank hearsay.

9 THE COURT: Response, Mr. Wilson?

10 MR. WILSON: Your Honor, I am attempting to
11 authenticate this document, but I'm using it in rebuttal to
12 the testimony that Mr. Seery just offered.

13 THE COURT: All right. I'll allow it. Overrule the
14 objection.

15 MR. WILSON: All right. Thank you, Your Honor.

16 BY MR. WILSON:

17 Q All right. Now, if we -- and oh, that September 14th
18 date, that was three days after the September 11th date that
19 we discussed was the date that HarbourVest filed its response
20 to the omnibus objection, correct?

21 A Yes. If that's the date that they filed it, then I -- if
22 you're representing that, I concede that the 14th is three
23 days after the 11th.

24 Q All right. And if you go back to the first page of this,
25 it looks like, on the following day, Lucy Bannon sends an

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Seery - Cross

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1 email to you, and is that your email address,
2 jpseeryjr@gmail.com?

3 A That's correct, yes.

4 Q And do you recall receiving this email from Lucy Bannon?

5 MR. MORRIS: Your Honor, I renew my objection that
6 this is hearsay. He's not rebutting anything that Mr. Seery
7 testified to. He testified that he'd never heard of the
8 gentleman at the bottom of the document. There's nothing in
9 this document that rebuts Mr. Seery's testimony at all.

10 THE COURT: Response, Mr. Wilson?

11 MR. WILSON: Well, I'm not -- I'm not trying to rebut
12 his statement that he hadn't -- that he hadn't heard of Syed
13 Khaderi. My rebuttal is attempted to -- attempting to show
14 that he has made various statements that he denied.

15 THE COURT: I'll overrule the objection.

16 BY MR. WILSON:

17 Q All right. So, back to this exhibit, Mr. Seery. You
18 recall receiving this email from Lucy Bannon on Tuesday,
19 September 15, 2020?

20 A Not specifically. But to be clear, I recall talking to
21 Lucy Bannon about the HCMLP dispute with HarbourVest.

22 Q Okay. And --

23 MR. WILSON: Bryan, can you go down to the next page?
24 Scroll down to where -- the James Seery email.

25 BY MR. WILSON:

Seery - Cross

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1 Q Do you see this email on your screen that's dated
2 September 15, 2020 at 10:33 p.m.?

3 A Yes, I do.

4 Q And do you recall sending this email to Lucy?

5 A Not specifically, no.

6 Q Well, do you deny that you sent this email to Lucy?

7 A It appears to be my email.

8 MR. WILSON: Your Honor, we would move to admit this
9 document into evidence as Dondero Exhibit Letter N.

10 THE COURT: Any objections?

11 MR. MORRIS: I would consent to the admission of Mr.
12 Seery's email, but the balance of it ought to be excluded as
13 hearsay.

14 THE COURT: What about that?

15 MR. WILSON: Well, Your Honor, I think that this
16 document -- and I'll get into this in a little more detail in
17 a second -- but I think this document is a combination of the
18 work product of Lucy Bannon and Mr. Seery in preparing a
19 response for the reporter who requested comment from Highland.

20 THE COURT: Okay. I --

21 MR. MORRIS: Your Honor, um, --

22 THE COURT: Go ahead.

23 MR. MORRIS: I just -- I do question how they got
24 this document, but that's for another day. That's number one.
25 Number two, in addition to the hearsay argument, I just --

Seery - Cross

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1 relevance grounds.

2 THE COURT: Okay. I'll allow the portion that is the
3 communication of Seery, that portion of Exhibit N. All right?

4 MR. WILSON: Okay. With due -- thank you, Your
5 Honor. With due respect, I -- to use that portion, I need to
6 refer to the portion below it, because he says, Good to submit
7 with your final edit/revisions. And so we need to know what
8 those final edit/revisions are, which are contained in the
9 email directly below that on the document that was four
10 minutes earlier in time.

11 THE COURT: All right. Fair enough. That'll be
12 allowed.

13 MR. WILSON: All right. Thank you, Your Honor.
14 (James Dondero's Exhibit N is received into evidence as
15 specified.)

16 MR. WILSON: So, Bryan, now can you scroll to the
17 next page? Oh, actually, let's just -- let's just stop at the
18 top -- at the bottom of the page. What's this statement?

19 BY MR. WILSON:

20 Q So, to be clear, Mr. Seery, when -- in response to Mr.
21 Khaderi's request for information and comment, you prepared
22 actually two responses, and one of those was a statement on
23 the record attributed to a spokesperson for HCMLP or something
24 along those lines. And then --

25 MR. WILSON: Can you scroll down to that next page?

Seery - Cross

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1 BY MR. WILSON:

2 Q And this says -- I think part of this got cut off for some
3 reason, but it looks like the official statement is in
4 quotation marks. It says, "We dispute the allegations made in
5 the filing and believe the underlying claims are invalid and
6 will be found to be without merit. Our focus continues to be
7 treating all valid claims in a transparent, orderly, and
8 equitable manner, and vigorously disputing meritless in the
9 court. That focus will assure that HCMLP's reorganization
10 process -- progress is towards an efficient and equitable
11 resolution."

12 And then below that there's another section of this email
13 that says, Background/Clarification, Not for Attribution. And
14 do you know the purpose of this second section of the
15 response?

16 A Do I know the purpose of that? Yes.

17 Q And what would that purpose be?

18 A Ms. Bannon was speaking on background to reporters. As I
19 said earlier, I've -- I never heard of the gentleman from
20 London. If he's at the bottom of the email, I didn't pay any
21 mind, never heard of him. Nor have I heard it since. Ms.
22 Bannon didn't ever reference the specific person.

23 But she is the public relations person. So, as I
24 testified earlier, she does communicate with the press. And
25 as I previously testified when Mr. Morris questioned me, one

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Seery - Cross

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1 of our tactics and our defenses for HarbourVest was going to
2 be that we were going to be very public and aggressive about
3 the investment and it would have a negative impact or negative
4 perspective for viewers, in our opinion, about HarbourVest's
5 investment.

6 Q All right. Well, look with me in the middle of that
7 paragraph right after the closed parenthetical, where it says,
8 "But it's important to note the background of HarbourVest's
9 active and deep involvement in the investment of which it now
10 complains."

11 And so it was your position that HarbourVest had an active
12 and deep involvement in the investment, correct?

13 A No. I don't think that's correct. Ms. Bannon prepared
14 the statement, it was a litigation defense on background, and
15 that's our -- that was our position for this purpose. It was
16 not my view that they were active and deeply involved. They
17 were certainly involved. There's no doubt about it. But they
18 got all their information, in our estimation and our research,
19 from Highland.

20 Q But in any event, you would agree with me that four
21 minutes after receiving this email, you approved this
22 statement to go out to the reporter, correct?

23 A No, that's not correct. That's -- this portion is on
24 background. That statement doesn't go out. The previous
25 statement was the official statement. This is the background

Seery - Cross

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1 discussion that she would have. So, no, she was not
2 authorized in any way whatsoever to send that out. She was
3 authorized to have conversations with those general facts.

4 MR. WILSON: Okay. Bryan, go to the top, or the
5 bottom of the page immediately preceding that. That's it.
6 Yes, that's it right there.

7 BY MR. WILSON:

8 Q Now, you'll see that this email from Lucy Bannon on
9 September 15, 2020 at 10:29 p.m. starts off, "Jim, let me know
10 what you think of the below. And, again, the first would be
11 on the record and the second will be sent for information
12 purposes to ensure accuracy, not for attribution."

13 So the intent was that this -- that this entire statement
14 be sent to the reporter, correct?

15 A I don't believe that's correct. I think when she goes on
16 background she doesn't send them a written doc. It's got to
17 be clear to the reporter, at least my understanding is that
18 what on background means -- I've been involved with this
19 before -- is that typically that's done orally. I don't know
20 if she's done it in a written statement before. I have never
21 seen that done in a written statement before. You give the
22 official statement and then you walk the reporter through your
23 other views on background. And you're not quoted. And it's
24 usually attributed to a source with knowledge.

25 Q Okay. We'll come back to that in a minute. The next

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Seery - Cross

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1 sentence after the one I just read to you --

2 MR. WILSON: Go back to where we were on the
3 background.

4 BY MR. WILSON:

5 Q Now, we just read you the sentence that starts with, "Then
6 it's important." The following sentence says, "HarbourVest
7 was not simply invested in HCLOF as an ignorant,
8 unsophisticated, passive investor, but was an active and
9 informed participant in the inception of its investment
10 through all of the Acis bankruptcy proceedings, and
11 HarbourVest played a material role in various outcomes related
12 to that case and its impact on HCLOF."

13 And is it -- did you not just tell me before we
14 investigated this document that HarbourVest did not play a
15 material role in the various outcomes of the Acis bankruptcy?

16 A I don't know exactly what I said, but I think that's
17 correct, after we'd done the research on it, yeah.

18 Q But you took the position in this email that you approved
19 to go out to a reporter that says that -- that HarbourVest was
20 an active and informed participant in the inception of -- of
21 its investment through all of the Acis bankruptcy proceedings
22 and played a material role in various outcomes related to that
23 case and its impact on HCLOF. Can we agree with that?

24 A Yes.

25 Q And then the final sentence of this paragraph says that,

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Seery - Cross

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1 We believe that neither the facts nor the law support
2 HarbourVest's, quote, We-were-too-lazy-to-know allegations.

3 Whose words were those, "We-were-too-lazy-to-know
4 allegations"?

5 A I don't recall. They may be mine. It's aggressive the
6 way I am, so that -- that may well be the case.

7 MR. WILSON: All right. Go -- go down to the next
8 page.

9 BY MR. WILSON:

10 Q And with respect your comment that that second paragraph
11 would not have gone to the reporter, look at this email in the
12 middle of the page from Lucy Bannon to Syed Khaderi, September
13 16, 2020, at 1:51 a.m. And --

14 MR. MORRIS: Your Honor, this I will object to as
15 hearsay. There is no witness here to testify to anything on
16 this document.

17 THE COURT: All right. How about that?

18 MR. WILSON: Well, it's -- well, scroll up just a
19 little bit. This email at the top of the page is three
20 minutes after the one in the middle of the page, where Lucy
21 Bannon is forwarding this to James Seery, saying, See below
22 for responses sent to *Creditflux*. Will follow up with the
23 story when it runs or with any other updates.

24 MR. MORRIS: Your Honor, these --

25 MR. WILSON: So I think this --

Seery - Cross

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1 MR. MORRIS: These documents don't appear on the
2 witness list. They're not being offered to impeach anything.
3 They're just -- he's taking discovery as we sit here.

4 MR. WILSON: Your Honor, in response, I'm simply
5 trying to rebut the statements that Mr. Seery made. In fact,
6 he told me just a minute ago that that second paragraph would
7 not have gone out to the reporter. However, this email from
8 Lucy Bannon to Syed Khaderi directly rebuts that statement.

9 THE COURT: But your whole purpose in this line of
10 questioning, with an undisclosed document, is to rebut the
11 earlier testimony he gave before you even put this exhibit in
12 front of him.

13 MR. WILSON: I'm trying to rebut multiple statements
14 that Mr. Seery has made today, and I think it -- you know, if
15 he's going to testify that this information did not go out to
16 a reporter, I think I'm allowed to rebut that to demonstrate
17 that it did.

18 THE COURT: All right. Why didn't you disclose this
19 in advance? It's feeling less and less like an impeachment
20 document the more we go through it.

21 MR. WILSON: Your Honor, I did not -- I did not
22 actually have this document at the time we filed our witness
23 and exhibit list, but I would also say that I didn't have any
24 purpose to use it if I didn't need it for rebuttal.

25 THE COURT: Okay. First off, you're supposed to

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Seery - Cross

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1 disclose all exhibits you anticipate using except those for
2 purposes of impeachment. Okay? Not rebuttal, to be
3 technical.

4 So, if you didn't disclose this exhibit, the only way you
5 can use it, subject to other possible objections, is if you're
6 impeaching a statement. And I'm just saying I think we're
7 going beyond trying to impeach the original statement and now
8 we're trying to impeach statements he's made after seeing
9 portions of the document.

10 What did you mean, you didn't have this document in time
11 to disclose it?

12 MR. WILSON: Well, I actually just received this
13 document this morning, Your Honor.

14 THE COURT: Where did you receive it from?

15 MR. MORRIS: From who?

16 MR. WILSON: I -- I honestly do not know the source
17 of this document, although it was provided to me by my client.

18 MR. MORRIS: Your client being Mr. Dondero?

19 THE COURT: Could you answer that, Mr. Wilson?

20 MR. WILSON: Yes, that's -- yes, that's correct.

21 THE COURT: All right. I will -- that's --

22 MR. MORRIS: Your Honor, I'd like to --

23 THE COURT: That's a different can of worms. But for
24 now, I sustain the objection. You're done questioning on this
25 document.

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Seery - Cross

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1 MR. WILSON: That's fine, Your Honor. I can move on.

2 BY MR. WILSON:

3 Q Now, Mr. Seery, you would agree with me that whether or
4 not HarbourVest played an active role in the Acis bankruptcy,
5 it was kept apprised of the -- of the ongoing in the
6 bankruptcy? (Pause.) I'm sorry. Could you hear that?

7 A Yes. My understanding is that -- that they were.

8 Q And in fact, did Highland have weekly conference calls
9 with HarbourVest during the Acis bankruptcy to discuss what
10 was going on in the bankruptcy?

11 A I don't know if they were weekly. I've been told that
12 they had regular calls updating HarbourVest, yes.

13 Q Okay. And did Highland produce over 40,000 pages of
14 documents to HarbourVest related to the Acis bankruptcy?

15 A I'm not aware of that, no.

16 Q Have those documents been provided to you?

17 A I hope not.

18 Q So, in your role --

19 A I'm sorry. I don't -- I didn't receive 40,000 documents
20 from anybody.

21 Q Well, did you receive any number of documents that were
22 provided by Highland to HarbourVest during the Acis
23 bankruptcy?

24 A I wasn't involved in this during the Acis bankruptcy. I'm
25 sorry.

Seery - Cross

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1 Q Well, I'm referring to, after you became involved in this
2 Highland bankruptcy, whether you were provided with these
3 documents that were sent from Highland to HarbourVest.

4 A I don't -- I don't know what the documents are. I've
5 reviewed tons of documents with respect to the HarbourVest
6 claims, but I don't know of the documents to which you're
7 referring.

8 Q Okay. And after you performed your investigation into the
9 HarbourVest claim, what was your opinion as to the cause in
10 the reduction in value of HarbourVest's investment in HCLOF?

11 A I think the main cause of the reduction in the investment
12 was the imposition of the Trustee and the failure of Highland
13 HCLOF and then subsequently with the injunction to reset the
14 CLOs.

15 You know, these are -- these are some of the worst-
16 performing CLOs in the market because they weren't reset. And
17 when the liabilities of the CLOs are set at a level to match
18 assets, and then liability -- the assets run off, and the
19 asset financings or the new deals come in at much lower
20 levels, and the obligations of the CLO are not reset, the
21 arbitrage that is the CLO shrinks. And that's what happened
22 to these CLOs.

23 Q And during the course of the Acis bankruptcy, Acis and
24 Brigade were given management responsibilities over the CLOs
25 and HCLOF, correct?

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Seery - Cross

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1 A I believe that the Trustee had the overall, and then
2 subsequently, with the confirmation of the plan, they took it
3 over. So I think that ultimately Mr. Terry had the management
4 authority, full management authority, and some advice through
5 Brigade. But I think technically it wasn't actually during
6 the Chapter 7. The Chapter 7 proceeding, I believe that Mr.
7 Phelan had the actual authority.

8 (Echoing.)

9 Q I'm sorry. And so your testimony is that Mr. Phelan had
10 the actual authority but he delegated that authority to Josh
11 Terry and Brigade?

12 A I think that's fair, yes.

13 Q And do you know when that occurred?

14 A I believe that the control of the CLOs was in July of
15 2018, and then the ultimate confirmation of the case was at
16 the very beginning of '19.

17 Q So, after being instituted as portfolio manager, and
18 during the time when Acis and Brigade were working under the
19 direction of the Trustee, who would have receive the fees for
20 managing those portfolios?

21 A I believe -- I don't know. I believe the -- that the Acis
22 estate would have received those fees.

23 Q And who -- and so is that your testimony, that prior to
24 confirmation the Acis estate would have received the
25 management fees?

004177

Seery - Cross

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1 A I believe that -- I believe they would have if they were
2 the manager, yeah.

3 Q Okay. And who would have received the fees after
4 confirmation?

5 A Acis.

6 Q Okay. And who would have had the discretion to set the
7 amount of those management fees?

8 A They would be agreed to in the -- in the investment
9 management agreement.

10 Q They would be agreed to?

11 A Yes. As far as I've seen, I've -- I haven't seen
12 unilateral ability of a manager to set fees at its -- at its
13 whim.

14 Q So is it your understanding that Acis and Brigade ended up
15 charging substantially more fees than Highland had charged
16 when it was under Highland's management?

17 A I think the fees were -- the fees were -- the fees were
18 set by the agreement.

19 MR. MORRIS: Your Honor, I just object to the line of
20 questioning on relevance grounds. This is a 9019 hearing,
21 Your Honor. How -- I just don't think this has any relevance
22 at all.

23 THE COURT: All right. Mr. Wilson, what is the
24 relevance?

25 MR. WILSON: The relevance is that Mr. Seery has

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Seery - Cross

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1 testified that these Acis CLOs were among the worst-performing
2 in the market, and frankly, we would agree with that, and I'm
3 trying to get his understanding as to why, because I think
4 there's direct relevance in the reason that the value of the
5 HarbourVest investment diminished.

6 MR. MORRIS: I don't think that was his testimony,
7 Your Honor. But at the end of the day, Your Honor has heard
8 the litany of reasons why the Debtor is entering into this
9 agreement. I just, I just think it's irrelevant, Your Honor.

10 THE COURT: All right. Mr. Wilson, I barely think
11 this is relevant. I mean, I'm going to give you some benefit
12 of the doubt on that because of, you know, the testimony that
13 HarbourVest lost \$50 million of value and --

14 (Echoing.)

15 THE COURT: -- maybe that shouldn't, you know, lie at
16 the feet of Highland. I think the compromise reflects that
17 they don't -- it doesn't lie entirely at the feet of Highland.
18 But, you know, maybe two or three more questions.

19 MR. WILSON: Yes. Thank you, Your Honor. And I
20 didn't have very much more on this point. But to be a hundred
21 percent honest, I can't remember my question right before the
22 objection.

23 THE WITNESS: I think you were asking me about the
24 fees and somehow alluding or implying that the manager could
25 unilaterally set fees.

004179

Seery - Cross

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1 The fees are set in the investment management contract.
2 The manager doesn't get to wake up on Wednesday and say, you
3 know, I'd like another half a basis point. It doesn't work
4 that way.

5 BY MR. WILSON:

6 Q But you would agree with me that the fees and expenses
7 charged to an investment would impact the performance of that
8 investment in the market?

9 A Absolutely.

10 Q Would you also agree with me that there was one CLO -- and
11 I think you referred to it in your direct testimony -- but CLO
12 7, which continued to be managed by Highland?

13 A That's correct.

14 Q And is it fair to say that CLO 7 exceeded the performance
15 of the CLOs that were managed by Acis and Brigade?

16 A I think that's fair. I don't -- I don't recall the
17 magnitude, but I think it's outperformed those -- those CLOs,
18 yes.

19 Q All right. Well, thank you. I want to turn your
20 attention to the portion of the settlement agreement that
21 deals with voting of the HarbourVest claim. How did
22 HarbourVest's commitment to vote for the plan become a part of
23 the settlement?

24 A Pretty straightforward negotiation. We -- in negotiating
25 the settlement, one of the key factors was the cost and

Seery - Cross

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1 expense of the litigation, in addition to the risk on the --
2 on the fees, and whether we could wrap this up in a global
3 settlement now. So in my experience, it's fairly typical, we
4 would try to do this in every settlement, have the settling
5 party, be that the claimant, agree to support the case and the
6 plan.

7 You know, we did not do that with the Committee members,
8 although we wanted to. (Echoing) I frankly still wish I had.
9 Those little -- little bits that have been difficult
10 (echoing). The Committee members have a different interest in
11 (echoing) than their more global interest for creditors at
12 large, which is more difficult than traditionally in
13 bankruptcy cases, less likely to have a Committee member, a
14 sitting Committee member, actually support the (echoing) of
15 the plan.

16 THE COURT: Mr. Wilson, could you be careful to put
17 your device on mute every time you're not talking? Because
18 we're getting some feedback loop from you when Mr. Seery
19 answers your questions. Okay?

20 (Echoing continues.)

21 THE COURT: Like right now. I'm hearing feedback of
22 my own voice through your speakers.

23 Right, Mike? Isn't that what --

24 A VOICE: I am, too.

25 THE COURT: Yes. Okay. So please be sure you put

004181

Seery - Cross

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1 your device on mute whenever you are not speaking. All right.

2 Go ahead.

3 BY MR. WILSON:

4 Q I mean, I think you just answered this question, but there
5 was -- there was no similar voting provision in the Acis or
6 the Redeemer settlements, correct?

7 A There is not, no. And just as a -- by way of explanation,
8 if it's okay, the reason was my counsel advised against it. I
9 did ask for it.

10 Q Your counsel advised against putting that voting
11 requirement in the Acis and Redeemer settlements?

12 A For the reasons I stated. And in my experience, that's
13 consistent, where sitting members of Committees don't
14 generally sign up to resolve their own claims and support the
15 plan because of their larger fiduciary duties to the creditor
16 body as a whole.

17 Q And during the settlement negotiations of the HarbourVest
18 claim, was this commitment to vote a topic of discussion?

19 A Not -- not particularly, no. It was pretty clear that
20 HarbourVest, if they were going to agree to the settlement and
21 the numbers, could see structure. Obviously, it wanted to
22 understand what the potential distributions would be under the
23 plan, but this was not a hotly-negotiated point.

24 Q And would you consider HarbourVest's commitment to vote
25 for the plan an important part of the settlement?

004182

Seery - Cross

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1 A I think it's an important part of the settlement, that the
2 part of the settlement is the subordinated claim. We could
3 put that into presumably any plan. But our plan does -- does
4 have a Class 9 for that. So I think it's a -- it's a part of
5 the settlement that is important or we wouldn't have included
6 it. It clearly wraps everything up and moves us towards
7 confirmation.

8 Q And would you have made the deal with HarbourVest if they
9 had pushed back on the commitment to vote for the plan?

10 A Yeah, I would have.

11 Q All right. Thank you.

12 MR. WILSON: No further questions.

13 THE COURT: All right. Mr. Draper, anything from
14 you?

15 MR. DRAPER: Yes, Your Honor.

16 CROSS-EXAMINATION

17 BY MR. DRAPER:

18 Q Mr. Seery, I may not understand the settlement, and I
19 apologize, but the way I think the settlement reads, the
20 interest that you're acquiring, you have the right to place in
21 any entity. Is that my -- is that correct?

22 A I don't recall the -- the specifics, but just from a
23 structural standpoint, we wanted to be able to put it into a
24 subsidiary as opposed to putting it directly in HCMLP. If we
25 couldn't do that, we would -- we would put it into HCMLP. So

Seery - Cross

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1 there wasn't a -- I don't recall the actual specifics, but we
2 certainly thought about holding that interest in a -- in a
3 subsidiary, just to have a cleaner hold.

4 Q Why aren't you putting it into the Debtor so the Court and
5 the estate have jurisdiction over that?

6 A I think the Court certainly has jurisdiction over an
7 entity that the estate owns a hundred percent of. I don't
8 think that's -- that's even a close call. So the important --

9 Q Now, --

10 A Can I finish?

11 Q Sure.

12 A You asked me why. To the extent that somebody thinks that
13 problematic, I will consent to the Court having complete
14 jurisdiction over it, since I control it a hundred percent.

15 Q No. The real reason is, if I remember correctly, Mr.
16 Dondero and Judge Lynn filed a motion to have some say or some
17 information as to sales by subsidiaries, and I think you took
18 the position that they weren't entitled to it. And so my
19 concern was that putting this in a subsidiary in a sense gave
20 you unfettered control without any review of the item.

21 A I don't -- I don't think that's the case where we --
22 there's a directly-held subsidiary where we own a hundred
23 percent of it. I don't think that that's the case.

24 Q Okay. But you're willing to (a) put this into the Debtor,
25 number one; and number two, have the estate and have the Court

Seery - Cross

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1 have complete control over the disposition of it and its
2 actions, correct?

3 A That's not correct, no.

4 Q What -- what is incorrect about my statement?

5 A The debtor-in-possession has control of its assets. The
6 Court doesn't have complete control over its assets. There's
7 --

8 Q Well, --

9 A -- issues -- hold on a second. This is not -- this is not
10 a game and a trap. We put it in a subsidiary for specific
11 reasons. You asked why. I'm giving you the why. It's not to
12 hide it from anybody. We're not going to sell the asset
13 unless somebody comes up with a great price for it. We're
14 going to monetize the assets. We're going to control HCLOF by
15 a majority.

16 Q But, again, the issue is, if it's in the estate, the Court
17 has supervision over it. If it's not in the estate, the Court
18 has no supervision of it.

19 A I don't think that's correct, because the Court has
20 supervision over the estate, which owns a hundred percent of
21 the special-purpose entity that will own the shares.

22 Q Okay. All right. Now, let's talk about the \$15 million
23 that you discussed and the legal fees that were incurred. Is
24 that the total amount that was spent, or is -- or is that --
25 was the total amount \$30 million and HarbourVest was only

Seery - Cross

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1 responsible for one half of it or functionally took the brunt
2 of one half of it?

3 A I think the total amount is between \$15 and \$20 million.
4 I don't have the exact numbers.

5 Q So, in fact, the HarbourVest loss due to its ownership
6 would have been one half of that, not \$15 million?

7 A Well, the vehicle lost the money. HarbourVest owned 49.98
8 percent of it, and Highland controlled the rest. So if you
9 allocate it that way, I suppose that would be a -- that's how
10 you would divide it, in -- roughly in half, yes.

11 Q And so HarbourVest's actual dollar loss due to the legal
12 fees is really the 49-point-whatever percent of \$15 million,
13 not \$15 million?

14 A I don't know if -- I certainly would argue that. I don't
15 think that HarbourVest has that position.

16 Q Okay. Now, in connection -- you were asked a question
17 about the documentation that was provided by Highland to
18 HarbourVest both during the bankruptcy of Acis and before.
19 You have control over the Harbour -- over the Highland server,
20 correct?

21 A I'm sorry. Can -- can we do two things? One is, Mr.
22 Draper, I can't see you, so it would be better if I could see
23 you during the questioning.

24 Q Okay.

25 A And could you repeat the question?

Seery - Cross

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1 Q All right. I'll be happy to. You were asked a question
2 about the documentation that was provided by Highland to
3 HarbourVest during the Acis bankruptcy and meetings that took
4 place between the parties. Correct?

5 A Yes.

6 Q And you stated you were unaware of the material that was
7 sent over?

8 A I think I testified that I didn't receive the 40,000
9 documents that were mentioned.

10 Q Did you do any search or order a search of the Highland
11 server to see what material was sent over by any party to
12 HarbourVest to analyze what -- what information they had
13 available to them and what was provided to them?

14 A Yes, we did a search.

15 Q And did you review the documentation that was sent over?

16 A The -- the documentation that we looked at was very
17 specific to the investment and to the OM. So we didn't look
18 for the -- the supposed 40,000 documents, no.

19 Q Did you look for the material that was provided to them
20 during the Acis bankruptcy and the periodic meetings that you
21 discussed? Or that you testified to earlier?

22 A The answer is no.

23 Q One last question. I think, and just so I understand your
24 testimony, you've broken out the HarbourVest claim into two
25 pieces. One is the legal fee amount that we've just

Seery - Cross

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1 discussed, and I gather the other piece of that is the fraud
2 in the inducement to enter into the CLO purchase?

3 A It's -- it's more -- it's much more than that.

4 Q Okay. Well, let me say it in a different way. The other
5 part of it is the losses as a result of the fraud in the
6 inducement to purchase the interest?

7 A I don't think that's -- that's fair. If I could explain?

8 Q Sure.

9 A Yeah. The legal fee piece is pretty clear. The other
10 piece starts with fraud in the inducement, but it's extensive
11 fraud claims. Fraud in the inducement, as I testified
12 earlier, would get them around the exculpation and liability
13 limitations in the OM. You don't get around all of those with
14 just the fraud. And so that's -- that's the split of that
15 claim. So the fraud in the inducement contains fraud
16 allegations. Even if you didn't have inducement, you'd have
17 other potential fraud claims.

18 Q But let me state it in a different fashion. But for the
19 investment, the fraud that you allege wouldn't have occurred?

20 A I -- HarbourVest alleges it.

21 Q No, I'm just -- in your analysis of the claim, but for the
22 inducement, the rest of the damages wouldn't have flowed?

23 A That's HarbourVest's position, yes. But for the fraud,
24 they wouldn't have made the investment.

25 Q All right.

Seery - Redirect

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1 MR. DRAPER: I have nothing further for this witness.

2 THE COURT: All right. Any redirect, Mr. Morris?

3 MR. MORRIS: Just a few very questions, Your Honor.

4 Just a very few questions.

5 REDIRECT EXAMINATION

6 BY MR. MORRIS:

7 Q Mr. Seery, you were asked about that document that Lucy
8 prepared. Do you remember that?

9 A Yes, I do.

10 Q In your experience, don't defendants often deny liability
11 before entering into settlements, or even worse, getting
12 adverse judgments entered against them?

13 A Of course. Yes.

14 Q Okay. And in response to Mr. Draper's questions, isn't
15 the Guernsey claim another claim that the Debtor took into
16 account in assessing the potential risks of this settlement?

17 A There's a number of claims contained in it. As I
18 mentioned earlier, I mentioned the RICO claim. But there is a
19 Guernsey shadow director claim, which is not dissimilar to
20 U.S. claims that somebody effectively controls an enterprise,
21 notwithstanding them not having the official role.

22 Q Okay.

23 MR. MORRIS: I have nothing further, Your Honor.

24 THE COURT: All right. Any recross on that redirect?

25 All right.

Seery - Redirect

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1 MR. WILSON: No, Your Honor.

2 MR. DRAPER: No, Your Honor.

3 THE COURT: Thank you. Mr. Seery, that concludes
4 your testimony. Thank you.

5 THE WITNESS: Thank you, Your Honor.

6 THE COURT: We need to take a bathroom break. Before
7 we do, I just want to be clear with what we have left. As I
8 understood it, we were having Mr. Pugatch from HarbourVest.
9 Mr. Morris, will that conclude the Debtor's evidence?

10 (Pause.) Okay. You were on mute, but I think you were saying
11 yes.

12 MR. MORRIS: Sorry. But to be clear, Debevoise is
13 going to be putting their witness on the stand.

14 THE COURT: Okay.

15 MR. MORRIS: But it's part of the evidence in support
16 of the motion.

17 THE COURT: All right. Do the Objectors have any
18 witnesses today?

19 MR. WILSON: Your Honor, Mr. Dondero intends to
20 examine Mr. Pugatch, but if he's going to be called by his
21 counsel, then we will do that as a cross-examination.

22 THE COURT: All right.

23 MR. DRAPER: This is Douglas Draper. I have no
24 witnesses.

25 THE COURT: Okay. All right. Well, I'm asking --

1 well, I do want to ask: Can we get a time estimate
2 potentially for Mr. Pugatch?

3 MS. WEISGERBER: For my examination, Your Honor,
4 twenty minutes, perhaps.

5 THE COURT: Okay.

6 MS. WEISGERBER: Or less.

7 THE COURT: All right. Well, let me tell you what
8 we're going to do. We're going to take a ten-minute bathroom
9 break. But I have a 1:30 hearing and I have a 2:00 o'clock.
10 Well, I have a 1:30 docket, multiple matters, and a 2:00
11 o'clock docket. So, you know, I'm really intending that we
12 get finished in time to give me and my staff a little bit of a
13 lunch break before launching into the 1:30 docket, so I'm
14 hopeful we can get done around 1:00-ish. If we can't, then
15 we're going to have to reconvene, I'm going to say probably
16 3:00-ish Central time. So let's hope we can get through
17 everything. All right? Ten-minute break.

18 THE CLERK: All rise.

19 (A recess ensued from 11:58 a.m. until 12:08 p.m.)

20 THE CLERK: All rise.

21 THE COURT: All right. Please be seated. We're
22 going back on the record in the Highland matters. Do we have
23 everyone? It looks like we do. Ms. Weisgerber is going to
24 call the next witness; is that correct?

25 MS. WEISGERBER: Yes, Your Honor. We call Michael

Pugatch - Direct

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1 Pugatch of HarbourVest to the stand.

2 THE COURT: All right. Mr. Pugatch, if you could
3 turn on your video and say, "Testing one, two."

4 MR. PUGATCH: Two.

5 THE COURT: All right. There you are. Please raise
6 your right hand.

7 MICHAEL PUGATCH, HARBOURVEST'S WITNESS, SWORN

8 THE COURT: Thank you. You may proceed.

9 MS. WEISGERBER: Thank you, Your Honor.

10 DIRECT EXAMINATION

11 BY MS. WEISGERBER:

12 Q Good morning. Can you please state your name for the
13 record?

14 A Sure. It's Michael Pugatch.

15 Q And where do you work, Mr. Pugatch?

16 A HarbourVest Partners.

17 Q And what is your title?

18 A I'm a managing director in our secondary investment
19 group.

20 Q Did HarbourVest file claims in the Highland bankruptcy,
21 Mr. Pugatch?

22 A We did, yes. Several claims, in fact.

23 Q What was the basis for those claims?

24 A Yeah. Among other things, fraudulent inducement based on
25 misrepresentations and omissions on the part of Highland in

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1 connection with our original investment, mismanagement at the
2 HCLOF level, including inappropriate fees that were charged
3 to investors, among a number of other items as well.

4 Q Can you explain what you mean by misrepresentations made
5 to HarbourVest by Highland?

6 A Yeah, sure. So, you know, based on a number of
7 statements that were made to us around the litigation
8 involving Mr. Terry, some of the intentions found, the
9 structural changes that came to light with respect to HCLOF
10 and our investment, as well as the fact that the arbitration
11 award specifically against Mr. Terry would have no impact or
12 implication on Highland's sale or business.

13 Q And can you explain what you mean by omissions made by
14 Highland to HarbourVest?

15 A Sure. So I would say, really, the implications behind
16 the structural changes that were made at the time of our
17 investment into HCLOF. Also, the intention, clear intentions
18 that Highland had to never, in fact, pay the arbitration
19 award that came to light during our due diligence period to
20 Mr. -- to Mr. Terry as part of the investment. And
21 ultimately the -- what Highland went about doing in terms of
22 stripping assets of Acis that led to the material value
23 declines and destruction of value that we've experienced
24 since our investment.

25 Q You mentioned a diligence period. Did HarbourVest

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1 conduct diligence on the investment?

2 A We did. We conducted very detailed due diligence, as we
3 do for all of our investments. That diligence period lasted
4 several months ahead of our investment decision.

5 Q And did HarbourVest conduct that diligence by itself?

6 A No. So, in addition to internal investment professionals
7 at HarbourVest, we engage with outside advisors, both
8 consultants as well as legal advisors, in connection with
9 that due diligence.

10 Q And did Highland answer all of HarbourVest's questions
11 during that diligence period?

12 A They did. And they were numerous. But yes, they
13 answered all the questions that we had for them.

14 Q Was the Terry dispute part of HarbourVest's diligence?

15 A It was. That came up as one of the outstanding items of
16 litigation as part of our due diligence.

17 Q I'm going to ask my colleague to pull up on the screen an
18 exhibit that was on our exhibit list as Items -- Exhibits 34
19 and 35. It's an August 15, 2017 email from Brad Eden to
20 Dustin Willard. Mr. Pugatch, do you recognize this document?

21 A I do, yes.

22 Q And what is it?

23 A This was an email sent to us during our due diligence
24 period in response to a request for more information on the
25 outstanding litigation that Highland was involved with.

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1 MS. WEISGERBER: And if my colleague can just scroll
2 to the attachment to that email.

3 BY MS. WEISGERBER:

4 Q And do you recall the attachment as well, Mr. Pugatch?

5 A Yes, I do.

6 MS. WEISGERBER: And if you can scroll back up to the
7 first email.

8 BY MS. WEISGERBER:

9 Q Who is Dustin Willard?

10 A Yes. Dustin is a colleague of mine at HarbourVest who
11 worked closely with me on this investment.

12 Q And you said that this document was shared with
13 HarbourVest during the diligence period before the HCLOF
14 investment?

15 A It was, correct.

16 Q Is it typical during diligence to receive a description
17 of litigation such as this?

18 A It is. It's a question that we always ask. Certainly a
19 component of our diligence to understand any outstanding
20 litigation on the part of our counterparty or manager that
21 we're investing in.

22 MS. WEISGERBER: Your Honor, I'd move to offer this
23 exhibit into evidence.

24 THE COURT: Any objection?

25 MR. DRAPER: No objection, Your Honor.

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1 MR. MORRIS: No objection from the Debtor, Your
2 Honor.

3 THE COURT: All right. What is the letter or number
4 for this exhibit?

5 MS. WEISGERBER: It's HarbourVest Exhibit 34.

6 THE COURT: All right. So HarbourVest Exhibit 34 is
7 admitted.

8 (HarbourVest's Exhibit 34 is received into evidence.)

9 THE COURT: And I need to be clear where it appears
10 on the docket. Can someone tell me?

11 MS. WEISGERBER: So, it's identified on our exhibit
12 list, not -- it's not attached to the exhibits. It is on the
13 docket. We were -- when we initially filed the exhibit list,
14 we were working out confidentiality issues. But it was
15 subsequently filed with our reply last night. It's at **Docket**
16 **No. 1735** --

17 THE COURT: All right.

18 MS. WEISGERBER: -- at Pages A -- Pages A345 to A350.

19 THE COURT: All right. Very well. Thank you.

20 BY MS. WEISGERBER:

21 Q Mr. Pugatch, we'll just scroll down to the second page of
22 the attachment. Can you describe generally what the
23 litigation says regarding the Terry dispute?

24 A Yes. Generally speaking, this dispute was described as
25 an employee dispute, employment agreement dispute, with Mr.

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1 Terry, who was a former employee of Highland involved in
2 their CLO business, and is described by Highland to us really
3 having to do with a series of false claims, in their opinion,
4 but having to do with a disgruntled former employee.

5 Q And did it strike you as an unusual or significant
6 dispute?

7 A No. I would say we often -- we'll see, you know, former
8 employees with, you know, claims against a former employer in
9 connection with wrongful termination. I wouldn't say it's
10 extremely common, but certainly not entirely out of the
11 ordinary. And based on the explanations that we'd received
12 from Highland, seemed to be more of an ordinary-course type
13 former employee litigation suit.

14 Q Based on what you now know about the Terry dispute, do
15 you believe that this was an adequate disclosure regarding
16 the dispute?

17 A I would say very clearly not, you know, based on the
18 facts that came to light subsequently, the various rulings in
19 connection with the Acis bankruptcy case. What was very
20 clearly not stated are the actual facts and implications of
21 the ongoing litigation with Mr. Terry.

22 MS. WEISGERBER: I'd ask my colleague to put up the
23 next exhibit. Okay. So, this is on a HarbourVest exhibit
24 list, which is Document No. 1723. It's Exhibit 36 on that.
25 Same issue with respect to initially not filed, but it is on

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1 the docket at our response last evening at ECF No. 1735 at
2 Page A351.

3 THE COURT: Page what?

4 MS. WEISGERBER: A351.

5 THE COURT: A351. Thank you.

6 MS. WEISGERBER: You're welcome.

7 BY MS. WEISGERBER:

8 Q Mr. Pugatch, I just put up a November 29, 2017 email from
9 Hunter Covitz to Dustin Willard, Michael Pugatch, and Nick
10 Bellisario. Do you recall this document?

11 A I do, yes.

12 Q And what is this document?

13 A This was an email sent to us by Highland a couple weeks
14 after we closed on our investment on the (inaudible) in
15 response to a *Wall Street Journal* article that had come out
16 regarding Highland, a number of actions that they had taken,
17 and what Highland was articulating to us, a number of false
18 claims that had been made about Highland's prior actions, and
19 specifically trying to explain some of that and also share
20 with HarbourVest a letter that was being sent to the editor
21 of the *Wall Street Journal* highlighting, in their view, some
22 of the inaccuracies around the reporting.

23 Q And did you receive this document?

24 A We did, yes.

25 MS. WEISGERBER: I'd move to offer this, so

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1 HarbourVest Exhibit 36, into evidence.

2 THE COURT: Any objections?

3 MR. WILSON: Your Honor, John Wilson. I would object
4 as to the relevance of this document.

5 THE COURT: All right. What's your response?

6 MS. WEISGERBER: Your Honor, it shows
7 misrepresentations that the witness will testify how it
8 relates back to prior representations prior to HarbourVest's
9 investment, as well as misrepresentations at that time.

10 THE COURT: Okay. I overrule the objection. I'm
11 going to admit it.

12 (HarbourVest's Exhibit 36 is received into evidence.)

13 BY MS. WEISGERBER:

14 Q Mr. Pugatch, can you describe generally -- we spoke about
15 this a little bit -- just what this communication from
16 Highland was conveying to HarbourVest at the time?

17 A Yes. Specifically, again, responding to this *Wall Street*
18 *Journal* article that had been published, trying to defend,
19 again, Highland's own views why there were inaccuracies in
20 the reporting. But importantly, from our perspective, trying
21 to reassure us as to the fact that, you know, these
22 accusations would have no bearing and any results from it
23 would have no bearing on their ongoing business or
24 partnership or the investment that we had made in HCLOF.

25 MS. WEISGERBER: And if you can scroll to the second

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1 page.

2 BY MS. WEISGERBER:

3 Q We'll just look at the last paragraph of another email
4 from Mr. Covitz. Can you just read that first sentence of
5 the last paragraph?

6 A Sure. (reading) While the dispute has no impact on our
7 investment activities, as always, we welcome any questions
8 you may have.

9 Q Mr. Pugatch, was this email and the discussion regarding
10 the Terry dispute consistent with the representations made to
11 you prior to HarbourVest's investment into HCLOF?

12 A It was, yes. Both the message, the lack of any impact
13 that ultimately the dispute with Mr. Terry, the arbitration
14 award would have around Highland's ongoing CLO business, or
15 HCLOF specifically, was all, you know, very clear in this
16 document, but all consistent with the representations that
17 had been made to us leading up to our investment in the
18 middle of November 2017 as well.

19 Q Thank you.

20 MS. WEISGERBER: And you can take down the exhibit,
21 Emily. Thank you.

22 BY MS. WEISGERBER:

23 Q You mentioned, Mr. Pugatch, an arbitration award to Mr.
24 Terry. How did you learn about that arbitration award?

25 A That was initially disclosed to us by Highland as we were

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1 in the late stages of our diligence and closing process on
2 the investment into HCLOF.

3 Q And generally, what did Highland tell you about the
4 arbitration award?

5 A We were aware of its existence. We were aware of the
6 quantum of the award, I think it was around an \$8 million
7 arbitration award in the favor of Mr. Terry, and that was
8 following the litigation around the wrongful termination and
9 employee dispute that Highland had described to us
10 previously.

11 Q Did you ask to see a copy of the arbitration award?

12 A No, we did not.

13 Q Why not?

14 A Ultimately, we -- you know, the explanations that
15 Highland had provided to us all seemed very reasonable. We
16 relied on their representations that this was, again, nothing
17 more than a dispute with a former disgruntled employee, in
18 their words, that had no bearing or, you know, would not have
19 any bearing on our investment in HCLOF or their ongoing CLO
20 business, which all very clearly was not the case, as
21 we've -- as we've learned over the last several years.

22 Q Following learning about the arbitration award, did
23 HarbourVest do other diligence?

24 A We did. So, in addition to asking questions related to
25 the arbitration award and any impact that it would have, we

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Pugatch - Direct

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1 also spent some time diligencing a couple of structural
2 changes that were proposed by Highland, and, in fact, ended
3 up delaying the closing of our investment by about two weeks
4 as we vetted some of those structural changes that Highland
5 had proposed. Vetted those both, you know, internally with
6 Highland directly and with external counsel in order to make
7 sure that those structural changes were in fact legally sound
8 in ultimately making our investment.

9 Q And were those changes proposed following the arbitration
10 award?

11 A They were, yes.

12 Q Did Highland tell you the reason for the structural
13 changes?

14 A Yeah. So, so some of this -- and specifically, this
15 involved a change of the portfolio manager at the HCLOF level
16 that was really in connection with a rebranding as Highland
17 was going through a rebuild of its CLO business and wanting
18 to align, from a brand perspective, their business on an
19 ongoing basis with the Highland brand as opposed to the Acis
20 brand. But more specifically, in the case of a late change
21 from a structured standpoint, the -- part of the intention
22 and the investment thesis of HCLOF was to pursue a reset, a
23 refinancing of all the underlying CLOs as they approached the
24 end of their investment period or came out of their
25 investment period.

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Pugatch - Direct

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1 And in connection with that, in light of the arbitration
2 award, Highland's view was that there may be difficulties in
3 the market in resetting certain of those Acis CLOs with the
4 Acis brand associated with them, given, again, the existence
5 of the arbitration award and concerns in the market around
6 the Acis brand reputation.

7 Q And what did they tell you was the market view of Acis,
8 or the Acis brand?

9 A Yeah. Their view or their concern was that the, you
10 know, because of the existence of that arbitration award, the
11 brand would be viewed as toxic.

12 Q Didn't this put you on notice that perhaps there was
13 something wrong with the structural changes?

14 A I mean, we -- I mean, short answer, no. We ultimately
15 asked questions, we diligenced the legal structure, but
16 relied on the representations that were made to us by
17 Highland around the rationale for the structural changes,
18 that these are all changes that were within a Highland-
19 managed vehicle or sat below the vehicle that we were
20 investing in, and so ultimately were in Highland's purview,
21 was the representations that we relied on.

22 Q And did HarbourVest alone do that diligence of the
23 structural changes?

24 A So, no. I mean, in connection with the diligence that we
25 did internally and with Highland directly, we engaged with

004203

Pugatch - Direct

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1 outside counsel who was working with us at the time to vet
2 those structural changes as well.

3 Q Did HarbourVest rely on Highland's representations
4 regarding the arbitration award and the structural changes in
5 making its investment in HCLOF?

6 A We did, absolutely.

7 Q If Highland had disclosed the nature of the structural
8 changes, of removing Acis as the portfolio manager and
9 related transfers, would HarbourVest have proceeded with its
10 investment?

11 A Definitively, no, we would not have.

12 Q Why not?

13 A I think the reality is if we had understood the intent,
14 you know, that Highland was ultimately undertaking here, we
15 would not have wanted to be any part of this, and certainly
16 getting dragged into all of this, the hassle, the value
17 destruction that we've seen on behalf of the investors and
18 the funds that we manage. And I would say, lastly, we just
19 full stop would not have done business with a firm who
20 engages with this type of behavior, had we actually known the
21 truth.

22 Q Mr. Pugatch, are you familiar with the bankruptcy that
23 followed of Acis?

24 A Yes.

25 Q And what was your -- or, did HarbourVest participate in

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Pugatch - Direct

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1 that bankruptcy?

2 A So, initially, no. Subsequently, we ended up getting
3 dragged into that on account of a number of misstatements by
4 Highland about the role that HarbourVest had played as part
5 of our investment into HCLOF and some of that structure and
6 the structural changes that I alluded to.

7 Q How did HarbourVest learn about those misstatements in
8 the bankruptcy about HarbourVest's role?

9 A So, ultimately, those came to light on -- you know, on
10 account of the ongoing proceedings within the Acis bankruptcy
11 process, and specifically brought to light to us by the Acis
12 trustee at the time, who decided to pursue, you know, further
13 diligence or discovery around the claims that Highland had
14 made around HarbourVest's involvement in those changes.

15 Q And what is your understanding of what the allegations
16 were that caused the Acis trustee to investigate HarbourVest?

17 A Sure. So, you know, our understanding was that Highland
18 had made statements, again, false statements that HarbourVest
19 had actually instructed some of those structural changes,
20 that we were the ones that had said that we would not do
21 business with Acis and had ordered some of the underlying
22 transfer of assets or, again, structural changes, that, you
23 know, very clearly I would say were not the case. Also, that
24 HarbourVest was -- was calling the shots as it relates to any
25 of the ongoing management or future resets of the CLOs.

Pugatch - Direct

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1 Q Did HarbourVest instruct any of those structural changes
2 or transfers to occur?

3 A We did not. Absolutely not.

4 Q Why didn't HarbourVest itself appear in the Acis
5 bankruptcy and file a claim?

6 A Yeah. HarbourVest's role, again, in HCLOF, we were a
7 passive investor in a Highland-managed company. We had no
8 direct interaction with or relationship with Acis. There was
9 really no reason for us to be directly involved until we were
10 subsequently dragged into involvement on account of those
11 misstatements. And then at that point our focus really
12 pivoted to, you know, whether we needed to defend ourselves
13 against those accusations that had been made by Highland and
14 after a request for further information in discovery by the
15 Acis trustee.

16 Q Did HCLOF participate in the Acis bankruptcy?

17 A They did, yes.

18 Q Did HCLOF incur fees for participating in the Acis
19 bankruptcy?

20 A Yes. In fact, very meaningful fees, to the tune of well
21 in excess of \$15 million of legal fees, as we understand it,
22 that have been incurred, largely in connection with the
23 ongoing Acis bankruptcy and Highland's continued pursuit of
24 and in connection with the litigation with Mr. Terry, which
25 we firmly believe was entirely inappropriate that HCLOF and

Pugatch - Direct

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1 ultimately investors in HCLOF bear those expenses, which were
2 not just expenses of HCLOF but of Highland and a number of
3 other Highland affiliates.

4 Q Do those expenses form a basis of separate claims filed
5 by HarbourVest against Highland?

6 A They do, yes. One of the multiple claims that we had
7 filed against Highland.

8 Q And a few more questions, just for the record, Mr.
9 Pugatch. How much did HarbourVest initially invest in HCLOF?

10 A Sure. So, our initial investment in November of 2017 was
11 right about \$73-1/2 million, I believe.

12 Q Did HarbourVest invest any additional money in HCLOF?

13 A We did. There was a subsequent capital call investment
14 of about \$5 million, bringing our total investment to just
15 under \$80 million in aggregate.

16 Q When HarbourVest initially made the investment, did it
17 anticipate making a profit on it?

18 A We did, yes.

19 Q How much did HarbourVest anticipate earning from the
20 investment?

21 A Yeah. So, our -- based on the original \$73-1/2 million
22 investment, we had expected a total return of about \$137
23 million on that -- on that investment.

24 Q What was that projection based on?

25 A So, that projection was based on materials that we had

004207

Pugatch - Direct

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1 received from Highland, their internal projection models on
2 the future performance of the underlying CLOs that we were
3 acquiring exposure to through our investment in HCLOF, and
4 was one of the inputs or formed the basis in connection with
5 our diligence that we ultimately ran different sensitivities
6 -- projections around and helped employ -- helped inform our
7 investment thesis.

8 Q Do you know the current value of HarbourVest's investment
9 in HCLOF?

10 A Yes. The current value is right around \$22-1/2 million.

11 Q So roughly how much has the investment itself decreased
12 from HarbourVest's initial investment?

13 A So, net of what was about \$4-1/2 million of distributions
14 that we received early on in the investment, we've lost, to
15 date, in excess of \$50 million on our original investment.

16 Q And just for -- to close out, Mr. Pugatch, knowing all
17 that you know, if HarbourVest had known that -- about the
18 nature of the transfers by Acis or Highland's intent with
19 respect to the arbitration award, would HarbourVest have made
20 this investment?

21 A No. The reality is, had we known the truth, or even had
22 a sense of the truth, the true intentions behind some of
23 those transfers and ultimately what would have happened, we
24 never would have made this investment, full stop.

25 Q Thank you, Mr. Pugatch.

Pugatch - Cross

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1 THE COURT: All right. I didn't hear you, Ms.
2 Weisgerber. Do you pass the witness?

3 MS. WEISGERBER: Yes, I pass the witness.

4 THE COURT: All right. Thank you.

5 Mr. Morris, any examination from you?

6 MR. MORRIS: No, thank you, Your Honor.

7 THE COURT: All right.

8 (Interruption.)

9 THE COURT: All right. I'm not sure whose voice that
10 was, but please, again, mute your devices when you're not
11 talking.

12 Any cross-examination of Mr. Pugatch? I'll start with
13 you, Mr. Wilson.

14 MR. WILSON: Yes, Your Honor.

15 THE COURT: Okay.

16 CROSS-EXAMINATION

17 BY MR. WILSON:

18 Q How are you -- I guess we're afternoon now. How are you
19 this afternoon, Mr. Pugatch?

20 A I'm doing well. Yourself?

21 Q I'm doing well as well. Do you recall that on Monday of
22 this week I took your deposition?

23 A Yes, I do.

24 Q And so you understand that my name is John Wilson and I
25 represent Jim Dondero, who has filed an objection to the 9019

004209

Pugatch - Cross

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1 motion filed by the Debtor?

2 I've got a few questions for you today. Has HarbourVest
3 been around for over 35 years?

4 A We have, yes.

5 Q And does HarbourVest have ten offices around the world?

6 A Correct, yes.

7 Q And does HarbourVest employ over 150 investment
8 professionals?

9 A Yes.

10 Q Does HarbourVest have over \$74 billion in assets under
11 management?

12 A Correct, yes.

13 Q And is HarbourVest's client base largely comprised of
14 institutional investors?

15 A Also correct.

16 Q And you would agree with me that HarbourVest is a
17 sophisticated investor, right?

18 A I would, yes.

19 Q How long have you worked for HarbourVest?

20 A I've been employed by HarbourVest for 17 years now.

21 Q And how long have you been a managing director?

22 A I've been a managing director for approximately six
23 years.

24 Q And you were, in fact, the managing director for the
25 investment that HarbourVest made in Highland CLO Funding,

004210

Pugatch - Cross

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1 Ltd., which has been referred to today as HCLOF, correct?

2 A I was, correct.

3 Q And HarbourVest, I think you just testified, invested
4 approximately \$73 million as its initial investment in HCLOF?

5 A Yes, correct.

6 Q And before HarbourVest made that investment, it had made
7 many investments of this type, correct?

8 A Yeah. We've made hundreds of investments into
9 partnerships over our history, correct.

10 Q So HarbourVest was well-experienced in evaluating and
11 deciding whether to invest in large investments, correct?

12 A It was, yes.

13 Q Now, in your -- and by your, I mean HarbourVest -- in the
14 response to the Debtor's omnibus objection, it says that by
15 summer 2017 HarbourVest was engaged in preliminary
16 discussions with Highland regarding the investment. Is that
17 a correct statement?

18 A Correct, yes.

19 Q And, in fact, those talks began in the second quarter of
20 2017, correct?

21 A Yes.

22 Q And so the investment closed ultimately on November 15th,
23 2017?

24 A Yes, that's correct.

25 Q So it's fair to say that HarbourVest considered and

004211

Pugatch - Cross

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1 evaluated this transaction for over six months before
2 investing its \$73 million, right?

3 A From the time of the initial conversations that we had
4 with Highland, yes.

5 Q And one of the reasons that it took over six months to
6 complete the investment is that HarbourVest performs due
7 diligence before it makes an investment, correct?

8 A Correct.

9 Q And when you're performing due diligence -- well, first
10 off, you would agree with me that that's a common practice
11 amongst sophisticated investors such as HarbourVest, correct?

12 A To perform due diligence?

13 Q Yes.

14 A Yes.

15 Q And describe -- describe what HarbourVest does in a
16 general sense when it performs its due diligence.

17 A Sure. So, we spend time with the manager -- in this
18 case, Highland -- certainly around the investment thesis, the
19 opportunity, receive materials around the underlying assets.
20 We take that and perform our own independent due diligence
21 around the value of those assets, perform due diligence on
22 the manager itself, the go-forward opportunity. In many
23 cases, and certainly in this case, engage with outside
24 advisors to assist with that due diligence. It's a very
25 robust and thorough process.

004212

Pugatch - Cross

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1 Q And by outside advisors, are you referring to the outside
2 counsel that you testified about earlier?

3 A Yes. Both outside counsel and outside consultants.

4 Q Okay. And so did you say that it's typical to engage
5 outside counsel when performing due diligence?

6 A Yes.

7 Q And which outside counsel did you retain with respect to
8 this due diligence?

9 A Debevoise and Plimpton as well as Milbank.

10 Q And during the course of HarbourVest's due diligence, did
11 it identify some items of concern?

12 A As with any investment, there are always items that are
13 identified that require further diligence, risks that are
14 identified that we look to mitigate through our due
15 diligence, et cetera.

16 Q And if Harbour -- I'm sorry, did you say something else?

17 A No.

18 Q You were finished? Okay. Now, if HarbourVest identifies
19 an item of concern, is it typical to request additional
20 information regarding those items of concern?

21 A It is, yes.

22 Q And so that actually happened with respect to the HCLOF
23 investment, correct?

24 A In certain cases, yes.

25 Q HarbourVest identified several litigation matters that it

004213

Pugatch - Cross

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1 had questions about, correct?

2 A Correct. As we would with any investment.

3 Q And it went back to Highland and asked them to explain
4 their position on those litigation matters?

5 A Correct.

6 Q And one of those litigation matters was the Joshua Terry
7 litigation, correct?

8 A Yes.

9 Q And at the time that HarbourVest was considering this
10 investment, beginning in the second quarter and continuing
11 through the summer, that Josh Terry litigation had not
12 resulted in an award or a final judgment, correct?

13 A Correct.

14 Q And I think we looked earlier at a document that your
15 counsel admitted as HarbourVest Exhibits 34 and 35. There
16 was an email from a HarbourVest -- or, I'm sorry, from a
17 Highland representative to a HarbourVest representative that
18 was discussing Highland's position on the litigation,
19 including the Terry litigation, correct?

20 A Are you referring to the document that we looked at
21 earlier?

22 Q I am. And I can put it on the screen if we need to.

23 A No. Right, I recall that, and yes, that's correct.

24 Q Okay. And just to be clear, that document, which stated
25 Highland's positions on the -- and summaries of the

004214

Pugatch - Cross

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1 litigation, was issued months before the arbitration award to
2 Josh Terry, correct?

3 A I don't remember the exact timing, but it was certainly
4 during our due diligence period and prior to the arbitration
5 award, yes.

6 Q Well, it seems to me that that email that you -- your
7 counsel admitted as an exhibit was issued in August of 2017.
8 Does that sound right to you?

9 A If that's what the email said, yes.

10 Q And if the Terry arbitration award came out in October,
11 then you would agree with me that that is several months
12 prior to the -- or at least two months prior to the
13 arbitration award?

14 A Yes.

15 Q And so when HarbourVest made requests of Highland to
16 provide information regarding its items of concern, Highland
17 complied with those requests, correct?

18 A It did, correct.

19 Q And was there ever a time when HarbourVest requested
20 Highland to provide information and that information was not
21 provided?

22 A Our requests for information, or at least, you know,
23 responses or color to a question, were always met either
24 with, you know, written or verbal communication back to us,
25 yeah.

004215

Pugatch - Cross

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1 Q And you would agree with me that, in fact, HarbourVest
2 delayed the closing of the investment by two weeks to
3 continue its due diligence, correct?

4 A Correct, related to the structural changes that were made
5 close to closing. That's right.

6 Q And after conducting that due diligence, HarbourVest
7 satisfied itself that the investment was sound?

8 A That the legal structure that had been put in place in
9 connection with those proposed changes by Highland was -- was
10 legally sound, yes, and on the back of, again, statements and
11 misrepresentations on the part of Highland around the nature
12 and potential impact to their ongoing CLO business and HCLOF.

13 MR. WILSON: Well, I'm going to object to the latter
14 part of your response as nonresponsive.

15 THE COURT: Sustained.

16 BY MR. WILSON:

17 Q Now, after you conducted the due diligence, HarbourVest
18 made the investment of \$73 million on November 15th, 2017,
19 correct?

20 A Correct.

21 Q And so I think you testified earlier that prior to that
22 investment HarbourVest had become aware that that Josh Terry
23 litigation had resulted in an arbitration award, correct?

24 A Yes.

25 Q But I think you've also testified that HarbourVest did

004216

Pugatch - Cross

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1 not request that Highland provide a copy of the arbitration
2 award, correct?

3 A That's correct.

4 Q And you further testified that you were represented by
5 outside counsel at the time, correct?

6 A Correct.

7 Q And as of Monday of this week, you had not reviewed that
8 arbitration award; is that correct?

9 A That's correct.

10 Q Have you reviewed that arbitration award since Monday of
11 this week?

12 A I have not.

13 Q But in any event, you testified that Highland told you
14 about the award?

15 A Yes.

16 Q And they told you the amount of the award?

17 A Yes.

18 Q And then they told you that the award had been converted
19 to a judgment?

20 A When you say the award had been converted to a judgment,
21 can you be more specific?

22 Q Well, I don't know how familiar you are with the
23 litigation process, but in this instance, that award was
24 taken to a court and the court entered a judgment on the
25 arbitration award. Did you -- were you aware of that?

004217

Pugatch - Cross

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1 A I don't recall the specific legal terms of judgment
2 against it. I was award of the existence of the arbitration
3 award and the -- and the obligation for Highland to comply
4 with that arbitration award.

5 Q And HarbourVest did not make an appearance in the Acis
6 bankruptcy, right?

7 A We did not.

8 Q But you were aware of the Acis bankruptcy, correct?

9 A Yes.

10 Q And you were kept apprised of the Acis bankruptcy by
11 Highland individuals, correct?

12 A We had conversations with a couple of Highland
13 individuals throughout the Acis bankruptcy process, yes.

14 Q Right. And in fact, you testified that you participated
15 in regular conference calls with Highland regarding that
16 bankruptcy?

17 A That's correct, yes.

18 Q And do you recall having been provided with over 40,000
19 documents by Highland related to the Acis bankruptcy?

20 A I do not recall that, no.

21 Q Would those documents have been provided to your outside
22 counsel, had you received them?

23 A I don't know the answer to that.

24 Q Did the outside counsel that represented you in the due
25 diligence continue to represent you throughout the Acis

Pugatch - Cross

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1 bankruptcy?

2 A They did. One of the counsels did, correct.

3 Q And which counsel was that?

4 A Debevoise.

5 Q So was your counsel actively involved with monitoring the
6 Acis bankruptcy?

7 A They were, yes, particularly after we were ultimately
8 accused of having something to do with the original structure
9 and -- as a result of misstatements by Highland.

10 Q Did your counsel attend hearings in the Acis bankruptcy?

11 A I don't recall.

12 Q Are you familiar with the PACER system?

13 A I am not.

14 Q Now, I think that HarbourVest has been described as a
15 passive investor. You recall that description of HarbourVest
16 in this instance?

17 A Yes.

18 Q But, in fact, HarbourVest invested substantial assets
19 such that it owned a 49.98 percent share of HCLOF. Would you
20 agree with that?

21 A That's correct.

22 Q And in fact, the next largest investor was CLO Holdco,
23 which owned 49.02 percent of the shares, correct?

24 A That sounds right.

25 Q And there was an advisory board that was created pursuant

Pugatch - Cross

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1 to the formation documents of this investment, correct?

2 A That's correct.

3 Q And in fact, that advisory board only had two members,
4 and one was a representative of HarbourVest and one was a
5 representative of CLO Holdco, correct?

6 A Correct.

7 Q And the advisor -- I'm sorry, the portfolio manager was
8 not allowed to disregard the recommendations of the advisory
9 board, correct?

10 A With respect to the limited set of items that the
11 advisory board could opine on, that is correct.

12 Q All right. I want to go over a couple of the
13 misrepresentations that HarbourVest has identified in its
14 filings related to its claim. The first one is -- and just
15 for the record, I'm reading from **Docket No. 1057** filed on
16 September 11, 2020, HarbourVest Response to Debtor's First
17 Omnibus Objection.

18 But the first misrepresentation identified in that
19 document says that Highland never informed HarbourVest that
20 Highland had no intention of paying the arbitration award.
21 And was -- was Highland obligated to pay the Josh Terry
22 arbitration award against Acis?

23 MR. MORRIS: Objection to the question to the extent
24 it calls for a legal conclusion.

25 THE COURT: Sustained.

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Pugatch - Cross

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1 MS. WEISGERBER: Join in that objection.

2 THE COURT: Sustained. I think --

3 BY MR. WILSON:

4 Q Your understanding was --

5 MR. WILSON: I'm sorry, Judge?

6 THE COURT: I sustained the objection as calling for
7 a legal conclusion. So, next question.

8 MR. WILSON: Yes, I -- I heard that. Thank you, Your
9 Honor.

10 BY MR. WILSON:

11 Q In your understanding, was Highland responsible for
12 paying the arbitration award to Josh Terry?

13 A My understanding is on the account of the fact that Acis
14 --

15 MS. WEISGERBER: Objection, Your Honor. Objection,
16 Your Honor, same basis.

17 THE COURT: Sustained. It was essentially the same
18 question.

19 MR. WILSON: Well, Your Honor, I didn't ask --

20 THE COURT: It was essentially the same question, Mr.
21 Wilson. Move on.

22 MR. WILSON: Okay.

23 BY MR. WILSON:

24 Q The next misrepresentation identified by HarbourVest said
25 that Highland did not inform HarbourVest that it undertook

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Pugatch - Cross

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1 the transfers to siphon assets away from Acis, LP and that
2 such transfers would prevent Mr. Terry from collecting on the
3 arbitration award. So the basis for that allegation would be
4 that Highland was siphoning assets from Acis to avoid having
5 Acis pay the arbitration award, correct?

6 A That -- that would be the implication, yes.

7 Q Okay. And then that misrepresentation continues on and
8 says that Highland represented to HarbourVest that it was
9 changing the portfolio manager because Acis was toxic. And
10 do you recall that representation being made to you?

11 A Yes, I do.

12 Q And would you agree with me that whether or not Acis is
13 toxic in the industry would be an opinion?

14 A I suppose it would be an opinion, but by the manager of
15 the vehicle responsible for managing the HCLOF investment and
16 the underlying CLOs. Yeah, we viewed the Acis name and the
17 Highland name as synonymous, if you will. I mean, Acis was a
18 subsidiary of Highland. For all intents and purposes, it was
19 the same from our perspective as we made the investment into
20 HCLOF.

21 Q So did HarbourVest have an independent understanding of
22 whether or not the Acis name was toxic in the industry?

23 A We did not, no. We relied on Highland's views of that as
24 manager of HCLOF.

25 MR. WILSON: Your Honor, just a brief housekeeping

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Pugatch - Cross

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1 item. Did you say that we need to be done at 1:00 o'clock?

2 THE COURT: Well, I said I really wanted you to be
3 done by 1:00 o'clock because I have a 1:30 docket and a 2:00
4 o'clock docket and I'd rather not have to hang up 70-
5 something people and reconnect them again at 3:00 o'clock.

6 How close are you to being finished?

7 MR. WILSON: Well, --

8 THE COURT: This is going at a very slow pace.

9 MR. WILSON: Well, I apologize for that, Your Honor.
10 I think I've got at least ten more minutes, but -- but I know
11 we also have closing remarks. And I was just going to ask if
12 Your Honor had a preference of --

13 THE COURT: Keep going.

14 MR. WILSON: -- of breaking now --

15 THE COURT: Keep -- let's --

16 MR. WILSON: -- or keep going? Okay.

17 THE COURT: Let's talk fast and try to get through.
18 You know, even if I'm sacrificing lunch today, I don't want
19 to inconvenience 75 people this way. So we'll just probably
20 start our 1:30 hearing a little late and inconvenience those
21 people.

22 All right. Go ahead.

23 MR. WILSON: All right. Thank you, Your Honor.

24 BY MR. WILSON:

25 Q Did Acis form its -- I can't recall if you answered this

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Pugatch - Cross

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1 question, but did Acis form its own opinion on whether or not
2 -- I'm sorry, strike that. Did HarbourVest form its own
3 opinion on whether or not the Acis name was toxic in the
4 industry?

5 MS. WEISGERBER: Objection, --

6 THE WITNESS: We did not. We didn't have a basis.

7 THE COURT: I'm sorry, did I have an objection?

8 BY MR. WILSON:

9 Q You did not --

10 THE COURT: Did I have an objection?

11 MS. WEISGERBER: Yeah. Objection. Yes. Objection,
12 asked and answered, Your Honor.

13 THE COURT: Overruled. He can answer.

14 BY MR. WILSON:

15 Q Okay. But --

16 A We did not.

17 Q Did Highland have the ability to investigate the Acis
18 name and make its own determination of whether that name was
19 toxic? I'm sorry, I think I'm misspeaking. HarbourVest.

20 A HarbourVest had the ability to do that, yes.

21 Q I apologize I misspoke. I meant HarbourVest. Did
22 HarbourVest have the ability to investigate that name and
23 determine if it was toxic?

24 A It was irrelevant to our investment thesis. And as I
25 said before, Acis was a subsidiary of Highland. We viewed

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Pugatch - Cross

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1 them as interchangeable in the context of our investment.

2 Q Okay. The next misrepresentation that you refer to says
3 that Highland indicated to HarbourVest that the dispute with
4 Mr. Terry would have no impact on its investment activities.
5 Would you agree with me that that is also an opinion?

6 A It was a statement that --

7 MS. WEISGERBER: Your Honor, I'm going to object to
8 the extent these questions are seeking a legal conclusion
9 regarding, you know, if something's an opinion or not.

10 THE COURT: Okay. Overruled. He can answer.

11 THE WITNESS: It was -- it was a statement that was
12 made to us by Highland and represented in multiple different
13 formats as fact. And a representation that we relied on in
14 connection with our investment.

15 BY MR. WILSON:

16 Q And finally, the misrepresentation, the last
17 misrepresentation identified, is that Highland expressed
18 confidence in the ability of HCLOF to reset or redeem the
19 CLOs. Would you agree with me that that statement is an
20 opinion?

21 A On the basis that it was the core investment thesis of
22 the -- of the investment of HCLOF. Again, whether that's
23 legally viewed as an opinion or a fact, it was -- it was
24 certainly the investment thesis that we made the investment
25 predicated upon.

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Pugatch - Cross

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1 Q And you just testified that you thought that Acis and
2 Highland were interchangeable from the perspective of the
3 investment opportunity, correct?

4 A Correct.

5 Q But you also accepted Highland's recommendation because
6 HarbourVest agreed that the change in the -- to a Highland
7 manager made commercial sense, correct?

8 A We took at face value what Highland recommended because
9 this all had to do with the structuring of an entity that
10 they fully managed with respect to multiple underlying
11 subsidiaries that weren't managed by Highland.

12 Q But would you agree that, at the time, you -- HarbourVest
13 thought that made commercial sense?

14 A It did not seem unreasonable to us based on the
15 explanation we were given.

16 Q Okay.

17 MR. WILSON: I want to refer to HarbourVest Exhibit
18 39.

19 (Pause.)

20 THE COURT: What are we waiting on? What are we
21 waiting on?

22 MR. WILSON: I'm trying to get the document on the
23 screen, Your Honor.

24 (Pause.)

25 THE COURT: We can't hear you. We can't hear you.

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1 MR. WILSON: I'm sorry. I'm sorry, Your Honor. I'm
2 speaking with my --

3 THE COURT: Okay.

4 MR. WILSON: -- co-counsel here.

5 THE COURT: All right.

6 (Pause.)

7 MS. WEISGERBER: Mr. Wilson, is it 39 or 38 that
8 you're referring to?

9 MR. WILSON: 39. HarbourVest 9019 motion on the
10 main -- on the Dondero file. And then there's the -- it's --
11 it's John -- and then there's the HarbourVest, and then the
12 exhibits are all in one file.

13 MS. WEISGERBER: Mr. Wilson, I'll just note that 39
14 was subject to confidentiality based on HCLOF's request.
15 HCLOF's counsel is present. I think they know it's an
16 excerpt. But I'd just -- that for HCLOF's counsel.

17 MR. WILSON: Well, is there an objection to showing
18 this document on the screen? Yes. All right. We're not
19 going to put Document 39 on the screen.

20 A VOICE: Yes.

21 MR. WILSON: All right. Scroll down to the next
22 page.

23 BY MR. WILSON:

24 Q This is a -- this is a document that was produced to us
25 this week, the Highland production. It appears to be a

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Pugatch - Cross

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1 Highland CLO Funding, Ltd. Statement of Operations for the
2 Year Ended 31 December 2017. Do you see at the top of that --
3 at the top of that document where it says total investment
4 income of \$26 million?

5 A I do, yes.

6 Q And total expenses were roughly \$1.8 million?

7 A Yes.

8 Q And then net change and unrealized depreciation on
9 investments and net realized loss on investments was \$4.26
10 million cumulative, resulting in a net increase in net assets
11 resulting from operations of \$20.224 million. Do you agree
12 with that?

13 A Yes.

14 Q Okay.

15 MR. WILSON: Go to the next one.

16 BY MR. WILSON:

17 Q And you understand that, in the course of the Acis
18 bankruptcy, the portfolio managers for certain of the CLOs
19 were changed by the Trustee, correct?

20 A Yes, around the underlying CLOs. That's -- that's my
21 understanding, yes.

22 Q And, in fact, Mr. Seery testified earlier today that that
23 occurred in the summer of 2018, correct?

24 MR. WILSON: Scroll.

25 THE WITNESS: I don't recall the timing, but that's

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Pugatch - Cross

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1 what he testified to.

2 BY MR. WILSON:

3 Q Well, this document is HarbourVest Exhibit 40, and this is
4 the statement of operations for the financial year ended 31
5 December 2018. Here, the total investment income is only
6 \$11.1 million. Do you see that?

7 A I do.

8 Q And do you see where the expenses have increased to \$13.6
9 million?

10 A I do, yes.

11 MR. WILSON: Okay. Scroll down some more.

12 BY MR. WILSON:

13 Q And do you see where it says net change and unrealized
14 loss on investments of \$48.47 million?

15 A Yes.

16 Q And so after Acis and Brigade took over the managements of
17 these CLOs, we had a net decrease in net assets resulting from
18 operations of \$52.483 million in the year 2018, correct?

19 MS. WEISGERBER: Objection, Your Honor. Assumes a
20 fact not in evidence.

21 THE COURT: Overruled. He --

22 MR. WILSON: Your Honor, --

23 THE COURT: We're just looking at this statement and
24 testifying about it says, so I overrule the objection.

25 MR. WILSON: Thank you, Your Honor. Thank you, Your

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1 Honor. I'm now going to turn to HarbourVest Exhibit 41. All
2 right. I'll --

3 BY MR. WILSON:

4 Q Did you answer the question, Mr. Pugatch?

5 A No, I -- I would agree with the second part of your
6 statement that for the year 2018 the -- the loss was \$52
7 million. I don't -- I don't believe that jives with the first
8 part of your statement that that was after Acis and Brigade
9 took over. As I understand, that was in the middle of the
10 year.

11 Q But in any event, Acis and Brigade had been managing this
12 for at least six months of 2018 when that loss occurred,
13 correct?

14 A They had been managing a portion of the underlying CLO
15 portfolio held by Highland CLO Funding.

16 Q All right. We're now looking at Exhibit #41, which is the
17 Draft Unaudited Statement of Comprehensive Income, 31 December
18 2019. Total income has now dropped to \$4.664 million.

19 MR. WILSON: And scroll down.

20 BY MR. WILSON:

21 Q Expenditures are at \$3.645 million. And then it says
22 investment gains and losses net out to \$11.493 million, a
23 negative \$11.493 million. And --

24 MR. WILSON: Scroll down to the --

25 BY MR. WILSON:

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Pugatch - Cross

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1 Q And so would you agree with me that in the year 2019,
2 HCLOF showed a net loss of \$10.476 million?

3 A Yes, that's what the financial statements say.

4 Q And in this year, the Acis CLOs were solely managed by
5 Acis and Brigade, correct?

6 A The Acis CLOs were. Yes, correct.

7 Q All right.

8 MR. WILSON: Now, go to 42.

9 BY MR. WILSON:

10 Q Now, this is HarbourVest #42.

11 MR. WILSON: Go down to the next page.

12 BY MR. WILSON:

13 Q And this is the Highland CLO Funding, Ltd. Unaudited
14 Condensed Statement of Operations for the Financial Period
15 Ended 30 June 2020. And so this is just half a year of
16 operations. And would you -- and this actually has a
17 comparison between 2019 and 2020. But do you see where it
18 says investment income has dropped from a million dollars in
19 the first half of 2019 to \$381,000 in the first half of 2020?

20 A Yes.

21 MR. WILSON: Okay. Scroll down.

22 BY MR. WILSON:

23 Q And do you see where, in the first half of 2019, total
24 expenses were \$1.85 million, and then in the first half of
25 2020 total expenses were \$2.16 million? Do you see that?

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Pugatch - Cross

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1 A I do.

2 Q And if you go down below that, where it says Net Realized
3 and Unrealized Gain/Loss on Investments, the first half of
4 2019 HCLOF lost \$12 million, and in the first half of 2020 it
5 lost \$39.472 million?

6 MR. MORRIS: Your Honor, I'm going to object. It's
7 John Morris for the Debtor. I'm happy to stipulate. In fact,
8 he can offer this document into evidence. There's no
9 foundation that Mr. Pugatch has any particularized knowledge
10 about any of the numbers behind this. All he's asking him to
11 do is to confirm what the document says. It says what it
12 says. But this -- I'll object on that basis, Your Honor.

13 THE COURT: All right. Mr. Wilson, what about it?
14 You're just getting him to read numbers off of these exhibits.

15 MR. WILSON: Well, --

16 THE COURT: Shall we just --

17 MR. WILSON: -- I understood --

18 THE COURT: -- by stipulation get them into evidence?

19 MR. WILSON: Well, --

20 MR. MORRIS: No objection, Your Honor.

21 MS. WEISGERBER: No objection.

22 THE COURT: All right. So these are exhibits what?
23 We've gone through 39, 41, and I don't know what else. 40,
24 maybe?

25 MR. WILSON: It was Exhibits 39, 40, 41, and 42 that

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1 were on the HarbourVest exhibit list.

2 THE COURT: All right. Those will be admitted, and
3 we've already discussed what docket entry number they appear
4 at.

5 (HarbourVest's Exhibits 39 through 42 are received into
6 evidence.)

7 THE COURT: All right. Anything else? You told me
8 you had 10 more minutes about 15 minutes ago.

9 MR. WILSON: Well, I'm sorry if I -- I think I had
10 said I had at least ten more minutes, and I was looking at the
11 -- it was 10:50 [sic] and you wanted to quit at 1:00. So I do
12 have longer than that. I'm sorry, Your Honor.

13 THE COURT: Well, --

14 MR. WILSON: But --

15 THE COURT: -- I feel like I'm being --

16 MR. WILSON: -- I'll try to proffer --

17 THE COURT: Okay, Mr. Wilson, let me just tell you
18 something. I feel like I'm being disrespected now, and the
19 parties are. We really need to pick up the pace. I've told
20 you I've got a 1:30 docket -- with four or five matters on it,
21 by the way. I've got a 2:00 o'clock docket. I'm starting
22 them late. No one advised my courtroom deputy that we were
23 going to need all day today for this, okay? So you've got
24 five more minutes to wrap it up, and then, of course, I have
25 to go to Mr. Draper and see if he has cross. All right? So

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Pugatch - Cross

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1 please don't test my patience any more. Five minutes to
2 finish.

3 MR. DRAPER: Judge, I have no questions.

4 THE COURT: I didn't hear you, Mr. Draper. What did
5 you say?

6 MR. DRAPER: I have no questions.

7 THE COURT: All right. Very good.

8 MR. WILSON: I apologize, Your Honor. I was actually
9 trying to be respectful of your time when I informed you that
10 I had at least ten more minutes left at 12:50, but I will try
11 to be as expedient as I can as I finish up.

12 BY MR. WILSON:

13 Q And I don't see you on my screen.

14 MR. WILSON: You can take that document down.

15 THE WITNESS: Here.

16 BY MR. WILSON:

17 Q Mr. Pugatch, do you have an opinion as to what caused
18 these incredible losses of value at HCLOF?

19 MS. WEISGERBER: Objection to the extent it calls for
20 a legal conclusion.

21 THE COURT: Overruled. He can answer.

22 THE WITNESS: I would say that there's no one cause
23 for the decline in value. I can point to a number of
24 different things, including the exorbitant fees that were
25 charged to HCLOF, including the inability to be able to re --

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Pugatch - Cross

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1 refinance the CLOs on the part of HCLOF, all of which stems
2 from the actions that Highland took prior to our investment in
3 HCLOF.

4 BY MR. WILSON:

5 Q And you've -- I think it's been referenced several times
6 in HarbourVest's arguments that -- that the reset was a
7 fundamental -- the inability to get a reset was a fundamental
8 cause of the loss in value. Is that -- is that HarbourVest's
9 position?

10 A That -- that is a part of the -- the cause in the
11 declining value of the CLOs, yes.

12 Q And you would agree with me that a reset is fundamentally
13 a reset of interest rates, correct?

14 A Of the interest rates of the liabilities of the -- the
15 timing for repayment of those liabilities, yes.

16 Q Now, just say with -- for the sake of a hypothetical
17 example. If you had a home that was valued at \$5 million, or
18 let's just say \$500,000, let's make it more realistic. If you
19 had a \$500,000 home and you had a mortgage on that home at
20 five percent interest, your inability to refinance that home
21 at a lower interest rate would not affect the underlying value
22 of that home, correct?

23 MS. WEISGERBER: Objection, Your Honor. Hypothetical.
24 And objection to relevance as well.

25 THE COURT: Sustained.

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1 MS. WEISGERBER: Calls for speculation.

2 THE COURT: Sustained.

3 BY MR. WILSON:

4 Q Is there any reason to believe that the change in the
5 interest rate would have prevented the massive losses of
6 investment value that occurred in HCLOF?

7 MS. WEISGERBER: Object on the same grounds.

8 THE COURT: Sustained.

9 THE WITNESS: The short -- the short answer is yes,
10 with a -- with the amount of leverage --

11 MS. WEISGERBER: I --

12 THE WITNESS: -- that exists. Oh, sorry.

13 MS. WEISGERBER: The objection was sustained.

14 THE COURT: Yeah, I sustained the objection. That
15 means you don't answer.

16 THE WITNESS: I'm sorry, Your Honor.

17 BY MR. WILSON:

18 Q So, would you agree with me that if the expenses and the
19 fees charged by the portfolio manager increased dramatically,
20 that would -- that would impact the value of the investment,
21 correct?

22 MS. WEISGERBER: Objection on the same grounds, and
23 relevance. This is a 9019 hearing, Your Honor. We are not
24 here to try every minutia. And in fact, we're trying to avoid
25 a trial on the merits. And it feels like we're getting a bit

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1 far afield now.

2 THE COURT: I sustain.

3 MR. WILSON: All right. I'll pass the witness.

4 THE COURT: All right. Mr. Draper said he had no
5 cross. So, any redirect, Ms. Weisgerber?

6 MS. WEISGERBER: No, Your Honor.

7 THE COURT: All right. Mr. Morris, did you have any
8 redirect?

9 MR. MORRIS: I do not, Your Honor. I have a very
10 brief closing and then some additional remarks if -- if we
11 finish.

12 THE COURT: All right. So, Mr. Pugatch, that
13 concludes your testimony. Thank you. You're excused if you
14 want to be.

15 All right. So, as I understood it, there would be no more
16 evidence after this.

17 MR. WILSON: Well, Your Honor, along those lines, as
18 a housekeeping measure, I think everything on my exhibit list
19 is included on someone else's exhibit list, but just for belt
20 and suspenders I would move to admit all of the exhibits on
21 the -- on Mr. Dondero's exhibit list.

22 THE COURT: Well, is that agreed or not? Because we
23 didn't have a witness to get them in.

24 MR. MORRIS: No objection, Your Honor.

25 THE COURT: Any objection? All right. If there's no

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1 objection, I'll --

2 MR. MORRIS: Your Honor, --

3 THE COURT: I'm sorry. Was there an objection? I
4 will admit Dondero Exhibits A through M, and those appear at
5 Docket Entry 1721, correct, Mr. Wilson?

6 MR. WILSON: That is correct, Your Honor.

7 THE COURT: All right.

8 MR. WILSON: That is correct, Your Honor.

9 (James Dondero's Exhibits A through M are received into
10 evidence.)

11 MR. WILSON: And one final matter is, during the
12 examination of Mr. Seery, you at least partially admitted
13 Dondero's Exhibit N, and I was wondering if we need to -- how
14 we'd need to submit that for the record.

15 THE COURT: Okay. First, I'm confused. I think you
16 said Mr. Terry's testimony. You --

17 MR. WILSON: I said Seery. I'm sorry.

18 THE COURT: Oh, Seery?

19 MR. WILSON: Or I may have said Terry, but I meant to
20 say Seery.

21 THE COURT: Okay. Maybe you said it. Okay. During
22 Mr. Seery's testimony -- oh, the email that I admitted a
23 portion of?

24 MR. WILSON: That is -- that's correct, Your Honor.

25 THE COURT: What -- what are you asking? It's not in

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1 your notebook. Are you asking do you need to separately
2 submit it or what?

3 MR. WILSON: Yeah, I was just asking what the Court's
4 preference on how we submit that for the -- put it in the
5 record.

6 THE COURT: Okay. That was so garbled I didn't hear
7 you. You need to file that on the docket as a supplemental
8 exhibit that was admitted, okay?

9 MR. WILSON: Okay. Thank you, Your Honor.

10 THE COURT: All right. Closing arguments? Mr.
11 Morris?

12 CLOSING ARGUMENT ON BEHALF OF THE DEBTOR

13 MR. MORRIS: Yes, very briefly, Your Honor. The
14 Debtor easily meets the standard here. The settlement
15 consideration relative to the claim establishes and reflects
16 the likelihood of success on the merits.

17 You know, I've never -- I did hear Mr. Pugatch in the
18 deposition the other day, but I otherwise haven't heard from
19 him. I found him to be incredibly credible, Your Honor, and I
20 regret the fact that he and HarbourVest are being blamed twice
21 here. The fact that they got 40,000 documents or didn't read
22 the arbitration award, it's just -- it's a shame that they're
23 being dragged through this yet again.

24 The fact is, Your Honor, there is no evidence that they
25 made the disclosures that HarbourVest claims -- complains

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1 about. They just don't. The fraudulent transfers led to the
2 bankruptcy, led to the appointment of a trustee, led to --
3 right? So, so it's -- that's why -- but they're getting
4 something for their claim.

5 It was a hard negotiation, Your Honor. There is no
6 dispute that if we litigated this it would be complex. It
7 would fact-intensive. The Debtor would be forced to rely upon
8 witnesses who are no longer employed by it. That it would be
9 expensive, for sure. There's no dispute about any of that.
10 There's no dispute that the creditor body has spoken loudly
11 here by unanimously refraining from objecting except for Mr.
12 Dondero and the entities controlled by him.

13 And you heard Mr. Seery's testimony. I think he
14 exhaustively informed the Court as to the process by which the
15 transaction was analyzed and negotiated, and there's no
16 evidence to the contrary that this was an arm's-length
17 negotiation.

18 Unless Your Honor has any questions, we would request that
19 the motion be granted.

20 THE COURT: Thank you. Ms. Weisgerber, your closing
21 argument?

22 CLOSING ARGUMENT ON BEHALF OF HARBOURVEST

23 MS. WEISGERBER: Sure. Thank you, Your Honor. I'll
24 also be brief. We again join in Mr. Morris's arguments and
25 comments.

1 The Court has now heard testimony from Mr. Pugatch
2 regarding the factual detail underlying HarbourVest's claims.
3 The Court has also heard about the significant damages that
4 HarbourVest stands to recover for those claims. And
5 HarbourVest came to this Court ready to litigate. It would --
6 it's ready to do so if needed. It believes it would prevail
7 on its claims if it had to do so.

8 But the Court also heard from Mr. Seery about his
9 understanding of HarbourVest's claims, his calculus, and his
10 decision to settle them. And we submit that nothing further
11 is needed by this Court in order to approve the settlement.
12 This is a question of the Debtor's business judgment. We're
13 not here to have a trial on the merits of HarbourVest's
14 claims. The Objectors have made various arguments, including
15 about the cause of HarbourVest's damages. But even the nature
16 of the legal claims that HarbourVest is asserting, some do not
17 require a loss causation. So we submit that's not even
18 relevant to the merits of the claims.

19 The settlement is clearly in the best interest of the
20 estate, and we respectfully request that the Court approve it.

21 THE COURT: Thank you. All right. Mr. Wilson, your
22 closing argument?

23 MR. LYNN: Michael Lynn. I will give the closing
24 argument, if that's satisfactory to the Court.

25 THE COURT: All right. Go ahead.

1 CLOSING ARGUMENT ON BEHALF OF JAMES DONDERO

2 MR. LYNN: Good afternoon, Your Honor. I just want
3 to make a few points, and I'll try to do it as quickly as
4 possible.

5 First, I feel compelled to address the argument of the
6 Debtor that Mr. Dondero is repeating his litigious behavior
7 from the Acis case. I don't know about the Acis case. I
8 wasn't involved except very, very peripherally. But with
9 respect to this case, we have only taken positions in court
10 that we believed -- that is, his lawyers -- believed were
11 warranted by law, facts as we knew them, and that are
12 consistent with professionalism. I'd be glad to explain any
13 position we took.

14 Often, through the Debtor's very persuasive powers, we
15 never had the chance to explain our position previously to the
16 Court. In fact, for the most part, as today, we have been
17 reactive rather than commencing proceedings. In fact, during
18 the first seven months of this case, we only appeared in court
19 a few times, when we felt we had to -- for example, when
20 discovery was being sought by the Creditors' Committee that we
21 feared might invade privilege. Then, much to the Debtor's
22 fury, we opposed the Acis 9019. We did so because we thought
23 it was too much.

24 Since, as the Court can see, the principal instigators of
25 litigation have been the Debtor, and to a lesser extent, the

1 Committee.

2 Indeed, in an apparent effort to drown Mr. Dondero and his
3 counsel in litigation, the Debtor has repeatedly sought court
4 action on a very short fuse, claiming need for expedited
5 hearing.

6 Perhaps the most startling example of this is the recent
7 contempt motion, for which there is no good reason for a quick
8 hearing. Resolution of that motion is not necessary to reach
9 the confirmation hearing. The motion could be heard after the
10 confirmation hearing. There is no need to put Mr. Dondero and
11 his professionals in a position where they have to respond in
12 a couple of days, two business days, and then will have two
13 days to prepare for trial.

14 Second, Your Honor, Mr. Seery has repeatedly asserted,
15 contrary to today's motion, that the HarbourVest claim was of
16 no merit. That is why, when he came in to settle for tens of
17 millions of dollars, we opposed this motion. It appears that
18 the motion is occurring without any cross-party discovery.
19 There is no consideration, apparently, of trying dispositive
20 -- dispositive motions first. There is no consideration for
21 junior classes of equity, which Mr. Seery has previously
22 opined were in the money. This, even though there's no reason
23 that this settlement is necessary pre-confirmation, unless Mr.
24 Seery wants HarbourVest's vote.

25 Third, for whatever reason, that seems to be the driving

1 factor for settling. On its face, the vote seems to be a key
2 factor of the settlement. About the longest provision of the
3 settlement agreement relates to voting. The motion itself --
4 in the motion itself, five of seven bullet points cited by the
5 Debtor for approval of the settlement deal with and emphasize
6 support of the plan or the vote that is to be cast for the
7 plan.

8 If the settlement is a good deal, it didn't need to have
9 as one of its parts the requirement that HarbourVest vote for
10 the plan.

11 Your Honor, I'll stop there. I know Your Honor would like
12 to get just a few minutes before your 1:30 docket. I've been
13 there and I understand that, and I do apologize for taking the
14 time we have, but I think that responsibility is shared with
15 the Debtor and HarbourVest.

16 Thank you, Your Honor.

17 THE COURT: All right. Thank you for that.

18 Mr. Draper, any closing argument from you?

19 CLOSING ARGUMENT ON BEHALF OF GET GOOD AND DUGABOY TRUSTS

20 MR. DRAPER: Yes, I have three comments. The first
21 is the claim -- the loss claim, absent the fraud claim, is, at
22 best, \$7 million. I think Mr. Seery's argument that a hundred
23 -- one hundred percent is attributable to there is just wrong.
24 If he and I both invested in a company 50-50 and it goes
25 broke, we only lost 50 cents each.

1 Number two, I think the Court heard the evidence. I think
2 this is, at best, a subordinated claim under 5 -- under the
3 Bankruptcy Code. It's really a "But for the
4 misrepresentations, we wouldn't have invested."

5 And the last one is the -- Judge Lynn represented the
6 voting, so I won't deal with that. But the one that troubles
7 me the most is the fact that this asset that is ultimately
8 being paid for in claim dollars that's being transferred over
9 to the Debtor and being put it outside the estate, outside the
10 purview of this Court, and placed in some subsidiary, this --
11 this transaction, if it is approved, must -- should contain a
12 provision that the asset that's being acquired come into the
13 Debtor and be owned by the Debtor.

14 THE COURT: All right.

15 MR. DRAPER: I have nothing further, Your Honor.

16 THE COURT: Thank you, Mr. Draper.

17 Mr. Morris, you get the last word since it's your motion.

18 MR. MORRIS: Very quickly, Your Honor. The
19 subordination argument doesn't hold water. This is not a
20 claim against the Debtor for the security; it's a claim for
21 fraud. Okay? So, so 510(b), if it was a claim against HCLOF,
22 that might make sense, but this is a claim against the Debtor.
23 And it's a Debtor -- it's a claim for fraud. That's number
24 one.

25 Number two, we need to keep this exactly as it's been

1 structured in order to avoid litigation. Mr. Seery told the
2 Court. I'm sure the Court can make its own assessment as to
3 Mr. Seery's credibility as to whether or not the Debtor is
4 intending to somehow get this asset beyond the Court.

5 But there are reasons why we've done this, Your Honor.
6 They could have made an objection on that basis. In fact, if
7 they did, it would be overruled, because there's no -- there's
8 no basis for this Court to find that somehow the Debtor and
9 Mr. Seery are doing something untoward to get assets away from
10 this Court's jurisdiction.

11 You know, I don't know what to say about Mr. Lynn's
12 commentary. Much of it had nothing to do with any evidence in
13 the record.

14 The fact remains, Your Honor, that this settlement is
15 fair. It's reasonable. It's in the best interest of the
16 estate. And we would respectfully request that the Court
17 grant the motion.

18 THE COURT: All right. Thank you. Well, I
19 appreciate all the arguments and evidence I have heard today.
20 I'm going to be brief in my ruling here, but I reserve the
21 right to supplement in a more fulsome written order, which I'm
22 going to instruct Mr. Morris to submit. I am approving the
23 motion to compromise the HarbourVest claim today, and I guess
24 subsumed in that is granting the motion to allow their claim
25 for 3018 voting purposes.

1 I in all ways find this compromise to meet the required
2 legal standard set forth in such cases as *TMT Trailer Ferry*,
3 *AWECO*, and *Foster Mortgage*, numerous other Fifth Circuit
4 cases.

5 First, I'm going to specifically say for the record that I
6 found both witnesses today, Mr. Seery and Mr. Pugatch, to be
7 very credible. Very credible testimony and meaningful
8 testimony was provided to the Court today. And based on that
9 testimony, I find, first, that this compromise was the product
10 of arm's-length negotiations. It was a hard-fought
11 negotiation, as far as I'm concerned. The Debtor objected to
12 these numerous HarbourVest proofs of claim. The Debtor did
13 not want to allow HarbourVest a significant claim for voting
14 purposes. I duly note the statements made in the disclosure
15 statement before this compromise was reached suggesting, you
16 know, the Debtor didn't think HarbourVest should have a large
17 claim.

18 That is consistent with everything I typically see in a
19 bankruptcy case when there's a claim objection. The objector
20 vehemently denies the claimant should have a proof of claim,
21 and then people sit down and think about the risks and rewards
22 of litigating things. And I believe very fervently that's
23 what happened here. There were good-faith, arm's-length
24 negotiations that resulted in this proposed compromise.

25 I find the compromise -- and I'll add to that point, on

1 the good-faith point, I find nothing sinister or improper
2 about the fact that the compromise includes a commitment of
3 HarbourVest to vote in favor of the plan. Again, we see this
4 a lot. You know, there's even a buzz word that doesn't even
5 exist in the Bankruptcy Code: "plan support agreement." You
6 know, we see those a lot -- you know, oftentimes negotiated
7 before the case, but sometimes after. You know, it may be
8 improper in certain situations, but there was nothing here
9 that troubles me about that component of the compromise.

10 I find the compromise to meet the paramount interest of
11 creditors here. Notably, we have very large creditors in this
12 case who have not objected. The *Foster Mortgage* case from the
13 Fifth Circuit tells me I am supposed to consider support or
14 opposition of creditors. No opposition of UBS. No opposition
15 of the Redeemer Committee Crusader Fund. No opposition from
16 Josh Terry or Acis. No opposition from Daugherty.

17 But moreover, when considering the paramount interest of
18 creditors, I find this compromise to be in all ways fair and
19 equitable and in the best interest of the estate, and
20 certainly within the range of reasonableness. The evidence
21 showed that HarbourVest asserted over \$300 million. Over \$300
22 million. Granted, that was based on all kinds of legal
23 theories that would be contested and expensive to litigate,
24 but the evidence also showed that they invested over \$70
25 million. You know, close to \$75 million. I forget the exact

1 number. \$75 or \$80 million, somewhere in that range. And now
2 the credible evidence is that investment is worth about \$22
3 million.

4 So, certainly, while the claim may not have, at the
5 ultimate end of the day in litigation, resulted in a \$300
6 million proof of claim, certainly, certainly there were strong
7 arguments for a very sizeable claim, more than this compromise
8 amount. So it's certainly fair and equitable and reasonable
9 when considering the complexity and duration of further
10 litigation, the risks and rewards, the expense, delay, and
11 likely success.

12 A couple of last things I'm going to say are these. I
13 understand, you know, there is vehement disagreement on the
14 part of our Objectors to the notion that Highland might have
15 caused a \$50 million loss to HarbourVest. But I will tell
16 you, for what it's worth -- I want the record clear that this
17 is part of my evaluation of the reasonableness of the
18 settlement -- my reaction is that, indeed, Highland's
19 litigation strategy in the Acis case caused HCLOF to lose a
20 huge portion of its value, to the detriment of HarbourVest.
21 You know, whether all evidence at the end of the day would
22 convince me of that, I don't know, but that's -- that is
23 definitely this judge's impression.

24 I'm very sympathetic to HarbourVest. It appears in all
25 ways from the record, not just the record before me today, but

1 the record in the Acis case that I presided over, that
2 Highland back then would have rather spent HarbourVest's
3 investment for HCLOF legal fees than let Josh Terry get paid
4 on his judgment. They were perfectly happy to direct the
5 spending of other people's money, is what the record suggested
6 to me.

7 And then, you know, I have alluded to this very recently,
8 as recently as last Friday: I can still remember Mr.
9 Ellington sitting on the witness stand over here to my left
10 and telling the Court, telling the parties under oath, that
11 HarbourVest -- he didn't use its name back then, okay? For
12 the first phase of the Acis case, or most of the Acis case, we
13 were told it was an investor from Boston. And at some point
14 someone even said their name begins with H. I mean, it seemed
15 almost humorous. But Mr. Ellington said it was they,
16 HarbourVest, the undisclosed investor, who was insistent that
17 the Acis name was toxic, and so that's what all of this had
18 been about: the rebranding, the wanting to extract or move
19 things away from Acis.

20 So, you know, I have heard for the -- well, at least the
21 second time today, from Mr. Pugatch, what I perceive to be
22 very credible testimony that that's just not the way it
23 happened.

24 And I guess the last thing I want to say here today, and
25 you know, I guess I have multiple reasons for saying this, not

1 just in connection with approving the settlement, you know,
2 I've heard about how the Acis CLOs, the HCLOF CLOs have lost,
3 you know, a crazy amount of value, that they underperform in
4 the market, that, you know, during the Acis/Brigade tenure
5 and, you know, they should have been reset. You know, I hope
6 those who have not been around as long as some of us in this
7 whole saga know that the -- Mr. Terry, Mr. Phelan, I think
8 Brigade, they all desperately wanted to reset these things,
9 but it was HCLOF, I believe directed by Highland, that wanted
10 to redeem, wanted to liquidate, take the pot of money,
11 warehouse it, and then do their own thing.

12 And there was, I think, from my vantage point, a
13 monumental effort to try to get everyone to the table to do
14 reasonable resets that would be good for the stakeholders at
15 HCLOF and be good for the creditors of Acis, including Josh
16 Terry. That was always the balancing act that most of us were
17 focused on during the Acis bankruptcy. But Highland, I
18 believe, directing HCLOF's strategy, just did not want the
19 resets to happen.

20 So, again, part of me, I suppose, just wants to make the
21 record clear on something that I fear not everyone is clear
22 about. And I say that because the comment was made that the
23 injunctions, the preliminary injunctions sought by the Acis
24 trustee caused the plummet in value, and I think that's just
25 not an accurate statement. I think litigation strategies are

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1 what caused the plummet in value, and that's why I think
2 ultimately HarbourVest would potentially have a meritorious
3 claim here in a significant amount if this litigation were to
4 go forward.

5 So, I approve this under 9019. And again, Mr. Morris,
6 you'll upload an order.

7 It is now 1:41, so let's as quickly as possible hear the
8 other motion that I don't think had any objections. Mr.
9 Morris?

10 MR. MORRIS: Your Honor, just -- yes, just very
11 quickly, just four things.

12 With respect to the order, I just want to make it clear
13 that we are going to include a provision that specifically
14 authorizes the Debtor to engage in -- to receive from
15 HarbourVest the asset, you know, the HCLOF interest, and that
16 that's consistent with its obligations under the agreement.

17 The objection has been withdrawn, I think the evidence is
18 what it is, and we want to make sure that nobody thinks that
19 they're going to go to a different court somehow to challenge
20 the transfer. So I just want to put the Court on notice and
21 everybody on notice that we are going to put in a specific
22 finding as to that.

23 THE COURT: All right. Fair --

24 MR. MORRIS: Number two is --

25 THE COURT: Fair enough. I do specifically approve

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1 that mechanism and find it is appropriate and supported by the
2 underlying agreements.

3 And just so you know, I spent some time noodling this
4 yesterday before I knew it was going to be settled, so I'm not
5 just casually doing that. I think it's fine.

6 Okay. Next?

7 MR. MORRIS: Thank you very much, Your Honor. Number
8 two, with respect to the motion to pay, there is no objection.
9 If we can just submit an order. Or if Your Honor has other
10 guidance for us, we're happy to take it.

11 THE COURT: Okay. Does anyone have anything they
12 want to say about that motion?

13 Again, I looked at it. I didn't see any objections. I
14 didn't see any problem with it. It's -- you know, you're
15 going through this exercise because of the earlier protocol
16 order.

17 MR. MORRIS: Correct.

18 THE COURT: All right. Well, if there's nothing,
19 then, I will approve that, finding there is good cause to
20 grant that motion.

21 MR. MORRIS: Okay.

22 THE COURT: All right. Is the only other
23 housekeeping matter --

24 MR. MORRIS: I --

25 THE COURT: -- we have the contempt motion?

1 MR. MORRIS: It is, and I do -- I do have to point
2 out how troubled the Debtor is to learn that Mr. Dondero was
3 still receiving documents from Highland as late as this
4 morning. It's got to be a violation of both the TRO -- I
5 guess it's now the preliminary injunction.

6 I would respectfully request -- I know that time is what
7 it is -- but maybe Mr. Dondero can answer now where he got the
8 document, who he got the document from, what other documents
9 he's gotten from the Debtor since Your Honor ordered him not
10 to communicate with the Debtor's employees.

11 This is not saying hello in the hallway. I mean, this is
12 just -- it is really troubling, Your Honor, and it's why we
13 need the contempt motion heard as soon as possible.

14 THE COURT: Well, Mr. Wilson, do you want to address
15 that? I think the words I heard were that you just got the
16 document this morning, and you got it from Mr. Dondero, but we
17 don't know where and when Mr. Dondero got it. Mr. Wilson, are
18 you there?

19 MR. LYNN: I'm afraid I'm back, Your Honor.

20 THE COURT: Okay.

21 MR. LYNN: I am not sure whether Mr. Dondero had it
22 in his files from some -- from back before he was asked not to
23 communicate with members or with employees of the Debtor. I
24 believe -- I believe he's with us, though I don't think he's
25 available by video.

1 Are you there, Mr. Dondero?

2 THE COURT: We can't hear you, Mr. Dondero.

3 MR. DONDERO: Judge?

4 THE COURT: Oh, go ahead.

5 MR. DONDERO: Can you hear me now?

6 THE COURT: Yes.

7 MR. DONDERO: Yes, I -- I -- when I moved offices, I
8 found it in a stack of paper, and --

9 MR. LYNN: I understand it shows that his microphone
10 is working.

11 THE COURT: Okay. Go ahead.

12 MR. DONDERO: Can you hear me?

13 THE COURT: Yes, go ahead.

14 MR. DONDERO: Yeah, I -- I'm sitting in new offices.
15 I've got everything in boxes. I was going through everything
16 yesterday, and I found those emails in a stack of papers and I
17 sent them over because I thought they would be relevant
18 relative to Seery's initial impression.

19 THE COURT: Okay. Well, let's talk about the timing
20 of this hearing. Mr. Morris, I'm going to -- I'm going to ask
21 you why --

22 MR. LYNN: Michael Lynn, Your Honor. I don't want to
23 waste the Court's time. We have not made available anything
24 to the Court objecting to the expedited hearing on the
25 contempt motion. We've been here.

1 I would say to Your Honor that if Mr. Dondero is indeed in
2 contempt, or was in contempt toward the motion, which has
3 nothing to do with the document that was presented as Dondero
4 Exhibit N, there is no need to hear this on an expedited
5 basis.

6 Every time we turn around, Your Honor, the Debtor is
7 asking that something be heard on an expedited basis. And we
8 have not opposed that. We have not fought that, to speak of,
9 to date. But this is getting a little ridiculous. We're
10 within days of confirmation of the Debtor's plan, and it is
11 simply a means of causing pain and suffering to Mr. Dondero
12 and those who are working with him and for him. And he does
13 have employees at NexPoint who are assisting him.

14 So we most strongly object to being put on a schedule
15 where we are expected to get a response to the contempt motion
16 on file by Monday, today being Thursday, and a weekend
17 intervening. And we strongly object to any setting of this
18 contempt motion on Tuesday or Wednesday. It is absurd, and it
19 is done solely, solely, Your Honor, to cause pain.

20 THE COURT: All right.

21 MR. MORRIS: Your Honor, if I may?

22 THE COURT: Please.

23 MR. MORRIS: Just very briefly, we had a hearing the
24 other day. The evidence is the exact same. The evidence is
25 crystal clear that the violations are meaningful, they're

1 substantial, and they are repeated.

2 After the TRO was entered into, Mr. Dondero and only Mr.
3 Dondero chose to interfere with the Debtor's business. Mr.
4 Dondero and only Mr. Dondero chose to communicate with the
5 Debtor's employees, not about saying hello in the hallway but
6 about coordinating a legal defense strategy against the
7 Debtor.

8 The need is immediate, Your Honor, and I would
9 respectfully request that the hearing be set for Tuesday or
10 Wednesday. They've had this motion now since the 7th of
11 January. They had a full evidentiary hearing, so they know
12 most of the evidence that's going to be presented. They have
13 a whole team of -- they have an army of lawyers, Your Honor,
14 and half a dozen firms working on behalf of Mr. Dondero and
15 his interests. For him to cry here, for him to cry that this
16 is too much is really -- it's obscene. It just is.

17 THE COURT: All right. I'm going to say a couple --

18 MR. LYNN: That is absurd.

19 THE COURT: I'm going to say a couple of things. One
20 is that I -- well, the one time I remember getting reversed
21 for holding someone in contempt of court, the District Court
22 felt like I had not given enough notice of that. The District
23 Courts, what they think is reasonable notice, is sometimes
24 very different from what the bankruptcy judges think. We're
25 used to going very lickety-split fast in the bankruptcy

1 courts. And the Courts of Appeals, District Court, Courts of
2 Appeals obviously, for good reason, are very concerned about
3 due process in this kind of context. So I'm sensitive to
4 that.

5 I'm also sensitive to the fact that it is monetary damages
6 that are being sought here to purge the contempt. Okay? The
7 shifting of attorneys' fees is basically what I understand is
8 being sought at this point. You know, we have a preliminary
9 injunction halting behavior at this point, and so I think
10 that's another reason I'm hesitant to give an emergency
11 hearing. I feel like monetary damages can wait and we can
12 give 21-plus days' notice of the hearing.

13 But I'm going to throw this out there as well. If I do
14 feel like there is a showing of contempt, if I do feel like
15 the phone -- as I told you the other day, I'm very, very
16 fixated on the phone that may have been destroyed or thrown
17 away, maybe at Mr. Dondero's suggestion. I mean, the
18 potential monetary sanction here may be very, very large if
19 the evidence plays out in the way I fear it might play out.
20 So I need to make sure everybody has adequate time to prepare
21 for that hearing and make sure I get all the evidence I need
22 to see. All right? Contempt of court is very, very, very,
23 very serious, and I don't think anyone would deny that.

24 So, with that, it was filed what day? January 4th? Is
25 that what I heard? Or --

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1 MR. MORRIS: January 7th, I believe, Your Honor.

2 THE COURT: January 7th? All right. Well, Traci,
3 are you there? Hopefully, you're not in a hunger coma at this
4 point.

5 THE CLERK: I am here.

6 THE COURT: Okay. We have -- we're going to have to
7 go to that first week of February, right? Because we've got
8 the confirmation hearing that, you know, late in January, and
9 then --

10 THE CLERK: Yes. Uh-huh.

11 THE COURT: Okay. Do you have an available date to
12 give right now?

13 THE CLERK: How about -- if you're willing to hear
14 them on Friday, February 5th.

15 THE COURT: Okay. I can do that. February 5th at
16 9:30. Any -- anybody want to argue about that?

17 MR. MORRIS: Thank you, Your Honor. That's
18 acceptable to the Debtor.

19 THE COURT: Okay. Mr. Lynn, is that good with you?

20 MR. LYNN: We'll do that, Your Honor. I would say,
21 by the way, that I'll be happy to buy Mr. Seery, out of my own
22 pocket, five cell phones, which ought to make up for the one
23 that was lost, though I recognize that those cell phones will
24 not have on them the privileged information, the conversations
25 between his lawyers and Mr. Dondero that I imagine he was

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1 looking forward to seeing.

2 THE COURT: Well, I wouldn't want him to see that
3 information, but I do think he's entitled to any nonprivileged
4 information, texting, or calls that are on that phone. So,
5 again, I'm either going to hear good explanations for that or
6 not, but it's something very concerning to me.

7 All right. So we have a game plan.

8 I'm going to ask, Did we have good-faith negotiations
9 between Dondero and the Committee and anything positive to
10 report? I'll ask Mr. Lynn and Mr. Clemente to weigh in.

11 MR. CLEMENTE: Yes, Your Honor. I'll go first, Your
12 Honor. Mr. Lynn and I have exchanged several emails over the
13 weekend, and the message that I sent to Mr. Lynn was very
14 clear. There had been a term sheet that Mr. Seery had sent
15 back to Mr. Dondero. I had asked Mr. Lynn to take a pencil
16 out and be very specific as to what it was Mr. Dondero was
17 prepared to do in connection with the pot plan. I instructed
18 him that some of the issues that the Committee still has is
19 obviously the overall value, along with the concept that's
20 signing up to a promise from Mr. Dondero to comply with
21 (indiscernible) as part of that value. As Your Honor may
22 understand, the Committee is obviously very skeptical of Mr.
23 Dondero's future performance under an agreement that he enters
24 into.

25 Those are but a couple of issues, Your Honor, that I

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1 advised Mr. Lynn were very concerning to the Committee. And I
2 suggested to him that if he wanted to move things forward, the
3 best way to do it would be to come to us with a fulsome term
4 sheet that explained exactly what it was in clear and precise
5 detail that Mr. Dondero was proposing, and that would be the
6 best way to move the process forward, Your Honor.

7 THE COURT: All right. Mr. Lynn, anything to add to
8 that?

9 MR. LYNN: Well, Your Honor, my experience in
10 negotiations is that it is useful to agree on substantive
11 terms, or at least be in the ballpark, before term sheets are
12 exchanged. Long ago, a term sheet was prepared and presented
13 to the Committee. Ultimately, I think it was rejected, though
14 I don't know if we ever received a formal rejection.

15 I explained in my emails, which I'm happy to share with
16 the Court if Your Honor wants to see them, why I was reluctant
17 to try to put into a term sheet form the proposal that I
18 suggested to Mr. Clemente. As I said, I'm more than happy to
19 provide you with that email chain and let you form your own
20 judgment, Your Honor, as to whether we're proceeding in good
21 faith.

22 THE COURT: All right. Well I'm not going to ask --

23 MR. POMERANTZ: Your Honor? Your Honor, this is Jeff
24 Pomerantz.

25 THE COURT: -- to see any of that. Mr. Pomerantz?

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1 MR. POMERANTZ: May I just be heard real quickly?

2 THE COURT: Sure.

3 MR. POMERANTZ: Your Honor, we also took Your Honor's
4 comments to heart. We, Mr. Seery and I, had an over-an-hour
5 conversation with Mr. Lynn and with Mr. Bonds. We provided
6 them with our thoughts as to what they needed to do in order
7 to move forward. Of course, it's not really the Debtor to
8 agree. It's the creditors to agree. But as Mr. Seery has
9 testified many times before and as I have told the Court, we
10 would support a plan that the Committee and Mr. Dondero could
11 get behind.

12 So we again -- I'm not going to divulge the nature of
13 those communications, but we suggested several things that Mr.
14 Dondero could do in order to move the ball forward, and
15 unfortunately, we have not seen any of those things done thus
16 far. So we are, at this point, not optimistic that there will
17 be a grand bargain plan.

18 THE COURT: All right.

19 MR. DONDERO: Your Honor, could I comment for a
20 second? This is Mr. Dondero.

21 THE COURT: If you and your counsel want you to
22 comment, you can comment.

23 MR. DONDERO: I'd love to do a pot plan. I would
24 love to reach some kind of settlement and everybody move on
25 with their lives. The estate started with \$360 million of

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1 third-party assets and \$90 million of notes. The \$360 million
2 of third-party assets are down to \$130 million.

3 MR. POMERANTZ: Again, Your Honor, I must interrupt.
4 I did this at the last hearing, and it's not my practice to
5 interrupt, but issues regarding what the value is or not, it's
6 going to require a response, and that's not really before Your
7 Honor. I think before Your Honor is --

8 MR. DONDERO: Okay.

9 MR. POMERANTZ: -- have there been negotiations?
10 Have they been in good faith? If Mr. Dondero wanted to
11 address that, that's fine, but I object to having any
12 discussion at this point, especially with Mr. Dondero not even
13 under oath, on what the nature of the value of the assets and
14 why they have changed and what not.

15 THE COURT: Well, --

16 MR. POMERANTZ: It's just not appropriate.

17 THE COURT: I understand --

18 MR. DONDERO: Okay. Can I --

19 THE COURT: Stop.

20 MR. DONDERO: Can I -- can I finish?

21 THE COURT: Let me please respond to that. I
22 understand your concern, but I've heard from Mr. Seery
23 testimony many months ago about the value plummeting during
24 the case. And I asked why, and I got some explanations. This
25 is not evidence. This is just, you know, this is not going to

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1 be binding in any way. Mr. Dondero can speak as to what he
2 thinks, you know, the situation is.

3 Go ahead, Mr. Dondero.

4 MR. DONDERO: Okay. I'm not trying to fixate on the
5 numbers. And as far as the third-party assets are, we would
6 be willing to pay -- I would be willing to pay for those. I'd
7 be willing to pay more, and even some value for the affiliate
8 notes that were really part of compensation agreements
9 throughout the history of Highland and avoid the POC
10 arguments. I'd be willing to pay for the assets and I'd be
11 willing to pay even more than that.

12 I have no transparency in terms of what the assets are,
13 and there's no fulsome discussion in terms of, well, here are
14 the assets, here are the notes, here's what we think the
15 values are, can you get to this number? It's just a -- you --
16 the -- it -- I don't view there is good-faith negotiations
17 going on because it's always just a: You need to put a big
18 number on a piece of paper; otherwise, you're going to get run
19 over.

20 And there's no back and forth going on, but it's not due
21 to a lack of willingness on my part. And maybe there needs to
22 be a committee set up. Maybe there needs to be, I don't know,
23 a mediator or an examiner or somebody to try and push through
24 the pot plan, but there's nothing happening. People are not
25 returning the judge's calls, I mean, Mr. Lynn's calls, or my

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1 calls. They're -- there's -- despite efforts of our -- of my
2 own and a willingness of my own, there's no negotiations of
3 any sort going on at the moment.

4 THE COURT: All right. I don't want anyone to
5 respond to that. I know people have different views of what's
6 going on. But let me just say a couple of things, and then
7 we're done.

8 We do have a Committee in this case. We have a Committee
9 with very sophisticated members and very sophisticated
10 professionals. Okay? That's who I wanted you to be talking
11 to before the end of the day Tuesday.

12 We have had co-mediators in this case. Okay? And, you
13 know, I identified very sophisticated human beings for that
14 role. Okay? And in fact, there ended up being settlements
15 that flowed out of the co-mediator process.

16 We're now 15 months into the case. There are major,
17 significant compromises now: HarbourVest, UBS, Acis, Terry,
18 and Redeemer Committee. I hate to use a worn-out metaphor,
19 but the train is leaving the station. We've got confirmation.
20 I've pushed out two weeks. I mean, you all are either going
21 to get there in the next few days or we're just going to go
22 forward with I think what everyone, you know, would rather be
23 a pot plan, but if we can't get there, we're just going to
24 have to consider the plan that's on the table now. Okay?

25 You know, the Committee, again, they're sophisticated.

1 They can compare apples to oranges and decide whether the plan
2 on the table, with its risks of future litigation and
3 recoveries, whether it's better or worse than whatever
4 consideration you're offering, Mr. Dondero.

5 And you know, as we all know, there is distrust here,
6 there, and everywhere among these parties. So I can totally
7 understand them, you know, taking a hard line: We either get
8 all cash or we're just not going to mess with it. We don't
9 want to risk broken promises. We'd rather just do litigation.

10 So, anyway, that's as much as I'm going to say except I am
11 going to further direct good-faith negotiations. It sounds
12 like to me a written term sheet might be the appropriate next
13 step, given where I've heard things are at the moment. But,
14 you know, I guess we don't have any hearings between now and
15 the 26th, right? No Highland hearings that I can think of
16 between now and the 26th.

17 MR. POMERANTZ: I don't think so.

18 MR. MORRIS: I think that's correct, Your Honor.

19 THE COURT: So you have all this time --

20 MR. MORRIS: At the moment.

21 THE COURT: You have all this time to negotiate and
22 simultaneously get ready for the confirmation hearing without
23 any other battles. So I know you will use the time well.

24 All right. We're adjourned.

25 THE CLERK: All rise.

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1 MR. BONDS: Thank you, Your Honor.

2 (Proceedings concluded at 2:04 p.m.)

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CERTIFICATE

21 I certify that the foregoing is a correct transcript from
22 the electronic sound recording of the proceedings in the
above-entitled matter.

23 **/s/ Kathy Rehling**

01/16/2021

24

25 Kathy Rehling, CETD-444
Certified Electronic Court Transcriber

Date

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EXHIBIT 10

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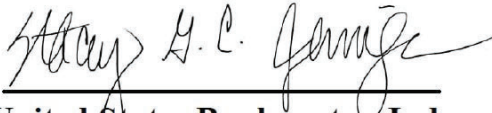
CLERK, U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS

ENTERED

THE DATE OF ENTRY IS ON
THE COURT'S DOCKET

The following constitutes the ruling of the court and has the force and effect therein described.

Signed January 20, 2021


United States Bankruptcy Judge

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

In re:

HIGHLAND CAPITAL MANAGEMENT, L.P.,¹

Debtor.

§
§
§
§
§
§

Chapter 11

Case No. 19-34054-sgj11

**ORDER APPROVING DEBTOR'S SETTLEMENT
WITH HARBOURVEST (CLAIM NOS. 143, 147, 149, 150, 153, 154) AND
AUTHORIZING ACTIONS CONSISTENT THEREWITH**

This matter having come before the Court on *Debtor's Motion for Entry of an Order Approving Settlement with HarbourVest (Claim Nos. 143, 147, 149, 150, 153, 154) and Authorizing Actions Consistent Therewith* [**Docket No. 1625**] (the "Motion"),² filed by Highland Capital Management, L.P., the debtor and debtor-in-possession (the "Debtor") in the above-captioned chapter 11 case (the "Bankruptcy Case"); and this Court having considered (a) the

¹ The Debtor's last four digits of its taxpayer identification number are (6725). The headquarters and service address for the above-captioned Debtor is 300 Crescent Court, Suite 700, Dallas, TX 75201.

² Capitalized terms used but not otherwise defined herein have the meanings ascribed to them in the Motion.



Motion; (b) the *Declaration of John A. Morris in Support of the Debtor's Motion for Entry of an Order Approving Settlement with HarbourVest (Claim Nos. 143, 147, 149, 150, 153, 154) and Authorizing Actions Consistent Therewith* [**Docket No. 1631**] (the "Morris Declaration"), and the exhibits annexed thereto, including the Settlement Agreement attached as **Exhibit "1"** (the "Settlement Agreement"); (c) the arguments and law cited in the Motion; (d) *James Dondero's Objection to Debtor's Motion for Entry of an Order Approving Settlement with HarbourVest* [**Docket No. 1697**] (the "Dondero Objection"), filed by James Dondero; (e) the *Objection to Debtor's Motion for Entry of an Order Approving Settlement with HarbourVest (Claim Nos. 143, 147, 149, 150, 153, 154) and Authorizing Actions Consistent Therewith* [**Docket No. 1706**] (the "Trusts' Objection"), filed by the Dugaboy Investment Trust ("Dugaboy") and Get Good Trust ("Get Good," and together with Dugaboy, the "Trusts"); (f) *CLO Holdco's Objection to HarbourVest Settlement* [**Docket No. 1707**] (the "CLOH Objection" and collectively, with the Dondero Objection and the Trusts' Objection, the "Objections"), filed by CLO Holdco, Ltd.; (g) the *Debtor's Omnibus Reply in Support of Debtor's Motion for Entry of an Order Approving Settlement with HarbourVest (Claim Nos. 143, 147, 149, 150, 153, 154), and Authorizing Actions Consistent Therewith* [**Docket No. 1731**] (the "Debtor's Reply"), filed by the Debtor; (h) the *HarbourVest Reply in Support of Debtor's Motion for Entry of an Order Approving Settlement with HarbourVest and Authorizing Actions Consistent Therewith* [**Docket No. 1734**] (the "HarbourVest Reply"), filed by HarbourVest 2017 Global Fund L.P., HarbourVest 2017 Global AIF L.P., HarbourVest Dover Street IX Investment L.P., HV International VIII Secondary L.P., HarbourVest Skew Base AIF L.P., and HarbourVest Partners L.P. (collectively, "HarbourVest"); (i) the testimonial and documentary evidence admitted into evidence during the hearing held on January 14, 2021 (the "Hearing"), including assessing the credibility of the witnesses; and (j) the

arguments made during the Hearing; and this Court having jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334; and this Court having found that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2); and this Court having found that venue of this proceeding and the Motion in this District is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and this Court having found that the relief requested in the Motion is in the best interests of the Debtor's estate, its creditors, and other parties-in-interest; and this Court having found the Settlement Agreement fair and equitable; and this Court having analyzed, for the reasons stated on the record, (1) the probability of success in litigating the claims subject to the Settlement Agreement, with due consideration for the uncertainty in fact and law, (2) the complexity and likely duration of litigation and any attendant expense, inconvenience, and delay, and (3) all other factors bearing on the wisdom of the compromise, including: (i) the best interests of the creditors, with proper deference to their reasonable views, and (ii) the extent to which the settlement is truly the product of arms-length bargaining, and not of fraud or collusion; and this Court having found that the Debtor's notice of the Motion and opportunity for a hearing on the Motion were appropriate under the circumstances and that no other notice need be provided; and this Court having determined that the legal and factual bases set forth in the Motion establish good cause for the relief granted herein; and upon all of the proceedings had before this Court; and after due deliberation and sufficient cause appearing therefor, it is hereby **ORDERED** that:

1. The Motion is **GRANTED** as set forth herein.
2. All objections to the Motion are overruled.
3. The Settlement Agreement, attached hereto as **Exhibit 1**, is approved in all respects pursuant to Rule 9019 of the Federal Rules of Bankruptcy Procedure.

4. All objections to the proofs of claim subject to the Motion³ are overruled as moot in light of the Court's approval of the Settlement Agreement.

5. The Debtor, HarbourVest, and all other parties are authorized to take any and all actions necessary and desirable to implement the Settlement Agreement without need of further approval or notice.

6. Pursuant to the express terms of the *Members Agreement Relating to the Company*, dated November 15, 2017, HarbourVest is authorized to transfer its interests in HCLOF to a wholly-owned and controlled subsidiary of the Debtor pursuant to the terms of the *Transfer Agreement for Ordinary Shares of Highland CLO Funding, Ltd.* without the need to obtain the consent of any party or to offer such interests first to any other investor in HCLOF.

7. The Court shall retain exclusive jurisdiction to hear and determine all matters arising from the implementation of this Order.

###End of Order###

³ This includes the *Debtor's First Omnibus Objection to Certain (A) Duplicate Claims; (B) Overstated Claims; (C) Late-Filed Claims; (D) Satisfied Claims; (E) No-Liability Claims; and (F) Insufficient-Documentation Claims [Docket No. 906]*.

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EXHIBIT 1

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EXECUTION VERSION

SETTLEMENT AGREEMENT

This Settlement Agreement (the “Agreement”) is entered into as of December 23, 2020, between Highland Capital Management, L.P. (the “Debtor”), on the one hand, and HarbourVest 2017 Global Fund L.P., HarbourVest 2017 Global AIF L.P., HarbourVest Dover Street IX Investment L.P., HV International VIII Secondary L.P., HarbourVest Skew Base AIF L.P., and HarbourVest Partners L.P. (each, a “HarbourVest Party,” and collectively, “HarbourVest”), on the other hand. Each of the foregoing are sometimes referred to herein collectively as the “Parties” and individually as a “Party.”

RECITALS

WHEREAS, on October 16, 2019 (the “Petition Date”), the Debtor filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code (the “Bankruptcy Case”) in the Bankruptcy Court for the District of Delaware, Case No. 19-12239 (CSS) (the “Delaware Bankruptcy Court”);

WHEREAS, on December 4, 2019, the Delaware Bankruptcy Court entered an order transferring venue of the Debtor’s case to the Bankruptcy Court for the Northern District of Texas, Dallas Division, Case No. 19-34054-sgj (the “Bankruptcy Court”);

WHEREAS, prior to the Petition Date, HarbourVest invested in Highland CLO Funding, Ltd. f/k/a Acis Loan Funding, Ltd. (“HCLOF”) and acquired an a 49.98% ownership interest in HCLOF (the “HarbourVest Interests”);

WHEREAS, the portfolio manager for HCLOF is Highland HCF Advisor, Ltd., a subsidiary of the Debtor;

WHEREAS, on April 8, 2020, HarbourVest filed proofs of claim in the Bankruptcy Case, which are listed on the Debtor’s claims register as claim numbers 143, 147, 149, 150, 153, and 154 (the “HarbourVest Claims”), asserting claims against the Debtor relating to its investment in HCLOF;

WHEREAS, on July 30, 2020, the Debtor filed the *Debtor’s First Omnibus Objection to Certain (a) Duplicate Claims; (b) Overstated Claims; (c) Late-Filed Claims; (d) Satisfied Claims; (e) No Liability Claims; and (f) Insufficient-Documentation Claims* [Docket No. 906], in which the Debtor objected to the HarbourVest Claims;

WHEREAS, on September 11, 2020, HarbourVest filed the *HarbourVest Response to Debtor’s First Omnibus Objection to Creation (a) Duplicate Claims; (b) Overstated Claims; (c) Late-Filed Claims; (d) Satisfied Claims; (e) No Liability Claims; and (f) Insufficient-Documentation Claims* [Docket No. 1057] (the “HarbourVest Response”);

WHEREAS, on October 18, 2020, HarbourVest filed the *Motion of HarbourVest Pursuant to Rule 3018(a) of the Federal Rules of Bankruptcy Procedure for Temporary Allowance of Claims for Purposes of Voting to Accept or Reject the Plan* [Docket No. 1207] (the “3018 Motion” and together with the HarbourVest Response, the “HarbourVest Pleadings”);

EXECUTION VERSION

WHEREAS, in the HarbourVest Pleadings, HarbourVest asserted, among other things, that the HarbourVest Claims included claims against the Debtor arising from fraudulent inducement, fraudulent concealment, fraudulent misrepresentation, breach of fiduciary duty, breach of securities laws, and misuse of assets and sought damages in excess of \$300,000,000;

WHEREAS, the Debtor disputes the HarbourVest Claims;

WHEREAS, on November 24, 2020, the Debtor filed the *Fifth Amended Plan of Reorganization for Highland Capital Management, L.P.* [Docket No. 1472] (as amended, the “Plan”).¹

WHEREAS, the Parties desire to enter into this Agreement which incorporates, formalizes, and finalizes the full and final resolution of the HarbourVest Claims and HarbourVest Pleadings; and

WHEREAS, this Agreement will be presented to the Bankruptcy Court for approval pursuant to **Federal Rule of Bankruptcy Procedure 9019** (“Rule 9019”).

NOW THEREFORE, in consideration of the above recitals, the covenants, conditions, and promises made herein, and other good and valuable consideration, the receipt of which is hereby acknowledged, the Parties agree as follows:

1. **Settlement of Claims.**

(a) In full and complete satisfaction of the HarbourVest Claims, HarbourVest will receive:

(i) an allowed, nonpriority general unsecured claim in the aggregate amount of \$45,000,000 (the “Allowed GUC Claim”); and

(ii) an allowed subordinated claim in the aggregate amount of \$35,000,000 (the “Allowed Subordinated Claim” and together with the Allowed GUC Claim, the “Allowed Claims”).

(b) On the Effective Date, HarbourVest will transfer all of its rights, title, and interest in the HarbourVest Interests to the Debtor or its nominee pursuant to the terms of the *Transfer Agreement for Ordinary Shares of Highland CLO Funding, Ltd.*, attached hereto as Exhibit A (the “Transfer Agreements”) and the Debtor or its nominee will become a shareholder of HCLOF with respect to the HarbourVest Interests. The terms of the Transfer Agreements are incorporated into this Agreement by reference.

2. **Releases.**

(a) Upon the Effective Date, and to the maximum extent permitted by law, each HarbourVest Party on behalf of itself and each of its current and former advisors, trustees, directors, officers, managers, members, partners, employees, beneficiaries, shareholders, agents,

¹ All capitalized terms used but not defined herein shall have the meanings given to them in the Plan.

EXECUTION VERSION

participants, subsidiaries, parents, successors, designees, and assigns hereby forever, finally, fully, unconditionally, and completely releases, relieves, acquits, remises, and exonerates, and covenants never to sue, the Debtor, HCLOF, HCLOF's current and former directors, and the Debtor's current and former advisors, trustees, directors, officers, managers, members, partners, employees, beneficiaries, shareholders, agents, participants, subsidiaries, parents, affiliates, successors, designees, and assigns, except as expressly set forth below (the "Debtor Released Parties"), for and from any and all claims, debts, liabilities, demands, obligations, promises, acts, agreements, liens, losses, costs and expenses (including, without limitation, attorney's fees and related costs), damages, injuries, suits, actions, and causes of action of whatever kind or nature, whether known or unknown, suspected or unsuspected, matured or unmatured, liquidated or unliquidated, contingent or fixed, at law or in equity, statutory or otherwise, including, without limitation, any claims, defenses, and affirmative defenses, whether known or unknown, including, without limitation, those which were or could have been asserted in, in connection with, or with respect to the Bankruptcy Case (collectively, the "HarbourVest Released Claims").

(b) Upon the Effective Date, and to the maximum extent permitted by law, the Debtor hereby forever, finally, fully, unconditionally, and completely releases, relieves, acquits, remises, and exonerates, and covenants never to sue (i) each HarbourVest Party and (ii) each HarbourVest Party's current and former advisors, trustees, directors, officers, managers, members, partners, employees, beneficiaries, shareholders, agents, participants, subsidiaries, parents, affiliates, successors, designees, and assigns (the "HarbourVest Released Parties"), for and from any and all claims, debts, liabilities, demands, obligations, promises, acts, agreements, liens, losses, costs and expenses (including, without limitation, attorney's fees and related costs), damages, injuries, suits, actions, and causes of action of whatever kind or nature, whether known or unknown, suspected or unsuspected, matured or unmatured, liquidated or unliquidated, contingent or fixed, at law or in equity, statutory or otherwise, including, without limitation, any claims, defenses, and affirmative defenses, whether known or unknown, which were or could have been asserted in, in connection with, or with respect to the Bankruptcy Case (collectively, the "Debtor Released Claims"); *provided, however*, that notwithstanding anything herein to the contrary, the release contained in this Section 2(b) will apply to the HarbourVest Released Parties set forth in subsection (b)(ii) only with respect to Debtor Released Claims arising from or relating to HarbourVest's ownership of the HarbourVest Interests.

(c) Notwithstanding anything in this Agreement to the contrary, the releases set forth herein will not apply with respect to (i) the Allowed Claims, (ii) the claims of Charlotte Investor IV, L.P., or (iii) the duties, rights, or obligations of any Party under this Agreement or the Transfer Agreements.

3. **Agreement Subject to Bankruptcy Court Approval.** The effectiveness of this Agreement and the Parties' obligations hereunder are conditioned in all respects on the approval of this Agreement by the Bankruptcy Court. The Parties agree to cooperate and use reasonable efforts to have this Agreement approved by the Bankruptcy Court. The "Effective Date" will be the date of an order entered by the Bankruptcy Court approving this Agreement pursuant to a motion filed under Rule 9019.

EXECUTION VERSION

4. **Representations and Warranties.** Subject in all respects to Section 3 hereof:

(a) each HarbourVest Party represents and warrants that (i) it has full authority to enter into this Agreement and to release the HarbourVest Released Claims and has not sold, transferred, or assigned any HarbourVest Released Claim to any other person or entity, (ii) no person or entity other than such HarbourVest Party has been, is, or will be authorized to bring, pursue, or enforce any HarbourVest Released Claim on behalf of, for the benefit of, or in the name of (whether directly or derivatively) of such HarbourVest Party; and (iii) HarbourVest owns all of the HCLOF Interests free and clear of any claims or interests; and

(b) the Debtor represents and warrants to HarbourVest that (i) it has full authority to enter into this Agreement and to release the Debtor Released Claims and (ii) no person or entity other than the Debtor has been, is, or will be authorized to bring, pursue, or enforce any Debtor Released Claim on behalf of, for the benefit of, or in the name of (whether directly or derivatively) of the Debtor Party.

5. **Plan Support.**

(a) Each HarbourVest Party hereby agrees that it will (a) vote all HarbourVest Claims held by such HarbourVest Party to accept the Plan, by delivering its duly executed and completed ballots accepting the Plan on a timely basis; and (b) not (i) change, withdraw, or revoke such vote (or cause or direct such vote to be changed withdrawn or revoked); (ii) exercise any right or remedy for the enforcement, collection, or recovery of any claim against the Debtor except in a manner consistent with this Agreement or the Plan, (iii) object to, impede, or take any action other action to interfere with, delay or postpone acceptance or confirmation of the Plan; (iv) directly or indirectly solicit, propose, file, support, participate in the formulation of or vote for, any restructuring, sale of assets (including pursuant to **11 U.S.C. § 363**), merger, workout, or plan of reorganization of the Debtor other than the Plan; or (v) otherwise take any action that would in any material respect interfere with, delay, or postpone the consummation of the Plan; provided, however, that such vote may be revoked (and, upon such revocation, deemed void ab initio) by such HarbourVest Party at any time following the termination of this agreement or the occurrence of a Support Termination Event (it being understood that any termination of this agreement shall entitle each HarbourVest Party to change its vote in accordance with section 1127(d) of the Bankruptcy Code), notwithstanding any voting deadline established by the Bankruptcy Court including without limitation the January 5, 2021, 5:00 p.m. (prevailing Central Time) deadline established by the *Order Approving Form of Ballots, Voting Deadline and Solicitation Procedures* [**Docket No. 1476**].

(b) In full resolution of the 3018 Motion, HarbourVest will have a general unsecured claim for voting purposes only in the amount of \$45,000,000.

(c) The obligations of the HarbourVest Parties under this Section 5 shall automatically terminate upon the occurrence of any of the following (each a "Support Termination Event"): (i) the effective date of the Plan, (ii) the withdrawal of the Plan, (iii) the entry of an order by the Bankruptcy Court (A) converting the Bankruptcy Case to a case under chapter 7 of the Bankruptcy Code or (B) appointing an examiner with expanded powers beyond those set forth in sections 1106(a)(3) and (4) of the Bankruptcy Code or a trustee in Bankruptcy

EXECUTION VERSION

Case, or (iv) the failure of the Court to enter an order approving the terms of this Agreement and the settlement described herein pursuant to Rule 9019 prior to confirmation of the Plan.

6. **No Admission of Liability.** The Parties acknowledge that there is a bona fide dispute with respect to the HarbourVest Claims. Nothing in this Agreement will imply, an admission of liability, fault or wrongdoing by the Debtor, HarbourVest, or any other person, and the execution of this Agreement does not constitute an admission of liability, fault, or wrongdoing on the part of the Debtor, HarbourVest, or any other person.

7. **Successors-in-Interest.** This Agreement shall be binding upon and shall inure to the benefit of each of the Parties and their successors, and assigns.

8. **Notice.** Each notice and other communication hereunder will be in writing and will be sent by email and delivered or mailed by registered mail, receipt requested, and will be deemed to have been given on the date of its delivery, if delivered, and on the fifth full business day following the date of the mailing, if mailed to each of the Parties thereto at the following respective addresses or such other address as may be specified in any notice delivered or mailed as set forth below:

HARBOURVEST

HarbourVest Partners L.P.
Attention: Michael J. Pugatch
One Financial Center
Boston, MA 02111
Telephone No. 617-348-3712
E-mail: mpugatch@harbourvest.com

with a copy (which shall not constitute notice) to:

Debevoise & Plimpton LLP
Attention: M. Natasha Labovitz, Esq.
919 Third Avenue
New York, NY 10022
Telephone No. 212-909-6649
E-mail: nlabovitz@debevoise.com

THE DEBTOR

Highland Capital Management, L.P.
300 Crescent Court, Suite 700
Dallas, Texas 75201
Attention: James P. Seery, Jr.
Telephone No.: 972-628-4100
Facsimile No.: 972-628-4147
E-mail: jpseeryjr@gmail.com

EXECUTION VERSION

with a copy (which shall not constitute notice) to:

Pachulski Stang Ziehl & Jones LLP
Attention: Jeffrey Pomerantz, Esq.
10100 Santa Monica Blvd., 13th Floor
Los Angeles, CA 90067
Telephone No.: 310-277-6910
Facsimile No.: 310-201-0760
E-mail: jpomerantz@pszjlaw.com

9. **Advice of Counsel.** Each Party represents that it has: (a) been adequately represented by independent legal counsel of its own choice, throughout all of the negotiations that preceded the execution of this Agreement; (b) executed this Agreement upon the advice of such counsel; (c) read this Agreement, and understands and assents to all the terms and conditions contained herein without any reservations; and (d) had the opportunity to have this Agreement and all the terms and conditions contained herein explained by independent counsel, who has answered any and all questions asked of such counsel, or which could have been asked of such counsel, including, but not limited to, with regard to the meaning and effect of any of the provisions of this Agreement.

10. **Entire Agreement.** This Agreement and the Transfer Agreement contain the entire agreement and understanding concerning the subject matter of this Agreement, and supersede and replace all prior negotiations and agreements, written or oral and executed or unexecuted, concerning such subject matter. Each of the Parties acknowledges that no other Party, nor any agent of or attorney for any such Party, has made any promise, representation or warranty, express or implied, written or oral, not otherwise contained in this Agreement to induce any Party to execute this Agreement. The Parties further acknowledge that they are not executing this Agreement in reliance on any promise, representation or warranty not contained in this Agreement, and that any such reliance would be unreasonable. This Agreement will not be waived or modified except by an agreement in writing signed by each Party or duly authorized representative of each Party.

11. **No Party Deemed Drafter.** The Parties acknowledge that the terms of this Agreement are contractual and are the result of arms'-length negotiations between the Parties and their chosen counsel. Each Party and its counsel cooperated in the drafting and preparation of this Agreement. In any construction to be made of this Agreement, the Agreement will not be construed against any Party.

12. **Future Cooperation.** The Parties agree to cooperate and execute such further documentation as is reasonably necessary to effectuate the intent of this Agreement.

13. **Counterparts.** This Agreement may be executed in counterparts with the same force and effect as if executed in one complete document. Each Party's signature hereto will signify acceptance of, and agreement to, the terms and provisions contained in this Agreement. Photographic, electronic, and facsimile copies of signed counterparts may be used in lieu of the originals of this Agreement for any purpose.

EXECUTION VERSION

14. **Governing Law; Venue; Attorneys' Fees and Costs.** The Parties agree that this Agreement will be governed by and will be construed according to the laws of the State of Texas without regard to conflict-of-law principles. Each of the Parties hereby submits to the exclusive jurisdiction of the Bankruptcy Court during the pendency of the Bankruptcy Case and thereafter to the exclusive jurisdiction of the state and federal courts located in the Northern District of Texas, Dallas Division, with respect to any disputes arising from or out of this Agreement. In any action to enforce this Agreement, the prevailing party shall be entitled to recover its reasonable and necessary attorneys' fees and costs (including experts).

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EXECUTION VERSION

IT IS HEREBY AGREED.

HIGHLAND CAPITAL MANAGEMENT, L.P.

By: /s/ James P. Seery, Jr.
Name: James P. Seery, Jr.
Its: CEO/CRO

HarbourVest 2017 Global Fund L.P., by HarbourVest 2017 Global Associates L.P., its General Partner, by HarbourVest GP LLC, its General Partner, by HarbourVest Partners, LLC, its Managing Member

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

HarbourVest 2017 Global AIF L.P., by HarbourVest Partners (Ireland) Limited, its Alternative Investment Fund Manager, by HarbourVest Partners L.P., its Duly Appointed Investment Manager, by HarbourVest Partners, LLC, its General Partner

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

HarbourVest Dover Street IX Investment L.P., by HarbourVest Partners L.P., its Duly Appointed Investment Manager, by HarbourVest Partners, LLC, its General Partner

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

HarbourVest Partners L.P., on behalf of funds and accounts under management, by HarbourVest Partners, LLC, its General Partner

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

EXECUTION VERSION

**HarbourVest Skew Base AIF L.P., by HarbourVest Partners (Ireland) Limited, its
Alternative Investment Fund Manager, by HarbourVest Partners L.P., its Duly Appointed
Investment Manager, by HarbourVest Partners, LLC, its General Partner**

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

**HV International VIII Secondary L.P., by HIPEP VIII Associates L.P., its General
Partner, by HarbourVest GP LLC, its General Partner, by HarbourVest Partners, LLC,
its Managing Member**

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

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Exhibit A

004285

**TRANSFER AGREEMENT
FOR ORDINARY SHARES OF
HIGHLAND CLO FUNDING, LTD.**

This Transfer Agreement, dated as of January ____, 2021 (this “**Transfer Agreement**”), is entered into by and among Highland CLO Funding, Ltd. (the “**Fund**”), Highland HCF Advisor, Ltd. (the “**Portfolio Manager**”), HCMLP Investments, LLC (the “**Transferee**”) and each of the following: HarbourVest Dover Street IX Investment L.P., HarbourVest 2017 Global AIF L.P., HarbourVest 2017 Global Fund L.P., HV International VIII Secondary L.P., and HarbourVest Skew Base AIF L.P. (collectively, the “**Transferors**”).

WHEREAS, each Transferor is the record, legal and beneficial owner of the number of ordinary shares (“**Shares**”) of the Fund set forth opposite such Transferor’s name on Exhibit A hereto (with respect to each Transferor, the “**Transferred Shares**”).

WHEREAS the Transferee is an affiliate and wholly owned subsidiary of Highland Capital Management, L.P. (“**HCMLP**”) which is one of the initial members of the Fund.

WHEREAS, each Transferor wishes to transfer and assign 100% of its rights, title and interest as a shareholder in the Fund, including the Transferred Shares (the “**Interest**”) on the terms set forth in this Transfer Agreement.

WHEREAS, subject to and in connection with the approval of that certain Settlement Agreement, dated on or about the date hereof, by and among HCMLP and the Transferors (the “**Settlement Agreement**”), the Transferee desires that the Interest be transferred to Transferee and that thereafter the Transferee will become a Shareholder and the Transferors will no longer be Shareholders.

WHEREAS, the Portfolio Manager desires to consent to such transfers and to the admission of Transferee as a Shareholder on the terms set forth herein, and the Transferors and Transferee agree to such terms.

WHEREAS, the Fund desires to amend its records to reflect the foregoing transfers.

NOW, THEREFORE, the parties hereto agree as follows:

1. Transfer of Shares and Advisory Board

- a. Each Transferor hereby transfers and assigns all of its rights, title, and interest in its Interest to the Transferee, and the Transferee wishes to be admitted to the Fund as a Shareholder.
- b. In connection with the transfer of the Interest as contemplated herein, the Transferee shall be granted the right to appoint a representative to the Fund’s advisory board (the “**Advisory Board**”) to replace the Transferors’ appointed representative to the Advisory Board.

- c. Transferee hereby assumes all of Transferor's rights and obligations in respect of the Interest effective as of the Effective Date (as defined below) and acknowledge that thereafter Transferee shall be subject to the applicable terms and provisions of the Members' Agreement dated as of November 15, 2017 (the "**Members' Agreement**"), the Articles of Incorporation adopted November 15, 2017 (the "**Articles**") and the Subscription and transfer Agreement, dated as of November 15, 2017 among each Transferor, the Fund and the Portfolio Manager (the "**Subscription Agreement**", and together with the Members' Agreement and the Articles, the "**Fund Agreements**") with respect to the Interest. Transferee does not assume any liability or responsibility for any obligations or liabilities incurred by any Transferor prior to the Effective Date of the transfer.
 - d. Following the transfer, each Transferor shall have no further rights or obligations to any party hereunder in respect of the Interest under the Fund Agreements.
 - e. This Transfer Agreement, and the parties' obligations hereunder, are conditioned in all respects on the approval by the Bankruptcy Court for the Northern District of Texas, Dallas Division pursuant to **Federal Rule of Bankruptcy Procedure 9019** of (i) this Transfer Agreement and (ii) the Settlement Agreement, and each of the parties agree that no further action shall be required from any party for the transfer of the Interest to be effective except as described herein.
2. Transferee's Representations and Warranties. The Transferee represents and warrants to the Transferors, the Portfolio Manager, and the Fund as follows:
- a. This Transfer Agreement constitutes a valid and binding obligation of the Transferee, enforceable against it in accordance with its terms;
 - b. This Transfer Agreement has been duly and validly executed and delivered by or on behalf of the Transferee and such execution and delivery have been duly authorized by all necessary trust action of the Transferee;
 - c. The Transferee acknowledges receipt of, has read, and is familiar with, the Fund's Offering Memorandum for Placing Shares dated November 15, 2017 (the "**Offering Memorandum**") and the Fund Agreements;
 - d. The Transferee hereby accepts and receives the Interest from the Transferors for investment, and not with a view to the sale or distribution of any part thereof, and the Transferee has no present intention of selling, granting participations in, or otherwise distributing the same, but subject nevertheless to any requirement of law that the disposition of the Transferee's property shall at all times be within such Transferee's control; and
 - e. The Transferee is an "Eligible U.S. Investor" as defined in the Offering Memorandum.

3. Transferors' Representations and Warranties. Each Transferor represents and warrants to the Transferee, the Portfolio Manager, and the Fund as follows:
 - a. This Transfer Agreement constitutes a valid and binding obligation of the Transferor, enforceable against it in accordance with its terms;
 - b. This Transfer Agreement has been duly authorized, and duly and validly executed and delivered by the Transferor and such execution and delivery have been duly authorized by all necessary action of the Transferor; and
 - c. As of the date hereof, the Transferor has good and valid title to the Transferor's Interest, free and clear of any liens, vesting requirements or claims by others.
4. Consent to Transfer. Based in part on the representations and warranties of the Transferors and the Transferee which are included herein, and on the terms contained herein, the Portfolio Manager and the Fund hereby consent to the transfers of the Interest, the admission of the Transferee as a Shareholder and the Transferee's appointment of a representative to the Advisory Board, the Portfolio Manager's execution of this Transfer Agreement constituting its prior written consent to the transfers of the Interest for the purposes of article 18.1 of the Articles and this Transfer Agreement constituting express notice in writing to the Fund of the assignment set out at clause 1(c) above for the purposes of the Law of Property (Miscellaneous Provisions) (Guernsey) Law, 1979 (as amended).
5. Completion: As of the date of approval by the Bankruptcy Court for the Northern District of Texas, Dallas Division pursuant to Federal Rule of Bankruptcy Procedure 9019 of (i) this Transfer Agreement and (ii) the Settlement Agreement (the "**Effective Date**"):
 - a. each Transferor shall deliver or cause to be delivered to the Transferee a transfer instrument relating to the Transferred Shares duly executed and completed by that Transferor in favor of the Transferee; and
 - b. the Transferee shall deliver to the Transferors and the Fund a duly executed and dated Adherence Agreement (as defined in the Members' Agreement).

Prior to the Effective Date the Transferee shall procure that:

 - c. the board of directors of the Fund shall hold a meeting at which the transfer of the Shares to the Transferee shall be approved and registration in the register of members of the Fund shall be effected on the Effective Date.
6. Miscellaneous.
 - a. Each of the parties hereto agree to execute any further instruments and perform any further acts which are or may become reasonably necessary to carry out the intent of this Transfer Agreement or are reasonably requested by the Portfolio Manager, the Fund or a Transferor to complete the transfer of the Interest.

- b. The parties to this Transfer Agreement acknowledge that the terms of this Transfer Agreement are the result of arms'-length negotiations between the parties and their respective counsel. Each party and its counsel cooperated in the drafting and preparation of this Transfer Agreement. In any construction to be made of this Transfer Agreement, the language or drafting of this Transfer Agreement will not be construed against any party.
- c. This Transfer Agreement shall be governed by, and construed and enforced in accordance with, the internal substantive laws of the state of Delaware, without giving effect to conflicts of law principles.
- d. The representations, warranties and covenants of the Transferors and the Transferee shall remain in full force and effect following the transfer of the Interest, and the Fund and the Portfolio Manager thereafter may rely on all such representations, warranties and covenants.
- e. This Transfer Agreement may be executed in multiple counterparts, each of which shall be deemed to be an original, but all of which together shall constitute one and the same instrument. Photographic, electronic, and facsimile copies of signed counterparts may be used in lieu of the originals of this Transfer Agreement for any purpose.
- f. Captions of sections have been added only for convenience and shall not be deemed to be a part of this Transfer Agreement.
- g. This Transfer Agreement is among the parties hereto. No Person that is not a party hereto shall have any right herein as a third-party beneficiary or otherwise except as expressly contemplated hereby.

[Remainder of Page Intentionally Blank]

IN WITNESS WHEREOF, the undersigned have executed this Transfer Agreement as of the date first above written.

TRANSFeree:

HCMLP Investments, LLC

By: Highland Capital Management, L.P.

Its: Member

By: _____

Name: James P. Seery, Jr.

Title: Chief Executive Officer

PORTFOLIO MANAGER:

Highland HCF Advisor, Ltd.

By: _____

Name: James P. Seery, Jr.

Title: President

FUND:

Highland CLO Funding, Ltd.

By: _____

Name:

Title:

[Additional Signatures on Following Page]

IN WITNESS WHEREOF, the undersigned have executed this Transfer Agreement as of the date first above written.

TRANSFERORS:

HarbourVest Dover Street IX Investment L.P.

By: HarbourVest Partners L.P., its Duly Appointed
Investment Manager

By: HarbourVest Partners, LLC

By: _____

Name: Michael Pugatch

Title: Managing Director

HV International VIII Secondary L.P.

By: HIPEP VIII Associates L.P.
Its General Partner

By: HarbourVest GP LLC
Its General Partner

By: HarbourVest Partners, LLC
Its Managing Member

By: _____

Name: Michael Pugatch

Title: Managing Director

HarbourVest 2017 Global AIF L.P.

By: HarbourVest Partners (Ireland) Limited
Its Alternative Investment Fund Manager

By: HarbourVest Partners L.P.
Its Duly Appointed Investment Manager

By: HarbourVest Partners, LLC
Its General Partner

By: _____

Name: Michael Pugatch

Title: Managing Director

HarbourVest Skew Base AIF L.P.

By: HarbourVest Partners (Ireland) Limited
Its Alternative Investment Fund Manager

By: HarbourVest Partners L.P.
Its Duly Appointed Investment Manager

By: HarbourVest Partners, LLC
Its General Partner

By: _____

Name: Michael Pugatch

Title: Managing Director

HarbourVest 2017 Global Fund L.P.

By: HarbourVest 2017 Global Associates L.P.
Its General Partner

By: HarbourVest GP LLC
Its General Partner

By: HarbourVest Partners, LLC
Its Managing Member

By: _____

Name: Michael Pugatch

Title: Managing Director

[Signature Page to Transfer of Ordinary Shares of Highland CLO Funding, Ltd.]

Exhibit A

<u>Transferee Name</u>	<u>Number of Shares</u>	<u>Percentage</u>
HarbourVest Dover Street IX Investment L.P.	54,355,482.14	71.0096%
HarbourVest 2017 Global AIF L.P.	7,426,940.38	9.7025%
HarbourVest 2017 Global Fund L.P.	3,713,508.46	4.8513%
HV International VIII Secondary L.P.	9,946,780.11	12.9944%
HarbourVest Skew Base AIF L.P.	1,103,956.03	1.4422%

EXHIBIT 11

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS**

CHARITABLE DAF FUND, L.P.
and CLO HOLDCO, LTD.,
directly and derivatively,

Plaintiffs,

V.

Cause No. _____

**HIGHLAND CAPITAL MANAGEMENT, §
L.P. , HIGHLAND HCF ADVISOR, LTD., §
and HIGHLAND CLO FUNDING, LTD., §
nominally, §**

Defendants.

ORIGINAL COMPLAINT

I.

INTRODUCTION

This action arises out of the acts and omissions of Defendant Highland Capital Management, L.P. (“HCM”), which is the general manager of Highland HCF Advisor, Ltd. (“HCFA”), both of which are registered investment advisers under the Investment Advisers Act of 1940 (the “Advisers Act”),¹ and nominal Defendant Highland CLO Funding, Ltd. (“HCLOF”) (HCM and HCFA each a “Defendant,” or together, “Defendants”). The acts and omissions which have recently come to light reveal breaches of fiduciary duty, a pattern of violations of the Advisers Act’s anti-fraud provisions, and concealed breaches of the HCLOF Company Agreement, among others, which have caused and/or likely will cause Plaintiffs damages.

¹ <https://adviserinfo.sec.gov/firm/summary/110126>



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At all relevant times, HCM was headed by CEO and potential party James P. Seery (“Seery”). Seery negotiated a settlement with the several Harbourvest² entities who owned 49.98% of HCLOF. The deal had HCM (or its designee) purchasing the Harbourvest membership interests in HCLOF for \$22.5 million. Recent revelations, however, show that the sale was predicated upon a sales price that was vastly below the Net Asset Value (“NAV”) of those interests. Upon information and belief, the NAV of HCLOF’s assets had risen precipitously, but was not disclosed to Harbourvest nor to Plaintiffs.

Under the Advisers Act, Defendants have a non-waivable duty of loyalty and candor, which includes its duty not to inside trade with its own investors, *i.e.*, not to trade with an investor to which HCM and Seery had access to superior non-public information. Upon information and belief, HCM’s internal compliance policies required by the Advisers Act would not generally have allowed a trade of this nature to go forward—meaning, the trade either was approved in spite of compliance rules preventing it, or the compliance protocols themselves were disabled or amended to a level that leaves Defendants HCM and HCLOF exposed to liability. Thus, Defendants have created an unacceptable perpetuation of exposure to liability.

Additionally, Defendants are liable for a pattern of conduct that gives rise to liability for their conduct of the enterprise consisting of HCM in relation to HCFA and HCLOF, through a pattern of concealment, misrepresentation, and violations of the securities rules. In the alternative, HCFA and HCM, are guilty of self-dealing, violations of the Advisers Act, and tortious interference by (a) not disclosing that Harbourvest had agreed to sell at a price well below the current NAV, and (b) diverting the Harbourvest opportunity to themselves.

² “Harbourvest” refers to the collective of Harbourvest Dover Street IX Investment, L.P., Harbourvest 2017 Global AIF, L.P., Harbourvest 2017 Global Fund, L.P., HV International VIII Secondary, L.P., and Harbourvest Skew Base AIF, L.P. Each was a member of Defendant Highland CLO Funding, Ltd.

For these reasons, judgment should be issued in Plaintiffs' favor.

II. PARTIES

1. Plaintiff CLO Holdco, Ltd. is a limited company incorporated under the laws of the Cayman Islands.
2. Plaintiff Charitable DAF Fund, L.P., ("DAF") is a limited partnership formed under the laws of the Cayman Islands.
3. Defendant Highland Capital Management, L.P. is a limited partnership with its principal place of business at 300 Crescent Court, Suite 700, Dallas, Texas 75201. It may be served at its principal place of business or through its principal officer, James P. Seery, Jr., or through the Texas Secretary of State, or through any other means authorized by federal or state law.
4. Defendant Highland HCF Advisor, Ltd. is a limited company incorporated under the laws of the Cayman Islands. Its principal place of business is 300 Crescent Court, Suite 700, Dallas, Texas 75201. It is a registered investment adviser ("RIA") subject to the laws and regulations of the Investment Advisers Act of 1940 (the "Adviser's Act"). It is a wholly-owned subsidiary of Highland Capital Management, L.P.
5. Nominal Defendant Highland CLO Funding, Ltd. is a limited company incorporated under the laws of the Island of Guernsey. Its registered office is at First Floor, Dorey Court, Admiral Park, St. Peter Port, Guernsey GY1 6HJ, Channel Islands. Its principal place of business is 300 Crescent Court, Suite 700, Dallas, Texas 75201.
6. Potential party James P. Seery, Jr. ("Seery") is an officer and/or director and/or control person of Defendants Highland Capital Management, L.P., Highland CLO Funding, Ltd., and Highland HCF Advisor, Ltd., and is a citizen of and domiciled in Floral Park, New York.

III.

JURISDICTION AND VENUE

7. This Court has subject matter jurisdiction over this dispute under 28 U.S.C. § 1331 as one or more rights and/or causes of action arise under the laws of the United States. This Court has supplemental subject matter jurisdiction over all other claims under 28 U.S.C. § 1367.

8. Personal jurisdiction is proper over the Defendants because they reside and/or have continual contacts with the state of Texas, having regularly submitted to jurisdiction here. Jurisdiction is also proper under 18 U.S.C. § 1965(d).

9. Venue is proper in this Court under 28 U.S.C. § 1391(b) and (c) because one or more Defendants reside in this district and/or a substantial part of the events or omissions giving rise to the claim occurred or a substantial part of property that is the subject of the action is situated in this district. Venue in this district is further provided under 18 U.S.C. § 1965(d).

IV.

RELEVANT BACKGROUND

HCLOF IS FORMED

10. Plaintiff DAF is a charitable fund that helps several causes throughout the country, including providing funding for humanitarian issues (such as veteran's welfare associations and women's shelters), public works (such as museums, parks and zoos), and education (such as specialty schools in underserved communities). Its mission is critical.

11. Since 2012, DAF was advised by its registered investment adviser, Highland Capital Management, L.P., and its various subsidiaries, about where to invest. This relationship was governed by an Investment advisory Agreement.

12. At one point in 2017, HCM advised DAF to acquire 143,454,001 shares of HCLOF, with HCFA (a subsidiary of HCM) serving as the portfolio manager. DAF did so via a holding entity, Plaintiff CLO Holdco, Ltd.

13. On November 15, 2017, through a Subscription and Transfer Agreement, the DAF entered into an agreement with others to sell and transfer shares in HCLOF, wherein the DAF retained 49.02% in CLO Holdco.

14. Pursuant to that agreement, Harbourvest acquired the following interests in the following entities:

Harbourvest Dover Street IX Investment, L.P., acquired 35.49%;

Harbourvest 2017 Global AIF, L.P., acquired 2.42%;

Harbourvest 2017 lobal Fund, L.P., acquired 4.85%;

HV International VIII Secondary, L.P., acquired 6.5%; and

Harbourvest Skew Base AIF, L.P., acquired 0.72%;

for a total of 49.98% (altogether, the “Harbourvest interests”).

15. On or about October 16, 2019, Highland Capital Management filed for Chapter 11 bankruptcy in Delaware Bankruptcy Court, which was later transferred to the Northern District of Texas Bankruptcy Court, in the case styled *In Re: Highland Capital Management, L.P., Debtor*, Cause No. 19-34054, (the “HCM Bankruptcy” and the Court is the “Bankruptcy Court”).

The Harbourvest Settlement with Highland Capital Management in Bankruptcy

16. On April 8, 2020, Harbourvest submitted its proofs of claim in the HCM bankruptcy proceeding. Annexed to its proofs of claims was an explanation of the Proof of Claim and the basis therefor setting out various pre-petition allegations of wrongdoing by HCM. *See, e.g.*, Case No. 19-bk-34054, **Doc. 1631-5**.

17. The debtor, HCM, made an omnibus response to the proofs of claims, stating they were duplicative of each other, overstated, late, and otherwise meritless.

18. Harbourvest responded to the omnibus objections on September 11, 2020. *See* Cause No. 19-bk-34054, [Doc. 1057](#).

19. Harbourvest represented that it had invested in HCLOF, purchasing 49.98% of HCLOF's outstanding shares.

20. Plaintiff CLO Holdco was and is also a 49.02% holder of HCLOF's member interests.

21. In its Omnibus Response, Harbourvest explained that its claims included unliquidated legal claims for fraud, fraud in the inducement, RICO violations under 18 U.S.C. 1964, among others (the "[Harbourvest Claims](#)"). *See* Cause No. 19-bk-34054, [Doc. 1057](#).

22. The Harbourvest Claims centered on allegations that when Harbourvest was intending to invest in a pool of Collateralized Loan Obligations, or CLOs, that were then-managed by Acis Capital Management ("Acis"), a subsidiary of HCM, HCM failed to disclose key facts about ongoing litigation with a former employee, Josh Terry.

23. Harbourvest contended that HCM never sufficiently disclosed the underlying facts about the litigation with Terry, and HCM's then-intended strategy to fight Terry caused HCLOF to incur around \$15 million in legal fees and costs. It contended that had it known the nature of the lawsuit and how it would eventually turn out, Harbourvest never would have invested in HCLOF. *See* Cause No. 19-bk-34054, [Doc. 1057](#).

24. HCLOF's portfolio manager is HCFA. HCM is the parent of HCFA and is managed by its General Partner, Strand Management, who employs Seery and acts on behalf of HCM.

25. Before acceding to the Harbourvest interests, HCM was a 0.6% holder of HCLOF interests.

26. While even assuming Harbourvest's underlying claims were valid as far as the lost \$15 million went, the true damage of the legal fees to Harbourvest would have been 49.98% of the HCLOF losses (i.e., less than \$7.5 million). Harbourvest claimed that it had lost over \$100 million in the HCLOF transaction due to fraud, which, after trebling under the racketeering statute, it claimed it was entitled to over \$300 million in damages.

27. In truth, as of September 2020, Harbourvest had indeed lost some \$52 million due to the alleged diminishing value of the HCLOF assets (largely due to the underperformance of the Acis entities³)—and the values were starting to recover.

28. HCM denied the allegations in the Bankruptcy Court. Other than the claim for waste of corporate assets of \$15 million, HCM at all times viewed the Harbourvest legal claims as being worth near zero and having no merit.

29. On December 23, 2020, HCM moved the Court to approve a settlement between itself and Harbourvest. No discovery had taken place between the parties, and Plaintiff did not have any notice of the settlement terms or other factors prior to the motion's filing (or even during its pendency) in order to investigate its rights.

30. HCM set the hearing right after the Christmas and New Year's holidays, almost ensuring that no party would have the time to scrutinize the underpinnings of the deal.

31. On January 14, 2021, the Bankruptcy Court held an evidentiary hearing and approved the settlement in a bench ruling, overruling the objections to the settlement.

³ Acis was being managed by Joshua Terry. JP Morgan had listed the four ACIS entities under his management as the four worst performers of the 1200 CLOs it evaluated.

32. An integral part of the settlement was allowing \$45 million in unsecured claims that, at the time of the agreement, were expected to net Harbourvest around 70 cents on the dollar. In other words, Harbourvest was expected to recover around \$31,500,000 from the allowed claims.

33. As part of the consideration for the \$45 million in allowed claims, Harbourvest agreed to transfer all of its interests in HCLOF to HCM or its designee.

34. HCM and Seery rationalized the settlement value by allocating \$22.5 million of the net value of the \$45 million in unsecured claims as consideration to purchase Harbourvest's interests in HCLOF, meaning, if 70% of the unsecured claims—i.e., \$31.5 million—was realized, because \$22.5 million of that would be allocated to the purchase price of the Harbourvest interests in HCLOF, the true “settlement” for Harbourvest's legal claims was closer to \$9 million.

35. Plaintiffs here are taking no position at this time about the propriety of settling the Harbourvest legal claims for \$9 million. That is for another day.

36. At the core of this lawsuit is the fact that HCM purchased the Harbourvest interests in HCLOF for \$22.5 million knowing that they were worth far more than that.

37. It has recently come to light that, upon information and belief, the Harbourvest interests, as of December 31, 2020, were worth in excess of \$41,750,000, and they have continued to go up in value.

38. On November 30, 2020, which was less than a month prior to the filing of the Motion to Approve the Settlement, the net asset value of those interests was over \$34.5 million. Plaintiffs were never made aware of that.

39. The change is due to how the net asset value, or NAV, was calculated. The means and methods for calculating the “net asset value” of the assets of HCLOF are subject to and

governed by the regulations passed by the SEC pursuant to the Adviser's Act, and by HCM's internal policies and procedures.

40. Typically, the value of the securities reflected by a market price quote.

41. However, the underlying securities in HCLOF are not liquid and had not been traded in a long while.

42. There not having been any contemporaneous market quotations that could be used in good faith to set the marks⁴ meant that other prescribed methods of assessing the value of the interests, such as the NAV, would have been the proper substitutes.

43. Seery testified that the fair market value of the Harbourvest HCLOF interests was \$22.5 million. Even allowing some leeway there, it was off the mark by a mile.

44. Given the artifice described herein, Seery and the entity Defendants had to know that the representation of the fair market value was false. But it does not appear that they disclosed it to Harbourvest to whom they owed fiduciary duties as the RIA in charge of HCLOF, and they certainly did not disclose the truth to the Plaintiff.

45. It is either the case that (i) Defendants conducted the proper analysis to obtain a current value of the assets but decided to use a far lower valuation in order to whitewash the settlement or enrich the bankruptcy estate; *or* (ii) Defendants never conducted the proper current valuation, and therefore baselessly represented what the current value of the assets was, despite knowingly having no reasonable basis for making such a claim.

46. For years HCM had such internal procedures and compliance protocols. HCM was not allowed by its own compliance officers to trade with an investor where HCM had superior knowledge about the value of the assets, for example. While Plaintiff has no reason to believe that

⁴ The term "mark" is shorthand for an estimated or calculated value for a non-publicly traded instrument.

those procedures were scrapped in recent months, it can only assume that they were either overridden improperly or circumvented wholesale.

47. Upon finalizing the Harbourvest Settlement Agreement and making representations to the Bankruptcy Court to the Plaintiffs about the value of the Harbourvest Interests, Seery and HCM had a duty to use current values and not rely on old valuations of the assets or the HCLOF interests.

48. Given Defendants' actual or constructive knowledge that they were purchasing Harbourvest's Interests in HCLOF for a less than 50% of what those interests were worth—Defendants owed Plaintiff a fiduciary duty not to purchase them for themselves.

49. Defendants should have either had HCLOF repurchase the interests with cash, or offer those interests to Plaintiff and the other members *pro rata*, before HCM agreed to purchase them all lock, stock and barrel, for no up-front cash.

50. Indeed, had Plaintiff been offered those interests, it would have happily purchased them and therefore would have infused over \$20 million in cash into the estate for the purpose of executing the Harbourvest Settlement.

51. That Defendants (and to perhaps a lesser extent, the Unsecured Creditors Committee (the "UCC")) agreed to pay \$22.5 million for the HCLOF assets, where they had previously not consented to any such expenditure by the estate on behalf of HCLOF, strongly indicates their awareness that they were purchasing assets for far below market value.

52. The above is the most reasonable and plausible explanation for why Defendants and the UCC forwent raising as much as \$22.5 million in cash now in favor of hanging on to the HCLOF assets.

53. Indeed, in January 2021 Seery threatened Ethen Powell that “[Judge Jernigan] is laughing at you” and “we are coming after you” in response to the latter’s attempt to exercise his right as beneficial holder of the CLO, and pointing out a conflict of interest in Seery’s plan to liquidate the funds.

54. HCM’s threat, made by Seery, is tantamount to not only a declaration that he intends to liquidate the funds regardless of whether the investors want to do so, and whether it is in their best interests, but also that HCM intends to leverage what it views as the Bankruptcy Court’s sympathy to evade accountability.

V.

CAUSES OF ACTION

FIRST CAUSE OF ACTION *Breaches of Fiduciary Duty*

55. Plaintiffs respectfully incorporate the foregoing factual averments as if fully set forth herein and further alleges the following:

56. HCM is a registered investment advisor and acts on behalf of HCFA. Both are fiduciaries to Plaintiffs.

57. The Advisers Act establishes an unwaivable federal fiduciary duty for investment advisers.⁵

⁵ See e.g., *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 194 (1963); *Transamerica Mortg. Advisors (tama) v. Lewis*, 444 U.S. 11, 17 (1979) (“§ 206 establishes ‘federal fiduciary standards’ to govern the conduct of investment advisers.”); *Santa Fe Indus. v. Green*, 430 U.S. 462, 471, n.11 (1977) (in discussing *SEC v. Capital Gains*, stating that the Supreme Court’s reference to fraud in the “equitable” sense of the term was “premised on its recognition that Congress intended the Investment Advisers Act to establish federal fiduciary standards for investment advisers”). See also Investment Advisers Act Release No. 3060 (July 28, 2010) (“Under the Advisers Act, an adviser is a fiduciary whose duty is to serve the best interests of its clients, which includes an obligation not to subrogate clients’ interests to its own”) (citing Proxy Voting by Investment Advisers, Investment Advisers Act Release No. 2106 (Jan. 31, 2003)).

58. HCM and the DAF entered into an Amended and Restated Investment Advisory Agreement, executed between them on July 1, 2014 (the “RIA Agreement”). It renews annually and continued until the end of January 2021.

59. In addition to being the RIA to the DAF, HCM was appointed the DAF’s attorney-in-fact for certain actions, such as “to purchase or otherwise trade in Financial Instruments that have been approved by the General Partner.” RIA Agreement ¶ 4.

60. The RIA Agreement further commits HCM to value financial assets “in accordance with the then current valuation policy of the Investment Advisor [HCM], a copy of which will provided to the General Partner upon request.” RIA Agreement ¶ 5.

61. While HCM contracted for the recognition that it would be acting on behalf of others and could be in conflict with advice given the DAF, (RIA Agreement ¶ 12), nowhere did it purport to waive the fiduciary duties owed to the DAF not to trade as a principal in a manner that harmed the DAF.

62. HCFA owed a fiduciary duty to Holdco as an investor in HCLOF and to which HCFA was the portfolio manager. HCM owed a fiduciary duty to the DAF (and to Holdco as its subsidiary) pursuant to a written Advisory Agreement HCM and the DAF had where HCM agreed to provide sound investment advice and management functions.

63. As a registered investment adviser, HCM’s fiduciary duty is broad and applies to the entire advisor-client relationship.

64. The core of the fiduciary duty is to act in the best interest of their investors—the advisor must put the ends of the client before its own ends or the ends of a third party.

65. This is manifested in a duty of loyalty and a duty of utmost care. It also means that the RIA has to follow the terms of the company agreements and the regulations that apply to the investment vehicle.

66. The fiduciary duty that HCM and Seery owed to Plaintiff is predicated on trust and confidence. Section 204A of the Advisers Act requires investment advisors (whether SEC-registered or not) to establish, maintain, and enforce written policies and procedures reasonably designed to prevent the RIA from trading on material, non-public information. *See* 17 C.F.R. § 275.206(4)-7. That means that Plaintiff should be able to take Defendants at their word and not have to second guess or dig behind representations made by them.

67. The simple thesis of this claim is that Defendants HCFA and HCM breached their fiduciary duties by (i) insider trading with Harbourvest and concealing the rising NAV of the underlying assets—i.e., trading with Harbourvest on superior, non-public information that was neither revealed to Harbourvest nor to Plaintiff; (ii) concealing the value of the Harbourvest Interests; and (iii) diverting the investment opportunity in the Harbourvest entities to HCM (or its designee) without offering it to or making it available to Plaintiff or the DAF.

68. HCM, as part of its contractual advisory function with Plaintiffs, had expressly recommended the HCLOF investment to the DAF. Thus, diverting the opportunity for returns on its investment was an additional breach of fiduciary duty.

69. This violated a multitude of regulations under 27 C.F.R. part 275, in addition to Rules 10b-5 and 10b5-1. 17 CFR 240.10b5-1 (“Rule 10b5-1”) explains that one who trades while possessing non-public information is liable for insider trading, and they do not necessarily have to have *used* the specific inside information.

70. It also violated HCM’s own internal policies and procedures.

71. Also, the regulations impose obligations on Defendants to calculate a *current* valuation when communicating with an investor, such as what may or may not be taken into account, and what cannot pass muster as a current valuation. Upon information and belief, these regulations were not followed by the Defendants.

72. HCM's internal policies and procedures, which it promised to abide by both in the RIA Agreement and in its Form ADV SEC filing, provided for the means of properly calculating the value of the assets.

73. HCM either did not follow these policies, changed them to be out of compliance both with the Adviser Act regulations and its Form ADV representations, and/or simply misrepresented or concealed their results.

74. In so doing, because the fiduciary duty owed to Plaintiff is a broad one, and because Defendants' malfeasance directly implicates its relationship with Plaintiff, Defendants have breached the Advisers Act's fiduciary duties owed to Plaintiff as part of their fiduciary relationship.⁶

75. At no time between agreeing with Harbourvest to the purchase of its interests and the court approval did Defendants disclose to either Harbourvest or to Plaintiff (and the Bankruptcy Court for that matter) that the purchase was at below 50% the current net asset value as well, and when they failed to offer Plaintiff (and the other members of HCLOF) their right to purchase the interests pro rata at such advantageous valuations. Plaintiff's lost opportunity to

⁶ See Advisers Act Release No. 4197 (Sept. 17, 2015) (Commission Opinion) (“[O]nce an investment Advisory relationship is formed, the Advisers Act does not permit an adviser to exploit that fiduciary relationship by defrauding his client in any investment transaction connected to the Advisory relationship.”); see also *SEC v. Lauer*, No. 03-80612-CIV, 2008 U.S. Dist. LEXIS 73026, at 90 (S.D. Fla. Sept. 24, 2008) (“Unlike the antifraud provisions of the Securities Act and the Exchange Act, Section 206 of the Advisers Act does not require that the activity be ‘in the offer or sale of any’ security or ‘in connection with the purchase or sale of any security.’”).

purchase has harmed Plaintiff. Plaintiff had been led to believe by the Defendants that the value of what was being purchased in the Harbourvest settlement by HCM (or its designee) was at fair market value. This representation, repeated again in the Bankruptcy Court during the Harbourvest confirmation, implicitly suggested that a proper current valuation had been performed.

76. Defendant's principal, Seery, testified in January 2021 that the then-current fair market value of Harbourvest's 49.98% interest in HCLOF was worth around \$22.5 million. But by then, it was worth almost double that amount and has continued to appreciate. Seery knew or should have known that fact because the value of some of the HCLOF assets had increased, and he had a duty to know the current value. His lack of actual knowledge, while potentially not overtly fraudulent, would nonetheless amount to a breach of fiduciary duty for acting without proper diligence and information that was plainly available.

77. Furthermore, HCLOF holds equity in MGM Studios and debt in CCS Medical via various CLO positions. But Seery, in his role as CEO of HCM, was made aware during an advisors meeting in December 2020 that Highland would have to restrict its trading in MGM because of its insider status due to activities that were likely to apply upward pressure on MGM's share price.

78. Furthermore, Seery controlled the Board of CCS Medical. And in or around October 2020, Seery was advocating an equatization that would have increased the value of the CCS securities by 25%, which was not reflected in the HCM report of the NAV of HCLOF's holdings.

79. Seery's knowledge is imputed to HCM.

80. Moreover, it is a breach of fiduciary duty to commit corporate waste, which is effectively what disposing of the HCLOF assets would constitute in a rising market, where there

is no demand for disposition by the investors (save for HCM, whose proper 0.6% interest could easily be sold to the DAF at fair value).

81. As holder of 0.6% of the HCLOF interests, and now assignee of the 49.98% Harbourvest Interests), HCM has essentially committed self-dealing by threatening to liquidate HCLOF now that it may be compelled to do so under its proposed liquidation plan, which perhaps inures to the short term goals of HCM but to the pecuniary detriment of the other holders of HCLOF whose upside will be prematurely truncated.

82. Seery and HCM should not be allowed to benefit from the breach of their fiduciary duties because doing so would also cause Plaintiffs irreparable harm. The means and methods of disposal would likely render the full scope of damages to the DAF not susceptible to specific calculation—particularly as they would relate to calculating the lost opportunity cost. Seery and HCM likely do not have the assets to pay a judgment to Plaintiffs that would be rendered, simply taking the lost appreciation of the HCLOF assets.

83. Defendants are thus liable for diverting a corporate opportunity or asset that would or should have been offered to Plaintiff and the other investors. Because federal law makes the duties invoked herein unwaivable, it is preposterous that HCM, as a 0.6% holder of HCLOF, deemed itself entitled to the all of the value and optionality of the below-market Harbourvest purchase.

84. Defendants cannot rely on any contractual provision that purports to waive this violation. Nothing in any agreement purports to permit, authorize or otherwise sanitize Defendants' self-dealing. All such provisions are void.

85. In the fourth quarter of 2020, Seery and HCM notified staff that they would be terminated on December 31, 2020. That termination was postponed to February 28, 2021.

Purchasing the Harbourvest assets without staffing necessary to be a functioning Registered Investment Advisor was a strategic reversal from prior filings that outlined canceling the CLO management contracts and allowing investors to replace Highland as manager.

86. Seery's compensation agreement with the UCC incentivizes him to expedite recoveries and to prevent transparency regarding the Harbourvest settlement.

87. What is more, Seery had previously testified that the management contracts for the funds—HCLOF included—were unprofitable, and that he intended to transfer them. But he later rejected offers to purchase those management contracts for fair value and instead decided to continue to manage the funds—which is what apparently gave rise to the Harbourvest Settlement, among others. He simultaneously rejected an offer for the Harbourvest assets of \$24 million, stating that they were worth much more than that.

88. Because of Defendants' malfeasance, Plaintiffs have lost over \$25 million in damages—a number that continues to rise—and the Defendants should not be able to obtain a windfall.

89. For the same reason, Defendants' malfeasance has also exposed HCLOF to a massive liability from Harbourvest since the assignment of those interests is now one that is likely unenforceable under the Advisers Act, Section 47(b), if there was unequal information.

90. HCM and HCFA are liable as principals for breach of fiduciary duty, as are the principals and compliance staff of each entity.

91. Plaintiffs seek disgorgement, damages, exemplary damages, attorneys' fees and costs. To the extent the Court determines that this claim had to have been brought derivatively on behalf of HCLOF, then Plaintiffs represent that any pre-suit demand would have been futile since asking HCM to bring suit against its principal, Seery, would have been futile.

SECOND CAUSE OF ACTION
Breach of HCLOF Company Agreement
(By Holdco against HCLOF, HCM and HCFA)

92. Plaintiffs respectfully incorporate the foregoing factual averments as if fully set forth herein and further alleges the following:

93. On November 15, 2017, the members of HCLOF, along with HCLOF and HCFA, executed the *Members Agreement Relating to the Company* (the “Company Agreement”).

94. The Company Agreement governs the rights and duties of the members of HCLOF.

95. Section 6.2 of HCLOF Company Agreement provides that when a member “other than ... CLO Holdco [Plaintiff] or a Highland Affiliate,” intends to sell its interest in HCLOF to a third party (i.e., not to an affiliate of the selling member), then the other members have the first right of refusal to purchase those interests pro rata for the same price that the member has agreed to sell.

96. Here, despite the fact that Harbourvest agreed to sell its interests in HCLOF for \$22.5 million when they were worth more than double that, Defendants did not offer Plaintiff the chance to buy its pro rata share of those interests at the same agreed price of \$22.5 million (adjusted pro rata).

97. The transfer and sale of the interests to HCM were accomplished as part of the Harbourvest Settlement which was approved by the Bankruptcy Court.

98. Plaintiff was not informed of the fact that Harbourvest had offered its shares to Defendant HCM for \$22.5 million—which was under 50% of their true value.

99. Plaintiff was not offered the right to purchase its pro rata share of the Harbourvest interests prior to the agreement being struck or prior to court approval being sought.

100. Had Plaintiff been allowed to do so, it would have obtained the interests with a net equity value over their purchase price worth in excess of \$20 million.

101. No discovery or opportunity to investigate was afforded Plaintiff prior to lodging an objection in the Bankruptcy Court.

102. Plaintiff is entitled to specific performance or, alternatively, disgorgement, constructive trust, damages, attorneys' fees and costs.

THIRD CAUSE OF ACTION
Negligence
(By the DAF and CLO Holdco against HCM and HCFA)

103. Plaintiffs respectfully incorporate the foregoing factual averments as if fully set forth herein, and further alleges the following:

104. Plaintiffs incorporate the foregoing causes of action and note that all the foregoing violations were breaches of the common law duty of care imposed by law on each of Seery, HCFA and HCM.

105. Each of these Defendants should have known that their actions were violations of the Advisers Act, HCM's internal policies and procedures, the Company Agreement, or all three.

106. Seery and HCM owed duties of care to Plaintiffs to follow HCM's internal policies and procedures regarding both the propriety and means of trading with a customer [Harbourvest], the propriety and means of trading as a principal in an account but in a manner adverse to another customer [the DAF and Holdco], and the proper means of valuing the CLOs and other assets held by HCLOF.

107. It would be foreseeable that failing to disclose the current value of the assets in the HCLOF would impact Plaintiffs negatively in a variety of ways.

108. It would be reasonably foreseeable that failing to correctly and accurately calculate the current net asset value of the market value of the interests would cause Plaintiffs to value the Harbourvest Interests differently.

109. It would be reasonably foreseeable that referring to old and antiquated market quotations and/or valuations of the HCLOF assets or interests would result in a mis-valuation of HCLOF and, therefore, a mis-valuation of the Harbourvest Interests.

110. Likewise, it would have been foreseeable that Plaintiff's failure to give Plaintiff the opportunity to purchase the Harbourvest shares at a \$22.5 million valuation would cause Plaintiff damages. Defendants knew that the value of those assets was rising. They further knew or should have known that whereas those assets were sold to HCM for an allowance of claims to be funded in the future, selling them to Plaintiff would have provided the estate with cash funds.

111. Defendants' negligence foreseeably and directly caused Plaintiff harm.

112. Plaintiff is thus entitled to damages.

FOURTH CAUSE OF ACTION
Racketeering Influenced Corrupt Organizations Act
(CLO Holdco and DAF against HCM)

113. Plaintiffs respectfully incorporate the foregoing factual averments as if fully set forth herein, and further alleges the following:

114. Defendants are liable for violations of the Racketeer Influenced and Corrupt Organizations ("RICO") Act, 18 U.S.C. § 1961 *et seq.*, for the conduct of an enterprise through a pattern of racketeering activity.

115. HCLOF constitutes an enterprise under the RICO Act. Additionally, or in the alternative, HCM, HCLA, and HCLOF constituted an association-in-fact enterprise. The purpose of the association-in-fact was the perpetuation of Seery's position at HCM and using the

Harbourvest settlement as a vehicle to enrich persons other than the HCLOF investors, including Holdco and the DAF, and the perpetuation of HCM's holdings in collateralized loan obligations owned by HCLOF, while attempting to deny Plaintiffs the benefit of its rights of ownership.

116. The association-in-fact was bound by informal and formal connections for years prior to the illicit purpose, and then changed when HCM joined it in order to achieve the association's illicit purpose. For example, HCM is the parent and control person over HCFA, which is the portfolio manager of HCLOF pursuant to a contractual agreement—both are registered investment advisors and provide advisory and management services to HCLOF.

117. Defendants injured Plaintiffs through their continuous course of conduct of the HCM-HCLA-HCLOF association-in-fact enterprise. HCM's actions (performed through Seery and others) constitute violations of the federal wire fraud, mail fraud, fraud in connection with a case under Title 11, and/or securities fraud laws, pursuant to 18 U.S.C. § 1961(1)(B) and (D).

118. HCM operated in such a way as to violate insider trading rules and regulations when it traded with Harbourvest while it had material, non-public information that it had not supplied to Harbourvest or to Plaintiffs.

119. In or about November 2020, HCM and Harbourvest entered into discussions about settling the Harbourvest Claims. Seery's conduct of HCLOF and HCLA on behalf of HCM through the interstate mails and/or wires caused HCM to agree to the purchase of Harbourvest's interests in HCLOF.

120. On or about each of September 30, 2020, through December 31, 2020, Seery, through his conduct of the enterprise, utilized the interstate wires and/or mails to obtain or arrive at valuations of the HCLOF interests. Seery's conduct of the enterprise caused them to cease

sending the valuation reports to Plaintiffs, which eventually allowed Plaintiffs to be misled into believing that Seery had properly valued the interests.

121. On or about September 30, 2020, Seery transmitted or caused to be transmitted though the interstate wires information to HCLOF investors from HCM (via HCFA), including Harbourvest, regarding the value of HCLOF interests and underlying assets.

122. Additionally, Seery operated HCM in such a way that he concealed the true value of the HCLOF interests by utilizing the interstate wires and mails to transmit communications to the court in the form of written representations on or about December 23, 2020, and then further transmitted verbal representations of the current market value (the vastly understated one) on January 14, 2021, during live testimony.

123. However, Harbourvest was denied the full picture and the true value of the underlying portfolio. At the end of October and November of 2020, HCM had updated the net asset values of the HCLOF portfolio. According to sources at HCM at the time, the HCLOF assets were worth north of \$72,969,492 as of November 30, 2020. Harbourvest's share of that would have been \$36,484,746.

124. The HCLOF net asset value had reached \$86,440,024 as of December 31, 2021, which means that by the time Seery was testifying in the Bankruptcy Court on January 14, 2021, the fair market value of the Harbourvest Assets was \$22.5 million, when it was actually closer to \$43,202,724. Seery, speaking on behalf of HCM, knew of the distinction in value.

125. On January 14, 2021, Seery also testified that he (implying HCM, HCLA and HCLOF) had valued the Harbourvest Assets at their current valuation and at fair market value. This was not true because the valuation that was used and testified to was ancient. The ostensible purpose of this concealment was to induce Plaintiff and other interest holdings to take no action.

126. In supporting HCM’s motion to the Bankruptcy Court to approve the Harbourvest Settlement, Seery omitted the fact that HCM was purchasing the interests at a massive discount, which would violate the letter and spirit of the Adviser’s Act.

127. Seery was informed in late December 2020 at an in-person meeting in Dallas to which Seery had to fly that HCLOF and HCM had to suspend trading in MGM Studios’ securities because Seery had learned from James Dondero, who was on the Board of MGM, of a potential purchase of the company. The news of the MGM purchase should have caused Seery to revalue the HCLOF investment in MGM.

128. In or around October 2020, Seery (who controls the Board of CSS Medical) was pursuing “equatization” of CSS Medical’s debt, which would have increased the value of certain securities by 25%. In several communications through the U.S. interstate wires and/or mails, and with Plaintiffs, and the several communications with Harbourvest during the negotiations of the settlement, Seery failed to disclose these changes which were responsible in part for the ever-growing value of the HCLOF CLO portfolio.

129. Seery was at all relevant times operating as an agent of HCM.

130. This series of related violations of the wire fraud, mail fraud, and securities fraud laws, in connection with the HCM bankruptcy, constitute a continuing pattern and practice of racketeering for the purpose of winning a windfall for HCM and himself--a nearly \$30,000,000 payday under the confirmation agreement.

131. The federal RICO statute makes it actionable for one’s conduct of an enterprise to include “fraud in connection with a [bankruptcy case]”. The Advisers’ Act antifraud provisions require full transparency and accountability to an advisers’ investors and clients and does not require a showing of reliance or materiality. The wire fraud provision likewise is violated when,

as here, the interstate wires are used as part of a “scheme or artifice ... for obtaining money or property by means of false ... pretenses, [or] representations[.]”

132. Accordingly, because Defendants’ conduct violated the wire fraud and mail fraud laws, and the Advisers’ Act antifraud provisions, and their acts and omissions were in connection with the HCM Bankruptcy proceedings under Title 11, they are sufficient to bring such conduct within the purview of the RICO civil action provisions, **18 U.S.C. § 1964**.

133. Plaintiffs are thus entitled to damages, treble damages, attorneys’ fees and costs of suit, in addition to all other injunctive or equitable relief to which they are justly entitled.

FIFTH CAUSE OF ACTION
Tortious Interference
(CLO Holdco against HCM)

134. Plaintiff respectfully incorporates the foregoing factual averments as if fully set forth herein and further alleges the following:

135. At all relevant times, HCM owned a 0.6% interest in HCLOF.

136. At all relevant times, Seery and HCM knew that Plaintiff had specific rights in HCLOF under the Company Agreement, § 6.2.

137. Section 6.2 of HCLOF Company agreement provides that when a member “other than ... CLO Holdco [Plaintiff] or a Highland Affiliate,” intends to sell its interest in HCLOF to a third party (i.e., not an affiliate of the member), then the other members have the first right of refusal to purchase those interests pro rata for the same price that the member has agreed to sell.

138. HCM, through Seery, tortiously interfered with Plaintiff’s contractual rights with HCLOF by, among other things, diverting the Harbourvest Interests in HCLOF to HCM without giving HCLOF or Plaintiff the option to purchase those assets at the same favorable price that HCM obtained them.

139. HCM and Seery tortiously interfered with Plaintiff's contractual rights with HCLOF by, among other things, misrepresenting the fair market value as \$22.5 million and concealing the current value of those interests.

140. But for HCM and Seery's tortious interference, Plaintiff would have been able to acquire the Harbourvest Interests at a highly favorable price. HCM and Seery's knowledge of the rights and intentional interference with these rights has caused damage to Plaintiff CLO Holdco.

141. Plaintiff is therefore entitled to damages from HCM and Seery, as well as exemplary damages.

VI.

JURY DEMAND

142. Plaintiff demands trial by jury on all claims so triable.

VII.

PRAYER FOR RELIEF

143. Wherefore, for the foregoing reasons, Plaintiffs respectfully pray that the Court enter judgment in its favor and against Defendants, jointly and severally, for:

- a. Actual damages;
- b. Disgorgement;
- c. Treble damages;
- d. Exemplary and punitive damages;
- e. Attorneys' fees and costs as allowed by common law, statute or contract;
- f. A constructive trust to avoid dissipation of assets;
- g. All such other relief to which Plaintiff is justly entitled.

Dated: April 12, 2021

Respectfully submitted,

SBAITI & COMPANY PLLC

/s/ Mazin A. Sbaiti

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EXHIBIT 12

004321

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In re:	§	
HIGHLAND CAPITAL	§	
MANAGEMENT, L.P.,	§	
	§	
Debtor,	§	
-----	§	
THE CHARITABLE DAF FUND, L.P.	§	
and CLO HOLDCO, LTD.,	§	
	§	
Plaintiffs/Appellants,	§	
	§	
v.	§	CIVIL ACTION NO. 3:21-CV-3129-B
	§	
HIGHLAND CAPITAL	§	
MANAGEMENT, L.P.,	§	
	§	
Defendant/Appellee.	§	

MEMORANDUM OPINION AND ORDER

Before the Court are Appellants The Charitable DAF Fund, L.P. (Charitable DAF) and CLO Holdco, Ltd. (CLO Holdco)'s appeals from the bankruptcy court's Motion to Dismiss Order and Motion to Stay Order. For the reasons that follow, the Motion to Dismiss Order is **REVERSED** and **REMANDED**. The Motion to Stay Order is **AFFIRMED**.



I.

BACKGROUND¹

These are consolidated appeals from an adversary proceeding in a bankruptcy case. The Debtor, Highland Capital Management, L.P. (HCM), filed for Chapter 11 bankruptcy on October 16, 2019, in the United States Bankruptcy Court for the District of Delaware and that court transferred venue to the United States Bankruptcy Court for the North District of Texas. *In re Highland Cap. Mgmt. L.P.*, 2022 WL 780991, at *1 (Bankr. N.D. Tex. Mar. 11, 2022).

In 2017, Charitable DAF—through the holding entity CLO Holdco—purchased 49.02% of the available shares of Highland CLO Funding, Ltd. (HCLOF) based upon investment advice from HCM.² Doc. 9, Appellant’s Br., 5. Another entity, HarbourVest, acquired 49.98% of the HCLOF shares and HCM and its employees acquired the remaining 1%. *Id.*; Doc. 21, Appellee’s Br., 7. A company agreement (the HCLOF Member Agreement) governing the rights and obligations of HCLOF shareholders purportedly prohibited a member from “sell[ing] shares to another member without first providing all other members the right to purchase a pro rata portion thereof at the same price” (the Right of First Refusal). Doc. 9, Appellant’s Br., 6. The value of the HCLOF shares fluctuated throughout the bankruptcy proceedings; the actual value is one of the issues giving rise to some of Charitable DAF’s causes of action. *Id.* at 6–7; R. at 551–65.

¹ Because these are two consolidated appeals with separate appellate records, the Court indicates when it switches between the separate appellate records by footnotes. The Appellant’s Brief and record cites in this Background section are in Doc. 6 in case No. 3:22-CV-0695-B. Appellee’s Brief, which was filed after consolidation, is in case No. 21-CV-3129-B.

² Except where otherwise stated, the Court refers to Charitable DAF and CLO Holdco collectively as Charitable DAF because Charitable DAF controls and owns CLO Holdco and both entities have the same director. Doc. 21, Appellee’s Br., 7 & n.6. Appellant Charitable DAF does not dispute this relationship and imputes the actions of CLO Holdco to itself throughout Appellant’s brief. See Doc. 9, Appellant’s Br., 13–14 (imputing the Objection to both Appellants).

During the bankruptcy, “HarbourVest filed proof of claims against [HCM] totaling over \$300 million, notionally.” [Doc. 9](#), Appellant’s Br., 6. As part of the settlement for these claims, “HarbourVest agreed to sell its interest in HCLOF to [HCM].” *Id.* at 8. HCM would then have majority ownership of HCLOF. *See id.* at 5; [Doc. 21](#), Appellee’s Br., 7. “CLO Holdco filed an objection to the settlement, contending that the HCLOF Member Agreement entitled [CLO] Holdco to a Right of first Refusal” (the Objection). [Doc. 9](#), Appellant’s Br., 8. At the beginning of the settlement hearing (the Rule 9019 Settlement Hearing), CLO Holdco withdrew its Objection. [Doc. 21](#), Appellee’s Br., 10–11; R. at 6269–70. After overruling the remaining objections from the other parties, the bankruptcy court approved the HarbourVest Settlement. [Doc. 9](#), Appellant’s Br., 9.

This Adversary Proceeding stems from the complaint filed by Appellants on April 12, 2021, in this Court in *Charitable DAF Fund, L.P. et al. v. Highland Capital Management, L.P., et al.*, Case No. 3:21-CV-0842-B. *Id.*; Complaint, *Charitable DAF Fund, L.P. v. Highland Cap. Mgmt., L.P.*, No. 3:21-CV-0842-B (N.D. Tex. Apr. 12, 2021), [Doc. 1](#). On September 20, 2021, this Court referred that case to the bankruptcy court for “docket[ing] as an Adversary Proceeding associated with the consolidated Chapter 11 Bankruptcy of Highland Capital Management, L.P.” Order of Reference, *Charitable DAF Fund, L.P. v. Highland Cap. Mgmt., L.P.*, No. 3:21-CV-0842-B (N.D. Tex. Sept. 20, 2021), [Doc. 64](#). During the Adversary Proceeding, Appellants moved for a stay of the case (the Motion to Stay) and Appellees moved to dismiss the case (the Motion to Dismiss). R. at 1634–67, 3248–52. On November 23, 2021, the bankruptcy court held a hearing on the Motion to Stay and Motion to Dismiss. *Id.* at 5951. The bankruptcy court denied the Motion to Stay at the hearing and later entered an order granting the Motion to Dismiss, dismissing all causes of action with prejudice. *Id.* at 5977; *In re Highland*, [2022 WL 780991](#), at *12. Appellants promptly appealed both orders; this

Court consolidated the appeals. *In re Highland Cap. Mgmt.*, 2022 WL 2193000, at *1, *4 (N.D. Tex. June 17, 2022). While the appeals were pending, the Fifth Circuit affirmed the HCM reorganization plan (the Plan), but vacated the exculpatory provision “as to all parties *except* [HCM], the Committee and its members, and the Independent Directors for conduct within the scope of their duties.” *Highland Cap. Mgmt., L.P. v. NexPoint Advisors, L.P.*, 2022 WL 3571094, at *14 (5th Cir. Aug. 19, 2022).

The appeals are fully briefed and ripe for review. The Court considers them below.

II.

LEGAL STANDARDS

Final judgments, orders, and decrees of a bankruptcy court may be appealed to a federal district court. 28 U.S.C. § 158(a). Because the district court functions as an appellate court in this scenario, it applies the same standards of review that federal appellate courts use when reviewing district court decisions. *In re Webb*, 954 F.2d 1102, 1103–04 (5th Cir. 1992) (citations omitted).

A. Rule 12(b)(6) Motion to Dismiss for Failure to State a Claim

Under Federal Rule of Civil Procedure 8(a)(2), a complaint must contain “a short and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). Rule 12(b)(6) authorizes a court to dismiss a plaintiff’s complaint for “failure to state a claim upon which relief can be granted.” Fed. R. Civ. P. 12(b)(6). In considering a Rule 12(b)(6) motion to dismiss, “[t]he court accepts all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff.” *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 205 (5th Cir. 2007). But the court will “not look beyond the face of the pleadings to determine whether relief should be granted based on the alleged facts.” *Spivey v. Robertson*, 197 F.3d 772, 774 (5th Cir. 1999).

To survive a motion to dismiss, plaintiffs must plead “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). “Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* “The plausibility standard is not akin to a ‘probability requirement’ but it asks for more than a sheer possibility that a defendant has acted unlawfully.” *Id.* (quoting *Twombly*, 550 U.S. at 556). When well-pleaded facts fail to meet this standard, “the complaint has alleged—but it has not shown—that the pleader is entitled to relief.” *Id.* at 679 (quotation marks and alterations omitted).

B. *Motion to Stay*

Incidental to a court’s inherent power to control its docket is the power to stay proceedings before it. *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936). A court considers four factors when determining whether to stay a case pending appeal: “(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.” *Veasey v. Perry*, 769 F.3d 890, 892 (5th Cir. 2014) (quoting *Nken v. Holder*, 556 U.S. 418, 426 (2009)). “The first two factors of the traditional standard are the most critical.” *Barber v. Bryant*, 833 F.3d 510, 511 (5th Cir. 2016) (quoting *Nken*, 556 U.S. at 434).

III.

ANALYSIS

The Court begins with the appeal of the Motion to Dismiss Order because it can only review the appeal of the Motion to Stay Order if it reverses the bankruptcy court's decision to dismiss the causes of action in the adversary proceeding. *In re Highland*, 2022 WL 2193000, at *2. Finding reversal of the Motion to Dismiss Order warranted, the Court then reviews the appeal of the Motion to Stay Order.

A. *Appeal of the Motion to Dismiss Order*³

Charitable DAF raises three issues in its appeal of the Motion to Dismiss Order: (1) whether the bankruptcy court “commit[ted] reversible error by sua sponte dismissing this action on the basis of collateral estoppel without giving notice and an opportunity to respond”; (2) whether collateral estoppel barred Charitable DAF's claims when the claims were adjudicated in a Rule 9019 Settlement Hearing; and (3) whether the bankruptcy court's application of judicial estoppel erroneously relied on a transcription error, an ostensibly inconsistent position of Charitable DAF, or a failure to conclude that “subsequently discovered evidence . . . render[ed] the ostensible inconsistency ‘inadvertent.’” Doc. 9, Appellant's Br., 2.

An appellate court reviews a dismissal under Rule 12(b)(6) de novo. *Stripling v. Jordan Prod. Co., LLC*, 234 F.3d 863, 868 (5th Cir. 2000). “[T]he application of collateral estoppel is” also reviewed de novo. *Id.* (quoting *United States v. Brackett*, 113 F.3d 1396, 1398 (5th Cir. 1997)). However, “a [bankruptcy] court's decision to invoke the equitable doctrine of judicial estoppel [is reviewed] for abuse of discretion.” *Cox v. Richards*, 761 F. App'x 244, 246 (5th Cir. 2019) (citing

³ For this appeal, the record and document citations are in case No. 3:22-CV-0695-B. However, Appellee's Brief is in case No. 21-CV-3129-B.

United States ex rel. Long v. GSDMIdea City, L.L.C., 798 F.3d 265, 271 (5th Cir. 2015)). Therefore, this Court reviews the bankruptcy court's sua sponte invocation of collateral estoppel de novo, the application of collateral estoppel de novo, and the invocation of judicial estoppel for abuse of discretion. The Court addresses each in turn below.

1. Sua Sponte Dismissal

The bankruptcy court dismissed Charitable DAF's claims with prejudice based on collateral estoppel—even though neither party raised the issue “per se”—finding their res judicata arguments relevant to the issue. *In re Highland*, 2022 WL 780991, at *7. The Court first considers whether the sua sponte application was proper.

Charitable DAF challenges the bankruptcy court's sua sponte invocation of collateral estoppel to dismiss its claims. Doc. 9, Appellant's Br., 11–12. Specifically, Charitable DAF argues that the bankruptcy court could “only do so if the ‘procedure employed is fair’—that is, if prior notice is given with adequate time for the plaintiff to prepare a response.” *Id.* at 12 (quoting *Carroll v. Fort James Corp.*, 470 F.3d 1171, 1177–78 (5th Cir. 2006)). The failure to provide “notice and an opportunity to dispute the claimed bases for dismissal is reversible error,” according to Charitable DAF. *Id.*

The Court disagrees. The Fifth Circuit has recognized two instances when a court may dismiss a case sua sponte on the basis of collateral estoppel: when (1) “both actions were brought in courts of the same district” or (2) “all of the relevant facts are contained in the record and . . . uncontroverted.” *OneBeacon Am. Ins. Co. v. Barnett*, 761 F. App'x 396, 399 (5th Cir. 2019) (first quoting *Trammell Crow Residential Co. v. Am. Prot. Ins. Co.*, 574 F. App'x 513, 522 (5th Cir. 2014); and then quoting *Mowbray v. Cameron Cnty.*, 274 F.3d 269, 281 (5th Cir. 2001)). This case easily

fits into the first category because all of the proceedings at issue took place in the bankruptcy court before the same judge. See *In re Highland*, 2022 WL 780991, at *7 (relying on the former category to dismiss the case). Thus, the bankruptcy court did not err by raising the collateral estoppel issue sua sponte.

This case is unlike the *Carroll* case cited by Charitable DAF, which did not involve collateral estoppel. 470 F.3d 1171. In *Carroll*, the Fifth Circuit held that a court may dismiss a case sua sponte under Federal Rule of Civil Procedure 12(b)(6) if the “procedure employed is fair[,]” which requires “both notice of the court’s intention and an opportunity to respond.” *Id.* at 1177 (quoting *Bazrowx v. Scott*, 136 F.3d 1053, 1054 (5th Cir. 1998)). The district court erred by not providing “notice or opportunity to be heard” and “did not even . . . mention [some of the dismissed] claims in its order of dismissal.” *Id.*

This case is more akin to *McIntyre v. Ben E. Keith Co.* where the Fifth Circuit upheld the district court’s sua sponte raising of the issue of res judicata to dismiss the case under Rule 12(b)(6). 754 F. App’x 262, 265 (5th Cir. 2018). In *McIntyre*, the plaintiff’s “Civil Rights Act and FLSA actions were brought before the same federal district court.” *Id.* Because the latter action closely resembled the former action, the Fifth Circuit found no reversible error with the district court’s raising the issue of res judicata sua sponte. *Id.*

First, dismissal for failure to state a claim like in *Carroll* and dismissal for collateral estoppel as in the instant case are conceptually and procedurally different. In the former, the plaintiff is in the process of attempting to “allege[] [their] best case,” *Bazrowx*, 136 F.3d at 1054, while collateral estoppel occurs after a plaintiff “alleged [their] best case” and fully litigated the issue. See *Allen v. McCurry*, 449 U.S. 90, 94 (1980). Put more succinctly, collateral estoppel eliminates “unnecessary

judicial waste” from repeated attempts at alleging the best case. *Arizona v. California*, 530 U.S. 392, 412 (2000) (quoting *United States v. Sioux Nation*, 448 U.S. 371, 432 (1980) (Rehnquist, J., dissenting)). Second, the parties addressed res judicata during oral argument and in their pleadings before the bankruptcy court. While res judicata is not collateral estoppel, it is closely related. *Hous. Prof'l Towing Ass'n v. City of Houston*, 812 F.3d 443, 447 (5th Cir. 2016) (“[R]es judicata encompasses two separate but linked preclusive doctrines: (1) true res judicata or claim preclusion and (2) collateral estoppel or issue preclusion.”). Thus, the bankruptcy court employed a fair procedure by allowing the parties to litigate the issues, including res judicata, before dismissing the case sua sponte. See generally *Carver v. Atwood*, 18 F.4th 494, 497 (5th Cir. 2021) (“District courts may, for appropriate reasons, dismiss cases sua sponte.”).

The Court next considers whether the bankruptcy court’s substantive application of collateral estoppel was proper.

2. Collateral Estoppel

“Collateral estoppel prevents litigation of an issue when: ‘(1) the identical issue was previously adjudicated; (2) the issue was actually litigated; and (3) the previous determination was necessary to the decision.’”⁴ *Bradberry v. Jefferson Cnty.*, 732 F.3d 540, 548 (5th Cir. 2013) (quoting *Pace v. Bogalusa City Sch. Bd.*, 403 F.3d 272, 290 (5th Cir. 2005)). “Relitigation of an issue is not precluded unless the facts and the legal standard used to assess them are the same in both proceedings.” *In re Southmark Corp.*, 163 F.3d at 932.

Charitable DAF attacks each element of collateral estoppel, so the Court addresses each

⁴ Appellant lists a fourth element occasionally referenced by the Fifth Circuit—“there is no special circumstance that would make it unfair to apply the doctrine”—but the Court finds no reason to address this possible fourth element in this case. See *In re Southmark Corp.*, 163 F.3d 925, 932 n.9 (5th Cir. 1999) (declining to apply the fourth element because appellant “failed to support it factually”).

element individually.

i. Identical issue

The bankruptcy court found “(a) consideration of the value that the estate was both receiving and paying, as well as (b) the potential existence of a ‘Right of First Refusal’ . . . [were] the gravamen of [Charitable DAF’s] Complaint.” *In re Highland*, 2022 WL 780991, at *9 (emphasis omitted). During the settlement hearing, the bankruptcy court had to determine whether the HarbourVest Settlement “was ‘fair and equitable’ and in the ‘best interests of creditors,’ and whether it was the ‘product of arms-length bargaining, and not of fraud or collusion[.]’” *Id.* at *8. This determination entailed “arguments and evidence regarding the methodology for the valuation of the HCLOF interest and the existence or non-existence of a ‘Right of First Refusal.’” *Id.*

Charitable DAF argues that the issues are not identical because the Objection “only addressed whether HarbourVest . . . had performed all conditions precedent to being able to transfer the interest to Highland *as another co-investor*” and did not present an identical claim “for breach of the HCLOF [Member] Agreement” and associated damages. *Doc. 9*, Appellant’s Br., 13–14. Further, “even if this one contract issue was fully . . . litigated,” only the second cause of action in Charitable DAF’s complaint arguably parallels that issue, according to Charitable DAF—the others are distinct. *Id.* at 14–15. Charitable DAF contends that these non-contract causes of action rely on evidence that was not known at the Rule 9019 Settlement Hearing, “stem from events that either occurred post-hearing, or were not discovered until after the hearing.” *Id.* at 15.

The Court finds the issues are identical. CLO Holdco’s Objection specifically argued:

Harbourvest has no authority to transfer its interests in HCLOF without first complying with the Right of First Refusal. The only way to effectuate such a transfer without first providing other members the Right of First Refusal is an intentionally

inaccurate interpretation of the Member Agreement's contractual provisions that would render specific passages redundant and meaningless.

R. at 4730. The bankruptcy court also heard argument and testimony from Seery, HCM's chief executive and chief restructuring officer, and Pugatch, a managing director of HarbourVest, about the valuation of HCLOF's assets at the settlement hearing. *Id.* at 6273, 6292, 6303–05 (“The twenty-two and a half [million] is the current—actually, the November value of HCLOF—the HarbourVest interests in HCLOF.”), 6358, 6374 (“The current value is right around \$22-1/2 million.”).

In the Original Complaint, Charitable DAF brought five causes of action: breach of fiduciary duties, breach of the HCLOF Member Agreement, negligence, RICO, and tortious interference. *Id.* at 551–65. The breach of fiduciary duties and negligence causes of action center around the alleged concealment of the rising value of HCLOF's assets and failing to offer the purchase of the assets to CLO Holdco or Charitable DAF before offering to HCM. *Id.* at 553–55, 559–60. The breach of the HCLOF Member Agreement cause of action encompasses the Right of First Refusal in the agreement. *Id.* at 558–59. The RICO cause of action alleges that HCM used mail and wire fraud “to obtain or arrive at valuations of the HCLOF interests,” and “conceal[] the true value of the HCLOF interests.” *Id.* at 560–64. Lastly, the tortious interference cause of action stems from HCM's alleged interference with CLO Holdco's Right of First Refusal in the Member Agreement and “misrepresenting the fair market value” of HCLOF's assets. *Id.* at 564–65. In sum, all of these causes of action involve either the valuation of HCLOF or the Right of First Refusal, so the issues are the same as those before the bankruptcy court at the Rule 2019 Settlement Hearing.

ii. *Actually Litigated*

The bankruptcy court found the same arguments were also actually litigated, reasoning:

The Bankruptcy Court would never have approved the HarbourVest Settlement if it thought the value being exchanged was not fair, or if it thought the HCLOF Interests could not be transferred and that someone might later sue the Debtor, claiming the Transfer was improper. All parties had the chance to argue and present evidence about this. The Bankruptcy Court made a ruling based on the evidence and argument.

In re Highland, 2022 WL 780991, at *9.

Charitable DAF argues that because the Objection was withdrawn and no one objected to the withdrawal, the issue asserted therein was not litigated. Doc. 9, Appellant's Br., 16. Additionally, it claims the Rule 9019 Settlement Hearing is not a mini-trial and, therefore, cannot serve as an opportunity for a party to litigate their claims. *Id.* at 17–18 (citing *Off. Comm. of Unsecured Creditors v. Moeller (In re Age Refin., Inc.)*, 801 F.3d 530, 541 (5th Cir. 2015)).

An issue is not actually litigated and, thus, precluded unless the legal standard in the prior action mirrors the legal standard of the latter action. *Copeland v. Merrill Lynch & Co.*, 47 F.3d 1415, 1422 (5th Cir. 1995) (citations omitted). The bankruptcy court approved the HarbourVest Settlement after applying the *Jackson Brewing* test, which considers:

(1) the probability of success in litigating the claims subject to the Settlement Agreement, with due consideration for the uncertainty in fact and law, (2) the complexity and likely duration of litigation and any attendant expense, inconvenience, and delay, and (3) all other factors bearing on the wisdom of the compromise, including: (i) the best interests of the creditors, with proper deference to their reasonable views, and (ii) the extent to which the settlement is truly the product of arms-length bargaining, and not of fraud or collusion.

R. at 5568; see also *In re Highland*, 2022 WL 780991, at *8 (quoting *Off. Comm. of Unsecured Creditors v. Moeller (In re Age Ref., Inc.)*, 801 F.3d 530, 540 (5th Cir. 2015)). Stated more succinctly, when faced with a settlement, the bankruptcy court ensures the “compromise is truly ‘fair and equitable’ and ‘in the best interest of the estate.’” *In re Jackson Brewing Co.*, 624 F.2d 599, 602 (5th

Cir. 1980) (quoting *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson* (TMT Trailer), 390 U.S. 414, 424 (1968)).

However, in the context of litigating actual claims—such as those asserted by Charitable DAF—a court applies a preponderance of the evidence standard, not the probability of success standard from *Jackson Brewing. Copeland*, 47 F.3d at 1423; *In re Zale Corp.*, 62 F.3d 746, 766 n.60 (5th Cir. 1995) (“We also note for future reference that the legal standard in a settlement hearing differs from that applicable in an adversary proceeding or state court trial Consequently, we doubt that the findings of the bankruptcy court in a settlement hearing would have preclusive effect in adversary proceedings or state court trials.”). See generally *Weaver v. Aquila Energy Mktg.*, 196 B.R. 945, 957 (S.D. Tex. 1996) (“[S]ettlement hearings and preference actions involve the application of different legal standards.”). “Examining whether a particular settlement is fair or equitable and in the best interest of the estate and creditors is a different inquiry, driven by different policies, than litigation of the actual claim.” *Copeland*, 47 F.3d at 1423. While the issues of the Right of First Refusal and the valuation of HCLOF were raised in the Rule 9019 Settlement Hearing, the parties did not fully litigate the issues as one would at trial, and the bankruptcy court did not resolve the issues according to a preponderance of the evidence standard. Because the bankruptcy court applied a legal standard in the Rule 9019 Settlement Hearing that is inapplicable to the adjudication of Charitable DAF’s causes of action, the issues were not actually litigated in the Rule 9019 Settlement Hearing and collateral estoppel does not apply.⁵ The Court **REVERSES** the bankruptcy court on this issue.

⁵ Having found the second element of collateral estoppel unmet, the Court need not address the third element—necessity of the previous determination to the prior decision.

3. Judicial Estoppel

The bankruptcy court found the elements of judicial estoppel met and barred the second and fifth causes of action, which rely on the Right of First Refusal. *In re Highland*, 2022 WL 780991, at *12. The Court now addresses whether judicial estoppel applies to Charitable DAF's second and fifth causes of action.

Judicial estoppel is an equitable common law doctrine aimed at preventing a party from asserting an inconsistent legal position from a previous proceeding. *In re Coastal Plains, Inc.*, 179 F.3d 197, 205 (5th Cir. 1999). "The purpose of the doctrine is 'to protect the integrity of the judicial process', by 'prevent[ing] parties from playing fast and loose with the courts to suit the exigencies of self interest.'" *Id.* (alteration in original) (quoting *Brandon v. Interfirst Corp.*, 858 F.2d 266, 268 (5th Cir. 1988)). A court examines three criteria when determining the applicability of judicial estoppel: "(1) the party against whom judicial estoppel is sought has asserted a legal position which is plainly inconsistent with a prior position; (2) a court accepted the prior position; and (3) the party did not act inadvertently." *Reed v. City of Arlington*, 650 F.3d 571, 574 (5th Cir. 2011) (en banc).

Charitable DAF raises arguments for each of the judicial estoppel elements, so the Court addresses each element below.

i. *Inconsistent legal position*

Charitable DAF argues that the bankruptcy court's determination relies on a transcription error that amounted to an admission of HCM's compliance with the Right of First Refusal. Doc. 9, Appellant's Br., 22–23. The corrected transcript makes clear that no admission was made on behalf of CLO Holdco, according to Charitable DAF. *Id.* at 23–24.

The relevant portion of the original transcript reads:

In response to Mr. Morris, I'm not going to enter into a stipulation on behalf of my client, **but** the Debtor is compliant with all aspects of the contract. We withdrew our objection, and we believe that's sufficient.

R. at 6280. The corrected transcript reads:

In response to Mr. Morris, I'm not going to enter into a stipulation on behalf of my client **that** the Debtor is compliant with all aspects of the contract. We withdrew our objection, and we believe that's sufficient.

Doc. 9-1, Appellant's Br. Ex. A, 4.

Accepting this verison of the record, CLO Holdco refused to "enter into a short stipulation on the record reflecting that the Debtor's acquisition of HarbourVest's interests in HCLOF is compliant with all of the applicable agreements between the parties." *Id.*; R. at 6280. However, moments before this, CLO Holdco withdrew its Objection premised on the Right of First Refusal stating:

CLO Holdco has had an opportunity to review the reply briefing, and after doing so has gone back and scrubbed the HCLOF corporate documents. Based on our analysis of Guernsey law and some of the arguments of counsel in those pleadings and our review of the appropriate documents, I obtained authority from my client, Grant Scott, as Trustee for CLO Holdco, to withdraw the CLO Holdco objection based on the interpretation of the member agreement.

R. at 6269–70. The bankruptcy court's decision rests primarily on this earlier withdrawal of the Objection and only later buttresses its argument with the then-unknown transcription error. *In re Highland*, **2022 WL 780991**, at *11 (following discussion of the withdrawal of the Objection with "[i]f that weren't enough" before mentioning the then-unknown transcription error). Thus, if the earlier withdrawal—without the transcription error—satisfies the first element of judicial estoppel then the bankruptcy court did not commit any error even if it referenced an incorrect transcription of the latter exchange.

The Court finds the bankruptcy court did not err in finding the first element of judicial estoppel. CLO Holdco made clear in the withdrawal of its objection that it no longer disputed the other parties' interpretation of the Right of First Refusal, which now forms the basis of Charitable DAF's second and fifth causes of action. *See R.* at 6269–70. Thus, the withdrawal of the objection put CLO Holdco on the opposite side of the legal argument that Charitable DAF now makes in its second and fifth causes of action. The first element of judicial estoppel is established because Charitable DAF has taken inconsistent positions in separate proceedings.

ii. *The bankruptcy court accepted the prior position*

The bankruptcy court solely relied on the withdrawal of the Objection to find the second element of judicial estoppel established. *In re Highland*, 2022 WL 780991, at *12. In the words of the bankruptcy court, it “perceived [this objection] as one of the major arguments that was relevant to the HarbourVest Settlement.” *Id.* “The [b]ankruptcy [c]ourt relied upon that withdrawal of CLO Holdco’s objection in making the determination to approve of the HarbourVest Settlement and, specifically, that Highland would not be running afoul of any obligation in entering into the HarbourVest Settlement.” *Id.*

Charitable DAF argues that there is no acceptance by the bankruptcy court of a prior position because without the transcription error, there is no admission and no inconsistent position. *Doc. 9*, Appellant’s Br., 25–26. Further, it contends that the withdrawal of the Objection is not the equivalent of stating the Right of First Refusal causes of action are meritless. *Id.* at 26–27.

The bankruptcy court did not err in finding the second element of judicial estoppel met because it necessarily relied on the change in CLO Holdco’s assessment of its Objection. The Right of First Refusal created a major obstacle to approval of the HarbourVest Settlement. When CLO

Holdco withdrew its Objection based on the Right of First Refusal, the Court had to accept CLO Holdco's position that the Right of First Refusal no longer posed an obstacle to the HarbourVest Settlement. Thus, the Court finds no error by the bankruptcy court for the second element of judicial estoppel.

iii. *Inadvertence of Charitable DAF*

The bankruptcy court did not examine the inadvertence of Charitable DAF in asserting inconsistent legal positions. See *In re Highland*, 2022 WL 780991, at *12.

Charitable DAF argues that it did not know the facts for several of its claims until after the settlement hearings, so it could not have asserted these claims at the hearing. Doc. 9, Appellant's Br., 27. Charitable DAF relies on the allegations surrounding the valuations of the HCLOF assets and the alleged acts violating the RICO statutes. *Id.* at 27–29. Additionally, the bankruptcy court did not address the inadvertence element for judicial estoppel and a failure to apply the correct legal standard is reversible error, Charitable DAF contends. Doc. 9, Appellant's Br., 27; Doc. 27, Appellant's Reply, 3–4.

The Court agrees with Appellant's last argument. A court abuses its discretion by applying the wrong legal standard. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990); *Def. Distrib. v. Bruck*, 30 F.4th 414, 427 (5th Cir. 2022). And the misapplication of a legal standard is reviewed de novo. *In re Woerner*, 783 F.3d 266, 270–71 (5th Cir. 2015). By not addressing the third element of judicial estoppel, the bankruptcy court applied the wrong legal standard. The Fifth Circuit implicitly recognized this third element—inadvertence—in *In re Coastal Plains, Inc.*, 179 F.3d at 206, 210, which the bankruptcy court cited for its legal standard. *In re Highland*, 2022 WL 780991, at *11. The Fifth Circuit has since clarified that “[t]his circuit . . . recognizes *three* particular requirements”

for judicial estoppel. *Kane v. Nat'l Union Fire Ins. Co.*, 535 F.3d 380, 386 (5th Cir. 2008) (emphasis added). Because the bankruptcy court did not address the inadvertence element in its order dismissing Charitable DAF's second and fifth causes of action, the bankruptcy court abused its discretion. While the district court finds no issue in the bankruptcy court's analysis of the first two elements of judicial estoppel, the bankruptcy court did not address this third element, warranting remand for determination by the bankruptcy court whether Charitable DAF acted inadvertently to change its legal position.

3. Leave to Amend

Charitable DAF requested leave to amend its complaint in its response to the motion to dismiss, R. at 2272–73, which the bankruptcy court denied by dismissing all claims with prejudice. *In re Highland*, 2022 WL 780991, at *12. The Court need not address this argument because, upon remand, the bankruptcy court will have the opportunity to reassess Charitable DAF's claims and determine whether amendment should be allowed under Federal Rule of Civil Procedure 15(a). See *Marucci Sports, L.L.C. v. Nat'l Collegiate Athletic Ass'n*, 751 F.3d 368, 378 (5th Cir. 2014) (listing factors a court considers when determining whether to allow amendment of the complaint).

C. *Appeal of the Motion to Stay Order*⁶

Appellant Charitable DAF raises one issue on appeal of the Motion to Stay Order: “Did the bankruptcy court err by proceeding with the case rather than staying it” when Charitable DAF was enjoined “from litigating any action against Appellee [HCM]”? Doc. 11, Appellant's Br., 2. The bankruptcy court denied Charitable DAF's Motion to Stay All Proceedings and the subsequent Amended Motion to Stay All Proceedings, reasoning:

⁶ For this appeal, the record and document citations are in case No. 3:21-CV-3129-B.

I just don't think that you have shown that, you know, either the exculpation clause or the injunction provisions of the plan somehow tie your hands in arguing the 12(b)(6) motion, defending against the 12(b)(6) motion today or I just think that your arguments reflect, frankly, a misunderstanding of how the injunction language and exculpation language applies here.

R. at 2087; *see also id.* at 4–5.

On appeal, Charitable DAF argues that the bankruptcy court erred in its denial of the motion for a stay because the Plan Confirmation Order's injunction prohibited Charitable DAF from participating in the case, “terminat[ing] any case or controversy and stripp[ing] the bankruptcy court of jurisdiction.” **Doc. 11**, Appellant's Br., 7. Accordingly, “[t]he bankruptcy court could only stay the case pending the [appeal of the Plan Confirmation Order's injunction], or dismiss the case as barred by the injunction[,]” Charitable DAF contends.” *Id.* at 9.

As noted above, the Fifth Circuit affirmed the Plan in all respects except one and specifically affirmed the injunction. *Highland*, **2022 WL 3571094**, at *13–14. The injunction in the Plan provides that “all Enjoined Parties are and shall be permanently enjoined . . . from directly or indirectly (i) commencing, conducting, or continuing in any manner any suit, action, or other proceeding of any kind . . . against or affecting the Debtor or the property of the Debtor.” R. at 2401. And the term Enjoined Parties includes “(i) all Entities who have held, hold, or may hold Claims against or Equity Interests in the Debtor [and] . . . (iii) any Entity that has appeared and/or filed any motion, objection, or other pleading in this Chapter 11 Case.” *Id.* at 2358.

Relatedly, the Plan exculpates HCM⁷ “from, any claim, obligation, suit, judgment, damage, demand, debt, right, Cause of Action, remedy, loss, and liability for conduct occurring on or after the Petition Date in connection with or arising out of [execution of the Plan].” *Id.* at 2398. However, this exculpation provision⁸ does “not apply to (a) any acts or omissions of an Exculpated Party arising out of or related to acts or omissions that constitute bad faith, fraud, gross negligence, criminal misconduct, or willful misconduct or (b) [other specific entities actions].” *Id.* at 2398–99.

The bankruptcy court did not abuse its discretion⁹ in denying the motion for a stay of the case. The bankruptcy court found that the Plan’s injunction and exculpation provisions—which it *approved*—did not prevent Charitable DAF from pursuing its causes of action. *Id.* at 2087. In effect, the bankruptcy court held that Charitable DAF could continue to litigate its causes of action and the Court agrees. *See id.* Just like the bankruptcy court, this Court does not see how the injunction and exculpation provisions prohibit Charitable DAF from participating in the below action. The exculpation provision permits Charitable DAF to bring claims against HCM for “bad faith, fraud,

⁷ The Plan makes clear that the term Exculpated Party does not include Charitable DAF. R. at 2359 (“Exculpated Parties” means, collectively, (i) the Debtor . . . provided, however, that, for the avoidance of doubt, none of . . . the Charitable Donor Advised Fund, L.P. (and any of its subsidiaries, including CLO Holdco, Ltd., and managed entities) . . . is included in the term ‘Exculpated Party.’”).

⁸ Subsequently to this appeal, the Fifth Circuit vacated a portion of the exculpation provision. *Highland*, 2022 WL 3571094, at *12. The Fifth Circuit held that “the exculpation of certain non-debtors . . . was unlawful” so the court “str[uck] all exculpated parties from the Plan except for [HCM], the Committee and its members, and the Independent Debtors.” *Id.* Charitable DAF brings its causes of action against HCM, so what remains of the exculpation provision still applies to this case. *See id.*

⁹ The parties disagree on whether this Court reviews the denial of the stay for abuse of discretion or de novo. *Doc. 11*, Appellant’s Br., 6 (“Questions of law are reviewed de novo.”); *Doc. 16*, Appellee’s Br., 2 (“The Court reviews the bankruptcy court’s order for abuse of discretion.”). Charitable DAF does not pursue this argument in its Reply, so this argument is considered waived, *Black v. N. Panola Sch. Dist.*, 461 F.3d 584, 588 n.1 (5th Cir. 2006), as well as incorrect. *See Moore v. Tangipahoa Par. Sch. Bd.*, 507 F. App’x 389, 392 (5th Cir. 2013) (citing *Wildmon v. Berwick Universal Pictures*, 983 F.2d 21, 23 (5th Cir. 1992)) (“We review a district court’s denial of a stay pending appeal for abuse of discretion.”).

gross negligence, criminal misconduct, or willful misconduct” and Charitable DAF’s causes of action—breach of fiduciary duty, breach of contract, negligence, and RICO—appear to fit within these categories of claims. *Id.* at 490–504, 2398–99. Further, Charitable DAF continued to participate by responding to HCM’s motion to dismiss and participating in the hearing regarding the motion to dismiss. See Section III(A) *supra*. Lastly and importantly, Charitable DAF did not even attempt to address the traditional stay elements. R. at 2087 (“I guess one might say the traditional four-factor test for a stay of a proceeding has really not been the subject of the argument here for a stay.”). Without argument on the factors for a stay, this Court lacks any basis to overturn the bankruptcy court.

The bankruptcy court’s Motion to Stay Order is **AFFIRMED**.

IV.

CONCLUSION

For the foregoing reasons, the Court **REVERSES** and **REMANDS** the bankruptcy court’s Motion to Dismiss Order and **AFFIRMS** the bankruptcy court’s Motion to Stay Order.

SO ORDERED.

SIGNED: September 2, 2022.

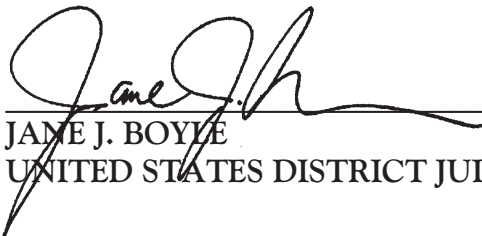

JAMES J. BOYLE
UNITED STATES DISTRICT JUDGE

EXHIBIT 13

004343

Between

CLO HOLDCO, LTD.

And

HARBOURVEST DOVER STREET IX INVESTMENT L.P.

And

HARBOURVEST 2017 GLOBAL AIF L.P.

And

HARBOURVEST 2017 GLOBAL FUND L.P.

And

HV INTERNATIONAL VIII SECONDARY L.P.

And

HARBOURVEST SKEW BASE AIF L.P.

And

HIGHLAND CAPITAL MANAGEMENT, L.P.

And

LEE BLACKWELL PARKER, III

And

QUEST IRA, INC., FBO LEE B. PARKER III, ACCT. # 3058311

And

QUEST IRA, INC., FBO HUNTER COVITZ, ACCT. # 1469811

And

QUEST IRA, INC., FBO JON POGLITSCH, ACCT. # 1470612

And

QUEST IRA, INC., FBO NEIL DESAI, ACCT. # 3059211

And

HIGHLAND CLO FUNDING, LTD.

And

HIGHLAND HCF ADVISOR, LTD.

MEMBERS AGREEMENT RELATING TO THE COMPANY

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THIS AGREEMENT is made the 15th day of November 2017

BETWEEN

- (1) **CLO HOLDCO, LTD.** whose registered office address is at Intertrust Corporate Services (Cayman) Limited, 190 Elgin Avenue, George Town, Grand Cayman KY1-9005, Cayman Islands;
- (2) **HARBOURVEST DOVER IX INVESTMENT L.P.** of c/o HarbourVest Partners, LLC, One Financial Center, 44th Floor, Boston, MA 02111, USA
- (3) **HARBOURVEST 2017 GLOBAL AIF L.P.** of c/o HarbourVest Partners, LLC, One Financial Center, 44th Floor, Boston, MA 02111, USA
- (4) **HARBOURVEST 2017 GLOBAL FUND L.P.** of c/o HarbourVest Partners, LLC, One Financial Center, 44th Floor, Boston, MA 02111, USA
- (5) **HV INTERNATIONAL VIII SECONDARY L.P.** of c/o HarbourVest Partners, LLC, One Financial Center, 44th Floor, Boston, MA 02111, USA
- (6) **HARBOURVEST SKEW BASE AIF L.P.** of c/o HarbourVest Partners, LLC, One Financial Center, 44th Floor, Boston, MA 02111, USA
- (7) **HIGHLAND CAPITAL MANAGEMENT, L.P.** of 300 Crescent Court, Suite 700, Dallas, Texas 75201, USA
- (8) **LEE BLACKWELL PARKER, III** of 300 Crescent Court, Suite 700, Dallas, Texas 75201, USA
- (9) **QUEST IRA, INC., FBO LEE B. PARKER III, ACCT. # 3058311** of 17171 Park Row #100, Houston, Texas 77084, USA
- (10) **QUEST IRA, INC., FBO HUNTER COVITZ, ACCT. # 1469811** of 17171 Park Row #100, Houston, Texas 77084, USA
- (11) **QUEST IRA, INC., FBO JON POGLITSCH, ACCT. # 1470612** of 17171 Park Row #100, Houston, Texas 77084, USA
- (12) **QUEST IRA, INC., FBO NEIL DESAI, ACCT. # 3059211** of 17171 Park Row #100, Houston, Texas 77084, USA

(together the "**Members**") and

- (13) **HIGHLAND CLO FUNDING, LTD.**, with registration number 60120 whose registered office is at First Floor, Dorey Court, Admiral Park, St Peter Port, Guernsey GY1 6HJ, Channel Islands (the "**Company**") and
- (14) **HIGHLAND HCF ADVISOR, LTD.**, whose registered address is at Maples Corporate Services Limited, PO Box 309, Ugland House, Grand Cayman, KY1-1104, Cayman Islands (the "**Portfolio Manager**").

WHEREAS:

- (A) The Company is a limited company incorporated under the laws of the Island of Guernsey on 30 March 2015.
- (B) The Company has been established to provide its investors with exposure to CLO Notes on both a direct basis and indirect basis and senior secured loans on an indirect basis, through the use of the investments described in its investment policy as set forth in the Offering Memorandum dated 15 November 2017, the (the "**Offering Memorandum**"), subject to the restrictions set forth therein.

- (C) The Members are the owners of the entire issued capital of the Company.
- (D) The Parties are entering into this Agreement to regulate the relationship between them and the operation and management of the Company.

OPERATIVE PROVISIONS

1. INTERPRETATION

In this Agreement, including the Schedule:

- 1.1 the following words and expressions shall have the following meanings, unless they are inconsistent with the context:

"Adherence Agreement" means the agreement under which a person agrees to be bound by the terms of this Agreement in the form substantially similar as set out in the Schedule;

"Advisers Act" shall mean the U.S. Investment Advisers Act of 1940, as amended from time to time, and the rules and regulations of the U.S. Securities and Exchange Commission promulgated thereunder;

"Affiliate" means, with respect to a person, (i) any other person who, directly or indirectly, is in control of, or controlled by, or is under common control with, such person or (ii) any other person who is a director, officer or employee (a) of such person, (b) of any subsidiary or parent company of such person or (c) of any person described in clause (i) above. For the purposes of this definition, control of a person shall mean the power, direct or indirect, (i) to vote more than 50% of the securities having ordinary voting power for the election of directors of such persons or (ii) to direct or cause the direction of the management and policies of such person whether by contract or otherwise. For purposes of this definition, the management of an account by one person for the benefit of any other person shall not constitute "control" of such other person and no entity shall be deemed an "Affiliate" of the Company solely because the administrator or its Affiliates serve as administrator or share trustee for such entity;

"Agreement" means this agreement together with the Schedule;

"Articles" means the articles of incorporation of the Company as amended from time to time;

"Business" means the business of the Company as described in Recital (B);

"Business Day" means a day (other than a Saturday or Sunday) on which banks are open for ordinary banking business in Guernsey;

"Directors" means the directors of the Company from time to time;

"CLO Holdco" means CLO Holdco, Ltd. (or any permitted successor to the business of CLO Holdco, Ltd. or interest in the Company);

"Code" shall mean the U.S. Internal Revenue Code of 1986, as amended from time to time.

"Directors" means the directors of the Company from time to time;

"Dover IX" means HarbourVest Dover Street IX Investment L.P. (or any permitted successor to the business of HarbourVest Dover Street IX Investment L.P. or any interest in the Company);

"DOL" shall mean the U.S. Department of Labor, or any governmental agency that succeeds to the powers and functions thereof.

"DOL Regulations" shall mean the regulations of the DOL included within 29 C.F.R. section 2510.3-101.

"Dover IX" shall mean HarbourVest Dover Street IX Investment L.P. (or any permitted successor to the business of HarbourVest Dover Street IX Investment L.P. or interest in the Company);

"ERISA" shall mean the U.S. Employee Retirement Income Security Act of 1974, as amended from time to time;

"ERISA Member" shall mean a Member that (a) is a "benefit plan investor" (as such term is defined in the DOL Regulations as modified by section 3(42) of ERISA) subject to the fiduciary responsibility provisions of part 4 of title I of ERISA or is a "plan" (as such term is defined in section 4975(e) of the Code) subject to section 4975 of the Code or (b) is designated as an ERISA Member by the General Partner in writing on or before the date at which such ERISA Member is admitted to the Company;

"HarbourVest Entities" means: Dover IX; HarbourVest 2017 Global AIF L.P.; HarbourVest 2017 Global Fund L.P.; HV International VIII Secondary L.P.; and HarbourVest Skew Base AIF L.P. (or any of their respective permitted successors to their businesses or interests in the Company);

"Highland Principals" means: Highland Capital Management, L.P.; Lee Blackwell Parker, III, Quest IRA, Inc., fbo Lee B. Parker III Acct. # 3058311; Quest IRA, Inc., fbo Hunter Covitz Acct. # 1469811; Quest IRA, Inc., fbo Jon Poglitsch Acct. # 1470612; Quest IRA, Inc., fbo Neil Desai Acct. # 3059211 (or any of their respective permitted successors to their businesses or interests in the Company);

"Law" means the Companies (Guernsey) Law, 2008, as amended;

"Member" means a person whose name is from time to time entered in the register of members of the Company as the holder of shares in the Company;

"Parties" means the parties to this Agreement and any other person who agrees to be bound by the terms of this Agreement under an Adherence Agreement;

"Shares" means ordinary shares in the Company;

"Subsidiary" shall have the meaning ascribed to it in the Law;

"Subscription and Transfer Agreement" means the Subscription and Transfer Agreement, dated as of 15 November 2017, entered into by and among CLO HoldCo, Ltd. and each of the Members and acknowledged and agreed by the Company and the Portfolio Manager.

Any capitalized terms used herein without definition have the meanings specified in the Offering Memorandum.

- 1.2 any reference to the Parties being obliged to procure shall so far as they are able includes, without limitation, procuring by the exercise of votes which they directly or indirectly control at meetings of the Directors or general meetings of the Company;
- 1.3 any reference to a person includes, where appropriate, that person's heirs, personal representatives and successors;
- 1.4 any reference to a person includes any individual, body corporate, corporation, firm, unincorporated association, organisation, trust or partnership;
- 1.5 any reference to time shall be to Guernsey time;
- 1.6 except where the context otherwise requires words denoting the singular include the plural and vice versa and words denoting any one gender include all genders;

1.7 unless otherwise stated, a reference to a Clause or a Schedule is a reference to a Clause or a Schedule to this Agreement; and

1.8 Clause headings are for ease of reference only and do not affect the construction of any provision.

2. THE BUSINESS OF THE COMPANY

2.1 The Parties hereby agree that the objects and purpose of the Company shall be to carry on the Business.

2.2 The Parties shall so far as they are able (including without limitation by the exercise of votes which they directly or indirectly control at meetings of the Directors or general meetings of the Company) procure that (i) the Company's principal activities shall be the pursuit of the objects and purposes described in Clause 2.1 conducted in accordance with the provisions hereof and with the Offering Memorandum, the Subscription and Transfer Agreement and Articles of the Company and (ii) the Parties shall not take any action inconsistent with the provisions of the Offering Memorandum, including, without limitation the investment strategy set forth in the "Summary" and the applicable restrictions during and after the Investment Period and the suspension or termination of the Investment Period following a Key Person Event.

2.3 The Members shall (so long as they hold shares in the capital of the Company) use all reasonable endeavours to promote and develop the Business of the Company.

3. VOTING RIGHTS

3.1 The Parties agree that the following provisions of this Clause 3 shall apply during such period or periods as the Members parties hereto are Members.

3.2 The Parties shall procure that the Company shall not take any action at any meeting requiring the sanction of an ordinary or special resolution or by written resolution, in each case of the Directors or of the Members, without the affirmative vote or prior written consent, as applicable, of the Members totalling in the aggregate more than seventy-five percent (75%) of the Company, including, but not limited to, the following actions:

3.2.1 any issuance of new shares of the Company or a new class of shares of the Company or payment of any dividend by issuance of new shares of the Company, other than issuances of Shares pursuant to the Offering Memorandum and the Subscription and Transfer Agreement;

3.2.2 any alteration or cancellation of any rights of any Shares or of the Share capital of the Company,

3.2.3 any conversion or redemption of Shares, except pursuant to Clause 5.5,

3.2.4 any payment of commission in consideration for subscribing or agreeing to subscribe for any shares in the Company,

3.2.5 the creation of any lien on any Shares, except pursuant to the remedies in Clause 5.3. or

3.2.6 the suspension of the calculation of the NAV; other than a temporary suspension of the calculation of the NAV and NAV per Share by the Board of Directors during any period if it determines in good faith that such a suspension is warranted by extraordinary circumstances, including: (i) during any period when any market on which the Company's investments are quoted, traded or dealt in is closed, other than for ordinary holidays and weekends, or during periods in which dealings are restricted or suspended; (ii) during the existence of any state of affairs, including as a result of political, economic, military or monetary events or any circumstances outside the control of the Portfolio Manager or the Company, as a result of which,

in the reasonable opinion of the Portfolio Manager, the determination of the value of the assets of the Company, would not be reasonably practicable or would be seriously prejudicial to the Members taken as a whole; (iii) during any breakdown in the means of communication normally employed in determining the price or value of the Company's assets or liabilities, or of current prices in any market as aforesaid, or when for any other reason the prices or values of any assets or liabilities of the Company cannot reasonably be accurately ascertained within a reasonable time frame; (iv) during any period when the transfer of funds involved in the realization or acquisition of any investments cannot, in the reasonable opinion of the Portfolio Manager, be effected at normal rates of exchange; or (v) automatically upon liquidation of the Company.

4. **ADVISORY BOARD.**

- 4.1 Composition of Advisory Board. The Company shall establish an advisory board (the "**Advisory Board**") composed of two individuals, one of whom shall be a representative of CLO Holdco and one of whom shall be a representative of Dover IX (or, in each case, or any permitted successor to the interest in the Company of such Member). No voting member of the Advisory Board shall be a controlled Affiliate of the Portfolio Manager (including, for the avoidance of doubt, following a permitted transfer of CLO Holdco's interest to an Affiliate of the Portfolio Manager, if applicable), it being understood that for the purposes of this sentence none of CLO Holdco, its wholly-owned subsidiaries nor any of their respective directors or trustees shall be deemed to be a controlled Affiliate of the Portfolio Manager due to their pre-existing non-discretionary advisory relationship with the Portfolio Manager. None of the members of the Advisory Board shall receive any compensation (other than reimbursement for reasonable and documented out-of-pocket expenses) in connection with their position on the Advisory Board. The Company shall bear any fees, costs and expenses related to the Advisory Board.
- 4.2 Meetings of Advisory Board; Written Consents. The Advisory Board shall meet with the Portfolio Manager at such times as requested by the Portfolio Manager from time to time. The quorum for a meeting of the Advisory Board shall be all of its members entitled to vote. All actions taken by the Advisory Board shall be (i) by a unanimous vote of all of the members of the Advisory Board in attendance in a meeting at which a quorum is present and entitled to vote and not abstaining from voting or (ii) by a written consent in lieu of a meeting signed by all of the members of the Advisory Board entitled to consent and not abstaining from consenting. Meetings of the Advisory Board may be held in person, by telephone or by other electronic device.
- 4.3 Functions of Advisory Board. The Advisory Board shall provide (or determine not to provide) any consents or approvals expressly contemplated by this Agreement and the Offering Memorandum to be provided by the Advisory Board and, at the request of the Portfolio Manager in its sole discretion, provide general advice (which, for the avoidance of doubt, shall be non-binding) to the Portfolio Manager or the Company with regard to Company activities and operations and other matters. For the avoidance of doubt, no consent or approval of the Advisory Board shall be required for any action or determination expressly permitted or contemplated hereunder or in the Offering Memorandum and not conditioned on such a consent or approval. The Portfolio Manager shall not act contrary to the advice of the Advisory Board with respect to any action or determination expressly conditioned herein or in the Offering Memorandum on the consent or approval of the Advisory Board. Without limiting the foregoing, the Advisory Board shall be authorized to give any approval or consent required or deemed necessary or advisable under the Advisers Act on behalf of the Company and the Members, including under Section 206(3) of the Advisers Act. The Portfolio Manager may from time to time in its discretion request the Advisory Board to review and ratify certain Company matters. The consent of the Advisory Board shall be required to approve the following actions: (i) any extension of the Investment Period; (ii) any extension of the Term (other than an automatic extension following an extension of the Investment Period that has been approved by the Advisory Board); (iii) any allotment of additional equity securities by the Company; and (iv) any investment in a Related Obligation or any other transaction between the Company or any entity in which the Company holds a direct or indirect interest, on the one hand, and Highland or any of its Affiliates, on the other hand and (v) other matters as set forth in the Offering

Memorandum. Notwithstanding the foregoing or anything to the contrary set forth herein, no transaction that is specifically authorized in the governing documents of the Company shall require approval of the Advisory Board, including, without limitation, sales or securitizations of all or a portion of the Company's loan portfolio into new Qualifying CLOs (i.e. the transfer of warehoused assets into new Qualifying CLOs), investments in CLO Notes issued by CLOs managed by Highland Affiliates, and the NexBank Credit Facility and any Permitted NexBank Credit Facility Amendments, in each case as described in the Offering Memorandum. Any such approval, consent or ratification given by the Advisory Board shall be binding on the Company and the Members. Neither the Advisory Board nor any member thereof shall have the power to bind or act for or on behalf of the Company in any manner, and no shareholder who appoints a member of the Advisory Board shall be deemed to be an Affiliate of the Company or Highland solely by reason of such appointment.

- 4.4 Term of Members of Advisory Board. A member of the Advisory Board shall be deemed removed from the Advisory Board (i) if such member is no longer an officer, director, manager, trustee, employee, consultant or other representative of CLO Holdco or Dover IX, as applicable, or their respective Affiliates and shall be replaced as soon as practicable with a representative of CLO Holdco or Dover IX, or their respective Affiliates, as applicable, or (ii) if the Member represented by such member either becomes a Defaulting Member or such member ceases to be eligible to represent such Member pursuant to Clause 4.1.
- 4.5 No Duties to Other Members. No Advisory Board member who is the representative of any Member shall, to the extent permitted by law, owe a fiduciary duty to the Company or any other Member (other than the duty to act in good faith), and may, to the fullest extent permitted by law, in all instances act in such member's own interest and in the interest of the Member that appointed such member.

5. **DEFAULTING MEMBERS**

- 5.1 In the event any Member defaults in its obligation to pay the full amount of the purchase price of Shares called for settlement under the Subscription and Transfer Agreement on the applicable Settlement Date (such unpaid amount, an "**Outstanding Settlement Amount**"), the Portfolio Manager, on behalf of the Company, shall provide written or telephonic notice of such default to such Member. If such default is not cured within 5 business days after written (or if applicable telephonic or email) notice thereof given by the Portfolio Manager, on behalf of the Company, has been received by such Member, such Outstanding Settlement Amount shall automatically accrue interest on a retroactive basis from the date such Outstanding Settlement Amount was due at 12% (the "**Default Interest Rate**") (which interest, once paid, shall not be applied to the purchase of the unsettled Shares of such Member, but which will upon receipt be distributed pro rata to those Members who have funded any such Outstanding Settlement Amounts pursuant to this Clause 5). No such Shares which have failed to be settled will be issued to any Member until settlement of the full amount of the purchase price has been made. In addition, if such default is not cured within 10 business days after written or telephonic notice thereof given by the Portfolio Manager, on behalf of the Company, has been received by such Member (a "**Defaulting Member**"), the following provisions shall apply:
- 5.2 Whenever the vote or consent of the Defaulting Member would otherwise be required or permitted hereunder or under the Articles, the Defaulting Member shall not be entitled to participate in such vote or consent in respect of his existing shareholding and with respect to any representative of such Defaulting Member on the Advisory Board, and such vote or consent shall be calculated as if such Defaulting Member were not a Member and, as applicable, any representative of such Defaulting Member on the Advisory Board were not a member of the Advisory Board.
- 5.3 The Portfolio Manager, on behalf of the Company, may pursue and enforce all rights and remedies available, including the commencement of legal proceedings against the Defaulting Member to collect the Outstanding Settlement Amounts, together with interest thereon for the account of the Company from the date due at the Default Interest Rate, plus the costs and expenses of collection (including attorneys' fees and expenses).

- 5.4 The Portfolio Manager, on behalf of the Company, may (at the sole cost of the Defaulting Member) borrow funds from any person (other than the Defaulting Member or its Affiliates) to cover such shortfall and/or advance all or a portion of the Defaulting Member's Outstanding Settlement Amount to the Company on behalf of the Defaulting Member, and such advance shall be repaid by the Defaulting Member to the Portfolio Manager, on behalf of the Company, with interest for the account of the Portfolio Manager, on behalf of the Company, on the amount outstanding from time to time commencing on the date of the advance at the Default Interest Rate. To the extent the Portfolio Manager, on behalf of the Company, advances funds to the Company on behalf of a Defaulting Member, all distributions from the Company that would otherwise be made to the Defaulting Member shall be paid to the Portfolio Manager, on behalf of the Company, (with any such amounts being applied first against accrued but unpaid interest and then against principal), until all amounts payable by the Defaulting Member to the Portfolio Manager, on behalf of the Company, under this Clause 5.4 (including interest) have been paid in full.
- 5.5 The Portfolio Manager, on behalf of the Company, may elect, upon notice to the Defaulting Member, to redeem the Defaulting Member's shares in an amount equal to 50% of the outstanding amount existing as of the date of the default at a price of \$0.0001 per Share. Thereupon, the commitment of the Defaulting Member under the Subscription and Transfer Agreement shall be zero, the Defaulting Member shall not be obligated to make any further settlements, the voting capital of such Defaulting Member and of each other Member shall be re-determined as of the date of such default to reflect the new commitment of the Defaulting Member, and the Portfolio Manager shall revise the books and records of the Company to reflect the reduction of the commitment of the Defaulting Member. The Members agree (x) that the damages suffered by the Company as the result of a failure by a Member to settle a commitment to purchase Shares that is required by this Agreement cannot be estimated with reasonable accuracy and (y) that the foregoing provisions of this Clause 5.5 shall act as liquidated damages for the default by the Defaulting Member (which each Member hereby agrees are reasonable).
- 5.6 The Board may offer to the non-Defaulting Members (pro rata in accordance with their respective Commitments) the option of purchasing the Defaulting Member's unsettled Shares on the terms set forth in the applicable Settlement Notice (as defined in the Subscription and Transfer Agreement).
- 5.7 At the election of the Board, distributions of dividends otherwise payable to the Defaulting Member under the Articles shall not be paid to the Defaulting Member, but instead shall be applied against the amount of the Outstanding Settlement Amount (plus interest at the Default Interest Rate and related costs); provided that any amounts so applied shall be deemed to have been distributed to the Defaulting Member under the Articles.
- 5.8 The Portfolio Manager may send an amended or new Settlement Notice to the Members other than the Defaulting Member in an amount equal to the Defaulting Member's Outstanding Settlement Amount and otherwise in accordance with the Subscription and Transfer Agreement.
- 5.9 Each Defaulting Member further appoints the Portfolio Manager as agent and attorney-in-fact for the Defaulting Member and hereby grants to the Portfolio Manager an irrevocable power of attorney to take all actions necessary on its behalf to sell, assign, or transfer the commitment to purchase unsettled Shares of such Defaulting Member pursuant to Clause 5.6 or as necessary on its behalf to effect the other remedies or rights set forth in this Clause 5; provided that the Portfolio Manager shall not bind any Defaulting Member to an indemnification or other similar obligation which guarantees the financial performance of the Company or which exceeds the ability of the Defaulting Member to provide indemnification under applicable law.

6. TRANSFERS OR DISPOSALS OF SHARES

- 6.1 No Member shall sell, pledge, charge, mortgage, assign, assign by way of security, transfer, convey, exchange or otherwise dispose of its Shares or its commitment to settle purchases of Shares under the Subscription and Transfer Agreement (each a "**Transfer**"), other than to an Affiliate of an initial Member party hereto, without the prior written consent of the Portfolio

Manager, which consent shall be in the sole discretion of the Portfolio Manager; provided that no such Transfer shall be made unless in the opinion of counsel reasonably satisfactory to the Portfolio Manager (who may be counsel for the Company, and which requirement for an opinion may be waived, in whole or in part, in the sole discretion of the Portfolio Manager) that:

- 6.1.1 such Transfer would not require registration under the Securities Act or any state securities or "Blue Sky" laws or other laws applicable to the Shares to be assigned or transferred and is conducted in conformance with the restrictions set forth in the Offering Memorandum;
 - 6.1.2 such Transfer would not be reasonably likely to cause the Company to be subject to tax in any jurisdiction other than of its incorporation on a net income basis, not be reasonably likely to cause the Company to become subject to registration as an investment company under the Investment Company Act of 1940, as amended;
 - 6.1.3 such Transfer would not cause the Company to be considered to be an entity whose underlying assets are considered to include "plan assets" by reason of investment by an "employee benefit plan" or "plan" in such entity pursuant to the U.S. Plan Assets Regulations; and
 - 6.1.4 such sale, assignment, disposition or transfer would not cause all or any portion of the assets of the Company to constitute "plan assets" under ERISA or the Code.
- 6.2 Prior to making any Transfer of Shares (other than Transfers to Affiliates of an initial Member or, in the case of CLO Holdco or a Highland Principal, to Highland, its Affiliates or another Highland Principal) a Member must first offer to the other Members a right to purchase the Shares, on a pro rata basis with respect to their current Shares, at the same price (which must be cash) as such Shares are proposed to be purchased by the prospective third party purchaser pursuant to an irrevocable offer letter. The other Members will have 30 days following receipt of the letter to determine whether to purchase their entire pro rata portion of the Shares proposed to be Transferred. If the other Members do not accept the offer, the Member may (subject to complying with the other Transfer restrictions in this Agreement) Transfer the applicable Shares that such Members have not elected to purchase to a third party at a price equal to or greater than the price described in the offer letter, provided that if the Member has not (a) entered into a definitive agreement to effect such sale within 90 days after the expiration of the period that the other Members have to accept the offer in the offer letter or (b) consummated the sale within 120 day after the entry into the definitive agreement to consummate the sale, it must comply with these right of first refusal procedures again. Any Member (other than the Member proposing to Transfer its Shares) may assign its right to purchase its pro rata portion of the Shares to any other Member (subject to complying with the other Transfer restrictions in this Agreement), any initial Member (other than the Member proposing to Transfer its Shares) may assign its right to purchase its pro rata portion of the Shares to an Affiliate (subject to complying with the other Transfer restrictions in this Agreement), and CLO Holdco and the Highland Principals (unless such Member is the Member proposing the Transfer its Shares) may assign its right to purchase its pro rata portion of the Shares to Highland, an Affiliate of Highland or other Highland Principals (subject to complying with the other Transfer restrictions in this Agreement).
- 6.3 No Highland Principal may transfer his or its interests in the Company other than (i) to a trust or other tax or estate planning vehicle or (ii) to the Portfolio Manager, its Affiliates or another Highland Principal upon the termination of such Highland Principal's (or the beneficial owner of such Highland Principal, if applicable) employment by Highland Capital Management, L.P.
- 6.4 Any transferor of any Share shall remain bound by the terms of this Agreement applicable to it prior to such transfer and that nothing in this Agreement shall constitute a waiver of any rights a Party to this Agreement may have by reason of a breach of this Agreement by a transferor prior to transfer. The transferor and/or the transferee shall bear all costs of any Transfer.
- 6.5 The Parties agree not to Transfer their Shares to any person unless such transferee agrees to be bound by the terms of this Agreement.
- 6.6 All Adherence Agreements executed pursuant to this Clause shall be executed by the transferee or allottee and each Party.

7. CONFIDENTIALITY

- 7.1 Each Party agrees to keep any information received by it pursuant to this Agreement or relating to the Business as confidential and not (save with the relevant Party's consent or as may be required by Law or the rules of any regulatory authority or any stock exchange) disclose to any person such information.
- 7.2 Notwithstanding the foregoing, the Parties agree that the HarbourVest Entities may disclose to their limited partners and prospective limited partners (including any agents of such limited partners or prospective limited partners), clients and applicable governmental agencies (a) the name and address of the Company, (b) the capital commitment and the remaining capital commitment, (c) the net asset value of such HarbourVest Entity's interest in the Company, (d) the amount of distributions that have been made to such HarbourVest Entity by the Company and the amount of contributions that have been made by such HarbourVest Entity to the Company, (e) such ratios and performance information calculated by such HarbourVest Entity using the information in clauses (a) through (d) above, including the ratio of net asset value plus distributions to contributions (i.e., the "multiple") and such HarbourVest Entity's internal rate of return with respect to its investment in the Company, and (f) tax information with respect to the Company.

8. DIVIDENDS

- 8.1 The Company agrees that it shall not, and the Portfolio Manager agrees it shall not cause the Company to, make any dividends except pursuant to the section titled "Summary—Dividend Policy" of the Offering Memorandum.

9. TERM OF THE COMPANY

- 9.1 Each Party agrees to cause the winding up and dissolution of the Company after the ten year anniversary of the date hereof (the "**Term**"); provided that the Portfolio Manager, in its reasonable discretion, may postpone dissolution of the Company for up to 180 days in order to facilitate orderly liquidation of the investments; provided, further, that the Term shall be automatically extended for any amount of time for which the Investment Period may be extended.
- 9.2 Notwithstanding the foregoing, the Term may be extended with the consent of the Portfolio Manager and the Advisory Board for up to two successive periods of one year each.

10. ERISA MATTERS

- 10.1 The Portfolio Manager, the Company and each Member shall use their reasonable best efforts to conduct the affairs and operations of the Company so as to limit investment in the Company by "benefit plan investors" (within the meaning of the DOL Regulations as modified by section 3(42) of ERISA) to less than the U.S. Plan Threshold. In the event the U.S. Plan Threshold is met or exceeded, the Portfolio Manager, on behalf of the Company, may require any Non-Qualified Holder that is a U.S. Plan Investor to sell or transfer their Shares to a person qualified to own the same that is not a U.S. Plan Investor within 30 days and within such 30 days and to provide the Company with satisfactory evidence of such sale or transfer such that such sale or transfer, together with other sale or transfers pursuant to this Clause, would result in the investment in the Company by "benefit plan investors" (within the meaning of the DOL Regulations as modified by section 3(42) of ERISA) to be less than the U.S. Plan Threshold. Where the conditions above are not satisfied within 30 days after the serving of the notice to transfer, such Non-Qualified Holder will be deemed, upon the expiration of such 30 days, to have forfeited their Shares.

11. TAX MATTERS

- 11.1 **PFIG.** For each fiscal year of the Company, the Company will no later than 120 days after the end of such fiscal year, commencing with the first fiscal year for which the Company is determined to be a PFIG (a "passive foreign investment company"), furnish to each of the

HarbourVest Entities (x) all information necessary to permit such HarbourVest Entity or any of its partners to complete United States Internal Revenue Service Form 8621 with respect to their interests in the Company and (y) a PFIC Annual Information Statement under section 1295(b) of the Code with respect to the Company; provided that if the Company is unable to furnish such final information and Statement within such 120 days, then the Company shall use its reasonable best efforts to furnish estimates of such information and Statement on or before the 120th day after the end of such fiscal year.

- 11.2 CFC. The Company shall furnish to each of the HarbourVest Entities within 120 days after the end of each fiscal year of the Company, a United States Internal Revenue Service Form 5471 for such fiscal year, completed for all information concerning the Company required to be filed by such HarbourVest Entity or any of its partners (i.e., all portions applicable to the relevant category of filer other than page 1 items A-D and page 2 Schedule B), to the extent such Form 5471 is required to be filed by such HarbourVest Entity or any of its partners; provided that if the Company is unable to furnish such final information within such 120 days, then the Company shall use its reasonable best efforts to furnish estimates of such information on or before the 120th day after the end of each fiscal year.
- 11.3 Other Tax Information. The Company shall furnish to each of the HarbourVest Entities (a) within 120 days after the end of each fiscal year of the Company such other information reasonably requested by the HarbourVest Entities that any HarbourVest Entity may require in order for it or any of its partners to comply with its U.S. federal income tax reporting obligations with respect to its interest in the Company; provided that if the Company is unable to furnish such final information within such 120 days, then the Company shall use its reasonable best efforts to furnish estimates of such information on or before the 120th day after the end of such fiscal year and (b) promptly upon request such other information reasonably requested by such HarbourVest Entity in order to withhold tax or to file tax returns and reports or to furnish tax information to any of its partners with respect to the Company.
- 11.4 Withholding and Other Taxes. The Company will use reasonable best efforts to acquire investments that will not result in withholding or other taxes being imposed directly or indirectly on the Company by any jurisdiction with respect to income or distributions from such investments.

12. **AMENDMENTS TO CERTAIN AGREEMENTS**

- 12.1 The Portfolio Manager and the Company shall not amend or terminate, or agree to amend or terminate, the Memorandum or Articles of Incorporation of the Company or that certain Portfolio Management Agreement between the Portfolio Manager and the Company dated as of the date hereof (the "**Management Agreement**") without the consent of the Parties.
- 12.2 The Portfolio Manager agrees that it shall not assign its rights, duties and obligations under the Management Agreement without the consent of the Members totalling in the aggregate more than seventy-five percent (75%) of the Company. Notwithstanding the foregoing, the Portfolio Manager may, without the consent of the Members, assign any of its rights or obligations under the Management Agreement to an Affiliate; provided that such Affiliate (A) has demonstrated ability, whether as an entity or by its personnel, to professionally and competently perform duties similar to those imposed upon the Portfolio Manager pursuant to the Management Agreement, (B) has the legal right and capacity to act as Portfolio Manager thereunder and (C) shall not cause the Company or the pool of collateral to become required to register under the provisions of the Investment Company Act and such action does not cause the company to be subject to tax in any jurisdiction outside of its jurisdiction of incorporation.
- 12.3 The Company agrees that it shall not hire any portfolio manager without the consent of the Parties and such new portfolio manager shall be required to join and abide by this Agreement.

13. **FINANCIAL REPORTS**

- 13.1 The books and records of account of the Company shall be audited as of the end of each fiscal year of the Company by a nationally recognized independent public accounting firm selected by

the Portfolio Manager that is registered with, and subject to regular inspection as of the commencement of the professional engagement period, and as of each calendar year-end, by, the Public Company Accounting Oversight Board in accordance with its rules. During the Term, the Portfolio Manager or the Company shall prepare and mail, deliver by fax, email or other electronic means or otherwise make available a financial report (audited in the case of a report sent as of the end of a fiscal year and unaudited in the case of a report sent as of the end of a quarter) to each Member on or before the 120th day after the end of each fiscal year and the 45th day after the end of each of the first three quarters of each fiscal year, setting forth for such fiscal year or quarter (a) the assets and liabilities of the Company as of the end of such fiscal year or quarter; (b) the net profit or net loss of the Company for such fiscal year or quarter; and (c) such Member's closing capital account balance as of the end of such fiscal year or quarter; provided that if the Portfolio Manager or the Company is unable to furnish final information with respect to any of the above, then the Portfolio Manager or the Company shall use its reasonable best efforts to furnish estimates of such information on or before the 120th day after the end of each fiscal year and the 45th day after the end of the first three quarters of each fiscal year. On or before the 60th day after the end of each fiscal year, the Portfolio Manager or the Company shall provide to each Member an unaudited draft of the financial report for such fiscal year.

- 13.2 After the end of each fiscal year or quarter, the Portfolio Manager or the Company shall cause to be delivered to the Advisory Board a reasonably detailed summary of the expenses incurred by the Company during such period.

14. **TERMINATION AND LIQUIDATION**

- 14.1 Save as provided for in Clause 13.2, this Agreement shall terminate:

- 14.1.1 when one Party holds all the Shares;
- 14.1.2 when a resolution is passed by the Company's Members or creditors, or an order made by a court or other competent body or person instituting a process that shall lead to the Company being wound up and its assets being distributed among the Company's creditors, Members or other contributors; or
- 14.1.3 with the written consent of all the Parties.

- 14.2 The following provisions of this Agreement remain in full force after termination: Clause 1 (Interpretation), Clause 7 (Confidentiality), this Clause, Clause 14 (Whole Agreement), Clause 16 (Assignments), Clause 17 (Variation and Waiver), Clause 18 (Service of Notice), Clause 19 (General) and Clause 21 (Governing Law and Jurisdiction).

- 14.3 Termination of this Agreement shall not affect any rights or liabilities that the Parties may have accrued under it.

- 14.4 Where the Company is to be wound up and its assets distributed, the Parties shall agree a suitable basis for dealing with the interests and assets of the Company and shall endeavour to ensure that:

- 14.4.1 all existing contracts of the Company are performed to the extent that there are sufficient resources;
- 14.4.2 the Company shall not enter into any new contractual obligations;
- 14.4.3 the Company is dissolved and its assets are distributed as soon as practical; and
- 14.4.4 any other proprietary information belonging to or originating from a Party shall be returned to it by the other Parties.

15. WHOLE AGREEMENT

- 15.1 This Agreement, and any documents referred to in it, constitute the whole agreement between the Parties and supersede any arrangements, understanding or previous agreement between them relating to the subject matter they cover.
- 15.2 Each Party acknowledges that in entering into this Agreement, and any documents referred to in it, it does not rely on, and shall have no remedy in respect of, any statement, representation, assurance or warranty of any person other than as expressly set out in this Agreement or those documents.
- 15.3 Nothing in this Clause 14 operates to limit or exclude any liability for fraud.

16. STATUS OF AGREEMENT

- 16.1 Each Party shall, to the extent that it is able to do so, exercise its voting rights and other powers in relation to the Company to procure that the provisions of this Agreement are properly and promptly observed and given full force and effect according to the spirit and intention of the Agreement.
- 16.2 If any provision in the memorandum of incorporation of the Company or the Articles conflicts with any provision of this Agreement, the provisions of this Agreement shall prevail as between the Parties. Each of the Parties shall, to the extent that it is able to do so, exercise its voting rights and other powers in relation to the Company to procure the modification of the memorandum of association of the Company or the Articles (as the case may be) in order to eliminate the conflict, but this Agreement shall not itself constitute a modification of the memorandum of association of the Company or the Articles.

17. ASSIGNMENTS

Save as expressly permitted by this Agreement, no person may assign, or grant any security interest over, any of its rights under this Agreement or any document referred to in it without the prior written consent of the Parties.

18. VARIATION AND WAIVER

- 18.1 A variation of this Agreement shall be in writing and signed by or on behalf of the Parties.
- 18.2 A waiver of any right under this Agreement is only effective if it is in writing and it applies only to the person to which the waiver is addressed and the circumstances for which it is given.
- 18.3 A person that waives a right in relation to one person, or takes or fails to take any action against that person, does not affect its rights against any other person.

19. SERVICE OF NOTICE

- 19.1 Any notice required to be given by any of the Parties may be sent by post or facsimile to the address and facsimile number of the addressee as set out in this Agreement, in either case marked for the attention of the relevant person named below, or to such other address and/or facsimile number and/or marked for the attention of such other person as the addressee may from time to time have notified for the purposes of this Clause.

19.1.1 to the Company:
Address:
First Floor, Dorey Court, Admiral Park
St Peter Port, Guernsey GY1 6HJ
Channel Islands

19.1.2 to CLO Holdco:

Address:
c/o Highland Capital Management, L.P.
300 Crescent Court, Suite 700
Dallas, TX 75201
Attn: General Counsel
Tel: +1 (972) 628-4100
Email: Notices@highlandcapital.com

19.1.3 to any HarbourVest Entity:

Address:
c/o HarbourVest Partners, LLC
One Financial Center, 44th Floor
Boston, MA 02111
USA
Attn: Michael Pugatch
Tel: +1 (617) 348-3712
F
Email: mpugatch@harbourvest.com

19.1.4 to any other Party: by post or hand delivery only to the address specified in the register of members of the Company.

19.2 Communications sent by post shall be deemed to have been received 24 hours after posting. Communications sent by facsimile transmission shall be deemed to have been received at the time the transmission has been received by the addressee **PROVIDED THAT** if the facsimile transmission, where permitted, is received after 5.00pm or on a day which is not a Business Day, it shall be deemed to have been received 11.00am the Business Day following thereafter.

19.3 In proving service by post it shall only be necessary to prove that the notice was contained in an envelope which was duly addressed and posted in accordance with this Clause and in the case of facsimile transmission it shall be necessary to prove that the facsimile was duly transmitted to the correct number.

20. **GENERAL**

20.1 Each of the Parties hereby agree not to enter into or abide by any agreement whether written or oral with any one or more of the other Parties in respect of the voting of Shares or the submission of Member resolutions to any Members for voting by them, or otherwise to direct or influence, or attempt to direct or influence, the day-to-day management of the Company, either directly or indirectly, other than in order to comply with the other terms of this Agreement or the Articles. In this regard, each of the Parties agrees to not to direct or influence or to attempt to direct or influence any of the Directors through any employment relationship that the Directors may have outside of the Company other than in order to comply with the other terms of this Agreement or the Articles. Each of the Parties hereby agree that this provision shall continue to apply to them whether or not they are or remain a Member.

20.2 Unless otherwise provided, all costs in connection with the negotiation, preparation, execution and performance of this Agreement, shall be borne by the Party that incurred the costs.

20.3 The Parties are not in partnership with each other and there is no relationship of principal and agent between them.

20.4 All transactions entered into between any Party and the Company shall be conducted in good faith and on the basis set out or referred to in this Agreement or, if not provided for in this Agreement, as may be agreed by the Parties and, in the absence of such agreement, on an arm's length basis.

20.5 Each Party shall at all times act in good faith towards the other Parties and shall use all reasonable endeavours to ensure that this Agreement is observed.

20.6 Each Party shall promptly execute and deliver all such documents, and do all such things, as the other Parties may from time to time reasonably require for the purpose of giving full effect to the provisions of this Agreement.

20.7 This Agreement may be executed in any number of counterparts, each of which is an original and which together have the same effect as if each Party had signed the same document. This Agreement may not be amended except with the consent of each Party.

21. STATUS OF AGREEMENT

21.1 The Parties shall, when necessary, exercise their powers of voting and any other rights and powers they have to amend, waive or suspend a conflicting provision in the Articles to the extent necessary to permit the Company and its Business to be administered as provided in this Agreement.

21.2 If there is an inconsistency between any of the provisions of this agreement and the provisions of the Articles, the provisions of this agreement shall prevail as between the Parties.


22. GOVERNING LAW AND JURISDICTION

This Agreement shall be governed by and construed in accordance with the laws of the Island of Guernsey and each of the Parties submits to the non-exclusive jurisdiction of the Royal Courts of the Island of Guernsey.

[Signature Page Follows.]


IN WITNESS WHEREOF the Parties hereto have caused this Agreement to be executed the day and year first before written.

SIGNED for and on behalf of **CLO HOLDCO, LTD.**

By: 
Name: Grant Scott
Title: Director


SIGNED for and on behalf of
HARBOURVEST DOVER STREET IX INVESTMENT L.P.

By: HarbourVest Partners (Europe) Limited,
its Alternative Investment Fund Manager

By: 
Name: Michael J. Pugatch
Title: Authorized Person

SIGNED for and on behalf of
HARBOURVEST 2017 GLOBAL AIF L.P.

By: HarbourVest Partners (Europe) Limited,
its Alternative Investment Fund Manager

By: 
Name: Michael J. Pugatch
Title: Authorized Person

SIGNED for and on behalf of
HARBOURVEST 2017 GLOBAL FUND L.P.

By: HarbourVest 2017 Global Associates L.P.,
its General Partner

By: HarbourVest GP LLC,
its General Partner

By: HarbourVest Partners, LLC,
its Managing Member

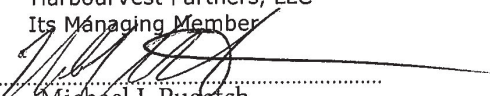
By: 
Name: Michael J. Pugatch
Title: Managing Director

SIGNATURE PAGE TO MEMBERS' AGREEMENT

004361

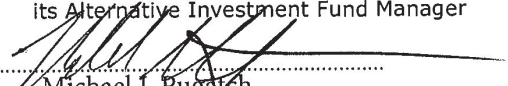
SIGNED for and on behalf of
HV INTERNATIONAL VIII SECONDARY L.P.

By: HIPEP VIII Associates L.P.
Its General Partner
By: HarbourVest GP LLC
Its General Partner
By: HarbourVest Partners, LLC
Its Managing Member

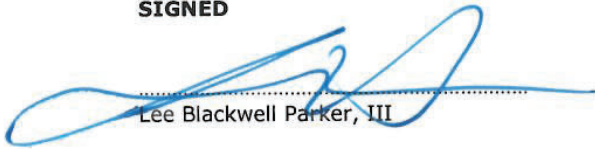
By: 
Name: Michael J. Pugatch
Title: Managing Director

SIGNED for and on behalf of
HARBOURVEST SKEW BASE AIF L.P.

By: HarbourVest Partners (Europe) Limited,
its Alternative Investment Fund Manager

By: 
Name: Michael J. Pugatch
Title: Authorized Person

SIGNED

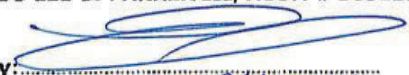


Lee Blackwell Parker, III

SIGNATURE PAGE TO MEMBERS' AGREEMENT

004363

SIGNED for and on behalf of
QUEST IRA, INC.
FBO LEE B. PARKER III, ACCT. # 3058311

By: 
Name: Emmanuel Magaci
Title: transactions officer

Read and approved

X 

SIGNED for and on behalf of
QUEST IRA, INC.
FBO HUNTER COVITZ, ACCT. # 1469811

By:
Name:
Title:

SIGNED for and on behalf of
QUEST IRA, INC.
FBO JON POGLITSCH, ACCT. # 1470612

By:
Name:
Title:

SIGNED for and on behalf of
QUEST IRA, INC.
FBO NEIL DESAI, ACCT. # 3059211

By:
Name:
Title:

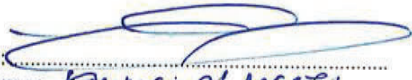
SIGNATURE PAGE TO MEMBERS' AGREEMENT

004364

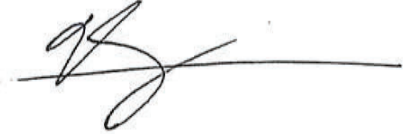
SIGNED for and on behalf of
QUEST IRA, INC.
FBO LEE B. PARKER III, ACCT. # 3058311

By:
Name:
Title:

SIGNED for and on behalf of
QUEST IRA, INC.
FBO HUNTER COVITZ, ACCT. # 1469811

By: 
Name: Emmanuel Magee
Title: Transactions Supervisor

Read & Approved



SIGNED for and on behalf of
QUEST IRA, INC.
FBO JON POGLITSCH, ACCT. # 1470612

By:
Name:
Title:

SIGNED for and on behalf of
QUEST IRA, INC.
FBO NEIL DESAI, ACCT. # 3059211

By:
Name:
Title:

SIGNED for and on behalf of
QUEST IRA, INC.
FBO LEE B. PARKER III, ACCT. # 3058311

By:.....
Name:
Title:

SIGNED for and on behalf of
QUEST IRA, INC.
FBO HUNTER COVITZ, ACCT. # 1469811

By:.....
Name:
Title:

SIGNED for and on behalf of
QUEST IRA, INC.
FBO JON POGLITSCH, ACCT. # 1470612

By:.....
Name: *Emmanuel Nacy*
Title: *Transactions Supervisor*

Read and Approved:

[Signature] *11/7/17*

SIGNED for and on behalf of
QUEST IRA, INC.
FBO NEIL DESAI, ACCT. # 3059211

By:.....
Name:
Title:

SIGNED for and on behalf of
QUEST IRA, INC.
FBO LEE B. PARKER III, ACCT. # 3058311

By:.....
Name:
Title:

SIGNED for and on behalf of
QUEST IRA, INC.
FBO HUNTER COVITZ, ACCT. # 1469811

By:.....
Name:
Title:

SIGNED for and on behalf of
QUEST IRA, INC.
FBO JON POGLITSCH, ACCT. # 1470612

By:.....
Name:
Title:

SIGNED for and on behalf of
QUEST IRA, INC.
FBO NEIL DESAI, ACCT. # 3059211

By:.....
Name: *Emmanuel Mader*
Title: *Transaction Supervisor*

Read and approved
[Signature]

SIGNED for and on behalf of
HIGHLAND CAPITAL MANAGEMENT, L.P.


By: Strand Advisors, Inc.,
its General Partner

By: 
Name: James Dondero
Title: President

SIGNED for and on behalf of
HIGHLAND HCF ADVISOR, LTD.


By:
Name: James Dondero
Title: President

SIGNED for and on behalf of
HIGHLAND CLO FUNDING, LTD.

By: 
Name: William Scott
Title: Director

SCHEDULE

Adherence Agreement

THIS ADHERENCE AGREEMENT is made on [•] 200[•]

BETWEEN:

- (1) [•] of [•] (the "**Covenantor**");
- (2) CLO HOLDCO, LTD. of [] (a "**Member**");
- (3) [•] of [] (a "**Member**");
- (4) [•] of [] (a "**Member**");
- (5) HIGHLAND CLO FUNDING, LTD., with registration number 60120 whose registered office is at First Floor, Dorey Court, Admiral Park, St Peter Port, Guernsey GY1 6HJ, Channel Islands (the "**Company**");
- (6) HIGHLAND HCF ADVISOR, LTD., registered address is at Maples Corporate Services Limited, PO Box 309, Ugland House, Grand Cayman, KY1-1104, Cayman Islands (the "**Portfolio Manager**").

RECITAL

This Agreement is supplemental to the members agreement made on November 15 2017 between the Members, the Portfolio Manager and the Company (the "**Members Agreement**").

IT IS HEREBY AGREED as follows:

1. The Covenantor hereby confirms that he has been supplied with a copy of the Members Agreement and hereby covenants with each of the parties thereto to observe, perform and be bound by all the terms of the Members Agreement as if it were a party thereto.
2. Each of the other parties to the Members Agreement hereby covenants with the Covenantor that the Covenantor shall be entitled to the benefit of the terms of the Members Agreement as if he were a party thereto.
3. This Agreement shall be governed by and construed in accordance with Guernsey law.

IN WITNESS of which this Agreement has been executed by the Covenantor and each of the parties to the Members Agreement on the date shown above.

EXHIBIT 14

004372

SECOND AMENDED AND RESTATED
INVESTMENT ADVISORY AGREEMENT

THIS SECOND AMENDED AND RESTATED INVESTMENT ADVISORY AGREEMENT (this “*Agreement*”), dated to be effective from January 1, 2017 (the “*Effective Date*”) is entered into by and between **Charitable DAF Fund, L.P.**, a Cayman Islands exempted limited partnership (the “*Fund*”), **Charitable DAF GP, LLC**, a limited liability company organized under the laws of the State of Delaware (the “*General Partner*”), the general partner of the Fund, and **Highland Capital Management, L.P.**, a limited partnership organized under the laws of the State of Delaware (the “*Investment Advisor*”). Each of the signatories hereto is sometimes referred to herein individually as a “*Party*” and collectively as the “*Parties*.”

RECITALS

WHEREAS, the Fund, the General Partner and the Investment Advisor entered into that certain Investment Advisory Agreement dated January 1, 2012 (the “*Original Agreement*”);

WHEREAS, the Parties amended and restated the Original Agreement in its entirety on the terms set forth in that certain Amended and Restated Investment Advisory Agreement dated July 1, 2014 (the “*Existing Agreement*”);

WHEREAS, the parties desire to amend and restate the Existing Agreement in its entirety with the terms as set forth in this Agreement effective as of the Effective Date;

NOW, THEREFORE, in consideration of the mutual covenants herein contained and for other good and valuable consideration, the receipt of which is hereby acknowledged, the Parties hereby agree, and the Existing Agreement is hereby amended and restated in its entirety, as follows:

1. Investment Advisory Services. Subject to Section 7, the Investment Advisor shall act as investment advisor to the Fund, the General Partner with respect to the Fund and its subsidiaries and shall provide investment advice with respect to the investment and reinvestment of the cash, Financial Instruments and other properties comprising the assets and liabilities of the Fund and its subsidiaries.

2. Custody. The Financial Instruments shall be held in the custody of Jefferies & Company, Inc. or one or more banks selected by the General Partner (each such bank, a “Custodian”). The General Partner will notify the Investment Advisor promptly of the proposed selection of any other Custodians. The Custodian shall at all times be responsible for the physical custody of the Financial Instruments; for the collection of interest, dividends, and other income attributable to the Financial Instruments; and for the exercise of rights and tenders on the Financial Instruments after consultation with and as then directed by the General Partner. At no time shall the Investment Advisor have possession of or maintain custody over any of the Financial Instruments. The Investment Advisor shall not be responsible for any loss incurred by reason of any act or omission of the Custodian.

3. Authority of the Investment Advisor. Subject to Section 7 of this Agreement, the Investment Advisor shall advise the General Partner on behalf of the Fund and/or its subsidiaries with respect to:

(a) investing, directly or indirectly, on margin or otherwise, in all types of securities and other financial instruments of United States and non-U.S. entities, including, without limitation, capital stock; all manner of equity securities (whether registered or unregistered, traded or privately offered, American Depository Receipts, common or preferred); physical commodities; shares of beneficial interest; partnership interests, limited liability company interests and similar financial instruments; secured and unsecured debt (both corporate and sovereign, bank debt, vendor claims and/or other contractual claims); bonds, notes and debentures (whether subordinated, convertible or otherwise); currencies; interest rate, currency, equity and other derivative products, including, without limitation, (i) future contracts (and options thereon) relating to stock indices, currencies, United States Government securities, securities of non-U.S. governments, other financial instruments and all other commodities, (ii) swaps and contracts for difference, options, swaptions, rights, warrants, when-issued securities, caps, collars, floors, forward rate agreements, and repurchase and reverse repurchase agreements and other cash equivalents, (iii) spot and forward currency transactions and (iv) agreements relating to or securing such transactions; leases, including, without limitation, equipment lease certificates; equipment trust certificates; mortgage-backed securities and other similar instruments (including, without limitation, fixed-rate, pass-throughs, adjustable rate mortgages, collateralized mortgage obligations, stripped mortgage-backed securities and REMICs); loans; credit paper; accounts and notes receivable and payable held by trade or other creditors; trade acceptances and claims; contract and other claims; executory contracts; participations; mutual funds, exchange traded funds and similar financial instruments; money market funds and instruments; obligations of the United States, any state thereof, non-U.S. governments and instrumentalities of any of them; commercial paper; certificates of deposit; bankers' acceptances; trust receipts; letters of credit; choses in action; puts; calls; other obligations and instruments or evidences of indebtedness of whatever kind or nature; and real estate and any kind of interests in real estate; in each case, of any person, corporation, government or other entity whatsoever, whether or not publicly traded or readily marketable (each of such items, "**Financial Instruments**"), and the sale of Financial Instruments short and covering such sales.

(b) engaging in such other lawful Financial Instruments transactions;

(c) research and analysis;

(d) purchasing Financial Instruments and holding them for investment;

(e) entering into contracts for or in connection with investments in Financial Instruments;

(f) investing in other pooled investment vehicles, which investments shall be subject in each case to the terms and conditions of the respective governing document for each such vehicle;

(g) possessing, transferring, mortgaging, pledging or otherwise dealing in, and exercising all rights, powers, privileges and other incidents of ownership or possession with respect to Financial Instruments and other property and funds held or owned by the Fund and/or its subsidiaries;

(h) lending, either with or without security, any Financial Instruments, funds or other properties of the Funds, including by entering into reverse repurchase agreements, and, from time to time, undertaking leverage on behalf of the Fund;

(i) opening, maintaining and closing accounts, including margin and custodial accounts, with brokers and dealers, including brokers and dealers located outside the United States;

(j) opening, maintaining and closing accounts, including custodial accounts, with banks, including banks located outside the United States, and drawing checks or other orders for the payment of monies;

(k) combining purchase or sale orders on behalf of the Fund with orders for other accounts to which the Investment Advisor or any of its affiliates provides investment services (“***Other Accounts***”) and allocating the Financial Instruments or other assets so purchased or sold, on an average-price basis or in any other manner deemed fair and equitable to the Investment Advisor in its sole discretion, among such accounts;

(l) entering into arrangements with brokers to open “average price” accounts wherein orders placed during a trading day are placed on behalf of the Fund and Other Accounts and are allocated among such accounts using an average price;

(m) organizing one or more corporations and other entities formed to hold record title, as nominee for the Fund and/or its subsidiaries (whether alone or together with the Other Accounts), to Financial Instruments or funds of the Fund and/or its subsidiaries;

(n) causing the Fund and/or its subsidiaries to engage in (i) agency, agency cross, related party principal transactions with affiliates of the Investment Manager and (ii) cross transactions with Other Accounts, in each case, to the extent permitted by applicable laws;

(o) engaging personnel, whether part-time or full-time, and attorneys, independent accountants or such other persons (including, without limitation, finders, consultants and investment bankers); and

(p) voting of Financial Instruments, participation in arrangements with creditors, the institution and settlement or compromise of suits and administrative proceedings and other like or similar matters.

4. Policies of the Fund. The activities engaged in by the Investment Advisor on behalf of the Fund and/or its subsidiaries shall be subject to the policies and control of the General Partner.

The Investment Advisor shall submit such periodic reports to the General Partner regarding the Investment Advisor's activities hereunder as the General Partner may reasonably request and a representative of the Investment Advisor shall be available to meet with the General Partner and/or any other representative of the Fund or its subsidiaries as reasonably requested by the General Partner.

In furtherance of the foregoing, the General Partner hereby appoints the Investment Advisor as the Fund's attorney-in-fact, with full power of authority to act in the Fund's name and on its behalf with respect to the Fund, as follows:

(a) to purchase or otherwise trade in Financial Instruments that have been approved by the General Partner;

(b) to execute and combine purchase or sale orders on behalf of the Fund with orders for Other Accounts and allocate the Financial Instruments or other assets so purchased or sold, on an average-price basis or in any other manner deemed fair and equitable to the Investment Advisor in its sole discretion, among such accounts; *provided, however*, that such purchase or sale orders shall be market rates;

(c) to direct the Custodian to deliver funds or the Financial Instruments, but only in the course of effecting trading and investment transactions for the Fund and subject to such restrictions as may be contained in the custody agreement between the Custodian and the Fund;

(d) to enter into contracts, provide certifications or take any other actions necessary to effect any of the foregoing transactions; and

(e) to select brokers on the basis of best execution and in consideration of relevant factors, including, but not limited to, price quotes; the size of the transaction; the nature of the market for the security; the timing of the transaction; the difficulty of execution; the broker-dealer's expertise in the relevant market or sector; the extent to which the broker-dealer makes market in the security or has an access to such market; the broker-dealer's skill in positioning the relevant market; the broker-dealer's facilities, reliability, promptness and financial stability; the broker-dealer's reputation for diligence and integrity (including in correcting errors); confidentiality considerations; the quality and usefulness of research services and investment ideas presented by the broker-dealer; and other factors deemed appropriate by the Investment Advisor.

5. Valuation of Financial Instruments. Financial Instruments will be valued in accordance with the then current valuation policy of the Investment Advisor, a copy of which will be provided to the General Partner upon request.

6. Status of the Investment Advisor. The Investment Advisor shall, for all purposes, be an independent contractor and not an employee of the General Partner or the Fund or its subsidiaries, nor shall anything herein be construed as making the Fund or its subsidiaries or the General Partner, a partner, member or co-venturer with the Investment Advisor or any of its affiliates or clients. The Investment Advisor shall have no authority to act for, represent, bind or obligate the Fund or its subsidiaries or the General Partner except as specifically provided herein.

7. Investments. ALL ULTIMATE INVESTMENT DECISIONS WITH RESPECT TO THE FUND AND ITS SUBSIDIARIES SHALL AT ALL TIMES REST SOLELY WITH THE GENERAL PARTNER AND/OR THE OFFICERS/DIRECTORS OF THE APPLICABLE SUBSIDIARY, IT BEING EXPRESSLY UNDERSTOOD THAT THE GENERAL PARTNER AND/OR THE OFFICERS/DIRECTORS OF THE APPLICABLE SUBSIDIARY SHALL BE FREE TO ACCEPT AND OR REJECT ANY OF THE ADVICE RENDERED BY THE INVESTMENT MANAGER HEREUNDER FOR ANY REASON OR FOR NO REASON.

8. Reimbursement by the General Partner. The Investment Advisor may retain, in connection with its responsibilities hereunder, the services of others to assist in the investment advice to be given to the General Partner with respect to the Fund and/or its subsidiaries (any such appointee, a “**Sub-Advisor**”), including, but not limited to, any affiliate of the Investment Advisor, but payment for any such services shall be assumed by the Investment Advisor, and, therefore, neither the General Partner nor the Fund or any of its subsidiaries shall have any liability therefor; *provided, however*, that the Investment Advisor, in its sole discretion, may retain the services of independent third party professionals, including, without limitation, attorneys, accountants and consultants, to advise and assist it in connection with the performance of its activities on behalf of the General Partner with respect to the Fund and/or its subsidiaries hereunder, and the Fund shall bear full responsibility therefor and the expense of any fees and disbursements arising therefrom.

9. Expenses.

(a) The Fund shall pay or reimburse the Investment Advisor and its affiliates for all expenses related to the services hereunder, including, but not limited to, investment-related expenses, brokerage commissions and other transaction costs, expenses related to clearing and settlement charges, professional fees relating to legal, auditing or valuation services, any governmental, regulatory, licensing, filing or registration fees incurred in compliance with the rules of any self-regulatory organization or any federal, state or local laws, research-related expenses (including, without limitation, news and quotation equipment and services, investment and trading-related software, including, without limitation, trade order management software (i.e., software used to route trade orders)), accounting (including accounting software), tax preparation expenses, costs and expenses associated with reporting and providing information to the Fund, any taxes imposed upon the Fund (including, but not limited to, collateralized debt obligations managed by the Investment Advisor or its affiliates), fees relating to valuing the Financial Instruments, and extraordinary expenses. In no event shall any of the foregoing costs or expenses include any salaries, occupational expense or general overhead of the Investment Advisor. For the avoidance of doubt, (i) the cost of all third party expenses incurred in connection with this Agreement shall not exceed standard market rates (which may include standard soft dollar arrangements) and (ii) to the extent any of the foregoing expenses were incurred on behalf of, or benefit of a number of Investment Advisor’s advised accounts, such expenses shall be allocated pro rata among such accounts.

(b) To the extent that expenses to be borne by the Fund are paid by the Investment Advisor or by any Sub-Advisor, the Fund shall reimburse the Investment Advisor (or Sub-Advisors, as applicable) for such expenses so long as such expenses are at market rates.

10. Fees.

(a) The Fund shall pay the Investment Advisor a quarterly fee (the “**Management Fee**”) equal to 2.0% per annum (0.5% per quarter) of the Net Assets (as defined below) of the Fund, payable in advance at and calculated as of the first business day of each calendar quarter. For purposes of calculating the Management Fee, the Net Assets of the Fund will be determined before giving effect to any of the following amounts payable by the Fund generally or in respect of any Investment which are effective as of the date on which such determination is made: (i) any fee payable to the Investment Advisor as of the date on which such determination is made; (ii) any capital withdrawals or distributions payable by the Fund which are effective as of the date on which such determination is made; and (iii) withholding or other taxes, expenses of processing withdrawals and other items payable, any increases or decreases in any reserves, holdback or other amounts specially allocated ending as of the date on which such determination is made. The Management Fee shall be prorated for partial periods and any applicable excess fees should be returned to the Fund by the Investment Advisor. Capital contributions made to the Fund after the commencement of a calendar quarter shall be subject to a prorated Management Fee based on the number of days remaining during such quarter.

(b) Subject to clauses (c) and (d) below, at the end of each Calculation Period (as defined below), an amount equal to 20% of the net capital appreciation of the Fund’s Investments (as defined below) after deducting the Management Fee shall be paid to the Investment Advisor (the “**Performance Fee**”); *provided, however*, that the net capital appreciation upon which the calculation of the Performance is based shall be reduced to the extent of any unrecovered balance remaining in the Loss Recovery Account (as defined below) maintained on the books and records of the Fund. The amount of the unrecovered balance remaining in the Loss Recovery Account at the time of calculating the Performance Fee shall be the amount existing immediately prior to its reduction pursuant to the second clause of the second sentence of clause (c) below.

(c) There shall be established on the books of the Fund a memorandum account (the “**Loss Recovery Account**”), the opening balance of which shall be zero. At the end of each Calculation Period, the balance in the Loss Recovery Account shall be adjusted as follows: first, if there has been, in the aggregate, net capital depreciation of the Fund’s Investments (as adjusted pursuant to the last sentence of this paragraph) since the end of the immediately preceding Calculation Period (or with respect to the initial Calculation Period, since the Effective Date), an amount equal to such net capital depreciation shall be credited to the Loss Recovery Account, and, second, if there has been, in the aggregate, net capital appreciation of the Fund’s investments (as adjusted pursuant to the last sentence of this paragraph) since the end of the immediately preceding Calculation Period, an amount equal to such net capital appreciation, before taking into account any Performance Fee to be paid to the Investment Advisor, shall be debited to and reduce any unrecovered balance in the Loss Recovery Account, but not below zero. Solely for purposes of this paragraph, in determining the Loss Recovery Account, net capital appreciation and net capital

depreciation for any applicable Calculation Period shall be calculated by taking into account the amount of the Management Fee paid for such period.

(d) In the event that all or a portion of the Fund's capital is distributed or withdrawn while there exists an unrecovered balance in the Loss Recovery Account, the unrecovered balance in the Loss Recovery Account shall be reduced as of the beginning of the next Calculation Period by an amount equal to the product obtained by multiplying the balance in such Loss Recovery Account by a fraction, the numerator of which is the amount distributed or withdrawn with respect to the immediately preceding distribution or withdrawal date, and the denominator of which is the total fair value of the Fund's Investment immediately prior to such distribution or withdrawal.

(e) For purposes of this Section 10, the net capital appreciation and net capital depreciation of the Fund's Investments for any given period will be calculation in accordance with the then current valuation policy of the Investment Advisor, a copy of which will be provided upon the General Partner's request. As soon as reasonably practicable following the end of a Calculation Period, the Investment Advisor shall deliver, or cause to be delivered, to the General Partner a statement showing the calculation of the Performance Fee, if any, with respect to such Calculation Period. The Performance Fee, if any, shall be payable within three (3) business days of the General Partner's receipt of such statement.

(f) Payments due to the Investment Advisor shall be made by wire transfer to:

Bank Name: Compass Bank
ABA#: 113010547
FBO: Highland Capital Management, L.P. (Master Operating
Account)
Acct#: 0025876342

(g) For purposes of this Section 10, the following terms have the definitions set forth below:

"Calculation Period" means the period commencing on the Effective Date (in the case of the initial Calculation Period) and thereafter each period commencing as of the day following the last day of the preceding Calculation Period, and ending as of the close of business on the first to occur of the following: (i) the last day of a calendar year; (ii) the distribution or withdrawal of capital of the Fund (but only with respect to such distributed or withdrawn amount); (iii) the permitted transfer of all or any portion of a partner's interest in the Fund; and (iv) the final capital distribution of the Fund following its dissolution;

"Investments" means all investments, securities, cash, receivables, financial instruments, contracts and other assets, whether tangible or intangible, owned by the Fund;

“**Net Assets**” means, with respect to the Fund as of any date, the excess of the total fair value of all Investments over the total liabilities, debts and obligations of the Fund, in each case, calculated on an accrual basis in accordance with accounting principles generally accepted in the United States and the then current valuation policy of the Service Provider, a copy of which will be provided to the General Partner upon request; and

“**Services Agreement**” means that certain Second Amended and Restated Service Agreement, dated effective as of the Effective Date, by and among the Parties, as amended, restated, modified and supplemented from time to time.

11. Exculpation; Indemnification.

(a) Whether or not herein expressly so provided, every provision of this Agreement relating to the conduct or affecting the liability of or affording protection to the Investment Advisor, its members or any of their respective affiliates and their respective partners, members, officers, directors, employees, shareholders and agents (including parties acting as agents for the execution of transactions) (each, a “**Covered Person**” and collectively, “**Covered Persons**”) shall be subject to the provisions of this Section.

(b) To the fullest extent permitted by law, no Covered Person shall be liable to the General Partner or the Fund or any of its subsidiaries or anyone for any reason whatsoever (including but not limited to (i) any act or omission by any Covered Person in connection with the conduct of the business of the General Partner or the Fund, that is determined by such Covered Person in good faith to be in or not opposed to the best interests of the General Partner or the Fund, (ii) any act or omission by any Covered Person based on the suggestions of any professional advisor of the General Partner or the Fund or any of its subsidiaries whom such Covered Person believes is authorized to make such suggestions on behalf of the General Partner or the Fund or any of its subsidiaries, (iii) any act or omission by the General Partner or the Fund or any of its subsidiaries, or (iv) any mistake, negligence, misconduct or bad faith of any broker or other agent of the General Partner or the Fund or any of its subsidiaries selected by Covered Person with reasonable care), unless any act or omission by such Covered Person constitutes willful misconduct or gross negligence by such Covered Person (as determined by a non-appealable judgment of a court of competent jurisdiction).

(c) Covered Persons may consult with legal counsel or accountants selected by such Covered Person and any act or omission by such Covered Person on behalf of the General Partner or the Fund or any of its subsidiaries or in furtherance of the business of the General Partner or the Fund or any of its subsidiaries in good faith in reliance on and in accordance with the advice of such counsel or accountants shall be full justification for the act or omission, and such Covered Person shall be fully protected in so acting or omitting to act if the counsel or accountants were selected with reasonable care.

(d) To the fullest extent permitted by law, the General Partner and the Fund and its subsidiaries shall indemnify and hold harmless Covered Persons (the “**Indemnified**

Party”), from and against any and all claims, liabilities, damages, losses, costs and expenses, including amounts paid in satisfaction of judgments, in compromises and settlements, as fines and penalties and legal or other costs and expenses of investigating or defending against any claim or alleged claim, of any nature whatsoever, known or unknown, liquidated or unliquidated, that are incurred by any Indemnified Party and arise out of or in connection with the business of the General Partner or the Fund or any of its subsidiaries, any investment made under or in connection with this Agreement, or the performance by the Indemnified Party of Covered Person’s responsibilities hereunder and against all taxes, charges, duties or levies incurred by such Covered Person or any Indemnified Party in connection with the General Partner or the Fund or any of its subsidiaries, provided that an Indemnified Party shall not be entitled to indemnification hereunder to the extent the Indemnified Party’s conduct constitutes willful misconduct or gross negligence (as determined by a non-appealable judgment of a court of competent jurisdiction). The termination of any proceeding by settlement, judgment, order or upon a plea of nolo contendere or its equivalent shall not, of itself, create a presumption that the Indemnified Party’s conduct constituted willful misconduct or gross negligence.

(e) Expenses incurred by an Indemnified Party in defense or settlement of any claim that shall be subject to a right of indemnification hereunder, shall be advanced by the General Partner prior to the final disposition thereof upon receipt of an undertaking by or on behalf of the Indemnified Party to repay the amount advanced to the extent that it shall be determined ultimately that the Indemnified Party is not entitled to be indemnified hereunder.

(f) The right of any Indemnified Party to the indemnification provided herein shall be cumulative of, and in addition to, any and all rights to which the Indemnified Party may otherwise be entitled by contract or as a matter of law or equity and shall be extended to the Indemnified Party’s successors, assigns and legal representatives.

(g) The provisions of this Section are expressly intended to confer benefits upon Covered Persons and such provisions shall remain operative and in full force and effect regardless of the expiration or any termination of this Agreement.

(h) In no event shall any Covered Person be liable for special, exemplary, punitive, indirect, or consequential loss, or damage of any kind whatsoever, including without limitation lost profits.

(i) No Covered Person shall be liable hereunder for any settlement of any action or claim effected without its written consent thereto.

(j) Pursuant to the exculpation and indemnification provisions described above, the Investment Advisor and each Indemnified Party will generally not be liable to the General Partner or the Fund for any act or omission (or alleged act or omission), absent bad faith, willful misconduct, fraud or gross negligence, and the General Partner and the Fund will generally be required to indemnify such persons against any Losses they may incur by reason of any act or omission (or alleged act or omission) related to the General Partner, the Fund or its subsidiaries, absent bad faith, willful misconduct, fraud or gross negligence. As a result of these provisions, the General Partner, the Fund and its subsidiaries, as applicable (not the Investment

Advisor or any other Indemnified Party) will be responsible for any Losses resulting from trading errors and similar human errors, absent bad faith, willful misconduct, fraud or gross negligence or the ability to waive or limit such Losses under applicable law. Trading errors might include, for example, keystroke errors that occur when entering trades into an electronic trading system or typographical or drafting errors related to derivatives contracts or similar agreements. Given the volume of transactions executed by the Investment Advisor and its affiliates on behalf of the Fund and/or its subsidiaries, the General Partner acknowledges that trading errors (and similar errors) will occur and that the General Partner will be responsible for any resulting Losses, even if such Losses result from the negligence (but not gross negligence) of the Investment Advisor or its affiliates.

12. Activities of the Investment Advisor and Others. The Investment Advisor, and its affiliates may engage, simultaneously with their investment management activities on behalf of the Fund, in other businesses, and may render services similar to those described in this Agreement to other individuals, companies, trusts or persons, and shall not by reason of such engaging in other businesses or rendering of services for others be deemed to be acting in conflict with the interests of the Fund. Notwithstanding the foregoing, the Investment Advisor and its affiliates shall devote as much time to provide advisory service to the General Partner with respect to the management of the Fund's assets as the Investment Advisor deems necessary and appropriate. In addition, the Investment Advisor or any of its affiliates, in their individual capacities, may engage in securities transactions which may be different than, and contrary to, the investment advice provided by the Investment Advisor to the General Partner with respect to the Fund. The Investment Advisor may give advice and recommend securities to, or buy securities for, accounts and other clients, which advice or securities may differ from advice given to, or securities recommended or bought for, the Fund, even though their investment objectives may be the same or similar. The Investment Advisor may recommend transactions in securities and other assets in which the Investment Advisor has an interest, including securities or other assets issued by affiliates of the Investment Manager. Each of the General Partner and the Fund acknowledges that it has received, reviewed and had an opportunity with respect to (a) a copy of Part 2 of the Investment Advisor's Form ADV, and (b) the supplemental disclosures attached hereto as Exhibit A, each of which further describes conflicts of interest relating to the Investment Advisor, its affiliates and their respective advised accounts.

13. Term. This Agreement shall remain in effect through an initial term concluding December 31, 2017 and shall be automatically extended for additional one-year terms thereafter, except that it may be terminated by the Investment Advisor, on the one hand, or by the General Partner and the Fund, on the other hand, upon at least 90 days' prior written notice to the General Partner or the Investment Advisor, as the case may be, prior to General Partner's fiscal year-end.

14. Miscellaneous.

(a) Notices. Any notice, consent or other communication made or given in connection with this Agreement shall be in writing and shall be deemed to have been duly given when delivered by hand or facsimile or five days after mailed by certified mail, return receipt requested, as follows:

If to the Investment Advisor, to:

Highland Capital Management, L.P.
300 Crescent Court, Suite 700
Dallas, Texas 75201
Telephone Number: (972) 628-4100
Facsimile Number: (972) 628-4147

If to the General Partner or the Fund, to:

Charitable DAF GP, LLC
4140 Park Lake Avenue, Suite 600
Raleigh, North Carolina 27612
Attention: Grant Scott
Telephone Number: (919) 854-1407
Facsimile Number: (919) 854-1401

(b) Entire Agreement. This Agreement contains all of the terms agreed upon or made by the parties relating to the subject matter of this Agreement, and supersedes all prior and contemporaneous agreements, negotiations, correspondence, undertakings and communications of the parties, oral or written, respecting such subject matter.

(c) Amendments and Waivers. No provision of this Agreement may be amended, modified, waived or discharged except as agreed to in writing by the parties. No amendment to this Agreement may be made without first obtaining the required approval from the Fund. The failure of a party to insist upon strict adherence to any term of this Agreement on any occasion shall not be considered a waiver thereof or deprive that party of the right thereafter to insist upon strict adherence to that term or any other term of this Agreement.

(d) Binding Effect; Assignment. This Agreement shall be binding upon and inure to the benefit of the General Partner, the Fund, the Investment Advisor, each Indemnified Party and their respective successors and permitted assigns. Any person that is not a signatory to this Agreement but is nevertheless conferred any rights or benefits hereunder (*e.g.*, officers, partners and personnel of the Investment Advisor and others who are entitled to indemnification hereunder) shall be entitled to such rights and benefits as if such person were a signatory hereto, and the rights and benefits of such person hereunder may not be impaired without such person's express written consent. No party to this Agreement may assign (as such term is defined under the U.S. Investment Advisers Act of 1940, as amended) all or any portion of its rights, obligations or liabilities under this Agreement without the prior written consent of the other parties to this Agreement; provided; however, that the Investment Advisor may assign all or any portion of its rights, obligations and liabilities hereunder to any of its affiliates at its discretion.

(e) Governing Law. Notwithstanding the place where this Agreement may be executed by any of the parties thereto, the parties expressly agree that all terms and provisions hereof shall be governed by and construed in accordance with the laws of the State of Texas applicable to agreements made and to be performed in that State.

(f) Jurisdiction; Venue; Waiver of Jury Trial. The Parties hereby agree that any action, claim, litigation, or proceeding of any kind whatsoever against any other Party in any way arising from or relating to this Agreement and all contemplated transactions, including claims sounding in contract, equity, tort, fraud and statute (“**Dispute**”) shall be submitted exclusively to the U.S. District Court for the Northern District of Texas or, if such court does not have subject matter jurisdiction, the courts of the State of Texas sitting in Dallas County, and any appellate court thereof (“**Enforcement Court**”). Each Party irrevocably and unconditionally submits to the exclusive personal and subject matter jurisdiction of the Enforcement Court for any Dispute and agrees to bring any Dispute only in the Enforcement Court. Each Party further agrees it shall not commence any Dispute in any forum, including administrative, arbitration, or litigation, other than the Enforcement Court. Each Party agrees that a final judgment in any such action, litigation, or proceeding is conclusive and may be enforced in other jurisdictions by suit on the judgment or in any other manner provided by law.

EACH PARTY IRREVOCABLY AND UNCONDITIONALLY WAIVES, TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW, ANY RIGHT IT MAY HAVE TO A TRIAL BY JURY IN ANY LEGAL ACTION, PROCEEDING, CAUSE OF ACTION OR COUNTERCLAIM ARISING OUT OF OR RELATING TO THIS AGREEMENT, INCLUDING ANY EXHIBITS, SCHEDULES, AND APPENDICES ATTACHED TO THIS AGREEMENT, OR THE TRANSACTIONS CONTEMPLATED HEREBY. EACH PARTY CERTIFIES AND ACKNOWLEDGES THAT (A) NO REPRESENTATIVE OF THE OTHER PARTY HAS REPRESENTED, EXPRESSLY OR OTHERWISE, THAT THE OTHER PARTY WOULD NOT SEEK TO ENFORCE THE FOREGOING WAIVER IN THE EVENT OF A LEGAL ACTION, (B) IT HAS CONSIDERED THE IMPLICATIONS OF THIS WAIVER, (C) IT MAKES THIS WAIVER KNOWINGLY AND VOLUNTARILY, AND (D) IT HAS BEEN INDUCED TO ENTER INTO THIS AGREEMENT BY, AMONG OTHER THINGS, THE MUTUAL WAIVERS AND CERTIFICATIONS IN THIS SECTION.

Nothing in this Section 14(f) shall be construed to limit either party’s right to obtain equitable or injunctive relief in a court of competent jurisdiction in appropriate circumstances.

(g) Headings. The headings contained in this Agreement are intended solely for convenience and shall not affect the rights of the parties to this Agreement.

(h) Counterparts. This Agreement may be signed in any number of counterparts with the same effect as if the signatures to each counterpart were upon a single instrument, and all such counterparts together shall be deemed an original of this Agreement.

(i) Survival. The provisions of Sections 8, 9, 10, 11 and 14 hereof shall survive the termination of this Agreement.

(j) Pronouns. All pronouns shall be deemed to refer to the masculine, feminine, neuter, singular or plural as the identity of the person or persons’ firm or company may require in the context thereof.

(k) Arm's-Length Agreement. The General Partner and the Fund have approved this Agreement and reviewed the activities described in Section 12 and in the Investment Advisor's Form ADV and the risks related thereto.

[Signature Page to Follow]

IN WITNESS WHEREOF the parties hereto have caused this Agreement to be executed
to be effective from the date first written above.

HIGHLAND CAPITAL MANAGEMENT, L.P.

By: Strand Advisors, Inc., its general partner

By: _____

Name: James Dondero

Title: President

Date: 6/21/17

CHARITABLE DAF GP, LLC

By: _____

Name: Grant J. Scott

Title: Managing Member

Date:

CHARITABLE DAF FUND, L.P.

By: Charitable DAF GP, LLC, its general
partner

By: _____

Name: Grant J. Scott

Title: Managing Member

Date:

IN WITNESS WHEREOF the parties hereto have caused this Agreement to be executed
to be effective from the date first written above.

HIGHLAND CAPITAL MANAGEMENT, L.P.

By: Strand Advisors, Inc., its general partner

By: _____

Name: James Dondero

Title: President

Date:

CHARITABLE DAF GP, LLC

By: _____

Name: Grant J. Scott

Title: Managing Member

Date: 6/21/2017

CHARITABLE DAF FUND, L.P.

By: Charitable DAF GP, LLC, its general
partner

By: _____

Name: Grant J. Scott

Title: Managing Member

Date: 6/21/2017

EXHIBIT A

Supplemental Disclosures

Potential Conflicts of Interest

The scope of the activities of Highland Capital Management, L.P. (the “**Investment Adviser**”), its affiliates, and the funds and clients managed or advised by the Investment Adviser or any of its affiliates may give rise to conflicts of interest or other restrictions and/or limitations imposed on Charitable DAF Fund, L.P. and its subsidiaries (collectively, the “**Fund**”) in the future that cannot be foreseen or mitigated at this time. The following briefly summarizes some of these conflicts, but is not intended to be an exhaustive list of all such conflicts. Additional conflicts are described in the Investment Adviser’s Form ADV. You are urged to review the Investment Adviser’s Form ADV in its entirety prior to investing in the Fund.¹

Highland Group & Highland Accounts. None of the Investment Adviser, its affiliates and their respective officers, directors, shareholders, members, partners, personnel and employees (collectively, the “**Highland Group**”) is precluded from engaging in or owning an interest in other business ventures or investment activities of any kind, whether or not such ventures are competitive with the Fund. The Investment Adviser is permitted to manage other client accounts, and does manage other client accounts, some of which may have objectives similar or identical to those of the Fund, including other collective investment vehicles that may be managed by the Highland Group and in which the Investment Adviser or any of its affiliates may have an equity interest.

The Fund will be subject to a number of actual and potential conflicts of interest involving the Highland Group including, among other things, the fact that: (i) the Highland Group conducts substantial investment activities for accounts, funds, collateralized debt obligations and collateralized loan obligations that invest in leveraged loans (collectively, “**CDOs**”) and other vehicles managed by members of the Highland Group (collectively, “**Highland Accounts**”) in which the Fund has no interest; (ii) the Highland Group advises Highland Accounts, which utilize the same, similar or different methodologies as the Fund and may have financial incentives (including, without limitation, as it relates to the composition of investors in such funds and accounts or to the Highland Group’s compensation arrangements) to favor certain Highland Accounts over the Fund; (iii) the Highland Group may use the strategy described herein in certain Highland Accounts; (iv) the Investment Adviser may give advice and recommend securities to, or buy or sell securities for, the Fund, which advice or securities may differ from advice given to, or securities recommended or bought or sold for, Highland Accounts; (v) the Investment Adviser has the discretion, to the extent permitted under applicable law, to use its affiliates as service providers to the Fund and its portfolio investments; (vi) certain investors affiliated with the Highland Group may choose to personally invest only in certain funds advised by the Highland Group and the amounts invested by them in such funds is expected to vary significantly; (vii) the Highland Group and Highland Accounts may actively engage in transactions in the same securities sought by the

¹ The Investment Adviser’s latest Form ADV filed and Part 2 Brochures can be accessed here: https://adviserinfo.sec.gov/IAPD/IAPDFirmSummary.aspx?ORG_PK=110126

Fund and, therefore, may compete with the Fund for investment opportunities or may hold positions opposite to positions maintained by the Fund; (viii) the Fund may invest in CDOs and Highland Accounts managed by members of the Highland Group; and (ix) the Investment Adviser will devote to the Fund only as much time as the Investment Adviser deems necessary and appropriate to manage the Fund's business.

The Investment Adviser undertakes to resolve conflicts in a fair and equitable basis, which in some instances may mean a resolution that would not maximize the benefit to the Fund's investors.

Allocation of Trading Opportunities. It is the policy of the Investment Adviser to allocate investment opportunities fairly and equitably over time. This means that such opportunities will be allocated among those accounts for which participation in the respective opportunity is considered appropriate, taking into account, among other considerations: (i) fiduciary duties owed to the accounts; (ii) the primary mandate of the accounts; (iii) the capital available to the accounts; (iv) any restrictions on the accounts and the investment opportunity; (v) the sourcing of the investment, size of the investment and amount of follow-on available related to the investment; (vi) whether the risk-return profile of the proposed investment is consistent with the account's objectives and program, whether such objectives are considered in light of the specific investment under consideration or in the context of the portfolio's overall holdings; (vii) the potential for the proposed investment to create an imbalance in the account's portfolio (taking into account expected inflows and outflows of capital); (viii) liquidity requirements of the account; (ix) potentially adverse tax consequences; (x) regulatory and other restrictions that would or could limit an account's ability to participate in a proposed investment; and (xi) the need to re-size risk in the account's portfolio.

The Investment Adviser has the authority to allocate trades to multiple Highland Accounts on an average price basis or on another basis it deems fair and equitable. Similarly, if an order for any accounts cannot be fully allocated under prevailing market conditions, the Investment Adviser may allocate the trades among different accounts on a basis it considers fair and equitable over time. One or more of the foregoing considerations may (and are often expected to) result in allocations among the Fund and one or more Highland Accounts on other than a *pari passu* basis. The Investment Adviser will allocate investment opportunities across its accounts for which the opportunities are appropriate, consistent with (i) its internal conflict of interest and allocation policies and (ii) the requirements of the U.S. Investment Advisers Act of 1940, as amended. The Investment Adviser will seek to allocate investment opportunities among such entities in a manner that is fair and equitable over time and consistent with its allocation policy. However, there is no assurance that such investment opportunities will be allocated to the Fund fairly or equitably in the short-term or over time and there can be no assurance that the Fund will be able to participate in all investment opportunities that are suitable for it.

The Investment Adviser and/or its affiliates may open "average price" accounts with brokers. In an "average price" account, purchase and sale orders placed during a trading day for the Fund, the Highland Accounts or affiliates of the Investment Adviser are combined, and securities bought and sold pursuant to such orders are allocated among such accounts on an average price basis.

Highland Group Trading. As part of their regular business, the members of the Highland Group hold, purchase, sell, trade or take other related actions both for their respective accounts and for the accounts of their respective clients, on a principal or agency basis, with respect to loans, securities and other investments and financial instruments of all types. The members of the Highland Group also provide investment advisory services, among other services, and engage in private equity, real estate and capital markets oriented investment activities. The members of the Highland Group will not be restricted in their performance of any such services or in the types of debt or equity investments which they may make. The members of the Highland Group may have economic interests in or other relationships with obligors or issuers in whose obligations or securities or credit exposures the Fund may invest. In particular, such persons may make and/or hold an investment in an obligor's or issuer's securities that may be *pari passu*, senior or junior in ranking to an investment in such obligor's or issuer's securities made and/or held by the Fund or in which partners, security holders, members, officers, directors, agents, personnel or employees of such persons serve on boards of directors or otherwise have ongoing relationships. Each of such ownership and other relationships may result in securities laws restrictions on transactions in such securities by the Fund and otherwise create conflicts of interest for the Fund. In such instances, the members of the Highland Group may in their discretion make investment recommendations and decisions that may be the same as or different from those made with respect to the Fund's investments. In connection with any such activities described above, the members of the Highland Group may hold, purchase, sell, trade or take other related actions in securities or investments of a type that may be suitable to investments for the Fund. The members of the Highland Group will not be required to offer such securities or investments to the Fund or provide notice of such activities to the Fund. In addition, in managing the Fund's portfolio, the Investment Adviser may take into account its relationship or the relationships of its affiliates with obligors and their respective affiliates, which may create conflicts of interest. Furthermore, in connection with actions taken in the ordinary course of business of the Investment Adviser in accordance with its fiduciary duties to its other clients, the Investment Adviser may take, or be required to take, actions which adversely affect the interests of the Fund.

The Highland Group has invested and may continue to invest in investments that would also be appropriate for the Fund. Such investments may be different from those made by the Fund. The Highland Group does not have any duty, in making or maintaining such investments, to act in a way that is favorable to the Fund or to offer any such opportunity to the Fund, subject to the Investment Adviser's internal allocation policy. The investment policies, fee arrangements and other circumstances applicable to such other accounts and investments may vary from those applicable to the Fund and its investments. The Highland Group may also provide advisory or other services for a customary fee with respect to investments made or held by the Fund, and neither the Fund nor its investors shall have any right to such fees. The Highland Group may also have ongoing relationships with, render services to or engage in transactions with other clients who make investments of a similar nature to those of the Fund, and with companies whose securities or properties are acquired by the Fund.

As further described below, in connection with the foregoing activities the Highland Group may from time to time come into possession of material nonpublic information that limits the ability of the Investment Adviser to effect a transaction for the Fund, and the Fund's investments may be constrained as a consequence of the Investment Adviser's inability to use such information for

advisory purposes or otherwise to effect transactions that otherwise may have been initiated on behalf of its clients, including the Fund.

Although the professional staff of the Investment Adviser will devote as much time to the Fund as the Investment Adviser deems appropriate to perform its duties in accordance with the Fund's advisory agreement and in accordance with reasonable commercial standards, the staff may have conflicts in allocating its time and services among the Fund and the Investment Adviser's other accounts.

Various Activities of the Investment Adviser and its Affiliates. The directors, officers, personnel, employees and agents of the Investment Adviser and its affiliates may, subject to applicable law, serve as directors (whether supervisory or managing), officers, personnel, employees, partners, agents, nominees or signatories or provide banking, agency, insurance and/or other services, and receive arm's length fees in connection with such services, for the Fund or its investments or other entities that operate in the same or a related line of business as the, for other clients managed by the Investment Adviser or its affiliates, or for any obligor or issuer in respect of the CDOs, and the Fund shall have no right to any such fees. In serving in these multiple capacities, they may have obligations to such other clients or investors in those entities, the fulfillment of which may not be in the best interests of the Fund. The Fund may compete with other Highland Accounts for capital and investment opportunities.

There is no limitation or restriction on the Investment Adviser or any of its affiliates with regard to acting as investment adviser or collateral manager (or in a similar role) to other parties or persons. This and other future activities of the Investment Adviser and/or its affiliates may give rise to additional conflicts of interest. Such conflicts may relate to obligations that the Investment Adviser's investment committee, the Investment Adviser or its affiliates have to other clients.

The Investment Adviser and its affiliates may participate in creditors or other committees with respect to the bankruptcy, restructuring or workout of an investment of the Fund or another account. In such circumstances, the Investment Adviser or its affiliates may take positions on behalf of themselves or another account that are adverse to the interests of the Fund.

The Investment Adviser and/or its affiliates may act as an underwriter, arranger or placement agent, or otherwise participate in the origination, structuring, negotiation, syndication or offering of CDOs, Highland Accounts and other investments purchased by the Fund. Such transactions shall be subject to fees that are intended to be no greater than arm's-length fees, and the Fund shall have no right to any such fees. There is no expectation for preferential access to transactions involving CDOs and Highland Accounts that are underwritten, originated, arranged or placed by the Investment Adviser and/or its affiliates and the Fund shall not have any right to any such fees.

Investments in Highland Accounts Managed by the Investment Manager or its Affiliates. The Fund may invest a significant portion of its capital in Highland Accounts. The Investment Adviser or its affiliates will receive senior and subordinated management fees and, in some cases, a performance-based allocation or fee with respect to its role as general partner and/or manager of the Highland Accounts. If the Fund invests in Highland Accounts in secondary transactions, the Fund will indirectly pay the fees (senior and subordinated) of such Highland Accounts and any

carried interest. If the Fund provides all of the equity for a Highland Account, there may be no third party with whom the amount of such fees, expenses and carried interest can be negotiated on an arm's-length basis. The Investment Adviser or its affiliates will have conflicting division of loyalties and responsibilities regarding the Fund and a Highland Account, and certain other conflicts of interest would be inherent in the situation. There can be no assurance that the interests of the Fund would not be subordinated to those of a Highland Account or to other interests of the Investment Adviser.

Multiple Levels of Fees. The Investment Adviser and the Highland Accounts are expected to impose management fees, other administrative fees, carried interest and other performance allocations on realized and unrealized appreciation in the value of the assets managed and other income. This may result in greater expense than if investors in the Fund were able to invest directly in the Highland Accounts or their respective underlying investments. Investors in the Fund should take into account that the return on their investment will be reduced to the extent of both levels of fees. The general partner or manager of a Highland Account may receive the economic benefit of certain fees from its portfolio companies for services and in connection with unconsummated transactions (*e.g.*, break-up, placement, monitoring, directors', organizational and set-up fees and financial advisory fees).

Cross Transactions and Principal Transactions. The Investment Adviser may effect client cross-transactions where the Investment Adviser causes a transaction to be effected between the Fund and another client advised by it or any of its affiliates. The Investment Adviser may engage in a client cross-transaction involving the Fund any time that the Investment Adviser believes such transaction to be fair to the Fund and such other client.

The Investment Adviser may effect principal transactions where the Fund acquires securities from or sells securities to the Investment Adviser and/or its affiliates, in each case in accordance with applicable law, which will include the Investment Adviser obtaining independent consent on behalf of the Fund prior to engaging in any such principal transaction between the Fund and the Investment Adviser or its affiliates.

The Investment Adviser may advise the Fund to acquire or dispose of securities in cross trades between the Fund and other clients of the Investment Adviser or its affiliates in accordance with applicable legal and regulatory requirements. In addition, the Fund may invest in securities of obligors or issuers in which the Investment Adviser and/or its affiliates have a debt, equity or participation interest, and the holding and sale of such investments by the Fund may enhance the profitability of the Investment Adviser's own investments in such companies. Moreover, the Fund may invest in assets originated by the Investment Adviser or its affiliates. In each such case, the Investment Adviser and such affiliates may have a potentially conflicting division of loyalties and responsibilities regarding the Fund and the other parties to such trade. Under certain circumstances, the Investment Adviser and its affiliates may determine that it is appropriate to avoid such conflicts by selling a security at a fair value that has been calculated pursuant to the Investment Adviser's valuation procedures to another client managed or advised by the Investment Adviser or such affiliates. In addition, the Investment Adviser may enter into agency cross-transactions where it or any of its affiliates acts as broker for the Fund and for the other party to the transaction, to the extent permitted under applicable law. The Investment Adviser may obtain independent consent

in writing on behalf of the Fund, which consent may be provided by the managing member of the General Partner or any other independent party on behalf of the Fund, if any such transaction requires the consent of the Fund under Section 206(3) of the U.S. Investment Advisers Act of 1940, as amended.

Material Non-Public Information. There are generally no ethical screens or information barriers among the Investment Adviser and certain of its affiliates of the type that many firms implement to separate persons who make investment decisions from others who might possess material, non-public information that could influence such decisions. If the Investment Adviser, any of its personnel or its affiliates were to receive material non-public information about a particular obligor or issuer, or have an interest in causing the Fund to acquire a particular security, the Investment Adviser may be prevented from advising the Fund to purchase or sell such asset due to internal restrictions imposed on the Investment Adviser. Notwithstanding the maintenance of certain internal controls relating to the management of material nonpublic information, it is possible that such controls could fail and result in the Investment Adviser, or one of its investment professionals, buying or selling an asset while, at least constructively, in possession of material non-public information. Inadvertent trading on material nonpublic information could have adverse effects on the Investment Adviser's reputation, result in the imposition of regulatory or financial sanctions, and as a consequence, negatively impact the Investment Adviser's ability to perform its portfolio management services to the Fund. In addition, while the Investment Adviser and certain of its affiliates currently operate without information barriers on an integrated basis, such entities could be required by certain regulations, or decide that it is advisable, to establish information barriers. In such event, the Investment Adviser's ability to operate as an integrated platform could also be impaired, which would limit the Investment Adviser's access to personnel of its affiliates and potentially impair its ability to manage the Fund's investments.

Conflicts Relating to Equity and Debt Ownership by the Fund and Affiliates. In certain circumstances, the Fund and other client accounts may invest in securities or other instruments of the same issuer (or affiliated group of issuers) having a different seniority in the issuer's capital structure. If the issuer becomes insolvent, restructures or suffers financial distress, there may be a conflict between the interests in the Fund and those other accounts insofar as the issuer may be unable (or in the case of a restructuring prior to bankruptcy may be expected to be unable) to satisfy the claims of all classes of its creditors and security holders and the Fund and such other accounts may have competing claims for the remaining assets of such issuers. Under these circumstances it may not be feasible for the Investment Adviser to reconcile the conflicting interests in the Fund and such other accounts in a way that protects the Fund's interests. Additionally, the Investment Adviser or its nominees may in the future hold board or creditors' committee memberships which may require them to vote or take other actions in such capacities that might be conflicting with respect to certain funds managed by the Investment Adviser in that such votes or actions may favor the interests of one account over another account. Furthermore, the Investment Adviser's fiduciary responsibilities in these capacities might conflict with the best interests of the investors.

Other Fees. The Investment Adviser and its affiliates are permitted to receive consulting fees, investment banking fees, advisory fees, breakup fees, director's fees, closing fees, transaction fees and similar fees in connection with actual or contemplated investments. Such fees will not reduce

or offset the Management Fee. Conflicts of interest may also arise due to the allocation of such fees to or among co-investors.

Soft Dollars. The Investment Adviser's authority to use "soft dollar" credits generated by the Fund's securities transactions to pay for expenses that might otherwise have been borne by the Investment Adviser may give the Investment Adviser an incentive to select brokers or dealers for transactions, or to negotiate commission rates or other execution terms, in a manner that takes into account the soft dollar benefits received by the Investment Adviser rather than giving exclusive consideration to the interests of the Fund.

**UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF
TEXAS, DALLAS DIVISION**

In Re: Highland Capital Management, L.P § Case No. **19-34054-SGJ11**

Charitable DAF Fund, L.P et al

Appellant

§

vs.

§

21-03067

Highland Capital Management, L.P

§

Appellee

§

3:23-CV-01503-B

[167] Order granting Defendant Highland Capital Management, L.P.'s Renewed motion to dismiss adversary proceeding (related document # [122](#)) Entered on 6/25/2023.

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APPELLANT RECORD

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**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

In re:	§ Chapter 11
	§
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§ Case No. 19-34054-sgj11
	§
Debtor.	§
	§
CHARITABLE DAF FUND, L.P. AND CLO	§
HOLDCO, LTD., DIRECTLY AND DERIVATIVELY	§
	§
Plaintiffs,	§ Adversary Proceeding No.
	§
vs.	§ 21-03067-sgj11
	§
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§
HIGHLAND HCF ADVISOR, LTD., AND	§
HIGHLAND CLO FUNDING LTD., NOMINALLY	§
	§
Defendant.	§
	§

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**APPELLANTS' SECOND AMENDED STATEMENT OF ISSUES
AND DESIGNATION OF RECORD ON APPEAL**

Pursuant to Rules 8009(a)(1)(A)-(B) and (a)(4) of the Federal Rules of Bankruptcy Procedure, The Charitable DAF Fund, L.P. and CLO Holdco, Ltd. ("Appellants") hereby designate the following items to be included in the record and identify the following issues with respect to

their appeal of the Order Granting Defendant Highland Capital Management, L.P.'s "Renewed Motion to Dismiss Complaint" [Adv. Proc. Doc. No. 122] which was entered by the United States Bankruptcy Court for the Northern District of Texas on June 25, 2023.

I. STATEMENT OF ISSUES TO BE PRESENTED ON APPEAL

- Whether the Bankruptcy Court had jurisdiction to rule on Highland Capital Management L.P.'s Renewed Motion to Dismiss Complaint
- Whether the Renewed Motion to Dismiss Complaint was improperly granted

II. DESIGNATION OF ITEMS TO BE INCLUDED IN THE RECORD

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1. Notice of Appeal for Bankruptcy Case Adversary Proceeding No. 21-03067-sgj11 [Doc. 168].

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2. The judgment, order, or decree appealed from: Memorandum Opinion and Order Granting Defendant Highland Capital Management, L.P.'s "Renewed Motion to Dismiss Complaint" [Adv. Proc. Doc. No. 122] [Doc. 167].

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3. Docket Sheet kept by the Bankruptcy Clerk.

4. Documents listed below and as described in the Docket Sheet for Bankruptcy Case Proceeding No. 21-03067-sgj.

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No.	Date Filed	Docket No.	Description/Document Text
1	9/29/21	1	(36 pgs; 3 docs) Adversary case 21-03067. ORDER REFERRING CASE NUMBER 21-CV-0842-B from U.S District Court for the Northern District of Texas, Dallas Division to U.S. Bankruptcy Court for Northern District of Texas, Dallas Division. Complaint by Charitable DAF Fund, LP, CLO Holdco, Ltd. against Highland Capital Management, LP, Highland HCF Advisor Ltd., Highland CLO Funding, Ltd. Fee Amount \$350 (Attachments: # 1 Original Complaint # 2 Docket Sheet from 3:20-cv-0842-B) Nature(s) of suit: 02 (Other (e.g. other actions that would have been brought in state court if unrelated to bankruptcy)). (Okafor, M.)
2	9/29/21	2	(1 pg) Supplemental Document (cover sheet) by CLO Holdco Ltd., Charitable DAF Fund (RE: related document(s)1 Adversary case 21-03067) [ORIGINALLY FILED IN 21-CV-0842 AS #2 ON 04/13/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)

Vol. 2 000139 000232 000239 000270 Thru Vol. 6	3	9/29/21	6	(93 pgs; 6 docs) MOTION for Leave to File First Amended Complaint filed by CLO Holdco Ltd., Charitable DAF Fund LP (Attachments: # 1 Exh 1_First Amended Complaint # 2 Exh 2_Motion for Authorization to Retain James Seery # 3 Exh 3_Order Approving Retention of James Seery # 4 Exh 4_Order Approving Settlement # 5 Proposed Order) (Bridges, Jonathan) (Entered: 04/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #6 ON 04/19/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
	4	9/29/21	22	(7 pgs; 2 docs) MOTION for an Order to Enforce the Order of Reference filed by Highland Capital Management LP. (Attachments: # 1 Exhibit(s) A--Proposed Order) (Annable, Zachery) Modified text on 5/20/2021 (mjr). (Entered: 05/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #22 ON 05/19/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
	5	9/29/21	23	(31 pgs) Brief/Memorandum in Support filed by Highland Capital Management LP re: 22 MOTION for an Order to Enforce the Order of Reference. (Annable, Zachery) Modified text on 5/20/2021 (mjr).(Entered: 05/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #23 ON 05/19/2021 IN U.S.DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
	6	9/29/21	24	(926 pgs; 29 docs) Appendix in Support filed by Highland Capital Management LP re: 23 Brief/Memorandum in Support. (Attachments: # 1 Appendix 1 # 2 Appendix 2 # 3 Appendix 3 # 4 Appendix 4 # 5 Appendix 5 # 6 Appendix 6 # 7 Appendix 7 # 8 Appendix 8 # 9 Appendix 9 # 10 Appendix10 # 11 Appendix 11 # 12 Appendix 12 # 13 Appendix 13 # 14 Appendix 14 # 15 Appendix 15 # 16 Appendix 16 # 17 Appendix 17 # 18 Appendix 18 # 19 Appendix 19 # 20 Appendix 20 # 21 Appendix 21# 22 Appendix 22 # 23 Appendix 23 # 24 Appendix 24 # 25 Appendix 25 # 26 Appendix 26 # 27 Appendix 27 # 28 Appendix 28) (Annable, Zachery) Modified linkage and text on 5/20/2021 (mjr). (Entered:05/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #24 ON 05/19/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
Vol. 7 001196	7	9/29/21	26	(7 pgs; 2 docs) MOTION to Dismiss Complaint filed by Highland Capital Management LP (Attachments: # 1 Exhibit(s) A--Proposed Order) (Annable, Zachery) Modified text on 5/28/2021 (jmg).(Entered: 05/27/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #26 ON 05/27/2021 IN U.S.DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)

Vol. 7 001203 thru Vol. 8	8	9/29/21	28	(508 pgs; 14 docs) Appendix in Support filed by Highland Capital Management LP (Attachments: # 1 Appendix 1 # 2 Appendix 2 # 3 Appendix 3 # 4 Appendix 4 # 5 Appendix 5 # 6 Appendix 6 # 7 Appendix 7 # 8 Appendix 8 # 9 Appendix 9 # 10 Appendix 10 # 11 Appendix 11 # 12 Appendix 12 # 13 Appendix 13) (Annable, Zachery) (Entered: 05/27/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #28 ON 05/27/2021 IN U.S. DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
Vol. 9 001711	9	9/29/21	33	(1 pg) Amended Civil Cover Sheet by CLO Holdco Ltd, Charitable DAF Fund LP. Amendment to 2 Supplemental Document. (Sbaiti, Mazin) Modified text on 6/23/2021 (mjr). (Entered: 06/22/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #33 ON 06/22/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001712	10	9/29/21	36	(26 pgs) RESPONSE filed by CLO Holdco Ltd, Charitable DAF Fund LP re: 22 MOTION for an Order to Enforce the Order of Reference (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #36 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001738	11	9/29/21	37	(22 pgs) Appendix in Support filed by CLO Holdco Ltd, Charitable DAF Fund LP re 36 Response/Objection Response to Motion for an Order to Enforce the Order of Reference (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #37 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001760	12	9/29/21	38	(45 pgs) RESPONSE filed by CLO Holdco Ltd, Charitable DAF Fund LP re: 26 MOTION to Dismiss (Defendant Highland Capital Management, L.P.'s Motion to Dismiss Complaint) (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #38 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001805	13	9/29/21	39	(88 pgs) Appendix in Support filed by CLO Holdco Ltd, Charitable DAF Fund LP re 38 Response/Objection to Defendant Highland Capital Management, L.P.'s Motion to Dismiss Complaint (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #39 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001893	14	9/29/21	42	(12 pgs) REPLY filed by Highland Capital Management LP re: 22 MOTION for an Order to Enforce the Order of Reference (Annable, Zachery) (Entered: 07/13/2021) [ORIGINALLY FILED IN 21-CV-0842AS #42 ON 07/13/2021 IN U.S.

			DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
VOL. 9	15	9/29/21	43 (852 pgs) Appendix in Support filed by Highland Capital Management LP re: 42 Reply. (Annable, Zachery) Modified text on 7/14/2021 (mjr). (Entered: 07/13/2021) [ORIGINALLY FILED IN 21-CV-0842AS #43 ON 07/13/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001905 thru Vol. 13	16	9/29/21	45 (21 pgs) REPLY filed by Highland Capital Management LP re: 26 MOTION to Dismiss (Defendant Highland Capital Management, L.P.'s Motion to Dismiss Complaint) (Annable, Zachery) (Entered:07/13/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #44 ON 07/13/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002757	17	9/29/21	57 (7 pgs; 2 docs) MOTION to Dismiss and Joinder in Motion to Dismiss of Highland Capital Management, L.P. filed by Highland CLO Funding Ltd. (Attachments: # 1 Proposed Order) Attorney Paul R Bessette added to party Highland CLO Funding Ltd (pty:dft) (Bessette, Paul) (Entered: 08/30/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #57 ON 08/30/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002778	18	9/29/23	58 (12 pgs) Brief/Memorandum in Support filed by Highland CLO Funding Ltd. re 57 MOTION to Dismiss and Joinder in Motion to Dismiss of Highland Capital Management, L.P. (Bessette, Paul) (Entered: 08/30/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #58 ON 08/30/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002785	19	9/29/23	59 (80 pgs; 5 docs) Appendix in Support filed by Highland CLO Funding Ltd re 58 Brief/Memorandum in Support of Motion (Attachments: # 1 Exhibit(s) A - Jackson v Dear # 2 Exhibit(s) B - Prudential Assurance v. Newman # 3 Exhibit(s) C - Harbourvest Settlement Agreement # 4 Exhibit(s) D - Boleat Declaration) (Bessette, Paul) (Entered: 08/30/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #59 ON 08/30/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002797	20	9/29/21	64 (1 pg) ORDER OF REFERENCE: Pursuant to 28 U.S.C. § 157 and this District's Miscellaneous Order No. 33, this case is hereby REFERRED to Judge Stacey G. C. Jernigan of the United States Bankruptcy Court for the Northern District of Texas, Dallas Division, to be adjudicated as a matter related to the consolidated Chapter 11 Bankruptcy of Highland Capital Management, L.P., Chapter 11 Case No.19-34054. (Ordered by Judge Jane J. Boyle
002877			

Vol. 14 002878 002883 thru Vol. 16				on 9/20/2021) (svc) (Entered: 09/20/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #64 ON 09/20/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
	21	10/19/21	66	(5 pgs) Notice of hearing filed by Defendant Highland Capital Management, LP (RE: related document(s) 26 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP, 47 Motion to strike document filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 55 Motion to abate filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) Hearing to be held on 11/23/2021 at 09:30 AM at https://us-courts.webex.com/meet/jerniga for 26 and for 47 and for 55, (Annable, Zachery)
	22	11/22/21	71	(509 pgs; 2 docs) Witness and Exhibit List <i>for Hearing on November 23, 2021</i> filed by Defendant Highland Capital Management, LP (RE: related document(s) 26 Motion to dismiss adversary proceeding). (Attachments: # 1 Exhibits 1-13) (Hayward, Melissa)
Vol. 17 003392 003394 003583 003585 003611	23	11/22/21	72	(2 pgs) Witness List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 26 Motion to dismiss adversary proceeding, 47 Motion to strike (related document(s): 43 Document), 55 Motion to abate (related document(s) 1 Complaint), 69 Motion to abate <i>Plaintiffs' Amended Motion to Stay All Proceedings</i> (related document(s) 55 Motion to abate (related document(s) 1 Complaint))). (Sbaiti, Mazin)
	24	11/22/21	73	(189 pgs; 4 docs) Exhibit List <i>for November 23, 2021 hearing</i> filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 47 Motion to strike (related document(s): 43 Document), 55 Motion to abate (related document(s) 1 Complaint)). (Attachments: # 1 Exhibit 1_Defendant's Memorandum of Law in Support of Motion for Reconsideration # 2 Exhibit 2_Highland Memorandum in Support of Motion to Dismiss # 3 Exhibit 3_Order (I) Confirming Fifth Amended Plan of Reorganization of Highland) (Sbaiti, Mazin)
	25	12/7/21	80	(2 pgs) Order granting Highland CLO Funding, Ltd.'s motion to dismiss adversary as a party with prejudice (related document 57) Entered on 12/7/2021. (Okafor, Marcey) Modified text on 3/11/2022 (Okafor, Marcey).
	26	3/11/22	99	(26 pgs) Memorandum of Opinion and order granting motion to dismiss the adversary proceeding (RE: related document(s) 26 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP). Entered on 3/11/2022 (Okafor, Marcey)
	27	3/11/22	100	(26 pgs) Order granting motion to dismiss adversary proceeding with prejudice (related document #26) Entered on 3/11/2022. (Okafor, Marcey)

Vol. 18 003637 003666 003843 003844 003851	28	3/21/22	104	(29 pgs) Notice of appeal. Fee Amount \$298 filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 100 Order on motion to dismiss adversary proceeding). Appellant Designation due by 04/4/2022. (Sbaiti, Mazin)
	29	5/26/22	120	(177 pgs; 2 docs) Support/supplemental document <i>Motion to Supplement Appellate Record</i> filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 111 Appellant designation). (Attachments: # 1 Amended Transcript of January 14, 2021 Hearing) (Sbaiti, Mazin)
	30	6/9/22	121	(1 pg) DISTRICT COURT Order: Case 3:22-00695-B is hereby transferred to the docket of the Honorable Judge Jane J. Boyle for consolidation with The Charitable DAF Fund LP, et al. v. Highland Capital Management LP, Case No. 3:21-cv-3129-N. Judge Karen Gren Scholer no longer assigned to case.(RE: related document(s) 86 Notice of appeal filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 104 Notice of appeal filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Entered on 6/9/2022 (Whitaker, Sheniqua) (Entered: 06/10/2022)
	31	10/24/22	122	(7 pgs) Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP (Annable, Zachery)
	32	10/14/22	123	(31 pgs) Brief in support filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Annable, Zachery)
Vol. 19 003882 Thru Vol 20	33	10/14/22	124	(513 pgs; 15 docs) Support/supplemental document (<i>Appendix in Support of Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7 # 8 Exhibit 8 # 9 Exhibit 9 # 10 Exhibit 10 # 11 Exhibit 11 # 12 Exhibit 12 # 13 Exhibit 13 # 14 Exhibit 14) (Annable, Zachery)
Vol. 21 004395	34	10/27/22	126	(5 pgs) Notice of hearing (<i>Notice of Hearing and Briefing Schedule on Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP). Hearing to be held on 12/8/2022 at 09:30 AM at https://us-courts.webex.com/meet/jerniga for 122. (Annable, Zachery)

Vol. 21 004400 004410 004442 Thru Vol. 22	35	11/18/22	128	(10 pgs) Motion for withdrawal of reference. Fee amount \$188, filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (Sbaiti, Mazin)
	36	11/18/22	129	(32 pgs) Response opposed to (related document(s): 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP) filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Sbaiti, Mazin)
	37	11/18/22	130	(254 pgs; 2 docs) Response opposed to (related document(s): 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP) filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Attachments: # 1 Appendix) (Sbaiti, Mazin)
Vol. 22 004696 004717 004732 004737 004742	38	9/2/22	131	(21 pgs) DISTRICT COURT MEMORANDUM OPINION AND ORDER: The Court REVERSES and REMANDS the bankruptcy court's Motion to Dismiss Order and AFFIRMS the bankruptcy courts Motion to Stay Order. re: appeal on Civil Action number: Case 3:22-00695-B consolidated with 3:21-CV-3129-B, (RE: related document(s) 81 Order on motion to abate, 100 Order on motion to dismiss adversary proceeding). Entered on 9/2/2022 (Whitaker, Sheniqua) (Entered: 11/29/2022)
	39	12/2/22	133	(15 pgs) Reply to (related document(s): 129 Response filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 130 Response filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) filed by Defendant Highland Capital Management, LP. (Annable, Zachery)
	40	12/7/22	135	(5 pgs) Notice of hearing filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP). Hearing to be held on 1/25/2023 at 01:30 PM at https://us-courts.webex.com/meet/jerniga for 122, (Annable, Zachery)
	41	12/7/22	136	(5 pgs) Notice of hearing filed by Defendant Highland Capital Management, LP (RE: related document(s) 128 Motion for withdrawal of reference filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Status Conference to be held on 1/25/2023 at 01:30 PM at https://us-courts.webex.com/meet/jerniga . (Annable, Zachery).
	42	12/9/22	138	(3 pgs) Response opposed to (related document(s): 128 Motion for withdrawal of reference. Fee amount \$188, filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) filed by Defendant Highland Capital Management, LP. (Annable, Zachery)

Vol. 22 004745	43	12/9/22	139	(25 pgs) Brief in support filed by Defendant Highland Capital Management, LP (RE: related document(s) 138 Response). (Annable, Zachery)
Vol. 23 004770	44	12/9/22	140	(280 pgs; 8 docs) Support/supplemental document (<i>Appendix in Support of Highland Capital Management, L.P.'s Response to Renewed Motion to Withdraw the Reference</i>) filed by Defendant Highland Capital Management, LP (RE: related document(s) 138 Response). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7) (Annable, Zachery)
Vol. 24 005050	45	12/16/22	144	(6 pgs) Reply to (related document(s): 138 Response filed by Defendant Highland Capital Management, LP) filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Sbaiti, Mazin)
005056 Thru Vol. 25.	46	1/23/23	145	(514 pgs; 15 docs) Witness and Exhibit List filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7 # 8 Exhibit 8 # 9 Exhibit 9 # 10 Exhibit 10 # 11 Exhibit 11 # 12 Exhibit 12 # 13 Exhibit 13 # 14 Exhibit 14) (Annable, Zachery)
Vol. 26 005570	47	1/23/23	146	(280 pgs; 8 docs) Witness and Exhibit List filed by Defendant Highland Capital Management, LP (RE: related document(s) 128 Motion for withdrawal of reference. Fee amount \$188.). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7) (Annable, Zachery)
Vol. 27 005850	48	1/23/23	147	(221 pgs; 7 docs) Witness and Exhibit List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Attachments: # 1 Exhibit 1_Excerpts from July 14, 2020 Hearing Transcript # 2 Exhibit 2_HCLOF Members Agreement Relating to the Company # 3 Exhibit 3_HarbourVest Settlement Agreement # 4 Exhibit 4_Order Approving Debtor's Settlement with HarbourVest # 5 Exhibit 5_HCLOF Offering # 6 Exhibit 6 Amended and Restated Investment Advisory Agreement) (Sbaiti, Mazin)
006071	49	1/23/23	148	(3 pgs) Witness and Exhibit List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 128 Motion for withdrawal of reference. Fee amount \$188.). (Phillips, Louis)
Vol. 28 006074	50	1/25/23	150	(56 pgs; 2 docs) Amended Witness and Exhibit List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 147 List (witness/exhibit/generic), 149 List (witness/exhibit/generic)). (Attachments: # 1 Exh 7_Testimony of Mark Patrick at June 8, 2021 hearing) (Sbaiti, Mazin)

Vol. 28 006130	51	1/25/23	152	(3 pgs) Notice of Appearance and Request for Notice by Louis M. Phillips filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Phillips, Louis)
	52	1/25/23	154	(1 pg) Court admitted exhibits date of hearing January 25, 2023 (RE: related document(s) 128 Motion for withdrawal of reference, filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) (COURT ADMITTED DEFENDANT'S EXHIBITS #1, #2, #3, #4, #5 & #6 OFFERED BY ATTY GREG DEMO). (Edmond, Michael) (Entered: 01/27/2023)
Vol. 32 006925 006942 006960	53	2/6/23	158	Report and recommendation to the U.S. District Court by U.S. Bankruptcy Judge. (RE: related document(s) 128 Motion for withdrawal of reference filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Entered on 2/6/2023 (Okafor, Marcey)
	54	2/6/23	161	(18 pgs) DISTRICT COURT Notice of transmission of report and recommendation in re: renewed motion to withdraw reference. Civil Case # 3:22-cv-02802-S. (RE: related document(s) 158 Report and recommendation to the U.S. District Court by U.S. Bankruptcy Judge. (RE: related document(s) 128 Motion for withdrawal of reference filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Entered on 2/6/2023) (Whitaker, Sheniqua)
	55	4/3/23	165	(1 pg) DISTRICT COURT ORDER: The Court GRANTS the 11 Joint Motion to Transfer Proceeding and Consolidate Before Original Court and the above-numbered case (3:22-cv-02802-S) is transferred to the docket of the Honorable Judge Jane Boyle: Civil case 3:21-cv-00842-B (order referring case). (RE: related document(s) 1 Complaint filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 143 Notice of transmission of motion to withdraw reference). Entered on 4/3/2023 (Whitaker, Sheniqua) Modified on 4/10/2023 (Whitaker, Sheniqua). (Entered: 04/10/2023)

TRANSCRIPTS

006961	56	11/24/21	78	(104 pgs) Transcript regarding Hearing Held 11-23-2021 RE: Motion Hearing. THIS TRANSCRIPT WILL BE MADE ELECTRONICALLY AVAILABLE TO THE GENERAL PUBLIC 90 DAYS AFTER THE DATE OF FILING. TRANSCRIPT RELEASE DATE IS 02/22/2022. Until that time the transcript may be viewed at the Clerk's Office or a copy may be obtained from the official court transcriber. Court Reporter/Transcriber Liberty Transcripts/Dipti Patel, Telephone number 847-848-4907. (RE: related document(s) 75 Hearing held on 11/23/2021. (RE: related document(s) 55 MOTION to Stay filed by CLO Holdco Ltd, Charitable DAF Fund LP (Sbaiti, Mazin) (Entered: 08/26/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #55 ON 08/26/2021 IN U.S.
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			<p>DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)) (Appearances: J. Pomerantz and J. Morris for Highland Defendants; J. Jordan and P. Bessett for HCLOF; M. Sbaiti for Plaintiffs. Nonevidentiary hearing. Motion denied. Mr. Pomerantz to upload order.), 76 Hearing held on 11/23/2021. (RE: related document(s) 47 Motion to strike 43 Appendix in support filed by CLO Holdco, Ltd., Charitable DAF Fund, LP (Bridges, Jonathan) Modified text on 7/16/2021 (mjr). (Entered: 07/15/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #47 ON 07/15/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)) (Appearances: J. Pomerantz and J. Morris for Highland Defendants; J. Jordan and P. Bessett for HCLOF; M. Sbaiti for Plaintiffs. Nonevidentiary hearing. Motion denied (Plaintiffs acknowledged complained-of Appendices it did not relate to Motion to Dismiss). Mr. Pomerantz to upload order.)). Transcript to be made available to the public on 02/22/2022. (Patel, Dipti)</p>
57	2/21/23	164	<p>164 (112 pgs) Transcript regarding Hearing Held 1/25/23 RE: HEARING ON DEFENDANT HIGHLAND CAPITAL MANAGEMENT L.P.'S RENEWED MOTION TO DISMISS COMPLAINT (122) AND STATUS CONFERENCE RE: MOTION FOR WITHDRAWAL OF REFERENCE FILED BY PLAINTIFF CLO HOLDCO, LTD., PLAINTIFF CHARITABLE DAF FUND, LP (128). THIS TRANSCRIPT WILL BE MADE ELECTRONICALLY AVAILABLE TO THE GENERAL PUBLIC 90 DAYS AFTER THE DATE OF FILING. TRANSCRIPT RELEASE DATE IS 05/22/2023. Until that time the transcript may be viewed at the Clerk's Office or a copy may be obtained from the official court transcriber. Court Reporter/Transcriber Dipti Patel, Telephone number 847-848-4907. (RE: related document(s) 155 Hearing held on 1/25/2023. (RE: related document(s) 122 Motion to dismiss adversary proceeding, (Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint) filed by Defendant Highland Capital Management, LP filed by Defendant Highland Capital Management, LP) (Appearances: J. Morris and G. Demo for Movants; L. Phillips and M. Sbaiti for Plaintiffs. Evidentiary hearing (appendices). Court took matter under advisement.), 156 Hearing held on 1/25/2023. (RE: related document(s) 128 Motion for withdrawal of reference. Fee amount \$188, filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) (Appearances: J. Morris and G. Demo for Movants; L. Phillips and M. Sbaiti for Plaintiffs. Evidentiary hearing (appendices). Court announced it will recommend denial to District Court. Court is working on Report & Recommendation.)). Transcript to be made available to the public on 05/22/2023. (Patel, Dipti)</p>

Dated: July 14, 2023

Respectfully submitted,

SBAITI & COMPANY PLLC

/s/ Mazin A. Sbaiti

Mazin A. Sbaiti

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Counsel for Appellants

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was filed electronically through the Court's ECF system, which provides notice to all parties of interest, on this 14th day of July, 2023.

/s/ Mazin A. Sbaiti

Mazin A. Sbaiti

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Counsel for Highland Capital Management, L.P.

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

In re:	§	
	§	Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P., ¹	§	
	§	Case No. 19-34054-sgj11
Reorganized Debtor.	§	
CHARITABLE DAF FUND, L.P., AND CLO	§	
HOLDCO, LTD., DIRECTLY AND	§	
DERIVATELY,	§	
Plaintiffs,	§	Adversary Proceeding No.
	§	
vs.	§	21-03067-sgj
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	
HIGHLAND HCF ADVISOR, LTD., AND	§	
HIGHLAND CLO FUNDING LTD.,	§	
NOMINALLY,	§	
Defendants.	§	

¹ The Reorganized Debtor's last four digits of its taxpayer identification number are (8357). The headquarters and service address for the above-captioned Reorganized Debtor is 100 Crescent Court, Suite 1850, Dallas, TX 75201.

NOTICE OF HEARING AND BRIEFING SCHEDULE ON DEFENDANT HIGHLAND CAPITAL MANAGEMENT, L.P.'S RENEWED MOTION TO DISMISS COMPLAINT

PLEASE TAKE NOTICE that the following matter pending in the above-referenced adversary proceeding is scheduled for hearing on **Thursday, December 8, 2022, at 9:30 a.m.**

(Central Time) (the "Hearing"):

1. *Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint* [Docket No. 122].

The Hearing on the Motion will be held via WebEx videoconference before The Honorable Stacey G. C. Jernigan, United States Bankruptcy Judge. The WebEx video participation/attendance link for the Hearing is: <https://us-courts.webex.com/meet/jerniga>.

A copy of the WebEx Hearing Instructions for the Hearing is attached hereto as **Exhibit A**; alternatively, the WebEx Hearing Instructions for the Hearing may be obtained from Judge Jernigan's hearing/calendar site at: <https://www.txnb.uscourts.gov/judges-info/hearing-dates/judge-jernigans-hearing-dates>.

Any response (each, a "Response") to the relief requested in the Motion shall be filed with the Clerk of the Court on or before **Friday, November 18, 2022, at 5:00 p.m. (Central Time)**.

Highland Capital Management, L.P., may file a reply (each, a "Reply") to any Response. Any Reply shall be filed with the Clerk of the Court on or before **Friday, December 2, 2022, at 5:00 p.m. (Central Time)**.

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Dated: October 27, 2022.

PACHULSKI STANG ZIEHL & JONES LLP

Jeffrey N. Pomerantz (CA Bar No. 143717)
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Gregory V. Demo (NY Bar No. 5371992)
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-and-

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Counsel for Highland Capital Management, L.P.

EXHIBIT A

004398

WebEx Hearing Instructions Judge Stacey G. Jernigan

Pursuant to General Order 2020-14 issued by the Court on May 20, 2020, all hearings before Judge Stacey G. Jernigan are currently being conducted by WebEx videoconference unless ordered otherwise.

For WebEx Video Participation/Attendance:

Link: <https://us-courts.webex.com/meet/jerniga>

For WebEx Telephonic Only Participation/Attendance:

Dial-In: 1.650.479.3207

Meeting ID: 479 393 582

Participation/Attendance Requirements:

- Counsel and other parties in interest who plan to actively participate in the hearing are encouraged to attend the hearing in the WebEx video mode using the WebEx video link above. Counsel and other parties in interest who will not be seeking to introduce any evidence at the hearing and who wish to attend the hearing in a telephonic only mode may attend the hearing in the WebEx telephonic only mode using the WebEx dial-in and meeting ID above.
- Attendees should join the WebEx hearing at least 10 minutes prior to the hearing start time. Please be advised that a hearing may already be in progress. During hearings, participants are required to keep their lines on mute at all times that they are not addressing the Court or otherwise actively participating in the hearing. The Court reserves the right to disconnect or place on permanent mute any attendee that causes any disruption to the proceedings. For general information and tips with respect to WebEx participation and attendance, please see Clerk's Notice 20-04: https://www.txnb.uscourts.gov/sites/txnb/files/hearings/Webex%20Information%20and%20Tips_0.pdf
- **Witnesses are required to attend the hearing in the WebEx video mode and live testimony will only be accepted from witnesses who have the WebEx video function activated.** Telephonic testimony without accompanying video will not be accepted by the Court.
- All WebEx hearing attendees are required to comply with Judge Jernigan's Telephonic and Videoconference Hearing Policy (included within Judge Jernigan's Judge-Specific Guidelines): <https://www.txnb.uscourts.gov/content/judge-stacey-g-c-jernigan>

Exhibit Requirements:

- Any party intending to introduce documentary evidence at the hearing must file an exhibit list in the case with a true and correct copy of each designated exhibit filed as a separate, individual attachment thereto so that the Court and all participants have ready access to all designated exhibits.
- If the number of pages of such exhibits exceeds 100, then such party must also deliver two (2) sets of such exhibits in exhibit binders to the Court by no later than twenty-four (24) hours in advance of the hearing.

Notice of Hearing Content and Filing Requirements:

IMPORTANT: For all hearings that will be conducted by WebEx only:

- The Notice of Hearing filed in the case and served on parties in interest must: (1) provide notice that the hearing will be conducted by WebEx videoconference only, (2) provide notice of the above WebEx video participation/attendance link, and (3) attach a copy of these WebEx Hearing Instructions or provide notice that they may be obtained from Judge Jernigan's hearing/calendar site: <https://www.txnb.uscourts.gov/judges-info/hearing-dates/judge-jernigans-hearing-dates>.
- When electronically filing the Notice of Hearing via CM/ECF select "at <https://us-courts.webex.com/meet/jerniga>" as the location of the hearing (note: this option appears immediately after the first set of Wichita Falls locations). Do not select Judge Jernigan's Dallas courtroom as the location for the hearing.

004399

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*Counsel for Charitable DAF Fund, L.P.
and CLO Holdco, Ltd.*

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

In re:	§	Chapter 11
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	Case No. 19-34054-sgj11
	§	
Debtor.	§	
CHARITABLE DAF FUND, L.P. AND CLO	§	
HOLDCO, LTD., DIRECTLY AND DERIVATIVELY	§	
	§	
Plaintiffs,	§	Adversary Proceeding No.
	§	
vs.	§	21-03067-sgj
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	
HIGHLAND HCF ADVISOR, LTD., AND	§	
HIGHLAND CLO FUNDING LTD., NOMINALLY	§	
	§	
Defendants.	§	
	§	

RENEWED MOTION TO WITHDRAW THE REFERENCE

The Charitable DAF Fund, L.P. and CLO Holdco, Ltd., Plaintiffs in the above-referenced adversary proceeding, file this Motion under **28 U.S.C. § 157(d)**, Rule 5011 of the Federal Rules of Bankruptcy Procedure, Rule 5011-1 of the Local Bankruptcy Rules, and this Court’s standing order, Order of Reference of Bankruptcy Cases & Proceedings Nunc Pro Tunc, In re Miscellaneous Order No. 3:04-MI-00033 (N.D. Tex. Oct. 4, 1982), as to the above-referenced adversary

proceeding. Plaintiffs respectfully re-urge withdrawal of the reference in light of Highland Capital Management, L.P.'s Renewed Motion to Dismiss and arguments advanced therein.

I.

BACKGROUND

1. Plaintiffs filed this action in district court. In response to Highland's motion seeking reference to the bankruptcy court [Doc. 1-1], Plaintiffs filed an opposition and cross-motion seeking withdrawal of the reference [Doc. 36]. The district court granted Highland's motion and referred the action to the bankruptcy court without addressing the merits of Plaintiff's cross-motion or the underlying statutory basis for withdrawal [Doc. 64].

2. In the bankruptcy court, Plaintiffs filed a proposed motion to withdraw the reference as an exhibit to their Motion for Stay [Doc. 69-1], explaining in the stay motion that they understood the Plan Injunction to prohibit them from advocating for withdrawal of the reference at that time, but that they would do so if allowed.

3. Highland moved to dismiss the action under Rule 12 of the Federal Rules of Civil Procedure [Doc. 26]. The bankruptcy court granted that motion [Doc. 80]. The district court reversed [Doc. 99].

4. Highland now re-urges dismissal under Rule 12 for the same and other reasons [Doc. 123], relying on arguments that implicate federal statutes and require, Plaintiffs submit, withdrawal of the reference now.

II.

WITHDRAWAL OF THE REFERENCE IS MANDATORY

5. This adversary proceeding primarily involves fiduciary duties imposed upon Registered Investment Advisers by the Investment Advisers Act of 1940 ("Advisers Act") and

corresponding state law claims for breach of those duties. As a result, presiding over this action will require extensive consideration of federal laws regulating interstate commerce, which renders withdrawal of the reference to bankruptcy court mandatory under 28 U.S.C. § 157(d).

6. Under § 157(d), withdrawal of the reference is mandatory when a proceeding “requires consideration” of non-bankruptcy federal laws regulating interstate commerce:

The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown. The district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.

28 U.S.C. § 157(d); cf. *TMT Procurement Corp. v. Vantage Drilling Co. (In re TMT Procurement Corp.)*, 764 F.3d 512, 523 & n.40 (5th Cir. 2014) (noting bankruptcy court’s “more limited jurisdiction” as a result of its “limited power” under 28 U.S.C. § 157); *LightSquared Inc. v. Deere & Co.*, 2014 U.S. Dist. LEXIS 14752 (S.D.N.Y. 2014) (quoting *Investor Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC*, 454 B.R. 307, 312 (S.D.N.Y. Jan. 31, 2011), for the proposition that, “[i]n determining whether withdrawal is mandatory, the Court ‘need not evaluate the merits of the parties’ claims; rather, it is sufficient for the Court to determine that the proceeding will involve consideration of federal non-bankruptcy law”); *In re Cont’l Airlines Corp.*, 50 B.R. 342, 360 (S.D. Tex. 1985), *aff’d*, 790 F.2d 35 (5th Cir. 1986) (“While that second clause [of § 157(d)] might not apply when some ‘other law’ only tangentially affects the proceeding, it surely does apply when federal labor legislation will likely be material to the proceeding’s resolution.”) (emphasis added).

7. Plainly here, the claims in the Complaint at least involve federal laws “regulating organizations or activities affecting interstate commerce.” The Advisers Act is such a law, and at least the first count of the Complaint implicates it. *See, e.g.*, Complaint [Doc. 1-1] ¶¶ 57 & n.5, 66,

69, 74 & n.6, 89 (explicitly invoking various provisions of the Advisers Act and accompanying regulations). Defendant’s entire argument against withdrawal of the reference thus turns on whether these laws “must be considered.”

8. It is readily apparent that these statutes must be considered in this adversary proceeding. The briefing already puts at issue significant, hotly contested issues regarding the interplay of bankruptcy law and these federal statutes, including

- Whether Defendant owed federal fiduciary duties under the Advisers Act that are unwaivable;
- To whom such duties are owed and whether they were violated;
- Whether they are actionable under federal law;
- Whether such Advisers Act fiduciary duties can be terminated by a blanket injunction in a bankruptcy plan;
- Whether a contractual jury waiver is enforceable as to claims for breach of unwaivable Advisers Act fiduciary duties;
- Whether such waivers can be enforced as to non-parties to the waiver.

Presiding over this action most certainly will require consideration of these issues.

9. Before joining the Fifth Circuit, Judge Clement addressed a similar matter during her time in the Eastern District of Louisiana. There, in *In re Harrah’s Entm’t*, 1996 U.S. Dist. LEXIS 18097, at *7-8 (E.D. La. 1996), she denied a motion to refer a federal securities action to bankruptcy court, relying on a rationale fully applicable here. Despite finding that the bankruptcy court had related-to jurisdiction, Judge Clement wrote,

Although “related to” bankruptcy jurisdiction exists over the non-debtor plaintiffs’ non-bankruptcy federal securities claims against non-debtor defendants, placing that bankruptcy jurisdiction in the bankruptcy court is inappropriate because plaintiffs would be entitled to a mandatory withdrawal of the reference.

Id. at *11.

10. Judge Clement rejected the argument that the case would “only involve the simple application of established federal securities laws.” *Id.* at *7. Instead, she relied on alleged “violations of several federal securities laws” and the plaintiff’s attempt “to hold defendants directly liable and secondarily liable based on a ‘controlling person’ theory for certain acts and omissions.” *Id.*

11. Without any need to analyze how “established” the applicable law might be, Judge Clement concluded, “This federal securities litigation involves more than simple application of federal securities laws and will be complicated enough to warrant mandatory withdrawal under § 157(d).” *Id.* (citing *Rannd Res. v. Von Harten (In re Rannd Res.)*, 175 B.R. 393, 396 (D. Nev. 1994), for the proposition that withdrawal of the reference is mandatory where resolution requires more than simple application of federal securities laws, even though that court’s determination was based solely on a review of the complaint’s alleged violations of § 12(2) of the Securities Act of 1933, § 10 of the Securities Exchange Act of 1934, and Rule 10b-5).

12. This authority is on all fours here. In the Complaint, Plaintiffs allege violations of federal securities law (the Advisers Act), as well as the RICO statute. Highland has taken the position that the RICO Statute cannot apply because of exclusions under RICO for claims that raise securities laws violations. Deciding the renewed motion to dismiss will require far more than simple application of these laws. Nothing more is necessary to satisfy § 157(d). *Cf. S. Pac. Transp. Co. v. Voluntary Purchasing Grps.*, 252 B.R. 373, 382-84 (E.D. Tex. 2000) (holding that even the court’s “limited” role in approving a CERCLA settlement “necessarily involves the substantial and material consideration of CERCLA” and “will require the court to examine the unique facts of the case in light of those CERCLA provisions which create the causes of action at issue”). *Compare id.* at 382 (“It is well settled that CERCLA is a statute ““rooted in the commerce clause’

and is precisely ‘the type of law . . . Congress had in mind when it enacted the statutory withdrawal provision [in § 157(d)].’”) *with* the Advisers Act, **15 U.S.C. § 80b-1** (“Upon the basis of facts disclosed by the record and report of the Securities and Exchange Commission made pursuant to section 30 of the Public Utility Holding Company Act of 1935, and facts otherwise disclosed and ascertained, it is hereby found that investment advisers are of national concern, in that, among other things—(1) their advice, counsel, publications, writings, analyses, and reports are furnished and distributed, and their contracts, subscription agreements, and other arrangements with clients are negotiated and performed, by the use of the mails and means and instrumentalities of interstate commerce; (2) their advice, counsel, publications, writings, analyses, and reports customarily relate to the purchase and sale of securities traded on national securities exchanges and in interstate over-the-counter markets, securities issued by companies engaged in business in interstate commerce, and securities issued by national banks and member banks of the Federal Reserve System; and (3) the foregoing transactions occur in such volume as substantially to affect interstate commerce, national securities exchanges, and other securities markets, the national banking system and the national economy.”).

13. Although it is unnecessary to demonstrate that Plaintiffs’ Advisers Act allegations will require application of underdeveloped law, that certainly is the case. As the Third Circuit pointed out in 2013, there is considerable “confusion” in the case law stemming from the fact that federal law (the Advisers Act) provides “the duty and the standard to which investment advisers are to be held,” but “the cause of action is presented as springing from state law.” *Belmont v. MB Inv. Partners, Inc.*, **708 F.3d 470, 502** (3d Cir. 2013). The *Belmont* court further suggests the “confusion [that this situation] engenders may explain why there has been little development in either state or federal law on the applicable standards.” *Id.* (emphasis added). “Half a century

later,” the *Belmont* court tells us, “courts still look primarily to *Capital Gains Research [, Inc., 375 U.S. 180, 192* (1963),] for a description of an investment adviser’s fiduciary duties.” *Id.* at 503; *see also* Plaintiffs’ Response to Renewed Motion to Dismiss (addressing the Debtor’s erroneous argument that the Advisers Act creates no private right of action). This observation is bolstered by the necessity of relying extensively on SEC regulations and rulings in the Complaint. *See* Complaint ¶ 57 & n.5 (invoking Investment Advisers Act Release Nos. 3060 (July 28, 2010), and 2106 (Jan. 31, 2003), 66 (17 C.F.R. 275.206(4)-7), 69 (27 C.F.R. part 275 and Rule 10b5-1), 74 & n.6 (Advisers Act Release No. 4197 (Sept. 17, 2015))).

III.

THIS ADVERSARY PROCEEDING IS NOT A CORE PROCEEDING

14. In previous briefing, the Debtor has suggested that this adversary proceeding should remain in bankruptcy court because it is a core proceeding under Title 11. Plaintiffs respectfully submit this is incorrect because the causes of action asserted in the Complaint do not “arise under,” or “arise in” Title 11 and therefore cannot be “core” proceedings.

15. To be clear, Plaintiffs are not seeking and have disclaimed any relief that would literally unwind or reverse any settlement approved by the bankruptcy court. Neither do Plaintiffs attempt an end run around the provisions of any approval. They merely seek vindication of their rights via damages, and they respectfully submit that a proper jurisdictional analysis demonstrates their causes of action are not core proceedings within the bankruptcy court’s jurisdiction, for the reasons addressed below.

16. ***First***, “the ‘core proceeding’ analysis is properly applied not to the case as a whole, but as to each cause of action within a case.” *Legal Xtranet, Inc. v. AT&T Mgmt. Servs., L.P. (In re Legal Xtranet, Inc.)*, 453 B.R. 699, 708–09 (Bankr. W.D. Tex. 2011); *Davis v. Life Inv’rs Ins.*

Co. of Am., 282 B.R. 186, 193 n. 4 (S.D. Miss.2002); *see also In re Exide Techs.*, 544 F.3d 196, 206 (3d Cir. 2008) (“A single cause of action may include both core and non-core claims. The mere fact that a non-core claim is filed with a core claim will not mean the second claim becomes ‘core.’”).

17. **Second**, the Fifth Circuit has explained that “§ 157 equates core proceedings with the categories of ‘arising under’ and ‘arising in’ proceedings; therefore, a proceeding is core under section 157 if it invokes a substantive right provided by title 11[, it ‘arises under’ the Bankruptcy Code,] or if it is a proceeding that, by its nature, could arise only in the context of a bankruptcy case[, it ‘arises in’ a bankruptcy case].” *United States. Brass Corp. v. Travelers Ins. Grp., Inc. (In re United States Brass Corp.)*, 301 F.3d 296, 304 (5th Cir. 2002); *TXMS Real Estate Invs., Inc. v. Senior Care Ctrs., LLC (In re Senior Care Centers, LLC)*, 622 B.R. 680, 692–93 (Bankr. N.D. Tex. 2020); *Stern v. Marshall*, 564 U.S. 462, 476 (2011).

18. **Third**, none of the Plaintiffs’ five causes of action—breach of fiduciary duty under the Advisers Act, breach of contract related to the HCLOF Company Agreement, negligence, RICO, and tortious interference—arise under title 11. That is, none of the substantive rights of recovery are created by federal bankruptcy law. And plainly so. Because “[a]rising under” jurisdiction [only] involve[s] cause[s] of action created or determined by a statutory provision of title 11,” this is indisputably the case. *Wood v. Wood (In re Wood)*, 825 F.2d 90, 97 (5th Cir.1987) (noting that a proceeding does not “arise under” Title 11 if it does not invoke a substantive right, created by federal bankruptcy law, that could not exist outside of bankruptcy).

19. **Fourth**, for similar reasons, none of Plaintiffs’ causes of action “arise in” a bankruptcy case. “Claims that ‘arise in’ a bankruptcy case are claims that by their nature, not their particular factual circumstance, could only arise in the context of a bankruptcy case.” *Legal*

Xtranet, Inc., 453 B.R. at 708–09 (emphasis added) (citing *Stoe v. Flaherty*, 436 F.3d 209, 216 (3d Cir. 2006)). The Debtor has previously argued that, because the factual circumstances giving rise to the causes of action included the HarbourVest Settlement, which was approved by the bankruptcy court, this somehow transforms Plaintiffs’ causes of action into core claims. But it is the nature of the causes of action that determines whether they are core, not their “particular factual circumstance.” *Id.*

20. To illustrate the point, in *Gupta v. Quincy Med. Ctr.*, 858 F.3d 657, 660 (1st Cir. 2017), the bankruptcy court had issued a sale order which approved an asset purchase agreement whereby the purchaser became obligated to make certain payments to employees. The purchaser failed to make these payments, so the employees sued the purchaser in bankruptcy court, and the bankruptcy court rendered a judgment in favor of the employees. On appeal, the district court concluded that the bankruptcy court lacked subject matter jurisdiction over the claims—claims plainly related to and existing only because of the approved sale order that gave rise to them. The First Circuit affirmed, explaining as follows:

[T]he fact that a matter would not have arisen had there not been a bankruptcy case does not ipso facto mean that the proceeding qualifies as an ‘arising in’ proceeding. Instead, the fundamental question is whether the proceeding by its nature, not its particular factual circumstance, could arise only in the context of a bankruptcy case. In other words, it is not enough that Appellants’ claims arose in the context of a bankruptcy case or even that those claims exist only because Debtors (Appellants’ former employer) declared bankruptcy; rather, “arising in” jurisdiction exists only if Appellants’ claims are the type of claims that can only exist in a bankruptcy case.

Id. at 664–65 (emphasis added).

21. Like the claims in *Gupta*, the Plaintiffs’ causes of action here arose in the context of a transaction approved in a bankruptcy case. But obviously, the causes of action are not “the type of claims that can only exist in a bankruptcy case.” And that ends the analysis. Because

Plaintiffs' causes of action do arise under the Bankruptcy Code, and because they are not claims that could only arise in the context of bankruptcy, this action is not a core proceeding.

IV.

CONCLUSION

In sum, because 28 U.S.C. § 157(d) mandates withdrawal of the reference here, and because this is not a "core" proceeding, the Court should withdraw the reference as to this adversary proceeding and grant Plaintiffs all additional relief to which they may be entitled.

Dated: November 18, 2022

Respectfully submitted,

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**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

In re:	§	Chapter 11
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	Case No. 19-34054-sgj11
	§	
Debtor.	§	
CHARITABLE DAF FUND, L.P. AND CLO	§	
HOLDCO, LTD., DIRECTLY AND DERIVATIVELY	§	
	§	
Plaintiffs,	§	Adversary Proceeding No.
	§	
vs.	§	21-03067-sgj
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	
HIGHLAND HCF ADVISOR, LTD., AND	§	
HIGHLAND CLO FUNDING LTD., NOMINALLY	§	
	§	
Defendants.	§	
	§	

PLAINTIFFS' RESPONSE TO RENEWED MOTION TO DISMISS COMPLAINT

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<i>Cudd Pressure Control, Inc. v. Roles</i> , 328 F. App'x 961 (5th Cir. 2009) (unpublished)	9
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<i>Lampkin v. UBS Painewebber, Inc. (In re Enron Corp. Sec., Derivative & “ERISA” Litig.),</i> 238 F. Supp. 3d 799 (S.D. Tex. 2017)	11
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<i>Superior Crewboats, Inc. v. Primary P & I Underwriters (In re Superior Crewboats, Inc.)</i> , 374 F.3d 330 (5th Cir. 2004)	8
<i>Tigue Inv. Co. v. Chase Bank of Tex., N.A.</i> , No. 3:03-CV-2490, 2004 U.S. Dist. LEXIS 27582 (N.D. Tex. Nov. 15, 2004)	19
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<i>Victaulic Co. v. Tieman</i> , 499 F.3d 227 (3d Cir. 2007)	6
<i>W. Res. Life Assurance Co. v. Graben</i> , 233 S.W.3d 360 (Tex. App.—Fort Worth 2007, no pet.)	11
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Investment Advisers Act Release No. IA-2106 (Jan. 31, 2003)	10
Investment Advisers Act Release No. 3060, 75 Fed. Reg. 49,234 (Aug. 12, 2010)	10
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I.

INTRODUCTION

This action arises from Defendant’s role as an investment advisor to the Plaintiffs under the Investment Advisers Act of 1940 (the “Advisers Act”). Plaintiffs learned—after the fact—that Defendant had failed to disclose to them the true value of securities sold in connection with a settlement that was approved in Defendant’s bankruptcy proceedings and failed to obtain their informed consent to the transaction. Defendant’s actions thus violated unwaivable fiduciary duties arising under the Advisers Act.

First, Highland’s arguments concerning “judicial estoppel” improperly rely upon evidence outside the four corners of Plaintiffs’ pleadings and raise new arguments that were not raised previously. The Court should not consider this extraneous evidence or successive motion practice. Moreover, Highland ignores the pleadings stating that there was evidence then unknown to Plaintiffs—namely, the falsity of the representation of the value of the assets in question—at the time of the HarbourVest 9019 settlement hearing—making any inconsistency in their positions inadvertent. With this inadvertence, judicial estoppel cannot apply.

Second, Highland feigns ignorance of the Advisers Act § 206(4) which imposes direct liability on an advisor to investors—something recognized by the Supreme Court and the Securities and Exchange Commission. Indeed, Highland’s own CEO testified under oath that he and Highland owed direct fiduciary duties to investors. Highland misleads this Court by suggesting there is no private cause of action under the Investment Advisers Act—which is false under Supreme Court precedent. Highland then fails to disclose that the Act gives rise to unwaivable fiduciary duties actionable at common law via claims for fiduciary duty and negligence, and which can also be brought derivatively.

Third, other than judicial estoppel, Highland has no articulated basis for dismissing the contract and tortious interference claims. Highland’s arguments are conclusory and superficial at best—as are its arguments for dismissing the negligence claim. Highland’s reliance on the Plan injunction entered by this Court to vitiate liability for unwaivable fiduciary duties is baseless.

As has been the case all along, Highland is seeking to avoid fair scrutiny of its self-dealing. Highland’s assumption that Plaintiffs have not been harmed ignores Supreme Court precedent holding that injury is not an element of an Advisers Act violation, and ignores the fact that Plaintiffs were denied a prime investment opportunity—of the sort Highland and its subsidiary were advising Plaintiffs about—so that Highland and its current CEO could reap a windfall at Plaintiffs’ expense. Discovery will bear out the allegations which have been pleaded with particularity and in good faith. In the unlikely event the Court considers the Renewed Motion to Dismiss to have any validity, then the Plaintiffs request leave to amend their pleadings to cure any identified deficiencies.

II.

FACTUAL BACKGROUND

Plaintiff Charitable DAF Fund, L.P. (“DAF”) is a charitable fund that helps several causes throughout the country, including providing millions of dollars every year to local charities in Dallas and around the country, such as family shelters, education initiatives, veteran’s welfare associations, public works (such as museums, parks and zoos), and education (such as specialty schools in underserved communities). Original Complaint (“Compl.”) at ¶ 10.

Since 2012, the DAF was advised by its registered investment advisor, Defendant Highland Capital Management, L.P. (“Highland”), and its various subsidiaries about where to invest. (Compl. at ¶ 11). This relationship was governed by an investment advisory agreement. (Compl.

at ¶ 12). As the DAF's investment advisor, Highland owed the DAF fiduciary obligations, including the duty against self-dealing, the duty to put the DAF's best interest ahead of its own, and the duty to obtain informed consent from the DAF. (Compl. at ¶¶ 56–57, 62).

In 2017, Highland advised the DAF to acquire 143,454,001 shares of Highland CLO Funding, Ltd (“HCLOF”), which the DAF did via a holding entity, Plaintiff CLO Holdco, Ltd. (“CLO Holdco”). (Compl. at ¶ 12).

Shortly thereafter, CLO Holdco entered into a Subscription and Transfer Agreement whereby a series of related entities collectively referred to as “HarbourVest” acquired a 49.98% membership interest in HCLOF (the “HarbourVest Interests”). (Compl. at ¶¶ 13–14). As part of this transaction Holdco retained a 49.02% membership interest. (Compl. at ¶ 13), and Highland took a 0.6% membership interest HCLOF (Compl. at ¶ 25).

HCLOF's portfolio manager is Highland HCF Advisor, Ltd. (“HCFA”), which is subsidiary of Highland and is controlled and operated by Highland. (Compl. at ¶ 24). Both are registered investment advisers (“RIA”). As such, both Highland and HCFA owed fiduciary duties to CLO Holdco as an investor in the HCLOF fund. James P. Seery, Jr., CEO of Highland, testified that Highland owed such fiduciary duties under the Investment Advisers Act of 1940 (the “Advisers Act”) to investors in the funds that Highland manages (App_0008-10, 0014).

The HCLOF parties' rights and obligations as members of HCLOF were governed by the *Members Agreement Relating to the Company* dated November 15, 2017 (“Company Agreement”). (Compl. at ¶¶ 93–94) (App_0018-35). Under the Company Agreement, no member was allowed to sell shares to another member without first providing all other members the opportunity and right to purchase a *pro rata* portion thereof at the same price being offered. (Compl. at ¶ 95; App_0026-27).

In October 2019, Highland filed for Chapter 11 (Compl. at ¶ 15). As part of this bankruptcy, HarbourVest filed its proof of claim against Highland totaling over \$300 million (Compl. at ¶¶ 16, 21-23). Highland denied the validity of these claims. (Compl. at ¶ 17, 26).

In the meantime, Highland continued to control HCLOF through its subsidiary HCFA. (Compl. at ¶¶ 115–124). In September 2020, HCLOF was underperforming, and the value of the investment had diminished—the HarbourVest Interests had diminished \$52 million in value. (Compl. at ¶ 27). On September 30, 2020, Highland utilized interstate wires to transmit information to the HCLOF investors regarding the value of their respective interests. (Compl. at ¶ 121). In the following months, however, the value HCLOF began to improve and Highland did not update investors; by the end of November 2020, the value of HCLOF’s total assets increased to \$72,969,492 (\$36,484,746 allocated to HarbourVest) and by the end of December, HCLOF’s reached \$86,440,024 (\$43,202,724 allocated to HarbourVest’s Interests). (Compl. at ¶¶ 123–124). However, Highland did not transmit these valuations to Plaintiffs (Compl. at ¶ 120).

Around November 2020, Highland and HarbourVest—utilizing the interstate wires—entered into discussions about settling HarbourVest’s claims in the bankruptcy. (Compl. at ¶ 119). Highland and HarbourVest reached a settlement, which Highland requested the bankruptcy court approve on December 23, 2020 (the “9019 Hearing”). (Compl. at ¶ 29; App_0046-64). As part of the settlement, Highland agreed to allow HarbourVest \$45 million in unsecured claims, which were expected to yield about seventy cents on the dollar to HarbourVest (roughly \$31,500,000). (Compl. at ¶ 32; App_46-64). As part of the consideration for the \$45 million in allowed claims, HarbourVest sold its interest in HCLOF to Highland for \$22,500,000 (Compl. at ¶ 33) (the “HarbourVest Settlement”).

Despite Highland’s fiduciary obligations to Plaintiffs, Highland concealed the rising value

of HCLOF and the Harbourview Interests, as well as the value that it was buying the interest for. It diverted the entire opportunity to participate in this windfall transaction to itself in violation of its fiduciary duties (Compl. at ¶ 67).

At the January 14, 2021, Bankruptcy Rule 9019 hearing to approve the settlement, HCF's CEO testified that the value allocated to the HarbourVest Interests was \$22.5 million. (Compl. at ¶¶ 34, 37). The bankruptcy court issued an order approving the HarbourVest Settlement (App_0065-68) (the "9019 Order"). The sale of the HarbourVest Interests transformed Highland from a minority member with a 0.6% interest into the controlling member with a 50.49% interest.

The truth was otherwise. As Plaintiffs learned only after the fact from former Highland employees who were familiar with the valuation, the HarbourVest interest was actually worth \$41,750,000 on a net asset value basis. (Compl. at ¶¶ 34, 37). Highland's failure to inform HCLOF—whom it controlled through HCFA—or Holdco, means Highland reaped a \$20 million-plus windfall by self-dealing and without proper disclosure, resting on affirmative misrepresentations by its CEO, and without obtaining informed consent from its investors.

This lawsuit followed and is now subject to a second successive motion to dismiss in violation of the Rules of Civil Procedure and precedent.

III.

MOTIONS TO STRIKE

A. DEFENDANTS' SUCCESSIVE MOTION TO DISMISS SHOULD BE STRICKEN

This Court presumptively denied Highland's bases for dismissal on the merits by not ruling on them, and during the first appeal, Highland did not ask the district court to rule on the merits or to affirm on that basis as it could have. *See Dandridge v. Williams*, 397 U.S. 471, 475 n.6 (1970). By failing to raise those presumptively denied bases for dismissal on appeal, Highland waived

them, *Legate v. Livingston*, 822 F.3d 207, 211 (5th Cir. 2016), and cannot re-assert them now.

The Fifth Circuit and the district courts within it have repeatedly held that successive Rule 12(b)(6) motions are not allowed under Rule 12(g) and (h), and that a motion such as this one can only be brought as a 12(c) motion after the pleadings have closed. See Fed. R. Civ. P. 12(g) and (h); see, e.g., *Du Bois v. Martin Luther King Jr. Family Clinic, Inc.*, No. 3:17-CV-2668-L, 2018 U.S. Dist. LEXIS 246910, at *5-6 (N.D. Tex. May 29, 2018). Accordingly, this is not a “renewed motion;” it is an improper *successive* motion to dismiss and should be stricken. *DuBois*, 2018 U.S. Dist. LEXIS 246910, at *5-6; *Leyse v. Bank of Am. Nat’l Ass’n*, 804 F.3d 316, 322 n.5 (3d Cir. 2015) (“district courts should enforce [the rule against successive motions] even if their failure to do so is not a ground for reversal”).

B. DEFENDANTS' EXHIBITS SHOULD BE STRICKEN

The district courts in this district have also held that a court should only take judicial notice of facts “sparingly at the pleadings stage.” *Reneker v. Offill*, No. 3:08-cv-1394-D, 2010 U.S. Dist. LEXIS 38526, at *5 (N.D. Tex. Apr. 19, 2010) (Fitzwater, J.) (quoting *Victaulic Co. v. Tieman*, 499 F.3d 227, 236 (3d Cir. 2007)). Courts in the Fifth Circuit have held that, other than legal documents, a court cannot take judicial notice of unpled *facts* unless the facts are undisputed. See *Lovelace v. Software Spectrum*, 78 F.3d 1015, 1018 (5th Cir. 1996). Thus, this Court should strike the appendix submitted with the motion as impertinent and improper.

IV.

PLAINTIFFS HAVE STATED CLAIMS FOR RELIEF

Motions to dismiss for failure to state a claim are viewed with disfavor and are seldom granted. See *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498 (5th Cir. 2000). “Under Federal Rule of Civil Procedure 8(a)(2), a pleading must contain ‘a short and plain statement of

the claim showing that the pleader is entitled to relief.” *Ashcroft v. Iqbal*, 556 U.S. 662, 677-678 (2009). This Court must draw all reasonable inferences in favor of the plaintiff. *See Collins*, 224 F.3d at 498. Rule 8 does not demand ““detailed factual allegations[.]”” *Id.* at 678 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). In ruling upon a Rule 12(b)(6) motion, the Court cannot decide disputed fact issues. The court may grant a motion under Rule 12(b)(6) *only if* it can determine with certainty that the plaintiff cannot prove a set of facts that would allow the relief sought in the complaint. *Scanlan v. Texas A&M Univ.*, 343 F.3d 533, 536 (5th Cir. 2003).

A. JUDICIAL ESTOPPEL SHOULD NOT BE APPLIED TO COUNTS 2 OR 5

The district court on appeal remanded for consideration of whether judicial estoppel applied to Counts 2 or 5 of the Complaint. *Charitable DAF Fund, L.P. v. Highland Capital Mgmt., L.P. (In re Highland Cap. Mgmt., L.P.)*, 643 B.R. 162, 174-75 (N.D. Tex. 2022) (“Remand Order”). Plaintiffs still disagree that there was any judicial admission, but nonetheless address the questions that were remanded.¹

1. Highland’s Reliance on Collateral Evidence is Improper

Highland’s entire argument on judicial estoppel fails for two reasons already addressed: First, it relies on new arguments not raised previously. And second, it relies on evidence outside of the four corners of the Complaint. For instance, the question of inadvertence which the district court remanded for this Court’s consideration is not one that can be resolved on the pleading because it asks *why* Holdco withdrew its objection. That cannot be determined at this early stage, and Highland’s selective document-dump is not competent evidence, not properly admitted, and therefore not proper for this Court to consider at the 12(b)(6) stage.

¹ Plaintiffs adopt and incorporate the arguments made previously to this Court and before the district court on appeal as to why judicial estoppel does not apply, and reserve all rights on appeal. For the purposes of this briefing and for the sake of brevity, Plaintiffs address the issues reserved for remand to this Court.

2. Highland Has Not Shown a Lack of Inadvertence

The Fifth Circuit has addressed “inadvertence” in the bankruptcy context by citing a debtor’s duty to disclose all claims at the beginning of a bankruptcy. *See Superior Crewboats, Inc. v. Primary P & I Underwriters (In re Superior Crewboats, Inc., 374 F.3d 330, 335* (5th Cir. 2004) (“The debtor's failure to satisfy its statutory disclosure duty is ‘inadvertent’ only when, in general, the debtor either lacks knowledge of the undisclosed claims *or* has no motive for their concealment.”) (*italics in original*). Here, no such duty to object to a 9019 settlement exists. Nonetheless, Holdco’s 9019 objection addressed *HarbourVest*’s violations of the Member Agreement. But Count 2 of the Complaint alleges that *Highland* violated the HCLOF Company Agreement by failing to offer the interest to Holdco (and other members) before it transferred the interest to its subsidiary. HoldCo never brought its objection as to Highland or its subsidiary. And Count 5 alleges that Highland HCF Advisors L.P. tortiously interfered with the Company Agreement in its investment advisory role, another claim that was not brought as an objection (and for which no duty to object existed).

a. Holdco Did Not Intentionally Conceal its Breach of Contract or Tortious Interference Claims From the Court and Had No Motive to Do So

There is no evidence in the record that Holdco intentionally concealed its claims from the Court for breach of contract or tortious interference—nor that it had any reason to do so. The opposite is true. The contract claims were disclosed, albeit they were withdrawn without prejudice. There was no motive to conceal the claims to the extent they were known to Holdco at the time. This Court and the district court has already ruled that the withdrawal of those claims did not attach *res judicata* or *collateral estoppel* preclusion. Other courts have found that unsuccessful legal positions taken during a 9019 hearing are not a basis for finding that judicial estoppel applies where those legal positions relate to matters more properly addressed in an adversary proceeding. *See,*

e.g., *Commerce Bank v. Malloy*, No. 13-CV-252, 2013 U.S. Dist. LEXIS 106329, at *15-17 (N.D. Okla. 2013). Therefore, their withdrawal without prejudice did not, and was not expected to, have any preclusive effect making the withdrawal inadvertent as to any alleged inconsistency.

b. New Facts Giving Rise to the Claims Were Not Known to Holdco

The facts giving rise to the lawsuit arose after the 9019 hearing. To wit, the tortious interference claim stems from Highland's concealment and misrepresentation of the net asset value of HCLOF prior to and during the 9019 hearing—the true value of which only became known to Holdco well after this Court's 9019 hearing and 9019 Order (Compl. ¶¶ 36-45, 47-52). Because of the misrepresentation and the self-dealing entailed therein, Holdco is able to state a tortious interference claim based upon inadvertence. And but for the misrepresentation, Holdco would not have withdrawn its objection, and would have made a more robust objection to the settlement or sought a different path. Therefore, judicial estoppel is improper.

B. PLAINTIFFS HAVE PROPERLY PLED CLAIMS FOR BREACH OF FIDUCIARY DUTY

In Texas, the elements of a breach of fiduciary duty are: “(1) a fiduciary relationship between the plaintiff and defendant; (2) the defendant must have breached his fiduciary duty to the plaintiff; and (3) the defendant's breach must result in injury to the plaintiff or benefit to the defendant.” *Cudd Pressure Control, Inc. v. Roles*, 328 F. App'x 961, 964 (5th Cir. 2009) (quoting *Navigant Consulting, Inc. v. Wilkinson*, 508 F.3d 277, 283 (5th Cir. 2007)).

1. Highland and HCFA Owe Fiduciary Duties Under the Advisers Act

“The Investment Advisers Act of 1940 was the last in a series of Acts designed to eliminate certain abuses in the securities industry, abuses which were found to have contributed to the stock market crash of 1929 and the depression of the 1930's.” *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 186 (1963). The Advisers Act thus “establishes ‘federal fiduciary standards’ to

govern the conduct of investment advisers.” *Transamerica Mortg. Advisors, Inc. (TAMA) v. Lewis*, 444 U.S. 11, 17 (1979) (citing *Santa Fe Indus. v. Green*, 430 U.S. 462, 471, n.11 (1977)).

The Advisers Act imposes both a duty of care and a duty of loyalty on investment advisors. See *SEC v. Tambone*, 550 F.3d 106, 146 (1st Cir. 2008) (“[15 U.S.C. § 80b-6] imposes a fiduciary duty on investment advisers to act at all times in the best interest of the fund and its investors.”); *SEC v. Ambassador Advisors, LLC*, 576 F. Supp. 3d 286, 300 (E.D. Pa. 2021) (“The fiduciary duties under § 206(2) also require investment advisers to seek “best execution” for all their clients’ transactions. “Best execution” means obtaining “the most favorable terms reasonably available under the circumstances.”); 17 C.F.R. § 275.204A-1 (describing the required investment adviser code of ethics, and its focus on conflicts of interest).

The Advisers Act was also enacted in part to prevent conflicts of interest, self-dealing and fraud by investment advisors. See *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. at 186–87. A key prohibition is that the advisor cannot engage in cherry picking—selecting the best securities and opportunities in a way that enriches itself. Accord *SEC v. World Tree Fin., L.L.C.*, 43 F.4th 448, 460 (5th Cir. 2022) (“Because cherry-picking involves allocating more profitable trades to certain accounts, an adviser is ‘stealing from one customer to enrich himself’”). See also Investment Advisers Act Release No. 3060, 75 Fed. Reg. 49,234 (Aug. 12, 2010) (“Under the Advisers Act, an advisor is a fiduciary whose duty is to serve the best interests of its clients, which includes an obligation not to subrogate clients’ interests to its own”) (citing Investment Advisers Act Release No. 2106 (Jan. 31, 2003)).²

² The SEC’s interpretive guidance of the Advisers Act is accorded *Chevron* deference. See *SEC v. Zandford*, 535 U.S. 813 (2002). In interpreting § 206 of the Advisers Act, the SEC has recognized that conflicts of interest arise where an advisor seeks to take advantage of an opportunity that it otherwise might offer to its client. See Commission Interpretation Regarding Standard of Conduct for Investment, Release No. IA-5248, Fed. Reg./Vol. 84, No. 134 at 33675-77 (citing Restatement (Third) of Agency, § 8.01 (2006))

Texas courts have also found that advisors owe fiduciary duties of care and loyalty. *W. Res. Life Assurance Co. v. Graben*, 233 S.W.3d 360, 374 (Tex. App.—Fort Worth 2007, no pet.); *Romano v. Merrill Lynch, Pierce, Fenner & Smith*, 834 F.2d 523, 530 (5th Cir. 1987) (holding that advisors owe investors fiduciary duties under Texas law); *Lampkin v. UBS Painewebber, Inc. (In re Enron Corp. Sec., Derivative & “ERISA” Litig.)*, 238 F. Supp. 3d 799, 851 (S.D. Tex. 2017) (under Texas law, an investment advisor and investors are in a formal fiduciary relationship). Texas law provides that a fiduciary relationship is governed by the terms of the agency. *See Hand v. Dean Witter Reynolds, Inc.*, 889 S.W. 2d 483, 492 (Tex. App.—Houston [14th Dist.] 1994, *writ denied*). The Advisers Act provides the scope of, and rules governing, the advisor/advisee agency relationship. *See Laird v. Integrated Res.*, 897 F.2d 826, 834 (5th Cir. 1990).

Here, HCFA is a wholly-owned subsidiary of Highland. Both are registered investment advisors under the Advisers Act of 1940 (Compl. ¶ 56). Highland operates HCFA, which serves as the Portfolio Manager of Highland CLO Funding, Ltd. (“HCLOF”). Highland was a direct advisor to the DAF. Therefore, Highland and HCFA each owed fiduciary duties to the DAF and Holdco respectively.

2. Holdco Has Standing to Bring a Breach of Fiduciary Duty Claim Directly and Derivatively

Highland contends that Holdco, as a mere investor in HCLOF who is not in privity with

(explaining that “the general fiduciary principle, ...also requires that an agent refrain from using the agent's position or the principal's property to benefit the agent or a third party.”)). A necessary but not sufficient measure by the advisor is full and fair disclosure and obtaining the client’s informed consent before the advisor takes such an action. *Id.* at 33676-77. “In order for disclosure to be full and fair, it should be sufficiently specific so that a client is able to understand the material facts or conflicts of interest and make an informed decision whether to provide consent.” *Id.* at 33676. This includes all information about an advisor’s potential gain or advantage—especially hidden ones and ulterior motives. *Id.* at 33677. The failure to make such disclosures and obtain informed consent in a manner that is not disinterested is a breach of the fiduciary duty under the Adviser’s Act. *Id.* at 33677.

Highland or HCFA, lacks standing. This is incorrect as a matter of law.

First, Highland incorrectly states that there is no private right of action under the Advisers Act. This is simply not true. Section 215 recognizes a limited private right of action for equitable relief including disgorgement, wherein one may seek to void the rights of a violator who performs a contract in violation of the Advisers Act. *See* 15 U.S.C. § 215. *TAMA*, 444 U.S. at 19 (“[W]hen Congress declared in § 215 that certain contracts are void, it intended that the customary legal incidents of voidness would follow, including the availability of a suit for rescission or for an injunction against continued operation of the contract, and for restitution.”). Plaintiff has pled disgorgement and is entitled to it under this statute.

Second, the Northern District of Texas decided almost a decade ago that, although the Advisers Act does not itself create a cause of action for damages, state law fiduciary duty claims can be brought for violations of the Advisers Act. *See Douglass v. Beakley*, 900 F. Supp. 2d 736, 751-52, n.16 (N.D. Tex. 2012) (Boyle, J.) (denying motion to dismiss state fiduciary duty claims predicated on breaches of the Advisers Act).³ Therefore, Holdco has standing to bring its claims

³ Highland newly contends that because HCLOF is a Guernsey company, Guernsey fiduciary duty law applies under the internal affairs doctrine to decide whether a fiduciary duty claim by an investor can be brought against an investment advisor. This argument fails. For one thing, it was not raised originally—meaning it was waived under Rule 12(g) and (h). For another, the argument incorrectly supposes—without any support—that the internal affairs doctrine would apply and would select Guernsey law for duties related to HCLOF. The internal affairs doctrine only applies to HCLOF’s *internal* affairs—i.e., the duties of officers and directors towards the company and shareholders. *Accord Alphonse v. Arch Bay Holdings, L.L.C.*, 548 F. App’x 979, 986 (5th Cir. 2013) (noting that internal affairs doctrine does not apply where rights with respect to “third parties external to the corporation are at issue”) (citing *First Nat’l City Bank v. Banco Para El Comercio Exterior De Cuba*, 462 U.S. 611, 621-22 (1983)). The internal affairs doctrine is NOT at issue here as neither Highland nor HCFA is alleged to be an officer or director of HCLOF, nor is their fiduciary duty alleged to arise out of service in such a role. Nor can the internal affairs doctrine circumvent federal securities laws. The Supreme court in *Edgar v. Mite Corp.*, 457 U.S. 624, 645 (1982) held that the internal affairs doctrine was irrelevant where the issue was the violation of the securities laws between a shareholder and a third party who was not an officer or director of the company, and that the internal affairs doctrine could not be used to circumvent federal securities laws. *See id*; *cf. Anderson v. Abbott*, 321 U.S. 349, 365 (1944) (declining to apply the law of the State of incorporation to determine

for violations of the Advisers Act under applicable state law. *Id.* Other courts are in accord. *See Goldenson v. Steffens*, No. 2:10-cv-00440, 2014 U.S. Dist. LEXIS 201258, at *137 (D. Me. Mar. 7, 2014) *Belmont v. MB Inv. Partners, Inc.*, 708 F.3d 470, 502-06 (3d Cir. 2013); *State ex rel. Udall v. Colonial Penn Ins. Co.*, 812 P.2d 777, 785 (N.M. 1991); *Strougo ex rel. Brazil Fund v. Scudder, Stevens & Clark, Inc.*, 964 F. Supp. 783, 799 (S.D.N.Y. 1997), *rev'd in part on other grounds in Strougo v. Bassini*, 282 F.3d 162 (2d Cir. 2002).

Third, the fiduciary duties under the Advisers Act are not limited to direct advisees. Highland's CEO, James Seery, testified under oath—under *direct examination by Highland's lawyers*—that he and Highland, as registered investment advisors, owed fiduciary duties to the funds they managed, and the *investors* in those funds. (App_0009) (“The goals of the debtor...number one, discharge Highland’s, ... duties to investors in the funds. Those are fiduciary duties under the Investment Advisers Act.”); (App_14) (“the Investment Advisers Act puts a fiduciary duty on Highland Capital to discharge its duty to the **investors**. So, while we have duties to the estate, we also have duties, as I mentioned in my last testimony, **to each of the investors in the funds.**”) (bolding added). Seery’s sworn, uncontradicted testimony is a judicial admission and an undisputed fact that this Court may take judicial notice of at this stage. *See Fed. R. Evid. 201(b)*.

whether a banking corporation complied with the requirements of federal banking laws because “no State may endow its corporate creatures with the power to place themselves above the Congress of the United States and defeat the federal policy concerning national banks which Congress has announced”); *Broyles v. Cantor Fitzgerald & Co.*, No. 10-854, 2014 U.S. Dist. LEXIS 169364 (M.D. La., Dec. 8, 2014) (internal affairs doctrine does not apply to claims of breach of a fiduciary duty against stockbroker). Here, Highland’s and HCFA’s fiduciary duties arise out of their roles as registered investment advisors to the DAF directly and to HCLOF, and so are non-waivable. *See 15 U.S.C. § 80b-6* and § 80b-15(a). Those duties are subject to their Advisory Agreements, neither of which select Guernsey law—actually, they expressly select Texas law. *See* Offering Memo p. 82 (“[HCFA]’s Portfolio Management Agreement is governed by the laws of the State of Texas.”) (APP_0175); DAF/HCMLP Advisory Agmt at ¶ 14(e) (APP_0219) Moreover, the Offering Memorandum (which is incorporated via the Company Agreement § 2.2), states that HCFA is “subject to the provisions of the Investment Advisers Act.” Offering Memo at p. 13 and 59 (APP_0106 and 0152).

Fourth, the Advisers Act § 206 expressly imposes duties owed directly to investors in a fund. See 15 U.S.C. § 80b-6(4). Highland attempts to circumscribe the issue to just “clients”. But Section 206(4) says nothing about clients while §§ 206(1) and (2) expressly limit duties only to “clients”. Accord *SEC v. Tambone*, 550 F.3d 106, 146 (1st Cir. 2008) (“[15 U.S.C. § 80b-6(4)] imposes a fiduciary duty on investment advisors to act at all times in the best interest of the fund and its investors.” (emphasis added)). The Supreme Court and circuit courts long ago recognized the right of investors in pools of funds to bring direct actions against the fund managers for breaches of the Advisers Act. See, e.g., *TAMA*, 444 U.S. at 13; *Abrahamson v. Fleschner*, 568 F.2d 862, 871-74 (2d Cir. 1977) *rev’d in part on other grounds*.

Furthermore, § 206(4) empowered the SEC to enact regulations refining the scope of the duties under § 206(4). Pursuant to its grant of authority, the SEC promulgated 17 C.F.R. § 275.206(4)-8 (“Rule 206(4)-8”) to enforce the fiduciary standards in Section 206(d), making it unlawful for an advisor to a “pooled investment vehicle” to:

- (1) Make any untrue statement of a material fact or to omit to state a material fact necessary to make the statements made, in the light of the circumstances under which they were made, not misleading, **to any investor** or prospective investor in the pooled investment vehicle; or
- (2) Otherwise engage in any act, practice, or course of business that is fraudulent, deceptive, or manipulative **with respect to any investor** or prospective investor in the pooled investment vehicle.

17 C.F.R. § 275.206(4)-8 (bolding added). By its plain terms, Rule 206(4)-8(a) expressly anticipates a lack of direct privity and imposes direct duties on investment advisors to investment funds with respect to the investors in those funds—which includes Holdco.⁴ *SEC v. ABS Manager*,

⁴ Highland does not appear to contest that HCLOF is a “pooled investment vehicle” for the purposes of this regulation. Normally, HCLOF would have to register under the Investment Company Act. The Investment Company Act, 15 U.S.C. § 80a-3(a)(1)(A), (C) states that an investment company is an issuer that “is or holds itself out as being engaged primarily, or proposes to engage primarily, in the business of

LLC, No. 13cv319, 2014 U.S. Dist. LEXIS 80542, at *45 (S.D. Cal. June 11, 2014) (adopting SEC’s position and granting summary judgment as to violations of Rule 206(4)-8 because “section 206(4) and Rule 275.206(4)-8. . . prohibit the same conduct as sections 206(1) and 206(2) but in connection with ‘pooled investment vehicles’”); *SEC v. Markusen*, 143 F. Supp. 3d 877,891 (D. Minn. 2015) (denying motion to dismiss action by investors against manager of fund); *Goldenson*, 2014 U.S. Dist. LEXIS 201258, at *139 (holding that an advisor to a pooled vehicle had general fiduciary duty to investors even as to outside investments made by the advisor).

Fifth, Holdco also pled its claims derivatively (Compl. at Caption and at ¶ 91). Thus, to the extent HCLOF has a breach of fiduciary duty claim (which it also does), because HCLOF is a Guernsey entity, Guernsey law determines derivative standing. Here, Guernsey law recognizes both derivative and double-derivative standing, especially where, as here, the company is controlled by the alleged wrongdoer. *See Jackson v. Dear and Seven Others*, [2013 GLR 167] Guernsey Royal Ct. (Talbot, Lieut, Bailiff) (adopting English company law on derivative actions and finding that double derivative actions are recognized vehicles in Guernsey corporations and customary law); *see also Carlyle Inv. Mgmt. L.L.C. v. Moonmouth Co. S.A.*, No. 7841-VCP, 2015 Del. Ch. LEXIS 237, at *49 (Del. Ch. Sep. 10, 2015) (noting derivative action for Guernsey entity

investing, reinvesting, or trading in securities” or that “is engaged or proposes to engage in the business of investing, reinvesting, owning, holding, or trading in securities, and owns or proposes to acquire investment securities having a value exceeding 40 per centum of the value of such issuer’s total assets[.]” HCLOF Meets this definition. *See, e.g.*, Company Agreement recital B and § 2.2 (APP_0017-18); Offering Memo (APP_0094-97, 0106-107). The exceptions identified in Rule 206(4)-8(2) are for investment companies that do not publicly offer their shares and have fewer than 100 investors. *Markusen*, 143 F.Supp.3d at 891 (holding that investment fund not required to register where it “[has] less than 100 investors and do[es] not publicly offer [its] securities”). HCLOF meets this definition. *See* Offering Memo at i (“There will be no public offer of the Placing Shares”) (APP_0085) and at p. 75 (shareholders list) (APP_0168). Thus, because HCLOF would have to register under the Investment Company Act but for the exceptions to identified in Rule 206(4)-8, *id.* at p. i (“[HCLOF] has not been and will not be registered under the Investment Company Act of 1940”), HCLOF qualifies as a “pooled investment vehicle”.

could proceed). Highland nowhere so much as purports to challenge the derivative standing of Holdco nor cites a single legal authority contravening it.

Therefore, Holdco has standing to bring claims for breach of the Advisers Act fiduciary duties as well as state law fiduciary duty claims.

3. The DAF Has Direct Standing to Bring Fiduciary Duty Claims

The Original Complaint pleads that Highland and the DAF are in a direct advisory relationship by virtue of a contractual arrangement. (Compl. ¶ 58). As the DAF's registered investment advisor, Highland is DAF's fiduciary. *See Douglass v. Beakley*, 900 F. Supp. 2d 736, at 751-52, n.16. The Advisory Agreement further commits Highland to value financial assets "in accordance with the then current valuation policy of the Investment Advisor [Highland], a copy of which will provided to the General Partner upon request." (Compl. ¶ 60). And while Highland contracted for the recognition that it would be acting on behalf of others and could be in conflict with advice given to the DAF, (Advisory Agreement ¶ 12), nowhere did it purport to *waive* the fiduciary duties owed to the DAF not to trade as a principal in a manner that was self-dealing or harmed the DAF. (Compl. ¶ 61). Additionally, Highland was appointed the DAF's attorney-in-fact. (Compl. at ¶ 59). "As the appointment of an attorney-in-fact creates a fiduciary relationship as a matter of law, Texas law imposes special duties on persons acting in that capacity." *Pool v. Johnson*, No. 3:01-CV-1168-L, 2002 U.S. Dist. LEXIS 6613, at *17 (N.D. Tex. Apr. 15, 2002) (citing *Sassen v. Tanglegrove Townhouse Condo. Ass'n*, 877 S.W.2d 489, 492 (Tex. App.—Texarkana 1994, writ denied)). Under Texas law, "[a] fiduciary owes its principal a high duty of good faith, fair dealing, honest performance, and strict accountability." *Id.* (citing *Sassen*, 877 S.W.2d at 492).

Here, Highland cannot to subrogate the DAF's rights to its own, nor self-deal, nor mislead

the DAF as to a competitive purchase. The DAF further has the right to full and fair disclosure by Highland before it usurps an opportunity that it was advising the DAF on. This is especially so because Highland cannot do indirectly what it cannot do directly. 15 U.S.C. § 80b-8(d).

4. Plaintiffs Have Alleged Several Breaches of Fiduciary Duty

Highland breached multiple fiduciary obligations in the process of negotiating and consummating the HarbourVest Settlement. The materiality of misrepresenting the value and the benefit to Highland of the investment is not debatable. *Accord SEC v. Blavin*, 760 F.2d 706, 711 (6th Cir. 1985). And Highland cannot escape liability for this duty by conducting its advisory activities through HCFA. *See* 15 U.S.C. § 80b-8(d).

Highland and HCFA breached the duty of care and the duty of loyalty. The Advisers Act's primary purpose is to eliminate advisors' conflicts of interest and ensure that advisors always act in the best interest of the investor. *See Laird*, 897 F.2d at 839. The Advisers Act also makes clear that the duty of loyalty means putting CLO Holdco's interest first. *See* Securities and Exchange Commission Interpretative Release, *Commission Interpretation Regarding Standard of Conduct for Investment Advisers*, 84 FR 33681 SEC Release No. IA-5248; File No. S7-07-18, 17 CFR Part 276, June 5, 2019 ("SEC Release") at p. 8, 23 (internal citations omitted). Under this duty, the Advisers Act explains that an advisor must have a rational, non-self-interested basis for how it allocates investment opportunities. *Id.* at 27.

Here, the HCLOF Company Agreement makes it clear that the purposes of HCLOF's investors is to acquire profitable CLO and CLO-related securities—which the shares in HCLOF would fall under (App_0020).⁵ The Offering Memorandum specifically incorporated the Advisers

⁵ The Company Agreement states that HCLOG "has been established to provide its investors with exposure to CLO Notes on both a direct basis and indirect basis and senior secured loans on an indirect basis, through the use of the investments described in its investment policy [in the Offering Memo]."

Act as a governing limit on Highland's ability to usurp investment opportunities. Offering Memo at p. 59 (APP_0151 to 0152).

Defendants' reserving for themselves without proper disclosure the entire HarbourVest interest in HCLOF is plainly a violation of fiduciary duty—and a knowing one at that.⁶ The fact that it was alleged to have been done knowingly, if not purposefully, satisfies the scienter requirement. "[A]s other courts have pointed out, cherry picking can satisfy the scienter element because it involves the knowing conduct of picking certain accounts over others." *World Tree Fin.*, 43 F.4th 448, 463 (citing cases).

And to the extent Highland contends that the Company Agreement or any other provision waives its obligations under the Advisers Act, or those of HCFA, those waivers are null and void under 15 U.S.C. § 80b-15(a).⁷

5. Rule 9(b) Does Not Apply to These Fiduciary Duty Claims

For Rule 9(b) to apply, the claim must sound in fraud. See FED. R. CIV. P. 9(b). "Allegations of breach of fiduciary duty are not necessarily fraud allegations." *In re Elec. Data Sys. Corp.* "ERISA" Litig., 305 F. Supp. 2d 658, 672 (E.D. Tex. 2004) (citing *Fink v. Nat'l Sav. & Trust Co.*,

⁶ Highland entered into settlement negotiations in November 2020 with HarbourVest where it first learned of HarbourVest's intent to sell its interests in HCLOF. (Compl. ¶ 119). On December 23, 2020, Highland moved for approval of the HarborVest Settlement. On January 14, 2021, at the Bankruptcy Court for the Northern District of Texas, Highland's CEO declared the that the value of HarbourVest's Interest in HCLOF was \$22.5 million (Compl. at ¶ 34). The Bankruptcy Court approved a settlement that permitted Highland to obtain HCLOF's interest for this amount (Compl. at ¶¶ 32-34). In truth, the HarbourVest Interests were worth in excess of \$41,750,000 at that time. (Compl. at ¶ 37). Highland, however, did not disclose the true value of HarbourVest's interests to Plaintiffs. (Compl. at ¶ 75). Furthermore, the value of the trade, the potential upside in the trade, and the nature of the trade were never disclosed to Holdco or the DAF prior to the hearing—indeed, the value and nature was misrepresented to them at the hearing. (Compl. ¶ 76, ¶ 120). Highland converted its 0.6% interest into a 50.58% interest and thereby control of HCLOF.

⁷ Even if this court dismisses the contract claim (Count 2), that would not operate to deprive CLO Holdco or the DAF of the right to have Highland put their interests first as a matter of Advisers Act fiduciary duty. Defendants cannot waive those fiduciary obligations. See 15 U.S.C. § 80b-15(a).

249 U.S. App. D.C. 33, 772 F.2d 951, 959 (C.A.D.C. 1985) (holding that plaintiffs did not plead fraud where the complaint only alleged a breach of fiduciary duty of loyalty or care)). Plaintiffs also allege that Highland breached fiduciary duties by self-dealing when Highland purchased the entire HarbourVest Interests without providing Plaintiffs with the opportunity to participate. (Compl. at ¶ 76–88). These allegations do not require a false statement, nor require Plaintiffs’ reliance, nor damage to Plaintiffs (a benefit to Highland suffices), all of which are elements of fraud. Because fraudulent conduct does not underlie Plaintiffs’ allegations, Rule 9(b) does not apply. *Tigue Inv. Co. v. Chase Bank of Tex. N.A.*, No. 3:03-CV-2490-N, 2004 U.S. Dist. LEXIS 27582, at *7–8 (N.D. Tex. Nov. 15, 2004). “Although fraud and breach of a duty to inform may both involve an omission, the Court does not find that every breach of a fiduciary duty to inform is a scheme to defraud.” *EDS*, 305 F. Supp. 2d at 672.

Thus, Rule 9(b) does not apply here because violations of §§ 206(2) and (4) of the Advisers Act do not require proving or even alleging all the elements of fraud. 15 U.S.C. § 80b-6(4). Negligence is sufficient to establish liability under § 206(2) and (4). *See Capital Gains*, 375 U.S. at 195 (“... Congress, in empowering the courts to enjoin any practice which operates ‘as a fraud or deceit’ upon a client, did not intend to require proof of intent to injure and actual injury to the client.”); *ZPR Inv. Mgmt. v. SEC*, 861 F.3d 1239, 1247 (11th Cir. 2017) (“Sections 206(2) and (4) require no showing of scienter, and a showing of negligence is sufficient.”) (internal citations omitted). Nor is a showing of reliance required. *Id.*

Even if Rule 9(b) did apply, it was met here. Plaintiff alleges the specific disclosures and statements in the Complaint made by Jim Seery under oath—when they were made, who made them, where they were made, and in what context. (Compl. ¶¶ 25-45; 47-51, 53, 55-91). Plaintiffs

further allege why those statements were false and how the falsity caused Plaintiffs injury. *Id.*⁸ *Accord Fund of Funds, Ltd. v. Vesco*, 74-Civ-1980, 1976 U.S. Dist. LEXIS 14183, at *31 (S.D.N.Y. 1976) (“The complaint identifies the alleged fraudulent transactions and how the fraud was accomplished. Defendant’s roles in those events are described and specific actions by defendant, as a participant in allegedly unlawful activity, is delineated.”).

Therefore, Rule 9(b) is not a basis for dismissing the claims herein.

C. PLAINTIFFS PLED CLAIMS FOR BREACH OF CONTRACT AND TORTIOUS INTERFERENCE

Plaintiff CLO Holdco’s breach of contract claim is straightforward. Under the HCLOF Company Agreement, a “Transfer” of the shares of HCLOF is defined to include the “sale” of the shares. Company Agreement, § 6.1 (App_0026). Sections 6.1 and 6.2 of the Agreement purport to allow sales by members of their interests in HCLOF to “affiliates” of members, but not to members themselves, without certain conditions precedent. App_0026-27). One of those conditions is that the other members have to be afforded the right to purchase their pro-rata portion (App_0027).

Highland contends that the “transfer” to its “nominee,” HCMLP Investments, LLC, is a transfer to an “affiliate.” But this is factual gerrymandering and outside the scope of a 12(b)(6). The transfer that is the basis of Plaintiffs’ contract claim is the sale by HarbourVest to Highland. That sale was accomplished through the Settlement Agreement with Highland (App_0046-54). In the Settlement Agreement, Highland paid for the HarbourVest Interests. In return, HarbourVest agreed to release its claims against Highland and transfer the HarbourVest Interests *to Highland*. (App_0047). Highland’s supposed “nominee,” HCMLP Investments, LLC was not a party to this agreement and Highland’s nominee did not pay for those interests. *Id.* Therefore, the Settlement

⁸ Indeed, Seery’s testimony that is averted to specifically stated that Class 8 interests were only going to be paid some seventy cents on the dollar. Yet, according to publicly filed documents, almost 100% of Class 8 interests have been paid. What changed? Nothing.

Agreement constitutes a sale to *Highland*, and the sale violated Section 6.2 of the Company Agreement. The addendum transfer where Highland delegated its right to receive the shares to a nominee is “form over substance” and is bad faith, in violation of the Company Agreement § 20.5’s “good faith” clause.

Defendant argues that Plaintiffs failed to plead actual damages. But Defendant ignores that fact that Plaintiffs plead that the breach of contract denied them the opportunity to obtain a share of the HarbourVest Interests at a \$20+ million discount, which it alleges are damages. (Compl. at ¶¶ 98–100, 102). Lost profits are an available remedy for breach of contract. *Basic Capital Mgmt. v. Dynex Commer., Inc.*, 402 S.W.3d 257, 268 (Tex. App.—Dallas, 2013). “Recovery for loss profits does not require that the loss be susceptible of exact calculation.” *Id.* (quoting *Holt Atherton Industries, Inc. v. Heine*, 835 S.W.2d 80, 84 (Tex. 1992)). Highland claims that Plaintiffs’ damages are too speculative. The case it cites, *Snowden v. Wells Fargo Bank, N.A.*, No. 3:18-cv-1797, 2019 U.S. Dist. LEXIS 23557, at *13–14 (N.D. Tex. Jan. 18, 2019), which is completely inapposite on the facts because there no one had actually lost their use and enjoyment of the home. However, Plaintiffs do plead that it would have paid for the interest with cash. (Compl. ¶ 49-50). Highland’s choice to disbelieve this allegation is not relevant here.

Turning to tortious interference. The elements are “(1) an existing contract subject to interference, (2) a willful and intentional act of interference with the contract, (3) that proximately caused the plaintiff’s injury, and (4) caused actual damages or loss.” *Prudential Ins. Co. of Am. v. Fin. Review Servs., Inc.*, 29 S.W.3d 74, 77 (Tex. 2000).

Because Highland’s entire premise for dismissing Plaintiffs’ tortious interference claim is predicated on the non-existence of an enforceable contract and/or judicial estoppel, Plaintiff’s tortious interference claim likewise survives. Plaintiffs’ tortious interference claim survives for

another reason: the self-dealing and misleading statements by Highland as to the value of HarbourVest, which enabled it to circumvent the contractual duties, and the right of first refusal was a willful interference with Holdco's rights under the Company Agreement. There is no motion suggesting that Holdco did not allege that it suffered an injury due to the failure to be offered the HarbourVest interest and lose control of HCLOF to Highland. Nothing in the record states that Plaintiffs conceded that the HarbourVest sale did not violate the Company Agreement.

D. PLAINTIFFS HAVE PLED A CLAIM FOR NEGLIGENCE

Highland's entire argument for dismissal of the negligence cause of action is incorporating its other arguments. But this is a waiver because it has not articulated any basis for dismissal and has not shown which elements have not been met. First, under long-established Texas law, the elements of a negligence claim are: (a) a legal duty owed by one person to another; (b) breach of that duty; and (c) damages proximately caused by the breach. *See Nabors Drilling, U.S.A., Inc. v. Escoto*, 288 S.W.3d 401, 404 (Tex. 2009). Here, the Motion should be denied because the elements have all been pled. *See* Compl. ¶¶ 103-112. As argued before, the Advisers Act imposes a duty of care and loyalty under § 206(4). Even if Highland's misleading statements were unintentional, and/or its disclosure failures were unintentional, they were doubtlessly in violation of the standard of care, and Highland makes no argument to the contrary.

Highland's attempt to argue that the Plan exculpation precludes this claim is a non-starter. It was raised previously, meaning it is waived under Rule (g) and (h) and therefore should be stricken. Moreover, the duty of care here is a *federally imposed duty* which is *unwaivable* under 15 U.S.C. § 80b-15(a) ("Any condition, stipulation, or provision binding any person to waive compliance with any provision of this subchapter or with any rule, regulation, or order thereunder shall be void."). No case undersigned could find—and no case cited by Highland—makes an

exception for a Chapter 11 debtor to be able to violate the securities laws with impunity.

E. MOTION TO DISMISS RICO CLAIM UNDER RULE 41

Plaintiffs respectfully dismiss the RICO claim under Rule 41(a) to the extent such a claim is revealed to have existed under non-securities bases. Because Highland has conceded that Plaintiffs' claims are actionable under the federal securities laws and the Advisers Act, and has cited same as a basis for dismissing the RICO claim, Highland is precluded and estopped from denying the violations of the Securities Laws and the Advisers Act. As such, to the extent that other, non-securities law violations may give rise to RICO violations, Plaintiffs respectfully reserve the right to bring such a claim but respectfully dismiss their RICO claim at this time.

F. HIGHLAND'S REQUEST FOR FEES FAILS

Defendants' oblique request for fees is baseless. Absent a contract or law shifting the responsibility for fees, a party is expected to bear their own fees in litigation. *See Fisk Elec. Co. v. DQSI, L.L.C.*, 740 F. App'x 399, 401-02 (5th Cir. 2018). This is as true for a successful defendant as it is for a successful plaintiff. *Id.* Here, no contract or law provides for attorneys' fees to even a prevailing defendant. Therefore, no fees may be awarded.

V.

MOTION IN THE ALTERNATIVE FOR LEAVE TO AMEND

Plaintiffs respectfully ask for leave to amend in the alternative to cure any pleading deficiencies that the Court determines exist. A court's discretion to deny leave is severely limited by the bias of Rule 15(a) favoring amendment. *See Dussouy v. Gulf Coast Invest. Corp.*, 660 F.2d 594, 598 (5th Cir. 1981). Leave to amend "should not be denied 'unless there is a *substantial reason* to do so.'" *Jacobsen v. Osborne*, 133 F.3d 315, 318 (5th Cir. 1998) (emphasis added) (quoting *Leffall v. Dall. Indep. Sch. Dist.*, 28 F.3d 521, 524 (5th Cir. 1994)).

Amendment would not be futile because—to the extent necessary under Rules 8 or 9(b)—Plaintiffs could add more detail, if necessary, on the representations and falsity, and on the allegations claimed to be deficient. The balance between Rule 8 and Rule 9(b) is not always perfect on the first try, and Plaintiffs should not be dismissed for want of an opportunity to cure any deficiencies. Plaintiffs could further add, if necessary, other acts by Highland wherein it has sold assets and used the funds to pay off its own creditors, which would buttress the allegations that this is not an isolated set of facts. Plaintiffs would further suggest that upon amendment, Plaintiffs would plead that there is a pattern of violations of the Advisers Act by Highland over the course of the past year which threatens to continue unabated into the future because Highland has clearly decided to shirk fiduciary duties to the investors in its funds.

VI.

CONCLUSION

For the foregoing reasons, the successive 12(b)(6) motion should be denied.

Dated: November 18, 2022

Respectfully submitted,

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**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

In re:	§	Chapter 11
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	Case No. 19-34054-sgj11
	§	
Debtor.	§	
CHARITABLE DAF FUND, L.P. AND CLO	§	
HOLDCO, LTD., DIRECTLY AND DERIVATIVELY	§	
	§	
Plaintiffs,	§	Adversary Proceeding No.
	§	
vs.	§	21-03067-sgj
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	
HIGHLAND HCF ADVISOR, LTD., AND	§	
HIGHLAND CLO FUNDING LTD., NOMINALLY	§	
	§	
Defendants.	§	
	§	

PLAINTIFFS' RESPONSE TO RENEWED MOTION TO DISMISS COMPLAINT

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I.

INTRODUCTION

This action arises from Defendant’s role as an investment advisor to the Plaintiffs under the Investment Advisers Act of 1940 (the “Advisers Act”). Plaintiffs learned—after the fact—that Defendant had failed to disclose to them the true value of securities sold in connection with a settlement that was approved in Defendant’s bankruptcy proceedings and failed to obtain their informed consent to the transaction. Defendant’s actions thus violated unwaivable fiduciary duties arising under the Advisers Act.

First, Highland’s arguments concerning “judicial estoppel” improperly rely upon evidence outside the four corners of Plaintiffs’ pleadings and raise new arguments that were not raised previously. The Court should not consider this extraneous evidence or successive motion practice. Moreover, Highland ignores the pleadings stating that there was evidence then unknown to Plaintiffs—namely, the falsity of the representation of the value of the assets in question—at the time of the HarbourVest 9019 settlement hearing—making any inconsistency in their positions inadvertent. With this inadvertence, judicial estoppel cannot apply.

Second, Highland feigns ignorance of the Advisers Act § 206(4) which imposes direct liability on an advisor to investors—something recognized by the Supreme Court and the Securities and Exchange Commission. Indeed, Highland’s own CEO testified under oath that he and Highland owed direct fiduciary duties to investors. Highland misleads this Court by suggesting there is no private cause of action under the Investment Advisers Act—which is false under Supreme Court precedent. Highland then fails to disclose that the Act gives rise to unwaivable fiduciary duties actionable at common law via claims for fiduciary duty and negligence, and which can also be brought derivatively.

Third, other than judicial estoppel, Highland has no articulated basis for dismissing the contract and tortious interference claims. Highland’s arguments are conclusory and superficial at best—as are its arguments for dismissing the negligence claim. Highland’s reliance on the Plan injunction entered by this Court to vitiate liability for unwaivable fiduciary duties is baseless.

As has been the case all along, Highland is seeking to avoid fair scrutiny of its self-dealing. Highland’s assumption that Plaintiffs have not been harmed ignores Supreme Court precedent holding that injury is not an element of an Advisers Act violation, and ignores the fact that Plaintiffs were denied a prime investment opportunity—of the sort Highland and its subsidiary were advising Plaintiffs about—so that Highland and its current CEO could reap a windfall at Plaintiffs’ expense. Discovery will bear out the allegations which have been pleaded with particularity and in good faith. In the unlikely event the Court considers the Renewed Motion to Dismiss to have any validity, then the Plaintiffs request leave to amend their pleadings to cure any identified deficiencies.

II.

FACTUAL BACKGROUND

Plaintiff Charitable DAF Fund, L.P. (“**DAF**”) is a charitable fund that helps several causes throughout the country, including providing millions of dollars every year to local charities in Dallas and around the country, such as family shelters, education initiatives, veteran’s welfare associations, public works (such as museums, parks and zoos), and education (such as specialty schools in underserved communities). Original Complaint (“**Compl.**”) at ¶ 10.

Since 2012, the DAF was advised by its registered investment advisor, Defendant Highland Capital Management, L.P. (“**Highland**”), and its various subsidiaries about where to invest. (**Compl.** at ¶ 11). This relationship was governed by an investment advisory agreement. (**Compl.**

at ¶ 12). As the DAF's investment advisor, Highland owed the DAF fiduciary obligations, including the duty against self-dealing, the duty to put the DAF's best interest ahead of its own, and the duty to obtain informed consent from the DAF. (Compl. at ¶¶ 56–57, 62).

In 2017, Highland advised the DAF to acquire 143,454,001 shares of Highland CLO Funding, Ltd (“HCLOF”), which the DAF did via a holding entity, Plaintiff CLO Holdco, Ltd. (“CLO Holdco”). (Compl. at ¶ 12).

Shortly thereafter, CLO Holdco entered into a Subscription and Transfer Agreement whereby a series of related entities collectively referred to as “HarbourVest” acquired a 49.98% membership interest in HCLOF (the “HarbourVest Interests”). (Compl. at ¶¶ 13–14). As part of this transaction Holdco retained a 49.02% membership interest. (Compl. at ¶ 13), and Highland took a 0.6% membership interest HCLOF (Compl. at ¶ 25).

HCLOF's portfolio manager is Highland HCF Advisor, Ltd. (“HCFA”), which is subsidiary of Highland and is controlled and operated by Highland. (Compl. at ¶ 24). Both are registered investment advisers (“RIA”). As such, both Highland and HCFA owed fiduciary duties to CLO Holdco as an investor in the HCLOF fund. James P. Seery, Jr., CEO of Highland, testified that Highland owed such fiduciary duties under the Investment Advisers Act of 1940 (the “Advisers Act”) to investors in the funds that Highland manages (App_0008-10, 0014).

The HCLOF parties' rights and obligations as members of HCLOF were governed by the *Members Agreement Relating to the Company* dated November 15, 2017 (“Company Agreement”). (Compl. at ¶¶ 93–94) (App_0018-35). Under the Company Agreement, no member was allowed to sell shares to another member without first providing all other members the opportunity and right to purchase a *pro rata* portion thereof at the same price being offered. (Compl. at ¶ 95; App_0026-27).

In October 2019, Highland filed for Chapter 11 (Compl. at ¶ 15). As part of this bankruptcy, HarbourVest filed its proof of claim against Highland totaling over \$300 million (Compl. at ¶¶ 16, 21-23). Highland denied the validity of these claims. (Compl. at ¶ 17, 26).

In the meantime, Highland continued to control HCLOF through its subsidiary HCFA. (Compl. at ¶¶ 115–124). In September 2020, HCLOF was underperforming, and the value of the investment had diminished—the HarbourVest Interests had diminished \$52 million in value. (Compl. at ¶ 27). On September 30, 2020, Highland utilized interstate wires to transmit information to the HCLOF investors regarding the value of their respective interests. (Compl. at ¶ 121). In the following months, however, the value HCLOF began to improve and Highland did not update investors; by the end of November 2020, the value of HCLOF’s total assets increased to \$72,969,492 (\$36,484,746 allocated to HarbourVest) and by the end of December, HCLOF’s reached \$86,440,024 (\$43,202,724 allocated to HarbourVest’s Interests). (Compl. at ¶¶ 123–124). However, Highland did not transmit these valuations to Plaintiffs (Compl. at ¶ 120).

Around November 2020, Highland and HarbourVest—utilizing the interstate wires—entered into discussions about settling HarbourVest’s claims in the bankruptcy. (Compl. at ¶ 119). Highland and HarbourVest reached a settlement, which Highland requested the bankruptcy court approve on December 23, 2020 (the “9019 Hearing”). (Compl. at ¶ 29; App_0046-64). As part of the settlement, Highland agreed to allow HarbourVest \$45 million in unsecured claims, which were expected to yield about seventy cents on the dollar to HarbourVest (roughly \$31,500,000). (Compl. at ¶ 32; App_46-64). As part of the consideration for the \$45 million in allowed claims, HarbourVest sold its interest in HCLOF to Highland for \$22,500,000 (Compl. at ¶ 33) (the “HarbourVest Settlement”).

Despite Highland’s fiduciary obligations to Plaintiffs, Highland concealed the rising value

of HCLOF and the Harbourview Interests, as well as the value that it was buying the interest for. It diverted the entire opportunity to participate in this windfall transaction to itself in violation of its fiduciary duties (Compl. at ¶ 67).

At the January 14, 2021, Bankruptcy Rule 9019 hearing to approve the settlement, HCF's CEO testified that the value allocated to the HarbourVest Interests was \$22.5 million. (Compl. at ¶¶ 34, 37). The bankruptcy court issued an order approving the HarbourVest Settlement (App_0065-68) (the "9019 Order"). The sale of the HarbourVest Interests transformed Highland from a minority member with a 0.6% interest into the controlling member with a 50.49% interest.

The truth was otherwise. As Plaintiffs learned only after the fact from former Highland employees who were familiar with the valuation, the HarbourVest interest was actually worth \$41,750,000 on a net asset value basis. (Compl. at ¶¶ 34, 37). Highland's failure to inform HCLOF—whom it controlled through HCFA—or Holdco, means Highland reaped a \$20 million-plus windfall by self-dealing and without proper disclosure, resting on affirmative misrepresentations by its CEO, and without obtaining informed consent from its investors.

This lawsuit followed and is now subject to a second successive motion to dismiss in violation of the Rules of Civil Procedure and precedent.

III.

MOTIONS TO STRIKE

A. DEFENDANTS' SUCCESSIVE MOTION TO DISMISS SHOULD BE STRICKEN

This Court presumptively denied Highland's bases for dismissal on the merits by not ruling on them, and during the first appeal, Highland did not ask the district court to rule on the merits or to affirm on that basis as it could have. *See Dandridge v. Williams*, 397 U.S. 471, 475 n.6 (1970). By failing to raise those presumptively denied bases for dismissal on appeal, Highland waived

them, *Legate v. Livingston*, 822 F.3d 207, 211 (5th Cir. 2016), and cannot re-assert them now.

The Fifth Circuit and the district courts within it have repeatedly held that successive Rule 12(b)(6) motions are not allowed under Rule 12(g) and (h), and that a motion such as this one can only be brought as a 12(c) motion after the pleadings have closed. See Fed. R. Civ. P. 12(g) and (h); see, e.g., *Du Bois v. Martin Luther King Jr. Family Clinic, Inc.*, No. 3:17-CV-2668-L, 2018 U.S. Dist. LEXIS 246910, at *5-6 (N.D. Tex. May 29, 2018). Accordingly, this is not a “renewed motion;” it is an improper *successive* motion to dismiss and should be stricken. *DuBois*, 2018 U.S. Dist. LEXIS 246910, at *5-6; *Leyse v. Bank of Am. Nat’l Ass’n*, 804 F.3d 316, 322 n.5 (3d Cir. 2015) (“district courts should enforce [the rule against successive motions] even if their failure to do so is not a ground for reversal”).

B. DEFENDANTS' EXHIBITS SHOULD BE STRICKEN

The district courts in this district have also held that a court should only take judicial notice of facts “sparingly at the pleadings stage.” *Reneker v. Offill*, No. 3:08-cv-1394-D, 2010 U.S. Dist. LEXIS 38526, at *5 (N.D. Tex. Apr. 19, 2010) (Fitzwater, J.) (quoting *Victaulic Co. v. Tieman*, 499 F.3d 227, 236 (3d Cir. 2007)). Courts in the Fifth Circuit have held that, other than legal documents, a court cannot take judicial notice of unpled *facts* unless the facts are undisputed. See *Lovelace v. Software Spectrum*, 78 F.3d 1015, 1018 (5th Cir. 1996). Thus, this Court should strike the **appendix** submitted with the motion as impertinent and improper.

IV.

PLAINTIFFS HAVE STATED CLAIMS FOR RELIEF

Motions to dismiss for failure to state a claim are viewed with disfavor and are seldom granted. See *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498 (5th Cir. 2000). “Under Federal Rule of Civil Procedure 8(a)(2), a pleading must contain ‘a short and plain statement of

the claim showing that the pleader is entitled to relief.” *Ashcroft v. Iqbal*, 556 U.S. 662, 677-678 (2009). This Court must draw all reasonable inferences in favor of the plaintiff. *See Collins*, 224 F.3d at 498. Rule 8 does not demand “‘detailed factual allegations[.]’” *Id.* at 678 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). In ruling upon a Rule 12(b)(6) motion, the Court cannot decide disputed fact issues. The court may grant a motion under Rule 12(b)(6) *only if* it can determine with certainty that the plaintiff cannot prove a set of facts that would allow the relief sought in the complaint. *Scanlan v. Texas A&M Univ.*, 343 F.3d 533, 536 (5th Cir. 2003).

A. JUDICIAL ESTOPPEL SHOULD NOT BE APPLIED TO COUNTS 2 OR 5

The district court on appeal remanded for consideration of whether judicial estoppel applied to Counts 2 or 5 of the Complaint. *Charitable DAF Fund, L.P. v. Highland Capital Mgmt., L.P. (In re Highland Cap. Mgmt., L.P.)*, 643 B.R. 162, 174-75 (N.D. Tex. 2022) (“Remand Order”). Plaintiffs still disagree that there was any judicial admission, but nonetheless address the questions that were remanded.¹

1. Highland’s Reliance on Collateral Evidence is Improper

Highland’s entire argument on judicial estoppel fails for two reasons already addressed: First, it relies on new arguments not raised previously. And second, it relies on evidence outside of the four corners of the Complaint. For instance, the question of inadvertence which the district court remanded for this Court’s consideration is not one that can be resolved on the pleading because it asks *why* Holdco withdrew its objection. That cannot be determined at this early stage, and Highland’s selective document-dump is not competent evidence, not properly admitted, and therefore not proper for this Court to consider at the 12(b)(6) stage.

¹ Plaintiffs adopt and incorporate the arguments made previously to this Court and before the district court on appeal as to why judicial estoppel does not apply, and reserve all rights on appeal. For the purposes of this briefing and for the sake of brevity, Plaintiffs address the issues reserved for remand to this Court.

2. Highland Has Not Shown a Lack of Inadvertence

The Fifth Circuit has addressed “inadvertence” in the bankruptcy context by citing a debtor’s duty to disclose all claims at the beginning of a bankruptcy. *See Superior Crewboats, Inc. v. Primary P & I Underwriters (In re Superior Crewboats, Inc., 374 F.3d 330, 335* (5th Cir. 2004) (“The debtor's failure to satisfy its statutory disclosure duty is ‘inadvertent’ only when, in general, the debtor either lacks knowledge of the undisclosed claims *or* has no motive for their concealment.”) (*italics in original*). Here, no such duty to object to a 9019 settlement exists. Nonetheless, Holdco’s 9019 objection addressed *HarbourVest*’s violations of the Member Agreement. But Count 2 of the Complaint alleges that *Highland* violated the HCLOF Company Agreement by failing to offer the interest to Holdco (and other members) before it transferred the interest to its subsidiary. HoldCo never brought its objection as to Highland or its subsidiary. And Count 5 alleges that Highland HCF Advisors L.P. tortiously interfered with the Company Agreement in its investment advisory role, another claim that was not brought as an objection (and for which no duty to object existed).

a. Holdco Did Not Intentionally Conceal its Breach of Contract or Tortious Interference Claims From the Court and Had No Motive to Do So

There is no evidence in the record that Holdco intentionally concealed its claims from the Court for breach of contract or tortious interference—nor that it had any reason to do so. The opposite is true. The contract claims were disclosed, albeit they were withdrawn without prejudice. There was no motive to conceal the claims to the extent they were known to Holdco at the time. This Court and the district court has already ruled that the withdrawal of those claims did not attach *res judicata* or *collateral estoppel* preclusion. Other courts have found that unsuccessful legal positions taken during a 9019 hearing are not a basis for finding that judicial estoppel applies where those legal positions relate to matters more properly addressed in an adversary proceeding. *See,*

e.g., *Commerce Bank v. Malloy*, No. 13-CV-252, 2013 U.S. Dist. LEXIS 106329, at *15-17 (N.D. Okla. 2013). Therefore, their withdrawal without prejudice did not, and was not expected to, have any preclusive effect making the withdrawal inadvertent as to any alleged inconsistency.

b. New Facts Giving Rise to the Claims Were Not Known to Holdco

The facts giving rise to the lawsuit arose after the 9019 hearing. To wit, the tortious interference claim stems from Highland's concealment and misrepresentation of the net asset value of HCLOF prior to and during the 9019 hearing—the true value of which only became known to Holdco well after this Court's 9019 hearing and 9019 Order (Compl. ¶¶ 36-45, 47-52). Because of the misrepresentation and the self-dealing entailed therein, Holdco is able to state a tortious interference claim based upon inadvertence. And but for the misrepresentation, Holdco would not have withdrawn its objection, and would have made a more robust objection to the settlement or sought a different path. Therefore, judicial estoppel is improper.

B. PLAINTIFFS HAVE PROPERLY PLED CLAIMS FOR BREACH OF FIDUCIARY DUTY

In Texas, the elements of a breach of fiduciary duty are: “(1) a fiduciary relationship between the plaintiff and defendant; (2) the defendant must have breached his fiduciary duty to the plaintiff; and (3) the defendant's breach must result in injury to the plaintiff or benefit to the defendant.” *Cudd Pressure Control, Inc. v. Roles*, 328 F. App'x 961, 964 (5th Cir. 2009) (quoting *Navigant Consulting, Inc. v. Wilkinson*, 508 F.3d 277, 283 (5th Cir. 2007)).

1. Highland and HCFA Owe Fiduciary Duties Under the Advisers Act

“The Investment Advisers Act of 1940 was the last in a series of Acts designed to eliminate certain abuses in the securities industry, abuses which were found to have contributed to the stock market crash of 1929 and the depression of the 1930's.” *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 186 (1963). The Advisers Act thus “establishes ‘federal fiduciary standards’ to

govern the conduct of investment advisers.” *Transamerica Mortg. Advisors, Inc. (TAMA) v. Lewis*, 444 U.S. 11, 17 (1979) (citing *Santa Fe Indus. v. Green*, 430 U.S. 462, 471, n.11 (1977)).

The Advisers Act imposes both a duty of care and a duty of loyalty on investment advisors. See *SEC v. Tambone*, 550 F.3d 106, 146 (1st Cir. 2008) (“[15 U.S.C. § 80b-6] imposes a fiduciary duty on investment advisers to act at all times in the best interest of the fund and its investors.”); *SEC v. Ambassador Advisors, LLC*, 576 F. Supp. 3d 286, 300 (E.D. Pa. 2021) (“The fiduciary duties under § 206(2) also require investment advisers to seek “best execution” for all their clients’ transactions. “Best execution” means obtaining “the most favorable terms reasonably available under the circumstances.”); 17 C.F.R. § 275.204A-1 (describing the required investment adviser code of ethics, and its focus on conflicts of interest).

The Advisers Act was also enacted in part to prevent conflicts of interest, self-dealing and fraud by investment advisors. See *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. at 186–87. A key prohibition is that the advisor cannot engage in cherry picking—selecting the best securities and opportunities in a way that enriches itself. Accord *SEC v. World Tree Fin., L.L.C.*, 43 F.4th 448, 460 (5th Cir. 2022) (“Because cherry-picking involves allocating more profitable trades to certain accounts, an adviser is ‘stealing from one customer to enrich himself’”). See also Investment Advisers Act Release No. 3060, 75 Fed. Reg. 49,234 (Aug. 12, 2010) (“Under the Advisers Act, an advisor is a fiduciary whose duty is to serve the best interests of its clients, which includes an obligation not to subrogate clients’ interests to its own”) (citing Investment Advisers Act Release No. 2106 (Jan. 31, 2003)).²

² The SEC’s interpretive guidance of the Advisers Act is accorded *Chevron* deference. See *SEC v. Zandford*, 535 U.S. 813 (2002). In interpreting § 206 of the Advisers Act, the SEC has recognized that conflicts of interest arise where an advisor seeks to take advantage of an opportunity that it otherwise might offer to its client. See Commission Interpretation Regarding Standard of Conduct for Investment, Release No. IA-5248, Fed. Reg./Vol. 84, No. 134 at 33675-77 (citing Restatement (Third) of Agency, § 8.01 (2006))

Texas courts have also found that advisors owe fiduciary duties of care and loyalty. *W. Res. Life Assurance Co. v. Graben*, 233 S.W.3d 360, 374 (Tex. App.—Fort Worth 2007, no pet.); *Romano v. Merrill Lynch, Pierce, Fenner & Smith*, 834 F.2d 523, 530 (5th Cir. 1987) (holding that advisors owe investors fiduciary duties under Texas law); *Lampkin v. UBS Painewebber, Inc. (In re Enron Corp. Sec., Derivative & “ERISA” Litig.)*, 238 F. Supp. 3d 799, 851 (S.D. Tex. 2017) (under Texas law, an investment advisor and investors are in a formal fiduciary relationship). Texas law provides that a fiduciary relationship is governed by the terms of the agency. *See Hand v. Dean Witter Reynolds, Inc.*, 889 S.W. 2d 483, 492 (Tex. App.—Houston [14th Dist.] 1994, *writ denied*). The Advisers Act provides the scope of, and rules governing, the advisor/advisee agency relationship. *See Laird v. Integrated Res.*, 897 F.2d 826, 834 (5th Cir. 1990).

Here, HCFA is a wholly-owned subsidiary of Highland. Both are registered investment advisors under the Advisers Act of 1940 (Compl. ¶ 56). Highland operates HCFA, which serves as the Portfolio Manager of Highland CLO Funding, Ltd. (“HCLOF”). Highland was a direct advisor to the DAF. Therefore, Highland and HCFA each owed fiduciary duties to the DAF and Holdco respectively.

2. Holdco Has Standing to Bring a Breach of Fiduciary Duty Claim Directly and Derivatively

Highland contends that Holdco, as a mere investor in HCLOF who is not in privity with

(explaining that “the general fiduciary principle, ...also requires that an agent refrain from using the agent's position or the principal's property to benefit the agent or a third party.”)). A necessary but not sufficient measure by the advisor is full and fair disclosure and obtaining the client’s informed consent before the advisor takes such an action. *Id.* at 33676-77. “In order for disclosure to be full and fair, it should be sufficiently specific so that a client is able to understand the material facts or conflicts of interest and make an informed decision whether to provide consent.” *Id.* at 33676. This includes all information about an advisor’s potential gain or advantage—especially hidden ones and ulterior motives. *Id.* at 33677. The failure to make such disclosures and obtain informed consent in a manner that is not disinterested is a breach of the fiduciary duty under the Adviser’s Act. *Id.* at 33677.

Highland or HCFA, lacks standing. This is incorrect as a matter of law.

First, Highland incorrectly states that there is no private right of action under the Advisers Act. This is simply not true. Section 215 recognizes a limited private right of action for equitable relief including disgorgement, wherein one may seek to void the rights of a violator who performs a contract in violation of the Advisers Act. *See* 15 U.S.C. § 215. *TAMA*, 444 U.S. at 19 (“[W]hen Congress declared in § 215 that certain contracts are void, it intended that the customary legal incidents of voidness would follow, including the availability of a suit for rescission or for an injunction against continued operation of the contract, and for restitution.”). Plaintiff has pled disgorgement and is entitled to it under this statute.

Second, the Northern District of Texas decided almost a decade ago that, although the Advisers Act does not itself create a cause of action for damages, state law fiduciary duty claims can be brought for violations of the Advisers Act. *See Douglass v. Beakley*, 900 F. Supp. 2d 736, 751-52, n.16 (N.D. Tex. 2012) (Boyle, J.) (denying motion to dismiss state fiduciary duty claims predicated on breaches of the Advisers Act).³ Therefore, Holdco has standing to bring its claims

³ Highland newly contends that because HCLOF is a Guernsey company, Guernsey fiduciary duty law applies under the internal affairs doctrine to decide whether a fiduciary duty claim by an investor can be brought against an investment advisor. This argument fails. For one thing, it was not raised originally—meaning it was waived under Rule 12(g) and (h). For another, the argument incorrectly supposes—without any support—that the internal affairs doctrine would apply and would select Guernsey law for duties related to HCLOF. The internal affairs doctrine only applies to HCLOF’s *internal* affairs—i.e., the duties of officers and directors towards the company and shareholders. *Accord Alphonse v. Arch Bay Holdings, L.L.C.*, 548 F. App’x 979, 986 (5th Cir. 2013) (noting that internal affairs doctrine does not apply where rights with respect to “third parties external to the corporation are at issue”) (citing *First Nat’l City Bank v. Banco Para El Comercio Exterior De Cuba*, 462 U.S. 611, 621-22 (1983)). The internal affairs doctrine is NOT at issue here as neither Highland nor HCFA is alleged to be an officer or director of HCLOF, nor is their fiduciary duty alleged to arise out of service in such a role. Nor can the internal affairs doctrine circumvent federal securities laws. The Supreme court in *Edgar v. Mite Corp.*, 457 U.S. 624, 645 (1982) held that the internal affairs doctrine was irrelevant where the issue was the violation of the securities laws between a shareholder and a third party who was not an officer or director of the company, and that the internal affairs doctrine could not be used to circumvent federal securities laws. *See id; cf. Anderson v. Abbott*, 321 U.S. 349, 365 (1944) (declining to apply the law of the State of incorporation to determine

for violations of the Advisers Act under applicable state law. *Id.* Other courts are in accord. *See Goldenson v. Steffens*, No. 2:10-cv-00440, 2014 U.S. Dist. LEXIS 201258, at *137 (D. Me. Mar. 7, 2014) *Belmont v. MB Inv. Partners, Inc.*, 708 F.3d 470, 502-06 (3d Cir. 2013); *State ex rel. Udall v. Colonial Penn Ins. Co.*, 812 P.2d 777, 785 (N.M. 1991); *Strougo ex rel. Brazil Fund v. Scudder, Stevens & Clark, Inc.*, 964 F. Supp. 783, 799 (S.D.N.Y. 1997), *rev'd in part on other grounds in Strougo v. Bassini*, 282 F.3d 162 (2d Cir. 2002).

Third, the fiduciary duties under the Advisers Act are not limited to direct advisees. Highland's CEO, James Seery, testified under oath—under *direct examination by Highland's lawyers*—that he and Highland, as registered investment advisors, owed fiduciary duties to the funds they managed, and the *investors* in those funds. (App_0009) (“The goals of the debtor...number one, discharge Highland’s, ... duties to investors in the funds. Those are fiduciary duties under the Investment Advisers Act.”); (App_14) (“the Investment Advisers Act puts a fiduciary duty on Highland Capital to discharge its duty to the **investors**. So, while we have duties to the estate, we also have duties, as I mentioned in my last testimony, **to each of the investors in the funds.**”) (bolding added). Seery’s sworn, uncontradicted testimony is a judicial admission and an undisputed fact that this Court may take judicial notice of at this stage. *See Fed. R. Evid. 201(b)*.

whether a banking corporation complied with the requirements of federal banking laws because “no State may endow its corporate creatures with the power to place themselves above the Congress of the United States and defeat the federal policy concerning national banks which Congress has announced”); *Broyles v. Cantor Fitzgerald & Co.*, No. 10-854, 2014 U.S. Dist. LEXIS 169364 (M.D. La., Dec. 8, 2014) (internal affairs doctrine does not apply to claims of breach of a fiduciary duty against stockbroker). Here, Highland’s and HCFA’s fiduciary duties arise out of their roles as registered investment advisors to the DAF directly and to HCLOF, and so are non-waivable. *See 15 U.S.C. § 80b-6* and § 80b-15(a). Those duties are subject to their Advisory Agreements, neither of which select Guernsey law—actually, they expressly select Texas law. *See* Offering Memo p. 82 (“[HCFA]’s Portfolio Management Agreement is governed by the laws of the State of Texas.”) (APP_0175); DAF/HCMLP Advisory Agmt at ¶ 14(e) (APP_0219) Moreover, the Offering Memorandum (which is incorporated via the Company Agreement § 2.2), states that HCFA is “subject to the provisions of the Investment Advisers Act.” Offering Memo at p. 13 and 59 (APP_0106 and 0152).

Fourth, the Advisers Act § 206 expressly imposes duties owed directly to investors in a fund. See 15 U.S.C. § 80b-6(4). Highland attempts to circumscribe the issue to just “clients”. But Section 206(4) says nothing about clients while §§ 206(1) and (2) expressly limit duties only to “clients”. Accord *SEC v. Tambone*, 550 F.3d 106, 146 (1st Cir. 2008) (“[15 U.S.C. § 80b-6(4)] imposes a fiduciary duty on investment advisors to act at all times in the best interest of the fund and its investors.” (emphasis added)). The Supreme Court and circuit courts long ago recognized the right of investors in pools of funds to bring direct actions against the fund managers for breaches of the Advisers Act. See, e.g., *TAMA*, 444 U.S. at 13; *Abrahamson v. Fleschner*, 568 F.2d 862, 871-74 (2d Cir. 1977) *rev’d in part on other grounds*.

Furthermore, § 206(4) empowered the SEC to enact regulations refining the scope of the duties under § 206(4). Pursuant to its grant of authority, the SEC promulgated 17 C.F.R. § 275.206(4)-8 (“Rule 206(4)-8”) to enforce the fiduciary standards in Section 206(d), making it unlawful for an advisor to a “pooled investment vehicle” to:

- (1) Make any untrue statement of a material fact or to omit to state a material fact necessary to make the statements made, in the light of the circumstances under which they were made, not misleading, **to any investor** or prospective investor in the pooled investment vehicle; or
- (2) Otherwise engage in any act, practice, or course of business that is fraudulent, deceptive, or manipulative **with respect to any investor** or prospective investor in the pooled investment vehicle.

17 C.F.R. § 275.206(4)-8 (bolding added). By its plain terms, Rule 206(4)-8(a) expressly anticipates a lack of direct privity and imposes direct duties on investment advisors to investment funds with respect to the investors in those funds—which includes Holdco.⁴ *SEC v. ABS Manager*,

⁴ Highland does not appear to contest that HCLOF is a “pooled investment vehicle” for the purposes of this regulation. Normally, HCLOF would have to register under the Investment Company Act. The Investment Company Act, 15 U.S.C. § 80a-3(a)(1)(A), (C) states that an investment company is an issuer that “is or holds itself out as being engaged primarily, or proposes to engage primarily, in the business of

LLC, No. 13cv319, 2014 U.S. Dist. LEXIS 80542, at *45 (S.D. Cal. June 11, 2014) (adopting SEC’s position and granting summary judgment as to violations of Rule 206(4)-8 because “section 206(4) and Rule 275.206(4)-8. . . prohibit the same conduct as sections 206(1) and 206(2) but in connection with ‘pooled investment vehicles’”); *SEC v. Markusen*, 143 F. Supp. 3d 877,891 (D. Minn. 2015) (denying motion to dismiss action by investors against manager of fund); *Goldenson*, 2014 U.S. Dist. LEXIS 201258, at *139 (holding that an advisor to a pooled vehicle had general fiduciary duty to investors even as to outside investments made by the advisor).

Fifth, Holdco also pled its claims derivatively (Compl. at Caption and at ¶ 91). Thus, to the extent HCLOF has a breach of fiduciary duty claim (which it also does), because HCLOF is a Guernsey entity, Guernsey law determines derivative standing. Here, Guernsey law recognizes both derivative and double-derivative standing, especially where, as here, the company is controlled by the alleged wrongdoer. *See Jackson v. Dear and Seven Others*, [2013 GLR 167] Guernsey Royal Ct. (Talbot, Lieut, Bailiff) (adopting English company law on derivative actions and finding that double derivative actions are recognized vehicles in Guernsey corporations and customary law); *see also Carlyle Inv. Mgmt. L.L.C. v. Moonmouth Co. S.A.*, No. 7841-VCP, 2015 Del. Ch. LEXIS 237, at *49 (Del. Ch. Sep. 10, 2015) (noting derivative action for Guernsey entity

investing, reinvesting, or trading in securities” or that “is engaged or proposes to engage in the business of investing, reinvesting, owning, holding, or trading in securities, and owns or proposes to acquire investment securities having a value exceeding 40 per centum of the value of such issuer’s total assets[.]” HCLOF Meets this definition. *See, e.g.,* Company Agreement recital B and § 2.2 (APP_0017-18); Offering Memo (APP_0094-97, 0106-107). The exceptions identified in Rule 206(4)-8(2) are for investment companies that do not publicly offer their shares and have fewer than 100 investors. *Markusen*, 143 F.Supp.3d at 891 (holding that investment fund not required to register where it “[has] less than 100 investors and do[es] not publicly offer [its] securities”). HCLOF meets this definition. *See* Offering Memo at i (“There will be no public offer of the Placing Shares”) (APP_0085) and at p. 75 (shareholders list) (APP_0168). Thus, because HCLOF would have to register under the Investment Company Act but for the exceptions to identified in Rule 206(4)-8, *id.* at p. i (“[HCLOF] has not been and will not be registered under the Investment Company Act of 1940”), HCLOF qualifies as a “pooled investment vehicle”.

could proceed). Highland nowhere so much as purports to challenge the derivative standing of Holdco nor cites a single legal authority contravening it.

Therefore, Holdco has standing to bring claims for breach of the Advisers Act fiduciary duties as well as state law fiduciary duty claims.

3. The DAF Has Direct Standing to Bring Fiduciary Duty Claims

The Original Complaint pleads that Highland and the DAF are in a direct advisory relationship by virtue of a contractual arrangement. (Compl. ¶ 58). As the DAF's registered investment advisor, Highland is DAF's fiduciary. *See Douglass v. Beakley*, 900 F. Supp. 2d 736, at 751-52, n.16. The Advisory Agreement further commits Highland to value financial assets "in accordance with the then current valuation policy of the Investment Advisor [Highland], a copy of which will provided to the General Partner upon request." (Compl. ¶ 60). And while Highland contracted for the recognition that it would be acting on behalf of others and could be in conflict with advice given to the DAF, (Advisory Agreement ¶ 12), nowhere did it purport to *waive* the fiduciary duties owed to the DAF not to trade as a principal in a manner that was self-dealing or harmed the DAF. (Compl. ¶ 61). Additionally, Highland was appointed the DAF's attorney-in-fact. (Compl. at ¶ 59). "As the appointment of an attorney-in-fact creates a fiduciary relationship as a matter of law, Texas law imposes special duties on persons acting in that capacity." *Pool v. Johnson*, No. 3:01-CV-1168-L, 2002 U.S. Dist. LEXIS 6613, at *17 (N.D. Tex. Apr. 15, 2002) (citing *Sassen v. Tanglegrove Townhouse Condo. Ass'n*, 877 S.W.2d 489, 492 (Tex. App.—Texarkana 1994, writ denied)). Under Texas law, "[a] fiduciary owes its principal a high duty of good faith, fair dealing, honest performance, and strict accountability." *Id.* (citing *Sassen*, 877 S.W.2d at 492).

Here, Highland cannot to subrogate the DAF's rights to its own, nor self-deal, nor mislead

the DAF as to a competitive purchase. The DAF further has the right to full and fair disclosure by Highland before it usurps an opportunity that it was advising the DAF on. This is especially so because Highland cannot do indirectly what it cannot do directly. 15 U.S.C. § 80b-8(d).

4. Plaintiffs Have Alleged Several Breaches of Fiduciary Duty

Highland breached multiple fiduciary obligations in the process of negotiating and consummating the HarbourVest Settlement. The materiality of misrepresenting the value and the benefit to Highland of the investment is not debatable. *Accord SEC v. Blavin*, 760 F.2d 706, 711 (6th Cir. 1985). And Highland cannot escape liability for this duty by conducting its advisory activities through HCFA. *See* 15 U.S.C. § 80b-8(d).

Highland and HCFA breached the duty of care and the duty of loyalty. The Advisers Act's primary purpose is to eliminate advisors' conflicts of interest and ensure that advisors always act in the best interest of the investor. *See Laird*, 897 F.2d at 839. The Advisers Act also makes clear that the duty of loyalty means putting CLO Holdco's interest first. *See* Securities and Exchange Commission Interpretative Release, *Commission Interpretation Regarding Standard of Conduct for Investment Advisers*, 84 FR 33681 SEC Release No. IA-5248; File No. S7-07-18, 17 CFR Part 276, June 5, 2019 ("SEC Release") at p. 8, 23 (internal citations omitted). Under this duty, the Advisers Act explains that an advisor must have a rational, non-self-interested basis for how it allocates investment opportunities. *Id.* at 27.

Here, the HCLOF Company Agreement makes it clear that the purposes of HCLOF's investors is to acquire profitable CLO and CLO-related securities—which the shares in HCLOF would fall under (App_0020).⁵ The Offering Memorandum specifically incorporated the Advisers

⁵ The Company Agreement states that HCLOG "has been established to provide its investors with exposure to CLO Notes on both a direct basis and indirect basis and senior secured loans on an indirect basis, through the use of the investments described in its investment policy [in the Offering Memo]."

Act as a governing limit on Highland's ability to usurp investment opportunities. Offering Memo at p. 59 (APP_0151 to 0152).

Defendants' reserving for themselves without proper disclosure the entire HarbourVest interest in HCLOF is plainly a violation of fiduciary duty—and a knowing one at that.⁶ The fact that it was alleged to have been done knowingly, if not purposefully, satisfies the scienter requirement. "[A]s other courts have pointed out, cherry picking can satisfy the scienter element because it involves the knowing conduct of picking certain accounts over others." *World Tree Fin.*, 43 F.4th 448, 463 (citing cases).

And to the extent Highland contends that the Company Agreement or any other provision waives its obligations under the Advisers Act, or those of HCFA, those waivers are null and void under 15 U.S.C. § 80b-15(a).⁷

5. Rule 9(b) Does Not Apply to These Fiduciary Duty Claims

For Rule 9(b) to apply, the claim must sound in fraud. See FED. R. CIV. P. 9(b). "Allegations of breach of fiduciary duty are not necessarily fraud allegations." *In re Elec. Data Sys. Corp.* "ERISA" Litig., 305 F. Supp. 2d 658, 672 (E.D. Tex. 2004) (citing *Fink v. Nat'l Sav. & Trust Co.*,

⁶ Highland entered into settlement negotiations in November 2020 with HarbourVest where it first learned of HarbourVest's intent to sell its interests in HCLOF. (Compl. ¶ 119). On December 23, 2020, Highland moved for approval of the HarborVest Settlement. On January 14, 2021, at the Bankruptcy Court for the Northern District of Texas, Highland's CEO declared that the value of HarbourVest's Interest in HCLOF was \$22.5 million (Compl. at ¶ 34). The Bankruptcy Court approved a settlement that permitted Highland to obtain HCLOF's interest for this amount (Compl. at ¶¶ 32-34). In truth, the HarbourVest Interests were worth in excess of \$41,750,000 at that time. (Compl. at ¶ 37). Highland, however, did not disclose the true value of HarbourVest's interests to Plaintiffs. (Compl. at ¶ 75). Furthermore, the value of the trade, the potential upside in the trade, and the nature of the trade were never disclosed to Holdco or the DAF prior to the hearing—indeed, the value and nature was misrepresented to them at the hearing. (Compl. ¶ 76, ¶ 120). Highland converted its 0.6% interest into a 50.58% interest and thereby control of HCLOF.

⁷ Even if this court dismisses the contract claim (Count 2), that would not operate to deprive CLO Holdco or the DAF of the right to have Highland put their interests first as a matter of Advisers Act fiduciary duty. Defendants cannot waive those fiduciary obligations. See 15 U.S.C. § 80b-15(a).

249 U.S. App. D.C. 33, 772 F.2d 951, 959 (C.A.D.C. 1985) (holding that plaintiffs did not plead fraud where the complaint only alleged a breach of fiduciary duty of loyalty or care)). Plaintiffs also allege that Highland breached fiduciary duties by self-dealing when Highland purchased the entire HarbourVest Interests without providing Plaintiffs with the opportunity to participate. (Compl. at ¶ 76–88). These allegations do not require a false statement, nor require Plaintiffs’ reliance, nor damage to Plaintiffs (a benefit to Highland suffices), all of which are elements of fraud. Because fraudulent conduct does not underlie Plaintiffs’ allegations, Rule 9(b) does not apply. *Tigue Inv. Co. v. Chase Bank of Tex. N.A.*, No. 3:03-CV-2490-N, 2004 U.S. Dist. LEXIS 27582, at *7–8 (N.D. Tex. Nov. 15, 2004). “Although fraud and breach of a duty to inform may both involve an omission, the Court does not find that every breach of a fiduciary duty to inform is a scheme to defraud.” *EDS*, 305 F. Supp. 2d at 672.

Thus, Rule 9(b) does not apply here because violations of §§ 206(2) and (4) of the Advisers Act do not require proving or even alleging all the elements of fraud. 15 U.S.C. § 80b-6(4). Negligence is sufficient to establish liability under § 206(2) and (4). *See Capital Gains*, 375 U.S. at 195 (“... Congress, in empowering the courts to enjoin any practice which operates ‘as a fraud or deceit’ upon a client, did not intend to require proof of intent to injure and actual injury to the client.”); *ZPR Inv. Mgmt. v. SEC*, 861 F.3d 1239, 1247 (11th Cir. 2017) (“Sections 206(2) and (4) require no showing of scienter, and a showing of negligence is sufficient.”) (internal citations omitted). Nor is a showing of reliance required. *Id.*

Even if Rule 9(b) did apply, it was met here. Plaintiff alleges the specific disclosures and statements in the Complaint made by Jim Seery under oath—when they were made, who made them, where they were made, and in what context. (Compl. ¶¶ 25-45; 47-51, 53, 55-91). Plaintiffs

further allege why those statements were false and how the falsity caused Plaintiffs injury. *Id.*⁸ *Accord Fund of Funds, Ltd. v. Vesco*, 74-Civ-1980, 1976 U.S. Dist. LEXIS 14183, at *31 (S.D.N.Y. 1976) (“The complaint identifies the alleged fraudulent transactions and how the fraud was accomplished. Defendant’s roles in those events are described and specific actions by defendant, as a participant in allegedly unlawful activity, is delineated.”).

Therefore, Rule 9(b) is not a basis for dismissing the claims herein.

C. PLAINTIFFS PLED CLAIMS FOR BREACH OF CONTRACT AND TORTIOUS INTERFERENCE

Plaintiff CLO Holdco’s breach of contract claim is straightforward. Under the HCLOF Company Agreement, a “Transfer” of the shares of HCLOF is defined to include the “sale” of the shares. Company Agreement, § 6.1 (App_0026). Sections 6.1 and 6.2 of the Agreement purport to allow sales by members of their interests in HCLOF to “affiliates” of members, but not to members themselves, without certain conditions precedent. App_0026-27). One of those conditions is that the other members have to be afforded the right to purchase their pro-rata portion (App_0027).

Highland contends that the “transfer” to its “nominee,” HCMLP Investments, LLC, is a transfer to an “affiliate.” But this is factual gerrymandering and outside the scope of a 12(b)(6). The transfer that is the basis of Plaintiffs’ contract claim is the sale by HarbourVest to Highland. That sale was accomplished through the Settlement Agreement with Highland (App_0046-54). In the Settlement Agreement, Highland paid for the HarbourVest Interests. In return, HarbourVest agreed to release its claims against Highland and transfer the HarbourVest Interests *to Highland*. (App_0047). Highland’s supposed “nominee,” HCMLP Investments, LLC was not a party to this agreement and Highland’s nominee did not pay for those interests. *Id.* Therefore, the Settlement

⁸ Indeed, Seery’s testimony that is averted to specifically stated that Class 8 interests were only going to be paid some seventy cents on the dollar. Yet, according to publicly filed documents, almost 100% of Class 8 interests have been paid. What changed? Nothing.

Agreement constitutes a sale to *Highland*, and the sale violated Section 6.2 of the Company Agreement. The addendum transfer where Highland delegated its right to receive the shares to a nominee is “form over substance” and is bad faith, in violation of the Company Agreement § 20.5’s “good faith” clause.

Defendant argues that Plaintiffs failed to plead actual damages. But Defendant ignores that fact that Plaintiffs plead that the breach of contract denied them the opportunity to obtain a share of the HarbourVest Interests at a \$20+ million discount, which it alleges are damages. (Compl. at ¶¶ 98–100, 102). Lost profits are an available remedy for breach of contract. *Basic Capital Mgmt. v. Dynex Commer., Inc.*, 402 S.W.3d 257, 268 (Tex. App.—Dallas, 2013). “Recovery for loss profits does not require that the loss be susceptible of exact calculation.” *Id.* (quoting *Holt Atherton Industries, Inc. v. Heine*, 835 S.W.2d 80, 84 (Tex. 1992)). Highland claims that Plaintiffs’ damages are too speculative. The case it cites, *Snowden v. Wells Fargo Bank, N.A.*, No. 3:18-cv-1797, 2019 U.S. Dist. LEXIS 23557, at *13–14 (N.D. Tex. Jan. 18, 2019), which is completely inapposite on the facts because there no one had actually lost their use and enjoyment of the home. However, Plaintiffs do plead that it would have paid for the interest with cash. (Compl. ¶ 49-50). Highland’s choice to disbelieve this allegation is not relevant here.

Turning to tortious interference. The elements are “(1) an existing contract subject to interference, (2) a willful and intentional act of interference with the contract, (3) that proximately caused the plaintiff’s injury, and (4) caused actual damages or loss.” *Prudential Ins. Co. of Am. v. Fin. Review Servs., Inc.*, 29 S.W.3d 74, 77 (Tex. 2000).

Because Highland’s entire premise for dismissing Plaintiffs’ tortious interference claim is predicated on the non-existence of an enforceable contract and/or judicial estoppel, Plaintiff’s tortious interference claim likewise survives. Plaintiffs’ tortious interference claim survives for

another reason: the self-dealing and misleading statements by Highland as to the value of HarbourVest, which enabled it to circumvent the contractual duties, and the right of first refusal was a willful interference with Holdco's rights under the Company Agreement. There is no motion suggesting that Holdco did not allege that it suffered an injury due to the failure to be offered the HarbourVest interest and lose control of HCLOF to Highland. Nothing in the record states that Plaintiffs conceded that the HarbourVest sale did not violate the Company Agreement.

D. PLAINTIFFS HAVE PLED A CLAIM FOR NEGLIGENCE

Highland's entire argument for dismissal of the negligence cause of action is incorporating its other arguments. But this is a waiver because it has not articulated any basis for dismissal and has not shown which elements have not been met. First, under long-established Texas law, the elements of a negligence claim are: (a) a legal duty owed by one person to another; (b) breach of that duty; and (c) damages proximately caused by the breach. *See Nabors Drilling, U.S.A., Inc. v. Escoto*, 288 S.W.3d 401, 404 (Tex. 2009). Here, the Motion should be denied because the elements have all been pled. *See* Compl. ¶¶ 103-112. As argued before, the Advisers Act imposes a duty of care and loyalty under § 206(4). Even if Highland's misleading statements were unintentional, and/or its disclosure failures were unintentional, they were doubtlessly in violation of the standard of care, and Highland makes no argument to the contrary.

Highland's attempt to argue that the Plan exculpation precludes this claim is a non-starter. It was raised previously, meaning it is waived under Rule (g) and (h) and therefore should be stricken. Moreover, the duty of care here is a *federally imposed duty* which is *unwaivable* under 15 U.S.C. § 80b-15(a) ("Any condition, stipulation, or provision binding any person to waive compliance with any provision of this subchapter or with any rule, regulation, or order thereunder shall be void."). No case undersigned could find—and no case cited by Highland—makes an

exception for a Chapter 11 debtor to be able to violate the securities laws with impunity.

E. MOTION TO DISMISS RICO CLAIM UNDER RULE 41

Plaintiffs respectfully dismiss the RICO claim under Rule 41(a) to the extent such a claim is revealed to have existed under non-securities bases. Because Highland has conceded that Plaintiffs' claims are actionable under the federal securities laws and the Advisers Act, and has cited same as a basis for dismissing the RICO claim, Highland is precluded and estopped from denying the violations of the Securities Laws and the Advisers Act. As such, to the extent that other, non-securities law violations may give rise to RICO violations, Plaintiffs respectfully reserve the right to bring such a claim but respectfully dismiss their RICO claim at this time.

F. HIGHLAND'S REQUEST FOR FEES FAILS

Defendants' oblique request for fees is baseless. Absent a contract or law shifting the responsibility for fees, a party is expected to bear their own fees in litigation. *See Fisk Elec. Co. v. DQSI, L.L.C.*, 740 F. App'x 399, 401-02 (5th Cir. 2018). This is as true for a successful defendant as it is for a successful plaintiff. *Id.* Here, no contract or law provides for attorneys' fees to even a prevailing defendant. Therefore, no fees may be awarded.

V.

MOTION IN THE ALTERNATIVE FOR LEAVE TO AMEND

Plaintiffs respectfully ask for leave to amend in the alternative to cure any pleading deficiencies that the Court determines exist. A court's discretion to deny leave is severely limited by the bias of Rule 15(a) favoring amendment. *See Dussouy v. Gulf Coast Invest. Corp.*, 660 F.2d 594, 598 (5th Cir. 1981). Leave to amend "should not be denied 'unless there is a *substantial reason* to do so.'" *Jacobsen v. Osborne*, 133 F.3d 315, 318 (5th Cir. 1998) (emphasis added) (quoting *Leffall v. Dall. Indep. Sch. Dist.*, 28 F.3d 521, 524 (5th Cir. 1994)).

Amendment would not be futile because—to the extent necessary under Rules 8 or 9(b)—Plaintiffs could add more detail, if necessary, on the representations and falsity, and on the allegations claimed to be deficient. The balance between Rule 8 and Rule 9(b) is not always perfect on the first try, and Plaintiffs should not be dismissed for want of an opportunity to cure any deficiencies. Plaintiffs could further add, if necessary, other acts by Highland wherein it has sold assets and used the funds to pay off its own creditors, which would buttress the allegations that this is not an isolated set of facts. Plaintiffs would further suggest that upon amendment, Plaintiffs would plead that there is a pattern of violations of the Advisers Act by Highland over the course of the past year which threatens to continue unabated into the future because Highland has clearly decided to shirk fiduciary duties to the investors in its funds.

VI.

CONCLUSION

For the foregoing reasons, the successive 12(b)(6) motion should be denied.

Dated: November 18, 2022

Respectfully submitted,

SBAITI & COMPANY PLLC

/s/ Mazin A. Sbaiti

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Counsel for Plaintiffs

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS**

CHARITABLE DAF FUND, L.P.
and CLO HOLDCO, LTD.,
directly and derivatively,

Plaintiffs,

V.

**HIGHLAND CAPITAL MANAGEMENT,
L.P., HIGHLAND HCF ADVISOR, LTD.,
and HIGHLAND CLO FUNDING, LTD.,
*nominally,***

Defendants.

[illegible]

CAUSE NO. 3:21-cv-00842-B

APPENDIX IN SUPPORT OF PLAINTIFF’S RESPONSE TO
HIGHLAND CAPITAL MANAGEMENT, L.P.’S MOTION TO DISMISS COMPLAINT

Exhibit No.	Description	Bates Range
	Declaration of Mazin A. Sbaiti	APP_0001 - 0002
1	Excerpts from Transcript of Hearing of Application to Employ James P. Seery, Jr. on July 14, 2020	APP_0003 - 0014
2	Highland CLO Funding - Members Agreement Relating to the Company	APP_0015 - 0042
3	HarbourVest Settlement Agreement	APP_0043 - 0061
4	Order Approving Debtor's Settlement with HarbourVest	APP_0062 - 0084
5	HCLOF Offering	APP_0085 - 0206
6	Amended and Restated Investment Advisory Agreement	APP_0207 - 0221

004474

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS**

CHARITABLE DAF FUND, L.P.
and CLO HOLDCO, LTD.,
directly and derivatively,

Plaintiffs,

V.

**HIGHLAND CAPITAL MANAGEMENT,
L.P., HIGHLAND HCF ADVISOR, LTD.,
and HIGHLAND CLO FUNDING, LTD.,
*nominally,***

Defendants.

§ §

CAUSE NO. 3:21-cv-00842-B

DECLARATION OF MAZIN A. SBAITI

1. My name is Mazin A. Sbaiti. I am over twenty-one years old and fully competent in all respects to make this Declaration.

2. I am a partner at Sbaiti & Company PLLC, and am admitted in good standing in this Court. I represent Plaintiffs Charitable DAF Fund, L.P. and CLO Holdco, Ltd. in this matter. The facts stated in this Declaration are based on my personal knowledge and made under penalty of perjury.

3. Exhibit 1 is a true and correct copy of excerpts from a Transcript of the July 14, 2020 Hearing before the Northern District of Texas Bankruptcy Court, in the *In Re Highland Capital Management, LP*, Cause No. 19-34054-sgj11.

4. Exhibit 2 is a true and correct copy of the Highland CLO Funding Members Agreement Relating to the Company, executed on November 15, 2017.

5. Exhibit 3 is a true and correct copy of the HarbourVest Settlement Agreement, entered into between Highland Capital Management and the various Harbourvest entities in the bankruptcy.

6. Exhibit 4 is a true and correct copy of the Order Approving Settlement with Harbourvest under Rule 9019 (the “9019 Order”).

7. Exhibit 5 is a true and correct copy of the HCLOF Offering Memorandum.

Executed on November 18, 2022.

/s/ Mazin A. Sbaiti

Mazin A. Sbaiti

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In Re:) **Case No. 19-34054-sgj11**
)
)
HIGHLAND CAPITAL) Dallas, Texas
MANAGEMENT, L.P.,) July 14, 2020
) 1:30 p.m. Docket
Debtor.)
) APPLICATIONS TO EMPLOY JAMES
) P. SEERY AND DEVELOPMENT
) SPECIALISTS, INC. (774, 775)

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE STACEY G.C. JERNIGAN,
UNITED STATES BANKRUPTCY JUDGE.

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EXHIBIT

1

exhibitster.com

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Seery - Direct

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1 matter as well as financing in distressed matters during that
2 time.

3 In 1999, I went to the business side and I began to manage
4 distressed assets at Lehman Brothers as well as a leverage
5 finance business. That grew into my running the risky finance
6 business as well as the loan business at Lehman globally,
7 which included high-grade loans, high-yield loans, trading and
8 sales of those products, a big part of distressed, all of
9 restructuring, all of asset management, and all of the hedging
10 of the portfolio that we had.

11 From there, I left Lehman with a small group and sold it
12 to Barclay's. I moved on and ran a hedge fund with two former
13 partners of mine who are the founding partners called River
14 Birch Capital. It was a long-short credit fund; mostly
15 credit, though we did structured finance as well, and we also
16 handled some equities.

17 Q Okay. Let's spend a few minutes, as a preview, talking
18 about the Debtor and its business. And let's start with the
19 basics. Is there a way you can summarize the business of the
20 Debtor?

21 A I think, from a high level, the best way to think about
22 the Debtor is that it's a registered investment advisor. As a
23 registered investment advisor, which is really any advisor of
24 third-party money over \$25 million, it has to register with
25 the SEC, and it manages funds in many different ways.

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Seery - Direct

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1 The Debtor manages approximately \$200 million current
2 values -- it was more than that at the start of the case -- of
3 its own assets. It doesn't have to be a registered investment
4 advisor for those assets, but it does manage its own assets,
5 which include directly-owned securities; loans from mostly
6 related entities, but not all; and investments in certain
7 funds which it also manages.

8 In addition, the Debtor manages about roughly \$2 billion
9 in -- \$2 billion in total managed assets, around \$2 billion in
10 CLO assets, and then other entities, which are hedge funds or
11 PE style.

12 In addition, the Debtor provides shared services for
13 approximately \$6 billion of assets. Those are assets that are
14 owned by related entities but not owned by Debtor-owned or
15 managed entities. And those are a combination of back office
16 services, which include timely reporting, asset management,
17 legal and compliance support, trading and research support,
18 but not the actual management of the assets.

19 The Debtors run -- and I think the way to think about it
20 is on a functional basis; at least, that's the way I think
21 about it -- and there's really six areas. There's corporate
22 management; finance, accounting and tax; trading and research;
23 private equity and fund investing; compliance and legal; and
24 then structured equity, which really includes all of the CLO
25 businesses.

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Seery - Direct

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1 The goals of the Debtor generally are what you'd expect
2 out of an asset manager. A little bit different than most
3 because the Debtor does own assets, which is a little
4 different than when money asset managers typically hold assets
5 away from the asset manager. But number one, discharge
6 Highland's, which I'll call Highland (inaudible), LP, duties
7 to investors in the funds. Those are fiduciary duties under
8 the Investment Advisors Act. Each day, you've got to make
9 sure that you do that first and foremost.

10 Number two, create positive MPD in each of the funds that
11 we manage, either through sales, purchases, or hedging.

12 Next, make sure that we report timely finances of our own
13 assets, including in the funds, but also, to the third-party
14 investors. Maximize the value of HCMLP's owned assets. And
15 then operate as efficiently as possible for the lowest cost.

16 That's essentially how the Debtor -- how we think about
17 the Debtor from a functional perspective. It's got about 70
18 employees laid out in those areas that I mentioned, and each
19 of those employees every day usually think about those goals
20 and try to discharge their duties by focusing on those goals.

21 Q Thank you, Mr. Seery. And can you describe for the Court
22 how those 70 or so employees are organized? Is there an
23 internal corporate structure that you're working with?

24 A Yeah. The way -- the way -- I apologize. The way we
25 think about it is, as I said, corporate management, which is

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1 really HR and overseeing the function that it's filling every
2 day, that's been really -- because Mr. Dondero was removed
3 from management. It used to all roll up to him. That's been
4 effectively rolling up to me since February.

5 Finance, accounting, and tax. Each of these businesses
6 every day require certain amounts of liquidity. Each of them
7 have requirements that they have to pay out to investors.
8 Each of them have expenses. And all of them have different
9 kinds of tax either obligations or reporting. Those are
10 managed by Frank Waterhouse as the CFO. (inaudible), sorry.

11 Trading and research. With respect to the assets, they're
12 not -- they're not static assets. Many of them do get traded
13 on a regular basis. A gentleman, Joe Sowin, heads up the
14 trading of the liquid assets. John Povish (phonetic) heads up
15 the research and the trading of the more illiquid assets, but
16 not PE. In addition, we have PE assets that require some
17 management every day, including Board seats. That's a
18 gentleman by the name of Cameron Baynard, and also he will
19 fund investments in that area. J.P. Sevilla is responsible
20 for working with Cameron on those investments and leading that
21 team.

22 Importantly, because of the nature of what the Debtor
23 does, the fiduciary obligations, as well as the
24 responsibilities to each investor and the legal overlay, we
25 have a robust compliance and legal department. That's headed

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1 by Thomas Surgent and Scott Ellington. Scott: more focused
2 on transactional issues with respect to legal. He is actually
3 general counsel. Everything that has do with compliance, the
4 interrelatedness of the funds, trading between funds or
5 positions that are shared across funds, which are many, runs
6 through Thomas Surgent and his team.

7 And finally, structured equity. Sitting on top of the
8 structured finance business that we have, understanding those
9 assets, particularly of two billion-ish assets in CLOs, that's
10 headed by Hunter Covitz.

11 Q Can you describe for the Court your interaction with each
12 of the department heads that you just identified?

13 A Well, depending on the nature of the issue each day, I
14 have at least -- I'd say generally at least weekly contact
15 with most, often daily contact with most. So, for example,
16 when there are trading issues, particularly as the market was
17 extremely volatile with respect to unliquid securities, Joe
18 Sowin and I were on the phone several times a day.

19 Relating to the COVID issues, Brian Collins, who heads the
20 HR group, and I were on the phone several times a day.

21 Relating to structured equity, depending on what's
22 happening with a particular fund or what's happening in loan
23 prices, I speak to Hunter Covitz. And it goes down the line.

24 So it really depends on each of the areas and what's going
25 on in the business, but I try to touch base with each of those

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Seery - Direct

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1 department heads on a regular basis.

2 Frank Waterhouse, of course, is at least weekly. We have
3 a standing call every week to make sure that we're focused on
4 liquidity, which is always a concern in a Chapter 11, and
5 Frank and his team are on that call and prepare weekly
6 materials for us.

7 Q Okay.

8 MR. MORRIS: Your Honor, before I move to the next
9 area of questions, the work of the Board, I just wanted to see
10 if the Court had any questions on the corporate organizational
11 structure, the internal structure of the business, or any of
12 the matters that Mr. Seery touched on?

13 THE COURT: I do not. And I do have in front of me a
14 demonstrative aid that Mr. Annable sent over ahead of time, so
15 I appreciate that as well.

16 MR. MORRIS: Okay. Your Honor, I think Mr. Seery
17 covered much of what's on that document, but if you'd like him
18 to go through that, we're happy to do it.

19 THE COURT: No, that's fine.

20 MR. MORRIS: Okay.

21 BY MR. MORRIS:

22 Q Then let's shift gears a little bit and start talking
23 about the work of the Independent Board itself. The
24 Independent Board was appointed in mid-January; is that right?

25 A Yeah. It was the first -- January 9th, the first week of

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Seery - Direct

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1 January, and we started working that afternoon.

2 Q Okay. Can you describe for the Court what the -- the
3 Board's initial focus? What were you focused on?

4 A Well, if you think about the areas that I just mentioned
5 previously, the Board initially, for lack of a better term,
6 gang-tackled everything. So we tried to make sure that we had
7 a broad base of understanding among the three of us with
8 respect to the business.

9 I, because of my background, had a lot more familiarity
10 with asset management, these type of asset security
11 businesses. But we wanted to make sure that each of us was at
12 least facile with the main areas that we had to understand.
13 First was operations. How does the company run each day?
14 Particularly, how was it going to run without Mr. Dondero?
15 And I went through some of those functional areas and how we
16 thought about those and who head each of those.

17 Next in the -- I don't mean to say it's second, because
18 it's always first, but liquidity. What did the Debtors'
19 liquidity look like? How are we going to manage that
20 liquidity, not just for the near-term, but also for the
21 medium-term, and then even into the slightly longer-term? We
22 had to think about what assets are there, what money those
23 assets might need that we would have to invest in them, and
24 whether there was liquidity in those assets that we can create
25 liquidity in order to fund the Debtors' business.

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Seery - Direct

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1 Personnel, we needed a good opportunity to understand who
2 did what, not just in the senior managers that I mentioned,
3 but deeper into the staff, because we're going to rely on
4 those folks. Particularly worked through with DSI.

5 As I mentioned, the Debtor, unlike a lot of other asset
6 managers, owns a lot of assets. It's a disparate group of
7 assets, but getting a feel and understanding for what those
8 assets were, what the critical issues surrounding those assets
9 are, who managed them day-to-day: We wanted to make sure that
10 each of the directors had a good (inaudible) and understanding
11 of those issues that might arise with respect to those assets,
12 and a good sense of how quickly those issues could, you know,
13 further arise.

14 We also had to get a very good understanding of each of
15 the funds that we manage. As I said, the Investment Advisors
16 Act puts a fiduciary duty on Highland Capital to discharge its
17 duty to the investors. So while we have duties to the estate,
18 we also have duties, as I mentioned in my last testimony, to
19 each of the investors in the funds.

20 Now, some of them are related parties, and those are a
21 little bit easier. Some of them are owned by Highland. But
22 there are third-party investors in these funds who have no
23 relation whatsoever to Highland, and we owe them a fiduciary
24 duty both to manage their assets prudently but also to seek to
25 maximize value. And we wanted to make sure we had a good

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1 understanding of that.

2 Finally, with respect to the shared service arrangements,
3 we needed to get an understanding of that \$6 billion in assets
4 and how our business, HCMLP, worked with those -- those shared
5 service counterparties and exactly who did what for whom.
6 It's very complicated because it had been run much more on a
7 functional basis than on a line basis from each contract. So
8 it's not as if your employees are allocated to NexBank. It's
9 the whole panoply of businesses that we enter into, and
10 providing those services to NexBank, not through a central
11 point but through whatever requests come in from the counter-
12 parties. So we needed a good understanding of what those
13 contracts looked and what those obligations were.

14 A VOICE: John, you're on mute.

15 MR. MORRIS: Thank you.

16 BY MR. MORRIS:

17 Q All of that work was going on in the first weeks of the
18 appointment of the Board?

19 A Yeah, it would not be fair to say we could do that in a
20 couple weeks. So it took far longer than that. But that
21 didn't mean that issues didn't start to arise immediately in
22 February. And so, while we were learning, we were also
23 starting to get a feel for different things that could happen
24 in the company.

25 As in many companies, immediately, one of the first things

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Seery - Direct

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1 you have to deal with is, particularly at the beginning of the
2 year, what does compensation look like; who are the -- what do
3 promotions look like; are you going to be able to hold this
4 team together to service these assets? And yeah, we had that,
5 with an additional wrinkle that Highland's payment structure
6 defers a significant amount of compensation to its employees,
7 and it vests over time, and it has the very typical provision
8 that if you are not there when it vests -- when it is going to
9 be paid, actually, not when it vests. Even if you're vested,
10 if you're not there when it gets paid, you're not entitled to
11 it. And so understanding who was owed what; how the vesting
12 worked; what the compensation structure looked like compared
13 to third parties, was one of the first things we had to do.
14 And Highland has an extremely robust review process. Brian
15 Collins manages it. It's first-rate. It goes through both
16 360 in terms of what other employees think of each other as
17 well as bottoms up, in terms of performance. And then it has
18 a top-down component, which ultimately ran through Mr.
19 Dondero. Since he was effectively removed from that role, the
20 Board had to jump in and get a full understanding with Brian
21 about what the process looked like; how it was going to work;
22 how it compared to other firms; and whether we could go
23 forward with it. And that was one of the motions that was
24 brought early to the Court.

25 A Let's talk a minute about the transactional work that the

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1 yesterday counsel for Mr. Dondero filed a joinder in the
2 Debtors' objection to Acis's claim. So, again, just thinking
3 about this in the context of mediation, I think, with that
4 joinder, they will be a necessary party. So, going back to
5 Mr. Seery's point, this is not just --

6 THE COURT: Oh, absolutely. Mr. Dondero is --

7 MS. PATEL: -- a two-party --

8 THE COURT: -- going to be a required party in
9 mediation. Absolutely. So, --

10 MS. PATEL: Thank you, Your Honor.

11 THE COURT: All right. Well, if there's nothing
12 further, we'll see you on the 21st. And, again, my courtroom
13 deputy may be reaching out before then if we've got things
14 nailed down on mediation.

15 (Proceedings concluded at 4:54 p.m.)

16 --oOo--

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CERTIFICATE

21

22 I certify that the foregoing is a correct transcript to
23 the best of my ability from the electronic sound recording of
24 the proceedings in the above-entitled matter.

25

/s/ Kathy Rehling

07/16/2020

26

27

Kathy Rehling, CETD-444
Certified Electronic Court Transcriber

Date

Between

CLO HOLDCO, LTD.

And

HARBOURVEST DOVER STREET IX INVESTMENT L.P.

And

HARBOURVEST 2017 GLOBAL AIF L.P.

And

HARBOURVEST 2017 GLOBAL FUND L.P.

And

HV INTERNATIONAL VIII SECONDARY L.P.

And

HARBOURVEST SKEW BASE AIF L.P.

And

HIGHLAND CAPITAL MANAGEMENT, L.P.

And

LEE BLACKWELL PARKER, III

And

QUEST IRA, INC., FBO LEE B. PARKER III, ACCT. # 3058311

And

QUEST IRA, INC., FBO HUNTER COVITZ, ACCT. # 1469811

And

QUEST IRA, INC., FBO JON POGLITSCH, ACCT. # 1470612

And

QUEST IRA, INC., FBO NEIL DESAI, ACCT. # 3059211

And

HIGHLAND CLO FUNDING, LTD.

And

HIGHLAND HCF ADVISOR, LTD.

MEMBERS AGREEMENT RELATING TO THE COMPANY



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THIS AGREEMENT is made the 15th day of November 2017

BETWEEN

- (1) **CLO HOLDCO, LTD.** whose registered office address is at Intertrust Corporate Services (Cayman) Limited, 190 Elgin Avenue, George Town, Grand Cayman KY1-9005, Cayman Islands;
- (2) **HARBOURVEST DOVER IX INVESTMENT L.P.** of c/o HarbourVest Partners, LLC, One Financial Center, 44th Floor, Boston, MA 02111, USA
- (3) **HARBOURVEST 2017 GLOBAL AIF L.P.** of c/o HarbourVest Partners, LLC, One Financial Center, 44th Floor, Boston, MA 02111, USA
- (4) **HARBOURVEST 2017 GLOBAL FUND L.P.** of c/o HarbourVest Partners, LLC, One Financial Center, 44th Floor, Boston, MA 02111, USA
- (5) **HV INTERNATIONAL VIII SECONDARY L.P.** of c/o HarbourVest Partners, LLC, One Financial Center, 44th Floor, Boston, MA 02111, USA
- (6) **HARBOURVEST SKEW BASE AIF L.P.** of c/o HarbourVest Partners, LLC, One Financial Center, 44th Floor, Boston, MA 02111, USA
- (7) **HIGHLAND CAPITAL MANAGEMENT, L.P.** of 300 Crescent Court, Suite 700, Dallas, Texas 75201, USA
- (8) **LEE BLACKWELL PARKER, III** of 300 Crescent Court, Suite 700, Dallas, Texas 75201, USA
- (9) **QUEST IRA, INC., FBO LEE B. PARKER III, ACCT. # 3058311** of 17171 Park Row #100, Houston, Texas 77084, USA
- (10) **QUEST IRA, INC., FBO HUNTER COVITZ, ACCT. # 1469811** of 17171 Park Row #100, Houston, Texas 77084, USA
- (11) **QUEST IRA, INC., FBO JON POGLITSCH, ACCT. # 1470612** of 17171 Park Row #100, Houston, Texas 77084, USA
- (12) **QUEST IRA, INC., FBO NEIL DESAI, ACCT. # 3059211** of 17171 Park Row #100, Houston, Texas 77084, USA

(together the "**Members**") and

- (13) **HIGHLAND CLO FUNDING, LTD.**, with registration number 60120 whose registered office is at First Floor, Dorey Court, Admiral Park, St Peter Port, Guernsey GY1 6HJ, Channel Islands (the "**Company**") and
- (14) **HIGHLAND HCF ADVISOR, LTD.**, whose registered address is at Maples Corporate Services Limited, PO Box 309, Ugland House, Grand Cayman, KY1-1104, Cayman Islands (the "**Portfolio Manager**").

WHEREAS:

- (A) The Company is a limited company incorporated under the laws of the Island of Guernsey on 30 March 2015.
- (B) The Company has been established to provide its investors with exposure to CLO Notes on both a direct basis and indirect basis and senior secured loans on an indirect basis, through the use of the investments described in its investment policy as set forth in the Offering Memorandum dated 15 November 2017, the (the "**Offering Memorandum**"), subject to the restrictions set forth therein.

- (C) The Members are the owners of the entire issued capital of the Company.
- (D) The Parties are entering into this Agreement to regulate the relationship between them and the operation and management of the Company.

OPERATIVE PROVISIONS

1. INTERPRETATION

In this Agreement, including the Schedule:

- 1.1 the following words and expressions shall have the following meanings, unless they are inconsistent with the context:

"Adherence Agreement" means the agreement under which a person agrees to be bound by the terms of this Agreement in the form substantially similar as set out in the Schedule;

"Advisers Act" shall mean the U.S. Investment Advisers Act of 1940, as amended from time to time, and the rules and regulations of the U.S. Securities and Exchange Commission promulgated thereunder;

"Affiliate" means, with respect to a person, (i) any other person who, directly or indirectly, is in control of, or controlled by, or is under common control with, such person or (ii) any other person who is a director, officer or employee (a) of such person, (b) of any subsidiary or parent company of such person or (c) of any person described in clause (i) above. For the purposes of this definition, control of a person shall mean the power, direct or indirect, (i) to vote more than 50% of the securities having ordinary voting power for the election of directors of such persons or (ii) to direct or cause the direction of the management and policies of such person whether by contract or otherwise. For purposes of this definition, the management of an account by one person for the benefit of any other person shall not constitute "control" of such other person and no entity shall be deemed an "Affiliate" of the Company solely because the administrator or its Affiliates serve as administrator or share trustee for such entity;

"Agreement" means this agreement together with the Schedule;

"Articles" means the articles of incorporation of the Company as amended from time to time;

"Business" means the business of the Company as described in Recital (B);

"Business Day" means a day (other than a Saturday or Sunday) on which banks are open for ordinary banking business in Guernsey;

"Directors" means the directors of the Company from time to time;

"CLO Holdco" means CLO Holdco, Ltd. (or any permitted successor to the business of CLO Holdco, Ltd. or interest in the Company);

"Code" shall mean the U.S. Internal Revenue Code of 1986, as amended from time to time.

"Directors" means the directors of the Company from time to time;

"Dover IX" means HarbourVest Dover Street IX Investment L.P. (or any permitted successor to the business of HarbourVest Dover Street IX Investment L.P. or any interest in the Company);

"DOL" shall mean the U.S. Department of Labor, or any governmental agency that succeeds to the powers and functions thereof.

"DOL Regulations" shall mean the regulations of the DOL included within 29 C.F.R. section 2510.3-101.

"Dover IX" shall mean HarbourVest Dover Street IX Investment L.P. (or any permitted successor to the business of HarbourVest Dover Street IX Investment L.P. or interest in the Company);

"ERISA" shall mean the U.S. Employee Retirement Income Security Act of 1974, as amended from time to time;

"ERISA Member" shall mean a Member that (a) is a "benefit plan investor" (as such term is defined in the DOL Regulations as modified by section 3(42) of ERISA) subject to the fiduciary responsibility provisions of part 4 of title I of ERISA or is a "plan" (as such term is defined in section 4975(e) of the Code) subject to section 4975 of the Code or (b) is designated as an ERISA Member by the General Partner in writing on or before the date at which such ERISA Member is admitted to the Company;

"HarbourVest Entities" means: Dover IX; HarbourVest 2017 Global AIF L.P.; HarbourVest 2017 Global Fund L.P.; HV International VIII Secondary L.P.; and HarbourVest Skew Base AIF L.P. (or any of their respective permitted successors to their businesses or interests in the Company);

"Highland Principals" means: Highland Capital Management, L.P.; Lee Blackwell Parker, III, Quest IRA, Inc., fbo Lee B. Parker III Acct. # 3058311; Quest IRA, Inc., fbo Hunter Covitz Acct. # 1469811; Quest IRA, Inc., fbo Jon Poglitsch Acct. # 1470612; Quest IRA, Inc., fbo Neil Desai Acct. # 3059211 (or any of their respective permitted successors to their businesses or interests in the Company);

"Law" means the Companies (Guernsey) Law, 2008, as amended;

"Member" means a person whose name is from time to time entered in the register of members of the Company as the holder of shares in the Company;

"Parties" means the parties to this Agreement and any other person who agrees to be bound by the terms of this Agreement under an Adherence Agreement;

"Shares" means ordinary shares in the Company;

"Subsidiary" shall have the meaning ascribed to it in the Law;

"Subscription and Transfer Agreement" means the Subscription and Transfer Agreement, dated as of 15 November 2017, entered into by and among CLO HoldCo, Ltd. and each of the Members and acknowledged and agreed by the Company and the Portfolio Manager.

Any capitalized terms used herein without definition have the meanings specified in the Offering Memorandum.

- 1.2 any reference to the Parties being obliged to procure shall so far as they are able includes, without limitation, procuring by the exercise of votes which they directly or indirectly control at meetings of the Directors or general meetings of the Company;
- 1.3 any reference to a person includes, where appropriate, that person's heirs, personal representatives and successors;
- 1.4 any reference to a person includes any individual, body corporate, corporation, firm, unincorporated association, organisation, trust or partnership;
- 1.5 any reference to time shall be to Guernsey time;
- 1.6 except where the context otherwise requires words denoting the singular include the plural and vice versa and words denoting any one gender include all genders;

- 1.7 unless otherwise stated, a reference to a Clause or a Schedule is a reference to a Clause or a Schedule to this Agreement; and
- 1.8 Clause headings are for ease of reference only and do not affect the construction of any provision.

2. THE BUSINESS OF THE COMPANY

- 2.1 The Parties hereby agree that the objects and purpose of the Company shall be to carry on the Business.
- 2.2 The Parties shall so far as they are able (including without limitation by the exercise of votes which they directly or indirectly control at meetings of the Directors or general meetings of the Company) procure that (i) the Company's principal activities shall be the pursuit of the objects and purposes described in Clause 2.1 conducted in accordance with the provisions hereof and with the Offering Memorandum, the Subscription and Transfer Agreement and Articles of the Company and (ii) the Parties shall not take any action inconsistent with the provisions of the Offering Memorandum, including, without limitation the investment strategy set forth in the "Summary" and the applicable restrictions during and after the Investment Period and the suspension or termination of the Investment Period following a Key Person Event.
- 2.3 The Members shall (so long as they hold shares in the capital of the Company) use all reasonable endeavours to promote and develop the Business of the Company.

3. VOTING RIGHTS

- 3.1 The Parties agree that the following provisions of this Clause 3 shall apply during such period or periods as the Members parties hereto are Members.
- 3.2 The Parties shall procure that the Company shall not take any action at any meeting requiring the sanction of an ordinary or special resolution or by written resolution, in each case of the Directors or of the Members, without the affirmative vote or prior written consent, as applicable, of the Members totalling in the aggregate more than seventy-five percent (75%) of the Company, including, but not limited to, the following actions:
- 3.2.1 any issuance of new shares of the Company or a new class of shares of the Company or payment of any dividend by issuance of new shares of the Company, other than issuances of Shares pursuant to the Offering Memorandum and the Subscription and Transfer Agreement;
- 3.2.2 any alteration or cancellation of any rights of any Shares or of the Share capital of the Company,
- 3.2.3 any conversion or redemption of Shares, except pursuant to Clause 5.5,
- 3.2.4 any payment of commission in consideration for subscribing or agreeing to subscribe for any shares in the Company,
- 3.2.5 the creation of any lien on any Shares, except pursuant to the remedies in Clause 5.3. or
- 3.2.6 the suspension of the calculation of the NAV; other than a temporary suspension of the calculation of the NAV and NAV per Share by the Board of Directors during any period if it determines in good faith that such a suspension is warranted by extraordinary circumstances, including: (i) during any period when any market on which the Company's investments are quoted, traded or dealt in is closed, other than for ordinary holidays and weekends, or during periods in which dealings are restricted or suspended; (ii) during the existence of any state of affairs, including as a result of political, economic, military or monetary events or any circumstances outside the control of the Portfolio Manager or the Company, as a result of which,

in the reasonable opinion of the Portfolio Manager, the determination of the value of the assets of the Company, would not be reasonably practicable or would be seriously prejudicial to the Members taken as a whole; (iii) during any breakdown in the means of communication normally employed in determining the price or value of the Company's assets or liabilities, or of current prices in any market as aforesaid, or when for any other reason the prices or values of any assets or liabilities of the Company cannot reasonably be accurately ascertained within a reasonable time frame; (iv) during any period when the transfer of funds involved in the realization or acquisition of any investments cannot, in the reasonable opinion of the Portfolio Manager, be effected at normal rates of exchange; or (v) automatically upon liquidation of the Company.

4. **ADVISORY BOARD.**

- 4.1 Composition of Advisory Board. The Company shall establish an advisory board (the "**Advisory Board**") composed of two individuals, one of whom shall be a representative of CLO Holdco and one of whom shall be a representative of Dover IX (or, in each case, or any permitted successor to the interest in the Company of such Member). No voting member of the Advisory Board shall be a controlled Affiliate of the Portfolio Manager (including, for the avoidance of doubt, following a permitted transfer of CLO Holdco's interest to an Affiliate of the Portfolio Manager, if applicable), it being understood that for the purposes of this sentence none of CLO Holdco, its wholly-owned subsidiaries nor any of their respective directors or trustees shall be deemed to be a controlled Affiliate of the Portfolio Manager due to their pre-existing non-discretionary advisory relationship with the Portfolio Manager. None of the members of the Advisory Board shall receive any compensation (other than reimbursement for reasonable and documented out-of-pocket expenses) in connection with their position on the Advisory Board. The Company shall bear any fees, costs and expenses related to the Advisory Board.
- 4.2 Meetings of Advisory Board; Written Consents. The Advisory Board shall meet with the Portfolio Manager at such times as requested by the Portfolio Manager from time to time. The quorum for a meeting of the Advisory Board shall be all of its members entitled to vote. All actions taken by the Advisory Board shall be (i) by a unanimous vote of all of the members of the Advisory Board in attendance in a meeting at which a quorum is present and entitled to vote and not abstaining from voting or (ii) by a written consent in lieu of a meeting signed by all of the members of the Advisory Board entitled to consent and not abstaining from consenting. Meetings of the Advisory Board may be held in person, by telephone or by other electronic device.
- 4.3 Functions of Advisory Board. The Advisory Board shall provide (or determine not to provide) any consents or approvals expressly contemplated by this Agreement and the Offering Memorandum to be provided by the Advisory Board and, at the request of the Portfolio Manager in its sole discretion, provide general advice (which, for the avoidance of doubt, shall be non-binding) to the Portfolio Manager or the Company with regard to Company activities and operations and other matters. For the avoidance of doubt, no consent or approval of the Advisory Board shall be required for any action or determination expressly permitted or contemplated hereunder or in the Offering Memorandum and not conditioned on such a consent or approval. The Portfolio Manager shall not act contrary to the advice of the Advisory Board with respect to any action or determination expressly conditioned herein or in the Offering Memorandum on the consent or approval of the Advisory Board. Without limiting the foregoing, the Advisory Board shall be authorized to give any approval or consent required or deemed necessary or advisable under the Advisers Act on behalf of the Company and the Members, including under Section 206(3) of the Advisers Act. The Portfolio Manager may from time to time in its discretion request the Advisory Board to review and ratify certain Company matters. The consent of the Advisory Board shall be required to approve the following actions: (i) any extension of the Investment Period; (ii) any extension of the Term (other than an automatic extension following an extension of the Investment Period that has been approved by the Advisory Board); (iii) any allotment of additional equity securities by the Company; and (iv) any investment in a Related Obligation or any other transaction between the Company or any entity in which the Company holds a direct or indirect interest, on the one hand, and Highland or any of its Affiliates, on the other hand and (v) other matters as set forth in the Offering

Memorandum. Notwithstanding the foregoing or anything to the contrary set forth herein, no transaction that is specifically authorized in the governing documents of the Company shall require approval of the Advisory Board, including, without limitation, sales or securitizations of all or a portion of the Company's loan portfolio into new Qualifying CLOs (i.e. the transfer of warehoused assets into new Qualifying CLOs), investments in CLO Notes issued by CLOs managed by Highland Affiliates, and the NexBank Credit Facility and any Permitted NexBank Credit Facility Amendments, in each case as described in the Offering Memorandum. Any such approval, consent or ratification given by the Advisory Board shall be binding on the Company and the Members. Neither the Advisory Board nor any member thereof shall have the power to bind or act for or on behalf of the Company in any manner, and no shareholder who appoints a member of the Advisory Board shall be deemed to be an Affiliate of the Company or Highland solely by reason of such appointment.

- 4.4 Term of Members of Advisory Board. A member of the Advisory Board shall be deemed removed from the Advisory Board (i) if such member is no longer an officer, director, manager, trustee, employee, consultant or other representative of CLO Holdco or Dover IX, as applicable, or their respective Affiliates and shall be replaced as soon as practicable with a representative of CLO Holdco or Dover IX, or their respective Affiliates, as applicable, or (ii) if the Member represented by such member either becomes a Defaulting Member or such member ceases to be eligible to represent such Member pursuant to Clause 4.1.
- 4.5 No Duties to Other Members. No Advisory Board member who is the representative of any Member shall, to the extent permitted by law, owe a fiduciary duty to the Company or any other Member (other than the duty to act in good faith), and may, to the fullest extent permitted by law, in all instances act in such member's own interest and in the interest of the Member that appointed such member.

5. **DEFAULTING MEMBERS**

- 5.1 In the event any Member defaults in its obligation to pay the full amount of the purchase price of Shares called for settlement under the Subscription and Transfer Agreement on the applicable Settlement Date (such unpaid amount, an "**Outstanding Settlement Amount**"), the Portfolio Manager, on behalf of the Company, shall provide written or telephonic notice of such default to such Member. If such default is not cured within 5 business days after written (or if applicable telephonic or email) notice thereof given by the Portfolio Manager, on behalf of the Company, has been received by such Member, such Outstanding Settlement Amount shall automatically accrue interest on a retroactive basis from the date such Outstanding Settlement Amount was due at 12% (the "**Default Interest Rate**") (which interest, once paid, shall not be applied to the purchase of the unsettled Shares of such Member, but which will upon receipt be distributed pro rata to those Members who have funded any such Outstanding Settlement Amounts pursuant to this Clause 5). No such Shares which have failed to be settled will be issued to any Member until settlement of the full amount of the purchase price has been made. In addition, if such default is not cured within 10 business days after written or telephonic notice thereof given by the Portfolio Manager, on behalf of the Company, has been received by such Member (a "**Defaulting Member**"), the following provisions shall apply:
- 5.2 Whenever the vote or consent of the Defaulting Member would otherwise be required or permitted hereunder or under the Articles, the Defaulting Member shall not be entitled to participate in such vote or consent in respect of his existing shareholding and with respect to any representative of such Defaulting Member on the Advisory Board, and such vote or consent shall be calculated as if such Defaulting Member were not a Member and, as applicable, any representative of such Defaulting Member on the Advisory Board were not a member of the Advisory Board.
- 5.3 The Portfolio Manager, on behalf of the Company, may pursue and enforce all rights and remedies available, including the commencement of legal proceedings against the Defaulting Member to collect the Outstanding Settlement Amounts, together with interest thereon for the account of the Company from the date due at the Default Interest Rate, plus the costs and expenses of collection (including attorneys' fees and expenses).

- 5.4 The Portfolio Manager, on behalf of the Company, may (at the sole cost of the Defaulting Member) borrow funds from any person (other than the Defaulting Member or its Affiliates) to cover such shortfall and/or advance all or a portion of the Defaulting Member's Outstanding Settlement Amount to the Company on behalf of the Defaulting Member, and such advance shall be repaid by the Defaulting Member to the Portfolio Manager, on behalf of the Company, with interest for the account of the Portfolio Manager, on behalf of the Company, on the amount outstanding from time to time commencing on the date of the advance at the Default Interest Rate. To the extent the Portfolio Manager, on behalf of the Company, advances funds to the Company on behalf of a Defaulting Member, all distributions from the Company that would otherwise be made to the Defaulting Member shall be paid to the Portfolio Manager, on behalf of the Company, (with any such amounts being applied first against accrued but unpaid interest and then against principal), until all amounts payable by the Defaulting Member to the Portfolio Manager, on behalf of the Company, under this Clause 5.4 (including interest) have been paid in full.
- 5.5 The Portfolio Manager, on behalf of the Company, may elect, upon notice to the Defaulting Member, to redeem the Defaulting Member's shares in an amount equal to 50% of the outstanding amount existing as of the date of the default at a price of \$0.0001 per Share. Thereupon, the commitment of the Defaulting Member under the Subscription and Transfer Agreement shall be zero, the Defaulting Member shall not be obligated to make any further settlements, the voting capital of such Defaulting Member and of each other Member shall be re-determined as of the date of such default to reflect the new commitment of the Defaulting Member, and the Portfolio Manager shall revise the books and records of the Company to reflect the reduction of the commitment of the Defaulting Member. The Members agree (x) that the damages suffered by the Company as the result of a failure by a Member to settle a commitment to purchase Shares that is required by this Agreement cannot be estimated with reasonable accuracy and (y) that the foregoing provisions of this Clause 5.5 shall act as liquidated damages for the default by the Defaulting Member (which each Member hereby agrees are reasonable).
- 5.6 The Board may offer to the non-Defaulting Members (pro rata in accordance with their respective Commitments) the option of purchasing the Defaulting Member's unsettled Shares on the terms set forth in the applicable Settlement Notice (as defined in the Subscription and Transfer Agreement).
- 5.7 At the election of the Board, distributions of dividends otherwise payable to the Defaulting Member under the Articles shall not be paid to the Defaulting Member, but instead shall be applied against the amount of the Outstanding Settlement Amount (plus interest at the Default Interest Rate and related costs); provided that any amounts so applied shall be deemed to have been distributed to the Defaulting Member under the Articles.
- 5.8 The Portfolio Manager may send an amended or new Settlement Notice to the Members other than the Defaulting Member in an amount equal to the Defaulting Member's Outstanding Settlement Amount and otherwise in accordance with the Subscription and Transfer Agreement.
- 5.9 Each Defaulting Member further appoints the Portfolio Manager as agent and attorney-in-fact for the Defaulting Member and hereby grants to the Portfolio Manager an irrevocable power of attorney to take all actions necessary on its behalf to sell, assign, or transfer the commitment to purchase unsettled Shares of such Defaulting Member pursuant to Clause 5.6 or as necessary on its behalf to effect the other remedies or rights set forth in this Clause 5; provided that the Portfolio Manager shall not bind any Defaulting Member to an indemnification or other similar obligation which guarantees the financial performance of the Company or which exceeds the ability of the Defaulting Member to provide indemnification under applicable law.

6. TRANSFERS OR DISPOSALS OF SHARES

- 6.1 No Member shall sell, pledge, charge, mortgage, assign, assign by way of security, transfer, convey, exchange or otherwise dispose of its Shares or its commitment to settle purchases of Shares under the Subscription and Transfer Agreement (each a "**Transfer**"), other than to an Affiliate of an initial Member party hereto, without the prior written consent of the Portfolio

Manager, which consent shall be in the sole discretion of the Portfolio Manager; provided that no such Transfer shall be made unless in the opinion of counsel reasonably satisfactory to the Portfolio Manager (who may be counsel for the Company, and which requirement for an opinion may be waived, in whole or in part, in the sole discretion of the Portfolio Manager) that:

- 6.1.1 such Transfer would not require registration under the Securities Act or any state securities or "Blue Sky" laws or other laws applicable to the Shares to be assigned or transferred and is conducted in conformance with the restrictions set forth in the Offering Memorandum;
 - 6.1.2 such Transfer would not be reasonably likely to cause the Company to be subject to tax in any jurisdiction other than of its incorporation on a net income basis, not be reasonably likely to cause the Company to become subject to registration as an investment company under the Investment Company Act of 1940, as amended;
 - 6.1.3 such Transfer would not cause the Company to be considered to be an entity whose underlying assets are considered to include "plan assets" by reason of investment by an "employee benefit plan" or "plan" in such entity pursuant to the U.S. Plan Assets Regulations; and
 - 6.1.4 such sale, assignment, disposition or transfer would not cause all or any portion of the assets of the Company to constitute "plan assets" under ERISA or the Code.
- 6.2 Prior to making any Transfer of Shares (other than Transfers to Affiliates of an initial Member or, in the case of CLO Holdco or a Highland Principal, to Highland, its Affiliates or another Highland Principal) a Member must first offer to the other Members a right to purchase the Shares, on a pro rata basis with respect to their current Shares, at the same price (which must be cash) as such Shares are proposed to be purchased by the prospective third party purchaser pursuant to an irrevocable offer letter. The other Members will have 30 days following receipt of the letter to determine whether to purchase their entire pro rata portion of the Shares proposed to be Transferred. If the other Members do not accept the offer, the Member may (subject to complying with the other Transfer restrictions in this Agreement) Transfer the applicable Shares that such Members have not elected to purchase to a third party at a price equal to or greater than the price described in the offer letter, provided that if the Member has not (a) entered into a definitive agreement to effect such sale within 90 days after the expiration of the period that the other Members have to accept the offer in the offer letter or (b) consummated the sale within 120 day after the entry into the definitive agreement to consummate the sale, it must comply with these right of first refusal procedures again. Any Member (other than the Member proposing to Transfer its Shares) may assign its right to purchase its pro rata portion of the Shares to any other Member (subject to complying with the other Transfer restrictions in this Agreement), any initial Member (other than the Member proposing to Transfer its Shares) may assign its right to purchase its pro rata portion of the Shares to an Affiliate (subject to complying with the other Transfer restrictions in this Agreement), and CLO Holdco and the Highland Principals (unless such Member is the Member proposing the Transfer its Shares) may assign its right to purchase its pro rata portion of the Shares to Highland, an Affiliate of Highland or other Highland Principals (subject to complying with the other Transfer restrictions in this Agreement).
- 6.3 No Highland Principal may transfer his or its interests in the Company other than (i) to a trust or other tax or estate planning vehicle or (ii) to the Portfolio Manager, its Affiliates or another Highland Principal upon the termination of such Highland Principal's (or the beneficial owner of such Highland Principal, if applicable) employment by Highland Capital Management, L.P.
- 6.4 Any transferor of any Share shall remain bound by the terms of this Agreement applicable to it prior to such transfer and that nothing in this Agreement shall constitute a waiver of any rights a Party to this Agreement may have by reason of a breach of this Agreement by a transferor prior to transfer. The transferor and/or the transferee shall bear all costs of any Transfer.
- 6.5 The Parties agree not to Transfer their Shares to any person unless such transferee agrees to be bound by the terms of this Agreement.
- 6.6 All Adherence Agreements executed pursuant to this Clause shall be executed by the transferee or allottee and each Party.

7. **CONFIDENTIALITY**

- 7.1 Each Party agrees to keep any information received by it pursuant to this Agreement or relating to the Business as confidential and not (save with the relevant Party's consent or as may be required by Law or the rules of any regulatory authority or any stock exchange) disclose to any person such information.
- 7.2 Notwithstanding the foregoing, the Parties agree that the HarbourVest Entities may disclose to their limited partners and prospective limited partners (including any agents of such limited partners or prospective limited partners), clients and applicable governmental agencies (a) the name and address of the Company, (b) the capital commitment and the remaining capital commitment, (c) the net asset value of such HarbourVest Entity's interest in the Company, (d) the amount of distributions that have been made to such HarbourVest Entity by the Company and the amount of contributions that have been made by such HarbourVest Entity to the Company, (e) such ratios and performance information calculated by such HarbourVest Entity using the information in clauses (a) through (d) above, including the ratio of net asset value plus distributions to contributions (i.e., the "multiple") and such HarbourVest Entity's internal rate of return with respect to its investment in the Company, and (f) tax information with respect to the Company.

8. **DIVIDENDS**

- 8.1 The Company agrees that it shall not, and the Portfolio Manager agrees it shall not cause the Company to, make any dividends except pursuant to the section titled "Summary—Dividend Policy" of the Offering Memorandum.

9. **TERM OF THE COMPANY**

- 9.1 Each Party agrees to cause the winding up and dissolution of the Company after the ten year anniversary of the date hereof (the "**Term**"); provided that the Portfolio Manager, in its reasonable discretion, may postpone dissolution of the Company for up to 180 days in order to facilitate orderly liquidation of the investments; provided, further, that the Term shall be automatically extended for any amount of time for which the Investment Period may be extended.
- 9.2 Notwithstanding the foregoing, the Term may be extended with the consent of the Portfolio Manager and the Advisory Board for up to two successive periods of one year each.

10. **ERISA MATTERS**

- 10.1 The Portfolio Manager, the Company and each Member shall use their reasonable best efforts to conduct the affairs and operations of the Company so as to limit investment in the Company by "benefit plan investors" (within the meaning of the DOL Regulations as modified by section 3(42) of ERISA) to less than the U.S. Plan Threshold. In the event the U.S. Plan Threshold is met or exceeded, the Portfolio Manager, on behalf of the Company, may require any Non-Qualified Holder that is a U.S. Plan Investor to sell or transfer their Shares to a person qualified to own the same that is not a U.S. Plan Investor within 30 days and within such 30 days and to provide the Company with satisfactory evidence of such sale or transfer such that such sale or transfer, together with other sale or transfers pursuant to this Clause, would result in the investment in the Company by "benefit plan investors" (within the meaning of the DOL Regulations as modified by section 3(42) of ERISA) to be less than the U.S. Plan Threshold. Where the conditions above are not satisfied within 30 days after the serving of the notice to transfer, such Non-Qualified Holder will be deemed, upon the expiration of such 30 days, to have forfeited their Shares.

11. **TAX MATTERS**

- 11.1 PFIC. For each fiscal year of the Company, the Company will no later than 120 days after the end of such fiscal year, commencing with the first fiscal year for which the Company is determined to be a PFIC (a "passive foreign investment company"), furnish to each of the

HarbourVest Entities (x) all information necessary to permit such HarbourVest Entity or any of its partners to complete United States Internal Revenue Service Form 8621 with respect to their interests in the Company and (y) a PFIC Annual Information Statement under section 1295(b) of the Code with respect to the Company; provided that if the Company is unable to furnish such final information and Statement within such 120 days, then the Company shall use its reasonable best efforts to furnish estimates of such information and Statement on or before the 120th day after the end of such fiscal year.

- 11.2 CFC. The Company shall furnish to each of the HarbourVest Entities within 120 days after the end of each fiscal year of the Company, a United States Internal Revenue Service Form 5471 for such fiscal year, completed for all information concerning the Company required to be filed by such HarbourVest Entity or any of its partners (i.e., all portions applicable to the relevant category of filer other than page 1 items A-D and page 2 Schedule B), to the extent such Form 5471 is required to be filed by such HarbourVest Entity or any of its partners; provided that if the Company is unable to furnish such final information within such 120 days, then the Company shall use its reasonable best efforts to furnish estimates of such information on or before the 120th day after the end of each fiscal year.
- 11.3 Other Tax Information. The Company shall furnish to each of the HarbourVest Entities (a) within 120 days after the end of each fiscal year of the Company such other information reasonably requested by the HarbourVest Entities that any HarbourVest Entity may require in order for it or any of its partners to comply with its U.S. federal income tax reporting obligations with respect to its interest in the Company; provided that if the Company is unable to furnish such final information within such 120 days, then the Company shall use its reasonable best efforts to furnish estimates of such information on or before the 120th day after the end of such fiscal year and (b) promptly upon request such other information reasonably requested by such HarbourVest Entity in order to withhold tax or to file tax returns and reports or to furnish tax information to any of its partners with respect to the Company.
- 11.4 Withholding and Other Taxes. The Company will use reasonable best efforts to acquire investments that will not result in withholding or other taxes being imposed directly or indirectly on the Company by any jurisdiction with respect to income or distributions from such investments.

12. **AMENDMENTS TO CERTAIN AGREEMENTS**

- 12.1 The Portfolio Manager and the Company shall not amend or terminate, or agree to amend or terminate, the Memorandum or Articles of Incorporation of the Company or that certain Portfolio Management Agreement between the Portfolio Manager and the Company dated as of the date hereof (the "**Management Agreement**") without the consent of the Parties.
- 12.2 The Portfolio Manager agrees that it shall not assign its rights, duties and obligations under the Management Agreement without the consent of the Members totalling in the aggregate more than seventy-five percent (75%) of the Company. Notwithstanding the foregoing, the Portfolio Manager may, without the consent of the Members, assign any of its rights or obligations under the Management Agreement to an Affiliate; provided that such Affiliate (A) has demonstrated ability, whether as an entity or by its personnel, to professionally and competently perform duties similar to those imposed upon the Portfolio Manager pursuant to the Management Agreement, (B) has the legal right and capacity to act as Portfolio Manager thereunder and (C) shall not cause the Company or the pool of collateral to become required to register under the provisions of the Investment Company Act and such action does not cause the company to be subject to tax in any jurisdiction outside of its jurisdiction of incorporation.
- 12.3 The Company agrees that it shall not hire any portfolio manager without the consent of the Parties and such new portfolio manager shall be required to join and abide by this Agreement.

13. **FINANCIAL REPORTS**

- 13.1 The books and records of account of the Company shall be audited as of the end of each fiscal year of the Company by a nationally recognized independent public accounting firm selected by

the Portfolio Manager that is registered with, and subject to regular inspection as of the commencement of the professional engagement period, and as of each calendar year-end, by, the Public Company Accounting Oversight Board in accordance with its rules. During the Term, the Portfolio Manager or the Company shall prepare and mail, deliver by fax, email or other electronic means or otherwise make available a financial report (audited in the case of a report sent as of the end of a fiscal year and unaudited in the case of a report sent as of the end of a quarter) to each Member on or before the 120th day after the end of each fiscal year and the 45th day after the end of each of the first three quarters of each fiscal year, setting forth for such fiscal year or quarter (a) the assets and liabilities of the Company as of the end of such fiscal year or quarter; (b) the net profit or net loss of the Company for such fiscal year or quarter; and (c) such Member's closing capital account balance as of the end of such fiscal year or quarter; provided that if the Portfolio Manager or the Company is unable to furnish final information with respect to any of the above, then the Portfolio Manager or the Company shall use its reasonable best efforts to furnish estimates of such information on or before the 120th day after the end of each fiscal year and the 45th day after the end of the first three quarters of each fiscal year. On or before the 60th day after the end of each fiscal year, the Portfolio Manager or the Company shall provide to each Member an unaudited draft of the financial report for such fiscal year.

- 13.2 After the end of each fiscal year or quarter, the Portfolio Manager or the Company shall cause to be delivered to the Advisory Board a reasonably detailed summary of the expenses incurred by the Company during such period.

14. **TERMINATION AND LIQUIDATION**

- 14.1 Save as provided for in Clause 13.2, this Agreement shall terminate:

- 14.1.1 when one Party holds all the Shares;
- 14.1.2 when a resolution is passed by the Company's Members or creditors, or an order made by a court or other competent body or person instituting a process that shall lead to the Company being wound up and its assets being distributed among the Company's creditors, Members or other contributors; or
- 14.1.3 with the written consent of all the Parties.

- 14.2 The following provisions of this Agreement remain in full force after termination: Clause 1 (Interpretation), Clause 7 (Confidentiality), this Clause, Clause 14 (Whole Agreement), Clause 16 (Assignments), Clause 17 (Variation and Waiver), Clause 18 (Service of Notice), Clause 19 (General) and Clause 21 (Governing Law and Jurisdiction).

- 14.3 Termination of this Agreement shall not affect any rights or liabilities that the Parties may have accrued under it.

- 14.4 Where the Company is to be wound up and its assets distributed, the Parties shall agree a suitable basis for dealing with the interests and assets of the Company and shall endeavour to ensure that:

- 14.4.1 all existing contracts of the Company are performed to the extent that there are sufficient resources;
- 14.4.2 the Company shall not enter into any new contractual obligations;
- 14.4.3 the Company is dissolved and its assets are distributed as soon as practical; and
- 14.4.4 any other proprietary information belonging to or originating from a Party shall be returned to it by the other Parties.

15. WHOLE AGREEMENT

- 15.1 This Agreement, and any documents referred to in it, constitute the whole agreement between the Parties and supersede any arrangements, understanding or previous agreement between them relating to the subject matter they cover.
- 15.2 Each Party acknowledges that in entering into this Agreement, and any documents referred to in it, it does not rely on, and shall have no remedy in respect of, any statement, representation, assurance or warranty of any person other than as expressly set out in this Agreement or those documents.
- 15.3 Nothing in this Clause 14 operates to limit or exclude any liability for fraud.

16. STATUS OF AGREEMENT

- 16.1 Each Party shall, to the extent that it is able to do so, exercise its voting rights and other powers in relation to the Company to procure that the provisions of this Agreement are properly and promptly observed and given full force and effect according to the spirit and intention of the Agreement.
- 16.2 If any provision in the memorandum of incorporation of the Company or the Articles conflicts with any provision of this Agreement, the provisions of this Agreement shall prevail as between the Parties. Each of the Parties shall, to the extent that it is able to do so, exercise its voting rights and other powers in relation to the Company to procure the modification of the memorandum of association of the Company or the Articles (as the case may be) in order to eliminate the conflict, but this Agreement shall not itself constitute a modification of the memorandum of association of the Company or the Articles.

17. ASSIGNMENTS

Save as expressly permitted by this Agreement, no person may assign, or grant any security interest over, any of its rights under this Agreement or any document referred to in it without the prior written consent of the Parties.

18. VARIATION AND WAIVER

- 18.1 A variation of this Agreement shall be in writing and signed by or on behalf of the Parties.
- 18.2 A waiver of any right under this Agreement is only effective if it is in writing and it applies only to the person to which the waiver is addressed and the circumstances for which it is given.
- 18.3 A person that waives a right in relation to one person, or takes or fails to take any action against that person, does not affect its rights against any other person.

19. SERVICE OF NOTICE

- 19.1 Any notice required to be given by any of the Parties may be sent by post or facsimile to the address and facsimile number of the addressee as set out in this Agreement, in either case marked for the attention of the relevant person named below, or to such other address and/or facsimile number and/or marked for the attention of such other person as the addressee may from time to time have notified for the purposes of this Clause.

19.1.1 to the Company:
Address:
First Floor, Dorey Court, Admiral Park
St Peter Port, Guernsey GY1 6HJ
Channel Islands

19.1.2 to CLO Holdco:

Address:
c/o Highland Capital Management, L.P.
300 Crescent Court, Suite 700
Dallas, TX 75201
Attn: General Counsel
Tel: +1 (972) 628-4100
Email: Notices@highlandcapital.com

19.1.3 to any HarbourVest Entity:

Address:
c/o HarbourVest Partners, LLC
One Financial Center, 44th Floor
Boston, MA 02111
USA
Attn: Michael Pugatch
Tel: +1 (617) 348-3712
F
Email: mpugatch@harbourvest.com

19.1.4 to any other Party: by post or hand delivery only to the address specified in the register of members of the Company.

19.2 Communications sent by post shall be deemed to have been received 24 hours after posting. Communications sent by facsimile transmission shall be deemed to have been received at the time the transmission has been received by the addressee **PROVIDED THAT** if the facsimile transmission, where permitted, is received after 5.00pm or on a day which is not a Business Day, it shall be deemed to have been received 11.00am the Business Day following thereafter.

19.3 In proving service by post it shall only be necessary to prove that the notice was contained in an envelope which was duly addressed and posted in accordance with this Clause and in the case of facsimile transmission it shall be necessary to prove that the facsimile was duly transmitted to the correct number.

20. **GENERAL**

20.1 Each of the Parties hereby agree not to enter into or abide by any agreement whether written or oral with any one or more of the other Parties in respect of the voting of Shares or the submission of Member resolutions to any Members for voting by them, or otherwise to direct or influence, or attempt to direct or influence, the day-to-day management of the Company, either directly or indirectly, other than in order to comply with the other terms of this Agreement or the Articles. In this regard, each of the Parties agrees to not to direct or influence or to attempt to direct or influence any of the Directors through any employment relationship that the Directors may have outside of the Company other than in order to comply with the other terms of this Agreement or the Articles. Each of the Parties hereby agree that this provision shall continue to apply to them whether or not they are or remain a Member.

20.2 Unless otherwise provided, all costs in connection with the negotiation, preparation, execution and performance of this Agreement, shall be borne by the Party that incurred the costs.

20.3 The Parties are not in partnership with each other and there is no relationship of principal and agent between them.

20.4 All transactions entered into between any Party and the Company shall be conducted in good faith and on the basis set out or referred to in this Agreement or, if not provided for in this Agreement, as may be agreed by the Parties and, in the absence of such agreement, on an arm's length basis.

20.5 Each Party shall at all times act in good faith towards the other Parties and shall use all reasonable endeavours to ensure that this Agreement is observed.

20.6 Each Party shall promptly execute and deliver all such documents, and do all such things, as the other Parties may from time to time reasonably require for the purpose of giving full effect to the provisions of this Agreement.

20.7 This Agreement may be executed in any number of counterparts, each of which is an original and which together have the same effect as if each Party had signed the same document. This Agreement may not be amended except with the consent of each Party.

21. STATUS OF AGREEMENT

21.1 The Parties shall, when necessary, exercise their powers of voting and any other rights and powers they have to amend, waive or suspend a conflicting provision in the Articles to the extent necessary to permit the Company and its Business to be administered as provided in this Agreement.

21.2 If there is an inconsistency between any of the provisions of this agreement and the provisions of the Articles, the provisions of this agreement shall prevail as between the Parties.

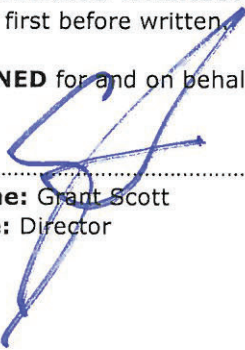
22. GOVERNING LAW AND JURISDICTION

This Agreement shall be governed by and construed in accordance with the laws of the Island of Guernsey and each of the Parties submits to the non-exclusive jurisdiction of the Royal Courts of the Island of Guernsey.

[Signature Page Follows.]

IN WITNESS WHEREOF the Parties hereto have caused this Agreement to be executed the day and year first before written.

SIGNED for and on behalf of **CLO HOLDCO, LTD.**


By:.....

Name: Grant Scott

Title: Director


SIGNED for and on behalf of
HARBOURVEST DOVER STREET IX INVESTMENT L.P.

By: HarbourVest Partners (Europe) Limited,
its Alternative Investment Fund Manager

By: 
Name: Michael J. Pugatch
Title: Authorized Person

SIGNED for and on behalf of
HARBOURVEST 2017 GLOBAL AIF L.P.

By: HarbourVest Partners (Europe) Limited,
its Alternative Investment Fund Manager

By: 
Name: Michael J. Pugatch
Title: Authorized Person

SIGNED for and on behalf of
HARBOURVEST 2017 GLOBAL FUND L.P.

By: HarbourVest 2017 Global Associates L.P.,
its General Partner

By: HarbourVest GP LLC,
its General Partner

By: HarbourVest Partners, LLC,
its Managing Member

By: 
Name: Michael J. Pugatch
Title: Managing Director

SIGNED for and on behalf of
HV INTERNATIONAL VIII SECONDARY L.P.

By: HIPEP VIII Associates L.P.

Its General Partner

By: HarbourVest GP LLC

Its General Partner

By: HarbourVest Partners, LLC

Its Managing Member

By: 

Name: Michael J. Pugatch

Title: Managing Director

SIGNED for and on behalf of
HARBOURVEST SKEW BASE AIF L.P.

By: HarbourVest Partners (Europe) Limited,
its Alternative Investment Fund Manager

By: 

Name: Michael J. Pugatch

Title: Authorized Person


SIGNED



.....
Lee Blackwell Parker, III

SIGNED for and on behalf of
QUEST IRA, INC.
FBO LEE B. PARKER III, ACCT. # 3058311

Read and approved

By: 
Name: *Emmanuel Maciel*
Title: *transactions supervisor*

X 

SIGNED for and on behalf of
QUEST IRA, INC.
FBO HUNTER COVITZ, ACCT. # 1469811

By:
Name:
Title:

SIGNED for and on behalf of
QUEST IRA, INC.
FBO JON POGLITSCH, ACCT. # 1470612

By:
Name:
Title:

SIGNED for and on behalf of
QUEST IRA, INC.
FBO NEIL DESAI, ACCT. # 3059211

By:
Name:
Title:


SIGNATURE PAGE TO MEMBERS' AGREEMENT

004509

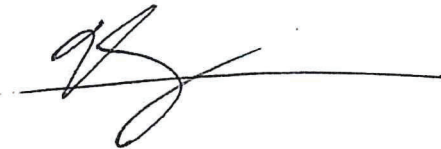
SIGNED for and on behalf of
QUEST IRA, INC.
FBO LEE B. PARKER III, ACCT. # 3058311

By:.....
Name:
Title:

SIGNED for and on behalf of
QUEST IRA, INC.
FBO HUNTER COVITZ, ACCT. # 1469811

By: 
Name: *Emmanuel Mader*
Title: *Transaction Supervisor*

Read & approved



SIGNED for and on behalf of
QUEST IRA, INC.
FBO JON POGLITSCH, ACCT. # 1470612

By:.....
Name:
Title:

SIGNED for and on behalf of
QUEST IRA, INC.
FBO NEIL DESAI, ACCT. # 3059211

By:.....
Name:
Title:

SIGNED for and on behalf of
QUEST IRA, INC.
FBO LEE B. PARKER III, ACCT. # 3058311

By:.....
Name:
Title:

SIGNED for and on behalf of
QUEST IRA, INC.
FBO HUNTER COVITZ, ACCT. # 1469811

By:.....
Name:
Title:

SIGNED for and on behalf of
QUEST IRA, INC.
FBO JON POGLITSCH, ACCT. # 1470612

By: 
Name: Emmanuel Mager
Title: Transactions Supervisor

Read and Approved:

 11/7/17

SIGNED for and on behalf of
QUEST IRA, INC.
FBO NEIL DESAI, ACCT. # 3059211

By:.....
Name:
Title:

SIGNED for and on behalf of
QUEST IRA, INC.
FBO LEE B. PARKER III, ACCT. # 3058311

By:.....
Name:
Title:


SIGNED for and on behalf of
QUEST IRA, INC.
FBO HUNTER COVITZ, ACCT. # 1469811

By:.....
Name:
Title:

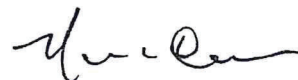
SIGNED for and on behalf of
QUEST IRA, INC.
FBO JON POGLITSCH, ACCT. # 1470612

By:.....
Name:
Title:

SIGNED for and on behalf of
QUEST IRA, INC.
FBO NEIL DESAI, ACCT. # 3059211

By: 
Name: Emmanuel Madet
Title: Transactional Supervisor

Read and approved



SIGNED for and on behalf of
HIGHLAND CAPITAL MANAGEMENT, L.P.

By: Strand Advisors, Inc.,
its General Partner



By:

Name: James Dondero

Title: President

SIGNED for and on behalf of
HIGHLAND HCF ADVISOR, LTD.


By:
Name: James Dondero
Title: President

SIGNED for and on behalf of
HIGHLAND CLO FUNDING, LTD.

By:

Name: William Scott

Title: Director

SCHEDULE

Adherence Agreement

THIS ADHERENCE AGREEMENT is made on [•] 200[•]

BETWEEN:

- (1) [•] of [•] (the "**Covenantor**");
- (2) CLO HOLDCO, LTD. of [] (a "**Member**");
- (3) [•] of [] (a "**Member**");
- (4) [•] of [] (a "**Member**");
- (5) HIGHLAND CLO FUNDING, LTD., with registration number 60120 whose registered office is at First Floor, Dorey Court, Admiral Park, St Peter Port, Guernsey GY1 6HJ, Channel Islands (the "**Company**");
- (6) HIGHLAND HCF ADVISOR, LTD., registered address is at Maples Corporate Services Limited, PO Box 309, Ugland House, Grand Cayman, KY1-1104, Cayman Islands (the "**Portfolio Manager**").

RECITAL

This Agreement is supplemental to the members agreement made on November 15 2017 between the Members, the Portfolio Manager and the Company (the "**Members Agreement**").

IT IS HEREBY AGREED as follows:

1. The Covenantor hereby confirms that he has been supplied with a copy of the Members Agreement and hereby covenants with each of the parties thereto to observe, perform and be bound by all the terms of the Members Agreement as if it were a party thereto.
2. Each of the other parties to the Members Agreement hereby covenants with the Covenantor that the Covenantor shall be entitled to the benefit of the terms of the Members Agreement as if he were a party thereto.
3. This Agreement shall be governed by and construed in accordance with Guernsey law.

IN WITNESS of which this Agreement has been executed by the Covenantor and each of the parties to the Members Agreement on the date shown above.

SETTLEMENT AGREEMENT

This Settlement Agreement (the “Agreement”) is entered into as of December 23, 2020, between Highland Capital Management, L.P. (the “Debtor”), on the one hand, and HarbourVest 2017 Global Fund L.P., HarbourVest 2017 Global AIF L.P., HarbourVest Dover Street IX Investment L.P., HV International VIII Secondary L.P., HarbourVest Skew Base AIF L.P., and HarbourVest Partners L.P. (each, a “HarbourVest Party,” and collectively, “HarbourVest”), on the other hand. Each of the foregoing are sometimes referred to herein collectively as the “Parties” and individually as a “Party.”

RECITALS

WHEREAS, on October 16, 2019 (the “Petition Date”), the Debtor filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code (the “Bankruptcy Case”) in the Bankruptcy Court for the District of Delaware, Case No. 19-12239 (CSS) (the “Delaware Bankruptcy Court”);

WHEREAS, on December 4, 2019, the Delaware Bankruptcy Court entered an order transferring venue of the Debtor’s case to the Bankruptcy Court for the Northern District of Texas, Dallas Division, Case No. 19-34054-sgj (the “Bankruptcy Court”);

WHEREAS, prior to the Petition Date, HarbourVest invested in Highland CLO Funding, Ltd. f/k/a Acis Loan Funding, Ltd. (“HCLOF”) and acquired an a 49.98% ownership interest in HCLOF (the “HarbourVest Interests”);

WHEREAS, the portfolio manager for HCLOF is Highland HCF Advisor, Ltd., a subsidiary of the Debtor;

WHEREAS, on April 8, 2020, HarbourVest filed proofs of claim in the Bankruptcy Case, which are listed on the Debtor’s claims register as claim numbers 143, 147, 149, 150, 153, and 154 (the “HarbourVest Claims”), asserting claims against the Debtor relating to its investment in HCLOF;

WHEREAS, on July 30, 2020, the Debtor filed the *Debtor’s First Omnibus Objection to Certain (a) Duplicate Claims; (b) Overstated Claims; (c) Late-Filed Claims; (d) Satisfied Claims; (e) No Liability Claims; and (f) Insufficient-Documentation Claims* [**Docket No. 906**], in which the Debtor objected to the HarbourVest Claims;

WHEREAS, on September 11, 2020, HarbourVest filed the *HarbourVest Response to Debtor’s First Omnibus Objection to Creation (a) Duplicate Claims; (b) Overstated Claims; (c) Late-Filed Claims; (d) Satisfied Claims; (e) No Liability Claims; and (f) Insufficient-Documentation Claims* [**Docket No. 1057**] (the “HarbourVest Response”);

WHEREAS, on October 18, 2020, HarbourVest filed the *Motion of HarbourVest Pursuant to Rule 3018(a) of the Federal Rules of Bankruptcy Procedure for Temporary Allowance of Claims for Purposes of Voting to Accept or Reject the Plan* [**Docket No. 1207**] (the “3018 Motion” and together with the HarbourVest Response, the “HarbourVest Pleadings”);

WHEREAS, in the HarbourVest Pleadings, HarbourVest asserted, among other things, that the HarbourVest Claims included claims against the Debtor arising from fraudulent inducement, fraudulent concealment, fraudulent misrepresentation, breach of fiduciary duty, breach of securities laws, and misuse of assets and sought damages in excess of \$300,000,000;

WHEREAS, the Debtor disputes the HarbourVest Claims;

WHEREAS, on November 24, 2020, the Debtor filed the *Fifth Amended Plan of Reorganization for Highland Capital Management, L.P.* [**Docket No. 1472**] (as amended, the “Plan”).¹

WHEREAS, the Parties desire to enter into this Agreement which incorporates, formalizes, and finalizes the full and final resolution of the HarbourVest Claims and HarbourVest Pleadings; and

WHEREAS, this Agreement will be presented to the Bankruptcy Court for approval pursuant to **Federal Rule of Bankruptcy Procedure 9019** (“Rule 9019”).

NOW THEREFORE, in consideration of the above recitals, the covenants, conditions, and promises made herein, and other good and valuable consideration, the receipt of which is hereby acknowledged, the Parties agree as follows:

1. Settlement of Claims.

(a) In full and complete satisfaction of the HarbourVest Claims, HarbourVest will receive:

(i) an allowed, nonpriority general unsecured claim in the aggregate amount of \$45,000,000 (the “Allowed GUC Claim”); and

(ii) an allowed subordinated claim in the aggregate amount of \$35,000,000 (the “Allowed Subordinated Claim” and together with the Allowed GUC Claim, the “Allowed Claims”).

(b) On the Effective Date, HarbourVest will transfer all of its rights, title, and interest in the HarbourVest Interests to the Debtor or its nominee pursuant to the terms of the *Transfer Agreement for Ordinary Shares of Highland CLO Funding, Ltd.*, attached hereto as Exhibit A (the “Transfer Agreements”) and the Debtor or its nominee will become a shareholder of HCLOF with respect to the HarbourVest Interests. The terms of the Transfer Agreements are incorporated into this Agreement by reference.

2. Releases.

(a) Upon the Effective Date, and to the maximum extent permitted by law, each HarbourVest Party on behalf of itself and each of its current and former advisors, trustees, directors, officers, managers, members, partners, employees, beneficiaries, shareholders, agents,

¹ All capitalized terms used but not defined herein shall have the meanings given to them in the Plan.

participants, subsidiaries, parents, successors, designees, and assigns hereby forever, finally, fully, unconditionally, and completely releases, relieves, acquits, remises, and exonerates, and covenants never to sue, the Debtor, HCLOF, HCLOF's current and former directors, and the Debtor's current and former advisors, trustees, directors, officers, managers, members, partners, employees, beneficiaries, shareholders, agents, participants, subsidiaries, parents, affiliates, successors, designees, and assigns, except as expressly set forth below (the "Debtor Released Parties"), for and from any and all claims, debts, liabilities, demands, obligations, promises, acts, agreements, liens, losses, costs and expenses (including, without limitation, attorney's fees and related costs), damages, injuries, suits, actions, and causes of action of whatever kind or nature, whether known or unknown, suspected or unsuspected, matured or unmatured, liquidated or unliquidated, contingent or fixed, at law or in equity, statutory or otherwise, including, without limitation, any claims, defenses, and affirmative defenses, whether known or unknown, including, without limitation, those which were or could have been asserted in, in connection with, or with respect to the Bankruptcy Case (collectively, the "HarbourVest Released Claims").

(b) Upon the Effective Date, and to the maximum extent permitted by law, the Debtor hereby forever, finally, fully, unconditionally, and completely releases, relieves, acquits, remises, and exonerates, and covenants never to sue (i) each HarbourVest Party and (ii) each HarbourVest Party's current and former advisors, trustees, directors, officers, managers, members, partners, employees, beneficiaries, shareholders, agents, participants, subsidiaries, parents, affiliates, successors, designees, and assigns (the "HarbourVest Released Parties"), for and from any and all claims, debts, liabilities, demands, obligations, promises, acts, agreements, liens, losses, costs and expenses (including, without limitation, attorney's fees and related costs), damages, injuries, suits, actions, and causes of action of whatever kind or nature, whether known or unknown, suspected or unsuspected, matured or unmatured, liquidated or unliquidated, contingent or fixed, at law or in equity, statutory or otherwise, including, without limitation, any claims, defenses, and affirmative defenses, whether known or unknown, which were or could have been asserted in, in connection with, or with respect to the Bankruptcy Case (collectively, the "Debtor Released Claims"); *provided, however*, that notwithstanding anything herein to the contrary, the release contained in this Section 2(b) will apply to the HarbourVest Released Parties set forth in subsection (b)(ii) only with respect to Debtor Released Claims arising from or relating to HarbourVest's ownership of the HarbourVest Interests.

(c) Notwithstanding anything in this Agreement to the contrary, the releases set forth herein will not apply with respect to (i) the Allowed Claims, (ii) the claims of Charlotte Investor IV, L.P., or (iii) the duties, rights, or obligations of any Party under this Agreement or the Transfer Agreements.

3. **Agreement Subject to Bankruptcy Court Approval.** The effectiveness of this Agreement and the Parties' obligations hereunder are conditioned in all respects on the approval of this Agreement by the Bankruptcy Court. The Parties agree to cooperate and use reasonable efforts to have this Agreement approved by the Bankruptcy Court. The "Effective Date" will be the date of an order entered by the Bankruptcy Court approving this Agreement pursuant to a motion filed under Rule 9019.

4. **Representations and Warranties.** Subject in all respects to Section 3 hereof:

(a) each HarbourVest Party represents and warrants that (i) it has full authority to enter into this Agreement and to release the HarbourVest Released Claims and has not sold, transferred, or assigned any HarbourVest Released Claim to any other person or entity, (ii) no person or entity other than such HarbourVest Party has been, is, or will be authorized to bring, pursue, or enforce any HarbourVest Released Claim on behalf of, for the benefit of, or in the name of (whether directly or derivatively) of such HarbourVest Party; and (iii) HarbourVest owns all of the HCLOF Interests free and clear of any claims or interests; and

(b) the Debtor represents and warrants to HarbourVest that (i) it has full authority to enter into this Agreement and to release the Debtor Released Claims and (ii) no person or entity other than the Debtor has been, is, or will be authorized to bring, pursue, or enforce any Debtor Released Claim on behalf of, for the benefit of, or in the name of (whether directly or derivatively) of the Debtor Party.

5. **Plan Support.**

(a) Each HarbourVest Party hereby agrees that it will (a) vote all HarbourVest Claims held by such HarbourVest Party to accept the Plan, by delivering its duly executed and completed ballots accepting the Plan on a timely basis; and (b) not (i) change, withdraw, or revoke such vote (or cause or direct such vote to be changed withdrawn or revoked); (ii) exercise any right or remedy for the enforcement, collection, or recovery of any claim against the Debtor except in a manner consistent with this Agreement or the Plan, (iii) object to, impede, or take any action other action to interfere with, delay or postpone acceptance or confirmation of the Plan; (iv) directly or indirectly solicit, propose, file, support, participate in the formulation of or vote for, any restructuring, sale of assets (including pursuant to 11 U.S.C. § 363), merger, workout, or plan of reorganization of the Debtor other than the Plan; or (v) otherwise take any action that would in any material respect interfere with, delay, or postpone the consummation of the Plan; provided, however, that such vote may be revoked (and, upon such revocation, deemed void ab initio) by such HarbourVest Party at any time following the termination of this agreement or the occurrence of a Support Termination Event (it being understood that any termination of this agreement shall entitle each HarbourVest Party to change its vote in accordance with section 1127(d) of the Bankruptcy Code), notwithstanding any voting deadline established by the Bankruptcy Court including without limitation the January 5, 2021, 5:00 p.m. (prevailing Central Time) deadline established by the *Order Approving Form of Ballots, Voting Deadline and Solicitation Procedures* [Docket No. 1476].

(b) In full resolution of the 3018 Motion, HarbourVest will have a general unsecured claim for voting purposes only in the amount of \$45,000,000.

(c) The obligations of the HarbourVest Parties under this Section 5 shall automatically terminate upon the occurrence of any of the following (each a “Support Termination Event”): (i) the effective date of the Plan, (ii) the withdrawal of the Plan, (iii) the entry of an order by the Bankruptcy Court (A) converting the Bankruptcy Case to a case under chapter 7 of the Bankruptcy Code or (B) appointing an examiner with expanded powers beyond those set forth in sections 1106(a)(3) and (4) of the Bankruptcy Code or a trustee in Bankruptcy

with a copy (which shall not constitute notice) to:

Pachulski Stang Ziehl & Jones LLP
Attention: Jeffrey Pomerantz, Esq.
10100 Santa Monica Blvd., 13th Floor
Los Angeles, CA 90067
Telephone No.: 310-277-6910
Facsimile No.: 310-201-0760
E-mail: jpomerantz@pszjlaw.com

9. **Advice of Counsel.** Each Party represents that it has: (a) been adequately represented by independent legal counsel of its own choice, throughout all of the negotiations that preceded the execution of this Agreement; (b) executed this Agreement upon the advice of such counsel; (c) read this Agreement, and understands and assents to all the terms and conditions contained herein without any reservations; and (d) had the opportunity to have this Agreement and all the terms and conditions contained herein explained by independent counsel, who has answered any and all questions asked of such counsel, or which could have been asked of such counsel, including, but not limited to, with regard to the meaning and effect of any of the provisions of this Agreement.

10. **Entire Agreement.** This Agreement and the Transfer Agreement contain the entire agreement and understanding concerning the subject matter of this Agreement, and supersede and replace all prior negotiations and agreements, written or oral and executed or unexecuted, concerning such subject matter. Each of the Parties acknowledges that no other Party, nor any agent of or attorney for any such Party, has made any promise, representation or warranty, express or implied, written or oral, not otherwise contained in this Agreement to induce any Party to execute this Agreement. The Parties further acknowledge that they are not executing this Agreement in reliance on any promise, representation or warranty not contained in this Agreement, and that any such reliance would be unreasonable. This Agreement will not be waived or modified except by an agreement in writing signed by each Party or duly authorized representative of each Party.

11. **No Party Deemed Drafter.** The Parties acknowledge that the terms of this Agreement are contractual and are the result of arms'-length negotiations between the Parties and their chosen counsel. Each Party and its counsel cooperated in the drafting and preparation of this Agreement. In any construction to be made of this Agreement, the Agreement will not be construed against any Party.

12. **Future Cooperation.** The Parties agree to cooperate and execute such further documentation as is reasonably necessary to effectuate the intent of this Agreement.

13. **Counterparts.** This Agreement may be executed in counterparts with the same force and effect as if executed in one complete document. Each Party's signature hereto will signify acceptance of, and agreement to, the terms and provisions contained in this Agreement. Photographic, electronic, and facsimile copies of signed counterparts may be used in lieu of the originals of this Agreement for any purpose.

14. **Governing Law; Venue; Attorneys' Fees and Costs.** The Parties agree that this Agreement will be governed by and will be construed according to the laws of the State of Texas without regard to conflict-of-law principles. Each of the Parties hereby submits to the exclusive jurisdiction of the Bankruptcy Court during the pendency of the Bankruptcy Case and thereafter to the exclusive jurisdiction of the state and federal courts located in the Northern District of Texas, Dallas Division, with respect to any disputes arising from or out of this Agreement. In any action to enforce this Agreement, the prevailing party shall be entitled to recover its reasonable and necessary attorneys' fees and costs (including experts).

[Remainder of Page Intentionally Blank]

IT IS HEREBY AGREED.

HIGHLAND CAPITAL MANAGEMENT, L.P.

By: /s/ James P. Seery, Jr.
Name: James P. Seery, Jr.
Its: CEO/CRO

HarbourVest 2017 Global Fund L.P., by HarbourVest 2017 Global Associates L.P., its General Partner, by HarbourVest GP LLC, its General Partner, by HarbourVest Partners, LLC, its Managing Member

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

HarbourVest 2017 Global AIF L.P., by HarbourVest Partners (Ireland) Limited, its Alternative Investment Fund Manager, by HarbourVest Partners L.P., its Duly Appointed Investment Manager, by HarbourVest Partners, LLC, its General Partner

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

HarbourVest Dover Street IX Investment L.P., by HarbourVest Partners L.P., its Duly Appointed Investment Manager, by HarbourVest Partners, LLC, its General Partner

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

HarbourVest Partners L.P., on behalf of funds and accounts under management, by HarbourVest Partners, LLC, its General Partner

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

**HarbourVest Skew Base AIF L.P., by HarbourVest Partners (Ireland) Limited, its
Alternative Investment Fund Manager, by HarbourVest Partners L.P., its Duly Appointed
Investment Manager, by HarbourVest Partners, LLC, its General Partner**

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

**HV International VIII Secondary L.P., by HIPEP VIII Associates L.P., its General
Partner, by HarbourVest GP LLC, its General Partner, by HarbourVest Partners, LLC,
its Managing Member**

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

Exhibit A

TRANSFER AGREEMENT
FOR ORDINARY SHARES OF
HIGHLAND CLO FUNDING, LTD.

This Transfer Agreement, dated as of December [REDACTED], 2020 (this “**Transfer Agreement**”), is entered into by and among Highland CLO Funding, Ltd. (the “**Fund**”), Highland HCF Advisor, Ltd. (the “**Portfolio Manager**”), HCMLP Investments, LLC (the “**Transferee**”) and each of the following: HarbourVest Dover Street IX Investment L.P., HarbourVest 2017 Global AIF L.P., HarbourVest 2017 Global Fund L.P., HV International VIII Secondary L.P., and HarbourVest Skew Base AIF L.P. (collectively, the “**Transferors**”).

WHEREAS, each Transferor is the record, legal and beneficial owner of the number of ordinary shares (“**Shares**”) of the Fund set forth opposite such Transferor’s name on Exhibit A hereto (with respect to each Transferor, the “**Transferred Shares**”).

WHEREAS the Transferee is an affiliate and wholly owned subsidiary of Highland Capital Management, L.P. (“**HCMLP**”) which is one of the initial members of the Fund.

WHEREAS, each Transferor wishes to transfer and assign 100% of its rights, title and interest as a shareholder in the Fund, including the Transferred Shares (the “**Interest**”) on the terms set forth in this Transfer Agreement.

WHEREAS, subject to and in connection with the approval of that certain Settlement Agreement, dated on or about the date hereof, by and among HCMLP and the Transferors (the “**Settlement Agreement**”), the Transferee desires that the Interest be transferred to Transferee and that thereafter the Transferee will become a Shareholder and the Transferors will no longer be Shareholders.

WHEREAS, the Portfolio Manager desires to consent to such transfers and to the admission of Transferee as a Shareholder on the terms set forth herein, and the Transferors and Transferee agree to such terms.

WHEREAS, the Fund desires to amend its records to reflect the foregoing transfers.

NOW, THEREFORE, the parties hereto agree as follows:

1. Transfer of Shares and Advisory Board

- a. Each Transferor hereby transfers and assigns all of its rights, title, and interest in its Interest to the Transferee, and the Transferee wishes to be admitted to the Fund as a Shareholder.
- b. In connection with the transfer of the Interest as contemplated herein, the Transferee shall be granted the right to appoint a representative to the Fund’s advisory board (the “**Advisory Board**”) to replace the Transferors’ appointed representative to the Advisory Board.

- c. Transferee hereby assumes all of Transferor's rights and obligations in respect of the Interest effective as of the Effective Date (as defined below) and acknowledge that thereafter Transferee shall be subject to the applicable terms and provisions of the Members' Agreement dated as of November 15, 2017 (the "**Members' Agreement**"), the Articles of Incorporation adopted November 15, 2017 (the "**Articles**") and the Subscription and transfer Agreement, dated as of November 15, 2017 among each Transferor, the Fund and the Portfolio Manager (the "**Subscription Agreement**", and together with the Members' Agreement and the Articles, the "**Fund Agreements**") with respect to the Interest. Transferee does not assume any liability or responsibility for any obligations or liabilities incurred by any Transferor prior to the Effective Date of the transfer.
 - d. Following the transfer, each Transferor shall have no further rights or obligations to any party hereunder in respect of the Interest under the Fund Agreements.
 - e. This Transfer Agreement, and the parties' obligations hereunder, are conditioned in all respects on the approval by the Bankruptcy Court for the Northern District of Texas, Dallas Division pursuant to **Federal Rule of Bankruptcy Procedure 9019** of (i) this Transfer Agreement and (ii) the Settlement Agreement, and each of the parties agree that no further action shall be required from any party for the transfer of the Interest to be effective except as described herein.
2. Transferee's Representations and Warranties. The Transferee represents and warrants to the Transferors, the Portfolio Manager, and the Fund as follows:
- a. This Transfer Agreement constitutes a valid and binding obligation of the Transferee, enforceable against it in accordance with its terms;
 - b. This Transfer Agreement has been duly and validly executed and delivered by or on behalf of the Transferee and such execution and delivery have been duly authorized by all necessary trust action of the Transferee;
 - c. The Transferee acknowledges receipt of, has read, and is familiar with, the Fund's Offering Memorandum for Placing Shares dated November 15, 2017 (the "**Offering Memorandum**") and the Fund Agreements;
 - d. The Transferee hereby accepts and receives the Interest from the Transferors for investment, and not with a view to the sale or distribution of any part thereof, and the Transferee has no present intention of selling, granting participations in, or otherwise distributing the same, but subject nevertheless to any requirement of law that the disposition of the Transferee's property shall at all times be within such Transferee's control; and
 - e. The Transferee is an "Eligible U.S. Investor" as defined in the Offering Memorandum.

3. Transferors' Representations and Warranties. Each Transferor represents and warrants to the Transferee, the Portfolio Manager, and the Fund as follows:
 - a. This Transfer Agreement constitutes a valid and binding obligation of the Transferor, enforceable against it in accordance with its terms;
 - b. This Transfer Agreement has been duly authorized, and duly and validly executed and delivered by the Transferor and such execution and delivery have been duly authorized by all necessary action of the Transferor; and
 - c. As of the date hereof, the Transferor has good and valid title to the Transferor's Interest, free and clear of any liens, vesting requirements or claims by others.
4. Consent to Transfer. Based in part on the representations and warranties of the Transferors and the Transferee which are included herein, and on the terms contained herein, the Portfolio Manager and the Fund hereby consent to the transfers of the Interest, the admission of the Transferee as a Shareholder and the Transferee's appointment of a representative to the Advisory Board, the Portfolio Manager's execution of this Transfer Agreement constituting its prior written consent to the transfers of the Interest for the purposes of article 18.1 of the Articles and this Transfer Agreement constituting express notice in writing to the Fund of the assignment set out at clause 1(c) above for the purposes of the Law of Property (Miscellaneous Provisions) (Guernsey) Law, 1979 (as amended).
5. Completion: As of the date of approval by the Bankruptcy Court for the Northern District of Texas, Dallas Division pursuant to Federal Rule of Bankruptcy Procedure 9019 of (i) this Transfer Agreement and (ii) the Settlement Agreement (the "**Effective Date**"):
 - a. each Transferor shall deliver or cause to be delivered to the Transferee a transfer instrument relating to the Transferred Shares duly executed and completed by that Transferor in favor of the Transferee; and
 - b. the Transferee shall deliver to the Transferors and the Fund a duly executed and dated Adherence Agreement (as defined in the Members' Agreement).

Prior to the Effective Date the Transferee shall procure that:

 - c. the board of directors of the Fund shall hold a meeting at which the transfer of the Shares to the Transferee shall be approved and registration in the register of members of the Fund shall be effected on the Effective Date.
6. Miscellaneous.
 - a. Each of the parties hereto agree to execute any further instruments and perform any further acts which are or may become reasonably necessary to carry out the intent of this Transfer Agreement or are reasonably requested by the Portfolio Manager, the Fund or a Transferor to complete the transfer of the Interest.

- b. The parties to this Transfer Agreement acknowledge that the terms of this Transfer Agreement are the result of arms'-length negotiations between the parties and their respective counsel. Each party and its counsel cooperated in the drafting and preparation of this Transfer Agreement. In any construction to be made of this Transfer Agreement, the language or drafting of this Transfer Agreement will not be construed against any party.
- c. This Transfer Agreement shall be governed by, and construed and enforced in accordance with, the internal substantive laws of the state of Delaware, without giving effect to conflicts of law principles.
- d. The representations, warranties and covenants of the Transferors and the Transferee shall remain in full force and effect following the transfer of the Interest, and the Fund and the Portfolio Manager thereafter may rely on all such representations, warranties and covenants.
- e. This Transfer Agreement may be executed in multiple counterparts, each of which shall be deemed to be an original, but all of which together shall constitute one and the same instrument. Photographic, electronic, and facsimile copies of signed counterparts may be used in lieu of the originals of this Transfer Agreement for any purpose.
- f. Captions of sections have been added only for convenience and shall not be deemed to be a part of this Transfer Agreement.
- g. This Transfer Agreement is among the parties hereto. No Person that is not a party hereto shall have any right herein as a third-party beneficiary or otherwise except as expressly contemplated hereby.

[Remainder of Page Intentionally Blank]

IN WITNESS WHEREOF, the undersigned have executed this Transfer Agreement as of the date first above written.

TRANSFeree:

HCMLP Investments, LLC

By: Highland Capital Management, L.P.

Its: Member

By: _____

Name: James P. Seery, Jr.

Title: Chief Executive Officer

PORTFOLIO MANAGER:

Highland HCF Advisor, Ltd.

By: _____

Name: James P. Seery, Jr.

Title: President

FUND:

Highland CLO Funding, Ltd.

By: _____

Name:

Title:

[Additional Signatures on Following Page]

IN WITNESS WHEREOF, the undersigned have executed this Transfer Agreement as of the date first above written.

TRANSFERORS:

HarbourVest Dover Street IX Investment L.P.

By: HarbourVest Partners L.P., its Duly Appointed Investment Manager

By: HarbourVest Partners, LLC

By: _____

Name: Michael Pugatch

Title: Managing Director

HV International VIII Secondary L.P.

By: HIPEP VIII Associates L.P.
Its General Partner

By: HarbourVest GP LLC
Its General Partner

By: HarbourVest Partners, LLC
Its Managing Member

By: _____

Name: Michael Pugatch

Title: Managing Director

HarbourVest 2017 Global AIF L.P.

By: HarbourVest Partners (Ireland) Limited
Its Alternative Investment Fund Manager

By: HarbourVest Partners L.P.
Its Duly Appointed Investment Manager

By: HarbourVest Partners, LLC
Its General Partner

By: _____

Name: Michael Pugatch

Title: Managing Director

HarbourVest Skew Base AIF L.P.

By: HarbourVest Partners (Ireland) Limited
Its Alternative Investment Fund Manager

By: HarbourVest Partners L.P.
Its Duly Appointed Investment Manager

By: HarbourVest Partners, LLC
Its General Partner

By: _____

Name: Michael Pugatch

Title: Managing Director

HarbourVest 2017 Global Fund L.P.

By: HarbourVest 2017 Global Associates L.P.
Its General Partner

By: HarbourVest GP LLC
Its General Partner

By: HarbourVest Partners, LLC
Its Managing Member

By: _____

Name: Michael Pugatch

Title: Managing Director

Exhibit A

<u>Transferee Name</u>	<u>Number of Shares</u>	<u>Percentage</u>
HarbourVest Dover Street IX Investment L.P.	[REDACTED]	[REDACTED]
HarbourVest 2017 Global AIF L.P.	[REDACTED]	[REDACTED]
HarbourVest 2017 Global Fund L.P.	[REDACTED]	[REDACTED]
HV International VIII Secondary L.P.	[REDACTED]	[REDACTED]
HarbourVest Skew Base AIF L.P.	[REDACTED]	[REDACTED]



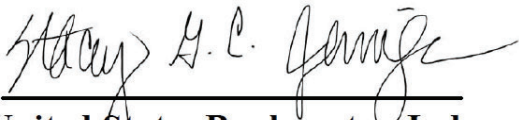
CLERK, U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS

ENTERED

THE DATE OF ENTRY IS ON
THE COURT'S DOCKET

The following constitutes the ruling of the court and has the force and effect therein described.

Signed January 20, 2021


United States Bankruptcy Judge

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

In re:

HIGHLAND CAPITAL MANAGEMENT, L.P.,¹

Debtor.

§ Chapter 11
§
§ Case No. 19-34054-SGJ11
§
§
§

**ORDER APPROVING DEBTOR'S SETTLEMENT
WITH HARBOURVEST (CLAIM NOS. 143, 147, 149, 150, 153, 154) AND
AUTHORIZING ACTIONS CONSISTENT THEREWITH**

This matter having come before the Court on *Debtor's Motion for Entry of an Order Approving Settlement with HarbourVest (Claim Nos. 143, 147, 149, 150, 153, 154) and Authorizing Actions Consistent Therewith* [Docket No. 1625] (the "Motion"),² filed by Highland Capital Management, L.P., the debtor and debtor-in-possession (the "Debtor") in the above-captioned chapter 11 case (the "Bankruptcy Case"); and this Court having considered (a) the

¹ The Debtor's last four digits of its taxpayer identification number are (6725). The headquarters and service address for the above-captioned Debtor is 300 Crescent Court, Suite 700, Dallas, TX 75201.

² Capitalized terms used but not otherwise defined herein have the meanings ascribed to them in the Motion.

Motion; (b) the *Declaration of John A. Morris in Support of the Debtor’s Motion for Entry of an Order Approving Settlement with HarbourVest (Claim Nos. 143, 147, 149, 150, 153, 154) and Authorizing Actions Consistent Therewith* [Docket No. 1631] (the “Morris Declaration”), and the exhibits annexed thereto, including the Settlement Agreement attached as **Exhibit “1”** (the “Settlement Agreement”); (c) the arguments and law cited in the Motion; (d) *James Dondero’s Objection to Debtor’s Motion for Entry of an Order Approving Settlement with HarbourVest* [Docket No. 1697] (the “Dondero Objection”), filed by James Dondero; (e) the *Objection to Debtor’s Motion for Entry of an Order Approving Settlement with HarbourVest (Claim Nos. 143, 147, 149, 150, 153, 154) and Authorizing Actions Consistent Therewith* [Docket No. 1706] (the “Trusts’ Objection”), filed by the Dugaboy Investment Trust (“Dugaboy”) and Get Good Trust (“Get Good,” and together with Dugaboy, the “Trusts”); (f) *CLO Holdco’s Objection to HarbourVest Settlement* [Docket No. 1707] (the “CLOH Objection” and collectively, with the Dondero Objection and the Trusts’ Objection, the “Objections”), filed by CLO Holdco, Ltd.; (g) the *Debtor’s Omnibus Reply in Support of Debtor’s Motion for Entry of an Order Approving Settlement with HarbourVest (Claim Nos. 143, 147, 149, 150, 153, 154), and Authorizing Actions Consistent Therewith* [Docket No. 1731] (the “Debtor’s Reply”), filed by the Debtor; (h) the *HarbourVest Reply in Support of Debtor’s Motion for Entry of an Order Approving Settlement with HarbourVest and Authorizing Actions Consistent Therewith* [Docket No. 1734] (the “HarbourVest Reply”), filed by HarbourVest 2017 Global Fund L.P., HarbourVest 2017 Global AIF L.P., HarbourVest Dover Street IX Investment L.P., HV International VIII Secondary L.P., HarbourVest Skew Base AIF L.P., and HarbourVest Partners L.P. (collectively, “HarbourVest”); (i) the testimonial and documentary evidence admitted into evidence during the hearing held on January 14, 2021 (the “Hearing”), including assessing the credibility of the witnesses; and (j) the

arguments made during the Hearing; and this Court having jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334; and this Court having found that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2); and this Court having found that venue of this proceeding and the Motion in this District is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and this Court having found that the relief requested in the Motion is in the best interests of the Debtor's estate, its creditors, and other parties-in-interest; and this Court having found the Settlement Agreement fair and equitable; and this Court having analyzed, for the reasons stated on the record, (1) the probability of success in litigating the claims subject to the Settlement Agreement, with due consideration for the uncertainty in fact and law, (2) the complexity and likely duration of litigation and any attendant expense, inconvenience, and delay, and (3) all other factors bearing on the wisdom of the compromise, including: (i) the best interests of the creditors, with proper deference to their reasonable views, and (ii) the extent to which the settlement is truly the product of arms-length bargaining, and not of fraud or collusion; and this Court having found that the Debtor's notice of the Motion and opportunity for a hearing on the Motion were appropriate under the circumstances and that no other notice need be provided; and this Court having determined that the legal and factual bases set forth in the Motion establish good cause for the relief granted herein; and upon all of the proceedings had before this Court; and after due deliberation and sufficient cause appearing therefor, it is hereby **ORDERED** that:

1. The Motion is **GRANTED** as set forth herein.
2. All objections to the Motion are overruled.
3. The Settlement Agreement, attached hereto as **Exhibit 1**, is approved in all respects pursuant to Rule 9019 of the Federal Rules of Bankruptcy Procedure.

4. All objections to the proofs of claim subject to the Motion³ are overruled as moot in light of the Court's approval of the Settlement Agreement.

5. The Debtor, HarbourVest, and all other parties are authorized to take any and all actions necessary and desirable to implement the Settlement Agreement without need of further approval or notice.

6. Pursuant to the express terms of the *Members Agreement Relating to the Company*, dated November 15, 2017, HarbourVest is authorized to transfer its interests in HCLOF to a wholly-owned and controlled subsidiary of the Debtor pursuant to the terms of the *Transfer Agreement for Ordinary Shares of Highland CLO Funding, Ltd.* without the need to obtain the consent of any party or to offer such interests first to any other investor in HCLOF.

7. The Court shall retain exclusive jurisdiction to hear and determine all matters arising from the implementation of this Order.

###End of Order###

³ This includes the *Debtor's First Omnibus Objection to Certain (A) Duplicate Claims; (B) Overstated Claims; (C) Late-Filed Claims; (D) Satisfied Claims; (E) No-Liability Claims; and (F) Insufficient-Documentation Claims [Docket No. 906]*.

EXHIBIT 1

004540

SETTLEMENT AGREEMENT

This Settlement Agreement (the “Agreement”) is entered into as of December 23, 2020, between Highland Capital Management, L.P. (the “Debtor”), on the one hand, and HarbourVest 2017 Global Fund L.P., HarbourVest 2017 Global AIF L.P., HarbourVest Dover Street IX Investment L.P., HV International VIII Secondary L.P., HarbourVest Skew Base AIF L.P., and HarbourVest Partners L.P. (each, a “HarbourVest Party,” and collectively, “HarbourVest”), on the other hand. Each of the foregoing are sometimes referred to herein collectively as the “Parties” and individually as a “Party.”

RECITALS

WHEREAS, on October 16, 2019 (the “Petition Date”), the Debtor filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code (the “Bankruptcy Case”) in the Bankruptcy Court for the District of Delaware, Case No. 19-12239 (CSS) (the “Delaware Bankruptcy Court”);

WHEREAS, on December 4, 2019, the Delaware Bankruptcy Court entered an order transferring venue of the Debtor’s case to the Bankruptcy Court for the Northern District of Texas, Dallas Division, Case No. 19-34054-sgj (the “Bankruptcy Court”);

WHEREAS, prior to the Petition Date, HarbourVest invested in Highland CLO Funding, Ltd. f/k/a Acis Loan Funding, Ltd. (“HCLOF”) and acquired an a 49.98% ownership interest in HCLOF (the “HarbourVest Interests”);

WHEREAS, the portfolio manager for HCLOF is Highland HCF Advisor, Ltd., a subsidiary of the Debtor;

WHEREAS, on April 8, 2020, HarbourVest filed proofs of claim in the Bankruptcy Case, which are listed on the Debtor’s claims register as claim numbers 143, 147, 149, 150, 153, and 154 (the “HarbourVest Claims”), asserting claims against the Debtor relating to its investment in HCLOF;

WHEREAS, on July 30, 2020, the Debtor filed the *Debtor’s First Omnibus Objection to Certain (a) Duplicate Claims; (b) Overstated Claims; (c) Late-Filed Claims; (d) Satisfied Claims; (e) No Liability Claims; and (f) Insufficient-Documentation Claims* [**Docket No. 906**], in which the Debtor objected to the HarbourVest Claims;

WHEREAS, on September 11, 2020, HarbourVest filed the *HarbourVest Response to Debtor’s First Omnibus Objection to Creation (a) Duplicate Claims; (b) Overstated Claims; (c) Late-Filed Claims; (d) Satisfied Claims; (e) No Liability Claims; and (f) Insufficient-Documentation Claims* [**Docket No. 1057**] (the “HarbourVest Response”);

WHEREAS, on October 18, 2020, HarbourVest filed the *Motion of HarbourVest Pursuant to Rule 3018(a) of the Federal Rules of Bankruptcy Procedure for Temporary Allowance of Claims for Purposes of Voting to Accept or Reject the Plan* [**Docket No. 1207**] (the “3018 Motion” and together with the HarbourVest Response, the “HarbourVest Pleadings”);

WHEREAS, in the HarbourVest Pleadings, HarbourVest asserted, among other things, that the HarbourVest Claims included claims against the Debtor arising from fraudulent inducement, fraudulent concealment, fraudulent misrepresentation, breach of fiduciary duty, breach of securities laws, and misuse of assets and sought damages in excess of \$300,000,000;

WHEREAS, the Debtor disputes the HarbourVest Claims;

WHEREAS, on November 24, 2020, the Debtor filed the *Fifth Amended Plan of Reorganization for Highland Capital Management, L.P.* [**Docket No. 1472**] (as amended, the “Plan”).¹

WHEREAS, the Parties desire to enter into this Agreement which incorporates, formalizes, and finalizes the full and final resolution of the HarbourVest Claims and HarbourVest Pleadings; and

WHEREAS, this Agreement will be presented to the Bankruptcy Court for approval pursuant to **Federal Rule of Bankruptcy Procedure 9019** (“Rule 9019”).

NOW THEREFORE, in consideration of the above recitals, the covenants, conditions, and promises made herein, and other good and valuable consideration, the receipt of which is hereby acknowledged, the Parties agree as follows:

1. Settlement of Claims.

(a) In full and complete satisfaction of the HarbourVest Claims, HarbourVest will receive:

(i) an allowed, nonpriority general unsecured claim in the aggregate amount of \$45,000,000 (the “Allowed GUC Claim”); and

(ii) an allowed subordinated claim in the aggregate amount of \$35,000,000 (the “Allowed Subordinated Claim” and together with the Allowed GUC Claim, the “Allowed Claims”).

(b) On the Effective Date, HarbourVest will transfer all of its rights, title, and interest in the HarbourVest Interests to the Debtor or its nominee pursuant to the terms of the *Transfer Agreement for Ordinary Shares of Highland CLO Funding, Ltd.*, attached hereto as Exhibit A (the “Transfer Agreements”) and the Debtor or its nominee will become a shareholder of HCLOF with respect to the HarbourVest Interests. The terms of the Transfer Agreements are incorporated into this Agreement by reference.

2. Releases.

(a) Upon the Effective Date, and to the maximum extent permitted by law, each HarbourVest Party on behalf of itself and each of its current and former advisors, trustees, directors, officers, managers, members, partners, employees, beneficiaries, shareholders, agents,

¹ All capitalized terms used but not defined herein shall have the meanings given to them in the Plan.

participants, subsidiaries, parents, successors, designees, and assigns hereby forever, finally, fully, unconditionally, and completely releases, relieves, acquits, remises, and exonerates, and covenants never to sue, the Debtor, HCLOF, HCLOF's current and former directors, and the Debtor's current and former advisors, trustees, directors, officers, managers, members, partners, employees, beneficiaries, shareholders, agents, participants, subsidiaries, parents, affiliates, successors, designees, and assigns, except as expressly set forth below (the "Debtor Released Parties"), for and from any and all claims, debts, liabilities, demands, obligations, promises, acts, agreements, liens, losses, costs and expenses (including, without limitation, attorney's fees and related costs), damages, injuries, suits, actions, and causes of action of whatever kind or nature, whether known or unknown, suspected or unsuspected, matured or unmatured, liquidated or unliquidated, contingent or fixed, at law or in equity, statutory or otherwise, including, without limitation, any claims, defenses, and affirmative defenses, whether known or unknown, including, without limitation, those which were or could have been asserted in, in connection with, or with respect to the Bankruptcy Case (collectively, the "HarbourVest Released Claims").

(b) Upon the Effective Date, and to the maximum extent permitted by law, the Debtor hereby forever, finally, fully, unconditionally, and completely releases, relieves, acquits, remises, and exonerates, and covenants never to sue (i) each HarbourVest Party and (ii) each HarbourVest Party's current and former advisors, trustees, directors, officers, managers, members, partners, employees, beneficiaries, shareholders, agents, participants, subsidiaries, parents, affiliates, successors, designees, and assigns (the "HarbourVest Released Parties"), for and from any and all claims, debts, liabilities, demands, obligations, promises, acts, agreements, liens, losses, costs and expenses (including, without limitation, attorney's fees and related costs), damages, injuries, suits, actions, and causes of action of whatever kind or nature, whether known or unknown, suspected or unsuspected, matured or unmatured, liquidated or unliquidated, contingent or fixed, at law or in equity, statutory or otherwise, including, without limitation, any claims, defenses, and affirmative defenses, whether known or unknown, which were or could have been asserted in, in connection with, or with respect to the Bankruptcy Case (collectively, the "Debtor Released Claims"); *provided, however*, that notwithstanding anything herein to the contrary, the release contained in this Section 2(b) will apply to the HarbourVest Released Parties set forth in subsection (b)(ii) only with respect to Debtor Released Claims arising from or relating to HarbourVest's ownership of the HarbourVest Interests.

(c) Notwithstanding anything in this Agreement to the contrary, the releases set forth herein will not apply with respect to (i) the Allowed Claims, (ii) the claims of Charlotte Investor IV, L.P., or (iii) the duties, rights, or obligations of any Party under this Agreement or the Transfer Agreements.

3. **Agreement Subject to Bankruptcy Court Approval.** The effectiveness of this Agreement and the Parties' obligations hereunder are conditioned in all respects on the approval of this Agreement by the Bankruptcy Court. The Parties agree to cooperate and use reasonable efforts to have this Agreement approved by the Bankruptcy Court. The "Effective Date" will be the date of an order entered by the Bankruptcy Court approving this Agreement pursuant to a motion filed under Rule 9019.

4. **Representations and Warranties.** Subject in all respects to Section 3 hereof:

(a) each HarbourVest Party represents and warrants that (i) it has full authority to enter into this Agreement and to release the HarbourVest Released Claims and has not sold, transferred, or assigned any HarbourVest Released Claim to any other person or entity, (ii) no person or entity other than such HarbourVest Party has been, is, or will be authorized to bring, pursue, or enforce any HarbourVest Released Claim on behalf of, for the benefit of, or in the name of (whether directly or derivatively) of such HarbourVest Party; and (iii) HarbourVest owns all of the HCLOF Interests free and clear of any claims or interests; and

(b) the Debtor represents and warrants to HarbourVest that (i) it has full authority to enter into this Agreement and to release the Debtor Released Claims and (ii) no person or entity other than the Debtor has been, is, or will be authorized to bring, pursue, or enforce any Debtor Released Claim on behalf of, for the benefit of, or in the name of (whether directly or derivatively) of the Debtor Party.

5. **Plan Support.**

(a) Each HarbourVest Party hereby agrees that it will (a) vote all HarbourVest Claims held by such HarbourVest Party to accept the Plan, by delivering its duly executed and completed ballots accepting the Plan on a timely basis; and (b) not (i) change, withdraw, or revoke such vote (or cause or direct such vote to be changed withdrawn or revoked); (ii) exercise any right or remedy for the enforcement, collection, or recovery of any claim against the Debtor except in a manner consistent with this Agreement or the Plan, (iii) object to, impede, or take any action other action to interfere with, delay or postpone acceptance or confirmation of the Plan; (iv) directly or indirectly solicit, propose, file, support, participate in the formulation of or vote for, any restructuring, sale of assets (including pursuant to **11 U.S.C. § 363**), merger, workout, or plan of reorganization of the Debtor other than the Plan; or (v) otherwise take any action that would in any material respect interfere with, delay, or postpone the consummation of the Plan; provided, however, that such vote may be revoked (and, upon such revocation, deemed void ab initio) by such HarbourVest Party at any time following the termination of this agreement or the occurrence of a Support Termination Event (it being understood that any termination of this agreement shall entitle each HarbourVest Party to change its vote in accordance with section 1127(d) of the Bankruptcy Code), notwithstanding any voting deadline established by the Bankruptcy Court including without limitation the January 5, 2021, 5:00 p.m. (prevailing Central Time) deadline established by the *Order Approving Form of Ballots, Voting Deadline and Solicitation Procedures* [**Docket No. 1476**].

(b) In full resolution of the 3018 Motion, HarbourVest will have a general unsecured claim for voting purposes only in the amount of \$45,000,000.

(c) The obligations of the HarbourVest Parties under this Section 5 shall automatically terminate upon the occurrence of any of the following (each a “Support Termination Event”): (i) the effective date of the Plan, (ii) the withdrawal of the Plan, (iii) the entry of an order by the Bankruptcy Court (A) converting the Bankruptcy Case to a case under chapter 7 of the Bankruptcy Code or (B) appointing an examiner with expanded powers beyond those set forth in sections 1106(a)(3) and (4) of the Bankruptcy Code or a trustee in Bankruptcy

Case, or (iv) the failure of the Court to enter an order approving the terms of this Agreement and the settlement described herein pursuant to Rule 9019 prior to confirmation of the Plan.

6. **No Admission of Liability.** The Parties acknowledge that there is a bona fide dispute with respect to the HarbourVest Claims. Nothing in this Agreement will imply, an admission of liability, fault or wrongdoing by the Debtor, HarbourVest, or any other person, and the execution of this Agreement does not constitute an admission of liability, fault, or wrongdoing on the part of the Debtor, HarbourVest, or any other person.

7. **Successors-in-Interest.** This Agreement shall be binding upon and shall inure to the benefit of each of the Parties and their successors, and assigns.

8. **Notice.** Each notice and other communication hereunder will be in writing and will be sent by email and delivered or mailed by registered mail, receipt requested, and will be deemed to have been given on the date of its delivery, if delivered, and on the fifth full business day following the date of the mailing, if mailed to each of the Parties thereto at the following respective addresses or such other address as may be specified in any notice delivered or mailed as set forth below:

HARBOURVEST

HarbourVest Partners L.P.
Attention: Michael J. Pugatch
One Financial Center
Boston, MA 02111
Telephone No. 617-348-3712
E-mail: mpugatch@harbourvest.com

with a copy (which shall not constitute notice) to:

Debevoise & Plimpton LLP
Attention: M. Natasha Labovitz, Esq.
919 Third Avenue
New York, NY 10022
Telephone No. 212-909-6649
E-mail: nlabovitz@debevoise.com

THE DEBTOR

Highland Capital Management, L.P.
300 Crescent Court, Suite 700
Dallas, Texas 75201
Attention: James P. Seery, Jr.
Telephone No.: 972-628-4100
Facsimile No.: 972-628-4147
E-mail: jpseeryjr@gmail.com

with a copy (which shall not constitute notice) to:

Pachulski Stang Ziehl & Jones LLP
Attention: Jeffrey Pomerantz, Esq.
10100 Santa Monica Blvd., 13th Floor
Los Angeles, CA 90067
Telephone No.: 310-277-6910
Facsimile No.: 310-201-0760
E-mail: jpomerantz@pszjlaw.com

9. **Advice of Counsel.** Each Party represents that it has: (a) been adequately represented by independent legal counsel of its own choice, throughout all of the negotiations that preceded the execution of this Agreement; (b) executed this Agreement upon the advice of such counsel; (c) read this Agreement, and understands and assents to all the terms and conditions contained herein without any reservations; and (d) had the opportunity to have this Agreement and all the terms and conditions contained herein explained by independent counsel, who has answered any and all questions asked of such counsel, or which could have been asked of such counsel, including, but not limited to, with regard to the meaning and effect of any of the provisions of this Agreement.

10. **Entire Agreement.** This Agreement and the Transfer Agreement contain the entire agreement and understanding concerning the subject matter of this Agreement, and supersede and replace all prior negotiations and agreements, written or oral and executed or unexecuted, concerning such subject matter. Each of the Parties acknowledges that no other Party, nor any agent of or attorney for any such Party, has made any promise, representation or warranty, express or implied, written or oral, not otherwise contained in this Agreement to induce any Party to execute this Agreement. The Parties further acknowledge that they are not executing this Agreement in reliance on any promise, representation or warranty not contained in this Agreement, and that any such reliance would be unreasonable. This Agreement will not be waived or modified except by an agreement in writing signed by each Party or duly authorized representative of each Party.

11. **No Party Deemed Drafter.** The Parties acknowledge that the terms of this Agreement are contractual and are the result of arms'-length negotiations between the Parties and their chosen counsel. Each Party and its counsel cooperated in the drafting and preparation of this Agreement. In any construction to be made of this Agreement, the Agreement will not be construed against any Party.

12. **Future Cooperation.** The Parties agree to cooperate and execute such further documentation as is reasonably necessary to effectuate the intent of this Agreement.

13. **Counterparts.** This Agreement may be executed in counterparts with the same force and effect as if executed in one complete document. Each Party's signature hereto will signify acceptance of, and agreement to, the terms and provisions contained in this Agreement. Photographic, electronic, and facsimile copies of signed counterparts may be used in lieu of the originals of this Agreement for any purpose.

14. **Governing Law; Venue; Attorneys' Fees and Costs.** The Parties agree that this Agreement will be governed by and will be construed according to the laws of the State of Texas without regard to conflict-of-law principles. Each of the Parties hereby submits to the exclusive jurisdiction of the Bankruptcy Court during the pendency of the Bankruptcy Case and thereafter to the exclusive jurisdiction of the state and federal courts located in the Northern District of Texas, Dallas Division, with respect to any disputes arising from or out of this Agreement. In any action to enforce this Agreement, the prevailing party shall be entitled to recover its reasonable and necessary attorneys' fees and costs (including experts).

[Remainder of Page Intentionally Blank]

IT IS HEREBY AGREED.

HIGHLAND CAPITAL MANAGEMENT, L.P.

By: /s/ James P. Seery, Jr.
Name: James P. Seery, Jr.
Its: CEO/CRO

HarbourVest 2017 Global Fund L.P., by HarbourVest 2017 Global Associates L.P., its General Partner, by HarbourVest GP LLC, its General Partner, by HarbourVest Partners, LLC, its Managing Member

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

HarbourVest 2017 Global AIF L.P., by HarbourVest Partners (Ireland) Limited, its Alternative Investment Fund Manager, by HarbourVest Partners L.P., its Duly Appointed Investment Manager, by HarbourVest Partners, LLC, its General Partner

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

HarbourVest Dover Street IX Investment L.P., by HarbourVest Partners L.P., its Duly Appointed Investment Manager, by HarbourVest Partners, LLC, its General Partner

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

HarbourVest Partners L.P., on behalf of funds and accounts under management, by HarbourVest Partners, LLC, its General Partner

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

**HarbourVest Skew Base AIF L.P., by HarbourVest Partners (Ireland) Limited, its
Alternative Investment Fund Manager, by HarbourVest Partners L.P., its Duly Appointed
Investment Manager, by HarbourVest Partners, LLC, its General Partner**

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

**HV International VIII Secondary L.P., by HIPEP VIII Associates L.P., its General
Partner, by HarbourVest GP LLC, its General Partner, by HarbourVest Partners, LLC,
its Managing Member**

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

Exhibit A

**TRANSFER AGREEMENT
FOR ORDINARY SHARES OF
HIGHLAND CLO FUNDING, LTD.**

This Transfer Agreement, dated as of January ____, 2021 (this “**Transfer Agreement**”), is entered into by and among Highland CLO Funding, Ltd. (the “**Fund**”), Highland HCF Advisor, Ltd. (the “**Portfolio Manager**”), HCMLP Investments, LLC (the “**Transferee**”) and each of the following: HarbourVest Dover Street IX Investment L.P., HarbourVest 2017 Global AIF L.P., HarbourVest 2017 Global Fund L.P., HV International VIII Secondary L.P., and HarbourVest Skew Base AIF L.P. (collectively, the “**Transferors**”).

WHEREAS, each Transferor is the record, legal and beneficial owner of the number of ordinary shares (“**Shares**”) of the Fund set forth opposite such Transferor’s name on Exhibit A hereto (with respect to each Transferor, the “**Transferred Shares**”).

WHEREAS the Transferee is an affiliate and wholly owned subsidiary of Highland Capital Management, L.P. (“**HCMLP**”) which is one of the initial members of the Fund.

WHEREAS, each Transferor wishes to transfer and assign 100% of its rights, title and interest as a shareholder in the Fund, including the Transferred Shares (the “**Interest**”) on the terms set forth in this Transfer Agreement.

WHEREAS, subject to and in connection with the approval of that certain Settlement Agreement, dated on or about the date hereof, by and among HCMLP and the Transferors (the “**Settlement Agreement**”), the Transferee desires that the Interest be transferred to Transferee and that thereafter the Transferee will become a Shareholder and the Transferors will no longer be Shareholders.

WHEREAS, the Portfolio Manager desires to consent to such transfers and to the admission of Transferee as a Shareholder on the terms set forth herein, and the Transferors and Transferee agree to such terms.

WHEREAS, the Fund desires to amend its records to reflect the foregoing transfers.

NOW, THEREFORE, the parties hereto agree as follows:

1. Transfer of Shares and Advisory Board

- a. Each Transferor hereby transfers and assigns all of its rights, title, and interest in its Interest to the Transferee, and the Transferee wishes to be admitted to the Fund as a Shareholder.
- b. In connection with the transfer of the Interest as contemplated herein, the Transferee shall be granted the right to appoint a representative to the Fund’s advisory board (the “**Advisory Board**”) to replace the Transferors’ appointed representative to the Advisory Board.

- c. Transferee hereby assumes all of Transferor's rights and obligations in respect of the Interest effective as of the Effective Date (as defined below) and acknowledge that thereafter Transferee shall be subject to the applicable terms and provisions of the Members' Agreement dated as of November 15, 2017 (the "**Members' Agreement**"), the Articles of Incorporation adopted November 15, 2017 (the "**Articles**") and the Subscription and transfer Agreement, dated as of November 15, 2017 among each Transferor, the Fund and the Portfolio Manager (the "**Subscription Agreement**", and together with the Members' Agreement and the Articles, the "**Fund Agreements**") with respect to the Interest. Transferee does not assume any liability or responsibility for any obligations or liabilities incurred by any Transferor prior to the Effective Date of the transfer.
 - d. Following the transfer, each Transferor shall have no further rights or obligations to any party hereunder in respect of the Interest under the Fund Agreements.
 - e. This Transfer Agreement, and the parties' obligations hereunder, are conditioned in all respects on the approval by the Bankruptcy Court for the Northern District of Texas, Dallas Division pursuant to **Federal Rule of Bankruptcy Procedure 9019** of (i) this Transfer Agreement and (ii) the Settlement Agreement, and each of the parties agree that no further action shall be required from any party for the transfer of the Interest to be effective except as described herein.
2. Transferee's Representations and Warranties. The Transferee represents and warrants to the Transferors, the Portfolio Manager, and the Fund as follows:
- a. This Transfer Agreement constitutes a valid and binding obligation of the Transferee, enforceable against it in accordance with its terms;
 - b. This Transfer Agreement has been duly and validly executed and delivered by or on behalf of the Transferee and such execution and delivery have been duly authorized by all necessary trust action of the Transferee;
 - c. The Transferee acknowledges receipt of, has read, and is familiar with, the Fund's Offering Memorandum for Placing Shares dated November 15, 2017 (the "**Offering Memorandum**") and the Fund Agreements;
 - d. The Transferee hereby accepts and receives the Interest from the Transferors for investment, and not with a view to the sale or distribution of any part thereof, and the Transferee has no present intention of selling, granting participations in, or otherwise distributing the same, but subject nevertheless to any requirement of law that the disposition of the Transferee's property shall at all times be within such Transferee's control; and
 - e. The Transferee is an "Eligible U.S. Investor" as defined in the Offering Memorandum.

3. Transferors' Representations and Warranties. Each Transferor represents and warrants to the Transferee, the Portfolio Manager, and the Fund as follows:
 - a. This Transfer Agreement constitutes a valid and binding obligation of the Transferor, enforceable against it in accordance with its terms;
 - b. This Transfer Agreement has been duly authorized, and duly and validly executed and delivered by the Transferor and such execution and delivery have been duly authorized by all necessary action of the Transferor; and
 - c. As of the date hereof, the Transferor has good and valid title to the Transferor's Interest, free and clear of any liens, vesting requirements or claims by others.
4. Consent to Transfer. Based in part on the representations and warranties of the Transferors and the Transferee which are included herein, and on the terms contained herein, the Portfolio Manager and the Fund hereby consent to the transfers of the Interest, the admission of the Transferee as a Shareholder and the Transferee's appointment of a representative to the Advisory Board, the Portfolio Manager's execution of this Transfer Agreement constituting its prior written consent to the transfers of the Interest for the purposes of article 18.1 of the Articles and this Transfer Agreement constituting express notice in writing to the Fund of the assignment set out at clause 1(c) above for the purposes of the Law of Property (Miscellaneous Provisions) (Guernsey) Law, 1979 (as amended).
5. Completion: As of the date of approval by the Bankruptcy Court for the Northern District of Texas, Dallas Division pursuant to Federal Rule of Bankruptcy Procedure 9019 of (i) this Transfer Agreement and (ii) the Settlement Agreement (the "**Effective Date**"):
 - a. each Transferor shall deliver or cause to be delivered to the Transferee a transfer instrument relating to the Transferred Shares duly executed and completed by that Transferor in favor of the Transferee; and
 - b. the Transferee shall deliver to the Transferors and the Fund a duly executed and dated Adherence Agreement (as defined in the Members' Agreement).

Prior to the Effective Date the Transferee shall procure that:

 - c. the board of directors of the Fund shall hold a meeting at which the transfer of the Shares to the Transferee shall be approved and registration in the register of members of the Fund shall be effected on the Effective Date.
6. Miscellaneous.
 - a. Each of the parties hereto agree to execute any further instruments and perform any further acts which are or may become reasonably necessary to carry out the intent of this Transfer Agreement or are reasonably requested by the Portfolio Manager, the Fund or a Transferor to complete the transfer of the Interest.

- b. The parties to this Transfer Agreement acknowledge that the terms of this Transfer Agreement are the result of arms'-length negotiations between the parties and their respective counsel. Each party and its counsel cooperated in the drafting and preparation of this Transfer Agreement. In any construction to be made of this Transfer Agreement, the language or drafting of this Transfer Agreement will not be construed against any party.
- c. This Transfer Agreement shall be governed by, and construed and enforced in accordance with, the internal substantive laws of the state of Delaware, without giving effect to conflicts of law principles.
- d. The representations, warranties and covenants of the Transferors and the Transferee shall remain in full force and effect following the transfer of the Interest, and the Fund and the Portfolio Manager thereafter may rely on all such representations, warranties and covenants.
- e. This Transfer Agreement may be executed in multiple counterparts, each of which shall be deemed to be an original, but all of which together shall constitute one and the same instrument. Photographic, electronic, and facsimile copies of signed counterparts may be used in lieu of the originals of this Transfer Agreement for any purpose.
- f. Captions of sections have been added only for convenience and shall not be deemed to be a part of this Transfer Agreement.
- g. This Transfer Agreement is among the parties hereto. No Person that is not a party hereto shall have any right herein as a third-party beneficiary or otherwise except as expressly contemplated hereby.

[Remainder of Page Intentionally Blank]

IN WITNESS WHEREOF, the undersigned have executed this Transfer Agreement as of the date first above written.

TRANSFeree:

HCMLP Investments, LLC

By: Highland Capital Management, L.P.

Its: Member

By: _____

Name: James P. Seery, Jr.

Title: Chief Executive Officer

PORTFOLIO MANAGER:

Highland HCF Advisor, Ltd.

By: _____

Name: James P. Seery, Jr.

Title: President

FUND:

Highland CLO Funding, Ltd.

By: _____

Name:

Title:

[Additional Signatures on Following Page]

IN WITNESS WHEREOF, the undersigned have executed this Transfer Agreement as of the date first above written.

TRANSFERORS:

HarbourVest Dover Street IX Investment L.P.

By: HarbourVest Partners L.P., its Duly Appointed Investment Manager

By: HarbourVest Partners, LLC

By: _____

Name: Michael Pugatch

Title: Managing Director

HV International VIII Secondary L.P.

By: HIPEP VIII Associates L.P.
Its General Partner

By: HarbourVest GP LLC
Its General Partner

By: HarbourVest Partners, LLC
Its Managing Member

By: _____

Name: Michael Pugatch

Title: Managing Director

HarbourVest 2017 Global AIF L.P.

By: HarbourVest Partners (Ireland) Limited
Its Alternative Investment Fund Manager

By: HarbourVest Partners L.P.
Its Duly Appointed Investment Manager

By: HarbourVest Partners, LLC
Its General Partner

By: _____

Name: Michael Pugatch

Title: Managing Director

HarbourVest Skew Base AIF L.P.

By: HarbourVest Partners (Ireland) Limited
Its Alternative Investment Fund Manager

By: HarbourVest Partners L.P.
Its Duly Appointed Investment Manager

By: HarbourVest Partners, LLC
Its General Partner

By: _____

Name: Michael Pugatch

Title: Managing Director

HarbourVest 2017 Global Fund L.P.

By: HarbourVest 2017 Global Associates L.P.
Its General Partner

By: HarbourVest GP LLC
Its General Partner

By: HarbourVest Partners, LLC
Its Managing Member

By: _____

Name: Michael Pugatch

Title: Managing Director

[Signature Page to Transfer of Ordinary Shares of Highland CLO Funding, Ltd.]

Exhibit A

<u>Transferee Name</u>	<u>Number of Shares</u>	<u>Percentage</u>
HarbourVest Dover Street IX Investment L.P.	54,355,482.14	71.0096%
HarbourVest 2017 Global AIF L.P.	7,426,940.38	9.7025%
HarbourVest 2017 Global Fund L.P.	3,713,508.46	4.8513%
HV International VIII Secondary L.P.	9,946,780.11	12.9944%
HarbourVest Skew Base AIF L.P.	1,103,956.03	1.4422%

THIS DOCUMENT IS IMPORTANT AND REQUIRES YOUR IMMEDIATE ATTENTION. If you are in any doubt as to the action you should take or the contents of this document, you are recommended to seek your own independent financial advice immediately from your stockbroker, bank, solicitor, accountant, or other appropriate independent financial adviser, who is authorised under the Financial Services and Markets Act 2000, as amended (“FSMA”) if you are in the United Kingdom, or from another appropriately authorised independent financial adviser if you are in a territory outside the United Kingdom.

A copy of this document, which comprises an offering memorandum (the “Offering Memorandum”) relating to Highland CLO Funding, Ltd. (the “Company”) in connection with the issue of Placing Shares in the Company, is available at the Company’s registered office upon request.

The Placing Shares are only suitable for investors: (i) who understand the potential risk of capital loss and that there may be limited liquidity in the underlying investments of the Company; (ii) for whom an investment in the Placing Shares is part of a diversified investment programme; and (iii) who fully understand and are willing to assume the risks involved in such an investment programme. It should be remembered that the price of the Placing Shares and the income from them can go down as well as up and that investors may not receive, on the sale or cancellation of the Placing Shares, the amount that they invested.

The Company and its directors (whose names appear in the section of this Offering Memorandum entitled “*Company Directors and Administration*”) (the “**Directors**”) accept responsibility for the information contained in this Offering Memorandum. To the best of the knowledge of the Company and the Directors (who have taken all reasonable care to ensure that such is the case), the information contained in the Offering Memorandum is in accordance with the facts and contains no omission likely to affect its import. The Directors have taken all reasonable care to ensure that the facts stated in the Offering Memorandum are true and accurate in all material respects, and that there are no other facts the omission of which would make misleading any statement in this Offering Memorandum, whether of facts or of opinion. All the Directors accept responsibility accordingly.

Potential investors should read the whole of this Offering Memorandum when considering an investment in the Placing Shares and, in particular, attention is drawn to the section of this Offering Memorandum entitled “*Risk Factors*” on pages 18 to 47 of this Offering Memorandum.

HIGHLAND CLO FUNDING, LTD.

(a closed-ended investment company limited by shares incorporated under the laws of Guernsey with registered number 60120)

Placing for a target issue of U.S. \$153,000,000 of Placing Shares

This Offering Memorandum does not constitute or form part of any offer or invitation to sell, or the solicitation of an offer to acquire or subscribe for, any securities other than the securities to which it relates or any offer or invitation to sell or issue, or any solicitation of any offer to purchase or subscribe for such securities by any person in any circumstances in which such offer or solicitation is unlawful.

The Placing Shares have not been and will not be registered under the U.S. Securities Act of 1933 (the “**U.S. Securities Act**”) or under the securities laws of any state or other jurisdiction of the United States. The Placing Shares may not be offered, sold, exercised, resold, transferred or delivered, directly or indirectly, within the United States or to, or for the account or benefit of, U.S. Persons, except pursuant to an exemption from, or in a transaction not subject to, the registration requirements of the U.S. Securities Act and in compliance with any applicable securities laws of any state or other jurisdiction in the United States.

The Company has not been and will not be registered under the U.S. Investment Company Act of 1940, as amended (the “**U.S. Investment Company Act**”) and investors will not be entitled to the benefits of the U.S. Investment Company Act. There will be no public offer of the Placing Shares in the United States.

Neither the U.S. Securities and Exchange Commission (the “SEC”) nor any state securities commission has approved or disapproved of the Placing Shares or passed upon or endorsed the merits of the offering of the Placing Shares or the adequacy or accuracy of this Offering Memorandum. Any representation to the contrary is a criminal offence in the United States.

Except with the express written consent of the Company given in respect of an investment in the Company, the Placing Shares may not be acquired by: (i) investors using assets of: (A) an “employee benefit plan” as defined in Section 3(3)

EXHIBIT

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exhibitsticker.com

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of the United States Employee Retirement Income Security Act of 1974, as amended (“ERISA”) that is subject to Title I of ERISA; (B) a “plan” as defined in Section 4975 of the United States Internal Revenue Code of 1986, as amended (the “U.S. Tax Code”), including an individual retirement account or other arrangement that is subject to Section 4975 of the U.S. Tax Code; or (C) an entity whose underlying assets are considered to include “plan assets” by reason of investment by an “employee benefit plan” or “plan” described in preceding clause (A) or (B) in such entity pursuant to the U.S. Plan Assets Regulations; or (ii) a governmental, church, non-U.S. or other employee benefit plan that is subject to any federal, state, local or non-U.S. law that is substantially similar to the provisions of Title I of ERISA or Section 4975 of the U.S. Tax Code, unless its purchase, holding, and disposition of the Placing Shares will not constitute or result in a non-exempt violation of any such substantially similar law.

The distribution of this Offering Memorandum and the offer of the Placing Shares in certain jurisdictions may be restricted by law. No action has been or will be taken to permit the possession, issue or distribution of this Offering Memorandum (or any other offering or publicity material relating to the Placing Shares) in any jurisdiction where action for that purpose may be required or doing so is restricted by law. Accordingly, neither this Offering Memorandum, nor any advertisement, nor any other offering material may be distributed or published in any jurisdiction except under circumstances that will result in compliance with any applicable laws and regulations. Persons into whose possession this Offering Memorandum comes should inform themselves about and observe any such restrictions. None of the Company or any of its affiliates or advisors accepts any legal responsibility for any breach by any person, whether or not a prospective investor, of any such restrictions.

In addition, the Placing Shares are subject to restrictions on transferability and resale in certain jurisdictions and may not be transferred or resold except as permitted under applicable securities laws and regulations. Investors may be required to bear the financial risks of their investment in the Placing Shares for an indefinite period of time. Any failure to comply with these restrictions may constitute a violation of the securities laws of any such jurisdictions. For further information on restrictions on offers, sales and transfers of the Placing Shares, please refer to the section of this Offering Memorandum entitled “Purchase and Transfer Restrictions” in “Placing Arrangements”.

In making an investment decision, each investor must rely on their own examination, analysis and enquiry of the Company and the terms of the Placing including the merits and risks involved. The investors also acknowledge that they have relied only on the information contained in this document. No person has been authorised to give any information or make any representations other than those contained in this Offering Memorandum and, if given or made, such information or representations must not be relied on as having been so authorised. Neither the delivery of this Offering Memorandum nor any subscription or sale made under it shall, under any circumstances, create any implication that there has been no change in the affairs of the Company since the date of this document or that the information in it is correct as of any subsequent time.

None of the Company or any of its representatives is making any representation to any prospective investor in respect of the Placing Shares regarding the legality of an investment in the Placing Shares by such prospective investor under the laws applicable to such prospective investor.

The contents of this Offering Memorandum should not be construed as legal, financial or tax advice. Each prospective investor should consult his, her or its own legal, financial or tax adviser for legal, financial or tax advice.

The Company is a registered closed-ended collective investment scheme pursuant to The Protection of Investors (Bailiwick of Guernsey) Law, 1987, as amended and the Registered Collective Investment Schemes Rules 2015 issued by the Guernsey Financial Services Commission. Neither the Guernsey Financial Services Commission nor the States of Guernsey take any responsibility for the soundness of the Company or for the correctness of any statements made or opinions expressed with regard to it.

If you are in any doubt about the contents of this Offering Memorandum you should consult your accountant, legal or professional adviser or financial adviser.

This Offering Memorandum has not been reviewed by the Guernsey Financial Services Commission and, in granting registration, the Guernsey Financial Services Commission has relied upon specific warranties provided by State Street (Guernsey) Limited, the Company’s designated administrator.

It should be remembered that the price of securities and the income from them can go down as well as up.

You are wholly responsible for ensuring that all aspects of the Company are acceptable to you. Investment in the Company may involve special risks that could lead to a loss of all or a substantial portion of such investment.

Unless you fully understand and accept the nature of the Company and the potential risks inherent in this Company you should not invest in the Company.

This Offering Memorandum is dated November 15, 2017.

IMPORTANT NOTICES

Investors should rely only on the information contained in this Offering Memorandum. No person has been authorised to give any information or to make any representations in connection with the Placing other than those contained in this Offering Memorandum and, if given or made, such information or representations must not be relied upon as having been authorised by or on behalf of the Company. Neither the delivery of this Offering Memorandum nor any subscription or sale made under this Offering Memorandum shall, under any circumstances, create any implication that there has been no change in the business or affairs of the Company since the date of this Offering Memorandum or that the information contained in this Offering Memorandum is correct as of any time subsequent to its date.

The contents of this Offering Memorandum are not to be construed as legal, financial, business, investment or tax advice. Each prospective investor should consult his or her own legal adviser, financial adviser or tax adviser for legal, financial or tax advice in relation to any purchase or proposed purchase of Placing Shares.

An investment in the Placing Shares is suitable only for institutional, professional and high net worth investors, private client fund managers and brokers and other investors who are capable of evaluating the merits and risks of such an investment and/or who have received advice from their fund manager or broker regarding such an investment and who have sufficient resources to be able to bear losses (which may equal the whole amount invested) that may result from such an investment. An investment in the Placing Shares should constitute part of a diversified investment portfolio. Accordingly, typical investors in the Company are expected to be institutional, professional and high net worth investors, private client fund managers and brokers and other investors who understand the risks involved in investing in the Company and/or who have received advice from their fund manager or broker regarding investment in the Company.

In making an investment decision, each investor must rely on their own examination, analysis and enquiry of the Company and the terms of the Placing including the merits and risks involved. Investors who purchase Placing Shares will be deemed to have acknowledged that no person has been authorised to give any information or make any representations other than those contained in this Offering Memorandum and, if given or made, such information or representations must not be relied on as having been authorised by the Company.

General

Prospective investors should not treat the contents of this Offering Memorandum as advice relating to legal, taxation, investment or any other matters. Prospective investors should inform themselves as to: (a) the legal requirements within their own countries for the purchase, holding, transfer, redemption or other disposal of Placing Shares; (b) any foreign exchange restrictions applicable to the purchase, holding, transfer, redemption or other disposal of Placing Shares which they might encounter; and (c) the income and other tax consequences which may apply in their own countries as a result of the purchase, holding, transfer, redemption or other disposal of Placing Shares. Prospective investors must rely on their own representatives, including their own legal advisers, financial advisers and accountants, as to legal, tax, investment or any other related matters concerning the Company and an investment therein.

Statements made in this Offering Memorandum are based on the law and practice currently in force and are subject to changes therein. This Offering Memorandum should be read in its entirety before making any application for Placing Shares.

Application will be made to the appropriate securities exchange for the Placing Shares to be admitted when deemed appropriate by the Company.

All times and dates referred to in this Offering Memorandum are, unless otherwise stated, references to Guernsey times and dates and are subject to change without further notice.

Capitalised terms contained in this Offering Memorandum shall have the meanings set out in the Offering memorandum and/or in the section of this Offering Memorandum entitled “Definitions”, save where the context indicates otherwise.

Restrictions on distribution and sale

The distribution of this Offering Memorandum and the offering and sale of securities offered hereby in certain jurisdictions may be restricted by law. Persons in possession of this Offering Memorandum are required to inform themselves about and observe any such restrictions. This Offering Memorandum may not be used for, or in connection with, and does not constitute, any offer to sell, or solicitation to purchase, any such securities in any jurisdiction in which solicitation would be unlawful.

For a description of restrictions on offers, sales and transfers of Shares, please refer to the sections of this Offering Memorandum entitled “Selling restrictions” below and “Purchase and Transfer Restrictions” in “Placing Arrangements”. Save as set out in these sections, there are no restrictions on the transfer of Shares under the Articles.

Forward-looking statements

This Offering Memorandum includes statements that are, or may be deemed to be, “forward-looking statements”. These forward-looking statements can be identified by the use of forward-looking terminology, including the terms “believes”, “estimates”, “anticipates”, “expects”, “intends”, “plans”, “projects”, “targets”, “aims”, “may”, “will” or “should” or, in each case, their negative or other variations or comparable terminology. These forward-looking statements include all matters that are not historical facts. They appear in a number of places throughout this Offering Memorandum and include statements regarding the intentions, beliefs or current expectations of the Company concerning, amongst other things, the investment objective and investment policy, investment strategy, financing strategies, investment performance, results of operations, financial condition, prospects, and dividend/distribution policy of the Company, and the markets in which the Company, and their respective portfolios of investments, invest and/or operate. By their nature, forward-looking statements involve risks (including those set out in the section of this Offering Memorandum entitled “Risk Factors”) and uncertainties because they relate to events and depend on circumstances that may or may not occur in the future. Forward-looking statements are not guarantees of future performance. The Company’s actual investment performance, results of operations, financial condition, dividend policy and the development of its investment strategy financing strategies may differ materially from the impression created by the forward-looking statements contained in this Offering Memorandum. In addition, even if the investment performance, results of operations, financial condition of the Company, and the development of its financing strategies, are consistent with the forward-looking statements contained in this Offering Memorandum, those results or developments may not be indicative of results or developments in subsequent periods. Important factors that could cause these differences include, but are not limited to:

- changes in economic conditions generally and the Company’s ability to achieve its investment objective and target returns and target dividends for investors;
- the ability of the Company to invest the cash on its balance sheet and the proceeds of the Placing on a timely basis within the investment objective and investment policy;
- foreign exchange mismatches with respect to exposed assets;
- changes in the interest rates and/or credit spreads, as well as the success of the Company’s investment strategy in relation to such changes and the management of the un-invested proceeds of the Placing;
- impairments in the value of the investments;
- the availability and cost of capital for future investments;
- the departure of key personnel employed by the Portfolio Manager;

- changes in laws or regulations, including tax laws, or new interpretations or applications of laws and regulations, that are applicable to the Company; and
- general economic trends and other external factors, including those resulting from war, incidents of terrorism or responses to such events.

Given these uncertainties, prospective investors are cautioned not to place any undue reliance on such forward-looking statements. Prospective investors should carefully review the “*Risk Factors*” section of this Offering Memorandum before making an investment decision. Forward-looking statements speak only as at the date of this Offering Memorandum. Although the Company undertakes no obligation to revise or update any forward-looking statements contained herein (save where required by the Offering Memorandum Rules), whether as a result of new information, future events, conditions or circumstances, any change in the Company’s expectations with regard thereto or otherwise, prospective investors are advised to consult any communications made directly to them by the Company and/or any additional disclosures through announcements that the Company may make through a website to be created or through the Administrator.

Selling Restrictions

This Offering Memorandum does not constitute, and may not be used for the purposes of, an offer or an invitation to apply for any Placing Shares by any person: (i) in any jurisdiction in which such offer or invitation is not authorised; or (ii) in any jurisdiction in which the person making such offer or invitation is not qualified to do so; or (iii) to any person to whom it is unlawful to make such offer or invitation. The distribution of this Offering Memorandum and the offering of Placing Shares in certain jurisdictions may be restricted. Accordingly, persons into whose possession this Offering Memorandum comes are required to inform themselves about and observe any restrictions as to the offer or sale of Placing Shares and the distribution of this Offering Memorandum under the laws and regulations of any jurisdiction in connection with any applications for Placing Shares, including obtaining any requisite governmental or other consent and observing any other formality prescribed in such jurisdiction.

Bailiwick of Guernsey

The Company has been established in Guernsey as a registered collective investment scheme under the RCIS Rules.

Further information in relation to the regulatory treatment of registered closed-ended investment funds domiciled in Guernsey may be found on the website of the Guernsey Financial Services Commission at www.gfsc.gg.

This Offering Memorandum is prepared, and a copy of it has been sent to the Guernsey Financial Services Commission, in accordance with the RCIS Rules.

The Commission takes no responsibility for the financial soundness of the Company or for the correctness of any statements made or opinions expressed with regard to it.

The applicant is strongly recommended to read and consider this Offering Memorandum before completing an application.

This Offering Memorandum has not been approved by the GFSC and neither the GFSC nor the States of Guernsey Policy Council takes any responsibility for the financial soundness of the Company or for the correctness of any of the statements made or opinions expressed with regard to it.

European Economic Area

In relation to each member state of the European Economic Area which has implemented the Prospectus Directive (each, a “**Relevant Member State**”), no Placing Shares have been offered or will be offered pursuant to the Placing to the public in that Relevant Member State prior to the publication of a prospectus in relation to the Placing Shares which has been approved by the competent authority in that Relevant Member State, or, where appropriate, approved in another Relevant Member State and notified to the competent authority in that Relevant Member State, all in accordance with the Prospectus Directive, except that offers of Placing Shares to the public may be made at any time

under the following exemptions under the Prospectus Directive, if they are implemented in that Relevant Member State:

- (a) to any legal entity which is a qualified investor as defined in the Prospectus Directive;
- (b) to fewer than 150 natural or legal persons (other than qualified investors as defined in the Prospectus Directive) in such Relevant Member State; or
- (c) in any other circumstances falling within Article 3(2) of the Prospectus Directive,

provided that no such offer of Placing Shares shall result in a requirement for the publication of a prospectus pursuant to Article 3 of the Prospectus Directive or a supplemental prospectus pursuant to Article 16 of the Prospectus Directive or any measure implementing the Prospectus Directive in a Relevant Member State and each person who initially acquires any Placing Shares or to whom any offer is made under the Placing will be deemed to have represented, acknowledged and agreed that it is a “qualified investor” within the meaning of Article 2(1)(e) of the Prospectus Directive.

For the purposes of this provision, the expression an “**offer to the public**” in relation to any offer of Placing Shares in any Relevant Member State means a communication in any form and by any means presenting sufficient information on the terms of the offer and any Placing Shares to be offered so as to enable an investor to decide to purchase or subscribe for the Placing Shares, as the same may be varied in that Relevant Member State by any measure implementing the Prospectus Directive in that Relevant Member State and the expression “**Prospectus Directive**” means Directive 2003/71/EC (and the amendments thereto, including 2010 PD Amending Directive, to the extent implemented in the Relevant Member State) and includes any relevant implementing measure in each Relevant Member State and the expression “**2010 PD Amending Directive**” means Directive 2010/73/EU.

The distribution of this Offering Memorandum in other jurisdictions may be restricted by law and therefore persons into whose possession this Offering Memorandum comes should inform themselves about and observe any such restrictions.

The Company is an alternative investment fund for the purpose of the AIFMD. The Placing Shares may only be marketed to prospective investors which are domiciled or have a registered office in a member state of the European Economic Area (“**EEA Persons**”) in which marketing has been registered or authorised (as applicable) under the relevant national implementation of Article 42 of AIFMD and in such cases only to EEA Persons which are Professional Investors or any other category of person to which such marketing is permitted under the national laws of such member state.

This Offering Memorandum is not intended for, should not be relied on by and should not be construed as an offer (or any other form of marketing) to any other EEA Person.

A “Professional Investor” is an investor who is considered to be a professional client or who may, on request, be treated as a professional client within the relevant national implementation of Annex II of Directive 2004/39/EC (Markets in Financial Instruments Directive) and the AIFMD.

Each EEA Person who initially acquires Placing Shares or to whom any offer is made will be deemed to have represented, warranted to and agreed with the entity placing such shares and the Company that (a) it is a “qualified investor” within the meaning of the law in that relevant member state implementing Article 2.1(e) of the Prospectus Directive and (b) , that it is a Professional Investor or other person to whom Placing Shares in the Company may lawfully be marketed under the AIFMD or under the national laws of that relevant member state.

The distribution of this Offering Memorandum in other jurisdictions may be restricted by law and therefore persons into whose possession this Offering Memorandum comes should inform themselves about and observe any such restrictions

Switzerland

This Offering Memorandum may only be freely circulated and Shares in the Company may only be freely offered, distributed or sold to regulated financial intermediaries such as banks, securities dealers, fund management companies,

asset managers of collective investment schemes and central banks as well as to regulated insurance companies. Circulating this Offering Memorandum and offering, distributing or selling Shares in the Company to other persons or entities including qualified investors as defined in the Federal Act on Collective Investment Schemes (“CISA”) and its implementing Ordinance (“CISO”) may trigger, in particular, (i) licensing/prudential supervision requirements for the distributor, (ii) a requirement to appoint a representative and paying agent in Switzerland and (iii) the necessity of a written distribution agreement between the representative in Switzerland and the distributor. Accordingly, legal advice should be sought before providing this Offering Memorandum to and offering, distributing, selling or on-selling Shares of the Company to any other persons or entities. This Offering Memorandum does not constitute an issuance prospectus pursuant to Articles 652a or 1156 of the Swiss Code of Obligations and may not comply with the information standards required thereunder. The Shares will not be listed on the SIX Swiss Exchange, and consequently, the information presented in this document does not necessarily comply with the information standards set out in the relevant listing rules. The documentation of the Company has not been and will not be approved, and may not be able to be approved, by the Swiss Financial Market Supervisory Authority (“FINMA”) under the CISA. Therefore, investors do not benefit from protection under the CISA or supervision by the FINMA. This Offering Memorandum does not constitute investment advice. It may only be used by those persons to whom it has been handed out in connection with the Shares and may neither be copied or directly/indirectly distributed or made available to other persons.

United States

The Placing Shares have not been and will not be registered under the U.S. Securities Act or with any securities regulatory authority of any state or other jurisdiction of the United States and the Placing Shares may not be offered, sold, exercised, resold, transferred or delivered, directly or indirectly, within the United States or to, or for the account or benefit of, U.S. Persons, except pursuant to an exemption from, or in a transaction not subject to, the registration requirements of the U.S. Securities Act and in compliance with any applicable securities laws of any state or other jurisdiction in the United States. There will be no public offer of the Placing Shares in the United States.

Subject to certain exceptions as described herein, the Placing is only being made outside the United States to non-U.S. Persons in reliance on Regulation S under the U.S. Securities Act.

In addition, prospective investors should note that, except with the express written consent of the Company given in respect of an investment in the Company, the Placing Shares may not be acquired by: (i) investors using assets of: (A) an “employee benefit plan” as defined in Section 3(3) of ERISA that is subject to Title I of ERISA; (B) a “plan” as defined in Section 4975 of the U.S. Tax Code, including an individual retirement account or other arrangement that is subject to Section 4975 of the U.S. Tax Code; or (C) an entity whose underlying assets are considered to include “plan assets” by reason of investment by an “employee benefit plan” or “plan” described in preceding clause (A) or (B) in such entity pursuant to the U.S. Plan Assets Regulations; or (ii) a governmental, church, non-U.S. or other employee benefit plan that is subject to any federal, state, local or non-U.S. law that is substantially similar to the provisions of Title I of ERISA or Section 4975 of the U.S. Tax Code, unless its purchase, holding, and disposition of the Placing Shares will not constitute or result in a non-exempt violation of any such substantially similar law.

If 25 per cent or more of any class of equity in the Company is owned, directly or indirectly, by U.S. Plan Investors that are subject to Title I of ERISA or Section 4975 of the U.S. Tax Code, the assets of the Company will be deemed to be “plan assets”, subject to the constraints of ERISA and Section 4975 of the U.S. Tax Code. This would result, among other things, in: (i) the application of the prudence and fiduciary responsibilities standards of ERISA to investments made by the Company, and (ii) the possibility that certain transactions that the Company and its subsidiaries might enter into, or may have entered into in the ordinary course of business, might constitute or result in non-exempt prohibited transactions under Section 406 of ERISA and/or Section 4975 of the U.S. Tax Code and might have to be rescinded. A non-exempt prohibited transaction may also result in the imposition of an excise tax under the U.S. Tax Code upon a “party in interest” (as defined in ERISA) or “disqualified person” (as defined in the U.S. Tax Code), with whom a plan engages in the transaction. The Company will use commercially reasonable efforts to restrict ownership by U.S. Plan Investors of equity in the Company. However, no assurance can be given that investment by U.S. Plan Investors will not exceed 25 per cent or more of any class of equity in the Company.

For a description of restrictions on offers, sales and transfers of Placing Shares, please refer to the section of this Offering Memorandum entitled “*Purchase and Transfer Restrictions*” in “*Placing Arrangements*”.

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SUMMARY

The following is an overview of the transaction structure and is qualified in its entirety by, and should be read in conjunction with, the more detailed information appearing elsewhere in this Offering Memorandum and related documents referred to herein. Capitalised terms not specifically defined in this Offering Memorandum have the meanings set out in the section of this Offering Memorandum entitled “*Definitions*” below. For a discussion of certain risk factors to be considered in connection with an investment in the Shares, see “*Risk Factors*”.

The Company:

Highland CLO Funding, Ltd. (formerly known as Acis Loan Funding, Ltd.) (the “**Company**”) is a closed-ended investment company limited by shares incorporated on 30 March 2015 under the laws of Guernsey with registered number 60120. The Company changed its name from Acis Loan Funding, Ltd. to Highland CLO Funding, Ltd. on October 27, 2017.

The Company holds a partial, indirect ownership in Highland CLO Management, LLC (“**Highland CLO Management**”), a Delaware series limited liability company established to manage Highland CLOs, act as a “majority-owned affiliate” for purposes of the U.S. Risk Retention Rules and as an “originator” for purposes of EU Retention Requirements and to hold with respect to Highland CLOs the required risk retention interests required under, and in accordance with, the U.S. Retention Rules and/or the EU Retention Requirements, as applicable (such interests with respect to any CLO, the applicable “**Retention Interest**”). Highland CLO Management is also partly held (on an indirect basis through Highland HCF Advisor) by Highland Capital Management, L.P. (“**Highland**”), a Delaware limited partnership, which controls the major economic decisions of Highland CLO Management.

The Company holds a partial, indirect ownership in ACIS CLO Management, LLC (“**Acis CLO Management**” and together with Highland CLO Management, the “**Management Companies**” and each, a “**Management Company**”), a Delaware series limited liability company established to manage Acis CLO 2017-7, Ltd. (“**Acis CLO 7**”), act as a “majority-owned affiliate” for purposes of the U.S. Risk Retention Rules and to hold the Retention Interests with respect to Acis CLO 7 required under, and in accordance with, the U.S. Retention Rules. Acis CLO Management is also partly held (on an indirect basis) by Acis Capital Management, L.P. (“**Acis**”), a Delaware limited partnership, which controls the major economic decisions of Acis CLO Management.

Each of Highland or Acis, as applicable, may hold their respective indirect ownership interests in the applicable Management Companies through, or transfer such interests to, affiliates that are intended to be, directly or indirectly, majority controlled, are majority controlled by or are under common majority control with, Highland or Acis, as applicable, with the intention that the Management Companies will remain their respective “majority-owned affiliates” for purposes of the U.S. Risk Retention Rules.

Investment Objective:

The Company’s investment objective is to provide Shareholders with stable and growing income returns, and to grow the capital value of the investment portfolio through opportunistic exposure to CLO Notes, investments in new issue CLOs sponsored by Highland and Acis CLO 7 through its interests in the Management Companies and CLO Income Notes, respectively, and senior secured loans primarily for the purpose of enabling Highland CLO Management to qualify as an “originator” for purposes of the EU Retention Requirements, on both a direct basis and indirect basis, through the use of the investments described in its investment policy and through use of leverage,

including, any Revolving Credit Facility, Warehouse Loan Facilities, total return swaps or repurchase agreements, in addition to secured loan facilities. With respect to the Company's investments, except with respect to Designated CLO Resets or Designated CLO Refinancings, if applicable, it is expected that the Portfolio Manager intends to seek monetization of such investments in the ordinary course in its discretion; provided that at the end of the Term, the Portfolio Manager, in its reasonable discretion may postpone dissolution of the Company for up to 180 days to facilitate the orderly liquidation of the investments.

Investment policy:

The Company's investment policy is to focus on synergistic investments in the following areas.

Loan Investments

The Company will invest on an indirect basis in a diverse portfolio of predominantly floating rate senior secured loans (or on a direct basis for the primary purpose of enabling Highland CLO Management to qualify as an "originator" for purposes of the EU Retention Requirements), all of which will have at least one rating, which may be public or private, from Moody's Investor Services, Inc. ("**Moody's**"), Standard & Poor's Financial Services LLC ("**S&P**") or Fitch Group, Inc. ("**Fitch**"). Initially, the Company's loan investments will be focused in the U.S., but depending on market conditions the Company may also invest in similar types of loans in Europe. Accordingly, there is no limit on the maximum U.S. or European exposure. Investments in U.S. or European loans may be made through a U.S. or European originator subsidiary of the Company. The Company intends to invest directly only in those senior secured loans to obligors with total potential indebtedness under all applicable loan agreements, indentures and other underlying instruments at least \$250,000,000 that would generally satisfy the eligibility criteria for Highland CLOs and (without limiting the foregoing):

- Such loan is not currently deferring the payment of any accrued and unpaid interest that otherwise would have been due and continues to remain unpaid;
- Such loan provides for a fixed amount of principal payable in cash on scheduled payment dates and/or at maturity and does not by its terms provide for earlier amortization or prepayment at a price less than par;
- Such loan is not an obligation issued by Highland, any of its controlled affiliates that are investment funds or any other investment fund whose investments are primarily managed by Highland or any affiliate or company that is controlled by Highland, an affiliate thereof, or an account, fund, client or portfolio established and controlled by Highland or an affiliate thereof (a "**Related Obligation**");
- Such loan is neither an equity security nor by its terms is convertible into or exchangeable for an equity security and does not include an attached warrant to purchase equity securities;
- Such loan is not a bridge loan; and

- Such loan is not a zero coupon loan.

Financing of Loan Portfolios / Securitization

It is intended that the Company will periodically seek to sell or securitise all or a portion of its loan portfolio, held directly or indirectly, into new Highland CLOs where Highland CLO Management acts as CLO Manager. In doing so, Highland CLO Management may seek to adopt the “originator” model to address the Origination Requirements (as defined below) applicable to such Highland CLOs to the extent such Highland CLOs sought to comply with EU Retention Requirements. As a result, Highland CLO Management will be required to commit to: (a) establishing the relevant CLO and (b) selling certain loan investments to the relevant CLO which it has purchased for its own account initially. In addition, under current guidance, prior to closing date of the relevant CLO, Highland CLO Management expects to sell investments to the relevant CLO such that the required percentage of the total securitised exposures held by the CLO issuer will have come from Highland CLO Management (collectively, the “**Origination Requirements**”).

CLO Notes

The Company will from time to time invest directly or indirectly (through affiliates and subsidiaries, including the Management Companies, as more fully described below) in CLO Notes issued by Acis CLO 7, Highland CLOs, CLOs where Acis is the CLO Manager, (“**Acis Legacy CLOs**”), CLOs where Highland is the CLO Manager, (“**Highland Legacy CLOs**” and together with the Highland CLOs, Acis CLO 7 and the Acis Legacy CLOs, the “**Managed CLOs**”) or CLOs managed by other asset managers.

With respect to each such investment, Highland CLO Management, and Acis CLO Management with respect to Acis CLO 7, will acquire the percentages and tranches of CLO Notes necessary to enable the related CLO to meet the U.S. Risk Retention Rules and, if applicable, the EU Retention Requirements.

With respect to any such investments in Highland CLOs where Highland CLO Management acts as CLO Manager, it is expected that Highland CLO Management will be a “relying adviser” of Highland. With respect to Acis CLO 7, Acis CLO Management is a “relying adviser” of Acis. It is further expected that Highland or Acis, as applicable, will act as a “sponsor” of such Managed CLOs for purposes of the U.S. Risk Retention Rules and will treat the applicable Management Company as its “majority-owned affiliate” under the U.S. Risk Retention Rules. All management and incentive fees received from such Managed CLO will be paid to the applicable Management Company pursuant to the relevant portfolio management agreement, which will then pay the majority of such fees to Highland or Acis, as applicable, in its roles as Staff and Services Provider and as Sub-Advisor. The applicable Management Company may also seek to act as “originator” for purposes of the EU Retention Requirements with respect to such Managed CLOs as described above.

Each CLO in which the Company directly or indirectly holds CLO Notes will have its own eligibility criteria and portfolio limits. These limits are designed to ensure the portfolio of loans within the CLO meets a prescribed level of diversity and quality as set by the relevant rating agencies rating securities issued by such CLO. The applicable CLO Manager, including Highland CLO Management with respect to new Highland CLOs or Acis CLO Management with respect to Acis CLO 7, intends to identify and actively manage loans

which meet those criteria and limits within each CLO. The eligibility criteria and portfolio limits within a CLO will typically include the following required criteria and may include some or all of the following expected criteria:

- a limit on the weighted average life of the portfolio;
- a limit on the weighted average rating of the portfolio;
- a limit on the maximum amount of portfolio assets with a rating lower than B-/B3/B-; and
- a limit on the minimum diversity of the portfolio.
- a limit on the minimum weighted average of the prescribed rating agency recovery rate;
- a limit on the minimum amount of senior secured assets;
- a limit on the maximum aggregate exposure to second lien loans, high yield bonds, mezzanine loans and unsecured loans;
- a limit on the maximum portfolio exposure to covenant-lite loans;
- an exclusion of project finance loans;
- an exclusion of structured finance securities;
- an exclusion on investing in the debt of companies domiciled in countries with a local currency sub investment grade rating; and
- an exclusion of leases.

The above are not intended to be an exhaustive list of the eligibility criteria and portfolio limits within a typical CLO and the inclusion or exclusion of such limits and their absolute levels are subject to change depending on market conditions.

Act as Risk Retention Provider

The Company may also invest in, provide loans to, or purchase performance-linked notes from, asset management subsidiaries, affiliated with the Company, the Portfolio Manager, Highland, Acis or the Management Companies and which may act as the asset manager of certain U.S. or European CLOs in order to satisfy the U.S. Risk Retention Rules or EU Retention Requirements.

Allocation of Investment Opportunities

Highland CLO Management will serve as CLO Manager to each newly-issued Highland CLO during the Investment Period.

During the Investment Period, the Company shall receive priority allocations with respect to all CLO Income Note investment opportunities with respect to new issue Highland CLOs, over the account of the Portfolio Manager, its affiliates and other clients, including other investment funds and client accounts, including those which follow an investment program substantially similar to that of the Business (such other clients, funds and accounts, collectively, the “**Other Accounts**”). For the avoidance of doubt, the Portfolio

Manager shall otherwise allocate investment opportunities among the Company and Highland and its affiliates and Other Accounts in accordance with its allocation policy which requires allocations among clients to be fair and equitable over time. *See “Risk Factors—Risks Relating to Conflicts of Interest—The Company will be subject to various conflicts of interest involving the Portfolio Manager and its affiliates”.*

Investment Restrictions:

During the Investment Period, the Company may invest up to \$250,000,000 in CLO Income Notes for new Highland CLOs as follows: (a) up to \$150,000,000 in the aggregate from new capital contributions; and (b) up to \$100,000,000 in the aggregate from proceeds received from existing seed portfolio investments and investments in new Highland CLOs, net of dividends paid, and amortization and interest payments on Company borrowings from committed credit facilities.

The Company may not, without the consent of the Advisory Board, invest in any CLO Notes or CLO Income Notes of new Highland CLOs that are not Qualifying CLOs. A “**Qualifying CLO**” is a Highland CLO (a) pursuant to which Highland, the Portfolio Manager, Highland CLO Management or any of its affiliates does not charge subordinate management fees in excess of 0.00%, senior management fees in excess of 0.15% or incentive management fees in excess of 0.00% and (b) which does not have a reinvestment period longer than 5 years; *provided* that, if the Portfolio Manager has provided reasonable evidence to the Advisory Board that a substantial portion of new issue CLOs have reinvestment periods longer than 5 years (the “**RP Condition**”), the consent of the Advisory Board to invest in any Highland CLO that meets clause (a) of the definition of Qualifying CLOs only shall not be unreasonably withheld, conditioned or delayed.

During the Investment Period, the Company shall be permitted to invest in a refinancing or “reset” with respect to the following CLOs (which may extend the re-investment period and/or term of such CLOs, subject to the proviso below) managed by Highland affiliates (the “**Designated CLO Resets**”):

Acis CLO 2013-1, Ltd.
Acis CLO 2014-3, Ltd.
Acis CLO 2014-4, Ltd.
Acis CLO 2014-5, Ltd.
Acis CLO 2015-6, Ltd.

provided that, with respect to Acis CLO 2014-3, Ltd., Acis CLO 2014-4, Ltd. and Acis CLO 2014-5, Ltd., any such Designated CLO Reset may not extend the re-investment period beyond 2.25 years of the date of such Designated CLO Reset.

During the Investment Period, the Company shall be permitted to invest in a refinancing with respect to Acis CLO 7 (which may not extend the re-investment period or term of such CLO) (the “**Designated CLO Refinancing**”).

For the avoidance of doubt, following the expiration of the Investment Period, the Company shall not consummate an investment in any “reset” with respect to CLO Income Notes held by the Company. In addition, the Company shall not permit a reset with respect to any CLO Income Notes of Managed CLOs

that it holds, unless such CLO Income Notes of Managed CLOs are fully redeemed.

The Company shall not invest in the CLO Income Notes of a new issue Highland CLO unless it is the 100% owner of the CLO Income Notes not forming part of the Retention Interest acquired by Highland CLO Management.

Indirect Actions

Neither the Portfolio Manager nor the Company may take any action indirectly through controlled subsidiaries that either the Portfolio Manager or the Company is not permitted to undertake directly as set forth herein.

Borrowing:

It is expected that the Company will have access to one or more committed credit facilities and will use advances under such facilities, together with the proceeds of the Shares, to purchase future senior secured loans (for the primary purpose of enabling Highland CLO Management to qualify as an “originator” for purposes of the EU Retention Requirements) or other assets. Such facilities may take the form of any Revolving Credit Facility, Warehouse Loan Facilities, total return swaps or repurchase agreements, in addition to secured loan facilities. In addition to such facilities, the Company will be permitted to borrow money for day to day administration and cash management purposes.

Borrowing Limits

Notwithstanding the foregoing or anything to the contrary set forth herein, as of the time any such debt is incurred, the Company’s maximum gross leverage exposure (excluding the Warehouse Loan Facilities) pursuant to (a) committed secured loan facilities and any other borrowing (other than described in clause (b)) shall not exceed (i) during the Investment Period, the greater of (x) 15% of the Company’s gross asset value and (y) \$50,000,000 and (ii) after the Investment Period, 15% of the Company’s gross asset value, and (b) repurchase agreements shall not exceed 75% of the Company’s gross asset value.

For purposes of the limits regarding repurchase agreements set forth in clause (b) above, the “gross asset value” of the Company shall exclude financing for CLO Notes held by a Management Company as part of a “vertical” Retention Interest (including for the Designated CLO Resets), the NexBank Credit Facility, any Warehouse Loan Facilities and cash equivalents.

Warehouse Loan Facilities

One or more multi-currency warehouse lending facilities may be entered into from time to time between (i) the Company and (ii) a warehouse provider (the “**Warehouse Loan Facilities**”), pursuant to which the Company is able to draw multi-currency loans from time to time in order to purchase assets for its portfolio. The Warehouse Loan Facilities will be entered into on market standard terms, as negotiated between the Company and the relevant warehouse provider in each case and will include a senior security package in favour of the warehouse provider.

Hedging and Derivatives

Without the consent of the Advisory Board, the Company may only use hedging or derivatives to hedge investments consistent with the Company's investment objectives, and not for speculative purposes.

Repurchase Agreements

The Company may not use repurchase agreements to finance the purchase of CLO Income Notes, however, the Company may pledge any already owned CLO Income Notes as additional collateral under repurchase agreements.

Revolving Credit Facility

The Company may enter into a secured revolving credit facility with a committed amount of \$50,000,000 for working capital purposes (a "**Revolving Credit Facility**")

NexBank Credit Facility

The Company currently has a secured term credit facility provided by NexBank SSB, a Texas savings bank, with a principal amount of \$22,158,337, as of September 30, 2017 (the "**NexBank Credit Facility**"). The Company may, from time to time, increase its borrowing under the NexBank Credit Facility up to a maximum principal amount of \$30,000,000 at any time without the consent of the Advisory Board, but subject to the limitations set forth above in "*Borrowing Limits*". The terms of the NexBank Credit Facility, and of any increase in the principal amount thereto, shall be at or better than market standard terms and shall be promptly disclosed to the Advisory Board (any such amended terms, the "**Permitted NexBank Credit Facility Amendments**").

Advisory Board:

The Company shall form and assemble an advisory board (the "**Advisory Board**") composed of individuals who shall be representatives of certain Shareholders selected by the Portfolio Manager in its sole discretion in order to (a) provide advice to the Portfolio Manager with respect to certain issues involving conflicts of interest in any transaction or relationship between the Company and the Portfolio Manager or any of its employees or affiliates that are presented to the Advisory Board by the Portfolio Manager, and (b) be required to approve the following actions:

- Any extension of the Investment Period;
- Any extension of the Term (other than an automatic extension following an extension of the Investment Period that has been approved by the Advisory Board);
- Any allotment of additional equity securities by the Company; and
- Any investment in a Related Obligation or any other transaction between the Company or any entity in which the Company holds a direct or indirect interest, on the one hand, and Highland or any of its affiliates, on the other hand.

Notwithstanding the foregoing or anything to the contrary set forth herein, no transaction that is specifically authorized in the governing documents of the Company shall require approval of the Advisory Board, including, without limitation, sales or securitizations of all or a portion of the Company's loan portfolio into new Qualifying CLOs (i.e. the transfer of warehoused assets into

new Qualifying CLOs), investments in CLO Notes issued by CLOs managed by Highland affiliates, and the NexBank Credit Facility and any Permitted NexBank Credit Facility Amendments.

No voting member of the Advisory Board shall be a controlled affiliate of Highland, it being understood that none of CLO Holdco, Ltd., its wholly-owned subsidiaries or any of their respective directors or trustees shall be deemed to be a controlled affiliate of Highland due to their pre-existing non-discretionary advisory relationship with Highland.

Each member of the Advisory Board shall owe no fiduciary or other duties to the Company or the shareholders and may act solely in the interest of the shareholder that it represents.

Neither the Advisory Board nor any member thereof shall have the power to bind or act for or on behalf of the Company in any manner, and no shareholder who appoints a member of the Advisory Board shall be deemed to be an affiliate of the Company, the Portfolio Manager or Highland solely by reason of such appointment.

Investment Period:

The Company's assets may be invested and, subject to the terms and conditions set forth in the "*Dividend Policy*" section below, reinvested for a period commencing on the Closing Date of the Placing and ending on April 30, 2020 (the "**Investment Period**"), subject to two additional one-year extensions with the consent of the Advisory Board (as hereinafter defined) and the Portfolio Manager; provided that the Term will automatically be extended by an identical length of time in the event of an extension of the Investment Period.

Termination of Investment Period following Key Person Event

The Portfolio Manager will promptly provide each Shareholder with written notice in the event that any two of James Dondero, Mark Okada, Trey Parker or Hunter Covitz (collectively, the "**Key Persons**") cease to devote such time to the affairs of the Company as is sufficient to effectively manage the operations of the Company (a "**Key Person Event**"), as determined by the Portfolio Manager in its reasonable discretion, taking into account such factors as it shall deem relevant in its reasonable discretion. The Portfolio Manager will promptly provide each Shareholder with written notice in the event of the termination of employment of any Key Person.

The Investment Period will be terminated immediately upon a Key Person Event. The Investment Period shall resume in the event that (i) the Portfolio Manager obtains or receives notice of the written election or vote of the Advisory Board to reinstate the Investment Period, or (ii) one or more Qualified Replacements (as defined below) are appointed in place of (or in addition to) the then existing Key Persons to cure the Key Person Event, in which event the Investment Period will continue until its termination as otherwise described herein without further regard to such Key Person Event.

For purposes of this Offering Memorandum, a "**Qualified Replacement**" means a person nominated by the Portfolio Manager and approved by the Advisory Board, such approval not to be unreasonably withheld, conditioned or delayed, as a replacement for any existing Key Person or as an additional Key Person; provided that the Advisory Board will provide notice of its

approval or disapproval of any person nominated to be a Qualified Replacement within 10 business days of such nomination.

For the avoidance of doubt, during any cessation of the Investment Period following a Key Person Event, (i) the Portfolio Manager may continue to require Placees to purchase Shares pursuant to the subscription and transfer agreement to fund (a) any indebtedness of the Company permitted hereunder incurred prior to the end of the Investment Period (including to repay outstanding indebtedness under any Warehouse Loan Facilities) or (b) the completion, no later than 180 days after the expiration of the Investment Period, new issue Highland CLOs that were in process at the time of such Key Person Event and (ii) the Company shall not receive priority allocations with respect to all CLO Income Note investment opportunities with respect to new issue Highland CLOs until the Investment Period resumes.

Term:

The term of the Company will end (and the Company thereafter will be wound up and dissolved) on the ten-year anniversary of the date of the Placing (the “**Term**”), subject to (a) automatic extension in the event of an extension of the Investment Period and (b) two additional one-year extension with the consent of the Portfolio Manager and the Advisory Board, or such earlier date after the end of the Investment Period on which the Portfolio Manager determines to terminate and wind up the Company following the receipt by the Company of all amounts reasonably expected by the Portfolio Manager to be received with respect to the Company’s assets or the sale thereof during the term and in a manner that will not cause the Company, the Portfolio Manager, Highland, Acis, the Management Companies or any subsidiary thereof to violate any applicable law or contract.

The Company has been established as a closed-ended vehicle. Accordingly, there is no right or entitlement attaching to Shares that allows them to be redeemed or repurchased by the Company at the option of the Shareholder.

**Placing Arrangements –
Investment Period Subscription
Commitment:**

The Company is seeking aggregate subscriptions to purchase Placing Shares in an aggregate amount of up to approximately U.S. \$153 million.

Placees will commit under a subscription and transfer agreement to purchase Shares to be settled from time to time during the Investment Period. The Portfolio Manager may call such Shares for settlement from time to time on a pro rata basis upon 10 Business Days’ notice to the Placees in such amounts as may be specified by the Portfolio Manager.

Upon the expiration of the Investment Period, all Placees will be released from any further obligation with respect to purchase Shares under their subscriptions, except to the extent necessary to:

(i) complete, no later than 180 days after the expiration of the Investment Period, the purchase of Shares pursuant to written commitments, letters of intent or similar contractual commitments that were in process as of the end of the Investment Period; and

(ii) fund any indebtedness of the Company permitted hereunder incurred prior to the end of the Investment Period (including to repay outstanding indebtedness under any Warehouse Loan Facilities).

Shares will be issued at a price per Share based on the most recent quarterly determined NAV of the Company.

The maximum number of Shares to be issued by the Company is an amount of Shares equal to U.S. \$153 million and there is no minimum number of Shares. Fractions of Placing Shares will be issued.

On the Closing Date, Placees will acquire Shares of existing Shareholders at a price per Share based on the NAV of the Company as of September 30, 2017, adjusted with respect to a dividend of \$9,000,000 on October 10, 2017, and a buyback of the Shares of Acis Capital Management, L.P. on October 24, 2017 (the “**Adjusted NAV**”) such that Placees and existing Shareholders will hold currently existing Shares on a *pro rata* basis and existing Shareholders will commit, as Placees under a subscription and transfer agreement, to purchase Shares such that new and existing Shareholders will hold both existing Shares and commitments on *pro rata* basis.

The Board may deduct from any dividend payable to any Shareholder on or in respect of a Share all sums of money (if any) presently payable by him to the Company on account of calls with respect to existing Shares, or calls of commitments to purchase Shares pursuant to the subscription and transfer agreement or otherwise.

A Shareholder that defaults in respect of its obligation to purchase Shares pursuant to the terms of the subscription and transfer agreement will be subject to customary default provisions.

The Board may retain any dividend or other monies payable on or in respect of a Share on which the Company has a lien and may apply the same in or towards satisfaction of the liabilities or obligations in respect of which the lien exists.

Highland Principal Commitment

Certain principals of Highland will subscribe, directly or indirectly, for \$3,000,000 of Shares in the aggregate.

Regulatory status:

The Company is a registered closed-ended investment company incorporated in Guernsey with limited liability on 30 March 2015 under the provisions of the Companies Law, with registered number 60120. The Company is regulated by the GFSC, and is not regulated by any regulator other than the GFSC.

Typical investors:

Investment in the Company is only suitable for Professional Investors as defined in the AIFMD and any other person to whom the Placing Shares may be lawfully offered.

Applicant’s service providers:

Portfolio Manager

Highland HCF Advisor, Ltd. (“**Highland HCF Advisor**”) has been appointed as the Portfolio Manager to the Company pursuant to the Portfolio Management Agreement. In that capacity, the Portfolio Manager will select the portfolio of investments and instruct the Custodian with respect to any acquisition, disposition or sale of investments and provide certain support and assistance (including back and middle office functions), personnel and credit and market research and analysis in connection with the origination and ongoing management of the portfolio by the Company. Under the Portfolio Management Agreement, the Company shall pay to the Portfolio Manager an amount equivalent to all reasonable third party costs and expenses incurred by

the Portfolio Manager in the performance of its obligations thereunder, together with any irrecoverable VAT arising on such costs and expenses.

The Portfolio Manager has entered into a Master Sub-Advisory Agreement (the “**HCF Sub-Advisory Agreement**”) and a Staff and Services Agreement (the “**HCF Staff and Services Agreement**”, together with the Sub-Advisory Agreement, the “**HCF Services Agreements**”) with Highland Capital Management, L.P. under which Highland Capital Management, L.P. provides investment research and recommendations and operational support to the Portfolio Manager, including services that may be used in connection with the Portfolio Manager’s recommendations regarding the composition, nature and timing of changes to the Company’s portfolio, the due diligence of actual or potential investments, the execution of investment transactions, and certain loan services and administrative services.

Highland CLO Management has a Master Sub-Advisory Agreement (the “**HCLOM Sub-Advisory Agreement**”) and a Staff and Services Agreement (the “**HCLOM Staff and Services Agreement**”, together with the HCLOM Sub-Advisory Agreement, the “**HCLOM Services Agreements**”) in place with Highland, pursuant to which Highland provides credit research and operational support to Highland CLO Management, including services in connection with determining the composition, nature and timing of changes to portfolios of Highland CLOs for which Highland CLO Management acts as CLO Manager, the due diligence of actual or potential investments, the execution of investment transactions approved by the Highland CLO Management, and certain loan services and administrative services.

Acis (an affiliate of Highland) has entered into a Master Sub-Advisory Agreement (the “**ACM Sub-Advisory Agreement**”) and a Staff and Services Agreement (the “**ACM Staff and Services Agreement**”, together with the ACM Sub-Advisory Agreement, the “**ACM Services Agreements**”) with Highland under which Highland provides investment research and recommendations and operational support to Acis, including services in connection with determining the composition, nature and timing of changes to portfolios of Acis CLOs for which Acis acts as CLO Manager, the due diligence of actual or potential investments, the execution of investment transactions approved by Acis, and certain loan services and administrative services.

Acis CLO Management has entered into a Master Sub-Advisory Agreement (the “**ACLOM Sub-Advisory Agreement**”, and together with the HCF Sub-Advisory Agreement, the HCLOM Sub-Advisory Agreement and the ACM Sub-Advisory Agreement, the “**Sub-Advisory Agreements**”) and a Staff and Services Agreement (the “**ACLOM Staff and Services Agreement**”, and the ACLOM Staff and Services Agreement together with the HCF Staff and Services Agreement, the HCLOM Staff and Services Agreement and the ACM Staff and Services Agreement, the “**Staff and Services Agreements**”, and the ACLOM Staff and Services Agreement together with the ACLOM Sub-Advisory Agreement, the “**ACLOM Services Agreements**” and the ACLOM Services Agreements with the HCF Services Agreements, the HCLOM Services Agreements and the ACM Services Agreements, the “**Services Agreements**”) in place with Acis, pursuant to which Acis provides credit research and operational support to Acis CLO Management, including services in connection with determining the composition, nature and timing of changes to portfolios of Acis CLO 7 for which Acis CLO Management acts as CLO Manager, the due diligence of actual or potential investments, the

execution of investment transactions approved by Acis CLO Management, and certain loan services and administrative services.

No management fees will be payable by the Company pursuant to any Services Agreement; it being understood that each of the Management Companies will pay (i) eleven-fifteenths (11/15^{ths}) of the total 0.15% senior management fee received from Acis CLO 7 and the Highland CLOs to affiliates of Highland pursuant to the applicable Services Agreements, and (ii) following any Designated CLO Reset, a portion of the management fees received from any CLO subject to such Designated CLO Reset to affiliates of Highland pursuant to the applicable Services Agreements, other than an amount equivalent to a senior management fee of 0.04%.

Administrator

State Street (Guernsey) Limited has been appointed as administrator to the Company pursuant to the Administration Agreement. In such capacity, the Administrator is responsible for the day-to-day administration of the Company. Under the terms of the Administration Agreement, the Administrator is entitled to an annual administration fee of up to 7 bps per annum of the Net Asset Value of the Company calculated and payable monthly in arrears, and other miscellaneous fees and expenses reimbursed, in each case, as determined in the Administration Agreement.

Operating Expenses:

Except as provided below, the Portfolio Manager will pay all of its own Overhead without reimbursement by the Company.

Subject to the following paragraph, the Company shall pay or reimburse the Portfolio Manager and its affiliates for all Operating Expenses. See “Company Directors and Administration—The Portfolio Manager—Highland Fees”.

Exculpation:

The Portfolio Manager will assume no responsibility under the Portfolio Management Agreement other than to render the services called for thereunder and affecting the duties and functions that have been delegated to it thereunder in good faith and, subject to the standard of conduct described in the next succeeding sentence. The Portfolio Manager will not be responsible for any action or inaction of the Company in declining to follow any advice, recommendation or direction of the Portfolio Manager.

The Portfolio Manager, its affiliates, any officer, director, secretary, manager, employee or any direct or indirect partner, member, stockholder, agent or legal representative (e.g., executors, guardians and trustees) of the Portfolio Manager and its affiliates, including persons formerly serving in such capacities, any person who serves at the request of the Portfolio Manager or the Board pursuant to the Articles, on behalf of the Company as an officer, director, secretary, manager, partner, member, employee, stockholder, agent or legal representative of any other person serving at the request of the Portfolio Manager or the Board pursuant to the Articles on behalf of the Company in such capacity as listed above, each member of the Advisory Board and each member of any subcommittee thereof and any assignees or successors of the foregoing (each, an “**Indemnified Person**”) will incur no liability to the Company or any Shareholder in the absence of a finding by any court or governmental body of competent jurisdiction in a final, non-appealable judgment that the commission by such person of an action, or the omission by such person to take an action, constitutes bad faith, gross

negligence or wilful misconduct (a **“Triggering Event”**), except as otherwise required by applicable law (including the Companies Law). Any claims arising from a Triggering Event shall be limited to actual out-of-pocket damages incurred as a direct consequence of the Triggering Event, and shall not include punitive, consequential or other damages or lost profits.

Indemnification:

To the fullest extent permitted by applicable law, the Company will be required to indemnify each Indemnified Person against all losses, liabilities, damages, expenses or costs (including any claim, judgment, award, settlement, reasonable legal and other professional fees and disbursements and other costs or expenses incurred in connection with the defence of any proceeding, whether or not matured or unmatured or whether or not asserted or brought due to contractual or other restrictions, joint or several) other than those arising from suits, disputes or actions by Highland, its affiliates or principals, Other Accounts or CLO HoldCo, Ltd. (collectively, the **“Indemnified Losses”**) incurred by such Indemnified Person or to which such Indemnified Person may be subject by reason of its activities in connection with the conduct of the business or affairs of the Company, unless such losses result from an Indemnified Person’s Triggering Event.

The Indemnified Persons shall be entitled to advancement of expenses as they are incurred in connection with the investigation, defence or resolution of any claim that may be subject to indemnification, subject to providing an undertaking to repay any amounts ultimately determined not to be subject to indemnification due to a Triggering Event.

Each member of the Advisory Board and each member of any subcommittee thereof and, solely in connection with matters relating to the Advisory Board or such subcommittee, the Shareholder and/or other person or entity on whose behalf such Advisory Board member or subcommittee member serves, will have the benefit of similar exculpation and indemnification rights unless it has not acted in good faith.

Notwithstanding the foregoing or anything to the contrary set forth herein, the Company will not provide for the exculpation or indemnification of any Indemnified Person for any liability (including liability under U.S. federal securities laws which, under certain circumstances, impose liability even on persons that act in good faith), to the extent that such liability may not be waived, modified or limited under applicable law.

Under the Companies Law, any indemnity provided (directly or indirectly) by the Company to a Director, or an associated company, or a body corporate which is an overseas company and a subsidiary of the company, against any liability attaching to him in connection with any negligence, default, breach of duty or breach of trust in relation to the Company is void, except in certain circumstances.

Regulatory status of Portfolio Manager:

Highland HCF Advisor is a relying adviser of Highland Capital Management, L.P., an investment adviser registered under the Investment Advisers Act of 1940, as amended (the **“Investment Advisers Act”**) and, as such, is subject to the provisions of the Investment Advisers Act.

Regulatory status of Custodian:

The Custodian of the Company is State Street Custodial Services (Ireland) Limited, which is authorised as an Investment Business Firm under Section

10 of the Irish Investment Intermediaries Act, 1995 (as amended), will provide custody and banking services.

Calculation of Net Asset Value: The Company intends to publish the Net Asset Value per Share on a quarterly basis, within 15 Business Days following the relevant quarter-end. Notice will be provided by the Administrator by e-mail.

Portfolio: The Company is currently invested in CLO Income Notes in the following Managed CLOs in the following amounts:

Acis CLOs: Aggregate Outstanding Amount (U.S.\$)

ACIS CLO 2013-1 Ltd.	\$18,558,000.00
ACIS CLO 2014-3 Ltd.	\$39,750,000.00
ACIS CLO 2014-4 Ltd.	\$50,750,000.00
ACIS CLO 2014-5 Ltd.	\$53,000,000.00
ACIS CLO 2015-6, Ltd.	\$51,850,000.00

Highland Legacy CLOs: Aggregate Outstanding Amount (U.S.\$)

Rockwall CDO, Ltd.	\$14,000,000.00
Brentwood CLO, Ltd.	\$12,000,000.00
Grayson CLO, Ltd.	\$5,900,000.00
Liberty CLO, Ltd.	\$17,000,000.00
HP CDO, Ltd.	\$1,621,542.70
Greenbriar CLO, Ltd.	\$18,000,000.00
Gleneagles CLO, Ltd.	\$1,250,000.00

ACIS CLO Management Aggregate Outstanding Amount (U.S.\$)

Acis CLO 7	\$17,850,000.00
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Net Asset Value: As of September 30, 2017, the unaudited net asset value per share of the Net Asset Value was US \$157,081,118.91. A special dividend in the aggregate amount of US \$9,000,000 was paid on October 10, 2017, and a buyback of Shares from Acis Capital Management, L.P. was made on October 24, 2017, for an aggregate purchase price of \$991,180.13.

Type and class of securities: The Shares being offered under the Placing are ordinary shares of no par value in the capital of the Company.

Currency of the securities issue: U.S. Dollar

Number of securities in issue: The issued share capital of the Company (all of which shares have been fully paid) as of the date of this Offering Memorandum consists of 143,454,001 million Shares.

There are no non-paid up Shares in issue.

Description of the rights attaching to the securities: The holders of the Shares shall be entitled to receive, and to participate in, any dividends declared in relation to the Shares that they hold.

On a winding-up or a return of capital by the Company, the net assets of the Company attributable to the Shares shall be divided pro rata among the holders of the Shares.

The Shares shall carry the right to receive notice of, attend and vote at general meetings of the Company.

Unless otherwise authorised by a special resolution, the Company shall not allot equity securities on any terms unless the Company has first made an offer to each person who holds Shares to allot to him, on the same or more favourable terms, such proportion of those equity securities that is as nearly as practicable (fractions being disregarded) equal to the proportion held by the relevant person of the Shares.

Restrictions on the free transferability of the securities:

The Company has elected to impose certain restrictions (pursuant to its Articles) on the Placing and on the future trading of the Shares so that the Company will not be required to register the offer and sale of the Shares under the U.S. Securities Act, so that the Company will not have an obligation to register as an investment company under the U.S. Investment Company Act and related rules and to address certain ERISA, U.S. Tax Code and other considerations. These transfer restrictions, which will remain in effect until the Company determines in its sole discretion to remove them, may adversely affect the ability of Shareholders to trade the Shares. Due to the restrictions described below, potential investors in the United States and U.S. Persons (including persons acting for the account or benefit of any U.S. Person) are advised to consult legal counsel prior to making any offer, resale, exercise, pledge or other transfer of the Shares.

Subject to certain exceptions, the Placing is only being made outside the United States to non-U.S. Persons in reliance on Regulation S under the U.S. Securities Act.

Dividend policy:

Whilst not forming part of the investment objective or policy of the Company, dividends will be payable in respect of each calendar quarter, payable in the month following the end of such quarter. During the Investment Period, any interest, proceeds from the realization of portfolio investments or other cash generated by the portfolio in excess of the dividends paid to Shareholders as provided below will be reinvested by the Company with the objective of growing the NAV.

During the Investment Period, on the 15th of February, May, August and November of each calendar year, beginning May 15, 2018 (each a “**Quarterly Dividend Date**”), after satisfaction of all expenses, debts, liabilities and obligations of the Company, the Company will pay a dividend to each Shareholder at a rate of at least 8% per annum, based on such Shareholder’s aggregate capital contributions as of the prior Quarterly Dividend Date (the “**Target Dividend**”).

Following the Investment Period, after satisfaction of all expenses, debts, liabilities and obligations of the Company, any interest, proceeds from the realization of portfolio investments or other cash generated by the portfolio will be distributed by the Company to the Shareholders as a dividend on each Quarterly Dividend Date in accordance with the distribution priority as follows (the “**Distribution Priority**”):

First, 100% to the Shareholders *pro rata* based on the number of Shares held until each Shareholder has received (i) pursuant to this clause (i), aggregate distributions from the Company equal to all capital contributions made by such Shareholder plus (ii) an amount necessary for such Shareholder to

receive a cumulative rate of return of 8.0% per annum, compounded annually, on such Shareholder's aggregate capital contributions;

Second, 100% to the Portfolio Manager until the Portfolio Manager has received aggregate distributions from the Company equal to 20% of the sum of all distributions made in excess of aggregate capital contributions made by Shareholders;

Third, 80% to the Shareholders *pro rata* based on the number of Shares held and 20% to the Portfolio Manager until each Shareholder has received aggregate distributions from the Company equal to all capital contributions made by such Shareholder plus an amount necessary for such Shareholder to receive a cumulative rate of return of 16% per annum, compounded annually, on such Shareholder's aggregate capital contributions; and

Thereafter, 70% to the Shareholders *pro rata* based on the number of Shares held and 30% to the Portfolio Manager.

For purposes of this section, references herein to a "Shareholder" shall include Highland HCF Advisor in its capacity as a shareholder of the Company, if applicable, and references to "aggregate distributions" received by the "Portfolio Manager" shall not include any distributions received by Highland HCF Advisor in its capacity as a Shareholder.

The total net proceeds and an estimate of the total expenses of the issue/offer, including estimated expenses charged to the investor by the issuer or the offeror:

The Net Placing Proceeds are expected to be approximately U.S. \$153 million.

The initial expenses of the Company are those which are necessary for the Placing, and shall not exceed U.S. \$750,000. These expenses will be paid on or around the Placing and will include, without limitation: the cost of settlement and escrow arrangements; printing, advertising and distribution costs; legal fees; and any other applicable expenses.

Reasons for the offer and use of proceeds:

The Company is making the offer in order to raise the Net Placing Proceeds which will be invested in accordance with the Company's investment objective and policy, including its indirect investment in the Management Companies.

Expenses related to the Placing:

All costs associated with the Placing will be borne by the Company after the Placing and therefore the Net Placing Proceeds will be lower than the Gross Placing Proceeds immediately following the Placing.

Ongoing annual expenses:

The Company currently estimates that its total annual expenses for 2017 will be approximately \$525,000 per annum, and will provide the Advisory Board with updated estimates and reasonable detail from time to time upon request. For the avoidance of doubt, except as expressly set forth in the section titled "*Company Directors and Administration—Portfolio Manager—Highland Fees*", the Portfolio Manager will pay all of its own operating, overhead and administrative expenses, including all costs and expenses on account on employee compensation, employee benefits and rent without reimbursement by the Company

These expenses will include the following:

The Portfolio Manager, Highland, Acis and the Management Companies

Please see below in section titled “*Company Directors and Administration—Portfolio Manager—Highland Fees*”.

Administrator

Under the terms of the Administration Agreement, the Administrator is entitled to an annual administration fee of up to 7 bps of the Net Asset Value of the Company per annum, payable monthly in arrears, and other miscellaneous fees and expenses reimbursed, in each case, as determined in the agreement.

Custodian

Under the terms of the Custody Agreement, the Custodian is entitled to receive transaction charges and sub custodian charges will be recovered by the Custodian from the Company as they are incurred by the relevant sub custodian. All such charges shall be charged at normal commercial rates.

Directors

The Directors are remunerated for their services at a fee of £35,000 per annum (£40,000 for the Chairman). For more information in relation to the remuneration of the Directors, please refer to the section of this Offering Memorandum entitled “Memorandum and Articles” in “Additional Information on the Company”.

Operating Expenses

All Operating Expenses shall be borne by the Company. All reasonably and properly incurred out-of-pocket expenses of the Administrator, the Custodian, and the Directors relating to the Company are borne by the Company.

The amount of charges and expenses which are borne by an investor may vary from year to year.

For more information on expenses charged during the most recent financial year, prospective investors should review the Company’s annual audited financial statements (if any) for the prior financial year.

Terms and conditions of the offer:

An amount of Shares equal to U.S. \$153 million are being marketed and are available for subscription of commitments under the Placing until the Closing Date.

Shares will be issued under the Placing at a price per Share based on the most recent quarterly determined NAV of the Company. The maximum number of Shares to be issued by the Company is an amount of Shares equal to U.S. \$153 million and there is no minimum number of Shares.

Placees may acquire Shares pursuant to a combination of issuance and transfer from existing Shareholders.

Placees may also enter into commitments to acquire Shares pursuant to a combination of issuance and transfer from existing Shareholders.

The Placing is not being underwritten.

Press Releases:

Neither the Portfolio Manager, the Company nor any Shareholder shall issue or approve any press release or other announcement referring to the identity

of a Shareholder without the prior written consent of the applicable Shareholder.

**UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF
TEXAS, DALLAS DIVISION**

In Re: Highland Capital Management, L.P § Case No. **19-34054-SGJ11**

Charitable DAF Fund, L.P et al

Appellant

§

vs.

§

21-03067

Highland Capital Management, L.P

§

Appellee

§

3:23-CV-01503-B

[167] Order granting Defendant Highland Capital Management, L.P.'s Renewed motion to dismiss adversary proceeding (related document # [122](#)) Entered on 6/25/2023.

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APPELLANT RECORD

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**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

In re:	§ Chapter 11
	§
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§ Case No. 19-34054-sgj11
	§
Debtor.	§
	§
CHARITABLE DAF FUND, L.P. AND CLO	§
HOLDCO, LTD., DIRECTLY AND DERIVATIVELY	§
	§
Plaintiffs,	§ Adversary Proceeding No.
	§
vs.	§ 21-03067-sgj11
	§
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§
HIGHLAND HCF ADVISOR, LTD., AND	§
HIGHLAND CLO FUNDING LTD., NOMINALLY	§
	§
Defendant.	§
	§

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**APPELLANTS' SECOND AMENDED STATEMENT OF ISSUES
AND DESIGNATION OF RECORD ON APPEAL**

Pursuant to Rules 8009(a)(1)(A)-(B) and (a)(4) of the Federal Rules of Bankruptcy Procedure, The Charitable DAF Fund, L.P. and CLO Holdco, Ltd. ("Appellants") hereby designate the following items to be included in the record and identify the following issues with respect to

their appeal of the Order Granting Defendant Highland Capital Management, L.P.'s "Renewed Motion to Dismiss Complaint" [Adv. Proc. Doc. No. 122] which was entered by the United States Bankruptcy Court for the Northern District of Texas on June 25, 2023.

I. STATEMENT OF ISSUES TO BE PRESENTED ON APPEAL

- Whether the Bankruptcy Court had jurisdiction to rule on Highland Capital Management L.P.'s Renewed Motion to Dismiss Complaint
- Whether the Renewed Motion to Dismiss Complaint was improperly granted

II. DESIGNATION OF ITEMS TO BE INCLUDED IN THE RECORD

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1. Notice of Appeal for Bankruptcy Case Adversary Proceeding No. 21-03067-sgj11 [Doc. 168].

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2. The judgment, order, or decree appealed from: Memorandum Opinion and Order Granting Defendant Highland Capital Management, L.P.'s "Renewed Motion to Dismiss Complaint" [Adv. Proc. Doc. No. 122] [Doc. 167].

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3. Docket Sheet kept by the Bankruptcy Clerk.

4. Documents listed below and as described in the Docket Sheet for Bankruptcy Case Proceeding No. 21-03067-sgj.

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No.	Date Filed	Docket No.	Description/Document Text
1	9/29/21	1	(36 pgs; 3 docs) Adversary case 21-03067. ORDER REFERRING CASE NUMBER 21-CV-0842-B from U.S District Court for the Northern District of Texas, Dallas Division to U.S. Bankruptcy Court for Northern District of Texas, Dallas Division. Complaint by Charitable DAF Fund, LP, CLO Holdco, Ltd. against Highland Capital Management, LP, Highland HCF Advisor Ltd., Highland CLO Funding, Ltd. Fee Amount \$350 (Attachments: # 1 Original Complaint # 2 Docket Sheet from 3:20-cv-0842-B) Nature(s) of suit: 02 (Other (e.g. other actions that would have been brought in state court if unrelated to bankruptcy)). (Okafor, M.)
2	9/29/21	2	(1 pg) Supplemental Document (cover sheet) by CLO Holdco Ltd., Charitable DAF Fund (RE: related document(s)1 Adversary case 21-03067) [ORIGINALLY FILED IN 21-CV-0842 AS #2 ON 04/13/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)

Vol. 2 000139 000232 000239 000270 Thru Vol. 6	3	9/29/21	6	(93 pgs; 6 docs) MOTION for Leave to File First Amended Complaint filed by CLO Holdco Ltd., Charitable DAF Fund LP (Attachments: # 1 Exh 1_First Amended Complaint # 2 Exh 2_Motion for Authorization to Retain James Seery # 3 Exh 3_Order Approving Retention of James Seery # 4 Exh 4_Order Approving Settlement # 5 Proposed Order) (Bridges, Jonathan) (Entered: 04/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #6 ON 04/19/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
	4	9/29/21	22	(7 pgs; 2 docs) MOTION for an Order to Enforce the Order of Reference filed by Highland Capital Management LP. (Attachments: # 1 Exhibit(s) A--Proposed Order) (Annable, Zachery) Modified text on 5/20/2021 (mjr). (Entered: 05/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #22 ON 05/19/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
	5	9/29/21	23	(31 pgs) Brief/Memorandum in Support filed by Highland Capital Management LP re: 22 MOTION for an Order to Enforce the Order of Reference. (Annable, Zachery) Modified text on 5/20/2021 (mjr).(Entered: 05/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #23 ON 05/19/2021 IN U.S.DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
	6	9/29/21	24	(926 pgs; 29 docs) Appendix in Support filed by Highland Capital Management LP re: 23 Brief/Memorandum in Support. (Attachments: # 1 Appendix 1 # 2 Appendix 2 # 3 Appendix 3 # 4 Appendix 4 # 5 Appendix 5 # 6 Appendix 6 # 7 Appendix 7 # 8 Appendix 8 # 9 Appendix 9 # 10 Appendix10 # 11 Appendix 11 # 12 Appendix 12 # 13 Appendix 13 # 14 Appendix 14 # 15 Appendix 15 # 16 Appendix 16 # 17 Appendix 17 # 18 Appendix 18 # 19 Appendix 19 # 20 Appendix 20 # 21 Appendix 21# 22 Appendix 22 # 23 Appendix 23 # 24 Appendix 24 # 25 Appendix 25 # 26 Appendix 26 # 27 Appendix 27 # 28 Appendix 28) (Annable, Zachery) Modified linkage and text on 5/20/2021 (mjr). (Entered:05/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #24 ON 05/19/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
Vol. 7 001196	7	9/29/21	26	(7 pgs; 2 docs) MOTION to Dismiss Complaint filed by Highland Capital Management LP (Attachments: # 1 Exhibit(s) A--Proposed Order) (Annable, Zachery) Modified text on 5/28/2021 (jmg).(Entered: 05/27/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #26 ON 05/27/2021 IN U.S.DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)

Vol. 7 001203 thru Vol. 8	8	9/29/21	28	(508 pgs; 14 docs) Appendix in Support filed by Highland Capital Management LP (Attachments: # 1 Appendix 1 # 2 Appendix 2 # 3 Appendix 3 # 4 Appendix 4 # 5 Appendix 5 # 6 Appendix 6 # 7 Appendix 7 # 8 Appendix 8 # 9 Appendix 9 # 10 Appendix 10 # 11 Appendix 11 # 12 Appendix 12 # 13 Appendix 13) (Annable, Zachery) (Entered: 05/27/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #28 ON 05/27/2021 IN U.S. DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
Vol. 9 001711	9	9/29/21	33	(1 pg) Amended Civil Cover Sheet by CLO Holdco Ltd, Charitable DAF Fund LP. Amendment to 2 Supplemental Document. (Sbaiti, Mazin) Modified text on 6/23/2021 (mjr). (Entered: 06/22/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #33 ON 06/22/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001712	10	9/29/21	36	(26 pgs) RESPONSE filed by CLO Holdco Ltd, Charitable DAF Fund LP re: 22 MOTION for an Order to Enforce the Order of Reference (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #36 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001738	11	9/29/21	37	(22 pgs) Appendix in Support filed by CLO Holdco Ltd, Charitable DAF Fund LP re 36 Response/Objection Response to Motion for an Order to Enforce the Order of Reference (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #37 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001760	12	9/29/21	38	(45 pgs) RESPONSE filed by CLO Holdco Ltd, Charitable DAF Fund LP re: 26 MOTION to Dismiss (Defendant Highland Capital Management, L.P.'s Motion to Dismiss Complaint) (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #38 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001805	13	9/29/21	39	(88 pgs) Appendix in Support filed by CLO Holdco Ltd, Charitable DAF Fund LP re 38 Response/Objection to Defendant Highland Capital Management, L.P.'s Motion to Dismiss Complaint (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #39 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001893	14	9/29/21	42	(12 pgs) REPLY filed by Highland Capital Management LP re: 22 MOTION for an Order to Enforce the Order of Reference (Annable, Zachery) (Entered: 07/13/2021) [ORIGINALLY FILED IN 21-CV-0842AS #42 ON 07/13/2021 IN U.S.

			DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
VOL. 9	15	9/29/21	43 (852 pgs) Appendix in Support filed by Highland Capital Management LP re: 42 Reply. (Annable, Zachery) Modified text on 7/14/2021 (mjr). (Entered: 07/13/2021) [ORIGINALLY FILED IN 21-CV-0842AS #43 ON 07/13/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001905 thru Vol. 13	16	9/29/21	45 (21 pgs) REPLY filed by Highland Capital Management LP re: 26 MOTION to Dismiss (Defendant Highland Capital Management, L.P.'s Motion to Dismiss Complaint) (Annable, Zachery) (Entered: 07/13/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #44 ON 07/13/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002757	17	9/29/21	57 (7 pgs; 2 docs) MOTION to Dismiss and Joinder in Motion to Dismiss of Highland Capital Management, L.P. filed by Highland CLO Funding Ltd. (Attachments: # 1 Proposed Order) Attorney Paul R Bessette added to party Highland CLO Funding Ltd (pty:dft) (Bessette, Paul) (Entered: 08/30/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #57 ON 08/30/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002778	18	9/29/23	58 (12 pgs) Brief/Memorandum in Support filed by Highland CLO Funding Ltd. re 57 MOTION to Dismiss and Joinder in Motion to Dismiss of Highland Capital Management, L.P. (Bessette, Paul) (Entered: 08/30/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #58 ON 08/30/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002785	19	9/29/23	59 (80 pgs; 5 docs) Appendix in Support filed by Highland CLO Funding Ltd re 58 Brief/Memorandum in Support of Motion (Attachments: # 1 Exhibit(s) A - Jackson v Dear # 2 Exhibit(s) B - Prudential Assurance v. Newman # 3 Exhibit(s) C - Harbourvest Settlement Agreement # 4 Exhibit(s) D - Boleat Declaration) (Bessette, Paul) (Entered: 08/30/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #59 ON 08/30/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002797	20	9/29/21	64 (1 pg) ORDER OF REFERENCE: Pursuant to 28 U.S.C. § 157 and this District's Miscellaneous Order No. 33, this case is hereby REFERRED to Judge Stacey G. C. Jernigan of the United States Bankruptcy Court for the Northern District of Texas, Dallas Division, to be adjudicated as a matter related to the consolidated Chapter 11 Bankruptcy of Highland Capital Management, L.P., Chapter 11 Case No.19-34054. (Ordered by Judge Jane J. Boyle
002877			

Vol. 14 002878 002883 thru Vol. 16				on 9/20/2021) (svc) (Entered: 09/20/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #64 ON 09/20/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
	21	10/19/21	66	(5 pgs) Notice of hearing filed by Defendant Highland Capital Management, LP (RE: related document(s) 26 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP, 47 Motion to strike document filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 55 Motion to abate filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) Hearing to be held on 11/23/2021 at 09:30 AM at https://us-courts.webex.com/meet/jerniga for 26 and for 47 and for 55, (Annable, Zachery)
	22	11/22/21	71	(509 pgs; 2 docs) Witness and Exhibit List <i>for Hearing on November 23, 2021</i> filed by Defendant Highland Capital Management, LP (RE: related document(s) 26 Motion to dismiss adversary proceeding). (Attachments: # 1 Exhibits 1-13) (Hayward, Melissa)
Vol. 17 003392 003394 003583 003585 003611	23	11/22/21	72	(2 pgs) Witness List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 26 Motion to dismiss adversary proceeding, 47 Motion to strike (related document(s): 43 Document), 55 Motion to abate (related document(s) 1 Complaint), 69 Motion to abate <i>Plaintiffs' Amended Motion to Stay All Proceedings</i> (related document(s) 55 Motion to abate (related document(s) 1 Complaint))). (Sbaiti, Mazin)
	24	11/22/21	73	(189 pgs; 4 docs) Exhibit List <i>for November 23, 2021 hearing</i> filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 47 Motion to strike (related document(s): 43 Document), 55 Motion to abate (related document(s) 1 Complaint)). (Attachments: # 1 Exhibit 1_Defendant's Memorandum of Law in Support of Motion for Reconsideration # 2 Exhibit 2_Highland Memorandum in Support of Motion to Dismiss # 3 Exhibit 3_Order (I) Confirming Fifth Amended Plan of Reorganization of Highland) (Sbaiti, Mazin)
	25	12/7/21	80	(2 pgs) Order granting Highland CLO Funding, Ltd.'s motion to dismiss adversary as a party with prejudice (related document 57) Entered on 12/7/2021. (Okafor, Marcey) Modified text on 3/11/2022 (Okafor, Marcey).
	26	3/11/22	99	(26 pgs) Memorandum of Opinion and order granting motion to dismiss the adversary proceeding (RE: related document(s) 26 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP). Entered on 3/11/2022 (Okafor, Marcey)
	27	3/11/22	100	(26 pgs) Order granting motion to dismiss adversary proceeding with prejudice (related document #26) Entered on 3/11/2022. (Okafor, Marcey)

Vol. 18 003637 003666 003843 003844 003851	28	3/21/22	104	(29 pgs) Notice of appeal. Fee Amount \$298 filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 100 Order on motion to dismiss adversary proceeding). Appellant Designation due by 04/4/2022. (Sbaiti, Mazin)
	29	5/26/22	120	(177 pgs; 2 docs) Support/supplemental document <i>Motion to Supplement Appellate Record</i> filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 111 Appellant designation). (Attachments: # 1 Amended Transcript of January 14, 2021 Hearing) (Sbaiti, Mazin)
	30	6/9/22	121	(1 pg) DISTRICT COURT Order: Case 3:22-00695-B is hereby transferred to the docket of the Honorable Judge Jane J. Boyle for consolidation with The Charitable DAF Fund LP, et al. v. Highland Capital Management LP, Case No. 3:21-cv-3129-N. Judge Karen Gren Scholer no longer assigned to case.(RE: related document(s) 86 Notice of appeal filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 104 Notice of appeal filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Entered on 6/9/2022 (Whitaker, Sheniqua) (Entered: 06/10/2022)
	31	10/24/22	122	(7 pgs) Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP (Annable, Zachery)
	32	10/14/22	123	(31 pgs) Brief in support filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Annable, Zachery)
Vol. 19 003882 Thru Vol 20	33	10/14/22	124	(513 pgs; 15 docs) Support/supplemental document (<i>Appendix in Support of Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7 # 8 Exhibit 8 # 9 Exhibit 9 # 10 Exhibit 10 # 11 Exhibit 11 # 12 Exhibit 12 # 13 Exhibit 13 # 14 Exhibit 14) (Annable, Zachery)
Vol. 21 004395	34	10/27/22	126	(5 pgs) Notice of hearing (<i>Notice of Hearing and Briefing Schedule on Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP). Hearing to be held on 12/8/2022 at 09:30 AM at https://us-courts.webex.com/meet/jerniga for 122. (Annable, Zachery)

Vol. 21 004400 004410 004442 Thru Vol. 22	35	11/18/22	128	(10 pgs) Motion for withdrawal of reference. Fee amount \$188, filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (Sbaiti, Mazin)
	36	11/18/22	129	(32 pgs) Response opposed to (related document(s): 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP) filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Sbaiti, Mazin)
	37	11/18/22	130	(254 pgs; 2 docs) Response opposed to (related document(s): 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP) filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Attachments: # 1 Appendix) (Sbaiti, Mazin)
Vol. 22 004696 004717 004732 004737 004742	38	9/2/22	131	(21 pgs) DISTRICT COURT MEMORANDUM OPINION AND ORDER: The Court REVERSES and REMANDS the bankruptcy court's Motion to Dismiss Order and AFFIRMS the bankruptcy courts Motion to Stay Order. re: appeal on Civil Action number: Case 3:22-00695-B consolidated with 3:21-CV-3129-B, (RE: related document(s) 81 Order on motion to abate, 100 Order on motion to dismiss adversary proceeding). Entered on 9/2/2022 (Whitaker, Sheniqua) (Entered: 11/29/2022)
	39	12/2/22	133	(15 pgs) Reply to (related document(s): 129 Response filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 130 Response filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) filed by Defendant Highland Capital Management, LP. (Annable, Zachery)
	40	12/7/22	135	(5 pgs) Notice of hearing filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP). Hearing to be held on 1/25/2023 at 01:30 PM at https://us-courts.webex.com/meet/jerniga for 122, (Annable, Zachery)
	41	12/7/22	136	(5 pgs) Notice of hearing filed by Defendant Highland Capital Management, LP (RE: related document(s) 128 Motion for withdrawal of reference filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Status Conference to be held on 1/25/2023 at 01:30 PM at https://us-courts.webex.com/meet/jerniga . (Annable, Zachery).
	42	12/9/22	138	(3 pgs) Response opposed to (related document(s): 128 Motion for withdrawal of reference. Fee amount \$188, filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) filed by Defendant Highland Capital Management, LP. (Annable, Zachery)

Vol. 22 004745	43	12/9/22	139	(25 pgs) Brief in support filed by Defendant Highland Capital Management, LP (RE: related document(s) 138 Response). (Annable, Zachery)
Vol. 23 004770	44	12/9/22	140	(280 pgs; 8 docs) Support/supplemental document (<i>Appendix in Support of Highland Capital Management, L.P.'s Response to Renewed Motion to Withdraw the Reference</i>) filed by Defendant Highland Capital Management, LP (RE: related document(s) 138 Response). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7) (Annable, Zachery)
Vol. 24 005050	45	12/16/22	144	(6 pgs) Reply to (related document(s): 138 Response filed by Defendant Highland Capital Management, LP) filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Sbaiti, Mazin)
005056 Thru Vol. 25.	46	1/23/23	145	(514 pgs; 15 docs) Witness and Exhibit List filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7 # 8 Exhibit 8 # 9 Exhibit 9 # 10 Exhibit 10 # 11 Exhibit 11 # 12 Exhibit 12 # 13 Exhibit 13 # 14 Exhibit 14) (Annable, Zachery)
Vol. 26 005570	47	1/23/23	146	(280 pgs; 8 docs) Witness and Exhibit List filed by Defendant Highland Capital Management, LP (RE: related document(s) 128 Motion for withdrawal of reference. Fee amount \$188.). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7) (Annable, Zachery)
Vol. 27 005850	48	1/23/23	147	(221 pgs; 7 docs) Witness and Exhibit List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Attachments: # 1 Exhibit 1_Excerpts from July 14, 2020 Hearing Transcript # 2 Exhibit 2_HCLOF Members Agreement Relating to the Company # 3 Exhibit 3_HarbourVest Settlement Agreement # 4 Exhibit 4_Order Approving Debtor's Settlement with HarbourVest # 5 Exhibit 5_HCLOF Offering # 6 Exhibit 6 Amended and Restated Investment Advisory Agreement) (Sbaiti, Mazin)
006071	49	1/23/23	148	(3 pgs) Witness and Exhibit List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 128 Motion for withdrawal of reference. Fee amount \$188.). (Phillips, Louis)
Vol. 28 006074	50	1/25/23	150	(56 pgs; 2 docs) Amended Witness and Exhibit List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 147 List (witness/exhibit/generic), 149 List (witness/exhibit/generic)). (Attachments: # 1 Exh 7_Testimony of Mark Patrick at June 8, 2021 hearing) (Sbaiti, Mazin)

Vol. 28 006130	51	1/25/23	152	(3 pgs) Notice of Appearance and Request for Notice by Louis M. Phillips filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Phillips, Louis)
	52	1/25/23	154	(1 pg) Court admitted exhibits date of hearing January 25, 2023 (RE: related document(s) 128 Motion for withdrawal of reference, filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) (COURT ADMITTED DEFENDANT'S EXHIBITS #1, #2, #3, #4, #5 & #6 OFFERED BY ATTY GREG DEMO). (Edmond, Michael) (Entered: 01/27/2023)
Vol. 32 006925 006942 006960	53	2/6/23	158	Report and recommendation to the U.S. District Court by U.S. Bankruptcy Judge. (RE: related document(s) 128 Motion for withdrawal of reference filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Entered on 2/6/2023 (Okafor, Marcey)
	54	2/6/23	161	(18 pgs) DISTRICT COURT Notice of transmission of report and recommendation in re: renewed motion to withdraw reference. Civil Case # 3:22-cv-02802-S. (RE: related document(s) 158 Report and recommendation to the U.S. District Court by U.S. Bankruptcy Judge. (RE: related document(s) 128 Motion for withdrawal of reference filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Entered on 2/6/2023) (Whitaker, Sheniqua)
	55	4/3/23	165	(1 pg) DISTRICT COURT ORDER: The Court GRANTS the 11 Joint Motion to Transfer Proceeding and Consolidate Before Original Court and the above-numbered case (3:22-cv-02802-S) is transferred to the docket of the Honorable Judge Jane Boyle: Civil case 3:21-cv-00842-B (order referring case). (RE: related document(s) 1 Complaint filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 143 Notice of transmission of motion to withdraw reference). Entered on 4/3/2023 (Whitaker, Sheniqua) Modified on 4/10/2023 (Whitaker, Sheniqua). (Entered: 04/10/2023)

TRANSCRIPTS

006961	56	11/24/21	78	(104 pgs) Transcript regarding Hearing Held 11-23-2021 RE: Motion Hearing. THIS TRANSCRIPT WILL BE MADE ELECTRONICALLY AVAILABLE TO THE GENERAL PUBLIC 90 DAYS AFTER THE DATE OF FILING. TRANSCRIPT RELEASE DATE IS 02/22/2022. Until that time the transcript may be viewed at the Clerk's Office or a copy may be obtained from the official court transcriber. Court Reporter/Transcriber Liberty Transcripts/Dipti Patel, Telephone number 847-848-4907. (RE: related document(s) 75 Hearing held on 11/23/2021. (RE: related document(s) 55 MOTION to Stay filed by CLO Holdco Ltd, Charitable DAF Fund LP (Sbaiti, Mazin) (Entered: 08/26/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #55 ON 08/26/2021 IN U.S.
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			<p>DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)) (Appearances: J. Pomerantz and J. Morris for Highland Defendants; J. Jordan and P. Bessett for HCLOF; M. Sbaiti for Plaintiffs. Nonevidentiary hearing. Motion denied. Mr. Pomerantz to upload order.), 76 Hearing held on 11/23/2021. (RE: related document(s) 47 Motion to strike 43 Appendix in support filed by CLO Holdco, Ltd., Charitable DAF Fund, LP (Bridges, Jonathan) Modified text on 7/16/2021 (mjr). (Entered: 07/15/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #47 ON 07/15/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)) (Appearances: J. Pomerantz and J. Morris for Highland Defendants; J. Jordan and P. Bessett for HCLOF; M. Sbaiti for Plaintiffs. Nonevidentiary hearing. Motion denied (Plaintiffs acknowledged complained-of Appendices it did not relate to Motion to Dismiss). Mr. Pomerantz to upload order.)). Transcript to be made available to the public on 02/22/2022. (Patel, Dipti)</p>
57	2/21/23	164	<p>164 (112 pgs) Transcript regarding Hearing Held 1/25/23 RE: HEARING ON DEFENDANT HIGHLAND CAPITAL MANAGEMENT L.P.'S RENEWED MOTION TO DISMISS COMPLAINT (122) AND STATUS CONFERENCE RE: MOTION FOR WITHDRAWAL OF REFERENCE FILED BY PLAINTIFF CLO HOLDCO, LTD., PLAINTIFF CHARITABLE DAF FUND, LP (128). THIS TRANSCRIPT WILL BE MADE ELECTRONICALLY AVAILABLE TO THE GENERAL PUBLIC 90 DAYS AFTER THE DATE OF FILING. TRANSCRIPT RELEASE DATE IS 05/22/2023. Until that time the transcript may be viewed at the Clerk's Office or a copy may be obtained from the official court transcriber. Court Reporter/Transcriber Dipti Patel, Telephone number 847-848-4907. (RE: related document(s) 155 Hearing held on 1/25/2023. (RE: related document(s) 122 Motion to dismiss adversary proceeding, (Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint) filed by Defendant Highland Capital Management, LP filed by Defendant Highland Capital Management, LP) (Appearances: J. Morris and G. Demo for Movants; L. Phillips and M. Sbaiti for Plaintiffs. Evidentiary hearing (appendices). Court took matter under advisement.), 156 Hearing held on 1/25/2023. (RE: related document(s) 128 Motion for withdrawal of reference. Fee amount \$188, filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) (Appearances: J. Morris and G. Demo for Movants; L. Phillips and M. Sbaiti for Plaintiffs. Evidentiary hearing (appendices). Court announced it will recommend denial to District Court. Court is working on Report & Recommendation.)). Transcript to be made available to the public on 05/22/2023. (Patel, Dipti)</p>

Dated: July 14, 2023

Respectfully submitted,

SBAITI & COMPANY PLLC

/s/ Mazin A. Sbaiti

Mazin A. Sbaiti

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Counsel for Appellants

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was filed electronically through the Court's ECF system, which provides notice to all parties of interest, on this 14th day of July, 2023.

/s/ Mazin A. Sbaiti

Mazin A. Sbaiti

RISK FACTORS

Investment in the Company should be regarded as long term in nature and involving a high degree of risk. Accordingly, prospective investors should consider carefully all of the information set out in this Offering Memorandum and the risks relating to the Company and the Shares including, in particular, the risks described below which are not presented in any order of priority and may not be an exhaustive list or explanation of all the risks which investors may face when making an investment in the Shares and should be used as guidance only.

Only those risks which are believed to be material and currently known to the Company in relation to itself and its industry as at the date of this Offering Memorandum have been disclosed. Additional risks and uncertainties not currently known, or deemed immaterial at the date of this Offering Memorandum, may also have an adverse effect on the business, results of operations, financial conditions and prospects of the Company and its net asset value. Potential investors should review this Offering Memorandum carefully and in its entirety and consult with their professional advisers before making an application to invest in the Shares.

Prospective investors should note that the risks relating to the Company and the Shares summarised in the section of this document headed “Summary” are the risks that the Directors believe to be the most essential to an assessment by a prospective investor of whether to consider an investment in the Shares. However, as the risks which the Company faces relate to events and depend on circumstances that may or may not occur in the future, prospective investors should consider not only the information on the key risks summarised in the section of this document headed “Summary” but also, among other things, the risks and uncertainties described below.

RISKS RELATING TO THE COMPANY

The Company is a recently incorporated company incorporated under the laws of Guernsey with limited history

The Company was incorporated under the laws of Guernsey on 30 March 2015. It commenced operations after the initial Placing in August 2015. As the Company has a limited operating history, investors have limited information on which to evaluate the Company’s ability to achieve its investment objective or implement its investment strategy and provide a satisfactory investment return. An investment in the Company is therefore subject to all the risks and uncertainties associated with a recently formed business, including the risk that the Company will not achieve its investment objective and that the value of an investment in the Company could decline substantially as a consequence. Any failure by the Company to do so may adversely affect its business, financial condition, results of operations and/or its NAV.

The Company’s returns and operating cash flows depend on many factors, including the price and performance of the investments, the availability and liquidity of investment opportunities falling within the Company’s investment objective and policy, the level and volatility of interest rates, readily accessible short-term borrowings, the conditions in the financial markets and economy, the financial performance of obligors under the investments and the Company’s ability successfully to operate its business and execute its investment strategy. There can be no assurance that the Company’s investment strategy will be successful.

The Company’s target return and target dividend yield are based on estimates and assumptions that are inherently subject to significant business and economic uncertainties and contingencies, and the actual return and dividend yield may be materially lower than the target return and target dividend yield and could be negative

The Company’s target return and target dividend yield set forth in this Offering Memorandum are targets only and are based on estimates and assumptions concerning the performance of its investment portfolio which will be subject to a variety of factors including, without limitation, the availability of investment opportunities, asset mix, value, volatility, holding periods, performance of underlying portfolio debt issuers, investment liquidity, borrower default, changes in current market conditions, interest rates, government regulations or other policies, the worldwide economic environment, changes in law and taxation, natural disasters, terrorism, social unrest and civil disturbances or the occurrence of risks described elsewhere in this Offering Memorandum, which are inherently subject to significant business, economic and market uncertainties and contingencies, all of which are beyond the control of the Company and which may adversely affect the Company’s ability to achieve its target return and target dividend yield. Such

targets are based on market conditions and the economic environment at the time of assessing the proposed targets and the assumption that the Company will be able to implement its investment policy and strategy successfully, and are therefore subject to change. There is no guarantee or assurance that the target return and/or target dividend yield can be achieved at or near the levels set forth in this Offering Memorandum. Accordingly, the Company's actual rate of return and actual dividend yield achieved may be materially lower than the targets, or may result in a loss. A failure to achieve the target return and/or target dividend yield set forth in this Offering Memorandum may adversely affect the Company's business, financial condition, results of operations and/or its NAV.

An investment in the Company will be a speculative investment of a long-term nature and involving a high degree of risk. Shareholders could lose all or a substantial portion of their investment in the Company. Shareholders must have the financial ability, sophistication, experience and willingness to bear the risks of an investment in the Company.

Material changes affecting global debt and equity capital markets may have a negative effect on the Company's business, financial condition, results of operations, and/or its NAV

The global financial markets have experienced extreme volatility and disruption in recent years, as evidenced by a lack of liquidity in the equity and debt capital markets, significant write-offs in the financial services sector, the repricing of credit risk in the credit market and the failure of major financial institutions. Despite actions of governmental authorities, these events contributed to general economic conditions that have materially and adversely affected the broader financial and credit markets and reduced, and in certain circumstances, significantly reduced, the availability of debt and equity capital.

Further, within the banking sector, the default of any institution could lead to defaults by other institutions. Concerns about, or default by, one institution could lead to significant liquidity problems, losses or defaults by other institutions, because the commercial soundness of many financial institutions may be closely related as a result of their credit, trading, clearing or other relationships. This risk is sometimes referred to as "systemic risk" and may adversely affect other third parties with whom the Company deals. The Company may therefore be exposed to systemic risk when the Company deals with various third parties whose creditworthiness may be exposed to such systemic risk.

Recurring market deterioration may materially adversely affect the ability of an issuer whose debt obligations form part of the Company's portfolio, or an issuer whose debt obligations form part of a CLO in which the Company holds CLO Notes, to service its debts or refinance its outstanding debt. Further, such financial market disruptions may have a negative effect on the valuations of the investments (and, by extension, on the Company's NAV), and on the potential for liquidity events involving such investments. In the future, non-performing assets in the Company's portfolio may cause the value of that portfolio to decrease (and, by extension and/or its the NAV to decrease). Adverse economic conditions may also decrease the value of any security obtained in relation to any of the investments.

Conversely, in the event of sustained market improvement, the Company may have access to a reduced number of attractive potential investment opportunities, which also may result in limited returns to Shareholders.

The Company's NAV is subject to valuation risk and the Company can provide no assurance that the NAVs it records from time to time will ultimately be realised

The Company's NAV will be calculated by third parties and will be subject to valuation risk (see the risk factor entitled "*The investments may be difficult to value accurately and, as a result, the Company may be subject to valuation risk*"). If a valuation estimate provided to the Company by a third party subsequently proves to be incorrect, no adjustment to any previously calculated NAV will be made. Any acquisitions or disposals of Shares based on previous erroneous NAVs may result in losses for shareholders.

The investments held by the Company will be valued quarterly and the Company's Net Asset Value will be calculated based on these values. Therefore, the actual value of the investments at any given time may be different from the value based on which the Company's latest Net Asset Value has been calculated.

Investors should note that where a loan becomes subject to a Forward Purchase Agreement (described further in the section of this Offering Memorandum entitled "*Additional Information on the Company*") the Company will (subject to certain conditions as set out in the section of this Offering Memorandum entitled "*Additional Information on the*

Company”) neither receive the gain nor bear the loss that occurs between the date when the loan is added to the Forward Purchase Agreement and the date when the transfer occurs.

Each of the Company, the Portfolio Manager, Acis and the Management Companies is reliant on Highland (acting in its different capacities), asset management subsidiaries and other third party service providers to carry on their businesses and a failure by one or more service providers may materially disrupt the business of the Company and or the Management Companies

The Company has no employees and its directors have all been appointed on a non-executive basis. Highland HCF Advisor will, as part of the services to be provided under the terms of the Portfolio Management Agreement, be responsible for selecting the portfolio of investments and the acquisition, disposition or sale of investments and providing the Company with the necessary personnel, credit research and other resources to perform the functions necessary to the business of the Company. In addition, Highland or its affiliates, including the Portfolio Manager, Acis or the Management Companies, may also act as CLO Manager in respect of the Managed CLOs from time to time. The Company may also invest in, provide debt financing to, or purchase performance-linked notes from, asset management subsidiaries, affiliated with the Company, the Portfolio Manager, Highland or Acis, including the Management Companies, and which may act as the asset manager of certain U.S. or European CLOs in order to satisfy certain U.S. or European risk retention requirements. Therefore, the Company is reliant upon the performance of Highland and/or its affiliates, asset management subsidiaries of the Company and other third party service providers for the performance of certain functions.

Highland CLO Management relies on Highland for access to its employees (which are shared with Highland). Acis CLO Management relies on Acis for access to its employees (which are shared with Acis). Highland and Acis, as applicable, will, as part of the services to be provided under the terms of the Staff and Services Agreements, be responsible for providing the Company with the necessary credit research, back office and other resources to perform the functions necessary to the business of each of the Management Companies, including its management of CLOs. Therefore, each of the Management Companies is reliant upon the performance of Highland and Acis, as applicable, for the performance of essential functions, and may be unable to properly manage CLOs without the support of Highland or Acis, as applicable.

Failure by any service provider to carry out its obligations to the Company or the applicable Management Company in accordance with the applicable duty of care and skill, or at all, or termination of any such appointment may adversely affect the Company’s or the applicable Management Company’s, as applicable, business, financial condition, results of operations and/or its NAV.

In the event that it is necessary for the Company or the applicable Management Company to replace any third party service provider, it may be that the transition process takes time, increases costs and may adversely affect the Company’s or the applicable Management Company’s, as applicable, business, financial condition, results of operations and/or its NAV.

The Shares will be subordinated to the rights of any secured Warehouse Loan Facility Provider or holder of any other future indebtedness or preference shares of the Company.

The Company is permitted to issue preference shares and incur indebtedness, including secured debt in the form of one or more Warehouse Loan Facilities or other lending facilities. Such preference shares and indebtedness will rank ahead of the Shares in respect of any distributions or payments by the Company to Shareholders. In an enforcement scenario under any Warehouse Loan Facility, the provider(s) of such facilities will have the ability to enforce their security over the assets of the Company and to dispose of or liquidate (on their own behalf or through a security trustee or receiver) the assets of the Company in a manner which is beyond the control of the Company. In such an enforcement scenario, there is no guarantee that there will be sufficient proceeds from the disposal or liquidation of the Company assets to repay any amounts due and payable on the Shares and this may adversely affect the performance of the Company’s business, financial condition, results of operations and/or its NAV.

Exculpation and Indemnification

The Articles contain provisions that, subject to applicable law, reduce or modify the duties that the Indemnified Persons would otherwise owe to the Company and the Shareholders. The Portfolio Manager will assume no

responsibility under the Portfolio Management Agreement other than to render the services called for thereunder and affecting the duties and functions that have been delegated to it thereunder in good faith and, subject to the standard of conduct described in the next succeeding sentence. The Portfolio Manager will not be responsible for any action or inaction of the Company in declining to follow any advice, recommendation or direction of the Portfolio Manager. Further, Indemnified Persons will incur no liability to the Company or any Shareholder in the absence of a Triggering Event, except as otherwise required by applicable law (including the Companies Law). Any claims arising from a Triggering Event shall be limited to actual out-of-pocket damages incurred as a direct consequence of the Triggering Event, and shall not include punitive, consequential or other damages or lost profits.

Under the Articles, the Company, to the fullest extent permitted by applicable law (including the Companies Law), will indemnify each Indemnified Person against all Indemnified Losses to which an Indemnified Person may become subject by reason of any acts or omissions or any alleged acts or omissions arising out of such Indemnified Person's or any other person's activities in connection with the conduct of the business or affairs of the Company and/or an investment, unless such Indemnified Losses result from any action or omission which constitutes, with respect to such person, a Triggering Event; provided, that notwithstanding the foregoing, the members of the Advisory Board or members of any subcommittee thereof shall be subject only to a duty of good faith (it being understood that, to the fullest extent permitted by applicable law, any such member, in determining to take or refrain from taking any action, shall be permitted to take into consideration only the interests of the Shareholder and/or other person represented by such member and, in so doing, shall, to the fullest extent permitted by applicable law, be considered to have acted in good faith). Any claims arising from a Triggering Event shall be limited to actual out-of-pocket damages incurred as a direct consequence of the Triggering Event, and shall not include punitive, consequential or other damages or lost profits.

The fees, costs and expenses (whether or not advanced) and other liabilities resulting from the Company's indemnification obligations are generally operating expenses and will be paid by or otherwise satisfied out of the assets of the Company. The application of the foregoing standards may result in Shareholders having a more limited right of action in certain cases than they would in the absence of such standards. In particular, a "gross negligence" standard of care has been held in some jurisdictions to involve conduct that is closer to wilful misconduct. Even though such provisions in the Articles will not act as a waiver on the part of any Shareholder of any of its rights under applicable U.S. securities laws or other laws, the applicability of which is not permitted to be waived, the Company may bear significant financial losses even where such losses were caused by the negligence (even if heightened) of such Indemnified Persons.

RISKS RELATING TO THE INVESTMENT STRATEGY

General Background relating to the United States and European Risk Retention Requirements

Effective for CLOs on December 24, 2016, the so-called "risk retention" rules promulgated by U.S. federal regulators under the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "**Dodd-Frank Act**") require a "securitizer" or "sponsor" (which in the case of a CLO is considered the collateral manager) to retain directly or through a "majority-owned affiliate" at least 5% of the credit risk of the securitized assets. Highland CLO Management is being formed with intention of acting as a "majority-owned affiliate" of Highland as a "sponsor" for purposes of holding the applicable Retention Interest under U.S. Risk Retention Rules with respect to Managed CLOs and to provide a vehicle whereby the Company can invest in Managed CLOs. Acis CLO Management is intended to act as a "majority-owned affiliate" of Acis as a "sponsor" for purposes of holding the applicable Retention Interest under U.S. Risk Retention Rules with respect to Acis CLO 7 and to provide a vehicle whereby the Company can invest in Acis CLO 7.

The CLOs in which the Company invests may be structured with the intent to be compliant with the European risk retention requirements for securitisation transactions, meaning, collectively, (i) Articles 404-410 of Regulation (EU) No 575/2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No. 648/2012 (the "**CRR**") as supplemented by Commission Delegated Regulation (EU) No. 625/2014 (the "**CRR Retention Requirements**") (ii) Articles 51-54 of the Commission Delegated Regulation (EU) No 231/2013 (the "**AIFMD Level 2 Regulation**") implementing Article 17 of Directive 2011/61/EU on Alternative Investment Fund Managers (the "**AIFMD**"), and (iii) Article 254-257 of the Commission Delegated Regulation (EU) 2015/35 implementing Article 135(2) of Directive 2009/138/EC on the taking-up and pursuit of the business of Insurance and Reinsurance, as amended by Directive 201/51/EU (and as supplemented by Articles 254-257 of Commission

Delegated Regulation (EU) 2015/35) (the “**Solvency II Level 2 Regulation**”), each together with any applicable guidance, technical standards and related documents published by any European regulator in relation thereto and any implementing laws or regulations in force in any Member State of the European Union (together with the CRR Retention Requirements and the AIFMD Level 2 Regulation, the “**EU Retention Requirements**” and, together with the risk retention requirements under the U.S. Risk Retention Rules, the “**Retention Requirements**”). Any such Company investments in CLOs intended to be compliant with the EU Retention Requirements will continue to be subject to the EU Retention Requirements. However, it is expected that, going forward, the Company’s investments in CLOs will be done primarily on an indirect basis through its indirect interest in the Management Companies. As used herein, any reference to the Company’s investments in CLOs or CLO Retention Notes shall be deemed to refer primarily to (i) prior to the formation of the Management Companies, the CLO securities the Company acquired directly and (ii) following the formation of the Management Companies, the indirect interests in CLOs it intends to hold through the applicable Management Company. Furthermore, any reference to Managed CLOs or CLOs managed by Highland, Acis, the Portfolio Manager and the Management Companies shall be deemed to refer primarily to (i) for CLOs formed prior to the formation of Acis, CLOs managed by Highland (ii) for CLOs formed after the formation of Acis and prior to the formation of Acis CLO Management, CLOs managed by Acis, (iii) for CLOs formed following the formation of Acis CLO Management and prior to the formation of Highland CLO Management, CLOs managed by Acis CLO Management and (iv) for CLOs formed following the formation of Highland CLO Management, CLOs managed by Highland CLO Management.

Although the Company, the Portfolio Manager, Highland, Acis and the Management Companies intend to comply with the Retention Requirements, there has been no explicit guidance regarding how entities may be structured for this purpose and therefore the regulatory environment in which the CLOs intend to operate is highly uncertain. There can be no assurance that applicable governmental authorities will agree that any of the transactions, structures or arrangements entered into by the Company, Highland, Acis or the applicable Management Company, and the manner in which it expects to hold retention interests, will satisfy the Retention Requirements, including any transactions pursuant to which Highland or Acis, as applicable, may hold their respective indirect ownership interests in the applicable Management Companies through, or transfer such interests to, affiliates that are intended to be, directly or indirectly, majority controlled, are majority controlled by or are under common majority control with, Highland or Acis, as applicable, with the intention that the Management Companies will remain their respective “majority-owned affiliates” for purposes of the U.S. Risk Retention Rules. If such transactions, structures or arrangements are determined not to comply with the Retention Requirements, Highland, Acis, the applicable Management Company or the Company (as applicable) could become subject to regulatory action which could in turn materially and adversely affect the Company and/or the potential return to shareholders. The impact of the Retention Requirements on the securitization market is also unclear and such rules may negatively impact the value of the CLOs and their underlying assets.

The investments may be difficult to value accurately and, as a result, the Company may be subject to valuation risk

The Company’s portfolio may at any given time include, directly and indirectly, securities or other financial instruments or obligations which are very thinly traded, for which no market exists or which are restricted as to their transferability under applicable securities laws. These investments may be extremely difficult to value accurately. Further, because of overall size or concentration in particular markets of positions held by the Company, the value of its investments which can be liquidated may differ, sometimes significantly, from their valuations. Third party pricing information may not be available for certain positions held by the Company. Investments to be held by the Company may trade with significant bid-ask spreads. The Company is entitled to rely, without independent investigation, upon pricing information and valuations furnished by third parties, including pricing services and valuation sources. In the absence of fraud, gross negligence (under New York law), bad faith or manifest error, valuation determinations in accordance with the Company’s valuation policy will be conclusive and binding.

Market factors may result in the failure of the investment strategy

Strategy risk is associated with the failure or deterioration of an investment strategy such that most or all investment managers employing that strategy suffer losses. Strategy-specific losses may result from excessive concentration by multiple market participants in the same investment or general economic or other events that adversely affect particular strategies (for example the disruption of historical pricing relationships). Furthermore, an imbalance of supply and demand favouring borrowers could result in yield compression, higher leverage and less favourable terms to the detriment of all investors in the relevant asset class. The investment strategy employed by the Company is speculative

and involves substantial risk of loss in the event of a failure or deterioration in the financial markets, although the Company has certain investment limits which define to a degree how it invests. As a result, the Company's investment strategy may fail, and it may be difficult for the Company to amend its investment strategy quickly or at all should certain market factors appear, which may adversely affect the Company's business, financial condition, results of operations and/or its NAV.

The investment strategy of the Company includes investing predominantly in CLO Notes, and, under certain circumstances, asset management subsidiaries, all of which are subject to a risk of loss of principal

The investment strategy of the Company consists of investing predominantly in CLO Notes, directly and indirectly through its investment in the Management Companies, and, under certain circumstances, asset management subsidiaries. The company may also invest in senior secured loans (for the primary purpose of enabling Highland CLO Management to qualify as an "originator" for purposes of the EU Retention Requirements). Such investments may be considered to be subject to a level of risk in the case of deterioration of general economic conditions, which might increase the risk of loss of principal or investment. This could result in losses to the Company which could have a material adverse effect on the Company's business, financial condition, results of operations and/or its NAV.

In the event of a default in relation to an investment, the Company or the CLO in which the Company holds CLO Notes will bear a risk of loss of principal, and accrued interest

Performance and investor yield on the Company's investments (including both direct investments by the Company in senior secured loans (for the primary purpose of enabling Highland CLO Management to qualify as an "originator" for purposes of the EU Retention Requirements) and investments in senior secured loans held by CLOs in which the Company holds CLO Notes) may be affected by the default or perceived credit impairment of such investments and by general or sector specific credit spread widening. Credit risks associated with the investments include (among others): (i) the possibility that earnings of an obligor may be insufficient to meet its debt service obligations; (ii) an obligor's assets declining in value; and (iii) the declining creditworthiness, default and potential for insolvency of an obligor during periods of rising interest rates and economic downturn. An economic downturn and/or rising interest rates could severely disrupt the market for the investments and adversely affect the value of the investments and the ability of the obligors thereof or the CLO to repay principal and interest. In turn, this may adversely affect the Company's business, financial condition, results of operations and/or its NAV.

In the event of a default in relation to an investment held by the Company or a CLO in which the Company holds CLO Notes, the Company will bear a risk of loss of principal and accrued interest on that investment. Any such investment may become defaulted for a variety of reasons, including non-payment of principal or interest, as well as breaches of contractual covenants. A defaulted investment may become subject to workout negotiations or may be restructured by, for example, reducing the interest rate, a write-down of the principal, and/or changes to its terms and conditions. Any such process may be extensive and protracted over time, and therefore may result in substantial uncertainty with respect to the ultimate recovery on the defaulted investment. In addition, significant costs might be imposed on the lender, further affecting the value of the investment. The liquidity in such defaulted investments may also be limited and, where a defaulted investment is sold, it is unlikely that the proceeds from such sale will be equal to the amount of unpaid principal and interest owed on that investment. This would adversely affect the value of the Company's investment portfolio and, by extension, its business, financial condition, results of operations and/or its NAV.

In the case of secured loans, restructuring can be an expensive and lengthy process which could have a material negative effect on the Company's anticipated return on the restructured loan. By way of example, it would not be unusual for any costs of enforcement to be paid out in full before the repayment of interest and principal. This would substantially reduce the Company's anticipated return on the restructured loan.

The illiquidity of investments may have an adverse impact on their price and the Company's ability to trade in them or require significant time for capital gains to materialise

Credit markets may from time to time become less liquid, leading to valuation losses on the investments making it difficult to acquire or dispose of them at prices the Company considers their fair value. Accordingly, this may impair the Company's ability to respond to market movements and the Company may experience adverse price movements upon liquidation of such investments. Liquidation of portions of the portfolio under these circumstances could produce realised losses. The size of the Company's positions may magnify the effect of a decrease in market liquidity for such

instruments. Settlement of transactions may be subject to delay and uncertainty. Such illiquidity may result from various factors, such as the nature of the instrument being traded, or the nature and/or maturity of the market in which it is being traded, the size of the position being traded, or lack of an established market for the relevant securities. Even where there is an established market, the price and/or liquidity of instruments in that market may be materially affected by certain factors.

The investment objective of the Company is to provide investors with stable income returns and capital appreciation from exposure on an indirect basis to a portfolio of predominantly floating rate senior secured loans, CLO Notes and, under certain circumstances, asset management subsidiaries. Investments which are in the form of loans are not as easily purchased or sold as publicly traded securities due to the unique and more customised nature of the debt agreement and the private syndication process. As a result, there may be a significant period between the date that the Company makes an investment and the date that any capital gain or loss on such investment is realised. Moreover, the sale of restricted and illiquid securities may result in higher brokerage charges or dealer discounts and other selling expenses than the sale of securities eligible for trading on national securities exchanges or in the over-the-counter markets. Further, the Company may not be able readily to dispose of such illiquid investments and, in some cases, may be contractually prohibited from disposing of such investments for a specified period of time, which could materially and adversely affect the Company's business, financial condition, results of operations and/or its NAV. See further the risk factor titled "*The Company will be unable to liquidate, sell, hedge or otherwise mitigate its credit risk under or associated with the CLO Retention Notes until such time as the securities of the relevant CLO have been redeemed in full (whether at final maturity or early redemption)*" below.

The Company may hold a relatively concentrated portfolio

The Company may hold a relatively concentrated portfolio. There is a risk that the Company could be subject to significant losses if any obligor, especially one with whom the Company had a concentration of investments, were to default or suffer some other material adverse change. The level of defaults in the portfolio and the losses suffered on such defaults may increase in the event of adverse financial or credit market conditions. Any of these factors could adversely affect the value of the Company's investment portfolio and, by extension, its business, financial condition, results of operations and/or its NAV.

A significant portion of the Company's investment portfolio is expected to comprise directly or indirectly of Managed CLOs advised by Highland, Acis, the Portfolio Manager or a Management Company, as the CLO Manager. The performance of the Company's portfolio depends heavily on the skills of Highland, Acis, the Portfolio Manager and the Management Companies, as applicable, in analyzing, selecting and managing the relevant CLOs. See further the sections titled "*Risks Relating to Highland and Acis*" and "*Conflicts of Interest*" below.

The Company may be exposed to foreign exchange risk, which may have an adverse impact on the value of its assets and on its results of operations

The base currency of the Company is the U.S. Dollar. Certain of the Company's assets may be invested in securities and other investments which are denominated in other currencies. Accordingly, the Company will necessarily be subject to foreign exchange risks and the value of its assets may be affected unfavourably by fluctuations in currency rates. Although the Company may utilise financial instruments to hedge against declines in the value of such assets as a result of changes in currency exchange rates, it is not obliged to do so and may terminate any hedge contract at any time. Moreover, it may not be possible for the Company to hedge against a particular change or event at an acceptable price or at all. In addition, there can be no assurance that any attempt to hedge against a particular change or event would be successful, and any such hedging failure could materially and adversely affect the Company's business, financial condition, results of operations and/or its NAV.

The hedging arrangements of the Company may not be successful

The Company's economic risks cannot be effectively hedged. However, in connection with the financing of certain investments, the Company may employ hedging techniques designed to reduce the risks of adverse movements in interest rates, securities' prices and/or currency exchange rates. However, some residual risk may remain as a result of imperfections and inconsistencies in the market and/or in the hedging contract. While such hedging transactions may reduce certain risks, they create others. The Company directly or indirectly (through affiliates and subsidiaries) will not be permitted to enter into hedging with respect to the CLO Retention Notes.

The Company may utilise certain derivative instruments (including, without limitation, single-name credit default swaps, credit default swap and loan credit default swap indexes, equity futures and equity indexes) for hedging purposes. However, even if used primarily for hedging purposes, the prices of derivative instruments are highly volatile, and acquiring or selling such instruments involves certain leveraged risks. There may be an imperfect correlation between the instrument acquired for hedging purposes and the investments or market sectors being hedged, in which case, a speculative element is added to the highly leveraged position acquired through a derivative instrument primarily for hedging purposes. In particular, the investments which are in the form of loans may, in certain circumstances, be repaid at any time on short notice at no cost, and accordingly the hedging of interest rate or currency risk in such circumstances may be less precise than is the case with investments in the public securities market.

Furthermore, default by any hedging counterparty in the performance of its obligations could subject the investments to unwanted credit and market risks. Accordingly, although the Company may benefit from the use of hedging strategies, failure to properly hedge the market risk in the investments and/or default of a counterparty in the performance of its obligations under a hedging contract may have a material adverse effect on the Company's business, financial condition, results of operations and/or its NAV, and such material adverse effects may exceed those which may have resulted had no hedging strategy been employed.

Under certain hedging contracts that the Company may enter into, the Company may be required to grant security interests over some of its assets to the relevant counterparty as collateral

In connection with certain hedging contracts, the Company may be required to grant security interests over some of its assets to the relevant counterparty to such hedging contract as collateral. Such hedging contracts typically will give the counterparty the right to terminate the agreement upon the occurrence of certain events. Such termination events may include, among others, a failure by the Company to pay amounts owed when due, a failure to provide required reports or financial statements, a decline in the value of the investments secured as collateral, a failure to maintain sufficient collateral coverage, a failure by the Company to comply with its investment policy and any investment restrictions, key changes in the Company's management, a significant reduction in the Company's Net Asset Value, and material violations of the terms, representations, warranties or covenants contained in the hedging contract, as well as other events determined by the counterparty. If a termination event were to occur, there may be a material adverse effect on the Company's business, financial condition, results of operations and/or its NAV.

The use of leverage by the Company may increase the volatility of returns and providers of leverage would rank ahead of investors in the Company in the event of insolvency

The Company may employ leverage in order to increase investment exposure with a view to achieving its target return, in the form of one or more committed credit facilities. Leverage may come in the form of CLO securitizations.

While leverage presents opportunities for increasing total returns, it can also have the effect of increasing the volatility of the Shares, including the risk of total loss of the amount invested. If income and capital appreciation on investments made with borrowed funds are less than the costs of the leverage, the Net Asset Value will decrease. The effect of the use of leverage is to increase the investment exposure, the result of which is that, in a market that moves adversely, the possible resulting loss to investors' capital would be greater than if leverage were not used. As a result of leverage, small changes in the value of the underlying assets may cause a relatively large change in the value of the Company. Many financial instruments used to employ leverage are subject to variation or other interim margin requirements, which may force premature liquidation of investments. Investors should be aware that the use of leverage by the Company can be considered to multiply the leverage effect on their investment returns in the Company. As described above, while this effect may be beneficial when markets' movements are favourable, it may result in a substantial loss of capital when markets' movements are unfavourable.

In addition, such leverage may involve granting of security or the outright transfer of specific investments in the portfolio. Since there is no security created in respect of the Shares, any insolvency of the Shareholders could rank behind the Company's financing and hedging counterparties, whose claims will be considered as indebtedness of the Company and may be secured. Leverage does create opportunities for greater total returns on the investments but simultaneously may create special risk considerations by magnifying changes in the total value of the Net Asset Value and in the yield on the investments held by the Company.

In addition, to the extent leverage is employed, the Company may be required to refinance transactions from time to time. On each refinancing, the applicable counterparty may choose to re-negotiate the terms of each transaction or indeed not to refinance the transaction at all. To the extent refinancing facilities are not available in the market at economic rates or at all, the Company may be required to sell assets at disadvantageous prices. Any such deleveraging may result in losses on investments which could be severe and accordingly could have a material adverse effect on the Company's business, financial condition, results of operations and/or its NAV.

Interest rate fluctuations could expose the Company to additional costs and losses

The prices of the investments that may be held by the Company tend to be sensitive to interest rate fluctuations and unexpected fluctuations in interest rates could cause the corresponding prices of a position to move in directions which were not initially anticipated. In addition, interest rate increases generally will increase the interest carrying costs of borrowed securities and leveraged investments. Further, the Company may invest in both floating and fixed rate securities and interest rate movements will affect those respective securities differently. In particular, when interest rates rise significantly the value of fixed interest rate securities often fall. Furthermore, to the extent that interest rate assumptions underlie the hedging of a particular position, fluctuations in interest rates could invalidate those underlying assumptions and expose the Company to additional costs and losses. Any of the above factors could materially and adversely affect the Company's business, financial condition, results of operations and/or its NAV.

Additional Information about LIBOR

In a speech on 27 July 2017, Andrew Bailey, the Chief Executive of the Financial Conduct Authority ("FCA"), announced the FCA's intention to cease sustaining LIBOR from the end of 2021.

The FCA has statutory powers to compel panel banks to contribute to LIBOR where necessary. The FCA has decided not to ask, or to require, that panel banks continue to submit contributions to LIBOR beyond the end of 2021. The FCA has indicated that the current panel banks will voluntarily sustain LIBOR until the end of 2021. The FCA does not intend to sustain LIBOR through using its influence or legal powers beyond that date. The FCA's intention is that after 2021, it will no longer be necessary for the FCA to persuade, or to compel, banks to submit to LIBOR due to the development of alternative benchmark rates, which the FCA suggested should be based on transactions and not on reference rates that do not have active underlying markets to support them. As of the date of this Offering Memorandum, no specific alternative rates have been generally agreed in the CLO market.

It is possible that the LIBOR administrator, ICE Benchmark Administration, and the panel banks could continue to produce LIBOR on the current basis after 2021, if they are willing and able to do so. However, the survival of LIBOR in its current form, or at all, is not guaranteed after 2021 and, if LIBOR in its current form does not survive, it could cause a disruption in the credit markets generally, which could negatively impact the market value and/or transferability of the Notes.

It is currently unclear how LIBOR would be determined pursuant to existing underlying CLO indentures if LIBOR ceased to exist. If an alternative or a successor benchmark rate were determined, it may increase the risk of a mismatch between the interest rate applicable to the underlying loan assets and the interest rate applicable to the underlying collateral obligations of the CLOs held by the Company. Such mismatch could have a material adverse effect on the value and liquidity of the CLO Notes held by the Company.

Investors should be aware that: (a) any of these changes or any other changes to LIBOR could affect the level of the published rate, including to cause it to be lower and/or more volatile than it would otherwise be; (b) if the applicable rate of interest on any collateral obligation held by the Company is calculated with reference to a currency or tenor which is discontinued, such rate of interest will then be determined by the provisions of the affected collateral obligation, which may include determination by the relevant calculation agent in its discretion; (c) the administrator of LIBOR will not have any involvement in the collateral obligations or notes linked to those obligations and may take any actions in respect of LIBOR without regard to the effect of such actions on the collateral obligations or the notes; and (d) any uncertainty in the value of LIBOR or the admissions made by financial institutions that LIBOR has been manipulated or any uncertainty in the prominence of LIBOR as a benchmark interest rate due to the recent regulatory reforms may adversely affect liquidity of the collateral obligations or the notes in the secondary market and their market value. Any of the above or any other significant change to the setting of LIBOR could materially and adversely affect the Company's business, financial condition, results of operations and/or its NAV.

In the event of the insolvency of an obligor in respect of an investment, or of an underlying obligor in respect of an investment, the return on such investment to the Company may be adversely impacted by the insolvency regime or insolvency regimes which may apply to that obligor or underlying obligor and any of their respective assets

In the event of the insolvency of an obligor in respect of an investment (and in the case of the CLO Notes, the obligors of the assets within the relevant CLO's portfolio), the Company's (or the CLO issuer's, in the case of CLO Notes) recovery of amounts outstanding in insolvency proceedings may be impacted by the insolvency regimes in force in the jurisdiction of incorporation of such obligor or in the jurisdiction in which such obligor mainly conducts its business (if different from the jurisdiction of incorporation), and/or in the jurisdiction in which the assets of such obligor are located. Such insolvency regimes impose rules for the protection of creditors and may adversely affect the ability to recover such amounts as are outstanding from the insolvent obligor under the investment, which may adversely affect the Company's business, financial condition, results of operations and/or its NAV.

Similarly, the ability of obligors to recover amounts owing to them from insolvent underlying obligors may be adversely impacted by any such insolvency regimes applicable to those underlying obligors, which in turn may adversely affect the abilities of those obligors to make payments due under the investment to the Company on a full or timely basis.

In particular, it should be noted that the United States and a number of European jurisdictions operate unpredictable insolvency regimes which may cause delays to the recovery of amounts owed by insolvent obligors or underlying obligors subject to those regimes. The different insolvency regimes applicable in the different jurisdictions result in a corresponding variability of recovery rates for senior secured loans, entered into or issued in such jurisdictions, any of which may have a material adverse effect on the performance of a CLO and, by extension, the Company's business, financial condition, results of operations and/or its NAV.

A CLO issuer may be subject to losses on investments as a result of insolvency or clawback legislation and/or fraudulent conveyance findings by courts

Various laws enacted for the protection of creditors and stakeholders may apply to certain investments that are debt obligations, although the existence and applicability of such laws will vary between jurisdictions. For example, if a court were to find that an obligor did not receive fair consideration or reasonably equivalent value for incurring indebtedness evidenced by an investment and the grant of any security interest securing such investment, and, after giving effect to such indebtedness, the obligor: (i) was insolvent; (ii) was engaged in a business for which the assets remaining in such obligor constituted unreasonably small capital; or (iii) intended to incur, or believed that it would incur, debts beyond its ability to pay such debts as they mature, such court may: (a) invalidate such indebtedness and such security interest as a fraudulent conveyance; (b) subordinate such indebtedness to existing or future creditors of the obligor; or (c) recover amounts previously paid by the obligor (including to a CLO issuer) in satisfaction of such indebtedness or proceeds of such security interest previously applied in satisfaction of such indebtedness. In addition, if an obligor in whose debt a CLO issuer has an investment becomes insolvent, any payment made on such investment may be subject to avoidance, cancellation and/or clawback as a "preference" if made within a certain period of time (which for example under some current laws may be as long as two years) before insolvency.

In general, if payments on an investment are voidable, whether as fraudulent conveyances, extortionate transactions or preferences, such payments may be recaptured either from the initial recipient or from subsequent transferees of such payments. To the extent that any such payments are recaptured from a CLO issuer, there will be an adverse effect on the performance of the CLO issuer and, by extension, on the Company's business, financial condition, results of operations and/or its NAV.

The due diligence process that the Company plans to undertake in evaluating specific investment opportunities may not reveal all facts that may be relevant in connection with such investment opportunities and any corporate mismanagement, fraud or accounting irregularities may materially affect the integrity of the Company's due diligence on investment opportunities

When conducting due diligence and making an assessment regarding an investment, the Company will be required to rely on resources available to it, including internal sources of information as well as information provided by existing and potential obligors, any equity sponsor(s), lenders and other independent sources. The due diligence process may at times be required to rely on limited or incomplete information.

The Portfolio Manager will select investments on the Company's behalf in part on the basis of information and data relating to potential investments filed with various government regulators and publicly available or made directly available to the Portfolio Manager by the entities filing such information or third parties. Although the Portfolio Manager will evaluate all such information and data and seek independent corroboration when it considers it appropriate and reasonably available, the Portfolio Manager will not be in a position to confirm the completeness, genuineness or accuracy of such information and data. The Portfolio Manager is dependent upon the integrity of the management of the entities filing such information and of such third parties as well as the financial reporting process in general.

The value of an investment made by the Portfolio Manager on the Company's behalf may be affected by fraud, misrepresentation or omission on the part of an obligor, underlying obligor, any related parties to such obligor or underlying obligor, or by other parties to the investment (or any related collateral and security arrangements). Such fraud, misrepresentation or omission may adversely affect the value of the investment and/or the value of the collateral underlying the investment in question and may adversely affect the ability of the Portfolio Manager's on the Company's behalf to enforce its contractual rights relating to that investment or the relevant obligor's ability to repay the principal or interest on the investment.

Investment analysis and decisions by the Portfolio Manager may be undertaken on an expedited basis in order to make it possible for the Portfolio Manager to take advantage of short-lived investment opportunities. In such cases, the available information at the time of an investment decision may be limited, inaccurate and/or incomplete. Furthermore, the Portfolio Manager may not have sufficient time to evaluate fully such information even if it is available.

Accordingly, the Portfolio Manager cannot guarantee that the due diligence investigation it carries out with respect to any investment opportunity will reveal or highlight all relevant facts that may be necessary or helpful in evaluating such investment opportunity. Any failure by the Portfolio Manager to identify relevant facts through the due diligence process may cause it to make inappropriate investment decisions, which may have a material adverse effect on the Company's business, financial condition, results of operations and/or its NAV.

The collateral and security arrangements attached to an investment may not have been properly created or perfected, or may be subject to other legal or regulatory restrictions

The collateral and security arrangements in relation to secured obligations in which the Company may invest (and the security arrangements relating to the underlying assets of CLOs) will be subject to such security or collateral having been correctly created and perfected and any applicable legal or regulatory requirements which may restrict the giving of collateral or security by an obligor, such as, for example, thin capitalisation, over-indebtedness, financial assistance and corporate benefit requirements. If the investments do not benefit from the expected collateral or security arrangements, this may adversely affect the value of, or in the event of a default, the recovery of principal or interest from, such investments. Accordingly, any such failure properly to create or perfect collateral and security interests attaching to the investments may adversely affect the performance of the CLO issuer and/or the Company and, by extension, the Company's business, financial condition, results of operations and/or its NAV.

The investments will be based in part on valuations of collateral which are subject to assumptions and factors that may be incomplete, inherently uncertain or subject to change

A component of the Company's analysis of the desirability of making a given investment relates to the estimated residual or recovery value of such investments in the event of the insolvency of the obligor (and in the case of the CLO Notes, the obligors of the assets within the relevant CLO's portfolio). This residual or recovery value will be driven primarily by the value of the anticipated future cash flows of the obligor's business and by the value of any underlying assets constituting the collateral for such investment. The anticipated future cash flows of the obligor's business and the value of collateral can, however, be extremely difficult to predict as in certain circumstances market quotations and third party pricing information may not be available. If the recovery value of the collateral associated with the investments in which the Company or a CLO issuer invests decreases or is materially worse than expected by the Company or a CLO issuer (as applicable), such a decrease or deficiency may affect the value of the investments made by the Company or a CLO issuer. Accordingly, there will be an adverse effect on the performance of the CLO issuer and/or the Company and, by extension, on the Company's business, financial condition, results of operations and/or its NAV.

CLO Income Notes are volatile and interest and principal payments payable on the CLO Income Notes are not fixed

CLO Income Notes are the most subordinated tranche of a CLO and all payments of principal and interest on such CLO Income Notes are fully subordinated. Interest and principal payments are not fixed but are based on residual amounts available to make such payments. As a result, payments on such CLO Income Notes will be made by the CLO issuer to the extent of available funds, and no payments thereon will be made until amongst other things (a) the payment of certain costs, fees and expenses have been made and (b) interest and principal (respectively) has been paid on the more senior notes of the CLO. Non-payment of interest or principal on such CLO Income Notes will be unlikely to cause an event of default in relation to the CLO issuer.

CLO Income Notes represent a highly leveraged investment in the underlying assets of the CLO issuer. Accordingly, it is expected that changes in the market value of such CLO Income Notes will be greater than changes in the market value of the underlying assets of the CLO issuer, which themselves are subject to credit, liquidity, interest rate and other risks. Utilisation of leverage is a speculative investment technique and involves certain risks to investors and will generally magnify the CLO Income Notes investors' opportunities for gain and risk of loss. In certain scenarios, the CLO Income Notes may be subject to a partial or a 100 per cent loss of invested capital. CLO Income Notes represent the most junior securities in a leveraged capital structure. As a result, any deterioration in performance of the asset portfolio of a CLO issuer, including defaults and losses, a reduction of realised yield or other factors, will be borne first by holders of such CLO Income Notes prior to the rest of the capital structure.

CLO Income Notes are a limited recourse obligation of the CLO issuer

CLO Income Notes are a limited recourse obligation of a CLO issuer and amounts payable on CLO Income Notes are payable solely from amounts received in respect of the collateral of the CLO issuer. Payments on CLO Income Notes prior to and following enforcement of the security over the collateral of a CLO issuer are subordinated to the prior payment of certain costs, fees and expenses of, or payable by, the CLO issuer and to payment of principal and interest on more senior notes of the CLO issuer. The holders of CLO Income Notes must rely solely on distributions on the collateral of the CLO for payment of principal and interest, if any, on the CLO Income Notes. There can be no assurance that the distributions on the collateral of a CLO will be sufficient to make payments on the CLO Income Notes. If distributions are insufficient to make payments on the CLO Income Notes, no other assets of the CLO issuer will be available for payment of the deficiency and following realisation of the collateral and the application of the proceeds thereof, the obligations of the CLO issuer to pay such deficiency shall be extinguished. Such shortfall will be borne in the first instance by the CLO Income Notes.

In addition, at any time whilst the CLO Income Notes are outstanding in a CLO, no CLO Income Notes holder shall be entitled to institute against the related CLO issuer, or join in any institution against such CLO issuer of, any bankruptcy, reorganization, arrangement, insolvency, examinership, winding up or liquidation proceedings under any applicable bankruptcy or similar law in connection with any obligations of the CLO issuer relating to the CLO Income Notes or otherwise owed to the CLO Income Notes holder, save for lodging a claim in the liquidation of the CLO issuer which is initiated by another party or taking proceedings to obtain a declaration as to the obligations of the CLO issuer, nor shall it have a claim arising in respect of the share capital of the CLO issuer.

Furthermore, following the establishment of the Management Companies, CLO Income Notes may not be held directly by the Company. As such the Company's interest in the CLO Income Notes may be indirect, and the Management Company, not the Company, will be entitled to exercise voting rights associated with the CLO Income Notes.

CLO Notes have limited liquidity

In addition to the restrictions mentioned in the section titled "*The Company will be unable to liquidate, sell, hedge or otherwise mitigate its credit risk under or associated with the CLO Retention Notes until such time as the securities of the relevant CLO have been redeemed in full (whether at final maturity or early redemption)*", there will usually be a limited market for notes representing collateralised loan obligations (including the CLO Notes). There is no guarantee that any party to a CLO transaction will make a secondary market in relation to the CLO Notes. There can be no assurance that a secondary market for any CLO Notes will develop or, if a secondary market does develop, that it will provide the holders of CLO Notes with liquidity of investment or that it will continue for the life of such notes. As a result, the Company may have to hold the CLO Notes for an indefinite period of time or until their early

redemption date or maturity date. Where a market does exist, to the extent that an investor wants to sell the CLO Notes, the price may, or may not, be at a discount from the outstanding principal amount. There may be additional restrictions on divestment in the terms and conditions of CLO Notes.

Investments in asset management subsidiaries may subject the Company to increased regulatory scrutiny or disputes related to CLOs or other investments managed by such asset management subsidiaries

As part of its business, the Portfolio Manager may advise the Company to invest in asset management subsidiaries, affiliated with the Company, Highland, Acis, the Portfolio Manager or the Management Companies and which may act as the asset manager of certain U.S. or European CLOs in order to satisfy certain U.S. or European risk retention requirements. Asset managers of U.S. or European CLOs operate in a highly regulated environment, and are subject to a comprehensive statutory and regulatory regime as well as oversight by governmental agencies. In light of the current conditions in the global financial markets and economy, regulators have increased their focus on the regulation of asset managers in the U.S. and Europe. New or modified regulations and related regulatory guidance, including under Basel III and the Dodd-Frank Act, may have unforeseen or unintended adverse effects on asset managers of CLOs. These international regulations could limit an asset management subsidiary from pursuing certain business opportunities and/or impose additional costs, and otherwise indirectly materially adversely affect the Company's business operations and have other negative consequences.

Investors will not have control over the CLO management activities of the Portfolio Manager, Highland, Acis or the Management Companies in CLOs

The Portfolio Manager, Highland, Acis and/or the Management Companies, in the capacity of CLO Manager of a CLO, will have the discretion to make collateral management decisions for such CLO, including with respect to asset selection, disposition and amendments of the underlying loans. In exercising such discretion, the Portfolio Manager, Highland, Acis and/or the applicable Management Company will be responsible to act solely in the best interests of the applicable CLO issuer, not the Company or any Investor. Any amendment, waiver or modification of an investment could postpone the receipt of payments in respect of such investment and/or reduce distributions to Investors. The shareholders will have no right to compel the Portfolio Manager, Highland, Acis or the Management Companies, in their roles as CLO Manager to take or refrain from taking any actions or decisions, and the actions or decisions taken by the Portfolio Manager, Highland, Acis or the Management Companies as CLO Manager may expose the Investors to losses on their investment.

United States retention requirements may affect future actions of the Company and negatively impact the leveraged loan market

As part of its business, the Company may invest in asset management subsidiaries, affiliated with the Company, the Portfolio Manager, Highland, Acis or the Management Companies and which may act as the asset manager of certain CLOs in order to satisfy the U.S. Risk Retention Rules.

On October 21, 2014, the U.S. Risk Retention Rules were issued and became effective on December 24, 2016 with respect to asset-backed securities collateralized by assets other than residential mortgages. The statements contained herein regarding how compliance with the U.S. Risk Retention Rules may be achieved by a CLO are solely based on publicly available information as of the date hereof. Except with respect to asset-backed securities transactions that satisfy certain exemptions, the U.S. Risk Retention Rules generally require one of the sponsors of asset-backed securities or a "majority-owned affiliate" thereof to retain not less than 5% of the credit risk of the assets collateralizing asset-backed securities. The preamble to the rule text in the U.S. Risk Retention Rules indicates that a party that organizes and initiates a securitization would be the "sponsor." In the case of many collateralized loan obligation transactions, the entity acting as collateral manager typically organizes and initiates a transaction and, therefore, would be considered the "sponsor" for U.S. Risk Retention Rules purposes, as further discussed in the preamble. The U.S. Risk Retention Rules provide that if there is more than one "sponsor" of a securitization transaction, each "sponsor" is to ensure that at least one "sponsor" (or its "majority-owned affiliate") retains the requisite U.S. Retention Interest.

It is expected that Highland or Acis, as applicable, will agree to act as "sponsor" for purposes of Managed CLOs in which the Company invests, but there can be no assurance, and no representation, made that any Governmental Authority will agree that such is the case. Each of Highland and Acis intends to treat the applicable Management Company as its "majority-owned affiliate" due to holding by it (or by affiliates that are intended to be, directly or

indirectly, majority controlled, are majority controlled by or are under common majority control with Highland or Acis, as applicable) of a controlling financial interest in such Management Company as determined under GAAP, although there can be no assurance that such Management Companies will maintain treatment as a “majority-owned affiliates” of Highland or Acis as “sponsors” given the lack of guidance in the U.S. Risk Retention Rules with respect to such affiliated situations. Moreover, there can be no guarantee that Highland or Acis will be able to maintain the treatment of such Management Company as a “majority-owned affiliate,” particularly if GAAP regulations or interpretations change over time.

Each of Highland or Acis, as applicable, may also hold their respective indirect ownership interests in the applicable Management Companies through, or transfer such interests to, affiliates that are intended to be, directly or indirectly, majority controlled, are majority controlled by or are under common majority control with, Highland or Acis, as applicable, with the intention that the Management Companies will remain their respective “majority-owned affiliates” for purposes of the U.S. Risk Retention Rules. There can be no assurance that following any such transfer any Governmental entity will agree that the applicable Management Company will remain a “majority-owned affiliate” of Highland or Acis, as applicable.

At this time, each potential investor should understand that there is uncertainty with respect to what is required to comply with the U.S. Risk Retention Rules in certain circumstances, and therefore there can be no assurance that, with respect to any Managed CLO or other CLO in which the Company invests, the applicable credit risk retention and disclosures with respect to such CLO will enable the applicable CLO Manager or U.S. retention holder to comply with the U.S. Risk Retention Rules.

In addition, there are a number of future uncertainties surrounding, U.S. Risk Retention Rules for CLO Managers, including: (i) the ultimate results of litigation currently in process brought by the Loan Syndications and Trading Association (LSTA), a major industry trade association, challenging, among other things, the regulators’ application of U.S. Risk Retention Rules to collateral managers of typical so-called open market CLOs, (ii) proposed legislation designed to exclude from U.S. Risk Retention Rules, collateral managers of certain defined “QCLOs” (qualified CLOs) and (iii) future directives and interpretations by Governmental Authorities with respect to the U.S. Risk Retention Rules. If such publicly available information is altered as a result of the foregoing (or anything else), there can be no assurance that, with respect to any Managed CLO or other CLO in which the Company invests, the applicable credit risk retention and disclosures would be viewed by any Governmental Authority as sufficient to meet the requirements under the U.S. Risk Retention Rules. The failure to satisfy the requirements of the U.S. Risk Retention Rules may have a material and adverse effect on the market value and/or liquidity of the applicable CLO Notes and on Highland, Acis and the Management Companies and the Company’s investments therein.

The failure by the Portfolio Manager, Highland, Acis and/or the Management Companies to comply with the U.S. Risk Retention Rules may have a material and adverse effect on the Company and/or the Portfolio Manager

The failure by the Portfolio Manager, Highland, Acis and/or the applicable Management Company to comply with the U.S. Risk Retention Rules with respect to any Managed CLO may result in regulatory actions and other proceedings being brought against the Portfolio Manager, Highland, Acis and/or the applicable Management Company, which could result in such person being required, among other things, to pay damages, transfer interests and/or acquire additional CLO Notes (which may or may not be available at such time for acquisition) or be subject to cease and desist orders or other regulatory action. In addition, a failure to remedy non-compliance with the U.S. Risk Retention Rules may also trigger a “cause” event under the applicable CLO Management Agreement and/or subject the Portfolio Manager, Highland, Acis and/or the applicable Management Company to adverse publicity and reputational risk resulting from such non-compliance. In addition, given the lack of clarity under the U.S. Risk Retention Rules with respect to the identity of the party responsible for holding U.S. risk retention interests upon a resignation or removal of a CLO Manager or an if the Portfolio Manager, Highland, Acis and/or the applicable Management Company resigns or the applicable holders of CLO Notes desire to remove the Portfolio Manager in connection with any such “cause” event, there may be no successor CLO Manager willing to accept appointment as such, in which case the Portfolio Manager, Highland, Acis and/or the applicable Management Company will be required to continue to act as CLO Manager under the applicable CLO Management Agreement. Further, given such lack of clarity under the U.S. Risk Retention Rules with respect to the identity of the party responsible for holding U.S. risk retention interests, there can be no assurance that Highland or Acis, as applicable, will be able to maintain compliance with the U.S. Risk Retention Rules following any transfer of ownership interests in an entity holding Retention Interests by Highland or Acis to their respective affiliates that are, directly or indirectly, majority controlled,

are majority controlled by or are under common majority control with, Highland or Acis, as applicable, particularly in situations involving CLOs which have already been issued when the related transfer occurs. As a result of any of the foregoing, the failure of the Portfolio Manager, Highland, Acis and/or the applicable Management Company to comply with the U.S. Risk Retention Rules may have a material and adverse effect on the market value and/or liquidity of the Company's investment in the applicable CLO Notes as well as on the business, condition (financial or otherwise), assets, operations or prospects of the Portfolio Manager, Highland, Acis and/or the applicable Management Company and the Company.

The Company will be unable to liquidate, sell, hedge or otherwise mitigate its credit risk under or associated with the CLO Retention Notes until such time as the securities of the relevant CLO have been redeemed in full (whether at final maturity or early redemption)

In connection with the intention to comply with the Retention Requirements, each Management Company will need to, amongst other things, (a) on the closing date of a Managed CLO, commit to purchase and retain CLO Notes held in the form and at least the minimum required under the applicable Retention Requirements, as applicable, for the relevant CLO (the "CLO Retention Notes") and (b) undertake that, for so long as any securities of the CLO remain outstanding (including the CLO Retention Notes), it will retain its interest in the CLO Retention Notes and will not (except to the extent permitted by the EU Retention Requirements, the accompanying regulatory technical standards or any other related guidance published by the European Securities and Markets Authority) sell, hedge or otherwise mitigate its credit risk under or associated with such CLO Retention Notes. The Company or the applicable Management Company, as applicable, may make certain representations and/or give certain undertakings in favour of Managed CLOs (and/or certain other transaction parties) in respect of its ongoing retention of the CLO Retention Notes and regarding its agreement to sell certain assets to such Managed CLOs from time to time. There are currently transactions in the market which are similar to the Managed CLOs, however if an applicable regulatory authority supervising investors in a Managed CLO were to conclude that the applicable Management Company was not holding the CLO Retention Notes in accordance with the CRR, it is possible, but far from certain, that this may negatively impact the investors in such Managed CLO. If such investors decided to take action against the Company or the applicable Management Company as a result of any negative impact, this may have an adverse effect on the Company's financial performance and prospects.

In addition, with the intention of achieving classification as an "originator" (as defined in the CRR) and complying with the CRR Retention Requirements if applicable to the relevant CLO, the applicable Management Company would be required to meet the Origination Requirements.

As a result of the above commitments, the applicable Management Company will be unable to liquidate, sell, hedge or otherwise mitigate its credit risk under or associated with the CLO Retention Notes until such time as the securities of the relevant CLO have been redeemed in full (whether at final maturity or early redemption). Consequently, if any shares were to become due and repayable in connection with any resolution for their redemption, the Company, the applicable Management Company will not be obliged to immediately sell, transfer or liquidate the CLO Retention Notes and the proceeds of such CLO Retention Notes (if any) will not be available until the final maturity or early redemption in full of the securities of the relevant CLO. In addition, cash held by the Company will not be able to be used to repay any shares to the extent that such repayment could leave the Company unable to continue to originate and sell assets to the CLO issuers in order to ensure that during the relevant CLO's reinvestment period the Company, the applicable Management Company has met the Origination Requirements.

The Company or the applicable Management Company directly or indirectly, may hold a controlling equity stake in the Managed CLOs; accordingly, upon exercise by the Company or the applicable Management Company an early redemption option will result in a full redemption of the applicable CLO securities. Neither the Company nor the applicable Management Company will generally be able to exercise any early redemption options during a "non-call period" (generally lasting two years) after the closing date of the CLO. As a result of this feature and the EU Retention Requirements, the relevant CLO Retention Notes will not be permitted to be sold, transferred or liquidated during this time. In addition, even after an early redemption option is permitted to be exercised, such an option usually contains a number of conditions to its exercise including, but not limited to, a threshold that the liquidation value of the CLO collateral exceed an amount which would pay (a) all expenses of the CLO and (b) principal and accrued interest on the CLO Notes senior to the CLO Income Notes. If the liquidation value of the portfolio will not achieve this threshold at the time the Company intends to exercise its early redemption option, the CLO will not be able to be optionally redeemed by the Company at such time. In such circumstances, the Company or the applicable Management Company

may not redeem the CLO Retention Notes until their final stated maturity (which may be in excess of 12 years), therefore producing no proceeds to pay to Shareholders until this point.

Potential non-compliance with or changes to the United States and European risk retention requirements

The purchase and retention of the CLO Retention Notes in a CLO will be undertaken by the Company or the applicable Management Company with the intention of achieving compliance with the U.S. Risk Retention Rules and/or the EU Retention Requirements by the relevant CLO.

The U.S. Risk Retention Rules and/or EU Retention Requirements may be amended, supplemented or revoked from time to time. There is no guarantee that existing CLOs or future CLOs will be grandfathered into the regime which results from such amendments, supplements or revocations and, as such, the CLOs in which the applicable Management Company is retaining the CLO Retention Notes, may become non-compliant with the U.S. Risk Retention Rules and/or EU Retention Requirements.

Liability for breach of a risk retention letter

The arranger of a CLO and certain other parties of a CLO in which a Management Company agrees to hold the CLO Retention Notes (in such capacity, the “**Retention Holder**”) will require the applicable Management Company to execute a risk retention letter. Under a risk retention letter the applicable Retention Holder will typically be required to, amongst other things, make certain representations, warranties and undertakings: (a) in relation to its acquisition and retention of the CLO Retention Notes for the life of the CLO; and (b) regarding its agreement to sell assets to the relevant CLO from time to time. If the applicable Retention Holder sells or is forced to sell the CLO Retention Notes prior to the maturity of the relevant CLO, or the applicable Retention Holder holds insufficient cash or investments to continually sell the assets to the CLO as described above or for any other reason the applicable Retention Holder is not considered to be an “originator” (as such term is defined in the CRR), the Company may be in breach of the terms of the related risk retention letter. In such circumstances the arranger of the relevant CLO and the other parties to the related risk retention letter would have recourse to the applicable Retention Holder for losses incurred as a result of such breach. Such claims may reduce, or entirely diminish any cash or assets of the Company which may have been available to make payments on the Shares.

RISKS RELATING TO HIGHLAND AND ACIS

Past Performance Not Indicative of Future Results

The past performance of Highland and Acis and their principals and affiliates in other portfolios or investment vehicles, including, without limitation their outstanding CLO transactions, may not be indicative of the results that the Company may be able to achieve. Similarly, the past performance of Highland, Acis and their principals and affiliates over a particular period may not necessarily be indicative of the results that may be expected in future periods. Furthermore, the nature of, and risks associated with, the Company’s investments may differ substantially from those investments and strategies undertaken historically by Highland, Acis and their principals and affiliates. There can be no assurance that Highland’s or Acis’ investment recommendations will perform as well as past investments of Highland or Acis or their principals and affiliates, that the Company will be able to avoid losses or that the Company will be able to make investments similar to the past investments of Highland, Acis and their principals and affiliates. In addition, such past investments may have been made utilizing a leveraged capital structure, an asset mix and fee arrangements that are different from the anticipated capital structure, asset mix and fee arrangements of the Company. Moreover, because the investment criteria that govern investments in the Company’s portfolio do not govern the investments and investment strategies of Highland, Acis and their principals and affiliates generally, such investments conducted in accordance with such criteria, and the results they yield, are not directly comparable with, and may differ substantially from other investments undertaken by Highland, Acis and their principals and affiliates.

Acis, as CLO Manager, Relies on Highland to Perform Certain Services

Acis currently relies on Highland, a U.S. SEC-registered investment adviser under common control with Acis, pursuant to the ACM Services Agreements, to provide investment research and recommendations and operational support to Acis, including services in connection with credit research, due diligence of actual or potential investments,

the execution of investment transactions, and certain loan services and administrative services. If Highland does not continue to provide such services to Acis, or there is a departure or inability of certain Highland personnel to provide such services to Acis, there can be no assurances that Acis would be able to find a substitute service provider with the same experience as, or on the same terms as its ACM Services Agreements with, Highland. The inability of Acis to perform its duties under the applicable CLO Management Agreements or the ACLOM Services Agreements in accordance with the standard of care specified therein due to the termination of the Services Agreements could result in removal of Acis or Acis CLO Management, as applicable, under the applicable CLO Management Agreements for the Acis CLOs and Acis CLO 7.

Litigation Involving Highland and Acis

Highland and Acis currently are and have been previously subject to various legal proceedings, many of which have been due to the nature of operating in the distressed loan business in the U.S. The legal process is often the route of last resort to recover amounts due from delinquent borrowers. Shareholders have had an opportunity to discuss with Highland to their satisfaction all litigation matters against Highland and its affiliates unrelated to its distressed business. We currently do not anticipate these proceedings will have a material negative impact to the Company.

Failure to Comply with Investment Advisers Act May Have an Adverse Effect on the Portfolio Manager's Performance

Highland HCF Advisor and Highland CLO Management are relying advisers of Highland, and Highland is a registered investment adviser registered under the Investment Advisers Act and, as such, is subject to the provisions of the Investment Advisers Act. Acis CLO Management is a relying adviser of Acis, and Acis is a registered investment adviser registered under the Investment Advisers Act and, as such, is subject to the provisions of the Investment Advisers Act. Failure to comply with the requirements imposed on the Portfolio Manager, Highland, Acis and/or the Management Companies under the Investment Advisers Act may have a significant adverse effect on the Portfolio Manager, Highland, Acis and/or the applicable Management Company. The Portfolio Manager, Highland's, Acis' and/or the applicable Management Company's ability to act as CLO Manager for Managed CLOs in which the Company holds CLO Notes may also be adversely affected by negative publicity arising from any regulatory compliance failures or other inappropriate behavior attributed to or any other negative publicity related to the Portfolio Manager, Highland, Acis and/or the applicable Management Company, any affiliate thereof or any of their respective investment professionals.

SEC enforcement actions

There can be no assurance that the Portfolio Manager, Highland, Acis and/or the Management Companies or their affiliates will avoid regulatory examination and possibly enforcement actions. Recent SEC enforcement actions and settlements involving U.S.-based private fund advisers have involved a number of issues, including the undisclosed allocation of the fees, costs and expenses related to unconsummated co-investment transactions (i.e., the allocation of broken deal expenses), undisclosed legal fee arrangements affording the applicable adviser with greater discounts than those afforded to funds advised by such adviser. Although each of the Portfolio Manager, Highland, Acis and the Management Companies believe the foregoing practices to have been common historically amongst private fund advisers within the U.S. private funds industry, if the SEC or any other governmental authority, regulatory agency or similar body may take issue with, or in the case of insufficient disclosure regarding acceleration of certain special fees as described below, may continue to take issue with, past or future practices of the Portfolio Manager, Highland, Acis or the Management Companies or any of their affiliates as they pertain to any of the foregoing. In such instances, the Portfolio Manager, Highland, Acis or the Management Companies and/or such affiliates may be at risk for regulatory sanction. Even if an investigation or proceeding did not result in a sanction or the sanction imposed against the Portfolio Manager, Highland, Acis or the Management Companies was small in monetary amount, the Portfolio Manager, Highland, Acis and/or the applicable Management Company or their respective affiliates may be subject to adverse publicity relating to the investigation, proceeding or imposition of any such sanction.

Potential litigation and regulatory actions may materially and adversely affect the Portfolio Manager, Highland, Acis and/or the Management Companies

There can be no assurance that the Portfolio Manager, Highland, Acis and/or the Management Companies or their affiliates will avoid potential third party or other litigation or regulatory actions under existing laws (including the U.S. Risk Retention Requirements) or laws enacted in the future. Recent SEC enforcement actions and settlements involving U.S.-based private fund advisers have involved a number of issues, including undisclosed legal fee arrangements affording the applicable adviser with greater discounts than those afforded to funds advised by such adviser and the undisclosed acceleration of certain special fees. In addition, the failure by the Portfolio Manager, Highland, Acis and/or the Management Companies to comply with the U.S. Risk Retention Rules may result in regulatory actions and other proceedings being brought against the Portfolio Manager, Highland, Acis and/or the Management Companies. If the SEC or any other Governmental Authority takes issue with the practices of the Portfolio Manager, Highland, Acis and/or the Management Companies or any of their affiliates as they pertain to any of the foregoing, the Portfolio Manager, Highland, Acis and/or the Management Companies and/or any such affiliates will be at risk for regulatory sanction. Even if an investigation or proceeding did not result in a sanction or the sanction imposed against the Portfolio Manager, Highland, Acis and/or the Management Companies and/or such affiliates was small in monetary amount, the adverse publicity relating to the investigation, proceeding or imposition of these sanctions could harm the Company, the Portfolio Manager, Highland, Acis and/or the Management Companies and/or their respective affiliates' reputations which may adversely affect the market value and/or liquidity of the Debt. There is also a material risk that Governmental Authorities in the United States and beyond will continue to adopt new laws or regulations (including tax laws or regulations), or change existing laws or regulations, or enhance the interpretation or enforcement of existing laws and regulations including the U.S. Risk Retention Rules. Any such events or changes could occur during the term of the Debt and may materially and adversely affect the Portfolio Manager, Highland, Acis and/or the Management Companies and its ability to operate and/or pursue its management strategies on behalf of the Issuer. Such risks are often difficult or impossible to predict, avoid or mitigate in advance.

Dependence on Highland, Acis and other collateral managers of CLOs

A significant portion of the Company's investment portfolio will comprise of its investment in the Management Companies and in Managed CLOs. The Company's investment portfolio may also include CLOs managed by other asset managers. The performance of the Company's portfolio depends heavily on the skills of the Portfolio Manager, Highland, Acis, the Management Companies or such other asset managers in analyzing, selecting and managing the relevant CLOs. As a result, the Company and the CLOs will be highly dependent on the financial and managerial experience of certain investment professionals associated with the Portfolio Manager, Highland, Acis, the Management Companies and the other asset managers, none of whom is under any contractual obligation to the Company or such CLOs to continue to be associated with the Portfolio Manager, Highland, Acis, the applicable Management Company or such other collateral manager for the term of the Company or any particular CLO. The loss of one or more of these individuals could have a material adverse effect on the performance of the Company and the relevant CLO.

Furthermore, the Portfolio Manager has informed the Company that these investment professionals are also actively involved in other investment activities and will not be able to devote all of their time to the Company's business and affairs. In addition, individuals not currently associated with the Portfolio Manager may become associated with the Portfolio Manager and the performance of the Company and the Managed CLOs may also depend on the financial and managerial experience of such individuals. Moreover, the Portfolio Management Agreement may be terminated under certain circumstances.

The Company generally may not terminate the Portfolio Management Agreement, even in the event of the Portfolio Manager's poor performance

The Portfolio Management Agreement was negotiated between related parties and its terms may not be as favorable as if it had been negotiated with unaffiliated third parties. The Company may choose not to enforce, or to enforce less vigorously, certain of its rights under the Portfolio Management Agreement in an effort to maintain its ongoing relationship with the Portfolio Manager or Highland Capital Management, L.P., as the case may be.

Termination of the Portfolio Management Agreement is difficult and costly. In order to terminate the Portfolio Management Agreement without cause, the Company must (i) be required to register as an investment company under the provisions of the Investment Company Act of 1940 and it must notify the Portfolio Manager of such

requirement, (ii) the portfolio must be liquidated in full and its financing arrangements must have been terminated or redeemed in full, or (iii) it must reach a mutual agreement with the Portfolio Manager to terminate the agreement. The initial term of the Portfolio Management Agreement is three years, with automatic renewals of three years thereafter. The Company may not choose to not renew the Portfolio Management Agreement.

The Company's ability to terminate the Portfolio Management Agreement for "cause" is limited, including grounds of wilful violation of the Portfolio Management Agreement by the Portfolio Manager and fraud or criminal activity. However, poor performance by the Portfolio Manager is not grounds for termination for cause under the Portfolio Management Agreement. See "*Material Contracts*"

RISKS RELATING TO CONFLICTS OF INTEREST

Various Potential and Actual Conflicts of Interest

Various potential and actual conflicts of interest may arise from the overall investment activity of the Portfolio Manager, Highland, its clients and its affiliates. The following briefly summarizes some of these conflicts, but is not intended to be an exhaustive list of all such conflicts.

The Company will be subject to various conflicts of interest involving the Portfolio Manager and its affiliates

The following briefly summarizes certain potential and actual conflicts of interest which may arise from the overall investment activity of the Portfolio Manager, Highland, its clients and its affiliates, but is not intended to be an exhaustive list of all such conflicts. The scope of the activities of the Portfolio Manager, Highland, its affiliates, and the funds and clients managed or advised by Highland or any of its affiliates may give rise to conflicts of interest or other restrictions and/or limitations imposed on the Company in the future that cannot be foreseen or mitigated at this time.

As part of their regular business, the Portfolio Manager, Highland, its affiliates and their respective officers, directors, trustees, shareholders, members, partners, personnel and employees and their respective funds and investment accounts (collectively, the "**Related Parties**") hold, purchase, sell, trade or take other related actions both for their respective accounts and for the accounts of their respective clients, on a principal or agency basis, with respect to loans, securities and other investments and financial instruments of all types. The Portfolio Manager, its affiliates and their respective officers, directors, shareholders, members, partners, personnel and employees also provide investment advisory services, among other services, and engage in private equity, real estate and capital markets-oriented investment activities. The Related Parties will not be restricted in their performance of any such services or in the types of debt or equity investments which they may make. The Related Parties may have economic interests in or other relationships with obligors or issuers in whose obligations or securities or credit exposures the Company and/or the Managed CLOs may invest. In particular, the Related Parties may make and/or hold an investment in an obligor's or issuer's securities that may be *pari passu*, senior or junior in ranking to an investment in such obligor's or issuer's securities made and/or held by the Company and/or the Managed CLOs, or in which partners, security holders, members, officers, directors, agents, personnel or employees of such Related Parties serve on boards of directors or otherwise have ongoing relationships. Each of such ownership and other relationships may result in securities laws restrictions on transactions in such securities by the Company and/or the Managed CLOs and otherwise create conflicts of interest for the Company and/or the Managed CLOs. In such instances, the Related Parties may in their discretion make investment recommendations and decisions that may be the same as or different from those made with respect to the Company's and/or the Managed CLOs' investments. In connection with any such activities described above, the Related Parties may hold, purchase, sell, trade or take other related actions in securities or investments of a type that may be suitable to be included as investments by the Company and/or Managed CLOs. Other than with respect to new issue Highland CLOs as described below, the Related Parties will not be required to offer such securities or investments to the Company or Managed CLOs or provide notice of such activities to the Company or Managed CLOs. In addition, in providing services under the Portfolio Management Agreement and the CLO Management Agreements, the Portfolio Manager may take into account its relationship or the relationships of its affiliates with obligors and their respective affiliates, which may create conflicts of interest. Furthermore, in connection with actions taken in the ordinary course of business of the Portfolio Manager in accordance with its fiduciary duties to its other clients, the Portfolio Manager may take, or be required to take, actions which adversely affect the interests of the Company and/or Managed CLOs. Except as otherwise set forth herein, including with respect to Qualifying CLOs, Designated CLO Resets, Designated CLO

Refinancings and the NexBank Facility and any Permitted NexBank Credit Facility Amendments, the consent of the Advisory Board will be required with respect to transactions with any Related Party.

The Related Parties invested and may continue to make investments that would also be appropriate for the Company, the Portfolio Manager, the Management Companies and/or the Managed CLOs. Such investments may be different from those recommended to the Company or made on behalf of the Managed CLOs or the Management Companies. Neither the Portfolio Manager nor any Related Entity has any duty, in making or maintaining such investments, to act in a way that is favorable to the Company, the Management Companies and/or the Managed CLOs or to offer any such opportunity to the Company, other than with respect to new issue Highland CLOs as described below, or the Managed CLOs. The investment policies, fee arrangements and other circumstances applicable to such other parties may vary from those applicable to the Company, the Portfolio Manager, Highland, Acis, the Management Companies and the Managed CLOs. The Portfolio Manager and/or any Related Entity may also provide advisory or other services for a customary fee to issuers or obligors whose debt obligations or other securities are held by the Company, the Portfolio Manager, Highland, Acis, the Management Companies and/or the Managed CLOs, and neither the Shareholders nor the Company shall have any right to such fees. The Portfolio Manager, Highland, Acis, the Management Companies and/or any Related Entity may also have ongoing relationships with, render services to or engage in transactions with other clients, including other issuers of collateralized loan obligations and collateralized debt obligations, who invest in assets of a similar nature to those of the Company, the Portfolio Manager, Highland, Acis, the Management Companies and/or the Managed CLOs, and with companies whose securities or loans are acquired by the Company, the Portfolio Manager, Highland, Acis, the Management Companies and/or the Managed CLOs, and may own equity or debt securities issued by obligors of debt held by the Company, the Portfolio Manager, Highland, Acis, the Management Companies and/or the Managed CLOs. In connection with the foregoing activities, the Portfolio Manager, Highland, Acis, the Management Companies and/or any Related Entity may from time to time come into possession of material nonpublic information that limits the ability of the Portfolio Manager to advise the Company or the Management Companies or effect a transaction for Managed CLOs, and the Company's, the Management Companies' and/or the Managed CLOs' investments may be constrained as a consequence of Highland's or Acis' inability to use such information for advisory purposes or otherwise to effect transactions that otherwise may have been initiated on behalf of its clients, including the Company, the Management Companies and/or the Managed CLOs. In addition, officers or affiliates of the Portfolio Manager, Highland, Acis and/or Related Parties may possess information relating to obligors of debt held by the Company, the Management Companies and/or the Managed CLOs that is not known to the individuals at the Portfolio Manager responsible for monitoring such investments and performing the other obligations under the Portfolio Management Agreement or CLO Management Agreements.

During the Investment Period, the Company shall receive priority allocations with respect to all CLO Income Note investment opportunities with respect to new issue Highland CLOs, over the account of the Portfolio Manager, its affiliates and Other Accounts. For the avoidance of doubt, the Portfolio Manager shall otherwise allocate investment opportunities among the Company and Highland and its affiliates and Other Accounts in accordance with its allocation policy which requires allocations among clients to be fair and equitable over time as described below. The Portfolio Manager, Highland, Acis and their affiliates may, from time to time, be presented with investment opportunities, other than with respect to new issue Highland CLOs during the Investment Period, that fall within the investment objectives of the Company, the Management Companies and/or the Managed CLOs and other clients, funds or other investment accounts managed by Highland, Acis or their affiliates, and in such circumstances, the Portfolio Manager, Highland, Acis and their affiliates expect to allocate such opportunities among the Company, the Management Companies and/or the Managed CLOs and such other clients, funds or other investment accounts on a basis that the Portfolio Manager, Highland, Acis and their affiliates determine in good faith is appropriate taking into consideration such factors as the fiduciary duties owed to the Company, the Management Companies, the Managed CLOs and such other clients, funds or other investment accounts, the primary mandates of the Company, the Management Companies, the Managed CLOs and such other clients, funds or other investment accounts, the capital available to the Company, the Management Companies, the Managed CLOs and such other clients, funds or other investment accounts, any restrictions on investment, the sourcing of the transaction, the size of the transaction, the amount of potential follow-on investing that may be required for such investment and the other investments of the Company, the Management Companies, the Managed CLOs and such other clients, funds or other investment accounts, the relation of such opportunity to the investment strategy of the Company, the Management Companies and/or the Managed CLOs and such other clients, funds or other investment accounts, reasons of portfolio balance and any other consideration deemed relevant by the Portfolio Manager, Highland, Acis

and their affiliates in good faith. Subject to the Company's priority allocation with respect to new issue Highland CLOs, the Portfolio Manager, will allocate investment opportunities across the entities for which such opportunities are appropriate, consistent with (1) its internal conflict of interest and allocation policies and (2) the requirements of the Investment Advisers Act. The Portfolio Manager, will seek to allocate investment opportunities among such entities in a manner that is fair and equitable over time and consistent with its allocation policy. However, there is no assurance that such investment opportunities will be allocated to the Company, the Management Companies and/or the Managed CLOs fairly or equitably in the short term or over time and there can be no assurance that the Company, the Management Companies and/or any of the Managed CLOs will be able to participate in all such investment opportunities that are suitable for it.

Although the professional staff of the Portfolio Manager will devote as much time to the Company as the Portfolio Manager deems appropriate to perform its duties in accordance with the Portfolio Management Agreement and in accordance with reasonable commercial standards, the staff may have conflicts in allocating its time and services among the Company and the Portfolio Manager's other accounts.

The directors, officers, personnel, employees and agents of the Portfolio Manager and its Related Parties may, subject to applicable law, serve as directors (whether supervisory or managing), officers, personnel, employees, partners, agents, nominees or signatories, and receive arm's length fees in connection with such service, for the Company or entities that operate in the same or a related line of business as the Company or the Management Companies, or of other clients managed by the Portfolio Manager or its affiliates, or for any obligor or issuer in respect of the debt, equity securities or other investments held by the Company, the Management Companies and/or Managed CLOs, or any affiliate thereof, to the extent permitted by their governing instruments, or by any resolutions duly adopted by the Company, such other entities, or any obligor or issuer (or any affiliate thereof) in respect of any of the debt, equity securities or other investments held by the Company, the Management Companies and/or Managed CLOs pursuant to their respective governing instruments, and neither the Company, The applicable Management Company nor the Managed CLOs shall have the right to any such fees.

As further described below, the Portfolio Manager and its Related Parties may effect client cross-transactions where the Portfolio Manager advises the Company or a Management Company, or causes a Managed CLO, to effect a transaction between the Company, the applicable Management Company or such Managed CLO, as applicable, and another client advised by the Portfolio Manager or any of its affiliates. The Portfolio Manager, may engage in a client cross-transaction involving the Company, the Management Companies and/or Managed CLOs any time that the Portfolio Manager believes such transaction to be fair to the Company, the applicable Management Company and/or the Managed CLOs, as applicable, and such other client. By purchasing Shares of the Company, a Shareholder is deemed to have consented to such client cross-transactions between the Company, the applicable Management Company and another client of the Portfolio Manager or one of its Related Parties.

As further described below, the Portfolio Manager may effect principal transactions where Highland advises the Company, or causes a Managed CLO, to make and/or hold an investment, including an investment in securities, in which the Portfolio Manager and/or its affiliates have a debt, equity or participation interest, in each case in accordance with applicable law, which may include the Portfolio Manager obtaining the consent and approval of the Advisory Board of the Company prior to engaging in any such principal transaction between the Company and the Portfolio Manager or its affiliates. By purchasing Shares of the Company, a Shareholder is deemed to have consented to such procedures relating to principal transactions between the Company and the Portfolio Manager or its Related Entities, subject to consent of the Advisory Board. In addition, in the event a Managed CLO engages in a principal trade, consent of the client may consist of consent of the board of directors of such Managed CLO (or certain professionals contracted by the board of directors, to the extent relevant), and none of the Company or its Shareholders will have any additional consent rights with respect to such transaction.

The Portfolio Manager may advise the Company, or direct the Managed CLOs, to acquire or dispose of investments in cross trades between the Company or the Managed CLOs, as applicable, and other clients of the Portfolio Manager or its affiliates in accordance with applicable legal and regulatory requirements. In addition, the Company and/or the Managed CLOs may invest in securities of obligors or issuers in which the Portfolio Manager and/or its affiliates have a debt, equity or participation interest, and the holding and sale of such investments by the Company and/or Managed CLOs may enhance the profitability of the Portfolio Manager's own investments in such companies. Moreover, the Company and Managed CLOs may invest in assets originated by the Portfolio Manager or its affiliates. In each such case, the Portfolio Manager and such affiliates may have a potentially conflicting division

of loyalties and responsibilities regarding the Company or the Managed CLOs, as applicable, and the other parties to such trade. Under certain circumstances, the Portfolio Manager and its affiliates may determine that it is appropriate to mitigate such conflicts by selling an investment at a fair value that has been calculated pursuant to the Portfolio Manager's valuation procedures to another client managed or advised by the Portfolio Manager or such affiliates. In addition, the Portfolio Manager may enter into agency cross-transactions where it or any of its affiliates acts as broker for the Company or a Managed CLO, as applicable, and for the other party to the transaction, to the extent permitted under applicable law. The Portfolio Manager may obtain the Company's written consent as provided herein if any such transaction requires the consent of the Company under Section 206(3) of the Investment Advisers Act.

The Portfolio Manager and/or its Related Parties may participate in creditor committees or other committees with respect to the bankruptcy, restructuring or workout of obligors or issuers of debt obligations or securities held by the Company and/or the Managed CLOs. In such circumstances, the Portfolio Manager may take positions on behalf of itself or Related Parties that are adverse to the interests of the Company or the Managed CLOs in the relevant investment.

The Portfolio Manager and/or its Related Parties may act as an underwriter, arranger or placement or administrative agent, or otherwise participate in the origination, structuring, negotiation, syndication, administration or offering of CLOs or any senior secured loans purchased by the Company. Such transactions are on an arm's-length basis and may be subject to arm's-length fees. There is no expectation for preferential access to transactions involving CLOs or senior secured loans that are underwritten, originated, arranged or placed by the Portfolio Manager and/or its affiliates and the Company shall not have any right to any such fees.

There is no limitation or restriction on the Portfolio Manager or any of its Related Parties with regard to acting as investment adviser or collateral manager (or in a similar role) to other parties or persons. This and other future activities of the Portfolio Manager and/or its Related Parties may give rise to additional conflicts of interest. Such conflicts may relate to obligations that the Portfolio Manager's investment committee, the Portfolio Manager or its affiliates have to other clients.

The members of the Portfolio Manager's investment committee serve or may serve as personnel, officers, directors or principals of entities that operate in the same or a related line of business as the Company, or of other clients managed by the Portfolio Manager or its affiliates. In serving in these multiple capacities, they may have obligations to such other clients or investors in those entities, the fulfillment of which may not be in the best interests of the Company. The Company may compete with other entities managed by the Portfolio Manager and its affiliates for capital and investment opportunities.

There are generally no ethical screens or information barriers among the Portfolio Manager and certain of its affiliates of the type that many firms implement to separate persons who make investment decisions from others who might possess material, non-public information that could influence such decisions. If the Portfolio Manager, any of its personnel or its affiliates were to receive material non-public information about a particular obligor, issuer or CLO, or have an interest in causing the Company or a Managed CLO to acquire a particular CLO security, the Portfolio Manager may be prevented from causing the Company or Managed CLO to purchase or sell such asset due to internal restrictions imposed on the Portfolio Manager. Notwithstanding the maintenance of certain internal controls relating to the management of material non-public information, it is possible that such controls could fail and result in the Portfolio Manager, or one of its investment professionals, buying or selling an asset while, at least constructively, in possession of material non-public information. Inadvertent trading on material non-public information could have adverse effects on the Portfolio Manager's reputation, result in the imposition of regulatory or financial sanctions, and as a consequence, negatively impact the Portfolio Manager's ability to perform its portfolio management services to the Company and the Managed CLOs. In addition, while the Portfolio Manager and certain of its affiliates currently operate without information barriers on an integrated basis, such entities could be required by certain regulations, or decide that it is advisable, to establish information barriers. In such event, the Portfolio Manager's ability to operate as an integrated platform could also be impaired, which would limit the Portfolio Manager's access to personnel of its affiliates and potentially impair its ability to advise the Company and manage the Managed CLOs' investments.

RISKS RELATING TO AN INVESTMENT IN THE SHARES

Shareholders have no right to have their Shares redeemed or repurchased by the Company

The Company has been established as a closed-ended vehicle. Accordingly, there is no right or entitlement attaching to the Shares that allows them to be redeemed or repurchased by the Company at the option of the Shareholder.

There is no public market for the Shares, and a market for the Shares may never develop, which could result in Shareholders being unable to monetize their investment.

The Shares have not been registered under any securities exchange, and, unless so registered, may not be offered or sold except pursuant to an exemption from the applicable securities exchange regulator. It is not expected that the Shares will be listed on any securities exchange in the future. The Shares are newly issued securities for which there is no established trading market. In the absence of an active trading market, Shareholders may be unable to resell the Shares at the time and for the price desired or at all. The Company can provide no assurances that the Shares will not subsequently trade below the price at which they are purchased pursuant to this Offering Memorandum.

In connection with the Company filing any registration for any securities exchange, the Company will agree to use commercially reasonable efforts to satisfy the criteria for listing and list and thereafter maintain the listing on such exchange or market so long as it is in the best interests of the Company. Each market or exchange has initial listing criteria, including criteria related to minimum bid price, public float, market makers, minimum number of round lot holders and board independence requirements that the Company can give no assurance that it will meet. The Company's inability to list or include the Shares on a securities exchange could affect the ability of Shareholders to sell their Shares subsequent to the declaration of the effectiveness of any registration statement, and consequently adversely affect the value of such Shares. In such case, Shareholders would find it more difficult to dispose of, or to obtain accurate quotations as to the market value of, the Shares. In addition, the Company would have more difficulty attracting the attention of market analysts to cover it in their research. If the Shares are approved for listing or inclusion on a securities exchange, the Company will have no prior reporting history, and thus there is no way to determine the prices or volumes at which the Shares will trade. The Company can give no assurances as to the development or liquidity of any trading market for the Shares. Shareholders may not be able to resell their Shares at or near their original acquisition price, or at any price.

In the event a market for the Shares does develop, the Shares may trade at a discount to the Net Asset Value per Share and Shareholders may be unable to realise their Shares at the Net Asset Value per Share or at any other price

The Shares may trade at a discount to the Net Asset Value per Share for a variety of reasons, including due to market or economic conditions or to the extent investors undervalue the Company.

Subject to the Companies Law, under its Articles, the Company may issue additional securities, including Shares, for any purpose. Any additional issuances by the Company, or the possibility of such issue, may cause the price of the Shares to decline.

The existence of a liquid market in the Shares cannot be guaranteed

The Shares may be admitted to a securities exchange at some point in the future, however there can be no guarantee that a liquid market in the Shares will develop or be sustained or that the Shares will trade at prices close to the Net Asset Value per Share. The number of Shares to be issued pursuant to the Placing is not yet known, and there may be a limited number of holders of Shares. Limited numbers and/or holders of Shares may mean that there is limited liquidity in such Shares which may affect: (i) a Shareholder's ability to realise some or all of their investment; (ii) the price at which such Shareholder can effect such realisation; and/or (iii) the price at which Shares trade in the secondary market. Accordingly, Shareholders may be unable to realise their investment at Net Asset Value per Share or at all.

The Shares will be subject to purchase and transfer restrictions in the Placing and in secondary transactions in the future

The Company intends to restrict the ownership and holding of its Shares so that none of its assets will constitute “plan assets” under the U.S. Plan Assets Regulations. The Company intends to impose such restrictions based on deemed representations in the case of a subscription of Shares. If the Company’s assets were deemed to be “plan assets” of any plan subject to Title I of ERISA or Section 4975 of the U.S. Tax Code (“**U.S. Plan**”), pursuant to Section 3(42) of ERISA and U.S. Department of Labor regulations promulgated under ERISA by the U.S. Department of Labor and codified at **29 C.F.R. Section 2510.3-101** as amended by Section 3(42) of ERISA (collectively, the “**U.S. Plan Asset Regulations**”) then: (i) the prudence and other fiduciary responsibility standards of ERISA would apply to investments made by the Company; and (ii) certain transactions that the Company or a subsidiary of the Company may enter into, or may have entered into, in the ordinary course of business might constitute or result in non-exempt prohibited transactions under Section 406 of ERISA or Section 4975 of the U.S. Tax Code and might have to be rescinded. Governmental plans and certain church plans, while not subject to Title I of ERISA or Section 4975 of the U.S. Tax Code, may nevertheless be subject to other State, local or other laws or regulations that would have the same effect as the U.S. Plan Asset Regulations so as to cause the underlying assets of the Company to be treated as assets of an investing entity by virtue of its investment (or any beneficial interest) in the Company and thereby subject the Company (or other persons responsible for the investment and operation of the Company assets) to laws or regulations that are similar to the fiduciary responsibility or prohibited transaction provisions contained in Title I of ERISA or Section 4975 of the U.S. Tax Code.

Each purchaser and subsequent transferee of the Shares will be deemed to represent and warrant that no portion of the assets used to acquire or hold its interest in the Shares constitutes or will constitute the assets of any U.S. Plan. The Articles of the Company provide that the Board of Directors may refuse to register a transfer of Shares to any person they believe to be a Non-Qualified Holder or a U.S. Plan investor. If any Shares are owned directly or beneficially by a person believed by the Board of Directors to be a Non-Qualified Holder or a U.S. Plan investor, the Board of Directors may give notice to such person requiring him either (i) to provide the Board of Directors within 30 days of receipt of such notice with sufficient satisfactory documentary evidence to satisfy the Board of Directors that such person is not a Non-Qualified Holder or a U.S. Plan investor, or (ii) to sell or transfer their Shares to a person qualified to own the same within 30 days and within such 30 days to provide the Board of Directors with satisfactory evidence of such sale or transfer. Where condition (i) or (ii) is not satisfied within 30 days after the serving of the notice, the person will be deemed, upon the expiration of such 30 days, to have forfeited their Shares.

In addition, the Placing Shares may not be offered, sold, exercised, resold, transferred or delivered, directly or indirectly, within the United States or to, or for the account or benefit of, U.S. Persons, except pursuant to an exemption from, or in a transaction not subject to, the registration requirements of the U.S. Securities Act and in compliance with any applicable securities laws of any state or other jurisdiction in the United States. For more information, refer to “Risks relating to regulation and taxation - The Company is not, and does not intend to become, registered in the United States as an investment company under the U.S. Investment Company Act and related rules” in this section of this Offering Memorandum.

For more information on purchase and transfer restrictions, prospective investors should refer to the section of this Offering Memorandum entitled “*Purchase and Transfer Restrictions*” in “*Placing Arrangements*”.

RISKS RELATING TO REGULATION AND TAXATION

Changes in law or regulations, or a failure to comply with any laws or regulations, may adversely affect the respective businesses, investments and performance of the Company

The Company is subject to laws and regulations enacted by national and local governments.

On June 23, 2016, in a public referendum, the United Kingdom voted to leave the European Union. On March 29, 2017, the United Kingdom triggered Article 50 of the Treaty on European Union (“**Article 50**”) by formally notifying the European Council of the United Kingdom’s intention to withdraw from the European Union. In accordance with Article 50, the European Union shall negotiate and conclude a withdrawal agreement with the United Kingdom within 2 years of the United Kingdom triggering Article 50, although the European Council in agreement with the United Kingdom may decide to extend this period. The United Kingdom’s decision to leave the European Union has caused,

and is anticipated to continue to cause, significant new uncertainties and instability in both domestic and global financial markets. These uncertainties could have a material adverse effect on the various obligors' ability to make payments due under the assets within the CLO portfolios, which in turn could have a material adverse effect on the Company's financial condition, results of operations and/or its NAV.

The Company is subject to, and is required to comply with, certain regulatory requirements that are applicable to registered investment schemes which are domiciled in Guernsey.

The laws and regulations affecting the Company are evolving and any changes in such laws and regulations may have an adverse effect on the ability of the Company to carry on its business. Any such changes may also have an adverse effect on the ability of the Company to pursue the investment policies, and may adversely affect the Company's business, financial condition, results of operations and/or its NAV.

Certain income of the Company may be subject to U.S. withholding tax, and changes in tax law may adversely affect the Company

The Company intends to make loan investments in the United States that will qualify for the "portfolio interest exemption" from U.S. withholding on interest. However, if the Company is not eligible for the portfolio interest exemption with respect to a loan paying U.S.-source interest, interest payments to the Company could be subject to a 30% withholding tax. In addition, there can be no assurance that, as a result of any change in any applicable law, rule or regulation or interpretation thereof, U.S.-source interest or other payments on the loans that were not subject to withholding tax when purchased will not in the future become subject to U.S. or other withholding tax or that the amount or rate of withholding tax to which a payment on a loan is subject might not increase.

In addition, if the Company acquires equity interests in U.S. entities, either as a result of a direct purchase or as a result of loans previously purchased by the Company being converted into equity interests, the Company could be subject to 30% U.S. withholding tax on any U.S.-source dividends. If the Company is deemed to be engaged in a trade or business in the United States as a result of its ownership of an equity interest in an entity treated as fiscally transparent in the United States or certain other investments, the Company could be subject to a tax on net income with respect to income from such equity interest or other investments, as well as a "branch profits" tax, with a combined U.S. tax rate with respect to such equity interest or other investments of approximately 54%.

If the Company is subject to U.S. withholding tax on payments from investments or is subject to U.S. net income tax, such tax would reduce the amounts available to make payments on the Placing Shares. The extent to which other source country withholding taxes may apply to the Issuer's income will depend on the actual composition of its assets.

The European Directive on Alternative Investment Fund Managers may impair marketing of the Shares to EU investors

The AIFMD was transposed into the national legislation of a number of EEA member states on 22 July 2013. The Company will be considered an Alternative Investment Fund ("AIF") for the purposes of AIFMD. AIFMD will allow the continued marketing of AIFs, such as the Company, under national private placement regimes where EEA member states choose to implement AIFMD national private placement regimes. In relation to the Company, such marketing will be subject to registration under the AIFMD in those EU member states where there will be marketing of the Shares to investors. To permit marketing, appropriate cooperation agreements must be in place between the supervisory authorities of the relevant EEA member states in which the Shares are being marketed and the jurisdiction of both the Company and the Portfolio Manager, as the AIFM of the Company.

Accordingly, the ability of the Portfolio Manager to market the Shares in the EEA will depend on the relevant EEA state permitting the marketing of non-EEA managed funds, the continuing status of Guernsey and the USA in relation to AIFMD and the Portfolio Manager's willingness to comply with the relevant provisions of AIFMD and the other requirements of the national private placement regimes of individual EEA states, the requirements of which may restrict the Company's ability to raise additional capital from the issue of new Shares in one or more EEA state.

Additionally, it should be noted that what is and what is not "marketing" under AIFMD can vary between EEA member states, in some cases covering most promotional activity in respect of a fund and in some cases covering only material that is sufficiently specific or precise in respect of information relating to the terms of the fund that it could

alone form the basis of a decision to invest in the fund. This in turn means that the type of promotional activity that will require registration under AIFMD can also vary between EEA member states.

However, what is and what is not “marketing” under AIFMD remains a developing area and regulatory guidance in many EEA member states is limited. It is possible that European Securities and Markets Authority (“ESMA”) or an EEA national regulator may change its policy approach in the future or that ESMA, the European Commission or another European entity, regulatory or legislative body may have a different interpretation at a later date of what constitutes marketing under AIFMD.

If it was held that certain promotional material in respect of the fund constitutes marketing under AIFMD and was provided to investors in an EEA member state without the Company having been registered in that EEA member state for marketing under AIFMD by the Portfolio Manager, the Portfolio Manager may face regulatory sanctions as a result of non-compliance with AIFMD, and the enforceability of agreements with Shareholders may be affected.

ESMA has also consulted on the possible extension of the passport for marketing and managing under AIFMD to non-EEA based managers (the marketing and managing passports are currently only available to EEA based AIFMs) and delivered advice to the European Commission on 18 July 2016 on whether, amongst other things, the passporting regime should be extended to the management and/or marketing of AIFs by non-EEA based managers.

This advice regarding extending the passport to US domiciled AIFMs was qualified, meaning it is currently not clear if the passporting regime will be extended to the Portfolio Manager as an AIFM, nor is it clear that the European Commission consider that this advice contains a positive assessment of a sufficient number of non-EEA countries to extend the passport to these countries. If the European Commission were to consider there were sufficient grounds to extend the passport and adopted the requisite delegated act extending the passport, the national private placement regimes which are currently applicable to non-EEA AIFMs and non-EEA AIFs in EEA member states will temporarily continue to co-exist with this new non-EEA passport (the “**Third Country Passport**”).

However, three years after the adoption of this delegated act, ESMA is required to issue an opinion on the functioning of the Third Country Passport and advise on the potential termination of the current national private placement regimes. If the national private placement regimes were then abolished, an AIF could not be marketed into Europe by a non-EEA AIFM except by way of the Third Country Passport, meaning in this scenario the Portfolio Manager would not be able to market the Shares in the Company in the EEA.

Any regulatory changes arising from implementation of the AIFMD (or otherwise) that limit the Company’s ability to carry on its business or to market future issues of its Shares may materially adversely affect the Company’s ability to carry out its investment policy successfully and to achieve its investment objective, which in turn may adversely affect the Company’s business, financial condition, results of operations and/or its NAV.

Final regulations implementing the “Volcker Rule” in the United States of America were issued in December 2013 and became effective by operation of law on 1 April 2014, subject to a conformance period. The final Volcker Rule regulations revised the November 2011 proposed regulations and include certain changes to the treatment of foreign funds and non-U.S. bank investors. If the Volcker Rule applies to an investor’s ownership of Shares, the investor may be forced to sell its shares, or the continued ownership of such shares may be subject to certain restrictions.

On 21 July 2010, U.S. President Barack Obama signed into law the Dodd-Frank Wall Street Reform and Consumer Protection Act and certain provisions therein known as the “Volcker Rule.” On 10 December 2013, the final Volcker Rule regulations (the “**Final Regulations**”) were issued by U.S. regulators. The Final Regulations are effective from 1 April 2014, subject to a conformance period ending on 21 July 2015 (which may be extended). The Volcker Rule generally restricts certain non-U.S. banks and affiliated financial firms, collectively identified as “banking entities,” from investing in and sponsoring “covered funds.” In the event that a non-U.S. bank is deemed to be a “banking entity” and the Company is deemed to be a “covered fund” for purposes of the Volcker Rule, the non-U.S. bank’s ownership of the Shares may be subject to investment restrictions. If so, the non-U.S. bank may be required to divest the Shares by the end of the conformance period. Depending on market conditions and other factors, if an investor is required to liquidate its investment in the Shares during the conformance period, it may suffer a loss from the price at which it purchased the Shares.

If the Company becomes subject to tax on a net income basis in any tax jurisdiction, including Guernsey or the United Kingdom, the Company's financial condition and prospects could be materially and adversely affected

The Company intends to conduct its affairs so that it will not be treated as UK resident for taxation purposes, or as having a permanent establishment or otherwise being engaged in a trade or business, in the UK. The Company intends that it will not be subject to tax on a net income basis in any country. There can be no assurance, however, that the net income of the Company will not become subject to income tax in one or more countries, including Guernsey and the United Kingdom, as a result of unanticipated activities performed by the Company, adverse developments or changes in law, contrary conclusions by the relevant tax authorities, changes in the Directors' personal circumstances or management errors, or other causes. The imposition of any such unanticipated net income taxes could materially reduce the post-tax returns available for distributions on the Shares, and consequently may adversely affect the Company's business, financial condition, results of operations and/or its NAV.

Changes in taxation legislation, or the rate of taxation, may adversely affect the Company

Any change in the tax status of the Company, or in taxation legislation or practice in Guernsey, the United Kingdom or elsewhere could affect the value of the investments held by the Company or the Company's ability to achieve its investment objectives or alter the post-tax returns to Shareholders. Statements in this Offering Memorandum concerning the taxation of Shareholders and/or the Company are based upon current Guernsey and United Kingdom law and published practice as at the date of this Offering Memorandum, which law and practice is, in principle, subject to change (potentially with retrospective effect) that could adversely affect the ability of the Company to meet its investment objective and which could adversely affect the taxation of Shareholders and/or the Company.

Potential investors are urged to consult their tax advisers with respect to their particular tax situations and the tax effect of an investment in the Company.

Possible Financial Transaction Tax

On 14 February 2013, the European Commission issued proposals, including a draft Directive (the "Commission's Proposal") for a financial transaction tax ("FTT") to be adopted in certain participating EU member states (including Belgium, Germany, Estonia, Greece, Spain, France, Italy, Austria, Portugal, Slovenia and Slovakia (the "Participating Member States"), although Estonia has since stated that it will not participate). If the Commission's Proposal was adopted in its current form, the FTT would be a tax primarily on "financial institutions" in relation to "financial transactions" (which would include the conclusion or modification of derivative contracts and the purchase and sale of financial instruments).

Under the Commission's Proposal, the FTT could apply in certain circumstances to persons both within and outside of the Participating Member States. Generally, it would apply where at least one party is a financial institution, and at least one party is established in a Participating Member State. A financial institution may be, or be deemed to be, "established" in a Participating Member State in a broad range of circumstances, including (a) by transacting with a person established in a Participating Member State or (b) where the financial instrument which is subject to the financial transaction is issued in a Participating Member State.

The FTT proposal remains subject to negotiation between the Participating Member States. It may therefore be altered prior to implementation, the timing of which remains unclear. Additional EU member states may decide to participate.

In addition to the FTT, certain countries (such as France and Italy) have unilaterally introduced or announced their own financial transaction tax, and other countries may follow suit. There is therefore a risk that a financial transaction tax may be incurred on certain transactions entered into by the Company. Any such financial transaction tax may adversely affect the cost of investment or hedging strategies pursued by the Company as well as the value and liquidity of certain assets within the Company, such as securities, derivatives and structured finance securities.

Different regulatory, tax or other treatment of the Company or the Shares in different jurisdictions, or changes to such treatment in different jurisdictions, may adversely impact shareholders in certain jurisdictions

For regulatory, tax and other purposes, the Company and the Shares may be treated in different ways in different jurisdictions. For instance, in certain jurisdictions and for certain purposes, the Shares may be treated as more akin to

holding units in a collective investment scheme. Furthermore, in certain jurisdictions, the treatment of the Company and/or the Shares may be uncertain or subject to change, or it may differ depending on the availability of certain information or disclosure by the Company of that information. The Company may be subject, therefore, to financially and logistically onerous requirements to disclose any or all of such information or to prepare or disclose such information in a form or manner which satisfies the regulatory, tax or other authorities in certain jurisdictions. The Company may elect not to disclose such information or prepare such information in a form which satisfies such authorities. Therefore Shareholders in such jurisdictions may be unable to satisfy the regulatory requirements to which they are subject.

The Company is not, and does not intend to become, registered in the United States as an investment company under the U.S. Investment Company Act and related rules

The Company has not, does not intend to, and may be unable to, become registered in the United States as an investment company under the U.S. Investment Company Act. The U.S. Investment Company Act provides certain protections to U.S. investors and imposes certain restrictions on companies that are registered as investment companies. As the Company is not so registered, and does not intend to so register, none of these protections or restrictions is or will be applicable to the Company. In addition, to avoid being required to register as an investment company under the U.S. Investment Company Act and to avoid violating the U.S. Investment Company Act, the Company has implemented restrictions on the purchase of the Shares by persons who are located in the United States or are U.S. Persons (or are acting for the account or benefit of any U.S. Person). For more information, prospective investors should refer to the section of this Offering Memorandum entitled “Purchase and Transfer Restrictions” in in “Placing Arrangements”.

Certain payments to the Company will in the future be subject to 30 per cent withholding tax unless the Company agrees to certain reporting and withholding requirements and certain Shareholders will be required to provide the Company with required information so that the Company may comply with its obligations under FATCA

Under Sections 1471 through 1474 of the U.S. Internal Revenue Code (commonly referred to as “FATCA”), Financial Institutions are required to use enhanced due diligence procedures to identify U.S. persons who have invested in either non-U.S. financial accounts or non-U.S. entities. Pursuant to FATCA, certain payments of (or attributable to) U.S.-source income, and the proceeds of sales of property that give rise to U.S.-source payments, will be subject to 30 per cent withholding tax with effect from 1 July 2014 unless the Company agrees to certain reporting and withholding requirements.

The United States and Guernsey have entered into an Intergovernmental Agreement (“US IGA”) to implement FATCA. Under the terms of the US IGA, the Company may be obliged to comply with the provisions of FATCA as enacted by the Guernsey legislation implementing the US IGA (the “Guernsey IGA Legislation”), rather than directly complying with the U.S. Treasury Regulations implementing FATCA. Under the terms of the US IGA, Guernsey resident entities that comply with the requirements of the Guernsey IGA Legislation will be treated as compliant with FATCA and, as a result, will not be subject to withholding tax under FATCA (“FATCA Withholding”) on payments they receive and will not be required to withhold under FATCA on payments they make.

The Company expects that it will be considered to be a Guernsey resident financial institution and therefore will be required to comply with the requirements of the Guernsey IGA Legislation.

Under the Guernsey IGA Legislation, the Company will be required to register with the United States Internal Revenue Service (“IRS”) and report to the Guernsey President of the Policy & Resources Committee certain holdings by and payments made to certain U.S. investors in the Company, as well as to non-U.S. financial institutions that do not comply with the terms of the Guernsey IGA Legislation. Under the terms of the US IGA, such information will be onward reported by the Guernsey President of the Policy & Resources Committee to the United States under the general information exchange provisions of the United States-Guernsey Agreement for the Exchange of Information Relating to Taxes.

Further, even if the Company is not characterised under FATCA as a Financial Institution, it nevertheless may become subject to such 30 per cent withholding tax on certain U.S.-source payments to it unless it either provides information to withholding agents with respect to its U.S. Controlling Persons or certifies that it has no such U.S. Controlling Persons.

As a result, Shareholders may be required to provide any information that the Company determines necessary in order to allow the Company to satisfy its obligations under FATCA.

Additional intergovernmental agreements similar to the US IGA have been entered into or are under discussion by other jurisdictions with the United States. Different rules than those described above may apply depending on whether a payee is resident in a jurisdiction that has entered into an intergovernmental agreement to implement FATCA.

In addition to the US IGA, Guernsey and the United Kingdom have entered into an inter-governmental agreement (“UK IGA”) for the implementation of information exchange arrangements, based on FATCA, whereby relevant financial information held in Guernsey in respect of a person or entity who is resident in the UK for tax purposes will be reported to the Guernsey President of the Policy & Resources Committee for onward reporting to the UK’s HM Revenue and Customs. Under the UK IGA, the Company may be required to provide information to the Guernsey authorities about investors and their interests in the Company in order to fully discharge its reporting obligations and, in the event of any failure or inability to comply with the proposed arrangements, may suffer a financial penalty or other sanction under Guernsey law.

The scope and application of FATCA Withholding and information reporting pursuant to the terms of FATCA and the IGAs are subject to review by the United States, the United Kingdom, Guernsey and other IGA governments, and the rules may change. Although the UK IGA and US IGA have been ratified by Guernsey’s parliament, guidance published to date has been in draft format only and therefore, while the Company intends to comply with applicable law, it cannot be predicted at this time what the full impact on the Company and the Company’s reporting responsibilities pursuant to the UK IGA and US IGA will be. Shareholders should consult with their own tax advisors regarding the application of FATCA to their particular circumstances.

OECD’s Base Erosion Profit Shifting (“BEPS”) Action Points

In 2013, the OECD published its report on Addressing Base Erosion and Profit Shifting (“BEPS”) and its Action Plan on BEPS. The aim of the report and Action Plan was to address and reduce aggressive international tax planning. BEPS remains an ongoing project. On 5 October 2015, the OECD published its final reports, analyses and sets of recommendations (deliverables) with a view to implementing internationally agreed and binding rules which could result in material changes to relevant tax legislation of participating OECD countries. The final package of deliverables was subsequently approved by the G20 Finance Ministers on 8 October 2015. On 24 November 2016, the OECD announced that more than 100 jurisdictions concluded negotiations on a multilateral instrument that will amend their respective tax treaties (more than 2,000 tax treaties worldwide) in order to implement the tax treaty-related BEPS recommendations, although the effective date of such multilateral instrument remains uncertain. A first high level signing ceremony took place on 7 June 2017 where 68 countries signed the multilateral instrument. It is currently anticipated that the multilateral instrument will enter into force after five countries have ratified it. The multilateral instrument will then enter into effect for a specific tax treaty after all parties to that treaty have ratified the multilateral instrument. The final actions to be implemented in the tax legislation of the countries in which the Company will have investments, in the countries where the Company is domiciled or resident, or changes in tax treaties negotiated by these countries, could adversely affect the returns from the Company to its investors.

COMPANY, ITS INVESTMENT OBJECTIVE, POLICY AND STRATEGY

COMPANY

Highland CLO Funding, Ltd. (formerly known as Acis Loan Funding, Ltd.) (the “**Company**”) was incorporated on 30 March 2015 and registered under the laws of Guernsey (registration number 60120) pursuant to the Companies Law. The Company changed its name on October 27, 2017. The Company is an investment company established to provide its investors with exposure to CLO Notes on both a direct basis and indirect basis and senior secured loans on an indirect basis, through the use of the investments described in its investment policy, including through the Management Companies.

The Company is seeking to raise U.S. \$153 million through the Placing to invest in accordance with its investment objective and policy. Applications to an appropriate securities exchange may be made when deemed appropriate by the Company.

Investment in the Company is only suitable for institutional, professional and high net worth investors, private client fund managers and brokers and other investors who understand the risks involved in investing in the Company and/or who have received advice from their fund manager or broker regarding investment in the Company.

INVESTMENT OBJECTIVE

The Company’s investment objective is to provide Shareholders with stable and growing income returns, and to grow the capital value of the investment portfolio through opportunistic exposure to CLO Notes, investments in new issue CLOs sponsored by Highland and Acis CLO 7 through its interests in the Management Companies and CLO Income Notes, respectively, and senior secured loans primarily for the purpose of enabling Highland CLO Management to qualify as an “originator” for purposes of the EU Retention Requirements, on both a direct basis and indirect basis, through the use of the investments described in its investment policy and through use of leverage, any Revolving Credit Facility, Warehouse Loan Facilities, total return swaps or repurchase agreements, in addition to secured loan facilities. With respect to the Company’s investments, except with respect to Designated CLO Resets or Designated CLO Refinancings, if applicable, it is expected that the Portfolio Manager intends to seek monetization of such investments in the ordinary course in its discretion; provided that at the end of the Term, the Portfolio Manager, in its reasonable discretion may postpone dissolution of the Company for up to 180 days to facilitate the orderly liquidation of the investments.

Highland HCF Advisor, in its capacity as the Portfolio Manager under the Portfolio Management Agreement, will manage the Company’s investments. In addition, the Portfolio Manager, Highland, Highland CLO Management, or another affiliate of Highland, in the capacity of the CLO Manager, may also manage Highland CLOs and the Portfolio Manager Highland, Acis, Acis CLO Management, or another affiliate of Acis, in the capacity of the CLO Manager, may also manage Managed CLOs, in each case, pursuant to CLO Management Agreements to be entered into from time to time.

INVESTMENT POLICY

Overview

The Company’s investment policy is to focus on synergistic investments in the following areas.

Loan Investments

The Company will invest on an indirect basis in a diverse portfolio of predominantly floating rate senior secured loans (or on a direct basis for the primary purpose of enabling Highland CLO Management to qualify as an “originator” for purposes of the EU Retention Requirements), all of which will have at least one rating, which may be public or private, from Moody’s, S&P or Fitch. Initially, the Company’s loan investments will be focused in the U.S., but depending on market conditions the Company may also invest in similar types of loans in Europe. Accordingly, there is no limit on the maximum U.S. or European exposure. Investments in U.S. or European loans may be made through a U.S. or European originator subsidiary of the Company. The Company intends to invest directly only in those senior secured loans to obligors with total potential indebtedness under all applicable loan agreements, indentures and other

underlying instruments at least \$250,000,000 that would generally satisfy the eligibility criteria for Highland CLOs and set forth in “*Summary—Investment Policy—Loan Investments*”.

Financing of Loan Portfolios / Securitization

It is intended that the Company will periodically seek to sell or securitise all or a portion of its loan portfolio, held directly or indirectly, into new Highland CLOs where Highland CLO Management acts as CLO Manager. In doing so, Highland CLO Management may seek to adopt the “originator” model to address the Origination Requirements (as defined below) applicable to such Highland CLOs to the extent such Highland CLOs sought to comply with EU Retention Requirements. As a result, Highland CLO Management, will be required to commit to: (a) establishing the relevant CLO and (b) selling certain loan investments to the relevant CLO which it has purchased for its own account initially. In addition, under current guidance, prior to closing date of the relevant CLO, Highland CLO Management expects to sell investments to the relevant CLO to satisfy the Origination Requirements.

CLO Notes

The Company will from time to time invest directly or indirectly (through affiliates and subsidiaries, including the Management Companies, as more fully described below) in CLO Notes issued by Managed CLOs or CLOs managed by other asset managers as set forth in “*Summary—Investment Policy—CLO Notes*”.

The Company is currently invested in CLO Income Notes issued by Managed CLOs managed by Highland, Acis and Acis CLO Management. Following the Placing, the Company will invest indirectly through the Management Companies in CLO Notes.

Act as Risk Retention Provider

The Company may also invest in, provide loans to, or purchase performance-linked notes from asset management subsidiaries, affiliated with the Company, the Portfolio Manager, Highland or Acis and which may act as the asset manager of certain U.S. or European CLOs in order to satisfy certain U.S. Risk Retention Rules or EU Retention Requirements.

Allocation of Investment Opportunities

Highland CLO Management will serve as CLO Manager to each newly-issued Highland CLO during the Investment Period.

During the Investment Period, the Company shall receive priority allocations with respect to all CLO Income Note investment opportunities with respect to new issue Highland CLOs, over the account of the Portfolio Manager, its affiliates and Other Accounts as set forth in “*Summary—Investment Policy—Allocation of Investment Opportunities*”.

INVESTMENT RESTRICTIONS

The Company will, at all times, invest and manage its assets in a way which is consistent with its object of spreading investment risk and in accordance with the investment policy set out in “*—Investment Policy*”.

In the event of any breach of the Company’s investment policy or of the investment restrictions applicable to the Company, Shareholders will be informed of the actions to be taken by the Company (at the time of such a breach) by an announcement issued by the Administrator.

During the Investment Period, the Company may invest up to \$250,000,000 in CLO Income Notes for new Highland CLOs as follows: (a) up to \$150,000,000 in the aggregate from new capital contributions; and (b) up to \$100,000,000 in the aggregate from proceeds received from existing seed portfolio investments and investments in new Highland CLOs, net of dividends paid, and amortization and interest payments on Company borrowings from committed credit facilities.

The Company may not, without the consent of the Advisory Board, invest in any CLO Notes or CLO Income Notes of new Highland CLOs that are not Qualifying CLOs as set forth in “*Summary—Investment Restrictions*”; provided that, if the Portfolio Manager has satisfied the RP Condition, the consent of the Advisory Board to invest in any

Highland CLO that meets clause (a) of the definition of Qualifying CLOs only shall not be unreasonably withheld, conditioned or delayed.

During the Investment Period, the Company shall be permitted to invest in “resets” with respect to the Designated CLO Resets and refinancings with respect to the Designated CLO Refinancings, each as set forth in “*Summary—Investment Restrictions*”.

The Company shall not invest in the CLO Income Notes of a new-issue Highland CLO unless it is the 100% owner of the CLO Income Notes not forming part of the Retention Interest acquired by Highland CLO Management.

BORROWING

Subject to the limitations set forth in “*Summary-Borrowing*”, it is expected that the Company will have access to one or more committed credit facilities. Such facilities may take the form of any Revolving Credit Facility, Warehouse Loan Facilities, total return swaps or repurchase agreements, in addition to secured loan facilities. It is expected that the Company will use advances under such facilities, together with the proceeds of the Shares, to purchase future senior secured loans (acquired for the primary purpose of enabling Highland CLO Management to qualify as an “originator” for purposes of the EU Retention Requirements) and other assets. In addition to such facilities, the Company will be permitted to borrow money for day to day administration and cash management purposes.

CHANGES TO INVESTMENT OBJECTIVE AND POLICY

Any material change to the investment objective and policy of the Company would be made only with the approval of Shareholders.

INVESTMENT STRATEGY

Whether the senior secured loans or other assets are held directly by the Company (with respect to senior secured loans for the purpose of enabling Highland CLO Management to qualify as an “originator” for purposes of the EU Retention Requirements) or indirectly via CLO Notes or its investment in the applicable Management Company it is the Company’s intention that, in any case, the portfolios will be actively managed (by the Portfolio Manager, Highland, Acis, the applicable Management Company, an asset manager subsidiary or the applicable CLO Manager, as the case may be) to minimise default risk and potential loss through comprehensive credit analysis performed by the Portfolio Manager, Highland, Acis, the applicable Management Company or the applicable CLO Manager (as applicable).

Whilst the intention is to pursue an active, non-benchmark total return strategy, Highland HCF Advisor as the Company’s Portfolio Manager will be cognisant of the positioning of the loan portfolios against relevant indices. Accordingly, Highland HCF Advisor will track the returns and volatility of such indices, while seeking to outperform them on a consistent basis. In-depth, fundamental credit research dictates name selection and sector over-weights/under-weights relative to the benchmark, backstopped by constant portfolio monitoring and risk oversight. The Portfolio Manager will typically look to diversify the Company’s portfolios to avoid the risk that any one obligor or industry will adversely impact overall returns. The investment strategy also places an emphasis on loan portfolio liquidity to ensure that if the Company’s credit outlook changes, it is free to respond quickly and effectively to reduce or mitigate risk in its portfolio. The Portfolio Manager believes this investment strategy will be successful in the future as a result of its emphasis on risk management, capital preservation and fundamental credit research. The Portfolio Manager believes the best way to control and mitigate risk is by remaining disciplined in market cycles, by making careful credit decisions and maintaining adequate diversification.

Leverage and Expected Returns

It is anticipated that any borrowing for the purpose of investing directly in senior secured loans (acquired for the primary purpose of enabling Highland CLO Management to qualify as an “originator” for purposes of the EU Retention Requirements) will be in the form of a term Warehouse Loan Facility, however the Company has entered into the NexBank Credit Facility and may enter into any Revolving Credit Facility, Warehouse Loan Facilities, total return swaps, repurchase agreements or other facilities to facilitate the acquisition or financing of loans. Loans purchased using such borrowings will typically be held for no more than 12 months before being sold to a Highland

CLO. Except in relation to the CLO Retention Notes it holds, the Company may enter into hedging and derivatives transactions pursuant to its investment activities, for the purposes of efficient portfolio management.

The Company does not currently grant any guarantee under any leveraging arrangement. The grant of any such guarantee would be disclosed to investors in accordance with the AIFMD Rules.

Any proposed changes to the Company's investment objective and policy will be subject to the process described in the section titled "*Changes to Investment Objective and Policy*" above in this section of the Offering Memorandum.

Collateral and Asset Re-use Arrangements

Any collateral and asset re-use arrangements of the Company will vary according to the brokers and/or trading counterparties which it may use (each a "**Trading Counterparty**").

The Company may be required to deliver collateral from time to time to its Trading Counterparties, under the terms of the relevant trading agreements, by posting initial margin and/or variation margin and on a mark-to-market basis. The Company may also deposit collateral as security with a Trading Counterparty. The treatment of such collateral varies according to the type of transaction and where it is traded. Under such arrangements, the cash, securities and other assets deposited as collateral will generally become the absolute property of the Trading Counterparty, the Trading Counterparty will have the right to use such collateral.

Where collateral is reused by a Trading Counterparty, the Company will have an unsecured right to the return of equivalent assets and such collateral will be at risk in the event of the insolvency of a Trading Counterparty.

Any changes to the right of re-use of collateral will be disclosed to investors in accordance with the AIFMD Rules.

Current Investments of the Company

In order to facilitate a timely investment of the proceeds of the Placing and to take advantage of existing opportunities, the Company is currently invested in CLO Income Notes issued by Managed CLOs managed by the Portfolio Manager, Highland, Acis and Acis CLO Management. The details of such CLOs are set out in "*The Current CLO Portfolio*".

Following the Placing, the Company will acquire further assets and fund origination by Highland CLO Management of new Highland CLOs and it is expected that the Net Placing Proceeds will be substantially invested in CLO Notes upon closing. The Company may also, from time to time: (i) hold assets within its portfolio to maturity; (ii) sell assets within its portfolio to the market; or (iii) sell assets within its portfolio to another CLO which is not Managed CLO.

TARGET RETURN AND DIVIDEND POLICY

Target Total Return

Whilst not forming part of the investment objective or policy of the Company, on the basis of current market conditions as at the date of this Offering Memorandum, the Company is targeting an annualised mid-teen total return over the medium-term, once the Net Placing Proceeds are substantially invested (through the Company) in CLO Notes (the "**Target Total Return**"). The Company intends to seek to deliver this return through a combination of dividend payments and capital appreciation.

Target Dividend Yield and Policy

Whilst not forming part of the investment objective or policy of the Company, dividends will be payable in respect of each calendar quarter, payable in the month following the end of such quarter.

During the Investment Period, on each Quarterly Dividend Date, beginning May 15, 2018, the Company will target the Target Dividend. During the Investment Period, excess cash or interest from the portfolio will be reinvested by the Company with the objective of growing the NAV.

Following the Investment Period, excess cash, interest and proceeds from the realization of portfolio investments after satisfaction of all expenses, debts, liabilities and obligations of the Company will be distributed by the Company to the Shareholders as a dividend on the Quarterly Dividend Date in accordance with the Distribution Priority as set forth in “*Summary-Dividend Policy*”.

To the extent the Company does not have available funds on hand to meet the Target Dividend with respect to any Quarterly Payment Date, the Board of Directors may suspend dividends if, in consultation with the Portfolio Manager, it determines that a sale of assets to produce proceeds to meet the Target Dividend would not be in the best interests of the Company and/or would not produce a sale price reflective of the value of the assets.

The Board may deduct from any dividend payable to any Shareholder on or in respect of a Share all sums of money (if any) presently payable by him to the Company on account of calls with respect to existing Shares, or calls of commitments to purchase Shares pursuant to the subscription and transfer agreement or otherwise.

The actual dividend generated by the Company in pursuing its investment objective will, however, depend on a wide range of factors including, but not limited to, general economic and market conditions, fluctuations in currency exchange rates, prevailing interest rates and credit spreads, the terms of the investments made by the Company and the risks highlighted in the “*Risk Factors*” section of this Offering Memorandum. Dividend payments may be suspended by Board of Directors in its absolute discretion, including, without limitation, in the event of adverse, or perceived adverse, market conditions.

The Target Total Return and the Target Dividend should not be taken as an indication of the Company’s expected future performance or results. The Target Total Return and the Target Dividend are targets only and there is no guarantee that they can or will be achieved and should not be seen as an indication of the Company’s expected or actual return. Target returns are hypothetical and are neither guarantees nor predictions or projections of future performance. Actual events and conditions may differ materially from the assumptions used to establish the Target Total Return and Target Dividend. Accordingly, investors should not place any reliance on the Target Total Return or the Target Dividend in deciding whether to invest in Shares.

Furthermore, the future performance of the Company may be materially adversely affected by the risks discussed in the section of this Offering Memorandum entitled “*Risk Factors*”.

FURTHER ISSUES OF SHARES

The Directors will have authority to allot further Shares in the share capital of the Company following the Placing subject to the subscription and transfer agreement. Further issues of Shares beyond the issuances contemplated in the subscription and transfer agreement would only be made subject to consent of the Advisory Board, as described in “*Summary—Advisory Board*” if the Directors determine such issues to be necessary to protect the Company, consistent with the Board’s duties to the Company, and in the best interests of Shareholders and the Company as a whole. Relevant factors in making such determination include net asset performance, share price rating and perceived investor demand. In the case of further issues of Shares (or sales of Shares from treasury), except as permitted by the Shareholders, such Shares will only be issued at prices which are not less than the then prevailing Net Asset Value per Share (as estimated by the Directors).

There are no provisions of Guernsey law which confer rights of pre-emption in respect of the allotment of Shares. The Articles, however, contain pre-emption rights in relation to allotments of Shares for cash.

VALUATION

Net Asset Value

As of September 30, 2017, the unaudited net asset value per share of the Net Asset Value was US \$157,081,118.91. A special dividend in the aggregate amount of US \$9,000,000 was paid on October 10, 2017, and a buyback of Shares from Acis Capital Management, L.P. was made on October 24, 2017, for an aggregate purchase price of \$991,180.13.

Publication of Net Asset Value

The Company intends to publish the Net Asset Value per Share as calculated in accordance with the process described below, on a quarterly basis (within 15 Business Days following the relevant month-end). Notice will be provided either by a website to be created or investors may elect to be contacted by the Administrator by e-mail. The Net Asset Value will be calculated by the Administrator on the basis of the valuation policy established by the Directors from time to time. The Company's initial valuation policy is described below.

Valuation of the portfolio

It is intended that, in accordance with its investment objective and policy set out above, the Company will invest in: (a) senior secured loans and other debt securities on both a direct basis (for the primary purpose of enabling Highland CLO Management to qualify as an "originator" for purposes of the EU Retention Requirements) and indirect basis, including through the use of leverage via repurchase facilities and Warehouse Loan Facilities, and for the purpose of enabling Highland CLO Management to qualify as an "originator" for purposes of the EU Retention Requirements; (b) CLO Notes, and any other assets held by management subsidiaries; and (c) interests in the Management Companies, and will value such instruments in accordance with the valuation policy established by the Portfolio Manager from time to time.

The Company (meaning for the purposes of the valuation of assets described herein, the Company itself, the Portfolio Manager or the Administrator under the ultimate supervision of the Board) will generally compute the value of the instruments and other assets of the Company as of the close of business on the last day of each fiscal period and on any other date selected by the Board in its sole discretion. In addition, the Company must compute the value of the instruments that are being distributed in-kind as of their date of distribution in accordance with the Company's Memorandum and Articles of Association. In determining the value of the assets of the Company, no value is placed on the goodwill or name of the Company, or the office records, files, statistical data or any similar intangible assets of the Company not normally reflected in the Company's accounting records, but there must be taken into consideration any related items of income earned but not received, expenses incurred but not yet paid, liabilities fixed or contingent, prepaid expenses to the extent not otherwise reflected in the books of account, and the value of options or commitments to purchase or sell instruments pursuant to agreements entered into on or prior to such valuation date.

A copy of the Company's valuation policy is available upon request.

The value of each instrument and other asset of the Company and the net worth of the Company as a whole determined pursuant the Company's Memorandum and Articles of Association are conclusive and binding on all of the members of the Company and all persons claiming through or under them.

Suspension of the calculation of Net Asset Value

The Directors may at any time, but are not obliged to, temporarily suspend the calculation of the NAV and NAV per Share during any period if it determines that such a suspension is warranted by extraordinary circumstances, including: (i) during any period when any market on which the Company's investments are quoted, traded or dealt in is closed, other than for ordinary holidays and weekends, or during periods in which dealings are restricted or suspended; (ii) during the existence of any state of affairs, including as a result of political, economic, military or monetary events or any circumstances outside the control, as a result of which, in the reasonable opinion of the Portfolio Manager, the determination of the value of the assets of the Company, would not be reasonably practicable or would be seriously prejudicial to the shareholders; (iii) during any breakdown in the means of communication normally employed in determining the price or value of the Company's assets or liabilities, or of current prices in any market as aforesaid, or when for any other reason the prices or values of any assets or liabilities of the Company cannot reasonably be

accurately ascertained within a reasonable time frame; (iv) during any period when the transfer of funds involved in the realization or acquisition of any investments cannot, in the reasonable opinion of the Portfolio Manager, be effected at normal rates of exchange; or (v) automatically upon liquidation of the Company.

Shareholders will be informed by e-mail from the Administrator in the event that the calculation of the NAV per Share is suspended as described above.

REPORTS AND ACCOUNTS

The accounting period of the Company ends on 31 December, in each year, and the audited annual accounts will be provided to Shareholders within four months of the year end to which they relate. The Company shall report its results of operations and financial position in U.S. Dollars. The Company's first accounts were prepared for the period ending 31 December 2015.

The audited annual accounts will also be available at the registered office of the Administrator and the Company.

The financial statements of the Company will be prepared in accordance with GAAP, and the annual accounts will be audited. The Company's financial statements, which will be the responsibility of its Board, will consist of a statement of comprehensive income, statement of financial position, statement of cash flows, statement of changes in equity, related notes and any additional information that the Board deems appropriate or that is required by applicable law.

It is expected that the CLOs and any Warehouse Loan Facilities established will not be consolidated in the Company's GAAP financial statements, although such assessment will depend on the facts and circumstances.

Any disclosures required to be made to Shareholders pursuant to the AIFMD will be contained either in the Company's periodic reports or communicated to Shareholders in written form.

THE CURRENT CLO PORTFOLIO

The Company is currently invested in CLO Income Notes in the following Managed CLOs in the following amounts (the “**Current CLO Portfolio**”):

CLOs:	Aggregate Outstanding Amount (U.S.\$)
ACIS CLO 2013-1 Ltd.	\$18,558,000.00
ACIS CLO 2014-3 Ltd.	\$39,750,000.00
ACIS CLO 2014-4 Ltd.	\$50,750,000.00
ACIS CLO 2014-5 Ltd.	\$53,000,000.00
ACIS CLO 2015-6, Ltd.	\$51,850,000.00
Acis CLO 2017-7, Ltd.	\$17,850,000.00
Rockwall CDO, Ltd.	\$14,000,000.00
Brentwood CLO, Ltd.	\$12,000,000.00
Grayson CLO, Ltd.	\$5,900,000.00
Liberty CLO, Ltd.	\$17,000,000.00
HP CDO, Ltd.	\$1,621,542.70
Greenbriar CLO, Ltd.	\$18,000,000.00
Gleneagles CLO, Ltd.	\$1,250,000.00

Valuation of the Current Portfolio

Information regarding the Current Portfolio and its valuation as of 30 September 2017 has been made available to all Placees free of charge.

Information on the historic performance of the Company is available upon request from the Portfolio Manager. Such information will be updated periodically in accordance with the AIFMD Rules.

MARKET OPPORTUNITY

INVESTMENT OPPORTUNITY

The Company intends to invest in CLO Notes of CLOs which are compliant with the U.S. Risk Retention Rules and which may be compliant with the EU Retention Requirements (as defined above) and in senior secured loans (for the primary purpose of enabling Highland CLO Management to qualify as an “originator” for purposes of the EU Retention Requirements). In pursuance of this intention, the Company will invest in each of the Management Companies which will, pursuant to the EU Retention Requirements, need to, amongst other things: (a) on the closing date of a CLO it establishes, commit to purchase “material net economic interest” equal to at least five per cent of the maximum portfolio principal amount of the assets in the CLO and (b) undertake that, for so long as any securities of the CLO remain outstanding (including any CLO Retention Notes), it will retain its interest in the CLO and will not (except to the extent permitted by the EU Retention Requirements) sell, hedge or otherwise mitigate its credit risk under or associated with such CLO. This five per cent material net economic interest in the CLO can, amongst other methods, be retained through the holding of a vertical strip of all issued tranches (AAA-rated notes to equity) or a retention holding in the first loss tranche or a combination thereof. The EU Retention Requirements prohibit many significant European investors from investing in any securitisation which does not comply with them.

In addition, with the intention of achieving classification as an “originator” (as defined in the CRR) and complying with the CRR Retention Requirements with respect to Highland CLOs, Highland CLO Management will be required to meet the Origination Requirements.

Highland CLO Management may seek to adopt the “originator” model to address the EU Retention Requirements for its CLOs and intends to be treated as a “majority-owned affiliated” of Highland in order to comply with the U.S. Risk Retention Rules.

In addition to its current holdings, the Company may buy floating rate senior secured loans from the primary and secondary market before selling the assets to one or more CLOs which it establishes and for which Highland CLO Management will act as a retention provider, thereby offering investors wholesale access to senior secured loans acquired by the Company and retained CLO Income Notes.

The Portfolio Manager will be responsible for selecting and monitoring the performance of the investments. The Company’s purchase and sale decisions (with certain exceptions) will be taken by Highland HCF Advisors as Portfolio Manager pursuant to the Portfolio Management Agreement. Further details on the investment process are set out in the section of this Offering Memorandum entitled “*Investment Process*”.

INVESTMENT PROCESS

Highland HCF Advisor as Portfolio Manager and CLO Manager

The Company has entered into a Portfolio Management Agreement with Highland HCF Advisor as the Portfolio Manager. Pursuant to the Portfolio Management Agreement, Highland HCF Advisor will, at its discretion, select the portfolio of investments and instruct the Custodian with respect to any acquisition, disposition or sale of investments and provide certain support services to the Company. The performance of the Company's portfolio will depend heavily on the skills of Highland HCF Advisor in analyzing, selecting and managing the investments. The Portfolio Manager has entered into Services Agreements with Highland Capital Management, L.P. under which the Portfolio Manager has agreed to make its investment research and recommendations and back-office support services available to Highland HCF Advisor. Further details are set out in the section of this offering memorandum entitled "Investment Process" and "Additional Information on the Company".

Based in Dallas, Texas, Highland is an SEC Registered Investment Adviser founded in 1993 that specializes in senior secured bank loans, high yield bonds, structured products and equities. Highland issued its first CLO in 1996, and Highland and its affiliates have since issued and managed over U.S. \$28 billion of CLOs and CDOs consisting of 40 separate vehicles. As of August 31, 2017, Highland and its affiliates, managed or serviced approximately U.S. \$13.4 billion in senior secured bank loans, high yield bonds, structured products and other assets for banks, insurance companies, pension plans, foundations and high net worth individuals.

The Portfolio Manager, Highland, Acis and/or the Management Companies, may act as CLO Manager(s) in relation to the Managed CLOs pursuant to CLO Management Agreements. The Portfolio Manager, Highland, Acis and/or the applicable Management Company as CLO Manager is responsible for purchasing and selling of collateral obligations and performing certain other advisory and administrative tasks for and on behalf of the Managed CLOs in each case subject to the provisions of the applicable CLO Management Agreement and any applicable provisions of the indenture.

Highland HCF Advisor is a relying adviser of Highland. Highland is an SEC Registered Investment Adviser and currently manages CLOs and other managed accounts and investment funds. Highland CLO Management is a relying adviser of Highland and will manage Highland CLOs. Highland CLO Management has the HCLOM Services Agreements in place with Highland, pursuant to which Highland provides credit research and operational support to Highland CLO Management, including services in connection with determining the composition, nature and timing of changes to the Highland CLO Management portfolio, the due diligence of actual or potential investments, the execution of investment transactions approved by Highland CLO Management, and certain loan services and administrative services.

Acis is an SEC Registered Investment Adviser and currently manages CLOs and other managed accounts and investment funds. Acis CLO Management is a relying adviser of Acis and currently manages ACIS CLO 2017-7. Acis is an affiliate of Highland and is 100% owned by Highland senior management, and was established by James Dondero and Mark Okada to focus on managing traditional CLOs that invest in liquid, broadly syndicated bank loans and secondary CLO investments. Acis has the ACM Services Agreements in place with Highland, pursuant to which Highland provides investment research and recommendations and operational support to Acis, including services in connection with the Portfolio Manager's recommendations with respect to the composition, nature and timing of changes to the Company's portfolio, the due diligence of actual or potential investments, the execution of investment transactions, and certain loan services and administrative services. Acis CLO Management has the ACLOM Services Agreements in place with Acis, pursuant to which Acis provides credit research and operational support to Acis CLO Management, including services in connection with determining the composition, nature and timing of changes to the ACIS CLO Management portfolio, the due diligence of actual or potential investments, the execution of investment transactions approved by ACIS CLO Management, and certain loan services and administrative services. All final credit decisions are made by the Highland individuals referenced below.

Investment Philosophy

Highland's investment philosophy centers on being investors first. The firm has 25 years of experience investing in alternative strategies through multiple cycles. Highland is a recognized pioneer in bank loan asset management and

CLO issuance. The firm invests a meaningful amount of capital in the portfolios they manage, with market value in excess of \$250 million invested alongside our clients, as of September 30, 2017.

Highland's investment philosophy is rooted in a value-driven approach that combines rigorous bottom-up credit underwriting with top-down risk analysis to optimize risk-adjusted performance of portfolios. The firm integrates risk management throughout its investment process and maintains a culture of a high level of compliance. Highland focuses on attractive risk/return arbitrage opportunities where the firm can add value. Highland seeks to generate alpha by implementing checks and balances that allow the firm to identify risks, mitigate volatility, and quickly ascertain and sell losers.

While participating in the larger, liquid bank loan asset class, Highland continues to capture market inefficiencies in this over the counter (OTC) market through mispricings that it identifies via robust fundamental analysis, proactive diligence and monitoring, and nimble trading capabilities. Given the scale of the firm's investment resources, Highland is able to follow and manage investment portfolio names more closely. Highland credit research analysts manage 20-30 credits per analyst versus most peers, who manage 40-50 credits per analyst. In addition, the firm's dedicated trading desk and active dialogue with the Street enable Highland to identify technical dislocations and opportunities. The firm's high conviction investment philosophy and active portfolio management style versus peers have been key drivers of creating alpha for clients over time.

Investment Monitoring and Risk Management

Risk management is integrated into all levels of the investment process, from research, to portfolio construction and management, to ongoing monitoring. Highland conducts extensive position and portfolio monitoring activities on a daily basis. Portfolio risk is reviewed using internally generated daily, weekly, and monthly reports which measure transaction compliance including investor-mandated metrics such as portfolio concentrations or required test scores, as well as compliance with evolving internal positioning targets. Individual position risk is monitored in a number of ways, including Highland's extensive proprietary intranet system (Highland Online Management Engine or "HOME"), which pulls together data from their various data providers (Wall Street Office, LPC, Moody's, S&P, MarkIt, S&P LCD, CSFB Index) to provide a comprehensive portfolio/risk management system. The system allows the CLO team to monitor metrics at any level of aggregation (instrument, issuer, portfolio, fund and across the platform). Additionally, the system is designed to be scalable and with flexibility to enable future data inputs and reporting requirements.

For both Managed CLOs and for the underlying loans, the HOME intranet system allows Highland to monitor portfolios on a real-time, ongoing basis by receiving alerts showing positions with the largest daily/weekly/monthly mark change, as well as alerts on downgrades/upgrades, and when their credit analyst has changed his opinion on a broadly syndicated loan.

Allocation Policy

Highland and its affiliates may, from time to time, be presented with investment opportunities that fall within the investment objectives of the Company and the Managed CLOs and other clients, funds or other investment accounts managed by Highland or its affiliates, and in such circumstances, subject to the Company's priority allocation with respect to CLO Income Notes of new issue Highland CLOs Highland and its affiliates expect to allocate such opportunities among the Company, the Managed CLOs and such other clients, funds or other investment accounts on a basis that Highland and its affiliates determine in good faith is appropriate taking into consideration such factors as the fiduciary duties owed to the Company, the Managed CLOs and such other clients, funds or other investment accounts, the primary mandates of the Company, the Managed CLOs and such other clients, funds or other investment accounts, the capital available to the Company, the Managed CLOs and such other clients, funds or other investment accounts, any restrictions on investment, the sourcing of the transaction, the size of the transaction, the amount of potential follow-on investing that may be required for such investment and the other collateral obligations of the Company, the Managed CLOs and such other clients, funds or other investment accounts, the relation of such opportunity to the investment strategy of the Company, the Managed CLOs and such other clients, funds or other investment accounts, reasons of portfolio balance and any other consideration deemed relevant by Highland and its affiliates in good faith. Subject to the Company's priority allocation with respect to CLO Income Notes of new issue Highland CLOs, Highland will allocate investment opportunities across the entities for which such opportunities are

appropriate, consistent with (1) its internal conflict of interest and allocation policies and (2) the requirements of the Investment Advisers Act. Highland will seek to allocate investment opportunities among such entities in a manner that is fair and equitable over time and consistent with its allocation policy. However, there is no assurance that such investment opportunities will be allocated to the Company and the Managed CLOs fairly or equitably in the short term or over time and there can be no assurance that the Company and the Managed CLOs will be able to participate in all such investment opportunities that are suitable for it.

Biographies of the Highland Key Personnel

The Portfolio Manager will use the services of the key personnel set forth below, although it may not necessarily continue to use their services during the entire term of the Portfolio Management Agreement. Of these, Trey Parker and Hunter Covitz (and such other personnel as may be determined from time to time) will be made available by the Portfolio Manager to the Company pursuant to the Portfolio Management Agreement.

Although the persons described above are currently employed by Highland and are engaged in the activities of the Portfolio Manager, such persons may not necessarily continue to be employed by the Portfolio Manager during the entire term of the Portfolio Management Agreement and, if so employed, may not remain engaged in the activities of the Portfolio Manager.

James Dondero, CFA, CMA

Co-Founder, President

Mr. Dondero is President of Highland CLO Management and Acis CLO Management, LLC and Co-Founder and President of Highland Capital Management, L.P. (an alternative asset manager specializing in high-yield fixed income investments) and Acis Capital Management, L.P. Mr. Dondero has over 30 years of experience in the credit and equity markets, focused largely on high-yield and distressed investing. Under Mr. Dondero's leadership, Highland and Acis have been a pioneer in both developing the collateralized loan obligation (CLO) market and advancing credit-oriented solutions for institutional and retail investors worldwide, including product offerings such as institutional separate accounts, CLOs, hedge funds, private equity funds, mutual funds, REITs, and ETFs. Mr. Dondero is the Chairman and President of NexPoint Residential Trust, Inc. (NYSE:NXRT), is Chairman of NexBank Capital, Inc., Cornerstone Healthcare Group Holding, Inc., and CCS Medical, Inc., and a board member of Jernigan Capital, Inc. (NYSE:JCAP), and MGM Holdings, Inc. He also serves on the Southern Methodist University Cox School of Business Executive Board. A dedicated philanthropist, Mr. Dondero actively supports initiatives in education, veterans affairs, and public policy. Prior to founding Highland in 1993, Mr. Dondero was involved in creating the GIC subsidiary of Protective Life, where as Chief Investment Officer he helped take the company from inception to over \$2 billion between 1989 and 1993. Between 1985 and 1989, Mr. Dondero was a corporate bond analyst and then portfolio manager at American Express. Mr. Dondero began his career in 1984 as an analyst in the JP Morgan training program. Mr. Dondero graduated from the University of Virginia where he earned highest honors (Beta Gamma Sigma, Beta Alpha Psi) from the McIntire School of Commerce with dual majors in accounting and finance. He has received certification as Certified Public Accountant (CPA) and Certified Managerial Accountant (CMA) and has earned the right to use the Chartered Financial Analyst (CFA) designation.

Mark Okada, CFA

Co-Founder, Co-Chief Investment Officer

Mr. Okada is Co-Founder of Highland CLO Management and Acis CLO Management, LLC and Co-Founder and Co-Chief Investment Officer of Highland Capital Management, L.P. and Acis Capital Management, L.P. Responsible for overseeing investment activities for various strategies within Highland and Acis, Mr. Okada is a pioneer in the development of the bank loan market and has over 30 years of credit experience. He is responsible for structuring one of the industry's first arbitrage CLOs and was actively involved in the development of Highland's bank loan separate account and mutual fund platforms. Mr. Okada received a BA in Economics and a BA in Psychology, cum laude, from the University of California, Los Angeles. He has earned the right to use the Chartered Financial Analyst designation. Mr. Okada is a Director of NexBank, Chairman of the Board of Directors of Common Grace Ministries, Inc., is on the Board of Directors for Education is Freedom, and also serves on the GrowSouth Fund advisory board.

Trey Parker

Partner, Portfolio Manager and Co-Chief Investment Officer

Mr. Parker is Partner, Portfolio Manager and Co-Chief Investment Officer at Highland Capital Management, L.P., and serves on the Investment Manager's Investment Committee. Prior to his current role, Mr. Parker was Head of Credit and covered a number of the industrial verticals, as well as parts of tech, media and telecom for the Investment Manager and worked on the Distressed & Special Situations investment team at Highland. Prior to joining Highland in March 2007, Mr. Parker was a Senior Associate at Hunt Special Situations Group, L.P., a Private Equity group focused on distressed and special situation investing. Mr. Parker was responsible for sourcing, executing and monitoring control Private Equity investments across a variety of industries. Prior to joining Hunt, Mr. Parker was an analyst at BMO Merchant Banking, a Private Equity group affiliated with the Bank of Montreal. While at BMO, Mr. Parker completed a number of LBO and mezzanine investment transactions. Prior to joining BMO, Mr. Parker worked in sales and trading for First Union Securities and Morgan Stanley. Mr. Parker received an MBA with concentrations in Finance, Strategy and Entrepreneurship from the University of Chicago Booth School of Business and a BA in Economics and Business from the Virginia Military Institute. Mr. Parker serves on the Board of Directors of Omnimax Holdings, Inc., TerreStar Corporation, JHT Holdings, Inc., and a non-profit organization, the Juvenile Diabetes Research Foundation (Dallas chapter).

Hunter Covitz, CPA

Managing Director, Structured Products

Mr. Covitz is a Managing Director and Portfolio Manager at Highland Capital Management, L.P. He is responsible for all CLOs, separate accounts, and hedge funds managed by Acis Capital Management, L.P., as well as all CLOs managed by Highland. Mr. Covitz serves on Highland's investment committee and leads the structured products investment team. Since joining Highland in 2003, Mr. Covitz has been instrumental in the structuring, warehousing, ramping, and ongoing portfolio management of over 30 Highland and Acis-originated CLOs. Prior to joining Highland, Mr. Covitz served as a tax consultant at Deloitte & Touche and KBA Group LLP, where he focused on high-net worth individuals and middle-market companies. He received both his MS and BBA in Accounting from the University of Oklahoma. Mr. Covitz is a licensed Certified Public Accountant.

Neil Desai

Portfolio Manager, Structured Products

Mr. Desai is a Portfolio Manager of Structured Products at Highland Capital Management, L.P. He is focused on sourcing and trading structured products for Highland's CLOs, hedge funds, mutual funds and separate accounts in the primary and secondary markets. Prior to joining Highland in August 2015, Mr. Desai was a Director in Pfizer Inc.'s Treasury organization where he built and ran Pfizer's structured products business. Prior to Pfizer, Mr. Desai spent several years structuring and trading various structured products at Barclays Capital and its spin-off hedge fund, C12 capital. Mr. Desai received both a Bachelor's and Master's degree in Computer Science & Electrical Engineering from MIT.

COMPANY DIRECTORS AND ADMINISTRATION

DIRECTORS

The Directors are responsible for managing the business affairs of the Company in accordance with the Articles and have overall responsibility for the Company's activities including the appointment of the service providers. The Directors may delegate certain functions to other parties such as the Administrator. The Directors have appointed Highland HCF Advisor as Portfolio Manager and delegated the investment management and risk management of the Company's investments to the Portfolio Manager pursuant to the Portfolio Management Agreement.

The Board comprises two Directors, both of whom are independent of Highland and Acis.

The address of the Directors, all of whom are non-executive, is the registered office of the Company. The Directors of the Company are as follows:

William Scott (Chairman)

William Scott, a Guernsey resident, acts as an independent non-executive Director of the Company. Mr. Scott also currently serves as independent non-executive director of a number of investment companies and funds. From 2003 to 2004, Mr. Scott worked as Senior Vice President with FRM Investment Management Limited. Previously, Mr. Scott was a director at Rea Brothers (which became part of the Close Brothers group in 1999 and where he was a director of Close Bank Guernsey Limited) (1989-2002) and Assistant Investment Manager with the London Residuary Body Superannuation Scheme (1987-1989). Mr. Scott graduated from the University of Edinburgh in 1982 and is a Chartered Accountant having qualified with Arthur Young (now E&Y) in 1987. Mr. Scott also holds the Securities Institute Diploma and is a Chartered Fellow of the Chartered Institute for Securities & Investment. He is also a Chartered Wealth Manager.

Heather Bestwick

Heather Bestwick, a Jersey resident, acts as an independent non-executive Director of the Company. She qualified as an English solicitor with Norton Rose, and worked in their London and Athens offices for eight years. In 1999 she joined Walkers in the Cayman Islands, qualifying as a Cayman Islands attorney and Notary Public, and became a partner in 2003. Her practice encompassed hedge funds, private equity, structured finance, secured lending and yacht registration and finance. Ms. Bestwick moved to Jersey in 2007 to become Managing Partner of the Walkers Jersey office. She joined Jersey Finance in 2010 as Technical Director and Deputy Chief Executive, leading the development of finance industry legislation on behalf of industry and liaising with the regulator and government. Ms. Bestwick is a member of the Channel Islands committee of the Association of Investment Companies.

Management functions of the Board of Directors

As there are no employees of the Company, the Board performs certain management functions, which include the overseeing of the Company's investment policy and investment strategy and the supervision of any delegated responsibilities to third-party service providers, and has the ultimate responsibility for the management and operations of the Company.

The Company has appointed Highland HCF Advisor as Portfolio Manager and delegated the investment management and risk management of the Company's investments to the Portfolio Manager pursuant to the Portfolio Management Agreement.

CORPORATE GOVERNANCE

The Directors are committed to maintaining high standards of corporate governance. Insofar as the Directors believe it to be appropriate and relevant to the Company, it is their intention that the Company should comply with best practice standards for the business carried on by the Company.

On 1 January 2012, the GFSC's Finance Sector Code of Corporate Governance (the "GFSC Code") came into effect. The GFSC has stated in the GFSC Code that companies which report against the UK Corporate Governance Code are

deemed to meet the requirements of the GFSC Code, and need take no further action. Other than as set out below, the Company currently complies with, and will comply with, the GFSC Code.

The Company does not have a senior independent director because all of its Directors are non-executive and the Company has a Chairman. There are no other instances of non-compliance with the UK Corporate Governance Code by the Company as at the date of this Offering Memorandum.

Audit Committee

The Company has established an Audit Committee, which comprises all the Directors. The Company's Audit Committee meets formally at least twice a year for the purpose, amongst other things, of considering the appointment, independence and remuneration of the Auditor and to review the Company's annual financial reports. Where audit-related and/or non-audit services are to be provided by the Auditors, full consideration of the financial and other implications on the independence of the Auditors arising from any such engagement will be considered before proceeding. Heather Bestwick acts as chairman of the Audit Committee. The responsibilities of the Audit Committee includes monitoring the integrity of the Company's results and financial statements, reviewing reports received from the Administrator on the adequacy and the effectiveness of the Company's internal controls and risk management systems, considering annually whether there is a need for an effectiveness of the Company's internal audit function and assessing the ongoing suitability of the Auditors and ensuring their co-ordination with any internal audit function.

The chairmanship of the Audit Committee and each Director's performance is reviewed annually by the Chairman and the performance of the Chairman is assessed by the other Directors.

Advisory Board

The Company has established an Advisory Board, which composed of individuals who shall be representatives of certain Shareholders. See "*Summary—Advisory Board*".

PORTFOLIO MANAGER

Highland HCF Advisor will act as Portfolio Manager to the Company (pursuant to the Portfolio Management Agreement) and may act (either itself or through an affiliate) as the CLO Manager to Managed CLOs.

Pursuant to the Portfolio Management Agreement, the Portfolio Manager will select the portfolio of investments and instruct the Custodian with respect to any acquisition, disposition or sale of investments and be responsible for the business decisions and carry on the day-to-day management of the Company's business and implementation of its investment objective and policy.

Highland Fees

Highland HCF Advisor will receive, in consideration for its services pursuant to the Portfolio Management Agreement, an amount equivalent to all Operating Expenses incurred by the Portfolio Manager in the performance of its obligations thereunder as described below, together with any irrecoverable VAT arising on such costs and expenses. Except as provided below, the Portfolio Manager will pay all of its own operating, overhead and administrative expenses, including all costs and expenses on account on employee compensation, employee benefits and rent ("**Overhead**") without reimbursement by the Company.

The Company shall pay or reimburse the Portfolio Manager and its affiliates for only for reasonable third party costs and expenses related to the services hereunder, including, but not limited to investment-related expenses, brokerage commissions and other transaction costs, expenses related to clearing and settlement charges, actual out-of-pocket professional fees relating to, trustee, administration, tax, accounting, legal, auditing or valuation services, any governmental, regulatory, licensing, filing or registration fees incurred in connection with the Company's compliance with the rules of any self-regulatory organization or any federal, state or local laws, research-related expenses (including, without limitation, news and quotation equipment and services, investment and trading-related software, including, without limitation, trade order management software (i.e., software used to route trade orders)), accounting (including accounting software), tax preparation expenses, costs and expenses associated with reporting and providing information to the Company, any taxes imposed upon the Company (including, but not limited to, any

irrecoverable VAT arising on such costs and expenses), fees relating to valuing the financial instruments, extraordinary expenses and the Company's indemnification obligations (including those incurred in connection with indemnifying indemnified persons, including advancing such amounts) (collectively, the "**Operating Expenses**"). In the event any fees or expenses are for services used by, or attributable to, other persons advised by Highland HCF Advisor or its affiliates, including, but not limited to, any fees or expenses for software or subscription-based services, the Company shall only reimburse the Portfolio Manager for its pro rata share of such expenses, as determined by the Portfolio Manager in good faith.

For the avoidance of doubt, (i) the cost of all third party expenses incurred by the Portfolio Manager in connection with the Portfolio Management Agreement shall not exceed standard market rates (which may include standard soft dollar arrangements) and (ii) to the extent any of the foregoing expenses were incurred on behalf of, or benefit of a number of Portfolio Manager's advised accounts, such expenses shall be allocated pro rata among such accounts.

To the extent that expenses to be borne by the Company are paid by the Portfolio Manager or by any services provider, the Company shall reimburse the Portfolio Manager (or the relevant services provider, as applicable) for such expenses so long as such expenses are determined on an arm's length basis.

The Portfolio Manager will also receive distributions pursuant to the Distribution Priority following the Investment Period, after satisfaction of all expenses, debts, liabilities and obligations of the Company and the Shareholders have receive a cumulative rate of return of 8.0% per annum, compounded annually. See "*Summary—Dividend Policy*".

Further details regarding the Portfolio Manager and Highland are set out in the section of this Offering Memorandum entitled "*Investment Process*". Further details regarding the Portfolio Management Agreement are set out in the section of this Offering Memorandum entitled "*Additional Information on the Company*".

CLO MANAGER

In addition, the Portfolio Manager, Highland, Acis and/or the Management Companies (or one of their affiliates), as CLO Manager, may also manage Managed CLOs pursuant to management agreements ("**CLO Management Agreements**") to be entered into from time to time. The applicable CLO Manager will receive customary fees, in consideration for its services as the CLO Manager, from each of the Managed CLOs it manages.

ADMINISTRATOR

State Street (Guernsey) Limited has been appointed as Administrator of the Company pursuant to the Administration Agreement (further details of which are set out in the section of this Offering Memorandum entitled "*Material Contracts*" in "*Additional Information on the Company*"). In such capacity, the Administrator is responsible for the day-to-day administration of the Company (including but not limited to the calculation and publication of the estimated quarterly NAV) and general secretarial functions required by the Companies Law (including but not limited to the maintenance of the Company's accounting and statutory records). Prospective investors should note that it is not possible for the Administrator to provide any investment advice to investors.

The Administrator is a private limited company, created under the laws of Guernsey on 17 March 2000 whose registered office is situated at First Floor, Dorey Court, Admiral Park, St Peter Port, Guernsey GY1 6HJ, Channel Islands. The Administrator is licensed under the POI Law, with the GFSC to carry out controlled investment business. The Administrator's principal business activity is providing securities services.

CUSTODIAN

State Street Custodial Services (Ireland) Limited has been appointed as Custodian of the Company pursuant to the Custody Agreement (further details of which are set out in the section of this Offering Memorandum entitled "*Material Contracts*" in "*Additional Information on the Company*"). In acting as custodian of the Company's investments, the Custodian shall provide for the safekeeping of certificates of deposit, shares, notes and in general any instrument evidencing the ownership of securities and may take custody of cash and other assets. Assets will be held in a custody account and registered in the name of the Company or the Custodian, its delegate or a nominee.

The Custodian, which is authorised as an Investment Business Firm under Section 10 of the Irish Investment Intermediaries Act, 1995 (as amended), will provide custody and banking services.

FEES AND EXPENSES

The expenses of the Company related to the Placing are described in “*Summary—Expenses related to the Placing*”.

The Company’s ongoing expenses are described in “*Summary—Ongoing annual expenses*”.

For more information on expenses charged during the most recent financial year, prospective investors should review the Company’s annual audited financial statements (if any) for the prior financial year.

MEETINGS AND REPORTS TO SHAREHOLDERS

All general meetings of the Company shall be held in Guernsey.

The Company’s audited annual report and accounts will be prepared to 31 December, each year, and it is expected that copies will be sent to Shareholders at the end of April each year. Shareholders will also receive an unaudited interim report each year covering the six months from 1 January to 30 June, expected to be despatched at the end of August each year.

The Company’s accounts are drawn up in U.S. Dollars and in compliance with GAAP.

The following information will be disclosed to investors at the same time as the annual financial statements and may be provided at other times by way of a report and/or letter sent to investors by the Portfolio Manager or the Administrator:

- (a) the percentage of the assets of the Company that are subject to special arrangements arising from their illiquid nature;
- (b) any new arrangements for managing the liquidity of the Company;
- (c) the current risk profile of the Company and the risk management systems employed by the Portfolio Manager to manage those risks; and
- (d) the total amount of leverage employed by the Company.

Any changes to the following information will be provided by the Portfolio Manager or the Administrator to investors without undue delay and may be provided by email:

- (a) the maximum level of leverage which the Portfolio Manager may employ on behalf of the Company;
- (b) the right of re-use of collateral or any changes to any guarantee granted under any leveraging arrangement; and
- (c) activation of liquidity management tools.

PLACING ARRANGEMENTS

THE PLACING

The target number of Placing Shares to be issued pursuant to the Placing is an amount of Shares equal to U.S. \$153 million. As at the date of this Offering Memorandum, the actual number of Placing Shares to be issued under the Placing is not known.

The results of the Placing will be released by the Company, including details of the number of Placing Shares allotted (or such other date as may be notified by the Company). The Directors are under no obligation to issue share certificates unless requested to do so by a Shareholder. No temporary documents of title will be issued.

The Company is seeking aggregate subscriptions to purchase Placing Shares in an aggregate amount of US \$153 million.

Placees will commit under the subscription and transfer agreement to purchase Shares to be settled from time to time during the Investment Period. The Portfolio Manager may call such Shares for settlement from time to time on a pro rata basis upon 10 Business Days' notice to the Placees in such amounts as may be specified by the Portfolio Manager.

Upon the expiration of the Investment Period, all Placees will be released from any further obligation with respect to purchase Shares under their subscriptions, except to the extent necessary to:

- (i) complete, no later than 180 days after the expiration of the Investment Period, the purchase of Shares pursuant to written commitments, letters of intent or similar contractual commitments that were in process as of the end of the Investment Period; and
- (ii) fund any indebtedness of the Company permitted hereunder incurred prior to the end of the Investment Period (including to repay outstanding indebtedness under any Warehouse Loan Facilities).

Shares will be issued at a price per Share based on the most recent quarterly determined NAV of the Company.

The maximum number of Shares to be issued by the Company is an amount of Shares equal to U.S. \$153 million and there is no minimum number of Shares. Fractions of Placing Shares will be issued.

On the Closing Date, Placees will acquire Shares of existing Shareholders at a price per Share based on the Adjusted NAV such that Placees and existing Shareholders will hold currently existing Shares on a *pro rata* basis and existing Shareholders will commit, as Placees under a subscription and transfer agreement, to purchase Shares such that new and existing Shareholders will hold both existing Shares and commitments on pro rata basis.

The Board may deduct from any dividend payable to any Shareholder on or in respect of a Share all sums of money (if any) presently payable by him to the Company on account of calls with respect to existing Shares, or calls of commitments to purchase Shares pursuant to the subscription and transfer agreement or otherwise.

A Shareholder that defaults in respect of its obligation to purchase Shares pursuant to the terms of the subscription and transfer agreement will be subject to customary default provisions.

The Board may retain any dividend or other monies payable on or in respect of a Share on which the Company has a lien and may apply the same in or towards satisfaction of the liabilities or obligations in respect of which the lien exists.

Highland Principal Commitment

Certain principals of Highland will subscribe, directly or indirectly, for \$3,000,000 of Shares in the aggregate.

TIME AND DATE OF THE OPENING AND CLOSING OF THE OFFER

This subscription is open for a fixed offer period only. This period runs from November 15, 2017, the offer opening date, until 17:00 in Guernsey on the Closing Date. Only fully completed applications received by this date with cleared funds in the Company's nominated account will be acceptable for investment.

USE OF PROCEEDS

The Net Placing Proceeds will depend on the number of Placing Shares issued pursuant to the Placing. The Portfolio Manager intends to invest the Net Placing Proceeds in accordance with the Company's investment policy (further details of the Company's investment process and strategy are set out in the section of this Offering Memorandum entitled "*Company, its Investment Objective, Policy and Strategy*").

DEALINGS

The Company does not guarantee that at any particular time any market maker(s) will be willing to make a market in the Placing Shares, nor does it guarantee the price at which a market will be made in the Placing Shares. Accordingly, the dealing price of the Placing Shares may not necessarily reflect changes in the Net Asset Value per Share. Furthermore, the level of the liquidity in the Placing Shares can vary significantly.

SCALING BACK AND ALLOCATION

If aggregate applications for Placing Shares exceed 325 million Shares, being the maximum number of Shares to be issued pursuant to the Placing, it will be necessary to scale back applications under the Placing. The Company reserves the right to decline in whole or in part any application for Placing Shares pursuant to the Placing.

GENERAL

Pursuant to anti-money laundering laws and regulations with which the Company must comply in the UK and Guernsey, the Company (and its agents) may require evidence in connection with any application for Placing Shares, including further identification of the applicant(s), before any Placing Shares are issued.

In the event that there are any significant changes affecting any of the matters described in this Offering Memorandum or where any significant new matters have arisen after the publication of this Offering Memorandum, the Company will publish a notice to investors. Such notice will give details of the significant change(s) or the significant new matter(s). In the event that the Company is required to publish any notice, applicants who have applied for Placing Shares shall have at least two clear business days following the publication of the relevant notice within which to withdraw their offer to subscribe for Placing Shares in its entirety. The right to withdraw an application to subscribe for Placing Shares in these circumstances will be available to all investors in the Placing. If the application is not withdrawn within the time limits set out in the relevant notice, any application for Placing Shares will remain valid and binding.

The Directors may, in their absolute discretion, waive the minimum application amounts in respect of any particular application for Placing Shares under the Placing.

Should the Placing be aborted or fail to complete for any reason, monies received will be returned without interest at the risk of the applicant to the bank account from which the money was received forthwith following such abort or failure, as the case may be.

CLEARING AND SETTLEMENT

Payment for the Placing Shares should be made in accordance with settlement instructions to be provided to Placees by or on behalf of the Company. To the extent that any application for Placing Shares is rejected in whole or in part (whether by scaling back or otherwise), monies received will be returned without interest at the risk of the applicant.

PURCHASE AND TRANSFER RESTRICTIONS

This Offering Memorandum does not constitute an offer to sell, or the solicitation of an offer to acquire or subscribe for, Placing Shares in any jurisdiction where such an offer or solicitation is unlawful or would impose any unfulfilled registration, qualification, publication or approval requirements on the Company.

The Company has elected to impose the restrictions described below on the Placing and on the future trading of the Placing Shares so that the Company will not be required to register the offer and sale of the Placing Shares under the U.S. Securities Act, so that the Company will not have an obligation to register as an investment company under the U.S. Investment Company Act and related rules and to address certain ERISA, U.S. Tax Code and other considerations. The Company and its agents will not be obligated to recognise any resale or other transfer of the Placing Shares made other than in compliance with the restrictions described below.

Restrictions due to lack of registration under the U.S. Securities Act and U.S. Investment Company Act

The Placing Shares have not been and will not be registered under the U.S. Securities Act or with any securities regulatory authority of any state or other jurisdiction of the United States and the Placing Shares may not be offered, sold, exercised, resold, transferred or delivered, directly or indirectly, within the United States or to, or for the account or benefit of, U.S. Persons, except pursuant to an exemption from, or in a transaction not subject to, the registration requirements of the U.S. Securities Act and in compliance with any applicable securities laws of any state or other jurisdiction in the United States. There will be no public offer of the Placing Shares in the United States.

Subject to certain exceptions as described herein, the Placing is only being made outside the United States to non-U.S. Persons in reliance on Regulation S under the U.S. Securities Act.

In addition, except with the express written consent of the Company given in respect of an investment in the Company, the Placing Shares may not be acquired by (i) investors using assets of (A) an “employee benefit plan” as defined in section 3(3) of ERISA that is subject to Title I of ERISA; (B) a “plan” as defined in Section 4975 of the U.S. Code, including an individual retirement account or other arrangement that is subject to Section 4975 of the U.S. Code; or (C) an entity which is deemed to hold the assets of any of the foregoing types of plans, accounts or arrangements that is subject to Title I of ERISA or Section 4975 of the U.S. Code; or (ii) a governmental, church, non-U.S. or other employee benefit plan that is subject to any federal, state, local or non-U.S. law that is substantially similar to the provisions of Title I of ERISA or Section 4975 of the U.S. Code, unless its purchase, holding, and disposition of the Placing Shares will not constitute or result in a non-exempt violation of any such substantially similar law.

Subscriber and Shareholder warranties

By participating in the Placing, each subscriber acknowledges and agrees that it will (for itself and any person(s) procured by it to subscribe for Shares and any nominee(s) for any such person(s)) be further deemed to represent and warrant to the Company that:

- (a) if it is located outside the United States, it is not a U.S. Person, it is acquiring the Shares in an offshore transaction meeting the requirements of Regulation S and it is not acquiring the Shares for the account or benefit of a U.S. Person;
- (b) if it is located inside the United States or is a U.S. Person, it is an Eligible U.S. Investor and has received, read, understood and, prior to its receipt of any Shares pursuant to the Placing, returned an executed a U.S. Investor Letter to the Company;
- (c) it acknowledges that the Shares have not been and will not be registered under the U.S. Securities Act or with any securities regulatory authority of any state or other jurisdiction of the United States and may not be offered or sold in the United States or to, or for the account or benefit of, U.S. Persons absent registration or an exemption from registration under the U.S. Securities Act;
- (d) it acknowledges that the Company has not registered under the U.S. Investment Company Act and that the Company has put in place restrictions for transactions not involving any public offering in the United States, and to ensure that the Company is not and will not be required to register under the U.S. Investment Company Act;
- (e) unless the Company expressly consents in writing otherwise, no portion of the assets used to purchase, and no portion of the assets used to hold, the Shares or any beneficial interest therein constitutes or will constitute the assets of (i) an “employee benefit plan” as defined in Section 3(3) of ERISA that is subject to Title I of ERISA; (ii) a “plan” as defined in Section 4975 of the U.S. Code, including an individual retirement account

or other arrangement that is subject to Section 4975 of the U.S. Code; or (iii) an entity which is deemed to hold the assets of any of the foregoing types of plans, accounts or arrangements that is subject to Title I of ERISA or Section 4975 of the U.S. Code. In addition, if an investor is a governmental, church, non-U.S. or other employee benefit plan that is subject to any federal, state, local or non-U.S. law that is substantially similar to the provisions of Title I of ERISA or Section 4975 of the U.S. Code, its purchase, holding, and disposition of the Shares must not constitute or result in a non-exempt violation of any such substantially similar law;

- (f) that if any Shares offered and sold are issued in certificated form, then such certificates evidencing ownership will contain a legend substantially to the following effect unless otherwise determined by the Company in accordance with applicable law:

“THE COMPANY HAS NOT BEEN REGISTERED UNDER THE UNITED STATES INVESTMENT COMPANY ACT OF 1940, AS AMENDED (THE “INVESTMENT COMPANY ACT”) AND THE SECURITY EVIDENCED HEREBY HAS NOT BEEN REGISTERED UNDER THE UNITED STATES SECURITIES ACT OF 1933, AS AMENDED (THE “SECURITIES ACT”), AND MAY NOT BE OFFERED, SOLD, PLEDGED OR OTHERWISE TRANSFERRED EXCEPT (A) OUTSIDE THE UNITED STATES TO A NON-US PERSON (AS DEFINED IN RULE 902 OF REGULATION S, “US PERSON”) THAT IS NOT A US RESIDENT FOR THE PURPOSES OF THE INVESTMENT COMPANY ACT (A “US RESIDENT”) IN ACCORDANCE WITH RULE 903 OR 904 OF REGULATION S UNDER THE SECURITIES ACT (AND NOT IN A PRE- ARRANGED TRANSACTION RESULTING IN THE RESALE OF SUCH SECURITY INTO THE UNITED STATES) OR (B) PURSUANT TO AN EXEMPTION FROM REGISTRATION UNDER THE SECURITIES ACT AND UNDER CIRCUMSTANCES WHICH WILL NOT REQUIRE THE COMPANY TO REGISTER UNDER THE INVESTMENT COMPANY ACT (PROVIDED THAT, IF SUCH TRANSFER PURSUANT TO THIS CLAUSE (B) IS TO A US PERSON OR A US RESIDENT, THE PURCHASER IS A QUALIFIED PURCHASER WITHIN THE MEANING OF SECTION 3(c)(7) OF THE INVESTMENT COMPANY ACT) AND, IN EACH CASE IN ACCORDANCE WITH ANY APPLICABLE SECURITIES LAWS OF THE STATES OF THE UNITED STATES AND OTHER JURISDICTIONS. THE HOLDER OF THIS SECURITY AGREES THAT IT WILL COMPLY WITH THE FOREGOING RESTRICTIONS. NO REPRESENTATION CAN BE MADE AS TO THE AVAILABILITY OF ANY EXEMPTION UNDER THE SECURITIES ACT FOR REALES OF THE SECURITY.

THE HOLDER ACKNOWLEDGES THAT THE COMPANY RESERVES THE RIGHT PRIOR TO ANY SALE OR OTHER TRANSFER TO REQUIRE THE DELIVERY OF SUCH CERTIFICATIONS, LEGAL OPINIONS AND OTHER INFORMATION AS THE COMPANY MAY REASONABLY REQUIRE TO CONFIRM THAT THE PROPOSED SALE OR OTHER TRANSFER COMPLIES WITH THE FOREGOING RESTRICTIONS.

IF A BENEFICIAL OWNER OF THIS SECURITY WHO IS REQUIRED TO BE A QUALIFIED PURCHASER WITHIN THE MEANING OF SECTION 3(c)(7) OF THE INVESTMENT COMPANY ACT IS AT ANY TIME NOT SUCH A QUALIFIED PURCHASER, THE COMPANY MAY (A) REQUIRE SUCH BENEFICIAL OWNER TO SELL THIS SECURITY TO A PERSON WHO IS NOT A US PERSON OR A US RESIDENT OR WHO IS A US PERSON WHO IS ALSO A QUALIFIED PURCHASER AND WHO IS OTHERWISE QUALIFIED TO PURCHASE SUCH SECURITY IN A TRANSACTION EXEMPT FROM REGISTRATION UNDER THE SECURITIES ACT OR (B) SELL THIS SECURITY ON BEHALF OF THE BENEFICIAL OWNER AT THE BEST PRICE REASONABLY OBTAINABLE TO A PERSON WHO IS NOT A US PERSON OR WHO IS A US PERSON OR A US RESIDENT WHO IS ALSO A QUALIFIED PURCHASER AND WHO IS OTHERWISE QUALIFIED TO PURCHASE SUCH SECURITY IN A TRANSACTION EXEMPT FROM REGISTRATION UNDER THE SECURITIES ACT.

THE HOLDER OF THIS SECURITY IS DEEMED TO HAVE ACKNOWLEDGED THAT THIS LEGEND WILL NOT BE REMOVED FROM THIS SECURITY FOR AS LONG AS THE COMPANY RELIES ON SECTION 3(c)(7) OF THE INVESTMENT COMPANY ACT”;

- (g) if in the future the investor decides to offer, sell, transfer, assign or otherwise dispose of the Shares, it will do so only in compliance with an exemption from the registration requirements of the U.S. Securities Act and under circumstances which will not require the Company to register under the U.S. Investment Company Act. It acknowledges that any sale, transfer, assignment, pledge or other disposal made other than in compliance with such laws and the above stated restrictions will be subject to the compulsory transfer provisions as provided in the Articles;
- (h) if in the future it decides to offer, resell, pledge or otherwise transfer any of the Shares, such Shares may be offered, resold, pledged or otherwise transferred only (A) outside the United States to persons not known to be U.S. Persons in an offshore transaction in accordance with Rule 904 of Regulation S under the U.S. Securities Act, (B) in a transaction that does not require registration under the U.S. Securities Act or any applicable United States securities laws and regulations or require the Company to register under the U.S. Investment Company Act, subject to, if requested by the Company, delivery of an opinion of counsel of recognised standing in form and substance reasonably satisfactory to the Company, or (C) to the Company;
- (i) it is purchasing the Shares for its own account or for one or more investment accounts for which it is acting as a fiduciary or agent, in each case for investment only, and not with a view to or for sale or other transfer in connection with any distribution of the Shares in any manner that would violate the U.S. Securities Act, the U.S. Investment Company Act or any other applicable securities laws;
- (j) it acknowledges that the Company reserves the right to make inquiries of any holder of the Shares or interests therein at any time as to such person's status under the U.S. federal securities laws and to require any such person that has not satisfied the Company that holding by such person will not violate or require registration under the U.S. securities laws to transfer such Shares or interests in accordance with the Articles;
- (k) it acknowledges and understands that the Company is required to comply with FATCA and that the Company will follow FATCA's extensive reporting and withholding requirements. The subscriber agrees to furnish any information and documents the Company may from time to time request, including but not limited to information required under FATCA;
- (l) it is entitled to acquire the Shares under the laws of all relevant jurisdictions which apply to it, it has fully observed all such laws and obtained all governmental and other consents which may be required thereunder and complied with all necessary formalities and it has paid all issue, transfer or other taxes due in connection with its acceptance in any jurisdiction of the Shares and that it has not taken any action, or omitted to take any action, which may result in the Company or its directors, officers, agents, employees and advisers being in breach of the laws of any jurisdiction in connection with the Placing or its acceptance of participation in the Placing;
- (m) it has received, carefully read and understands this Offering Memorandum, and has not, directly or indirectly, distributed, forwarded, transferred or otherwise transmitted this Offering Memorandum or any other presentation or offering materials concerning the Shares to within the United States or to any U.S. Persons, nor will it do any of the foregoing; and
- (n) if it is acquiring any Shares as a fiduciary or agent for one or more accounts, the investor has sole investment discretion with respect to each such account and full power and authority to make such foregoing representations, warranties, acknowledgements and agreements on behalf of each such account.

The Company and its directors, officers, agents, employees, advisers and others will rely upon the truth and accuracy of the foregoing representations, warranties, acknowledgments and agreements.

If any of the representations, warranties, acknowledgments or agreements made by the investor are no longer accurate or have not been complied with, the investor will immediately notify the Company.

TAXATION

GENERAL

The information below, which relates only to Guernsey and UK taxation, summarises the advice received by the Board and is applicable to the Company (except insofar as express reference is made to the treatment of other persons) to persons who are resident or ordinarily resident in Guernsey or the United Kingdom for taxation purposes and who hold Placing Shares as an investment. It is based on current Guernsey and UK tax law and published practice, respectively, which law or practice is, in principle, subject to any subsequent changes therein (potentially with retrospective effect). Certain Shareholders, such as dealers in securities, collective investment schemes, insurance companies and persons acquiring their Placing Shares in connection with their employment may be taxed differently and are not considered. The tax consequences for each Shareholder of investing in the Company may depend upon the Shareholder's own tax position and upon the relevant laws of any jurisdiction to which the Shareholder is subject.

If you are in any doubt about your tax position, you should consult your professional adviser.

GUERNSEY

The Directors intend to conduct the Company's affairs such that, based on current law and practice of the relevant tax authorities, the Company will not become resident for tax purposes in any other territory other than Guernsey.

The Company

The Company has been granted tax exempt status by the Director of Income Tax in Guernsey pursuant to the Income Tax (Exempt Bodies) (Guernsey) Ordinance, 1989. The Company will need to reapply annually for exempt status, an application that currently incurs a fee of £1,200 per annum. It is expected that the Company will continue to apply for exempt status annually.

Once exempt status has been granted, the Company is not considered resident in Guernsey for Guernsey income tax purposes and will be exempt from tax in Guernsey on both bank deposit interest and any income that does not have its source in Guernsey. It is not anticipated that any income other than bank deposit interest will arise in Guernsey and therefore the Company is not expected to incur any additional liability to Guernsey tax.

Shareholders

Non-Guernsey resident Shareholders will not be subject to any income tax in Guernsey in respect of or in connection with the acquisition, holding or disposal of any shares owned by them. Such Shareholders will receive dividends without deduction of Guernsey income tax.

Any Shareholders who are resident in Guernsey will be subject to Guernsey income tax on any dividends paid to such persons but will not suffer any deduction of tax by the Company from any such dividends payable where the Company is granted tax exempt status. The Company is however required to provide the Director of Income Tax the names, addresses and gross amount of any income paid to Guernsey resident shareholders during the previous year when renewing the Company's exempt tax status each year.

At present Guernsey does not levy taxes upon capital gains, capital transfer, wealth, sales or turnover (unless the varying of investments and turning of such investments to account is a business or part of a business), nor are there any estate duties save for registration fees and an ad valorem duty for a Guernsey grant of representation where the deceased dies leaving assets in Guernsey which require presentation of such a grant. No stamp duty is chargeable in Guernsey on the issue, transfer, switching or redemption of Shares in the Company.

FATCA

The US Hiring Incentives to Restore Employment Act resulted in the introduction of legislation in the US known as the Foreign Account Tax Compliance Act (**FATCA**) which has the effect that a 30 per cent withholding tax may be imposed on payments of US source income and certain payments of proceeds from the sale of property that could give rise to US source income unless there is compliance with requirements for the Company to report on an annual basis the identity of, and certain other information about, direct and indirect US investors in the Company to the relevant

Guernsey authority for onward transmission to the US Internal Revenue Service (**IRS**). An investor that fails to provide the required information to the Company may be subject to the 30 per cent withholding tax with respect to its share of any such payments directly or indirectly attributable to US investments of the Company, and the Company might be required to terminate such investor's investment in the Company.

On 13 December 2013 an intergovernmental agreement was entered into between Guernsey and the US in respect of FATCA (the **IGA**), which agreement was enacted into Guernsey law as of 30 June 2014 by the Income Tax (Approved International Agreements) (Implementation) (United Kingdom and United States of America) Regulations, 2014. Guidance notes currently in draft form have been issued by the relevant Guernsey authority to provide practical assistance on the reporting obligations of affected businesses under the IGA.

Although the Company will attempt to satisfy any obligations imposed on it to avoid the imposition of such withholding tax, no assurance can be given that the Company will be able to satisfy these obligations. If the Company becomes subject to a withholding tax as a result of FATCA, the return of all Shareholders may be materially affected.

This summary of Guernsey taxation issues can only provide a general overview of this area and it is not a description of all the tax considerations that may be relevant to a decision to invest in the Company. The summary of certain Guernsey tax issues is based on the laws and regulations in force as of the date of this document and may be subject to any changes in Guernsey law occurring after such date. Legal advice should be taken with regard to individual circumstances. Any person who is in any doubt as to his tax position or where he is resident, or otherwise subject to taxation, in a jurisdiction other than Guernsey, should consult his professional adviser.

UNITED KINGDOM

The following statements are intended as a general guide to certain UK tax considerations relating to an investment in Shares and do not purport to be a complete analysis of all potential UK tax consequences of holding Shares. They are based on current UK legislation and current published practice of HMRC, which may change, possibly with retroactive effect. Except insofar as express reference is made to the treatment of non-UK tax residents and non-UK domiciled individuals, they apply only to Shareholders who are resident and domiciled (in the case of individuals) or resident (in the case of companies) for tax purposes in (and only in) the UK, who hold their Shares as an investment (other than under an individual savings account) and who are the absolute beneficial owners of both the Shares and any dividends paid on them. The statements are not addressed to Shareholders who hold Shares in connection with a trade, profession or vocation carried on in the UK through a branch or agency (or, in the case of a corporate Shareholder, in connection with a trade in the UK carried on through a permanent establishment or otherwise). The tax position of certain categories of Shareholders who are subject to special rules (such as persons acquiring their Shares in connection with employment, dealers in securities, insurance companies and collective investment schemes) is not considered.

Taxation of the Company

As the Company is an alternative investment fund for the purpose of the Alternative Investment Fund Managers Regulations 2013, it should not be considered to be UK resident for UK tax purposes. Accordingly, and provided that the Company does not carry on a trade in the UK through a permanent establishment situated therein for UK corporation tax purposes or through a branch or agency situated in the UK which would bring it within the charge to income tax, the Company will not be subject to UK corporation tax or income tax on income and capital gains arising to it save as noted below in relation to possible withholding tax on certain UK source income. The Directors intend that the affairs of the Company are conducted so that no such permanent establishment, branch or agency will arise insofar as this is within their control, but it cannot be guaranteed that the conditions necessary to prevent any such permanent establishment, branch or agency coming into being will at all times be satisfied.

Interest and other income received by the Company which has a UK source may be subject to withholding taxes in the UK.

Disposals of Shares

Each class of Shares will constitute a relevant interest in an "offshore fund" for the purposes of UK taxation. Under the UK's offshore fund legislation, any gain arising on the sale, redemption or other disposal of shares in an offshore

fund (which may include an in specie redemption by the Company) held by persons who are resident in the UK for tax purposes will be taxed at the time of such sale, disposal or redemption as income and not as a capital gain. This does not apply, however, where the relevant offshore fund is accepted by HMRC as a “reporting fund” throughout the period during which the relevant interests were held.

It is not currently intended that the Company will apply for reporting fund status under the offshore funds regime in respect of any Shares. Accordingly, Shareholders who are resident in the UK for taxation purposes may be liable to UK income taxation in respect of gains arising from the sale, redemption or other disposal of their Shares. Such gains may remain taxable notwithstanding any general or specific UK capital gains tax exemption or allowance available to a Shareholder and may result in certain Shareholders incurring a proportionately greater UK taxation charge. Any losses arising on the disposal of Shares by Shareholders who are resident in the UK will be eligible for capital gains loss relief. The Directors may launch one or more classes of Shares in future certified by HMRC as reporting funds for the purposes of UK taxation.

Dividends

Any dividends received by UK resident individual Shareholders (or deemed to be received in the case of any future class of Shares with reporting fund status) will generally be subject to UK income tax whether or not such distributions are reinvested.

Dividends received by a UK resident Shareholder (or deemed to be received in the case of any future class of Shares with reporting fund status) within the charge to corporation tax should be exempt from tax in respect of dividends paid by the Company, although it should be noted that this exemption is subject to certain exclusions and specific anti-avoidance rules (particularly in the case of “small companies”, as defined in section 931S of the Corporation Tax Act 2009 (“CTA 2009”)).

Other UK taxation considerations

The attention of non-corporate Shareholders who are resident in the UK is drawn to the provisions of Chapter 2 of Part 13 of the UK Income Tax Act 2007. These provisions are aimed at preventing the avoidance of income tax by individuals through transactions resulting in the transfer of assets or income to persons (including companies) resident or domiciled abroad and may render them liable for income tax in respect of undistributed income and profits of the Company. This legislation will, however, not apply if such a Shareholder can satisfy HMRC that either:

- (i) it would not be reasonable to draw the conclusion from all the circumstances of the case, that the purpose of avoiding liability to taxation was the purpose, or one of the purposes, for which the relevant transactions or any of them were effected;
- (ii) all the relevant transactions are genuine commercial transactions and it would not be reasonable to draw the conclusion, from all the circumstances of the case, that any one or more of the transactions was more than incidentally designed for the purpose of avoiding liability to taxation; or
- (iii) all the relevant transactions were genuine, arm’s length transactions and if the Shareholder were liable to tax under Chapter 2 of Part 13 in respect of such transactions such liability would constitute an unjustified and disproportionate restriction on a freedom protected by Title II or IV of Part Three of the Treaty on the Functioning of the European Union or Part II or III of the EEA Agreement.

Chapter 3 of Part 6 of the CTA 2009 provides that, if at any time in an accounting period a corporate Shareholder within the charge to UK corporation tax holds an interest in an offshore fund and there is a time in that period when that fund fails to satisfy the “non-qualifying investments test”, the interest held by such a corporate Shareholder will be treated for the accounting period as if it were rights under a creditor relationship for the purposes of the rules relating to the taxation of most corporate debt contained in the CTA 2009 (the “Corporate Debt Regime”). Shares will (as explained above) constitute interests in an offshore fund and, on the basis of the current investment policies of the Company, it is likely that the “non-qualifying investments test” will not be met. In circumstances where the test is not so satisfied (for example where the Company invests in cash, securities or debt instruments or open-ended companies that themselves do not satisfy the “non-qualifying investments test” and the market value of such investments exceeds

60 per cent. of the market value of all its investments at any time), the Shares in the relevant class will be treated for corporation tax purposes as within the Corporate Debt Regime. As a consequence, all returns on the Shares in respect of each corporate Shareholder's accounting period during which the test is not met (including gains, profits and deficits and exchange gains and losses) will be taxed or relieved as an income receipt or expense on a fair value accounting basis. Accordingly, a corporate Shareholder in the Company may, depending on its own circumstances, incur a charge to corporation tax on an unrealised increase in the value of its holding of Shares (and, likewise, obtain relief against corporation tax for an unrealised reduction in the value of its holding of Shares). The provisions relating to non-reporting funds (outlined above) would not then apply to such corporate shareholders and the effect of the provisions relating to holdings in controlled foreign companies (outlined below) would then be substantially mitigated.

Part 9A of TIOPA 2010 subjects UK resident companies to tax on the profits of companies not so resident (such as the Company) in which they have an interest. The provisions, broadly, affect UK resident companies which hold, alone or together with certain other associated persons, shares which confer a right to at least 25 per cent. of the profits of a non-resident company (a "25% Interest") where that non-resident company is controlled by persons who are resident in the UK and is subject to a lower level of taxation in its territory of residence. The legislation is not directed towards the taxation of capital gains. In addition, these provisions will not apply if the shareholder reasonably believes that it does not hold a 25% Interest in the Company throughout the relevant accounting period.

The attention of persons resident in the UK for taxation purposes is drawn to the provisions of section 13 of the Taxation of Chargeable Gains Act 1992 ("section 13"). Section 13 applies to a "participator" for UK taxation purposes (which term includes a shareholder) if at any time when any gain accrues to the Company which constitutes a chargeable gain for those purposes, at the same time, the Company is itself controlled by a sufficiently small number of persons so as to render the Company a body corporate that would, were it to have been resident in the UK for taxation purposes, be a "close" company for those purposes. The provisions of section 13 could, if applied, result in any such person who is a "participator" in the Company being treated for the purposes of UK taxation of chargeable gains as if a part of any chargeable gain accruing to the Company had accrued to that person directly, that part being equal to the proportion of the gain that corresponds on a just and reasonable basis to that person's proportionate interest in the Company as a "participator". No liability under section 13 could be incurred by such a person however, where such proportion does not exceed one quarter of the gain. In addition, exemptions may also apply where none of the acquisition, holding or disposal of the assets had a tax avoidance main purpose or where the relevant gains arise on the disposal of assets used only for the purposes of genuine, economically significant business activities carried on outside the UK.

In the case of UK resident individuals domiciled outside the UK, section 13 applies only to gains relating to UK situate assets of the Company and gains relating to non-UK situate assets if such gains are remitted to the UK.

Stamp duty and stamp duty reserve tax

No UK stamp duty or stamp duty reserve tax will be payable on an issue of Shares. UK stamp duty at the rate of 0.5% of the value of the consideration for the transfer of any Shares (rounded up where necessary to the nearest £5) may become payable on any instrument of transfer of the Shares which is executed within the UK, or which relates to any property situated, or to any matter or thing done or to be done, in the UK. Provided, as is the intention, that the Shares are not registered in any register kept in the UK by or on behalf of the Company and are not paired with shares issued by a body corporate incorporated in the UK, any agreement to transfer the Shares will not be subject to stamp duty reserve tax.

Inheritance tax

A liability to UK inheritance tax on Shares may arise in the event of the death of or on the making of certain categories of lifetime transfers by an individual Shareholder domiciled or deemed to be domiciled in the UK for inheritance tax purposes.

The Common Reporting Standard

Drawing extensively on the intergovernmental approach to implementing US FATCA, the OECD developed the Common Reporting Standard ("CRS") to address the issue of offshore tax evasion on a global basis. Aimed at maximizing efficiency and reducing cost for financial institutions, the CRS provides a common standard for due

diligence, reporting and exchange of financial account information. Pursuant to the CRS, tax authorities in participating CRS jurisdictions will obtain from reporting financial institutions, and automatically exchange with other participating tax authorities in which the Shareholders of the reporting financial institution are resident on an annual basis, financial account and personal information with respect to all reportable accounts identified by financial institutions on the basis of common due diligence and reporting procedures. The first information exchanges are expected to begin in September 2017. Guernsey has legislated to implement the CRS. As a result, the Company will be required to comply with the CRS due diligence and reporting requirements, as adopted by Guernsey. Shareholders may be required to provide additional information to the Company to enable the Company to satisfy its obligations under the CRS. Failure to provide requested information may subject a Shareholder to liability for any resulting penalties or other charges and/or mandatory termination of its interest in the Company.

If you are in any doubt as to your tax position, you should consult your professional adviser.

SHAREHOLDERS OF THE COMPANY

So far as the Company is aware, as at November 15 2017 (being the latest practicable date prior to publication of this document) CLO Holdco, Ltd. is the sole Shareholder and holds directly or indirectly 5% or more of the Company's voting rights.

Immediately following the Placing the following persons will hold directly or indirectly the following percentages of the Company's voting rights:

Name	Immediately prior to the Placing		Immediately following the Placing	
	Number of Shares	% of voting rights in respect of the issued share capital	Number of Shares	% of voting rights in respect of the issued share capital
CLO Holdco, Ltd.	143,454,001.00	100.00%	70,314,387.44	49.02%
HarbourVest Dover Street IX Investment L.P.	0.00	0.00%	50,917,791.20	35.49%
HarbourVest 2017 Global Fund L.P.	0.00	0.00%	3,478,649.09	2.42%
HarbourVest 2017 Global AIF L.P.	0.00	0.00%	6,957,226.48	4.85%
HV International VIII Secondary L.P.	0.00	0.00%	9,317,699.94	6.50%
HarbourVest Skew Base AIF L.P.	0.00	0.00%	1,034,136.77	0.72%
Highland Capital Management, L.P.	0.00	0.00%	898,708.98	0.63%
Lee Blackwell Parker, III	0.00	0.00%	94,173.23	0.07%
Quest IRA, Inc., fbo Lee B. Parker III, Acct. # 3058311	0.00	0.00%	58,798.51	0.04%
Quest IRA, Inc., fbo Hunter Covitz, Acct. # 1469811	0.00	0.00%	239,018.34	0.17%
Quest IRA, Inc., fbo Jon Poglitsch, Acct. # 1470612	0.00	0.00%	95,607.34	0.07%
Quest IRA, Inc., fbo Neil Desai, Acct. # 3059211	0.00	0.00%	47,803.67	0.03%

Save as set out above in this section of this Offering Memorandum, the Company is not aware of any person who holds, or who will immediately following the Placing hold, as shareholder directly or indirectly, 5% or more of the voting rights of the Company.

None of the Shareholders referred to in the table set forth in above has voting rights which differ from those of any other Shareholder in respect of any Shares held by them.

Save as set out in this above in this section of this Offering Memorandum, the Company is not aware of any person who immediately following the Placing directly or indirectly, jointly or severally, will own sufficient shares to exercise control over the Company.

ADDITIONAL INFORMATION ON THE COMPANY

INCORPORATION AND ADMINISTRATION

The Company is a registered closed-ended investment company incorporated in Guernsey with limited liability on 30 March 2015 under the provisions of the Companies Law, with registered number 60120. The Company continues to be registered and domiciled in Guernsey. The registered office and principal place of business of the Company is First Floor, Dorey Court, Admiral Park, St Peter Port, Guernsey GY1 6HJ, Channel Islands (telephone number 01481 715601). The statutory records of the Company are kept at this address. The Company operates and issues shares in accordance with the Companies Law and ordinances and regulations made thereunder and has no employees. The Company shall have an unlimited life.

The Company is regulated by the GFSC and is not regulated by any regulator other than the GFSC.

The Company's accounting period will end on 31 December, of each year, with the first year end on 31 December 2015.

PricewaterhouseCoopers CI LLP of Royal Bank Place, 1 Gategny Esplanade, St Peter Port, Guernsey GY1 4ND has been the only Auditors of the Company since incorporation. PricewaterhouseCoopers CI LLP is a member of the Institute of Chartered Accountants of England & Wales. The Shareholders have the power, under the Companies Law, to appoint the auditor at each AGM or remove the auditor by ordinary resolution.

The annual report and accounts will be prepared according to GAAP.

Save for its entry into the material contracts summarised in "*Material Contracts*" of this section of this Offering Memorandum and certain non-material contracts, since its incorporation the Company has not incurred borrowings, issued any debt securities, incurred any contingent liabilities or made any guarantees, nor granted any charges or mortgages.

Save as set out in "*Share Capital*" below, there have been no changes to the issued share capital of the Company since incorporation.

SHARE CAPITAL

On incorporation, the share capital of the Company consisted of one ordinary share of no par value. The Placing Shares will be issued in the form of participating ordinary shares having the rights set out in the Articles. Shareholders have no right to have their Shares redeemed.

As at the date of this Offering Memorandum, the Company's issued and fully paid up share capital is 143,454,001 shares of no par value.

None of the Shareholders has voting rights attaching to Shares that they hold which are different to the voting rights attached to any other Shares of the same class in the Company.

As at the date of this Offering Memorandum, the memorandum of incorporation provides that there is no limit on the number of shares of any class which the Company is authorised to issue.

The Directors have absolute authority under the Articles to allot the Shares to be issued pursuant to the Placing and are expected to do so shortly prior to the Placing.

No share or loan capital of the Company is under option or has been agreed, conditionally or unconditionally, to be put under option.

DIRECTORS' AND OTHER INTERESTS

As at the date of this Offering Memorandum, none of the Directors or any person connected with any of the Directors has a Shareholding or any other interest in the share capital of the Company. The Directors and their connected persons may, however, subscribe for Shares pursuant to the Placing.

The Directors are not aware of any person or persons who, following the Placing, will or could, directly or indirectly, jointly or severally, exercise control over the Company and there are no arrangements known to the Directors the operation of which may subsequently result in change of control of the Company, other than as disclosed above in “Shareholders of the Company” on page 75 of this Offering Memorandum.

There are no outstanding loans from the Company to any of the Directors or any outstanding guarantees provided by the Company in respect of any obligation of any of the Directors.

The aggregate remuneration and benefits in kind of the Directors in respect of the Company’s accounting period ending on 31 December 2017, which will be payable out of the assets of the Company, is not expected to exceed £150,000. No amount has been set aside or accrued by the Company to provide pension, retirement or other similar benefits.

No Director has a service contract with the Company, nor are any such contracts proposed. The Directors have been appointed through letters of appointment which can be terminated in accordance with the Articles and without compensation. The notice period specified in the Articles for the removal of Directors is one month. The Articles provide that the office of Director shall be terminated by, among other things: (i) written resignation; (ii) unauthorised absences from board meetings for 12 months or more; (iii) written request of the other Directors; and (iv) an ordinary resolution.

None of the Directors has, or has had, an interest in any transaction which is or was unusual in its nature or conditions or significant to the business of the Company and which has been effected by the Company since its incorporation.

In addition to their directorships of the Company, the Directors hold or have held the directorships and are or were members of the partnerships, as listed in the table below, over or within the past five years.

<i>Name</i>	<i>Current directorships/partnerships</i>	<i>Past directorships/partnerships</i>
William Scott	Aberdeen Global Infrastructure GP Limited (name changed from Lloyds Bank Global Infrastructure GP Limited 15 May 2014)	BMS Specialist Debt Fund Limited (applied for voluntary strike-off 29 September 2014)
	Aberdeen Global Infrastructure GP II Limited	Cinven Capital Management (G3) Limited
	Aberdeen Infrastructure Finance GP Limited (name changed from Uberior Infrastructure Finance GP Limited 7 August 2014)	FCA Catalyst Fund SPC (formerly FCM Catalyst Fund SPC)
	Aberdeen Infrastructure Spain Co-Invest II GP Limited	FCA Catalyst Master Fund SPC (formerly FCM Catalyst Master Fund SPC)
	Absolute Alpha Fund PCC Limited	FCA Trading SPC (formerly FCM Trading SPC)
	Acencia Debt Strategies Limited	Financial Risk Management Diversified Fund Limited
	AHL Strategies PCC Limited	Financial Risk Management Matrio Fund Limited
	Axiom European Financial Debt Fund Limited	Financial Ventures Limited
	Cinven Capital Management (V) General Partner Limited	FRM Access II Fund SPC
	Cinven Capital Management (VI) General Partner Limited	FRM Customised Diversified Fund Limited
	Cinven Capital Management (G4) Limited	FRM Diversified II Fund SPC
	Cinven Limited	FRM Diversified II Master Fund Limited
	Class N AHL 2.5XL Trading Limited	FRM Diversified III Fund PCC Limited
	Class P Global Futures EUR Trading Limited	FRM Diversified III Master Fund Limited
	Hanseatic Asset Management LBG	FRM Equity Alpha Limited

Highland CLO Funding, Ltd.	FRM Credit Strategies Fund PCC Limited
KCSB Properties Limited	FRM Credit Strategies Master Fund PCC Limited
MAN AHL Diversified PCC Limited	FRM Global Diversified Fund
Pershing Square Holdings Limited	FRM Phoenix Fund Limited (name changed from FRM Financials Limited 10 June 2008)
Sandbourne Asset Management Limited (name changed from Sandbourne Asset Management Guernsey Limited 26 June 2015)	FRM Sigma Fund Limited
Sandbourne PCC Limited	FRM Strategic Fund PCC Limited
Savile AD4 Limited	FRM Strategic Master Fund Limited
Savile AD7 Limited	FRM Tail Hedge Limited
Savile AD8 Limited	FRM Thames Fund General Partner 1 Limited
Savile AD9 Limited	Invista European Real Estate Trust SICAF
SPL Guernsey ICC Limited (formerly Arch Guernsey ICC Limited)	Land Race Limited
The Flight and Partners Recovery Fund Limited	OldCo Limited (name changed from Axiom European Financial Debt Limited 25 September 2015)
30 St. Mary Axe Management Limited Partnership Incorporated	Principia TR-S 40 Ltd
	Property Income & Growth Fund Limited
	PSource Structured Debt Fund Limited
	PSource Structured Debt SPV II Inc
	Sandbourne Fund
	Savile AD2 Limited
	Savile ANG1 Limited
	Savile APG1 Limited
	Savile APG3 Limited
	Savile Durham 1 Limited
	Savile Exeter 1 Limited
	Savile ML1 Limited
	Secured Real Estate Finance Limited (dormant after unsatisfactory fundraising)
	TBH Guernsey Limited
	Threadneedle Asset Backed Income Limited (dormant after unsatisfactory fundraising)
	UCAP Investment Management Fund PCC Limited (name changed from Utrup Investment Management Fund PCC Limited 7 February 14)
	UCAP Investment Management Limited (name changed from Utrup Investment Management Limited 7 February 14)
	WyeTree RMBS Opportunities Fund Limited (name changed from WyeTree Opportunities

Fund Limited 29 May 2014)

<i>Name</i>	<i>Current directorships/partnerships</i>	<i>Past directorships/partnerships</i>
Heather Bestwick	Andium Homes Limited	Jersey Finance Limited
	Deutsche International Corporate Services Limited	Walkers Limited
	Equiom (Jersey) Limited	Walkers Capital Markets Limited
	Highland CLO Funding, Ltd.	Walkers Pension Services (Jersey) Limited
	Equiom (Guernsey) Limited	Walkers Property Services (Jersey) Limited
	Sole Shipping SO II GP Limited	Homelink (Jersey) Limited
	Sole Shipping SO Adviser Limited	Altamas Resources Limited
	EPE Special Opportunities plc	BSREP Marina Village (Jersey) Limited
		Altair Partners Limited
		Cyan Blue Topco Limited
		Century Limited
		Fundamental Global Corporate Secured Loan Fund Limited
		AEP 2003 Limited
		AEP 2008 Limited
		AEP 2012 Limited
		Invision Capital Partners IV Limited
		Invision IV Co-invest General Partner Limited
		Invision Capital Partners V Limited
		Triton Advisers Limited
		GCP Infrastructure OEIC Limited
		Equiom Trust Company (CI) Limited
		Rokos Capital Management (GP) Limited
		Rokos Intermediate (Jersey) Limited

As at the date of this Offering Memorandum, there are no potential conflicts of interest between any duties to the Company of any of the Directors and their private interests and/or other duties. There are no lock up provisions regarding the disposal by any of the Directors of any Shares.

Save as set out in immediately following paragraph below, as at the date of this Offering Memorandum:

- (a) none of the Directors has had any convictions in relation to fraudulent offences for at least the previous five years;
- (b) save as detailed above, none of the Directors was a director of a company, a member of an administrative, management or supervisory body or a senior manager of a company within the previous five years which has entered into any bankruptcy, receivership or liquidation proceedings;
- (c) none of the Directors has been subject to any official public incrimination and/or sanctions by statutory or regulatory authorities (including designated professional bodies) or has been

disqualified by a court from acting as a member of the administrative, management or supervisory bodies of an issuer or from acting in the management or conduct of the affairs of any issuer for at least the previous five years; and

- (d) none of the Directors are aware of any contract or arrangement subsisting in which they are materially interested and which is significant to the business of the Company which is not otherwise disclosed in this Offering Memorandum.

In respect of the declaration in the immediately preceding paragraph above, certain of the Directors have been directors of entities which have been dissolved. To the best of each Director's knowledge, no such entity, upon its dissolution, was insolvent or owed any amounts to creditors.

The Company maintains directors' and officers' liability insurance on behalf of the Directors at the expense of the Company.

No employees of the Administrator have any service contracts with the Company.

MATERIAL CONTRACTS

The following are all of the contracts, not being contracts entered into in the ordinary course of business, that have been entered into by the Company since its incorporation and are, or may be, material or that contain any provision under which the Company has any obligation or entitlement which is or may be material to it as at the date of this Offering Memorandum.

Administration Agreement

An administration agreement dated 10 August 2015 between (i) the Company and (ii) the Administrator, whereby the Administrator was appointed to act as administrator of the Company and provide related administrative, compliance and treasury services (the "**Administration Agreement**").

Under the terms of the Administration Agreement, the Administrator is entitled to an annual administration fee of up to 7 bps per annum of the Net Asset Value of the Company per annum, payable monthly in arrears, and other miscellaneous fees and expenses reimbursed, in each case, as determined in the Administration Agreement.

The Administration Agreement may be terminated by either party on not less than three months written notice (or such shorter notice as the parties may agree). The Administration Agreement may be terminated immediately by either party: (i) in the event that either party shall go into liquidation or receivership or an examiner shall be appointed to the Company (except for a voluntary liquidation for the purposes of reconstruction or amalgamation upon terms previously approved in writing by the notifying party, such approval not to be unreasonably withheld or delayed) or be unable to pay its debts as they fall due or commits any act of bankruptcy under the laws of an applicable jurisdiction; or (ii) if the other party commits any material breach of the provisions of the Administration Agreement and, if such breach is capable of remedy shall not have remedied that within 30 days after the service of written notice requiring it to be remedied; (iii) if it shall become illegal or impossible without breach of any applicable laws and for reasons reasonably outside the control of the relevant party for any party to fulfil its obligations hereunder; or (iv) if any changes to the Administration Agreement are required as a consequence of any financial services regulation which may in the future bind any of the parties thereto and which cannot be agreed between the parties. The appointment of the Administrator shall also automatically terminate forthwith if the Administrator shall become or be deemed to become resident for tax purposes in the United Kingdom or in any other place or places outside Guernsey in circumstances which cause the Company to become liable to pay any taxes which it would not otherwise be liable to pay.

The Company has given certain market standard indemnities in favour of the Administrator in respect of the Administrator's potential losses in carrying out its responsibilities under the Administration Agreement.

The Administration Agreement is governed by the laws of Guernsey.

Portfolio Management Agreement

A Portfolio Management Agreement dated November 15, 2017 between (i) the Company and (ii) the Portfolio Manager (the “**Portfolio Management Agreement**”), pursuant to which the Company appointed the Portfolio Manager to select the portfolio of investments and instruct the Custodian with respect to any acquisition, disposition or sale of investments and provide certain support and assistance (including back and middle office functions), personnel and credit and market research and analysis in connection with the investment and ongoing management of the portfolio.

The Portfolio Management Agreement may be terminated in the event of (A) the Company determining in good faith that the Company or the portfolio has become required to register as an investment company under the provisions of the Investment Company Act (where there is no available exemption), and the Company has given prior notice to the Portfolio Manager of such requirement, (B) the date on which the portfolio has been liquidated in full and the Company’s financing arrangements have been terminated or redeemed in full and (C) such other date as agreed between the Company and the Portfolio Manager.

In addition, the Portfolio Management Agreement may be terminated, and the Portfolio Manager removed for “Cause” by the Advisory Board or by the Board of Directors upon 30 business days’ prior written notice to the Portfolio Manager.

As defined in the Portfolio Management Agreement, “Cause” means any one of the following events: (a) the Portfolio Manager wilfully violates, or takes any action that it knows breaches any material provision of the Portfolio Management Agreement or the Offering Memorandum applicable to it in bad faith (not including a wilful and intentional breach that results from a good faith dispute regarding reasonable alternative courses of action or interpretation of instructions); (b) the Portfolio Manager breaches in any respect any provision of the Portfolio Management Agreement or any terms of the Offering Memorandum applicable to it (other than as covered by clause (a) and except for any such violations or breaches that have not had, or could not, either individually or in the aggregate, reasonably be expected to have, a material adverse effect on the Company) and fails to cure such breach within 30 days of the Portfolio Manager receiving notice of such breach, unless, if such breach is remediable, the Portfolio Manager has taken action that the Portfolio Manager believes in good faith will remedy such breach, and such action does remedy such breach, within sixty (60) days after the Portfolio Manager receives notice thereof; (c) the Portfolio Manager is wound up or dissolved or there is appointed over it or a substantial portion of its assets a receiver, administrator, administrative receiver, trustee or similar officer; or the Portfolio Manager (i) ceases to be able to, or admits in writing its inability to, pay its debts as they become due and payable, or makes a general assignment for the benefit of, or enters into any composition or arrangement with, its creditors generally; (ii) applies for or consents (by admission of material allegations of a petition or otherwise) to the appointment of a receiver, trustee, assignee, custodian, liquidator or sequestrator (or other similar official) of the Portfolio Manager or of any substantial part of its properties or assets, or authorizes such an application or consent, or proceedings seeking such appointment are commenced without such authorization, consent or application against the Portfolio Manager and continue undismissed for sixty (60) days; (iii) authorizes or files a voluntary petition in bankruptcy, or applies for or consents (by admission of material allegations of a petition or otherwise) to the application of any bankruptcy, reorganization, arrangement, readjustment of debt, insolvency or dissolution, or authorizes such application or consent, or proceedings to such end are instituted against the Portfolio Manager without such authorization, application or consent and are approved as properly instituted and remain undismissed for sixty (60) days or result in adjudication of bankruptcy or insolvency; or (iv) permits or suffers all or any substantial part of its properties or assets to be sequestered or attached by court order and the order remains undismissed for sixty (60) days; (d) the occurrence of an act by the Portfolio Manager that constitutes fraud or criminal activity in the performance of its obligations under the Portfolio Management Agreement (as determined pursuant to a final adjudication by a court of competent jurisdiction), or the Portfolio Manager being indicted for a criminal offense materially related to its business of providing asset management services; or (e) any Key Person of the Portfolio Manager (in the performance of his or her investment management duties) is convicted for a criminal offense materially related to the business of the Portfolio Manager providing asset management services and continues to have responsibility for the performance by the Portfolio Manager hereunder for a period of ten (10) days after such conviction.

The Portfolio Management Agreement provides that if any of the events specified in the definition of “Cause” occurs, the Portfolio Manager will give prompt written notice thereof to the Company upon the Portfolio Manager’s becoming aware of the occurrence of such event. The Advisory Board and/or the Board of Directors may waive any event

described in (a), (b), (d), or (e) above as a basis for termination of the Portfolio Management Agreement and removal of the Portfolio Manager under the terms of the Portfolio Management Agreement.

Any resignation or removal of the Portfolio Manager will only be effective on the satisfaction of certain conditions set out in the Portfolio Management Agreement.

Under the Portfolio Management Agreement, the Portfolio Manager agrees to perform its obligations thereunder, with reasonable care (a) using a degree of skill and attention no less than that which the Portfolio Manager exercises with respect to comparable assets that it manages for itself and others having similar investment objectives and restrictions, and (b) to the extent not inconsistent with the foregoing, in a manner consistent with the Portfolio Manager's customary standards, policies and procedures in performing its duties under the Portfolio Management Agreement (the "**Standard of Care**"); provided that the Portfolio Manager will not be liable for any loss or damages resulting from any failure to satisfy the Standard of Care except to the extent any act or omission of the Portfolio Manager constitutes a Portfolio Manager Breach (as defined below). The Standard of Care may change from time to time to reflect changes by the Portfolio Manager to its customary standards, policies and procedures provided that such customary standards, policies and procedures are at least as rigorous as the foregoing.

The Portfolio Manager will not be liable (whether directly or indirectly, in contract or in tort or otherwise) to the Company under the Portfolio Management Agreement for liabilities incurred by the Company as a result of or arising out of or in connection with the performance by the Portfolio Manager under the Portfolio Management Agreement, or for any losses or damages resulting from any failure to satisfy the Standard of Care except to the extent such liabilities were incurred by reason of acts or omissions constituting bad faith, fraud, wilful misconduct or due to the gross negligence (with such term given its meaning under New York law) or reckless disregard of the duties and obligations of the Portfolio Manager (a "**Portfolio Manager Breach**").

Under the Portfolio Management Agreement, the Company will be required to indemnify the Portfolio Manager and its affiliates, managers, directors, officers, secretaries, partners, agents and employees, from and against all liabilities incurred in connection with the Portfolio Management Agreement (except to the extent such liabilities are incurred as a result of any acts or omissions of the Portfolio Manager which constitute a Portfolio Manager Breach).

The Portfolio Manager is able to resign its role under the Portfolio Management Agreement upon 90 days' written notice to the Company. Whilst the resignation will not be effective until the date as of which a successor adviser has been appointed, it may be difficult to locate an alternative adviser as a successor. In addition, the Portfolio Manager may immediately resign by providing written notice to the Company upon the occurrence of certain events relating to the Company such as, amongst others, the failure of the Company to comply in any material respect with any investment policy or investment objective to which it is bound to comply, a wilful breach or knowing violation by the Company of a material provision of the Portfolio Management Agreement or the occurrence of insolvency proceedings in respect of the Company.

Under the Portfolio Management Agreement, the Portfolio Manager agrees to the provision of certain human resources as may be necessary to enable the Company to conduct any matters related to its portfolio of assets.

Under the Portfolio Management Agreement, the Company shall pay to the Portfolio Manager an amount equivalent to all reasonable third party costs and expenses incurred by the Portfolio Manager in the performance of its obligations thereunder, together with any irrecoverable VAT arising on such costs and expenses.

The Portfolio Management Agreement is governed by the laws of the State of Texas.

Predecessor and Interim Portfolio Management Agreements and Terminations

Prior to the current Portfolio Management Agreement, the Company held a Portfolio Management Agreement dated 22 December 2016 (the "**Predecessor Portfolio Management Agreement**") between (i) the Company and (ii) Acis as the predecessor portfolio manager (the "**Predecessor Portfolio Manager**"), pursuant to which the Company appointed Acis as the Predecessor Portfolio Manager to select the portfolio of investments and instruct the Custodian with respect to any acquisition, disposition or sale of investments and provide certain support and assistance (including back and middle office functions), personnel and credit and market research and analysis in connection with the investment and ongoing management of the portfolio.

The terms of the Predecessor Portfolio Management Agreement were substantially similar to the terms of the Portfolio Management Agreement.

The Predecessor Portfolio Management Agreement was governed by the laws of the State of Texas.

The Predecessor Portfolio Management Agreement was terminated pursuant to a Portfolio Management Agreement dated October 27, 2017 (the “**Interim Portfolio Management Agreement**”) between (i) the Company and (ii) the Portfolio Manager and agreed and acknowledged by the Predecessor Portfolio Manager, pursuant to which the Company appointed Highland HCF as the Portfolio Manager to select the portfolio of investments and instruct the Custodian with respect to any acquisition, disposition or sale of investments and provide certain support and assistance (including back and middle office functions), personnel and credit and market research and analysis in connection with the investment and ongoing management of the portfolio. Pursuant to the Interim Portfolio Management Agreement, (x) the Predecessor Portfolio Management Agreement was cancelled and terminated in its entirety, (y) each party thereto released the other party from all claims, suits or causes of action arising out of or relating to the Predecessor Portfolio Management Agreement and (z) each party ratified prior transactions effected in accordance with the Predecessor Portfolio Management Agreement.

The terms of the Interim Portfolio Management Agreement were substantially similar to the terms of the Portfolio Management Agreement.

The Interim Portfolio Management Agreement was terminated pursuant to the Portfolio Management Agreement. Pursuant to the Interim Portfolio Management Agreement, (x) the Predecessor Portfolio Management Agreement was cancelled and terminated in its entirety and (y) each party ratified prior transactions effected in accordance with the Interim Portfolio Management Agreement.

The Interim Portfolio Management Agreement was governed by the laws of the State of Texas.

Subscription and Transfer Agreement

A Subscription and Transfer Agreement dated November 15, 2017 (the “**Subscription and Transfer Agreement**”) entered into by and among the Company, the Portfolio Manager, CLO Holdco, Ltd., HarbourVest Dover Street IX Investment L.P., HarbourVest 2017 Global AIF L.P., HarbourVest 2017 Global Fund L.P., HV International VIII Secondary L.P., HarbourVest Skew Base AIF L.P., Highland Capital Management, L.P., Lee Blackwell Parker, III, Quest IRA, Inc., fbo Lee B. Parker, III, Acct., Quest IRA, Inc., fbo Hunter Covitz, Acct., Quest IRA, Inc., fbo Jon Poglitsch, Acct. and Quest IRA, Inc., fbo Neil Desai, Acct., pursuant to which CLO Holdco, Ltd., as the existing Shareholder, agrees to transfer a portion of its shares to the new Shareholders listed above.

Under the Subscription and Transfer Agreement, CLO Holdco, Ltd. agreed to provide an indemnity to the new Shareholders relating to certain liabilities arising prior to the date of the transfer of Shares.

Further, each of the Shareholders subscribed to purchase Shares on a pro rata basis pursuant to commitments under the Subscription and Transfer Agreement, to be called for settlement by the Portfolio Manager from time to time during the Investment Period and at such time issued (including in the form of fractional shares).

The Subscription and Transfer Agreement may be terminated by mutual agreement of the parties.

The Subscription and Transfer Agreement is governed by the laws of Guernsey.

Members' Agreement

A Shareholders' Agreement relating to the Company dated November 15, 2017 (the “**Shareholder's Agreement**”), among CLO HoldCo, Ltd., HarbourVest Dover Street IX Investment L.P., HarbourVest 2017 Global AIF L.P., HarbourVest 2017 Global Fund L.P., HV International VIII Secondary L.P., HarbourVest Skew Base AIF L.P., Highland Capital Management, L.P., Lee Blackwell Parker, III, Quest IRA, Inc., fbo Lee B. Parker, III, Acct., Quest IRA, Inc., fbo Hunter Covitz, Acct., Quest IRA, Inc., fbo Jon Poglitsch, Acct., Quest IRA, Inc., fbo Neil Desai, Acct., the Company and the Portfolio Manager, which contemplates certain agreements of commercial terms among the Shareholders with respect to the formation of an Advisory Board, voting matters and the Shareholders' commitments to settle subscriptions for the Placing Shares.

Pursuant to the Shareholders' Agreement, the Shareholders set forth their rights in respect of the Company with respect to their voting rights, the composition and function of the Advisory Board, provisions with respect to Shareholders defaulting on commitments to settle Shares, indemnification and restrictions on the transfers or disposals of Shares.

The Shareholders' Agreement will be terminated when one party holds all the Shares, when a resolution is passed by the Shareholders or creditors of the Company or with the written consent of the parties.

The Shareholders' Agreement is governed by the laws of Guernsey.

NexBank Credit Facility

The Company currently has the NexBank Credit Facility with a principal amount of \$22,158,337, as of September 30, 2017. The NexBank Credit Facility is governed by an Amended and Restated Loan Agreement dated as of 17 January 2017 that provides for quarterly payments of principal and interest at 5.00% *per annum* and a maturity on November 23, 2021.

Warehouse Loan Facilities

One or more multi-currency Warehouse Loan Facilities may be entered into from time to time between (i) the Company and (ii) a warehouse provider as described in "*Summary-Borrowing-Warehouse Loan Facilities*".

Forward Purchase Agreements

Forward Purchase Agreements may be entered into from time to time, between (i) the Company and (ii) a CLO (each, a "**Forward Purchase Agreement**"), pursuant to which the Company may from time to time enter into sale and purchase contracts with a CLO with respect to the assets of the Company ("**Forward Sales**"). Such Forward Sales are with a view to effectively managing its access to wholesale funding and exposure to undesirable market price volatilities of its portfolio. Such Forward Purchase Agreements may be entered into at the same time or shortly after the origination or acquisition of the relevant asset by the Company, at a later date, or not at all. Where a loan becomes subject to a Forward Purchase Agreement, the Company will (subject to the conditions set out below) neither receive the gain nor bear the loss that occurs between the date when the loan is added to the Forward Purchase Agreement and the date when the transfer occurs.

Each Forward Sale will be conditional upon:

- the occurrence of the closing date of the relevant CLO; and
- the assets that are the subject of such Forward Sale satisfying a set of eligibility criteria on the closing date of the relevant CLO as agreed between the Company and the relevant CLO.

The Forward Purchase Agreements will contain standard limited recourse and non-petition provisions with respect to the Company and with respect to the relevant CLO.

The governing law of the Forward Purchase Agreements will be English or New York law.

Custody Agreement

A custody agreement dated 10 August 2015 between (i) the Company and (ii) the Custodian (the "**Custody Agreement**"), whereby the Custodian was appointed to act as custodian of the Company's investments, cash and other assets.

The Custodian provides custody services in respect of such of the property of the Company which is delivered to and accepted by the Custodian as and when such custody services may be required. Securities are held by the Custodian in one or more accounts registered in the name of the Company or of the Custodian, its delegate or a nominee. The securities are separately designated in the books of the Custodian as belonging to the Company.

Under the terms of the Custody Agreement, the Custodian is entitled to receive transaction charges and sub-custodian charges will be recovered by the Custodian from the Company as they are incurred by the relevant sub-custodian. All such charges shall be charged at normal commercial rates.

The Custody Agreement shall continue for an initial period of six months and thereafter may be terminated by either of the parties hereto on giving ninety (90) days' prior written notice to the other party hereto, provided that the appointment of the Custodian shall not terminate before the appointment of a replacement Custodian provided always if a replacement custodian is not appointed within six months from the date of the relevant termination notice, the Custody Agreement shall terminate in any event. It may be terminated without notice in certain specified circumstances including the insolvency of either party.

The Custodian has a market standard indemnity from the Company in relation to liabilities incurred other than as a result of its negligence, fraud, bad faith, wilful default or recklessness in carrying out its responsibilities under the Custody Agreement.

The Custody Agreement is governed by the laws of Ireland.

MEMORANDUM AND ARTICLES

Memorandum of Incorporation

The Memorandum of Incorporation provides that the Company's objects are unrestricted and it shall therefore have the full power and authority to carry out any object not prohibited by the Companies Law, or any other law of Guernsey.

Articles of Incorporation

The Articles of Incorporation of the Company contain provisions, *inter alia*, to the following effect.

Share Capital

The Company may issue an unlimited number of Shares of no par value each, including Unclassified Shares which may be designated and issued as Ordinary Shares or otherwise as the Directors may from time to time determine.

Ordinary Shares

The rights attaching to the Ordinary Shares shall be as follows:

- (a) As to income – subject to the rights of any Ordinary Shares which may be issued with special rights or privileges, the Ordinary Shares of each class carry the right to receive all income of the Company attributable to the Ordinary Shares, and to participate in any distribution of such income by the Company, pro rata to the relative Net Asset Values of each of the classes of Ordinary Shares and, within each such class, income shall be divided *pari passu* amongst the holders of Ordinary Shares of that class in proportion to the number of Ordinary Shares of such class held by them.
- (b) As to capital – on a winding up of the Company or other return of capital (other than by way of a repurchase or redemption of Ordinary Shares in accordance with the provision of the Articles and the Companies Law), the surplus assets of the Company attributable to the Ordinary Shares remaining after payment of all creditors shall, subject to the rights of any Ordinary Shares that may be issued with special rights or privileges, be divided amongst the holders of Ordinary Shares of each class pro rata to the relative Net Asset Values of each of the classes of the Ordinary Shares and, within each such class, such assets shall be divided *pari passu* amongst the holders of Ordinary Shares of that class in proportion to the number of Ordinary Shares of that class held by them.
- (c) As to voting – the holders of the Ordinary Shares shall be entitled to receive notice of and to attend, speak and vote at general meetings of the Company.

General

Without prejudice to any special rights previously conferred on the holders of any existing Shares or class of Shares, any Share (or option, warrant or other right in respect of a Share) in the Company may be issued with such preferred, deferred or other special rights or restrictions, whether as to dividend, voting, return of capital or otherwise, as the Board may determine.

Offers to Shareholders to be on a pre-emptive basis

- (a) The Company shall not allot equity securities to a person on any terms unless:
 - (i) it has made an offer to each person who holds equity securities of the same class in the Company to allot to him on the same or more favourable terms a proportion of those securities that is as nearly as practicable equal to the proportion in number held by him of the share capital of the Company; and
 - (ii) the period during which any such offer may be accepted has expired or the Company has received notice of the acceptance or refusal of every offer so made.
- (b) Securities that the Company has offered to allot to a holder of equity securities in accordance with the preceding may be allotted to him, or anyone in whose favour he has renounced his right to their allotment, without contravening the restriction referred to in above.
- (c) Shares held by the Company as treasury shares shall be disregarded for the purposes of the restriction referred to in the second preceding paragraph, so that the Company is not treated as a person who holds equity shares; and the treasury shares are not treated as forming part of the equity share capital of the Company.
- (d) Any offer required to be made by the Company pursuant to the restriction referred to above should be made by a notice (given in accordance with “—*Notices*” below) and such offer must state a period during which such offer may be accepted and such offer shall not be withdrawn before the end of that period. Such period must be a period of at least 21 days beginning on the date on which such offer is deemed to be delivered or received (as the case may be), pursuant to “—*Notices*” below.
- (e) The restriction referred to above shall not apply in relation to the allotment of bonus shares, nor to a particular allotment of equity securities if these are, or are to be, wholly or partly paid otherwise than in cash.
- (f) The Company may by special resolution resolve that the restriction referred to above shall be excluded or that the restriction referred to in above shall apply with such modifications as may be specified in the resolution:
 - (i) generally in relation to the allotment by the Company of equity securities;
 - (ii) in relation to allotments of a particular description; or
 - (iii) in relation to a specified allotment of equity securities;and any such resolution must: (A) state the maximum number of equity securities in respect of which the restriction referred to above is excluded or modified; and (B) specify the date on which such exclusion or modifications will expire, which must be not more than five years from the date on which the resolution is passed.
- (g) Any resolution passed pursuant to the provisions referred to in the preceding paragraph may:
 - (i) be renewed or further renewed by special resolution of the Company for a further period not exceeding five years; and

- (ii) be revoked or varied at any time by special resolution of the Company.
- (h) Notwithstanding that any such resolution referred to in the two preceding paragraphs has expired, the Directors may allot equity securities in pursuance of an offer or agreement previously made by the Company if the resolution enabled the Company to make an offer or agreement that would or might require equity securities to be allotted after it expired.
- (i) In relation to an offer to allot securities, a reference (however expressed) to the holder of shares of any description is to whoever was the holder of shares of that description at the close of business on a date to be specified in the offer and the specified date must fall within the period of 28 days immediately before the date of the offer.

Issue of Shares

Subject to “—*Offers to Shareholders to be on a pre-emptive basis*”, the unissued Shares shall be at the disposal of the Board, which is authorised to allot or grant options, warrants or other rights over or otherwise dispose of them to such persons on such terms and conditions and at such times as the Board determines but so that no Share shall be issued at a discount except in accordance with the Companies Law and so that the amount payable on application on each Share shall be fixed by the Board.

Variation of class rights

If at any time the share capital is divided into different classes of Shares, the rights attached to any class (unless otherwise provided by the terms of issue) may, whether or not the Company is being wound up, be varied with the consent in writing of the holders of three-fourths of the issued Shares of that class or with the sanction of a special resolution of the holders of the Shares of that class.

Winding up

The term of the Placing will commence on the date of the Placing and will end (and the Company thereafter will be wound up and dissolved) at the end of the Term, subject to extension as described in “*Summary-Term*”.

If the Company is wound up whether voluntarily or otherwise the liquidator may with the sanction of a special resolution divide among the Shareholders in specie any part of the assets of the Company and may with the like sanction vest any part of the assets of the Company in trustees upon such trusts for the benefit of the Shareholders as the liquidator with the like sanction shall think fit.

If any of the securities or other assets to be divided as aforesaid involve a liability to calls or otherwise any person entitled under such division to any of the said assets may within fourteen (14) clear days after the passing of the special resolution, by notice in writing, direct the liquidator to sell his proportion and pay him the net proceeds and the liquidator shall, if practicable, act accordingly.

Disclosure of Third Party Interests in Shares

The Directors shall have power, if required for any regulatory purposes, by notice in writing to require any Shareholder to disclose to the Company the identity of any person (other than the Shareholder) who has an interest in the Shares held by the Shareholder and the nature of such interest. Any such notice shall require any information in response to such notice to be given in writing within the prescribed period which is 28 days after service of the notice or 14 days if the Shares concerned represent 0.25 per cent or more in value of the issued Shares of the relevant class or such other reasonable period as the Directors may determine. If any Shareholder has been duly served with such a notice and is in default for the prescribed period in supplying to the Company the information required by such notice, the Directors may serve a direction notice upon such Shareholder. The direction notice may direct that in respect of the Shares in respect of which the default has occurred (the “default Shares”) and any other Shares held by the Shareholder, the Shareholder shall not be entitled to vote (either personally or by representative or by proxy) in general meetings or class meetings. Where the default Shares represent at least 0.25 per cent of the class of Shares concerned, the direction notice may additionally direct that dividends on such shares will be retained by the Company (without interest) and

that no transfer of the Shares (other than a transfer approved under the Articles) shall be registered until the default is rectified.

Dividends

Subject to compliance with Section 304 of the Companies Law and the Distribution Priority, the Board may at any time declare and pay such dividends as appear to be justified by the position of the Company. The Board may also declare and pay any fixed dividend which is payable on any Shares half-yearly or otherwise on fixed dates whenever the position, in the opinion of the Board, so justifies. Dividend payments may be suspended by the Directors in their absolute discretion, including, without limitation, in the event of adverse, or perceived adverse, market conditions.

The method of payment of dividends shall be at the discretion of the Board and the Portfolio Manager.

No dividend shall be paid in excess of the amounts permitted by the Companies Law or approved by the Board.

Unless and to the extent that the rights attached to any Shares or the terms of issue thereof otherwise provide, all dividends shall be declared and paid pro rata according to the number of Shares held by each Shareholder. For the avoidance of doubt, where there is more than one class of Shares in issue, dividends declared in respect of any class of Share shall be declared and paid pro rata according to the number of Shares of the relevant class held by each Shareholder.

With the sanction of the Company in general meeting by way of a special resolution, any dividend may be paid wholly or in part by the distribution of specific assets and, in particular, of paid-up Shares of the Company. Where any difficulty arises in regard to such distribution, the Board may settle the same as it thinks expedient and in particular may issue fractional Shares and fix the value for distribution of such specific assets and may determine that cash payments shall be made to any Shareholders upon the basis of the value so fixed in order to adjust the rights of Shareholders and may vest any such specific assets in trustees for the Shareholders entitled as may seem expedient to the Board.

Any dividend interest or other monies payable in cash in respect of Shares may be paid by cheque or warrant sent through the post to the registered address of the holder or, in the case of joint holders, to the registered address of that one of the joint holders who is first named on the register. Any one of two or more joint holders may give effectual receipts for any dividends, interest or other monies payable in respect of their joint holdings. In addition, any such dividend or other sum may be paid by any bank or other funds transfer system or such other means and to or through such person as the holder or joint holders (as the case may be) may in writing direct, and the Company shall have no responsibility for any sums lost or delayed in the course of any such transfer or where it has acted on any such directions. Any one of two or more joint holders may give effectual receipts for any dividends, interest, bonuses or other monies payable in respect of their joint holdings.

No dividend or other monies payable on or in respect of a Share shall bear interest against the Company.

All unclaimed dividends may be invested or otherwise made use of by the Board for the benefit of the Company until claimed and the Company shall not be constituted a trustee in respect thereof. All dividends unclaimed for a period of six years after having been declared shall be forfeited and shall revert to the Company.

Transfer of Shares

No Shareholder shall sell, pledge, charge, mortgage, assign, assign by way of security, transfer, convey, exchange or otherwise dispose of its Shares or its commitment to settle purchases of Shares under the Subscription and Transfer Agreement (each a “**Transfer**”, other than to an Affiliate of an initial Shareholder party hereto, without the prior written consent of the Portfolio Manager, which consent shall be in the sole discretion of the Portfolio Manager; provided that no such Transfer shall be made unless in the opinion of counsel reasonably satisfactory to the Portfolio Manager (who may be counsel for the Company, and which requirement for an opinion may be waived, in whole or in part, in the sole discretion of the Portfolio Manager) that:

- (a) such Transfer would not require registration under the Securities Act or any state securities or “Blue Sky” laws or other laws applicable to the Shares to be assigned or transferred and is conducted in conformance with the restrictions set forth in this Offering Memorandum;
- (b) such Transfer would not be reasonably likely to cause the Company to be subject to tax in any jurisdiction other than of its incorporation on a net income basis, not be reasonably likely to cause the Company to become subject to registration as an investment company under the U.S. Investment Company Act;
- (c) such Transfer would not cause the Company to be considered to be an entity whose underlying assets are considered to include “plan assets” by reason of investment by an “employee benefit plan” or “plan” in such entity pursuant to the U.S. Plan Assets Regulations; and
- (d) such sale, assignment, disposition or transfer would not to cause all or any portion of the assets of the Company to constitute “plan assets” under ERISA or the U.S. Tax Code.

Prior to making any Transfer of Shares (other than Transfers to Affiliates of an initial Shareholder or, in the case of CLO Holdco or a Highland Principal (as defined in the Members' Agreement), to Highland, its Affiliates or another Highland Principal) a Shareholder must first offer to the other Shareholders a right to purchase the Shares, on a pro rata basis with respect to their current Shares, at the same price (which must be cash) as such Shares are proposed to be purchased by the prospective third party purchaser pursuant to an irrevocable offer letter. The other Shareholders will have 30 days following receipt of the letter to determine whether to purchase their entire pro rata portion of the Shares proposed to be Transferred. If the other Shareholders do not accept the offer, the Shareholder may (subject to complying with the other Transfer restrictions in the Articles) Transfer the applicable Shares that such Shareholders have not elected to purchase to a third party at a price equal to or greater than the price described in the offer letter, provided that if the Shareholder has not (a) entered into a definitive agreement to effect such sale within 90 days after the expiration of the period that the other Shareholders have to accept the offer in the offer letter or (b) consummated the sale within 120 day after the entry into the definitive agreement to consummate the sale, it must comply with these right of first refusal procedures again. Any Shareholder (other than the Shareholder proposing to Transfer its Shares) may assign its right to purchase its pro rata portion of the Shares to any other Shareholder (subject to complying with the other Transfer restrictions in the Articles), any initial Shareholder (other than the Shareholder proposing to Transfer its Shares) may assign its right to purchase its pro rata portion of the Shares to an Affiliate (subject to complying with the other Transfer restrictions in the Articles), and CLO Holdco or the Highland Principals (unless such Shareholder is the Shareholder proposing the Transfer its shares) may assign its right to purchase its pro rata portion of the Shares to Highland, an Affiliate of Highland or other Highland Principals (subject to complying with the other Transfer restrictions in the Articles).

Subject to the Articles and such of the restrictions of the Articles as may be applicable, any Shareholder may transfer all or any of his certificated Shares by an instrument of transfer in any usual or common form or in any other form which the Board may approve. The instrument of transfer of a certificated Share shall be signed by or on behalf of the transferor and, unless the Share is fully paid, by or on behalf of the transferee. An instrument of transfer of a certificated Share need not be under seal.

The Board may, in its absolute discretion and without giving a reason, decline to transfer, convert or register any transfer of any Share in certificated form which is not fully paid or on which the Company has a lien. The Directors may also refuse to register a transfer of Shares unless it is in respect of only one class of Shares, it is in favour of a single transferee or not more than four joint transferees; and in the case of a Share in certificated form, having been delivered for registration to the Office or such other place as the Board may decide, it is accompanied by the certificate(s) for the Shares to which it relates and such other evidence as the Board may reasonably require to prove the right of the transferor to make the transfer.

The Board may, in its absolute discretion, decline to register a transfer of any Shares to any person whose ownership may result in a person holding Shares in violation of the transfer restrictions published by the Company, from time to time.

The Directors may, in their absolute discretion, refuse to register a transfer of any Shares to a person that they have reason to believe is (i) an “employee benefit plan” (within the meaning of Section 3(3) of ERISA) that is subject to Part 4 of Title 1 of ERISA, (ii) a plan, individual retirement account or other arrangement that is subject to Section

4975 of the U.S. Internal Revenue Code of 1986, as amended (the “**U.S. Tax Code**”) or any other state, local laws or regulations that would have the same effect as regulations promulgated under ERISA by the U.S. Department of Labor and codified at **29 C.F.R. Section 2510.3-101** to cause the underlying assets of the Company to be treated as assets of that investing entity by virtue of its investment (or any beneficial interest) in the Company and thereby subject the Company and the Portfolio Manager (or other persons responsible for the investment and operation of the Company’s assets) to laws or regulations that are similar to the fiduciary responsibility or prohibited transaction provisions contained in Title I of ERISA or Section 4975 of the U.S. Tax Code, (iii) an entity whose underlying assets are considered to include “plan assets” of any such plan, account or arrangement (each of (i), (ii) and (iii) in this paragraph a “**Plan**”) or (iv) any person in circumstances where the holding of Shares by such person would (a) give rise to an obligation on the Company to register as an “investment company” under the Investment Company Act (as defined in the Articles) (including because the holder of the Shares is not a “qualified purchaser” as defined in the Investment Company Act), (b) preclude the Company from relying on the exception to the definition of “investment company” contained in Section 3(c)(7) of the Investment Company Act, (c) give rise to an obligation on the Company to register its Shares under the Exchange Act, the Securities Act or any similar legislation (each as defined in the Articles), (d) result in the Company not being considered a “Foreign Private Issuer” as that term is defined by Rule 3b-4(c) promulgated under the Exchange Act, (e) give rise to an obligation on the Portfolio Manager to register as a commodity pool operator or commodity trading advisor under the U.S. Commodity Exchange Act of 1974, as amended, (f) cause the Company to be a “controlled foreign corporation” for the purposes of the U.S. Tax Code, or cause the Company to suffer any pecuniary disadvantage (including any excise tax, penalties or liabilities under ERISA or the U.S. Tax Code), or (g) give rise to the Company or the Portfolio Manager becoming subject to any U.S. law or regulation determined to be detrimental to it (each such person in this paragraph a “**Prohibited U.S. Person**”). Each person acquiring Shares shall by virtue of such acquisition be deemed to have represented to the Company that they are not a Prohibited U.S. Person.

If the Board refuses to register the transfer of a Share it shall, within two months after the date on which the transfer was lodged with the Company, send notice of the refusal to the transferee.

The registration of transfers may be suspended at such times and for such periods (not exceeding 30 days in the aggregate in any one calendar year) as the Board may decide on giving notice in *La Gazette Officielle* and either generally or in respect of a particular class of Share.

Compulsory redemptions of Shares by the Company

The Company may redeem all or any of the Shares at any time subject to and in accordance with the provisions of the Members' Agreement and the Articles.

A Director is authorised to do all such acts and things as shall be necessary or expedient and to execute any documents deemed necessary or desirable in each case to complete any redemption of Shares subject to and in accordance with the Members' Agreement and the Articles.

The redemption of Shares under the Articles shall be deemed to be effective from the close of business on the relevant redemption date at which time any Shares which are so redeemed shall forthwith be cancelled and the name of the relevant Shareholder(s) be removed from the Register. Upon the redemption of a Share being effected pursuant to the Members' Agreement and the Articles, a Shareholder shall cease to be entitled to any rights in respect thereof save for payment of the redemption proceeds.

Purchase of Shares

The Company may, at the discretion of the Board, purchase any of its own Shares, whether or not they are redeemable, and may pay the purchase price in respect of such purchase to the fullest extent permitted by the Companies Law.

Notices

A notice or other communication may be given by the Company to any Shareholder by any means as set out in Section 523 of the Companies Law.

Any notice or other document, if served by post (including registered post, recorded delivery service or ordinary letter post), shall be deemed to have been served 48 hours after the time when the letter containing the same is posted and in proving such service it shall be sufficient to prove that the letter containing the notice or document was properly posted.

Any notice or other document that may be sent by the Company by courier will be deemed to be received 24 hours after the time at which it was despatched.

A notice may be given by the Company to the joint holders of a Share by giving the notice to the joint holder first named in the register in respect of the Share.

Any notice or other communication sent to the address of any Shareholder shall, notwithstanding the death, disability or insolvency of such Shareholder and whether the Company has notice thereof, be deemed to have been duly served in respect of any Share registered in the name of such Shareholder as sole or joint holder and such service shall, for all purposes, be deemed a sufficient service of such notice or document on all persons interested (whether jointly with or as claiming through or under him) in any such Share.

All Shareholders shall be deemed to have agreed to accept communication from the Company by electronic means in accordance with sections 524 and 526 and schedule 3 of the Companies Law unless a Shareholder notifies the Company otherwise. Such notification must be in writing and signed by the Shareholder and delivered to the Company's registered office or such other place as the Board directs. A Shareholder shall be entitled to require the Company to send him a version of a document or information in hard copy form.

Every person who becomes entitled to a Share shall be bound by any notice in respect of that Share which, before his name is entered in the register of members, has been duly given to a person from which he derives his title.

General meetings

General meetings shall be held once at least in each calendar year in accordance with Section 199 of the Companies Law but so that not more than fifteen (15) months may elapse between one annual general meeting and the next. At each such annual general meeting shall be laid copies of the Company's most recent accounts, Directors' report and, if applicable, the auditor's report in accordance with Section 252 of the Companies Law. The requirement for an annual general meeting may be waived by the shareholders in accordance with Section 201 of the Companies Law. Other meetings of the Company shall be called extraordinary general meetings.

All general meetings shall be held in Guernsey.

A shareholder participating by video link or telephone conference call or other electronic or telephonic means of communication in a meeting at which a quorum is present shall be treated as having attended that meeting, provided that the shareholders present at the meeting can hear and speak to the participating shareholder.

A video link or telephone conference call or other electronic or telephonic means of communication in which a quorum of shareholders participates and all participants can hear and speak to each other shall be a valid meeting which shall be deemed to take place where the Chairman is present unless the shareholders resolve otherwise.

Any general meeting convened by the Board, unless its time shall have been fixed by the Company in a general meeting or unless convened in pursuance of a requisition, may be postponed by the Board by notice in writing and the meeting shall, subject to any further postponement or adjournment, be held at the postponed date for the purpose of transacting the business covered by the original notice.

The Board may, whenever it thinks fit, and shall on the requisition of shareholders who hold more than ten per cent (10%) of such of the capital of the Company as carries the right to vote at general meetings (excluding any capital held as treasury shares) in accordance with Sections 203 and 204 of the Companies Law, proceed to convene a general meeting.

Notice of general meetings

A general meeting of the Company (other than an adjourned meeting) must be called by notice of at least 14 clear days.

A general meeting may be called by shorter notice than otherwise required if all the Shareholders entitled to attend and vote so agree.

Notices and other documents may be sent in electronic form or published on a website in accordance with Section 208 of the Companies Law.

Notice of a general meeting of the Company must be sent to every Shareholder (being only persons registered as a Shareholder), every Director and every alternate Director registered as such.

Notice of a general meeting of the Company must state the time and date of the meeting, state the place of the meeting, specify any special business to be put to the meeting (as defined in the Articles), contain the information required under Section 178(6)(a) of the Companies Law in respect of a resolution which is to be proposed as a special resolution at the meeting, contain the information required under Section 179(6)(a) of the Companies Law in respect of a resolution which is to be proposed as a waiver resolution at the meeting, and contain the information required under Section 180(3)(a) of the Companies Law in respect of a resolution which is to be proposed as a unanimous resolution at the meeting.

Notice of a general meeting must state the general nature of the business to be dealt with at the meeting.

The accidental omission to give notice of any meeting to or the non-receipt of such notice by any Shareholder shall not invalidate any resolution or any proposed resolution otherwise duly approved.

Conflicts of interest

A Director must, immediately after becoming aware of the fact that he is interested in a transaction or proposed transaction with the Company, disclose to the Board in accordance with section 162 of the Companies Law the nature and extent of that interest.

The obligation referred to above does not apply if:

- (a) the transaction or proposed transaction is between the Director and the Company; and
- (b) the transaction or proposed transaction is or is to be entered into in the ordinary course of the Company's business and on usual terms and conditions.

A general disclosure to the Board to the effect that a Director has an interest (as director, officer, employee, member or otherwise) in a party and is to be regarded as interested in any transaction which may after the date of the disclosure be entered into with that party is sufficient disclosure of interest in relation to that transaction.

Nothing referred to above in this section applies in relation to:

- (a) remuneration or other benefit given to a Director;
- (b) insurance purchased or maintained for a Director in accordance with Section 158 of the Companies Law; or
- (c) a qualifying third party indemnification provision provided for a Director in accordance with Section 159 of the Companies Law.

Subject to the paragraph below, a Director is interested in a transaction to which the Company is a party if such Director:

- (a) is a party to, or may derive a material benefit from, the transaction;

- (b) has a material financial interest in another party to the transaction;
- (c) is a director, officer, employee or member of another party (other than a party which is an associated company) who may derive a material financial benefit from the transaction;
- (d) is the parent, child or spouse of another party who may derive a material financial benefit from the transaction; or
- (e) is otherwise directly or indirectly materially interested in the transaction.

A Director is not interested in a transaction to which the Company is a party if the transaction comprises only the giving by the Company of security to a third party which has no connection with the Director, at the request of the third party, in respect of a debt or obligation of the Company for which the Director or another person has personally assumed responsibility in whole or in part under a guarantee, indemnity or security.

Save as provided in the Articles, a Director shall not vote in respect of any contract or arrangement or any other proposal whatsoever in which he has any material interest otherwise than by virtue of his interest in Shares or debentures or other securities of or otherwise through the Company. A Director may be counted in the quorum at a meeting in relation to any resolution on which he is debarred from voting.

A Director shall (in the absence of some other material interest than is indicated below) be entitled to vote (and be counted in the quorum) in respect of any resolution concerning any of the following matters, namely:

- (a) the giving of any guarantee, security or indemnity to him in respect of money lent or obligations incurred by him at the request of or for the benefit of the Company or any of its subsidiaries;
- (b) the giving of any guarantee, security or indemnity to a third party in respect of a debt or obligation of the Company or any of its subsidiaries for which he himself has assumed responsibility in whole or in part under a guarantee or indemnity or by the giving of security;
- (c) any proposal concerning an offer of Shares or debentures or other securities of or by the Company or any of its subsidiaries for subscription or purchase in which offer he is or is to be interested as a participant in the underwriting or sub-underwriting thereof; or
- (d) any proposal concerning any other company in which he is interested, directly or indirectly and whether as an officer or shareholder or otherwise howsoever, provided that he is not the holder of or beneficially interested in one per cent or more of the issued shares of such company (or of any third company through which his interest is derived) or of the voting rights available to shareholders of the relevant company (any such interest being deemed for these purposes to be a material interest in all circumstances).

Where proposals are under consideration concerning the appointment (including fixing or varying the terms of appointment) of two or more Directors to offices or employment with the Company or any company in which the Company is interested, the Directors may be counted in the quorum for the consideration of such proposals and such proposals may be divided and considered in relation to each Director separately and in such case each of the Directors concerned (if not debarred from voting under the provisions referred to above) shall be entitled to vote (and be counted in the quorum) in respect of each resolution except that concerning his own appointment.

If any question shall arise at any meeting as to the materiality of a Director's interest or as to the entitlement of any Director to vote and such question is not resolved by his voluntarily agreeing to abstain from voting, such question shall be referred to the chairman of the meeting and his ruling in relation to any other Director shall be final and conclusive except in a case where the nature or extent of the interests of the Director concerned have not been fairly disclosed.

The Company may by ordinary resolution suspend or relax the provisions referred to above to any extent or ratify any transaction not duly authorised by reason of a contravention of any of the paragraphs above.

Subject to the provisions referred to above the Directors may exercise the voting power conferred by the shares in any other company held or owned by the Company or exercisable by them as directors of such other company in such manner in all respects as they think fit (including the exercise thereof in favour of any resolution appointing themselves or any of them director, managing director, managers or other officer of such company or voting or providing for the payment or remuneration to the directors, managing director, manager or other officer of such company).

A Director may hold any other office or place of profit under the Company (other than the office of Auditor) in conjunction with his office of Director on such terms as to tenure of office or otherwise as the Directors may determine.

Subject to due disclosure in accordance with the provisions referred to in this section, no Director or intending Director shall be disqualified by his office from contracting with the Company as vendor, purchaser or otherwise, nor shall any such contract or arrangement entered into by or on behalf of the Company in which any Director is in any way interested render the Director liable to account to the Company for any profit realised by any such contract or arrangement by reason of such Director holding that office or of the fiduciary relationship thereby established.

Any Director may act by himself or his firm in a professional capacity for the Company and he or his firm shall be entitled to remuneration for professional services as if he were not a Director, provided that nothing herein contained shall authorise a Director or his firm to act as Auditor to the Company.

Any Director may continue to be or become a director, managing director, manager or other officer or member of any company in which the Company may be interested and (unless otherwise agreed) no such Director shall be accountable for any remuneration or other benefits received by him as a director, managing director, manager or other officer or member of any such other company.

Remuneration and appointment of Directors

The ordinary remuneration of the Directors who do not hold executive office for their services (excluding amounts payable under any other sub-paragraph of the Articles) shall not exceed in aggregate £150,000 per annum or such higher amount as the Company may from time to time by ordinary resolution determine. Such remuneration shall be deemed to accrue from day to day. The Directors shall also be paid all reasonable out-of-pocket travelling, hotel and other expenses properly incurred by them in attending and returning from meetings of the Directors or any committee of the Directors or general meetings of the Company or in connection with the business of the Company. In addition, the Board may award additional remuneration to any Director engaged in exceptional work at the request of the Board on a time spent basis.

The Board shall have power at any time to appoint any person eligible in accordance with Section 137 of the Companies Law to be a Director either to fill a casual vacancy or as an addition to the existing Directors but so that the total number of Directors shall not at any time exceed the number, if any, fixed pursuant to the Articles. Any Director so appointed shall hold office only until the next following annual general meeting and shall then be eligible for re-election. Without prejudice to the powers of the Board, the Company in general meeting may appoint any person to be a Director either to fill a casual vacancy or as an additional Director.

The Directors may at any time appoint one or more of their body (other than a Director resident in the United Kingdom) to the office of managing director for such term and at such remuneration and upon such terms as they determine.

Disqualification of Directors

No person other than a Director retiring at a general meeting shall, unless recommended by the Directors, be eligible for election by the Company to the office of Director unless, not less than 14 clear days before the date appointed for the meeting there shall have been left at the Company's registered office notice in writing signed by a Shareholder duly qualified to attend and vote at the meeting for which such notice is given of his intention to propose such person for election together with notice in writing signed by that person of his willingness to be elected.

A Director shall cease to hold office: (i) if the Director (not being a person holding for a fixed term an executive office subject to termination if he ceases for any reason to be a Director) resigns his office by written notice signed by him sent to or deposited at the registered office of the Company, (ii) if he shall have absented himself from meetings of the Board for a consecutive period of 12 months and the Board resolves that his office shall be vacated, (iii) if he

dies or becomes of unsound mind or incapable, (iv) if he becomes insolvent, suspends payment or compounds with his creditors, (v) if he is requested to resign by written notice signed by all his co-Directors, (vi) if the Company in general meeting shall declare that he shall cease to be a Director, (vii) if he becomes resident in the United Kingdom and, as a result thereof, a majority of the Directors are resident in the United Kingdom, (viii) if he becomes ineligible to be a Director in accordance with section 137 of the Companies Law or (ix) if he becomes prohibited from being a Director by reason of any order made under any provisions or any law or enactment.

Indemnities

The Directors, company secretary and officers of the Company and their respective heirs and executors shall, to the extent permitted by Section 157 of the Companies Law, be fully indemnified out of the assets and profits of the Company from and against all actions expenses and liabilities which they or their respective heirs or executors may incur by reason of any contract entered into or any act in or about the execution of their respective offices or trusts except such (if any) as they shall incur by or through their own negligence, default, breach of duty or breach of trust respectively and none of them shall be answerable for the acts, receipts, neglects or defaults of the others of them or for joining in any receipt for the sake of conformity or for any bankers or other person with whom any monies or assets of the Company may be lodged or deposited for safe custody or for any bankers or other persons into whose hands any money or assets of the Company may come or for any defects of title of the Company to any property purchased or for insufficiency or deficiency of or defect in title of the Company to any security upon which any monies of the Company shall be placed out or invested or for any loss misfortune or damage resulting from any such cause as aforesaid or which may happen in or about the execution of their respective offices or trusts, except if the same shall happen by or through their own negligence, default, breach of duty or breach of trust.

To the fullest extent permitted by applicable law (including the Companies Law) and subject to compliance with this Offering Memorandum, the Portfolio Manager, its affiliates, any officer, director, secretary, manager, employee or any direct or indirect partner, member, stockholder, agent or legal representative (including executors, guardians and trustees) of the Portfolio Manager and its affiliates, including persons formerly serving in such capacities, any person who serves at the request of the Portfolio Manager or the Board pursuant to the Articles, on behalf of the Company as an officer, director, secretary, manager, partner, member, employee, stockholder, agent or legal representative of any other person serving at the request of the Portfolio Manager or the Board pursuant to the Articles on behalf of the Company in such capacity as listed above, each member of the Advisory Board and each member of any subcommittee thereof and any assignees or successors of the foregoing (each, an **"Indemnified Person"**) shall be fully indemnified against all losses, liabilities, damages, expenses or costs (including any claim, judgment, award, settlement, reasonable legal and other professional fees and disbursements and other costs or expenses incurred in connection with the defence of any proceeding, whether or not matured or unmatured or whether or not asserted or brought due to contractual or other restrictions, joint or several) other than those arising from suits, disputes or actions by Highland, its affiliates or principals, Other Accounts or CLO HoldCo, Ltd. (collectively, the **"Indemnified Losses"**) to which an Indemnified Person may become subject by reason of any acts or omissions or any alleged acts or omissions arising out of such Indemnified Person's or any other person's activities in connection with the conduct of the business or affairs of the Company and/or an investment, unless such Indemnified Losses result from any action or omission which constitutes, with respect to such person, a Triggering Event; provided, that notwithstanding the foregoing, the members of the Advisory Board or members of any subcommittee thereof shall be subject only to a duty of good faith (it being understood that, to the fullest extent permitted by applicable law, any such member, in determining to take or refrain from taking any action, shall be permitted to take into consideration only the interests of the Shareholder and/or other person represented by such member and, in so doing, shall, to the fullest extent permitted by applicable law, be considered to have acted in good faith). Any claims arising from a Triggering Event shall be limited to actual out-of-pocket damages incurred as a direct consequence of the Triggering Event, and shall not include punitive, consequential or other damages or lost profits.

Borrowing powers

Subject to the restrictions set forth in this Offering Memorandum, the Board may exercise all the powers of the Company to borrow money (in whatever currency the Board determines from time to time) and to mortgage, hypothecate, pledge or charge all or part of its undertaking property and uncalled capital and to issue debentures and other securities, whether outright or as collateral security for any liability or obligation of the Company or of any third party, subject to any limits on borrowings adopted by the Board from time to time. The Board may exercise all the

powers of the Company to engage in currency or interest rate hedging in the interests of efficient portfolio management.

Forfeiture and surrender of Shares

Any Share in respect of which a notice requiring payment of an unpaid call or instalment, together with any interest which may have accrued and any expenses which may have been incurred, has been served may, at any time before payment has been made, be forfeited by a resolution of the Directors to that effect. Such forfeiture shall include all dividends declared in respect of the forfeited Share and not actually paid before the forfeiture.

The Board may accept from any Shareholder on such terms as agreed a surrender of any Shares in respect of which there is a liability for calls. Any surrendered Share may be disposed of in the same manner as a forfeited share.

If any Shares are owned directly or beneficially by a person believed by the Directors to be a Prohibited U.S. Person, the Directors may give notice to such person requiring them either (i) to provide the Directors within 30 days of receipt of such notice with sufficient satisfactory documentary evidence to satisfy the Directors that such person is not a Prohibited U.S. Person or (ii) to sell or transfer their Shares to a person qualified to own the same within 30 days and within such 30 days to provide the Directors with satisfactory evidence of such sale or transfer. Where condition (i) or (ii) is not satisfied within 30 days after the serving of the notice, the person will be deemed, upon the expiration of such 30 days, to have forfeited their Shares.

LITIGATION

There are no, and have not been in the last 12 months, any governmental, legal or arbitration proceedings, nor, so far as the Company is aware, are any such proceedings pending or threatened, which may have, or have in the recent past had, a significant effect on the Company's financial position or profitability.

RELATED PARTY TRANSACTIONS

Other than as set out in the section of this Offering Memorandum entitled "*Material Contracts*" (including the NexBank Credit Facility), "*Investment Policy—Company Borrowing*" and cross-transactions as described in "*Risk Factors—Risks Relating to Conflicts of Interest—The Company will be subject to various conflicts of interest involving the Portfolio Manager and its affiliates*" the Company has not entered into any related party transactions. The consent of the Advisory Board will be required with respect to transactions with any Related Party.

GENERAL

Highland may be regarded as the promoter of the Company. Save as disclosed in this section of this Offering Memorandum, no amount or benefit has been paid, or given, to the promoter or any of its subsidiaries since the incorporation of the Company and none is intended to be paid, or given. Highland is a limited partnership, established under the laws of the State of Delaware in the U.S. with its registered office at 1209 Orange Street, in the City of Wilmington, County of New Castle, Delaware 19801.

The Net Placing Proceeds available for investment by the Company following the Placing will be approximately U.S. \$153 million (less any amounts retained for working capital purposes) and these proceeds will be invested in accordance with the Company's investment policy described in the section of this Offering Memorandum entitled "*The Company*". Since incorporation, the Company has not commenced operations, and therefore has not generated earnings. As the Shares do not have a par value, the Placing Price consists solely of share premium.

None of the Shares available under the Placing are being underwritten.

Application will be made to the appropriate securities exchange for the Placing Shares to be admitted when deemed appropriate by the Company.

The Company does not own any premises and does not lease any premises.

THIRD PARTY SOURCES

Where third party information has been referenced in this Offering Memorandum, the source of that third party information has been disclosed. Where information contained in this Offering Memorandum has been so sourced, the Company confirms that such information has been accurately reproduced and, as far as the Company is aware and able to ascertain from information published by such third parties, no facts have been omitted which would render the reproduced information inaccurate or misleading.

Highland has given and not withdrawn its written consent to the issue of this Offering Memorandum with references to its name in the form and context in which such references appear. Highland accepts responsibility for information attributed to it in this Offering Memorandum and declares that, having taken all reasonable care to ensure that such is the case, the information attributed to it in this Offering Memorandum is, to the best of its knowledge, in accordance with the facts and contains no omission likely to affect its import.

Each of the Management Companies has given and, as at the date of this Offering Memorandum, has not withdrawn its written consent to the issue of this Offering Memorandum with references to its name in the form and context in which such references appear. Each of the Management Companies accepts responsibility for information attributed to it in this Offering Memorandum and declares that, having taken all reasonable care to ensure that such is the case, the information attributed to it in this Offering Memorandum is, to the best of its knowledge, in accordance with the facts and contains no omission likely to affect its import.

WORKING CAPITAL

The Company is of the opinion that the working capital available to the Group is sufficient for the present requirements of the Company, that is, for at least the next 12 months from the date of this Offering Memorandum.

CAPITALISATION AND INDEBTEDNESS

As at the date of this Offering Memorandum, the Company:

- (a) does not have any secured, unsecured or unguaranteed indebtedness, including indirect and contingent, other than the NexBank Credit Facility;
- (b) has not granted any mortgage or charge over any of its assets, other than that granted under the NexBank Credit Facility; and
- (c) does not have any contingent liabilities or guarantees.

As at the date of this Offering Memorandum, the Company's issued and fully paid up share capital consisted of 143,454,001 Shares of no par value.

DOCUMENTS AVAILABLE FOR INSPECTION

Copies of the Articles, the constitutional documents of the Company, the material contracts referred to in "*Material Contracts*" above and this Offering Memorandum will be available for inspection at the registered office of the Company during normal business hours on any weekday (Saturdays and public holidays excepted) up to and including the date of the Placing.

Copies of this Offering Memorandum may be obtained, free of charge during normal business hours on any weekday (bank and public holidays excepted) at the Company's registered office up to and including the date of the Placing.

RELATIONSHIP BETWEEN SHAREHOLDERS, THE COMPANY AND SERVICE PROVIDERS

The Company is a registered closed-ended investment company incorporated in Guernsey with limited liability on 30 March 2015. While prospective investors will acquire an interest in the Company on subscribing for Placing Shares, the Company is the sole legal and/or beneficial owner of its investments. Consequently, Shareholders have no direct legal or beneficial interest in those investments. The liability of Shareholders for the debts and other obligations of the Company is limited to the amount unpaid, if any, on the Placing Shares held by them.

Shareholders' rights in respect of their investment in the Company are governed by the Articles, the Companies Law and the investment terms set out in this Offering Memorandum.

RIGHTS AGAINST THIRD PARTIES, INCLUDING THIRD PARTY SERVICE PROVIDERS

As the Company has no employees and the Directors have all been appointed on a non-executive basis, the Company is reliant on the performance of service providers listed in this Offering Memorandum (the "**Service Providers**").

Without prejudice to any potential right of action in tort that a Shareholder may have to bring a claim against a Service Provider, each Shareholder's contractual relationship in respect of its investment in Shares is with the Company only. Therefore, no Shareholder will have any contractual claim against any Service Provider with respect to such Service Provider's default.

JURISDICTION AND APPLICABLE LAW

As noted above, Shareholders' rights are governed by the Articles, the Companies Law and the terms set out in this Offering Memorandum. By subscribing for Placing Shares, investors agree to be bound by the Articles, the Companies Law and the terms set out in this Offering Memorandum.

Information on the existence or not of any legal instruments providing for the recognition and enforcement of judgments in the territory where the Company is established is as follows. A final and conclusive judgement under which a sum of money is payable (not being a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or penalty) obtained in the superior courts in the reciprocating countries set out in the Judgments (Reciprocal Enforcement) (Guernsey) Law 1957 (the "**1957 Law**") (which includes the Supreme Court and the Senior Courts of England and Wales, excluding the Crown Court), after a hearing on the merits would be recognised as a valid judgement by the Guernsey courts and would be enforceable in accordance with and subject to the provisions of the 1957 Law.

The Guernsey courts would also recognise, without reconsideration of the merits and assuming proper service of process and assumption of jurisdiction in accordance with the laws of the relevant jurisdiction, any final and conclusive judgement under which affixed or ascertainable sum of money is payable (not being a sum payable in respect of taxes or other charges or a like nature or in respect of a fine or other penalty) obtained in a court not recognised by the 1957 Law provided that the judgment was not obtained by fraud or in a manner opposed to the principles of natural justice and recognition of the judgment is not contrary to public policy as applied by the Guernsey courts.

FAIR TREATMENT AND PREFERENTIAL TREATMENT OF INVESTORS

The Directors owe certain fiduciary duties to the Company which require them, among other things, to act in good faith and in what they consider to be the best interests of the Company. In doing so, the Directors will act in a manner that ensures the fair treatment of investors.

Under the AIFMD Rules, the Portfolio Manager as AIFM must treat all investors fairly. The Portfolio Manager ensures the fair treatment of investors through its decision-making procedures and organisational structure which (1) identify any preferential treatment, or the right thereto, accorded to investors and (2) ensure that any such preferential treatment does not result in an overall disadvantage to other investors.

In addition, the Portfolio Manager monitors the terms of side arrangements entered into with investors in relation to their investment in the Company to seek to ensure the fair treatment of investors. In so doing, the Portfolio Manager takes into consideration whether such side arrangements are in accordance with side arrangements previously entered into.

The Portfolio Manager may enter into side letters in relation to the Company and its investments with certain individual investors covering, *inter alia*, *capacity*, *provision of additional information*, *fees*, *most favoured investor commitments*, *individual investor approval requirements*, *transfer rights and confirmations of how expenses will be borne*. Such information may provide the recipient greater insights into the Company activities than is included in standard reports to investors. In entering into any side letters, the Company will act in the best interests of the investors as a whole.

Information on such side letters will be disclosed to investors in accordance with the AIFMD.

TERMS AND CONDITIONS OF THE PLACING

INTRODUCTION

Each Placee which confirms its agreement (whether orally or in writing) to subscribe for Placing Shares under the Placing will be bound by these terms and conditions and will be deemed to have accepted them.

The Company may require any Placee to agree to such further terms and/or conditions and/or give such additional warranties and/or representations as it (in its absolute discretion) sees fit and/or may require any such Placee to execute a separate placing letter (a “**Placing Letter**”).

AGREEMENT TO SUBSCRIBE FOR PLACING SHARES

Any Placee agrees to become a member of the Company and agrees to subscribe for those Placing Shares allocated to it at the Placing Price in respect of the Placing Shares allocated to the Placee. To the fullest extent permitted by law, each Placee acknowledges and agrees that it will not be entitled to exercise any remedy of rescission at any time. This does not affect any other rights the Placee may have.

PAYMENT FOR PLACING SHARES

Each Placee must pay the Placing Price for the Placing Shares issued to the Placee in the manner and by the time directed by the Company. If any Placee fails to pay as so directed and/or by the time required, the relevant Placee’s application for Placing Shares shall be rejected.

REPRESENTATIONS AND WARRANTIES

By agreeing to subscribe for Placing Shares, each Placee which will enter into a commitment to subscribe for Placing Shares will (for itself and any person(s) procured by it to subscribe for Placing Shares and any nominee(s) for any such person(s)) agree, represent and warrant to the Company that:

- (a) in agreeing to subscribe for Placing Shares under the Placing, it is relying solely on this Offering Memorandum and any subsequent notice published by the Company subsequent to the date of this Offering Memorandum and not on any other information given, or representation or statement made at any time, by any person concerning the Company or the Placing. It agrees that none of the Company nor any of its respective officers, agents or employees, will have any liability for any other information or representation. It irrevocably and unconditionally waives any rights it may have in respect of any other information or representation;
- (b) if the laws of any territory or jurisdiction outside the United Kingdom are applicable to its agreement to subscribe for Placing Shares under the Placing, it warrants that it has complied with all such laws, obtained all governmental and other consents which may be required, complied with all requisite formalities and paid any issue, transfer or other taxes due in connection with its placing commitment in any territory and that it has not taken any action or omitted to take any action which will result in the Company or any of its respective officers, agents, affiliates or employees acting in breach of the regulatory or legal requirements, directly or indirectly, of any territory or jurisdiction outside the United Kingdom in connection with the Placing;
- (c) it does not have a registered address in, and is not a citizen, resident or national of, any jurisdiction in which it is unlawful to make or accept an offer of the Placing Shares and it is not acting on a non-discretionary basis for any such person;
- (d) it agrees that, having had the opportunity to read this Offering Memorandum, it shall be deemed to have had notice of all information and representations contained in this Offering Memorandum, that it is acquiring Placing Shares solely on the basis of this Offering Memorandum and any subsequent notice published by the Company subsequent to the date of this Offering Memorandum and no other information and that in accepting a participation in the Placing it has had access to all information it believes necessary or appropriate in connection with its decision to subscribe for Placing Shares;

- (e) it acknowledges that no person is authorised in connection with the Placing to give any information or make any representation other than as contained in this Offering Memorandum and any subsequent notice published by the Company subsequent to the date of this Offering Memorandum and, if given or made, any information or representation must not be relied upon as having been authorised by the Company;
- (f) it is not applying as, nor is it applying as nominee or agent for, a person who is or may be liable to notify and account for tax under the Stamp Duty Reserve Tax Regulations 1986 at any of the increased rates referred to in section 67, 70, 93 or 96 (depository receipts and clearance services) of the Finance Act 1986;
- (g) it accepts that none of the Placing Shares have been or will be registered under the laws of any Restricted Territory. Accordingly, the Placing Shares may not be offered, sold, issued or delivered, directly or indirectly, within any Restricted Territory unless an exemption from any registration requirement is available;
- (h) if it is receiving the offer in circumstances under which the laws or regulations of a jurisdiction other than the United Kingdom would apply, that it is a person to whom the Placing Shares may be lawfully offered under that other jurisdiction's laws and regulations;
- (i) if it is a resident in the EEA (other than the United Kingdom), it is a "Qualified Investor" within the meaning of the law in the Relevant Member State implementing Article 2(1)(e)(i), (ii) or (iii) of the Prospectus Directive;
- (j) if it is outside the United Kingdom, neither this Offering Memorandum nor any other offering, marketing or other material in connection with the Placing constitutes an invitation, offer or promotion to, or arrangement with, it or any person whom it is procuring to subscribe for Placing Shares pursuant to the Placing unless, in the relevant territory, such offer, invitation or other course of conduct could lawfully be made to it or such person and such documents or materials could lawfully be provided to it or such person and Placing Shares could lawfully be distributed to and subscribed and held by it or such person without compliance with any unfulfilled approval, registration or other regulatory or legal requirements;
- (k) it acknowledges the representations, warranties and agreements set out in this Offering Memorandum, including those set out in the section of this Offering Memorandum entitled "*Purchase and Transfer Restrictions*" in "*Placing Arrangements*", and further acknowledges that it is not a U.S. Person, it is not located within the United States, it is subscribing for Placing Shares in an "offshore transaction" as defined in Regulation S and it is not acquiring the Placing Shares for the account or benefit of a U.S. Person, and where it is subscribing for Placing Shares for one or more managed, discretionary or advisory accounts, it is authorised in writing for each such account: (i) to subscribe for the Placing Shares for each such account; (ii) to make on each such account's behalf the representations, warranties and agreements set out in this Offering Memorandum or in any Placing Letter, where relevant; and (iii) to receive on behalf of each such account any documentation relating to the Placing in the form provided by the Company. It agrees that the provision of this paragraph shall survive any resale of the Placing Shares by or on behalf of any such account;
- (l) it is acting as principal only in respect of the Placing, or, if it is acting for any other person (i) it is and will remain liable to the Company for the performance of all its obligations as a placee in respect of the Placing (regardless of the fact that it is acting for another person), (ii) it is both an "authorised person" for the purposes of FSMA and a "qualified investor" as defined at Article 2.1(e)(i) of Directive 2003/71/EC (known as Prospectus Directive) acting as agent for such person, and (iii) such person is either (1) a FSMA Qualified Investor or (2) its "client" (as defined in section 86(2) of FSMA) that has engaged it to act as his agent on terms which enable it to make decisions concerning the Placing or any other offers of transferable securities on his behalf without reference to him;
- (m) it has not and will not offer or sell any Placing Shares to persons in the United Kingdom, except to persons whose ordinary activities involve them in acquiring, holding, managing or disposing of investments (as principal or agent) for the purposes of their business or otherwise in circumstances which

- have not resulted and which will not result in an offer to the public in the United Kingdom within the meaning of section 102B of the FSMA;
- (n) it is an “eligible counterparty” within the meaning of Chapter 3 of the FCA’s Conduct of Business Sourcebook and it is subscribing for or purchasing the Shares for investment only and not for resale or distribution;
 - (o) it irrevocably appoints any Director of the Company to be its agent and on its behalf (without any obligation or duty to do so), to sign, execute and deliver any documents and do all acts, matters and things as may be necessary for, or incidental to, its subscription for all or any of the Placing Shares for which it has given a commitment under the Placing, in the event of its own failure to do so;
 - (p) it accepts that if the Placing does not proceed or such Placing Shares are not admitted to a securities exchange for any reason whatsoever, then none of the Company or any of its affiliates, nor persons controlling, controlled by or under common control with any of them nor any of their respective employees, agents, officers, members, stockholders, partners or representatives, shall have any liability whatsoever to it or any other person;
 - (q) it has not taken any action or omitted to take any action which will or may result in the Company or any of its directors, officers, agents, affiliates, employees or advisers being in breach of the legal or regulatory requirements of any territory in connection with the Placing or its subscription of Placing Shares pursuant to the Placing;
 - (r) in connection with its participation in the Placing it has observed all relevant legislation and regulations, in particular (but without limitation) those relating to money laundering and countering terrorist financing and that its placing commitment is only made on the basis that it accepts full responsibility for any requirement to identify and verify the identity of its clients and other persons in respect of whom it has applied. In addition, it warrants that it is a person: (i) subject to the Money Laundering Regulations 2007 in force in the United Kingdom; or (ii) subject to the Money Laundering Directive (2005/60/EC of the European Parliament and of the EC Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing); or (iii) subject to the Guernsey AML Requirements; or (iv) acting in the course of a business in relation to which an overseas regulatory authority exercises regulatory functions and is based or incorporated in, or formed under the law of, a country in which there are in force provisions at least equivalent to those required by the Money Laundering Directive;
 - (s) due to anti-money laundering and the countering of terrorist financing requirements, the Company may require proof of identity of the Placee and related parties and verification of the source of the payment before the placing commitment can be processed and that, in the event of delay or failure by the Placee to produce any information required for verification purposes, the Company may refuse to accept the placing commitment and the subscription moneys relating thereto. It holds harmless and will indemnify the Company against any liability, loss or cost ensuing due to the failure to process the placing commitment, if such information as has been required has not been provided by it or has not been provided timeously;
 - (t) any person in Guernsey involved in the business of the Company who knows or suspects or has reasonable grounds for knowing or suspecting that any other person (including the Company or any person subscribing for Placing Shares) is involved in money laundering activities, is under an obligation to report such suspicion to the relevant authorities pursuant to the Guernsey AML Requirements. Similar disclosures may be required under other legislation;
 - (u) it and each person or body (including, without limitation, any local authority or the managers of any pension fund) on whose behalf it accepts Placing Shares pursuant to the Placing or to whom it allocates such Placing Shares have the capacity and authority to enter into and to perform their obligations as a Placee of the Placing Shares and will honour those obligations;

- (v) it confirms that it is not acquiring the Placing Shares using the assets of: (i)(A) an “employee benefit plan” as defined in Section 3(3) of ERISA that is subject to Title I of ERISA; (B) a “plan” as defined in Section 4975 of the U.S. Tax Code, including an individual retirement account or other arrangement that is subject to Section 4975 of the U.S. Tax Code; or (C) an entity whose underlying assets are considered to include “plan assets” by reason of investment by an “employee benefit plan” or “plan” described in preceding clause (A) or (B) in such entity pursuant to the U.S. Plan Assets Regulations; or (ii) a governmental, church, non-U.S. or other employee benefit plan that is subject to any federal, state, local or non-U.S. law that is substantially similar to the provisions of Title I of ERISA or Section 4975 of the U.S. Tax Code, unless its purchase, holding, and disposition of the Placing Shares will not constitute or result in a non-exempt violation of any such substantially similar law;
- (w) the representations, undertakings and warranties contained in this Offering Memorandum or in any Placing Letter, where relevant, are irrevocable. It acknowledges that the Company and its affiliates will rely upon the truth and accuracy of such representations and warranties and it agrees that if any of the representations or warranties made or deemed to have been made by its subscription of the Shares are no longer accurate, it shall promptly notify the Company;
- (x) nothing has been done or will be done by it in relation to the Placing that has resulted or could result in any person being required to publish a prospectus in relation to the Company or to any ordinary shares in accordance with FSMA or the Prospectus Rules or in accordance with any other laws applicable in any part of the European Union or the European Economic Area;
- (y) it accepts that the allocation of Placing Shares shall be determined by the Company in its absolute discretion and that such persons may scale down any placing commitments for this purpose on such basis as they may determine; and
- (z) time shall be of the essence as regards its obligations to settle payment for the Placing Shares and to comply with its other obligations under the Placing; and
- (aa) it has been provided an opportunity to ask questions of, and have received satisfactory answers thereto from, the Company, the Portfolio Manager, Highland, Acis and/or their respective affiliates, as applicable, regarding the Company’s assets and the terms and conditions of the offering of the Placing Shares, and it and its representatives have obtained all additional information requested of the Company, the Portfolio Manager, Highland, Acis and/or their respective affiliates, as applicable and to the extent such information is in their possession or reasonably obtainable thereby without undue expense or burden, in order to respond to any inquiries it has made regarding the offering of the Placing Shares. In connection with the offering of the Shares, it is not relying upon any statements other than those statements contained in the Offering Memorandum. It are not relying on the Company, the Portfolio Manager, Highland, Acis and/or their respective any of its respective affiliates or any of its partners, members, managers, shareholders, officers, employees, shared personnel, representatives, consultants, advisors, attorneys or agents for legal, investment or tax advice. It has sought independent legal, investment and tax advice to the extent that it has deemed necessary or appropriate in connection with its decision to subscribe for the Placing Shares.

SUPPLY AND DISCLOSURE OF INFORMATION

If the Administrator or the Company or any of their agents request any information in connection with a Placee’s agreement to subscribe for Placing Shares under the Placing or to comply with any relevant legislation, such Placee must promptly disclose it to them.

DATA PROTECTION

Pursuant to the Data Protection (Bailiwick of Guernsey) Law, 2001, as amended (the “**DP Law**”) and any successor legislation, the Company and/or the Administrator may hold personal data (as defined in the DP Law) relating to past and present Shareholders.

Such personal data held is used by those parties in relation to the Placing and to maintain a register of the Shareholders and mailing lists and this may include sharing such data with third parties in one or more of the countries mentioned below when (a) effecting the payment of dividends and redemption proceeds to Shareholders (in each case, where applicable) and, if applicable, the payment of commissions to third parties; and (b) filing returns of Shareholders and their respective transactions in shares with statutory bodies and regulatory authorities. Personal data may be retained on record for a period exceeding six years after it is no longer used.

The countries referred to above include, but need not be limited to, those in the European Economic Area or the European Union and any of their respective dependent territories overseas, Andorra, Argentina, Canada, State of Israel, New Zealand, Switzerland and the Eastern Republic of Uruguay.

By becoming registered as a holder of Placing Shares in the Company a person becomes a data subject (as defined in the DP Law) and is deemed to have consented to the processing by the Company and the Administrator of any personal data relating to them in the manner described above.

The Company will be the “data controller” in respect of the personal data, but has appointed the Administrator as a “data processor” of such data (each as defined in the DP Law). Details of the registration of the Company as data controller can be found on the website of the Guernsey Data Protection Commissioner: www.dpr.gov.gg.

MISCELLANEOUS

The rights and remedies of the Company and the Administrator under these terms and conditions are in addition to any rights and remedies which would otherwise be available to each of them and the exercise or partial exercise of one will not prevent the exercise of others.

On the acceptance of their placing commitment, if a Placee is a discretionary fund manager, that Placee may be asked to disclose in writing or orally the jurisdiction in which its funds are managed or owned. All documents provided in connection with the Placing will be sent at the Placee’s risk. They may be returned by post to such Placee at the address notified by such Placee.

Each Placee agrees to be bound by the Articles (as amended from time to time) once the Placing Shares, which the Placee has agreed to subscribe for pursuant to the Placing, have been acquired by the Placee. The contract to subscribe for Placing Shares under the Placing and the appointments and authorities mentioned in this Offering Memorandum will be governed by, and construed in accordance with, the laws of England. For the exclusive benefit of the Company and the Administrator, each Placee irrevocably submits to the jurisdiction of the courts of England and Wales and waives any objection to proceedings in any such court on the ground of venue or on the ground that proceedings have been brought in an inconvenient forum. This does not prevent an action being taken against a Placee in any other jurisdiction.

In the case of a joint agreement to subscribe for Placing Shares under the Placing, references to a “Placee” in these terms and conditions are to each of the Placees who are a party to that joint agreement and their liability is joint and several.

The Company expressly reserves the right to modify the Placing (including, without limitation, its timetable and settlement) at any time prior to the date of the Placing.

PLACING STATISTICS

Target Gross Placing Proceeds*	U.S. \$153 million
Minimum expected initial Net Asset Value per Share**	U.S. \$1.02535

* The target size of the Placing is U.S. \$153 million. The number of Placing Shares to be issued, and therefore the Gross Placing Proceeds, is not known as at the date of this Offering Memorandum.

** NAV per Share immediately following Placing based on the NAV of the Company as at September 30, 2017, as adjusted with respect to a dividend of US \$ 9 million on October 10, 2017, and a buyback of Shares from Acis Capital Management, L.P. for an aggregate purchase price of \$991,180.13 on October 24, 2017.

DEFINITIONS

The following definitions apply in this Offering Memorandum unless the context otherwise requires:

“2010 PD Amending Directive”	Directive 2010/73/EU of the European Parliament and of the Council of 24 November 2010 amending Directives 2003/71/EC on the prospectus to be published when securities are offered to the public or admitted to trading and 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market
“Accredited Investor”	an as “accredited investor” as defined in Rule 501(a) of Regulation D under the Securities Act
“Acis”	Acis Capital Management, L.P.
“Acis CLO Management”	Acis CLO Management, LLC
“Acis Legacy CLO”	a CLO in which Acis is the CLO manager
“Administration Agreement”	the agreement dated 10 August 2015 between the Company and the Administrator, a summary of which is set out in the section of this Offering Memorandum entitled “ <i>Additional Information on the Company</i> ”
“Administrator”	State Street (Guernsey) Limited, or such other person or persons from time to time appointed by the Company
“affiliate” or “affiliated”	with respect to a person, (i) any other person who, directly or indirectly, is in control of, or controlled by, or is under common control with, such person or (ii) any other person who is a director, officer or employee (a) of such person, (b) of any subsidiary or parent company of such person or (c) of any person described in clause (i) above. For the purposes of this definition, control of a person shall mean the power, direct or indirect, (i) to vote more than 50% of the securities having ordinary voting power for the election of directors of such persons or (ii) to direct or cause the direction of the management and policies of such person whether by contract or otherwise. For purposes of this definition, the management of an account by one person for the benefit of any other person shall not constitute “control” of such other person and no entity shall be deemed an “affiliate” of the Company solely because the Administrator or its affiliates serve as administrator or share trustee for such entity
“AIF”	an alternative investment fund, as defined in the AIFMD
“AIFM”	an alternative investment fund manager, as defined in the AIFMD
“AIFMD”	Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directive 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010

“AIFMD Rules”	any implementing legislation and regulations under AIFMD including, without limitation, Commission Delegated Regulation (EU) No 231/2013 supplementing the AIFMD with regard to exemptions, general operating conditions, depositaries, leverage, transparency, supervision and other applicable regulations implementing the AIFMD, in each case as may be altered, amended, added to or cancelled from time to time
“Application Form”	the application form for Shares, which is available upon request;
“Approved Pricing Source”	in relation to loans, Markit Partners or any other entity appointed from time to time and in relation to CLO Notes, Thomson Reuters or any other entity appointed from time to time
“Articles”	the articles of incorporation of the Company
“Audit Committee”	the audit committee of the Company, as more fully described in the section of this Offering Memorandum entitled “ <i>Audit Committee</i> ” in “ <i>Company Directors and Administration</i> ”
“Auditor”	PricewaterhouseCoopers CI LLP, or such other person or persons from time to time appointed by the Company
“bps”	basis point
“Business Day”	a day on which the banks in Guernsey and the United Kingdom are normally open for business
“certificated” or “certificated form”	not in uncertificated form
“Chairman”	the chairman of the Board
“CLO”	a special purpose vehicle which issues notes backed by a pool of collateral consisting primarily of loans
“CLO Income Notes”	the most subordinated tranche of debt issued by a CLO (which may be represented by a debt or equity security)
“CLO Manager”	the entity acting as manager in a CLO pursuant to the relevant CLO Management Agreement
“CLO Notes”	notes representing tranches of debt issued by a CLO, including CLO Income Notes (which may be represented by a debt or equity security)
“Closing Date”	November 15, 2017
“Companies Law”	the Companies (Guernsey) Law 2008, as amended, extended or replaced and any ordinance, statutory instrument or regulation made thereunder
“Company”	Highland CLO Funding, Ltd., a closed-ended investment company incorporated in Guernsey under the Companies Law on 30 March 2015 with registration number 60120
“CRR”	Regulation 575/2013 of the European Parliament and of the Council on prudential requirements for credit institutions and investment firms

“CRR Retention Requirements”	the retention requirements contained in the CRR as amended from time to time and including any guidance or any technical standards published in relation thereto
“Custodian”	State Street Custodial Services (Ireland) Limited
“Custody Agreement”	the agreement dated 10 August 2015 between the Company and the Custodian, further details of which are set out in the section of this Offering Memorandum entitled “ <i>Additional Information on the Company</i> ”
“Directors” or “Board” or “Board of Directors”	the directors of the Company
“DP Law”	The Data Protection (Bailiwick of Guernsey) Law, 2001, as amended
“EEA”	the European Economic Area being the countries included as such in the Agreement on European Economic Area, dated 1 January 1994, among Iceland, Liechtenstein, Norway, the European Community and the EU Member States, as may be modified, supplemented or replaced
“Eligible U.S. Investor”	a U.S. Person who is reasonably believed to be (x) a Qualified Institutional Buyer and a Qualified Purchaser (y) an Accredited Investor and a Qualified Purchaser or (z) an Accredited Investor and a Knowledgeable Employee with respect to the Company and to whom the Company is privately placing a certain number of the Placing Shares in reliance on exemptions from registration under the U.S. Securities Act and the U.S. Investment Company Act
“ERISA”	the U.S. Employee Retirement Income Security Act of 1974, as amended from time to time, and the applicable regulations thereunder
“EU”	the European Union
“EU Member State”	a member country of the EU
“EU Retention Requirements”	has the meaning given to it in the section of this Offering Memorandum entitled “ <i>Risk Factors</i> ”
“EU Savings Tax Directive”	Council Directive 2003/48/EC of 3 June 2003 on taxation of savings income in the form of interest payments
“EURIBOR”	Euro interbank offered rate, a benchmark interest rate
“Euro” or “€”	the lawful currency of the EU
“FATCA”	the U.S. Foreign Account Tax Compliance Act 2010
“FATCA Withholding”	has the meaning given to it in the section of this Offering Memorandum entitled “ <i>Risk Factors</i> ”
“Financial Conduct Authority” or “FCA”	the UK Financial Conduct Authority and any successor regulatory authority

“Forward Purchase Agreement”	agreements which may be entered into from time to time between the Company and a CLO pursuant to which the Company may, from time to time, enter into sale and purchase contracts with a CLO with respect to certain assets of the Company
“FSMA”	the Financial Services and Markets Act 2000 of the United Kingdom, as amended
“FTT”	the European Commission’s proposal for a Directive for a common financial transaction tax in certain EU Member States
“GFSC” or “Commission”	the Guernsey Financial Services Commission
“GFSC Code”	the Finance Sector Code of Corporate Governance published by the Commission
“Gross Placing Proceeds”	the aggregate value of the Placing Shares
“Guernsey AML Requirements”	The Criminal Justice (Proceeds of Crime) (Bailiwick of Guernsey) Law, 1999, the Criminal Justice (Proceeds of Crime) (Financial Services Businesses) (Bailiwick of Guernsey) Regulations 2007 and the Handbook of Financial Services Business (in each case as amended) and any other regulations relating to prevention of use of the financial system for the purpose of money laundering and made pursuant thereto
“Guernsey IGA Legislation”	Guernsey legislation implementing the IGA
“Highland”	Highland Capital Management, L.P.
“Highland CLO”	a CLO in which Highland or Highland CLO Management (or their affiliate) or a wholly owned subsidiary of the Company advised by Highland is the collateral manager
“Highland CLO Management”	Highland CLO Management, LLC
“Highland HCF Advisor”	Highland HCF Advisor, Ltd.
“Highland Legacy CLO”	a CLO in which Highland is the CLO manager
“HMRC”	Her Majesty’s Revenue and Customs
“IRR”	internal rate of return
“IRS”	U.S. Internal Revenue Service
“Knowledgeable Employee”	a “knowledgeable employee” as defined in Rule 3c-5 promulgated under the Investment Company Act
“LIBOR”	London interbank offered rate, a benchmark interest rate
“Managed CLO”	any Acis Legacy CLO, Acis CLO 7, any Highland CLO or any Highland Legacy CLO
“Market Abuse Directive”	Directive 2003/6/EC of the European Parliament and of the Council on insider dealing and market manipulation (market abuse)
“Memorandum”	the memorandum of incorporation of the Company

“Money Laundering Directive”	2005/60/EC of the European Parliament and of the EC Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing
“Net Asset Value” or “NAV”	gross assets less liabilities (including accrued but unpaid fees) determined in accordance with the section of this Offering Memorandum entitled “ <i>Net Asset Value</i> ” in “ <i>The Company</i> ”
“Net Asset Value per Share” or “NAV per Share”	the Net Asset Value divided by the number of Shares in issue at the relevant time
“Net Placing Proceeds”	the Gross Placing Proceeds less any offering expenses and any amounts retained for working capital purposes
“Non-Qualified Holder”	any person whose ownership of Shares (i) may result in the U.S. Plan Threshold being exceeded causing the Company’s assets to be deemed “plan assets” for the purpose of ERISA or the U.S. Tax Code; (ii) may cause the Company to be required to register as an “investment company” under the U.S. Investment Company Act (including because the holder of the shares is not a “qualified purchaser” as defined in the U.S. Investment Company Act) or to lose an exemption or a status thereunder to which it might be entitled; (iii) may cause the Company to have to register under the U.S. Exchange Act or any similar legislation; (iv) may cause the Company not to be considered a “Foreign Private Issuer” as such term is defined in rule 3b-4(c) under the U.S. Exchange Act; (v) may result in a person holding shares in violation of the transfer restrictions published by the Company, from time to time; and (vi) may cause the Company to be a “controlled foreign corporation” for the purposes of the U.S. Tax Code
“Offering Memorandum”	this offering memorandum
“Ordinary Shares”	ordinary shares of no par value each in the capital of the Company
“Placee”	a person subscribing for Shares under the Placing
“Placing”	the placing of Placing Shares at the Placing Price to one or more investors
“Placing Price”	As of a given date, the price per Ordinary Share determined in reference to the most recent quarterly determined NAV
“Placing Shares”	Shares to be issued by the Company pursuant to the Placing
“POI Law”	The Protection of Investors (Bailiwick of Guernsey) Law, 1987, as amended
“Portfolio Management Agreement”	the agreement dated 22 December 2016 between the Company and the Portfolio Manager pursuant to which the Portfolio Manager will provide certain support and personnel to the Company
“Portfolio Manager”	Highland HCF Advisor acting as Portfolio Manager to the Company pursuant to the Portfolio Management Agreement
“Prospectus Directive”	Directive 2003/71/EC of the European Parliament and of the Council on the prospectus to be published when securities are offered to the public or admitted to trading
“Provider”	the provider of any Warehouse Loan to the Company

“Qualified Institutional Buyers”	has the meaning given in Regulation 144A of the U.S. Securities Act
“Qualified Purchasers”	has the meaning given in the U.S. Investment Company Act
“RCIS Rules”	the Registered Collective Investment Schemes Rules 2015
“Register”	the register of Shareholders
“Regulation S”	Regulation S promulgated under the U.S. Securities Act
“Relevant Member State”	each member state of the European Economic Area which has implemented the Prospectus Directive
“Restricted Shareholders”	Shareholders who are resident in, or citizens of, a Restricted Territory
“Restricted Territory”	the United States and any other jurisdiction where the extension or availability of the Placing would breach any applicable law
“RTS”	the Regulatory Technical Standards, published by the European Commission
“SDRT”	UK Stamp Duty Reserve Tax
“SEC”	the U.S. Securities and Exchange Commission
“Services Agreements”	the Staff and Services Agreement and the Sub-Advisory Agreement
“Share”	a share in the capital of the Company (of whatever class) and having such rights and being subject to such restrictions as are contained in the Articles
“Shareholder”	a holder of Shares
“Shareholding”	a holding of Shares
“UK” or “United Kingdom”	the United Kingdom of Great Britain and Northern Ireland
“UK Corporate Governance Code”	the UK Corporate Governance Code as published by the Financial Reporting Council
“United States” or “U.S.”	the United States of America, its territories and possessions, any state of the United States of America and the District of Columbia
“U.S. Dollar” or “U.S.\$”	the lawful currency of the United States
“U.S. Exchange Act”	the U.S. Securities Exchange Act of 1934, as amended
“U.S. Investment Company Act”	the U.S. Investment Company Act of 1940, as amended
“U.S. Person”	has the meaning given in Regulation S under the U.S. Securities Act
“U.S. Plan”	any plan subject to Title 1 of ERISA or section 4975 of the U.S. Tax Code
“U.S. Plan Assets Regulations”	the regulations promulgated by the U.S. Department of Labor at 29 CFR 2510.3-101, as modified by section 3(42) of ERISA
“U.S. Plan Investor”	(i) an “employee benefit plan” as defined in section 3(3) of ERISA that is subject to Title I of ERISA; (ii) a “plan” as defined in Section 4975 of the U.S. Tax Code, including an individual retirement account or other arrangement that is subject to Section 4975 of the U.S. Tax Code; or

(iii) an entity whose underlying assets are considered to include “plan assets” by reason of investment by an “employee benefit plan” or “plan” described in the preceding clause (i) or (ii) in such entity pursuant to the U.S. Plan Assets Regulations

“U.S. Plan Threshold”

ownership by benefit plan investors, as defined under section 3(42) of ERISA, in the aggregate of 25 per cent or more of the value of any class of equity in the Company (calculated by excluding the value of any equity interest held by any person (other than a benefit plan investor, as defined under section 3(42) of ERISA) that has discretionary authority or control with respect to the assets of the Company or that provides investment advice for a fee (direct or indirect) with respect to such assets, or any affiliate of such a person); the term shall be amended to reflect such new ownership threshold that may be established by a change in the U.S. Plan Asset Regulations or other applicable law

“U.S. Risk Retention Rules”

the United States federal interagency credit risk retention rules, codified at 17 C.F.R. Part 246.

“U.S. Securities Act”

the U.S. Securities Act of 1933, as amended

“U.S. Tax Code”

the U.S. Internal Revenue Code of 1986, as amended

“VAT”

value added tax or a similar consumption tax

DIRECTORS, ADVISERS AND SERVICE PROVIDERS

Directors

Heather Bestwick
William Scott

All c/o the Company's registered office

Registered Office

First Floor, Dorey Court
Admiral Park
St Peter Port
Guernsey
GY1 6HJ
Channel Islands

Portfolio Manager and Adviser

Highland HCF Advisor, Ltd.
c/o Maples Corporate Services Limited
PO Box 309, Ugland House
Grand Cayman, KY1-1104
Cayman Islands

Legal Advisers to the Company (as to Guernsey law)

Mourant Ozannes
PO Box 186
1 Le Marchant Street
St Peter Port
Guernsey GY1 4HP
Channel Islands

**Legal Advisers to the Company
(as to English law)**

Dechert LLP
160 Queen Victoria Street
London
EC4V 4QQ
United Kingdom

Administrator/Company Secretary

State Street (Guernsey) Limited
First Floor, Dorey Court
Admiral Park
St Peter Port, Guernsey GY1 6HJ
Channel Islands

Custodian & Principal Bankers

State Street Custodial Services (Ireland) Limited
No. 78
Sir John Rogerson's Quay
Dublin
Ireland

Corporate Services Provider

State Street Guernsey (Limited)
First Floor, Dorey Court
Admiral Park,
St Peter Port, Guernsey GY1 6HJ
Channel Islands

Auditors

PricewaterhouseCoopers CI LLP
Royal Bank Place
1 Glatigny Esplanade
St Peter Port
Guernsey
GY1 4ND
Channel Islands

AMENDED AND RESTATED
INVESTMENT ADVISORY AGREEMENT

THIS AMENDED AND RESTATED INVESTMENT ADVISORY AGREEMENT (this “*Agreement*”), dated to be effective from July 1, 2014 is entered into by and between **Charitable DAF Fund, L.P.**, a Cayman Islands exempted limited partnership (the “*Fund*”), **Charitable DAF GP, LLC**, a limited liability company organized under the laws of the State of Delaware (the “*General Partner*”), the general partner of the Fund, and **Highland Capital Management, L.P.**, a limited partnership organized under the laws of the State of Delaware (the “*Investment Advisor*”).

RECITALS

WHEREAS, the Fund, the General Partner and the Investment Advisor are parties to that certain Investment Advisory Agreement dated January 1, 2012 (the “*Original Agreement*”);

WHEREAS, the parties desire to amend and restate the Original Agreement in its entirety with the terms as set forth in this Agreement effective as of the Effective Date;

NOW, THEREFORE, in consideration of the mutual covenants herein contained and for other good and valuable consideration, the receipt of which is hereby acknowledged, the parties hereto agree as follows:

1. Investment Advisory Services. Subject to Section 7, the Investment Advisor shall act as investment advisor to the Fund, the General Partner with respect to the Fund and its subsidiaries and shall provide investment advice with respect to the investment and reinvestment of the cash, Financial Instruments and other properties comprising the assets and liabilities of the Fund and its subsidiaries.

2. Custody. The Financial Instruments shall be held in the custody of Jefferies & Company, Inc. or one or more banks selected by the General Partner (each such bank, a “Custodian”). The General Partner will notify the Investment Advisor promptly of the proposed selection of any other Custodians. The Custodian shall at all times be responsible for the physical custody of the Financial Instruments; for the collection of interest, dividends, and other income attributable to the Financial Instruments; and for the exercise of rights and tenders on the Financial Instruments after consultation with and as then directed by the General Partner. At no time shall the Investment Advisor have possession of or maintain custody over any of the



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Financial Instruments. The Investment Advisor shall not be responsible for any loss incurred by reason of any act or omission of the Custodian.

3. Authority of the Investment Advisor. Subject to Section 7 of this Agreement, the Investment Advisor shall advise the General Partner on behalf of the Fund and/or its subsidiaries with respect to:

(a) investing, directly or indirectly, on margin or otherwise, in all types of securities and other financial instruments of United States and non-U.S. entities, including, without limitation, capital stock; all manner of equity securities (whether registered or unregistered, traded or privately offered, American Depository Receipts, common or preferred); physical commodities; shares of beneficial interest; partnership interests, limited liability company interests and similar financial instruments; secured and unsecured debt (both corporate and sovereign, bank debt, vendor claims and/or other contractual claims); bonds, notes and debentures (whether subordinated, convertible or otherwise); currencies; interest rate, currency, equity and other derivative products, including, without limitation, (i) future contracts (and options thereon) relating to stock indices, currencies, United States Government securities, securities of non-U.S. governments, other financial instruments and all other commodities, (ii) swaps and contracts for difference, options, swaptions, rights, warrants, when-issued securities, caps, collars, floors, forward rate agreements, and repurchase and reverse repurchase agreements and other cash equivalents, (iii) spot and forward currency transactions and (iv) agreements relating to or securing such transactions; leases, including, without limitation, equipment lease certificates; equipment trust certificates; mortgage-backed securities and other similar instruments (including, without limitation, fixed-rate, pass-throughs, adjustable rate mortgages, collateralized mortgage obligations, stripped mortgage-backed securities and REMICs); loans; credit paper; accounts and notes receivable and payable held by trade or other creditors; trade acceptances and claims; contract and other claims; executory contracts; participations; mutual funds, exchange traded funds and similar financial instruments; money market funds and instruments; obligations of the United States, any state thereof, non-U.S. governments and instrumentalities of any of them; commercial paper; certificates of deposit; bankers' acceptances; trust receipts; letters of credit; choses in action; puts; calls; other obligations and instruments or evidences of indebtedness of whatever kind or nature; and real estate and any kind of interests in

real estate; in each case, of any person, corporation, government or other entity whatsoever, whether or not publicly traded or readily marketable (each of such items, “*Financial Instruments*”), and the sale of Financial Instruments short and covering such sales.

- (b) engaging in such other lawful Financial Instruments transactions;
- (c) research and analysis;
- (d) purchasing Financial Instruments and holding them for investment;
- (e) entering into contracts for or in connection with investments in Financial Instruments;
- (f) investing in other pooled investment vehicles, which investments shall be subject in each case to the terms and conditions of the respective governing document for each such vehicle;
- (g) possessing, transferring, mortgaging, pledging or otherwise dealing in, and exercising all rights, powers, privileges and other incidents of ownership or possession with respect to Financial Instruments and other property and funds held or owned by the Fund and/or its subsidiaries;
- (h) lending, either with or without security, any Financial Instruments, funds or other properties of the Funds, including by entering into reverse repurchase agreements, and, from time to time, undertaking leverage on behalf of the Fund;
- (i) opening, maintaining and closing accounts, including margin and custodial accounts, with brokers and dealers, including brokers and dealers located outside the United States;
- (j) opening, maintaining and closing accounts, including custodial accounts, with banks, including banks located outside the United States, and drawing checks or other orders for the payment of monies;

(k) combining purchase or sale orders on behalf of the Fund with orders for other accounts to which the Investment Advisor or any of its affiliates provides investment services (“*Other Accounts*”) and allocating the Financial Instruments or other assets so purchased or sold, on an average-price basis or in any other manner deemed fair and equitable to the Investment Advisor in its sole discretion, among such accounts;

(l) entering into arrangements with brokers to open “average price” accounts wherein orders placed during a trading day are placed on behalf of the Fund and Other Accounts and are allocated among such accounts using an average price;

(m) organizing one or more corporations and other entities formed to hold record title, as nominee for the Fund and/or its subsidiaries (whether alone or together with the Other Accounts), to Financial Instruments or funds of the Fund and/or its subsidiaries;

(n) causing the Fund and/or its subsidiaries to engage in (i) agency, agency cross, related party principal transactions with affiliates of the Investment Manager and (ii) cross transactions with Other Accounts, in each case, to the extent permitted by applicable laws;

(o) engaging personnel, whether part-time or full-time, and attorneys, independent accountants or such other persons (including, without limitation, finders, consultants and investment bankers); and

(p) voting of Financial Instruments, participation in arrangements with creditors, the institution and settlement or compromise of suits and administrative proceedings and other like or similar matters.

4. Policies of the Fund. The activities engaged in by the Investment Advisor on behalf of the Fund and/or its subsidiaries shall be subject to the policies and control of the General Partner.

The Investment Advisor shall submit such periodic reports to the General Partner regarding the Investment Advisor’s activities hereunder as the General Partner may reasonably request and a representative of the Investment Advisor shall be available to meet with the

General Partner and/or any other representative of the Fund or its subsidiaries as reasonably requested by the General Partner.

In furtherance of the foregoing, the General Partner hereby appoints the Investment Advisor as the Fund's attorney-in-fact, with full power of authority to act in the Fund's name and on its behalf with respect to the Fund, as follows:

(a) to purchase or otherwise trade in Financial Instruments that have been approved by the General Partner;

(b) to execute and combine purchase or sale orders on behalf of the Fund with orders for Other Accounts and allocate the Financial Instruments or other assets so purchased or sold, on an average-price basis or in any other manner deemed fair and equitable to the Investment Advisor in its sole discretion, among such accounts; *provided, however*, that such purchase or sale orders shall be market rates;

(c) to direct the Custodian to deliver funds or the Financial Instruments, but only in the course of effecting trading and investment transactions for the Fund and subject to such restrictions as may be contained in the custody agreement between the Custodian and the Fund;

(d) to enter into contracts, provide certifications or take any other actions necessary to effect any of the foregoing transactions; and

(e) to select brokers on the basis of best execution and in consideration of relevant factors, including, but not limited to, price quotes; the size of the transaction; the nature of the market for the security; the timing of the transaction; the difficulty of execution; the broker-dealer's expertise in the relevant market or sector; the extent to which the broker-dealer makes market in the security or has an access to such market; the broker-dealer's skill in positioning the relevant market; the broker-dealer's facilities, reliability, promptness and financial stability; the broker-dealer's reputation for diligence and integrity (including in correcting errors); confidentiality considerations; the quality and usefulness of research services and investment ideas presented by the broker-dealer; and other factors deemed appropriate by the Investment Advisor.

5. Valuation of Financial Instruments. Financial Instruments will be valued in accordance with the then current valuation policy of the Investment Advisor, a copy of which will be provided to the General Partner upon request.

6. Status of the Investment Advisor. The Investment Advisor shall, for all purposes, be an independent contractor and not an employee of the General Partner or the Fund or its subsidiaries, nor shall anything herein be construed as making the Fund or its subsidiaries or the General Partner, a partner, member or co-venturer with the Investment Advisor or any of its affiliates or clients. The Investment Advisor shall have no authority to act for, represent, bind or obligate the Fund or its subsidiaries or the General Partner except as specifically provided herein.

7. Investments. ALL ULTIMATE INVESTMENT DECISIONS WITH RESPECT TO THE FUND AND ITS SUBSIDIARIES SHALL AT ALL TIMES REST SOLELY WITH THE GENERAL PARTNER AND/OR THE OFFICERS/DIRECTORS OF THE APPLICABLE SUBSIDIARY, IT BEING EXPRESSLY UNDERSTOOD THAT THE GENERAL PARTNER AND/OR THE OFFICERS/DIRECTORS OF THE APPLICABLE SUBSIDIARY SHALL BE FREE TO ACCEPT AND OR REJECT ANY OF THE ADVICE RENDERED BY THE INVESTMENT MANAGER HEREUNDER FOR ANY REASON OR FOR NO REASON.

8. Reimbursement by the General Partner. The Investment Advisor may retain, in connection with its responsibilities hereunder, the services of others to assist in the investment advice to be given to the General Partner with respect to the Fund and/or its subsidiaries (any such appointee, a "***Sub-Advisor***"), including, but not limited to, any affiliate of the Investment Advisor, but payment for any such services shall be assumed by the Investment Advisor, and, therefore, neither the General Partner nor the Fund or any of its subsidiaries shall have any liability therefor; *provided, however*, that the Investment Advisor, in its sole discretion, may retain the services of independent third party professionals, including, without limitation, attorneys, accountants and consultants, to advise and assist it in connection with the performance of its activities on behalf of the General Partner with respect to the Fund and/or its subsidiaries

hereunder, and the Fund shall bear full responsibility therefor and the expense of any fees and disbursements arising therefrom.

9. Expenses.

(a) The Fund shall pay or reimburse the Investment Advisor and its affiliates for all expenses related to the services hereunder, including, but not limited to, investment-related expenses, brokerage commissions and other transaction costs, expenses related to clearing and settlement charges, professional fees relating to legal, auditing or valuation services, any governmental, regulatory, licensing, filing or registration fees incurred in compliance with the rules of any self-regulatory organization or any federal, state or local laws, research-related expenses (including, without limitation, news and quotation equipment and services, investment and trading-related software, including, without limitation, trade order management software (i.e., software used to route trade orders)), accounting (including accounting software), tax preparation expenses, costs and expenses associated with reporting and providing information to the Fund, any taxes imposed upon the Fund (including, but not limited to, collateralized debt obligations managed by the Investment Advisor or its affiliates), fees relating to valuing the Financial Instruments, and extraordinary expenses. In no event shall any of the foregoing costs or expenses include any salaries, occupational expense or general overhead of the Investment Advisor. For the avoidance of doubt, (i) the cost of all third party expenses incurred in connection with this Agreement shall not exceed standard market rates (which may include standard soft dollar arrangements) and (ii) to the extent any of the foregoing expenses were incurred on behalf of, or benefit of a number of Investment Advisor's advised accounts, such expenses shall be allocated pro rata among such accounts.

(b) To the extent that expenses to be borne by the Fund are paid by the Investment Advisor or by any Sub-Advisor, the Fund shall reimburse the Investment Advisor (or Sub-Advisors, as applicable) for such expenses so long as such expenses are at market rates.

10. Fees. Without limiting the expense reimbursements set forth above, the Investment Advisor shall provide the Fund with the services described herein for 100 bps per annum (25 bps per quarter) of the market value of the Equity Investments (defined below) and 50 bps per annum (12.5 bps per quarter) of the market value of the Debt Investments (defined

below), calculated as of the last business day of each calendar quarter (the “**Calculation Date**”), payable quarterly in arrears by the 45th business day following the end of each quarter, provided that the Investment Advisor shall deliver to the General Partner on or before the 30th business day following the end of each calendar quarter a statement showing the calculation of the fee for such quarter. For purposes hereof, the “**Equity Investments**” shall mean those Financial Instruments which are equity investments held by the Fund (either directly or indirectly through a subsidiary vehicle) on the Calculation Date, and “**Debt Investments**” shall mean those Financial Instruments which are debt investments held by the Fund (either directly or indirectly through a subsidiary vehicle) on the Calculation Date. For the avoidance of doubt, the Financial Instruments shall be valued as of each Calculation Date in accordance with the then current valuation policy of the Investment Advisor. Notwithstanding the foregoing, neither the term “Equity Investments” nor the term “Debt Investments” shall include any Financial Instruments with respect to which the Investment Advisor or any affiliate thereof already receives management fees.

11. Exculpation; Indemnification.

(a) Whether or not herein expressly so provided, every provision of this Agreement relating to the conduct or affecting the liability of or affording protection to the Investment Advisor, its members or any of their respective affiliates and their respective partners, members, officers, directors, employees, shareholders and agents (including parties acting as agents for the execution of transactions) (each, a “**Covered Person**” and collectively, “**Covered Persons**”) shall be subject to the provisions of this Section.

(b) To the fullest extent permitted by law, no Covered Person shall be liable to the General Partner or the Fund or any of its subsidiaries or anyone for any reason whatsoever (including but not limited to (i) any act or omission by any Covered Person in connection with the conduct of the business of the General Partner or the Fund, that is determined by such Covered Person in good faith to be in or not opposed to the best interests of the General Partner or the Fund, (ii) any act or omission by any Covered Person based on the suggestions of any professional advisor of the General Partner or the Fund or any of its subsidiaries whom such Covered Person believes is authorized to make such suggestions on

behalf of the General Partner or the Fund or any of its subsidiaries, (iii) any act or omission by the General Partner or the Fund or any of its subsidiaries, or (iv) any mistake, negligence, misconduct or bad faith of any broker or other agent of the General Partner or the Fund or any of its subsidiaries selected by Covered Person with reasonable care), unless any act or omission by such Covered Person constitutes willful misconduct or gross negligence by such Covered Person (as determined by a non-appealable judgment of a court of competent jurisdiction).

(c) Covered Persons may consult with legal counsel or accountants selected by such Covered Person and any act or omission by such Covered Person on behalf of the General Partner or the Fund or any of its subsidiaries or in furtherance of the business of the General Partner or the Fund or any of its subsidiaries in good faith in reliance on and in accordance with the advice of such counsel or accountants shall be full justification for the act or omission, and such Covered Person shall be fully protected in so acting or omitting to act if the counsel or accountants were selected with reasonable care.

(d) To the fullest extent permitted by law, the General Partner and the Fund and its subsidiaries shall indemnify and hold harmless Covered Persons (the “**Indemnified Party**”), from and against any and all claims, liabilities, damages, losses, costs and expenses, including amounts paid in satisfaction of judgments, in compromises and settlements, as fines and penalties and legal or other costs and expenses of investigating or defending against any claim or alleged claim, of any nature whatsoever, known or unknown, liquidated or unliquidated, that are incurred by any Indemnified Party and arise out of or in connection with the business of the General Partner or the Fund or any of its subsidiaries, any investment made under or in connection with this Agreement, or the performance by the Indemnified Party of Covered Person’s responsibilities hereunder and against all taxes, charges, duties or levies incurred by such Covered Person or any Indemnified Party in connection with the General Partner or the Fund or any of its subsidiaries, provided that an Indemnified Party shall not be entitled to indemnification hereunder to the extent the Indemnified Party’s conduct constitutes willful misconduct or gross negligence (as determined by a non-appealable judgment of a court of competent jurisdiction). The termination of any proceeding by settlement, judgment, order or upon a plea of nolo contendere or its equivalent shall not, of itself, create a presumption that the Indemnified Party’s conduct constituted willful misconduct or gross negligence.

(e) Expenses incurred by an Indemnified Party in defense or settlement of any claim that shall be subject to a right of indemnification hereunder, shall be advanced by the General Partner prior to the final disposition thereof upon receipt of an undertaking by or on behalf of the Indemnified Party to repay the amount advanced to the extent that it shall be determined ultimately that the Indemnified Party is not entitled to be indemnified hereunder.

(f) The right of any Indemnified Party to the indemnification provided herein shall be cumulative of, and in addition to, any and all rights to which the Indemnified Party may otherwise be entitled by contract or as a matter of law or equity and shall be extended to the Indemnified Party's successors, assigns and legal representatives.

(g) The provisions of this Section are expressly intended to confer benefits upon Covered Persons and such provisions shall remain operative and in full force and effect regardless of the expiration or any termination of this Agreement.

(h) In no event shall any Covered Person be liable for special, exemplary, punitive, indirect, or consequential loss, or damage of any kind whatsoever, including without limitation lost profits.

(i) No Covered Person shall be liable hereunder for any settlement of any action or claim effected without its written consent thereto.

(j) Pursuant to the exculpation and indemnification provisions described above, the Investment Advisor and each Indemnified Party will generally not be liable to the General Partner or the Fund for any act or omission (or alleged act or omission), absent bad faith, willful misconduct, fraud or gross negligence, and the General Partner and the Fund will generally be required to indemnify such persons against any Losses they may incur by reason of any act or omission (or alleged act or omission) related to the General Partner, the Fund or its subsidiaries, absent bad faith, willful misconduct, fraud or gross negligence. As a result of these provisions, the General Partner, the Fund and its subsidiaries, as applicable (not the Investment Advisor or any other Indemnified Party) will be responsible for any Losses resulting from trading errors and similar human errors, absent bad faith, willful misconduct,

fraud or gross negligence or the ability to waive or limit such Losses under applicable law. Trading errors might include, for example, keystroke errors that occur when entering trades into an electronic trading system or typographical or drafting errors related to derivatives contracts or similar agreements. Given the volume of transactions executed by the Investment Advisor and its affiliates on behalf of the Fund and/or its subsidiaries, the General Partner acknowledges that trading errors (and similar errors) will occur and that the General Partner will be responsible for any resulting Losses, even if such Losses result from the negligence (but not gross negligence) of the Investment Advisor or its affiliates.

12. Activities of the Investment Advisor and Others. The Investment Advisor, and its affiliates may engage, simultaneously with their investment management activities on behalf of the Fund, in other businesses, and may render services similar to those described in this Agreement to other individuals, companies, trusts or persons, and shall not by reason of such engaging in other businesses or rendering of services for others be deemed to be acting in conflict with the interests of the Fund. Notwithstanding the foregoing, the Investment Advisor and its affiliates shall devote as much time to provide advisory service to the General Partner with respect to the management of the Fund's assets as the Investment Advisor deems necessary and appropriate. In addition, the Investment Advisor or any of its affiliates, in their individual capacities, may engage in securities transactions which may be different than, and contrary to, the investment advice provided by the Investment Advisor to the General Partner with respect to the Fund. The Investment Advisor may give advice and recommend securities to, or buy securities for, accounts and other clients, which advice or securities may differ from advice given to, or securities recommended or bought for, the Fund, even though their investment objectives may be the same or similar. The Investment Advisor may recommend transactions in securities and other assets in which the Investment Advisor has an interest, including securities or other assets issued by affiliates of the Investment Manager. Each of the General Partner and the Fund acknowledges that it has received a copy of Part 2 of the Investment Advisor's Form ADV, which further describes conflicts of interest, including the Investment Advisor, its affiliates and their respective advised accounts.

13. Term. This Agreement shall remain in effect through an initial term concluding December 31, 2014 and shall be automatically extended for additional one-year

terms thereafter, except that it may be terminated by the Investment Advisor, on the one hand, or by the General Partner and the Fund, on the other hand, upon at least 90 days' prior written notice to the General Partner or the Investment Advisor, as the case may be, prior to General Partner's fiscal year-end.

14. Miscellaneous.

(a) Notices. Any notice, consent or other communication made or given in connection with this Agreement shall be in writing and shall be deemed to have been duly given when delivered by hand or facsimile or five days after mailed by certified mail, return receipt requested, as follows:

If to the Investment Advisor, to:

Highland Capital Management, L.P.
300 Crescent Court, Suite 700
Dallas, Texas 75201
Telephone Number: (972) 628-4100
Facsimile Number: (972) 628-4147

If to the General Partner or the Fund, to:

Charitable DAF GP, LLC
4140 Park Lake Avenue, Suite 600
Raleigh, North Carolina 27612
Attention: Grant Scott
Telephone Number: (919) 854-1407
Facsimile Number: (919) 854-1401

(b) Entire Agreement. This Agreement contains all of the terms agreed upon or made by the parties relating to the subject matter of this Agreement, and supersedes all prior and contemporaneous agreements, negotiations, correspondence, undertakings and communications of the parties, oral or written, respecting such subject matter.

(c) Amendments and Waivers. No provision of this Agreement may be amended, modified, waived or discharged except as agreed to in writing by the parties. No amendment to this Agreement may be made without first obtaining the required approval from the Fund. The failure of a party to insist upon strict adherence to any term of this Agreement on

any occasion shall not be considered a waiver thereof or deprive that party of the right thereafter to insist upon strict adherence to that term or any other term of this Agreement.

(d) Binding Effect; Assignment. This Agreement shall be binding upon and inure to the benefit of the General Partner, the Fund, the Investment Advisor, each Indemnified Party and their respective successors and permitted assigns. Any person that is not a signatory to this Agreement but is nevertheless conferred any rights or benefits hereunder (*e.g.*, officers, partners and personnel of the Investment Advisor and others who are entitled to indemnification hereunder) shall be entitled to such rights and benefits as if such person were a signatory hereto, and the rights and benefits of such person hereunder may not be impaired without such person's express written consent. No party to this Agreement may assign (as such term is defined under the U.S. Investment Advisers Act of 1940, as amended) all or any portion of its rights, obligations or liabilities under this Agreement without the prior written consent of the other parties to this Agreement; provided; however, that the Investment Advisor may assign all or any portion of its rights, obligations and liabilities hereunder to any of its affiliates at its discretion.

(e) Governing Law. Notwithstanding the place where this Agreement may be executed by any of the parties thereto, the parties expressly agree that all terms and provisions hereof shall be governed by and construed in accordance with the laws of the State of Texas applicable to agreements made and to be performed in that State.

(f) Arbitration. (i) Any controversy or claim or dispute arising out of or relating to this Agreement or the breach, termination, enforcement, interpretation or validity thereof (a “**Disputed Matter**”) shall be handled exclusively pursuant to the following procedures. In the event of any Disputed Matter, the parties agree that upon written notice of such Disputed Matter sent by one party to the party, the parties shall arbitrate the Disputed Matter pursuant to this Section 14(f) unless the parties expressly agree in writing to resolve the Disputed Matter in another manner through mediation or otherwise. The arbitration shall be conducted pursuant to the commercial arbitration rules of the American Arbitration Association in Dallas, Texas. Any arbitration pursuant to this Agreement unless otherwise agreed to by the parties shall be conducted by a panel of three (3) arbitrators mutually selected by the parties from a list of

arbitrators determined in accordance with the American Arbitration Association's arbitrator selection procedure.

(ii) The judgment upon the award rendered in any such arbitration shall be final and binding upon the parties and may be entered in any court having jurisdiction thereof. All fees and expenses of the arbitrator and all other expenses of the arbitration shall be paid by the non-prevailing party in such arbitration. The arbitrator shall have no authority to impose any punitive or consequential damages.

(iii) Nothing in this Section 14(f) shall be construed to limit either party's right to obtain equitable or injunctive relief in a court of competent jurisdiction in appropriate circumstances.

(g) Headings. The headings contained in this Agreement are intended solely for convenience and shall not affect the rights of the parties to this Agreement.

(h) Counterparts. This Agreement may be signed in any number of counterparts with the same effect as if the signatures to each counterpart were upon a single instrument, and all such counterparts together shall be deemed an original of this Agreement.

(i) Survival. The provisions of Sections 8, 9, 10, 11 and 14 hereof shall survive the termination of this Agreement.

(j) Pronouns. All pronouns shall be deemed to refer to the masculine, feminine, neuter, singular or plural as the identity of the person or persons' firm or company may require in the context thereof.

(k) Arm's-Length Agreement. The General Partner and the Fund have approved this Agreement and reviewed the activities described in Section 12 and in the Investment Advisor's Form ADV and the risks related thereto.

[Signature Page to Follow]

IN WITNESS WHEREOF the parties hereto have caused this Agreement to be executed
to be effective from the date first written above.

HIGHLAND CAPITAL MANAGEMENT, L.P.

By: Strand Advisors, Inc., its general partner

By: 

Name: James Dondero

Title: President

Date: August 26, 2014

CHARITABLE DAF GP, LLC

By: 

Name: Grant J. Scott

Title: Managing Member

Date: August 26, 2014

CHARITABLE DAF FUND, L.P.

By: Charitable DAF GP, LLC, its general partner

By: 

Name: Grant J. Scott

Title: Managing Member

Date: August 26, 2014

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In re:	§	
HIGHLAND CAPITAL	§	
MANAGEMENT, L.P.,	§	
	§	
Debtor,	§	
-----	§	
THE CHARITABLE DAF FUND, L.P.	§	
and CLO HOLDCO, LTD.,	§	
	§	
Plaintiffs/Appellants,	§	
	§	
v.	§	CIVIL ACTION NO. 3:21-CV-3129-B
	§	
HIGHLAND CAPITAL	§	
MANAGEMENT, L.P.,	§	
	§	
Defendant/Appellee.	§	

MEMORANDUM OPINION AND ORDER

Before the Court are Appellants The Charitable DAF Fund, L.P. (Charitable DAF) and CLO Holdco, Ltd. (CLO Holdco)'s appeals from the bankruptcy court's Motion to Dismiss Order and Motion to Stay Order. For the reasons that follow, the Motion to Dismiss Order is **REVERSED** and **REMANDED**. The Motion to Stay Order is **AFFIRMED**.

I.

BACKGROUND¹

These are consolidated appeals from an adversary proceeding in a bankruptcy case. The Debtor, Highland Capital Management, L.P. (HCM), filed for Chapter 11 bankruptcy on October 16, 2019, in the United States Bankruptcy Court for the District of Delaware and that court transferred venue to the United States Bankruptcy Court for the North District of Texas. *In re Highland Cap. Mgmt. L.P.*, 2022 WL 780991, at *1 (Bankr. N.D. Tex. Mar. 11, 2022).

In 2017, Charitable DAF—through the holding entity CLO Holdco—purchased 49.02% of the available shares of Highland CLO Funding, Ltd. (HCLOF) based upon investment advice from HCM.² Doc. 9, Appellant’s Br., 5. Another entity, HarbourVest, acquired 49.98% of the HCLOF shares and HCM and its employees acquired the remaining 1%. *Id.*; Doc. 21, Appellee’s Br., 7. A company agreement (the HCLOF Member Agreement) governing the rights and obligations of HCLOF shareholders purportedly prohibited a member from “sell[ing] shares to another member without first providing all other members the right to purchase a pro rata portion thereof at the same price” (the Right of First Refusal). Doc. 9, Appellant’s Br., 6. The value of the HCLOF shares fluctuated throughout the bankruptcy proceedings; the actual value is one of the issues giving rise to some of Charitable DAF’s causes of action. *Id.* at 6–7; R. at 551–65.

¹ Because these are two consolidated appeals with separate appellate records, the Court indicates when it switches between the separate appellate records by footnotes. The Appellant’s Brief and record cites in this Background section are in Doc. 6 in case No. 3:22-CV-0695-B. Appellee’s Brief, which was filed after consolidation, is in case No. 21-CV-3129-B.

² Except where otherwise stated, the Court refers to Charitable DAF and CLO Holdco collectively as Charitable DAF because Charitable DAF controls and owns CLO Holdco and both entities have the same director. Doc. 21, Appellee’s Br., 7 & n.6. Appellant Charitable DAF does not dispute this relationship and imputes the actions of CLO Holdco to itself throughout Appellant’s brief. See Doc. 9, Appellant’s Br., 13–14 (imputing the Objection to both Appellants).

During the bankruptcy, “HarbourVest filed proof of claims against [HCM] totaling over \$300 million, notionally.” [Doc. 9](#), Appellant’s Br., 6. As part of the settlement for these claims, “HarbourVest agreed to sell its interest in HCLOF to [HCM].” *Id.* at 8. HCM would then have majority ownership of HCLOF. *See id.* at 5; [Doc. 21](#), Appellee’s Br., 7. “CLO Holdco filed an objection to the settlement, contending that the HCLOF Member Agreement entitled [CLO] Holdco to a Right of first Refusal” (the Objection). [Doc. 9](#), Appellant’s Br., 8. At the beginning of the settlement hearing (the Rule 9019 Settlement Hearing), CLO Holdco withdrew its Objection. [Doc. 21](#), Appellee’s Br., 10–11; R. at 6269–70. After overruling the remaining objections from the other parties, the bankruptcy court approved the HarbourVest Settlement. [Doc. 9](#), Appellant’s Br., 9.

This Adversary Proceeding stems from the complaint filed by Appellants on April 12, 2021, in this Court in *Charitable DAF Fund, L.P. et al. v. Highland Capital Management, L.P., et al.*, Case No. 3:21-CV-0842-B. *Id.*; Complaint, *Charitable DAF Fund, L.P. v. Highland Cap. Mgmt., L.P.*, No. 3:21-CV-0842-B (N.D. Tex. Apr. 12, 2021), [Doc. 1](#). On September 20, 2021, this Court referred that case to the bankruptcy court for “docket[ing] as an Adversary Proceeding associated with the consolidated Chapter 11 Bankruptcy of Highland Capital Management, L.P.” Order of Reference, *Charitable DAF Fund, L.P. v. Highland Cap. Mgmt., L.P.*, No. 3:21-CV-0842-B (N.D. Tex. Sept. 20, 2021), [Doc. 64](#). During the Adversary Proceeding, Appellants moved for a stay of the case (the Motion to Stay) and Appellees moved to dismiss the case (the Motion to Dismiss). R. at 1634–67, 3248–52. On November 23, 2021, the bankruptcy court held a hearing on the Motion to Stay and Motion to Dismiss. *Id.* at 5951. The bankruptcy court denied the Motion to Stay at the hearing and later entered an order granting the Motion to Dismiss, dismissing all causes of action with prejudice. *Id.* at 5977; *In re Highland*, [2022 WL 780991](#), at *12. Appellants promptly appealed both orders; this

Court consolidated the appeals. *In re Highland Cap. Mgmt.*, 2022 WL 2193000, at *1, *4 (N.D. Tex. June 17, 2022). While the appeals were pending, the Fifth Circuit affirmed the HCM reorganization plan (the Plan), but vacated the exculpatory provision “as to all parties *except* [HCM], the Committee and its members, and the Independent Directors for conduct within the scope of their duties.” *Highland Cap. Mgmt., L.P. v. NexPoint Advisors, L.P.*, 2022 WL 3571094, at *14 (5th Cir. Aug. 19, 2022).

The appeals are fully briefed and ripe for review. The Court considers them below.

II.

LEGAL STANDARDS

Final judgments, orders, and decrees of a bankruptcy court may be appealed to a federal district court. 28 U.S.C. § 158(a). Because the district court functions as an appellate court in this scenario, it applies the same standards of review that federal appellate courts use when reviewing district court decisions. *In re Webb*, 954 F.2d 1102, 1103–04 (5th Cir. 1992) (citations omitted).

A. Rule 12(b)(6) Motion to Dismiss for Failure to State a Claim

Under Federal Rule of Civil Procedure 8(a)(2), a complaint must contain “a short and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). Rule 12(b)(6) authorizes a court to dismiss a plaintiff’s complaint for “failure to state a claim upon which relief can be granted.” Fed. R. Civ. P. 12(b)(6). In considering a Rule 12(b)(6) motion to dismiss, “[t]he court accepts all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff.” *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 205 (5th Cir. 2007). But the court will “not look beyond the face of the pleadings to determine whether relief should be granted based on the alleged facts.” *Spivey v. Robertson*, 197 F.3d 772, 774 (5th Cir. 1999).

To survive a motion to dismiss, plaintiffs must plead “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). “Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* “The plausibility standard is not akin to a ‘probability requirement’ but it asks for more than a sheer possibility that a defendant has acted unlawfully.” *Id.* (quoting *Twombly*, 550 U.S. at 556). When well-pleaded facts fail to meet this standard, “the complaint has alleged—but it has not shown—that the pleader is entitled to relief.” *Id.* at 679 (quotation marks and alterations omitted).

B. *Motion to Stay*

Incidental to a court’s inherent power to control its docket is the power to stay proceedings before it. *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936). A court considers four factors when determining whether to stay a case pending appeal: “(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.” *Veasey v. Perry*, 769 F.3d 890, 892 (5th Cir. 2014) (quoting *Nken v. Holder*, 556 U.S. 418, 426 (2009)). “The first two factors of the traditional standard are the most critical.” *Barber v. Bryant*, 833 F.3d 510, 511 (5th Cir. 2016) (quoting *Nken*, 556 U.S. at 434).

III.

ANALYSIS

The Court begins with the appeal of the Motion to Dismiss Order because it can only review the appeal of the Motion to Stay Order if it reverses the bankruptcy court's decision to dismiss the causes of action in the adversary proceeding. *In re Highland*, 2022 WL 2193000, at *2. Finding reversal of the Motion to Dismiss Order warranted, the Court then reviews the appeal of the Motion to Stay Order.

A. *Appeal of the Motion to Dismiss Order*³

Charitable DAF raises three issues in its appeal of the Motion to Dismiss Order: (1) whether the bankruptcy court “commit[ted] reversible error by sua sponte dismissing this action on the basis of collateral estoppel without giving notice and an opportunity to respond”; (2) whether collateral estoppel barred Charitable DAF's claims when the claims were adjudicated in a Rule 9019 Settlement Hearing; and (3) whether the bankruptcy court's application of judicial estoppel erroneously relied on a transcription error, an ostensibly inconsistent position of Charitable DAF, or a failure to conclude that “subsequently discovered evidence . . . render[ed] the ostensible inconsistency ‘inadvertent.’” Doc. 9, Appellant's Br., 2.

An appellate court reviews a dismissal under Rule 12(b)(6) de novo. *Stripling v. Jordan Prod. Co., LLC*, 234 F.3d 863, 868 (5th Cir. 2000). “[T]he application of collateral estoppel is” also reviewed de novo. *Id.* (quoting *United States v. Brackett*, 113 F.3d 1396, 1398 (5th Cir. 1997)). However, “a [bankruptcy] court's decision to invoke the equitable doctrine of judicial estoppel [is reviewed] for abuse of discretion.” *Cox v. Richards*, 761 F. App'x 244, 246 (5th Cir. 2019) (citing

³ For this appeal, the record and document citations are in case No. 3:22-CV-0695-B. However, Appellee's Brief is in case No. 21-CV-3129-B.

United States ex rel. Long v. GSDMIdea City, L.L.C., 798 F.3d 265, 271 (5th Cir. 2015)). Therefore, this Court reviews the bankruptcy court’s sua sponte invocation of collateral estoppel de novo, the application of collateral estoppel de novo, and the invocation of judicial estoppel for abuse of discretion. The Court addresses each in turn below.

1. Sua Sponte Dismissal

The bankruptcy court dismissed Charitable DAF’s claims with prejudice based on collateral estoppel—even though neither party raised the issue “per se”—finding their res judicata arguments relevant to the issue. *In re Highland*, 2022 WL 780991, at *7. The Court first considers whether the sua sponte application was proper.

Charitable DAF challenges the bankruptcy court’s sua sponte invocation of collateral estoppel to dismiss its claims. Doc. 9, Appellant’s Br., 11–12. Specifically, Charitable DAF argues that the bankruptcy court could “only do so if the ‘procedure employed is fair’—that is, if prior notice is given with adequate time for the plaintiff to prepare a response.” *Id.* at 12 (quoting *Carroll v. Fort James Corp.*, 470 F.3d 1171, 1177–78 (5th Cir. 2006)). The failure to provide “notice and an opportunity to dispute the claimed bases for dismissal is reversible error,” according to Charitable DAF. *Id.*

The Court disagrees. The Fifth Circuit has recognized two instances when a court may dismiss a case sua sponte on the basis of collateral estoppel: when (1) “both actions were brought in courts of the same district” or (2) “all of the relevant facts are contained in the record and . . . uncontroverted.” *OneBeacon Am. Ins. Co. v. Barnett*, 761 F. App’x 396, 399 (5th Cir. 2019) (first quoting *Trammell Crow Residential Co. v. Am. Prot. Ins. Co.*, 574 F. App’x 513, 522 (5th Cir. 2014); and then quoting *Mowbray v. Cameron Cnty.*, 274 F.3d 269, 281 (5th Cir. 2001)). This case easily

fits into the first category because all of the proceedings at issue took place in the bankruptcy court before the same judge. See *In re Highland*, 2022 WL 780991, at *7 (relying on the former category to dismiss the case). Thus, the bankruptcy court did not err by raising the collateral estoppel issue sua sponte.

This case is unlike the *Carroll* case cited by Charitable DAF, which did not involve collateral estoppel. 470 F.3d 1171. In *Carroll*, the Fifth Circuit held that a court may dismiss a case sua sponte under Federal Rule of Civil Procedure 12(b)(6) if the “procedure employed is fair[,]” which requires “both notice of the court’s intention and an opportunity to respond.” *Id.* at 1177 (quoting *Bazrowx v. Scott*, 136 F.3d 1053, 1054 (5th Cir. 1998)). The district court erred by not providing “notice or opportunity to be heard” and “did not even . . . mention [some of the dismissed] claims in its order of dismissal.” *Id.*

This case is more akin to *McIntyre v. Ben E. Keith Co.* where the Fifth Circuit upheld the district court’s sua sponte raising of the issue of res judicata to dismiss the case under Rule 12(b)(6). 754 F. App’x 262, 265 (5th Cir. 2018). In *McIntyre*, the plaintiff’s “Civil Rights Act and FLSA actions were brought before the same federal district court.” *Id.* Because the latter action closely resembled the former action, the Fifth Circuit found no reversible error with the district court’s raising the issue of res judicata sua sponte. *Id.*

First, dismissal for failure to state a claim like in *Carroll* and dismissal for collateral estoppel as in the instant case are conceptually and procedurally different. In the former, the plaintiff is in the process of attempting to “allege[] [their] best case,” *Bazrowx*, 136 F.3d at 1054, while collateral estoppel occurs after a plaintiff “alleged [their] best case” and fully litigated the issue. See *Allen v. McCurry*, 449 U.S. 90, 94 (1980). Put more succinctly, collateral estoppel eliminates “unnecessary

judicial waste” from repeated attempts at alleging the best case. *Arizona v. California*, 530 U.S. 392, 412 (2000) (quoting *United States v. Sioux Nation*, 448 U.S. 371, 432 (1980) (Rehnquist, J., dissenting)). Second, the parties addressed res judicata during oral argument and in their pleadings before the bankruptcy court. While res judicata is not collateral estoppel, it is closely related. *Hous. Prof'l Towing Ass'n v. City of Houston*, 812 F.3d 443, 447 (5th Cir. 2016) (“[R]es judicata encompasses two separate but linked preclusive doctrines: (1) true res judicata or claim preclusion and (2) collateral estoppel or issue preclusion.”). Thus, the bankruptcy court employed a fair procedure by allowing the parties to litigate the issues, including res judicata, before dismissing the case sua sponte. See generally *Carver v. Atwood*, 18 F.4th 494, 497 (5th Cir. 2021) (“District courts may, for appropriate reasons, dismiss cases *sua sponte*.”).

The Court next considers whether the bankruptcy court’s substantive application of collateral estoppel was proper.

2. Collateral Estoppel

“Collateral estoppel prevents litigation of an issue when: ‘(1) the identical issue was previously adjudicated; (2) the issue was actually litigated; and (3) the previous determination was necessary to the decision.’”⁴ *Bradberry v. Jefferson Cnty.*, 732 F.3d 540, 548 (5th Cir. 2013) (quoting *Pace v. Bogalusa City Sch. Bd.*, 403 F.3d 272, 290 (5th Cir. 2005)). “Relitigation of an issue is not precluded unless the facts and the legal standard used to assess them are the same in both proceedings.” *In re Southmark Corp.*, 163 F.3d at 932.

Charitable DAF attacks each element of collateral estoppel, so the Court addresses each

⁴ Appellant lists a fourth element occasionally referenced by the Fifth Circuit—“there is no special circumstance that would make it unfair to apply the doctrine”—but the Court finds no reason to address this possible fourth element in this case. See *In re Southmark Corp.*, 163 F.3d 925, 932 n.9 (5th Cir. 1999) (declining to apply the fourth element because appellant “failed to support it factually”).

element individually.

i. Identical issue

The bankruptcy court found “(a) consideration of the value that the estate was both receiving and paying, as well as (b) the potential existence of a ‘Right of First Refusal’ . . . [were] the gravamen of [Charitable DAF’s] Complaint.” *In re Highland*, 2022 WL 780991, at *9 (emphasis omitted). During the settlement hearing, the bankruptcy court had to determine whether the HarbourVest Settlement “was ‘fair and equitable’ and in the ‘best interests of creditors,’ and whether it was the ‘product of arms-length bargaining, and not of fraud or collusion[.]’” *Id.* at *8. This determination entailed “arguments and evidence regarding the methodology for the valuation of the HCLOF interest and the existence or non-existence of a ‘Right of First Refusal.’” *Id.*

Charitable DAF argues that the issues are not identical because the Objection “only addressed whether HarbourVest . . . had performed all conditions precedent to being able to transfer the interest to Highland *as another co-investor*” and did not present an identical claim “for breach of the HCLOF [Member] Agreement” and associated damages. *Doc. 9*, Appellant’s Br., 13–14. Further, “even if this one contract issue was fully . . . litigated,” only the second cause of action in Charitable DAF’s complaint arguably parallels that issue, according to Charitable DAF—the others are distinct. *Id.* at 14–15. Charitable DAF contends that these non-contract causes of action rely on evidence that was not known at the Rule 9019 Settlement Hearing, “stem from events that either occurred post-hearing, or were not discovered until after the hearing.” *Id.* at 15.

The Court finds the issues are identical. CLO Holdco’s Objection specifically argued:

Harbourvest has no authority to transfer its interests in HCLOF without first complying with the Right of First Refusal. The only way to effectuate such a transfer without first providing other members the Right of First Refusal is an intentionally

inaccurate interpretation of the Member Agreement's contractual provisions that would render specific passages redundant and meaningless.

R. at 4730. The bankruptcy court also heard argument and testimony from Seery, HCM's chief executive and chief restructuring officer, and Pugatch, a managing director of HarbourVest, about the valuation of HCLOF's assets at the settlement hearing. *Id.* at 6273, 6292, 6303–05 (“The twenty-two and a half [million] is the current—actually, the November value of HCLOF—the HarbourVest interests in HCLOF.”), 6358, 6374 (“The current value is right around \$22-1/2 million.”).

In the Original Complaint, Charitable DAF brought five causes of action: breach of fiduciary duties, breach of the HCLOF Member Agreement, negligence, RICO, and tortious interference. *Id.* at 551–65. The breach of fiduciary duties and negligence causes of action center around the alleged concealment of the rising value of HCLOF's assets and failing to offer the purchase of the assets to CLO Holdco or Charitable DAF before offering to HCM. *Id.* at 553–55, 559–60. The breach of the HCLOF Member Agreement cause of action encompasses the Right of First Refusal in the agreement. *Id.* at 558–59. The RICO cause of action alleges that HCM used mail and wire fraud “to obtain or arrive at valuations of the HCLOF interests,” and “conceal[] the true value of the HCLOF interests.” *Id.* at 560–64. Lastly, the tortious interference cause of action stems from HCM's alleged interference with CLO Holdco's Right of First Refusal in the Member Agreement and “misrepresenting the fair market value” of HCLOF's assets. *Id.* at 564–65. In sum, all of these causes of action involve either the valuation of HCLOF or the Right of First Refusal, so the issues are the same as those before the bankruptcy court at the Rule 2019 Settlement Hearing.

ii. *Actually Litigated*

The bankruptcy court found the same arguments were also actually litigated, reasoning:

The Bankruptcy Court would never have approved the HarbourVest Settlement if it thought the value being exchanged was not fair, or if it thought the HCLOF Interests could not be transferred and that someone might later sue the Debtor, claiming the Transfer was improper. All parties had the chance to argue and present evidence about this. The Bankruptcy Court made a ruling based on the evidence and argument.

In re Highland, 2022 WL 780991, at *9.

Charitable DAF argues that because the Objection was withdrawn and no one objected to the withdrawal, the issue asserted therein was not litigated. Doc. 9, Appellant's Br., 16. Additionally, it claims the Rule 9019 Settlement Hearing is not a mini-trial and, therefore, cannot serve as an opportunity for a party to litigate their claims. *Id.* at 17–18 (citing *Off. Comm. of Unsecured Creditors v. Moeller (In re Age Refin., Inc.)*, 801 F.3d 530, 541 (5th Cir. 2015)).

An issue is not actually litigated and, thus, precluded unless the legal standard in the prior action mirrors the legal standard of the latter action. *Copeland v. Merrill Lynch & Co.*, 47 F.3d 1415, 1422 (5th Cir. 1995) (citations omitted). The bankruptcy court approved the HarbourVest Settlement after applying the *Jackson Brewing* test, which considers:

(1) the probability of success in litigating the claims subject to the Settlement Agreement, with due consideration for the uncertainty in fact and law, (2) the complexity and likely duration of litigation and any attendant expense, inconvenience, and delay, and (3) all other factors bearing on the wisdom of the compromise, including: (i) the best interests of the creditors, with proper deference to their reasonable views, and (ii) the extent to which the settlement is truly the product of arms-length bargaining, and not of fraud or collusion.

R. at 5568; *see also In re Highland*, 2022 WL 780991, at *8 (quoting *Off. Comm. of Unsecured Creditors v. Moeller (In re Age Ref., Inc.)*, 801 F.3d 530, 540 (5th Cir. 2015)). Stated more succinctly, when faced with a settlement, the bankruptcy court ensures the “compromise is truly ‘fair and equitable’ and ‘in the best interest of the estate.’” *In re Jackson Brewing Co.*, 624 F.2d 599, 602 (5th

Cir. 1980) (quoting *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson* (TMT Trailer), 390 U.S. 414, 424 (1968)).

However, in the context of litigating actual claims—such as those asserted by Charitable DAF—a court applies a preponderance of the evidence standard, not the probability of success standard from *Jackson Brewing. Copeland*, 47 F.3d at 1423; *In re Zale Corp.*, 62 F.3d 746, 766 n.60 (5th Cir. 1995) (“We also note for future reference that the legal standard in a settlement hearing differs from that applicable in an adversary proceeding or state court trial Consequently, we doubt that the findings of the bankruptcy court in a settlement hearing would have preclusive effect in adversary proceedings or state court trials.”). See generally *Weaver v. Aquila Energy Mktg.*, 196 B.R. 945, 957 (S.D. Tex. 1996) (“[S]ettlement hearings and preference actions involve the application of different legal standards.”). “Examining whether a particular settlement is fair or equitable and in the best interest of the estate and creditors is a different inquiry, driven by different policies, than litigation of the actual claim.” *Copeland*, 47 F.3d at 1423. While the issues of the Right of First Refusal and the valuation of HCLOF were raised in the Rule 9019 Settlement Hearing, the parties did not fully litigate the issues as one would at trial, and the bankruptcy court did not resolve the issues according to a preponderance of the evidence standard. Because the bankruptcy court applied a legal standard in the Rule 9019 Settlement Hearing that is inapplicable to the adjudication of Charitable DAF’s causes of action, the issues were not actually litigated in the Rule 9019 Settlement Hearing and collateral estoppel does not apply.⁵ The Court **REVERSES** the bankruptcy court on this issue.

⁵ Having found the second element of collateral estoppel unmet, the Court need not address the third element—necessity of the previous determination to the prior decision.

3. Judicial Estoppel

The bankruptcy court found the elements of judicial estoppel met and barred the second and fifth causes of action, which rely on the Right of First Refusal. *In re Highland*, 2022 WL 780991, at *12. The Court now addresses whether judicial estoppel applies to Charitable DAF's second and fifth causes of action.

Judicial estoppel is an equitable common law doctrine aimed at preventing a party from asserting an inconsistent legal position from a previous proceeding. *In re Coastal Plains, Inc.*, 179 F.3d 197, 205 (5th Cir. 1999). "The purpose of the doctrine is 'to protect the integrity of the judicial process', by 'prevent[ing] parties from playing fast and loose with the courts to suit the exigencies of self interest.'" *Id.* (alteration in original) (quoting *Brandon v. Interfirst Corp.*, 858 F.2d 266, 268 (5th Cir. 1988)). A court examines three criteria when determining the applicability of judicial estoppel: "(1) the party against whom judicial estoppel is sought has asserted a legal position which is plainly inconsistent with a prior position; (2) a court accepted the prior position; and (3) the party did not act inadvertently." *Reed v. City of Arlington*, 650 F.3d 571, 574 (5th Cir. 2011) (en banc).

Charitable DAF raises arguments for each of the judicial estoppel elements, so the Court addresses each element below.

i. Inconsistent legal position

Charitable DAF argues that the bankruptcy court's determination relies on a transcription error that amounted to an admission of HCM's compliance with the Right of First Refusal. Doc. 9, Appellant's Br., 22–23. The corrected transcript makes clear that no admission was made on behalf of CLO Holdco, according to Charitable DAF. *Id.* at 23–24.

The relevant portion of the original transcript reads:

In response to Mr. Morris, I'm not going to enter into a stipulation on behalf of my client, **but** the Debtor is compliant with all aspects of the contract. We withdrew our objection, and we believe that's sufficient.

R. at 6280. The corrected transcript reads:

In response to Mr. Morris, I'm not going to enter into a stipulation on behalf of my client **that** the Debtor is compliant with all aspects of the contract. We withdrew our objection, and we believe that's sufficient.

Doc. 9-1, Appellant's Br. Ex. A, 4.

Accepting this version of the record, CLO Holdco refused to "enter into a short stipulation on the record reflecting that the Debtor's acquisition of HarbourVest's interests in HCLOF is compliant with all of the applicable agreements between the parties." *Id.*; R. at 6280. However, moments before this, CLO Holdco withdrew its Objection premised on the Right of First Refusal stating:

CLO Holdco has had an opportunity to review the reply briefing, and after doing so has gone back and scrubbed the HCLOF corporate documents. Based on our analysis of Guernsey law and some of the arguments of counsel in those pleadings and our review of the appropriate documents, I obtained authority from my client, Grant Scott, as Trustee for CLO Holdco, to withdraw the CLO Holdco objection based on the interpretation of the member agreement.

R. at 6269–70. The bankruptcy court's decision rests primarily on this earlier withdrawal of the Objection and only later buttresses its argument with the then-unknown transcription error. *In re Highland*, **2022 WL 780991**, at *11 (following discussion of the withdrawal of the Objection with "[i]f that weren't enough" before mentioning the then-unknown transcription error). Thus, if the earlier withdrawal—without the transcription error—satisfies the first element of judicial estoppel then the bankruptcy court did not commit any error even if it referenced an incorrect transcription of the latter exchange.

The Court finds the bankruptcy court did not err in finding the first element of judicial estoppel. CLO Holdco made clear in the withdrawal of its objection that it no longer disputed the other parties' interpretation of the Right of First Refusal, which now forms the basis of Charitable DAF's second and fifth causes of action. *See R.* at 6269–70. Thus, the withdrawal of the objection put CLO Holdco on the opposite side of the legal argument that Charitable DAF now makes in its second and fifth causes of action. The first element of judicial estoppel is established because Charitable DAF has taken inconsistent positions in separate proceedings.

ii. *The bankruptcy court accepted the prior position*

The bankruptcy court solely relied on the withdrawal of the Objection to find the second element of judicial estoppel established. *In re Highland*, 2022 WL 780991, at *12. In the words of the bankruptcy court, it “perceived [this objection] as one of the major arguments that was relevant to the HarbourVest Settlement.” *Id.* “The [b]ankruptcy [c]ourt relied upon that withdrawal of CLO Holdco’s objection in making the determination to approve of the HarbourVest Settlement and, specifically, that Highland would not be running afoul of any obligation in entering into the HarbourVest Settlement.” *Id.*

Charitable DAF argues that there is no acceptance by the bankruptcy court of a prior position because without the transcription error, there is no admission and no inconsistent position. *Doc. 9*, Appellant’s Br., 25–26. Further, it contends that the withdrawal of the Objection is not the equivalent of stating the Right of First Refusal causes of action are meritless. *Id.* at 26–27.

The bankruptcy court did not err in finding the second element of judicial estoppel met because it necessarily relied on the change in CLO Holdco’s assessment of its Objection. The Right of First Refusal created a major obstacle to approval of the HarbourVest Settlement. When CLO

Holdco withdrew its Objection based on the Right of First Refusal, the Court had to accept CLO Holdco's position that the Right of First Refusal no longer posed an obstacle to the HarbourVest Settlement. Thus, the Court finds no error by the bankruptcy court for the second element of judicial estoppel.

iii. *Inadvertence of Charitable DAF*

The bankruptcy court did not examine the inadvertence of Charitable DAF in asserting inconsistent legal positions. See *In re Highland*, 2022 WL 780991, at *12.

Charitable DAF argues that it did not know the facts for several of its claims until after the settlement hearings, so it could not have asserted these claims at the hearing. Doc. 9, Appellant's Br., 27. Charitable DAF relies on the allegations surrounding the valuations of the HCLOF assets and the alleged acts violating the RICO statutes. *Id.* at 27–29. Additionally, the bankruptcy court did not address the inadvertence element for judicial estoppel and a failure to apply the correct legal standard is reversible error, Charitable DAF contends. Doc. 9, Appellant's Br., 27; Doc. 27, Appellant's Reply, 3–4.

The Court agrees with Appellant's last argument. A court abuses its discretion by applying the wrong legal standard. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990); *Def. Distrib. v. Bruck*, 30 F.4th 414, 427 (5th Cir. 2022). And the misapplication of a legal standard is reviewed de novo. *In re Woerner*, 783 F.3d 266, 270–71 (5th Cir. 2015). By not addressing the third element of judicial estoppel, the bankruptcy court applied the wrong legal standard. The Fifth Circuit implicitly recognized this third element—inadvertence—in *In re Coastal Plains, Inc.*, 179 F.3d at 206, 210, which the bankruptcy court cited for its legal standard. *In re Highland*, 2022 WL 780991, at *11. The Fifth Circuit has since clarified that “[t]his circuit . . . recognizes *three* particular requirements”

for judicial estoppel. *Kane v. Nat'l Union Fire Ins. Co.*, 535 F.3d 380, 386 (5th Cir. 2008) (emphasis added). Because the bankruptcy court did not address the inadvertence element in its order dismissing Charitable DAF's second and fifth causes of action, the bankruptcy court abused its discretion. While the district court finds no issue in the bankruptcy court's analysis of the first two elements of judicial estoppel, the bankruptcy court did not address this third element, warranting remand for determination by the bankruptcy court whether Charitable DAF acted inadvertently to change its legal position.

3. Leave to Amend

Charitable DAF requested leave to amend its complaint in its response to the motion to dismiss, R. at 2272–73, which the bankruptcy court denied by dismissing all claims with prejudice. *In re Highland*, 2022 WL 780991, at *12. The Court need not address this argument because, upon remand, the bankruptcy court will have the opportunity to reassess Charitable DAF's claims and determine whether amendment should be allowed under Federal Rule of Civil Procedure 15(a). See *Marucci Sports, L.L.C. v. Nat'l Collegiate Athletic Ass'n*, 751 F.3d 368, 378 (5th Cir. 2014) (listing factors a court considers when determining whether to allow amendment of the complaint).

C. Appeal of the Motion to Stay Order⁶

Appellant Charitable DAF raises one issue on appeal of the Motion to Stay Order: “Did the bankruptcy court err by proceeding with the case rather than staying it” when Charitable DAF was enjoined “from litigating any action against Appellee [HCM]”? Doc. 11, Appellant's Br., 2. The bankruptcy court denied Charitable DAF's Motion to Stay All Proceedings and the subsequent Amended Motion to Stay All Proceedings, reasoning:

⁶ For this appeal, the record and document citations are in case No. 3:21-CV-3129-B.

I just don't think that you have shown that, you know, either the exculpation clause or the injunction provisions of the plan somehow tie your hands in arguing the 12(b)(6) motion, defending against the 12(b)(6) motion today or I just think that your arguments reflect, frankly, a misunderstanding of how the injunction language and exculpation language applies here.

R. at 2087; *see also id.* at 4–5.

On appeal, Charitable DAF argues that the bankruptcy court erred in its denial of the motion for a stay because the Plan Confirmation Order's injunction prohibited Charitable DAF from participating in the case, “terminat[ing] any case or controversy and stripp[ing] the bankruptcy court of jurisdiction.” **Doc. 11**, Appellant's Br., 7. Accordingly, “[t]he bankruptcy court could only stay the case pending the [appeal of the Plan Confirmation Order's injunction], or dismiss the case as barred by the injunction[,]” Charitable DAF contends.” *Id.* at 9.

As noted above, the Fifth Circuit affirmed the Plan in all respects except one and specifically affirmed the injunction. *Highland*, **2022 WL 3571094**, at *13–14. The injunction in the Plan provides that “all Enjoined Parties are and shall be permanently enjoined . . . from directly or indirectly (i) commencing, conducting, or continuing in any manner any suit, action, or other proceeding of any kind . . . against or affecting the Debtor or the property of the Debtor.” R. at 2401. And the term Enjoined Parties includes “(i) all Entities who have held, hold, or may hold Claims against or Equity Interests in the Debtor [and] . . . (iii) any Entity that has appeared and/or filed any motion, objection, or other pleading in this Chapter 11 Case.” *Id.* at 2358.

Relatedly, the Plan exculpates HCM⁷ “from, any claim, obligation, suit, judgment, damage, demand, debt, right, Cause of Action, remedy, loss, and liability for conduct occurring on or after the Petition Date in connection with or arising out of [execution of the Plan].” *Id.* at 2398. However, this exculpation provision⁸ does “not apply to (a) any acts or omissions of an Exculpated Party arising out of or related to acts or omissions that constitute bad faith, fraud, gross negligence, criminal misconduct, or willful misconduct or (b) [other specific entities actions].” *Id.* at 2398–99.

The bankruptcy court did not abuse its discretion⁹ in denying the motion for a stay of the case. The bankruptcy court found that the Plan’s injunction and exculpation provisions—which it *approved*—did not prevent Charitable DAF from pursuing its causes of action. *Id.* at 2087. In effect, the bankruptcy court held that Charitable DAF could continue to litigate its causes of action and the Court agrees. *See id.* Just like the bankruptcy court, this Court does not see how the injunction and exculpation provisions prohibit Charitable DAF from participating in the below action. The exculpation provision permits Charitable DAF to bring claims against HCM for “bad faith, fraud,

⁷ The Plan makes clear that the term Exculpated Party does not include Charitable DAF. R. at 2359 (“Exculpated Parties” means, collectively, (i) the Debtor . . . provided, however, that, for the avoidance of doubt, none of . . . the Charitable Donor Advised Fund, L.P. (and any of its subsidiaries, including CLO Holdco, Ltd., and managed entities) . . . is included in the term ‘Exculpated Party.’”).

⁸ Subsequently to this appeal, the Fifth Circuit vacated a portion of the exculpation provision. *Highland*, 2022 WL 3571094, at *12. The Fifth Circuit held that “the exculpation of certain non-debtors . . . was unlawful” so the court “str[uck] all exculpated parties from the Plan except for [HCM], the Committee and its members, and the Independent Debtors.” *Id.* Charitable DAF brings its causes of action against HCM, so what remains of the exculpation provision still applies to this case. *See id.*

⁹ The parties disagree on whether this Court reviews the denial of the stay for abuse of discretion or de novo. *Doc. 11*, Appellant’s Br., 6 (“Questions of law are reviewed de novo.”); *Doc. 16*, Appellee’s Br., 2 (“The Court reviews the bankruptcy court’s order for abuse of discretion.”). Charitable DAF does not pursue this argument in its Reply, so this argument is considered waived, *Black v. N. Panola Sch. Dist.*, 461 F.3d 584, 588 n.1 (5th Cir. 2006), as well as incorrect. *See Moore v. Tangipahoa Par. Sch. Bd.*, 507 F. App’x 389, 392 (5th Cir. 2013) (citing *Wildmon v. Berwick Universal Pictures*, 983 F.2d 21, 23 (5th Cir. 1992)) (“We review a district court’s denial of a stay pending appeal for abuse of discretion.”).

gross negligence, criminal misconduct, or willful misconduct” and Charitable DAF’s causes of action—breach of fiduciary duty, breach of contract, negligence, and RICO—appear to fit within these categories of claims. *Id.* at 490–504, 2398–99. Further, Charitable DAF continued to participate by responding to HCM’s motion to dismiss and participating in the hearing regarding the motion to dismiss. See Section III(A) *supra*. Lastly and importantly, Charitable DAF did not even attempt to address the traditional stay elements. R. at 2087 (“I guess one might say the traditional four-factor test for a stay of a proceeding has really not been the subject of the argument here for a stay.”). Without argument on the factors for a stay, this Court lacks any basis to overturn the bankruptcy court.

The bankruptcy court’s Motion to Stay Order is **AFFIRMED**.

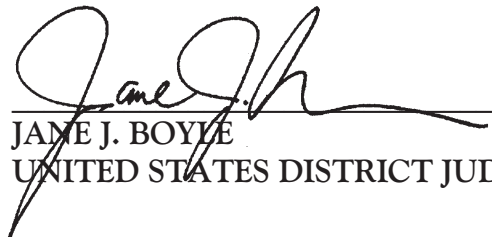
IV.

CONCLUSION

For the foregoing reasons, the Court **REVERSES** and **REMANDS** the bankruptcy court’s Motion to Dismiss Order and **AFFIRMS** the bankruptcy court’s Motion to Stay Order.

SO ORDERED.

SIGNED: September 2, 2022.



JANE J. BOYLE
UNITED STATES DISTRICT JUDGE

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**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

In re:	)	Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P., ¹	)	Case No. 19-34054-sgj11
Reorganized Debtor.)	
In re: CHARITABLE DAF FUND, L.P., AND CLO HOLDCO LTD.,	)	Adv. Pro. No. 21-03067-sgj
Plaintiffs,)	
vs.)	
HIGHLAND CAPITAL MANAGEMENT, L.P., HIGHLAND HCF ADVISOR, LTD., AND HIGHLAND CLO FUNDING, LTD.)	
Defendants)	

**REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF
RENEWED MOTION TO DISMISS COMPLAINT**

¹ Highland's last four digits of its taxpayer identification number are (8357). The headquarters and service address for Highland is 100 Crescent Court, Suite 1850, Dallas, TX 75201.

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Highland² submits this reply in further support of Highland's Motion [[Docket No. 122](#)].

I. PLAINTIFFS' SO-CALLED "MOTIONS" MUST BE DENIED³

1. In an effort to put their RICO claim (Count 3) into suspended animation so that they can re-assert it at some later date (and presumably in a different court), Plaintiffs "move to dismiss" that Count pursuant to [FRCP 41\(a\)](#) while attempting to "reserve the right to bring such a claim." Pl. Mem at 23.⁴ But by its plain terms, Rule 41(a) only permits "an action" to be dismissed, not a single claim in a complaint. *Nat'l Horsemen's Benevolent & Protective Ass'n v. Black*, No. 22-10387, 2022 U.S. App. LEXIS 31958, at *19 & n.15 (5th Cir. Nov. 18, 2022). If Plaintiffs want to dismiss their entire complaint with prejudice, they are welcome to do so. But Plaintiffs cannot dismiss a single claim without prejudice just by saying so. Absent a voluntary dismissal of their entire case, Plaintiffs must face the music on this Motion.⁵

2. Separately, Plaintiffs' argument that the Motion violates [FRCP 12\(g\)](#) and should therefore be stricken as a "successive motion to dismiss" is based on the erroneous notion that this Court "presumptively denied Highland's bases for dismissal on the merits by not ruling on them." Pl. Mem. at 5-6. In fact, *the Court did the exact opposite*. After ruling that Plaintiffs were estopped from bringing their claims, the Court expressly stated that it would "forego" and "refrain"

² Capitalized terms used but not defined herein have the meanings given to them in *Highland's Memorandum of Law in Support of Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint* [[Docket No. 123](#)] (the "[Memorandum](#)" or "[Mem.](#)").

³ Each of Plaintiffs' so-called "motions" is procedurally improper because each fails to comply with Rule 7007-1 of the *Local Bankruptcy Rules of the United States Bankruptcy Court for the Northern District of Texas* in every respect and should be denied on that basis alone.

⁴ Citations to "Pl. Mem. at ___" refer to *Plaintiffs' Response to Renewed Motion to Dismiss Complaint* [[Docket No. 130](#)] (which also includes Plaintiffs' Appendix ("Pl. Appx. ___")).

⁵ In order to dismiss only Count 3, Plaintiffs were required to move for leave to amend pursuant to [FRCP 15](#). Had they followed the rule, Highland would have pointed out that the dismissal of Count 3 would have to be with prejudice because Plaintiffs' attempt to preserve their right to bring the RICO claim in a separate action would present a textbook case of *res judicata*. See Original MTD Decision [[Docket No. 100 at 11](#)] (citing cases).

from addressing Highland’s substantive arguments “for the sake of efficiency and judicial economy,” while also noting that it was “inclined to agree with these arguments.” MTD Order at 26. Now, following remand, Highland renews its motion to dismiss each claim on the same basis—failure to state a claim—that it initially asserted because it never obtained a substantive ruling on those aspects of the Original MTD. That is entirely appropriate because the assertion after remand of defenses not initially addressed is not duplicative. *See Butler v. Denka Performance Elastomer, LLC*, 2022 U.S. Dist. LEXIS 4981, at *11 (E.D. La. Jan. 11, 2022).⁶

3. Even if it were (and it is not), the Court still maintains the discretion to entertain even a duplicative motion if judicial economy would be served by doing so, rather than forcing Highland to answer and then assert the same grounds on a Rule 12(c) motion. *See Jacquez v. Geo Int’l Mgmt.*, 2021 U.S. Dist. LEXIS 130474, at *4 (W.D. Tex. Mar. 24, 2021) (court has discretion to entertain second Rule 12(b)(6) motion) (citing *Doe v. Columbia-Brazoria Indep. Sch. Dist.*, 855 F.3d 681, 686 (5th Cir. 2017)); *Leyse v. Bank of Am. Nat’l Ass’n*, 804 F.3d 316, 321-22 (3d Cir. 2015); *Wells Fargo Trust Co., N.A. v. Sioux City*, 2022 U.S. Dist. LEXIS 81860, at *10 (D. Neb. May 5, 2022). Here, where the Complaint is plainly vulnerable, there is no reason to require Highland to expend additional time and expense answering the Complaint and engaging in legally unnecessary discovery at the behest of a serial litigant’s sock puppet.

⁶ Plaintiffs’ suggestion that this Court “presumptively denied” the Original MTD “on the merits” is plainly wrong and is not supported by the cases they cite. *Dandridge v. Williams*, 397 U.S. 471, 475 n.6 (1970), does not hold that matters not ruled on by the lower court are “presumptively denied.” Instead, the Supreme Court observed that “when the court from which a case comes has expressed no views on a controlling question, it may be appropriate to remand the case rather than deal with the merits of that question in this Court.” Here, Highland asks this Court to now address the merits of the other arguments it raised in the Original MTD. *Legate v. Livingston*, 822 F.3d 207, 211 (5th Cir. 2016), simply recognized that appellant there failed to address on appeal the core holding of the decision against him and is irrelevant. *Du Bois v. Martin Luther King Jr Family Clinic, Inc.*, 2018 U.S. Dist. LEXIS 246910 (N.D. Tex. May 29, 2018), was in a completely different posture than this case. In *Du Bois*, the defendant filed a cursory motion to dismiss and then, two months later, an “amended” motion to dismiss asserting additional bases. The court denied the motion as a second motion under Rule 12(g). That is radically different than the matter here, where the District Court remanded, and Highland is asserting the same basis for dismissal and substantially the same arguments.

4. Next, Plaintiffs “move to strike” Highland’s Appendix, claiming that “a court cannot take judicial notice of unpled facts unless the facts are undisputed.” Pl. Mem. at 6. Plaintiffs’ contention is without merit. The Fifth Circuit’s standard is clear:

When considering a motion to dismiss under Rule 12(b)(6), the Court’s review is limited to the complaint; any documents attached to the complaint; any documents attached to the motion to dismiss that are central to the claim and referenced by the complaint; and matters subject to judicial notice under Federal Rule of Evidence 201.

Perkins v. Starbucks Corp., 2022 U.S. Dist. LEXIS 208484, at *8 (S.D. Tex. Nov. 17, 2022).⁷

5. With the exception of exhibits 7, 13, and 14, all documents in the Appendix are on the docket of this Court or the District Court and are therefore properly included. *See id.* at *3 n.1. Exhibit 7 (the deposition of HarbourVest’s Michael Pugatch) is cited solely to establish the undisputed fact that Plaintiffs had the opportunity to conduct discovery on the 9019 Motion. Exhibits 13 and 14—the Member Agreement and the DAF/Highland advisory agreement—are the weak linchpins of Plaintiffs’ claims and are referenced in the Complaint.⁸ Thus, all of the documents in the Appendix are properly before the Court.⁹

6. Plaintiffs’ fourth improperly asserted “motion” is for leave to amend. Plaintiffs complain of the difficulty of pleading the minimum requirements of Rule 9 but suggest additional,

⁷ As this Court very recently ruled in a companion case *involving Plaintiff DAF and its same counsel*, “a court may also take judicial notice of matters that are part of the public record when considering a motion to dismiss.” *Charitable DAF Fund, L.P. v. Highland Cap. Mgmt. L.P. (In re Highland Cap. Mgmt. L.P.)*, 2022 Bankr. LEXIS 2780, at *5 n.4 (Bankr. N.D. Tex. Sep. 30, 2022).

⁸ Plaintiffs’ objection to Exhibits 13 and 14 is particularly odd given that (a) Highland’s Exhibit 13 is a duplicate of Plaintiffs’ Exhibit 2 (Pl. Appx. 15-42), and (b) Highland’s Exhibit 14—the *Second Amended and Restated Investment Advisory Agreement*—superseded the version of that Agreement that Plaintiffs mistakenly included in their Appendix. *See* Pl. Ex. 6, Appx 207-21. If Plaintiffs want the Court to consider the DAF Advisory Agreement, they should presumably want the Court to consider the operative document and not a stale version.

⁹ Notably, with the exception of Exhibit 14, Highland’s Appendix offered in support of its current Motion is exactly the same as the Appendix it offered in support of its Original MTD—and Plaintiffs failed to object the first time around, thereby further highlighting the lack of credibility underlying this so-called “motion.” *Compare Appendix in Support of Highland Capital Management, L.P.’s Motion to Dismiss the Complaint* [Docket No. 28] with *Appendix in Support of Highland Capital Management, L.P.’s Renewed Motion to Dismiss the Complaint* [Docket No. 124].

unpled facts exist. Plaintiffs filed this case on April 12, 2021. Since that time, Plaintiffs have never actually identified any new “facts” or sought leave to amend,¹⁰ despite having vigorously litigated the Original MTD. Even now, while Plaintiffs vaguely assert that they possess further facts to plead viable claims, they fail to disclose or allege any of them. This renders the claims futile. *See Mora v. Angiodynamics, Inc. Defs.*, 2022 U.S. Dist. LEXIS 200544, at *11 (S.D. Tex. Sep. 20, 2022) (denying request in brief for leave to amend where plaintiff did not show that amendment would not be futile), *report & recommendation adopted*, 2022 U.S. Dist. LEXIS 199844 (S.D. Tex. Nov. 1, 2022). Plaintiffs’ request for leave to amend should be denied.

II. THE COMPLAINT FAILS TO STATE A CLAIM ON WHICH RELIEF CAN BE GRANTED

A. Judicial Estoppel Bars Counts 2 and 5¹¹

7. With respect to Counts 2 and 5, Plaintiffs first allege they only conceded that HarbourVest, not Highland, complied with the Members Agreement, *i.e.*, that Highland still had a supposed obligation to bring the transaction to Plaintiffs. Pl. Mem. at 8. That position contradicts the Decision in which the District Court held that CLOH “made clear in the withdrawal of its objection that it no longer disputed *the other parties’ interpretation* of the Right of First Refusal, which now forms the basis of Charitable DAF’s second and fifth causes of action.” Decision at 16 (emphasis added). The District Court’s holding that Plaintiffs’ position applied to *all* parties was correct, is law of the case, and is not at issue on remand.¹² Plaintiffs next argue that, because

¹⁰ Of course, this excludes *Plaintiffs’ Motion for Leave to File First Amended Complaint* filed in the District Court [Case No. 3:21-cv-00842-B, **Docket No. 6**], in which Plaintiffs improperly sought to name James P. Seery, Jr. as a defendant, an act that resulted in the imposition of a contempt order [Bankr. **Docket No. 2660**].

¹¹ On the issue of judicial estoppel, the District Court remanded *solely* “for [a] determination by the bankruptcy court whether the Charitable DAF acted inadvertently to change its legal position.” Decision at 18.

¹² Plaintiffs’ position in the *first* paragraph of page 8 also contradicts their position in the *second* paragraph of page 8, where they admit that their “contract claims were disclosed [in the Objection] albeit they were withdrawn without prejudice.” “Contract claims” necessarily refers to claims with respect to HarbourVest and Highland; all were

they did not conceal claims, withdrawal was not inadvertent. Pl. Mem. at 8-9. But, to the extent Plaintiffs now claim their claim is somehow different than the claim they withdrew in the 9019 Objection, they have concealed the claim.

8. More importantly, as Highland noted (and Plaintiffs concur), a failure to disclose is “‘inadvertent’ only when, in general, the debtor lacks knowledge of the undisclosed claims *or* has no motive for their concealment.” *Superior Crewboats, Inc. v. Primary P & I Underwriters (In re Superior Crewboats, Inc.)*, 374 F.3d 330 (5th Cir. 2004). Here, Plaintiffs’ assertion that a purported misrepresentation of the *value* of HarbourVest’s interest bears on whether Highland had a *contractual obligation* to offer those interest to Plaintiffs is a *non sequitur*. Plaintiffs knowingly withdrew their contract claim after an investigation of their rights, with full knowledge of the facts, of the contract, and of applicable law.¹³ Mem. ¶ 21-24. And Plaintiffs had a motive to conceal; they seek to “reap a windfall” from that concealment. *Id.* ¶ 24.

9. Finally, Plaintiffs vaguely argue that CLOH would not have withdrawn its objection or would have “made a more robust objection” (whatever that means) had they known of the alleged misrepresentation of value upon which Plaintiffs’ tortious interference claim is

withdrawn. If their “contract claims” did not include claims in respect of Highland, there would have been nothing to withdraw applicable here.

¹³ Plaintiffs cite *Commerce Bank v. Malloy*, 2013 U.S. Dist. LEXIS 106329, at *16 (N.D. Okla. July 30, 2013), for the proposition that “unsuccessful legal position taken during a 9019 hearing are not a basis for finding that judicial estoppel applies” to issues more properly addressed in an adversary proceeding. In fact, in *Commerce Bank*, plaintiff consistently took the position that the issue of assignability of the contract at issue was better dealt with in an adversary proceeding than a 9019 motion and never withdrew that argument. The finding of no judicial estoppel was predicated on plaintiff’s consistent assertion of the position, not its validity. Moreover, the Tenth Circuit’s view of judicial estoppel—that it relates primarily to assertions of fact—differs from the Fifth Circuit’s—that it prevents a party from asserting inconsistent legal positions. Decision at 14. Plaintiffs have taken inconsistent factual and legal positions, and the Decision found as law of the case that judicial estoppel applies subject to a determination of inadvertence.

based.¹⁴ Pl. Mem. at 9. This is also a *non sequitur*. HCLOF's value is irrelevant to the contractual interpretation analysis that underlies Counts 2 and 5.

10. Plaintiffs conducted a full investigation of their rights under the Members Agreement; their withdrawal was advertent, voluntary, informed, and intentional. Mem. ¶¶ 21-24.

B. Plaintiffs Concede Dismissal of Their RICO Claim

11. Because Plaintiffs offer no substantive response to Highland's arguments that Count 4 (RICO) must be dismissed (*see* Mem. ¶¶ 26-39),¹⁵ those arguments are deemed conceded. *See E-Dealer Direct v. Bank of Am., N.A.*, No. EP-21-CV-62-DB, 2021 U.S. Dist. LEXIS 99011, at *21 (W.D. Tex. May 25, 2021). Count 4 must therefore be dismissed.

C. Plaintiffs' Breach of Fiduciary Duty Claim Fails

12. In response to Highland's arguments in support of its Motion (Mem. ¶¶ 40-46), Plaintiffs argue that: (1) Highland owes Plaintiffs duties under the IAA; (2) they are making a claim under Section 215 of the IAA; (3) state law fiduciary duty claims can be brought for violations of the IAA; (4) fiduciary duties can run to investors in funds and Section 206 of the IAA imposes duties to such investors; (5) CLOH pled its claims derivatively in the alternative; (6) Plaintiffs have alleged breaches of fiduciary duty; and (7) Rule 9(b) does not apply or Plaintiffs have satisfied it. Pl. Mem. at 9-20. Each of these arguments fails as a matter of law and/or were not actually pled in the Complaint.

¹⁴ This argument is rank speculation since neither the Plaintiffs' current trustee (Mark Patrick) nor its counsel (Sbaiti & Company PLLC) played any role in the decision to withdraw CLOH's objection; there is simply no foundation for Plaintiffs' argument concerning what Grant Scott (who made the decision to withdraw CLOH's objection) or John Kane (CLOH's counsel) might or might not have done in a hypothetical situation. Rather than speculate, the Court should decide the Motion based on the undisputed facts that Plaintiffs ignore—the intentional withdrawal of CLOH's objection based on a fully informed legal analysis. In the end, Plaintiffs' argument—like their Complaint—is simply an audacious attempt to re-litigate a result they do not like because it was made by someone other than Mr. Dondero.

¹⁵ Plaintiffs do concede that their RICO claim is predicated on securities law violations (Pl. Mem. at 23); consequently, it is not sustainable. Plaintiffs' attempt to voluntarily withdraw their RICO claim and save it for another day fails for the reasons set forth above. *See supra* ¶ 1.

13. **First**, Plaintiffs cannot credibly dispute that no private right of action exists under Section 206 of the IAA (*see* Mem. ¶ 44). Instead, they simply engage in a bait-and-switch and now assert that “Section 215 recognizes a limited private right of action for equitable relief” (even though Section 215 is not even mentioned in the Complaint). Pl. Mem. at 12. But Section 215 provides no cover for Plaintiffs because it imposes no fiduciary duty of any kind. Rather, Section 215 gives a client of an investment advisor a limited right to void an advisory agreement “*made in violation* of any provision” of the IAA, not for subsequent breaches. Mem. ¶ 44 n.29; *NexPoint Diversified Real Estate Tr. v. Acis Cap. Mgmt., L.P.*, 2022 U.S. Dist. LEXIS 142029, at *10 (S.D.N.Y. Aug. 9, 2022) (Section 215 “voids a contract only where the contract would be invalid under that principle—that is, where the contract was made illegally or requires illegal performance”) (quoting *Omega Overseas, Ltd. v. Griffith*, 2014 U.S. Dist. LEXIS 109781 (S.D.N.Y. Aug. 7, 2014)). Section 215 is therefore irrelevant because (a) Plaintiffs do not allege that any advisory agreement was “made in violation” of the IAA; (b) Plaintiffs do not seek the equitable remedy of rescission; and (c) even on the most generous reading, Section 215 does not create or impose a fiduciary duty nor does it provide a remedy for post-formation conduct.

14. **Second**, Plaintiffs do not address their failure to plead the breach of any duty and that is not surprising: An advisor to a fund does not owe fiduciary duties to fund investors (like CLOH), as this would itself create a conflict of interest. *See* Mem. ¶ 45; *Mary E. Bivins Found. v. Highland Cap. Mgmt., L.P.*, 451 S.W.3d 104, 113 (Tex. App. 2014) (adopting reasoning in *Goldstein*). In any event, there was no “taking” of a corporate opportunity here. As this Court knows, the HarbourVest Transfer was but one component of a broader settlement of HarbourVest’s claim against Highland, not the purchase of a security for cash free of extraneous considerations. Mem. ¶ 46. Thus, this transaction could not have been offered to Plaintiffs. Further, the applicable

agreements prepared under Mr. Dondero’s watch expressly disclosed that Highland could compete with DAF for investments and had no obligation to offer those investments to DAF. Mem. ¶ 45.¹⁶

15. **Third**, the Complaint is clear that the only breach of fiduciary duty claims pled were federal, not state claims. *See, e.g.* Compl. ¶ 57 (alleging “federal fiduciary duty”); ¶ 69 (alleging violation of federal regulation); ¶ 74 (“breached the Advisers Act’s fiduciary duties”); and ¶ 83 (“federal law makes the duties ... unwaivable”). Plaintiffs cannot amend the Complaint by brief to assert new state law claims. *See 360 Sec. Partners, LLC v. Hammond*, No. 3:21-CV-3004-B, 2022 U.S. Dist. LEXIS 140283, at *14 (N.D. Tex. Aug. 8, 2022). But even if they could, state law claims would fail for the same reasons: Highland has complied with all obligations to Plaintiffs and has not violated its duties.

16. **Fourth**, Plaintiffs have failed to properly plead demand futility for a derivative claim. None of Highland, HCFA, or Mr. Seery controls HCLOF’s ability to bring suit. The Complaint makes no allegation as to the corporate management (rather than portfolio management) of HCLOF, aside from a bare, inconsistent allegation that: “[t]o the extent the Court determines that this claim had to have been brought derivatively on behalf of *HCLOF*, then Plaintiffs represent that any pre-suit demand would have been futile since asking *HCM* to bring suit against its principal, Seery, would have been futile.” Compl. ¶ 91 (emphasis added). But the issue is not asking *Highland* to bring suit, it is asking *HCLOF*.¹⁷ Even more to the point, at the hearing on the Original MTD, Plaintiffs’ counsel stated: “I think that based upon Highland’s

¹⁶ The twists and gyrations that Mr. Dondero and his “charitable trusts” engage in to try to disavow or nullify the very provisions written to protect him would be amusing if not for the substantial costs and burdens they unfairly place on the court system and Highland’s creditors.

¹⁷ The Complaint does not allege, nor could it, that Highland, HCFA, or Mr. Seery controls HCLOF. HCLOF is a Guernsey entity (Compl. ¶ 5) managed by independent directors, and the Complaint makes no allegation that they are under any conflict or disability preventing them from deciding whether HCLOF ought to bring suit against Highland or Mr. Seery. *See Highland CLO Funding, Ltd.’s Brief in Support of its Motion to Dismiss and Joinder in Motion to Dismiss of Highland Capital Management, L.P.*, [Docket No. 58] (Sept. 29, 2021), at 2, 4-6.

arguments and the arguments that we had, I don't think the derivative action is necessary for us to maintain on a go-forward basis. And so we don't oppose them [HCLOF] being dismissed." Nov. 23 Hearing Tr., **Docket No. 78**, at 97:3-98:2 (filed Nov. 24, 2021). Plaintiffs (1) already told the Court they did not believe a derivative action was necessary and (2) voluntarily dismissed HCLOF with prejudice [**Docket No. 80**, Dec. 7, 2021]; Plaintiffs cannot now argue the contrary.¹⁸

17. Finally, Rule 9(b) applies to the fiduciary duty claim, as Plaintiffs have asserted securities law violations, including Section 10 of the Securities Exchange Act and Rule 10b-5 promulgated thereunder, to the pleading of which Rule 9(b) applies. Mem. ¶ 40.

D. Plaintiffs' Breach of Contract and Tortious Interference Claims Fail

18. Even absent judicial estoppel, Plaintiffs' breach of contract (Count 2) and tortious interference (Count 5) claims fail. HarbourVest's transfer of its interests in HCLOF to a subsidiary of Highland was permitted under the plain and unambiguous terms of the Member Agreement (Ex. 13, Appx. 459-487) and the Right of First Refusal did not apply. Mem. ¶ 48. Plaintiffs' efforts to recharacterize the Transfer as a "sale to Highland" contradicts the facts and the terms of the transaction authorized by this Court in the Settlement Order. As authorized, HarbourVest transferred its interests to HCMLP Investments, LLC ("**HCMLPI**"), a wholly-owned subsidiary (or "Affiliate") of Highland (Appx. Ex. 10, Appx. 386-409), as part of the settlement of HarbourVest's claim in the Highland case. HCMLPI's status as an "Affiliate" of Highland is established by documents of which the Court may take judicial notice or on which the Complaint relies. *See, e.g.*, Ex. 12 at Appx. at 91 (Highland is HCMLPI's member), Ex. 8 at Appx. 204-05

¹⁸ Plaintiffs' interpretation of Guernsey law is also wrong. Under Guernsey law, for a plaintiff to bring a derivative suit it must establish that wrongdoers control the company. *Highland CLO Funding, Ltd.'s Brief in Support of its Motion to Dismiss and Joinder in Motion to Dismiss of Highland Capital Mgmt. L.P.* at 5 [**Doc. No. 58**] (citing *Jackson v. Dear and Others*, Judgment 10/2013, ¶ 8 (Royal Ct. Guernsey 26 March 2013) (unreported judgment) (*available at* <https://www.guernseylegalresources.gg/CHttpHandler.ashx?documentid=63021>)).

(HCMLPI is an affiliate), and Ex. 10 at Appx. 402 (same). HarbourVest's interest could be transferred to an "Affiliate" of Highland under the Members Agreement, and that is the end of the matter.

19. Plaintiff's tortious interference claim also necessarily fails; it is duplicative of Plaintiffs' breach of contract claim (Mem. ¶ 48) and there is no breach of the Members Agreement (*id.* ¶ 51).¹⁹ Further, Plaintiffs fail to explain how Highland, a party to the Members Agreement, could have interfered with it; only third parties can interfere with a contract. *1st & Trinity Super Majority, LLC v. Milligan*, 2022 Tex. App. LEXIS 4842, at *39 (Tex. App. July 14, 2022).

E. Plaintiffs' Negligence Claim Fails

20. Plaintiffs contend that the basis of their negligence claim is the alleged breach of duty under Section 206(4) of the IAA. Pl. Mem. at 22. But there is no private right of action under Section 206. Mem. ¶ 44. Moreover, the exculpation provision in Highland's Plan, which is *res judicata*, binds Plaintiffs, and cannot be collaterally attacked,²⁰ bars claims for negligence (Mem. ¶ 50), and Plaintiffs cite no authority barring the application of that provision to (noncognizable) claims of negligence under the IAA. And Plaintiffs essentially concede that any other negligence claim is barred by the exculpation provision. Plaintiffs' negligence claim must be dismissed.

¹⁹ Of course, it is axiomatic that tortious interference with contract claims cannot exist in the absence of a contract right with which a defendant can interfere. *See e.g., WickFire, L.L.C. v. Woodruff*, 989 F.3d 343, 354 (5th Cir. 2021) ("to prevail on an interference claim, the plaintiff must "present evidence that some obligatory provision of a contract [was] breached") (internal quotations omitted). CLOH conceded that Plaintiffs had no contractual right of first refusal; therefore, a claim for tortious interference cannot be viable.

²⁰ *See Occidental Petro. Corp. v. Sanchez Energy Corp. (In re Sanchez Energy Corp.)*, 631 B.R. 847, 858 (Bankr. S.D. Tex. 2021).

III. CONCLUSION

WHEREFORE, Highland respectfully requests that the Court grant the Motion and enter an order in the form annexed to the Motion as Exhibit A and grant such further relief as the it deems just and proper.

Dated: December 2, 2022

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Counsel for Highland Capital Management, L.P.

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

In re:	§	
	§	Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P., ¹	§	
	§	Case No. 19-34054-sgj11
Reorganized Debtor.	§	
CHARITABLE DAF FUND, L.P., AND CLO	§	
HOLDCO, LTD., DIRECTLY AND	§	
DERIVATELY,	§	
Plaintiffs,	§	Adversary Proceeding No.
	§	
vs.	§	21-03067-sgj
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	
HIGHLAND HCF ADVISOR, LTD., AND	§	
HIGHLAND CLO FUNDING LTD.,	§	
NOMINALLY,	§	
Defendants.	§	

¹ The Reorganized Debtor's last four digits of its taxpayer identification number are (8357). The headquarters and service address for the above-captioned Reorganized Debtor is 100 Crescent Court, Suite 1850, Dallas, TX 75201.

**AMENDED NOTICE OF HEARING AND
NOTICE OF STATUS CONFERENCE**

PLEASE TAKE NOTICE that the following matter has been rescheduled for hearing on **Wednesday, January 25, 2023, at 1:30 p.m. (Central Time)** (the “Hearing”):

1. *Defendant Highland Capital Management, L.P.’s Renewed Motion to Dismiss Complaint* [**Docket No. 122**].

PLEASE TAKE FURTHER NOTICE that the following matter has been scheduled for a status conference on **Wednesday, January 25, 2023, at 1:30 p.m. (Central Time)** (the “Status Conference”):

1. *Renewed Motion to Withdraw the Reference* [**Docket No. 128**].

The Hearing and Status Conference will be held via WebEx videoconference before The Honorable Stacey G. C. Jernigan, United States Bankruptcy Judge. The WebEx video participation/attendance link for the Hearing is: <https://us-courts.webex.com/meet/jerniga>.

A copy of the WebEx Hearing Instructions for the Hearing and Status Conference is attached hereto as **Exhibit A**; alternatively, the WebEx Hearing Instructions for the Hearing and Status Conference may be obtained from Judge Jernigan’s hearing/calendar site at: <https://www.txnb.uscourts.gov/judges-info/hearing-dates/judge-jernigans-hearing-dates>.

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Dated: December 7, 2022.

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EXHIBIT A

004735

WebEx Hearing Instructions Judge Stacey G. Jernigan

Pursuant to General Order 2020-14 issued by the Court on May 20, 2020, all hearings before Judge Stacey G. Jernigan are currently being conducted by WebEx videoconference unless ordered otherwise.

For WebEx Video Participation/Attendance:

Link: <https://us-courts.webex.com/meet/jerniga>

For WebEx Telephonic Only Participation/Attendance:

Dial-In: 1.650.479.3207

Meeting ID: 479 393 582

Participation/Attendance Requirements:

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DALLAS DIVISION**

In re:	§	
	§	Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P., ¹	§	
	§	Case No. 19-34054-sgj11
Reorganized Debtor.	§	
CHARITABLE DAF FUND, L.P., AND CLO	§	
HOLDCO, LTD., DIRECTLY AND	§	
DERIVATELY,	§	
Plaintiffs,	§	Adversary Proceeding No.
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vs.	§	21-03067-sgj
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HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	
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¹ The Reorganized Debtor's last four digits of its taxpayer identification number are (8357). The headquarters and service address for the above-captioned Reorganized Debtor is 100 Crescent Court, Suite 1850, Dallas, TX 75201.

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Dated: December 7, 2022.

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004741

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**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

In re:	)	Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P., ¹	)	Case No. 19-34054-sgj11
Reorganized Debtor.)	
In re: CHARITABLE DAF FUND, L.P., AND CLO HOLDCO LTD.,	)	Adv. Pro. No. 21-03067-sgj
Plaintiffs,)	
vs.)	
HIGHLAND CAPITAL MANAGEMENT, L.P., HIGHLAND HCF ADVISOR, LTD., AND HIGHLAND CLO FUNDING, LTD.)	
Defendants)	

**HIGHLAND CAPITAL MANAGEMENT, L.P.’S
RESPONSE TO “RENEWED” MOTION TO WITHDRAW THE REFERENCE**

¹ The Reorganized Debtor’s last four digits of its taxpayer identification number are (8357). The headquarters and service address for the Reorganized Debtor is 100 Crescent Court, Suite 1850, Dallas, TX 75201.

Highland Capital Management, L.P., a defendant in the above-captioned adversary proceeding (“Highland”), hereby submits this response (the “Response”) in opposition to the *Renewed Motion to Withdraw the Reference* [D.I. 128] (the “Motion”) filed by plaintiffs The Charitable DAF Fund, L.P. (“DAF”) and CLO Holdco, Ltd. (“CLOH,” and together with DAF, “Plaintiffs”). In support of its Response, Highland states as follows:

RELIEF REQUESTED

1. Through this Response, Highland respectfully requests that the Court deny the Motion in full, because the Motion is nothing more than another attempt by Plaintiffs to forum shop, delay adjudication, and waste judicial and estate resources.

2. Pursuant to Rules 7.1(d) and (h) of the *Local Bankruptcy Rules of the United States Bankruptcy Court for the Northern District of Texas* (the “Local Rules”), a separate brief (the “Brief”) is being filed contemporaneously with this Response and is incorporated by reference as if fully set forth herein.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Highland respectfully requests that the Court enter an order (i) denying in whole the relief requested in the Motion, and (ii) granting Highland such further and additional relief as the Court deems just and proper.

Dated: December 9, 2022

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In re:)	Chapter 11
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Plaintiffs,)	
vs.)	
HIGHLAND CAPITAL MANAGEMENT, L.P., HIGHLAND HCF ADVISOR, LTD., AND HIGHLAND CLO FUNDING, LTD.)	
Defendants)	

**BRIEF IN SUPPORT OF HIGHLAND CAPITAL MANAGEMENT, L.P.’S
RESPONSE TO “RENEWED” MOTION TO WITHDRAW THE REFERENCE**

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Highland Capital Management, L.P., a defendant in the above-captioned adversary proceeding (“Highland”), hereby submits this brief in support of its response (the “Response”) to the *Renewed Motion to Withdraw the Reference* [D.I. 128] (the “Motion”) filed by plaintiffs The Charitable DAF Fund, L.P. (“DAF”) and CLO Holdco, Ltd. (“CLOH,” and together with DAF, “Plaintiffs”).² In opposition to the Motion, Highland states as follows:

PRELIMINARY STATEMENT³

1. This Court should deny Plaintiffs’ Motion because it is yet another attempt to forum shop, delay adjudication, and waste judicial and estate resources.

2. On April 12, 2021, Plaintiffs commenced this action in the District Court by filing its (baseless) Complaint. After Highland moved to enforce the reference, Plaintiffs cross-moved for a ruling that mandatory withdrawal of the reference was required under 28 U.S.C § 157(d) and that enforcing the reference would therefore be pointless. On September 29, 2021, notwithstanding Plaintiffs’ cross-motion, the District Court enforced the reference and sent this matter to this Court for adjudication.

3. After referral, Plaintiffs pressed their Stay Motion, and on November 18, 2021, stated that, if their request for a stay were denied, they would file a motion for mandatory withdrawal of the reference. Plaintiffs’ Stay Motion was denied, but Plaintiffs, for unknown reasons, did not move to withdraw the reference at that time.

4. Now, a year after the hearing on the Original MTD and after resolution of Plaintiffs’ appeal of the MTD Order, Plaintiffs filed the Motion to withdraw the reference under 28 U.S.C. § 157(d). The Motion is untimely. The Complaint was referred to this Court in September 2021.

² Concurrently herewith, Highland is filing its *Appendix in Support of Highland Capital Management, L.P.’s Response to Renewed Motion to Withdraw the Reference* (the “Appendix”). Citations to the Appendix are as follows: Ex. #, Appx. #.

³ All capitalized used but not defined in this Preliminary Statement have the meanings given to them below.

Plaintiffs could have filed a motion to withdraw at that time; they did not and instead adjudicated the Original MTD on the merits in this Court. The MTD Order was remanded in early September 2022. Plaintiffs could have filed a motion to withdraw at that time; they did not. Instead, Plaintiffs waited to file the Motion until a month after Highland filed the Renewed Motion and after all parties had expended significant resources adjudicating the matter in this Court. The Motion also fails on the merits.

5. ***First***, the Complaint does not require substantial and material consideration of non-bankruptcy federal law. Notwithstanding that, Plaintiffs argue mandatory withdrawal is necessary so that the District Court, not this Court, can resolve four fundamental issues: (a) whether Highland owe Plaintiffs a fiduciary duty under the IAA; (b) the scope of such duty and whether breached; (c) remedies and damages for any breach; and (d) whether a violation of the IAA can be a predicate act under RICO. But the foregoing allegations only require application of well-settled federal law, including law from the Supreme Court. None warrant withdrawal.

6. ***Second***, the Bankruptcy Court has jurisdiction to adjudicate the Complaint. The facts underlying the Complaint arose ***after*** the Petition Date but ***prior*** to confirmation from Highland's ordinary course operation of its estate. Assuming a viable claim exists, it would be an "administrative expense claim," and this Court has core jurisdiction to adjudicate administrative expense claims.

7. Ultimately, the Motion is another waste of judicial and estate resources and should be denied as untimely, prejudicial to Highland, and meritless.

BACKGROUND

8. On October 16, 2019 (the "Petition Date"), Highland filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code.

9. On February 22, 2021, this Court entered the *Order Confirming the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (as Modified) and (ii) Granting Related Relief* [Bankr. **Docket No. 1943**] (the “Confirmation Order”), which confirmed the *Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (as Modified)* [Bankr. **Docket No. 1808**] (the “Plan”). The Plan became effective on August 11, 2021 [Bankr. **Docket No. 2700**] (the “Effective Date”).⁴

10. Pursuant to the Plan, this Court expressly retained jurisdiction to “allow, disallow, determine, liquidate ... any Claim ... including, without limitation, the resolution of any request for payment of any Administrative Expense Claim” Plan, Art. XI.⁵

11. On April 12, 2021, Plaintiffs filed their *Original Complaint* [D.I. 1] (the “Complaint”) in the U.S. District Court for the Northern District of Texas (the “District Court”), in which they alleged that the Bankruptcy Court approved settlement with HarbourVest somehow violated the contractual and extra-contractual duties Highland purportedly owed (i) to CLOH as an investor in Highland CLO Funding, Ltd. (“HCLOF”) and (ii) to DAF as an advisee under an investment management agreement. Complaint ¶¶ 56-112.⁶ Highland’s alleged misconduct in settling the HarbourVest claim occurred during the last quarter of 2020 and the first quarter of

⁴ On September 8, 2022, the U.S. Court of Appeals for the Fifth Circuit affirmed, in material part, the Confirmation Order’s factual findings and legal conclusions. *NexPoint Advisors, L.P., et al. v. Highland Cap. Mgmt., L.P.*, **48 F.4th 419** (5th Cir. 2022).

⁵ The Plan defines “Administrative Expense Claim,” in relevant part, as a:

Claim for costs and expenses of administration of the Chapter 11 Case ... pursuant to sections 503(b), 507(a)(2), 507(b) ... including ... (a) the actual and necessary costs and expense incurred after the Petition Date and through the Effective Date of preserving the Estate and operating the business of the Debtor

Plan, Art I.B.2.

⁶ Plaintiffs subsequently sought to add Mr. Seery as a defendant in violation of two orders entered by this Court. Plaintiffs’ actions resulted in this Court holding Plaintiffs, among others, in contempt. *In re Highland Cap. Mgmt., L.P.*, **2021 Bankr. LEXIS 2074** (Bankr. N.D. Tex. Aug. 3, 2021), *aff’d* **2022 U.S. Dist. LEXIS 175778** (N.D. Tex. Sept. 28, 2022). The contempt order was affirmed by the District Court, but Plaintiffs have, of course, appealed to the Fifth Circuit.

2021, *i.e.* after the Petition Date but before the Effective Date while Highland was a debtor-in-possession. *Id.* ¶¶ 29-54.

12. On May 19, 2021, Highland moved for an order to enforce the standing order of reference (Misc. Order No. 33) [D.I. 22] (the “Motion to Enforce”) in the District Court arguing that the Complaint asserted claims arising in, arising under, or related to Title 11 and Highland’s bankruptcy case.

13. On May 27, 2021, Highland moved to dismiss the Complaint [D.I. 26] (the “Original MTD”). The Original MTD was fully briefed to the District Court.

14. On June 29, 2021, Plaintiffs filed their response to the Motion to Enforce [D.I. 36] in which they cross-moved, arguing the Motion to Enforce should be denied because the claims in the Complaint were subject to mandatory withdrawal of the reference, could not be adjudicated in this Court, and that granting the Motion to Enforce would therefore be pointless. The arguments in Plaintiffs’ cross-motion are identical to those in the Motion.

15. On August 26, 2021, Plaintiffs filed a motion in the District Court to stay all proceedings pending appeal of the Confirmation Order [D.I. 55] (the “Stay Motion”), arguing that the Plan injunction somehow prohibited the prosecution of the Complaint. The Stay Motion was fully briefed to the District Court.

16. On September 20, 2021, the District Court—notwithstanding Plaintiffs’ cross-motion—granted the Motion to Enforce [D.I. 1] and referred this case to this Court, including the Original MTD, “[p]ursuant to 28 U.S.C. § 157 ... to be adjudicated as a matter related to the ... Bankruptcy of Highland Capital Management, L.P.” This Court docketed the proceeding and set a hearing for November 23, 2021, on both the Original MTD and Stay Motion.

17. On November 18, 2021, five days before the scheduled hearing, Plaintiffs filed—without leave of this Court⁷—an amended motion to stay the proceedings [D.I. 69] and attached a draft motion to withdraw the reference [D.I. 69-1] (the “Proposed Motion”). Plaintiffs said they would file the Proposed Motion if this Court denied the Stay Motion.

18. At the November 23 hearing, this Court denied the Stay Motion from the bench,⁸ finding Plaintiffs’ arguments “reflect[ed] frankly, a misunderstanding of how the injunction language ... applies here”⁹ and that the injunction did not prevent litigation of the Complaint in this Court. Subsequently, Plaintiffs argued the merits of the Original MTD, including their alleged claims under the Investment Advisers Act (the “IAA”) and RICO, to this Court.¹⁰ Plaintiffs, for reasons known only to them, never filed the Proposed Motion.

19. On March 11, 2022, this Court granted the Original MTD [D.I. 100] (the “MTD Order”) and dismissed the Complaint with prejudice. *Charitable DAF Fund, L.P. v. Highland Cap. Mgmt., L.P. (In re Highland Cap. Mgmt., L.P.)*, 2022 Bankr. LEXIS 659 (Bankr. N.D. Tex. Mar. 11, 2022). Plaintiffs appealed the MTD Order to the District Court and that appeal was consolidated with Plaintiffs’ appeal of this Court’s denial of the Stay Motion. *See* 3:21-cv-03129-B, Docket No. 20 (N.D. Tex. Jun. 17, 2022). Both appeals were fully briefed to the District Court. Plaintiffs did not raise 28 U.S.C. § 157(d) in the appeals or otherwise argue that this Court lacked jurisdiction to have entered the MTD Order.

⁷ Ex. 1, Appx. 12 (“I will say that these last-minute amended motions are not going to be tolerated Your firm has already been sanctioned once in this adversary proceeding So, you know, I’m just kind of baffled why you would take a chance filing an amended motion without leave or somehow getting it to the attention of the Court or running it by the other parties for their consent to you doing it.”)

⁸ A formal order denying the Stay Motion was entered on December 7, 2021 [D.I. 81].

⁹ Ex. 1, Appx. 30.

¹⁰ Ex. 1, Appx. 65-97.

20. On September 2, 2022, the District Court remanded the MTD Order to this Court for further proceedings. *Charitable DAF Fund, L.P. v. Highland Cap. Mgmt., L.P. (In re Highland Cap. Mgmt., L.P.)*, 643 B.R. 162, 166 (N.D. Tex. 2022). The District Court, in the same opinion, affirmed this Court’s denial of the Stay Motion. *Id.* at 24-28.

21. On October 14, 2022, Highland filed its renewed motion to dismiss [D.I. 122] (the “Renewed MTD”). Plaintiffs responded to the Renewed MTD on November 18, 2022 (the “Response”) but did not include a statement regarding their consent to entry of final orders or judgments as required by Federal Rule of Bankruptcy Procedure 7012(b).

22. On November 18, 2022, only after the parties expended significant resources adjudicating the Complaint in this Court did Plaintiffs file the Motion seeking mandatory withdrawal of the reference. Although the Motion is styled as a “renewed” motion, it renews nothing.

ARGUMENT

I. There is No Basis for Mandatory Withdrawal of the Reference

23. Under 28 U.S.C. § 157(d), a district court “shall, *on timely motion* of a party, so withdraw a proceeding if ... resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.” 28 U.S.C. § 157(d) (emphasis added). Assuming a timely motion, mandatory withdrawal is warranted only if a matter requires “substantial and material consideration” and “significant interpretation of federal laws[,]” rather than a “straightforward application of a federal statute to a particular set of facts.” *In re Nat’l Gypsum*, 14 B.R. 188, 192-93 (N.D. Tex. 1991); *Kirschner v. Dondero (In re Highland Cap. Mgmt., L.P.)*, 2022 Bankr. LEXIS 1028, at *27-28 (Bankr. N.D. Tex. Apr. 6, 2022) (same).

24. Simply asserting federal law is insufficient and mandatory withdrawal only applies when a matter requires something “more than mere application of existing law to new facts.” *In re Vicars Ins. Agency, Inc.*, 96 F.3d 949, 953-54 (7th Cir. 1996); *City of N.Y. v. Exxon Corp.*, 932 F.2d 1020, 1026 (2d Cir. 1991) (mandatory withdrawal requires “significant interpretation, as opposed to simple application, of federal laws”). “[M]andatory withdrawal is to be applied narrowly” to “prevent 157(d) from becoming an ‘escape hatch.’” *Manila Indus., Inc. v. Ondova Ltd. (In re Ondova Ltd.)*, 2009 U.S. Dist. LEXIS 102134, at *6 (N.D. Tex. Oct. 1, 2009), *aff’d* 2009 U.S. Dist. LEXIS 102071 (N.D. Tex. Nov. 3, 2009).

a. The Motion Is Untimely and Should Be Denied

25. A motion to withdraw the reference may only be granted if it is “timely.” 28 U.S.C. § 157(d). Section 157(d) does not define “timely,” but it has been interpreted as requiring a motion be made at the first reasonable opportunity. *See In re Fresh Approach, Inc.*, 51 B.R. 412, 415-16 (Bankr. N.D. Tex. 1985) (finding a motion to withdraw the reference untimely when filed sixteen days after the court entered its decision on the matter); *see also Sec. Farms v. Int’l Bhd. of Teamsters*, 124 F.3d 999, 1007, n.3 (9th Cir. 1997). (“A motion to withdraw is timely ‘if it was made as promptly as possible in light of the developments in the bankruptcy proceeding.’”); *Connolly v. Bidermann Indust. U.S.A., Inc.*, 1996 U.S. Dist. LEXIS 8059, at *8 (S.D.N.Y. June 13, 1996) (“Plaintiff’s delay of over eight months renders her motion untimely, and as such it does not meet the threshold requirement set forth in 28 U.S.C. § 157(d).”); 9 COLLIER ON BANKRUPTCY ¶ 5011.01[2] (“[M]otions for mandatory withdrawal must be made as soon as it is apparent that it is necessary for the district court to hear the proceeding”).

26. Failure to timely move for mandatory withdrawal is dispositive, especially when that delay would prejudice the non-movant or is an attempt to delay or forum shop. *See Fresh Approach*, 51 B.R. at 415 (“[A] motion to withdraw reference should not be used as a vehicle to

protract litigation and delay controversies. ‘If a motion for withdrawal of reference is not timely made, it will almost certainly be held that the provisions of the second sentence of section 157(d) have been waived.’”) (citations omitted); *see also Hupp v. Educ. Credit Mgmt. Corp.*, 2007 U.S. Dist. LEXIS 68199, at *8-10 (S.D. Cal. Sept. 13, 2007) (“Courts have found a motion to withdraw the reference untimely when a significant amount of time has passed since the moving party had notice of grounds for withdrawing the reference or where the withdrawal would have an adverse effect on judicial economy”); *Drew v. WorldCom, Inc.*, 2006 U.S. Dist. LEXIS 52318, at *8-9 (S.D.N.Y. July 26, 2006) (denying motion to withdraw reference filed eighteen months after objection to claim, noting “there is no legitimate justification for the length of the delay in this case,” and “the timing of [movants’] motion gives rise to a strong inference that he is attempting to forum shop”).¹¹

27. Here, the Motion is untimely and can only be interpreted as an attempt to forum shop, delay adjudication, and waste judicial and estate resources. The Complaint was referred to this Court on September 20, 2021. Plaintiffs did not file a motion to withdraw at that time (although they threatened to file the Proposed Motion), and consequently the parties spent considerable time and resources adjudicating the MTD Order in this Court on the merits in November 2021. Subsequently, the parties spent more time and resources adjudicating the appeal of the MTD Order. The MTD Order was remanded to this Court on September 2, 2021. But Plaintiffs did not file the Motion until November 18, 2022, after Highland spent more time and

¹¹ *In re Rickel & Assoc., Inc.*, 2003 U.S. Dist. LEXIS 23136, *6 (S.D.N.Y. Dec. 24, 2003) (finding motion to withdraw reference untimely where “the bankruptcy court had devoted substantial resources to the claim,” and “defendants [] seek to retrace in the district court substantially the same journey previously taken in the bankruptcy court,” noting “the potential prejudice ... of having a case dislodged from its steady progression in the bankruptcy court’s calendar to be placed on that of the district court.”); *In re New York Trap Rock Corp.*, 158 BR 574, 577 (S.D.N.Y. 1993) (finding untimely a motion to withdraw reference filed after a “short” period of three months where “time span was rich with events,” and the circumstances strongly indicated forum shopping—“[f]orum shopping efforts pursued by awaiting a decision relevant to the merits and then bypassing or filing a motion to transfer should not be rewarded with success.”).

resources briefing and filing the Renewed MTD. Instead of timely filing a motion to withdraw the reference, Plaintiffs allowed Highland (and this Court) to expend substantial time, effort, and money briefing and arguing this case *in this Court*. Plaintiffs' belated attempt to now have the case adjudicated in the District Court is impermissible. The Motion is untimely and prejudicial to Highland. It should be denied on that basis alone.

b. The Renewed MTD Does Not Require "Substantial and Material Consideration" of Significant Federal Laws

28. Even if the Motion were timely (it is not), the Complaint does not require "substantial and material consideration" and "significant interpretation of federal laws." Plaintiffs attempt to bootstrap themselves into this stringent standard by exaggerating the complexity of their baseless claims. But, their claims are simple: (a)(i) did Highland owe Plaintiffs a fiduciary duty under the IAA; (ii) what was the nature of that duty and was it violated; and (iii), if violated, what are the remedies and potential damages and (b) is the alleged securities fraud a predicate act under RICO? These are not difficult questions or outside this Court's expertise.

29. **Fiduciary Duty under the IAA.** It is well-settled that Section 206 of the IAA creates a fiduciary duty to an investment adviser's "client" (*i.e.* the person or entity that is the counterparty to the investment management agreement) but not to an underlying investor in the "client." *Goldstein v. SEC*, 451 F.3d 873, 881 (D.C. Cir. 2006) ("The adviser owes fiduciary duties only to the fund [*i.e.*, the client], not to the fund's investors ... If the investors are owed a duty and

the entity is also owed a fiduciary duty, then the adviser will inevitably face conflicts of interest.”)¹²

30. HCLOF is a fund managed by Highland HCF Advisors, Ltd. (“HCFA”), a Highland subsidiary. CLOH is an investor in HCLOF; DAF is not. Highland’s and HCFA’s duties do not run to investors in HCLOF, just to HCLOF itself. Highland has never had a management agreement or client relationship with CLOH and owes it no fiduciary or other duty. Highland, at all relevant times, was party to a management agreement with DAF and owed DAF certain duties under that agreement.¹³ This analysis is not complicated and only requires a straightforward application of settled law.

31. **The Scope of the Fiduciary Duty and Breach.** An adviser’s fiduciary duty is satisfied by disclosure. “To meet its duty of loyalty, an adviser must make full and fair disclosure to its clients of all material facts relating to the advisory relationship.” *See Commission Interpretation Regarding Standard of Conduct for Investment Advisers*, Release No. IA-5248; File No. S7-07-18 (July 12, 2019), Ex. 4, Appx. 170-71. The law is well-established; includes Supreme Court jurisprudence; is not based solely on interpretation of SEC releases; and was recently opined on by the District Court in one of Mr. Dondero’s numerous appeals of this Court’s orders. *See, e.g., SEC v. Cap. Gains Rsch. Bureau, Inc.*, 375 U.S. 180, 191-92 (1963); *Laird v. Integrated Res., Inc.*, 897 F.2d 826, 831-36 (5th Cir. 1990); *Robare Grp., Ltd. v. SEC*, 992 F.3d 468, 472 (D.C. Cir. 2019); *Goldstein*, 451 F.3d at 881; *Dugaboy Inv. Tr. v. Highland Cap Mgmt., L.P.*, 2022 U.S. Dist.

¹² *See also SEC v. Northshore Asset Mgmt.*, 2008 U.S. Dist. LEXIS 36160, at *18-20 (S.D.N.Y. May 5, 2008) (dismissing a claim that an investment adviser owed a duty to a fund’s investors rather than just the fund); *SEC v. Trabulse*, 526 F.Supp.2d 1008, 1016 (N.D. Cal. 2007) (same); *Prohibition on Fraud by Advisers to Certain Pooled Investment Vehicles*, Release No. IA-2628; File No. S7-25-06 (Aug. 3, 2007), Ex. 2, Appx. 119 (Rule 206(4)-8 “does not create under the Advisers Act a fiduciary duty to investors or prospective investors in a pooled investment vehicle not otherwise imposed by law”).

¹³ Highland and DAF entered into that certain *Second Amended and Restated Investment Advisory Agreement*, effective from January 1, 2017 (the “DAF Agreement”). Ex. 3, Appx. 126-48. The DAF Agreement terminated on February 28, 2021.

LEXIS 172351, at *10-11 (N.D. Tex. Sept. 22, 2022). Adjudicating this issue only requires determining if appropriate disclosures were made (which they were).¹⁴

32. **Remedies for Breach of Duty.** Assuming, *arguendo*, that Highland breached its fiduciary duty to DAF under the IAA, under clear Supreme Court precedent, there is no private right of action for such breach under Rule 206 of the IAA. *Transamerica Mortg. Advisors v. Lewis*, 444 U.S. 11, 13-14 (1979) (“[W]e hold there exists a limited private remedy under the Investment Advisers Act of 1940 to void an investment advisers contract, but that the Act confers no other private causes of action, legal or equitable [on a client]”).¹⁵ There is no unsettled federal law.¹⁶

33. **Bankruptcy Courts Apply the IAA.** Finally, bankruptcy courts routinely analyze federal securities laws. In fact, this Court reviewed Plaintiffs’ claims earlier this year although it did not rule on them. *Charitable DAF Fund*, 2022 Bankr. LEXIS 659, at *39-40 (“[This Court]

¹⁴ Exhibit A to the DAF Agreement includes pages of disclosures, including the following: (1) “[Highland] ... is [not] precluded from engaging in or owning an interest in. . . investment activities of any kind, whether or not such ventures are competitive with [DAF]” and (2) “[Highland] ... may actively engage in transactions in the same securities sought by [DAF] and, therefore, may compete with [DAF] for investment opportunities or may hold positions opposite to positions maintained by [DAF].” Ex. 3, Appx. 142-43.

¹⁵ See also *Corwin v. Marney, Orton Inv.*, 788 F.2d 1063, 1066 (5th Cir. 1986) (affirming dismissal of claims under the Advisers Act “because the investors had no private causes of action”); *Charitable DAF Fund, L.P. v. Highland Cap. Mgmt., L.P. (In re Highland Cap. Mgmt., L.P.)*, 2022 Bankr. LEXIS 2780, at *13 n.23 (“the court notes that the ... Supreme Court has held [in *Transamerica*] that there is not a private right of action for damages under the IAA.”); *NexPoint Diversified Real Es. Tr. v. Acis Cap. Mgmt., L.P.*, 2022 U.S. Dist. LEXIS 142029, at *9-10 (S.D.N.Y. Aug. 9, 2022) (“[U]nder the IAA ... there is no private right of action to bring a claim pursuant to [Section 206 of the IAA].”).

¹⁶ Plaintiffs alleged, for the first time, in their Response to the Renewed MTD that “Section 215 [of the IAA] recognizes a limited private right of action for equitable relief” (even though Section 215 is not mentioned in the Complaint). Response at 12. Plaintiffs do not mention Rule 215 in the Motion but will presumably argue it is a basis for mandatory withdrawal of the reference. It is not. First, Rule 215 was not pled in the Complaint and cannot be the basis for withdrawal—there is no claim to withdraw. Second, Rule 215 imposes no fiduciary duty of any kind but simply provides, under clear Supreme Court precedent, “a limited private remedy ... to void an investment advisers contract, but ... confers no other private causes of action, legal or equitable.” *Transamerica*, 441 U.S. at 24; see also *Corwin*, 788 F.2d at 1066 (“The Investors seek damages, not the voiding of an investment advisers contract, and there is no such private cause of action based on [Section 215]”). That remedy applies only when an advisory agreement was made in violation of any provision of the IAA, not for subsequent breaches. *NexPoint*, 2022 U.S. Dist. LEXIS 142029, at *10 (Section 215 “voids a contract only where the contract would be invalid under that principle—that is, where the contract was made illegally or requires illegal performance.”) (quoting *Omega Overseas, Ltd. v. Griffith*, 2014 U.S. Dist. LEXIS 109781 (S.D.N.Y. Aug. 7, 2014)). Here, the contours of Rule 215 (and its lack of applicability to the Complaint) are well-settled and will only require the application of that settled case law to the facts of this case.

will forego addressing the other arguments of Highland While this court is inclined to agree with those arguments, the court will refrain from addressing them until such time as any higher court may instruct this court to address them.”) Further, Highland was heavily involved in the bitterly contested bankruptcy of Acis Capital Management, L.P. (“Acis”). *In re Acis Cap. Mgmt., L.P., et al*, Case No. 18-30264-sgj11 (Bankr. N.D. Tex. 2019). In *Acis*, Highland (then controlled by Mr. Dondero) brought claims *in this Court* alleging Acis was liable to Highland for breach of fiduciary duties under the IAA—nearly identical claims to those in the Complaint. Ex. 5, Appx. 205-06.

34. Moreover, 11 U.S.C. § 523(a)(19) requires bankruptcy courts to determine if there were violations of “federal securities laws (as that term is defined in section 3(a)(47) of the Securities Exchange Act of 1934) ...”¹⁷ in connection with discharge. As part of this analysis, bankruptcy courts look to, among other things, the applicability of the IAA. *See, e.g., Tillman Enters., LLC v. Horlbeck (In re Horlbeck)*, 589 B.R. 818, 832 (Bankr. N.D. Ill. 2018) (“bankruptcy courts have jurisdiction to determine liability on an underlying securities claim for purposes of § 523(a)(19)” and “liability under § 523(a)(19) cannot be supported by an alleged violation” of the Advisers Act as there is no private remedy or “actionable claim”); *Tradex Glob. Master Fund SPC, Ltd. v. Pui-Yun Chui (In re Pui-Yun Chui)*, 538 B.R. 793, 806-08 (Bankr. N.D. Cal. 2015) (same).¹⁸ Bankruptcy court analysis of the IAA, however, is not limited to Section 523(a)(19). *See Calvert v. Zions Bancorporation (In re Consol. Meridian Funds)*, 485 B.R. 604 (Bankr. W.D. Wash. 2013)

¹⁷ Section 3(a)(47) of the Securities Exchange Act of 1934 (the “Exchange Act”) defines “securities laws” as “the Securities Act of 1933 (15 U.S.C. 78a et seq.), the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.), the Sarbanes-Oxley Act of 2002, the Trust Indenture Act of 1939 (15 U.S.C. 77aaa et seq.), the Investment Company Act of 1940 (15 U.S.C. 80a-1 et seq.), *the Investment Advisers Act of 1940* (15 U.S.C. 80b et seq.), and the Securities Investor Protection Act of 1970 (15 U.S.C. 78aaa, et seq.)” (emphasis added).

¹⁸ *See also King v. Skolness (In re King)*, 624 B.R. 259, 301 (Bankr. N.D. Ga. 2020) (bankruptcy court could determine liability under state and federal securities laws for purposes of § 523(a)(19)); *Holzhueter v. Groth (In re Holzhueter)*, 571 B.R. 812, 822-24 (Bankr. W.D. Wis. 2017) (same).

(dismissing complaint alleging that defendant owed a fiduciary duty to an investor under the IAA for failure to state a claim); *Living Benefits Asset Mgmt. v. Kestrel Aircraft Co. (In re Living Benefits Asset Mgmt.)*, 587 B.R. 311, 317-20 (N.D. Tex. 2018) (affirming bankruptcy court's rulings under the IAA), *aff'd* 916 F.3d 528 (5th Cir. 2019); *In re Acis Cap. Mgmt. L.P., et al.*, Case No. 18-30264-sgj11, D.I. 549 (Bankr. N.D. Tex. Sept. 4, 2018) (Ex. 6, Appx. 228-30) (finding the IAA did not prohibit assumption of a management agreement under Section 365).

35. **The IAA Cannot Be a RICO Predicate:** Plaintiffs allege that determining whether securities fraud can be a predicate act under RICO requires mandatory withdrawal. Motion ¶ 12. This argument also fails. *First*, Plaintiffs concede they have no RICO claim. Response at 23. Consequently, it should not be a basis for withdrawal of the reference. *Second*, RICO, by its terms, expressly excludes securities fraud as a predicate act. 18 U.S.C.A. § 1964(c) (“[N]o person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of [RICO].”)¹⁹ Because Plaintiffs’ RICO claim is premised on an alleged securities fraud, it is barred by the express language of the RICO statute. *See, e.g., MLSMK Inv. Co. v. JP Morgan Chase & Co.*, 651 F.3d 268, 273-80 (2d Cir. 2011) (barring RICO claims arising out of the operation of a Ponzi scheme because they involved a purchase or sale of a security despite no private right of action existing); *Affco Invs. 2001 LLC v. Proskauer Rose L.L.P.*, 625 F.3d 185, 189-91 (5th Cir. 2010) (same). There is no unsettled question of federal law warranting mandatory withdrawal.

¹⁹ *See also* H.R. Rep. No. 104-369, at 47 (1995) (“The Committee intends this amendment to eliminate securities fraud as a predicate offense in a civil RICO action. In addition, the . . . Committee intends that a plaintiff may not plead other specified offenses, such as mail or wire fraud, as predicate acts under civil RICO if such offenses are based on conduct that would have been actionable as securities fraud.”)

c. Plaintiffs Cite No Applicable Case Law.

36. Plaintiffs' only citations to support their arguments are to two factually inapposite cases. **First**, they cite *In re Harrah's Entertainment*, 1996 U.S. Dist. LEXIS 18097 (E.D. La. Nov. 26, 1996), which has nothing to do with the IAA. *Harrah's* involved a class action arising from the issuance of \$435 million in publicly traded debt; claims that the prospectus violated the Exchange Act; and attempts to hold the issuer's partners liable for the issuer's actions under the Exchange Act. The district court ruled that mandatory withdrawal applied because of the foregoing factors, none of which apply here. There is no public issuance; no retail investors; no class action; no derivative liability; no applicability of the Exchange Act; and no complicated factual analysis. Plaintiffs' IAA claims require only the straightforward application of settled law to the facts in a dispute between two private parties.

37. **Second**, Plaintiffs cite *Belmont v. MB Investment Partners, Inc.*, 708 F.3d 470 (3d Cir. 2012), for the proposition that there is "considerable 'confusion'" because "federal law (the IAA) provides, 'the duty and the standard to which investment advisers are to be held,' but 'the cause of action is presented as springing from state law.'" Motion ¶ 13. *Belmont* confirms no private right of action exists under the IAA. *Belmont*, 708 F.3d at 502. The only "confusion" noted in *Belmont* is if **state, not federal, law** creates a private right. *Id.* (finding the lack of private rights in the IAA "ought to call into serious question whether a limitation in federal law can be circumvented simply by hanging the label 'state law' on an otherwise forbidden federal law claim" but recognizing split on state law claims). But Plaintiffs have not pled a state law claim, and an unpled claim is irrelevant—there is nothing to withdraw under 28 U.S.C. § 157(d). Further, section 157(d) requires mandatory withdrawal only **if material federal law is implicated**; state law claims—even properly pled ones—are not a basis for mandatory withdrawal.

d. Plaintiffs' Additional Arguments Are Meritless.

38. Plaintiffs' allege two additional arguments to support mandatory withdrawal. **First**, Plaintiffs argue the District Court needs to assess whether a breach of fiduciary duty claim "can be terminated by a blanket injunction in a bankruptcy plan." Motion ¶ 8. But Plaintiffs have been told **three times** that the Plan's injunction does not prevent Plaintiffs' prosecution of their alleged IAA claims so long as they are prosecuted in this Court—twice by this Court and once by the District Court.²⁰ **Second**, Plaintiffs' jury trial waiver argument is premature and irrelevant. DAF affirmatively waived its jury trial right in the DAF Agreement (Ex. 3, Appx. 138),²¹ but neither Plaintiff has a jury trial right having availed themselves of the equitable jurisdiction of this Court.²² And, importantly for the Motion, Highland has not yet moved to strike Plaintiffs' jury trial demand.²³ Accordingly, Plaintiffs' request to withdraw the reference on the jury trial question is

²⁰ Ex. 1, Appx. 30 ("I just don't think that you have shown that ... the injunction provisions of the plan somehow tie your hands in arguing the 12(b)(6) motion, defending against the 12(b)(6) motion today or I just think that your arguments reflect, frankly, a misunderstanding of how the injunction language ... applies here."); Ex. 7, Appx. 261 (responding to DAF's assertion that it could not prosecute a claim for an IAA breach of fiduciary duty because of the Plan injunction "THE COURT: Why not? Why not? Why not? There is nothing that would have precluded you from filing a request for allowance of administrative claim."); *Charitable DAF*, 643 B.R. at 176-77 ("The bankruptcy court found the Plan's injunction ... did not prevent [DAF] from pursuing its causes of action. ... [T]he bankruptcy court held that Charitable DAF could continue to litigate its cause of action and the Court agrees. ... Just like the bankruptcy court, this Court does not see how the injunction ... prohibit[s] [DAF] from participating [in litigating the Complaint] ... [and] [DAF] continued to participate by responding to HCM's motion to dismiss and participating in the hearing regarding the motion to dismiss.")

²¹ Plaintiffs argue that the District Court must determine whether DAF's contractual waiver "can be enforced as to non parties [*i.e.*, CLOH] to the waiver" (Motion ¶ 8), but Highland has not argued that CLOH waived its jury trial rights through the DAF Agreement.

²² The causes of action in the Complaint are administrative expense claims (*see infra* ¶¶ 39-41), and, by pursuing the Complaint, Plaintiffs have triggered the claims allowance process and subjected themselves to this Court's equitable jurisdiction. *See, e.g., In re UAL Corp.*, 386 B.R. 701, 707 (Bankr. N.D. Ill. 2008) ("[B]y filing a claim ... the creditor triggers the process of 'allowance and disallowance of claims,' thereby subjecting himself to the bankruptcy court's equitable power ... As such, there is no Seventh Amendment right to a jury trial ... Claims for payment of an administrative expense are no different from other claims in this regard.") (citing *Langenkamp v. Culp*, 498 U.S. 42 (1990)); *see also Harpole Constr., Inc. v. Medallion Midstream, LLC (In re Harpole Constr., Inc.)*, 565 B.R. 193, 202 (Bankr. D. N.M. 2017) (same); *Carter v. Schott (In re Carter Paper Co.)*, 220 B.R. 276, 290-311 (Bankr. M.D. La. 1998) (finding breach of fiduciary duty claim against bankruptcy trustee originally filed in state court was an administrative expense claim and no jury trial right existed).

²³ Highland will move to strike the jury trial demand if the Renewed MTD is denied, but if the time comes to adjudicate Plaintiffs' jury trial right, it will be decided by this Court as a matter of core bankruptcy law. Highland reserves all rights.

premature; there is currently nothing to withdraw. Plaintiffs' thinly veiled attempt to create controversy and a federal issue where none exists should be rejected. *See, e.g., Keach v. World Fuel Servs. Corp. (In re Montreal Me. & Atl. Ry.)*, 2015 U.S. Dist. LEXIS 74006, at *21-23 (D. Me. June 8, 2015) (finding no mandatory withdrawal when movant simply "tries to kick up some dust to make the relevant analysis seem complicated").

II. The Court Has "Core" Jurisdiction to Adjudicate the Complaint

39. The Court has already found that this action "arises in" Highland's bankruptcy case and is a "core" proceeding.

[This action] "arises in" a bankruptcy case (making it "core"), in that a claim is being asserted against a debtor (which was not yet a "reorganized debtor" ...) and involves actions of a debtor-in-possession in administering its case. It involves orders of this Bankruptcy Court and activities and litigation over which the Bankruptcy Court presided.

Charitable DAF, 2022 Bankr. LEXIS 659, at *14-15. Plaintiffs did not appeal that portion of the MTD Order, and it is binding.

40. But even in the absence of a prior ruling, this action involves the adjudication of an administrative expense claim and is quintessentially "core," having "arisen in" Highland's bankruptcy. An administrative expense claim is a priority claim under Section 503(b) for, among other things, "the actual, necessary costs and expenses of preserving the estate" 11 U.S.C. § 503(b)(1)(A). Administrative expense claims include claims arising from a debtor-in-possession's postpetition negligence, tortfeasance, and malfeasance. *See Reading Co. v. Brown*, 391 U.S. 471, 478-79 (1968) (holding that if a debtor-in-possession commits a tort or harms a non-debtor following the petition date, the resulting claim is an administrative expense claim even though there was no benefit to the debtor's estate); *Charitable DAF Fund, L.P. v. Highland Cap. Mgmt., L.P. (In re Highland Cap. Mgmt., L.P.)*, 2022 Bankr. LEXIS 2780, at *19-21 (Bankr. N.D. Tex.

Sept 30, 2022) (finding Highland’s alleged breach of its contractual and extra-contractual duties under the IAA to DAF constituted an administrative expense claim).²⁴

41. Plaintiffs were allegedly harmed by Highland’s breach of its duties and obligations (a) *after* the Petition Date, but *before* the Effective Date, *i.e.*, while Highland was a debtor-in-possession, and (b) arising from the ordinary course operation of its estate. Accordingly, under *Reading* (and this Court’s recent precedent), the claims alleged in the Complaint, if valid, would be administrative claims. This Court retained jurisdiction to adjudicate administrative claims (Plan, Art. XI), and adjudication of an administrative claim is a “core” proceeding. *See In re Weblink Wireless, Inc.*, 2003 Bankr. LEXIS 2312, at *3 (Bankr. N.D. Tex. Mar. 12, 2003) (“The allowance of an administrative expense to be paid pursuant to a confirmed plan of reorganization constitutes a core matter over which the court has jurisdiction to enter a final order.”); *see also In re Taco Bueno Rests., Inc.*, 606 B.R. 289, 292 (Bankr. N.D. Tex. 2019) (finding core jurisdiction to adjudicate administrative claim); *In re Pilgrim’s Pride Corp.*, 453 B.R. 691, 692 (Bankr. N.D. Tex. 2011) (“Objections [to administrative expense claims] are subject to the court’s core jurisdiction pursuant to 28 U.S.C. §§ 1334 and 157(b)(2)(B)”).²⁵ This Court has “core” jurisdiction to adjudicate the Complaint and can enter final orders under 28 U.S.C. §§ 157(b) and 1334(b).²⁶

²⁴ *See, e.g., Total Minatome Corp. v. Jack/Wade Drilling, Inc. (In re Jack/Wade Drilling, Inc.)*, 258 F.3d 385, 388 (5th Cir. 2001); *In re Al Copeland Enters., Inc.*, 991 F.2d 233, 239 (5th Cir. 1993).

²⁵ *See also In re Colo. Place L.P.*, 2002 Bankr. LEXIS 2000, at *1 (Bankr. N.D. Tex. Feb. 5, 2002) (same); *In re SGS Studio, Inc.*, 256 B.R. 580, 581 (Bankr. N.D. Tex. 2000) (same); *Rand Energy Co. v. Del Mar Drilling Co. (In re Rand Energy Co.)*, 256 B.R. 712, 714 (Bankr. N.D. Tex. 2000) (same).

²⁶ Plaintiffs cite *Gupta v. Quincy Medical Center*, 585 F.3d 657 (1st Cir. 2017) to support their argument that this Court lacks jurisdiction over the Complaint. In *Gupta*, the bankruptcy court approved an asset purchase agreement pursuant to 11 U.S.C. § 363, which provided that certain employees would receive severance if terminated. When they were subsequently terminated, they sought damages for breach of the purchase agreement *in the bankruptcy court*. The First Circuit held that the severance claims arose “solely” from the alleged breach of the agreement and not from (a) a breach of the order approving the agreement, (b) a question of interpretation of that order, (c) the administration of the bankruptcy estate, or (d) the Bankruptcy Code (*Id.* at 664) and accordingly held there was no bankruptcy jurisdiction. *Gupta* is irrelevant. The Complaint asserts administrative expense claims against the estate and thus invokes the claims allowance process and this Court’s equitable jurisdiction—a quintessentially core action.

CONCLUSION

42. Highland respectfully requests that the Court deny the Motion and grant such further relief as the Court deems just and proper.

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Dated: December 9, 2022

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**UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF
TEXAS, DALLAS DIVISION**

In Re: Highland Capital Management, L.P § Case No. **19-34054-SGJ11**

Charitable DAF Fund, L.P et al

Appellant

§

vs.

§

21-03067

Highland Capital Management, L.P

§

Appellee

§

3:23-CV-01503-B

[167] Order granting Defendant Highland Capital Management, L.P.'s Renewed motion to dismiss adversary proceeding (related document # [122](#)) Entered on 6/25/2023.

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APPELLANT RECORD

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**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

In re:	§ Chapter 11
	§
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§ Case No. 19-34054-sgj11
	§
Debtor.	§
	§
CHARITABLE DAF FUND, L.P. AND CLO	§
HOLDCO, LTD., DIRECTLY AND DERIVATIVELY	§
	§
Plaintiffs,	§ Adversary Proceeding No.
	§
vs.	§ 21-03067-sgj11
	§
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§
HIGHLAND HCF ADVISOR, LTD., AND	§
HIGHLAND CLO FUNDING LTD., NOMINALLY	§
	§
Defendant.	§
	§

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**APPELLANTS' SECOND AMENDED STATEMENT OF ISSUES
AND DESIGNATION OF RECORD ON APPEAL**

Pursuant to Rules 8009(a)(1)(A)-(B) and (a)(4) of the Federal Rules of Bankruptcy Procedure, The Charitable DAF Fund, L.P. and CLO Holdco, Ltd. ("Appellants") hereby designate the following items to be included in the record and identify the following issues with respect to

their appeal of the Order Granting Defendant Highland Capital Management, L.P.'s "Renewed Motion to Dismiss Complaint" [Adv. Proc. Doc. No. 122] which was entered by the United States Bankruptcy Court for the Northern District of Texas on June 25, 2023.

I. STATEMENT OF ISSUES TO BE PRESENTED ON APPEAL

- Whether the Bankruptcy Court had jurisdiction to rule on Highland Capital Management L.P.'s Renewed Motion to Dismiss Complaint
- Whether the Renewed Motion to Dismiss Complaint was improperly granted

II. DESIGNATION OF ITEMS TO BE INCLUDED IN THE RECORD

Vol. 1
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1. Notice of Appeal for Bankruptcy Case Adversary Proceeding No. 21-03067-sgj11 [Doc. 168].

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2. The judgment, order, or decree appealed from: Memorandum Opinion and Order Granting Defendant Highland Capital Management, L.P.'s "Renewed Motion to Dismiss Complaint" [Adv. Proc. Doc. No. 122] [Doc. 167].

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3. Docket Sheet kept by the Bankruptcy Clerk.

4. Documents listed below and as described in the Docket Sheet for Bankruptcy Case Proceeding No. 21-03067-sgj.

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No.	Date Filed	Docket No.	Description/Document Text
1	9/29/21	1	(36 pgs; 3 docs) Adversary case 21-03067. ORDER REFERRING CASE NUMBER 21-CV-0842-B from U.S District Court for the Northern District of Texas, Dallas Division to U.S. Bankruptcy Court for Northern District of Texas, Dallas Division. Complaint by Charitable DAF Fund, LP, CLO Holdco, Ltd. against Highland Capital Management, LP, Highland HCF Advisor Ltd., Highland CLO Funding, Ltd. Fee Amount \$350 (Attachments: # 1 Original Complaint # 2 Docket Sheet from 3:20-cv-0842-B) Nature(s) of suit: 02 (Other (e.g. other actions that would have been brought in state court if unrelated to bankruptcy)). (Okafor, M.)
2	9/29/21	2	(1 pg) Supplemental Document (cover sheet) by CLO Holdco Ltd., Charitable DAF Fund (RE: related document(s)1 Adversary case 21-03067) [ORIGINALLY FILED IN 21-CV-0842 AS #2 ON 04/13/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)

Vol. 2 000139 000232 000239 000270 Thru Vol. 6	3	9/29/21	6	(93 pgs; 6 docs) MOTION for Leave to File First Amended Complaint filed by CLO Holdco Ltd., Charitable DAF Fund LP (Attachments: # 1 Exh 1_First Amended Complaint # 2 Exh 2_Motion for Authorization to Retain James Seery # 3 Exh 3_Order Approving Retention of James Seery # 4 Exh 4_Order Approving Settlement # 5 Proposed Order) (Bridges, Jonathan) (Entered: 04/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #6 ON 04/19/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
	4	9/29/21	22	(7 pgs; 2 docs) MOTION for an Order to Enforce the Order of Reference filed by Highland Capital Management LP. (Attachments: # 1 Exhibit(s) A--Proposed Order) (Annable, Zachery) Modified text on 5/20/2021 (mjr). (Entered: 05/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #22 ON 05/19/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
	5	9/29/21	23	(31 pgs) Brief/Memorandum in Support filed by Highland Capital Management LP re: 22 MOTION for an Order to Enforce the Order of Reference. (Annable, Zachery) Modified text on 5/20/2021 (mjr).(Entered: 05/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #23 ON 05/19/2021 IN U.S.DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
	6	9/29/21	24	(926 pgs; 29 docs) Appendix in Support filed by Highland Capital Management LP re: 23 Brief/Memorandum in Support. (Attachments: # 1 Appendix 1 # 2 Appendix 2 # 3 Appendix 3 # 4 Appendix 4 # 5 Appendix 5 # 6 Appendix 6 # 7 Appendix 7 # 8 Appendix 8 # 9 Appendix 9 # 10 Appendix10 # 11 Appendix 11 # 12 Appendix 12 # 13 Appendix 13 # 14 Appendix 14 # 15 Appendix 15 # 16 Appendix 16 # 17 Appendix 17 # 18 Appendix 18 # 19 Appendix 19 # 20 Appendix 20 # 21 Appendix 21# 22 Appendix 22 # 23 Appendix 23 # 24 Appendix 24 # 25 Appendix 25 # 26 Appendix 26 # 27 Appendix 27 # 28 Appendix 28) (Annable, Zachery) Modified linkage and text on 5/20/2021 (mjr). (Entered:05/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #24 ON 05/19/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
Vol. 7 001196	7	9/29/21	26	(7 pgs; 2 docs) MOTION to Dismiss Complaint filed by Highland Capital Management LP (Attachments: # 1 Exhibit(s) A--Proposed Order) (Annable, Zachery) Modified text on 5/28/2021 (jmg).(Entered: 05/27/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #26 ON 05/27/2021 IN U.S.DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)

Vol. 7 001203 thru Vol. 8	8	9/29/21	28	(508 pgs; 14 docs) Appendix in Support filed by Highland Capital Management LP (Attachments: # 1 Appendix 1 # 2 Appendix 2 # 3 Appendix 3 # 4 Appendix 4 # 5 Appendix 5 # 6 Appendix 6 # 7 Appendix 7 # 8 Appendix 8 # 9 Appendix 9 # 10 Appendix 10 # 11 Appendix 11 # 12 Appendix 12 # 13 Appendix 13) (Annable, Zachery) (Entered: 05/27/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #28 ON 05/27/2021 IN U.S. DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
Vol. 9 001711	9	9/29/21	33	(1 pg) Amended Civil Cover Sheet by CLO Holdco Ltd, Charitable DAF Fund LP. Amendment to 2 Supplemental Document. (Sbaiti, Mazin) Modified text on 6/23/2021 (mjr). (Entered: 06/22/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #33 ON 06/22/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001712	10	9/29/21	36	(26 pgs) RESPONSE filed by CLO Holdco Ltd, Charitable DAF Fund LP re: 22 MOTION for an Order to Enforce the Order of Reference (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #36 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001738	11	9/29/21	37	(22 pgs) Appendix in Support filed by CLO Holdco Ltd, Charitable DAF Fund LP re 36 Response/Objection Response to Motion for an Order to Enforce the Order of Reference (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #37 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001760	12	9/29/21	38	(45 pgs) RESPONSE filed by CLO Holdco Ltd, Charitable DAF Fund LP re: 26 MOTION to Dismiss (Defendant Highland Capital Management, L.P.'s Motion to Dismiss Complaint) (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #38 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001805	13	9/29/21	39	(88 pgs) Appendix in Support filed by CLO Holdco Ltd, Charitable DAF Fund LP re 38 Response/Objection to Defendant Highland Capital Management, L.P.'s Motion to Dismiss Complaint (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #39 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001893	14	9/29/21	42	(12 pgs) REPLY filed by Highland Capital Management LP re: 22 MOTION for an Order to Enforce the Order of Reference (Annable, Zachery) (Entered: 07/13/2021) [ORIGINALLY FILED IN 21-CV-0842AS #42 ON 07/13/2021 IN U.S.

			DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
VOL. 9	15	9/29/21	43 (852 pgs) Appendix in Support filed by Highland Capital Management LP re: 42 Reply. (Annable, Zachery) Modified text on 7/14/2021 (mjr). (Entered: 07/13/2021) [ORIGINALLY FILED IN 21-CV-0842AS #43 ON 07/13/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001905 thru Vol. 13	16	9/29/21	45 (21 pgs) REPLY filed by Highland Capital Management LP re: 26 MOTION to Dismiss (Defendant Highland Capital Management, L.P.'s Motion to Dismiss Complaint) (Annable, Zachery) (Entered:07/13/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #44 ON 07/13/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002757	17	9/29/21	57 (7 pgs; 2 docs) MOTION to Dismiss and Joinder in Motion to Dismiss of Highland Capital Management, L.P. filed by Highland CLO Funding Ltd. (Attachments: # 1 Proposed Order) Attorney Paul R Bessette added to party Highland CLO Funding Ltd (pty:dft) (Bessette, Paul) (Entered: 08/30/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #57 ON 08/30/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002778	18	9/29/23	58 (12 pgs) Brief/Memorandum in Support filed by Highland CLO Funding Ltd. re 57 MOTION to Dismiss and Joinder in Motion to Dismiss of Highland Capital Management, L.P. (Bessette, Paul) (Entered: 08/30/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #58 ON 08/30/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002785	19	9/29/23	59 (80 pgs; 5 docs) Appendix in Support filed by Highland CLO Funding Ltd re 58 Brief/Memorandum in Support of Motion (Attachments: # 1 Exhibit(s) A - Jackson v Dear # 2 Exhibit(s) B - Prudential Assurance v. Newman # 3 Exhibit(s) C - Harbourvest Settlement Agreement # 4 Exhibit(s) D - Boleat Declaration) (Bessette, Paul) (Entered: 08/30/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #59 ON 08/30/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002797	20	9/29/21	64 (1 pg) ORDER OF REFERENCE: Pursuant to 28 U.S.C. § 157 and this District's Miscellaneous Order No. 33, this case is hereby REFERRED to Judge Stacey G. C. Jernigan of the United States Bankruptcy Court for the Northern District of Texas, Dallas Division, to be adjudicated as a matter related to the consolidated Chapter 11 Bankruptcy of Highland Capital Management, L.P., Chapter 11 Case No.19-34054. (Ordered by Judge Jane J. Boyle
002877			

Vol. 14				on 9/20/2021) (svc) (Entered: 09/20/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #64 ON 09/20/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002878	21	10/19/21	66	(5 pgs) Notice of hearing filed by Defendant Highland Capital Management, LP (RE: related document(s) 26 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP, 47 Motion to strike document filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 55 Motion to abate filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) Hearing to be held on 11/23/2021 at 09:30 AM at https://us-courts.webex.com/meet/jerniga for 26 and for 47 and for 55, (Annable, Zachery)
002883 thru Vol. 16	22	11/22/21	71	(509 pgs; 2 docs) Witness and Exhibit List <i>for Hearing on November 23, 2021</i> filed by Defendant Highland Capital Management, LP (RE: related document(s) 26 Motion to dismiss adversary proceeding). (Attachments: # 1 Exhibits 1-13) (Hayward, Melissa)
Vol. 17	23	11/22/21	72	(2 pgs) Witness List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 26 Motion to dismiss adversary proceeding, 47 Motion to strike (related document(s): 43 Document), 55 Motion to abate (related document(s) 1 Complaint), 69 Motion to abate <i>Plaintiffs' Amended Motion to Stay All Proceedings</i> (related document(s) 55 Motion to abate (related document(s) 1 Complaint))). (Sbaiti, Mazin)
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003394	24	11/22/21	73	(189 pgs; 4 docs) Exhibit List <i>for November 23, 2021 hearing</i> filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 47 Motion to strike (related document(s): 43 Document), 55 Motion to abate (related document(s) 1 Complaint)). (Attachments: # 1 Exhibit 1_Defendant's Memorandum of Law in Support of Motion for Reconsideration # 2 Exhibit 2_Highland Memorandum in Support of Motion to Dismiss # 3 Exhibit 3_Order (I) Confirming Fifth Amended Plan of Reorganization of Highland) (Sbaiti, Mazin)
003583	25	12/7/21	80	(2 pgs) Order granting Highland CLO Funding, Ltd.'s motion to dismiss adversary as a party with prejudice (related document 57) Entered on 12/7/2021. (Okafor, Marcey) Modified text on 3/11/2022 (Okafor, Marcey).
003585	26	3/11/22	99	(26 pgs) Memorandum of Opinion and order granting motion to dismiss the adversary proceeding (RE: related document(s) 26 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP). Entered on 3/11/2022 (Okafor, Marcey)
003611	27	3/11/22	100	(26 pgs) Order granting motion to dismiss adversary proceeding with prejudice (related document #26) Entered on 3/11/2022. (Okafor, Marcey)

Vol. 18 003637 003666 003843 003844 003851	28	3/21/22	104	(29 pgs) Notice of appeal. Fee Amount \$298 filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 100 Order on motion to dismiss adversary proceeding). Appellant Designation due by 04/4/2022. (Sbaiti, Mazin)
	29	5/26/22	120	(177 pgs; 2 docs) Support/supplemental document <i>Motion to Supplement Appellate Record</i> filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 111 Appellant designation). (Attachments: # 1 Amended Transcript of January 14, 2021 Hearing) (Sbaiti, Mazin)
	30	6/9/22	121	(1 pg) DISTRICT COURT Order: Case 3:22-00695-B is hereby transferred to the docket of the Honorable Judge Jane J. Boyle for consolidation with The Charitable DAF Fund LP, et al. v. Highland Capital Management LP, Case No. 3:21-cv-3129-N. Judge Karen Gren Scholer no longer assigned to case.(RE: related document(s) 86 Notice of appeal filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 104 Notice of appeal filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Entered on 6/9/2022 (Whitaker, Sheniqua) (Entered: 06/10/2022)
	31	10/24/22	122	(7 pgs) Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP (Annable, Zachery)
	32	10/14/22	123	(31 pgs) Brief in support filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Annable, Zachery)
Vol. 19 003882 Thru Vol 20	33	10/14/22	124	(513 pgs; 15 docs) Support/supplemental document (<i>Appendix in Support of Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7 # 8 Exhibit 8 # 9 Exhibit 9 # 10 Exhibit 10 # 11 Exhibit 11 # 12 Exhibit 12 # 13 Exhibit 13 # 14 Exhibit 14) (Annable, Zachery)
Vol. 21 004395	34	10/27/22	126	(5 pgs) Notice of hearing (<i>Notice of Hearing and Briefing Schedule on Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP). Hearing to be held on 12/8/2022 at 09:30 AM at https://us-courts.webex.com/meet/jerniga for 122. (Annable, Zachery)

Vol. 21 004400 004410 004442 Thru Vol. 22	35	11/18/22	128	(10 pgs) Motion for withdrawal of reference. Fee amount \$188, filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (Sbaiti, Mazin)
	36	11/18/22	129	(32 pgs) Response opposed to (related document(s): 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP) filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Sbaiti, Mazin)
	37	11/18/22	130	(254 pgs; 2 docs) Response opposed to (related document(s): 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP) filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Attachments: # 1 Appendix) (Sbaiti, Mazin)
Vol. 22 004696 004717 004732 004737 004742	38	9/2/22	131	(21 pgs) DISTRICT COURT MEMORANDUM OPINION AND ORDER: The Court REVERSES and REMANDS the bankruptcy court's Motion to Dismiss Order and AFFIRMS the bankruptcy courts Motion to Stay Order. re: appeal on Civil Action number: Case 3:22-00695-B consolidated with 3:21-CV-3129-B, (RE: related document(s) 81 Order on motion to abate, 100 Order on motion to dismiss adversary proceeding). Entered on 9/2/2022 (Whitaker, Sheniqua) (Entered: 11/29/2022)
	39	12/2/22	133	(15 pgs) Reply to (related document(s): 129 Response filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 130 Response filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) filed by Defendant Highland Capital Management, LP. (Annable, Zachery)
	40	12/7/22	135	(5 pgs) Notice of hearing filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP). Hearing to be held on 1/25/2023 at 01:30 PM at https://us-courts.webex.com/meet/jerniga for 122, (Annable, Zachery)
	41	12/7/22	136	(5 pgs) Notice of hearing filed by Defendant Highland Capital Management, LP (RE: related document(s) 128 Motion for withdrawal of reference filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Status Conference to be held on 1/25/2023 at 01:30 PM at https://us-courts.webex.com/meet/jerniga . (Annable, Zachery).
	42	12/9/22	138	(3 pgs) Response opposed to (related document(s): 128 Motion for withdrawal of reference. Fee amount \$188, filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) filed by Defendant Highland Capital Management, LP. (Annable, Zachery)

Vol. 22 004745	43	12/9/22	139	(25 pgs) Brief in support filed by Defendant Highland Capital Management, LP (RE: related document(s) 138 Response). (Annable, Zachery)
Vol. 23 004770	44	12/9/22	140	(280 pgs; 8 docs) Support/supplemental document (<i>Appendix in Support of Highland Capital Management, L.P.'s Response to Renewed Motion to Withdraw the Reference</i>) filed by Defendant Highland Capital Management, LP (RE: related document(s) 138 Response). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7) (Annable, Zachery)
Vol. 24 005050	45	12/16/22	144	(6 pgs) Reply to (related document(s): 138 Response filed by Defendant Highland Capital Management, LP) filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Sbaiti, Mazin)
005056 Thru Vol. 25.	46	1/23/23	145	(514 pgs; 15 docs) Witness and Exhibit List filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7 # 8 Exhibit 8 # 9 Exhibit 9 # 10 Exhibit 10 # 11 Exhibit 11 # 12 Exhibit 12 # 13 Exhibit 13 # 14 Exhibit 14) (Annable, Zachery)
Vol. 26 005570	47	1/23/23	146	(280 pgs; 8 docs) Witness and Exhibit List filed by Defendant Highland Capital Management, LP (RE: related document(s) 128 Motion for withdrawal of reference. Fee amount \$188.). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7) (Annable, Zachery)
Vol. 27 005850	48	1/23/23	147	(221 pgs; 7 docs) Witness and Exhibit List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Attachments: # 1 Exhibit 1_Excerpts from July 14, 2020 Hearing Transcript # 2 Exhibit 2_HCLOF Members Agreement Relating to the Company # 3 Exhibit 3_HarbourVest Settlement Agreement # 4 Exhibit 4_Order Approving Debtor's Settlement with HarbourVest # 5 Exhibit 5_HCLOF Offering # 6 Exhibit 6 Amended and Restated Investment Advisory Agreement) (Sbaiti, Mazin)
006071	49	1/23/23	148	(3 pgs) Witness and Exhibit List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 128 Motion for withdrawal of reference. Fee amount \$188.). (Phillips, Louis)
Vol. 28 006074	50	1/25/23	150	(56 pgs; 2 docs) Amended Witness and Exhibit List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 147 List (witness/exhibit/generic), 149 List (witness/exhibit/generic)). (Attachments: # 1 Exh 7_Testimony of Mark Patrick at June 8, 2021 hearing) (Sbaiti, Mazin)

Vol. 28 006130	51	1/25/23	152	(3 pgs) Notice of Appearance and Request for Notice by Louis M. Phillips filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Phillips, Louis)
	52	1/25/23	154	(1 pg) Court admitted exhibits date of hearing January 25, 2023 (RE: related document(s) 128 Motion for withdrawal of reference, filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) (COURT ADMITTED DEFENDANT'S EXHIBITS #1, #2, #3, #4, #5 & #6 OFFERED BY ATTY GREG DEMO). (Edmond, Michael) (Entered: 01/27/2023)
Vol. 32 006925 006942 006960	53	2/6/23	158	Report and recommendation to the U.S. District Court by U.S. Bankruptcy Judge. (RE: related document(s) 128 Motion for withdrawal of reference filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Entered on 2/6/2023 (Okafor, Marcey)
	54	2/6/23	161	(18 pgs) DISTRICT COURT Notice of transmission of report and recommendation in re: renewed motion to withdraw reference. Civil Case # 3:22-cv-02802-S. (RE: related document(s) 158 Report and recommendation to the U.S. District Court by U.S. Bankruptcy Judge. (RE: related document(s) 128 Motion for withdrawal of reference filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Entered on 2/6/2023) (Whitaker, Sheniqua)
	55	4/3/23	165	(1 pg) DISTRICT COURT ORDER: The Court GRANTS the 11 Joint Motion to Transfer Proceeding and Consolidate Before Original Court and the above-numbered case (3:22-cv-02802-S) is transferred to the docket of the Honorable Judge Jane Boyle: Civil case 3:21-cv-00842-B (order referring case). (RE: related document(s) 1 Complaint filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 143 Notice of transmission of motion to withdraw reference). Entered on 4/3/2023 (Whitaker, Sheniqua) Modified on 4/10/2023 (Whitaker, Sheniqua). (Entered: 04/10/2023)

TRANSCRIPTS

006961	56	11/24/21	78	(104 pgs) Transcript regarding Hearing Held 11-23-2021 RE: Motion Hearing. THIS TRANSCRIPT WILL BE MADE ELECTRONICALLY AVAILABLE TO THE GENERAL PUBLIC 90 DAYS AFTER THE DATE OF FILING. TRANSCRIPT RELEASE DATE IS 02/22/2022. Until that time the transcript may be viewed at the Clerk's Office or a copy may be obtained from the official court transcriber. Court Reporter/Transcriber Liberty Transcripts/Dipti Patel, Telephone number 847-848-4907. (RE: related document(s) 75 Hearing held on 11/23/2021. (RE: related document(s) 55 MOTION to Stay filed by CLO Holdco Ltd, Charitable DAF Fund LP (Sbaiti, Mazin) (Entered: 08/26/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #55 ON 08/26/2021 IN U.S.
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			<p>DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)) (Appearances: J. Pomerantz and J. Morris for Highland Defendants; J. Jordan and P. Bessett for HCLOF; M. Sbaiti for Plaintiffs. Nonevidentiary hearing. Motion denied. Mr. Pomerantz to upload order.), 76 Hearing held on 11/23/2021. (RE: related document(s) 47 Motion to strike 43 Appendix in support filed by CLO Holdco, Ltd., Charitable DAF Fund, LP (Bridges, Jonathan) Modified text on 7/16/2021 (mjr). (Entered: 07/15/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #47 ON 07/15/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)) (Appearances: J. Pomerantz and J. Morris for Highland Defendants; J. Jordan and P. Bessett for HCLOF; M. Sbaiti for Plaintiffs. Nonevidentiary hearing. Motion denied (Plaintiffs acknowledged complained-of Appendices it did not relate to Motion to Dismiss). Mr. Pomerantz to upload order.)). Transcript to be made available to the public on 02/22/2022. (Patel, Dipti)</p>
57	2/21/23	164	<p>164 (112 pgs) Transcript regarding Hearing Held 1/25/23 RE: HEARING ON DEFENDANT HIGHLAND CAPITAL MANAGEMENT L.P.'S RENEWED MOTION TO DISMISS COMPLAINT (122) AND STATUS CONFERENCE RE: MOTION FOR WITHDRAWAL OF REFERENCE FILED BY PLAINTIFF CLO HOLDCO, LTD., PLAINTIFF CHARITABLE DAF FUND, LP (128). THIS TRANSCRIPT WILL BE MADE ELECTRONICALLY AVAILABLE TO THE GENERAL PUBLIC 90 DAYS AFTER THE DATE OF FILING. TRANSCRIPT RELEASE DATE IS 05/22/2023. Until that time the transcript may be viewed at the Clerk's Office or a copy may be obtained from the official court transcriber. Court Reporter/Transcriber Dipti Patel, Telephone number 847-848-4907. (RE: related document(s) 155 Hearing held on 1/25/2023. (RE: related document(s) 122 Motion to dismiss adversary proceeding, (Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint) filed by Defendant Highland Capital Management, LP filed by Defendant Highland Capital Management, LP) (Appearances: J. Morris and G. Demo for Movants; L. Phillips and M. Sbaiti for Plaintiffs. Evidentiary hearing (appendices). Court took matter under advisement.), 156 Hearing held on 1/25/2023. (RE: related document(s) 128 Motion for withdrawal of reference. Fee amount \$188, filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) (Appearances: J. Morris and G. Demo for Movants; L. Phillips and M. Sbaiti for Plaintiffs. Evidentiary hearing (appendices). Court announced it will recommend denial to District Court. Court is working on Report & Recommendation.)). Transcript to be made available to the public on 05/22/2023. (Patel, Dipti)</p>

Dated: July 14, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was filed electronically through the Court's ECF system, which provides notice to all parties of interest, on this 14th day of July, 2023.

/s/ Mazin A. Sbaiti

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**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

In re:	)	Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P., ¹	)	Case No. 19-34054-sgj11
Reorganized Debtor.)	
<hr/>		
In re: CHARITABLE DAF FUND, L.P., AND	)	Adv. Pro. No. 21-03067-sgj
CLO HOLDCO LTD.,)	
Plaintiffs,)	
vs.)	
HIGHLAND CAPITAL MANAGEMENT, L.P.,)	
HIGHLAND HCF ADVISOR, LTD., AND)	
HIGHLAND CLO FUNDING, LTD.)	
Defendants)	

APPENDIX IN SUPPORT OF HIGHLAND CAPITAL MANAGEMENT, L.P.'S RESPONSE TO "RENEWED" MOTION TO WITHDRAW THE REFERENCE

¹ The Reorganized Debtor's last four digits of its taxpayer identification number are (8357). The headquarters and service address for the Reorganized Debtor is 100 Crescent Court, Suite 1850, Dallas, TX 75201.

<u>Ex.</u>	<u>Description</u>	<u>Appx. #</u>
1.	Transcript of November 23, 2021 hearing	1-105
2.	Securities and Exchange Commission, C.F.R. Parts 275, <i>Prohibition on Fraud by Advisers to Certain Pooled Investment Vehicles</i> , Release No. IA-2628; File No. S7-25-06.	106-125
3.	<i>Second Amended and Restated Investment Advisory Agreement</i> , dated to be effective January 1, 2017, by and between Charitable DAF Fund, L.P., Charitable DAF GP, LLC, and Highland Capital Management, L.P.	126-148
4.	Securities and Exchange Commission, C.F.R. Parts 276, <i>Commission Interpretation Regarding Standard of Conduct for Investment Advisers</i> , Release No. IA-5248; File No. S7-07-18.	149-191
5.	<i>In re Acis Capital Management, L.P.</i> , et al, Case No. 18-30264-sgj11, D.I. 497 (Bankr. N.D. Tex. Aug. 13, 2018)	192-223
6.	<i>In re Acis Capital Management, L.P.</i> , et al, Case No. 18-30264-sgj11, D.I. 549 (Bankr. N.D. Tex. Sept. 4, 2018)	224-231
7.	Transcript of August 3, 2022 Hearing, Adversary Proc. No. 22-03052-sgj (Bankr. N.D. Tex. August 3, 2022)	232-277

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Dated: December 9, 2022

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EXHIBIT 1

004773

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS (DALLAS)

IN RE: . Case No. 19-34054-11 (SGJ)
HIGHLAND CAPITAL .
MANAGEMENT, L.P., .
Debtor. .
. Adv. No. 21-03067 (SGJ)
CHARITABLE DAF FUND, LP, .
et al., .
Plaintiffs, . Earle Cabell Federal Building
v. . 1100 Commerce Street
DALLAS, TEXAS 75242
HIGHLAND CAPITAL, .
MANAGEMENT, L.P., et al., .
Defendants. . Tuesday, November 23, 2021
. 9:40 a.m.

TRANSCRIPT OF HEARING ON
PLAINTIFFS' MOTION TO STAY ALL PROCEEDINGS (55);
PLAINTIFFS' MOTION TO STRIKE REPLY APPENDIX (47); AND
DEFENDANTS' MOTION TO DISMISS COMPLAINT (26)

**BEFORE HONORABLE STACEY G. JERNIGAN
UNITED STATES BANKRUPTCY COURT JUDGE**

TELEPHONIC APPEARANCES CONTINUED ON NEXT PAGE.

Audio Operator: Hawaii S. Jeng

Proceedings recorded by electronic sound recording, transcript
produced by a transcript service.

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004774

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1 THE COURT: Good morning. Please be seated.

2 All right. We have a setting in the Charitable DAF
3 Fund, et al., v. Highland, Adversary 21-3067. We have three
4 motions that are set.

5 Let me get appearances from the Plaintiffs' counsel
6 first. Go ahead.

7 MR. SBAITI: Good morning, Your Honor. This is Mazin
8 Sbaiti for the Plaintiffs.

9 THE COURT: Okay. Thank you.

10 Now for the Defendants, who do we have appearing?

11 MR. POMERANTZ: Good morning, Your Honor. It's Jeff
12 Pomerantz and John Morris from Pachulski Stang Ziehl & Jones.
13 Your Honor, before -- I understand Your Honor is going to take
14 up the motion to stay first.

15 Before Your Honor does so, I have a procedural issue
16 relating to that motion that I would like to address the Court
17 after appearances are made.

18 THE COURT: All right. I assume that's all the
19 lawyer appearances for this adversary.

20 MR. JORDAN: Your Honor?

21 THE COURT: Oh, go ahead.

22 MR. JORDAN: Your Honor, we are a nominal defendant,
23 but John Jordan on behalf of Highland CLO Funding, Ltd.

24 THE COURT: Okay. Thank you. Sorry about that.

25 MR. BESSETTE: And, Your Honor, Paul Bessette, Mr.

1 Jordan's colleague is on the phone, as well.

2 THE COURT: Okay. Thank you.

3 All right. Anyone else I missed?

4 (No audible response)

5 THE COURT: All right. Mr. Pomerantz, your
6 procedural issue?

7 MR. POMERANTZ: Thank you, Your Honor.

8 Your Honor, I must once again bring to this Court's
9 attention a violation of the Court Rules by the various counsel
10 representing Mr. Dondero. This time it's by Mr. Sbaiti.

11 When the district court entered its order granting
12 Highland's motion to enforce the reference and referring this
13 matter to Your Honor, there were three matters on the Court's
14 docket, district court's docket that got transferred. First
15 was the motion to dismiss, second was the motion to stay, and
16 third was the motion to strike, which essentially has been
17 rendered moot.

18 The briefing was complete with respect to the first
19 two matters, the motion to dismiss and the motion to stay. And
20 all that remained for the Court to do was to set a hearing and
21 have oral argument. Your Honor, on October 13th, Your Honor
22 set a hearing for today for each of those two motions.
23 Nevertheless, on November 10th, almost a month after the Court
24 set the matters for hearing and after pleadings were closed,
25 Plaintiffs filed what they called their amended motion to stay.

1 As an initial matter, Your Honor, the amended motion
2 was not even filed in this adversary proceeding initially. It
3 was filed in the main case, and there was an error that Mr.
4 Sbaiti corrected on November 18th, five days before this
5 hearing. Plaintiff did not ask for leave of court to file any
6 further pleadings. They did not provide the time under the
7 local rules for response. And, in fact, they raised additional
8 arguments in their amended motion.

9 Well, Your Honor, we can certainly argue to the Court
10 that the amended motion constitutes a new motion, is untimely,
11 and the hearing should be continued to allow us to file a
12 response. We're not going to do that, Your Honor. As I will
13 discuss when it's my time to response substantively to the
14 motion, the new arguments to stay the proceedings, the amended
15 motion are equally as frivolous as the arguments contained in
16 the original motion.

17 But I bring this to the Court's attention because,
18 again, it's extremely frustrating to have the lawyers
19 representing Mr. Dondero's related entities continue to act as
20 if the rules do not apply to them. Your Honor will recall just
21 a week or so ago, Your Honor made a -- we had a similar issue
22 in connection with the motion to dismiss. Failure to follow
23 the rules is unprofessional, and it's disrespectful not only to
24 Highland's professionals but also to the Court and it
25 interferes with Your Honor's ability to control your docket and

1 sufficiently prepare for contested matters.

2 At some point, Your Honor, there should be real
3 consequences for the continued violation of the rules. Having
4 said that, Your Honor, we are prepared to go forward with the
5 motion to stay today.

6 THE COURT: All right. Mr. Sbaiti, what say you?
7 I'm looking at Docket Entry Number 69 in the adversary
8 proceeding that was filed last Thursday. So, obviously, very,
9 very late in the game, shall we say. What is your response to
10 this?

11 MR. SBAITI: Your Honor, that was not filed in the
12 adversary as an error. When we asked one of our paralegals to
13 file it, we're not as familiar with the bankruptcy court system
14 and it was an error. It was corrected once the lawyers
15 realized it, which was last -- which was on November the 18th.
16 It was filed in, I guess in the main case. But it was simply
17 an inadvertent error, Your Honor.

18 MR. POMERANTZ: I would add, Your Honor, the original
19 motion filed inadvertently was November 10th. It still was not
20 timely. I think Mr. Sbaiti needs to answer the question of why
21 that was filed untimely, okay.

22 THE COURT: All right. Thank you, Mr. Sbaiti.

23 So, one of my pet peeves in life is people blaming
24 paralegals, by the way. But be that as it may, as Mr.
25 Pomerantz points out that it was still untimely the motion

1 filed in the underlying bankruptcy case November 10th. So what
2 is your --

3 MR. SBAITI: Your Honor, when we looked at the motion
4 and looked at the progression of the case, we filed an amended
5 motion simply to clarify our position. And really I don't
6 think we've changed our arguments all that much. We simply
7 clarified our position. We've seen amended motions filed in
8 the bankruptcy in our prior dealings, and so at that point, we
9 felt like there wasn't a rule explicitly saying we couldn't
10 have an amended motion.

11 But if it's untimely, Your Honor, you know, we don't
12 think it changes the underlying arguments. As Mr. Pomerantz
13 said, we don't think there's any prejudice to Highland either.

14 THE COURT: All right. Well, just to be clear, you
15 know, it's one thing in an underlying bankruptcy case to file
16 an amended motion after you've gotten a motion set for hearing
17 that might slightly adjust, you know, facts or relief sought.
18 And, of course, we independently look at it when it happens in
19 an underlying case to see do we need more notice to affected
20 parties.

21 But in an adversary proceeding, you know, you just
22 don't do this. All right? If you have some sort of
23 exceptional circumstances, you can file I guess a motion to
24 amend because I got to include this new information that didn't
25 exist. But you just don't do this, okay?

1 So I don't -- could you be clear what was the new
2 information? What was the new information that had to be
3 brought before the Court suddenly?

4 MR. SBAITI: Your Honor, there wasn't new
5 information. We were simply giving notice of our understanding
6 of where the legal arguments were going. The reason being is
7 that after those motions were filed and recently, the debtor
8 took the position in two other cases that they should be
9 dismissed pursuant to the permanent injunction.

10 And so that clarified for us at least a couple of
11 arguments that were unclear to us where the debtor stood on
12 whether or not the permanent injunction would be a basis to
13 dismiss or stay any of the claims that were pending. There are
14 two other claims pending in district court. Since we had filed
15 that motion, the debtor filed a motion to reconsider the stays
16 that were granted in those two courts. And then they also
17 moved to dismiss on the basis of the permanent injunction.

18 And so given that the debtor took the position that
19 they were willing to dismiss those cases based upon the
20 permanent injunction, it in many ways contravenes the position
21 they took in response to our motion which is that the -- for
22 example, they somewhat take the position in Paragraph 22, it
23 wasn't as clear then but it's clear -- it seems clearer now
24 that the permanent injunction is not relevant to whether or not
25 the case can go forward in any capacity.

10

1 And so we simply wanted to incorporate that, but it's
2 mainly legal argument about the choices that are before the
3 Court. That was really it. I mean, theoretically, I would
4 have made them for the first time during oral argument and we
5 thought we were doing something good by giving -- apprising the
6 Court in writing and giving notice of these arguments to the
7 other side by filing an amended motion. We didn't add new
8 evidence or anything like that.

9 MR. POMERANTZ: Your Honor, that argument is
10 completely disingenuous because our motion to dismiss and
11 motion for reconsideration that Mr. Sbaiti refers to is several
12 weeks ago, okay. It wasn't November 10th. It was several
13 weeks ago.

14 I will respond substantively why Mr. Sbaiti is wrong
15 and there's no inconsistent positions when it's my time to
16 speak. But for Mr. Sbaiti to say he was doing us a favor and
17 he was reacting to recent new information is just wrong, Your
18 Honor. And they should just not be continued to allowed to get
19 away with flouting the rules.

20 THE COURT: All right. Well, let me just say I'm
21 confused, maybe I should say baffled, about this amended
22 motion. You know, the motion to dismiss that is before the
23 Court for oral argument today isn't about the injunction, isn't
24 about the plan injunction. It's about res judicata and other
25 12(b)(6) arguments.

1 So I'm confused and I think, you know, it's been
2 clear for many months in this adversary proceeding, in
3 particular, the debtor's position on the plan injunction,
4 particularly, you know, in the whole argument on the motion to
5 leave to add Mr. Seery as a defendant.

6 So I'm confused, but we're going to go forward on the
7 argument today, whatever argument you want to make. And you've
8 been, I guess, forewarned. I will say that these last-minute
9 amended motions are not going to be tolerated, are not going to
10 be considered. And so, you know, I hope you won't do it again.
11 Your firm has already been sanctioned once in this adversary
12 proceeding. I'm sure we all remember.

13 So, you know, I'm just kind of baffled why you would
14 take a chance filing an amended motion without leave or somehow
15 getting it to the attention of the Court or running it by the
16 other parties for their consent to you doing it. But we're
17 going to go forward and just hear the arguments, okay. And so
18 --

19 MR. SBAITI: Thank you.

20 THE COURT: -- I'll hear your argument.

21 I'm letting people know I don't know where this time
22 estimate came on the calendar today, three hours. I don't know
23 if someone specifically expressed that. But I'm letting you
24 know at noon I have a swearing-in ceremony that I'm doing back
25 in my chambers. So I will stop at noon Central time.

1 And so does anyone think that's going to be a
2 problem?

3 MR. SBAITI: It should not be, Your Honor, from our
4 perspective.

5 THE COURT: Mr. Pomerantz?

6 MR. POMERANTZ: I don't believe so. Mr. Morris is
7 going to handle the motion to dismiss which is going to be the
8 bulk. My presentation on the motion to stay is only going to
9 be around ten minutes or so.

10 THE COURT: Okay. Thank you.

11 Mr. Sbaiti, your argument on the motion for stay.

12 MR. SBAITI: Thank you, Your Honor.

13 Your Honor, may I share my screen?

14 THE COURT: You may.

15 MR. SBAITI: I have a PowerPoint that can kind of --

16 THE COURT: Okay. You may.

17 MR. SBAITI: -- walk us through. Thank you.

18 Is Your Honor able to see my screen?

19 THE COURT: I can, yes.

20 MR. SBAITI: Thank you, Your Honor.

21 Your Honor, what I would point you to is, first, the
22 injunction language. This is what Your Honor's permanent
23 injunction says, and this is really what animates our motion to
24 stay. Our motion to stay is derived specifically because my
25 clients and I feel like our case has been enjoined by this

1 injunction, if not completely disposed of.

2 The language says that we're an enjoined:

3 "An enjoined party is permanently enjoined from
4 commencing, conducting, or continuing in any manner
5 any suit, action, or other proceeding of any kind
6 including any proceeding in a judicial, arbitral,
7 administrative, or other forum against or affecting
8 the debtor or the property of the debtor."

9 And then (v) of that injunction says:

10 "or acting or proceeding in any manner in any place
11 whatsoever that does not conform to or comply with
12 the provisions of the plan."

13 One of the things that was suggested in Paragraph 22
14 of their response was that the DAF and Holdco are not enjoined
15 parties. But the final plan defines an enjoined party in
16 Article 1(b) (56) as any entity who has or -- all entities who
17 have held, hold, or may hold claims against the debtor; any
18 entity that has appeared and/or filed any motion, objection, or
19 other pleading in this Chapter 11 case regardless of the
20 capacity in which such entity appeared and any other party in
21 interest. And, five, the related persons of each of the
22 foregoing.

23 Article 1(b) (22) defines a claim as any claim that's
24 defined in Section 1015 of the Bankruptcy Code. And Section
25 1015 of the Bankruptcy Code defines a claim as a right to

1 payment whether or not such right is reduced to judgment,
2 liquidated, unliquidated, fixed, contingent, matured,
3 unmatured, disputed, undisputed, legal, equitable, secured, or
4 unsecured.

5 So given this definition, when we've read this
6 injunction, we believed that we were enjoined parties, the DAF
7 and Holdco were both enjoined parties. They had appeared in
8 the -- they have claims. Obviously, those are the claims being
9 asserted here.

10 And so going back to the injunction language, we
11 believe this lawsuit has been disposed of by this permanent
12 injunction. We believe there's really only one or two things
13 that should probably happen with this lawsuit. Either it could
14 be dismissed based upon the permanent injunction or what we
15 proposed in our motion to stay is that the Court exercise its
16 inherent authority to simply stay the case pending the appeal
17 of this language, which is up on appeal in the Fifth Circuit
18 right now.

19 If that language, and if the injunction gets affirmed
20 by the Fifth Circuit, then certainly the dismissal can happen
21 once that affirmance happens and there's no harm, no foul, and
22 no one's wasted any time.

23 If they're not, if it's overturned, then, obviously,
24 the injunction would be vacated, presumably by the Fifth
25 Circuit. And at some point, if the Court decides not to enter

1 a similar injunction that would likewise dispose of this case,
2 then the case could proceed on the merits.

3 The issue we've identified both in our original
4 motion and as we fleshed out in our -- as a matter of law in
5 our amended motion to simply put a finer point on it is that
6 the merits are now -- have been disposed of. This injunction
7 ends this case, at least as far as we read it. It ends this
8 case irrespective of the underlying merits of the lawsuit,
9 which means that the lawsuit merits themselves have become moot
10 and any opinion or any attempt to resolve it is obviously an
11 advisory opinion by the Court.

12 So we really only see two ways that this could go
13 right now without either gutting the injunction or
14 circumventing it completely, which is to say that either the
15 case should be dismissed based upon the permanent injunction or
16 the case should be stayed based upon the permanent injunction.

17 Mr. Pomerantz or the debtors' brief suggests that,
18 well, the injunction doesn't prevent hearing pending motions.
19 But I would respectfully disagree with that. If you look at
20 the language, "commencing, conducting, or continuing in any
21 manner in any suit, action, or other proceeding against or
22 affecting the debtor."

23 As 12(b)(6) hearing, I would imagine, was intended to
24 fall under the umbrella of a proceeding. And us arguing a
25 12(b)(6) motion would us be conducting and maybe even

1 continuing the suit because we're trying to protect the merits
2 of the suit, which as I said are at this juncture already moot.

3 And so it comes down to I think a very simple
4 question, which is what do we do at this juncture. Do we just
5 simply dismiss the lawsuit in light of this permanent
6 injunction or stay the lawsuit in light of this permanent
7 injunction?

8 The debtor makes a lot of hay out of the fact that,
9 well, there are special rules that apply when you're trying to
10 stay a case pending appeal. But if you look at all of their
11 case law, it has to do with different circumstances where an
12 appeal -- where there's a matter on appeal that could
13 substantially affect the resolution of the case, which here we
14 think it actually could. But in those cases, those appeals
15 would affect the resolution of the case on the merits; whereas,
16 here, the question goes to whether or not a permanent
17 injunction that really has stopped us all in our tracks.

18 As soon as we understood this injunction and its
19 scope, we're the ones who reached out to the debtor's counsel
20 and asked them on a meet-and-confer whether or not they would
21 just agree to stay the matter. And we were a little bit
22 surprised by their reaction when they first didn't think that
23 this applied to our case, and we didn't understand how. And
24 then they changed their mind, said it did apply to our case but
25 they didn't think that we should stay the case. And they

1 didn't suggest let's just dismiss it based upon the permanent
2 injunction.

3 So it kind of comes down to the same small -- same
4 simple issue, Your Honor. There's this permanent injunction,
5 and I don't think there's any way for us to get around it at
6 this juncture.

7 THE COURT: Mr. Pomerantz:

8 MR. POMERANTZ: Yes, Your Honor.

9 I'm going to respond to several of the arguments Mr.
10 Sbaiti made in his motion, which apparently he's abandoned
11 because he only is focused on the injunction. And I'm also
12 going to tell Your Honor, what our arguments are because
13 despite Mr. Sbaiti's efforts, he's completely misquoted them.

14 So in the motion and the amended motion, the
15 Plaintiffs make several arguments why this Court should stay
16 the matter. First, they argue they're entitled to a stay
17 because the exculpation provision in the plan prohibits them
18 from proceeding against the Defendants in the action. And
19 there are several problems with that argument.

20 First, Mr. Sbaiti and the Plaintiffs don't even
21 attempt to meet the Fifth Circuit's standards for a stay
22 pending appeal because, of course, they can't. Mr. Sbaiti's
23 trying to sidestep the grounds for a stay pending appeal by
24 arguing it doesn't apply just is incorrect.

25 They would have to show that there is a likelihood of

1 success on the merits, they would suffer irreparable harm, the
2 debtor wouldn't suffer irreparable harm, and there is -- public
3 interest supports a stay. They can't do any of them.

4 In fact, as Your Honor is well aware, Your Honor
5 denied the actual appellants in that suit, in that order, the
6 confirmation order, a stay pending appeal and that was denied
7 by the district court and also denied by the Fifth Circuit
8 Court of Appeals.

9 The Plaintiffs didn't object to the plan, they are
10 not parties to the appeal, and they never sought a stay pending
11 appeal. So they really can't explain why they as really
12 strangers to the appeal are entitled to a stay of the
13 effectiveness of the plan when the actual appellants to that
14 order were denied a stay pending appeal up through the
15 appellate ladder.

16 Second, notwithstanding Mr. Sbaiti's arguments in the
17 motion, the exculpation provision is neither as broad nor does
18 it affect all the parties that are subject to this litigation.
19 There are three Defendants in the complaint. The only
20 Defendant that is covered by the exculpation provision is the
21 debtor. The exculpation provision does not apply HCF Advisors,
22 and it does not apply to Highland CLO Funding.

23 Also, while the exculpation provision does apply to
24 the debtor, it only exculpates the debtor from claims of
25 negligence. The complaint raises a variety of causes of action

1 that have nothing to do with negligence and would not be
2 covered by the exculpation provision.

3 But, Your Honor, the biggest problem with their
4 argument that the exculpation provision supports a stay is that
5 the exculpation -- the appeal of the exculpation provision has
6 nothing to do with this case. Why? Because the Fifth Circuit
7 appeal concerns whether the exculpation provision is
8 appropriate for parties other than the debtor. The debtor is
9 the only Defendant in this case that obtains the benefit of the
10 exculpation.

11 And there is no dispute, there was no dispute at
12 confirmation, there's no dispute in the case law, there's no
13 dispute in Pacific Lumber, there's no dispute in the appeal
14 that a plan can exculpate the debtor. So the Fifth Circuit
15 appeal doesn't implicate the exculpation provision and cannot
16 support a basis for a stay.

17 The next argument Mr. Sbaiti makes is the injunction
18 provision, and the injunction provision is on appeal to the
19 Fifth Circuit. But the aspect of the appeal of the injunction
20 is not the provision that Mr. Sbaiti points to.

21 And, again, as with the exculpation provision, the
22 same arguments about failure to obtain a stay, failure to be
23 party to the appeals, and failure to object to the plan apply,
24 as well. But as is the case with the exculpation provision,
25 the resolution of the appeal of the injunction provision will

1 not affect this case in any way.

2 They point to the portion of the injunction that
3 prohibits enjoined parties from directly or indirectly
4 continuing, commencing, or conducting in any manner any suit or
5 action proceeding against the debtor. They argue that they
6 cannot proceed without violating the injunction because the
7 injunction was intended to put all litigation against the
8 debtor to an end.

9 But, of course, Your Honor, that is not true. That
10 is not what the injunction is. The issue on appeal before the
11 Fifth Circuit as it relates to the injunction is whether the
12 injunction impermissibly enjoins parties from enforcing their
13 rights with respect to post-effective date commercial
14 relationships with the reorganized debtor. And, of course, we
15 argue that it's appropriate, but it has nothing to do with the
16 provision Mr. Sbaiti identified.

17 The appeal does not impact in any way whether a plan
18 can enjoin prosecution of claims that arose prior to the
19 effective date. And, of course, such a plan provision is
20 completely appropriate and is customary. The plan provided the
21 debtor as the plan provides all debtors with a fresh start and
22 enjoins litigation against the debtor.

23 But importantly, Your Honor, that does not mean as
24 Plaintiffs argue that any liability for pre-effective date
25 conduct just goes away and that creditors are left without a

1 remedy to pursue claims against the debtor for pre-effective
2 date conduct.

3 Rather, if they have a pre-petition claim in lieu of
4 their litigation that's pending, they file a pre-petition claim
5 against the estate and that matter is resolved in the claims
6 objection procedure. Or, as in the case here, when they make
7 an allegation that there is a post-petition claim, what do they
8 do? They file a request for payment of an administrative
9 claim, and this Court addresses the validity of the
10 administration claim. The lawsuit pending in another
11 jurisdiction stops, but the claim has to be resolved in the
12 bankruptcy court.

13 The only conduct that the injunction really prohibits
14 is them from proceeding with actions in other courts. It does
15 not deny them a remedy. Accordingly, their argument that they
16 cannot proceed with claims against the debtor because of the
17 injunction provision just lacks any merit and can't form the
18 basis for a stay.

19 Plaintiffs' next argument in their briefing is that
20 if the Court refuses to stay the complaint, they will file a
21 motion to withdraw the reference of this matter to the district
22 court. Your Honor, this is the biggest head-scratcher of them
23 all given how this complaint ended up before Your Honor. This
24 exact issue and Plaintiffs' arguments as to why the reference
25 should be withdrawn have already been fully briefed and decided

1 by the district court.

2 As Your Honor may recall, the Plaintiff filed this
3 action in the district court, conveniently failing to include
4 the bankruptcy case as a related case or mentioning that the
5 bankruptcy courts have related jurisdiction in the filings.
6 Your Honor may have had occasion to review the underlying
7 complaint when the debtor brought a motion for contempt against
8 counsel for Plaintiffs for pursuing a claim against Mr. Seery
9 in violation of Your Honor's January 9th, 2020 and July 16th,
10 2020 orders.

11 Your Honor issued an order finding counsel and
12 various parties in contempt which order is, of course, subject
13 to appeal. At the time we were litigating the contempt motion,
14 we filed two motions in district court. The first was a motion
15 to enforce the reference and have the district court send that
16 complaint to Your Honor. And that motion to enforce the
17 reference is now on Your Honor's docket at Number 22 and 23.

18 The second was the motion to dismiss which is before
19 Your Honor today. Plaintiffs oppose the motion to enforce the
20 reference arguing that mandatory withdrawal was required
21 because the matter involved consideration of non-bankruptcy
22 federal law, specifically federal securities laws and the
23 Investment Advisors' Act.

24 Plaintiffs further argue to the district court why
25 would you refer the case to the bankruptcy court if it's only

1 going to end up back in the district court upon mandatory
2 withdrawal of the reference. They argue to the district court
3 that would be a complete waste of time.

4 We filed our reply at Docket Number 42 explaining to
5 the district court why mandatory withdrawal of the reference
6 did not apply and why this case should be referred to Your
7 Honor. And what did the district court subsequently do? It
8 entered an order referring this action to Your Honor which is
9 why we are here today.

10 Plaintiffs now flout the district court's order of
11 reference by telling the Court that if the Court does not stay
12 the matter, they will file a motion to withdraw the reference
13 before Your Honor, and they attach virtually identical pleading
14 that they filed in opposition to our motion to enforce the
15 reference.

16 Plaintiffs did not disclose in their amended motion
17 that there was a fully-briefed motion to enforce the reference
18 before the district court. Plaintiffs' argument is
19 disingenuous and designed to mislead the Court.

20 The district court has only agreed that mandatary
21 withdrawal of the reference does not apply and this case
22 belongs in Your Honor. And while we cannot stop the Plaintiffs
23 from filing any motion before this Court, we want to put them
24 on notice that if they do file a motion for withdrawal of the
25 reference in light of the facts as I just stated them, we will

1 seek sanctions.

2 In any event, Your Honor, the fact that they may file
3 a motion for withdrawal of the reference at some point in the
4 future is not grounds to stay the matter.

5 Lastly, Your Honor, Plaintiffs argued in the opening
6 that Highland's position today in opposing the motion to stay
7 is inconsistent with positions Highland has taken in two other
8 lawsuits commenced by the Sbaiti firm. Like all of their other
9 arguments, they misrepresent the facts and are frivolous.

10 The Sbaiti firm filed a complaint on behalf of the
11 DAF in the district court arguing that Highland mismanaged
12 (audio drop). That complaint followed in the heels of an
13 almost identical complaint filed by Dugaboy asserting the same
14 claims.

15 And Your Honor may recall questioning Mr. Sbaiti at a
16 hearing in June how Dugaboy could pursue such a claim in the
17 district court if Dugaboy had a pending proof of administrative
18 claim on file in the bankruptcy case. Well, soon after that
19 hearing, Your Honor, the Dugaboy complaint was dismissed, and a
20 few days later the DAF complaint was filed. That complaint has
21 never been served on Highland.

22 The second lawsuit is also a lawsuit filed by the
23 Sbaiti firm on behalf of an entity called PCMG in the district
24 court. And PCMG previously held less than five one-hundredths
25 of a percent interest in a certain fund managed by highland.

1 The lawsuit alleges that Highland acted improperly to sell
2 certain assets of the fund, thereby damaging PCMG. That
3 complaint has also never been served on Highland.

4 The Plaintiffs sought a stay of those matters before
5 Highland could file a response, and the court -- the district
6 court's entered stays in those matters. And Highland has filed
7 motions for reconsideration and the motions to dismiss because
8 they violate the injunction.

9 But, importantly, Your Honor, if you read the
10 motions, Highland does not argue that Plaintiffs do not have a
11 remedy for the alleged wrongs they say they suffer. Rather,
12 Highland's argument is that any claims alleged in those
13 lawsuits, just like any claims alleged in the lawsuit before
14 Your Honor today, must proceed in bankruptcy court as part of
15 the claims objection process. That's where they will have
16 their day in court. The lawsuits don't go away. The
17 injunction prevents them from continuing on in district court.

18 Accordingly, Highland is being totally consistent in
19 all matters, and the litigations may not proceed there but must
20 proceed before Your Honor. And, of course, none of these three
21 matters are implicated by the Fifth Circuit appeal.

22 Your Honor, the amended motion was procedurally
23 improper and is substantively without merit. And for all these
24 reasons, we request that the Court deny the stay motion and
25 proceed with the hearing on the motion to dismiss.

1 Thank you, Your Honor.

2 THE COURT: All right.

3 Mr. Sbaiti, you get the last word.

4 MR. SBAITI: Thank you, Your Honor.

5 Your Honor, the administrative claim process that was
6 described as being the way that these claims were supposed to
7 proceed, by the language of the order that we read, does not
8 allow for these claims. Those claims are limited to a specific
9 category of claims that don't include the claims that are
10 alleged in this lawsuit.

11 And in any event, this lawsuit wasn't filed as an
12 administrative claim. So if that's the case and it needs to be
13 refiled or reasserted as an administrative claim, then I think
14 that's a subject for another day. All I know is that we have
15 this injunction right now that either should stay this case
16 pending the appeal, which I'll address the issue on appeal in a
17 moment, or it should be dismissed, perhaps without prejudice so
18 that it can be refiled properly as an administrative claim if
19 that's what's supposed to happen, because I guess this converts
20 the matter.

21 The appeal, the subject of the appeal as to the
22 injunction, Your Honor, the appeal actually encompasses many of
23 the issues that we're talking about in this case. Now Mr.
24 Pomerantz tries to narrow the scope of what's up on appeal, and
25 that may indeed be the argument that they're going to present

1 to the Fifth Circuit or that they've presented to the Fifth
2 Circuit.

3 But the actual issue up on appeal is the
4 enforceability and validity of the order for a variety of
5 reasons which includes the provision that we're talking about
6 and the enforceability of the provision that we're talking
7 about because it gets rid of particular claims. And I guess
8 the argument back is, no, it doesn't because there's now an
9 alternative means of going there.

10 Mr. Pomerantz says that we shouldn't have proffered a
11 motion to enforce the reference. That proffer, however, was
12 because Judge Boyle's reference to this Court didn't deal with
13 our motion to -- our cross-motion to withdraw the reference.
14 All it dealt with was their motion to enforce the reference as
15 a -- to enforce the standing order in the district court. And
16 that's all she ordered was she cited the standing order and the
17 statutes, I think it's 157(a), and that's really all it did.

18 So it left open the question of whether she wanted
19 Your Honor to deal with the withdrawal of the reference
20 specifically as to the 12(b)(6) issue in the first instance.
21 It didn't resolve the question. It doesn't purport to resolve
22 that question. And it's not unheard of for the district court
23 then to send the matter to the bankruptcy court and then to
24 piecemeal which proceedings the withdrawal of the reference is
25 applicable to and then all the other proceedings would stay

1 with Your Honor or with the bankruptcy court.

2 So we weren't flouting the district court's order,
3 and we certainly weren't flouting any of the previous orders.
4 And the threat of a sanction for simply exercising our rights
5 in due course is not well taken.

6 Now Mr. Pomerantz says, well, the DAF and CLO Holdco
7 are not parties to the appeal. I don't think that's relevant
8 because if the provision is struck by the Fifth Circuit, it's
9 not only struck for the appellants, it's struck as to all.
10 It's either valid or it's invalid. And even if it's declared
11 to be invalid only as to the appellants, it's not suddenly
12 valid as to everyone else who didn't appeal. That's not
13 generally how these appeals have worked.

14 If the Court doesn't stay this matter, Your Honor,
15 and doesn't dismiss it, we still maintain, Your Honor, that as
16 it stands today, the question on the merits have been mooted
17 and we cannot proceed. I think what Mr. Pomerantz is hoping
18 for or the debtor is hoping for is a provision where our hands
19 are potentially tied to argue the motion.

20 And if the Court tells us they're not, then we'll
21 certainly argue the 12(b)(6). But what I don't want to do is
22 argue a 12(b)(6) motion that on its face appears to violate the
23 permanent injunction and then be held in contempt for violating
24 that injunction.

25 And so that's why we've asked for the Court to either

1 stay the matter under its inherent jurisdiction or to -- if
2 you're going to -- if it's not going to be stayed, then we
3 believe it has to be dismissed according to the permanent
4 injunction as it stands right now.

5 THE COURT: All right.

6 The motion to stay is denied. The amended motion to
7 stay is likewise denied. This is an odd argument. I guess one
8 might say the traditional four-factor test for a stay of a
9 proceeding has really not been the subject of the argument here
10 for a stay.

11 So suffice it to say the four-prong test for a stay,
12 you know, hasn't been met here. There hasn't been a showing of
13 substantial likelihood of success on the merits or irreparable
14 injury if the stay's not granted or a stay will not
15 substantially harm others or the stay would serve a public
16 interest.

17 But going on to the arguments that were focused on by
18 movant, I just don't think that you have shown that, you know,
19 either the exculpation clause or the injunction provisions of
20 the plan somehow tie your hands in arguing the 12(b)(6) motion,
21 defending against the 12(b)(6) motion today or I just think
22 that your arguments reflect, frankly, a misunderstanding of how
23 the injunction language and exculpation language applies here.

24 So the motion for stay is denied, and I will ask Mr.
25 Pomerantz to submit an order reflecting the Court's ruling.

1 So it looks like we have another procedural matter,
2 Mr. Sbaiti. You filed a motion to strike reply appendix of the
3 Plaintiffs quite a while back. So did you want to present
4 that?

5 MR. SBAITI: Yes, Your Honor. I think it's a very
6 simple procedural issue.

7 Generally, a party that files a 12(b)(6) is limited
8 to the four corners of the complaint. And if there's a
9 contract incorporated or a document incorporated as an
10 intrinsic part of the complaint, you know, that's usually
11 considered under the 12(b)(6) motion.

12 What the Defendants did, what the debtor here did is
13 they filed a bunch of evidence in their 12(b)(6), essentially
14 attempting to argue it as a summary judgment. We raised that
15 in our response. So as part of our response, we objected to
16 all the evidence. But then on the reply, they filed a bunch
17 more evidence both without leave and improperly, basically
18 sandbagged us.

19 And so we raised two points for striking that
20 evidence. One was akin to the first argument, which is it's
21 not an evidentiary hearing. It's not an evidentiary process in
22 the first instance. A 12(b)(6) motion has to assume that the
23 facts pled are true, and then the question is whether they
24 state a claim.

25 And, secondly, adding them to the reply is especially

1 egregious because the reply is the last word. And we didn't
2 have an opportunity to respond, and we also don't think it's
3 relevant nor should we have to respond to a whole bunch of
4 extra evidence that was attached.

5 That's essentially the basis of our motion, Your
6 Honor.

7 MR. POMERANTZ: Your Honor, the simple answer to the
8 issue is we filed the reply of the appendix in connection with
9 the motion to enforce the reference. We didn't file it in
10 connection with the motion to dismiss. The motion to enforce
11 the reference is moot. So what Mr. Sbaiti, his whole argument
12 doesn't make any sense.

13 As a substantive matter, just there wasn't any
14 evidence. It was pointing to court pleadings, orders, and
15 stuff. So it's irrelevant. I don't know why it's still on the
16 docket. It shouldn't be on the docket since it related to the
17 motion to enforce the reference.

18 THE COURT: All right. Mr. Sbaiti, did you just
19 simply --

20 MR. SBAITI: Your Honor, much of that evidence was --

21 THE COURT: -- misunderstand or what?

22 MR. SBAITI: I think we might have because it was
23 filed as a separate item, and it may have been miscallendared or
24 misapplied on our system. But the way it was presented to us
25 when we got it was it appeared to be evidence in support of,

1 well, I guess both, but certainly evidence that was averted to
2 in the reply.

3 But if they're saying that the Court's not going to
4 consider it, then that moots the motion and I think we can move
5 on.

6 MR. POMERANTZ: Yes, Your Honor. I had nothing to do
7 with his motion. I guess there was another mistake on their
8 end. I guess that stuff happens occasionally.

9 THE COURT: Okay. All right. So I'll deny it as
10 based on a mistake that's been acknowledged here. And so with
11 that, let's have an order cleaning that up, as well, Mr.
12 Pomerantz, please.

13 With that, we'll move on to the Defendants' motion to
14 dismiss complaint. I think, Mr. Pomerantz, you said Mr. Morris
15 will be making this argument?

16 MR. POMERANTZ: That is correct, Your Honor.

17 THE COURT: All right.

18 Mr. Morris, I'll hear your argument.

19 MR. MORRIS: Good morning, Your Honor. John Morris
20 for Pachulski Stang Ziehl & Jones for the reorganized debtor.
21 Can you hear me okay?

22 THE COURT: I can. Thank you.

23 MR. MORRIS: Okay.

24 Your Honor, this is a bit like Groundhog's Day. I
25 believe that we're going to spend the next half hour or an hour

1 discussing the very issues that were before the Court earlier
2 this year on the HarbourVest 9019 motion.

3 As the Court will recall from the June 8 hearing,
4 there is a complaint that's been filed ostensibly by the DAF
5 and CLO Holdco. As Your Honor will recall, the testimony
6 established that Mark Patrick had just been installed as the
7 trustee, had no knowledge of the prior events, and Mr. Dondero
8 and Mr. Sbaiti spent quite some time together formulating this
9 particular complaint that is nothing less than a collateral
10 attack on the Court's prior order.

11 I'd like to, if I can, just walk through a PowerPoint
12 presentation to try to make the debtor's position quite clear,
13 if I may.

14 THE COURT: You may.

15 MR. MORRIS: And I would ask my assistant, Ms. Canty
16 (phonetic), to put up the first slide.

17 Your Honor, you'll recall that last December, the
18 debtor filed its motion under Rule 9019 for court approval of a
19 settlement. The debtor was completely and utterly transparent
20 in what the terms of the settlement were.

21 Very briefly, as set forth in Appendix 2 or Exhibit 2
22 which was the motion itself, in Paragraph 32, Your Honor, the
23 debtor set forth the terms of the transaction for which it was
24 seeking approval. Those terms included in the very first
25 bullet point a statement that HarbourVest shall transfer its

1 entire interest in CLOF to an entity to be designated by the
2 debtor.

3 And that's an important point that we'll talk about
4 in a number of different contexts, Your Honor. The debtor made
5 it very clear at the very first moment of this matter that it
6 was not going to acquire the asset but the asset was going to
7 be transferred to an entity to be designated by the debtor.
8 The debtor's motion filed last December clearly stated the
9 value of the interest that it would be acquiring in return.
10 That was also set forth in Paragraph 32 in a footnote.

11 It didn't say that it was the fair market value. It
12 said the method of valuation was the net asset value and gave a
13 valuation date of December 1st so that all parties in interest
14 who received the motion understood the economics of the deal.
15 And the deal that the debtor was asking the Court to approve
16 was one whereby HarbourVest would receive certain claims and in
17 exchange for those claims, they were going to transfer their
18 interest in CLO -- HCLOF.

19 The debtor also filed on the docket for all to see a
20 copy of the settlement agreement. The settlement agreement
21 sets forth the terms of the deal, including again the statement
22 that HarbourVest "will transfer all of its rights, title, and
23 interest in HCLOF." It actually says to an affiliate or an
24 entity to be designated by the debtor. And the transfer
25 agreement itself was also put on the docket.

1 So that's where things stood just before Christmas.
2 I know that there's some due process and other type arguments
3 that are in the Plaintiffs' opposition to the motion. But, of
4 course, the undisputed facts are that the debtor timely filed
5 the motion. The time period was consistent with all applicable
6 rules. Nobody ever asked the debtor for an extension of time.
7 Nobody ever filed a motion for an extension of time. And so
8 those due process arguments I think carry no weight at all.

9 So the debtor filed the motion. And if we can go to
10 the next slide, we see what the responses were, and there were
11 several. All of the responses, the only responses were
12 objections to the motion filed by Mr. Dondero and his certain
13 of his affiliated entities.

14 Mr. Dondero's objection can be summarized as follows.
15 He made the following observations and asserted the following
16 objections to the proposed settlement. The first thing he said
17 is that the settlement far exceeds the bounds of
18 reasonableness. Now, of course, one cannot make a
19 determination of reasonableness without having an understanding
20 of value. The debtor was giving something and it was getting
21 something.

22 And so Mr. Dondero understood that the issue of value
23 was front and center. If there was any mistake about it, he
24 also noted that he understood that as part of the settlement
25 and, again, I've written this incorrectly, HarbourVest will

1 transfer its entire interest in HCLOF to the debtor. That is
2 not what Mr. Dondero understood. In fact, Mr. Dondero
3 understood that it would transfer its entire interest in HCLOF
4 "to an entity to be designated by the debtor," again, making it
5 clear that he knew exactly what the debtor was doing here. And
6 that can be found at Appendix 4 in Footnote 3 on Page 1 if you
7 want the exact quote from Mr. Dondero's pleading.

8 In the same footnote, he also specifically
9 acknowledges that he understood the valuation. He understood
10 the method valuation. He understood the valuation date of
11 December 1st. And he urged the Court in his pleading to
12 scrutinize the settlement to make clear that the available
13 value of the investment should be realized by the debtor's
14 estate.

15 And this is such a critical point, Your Honor. His
16 concern was that by placing the value in an entity other than
17 the debtor itself, that the Court wouldn't have jurisdiction
18 over that asset. That was his concern. So not only did he
19 understand that the asset was going to be transferred to an
20 affiliate, he wanted to make sure that this Court had
21 jurisdiction over the asset.

22 And, of course, Mr. Seery in his testimony and
23 otherwise, we provided the Court with all the comfort it needed
24 to know that even though it was being assigned to a special-
25 purpose vehicle wholly-owned by the debtor, it would

1 nevertheless be subject to the Court's jurisdiction.

2 Mr. Dondero's trusts also filed an objection if we
3 can go to the next slide.

4 Dugaboy and Get Good represented by Douglas Draper
5 made the following observations and asserted the following
6 objections to the HarbourVest Settlement. They, too, made
7 clear that they understood that the asset was going to be
8 transferred to an entity designated by the debtor. They, too,
9 acknowledge that they understood that the debtor was valuing
10 the asset at approximately \$22 million as of December 1st. And
11 their objection was that the Court couldn't evaluate the
12 settlement without knowing how the asset was valued, without
13 knowing whether the debtor could acquire the asset, very
14 critical point.

15 These are the points that are made in the complaint.
16 These are the exact same points that are made in the complaint.
17 And also the Court couldn't evaluate the settlement unless they
18 understood that the value would be inure to the benefit of the
19 debtor's estate, again, mimicking Mr. Dondero's concern that by
20 placing the asset in an affiliate of the debtor, that it might
21 not be subject to the Court's jurisdiction.

22 Finally, and most importantly, if we can go to the
23 next slide. The Plaintiff, CLO Holdco, filed an objection to
24 the 9019 motion. And this is just so critical. And this is
25 the Groundhog Day aspect that I specifically speak of. CLO

1 Holdco's objection was based solely on its assertion that it
2 had a superior right to the opportunity to acquire the asset
3 that was being transferred by HarbourVest. It only made one
4 argument in support of its contention that it had a superior
5 right, but that argument was specifically premised on the
6 membership agreement, Section 6.1 and 6.2 of the membership
7 agreement.

8 CLO Holdco, the Plaintiff in the underlying action,
9 argued to this Court that HarbourVest had no authority to
10 transfer the asset without complying with the right of first
11 refusal that would give CLO Holdco the opportunity to take the
12 asset for itself. That's what this Court was told. CLO Holdco
13 didn't make this argument fleetingly. They provided an
14 extraordinarily detailed analysis of Sections 6.1 and 6.2 of
15 the membership agreement and concluded "that HarbourVest must
16 effectuate the right of first refusal before it can transfer
17 its interest in HCLOF. That was the objection. Objections
18 have consequences, as Your Honor knows.

19 If we can go to the next slide.

20 By filing an objection, CLO Holdco and the trusts and
21 Mr. Dondero became participants in the litigation.
22 Notwithstanding the Plaintiffs' arguments to the contrary, when
23 they file the objections, they participate in what's called a
24 contested matter. And in a contested matter, they had every
25 right to take all discovery on any issue that was related to

1 the 9019 motion, including the transfer, the disposition of the
2 asset to an affiliate of the debtor, the valuation of the asset
3 that's being received, the merits of the settlement itself, the
4 causes of action, whether, you know, what communications that
5 were, the negotiations, what did Mr. Seery and Mr. Pugatch
6 discuss? Right?

7 They could have taken any discovery they wanted. And
8 they did avail themselves of discovery, in fact. They did -- I
9 don't know why they did what they did, but they chose to take
10 one deposition, and that was Mr. Pugatch, okay.

11 His deposition transcript, I think is at Exhibit 7,
12 or Appendix Number 7, and it was a long deposition. It really
13 was. And they asked Mr. Pugatch at the deposition if he knew
14 what the value of the asset that was being transferred was.
15 And he said \$22.5 million. So it wasn't just Mr. Seery or the
16 debtor who was subscribing to this valuation. The party on the
17 other side of an arm's length negotiation was subscribing to
18 the exact same valuation.

19 The Plaintiffs could have taken whatever discovery
20 they wanted. This is a full and fair opportunity to
21 participate in the litigation. We proceeded to trial. Before
22 we got there, actually, the debtor filed its response to CLO
23 Holdco's objection and proffered its own very detailed and
24 apparently very persuasive analysis that CLO Holdco's objection
25 was without merit, that CLO Holdco had no right of first

1 refusal under the facts and circumstances as they existed, and
2 with Grant Scott, Mr. Dondero's childhood friend at the helm,
3 we got to Court for the contested hearing on the debtor's 9019
4 motion, and CLO Holdco withdrew their objection.

5 And I've put up on the screen just an excerpt of the
6 transcript because, you know, when we talk about whether or res
7 *judicata* should apply, because was there a hearing on the
8 merits? Was there a decision on the merits? Just look at the
9 words of CLO Holdco's lawyer. "CLO Holdco has had an
10 opportunity to review the reply briefing and after doing so has
11 gone back and scrubbed the HCLOF corporate documents based on
12 our analysis of Guernsey law."

13 And some of the arguments of counsel in those
14 pleadings and our review of the appropriate documents, counsel
15 obtained the authority from Mr. Scott to withdraw the CLO
16 Holdco objection based on the interpretation of the member
17 agreement. We were grateful for that and the Court
18 specifically said in response, "That eliminates one of the
19 major arguments that we had anticipated this morning."

20 Apparently, the Plaintiffs believe that those events
21 have no meaning and that this Court's reliance on CLO Holdco's
22 substantive withdrawal of its objection has no meaning. I
23 think they're wrong, and we'll get to that in a moment.

24 We proceeded with the hearing. Mr. Seery and
25 Mr. Pugatch testified at length. If you look at Footnote 3,

1 you'll see Mr. Seery testified for almost 70 pages of
2 testimony. Mr. Pugatch testified for almost 45 pages of
3 testimony. His testimony was exhaustive. And, again, any of
4 the objecting parties had the right to ask whatever questions
5 they want.

6 But I do want to just note a few things that aren't
7 up on the screen right now. If you go to Appendix 9, Your
8 Honor, which is the transcript of the hearing, at Page 13, you
9 will see that the very first thing I discussed in my opening
10 statement was the economics and how with a valuation of \$22.5
11 million this deal made sense for the debtor.

12 You will see from Pages 30 to 42 there is extensive
13 testimony from Mr. Seery about the amount and the value of the
14 asset. But the most important part of Mr. Seery's testimony is
15 that he explains how it came to be that HarbourVest agreed to
16 transfer its interest in HCLOF to an affiliate of the debtor.
17 And that came about, not because Mr. Seery or the debtor was
18 initially at all interested in doing this. The whole idea
19 originated with HarbourVest.

20 They wanted to extract themselves from the Highland
21 platform. They wanted to give this piece up. So there's no
22 conspiracy going on here. The unrebutted testimony that all of
23 the objecting parties had an opportunity to challenge was that
24 the whole idea originated with Mr. Pugatch and with
25 HarbourVest. I think that's an important point to take into

1 account.

2 And finally, again, from the hearing, if you look at
3 at Appendix 9, you'd also find that Mr. Pugatch, again,
4 testified, as he had in his deposition, as to the value of the
5 interest being transferred. So we completed the testimony. We
6 rested our case having had a full and fair opportunity to
7 contest the motion. The objecting parties rested as well. And
8 we got to the point where we had to prepare the notice, and we
9 were discussing that at the hearing, if we can go to the next
10 slide.

11 And it's very important, because again, this was all
12 done transparently, and it was all done on the record. And
13 after the close of evidence, I addressed the order that was
14 going to be prepared. I specifically said that I wanted to
15 make clear that we were going to include a provision, "that
16 specifically authorizes the debtor to engage in, to receive
17 HarbourVest the asset, you know, the HCLOF interest," right. I
18 wanted everybody to know that was what was going to happen, and
19 then I said, "The objection has been withdrawn." I think the
20 evidence is what it is and we want to make sure that nobody
21 thinks they're going to go to a different court somehow to
22 challenge the transfer. But yet, that is exactly what the
23 complaint seeks to do.

24 Having put everybody on notice as to where we were
25 going, as to what the evidence showed, the debtor drafted and

1 the Court adopted an order, and the order says, among other
2 things, that HarbourVest was authorized to transfer its
3 interest to the debtor. Actually, it says, "to a wholly owned
4 and controlled subsidiary of the debtor," pursuant to the
5 transfer agreement, "without the need to obtain the consent of
6 any party or to offer such interest first to any other investor
7 in HCLOF." So the Court heard the 9019 motion pursuant to a
8 Bankruptcy Rule and entered an order that was unambiguous and
9 that the Plaintiffs did not appeal from.

10 We can go to the next slide.

11 At a very high level, Your Honor, it is just crystal
12 clear that the complaint is just inextricably intertwined with
13 the 9019 proceedings and the order itself. I think Mr. Sbaiti
14 would agree with me that but for the order that approved the
15 transfer of the asset and the testimony about the value of that
16 asset, they have no claims.

17 Every single claim is predicated on what happened in
18 the 9019 hearing. Every single claim is predicated on the
19 Court's order approving the transfer of the asset and the
20 testimony and evidence that was adduced in relation to that
21 asset.

22 There were really only two issues that the Court -- I
23 mean, if you want to think about it at its most simplistic
24 level, the Court was being asked to assess, is it fair, is it
25 reasonable, is it legally permissible for the debtor to give

1 something. In this case, allowed claims and releases, and to
2 get something in return. In this case, HarbourVest's interest
3 in HCLOF and releases in return. And that is really the
4 gravamen of the complaint.

5 The complaint is based whether it's breach of
6 fiduciary duty or RICO or breach of contract or tortious
7 interference, whatever the claim is, none of them exist if the
8 debtor doesn't get this. They just don't exist. And that is
9 why the complaint and the proceeding are inextricably
10 intertwined. And if you just take a look at just one paragraph
11 of the pleading, it says at the core of this lawsuit is the
12 fact that HCM, that's the then debtor, purchased the
13 HarbourVest interests in HCLOF for \$22.5 million knowing that
14 they were worth far more than that. There's not a cause of
15 action that exists in the complaint that isn't dependent on
16 Paragraph 36.

17 So if we can go to the next slide with that
18 background, I'd like to argue why under 12(b), the complaint
19 should be dismissed because the claim should be barred under
20 the doctrine of *res judicata*. Luckily, Your Honor, there is at
21 least one area of agreement between the parties here, and that
22 is the purpose of the doctrine and the elements that have to be
23 satisfied in order to meet the burden of proof necessary to
24 have the claims barred. And in Footnote 1, you can -- I've
25 tried to just be helpful to the Court to show that we may not

1 cite to the exact same cases, but the parties agree that the
2 doctrine is intended to foreclose the re-litigation of claims
3 that were or could have been raised in a prior action and that
4 there's four elements that have to be satisfied for the
5 doctrine to apply.

6 The parties have to be either identical or at least
7 in privity, the judgment in the prior action had to have been
8 rendered by a court of competent jurisdiction. Number three,
9 the prior action had to have been concluded by a judgment on
10 the merits. And the last one is that the same claim or cause
11 of action was involved in both suits. So I just want to spend
12 a few minutes now, Your Honor, going through those four
13 elements to show the Court how easily the reorganized debtor
14 meets this standard.

15 If we can go to the next slide, I can take care of
16 the first two elements very quickly.

17 The first element, the debtor asserted that the
18 Plaintiffs were parties or in privity with parties to the prior
19 proceeding. That's at Paragraph 17 of the motion to dismiss.
20 The debtor relies on the deposition testimony of Grant Scott,
21 who was then the trustee of the DAF.

22 CLO Holdco is a wholly-owned subsidiary of the DAF,
23 or wholly controlled, in any event, and Mr. Scott's testimony
24 was that he was the only director and there were no employees
25 of either entity. So we, in our motion, put forth evidence to

1 establish the first element, and I don't believe, maybe I've
2 missed it. I don't believe that the Plaintiffs have contested
3 that element. If they have, I think Mr. Scott's testimony will
4 carry the day, in any event.

5 The second element as to whether or not a court of
6 competent jurisdiction is the entity or the court that rendered
7 the ruling. Of course, that's been met, too. The Plaintiffs,
8 in their opposition to the motion to dismiss, suggested that
9 the bankruptcy court would have lacked jurisdiction if their
10 cross motion to withdraw the reference was granted. They said
11 if the district court decides that mandatory withdrawal
12 applies, then it cannot find that the bankruptcy courts already
13 entered final judgment was rendered on Plaintiffs' causes of
14 action and had jurisdiction to do so. I think that's just a
15 clear misstatement of the law.

16 But in any event, Your Honor, at this point, I
17 believe it's irrelevant because the district court, in fact,
18 sent the case back to Your Honor and back to this Court. And
19 so, at the end of the day, Plaintiffs' argument doesn't hold
20 water because of the district court's ruling, which can be
21 found -- the order of reference can be found at Docket
22 Number 64. And so I think that easily takes care of the second
23 prong.

24 The third prong is whether -- if we can go to the
25 next slide -- the prior proceeding resulted in a judgment on

1 the merits. And this is really the critical point, Your Honor.
2 As the Court knows, the whole doctrine of *res judicata* is
3 designed to prevent, as the parties agree, the re-litigation of
4 claims. Stated another way, it's to bring finale. It's to
5 make sure that the Court doesn't hear the same claims and the
6 same issues that either were brought or that could have been
7 brought in a prior proceeding. And so, we believe that we
8 easily meet the standards set forth in the third prong. The
9 9019 order necessarily determined that the *quid pro quo* that I
10 described earlier was fair, reasonable, and legally
11 permissible.

12 Notwithstanding their assertions to the contrary, the
13 Plaintiffs are most definitely seeking to unwind at least one
14 half of the Court's order by belatedly claiming that they are
15 entitled to the benefit of the bargain while leaving Highland
16 burdened, frankly, with the claims that HarbourVest got as part
17 of the deal. I will tell you, Your Honor, and this is
18 argument, the debtor would never have asked for, and I don't
19 believe that the Court would ever have granted, the 9019 motion
20 if they thought that there was a risk in the future that
21 Highland wouldn't get the benefit of the bargain and it was
22 incumbent upon CLO Holdco and the DAF, and frankly, any party
23 in interest, to stand up and be counted and tell the Court and
24 the debtor, why the debtor was not entitled to do this deal and
25 CLO Holdco did that. They actually did.

1 They stood up and they filed an objection and they
2 said we have a superior right to this asset in the form of a
3 right of first refusal. They wound up folding in the face of
4 persuasive argument, and I respect the lawyer who did that. I
5 just do. But that was the time to speak up, and that's why it
6 is on the merits because that is exactly what *res judicata* is
7 intended to do. It's intended to have everybody put your cards
8 on the table. You don't put one card on the table and say, I'm
9 going to challenge this under 6.2 of the members agreement, but
10 I'm not going to tell you that I also think you owe me a
11 fiduciary duty under the Advisors Act or as the control party
12 or under any other theory that they had. They can't do that.
13 That's exactly what the problem is here.

14 If we can go to the next slide. Is it a judgment on
15 the merits? The debtor and the Court relied on CLO Holdco's
16 representation that it was withdrawing its argument, its claim,
17 its contention, its assertion that it had a superior right to
18 obtain the HarbourVest interest in HCLOF. Again, they did so
19 not whimsically, not because Mr. Kane was going to be out of
20 town and he couldn't make the hearing. He did it after, and I
21 don't think this matters frankly, but I think it's worth noting
22 that he did it after an extremely careful analysis. I would
23 tell you, Your Honor, that -- well, I would argue, Your Honor,
24 that even if Mr. Kane at CLO Holdco had never filed an
25 objection, if they'd never filed -- if they'd gotten notice

1 that this was happening and they sat silently, that would have
2 been enough for *res judicata* because the issue before the Court
3 was whether it was legally permissible for the debtor to
4 acquire this asset.

5 And if they had an obligation, if they owed a duty to
6 another party, it wouldn't have been legally permissible. And
7 if somebody believed that it wasn't legally permissible because
8 a duty was owed to them, they had an obligation to speak up.

9 And so I think it's very important, particularly for the
10 collateral estoppel argument that I'll make in a moment, that
11 CLO Holdco did in fact file an objection. It was based on the
12 breach of contract claim that's in their complaint. It's the
13 exact same claim. And they withdrew it. I think it's very,
14 very important. I think it highlights why *res judicata*
15 applies. I think it is the linchpin of the collateral estoppel
16 argument.

17 But at the end of the day, I think if they say
18 nothing, they should be estopped or precluded under *res*
19 *judicata* from now asserting -- it would be like -- I was
20 thinking about this earlier, Your Honor. If you'll remember
21 earlier this year, Mr. Dondero and his entities have kind of a
22 habit of withdrawing objections at the last minute. We had a
23 couple of sale hearings earlier this year. And the issue was
24 valuation, you know, and the process, and could the debtor meet
25 its burden of proving that the sale outside of the ordinary

1 course of business was in the debtor's best interest. And they
2 sold that restaurant. And Mr. Dondero objected. And at the
3 last second, they withdrew the objection. Did they sue
4 tomorrow? Does Your Honor really think that they could bring a
5 lawsuit tomorrow and say they just found a document or theory
6 on which the debtor had an obligation to give them a right of
7 first refusal, even though we've already closed on the
8 transaction, even though they were given notice of the
9 transaction, even though they filed an objection to the
10 transaction, even though they withdrew the objection? Would
11 the Court tolerate for one second a new pleading tomorrow from
12 Mr. Dondero that the debtor actually had a fiduciary duty to
13 give him a right of first refusal to buy that asset under
14 whatever theory, just because he pleads it and the Court has to
15 accept as true the allegations in the complaint? I think not.
16 And I think it's worth thinking about that to highlight just
17 how -- just how wrong this is.

18 Continuing on. You know, the Plaintiffs in
19 opposition say it can't be a trial on the merits because we
20 weren't parties. Of course they were parties. Again, they
21 filed an objection. They were the parties to the contested
22 matter, full stop. They rely on a case called Applewood and
23 they say, this is the very first point they make in their
24 brief. Applewood, if it wasn't *res judicata* in Applewood, how
25 could it possibly be *res judicata* here? But the facts are just

1 so inapposite, right?

2 In Applewood, you had a garden variety plan and
3 release where the debtor and the officers and directors got a
4 discharge. No objection to it. And a secured lender later on
5 sought to sue guarantors who happened to be officers and
6 directors. And the court, not surprisingly, said that the
7 confirmation order wouldn't prevent the secured lender from
8 going after the officers and directors, not in their
9 capacities, as such, but in their capacity as guarantors, which
10 were never part of the confirmation order. That just doesn't
11 apply here because here, we have the debtor making a motion
12 before the Court in which it sought permission and authority to
13 acquire a particular asset. Anybody who had a claim to that
14 asset should have stepped forward and put their cards on the
15 table.

16 And again, CLO Holdco put their cards on the table
17 and they lost, and they folded. To use the poker analogy, they
18 folded. And to hear them come into Court today and say we're
19 going to sue you because I reshuffled the deck, it's not right
20 and Applewood has no relevance.

21 Finally, Your Honor, you know, it's not on the
22 merits, they say, because you know, Mr. Seery and the debtor
23 hid the true value of the asset, and had we only known the true
24 value of the asset, we would have made all of these other
25 claims. The fact of the matter is, you either have a fiduciary

1 duty or you don't. And if you had a fiduciary duty, they
2 should have spoken up and they did only under 6.2, but they
3 did.

4 But here's the important part, Your Honor. Take the
5 allegations as true. You have to take all of the allegations
6 as true, not just some of them. And if you look at
7 Paragraph 127 of the complaint, and I would ask Ms. Canty to go
8 to Appendix 11 and let's just put Paragraph 127 up on the
9 board.

10 Here's the irony of the whole thing, right. The
11 whole complaint is based on the fact that somehow Mr. Seery was
12 engaged in insider trading. They accused him of insider
13 trading, and they say he didn't disclose the full value of the
14 asset. Just read Paragraph 127. James Dondero, who was on the
15 board of MGM, is the tippee. You've got an insider trading
16 case -- I mean, I don't represent MGM. I'm not with the SEC.
17 I don't know why Mr. Dondero thought he should be telling
18 Mr. Seery in December, 2020. It's not clear if it was before
19 or after the 9019 motion was filed. But Mr. Dondero is the
20 very source of information -- you can't make this up. He's the
21 very source of the information that he now complains Mr. Seery
22 didn't disclose.

23 Of course, Mr. Dondero, the trust, CLO Holdco could
24 have asked Mr. Seery at any time, how did you come up with your
25 valuation? Mr. Dondero, knowing that he had supplied to

1 Mr. Seery, according to Paragraph 27, please take it as true
2 for purposes of this motion only. He's the source of the
3 inside information. And now he has the audacity to come to
4 this Court, notwithstanding the Court's approval, all of the
5 time and money and effort spent in the 9019 process, and say,
6 Mr. Seery was wrong because he didn't tell CLO Holdco and the
7 DAF about the information that Mr. Dondero gave to Mr. Seery.
8 It's not right.

9 It was a judgment on the merits. And if Mr. Dondero
10 or the DAF or CLO Holdco or the trust wanted to challenge the
11 valuation, they had every opportunity to do so. And based on
12 Paragraph 127, if the Court accepts it as true, shame on them.
13 Shame on them for not pursuing this issue before. The guy gave
14 Mr. Seery, according to this allegation, and I'm just going to
15 leave it there, inside information. And he sits there in
16 silence, right? It says, look at the last sentence: "The news
17 of the MGM purchase should have caused Seery to revalue HCLOF's
18 investment." Seriously?

19 The third element is (indiscernible). The fourth
20 element, if we can go to the next slide.

21 Are they the same claims? Did the claims arise from
22 the same set of operative facts? I've addressed this pretty
23 clearly already, so I don't want to belabor the point. But
24 obviously, both the 9019 motion and the complaint arise solely
25 from the debtor's settlement with HarbourVest. The debtor's

1 acquisition of HarbourVest's interest in HCLOF and the debtor's
2 valuation of that interest. Without those three facts, there
3 is no complaint. It's just not credible to argue that the
4 fourth element is not met.

5 The case law is clear. It's quoted in the
6 Plaintiffs' opposition. It's not just the test of whether the
7 claims are the same. It's whether the claim is the same as
8 that which was brought or could have been brought.

9 In their opposition, the Plaintiffs contend that the
10 claims "did not write them until after the settlement was
11 consummated," and that the first time the plaintiffs heard
12 about the valuation of HarbourVest's interests was at the
13 January 14, 2021, hearing. I think I quoted that. If you
14 look, I don't know if it's Page 10 or Paragraph 10; the way I
15 wrote it, it's probably Page 10. I think that's a quote right
16 out of there. But of course, as we saw the debtor disclosed
17 the valuation in its very initial motion, CLO Holdco's counsel
18 elicited valuation testimony directly from Mr. Pugatch, so that
19 was before the hearing.

20 And of course, Mr. Dondero and the trusts both cited
21 in their objections the valuation. The notion that this was
22 not right, just -- it's contradicted by their own conduct,
23 their objections, their questions in deposition, the
24 information that was contained in the motion that they objected
25 to.

1 I do want to go off-script for just a minute, if we
2 could just take that down because I know that this is probably
3 something that Mr. Sbaiti may argue. And that is, well, gee,
4 but you have to take the allegation as true that Mr. Seery
5 wasn't honest, that Mr. Seery lied to the court. I don't
6 understand why there's not a fraud cause of action in there,
7 but there's not. But that's their theory.

8 And gee, how does he get to skate away Scott free if
9 he's allowed to do that with impunity, right? I will tell you,
10 Your Honor, of course you've seen Mr. Seery many times. You've
11 made your own assessments of his credibility. I'm not here to
12 argue the merits, but I will just say that the Defendants, if
13 ever forced to, will contest the allegation.

14 But here's the thing, and here's the important point
15 about, you know, whether or not he could lie with impunity and
16 say, I suspect that's where Mr. Sbaiti is going to want to go.

17 Mr. Seery said what he said. And he had a reason to
18 speak, and he spoke, and he said what he said and he told
19 everybody who would listen exactly what he was doing and how he
20 was doing it. For whatever reason, the objectors put the
21 valuation front and center. It's right in their objections.
22 They noted the objections. But for whatever reason, they did
23 nothing.

24 Whether they were negligent or whether they were
25 lying in wait is kind of irrelevant. They had a full and fair

1 opportunity to contest this issue. And if they had done so,
2 and the evidence proved what they're now alleging, they can't
3 tell you what would have happened. So, you know, HarbourVest
4 may have taken a different position. The Court may have done
5 something.

6 We're never going to know now because Mr. Seery and
7 the debtor are getting away with something, but because they
8 put in evidence that went unchallenged by Mr. Dondero and the
9 Plaintiffs. It simply went unchallenged. And they say, oh,
10 gee, that's because we didn't know. Well first of all, you
11 didn't ask. And second of all, again, the source of the inside
12 information, the reason that Mr. Seery should have known the
13 asset was worth more. The reason that he should have refrained
14 from trading and not engaged in insider information was
15 Paragraph 127. It was Mr. Dondero.

16 Here's another thing. If -- if again Mr. Seery had
17 not been honest with the Court and that was ever brought out,
18 Maybe HarbourVest -- maybe HarbourVest would have had a right
19 to complain. There's a lot in the complaint about oh,
20 HarbourVest was misled. The actual evidence that's in the
21 record, and this is part of res judicata, Mr. Seery testified
22 very clearly to the arm's length negotiation that took place.
23 He told the Court under oath that the negotiations were
24 contentious.

25 He told the Court under oath that in order to try to

1 resolve the case, he and Mr. Pugatch went off and had their own
2 private conversation without lawyers. They could have taken
3 discovery on any of that, right. What did you guys talk about?
4 It's certainly not privileged. They had every opportunity.
5 But what we do know is that Mr. Pugatch under oath, in
6 deposition, and at trial, said the value is \$22.5 million.

7 So I don't think Mr. Pugatch or HarbourVest is ever,
8 ever, every going to complain about the transaction they did.
9 Because of what the evidence simply shows. But again, you've
10 got the Plaintiffs in their complaint saying that somehow the
11 debtor and Mr. Seery in negotiating this transaction has now
12 exposed the debtor to liability. It just makes no sense.

13 So there was a time and there was a place to
14 challenge Mr. Seery. Somebody, you know, maybe HarbourVest
15 could have done something, maybe they could still do something.
16 I don't know. If they really think that there's a problem,
17 maybe we'll hear from HarbourVest someday. But the Plaintiffs
18 have no right to complain. They just don't. They knew
19 everything. They were the source of the inside information.
20 They sat on their hands, and they shouldn't be allowed to do
21 what they're doing now.

22 If we can go to the next slide. I want to move to
23 the next theory and try to finish this up. The next theory is
24 that the Plaintiffs' claims are barred by judicial estoppel.
25 The judicial estoppel argument is really, really very

1 straight-forward. And it's important because if the Court
2 thinks about this the way I do, it's that the whole issue of
3 valuation is completely irrelevant to the Plaintiffs unless
4 they can show that they were owed some kind of duty, that they
5 had some superior right to acquire the asset. But that's
6 exactly the issue that CLO Holdco relied upon and withdrew and
7 should now be estopped from pursuing. Right.

8 The legal standard, again the parties agree on, that
9 in order to be estopped, the party must take an inconsistent
10 position. And the party must have convinced the Court to
11 accept that position. Again, both prongs are easily met here
12 in just a few sentences from the January 14 hearing. You have
13 Mr. Kane saying that he understands and acknowledges and admits
14 that they have no superior right to the investment. And the
15 Court relying on that very representation in declining to
16 conduct a hearing and render a ruling on the merits of the
17 claim that was withdrawn. The objection that was withdrawn.

18 And for the avoidance of doubt, after Mr. Draper
19 spoke on behalf of the Trust, the Court, at Page 22 engaged in
20 the following colloquy. The Court asked Mr. Draper:

21 "THE COURT: Were you saying that the Court still
22 needs to drill down on the issue of whether the
23 debtor can acquire HarbourVest's interest in HCLOF.

24 "MR. DRAPER: No.

25 "THE COURT: Okay. I was confused whether you were

1 saying I needed to take an independent look of that.

2 Now that the objection has been withdrawn of CLO

3 Holdco, you're not pressing the issue.

4 "MR. DRAPER: No. I am not."

5 Okay. You can call it res judicata, you can call it
6 judicial estoppel, collateral estoppel, the two prongs are
7 easily met. They're taking an inconsistent position today and
8 through all kinds of different theories, including the one that
9 they withdrew, the Plaintiffs assert that they had a superior
10 right to acquire the interest from HarbourVest.

11 And they should have asserted those rights at the
12 hearing. That was the time. And they should be estopped now
13 from taking a completely inconsistent position from the one
14 that was before the Court. And I just do want to point out,
15 the statement from a case called Hall vs. G.E. Plastic. And
16 it's interesting, Your Honor, because there's only a few cases
17 that I focused on, because this is really more fact intensive.
18 And there isn't a dispute as to the, you know, the elements of
19 these matters.

20 But it is interesting that the Plaintiffs, you know,
21 generally ignore all of the cases that we cite to. One which
22 is Hall vs. G.E. Plastic, where the Court said that the focus
23 on the prior success or judicial acceptance requirements is to
24 minimize the degree of a party contradicting a Court's
25 determination, based on a party's prior position. That's the

1 whole point of the exercise. You can't do this. You can't do
2 this.

3 Just quickly, that leaves the individual arguments as to
4 each of the five causes of action and I just want to go through
5 some highlights. There's a negligence claim, Your Honor. And
6 we did not file a pleading, but the Court can certainly take
7 judicial notice of the fact that the effective date has
8 occurred. Under the effective date, the plan is now effective.
9 That includes the exculpation clause, as Mr. Pomerantz, I think
10 accurately and without contradiction pointed out earlier, the
11 exculpation clause applies specifically to the debtor and to
12 negligence claims. And that's not a matter that's at all
13 subject to appeal.

14 So I think just to add to the arguments that we have
15 in our papers, which I adopt and do not abandon for any
16 purpose, I would add to the argument on negligence, that it's
17 now precluded, as a result of the plan becoming effective.

18 The fiduciary duty count suffers from numerous defects. I
19 just want to point out a couple of them. They don't respond to
20 the argument under Corwin, that under the Advisor's Act, there
21 is no private right of action to sue for damages arising from a
22 breach of fiduciary duty. This claim rears its head in
23 virtually every single complaint. They've never addressed
24 Corwin. Corwin is binding on this Court, and it is unambiguous
25 that there is no private right of action to sue for damages for

1 breach of fiduciary duty under the Advisor's Act.

2 They ignore Goldstein. Goldstein is not from the
3 Fifth Circuit, but it's very persuasive authority that advisors
4 do not owe fiduciary duties to their individual investors.
5 Instead, they owe fiduciary duty to their client. Their client
6 is the entity with whom they're in contractual privity. And so
7 in this case, there's no fiduciary duty there, either.

8 The breach of contract claim. Again I just -- I
9 would just say quickly, Your Honor, it's barred under judicial
10 estoppel. Even if it wasn't, it's clear based on Mr. James'
11 analysis and admission that the debtor's, or the reorganized
12 debtor's interpretation of 6.2 is accurate. And you know, I
13 said this in the beginning. Now let me tie it in a bow because
14 the breach of contract claim, and the tortuous interference
15 claim are both tied to the same thing. And that is the
16 assertion that the Plaintiffs had a right under the membership
17 agreement, a right of first refusal.

18 And they basically say that the debtor was playing
19 games. That they shouldn't be able to get through 6.2 by
20 assigning it to an affiliate. And that's where I go back, Your
21 Honor, and just remind the Court that the debtor told the whole
22 world exactly what they were doing in their motion. And their
23 objections, Mr. Dondero and the Trusts both acknowledge to the
24 whole world that they understood exactly what was happening.

25 In fact, their concern was not that it was going to

1 the debtor, but that it might be going to an affiliate outside
2 of the bankruptcy court's jurisdiction. And for them to now
3 say, having taken all of those positions -- talk about
4 inconsistent positions. They should be barred from saying
5 today, that the use of an affiliate to effectuate the
6 transaction was wrongful, because they actually told the Court
7 that they needed to -- that the Court needed to make sure that
8 it had jurisdiction over the very entity they now say somehow
9 shouldn't have been allowed to get the asset.

10 It's a bit much. So that takes care of the tortuous
11 interference.

12 The RICO claim, Your Honor, again is a motion.
13 There's so many different aspects to it. But I don't think the
14 Court needs to get past the Supreme Court holdings in HJ, Inc.
15 Again, just simply ignored by the Plaintiffs in their
16 opposition to the motion to dismiss. In HJ, Inc., the Court --
17 the Supreme Court did an exhaustive analysis to try to
18 determine and ultimately did determine, what a pattern of
19 racketeering activity meant. And the Supreme Court came to the
20 following formulation. That it had to have two or more
21 predicate related offenses that amounted to a threat of
22 continued criminal activities.

23 You know, the notion here is that the debtor and Mr.
24 Seery engaged in insider trading. We've already -- I've
25 already mentioned that according to the complaint, which the

1 Court can take as true. Mr. Dondero, himself, was the tippee.
2 But be that as it may, they don't come close to meeting the
3 very high standards set forth by the Supreme Court in HJ, Inc.
4 to show that whatever conduct Mr. Seery and the debtor engaged
5 in, and if you take the allegations as true, in not telling
6 what the fair value of the asset was, that that doesn't amount
7 to a hill of beans for purposes of RICO. That you don't have
8 any, I think predicate acts. I think here's the Court,
9 predicate acts extending over a few weeks or months,
10 threatening no future criminal conduct, do not meet RICO
11 pleading grounds. Right.

12 Security fraud claims cannot be predicate acts for
13 purposes of RICO. That is also clear. And that is really, I
14 mean they say mail, wire and fraud. But what's really at heart
15 is the 10(b)(5). Okay, it's the 10(b)(5) claim. Again, Mr.
16 Seery being -- I mean Mr. Dondero being the tippee. But those
17 are just some of the reasons.

18 None of, you know, that the RICO claim fails. You
19 know, I'll otherwise rely on the papers, unless the Court has
20 specific questions as to any of the other pieces of the motion
21 to dismiss the RICO claim, or any other aspect of the
22 Defendants' motion. I think this is clear. I think we win, no
23 matter how you slice it. It's just wrong. It's just wrong.

24 This Court will never, ever have a final order if Mr.
25 Dondero is able to engineer complaints such as this, which seek

1 to assert claims that absolutely positively could have and
2 should have been brought at the time the debtor made its
3 motion.

4 Unless the Court has any questions, I have nothing
5 further.

6 THE COURT: I do not. All right.

7 Mr. Sbaiti, I'm going to let you have as much time as
8 Mr. Morris. He took 55 minutes. As I mentioned, I have a hard
9 stop at 12:00 to do a swearing in ceremony. So if you're not
10 finished in 40 minutes, then I'm going to have to take a break
11 and come back and let you finish. All right?

12 MR. SBAITI: Thank you, Your Honor. Although I don't
13 think I'm going to be much longer than 35-ish minutes.

14 THE COURT: Okay.

15 MR. SBAITI: if not less.

16 THE COURT: Okay.

17 MR. SBAITI: I think you'll be able to be done by --
18 we'll be able to be done by noon.

19 THE COURT: All right. Thank you.

20 MR. SBAITI: Thank you, Your Honor. Your Honor, may I
21 share my screen?

22 THE COURT: You may.

23 MR. SBAITI: Thank you, Your Honor. Do you see my
24 Power Point, Your Honor?

25 THE COURT: I do.

1 MR. SBAITI: Thank you, Your Honor. I don't know
2 what which one you see. Is it the --

3 THE COURT: I see presentation.

4 MR. SBAITI: With the full page?

5 THE COURT: Yes, uh-huh.

6 MR. SBAITI: Okay, yeah, great. I just want to make
7 sure we're on the right page. Thank you, Your Honor. So Your
8 Honor, the defendant debtor is a registered investment advisor.
9 And it all begins with that. And this where the distinctions
10 between what happened in the 9019 and I'll get to the elements
11 of res judicata through argument.

12 But the first thing that has to be identified is that
13 the Defendant is a registered investment advisor. The
14 objection filed by Holdco back during the 9019 was an objection
15 against HarbourVest selling its interest by filing the right of
16 first refusal. It did not deal with the investment advisor
17 feature of Highland's relationship. And I'll get to why the
18 9019 doesn't preclude these arguments today.

19 This is essentially the structure. Highland was the
20 investment advisor of HCLOF, and Holdco is an investor in
21 HCLOF. And so Highland would owe a fiduciary duty under the
22 Advisor's Act against -- to CLO Holdco.

23 Highland also had a direct advisor relationship with
24 the DAF. And so under the Investment Advisor's Act, it owed
25 fiduciary duties to both of those entities. The law governing

1 registered investment advisors is that it's a federally
2 recognized and defined fiduciary duties. The fiduciary duty to
3 there's a fiduciary duty to affirmatively keep the advisee
4 informed and the fiduciary duty not to self-deal, i.e., not to
5 trade ahead of an advisee and opportunity that an advisee would
6 want or expect and without the advisee's expressed informed
7 consent.

8 This is a federally recognized and defined fiduciary
9 duty and it's actionable under state fiduciary duty laws.
10 While Mr. Morris ended his argument by saying we didn't deal
11 with their case law saying that there's no private right of
12 action under the Advisor's Act, the fact of the matter is that
13 Judge Boyle, about ten years ago, found that a state -- the
14 breach of fiduciary duty claim can be predicated on breaches of
15 federally imposed fiduciary duties under the Advisor's Act.
16 And that's what Douglass v. Beakley held. And that's actually
17 what we cited in our response. So I'm not sure why he would
18 argue that we haven't addressed the issue of where does this
19 private right of action come from.

20 Federal Law supplies the rules of the relationship
21 and State Law provides the cause of action for those breaches.
22 Now the scope of that has been expounded upon by many cases.
23 The Fifth Circuit held in Laird, as a fiduciary, the standard
24 of care to which an investment advisor must adhere imposes an
25 affirmative duty of utmost good faith and full and fair

1 disclosure to all material facts, as well as an affirmative
2 obligation to employ reasonable care to avoid misleading his
3 clients.

4 The word "affirmative" there is important because it
5 means the investment advisor is not supposed to wait to be
6 asked. The investment advisor as an affirmative duty to
7 proactively provide the information to the client.

8 The next standard comes from the SEC. We call it the
9 SEC interpretation letter. It's a release that came out in
10 2019. And to meet it's duty of loyalty, an advisor must make
11 full and fair disclosure to its clients of all material facts
12 relating to the advisor relationship. Material facts relating
13 to the advisor relationship include the capacity at which the
14 firm is acting with respect to the advice provided.

15 The SEC had another release in 2000 -- or excuse me,
16 in that same release, the SEC said the duty of loyalty requires
17 that an advisor not subordinate its clients interests to its
18 own. In other word, an investment advisor must not place its
19 own interest ahead of its clients' interests. An advisor has a
20 duty to act in the client's best interest, not its own.

21 The SEC general instruction three to part 2 of Form
22 ADV, that every investment advisor has to pull out. And this
23 is cited in our papers. As a fiduciary, you must also seek to
24 avoid conflicts of interest with your clients, and at a
25 minimum, make full disclosure of all material conflicts of

1 interest between you and your clients that could affect the
2 advisor relationship. This obligation requires that you provide
3 the client with sufficiently specific facts, so that the client
4 is able to understand the conflicts of interest you have, and
5 the business practices in which you engage, and can give
6 informed consent to such conflicts or practices or reject them.

7 And, finally, the Third Circuit in Belmont said:

8 "Under the best interest test, an advisor may benefit
9 from a transaction recommended to a client if, and
10 only if, that benefit, and all related details of the
11 transaction are fully disclosed."

12 These fiduciary duties are unwaivable by the advisor.
13 Any condition, stipulation or provision binding any person to
14 waive compliance with any provision of this subchapter, or with
15 any rule, regulation or order thereunder shall be void.

16 So the lawsuit does not allege that the HarbourVest
17 settlement should be undone or unwound. I'd like to move to
18 that point. Mr. Morris says well, you have to unwind half of
19 the settlement. Maybe HarbourVest doesn't have to give back
20 what it got, but Highland would still be saddled with the cost
21 of the settlement, but not with the benefit of the settlement.

22 Well, actually that's not true. There's two points
23 that we would make on that. Number one, our suit is a suit for
24 damages. In other words, the suit would be a suit for money
25 damages, based on the difference between the value of the asset

1 and what HarbourVest or what the actual value of the asset that
2 was represented, \$22.5 million. So the second point, though,
3 is that even under a situation where CLO or Holdco or the DAF,
4 or even HCLOF were to purchase the HarbourVest suit, the
5 expectation would obviously be that they'd pay the \$22.5
6 million that Highland paid for it.

7 So Highland is -- so it's not unwinding, and there's
8 no saddling Highland with a burden that they didn't otherwise
9 have, I think that's a misrepresentation. But we're not
10 seeking to unwind the lawsuit -- or excuse me, unwind the
11 settlement.

12 Now Mr. Morris is correct, the representation of
13 value by Mr. Seery is -- is one of the main points here. And
14 the representation was that the value of the entire asset. Not
15 just the shares of MGM, but the value of the entire asset was
16 \$22.5 million. So in other word, nearly half of HCLOF was
17 represented to be worth \$22.5 million. It was argued by
18 counsel on Page 14 of the January 14th transcript, and then on
19 Page 112 of that transcript, Mr. Seery specifically says the
20 current value is right around \$22.5 million.

21 Now that was also in some of the filing papers and
22 Mr. Morris put up the evidence to Your Honor that Mr. Pugatch,
23 on behalf of HarbourVest also parroted that number. But
24 there's not any evidence today about where that number came
25 from, or whether he was simply relying on Highland's

1 representation of that value.

2 Now as a general rule, in these 12(B)(6) motions, as
3 I said before, we don't look at the evidence because the whole
4 point of discovery is to find out what's behind a lot of the
5 evidence. That's been quoted. The amount of evidence that
6 went into the 9019 motion as not necessarily full-blown
7 discovery.

8 I understand Mr. Morris saying well, they could have
9 asked the question. But as I just showed you, they shouldn't
10 have to ask the question. There should be fair and full
11 disclosure of all the material facts. And if it turns out,
12 which we believe it is true, that by January, the value of
13 HCLOF was twice what it was represented, or the HarbourVest
14 portion of HCLOF was twice as to what it was represented,
15 that's a material omission that Highland had an affirmative
16 duty to not misrepresent. Irrespective of the questions being
17 asked.

18 The DAF found out later on that the representation of
19 the value wasn't true. Now Mr. Morris talked for a very long
20 time about all the opportunities that somebody, Mr. Dondero,
21 somebody other than CLO Holdco. In addition to CLO Holdco,
22 could have asked the magic question to find out whether or not
23 they were telling the truth. But that runs right in the face
24 of the standards set forth by the SEC and by the Courts as to
25 the affirmative obligation of an advisor to disclose all the

1 material benefits that they're going to get as part of a trade.
2 The idea being that when you're a registered investment advisor
3 and you want to engage in a transaction, you make a full
4 disclosure and say this is the transaction. It's worth 41, but
5 I'm paying 22-1/2. But here's why I'd like to be able to do
6 it. And then that's the discussion that happens.

7 That clearly didn't happen here. And when it turned
8 out that there was this entirely huge upside that they were
9 gaining the benefit of, and maybe HarbourVest didn't care, that
10 that was a false statement. Now the reason we don't have a
11 common law fraud claim, or that we don't necessarily hang our
12 hat on a fraud claim is we don't have enough evidence as it
13 stands today, to specifically say that Mr. Seery intentionally
14 misrepresented that. Although we believe that it was grossly
15 reckless of him to do so. But we don't really need a fraud
16 claim with a gross recklessness standard. We have a breach of
17 fiduciary duty, which basically gets us to the same place.

18 So the timeline we have is September 30th was the
19 last valuation of HCLOF assets provided by HCMLP. And the
20 value of HCLOF, at that time, or the HarbourVest of that value,
21 would have been about 22.5 million. So what it appears to be
22 is that in January or in late December, the valuation that was
23 being done -- what was being reported, wasn't the current
24 valuation. It was the valuation as of the end of the third
25 quarter of 2020.

1 On December 22nd, the motion to approve the
2 settlement with HarbourVest was filed. HCMLP should have had
3 or would have had up-to-date valuations of the HCLOF assets,
4 but didn't necessarily disclose them as being different than
5 the 22.5 million. On January the 14th, Your Honor, held the
6 9019 hearing. And then that same day, Your Honor entered the
7 approval order.

8 And finally, in March, the DAF learns the true value
9 of HLOF assets as of January 2021 and starts to look into it.
10 Now Mr. Morris makes much of the fact that well, Mr. Dondero at
11 least knew that he had tipped them off, Mr. Seery. And if you
12 actually read Paragraph 127, you'll see specifically what it's
13 purported that he said. He said stop trading in the MGM
14 assets, because MGM might be in play. So you can't trade
15 because I'm an advisor, Mr. Dondero's an insider, he's the
16 tipper, not the tippee. Mr. Seery becomes the tippee under
17 that theory of the case, and he has to, and is required to,
18 because of their affiliation at the time, he's required to
19 cease trading. And that was the purpose of saying that.

20 The collateral issue that we point is that he at the
21 very least knew about that, and that should have caused him to
22 revalue, if he hadn't done so at the time. Not that, knowing
23 that alone is sufficient to know what the value of HCLOF
24 actually was on that date. That's a complete misrepresentation
25 of the point and purpose of that allegation.

1 And as Your Honor knows, under 12(B)(6)
2 jurisprudence, the way this is supposed to go is we get the
3 benefit of every inference based upon the allegations, not the
4 movant. So the first violation is that the debtor as an IRA
5 failed to affirmatively disclose the true current valuation of
6 HCLOF and failed to keep the DAF and CLO Holdco reasonably
7 informed of the value of the assets.

8 And the debtor as an IRA, failed to obtain CLO
9 Holdco's with the DAF's informed consent before it traded in
10 the asset, because it didn't have all of the information. The
11 typical remedy for breach of fiduciary duty is typically
12 damages for any loss suffered by the Plaintiff as a result of
13 the breach. I don't think there's a debate there.

14 So now we get to Mr. Morris' key argument. His key
15 argument is that we should be talking about res judicata. The
16 elements of res judicata and I think we agree is you have to
17 have identical parties in the action; the prior judgment was
18 rendered by a Court of competent jurisdiction; the final
19 judgment was final on the merits, and the cases involved the
20 same causes of action or the same transaction and nexus of
21 facts.

22 Now I'm going to skip to three, because I think
23 that's one of the key points that we disagree with them on.
24 There is no case, Your Honor, that we could find, and no case
25 that I read them citing that says an order on an 9019 has

1 preclusive effect under res judicata under an objector to the
2 settlement. We looked. We looked in the Fifth Circuit. We
3 looked outside of the Fifth Circuit. No District Court, no
4 Fifth Circuit Court of Appeals' opinion we could find held that
5 a 9019 order has res judicata effect on an objector's
6 objection. And I think the reason is pretty simple. Is it
7 doesn't.

8 Because the Plaintiff's claims, here our claims
9 hadn't even accrued. We have a four year statute of
10 limitations, but I think more importantly is that, as the Fifth
11 Circuit said, the 9019 motion grants the Court discretion.
12 It's not supposed to be a mini trial. The Court can approve a
13 settlement over even the valid objection of an objector. It's
14 not a trial on the merits. It's not supposed to be a trial on
15 the merits. It's not supposed to be a disposition on the
16 merits.

17 So the fact that Your Honor could have approved the
18 9019 settlement with HarbourVest, even if we had a valid
19 objection, means this isn't a disposition on the merits, as res
20 judicata would envision. It wasn't a trial on the merits, even
21 though it was withdrawn.

22 The other elements that we would point out to is that
23 neither the DAV nor Holdco were parties to the dispute between
24 HarbourVest and Highland. And this keys off of the issue that
25 I just raised. The cases that are cited by the debtor to Your

1 Honor all have to do with where one of the settling parties is
2 trying to undo the settlement for some collateral reason. And
3 the Courts have held, no, that's res judicata, because you were
4 a party to the action. HarbourVest brought the claims against
5 Highland. Highland settled those claims.

6 CLO Holdco was collateral to that settlement, it's
7 not a -- excuse me, collateral to that dispute. It's not a
8 party to that dispute. Its claims weren't being resolved by
9 the settlement. And while you have a notice to all creditors
10 and those objections can be raised, there was not inherently
11 any manner for resolving those objections on their own merits.
12 Only -- it was only resolved in so far as deciding whether or
13 not the settlement was in the best interest of the debtor,
14 which Your Honor decided, and we don't challenge that. But we
15 do argue that it caused damages and the debtor shouldn't get
16 off for those damages.

17 The fourth element is that the --

18 THE COURT: Just for the record, the standard in a
19 9019 context is not best interest of the debtor, right?

20 MR. SBAITI: Your Honor, I mean that's what the rule
21 says and Your Honor's order --

22 THE COURT: That is not what the rule says. The rule
23 is actually very sparsely worded and then we have Fifth Circuit
24 case law and U.S. Supreme Court law that talk about what the
25 standard is.

1 MR. SBAITI: Yes, Your Honor. And there are five --

2 THE COURT: And it's -- is it fair?

3 MR. SBAITI: There are five elements.

4 THE COURT: Is it fair and equitable and in the best
5 interest of the estate given a long list --

6 MR. SBAITI: Correct, Your Honor. And I didn't mean
7 to --

8 THE COURT: -- of considerations that the Court is
9 supposed to consider that "bear on the wisdom of the
10 settlement." Okay. So it's actually much more involved, is my
11 point, than is it in the best interest of the estate. Is it in
12 the best interest of the estate and fair and equitable given
13 all factors bearing on the wisdom of the compromise? And then
14 we have a long laundry list of things the Court should consider
15 as part of that analysis.

16 MR. SBAITI: That's a --

17 THE COURT: I just bring that up because if I'm still
18 -- my brain is still stuck five minutes ago on your comment
19 that you can't find any case saying that an order approving a
20 9019 compromise has res judicata effect on creditors. And it's
21 -- let me just say it's shocking to me that someone would argue
22 otherwise. Bankruptcy is a collective proceeding --

23 MR. SBAITI: Your Honor --

24 THE COURT: -- where creditors can weigh in and
25 object and raise whatever arguments they think the Court should

1 consider that bear on the wisdom of the compromise. And the
2 Fifth Circuit in Foster Mortgage has said the Court should give
3 great deference to the views of the creditors, the paramount
4 interest of creditors.

5 So it's a really sort of shocking proposition that
6 the order approving a 9019 compromise wouldn't have res
7 judicata effect on all parties and interests who got notice of
8 that. So if you have any elaboration on that, I'd like to hear
9 it.

10 MR. SBAITI: Your Honor, we looked at the Fifth
11 Circuit cases that they cited, which I believe included that
12 case. And even in that case, the point that we made in our
13 papers and the point I was trying to arrive at is that among
14 the factors, yes, the Court should give great deference to the
15 creditors. But among the factors is not that the objections
16 lack merit or are meritless or that they wouldn't be winnable
17 if they were simply standalone claims.

18 And that was really the only point I was trying to
19 make is that Your Honor has discretion. Granted it's -- as you
20 mentioned, it's not unfettered discretion. It's bounded by
21 standards and there are -- there is, I know, about five
22 standards Your Honor has to consider or the Court has to
23 consider. But among those, that laundry list of standards, is
24 not that the Court finds that any objection lacks merit. And
25 that was really the only point I was making.

1 And in terms of the case law, we looked at the Fifth
2 Circuit. We looked, frankly, outside the Fifth Circuit as much
3 as we could, and because this is actually not an easy one to
4 research, as it turned out, despite the language. And we also
5 looked for district court opinions in the Fifth Circuit to see
6 did any district court or did any court of appeals give this
7 type of approval to the standard that a 9019 order has res
8 judicata effect on a claim raised in an objection by a
9 creditor.

10 And we couldn't find any and I read all the cases
11 that Mr. Morris cited in his papers, and they didn't cite one
12 that explicitly said that. They tried to drive at it through
13 insinuation that, well, if the Court has to give great
14 deference or if the Court has to take into account the
15 underlying facts and the fact that there is discovery, surely
16 that must mean this is akin to the trial on the merits. And I
17 think that's where we simply disagree in good faith. I'm not
18 ascribing any bad intention. But we disagree that that's where
19 the law goes.

20 Res judicata is not -- while it's supposed to stop
21 the relitigation of issues, it is predicated on there having
22 been actual litigation of those issues. And when HarbourVest
23 and Highland settle a case and my clients show up with an
24 objection, even though they withdraw an objection, that, in our
25 opinion -- and we're asking the Court to see it our way -- is

1 not trial on the merits. It's not a disposition on the merits
2 of the objection in and of itself. Some objections we can --

3 THE COURT: But the context matters. In the context
4 of a 9019 compromise, the hearing is about look at the bonafide
5 ease of the settlement. And it's either fair and equitable and
6 in the best interest of the estate or not. And an objector can
7 say this is a terrible settlement and here's why it's a
8 terrible settlement and let me cross-examine the movant and let
9 me put on my own witness that will enlighten the Court as to
10 why this is a terrible settlement, why I say terrible, why it's
11 not fair and equitable.

12 That's your chance to convince the Court, don't
13 approve this settlement because there are, you know, 14
14 problems with it. And if you convince the Court, then you
15 convince the Court and it's not approved. If you don't, you
16 appeal, and we do have an appeal of the settlement order.

17 So, again, I'm not understanding the "res judicata
18 doesn't apply" argument.

19 MR. SBAITI: Your Honor, if I could riff on two
20 points based upon what you just said, if I could address those.

21 The first is there are clearly two kinds of
22 objections that get -- at least two kinds of objections that
23 get raised in these 9019 approval hearings. The two that you
24 heard recounted, some were this is bad for the estate. There's
25 reasons why we don't think the estate will benefit from it and

1 it will be harmed from it.

2 And those types of objections, which I believe mostly
3 comprise the objections that Mr. Morris was talking about
4 because they are concerns for the estate. And so creditors who
5 want to get money from the estate are concerned that the
6 settlement will not enter (phonetic) to the benefit of the
7 estate, and therefore, not enter to their benefit as creditors.
8 That's number one.

9 But those don't adhere in a lawsuit. Those aren't
10 claims for damages that the settlement is going to create for
11 the person objection or for the party objecting. There's a
12 whole separate set of objections similar to the ones HCLO
13 Holdco raised where that what inheres in the objection is this
14 is actually going to cause us some kind of damage.

15 And so, the factors though, don't require the Court
16 in those second set of instances to say, well, you know what?
17 Not only do I think you're wrong, but I think that your
18 lawsuit, the underlying causes of action that give rise to this
19 objection, have no merit on their own face, that the discovery
20 is not there to support them, that a jury is not going to find
21 there. I am now the trier or the Court is now the trier of
22 fact on the merits of the underlying causes of action that
23 animate the objection.

24 And that's where I believe we're diverging with the
25 debtor on the law. It goes too far to say that a 9019 hearing

1 where the Court in the end has discretion to approve it, even
2 over a meritorious objection by any party, regardless of what
3 bucket of objections the objection falls into. It goes -- our
4 argument today, Your Honor, and we're asking the Court to see
5 it our way, is that that would go too far. That an actual
6 cause of action shouldn't be eradicated simply because of the
7 9019 process because, as you pointed out, the Court does have
8 to go through a litany of factors.

9 And if the Court determines that it's fair and it's
10 more equitable to overrule the objection, the Court has that
11 discretion. And we're not here to unwind that discretion.

12 But the settlement process did violate certain
13 obligations and did cause my client damages. And that's what
14 we're saying isn't precluded.

15 THE COURT: Okay.

16 MR. SBAITI: The fourth element, Your Honor, which I
17 guess in many ways maps on to the argument I just made to Your
18 Honor is that the cases, the underlying cases, do not involve
19 the same claims. Plaintiffs' claims arise from the settlement
20 process itself and not from the underlying issues being settled
21 between HarbourVest and Highland. So that's why we think at
22 least three of the four elements aren't met here. And we'll
23 reserve on the papers, you know, whether jurisdiction was
24 applicable because I think that's probably water under the
25 bridge at this point in the oral argument.

1 Now, Mr. Morris attacks the case that we cite,
2 Applewood Chair vs. Three Rivers Planning. And he argues that,
3 well, this is not applicable. And the argument he made however
4 was he put it in the context of, well, the parties there, the
5 issue was you had guarantors who were not parties in their
6 capacity as guarantors. But that's not actually what the Court
7 held.

8 The Court didn't say that the release wasn't
9 applicable to them because they didn't appear as parties in
10 their guarantee capacities. They -- the Court held that, well,
11 the specific discharge language doesn't enumerate those
12 specific guarantees, and so therefore it's not released.

13 And where this dovetails, we believe, as closely as
14 we can, this isn't a 9019 case. This is a final confirmed
15 plan. But where it dovetails with what our argument is, is
16 that the Court there as well was essentially saying the
17 underlying causes of action weren't really presented to us, so
18 we're not -- we -- and the confirmation of the plan didn't
19 involve disposing of them, so we're not going to say that they
20 are precluded. And we think that that's as close an analogy as
21 we've found in the Fifth Circuit to the issues here today.

22 So I would say, Your Honor, that we believe that
23 dispenses with the res judicata argument. The judicial
24 estoppel argument, they conflate the language. I'll go back to
25 this for a second. They conflate the language of judicial

1 estoppel on the success of the claim. None of the cases they
2 cite on judicial estoppel involved where a party took a
3 position, withdrew their argument, and then the Court moved on.

4 Mr. Morris tries to convert a judicial estoppel claim
5 into a judicial reliance claim, which is not the purpose of the
6 doctrine and is not the doctrine at all. The doctrine is that
7 if you take a successful position in one court, you can't take
8 the opposite position in another court. CLO Holdco didn't take
9 a successful position in one court and then change its position
10 later on. In fact, its positions, as Mr. Morris stated, are
11 remarkably similar. They're not inconsistent, which is the
12 problem with their judicial estoppel argument. And we -- I
13 think we fairly briefed that in our papers and we'll otherwise
14 rest on the papers.

15 To deal -- to address the actual claims, again, I
16 come back to the idea of a fiduciary duty claim, which is our
17 lead claim. And to be clear, it's a state claim predicated on
18 the violation of federally imposed fiduciary duties.

19 And I'm looking for a clock to make sure I'm not
20 abusing Your Honor's time, and I don't have one right in front
21 of me because my screen -- my screen is up.

22 Your Honor, the Douglass v. Beakley case is, like I
23 said, is Judge Boyle's case. It specifically provides a cause
24 of action based upon violations of the Advisers Act. We also
25 cite about four or five other cases in footnote 8 of our

1 response from other circuits, including the Third Circuit, the
2 Belton case that I referred to earlier, all of which held that,
3 yes, a state fiduciary duty claim can be predicated on breaches
4 of a federal Advisers Act violation.

5 The other point that they make on the fiduciary duty
6 claim is they argue HCMLP doesn't owe fiduciary duties to CLO
7 Holdco. And the cases they cite, Your Honor, we dealt with in
8 the papers why they were distinguishable, because in those
9 cases they were dealing with the fact that there wasn't any
10 harm or any direct relationship. But what they ignore is the
11 actual language of the Advisers Act, which is important.

12 Well, first of all, Mr. Seery admitted in his own
13 testimony during the approval hearing in July of 2019 that he
14 says, "We owe." He says, "There are third party investors in
15 the fund -- in these funds who have no relation whatsoever to
16 Highland, and we owe them a fiduciary duty both to manage their
17 assets prudently, but also to seek to maximize value." I think
18 Mr. Seery was absolutely correct when he said that. Highland
19 owes fiduciary duties to the investors in the funds that
20 Highland manages. The core of our case is that Highland is
21 using or abusing the assets of the funds it managed in HCLOF
22 for its own enrichment, which is a classic breach of fiduciary
23 duty case under the Advisers Act.

24 Now -- excuse me. The other point that I would say,
25 Your Honor, is that there is a statutory basis for us to argue

1 a breach of fiduciary duty. Excuse me. I didn't mean to stop
2 sharing. I apologize.

3 Are you back with me, Your Honor, on my --

4 THE COURT: Yes.

5 MR. SBAITI: -- PowerPoint?

6 THE COURT: Yes.

7 MR. SBAITI: Sorry about that, Your Honor. I just
8 hit the wrong thing. I'm not very technologically savvy. Here
9 we go.

10 So Holdco is an investor in HCLOF, which is a pooled
11 investment vehicle. A pooled investment vehicle under the case
12 law we cite is simply defined as an investment vehicle that
13 doesn't publicly solicit investors and has few than 100
14 investors. Highland advises it. That's the same holding in
15 TransAmerica Mortgage, by the way, which we also cite.

16 15 U.S. C. Section 80(b) (6) establishes the federal
17 fiduciary standards to govern the conduct of registered
18 investment advisers. That's also the TransAmerica case. 15
19 U.S.C. Section 80(b) (6) (D) delegated to the SEC the power to
20 decide the scope of those duties that are imposed under the
21 statute. And so the SEC enacted 17 C.F.R. Section 275.206(4)-
22 8.

23 And it expressly states, and we cite the statute or
24 the regular in full in our papers, that the fiduciary duties
25 are owed to investors in the pooled investment vehicles. It

1 specifically says that. It talks about two different duties
2 owed and they're owed to the investors in the vehicles, which
3 means they're owed to Holdco as an investor in HCLOF, which is
4 the vehicle that Highland manages.

5 It's black and white in the regulation. And we
6 haven't seen any response. There was no response of that in
7 the reply that was filed, Your Honor. And so the argument that
8 there's not a fiduciary duty owed to Holdco because it's merely
9 an investor in HCLOF simply doesn't comport with the law.

10 And finally, the petition lays out the basis for our
11 claims including the applicable federal and state law.
12 Plaintiffs' response lays out why the legal arguments aren't
13 opposite at the 12(b)(6) stage and Rule 9(b) is met where
14 necessary under the federal claim. And I'm trying to unshare
15 so that I can get back to regular argument.

16 I'd like to briefly address Mr. Morris' argument,
17 Your Honor. Your Honor, I re-raise my argument that I made
18 before, which is that a 12(b)(6) motion and hearing is not the
19 appropriate time for all the evidence that was poured in here.
20 And I understand Mr. Morris' contention, well, it's really hard
21 to ignore all the history of this case. But a lot of that
22 history really boils down to things that were actually admitted
23 in the complaint. The complaint recognized there was a 9019.
24 But what Mr. Morris wants to do is go beyond that and to go to
25 what people said and what they must have meant. What Mr.

1 Dondero must have meant in his objection, what Dugaboy must
2 have meant by their objection, what Mr. Pugatch must have meant
3 by his testimony.

4 All of that is highly improper at this stage of the
5 proceeding, Your Honor. It's outside of the 12(b)(6) confines.
6 It's outside the four corners of the complaint. And we object
7 to all of that evidence being considered.

8 THE COURT: Let me --

9 MR. SBAITI: The question we --

10 THE COURT: Let me ask you about that procedural
11 point.

12 MR. SBAITI: Yes, Your Honor.

13 THE COURT: As we know, 12(d) provides that if
14 matters outside the pleadings are presented to and not excluded
15 by the Court in a 12(b)(6) motion, the motion must be treated
16 as one for a summary judgment under Rule 56 and all parties
17 must be given a reasonable opportunity to present all the
18 material that is pertinent to the motion.

19 Are you -- what are you arguing? That I should treat
20 it as a motion for summary judgment and give you more time to
21 present other materials? I mean, you both presented an
22 appendix, okay. And I'm telling you we're seeing this more and
23 more, I've noticed. People are going beyond the four corners
24 of a motion to dismiss and attaching things. And there's some,
25 you know, Fifth Circuit authority that says, well, if what is

1 attached is integral to understanding, you know, an allegation
2 or whatever in the pleading, you know, there is some discretion
3 to go outside the four corners.

4 So I'm trying to understand the point you're making
5 with this. Are you saying I should treat it as a motion for
6 summary judgment or do these attachments really -- you know, do
7 I have authority under the Fifth Circuit to consider them as
8 part of the 12(b)(6) motion or not?

9 MR. SBAITI: Typically, in our experience, Your
10 Honor, is when a summary or when a 12(b)(6) is going to be
11 treated as summary judgment under 12(d), the Court says that
12 and then the parties are given an opportunity, as you said, to
13 go do some discovery in order to put together the evidence and
14 materials to then come back and respond as a summary judgment.
15 We responded to a 12(b)(6) and objected to the evidence. If
16 the Court wants to treat it as a summary judgment, then we
17 would ask for an opportunity for -- to conduct discovery in
18 order to be able to respond as a summary judgment motion, but
19 we didn't -- because we responded to a 12(b)(6) --

20 THE COURT: You did the same thing though. You did
21 the same thing in your response. You submitted an appendix of
22 evidence, if you want to call it evidence. As someone pointed
23 out, it's stuff from the bankruptcy court record. I don't
24 think it went beyond what was already in the bankruptcy court.

25 MR. MORRIS: And if I -- can I be heard on this, Your

1 Honor?

2 THE COURT: You can. You can.

3 MR. MORRIS: Just to respond. This is really quite
4 simple. The motion to dismiss is based on res judicata. Res
5 judicata necessarily requires a review of what happened in
6 connection with the prior hearing. There's nothing that we
7 have identified or put forth in the appendix or on our exhibit
8 list except for the pleadings in the 9019, the transcripts, the
9 one deposition transcript, the one trial transcript, the
10 settlement agreement, the transfer agreement. I'd love to know
11 what the Court couldn't or shouldn't take judicial notice of.
12 There is no emails. There is no -- there is no -- there is no
13 extrinsic evidence, if you will. All of this is either on the
14 docket or was presented as part of the hearing.

15 THE COURT: Yeah. I'm just trying to ferret --

16 MR. MORRIS: And it's necessary. And it's necessary
17 for the motion.

18 THE COURT: Yeah. I'm just trying to ferret out the
19 procedural position that's being asserted here. And I don't
20 have the case cites off the top of my brain, but there is
21 authority from at least the Northern District judges, if not
22 the Fifth Circuit, saying in a 12(b)(6) motion I can take
23 judicial notice of items in the record. And then, you know,
24 there -- I know there's Fifth Circuit authority saying I can go
25 beyond the four corners in a 12(b) context if it's just basic,

1 you know, explaining things that are in allegations. You know,
2 such as --

3 MR. SBAITI: May I address that, Your Honor?

4 THE COURT: -- such as if a contract is in dispute,
5 okay. Like there's no way you can have a cause of action under
6 the contract and here's the contract. So I'm just trying to
7 nail down your procedural position here.

8 MR. SBAITI: Your Honor, the distinction I was trying
9 to make that I don't think I put as artfully as I might be able
10 to put now is in a 12(b)(6) if there's a contract, as you said,
11 if there's a legal document, a contract and order that's
12 integral to the case, Your Honor can take judicial notice of
13 that. Generally, a court can take judicial notice of filings
14 in a bankruptcy, the fact that they were filed.

15 So the transcripts, which Your Honor can't take
16 judicial notice of, is the truth of those. And that was what I
17 was objecting to is it's one thing for him to say an objection
18 was filed and therefore, because an objection was filed, that
19 should be it. That was your only chance. I'm not saying Mr.
20 Morris can't make that argument.

21 But when he goes beyond the fact of the filing or the
22 fact that there was a transcript or the fact that there was a
23 deposition and starts to read from the depositions or read from
24 the filings and say this is what those mean, that goes against
25 the 12(b)(6) parameters because, number one, now it's

1 substantive evidence and not simply a judicial notice of
2 something that's right there in front of the Court, i.e.,
3 something on its own docket. Because those statements and the
4 interpretation of those statements are subject to credibility
5 findings. They're subject to clarification. They're subject
6 to rebuttal. That's the purpose of discovery.

7 And so if Your Honor -- and Mr. Morris is right.
8 Usually, res judicata involves knowing what happened in the
9 prior proceedings. So if all he wants to do is rest on the
10 fact that an objection was filed by CLO Holdco and maybe even
11 other people, and that should be it and he thinks that's enough
12 for Your Honor to say res judicata applies, then I don't think
13 we have a problem. It's when he goes beyond that and says,
14 Your Honor, these people must have known and this is what they
15 meant by their argument, that's what I'm asking Your Honor not
16 to consider. And if Mr. Morris wants you to consider that,
17 that's a summary judgment motion and we should have the
18 opportunity to do discovery at the very least into the issues
19 he has now raised as supporting his res judicata defense which
20 he has the burden of proof on.

21 MR. MORRIS: Your Honor, this is one of the strangest
22 arguments I have ever heard. I'm allowed to offer the Court
23 and the Court is allowed to accept the documents, but I'm not
24 allowed to read them. I'm not allowed to make arguments. I
25 don't understand what that even means. If it were a contract,

1 I would be allowed to put the contract in front of Your Honor,
2 but I wouldn't be able to argue why the contract doesn't say
3 what the Plaintiff says. I don't get it.

4 THE COURT: Okay.

5 MR. MORRIS: That's --

6 THE COURT: Just I've heard enough on this. I don't
7 think we have moved into Rule 12(e), that realm of me needing
8 to treat this as a motion for summary judgment. I think the
9 so-called evidence, the appendix that was attached to the
10 motion as well as the appendix that was attached to Plaintiffs'
11 response, it's stuff that I can take judicial notice of that's
12 in the record of this Court and I can look at it. You know, it
13 is what it is, the record of this Court.

14 All right. So I have nine people waiting in
15 chambers. I'm trying to figure out should I take a break now
16 or are you fairly close to wrapping up. Either answer is fine,
17 Mr. Sbaiti. I just need to figure out who I make wait here.

18 MR. SBAITI: I have -- oh, I'm sorry. I didn't mean
19 to interrupt you, Your Honor. I was just going to say I have
20 five minutes left, but I know Mr. Morris probably wants to come
21 back. So if you want to break now and we can come back at
22 whenever the Court wants us to, we can do so.

23 THE COURT: All right. Why don't you make your final
24 five minutes and then we'll take a break?

25 MR. SBAITI: Okay. Thank you, Your Honor.

1 I just wanted to address some of the arguments that
2 Mr. Morris raised in his argument. The first thing is -- and I
3 addressed this in part -- but Mr. Morris makes a big deal about
4 paragraph 127 of the complaint and essentially suggests that
5 we're the -- or that Mr. Dondero is the perpetrator of a
6 nefarious scheme. Whereas, what the pleading actually says,
7 and I again encourage Your Honor to re-read -- to read it
8 specifically, is that Mr. Dondero warned Mr. Seery not to trade
9 in the stock and not to make any transactions because the stock
10 was going to appreciate in value.

11 That has two implications for us, Your Honor. Number
12 one, it means Mr. Seery was a tippee of insider information,
13 and number two, it means that Mr. Seery, if he did trade on
14 that information or if he did pass that information on to
15 someone else, that is a problem from the Advisers Act
16 standpoint, which is really the only purpose of saying that.

17 While paragraph 127 also says that that should have
18 caused Mr. Seery to revalue the NAV of HCLOF, it does not state
19 and we did not plead that the entire value of HCLOF is tied to
20 the MGM stock. So the insinuation that that somehow gave us
21 inside information about what the true value of HCLOF was and
22 we should have known or that Mr. Dondero should have known is
23 simply untrue.

24 The other argument Mr. -- that Mr. Morris likes to
25 harp on is that CLO Holdco withdrew its argument, but he

1 characterizes Mr. Kane's withdrawal testimony -- as he says,
2 Mr. Kane admitted that CLO Holdco lacked the superior right to
3 obtain the HarbourVest. If you read the very language that was
4 highlighted on Mr. Morris' slide, that's not what Mr. Kane
5 says. Mr. Kane says, "We've gone back to the drawing board.
6 We've read your reply. And my client has given me permission
7 to withdraw the argument or withdraw the objection." That's
8 all he said. There was not an admission that he was wrong.
9 There was not an admission that they had made a mistake. There
10 was simply an admission that they decided to withdraw the
11 objection for whatever reason.

12 Lastly, on the specific claims --

13 THE COURT: That's not an accurate description of the
14 record. He said he looked at --

15 MR. SBAITI: Your Honor, I was reading it along with
16 him.

17 THE COURT: -- Guernsey Law. And I don't know if his
18 words were deep dive.

19 MR. SBAITI: Yeah.

20 THE COURT: But he had looked at the agreements
21 extensively. That's just not what he said.

22 MR. SBAITI: And he said he was with -- Your Honor,
23 he said he was withdrawing. He didn't say we were wrong. He
24 didn't say we don't have a claim. What he said was, "We're
25 withdrawing the objection."

1 THE COURT: After doing an extensive look at the
2 agreements in Guernsey Law, okay, so.

3 MR. SBAITI: Sure. But, Your Honor, he might have --
4 he could just as easily thought we have a chance, but it's not
5 a good one. And frankly, we'll be here for 20 days and we're
6 withdrawing it for that reason because we'll live to fight
7 another day. Your Honor, there's an innumerable number. To
8 simply say that he admitted that they didn't have a correct
9 claim, it's just he didn't say that. That's all. That's the
10 only point I'm making.

11 Your Honor, I don't disagree with the debtor that the
12 Court's exculpation clause gets rid of the negligence claim
13 which was obviously filed before the effective date, so that
14 claim is gone.

15 And I think the last argument that Mr. Morris makes
16 on the RICO claim is the federal court, the Supreme Court
17 standard for pleading a RICO claim, that acts that only
18 continue for a few weeks are not -- don't set out a RICO claim.
19 Your Honor, in our response to that, we actually submitted an
20 amended complaint that shows that the type of acts we're
21 talking about, the pattern of the debtor using its investor
22 vehicles assets to liquidate is a long pattern and practice
23 than simply the HarbourVest suit. And so, we move to amend on
24 that basis to satisfy that pleading defect, which is the main
25 one that they focused on.

1 That's all I have, Your Honor.

2 THE COURT: All right. Thank you.

3 We're going to take a 15 minute break and come back.

4 I'll ask Mr. Jordan and Mr. Bessette did they have anything
5 they wanted to say today. I know they joined in the debtor's
6 motion. And then we'll let Mr. Morris have rebuttal.

7 All right. So we'll be back in 15 minutes.

8 THE CLERK: All rise.

9 MR. MORRIS: Thank you, Your Honor.

10 (Recess at 12:05 p.m./Reconvened at 12:23 p.m.)

11 THE CLERK: All rise.

12 THE COURT: All right. Please be seated.

13 We're back on the record in Charitable DAF v.
14 Highland Capital. All right. So I promised I was going to go
15 back to counsel for Highland CLO Funding, Ltd. So Mr. Jordan,
16 Mr. Bessette, is there anything you wanted to say for oral
17 argument?

18 MR. JORDAN: Thank you, Your Honor. John Jordan on
19 behalf of HCLOF.

20 Our points are two procedural points. The first is
21 as the Court anticipated, in our motion to dismiss filed back
22 in August, we joined in the motion to dismiss of Highland. And
23 so to the extent that the Court after deliberation is inclined
24 to grant that motion, we would ask that as a joining party,
25 HCLOF be pulled along with that.

1 The second procedural point is that back in our
2 motion to dismiss, we pointed out that the complaint does not
3 actually allege anything against HCLOF. In the story, we're
4 essentially the football and neither Oklahoma nor UT. And we
5 pointed that out as an additional argument to what you've heard
6 today. That motion was never responded to. The deadline by
7 agreement was extended to October 11th. And the lack of
8 response was, we believe, not inadvertent but simply an
9 acknowledgment that HCLOF is not a party that anything is being
10 claimed against.

11 It particularly makes sense since effectively and in
12 rough numbers, they're half owned by both sides. So for every
13 dollar that HCLOF spends hanging around the case, the parties
14 are paying essentially 100 cents collectively. So for that
15 reason, we would ask, and subject to Mr. Sbaiti's input,
16 whether the Court would ask us or direct us to upload an order
17 granting our motion as unopposed. We just feel like we don't
18 have any role in this case.

19 THE COURT: All right.

20 Mr. Sbaiti, what about that?

21 MR. SBAITI: Your Honor, they were originally added
22 as a nominal party. And as a nominal party, because of the
23 potential need to have a derivative action, I think that based
24 upon Highland's arguments and the arguments that we had, I
25 don't think the derivative action is necessary for us to

1 maintain on a go-forward basis. And so we don't oppose them
2 being dismissed.

3 THE COURT: All right. Then I assume, Mr. Morris,
4 you don't have any problem with this, correct?

5 MR. MORRIS: No, Your Honor.

6 THE COURT: Okay. So I'll look for the parties to
7 submit an agreed order of dismissal of HCLOF after the hearing.
8 All right?

9 MR. JORDAN: Thank you, Your Honor.

10 THE COURT: All right. Mr. Morris, you get the last
11 word.

12 MR. MORRIS: Thank you, Your Honor. I hope to be
13 relatively brief. I really just want to focus on the arguments
14 concerning whether or not the order that was entered by this
15 Court was an order that was entered on the merits.

16 As the Court is well aware, a 9019 motion filed by a
17 debtor is done so on notice. It is to give all parties in
18 interest an opportunity to be heard, not just as to whether or
19 not the debtor meets its burden of proof under Rule 9019 but
20 whether or not the Court can find, as it must, that the
21 proposed settlement is in the best interest of the estate.

22 The purpose of -- I mean that is the purpose of the
23 giving notice so that everybody has a chance to be heard. The
24 questions that the Court asked, the questions that every
25 bankruptcy court asks in a 9019 is can the debtor do this deal,

1 should the debtor do this deal, is it in the best interest of
2 the estate to do this deal.

3 And, you know, the idea that a 9019 order is somehow
4 res judicata only to the parties to a settlement is just
5 something that doesn't make any sense to me because it
6 abrogates so many rules that exist that allows and encourages
7 and requires parties who have objections to be heard.

8 Mr. Sbaiti's clients filed an objection. They
9 initiated a contested matter. They obtained rights. They were
10 litigants. They are litigants in a contested matter where
11 they're required to tell the Court what objections they have to
12 the settlement, and they did that.

13 Mr. Sbaiti, you know, told me that I wasn't allowed
14 to characterize the words that are used in the documents that
15 have now been admitted by the Court. And, yet, I heard him say
16 that maybe Mr. Kane (phonetic) really meant to tell Your Honor
17 that he was withdrawing the claim because he was going to save
18 it for another day.

19 I'd just ask the Court to look at the transcript. I
20 don't have to interpret it at all. And I'd ask the Court to
21 read the words. I can put them back up on the screen, but
22 they're pretty short. It's at Pages 7 and 8 of the transcript
23 of what Mr. Kane told you and what you said in response. It's
24 on the page, not my interpretation, and what the import of that
25 was.

1 Mr. Sbaiti believes, I guess, if one is allowed to
2 engage in such conduct without consequence, that one is allowed
3 to allow to file objections, cause the Court and the litigants
4 to participate, to give discovery, to write briefs, to do
5 analyses, withdraw it on the basis of their own good faith
6 analysis of Guernsey law of the documents and somehow say it's
7 irrelevant. Not what the law is, not what res judicata is
8 intended to do.

9 He should have put all of his cards on the table. In
10 fact, I think that Mr. Kane believed he was putting all of his
11 cards on the table because that's what he did. He filed a very
12 comprehensive objection. He asserted a right to the
13 opportunity that the debtor was proposing to take in the 9019
14 motion. That's what he was doing. He was objecting on the
15 basis that he claimed his client had a superior right to this
16 asset.

17 And he didn't -- like I said earlier, Your Honor, I
18 don't think he would be permitted, I don't think these claims
19 would fly today if no objection was filed. But the fact that
20 there was renders, I think, indisputable that there was a
21 finding on the merits, right. And the only reason that the
22 Court didn't rule on Mr. Kane's motion, the only reason the
23 Court didn't rule on it is because Mr. Kane withdrew it.

24 Is that really the way this process is supposed to
25 work, that one can tell the Court that after a review of the

1 documents, I'm going to withdraw the objection and then file a
2 claim for damages three months later with a different client,
3 with a different control person, with a different lawyer?
4 That's okay under doctrine of res judicata? I don't think so.

5 They had a full and fair opportunity. The fact that
6 this was somehow -- you know, they're denigrating the fact that
7 this was a 9019 motion. There's not supposed to be a mini-
8 trial. Your Honor had discretion as to what to do. Every
9 court in every bench trial has discretion as to what to do and
10 whether or not to overrule objections and whether or not to
11 sustain [sic] objections. That's what judges to.

12 And there's nothing offensive about the fact that it
13 happened in the context of a 9019 motion. They don't get to
14 sit on their hands and wait to fight another day. If they
15 believed that the debtor was exposing itself to liability, and
16 that's what they actually say in the opposition, that's what I
17 actually think they say in the complaint, accept it as true,
18 they believe that the debtor created liability for itself by
19 rendering -- by entering into this transaction.

20 Shouldn't they have raised their hand and said you
21 can't do this deal, right? And the only response to that --
22 they have to that is they had no idea about value. Paragraph
23 127, Your Honor, Mr. Dondero, the architect of this complaint,
24 as was proven on June 8th, knew very well about value. And it
25 doesn't matter that it was only MGM. Your Honor commented on

1 that at the June 8th hearing in a different context. But
2 everybody knows, right, it is. He sits on the board of MGM.

3 And I'm sorry if I called him a tippee instead of a
4 tipper. But if this complaint goes forward, we'll dig into
5 that real deep. But there's no reason it ought to, Your Honor.
6 This case ought to be dismissed on res judicata grounds. It
7 should be dismissed on judicial estoppel grounds. And it
8 should be dismissed for all the reasons that I said in my
9 argument in my brief.

10 But I do just want to close with one point, and that
11 is to read from a case called Goldstein, which I think I
12 alluded to earlier on this issue of whether there's a fiduciary
13 duty that's owed by an advisor to an investor and a fund:

14 "At best, it is counterintuitive to characterize the
15 investors in a hedge fund as the clients of the
16 advisors. The advisor owes fiduciary duties only to
17 the fund, not to the fund's investors."

18 There's a lot of discussion about fiduciary duties,
19 Your Honor. But to the extent that they have any basis to
20 defeat the motion to dismiss on res judicata or collateral
21 estoppel grounds, we hope and we trust and we know the Court
22 will review the case law vigorously to test some of the
23 assertions to that.

24 I have nothing further, Your Honor.

25 THE COURT: All right. Well, thank you to all of

1 you.

2 As a reminder, I don't think you need it, but as a
3 reminder, I am essentially acting as a magistrate for Judge
4 Boyle in this action. And whichever way I go on whichever
5 theories, I think she would expect a thorough write-up. It
6 would, of course, be in the form of a report and recommendation
7 for her to either adopt or not if I dispose of some or all of
8 the counts in the lawsuit.

9 Even to the extent I deny dismissal, even though the
10 rule typically does not require a court to make detailed
11 findings and conclusions in connection with a denial of a
12 motion to dismiss, again, since I'm sitting as a magistrate, I
13 think Judge Boyle would expect some thorough explanations and
14 reasoning from me.

15 So that's my way of saying I'm taking this under
16 advisement. I am going to drill down on some of the cases that
17 have been argued. I think some important issues are raised
18 here that need some thorough reasoning.

19 So I will do the best to get this out without too
20 much delay. I think there's probably zero chance, zero chance
21 I'm going to get it done by the end of the year. We're just
22 too behind with some of our under-advisements. But I will try
23 earnestly to get it out fairly soon after the first of the
24 year. All right?

25 Thank you. You all have a good holiday.

1 THE CLERK: All rise.

2 (Proceedings concluded at 12:37 p.m.)

3 * * * * *

4
5 C E R T I F I C A T I O N

6 We, DIPTI PATEL, KAREN WATSON, CRYSTAL THOMAS, AND
7 PATTIE MITCHELL, court approved transcribers, certify that the
8 foregoing is a correct transcript from the official electronic
9 sound recording of the proceedings in the above-entitled
10 matter, and to the best of my ability.

11
12 /s/ Dipti Patel

13 DIPTI PATEL, CET-997

14
15 /s/ Karen Watson

16 KAREN WATSON, CET-1039

17
18 /s/ Crystal Thomas

19 CRYSTAL THOMAS, CET-

20
21 /s/ Pattie Mitchell

22 PATTIE MITCHELL

23 LIBERTY TRANSCRIPTS

DATE: November 23, 2021

EXHIBIT 2

004878

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 275

[Release No. IA-2628; File No. S7-25-06]

RIN 3235-AJ67

Prohibition of Fraud by Advisers to Certain Pooled Investment Vehicles

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Securities and Exchange Commission is adopting a new rule that prohibits advisers to pooled investment vehicles from making false or misleading statements to, or otherwise defrauding, investors or prospective investors in those pooled vehicles. This rule is designed to clarify, in light of a recent court opinion, the Commission's ability to bring enforcement actions under the Investment Advisers Act of 1940 against investment advisers who defraud investors or prospective investors in a hedge fund or other pooled investment vehicle.

EFFECTIVE DATE: September 10, 2007.

FOR FURTHER INFORMATION CONTACT: David W. Blass, Assistant Director, Daniel S. Kahl, Branch Chief, or Vivien Liu, Senior Counsel, at 202-551-6787, Division of Investment Management, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-5041.

SUPPLEMENTARY INFORMATION: The Commission is adopting new rule 206(4)-8 under the Investment Advisers Act of 1940 ("Advisers Act").¹

¹ 15 U.S.C. 80b. Unless otherwise noted, when we refer to the Advisers Act, or any paragraph of the Advisers Act, we are referring to 15 U.S.C. 80b of the United States Code, at which the Advisers Act is codified.

I. INTRODUCTION

On December 13, 2006, we proposed a new rule under the Advisers Act that would prohibit advisers to pooled investment vehicles from defrauding investors or prospective investors in pooled investment vehicles they advise.² We proposed the rule in response to the opinion of the Court of Appeals for the District of Columbia Circuit in Goldstein v. SEC, which created some uncertainty regarding the application of sections 206(1) and 206(2) of the Advisers Act in certain cases where investors in a pool are defrauded by an investment adviser to that pool.³ In addressing the scope of the exemption from registration in section 203(b)(3) of the Advisers Act and the meaning of “client” as used in that section, the Court of Appeals expressed the view that, for purposes of sections 206(1) and (2) of the Advisers Act, the “client” of an investment adviser managing a pool is the pool itself, not an investor in the pool. As a result, it was unclear whether the Commission could continue to rely on sections 206(1) and (2) of the Advisers Act to bring enforcement actions in certain cases where investors in a pool are defrauded by an investment adviser to that pool.⁴

² Prohibition of Fraud by Advisers to Certain Pooled Investment Vehicles; Accredited Investors in Certain Private Investment Vehicles, Investment Advisers Act Release No. 2576 (Dec. 27, 2006) [72 FR 400 (Jan. 4, 2007)] (the “Proposing Release”). In the Proposing Release, we also proposed two new rules that would define the term “accredited natural person” under Regulation D and section 4(6) of the Securities Act of 1933 [15 USC 77d(6)] (“Securities Act”). As proposed, these rules would add to the existing definition of “accredited investor” and apply to private offerings of certain unregistered investment pools. On May 23, 2007, we voted to propose more general amendments to the definition of accredited investor. Proposed Modernization of Smaller Company Capital-Raising and Disclosure Requirements, Securities Act Release No. (, 2007) [72 FR (, 2007)]. We plan to defer consideration of our proposal to define the term accredited natural person until we have had the opportunity to evaluate fully the comments we received on that proposal together with those we receive on our May 2007 proposal.

³ 451 F.3d 873 (D.C. Cir. 2006) (“Goldstein”).

⁴ Prior to the issuance of the Goldstein decision, we brought enforcement actions against advisers alleging false and misleading statements to investors under sections 206(1) and (2) of the Advisers Act. See, e.g., SEC v. Kirk S. Wright, International Management Associates, LLC, Litigation Release No. 19581 (Feb. 28, 2006); SEC v. Wood River Capital Management, LLC,

In its opinion, the Court of Appeals distinguished sections 206(1) and (2) from section 206(4) of the Advisers Act, which is not limited to conduct aimed at clients or prospective clients of investment advisers.⁵ Section 206(4) provides us with rulemaking authority to define, and prescribe means reasonably designed to prevent, fraud by advisers.⁶ We proposed rule 206(4)-8 under this authority.

We received 45 comment letters in response to our proposal.⁷ Most commenters generally supported the proposal. Eighteen endorsed the rule as proposed, noting that the rule would strengthen the antifraud provisions of the Advisers Act or that the rule would clarify the Commission's enforcement authority with respect to advisers.⁸ Others, however, urged that we

Litigation Release No. 19428 (Oct. 13, 2005); SEC v. Samuel Israel III; Daniel E. Marino; Bayou Management, LLC; Bayou Accredited Fund, LLC; Bayou Affiliates Fund, LLC; Bayou No Leverage Fund, LLC; and Bayou Superfund, LLC, Litigation Release No. 19406 (Sept. 29, 2005); SEC v. Beacon Hill Asset Management LLC, Litigation Release No. 18745A (June 16, 2004).

⁵ See Goldstein, supra note 3, at note 6. See also United States v. Elliott, 62 F.3d 1304, 1311 (11th Cir. 1995).

⁶ Section 206(4) of the Advisers Act makes it unlawful for an investment adviser to “engage in any act, practice, or course of business which is fraudulent, deceptive, or manipulative” and authorizes us “by rules and regulations [to] define, and prescribe means reasonably designed to prevent, such acts, practices, and courses of business as are fraudulent, deceptive, or manipulative.”

⁷ We received over 600 comment letters that addressed the proposed amendments to the term “accredited natural person” under Regulation D and section 4(6) of the Securities Act. All of the public comments we received are available for inspection in our Public Reference Room at 100 F Street, NE, Washington DC, 20549 in File No. S7-25-06, or may be viewed at www.sec.gov/comments/s7-25-06/s72506.shtml.

⁸ E.g., Letter of the Alternative Investments Compliance Association (Mar. 5, 2007); Letter of the CFA Center for Financial Market Integrity (Mar. 9, 2007) (“CFA Center Letter”); Letter of the Coalition of Private Investment Companies (Mar. 9, 2007); Letter of the Commonwealth of Massachusetts (Mar. 9, 2007) (“Massachusetts Letter”); Letter of the Department of Banking of the State of Connecticut (Mar. 8, 2007); Letter of the North America Securities Administrators Association (Apr. 2, 2007) (“NASAA Letter”); and Letter of the U.S. Chamber of Commerce (Mar. 9, 2007). Another commenter observed that the proposed rules are broadly similar to current U.K. legislation and regulations. See Letter of Alternative Investment Management Association (Mar. 9, 2007) (“AIMA Letter”).

make revisions that would restrict the scope of the rule to more narrowly define the conduct or acts it prohibits.⁹

Today, we are adopting new rule 206(4)-8 as proposed. The rule prohibits advisers from (i) making false or misleading statements to investors or prospective investors in hedge funds and other pooled investment vehicles they advise, or (ii) otherwise defrauding these investors. The rule clarifies that an adviser's duty to refrain from fraudulent conduct under the federal securities laws extends to the relationship with ultimate investors and that the Commission may bring enforcement actions under the Advisers Act against investment advisers who defraud investors or prospective investors in those pooled investment vehicles.

II. DISCUSSION

Rule 206(4)-8 prohibits advisers to pooled investment vehicles from (i) making false or misleading statements to investors or prospective investors in those pools or (ii) otherwise defrauding those investors or prospective investors. We will enforce the rule through civil and administrative enforcement actions against advisers who violate it.

Section 206(4) authorizes the Commission to adopt rules and regulations that “define, and prescribe means reasonably designed to prevent, such acts, practices, and courses of business as are fraudulent, deceptive, or manipulative.” In adopting rule 206(4)-8, we intend to employ all of the broad authority that Congress provided us in section 206(4) and direct it at adviser conduct affecting an investor or potential investor in a pooled investment vehicle.

⁹ E.g., Letter of American Bar Association (Mar. 12, 2007) (“ABA Letter”); Letter of Davis Polk & Wardwell (Mar. 9, 2007) (“Davis Polk Letter”); Letter of Dechert LLP (Mar. 8, 2007) (“Dechert Letter”); Letter of New York City Bar (Mar. 8, 2007) (“NYCB Letter”); Letter of Schulte Roth & Zabel LLP (Mar. 9, 2007) (“Schulte Roth Letter”); and Letter of Sullivan & Cromwell LLP (Mar. 9, 2007) (“Sullivan & Cromwell Letter”).

A. Scope of Rule 206(4)-8

Some commenters questioned the scope of the rule, arguing that the Commission should define fraud.¹⁰ We believe that we have done so, only more broadly than some commenters would have us do. As the Proposing Release indicated, our intent is to prohibit all fraud on investors in pools managed by investment advisers. Congress expected that we would use the authority provided by section 206(4) to “promulgate general antifraud rules capable of flexibility.”¹¹ The terms material false statements or omissions and “acts, practices, and courses of business as are fraudulent, deceptive, or manipulative” encompass the well-developed body of law under the antifraud provisions of the federal securities laws. The legal authorities identifying the types of acts, practices, and courses of business that are fraudulent, deceptive, or manipulative under the federal securities laws are numerous, and we believe that the conduct prohibited by rule 206(4)-8 is sufficiently clear and well understood.¹²

¹⁰ E.g., ABA Letter, supra note 9; Letter of Debevoise & Plimpton LLP (Mar. 14, 2007); and NYCB Letter, supra note 9.

¹¹ S.Rep. No. 1760, 86th Cong., 2d. Sess. (June 28, 1960) at 4. See rule 206(4)-1(a)(5) [17 CFR 275.206(4)-1(a)(5)] under the Advisers Act; rule 17j-1(b) [17 CFR 270.17j-1(b)] under the Investment Company Act of 1940 [15 U.S.C. 80a-1] (“Investment Company Act”); and rule 13e-3(b)(1) [17 CFR 240.13e-3(b)(1)] under the Securities Exchange Act of 1934 [15 U.S.C. 77a] (“Exchange Act”).

¹² Loss, Seligman, & Paredes, Securities Regulation, Chap. 9 (Fraud) (Fourth Ed. 2006); Hazen, Treatise on The Law of Securities Regulation, Vol. 3, Ch. 12 (Manipulation and Fraud – Civil Liability; Implied Private Remedies; SEC Rule 10b-5; Fraud in Connection With the Purchase or Sale of Securities; Improper Trading on Nonpublic Material Information) (Fifth Ed. 2005). See, e.g., Superintendent of Insurance of New York v. Bankers Life & Casualty Co., 404 U.S. 6, 11 n. 7 (1971) (“We believe that section 10(b) and Rule 10b-5 prohibit *all* fraudulent schemes in connection with the purchase or sale of securities, whether the artifices employed involve a garden type variety of fraud, or present a unique form of deception. Novel or atypical methods should not provide immunity from the securities laws.” (quoting A. T. Brod & Co. v. Perlow, 375 F.2d 393, 397 (CA2 1967))); Santa Fe Industries, Inc. v. Green, 430 U.S. 462, 477 (1977) (“No doubt Congress meant to prohibit the full range of ingenious devices that might be used to manipulate securities prices.”). Moreover, the established legal principles are sufficiently flexible to encompass future novel factual scenarios. United States v. Brown, 555 F.2d 336, 339-40 (2d Cir. 1977) (“The fact that there is no litigated fact pattern precisely in point may constitute a tribute to the cupidity and ingenuity of the malefactors involved but hardly provides an escape from the penal sanctions of the securities fraud provisions here involved.”).

1. Investors and Prospective Investors

Rule 206(4)-8 prohibits investment advisers from making false or misleading statements to, or engaging in other fraud on, investors or prospective investors in a pooled investment vehicle they manage. The scope of the rule is modeled on that of sections 206(1) and (2) of the Advisers Act, which make unlawful fraud by advisers against clients or prospective clients. Rule 206(4)-8 prohibits false or misleading statements made, for example, to existing investors in account statements as well as to prospective investors in private placement memoranda, offering circulars, or responses to “requests for proposals,” electronic solicitations, and personal meetings arranged through capital introduction services.

Some commenters argued that the rule should not prohibit fraud against prospective investors in a pooled investment vehicle, asserting that such fraud does not actually harm investors until they, in fact, make an investment.¹³ We disagree. False or misleading statements and other frauds by advisers are no less objectionable when made in an attempt to draw in new investors than when made to existing investors.¹⁴ For similar policy reasons that we believe led Congress to apply the protections of sections 206(1) and (2) to prospective clients, we have decided to apply those of rule 206(4)-8 to prospective investors.¹⁵ We believe that prohibiting false or misleading statements made to, or other fraud on, any prospective investors is a means reasonably designed to prevent fraud.

¹³ Davis Polk Letter, supra note 9; Dechert Letter, supra note 9; NYCB Letter, supra note 9; Letter of the Securities Industry and Financial Markets Association (Mar. 9, 2007); Sullivan & Cromwell Letter, supra note 9.

¹⁴ See CFA Center Letter, supra note 8.

¹⁵ We have used the term “prospective investor” to give the term similar scope to the term “prospective client” in sections 206(1) and (2). See, e.g., In the Matter of Ralph Harold Seipel, 38 S.E.C. 256, 257-58 (1958) (the solicitation of clients is part of the activity of an investment adviser and it is immaterial for purposes of an enforcement action under sections 206(1) and (2) that an adviser engaging in fraudulent solicitations was not successful in his efforts to obtain clients).

2. Unregistered Investment Advisers

Rule 206(4)-8 applies to both registered and unregistered investment advisers.¹⁶ As we noted in the Proposing Release, many of our enforcement cases against advisers to pooled investment vehicles have been brought against advisers that are not registered under the Advisers Act, and we believe it is critical that we continue to be in a position to bring actions against unregistered advisers that manage pools and that defraud investors in those pools.¹⁷ The two commenters that expressed an explicit view on this aspect of the proposal supported our application of the rule to advisers that are not registered with the Commission.¹⁸

3. Pooled Investment Vehicles

The rule we are adopting today applies to investment advisers with respect to any “pooled investment vehicle” they advise. The rule defines a pooled investment vehicle¹⁹ as any investment company defined in section 3(a) of the Investment Company Act²⁰ and any privately offered pooled investment vehicle that is excluded from the definition of investment company by reason of either section 3(c)(1) or 3(c)(7) of the Investment Company Act.²¹ As a result, the rule

¹⁶ A few commenters requested that we clarify how we intend to apply rule 206(4)-8 to offshore advisers’ interaction with non-U.S. investors. See AIMA Letter, *supra* note 8; Letter of Jones Day (Mar. 9, 2007); Sullivan & Cromwell Letter, *supra* note 9. Our adoption of this rule will not alter our jurisdictional authority.

¹⁷ Proposing Release, *supra* note 2, at note 14.

¹⁸ Massachusetts Letter, *supra* note 8; NASAA Letter, *supra* note 8.

¹⁹ Rule 206(4)-8(b).

²⁰ 15 U.S.C. 80a-3(a). Unless otherwise noted, when we refer to the Investment Company Act, or any paragraph of the Investment Company Act, we are referring to 15 U.S.C. 80a of the United States Code, at which the Company Act is codified.

²¹ Section 3(c)(1) of the Investment Company Act excludes from the definition of investment company an issuer the securities (other than short-term paper) of which are beneficially owned by not more than 100 persons and that is not making or proposing to make a public offering of its securities. Section 3(c)(7) of the Investment Company Act excludes from the definition of investment company an issuer the outstanding securities of which are owned exclusively by persons who, at the time of acquisition of such securities, are “qualified purchasers” and that is not making or proposing to make a public offering of its securities. “Qualified purchaser” is

applies to advisers to hedge funds, private equity funds, venture capital funds, and other types of privately offered pools that invest in securities, as well as advisers to investment companies that are registered with us.²²

Several commenters supported applying the protection of the new antifraud rule to investors in all these kinds of pooled investment vehicles, noting, for example, that every investor, not just the wealthy or sophisticated that typically invest in private pools, should be protected from fraud.²³ Some other commenters urged us not to apply the rule to advisers to registered investment companies, arguing that the rule is unnecessary because other provisions of the federal securities laws prohibiting fraud are available to the Commission to address these matters.²⁴ They expressed concern that application of another antifraud provision with different elements would be burdensome. These commenters claimed that the rule would, for example, make it necessary for advisers to conduct extensive reviews of all communications with clients. But the other antifraud provisions available to us contain different elements because they were not specifically designed to address frauds by investment advisers with respect to investors in pooled investment vehicles. In some cases, the other antifraud provisions may not permit us to

defined in section 2(a)(51) of the Investment Company Act generally to include a natural person (or a company owned by two or more related natural persons) who owns not less than \$5,000,000 in investments; a person, acting for its own account or accounts of other qualified purchasers, who owns and invests on a discretionary basis, not less than \$25,000,000; and a trust whose trustee, and each of its settlors, is a qualified purchaser.

²² We have brought enforcement actions under the Advisers Act against advisers to these types of funds. See, e.g., In the Matter of Askin Capital Management, L.P and David J. Askin, Investment Advisers Act Release No. 1492 (May 23, 1995) (hedge fund); In the Matter of Thayer Capital Partners, Investment Advisers Act Release No. 2276 (Aug. 12, 2004) (private equity fund); SEC v. Michael A. Liberty, Litigation Release No. 19601 (Mar. 8, 2006) (venture capital fund).

²³ E.g., NASAA Letter, supra note 8.

²⁴ E.g., ABA Letter, supra note 9; Letter of Investment Adviser Association (Mar. 9, 2007); Letter of Investment Company Institute (Mar. 9, 2007) (“ICI Letter”); Sullivan & Cromwell Letter, supra note 9. Commenters noted in particular that section 34(b) of the Investment Company Act already prohibits an adviser from making fraudulent material statements or omissions in a fund’s registration statement or in required records.

proceed against the adviser.²⁵ As a result, the existing antifraud provisions may not be available to us in all cases. As we discussed above, before the Goldstein decision we had brought actions against advisers to mutual funds under sections 206(1) and (2) for defrauding investors in mutual funds.²⁶ Because, before the Goldstein decision, advisers to pooled investment vehicles operated with the understanding that the Advisers Act prohibited the conduct that this rule prohibits, we believe that advisers that are attentive to their traditional compliance responsibilities will not need to alter their business practices or take additional steps and incur new costs as a result of this rule's adoption.

B. Prohibition on False or Misleading Statements

Rule 206(4)-8(a)(1) prohibits any investment adviser to a pooled investment vehicle from making an untrue statement of a material fact to any investor or prospective investor in the pooled investment vehicle, or omitting to state a material fact necessary in order to make the statements made to any investor or prospective investor in the pooled investment vehicle, in the light of the circumstances under which they were made, not misleading.²⁷

The provision is very similar to those in many of our antifraud laws and rules that, depending upon the circumstances, may also be applicable to the same investor

²⁵ This may be the case with respect to section 34(b) of the Investment Company Act, for example, if the adviser's fraudulent statements are not made in a document described in that section, or with respect to rule 10b-5 under the Exchange Act, where the fraudulent conduct does not relate to a misstatement or omission in connection with the purchase or sale of any security.

²⁶ See, e.g., In the Matter of Van Kampen Investment Advisory Corp., Investment Advisers Act Release No. 1819 (Sept. 8, 1999); In the Matter of The Dreyfus Corporation, Investment Advisers Act Release No. 1870 (May 10, 2000); In the Matter of Federated Investment Management Company, Investment Advisers Act Release No. 2448 (Nov. 28, 2005).

²⁷ A fact is material if there is a substantial likelihood that a reasonable investor in making an investment decision would consider it as having significantly altered the total mix of information available. Basic, Inc. v. Levinson, 485 U.S. 224, 231-32 (1988); TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976). See also In the Matter of Van Kampen Investment Advisory Corp., supra note 26; In the Matter of the Dreyfus Corporation, supra note 26.

communications.²⁸ Sections 206(1) and (2) have imposed similar obligations on advisers since 1940 and, before Goldstein, were commonly accepted as imposing similar requirements on communications with investors in a fund. For these reasons, and because the nature of the duty to communicate without false statements is so well developed in current law, we believe that commenters' concerns about the breadth of the prohibition or any chilling effect the new rule might have on investor communications are misplaced.²⁹ Advisers to pooled investment vehicles attentive to their traditional compliance responsibilities will not need to alter their communications with investors.

Rule 206(4)-8(a)(1) prohibits advisers to pooled investment vehicles from making any materially false or misleading statements to investors in the pool regardless of whether the pool is offering, selling, or redeeming securities. While the new rule differs in this aspect from rule 10b-5 under the Exchange Act, the conduct prohibited is similar. The new rule prohibits, for example, materially false or misleading statements regarding investment strategies the pooled investment vehicle will pursue, the experience and credentials of the adviser (or its associated persons), the risks associated with an investment in the pool, the performance of the pool or other funds advised by the adviser, the valuation of the pool or investor accounts in it, and practices

²⁸ See, e.g., sections 12 and 17 of the Securities Act [15 U.S.C. 77l, 77q]; section 14 of the Exchange Act [15 U.S.C. 78n]; section 34 of the Investment Company Act; rules 156, 159, and 610 under the Securities Act [17 CFR 230.156, 230.159, 230.610]; rules 10b-5, 13e-3, 13e-4, and 15c1-2 under the Exchange Act [17 CFR 240.10b-5, 240.13e-3, 240.13e-4, 240.15c1-2]; and rule 17j-1 under the Investment Company Act [17 CFR 270.17j-1].

²⁹ Letter of Managed Funds Association (Mar. 9, 2007) ("MFA Letter"); NYCB Letter, supra note 9; Davis Polk Letter, supra note 9; Dechert Letter, supra note 9; Letter of Seward & Kissel LLP (Mar. 8, 2007) ("Seward & Kissel Letter").

the adviser follows in the operation of its advisory business such as how the adviser allocates investment opportunities.³⁰

C. Prohibition of Other Frauds

Rule 206(4)-8(a)(2) makes it a fraudulent, deceptive, or manipulative act, practice, or course of business for any investment adviser to a pooled investment vehicle to “otherwise engage in any act, practice, or course of business that is fraudulent, deceptive, or manipulative with respect to any investor or prospective investor in the pooled investment vehicle.”³¹ As we noted in the Proposing Release, the wording of this provision is drawn from the first sentence of section 206(4) and is designed to apply more broadly to deceptive conduct that may not involve statements.³²

Some commenters asserted that section 206(4) provides us authority only to adopt prophylactic rules that explicitly identify conduct that would be fraudulent under the new rule.³³ We believe our authority is broader. We do not believe that the commenters’ suggested approach would be consistent with the purposes of the Advisers Act or the protection of investors. That approach would have us adopt the rule prohibiting fraudulent communications but not fraudulent conduct.³⁴ But, section 206(4) itself specifically authorizes us to adopt rules defining and prescribing “acts, practices and courses of business,” (*i.e.*, conduct), and does not explicitly refer to communications, which, nonetheless, represent a form of an act, practice, or

³⁰ We have previously brought enforcement actions alleging these or similar types of frauds. See Proposing Release, supra note 2, at note 29.

³¹ Rule 206(4)-8(a)(2).

³² See Section II.C of the Proposing Release, supra note 2.

³³ ABA Letter, supra note 9; ICI Letter, supra note 24; Schulte Roth Letter, supra note 9; Sullivan & Cromwell Letter, supra note 9.

³⁴ See, e.g., ABA Letter, supra note 9.

course of business. In addition, rule 206(4)-8 as adopted would provide greater protection to investors in pooled investment vehicles.

Alternatively, commenters would have us adopt a rule prohibiting identified known fraudulent conduct or would have us provide detailed commentary describing specific forms of fraudulent conduct that the rule would prohibit.³⁵ Either approach would fail to prohibit fraudulent conduct we did not identify, and could provide a roadmap for those wishing to engage in fraudulent conduct. This approach would be inconsistent with our historical application of the federal securities laws under which broad prohibitions have been applied against specific harmful activity.

D. Other Matters

We noted in the Proposing Release that, unlike violations of rule 10b-5 under the Exchange Act, the Commission would not need to demonstrate that an adviser violating rule 206(4)-8 acted with scienter.³⁶ Commenters questioned whether the rule should encompass negligent conduct, arguing that it would “expand the concept of fraud itself beyond its original meaning.”³⁷ We read the language of section 206(4) as not by its terms limited to knowing or deliberate conduct. For example, section 206(4) encompasses “acts, practices, and courses of business as are . . . deceptive,” thereby reaching conduct that is negligently deceptive as well as conduct that is recklessly or deliberately deceptive. In addition, the Court of Appeals for the District of Columbia Circuit concluded that “scienter is not required under section 206(4).”³⁸

³⁵ Id.

³⁶ Section II.B of the Proposing Release, supra note 2.

³⁷ See ABA Letter, supra note 9 at page 3.

³⁸ SEC v. Steadman, 967 F.2d 636, at 647 (D.C. Cir. 1992). The court in Steadman analogized section 206(4) of the Advisers Act to section 17(a)(3) of the Securities Act, which the Supreme Court had held did not require a finding of scienter, id. (citing Aaron v. SEC, 446 U.S. 680 (1980)). In discussing section 17(a)(3) and its lack of a scienter requirement, the Steadman court

We believe use of a negligence standard also is appropriate as a method reasonably designed to prevent fraud. As the Supreme Court noted in U.S. v. O’Hagan, “[a] prophylactic measure, because its mission is to prevent, typically encompasses more than the core activity prohibited.”³⁹ In O’Hagan, the Court held that under section 14(e) “the Commission may prohibit acts, not themselves fraudulent under the common law or §10(b), if the prohibition is ‘reasonably designed to prevent . . . acts and practices [that] are fraudulent.’”⁴⁰ Along these lines, the prohibitions in rule 206(4)-8 are reasonably designed to prevent fraud. We believe that, by taking sufficient care to avoid negligent conduct, advisers will be more likely to avoid reckless deception. Since the Commission clearly is authorized to prescribe conduct that goes beyond fraud as a means reasonably designed to prevent fraud, prohibiting deceptive conduct done negligently is a way to accomplish this objective.

Rule 206(4)-8 does not create under the Advisers Act a fiduciary duty to investors or prospective investors in a pooled investment vehicle not otherwise imposed by law. Nor does the rule alter any duty or obligation an adviser has under the Advisers Act, any other federal law or regulation, or any state law or regulation (including state securities laws) to investors in a pooled investment vehicle it advises.⁴¹ The rule, for example, will permit us to bring an enforcement action against an investment adviser that violates a fiduciary duty imposed by other law if the violation of such law or obligation also constitutes an act, practice, or course of

observed that, similarly, a violation of section 206(2) of the Advisers Act could rest on a finding of simple negligence. Id. at 643, note 5. But see Aaron at 690-91 (citing Ernst & Ernst v. Hochfelder, 425 U.S. 185, 199 (1976)); cf. S. Rep. No. 1760, 86th Cong., 2d Sess. (June 28, 1960) at 8 and H. R. Rep. 2179, 86th Cong., 2d Sess. (Aug. 26, 1960) at 8 (comparing section 206(4) to section 15(c)(2) of the Exchange Act).

³⁹ U.S. v. O’Hagan, 521 U.S. 642, 672-73 (1997).

⁴⁰ Id. at 673.

⁴¹ For example, under the Uniform Limited Partnership Act, advisers who serve as general partners owe fiduciary duties to the limited partners. UNIF. LIMITED PARTNERSHIP ACT § 408 (2001).

business that is fraudulent, deceptive, or manipulative within the meaning of the rule and section 206(4).⁴²

Finally, the rule does not create a private right of action.⁴³

III. PAPERWORK REDUCTION ACT

The Paperwork Reduction Act of 1995 does not apply because rule 206(4)-8 does not impose a new “collection of information” within the meaning of the Paperwork Reduction Act of 1995. The rule does not create any filing, reporting, recordkeeping, or disclosure requirements for investment advisers subject to the rule. Accordingly, there is no “collection of information” under the Paperwork Reduction Act that requires the approval of the Office of Management and Budget under 44 U.S.C. 3501.

IV. COST-BENEFIT ANALYSIS

The Commission is sensitive to costs imposed by our rules and the benefits that derive from them. In the Proposing Release, we encouraged commenters to discuss any potential costs and benefits that we did not consider in our discussion. Three commenters addressed the issue of cost. Two of them stated their belief that the rule would increase advisers’ costs of compliance, by, for example, making it necessary for advisers to conduct extensive reviews of all communications with clients.⁴⁴ One stated that the rule would achieve a reasonable balance of

⁴² For example, if an adviser has a duty from a source other than the rule to make a material disclosure to an investor in a fund and negligently or deliberately fails to make the disclosure, the rule would apply to the failure.

⁴³ The Supreme Court has held that “there exists a limited private remedy under the Investment Advisers Act of 1940 to void an investment adviser’s contract, but that the Act confers no other private causes of action, legal or equitable.” *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11 at 24 (1979) (footnote omitted).

⁴⁴ NYCB Letter, *supra* note 9; Seward & Kissel Letter, *supra* note 29.

providing important benefits to investors at an acceptable cost.⁴⁵ None of the three commenters, however, provided analysis or empirical data in connection with their statements.

The rule makes it a fraudulent, deceptive, or manipulative act, practice, or course of business within the meaning of section 206(4) for any investment adviser to a pooled investment vehicle to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, to any investor or prospective investor in the pooled investment vehicle. The rule also makes it a fraudulent, deceptive, or manipulative act, practice, or course of business within the meaning of section 206(4) for any investment adviser to a pooled investment vehicle to otherwise engage in any act, practice, or course of business that is fraudulent, deceptive, or manipulative with respect to any investor or prospective investor in the pooled investment vehicle. For the reasons discussed, we do not believe that the rule will require advisers to incur new or additional costs.

Investment advisers to pooled investment vehicles should not be making untrue statements or omitting material facts or otherwise be engaged in fraud with respect to investors or prospective investors in pooled investment vehicles today, because federal authorities, state authorities, and private litigants often can, and do, seek redress from the adviser for the untrue statements or omissions or other frauds. In most cases, the conduct that the rule prohibits is already prohibited by federal securities statutes,⁴⁶ other federal statutes (including federal wire fraud statutes),⁴⁷ as well as state law.⁴⁸

⁴⁵ CFA Center Letter, supra note 8.

⁴⁶ See, e.g., section 10(b) of the Exchange Act [15 U.S.C. 78j(b)] and section 17(a) of the Securities Act [15 U.S.C. 77q] which would apply when the false statements are made “in connection with the purchase or sale of a security” or involve the “offer or sale” of a security, and section 34(b) of the Investment Company Act which makes it unlawful “to make any untrue statement of a

We recognize that there are costs involved in assuring that communications to investors and prospective investors do not contain untrue or misleading statements and preventing other frauds. Advisers have incurred, and will continue to incur, these costs due to the prohibitions and deterrent effect of the law and rules that apply under these circumstances. While each of the provisions noted above may have different limitation periods, apply in different factual circumstances, or require the government (or a private litigant) to prove different states of mind than the rule, as discussed above we believe that the multiple prohibitions against fraud, and the consequences under both criminal and civil law for fraud, should currently cause an adviser to take the precautions it deems necessary to refrain from such conduct.

Furthermore, prior to Goldstein, advisers operated with the understanding that the Advisers Act prohibited the same conduct that would be prohibited by the rule. Accordingly, we do not believe that advisers to pooled investment vehicles attentive to their traditional compliance responsibilities will need to take steps or alter their business practices in such a way that will require them to incur new or additional costs as a result of the adoption of the rule.

material fact in any registration statement, application, report, account, record, or other document filed or transmitted pursuant to [the Investment Company Act]”

⁴⁷ See, e.g., 18 U.S.C. 1341 (Frauds and Swindles) and 18 U.S.C. 1343 (Fraud by wire, radio, or television) which make it a criminal offense to use the mails or to communicate by means of wire, having devised a scheme to defraud or for obtaining money or property by means of false or fraudulent pretenses, and 18 U.S.C. 1957 (Engaging in monetary transactions in property derived from specified unlawful activity) which makes it a criminal racketeering offense to engage or attempt to engage in a transaction in criminally derived property of a value greater than \$10,000.

⁴⁸ See, e.g., Metro Communications Corp. BVI v. Advanced Mobilecomm Technologies, 854 A.2d 121, 156 (Del. Ch. 2004) (court held that plaintiff-former member of LLC had sufficiently alleged a common law fraud claim based on allegation that a series of reports by LLC’s managers contained misleading statements; court stated that “[i]n the usual fraud case, the speaking party who is subject to an accusation of fraud is on the opposite side of a commercial transaction from the plaintiff, who alleges that but for the material misstatements or omissions of the speaking party he would not have contracted with the speaking party”).

We also recognize that the rule may cause some advisers to pay more attention to the information they present to better guard against making an untrue or misleading statement to an investor or prospective investor and to reevaluate measures that are intended to prevent fraud. As a consequence, some advisers might seek guidance, legal or otherwise, and more closely review the information that they disseminate to investors and prospective investors and the antifraud related policies and procedures they have implemented. While increased concern about making false statements or committing fraud could be attributable to the new rule, advisers should already be incurring these costs to ensure truthfulness and prevent fraud, regardless of the rule, because of the myriad of laws or regulations that may already apply.

The principal benefit of the rule is that it clearly enables the Commission to bring enforcement actions under the Advisers Act, if an adviser to a pooled investment vehicle disseminates false or misleading information to investors or prospective investors or otherwise commits fraud with respect to any investor or prospective investor. As noted above, the existing antifraud provisions may not be available to us in all cases. Through our enforcement actions we are able to protect fund investor assets by stopping ongoing frauds,⁴⁹ barring persons that have committed certain specified violations or offenses from being associated with an investment adviser,⁵⁰ imposing penalties,⁵¹ seeking court orders to protect fund assets,⁵² and to order disgorgement of ill-gotten gains.⁵³ Moreover, we believe that rule 206(4)-8 will deter advisers to pooled investment vehicles from engaging in fraudulent conduct with respect to investors in

⁴⁹ See section 203(k) of the Advisers Act (Commission authority to issue cease and desist orders).

⁵⁰ See section 203(f) of the Advisers Act (Commission authority to bar a person from being associated with an investment adviser).

⁵¹ See section 203(i) of the Advisers Act (Commission authority to impose civil penalties).

⁵² See section 209(d) of the Advisers Act (Commission authority to seek injunctions and restraining orders in federal court).

⁵³ See section 203(j) of the Advisers Act (Commission authority to order disgorgement).

those pools and will provide investors with greater confidence when investing in pooled investment vehicles.

V. REGULATORY FLEXIBILITY ACT ANALYSIS

The Commission certified, pursuant to section 605(b) of the Regulatory Flexibility Act, that rule 206(4)-8 will not have a significant economic impact on a substantial number of small entities.⁵⁴ This certification was included in the Proposing Release.⁵⁵ While we encouraged written comment regarding this certification, none of the commenters responded to this request.

VI. STATUTORY AUTHORITY

We are adopting new rule 206(4)-8 pursuant to our authority set forth in sections 206(4) and 211(a) of the Advisers Act (15 U.S.C. 80b-6(4) and 80b-11(a)).

List of Subjects

17 CFR Part 275

Reporting and recordkeeping requirements, Securities.

VII. TEXT OF RULES

For the reasons set out in the preamble, Title 17, Chapter II of the Code of Federal Regulations is amended as follows:

PART 275 – RULES AND REGULATIONS, INVESTMENT ADVISERS ACT OF 1940

1. The authority citation for Part 275 continues to read in part as follows:

Authority: 15 U.S.C. 80b-2(a)(11)(F), 80b-2(a)(17), 80b-3, 80b-4, 80b-4a, 80b-6(4), 80b-6a, and 80b-11, unless otherwise noted.

* * * * *

⁵⁴ 5 U.S.C. 605(b).

⁵⁵ Section VII.A of the Proposing Release, supra note 2.

2. Section 275.206(4)-8 is added to read as follows:

§206(4)-8 Pooled investment vehicles.

(a) Prohibition. It shall constitute a fraudulent, deceptive, or manipulative act, practice, or course of business within the meaning of section 206(4) of the Act (15 U.S.C. 80b-6(4)) for any investment adviser to a pooled investment vehicle to:

(1) Make any untrue statement of a material fact or to omit to state a material fact necessary to make the statements made, in the light of the circumstances under which they were made, not misleading, to any investor or prospective investor in the pooled investment vehicle; or

(2) Otherwise engage in any act, practice, or course of business that is fraudulent, deceptive, or manipulative with respect to any investor or prospective investor in the pooled investment vehicle.

(b) Definition. For purposes of this section “pooled investment vehicle” means any investment company as defined in section 3(a) of the Investment Company Act of 1940 (15 U.S.C. 80a-3(a)) or any company that would be an investment company under section 3(a) of that Act but for the exclusion provided from that definition by either section 3(c)(1) or section 3(c)(7) of that Act (15 U.S.C. 80a-3(c)(1) or (7)).

By the Commission.

Nancy M. Morris
Secretary

August 3, 2007

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EXHIBIT 3

SECOND AMENDED AND RESTATED
INVESTMENT ADVISORY AGREEMENT

THIS SECOND AMENDED AND RESTATED INVESTMENT ADVISORY AGREEMENT (this “*Agreement*”), dated to be effective from January 1, 2017 (the “*Effective Date*”) is entered into by and between **Charitable DAF Fund, L.P.**, a Cayman Islands exempted limited partnership (the “*Fund*”), **Charitable DAF GP, LLC**, a limited liability company organized under the laws of the State of Delaware (the “*General Partner*”), the general partner of the Fund, and **Highland Capital Management, L.P.**, a limited partnership organized under the laws of the State of Delaware (the “*Investment Advisor*”). Each of the signatories hereto is sometimes referred to herein individually as a “*Party*” and collectively as the “*Parties*.”

RECITALS

WHEREAS, the Fund, the General Partner and the Investment Advisor entered into that certain Investment Advisory Agreement dated January 1, 2012 (the “*Original Agreement*”);

WHEREAS, the Parties amended and restated the Original Agreement in its entirety on the terms set forth in that certain Amended and Restated Investment Advisory Agreement dated July 1, 2014 (the “*Existing Agreement*”);

WHEREAS, the parties desire to amend and restate the Existing Agreement in its entirety with the terms as set forth in this Agreement effective as of the Effective Date;

NOW, THEREFORE, in consideration of the mutual covenants herein contained and for other good and valuable consideration, the receipt of which is hereby acknowledged, the Parties hereby agree, and the Existing Agreement is hereby amended and restated in its entirety, as follows:

1. Investment Advisory Services. Subject to Section 7, the Investment Advisor shall act as investment advisor to the Fund, the General Partner with respect to the Fund and its subsidiaries and shall provide investment advice with respect to the investment and reinvestment of the cash, Financial Instruments and other properties comprising the assets and liabilities of the Fund and its subsidiaries.

2. Custody. The Financial Instruments shall be held in the custody of Jefferies & Company, Inc. or one or more banks selected by the General Partner (each such bank, a “Custodian”). The General Partner will notify the Investment Advisor promptly of the proposed selection of any other Custodians. The Custodian shall at all times be responsible for the physical custody of the Financial Instruments; for the collection of interest, dividends, and other income attributable to the Financial Instruments; and for the exercise of rights and tenders on the Financial Instruments after consultation with and as then directed by the General Partner. At no time shall the Investment Advisor have possession of or maintain custody over any of the Financial Instruments. The Investment Advisor shall not be responsible for any loss incurred by reason of any act or omission of the Custodian.

3. Authority of the Investment Advisor. Subject to Section 7 of this Agreement, the Investment Advisor shall advise the General Partner on behalf of the Fund and/or its subsidiaries with respect to:

(a) investing, directly or indirectly, on margin or otherwise, in all types of securities and other financial instruments of United States and non-U.S. entities, including, without limitation, capital stock; all manner of equity securities (whether registered or unregistered, traded or privately offered, American Depository Receipts, common or preferred); physical commodities; shares of beneficial interest; partnership interests, limited liability company interests and similar financial instruments; secured and unsecured debt (both corporate and sovereign, bank debt, vendor claims and/or other contractual claims); bonds, notes and debentures (whether subordinated, convertible or otherwise); currencies; interest rate, currency, equity and other derivative products, including, without limitation, (i) future contracts (and options thereon) relating to stock indices, currencies, United States Government securities, securities of non-U.S. governments, other financial instruments and all other commodities, (ii) swaps and contracts for difference, options, swaptions, rights, warrants, when-issued securities, caps, collars, floors, forward rate agreements, and repurchase and reverse repurchase agreements and other cash equivalents, (iii) spot and forward currency transactions and (iv) agreements relating to or securing such transactions; leases, including, without limitation, equipment lease certificates; equipment trust certificates; mortgage-backed securities and other similar instruments (including, without limitation, fixed-rate, pass-throughs, adjustable rate mortgages, collateralized mortgage obligations, stripped mortgage-backed securities and REMICs); loans; credit paper; accounts and notes receivable and payable held by trade or other creditors; trade acceptances and claims; contract and other claims; executory contracts; participations; mutual funds, exchange traded funds and similar financial instruments; money market funds and instruments; obligations of the United States, any state thereof, non-U.S. governments and instrumentalities of any of them; commercial paper; certificates of deposit; bankers' acceptances; trust receipts; letters of credit; choses in action; puts; calls; other obligations and instruments or evidences of indebtedness of whatever kind or nature; and real estate and any kind of interests in real estate; in each case, of any person, corporation, government or other entity whatsoever, whether or not publicly traded or readily marketable (each of such items, "**Financial Instruments**"), and the sale of Financial Instruments short and covering such sales.

(b) engaging in such other lawful Financial Instruments transactions;

(c) research and analysis;

(d) purchasing Financial Instruments and holding them for investment;

(e) entering into contracts for or in connection with investments in Financial Instruments;

(f) investing in other pooled investment vehicles, which investments shall be subject in each case to the terms and conditions of the respective governing document for each such vehicle;

(g) possessing, transferring, mortgaging, pledging or otherwise dealing in, and exercising all rights, powers, privileges and other incidents of ownership or possession with respect to Financial Instruments and other property and funds held or owned by the Fund and/or its subsidiaries;

(h) lending, either with or without security, any Financial Instruments, funds or other properties of the Funds, including by entering into reverse repurchase agreements, and, from time to time, undertaking leverage on behalf of the Fund;

(i) opening, maintaining and closing accounts, including margin and custodial accounts, with brokers and dealers, including brokers and dealers located outside the United States;

(j) opening, maintaining and closing accounts, including custodial accounts, with banks, including banks located outside the United States, and drawing checks or other orders for the payment of monies;

(k) combining purchase or sale orders on behalf of the Fund with orders for other accounts to which the Investment Advisor or any of its affiliates provides investment services (“***Other Accounts***”) and allocating the Financial Instruments or other assets so purchased or sold, on an average-price basis or in any other manner deemed fair and equitable to the Investment Advisor in its sole discretion, among such accounts;

(l) entering into arrangements with brokers to open “average price” accounts wherein orders placed during a trading day are placed on behalf of the Fund and Other Accounts and are allocated among such accounts using an average price;

(m) organizing one or more corporations and other entities formed to hold record title, as nominee for the Fund and/or its subsidiaries (whether alone or together with the Other Accounts), to Financial Instruments or funds of the Fund and/or its subsidiaries;

(n) causing the Fund and/or its subsidiaries to engage in (i) agency, agency cross, related party principal transactions with affiliates of the Investment Manager and (ii) cross transactions with Other Accounts, in each case, to the extent permitted by applicable laws;

(o) engaging personnel, whether part-time or full-time, and attorneys, independent accountants or such other persons (including, without limitation, finders, consultants and investment bankers); and

(p) voting of Financial Instruments, participation in arrangements with creditors, the institution and settlement or compromise of suits and administrative proceedings and other like or similar matters.

4. Policies of the Fund. The activities engaged in by the Investment Advisor on behalf of the Fund and/or its subsidiaries shall be subject to the policies and control of the General Partner.

The Investment Advisor shall submit such periodic reports to the General Partner regarding the Investment Advisor's activities hereunder as the General Partner may reasonably request and a representative of the Investment Advisor shall be available to meet with the General Partner and/or any other representative of the Fund or its subsidiaries as reasonably requested by the General Partner.

In furtherance of the foregoing, the General Partner hereby appoints the Investment Advisor as the Fund's attorney-in-fact, with full power of authority to act in the Fund's name and on its behalf with respect to the Fund, as follows:

(a) to purchase or otherwise trade in Financial Instruments that have been approved by the General Partner;

(b) to execute and combine purchase or sale orders on behalf of the Fund with orders for Other Accounts and allocate the Financial Instruments or other assets so purchased or sold, on an average-price basis or in any other manner deemed fair and equitable to the Investment Advisor in its sole discretion, among such accounts; *provided, however*, that such purchase or sale orders shall be market rates;

(c) to direct the Custodian to deliver funds or the Financial Instruments, but only in the course of effecting trading and investment transactions for the Fund and subject to such restrictions as may be contained in the custody agreement between the Custodian and the Fund;

(d) to enter into contracts, provide certifications or take any other actions necessary to effect any of the foregoing transactions; and

(e) to select brokers on the basis of best execution and in consideration of relevant factors, including, but not limited to, price quotes; the size of the transaction; the nature of the market for the security; the timing of the transaction; the difficulty of execution; the broker-dealer's expertise in the relevant market or sector; the extent to which the broker-dealer makes market in the security or has an access to such market; the broker-dealer's skill in positioning the relevant market; the broker-dealer's facilities, reliability, promptness and financial stability; the broker-dealer's reputation for diligence and integrity (including in correcting errors); confidentiality considerations; the quality and usefulness of research services and investment ideas presented by the broker-dealer; and other factors deemed appropriate by the Investment Advisor.

5. Valuation of Financial Instruments. Financial Instruments will be valued in accordance with the then current valuation policy of the Investment Advisor, a copy of which will be provided to the General Partner upon request.

6. Status of the Investment Advisor. The Investment Advisor shall, for all purposes, be an independent contractor and not an employee of the General Partner or the Fund or its subsidiaries, nor shall anything herein be construed as making the Fund or its subsidiaries or the General Partner, a partner, member or co-venturer with the Investment Advisor or any of its affiliates or clients. The Investment Advisor shall have no authority to act for, represent, bind or obligate the Fund or its subsidiaries or the General Partner except as specifically provided herein.

7. Investments. ALL ULTIMATE INVESTMENT DECISIONS WITH RESPECT TO THE FUND AND ITS SUBSIDIARIES SHALL AT ALL TIMES REST SOLELY WITH THE GENERAL PARTNER AND/OR THE OFFICERS/DIRECTORS OF THE APPLICABLE SUBSIDIARY, IT BEING EXPRESSLY UNDERSTOOD THAT THE GENERAL PARTNER AND/OR THE OFFICERS/DIRECTORS OF THE APPLICABLE SUBSIDIARY SHALL BE FREE TO ACCEPT AND OR REJECT ANY OF THE ADVICE RENDERED BY THE INVESTMENT MANAGER HEREUNDER FOR ANY REASON OR FOR NO REASON.

8. Reimbursement by the General Partner. The Investment Advisor may retain, in connection with its responsibilities hereunder, the services of others to assist in the investment advice to be given to the General Partner with respect to the Fund and/or its subsidiaries (any such appointee, a “***Sub-Advisor***”), including, but not limited to, any affiliate of the Investment Advisor, but payment for any such services shall be assumed by the Investment Advisor, and, therefore, neither the General Partner nor the Fund or any of its subsidiaries shall have any liability therefor; *provided, however*, that the Investment Advisor, in its sole discretion, may retain the services of independent third party professionals, including, without limitation, attorneys, accountants and consultants, to advise and assist it in connection with the performance of its activities on behalf of the General Partner with respect to the Fund and/or its subsidiaries hereunder, and the Fund shall bear full responsibility therefor and the expense of any fees and disbursements arising therefrom.

9. Expenses.

(a) The Fund shall pay or reimburse the Investment Advisor and its affiliates for all expenses related to the services hereunder, including, but not limited to, investment-related expenses, brokerage commissions and other transaction costs, expenses related to clearing and settlement charges, professional fees relating to legal, auditing or valuation services, any governmental, regulatory, licensing, filing or registration fees incurred in compliance with the rules of any self-regulatory organization or any federal, state or local laws, research-related expenses (including, without limitation, news and quotation equipment and services, investment and trading-related software, including, without limitation, trade order management software (i.e., software used to route trade orders)), accounting (including accounting software), tax preparation expenses, costs and expenses associated with reporting and providing information to the Fund, any taxes imposed upon the Fund (including, but not limited to, collateralized debt obligations managed by the Investment Advisor or its affiliates), fees relating to valuing the Financial Instruments, and extraordinary expenses. In no event shall any of the foregoing costs or expenses include any salaries, occupational expense or general overhead of the Investment Advisor. For the avoidance of doubt, (i) the cost of all third party expenses incurred in connection with this Agreement shall not exceed standard market rates (which may include standard soft dollar arrangements) and (ii) to the extent any of the foregoing expenses were incurred on behalf of, or benefit of a number of Investment Advisor’s advised accounts, such expenses shall be allocated pro rata among such accounts.

(b) To the extent that expenses to be borne by the Fund are paid by the Investment Advisor or by any Sub-Advisor, the Fund shall reimburse the Investment Advisor (or Sub-Advisors, as applicable) for such expenses so long as such expenses are at market rates.

10. Fees.

(a) The Fund shall pay the Investment Advisor a quarterly fee (the “**Management Fee**”) equal to 2.0% per annum (0.5% per quarter) of the Net Assets (as defined below) of the Fund, payable in advance at and calculated as of the first business day of each calendar quarter. For purposes of calculating the Management Fee, the Net Assets of the Fund will be determined before giving effect to any of the following amounts payable by the Fund generally or in respect of any Investment which are effective as of the date on which such determination is made: (i) any fee payable to the Investment Advisor as of the date on which such determination is made; (ii) any capital withdrawals or distributions payable by the Fund which are effective as of the date on which such determination is made; and (iii) withholding or other taxes, expenses of processing withdrawals and other items payable, any increases or decreases in any reserves, holdback or other amounts specially allocated ending as of the date on which such determination is made. The Management Fee shall be prorated for partial periods and any applicable excess fees should be returned to the Fund by the Investment Advisor. Capital contributions made to the Fund after the commencement of a calendar quarter shall be subject to a prorated Management Fee based on the number of days remaining during such quarter.

(b) Subject to clauses (c) and (d) below, at the end of each Calculation Period (as defined below), an amount equal to 20% of the net capital appreciation of the Fund’s Investments (as defined below) after deducting the Management Fee shall be paid to the Investment Advisor (the “**Performance Fee**”); *provided, however*, that the net capital appreciation upon which the calculation of the Performance is based shall be reduced to the extent of any unrecovered balance remaining in the Loss Recovery Account (as defined below) maintained on the books and records of the Fund. The amount of the unrecovered balance remaining in the Loss Recovery Account at the time of calculating the Performance Fee shall be the amount existing immediately prior to its reduction pursuant to the second clause of the second sentence of clause (c) below.

(c) There shall be established on the books of the Fund a memorandum account (the “**Loss Recovery Account**”), the opening balance of which shall be zero. At the end of each Calculation Period, the balance in the Loss Recovery Account shall be adjusted as follows: first, if there has been, in the aggregate, net capital depreciation of the Fund’s Investments (as adjusted pursuant to the last sentence of this paragraph) since the end of the immediately preceding Calculation Period (or with respect to the initial Calculation Period, since the Effective Date), an amount equal to such net capital depreciation shall be credited to the Loss Recovery Account, and, second, if there has been, in the aggregate, net capital appreciation of the Fund’s investments (as adjusted pursuant to the last sentence of this paragraph) since the end of the immediately preceding Calculation Period, an amount equal to such net capital appreciation, before taking into account any Performance Fee to be paid to the Investment Advisor, shall be debited to and reduce any unrecovered balance in the Loss Recovery Account, but not below zero. Solely for purposes of this paragraph, in determining the Loss Recovery Account, net capital appreciation and net capital

depreciation for any applicable Calculation Period shall be calculated by taking into account the amount of the Management Fee paid for such period.

(d) In the event that all or a portion of the Fund's capital is distributed or withdrawn while there exists an unrecovered balance in the Loss Recovery Account, the unrecovered balance in the Loss Recovery Account shall be reduced as of the beginning of the next Calculation Period by an amount equal to the product obtained by multiplying the balance in such Loss Recovery Account by a fraction, the numerator of which is the amount distributed or withdrawn with respect to the immediately preceding distribution or withdrawal date, and the denominator of which is the total fair value of the Fund's Investment immediately prior to such distribution or withdrawal.

(e) For purposes of this Section 10, the net capital appreciation and net capital depreciation of the Fund's Investments for any given period will be calculation in accordance with the then current valuation policy of the Investment Advisor, a copy of which will be provided upon the General Partner's request. As soon as reasonably practicable following the end of a Calculation Period, the Investment Advisor shall deliver, or cause to be delivered, to the General Partner a statement showing the calculation of the Performance Fee, if any, with respect to such Calculation Period. The Performance Fee, if any, shall be payable within three (3) business days of the General Partner's receipt of such statement.

(f) Payments due to the Investment Advisor shall be made by wire transfer to:

Bank Name: Compass Bank
ABA#: 113010547
FBO: Highland Capital Management, L.P. (Master Operating
Account)
Acct#: 0025876342

(g) For purposes of this Section 10, the following terms have the definitions set forth below:

"Calculation Period" means the period commencing on the Effective Date (in the case of the initial Calculation Period) and thereafter each period commencing as of the day following the last day of the preceding Calculation Period, and ending as of the close of business on the first to occur of the following: (i) the last day of a calendar year; (ii) the distribution or withdrawal of capital of the Fund (but only with respect to such distributed or withdrawn amount); (iii) the permitted transfer of all or any portion of a partner's interest in the Fund; and (iv) the final capital distribution of the Fund following its dissolution;

"Investments" means all investments, securities, cash, receivables, financial instruments, contracts and other assets, whether tangible or intangible, owned by the Fund;

“**Net Assets**” means, with respect to the Fund as of any date, the excess of the total fair value of all Investments over the total liabilities, debts and obligations of the Fund, in each case, calculated on an accrual basis in accordance with accounting principles generally accepted in the United States and the then current valuation policy of the Service Provider, a copy of which will be provided to the General Partner upon request; and

“**Services Agreement**” means that certain Second Amended and Restated Service Agreement, dated effective as of the Effective Date, by and among the Parties, as amended, restated, modified and supplemented from time to time.

11. Exculpation; Indemnification.

(a) Whether or not herein expressly so provided, every provision of this Agreement relating to the conduct or affecting the liability of or affording protection to the Investment Advisor, its members or any of their respective affiliates and their respective partners, members, officers, directors, employees, shareholders and agents (including parties acting as agents for the execution of transactions) (each, a “**Covered Person**” and collectively, “**Covered Persons**”) shall be subject to the provisions of this Section.

(b) To the fullest extent permitted by law, no Covered Person shall be liable to the General Partner or the Fund or any of its subsidiaries or anyone for any reason whatsoever (including but not limited to (i) any act or omission by any Covered Person in connection with the conduct of the business of the General Partner or the Fund, that is determined by such Covered Person in good faith to be in or not opposed to the best interests of the General Partner or the Fund, (ii) any act or omission by any Covered Person based on the suggestions of any professional advisor of the General Partner or the Fund or any of its subsidiaries whom such Covered Person believes is authorized to make such suggestions on behalf of the General Partner or the Fund or any of its subsidiaries, (iii) any act or omission by the General Partner or the Fund or any of its subsidiaries, or (iv) any mistake, negligence, misconduct or bad faith of any broker or other agent of the General Partner or the Fund or any of its subsidiaries selected by Covered Person with reasonable care), unless any act or omission by such Covered Person constitutes willful misconduct or gross negligence by such Covered Person (as determined by a non-appealable judgment of a court of competent jurisdiction).

(c) Covered Persons may consult with legal counsel or accountants selected by such Covered Person and any act or omission by such Covered Person on behalf of the General Partner or the Fund or any of its subsidiaries or in furtherance of the business of the General Partner or the Fund or any of its subsidiaries in good faith in reliance on and in accordance with the advice of such counsel or accountants shall be full justification for the act or omission, and such Covered Person shall be fully protected in so acting or omitting to act if the counsel or accountants were selected with reasonable care.

(d) To the fullest extent permitted by law, the General Partner and the Fund and its subsidiaries shall indemnify and hold harmless Covered Persons (the “**Indemnified**

Party”), from and against any and all claims, liabilities, damages, losses, costs and expenses, including amounts paid in satisfaction of judgments, in compromises and settlements, as fines and penalties and legal or other costs and expenses of investigating or defending against any claim or alleged claim, of any nature whatsoever, known or unknown, liquidated or unliquidated, that are incurred by any Indemnified Party and arise out of or in connection with the business of the General Partner or the Fund or any of its subsidiaries, any investment made under or in connection with this Agreement, or the performance by the Indemnified Party of Covered Person’s responsibilities hereunder and against all taxes, charges, duties or levies incurred by such Covered Person or any Indemnified Party in connection with the General Partner or the Fund or any of its subsidiaries, provided that an Indemnified Party shall not be entitled to indemnification hereunder to the extent the Indemnified Party’s conduct constitutes willful misconduct or gross negligence (as determined by a non-appealable judgment of a court of competent jurisdiction). The termination of any proceeding by settlement, judgment, order or upon a plea of nolo contendere or its equivalent shall not, of itself, create a presumption that the Indemnified Party’s conduct constituted willful misconduct or gross negligence.

(e) Expenses incurred by an Indemnified Party in defense or settlement of any claim that shall be subject to a right of indemnification hereunder, shall be advanced by the General Partner prior to the final disposition thereof upon receipt of an undertaking by or on behalf of the Indemnified Party to repay the amount advanced to the extent that it shall be determined ultimately that the Indemnified Party is not entitled to be indemnified hereunder.

(f) The right of any Indemnified Party to the indemnification provided herein shall be cumulative of, and in addition to, any and all rights to which the Indemnified Party may otherwise be entitled by contract or as a matter of law or equity and shall be extended to the Indemnified Party’s successors, assigns and legal representatives.

(g) The provisions of this Section are expressly intended to confer benefits upon Covered Persons and such provisions shall remain operative and in full force and effect regardless of the expiration or any termination of this Agreement.

(h) In no event shall any Covered Person be liable for special, exemplary, punitive, indirect, or consequential loss, or damage of any kind whatsoever, including without limitation lost profits.

(i) No Covered Person shall be liable hereunder for any settlement of any action or claim effected without its written consent thereto.

(j) Pursuant to the exculpation and indemnification provisions described above, the Investment Advisor and each Indemnified Party will generally not be liable to the General Partner or the Fund for any act or omission (or alleged act or omission), absent bad faith, willful misconduct, fraud or gross negligence, and the General Partner and the Fund will generally be required to indemnify such persons against any Losses they may incur by reason of any act or omission (or alleged act or omission) related to the General Partner, the Fund or its subsidiaries, absent bad faith, willful misconduct, fraud or gross negligence. As a result of these provisions, the General Partner, the Fund and its subsidiaries, as applicable (not the Investment

Advisor or any other Indemnified Party) will be responsible for any Losses resulting from trading errors and similar human errors, absent bad faith, willful misconduct, fraud or gross negligence or the ability to waive or limit such Losses under applicable law. Trading errors might include, for example, keystroke errors that occur when entering trades into an electronic trading system or typographical or drafting errors related to derivatives contracts or similar agreements. Given the volume of transactions executed by the Investment Advisor and its affiliates on behalf of the Fund and/or its subsidiaries, the General Partner acknowledges that trading errors (and similar errors) will occur and that the General Partner will be responsible for any resulting Losses, even if such Losses result from the negligence (but not gross negligence) of the Investment Advisor or its affiliates.

12. Activities of the Investment Advisor and Others. The Investment Advisor, and its affiliates may engage, simultaneously with their investment management activities on behalf of the Fund, in other businesses, and may render services similar to those described in this Agreement to other individuals, companies, trusts or persons, and shall not by reason of such engaging in other businesses or rendering of services for others be deemed to be acting in conflict with the interests of the Fund. Notwithstanding the foregoing, the Investment Advisor and its affiliates shall devote as much time to provide advisory service to the General Partner with respect to the management of the Fund's assets as the Investment Advisor deems necessary and appropriate. In addition, the Investment Advisor or any of its affiliates, in their individual capacities, may engage in securities transactions which may be different than, and contrary to, the investment advice provided by the Investment Advisor to the General Partner with respect to the Fund. The Investment Advisor may give advice and recommend securities to, or buy securities for, accounts and other clients, which advice or securities may differ from advice given to, or securities recommended or bought for, the Fund, even though their investment objectives may be the same or similar. The Investment Advisor may recommend transactions in securities and other assets in which the Investment Advisor has an interest, including securities or other assets issued by affiliates of the Investment Manager. Each of the General Partner and the Fund acknowledges that it has received, reviewed and had an opportunity with respect to (a) a copy of Part 2 of the Investment Advisor's Form ADV, and (b) the supplemental disclosures attached hereto as Exhibit A, each of which further describes conflicts of interest relating to the Investment Advisor, its affiliates and their respective advised accounts.

13. Term. This Agreement shall remain in effect through an initial term concluding December 31, 2017 and shall be automatically extended for additional one-year terms thereafter, except that it may be terminated by the Investment Advisor, on the one hand, or by the General Partner and the Fund, on the other hand, upon at least 90 days' prior written notice to the General Partner or the Investment Advisor, as the case may be, prior to General Partner's fiscal year-end.

14. Miscellaneous.

(a) Notices. Any notice, consent or other communication made or given in connection with this Agreement shall be in writing and shall be deemed to have been duly given when delivered by hand or facsimile or five days after mailed by certified mail, return receipt requested, as follows:

If to the Investment Advisor, to:

Highland Capital Management, L.P.
300 Crescent Court, Suite 700
Dallas, Texas 75201
Telephone Number: (972) 628-4100
Facsimile Number: (972) 628-4147

If to the General Partner or the Fund, to:

Charitable DAF GP, LLC
4140 Park Lake Avenue, Suite 600
Raleigh, North Carolina 27612
Attention: Grant Scott
Telephone Number: (919) 854-1407
Facsimile Number: (919) 854-1401

(b) Entire Agreement. This Agreement contains all of the terms agreed upon or made by the parties relating to the subject matter of this Agreement, and supersedes all prior and contemporaneous agreements, negotiations, correspondence, undertakings and communications of the parties, oral or written, respecting such subject matter.

(c) Amendments and Waivers. No provision of this Agreement may be amended, modified, waived or discharged except as agreed to in writing by the parties. No amendment to this Agreement may be made without first obtaining the required approval from the Fund. The failure of a party to insist upon strict adherence to any term of this Agreement on any occasion shall not be considered a waiver thereof or deprive that party of the right thereafter to insist upon strict adherence to that term or any other term of this Agreement.

(d) Binding Effect; Assignment. This Agreement shall be binding upon and inure to the benefit of the General Partner, the Fund, the Investment Advisor, each Indemnified Party and their respective successors and permitted assigns. Any person that is not a signatory to this Agreement but is nevertheless conferred any rights or benefits hereunder (*e.g.*, officers, partners and personnel of the Investment Advisor and others who are entitled to indemnification hereunder) shall be entitled to such rights and benefits as if such person were a signatory hereto, and the rights and benefits of such person hereunder may not be impaired without such person's express written consent. No party to this Agreement may assign (as such term is defined under the U.S. Investment Advisers Act of 1940, as amended) all or any portion of its rights, obligations or liabilities under this Agreement without the prior written consent of the other parties to this Agreement; provided; however, that the Investment Advisor may assign all or any portion of its rights, obligations and liabilities hereunder to any of its affiliates at its discretion.

(e) Governing Law. Notwithstanding the place where this Agreement may be executed by any of the parties thereto, the parties expressly agree that all terms and provisions hereof shall be governed by and construed in accordance with the laws of the State of Texas applicable to agreements made and to be performed in that State.

(f) Jurisdiction; Venue; Waiver of Jury Trial. The Parties hereby agree that any action, claim, litigation, or proceeding of any kind whatsoever against any other Party in any way arising from or relating to this Agreement and all contemplated transactions, including claims sounding in contract, equity, tort, fraud and statute (“**Dispute**”) shall be submitted exclusively to the U.S. District Court for the Northern District of Texas or, if such court does not have subject matter jurisdiction, the courts of the State of Texas sitting in Dallas County, and any appellate court thereof (“**Enforcement Court**”). Each Party irrevocably and unconditionally submits to the exclusive personal and subject matter jurisdiction of the Enforcement Court for any Dispute and agrees to bring any Dispute only in the Enforcement Court. Each Party further agrees it shall not commence any Dispute in any forum, including administrative, arbitration, or litigation, other than the Enforcement Court. Each Party agrees that a final judgment in any such action, litigation, or proceeding is conclusive and may be enforced in other jurisdictions by suit on the judgment or in any other manner provided by law.

EACH PARTY IRREVOCABLY AND UNCONDITIONALLY WAIVES, TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW, ANY RIGHT IT MAY HAVE TO A TRIAL BY JURY IN ANY LEGAL ACTION, PROCEEDING, CAUSE OF ACTION OR COUNTERCLAIM ARISING OUT OF OR RELATING TO THIS AGREEMENT, INCLUDING ANY EXHIBITS, SCHEDULES, AND APPENDICES ATTACHED TO THIS AGREEMENT, OR THE TRANSACTIONS CONTEMPLATED HEREBY. EACH PARTY CERTIFIES AND ACKNOWLEDGES THAT (A) NO REPRESENTATIVE OF THE OTHER PARTY HAS REPRESENTED, EXPRESSLY OR OTHERWISE, THAT THE OTHER PARTY WOULD NOT SEEK TO ENFORCE THE FOREGOING WAIVER IN THE EVENT OF A LEGAL ACTION, (B) IT HAS CONSIDERED THE IMPLICATIONS OF THIS WAIVER, (C) IT MAKES THIS WAIVER KNOWINGLY AND VOLUNTARILY, AND (D) IT HAS BEEN INDUCED TO ENTER INTO THIS AGREEMENT BY, AMONG OTHER THINGS, THE MUTUAL WAIVERS AND CERTIFICATIONS IN THIS SECTION.

Nothing in this Section 14(f) shall be construed to limit either party’s right to obtain equitable or injunctive relief in a court of competent jurisdiction in appropriate circumstances.

(g) Headings. The headings contained in this Agreement are intended solely for convenience and shall not affect the rights of the parties to this Agreement.

(h) Counterparts. This Agreement may be signed in any number of counterparts with the same effect as if the signatures to each counterpart were upon a single instrument, and all such counterparts together shall be deemed an original of this Agreement.

(i) Survival. The provisions of Sections 8, 9, 10, 11 and 14 hereof shall survive the termination of this Agreement.

(j) Pronouns. All pronouns shall be deemed to refer to the masculine, feminine, neuter, singular or plural as the identity of the person or persons’ firm or company may require in the context thereof.

(k) Arm's-Length Agreement. The General Partner and the Fund have approved this Agreement and reviewed the activities described in Section 12 and in the Investment Advisor's Form ADV and the risks related thereto.

[Signature Page to Follow]

IN WITNESS WHEREOF the parties hereto have caused this Agreement to be executed
to be effective from the date first written above.

HIGHLAND CAPITAL MANAGEMENT, L.P.

By: Strand Advisors, Inc., its general partner

By: _____

Name: James Dondero

Title: President

Date: 6/21/17

CHARITABLE DAF GP, LLC

By: _____

Name: Grant J. Scott

Title: Managing Member

Date:

CHARITABLE DAF FUND, L.P.

By: Charitable DAF GP, LLC, its general
partner

By: _____

Name: Grant J. Scott

Title: Managing Member

Date:

IN WITNESS WHEREOF the parties hereto have caused this Agreement to be executed
to be effective from the date first written above.

HIGHLAND CAPITAL MANAGEMENT, L.P.

By: Strand Advisors, Inc., its general partner

By: _____

Name: James Dondero

Title: President

Date:

CHARITABLE DAF GP, LLC

By: _____

Name: Grant J. Scott

Title: Managing Member

Date: 6/21/2017

CHARITABLE DAF FUND, L.P.

By: Charitable DAF GP, LLC, its general
partner

By: _____

Name: Grant J. Scott

Title: Managing Member

Date: 6/21/2017

EXHIBIT A

Supplemental Disclosures

Potential Conflicts of Interest

The scope of the activities of Highland Capital Management, L.P. (the “**Investment Adviser**”), its affiliates, and the funds and clients managed or advised by the Investment Adviser or any of its affiliates may give rise to conflicts of interest or other restrictions and/or limitations imposed on Charitable DAF Fund, L.P. and its subsidiaries (collectively, the “**Fund**”) in the future that cannot be foreseen or mitigated at this time. The following briefly summarizes some of these conflicts, but is not intended to be an exhaustive list of all such conflicts. Additional conflicts are described in the Investment Adviser’s Form ADV. You are urged to review the Investment Adviser’s Form ADV in its entirety prior to investing in the Fund.¹

Highland Group & Highland Accounts. None of the Investment Adviser, its affiliates and their respective officers, directors, shareholders, members, partners, personnel and employees (collectively, the “**Highland Group**”) is precluded from engaging in or owning an interest in other business ventures or investment activities of any kind, whether or not such ventures are competitive with the Fund. The Investment Adviser is permitted to manage other client accounts, and does manage other client accounts, some of which may have objectives similar or identical to those of the Fund, including other collective investment vehicles that may be managed by the Highland Group and in which the Investment Adviser or any of its affiliates may have an equity interest.

The Fund will be subject to a number of actual and potential conflicts of interest involving the Highland Group including, among other things, the fact that: (i) the Highland Group conducts substantial investment activities for accounts, funds, collateralized debt obligations and collateralized loan obligations that invest in leveraged loans (collectively, “**CDOs**”) and other vehicles managed by members of the Highland Group (collectively, “**Highland Accounts**”) in which the Fund has no interest; (ii) the Highland Group advises Highland Accounts, which utilize the same, similar or different methodologies as the Fund and may have financial incentives (including, without limitation, as it relates to the composition of investors in such funds and accounts or to the Highland Group’s compensation arrangements) to favor certain Highland Accounts over the Fund; (iii) the Highland Group may use the strategy described herein in certain Highland Accounts; (iv) the Investment Adviser may give advice and recommend securities to, or buy or sell securities for, the Fund, which advice or securities may differ from advice given to, or securities recommended or bought or sold for, Highland Accounts; (v) the Investment Adviser has the discretion, to the extent permitted under applicable law, to use its affiliates as service providers to the Fund and its portfolio investments; (vi) certain investors affiliated with the Highland Group may choose to personally invest only in certain funds advised by the Highland Group and the amounts invested by them in such funds is expected to vary significantly; (vii) the Highland Group and Highland Accounts may actively engage in transactions in the same securities sought by the

¹ The Investment Adviser’s latest Form ADV filed and Part 2 Brochures can be accessed here: https://adviserinfo.sec.gov/IAPD/IAPDFirmSummary.aspx?ORG_PK=110126

Fund and, therefore, may compete with the Fund for investment opportunities or may hold positions opposite to positions maintained by the Fund; (viii) the Fund may invest in CDOs and Highland Accounts managed by members of the Highland Group; and (ix) the Investment Adviser will devote to the Fund only as much time as the Investment Adviser deems necessary and appropriate to manage the Fund's business.

The Investment Adviser undertakes to resolve conflicts in a fair and equitable basis, which in some instances may mean a resolution that would not maximize the benefit to the Fund's investors.

Allocation of Trading Opportunities. It is the policy of the Investment Adviser to allocate investment opportunities fairly and equitably over time. This means that such opportunities will be allocated among those accounts for which participation in the respective opportunity is considered appropriate, taking into account, among other considerations: (i) fiduciary duties owed to the accounts; (ii) the primary mandate of the accounts; (iii) the capital available to the accounts; (iv) any restrictions on the accounts and the investment opportunity; (v) the sourcing of the investment, size of the investment and amount of follow-on available related to the investment; (vi) whether the risk-return profile of the proposed investment is consistent with the account's objectives and program, whether such objectives are considered in light of the specific investment under consideration or in the context of the portfolio's overall holdings; (vii) the potential for the proposed investment to create an imbalance in the account's portfolio (taking into account expected inflows and outflows of capital); (viii) liquidity requirements of the account; (ix) potentially adverse tax consequences; (x) regulatory and other restrictions that would or could limit an account's ability to participate in a proposed investment; and (xi) the need to re-size risk in the account's portfolio.

The Investment Adviser has the authority to allocate trades to multiple Highland Accounts on an average price basis or on another basis it deems fair and equitable. Similarly, if an order for any accounts cannot be fully allocated under prevailing market conditions, the Investment Adviser may allocate the trades among different accounts on a basis it considers fair and equitable over time. One or more of the foregoing considerations may (and are often expected to) result in allocations among the Fund and one or more Highland Accounts on other than a *pari passu* basis. The Investment Adviser will allocate investment opportunities across its accounts for which the opportunities are appropriate, consistent with (i) its internal conflict of interest and allocation policies and (ii) the requirements of the U.S. Investment Advisers Act of 1940, as amended. The Investment Adviser will seek to allocate investment opportunities among such entities in a manner that is fair and equitable over time and consistent with its allocation policy. However, there is no assurance that such investment opportunities will be allocated to the Fund fairly or equitably in the short-term or over time and there can be no assurance that the Fund will be able to participate in all investment opportunities that are suitable for it.

The Investment Adviser and/or its affiliates may open "average price" accounts with brokers. In an "average price" account, purchase and sale orders placed during a trading day for the Fund, the Highland Accounts or affiliates of the Investment Adviser are combined, and securities bought and sold pursuant to such orders are allocated among such accounts on an average price basis.

Highland Group Trading. As part of their regular business, the members of the Highland Group hold, purchase, sell, trade or take other related actions both for their respective accounts and for the accounts of their respective clients, on a principal or agency basis, with respect to loans, securities and other investments and financial instruments of all types. The members of the Highland Group also provide investment advisory services, among other services, and engage in private equity, real estate and capital markets oriented investment activities. The members of the Highland Group will not be restricted in their performance of any such services or in the types of debt or equity investments which they may make. The members of the Highland Group may have economic interests in or other relationships with obligors or issuers in whose obligations or securities or credit exposures the Fund may invest. In particular, such persons may make and/or hold an investment in an obligor's or issuer's securities that may be *pari passu*, senior or junior in ranking to an investment in such obligor's or issuer's securities made and/or held by the Fund or in which partners, security holders, members, officers, directors, agents, personnel or employees of such persons serve on boards of directors or otherwise have ongoing relationships. Each of such ownership and other relationships may result in securities laws restrictions on transactions in such securities by the Fund and otherwise create conflicts of interest for the Fund. In such instances, the members of the Highland Group may in their discretion make investment recommendations and decisions that may be the same as or different from those made with respect to the Fund's investments. In connection with any such activities described above, the members of the Highland Group may hold, purchase, sell, trade or take other related actions in securities or investments of a type that may be suitable to investments for the Fund. The members of the Highland Group will not be required to offer such securities or investments to the Fund or provide notice of such activities to the Fund. In addition, in managing the Fund's portfolio, the Investment Adviser may take into account its relationship or the relationships of its affiliates with obligors and their respective affiliates, which may create conflicts of interest. Furthermore, in connection with actions taken in the ordinary course of business of the Investment Adviser in accordance with its fiduciary duties to its other clients, the Investment Adviser may take, or be required to take, actions which adversely affect the interests of the Fund.

The Highland Group has invested and may continue to invest in investments that would also be appropriate for the Fund. Such investments may be different from those made by the Fund. The Highland Group does not have any duty, in making or maintaining such investments, to act in a way that is favorable to the Fund or to offer any such opportunity to the Fund, subject to the Investment Adviser's internal allocation policy. The investment policies, fee arrangements and other circumstances applicable to such other accounts and investments may vary from those applicable to the Fund and its investments. The Highland Group may also provide advisory or other services for a customary fee with respect to investments made or held by the Fund, and neither the Fund nor its investors shall have any right to such fees. The Highland Group may also have ongoing relationships with, render services to or engage in transactions with other clients who make investments of a similar nature to those of the Fund, and with companies whose securities or properties are acquired by the Fund.

As further described below, in connection with the foregoing activities the Highland Group may from time to time come into possession of material nonpublic information that limits the ability of the Investment Adviser to effect a transaction for the Fund, and the Fund's investments may be constrained as a consequence of the Investment Adviser's inability to use such information for

advisory purposes or otherwise to effect transactions that otherwise may have been initiated on behalf of its clients, including the Fund.

Although the professional staff of the Investment Adviser will devote as much time to the Fund as the Investment Adviser deems appropriate to perform its duties in accordance with the Fund's advisory agreement and in accordance with reasonable commercial standards, the staff may have conflicts in allocating its time and services among the Fund and the Investment Adviser's other accounts.

Various Activities of the Investment Adviser and its Affiliates. The directors, officers, personnel, employees and agents of the Investment Adviser and its affiliates may, subject to applicable law, serve as directors (whether supervisory or managing), officers, personnel, employees, partners, agents, nominees or signatories or provide banking, agency, insurance and/or other services, and receive arm's length fees in connection with such services, for the Fund or its investments or other entities that operate in the same or a related line of business as the, for other clients managed by the Investment Adviser or its affiliates, or for any obligor or issuer in respect of the CDOs, and the Fund shall have no right to any such fees. In serving in these multiple capacities, they may have obligations to such other clients or investors in those entities, the fulfillment of which may not be in the best interests of the Fund. The Fund may compete with other Highland Accounts for capital and investment opportunities.

There is no limitation or restriction on the Investment Adviser or any of its affiliates with regard to acting as investment adviser or collateral manager (or in a similar role) to other parties or persons. This and other future activities of the Investment Adviser and/or its affiliates may give rise to additional conflicts of interest. Such conflicts may relate to obligations that the Investment Adviser's investment committee, the Investment Adviser or its affiliates have to other clients.

The Investment Adviser and its affiliates may participate in creditors or other committees with respect to the bankruptcy, restructuring or workout of an investment of the Fund or another account. In such circumstances, the Investment Adviser or its affiliates may take positions on behalf of themselves or another account that are adverse to the interests of the Fund.

The Investment Adviser and/or its affiliates may act as an underwriter, arranger or placement agent, or otherwise participate in the origination, structuring, negotiation, syndication or offering of CDOs, Highland Accounts and other investments purchased by the Fund. Such transactions shall be subject to fees that are intended to be no greater than arm's-length fees, and the Fund shall have no right to any such fees. There is no expectation for preferential access to transactions involving CDOs and Highland Accounts that are underwritten, originated, arranged or placed by the Investment Adviser and/or its affiliates and the Fund shall not have any right to any such fees.

Investments in Highland Accounts Managed by the Investment Manager or its Affiliates. The Fund may invest a significant portion of its capital in Highland Accounts. The Investment Adviser or its affiliates will receive senior and subordinated management fees and, in some cases, a performance-based allocation or fee with respect to its role as general partner and/or manager of the Highland Accounts. If the Fund invests in Highland Accounts in secondary transactions, the Fund will indirectly pay the fees (senior and subordinated) of such Highland Accounts and any

carried interest. If the Fund provides all of the equity for a Highland Account, there may be no third party with whom the amount of such fees, expenses and carried interest can be negotiated on an arm's-length basis. The Investment Adviser or its affiliates will have conflicting division of loyalties and responsibilities regarding the Fund and a Highland Account, and certain other conflicts of interest would be inherent in the situation. There can be no assurance that the interests of the Fund would not be subordinated to those of a Highland Account or to other interests of the Investment Adviser.

Multiple Levels of Fees. The Investment Adviser and the Highland Accounts are expected to impose management fees, other administrative fees, carried interest and other performance allocations on realized and unrealized appreciation in the value of the assets managed and other income. This may result in greater expense than if investors in the Fund were able to invest directly in the Highland Accounts or their respective underlying investments. Investors in the Fund should take into account that the return on their investment will be reduced to the extent of both levels of fees. The general partner or manager of a Highland Account may receive the economic benefit of certain fees from its portfolio companies for services and in connection with unconsummated transactions (e.g., break-up, placement, monitoring, directors', organizational and set-up fees and financial advisory fees).

Cross Transactions and Principal Transactions. The Investment Adviser may effect client cross-transactions where the Investment Adviser causes a transaction to be effected between the Fund and another client advised by it or any of its affiliates. The Investment Adviser may engage in a client cross-transaction involving the Fund any time that the Investment Adviser believes such transaction to be fair to the Fund and such other client.

The Investment Adviser may effect principal transactions where the Fund acquires securities from or sells securities to the Investment Adviser and/or its affiliates, in each case in accordance with applicable law, which will include the Investment Adviser obtaining independent consent on behalf of the Fund prior to engaging in any such principal transaction between the Fund and the Investment Adviser or its affiliates.

The Investment Adviser may advise the Fund to acquire or dispose of securities in cross trades between the Fund and other clients of the Investment Adviser or its affiliates in accordance with applicable legal and regulatory requirements. In addition, the Fund may invest in securities of obligors or issuers in which the Investment Adviser and/or its affiliates have a debt, equity or participation interest, and the holding and sale of such investments by the Fund may enhance the profitability of the Investment Adviser's own investments in such companies. Moreover, the Fund may invest in assets originated by the Investment Adviser or its affiliates. In each such case, the Investment Adviser and such affiliates may have a potentially conflicting division of loyalties and responsibilities regarding the Fund and the other parties to such trade. Under certain circumstances, the Investment Adviser and its affiliates may determine that it is appropriate to avoid such conflicts by selling a security at a fair value that has been calculated pursuant to the Investment Adviser's valuation procedures to another client managed or advised by the Investment Adviser or such affiliates. In addition, the Investment Adviser may enter into agency cross-transactions where it or any of its affiliates acts as broker for the Fund and for the other party to the transaction, to the extent permitted under applicable law. The Investment Adviser may obtain independent consent

in writing on behalf of the Fund, which consent may be provided by the managing member of the General Partner or any other independent party on behalf of the Fund, if any such transaction requires the consent of the Fund under Section 206(3) of the U.S. Investment Advisers Act of 1940, as amended.

Material Non-Public Information. There are generally no ethical screens or information barriers among the Investment Adviser and certain of its affiliates of the type that many firms implement to separate persons who make investment decisions from others who might possess material, non-public information that could influence such decisions. If the Investment Adviser, any of its personnel or its affiliates were to receive material non-public information about a particular obligor or issuer, or have an interest in causing the Fund to acquire a particular security, the Investment Adviser may be prevented from advising the Fund to purchase or sell such asset due to internal restrictions imposed on the Investment Adviser. Notwithstanding the maintenance of certain internal controls relating to the management of material nonpublic information, it is possible that such controls could fail and result in the Investment Adviser, or one of its investment professionals, buying or selling an asset while, at least constructively, in possession of material non-public information. Inadvertent trading on material nonpublic information could have adverse effects on the Investment Adviser's reputation, result in the imposition of regulatory or financial sanctions, and as a consequence, negatively impact the Investment Adviser's ability to perform its portfolio management services to the Fund. In addition, while the Investment Adviser and certain of its affiliates currently operate without information barriers on an integrated basis, such entities could be required by certain regulations, or decide that it is advisable, to establish information barriers. In such event, the Investment Adviser's ability to operate as an integrated platform could also be impaired, which would limit the Investment Adviser's access to personnel of its affiliates and potentially impair its ability to manage the Fund's investments.

Conflicts Relating to Equity and Debt Ownership by the Fund and Affiliates. In certain circumstances, the Fund and other client accounts may invest in securities or other instruments of the same issuer (or affiliated group of issuers) having a different seniority in the issuer's capital structure. If the issuer becomes insolvent, restructures or suffers financial distress, there may be a conflict between the interests in the Fund and those other accounts insofar as the issuer may be unable (or in the case of a restructuring prior to bankruptcy may be expected to be unable) to satisfy the claims of all classes of its creditors and security holders and the Fund and such other accounts may have competing claims for the remaining assets of such issuers. Under these circumstances it may not be feasible for the Investment Adviser to reconcile the conflicting interests in the Fund and such other accounts in a way that protects the Fund's interests. Additionally, the Investment Adviser or its nominees may in the future hold board or creditors' committee memberships which may require them to vote or take other actions in such capacities that might be conflicting with respect to certain funds managed by the Investment Adviser in that such votes or actions may favor the interests of one account over another account. Furthermore, the Investment Adviser's fiduciary responsibilities in these capacities might conflict with the best interests of the investors.

Other Fees. The Investment Adviser and its affiliates are permitted to receive consulting fees, investment banking fees, advisory fees, breakup fees, director's fees, closing fees, transaction fees and similar fees in connection with actual or contemplated investments. Such fees will not reduce

or offset the Management Fee. Conflicts of interest may also arise due to the allocation of such fees to or among co-investors.

Soft Dollars. The Investment Adviser's authority to use "soft dollar" credits generated by the Fund's securities transactions to pay for expenses that might otherwise have been borne by the Investment Adviser may give the Investment Adviser an incentive to select brokers or dealers for transactions, or to negotiate commission rates or other execution terms, in a manner that takes into account the soft dollar benefits received by the Investment Adviser rather than giving exclusive consideration to the interests of the Fund.

EXHIBIT 4

004921

Conformed to Federal Register version

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 276

[Release No. IA-5248; File No. S7-07-18]

RIN: 3235-AM36

Commission Interpretation Regarding Standard of Conduct for Investment Advisers

AGENCY: Securities and Exchange Commission.

ACTION: Interpretation.

SUMMARY: The Securities and Exchange Commission (the “SEC” or the “Commission”) is publishing an interpretation of the standard of conduct for investment advisers under the Investment Advisers Act of 1940 (the “Advisers Act” or the “Act”).

DATES: Effective July 12, 2019.

FOR FURTHER INFORMATION CONTACT: Olawalé Oriola, Senior Counsel; Matthew Cook, Senior Counsel; or Jennifer Songer, Branch Chief, at (202) 551-6787 or *IArules@sec.gov*, Investment Adviser Regulation Office, Division of Investment Management, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-8549.

SUPPLEMENTARY INFORMATION: The Commission is publishing an interpretation of the standard of conduct for investment advisers under the Advisers Act [15 U.S.C. 80b].¹

¹ 15 U.S.C. 80b. Unless otherwise noted, when we refer to the Advisers Act, or any paragraph of the Advisers Act, we are referring to 15 U.S.C. 80b of the United States Code, at which the Advisers Act is codified, and when we refer to rules under the Advisers Act, or any paragraph of these rules, we are referring to title 17, part 275 of the Code of Federal Regulations [17 CFR 275], in which these rules are published.

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I. INTRODUCTION

Under federal law, an investment adviser is a fiduciary.² The fiduciary duty an investment adviser owes to its client under the Advisers Act, which comprises a duty of care and a duty of loyalty, is important to the Commission's investor protection efforts. Also important to the Commission's investor protection efforts is the standard of conduct that a broker-dealer owes to a retail customer when it makes a recommendation of any securities transaction or investment strategy involving securities.³ Both investment advisers and broker-dealers play an important

² *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 194 (1963) ("SEC v. Capital Gains"); *see also infra* footnotes 34–44 and accompanying text; Investment Adviser Codes of Ethics, Investment Advisers Act Release No. 2256 (July 2, 2004); Compliance Programs of Investment Companies and Investment Advisers, Investment Advisers Act Release No. 2204 (Dec. 17, 2003); Electronic Filing by Investment Advisers; Proposed Amendments to Form ADV, Investment Advisers Act Release No. 1862 (Apr. 5, 2000). Investment advisers also have antifraud liability with respect to prospective clients under section 206 of the Advisers Act.

³ *See* Regulation Best Interest, Exchange Act Release No. 34-86031 (June 5, 2019) ("Reg. BI Adoption"). This final interpretation regarding the standard of conduct for investment advisers under the Advisers Act ("Final Interpretation") interprets section 206 of the Advisers Act, which is applicable to both SEC- and

role in our capital markets and our economy more broadly. Investment advisers and broker-dealers have different types of relationships with investors, offer different services, and have different compensation models. This variety is important because it presents investors with choices regarding the types of relationships they can have, the services they can receive, and how they can pay for those services.

On April 18, 2018, the Commission proposed rules and forms intended to enhance the required standard of conduct for broker-dealers⁴ and provide retail investors with clear and succinct information regarding the key aspects of their brokerage and advisory relationships.⁵ In connection with the publication of these proposals, the Commission published for comment a separate proposed interpretation regarding the standard of conduct for investment advisers under the Advisers Act (“Proposed Interpretation”).⁶ We stated in the Proposed Interpretation, and we continue to believe, that it is appropriate and beneficial to address in one release and reaffirm—and in some cases clarify—certain aspects of the fiduciary duty that an investment adviser owes

state-registered investment advisers, as well as other investment advisers that are exempt from registration or subject to a prohibition on registration under the Advisers Act. This Final Interpretation is intended to highlight the principles relevant to an adviser’s fiduciary duty. It is not, however, intended to be the exclusive resource for understanding these principles. Separately, in various circumstances, case law, statutes (such as the Employee Retirement Income Security Act of 1974 (“ERISA”)), and state law impose obligations on investment advisers. In some cases, these standards may differ from the standard enforced by the Commission.

⁴ Regulation Best Interest, Exchange Act Release No. 83062 (Apr. 18, 2018) (“Reg. BI Proposal”).

⁵ Form CRS Relationship Summary; Amendments to Form ADV; Required Disclosures in Retail Communications and Restrictions on the use of Certain Names or Titles, Investment Advisers Act Release No. 4888 (Apr. 18, 2018) (“Relationship Summary Proposal”).

⁶ Proposed Commission Interpretation Regarding Standard of Conduct for Investment Advisers; Request for Comment on Enhancing Investment Adviser Regulation, Investment Advisers Act Release No. 4889 (Apr. 18, 2018).

to its clients under section 206 of the Advisers Act.⁷ After considering the comments received, we are publishing this Final Interpretation with some clarifications to address comments.⁸

A. Overview of Comments

We received over 150 comment letters on our Proposed Interpretation from individuals, investment advisers, trade or professional organizations, law firms, consumer advocacy groups, and bar associations.⁹ Although many commenters generally agreed that the Proposed Interpretation was useful,¹⁰ some noted the challenges inherent in a Commission interpretation covering the broad scope of the fiduciary duty that an investment adviser owes to its clients under the Advisers Act.¹¹ Some of these commenters suggested modifications to or withdrawal

⁷ Further, the Commission recognizes that many advisers provide impersonal investment advice. *See, e.g.*, Advisers Act rule 203A-3 (defining “impersonal investment advice” in the context of defining “investment adviser representative” as “investment advisory services provided by means of written material or oral statements that do not purport to meet the objectives or needs of specific individuals or accounts”). This Final Interpretation does not address the extent to which the Advisers Act applies to different types of impersonal investment advice.

⁸ In the Proposed Interpretation, the Commission also requested comment on: licensing and continuing education requirements for personnel of SEC-registered investment advisers; delivery of account statements to clients with investment advisory accounts; and financial responsibility requirements for SEC-registered investment advisers, including fidelity bonds. We are continuing to evaluate the comments received in response.

⁹ Comment letters submitted in File No. S7-09-18 are available on the Commission’s website at <https://www.sec.gov/comments/s7-09-18/s70918.htm>. We also considered those comments submitted in File No. S7-08-18 (Comments on Relationship Summary Proposal) and File No. S7-07-18 (Comments on Reg. BI Proposal). Those comments are available on the Commission’s website at <https://www.sec.gov/comments/s7-08-18/s70818.htm> and <https://www.sec.gov/comments/s7-07-18/s70718.htm>.

¹⁰ *See, e.g.*, Comment Letter of North American Securities Administrators Association (Aug. 23, 2018) (“NASAA Letter”) (stating that the Proposed Interpretation is a “useful resource”); Comment Letter of Invesco (Aug. 7, 2018) (“Invesco Letter”) (agreeing that “there are benefits to having a clear statement regarding the fiduciary duty that applies to an investment adviser”).

¹¹ *See, e.g.*, Comment Letter of Pickard Djinis and Pisarri LLP (Aug. 7, 2018) (“Pickard Letter”) (noting the Commission’s “efforts to synthesize case law, legislative history, academic literature, prior Commission releases and other sources to produce a comprehensive explanation of the fiduciary standard of conduct”); Comment Letter of Dechert LLP (Aug. 7, 2018) (“Dechert Letter”) (“It is crucial that any universal interpretation of an adviser’s fiduciary duty be based on sound and time-tested principles. Given the difficulty of defining and encompassing all of an adviser’s responsibilities to its clients, while also accommodating the diversity of advisory arrangements, interpretive issues will arise in the future.”); Comment Letter of the Hedge Funds Subcommittee of the Federal Regulation of Securities Committee of the Business Law Section of the American Bar Association (Aug. 24, 2018) (“ABA Letter”) (“We note at

of the Proposed Interpretation.¹² Although most commenters agreed that an investment adviser's fiduciary duty comprises a duty of care and a duty of loyalty, as described in the Proposed Interpretation, they had differing views on aspects of the fiduciary duty and in some cases sought clarification on its application.¹³

Some commenters requested that we adopt rule text instead.¹⁴ The relationship between an investment adviser and its client has long been based on fiduciary principles not generally set forth in specific statute or rule text. We believe that this principles-based approach should continue as it expresses broadly the standard to which investment advisers are held while allowing them flexibility to meet that standard in the context of their specific services. In our view, adopting rule text is not necessary to achieve our goal in this Final Interpretation of reaffirming and in some cases clarifying certain aspects of the fiduciary duty.

the outset that it is difficult to capture the nature of an investment adviser's fiduciary duty in a broad statement that has universal applicability.”).

¹² See, e.g., Comment Letter of L.A. Schnase (Jul. 30, 2018) (urging the Commission not to issue the Proposed Interpretation in final form, or at least not without substantial rewriting or reshaping); Comment Letter of Money Management Institute (Aug. 7, 2018) (“MMI Letter”) (urging the Commission to “revise the interpretation so that it reflects the common law principles in which an investment adviser's fiduciary duty is grounded”); Dechert Letter (recommending that we withdraw the Proposed Interpretation and instead rely on existing authority and sources of law, as well as existing Commission practices for providing interpretive guidance, in order to define the source and scope of an investment adviser's fiduciary duty).

¹³ See, e.g., Comment Letter of Cambridge Investment Research Inc. (Aug. 7, 2018) (“Cambridge Letter”) (stating that “greater clarity on all aspects of an investment adviser's fiduciary duty will improve the ability to craft such policies and procedures, as well as support the elimination of confusion for retail clients and investment professionals”); Comment Letter of Institutional Limited Partners Association (Aug. 6, 2018) (“ILPA Letter 1”) (“Interpretation will provide more certainty regarding the fiduciary duties owed by private fund advisers to their clients.”); Comment Letter of New York City Bar Association (Jun. 26, 2018) (“NY City Bar Letter”) (stating that the uniform interpretation of an investment adviser's fiduciary duty is necessary).

¹⁴ Some commenters suggested that we codify the Proposed Interpretation. See, e.g., Comment Letter of Roy Tanga (Apr. 25, 2018); Comment Letter of Financial Engines (Aug. 6, 2018) (“Financial Engines Letter”); ILPA Letter 1; Comment Letter of AARP (Aug. 7, 2018) (“AARP Letter”); Comment Letter of Gordon Donohue (Aug. 6, 2018); Comment Letter of Financial Planning Coalition (Aug. 7, 2018) (“FPC Letter”).

II. INVESTMENT ADVISERS' FIDUCIARY DUTY

The Advisers Act establishes a federal fiduciary duty for investment advisers.¹⁵ This fiduciary duty is based on equitable common law principles and is fundamental to advisers' relationships with their clients under the Advisers Act.¹⁶ The investment adviser's fiduciary duty is broad and applies to the entire adviser-client relationship.¹⁷ The fiduciary duty to which advisers are subject is not specifically defined in the Advisers Act or in Commission rules, but reflects a Congressional recognition "of the delicate fiduciary nature of an investment advisory relationship" as well as a Congressional intent to "eliminate, or at least to expose, all conflicts of interest which might incline an investment adviser—consciously or unconsciously—to render advice which was not disinterested."¹⁸ An adviser's fiduciary duty is imposed under the

¹⁵ *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 17 (1979) ("Transamerica Mortgage v. Lewis") ("§ 206 establishes federal fiduciary standards to govern the conduct of investment advisers.") (quotation marks omitted); *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462, 471, n.11 (1977) (in discussing SEC v. Capital Gains, stating that the Supreme Court's reference to fraud in the "equitable" sense of the term was "premised on its recognition that Congress intended the Investment Advisers Act to establish federal fiduciary standards for investment advisers"); SEC v. Capital Gains, *supra* footnote 2; Amendments to Form ADV, Investment Advisers Act Release No. 3060 (July 28, 2010) ("Investment Advisers Act Release 3060") ("Under the Advisers Act, an adviser is a fiduciary whose duty is to serve the best interests of its clients, which includes an obligation not to subrogate clients' interests to its own," citing Proxy Voting by Investment Advisers, Investment Advisers Act Release No. 2106 (Jan. 31, 2003) ("Investment Advisers Act Release 2106")).

¹⁶ See SEC v. Capital Gains, *supra* footnote 2 (discussing the history of the Advisers Act, and how equitable principles influenced the common law of fraud and changed the suits brought against a fiduciary, "which Congress recognized the investment adviser to be").

¹⁷ The Commission has previously recognized the broad scope of section 206 of the Advisers Act in a variety of contexts. See, e.g., Investment Advisers Act Release 2106, *supra* footnote 15; Timbervest, LLC, et al., Advisers Act Release No. 4197 (Sept. 17, 2015) (Commission Opinion) ("[O]nce an investment advisory relationship is formed, the Advisers Act does not permit an adviser to exploit that fiduciary relationship by defrauding his client in any investment transaction connected to the advisory relationship."); see also SEC v. Lauer, 2008 WL 4372896, at 24 (S.D. Fla. Sept. 24, 2008) ("Unlike the antifraud provisions of the Securities Act and the Exchange Act, Section 206 of the Advisers Act does not require that the activity be 'in the offer or sale of any' security or 'in connection with the purchase or sale of any security.'"); Thomas P. Lemke & Gerald T. Lins, Regulation of Investment Advisers (2013 ed.), at § 2:30 ("[T]he SEC has ... applied [sections 206(1) and 206(2)] where fraud arose from an investment advisory relationship, even though the wrongdoing did not specifically involve securities.").

¹⁸ See SEC v. Capital Gains, *supra* footnote 2; see also In the Matter of Arleen W. Hughes, Exchange Act Release No. 4048 (Feb. 18, 1948) ("Arleen Hughes") (Commission Opinion) (discussing the relationship of

Advisers Act in recognition of the nature of the relationship between an investment adviser and a client and the desire “so far as is presently practicable to eliminate the abuses” that led to the enactment of the Advisers Act.¹⁹ It is made enforceable by the antifraud provisions of the Advisers Act.²⁰

An investment adviser’s fiduciary duty under the Advisers Act comprises a duty of care and a duty of loyalty.²¹ This fiduciary duty requires an adviser “to adopt the principal’s goals,

trust and confidence between the client and a dual registrant and stating that the registrant was a fiduciary and subject to liability under the antifraud provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934).

¹⁹ See SEC v. Capital Gains, *supra* footnote 2 (noting that the “declaration of policy” in the original bill, which became the Advisers Act, declared that “the national public interest and the interest of investors are adversely affected ... when the business of investment advisers is so conducted as to defraud or mislead investors, or to enable such advisers to relieve themselves of their fiduciary obligations to their clients. It is hereby declared that the policy and purposes of this title, in accordance with which the provisions of this title shall be interpreted, are to mitigate and, so far as is presently practicable to eliminate the abuses enumerated in this section”) (citing S. 3580, 76th Cong., 3d Sess., § 202 and Investment Trusts and Investment Companies, Report of the Securities and Exchange Commission, Pursuant to Section 30 of the Public Utility Holding Company Act of 1935, on Investment Counsel, Investment Management, Investment Supervisory, and Investment Advisory Services, H.R. Doc. No. 477, 76th Cong. 2d Sess., 1, at 28) (emphasis added).

²⁰ *Id.*; Transamerica Mortgage v. Lewis, *supra* footnote 15 (“[T]he Act’s legislative history leaves no doubt that Congress intended to impose enforceable fiduciary obligations.”). Some commenters questioned the standard to which the Advisers Act holds investment advisers. See, e.g., Comment Letter of Stark & Stark, PC (undated) (“The duty of care at common law and under the Advisers Act only requires that advisers not be negligent in performing their duties.”) (internal citation omitted); Comment Letter of Institutional Limited Partners Association (Nov. 21, 2018) (“ILPA Letter 2”) (“The Advisers Act standard is a lower simple ‘negligence’ standard.”). Claims arising under Advisers Act section 206(2) are not scienter-based and can be adequately pled with only a showing of negligence. *Robare Group, Ltd., et al. v. SEC*, 922 F.3d 468, 472 (D.C. Cir. 2019) (“Robare v. SEC”); *SEC v. Steadman*, 967 F.2d 636, 643, n.5 (D.C. Cir. 1992) (citing SEC v. Capital Gains, *supra* footnote 2) (“[A] violation of § 206(2) of the Investment Advisers Act may rest on a finding of simple negligence.”); *SEC v. DiBella*, 587 F.3d 553, 567 (2d Cir. 2009) (“the government need not show intent to make out a section 206(2) violation”); *SEC v. Gruss*, 859 F. Supp. 2d 653, 669 (S.D.N.Y. 2012) (“Claims arising under Section 206(2) are not scienter-based and can be adequately pled with only a showing of negligence.”). However, claims arising under Advisers Act section 206(1) require scienter. See, e.g., *Robare v. SEC*; *SEC v. Moran*, 922 F. Supp. 867, 896 (S.D.N.Y. 1996); *Carroll v. Bear, Stearns & Co.*, 416 F. Supp. 998, 1001 (S.D.N.Y. 1976).

²¹ See, e.g., Investment Advisers Act Release 2106, *supra* footnote 15. These duties were generally recognized by commenters. See, e.g., Comment Letter of Consumer Federation of America (Aug. 7, 2018) (“CFA Letter”); Comment Letter of the Investment Adviser Association (Aug. 6, 2018) (“IAA Letter”); Comment Letter of Investments & Wealth Institute (Aug. 6, 2018); Comment Letter of Raymond James (Aug. 7, 2018); FPC Comment Letter. But see Dechert Letter (questioning the sufficiency of support for a duty of care).

objectives, or ends.”²² This means the adviser must, at all times, serve the best interest of its client and not subordinate its client’s interest to its own. In other words, the investment adviser cannot place its own interests ahead of the interests of its client. This combination of care and loyalty obligations has been characterized as requiring the investment adviser to act in the “best interest” of its client at all times.²³ In our view, an investment adviser’s obligation to act in the best interest of its client is an overarching principle that encompasses both the duty of care and the duty of loyalty. As discussed in more detail below, in our view, the duty of care requires an investment adviser to provide investment advice in the best interest of its client, based on the client’s objectives. Under its duty of loyalty, an investment adviser must eliminate or make full and fair disclosure of all conflicts of interest which might incline an investment adviser—consciously or unconsciously—to render advice which is not disinterested such that a client can provide informed consent to the conflict.²⁴ We believe this is another part of an investment adviser’s obligation to act in the best interest of its client.

A. Application of Duty Determined by Scope of Relationship

An adviser’s fiduciary duty is imposed under the Advisers Act in recognition of the

²² Arthur B. Laby, *The Fiduciary Obligations as the Adoption of Ends*, 56 Buffalo Law Review 99 (2008); *see also* Restatement (Third) of Agency, §2.02 Scope of Actual Authority (2006) (describing a fiduciary’s authority in terms of the fiduciary’s reasonable understanding of the principal’s manifestations and objectives).

²³ Investment Advisers Act Release 3060, *supra* footnote 15 (adopting amendments to Form ADV and stating that “under the Advisers Act, an adviser is a fiduciary whose duty is to serve the best interests of its clients, which includes an obligation not to subrogate clients’ interests to its own,” citing Investment Advisers Act Release 2106, *supra* footnote 15). *See SEC v. Tambone*, 550 F.3d 106, 146 (1st Cir. 2008) (“SEC v. Tambone”) (“Section 206 imposes a fiduciary duty on investment advisers to act at all times in the best interest of the fund...”); *SEC v. Moran*, 944 F. Supp. 286, 297 (S.D.N.Y. 1996) (“SEC v. Moran”) (“Investment advisers are entrusted with the responsibility and duty to act in the best interest of their clients.”). Although most commenters agreed that an adviser has an obligation to act in its client’s best interest, some questioned whether the Proposed Interpretation appropriately considered the best interest obligation as part of the duty of care, or whether it instead should be considered part of the duty of loyalty. *See, e.g.*, MMI Letter; Comment Letter of Investment Company Institute (Aug. 7, 2018) (“ICI Letter”).

²⁴ *See infra* footnotes 67-70 and accompanying text for a more detailed discussion of informed consent and how it is generally considered on an objective basis and may be inferred.

nature of the relationship between an adviser and its client—a relationship of trust and confidence.²⁵ The adviser’s fiduciary duty is principles-based and applies to the entire relationship between the adviser and its client. The fiduciary duty follows the contours of the relationship between the adviser and its client, and the adviser and its client may shape that relationship by agreement, provided that there is full and fair disclosure and informed consent.²⁶ With regard to the scope of the adviser-client relationship, we recognize that investment advisers provide a wide range of services, from a single financial plan for which a client may pay a one-time fee, to ongoing portfolio management for which a client may pay a periodic fee based on the value of assets in the portfolio. Investment advisers also serve a large variety of clients, from retail clients with limited assets and investment knowledge and experience to institutional clients with very large portfolios and substantial knowledge, experience, and analytical resources.²⁷ In our experience, the principles-based fiduciary duty imposed by the Advisers Act has provided sufficient flexibility to serve as an effective standard of conduct for investment advisers, regardless of the services they provide or the types of clients they serve.

Although all investment advisers owe each of their clients a fiduciary duty under the Advisers Act, that fiduciary duty must be viewed in the context of the agreed-upon scope of the

²⁵ See, e.g., Hearings on S. 3580 before Subcommittee of the Senate Committee on Banking and Currency, 76th Cong., 3d Sess. (leading investment advisers emphasized their relationship of “trust and confidence” with their clients); SEC v. Capital Gains, *supra* footnote 2 (citing same).

²⁶ Several commenters asked that we clarify that an adviser and its client can tailor the scope of the relationship to which the fiduciary duty applies through contract. See, e.g., MMI Letter; Financial Engines Letter; ABA Letter.

²⁷ This Final Interpretation also applies to automated advisers, which are often colloquially referred to as “robo-advisers.” Automated advisers, like all SEC-registered investment advisers, are subject to all of the requirements of the Advisers Act, including the requirement that they provide advice consistent with the fiduciary duty they owe to their clients. See Division of Investment Management, Robo Advisers, IM Guidance Update No. 2017-02 (Feb. 2017), available at <https://www.sec.gov/investment/im-guidance-2017-02.pdf> (describing Commission staff’s guidance as to three distinct areas under the Advisers Act that automated advisers should consider, due to the nature of their business model, in seeking to comply with their obligations under the Advisers Act).

relationship between the adviser and the client. In particular, the specific obligations that flow from the adviser's fiduciary duty depend upon what functions the adviser, as agent, has agreed to assume for the client, its principal. For example, the obligations of an adviser providing comprehensive, discretionary advice in an ongoing relationship with a retail client (*e.g.*, monitoring and periodically adjusting a portfolio of equity and fixed income investments with limited restrictions on allocation) will be significantly different from the obligations of an adviser to a registered investment company or private fund where the contract defines the scope of the adviser's services and limitations on its authority with substantial specificity (*e.g.*, a mandate to manage a fixed income portfolio subject to specified parameters, including concentration limits and credit quality and maturity ranges).²⁸

While the application of the investment adviser's fiduciary duty will vary with the scope of the relationship, the relationship in all cases remains that of a fiduciary to the client. In other words, an adviser's federal fiduciary duty may not be waived, though it will apply in a manner that reflects the agreed-upon scope of the relationship.²⁹ A contract provision purporting to waive the adviser's federal fiduciary duty generally, such as (i) a statement that the adviser will not act as a fiduciary, (ii) a blanket waiver of all conflicts of interest, or (iii) a waiver of any

²⁸ See, *e.g.*, *infra* text following footnote 35.

²⁹ Because an adviser's federal fiduciary obligations are enforceable through section 206 of the Advisers Act, we would view a waiver of enforcement of section 206 as implicating section 215(a) of the Advisers Act, which provides that "any condition, stipulation or provision binding any person to waive compliance with any provision of this title. . . shall be void." See also Restatement (Third) of Agency, § 8.06 Principal's Consent (2006) ("[T]he law applicable to relationships of agency as defined in § 1.01 imposes mandatory limits on the circumstances under which an agent may be empowered to take disloyal action. These limits serve protective and cautionary purposes. Thus, an agreement that contains general or broad language purporting to release an agent in advance from the agent's general fiduciary obligation to the principal is not likely to be enforceable. This is because a broadly sweeping release of an agent's fiduciary duty may not reflect an adequately informed judgment on the part of the principal; if effective, the release would expose the principal to the risk that the agent will exploit the agent's position in ways not foreseeable by the principal at the time the principal agreed to the release. In contrast, when a principal consents to specific transactions or to specified types of conduct by the agent, the principal has a focused opportunity to assess risks that are more readily identifiable.").

specific obligation under the Advisers Act, would be inconsistent with the Advisers Act,³⁰
regardless of the sophistication of the client.³¹

³⁰ See sections 206 and 215(a). Commenters generally agreed that a client cannot waive an investment adviser's fiduciary duty through agreement. See Dechert Letter; Comment Letter of Ropes & Gray LLP (Aug. 7, 2018) ("Ropes & Gray Letter"), at n.20; see also *supra* footnote 29. In the Proposed Interpretation, we stated that "the investment adviser cannot disclose or negotiate away, and the investor cannot waive, the federal fiduciary duty." One commenter disputed this broad statement, believing that it called into question "the ability of an investment adviser and client to define the scope of the adviser's services and duties." ABA Letter; see also Financial Engines Letter. We have modified this statement to clarify that a general waiver of the fiduciary duty would violate that duty and to provide examples of such a general waiver.

³¹ Some commenters mentioned a 2007 No-Action Letter in which staff indicated that whether a clause in an advisory agreement that purports to limit an adviser's liability under that agreement (a so-called "hedge clause") would violate sections 206(1) and 206(2) of the Advisers Act depends on all of the surrounding facts and circumstances. Heitman Capital Management, LLC, SEC Staff No-Action Letter (Feb. 12, 2007) ("Heitman Letter"). A few commenters indicated that the Heitman Letter expanded the ability of investment advisers to private funds, and potentially other sophisticated clients, to disclaim their fiduciary duties under state law in an advisory agreement. See, e.g., ILPA Letter 1; ILPA Letter 2. The commenters' descriptions of the Heitman Letter suggest that it may have been applied incorrectly. The Heitman Letter does not address the scope or substance of an adviser's federal fiduciary duty; rather, it addresses the extent to which hedge clauses may be misleading in violation of the Advisers Act's antifraud provisions. Another commenter agreed with this reading of the Heitman Letter. See Comment Letter of American Investment Council (Feb. 25, 2019). In response to these comments, we express below the Commission's views about an adviser's obligations under sections 206(1) and 206(2) of the Advisers Act with respect to the use of hedge clauses. Accordingly, because we are expressing our views in this Final Interpretation, the Heitman Letter is withdrawn.

This Final Interpretation makes clear that an adviser's federal fiduciary duty may not be waived, though its application may be shaped by agreement. This Final Interpretation does not take a position on the scope or substance of any fiduciary duty that applies to an adviser under applicable state law. See *supra* footnote 3. The question of whether a hedge clause violates the Advisers Act's antifraud provisions depends on all of the surrounding facts and circumstances, including the particular circumstances of the client (e.g., sophistication). In our view, however, there are few (if any) circumstances in which a hedge clause in an agreement with a retail client would be consistent with those antifraud provisions, where the hedge clause purports to relieve the adviser from liability for conduct as to which the client has a non-waivable cause of action against the adviser provided by state or federal law. Such a hedge clause generally is likely to mislead those retail clients into not exercising their legal rights, in violation of the antifraud provisions, even where the agreement otherwise specifies that the client may continue to retain its non-waivable rights. Whether a hedge clause in an agreement with an institutional client would violate the Advisers Act's antifraud provisions will be determined based on the particular facts and circumstances. To the extent that a hedge clause creates a conflict of interest between an adviser and its client, the adviser must address the conflict as required by its duty of loyalty.

B. Duty of Care

As fiduciaries, investment advisers owe their clients a duty of care.³² The Commission has discussed the duty of care and its components in a number of contexts.³³ The duty of care includes, among other things: (i) the duty to provide advice that is in the best interest of the client, (ii) the duty to seek best execution of a client's transactions where the adviser has the responsibility to select broker-dealers to execute client trades, and (iii) the duty to provide advice and monitoring over the course of the relationship.

1. Duty to Provide Advice that is in the Best Interest of the Client

The duty of care includes a duty to provide investment advice that is in the best interest of the client, including a duty to provide advice that is suitable for the client.³⁴ In order to

³² See Investment Advisers Act Release 2106, *supra* footnote 15 (stating that under the Advisers Act, “an adviser is a fiduciary that owes each of its clients duties of care and loyalty with respect to all services undertaken on the client’s behalf, including proxy voting,” which is the subject of the release, and citing SEC v. Capital Gains *supra* footnote 2, to support this point). This Final Interpretation does not address the specifics of how an investment adviser might satisfy its fiduciary duty when voting proxies. See also Restatement (Third) of Agency, § 8.08 (discussing the duty of care that an agent owes its principal as a matter of common law); Tamar Frankel & Arthur B. Laby, *The Regulation of Money Managers* (updated 2017) (“Advice can be divided into three stages. The first determines the needs of the particular client. The second determines the portfolio strategy that would lead to meeting the client’s needs. The third relates to the choice of securities that the portfolio would contain. The duty of care relates to each of the stages and depends on the depth or extent of the advisers’ obligation towards their clients.”).

³³ See, e.g., Suitability of Investment Advice Provided by Investment Advisers; Custodial Account Statements for Certain Advisory Clients, Investment Advisers Act Release No. 1406 (Mar. 16, 1994) (“Investment Advisers Act Release 1406”) (stating that advisers have a duty of care and discussing advisers’ suitability obligations); Interpretive Release Concerning the Scope of Section 28(e) of the Securities Exchange Act of 1934 and Related Matters, Exchange Act Release No. 23170 (Apr. 28, 1986) (“Exchange Act Release 23170”) (“an adviser, as a fiduciary, owes its clients a duty of obtaining the best execution on securities transactions”). We highlight certain contexts, but not all, in which the Commission has addressed the duty of care. See, e.g., Investment Advisers Act Release 2106, *supra* footnote 15.

³⁴ In 1994, the Commission proposed a rule that would have made express the fiduciary obligation of investment advisers to make only suitable recommendations to a client. Investment Advisers Act Release 1406, *supra* footnote 33. Although never adopted, the rule was designed, among other things, to reflect the Commission’s interpretation of an adviser’s *existing* suitability obligation under the Advisers Act. In addition, we do not cite Investment Advisers Act Release 1406 as the source of authority for the view we express here, which at least one comment letter suggested, but cite it merely to show that the Commission has long held this view. See Comment Letter of the Managed Funds Association and the Alternative Investment Management Association (Aug. 7, 2018) (indicating that the Commission’s failure to adopt the proposed suitability rule means “investment advisers are not subject to an express ‘suitability’ standard

provide such advice, an adviser must have a reasonable understanding of the client's objectives. The basis for such a reasonable understanding generally would include, for retail clients, an understanding of the investment profile, or for institutional clients, an understanding of the investment mandate.³⁵ The duty to provide advice that is in the best interest of the client based on a reasonable understanding of the client's objectives is a critical component of the duty of care.

Reasonable Inquiry into Client's Objectives

How an adviser develops a reasonable understanding will vary based on the specific facts and circumstances, including the nature of the client, the scope of the adviser-client relationship, and the nature and complexity of the anticipated investment advice.

In order to develop a reasonable understanding of a retail client's objectives, an adviser should, at a minimum, make a reasonable inquiry into the client's financial situation, level of financial sophistication, investment experience, and financial goals (which we refer to collectively as the retail client's "investment profile"). For example, an adviser undertaking to formulate a comprehensive financial plan for a retail client would generally need to obtain a

under existing regulation"). We believe that this obligation to make only suitable recommendations to a client is part of an adviser's fiduciary duty to act in the best interest of its client. Accordingly, an adviser must provide investment advice that is suitable for its client in providing advice that is in the best interest of its client. *See* SEC v. Tambone, *supra* footnote 23 ("Section 206 imposes a fiduciary duty on investment advisers to act at all times in the best interest of the fund...."); SEC v. Moran, *supra* footnote 23 ("Investment advisers are entrusted with the responsibility and duty to act in the best interest of their clients.").

³⁵ Several commenters stated that the duty to make a reasonable inquiry into a client's investment profile may not apply in the institutional client context. *See, e.g.,* Comment Letter of BlackRock, Inc. (Aug. 7, 2018); Comment Letter of Teachers Insurance and Annuity Association of America (Aug. 7, 2018); Comment Letter of Allianz Global Investors U.S. LLC (Aug. 7, 2018) ("Allianz Letter"); Comment Letter of John Hancock Life Insurance Company (U.S.A.) (Aug. 3, 2018). Accordingly, we are describing the duty as a duty to have a reasonable understanding of the client's objectives. While not every client will have an investment profile, every client will have objectives. For example, an institutional client's objectives may be ascertained through its investment mandate.

range of personal and financial information about the client such as current income, investments, assets and debts, marital status, tax status, insurance policies, and financial goals.³⁶

In addition, it will generally be necessary for an adviser to a retail client to update the client's investment profile in order to maintain a reasonable understanding of the client's objectives and adjust the advice to reflect any changed circumstances.³⁷ The frequency with which the adviser must update the client's investment profile in order to consider changes to any advice the adviser provides would itself turn on the facts and circumstances, including whether the adviser is aware of events that have occurred that could render inaccurate or incomplete the investment profile on which the adviser currently bases its advice. For instance, in the case of a financial plan where the investment adviser also provides advice on an ongoing basis, a change in the relevant tax law or knowledge that the client has retired or experienced a change in marital status could trigger an obligation to make a new inquiry.

By contrast, in providing investment advice to institutional clients, the nature and extent of the reasonable inquiry into the client's objectives generally is shaped by the specific investment mandates from those clients. For example, an investment adviser engaged to advise on an institutional client's investment grade bond portfolio would need to gain a reasonable understanding of the client's objectives within that bond portfolio, but not the client's objectives

³⁶ Investment Advisers Act Release 1406, *supra* footnote 33. After making a reasonable inquiry into the client's investment profile, it generally would be reasonable for an adviser to rely on information provided by the client (or the client's agent) regarding the client's financial circumstances, and an adviser should not be held to have given advice not in its client's best interest if it is later shown that the client had misled the adviser concerning the information on which the advice was based.

³⁷ Such updating would not be needed with one-time investment advice. In the Proposed Interpretation, we stated that an adviser "must" update a client's investment profile in order to adjust the advice to reflect any changed circumstances. We believe that any obligation to update a client's investment profile, like the nature and extent of the reasonable inquiry into a retail client's objectives, turns on what is reasonable under the circumstances. Accordingly, we have revised the wording of this statement in this Final Interpretation.

within its entire investment portfolio. Similarly, an investment adviser whose client is a registered investment company or a private fund would need to have a reasonable understanding of the fund's investment guidelines and objectives. For advisers acting on specific investment mandates for institutional clients, particularly funds, we believe that the obligation to update the client's objectives would not be applicable except as may be set forth in the advisory agreement.

Reasonable belief that advice is in the best interest of the client

An investment adviser must have a reasonable belief that the advice it provides is in the best interest of the client based on the client's objectives. The formation of a reasonable belief would involve considering, for example, whether investments are recommended only to those clients who can and are willing to tolerate the risks of those investments and for whom the potential benefits may justify the risks.³⁸ Whether the advice is in a client's best interest must be evaluated in the context of the portfolio that the adviser manages for the client and the client's objectives.

For example, when an adviser is advising a retail client with a conservative investment objective, investing in certain derivatives may be in the client's best interest when they are used to hedge interest rate risk or other risks in the client's portfolio, whereas investing in certain directionally speculative derivatives on their own may not. For that same client, investing in a particular security on margin may not be in the client's best interest, even if investing in that same security without the use of margin may be in the client's best interest. However, for

³⁸ Item 8 of Part 2A of Form ADV requires an investment adviser to describe its methods of analysis and investment strategies and disclose that investing in securities involves risk of loss which clients should be prepared to bear. This item also requires that an adviser explain the material risks involved for each significant investment strategy or method of analysis it uses and particular type of security it recommends, with more detail if those risks are significant or unusual. Accordingly, investment advisers are required to identify and explain certain risks involved in their investment strategies and the types of securities they recommend. An investment adviser needs to consider those same risks in determining the clients to which the adviser recommends those investments.

example, when advising a financially sophisticated client, such as a fund or other sophisticated client that has an appropriate risk tolerance, it may be in the best interest of the client to invest in such derivatives or in securities on margin, or to invest in other complex instruments or other products that may have limited liquidity.

Similarly, when an adviser is assessing whether high risk products—such as penny stocks or other thinly-traded securities—are in a retail client’s best interest, the adviser should generally apply heightened scrutiny to whether such investments fall within the retail client’s risk tolerance and objectives. As another example, complex products such as inverse or leveraged exchange-traded products that are designed primarily as short-term trading tools for sophisticated investors may not be in the best interest of a retail client absent an identified, short-term, client-specific trading objective and, to the extent that such products are in the best interest of a retail client initially, they would require daily monitoring by the adviser.³⁹

A reasonable belief that investment advice is in the best interest of a client also requires that an adviser conduct a reasonable investigation into the investment sufficient not to base its advice on materially inaccurate or incomplete information.⁴⁰ We have taken enforcement action where an investment adviser did not independently or reasonably investigate securities before recommending them to clients.⁴¹

³⁹ See Exchange-Traded Funds, Securities Act Release No. 10515 (June 28, 2018); SEC staff and FINRA, Investor Alert, Leveraged and Inverse ETFs: Specialized Products with Extra Risks for Buy-and-Hold Investors (Aug. 1, 2009); SEC Office of Investor Education and Advocacy, Investor Bulletin: Exchange-Traded Funds (ETFs) (Aug. 2012); *see also* FINRA Regulatory Notice 09-31, Non-Traditional ETFs – FINRA Reminds Firms of Sales Practice Obligations Relating to Leveraged and Inverse Exchange-Traded Funds (June 2009).

⁴⁰ See, e.g., Concept Release on the U.S. Proxy System, Investment Advisers Act Release No. 3052 (July 14, 2010) (indicating that a fiduciary “has a duty of care requiring it to make a reasonable investigation to determine that it is not basing its recommendations on materially inaccurate or incomplete information”).

⁴¹ See, e.g., In the Matter of Larry C. Grossman, Investment Advisers Act Release No. 4543 (Sept. 30, 2016) (Commission Opinion) (“*In re* Grossman”) (in connection with imposing liability on a principal of a

The cost (including fees and compensation) associated with investment advice would generally be one of many important factors—such as an investment product’s or strategy’s investment objectives, characteristics (including any special or unusual features), liquidity, risks and potential benefits, volatility, likely performance in a variety of market and economic conditions, time horizon, and cost of exit—to consider when determining whether a security or investment strategy involving a security or securities is in the best interest of the client. When considering similar investment products or strategies, the fiduciary duty does not necessarily require an adviser to recommend the lowest cost investment product or strategy.

Moreover, an adviser would not satisfy its fiduciary duty to provide advice that is in the client’s best interest by simply advising its client to invest in the lowest cost (to the client) or least remunerative (to the investment adviser) investment product or strategy without any further analysis of other factors in the context of the portfolio that the adviser manages for the client and the client’s objective. Rather, the adviser could recommend a higher-cost investment or strategy if the adviser reasonably concludes that there are other factors about the investment or strategy that outweigh cost and make the investment or strategy in the best interest of the client, in light of that client’s objectives. For example, it might be consistent with an adviser’s fiduciary duty to advise a client with a high risk tolerance and significant investment experience to invest in a private equity fund with relatively higher fees and significantly less liquidity as compared with a fund that invests in publicly-traded companies if the private equity fund was in the client’s best

registered investment adviser for recommending offshore private investment funds to clients), *stayed in part*, Investment Advisers Act No. 4563 (Nov. 1, 2016), *response to remand*, Investment Advisers Act Release No. 4871 (Mar. 29, 2018) (reinstating the Sept. 30, 2016 opinion and order, except with respect to the disgorgement and prejudgment interest in light of the Supreme Court’s decision in *Kokesh v. SEC*, 137 S. Ct. 1635 (2017)).

interest because it provided exposure to an asset class that was appropriate in the context of the client's overall portfolio.

An adviser's fiduciary duty applies to all investment advice the investment adviser provides to clients, including advice about investment strategy, engaging a sub-adviser, and account type.⁴² Advice about account type includes advice about whether to open or invest through a certain type of account (*e.g.*, a commission-based brokerage account or a fee-based advisory account) and advice about whether to roll over assets from one account (*e.g.*, a retirement account) into a new or existing account that the adviser or an affiliate of the adviser manages.⁴³ In providing advice about account type, an adviser should consider all types of accounts offered by the adviser and acknowledge to a client when the account types the adviser offers are not in the client's best interest.⁴⁴

⁴² In addition, with respect to prospective clients, investment advisers have antifraud liability under section 206 of the Advisers Act, which, among other things, applies to transactions, practices, or courses of business which operate as a fraud or deceit upon prospective clients, including those regarding investment strategy, engaging a sub-adviser, and account type. We believe that, in order to avoid liability under this antifraud provision, an investment adviser should have sufficient information about the prospective client and its objectives to form a reasonable basis for advice before providing any advice about these matters. At the point in time at which the prospective client becomes a client of the investment adviser (*e.g.*, at account opening), the fiduciary duty applies. Accordingly, while advice to prospective clients about these matters must comply with the antifraud provisions under section 206 of the Advisers Act, the adviser must also satisfy its fiduciary duty with respect to any such advice (*e.g.*, regarding account type) when a prospective client becomes a client.

⁴³ We consider advice about "rollovers" to include advice about account type, in addition to any advice regarding the investments or investment strategy with respect to the assets to be rolled over, as the advice necessarily includes the advice about the account type into which assets are to be rolled over. As noted below, as a general matter, an adviser's duty to monitor extends to all personalized advice it provides to the client, including, for example, in an ongoing relationship, an evaluation of whether a client's account or program type (for example, a wrap account) continues to be in the client's best interest. *See infra* text accompanying footnote 52.

⁴⁴ Accordingly, in providing advice to a client or customer about account type, a financial professional who is dually licensed (*i.e.*, an associated person of a broker-dealer and a supervised person of an investment adviser (regardless of whether the professional works for a dual registrant, affiliated firms, or unaffiliated firms)) should consider all types of accounts offered (*i.e.*, both brokerage accounts and advisory accounts) when determining whether the advice is in the client's best interest. A financial professional who is only a supervised person of an investment adviser (regardless of whether that advisory firm is a dual registrant or affiliated with a broker-dealer) may only recommend an advisory account the adviser offers when the account is in the client's best interest. If a financial professional who is only a supervised person of an

2. Duty to Seek Best Execution

An investment adviser's duty of care includes a duty to seek best execution of a client's transactions where the adviser has the responsibility to select broker-dealers to execute client trades (typically in the case of discretionary accounts).⁴⁵ In meeting this obligation, an adviser must seek to obtain the execution of transactions for each of its clients such that the client's total cost or proceeds in each transaction are the most favorable under the circumstances. An adviser fulfills this duty by seeking to obtain the execution of securities transactions on behalf of a client with the goal of maximizing value for the client under the particular circumstances occurring at the time of the transaction. Maximizing value encompasses more than just minimizing cost. When seeking best execution, an adviser should consider "the full range and quality of a broker's services in placing brokerage including, among other things, the value of research provided as well as execution capability, commission rate, financial responsibility, and responsiveness" to the adviser.⁴⁶ In other words, the "determinative factor" is not the lowest possible commission cost, "but whether the transaction represents the best qualitative execution."⁴⁷ Further, an

investment adviser chooses to advise a client to consider a non-advisory account (or to speak with other personnel at a dual registrant or affiliate about a non-advisory account), that advice should be in the best interest of the client. This same framework applies in the case of a prospective client, but any advice or recommendation given to a prospective client would be subject to the antifraud provisions of the federal securities laws. *See supra* footnote 42 and Reg. BI Adoption, *supra* footnote 3.

⁴⁵ *See* Commission Guidance Regarding Client Commission Practices Under Section 28(e) of the Securities Exchange Act of 1934, Exchange Act Release No. 54165 (July 18, 2006) (stating that investment advisers have "best execution obligations"); Investment Advisers Act Release 3060, *supra* footnote 15 (discussing an adviser's best execution obligations in the context of directed brokerage arrangements and disclosure of soft dollar practices); *see also* Advisers Act rule 206(3)-2(c) (referring to adviser's duty of best execution of client transactions).

⁴⁶ Exchange Act Release 23170, *supra* footnote 33.

⁴⁷ *Id.*

investment adviser should “periodically and systematically” evaluate the execution it is receiving for clients.⁴⁸

3. Duty to Provide Advice and Monitoring over the Course of the Relationship

An investment adviser’s duty of care also encompasses the duty to provide advice and monitoring at a frequency that is in the best interest of the client, taking into account the scope of the agreed relationship.⁴⁹ For example, when the adviser has an ongoing relationship with a client and is compensated with a periodic asset-based fee, the adviser’s duty to provide advice and monitoring will be relatively extensive as is consistent with the nature of the relationship.⁵⁰ Conversely, absent an express agreement regarding the adviser’s monitoring obligation, when the adviser and the client have a relationship of limited duration, such as for the provision of a

⁴⁸ *Id.* The Advisers Act does not prohibit advisers from using an affiliated broker to execute client trades. However, the adviser’s use of such an affiliate involves a conflict of interest that must be fully and fairly disclosed and the client must provide informed consent to the conflict. *See also* Interpretation of Section 206(3) of the Investment Advisers Act of 1940, Investment Advisers Act Release No. 1732 (Jul. 17, 1998) (discussing application of section 206(3) of the Advisers Act to certain principal and agency transactions). Two commenters requested that we prescribe specific obligations related to best execution. Comment Letter of the Healthy Markets Association (Aug. 7, 2018); Comment Letter of ICE Data Services (Aug. 7, 2018). However, prescribing specific requirements of how an adviser might satisfy its best execution obligations is outside of the scope of this Final Interpretation.

⁴⁹ *Cf.* SEC v. Capital Gains, *supra* footnote 2 (describing advisers’ “basic function” as “furnishing to clients on a personal basis competent, unbiased, and continuous advice regarding the sound management of their investments” (quoting Investment Trusts and Investment Companies, Report of the Securities and Exchange Commission, Pursuant to Section 30 of the Public Utility Holding Company Act of 1935, on Investment Counsel, Investment Management, Investment Supervisory, and Investment Advisory Services, H.R. Doc. No. 477, 76th Cong. 2d Sess., 1, at 28)). *Cf.* Barbara Black, *Brokers and Advisers-What’s in a Name?*, 32 Fordham Journal of Corporate and Financial Law XI (2005) (“[W]here the investment adviser’s duties include management of the account, [the adviser] is under an obligation to monitor the performance of the account and to make appropriate changes in the portfolio.”); Arthur B. Laby, *Fiduciary Obligations of Broker-Dealers and Investment Advisers*, 55 Villanova Law Review 701 (2010) (“Laby Villanova Article”) (stating that the scope of an adviser’s activity can be altered by contract and that an adviser’s fiduciary duty would be commensurate with the scope of the relationship) (internal citations omitted).

⁵⁰ However, an adviser and client may scope the frequency of the adviser’s monitoring (*e.g.*, agreement to monitor quarterly or monthly and as appropriate in between based on market events), provided that there is full and fair disclosure and informed consent. We consider the frequency of monitoring, as well as any other material facts relating to the agreed frequency, such as whether there will also be interim monitoring when there are market events relevant to the client’s portfolio, to be a material fact relating to the advisory relationship about which an adviser must make full and fair disclosure and obtain informed consent as required by its fiduciary duty.

one-time financial plan for a one-time fee, the adviser is unlikely to have a duty to monitor. In other words, in the absence of any agreed limitation or expansion, the scope of the duty to monitor will be indicated by the duration and nature of the agreed advisory arrangement.⁵¹ As a general matter, an adviser's duty to monitor extends to all personalized advice it provides to the client, including, for example, in an ongoing relationship, an evaluation of whether a client's account or program type (for example, a wrap account) continues to be in the client's best interest.⁵²

C. Duty of Loyalty

The duty of loyalty requires that an adviser not subordinate its clients' interests to its own.⁵³ In other words, an investment adviser must not place its own interest ahead of its client's interests.⁵⁴ To meet its duty of loyalty, an adviser must make full and fair disclosure to its clients

⁵¹ See also Laby Villanova Article, *supra* footnote 49, at 728 (2010) ("If an adviser has agreed to provide continuous supervisory services, the scope of the adviser's fiduciary duty entails a continuous, ongoing duty to supervise the client's account, regardless of whether any trading occurs. This feature of the adviser's duty, even in a non-discretionary account, contrasts sharply with the duty of a broker administering a non-discretionary account, where no duty to monitor is required.") (internal citations omitted).

⁵² Investment advisers also may consider whether written policies and procedures relating to monitoring would be appropriate under Advisers Act rule 206(4)-7, which requires any investment adviser registered or required to be registered under the Advisers Act to adopt and implement written policies and procedures reasonably designed to prevent violation of the Advisers Act and the rules thereunder by the adviser and its supervised persons.

⁵³ Investment Advisers Act Release 3060, *supra* footnote 15 (adopting amendments to Form ADV and stating that "[u]nder the Advisers Act, an adviser is a fiduciary whose duty is to serve the best interests of its clients, which includes an obligation not to subrogate clients' interests to its own," citing Investment Advisers Act Release 2106, *supra* footnote 15). The duty of loyalty applies not just to advice regarding potential investments, but to all advice the investment adviser provides to an existing client, including advice about investment strategy, engaging a sub-adviser, and account type. See *supra* text accompanying footnotes 42-43.

⁵⁴ For example, an adviser cannot favor its own interests over those of a client, whether by favoring its own accounts or by favoring certain client accounts that pay higher fee rates to the adviser over other client accounts. The Commission has brought numerous enforcement actions against advisers that allocated trades to their own accounts and allocated less favorable or unprofitable trades to their clients' accounts. See, e.g., *SEC v. Strategic Capital Management, LLC and Michael J. Breton*, Litigation Release No. 23867 (June 23, 2017) (partial settlement) (adviser placed trades through a master brokerage account and then allocated profitable trades to adviser's account while placing unprofitable trades into the client accounts in

of all material facts relating to the advisory relationship.⁵⁵ Material facts relating to the advisory relationship include the capacity in which the firm is acting with respect to the advice provided. This will be particularly relevant for firms or individuals that are dually registered as broker-dealers and investment advisers and who serve the same client in both an advisory and a brokerage capacity. Thus, such firms and individuals generally should provide full and fair disclosure about the circumstances in which they intend to act in their brokerage capacity and the circumstances in which they intend to act in their advisory capacity. This disclosure may be accomplished through a variety of means, including, among others, written disclosure at the beginning of a relationship that clearly sets forth when the dual registrant would act in an advisory capacity and how it would provide notification of any changes in capacity.⁵⁶ Similarly, a dual registrant acting in its advisory capacity should disclose any circumstances under which its advice will be limited to a menu of certain products offered through its affiliated broker-dealer or affiliated investment adviser.

violation of fiduciary duty and contrary to disclosures). In the Proposed Interpretation, we stated that the duty of loyalty requires an adviser to “put its client’s interest first.” One commenter suggested that the requirement of an adviser to put its client’s interest “first” is very different from a requirement not to “subordinate” or “subrogate” clients’ interests, and is inconsistent with how the duty of loyalty had been applied in the past. *See* Comment Letter of the Asset Management Group of the Securities Industry and Financial Markets Association (Aug. 7, 2018) (“SIFMA AMG Letter”). Accordingly, we have revised the description of the duty of loyalty in this Final Interpretation to be more consistent with how we have previously described the duty. *See* Investment Advisers Act Release 3060, *supra* footnote 15 (“Under the Advisers Act, an adviser is a fiduciary whose duty is to serve the best interests of its clients, which includes an obligation not to subrogate clients’ interests to its own.”) (citing Investment Advisers Act Release 2106, *supra* footnote 15). In practice, referring to putting a client’s interest first is a plain English formulation commonly used by investment advisers to explain their duty of loyalty in a way that may be more understandable to retail clients.

⁵⁵ *See* SEC v. Capital Gains, *supra* footnote 2 (“Failure to disclose material facts must be deemed fraud or deceit within its intended meaning.”); Investment Advisers Act Release 3060, *supra* footnote 15 (“as a fiduciary, an adviser has an ongoing obligation to inform its clients of any material information that could affect the advisory relationship”); *see also* General Instruction 3 to Part 2 of Form ADV (“Under federal and state law, you are a fiduciary and must make full disclosure to your clients of all material facts relating to the advisory relationship.”).

⁵⁶ *See also* Reg. BI Adoption, *supra* footnote 3, at 99.

In addition, an adviser must eliminate or at least expose through full and fair disclosure all conflicts of interest which might incline an investment adviser—consciously or unconsciously—to render advice which was not disinterested.⁵⁷ We believe that while full and fair disclosure of all material facts relating to the advisory relationship or of conflicts of interest and a client’s informed consent prevent the presence of those material facts or conflicts themselves from violating the adviser’s fiduciary duty, such disclosure and consent do not themselves satisfy the adviser’s duty to act in the client’s best interest.⁵⁸ To illustrate what

⁵⁷ In the Proposed Interpretation, we stated that an adviser must seek to avoid conflicts of interest with its clients. Proposed Interpretation, *supra* footnote 6. Some commenters requested clarity on what it means to “seek to avoid” conflicts of interest. *See, e.g.*, Comment Letter of Schulte Roth & Zabel LLP (Aug. 8, 2018); ABA Letter (stating that this wording could be read to require an adviser to first seek to avoid a conflict, before addressing a conflict through disclosure, rather than being able to provide full and fair disclosure of a conflict, and only seek avoidance if the conflict cannot be addressed through disclosure). The Commission first used this phrasing when adopting amendments to the Form ADV Part 2 instructions. *See* Investment Advisers Act Release 3060, *supra* footnote 15 and General Instruction 3 to Part 2 of Form ADV (“As a fiduciary, you also must seek to avoid conflicts of interest with your clients, and, at a minimum, make full disclosure of all material conflicts of interest between you and your clients that could affect the advisory relationship.”). The release adopting this instruction clarifies the Commission’s intent that it capture the fiduciary duty described in SEC v. Capital Gains and Arleen Hughes. *See* Investment Advisers Act Release 3060, *supra* footnote 15, at n.4 and accompanying text (citing SEC v. Capital Gains, *supra* footnote 2, and Arleen Hughes, *supra* footnote 18, as the basis of this language). Both of these cases emphasized that the adviser, as a fiduciary, should seek to avoid conflicts, but at a minimum must make full and fair disclosure of the conflict and obtain the client’s informed consent. *See* SEC v. Capital Gains, *supra* footnote 2 (“The Advisers Act thus reflects . . . a congressional intent to eliminate, or at least to expose, all conflicts of interest which might incline an investment adviser—consciously or unconsciously—to render advice which was not disinterested.”); Arleen Hughes, *supra* footnote 18 (“Since loyalty to his trust is the first duty which a fiduciary owes to his principal, it is the general rule that a fiduciary must not put himself into a position where his own interests may come in conflict with those of his principal” but if a fiduciary “chooses to assume a role in which she is motivated by conflicting interests, . . . she may do so if, but only if, she obtains her client’s consent after disclosure . . .”). We believe the Commission’s reference to “seek to avoid” conflicts in the Form ADV Part 2 instructions is consistent with the Final Interpretation’s statement that an adviser “must eliminate or at least expose all conflicts of interest which might incline an investment adviser—consciously or unconsciously—to render advice which was not disinterested” as well as the substantively identical statements in SEC v. Capital Gains, *supra* footnote 2, and Arleen Hughes, *supra* footnote 18. While an adviser may satisfy its duty of loyalty by making full and fair disclosure of conflicts of interest and obtaining the client’s informed consent, an adviser is prohibited from overreaching or taking unfair advantage of a client’s trust.

⁵⁸ As noted above, an investment adviser’s obligation to act in the best interest of its client is an overarching principle that encompasses both the duty of care and the duty of loyalty. *See* SEC v. Tambone, *supra* footnote 23 (stating that Advisers Act section 206 “imposes a fiduciary duty on investment advisers to act at all times in the best interest of the fund . . . and includes an obligation to provide ‘full and fair disclosure of all material facts’”) (emphasis added) (citing SEC v. Capital Gains, *supra* footnote 2). We describe

constitutes full and fair disclosure, we are providing the following guidance on (i) the appropriate level of specificity, including the appropriateness of stating that an adviser “may” have a conflict, and (ii) considerations for disclosure regarding conflicts related to the allocation of investment opportunities among eligible clients.

In order for disclosure to be full and fair, it should be sufficiently specific so that a client is able to understand the material fact or conflict of interest and make an informed decision whether to provide consent.⁵⁹ For example, it would be inadequate to disclose that the adviser has “other clients” without describing how the adviser will manage conflicts between clients if and when they arise, or to disclose that the adviser has “conflicts” without further description.

above in this Final Interpretation how the application of an investment adviser’s fiduciary duty to its client will vary with the scope of the advisory relationship. *See supra* section II.A.

⁵⁹ Arleen Hughes, *supra* footnote 18, at 4 and 8 (stating, “[s]ince loyalty to his trust is the first duty which a fiduciary owes to his principal, it is the general rule that a fiduciary must not put himself into a position where his own interests may come in conflict with those of his principal. To prevent any conflict and the possible subordination of this duty to act solely for the benefit of his principal, a fiduciary at common law is forbidden to deal as an adverse party with his principal. An exception is made, however, where the principal gives his informed consent to such dealings,” and adding that, “[r]egistrant has an affirmative obligation to disclose all material facts to her clients in a manner which is clear enough so that a client is fully apprised of the facts and is in a position to give his informed consent.”); *see also Hughes v. Securities and Exchange Commission*, 174 F.2d 969 (1949) (affirming the SEC decision in Arleen Hughes); General Instruction 3 to Part 2 of Form ADV (stating that an adviser’s disclosure obligation “requires that [the adviser] provide the client with sufficiently specific facts so that the client is able to understand the conflicts of interest [the adviser has] and the business practices in which [the adviser] engage[s], and can give informed consent to such conflicts or practices or reject them”); Investment Advisers Act Release 3060, *supra* footnote 15; Restatement (Third) of Agency §8.06 (“Conduct by an agent that would otherwise constitute a breach of duty as stated in §§ 8.01, 8.02, 8.03, 8.04, and 8.05 [referencing the fiduciary duty] does not constitute a breach of duty if the principal consents to the conduct, provided that (a) in obtaining the principal’s consent, the agent (i) acts in good faith, (ii) discloses all material facts that the agent knows, has reason to know, or should know would reasonably affect the principal’s judgment unless the principal has manifested that such facts are already known by the principal or that the principal does not wish to know them, and (iii) otherwise deals fairly with the principal; and (b) the principal’s consent concerns either a specific act or transaction, or acts or transactions of a specified type that could reasonably be expected to occur in the ordinary course of the agency relationship.”). *See infra* footnotes 67-70 and accompanying text for a more detailed discussion of informed consent and how it is generally considered on an objective basis and may be inferred.

Similarly, disclosure that an adviser “may” have a particular conflict, without more, is not adequate when the conflict actually exists.⁶⁰ For example, we would consider the use of “may” inappropriate when the conflict exists with respect to some (but not all) types or classes of clients, advice, or transactions without additional disclosure specifying the types or classes of clients, advice, or transactions with respect to which the conflict exists. In addition, the use of “may” would be inappropriate if it simply precedes a list of all possible or potential conflicts regardless of likelihood and obfuscates actual conflicts to the point that a client cannot provide informed consent. On the other hand, the word “may” could be appropriately used to disclose to a client a potential conflict that does not currently exist but might reasonably present itself in the future.⁶¹

Whether the disclosure is full and fair will depend upon, among other things, the nature of the client, the scope of the services, and the material fact or conflict. Full and fair disclosure for an institutional client (including the specificity, level of detail, and explanation of terminology) can differ, in some cases significantly, from full and fair disclosure for a retail client because institutional clients generally have a greater capacity and more resources than

⁶⁰ We have brought enforcement actions in such cases. *See, e.g.*, In the Matter of The Robare Group, Ltd., et al., Investment Advisers Act Release No. 4566 (Nov. 7, 2016) (Commission Opinion) (finding, among other things, that adviser’s disclosure that it *may* receive a certain type of compensation was inadequate because it did not reveal that the adviser actually had an arrangement pursuant to which it received fees that presented a potential conflict of interest); *aff’d in part and rev’d in part on other grounds Robare v. SEC*, *supra* footnote 20; *In re Grossman*, *supra* footnote 41 (indicating that “the use of the prospective ‘may’ in [the relevant Form ADV disclosures] is misleading because it suggested the mere possibility that [the broker] would make a referral and/or be paid ‘referral fees’ at a later point, when in fact a commission-sharing arrangement was already in place and generating income”). *Cf. Dolphin & Bradbury, Inc. v. SEC*, 512 F.3d 634, 640 (D.C. Cir. 2008) (“The Commission noted the critical distinction between disclosing the risk that a future event *might* occur and disclosing actual knowledge the event *will* occur.”) (emphasis in original). For Form ADV Part 2 purposes, advisers are instructed that when they have a conflict or engage in a practice with respect to some (but not all) types or classes of clients, advice, or transactions, to indicate as such rather than disclosing that they “may” have the conflict or engage in the practice. General Instruction 2 to Part 2 of Form ADV.

⁶¹ We have added this example of a circumstance where “may” could be appropriately used in response to the request of some commenters. *See, e.g.*, Pickard Letter; ICI Letter; Ropes & Gray Letter; IAA Letter.

retail clients to analyze and understand complex conflicts and their ramifications.⁶²

Nevertheless, regardless of the nature of the client, the disclosure must be clear and detailed enough for the client to make an informed decision to consent to the conflict of interest or reject it.

When allocating investment opportunities among eligible clients, an adviser may face conflicts of interest either between its own interests and those of a client or among different clients.⁶³ If so, the adviser must eliminate or at least expose through full and fair disclosure the conflicts associated with its allocation policies, including how the adviser will allocate investment opportunities, such that a client can provide informed consent.⁶⁴ When allocating investment opportunities, an adviser is permitted to consider the nature and objectives of the client and the scope of the relationship.⁶⁵ An adviser need not have *pro rata* allocation policies, or any particular method of allocation, but, as with other conflicts and material facts, the

⁶² Arleen Hughes, *supra* footnote 18 (the “method and extent of disclosure depends upon the particular client involved,” and an unsophisticated client may require “a more extensive explanation than the informed investor”).

⁶³ See Restatement (Third) of Agency, § 8.01 General Fiduciary Principle (2006) (“Unless the principal consents, the general fiduciary principle, as elaborated by the more specific duties of loyalty stated in §§ 8.02 to 8.05, also requires that an agent refrain from using the agent’s position or the principal’s property to benefit the agent or a third party.”).

⁶⁴ The Commission has brought numerous enforcement actions alleging that advisers unfairly allocated client trades to preferred clients without making full and fair disclosure. See Staff of the U.S. Securities and Exchange Commission, *Study on Investment Advisers and Broker-Dealers As Required by Section 913 of the Dodd-Frank Wall Street Reform and Consumer Protection Act* (Jan. 2011), available at <https://www.sec.gov/news/studies/2011/913studyfinal.pdf>, at 23–24 (citing enforcement actions). This Final Interpretation sets forth the Commission’s views regarding what constitutes full and fair disclosure. See, e.g., *supra* text accompanying footnote 59; see also Barry Barbash and Jai Massari, *The Investment Advisers Act of 1940: Regulation by Accretion*, 39 Rutgers Law Journal 627 (2008) (stating that under section 206 of the Advisers Act and traditional notions of fiduciary and agency law, an adviser must not give preferential treatment to some clients or systematically exclude eligible clients from participating in specific opportunities without providing the clients with appropriate disclosure regarding the treatment).

⁶⁵ An adviser and a client may even agree that certain investment opportunities or categories of investment opportunities will not be allocated or offered to a client.

adviser's allocation practices must not prevent it from providing advice that is in the best interest of its clients.⁶⁶

While most commenters agreed that informed consent is a component of the fiduciary duty, a few commenters objected to what they saw as subjectivity in the use of the term "informed" to describe a client's consent to a disclosed conflict.⁶⁷ The fact that disclosure must be full and fair such that a client can provide informed consent does not require advisers to make an affirmative determination that a particular client understood the disclosure and that the client's consent to the conflict of interest was informed. Rather, disclosure should be designed to put a client in a position to be able to understand and provide informed consent to the conflict of interest. A client's informed consent can be either explicit or, depending on the facts and circumstances, implicit.⁶⁸ We believe, however, that it would not be consistent with an adviser's fiduciary duty to infer or accept client consent where the adviser was aware, or reasonably should have been aware, that the client did not understand the nature and import of the conflict.⁶⁹

⁶⁶ In the Proposed Interpretation, we stated that "in allocating investment opportunities among eligible clients, an adviser must treat all clients fairly." Some commenters interpreted this statement to mean that it would be impermissible for an adviser to allocate a particular investment to one eligible client instead of a second eligible client, even when the second client had received full and fair disclosure and provided informed consent to such an investment being allocated to the first client. *See, e.g.,* Ropes & Gray Letter; SIFMA AMG Letter. We have removed that sentence from this Final Interpretation and replaced it with this discussion that clarifies our views regarding allocation of investment opportunities.

⁶⁷ *See, e.g.,* Comment Letter of LPL Financial LLC (Aug. 7, 2018); Ropes & Gray Letter.

⁶⁸ We do not interpret an adviser's fiduciary duty to require that full and fair disclosure or informed consent be achieved in a written advisory contract or otherwise in writing. For example, an adviser could provide a client full and fair disclosure of all material facts relating to the advisory relationship as well as full and fair disclosure of all conflicts of interest which might incline the adviser, consciously or unconsciously, to render advice that was not disinterested, through a combination of Form ADV and other disclosure and the client could implicitly consent by entering into or continuing the investment advisory relationship with the adviser.

⁶⁹ *See* Arleen Hughes, *supra* footnote 18 ("Registrant cannot satisfy this duty by executing an agreement with her clients which the record shows some clients do not understand and which, in any event, does not contain the essential facts which she must communicate."). In the Proposed Interpretation, we stated that inferring or accepting client consent to a conflict would not be consistent with the fiduciary duty where "the material facts concerning the conflict could not be fully and fairly disclosed." Some commenters expressed

In some cases, conflicts may be of a nature and extent that it would be difficult to provide disclosure to clients that adequately conveys the material facts or the nature, magnitude, and potential effect of the conflict sufficient for a client to consent to or reject it.⁷⁰ In other cases, disclosure may not be specific enough for a client to understand whether and how the conflict could affect the advice it receives. For retail clients in particular, it may be difficult to provide disclosure regarding complex or extensive conflicts that is sufficiently specific, but also understandable. In all of these cases where an investment adviser cannot fully and fairly disclose a conflict of interest to a client such that the client can provide informed consent, the adviser should either *eliminate* the conflict or adequately *mitigate* (*i.e.*, modify practices to reduce) the conflict such that full and fair disclosure and informed consent are possible.

Full and fair disclosure of all material facts relating to the advisory relationship, and all conflicts of interest which might incline an investment adviser—consciously or unconsciously—to render advice which was not disinterested, can help clients and prospective clients in evaluating and selecting investment advisers. Accordingly, we require advisers to deliver to their clients a “brochure,” under Part 2A of Form ADV, which sets out minimum disclosure requirements, including disclosure of certain conflicts.⁷¹ Investment advisers are required to

agreement with this statement. *See, e.g.*, CFA Letter (agreeing that “advisers should be precluded from inferring or accepting client consent to a conflict” where the material facts concerning the conflict could not be fully and fairly disclosed). Other commenters expressed doubt that such disclosure could be impossible. *See, e.g.*, Allianz Letter (“[W]e have not encountered a situation in which we could not fully and fairly disclose the material facts, including the nature, extent, magnitude and potential effects of the conflict.”). In response to commenters, we have replaced the general statement about an inability to fully and fairly disclose material facts about the conflict with more specific examples of how advisers can make such full and fair disclosure. *See supra* text accompanying footnotes 59-66.

⁷⁰ As discussed above, institutional clients generally have a greater capacity and more resources than retail clients to analyze and understand complex conflicts and their ramifications. *See supra* text accompanying footnote 62.

⁷¹ Investment Advisers Act Release 3060, *supra* footnote 15; General Instruction 3 to Part 2 of Form ADV (“Under federal and state law, you are a fiduciary and must make full disclosure to your clients of all material facts relating to the advisory relationship. As a fiduciary, you also must seek to avoid conflicts of

deliver the brochure to a prospective client at or before entering into a contract so that the prospective client can use the information contained in the brochure to decide whether or not to enter into the advisory relationship.⁷² In a concurrent release, we are requiring all investment advisers to deliver to retail investors, at or before the time the adviser enters into an investment advisory agreement, a relationship summary, which would include, among other things, a plain English summary of certain of the firm's conflicts of interest, and would encourage retail investors to inquire about those conflicts.⁷³

III. ECONOMIC CONSIDERATIONS

As noted above, this Final Interpretation is intended to reaffirm, and in some cases clarify, certain aspects of an investment adviser's fiduciary duty under the Advisers Act. The Final Interpretation does not itself create any new legal obligations for advisers. Nonetheless, the Commission recognizes that to the extent an adviser's practices are not consistent with the Final Interpretation provided above, the Final Interpretation could have potential economic effects. We discuss these potential effects below.

interest with your clients, and, at a minimum, make full disclosure of all material conflicts of interest between you and your clients that could affect the advisory relationship. This obligation requires that you provide the client with sufficiently specific facts so that the client is able to understand the conflicts of interest you have and the business practices in which you engage, and can give informed consent to such conflicts or practices or reject them.”). *See also* Robare v. SEC, *supra* footnote 20 (“[R]egardless of what Form ADV requires, [investment advisers have] a fiduciary duty to fully and fairly reveal conflicts of interest to their clients.”).

⁷² Investment Advisers Act rule 204-3. *See* Investment Advisers Act Release 3060, *supra* footnote 15 (adopting amendments to Form ADV and stating that, “A client may use this disclosure to select his or her own adviser and evaluate the adviser’s business practices and conflicts on an ongoing basis. As a result, the disclosure clients and prospective clients receive is critical to their ability to make an informed decision about whether to engage an adviser and, having engaged the adviser, to manage that relationship.”). To the extent that the information required for inclusion in the brochure does not satisfy an adviser’s disclosure obligation, the adviser “may have to disclose to clients information not specifically required by Part 2 of Form ADV or in more detail than the brochure items might otherwise require” and this disclosure may be made “in [the] brochure or by some other means.” General Instruction 3 to Part 2 of Form ADV.

⁷³ Form CRS Relationship Summary; Amendments to Form ADV; Required Disclosures in Retail Communications and Restrictions on the use of Certain Names or Titles, Investment Advisers Act Release No. 5247 (June 5, 2019) (“Relationship Summary Adoption”).

A. Background

The Commission's interpretation of the standard of conduct for investment advisers under the Advisers Act set forth in this Final Interpretation would affect investment advisers and their associated persons as well as the clients of those investment advisers, and the market for financial advice more broadly.⁷⁴ As of December 31, 2018, there were 13,299 investment advisers registered with the Commission with over \$84 trillion in assets under management as well as 17,268 investment advisers registered with states with approximately \$334 billion in assets under management and 3,911 investment advisers who submit Form ADV as exempt reporting advisers.⁷⁵ As of December 31, 2018, there are approximately 41 million client accounts advised by SEC-registered investment advisers.⁷⁶

These investment advisers currently incur ongoing costs related to their compliance with their legal and regulatory obligations, including costs related to understanding the standard of conduct. We believe, based on the Commission's experience, that the interpretations set forth in this Final Interpretation are generally consistent with investment advisers' current understanding of their fiduciary duty under the Advisers Act.⁷⁷ However, we recognize that as the scope of the

⁷⁴ See Relationship Summary Proposal, *supra* footnote 5, at section IV.A (discussing the market for financial advice generally).

⁷⁵ Data on investment advisers is based on staff analysis of Form ADV, particularly Item 5.F.(2)(c) of Part 1A for Regulatory Assets under Management. Because this Final Interpretation interprets an adviser's fiduciary duty under section 206 of the Advisers Act, this interpretation would be applicable to both SEC- and state-registered investment advisers, as well as other investment advisers that are exempt from registration or subject to a prohibition on registration under the Advisers Act.

⁷⁶ Item 5.F.(2)(f) of Part 1A of Form ADV.

⁷⁷ See *supra* section II.B.i. For example, some commenters asked that we clarify from the Proposed Interpretation that an adviser and its client can tailor the scope of the relationship to which the fiduciary duty applies, through contract. See, e.g., MMI Letter; Financial Engines Letter; ABA Letter. See *supra* footnotes 67–69 and accompanying text, including clarifications addressing these commenters' concerns. More generally, some commenters requested clarifications from the Proposed Interpretation, and we are issuing this Final Interpretation to address those issues raised by commenters, as discussed in more detail above.

adviser-client relationship varies and in many cases can be broad, there may be certain current circumstances where investment advisers interpret their fiduciary duty to require something less, and other current circumstances where they interpret their fiduciary duty to require something more, than this Final Interpretation. We lack data to identify which investment advisers currently understand their fiduciary duty to require something different from the standard of conduct articulated in this Final Interpretation. Based on our experience over decades of interacting with the investment management industry as its primary regulator, however, we generally believe that it is not a significant portion of the market.

One commenter suggested that the Proposed Interpretation's discussion of how an adviser fulfills its fiduciary duty appeared to be based in the context of having as a client an individual investor, and not a fund.⁷⁸ This commenter indicated its concerns about the ability of a fund manager to infer consent from a client that is a fund, and that issues regarding inferring consent from funds could significantly increase compliance costs for venture capital funds.⁷⁹ Our discussion above in this Final Interpretation includes clarifications to address comments, and expressly acknowledges that while all investment advisers owe each of their clients a fiduciary duty, the specific application of the investment adviser's fiduciary duty must be viewed in the context of the agreed-upon scope of the adviser-client relationship.⁸⁰ This Final Interpretation, as compared to the Proposed Interpretation, includes significantly more examples of the application of the fiduciary duty to institutional clients, and clarifies the Commission's interpretation of what constitutes full and fair disclosure and informed consent, acknowledging a number of comments

⁷⁸ See Comment Letter of National Venture Capital Association (Aug. 7, 2018) ("NVCA Letter").

⁷⁹ *Id.*

⁸⁰ See *supra* section II.A.

on this topic.⁸¹ We believe that these clarifications will help address some of this commenter's concerns with respect to increased compliance costs for venture capital funds, in part by clarifying how the fiduciary duty can apply to institutional clients. We continue to believe, based on our experience with investment advisers to different types of clients, that advisers understand their fiduciary duty to be generally consistent with the standards of this Final Interpretation.

B. Potential Economic Effects

Based on our experience as the long-standing regulator of the investment adviser industry, the Commission's interpretation of the fiduciary duty under section 206 of the Advisers Act described in this Final Interpretation generally reaffirms the current practices of investment advisers. Therefore, we expect there to be no significant economic effects from this Final Interpretation. However, as with other circumstances in which the Commission speaks to the legal obligations of regulated entities, we acknowledge that affected firms, including those whose practices are consistent with the Commission's interpretation, incur costs to evaluate the Commission's interpretation and assess its applicability to them. Further, to the extent certain investment advisers currently understand the practices necessary to comply with their fiduciary duty to be different from those discussed in this Final Interpretation, there could be some economic effects, which we discuss below.

Clients of investment advisers

The typical relationship between an investment adviser and a client is a principal-agent relationship, where the principal (the client) hires an agent (the investment adviser) to perform

⁸¹ In particular, this Final Interpretation expressly notes our belief that a client generally may provide its informed consent implicitly "by entering into or continuing the investment advisory relationship with the adviser" after disclosure of a conflict of interest. *See supra* footnote 68.

some service (investment advisory services) on the principal's behalf.⁸² Because investors and investment advisers are likely to have different preferences and goals, the investment adviser relationship is subject to agency problems, including those resulting from conflicts: that is, investment advisers may take actions that increase their well-being at the expense of investors, thereby imposing agency costs on investors.⁸³ A fiduciary duty, such as the duty investment advisers owe their clients, can mitigate these agency problems and reduce agency costs by deterring investment advisers from taking actions that expose them to legal liability.⁸⁴

To the extent this Final Interpretation causes a change in behavior of those investment advisers, if any, who currently interpret their fiduciary duty to require something different from this Final Interpretation, we expect a potential reduction in agency problems and, consequently, a reduction of agency costs to the client.⁸⁵ For example, an adviser that, as part of its duty of loyalty, fully and fairly discloses⁸⁶ a conflict of interest and receives informed consent from its client with respect to the conflict may reduce agency costs by increasing the client's awareness of the conflict and improving the client's ability to monitor the adviser with respect to this conflict. Alternatively, the client may choose to not consent given the information the adviser

⁸² See, e.g., James A. Brickley, Clifford W. Smith, Jr. & Jerold L. Zimmerman, *Managerial Economics and Organizational Architecture* (2004), at 265 ("An agency relationship consists of an agreement under which one party, the principal, engages another party, the agent, to perform some service on the principal's behalf."); see also Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 *Journal of Financial Economics* 305-360 (1976) ("Jensen and Meckling").

⁸³ See, e.g., Jensen and Meckling, *supra* footnote 82.

⁸⁴ See, e.g., Frank H. Easterbrook & Daniel R. Fischel, *Contract and Fiduciary Duty*, 36 *Journal of Law & Economics* 425-46 (1993).

⁸⁵ To the extent that this Final Interpretation clarifies the fiduciary duty for investment advisers, one commenter suggested it may then clarify what clients expect of their investment advisers. See Cambridge Letter (stating that "greater clarity on all aspects of an investment adviser's fiduciary duty will improve the ability to craft such policies and procedures, as well as support the elimination of confusion for retail clients and investment professionals").

⁸⁶ As discussed above, whether such a disclosure is full and fair will depend upon, among other things, the nature of the client, the scope of the services, and the conflict. See *supra* section II.C.

discloses about a conflict of interest if the perceived risk associated with the conflict is too significant, and instead try to renegotiate the contract with the adviser or look for an alternative adviser or other financial professional. In addition, the obligation to fully and fairly disclose a current conflict may cause the adviser to take other actions, for example eliminating or adequately mitigating (*i.e.*, modifying practices to reduce) that conflict rather than taking the risk that the client will not provide informed consent or will look for an alternative adviser or other financial professional. The extent to which agency costs would be reduced by such a disclosure is difficult to assess given that we are unable to ascertain the total number of investment advisers that currently interpret their fiduciary duty to require something different from the Commission's interpretation,⁸⁷ and consequently we are not able to estimate the agency costs such advisers currently impose on investors. In addition, we believe that there may be potential benefits for clients of those investment advisers, if any, to the extent this Final Interpretation is effective at strengthening investment advisers' understanding of their obligations to their clients. Further, to the extent that this Final Interpretation enhances the understanding of any investment advisers of their duty of care, it may potentially raise the quality of investment advice and also lead to increased compliance with the duty to monitor, for example whether advice about an account or program type remains in the client's best interest, thereby increasing the likelihood that the advice fits with a client's objectives.

In addition, to the extent that this Final Interpretation causes some investment advisers to properly identify circumstances in which conflicts may be of a nature and extent that it would be

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One commenter did not agree that the discussion of fiduciary obligations in the Proposed Interpretation applied to advisers to funds as well as advisers to retail investors. *See* NVCA Letter. As discussed above, this Final Interpretation has clarified the discussion to address this commenter's concerns and acknowledges that the application of the fiduciary duty of an adviser to a retail client would be different from the specific application of the fiduciary duty of an adviser to a registered investment company or private fund.

difficult to provide disclosure to clients that adequately conveys the material facts or nature, magnitude, and potential effect of the conflict sufficient for clients to consent to it or reject it, or in which the disclosure may not be specific enough for clients to understand whether and how the conflict could affect the advice they receive, this Final Interpretation may lead those investment advisers to take additional steps to improve their disclosures or to determine whether adequately mitigating (*i.e.*, modifying practices to reduce) the conflict may be appropriate such that full and fair disclosure and informed consent are possible. This Final Interpretation may also cause some investment advisers to conclude in some circumstances that they cannot fully and fairly disclose a conflict of interest to a client such that the client can provide informed consent. We would expect that these advisers would either eliminate the conflict or adequately mitigate (*i.e.*, modify practices to reduce) the conflict such that full and fair disclosure and informed consent would be possible. Thus, to the extent this Final Interpretation would cause investment advisers to better understand their obligations and therefore to modify their business practices in ways that (i) reduce the likelihood that conflicts and other agency costs will cause an adviser to place its interests ahead of the interests of the client or (ii) help those advisers to provide full and fair disclosure, it would be expected to ameliorate the agency conflict between investment advisers and their clients. In turn, this may improve the quality of advice that the clients receive and therefore produce higher overall returns for clients and increase the efficiency of portfolio allocation. However, as discussed above, we would generally expect these effects to be minimal because we believe that the interpretations we are setting forth in this Final Interpretation are generally consistent with investment advisers' current understanding of their fiduciary duty under the Advisers Act. Finally, this Final Interpretation would also benefit

clients of investment advisers to the extent it assists the Commission in its oversight of investment advisers' compliance with their regulatory obligations.

Investment advisers and the market for investment advice

In general, we expect this Final Interpretation to affirm investment advisers' understanding of the fiduciary duty they owe their clients under the Advisers Act, reduce uncertainty for advisers, and facilitate their compliance. Further, by addressing in one release certain aspects of the fiduciary duty that an investment adviser owes to its clients under the Advisers Act, this Final Interpretation could reduce investment advisers' costs associated with comprehensively assessing their compliance obligations. We acknowledge that, as with other circumstances in which the Commission speaks to the legal obligations of regulated entities, affected firms, including those whose practices are consistent with the Commission's interpretation, incur costs to evaluate the Commission's interpretation and assess its applicability to them. Moreover, as discussed above, there may be certain investment advisers who currently understand their fiduciary duty to require something different from the fiduciary duty described in this Final Interpretation. Those investment advisers would experience an increase in their compliance costs as they change their systems, processes, disclosures, and behavior, and train their supervised persons, to align with this Final Interpretation. However, this increase in costs would be mitigated by potential benefits in efficiency for investment advisers that are able to understand aspects of their fiduciary duty by reference to a single Commission release that reaffirms—and in some cases clarifies—certain aspects of the fiduciary duty.⁸⁸ In addition, and as discussed above, in the case of an investment adviser that believed it owed its clients a lower

⁸⁸ As noted above, *supra* footnote 3, this Final Interpretation is intended to highlight the principles relevant to an adviser's fiduciary duty. It is not, however, intended to be the exclusive resource for understanding these principles.

standard of conduct, there will be client benefits from the ensuing adaptation of a higher standard of conduct and related change in policies and procedures.

Moreover, to the extent any investment advisers that understood their fiduciary duty to require something different from the fiduciary duty described in this Final Interpretation change their behavior to align with this Final Interpretation, there could also be some economic effects on the market for investment advice. For example, any improved compliance may not only reduce agency costs in current investment advisory relationships and increase the value of those relationships to current clients, it may also increase trust in the market for investment advice among all investors, which may result in more investors seeking advice from investment advisers. This may, in turn, benefit investors by improving the efficiency of their portfolio allocation. To the extent it is costly or difficult, at least in the short term, to expand the supply of investment advisory services to meet an increase in demand, any such new demand for investment advisory services could put some upward price pressure on fees. At the same time, however, if any such new demand increases the overall profitability of investment advisory services, then we expect it would encourage entry by new investment advisers—or hiring of new representatives by current investment advisers—such that competition would increase over time. Indeed, the recent growth in the investment adviser segment of the market, both in terms of number of firms and number of representatives,⁸⁹ may suggest that the costs of expanding the supply of investment advisory services are currently relatively low.

Additionally, we acknowledge that to the extent certain investment advisers recognize, as a result of this Final Interpretation, that their fiduciary duty is stricter than the fiduciary duty as they currently interpret it, it could potentially affect competition. Specifically, this Final

⁸⁹ See Relationship Summary Proposal, *supra* footnote 5, at section IV.A.1.d.

Interpretation of certain aspects of the standard of conduct for investment advisers may result in additional compliance costs for investment advisers seeking to meet their fiduciary duty. This increase in compliance costs, in turn, may discourage competition for client segments that generate lower revenues, such as clients with relatively low levels of financial assets, which could reduce the supply of investment advisory services and raise fees for these client segments. However, the investment advisers who already are complying with the understanding of their fiduciary duty reflected in this Final Interpretation, and who may therefore currently have a comparative cost disadvantage, could find it more profitable to compete for the clients of those investment advisers who would face higher compliance costs as a result of this Final Interpretation, which would mitigate negative effects on the supply of investment advisory services. Further, as noted above, there has been a recent growth trend in the supply of investment advisory services, which is likely to mitigate any potential negative supply effects from this Final Interpretation.⁹⁰

One commenter discussed that, in its view, any statement in the Proposed Interpretation that certain circumstances may require the elimination of material conflicts, rather than full and fair disclosure or the mitigation of such conflicts, could lead to an effect on the market and costs to advisers, if such a requirement would cause advisers who had not shared that interpretation to change their business models or product offerings or the ways in which they interact with

⁹⁰ Beyond having an effect on competition in the market for investment adviser services, it is possible that this Final Interpretation could affect competition between investment advisers and other providers of financial advice, such as broker-dealers, banks, and insurance companies. This may be the case if certain investors base their choice between an investment adviser and another provider of financial advice, at least in part, on their perception of the standards of conduct each owes to their customers. To the extent that this Final Interpretation increases investors' trust in investment advisers' overall compliance with their standard of conduct, certain of these investors may become more willing to hire an investment adviser rather than one of their non-investment adviser competitors. As a result, investment advisers as a group may become more competitive compared to that of other types of providers of financial advice. On the other hand, if this Final Interpretation raises costs for investment advisers, they could become less competitive with other financial advice providers.

clients.⁹¹ We disagree that this Final Interpretation includes a requirement to eliminate conflicts of interest. As discussed in more detail above, elimination of a conflict is one method of addressing that conflict; when appropriate advisers may also address the conflict by providing full and fair disclosure such that a client can provide informed consent to the conflict.⁹² Further, we believe that any potential costs or market effects resulting from investment advisers addressing conflicts of interest may be decreased by the flexibility advisers have to meet their federal fiduciary duty in the context of the specific scope of services that they provide to their clients, as discussed in this Final Interpretation.

The commenter also drew particular attention to the question of whether the Commission's discussion of the fiduciary duty in the Proposed Interpretation applied to advisers to institutional clients as well as those to retail clients. The same commenter indicated that failing to accommodate the application of the concepts in the Proposed Interpretation to sophisticated clients could risk changing the marketplace or limiting investment opportunities for sophisticated clients, increasing compliance burdens for advisers to sophisticated clients, or chilling innovation. As explained above, this Final Interpretation, as compared to the Proposed Interpretation, discusses in more detail the ability of investment advisers and different types of clients to shape the scope of the relationship to which the fiduciary duty applies.⁹³ In particular, this Final Interpretation acknowledges that while advisers owe each of their clients a fiduciary duty, the specific obligations of, for example, an adviser providing comprehensive, discretionary advice in an ongoing relationship with a retail client will be significantly different from the

⁹¹ See Dechert Letter.

⁹² See *supra* section II.C.

⁹³ See *supra* footnotes 78-81 and accompanying text.

obligations of an adviser to an institutional client, such as a registered investment company or private fund, where the contract defines the scope of the adviser's services and limitations on its authority with substantial specificity.⁹⁴

Finally, to the extent this Final Interpretation causes some investment advisers to reassess their compliance with their duty of loyalty, it could lead to a reduction in the expected profitability of advice relating to particular investments for which compliance costs would increase following the reassessment.⁹⁵ As a result, the number of investment advisers willing to advise a client to make these investments may be reduced. A decline in the supply of investment adviser advice regarding these types of investments could affect efficiency for investors; it could reduce the efficiency of portfolio allocation for those investors who might otherwise benefit from investment adviser advice regarding these types of investments and are no longer able to receive such advice. At the same time, if providing full and fair disclosure and appropriate monitoring for highly complex products (*e.g.*, those with a complex payout structure, such as those that include variable or contingent payments or payments to multiple parties) results in these products becoming less profitable for investment advisers, investment advisers may be discouraged from supplying advice regarding such products. However, investors may benefit from (1) no longer receiving inadequate disclosure or monitoring for such products, (2) potentially receiving advice regarding other, less complex or expensive products that may be more efficient for the investor, and (3) only receiving recommendations for highly complex or high cost products for which an

⁹⁴ See *supra* section II.A.

⁹⁵ For example, such products could include highly complex, high cost products with risk and return characteristics that are hard for retail investors to fully understand, or where the investment adviser and its representatives receive complicated payments from affiliates that create conflicts of interest that are difficult for retail investors to fully understand.

investment adviser can provide full and fair disclosure regarding its conflicts and appropriate monitoring.

List of Subjects in 17 CFR Part 276

Securities.

Amendments to the Code of Federal Regulations

For the reasons set out above, the Commission is amending Title 17, chapter II of the Code of Federal Regulations as set forth below:

PART 276—INTERPRETATIVE RELEASES RELATING TO THE INVESTMENT ADVISERS ACT OF 1940 AND GENERAL RULES AND REGULATIONS THEREUNDER

1. Part 276 is amended by adding Release No. IA–5428 and the release date of June 5, 2019, to the end of the list of interpretive releases to read as follows”

Subject	Release No.	Date	Fed. Reg. Vol. and Page
* * * * *			
Commission Interpretation Regarding Standard of Conduct for Investment Advisers	IA-5248	June 5, 2019	[Insert FR Volume Number] FR [Insert FR Page Number]

By the Commission.

Dated: June 5, 2019.

Vanessa A. Countryman,

Acting Secretary.

EXHIBIT 5

004964

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**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

In re:	§	Case No. 18-30264-SGJ-11
	§	Case No. 18-30265-SGJ-11
ACIS CAPITAL MANAGEMENT, L.P. and	§	
ACIS CAPITAL MANAGEMENT GP, LLC,	§	(Jointly Administered Under Case No.
	§	18-30264-SGJ-11)
	§	
Debtors.	§	Chapter 11

**JOINT OBJECTION OF HIGHLAND CAPITAL MANAGEMENT, L.P. AND
HIGHLAND CLO FUNDING, LTD. TO FINAL APPROVAL OF DISCLOSURE
STATEMENT AND TO CONFIRMATION OF THE JOINT PLAN FOR ACIS CAPITAL
MANAGEMENT, L.P. AND ACIS CAPITAL MANAGEMENT GP, LLC**

Highland Capital Management, L.P. (“**Highland**”) and Highland CLO Funding, Ltd.
 (“**HCLOF**”) hereby file their joint objection (the “**Objection**”) to final approval of the
disclosure statement [Doc. No. 442] (as amended, the “**Disclosure Statement**”) and to
confirmation of the *First Amended Joint Plan for Acis Capital Management, L.P. and Acis*

Capital Management GP, LLC [Doc. No. 441] (as amended, the “**Plan**”),¹ and respectfully state as follows:²

I.
PRELIMINARY STATEMENT

“If at first you don’t succeed, try, try again.” –*William Edward Hickson*

1. In proposing Plans A, B and C, it would appear that the Chapter 11 Trustee has taken this old adage to heart. Although originally penned as a motivator to would-be teachers, in the context of these bankruptcy proceedings, this approach by the Chapter 11 Trustee has proven to be a colossal waste of time and resources at a cost to the estates that eclipses not only the value of the estates’ assets, but the very pre-petition claims the Chapter 11 Trustee is purportedly responsible for paying. The result of this case appears to be nothing more than functionally administratively insolvent estates with mountains of administrative claims continuing to accrue daily.

2. By their literal interpretation, the Chapter 11 Trustee’s Plans, supported by unequivocal admissions in his pleadings, establish that post-petition, he has intentionally breached pre-petition contractual obligations of the Debtors to create a purported \$100 million post-petition claim against the estates for an entity that had no claims against the estates when the Orders for Relief were entered. By his own account, he has rendered the estates administratively insolvent. Having thus admitted to putting the estates into this predicament—which under almost every other measure would be considered a flagrant breach of fiduciary

¹ Defined terms herein shall be as set forth in the Plan unless otherwise provided herein.

² HCLOF has filed no proof of claim in these cases, seeks no monetary relief from the Debtors, and has moved to amend its pending adversary proceeding claim to reflect that it no longer seeks the equitable claims that it sought previously (such claims are moot in any event). Nonetheless, HCLOF objects on the basis that the proposed plans propose either to take its property or alter its contractual and legal rights. HCLOF asserts no creditor standing in any of the objections set forth herein, and makes these objections as a party in interest given the substantial harm the plans propose to impose on it.

duty—he is now championing to “fix” the situation by either (i) taking non-estate property from the purported (involuntary) claimant and selling it along with some executory contracts of the estates that are otherwise valueless, then distributing the ill-gotten proceeds after carving off a substantial fee for himself, or (ii) re-writing multiple securities contracts to which the estates are not a party in order to not only insulate the estates from the consequences of his self-proclaimed intentional breach, but to radically alter the bargained-for rights of third party market participants in five collateralized loan obligation funds with over \$2 billion at stake, none of which ever belonged to the Debtors.

3. What the Chapter 11 Trustee is proposing under each of Plans A, B and C violates some of the most basic tenets of Title 11 and ignores the very confines of this Court’s jurisdiction. These Plans are patently unconfirmable with an unconscionable premise: that a Chapter 11 Trustee should be handsomely rewarded for an intentional post-petition breach of the estates pre-petition contractual obligations. Such a conclusion is beyond the pale no matter how allegedly noble the cause. These cases should be either dismissed or, at most, converted back to Chapter 7 liquidation.

II.

RELEVANT BACKGROUND

4. On January 30, 2018, Joshua N. Terry (“**Terry**”) filed involuntary petitions for relief under Chapter 7, Title 11 of the United States Code (the “**Bankruptcy Code**”) against Acis Capital Management, L.P. and Acis Capital Management GP, LLC (“**Acis GP**,” and with Acis LP, the “**Debtors**”). A Chapter 7 Trustee was thereafter appointed.

5. On May 4, 2018, the Chapter 7 Trustee filed an *Expedited Motion to Convert Cases to Chapter 11* [**Doc. No. 171**] (the “**Motion to Convert**”). Also on May 4, 2018, Terry filed an *Emergency Motion for an Order Appointing Trustee for the Chapter 11 Estates of Acis*

Capital Management, L.P. and Acis Capital Management GP, LLC Pursuant to Bankruptcy Code Section 1104(a) [Doc. No. 173] (the “**Motion to Appoint Chapter 11 Trustee**”).

6. On May 11, 2018, after a hearing on the matter, the Court entered orders granting the Motion to Convert [Doc. No. 205] and the Motion to Appoint Chapter 11 Trustee [Doc. No. 206]. Thereafter, the United States Trustee appointed Robin Phelan as Chapter 11 Trustee (the “**Chapter 11 Trustee**”).³

7. On July 5, 2018, the Chapter 11 Trustee filed the initial Plan [Doc. No. 383], which proposed three (3) alternatives – Plans A, B and C. In summary, Plan A of the Chapter 11 Trustee’s Plan proposes to transfer HCLOF’s Equity Notes, along with the portfolio management agreements (the “**PMAs**”) to which Acis LP is a counter-party, to a third party “plan funder,” which is Oaktree. Through this transaction, the Chapter 11 Trustee claims that all creditors will be satisfied in full. Alternatively, the Chapter 11 Trustee has proposed Plans B and C, which are effectively identical in their treatment of creditors and call for Acis LP to retain the PMAs and pay out creditors from future cash flow streams therefrom, as well as potential recoveries from estates’ causes of action. Both Plans B and C require radical modification to of the CLO Indentures, ostensibly to ensure the future income stream to the estates.

8. On July 13, 2018, the Chapter 11 Trustee filed (i) the Disclosure Statement [Doc. No. 405]; (ii) the *First Modification to the Joint Plan for Acis Capital Management, L.P. and Acis Capital Management GP, LLC* [Doc. No. 406]; and (iii) the *Motion for Entry of Order (A) Conditionally Approving Disclosure Statement; (B) Scheduling Combined Hearing on Final Approval of Disclosure Statement and Confirmation of Plan, and Setting Related Deadlines; (C)*

³ Mr. Phelan was initially appointed on May 11, 2018 as the Chapter 11 Trustee of Acis LP and was appointed on May 16, 2018 as the Chapter 11 Trustee of Acis GP.

Approving Forms for Voting and Notice; and (D) Granting Related Relief [Doc. No. 407] (the “**Motion for Conditional Approval**”).

9. On July 24, 2018, Highland and HCLOF filed respective objections to the Motion for Conditional Approval, [Doc. No. 431] and [Doc. No. 432]. On July 28, 2018, Highland filed a supplement to such objection [Doc. No. 440]. In each objection, Highland and HCLOF reserved rights to object to the final approval of the Disclosure Statement.

10. On July 29, 2018, the Chapter 11 Trustee amended the Plan and Disclosure Statement following an expedited hearing on the Motion for Conditional Approval held earlier that day. Thereafter, on July 30, 2018, the Court entered the *Order (I) Conditionally Approving Disclosure Statement, (II) Scheduling Combined Hearing on Final Approval of Disclosure Statement and Confirmation of Plan, and Setting Related Deadlines, (III) Approving Forms for Voting and Notice, and (IV) Approving Related Matters* [Doc. No. 446] (the “**Conditional Approval Order**”), conditionally approving the Disclosure Statement, setting an August 21, 2018 combined hearing for final approval of the Disclosure Statement and confirmation of the Plan, and setting related deadlines, including a compressed and expedited discovery schedule (the “**Discovery Schedule**”).

11. The Conditional Approval Order required the Chapter 11 Trustee to file a “**Limited Issues Brief**” on or before 4:00 p.m. on August 10, 2018, addressing: (a) issues related to section 1142 of the Bankruptcy Code in connection with the proposed transfer of HCLOF’s subordinated notes under the Plan A alternative, and (b) issues related to sections 365 and 1123(a)(5)(F) of the Bankruptcy Code in connection with the proposed modification of the existing Indentures under the proposed Plan B and Plan C (collectively, the “**Limited Issues**”).

Also as per the Conditional Approval Order, the deadline for parties to respond to the Limited Issues Brief is 4:00 p.m. on August 16, 2018.

12. Per the Discovery Schedule, the Chapter 11 Trustee filed the Limited Issues Brief on August 10, 2018 [Doc. No. 493]. Highland and/or HCLOF intend to timely respond to the Limited Issues Brief per the Discovery Schedule. As such, while certain Limited Issues are mentioned herein, Highland and HCLOF reserve all rights on those issues for subsequent objection. Per the Discovery Schedule, this joint objection is to cover matters other than the Limited Issues; provided, however, discovery is actually occurring after the deadline to file this objection. Thus, Highland and HCLOF reserve their rights to supplement these objections.

III. **OBJECTION**

13. In order to confirm the Plan, the Chapter 11 Trustee bears the burden of establishing the various provisions of Bankruptcy Code section 1129 by a preponderance of the evidence. *See In re Couture Hotel Corp.*, 536 B.R. 712, 732 (Bankr. N.D. Tex. 2015). The Plan is deficient on almost every applicable subsection of 1129 and, as a result, the Plan is unconfirmable as a matter of law.

A. The Bankruptcy Court Lacks Subject Matter Jurisdiction to Confirm the Plan

14. The Bankruptcy Court lacks subject matter jurisdiction over this proceeding and, therefore, proceeding with confirmation of any plan will be void *ab initio*. This Court should have dismissed the involuntary petitions that were filed by Joshua Terry in bad faith, and because this Court lacks subject matter jurisdiction over essentially a two-party dispute subject to arbitration. *See* Brief of Appellant Neutra (Case No. 3:18-cv-01056 (N.D. Tex.)), [Doc. No. 11].

15. Even assuming this Court has subject matter over this proceeding, the Plans violate the strictures of that jurisdiction in at least two critical and insurmountable ways:

- a. Plan A is premised on the taking of non-estate property without its owners consent; and
- b. Plans B and C are premised on radically altering non-estate executory contracts.

16. The Court's lack of subject matter jurisdiction is so fundamental, that frankly the Court need look no further. The Chapter 11 Trustee has presented the Court with patently unconfirmable Plans. Section 1129(a)(1) and (a)(2) require, respectively, that the plan and the plan proponent, comply with the applicable provisions of the Bankruptcy Code. The Chapter 11 Trustee's Plan A, however, asks this Court to exceed its constitutional and statutory authority to infringe upon the rights of a non-creditor and effect a taking of non-estate property (the "**Equity Notes**") via an equitable subrogation theory that is completely contrary to the law, and convert that non-estate property into "property of the estate," so that he can then sell it to a third party (Oaktree). This Court cannot approve this scheme because it has no jurisdiction to do so. Confirming Plan B or C likewise would require the Court to exceed its authority because both plans are premised on the nonconsensual alteration of non-executory contracts. Worse yet, the amendments will be to the detriment of third parties who are not creditors of these estates and who are not remotely implicated in these proceedings. This Court simply has no such jurisdiction.

17. It is fundamental that bankruptcy courts do not have subject matter jurisdiction over property that does not belong to a debtor's estate. *See TMT Procurement Corp. v. Vantage Drilling Co. (In re TMT Procurement Corp.)*, 764 F.3d 512, 525 (5th Cir. 2014) (bankruptcy court did not have in rem jurisdiction over assets that were not "property of the estate"); *see also Scott v. Bierman*, 429 F. App'x. 225, 231 (4th Cir. 2011) ("[A] bankruptcy court's jurisdiction does not extend to property not part of a debtor's estate."); *see also NovaCare Holdings, Inc. v. Mariner Post-Acute Network, Inc. (In re Mariner Post-Acute Network, Inc.)*, 267 B.R. 46, 59

(Bankr. D. Del. 2001) (same); *In re Funneman*, 155 B.R. 197, 199-200 (Bankr. S.D. Ill. 1993) (partnership property was not property of the debtor-partner's estate and, therefore, outside the court's subject matter jurisdiction).

18. These jurisdictional principles exist to protect the very type of non-debtor property interests that are at issue in this case. And they apply even when the property would benefit a debtor's estate. *See, e.g., Vineyard v. McKenzie (In re Quality Holstein Leasing)*, 752 F.2d 1009, 1013 (5th Cir. 1985) (noting the limitations placed on the trustee's strong arm powers by section 541, and stating that "Congress did not mean to authorize a bankruptcy estate to benefit from property that the debtor did not own.").

19. Before the Court can order a transfer of the Equity Notes to Oaktree, it would necessarily have to find that they constitute "property of the estate." If the Court cannot conclude that the Equity Notes are property of the estate, then it will lack jurisdiction to order their transfer by any means. *See, e.g., In re Murchison*, 54 B.R. 721, 725 (Bankr. N.D. Tex. 1985). (finding that the court was without jurisdiction to approve the sale of property that was not property of the estate: "Because the criterion of § 541(a)(1) has not been satisfied, § 363(b)(1) cannot apply.").⁴

20. Section 541 of the Bankruptcy Code defines "property of the estate" as, in relevant part, (i) "all legal or equitable interests of the debtor in property as of the commence of the case," (ii) "[a]ny interest in property that the trustee recovers under section 329(b), 363(n), 543, 550, 553, or 723 of this title," and (iii) "[a]ny interest in property that the estate acquires after the commencement of the case." 11 U.S.C. §§ 541(a)(1), (a)(3), (a)(7).

⁴ Bankruptcy courts have been held to be without jurisdiction to order the sale of non-estate assets, even where the sale was entirely consensual. *See, e.g., First Nat'l Bank v. Community Trust Bank*, No. 05-1610, 2006 WL 724882, at *4 (W.D. La. Mar. 21, 2006) ("Since the property was not part of the bankruptcy estate, the Bankruptcy Court had no authority or jurisdiction to order the consensual sale and, therefore, the sale was void").

21. Neither the Chapter 11 Trustee nor his proposed transferee, Oaktree, dispute that the Equity Notes are the property of HCLOF. *See* July 6, 2018 Hrg. Tr. at 71:19-25; 119:11-18. Nor has the Chapter 11 Trustee obtained an interest in the Equity Notes via any of the Bankruptcy Code sections enumerated in section 541(a)(3). Thus, for the Equity Notes to be “property of the estate,” they would necessarily have to be “property that the estate[s] acquire after the commencement of the case” under section 541(a)(7).⁵

22. Upon first blush, that would seem to require only that the Chapter 11 Trustee prevail upon his equitable subrogation theory, thereby converting the Equity Notes into “property of the estate.” However, even if the Chapter 11 Trustee successfully can obtain ownership of the Equity Notes, such property acquired post-petition is not “property of the estate” under section 541(a)(7).

23. Under controlling Fifth Circuit law, section 541(a)(7) only applies to “property interest that are themselves traceable to ‘property of the estate’ or generated in the normal course of the debtor’s business.” *In re TMT Procurement Corp.*, 764 F.3d at 524-25 (“As we previously recognized in *In re McLain*, ‘Congress enacted § 541(a)(7) to clarify its intention that § 541 be an all-embracing definition and to ensure that property interests created with or by property of the estate are themselves property of the estate’) (citing *In re McLain*, 516 F.3d 301 (5th Cir. 2008)) (emphasis added); *see also In re Cent. Med. Ctr.*, 122 B.R. 568 (Bankr. E.D. Mo. 1990) (“Congress did not intend Section 541 ‘to enlarge a debtor’s rights against others beyond those

⁵ The Chapter 11 Trustee also does not, and cannot, dispute the axiom that the debtor in possession or trustee steps into the shoes of a debtor and possesses no greater rights than that of the debtor. *See Majestic Star Casino, LLC v. Barden Dev., Inc. (In re Majestic Star Casino, LLC)*, 716 F.3d 736, 748 (3d Cir. 2013) (“It is a given that the trustee or debtor-in-possession can assert no greater rights than the debtor himself had on the date the bankruptcy case was commenced.”) (internal alterations omitted)); *In re Gibraltar Res., Inc.*, 197 B.R. 246, 253 (Bankr. N.D. Tex. 1996) (“the general rule is that a trustee has no greater rights than the debtor and stands in the shoes of the debtor”); *In re Brooks*, 60 B.R. 155, 160 (Bankr. N.D. Tex. 1986) (“Of course, a bankruptcy trustee can acquire no greater rights in property than the debtor possessed.”) (citation omitted)). The Debtors had no right to sell the Equity Notes before the commencement of these bankruptcy cases and have no such rights now.

existing at the commencement of the case..”) (citing *In re N.S. Garrott & Sons*, 772 F.2d 462, 466 (8th Cir. 1985)). That is not the case with the Equity Notes, which are not traceable to any property of the estate, but under the Chapter 11 Trustee’s (unsupportable) theory, are property of the estate as a result of a subrogation right that purportedly vested with the estates post-petition.

24. The property at issue in *In re TMT Procurement* was certain corporate shares that were pledged by a non-debtor third party into a court-ordered escrow that served as the collateral for the debtors’ DIP loan. *In re TMT Procurement Corp.*, 764 F.3d at 524. The shares never belonged to the debtors at issue. *Id.* at 524-25. The corporation whose shares had been pledged appealed the orders of the district court (which had withdrawn the reference from the bankruptcy court), arguing that the district court did not have jurisdiction to issue orders with respect to the shares, which were not “property of the estate.” *Id.* at 522-23.

25. The Fifth Circuit, vacating the district court’s order, rejected the debtors’ argument that the shares were property of the estate under section 541(a)(7). In doing so, the Fifth Circuit made clear that: “[T]he Vantage Shares are not ‘property of the estate’ under § 541(a)(7) because they were not created with or by property of the estate, they were not acquired in the estate’s normal course of business, and they are not traceable to or arise out of any pre-petition interest included in the bankruptcy estate.” *Id.* at 525 (rejecting also the argument that the tracing limitation did not apply to corporate debtors in chapter 11 bankruptcies).

26. The Plan does not satisfy sections 1129(a)(1) and (a)(2) because it seeks to impermissibly expand the scope of estate property and requires the Court to exceed its jurisdiction. The Equity Notes were not “property of the estate” at the commencement of these cases and the Chapter 11 Trustee has not obtained the Equity Notes through one of the

enumerated sections in Section 541(a)(3). Nor are the Equity Notes traceable to any property of the estate. Therefore, the Plan cannot be confirmed. *See In re Cent. Med. Ctr.*, 122 B.R. at 573 (holding that the plan failed to satisfy section 1129(a) “[b]ecause the Plan violates Section 541(a) due to its improper expansion of the estate’s interest” in certain funds in which it only had a reversionary interest at the commencement of the case; the plan “baldly seeks to divest the bondholders of property which is rightfully theirs.”).

B. Sections 1129(a)(1), (3) – The Plan Violates the Bankruptcy Code and Violates Other Applicable Law

27. Bankruptcy Code section 1129(a)(1) requires that a plan comply “with the applicable provisions of this title,” and section 1129(a)(3) states that a plan cannot be proposed “by any means forbidden by law.” As to section 1129(a)(1), the Plan violates well-accepted tenets of bankruptcy law because the Chapter 11 Trustee seeks to (i) take possession of non-estate property and (ii) fundamentally alter non-debtor executory contracts. These are included among the Limited Issues and will be set forth in the response to the Limited Issues Brief.

28. As to section 1129(a)(3), despite the Chapter 11 Trustee’s obfuscations regarding “transfers” and other similar self-serving characterizations, the practical reality is that the Plan A transaction effects a sale of the Equity Notes to Oaktree. The Equity Notes are undoubtedly securities. *See Reves v. Ernst & Young*, 494 U.S. 56, 65 (1990); *Arco Capital Corps. Ltd. v. Deutsche Bank AG*, 949 F. Supp. 2d 532, 542-43 (S.D.N.Y. 2013) (finding sale of CLO notes to be a sale of a security under *Morrison v. Nat’l Australian Bank Ltd.*, 561 U.S. 247 (2010)). Any sale of securities must comport with the requirements of federal securities laws, including the Securities Act of 1933 (the “’33 Act”).⁶

⁶ Moreover, none of the Indentures or other relevant documents permit the Chapter 11 Trustee, on behalf of Acis, or otherwise, to market HCLOF’s Equity Notes for sale. The Chapter 11 Trustee cannot sell the Equity Notes in violation of the terms of the Indentures, and seek at the same time to retain the benefits of the Indentures.

29. Section 77e of the '33 Act makes it unlawful “to offer to sell or offer to buy . . . any security, unless a registration statement has been filed as to such security.” 15 U.S.C. § 77e(c).⁷ The Chapter 11 Trustee has not filed a registration statement covering his proposed sale of the Equity Notes.

30. Section 1145(a)(1) and (a)(2) do not absolve the Chapter 11 Trustee from compliance with these requirements because Oaktree is not receiving the Equity Notes on account of claims against the estates. *See also SEC v. Universal Express, Inc.*, 475 F. Supp. 2d 412, 425 (S.D.N.Y. 2007) (“[T]he section 1145(a) exemption is available only when the offerees are receiving the securities, at least in part, in exchange for claims against or interests in the debtor which they hold.” (internal citation omitted)).

31. The mechanism set forth in the Plan for the transfer of the Equity Notes makes plain that Oaktree is not the initial transferee (or subrogee). Instead, the initial transferee are the bankruptcy estates. As described, the estates will then transfer the notes to Oaktree. Because Oaktree will not be receiving the Equity Notes in exchange for claims or interests that Oaktree has against the Debtors, the section 1145(a) exemption cannot, and does not, apply.

32. Bankruptcy Code section 1145 provides a limited exemption when the Chapter 11 Trustee sells a security “of an issuer other than the debtor or an affiliate” 11 U.S.C. § 1145(a)(3). The exemption allows trustees to raise cash for an estate while protecting purchasers by requiring that adequate information about the securities is available. This “portfolio securities” exemption should be strictly construed because public policy strongly supports the registration of securities. *See Quinn & Co. v. S.E.C.*, 452 F.2d 943, 946 (10th Cir. 1971); 8

⁷ In any litigation or enforcement action, it would be the Chapter 11 Trustee’s burden to show the applicability of an exemption to this requirement. *E.g.*, *SEC v. Carrillo Huettell LLP*, No. 13 Civ. 1735(GBD)(JCF), 2017 WL 213067, at *3 n.7 (S.D.N.Y. Jan. 17, 2017). The Chapter 11 Trustee has not argued that any of these exemptions apply. *See* 15 U.S.C. § 77d (providing exemptions to registration requirements).

Collier on Bankr. ¶ 1145.02 (16th ed. 2018). This exemption requires that (1) the debtor own the security on the date the bankruptcy petition was filed; (2) any exempt securities are not securities of the debtor's affiliates; (3) the issuer of the securities is in full compliance with registration and disclosure laws; and (4) the volume of the securities sold be limited to less than 4% of shares outstanding. 11 U.S.C. § 1145(a)(3).

33. The Chapter 11 Trustee's Plan A transaction clearly does not qualify for this exemption. First, neither the Chapter 11 Trustee nor the Debtors owned the Equity Notes on the date the bankruptcy petition was filed, nor do they own them now. Second, the proposed sale would be far in excess of the 4% threshold permitted by the exemption. Because the section 1145 exemptions do not apply, the Chapter 11 Trustee will be in violation of the '33 Act.

34. In addition to violating the '33 Act, the Plan violates the Investment Advisors Act of 1940 (the "IAA"). It is clear that the Chapter 11 Trustee owes fiduciary duties to HCLOF and its investors. In agreeing to manage the CLO investments, Acis LP represented to the CLOs that it is "registered as an investment adviser" under the IAA and agreed to perform its portfolio management services consistent with the IAA. *See, e.g.*, 2013-1 PMA § 17(b)(i). The IAA imposes a fiduciary duty on Acis LP to act for the benefit of the CLO and its investors, including Equity Noteholders like HCLOF. *See Transamerica Mortg. Advisors v. Lewis*, 444 U.S. 11, 36 (1979) ("Congress intended to impose enforceable fiduciary obligations" in passing the Act); 15 U.S.C. § 80b-6.⁸ The scope of Acis LP's (and thus the Chapter 11 Trustee's) fiduciary duties is broad. The Chapter 11 Trustee's obligations include a duty to refrain from conduct that directly harms the CLOs, as well as the more general duty of undivided loyalty. *See Bullmore v. Banc of*

⁸ Acis LP also owes fiduciary duties as an investment advisor under New York's common law. *See Bullmore v. Ernst & Young Cayman Islands*, 846 N.Y.S.2d 145, 148 (N.Y. App. Div. 2007) ("Professionals such as investment advisors, who owe fiduciary duties to their clients, 'may be subject to tort liability for failure to exercise reasonable care, irrespective of their contractual duties'" (citations omitted)).

Am. Sec. LLC, 485 F. Supp. 2d 464, 471 (S.D.N.Y. 2007) (applying New York law). Each of the plans proposed by the Chapter 11 Trustee rest upon a flagrant violation of Acis LP's fiduciary duties: Plan A proposes to sell HCLOF's property without its consent and Plan B and Plan C propose to impermissibly modify the Indentures to strip HCLOF and the other noteholders of their right to call a redemption. These issues will be more thoroughly addressed in HCLOF and Highland's response to the Chapter 11 Trustee's Limited Issues Brief.

35. Moreover, the Chapter 11 Trustee cannot disclaim the duties he owes to the CLOs and the investors under the contracts and securities laws, including the IAA. In one analogous case, *In re New Center Hospital*, 200 B.R. 592 (E.D. Mich. 1996), the chapter 11 trustee sought to escape the duties of the debtor-hospital as the administrator of an employee benefit plan governed by ERISA. The chapter 11 trustee argued that if he were to administer the plan, he would be required to act solely in the interest of the ERISA plan beneficiaries which would be in conflict with his duties to the bankruptcy estates; therefore, he could not serve as an ERISA fiduciary and a bankruptcy estate fiduciary at the same time. *Id.* The district court rejected this argument and overturned the decision of the bankruptcy court, concluding that, "[t]he Bankruptcy Trustee assumes the position of the debtor as to that debtor's many obligations. Courts have held that statutory obligations that bind the debtor will subsequently bind the bankruptcy estate." *Id.* (internal citations omitted). Likewise, the Chapter 11 Trustee is bound to perform the obligations and duties of Acis LP under relevant contract and applicable law, including the IAA. Because the Chapter 11 Trustee has put forth a Plan that violates such duties, he cannot meet the section 1129(a)(3) standard that the Plan is not "forbidden by law."

C. Section 1129(a)(3) – The Plan Was Not Proposed in Good Faith

36. Bankruptcy Code section 1129(a)(3) further provides that a plan must be proposed in good faith. The Chapter 11 Trustee, as proponent of the Plan, bears the burden of

demonstrating that it was filed in good faith. *In re Barnes*, 309 B.R. 888, 892 (Bankr. N.D. Tex. 2003). A good faith plan “must fairly achieve a result consistent with the [Bankruptcy] Code.” *Id.* (quoting *In re Block Shim Dev. Co. – Irving*, 939 F.2d 289, 292 (5th Cir. 1991)). Good faith itself is “evaluated in light of the totality of the circumstances surrounding establishment of [the] plan, mindful of the purposes underlying the Bankruptcy Code.” *In re Village at Camp Bowie I, L.P.*, 710 F.3d 239, 247 (5th Cir. 2013). The ultimate goal of the analysis is to determine the “subjective motive” of a plan proponent. *In re Texas Star Refreshments, LLC*, 494 B.R. 684, 694 (Bankr. N.D. Tex. 2013).

37. The record demonstrates there was virtually no negotiation of the economic terms of the Oaktree proposal, and in particular there was no effort by the Chapter 11 Trustee to secure the highest possible price for the Equity Notes.⁹ The purported consideration for the PMAs was clearly based not on any actual metric of value for those contract rights, but on an amount necessary to pay Josh Terry’s claim. Certainly as to the Equity Notes, this was not a negotiation between a willing seller and a willing buyer – the seller was not even present. It is instead a scheme, concocted in bad faith, to take property from one party and provide a windfall to other parties.

38. Moreover, improper motives have tainted these bankruptcy cases from the beginning. Joshua Terry initiated these proceedings on the eve of a state court hearing to consider the very relief he then requested from this Court. From the very beginning, Terry has made clear his motivation for initiating the involuntary bankruptcy: to prevent Acis LP from

⁹ The Chapter 11 Trustee has testified that he engaged in no substantive negotiation concerning the sale price of the Equity Notes. See Transcript of July 6, 2018 hearing at 75:14-16; 76:6-8:

MR. MALONEY. Was there any negotiation over the price formula that they were proposing for the subordinated notes?

MR. PHELAN. No . . .

. . .

Q. Now you didn’t ask that they increase that at all?

A. No.

meeting its contractual obligation to effectuate the reset requested by the equity—so that the Debtors could continue to earn management fees they are not entitled to.¹⁰

39. The Chapter 11 Trustee has adopted Terry’s cause.

40. At the end of the day, these bankruptcy cases and the Plan amount to nothing but a free option play by Terry, the Chapter 11 Trustee, and Oaktree to monetize PMAs with less than nominal value, at the expense of Highland (who is effectively funding the administrative expenses of these cases on account of the substantial management fees being withheld from it) and HCLOF (who is being denied its contractual rights with non-debtor parties and stripped of its own property against its will to fund that payment). The Chapter 11 Trustee has nothing to lose from this strategy – he can turn an asset with little or no value into a big pay day for Terry and himself. Oaktree similarly has nothing to lose – if it doesn’t end up getting the Equity Notes, it walks away with all its expenses paid and a \$2.5 million break-up fee for its time.

41. In these circumstances, the Court should not make a good faith finding.

D. Section 1129(a)(5) – The Plan Does Not Properly Disclose or Address Insider Issues

42. Bankruptcy Code section 1129(a)(5)(A)(i) requires a plan proponent to disclose “The identity and affiliations of any individual proposed to serve, after confirmation of the plan, as a director, officer, or voting trustee of the debtor, an affiliate of the debtor participating in a joint plan with the debtor, or a successor to the debtor under the plan.” Under both Plan B and Plan C, Terry is slated to receive 100% of the equity in the Reorganized Debtor (as well as, inexplicably, any residual assets of the Acis Trust upon payment in full of all creditors). Terry therefore clearly comes within the definition of individuals described in section 1129(a)(5)(A)(i).

¹⁰ Among the things acknowledged by Terry at the involuntary trial in March 2018 was the fact that he “had no issues with the rest or refinance transaction. [Rather,] the issue was that these collateral-management agreements were transferred for no consideration to Acis.” March 21, 2018 Hrg. Tr. At 132:16-19. Note, however, that fees would not continue to be payable under the PMAs following a reset in any circumstance. *See also Id.* at 27:22-28:1: “Q: And you knew there was an extreme likelihood that the [reset] transaction was not going forward as a result of the bankruptcy filing, correct? MR. TERRY: Yes, that was our goal on filing the involuntary petitions.”

While Terry's identity is disclosed in Plans B and C, his affiliations are not. Specifically, the Chapter 11 Trustee makes no effort to describe Terry's relationship and affiliations with other parties in interest in this case including (without limitation) Oaktree, Brigade Capital Management, L.P., and Cortland Capital Markets Services LLC. Furthermore, the Chapter 11 Trustee does not disclose or otherwise describe the post-petition affiliation between Terry and the Chapter 11 Trustee himself. Discovery in this matter has revealed, and evidence at the confirmation hearing will further demonstrate, that Terry has essentially acted as the co-trustee in this case. This includes: taking it upon himself to market the Debtors' assets, introducing the Chapter 11 Trustee to Oaktree, participating in most substantive communications with Oaktree, and participating in the formulation of a Plan that (under Plans B and C) hands control of the Debtors over to him. On this record, it is clear that Terry's affiliations have not been disclosed, in violation of section 1129(a)(5)(A)(i).

43. While Terry's undisclosed affiliations is a significant issue in and of itself, the relationship between Terry and the Chapter 11 Trustee raises yet another, troubling issue. The facts of this case lead inexorably to the conclusion that Terry is an insider of the Plan proponent (i.e., the Chapter 11 Trustee). The term "insider" is defined in Bankruptcy Code section 101(31) to "include" parties who have certain officer, director, or ownership interests in a debtor. However, the concept of a non-statutory insider has been recognized by many courts, including the Supreme Court. *See U.S. Bank N.A. v. Village at Lakeside, LLC*, 138 S. Ct. 960 (2018). The Fifth Circuit has identified the following factors to consider when determining whether a party is non-statutory insider: (1) the closeness of the relationship between the party and the debtor; and (2) whether the transactions between the party and the debtor were conducted at arms-length. *Browning Interests v. Allison (In re Holloway)*, 955 F.2d 1008, 1011 (5th Cir. 1992).

Importantly, cases recognize that control over the debtor is not a requirement for determining non-statutory insider status. *See, e.g., In re The Village at Lakeridge, LLC*, 814 F.3d 993, 1001 (9th Cir. 2016); *Anstine v. Carl Zeiss Meditec AG (In re U.S. Med., Inc.)*, 531 F.3d 1272, 1277 n.5 (10th Cir. 2008).

44. The ultimate point of analyzing whether any party is an insider is to determine whether such party is using “their privileged position to disadvantage non-insider creditors.” *See In re South Beach Secs., Inc.*, 376 B.R. 881, 888 (Bankr. N.D. Ill. 2007). Insider status is also critical for determining whether a party’s desire to obtain, or maintain, control over a debtor is motivating the party. *See In re Rexford Props., LLC*, 557 B.R. 788, 799 (Bankr. C.D. Cal. 2016) (noting that insiders seeking to retain ownership of the reorganized debtor were “influenced by totally different considerations from those motivating the other creditors.”) (quoting *In re Featherworks Corp.*, 25 B.R. 634, 640 (1st Cir. BAP 1982)).

45. In this case, the Chapter 11 Trustee is the proponent of the Plan. Plan proponent insiders should be scrutinized because they, like a debtor insider, may be using a plan process to benefit their “privileged position.” For example, in *In re Allegheny Int’l, Inc.*, 118 B.R. 282 (Bankr. W.D. Pa. 1982), the court found that a non-debtor plan proponent (Japonica Partners, L.P.) was considered an insider because Japonica during the case had access to “voluminous and thorough” information available only to insiders. Moreover, the court noted that while Japonica “did not have actual control or legal decision making power [over the debtor] . . . [Japonica] attempted to influence, in not very subtle ways, decisions made by the debtor.” *Id.* at 298.

46. Terry’s actions fit perfectly into such a non-statutory insider analysis. A review of the Plan makes plain Terry’s favorable treatment. His claim is separately classified, the claim is treated the same as an entirely secured claim would be, despite the fact that Terry did not even

alleged his claim was fully secured, he is being permitted to use \$1 million to acquire Acis LP's equity, despite the fact that the claim on file is less than \$1 million, and the Chapter 11 Trustee has made no indication that Terry's secured claim may be avoided, despite the fact that the garnishment took place well within the 90-day pre-petition preference period.

47. In addition, while Terry is not in formal "control" of the Chapter 11 Trustee, Terry had access to voluminous insider information during the pendency of this case and he clearly influenced decisions made by the Chapter 11 Trustee. Nothing about the relationship between Terry and the Chapter 11 Trustee suggests that they acted at arms-length. Moreover, Terry used his close relationship to further his non-creditor motivation to put into place provisions that will allow him to take sole control over the Reorganized Debtor. Thus, Terry meets every single element for establishing that he is a non-statutory insider of the Plan proponent in this case. Moreover, any attempt by the Chapter 11 Trustee to distinguish the facts and cases on the basis that the Chapter 11 Trustee is not the same entity as the Debtors is specious. Once again, the Chapter 11 Trustee is the Plan proponent in this case. If a Chapter 11 trustee were able to hide behind an "I am not the debtor" argument, then it would follow that parties could engage in all manner of inside dealing and wrongful acts with a trustee with impunity. That makes no sense. The non-statutory insider analysis is designed to identify whether a party has a close relationship that allows the party to influence the process to further non-creditor goals (i.e., control). Terry meets that test with respect to the Plan proponent in this case. And, as discussed below, the fact that Terry is a non-statutory insider means the Chapter 11 Trustee cannot cram down the Plan.

E. Sections 1129(a)(7) and 1129(b) – The Plan Is Not In the Best Interest of Creditors and Is Not Fair And Equitable

48. Bankruptcy Code sections 1129(a)(7) and 1129(b) require that a plan be in the best interest of creditors and otherwise fair and equitable. First and foremost, Plans A, B, and C are premised on actions that are not supported by the law. How could it ever be in the best interest of creditors for a plan proponent to act outside the law? The Plan is a legal fallacy and, even if confirmed, will be the subject of years of litigation and ever-increasing administrative expense claims. That is not in the creditors' best interests.

49. Also, included in a best interest of creditors analysis is a determination that creditors who have not accepted the plan will receive no less under the Plan than they would in a hypothetical Chapter 7 liquidation. *In re Briscoe Enters., Ltd. II*, 994 F.2d 1160, 1167 (5th Cir. 1993). This requires a valuation analysis comparing what the creditor would receive if the property were sold today versus the value such creditor would receive as a creditor in a Chapter 7 case. *Id.*

50. The Chapter 11 Trustee cannot meet his burden on this valuation issue with respect to HCLOF.¹¹ It is undisputable that HCLOF was not a creditor as of the Petition Date. That is, the basis for the Chapter 11 Trustee asserting that HCLOF is a creditor is the equitable relief sought in an adversary proceeding brought by HCLOF against the Chapter 11 Trustee after the Petition Date. In a hypothetical Chapter 7 case, there would simply be an orderly liquidation and therefore no need to twist the law of equitable relief and subrogation to support a plan process and HCLOF would keep its subordinated notes. As such, any liquidation analysis by the Chapter 11 Trustee is a non-sequitur from the beginning because it would be based on the facially incorrect assumption that HCLOF was a creditor on the Petition Date. Moreover, even if

¹¹ As noted, HCLOF asserts no creditor standing.

that flaw is simply ignored (and there is no reason to do so), the valuation numbers do not add up. The Plan proposes to pay HCLOF amounts based entirely on a May 2018 letter sent by Highland. Evidence has shown in this case that circumstances have changed dramatically since May 2018, and further, that HCLOF values its Equity Notes much higher than what is being proposed under the Plan. The Chapter 11 Trustee bears the burden of rebutting that valuation evidence and, based on the record of this case, he will not be able to meet such burden. In fact, the Chapter 11 Trustee has not even substantively included HCLOF in its analysis purporting to satisfy section 1129(a)(7)¹² and he has advanced no expert witness to address the valuation issues necessary to do so at the confirmation hearing. Therefore, the Chapter 11 Trustee cannot satisfy the required test under section 1129(a)(7).

F. Sections 1129(a)(8), (10) and 1129(b) – The Plan Does Not Meet the Requirements for Cram Down

51. Bankruptcy Code sections 1129(a)(8) requires that each impaired class vote in favor of a plan. Bankruptcy Code section 1129(a)(10) permits a plan proponent to cram down a plan on non-voting classes, as long as one class of impaired creditors votes in favor of the plan. Insider votes are not counted for the purposes of consent under 1129(a)(10). Section 1129(b), in turn, requires in a cram down plan that the plan not unfairly discriminate and is fair and equitable to the non-voting creditors. Based on the record of this case, it is assumed that Class 3 (the Terry Secured Claim) will be the only class with the claim amount and numerosity to be deemed (according to the Chapter 11 Trustee) a consenting class. Therefore, in order to meet the cram down confirmation requirements, the Chapter 11 Trustee has the burden of showing that: (i) Terry is impaired; (ii) Terry is not an insider; and (iii) cramming the Plan down solely on

¹² The Chapter 11 Trustee's liquidation analysis is attached as Exhibit 2-D to the Disclosure Statement. The amount of the Class 2 HCLOF claim is listed as "TBD." *Id.*

Terry's vote does not unfairly discriminate and is fair and equitable to other creditors. The Chapter 11 Trustee cannot meet such a burden.

52. The Fifth Circuit interprets the concept of impairment broadly to include any alternation of a creditor's rights. *In re Village at Camp Bowie I, L.P.*, 710 F.3d at 245. However, a broad interpretation does not mean that the concept of impairment does not exist. The policy reason for requiring an impaired class to accept the plan under a cram down is to ensure that at least one group of creditors that is "hurt . . . nonetheless favors the plan." *In re One Times Square Assocs. Ltd. P'ship*, 165 B.R. 773, 776-77 (S.D.N.Y. 1994) (emphasis added).

53. Here, no viable argument can be made that Terry is impaired under Plan A because Plan A proposes to pay Terry in full with interest. The interest element, of course, compensates Terry for any delay in receiving what he alleges he is owed. Paying a creditor in full with interest is the very definition of non-impairment. Using a lone creditor, let alone an insider such as Terry, should not be sufficient to fulfill the section 1129(a)(10) requirement. This is a textbook case of using artificial impairment to generate an impaired accepting class.

54. Moreover, even if Terry were considered impaired under Plan A, Terry's votes should not be counted under any of the plans (A, B, or C) because Terry is a non-statutory insider. The basis for deeming Terry a non-statutory insider is set forth above. Because of his status as such, the Chapter 11 Trustee is prohibited by the plain language of section 1129(a)(10) from relying on Terry's votes to support a plan.

55. The final requirement for a cram down plan is that it is fair and equitable and does not unfairly discriminate. Whether a plan is proposed in good faith is a critical element of this determination. *See In re Village at Camp Bowie I, L.P.*, 710 F.3d at 247 (citing *In re Sandy Ridge Dev. Corp.*, 881 F.2d 1346 (5th Cir. 1989)). Because, as set forth above, the Chapter 11

Trustee is unable to establish that the Plan was proposed in good faith, he likewise will be unable to establish that he meets the cram down standard. The Plan also unfairly discriminates on a number of different bases. Moreover, the Chapter 11 Trustee provides no basis for classifying Highland's claims separately under the Plan, other than to gerrymander the classes.

G. Section 1129(a)(10) – The Plan's Claim Classifications are Improper

56. A further requirement under section 1129(a)(10) and related case law is that claims be properly classified under a plan. *See, e.g., In re Greystone III Joint Venture*, 995 F.2d 1274, 1279 (5th Cir. 1991) (prohibiting the gerrymandering of classes to create a consenting impaired class). Claims that are "substantially similar" must be classified together. Terry's claim treatment under the Plan is a blatant example of gerrymandering. Terry has alleged a partial secured claim based on pre-petition garnishment of certain funds. However, the garnishment occurred within the 90-day preference period and is *per se* avoidable. As such, Terry is nothing more than a general unsecured creditor in this case. His claim should be classified alongside other general unsecured creditors in Class 4.

57. Highland is a general unsecured creditor in the case, but its claim has been separately classified from other general unsecured creditors. Similarly, HCLOF is a Class 2 claimant under Plan A, but is effectively a Class 5B claimant under Plan B and Plan C. Presumably, the Chapter 11 Trustee bases such separate classification and disparate treatment on his allegation that Highland and/or HCLOF are liable for a fraudulent transfer. However, that matter remains subject to an on-going adversary proceeding. In other words, the Chapter 11 Trustee has simply made an allegation and is yet to prove his case. Permitting separate classification based on unproven allegations would seem an invitation for plan proponents to

engage in all manner of mischief in order to craft around the requirement that substantially similar claims be classified together.¹³

H. Section 1129(a)(11) – The Plan is Not Feasible

58. Bankruptcy Code section 1129(a)(11) has been interpreted to require a finding that a plan is economically feasible. This requires the Chapter 11 Trustee to demonstrate that the plan has a “reasonable assurance of commercial viability.” *In re Briscoe Enters., Ltd. II*, 994 F.2d at 1166. Moreover, the Chapter 11 Trustee must “present proof through reasonable projections that there will be sufficient cash flow to funder the [Plan].” *See In re Couture Hotel Corp.*, 536 B.R. 712, 737 (Bankr. N.D. Tex. 2015).

59. On the record before the Court, the Chapter 11 Trustee has failed to demonstrate sufficient funds to meet all the obligations set forth in the Plan. That includes the very substantial administrative expense burden that appears to have surpassed the total claims alleged by the Chapter 11 Trustee to be payable in this case.

I. The Plan Cannot Effect an Assumption and Assignment of the PMAs Without Consent.

60. The Plan A transaction cannot be confirmed because it proposes to assume and assign the PMAs to Oaktree (*see* Plan § 2.17(c)) in violation of section 365(c)(1) of the Bankruptcy Code and without the requisite consent. *See* 11 U.S.C. § 365(c)(1) (trustee “may not

¹³ HCLOF and Highland object to the Chapter 11 Trustee’s apparent attempt to litigate the fraudulent transfer claims currently pending in the adversary proceeding as part of the plan confirmation process. As set forth in their separately-filed joint motion to strike the expert report of Kevin Haggard of Miller Buckfire, any such attempts are procedurally improper and inconsistent with the parties’ understanding and agreed-upon schedule. Highland and HCLOF have a right under the Bankruptcy Code and applicable rules to litigate the fraudulent transfer claims in a proceeding subject to the heightened procedural protections available in an adversary proceeding—not in the context of a harried and accelerated confirmation process (a process of the Trustee’s own making). *See In re Mansaray-Ruffin*, 530 F.3d 230, 242 (3d Cir. 2008) (“[W]here the Rules require an adversary proceeding—which entails a fundamentally different, and heightened, level of procedural protections—to resolve a particular issue, a creditor has the due process right not to have that issue without one.”). The Court should not condone this type of “litigation by ambush.” *See In re Vidal*, No. 12-11758 BLS, 2013 WL 441605, at *5 (Bankr. D. Del. Feb. 5, 2013) (applying *Mansaray-Ruffin* to avoid “lien-stripping by ambush”).

assume or assign any executory contract . . . if applicable law excuses a party, other than the debtor, to such contract . . . from accepting performance from or rendering performance to an entity other than the debtor . . . and such party does not consent to such assumption or assignment”); *In re Cedar Chem. Corp.*, 294 B.R. 224, 232 (Bankr. S.D.N.Y. 2003) (“a contract otherwise unassignable under § 365(c)(1) can be assumed and assigned if the non-debtor party consents”). The IAA and New York state law provide the relevant “applicable law” prohibiting assignment and excusing HCLOF from accepting performance from anyone other than Acis and/or Highland.

61. The IAA prohibits the assumption and assignment of the PMAs to Oaktree without, among other things, the Equity Noteholders’ consent. Section 205(a)(2) of the IAA prohibits investment advisers (i.e., Acis LP) from entering into an investment advisory contract with a client (here, the CLOs) that “fails to provide, in substance, that no assignment of such contract shall be made by the investment adviser without the consent of the other party by the contract.” 15 U.S.C. § 80b-5(a)(2). Section 202(a)(1) of the IAA defines “assignment” generally to include “any direct or indirect transfer . . . of an investment advisory contract” by an adviser. 15 U.S.C. § 80b-2(a)(1) (emphasis added).

62. Section 14 of the PMAs (titled “Delegations/Assignments”) provides the provisions intended to satisfy section 205(a)(2) of the IAA. Those sections, in relevant part, prohibit Acis from assigning its responsibilities under the PMAs without the written consent of each relevant CLO, at least a majority of the Equity Notes of each CLO, at least a majority of the Controlling Class (as defined in the indentures), and satisfaction of the Global Rating Agency Condition. *See, e.g.*, 2013-1 PMA, § 14(a). Acis cannot transfer, either directly or indirectly, its responsibilities under the PMAs without first satisfying the requisite conditions, including

obtaining the written consent of a majority of the Equity Noteholders of each CLO (which the Chapter 11 Trustee has not obtained).

63. The *CWCapital Cobalt VR Ltd. v. CWCapital Invs. LLC*, No. 17 Civ. 9463, 2018 U.S. Dist. LEXIS 90174 (S.D.N.Y. May 23, 2018) case does not mandate a different result. First, the language the Trustee quotes is from a decades-old SEC no-action letter. *Id.* at *12 (quoting *SEC No-Action Letter, Am. Century Cos.*, 1997 WL 1879138, at *5 (Dec. 23, 1997)). SEC no-action letters are only binding with respect to the party requesting guidance, have no precedential value unless the SEC agrees to allow a party to rely on them, and the SEC is free to change their interpretation at any time. *See* SEC, Fast Answers, available at <https://www.sec.gov/fast-answers/answersnoactionhtm.html>. Second, CWCapital did not decide whether the IAA separately requires client consent. 2018 U.S. Dist. LEXIS 90174, at *12-13. Third, a reported case from a court in this District recently found to be well-pleaded a cause of action for “assigning the benefits of [an] agreement to provide investment advisory services to others” based on the IAA. *Douglass v. Beakley*, 900 F. Supp. 2d 736, 748 (N.D. Tex. 2012).

64. The proposed assumption and assignment undermines the public policy reasons for section 205(a)(2) of the IAA. The Chapter 11 Trustee’s transfer of portfolio management duties to Oaktree thus violates section 205(a)(2) of the IAA, and in turn, violates section 365(c)(1) of the Bankruptcy Code. The Chapter 11 Trustee and this Court cannot ignore the dictates of the IAA. *Cf. In re Adelphia Commc’ns Corp.*, 359 B.R. 65, 78-79 (Bankr. S.D.N.Y. 2007) (local ordinances provided “applicable law” that prohibited assignment).

65. The PMAs are also a personal services contract that cannot be assigned under New York law without consent. *See Wien & Malkin LLP v. Helmsley-Spear, Inc.*, 6 N.Y.3d 471, 482 (N.Y. 2006) (hotel management contract held below to be personal services contract;

“personal services contracts generally may not be assigned absent the principal's consent”) (citing 9 Corbin, Contracts § 865 [interim ed.]; 3 Farnsworth, Contracts §§ 11.4, 11.10 [3d ed]); *Marriott Int’l, Inc. v. Eden Roc, LLLP*, 104 A.D.3d 583, 584 (N.Y. App. Div. 1st Dep’t 2013) (“The parties’ detailed management agreement places full discretion with plaintiffs to manage virtually every aspect of the hotel. Such an agreement, in which a party has discretion to execute tasks that cannot be objectively measured, is a classic example of a personal services contract that may not be enforced by injunction”); *see also* 6A N.Y. Jur., Assignments § 11 (“[T]he principle that all ordinary business contracts are assignable is subject to the exception that executory contracts for personal services or those involving a relationship of personal confidence are not assignable by one party unless the other party consents or waives the right to object. Thus, as a general rule, an employment contract for the performance of personal duties or services is not assignable by the employer so as to vest in the assignee the right to the labor of someone who never agreed to such employment. In fact, generally, no executory contract for personal services can be assigned by either party.”).

66. Under New York law, personal service contracts are generally those that depend on the skill or reputation of the performing party. *See In re Schick*, 235 B.R. 318, 323 (Bankr. S.D.N.Y. 1999) (“Faced with a state law restricting assignment . . . a court must inquire into its rationale and uphold the restriction under section 365(c) if the identity of the contracting party is material to the agreement”). As one bankruptcy court has stated with respect to New York law on the issue:

It is well settled that when an executory contract is of such a nature as to be based upon personal services or skills, or upon personal trust or confidence, the debtor-in-possession or trustee is unable to assume or assign the rights of the bankrupt in such contract. . . . It is patently unfair in such cases to require a non-debtor third party to accept performance from anyone other than the original contract vendee,

unless the contract clearly provides for the right to assign to another contract vendee.

In re Grove Rich Realty Corp., 200 B.R. 502, 510 (Bankr. E.D.N.Y. 1996); *see also Donald Rubin, Inc. v. Schwartz*, 559 N.Y.S. 2d 307, 310 (N.Y. App. Div. 1990) (describing a consulting agreement as being “in the nature of a personal services contract”); *Carbo Indus., Inc. v. Coastal Ref & Mktg., Inc.*, 154 F. App’x 218, 220 (2d Cir. 2005) (“this case does not fall within the limited exception developed for ‘personal services contracts’—*e.g.*, consulting contracts.”) (citing *Donald Rubin*, 559 N.Y.S. 2d at 310) (emphasis added).

67. As has been previously explained, HCLOF and its investors invested in reliance on the skill and expertise of Highland to manage the CLOs. In this case, a witness put on by the Chapter 11 Trustee – Zach Alpern of Stifel, Niocolas – testified to the fact investors pick sub-advisors based on the fact that different advisors “have different styles and make different creditor choices.”¹⁴ Mr. Alpern further testified that “equity holders make an informed decision when they make their investment and their opinion of the advisor is one of the considerations that they may make at the time of their investment, and it’s a consideration that they probably take into account whether they hold or sell that investment.”¹⁵

68. Replacing Acis/Highland with Oaktree/Brigade frustrates the investment objective of the parties, denies them the benefit of their bargain, and undermines and violates the IAA as well as black-letter New York law relating to personal service contracts. The assumption and assignment of the PMAs cannot be approved.

¹⁴ See Transcript of August 1, 2018 hearing on the Chapter 11 Trustee’s *Emergency Motion to Approve Replacement Sub-Advisory and Shared Services Providers, Brigade Capital Management, LP and Cortland Capital Markets Services LLC*, at 67:24-25.

¹⁵ *Id.* at 69:9-14.

J. The Disclosure Statement Should Not be Finally Approved

69. As to the Disclosure Statement, Highland and HCLOF renew their objections to its final approval based on the fact that it describes a patently unconfirmable Plan. *See In re Quigley Co.*, 377 B.R. 110, 115-16 (Bankr. S.D.N.Y. 2007); *In re Arnold*, 471 B.R. 578, 586 (Bankr. C.D. Cal. 2002).

**IV.
RESERVATION OF RIGHTS**

70. Nothing herein shall be construed as an admission of, or concession to, any fact contained in the Disclosure Statement or the Plan, and Highland and HCLOF reserve all rights to contest and rebut any and all factual allegations at the Confirmation Hearing. As previously mentioned herein, because discovery is ongoing per the Discovery Schedule, Highland and HCLOF reserve their rights to amend these Objections.

WHEREFORE, Highland and HCLOF respectfully request entry of an order (i) denying confirmation of the Plan; (ii) denying final approval of the Disclosure Statement; and (iii) granting such other and further relief to which Highland and HCLOF are entitled.

Dated: August 13, 2018

Respectfully submitted,

/s/ Jason B. Binford

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CERTIFICATE OF SERVICE

This is to certify that on August 13, 2018, a true and correct copy of the foregoing was served electronically via the Court's ECF system on those parties registered to receive such service.

/s/ Melina Bales

Melina Bales

EXHIBIT 6

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18-30264-sgj11 Acis Capital Management, L.P. - Court's Ruling on Plan Confirmation

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Dear Counsel:

The following is the court's ruling on the request of the Chapter 11 Trustee ("Acis Trustee") of Acis Capital Management, L.P. ("Acis") and Acis Capital Management GP, LLC (collectively, the "Debtors") to confirm the ***First Amended Joint Plan for the Debtors (the "Plan")***, as modified, which contains therein alternatives Plan A, Plan B, and Plan C.

The court will deny confirmation of Plans A, B, and C. Below is some of the court's reasoning.

Plans B and C

First, Plans B and C are unconfirmable because they contemplate the amendment of the various CLO Indentures to which Acis is not a party. Specifically, Section 3.24 (for Plan B) and Section 4.24 (for Plan C) each provide as follows:

"Amendment of Indentures. The Indentures shall be amended pursuant to section 1123(a)(5)(F) of the Bankruptcy Code to provide that the Acis CLOs cannot be called for redemption until the later of (a) the date on which all Allowed Claims against the Debtors have been paid in full, or (b) three (3) years after the Effective Date. In the event that the Acis CLOs are reset, any new indenture with respect to a reset CLO shall provide the reorganized Acis will continue as the portfolio manager and that the reset CLO cannot be called for redemption until the later of (y) the date on which all Allowed Claims against the Debtors have been paid in full, or (z) three (3) years after the Effective Date."

The court recognizes that section 1123(a)(5)(F) of the Bankruptcy Code provides that a Chapter 11 plan may provide for adequate means for the plan's implementation, ***such as cancellation or modification of any indenture*** or similar instrument. However, the court concludes that section 1123(a)(5)(F) applies only to an indenture on which the debtor is a party—namely the issuer. While the court understands that oftentimes multiple, intertwined agreements are sometimes read together and treated in many respects as one integrated document, and while the court recognizes that, in this case, the CLO Indentures and CLO PMAs (the latter of which Acis is party to) are very interrelated, the court does not believe that this gives Acis the right to amend the Indentures without every single party thereto otherwise agreeing. For this simple reason, the current Plans B and C will not be confirmed.

Plan A

Next, with regard to Plan A, the issues are much more complicated. But the court finds Plan A unconfirmable because—while HCLOF has repeatedly asked the Bankruptcy Court for relief, and has also made certain demands upon the CLO Issuers, the Indenture Trustee and the Acis Trustee with regard to optional redemptions—HCLOF is ***not the holder of a claim*** against Acis, as defined in Section 101(5) of the Bankruptcy Code, to which the doctrine of equitable subrogation

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can be applied.

Plan A, distilled to its essence, is premised upon: (1) treating HCLOF as an entity with a “claim” against Acis, pursuant to the Bankruptcy Code’s definition in section 101(5)(B), that can be provided for in an Acis plan as an unsecured claim (Class 2); (2) monetizing or liquidating that claim—by calculating the amount HCLOF would realize if HCLOF received exactly what it has demanded from the CLO Issuers, the Indenture Trustee, and the Acis Trustee; (3) paying the monetized/liquidated claim of HCLOF in cash in full on the Effective Date of the Plan, with cash that the Acis Trustee would receive from Plan funder Oaktree; (4) after payment of HCLOF on its liquidated/monetized claim, the Acis Trustee would be entitled to step into the shoes of HCLOF, and be the new holder of HCLOF’s Sub Notes, via the court’s application of the common law doctrine of equitable subrogation to the Acis Trustee—it is argued that this would be equitable, since the Acis Trustee would essentially be paying the CLO Issuers’ (a debtor’s) obligations on the Sub Notes to HCLOF (a creditor) and, thus, should be able to step into that creditor’s shoes to avert HCLOF’s double recovery; and (5) the Acis Trustee, after acquiring the Sub Notes through equitable subrogation, would convey those Sub Notes to Oaktree, the plan funder.

HCLOF, Highland Capital Management (“Highland”), and the CLO Issuers object to this use of equitable subrogation—essentially arguing that, no matter what one calls it, this is forcing a non-debtor party to sell its property that is not property of the estate. The court does not find this to be an easy analysis at all. To be sure, this is a novel proposed application of the equitable subrogation doctrine. To be sure, the Acis Trustee’s proposal, at first blush—and even after a second or third turn—looks a little like an effort to force a sale of non-debtor property. This would be a novel application of the equitable subrogation doctrine—which, admittedly, has grown from a somewhat narrow to a much broader doctrine over time, with the historical purpose always being to serve the interests of fairness and justice. It is worth noting that, initially, courts in New York attempted to limit the scope of equitable subrogation to apply only to persons standing directly in the place of a surety. Then, as courts in other states expanded the concept of equitable subrogation, so did the courts of New York, eventually expanding the concept to cover third party guarantors. It was further expanded to parties who pay off a mortgage and in the case of refinancing mortgagees. The doctrine essentially went from a narrow remedy only available to sureties, to a broad doctrine available to almost any party regardless of his legal interest.

But the court believes there are at least a couple of reasons the doctrine should not be applied here. First, the court does not believe HCLOF can be construed to have a “claim” against Acis, pursuant to section 101(5)(B) of the Bankruptcy Code.

The evidence (Exh. 38) was that HCLOF made statements in correspondence dated May 4, 2018, from HCLOF to U.S. Bank, the indenture trustee for all five Acis CLOs, arguing that Acis, as portfolio manager under the CLO-PMAs, was breaching its duties, and stating that both the CLO Issuer “and the Subordinated Noteholders have a claim for the losses caused by the actions of the Portfolio Manager and the Chapter 11 Trustee” and claiming setoff right against funds held by the indenture trustee belonging to the Debtors.

Additionally, the evidence was also that HCLOF has twice during the bankruptcy case purported to direct the CLO Issuers, the Indenture Trustee, and Acis “to effect an Optional Redemption of all Secured Notes and the Subordinated Notes in full.” Exhs. 20 & 21. In the second notice, HCLOF added language that this would be “for the express purpose of placement of a portion of the portfolio assets held by the Co-issuers into a warehouse arrangement or a total return swap or other derivatives arrangement with Highland Capital Management, L.P.” The end result of

this, of course, would be that the Debtor Acis would no longer have any assets to manage and no revenue stream to potentially pay its creditors.

Then, after the Trustee refused to effectuate an optional redemption, both HCLOF and Highland filed, on May 30, 2018, an adversary proceeding against the Acis Trustee, demanding that the Acis Trustee specifically perform and effectuate an optional redemption (the "Adversary"-- Adversary No. 18-03078-sgj). The Adversary Complaint states: *"Under the [CLO] funds' governing documents, the investors [e.g. HCLOF] have the right to have their money returned upon demand. Consequently, to mitigate their on-going losses, the investors have instructed the Indenture Trustee and Acis LP, as the putative portfolio manager of the funds, to sell the funds' assets through a redemption process provided for in the Indenture, and return the investors' money to be invested elsewhere with higher yields The Debtors, which are controlled by a Chapter 11 Trustee, have refused to authorize the necessary processes to effectuate a redemption of the funds to allow the return of the investors' money The investors are suffering daily losses because of the Chapter 11 Trustee's inaction. . . . The Plaintiffs file this Complaint to protect their interests and urge the Court to promptly enter a preliminary injunction enjoining the Chapter 11 Trustee from interfering with the redemption process and allowing the investors to have their money returned before they incur further losses."* Para. 2.

The Original Complaint went on to state that the ACIS CLO PMAs are valid and enforceable contracts between the CLOs and Acis LP. Under the PMAs, Acis LP provides investment advisory services to the CLOs. "Plaintiff HCLOF, who holds an equity position in the CLO, *is a third-party beneficiary of the PMA*. The Chapter 11 Trustee, as Acis LP's Chapter 11 trustee, has anticipatorily breached the PMA by communicating his refusal to effect the Subordinated Noteholders' requested redemption as required by the PMA. The Chapter 11 Trustee's breach has caused damage to HCLOF." Paragraphs 67-70. See also paras. 74-77; 81-84; 88-91; 95-98.

Subsequently, HCLOF withdrew its two sets of redemption notices and on August 10, 2018 (after appealing a bankruptcy court preliminary injunction in the Adversary and after also moving to withdraw the reference in the Adversary), moved to amend the Adversary to ask for only the following: *"Pursuant to 28 U.S.C. § 2201, HCLOF seeks a declaration that the Chapter 11 Trustee has no authority to sell or transfer HCLOF's property without HCLOF's consent. HCLOF seeks no money damages or other relief not sought in this Amended Complaint."*

Is this all enough for HCLOF to have a "claim" against the Debtor, pursuant to section 101(5)—in other words, does it amount to an assertion of a "right to an equitable remedy for breach of performance if such breach gives rise to a right to payment"—particularly when HCLOF has now withdrawn its two notices requesting the Indenture Trustee and Debtor commence an optional redemption process and has also sought to amend the Original Complaint to specify that it is not seeking any damages?

The court believes no. The five CLO PMAs specifically provide that there are *no third party beneficiaries* (except that four of the five CLO PMAs carve out the Indenture Trustee as a third party beneficiary). Thus, HCLOF—although it alleged in the Original Complaint—that it was an alleged "third party beneficiary," never had any basis to state that or to complain of Acis's alleged "anticipatory breach" of the CLO PMAs, as it purported to do in the Original Complaint. Moreover, there is, of course, no longer a PMA between Acis and HCLOF (f/k/a/ as ALF), as of October 27, 2017, as a result of the series of transactions that "the Highlands" apparently

orchestrated after the Josh Terry arbitration award and judgment. Thus, HCLOF cannot claim any breach of contract between Acis and HCLOF. Acis is technically not a party to the Indentures. Thus, as far as the court is aware, ***there is no contract between HCLOF and Acis whatsoever. If there is some theory under which HCLOF can assert liability against Acis , it has not been articulated.***

In summary, the court does not believe HCLOF (though it has made many threats and demands and filed an Adversary) has ever articulated a viable claim against Acis. Without a viable claim, the court does not believe the equitable subrogation doctrine asserted by the Acis Trustee works. And, without some sort of claim being validly asserted against Acis, any payment by it on account of the Sub Notes would appear to be voluntary.

The court recognizes that some courts have applied the equitable subrogation doctrine where a party paid a debt on which it had no liability and seemed to do it somewhat voluntarily—despite there being a long-standing exception to the doctrine for “voluntary payment.” The strongest example of this is the case of NY Stock Exchange v, Sloan, **1980 U.S. Dist. LEXIS 13316** (S.D.N.Y. Aug. 15. 2018). But it appears to this court that, in any case where a court has allowed equitable subrogation where “voluntariness” was somewhat in existence, ***there was a situation where there was a primary obligor who wasn't paying its obligation***. Here, the CLO Issuers are perfectly willing and able to perform their obligations. Thus, applying equitable subrogation here seems a bridge too far. The Acis Trustee would appear to an “officious meddler” (although with good motives) and—with no real exposure to HCLOF, in the court’s view—the payment of the Sub Notes obligations would be purely voluntary. The court recognizes that the Acis Trustee would be attempting to protect an interest of its own (the Acis PMA revenue stream) somewhat like the property developer in the Hamlet case. Hamlet v. Northeast, **64 A.D.3d 85** (N.Y App. Div. Second Dept. 2009). But, in Hamlet, the property developer who paid the Environmental fees to the town of Brookhaven, that the subcontractor had bonded and agreed to pay, was itself primarily liable on the Environmental fees (in other words, the Town had a claim against Hamlet). Again, equitable subrogation under the exact facts and circumstances of this case seems a bridge too far.

Miscellaneous Rulings

The court rules on a few miscellaneous matters that were contested, although it is denying confirmation. This may be useful for any future appeals or for any future proposed plans.

Assumption and Assignment of the PMAs would not violate section 365 of the Bankruptcy Code.

The court believes that the assumption of the CLO PMAs by the Acis Trustee and the assignment of the CLO PMAs to a third party (either Oaktree or Brigade or Cortland) would be permissible under section 365 of the Code. Section 365 of the Bankruptcy Code does not prohibit the Trustee from assigning its rights under the PMAs without the written consent of the CLOs, the Subordinated Noteholders, and others. Section 365(c)(1) of the Bankruptcy Code provides:

“The trustee may not assume or assign any executory contract . . . if . . . applicable law excuses a party, other than the debtor, to such contract . . . from accepting performance or rendering performance to an entity other than the debtor or debtor in possession, whether or not such contract . . . prohibits or restricts assignment of rights; and . . . such party does not consent to such assumption or assignment[.]”

11 U.S.C. § 365(c)(1).

The court overrules any objection that there is some applicable law that excuses the

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counterparties to the PMAs (i.e., the CLO Issuers) from accepting performance from a party other than the debtor. First, these are not personal services contracts. Assessing whether a contract is a personal service contract "depends upon the subject of the contract, the circumstances of the case and the intent of the parties to the contract." *Leonard v. Gen. Motors Corp.* (In re Headquarters Dodge), 13 F.3d 674, 682-83 (3d Cir. 1993) (internal quotation marks omitted); see also *In re Compass Van & Storage Corp.*, 65 B.R. 1007, 1011-12 (Bankr. E.D.N.Y. 1986) ("Ascertaining whether a contract is personal posits on close distinctions, e.g., the nature and subject matter of the contract, the circumstances of the case placed in juxtaposition with the intention of the parties."). Even "clauses in the contract . . . attesting to a personal relationship will not be dispositive." *Leonard*, 13 F.3d at 683. Ultimately, if "the identity of that person or entity [rendering performance under the contract] is an essential element of the contract, and if the contract is non-assignable under applicable non-bankruptcy law then the estate cannot assign the contract." *Grove Rich Realty*, 200 B.R. at 507. Accordingly, in order to determine whether the PMAs are personal service contracts, the court must assess the particular circumstances in the case, the nature of the services provided by Acis under the PMAs, and whether such services are nondelegable. Highland contends that because the PMAs "depend on the skill and reputation of the performing party," the PMAs are personal service contracts, and thus unassignable. If this were the standard, the exception would swallow the rule—any prudent party contracting for another's services considers the other party's skill, expertise, and reputation—and any contract for services premised on the skill and reputation of the party providing services would be a personal service contract. It is not whether the party providing services is skilled and reputable—it is whether such services are unique in nature. See *Compass Van & Storage Corp.*, 65 B.R. at 1011. To support its contention, Highland cites New York cases under which hotel management contracts or consulting contracts were found to be personal service contracts. In the *Marriott* case cited by Highland, in which the court found the hotel management to be a personal service contract, the court observed that the hotel manager had "full discretion . . . to manage virtually every aspect of the hotel." *Marriott Int'l, Inc. v. Eden Roc, LLLP*, 104 A.D.3d 583, 584 (N.Y. App. Div. 1st Dep't 2013). *Marriott* is distinguishable. Here, Acis did not manage virtually every aspect of the CLOs. Pursuant to the Shared Services Agreement and Sub-Advisory Agreement, Acis LP delegated certain of its responsibilities under the PMAs to Highland. Accordingly, the personal qualities of Acis LP were not essential to performance under the PMAs. While the expertise of Acis LP was relevant to its selection as portfolio manager, such expertise is not unique—as demonstrated by the expertise and reputation of Oaktree, Brigade, and others who act as CLO portfolio managers. Also, importantly, the PMAs themselves provide that Acis may delegate the performance of its duties under the PMAs to third parties: "In providing services hereunder, the Portfolio Manager may employ third parties, including its Affiliates, to render advice (including investment advice), to provide services to arrange for trade execution and otherwise provide assistance to the Issuer, and to perform any of the Portfolio Manager's duties under this Agreement; provided that the Portfolio Manager shall not be relieved of any of its duties hereunder regardless of the performance of any services by third parties." 2014-3 PMA § 3(h)(iii). And although section 14 the PMAs requires consent for assignment, section 14 contemplates that an Affiliate assignee "has demonstrated ability, whether as an entity or by its personnel, to professionally and competently perform duties similar to those imposed upon the Portfolio Manager pursuant to this Agreement." *Id.* § 14(a). Further, sections 14 and 32 of the PMAs provide for merger, consolidation, or amalgamation of Acis with another company, where the resulting entity succeeds "to all or substantially all of the collateral management business of the Portfolio Manager." Pursuant to the terms of the PMAs themselves, the duties of Acis were not "so unique that the dut[ies were] thereby rendered nondelegable." See *Compass Van & Storage*, 65 B.R. at 1011 (citing RESTATEMENT (SECOND) OF CONTRACTS § 318(2) (1981)). As such, unlike personal service contracts, the PMAs do not "synthesize into those consensual agreements . . . distinctive characteristics that commit to a special knowledge, unique skill or talent, singular judgment and taste." *Compass*

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Van & Storage, 65 B.R. at 1011. Accordingly, because the duties of Acis LP under the PMAs are delegable (and were delegated) and are not unique, the PMAs cannot be personal service contracts that fall within the narrow exception of section 365(c)(1).

Additionally, Section 205(a)(2) of the Investment Advisors Act of 1940 ("IAA") is not a nonbankruptcy law that precludes assumption and assignment of the PMAs. Section 205(a)(2) of the IAA provides that a registered investment adviser (such as Acis) cannot enter into an investment advisory contract unless such contract provides "that no assignment of such contract shall be made by the investment adviser without the consent of the other party to the contract[.]" 15 U.S.C. § 80b-5(a)(2). Thus, this provision of the IAA merely requires that the PMAs contain an anti-assignment provision—the IAA is not "applicable law" that prohibits assumption or assignment without consent of the counterparties to the PMAs. Indeed, in the Southern District of New York, the court held:

"Section 205(a)(2) of the [IAA] . . . does not . . . prohibit an investment adviser's assignment of an investment advisory contract without client consent. The section merely provides that the contract must contain the specified provision. Thus, the assignment of a non-investment company advisory contract, without obtaining client consent, could constitute a breach of the advisory contract, but not a violation of Section 205(a)(2)."

CWCapital Cobalt VR Ltd. v. CWCapital Invs. LLC, 2018 U.S. Dist. LEXIS 90174, at *12 (S.D.N.Y. May 23, 2018). Assignment of the PMAs without consent of the counterparties simply constitutes breach of the PMAs, but the IAA is not "applicable law" that excuses the counterparties to the PMAs from accepting or rendering performance without such consent. Accordingly, the assignment of the PMAs to Oaktree does not violate the IAA or section 365(c)(1) of the Bankruptcy Code.

Preliminary Injunction

The preliminary injunction in place preventing HCLOF from pursuing optional redemptions will remain in place for now. The court believes there are automatic stay implications (section 362(a)(3)) with regard to HCLOF pursuing optional redemptions. The effect of an optional redemption is to ***exercise control over the Acis PMAs and revenue stream*** (property of the estate—see, e.g., Hometown Valley View v. Prime, 847 F.3d 302 (5th Cir. 2017)). While HCLOF is not itself a creditor (and while "the Highlands" entity separateness is not being challenged, and is not being disregarded by either the Acis Trustee, the court, or anyone else at this juncture), the court notes that HCLOF, Highland, and other Highland-related parties seem to work in tandem. Highland asserts a claim against Acis. Actions taken by HCLOF could be construed to be actions of Highland, an actual creditor. There is also a basis for keeping the preliminary injunction in place pending determination of the Acis Trustee's fraudulent transfer lawsuits. The evidence thus far has been compelling that numerous transfers after the Josh Terry judgment denuded Acis of value—perhaps even the ability to control its own destiny when the ALF PMA was essentially terminated without cause and Acis was made to sell its shares in ALF/HCLOF back to ALF/HCLOF. In the face of these facts, the court will be reluctant to terminate the preliminary injunction until this litigation is fully resolved.

End of Ruling

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EXHIBIT 7

005004

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In Re:) **Case No. 19-34054-sgj-11**
) Chapter 11
)
HIGHLAND CAPITAL) Dallas, Texas
MANAGEMENT, L.P.,) August 3, 2022
) 2:30 p.m. Docket
Reorganized Debtor.)
)
)
CHARITABLE DAF FUND, L.P.,) **Adversary Proceeding 22-3052-sgj**
)
Plaintiff,)
)
v.) MOTION TO DISMISS ADVERSARY
) PROCEEDING FILED BY DEFENDANT
) HIGHLAND CAPITAL MANAGEMENT,
HIGHLAND CAPITAL) LP [19]
MANAGEMENT, L.P.,)
)
Defendant.)
)

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE STACEY G.C. JERNIGAN,
UNITED STATES BANKRUPTCY JUDGE.

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1 DALLAS, TEXAS - AUGUST 3, 2022 - 2:37 P.M.

2 THE COURT: 22-3052. This is a motion to dismiss
3 adversary proceeding. For the Movant Highland, who do we have
4 appearing?

5 MR. DEMO: Your Honor, Greg Demo; Pachulski Stang
6 Ziehl & Jones; on behalf of Highland. Zachery Annable from
7 the Hayward firm is here as well. And we have Jim Seery.

8 THE COURT: Okay. Thank you.

9 All right. For Plaintiff/Respondent Charitable DAF, who
10 do we have appearing?

11 MR. BRIDGES: Jonathan Bridges here, Your Honor.

12 THE COURT: All right. Well, I've got the pleadings
13 here in front of me, and I saw an exhibit list of Movant/
14 Debtor, but I think the exhibits were just all of the
15 attachments to the amended motion to dismiss. Is that
16 correct?

17 MR. DEMO: That's --

18 THE COURT: Or the appendix, I should say?

19 MR. DEMO: That is absolutely correct.

20 THE COURT: Okay. All right. Well, I'll hear
21 Highland's argument.

22 MR. DEMO: And for the exhibits, we did have a
23 discussion with opposing counsel, counsel for the DAF.
24 Exhibit 17 is Mr. Seery's declaration. We filed the motion to
25 dismiss under both 12(b)(1) and 12(b)(6), and so Mr. Seery's

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1 declaration we would like to formally enter into evidence
2 because that goes to what we believe is Plaintiff's lack of
3 standing and thus this Court's lack of jurisdiction. And we
4 do believe that extrinsic evidence is appropriate for that.

5 With respect to Exhibits 1 through 13 and then Exhibits 21
6 and 22, those are all documents that were filed on this
7 Court's docket and they consist of really three buckets:
8 either complaints or orders, the plan, and then transcripts.
9 All of those are on this Court's docket. And we would ask
10 your Court to take judicial notice of those. And I know that
11 Mr. Bridges may have some issues with that, but we do believe
12 that's appropriate for a 12(b)(6) motion.

13 THE COURT: All right. So you mentioned 17, the
14 Seery Declaration. 1 through 13, --

15 MR. DEMO: Yes, Your Honor.

16 THE COURT: 1 through 13, and 21 and 22. Or did I
17 mishear?

18 MR. DEMO: Yes. No, that's exactly right, Your
19 Honor.

20 THE COURT: So that's the universe of what you're
21 asking the Court to consider? You're not asking the Court to
22 consider 14, 15, and 18 through 20? I don't have them in
23 front of me to --

24 MR. DEMO: 14 -- we are not asking Your Honor to
25 consider 14, 15, 16, 18, 19, and 20.

1 THE COURT: Okay. All right. Mr. Bridges, what say
2 you about this?

3 MR. BRIDGES: Thank you, Your Honor. Counsel is
4 correct. We have no objection to Exhibit 17.

5 We do object to the remainder. And the remainder, our
6 objection is because they're not referenced in the pleading
7 and because they aren't actually evidence. What was filed,
8 especially what was filed in a different adversarial matter,
9 isn't evidence in this case. And that's the basis for our
10 objection.

11 MR. DEMO: Your Honor, if I may?

12 THE COURT: You may.

13 MR. DEMO: I guess the first thing is that they were
14 all referenced in the pleadings, Your Honor.

15 The second thing is that Your Honor can take judicial
16 notice of things on her docket, and all of these things are on
17 Your Honor's docket for purposes of the 12(b)(6) motion.

18 And I'm honestly a little surprised by Mr. Bridges'
19 arguments and by Plaintiff's arguments because they ask you to
20 do the exact same thing in their pleading. They ask you to
21 take judicial notice of two time entries that were filed in
22 the main docket here as evidence that we, Highland, had
23 knowledge of Plaintiff filing the complaint in the District
24 Court. And, you know, we're not going to quibble with that
25 because they are on your Court's dockets and we do believe

1 that you can take judicial notice of those.

2 And I can cite you Fifth Circuit case law, if you'd like,
3 but I think it's a fairly standard issue.

4 THE COURT: All right. I'll over --

5 MR. BRIDGES: Your Honor, one more thing?

6 THE COURT: Go ahead. Uh-huh.

7 MR. BRIDGES: I might be confused, Your Honor. My
8 objection was the failure to reference these documents in the
9 original complaint, the pending complaint in this adversary
10 proceeding, not to -- failure to have referenced them in the
11 briefing of this motion.

12 MR. DEMO: Your Honor, I don't think that changes it.
13 I mean, Your Honor is entitled to take judicial notice of
14 exhibits -- I mean, I'm sorry, of matters on her docket -- for
15 the purposes of our motion to dismiss. And all of these
16 pleadings and all of these exhibits and appendices -- the
17 witness and exhibit list were referenced in our motion to
18 dismiss. I don't think that changes anything.

19 THE COURT: All right. I overrule the objection. I
20 can take judicial notice of these items, and I will.

21 MR. DEMO: Thank you, Your Honor.

22 THE COURT: All right. You may proceed.

23 MR. DEMO: Thank you. Again, Your Honor, for
24 purposes of the record, Greg Demo; Pachulski Stang Ziehl &
25 Jones; on behalf of Highland Capital Management.

1 We were here today on -- originally on two motions to
2 dismiss. And our two motions to dismiss were generally
3 identical. The first motion to dismiss, which is going
4 forward today, is the motion -- I'm sorry, the motion to
5 dismiss the complaint filed by the Charitable DAF Fund, which
6 alleges that Highland breached its fiduciary obligations to
7 the DAF as an investor in Multi-Strat during the course of the
8 bankruptcy.

9 The second thing we were supposed to be here today on,
10 Your Honor, was a complaint -- a motion to dismiss the
11 complaint filed by PCMG Trading Partners XXIII. PCMG is
12 majority-owned by Jim Dondero and wholly controlled by Jim
13 Dondero. We did have PCMG contact us last week and offer to
14 withdraw that motion. We were happy to accept that offer
15 because we do think that it should have been dismissed.

16 That said, Your Honor, we were equally frustrated with
17 that offer, because the complaint was filed over a year ago.
18 Highland had to expend substantial resources briefing and
19 responding to motions. And then, on the eve of trial, when we
20 have a dispositive motion on file, they withdrew it. And that
21 is frustrating, Your Honor.

22 And it's doubly frustrating because Mr. Dondero has come
23 to this Court and tried to make an issue of the burn rate for
24 legal fees in this Court. And we think that -- that the
25 filing of the complaint and then the last-minute withdrawal of

1 the complaint is emblematic of what Mr. Dondero is doing here,
2 Your Honor.

3 That said, we are here only on one motion to dismiss. And
4 as I mentioned, it's our motion to dismiss Plaintiff's
5 complaint which alleges that Highland Capital Management
6 breached its fiduciary obligations to Plaintiff and those
7 fiduciary obligations arose under the Investment Advisors Act,
8 common law, and contract. And those breaches allegedly
9 occurred in mid-2020. And that was after the petition date,
10 after Your Honor appointed independent directors to manage the
11 bankruptcy, but before confirmation of the plan and before the
12 plan's effective date. And each of those causes of action
13 primarily revolve around the Plaintiff's contention that
14 Highland sold assets that it wasn't supposed to sell. In
15 other words, Highland sold assets that Mr. Dondero did not
16 want it to sell.

17 And I realize I mentioned the complaint was originally
18 filed in the District Court for the Northern District of
19 Texas. The District Court referred the complaint to Your
20 Honor in May of this year, and Highland filed its amended
21 motion to dismiss on May 22nd -- I'm sorry, May 27th, 2022.

22 And our motion to dismiss is simple, Your Honor, and it
23 amounts to one simple question: Are the causes -- should the
24 Court dismiss the complaint because the causes of action in
25 the complaint are administrative expense claims that should

1 have been filed in this Court and served on the Debtor prior
2 to the administrative expense claim bar date, which occurred
3 in September of 2021?

4 We believe the answer to that question is yes, Your Honor.
5 We believe it's unequivocally yes under black letter
6 bankruptcy law.

7 But as a separate and alternative basis for dismissal, we
8 believe that Plaintiff lacks both constitutional and
9 prudential standing, because (1) Plaintiff, the Charitable DAF
10 Fund, is not an investor in Multi-Strat, and that's what Mr.
11 Seery's declaration says; and (2) the Plaintiff did not allege
12 in the complaint how it was harmed by Highland's actions with
13 respect to Multi-Strat when it was not an investor in Multi-
14 Strat.

15 That's it, Your Honor. And we believe it is and should be
16 a simple matter.

17 Plaintiff, however, has made a belated and what we believe
18 is a procedurally-improper request to have the complaint
19 treated as a late-filed administrative claim by this Court.
20 We believe Your Honor should deny that request.

21 But before addressing the law, I think it's important,
22 Your Honor, to go through the facts and to go through the
23 timeline of this complaint, because what the facts and what
24 the timeline will show is that there was no inadvertent error,
25 Your Honor. There was a tactical and strategic decision to

1 file the complaint outside of this Court in the hopes that
2 this Court would not know about it and that it could be
3 adjudicated around Your Honor.

4 And Ms. Canty, can you please put up Slide 1?

5 And as you'll see, Your Honor, this is the timeline that
6 we would like to discuss. So, first, February 22nd, 2021.
7 Your Honor confirmed Highland's plan of reorganization.
8 Highland's plan, like all plans, included clear procedures for
9 dealing with administrative expense claims and stated --
10 again, we believe clearly -- that all administrative expense
11 claims are required to be filed within 45 days of the plan
12 effective date.

13 The next date we would bring Your Honor's attention to is
14 June 23rd, 2021. On June 23rd, the Dugaboy Investment Trust
15 filed a complaint in the Northern District of Texas, alleging
16 that Highland breached its fiduciary duties with respect to
17 Multi-Strat. We did not receive notice of that hearing -- of
18 that motion, of that complaint. But on June 25th, which is
19 the next day here, we had a hearing in front of Your Honor on
20 the Plaintiff the Charitable DAF's motion to reconsider the
21 order appointing Mr. Seery as Highland's chief restructuring
22 officer. During that hearing, we discovered that the Dugaboy
23 Investment Trust, Mr. Dondero's family trust, had filed its
24 complaint, and we brought that to Your Honor's attention.
25 Plaintiff's counsel at that June 25th hearing is the same

1 counsel in front of Your Honor today.

2 During that hearing, Your Honor rightly asked Plaintiff,
3 Plaintiff's counsel, about why it believed it could file
4 claims rightly before Your Honor in different courts. And
5 Your Honor rightly told Plaintiff to, and I'm quoting here,
6 "Go back and hit the books and be prepared to defend" filing
7 claims outside of this Court. After that hearing, Dugaboy
8 withdrew the Dugaboy complaint.

9 The next date I would call Your Honor's attention to is
10 July 22nd, 2021, approximately one month after that June
11 hearing. That's the date the complaint at issue today was
12 filed, Your Honor. The complaint -- and the complaint at
13 issue today was never served. Plaintiff filed a motion to
14 stay that complaint in the Northern District of Texas and
15 never served that motion to stay.

16 Moving forward, Your Honor, November 23rd, 2021. We are
17 here again in front of Your Honor on Plaintiff's complaint
18 with respect to the HarbourVest settlement. And Highland had
19 moved to dismiss that complaint. And again Plaintiff's
20 counsel at that hearing in front of Your Honor was the counsel
21 here today.

22 During that hearing, we also heard Plaintiff's motion to
23 stay the HarbourVest complaint pending resolution and pending
24 the appeal of Highland's plan of reorganization to the Fifth
25 Circuit.

1 Plaintiff's arguments concerning the plan injunction at
2 that hearing were essentially the exact same as the arguments
3 they make in the response to our motion to dismiss, that the
4 plan injunction prohibited them from doing anything. It
5 prohibited them from prosecuting the causes of action in the
6 complaint outside of this Court, which we agree with, but they
7 also argued it prohibited them from prosecuting the causes of
8 action in the complaint inside of this Court.

9 At that hearing, Your Honor -- and I'll backtrack just a
10 second after that -- at that hearing, Your Honor, Highland's
11 counsel was very clear on the record that they agreed that the
12 plan injunction prohibited litigation filed prior to the
13 effective date from occurring outside of this Court.
14 Highland, however, was also clear that Plaintiff did have a
15 remedy, and that remedy was to file the causes of action in
16 the complaint as a motion for allowance of an administrative
17 expense claim in this Court and prosecute them here.

18 At that hearing in November of 2021, Your Honor also told
19 Plaintiff's counsel that their arguments concerning the plan
20 injunction, and I'm quoting here, Your Honor, "reflect,
21 frankly, a misunderstanding of how the injunction language
22 applies."

23 Now, I'm going to backtrack, Your Honor, because I did
24 forget a very important date, and that's the August 11th, 2021
25 effective date of the plan. It is undisputed, Your Honor,

1 that Plaintiff received notice of that effective date, and
2 Plaintiff's counsel was separately noticed with that effective
3 date of the plan.

4 Those certificates of service are in Bankruptcy Docket No.
5 2747, and are included in our witness and exhibit list as
6 Exhibit 8. Again, it is undisputed that both Plaintiff's
7 counsel and Plaintiff had notice of the effective date of the
8 plan.

9 And it is also undisputed, Your Honor, that that notice
10 disclosed that all administrative expense claims had to be
11 filed with this Court and served on the Debtor within 45 days
12 of the effective date of the plan, which was September 25,
13 2021.

14 It is important to note that at no point in this timeline
15 to date did Plaintiff's counsel -- I'm sorry, did Plaintiff do
16 anything. Plaintiff did not file an administrative expense
17 claim. Plaintiff did not file a motion to have their
18 complaint allowed as timely filed. Plaintiff did nothing.

19 It was not until May of 2022 when the District Court
20 referred this action to Your Honor and after Highland filed
21 its amended motion to dismiss for Plaintiff's failure to
22 comply with the administrative expense claim bar date that
23 Plaintiff came into this Court asking leniency.

24 Plaintiff came into this Court in their response to the
25 motion to dismiss asking Your Honor to treat their claim as a

1 timely-filed administrative expense claim. But what this
2 timeline shows, Your Honor, and what the facts show, Your
3 Honor, is, again, that this was not an inadvertent mistake.
4 Plaintiff chose to file the complaint outside of this Court.
5 Plaintiff, with notice of the effective date and notice of the
6 administrative expense claim bar date, chose not to file an
7 administrative expense claim in this Court.

8 Plaintiff, with Your Honor's -- Your Honor's direct (audio
9 gap) in November of 2021 that they misunderstood the plan
10 injunction, still did nothing, Your Honor. It was not until
11 we moved to dismiss this action that Plaintiff requested, in a
12 procedurally-improper way, to have their claim treated as a
13 late-filed claim.

14 What we believe that shows, Your Honor, is that this was
15 tactical. That what Plaintiff actually wanted was to file
16 their claim in the District Court, which they did, and which
17 they did not give us notice of; to stay that action in the
18 District Court, which they did, and which they did not give us
19 notice of; and to have that complaint sit there in the
20 District Court until the Fifth Circuit overturned the plan,
21 and then and only then would they litigate that action, again,
22 away from Your Honor.

23 We believe that's highly improper, Your Honor.

24 That said, the legal question here is, again, very simple.
25 Does the complaint include administrative expense claims that

1 are now time-barred because they were not filed in this Court
2 by the September 2021 administrative expense claim bar date?
3 Again, we believe the answer to that question is a simple yes.
4 These are administrative expense claims.

5 Again, Plaintiff's complaint alleges that Highland
6 violated its fiduciary obligations to Plaintiff in mid-2020,
7 after the petition date, after appointment of independent
8 directors, before confirmation, and before the effective date,
9 at all times while Highland was the debtor-in-possession.

10 And as Your Honor knows, administrative expense claims,
11 generally speaking, are claims that arise under Section 503(b)
12 of the Code for the actual and necessary costs of preserving
13 the estate and that arise from the debtor-in-possession or
14 trustee's postpetition, pre-effective-date, ordinary-course
15 operation of the estate.

16 And the claims in the complaint are administrative expense
17 claims under 503(b) under the *Reading* exception which was
18 created by the Supreme Court in 1968 in *Reading Co. v. Brown*.
19 And as set forth in our brief, Your Honor, *Reading* is still
20 good law. It's routinely applied in the Fifth Circuit and
21 it's routinely applied in all circuits.

22 And *Reading*, Your Honor, (garbled) it includes not just
23 torts, but other claims arising from intentional or other
24 wrongful or -- wrongful acts as well. And the claims asserted
25 in the complaint are clearly administrative expense claims

1 under *Reading*. They are claims for intentional and/or
2 negligent violations of Highland's alleged fiduciary duty to
3 Plaintiff during the course of the bankruptcy.

4 And Ms. Canty, if you could please put up Slide 2.

5 Now, Plaintiff tries to dodge this by saying that the
6 definition of, quote, administrative expense claims and the
7 plan does not include the types of claims that they allege
8 here. But that's not the case, Your Honor. And the defined
9 term "Administrative Expense Claim" is in the middle box of
10 your screen. And as you'll see, it says it's any claim
11 allowed pursuant to Sections 503(b), 507(a)(2), 507(b), or
12 1114(2) of the Bankruptcy Code. Those include administrative
13 expense claims under the *Reading* exception, and they include
14 the administrative expense claims asserted in the complaint.

15 Those claims were required under the plan -- and the
16 provisions are all right here -- again to be filed in this
17 Court by September 2021. They were not.

18 And as I mentioned above, it is undisputed that Plaintiff
19 had notice of the plan, that Plaintiff had notice of the
20 administrative expense claim bar date. And it's also
21 undisputed that Plaintiff, represented by counsel, did not
22 file with this Court an administrative expense claim by
23 September 25th, 2021. Plaintiff's claims are now time-barred.

24 And we believe Your Honor's *Taco Bueno* opinion is on all
25 fours. In *Taco Bueno*, the claimant at least tried to file an

1 administrative expense claim with this Court by filing a proof
2 of claim on the claims register. Your Honor held that wasn't
3 good enough and it did not count as an administrative expense
4 claim, and Your Honor barred claimant's claim in *Taco Bueno* as
5 time-barred.

6 Here, similarly, Plaintiff, who's been represented at all
7 times by counsel, indisputably had notice and chose to file
8 the complaint in the District Court rather than complying with
9 the provisions of the plan and with the provisions of the
10 Bankruptcy Code. Under *Taco Bueno* and various cases, Your
11 Honor, this claim is time-barred.

12 And that should end the discussion, Your Honor, but it
13 doesn't, because Plaintiff, in its response to our motion to
14 dismiss, finally asked this Court for leniency and finally
15 asked this Court to treat the claim as, quote, a request for
16 an order permitting a late claim or otherwise to have it
17 treated as a timely administrative expense claim under **Federal**
18 **Rule of Civil Procedure 15**.

19 But that's not how it works, Your Honor. Section 502 of
20 the Code allows late-filed administrative expense claims only
21 for cause. But that requires a separate motion, and it
22 requires evidence, Your Honor. None of that happened here.
23 Instead, Plaintiff filed a one-line request to have it treated
24 as a late-filed claim, and it filed that request 16 months
25 after confirmation, 10 months after the bar date, and 8 months

1 after Your Honor rejected their argument on the plan
2 injunction.

3 There is no cause here. Plaintiff has provided no
4 evidence of it. It just asked for leniency based on a series
5 of what we believe are irrelevant arguments.

6 And that's where the facts again become important. As
7 Your Honor has said, facts matter. And the facts here, the
8 undisputed facts (garbled) Plaintiff and bely a finding of
9 cause or excusable neglect under *Pioneer*. Again, two
10 standards that Plaintiff has not even tried to argue.

11 And, again, Your Honor, what we believe the facts show is
12 that there was no inadvertent technical error here. There was
13 a considered and strategic plan to file these claims outside
14 of this Court in the hopes of avoiding Your Honor.

15 As in *Houbigant*, which we briefed in our paper, Plaintiff
16 is bound by those tactical decisions. And the complaint, Your
17 Honor, we would ask be dismissed with prejudice for failure to
18 state a -- I'm sorry, for failure to comply with the
19 administrative expense claim bar date.

20 And lastly, Your Honor, standing. In our motion to
21 dismiss, we sought an order dismissing this action under
22 12(b)(1) for lack of constitutional standing and also under
23 12(b)(6) for lack of prudential standing. And as stated in
24 our papers and in Mr. Seery's declaration -- which, again, is
25 Exhibit 17 on our witness and exhibit list -- the DAF, the

1 Plaintiff here, is not an investor in Multi-Strat. And all of
2 the allegations in the complaint, all of the causes of action
3 in the complaint, revolve around the DAF being an investor in
4 Multi-Strat, and Plaintiff did not plead how it could possibly
5 have standing as a non-investor.

6 Consequently, Your Honor, Plaintiff failed to plead
7 constitutional standing, failed to plead an injury, and failed
8 to plead prudential standing because it failed to plead how it
9 was the real party in interest under Section 17.

10 Now, Plaintiff makes various arguments in its response
11 about how it could have direct and/or derivative standing.
12 But, again, Your Honor, one, we believe those arguments are
13 meritless, and we believe that they're irrelevant, because
14 notwithstanding the liberal amendments standard in **Federal**
15 **Rule of Civil Procedure 15** and the language in **Federal Rule of**
16 **Civil Procedure 17**, we believe amendment here would be futile.
17 For all the reasons we discussed, the claims are time-barred.
18 And even if Plaintiff were able to amend its complaint to fix
19 the standing issues, Plaintiff in no world can unwind and turn
20 back the clock to be able to file the complaint in this Court
21 as an administrative expense claim by the administrative
22 expense claim bar date, which, again, was on September 25th,
23 2021.

24 For the foregoing reasons, Your Honor, we ask that you
25 dismiss the complaint with prejudice. And I'm happy to answer

1 any questions.

2 THE COURT: Okay. No questions right now.

3 MR. DEMO: Thank you.

4 THE COURT: Mr. Bridges?

5 MR. BRIDGES: Thank you, Your Honor. The last time I
6 appeared in this Court was at the June 25th, 2021 hearing that
7 counsel referenced. It's particularly memorable to me because
8 of being postponed due to symptoms from a cranky gallbladder.
9 The time before that I remember even better. That was the
10 only other time I was before you, Your Honor. The
11 particularly painful order that was the result of that
12 previous time is also very memorable to me.

13 My gallbladder is no longer with us, and that order, that
14 painful order, has been expunged at considerable costs. I was
15 hoping that meant today would be a fresh start. Apparently, I
16 need to go backwards just a little bit, perhaps.

17 At the June 25th hearing that counsel described, I did
18 argue. At the end, you did ask about a recently-filed lawsuit
19 that I didn't know anything about and told you so. You asked
20 if Mr. Sbaiti was available, and I believe we had to go get
21 him, and he answered your questions, and your exchange was
22 with him.

23 I'm afraid that, again, I am unprepared and largely not in
24 the know about the other matters that counsel has referenced.
25 I came to argue the motion that's at issue today in the

1 adversary proceeding that we're here for.

2 The *Federal Reporters*, Your Honor, I know that you know
3 this, they're full of opinions admonishing courts to favor
4 resolving cases on the merits. Ever since the code pleading
5 system was abolished, federal courts have expressed their bias
6 in favor of addressing the merits of cases, and I would be
7 remiss in failing to mention that here on Highland's motion to
8 dismiss this case on timeliness and standing grounds.

9 Rule 15 and Rule 17 of the Federal Rules of Civil
10 Procedure are among those aimed at getting cases to the
11 merits, and we relied on both of those in our brief.

12 The first issue raised in the briefs is the classification
13 of our allegations as an administrative expense claim. That
14 three-word term is capitalized in the plan, indicating that it
15 is a defined term. I read in the reply brief and heard
16 counsel argue just moments ago that Highland views this as
17 merely a naming convention and not as a limiting provision,
18 the defined term. And I see that as a reasonable view of
19 what's in the plan. But it does quite -- quite plainly appear
20 as a defined term, with a lengthy definition.

21 Although this is not a hill we would choose to die on, and
22 much of our response brief is devoted to alternative
23 arguments, we don't view the allegations in the complaint as
24 administrative in nature, nor as an expense, nor, perhaps most
25 importantly, as the result of an action that benefits the

1 estate, as both the plan definition and Section 503(b)
2 require.

3 Section 503(b) concerns only, quote, the costs and
4 expenses of preserving the estate. What the complaint alleges
5 in this matter is that the acts complained of were against the
6 interests of the estate and depleted the estate's assets.

7 For example, Paragraph 22, which sums up the factual
8 allegations in the complaint, reads as follows. Quote, "In
9 short, HCMLP caused Multi-Strat to sell the viatical pool at a
10 substantially discounted amount to curry favor with the
11 brokers and buyers in the marketplace, for no apparent benefit
12 to Multi-Strat's investors or the Debtor's estate."

13 This allegation does not on its face appear to be based on
14 the result of an action that benefits the estate.

15 The second issue concerns the consequences if we're wrong
16 about the first issue.

17 THE COURT: Let me --

18 MR. BRIDGES: The consequences --

19 THE COURT: Let me back up. Let me back up if you're
20 moving off that point. What about the Supreme Court --

21 MR. BRIDGES: Yes, Your Honor.

22 THE COURT: What about the Supreme Court's *Reading*
23 case or *Reading* case? If my memory -- it's been years since
24 I've read it, but I remember it pretty well. I believe that
25 involved a fire, right, a fire in a building that a trustee

1 was operating. Certainly, a fire and great damage caused to a
2 third party wouldn't seem on its face to benefit the estate,
3 as that phrasing is used in 503(b). But the U.S. Supreme
4 Court said something to the effect of, you know, he's doing
5 business and it's a cost of doing business that, you know,
6 you're going to sometimes have things like this happen. And
7 isn't that exactly the same sort of situation we have here if
8 your allegations are true?

9 MR. BRIDGES: I don't think so, Your Honor, although
10 I would -- would like to emphasize again this is not a hill
11 that we would choose to die on. But I think --

12 THE COURT: Am I correct --

13 MR. BRIDGES: -- two reasons distinguish --

14 THE COURT: -- in remembering the facts of that
15 famous U.S. Supreme Court case, that it involved a fire and
16 that the trustee who was operating the business, it was a
17 consequence of him operating the business? Am I correct in
18 remembering those facts?

19 MR. BRIDGES: That sounds correct to me, Your Honor,
20 but I don't pretend to remember it well enough to disagree
21 with you. I would like --

22 THE COURT: Mr. Demo, --

23 MR. BRIDGES: -- to distinguish it.

24 THE COURT: -- can you confirm or tell me if I'm
25 wrong?

1 MR. DEMO: Yeah. You're absolutely correct, Your
2 Honor. The trustee in that case accidentally burned down the
3 neighboring building, and the Supreme Court found that it was
4 still an administrative expense claim under the "*Reading*" or
5 "*Reading*" exception. And that exception provides that even
6 though burning down somebody else's house does not benefit the
7 estate, that it still counts as an administrative expense
8 claim under 503(b). And we have other case that comes --
9 other case law that comes after that that even broadens that,
10 Your Honor.

11 THE COURT: Yes. And I know the Fifth Circuit case
12 has cited that case in different opinions.

13 Okay. So, going back to that, Mr. Bridges, I mean, you
14 just argued 503(b) doesn't contemplate this type of claim that
15 -- or claims you're alleging in the action, but hasn't the
16 Supreme Court in fact said that it does apply to this kind of
17 thing?

18 MR. BRIDGES: Your Honor, no, I don't think so. And
19 the reasons are twofold. One is because the fire in that case
20 is not, I don't believe, the actions being complained of by
21 the plaintiff. Rather, actions that are to the benefit of the
22 estate result in negligently, accidentally, causing a fire.
23 And that is a significant difference from here, where the
24 actions allegedly being -- that we're alleging, that are
25 complained of, are actually actions against the interests of

1 the estate, selling out the estate on the cheap. Your Honor,
2 that is one distinction.

3 The other is that we're relying on the defined term, which
4 has different language from the actual Code, which was not at
5 issue in the other case.

6 Those are the two distinctions that I draw, Your Honor.

7 THE COURT: Well, if this is not --

8 MR. BRIDGES: The second issue --

9 THE COURT: -- a 503-type claim, then what kind of
10 claim would it be? It has to fit into some sort of category
11 here.

12 MR. BRIDGES: Your Honor, honestly, our position is
13 that the order itself creates -- the final plan creates a gap
14 by not identifying this as -- as that kind of -- as an
15 administrative priority claim.

16 THE COURT: Okay.

17 MR. BRIDGES: The second issue, Your Honor, concerns
18 the consequences if we're wrong about the first issue and that
19 the consequences need not be forfeiture.

20 Counsel raises concerns about the purpose of the
21 administrative claim bar date and the ability to distribute
22 funds. Those concerns certainly seem valid. But importantly,
23 they go to priority, not validity.

24 Not one of their policy arguments supports outright
25 dismissal of the complaint, which would amount to a default

1 and would have the effect of protecting the interests of
2 equity in this matter over the interests of a creditor.

3 Rule 15 allows for relation back of allegations from a
4 previous filing, and we believe it governs here. Highland
5 doesn't deny that it had notice of the complaint, so they
6 don't have prejudice from the timing of it. And there is
7 authority under the Code for allowing timely filing or
8 treating as timely the filing of one type of claim that was
9 submitted as another type of claim.

10 And on this, I'd point the Court to the Delaware
11 *Bluestream [sic] Brands* case, 2021 Bankr. LEXIS 1980, which
12 cites to the First Circuit and other cases allowing a timely
13 proof of claim to be treated as an administrative expense
14 claim.

15 THE COURT: Doesn't that --

16 MR. BRIDGES: I'm truly --

17 THE COURT: Doesn't that run contrary to my *Taco*
18 *Bueno* opinion?

19 MR. BRIDGES: Perhaps, Your Honor. It does cite your
20 opinion in a "*But see.*" And I again would defer to your
21 knowledge of the proceedings in that case. But I saw in the
22 opinion no argument whatsoever concerning the ability of the
23 creditor to seek relief on its proof of claim regarding the
24 same transaction. I read it not to exclude that.

25 Although the Court relied -- also, the Court relied on

1 prejudice to the creditors in that case if the administrative
2 claim had been allowed. Importantly, in this case, where
3 creditors can expect to be paid in full, no such prejudice
4 exists, or at least at this stage of the claim -- of the case
5 there is no evidence that any such prejudice to the creditors
6 exists.

7 I'm truly unsure how to respond to the accusation that the
8 decision to file this action in District Court was a strategic
9 one, a strategic decision. In some regards, certainly, all of
10 our decisions are strategic. But the implication that this
11 was somehow a nefarious decision that should inflame the Court
12 is simply untrue.

13 I think the timeline supports us in this, that at the time
14 of the filing of this lawsuit the plan was not yet effective,
15 so the route to bring an administrative claim, if that's what
16 this is, did not appear to be available to us without the plan
17 having gone effective.

18 Also, it appeared that it might not go effective for a
19 year or more while the appeal to the Fifth Circuit was
20 pending.

21 A few weeks later, I think it was less than three,
22 approximately 20 days later, when Highland elected to make the
23 plan effective, the injunction as we understand it precludes
24 us from serving them from that point forward, as doing so
25 would have been continuing with this case. The plan

1 injunction prevented us from doing so.

2 And so the accusation that we intentionally filed the
3 lawsuit and didn't serve them with process is really about a
4 three-week period that before we got them served we were
5 enjoined, as we understand the injunction, from doing so.

6 I have not heard from them that we're wrong on that
7 interpretation of the injunction. I know from their other
8 pleadings in this matter that they view the injunction as
9 applying to this matter. The only question I have is whether
10 they agree with our take that serving process would have been
11 continuing with the action.

12 THE COURT: Let me -- let me --

13 MR. BRIDGES: The notion that we --

14 THE COURT: -- double-check that I understand
15 something you said. I think what I heard you say was, because
16 the plan had not gone effective yet, therefore triggering
17 the 45-day deadline for filing administrative expense claims,
18 you had no other avenue here to pursue your claims except to
19 file the District Court lawsuit. Is that what I heard you
20 say, or am I misunderstanding?

21 MR. BRIDGES: Well, that's certainly more strongly
22 than I intended to say it. I don't think so, Your Honor. But
23 a similar vein, that the idea of filing a claim as required by
24 the final plan was not -- was not something that had gone into
25 effect yet. So thinking that that --

1 THE COURT: What do you mean? You can file a request
2 for allowance of administrative claim, heck, in the first 30
3 days of a bankruptcy case. You don't have to wait for the
4 Court to set a deadline.

5 MR. BRIDGES: Your Honor, --

6 THE COURT: You can file one at any time.

7 MR. BRIDGES: -- we did not have an effective
8 deadline. We did not know when that effective deadline would
9 go effective. That process, that procedure, did not appear to
10 be the one that was, what, most available to us.

11 THE COURT: Why not? Why not? Why not? There is
12 nothing that would have precluded you from filing a request
13 for allowance of administrative expense claim. People file
14 them throughout Chapter 11 cases frequently, --

15 MR. BRIDGES: The --

16 THE COURT: -- before there's ever a deadline set.

17 MR. BRIDGES: Your Honor, the answer to that question
18 is that reading the definition of what it was did not cause us
19 to believe that's what we had here. That is Issue #1 over
20 again.

21 One question -- again, one question is whether we are
22 right or wrong on Issue 1. And I'm hearing you loudly and
23 clearly that you don't agree with us on that.

24 But in connection with that, I don't, Your Honor, I don't
25 think a fair conclusion is that we knew better or should have

1 known better than to read the defined term and think that it
2 does not apply to the case that we brought.

3 Certainly, the final order -- I'm sorry, the plan was not
4 in effect yet, so we weren't governed by it at that time. And
5 I believe and urge the Court to consider that a plain reading
6 of that plan does not sound like on its face that our claim --
7 our complaint is within its four corners.

8 THE COURT: Did you worry about the automatic stay?

9 MR. BRIDGES: Yes, Your Honor.

10 THE COURT: Okay. What is your analysis there?

11 MR. BRIDGES: Your Honor, it was well more than a
12 year ago. I don't think I can remember that. It wasn't in
13 the briefing for today, and it's not fresh on my mind.

14 THE COURT: You're right. You're right, it wasn't in
15 the briefing. But, again, I'm just trying to put myself in
16 your brains and, you know, I don't -- I will say it's a gray
17 issue, because these are not prepetition claims, and usually
18 362 stays collection or actions aimed at pursuing prepetition
19 claims.

20 On the other hand, the relief sought in the DAF's
21 complaint asked for, among other things, disgorgement of all
22 ill-gotten gains, and also voiding of certain agreements of
23 Highland. This sounds potentially like exercising or an
24 attempt to exercise control over property of the estate. So,
25 again, it's something that weighs on me a little bit.

1 But, again, it's not the subject of the hearing today, but
2 I kind of am still interested in what your thought process
3 was. You know, it's a very risky thing to file a lawsuit
4 against a Chapter 11 debtor as opposed to filing a proof of
5 claim or a request for allowance of administrative claim. So
6 I just -- it would be helpful to hear what your analysis was
7 on that.

8 MR. BRIDGES: Perhaps this would be helpful as well,
9 Your Honor. At least as -- at least in my view and
10 experience, you do not have to be a bankruptcy lawyer to know
11 what the automatic stay is. An administrative expense claim
12 isn't the same kind of recognized concept, I believe.
13 Certainly, not to me.

14 And so the notion that what we were doing is sitting on
15 our hands rather than serving the complaint because of some
16 ulterior motive is just wrong. That's untrue. And generally
17 speaking, in this day and age, cases aren't dismissed without
18 reaching the merits simply because they weren't filed in the
19 right place or with the right forum.

20 Your Honor, that brings us to the third issue, which is
21 standing. Again, courts in this day and age do not dismiss
22 cases without reaching the merits simply because they were not
23 brought by the real party in interest. That's what Rule 17
24 says quite clearly. An opportunity for the real party in
25 interest to join must be provided. If -- if that's -- let me

1 back up. If -- because Highland admits that Plaintiff's
2 subsidiary, CLO Holdco, is an investor who would have
3 standing, that should end the matter there.

4 Moreover, the Plaintiff, the DAF, has alleged in
5 Paragraphs 7 and 11 of the complaint that it is an investor.
6 And frankly, Your Honor, I don't think that's incorrect when
7 you view that someone can invest indirectly. That is not a
8 peculiar concept, and I don't think it's a stretch to say that
9 that pleading that we are indirectly an investor is an invalid
10 one. And in Paragraph 54, it states quite clearly that, if
11 necessary, we are seeking to plead our claim derivatively.

12 That's all I have today, Your Honor. If there's more I
13 can answer, I will do my best.

14 THE COURT: Okay. So, am I hearing that the DAF
15 acknowledges that CLO Holdco, its one-hundred-percent
16 subsidiary, last I knew, that it is actually the investor in
17 Multi-Strat, not DAF? Am I hearing that?

18 MR. BRIDGES: Mostly yes, Your Honor. I'd like to
19 quibble around the edges. I believe it is not a one-hundred-
20 percent-owned subsidiary.

21 THE COURT: Okay.

22 MR. BRIDGES: My recollection is that it's --

23 THE COURT: Well, forget that hundred percent. But
24 the point is I'm hearing DAF acknowledge that it's CLO Holdco
25 that it is at least partly an owner of, if not mostly an owner

1 of, CLO Holdco is the one that invested in Multi-Strat.

2 MR. BRIDGES: I believe Highland is correct on that,
3 Your Honor. Yes.

4 THE COURT: Okay. So your argument is that the DAF
5 still would have standing because it should be considered an
6 indirect owner of interest in Multi-Strat?

7 MR. BRIDGES: Slightly different from that, Your
8 Honor. Not only is it an indirect investor, it also is
9 receiving investment device -- advice from Highland for the
10 purposes of directing its subsidiaries or counsel to these
11 subsidiaries or aiding them in making investment decisions.
12 So that investment advice and the contract claims are still
13 relevant, whether the investment by the DAF is direct or
14 indirect. The relationship is, in all important aspects, the
15 same, regardless of whether the investment in the ultimate
16 asset is a direct one or an indirect one.

17 And Your Honor, I don't believe there's anything unusual
18 about that relationship between a subsidiary and its -- and
19 its parent.

20 THE COURT: You don't think there's anything unusual
21 about what?

22 MR. BRIDGES: About the relationship --

23 THE COURT: About only naming the parent as a party,
24 not the subsidiary that actually owns the investment?

25 MR. BRIDGES: No, Your Honor. That's not what I was

1 referring to.

2 The relationship between a parent entity that uses
3 subsidiaries to make its investment is a not-unusual corporate
4 arrangement.

5 THE COURT: Oh, well, certainly. I wouldn't think it
6 would be. But I'm more focused on the parent being the
7 Plaintiff in the lawsuit and not the subsidiary.

8 MR. BRIDGES: Your Honor, I think that's what
9 derivative case law and the statutes that govern it are all
10 about. This is not a novel thing.

11 THE COURT: I think you've got it flip-flopped, don't
12 you? I mean, usually, derivative -- I mean, I guess I -- I
13 see what you're saying. The entity has a cause of action and
14 it won't bring it for whatever reason, so the shareholders --
15 here, I guess you're saying the DAF -- would ask for standing.
16 It doesn't seem like the same thing we usually -- the same
17 context we usually see derivative litigation brought in.
18 Would you acknowledge that?

19 MR. BRIDGES: I think in the federal courts what
20 you're referring to is shareholder derivative actions that
21 indeed tend to fit the paradigm you're talking about.

22 It is not unusual at all, however, for a majority owner of
23 an LLC to bring an action that is derivative on behalf of the
24 LLC, or a minority but a significant minority member of an LLC
25 or another type of company to bring such action. Shareholder

1 derivatives are not the only kind of derivative action.

2 THE COURT: Okay. I think that's all the questions I
3 have. Anything else?

4 (No response.)

5 THE COURT: Anything else? Okay. I guess -- that
6 was directed to you, Mr. Bridges. Anything else?

7 MR. BRIDGES: I'm sorry. Not from me, Your Honor.

8 THE COURT: All right. Mr. Demo, you have the last
9 word.

10 MR. DEMO: Thank you, Your Honor. And I'll be fairly
11 brief.

12 Mr. Bridges I think is still -- I'm sorry, not --
13 Plaintiff I think is still confused about what an
14 administrative claim, expense claim is and how the *Reading*
15 exception applies. In *Reading*, there was no benefit to
16 burning down somebody's house. In *A.I. [sic] Copeland*, which
17 is a Fifth Circuit case, a debtor improperly failed to turn
18 over tax claims -- I'm sorry, tax distributions, tax payments,
19 to the State of Texas, in violation of Texas statutes. That
20 was an administrative expense claim.

21 All of the claims here arise from Highland's alleged
22 intentional or negligent breach of its fiduciary duties to the
23 DAF -- again, not an investor in Multi-Strat, but that's what
24 was pled. All of those fall under the *Reading* exception.

25 And to Plaintiff's point about, you know, there not being

1 a benefit to the estate here, I would read you the last line
2 of Paragraph 49, which says that one of the breaches includes
3 utilizing the sale proceeds for its own names, namely -- I'm
4 sorry. Utilizing -- let me start over, Your Honor. It says,
5 "utilizing the sale proceeds for its own end, namely, to
6 enrich itself." That's Mr. Bridges, that's Plaintiff's
7 complaint. They are alleging that we took these actions to
8 benefit Highland during the course of the bankruptcy.

9 Either way you slice it, Your Honor, this is an
10 administrative expense claim. We think *Reading* is directly on
11 point, that they have pled a substantial benefit to the
12 estate. They basically pled that we took these assets and
13 absconded with them.

14 Either way you slice it, under *Reading*, it applies. Under
15 benefit to the estate, under their complaint, it applies.
16 This is an administrative expense claim and had to be filed by
17 the administrative expense claim bar date.

18 And, again, with respect to the plan injunction, Your
19 Honor, even if Mr. Bridges was right -- I'm sorry. Even if
20 Plaintiff were right, and they're not, and I do think a point
21 needs to be made here, is that Plaintiff is the only party,
22 Plaintiff and PCBM, are the only parties who did not
23 understand the plan. Even Mr. Dondero's other affiliates --
24 NexPoint, NexPoint Advisors, Highland Capital Management Fund
25 Advisors, and CPCM -- all were able to file administrative

1 expense claims in this Court on or substantially before the
2 administrative expense claims bar date. Plaintiff's
3 interpretation and confusion with the plan injunction applies
4 only to Plaintiff. They are on an island here.

5 And yes, it's also wrong. And even if Plaintiff were
6 confused about that when they filed their complaint in the
7 Northern District of Texas, they cannot say they were confused
8 about that after the November 2021 hearing, where Your Honor
9 told them bluntly and blatantly that they misunderstood the
10 plan injunction and where Highland told them that they were
11 not without a remedy, that their remedy was to file an
12 administrative expense claim in this Court.

13 So, even giving Plaintiff the benefit of the doubt that
14 they did innocently misunderstand the plan injunction, that
15 misunderstanding ended in November of 2021, eight months ago.
16 During that eight-month period, Plaintiff again did nothing.
17 Plaintiff only made a request, and a procedurally-improper
18 request, to have the claim treated as late-filed when it
19 responded to our motion to dismiss.

20 With respect to the policy here, Your Honor, I think Your
21 Honor nailed it in *Taco Bueno*. Bar dates are important.
22 Administrative expense bar dates are extremely important. And
23 so now I understand under **Federal Rule of Civil Procedure 15**
24 and all the other Federal Rules you do want to get to the
25 merits, but 503 applies here, Your Honor. There are separate

1 procedures dealing with administrative expense claims, and
2 those procedures are important to protect not just the Debtor
3 but all creditors in this matter.

4 This is not a two-party dispute. Bankruptcy is not a two-
5 party game. There are other creditors here who have been
6 waiting ten, ten years, a decade to be paid. And Plaintiff is
7 coming in and saying, you know what, we should get an
8 administrative expense claim. We should be able to take
9 a-hundred-cent dollars off the top. And they're doing that,
10 Your Honor, without any evidence whatsoever. No evidence of
11 cause under 503(a). No evidence under *Pioneer*. And not even
12 an attempt to plead them.

13 The policy here does not favor them. It favors the
14 estate. It favors all other creditors in this action who are
15 relying on the confirmed plan that has been confirmed for well
16 over a year now, Your Honor.

17 And the last thing I'll say on standing, I do think
18 Plaintiff's arguments on direct and derivative are just way
19 off. But I don't think they matter, Your Honor, because,
20 again, regardless of the liberal amendment standards in 15,
21 and regardless of the language in 17, amendment here is
22 futile. That is our point. It doesn't matter if they fix the
23 standing issues. Their complaint is still going to be time-
24 barred. And they still, like today, they still will have no
25 evidence of cause or excusable neglect to justify that

1 complaint.

2 Again, happy to answer any questions, Your Honor, but we
3 do think this is a straightforward matter. And with that,
4 I'll cede my time.

5 THE COURT: Okay. Thank you.

6 The Court is going to grant the motion to dismiss. And
7 I'm obviously going to write this up. But there's no question
8 whatsoever that the purported claims against Highland that
9 have been asserted in this action by the DAF concerning the
10 Multi-Strat sales of assets, they arise from postpetition
11 transactions, and to the extent the claims are valid, they
12 would have given rise to postpetition administrative expense
13 claims. There's just no -- there's no legitimate argument to
14 the contrary on that.

15 And so that means this is a Section 503(b) issue, not a
16 Rule 15 or a Rule 17 issue.

17 Not only did the plan provide a specific procedure for
18 filing administrative expense claims, but 503 of the
19 Bankruptcy Code also contemplates such a procedure.

20 And as this Court held in a lengthy opinion in the *Taco*
21 *Bueno* case, these procedures have to be strictly complied
22 with. It's very clear from the language of the Code, and the
23 legislative history, if the language of the Code weren't
24 clear, that proofs of claim are very different things than
25 postpetition claims that arise. You file a proof of claim, a

1 simple form, for a prepetition claim. It's deemed allowed if
2 no one objects. You don't even have to get an order. But,
3 again, as I explained in *Taco Bueno*, a 503 administrative
4 expense claim is a very different animal. Okay? You have to
5 put the world on notice.

6 As Mr. Demo said, it's not a two-party dispute. It's a
7 type of claim that potentially every unsecured creditor in the
8 case would care about and want to weigh in on. You're held to
9 strict proof.

10 And, again, as I noted from the Supreme Court *Reading*
11 case, the Supreme Court has said technically there doesn't
12 have to be a benefit to the estate. There are some things
13 that are just a cost of doing business. A fire to a
14 neighbor's building didn't benefit the estate, but still the
15 victim of that fire was entitled to an administrative expense
16 claim. But this is not even the stretch that a fire would be.
17 So there's just zero room for argument, I think, here that the
18 claims asserted in this action are of the nature of
19 administrative expense claims, postpetition claims, and a
20 request had to be filed by September 25th.

21 And to the extent a sentence or two in this response filed
22 July 5th, 2022 is a request to file a late-filed
23 administrative expense claim, I mean, it's procedurally
24 improper in every way. And so I'm not going to grant any
25 relief based on that.

1 Last, the standing issue. While I have the view that CLO
2 Holdco would have been the party aggrieved here if these
3 claims are valid, and there does appear to be a problem with
4 the standing of the Charitable DAF, I think this is a moot
5 point or an irrelevant point. While under 17 I could, in
6 different circumstances, allow the proper party to substitute
7 in, it would be an exercise in futility here because, again,
8 we're ten months past the deadline for a timely filing of an
9 administrative expense claim.

10 So, I will draft up an opinion and order in this regard.

11 Let me just throw this out here so no one is surprised or
12 on a different page. I don't think I have to do a report and
13 recommendation on this. And anyone who wants to weigh in can
14 weigh in, but as you know, --

15 MR. DEMO: Your Honor?

16 THE COURT: Oh.

17 MR. DEMO: I'm sorry. I was just agreeing with Your
18 Honor. This is the claims allowance process. This is a pure
19 core proceeding at this point.

20 THE COURT: Okay. And so certainly I'll also hear
21 from Mr. Bridges if he has a comment.

22 But the way I look at this is, okay, we start with the
23 point of Judge Godbey, I think it was, had this one. He *sua*
24 *sponte* referred this to the Bankruptcy Court. There wasn't a
25 report and recommendation where I said, I think you should

1 either not withdraw or withdraw but let the Bankruptcy Court
2 do pretrial matters. He just *sua sponte* did that. Okay?

3 But then a couple of additional points. Rule 7012(b)
4 says that a responsive pleading to a 12(b)(6) or a 12(b)(1),
5 any -- shall include a statement that the party does or does
6 not consent to the entry of final orders of judgment by the
7 Court. So I guess we could argue, does that apply to the
8 Movant or does it apply to the Respondent? But I think it
9 probably applies to the Respondent here, and so there was
10 just nothing in the response as to whether Respondent did or
11 did not consent to entry of a final order, so I would view
12 that as a waiver.

13 But most importantly of all, I guess, my third point on
14 this is I think this is an arising-in core matter, not merely
15 related to, where consent is necessary. Because certainly
16 the idea of do you need an administrative expense claim or
17 not and were the proper procedures followed, I think that's
18 core arising in.

19 So, for all of these reasons, I'm letting you know I'm
20 not doing this in a report and recommendation. I'm just
21 doing this in an opinion and order.

22 Mr. Bridges, anything you want to say about that?

23 MR. BRIDGES: Yes, Your Honor. If I could back up
24 and correct myself first. I think I was mistaken about CLO
25 Holdco. They are indeed, I am told, the hundred-percent

1 subsidiary of the Plaintiff, the Charitable DAF.

2 Secondly, yes, Your Honor, this is a Rule 12 motion in an
3 adversary proceeding. We would object to a final order and
4 ask you to issue a report and recommendation.

5 THE COURT: Well, you didn't put that in your
6 response. What is your comment about that?

7 MR. BRIDGES: Your Honor, my comment on that is I
8 feel -- I feel like my hands are tied by the injunction. We
9 haven't been able to file any motion for leave on fear of --
10 on pain of getting a ruling from this Court against us as to
11 the injunction, but we don't have clarity as to what we're
12 enjoined from and what we are not. And I guess that would be
13 my basis.

14 THE COURT: Okay. Well, I don't know what that has
15 to do it with putting a sentence in a response that's required
16 by 7012(b) saying whether you consent or don't consent. I
17 don't know what an injunction has to do with that.

18 But anyway, I do view this as an arising-in matter where
19 consent is probably irrelevant, but I'm just dotting all our
20 I's here.

21 All right. I will -- I've got one law clerk working on
22 one under-advisement of Highland that I think is pretty close.
23 I've got another law clerk working on another under-advisement
24 in Highland that is getting there. So I think I'll probably
25 just jot out a pretty fast opinion and order on this one,

44

1 because the facts on it are pretty simple, and I think
2 probably in a few days you'll have it.

3 All right. We're adjourned.

4 THE CLERK: All rise.

5 MR. DEMO: Thank you.

6 (Proceedings concluded at 3:44 p.m.)

7 --oOo--

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CERTIFICATE

21 I certify that the foregoing is a correct transcript from
22 the electronic sound recording of the proceedings in the
above-entitled matter.

23 **/s/ Kathy Rehling**

08/04/2022

24

25 Kathy Rehling, CETD-444
Certified Electronic Court Transcriber

Date

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**UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF
TEXAS, DALLAS DIVISION**

In Re: Highland Capital Management, L.P § Case No. **19-34054-SGJ11**

Charitable DAF Fund, L.P et al

Appellant

§

vs.

§

21-03067

Highland Capital Management, L.P

§

Appellee

§

3:23-CV-01503-B

[167] Order granting Defendant Highland Capital Management, L.P.'s Renewed motion to dismiss adversary proceeding (related document # [122](#)) Entered on 6/25/2023.

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APPELLANT RECORD

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**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

In re:	§ Chapter 11
	§
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§ Case No. 19-34054-sgj11
	§
Debtor.	§
	§
CHARITABLE DAF FUND, L.P. AND CLO	§
HOLDCO, LTD., DIRECTLY AND DERIVATIVELY	§
	§
Plaintiffs,	§ Adversary Proceeding No.
	§
vs.	§ 21-03067-sgj11
	§
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§
HIGHLAND HCF ADVISOR, LTD., AND	§
HIGHLAND CLO FUNDING LTD., NOMINALLY	§
	§
Defendant.	§
	§

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**APPELLANTS' SECOND AMENDED STATEMENT OF ISSUES
AND DESIGNATION OF RECORD ON APPEAL**

Pursuant to Rules 8009(a)(1)(A)-(B) and (a)(4) of the Federal Rules of Bankruptcy Procedure, The Charitable DAF Fund, L.P. and CLO Holdco, Ltd. ("Appellants") hereby designate the following items to be included in the record and identify the following issues with respect to

their appeal of the Order Granting Defendant Highland Capital Management, L.P.'s "Renewed Motion to Dismiss Complaint" [Adv. Proc. Doc. No. 122] which was entered by the United States Bankruptcy Court for the Northern District of Texas on June 25, 2023.

I. STATEMENT OF ISSUES TO BE PRESENTED ON APPEAL

- Whether the Bankruptcy Court had jurisdiction to rule on Highland Capital Management L.P.'s Renewed Motion to Dismiss Complaint
- Whether the Renewed Motion to Dismiss Complaint was improperly granted

II. DESIGNATION OF ITEMS TO BE INCLUDED IN THE RECORD

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1. Notice of Appeal for Bankruptcy Case Adversary Proceeding No. 21-03067-sgj11 [Doc. 168].

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2. The judgment, order, or decree appealed from: Memorandum Opinion and Order Granting Defendant Highland Capital Management, L.P.'s "Renewed Motion to Dismiss Complaint" [Adv. Proc. Doc. No. 122] [Doc. 167].

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3. Docket Sheet kept by the Bankruptcy Clerk.

4. Documents listed below and as described in the Docket Sheet for Bankruptcy Case Proceeding No. 21-03067-sgj.

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000138

No.	Date Filed	Docket No.	Description/Document Text
1	9/29/21	1	(36 pgs; 3 docs) Adversary case 21-03067. ORDER REFERRING CASE NUMBER 21-CV-0842-B from U.S District Court for the Northern District of Texas, Dallas Division to U.S. Bankruptcy Court for Northern District of Texas, Dallas Division. Complaint by Charitable DAF Fund, LP, CLO Holdco, Ltd. against Highland Capital Management, LP, Highland HCF Advisor Ltd., Highland CLO Funding, Ltd. Fee Amount \$350 (Attachments: # 1 Original Complaint # 2 Docket Sheet from 3:20-cv-0842-B) Nature(s) of suit: 02 (Other (e.g. other actions that would have been brought in state court if unrelated to bankruptcy)). (Okafor, M.)
2	9/29/21	2	(1 pg) Supplemental Document (cover sheet) by CLO Holdco Ltd., Charitable DAF Fund (RE: related document(s)1 Adversary case 21-03067) [ORIGINALLY FILED IN 21-CV-0842 AS #2 ON 04/13/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)

Vol. 2 000139 000232 000239 000270 Thru Vol. 6	3	9/29/21	6	(93 pgs; 6 docs) MOTION for Leave to File First Amended Complaint filed by CLO Holdco Ltd., Charitable DAF Fund LP (Attachments: # 1 Exh 1_First Amended Complaint # 2 Exh 2_Motion for Authorization to Retain James Seery # 3 Exh 3_Order Approving Retention of James Seery # 4 Exh 4_Order Approving Settlement # 5 Proposed Order) (Bridges, Jonathan) (Entered: 04/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #6 ON 04/19/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
	4	9/29/21	22	(7 pgs; 2 docs) MOTION for an Order to Enforce the Order of Reference filed by Highland Capital Management LP. (Attachments: # 1 Exhibit(s) A--Proposed Order) (Annable, Zachery) Modified text on 5/20/2021 (mjr). (Entered: 05/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #22 ON 05/19/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
	5	9/29/21	23	(31 pgs) Brief/Memorandum in Support filed by Highland Capital Management LP re: 22 MOTION for an Order to Enforce the Order of Reference. (Annable, Zachery) Modified text on 5/20/2021 (mjr).(Entered: 05/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #23 ON 05/19/2021 IN U.S.DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
	6	9/29/21	24	(926 pgs; 29 docs) Appendix in Support filed by Highland Capital Management LP re: 23 Brief/Memorandum in Support. (Attachments: # 1 Appendix 1 # 2 Appendix 2 # 3 Appendix 3 # 4 Appendix 4 # 5 Appendix 5 # 6 Appendix 6 # 7 Appendix 7 # 8 Appendix 8 # 9 Appendix 9 # 10 Appendix10 # 11 Appendix 11 # 12 Appendix 12 # 13 Appendix 13 # 14 Appendix 14 # 15 Appendix 15 # 16 Appendix 16 # 17 Appendix 17 # 18 Appendix 18 # 19 Appendix 19 # 20 Appendix 20 # 21 Appendix 21# 22 Appendix 22 # 23 Appendix 23 # 24 Appendix 24 # 25 Appendix 25 # 26 Appendix 26 # 27 Appendix 27 # 28 Appendix 28) (Annable, Zachery) Modified linkage and text on 5/20/2021 (mjr). (Entered:05/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #24 ON 05/19/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
Vol. 7 001196	7	9/29/21	26	(7 pgs; 2 docs) MOTION to Dismiss Complaint filed by Highland Capital Management LP (Attachments: # 1 Exhibit(s) A--Proposed Order) (Annable, Zachery) Modified text on 5/28/2021 (jmg).(Entered: 05/27/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #26 ON 05/27/2021 IN U.S.DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)

Vol. 7 001203 thru Vol. 8	8	9/29/21	28	(508 pgs; 14 docs) Appendix in Support filed by Highland Capital Management LP (Attachments: # 1 Appendix 1 # 2 Appendix 2 # 3 Appendix 3 # 4 Appendix 4 # 5 Appendix 5 # 6 Appendix 6 # 7 Appendix 7 # 8 Appendix 8 # 9 Appendix 9 # 10 Appendix 10 # 11 Appendix 11 # 12 Appendix 12 # 13 Appendix 13) (Annable, Zachery) (Entered: 05/27/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #28 ON 05/27/2021 IN U.S. DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
Vol. 9 001711	9	9/29/21	33	(1 pg) Amended Civil Cover Sheet by CLO Holdco Ltd, Charitable DAF Fund LP. Amendment to 2 Supplemental Document. (Sbaiti, Mazin) Modified text on 6/23/2021 (mjr). (Entered: 06/22/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #33 ON 06/22/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001712	10	9/29/21	36	(26 pgs) RESPONSE filed by CLO Holdco Ltd, Charitable DAF Fund LP re: 22 MOTION for an Order to Enforce the Order of Reference (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #36 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001738	11	9/29/21	37	(22 pgs) Appendix in Support filed by CLO Holdco Ltd, Charitable DAF Fund LP re 36 Response/Objection Response to Motion for an Order to Enforce the Order of Reference (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #37 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001760	12	9/29/21	38	(45 pgs) RESPONSE filed by CLO Holdco Ltd, Charitable DAF Fund LP re: 26 MOTION to Dismiss (Defendant Highland Capital Management, L.P.'s Motion to Dismiss Complaint) (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #38 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001805	13	9/29/21	39	(88 pgs) Appendix in Support filed by CLO Holdco Ltd, Charitable DAF Fund LP re 38 Response/Objection to Defendant Highland Capital Management, L.P.'s Motion to Dismiss Complaint (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #39 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001893	14	9/29/21	42	(12 pgs) REPLY filed by Highland Capital Management LP re: 22 MOTION for an Order to Enforce the Order of Reference (Annable, Zachery) (Entered: 07/13/2021) [ORIGINALLY FILED IN 21-CV-0842AS #42 ON 07/13/2021 IN U.S.

			DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
VOL. 9	15	9/29/21	43 (852 pgs) Appendix in Support filed by Highland Capital Management LP re: 42 Reply. (Annable, Zachery) Modified text on 7/14/2021 (mjr). (Entered: 07/13/2021) [ORIGINALLY FILED IN 21-CV-0842AS #43 ON 07/13/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001905 thru Vol. 13	16	9/29/21	45 (21 pgs) REPLY filed by Highland Capital Management LP re: 26 MOTION to Dismiss (Defendant Highland Capital Management, L.P.'s Motion to Dismiss Complaint) (Annable, Zachery) (Entered:07/13/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #44 ON 07/13/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002757	17	9/29/21	57 (7 pgs; 2 docs) MOTION to Dismiss and Joinder in Motion to Dismiss of Highland Capital Management, L.P. filed by Highland CLO Funding Ltd. (Attachments: # 1 Proposed Order) Attorney Paul R Bessette added to party Highland CLO Funding Ltd (pty:dft) (Bessette, Paul) (Entered: 08/30/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #57 ON 08/30/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002778	18	9/29/23	58 (12 pgs) Brief/Memorandum in Support filed by Highland CLO Funding Ltd. re 57 MOTION to Dismiss and Joinder in Motion to Dismiss of Highland Capital Management, L.P. (Bessette, Paul) (Entered: 08/30/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #58 ON 08/30/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002785	19	9/29/23	59 (80 pgs; 5 docs) Appendix in Support filed by Highland CLO Funding Ltd re 58 Brief/Memorandum in Support of Motion (Attachments: # 1 Exhibit(s) A - Jackson v Dear # 2 Exhibit(s) B - Prudential Assurance v. Newman # 3 Exhibit(s) C - Harbourvest Settlement Agreement # 4 Exhibit(s) D - Boleat Declaration) (Bessette, Paul) (Entered: 08/30/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #59 ON 08/30/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002797	20	9/29/21	64 (1 pg) ORDER OF REFERENCE: Pursuant to 28 U.S.C. § 157 and this District's Miscellaneous Order No. 33, this case is hereby REFERRED to Judge Stacey G. C. Jernigan of the United States Bankruptcy Court for the Northern District of Texas, Dallas Division, to be adjudicated as a matter related to the consolidated Chapter 11 Bankruptcy of Highland Capital Management, L.P., Chapter 11 Case No.19-34054. (Ordered by Judge Jane J. Boyle
002877			

Vol. 14				on 9/20/2021) (svc) (Entered: 09/20/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #64 ON 09/20/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002878	21	10/19/21	66	(5 pgs) Notice of hearing filed by Defendant Highland Capital Management, LP (RE: related document(s) 26 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP, 47 Motion to strike document filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 55 Motion to abate filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) Hearing to be held on 11/23/2021 at 09:30 AM at https://us-courts.webex.com/meet/jerniga for 26 and for 47 and for 55, (Annable, Zachery)
002883 thru Vol. 16	22	11/22/21	71	(509 pgs; 2 docs) Witness and Exhibit List <i>for Hearing on November 23, 2021</i> filed by Defendant Highland Capital Management, LP (RE: related document(s) 26 Motion to dismiss adversary proceeding). (Attachments: # 1 Exhibits 1-13) (Hayward, Melissa)
Vol. 17	23	11/22/21	72	(2 pgs) Witness List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 26 Motion to dismiss adversary proceeding, 47 Motion to strike (related document(s): 43 Document), 55 Motion to abate (related document(s) 1 Complaint), 69 Motion to abate <i>Plaintiffs' Amended Motion to Stay All Proceedings</i> (related document(s) 55 Motion to abate (related document(s) 1 Complaint))). (Sbaiti, Mazin)
003392				
003394	24	11/22/21	73	(189 pgs; 4 docs) Exhibit List <i>for November 23, 2021 hearing</i> filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 47 Motion to strike (related document(s): 43 Document), 55 Motion to abate (related document(s) 1 Complaint)). (Attachments: # 1 Exhibit 1_Defendant's Memorandum of Law in Support of Motion for Reconsideration # 2 Exhibit 2_Highland Memorandum in Support of Motion to Dismiss # 3 Exhibit 3_Order (I) Confirming Fifth Amended Plan of Reorganization of Highland) (Sbaiti, Mazin)
003583	25	12/7/21	80	(2 pgs) Order granting Highland CLO Funding, Ltd.'s motion to dismiss adversary as a party with prejudice (related document 57) Entered on 12/7/2021. (Okafor, Marcey) Modified text on 3/11/2022 (Okafor, Marcey).
003585	26	3/11/22	99	(26 pgs) Memorandum of Opinion and order granting motion to dismiss the adversary proceeding (RE: related document(s) 26 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP). Entered on 3/11/2022 (Okafor, Marcey)
003611	27	3/11/22	100	(26 pgs) Order granting motion to dismiss adversary proceeding with prejudice (related document #26) Entered on 3/11/2022. (Okafor, Marcey)

Vol. 18 003637	28	3/21/22	104	(29 pgs) Notice of appeal. Fee Amount \$298 filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 100 Order on motion to dismiss adversary proceeding). Appellant Designation due by 04/4/2022. (Sbaiti, Mazin)
003666	29	5/26/22	120	(177 pgs; 2 docs) Support/supplemental document <i>Motion to Supplement Appellate Record</i> filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 111 Appellant designation). (Attachments: # 1 Amended Transcript of January 14, 2021 Hearing) (Sbaiti, Mazin)
003843	30	6/9/22	121	(1 pg) DISTRICT COURT Order: Case 3:22-00695-B is hereby transferred to the docket of the Honorable Judge Jane J. Boyle for consolidation with The Charitable DAF Fund LP, et al. v. Highland Capital Management LP, Case No. 3:21-cv-3129-N. Judge Karen Gren Scholer no longer assigned to case.(RE: related document(s) 86 Notice of appeal filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 104 Notice of appeal filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Entered on 6/9/2022 (Whitaker, Sheniqua) (Entered: 06/10/2022)
003844	31	10/24/22	122	(7 pgs) Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP (Annable, Zachery)
003851	32	10/14/22	123	(31 pgs) Brief in support filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Annable, Zachery)
Vol. 19 003882 Thru Vol 20	33	10/14/22	124	(513 pgs; 15 docs) Support/supplemental document (<i>Appendix in Support of Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7 # 8 Exhibit 8 # 9 Exhibit 9 # 10 Exhibit 10 # 11 Exhibit 11 # 12 Exhibit 12 # 13 Exhibit 13 # 14 Exhibit 14) (Annable, Zachery)
Vol. 21 004395	34	10/27/22	126	(5 pgs) Notice of hearing (<i>Notice of Hearing and Briefing Schedule on Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP). Hearing to be held on 12/8/2022 at 09:30 AM at https://us-courts.webex.com/meet/jerniga for 122. (Annable, Zachery)

Vol. 21 004400 004410 004442 Thru Vol. 22	35	11/18/22	128	(10 pgs) Motion for withdrawal of reference. Fee amount \$188, filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (Sbaiti, Mazin)
	36	11/18/22	129	(32 pgs) Response opposed to (related document(s): 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP) filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Sbaiti, Mazin)
	37	11/18/22	130	(254 pgs; 2 docs) Response opposed to (related document(s): 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP) filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Attachments: # 1 Appendix) (Sbaiti, Mazin)
Vol. 22 004696 004717 004732 004737 004742	38	9/2/22	131	(21 pgs) DISTRICT COURT MEMORANDUM OPINION AND ORDER: The Court REVERSES and REMANDS the bankruptcy court's Motion to Dismiss Order and AFFIRMS the bankruptcy courts Motion to Stay Order. re: appeal on Civil Action number: Case 3:22-00695-B consolidated with 3:21-CV-3129-B, (RE: related document(s) 81 Order on motion to abate, 100 Order on motion to dismiss adversary proceeding). Entered on 9/2/2022 (Whitaker, Sheniqua) (Entered: 11/29/2022)
	39	12/2/22	133	(15 pgs) Reply to (related document(s): 129 Response filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 130 Response filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) filed by Defendant Highland Capital Management, LP. (Annable, Zachery)
	40	12/7/22	135	(5 pgs) Notice of hearing filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP). Hearing to be held on 1/25/2023 at 01:30 PM at https://us-courts.webex.com/meet/jerniga for 122, (Annable, Zachery)
	41	12/7/22	136	(5 pgs) Notice of hearing filed by Defendant Highland Capital Management, LP (RE: related document(s) 128 Motion for withdrawal of reference filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Status Conference to be held on 1/25/2023 at 01:30 PM at https://us-courts.webex.com/meet/jerniga . (Annable, Zachery).
	42	12/9/22	138	(3 pgs) Response opposed to (related document(s): 128 Motion for withdrawal of reference. Fee amount \$188, filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) filed by Defendant Highland Capital Management, LP. (Annable, Zachery)

Vol. 22 004745	43	12/9/22	139	(25 pgs) Brief in support filed by Defendant Highland Capital Management, LP (RE: related document(s) 138 Response). (Annable, Zachery)
Vol. 23 004770	44	12/9/22	140	(280 pgs; 8 docs) Support/supplemental document (<i>Appendix in Support of Highland Capital Management, L.P.'s Response to Renewed Motion to Withdraw the Reference</i>) filed by Defendant Highland Capital Management, LP (RE: related document(s) 138 Response). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7) (Annable, Zachery)
Vol. 24 005050	45	12/16/22	144	(6 pgs) Reply to (related document(s): 138 Response filed by Defendant Highland Capital Management, LP) filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Sbaiti, Mazin)
005056 Thru Vol. 25.	46	1/23/23	145	(514 pgs; 15 docs) Witness and Exhibit List filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7 # 8 Exhibit 8 # 9 Exhibit 9 # 10 Exhibit 10 # 11 Exhibit 11 # 12 Exhibit 12 # 13 Exhibit 13 # 14 Exhibit 14) (Annable, Zachery)
Vol. 26 005570	47	1/23/23	146	(280 pgs; 8 docs) Witness and Exhibit List filed by Defendant Highland Capital Management, LP (RE: related document(s) 128 Motion for withdrawal of reference. Fee amount \$188.). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7) (Annable, Zachery)
Vol. 27 005850	48	1/23/23	147	(221 pgs; 7 docs) Witness and Exhibit List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Attachments: # 1 Exhibit 1_Excerpts from July 14, 2020 Hearing Transcript # 2 Exhibit 2_HCLOF Members Agreement Relating to the Company # 3 Exhibit 3_HarbourVest Settlement Agreement # 4 Exhibit 4_Order Approving Debtor's Settlement with HarbourVest # 5 Exhibit 5_HCLOF Offering # 6 Exhibit 6 Amended and Restated Investment Advisory Agreement) (Sbaiti, Mazin)
006071	49	1/23/23	148	(3 pgs) Witness and Exhibit List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 128 Motion for withdrawal of reference. Fee amount \$188.). (Phillips, Louis)
Vol. 28 006074	50	1/25/23	150	(56 pgs; 2 docs) Amended Witness and Exhibit List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 147 List (witness/exhibit/generic), 149 List (witness/exhibit/generic)). (Attachments: # 1 Exh 7_Testimony of Mark Patrick at June 8, 2021 hearing) (Sbaiti, Mazin)

Vol. 28 006130	51	1/25/23	152	(3 pgs) Notice of Appearance and Request for Notice by Louis M. Phillips filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Phillips, Louis)
	52	1/25/23	154	(1 pg) Court admitted exhibits date of hearing January 25, 2023 (RE: related document(s) 128 Motion for withdrawal of reference, filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) (COURT ADMITTED DEFENDANT'S EXHIBITS #1, #2, #3, #4, #5 & #6 OFFERED BY ATTY GREG DEMO). (Edmond, Michael) (Entered: 01/27/2023)
Vol. 32 006925 006942 006960	53	2/6/23	158	Report and recommendation to the U.S. District Court by U.S. Bankruptcy Judge. (RE: related document(s) 128 Motion for withdrawal of reference filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Entered on 2/6/2023 (Okafor, Marcey)
	54	2/6/23	161	(18 pgs) DISTRICT COURT Notice of transmission of report and recommendation in re: renewed motion to withdraw reference. Civil Case # 3:22-cv-02802-S. (RE: related document(s) 158 Report and recommendation to the U.S. District Court by U.S. Bankruptcy Judge. (RE: related document(s) 128 Motion for withdrawal of reference filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Entered on 2/6/2023) (Whitaker, Sheniqua)
	55	4/3/23	165	(1 pg) DISTRICT COURT ORDER: The Court GRANTS the 11 Joint Motion to Transfer Proceeding and Consolidate Before Original Court and the above-numbered case (3:22-cv-02802-S) is transferred to the docket of the Honorable Judge Jane Boyle: Civil case 3:21-cv-00842-B (order referring case). (RE: related document(s) 1 Complaint filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 143 Notice of transmission of motion to withdraw reference). Entered on 4/3/2023 (Whitaker, Sheniqua) Modified on 4/10/2023 (Whitaker, Sheniqua). (Entered: 04/10/2023)

TRANSCRIPTS

006961	56	11/24/21	78	(104 pgs) Transcript regarding Hearing Held 11-23-2021 RE: Motion Hearing. THIS TRANSCRIPT WILL BE MADE ELECTRONICALLY AVAILABLE TO THE GENERAL PUBLIC 90 DAYS AFTER THE DATE OF FILING. TRANSCRIPT RELEASE DATE IS 02/22/2022. Until that time the transcript may be viewed at the Clerk's Office or a copy may be obtained from the official court transcriber. Court Reporter/Transcriber Liberty Transcripts/Dipti Patel, Telephone number 847-848-4907. (RE: related document(s) 75 Hearing held on 11/23/2021. (RE: related document(s) 55 MOTION to Stay filed by CLO Holdco Ltd, Charitable DAF Fund LP (Sbaiti, Mazin) (Entered: 08/26/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #55 ON 08/26/2021 IN U.S.
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			<p>DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)) (Appearances: J. Pomerantz and J. Morris for Highland Defendants; J. Jordan and P. Bessett for HCLOF; M. Sbaiti for Plaintiffs. Nonevidentiary hearing. Motion denied. Mr. Pomerantz to upload order.), 76 Hearing held on 11/23/2021. (RE: related document(s) 47 Motion to strike 43 Appendix in support filed by CLO Holdco, Ltd., Charitable DAF Fund, LP (Bridges, Jonathan) Modified text on 7/16/2021 (mjr). (Entered: 07/15/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #47 ON 07/15/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)) (Appearances: J. Pomerantz and J. Morris for Highland Defendants; J. Jordan and P. Bessett for HCLOF; M. Sbaiti for Plaintiffs. Nonevidentiary hearing. Motion denied (Plaintiffs acknowledged complained-of Appendices it did not relate to Motion to Dismiss). Mr. Pomerantz to upload order.)). Transcript to be made available to the public on 02/22/2022. (Patel, Dipti)</p>
57	2/21/23	164	<p>164 (112 pgs) Transcript regarding Hearing Held 1/25/23 RE: HEARING ON DEFENDANT HIGHLAND CAPITAL MANAGEMENT L.P.'S RENEWED MOTION TO DISMISS COMPLAINT (122) AND STATUS CONFERENCE RE: MOTION FOR WITHDRAWAL OF REFERENCE FILED BY PLAINTIFF CLO HOLDCO, LTD., PLAINTIFF CHARITABLE DAF FUND, LP (128). THIS TRANSCRIPT WILL BE MADE ELECTRONICALLY AVAILABLE TO THE GENERAL PUBLIC 90 DAYS AFTER THE DATE OF FILING. TRANSCRIPT RELEASE DATE IS 05/22/2023. Until that time the transcript may be viewed at the Clerk's Office or a copy may be obtained from the official court transcriber. Court Reporter/Transcriber Dipti Patel, Telephone number 847-848-4907. (RE: related document(s) 155 Hearing held on 1/25/2023. (RE: related document(s) 122 Motion to dismiss adversary proceeding, (Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint) filed by Defendant Highland Capital Management, LP filed by Defendant Highland Capital Management, LP) (Appearances: J. Morris and G. Demo for Movants; L. Phillips and M. Sbaiti for Plaintiffs. Evidentiary hearing (appendices). Court took matter under advisement.), 156 Hearing held on 1/25/2023. (RE: related document(s) 128 Motion for withdrawal of reference. Fee amount \$188, filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) (Appearances: J. Morris and G. Demo for Movants; L. Phillips and M. Sbaiti for Plaintiffs. Evidentiary hearing (appendices). Court announced it will recommend denial to District Court. Court is working on Report & Recommendation.)). Transcript to be made available to the public on 05/22/2023. (Patel, Dipti)</p>

Dated: July 14, 2023

Respectfully submitted,

SBAITI & COMPANY PLLC

/s/ Mazin A. Sbaiti

Mazin A. Sbaiti

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Counsel for Appellants

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was filed electronically through the Court's ECF system, which provides notice to all parties of interest, on this 14th day of July, 2023.

/s/ Mazin A. Sbaiti

Mazin A. Sbaiti

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

In re:	§ Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§ Case No. 19-34054-sgj11
Debtor.	§
CHARITABLE DAF FUND, L.P. AND CLO	§
HOLDCO, LTD., DIRECTLY AND DERIVATIVELY	§
Plaintiffs,	§ Adversary Proceeding No.
vs.	§ 21-03067-sgj
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§
HIGHLAND HCF ADVISOR, LTD., AND	§
HIGHLAND CLO FUNDING LTD., NOMINALLY	§
Defendants.	§

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In its response brief, Defendant Highland Capital Management, L.P. does not dispute that Plaintiffs first moved to withdraw the reference under 28 U.S.C. § 157(d) on June 29, 2021 (Dkt. 36), in the district court, or that the district court referred the entire action to this Court without addressing the merits of that motion. It merely argues that Plaintiffs should have re-urged their motion sooner. This Court's statutory jurisdiction is not so easily established.

Neither does the response brief dispute that Plaintiffs' pending claims "require[] consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce," as § 157(d) requires. It only questions the complexity of the laws at issue and contends that this Court has sufficient experience to consider them. These arguments do not undo § 157(d)'s jurisdictional bar. Plaintiffs' motion should be granted.

A. Plaintiffs Have Not Waived Jurisdiction

At the outset of this action, Plaintiffs asserted that this Court lacked jurisdiction under § 157(d). Motion for Leave to File First Amended Complaint, 6-7 (Dkt. 6). Plaintiffs moved to withdraw the reference shortly thereafter in their Response and Cross Motion on June 29, 2021 (Dkt. 36). Plaintiffs have maintained this position consistently in repeated filings. Plaintiffs' Amended Motion to Stay All Proceedings, Exhibit A, Proposed Motion to Withdraw Reference (Dkt. 60-1); Renewed Motion to Withdraw Reference (Dkt. 128). The timing of the re-urging of Plaintiffs' motion cannot create jurisdiction where there is none.

The plain language of § 157(d) mandates withdrawal of the reference following a timely motion. There is no additional requirement that a party must repeat its objection to the authority of the Bankruptcy Court through a re-urged or renewed motion to withdraw reference according to a particular timeframe. And Highland points to no authority indicating otherwise.

Highland attempts to bolster its waiver argument with reference to Rule 7012(b) of the Federal Rules of Bankruptcy Procedure. But that rule, by its own terms, applies only to responsive pleadings. “Pleading” is a term of art in the Federal Rules, and what can constitute a pleading is enumerated exhaustively in Rule 7(a) of the Federal Rules of Civil Procedure, made applicable by Rule 7007, FRBP. *See* Fed. R. Civ. P. 7(a) (“Pleadings. Only these pleadings are allowed: (1) a complaint; (2) an answer to a complaint; (3) an answer to a counterclaim designated as a counterclaim; (4) an answer to a crossclaim; (5) a third-party complaint; (6) an answer to a third-party complaint; and (7) if the court orders one, a reply to an answer.”) Plaintiffs have filed none of the above except for their Original Complaint, which is certainly not a “responsive” pleading. Rule 7012(b) therefore does not apply.¹

Because Plaintiffs’ June 29, 2021 motion was timely, and because subject matter jurisdiction cannot be established by waiver, Highland’s principal argument against withdrawal of the reference fails.

B. Plaintiffs Have Established That Consideration of the Advisers Act Is Necessary

Plaintiffs have established—and Highland does not dispute—that withdrawal of the reference is mandatory under § 157(d) when a federal law, such as the Advisers Act, must be considered. Renewed Motion to Withdraw the Reference [Dkt. 128] at 2-3. Highland likewise does not dispute that resolving its pending Renewed Motion to Dismiss will require analysis of the Advisers Act. Instead, Highland argues only that such analysis will be simple and immaterial. This is incorrect.

¹ If the Renewed Motion has triggered a contested matter, under Rule 9014 of the Rules of Bankruptcy Procedure, it is clear that Rule 7012 is not applicable (“(c) Application of Part VII Rules. Except as otherwise provided in this rule, and unless the court directs otherwise, the following rules shall apply: 7009, 7017, 7021, 7025, 7026, 7028–7037, 7041, 7042, 7052, 7054–7056, 7064, 7069, and 7071.”).

As Plaintiffs demonstrated in their opening brief, the likelihood of anything more than simple application of federal securities laws is sufficient to trigger mandatory withdrawal under § 157(d). *See In re Harrah's Entm't*, No. 95-3925, 1996 U.S. Dist. LEXIS 18097, at *7-8 (E.D. La. 1996) (rejecting argument that the case would “only involve the simple application of established federal securities laws” where plaintiff alleged violation of such laws and was attempting “to hold defendants directly liable and secondarily liable based on a ‘controlling person’ theory for certain acts and omissions”); *id.* at *7-8, 11 (concluding, “This federal securities litigation involves more than simple application of federal securities laws and will be complicated enough to warrant mandatory withdrawal under § 157(d),” and citing *In re Rann'd Res.*, 175 B.R. 393, 396 (D. Nev. 1994), for the proposition that withdrawal of the reference is mandatory where resolution requires more than simple application of federal securities laws); *In re Cont'l Airlines Corp.*, 50 B.R. 342, 360 (S.D. Tex. 1985), *aff'd*, 790 F.2d 35 (5th Cir. 1986) (“While that second clause [of § 157(d)] might not apply when some ‘other law’ only tangentially affects the proceeding, it surely does apply when federal labor legislation will likely be material to the proceeding’s resolution.”).

That more than simple application of the Advisers Act is required is amply demonstrated by the parties’ briefing of the pending Renewed Motion to Dismiss Complaint, which Plaintiffs incorporate by reference here. *See e.g.*, Plaintiffs’ Response to Renewed Motion to Dismiss Complaint [Dkt. 129] at 12-13 & n.3 (explaining the viability of an action for breach of fiduciary duties imposed by the Adviser Act and explaining Highland’s inability to circumvent those duties via the internal-affairs doctrine); *id.* at 14-15 & n.4 (invoking Rule 206(4)-8, promulgated under 17 C.F.R. § 275.206(4)-8, as governing the duties owed by advisors to “pooled investment vehicles” and explaining how Highland qualifies as such).

Neither does Highland’s specious core-jurisdiction argument save the day, as the mandatory withdrawal provisions of § 157(d) apply even to matters within a bankruptcy court’s core jurisdiction. *See, e.g., In re Bos. Generating, LLC*, No. 10-cv-6528, 2010 U.S. Dist. LEXIS 116073, at *14–15 (S.D.N.Y. Nov. 1, 2010) (quoting *New York v. Exxon Corp.*, 932 F.2d 1020, 1026 (2d Cir. 1991) for the proposition, “[M]atters within [the bankruptcy court’s ‘core’ jurisdiction, upon timely motion, must be withdrawn under § 157(d) if they require the bankruptcy court to substantially interpret federal statutes which affect interstate commerce.”) (alterations in original); *cf. Stern v. Marshall*, 564 U.S. 462, 499 (2011) (holding that Congress cannot bypass Article III and create jurisdiction in bankruptcy court “simply because a proceeding may have some bearing on a bankruptcy case”); *In re Prescription Home Health Care*, 316 F.3d 542, 548 (5th Cir. 2002) (rejecting “the theory that a bankruptcy court has jurisdiction to enjoin any activity that threatens the debtor’s reorganization prospects”).

Because the resolution of this case—indeed, the resolution of the pending Renewed Motion to Dismiss—will require consideration of federal securities law, withdrawal of the reference is mandatory.

CONCLUSION

For all these reasons, Plaintiffs respectfully submit that the motion should be granted.

Dated: December 16, 2022

Respectfully submitted,

SBAITI & COMPANY PLLC

/s/ Jonathan Bridges

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Counsel for Highland Capital Management, L.P.

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

In re:)	
	)	Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P., ¹	)	Case No. 19-34054-sgj11
Reorganized Debtor.)	
In re: CHARITABLE DAF FUND, L.P., AND)	
CLO HOLDCO LTD.,	)	Adv. Pro. No. 21-03067-sgj
Plaintiffs,)	
vs.)	
HIGHLAND CAPITAL MANAGEMENT, L.P.,)	
HIGHLAND HCF ADVISOR, LTD., AND)	
HIGHLAND CLO FUNDING, LTD.,)	
Defendants)	

¹ The Reorganized Debtor's last four digits of its taxpayer identification number are (8357). The headquarters and service address for the Reorganized Debtor is 100 Crescent Court, Suite 1850, Dallas, TX 75201.

**REORGANIZED DEBTOR’S WITNESS AND EXHIBIT LIST WITH
RESPECT TO EVIDENTIARY HEARING TO BE HELD ON JANUARY 25, 2023**

Highland Capital Management, L.P. (the “Debtor”) submits the following witness and exhibit list with respect to *Defendant Highland Capital Management, L.P.’s Renewed Motion to Dismiss Complaint* [Docket No. 122], which the Court has set for hearing at 1:30 p.m. (Central Time) on January 25, 2023 (the “Hearing”) in the above-styled adversary proceeding (the “Adversary Proceeding”).

A. Witnesses:

1. Any witness identified by or called by any other party; and
2. Any witness necessary for rebuttal.

Exhibits:

Number	Exhibit	Offered	Admitted
1.	HarbourVest 2017 Global Fund L.P. Proof of Claim No. 143, HarbourVest 2017 Global AIF L.P., Proof of Claim No. 147, HarbourVest Dover Street IX Investment L.P., Proof of Claim No. 150, HV International VIII Secondary L.P., Proof of Claim No. 153, HarbourVest Skew Base AIF L.P., Proof of Claim No. 154, and HarbourVest Partners L.P., Proof of Claim No. 149.		
2.	<i>Motion for Entry of an Order Approving Settlement with HarbourVest (Claim Nos. 143, 147, 149, 150, 153, 154) and Authorizing Actions Consistent Therewith</i> [Bankr. Docket No. 1625]		
3.	<i>Settlement Agreement and Transfer Agreement for Ordinary Shares of Highland CLO Funding, Ltd.</i> [Bankr. Docket No. 1631-1]		
4.	<i>James Dondero’s Objection to the Debtor’s Motion for Entry of an Order Approving Settlement with HarbourVest</i> [Bankr. Docket No. 1697]		
5.	<i>The Dugaboy Investment Trust and Get Good Trust’s Objection to the Debtor’s Motion for Entry of an Order Approving Settlement with HarbourVest (Claim Nos. 143, 147, 149, 150, 153, 154) and Authorizing Actions Consistent Therewith</i> [Bankr. Docket No. 1706]		
6.	<i>CLO Holdco, Ltd.’s Objection to HarbourVest Settlement</i> [Bankr. Docket No. 1707]		

Number	Exhibit	Offered	Admitted
7.	Deposition Transcript of Michael Pugatch, January 21, 2021		
8.	<i>Debtor's Omnibus Reply in Support of Debtor's Motion for Entry of an Order Approving Settlement with HarbourVest (Claim Nos. 143, 147, 149, 150, 153, 154) and Authorizing Actions Consistent Therewith</i> [Bankr. Docket No. 1731]		
9.	Hearing Transcript, January 14, 2021		
10.	<i>Order Approving Debtor's Settlement with HarbourVest (Claim Nos. 143, 147, 149, 150, 153, 154) and Authorizing Actions Consistent Therewith</i> [Bankr. Docket No. 1788]		
11.	<i>Original Complaint</i> , Case No. 21-cv-00842-B, Docket No. 1 (N.D. Tex. Apr. 12, 2021)		
12.	<i>Memorandum Opinion and Order</i> , Case No. 21-cv-03129-B, Docket No. 28 (N.D. Tex. September 2, 2021)		
13.	Members Agreement, November 15, 2017		
14.	Second Amended and Restated Investment Advisory Agreement		

Dated: January 23, 2023

PACHULSKI STANG ZIEHL & JONES LLP

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-and-

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Counsel for Highland Capital Management, L.P.

EXHIBIT 1

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CLAIM 143

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Fill in this information to identify the case:

Debtor Highland Capital Management, L.P.

United States Bankruptcy Court for the: Northern District of Texas
(State)

Case number 19-34054

Official Form 410
Proof of Claim

04/19

Read the instructions before filling out this form. This form is for making a claim for payment in a bankruptcy case. Do not use this form to make a request for payment of an administrative expense. Make such a request according to **11 U.S.C. § 503**.

Filers must leave out or redact information that is entitled to privacy on this form or on any attached documents. Attach redacted copies or any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, judgments, mortgages, and security agreements. **Do not send original documents**; they may be destroyed after scanning. If the documents are not available, explain in an attachment.

A person who files a fraudulent claim could be fined up to \$500,000, imprisoned for up to 5 years, or both. **18 U.S.C. §§ 152, 157, and 3571**.

Fill in all the information about the claim as of the date the case was filed. That date is on the notice of bankruptcy (Form 309) that you received.

Part 1: Identify the Claim

1. Who is the current creditor?	<u>HarbourVest 2017 Global Fund L.P.</u> Name of the current creditor (the person or entity to be paid for this claim)	
	Other names the creditor used with the debtor _____	
2. Has this claim been acquired from someone else?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. From whom? _____	
3. Where should notices and payments to the creditor be sent?	Where should notices to the creditor be sent? <u>HarbourVest 2017 Global Fund L.P.</u> <u>Attn: Erica Weisgerber</u> <u>Debevoise and Plimpton LLP</u> <u>919 Third Avenue</u> <u>New York, NY 10022, U.S.A.</u> Contact phone <u>2129096000</u> Contact email <u>eweisgerber@debevoise.com</u> Uniform claim identifier for electronic payments in chapter 13 (if you use one): _____	Where should payments to the creditor be sent? (if different) <u>See summary page</u> Contact phone <u>6173483773</u> Contact email <u>agoren@harbourvest.com</u>
4. Does this claim amend one already filed?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Claim number on court claims registry (if known) _____ Filed on _____ MM / DD / YYYY	
5. Do you know if anyone else has filed a proof of claim for this claim?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Who made the earlier filing? _____	



Part 2: Give Information About the Claim as of the Date the Case Was Filed

6. Do you have any number you use to identify the debtor?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Last 4 digits of the debtor's account or any number you use to identify the debtor: ____
7. How much is the claim? \$ <u>See Annex</u>	Does this amount include interest or other charges? <input type="checkbox"/> No <input type="checkbox"/> Yes. Attach statement itemizing interest, fees, expenses, or other charges required by Bankruptcy Rule 3001(c)(2)(A).
8. What is the basis of the claim?	Examples: Goods sold, money loaned, lease, services performed, personal injury or wrongful death, or credit card. Attach redacted copies of any documents supporting the claim required by Bankruptcy Rule 3001(c). Limit disclosing information that is entitled to privacy, such as health care information. <u>See Annex</u>
9. Is all or part of the claim secured?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. The claim is secured by a lien on property. Nature or property: <input type="checkbox"/> Real estate: If the claim is secured by the debtor's principle residence, file a <i>Mortgage Proof of Claim Attachment</i> (Official Form 410-A) with this <i>Proof of Claim</i> . <input type="checkbox"/> Motor vehicle <input type="checkbox"/> Other. Describe: _____ Basis for perfection: _____ Attach redacted copies of documents, if any, that show evidence of perfection of a security interest (for example, a mortgage, lien, certificate of title, financing statement, or other document that shows the lien has been filed or recorded.) Value of property: \$ _____ Amount of the claim that is secured: \$ _____ Amount of the claim that is unsecured: \$ _____ (The sum of the secured and unsecured amount should match the amount in line 7.) Amount necessary to cure any default as of the date of the petition: \$ _____ Annual Interest Rate (when case was filed) _____ % <input type="checkbox"/> Fixed <input type="checkbox"/> Variable
10. Is this claim based on a lease?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Amount necessary to cure any default as of the date of the petition. \$ _____
11. Is this claim subject to a right of setoff?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Identify the property: _____



12. Is all or part of the claim entitled to priority under 11 U.S.C. § 507(a)?

☒ No

☐ Yes. Check all that apply:

Amount entitled to priority

A claim may be partly priority and partly nonpriority. For example, in some categories, the law limits the amount entitled to priority.

☐ Domestic support obligations (including alimony and child support) under 11 U.S.C. § 507(a)(1)(A) or (a)(1)(B).

\$ _____

☐ Up to \$3,025* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use. 11 U.S.C. § 507(a)(7).

\$ _____

☐ Wages, salaries, or commissions (up to \$13,650*) earned within 180 days before the bankruptcy petition is filed or the debtor's business ends, whichever is earlier. 11 U.S.C. § 507(a)(4).

\$ _____

☐ Taxes or penalties owed to governmental units. 11 U.S.C. § 507(a)(8).

\$ _____

☐ Contributions to an employee benefit plan. 11 U.S.C. § 507(a)(5).

\$ _____

☐ Other. Specify subsection of 11 U.S.C. § 507(a)() that applies.

\$ _____

* Amounts are subject to adjustment on 4/01/22 and every 3 years after that for cases begun on or after the date of adjustment.

13. Is all or part of the claim pursuant to 11 U.S.C. § 503(b)(9)?

☒ No

☐ Yes. Indicate the amount of your claim arising from the value of any goods received by the debtor within 20 days before the date of commencement of the above case, in which the goods have been sold to the Debtor in the ordinary course of such Debtor's business. Attach documentation supporting such claim.

\$ _____

Part 3: Sign Below

The person completing this proof of claim must sign and date it. FRBP 9011(b).

If you file this claim electronically, FRBP 5005(a)(2) authorizes courts to establish local rules specifying what a signature is.

A person who files a fraudulent claim could be fined up to \$500,000, imprisoned for up to 5 years, or both. 18 U.S.C. §§ 152, 157, and 3571.

Check the appropriate box:

☐ I am the creditor.

☒ I am the creditor's attorney or authorized agent.

☐ I am the trustee, or the debtor, or their authorized agent. Bankruptcy Rule 3004.

☐ I am a guarantor, surety, endorser, or other codebtor. Bankruptcy Rule 3005.

I understand that an authorized signature on this *Proof of Claim* serves as an acknowledgement that when calculating the amount of the claim, the creditor gave the debtor credit for any payments received toward the debt.

I have examined the information in this *Proof of Claim* and have reasonable belief that the information is true and correct.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on date 04/08/2020
MM / DD / YYYY

/s/Michael Pugatch
Signature

Print the name of the person who is completing and signing this claim:

Name Michael Pugatch
First name Middle name Last name

Title Managing Director - Company: HarbourVest 2017 Global Fund L.P., by Harbo

Company by HarbourVest GP LLC, its General Partner, by HarbourVest Partners, LL
Identify the corporate servicer as the company if the authorized agent is a servicer.

Address

Contact phone _____

Email _____



For phone assistance: Domestic (877) 573-3984 | International (310) 751-1829

Debtor: 19-34054 - Highland Capital Management, L.P. District: Northern District of Texas, Dallas Division		
Creditor: HarbourVest 2017 Global Fund L.P. Attn: Erica Weisgerber Debevoise and Plimpton LLP 919 Third Avenue New York, NY, 10022 U.S.A. Phone: 2129096000 Phone 2: Fax: Email: eweisgerber@debevoise.com	Has Supporting Documentation: Yes, supporting documentation successfully uploaded Related Document Statement:	
	Has Related Claim: No Related Claim Filed By:	
	Filing Party: Authorized agent	
Disbursement/Notice Parties: HarbourVest 2017 Global Fund L.P. c/o HarbourVest Partners, LLC One Financial Center Boston, MA, 02111 U.S.A. Phone: 6173483773 Phone 2: Fax: E-mail: agoren@harbourvest.com DISBURSEMENT ADDRESS		
Other Names Used with Debtor:	Amends Claim: No Acquired Claim: No	
Basis of Claim: See Annex	Last 4 Digits: No	Uniform Claim Identifier:
Total Amount of Claim: See Annex	Includes Interest or Charges: None	
Has Priority Claim: No	Priority Under:	
Has Secured Claim: No Amount of 503(b)(9): No Based on Lease: No Subject to Right of Setoff: No	Nature of Secured Amount: Value of Property: Annual Interest Rate: Arrearage Amount: Basis for Perfection: Amount Unsecured:	
Submitted By: Michael Pugatch on 08-Apr-2020 4:40:16 p.m. Eastern Time Title: Managing Director - Company: HarbourVest 2017 Global Fund L.P., by HarbourVest 2017 Global Associates L.P., its Gen Partner Company: by HarbourVest GP LLC, its General Partner, by HarbourVest Partners, LLC, its Managing Member		

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

In re:

Highland Capital Management, L.P.

Debtor.

Chapter 11

Case No. 19-34054 (SGJ)

ANNEX TO PROOF OF CLAIM

1. This annex (the “Annex”) is part of and is incorporated by reference into the attached proof of claim (together with the Annex, the “Proof of Claim”) and describes in more detail the claims of HarbourVest 2017 Global Fund L.P. (the “Claimant”) against the debtor Highland Capital Management, L.P. (the “Debtor”).

2. The Claimant is a limited partner in one of the Debtor’s managed vehicles, Highland CLO Funding, Ltd. (“HCLOF”). Acis Capital Management GP, L.L.C. and Acis Capital Management L.P. (together, “Acis”), the portfolio manager for HCLOF, filed for chapter 11 in the United States Bankruptcy Court for the Northern District of Texas (the “Court”) on January 30, 2018. The Acis bankruptcy filing resulted from a dispute between Debtor and its former employee, Joshua Terry, who served as portfolio manager for Debtor’s collateral loan obligations funds (“CLO”) business. *See, e.g., Findings of Fact and Conclusions of Law in Support of Orders for Relief Issued After Trial on Contested Involuntary Bankruptcy Petition (“Involuntary Petition Ruling”)* [Case No. 18-30264 (SGJ), **Dkt. No. 118**]. As noted in more detail in the Court’s *Bench Ruling and Memorandum of Law in Support of: (A) Final Approval of Disclosure Statement; and (B) Confirmation of Chapter 11 Trustee’s Third Amended Joint Plan (“Confirmation Ruling”)* [Case No. 18-30264 (SGJ), **Dkt. No 827**] and related filings in the Acis

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bankruptcy cases, there has been extensive litigation regarding alleged improper conduct associated with the management of, and transactions relating to, Acis, including transactions with and related to HCLOF. *See, e.g., id.; Second Amended Complaint* [Case No. 18-03078(SGJ), **Dkt. No. 157**].

3. Due to the Acis bankruptcy and certain conduct alleged to have been undertaken by the Debtor (to whom Acis subcontracted its functions) and Debtor's employees (who were officers, employees, and agents of Acis), the Claimant has suffered significant harm. Such harm includes, but is not limited to, financial harm resulting from, among other things (i) court orders in the Acis bankruptcy that prevented certain CLOs in which HCLOF was invested from being refinanced or reset and court orders that otherwise regulated the activity of HCLOF; and (ii) significant fees and expenses related to the Acis bankruptcy that were charged to HCLOF. *See, e.g., Involuntary Petition Ruling* ¶ 27; *see also Confirmation Ruling*.

4. Claimant hereby files this Claim to assert any and all of its rights to payment, remedies, and other claims (including contingent or unliquidated claims) against the Debtor in connection with and relating to the foregoing harm, including for any amounts due or owed under the various agreements with the Debtor in connection with HCLOF (including, but not limited to, the Subscription and Transfer Agreement for Ordinary Shares Highland CLO Funding, Ltd., dated as of November 15, 2017, the Members Agreement Relating to the Company, dated as of November 15, 2017, the Highland CLO Funding, Ltd. Offering Memorandum dated November 15, 2017), and any and all legal and equitable claims or causes of action relating to the foregoing harm.

5. The Claimant has not attached the documentation supporting this Claim to this Proof of Claim because the documentation is voluminous and the Debtor has copies of such

documents. However, any requested relevant documents will be provided to the Official Committee of Unsecured Creditors, the Court, the United States Trustee and the Debtor in the event of a dispute regarding this Proof of Claim and will be made available for review by other parties in interest as appropriate upon reasonable request and after consultation with the Debtor and execution of appropriate confidentiality agreements.

6. This Proof of Claim is filed with a full reservation of rights, including the right to amend, update, modify, supplement or otherwise revise this Proof of Claim in any respect at any time. The filing of this Proof of Claim is not and should not be construed to be: (a) a waiver or release of any of the Claimant's rights against any person, entity or property accruing to it against the Debtor and its estate; (b) a waiver of the Claimant's rights to assert that **28 U.S.C. § 157(b)(2)(C)** is unconstitutional; (c) a consent or submission by the Claimant, or waiver of the Claimant's rights to object, to the jurisdiction of this Court with respect to the subject matter of any of the claims described herein, or any objection or other proceeding commenced with respect to any of the claims described herein, or any other proceeding commenced in the Debtor's chapter 11 case against or otherwise involving the Claimant; (d) a waiver or release of any right of the Claimant, or consent by the Claimant, to a trial by jury in this or any other court or proceeding; (e) a waiver or release of, or any limitation on, any right of the Claimant to have orders entered only after *de novo* review by a United States District Judge; (f) an election of remedies; or (g) a waiver of, or any other limitation on, any right of the Claimant to request withdrawal of the reference with respect to any matter, including, without limitation, any matter relating to this Proof of Claim.

7. Claimant's express reservation of all rights and causes of action, includes, without limitation, contingent or unliquidated rights that it or its affiliates may have against the Debtor,

as well as defenses, offsets and counterclaims. This description and classification of claims by the Claimant is not a concession or admission as to the correct characterization or treatment of any such claims or a waiver of any rights of the Claimant.

8. Furthermore, the Claimant expressly reserves its rights to (a) file additional proofs of claim for additional claims that may be based on the same or additional documents or facts or other liability or indebtedness of the Debtor to the Claimant under contract or otherwise; (b) assert claims for cure of defaults in any agreement that the Debtor or any trustee appointed in this chapter 11 case may seek to assume; (c) assert any and all other claims, causes of action, defenses, offsets or counterclaims against the Debtor or any other parties; (d) file a request for payment of an administrative expense under 11 U.S.C. §§ 503 and 507 for any or all of the claims or rights of payment described above and any additional amounts; and (e) seek recovery through any relevant third parties, including any of the Debtor's insurance coverage providers.

9. This Proof of Claim does not encompass all claims that the Claimant or its affiliates may have that arise after the Petition Date and are entitled to administrative priority, and the Claimant expressly reserves its right to file such claim or any similar claim at the appropriate time, including any such post-petition claims arising under these service contracts.

10. This Proof of Claim is filed without prejudice to the filing by the Claimant of additional proofs of claim or requests for payment with respect to any other indebtedness, liability or obligation of the Debtor. The Claimant does not, by this Proof of Claim or any amendment or other action, waive any rights with respect to any scheduled claim.

11. The Claimant reserves the right to withdraw, amend, clarify, modify or supplement this Proof of Claim to assert additional claims, causes of action or additional grounds for this Proof of Claim (including adding any additional contracts, agreements, obligations or

other relationships between the Claimant and the Debtor), as well as the right to file any separate or additional proofs of claim with respect to the claims set forth herein or otherwise, including for the purpose of fixing and liquidating any contingent or unliquidated claim set forth herein, or to file additional proofs of claim in respect of additional amounts or for any other reason.

12. In executing and filing this Proof of Claim, the Claimant does not submit to the jurisdiction of the Bankruptcy Court for the Northern District of Texas for any purpose other than with respect to this Proof of Claim against the Debtor, and does not waive or release any rights or remedies against any other person or entity that may be liable for all or part of this Proof of Claim.

13. The Claimant otherwise reserves its rights, and nothing herein shall prejudice the Claimant's rights, under any order of the Court previously entered in this chapter 11 case.

14. Payments on account of this Proof of Claim should be sent to the Claimant at the address specified for notices to the Claimant in Part 1.3 of the Proof of Claim.

CLAIM 147

005071

Fill in this information to identify the case:

Debtor Highland Capital Management, L.P.

United States Bankruptcy Court for the: Northern District of Texas
(State)

Case number 19-34054

Official Form 410
Proof of Claim

04/19

Read the instructions before filling out this form. This form is for making a claim for payment in a bankruptcy case. Do not use this form to make a request for payment of an administrative expense. Make such a request according to **11 U.S.C. § 503**.

Filers must leave out or redact information that is entitled to privacy on this form or on any attached documents. Attach redacted copies or any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, judgments, mortgages, and security agreements. **Do not send original documents**; they may be destroyed after scanning. If the documents are not available, explain in an attachment.

A person who files a fraudulent claim could be fined up to \$500,000, imprisoned for up to 5 years, or both. **18 U.S.C. §§ 152, 157, and 3571**.

Fill in all the information about the claim as of the date the case was filed. That date is on the notice of bankruptcy (Form 309) that you received.

Part 1: Identify the Claim

1. Who is the current creditor?	<u>HarbourVest 2017 Global AIF L.P.</u> Name of the current creditor (the person or entity to be paid for this claim)	
	Other names the creditor used with the debtor _____	
2. Has this claim been acquired from someone else?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. From whom? _____	
3. Where should notices and payments to the creditor be sent?	Where should notices to the creditor be sent? <u>HarbourVest 2017 Global AIF L.P.</u> <u>Attn: Erica Weisgerber</u> <u>Debevoise and Plimpton LLP</u> <u>919 Third Avenue</u> <u>New York, NY 10022, U.S.A.</u> Contact phone <u>2129096000</u> Contact email <u>eweisgerber@debevoise.com</u>	Where should payments to the creditor be sent? (if different) <u>See summary page</u> Contact phone <u>6173483773</u> Contact email <u>agoren@harbourvest.com</u>
	Federal Rule of Bankruptcy Procedure (FRBP) 2002(g) Uniform claim identifier for electronic payments in chapter 13 (if you use one): _____	
4. Does this claim amend one already filed?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Claim number on court claims registry (if known) _____ Filed on _____ MM / DD / YYYY	
5. Do you know if anyone else has filed a proof of claim for this claim?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Who made the earlier filing? _____	



Part 2: Give Information About the Claim as of the Date the Case Was Filed

6. Do you have any number you use to identify the debtor?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Last 4 digits of the debtor's account or any number you use to identify the debtor: ____
7. How much is the claim? \$ <u>See Annex</u>	Does this amount include interest or other charges? <input type="checkbox"/> No <input type="checkbox"/> Yes. Attach statement itemizing interest, fees, expenses, or other charges required by Bankruptcy Rule 3001(c)(2)(A).
8. What is the basis of the claim?	Examples: Goods sold, money loaned, lease, services performed, personal injury or wrongful death, or credit card. Attach redacted copies of any documents supporting the claim required by Bankruptcy Rule 3001(c). Limit disclosing information that is entitled to privacy, such as health care information. <u>See Annex</u>
9. Is all or part of the claim secured?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. The claim is secured by a lien on property. Nature or property: <input type="checkbox"/> Real estate: If the claim is secured by the debtor's principle residence, file a <i>Mortgage Proof of Claim Attachment</i> (Official Form 410-A) with this <i>Proof of Claim</i> . <input type="checkbox"/> Motor vehicle <input type="checkbox"/> Other. Describe: _____ Basis for perfection: _____ Attach redacted copies of documents, if any, that show evidence of perfection of a security interest (for example, a mortgage, lien, certificate of title, financing statement, or other document that shows the lien has been filed or recorded.) Value of property: \$ _____ Amount of the claim that is secured: \$ _____ Amount of the claim that is unsecured: \$ _____ (The sum of the secured and unsecured amount should match the amount in line 7.) Amount necessary to cure any default as of the date of the petition: \$ _____ Annual Interest Rate (when case was filed) _____ % <input type="checkbox"/> Fixed <input type="checkbox"/> Variable
10. Is this claim based on a lease?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Amount necessary to cure any default as of the date of the petition. \$ _____
11. Is this claim subject to a right of setoff?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Identify the property: _____



12. Is all or part of the claim entitled to priority under 11 U.S.C. § 507(a)? A claim may be partly priority and partly nonpriority. For example, in some categories, the law limits the amount entitled to priority.	<div style="display: flex; justify-content: space-between;"><div><input checked="" type="checkbox"/> No</div><div style="text-align: right;">Amount entitled to priority</div></div> <div style="margin-top: 10px;"><input type="checkbox"/> Yes. Check all that apply: <div style="display: flex; justify-content: space-between; margin-top: 5px;"><div><input type="checkbox"/> Domestic support obligations (including alimony and child support) under 11 U.S.C. § 507(a)(1)(A) or (a)(1)(B).</div><div style="text-align: right;">\$ _____</div></div><div style="display: flex; justify-content: space-between; margin-top: 5px;"><div><input type="checkbox"/> Up to \$3,025* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use. 11 U.S.C. § 507(a)(7).</div><div style="text-align: right;">\$ _____</div></div><div style="display: flex; justify-content: space-between; margin-top: 5px;"><div><input type="checkbox"/> Wages, salaries, or commissions (up to \$13,650*) earned within 180 days before the bankruptcy petition is filed or the debtor's business ends, whichever is earlier. 11 U.S.C. § 507(a)(4).</div><div style="text-align: right;">\$ _____</div></div><div style="display: flex; justify-content: space-between; margin-top: 5px;"><div><input type="checkbox"/> Taxes or penalties owed to governmental units. 11 U.S.C. § 507(a)(8).</div><div style="text-align: right;">\$ _____</div></div><div style="display: flex; justify-content: space-between; margin-top: 5px;"><div><input type="checkbox"/> Contributions to an employee benefit plan. 11 U.S.C. § 507(a)(5).</div><div style="text-align: right;">\$ _____</div></div><div style="display: flex; justify-content: space-between; margin-top: 5px;"><div><input type="checkbox"/> Other. Specify subsection of 11 U.S.C. § 507(a)() that applies.</div><div style="text-align: right;">\$ _____</div></div></div>
* Amounts are subject to adjustment on 4/01/22 and every 3 years after that for cases begun on or after the date of adjustment.	

13. Is all or part of the claim pursuant to 11 U.S.C. § 503(b)(9)?	<div style="display: flex; justify-content: space-between;"><div><input checked="" type="checkbox"/> No</div><div><input type="checkbox"/> Yes. Indicate the amount of your claim arising from the value of any goods received by the debtor within 20 days before the date of commencement of the above case, in which the goods have been sold to the Debtor in the ordinary course of such Debtor's business. Attach documentation supporting such claim.</div></div> <div style="margin-top: 10px;">\$ _____</div>
---	--

Part 3: Sign Below

The person completing this proof of claim must sign and date it. FRBP 9011(b).

If you file this claim electronically, FRBP 5005(a)(2) authorizes courts to establish local rules specifying what a signature is.

A person who files a fraudulent claim could be fined up to \$500,000, imprisoned for up to 5 years, or both. 18 U.S.C. §§ 152, 157, and 3571.

Check the appropriate box:

- ☐
☒
☐
☐

I am the creditor.

I am the creditor's attorney or authorized agent.

I am the trustee, or the debtor, or their authorized agent. Bankruptcy Rule 3004.

I am a guarantor, surety, endorser, or other codebtor. Bankruptcy Rule 3005.

I understand that an authorized signature on this *Proof of Claim* serves as an acknowledgement that when calculating the amount of the claim, the creditor gave the debtor credit for any payments received toward the debt.

I have examined the information in this *Proof of Claim* and have reasonable belief that the information is true and correct.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on date 04/08/2020
MM / DD / YYYY

/s/Michael Pugatch
Signature

Print the name of the person who is completing and signing this claim:

Name Michael Pugatch
First name Middle name Last name

Title Managing Director-Company: HarbourVest 2017 Global AIF L.P., by HarbourV

Company Inv Fund Mgr, by HarbourVest Partners L.P., its Duly Appointed Investme
Identify the corporate servicer as the company if the authorized agent is a servicer.

Address

Contact phone _____ Email _____

For phone assistance: Domestic (877) 573-3984 | International (310) 751-1829

Debtor: 19-34054 - Highland Capital Management, L.P. District: Northern District of Texas, Dallas Division		
Creditor: HarbourVest 2017 Global AIF L.P. Attn: Erica Weisgerber Debevoise and Plimpton LLP 919 Third Avenue New York, NY, 10022 U.S.A. Phone: 2129096000 Phone 2: Fax: Email: eweisgerber@debevoise.com	Has Supporting Documentation: Yes, supporting documentation successfully uploaded Related Document Statement:	
	Has Related Claim: No Related Claim Filed By:	
	Filing Party: Authorized agent	
Disbursement/Notice Parties: HarbourVest 2017 Global AIF L.P. c/o HarbourVest Partners, LLC One Financial Center Boston, MA, 02111 Phone: 6173483773 Phone 2: Fax: E-mail: agoren@harbourvest.com DISBURSEMENT ADDRESS		
Other Names Used with Debtor:	Amends Claim: No Acquired Claim: No	
Basis of Claim: See Annex	Last 4 Digits: No	Uniform Claim Identifier:
Total Amount of Claim: See Annex	Includes Interest or Charges: None	
Has Priority Claim: No	Priority Under:	
Has Secured Claim: No Amount of 503(b)(9): No Based on Lease: No Subject to Right of Setoff: No	Nature of Secured Amount: Value of Property: Annual Interest Rate: Arrearage Amount: Basis for Perfection: Amount Unsecured:	
Submitted By: Michael Pugatch on 08-Apr-2020 4:49:59 p.m. Eastern Time Title: Managing Director-Company: HarbourVest 2017 Global AIF L.P., by HarbourVest Partners Ireland Limited, its Alternative Company: Inv Fund Mgr, by HarbourVest Partners L.P., its Duly Appointed Investment Manager, by HarbourVest Partners, LLC, its Gen Ptr		

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

In re:

Highland Capital Management, L.P.

Debtor.

Chapter 11

Case No. 19-34054 (SGJ)

ANNEX TO PROOF OF CLAIM

1. This annex (the “Annex”) is part of and is incorporated by reference into the attached proof of claim (together with the Annex, the “Proof of Claim”) and describes in more detail the claims of HarbourVest 2017 Global AIF L.P. (the “Claimant”) against the debtor Highland Capital Management, L.P. (the “Debtor”).

2. The Claimant is a limited partner in one of the Debtor’s managed vehicles, Highland CLO Funding, Ltd. (“HCLOF”). Acis Capital Management GP, L.L.C. and Acis Capital Management L.P. (together, “Acis”), the portfolio manager for HCLOF, filed for chapter 11 in the United States Bankruptcy Court for the Northern District of Texas (the “Court”) on January 30, 2018. The Acis bankruptcy filing resulted from a dispute between Debtor and its former employee, Joshua Terry, who served as portfolio manager for Debtor’s collateral loan obligations funds (“CLO”) business. *See, e.g., Findings of Fact and Conclusions of Law in Support of Orders for Relief Issued After Trial on Contested Involuntary Bankruptcy Petition (“Involuntary Petition Ruling”)* [Case No. 18-30264 (SGJ), **Dkt. No. 118**]. As noted in more detail in the Court’s *Bench Ruling and Memorandum of Law in Support of: (A) Final Approval of Disclosure Statement; and (B) Confirmation of Chapter 11 Trustee’s Third Amended Joint Plan (“Confirmation Ruling”)* [Case No. 18-30264 (SGJ), **Dkt. No 827**] and related filings in the Acis

005076

bankruptcy cases, there has been extensive litigation regarding alleged improper conduct associated with the management of, and transactions relating to, Acis, including transactions with and related to HCLOF. *See, e.g., id.; Second Amended Complaint* [Case No. 18-03078(SGJ), **Dkt. No. 157**].

3. Due to the Acis bankruptcy and certain conduct alleged to have been undertaken by the Debtor (to whom Acis subcontracted its functions) and Debtor's employees (who were officers, employees, and agents of Acis), the Claimant has suffered significant harm. Such harm includes, but is not limited to, financial harm resulting from, among other things (i) court orders in the Acis bankruptcy that prevented certain CLOs in which HCLOF was invested from being refinanced or reset and court orders that otherwise regulated the activity of HCLOF; and (ii) significant fees and expenses related to the Acis bankruptcy that were charged to HCLOF. *See, e.g., Involuntary Petition Ruling* ¶ 27; *see also Confirmation Ruling*.

4. Claimant hereby files this Claim to assert any and all of its rights to payment, remedies, and other claims (including contingent or unliquidated claims) against the Debtor in connection with and relating to the foregoing harm, including for any amounts due or owed under the various agreements with the Debtor in connection with HCLOF (including, but not limited to, the Subscription and Transfer Agreement for Ordinary Shares Highland CLO Funding, Ltd., dated as of November 15, 2017, the Members Agreement Relating to the Company, dated as of November 15, 2017, the Highland CLO Funding, Ltd. Offering Memorandum dated November 15, 2017), and any and all legal and equitable claims or causes of action relating to the foregoing harm.

5. The Claimant has not attached the documentation supporting this Claim to this Proof of Claim because the documentation is voluminous and the Debtor has copies of such

documents. However, any requested relevant documents will be provided to the Official Committee of Unsecured Creditors, the Court, the United States Trustee and the Debtor in the event of a dispute regarding this Proof of Claim and will be made available for review by other parties in interest as appropriate upon reasonable request and after consultation with the Debtor and execution of appropriate confidentiality agreements.

6. This Proof of Claim is filed with a full reservation of rights, including the right to amend, update, modify, supplement or otherwise revise this Proof of Claim in any respect at any time. The filing of this Proof of Claim is not and should not be construed to be: (a) a waiver or release of any of the Claimant's rights against any person, entity or property accruing to it against the Debtor and its estate; (b) a waiver of the Claimant's rights to assert that **28 U.S.C. § 157(b)(2)(C)** is unconstitutional; (c) a consent or submission by the Claimant, or waiver of the Claimant's rights to object, to the jurisdiction of this Court with respect to the subject matter of any of the claims described herein, or any objection or other proceeding commenced with respect to any of the claims described herein, or any other proceeding commenced in the Debtor's chapter 11 case against or otherwise involving the Claimant; (d) a waiver or release of any right of the Claimant, or consent by the Claimant, to a trial by jury in this or any other court or proceeding; (e) a waiver or release of, or any limitation on, any right of the Claimant to have orders entered only after *de novo* review by a United States District Judge; (f) an election of remedies; or (g) a waiver of, or any other limitation on, any right of the Claimant to request withdrawal of the reference with respect to any matter, including, without limitation, any matter relating to this Proof of Claim.

7. Claimant's express reservation of all rights and causes of action, includes, without limitation, contingent or unliquidated rights that it or its affiliates may have against the Debtor,

as well as defenses, offsets and counterclaims. This description and classification of claims by the Claimant is not a concession or admission as to the correct characterization or treatment of any such claims or a waiver of any rights of the Claimant.

8. Furthermore, the Claimant expressly reserves its rights to (a) file additional proofs of claim for additional claims that may be based on the same or additional documents or facts or other liability or indebtedness of the Debtor to the Claimant under contract or otherwise; (b) assert claims for cure of defaults in any agreement that the Debtor or any trustee appointed in this chapter 11 case may seek to assume; (c) assert any and all other claims, causes of action, defenses, offsets or counterclaims against the Debtor or any other parties; (d) file a request for payment of an administrative expense under 11 U.S.C. §§ 503 and 507 for any or all of the claims or rights of payment described above and any additional amounts; and (e) seek recovery through any relevant third parties, including any of the Debtor's insurance coverage providers.

9. This Proof of Claim does not encompass all claims that the Claimant or its affiliates may have that arise after the Petition Date and are entitled to administrative priority, and the Claimant expressly reserves its right to file such claim or any similar claim at the appropriate time, including any such post-petition claims arising under these service contracts.

10. This Proof of Claim is filed without prejudice to the filing by the Claimant of additional proofs of claim or requests for payment with respect to any other indebtedness, liability or obligation of the Debtor. The Claimant does not, by this Proof of Claim or any amendment or other action, waive any rights with respect to any scheduled claim.

11. The Claimant reserves the right to withdraw, amend, clarify, modify or supplement this Proof of Claim to assert additional claims, causes of action or additional grounds for this Proof of Claim (including adding any additional contracts, agreements, obligations or

other relationships between the Claimant and the Debtor), as well as the right to file any separate or additional proofs of claim with respect to the claims set forth herein or otherwise, including for the purpose of fixing and liquidating any contingent or unliquidated claim set forth herein, or to file additional proofs of claim in respect of additional amounts or for any other reason.

12. In executing and filing this Proof of Claim, the Claimant does not submit to the jurisdiction of the Bankruptcy Court for the Northern District of Texas for any purpose other than with respect to this Proof of Claim against the Debtor, and does not waive or release any rights or remedies against any other person or entity that may be liable for all or part of this Proof of Claim.

13. The Claimant otherwise reserves its rights, and nothing herein shall prejudice the Claimant's rights, under any order of the Court previously entered in this chapter 11 case.

14. Payments on account of this Proof of Claim should be sent to the Claimant at the address specified for notices to the Claimant in Part 1.3 of the Proof of Claim.

CLAIM 150

005081

Fill in this information to identify the case:

Debtor Highland Capital Management, L.P.

United States Bankruptcy Court for the: Northern District of Texas
(State)

Case number 19-34054

Official Form 410
Proof of Claim

04/19

Read the instructions before filling out this form. This form is for making a claim for payment in a bankruptcy case. Do not use this form to make a request for payment of an administrative expense. Make such a request according to **11 U.S.C. § 503**.

Filers must leave out or redact information that is entitled to privacy on this form or on any attached documents. Attach redacted copies or any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, judgments, mortgages, and security agreements. **Do not send original documents**; they may be destroyed after scanning. If the documents are not available, explain in an attachment.

A person who files a fraudulent claim could be fined up to \$500,000, imprisoned for up to 5 years, or both. **18 U.S.C. §§ 152, 157, and 3571.**

Fill in all the information about the claim as of the date the case was filed. That date is on the notice of bankruptcy (Form 309) that you received.

Part 1: Identify the Claim

1. Who is the current creditor?	<u>HarbourVest Dover Street IX Investment L.P.</u> Name of the current creditor (the person or entity to be paid for this claim)	
	Other names the creditor used with the debtor _____	
2. Has this claim been acquired from someone else?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. From whom? _____	
3. Where should notices and payments to the creditor be sent?	Where should notices to the creditor be sent? See summary page	Where should payments to the creditor be sent? (if different) See summary page
Federal Rule of Bankruptcy Procedure (FRBP) 2002(g)		
	Contact phone <u>2129096000</u> Contact email <u>eweisgerber@debevoise.com</u>	Contact phone <u>6173483773</u> Contact email <u>agoren@harbourvest.com</u>
Uniform claim identifier for electronic payments in chapter 13 (if you use one): _____		
4. Does this claim amend one already filed?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Claim number on court claims registry (if known) _____ Filed on _____ MM / DD / YYYY	
5. Do you know if anyone else has filed a proof of claim for this claim?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Who made the earlier filing? _____	



Part 2: Give Information About the Claim as of the Date the Case Was Filed

6. Do you have any number you use to identify the debtor?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Last 4 digits of the debtor's account or any number you use to identify the debtor: ____
7. How much is the claim? \$ <u>See Annex</u>	Does this amount include interest or other charges? <input type="checkbox"/> No <input type="checkbox"/> Yes. Attach statement itemizing interest, fees, expenses, or other charges required by Bankruptcy Rule 3001(c)(2)(A).
8. What is the basis of the claim?	Examples: Goods sold, money loaned, lease, services performed, personal injury or wrongful death, or credit card. Attach redacted copies of any documents supporting the claim required by Bankruptcy Rule 3001(c). Limit disclosing information that is entitled to privacy, such as health care information. <u>See Annex</u>
9. Is all or part of the claim secured?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. The claim is secured by a lien on property. Nature or property: <input type="checkbox"/> Real estate: If the claim is secured by the debtor's principle residence, file a <i>Mortgage Proof of Claim Attachment</i> (Official Form 410-A) with this <i>Proof of Claim</i> . <input type="checkbox"/> Motor vehicle <input type="checkbox"/> Other. Describe: _____ Basis for perfection: _____ Attach redacted copies of documents, if any, that show evidence of perfection of a security interest (for example, a mortgage, lien, certificate of title, financing statement, or other document that shows the lien has been filed or recorded.) Value of property: \$ _____ Amount of the claim that is secured: \$ _____ Amount of the claim that is unsecured: \$ _____ (The sum of the secured and unsecured amount should match the amount in line 7.) Amount necessary to cure any default as of the date of the petition: \$ _____ Annual Interest Rate (when case was filed) _____ % <input type="checkbox"/> Fixed <input type="checkbox"/> Variable
10. Is this claim based on a lease?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Amount necessary to cure any default as of the date of the petition. \$ _____
11. Is this claim subject to a right of setoff?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Identify the property: _____



12. Is all or part of the claim entitled to priority under 11 U.S.C. § 507(a)?

☒ No

☐ Yes. Check all that apply:

Amount entitled to priority

A claim may be partly priority and partly nonpriority. For example, in some categories, the law limits the amount entitled to priority.

☐ Domestic support obligations (including alimony and child support) under 11 U.S.C. § 507(a)(1)(A) or (a)(1)(B).

\$ _____

☐ Up to \$3,025* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use. 11 U.S.C. § 507(a)(7).

\$ _____

☐ Wages, salaries, or commissions (up to \$13,650*) earned within 180 days before the bankruptcy petition is filed or the debtor's business ends, whichever is earlier. 11 U.S.C. § 507(a)(4).

\$ _____

☐ Taxes or penalties owed to governmental units. 11 U.S.C. § 507(a)(8).

\$ _____

☐ Contributions to an employee benefit plan. 11 U.S.C. § 507(a)(5).

\$ _____

☐ Other. Specify subsection of 11 U.S.C. § 507(a)() that applies.

\$ _____

* Amounts are subject to adjustment on 4/01/22 and every 3 years after that for cases begun on or after the date of adjustment.

13. Is all or part of the claim pursuant to 11 U.S.C. § 503(b)(9)?

☒ No

☐ Yes. Indicate the amount of your claim arising from the value of any goods received by the debtor within 20 days before the date of commencement of the above case, in which the goods have been sold to the Debtor in the ordinary course of such Debtor's business. Attach documentation supporting such claim.

\$ _____

Part 3: Sign Below

The person completing this proof of claim must sign and date it.

FRBP 9011(b).

If you file this claim electronically, FRBP 5005(a)(2) authorizes courts to establish local rules specifying what a signature is.

A person who files a fraudulent claim could be fined up to \$500,000, imprisoned for up to 5 years, or both.

18 U.S.C. §§ 152, 157, and 3571.

Check the appropriate box:

☐ I am the creditor.

☒ I am the creditor's attorney or authorized agent.

☐ I am the trustee, or the debtor, or their authorized agent. Bankruptcy Rule 3004.

☐ I am a guarantor, surety, endorser, or other codebtor. Bankruptcy Rule 3005.

I understand that an authorized signature on this *Proof of Claim* serves as an acknowledgement that when calculating the amount of the claim, the creditor gave the debtor credit for any payments received toward the debt.

I have examined the information in this *Proof of Claim* and have reasonable belief that the information is true and correct.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on date 04/08/2020

MM / DD / YYYY

/s/Michael Pugatch

Signature

Print the name of the person who is completing and signing this claim:

Name Michael Pugatch

First name

Middle name

Last name

Title Managing Director-Company: HarbourVest Dover Street IX Investment L.P.,

Company Inv Fund Mgr, by HarbourVest Partners L.P., its Duly Appointed Investme
Identify the corporate servicer as the company if the authorized agent is a servicer.

Address

Contact phone

Email



For phone assistance: Domestic (877) 573-3984 | International (310) 751-1829

Debtor: 19-34054 - Highland Capital Management, L.P. District: Northern District of Texas, Dallas Division		
Creditor: HarbourVest Dover Street IX Investment L.P. Attn: Erica Weisgerber Debevoise and Plimpton LLP 919 Third Avenue New York, NY, 10022 U.S.A. Phone: 2129096000 Phone 2: Fax: Email: eweisgerber@debevoise.com	Has Supporting Documentation: Yes, supporting documentation successfully uploaded Related Document Statement:	
	Has Related Claim: No Related Claim Filed By:	
	Filing Party: Authorized agent	
Disbursement/Notice Parties: HarbourVest Dover Street IX Investment L.P. c/o HarbourVest Partners, LLC One Financial Center Boston, MA, 02111 U.S.A. Phone: 6173483773 Phone 2: Fax: E-mail: agoren@harbourvest.com DISBURSEMENT ADDRESS		
Other Names Used with Debtor:	Amends Claim: No Acquired Claim: No	
Basis of Claim: See Annex	Last 4 Digits: No	Uniform Claim Identifier:
Total Amount of Claim: See Annex	Includes Interest or Charges: None	
Has Priority Claim: No	Priority Under:	
Has Secured Claim: No Amount of 503(b)(9): No Based on Lease: No Subject to Right of Setoff: No	Nature of Secured Amount: Value of Property: Annual Interest Rate: Arrearage Amount: Basis for Perfection: Amount Unsecured:	
Submitted By: Michael Pugatch on 08-Apr-2020 4:59:00 p.m. Eastern Time Title: Managing Director-Company: HarbourVest Dover Street IX Investment L.P., by HarbourVest Partners Ireland Limited, its Alter Company: Inv Fund Mgr, by HarbourVest Partners L.P., its Duly Appointed Investment Manager, by HarbourVest Partners, LLC, its Gen Ptr		

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In re:

Highland Capital Management, L.P.

Debtor.

Chapter 11

Case No. 19-34054 (SGJ)

ANNEX TO PROOF OF CLAIM

1. This annex (the “Annex”) is part of and is incorporated by reference into the attached proof of claim (together with the Annex, the “Proof of Claim”) and describes in more detail the claims of HarbourVest Dover Street IX Investment L.P. (the “Claimant”) against the debtor Highland Capital Management, L.P. (the “Debtor”).

2. The Claimant is a limited partner in one of the Debtor’s managed vehicles, Highland CLO Funding, Ltd. (“HCLOF”). Acis Capital Management GP, L.L.C. and Acis Capital Management L.P. (together, “Acis”), the portfolio manager for HCLOF, filed for chapter 11 in the United States Bankruptcy Court for the Northern District of Texas (the “Court”) on January 30, 2018. The Acis bankruptcy filing resulted from a dispute between Debtor and its former employee, Joshua Terry, who served as portfolio manager for Debtor’s collateral loan obligations funds (“CLO”) business. *See, e.g., Findings of Fact and Conclusions of Law in Support of Orders for Relief Issued After Trial on Contested Involuntary Bankruptcy Petition (“Involuntary Petition Ruling”)* [Case No. 18-30264 (SGJ), **Dkt. No. 118**]. As noted in more detail in the Court’s *Bench Ruling and Memorandum of Law in Support of: (A) Final Approval of Disclosure Statement; and (B) Confirmation of Chapter 11 Trustee’s Third Amended Joint Plan (“Confirmation Ruling”)* [Case No. 18-30264 (SGJ), **Dkt. No 827**] and related filings in the Acis

bankruptcy cases, there has been extensive litigation regarding alleged improper conduct associated with the management of, and transactions relating to, Acis, including transactions with and related to HCLOF. *See, e.g., id.; Second Amended Complaint* [Case No. 18-03078(SGJ), **Dkt. No. 157**].

3. Due to the Acis bankruptcy and certain conduct alleged to have been undertaken by the Debtor (to whom Acis subcontracted its functions) and Debtor's employees (who were officers, employees, and agents of Acis), the Claimant has suffered significant harm. Such harm includes, but is not limited to, financial harm resulting from, among other things (i) court orders in the Acis bankruptcy that prevented certain CLOs in which HCLOF was invested from being refinanced or reset and court orders that otherwise regulated the activity of HCLOF; and (ii) significant fees and expenses related to the Acis bankruptcy that were charged to HCLOF. *See, e.g., Involuntary Petition Ruling* ¶ 27; *see also Confirmation Ruling*.

4. Claimant hereby files this Claim to assert any and all of its rights to payment, remedies, and other claims (including contingent or unliquidated claims) against the Debtor in connection with and relating to the foregoing harm, including for any amounts due or owed under the various agreements with the Debtor in connection with HCLOF (including, but not limited to, the Subscription and Transfer Agreement for Ordinary Shares Highland CLO Funding, Ltd., dated as of November 15, 2017, the Members Agreement Relating to the Company, dated as of November 15, 2017, the Highland CLO Funding, Ltd. Offering Memorandum dated November 15, 2017), and any and all legal and equitable claims or causes of action relating to the foregoing harm.

5. The Claimant has not attached the documentation supporting this Claim to this Proof of Claim because the documentation is voluminous and the Debtor has copies of such

documents. However, any requested relevant documents will be provided to the Official Committee of Unsecured Creditors, the Court, the United States Trustee and the Debtor in the event of a dispute regarding this Proof of Claim and will be made available for review by other parties in interest as appropriate upon reasonable request and after consultation with the Debtor and execution of appropriate confidentiality agreements.

6. This Proof of Claim is filed with a full reservation of rights, including the right to amend, update, modify, supplement or otherwise revise this Proof of Claim in any respect at any time. The filing of this Proof of Claim is not and should not be construed to be: (a) a waiver or release of any of the Claimant's rights against any person, entity or property accruing to it against the Debtor and its estate; (b) a waiver of the Claimant's rights to assert that **28 U.S.C. § 157(b)(2)(C)** is unconstitutional; (c) a consent or submission by the Claimant, or waiver of the Claimant's rights to object, to the jurisdiction of this Court with respect to the subject matter of any of the claims described herein, or any objection or other proceeding commenced with respect to any of the claims described herein, or any other proceeding commenced in the Debtor's chapter 11 case against or otherwise involving the Claimant; (d) a waiver or release of any right of the Claimant, or consent by the Claimant, to a trial by jury in this or any other court or proceeding; (e) a waiver or release of, or any limitation on, any right of the Claimant to have orders entered only after *de novo* review by a United States District Judge; (f) an election of remedies; or (g) a waiver of, or any other limitation on, any right of the Claimant to request withdrawal of the reference with respect to any matter, including, without limitation, any matter relating to this Proof of Claim.

7. Claimant's express reservation of all rights and causes of action, includes, without limitation, contingent or unliquidated rights that it or its affiliates may have against the Debtor,

as well as defenses, offsets and counterclaims. This description and classification of claims by the Claimant is not a concession or admission as to the correct characterization or treatment of any such claims or a waiver of any rights of the Claimant.

8. Furthermore, the Claimant expressly reserves its rights to (a) file additional proofs of claim for additional claims that may be based on the same or additional documents or facts or other liability or indebtedness of the Debtor to the Claimant under contract or otherwise; (b) assert claims for cure of defaults in any agreement that the Debtor or any trustee appointed in this chapter 11 case may seek to assume; (c) assert any and all other claims, causes of action, defenses, offsets or counterclaims against the Debtor or any other parties; (d) file a request for payment of an administrative expense under 11 U.S.C. §§ 503 and 507 for any or all of the claims or rights of payment described above and any additional amounts; and (e) seek recovery through any relevant third parties, including any of the Debtor's insurance coverage providers.

9. This Proof of Claim does not encompass all claims that the Claimant or its affiliates may have that arise after the Petition Date and are entitled to administrative priority, and the Claimant expressly reserves its right to file such claim or any similar claim at the appropriate time, including any such post-petition claims arising under these service contracts.

10. This Proof of Claim is filed without prejudice to the filing by the Claimant of additional proofs of claim or requests for payment with respect to any other indebtedness, liability or obligation of the Debtor. The Claimant does not, by this Proof of Claim or any amendment or other action, waive any rights with respect to any scheduled claim.

11. The Claimant reserves the right to withdraw, amend, clarify, modify or supplement this Proof of Claim to assert additional claims, causes of action or additional grounds for this Proof of Claim (including adding any additional contracts, agreements, obligations or

other relationships between the Claimant and the Debtor), as well as the right to file any separate or additional proofs of claim with respect to the claims set forth herein or otherwise, including for the purpose of fixing and liquidating any contingent or unliquidated claim set forth herein, or to file additional proofs of claim in respect of additional amounts or for any other reason.

12. In executing and filing this Proof of Claim, the Claimant does not submit to the jurisdiction of the Bankruptcy Court for the Northern District of Texas for any purpose other than with respect to this Proof of Claim against the Debtor, and does not waive or release any rights or remedies against any other person or entity that may be liable for all or part of this Proof of Claim.

13. The Claimant otherwise reserves its rights, and nothing herein shall prejudice the Claimant's rights, under any order of the Court previously entered in this chapter 11 case.

14. Payments on account of this Proof of Claim should be sent to the Claimant at the address specified for notices to the Claimant in Part 1.3 of the Proof of Claim.

CLAIM 153

005091

Fill in this information to identify the case:

Debtor Highland Capital Management, L.P.

United States Bankruptcy Court for the: Northern District of Texas
(State)

Case number 19-34054

Official Form 410
Proof of Claim

04/19

Read the instructions before filling out this form. This form is for making a claim for payment in a bankruptcy case. Do not use this form to make a request for payment of an administrative expense. Make such a request according to **11 U.S.C. § 503**.

Filers must leave out or redact information that is entitled to privacy on this form or on any attached documents. Attach redacted copies or any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, judgments, mortgages, and security agreements. **Do not send original documents**; they may be destroyed after scanning. If the documents are not available, explain in an attachment.

A person who files a fraudulent claim could be fined up to \$500,000, imprisoned for up to 5 years, or both. **18 U.S.C. §§ 152, 157, and 3571**.

Fill in all the information about the claim as of the date the case was filed. That date is on the notice of bankruptcy (Form 309) that you received.

Part 1: Identify the Claim

1. Who is the current creditor?	<u>HV International VIII Secondary L.P.</u> Name of the current creditor (the person or entity to be paid for this claim)	
	Other names the creditor used with the debtor _____	
2. Has this claim been acquired from someone else?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. From whom? _____	
3. Where should notices and payments to the creditor be sent?	Where should notices to the creditor be sent? <u>HV International VIII Secondary L.P.</u> <u>Attn: Erica Weisgerber</u> <u>Debevoise and Plimpton LLP</u> <u>919 Third Avenue</u> <u>New York, NY 10022, U.S.A.</u> Contact phone <u>2129096000</u> Contact email <u>eweisgerber@debevoise.com</u>	Where should payments to the creditor be sent? (if different) <u>See summary page</u> Contact phone <u>6173483773</u> Contact email <u>agoren@harbourvest.com</u>
	Uniform claim identifier for electronic payments in chapter 13 (if you use one): _____	
4. Does this claim amend one already filed?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Claim number on court claims registry (if known) _____ Filed on _____ MM / DD / YYYY	
5. Do you know if anyone else has filed a proof of claim for this claim?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Who made the earlier filing? _____	



Part 2: Give Information About the Claim as of the Date the Case Was Filed

6. Do you have any number you use to identify the debtor?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Last 4 digits of the debtor's account or any number you use to identify the debtor: ____
7. How much is the claim? \$ <u>See Annex</u>	Does this amount include interest or other charges? <input type="checkbox"/> No <input type="checkbox"/> Yes. Attach statement itemizing interest, fees, expenses, or other charges required by Bankruptcy Rule 3001(c)(2)(A).
8. What is the basis of the claim?	Examples: Goods sold, money loaned, lease, services performed, personal injury or wrongful death, or credit card. Attach redacted copies of any documents supporting the claim required by Bankruptcy Rule 3001(c). Limit disclosing information that is entitled to privacy, such as health care information. <u>See Annex</u>
9. Is all or part of the claim secured?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. The claim is secured by a lien on property. Nature or property: <input type="checkbox"/> Real estate: If the claim is secured by the debtor's principle residence, file a <i>Mortgage Proof of Claim Attachment</i> (Official Form 410-A) with this <i>Proof of Claim</i> . <input type="checkbox"/> Motor vehicle <input type="checkbox"/> Other. Describe: _____ Basis for perfection: _____ Attach redacted copies of documents, if any, that show evidence of perfection of a security interest (for example, a mortgage, lien, certificate of title, financing statement, or other document that shows the lien has been filed or recorded.) Value of property: \$ _____ Amount of the claim that is secured: \$ _____ Amount of the claim that is unsecured: \$ _____ (The sum of the secured and unsecured amount should match the amount in line 7.) Amount necessary to cure any default as of the date of the petition: \$ _____ Annual Interest Rate (when case was filed) _____ % <input type="checkbox"/> Fixed <input type="checkbox"/> Variable
10. Is this claim based on a lease?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Amount necessary to cure any default as of the date of the petition. \$ _____
11. Is this claim subject to a right of setoff?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Identify the property: _____



12. Is all or part of the claim entitled to priority under 11 U.S.C. § 507(a)?

☒ No

☐ Yes. Check all that apply:

Amount entitled to priority

A claim may be partly priority and partly nonpriority. For example, in some categories, the law limits the amount entitled to priority.

☐ Domestic support obligations (including alimony and child support) under 11 U.S.C. § 507(a)(1)(A) or (a)(1)(B).

\$ _____

☐ Up to \$3,025* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use. 11 U.S.C. § 507(a)(7).

\$ _____

☐ Wages, salaries, or commissions (up to \$13,650*) earned within 180 days before the bankruptcy petition is filed or the debtor's business ends, whichever is earlier. 11 U.S.C. § 507(a)(4).

\$ _____

☐ Taxes or penalties owed to governmental units. 11 U.S.C. § 507(a)(8).

\$ _____

☐ Contributions to an employee benefit plan. 11 U.S.C. § 507(a)(5).

\$ _____

☐ Other. Specify subsection of 11 U.S.C. § 507(a)() that applies.

\$ _____

* Amounts are subject to adjustment on 4/01/22 and every 3 years after that for cases begun on or after the date of adjustment.

13. Is all or part of the claim pursuant to 11 U.S.C. § 503(b)(9)?

☒ No

☐ Yes. Indicate the amount of your claim arising from the value of any goods received by the debtor within 20 days before the date of commencement of the above case, in which the goods have been sold to the Debtor in the ordinary course of such Debtor's business. Attach documentation supporting such claim.

\$ _____

Part 3: Sign Below

The person completing this proof of claim must sign and date it.

FRBP 9011(b).

If you file this claim electronically, FRBP 5005(a)(2) authorizes courts to establish local rules specifying what a signature is.

A person who files a fraudulent claim could be fined up to \$500,000, imprisoned for up to 5 years, or both.

18 U.S.C. §§ 152, 157, and 3571.

Check the appropriate box:

☐ I am the creditor.

☒ I am the creditor's attorney or authorized agent.

☐ I am the trustee, or the debtor, or their authorized agent. Bankruptcy Rule 3004.

☐ I am a guarantor, surety, endorser, or other codebtor. Bankruptcy Rule 3005.

I understand that an authorized signature on this *Proof of Claim* serves as an acknowledgement that when calculating the amount of the claim, the creditor gave the debtor credit for any payments received toward the debt.

I have examined the information in this *Proof of Claim* and have reasonable belief that the information is true and correct.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on date 04/08/2020

MM / DD / YYYY

/s/Michael Pugatch

Signature

Print the name of the person who is completing and signing this claim:

Name Michael Pugatch

First name

Middle name

Last name

Title Managing Director-Company: HV International VIII Secondary L.P., by HII

Company by HarbourVest GP LLC, its General Partner, by HarbourVest Partners, LL
Identify the corporate servicer as the company if the authorized agent is a servicer.

Address

Contact phone

Email



For phone assistance: Domestic (877) 573-3984 | International (310) 751-1829

Debtor: 19-34054 - Highland Capital Management, L.P. District: Northern District of Texas, Dallas Division		
Creditor: HV International VIII Secondary L.P. Attn: Erica Weisgerber Debevoise and Plimpton LLP 919 Third Avenue New York, NY, 10022 U.S.A. Phone: 2129096000 Phone 2: Fax: Email: eweisgerber@debevoise.com	Has Supporting Documentation: Yes, supporting documentation successfully uploaded Related Document Statement:	
	Has Related Claim: No Related Claim Filed By:	
	Filing Party: Authorized agent	
Disbursement/Notice Parties: HV International VIII Secondary L.P. c/o HarbourVest Partners, LLC One Financial Center Boston, MA, 02111 U.S.A. Phone: 6173483773 Phone 2: Fax: E-mail: agoren@harbourvest.com DISBURSEMENT ADDRESS		
Other Names Used with Debtor:	Amends Claim: No Acquired Claim: No	
Basis of Claim: See Annex	Last 4 Digits: No	Uniform Claim Identifier:
Total Amount of Claim: See Annex	Includes Interest or Charges: None	
Has Priority Claim: No	Priority Under:	
Has Secured Claim: No Amount of 503(b)(9): No Based on Lease: No Subject to Right of Setoff: No	Nature of Secured Amount: Value of Property: Annual Interest Rate: Arrearage Amount: Basis for Perfection: Amount Unsecured:	
Submitted By: Michael Pugatch on 08-Apr-2020 5:16:54 p.m. Eastern Time Title: Managing Director-Company: HV International VIII Secondary L.P., by HIPEP VIII Associates L.P., its General Partner, Company: by HarbourVest GP LLC, its General Partner, by HarbourVest Partners, LLC, its Managing Member		

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In re:

Highland Capital Management, L.P.

Debtor.

Chapter 11

Case No. 19-34054 (SGJ)

ANNEX TO PROOF OF CLAIM

1. This annex (the “Annex”) is part of and is incorporated by reference into the attached proof of claim (together with the Annex, the “Proof of Claim”) and describes in more detail the claims of HV International VIII Secondary L.P. (the “Claimant”) against the debtor Highland Capital Management, L.P. (the “Debtor”).

2. The Claimant is a limited partner in one of the Debtor’s managed vehicles, Highland CLO Funding, Ltd. (“HCLOF”). Acis Capital Management GP, L.L.C. and Acis Capital Management L.P. (together, “Acis”), the portfolio manager for HCLOF, filed for chapter 11 in the United States Bankruptcy Court for the Northern District of Texas (the “Court”) on January 30, 2018. The Acis bankruptcy filing resulted from a dispute between Debtor and its former employee, Joshua Terry, who served as portfolio manager for Debtor’s collateral loan obligations funds (“CLO”) business. *See, e.g., Findings of Fact and Conclusions of Law in Support of Orders for Relief Issued After Trial on Contested Involuntary Bankruptcy Petition (“Involuntary Petition Ruling”)* [Case No. 18-30264 (SGJ), **Dkt. No. 118**]. As noted in more detail in the Court’s *Bench Ruling and Memorandum of Law in Support of: (A) Final Approval of Disclosure Statement; and (B) Confirmation of Chapter 11 Trustee’s Third Amended Joint Plan (“Confirmation Ruling”)* [Case No. 18-30264 (SGJ), **Dkt. No 827**] and related filings in the Acis

bankruptcy cases, there has been extensive litigation regarding alleged improper conduct associated with the management of, and transactions relating to, Acis, including transactions with and related to HCLOF. *See, e.g., id.; Second Amended Complaint* [Case No. 18-03078(SGJ), **Dkt. No. 157**].

3. Due to the Acis bankruptcy and certain conduct alleged to have been undertaken by the Debtor (to whom Acis subcontracted its functions) and Debtor's employees (who were officers, employees, and agents of Acis), the Claimant has suffered significant harm. Such harm includes, but is not limited to, financial harm resulting from, among other things (i) court orders in the Acis bankruptcy that prevented certain CLOs in which HCLOF was invested from being refinanced or reset and court orders that otherwise regulated the activity of HCLOF; and (ii) significant fees and expenses related to the Acis bankruptcy that were charged to HCLOF. *See, e.g., Involuntary Petition Ruling* ¶ 27; *see also Confirmation Ruling*.

4. Claimant hereby files this Claim to assert any and all of its rights to payment, remedies, and other claims (including contingent or unliquidated claims) against the Debtor in connection with and relating to the foregoing harm, including for any amounts due or owed under the various agreements with the Debtor in connection with HCLOF (including, but not limited to, the Subscription and Transfer Agreement for Ordinary Shares Highland CLO Funding, Ltd., dated as of November 15, 2017, the Members Agreement Relating to the Company, dated as of November 15, 2017, the Highland CLO Funding, Ltd. Offering Memorandum dated November 15, 2017), and any and all legal and equitable claims or causes of action relating to the foregoing harm.

5. The Claimant has not attached the documentation supporting this Claim to this Proof of Claim because the documentation is voluminous and the Debtor has copies of such

documents. However, any requested relevant documents will be provided to the Official Committee of Unsecured Creditors, the Court, the United States Trustee and the Debtor in the event of a dispute regarding this Proof of Claim and will be made available for review by other parties in interest as appropriate upon reasonable request and after consultation with the Debtor and execution of appropriate confidentiality agreements.

6. This Proof of Claim is filed with a full reservation of rights, including the right to amend, update, modify, supplement or otherwise revise this Proof of Claim in any respect at any time. The filing of this Proof of Claim is not and should not be construed to be: (a) a waiver or release of any of the Claimant's rights against any person, entity or property accruing to it against the Debtor and its estate; (b) a waiver of the Claimant's rights to assert that **28 U.S.C. § 157(b)(2)(C)** is unconstitutional; (c) a consent or submission by the Claimant, or waiver of the Claimant's rights to object, to the jurisdiction of this Court with respect to the subject matter of any of the claims described herein, or any objection or other proceeding commenced with respect to any of the claims described herein, or any other proceeding commenced in the Debtor's chapter 11 case against or otherwise involving the Claimant; (d) a waiver or release of any right of the Claimant, or consent by the Claimant, to a trial by jury in this or any other court or proceeding; (e) a waiver or release of, or any limitation on, any right of the Claimant to have orders entered only after *de novo* review by a United States District Judge; (f) an election of remedies; or (g) a waiver of, or any other limitation on, any right of the Claimant to request withdrawal of the reference with respect to any matter, including, without limitation, any matter relating to this Proof of Claim.

7. Claimant's express reservation of all rights and causes of action, includes, without limitation, contingent or unliquidated rights that it or its affiliates may have against the Debtor,

as well as defenses, offsets and counterclaims. This description and classification of claims by the Claimant is not a concession or admission as to the correct characterization or treatment of any such claims or a waiver of any rights of the Claimant.

8. Furthermore, the Claimant expressly reserves its rights to (a) file additional proofs of claim for additional claims that may be based on the same or additional documents or facts or other liability or indebtedness of the Debtor to the Claimant under contract or otherwise; (b) assert claims for cure of defaults in any agreement that the Debtor or any trustee appointed in this chapter 11 case may seek to assume; (c) assert any and all other claims, causes of action, defenses, offsets or counterclaims against the Debtor or any other parties; (d) file a request for payment of an administrative expense under 11 U.S.C. §§ 503 and 507 for any or all of the claims or rights of payment described above and any additional amounts; and (e) seek recovery through any relevant third parties, including any of the Debtor's insurance coverage providers.

9. This Proof of Claim does not encompass all claims that the Claimant or its affiliates may have that arise after the Petition Date and are entitled to administrative priority, and the Claimant expressly reserves its right to file such claim or any similar claim at the appropriate time, including any such post-petition claims arising under these service contracts.

10. This Proof of Claim is filed without prejudice to the filing by the Claimant of additional proofs of claim or requests for payment with respect to any other indebtedness, liability or obligation of the Debtor. The Claimant does not, by this Proof of Claim or any amendment or other action, waive any rights with respect to any scheduled claim.

11. The Claimant reserves the right to withdraw, amend, clarify, modify or supplement this Proof of Claim to assert additional claims, causes of action or additional grounds for this Proof of Claim (including adding any additional contracts, agreements, obligations or

other relationships between the Claimant and the Debtor), as well as the right to file any separate or additional proofs of claim with respect to the claims set forth herein or otherwise, including for the purpose of fixing and liquidating any contingent or unliquidated claim set forth herein, or to file additional proofs of claim in respect of additional amounts or for any other reason.

12. In executing and filing this Proof of Claim, the Claimant does not submit to the jurisdiction of the Bankruptcy Court for the Northern District of Texas for any purpose other than with respect to this Proof of Claim against the Debtor, and does not waive or release any rights or remedies against any other person or entity that may be liable for all or part of this Proof of Claim.

13. The Claimant otherwise reserves its rights, and nothing herein shall prejudice the Claimant's rights, under any order of the Court previously entered in this chapter 11 case.

14. Payments on account of this Proof of Claim should be sent to the Claimant at the address specified for notices to the Claimant in Part 1.3 of the Proof of Claim.

CLAIM 154

Fill in this information to identify the case:

Debtor Highland Capital Management, L.P.

United States Bankruptcy Court for the: Northern District of Texas
(State)

Case number 19-34054

Official Form 410
Proof of Claim

04/19

Read the instructions before filling out this form. This form is for making a claim for payment in a bankruptcy case. Do not use this form to make a request for payment of an administrative expense. Make such a request according to **11 U.S.C. § 503**.

Filers must leave out or redact information that is entitled to privacy on this form or on any attached documents. Attach redacted copies or any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, judgments, mortgages, and security agreements. **Do not send original documents**; they may be destroyed after scanning. If the documents are not available, explain in an attachment.

A person who files a fraudulent claim could be fined up to \$500,000, imprisoned for up to 5 years, or both. **18 U.S.C. §§ 152, 157, and 3571**.

Fill in all the information about the claim as of the date the case was filed. That date is on the notice of bankruptcy (Form 309) that you received.

Part 1: Identify the Claim

1. Who is the current creditor?	<u>HarbourVest Skew Base AIF L.P.</u> Name of the current creditor (the person or entity to be paid for this claim)	
	Other names the creditor used with the debtor _____	
2. Has this claim been acquired from someone else?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. From whom? _____	
3. Where should notices and payments to the creditor be sent?	Where should notices to the creditor be sent? <u>HarbourVest Skew Base AIF L.P.</u> <u>Attn: Erica Weisgerber</u> <u>Debevoise and Plimpton LLP</u> <u>919 Third Avenue</u> <u>New York, NY 10022, U.S.A.</u> Contact phone <u>2129096000</u> Contact email <u>eweisgerber@debevoise.com</u>	Where should payments to the creditor be sent? (if different) <u>See summary page</u> Contact phone <u>6173483773</u> Contact email <u>agoren@harbourvest.com</u>
	Uniform claim identifier for electronic payments in chapter 13 (if you use one): _____	
4. Does this claim amend one already filed?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Claim number on court claims registry (if known) _____ Filed on _____ MM / DD / YYYY	
5. Do you know if anyone else has filed a proof of claim for this claim?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Who made the earlier filing? _____	



Part 2: Give Information About the Claim as of the Date the Case Was Filed

6. Do you have any number you use to identify the debtor?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Last 4 digits of the debtor's account or any number you use to identify the debtor: ____
7. How much is the claim? \$ <u>See Annex</u>	Does this amount include interest or other charges? <input type="checkbox"/> No <input type="checkbox"/> Yes. Attach statement itemizing interest, fees, expenses, or other charges required by Bankruptcy Rule 3001(c)(2)(A).
8. What is the basis of the claim?	Examples: Goods sold, money loaned, lease, services performed, personal injury or wrongful death, or credit card. Attach redacted copies of any documents supporting the claim required by Bankruptcy Rule 3001(c). Limit disclosing information that is entitled to privacy, such as health care information. <u>See Annex</u>
9. Is all or part of the claim secured?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. The claim is secured by a lien on property. Nature or property: <input type="checkbox"/> Real estate: If the claim is secured by the debtor's principle residence, file a <i>Mortgage Proof of Claim Attachment</i> (Official Form 410-A) with this <i>Proof of Claim</i> . <input type="checkbox"/> Motor vehicle <input type="checkbox"/> Other. Describe: _____ Basis for perfection: _____ Attach redacted copies of documents, if any, that show evidence of perfection of a security interest (for example, a mortgage, lien, certificate of title, financing statement, or other document that shows the lien has been filed or recorded.) Value of property: \$ _____ Amount of the claim that is secured: \$ _____ Amount of the claim that is unsecured: \$ _____ (The sum of the secured and unsecured amount should match the amount in line 7.) Amount necessary to cure any default as of the date of the petition: \$ _____ Annual Interest Rate (when case was filed) _____ % <input type="checkbox"/> Fixed <input type="checkbox"/> Variable
10. Is this claim based on a lease?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Amount necessary to cure any default as of the date of the petition. \$ _____
11. Is this claim subject to a right of setoff?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Identify the property: _____



12. Is all or part of the claim entitled to priority under 11 U.S.C. § 507(a)?

☒ No

☐ Yes. Check all that apply:

Amount entitled to priority

A claim may be partly priority and partly nonpriority. For example, in some categories, the law limits the amount entitled to priority.

☐ Domestic support obligations (including alimony and child support) under 11 U.S.C. § 507(a)(1)(A) or (a)(1)(B).

\$ _____

☐ Up to \$3,025* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use. 11 U.S.C. § 507(a)(7).

\$ _____

☐ Wages, salaries, or commissions (up to \$13,650*) earned within 180 days before the bankruptcy petition is filed or the debtor's business ends, whichever is earlier. 11 U.S.C. § 507(a)(4).

\$ _____

☐ Taxes or penalties owed to governmental units. 11 U.S.C. § 507(a)(8).

\$ _____

☐ Contributions to an employee benefit plan. 11 U.S.C. § 507(a)(5).

\$ _____

☐ Other. Specify subsection of 11 U.S.C. § 507(a)() that applies.

\$ _____

* Amounts are subject to adjustment on 4/01/22 and every 3 years after that for cases begun on or after the date of adjustment.

13. Is all or part of the claim pursuant to 11 U.S.C. § 503(b)(9)?

☒ No

☐ Yes. Indicate the amount of your claim arising from the value of any goods received by the debtor within 20 days before the date of commencement of the above case, in which the goods have been sold to the Debtor in the ordinary course of such Debtor's business. Attach documentation supporting such claim.

\$ _____

Part 3: Sign Below

The person completing this proof of claim must sign and date it.

FRBP 9011(b).

If you file this claim electronically, FRBP 5005(a)(2) authorizes courts to establish local rules specifying what a signature is.

A person who files a fraudulent claim could be fined up to \$500,000, imprisoned for up to 5 years, or both.

18 U.S.C. §§ 152, 157, and 3571.

Check the appropriate box:

☐ I am the creditor.

☒ I am the creditor's attorney or authorized agent.

☐ I am the trustee, or the debtor, or their authorized agent. Bankruptcy Rule 3004.

☐ I am a guarantor, surety, endorser, or other codebtor. Bankruptcy Rule 3005.

I understand that an authorized signature on this *Proof of Claim* serves as an acknowledgement that when calculating the amount of the claim, the creditor gave the debtor credit for any payments received toward the debt.

I have examined the information in this *Proof of Claim* and have reasonable belief that the information is true and correct.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on date 04/08/2020

MM / DD / YYYY

/s/Michael Pugatch

Signature

Print the name of the person who is completing and signing this claim:

Name Michael Pugatch

First name

Middle name

Last name

Title Managing Director-Company: HarbourVest Skew Base AIF L.P., by HarbourVest

Company Fund Manager, by HarbourVest Partners L.P., its Duly Appointed Investme
Identify the corporate servicer as the company if the authorized agent is a servicer.

Address

Contact phone

Email



For phone assistance: Domestic (877) 573-3984 | International (310) 751-1829

Debtor: 19-34054 - Highland Capital Management, L.P. District: Northern District of Texas, Dallas Division		
Creditor: HarbourVest Skew Base AIF L.P. Attn: Erica Weisgerber Debevoise and Plimpton LLP 919 Third Avenue New York, NY, 10022 U.S.A. Phone: 2129096000 Phone 2: Fax: Email: eweisgerber@debevoise.com	Has Supporting Documentation: Yes, supporting documentation successfully uploaded Related Document Statement:	
	Has Related Claim: No Related Claim Filed By:	
	Filing Party: Authorized agent	
Disbursement/Notice Parties: HarbourVest Skew Base AIF L.P. c/o HarbourVest Partners, LLC One Financial Center Boston, MA, 02111 Phone: 6173483773 Phone 2: Fax: E-mail: agoren@harbourvest.com DISBURSEMENT ADDRESS		
Other Names Used with Debtor:	Amends Claim: No Acquired Claim: No	
Basis of Claim: See Annex	Last 4 Digits: No	Uniform Claim Identifier:
Total Amount of Claim: See Annex	Includes Interest or Charges: None	
Has Priority Claim: No	Priority Under:	
Has Secured Claim: No Amount of 503(b)(9): No Based on Lease: No Subject to Right of Setoff: No	Nature of Secured Amount: Value of Property: Annual Interest Rate: Arrearage Amount: Basis for Perfection: Amount Unsecured:	
Submitted By: Michael Pugatch on 08-Apr-2020 5:11:50 p.m. Eastern Time Title: Managing Director-Company: HarbourVest Skew Base AIF L.P., by HarbourVest Partners Ireland Limited, its Alternative Inv Company: Fund Manager, by HarbourVest Partners L.P., its Duly Appointed Investment Manager, by HarbourVest Partners, LLC, its Gen Ptr		

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In re:

Highland Capital Management, L.P.

Debtor.

Chapter 11

Case No. 19-34054 (SGJ)

ANNEX TO PROOF OF CLAIM

1. This annex (the “Annex”) is part of and is incorporated by reference into the attached proof of claim (together with the Annex, the “Proof of Claim”) and describes in more detail the claims of HarbourVest Skew Base AIF L.P. (the “Claimant”) against the debtor Highland Capital Management, L.P. (the “Debtor”).

2. The Claimant is a limited partner in one of the Debtor’s managed vehicles, Highland CLO Funding, Ltd. (“HCLOF”). Acis Capital Management GP, L.L.C. and Acis Capital Management L.P. (together, “Acis”), the portfolio manager for HCLOF, filed for chapter 11 in the United States Bankruptcy Court for the Northern District of Texas (the “Court”) on January 30, 2018. The Acis bankruptcy filing resulted from a dispute between Debtor and its former employee, Joshua Terry, who served as portfolio manager for Debtor’s collateral loan obligations funds (“CLO”) business. *See, e.g., Findings of Fact and Conclusions of Law in Support of Orders for Relief Issued After Trial on Contested Involuntary Bankruptcy Petition* (“Involuntary Petition Ruling”) [Case No. 18-30264 (SGJ), **Dkt. No. 118**]. As noted in more detail in the Court’s *Bench Ruling and Memorandum of Law in Support of: (A) Final Approval of Disclosure Statement; and (B) Confirmation of Chapter 11 Trustee’s Third Amended Joint Plan* (“Confirmation Ruling”) [Case No. 18-30264 (SGJ), **Dkt. No 827**] and related filings

in the Acis bankruptcy cases, there has been extensive litigation regarding alleged improper conduct associated with the management of, and transactions relating to, Acis, including transactions with and related to HCLOF. *See, e.g., id.; Second Amended Complaint* [Case No. 18-03078(SGJ), Dkt. No. 157].

3. Due to the Acis bankruptcy and certain conduct alleged to have been undertaken by the Debtor (to whom Acis subcontracted its functions) and Debtor's employees (who were officers, employees, and agents of Acis), the Claimant has suffered significant harm. Such harm includes, but is not limited to, financial harm resulting from, among other things (i) court orders in the Acis bankruptcy that prevented certain CLOs in which HCLOF was invested from being refinanced or reset and court orders that otherwise regulated the activity of HCLOF; and (ii) significant fees and expenses related to the Acis bankruptcy that were charged to HCLOF. *See, e.g., Involuntary Petition Ruling* ¶ 27; *see also Confirmation Ruling*.

4. Claimant hereby files this Claim to assert any and all of its rights to payment, remedies, and other claims (including contingent or unliquidated claims) against the Debtor in connection with and relating to the foregoing harm, including for any amounts due or owed under the various agreements with the Debtor in connection with HCLOF (including, but not limited to, the Subscription and Transfer Agreement for Ordinary Shares Highland CLO Funding, Ltd., dated as of November 15, 2017, the Members Agreement Relating to the Company, dated as of November 15, 2017, the Highland CLO Funding, Ltd. Offering Memorandum dated November 15, 2017), and any and all legal and equitable claims or causes of action relating to the foregoing harm.

5. The Claimant has not attached the documentation supporting this Claim to this Proof of Claim because the documentation is voluminous and the Debtor has copies of such

documents. However, any requested relevant documents will be provided to the Official Committee of Unsecured Creditors, the Court, the United States Trustee and the Debtor in the event of a dispute regarding this Proof of Claim and will be made available for review by other parties in interest as appropriate upon reasonable request and after consultation with the Debtor and execution of appropriate confidentiality agreements.

6. This Proof of Claim is filed with a full reservation of rights, including the right to amend, update, modify, supplement or otherwise revise this Proof of Claim in any respect at any time. The filing of this Proof of Claim is not and should not be construed to be: (a) a waiver or release of any of the Claimant's rights against any person, entity or property accruing to it against the Debtor and its estate; (b) a waiver of the Claimant's rights to assert that **28 U.S.C. § 157(b)(2)(C)** is unconstitutional; (c) a consent or submission by the Claimant, or waiver of the Claimant's rights to object, to the jurisdiction of this Court with respect to the subject matter of any of the claims described herein, or any objection or other proceeding commenced with respect to any of the claims described herein, or any other proceeding commenced in the Debtor's chapter 11 case against or otherwise involving the Claimant; (d) a waiver or release of any right of the Claimant, or consent by the Claimant, to a trial by jury in this or any other court or proceeding; (e) a waiver or release of, or any limitation on, any right of the Claimant to have orders entered only after *de novo* review by a United States District Judge; (f) an election of remedies; or (g) a waiver of, or any other limitation on, any right of the Claimant to request withdrawal of the reference with respect to any matter, including, without limitation, any matter relating to this Proof of Claim.

7. Claimant's express reservation of all rights and causes of action, includes, without limitation, contingent or unliquidated rights that it or its affiliates may have against the Debtor,

as well as defenses, offsets and counterclaims. This description and classification of claims by the Claimant is not a concession or admission as to the correct characterization or treatment of any such claims or a waiver of any rights of the Claimant.

8. Furthermore, the Claimant expressly reserves its rights to (a) file additional proofs of claim for additional claims that may be based on the same or additional documents or facts or other liability or indebtedness of the Debtor to the Claimant under contract or otherwise; (b) assert claims for cure of defaults in any agreement that the Debtor or any trustee appointed in this chapter 11 case may seek to assume; (c) assert any and all other claims, causes of action, defenses, offsets or counterclaims against the Debtor or any other parties; (d) file a request for payment of an administrative expense under 11 U.S.C. §§ 503 and 507 for any or all of the claims or rights of payment described above and any additional amounts; and (e) seek recovery through any relevant third parties, including any of the Debtor's insurance coverage providers.

9. This Proof of Claim does not encompass all claims that the Claimant or its affiliates may have that arise after the Petition Date and are entitled to administrative priority, and the Claimant expressly reserves its right to file such claim or any similar claim at the appropriate time, including any such post-petition claims arising under these service contracts.

10. This Proof of Claim is filed without prejudice to the filing by the Claimant of additional proofs of claim or requests for payment with respect to any other indebtedness, liability or obligation of the Debtor. The Claimant does not, by this Proof of Claim or any amendment or other action, waive any rights with respect to any scheduled claim.

11. The Claimant reserves the right to withdraw, amend, clarify, modify or supplement this Proof of Claim to assert additional claims, causes of action or additional grounds for this Proof of Claim (including adding any additional contracts, agreements, obligations or

other relationships between the Claimant and the Debtor), as well as the right to file any separate or additional proofs of claim with respect to the claims set forth herein or otherwise, including for the purpose of fixing and liquidating any contingent or unliquidated claim set forth herein, or to file additional proofs of claim in respect of additional amounts or for any other reason.

12. In executing and filing this Proof of Claim, the Claimant does not submit to the jurisdiction of the Bankruptcy Court for the Northern District of Texas for any purpose other than with respect to this Proof of Claim against the Debtor, and does not waive or release any rights or remedies against any other person or entity that may be liable for all or part of this Proof of Claim.

13. The Claimant otherwise reserves its rights, and nothing herein shall prejudice the Claimant's rights, under any order of the Court previously entered in this chapter 11 case.

14. Payments on account of this Proof of Claim should be sent to the Claimant at the address specified for notices to the Claimant in Part 1.3 of the Proof of Claim.

CLAIM 149

Fill in this information to identify the case:

Debtor Highland Capital Management, L.P.

United States Bankruptcy Court for the: Northern District of Texas
(State)

Case number 19-34054

Official Form 410
Proof of Claim

04/19

Read the instructions before filling out this form. This form is for making a claim for payment in a bankruptcy case. Do not use this form to make a request for payment of an administrative expense. Make such a request according to **11 U.S.C. § 503**.

Filers must leave out or redact information that is entitled to privacy on this form or on any attached documents. Attach redacted copies or any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, judgments, mortgages, and security agreements. **Do not send original documents**; they may be destroyed after scanning. If the documents are not available, explain in an attachment.

A person who files a fraudulent claim could be fined up to \$500,000, imprisoned for up to 5 years, or both. **18 U.S.C. §§ 152, 157, and 3571.**

Fill in all the information about the claim as of the date the case was filed. That date is on the notice of bankruptcy (Form 309) that you received.

Part 1: Identify the Claim

1. Who is the current creditor?	<u>HarbourVest Partners L.P. on behalf of funds and accounts under management</u> Name of the current creditor (the person or entity to be paid for this claim)	
	Other names the creditor used with the debtor _____	
2. Has this claim been acquired from someone else?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. From whom? _____	
3. Where should notices and payments to the creditor be sent?	Where should notices to the creditor be sent? See summary page	Where should payments to the creditor be sent? (if different) See summary page
Federal Rule of Bankruptcy Procedure (FRBP) 2002(g)		
	Contact phone <u>2129096000</u> Contact email <u>eweisgerber@debevoise.com</u>	Contact phone <u>6173483773</u> Contact email <u>agoren@harbourvest.com</u>
Uniform claim identifier for electronic payments in chapter 13 (if you use one): _____		
4. Does this claim amend one already filed?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Claim number on court claims registry (if known) _____ Filed on _____ MM / DD / YYYY	
5. Do you know if anyone else has filed a proof of claim for this claim?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Who made the earlier filing? _____	



Part 2: Give Information About the Claim as of the Date the Case Was Filed

6. Do you have any number you use to identify the debtor?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Last 4 digits of the debtor's account or any number you use to identify the debtor: ____
7. How much is the claim? \$ <u>See Annex</u>	Does this amount include interest or other charges? <input type="checkbox"/> No <input type="checkbox"/> Yes. Attach statement itemizing interest, fees, expenses, or other charges required by Bankruptcy Rule 3001(c)(2)(A).
8. What is the basis of the claim?	Examples: Goods sold, money loaned, lease, services performed, personal injury or wrongful death, or credit card. Attach redacted copies of any documents supporting the claim required by Bankruptcy Rule 3001(c). Limit disclosing information that is entitled to privacy, such as health care information. <u>See Annex</u>
9. Is all or part of the claim secured?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. The claim is secured by a lien on property. Nature or property: <input type="checkbox"/> Real estate: If the claim is secured by the debtor's principle residence, file a <i>Mortgage Proof of Claim Attachment</i> (Official Form 410-A) with this <i>Proof of Claim</i> . <input type="checkbox"/> Motor vehicle <input type="checkbox"/> Other. Describe: _____ Basis for perfection: _____ Attach redacted copies of documents, if any, that show evidence of perfection of a security interest (for example, a mortgage, lien, certificate of title, financing statement, or other document that shows the lien has been filed or recorded.) Value of property: \$ _____ Amount of the claim that is secured: \$ _____ Amount of the claim that is unsecured: \$ _____ (The sum of the secured and unsecured amount should match the amount in line 7.) Amount necessary to cure any default as of the date of the petition: \$ _____ Annual Interest Rate (when case was filed) _____ % <input type="checkbox"/> Fixed <input type="checkbox"/> Variable
10. Is this claim based on a lease?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Amount necessary to cure any default as of the date of the petition. \$ _____
11. Is this claim subject to a right of setoff?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Identify the property: _____



12. Is all or part of the claim entitled to priority under 11 U.S.C. § 507(a)? A claim may be partly priority and partly nonpriority. For example, in some categories, the law limits the amount entitled to priority.	<div style="display: flex; justify-content: space-between;"><div><input checked="" type="checkbox"/> No</div><div style="text-align: right;">Amount entitled to priority</div></div> <div style="margin-top: 10px;"><input type="checkbox"/> Yes. Check all that apply: <div style="margin-top: 5px;"><input type="checkbox"/> Domestic support obligations (including alimony and child support) under 11 U.S.C. § 507(a)(1)(A) or (a)(1)(B). \$ _____</div><div style="margin-top: 5px;"><input type="checkbox"/> Up to \$3,025* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use. 11 U.S.C. § 507(a)(7). \$ _____</div><div style="margin-top: 5px;"><input type="checkbox"/> Wages, salaries, or commissions (up to \$13,650*) earned within 180 days before the bankruptcy petition is filed or the debtor's business ends, whichever is earlier. 11 U.S.C. § 507(a)(4). \$ _____</div><div style="margin-top: 5px;"><input type="checkbox"/> Taxes or penalties owed to governmental units. 11 U.S.C. § 507(a)(8). \$ _____</div><div style="margin-top: 5px;"><input type="checkbox"/> Contributions to an employee benefit plan. 11 U.S.C. § 507(a)(5). \$ _____</div><div style="margin-top: 5px;"><input type="checkbox"/> Other. Specify subsection of 11 U.S.C. § 507(a)() that applies. \$ _____</div></div> <div style="margin-top: 10px; font-size: small;">* Amounts are subject to adjustment on 4/01/22 and every 3 years after that for cases begun on or after the date of adjustment.</div>
13. Is all or part of the claim pursuant to 11 U.S.C. § 503(b)(9)?	<div><input checked="" type="checkbox"/> No</div> <div><input type="checkbox"/> Yes. Indicate the amount of your claim arising from the value of any goods received by the debtor within 20 days before the date of commencement of the above case, in which the goods have been sold to the Debtor in the ordinary course of such Debtor's business. Attach documentation supporting such claim. \$ _____</div>

Part 3: Sign Below

The person completing this proof of claim must sign and date it.
FRBP 9011(b).

If you file this claim electronically, **FRBP 5005(a)(2)** authorizes courts to establish local rules specifying what a signature is.

A person who files a fraudulent claim could be fined up to \$500,000, imprisoned for up to 5 years, or both.
18 U.S.C. §§ 152, 157, and 3571.

Check the appropriate box:

- ☐ I am the creditor.
- ☒ I am the creditor's attorney or authorized agent.
- ☐ I am the trustee, or the debtor, or their authorized agent. Bankruptcy Rule 3004.
- ☐ I am a guarantor, surety, endorser, or other codebtor. Bankruptcy Rule 3005.

I understand that an authorized signature on this *Proof of Claim* serves as an acknowledgement that when calculating the amount of the claim, the creditor gave the debtor credit for any payments received toward the debt.

I have examined the information in this *Proof of Claim* and have reasonable belief that the information is true and correct.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on date 04/08/2020
MM / DD / YYYY

/s/Michael Pugatch
Signature

Print the name of the person who is completing and signing this claim:

Name Michael Pugatch
First name Middle name Last name

Title Managing Director

Company HarbourVest Partners L.P., on behalf of funds and accounts under manage
Identify the corporate servicer as the company if the authorized agent is a servicer.

Address _____

Contact phone _____ Email _____



For phone assistance: Domestic (877) 573-3984 | International (310) 751-1829

Debtor: 19-34054 - Highland Capital Management, L.P. District: Northern District of Texas, Dallas Division		
Creditor: HarbourVest Partners L.P. on behalf of funds and accounts under management Attn: Erica Weisgerber Debevoise and Plimpton LLP 919 Third Avenue New York, NY, 10022 U.S.A. Phone: 2129096000 Phone 2: Fax: Email: eweisgerber@debevoise.com	Has Supporting Documentation: Yes, supporting documentation successfully uploaded Related Document Statement:	
	Has Related Claim: No Related Claim Filed By:	
	Filing Party: Authorized agent	
Disbursement/Notice Parties: HarbourVest Partners L.P. c/o HarbourVest Partners, LLC One Financial Center Boston, MA, 02111 U.S.A. Phone: 6173483773 Phone 2: Fax: E-mail: agoren@harbourvest.com DISBURSEMENT ADDRESS		
Other Names Used with Debtor:	Amends Claim: No Acquired Claim: No	
Basis of Claim: See Annex	Last 4 Digits: No	Uniform Claim Identifier:
Total Amount of Claim: See Annex	Includes Interest or Charges: None	
Has Priority Claim: No	Priority Under:	
Has Secured Claim: No Amount of 503(b)(9): No Based on Lease: No Subject to Right of Setoff: No	Nature of Secured Amount: Value of Property: Annual Interest Rate: Arrearage Amount: Basis for Perfection: Amount Unsecured:	
Submitted By: Michael Pugatch on 08-Apr-2020 5:06:59 p.m. Eastern Time Title: Managing Director Company: HarbourVest Partners L.P., on behalf of funds and accounts under management, by HarbourVest Partners, LLC, its Gen Partner		

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In re:

Highland Capital Management, L.P.

Debtor.

Chapter 11

Case No. 19-34054 (SGJ)

ANNEX TO PROOF OF CLAIM

1. This annex (the “Annex”) is part of and is incorporated by reference into the attached proof of claim (together with the Annex, the “Proof of Claim”) and describes in more detail the claims of HarbourVest Partners L.P. on behalf of funds and accounts under management (the “Claimant”) against the debtor Highland Capital Management, L.P. (the “Debtor”).

2. The Claimant manages investment funds that are limited partners in one of the Debtor’s managed vehicles, Highland CLO Funding, Ltd. (“HCLOF”). Acis Capital Management GP, L.L.C. and Acis Capital Management L.P. (together, “Acis”), the portfolio manager for HCLOF, filed for chapter 11 in the United States Bankruptcy Court for the Northern District of Texas (the “Court”) on January 30, 2018. The Acis bankruptcy filing resulted from a dispute between Debtor and its former employee, Joshua Terry, who served as portfolio manager for Debtor’s collateral loan obligations funds (“CLO”) business. *See, e.g., Findings of Fact and Conclusions of Law in Support of Orders for Relief Issued After Trial on Contested Involuntary Bankruptcy Petition* (“Involuntary Petition Ruling”) [Case No. 18-30264 (SGJ), **Dkt. No. 118**]. As noted in more detail in the Court’s *Bench Ruling and Memorandum of Law in Support of: (A) Final Approval of Disclosure Statement; and (B) Confirmation of Chapter 11 Trustee’s Third*

Amended Joint Plan (“Confirmation Ruling”) [Case No. 18-30264 (SGJ), **Dkt. No 827**] and related filings in the Acis bankruptcy cases, there has been extensive litigation regarding alleged improper conduct associated with the management of, and transactions relating to, Acis, including transactions with and related to HCLOF. *See, e.g., id.; Second Amended Complaint* [Case No. 18-03078(SGJ), **Dkt. No. 157**].

3. Due to the Acis bankruptcy and certain conduct alleged to have been undertaken by the Debtor (to whom Acis subcontracted its functions) and Debtor’s employees (who were officers, employees, and agents of Acis), the Claimant has suffered significant harm. Such harm includes, but is not limited to, financial harm resulting from, among other things (i) court orders in the Acis bankruptcy that prevented certain CLOs in which HCLOF was invested from being refinanced or reset and court orders that otherwise regulated the activity of HCLOF; and (ii) significant fees and expenses related to the Acis bankruptcy that were charged to HCLOF. *See, e.g., Involuntary Petition Ruling* ¶ 27; *see also Confirmation Ruling*.

4. Claimant hereby files this Claim to assert any and all of its rights to payment, remedies, and other claims (including contingent or unliquidated claims) against the Debtor in connection with and relating to the foregoing harm, including for any amounts due or owed under the various agreements with the Debtor in connection with HCLOF (including, but not limited to, the Subscription and Transfer Agreement for Ordinary Shares Highland CLO Funding, Ltd., dated as of November 15, 2017, the Members Agreement Relating to the Company, dated as of November 15, 2017, the Highland CLO Funding, Ltd. Offering Memorandum dated November 15, 2017), and any and all legal and equitable claims or causes of action relating to the foregoing harm.

5. The Claimant has not attached the documentation supporting this Claim to this Proof of Claim because the documentation is voluminous and the Debtor has copies of such documents. However, any requested relevant documents will be provided to the Official Committee of Unsecured Creditors, the Court, the United States Trustee and the Debtor in the event of a dispute regarding this Proof of Claim and will be made available for review by other parties in interest as appropriate upon reasonable request and after consultation with the Debtor and execution of appropriate confidentiality agreements.

6. This Proof of Claim is filed with a full reservation of rights, including the right to amend, update, modify, supplement or otherwise revise this Proof of Claim in any respect at any time. The filing of this Proof of Claim is not and should not be construed to be: (a) a waiver or release of any of the Claimant's rights against any person, entity or property accruing to it against the Debtor and its estate; (b) a waiver of the Claimant's rights to assert that 28 U.S.C. § 157(b)(2)(C) is unconstitutional; (c) a consent or submission by the Claimant, or waiver of the Claimant's rights to object, to the jurisdiction of this Court with respect to the subject matter of any of the claims described herein, or any objection or other proceeding commenced with respect to any of the claims described herein, or any other proceeding commenced in the Debtor's chapter 11 case against or otherwise involving the Claimant; (d) a waiver or release of any right of the Claimant, or consent by the Claimant, to a trial by jury in this or any other court or proceeding; (e) a waiver or release of, or any limitation on, any right of the Claimant to have orders entered only after *de novo* review by a United States District Judge; (f) an election of remedies; or (g) a waiver of, or any other limitation on, any right of the Claimant to request withdrawal of the reference with respect to any matter, including, without limitation, any matter relating to this Proof of Claim.

7. Claimant's express reservation of all rights and causes of action, includes, without limitation, contingent or unliquidated rights that it or its affiliates may have against the Debtor, as well as defenses, offsets and counterclaims. This description and classification of claims by the Claimant is not a concession or admission as to the correct characterization or treatment of any such claims or a waiver of any rights of the Claimant.

8. Furthermore, the Claimant expressly reserves its rights to (a) file additional proofs of claim for additional claims that may be based on the same or additional documents or facts or other liability or indebtedness of the Debtor to the Claimant under contract or otherwise; (b) assert claims for cure of defaults in any agreement that the Debtor or any trustee appointed in this chapter 11 case may seek to assume; (c) assert any and all other claims, causes of action, defenses, offsets or counterclaims against the Debtor or any other parties; (d) file a request for payment of an administrative expense under 11 U.S.C. §§ 503 and 507 for any or all of the claims or rights of payment described above and any additional amounts; and (e) seek recovery through any relevant third parties, including any of the Debtor's insurance coverage providers.

9. This Proof of Claim does not encompass all claims that the Claimant or its affiliates may have that arise after the Petition Date and are entitled to administrative priority, and the Claimant expressly reserves its right to file such claim or any similar claim at the appropriate time, including any such post-petition claims arising under these service contracts.

10. This Proof of Claim is filed without prejudice to the filing by the Claimant of additional proofs of claim or requests for payment with respect to any other indebtedness, liability or obligation of the Debtor. The Claimant does not, by this Proof of Claim or any amendment or other action, waive any rights with respect to any scheduled claim.

11. The Claimant reserves the right to withdraw, amend, clarify, modify or supplement this Proof of Claim to assert additional claims, causes of action or additional grounds for this Proof of Claim (including adding any additional contracts, agreements, obligations or other relationships between the Claimant and the Debtor), as well as the right to file any separate or additional proofs of claim with respect to the claims set forth herein or otherwise, including for the purpose of fixing and liquidating any contingent or unliquidated claim set forth herein, or to file additional proofs of claim in respect of additional amounts or for any other reason.

12. In executing and filing this Proof of Claim, the Claimant does not submit to the jurisdiction of the Bankruptcy Court for the Northern District of Texas for any purpose other than with respect to this Proof of Claim against the Debtor, and does not waive or release any rights or remedies against any other person or entity that may be liable for all or part of this Proof of Claim.

13. The Claimant otherwise reserves its rights, and nothing herein shall prejudice the Claimant's rights, under any order of the Court previously entered in this chapter 11 case.

14. Payments on account of this Proof of Claim should be sent to the Claimant at the address specified for notices to the Claimant in Part 1.3 of the Proof of Claim.

EXHIBIT 2

005121

PACHULSKI STANG ZIEHL & JONES LLP
 Jeffrey N. Pomerantz (CA Bar No. 143717) (*admitted pro hac vice*)
 Ira D. Kharasch (CA Bar No. 109084) (*admitted pro hac vice*)
 John A. Morris (NY Bar No. 266326) (*admitted pro hac vice*)
 Gregory V. Demo (NY Bar No. 5371992) (*admitted pro hac vice*)
 Hayley R. Winograd (NY Bar No. 5612569) (*admitted pro hac vice*)
 10100 Santa Monica Blvd., 13th Floor
 Los Angeles, CA 90067
 Telephone: (310) 277-6910
 Facsimile: (310) 201-0760

HAYWARD & ASSOCIATES PLLC
 Melissa S. Hayward (TX Bar No. 24044908)
 MHayward@HaywardFirm.com
 Zachery Z. Annable (TX Bar No. 24053075)
 ZAnnable@HaywardFirm.com
 10501 N. Central Expy, Ste. 106
 Dallas, TX 75231
 Telephone: (972) 755-7100
 Facsimile: (972) 755-7110

Counsel for the Debtor and Debtor-in-Possession

**IN THE UNITED STATES BANKRUPTCY COURT
 FOR THE NORTHERN DISTRICT OF TEXAS
 DALLAS DIVISION**

In re:	§	
	§	Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P., ¹	§	
	§	Case No. 19-34054-sgj11
	§	
Debtor.	§	

**DEBTOR'S MOTION FOR ENTRY OF AN ORDER APPROVING
 SETTLEMENT WITH HARBOURVEST (CLAIM NOS. 143, 147, 149, 150, 153, 154)
 AND AUTHORIZING ACTIONS CONSISTENT THEREWITH**

TO THE HONORABLE STACEY G. C. JERNIGAN,
 UNITED STATES BANKRUPTCY JUDGE:

¹ The last four digits of the Debtor's taxpayer identification number are 6725. The headquarters and service address for the Debtor is 300 Crescent Court, Suite 700, Dallas, TX 75201.



Highland Capital Management, L.P., the above-captioned debtor and debtor-in-possession (“Highland” or the “Debtor”), files this motion (the “Motion”) for entry of an order, substantially in the form attached hereto as **Exhibit A**, pursuant to Rule 9019 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), approving a settlement agreement (the “Settlement Agreement”),² a copy of which is attached as Exhibit 1 to the *Declaration of John A. Morris in Support of the Debtor’s Motion for Entry of an Order Approving Settlement with HarbourVest (Claim Nos. 143, 147, 149, 150, 153, 154) and Authorizing Actions Consistent Therewith* being filed simultaneously with this Motion (“Morris Dec.”), that, among other things, fully and finally resolves the proofs of claim filed by HarbourVest 2017 Global Fund L.P., HarbourVest 2017 Global AIF L.P., HarbourVest Dover Street IX Investment L.P., HV International VIII Secondary L.P., HarbourVest Skew Base AIF L.P., and HarbourVest Partners L.P. (collectively, “HarbourVest”). In support of this Motion, the Debtor represents as follows:

JURISDICTION

1. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2). Venue in this District is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

2. The statutory predicates for the relief sought herein are sections 105(a) and 363 of title 11 of the United States Code (the “Bankruptcy Code”), and Rule 9019 of the Bankruptcy Rules.

² All capitalized terms used but not defined herein shall have the meanings given to them in the Settlement Agreement.

RELEVANT BACKGROUND

A. Procedural Background

3. On October 16, 2019 (the “Petition Date”), the Debtor filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code in the Bankruptcy Court for the District of Delaware, Case No. 19-12239 (CSS) (the “Delaware Court”).

4. On October 29, 2019, the official committee of unsecured creditors (the “Committee”) was appointed by the U.S. Trustee in the Delaware Court.

5. On December 4, 2019, the Delaware Court entered an order transferring venue of the Debtor’s case to this Court [Docket No. 186].³

6. On December 27, 2019, the Debtor filed that certain *Motion of the Debtor for Approval of Settlement with the Official Committee of Unsecured Creditors Regarding Governance of the Debtor and Procedures for Operations in the Ordinary Course* [Docket No. 281] (the “Settlement Motion”). This Court approved the Settlement Motion on January 9, 2020 [Docket No. 339] (the “Settlement Order”).

7. In connection with the Settlement Order, an independent board of directors was constituted at the Debtor’s general partner, Strand Advisors, Inc., and certain operating protocols were instituted.

8. On July 16, 2020, this Court entered an order appointing James P. Seery, Jr., as the Debtor’s chief executive officer and chief restructuring officer [Docket No. 854].

9. The Debtor has continued in the possession of its property and has continued to operate and manage its business as a debtor-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No trustee or examiner has been appointed in this chapter 11 case.

³ All docket numbers refer to the docket maintained by this Court.

B. Overview of HarbourVest's Claims

10. HarbourVest's claims against the Debtor's estate arise from its \$80 million investment in Highland CLO Funding, f/k/a Acis Loan Funding, Ltd. ("HCLOF"), pursuant to which HarbourVest obtained a 49 percent interest in HCLOF (the "Investment").

11. In brief, HarbourVest contends that it was fraudulently induced into entering into the Investment based on the Debtor's misrepresentations and omissions concerning certain material facts, including that the Debtor: (1) failed to disclose that it never intended to pay an arbitration award obtained by a former portfolio manager, (2) failed to disclose that it engaged in a series of fraudulent transfers for the purpose of preventing the former portfolio manager from collecting on his arbitration award and misrepresented the reasons changing the portfolio manager for HCLOF immediately prior to the Investment, (3) indicated that the dispute with the former portfolio manager would not impact investment activities, and (4) expressed confidence in the ability of HCLOF to reset or redeem the collateralized loan obligations ("CLOs") under its control.

12. HarbourVest seeks to rescind its Investment and claims damages in excess of \$300 million based on theories of fraud, fraudulent inducement, fraudulent concealment, fraudulent misrepresentation, negligent misrepresentation, and breach of fiduciary duty (under Guernsey law), and on alleged violations of state securities laws and the Racketeer Influenced Corrupt Organization Act ("RICO").

13. HarbourVest's allegations are summarized below.⁴

⁴ Solely for purposes of this Motion, and not for any other reason, the facts set forth herein are adopted largely from the *HarbourVest Response to Debtor's First Omnibus Objection to Certain (A) Duplicate Claims; (B) Overstated Claims; (C) Late-Filed Claims; (D) Satisfied Claims; (E) No-Liability Claims; and (F) Insufficient-Documentation Claims* [Docket No. 1057] (the "Response").

C. Summary of HarbourVest's Factual Allegations

14. At the time HarbourVest made its Investment, the Debtor was embroiled in an arbitration against Joshua Terry ("Mr. Terry"), a former employee of the Debtor and limited partner of Acis Capital Management, L.P. ("Acis LP"). Through Acis LP, Mr. Terry managed Highland's CLO business, including CLO-related investments held by Acis Loan Funding, Ltd. ("Acis Funding").

15. The litigation between Mr. Terry and the Debtor began in 2016, after the Debtor terminated Mr. Terry and commenced an action against him in Texas state court. Mr. Terry asserted counterclaims for wrongful termination and for the wrongful taking of his ownership interest in Acis LP and subsequently had certain claims referred to arbitration where he obtained an award of approximately \$8 million (the "Arbitration Award") on October 20, 2017.

16. HarbourVest alleges that the Debtor responded to the Arbitration Award by engaging in a series of fraudulent transfers and corporate restructurings, the true purposes of which were fraudulently concealed from HarbourVest.

17. For example, according to HarbourVest, the Debtor changed the name of the target fund from Acis Funding to "Highland CLO Funding, Ltd." ("HCLOF") and "swapped out" Acis LP for Highland HCF Advisor, Ltd. as portfolio manager (the "Structural Changes"). The Debtor allegedly told HarbourVest that it made these changes because of the "reputational harm" to Acis LP resulting from the Arbitration Award. The Debtor further told HarbourVest that in lieu of redemptions, resetting the CLOs was necessary, and that it would be easier to reset them under the "Highland" CLO brand instead of the Acis CLO brand.

18. In addition, HarbourVest also alleges that the Debtor had no intention of allowing Mr. Terry to collect on his Arbitration Award, and orchestrated a scheme to "denude"

Acis of assets by fraudulently transferring virtually all of its assets and attempting to transfer its profitable portfolio management contracts to non-Acis, Debtor-related entities.

19. Unaware of the fraudulent transfers or the true purposes of the Structural Changes, and in reliance on representations made by the Debtor, HarbourVest closed on its Investment in HCLOF on November 15, 2017.

20. After discovering the transfers that occurred between Highland and Acis between October and December 2017 following the Arbitration Award (the “Transfers”), on January 24, 2018, Terry moved for a temporary restraining order (the “TRO”) from the Texas state court on the grounds that the Transfers were pursued for the purpose of rendering Acis LP judgment-proof. The state court granted the TRO, enjoining the Debtor from transferring any CLO management contracts or other assets away from Acis LP.

21. On January 30, 2018, Mr. Terry filed involuntary bankruptcy petitions against Acis LP and its general partner, Acis Capital Management GP, LLC. *See In re Acis Capital Management, L.P.*, Case No. 18-30264-sgj11 (Bankr. N.D. Tex. 2018) and *In re Acis Capital Management GP, LLC*, Case No. 18-30265-sgj11 (Bankr. N.D. Tex. 2018) (collectively, the “Acis Bankruptcy Case”). The Bankruptcy Court overruled the Debtor’s objection, granted the involuntary petitions, and appointed a chapter 11 trustee (the “Acis Trustee”). A long sequence of events subsequently transpired, all of which relate to HarbourVest’s claims, including:

- On May 31, 2018, the Court issued a *sua sponte* TRO preventing any actions in furtherance of the optional redemptions or other liquidation of the Acis CLOs.
- On June 14, 2018, HCLOF withdrew optional redemption notices.
- The TRO expired on June 15, 2018, and HCLOF noticed the Acis Trustee that it was requesting an optional redemption.

- HCLOF's request was withdrawn on July 6, 2018, and on June 21, 2018, the Acis Trustee sought an injunction preventing Highland/HCLOF from seeking further redemptions (the "Preliminary Injunction").
- The Court granted the Preliminary Injunction on July 10, 2018, pending the Acis Trustee's attempts to confirm a plan or resolve the Acis Bankruptcy.
- On August 30, 2018, the Court denied confirmation of the First Amended Joint Plan for Acis, and held that the Preliminary Injunction must stay in place on the ground that the "evidence thus far has been compelling that numerous transfers after the Josh Terry judgment denuded Acis of value."
- After the Debtor made various statements implicating HarbourVest in the Transfers, the Acis Trustee investigated HarbourVest's involvement in such Transfers, including extensive discovery and taking a 30(b)(6) deposition of HarbourVest's managing director, Michael Pugatch, on November 17, 2018.
- On March 20, 2019, HCLOF sent a letter to Acis LP stating that it was not interested in pursuing, or able to pursue, a CLO reset transaction.

D. The Parties' Pleadings and Positions Concerning HarbourVest's Proofs of Claim

22. On April 8, 2020, HarbourVest filed proofs of claim against Highland that were subsequently denoted by the Debtor's claims agents as claim numbers 143, 147, 149, 150, 153, and 154, respectively (collectively, the "Proofs of Claim"). Morris Dec. Exhibits 2-7.

23. The Proofs of Claim assert, among other things, that HarbourVest suffered significant harm due to conduct undertaken by the Debtor and the Debtor's employees, including "financial harm resulting from (i) court orders in the Acis Bankruptcy that prevented certain CLOs in which HCLOF was invested from being refinanced or reset and court orders that otherwise relegated the activity of HCLOF [*i.e.*, the Preliminary Injunction]; and (ii) significant fees and expenses related to the Acis Bankruptcy that were charged to HCLOF." *See, e.g.*, Morris Dec. Exhibit 2 ¶3.

24. HarbourVest also asserted "any and all of its right to payment, remedies, and other claims (including contingent or unliquidated claims) against the Debtor in connection with and relating to the forgoing harm, including for any amounts due or owed under the various

agreements with the Debtor in connection with relating to” the Operative Documents “and any and all legal and equitable claims or causes of action relating to the forgoing harm.” *See, e.g.*, Morris Dec. Exhibit 2 ¶4.

25. Highland subsequently objected to HarbourVest’s Proofs of Claim on the grounds that they were no-liability claims. [Docket No. 906] (the “Claim Objection”).

26. On September 11, 2020, HarbourVest filed its Response. The Response articulated specified claims under U.S. federal and state and Guernsey law, including claims for fraud, fraudulent concealment, fraudulent inducement, fraudulent misrepresentation, negligent misrepresentation (collectively, the “Fraud Claims”), U.S. State and Federal Securities Law Claims (the “Securities Claims”), violations of the Federal Racketeer Influenced and Corrupt Organizations Act (“RICO”), breach of fiduciary duty and misuse of fund assets, and an unfair prejudice claim under Guernsey law (collectively, with the Proofs of Claim, the “HarbourVest Claims”).

27. On October 18, 2020, HarbourVest filed its *Motion of HarbourVest Pursuant to Rule 3018 of the Federal Rules of Bankruptcy Procedure for Temporary Allowance of Claims for Purposes of Voting to Accept or Reject the Plan* [Docket No. 1207] (the “3018 Motion”). In its 3018 Motion, HarbourVest sought for its Claims to be temporarily allowed for voting purposes in the amount of more than \$300 million (based largely on a theory of treble damages).

E. Settlement Discussions

28. In October, the parties discussed the possibility of resolving the Rule 3018 Motion.

29. In November, the parties broadened the discussions in an attempt to reach a global resolution of the HarbourVest Claims. In the pursuit thereof, the parties and their

counsel participated in several conference calls where they engaged in a spirited exchange of perspectives concerning the facts and the law.

30. During follow up meetings, the parties' interests became more defined. Specifically, HarbourVest sought to maximize its recovery while fully extracting itself from the Investment, while the Debtor sought to minimize the HarbourVest Claims consistent with its perceptions of the facts and law.

31. After the parties' interests became more defined, the principals engaged in a series of direct, arm's-length, telephonic negotiations that ultimately lead to the settlement, whose terms are summarized below.

F. Summary of Settlement Terms

32. The Settlement Agreement contains the following material terms, among others:

- HarbourVest shall transfer its entire interest in HCLOF to an entity to be designated by the Debtor;⁵
- HarbourVest shall receive an allowed, general unsecured, non-priority claim in the amount of \$45 million and shall vote its Class 8 claim in that amount to support the Plan;
- HarbourVest shall receive a subordinated, allowed, general unsecured, non-priority claim in the amount of \$35 million and shall vote its Class 9 claim in that amount to support the Plan;
- HarbourVest will support confirmation of the Debtor's Plan, including, but not limited to, voting its claims in support of the Plan;
- The HarbourVest Claims shall be allowed in the aggregate amount of \$45 million for voting purposes;
- HarbourVest will support the Debtor's pursuit of its pending Plan of Reorganization; and
- The parties shall exchange mutual releases.

⁵ The NAV for HarbourVest's 49.98% interest in HCLOF was estimated to be approximately \$22 million as of December 1, 2020.

See generally Morris Dec. Exhibit 1.

BASIS FOR RELIEF REQUESTED

33. Bankruptcy Rule 9019 governs the procedural prerequisites to approval of a settlement, providing that:

On motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement. Notice shall be given to creditors, the United States trustee, the debtor, and indenture trustees as provided in Rule 2002 and to any other entity as the court may direct.

FED. R. BANKR. P. 9019(a).

34. Settlements in bankruptcy are favored as a means of minimizing litigation, expediting the administration of the bankruptcy estate, and providing for the efficient resolution of bankruptcy cases. *See Myers v. Martin (In re Martin)*, 91 F.3d 389, 393 (3d Cir. 1996); *Rivercity v. Herpel (In re Jackson Brewing Co.)*, 624 F.2d 599, 602 (5th Cir. 1980). Pursuant to Bankruptcy Rule 9019(a), a bankruptcy court may approve a compromise or settlement as long as the proposed settlement is fair, reasonable, and in the best interest of the estate. *See In re Age Ref. Inc.*, 801 F.3d 530, 540 (5th Cir. 2015). Ultimately, “approval of a compromise is within the sound discretion of the bankruptcy court.” *See United States v. AWECO, Inc. (In re AWECO, Inc.)*, 725 F.2d 293, 297 (5th Cir. 1984); *Jackson Brewing*, 624 F.2d at 602–03.

35. In making this determination, the United States Court of Appeals for the Fifth Circuit applies a three-part test, “with a focus on comparing ‘the terms of the compromise with the rewards of litigation.’” *Official Comm. of Unsecured Creditors v. Cajun Elec. Power Coop. (In re Cajun Elec. Power Coop.)*, 119 F.3d 349, 356 (5th Cir. 1997) (citing *Jackson Brewing*, 624 F.2d at 602). The Fifth Circuit has instructed courts to consider the following factors: “(1) The probability of success in the litigation, with due consideration for the uncertainty of law and fact, (2) The complexity and likely duration of the litigation and any

attendant expense, inconvenience and delay, and (3) All other factors bearing on the wisdom of the compromise.” *Id.* Under the rubric of the third factor referenced above, the Fifth Circuit has specified two additional factors that bear on the decision to approve a proposed settlement. First, the court should consider “the paramount interest of creditors with proper deference to their reasonable views.” *Id.*; *Conn. Gen. Life Ins. Co. v. United Cos. Fin. Corp. (In re Foster Mortgage Corp.)*, 68 F.3d 914, 917 (5th Cir. 1995). Second, the court should consider the “extent to which the settlement is truly the product of arms-length bargaining, and not of fraud or collusion.” *Age Ref. Inc.*, 801 F.3d at 540; *Foster Mortgage Corp.*, 68 F.3d at 918 (citations omitted).

36. There is ample basis to approve the proposed Settlement Agreement based on the Rule 9019 factors set forth by the Fifth Circuit.

37. First, although the Debtor believes that it has valid defenses to the HarbourVest Claims, there is no guarantee that the Debtor would succeed in its litigation with HarbourVest. Indeed, to establish its defenses, the Debtor would be required to rely, at least in part, on the credibility of witnesses whose veracity has already been called into question by this Court. Moreover, it will be difficult to dispute that the Transfers precipitated the Acis Bankruptcy, and, ultimately, the imposition of the Bankruptcy Court’s TRO that restricted HCLOF’s ability to reset or redeem the CLOs and that is at the core of the HarbourVest Claims.

38. The second factor—the complexity, duration, and costs of litigation—also weighs heavily in favor of approving the Settlement Agreement. As this Court is aware, the events forming the basis of the HarbourVest Claims—including the Terry Litigation and Acis Bankruptcy—proceeded *for years* in this Court and in multiple other forums, and has already cost the Debtor’s estate millions of dollars in legal fees. If the Settlement Agreement is not approved, then the parties will expend significant resources litigating a host of fact-intensive

issues including, among other things, the substance and materiality of the Debtor's alleged fraudulent statements and omissions and whether HarbourVest reasonably relied on those statements and omissions.

39. Third, approval of the Settlement Agreement is justified by the paramount interest of creditors. Specifically, the settlement will enable the Debtor to: (a) avoid incurring substantial litigation costs; (b) avoid the litigation risk associated with HarbourVest's \$300 million claim; and (c) through the plan support provisions, increase the likelihood that the Debtor's pending plan of reorganization will be confirmed.

40. Finally, the Settlement Agreement was unquestionably negotiated at arm's-length. The terms of the settlement are the result of numerous, ongoing discussions and negotiations between the parties and their counsel and represent neither party's "best case scenario." Indeed, the Settlement Agreement should be approved as a rational exercise of the Debtor's business judgment made after due deliberation of the facts and circumstances concerning HarbourVest's Claims.

NO PRIOR REQUEST

41. No previous request for the relief sought herein has been made to this, or any other, Court.

NOTICE

42. Notice of this Motion shall be given to the following parties or, in lieu thereof, to their counsel, if known: (a) counsel for HarbourVest; (b) the Office of the United States Trustee; (c) the Office of the United States Attorney for the Northern District of Texas; (d) the Debtor's principal secured parties; (e) counsel to the Committee; and (f) parties requesting notice pursuant to Bankruptcy Rule 2002. The Debtor submits that, in light of the nature of the relief requested, no other or further notice need be given.

PACHULSKI STANG ZIEHL & JONES LLP

-and-

/s/ Zachery Z. Annable

Counsel for the Debtor and Debtor-in-Possession

EXHIBIT 3

005135

SETTLEMENT AGREEMENT

This Settlement Agreement (the “Agreement”) is entered into as of December 23, 2020, between Highland Capital Management, L.P. (the “Debtor”), on the one hand, and HarbourVest 2017 Global Fund L.P., HarbourVest 2017 Global AIF L.P., HarbourVest Dover Street IX Investment L.P., HV International VIII Secondary L.P., HarbourVest Skew Base AIF L.P., and HarbourVest Partners L.P. (each, a “HarbourVest Party,” and collectively, “HarbourVest”), on the other hand. Each of the foregoing are sometimes referred to herein collectively as the “Parties” and individually as a “Party.”

RECITALS

WHEREAS, on October 16, 2019 (the “Petition Date”), the Debtor filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code (the “Bankruptcy Case”) in the Bankruptcy Court for the District of Delaware, Case No. 19-12239 (CSS) (the “Delaware Bankruptcy Court”);

WHEREAS, on December 4, 2019, the Delaware Bankruptcy Court entered an order transferring venue of the Debtor’s case to the Bankruptcy Court for the Northern District of Texas, Dallas Division, Case No. 19-34054-sgj (the “Bankruptcy Court”);

WHEREAS, prior to the Petition Date, HarbourVest invested in Highland CLO Funding, Ltd. f/k/a Acis Loan Funding, Ltd. (“HCLOF”) and acquired an a 49.98% ownership interest in HCLOF (the “HarbourVest Interests”);

WHEREAS, the portfolio manager for HCLOF is Highland HCF Advisor, Ltd., a subsidiary of the Debtor;

WHEREAS, on April 8, 2020, HarbourVest filed proofs of claim in the Bankruptcy Case, which are listed on the Debtor’s claims register as claim numbers 143, 147, 149, 150, 153, and 154 (the “HarbourVest Claims”), asserting claims against the Debtor relating to its investment in HCLOF;

WHEREAS, on July 30, 2020, the Debtor filed the *Debtor’s First Omnibus Objection to Certain (a) Duplicate Claims; (b) Overstated Claims; (c) Late-Filed Claims; (d) Satisfied Claims; (e) No Liability Claims; and (f) Insufficient-Documentation Claims* [**Docket No. 906**], in which the Debtor objected to the HarbourVest Claims;

WHEREAS, on September 11, 2020, HarbourVest filed the *HarbourVest Response to Debtor’s First Omnibus Objection to Creation (a) Duplicate Claims; (b) Overstated Claims; (c) Late-Filed Claims; (d) Satisfied Claims; (e) No Liability Claims; and (f) Insufficient-Documentation Claims* [**Docket No. 1057**] (the “HarbourVest Response”);

WHEREAS, on October 18, 2020, HarbourVest filed the *Motion of HarbourVest Pursuant to Rule 3018(a) of the Federal Rules of Bankruptcy Procedure for Temporary Allowance of Claims for Purposes of Voting to Accept or Reject the Plan* [**Docket No. 1207**] (the “3018 Motion” and together with the HarbourVest Response, the “HarbourVest Pleadings”);

WHEREAS, in the HarbourVest Pleadings, HarbourVest asserted, among other things, that the HarbourVest Claims included claims against the Debtor arising from fraudulent inducement, fraudulent concealment, fraudulent misrepresentation, breach of fiduciary duty, breach of securities laws, and misuse of assets and sought damages in excess of \$300,000,000;

WHEREAS, the Debtor disputes the HarbourVest Claims;

WHEREAS, on November 24, 2020, the Debtor filed the *Fifth Amended Plan of Reorganization for Highland Capital Management, L.P.* [**Docket No. 1472**] (as amended, the “Plan”).¹

WHEREAS, the Parties desire to enter into this Agreement which incorporates, formalizes, and finalizes the full and final resolution of the HarbourVest Claims and HarbourVest Pleadings; and

WHEREAS, this Agreement will be presented to the Bankruptcy Court for approval pursuant to **Federal Rule of Bankruptcy Procedure 9019** (“Rule 9019”).

NOW THEREFORE, in consideration of the above recitals, the covenants, conditions, and promises made herein, and other good and valuable consideration, the receipt of which is hereby acknowledged, the Parties agree as follows:

1. Settlement of Claims.

(a) In full and complete satisfaction of the HarbourVest Claims, HarbourVest will receive:

(i) an allowed, nonpriority general unsecured claim in the aggregate amount of \$45,000,000 (the “Allowed GUC Claim”); and

(ii) an allowed subordinated claim in the aggregate amount of \$35,000,000 (the “Allowed Subordinated Claim” and together with the Allowed GUC Claim, the “Allowed Claims”).

(b) On the Effective Date, HarbourVest will transfer all of its rights, title, and interest in the HarbourVest Interests to the Debtor or its nominee pursuant to the terms of the *Transfer Agreement for Ordinary Shares of Highland CLO Funding, Ltd.*, attached hereto as Exhibit A (the “Transfer Agreements”) and the Debtor or its nominee will become a shareholder of HCLOF with respect to the HarbourVest Interests. The terms of the Transfer Agreements are incorporated into this Agreement by reference.

2. Releases.

(a) Upon the Effective Date, and to the maximum extent permitted by law, each HarbourVest Party on behalf of itself and each of its current and former advisors, trustees, directors, officers, managers, members, partners, employees, beneficiaries, shareholders, agents,

¹ All capitalized terms used but not defined herein shall have the meanings given to them in the Plan.

participants, subsidiaries, parents, successors, designees, and assigns hereby forever, finally, fully, unconditionally, and completely releases, relieves, acquits, remises, and exonerates, and covenants never to sue, the Debtor, HCLOF, HCLOF's current and former directors, and the Debtor's current and former advisors, trustees, directors, officers, managers, members, partners, employees, beneficiaries, shareholders, agents, participants, subsidiaries, parents, affiliates, successors, designees, and assigns, except as expressly set forth below (the "Debtor Released Parties"), for and from any and all claims, debts, liabilities, demands, obligations, promises, acts, agreements, liens, losses, costs and expenses (including, without limitation, attorney's fees and related costs), damages, injuries, suits, actions, and causes of action of whatever kind or nature, whether known or unknown, suspected or unsuspected, matured or unmatured, liquidated or unliquidated, contingent or fixed, at law or in equity, statutory or otherwise, including, without limitation, any claims, defenses, and affirmative defenses, whether known or unknown, including, without limitation, those which were or could have been asserted in, in connection with, or with respect to the Bankruptcy Case (collectively, the "HarbourVest Released Claims").

(b) Upon the Effective Date, and to the maximum extent permitted by law, the Debtor hereby forever, finally, fully, unconditionally, and completely releases, relieves, acquits, remises, and exonerates, and covenants never to sue (i) each HarbourVest Party and (ii) each HarbourVest Party's current and former advisors, trustees, directors, officers, managers, members, partners, employees, beneficiaries, shareholders, agents, participants, subsidiaries, parents, affiliates, successors, designees, and assigns (the "HarbourVest Released Parties"), for and from any and all claims, debts, liabilities, demands, obligations, promises, acts, agreements, liens, losses, costs and expenses (including, without limitation, attorney's fees and related costs), damages, injuries, suits, actions, and causes of action of whatever kind or nature, whether known or unknown, suspected or unsuspected, matured or unmatured, liquidated or unliquidated, contingent or fixed, at law or in equity, statutory or otherwise, including, without limitation, any claims, defenses, and affirmative defenses, whether known or unknown, which were or could have been asserted in, in connection with, or with respect to the Bankruptcy Case (collectively, the "Debtor Released Claims"); *provided, however*, that notwithstanding anything herein to the contrary, the release contained in this Section 2(b) will apply to the HarbourVest Released Parties set forth in subsection (b)(ii) only with respect to Debtor Released Claims arising from or relating to HarbourVest's ownership of the HarbourVest Interests.

(c) Notwithstanding anything in this Agreement to the contrary, the releases set forth herein will not apply with respect to (i) the Allowed Claims, (ii) the claims of Charlotte Investor IV, L.P., or (iii) the duties, rights, or obligations of any Party under this Agreement or the Transfer Agreements.

3. **Agreement Subject to Bankruptcy Court Approval.** The effectiveness of this Agreement and the Parties' obligations hereunder are conditioned in all respects on the approval of this Agreement by the Bankruptcy Court. The Parties agree to cooperate and use reasonable efforts to have this Agreement approved by the Bankruptcy Court. The "Effective Date" will be the date of an order entered by the Bankruptcy Court approving this Agreement pursuant to a motion filed under Rule 9019.

4. **Representations and Warranties.** Subject in all respects to Section 3 hereof:

(a) each HarbourVest Party represents and warrants that (i) it has full authority to enter into this Agreement and to release the HarbourVest Released Claims and has not sold, transferred, or assigned any HarbourVest Released Claim to any other person or entity, (ii) no person or entity other than such HarbourVest Party has been, is, or will be authorized to bring, pursue, or enforce any HarbourVest Released Claim on behalf of, for the benefit of, or in the name of (whether directly or derivatively) of such HarbourVest Party; and (iii) HarbourVest owns all of the HCLOF Interests free and clear of any claims or interests; and

(b) the Debtor represents and warrants to HarbourVest that (i) it has full authority to enter into this Agreement and to release the Debtor Released Claims and (ii) no person or entity other than the Debtor has been, is, or will be authorized to bring, pursue, or enforce any Debtor Released Claim on behalf of, for the benefit of, or in the name of (whether directly or derivatively) of the Debtor Party.

5. **Plan Support.**

(a) Each HarbourVest Party hereby agrees that it will (a) vote all HarbourVest Claims held by such HarbourVest Party to accept the Plan, by delivering its duly executed and completed ballots accepting the Plan on a timely basis; and (b) not (i) change, withdraw, or revoke such vote (or cause or direct such vote to be changed withdrawn or revoked); (ii) exercise any right or remedy for the enforcement, collection, or recovery of any claim against the Debtor except in a manner consistent with this Agreement or the Plan, (iii) object to, impede, or take any action other action to interfere with, delay or postpone acceptance or confirmation of the Plan; (iv) directly or indirectly solicit, propose, file, support, participate in the formulation of or vote for, any restructuring, sale of assets (including pursuant to **11 U.S.C. § 363**), merger, workout, or plan of reorganization of the Debtor other than the Plan; or (v) otherwise take any action that would in any material respect interfere with, delay, or postpone the consummation of the Plan; provided, however, that such vote may be revoked (and, upon such revocation, deemed void ab initio) by such HarbourVest Party at any time following the termination of this agreement or the occurrence of a Support Termination Event (it being understood that any termination of this agreement shall entitle each HarbourVest Party to change its vote in accordance with section 1127(d) of the Bankruptcy Code), notwithstanding any voting deadline established by the Bankruptcy Court including without limitation the January 5, 2021, 5:00 p.m. (prevailing Central Time) deadline established by the *Order Approving Form of Ballots, Voting Deadline and Solicitation Procedures* [**Docket No. 1476**].

(b) In full resolution of the 3018 Motion, HarbourVest will have a general unsecured claim for voting purposes only in the amount of \$45,000,000.

(c) The obligations of the HarbourVest Parties under this Section 5 shall automatically terminate upon the occurrence of any of the following (each a “Support Termination Event”): (i) the effective date of the Plan, (ii) the withdrawal of the Plan, (iii) the entry of an order by the Bankruptcy Court (A) converting the Bankruptcy Case to a case under chapter 7 of the Bankruptcy Code or (B) appointing an examiner with expanded powers beyond those set forth in sections 1106(a)(3) and (4) of the Bankruptcy Code or a trustee in Bankruptcy

Case, or (iv) the failure of the Court to enter an order approving the terms of this Agreement and the settlement described herein pursuant to Rule 9019 prior to confirmation of the Plan.

6. **No Admission of Liability.** The Parties acknowledge that there is a bona fide dispute with respect to the HarbourVest Claims. Nothing in this Agreement will imply, an admission of liability, fault or wrongdoing by the Debtor, HarbourVest, or any other person, and the execution of this Agreement does not constitute an admission of liability, fault, or wrongdoing on the part of the Debtor, HarbourVest, or any other person.

7. **Successors-in-Interest.** This Agreement shall be binding upon and shall inure to the benefit of each of the Parties and their successors, and assigns.

8. **Notice.** Each notice and other communication hereunder will be in writing and will be sent by email and delivered or mailed by registered mail, receipt requested, and will be deemed to have been given on the date of its delivery, if delivered, and on the fifth full business day following the date of the mailing, if mailed to each of the Parties thereto at the following respective addresses or such other address as may be specified in any notice delivered or mailed as set forth below:

HARBOURVEST

HarbourVest Partners L.P.
Attention: Michael J. Pugatch
One Financial Center
Boston, MA 02111
Telephone No. 617-348-3712
E-mail: mpugatch@harbourvest.com

with a copy (which shall not constitute notice) to:

Debevoise & Plimpton LLP
Attention: M. Natasha Labovitz, Esq.
919 Third Avenue
New York, NY 10022
Telephone No. 212-909-6649
E-mail: nlabovitz@debevoise.com

THE DEBTOR

Highland Capital Management, L.P.
300 Crescent Court, Suite 700
Dallas, Texas 75201
Attention: James P. Seery, Jr.
Telephone No.: 972-628-4100
Facsimile No.: 972-628-4147
E-mail: jpseeryjr@gmail.com

with a copy (which shall not constitute notice) to:

Pachulski Stang Ziehl & Jones LLP
Attention: Jeffrey Pomerantz, Esq.
10100 Santa Monica Blvd., 13th Floor
Los Angeles, CA 90067
Telephone No.: 310-277-6910
Facsimile No.: 310-201-0760
E-mail: jpomerantz@pszjlaw.com

9. **Advice of Counsel.** Each Party represents that it has: (a) been adequately represented by independent legal counsel of its own choice, throughout all of the negotiations that preceded the execution of this Agreement; (b) executed this Agreement upon the advice of such counsel; (c) read this Agreement, and understands and assents to all the terms and conditions contained herein without any reservations; and (d) had the opportunity to have this Agreement and all the terms and conditions contained herein explained by independent counsel, who has answered any and all questions asked of such counsel, or which could have been asked of such counsel, including, but not limited to, with regard to the meaning and effect of any of the provisions of this Agreement.

10. **Entire Agreement.** This Agreement and the Transfer Agreement contain the entire agreement and understanding concerning the subject matter of this Agreement, and supersede and replace all prior negotiations and agreements, written or oral and executed or unexecuted, concerning such subject matter. Each of the Parties acknowledges that no other Party, nor any agent of or attorney for any such Party, has made any promise, representation or warranty, express or implied, written or oral, not otherwise contained in this Agreement to induce any Party to execute this Agreement. The Parties further acknowledge that they are not executing this Agreement in reliance on any promise, representation or warranty not contained in this Agreement, and that any such reliance would be unreasonable. This Agreement will not be waived or modified except by an agreement in writing signed by each Party or duly authorized representative of each Party.

11. **No Party Deemed Drafter.** The Parties acknowledge that the terms of this Agreement are contractual and are the result of arms'-length negotiations between the Parties and their chosen counsel. Each Party and its counsel cooperated in the drafting and preparation of this Agreement. In any construction to be made of this Agreement, the Agreement will not be construed against any Party.

12. **Future Cooperation.** The Parties agree to cooperate and execute such further documentation as is reasonably necessary to effectuate the intent of this Agreement.

13. **Counterparts.** This Agreement may be executed in counterparts with the same force and effect as if executed in one complete document. Each Party's signature hereto will signify acceptance of, and agreement to, the terms and provisions contained in this Agreement. Photographic, electronic, and facsimile copies of signed counterparts may be used in lieu of the originals of this Agreement for any purpose.

14. **Governing Law; Venue; Attorneys' Fees and Costs.** The Parties agree that this Agreement will be governed by and will be construed according to the laws of the State of Texas without regard to conflict-of-law principles. Each of the Parties hereby submits to the exclusive jurisdiction of the Bankruptcy Court during the pendency of the Bankruptcy Case and thereafter to the exclusive jurisdiction of the state and federal courts located in the Northern District of Texas, Dallas Division, with respect to any disputes arising from or out of this Agreement. In any action to enforce this Agreement, the prevailing party shall be entitled to recover its reasonable and necessary attorneys' fees and costs (including experts).

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IT IS HEREBY AGREED.

HIGHLAND CAPITAL MANAGEMENT, L.P.

By: /s/ James P. Seery, Jr.
Name: James P. Seery, Jr.
Its: CEO/CRO

HarbourVest 2017 Global Fund L.P., by HarbourVest 2017 Global Associates L.P., its General Partner, by HarbourVest GP LLC, its General Partner, by HarbourVest Partners, LLC, its Managing Member

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

HarbourVest 2017 Global AIF L.P., by HarbourVest Partners (Ireland) Limited, its Alternative Investment Fund Manager, by HarbourVest Partners L.P., its Duly Appointed Investment Manager, by HarbourVest Partners, LLC, its General Partner

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

HarbourVest Dover Street IX Investment L.P., by HarbourVest Partners L.P., its Duly Appointed Investment Manager, by HarbourVest Partners, LLC, its General Partner

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

HarbourVest Partners L.P., on behalf of funds and accounts under management, by HarbourVest Partners, LLC, its General Partner

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

**HarbourVest Skew Base AIF L.P., by HarbourVest Partners (Ireland) Limited, its
Alternative Investment Fund Manager, by HarbourVest Partners L.P., its Duly Appointed
Investment Manager, by HarbourVest Partners, LLC, its General Partner**

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

**HV International VIII Secondary L.P., by HIPEP VIII Associates L.P., its General
Partner, by HarbourVest GP LLC, its General Partner, by HarbourVest Partners, LLC,
its Managing Member**

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

Exhibit A

TRANSFER AGREEMENT
FOR ORDINARY SHARES OF
HIGHLAND CLO FUNDING, LTD.

This Transfer Agreement, dated as of December [REDACTED], 2020 (this “**Transfer Agreement**”), is entered into by and among Highland CLO Funding, Ltd. (the “**Fund**”), Highland HCF Advisor, Ltd. (the “**Portfolio Manager**”), HCMLP Investments, LLC (the “**Transferee**”) and each of the following: HarbourVest Dover Street IX Investment L.P., HarbourVest 2017 Global AIF L.P., HarbourVest 2017 Global Fund L.P., HV International VIII Secondary L.P., and HarbourVest Skew Base AIF L.P. (collectively, the “**Transferors**”).

WHEREAS, each Transferor is the record, legal and beneficial owner of the number of ordinary shares (“**Shares**”) of the Fund set forth opposite such Transferor’s name on Exhibit A hereto (with respect to each Transferor, the “**Transferred Shares**”).

WHEREAS the Transferee is an affiliate and wholly owned subsidiary of Highland Capital Management, L.P. (“**HCMLP**”) which is one of the initial members of the Fund.

WHEREAS, each Transferor wishes to transfer and assign 100% of its rights, title and interest as a shareholder in the Fund, including the Transferred Shares (the “**Interest**”) on the terms set forth in this Transfer Agreement.

WHEREAS, subject to and in connection with the approval of that certain Settlement Agreement, dated on or about the date hereof, by and among HCMLP and the Transferors (the “**Settlement Agreement**”), the Transferee desires that the Interest be transferred to Transferee and that thereafter the Transferee will become a Shareholder and the Transferors will no longer be Shareholders.

WHEREAS, the Portfolio Manager desires to consent to such transfers and to the admission of Transferee as a Shareholder on the terms set forth herein, and the Transferors and Transferee agree to such terms.

WHEREAS, the Fund desires to amend its records to reflect the foregoing transfers.

NOW, THEREFORE, the parties hereto agree as follows:

1. Transfer of Shares and Advisory Board

- a. Each Transferor hereby transfers and assigns all of its rights, title, and interest in its Interest to the Transferee, and the Transferee wishes to be admitted to the Fund as a Shareholder.
- b. In connection with the transfer of the Interest as contemplated herein, the Transferee shall be granted the right to appoint a representative to the Fund’s advisory board (the “**Advisory Board**”) to replace the Transferors’ appointed representative to the Advisory Board.

- c. Transferee hereby assumes all of Transferor's rights and obligations in respect of the Interest effective as of the Effective Date (as defined below) and acknowledge that thereafter Transferee shall be subject to the applicable terms and provisions of the Members' Agreement dated as of November 15, 2017 (the "**Members' Agreement**"), the Articles of Incorporation adopted November 15, 2017 (the "**Articles**") and the Subscription and transfer Agreement, dated as of November 15, 2017 among each Transferor, the Fund and the Portfolio Manager (the "**Subscription Agreement**", and together with the Members' Agreement and the Articles, the "**Fund Agreements**") with respect to the Interest. Transferee does not assume any liability or responsibility for any obligations or liabilities incurred by any Transferor prior to the Effective Date of the transfer.
 - d. Following the transfer, each Transferor shall have no further rights or obligations to any party hereunder in respect of the Interest under the Fund Agreements.
 - e. This Transfer Agreement, and the parties' obligations hereunder, are conditioned in all respects on the approval by the Bankruptcy Court for the Northern District of Texas, Dallas Division pursuant to **Federal Rule of Bankruptcy Procedure 9019** of (i) this Transfer Agreement and (ii) the Settlement Agreement, and each of the parties agree that no further action shall be required from any party for the transfer of the Interest to be effective except as described herein.
2. Transferee's Representations and Warranties. The Transferee represents and warrants to the Transferors, the Portfolio Manager, and the Fund as follows:
- a. This Transfer Agreement constitutes a valid and binding obligation of the Transferee, enforceable against it in accordance with its terms;
 - b. This Transfer Agreement has been duly and validly executed and delivered by or on behalf of the Transferee and such execution and delivery have been duly authorized by all necessary trust action of the Transferee;
 - c. The Transferee acknowledges receipt of, has read, and is familiar with, the Fund's Offering Memorandum for Placing Shares dated November 15, 2017 (the "**Offering Memorandum**") and the Fund Agreements;
 - d. The Transferee hereby accepts and receives the Interest from the Transferors for investment, and not with a view to the sale or distribution of any part thereof, and the Transferee has no present intention of selling, granting participations in, or otherwise distributing the same, but subject nevertheless to any requirement of law that the disposition of the Transferee's property shall at all times be within such Transferee's control; and
 - e. The Transferee is an "Eligible U.S. Investor" as defined in the Offering Memorandum.

3. Transferors' Representations and Warranties. Each Transferor represents and warrants to the Transferee, the Portfolio Manager, and the Fund as follows:
 - a. This Transfer Agreement constitutes a valid and binding obligation of the Transferor, enforceable against it in accordance with its terms;
 - b. This Transfer Agreement has been duly authorized, and duly and validly executed and delivered by the Transferor and such execution and delivery have been duly authorized by all necessary action of the Transferor; and
 - c. As of the date hereof, the Transferor has good and valid title to the Transferor's Interest, free and clear of any liens, vesting requirements or claims by others.
4. Consent to Transfer. Based in part on the representations and warranties of the Transferors and the Transferee which are included herein, and on the terms contained herein, the Portfolio Manager and the Fund hereby consent to the transfers of the Interest, the admission of the Transferee as a Shareholder and the Transferee's appointment of a representative to the Advisory Board, the Portfolio Manager's execution of this Transfer Agreement constituting its prior written consent to the transfers of the Interest for the purposes of article 18.1 of the Articles and this Transfer Agreement constituting express notice in writing to the Fund of the assignment set out at clause 1(c) above for the purposes of the Law of Property (Miscellaneous Provisions) (Guernsey) Law, 1979 (as amended).
5. Completion: As of the date of approval by the Bankruptcy Court for the Northern District of Texas, Dallas Division pursuant to Federal Rule of Bankruptcy Procedure 9019 of (i) this Transfer Agreement and (ii) the Settlement Agreement (the "**Effective Date**"):
 - a. each Transferor shall deliver or cause to be delivered to the Transferee a transfer instrument relating to the Transferred Shares duly executed and completed by that Transferor in favor of the Transferee; and
 - b. the Transferee shall deliver to the Transferors and the Fund a duly executed and dated Adherence Agreement (as defined in the Members' Agreement).

Prior to the Effective Date the Transferee shall procure that:

 - c. the board of directors of the Fund shall hold a meeting at which the transfer of the Shares to the Transferee shall be approved and registration in the register of members of the Fund shall be effected on the Effective Date.
6. Miscellaneous.
 - a. Each of the parties hereto agree to execute any further instruments and perform any further acts which are or may become reasonably necessary to carry out the intent of this Transfer Agreement or are reasonably requested by the Portfolio Manager, the Fund or a Transferor to complete the transfer of the Interest.

- b. The parties to this Transfer Agreement acknowledge that the terms of this Transfer Agreement are the result of arms'-length negotiations between the parties and their respective counsel. Each party and its counsel cooperated in the drafting and preparation of this Transfer Agreement. In any construction to be made of this Transfer Agreement, the language or drafting of this Transfer Agreement will not be construed against any party.
- c. This Transfer Agreement shall be governed by, and construed and enforced in accordance with, the internal substantive laws of the state of Delaware, without giving effect to conflicts of law principles.
- d. The representations, warranties and covenants of the Transferors and the Transferee shall remain in full force and effect following the transfer of the Interest, and the Fund and the Portfolio Manager thereafter may rely on all such representations, warranties and covenants.
- e. This Transfer Agreement may be executed in multiple counterparts, each of which shall be deemed to be an original, but all of which together shall constitute one and the same instrument. Photographic, electronic, and facsimile copies of signed counterparts may be used in lieu of the originals of this Transfer Agreement for any purpose.
- f. Captions of sections have been added only for convenience and shall not be deemed to be a part of this Transfer Agreement.
- g. This Transfer Agreement is among the parties hereto. No Person that is not a party hereto shall have any right herein as a third-party beneficiary or otherwise except as expressly contemplated hereby.

[Remainder of Page Intentionally Blank]

[Additional Signatures on Following Page]

IN WITNESS WHEREOF, the undersigned have executed this Transfer Agreement as of the date first above written.

TRANSFERORS:

HarbourVest Dover Street IX Investment L.P.

By: HarbourVest Partners L.P., its Duly Appointed Investment Manager

By: HarbourVest Partners, LLC

By: _____

Name: Michael Pugatch

Title: Managing Director

HV International VIII Secondary L.P.

By: HIPEP VIII Associates L.P.
Its General Partner

By: HarbourVest GP LLC
Its General Partner

By: HarbourVest Partners, LLC
Its Managing Member

By: _____

Name: Michael Pugatch

Title: Managing Director

HarbourVest 2017 Global AIF L.P.

By: HarbourVest Partners (Ireland) Limited
Its Alternative Investment Fund Manager

By: HarbourVest Partners L.P.
Its Duly Appointed Investment Manager

By: HarbourVest Partners, LLC
Its General Partner

By: _____

Name: Michael Pugatch

Title: Managing Director

HarbourVest Skew Base AIF L.P.

By: HarbourVest Partners (Ireland) Limited
Its Alternative Investment Fund Manager

By: HarbourVest Partners L.P.
Its Duly Appointed Investment Manager

By: HarbourVest Partners, LLC
Its General Partner

By: _____

Name: Michael Pugatch

Title: Managing Director

HarbourVest 2017 Global Fund L.P.

By: HarbourVest 2017 Global Associates L.P.
Its General Partner

By: HarbourVest GP LLC
Its General Partner

By: HarbourVest Partners, LLC
Its Managing Member

By: _____

Name: Michael Pugatch

Title: Managing Director

Exhibit A

<u>Transferee Name</u>	<u>Number of Shares</u>	<u>Percentage</u>
HarbourVest Dover Street IX Investment L.P.	[REDACTED]	[REDACTED]
HarbourVest 2017 Global AIF L.P.	[REDACTED]	[REDACTED]
HarbourVest 2017 Global Fund L.P.	[REDACTED]	[REDACTED]
HV International VIII Secondary L.P.	[REDACTED]	[REDACTED]
HarbourVest Skew Base AIF L.P.	[REDACTED]	[REDACTED]

EXHIBIT 4

D. Michael Lynn
State Bar I.D. No. 12736500
John Y. Bonds, III
State Bar I.D. No. 02589100
John T. Wilson, IV
State Bar I.D. No. 24033344
Bryan C. Assink
State Bar I.D. No. 24089009
BONDS ELLIS EPPICH SCHAFFER JONES LLP
420 Throckmorton Street, Suite 1000
Fort Worth, Texas 76102
(817) 405-6900 telephone
(817) 405-6902 facsimile

ATTORNEYS FOR JAMES DONDERO

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE:	§	
	§	
HIGHLAND CAPITAL MANAGEMENT,	§	Case No. 19-34054
L.P.,	§	
	§	
Debtor.	§	Chapter 11

**JAMES DONDERO’S OBJECTION TO DEBTOR’S MOTION FOR ENTRY
OF AN ORDER APPROVING SETTLEMENT WITH HARBOURVEST
[Relates to Docket No. 1625]**

James Dondero (“Respondent”), a creditor, indirect equity security holder, and party in interest in the above-captioned bankruptcy case, hereby files this Objection to *Debtor’s Motion for Entry of an Order Approving Settlement with HarbourVest (Claim Nos. 143, 147, 149, 150, 153, 154)* [Docket No. 1625] (the “Motion”) filed by Highland Capital Management, L.P. (the “Debtor”). Through the Motion, the Debtor seeks approval of its compromise with HarbourVest 2017 Global Fund L.P., HarbourVest 2017 Global AIF L.P., HarbourVest Dover Street IX Investment L.P., HV International VIII Secondary L.P., HarbourVest Skew Base AIF L.P., and HarbourVest Partners L.P. (collectively, “HarbourVest”) pursuant to Rule 9019 of the Federal



Rules of Bankruptcy Procedure (the “Bankruptcy Rules”). In support of this objection, Respondent respectfully represents as follows:

I. INTRODUCTION

1. Under Bankruptcy Rule 9019, the Bankruptcy Court is tasked with making an independent judgment on the merits of a proposed settlement to ensure that the proposed settlement is “fair, equitable, and in the best interest of the estate.”¹ While Respondent recognizes the Debtor’s efforts in arranging a settlement, there are at least three significant issues with the terms of the settlement that merit denial of the Motion: (i) the proposed settlement is not reasonable or in the best interest of the estate given the weakness of the HarbourVest Claim (as hereinafter defined); (ii) the proposed settlement is a blatant attempt to purchase votes in support of Debtor’s plan by giving HarbourVest a significant claim to which it would not otherwise be entitled; and (iii) the proposed settlement seeks to improperly classify the HarbourVest Claim² in two separate classes in order to gerrymander an affirmative vote on its reorganization plan. Moreover, the proposed settlement does not satisfy the factors for approval fixed by case law. On information and belief, Debtor’s CEO/CRO, Mr. Seery, has previously asserted on multiple occasions that the HarbourVest Claim had no value and that the Debtor could resolve such claim for no more than \$5 million. While Respondent and Mr. Seery have had a number of disagreements in this case, Respondent agrees with Mr. Seery’s initial conclusion that the HarbourVest Claim is substantially without merit. Respondent understands that any settlement will not necessarily provide the best possible outcome for the Debtor, but in this instance the proposed settlement far exceeds the bounds of reasonableness and, on its face, is an attempt by the Debtor to purchase votes in favor

¹ See *In re Jackson Brewing Co.*, 624 F.2d 599, 602 (5th Cir. 1980).

² While HarbourVest has filed a number of claims, each filed claim is exactly the same except in the name of the claimant. See Claim Nos. 143, 147, 149, 150, 153, and 154.

of confirmation of its Plan. Given the Debtor's prior positions as to the merits of HarbourVest Claim it is necessary for the Court to closely scrutinize the settlement to determine why the Debtor now believes granting HarbourVest a net claim of nearly \$60 million³ resulting from HarbourVest's investment in a non-debtor entity (which was and is managed by a non-debtor) to be in the best interest of the estate. Upon close scrutiny, Respondent believes the Court will find that the proposed settlement is not reasonable or in the best interest of the estate and the Motion therefore should be denied.

II. BACKGROUND

2. On October 16, 2019 (the "Petition Date"), the Debtor filed a voluntary petition for relief under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code") in the U.S. Bankruptcy Court for the District of Delaware, Case No. 19-12239 (CSS) (the "Delaware Court").

3. On October 29, 2019, the Official Committee of Unsecured Creditors (the "Committee") was appointed by the U.S. Trustee in Delaware.

4. On December 4, 2019, the Delaware Court entered an order transferring venue of the Debtor's Bankruptcy Case to this Court [Docket No. 186].

5. On December 27, 2019, the Debtor filed that certain *Motion of the Debtor for Approval of Settlement with the Official Committee of Unsecured Creditors Regarding Governance of the Debtor and Procedures for Operations in the Ordinary Course* [Docket No. 281] (the "Settlement Motion"). This Court approved the Settlement Motion on January 9, 2020 [Docket No. 339] (the "Settlement Order").

³ The proposed settlement provides that HarbourVest shall receive an allowed general unsecured (Class 8) claim in the amount of \$45 million and an allowed subordinated general unsecured (Class 9) claim in the amount of \$35 million. As part of the settlement, HarbourVest will then transfer its entire interest in Highland CLO Funding, Ltd. ("HCLOF") to an entity to be designated by the Debtor. The Debtor states that the value of this interest is approximately \$22 million as of December 1, 2020.

6. In connection with the Settlement Order, an independent board of directors was appointed on January 9, 2020, for the Debtor's general partner, Strand Advisors, Inc. (the "Board"). The members of the Board are James P. Seery, Jr., John S. Dubel, and Russell F. Nelms.

7. On July 16, 2020, this Court entered an order authorizing the Debtor to employ James P. Seery, Jr. as Chief Executive Officer and Chief Restructuring Officer of the Debtor. *See* Docket No. 854.

8. On April 8, 2020, HarbourVest filed Proofs of Claim Numbers 143, 149, 149, 150, 153, and 154 (collectively, the "HarbourVest Claim")⁴.

9. On July 30, 2020, the Debtor filed *Debtor's First Omnibus Objection to Certain (A) Duplicate Claims; (B) Overstated Claims; (C) Late-Filed Claims; (D) Satisfied Claims; (E) No Liability Claims; and (F) Insufficient-Documentation Claims* [Docket No. 906] (the "Debtor Objection"), which contained an objection to the HarbourVest Claim.

10. On September 11, 2020, HarbourVest filed *HarbourVest Response to Debtor's First Omnibus Objection to Certain (A) Duplicate Claims; (B) Overstated Claims; (C) Late-Filed Claims; (D) Satisfied Claims; (E) No Liability Claims; and (F) Insufficient-Documentation Claims* [Docket No. 1057] (the "HarbourVest Response").

11. On December 23, 2020, the Debtor filed the Motion seeking approval of a proposed settlement of the HarbourVest Claim under Rule 9019. Docket No. 1625.

III. LEGAL STANDARD

12. The merits of a proposed compromise should be judged under the criteria set forth in *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414 (1968). *TMT Trailer* requires that a compromise must be "fair and equitable." *TMT Trailer*, 390

⁴ While HarbourVest has filed a number of claims, each filed claim is exactly the same except in the name of the claimant. *See* Claim Nos. 143, 147, 149, 150, 153, and 154.

U.S. at 424; *In re AWECO, Inc.*, 725 F.2d 293, 298 (5th Cir. 1984). The terms “fair and equitable,” commonly referred to as the “absolute priority rule,” mean that (i) senior interests are entitled to full priority over junior interests; and (ii) the compromise is reasonable in relation to the likely rewards of litigation. *In re Cajun Electric Power Coop.*, 119 F.3d 349, 355 (5th Cir. 1997); *In re Jackson Brewing Co.*, 624 F.2d 599, 602 (5th Cir. 1980).

13. In determining whether a proposed compromise is fair and equitable, a Court should consider the following factors:

- (i) the probabilities of ultimate success should the claim be litigated;
- (ii) the complexity, expense, and likely duration of litigating the claim;
- (iii) the difficulties of collecting a judgment rendered from such litigation; and,
- (iv) all other factors relevant to a full and fair assessment of the wisdom of the compromise.

TMT Trailer, 390 U.S. at 424.

14. In considering whether to approve a proposed compromise, the bankruptcy judge “may not simply accept the trustee’s word that the settlement is reasonable, nor may he merely ‘rubber stamp’ the trustee’s proposal.” *In re Am. Res. Corp.*, 841 F.2d 159, 162 (7th Cir. 1987). “[T]he bankruptcy judge must apprise himself of all facts necessary to evaluate the settlement and make an informed and independent judgment about the settlement.” *See TMT Trailer*, 390 U.S. at 424, 434.

15. While the trustee’s business judgment is entitled to a certain deference, “business judgment is not alone determinative of the issue of court approval.” *See In re Endoscopy Ctr. of S. Nev., LLC*, 451 B.R. 527, 536 (Bankr. D. Nev. 2011). Further, the business judgment rule does not provide a debtor with “unfettered freedom” to do as it wishes. *See In re Pilgrim’s Pride Corp.*, 403 B.R. 413, 426 (Bankr. N.D. Tex. 2009) (“[A]s a fiduciary holding its estate in trust and responsible

to the court, a debtor in possession must administer its case and conduct its business in a fashion amenable to the scrutiny to be expected from creditor and court oversight.”). The Court must conduct an “intelligent, objective and educated evaluation”⁵ of the proposed settlement “to ensure that the settlement is fair, equitable, and in the best interest of the estate and creditors.” *See In re Mirant Corp.*, 348 B.R. 725, 739 (Bankr. N.D. Tex. 2006) (quoting *Conn. Gen. Life Ins. Co. v. Foster Mortgage Corp. (In re Foster Mortgage Corp.)*, 68 F.3d 914, 917 (5th Cir. 1995)).

IV. ARGUMENT AND AUTHORITIES

16. As discussed in detail below, there are three significant issues with the terms of the settlement that merit denial of the Motion: (i) the proposed settlement is not reasonable or in the best interest of the estate given the weakness of the HarbourVest Claim; (ii) the proposed settlement is a blatant attempt to purchase votes in support of Debtor’s plan by giving HarbourVest a substantial claim to which it is not entitled; and (iii) the proposed settlement seeks to improperly classify HarbourVest’s one claim in two separate classes in order to gerrymander an affirmative vote on its reorganization plan. For these and certain additional reasons as discussed below, the Motion should be denied.

A. Through its Claim, HarbourVest Seeks to Revisit this Court’s Orders in the Acis Case

17. As an initial matter, through its proofs of claim, HarbourVest appears to be second guessing the Court’s judgment in the Chapter 11 case of Acis Capital Management, LP and Acis Capital Management GP, LLC (collectively, “Acis”) and seeking to revisit the Court’s orders entered in that case years ago. HarbourVest appears to be arguing that the TRO and injunction

⁵ *In re Jackson Brewing Co.*, 624 F.2d 599, 602 (5th Cir. 1980) (“To assure a proper compromise the bankruptcy judge, must be apprised of all the necessary facts for an intelligent, objective and educated evaluation. He must compare the terms of the compromise with the likely rewards of litigation.”).

entered in the Acis case that prevented redemptions or resets in the CLOs are now the root cause of the decrease in value of its investment in HCLOF.

18. Specifically, the claim states that HarbourVest incurred “financial harm resulting from, among other things (i) court orders in the Acis bankruptcy that prevented certain CLOs in which HCLOF was invested from being refinanced or reset and court orders that otherwise regulated the activity of HCLOF.”⁶

19. Essentially, HarbourVest is saying that the orders entered in the Acis case did not actually protect the investors and their investments, but instead were a triggering cause for the alleged diminution in value of its investment in HCLOF. Nevertheless, even though the value of HCLOF dropped dramatically only after the Effective Date of Acis’s Plan, years later and despite the lack of Debtor involvement in managing HarbourVest’s investment, HarbourVest now seeks to impute liability to the Debtor through a flimsy narrative designed to recoup investment losses unrelated to the Debtor and for which the Debtor owed HarbourVest no duty.

20. That HarbourVest now, years later, seeks to revisit this Court’s Acis orders raises a number of issues, including those as to HarbourVest’s involvement (or lack thereof) in the Acis case, whether the orders, Plan, or Confirmation Order in the Acis case may bar some of the relief requested by HarbourVest here, and questions related to the merits of the HarbourVest Claim and the legal grounds allegedly supporting it.

⁶ See Proof of Claim 143, para. 3 (“Due to the Acis bankruptcy and certain conduct alleged to have been undertaken by the Debtor (to whom Acis subcontracted its functions) and Debtor’s employees (who were officers, employees, and agents of Acis), the Claimant has suffered significant harm. Such harm includes, but is not limited to, financial harm resulting from, among other things (i) court orders in the Acis bankruptcy that prevented certain CLOs in which HCLOF was invested from being refinanced or reset and court orders that otherwise regulated the activity of HCLOF; and (ii) significant fees and expenses related to the Acis bankruptcy that were charged to HCLOF.”).

B. The HarbourVest Claim Lacks Merit and the Proposed Settlement is Not Reasonable

21. Based on the HarbourVest Claim and its filed response to the Debtor's objection, Respondent believes that the HarbourVest claim is meritless and the proposed settlement is not reasonable, fair and equitable, or in the best interest of the estate.

22. First, the proposed settlement is concerning particularly because HarbourVest's bare bones proof of claim contains very little in terms of allegations of specific conduct against the Debtor that would give rise to a \$60 million claim against this estate. While HarbourVest's response to the Debtor's claim objection is lengthy, it contains very little in real substance supporting its right to such a claim against the estate. The response also omits a number of key facts that are relevant and potentially fatal to its claim for damages against the Debtor's estate. Among them is the fact that Acis (and thereafter Reorganized Acis), along with Mr. Joshua Terry, managed HarbourVest's investment for years after it was made.⁷ Despite this fact, HarbourVest's alleged damages appear to be based largely on the difference between the value of its initial investment at confirmation of Acis's Plan and the current value of the investment—which amount was directly determined by the performance of the CLOs that Acis managed during this time.⁸ Neither the claim nor the response directly address the implications of Acis's management of the CLOs during the period following HarbourVest's investment. Nor does HarbourVest address or discuss performance of the CLOs, the market forces that may have caused HarbourVest's investment to lose value, or other factors influencing the current value of its investment. The

⁷ See, e.g., HarbourVest Proof of Claim 143, p. 5 ("The Claimant is a limited partner in one of the Debtor's managed vehicles, Highland CLO Funding, Ltd. ("HCLOF"). Acis Capital Management GP, L.L.C. and Acis Capital Management L.P. (together, "Acis"), the portfolio manager for HCLOF, filed for chapter 11 in the United States Bankruptcy Court for the Northern District of Texas (the "Court") on January 30, 2018.").

⁸ See HarbourVest Response, Docket No. 1057, para. 40 ("HarbourVest has been injured from the Investment: not only has the Investment failed to accrue value, its value plummeted. The Investment's current value is far less than HarbourVest's initial contribution.").

speculative nature of the damages and the lack of specificity of the HarbourVest Claim and the role of Acis in the loss of value to HarbourVest all call into question the reliability of the allegations and the legal basis for the claim amount awarded in the settlement.

23. Also absent from Harbourvest's papers is any discussion of any contract or agreement between (i) HarbourVest and the Debtor; and (ii) any agreement that was executed in conjunction with HarbourVest's initial investment. While the proof of claim references a number of agreements, there is no explanation in the claim or in HarbourVest's response to the Debtor's claim objection of how these agreements give rise to liability against the *Debtor*. For example, neither the claim nor the HarbourVest Response (which includes more than 600 pages of attachments) attach *any* written agreement between HarbourVest and any other party. While HarbourVest has alleged a number of claims sounding in tort, many of those claims cannot exist absent a contract or other express relationship between the parties. Moreover, the terms of the relevant contracts themselves likely contain a number of provisions that may call into question Debtor's liability or would be otherwise relevant to merits of the HarbourVest Claim. For example, HarbourVest in its papers appears to assert or imply that the Debtor made a number of false or fraudulent representations to solicit HarbourVest's investment, but then fails to discuss or even identify the applicable agreements it alleges it was induced into signing in connection with its investment (this despite the substantial value of the investment when the Acis plan was confirmed).

24. Given these issues, among many others, the HarbourVest Claim is unsustainable both from a liability and damages standpoint and there are many very high hurdles HarbourVest would have to clear in seeking to prove liability against the Debtor and in proving its damages. For a long period of time, its investment was managed by Acis and the investment's performance was directly tied to Acis's inadequate performance as portfolio manager. Further, the value of

C. The Proposed Settlement is an Improper Attempt by the Debtor to Purchase Votes in Support of its Plan and the Separate Classification of the HarbourVest Claim Constitutes Gerrymandering in Violation of 11 U.S.C. § 1122

27. Section 1122 of the Bankruptcy Code provides as follows:

(a) Except as provided in subsection (b) of this section, a plan may place a claim or an interest in a particular class only if such claim or interest is substantially similar to the other claims or interests of such class.

(b) A plan may designate a separate class of claims consisting only of every unsecured claim that is less than or reduced to an amount that the court approves as reasonable and necessary for administrative convenience.

11 U.S.C. § 1122.

28. “Chapter 11 requires classification of claims against a debtor for two reasons. Each class of creditors will be treated in the debtor's plan of reorganization based upon the similarity of its members' priority status and other legal rights against the debtor's assets. Proper classification is essential to ensure that creditors with claims of similar priority against the debtor's assets are treated similarly.” *In re Greystone III Joint Venture*, 995 F.2d 1274, 1277 (5th Cir. 1991).

29. “Section 1122 consequently must contemplate some limits on classification of claims of similar priority. A fair reading of both subsections suggests that ordinarily substantially similar claims, those which share common priority and rights against the debtor’s estate, should be placed in the same class.” *Id.* at 1278.

30. The Fifth Circuit has stated that there is “one clear rule that emerges from otherwise muddled caselaw on § 1122 claims classification: thou shalt not classify similar claims differently in order to gerrymander an affirmative vote on a reorganization plan.” *Id.* at 1279. The Court observed:

There must be some limit on a debtor’s power to classify creditors in such a manner. . . . Unless there is some requirement of keeping similar claims together, nothing would stand in the way of a debtor seeking out a few impaired creditors (or even one such creditor) who will vote for the plan and placing them in their own class.

In re Greystone III Joint Venture, 995 F.2d 1274, 1279 (5th Cir. 1991) (quoting *In re U.S. Truck Co.*, 800 F.2d 581, 586 (6th Cir. 1986)).

31. Here, the HarbourVest settlement and the classification of the HarbourVest Claim under the Plan blatantly violate the Fifth Circuit’s “one rule” concerning the classification of claims under section 1122. To the extent that HarbourVest even has a legitimate claim, not only should its claim be classified together with other unsecured creditors, its claim should be classified solely in one class. To allow the Debtor to do otherwise as proposed is improper gerrymandering in order to obtain a consenting class in express violation of section 1122.

D. There Are Other Reasons for the Court to Closely Scrutinize the Proposed Settlement that May Warrant Denial of the Motion

32. There are a number of other reasons for the Court to closely scrutinize the proposed settlement that may warrant denial of the Motion.

33. First, the granting to HarbourVest of a claim in the total amount of \$80 million potentially allows HarbourVest to achieve a significant windfall at the expense of other creditors and equity holders. The Debtor has asserted numerous times that the estate is solvent and, for this reason, the purported subordinated claim of \$35 million (if allowed and approved) may be worth just as much as its general unsecured claim. This is a huge figure in this case, outshined only by the Redeemer Committee, which has an actual arbitration award obtained after lengthy litigation. By contrast, the HarbourVest Claim contains only a few paragraphs of generalized allegations that essentially argue that the Debtor’s alleged actions related to the Acis bankruptcy, and this Court’s orders in the Acis case, are a “but for” cause of the loss of its investment. While the HarbourVest Response is lengthy, it lacks necessary details for the Court to determine whether HarbourVest *may* be entitled to the relief requested by the Motion. The other significant creditors in this case—*inter alia*, Redeemer, UBS and Acis—all had pending claims that were litigated. Nor is HarbourVest a trade creditor, vendor, or other contract counter-party of the Debtor. The HarbourVest Claim is thus uniquely situated in this case and, given the size and the nature of its

claims, should invite close scrutiny. Under these facts, the potential allowance of an \$80 million claim (less the value of its share in HCLOF, which may suffer by continued management by Acis) against the estate for an investment which was not held or managed by the Debtor would be a huge undue windfall.

34. Second, the Motion states that HarbourVest will vote its proposed allowed Class 8 (proposed at \$45 million) and Class 9 (proposed at \$35 million) claims in support of confirmation. There are at least two potential issues with this proposal. First, the deadline for parties to submit ballots was January 5, 2021, and as of the close of business on January 5, the HarbourVest Claim has not been allowed for voting purposes.⁹ Second, the Motion and proposed settlement agreement state that the HarbourVest Claim will be allowed for voting purposes only as a general unsecured claim in the amount of \$45 million. It is unclear how HarbourVest can, or would be authorized to, vote its purported Class 8 and 9 Claims in support of the Plan after the voting deadline and when the settlement provides only for a voting claim in Class 8.

35. Third, while the Motion addresses the factor of probability of success in the litigation, it does not discuss in detail the cost of doing so in relation to the amount to be paid to HarbourVest under the settlement or the likelihood that the Debtor will succeed in the litigation. In addition, unlike the claims filed by Acis and UBS, the HarbourVest Claim does not arise from pending litigation. At this point, relatively little litigation has occurred and the parties have not addressed threshold issues that might dramatically narrow the scope of the HarbourVest Claim. Rule 9019 requires an analysis as to whether the probability of success in litigation is outweighed by the consideration achieved under the settlement. *See In re Jackson Brewing Co.*, 624 F.2d 599, 602 (5th Cir. 1980) (The Court must “compare the terms of the compromise with the likely rewards

⁹ The hearing on the 3018 and 9019 motions are set concurrently with confirmation.

of litigation.”). Given the excessive amount to be paid under the settlement and the weakness of the HarbourVest Claim, this factor weighs in favor of denial of the Motion.

36. Fourth, it is unclear from the settlement papers whether the transfer by HarbourVest of its interest in HCLOF to the Debtor or an entity the Debtor designates will cause the value of the investment to be received by the Debtor’s estate. Further, the interest of HCLOF being conveyed under the proposed settlement may be subject to the Acis plan injunction, which could potentially prevent the Debtor’s estate from realizing the value of this interest. In the event the Court is inclined to approve the settlement, the order should make clear that the available value of the investment should be realized by the Debtor’s estate.

CONCLUSION

For the reasons set forth above, Respondent respectfully requests that the Court enter an order denying the Motion and providing Respondent such other and further relief to which he may be justly entitled.

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Dated: January 6, 2021

Respectfully submitted,

/s/ D. Michael Lynn

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that, on January 6, 2021, a true and correct copy of the foregoing document was served via the Court's CM/ECF system on counsel for the Debtor and on all other parties requesting or consenting to such service in this case.

/s/ Bryan C. Assink

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EXHIBIT 5

005171

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UNITED STATES BANKRUPTCY COURT FOR THE
 NORTHERN DISTRICT OF TEXAS
 DALLAS DIVISION

IN RE:	*	Chapter 11
	*	
	*	Case No. 19-34054sgj11
HIGHLAND CAPITAL MANAGEMENT, L.P.	*	
	*	
Debtor	*	

**OBJECTION TO DEBTOR’S MOTION FOR ENTRY OF AN ORDER APPROVING
 SETTLEMENT WITH HARBOURVEST (CLAIM NOS. 143, 147, 149, 150, 153, 154)
 AND AUTHORIZING ACTIONS CONSISTENT THEREWITH**

The Dugaboy Investment Trust and Get Good Trust (jointly, “Objectors”), submit this Objection for the purpose of objecting to the *Debtor’s Motion for Entry of an Order Approving Settlement with HarbourVest (Claim Nos. 143, 147, 149, 150, 153, 154) and Authorizing Actions Consistent Therewith* [Dkt. #1625] (the “Motion”) filed by Highland Capital Management, L.P. (the “Debtor”). Through the Motion, the Debtor seeks approval of its compromise with HarbourVest 2017 Global Fund L.P., HarbourVest 2017 Global AIF L.P., HarbourVest Dover Street IX Investment L.P., HV International VIII Secondary L.P., HarbourVest Skew Base AIF L.P., and HarbourVest Partners L.P. (collectively, “HarbourVest”) pursuant to Rule 9019 of the



Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”). In support of this objection, Objectors respectfully represent as follows:

I. INTRODUCTION

1. Objectors recognize that Courts favorably view settlements and, as a matter of course, generally approve settlements as being in the best interest of the bankruptcy estate. The settlement proposed herein, however, is different than other settlements inasmuch as it represents a 180 degree departure from the Debtor’s own analysis of the Claim of HarbourVest and the fact that the settlement is tied to HarbourVest approving the Debtor’s plan. Little or no information is provided by the Debtor as to why its initial analysis was flawed and what information or legal principal it discovered to change a zero claim into a massive claim that will have a significant impact on the recovery to creditors.

II. BACKGROUND

2. On October 16, 2019 (the “Petition Date”), the Debtor filed a voluntary petition for relief under chapter 11 of title 11 of the United States Code (the “Bankruptcy Code”) in the U.S. Bankruptcy Court for the District of Delaware, Case No. 19-12239 (CSS) (the “Delaware Court”).

3. On October 29, 2019, the Official Committee of Unsecured Creditors (the “Committee”) was appointed by the U.S. Trustee in Delaware.

4. On December 4, 2019, the venue of this case was transferred. [Dkt. #186].

5. On July 16, 2020, this Court entered an order authorizing the Debtor to employ James P. Seery, Jr. as Chief Executive Officer and Chief Restructuring Officer of the Debtor. [See Dkt. #854].

6. On April 8, 2020, HarbourVest filed Proofs of Claim Numbers 143, 149, 149, 150, 153, and 154 (collectively, the “HarbourVest Claim”)¹.

7. On July 30, 2020, the Debtor filed *Debtor’s First Omnibus Objection to Certain (A) Duplicate Claims; (B) Overstated Claims; (C) Late-Filed Claims; (D) Satisfied Claims; (E) No Liability Claims; and (F) Insufficient-Documentation Claims* [Dkt. #906] (the “Debtor Objection”), which contained an objection to the HarbourVest Claim.

8. On September 11, 2020, HarbourVest filed *HarbourVest Response to Debtor’s First Omnibus Objection to Certain (A) Duplicate Claims; (B) Overstated Claims; (C) Late-Filed Claims; (D) Satisfied Claims; (E) No Liability Claims; and (F) Insufficient-Documentation Claims* [Dkt. #1057] (the “HarbourVest Response”).

9. The Debtor, in its *Disclosure Statement for the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.* [Dkt. #1473 pgs. 40-41], described its position relative to the HarbourVest Claim as follows:

The Debtor intends to **vigorously** defend the HarbourVest Claims on various grounds The HarbourVest Entities invested approximately \$80,000,000.00 in HCLOF but seek an allowed claim in excess of 300 million dollars (after giving effect to treble damages for the alleged RICO violations)

10. On December 23, 2020, the Debtor filed the Motion seeking approval of a proposed settlement of the HarbourVest Claim under Rule 9019. [Dkt. # 1625].

11. The proposed settlement provides HarbourVest with the following:

- a. An allowed, general unsecured claim in the amount of \$45,000,000.00 [Dkt. #1625 pg. 9 pp.f]; and

¹ While HarbourVest has filed a number of claims, each filed claim is exactly the same except in the name of the claimant. See Claim Nos. 143, 147, 149, 150, 153, and 154.

- b. A \$35,000,000 claim in Class 9 [Dkt. #1625 pg. 9 pp.f].
12. An integral element of the settlement requires that HarbourVest will “support confirmation of the Debtor’s Plan including, but not limited to, voting its claims in support of the Plan.”
13. The settlement also contains a provision that HarbourVest will transfer its entire interest in HCLOF to an entity to be designated by the Debtor. It is unclear whether HarbourVest has a right to transfer the interest and secondly, what the Debtor will do with the interest [Dkt. #1625 pp.f].
14. The sole support for the Motion is the Declaration of John Morris [Dkt. #1631] which fails to account for the enormous change in the Debtor’s position between November 24, 2020 when the Disclosure Statement was approved and December 23, 2020 when the Motion was filed, a period of less than thirty (30) days.
15. The Declaration of John Morris [Dkt. #1631] also contains no information as to the potential cost of the litigation, whether HarbourVest can transfer the interest or reasons, other than conclusory reasons, as to why the settlement is beneficial to the estate. The Debtor makes the assertion that the interest it is acquiring was worth \$22,000,000.00 as of December 1, 2020 without advising as to the basis for the valuation. Is it a book value and, if not, what was the methodology employed to arrive at the valuation? The Court has no basis to evaluate the settlement without essential information as to 1) how the asset being acquired is valued; 2) can the Debtor acquire the interest; and 3) how will the Debtor bring value to the estate in connection with the interest inasmuch as the Debtor has discretion as to where to place the asset to be acquired.

A. LEGAL STANDARDS

- Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414 (1968).

B. ISSUES WITH THE SETTLEMENT

a) The settlement represents a radical change in the Debtor's position that was set forth in its Disclosure Statement. While the Debtor asserts that its position is

based on its fear of parties' oral testimony, the size of the transactions at issue make the case a document case, as opposed to who said what, when and how. A review of the applicable documents to determine whether they support the Debtor's initial position is warranted, as opposed to stating that the case is based upon the credibility of a witness. This settlement is not the settlement of an automobile accident where the parties are disputing who ran a red light;

- b) The settlement requires HarbourVest to support and vote in favor of the Debtor's Plan. On its face this appears to be vote buying. The settlement should not be conditioned upon HarbourVest's support or non-support of the Plan and its vote in favor or against the Plan; and
- c) No information is provided as to whether the Debtor can acquire the interest in HCLOF, liquidate the interest, who will receive the interest, or how will the estate benefit from the interest to be acquired.

CONCLUSION

The settlement with HarbourVest has too many questions to be approved on the record before this Court and the parties, due to the Notice of the Motion, the holidays and the press of other litigation in this case, do not have the time to adequately investigate the propriety of the settlement.

January 8, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that on the 8th day of January, 2021, a copy of the above and foregoing *Objection To Debtor's Motion For Entry Of An Order Approving Settlement With Harbourvest (Claim Nos. 143, 147, 149, 150, 153, 154) And Authorizing Actions Consistent Therewith* has been served electronically to all parties entitled to receive electronic notice in this matter through the Court's ECF system as follows:

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EXHIBIT 6

005182

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ATTORNEYS FOR CLO HOLDCO, LTD.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In re:	§	
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	Case No. 19-34054-SGJ
	§	
Debtor.	§	Chapter 11
	§	

CLO HOLDCO, LTD.'S OBJECTION TO HARBOURVEST SETTLEMENT

TO THE HONORABLE STACEY G. JERNIGAN, U.S. BANKRUPTCY JUDGE:

CLO Holdco, Ltd. ("**CLO Holdco**") respectfully files this *Objection to Harbourvest Settlement* (the "**Harbourvest Settlement Objection**") which seeks entry of an order from this Court denying the Debtor's *Motion for Entry of an Order Approving Settlement with Harbourvest (Claims Nos. 143, 147, 149, 150, 153, 154) and Authorizing Actions Consistent Therewith* (the "**Harbourvest Settlement Motion**") for the reasons stated below. In support of the Harbourvest Settlement Objection, CLO Holdco respectfully states as follows:

I.
BACKGROUND

A. TRANSFERRING SHARES IN HCLOF



1. CLO Holdco owns 75,061,630.55 shares, or about 49.02% of Highland CLO Funding, Ltd. ("**HCLOF**"). Other shareholders include Harbourvest 2017 Global AIF L.P., Harbourvest Global Fund L.P., Harbourvest Dover Street IX Investment L.P., and Harbourvest Skew Base AIF L.P., and HV International VIII Secondary L.P. (collectively, "**Harbourvest**"). Harbourvest owns approximately 49.98% of HCLOF. The remaining 1% is owned by the Debtor and a five other investors.

2. HCLOF is governed by a *Members Agreement Relating to the Company* dated November 15, 2017 by and between each of the members of HCLOF, including Harbourvest, the Debtor, and CLO Holdco (the "**Member Agreement**"). A copy of that agreement is attached hereto as **Exhibit A**.

3. Section 6 of the Member Agreement addresses the "Transfer or Disposals of Shares." MEMBER AGREEMENT, § 6. The Member Agreement places strict restrictions on the sale or transfer of shares to entities other than the initial Member's own affiliates. *See id.* at §§ 6.1, 6.2. Before a Member can transfer its interests to a party other than its own affiliates it must: (i) obtain the prior written consent of the Portfolio Manager; and (ii) "offer to the other Members a right to purchase the Shares, on a pro rata basis with respect to their current Shares, at the same price (which must be cash) as such Shares are proposed to be purchased by the prospective third party purchaser pursuant to an irrevocable offer letter" (the "**Right of First Refusal**"). *Id.* As further stated in section 6.2 of the Member Agreement, "The other Members will have 30 days following receipt of the letter to determine whether to purchase their entire pro rata portion of the Shares proposed to be Transferred." *Id.* at § 6.2.

B. THE HARBOURVEST SETTLEMENT

4. On December 23, 2020, the Debtor filed the Harbourvest Settlement Motion. On the following day, the Debtor filed a copy of the Settlement Agreement referenced in the

Harbourvest Settlement Motion (the "**Settlement Agreement**") [Dkt. No. 3]. In the Settlement Agreement, Harbourvest represents and warrants that it is authorized to transfer its interest in HCLOF to the Transferee, HCMLP Investments, LLC (the "**Transferee**"). SETTLEMENT AGREEMENT, Ex. A. § 3. Further, the Transferee and Debtor agree to be bound by the terms and conditions of the Member Agreement. *Id.* at § 1.c.

5. In exchange for conveniently classified allowed claims under the Debtor's *Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.* (the "**Plan**") [Dkt. No. 1472], Harbourvest agrees to vote in favor of the Plan and to transfer all of its interests in HCLOF to the Transferee. SETTLEMENT AGREEMENT, § 1.

6. As detailed below, CLO Holdco objects to the Harbourvest Settlement Motion because Harbourvest has no authority to transfer its interests in HCLOF without first complying with the Right of First Refusal. The only way to effectuate such a transfer without first providing other members the Right of First Refusal is an intentionally inaccurate interpretation of the Member Agreement's contractual provisions that would render specific passages redundant and meaningless. More simply put, the only way Harbourvest and the Debtor could effectuate the Settlement Agreement is by violating fundamental tenets of contract interpretation.

II. ARGUMENTS AND AUTHORITIES

A. CONTRACT INTERPRETATION – AVOIDING REDUNDANCIES AND SURPLUS LANGUAGE

7. The Fifth Circuit recognizes fundamental tenets of contract interpretation, and notes that "contracts should be read as a whole, viewing particular language in the context in which it appears. *Woolley v. Clifford Chance Rogers & Wells, L.L.P.*, 51 F. App'x 930 (5th Cir. 2002) (citing Restatement (Second) of Contracts § 202 (1981)). The Fifth Circuit has applied substantially the same tenets of contract interpretation across the laws of various jurisdictions, and consistently reasons that "[a]ll parts of the agreement are to be reconciled, if possible, in order to avoid an

inconsistency. A specific provision will not be set aside in favor of a catch-all clause." *Broad v. Rockwell Int'l Corp.*, 642 F.2d 929, 947 (5th Cir. 1981) (internal citations omitted); and *see Hawthorne Land Co. v. Equilon Pipeline Co., LLC*, 309 F.3d 888, 892–93 (5th Cir. 2002); *Luv N' Care, Ltd. v. Grupo Rimar*, 844 F.3d 442, 447 (5th Cir. 2016); *Wooley*, 51 F.Appx. at 930.

8. Reconciliation of terms that would otherwise render other parts of a contract redundant is fundamental to proper contract interpretation. *Hawthorne Land*, 309 F.3d at 892-93. As the Fifth Circuit explained in *Hawthorne Land*, "each provision of a contract must be read in light of the other provisions so that each is given the meaning suggested by the contract as a whole. A contract should be interpreted so as to avoid neutralizing or ignoring a provision or treating it as surplusage." *Id.* (internal citations and quotations omitted). In other words, provisions of a contract should be read to create harmony, not internal inconsistencies, redundancies, and unnecessary surplus language. *See, e.g., Luv N' Care*, 844 F.3d at 447 (overturning district court on appeal by interpreting contract in manner that eliminated perceived redundancy).

B. ANALYZING THE MEMBER AGREEMENT

9. Section 6.1 of the Member Agreement will almost certainly be cited by the Debtor and Harbourvest as authority for their entry into the Settlement Agreement, regardless of whether other Members or the Portfolio Manager consent. It states, in pertinent part, that:

No Member shall sell, pledge, charge, mortgage, assign, assign by way of security, transfer, convey, exchange or otherwise dispose of its Shares or its commitment to settle purchases of Shares under the Subscription and Transfer Agreement (each a "Transfer"), other than to an Affiliate of an initial Member party hereto, without the prior written consent of the Portfolio Manager...

MEMBER AGREEMENT, § 6.1. Harbourvest will likely stress that under the terms of the Member Agreement, it can transfer its interests so long as the transfer is to "an Affiliate of an initial Member." Indeed, the Debtor will no doubt point out to this Court that Harbourvest is

conveniently transferring its interests in HCLOF to an Affiliate of the Debtor, and that the Debtor is an initial Member listed in the Member Agreement.

10. Section 6.1, however, must be read in the context of the Member Agreement, and in conjunction with the transfer restrictions found in section 6.2. Read together it is clear that the consent exception allowing a transfer in 6.1 was intended to allow a Member to transfer its shares to *its* own Affiliate, without required consents and effectuating a Right of First Refusal. Doing so would allow inter-company transfers within a corporate structure without the need for complicated procedures. Applying Fifth Circuit precedent, this interpretation fits squarely within the agreement and gives weight to the terms of section 6.2 of the Member Agreement, as explained below.

(i) Surplusage – Specific Allowance of Transfers by CLO Holdco to Debtor Affiliates

11. Recall that both CLO Holdco and the Debtor are initial Members to the Member Agreement. MEMBER AGREEMENT, p. 3. Section 6.2 of the Member Agreement states, in pertinent part, that "Prior to making any Transfer of Shares (other than Transfers to Affiliates of an initial Member or, *in the case of CLO Holdco or a Highland Principal, to Highland, its Affiliates or another Highland Principal*) a Member must first..." comply with the Right of First Refusal. *Id.* at § 6.2 (emphasis added). The italicized language above is important for two reasons: (i) it specifically enumerates that CLO Holdco can transfer its interests to Debtor Affiliates without having to pursue the Right of First Refusal; and (ii) it allows only limited transfers between Members, as opposed to between a Member and an Affiliate of an initial Member.

12. If, as the Debtor and Harbourvest will likely argue, Members are allowed to transfer their interests to any Affiliates of any other initial Members, there is absolutely no need for the Member Agreement to specifically authorize CLO Holdco to transfer its interests to the Debtor's Affiliates. Per Fifth Circuit fundamentals of contract interpretation, that purported redundancy

should not be discarded as mere surplusage, and the Member Agreement should be interpreted in a manner that gives weight to that provision. *Hawthorne Land*, 309 F.3d at 892-93.

13. If the Member Agreement is read to literally allow all "Transfers to Affiliates of an initial Member" there would be no reason to expressly set forth allowed transfers between specific Members and other Member's Affiliates. If the Member Agreement sought to list all allowed transfers between Members and their Affiliates, it should have similarly noted that any Member could transfer its interest to any Harbourvest Member entity, as each Harbourvest Member entity is an Affiliate of the other Harbourvest Member entities. Alternatively, if the specific enumeration of CLO Holdco and the Highland Principals' transfer rights was surplusage, it would presumably have listed other parties' rights, or had inclusive language such as "including but not limited to" or "for example." The Member Agreement lacks such language and, as a result, should be interpreted in a manner that both gives weight to the specific provision while reconciling other provisions of the contract.

(ii) Absurd Results – Disparate Transfer Rights Between Members

14. Note that the Member Agreement does not generally allow a transfer of interests from Member to Member unless specifically enumerated. Section 6.2 specifically allows only CLO Holdco and the Highland Principals to make transfers to other Members, but those other Members include only the Debtor or another Highland Principal. MEMBER AGREEMENT, § 6.2. It does not allow the Debtor to transfer interests to any Member, and does not expressly allow any Member, other than limited transfers by CLO Holdco and the Highland Principals, to transfer interests to any other Member. *Id.* For instance, if the Debtor wished to transfer its interests to CLO Holdco, it would first have to offer all of the other Members their Right of First Refusal. *Id.*

15. Similarly, if Harbourvest wished to transfer its interest to CLO Holdco, it could not do so without first providing the Right of First Refusal to all other Members. *Id.* As noted above,

however, allowing a Member to transfer its interest to an Affiliate of any initial Member would allow all of the Members to transfer their interests to any Harbourvest Member entity, as the Harbourvest Members are Affiliates of each other. Given the specific enumeration of CLO Holdco and the Highland Principals' rights to inter-Member transfers, it would be inconsistent to expand that specific provision to allow all transfers by all Members to any Harbourvest entity without first providing a Right of First Refusal.

16. Such a reading would lead to absurd results. It would grant similarly situated Members profoundly disparate rights under the agreement, and could easily lead to manipulation. For instance, because the Harbourvest Members are technically Affiliates of an initial Member (each other), they could obtain control of all of the interests in HCLOF without any Member receiving a Right of First Refusal for any transfer. No other Member could do that. For instance, if CLO Holdco wished to acquire other Members' interests, the transferring member (including Harbourvest) would have to offer a Right of First Refusal in every instance. To resolve that potential disparate treatment—though CLO Holdco and Harbourvest own nearly identical ownership interests in HCLOF—CLO Holdco would have to form an Affiliate and acquire interests through the Affiliate. That simply cannot be the intended result of the Member Agreement.

17. Instead, the Member Agreement must be read to require Harbourvest to provide a Right of First Refusal to the other Members of HCLOF before transferring its interests to either the Debtor or the Transferee.

C. THE RIGHT OF FIRST REFUSAL IN BANKRUPTCY

18. Most cases addressing third party rights of first refusal in bankruptcy involve the assignment of leases and landlords' rights of first refusal. In those cases, courts analyze whether such a provision in the debtor's contract is a defacto restriction on assignment that may be excised

from the agreement. This case is very different. Here, it is a creditor that owes a right of first refusal to another non-debtor entity.

19. Even so, at least one court has issued telling commentary on a bankruptcy court's ability to excise provisions of a bargained-for contract, stating "A bankruptcy court's authority to excise a bargained for element of a contract is questionable and modification of a nondebtor contracting party's rights is not to be taken lightly." *In re E-Z Serve Convenience Stores, Inc.*, 289 B.R. 45, 51-52 (Bankr. M.D.N.C. 2003) (citing *In re Joshua Slocum Ltd.*, 922 F.2d 1081, 1091 (3d Cir. 1991)). CLO Holdco was unable to find any case that would allow a bankruptcy court to invalidate or otherwise excise a third party's right of first refusal in what largely amounts to a non-debtor contract.

20. As the Member Agreement requires Harbourvest to provide a Right of First Refusal to the non-Debtor Members under section 6.2 of the Agreement, and such Members have 30 days to review and determine whether to purchase their pro-rata shares offered by Harbourvest, Harbourvest lacks contractual authority to enter into the Settlement Agreement.

D. HARBOURVEST'S LACK OF AUTHORITY PRECLUDES ENFORCEMENT OF SETTLEMENT

21. Harbourvest has not completed its conditions precedent to the transfer of its interest to Transferee under the Member Agreement. As detailed above, and in section 6.2 of the Agreement, Harbourvest must effectuate the Right of First Refusal before it can transfer its interests in HCLOF. MEMBER AGREEMENT, § 6.2. Harbourvest is, in essence, bound by the condition precedent of effectuating the Right of First Refusal before it is authorized under the Member Agreement to enter into the Settlement Agreement.

22. Courts should not enforce a settlement agreement where a party has a condition precedent to entry into the agreement and fails to satisfy that condition. *In re De La Fuente*, 409 B.R. 842, 846 (Bankr. S.D. Tex. 2009). As noted in part in *De La Fuente*, the court would not recognize

or enforce a settlement where the parties were subject to conditions precedent before the settlement could be effective, and the conditions precedent were not satisfied. This Court should similarly deny Harbourvest's proposed settlement, as it would deny the Members' Right of First Refusal, which is the benefit of their bargain under the Member Agreement.

**III.
PRAYER FOR RELIEF**

WHEREFORE, CLO Holdco requests that this Court grant the Objection and enter an order denying the Harbourvest Settlement Motion.

DATED: January 8, 2020

Respectfully submitted,

KANE RUSSELL COLEMAN LOGAN PC

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CERTIFICATE OF SERVICE

I hereby certify that on January 8, 2020, a true and correct copy of the foregoing CLO Holdco Objection was served via the Court's electronic case filing (ECF) system upon all parties receiving such service in this bankruptcy case; and via e-mail upon the United States Trustee at Lisa.L.Lambert@usdoj.gov and upon the following parties:

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EXHIBIT 7

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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE:

CHAPTER 11

CASE NO.

HIGHLAND CAPITAL 19-34054-
MANAGEMENT, L.P. SGJLL

Debtor.

Confidential - Under Protective Order

REMOTE DEPOSITION OF
MICHAEL PUGATCH
Zoom Videoconference
01/11/2021
1:07 P.M. (EDT)

REPORTED BY: AMANDA GORRANO, CLR
CLR NO. 052005-01
JOB NO. 188591

<p>Page 2</p> <p>1</p> <p>2 01/11/2021</p> <p>3 1:07 P.M. (EDT)</p> <p>4</p> <p>5</p> <p>6 REMOTE ORAL DEPOSITION OF MICHAEL</p> <p>7 PUGATCH, held virtually via Zoom</p> <p>8 Videoconferencing, pursuant to the</p> <p>9 Federal Rules of Civil Procedure before</p> <p>10 Amanda Gorrone, Certified Live Note</p> <p>11 Reporter, and Notary Public of the State</p> <p>12 of New York.</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	<p>Page 3</p> <p>1</p> <p>2 A P P E A R A N C E S: (Via Remote)</p> <p>3 PACHULSKI STANG ZIEHL & JONES</p> <p>4 Attorneys for Debtor</p> <p>5 780 Third Avenue</p> <p>6 New York, New York 10017</p> <p>7 BY: JOHN MORRIS, ESQ.</p> <p>8 HAYLEY WINOGRAD, ESQ.</p> <p>9</p> <p>10 BONDS ELLIS EPPICH SCHAFFER JONES</p> <p>11 Attorneys for Jim Dondero</p> <p>12 420 Throckmorton Street</p> <p>13 Fort Worth, Texas 76102</p> <p>14 BY: JOHN WILSON, ESQ.</p> <p>15 BRYAN ASSINK, ESQ.</p> <p>16</p> <p>17 DEBEVOISE & PLIMPTON</p> <p>18 Attorneys for HarbourVest</p> <p>19 919 Third Avenue</p> <p>20 New York, New York 10022</p> <p>21 BY: ERICA WEISGERBER, ESQ.</p> <p>22 M. NATASHA LABOVITZ, ESQ.</p> <p>23 EMILY HUSH, ESQ.</p> <p>24 DANIEL STROIK, ESQ.</p> <p>25</p>
<p>Page 4</p> <p>1</p> <p>2 A P P E A R A N C E S: (Via Remote)</p> <p>3 KANE RUSSELL COLEMAN & LOGAN</p> <p>4 Attorneys for CLO Holdco Limited</p> <p>5 Bank of America Plaza</p> <p>6 901 Main Street</p> <p>7 Dallas, Texas 75202</p> <p>8 BY: JOHN KANE, ESQ.</p> <p>9</p> <p>10 HELLER, DRAPER, HAYDEN, PATRICK, & HORN</p> <p>11 Attorneys for The Dugaboy Investment</p> <p>12 Trust and the Get Good Trust</p> <p>13 650 Poydras Street</p> <p>14 New Orleans, Louisiana 70130</p> <p>15 BY: DOUGLAS DRAPER, ESQ.</p> <p>16</p> <p>17 LATHAM & WATKINS</p> <p>18 Attorney For UBS</p> <p>19 885 Third Avenue</p> <p>20 New York, New York</p> <p>21 BY: SHANNON MCLAUGHLIN, ESQ.</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	<p>Page 5</p> <p>1</p> <p>2 A P P E A R A N C E S: (Via Remote)</p> <p>3 KING & SPALDING</p> <p>4 Attorney for Highland CLO Funding, Ltd.</p> <p>5 1180 Peachtree Street, NE</p> <p>6 Atlanta, Georgia 30309</p> <p>7 BY: MARK MALONEY, ESQ.</p> <p>8</p> <p>9</p> <p>10</p> <p>11 ALSO PRESENT:</p> <p>12 ALIZA GOREN, ESQ.</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>

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<div>1</div> <div>2MR. WILSON: I'm John Wilson</div> <div>3with the firm of Bonds Ellis Eppich</div> <div>4Schafer Jones LP. And I represent Jim</div> <div>5Dondero.</div> <div>6MR. MORRIS: John Morris and</div> <div>7Hayley Winograd of Pachulski Stang</div> <div>8Ziehl & Jones for the Debtor.</div> <div>9MS. WEISGERBER: Erica</div> <div>10Weisgerber from Debevoise & Plimpton</div> <div>11for HarbourVest.</div> <div>12MR. KANE: John Kane of Kane</div> <div>13Russell Coleman & Logan, for CLO</div> <div>14Holdco Limited.</div> <div>15MR. DRAPER: Douglas Draper of</div> <div>16Heller Draper & Horn, for The Dugaboy</div> <div>17Investment Trust and the Get Good</div> <div>18Trust.</div> <div>19MS. McLAUGHLIN: Shannon</div> <div>20McLaughlin from Latham & Watkins LLP</div> <div>21for UBS.</div> <div>22MR. MALONEY: Mark Maloney from</div> <div>23King & Spalding, on behalf of Highland</div> <div>24CLO Funding Limited.</div> <div>25MS. WEISGERBER: I'm joined on</div>	<div>1</div> <div>2the line by my colleagues from</div> <div>3Debevoise, Natasha Labovitz and Emily</div> <div>4Hush, and Aliza Goren from HarbourVest</div> <div>5is on the line, as well.</div> <div>6MR. WILSON: As a preliminary</div> <div>7matter, the witness' counsel has</div> <div>8produced some documents to us that</div> <div>9they've requested be subject to the</div> <div>10confidentially order or a brief</div> <div>11protective order entered at Document</div> <div>12Number 382, in this case.</div> <div>13And she's also requested that</div> <div>14all counsel and participants in this</div> <div>15deposition agree to be bound by the</div> <div>16terms of that order, because some of</div> <div>17the documents that were produced are</div> <div>18stamped "confidential," and they want</div> <div>19to maintain that confidentially.</div> <div>20Do we have an agreement of all</div> <div>21counsel and participants on the</div> <div>22deposition to be bound by the terms of</div> <div>23that agreed protective order?</div> <div>24(All agreed.)</div> <div>25MS. WEISGERBER: Okay. I think</div>																																																																												

<p style="text-align: right;">Page 10</p> <p>1 Confidential - Pugatch</p> <p>2 that was everyone. Thank you all for</p> <p>3 confirming. And the deposition will</p> <p>4 be marked "confidential" until and</p> <p>5 unless HarbourVest designates the</p> <p>6 testimony otherwise.</p> <p>7 MR. WILSON: And that's fine.</p> <p>8 (Whereupon, a request for</p> <p>9 Transcript be marked Confidential</p> <p>10 under the Protective Order was made.)</p> <p>11 MICHAEL PUGATCH,</p> <p>12 called as a witness, having been</p> <p>13 first duly affirmed by a Notary Public of</p> <p>14 the State of New York, was examined and</p> <p>15 testified as follows:</p> <p>16 EXAMINATION</p> <p>17 BY MR. WILSON:</p> <p>18 Q. All right. Mr. Pugatch, how do</p> <p>19 you pronounce your name? I'm sorry.</p> <p>20 A. Yep, you've got it. Pugatch.</p> <p>21 Q. Pugatch. Okay. Can you state</p> <p>22 your full name for the record?</p> <p>23 A. Yeah. Michael Pugatch.</p> <p>24 Q. Okay. And you've been</p> <p>25 designated by HarbourVest to discuss some</p>	<p style="text-align: right;">Page 11</p> <p>1 Confidential - Pugatch</p> <p>2 matters related to the 9019 motion. And</p> <p>3 specifically we asked that HarbourVest</p> <p>4 produce a witness who could talk about the</p> <p>5 negotiations of the settlement with the</p> <p>6 Debtor, and also the factual allegations</p> <p>7 underlying HarbourVest's Proof of Claim,</p> <p>8 and those described in HarbourVest's</p> <p>9 response to the claim objection, including</p> <p>10 without limitation, its investment with</p> <p>11 Acis/HCLOF in the alleged representations</p> <p>12 made by the Debtor and/or Acis/HCLOF to</p> <p>13 HarbourVest, and any and all agreements</p> <p>14 entered into between HarbourVest and any</p> <p>15 other party related to its investment.</p> <p>16 Do you agree that you're the</p> <p>17 best person to talk about these matters on</p> <p>18 behalf of HarbourVest?</p> <p>19 A. Yes. Yes.</p> <p>20 Q. Okay. Have you given a</p> <p>21 deposition before?</p> <p>22 A. I have.</p> <p>23 Q. Okay. So you understand how it</p> <p>24 works that you're under oath, and that I'm</p> <p>25 going to be asking questions and you're</p>
<p style="text-align: right;">Page 12</p> <p>1 Confidential - Pugatch</p> <p>2 going to be giving answers. If at any</p> <p>3 time I ask a question that you don't</p> <p>4 understand, or we've had some problems</p> <p>5 with sometimes connectivity issues with</p> <p>6 Zoom. But yeah, any time that you don't</p> <p>7 understand my question or you didn't catch</p> <p>8 it, I'll be happy to repeat it.</p> <p>9 Also, one thing I found with</p> <p>10 Zoom is that it's easier to talk over</p> <p>11 people. I'll try not to talk over you. I</p> <p>12 would ask that you try to ensure that I've</p> <p>13 finished asking my question before you</p> <p>14 start your answer. And I will likewise</p> <p>15 try to ensure that you've finished your</p> <p>16 answer before start my next question.</p> <p>17 And at any time during this</p> <p>18 deposition if you feel the need to take a</p> <p>19 break, that's totally okay with me. The</p> <p>20 one thing that I would ask is if I've just</p> <p>21 asked a question, that you answer the</p> <p>22 question before requesting the break.</p> <p>23 And if we have that agreement</p> <p>24 and the ground rules, then I think I'm</p> <p>25 ready to start asking you my questions.</p>	<p style="text-align: right;">Page 13</p> <p>1 Confidential - Pugatch</p> <p>2 A. Sounds good.</p> <p>3 Q. What's your current address?</p> <p>4 A. 47 Wayne Road in Needham,</p> <p>5 Massachusetts.</p> <p>6 Q. Okay. And where are you located</p> <p>7 today?</p> <p>8 A. At that address.</p> <p>9 Q. Okay. That's your home address?</p> <p>10 A. Correct.</p> <p>11 Q. And is anyone in the room with</p> <p>12 you there?</p> <p>13 A. No.</p> <p>14 Q. And did you talk with anyone</p> <p>15 about your deposition today?</p> <p>16 A. Only counsel.</p> <p>17 Q. Okay. And did you go over the</p> <p>18 facts of the underlying investment and the</p> <p>19 settlement negotiations with your counsel?</p> <p>20 MS. WEISGERBER: I'm going to</p> <p>21 object on privilege grounds. He</p> <p>22 can – he prepared for the deposition</p> <p>23 with counsel. I don't think you can</p> <p>24 inquire into specifics of the</p> <p>25 preparation.</p>

<p style="text-align: right;">Page 14</p> <p>1 Confidential - Pugatch</p> <p>2 MR. WILSON: Okay. Well, you</p> <p>3 know, he was designated to talk about</p> <p>4 these matters, and I'm just asking if</p> <p>5 he discussed these matters with his</p> <p>6 counsel his before his testimony.</p> <p>7 That's all. I'm not asking the</p> <p>8 substance of those communications.</p> <p>9 MS. WEISGERBER: You're asking</p> <p>10 about conversations with counsel. How</p> <p>11 about you just ask if he's prepared to</p> <p>12 talk about those topics today?</p> <p>13 MR. WILSON: Okay.</p> <p>14 BY MR. WILSON:</p> <p>15 Q. Are you prepared to talk about</p> <p>16 those topics today?</p> <p>17 A. Yes.</p> <p>18 Q. Okay. Now, HarbourVest has</p> <p>19 filed several proofs of claim in this</p> <p>20 matter, and it looks like those are</p> <p>21 numbered 143 on behalf of HarbourVest,</p> <p>22 217 Global Fund L.P., and 144 HarbourVest</p> <p>23 2017 Global AIF, 149 HarbourVest Partners</p> <p>24 L.P., 150 HarbourVest Dover Street, IX</p> <p>25 Investment L.P., 153 HarbourVest – or I'm</p>	<p style="text-align: right;">Page 15</p> <p>1 Confidential - Pugatch</p> <p>2 sorry, HV International VIII Secondary</p> <p>3 L.P., and 154 HarbourVest Skew Base AIF</p> <p>4 LP.</p> <p>5 And you're here to talk on</p> <p>6 behalf of all of those entities, and you</p> <p>7 have, for purpose of this settlement and</p> <p>8 you're – the 9019 motion, these proofs of</p> <p>9 claim are all lumped together as one</p> <p>10 claim; is that correct?</p> <p>11 MS. WEISGERBER: I'm just going</p> <p>12 to object quickly and clarify that</p> <p>13 he's not here as a 30(b)(6) witness,</p> <p>14 but he is here as someone from</p> <p>15 HarbourVest who signed those proofs of</p> <p>16 claim. So with that, I'll let you</p> <p>17 continue.</p> <p>18 A. I'll just answered the question,</p> <p>19 yes, as a representative on behalf of all</p> <p>20 of those entities. I would defer to</p> <p>21 counsel, from a legal perspective, whether</p> <p>22 these are treated as a single or separate</p> <p>23 claims.</p> <p>24 MR. WILSON: Okay. And we can</p> <p>25 move on for now.</p>
<p style="text-align: right;">Page 16</p> <p>1 Confidential - Pugatch</p> <p>2 I'm going to submit the first</p> <p>3 exhibit. It's going to be Exhibit</p> <p>4 No. 1 to the deposition. I'm sending</p> <p>5 it by E-mail, and I'm also going to</p> <p>6 use a share screen.</p> <p>7 (Whereupon, Exhibit 1, Proof of</p> <p>8 Claim 143 filed 4/08/2020 nine pages,</p> <p>9 was marked for identification.)</p> <p>10 MR. WILSON: So this document</p> <p>11 right here is Claim Number 143 filed</p> <p>12 on April 8, 2020, and this one is</p> <p>13 filed on behalf of HarbourVest 2017</p> <p>14 Global Fund L.P.</p> <p>15 If we go down, scroll to the</p> <p>16 annex to proof of claim, it's Page 5</p> <p>17 of the document. It says that the</p> <p>18 Claimant is a limited partner in one</p> <p>19 of the Debtor's managed vehicles,</p> <p>20 Highland CLO Funding, Ltd.</p> <p>21 And I'm going to now send out an</p> <p>22 E-mail with Exhibit No. 2. I'm going</p> <p>23 to pull this Exhibit No. 2 document up</p> <p>24 on the share screen, as well. I guess</p> <p>25 that's right.</p>	<p style="text-align: right;">Page 17</p> <p>1 Confidential - Pugatch</p> <p>2 (Whereupon, Exhibit 2, Proof of</p> <p>3 Claim 149 filed 4/08/2020 nine pages,</p> <p>4 was marked for identification.)</p> <p>5 BY MR. WILSON:</p> <p>6 Q. Can you see the official proof,</p> <p>7 official form 410 proof of claim on your</p> <p>8 screen?</p> <p>9 A. The first one that you shared?</p> <p>10 Q. I'm now on Exhibit No. 2. Is it</p> <p>11 showing up on your screen?</p> <p>12 A. No.</p> <p>13 Q. Okay. Actually, I'm sorry. Is</p> <p>14 it now showing up on your screen?</p> <p>15 A. Now, it's showing up, yep.</p> <p>16 Q. Okay. So this one is Proof of</p> <p>17 Claim 149, filed on the same date. And</p> <p>18 this one's filed on behalf HarbourVest</p> <p>19 Partners L.P. And I'm going to scroll</p> <p>20 down to the annex to proof of claim, which</p> <p>21 looks largely like the annex to the</p> <p>22 previous proof of claim we looked at.</p> <p>23 But this one says, in Paragraph</p> <p>24 No. 2, the Claimant manages investment</p> <p>25 funds that are limited partners in one of</p>

<p style="text-align: right;">Page 18</p> <p>1 Confidential - Pugatch</p> <p>2 the Debtor's managed vehicles, Highland</p> <p>3 CLO Funding, Ltd.</p> <p>4 And can you tell me why this</p> <p>5 HarbourVest Partners L.P. filed a separate</p> <p>6 proof of claim, from the entities that</p> <p>7 were investors in HCLOF?</p> <p>8 A. I would only be able to answer</p> <p>9 that, based on conversations with counsel.</p> <p>10 Q. But in any event, HarbourVest</p> <p>11 Partners L.P. did not invest in HCLOF,</p> <p>12 correct?</p> <p>13 A. Not directly on behalf of</p> <p>14 itself, no.</p> <p>15 Q. All right. I'm going to stop</p> <p>16 that share screen.</p> <p>17 MR. WILSON: And this is going</p> <p>18 to be Exhibit Number 3.</p> <p>19 (Whereupon, Exhibit 3,</p> <p>20 Declaration of Michael Pugatch in</p> <p>21 Support of Motion of HarbourVest</p> <p>22 Pursuant to Rule 3018(a), was marked</p> <p>23 for identification.)</p> <p>24 MR. WILSON: And Exhibit No. 3</p> <p>25 that I've just submitted via E-mail,</p>	<p style="text-align: right;">Page 19</p> <p>1 Confidential - Pugatch</p> <p>2 and I'm about to put it up on the</p> <p>3 screen, is the Declaration of</p> <p>4 HarbourVest. Let me get it up here,</p> <p>5 so you can see it. This is the</p> <p>6 declaration of Michael Pugatch in</p> <p>7 support of motion of HarbourVest</p> <p>8 pursuant to Rule 3018(a).</p> <p>9 BY MR. WILSON:</p> <p>10 Q. Have you seen this document</p> <p>11 before?</p> <p>12 A. Yes.</p> <p>13 Q. And, in fact, this is your</p> <p>14 declaration; is that correct?</p> <p>15 A. Yes.</p> <p>16 Q. And at the first line of this,</p> <p>17 of Paragraph 1 says that you're the</p> <p>18 managing director of HarbourVest Partners</p> <p>19 LLC?</p> <p>20 A. Correct.</p> <p>21 Q. And how is HarbourVest Partners</p> <p>22 LLC connected to these claims?</p> <p>23 A. That is the corporate entity or</p> <p>24 managing member of all of the underlying</p> <p>25 funds that are managed on behalf of</p>
<p style="text-align: right;">Page 20</p> <p>1 Confidential - Pugatch</p> <p>2 HarbourVest Partners L.P.</p> <p>3 Q. And you're the managing director</p> <p>4 of that entity?</p> <p>5 A. A managing director to that</p> <p>6 entity, yes.</p> <p>7 Q. You said "a managing director,"</p> <p>8 are there others?</p> <p>9 A. Yes.</p> <p>10 Q. Who are the others?</p> <p>11 A. There are over 50 managing</p> <p>12 directors at HarbourVest Partners LLC.</p> <p>13 Q. And are you the managing</p> <p>14 director that has charge of this</p> <p>15 particular HarbourVest investment, the one</p> <p>16 in HCLOF?</p> <p>17 A. Yes.</p> <p>18 MR. WILSON: All right. I beg</p> <p>19 your patience. I'm trying to conduct</p> <p>20 this deposition solo. I've got a lot</p> <p>21 of stuff I've got to go through. So</p> <p>22 I'll do my best to do it efficiently.</p> <p>23 But this next exhibit I'm going</p> <p>24 to submit is going to be Exhibit No.</p> <p>25 4. I'm sending it in the E-mail now.</p>	<p style="text-align: right;">Page 21</p> <p>1 Confidential - Pugatch</p> <p>2 (Whereupon, Exhibit 4, Member</p> <p>3 Agreement 28 pages, was marked for</p> <p>4 identification.)</p> <p>5 BY MR. WILSON:</p> <p>6 Q. Can you see this on your share</p> <p>7 screen?</p> <p>8 A. I can.</p> <p>9 Q. This is the Members Agreement</p> <p>10 relating to the Company.</p> <p>11 A. (Nods.)</p> <p>12 Q. I'm just going to scroll down.</p> <p>13 Okay. So this is the signature page for</p> <p>14 the HarbourVest entities that were</p> <p>15 invested in this company. And it says</p> <p>16 that you were the authorized person to</p> <p>17 sign on behalf of the first two entities:</p> <p>18 HarbourVest Dover Street, HarbourVest 2017</p> <p>19 Global, and then the next one here it says</p> <p>20 you're managing director. And here we see</p> <p>21 that HarbourVest Partners LLC.</p> <p>22 And if we scroll down, we see</p> <p>23 that you're the managing director of</p> <p>24 HarbourVest Partners LLC, again, on behalf</p> <p>25 of HV International, and that you're an</p>

<p style="text-align: right;">Page 22</p> <p>1 Confidential - Pugatch</p> <p>2 authorized person on behalf of HarbourVest</p> <p>3 Skew Base.</p> <p>4 So you signed all these</p> <p>5 agreements on behalf of the HarbourVest</p> <p>6 entities, when HarbourVest made its</p> <p>7 investment in HCLOF. Would that be</p> <p>8 correct?</p> <p>9 A. Correct.</p> <p>10 Q. Okay. Sorry that was</p> <p>11 cumbersome, but I needed to get through</p> <p>12 it.</p> <p>13 MR. WILSON: I'm going to now</p> <p>14 stop that share screen. And I'll need</p> <p>15 to go to Exhibit No. 5. I'm E-mailing</p> <p>16 out Exhibit No. 5 right now.</p> <p>17 (Whereupon, Exhibit 5,</p> <p>18 HarbourVest Response to Debtor's First</p> <p>19 Omnibus Objection 617 pages, was</p> <p>20 marked for identification.)</p> <p>21 BY MR. WILSON:</p> <p>22 Q. This is -- I'll do another share</p> <p>23 screen -- this is Docket 1057 filed in the</p> <p>24 Highland bankruptcy. And this is</p> <p>25 HarbourVest Response to Debtor's First</p>	<p style="text-align: right;">Page 23</p> <p>1 Confidential - Pugatch</p> <p>2 Omnibus Objection.</p> <p>3 Did you participate in the</p> <p>4 creation of this document?</p> <p>5 A. Yes.</p> <p>6 Q. So you had an opportunity to</p> <p>7 review this document, before it was filed?</p> <p>8 A. Correct.</p> <p>9 Q. And you agree with the</p> <p>10 statements and the positions taken in this</p> <p>11 document?</p> <p>12 A. I do.</p> <p>13 Q. All right. So what this says in</p> <p>14 Paragraph 8, that by the summer of 2017,</p> <p>15 HarbourVest was engaged in preliminary</p> <p>16 discussions with Highland, regarding the</p> <p>17 investment.</p> <p>18 First off, why was HarbourVest</p> <p>19 engaged in preliminary discussions with</p> <p>20 Highland?</p> <p>21 A. Highland had approached</p> <p>22 HarbourVest with an investment</p> <p>23 opportunity. This was really borne out of</p> <p>24 discussions that we had with them around a</p> <p>25 couple of investment opportunities, that</p>
<p style="text-align: right;">Page 24</p> <p>1 Confidential - Pugatch</p> <p>2 this opportunity with HCLOF being the one</p> <p>3 that by the summer of 2017, as stated</p> <p>4 here, was in, was advancing through</p> <p>5 discussions.</p> <p>6 Q. And which individuals at</p> <p>7 Highland were you engaged in discussions</p> <p>8 with? By "you," I mean HarbourVest.</p> <p>9 A. Yeah, I mean, originally it was</p> <p>10 through a couple of members of their</p> <p>11 investor relations team. My first point</p> <p>12 of contact was with Brad Eden, and then</p> <p>13 subsequently progressed to a larger subset</p> <p>14 of employees of Highland.</p> <p>15 Q. And who on behalf of HarbourVest</p> <p>16 was engaging in these discussions?</p> <p>17 A. It was primarily myself, my</p> <p>18 colleague, or two -- two colleagues</p> <p>19 primarily, alongside myself.</p> <p>20 Q. I'm sorry. I didn't catch the</p> <p>21 last part.</p> <p>22 A. Sorry. Myself and two other</p> <p>23 colleagues primarily.</p> <p>24 Q. And who are these two other</p> <p>25 colleagues?</p>	<p style="text-align: right;">Page 25</p> <p>1 Confidential - Pugatch</p> <p>2 A. Dustin Willard and then a more</p> <p>3 junior member of the HarbourVest team.</p> <p>4 Q. When you say "the HarbourVest</p> <p>5 team," what does that mean?</p> <p>6 A. So the broader investment team</p> <p>7 and specifically in this context, the</p> <p>8 secondary investment team at HarbourVest,</p> <p>9 that this was an opportunity for.</p> <p>10 Q. So who made the final decision,</p> <p>11 on behalf of HarbourVest, to make this</p> <p>12 investment?</p> <p>13 A. Ultimately it was a decision</p> <p>14 made by the investment committee of</p> <p>15 HarbourVest.</p> <p>16 Q. And who's on that investment</p> <p>17 committee?</p> <p>18 A. It's a four-member committee</p> <p>19 comprised of managing directors within the</p> <p>20 firm.</p> <p>21 Q. And who are those managing</p> <p>22 directors?</p> <p>23 A. I don't recall at the time who</p> <p>24 the members were. I can tell you the</p> <p>25 members now, of that committee. It has</p>

<p style="text-align: right;">Page 26</p> <p>1 Confidential - Pugatch</p> <p>2 changed or evolved over time.</p> <p>3 Q. And that committee included you?</p> <p>4 A. I was involved in the</p> <p>5 decisionmaking of that, yes, correct.</p> <p>6 Q. So you were part of the four-man</p> <p>7 committee that made this decision?</p> <p>8 A. Yes.</p> <p>9 Q. All right. I'm going to go back</p> <p>10 to what we've marked as Exhibit 3, which</p> <p>11 is your declaration. And it says in</p> <p>12 Paragraph 2, that HarbourVest is a passive</p> <p>13 minority investor in Highland CLO funds,</p> <p>14 HCLOF, and by the way, I haven't stated</p> <p>15 this before, but in this deposition if I</p> <p>16 say HCLOF, I'm going to be referring to</p> <p>17 Highland CLO funds.</p> <p>18 But it says that the vehicle is</p> <p>19 managed by Highland Capital Management,</p> <p>20 L.P.</p> <p>21 And why do you say that that</p> <p>22 vehicle was managed by Highland Capital</p> <p>23 Management, L.P.?</p> <p>24 A. I believe that is the named</p> <p>25 investment manager of HCLOF, per the</p>	<p style="text-align: right;">Page 27</p> <p>1 Confidential - Pugatch</p> <p>2 organization documents of that vehicle.</p> <p>3 Q. You believe that that was the</p> <p>4 investment manager on the organization</p> <p>5 documents, which --</p> <p>6 A. Of the various transaction</p> <p>7 documents that we entered into, in</p> <p>8 connection with our investment.</p> <p>9 Q. Would those have been the</p> <p>10 documents that you had entered on November</p> <p>11 the 15 of 2017?</p> <p>12 A. Yes.</p> <p>13 Q. Okay. It says that HarbourVest</p> <p>14 initially invested \$73,522,928 for roughly</p> <p>15 49 percent interest in HCLOF; and more</p> <p>16 specifically, that would be a 49.98</p> <p>17 percent interest in HCLOF, correct?</p> <p>18 A. Sounds right, yes.</p> <p>19 Q. Okay. And then HarbourVest</p> <p>20 contributed an additional \$4,998,501</p> <p>21 following a capital call, and it's</p> <p>22 received three dividends, each totally</p> <p>23 \$1,570,429.</p> <p>24 Is all of that correct?</p> <p>25 A. Yes.</p>
<p style="text-align: right;">Page 28</p> <p>1 Confidential - Pugatch</p> <p>2 Q. And has HarbourVest received any</p> <p>3 additional dividends, since the making of</p> <p>4 this declaration?</p> <p>5 A. No, we have not.</p> <p>6 Q. Now, I want to skip down to</p> <p>7 Paragraph 3, where it says that</p> <p>8 HarbourVest expected proceeds from the</p> <p>9 original HCLOF investment were projected</p> <p>10 to exceed 135 million.</p> <p>11 Do you agree with that?</p> <p>12 A. That was the original projected</p> <p>13 value of the investment, yes.</p> <p>14 Q. Well, whose expectation was</p> <p>15 that?</p> <p>16 A. Those were figures, as I recall,</p> <p>17 that were originally provided to us by</p> <p>18 Highland to form the basis of our due</p> <p>19 diligence that we went through, and</p> <p>20 penultimately were included as part of our</p> <p>21 investment thesis in making the</p> <p>22 investment.</p> <p>23 Q. So your testimony is that</p> <p>24 Highland told you that your investment</p> <p>25 would be worth over \$135 million?</p>	<p style="text-align: right;">Page 29</p> <p>1 Confidential - Pugatch</p> <p>2 A. Yes.</p> <p>3 MS. WEISGERBER: Objection to</p> <p>4 the form. Misstates testimony.</p> <p>5 Go ahead, Mike.</p> <p>6 A. That was, that was part of our</p> <p>7 original due diligence, on the investment</p> <p>8 opportunity.</p> <p>9 Q. When you say part of your due</p> <p>10 diligence, are you saying that the number</p> <p>11 originated from Highland or that the</p> <p>12 number originated from your due diligence</p> <p>13 operations?</p> <p>14 MS. WEISGERBER: Objection to</p> <p>15 form.</p> <p>16 A. The number originally came from</p> <p>17 Highland and formed the basis upon which</p> <p>18 we conducted due diligence on the</p> <p>19 investment opportunity.</p> <p>20 Q. And after performing due</p> <p>21 diligence, you were satisfied that that</p> <p>22 was a reasonable projection?</p> <p>23 A. Yes.</p> <p>24 Q. And what was the, what was the</p> <p>25 estimated date, in which the value of your</p>

<p style="text-align: right;">Page 30</p> <p>1 Confidential - Pugatch</p> <p>2 investment would exceed the \$135 million?</p> <p>3 MS. WEISGERBER: Objection to</p> <p>4 form.</p> <p>5 A. I don't recall exactly. That</p> <p>6 would have been over, over several years.</p> <p>7 And again, this was the -- this was the</p> <p>8 projected value based on the original</p> <p>9 investment or the assets that were held by</p> <p>10 HCLOF, at the time of our investment.</p> <p>11 Q. Now, when you talk about a</p> <p>12 portfolio manager -- I'm sorry, when you</p> <p>13 talk about investment manager, are you</p> <p>14 referring to the portfolio manager?</p> <p>15 A. No.</p> <p>16 Q. So what's the difference in an</p> <p>17 investment manager and a portfolio</p> <p>18 manager?</p> <p>19 A. So in the context of this</p> <p>20 investment, the investment manager. We --</p> <p>21 we had -- HarbourVest had an investment</p> <p>22 with HCLOF. Highland was the investment</p> <p>23 manager of HCLOF that in turn held equity</p> <p>24 positions in a variety of CLOs, which had</p> <p>25 various portfolio managers associated with</p>	<p style="text-align: right;">Page 31</p> <p>1 Confidential - Pugatch</p> <p>2 those, all Highland affiliates.</p> <p>3 Q. And so who was the portfolio</p> <p>4 manager for the HarbourVest investment in</p> <p>5 HCLOF?</p> <p>6 MS. WEISGERBER: Objection to</p> <p>7 form.</p> <p>8 A. There were various underling</p> <p>9 portfolio managers, depending on the</p> <p>10 underlying CLO position.</p> <p>11 Q. Well, who was the initial</p> <p>12 portfolio manager?</p> <p>13 A. So, again it would depend on</p> <p>14 which underlying assets we're talking</p> <p>15 about. HCLOF was a diversified portfolio</p> <p>16 of multiple underlying CLO equity</p> <p>17 positions, all with portfolio managers</p> <p>18 that were Highland affiliates, as we</p> <p>19 understood it.</p> <p>20 Q. Well, I'm going to go back to</p> <p>21 Exhibit 1, Paragraph 2, this says, in the</p> <p>22 second sentence, "Acis Capital Management</p> <p>23 GP, LLC, and Acis Capital Management,</p> <p>24 L.P., together Acis, the portfolio manager</p> <p>25 for HCLOF," and then it continues on,</p>
<p style="text-align: right;">Page 32</p> <p>1 Confidential - Pugatch</p> <p>2 "filed for Chapter 11."</p> <p>3 Is this proof of claim correct,</p> <p>4 when it states that Acis Capital</p> <p>5 Management GP, LLC, and Acis Capital</p> <p>6 Management, L.P., were the portfolio</p> <p>7 manager for HCLOF?</p> <p>8 MS. WEISGERBER: Objection to</p> <p>9 form.</p> <p>10 A. I know that there was an issue</p> <p>11 with the portfolio manager for at least</p> <p>12 the Acis CLOs that were held by HCLOF.</p> <p>13 Q. Well, how do you distinguish</p> <p>14 between the Acis CLOs and the Highland</p> <p>15 CLOs? Is that based on who was managing</p> <p>16 them?</p> <p>17 MS. WEISGERBER: Objection to</p> <p>18 form.</p> <p>19 A. Again, they were all underlying</p> <p>20 investments of HCLOF. We didn't</p> <p>21 distinguish the portfolio manager, if you</p> <p>22 will, of those vehicles, other than again</p> <p>23 they were Highland affiliates.</p> <p>24 Q. But it's fair to say that Acis</p> <p>25 was managing at least a portion of the</p>	<p style="text-align: right;">Page 33</p> <p>1 Confidential - Pugatch</p> <p>2 HCLOF investment, correct?</p> <p>3 A. Correct. The underlying</p> <p>4 investments held by HCLOF, correct.</p> <p>5 Q. And did anything -- from the</p> <p>6 time that you -- well, let's just go to</p> <p>7 the -- I think we had the members</p> <p>8 agreement up a second ago. This would</p> <p>9 have been Exhibit 4.</p> <p>10 Yeah, right here. No. 14,</p> <p>11 Highland HCF Advisor, Ltd. is listed as</p> <p>12 the portfolio manager on the members</p> <p>13 agreement.</p> <p>14 Is that accurate, that Highland</p> <p>15 HCF Advisor, Ltd. was the portfolio</p> <p>16 manager?</p> <p>17 MS. WEISGERBER: Objection to</p> <p>18 form. Can you state as of what date</p> <p>19 you're asking, Counsel?</p> <p>20 MR. WILSON: Well, the date of</p> <p>21 this memorandum is, it says right</p> <p>22 here, 15 November 2017.</p> <p>23 BY MR. WILSON:</p> <p>24 Q. So as of the date November 15,</p> <p>25 2017, who was the portfolio manager for</p>

<p style="text-align: right;">Page 34</p> <p>1 Confidential - Pugatch</p> <p>2 this investment?</p> <p>3 A. I don't recall the specific</p> <p>4 names of the various entities that sat</p> <p>5 below the HCLOF level or below Highland</p> <p>6 Capital, as the investment manager of</p> <p>7 HCLOF.</p> <p>8 Q. Well, are you familiar with a</p> <p>9 company called Brigade?</p> <p>10 A. Yes.</p> <p>11 Q. And was that company a</p> <p>12 sub-manager of this investment?</p> <p>13 MS. WEISGERBER: Objection to</p> <p>14 form.</p> <p>15 A. Not at the time of our</p> <p>16 investment.</p> <p>17 Q. Not at the time. Well, when did</p> <p>18 the portfolio managers begin to change in</p> <p>19 this investment?</p> <p>20 MS. WEISGERBER: Objection to</p> <p>21 form.</p> <p>22 A. Do you mean subsequent to our</p> <p>23 investment?</p> <p>24 Q. Yes.</p> <p>25 A. So as I understand it in</p>	<p style="text-align: right;">Page 35</p> <p>1 Confidential - Pugatch</p> <p>2 connection with the Acis bankruptcy that</p> <p>3 took place, there was a change in the</p> <p>4 underlying either portfolio manager of</p> <p>5 certain of the CLOs, the Acis-managed CLOs</p> <p>6 or Acis-branded CLOs, I should say, and/or</p> <p>7 sub-advisor of those CLOs.</p> <p>8 Q. And was that at the direction of</p> <p>9 the Chapter 11 trustee?</p> <p>10 MS. WEISGERBER: Objection.</p> <p>11 A. That's my understanding.</p> <p>12 Q. And so when this investment was</p> <p>13 initially made, was Highland HCF Advisor,</p> <p>14 Ltd. the portfolio manager of the entire</p> <p>15 investment?</p> <p>16 MS. WEISGERBER: Objection to</p> <p>17 form.</p> <p>18 A. I don't recall the specifics</p> <p>19 underneath the HCLOF entity.</p> <p>20 Q. Well, there aren't any other</p> <p>21 portfolio managers listed on this</p> <p>22 document, that I can see.</p> <p>23 Is there any place in this</p> <p>24 document that you can point me to that</p> <p>25 would identify another portfolio manager?</p>
<p style="text-align: right;">Page 36</p> <p>1 Confidential - Pugatch</p> <p>2 MS. WEISGERBER: Objection to</p> <p>3 form. The document speaks for itself.</p> <p>4 A. Again, I think we may be</p> <p>5 distinguishing here between portfolio</p> <p>6 manager at the HCLOF level and portfolio</p> <p>7 manager sub-advisor, again, I'm not sure</p> <p>8 the proper terminology as it relates to</p> <p>9 each of the underlying CLOs that were</p> <p>10 partially owned by HCLOF.</p> <p>11 Q. Well, after the Acis bankruptcy</p> <p>12 was filed, and after the Chapter 11</p> <p>13 trustee appointed Acis as a portfolio</p> <p>14 manager of at least part of HCLOF, did</p> <p>15 Highland HCF Advisor continue to serve as</p> <p>16 portfolio manager?</p> <p>17 MS. WEISGERBER: Objection to</p> <p>18 form.</p> <p>19 A. All of HarbourVest's interaction</p> <p>20 was with Highland as the investment</p> <p>21 manager of HCLOF. My understanding of the</p> <p>22 change in those entities related to the</p> <p>23 portfolio management of the underlying</p> <p>24 Acis CLOs, not a change in the portfolio</p> <p>25 manager, at the HCLOF level.</p>	<p style="text-align: right;">Page 37</p> <p>1 Confidential - Pugatch</p> <p>2 Q. Well, Highland is listed as a</p> <p>3 member under this -- Highland Capital</p> <p>4 Management LLP is listed as a member under</p> <p>5 this Member Agreement; is that correct?</p> <p>6 MS. WEISGERBER: Objection to</p> <p>7 form.</p> <p>8 A. If that's what the document</p> <p>9 says, yes.</p> <p>10 Q. I'm going to look -- let me stop</p> <p>11 my share screen for a second.</p> <p>12 All right. I'm now at the top</p> <p>13 of Page 5 of this Exhibit 4, where it</p> <p>14 says, "Dover IX shall mean HarbourVest</p> <p>15 Dover Street IX Investment L.P."</p> <p>16 And Dover IX was the largest</p> <p>17 single investor of the HarbourVest Group;</p> <p>18 is that correct?</p> <p>19 A. Correct.</p> <p>20 Q. All right. I'm now going to go</p> <p>21 down to Paragraph 5. I'm sorry, it's not</p> <p>22 Paragraph 5. Paragraph 4, where it says</p> <p>23 "Composition of Advisory Board" in</p> <p>24 Paragraph 4.1, The Company shall establish</p> <p>25 an Advisory Board composed of two</p>

<p style="text-align: right;">Page 38</p> <p>1 Confidential - Pugatch</p> <p>2 individuals, one of whom shall be a</p> <p>3 representative of CLO Holdco and one of</p> <p>4 whom shall be a representative of</p> <p>5 Dover IX.</p> <p>6 And did this Advisory Board get</p> <p>7 created?</p> <p>8 A. I believe it was created, yes.</p> <p>9 Q. And who was the representative</p> <p>10 for CLO Holdco on the Advisory Board?</p> <p>11 A. I don't know.</p> <p>12 Q. Who was the representative for</p> <p>13 Dover IX on the Advisory Board?</p> <p>14 A. I can't recall whether it was</p> <p>15 myself or one other colleague who jointly</p> <p>16 manages this investment with me.</p> <p>17 Q. You don't recall if you were on</p> <p>18 the Advisory Board?</p> <p>19 A. The Advisory Board never met</p> <p>20 formally under its capacity as an Advisory</p> <p>21 Board.</p> <p>22 Q. Well, if you look down in</p> <p>23 Paragraph 4.3, I've got my mouse pointed</p> <p>24 here, I don't know if you can see it.</p> <p>25 About two-thirds of the way down in this</p>	<p style="text-align: right;">Page 39</p> <p>1 Confidential - Pugatch</p> <p>2 paragraph it says, "The consent of the</p> <p>3 Advisory Board shall be required to</p> <p>4 approve the following actions," and then</p> <p>5 it lists a number of things.</p> <p>6 Did the Advisory Board not have</p> <p>7 to – was it not required that the</p> <p>8 Advisory Board ever meet, because they</p> <p>9 didn't take any of these actions?</p> <p>10 MS. WEISGERBER: Objection.</p> <p>11 Objection to form.</p> <p>12 A. There may have been one or two</p> <p>13 actions taken by the Advisory Board, I'm</p> <p>14 looking at the list here to see what those</p> <p>15 may even have been, during the duration of</p> <p>16 our investment; but if so, those would</p> <p>17 have been written resolutions or written</p> <p>18 consents, as opposed to any meeting that</p> <p>19 was convened amongst the entire Advisory</p> <p>20 Board.</p> <p>21 Q. Okay. And the entire Advisory</p> <p>22 Board is just two individuals, correct?</p> <p>23 A. Correct, that's my</p> <p>24 understanding.</p> <p>25 Q. Okay. And if you go up a few</p>
<p style="text-align: right;">Page 40</p> <p>1 Confidential - Pugatch</p> <p>2 sentences above that in Paragraph 4.3 it</p> <p>3 says, The portfolio manager shall not act</p> <p>4 contrary to advice of the Advisory Board</p> <p>5 with respect to any action or</p> <p>6 determination expressly conditioned herein</p> <p>7 or in the offering memorandum on the</p> <p>8 consider approval of the Advisory Board.</p> <p>9 So the portfolio manager did not</p> <p>10 have the authority to disregard the advice</p> <p>11 of the Advisory Board; is that correct?</p> <p>12 MS. WEISGERBER: Objection to</p> <p>13 form; misstates the document.</p> <p>14 A. With respect to the limited role</p> <p>15 that the Advisory Board would have to</p> <p>16 play, yes, that would be my read.</p> <p>17 Q. Now, what is your understanding</p> <p>18 of a reset transaction?</p> <p>19 A. Has to do with a refinancing and</p> <p>20 reset of the investment period of an</p> <p>21 underlying CLO.</p> <p>22 Q. And would a reset transaction be</p> <p>23 contained within this – these actions</p> <p>24 that the Advisory Board's consent is</p> <p>25 required to approve?</p>	<p style="text-align: right;">Page 41</p> <p>1 Confidential - Pugatch</p> <p>2 A. No, it would not.</p> <p>3 MS. WEISGERBER: Objection.</p> <p>4 MR. MALONEY: Join.</p> <p>5 Q. It would not?</p> <p>6 A. It would not.</p> <p>7 Q. Well, if a reset was to be</p> <p>8 proposed, who would have the discretion to</p> <p>9 make that decision to enter a reset</p> <p>10 transaction?</p> <p>11 MS. WEISGERBER: Objection to</p> <p>12 form and foundation.</p> <p>13 MR. MALONEY: Join.</p> <p>14 A. That would be Highland as the</p> <p>15 manager of HCLOF, who owns the equity</p> <p>16 position to the underlying CLOs.</p> <p>17 Q. So you're saying that Highland</p> <p>18 would have the exclusive authority to</p> <p>19 enter a reset transaction?</p> <p>20 A. Correct.</p> <p>21 MS. WEISGERBER: Objection to</p> <p>22 form.</p> <p>23 MR. MALONEY: Join.</p> <p>24 Q. What if HarbourVest objected to</p> <p>25 a reset transaction? Would it have any</p>

<p style="text-align: right;">Page 42</p> <p>1 Confidential - Pugatch</p> <p>2 rights or remedies, in your understanding?</p> <p>3 MS. WEISGERBER: I'm going to</p> <p>4 object to form. And also just object</p> <p>5 to the extent that this is calling for</p> <p>6 legal conclusions.</p> <p>7 Mike --</p> <p>8 MR. WILSON: I've ask the</p> <p>9 witness, within his understanding of</p> <p>10 the way this investment worked.</p> <p>11 MS. WEISGERBER: If you have an</p> <p>12 understanding separate from any other</p> <p>13 conversations with counsel, Mike, you</p> <p>14 can certainly answer.</p> <p>15 A. Within my understanding,</p> <p>16 HarbourVest would not have had any ability</p> <p>17 or rights to object to a reset or for</p> <p>18 similar actions by Highland, as the</p> <p>19 manager of the HCLOF.</p> <p>20 Q. Okay. And just to, just for</p> <p>21 clarity, in 4.2 it says that, All actions</p> <p>22 taken by the Advisory Board shall be (i)</p> <p>23 by a unanimous vote of all of the members</p> <p>24 of the Advisory Board in attendance; or</p> <p>25 (ii), by written consent in lieu of a</p>	<p style="text-align: right;">Page 43</p> <p>1 Confidential - Pugatch</p> <p>2 meeting signed by all of the members of</p> <p>3 the Advisory Board.</p> <p>4 And we've talked about how there</p> <p>5 were two members, one of which represented</p> <p>6 CLO Holdco and one of which represented</p> <p>7 HarbourVest, and it was your testimony</p> <p>8 that you don't recall a meeting ever being</p> <p>9 conducted that you believed that there had</p> <p>10 been some written consents issued by the</p> <p>11 Advisory Board; is that correct?</p> <p>12 MS. WEISGERBER: Objection to</p> <p>13 form.</p> <p>14 A. That is my recollection, yes.</p> <p>15 Q. I'm sorry? I didn't hear your</p> <p>16 answer.</p> <p>17 A. That is my recollection, yes.</p> <p>18 Q. Okay. So what is the Advisory</p> <p>19 Board's general function in your</p> <p>20 understanding?</p> <p>21 MS. WEISGERBER: Objection to</p> <p>22 form.</p> <p>23 You can answer, Mike, if you</p> <p>24 know, other than, you know, legal</p> <p>25 conclusions, things like that, legal</p>
<p style="text-align: right;">Page 44</p> <p>1 Confidential - Pugatch</p> <p>2 advice.</p> <p>3 And also, Mike, you're welcome</p> <p>4 to look at the document, I think John</p> <p>5 is E-mailing you the documents as</p> <p>6 well. I don't know if you have the</p> <p>7 full document in front of you.</p> <p>8 THE WITNESS: Yeah, I can pull</p> <p>9 it up here.</p> <p>10 A. I mean, my understanding is the</p> <p>11 Advisory Board, the Advisory Board's</p> <p>12 involvement is as spelled as in Section</p> <p>13 4.3 of the agreement that you have on the</p> <p>14 screen. And that is the extent of the</p> <p>15 role that the Advisory Board would play.</p> <p>16 Q. Well, but as a practical matter,</p> <p>17 what did that entail?</p> <p>18 MS. WEISGERBER: Objection to</p> <p>19 form.</p> <p>20 A. Again, as a practical matter,</p> <p>21 the listed items, which I can't see, that</p> <p>22 are off the screen further down in 4.3 are</p> <p>23 the items that would require approval by</p> <p>24 the Advisory Board.</p> <p>25 Q. But other than those items, the</p>	<p style="text-align: right;">Page 45</p> <p>1 Confidential - Pugatch</p> <p>2 Advisory Board was not a routine part of</p> <p>3 the decision-making of the portfolio</p> <p>4 manager?</p> <p>5 MS. WEISGERBER: Objection to</p> <p>6 form.</p> <p>7 A. Not at all.</p> <p>8 Q. Did you say "not at all"?</p> <p>9 A. Not at all, no.</p> <p>10 Q. I'm going to refer back to</p> <p>11 Exhibit 5, which was Document -- or Docket</p> <p>12 1057. I'll put that back on the share</p> <p>13 screen. I wanted you to scroll, sorry.</p> <p>14 It's a long document.</p> <p>15 I want you to look at</p> <p>16 Paragraph 37, which should be on your</p> <p>17 screen. And it says that these are</p> <p>18 misrepresentations that HarbourVest</p> <p>19 alleges were made by Highland. And the</p> <p>20 first bullet point states that, "Highland</p> <p>21 never informed HarbourVest that Highland</p> <p>22 had no intention of paying the Arbitration</p> <p>23 Award and was undertaking steps to ensure</p> <p>24 that Mr. Terry could not collect on his</p> <p>25 judgment."</p>

<p style="text-align: right;">Page 46</p> <p>1 Confidential - Pugatch</p> <p>2 Now, Mr. Terry did not have an</p> <p>3 arbitration award against Highland; is</p> <p>4 that correct?</p> <p>5 MS. WEISGERBER: Objection to</p> <p>6 form and foundation.</p> <p>7 A. My understanding is there was an</p> <p>8 Arbitration Award, awarded for the benefit</p> <p>9 of Mr. Terry.</p> <p>10 Q. But that award was against Acis,</p> <p>11 correct?</p> <p>12 MS. WEISGERBER: Objection to</p> <p>13 form.</p> <p>14 A. I don't know all of the details.</p> <p>15 I do know that Acis was a subsidiary of</p> <p>16 Highland, and there was an arbitration</p> <p>17 award that was for the benefit of</p> <p>18 Mr. Terry.</p> <p>19 Q. But you would agree with me that</p> <p>20 if, if Highland, or I'm sorry if Mr. Terry</p> <p>21 had an arbitration award against Acis,</p> <p>22 then Highland would not have any</p> <p>23 obligation to pay that award?</p> <p>24 MR. MORRIS: Objection to the</p> <p>25 form of the question.</p>	<p style="text-align: right;">Page 47</p> <p>1 Confidential - Pugatch</p> <p>2 MS. WEISGERBER: Objection to</p> <p>3 the form. Objection to the extent</p> <p>4 that it calls for a legal conclusion.</p> <p>5 I don't -- Mike, if you have a</p> <p>6 layman's understanding of the answer</p> <p>7 to that question, you're welcome to</p> <p>8 answer. But if not, don't answer.</p> <p>9 A. My understanding was Acis was a</p> <p>10 controlled subsidiary of Highland's.</p> <p>11 Q. Okay. Well, the next bullet</p> <p>12 point says that, "Highland did not inform</p> <p>13 HarbourVest that it undertook the</p> <p>14 transfers to siphon assets away from Acis,</p> <p>15 L.P., and that such transfers would</p> <p>16 prevent Mr. Terry from collecting on the</p> <p>17 Arbitration Award."</p> <p>18 So if your understanding was</p> <p>19 that Highland was responsible for the</p> <p>20 arbitration award, then why is it relevant</p> <p>21 that Highland siphoned assets away from</p> <p>22 Acis, L.P.?</p> <p>23 MS. WEISGERBER: Objection to</p> <p>24 form. Misstates testimony.</p> <p>25 Can you clarify that question,</p>
<p style="text-align: right;">Page 48</p> <p>1 Confidential - Pugatch</p> <p>2 John? I think the beginning of it was</p> <p>3 a little muddled.</p> <p>4 BY MR. WILSON:</p> <p>5 Q. Well, this objection says that</p> <p>6 Highland had -- or response to objection,</p> <p>7 says that Highland had no intention of</p> <p>8 paying the arbitration award, but that</p> <p>9 seems to conflict with the next bullet</p> <p>10 point that says that it undertook</p> <p>11 transfers to siphon assets away from Acis,</p> <p>12 L.P., to prevent Mr. Terry from collecting</p> <p>13 on the arbitration award.</p> <p>14 So where were those assets being</p> <p>15 siphoned to?</p> <p>16 MS. WEISGERBER: Objection to</p> <p>17 form and foundation.</p> <p>18 If you're capable of answering</p> <p>19 that question, Mike, you can.</p> <p>20 A. I don't know the specific</p> <p>21 details of where those assets were</p> <p>22 siphoned off to, other than it was to</p> <p>23 another Highland affiliate.</p> <p>24 Q. The next sentence says that,</p> <p>25 "Highland simply did not inform</p>	<p style="text-align: right;">Page 49</p> <p>1 Confidential - Pugatch</p> <p>2 HarbourVest and represented to HarbourVest</p> <p>3 that the reason for changing the portfolio</p> <p>4 manager for HCLOF was because Acis was</p> <p>5 toxic in the industry."</p> <p>6 Do you see that?</p> <p>7 A. Yes.</p> <p>8 Q. And it seems when I read these</p> <p>9 documents that have been filed in the</p> <p>10 Highland bankruptcy, and also the Acis</p> <p>11 bankruptcy, that there's a difference in</p> <p>12 position as to which entity, being either</p> <p>13 Highland or HarbourVest, had the belief</p> <p>14 that the Acis name was toxic. Can you</p> <p>15 shed any light on that?</p> <p>16 MS. WEISGERBER: Objection to</p> <p>17 form.</p> <p>18 A. I can unequivocally say that the</p> <p>19 idea to change the portfolio manager or</p> <p>20 the idea that the Acis brand was toxic did</p> <p>21 not come from HarbourVest.</p> <p>22 Q. That was not at HarbourVest's</p> <p>23 suggestion or insistence?</p> <p>24 A. Absolutely not.</p> <p>25 Q. Well, whose suggestion was it</p>

<p style="text-align: right;">Page 50</p> <p>1 Confidential - Pugatch</p> <p>2 that the Acis name was toxic?</p> <p>3 A. Somebody at Highland.</p> <p>4 Q. Do you know who?</p> <p>5 A. I don't recall the conversation</p> <p>6 where that first came up or who said, or</p> <p>7 who at Highland said that.</p> <p>8 Q. But that conversation did occur</p> <p>9 prior to HarbourVest's investment?</p> <p>10 A. Yes.</p> <p>11 Q. So Acis was previously the</p> <p>12 portfolio manager for HCLOF prior to</p> <p>13 November 15, 2017, and now November 17 --</p> <p>14 or 15th, 2017, the portfolio manager was</p> <p>15 changed.</p> <p>16 And what is HarbourVest's</p> <p>17 position as to why that change in</p> <p>18 portfolio manager damaged it?</p> <p>19 MS. WEISGERBER: Objection;</p> <p>20 form, objection to the extent it calls</p> <p>21 for a legal conclusion.</p> <p>22 Mike, you can answer --</p> <p>23 MR. WILSON: I'm not asking for</p> <p>24 a -- with all due respect, I'm not</p> <p>25 asking for a legal conclusion. I'm</p>	<p style="text-align: right;">Page 51</p> <p>1 Confidential - Pugatch</p> <p>2 asking for his understanding why the</p> <p>3 change in the portfolio manager</p> <p>4 damaged HarbourVest.</p> <p>5 MS. WEISGERBER: Same objection.</p> <p>6 You can provide any</p> <p>7 non-privileged answer that you have,</p> <p>8 Mike, if any.</p> <p>9 A. Ultimately my understanding is</p> <p>10 that that change in portfolio manager and</p> <p>11 the subsequent litigation between Acis,</p> <p>12 Highland, and Josh Terry led to material</p> <p>13 diminution in value, as it relates to the</p> <p>14 underlying assets of HCLOF stemming from</p> <p>15 Highland's decision not to comply with the</p> <p>16 arbitration award to Mr. Terry.</p> <p>17 Q. Okay. Now, if you go up to</p> <p>18 Page 4 in this document, it says that on</p> <p>19 October 27th, and this is Paragraph 11</p> <p>20 now, "On October 27, 2017, Acis' portfolio</p> <p>21 management rights for HCLOF were</p> <p>22 transferred to Highland HCF"; is that</p> <p>23 correct?</p> <p>24 A. That sounds right, yes.</p> <p>25 Q. And this is over two weeks prior</p>
<p style="text-align: right;">Page 52</p> <p>1 Confidential - Pugatch</p> <p>2 to HarbourVest's investment, correct?</p> <p>3 A. Correct.</p> <p>4 Q. So HarbourVest had full</p> <p>5 knowledge that that the portfolio manager</p> <p>6 of HCLOF was being changed prior to its</p> <p>7 investment, correct?</p> <p>8 A. Correct.</p> <p>9 MS. WEISGERBER: Objection to</p> <p>10 form.</p> <p>11 And just to clarify, you're</p> <p>12 asking him, HarbourVest, he's</p> <p>13 testifying on behalf of himself. I</p> <p>14 could just take a standing objection</p> <p>15 to that because I know sometimes</p> <p>16 you're just saying HarbourVest meaning</p> <p>17 Mike, so...</p> <p>18 BY MR. WILSON:</p> <p>19 Q. Okay. And just to be clear,</p> <p>20 HCLOF changed its portfolio manager on</p> <p>21 October 27, 2017, but after the Acis</p> <p>22 bankruptcy was initiated the Chapter 11</p> <p>23 trustee made changes to the portfolio</p> <p>24 manager, correct?</p> <p>25 MS. WEISGERBER: Objection to</p>	<p style="text-align: right;">Page 53</p> <p>1 Confidential - Pugatch</p> <p>2 form, foundation.</p> <p>3 A. I know there were changes</p> <p>4 subsequent to the Acis bankruptcy, to the</p> <p>5 underlying management of the Acis CLOs.</p> <p>6 Q. All right. I'm going to go back</p> <p>7 to Paragraph 37, and I want to look at</p> <p>8 these next two bullet points.</p> <p>9 It says that, in the third</p> <p>10 bullet point, that "Highland indicated to</p> <p>11 HarbourVest that the dispute with</p> <p>12 Mr. Terry (which appeared on a litigation</p> <p>13 schedule presented to HarbourVest during</p> <p>14 diligence) would have no impact on</p> <p>15 investment activities."</p> <p>16 And that would be the opinion of</p> <p>17 Highland, correct?</p> <p>18 MS. WEISGERBER: Objection to</p> <p>19 form. The opinion of Highland? Is</p> <p>20 that what you meant to ask?</p> <p>21 MR. WILSON: Right.</p> <p>22 BY MR. WILSON:</p> <p>23 Q. That's Highland expressing its</p> <p>24 opinion to HarbourVest, correct?</p> <p>25 MS. WEISGERBER: Objection to</p>

<p style="text-align: right;">Page 54</p> <p>1 Confidential - Pugatch</p> <p>2 form.</p> <p>3 A. I would just say Highland</p> <p>4 presented that as facts to HarbourVest.</p> <p>5 Q. Okay. And the next one, it says</p> <p>6 that "Highland expressed confidence in the</p> <p>7 ability of HCLOF to reset or redeem the</p> <p>8 CLOs notwithstanding that Highland was</p> <p>9 using HCLOF as part of its scheme to avoid</p> <p>10 the pending Arbitration Award."</p> <p>11 That's again an opinion, right,</p> <p>12 that Highland expressed confidence in the</p> <p>13 ability of HCLOF?</p> <p>14 MS. WEISGERBER: Objection to</p> <p>15 form. Objection to the extent it</p> <p>16 calls for a legal conclusion.</p> <p>17 A. Ultimately, their ability, or</p> <p>18 HCLOF's ability to reset or redeem the</p> <p>19 CLOs would be subject to market conditions</p> <p>20 and the ability to actually affect those</p> <p>21 transactions, but they expressed their,</p> <p>22 you know, their belief or view in HCLOF's</p> <p>23 ability to do that notwithstanding the,</p> <p>24 that change in portfolio manager.</p> <p>25 Q. Well, in Paragraph 39 on that</p>	<p style="text-align: right;">Page 55</p> <p>1 Confidential - Pugatch</p> <p>2 same page, it says, "In reliance on</p> <p>3 Highland's misrepresentations and</p> <p>4 omissions, HarbourVest invested in HCLOF."</p> <p>5 Now, HarbourVest is a</p> <p>6 sophisticated investor, correct?</p> <p>7 A. Correct.</p> <p>8 Q. And if we were to go to</p> <p>9 Paragraph 36, it says, right here in the</p> <p>10 middle, "These facts were material:</p> <p>11 indeed, HarbourVest expressed concern and</p> <p>12 requested further information regarding</p> <p>13 the Transfers, the Arbitration Award, and</p> <p>14 their implications for HCLOF, and the</p> <p>15 investment's closing date was delayed."</p> <p>16 And the closing date was</p> <p>17 ultimately November 15, 2017, correct?</p> <p>18 A. Correct.</p> <p>19 Q. What was the initial closing</p> <p>20 date that had to be delayed?</p> <p>21 A. I believe it was scheduled for</p> <p>22 November 1st.</p> <p>23 Q. So HarbourVest had full</p> <p>24 knowledge of these facts that it, that it</p> <p>25 lays out here forming the basis of the</p>
<p style="text-align: right;">Page 56</p> <p>1 Confidential - Pugatch</p> <p>2 alleged misrepresentations, and they</p> <p>3 requested further information regarding</p> <p>4 those facts.</p> <p>5 Did they receive any further</p> <p>6 information?</p> <p>7 MR. MORRIS: Objection to the</p> <p>8 form of the question.</p> <p>9 MS. WEISGERBER: Objection to</p> <p>10 form. Misstates testimony.</p> <p>11 A. We did have subsequent</p> <p>12 conversations and, I believe, receive</p> <p>13 subsequent information describing the</p> <p>14 intent around, and the, you know, new</p> <p>15 structure, pro forma structure, of the</p> <p>16 action that Highland had undertaken. And</p> <p>17 part of the reason for the delay in the</p> <p>18 closing was to ensure that we had adequate</p> <p>19 time to diligence those changes, ask</p> <p>20 questions, in connection with a thorough</p> <p>21 due diligence process, and ensure that the</p> <p>22 underlying legal structure was still</p> <p>23 sound.</p> <p>24 Q. And HarbourVest was investing</p> <p>25 over \$73 million, correct?</p>	<p style="text-align: right;">Page 57</p> <p>1 Confidential - Pugatch</p> <p>2 A. Right.</p> <p>3 Q. And HarbourVest had made</p> <p>4 investments of this nature previously,</p> <p>5 correct?</p> <p>6 A. We did.</p> <p>7 MS. WEISGERBER: Objection to</p> <p>8 form.</p> <p>9 A. HarbourVest has made hundreds of</p> <p>10 investment over its years, yes.</p> <p>11 Q. And HarbourVest has conducted</p> <p>12 due diligence regarding its investments in</p> <p>13 the past, correct?</p> <p>14 A. Correct.</p> <p>15 Q. And HarbourVest received</p> <p>16 additional information on items of concern</p> <p>17 and reviewed that information and</p> <p>18 satisfied itself that this was an</p> <p>19 appropriate investment, correct?</p> <p>20 MS. WEISGERBER: Objection to</p> <p>21 form. Misstates testimony.</p> <p>22 A. On the back of</p> <p>23 misrepresentations by Highland, yes.</p> <p>24 MR. WILSON: Well, I think</p> <p>25 that's nonresponsive and I object.</p>

<p style="text-align: right;">Page 58</p> <p>1 Confidential - Pugatch</p> <p>2 Q. I'm just, I'm just, reading from</p> <p>3 your pleading that you filed in the</p> <p>4 bankruptcy, where you say that these were</p> <p>5 material facts, and HarbourVest sought</p> <p>6 more information regarding these facts.</p> <p>7 And then you've testified that they</p> <p>8 performed additional due diligence</p> <p>9 regarding that information they received,</p> <p>10 and then they determined that the</p> <p>11 investment was appropriate, correct?</p> <p>12 MS. WEISGERBER: Objection to</p> <p>13 form. Misstates testimony.</p> <p>14 Go ahead, Mike.</p> <p>15 A. Yeah, that is correct, on the</p> <p>16 back of the additional information we</p> <p>17 received from Highland.</p> <p>18 And I would add, with, you know,</p> <p>19 with the benefit of external advisors and</p> <p>20 outside counsel reviewing those structural</p> <p>21 changes, as well.</p> <p>22 Q. All right. Thank you.</p> <p>23 Now, going back to your</p> <p>24 declaration, which we've marked as</p> <p>25 Exhibit 3, Paragraph 3 says that "The</p>	<p style="text-align: right;">Page 59</p> <p>1 Confidential - Pugatch</p> <p>2 unaudited net asset value of HCLOF, as of</p> <p>3 August 31, 2020, was \$44,587,820."</p> <p>4 And is that a – is that a book</p> <p>5 value, I guess?</p> <p>6 A. That is a fair market value, in</p> <p>7 accordance with the valuation policy of</p> <p>8 HCLOF.</p> <p>9 Q. Do you happen to know the net</p> <p>10 asset value of HCLOF as of February 1,</p> <p>11 2019? And I don't want an exact number, I</p> <p>12 just want an approximation.</p> <p>13 A. No, I do not.</p> <p>14 Q. Do you know where I could get</p> <p>15 that information?</p> <p>16 A. Presumably from the Debtor.</p> <p>17 Q. We'll come back to this in a</p> <p>18 minute, but I'm going to –</p> <p>19 MS. WEISGERBER: I think we've</p> <p>20 been going about an hour, John, if we</p> <p>21 can take a quick break.</p> <p>22 MR. WILSON: Yeah, a break is</p> <p>23 fine.</p> <p>24 MS. WEISGERBER: Actually,</p> <p>25 Mike...</p>
<p style="text-align: right;">Page 60</p> <p>1 Confidential - Pugatch</p> <p>2 MR. WILSON: I'm sorry? I</p> <p>3 didn't hear you.</p> <p>4 MS. WEISGERBER: It can be up to</p> <p>5 Mike.</p> <p>6 Mike, do you want to take a</p> <p>7 quick break? Do you want to keep</p> <p>8 going?</p> <p>9 MR. WILSON: No, we can, if</p> <p>10 y'all need a break, we can take a</p> <p>11 break, like 10, 15 minutes.</p> <p>12 THE WITNESS: Yeah, why don't we</p> <p>13 take a break, please.</p> <p>14 MR. WILSON: What do y'all</p> <p>15 prefer? 10, 15?</p> <p>16 MS. WEISGERBER: Ten minutes is</p> <p>17 fine.</p> <p>18 Mike, is that good with you.</p> <p>19 THE WITNESS: Yeah, ten-minute</p> <p>20 break is fine.</p> <p>21 MR. WILSON: Okay. Well, we'll</p> <p>22 break till, let's say, 1:20 central</p> <p>23 time.</p> <p>24 THE WITNESS: Perfect.</p> <p>25 MR. WILSON: All right. Thanks</p>	<p style="text-align: right;">Page 61</p> <p>1 Confidential - Pugatch</p> <p>2 guys.</p> <p>3 (Recess taken.)</p> <p>4 MR. WILSON: Yes, I just sent</p> <p>5 out an E-mail with Exhibit 6, and I'm</p> <p>6 going to pull that up on the screen</p> <p>7 share, as well.</p> <p>8 (Whereupon, Exhibit 6, Offering</p> <p>9 Memorandum 122 pages, was marked for</p> <p>10 identification.)</p> <p>11 BY MR. WILSON:</p> <p>12 Q. All right. So this is the</p> <p>13 Offering Memorandum, and I'm looking at</p> <p>14 the bottom of Page 1 – I mean, the top of</p> <p>15 Page 1, I'm sorry.</p> <p>16 The Company that was being</p> <p>17 invested in is Highland CLO Funding, Ltd.</p> <p>18 Do you see that, Mr. Pugatch?</p> <p>19 MS. WEISGERBER: Objection to</p> <p>20 form.</p> <p>21 A. I do. Okay.</p> <p>22 Q. And then this document defines</p> <p>23 Highland, as Highland Capital Management,</p> <p>24 L.P. Do you see that?</p> <p>25 A. Yes.</p>

<p style="text-align: right;">Page 62</p> <p>1 Confidential - Pugatch</p> <p>2 Q. Okay. Now, if we go down to, I</p> <p>3 guess it's Page 8 of this document, and</p> <p>4 this first full paragraph at the top, it</p> <p>5 says, "No voting member of the Advisory</p> <p>6 Board shall be a controlled affiliate of</p> <p>7 Highland."</p> <p>8 Do you see that?</p> <p>9 A. I do.</p> <p>10 Q. And then it also says that, "It</p> <p>11 being understood that none of CLO Holdco</p> <p>12 Ltd., it's wholly-owned subsidiaries, or</p> <p>13 any of their respective directors or</p> <p>14 trustees shall be deemed to be a</p> <p>15 controlled affiliate of Highland, due to</p> <p>16 their preexisting non-discretionary</p> <p>17 advisory relationship with Highland."</p> <p>18 Do you see that?</p> <p>19 A. Yes.</p> <p>20 Q. So there were no affiliates of</p> <p>21 Highland on the Advisory Board, correct?</p> <p>22 MS. WEISGERBER: Objection to</p> <p>23 form.</p> <p>24 A. For voting purposes under the</p> <p>25 document, that is how this reads, correct.</p>	<p style="text-align: right;">Page 63</p> <p>1 Confidential - Pugatch</p> <p>2 MR. WILSON: All right. I'm</p> <p>3 going to turn to the next exhibit.</p> <p>4 And this is going to be Exhibit No. 7</p> <p>5 coming in the E-mail. I'm also going</p> <p>6 to put Exhibit No. 7 on the screen.</p> <p>7 (Whereupon, Exhibit 7, Share</p> <p>8 Subscription and Transfer Agreement 31</p> <p>9 pages, was marked for identification.)</p> <p>10 Q. All right. Do you see that?</p> <p>11 The "Subscription and Transfer Agreement</p> <p>12 For Ordinary Shares"?</p> <p>13 A. Yep.</p> <p>14 Q. All right. So what this</p> <p>15 document says is that, it repeats that</p> <p>16 Highland HCLF Advisory Ltd. is the</p> <p>17 portfolio manager. Highland CLO Funding</p> <p>18 Ltd. is the fund, and CLO Holdco Ltd. is</p> <p>19 the existing shareholder.</p> <p>20 And if we go down to the bottom</p> <p>21 half of this page, it says that</p> <p>22 HarbourVest was acquiring its shares in</p> <p>23 this investment from CLO Holdco, correct?</p> <p>24 A. Yes.</p> <p>25 MS. WEISGERBER: Objection to</p>
<p style="text-align: right;">Page 64</p> <p>1 Confidential - Pugatch</p> <p>2 form.</p> <p>3 Q. And prior to the date of this</p> <p>4 document, which I believe is November 15,</p> <p>5 2017, CLO Holdco held 100 percent of the</p> <p>6 shares of HCLOF, correct?</p> <p>7 MS. WEISGERBER: Objection to</p> <p>8 form, foundation.</p> <p>9 A. I don't recall. I know they</p> <p>10 were the largest, the largest investor. I</p> <p>11 don't recall if it was 100 percent.</p> <p>12 Q. Well, if you look at the chart</p> <p>13 below Paragraph A, it says that CLO Holdco</p> <p>14 Ltd. immediately prior to the placing on</p> <p>15 100 percent share percentage.</p> <p>16 Do you have any reason to</p> <p>17 disagree with that?</p> <p>18 A. No.</p> <p>19 MS. WEISGERBER: Objection to</p> <p>20 form.</p> <p>21 Q. All right. Now, below CLO</p> <p>22 Holdco Ltd., these are the five</p> <p>23 HarbourVest entities that have filed</p> <p>24 proofs of claim in this bankruptcy,</p> <p>25 correct?</p>	<p style="text-align: right;">Page 65</p> <p>1 Confidential - Pugatch</p> <p>2 MS. WEISGERBER: Objection to</p> <p>3 form.</p> <p>4 A. Those are the five HarbourVest</p> <p>5 entities with a direct investment in</p> <p>6 HCLOF.</p> <p>7 Q. And each one of those entities</p> <p>8 has filed a proof of claim in this</p> <p>9 bankruptcy, correct?</p> <p>10 A. Yes.</p> <p>11 Q. And the largest – I think we</p> <p>12 discussed this earlier, but Dover Street</p> <p>13 IX is the largest of those investors, with</p> <p>14 a 35.49 percent share percentage, correct?</p> <p>15 MS. WEISGERBER: Objection to</p> <p>16 form.</p> <p>17 A. Correct.</p> <p>18 Q. And if you take the total of</p> <p>19 those investments of the HarbourVest</p> <p>20 entities, you get a 49.98 percent total.</p> <p>21 Is that your understanding?</p> <p>22 MS. WEISGERBER: Objection to</p> <p>23 form.</p> <p>24 A. I know it has 49 percent, and</p> <p>25 some percentage. I'll take your math as</p>

<p style="text-align: right;">Page 66</p> <p>1 Confidential - Pugatch</p> <p>2 correct.</p> <p>3 Q. And 49.98 percent is larger than</p> <p>4 the next largest shareholder, which is CLO</p> <p>5 Holdco which is 49.02 percent, correct?</p> <p>6 MS. WEISGERBER: Objection to</p> <p>7 form.</p> <p>8 A. In taking all of the HarbourVest</p> <p>9 entities, collectively, yes, correct.</p> <p>10 Q. And so I want to go back to</p> <p>11 earlier where we saw in documents filed by</p> <p>12 HarbourVest, where it refers to itself as</p> <p>13 a passive investor. What do you, I</p> <p>14 apologize if I've already asked you this</p> <p>15 question, but what do you mean by passive</p> <p>16 investor?</p> <p>17 A. Meaning we were a minority</p> <p>18 investor in HCLOF. HCLOF was fully</p> <p>19 controlled by Highland as the investment</p> <p>20 manager. So HarbourVest did not have any</p> <p>21 governance, rights, or control as it</p> <p>22 related to the ongoing investment</p> <p>23 management and decisionmaking of HCLOF.</p> <p>24 Q. HarbourVest has the largest</p> <p>25 percentage of the shares of any of these</p>	<p style="text-align: right;">Page 67</p> <p>1 Confidential - Pugatch</p> <p>2 investors, correct?</p> <p>3 MS. WEISGERBER: Objection to</p> <p>4 form.</p> <p>5 A. Taken collectively, yes.</p> <p>6 Q. And HarbourVest owned one of the</p> <p>7 two spots on the Advisory Board, correct?</p> <p>8 MS. WEISGERBER: Objection to</p> <p>9 form.</p> <p>10 A. Correct.</p> <p>11 Q. And if you look down below the</p> <p>12 HarbourVest entities on this chart, you</p> <p>13 see that Highland Capital Management, L.P.</p> <p>14 is purchasing a .63 percent interest,</p> <p>15 correct?</p> <p>16 MS. WEISGERBER: Objection to</p> <p>17 form. The document speaks for itself.</p> <p>18 A. According to the document, yes.</p> <p>19 Q. Do you have any reason to</p> <p>20 disagree with that document?</p> <p>21 MS. WEISGERBER: Objection to</p> <p>22 form.</p> <p>23 A. I do not.</p> <p>24 MR. WILSON: All right. I'm</p> <p>25 going to stop that screen share. I'm</p>
<p style="text-align: right;">Page 68</p> <p>1 Confidential - Pugatch</p> <p>2 going to E-mail out the next exhibit.</p> <p>3 This was Exhibit 8 that I just sent,</p> <p>4 and I'll pull it up on the screen</p> <p>5 share.</p> <p>6 (Whereupon, Exhibit 8, E-mail</p> <p>7 08/15/2017, was marked for</p> <p>8 identification.)</p> <p>9 Q. Now, I'll represent to you that</p> <p>10 I received this document this morning from</p> <p>11 your counsel. Do you recognize this</p> <p>12 E-mail? Have you seen it before?</p> <p>13 A. Yes, I have.</p> <p>14 Q. And this E-mail is sent by Brad</p> <p>15 Eden. I think you mentioned that he was</p> <p>16 one of the representatives that was</p> <p>17 involved in the pre-investment discussions</p> <p>18 with Highland?</p> <p>19 A. Correct.</p> <p>20 Q. And I think you told me that</p> <p>21 Dustin Willard was involved in those</p> <p>22 discussions on the HarbourVest side,</p> <p>23 correct?</p> <p>24 A. Correct.</p> <p>25 Q. And so this is an E-mail sent on</p>	<p style="text-align: right;">Page 69</p> <p>1 Confidential - Pugatch</p> <p>2 August 15, 2017 from Brad Eden to Dustin</p> <p>3 Willard. Are you familiar with Thomas</p> <p>4 Surgent?</p> <p>5 A. Yes.</p> <p>6 Q. Was he involved in those</p> <p>7 discussions with you and HarbourVest as</p> <p>8 well?</p> <p>9 A. In some of those discussions,</p> <p>10 yes.</p> <p>11 Q. Okay. So when it says, "Dustin,</p> <p>12 attached is a legal summary. Of course,</p> <p>13 Thomas is available to answer any</p> <p>14 follow-up questions." Do you know if</p> <p>15 Thomas was consulted with any follow-up</p> <p>16 questions?</p> <p>17 A. I recall --</p> <p>18 MS. WEISGERBER: Objection to</p> <p>19 form.</p> <p>20 A. -- having follow-up</p> <p>21 conversations with Highland, I don't --</p> <p>22 around these legal summaries. I don't</p> <p>23 recall with whom.</p> <p>24 Q. Okay. And just to show you the</p> <p>25 attachment that's referenced in the</p>

<p style="text-align: right;">Page 70</p> <p>1 Confidential - Pugatch</p> <p>2 E-mail, this says that SEC financial</p> <p>3 crisis matter crusader, Terry, Daugherty</p> <p>4 and UBS. So and then I guess these are --</p> <p>5 this is information provided by Highland</p> <p>6 to HarbourVest regarding these matters.</p> <p>7 Why were these particular matters</p> <p>8 addressed in this E-mail, to your</p> <p>9 knowledge?</p> <p>10 MS. WEISGERBER: Objection to</p> <p>11 form and foundation.</p> <p>12 A. These were all outstanding</p> <p>13 litigation matters that we had become</p> <p>14 aware of in connection with our diligence</p> <p>15 that we asked for a further explanation</p> <p>16 from Highland on the underlying substance.</p> <p>17 Q. Now, did you become</p> <p>18 independently aware of these in the course</p> <p>19 of your due diligence, or were these</p> <p>20 brought to your attention by Highland</p> <p>21 first?</p> <p>22 A. I don't know.</p> <p>23 MS. WEISGERBER: Objection to</p> <p>24 form.</p> <p>25 Q. You don't know?</p>	<p style="text-align: right;">Page 71</p> <p>1 Confidential - Pugatch</p> <p>2 A. (Nods.)</p> <p>3 Q. Okay. And particularly with</p> <p>4 respect to Mr. Terry, is it your opinion</p> <p>5 that there are any material</p> <p>6 misrepresentations made in this summary?</p> <p>7 MS. WEISGERBER: Objection to</p> <p>8 form. Objection to the extent it</p> <p>9 calls for a legal conclusion.</p> <p>10 Mike, to the extent you have an</p> <p>11 answer that does not infringe on</p> <p>12 conversations with counsel, you can</p> <p>13 provide it.</p> <p>14 A. Yeah, I would say our</p> <p>15 understanding or interpretation of that,</p> <p>16 or the answer to that question would be</p> <p>17 based on conversations with counsel.</p> <p>18 Q. Well, this document was provided</p> <p>19 to you in the course of the discussions</p> <p>20 prior to HarbourVest's investment, and</p> <p>21 you've stated that Highland, or you've</p> <p>22 taken the position that Highland made</p> <p>23 material misrepresentations to</p> <p>24 HarbourVest, in the course of these</p> <p>25 discussions.</p>
<p style="text-align: right;">Page 72</p> <p>1 Confidential - Pugatch</p> <p>2 Does this document evidence</p> <p>3 those material misrepresentations?</p> <p>4 MS. WEISGERBER: Objection to</p> <p>5 form. Objection to the extent it</p> <p>6 calls for a legal conclusion.</p> <p>7 A. Yeah, same answer as previous.</p> <p>8 Q. Well, I'm not asking you for a</p> <p>9 legal conclusion. I'm asking you are</p> <p>10 there misrepresentations in this document</p> <p>11 that you claim Highland made?</p> <p>12 MS. WEISGERBER: Same</p> <p>13 objections.</p> <p>14 I think misrepresentations calls</p> <p>15 for a legal conclusion regarding legal</p> <p>16 misrepresentations, actionable</p> <p>17 misrepresentations. So if he doesn't</p> <p>18 have any non-privileged testimony to</p> <p>19 give, he can't give any testimony.</p> <p>20 MR. WILSON: Well, I'm here</p> <p>21 today to investigate HarbourVest's</p> <p>22 claim and one of the basis of</p> <p>23 HarbourVest's claim is</p> <p>24 misrepresentation. So I'm trying to</p> <p>25 figure out what those</p>	<p style="text-align: right;">Page 73</p> <p>1 Confidential - Pugatch</p> <p>2 misrepresentations were.</p> <p>3 And I would ask that the witness</p> <p>4 tell me if there's a misrepresentation</p> <p>5 in this document that was provided in</p> <p>6 this E-mail.</p> <p>7 MS. WEISGERBER: Same</p> <p>8 objections.</p> <p>9 Mike, if you have a general</p> <p>10 understanding of, generally,</p> <p>11 misrepresentations that HarbourVest</p> <p>12 believes were made in connection or</p> <p>13 regarding the Terry litigation,</p> <p>14 et cetera, you can provide that</p> <p>15 information.</p> <p>16 THE WITNESS: Yeah, sure.</p> <p>17 A. So in general, my understanding</p> <p>18 and the way that Highland had</p> <p>19 characterized the ongoing litigation with</p> <p>20 Mr. Terry was that it was nothing more</p> <p>21 than an employment dispute with a former</p> <p>22 employee and that, you know, the</p> <p>23 arbitration -- well, actually, it was</p> <p>24 before the Arbitration Board, but the</p> <p>25 ongoing litigation had no impact, bearing,</p>

<p style="text-align: right;">Page 74</p> <p>1 Confidential - Pugatch</p> <p>2 or ultimate result on the underlying CLOs</p> <p>3 that Highland managed, including the Acis</p> <p>4 CLOs.</p> <p>5 Q. So you're saying that</p> <p>6 Highland --</p> <p>7 MR. MORRIS: John, I'm sorry to</p> <p>8 interrupt. Before you go on, somebody</p> <p>9 with the initials DSD just joined the</p> <p>10 deposition. Can you please identify</p> <p>11 yourself?</p> <p>12 MR. DRAPER: This is Douglas</p> <p>13 Draper. I just changed machines.</p> <p>14 MR. MORRIS: Okay. No problem,</p> <p>15 Doug. Thank you.</p> <p>16 BY MR. WILSON:</p> <p>17 Q. So, and I'm not trying to put</p> <p>18 words in your mouth, but is the gist of</p> <p>19 what you're telling me that Highland</p> <p>20 represented that this was a minor dispute</p> <p>21 with a former employee and it would not</p> <p>22 affect its CLO business?</p> <p>23 A. Correct.</p> <p>24 MS. WEISGERBER: Objection to</p> <p>25 form.</p>	<p style="text-align: right;">Page 75</p> <p>1 Confidential - Pugatch</p> <p>2 A. Correct.</p> <p>3 Q. Well, are there any more</p> <p>4 specific E-mails or written</p> <p>5 communications, that you're aware of, that</p> <p>6 would contain misrepresentations by</p> <p>7 Highland to HarbourVest?</p> <p>8 MS. WEISGERBER: Objection to</p> <p>9 form.</p> <p>10 Are you asking about from</p> <p>11 today's production, or are you asking</p> <p>12 about just, in general?</p> <p>13 MR. WILSON: Well, you produced</p> <p>14 two E-mails to us today. I'm just</p> <p>15 asking if there's anything else he's</p> <p>16 aware of where there's written</p> <p>17 misrepresentations from Highland to</p> <p>18 HarbourVest.</p> <p>19 MS. WEISGERBER: Mike, if you</p> <p>20 have an answer separate from</p> <p>21 conversations with lawyers, et cetera,</p> <p>22 you can certainly answer.</p> <p>23 A. Yeah, my understanding of the</p> <p>24 documents I reviewed that were part of the</p> <p>25 production to you earlier today, there is</p>
<p style="text-align: right;">Page 76</p> <p>1 Confidential - Pugatch</p> <p>2 another document that would also include</p> <p>3 misrepresentations on the part of this,</p> <p>4 the Terry lawsuit and ultimate impact on</p> <p>5 the CLO business.</p> <p>6 BY MR. WILSON:</p> <p>7 Q. And what document is that?</p> <p>8 A. That was the E-mail, E-mail with</p> <p>9 an attachment around a response to a Wall</p> <p>10 Street Journal article and some of the</p> <p>11 content in the E-mail itself.</p> <p>12 Q. Okay. We'll look at that one.</p> <p>13 What was the -- HarbourVest had</p> <p>14 seen the Terry Arbitration Award, correct?</p> <p>15 MS. WEISGERBER: Objection to</p> <p>16 form.</p> <p>17 Q. Prior to making its investment</p> <p>18 in HCLOF?</p> <p>19 A. We were aware of the existence</p> <p>20 and the outcome of the Arbitration Award.</p> <p>21 Q. Had you read the Arbitration</p> <p>22 Award?</p> <p>23 A. No.</p> <p>24 Q. Well, how did you know the</p> <p>25 substance of the Arbitration Award without</p>	<p style="text-align: right;">Page 77</p> <p>1 Confidential - Pugatch</p> <p>2 reading it?</p> <p>3 MS. WEISGERBER: Objection to</p> <p>4 form.</p> <p>5 A. We were informed by Highland of</p> <p>6 the outcome of the ongoing litigation and</p> <p>7 the outcome of the Arbitration Award.</p> <p>8 Q. Was that part of the</p> <p>9 documentation that you requested Highland</p> <p>10 provide you to continue your due</p> <p>11 diligence, before making the investment?</p> <p>12 MS. WEISGERBER: Objection to</p> <p>13 form.</p> <p>14 A. We certainly requested more</p> <p>15 color around the outcome of that, and any</p> <p>16 impact that it could have to HCLOF or the</p> <p>17 ongoing viability of Highland's CLO</p> <p>18 business.</p> <p>19 Q. And what, what were you provided</p> <p>20 with respect to the Terry Arbitration</p> <p>21 Award?</p> <p>22 MS. WEISGERBER: Objection to</p> <p>23 form.</p> <p>24 A. The existence of that award, the</p> <p>25 quantum of that award, the judgment of</p>

<p style="text-align: right;">Page 78</p> <p>1 Confidential - Pugatch</p> <p>2 just under \$8 million in connection with</p> <p>3 that award. That was the information that</p> <p>4 was disclosed at – and represented as a</p> <p>5 settlement or, you know, arbitration</p> <p>6 ruling, in connection with the employee</p> <p>7 litigation, wrongful termination suit.</p> <p>8 Q. So did HarbourVest not request a</p> <p>9 copy of the Arbitration Award to review?</p> <p>10 MS. WEISGERBER: Objection to</p> <p>11 form.</p> <p>12 A. We did not specifically, no.</p> <p>13 Q. And so, to this day, have you</p> <p>14 read the Arbitration Award?</p> <p>15 A. I have not.</p> <p>16 MS. WEISGERBER: Objection to</p> <p>17 form.</p> <p>18 Q. You have not?</p> <p>19 A. I have not.</p> <p>20 MR. WILSON: Okay. I think my</p> <p>21 last E-mail went out with Exhibit 9 on</p> <p>22 it. I will pull that up.</p> <p>23 Q. Can you see that on the screen</p> <p>24 share?</p> <p>25 A. Yes.</p>	<p style="text-align: right;">Page 79</p> <p>1 Confidential - Pugatch</p> <p>2 (Whereupon, Exhibit 9,</p> <p>3 11/29/2017 E-mail with cover letter</p> <p>4 Highland Capital Management, was</p> <p>5 marked for identification.)</p> <p>6 Q. Okay. So I think this is out of</p> <p>7 order, but this should have been first in</p> <p>8 the exhibit. But this is an E-mail from</p> <p>9 Hunter Covitz to Dustin Willard, Michael</p> <p>10 Pugatch and Nick Bellisario, carbon copies</p> <p>11 to Trey Parker and Brad Eden.</p> <p>12 And Trey Parker and Brad Eden</p> <p>13 are Highland affiliates, right?</p> <p>14 A. Yes.</p> <p>15 Q. And we've talked about Dustin</p> <p>16 Willard. Who's Nick Bellisario?</p> <p>17 A. He was another member of the</p> <p>18 HarbourVest team.</p> <p>19 Q. And was he on the, the</p> <p>20 four-member board that you talked about</p> <p>21 earlier, that made the investment</p> <p>22 decision?</p> <p>23 A. No, he was the junior member of</p> <p>24 the investment team that I alluded to.</p> <p>25 Q. Okay. And this, this E-mail</p>
<p style="text-align: right;">Page 80</p> <p>1 Confidential - Pugatch</p> <p>2 came out about two weeks after the</p> <p>3 HarbourVest investment, correct?</p> <p>4 A. Correct.</p> <p>5 Q. And it's your opinion or</p> <p>6 position that this E-mail contains</p> <p>7 misrepresentations that Highland made to</p> <p>8 HarbourVest?</p> <p>9 MS. WEISGERBER: Objection to</p> <p>10 form. Objection to the extent it</p> <p>11 calls for a legal conclusion.</p> <p>12 A. Yes.</p> <p>13 Q. And there was a Wall Street</p> <p>14 Journal article that had come out shortly</p> <p>15 before this E-mail, correct?</p> <p>16 A. Correct.</p> <p>17 Q. And how did you became aware of</p> <p>18 that Wall Street Journal article?</p> <p>19 A. I certainly would have seen it.</p> <p>20 I may have been sent it separately by</p> <p>21 Highland, I don't recall.</p> <p>22 Q. You don't recall if you saw it</p> <p>23 independently or Highland telling you</p> <p>24 about it?</p> <p>25 A. I don't.</p>	<p style="text-align: right;">Page 81</p> <p>1 Confidential - Pugatch</p> <p>2 Q. And what did you – what was</p> <p>3 your reaction to receiving these E-mails</p> <p>4 from Highland regarding that article?</p> <p>5 MS. WEISGERBER: Objection to</p> <p>6 form.</p> <p>7 A. The article or the accusations</p> <p>8 in the article were something that</p> <p>9 required more explanation from our</p> <p>10 perspective.</p> <p>11 Q. And attached to this E-mail</p> <p>12 was – we just scrolled through it a</p> <p>13 second ago – but a letter from James</p> <p>14 Dondero that was sent to the</p> <p>15 editor-in-chief of the Wall Street</p> <p>16 Journal, Mr. Gerard Baker, on November</p> <p>17 28th.</p> <p>18 And did you read this</p> <p>19 attachment?</p> <p>20 A. Yes.</p> <p>21 Q. And did this attachment to this</p> <p>22 E-mail aleve your concerns that you had</p> <p>23 regarding the article?</p> <p>24 MS. WEISGERBER: Objection to</p> <p>25 form.</p>

<p style="text-align: right;">Page 82</p> <p>1 Confidential - Pugatch</p> <p>2 A. I wouldn't say alleviated the</p> <p>3 concerns but certainly provided an</p> <p>4 explanation or refute to some of the</p> <p>5 claims made in the, in the article.</p> <p>6 Q. And do you contend that this</p> <p>7 letter that was written to Gerard Baker</p> <p>8 and provided later to HarbourVest was a</p> <p>9 material misrepresentation?</p> <p>10 MS. WEISGERBER: Objection to</p> <p>11 form.</p> <p>12 Don't answer that, Mike. It</p> <p>13 calls for a legal conclusion.</p> <p>14 MR. WILSON: I'm asking for his</p> <p>15 understanding.</p> <p>16 Q. Do you contend that there's</p> <p>17 misrepresentations in this letter?</p> <p>18 MS. WEISGERBER: Material</p> <p>19 misrepresentations absolutely calls</p> <p>20 for a legal conclusion, John.</p> <p>21 MR. WILSON: Well, I've</p> <p>22 shortened it to misrepresentations.</p> <p>23 So I just want to know if he thinks</p> <p>24 there's anything that's misrepresented</p> <p>25 in this letter.</p>	<p style="text-align: right;">Page 83</p> <p>1 Confidential - Pugatch</p> <p>2 MS. WEISGERBER: Same</p> <p>3 objections.</p> <p>4 Mike, if you have an</p> <p>5 understanding, separate from</p> <p>6 conversations with lawyers, you can</p> <p>7 answer.</p> <p>8 A. I would need to reread the</p> <p>9 letter to definitively answer that outside</p> <p>10 of conversations with counsel.</p> <p>11 Q. But to be clear, this letter was</p> <p>12 issued two weeks after HarbourVest's</p> <p>13 investment, correct?</p> <p>14 A. Correct.</p> <p>15 MS. WEISGERBER: Objection;</p> <p>16 asked and answered.</p> <p>17 MR. WILSON: I'm going to now</p> <p>18 send out the next exhibit, which is</p> <p>19 going to be Exhibit No. 10.</p> <p>20 (Whereupon, Exhibit 10, 2004</p> <p>21 Examination of Investor in Highland</p> <p>22 CLO Funding Ltd. 10/10/2018, was</p> <p>23 marked for identification.)</p> <p>24 MR. WILSON: It just went</p> <p>25 through. So I'm going to pull it up</p>
<p style="text-align: right;">Page 84</p> <p>1 Confidential - Pugatch</p> <p>2 on my screen share.</p> <p>3 So this Exhibit 10, the document</p> <p>4 I received this morning, filed in the</p> <p>5 Acis bankruptcy, it looks like, well,</p> <p>6 let's see, dated in, dated October 10,</p> <p>7 2018.</p> <p>8 BY MR. WILSON:</p> <p>9 Q. Have you seen this document</p> <p>10 before?</p> <p>11 A. Yes.</p> <p>12 Q. And it's a motion for 2004</p> <p>13 Examination of Investor in Highland CLO</p> <p>14 Funding, Ltd., correct?</p> <p>15 A. Sorry. Was there a question,</p> <p>16 John?</p> <p>17 Q. Yeah. I was just asking you to</p> <p>18 confirm that this was the motion for 2004</p> <p>19 Examination of Investor in Highland CLO</p> <p>20 Funding?</p> <p>21 A. Yes.</p> <p>22 Q. And so if I scroll down to</p> <p>23 Paragraph 6, which is on, it looks like</p> <p>24 it's on Page 4. In the second sentence,</p> <p>25 it says that "Although HCLOF/ALF was a one</p>	<p style="text-align: right;">Page 85</p> <p>1 Confidential - Pugatch</p> <p>2 time wholly-owned by an affiliate of</p> <p>3 Highland, it did an offering memorandum in</p> <p>4 November of 2017 and as a result, is now</p> <p>5 owned 49.985% by certain affiliates of a</p> <p>6 large investor and manager of private</p> <p>7 equity funds."</p> <p>8 And that's defined as investor.</p> <p>9 So the Investor is the HarbourVest</p> <p>10 entities collectively, correct?</p> <p>11 A. Correct.</p> <p>12 Q. All right. And then the next</p> <p>13 sentence, says that "Despite its large</p> <p>14 ownership percentage in HCLOF in the</p> <p>15 alleged millions in losses that will</p> <p>16 result if the Acis CLOs are not reset to</p> <p>17 make them consistent with prevailing</p> <p>18 market conditions the Investor has not yet</p> <p>19 appeared in this case or taken any</p> <p>20 position in this bankruptcy case."</p> <p>21 Do you see that?</p> <p>22 A. I do.</p> <p>23 Q. Is that correct?</p> <p>24 MS. WEISGERBER: Objection to</p> <p>25 form.</p>

<p style="text-align: right;">Page 86</p> <p>1 Confidential - Pugatch</p> <p>2 A. Is what correct?</p> <p>3 Q. Well, I guess, I'm most</p> <p>4 concerned with this last part of the</p> <p>5 sentence. It starts with "The Investor</p> <p>6 has not yet appeared in this case or taken</p> <p>7 any position in the bankruptcy case."</p> <p>8 Do you agree with that?</p> <p>9 MS. WEISGERBER: Objection to</p> <p>10 form.</p> <p>11 Mike, if you want to look at the</p> <p>12 whole document, you're welcome to.</p> <p>13 This is not a document that's a</p> <p>14 HarbourVest-prepared document.</p> <p>15 BY MR. WILSON:</p> <p>16 Q. Maybe a better way of asking the</p> <p>17 question is: As of the date of this</p> <p>18 document, which was in October of 2018,</p> <p>19 had HarbourVest appeared in the Acis</p> <p>20 bankruptcy?</p> <p>21 A. No, we did not.</p> <p>22 Q. And had they asserted any</p> <p>23 positions regarding the Acis bankruptcy?</p> <p>24 A. Not through the court.</p> <p>25 MS. WEISGERBER: Objection to</p>	<p style="text-align: right;">Page 87</p> <p>1 Confidential - Pugatch</p> <p>2 form.</p> <p>3 Q. Okay. Had Highland encouraged</p> <p>4 HarbourVest to participate in the Acis</p> <p>5 bankruptcy?</p> <p>6 MS. WEISGERBER: Objection to</p> <p>7 form.</p> <p>8 A. No.</p> <p>9 Q. They did not?</p> <p>10 MS. WEISGERBER: Objection to</p> <p>11 form.</p> <p>12 Q. Highland did not encourage</p> <p>13 HarbourVest to participate in the Acis</p> <p>14 bankruptcy?</p> <p>15 A. When you say "participate," can</p> <p>16 you define that, please.</p> <p>17 Q. Well, appear in the case, as</p> <p>18 stated in this motion.</p> <p>19 A. No, they had not.</p> <p>20 Q. Did Harbour – I'm sorry – did</p> <p>21 Highland keep HarbourVest apprised of the</p> <p>22 events that occurred in the Acis</p> <p>23 bankruptcy?</p> <p>24 MS. WEISGERBER: Objection to</p> <p>25 form. I'm just going to restate my</p>
<p style="text-align: right;">Page 88</p> <p>1 Confidential - Pugatch</p> <p>2 objection to the extent you're asking</p> <p>3 questions about HarbourVest. This is</p> <p>4 Mr. Pugatch answering, based on his</p> <p>5 knowledge.</p> <p>6 A. We were kept informed from time</p> <p>7 to time throughout the Acis bankruptcy</p> <p>8 proceeding.</p> <p>9 Q. Well, did you, in fact, have</p> <p>10 weekly conference calls with Highland</p> <p>11 representatives regarding the Acis</p> <p>12 bankruptcy?</p> <p>13 MS. WEISGERBER: Objection to</p> <p>14 form.</p> <p>15 A. I don't recall them being</p> <p>16 weekly, no.</p> <p>17 Q. You can agree with me you</p> <p>18 participated in the conference calls with</p> <p>19 Highland regarding the Acis bankruptcy?</p> <p>20 A. Yes.</p> <p>21 MS. WEISGERBER: Same objection.</p> <p>22 Q. And on what, on what –</p> <p>23 MR. WILSON: Sorry. Strike</p> <p>24 that.</p> <p>25 Q. With what regularity would you</p>	<p style="text-align: right;">Page 89</p> <p>1 Confidential - Pugatch</p> <p>2 estimate those conference calls occurred,</p> <p>3 if it's not weekly?</p> <p>4 MS. WEISGERBER: Objection to</p> <p>5 form.</p> <p>6 A. From memory, maybe once, once a</p> <p>7 month on average. Sometimes more</p> <p>8 frequently, sometimes less frequently.</p> <p>9 Q. Did Highland provide you with</p> <p>10 documents and evidence that were filed in</p> <p>11 the Acis bankruptcy?</p> <p>12 MS. WEISGERBER: Objection to</p> <p>13 form.</p> <p>14 We're really starting to get</p> <p>15 pretty far afield here, John, from</p> <p>16 HarbourVest. You know, I'm not sure</p> <p>17 where you're going with this. This is</p> <p>18 a settlement motion that's teed up for</p> <p>19 the court.</p> <p>20 You're welcome to keep going,</p> <p>21 but at some point we're going to cut</p> <p>22 it off.</p> <p>23 MR. WILSON: Well, I think – I</p> <p>24 don't think I'm going to go too far</p> <p>25 down this path, but I think this</p>

<p style="text-align: right;">Page 90</p> <p>1 Confidential - Pugatch</p> <p>2 directly relates to the claims that</p> <p>3 HarbourVest has made. But I'll repeat</p> <p>4 my question.</p> <p>5 BY MR. WILSON:</p> <p>6 Q. Did Highland provide HarbourVest</p> <p>7 with documents and evidence that were</p> <p>8 filed in the Acis bankruptcy?</p> <p>9 MS. WEISGERBER: Objection to</p> <p>10 form.</p> <p>11 A. I don't recall what documents</p> <p>12 Highland may have provided to us, at that</p> <p>13 point in time.</p> <p>14 Q. I don't want you to recall</p> <p>15 specific documents that were provided, but</p> <p>16 did, did Highland provide documents from</p> <p>17 the Acis bankruptcy to HarbourVest?</p> <p>18 MS. WEISGERBER: Objection to</p> <p>19 form. Asked and answered.</p> <p>20 A. I don't recall.</p> <p>21 Q. You don't recall?</p> <p>22 A. (Nods.)</p> <p>23 Q. Would you dispute that between</p> <p>24 2018 and 2019 that Highland provided over</p> <p>25 40,000 pages of documents related to the</p>	<p style="text-align: right;">Page 91</p> <p>1 Confidential - Pugatch</p> <p>2 Acis bankruptcy to HarbourVest?</p> <p>3 MS. WEISGERBER: Objection to</p> <p>4 form, foundation.</p> <p>5 A. I don't know and I don't recall.</p> <p>6 Q. And the Acis plan became</p> <p>7 effective on February 1st, 2019. Is that</p> <p>8 your understanding?</p> <p>9 A. I believe so, yes.</p> <p>10 Q. And do you -- I asked you this</p> <p>11 earlier, but I'm going to ask again. Do</p> <p>12 you have any understanding of what the</p> <p>13 value of HCLOF was, at that date?</p> <p>14 A. I don't recall.</p> <p>15 MS. WEISGERBER: Objection to</p> <p>16 form.</p> <p>17 Q. You don't?</p> <p>18 A. I don't recall, no.</p> <p>19 Q. And there was an injunction put</p> <p>20 in place in the Acis bankruptcy that</p> <p>21 prevented certain actions with respect to</p> <p>22 HCLOF, correct?</p> <p>23 MS. WEISGERBER: Objection to</p> <p>24 form, foundation.</p> <p>25 MR. MALONEY: Join.</p>
<p style="text-align: right;">Page 92</p> <p>1 Confidential - Pugatch</p> <p>2 A. Yes.</p> <p>3 Q. Now, I'm going to go back up to</p> <p>4 Paragraph 2. This says that Acis LP</p> <p>5 manages the Acis CLOs, that certain</p> <p>6 portfolio management agreement between</p> <p>7 Acis, and then it goes on. So what are</p> <p>8 the Acis CLOs, as it relates to the</p> <p>9 investment that HarbourVest made?</p> <p>10 MR. MALONEY: Objection to the</p> <p>11 form of the question.</p> <p>12 MS. WEISGERBER: Objection to</p> <p>13 form.</p> <p>14 A. The Acis CLOs -- or HCLOF owned</p> <p>15 equity in certain of the Acis CLOs as a</p> <p>16 portion of its investment portfolio.</p> <p>17 Q. And I think you were trying to</p> <p>18 distinguish earlier between who the</p> <p>19 portfolio manager was. And that would</p> <p>20 depend on whether it was an Acis CLO or a</p> <p>21 Highland CLO; is that correct?</p> <p>22 MR. MALONEY: Objection to form.</p> <p>23 MS. WEISGERBER: Objection to</p> <p>24 form, misstates testimony.</p> <p>25 A. I was referencing the portfolio</p>	<p style="text-align: right;">Page 93</p> <p>1 Confidential - Pugatch</p> <p>2 manager of the underlying CLOs, yes.</p> <p>3 Q. But we can agree that Acis had</p> <p>4 responsibility for managing at least a</p> <p>5 portion of HCLOF, correct?</p> <p>6 A. Highland --</p> <p>7 MR. WILSON: Objection to form.</p> <p>8 MR. MALONEY: Objection to form</p> <p>9 as well, foundation, and legal</p> <p>10 conclusion.</p> <p>11 (Reporter clarification.)</p> <p>12 A. It's my understanding it's</p> <p>13 Highlands' subsidiaries, yes.</p> <p>14 Q. Okay. Well, I'm going to go</p> <p>15 down to Paragraph 4, at the top of your</p> <p>16 screen here where it says, "Recently</p> <p>17 William Scott, the director of HCLOF,</p> <p>18 testified that he wants to reset the Acis</p> <p>19 CLOs to bring them in line with current</p> <p>20 market interest rates, that the inability</p> <p>21 to do the reset is causing damages to</p> <p>22 HCLOF in the amount of approximately</p> <p>23 \$295,000 per week."</p> <p>24 Is that an accurate statement?</p> <p>25 MS. WEISGERBER: Objection to</p>

<p style="text-align: right;">Page 94</p> <p>1 Confidential - Pugatch</p> <p>2 form and foundation.</p> <p>3 MR. MALONEY: Mark Maloney.</p> <p>4 Object to form and foundation.</p> <p>5 A. I don't know. You'd have to ask</p> <p>6 William Scott.</p> <p>7 Q. Well, were you aware, I mean,</p> <p>8 there's a citation to a, well, I don't</p> <p>9 know if there's a citation on this one.</p> <p>10 But it says that he recently testified.</p> <p>11 Were you aware that he testified that he</p> <p>12 wanted to reset the Acis CLOs?</p> <p>13 MS. WEISGERBER: Same objection.</p> <p>14 We're really getting far afield.</p> <p>15 MR. WILSON: I'm just asking if</p> <p>16 he was aware that this statement</p> <p>17 occurred.</p> <p>18 A. At some point in time, yes, I</p> <p>19 became aware of that.</p> <p>20 Q. Okay. Do you agree that the</p> <p>21 inability to do a reset was causing</p> <p>22 damages in the amount of \$295,000 per</p> <p>23 week?</p> <p>24 MS. WEISGERBER: Objection to</p> <p>25 form and foundation. This is not a</p>	<p style="text-align: right;">Page 95</p> <p>1 Confidential - Pugatch</p> <p>2 HarbourVest-prepared document.</p> <p>3 MR. WILSON: Well, I understand</p> <p>4 that. I'm just asking if he agrees</p> <p>5 with it.</p> <p>6 A. I don't have enough information</p> <p>7 to assess that, specifically the \$295,000</p> <p>8 per week number.</p> <p>9 Q. I want to go down to Paragraph 7</p> <p>10 of this document, and this is going to be</p> <p>11 at the top of Page 5. It says</p> <p>12 "Mr. Ellington also testified that because</p> <p>13 it would be putting in additional capital</p> <p>14 in connection with any reset CLOs, the</p> <p>15 Investor," and we discussed that that's</p> <p>16 HarbourVest, "had the ability to start</p> <p>17 'calling the shots' and dictate the terms</p> <p>18 of any reset transactions."</p> <p>19 Do you agree with that?</p> <p>20 A. No.</p> <p>21 MS. WEISGERBER: Objection to</p> <p>22 form.</p> <p>23 Q. I want to go down to Paragraph</p> <p>24 9.</p> <p>25 It says, "The Trustee also needs</p>
<p style="text-align: right;">Page 96</p> <p>1 Confidential - Pugatch</p> <p>2 information regarding whether the Investor</p> <p>3 presently has any concerns about pursuing</p> <p>4 reset transactions with the Reorganized</p> <p>5 Acis and Brigade, under the plan now that</p> <p>6 Acis has been able to successfully serve</p> <p>7 as the portfolio manager for the Acis CLOs</p> <p>8 on a post-petition basis, and there are no</p> <p>9 impediments to the ability of the</p> <p>10 Reorganized Acis and Brigade to pursue a</p> <p>11 reset on the Acis CLOs."</p> <p>12 Do you know whether the Investor</p> <p>13 had any concerns about pursuing a reset?</p> <p>14 MS. WEISGERBER: Objection to</p> <p>15 form, foundation.</p> <p>16 A. The context of a reset or</p> <p>17 refinancing of the various CLOs in HCLOF</p> <p>18 was part of the original investment</p> <p>19 thesis. So there would not have been</p> <p>20 concerns about the ability to do so. Our</p> <p>21 concerns were more in the inability to do</p> <p>22 so, as a result of the Acis bankruptcy.</p> <p>23 Q. But here, you've got the Trustee</p> <p>24 representing in Paragraph 5, that</p> <p>25 according to the Trustee's Second Amended</p>	<p style="text-align: right;">Page 97</p> <p>1 Confidential - Pugatch</p> <p>2 Joint Plan, it provides for such a reset</p> <p>3 to be performed by the Reorganized Acis</p> <p>4 and supervised by Brigade Capital</p> <p>5 Management.</p> <p>6 And it appears to me that the</p> <p>7 Trustee is trying to get the Investor's</p> <p>8 position on whether a reset should be</p> <p>9 pursued. And I'm just asking you whether</p> <p>10 HarbourVest objected to a reset at this</p> <p>11 time?</p> <p>12 MS. WEISGERBER: I'm going to</p> <p>13 object to all of the colloquy before.</p> <p>14 I'm going to object to any extent</p> <p>15 Mike's being asked about what the</p> <p>16 Trustee wanted or viewed. If you want</p> <p>17 to ask your question in isolation, go</p> <p>18 ahead.</p> <p>19 Q. What was HarbourVest's position</p> <p>20 regarding a reset, as of the date that</p> <p>21 this was filed, and I'll look again,</p> <p>22 October 10, 2018?</p> <p>23 MS. WEISGERBER: Objection to</p> <p>24 form. Objection to the extent it's</p> <p>25 asking HarbourVest's position. And I</p>

<p style="text-align: right;">Page 98</p> <p>1 Confidential - Pugatch</p> <p>2 cannot conceive how this is relevant</p> <p>3 to the 9019 motion before the court</p> <p>4 right now.</p> <p>5 Nonetheless, Mike, if you have</p> <p>6 an answer, on behalf of yourself, you</p> <p>7 can answer.</p> <p>8 A. HarbourVest was a passive</p> <p>9 minority investor in HCLOF. It had no</p> <p>10 ability to control the underlying</p> <p>11 portfolio management or ability to reset,</p> <p>12 refinance, or call in any of the equity of</p> <p>13 the underlying CLOs. That was all under</p> <p>14 the purview of Highland.</p> <p>15 Q. Did you understand that</p> <p>16 Mr. Ellington had given sworn testimony</p> <p>17 that the Investor is the party calling the</p> <p>18 shots for HCLOF, with respect to any reset</p> <p>19 transactions?</p> <p>20 MS. WEISGERBER: Objection to</p> <p>21 form.</p> <p>22 A. I did become aware of it, yes.</p> <p>23 Q. When did you become aware of</p> <p>24 that?</p> <p>25 A. At some point subsequent to that</p>	<p style="text-align: right;">Page 99</p> <p>1 Confidential - Pugatch</p> <p>2 testimony being given.</p> <p>3 Q. But was it when you read this</p> <p>4 motion that we're looking at as</p> <p>5 Exhibit 10?</p> <p>6 MS. WEISGERBER: Objection to</p> <p>7 form.</p> <p>8 A. It may have been. I don't</p> <p>9 recall the exact time or medium that I</p> <p>10 became aware of that.</p> <p>11 Q. Was a deposition given as a</p> <p>12 result of this motion?</p> <p>13 MS. WEISGERBER: Objection to</p> <p>14 form. If you have the whole document,</p> <p>15 Mike, that may make sense.</p> <p>16 MR. WILSON: Well, this motion</p> <p>17 at the top says it's a Motion for 2004</p> <p>18 Examination of Investor. And then</p> <p>19 attached to this motion are some</p> <p>20 document requests, and then deposition</p> <p>21 topics for a corporate representative</p> <p>22 of the Investor, and then a proposed</p> <p>23 order.</p> <p>24 BY MR. WILSON:</p> <p>25 Q. Do you recall whether a</p>
<p style="text-align: right;">Page 100</p> <p>1 Confidential - Pugatch</p> <p>2 deposition was given, after this motion</p> <p>3 was filed?</p> <p>4 A. Yes.</p> <p>5 Q. And who was the designated</p> <p>6 deponent?</p> <p>7 A. I was.</p> <p>8 Q. And were documents produced, as</p> <p>9 a result of this?</p> <p>10 A. Yes, there were.</p> <p>11 Q. And were you asked at that</p> <p>12 deposition what the Investor's position on</p> <p>13 a reset was?</p> <p>14 MS. WEISGERBER: Objection to</p> <p>15 form.</p> <p>16 If you recall.</p> <p>17 A. I don't recall specifically that</p> <p>18 question being asked.</p> <p>19 Q. Well, do you know what</p> <p>20 the Debtor's position -- I'm sorry, the</p> <p>21 Debtor's -- the Investor's position on a</p> <p>22 reset was as of that day?</p> <p>23 MS. WEISGERBER: Objection to</p> <p>24 form. Asked and answered.</p> <p>25 A. I would just say again, in</p>	<p style="text-align: right;">Page 101</p> <p>1 Confidential - Pugatch</p> <p>2 general, the original investment thesis</p> <p>3 here was predicated on a refinancing reset</p> <p>4 of the various CLOs, and we were not in</p> <p>5 control as a passive minority investor</p> <p>6 here to --</p> <p>7 Q. Well, you said you weren't in</p> <p>8 control, but what would HarbourVest's</p> <p>9 preference have been?</p> <p>10 MS. WEISGERBER: Objection to</p> <p>11 form.</p> <p>12 A. I do not recall.</p> <p>13 MS. WEISGERBER: If you recall.</p> <p>14 A. I don't recall the specifics</p> <p>15 around what Acis CLO were referring to</p> <p>16 here or what the specific implications of</p> <p>17 a reset were at that time; but regardless,</p> <p>18 that was a decision for the investment</p> <p>19 manager of HCLO.</p> <p>20 Q. But was it your opinion, your</p> <p>21 personal opinion, that a reset was</p> <p>22 appropriate?</p> <p>23 MS. WEISGERBER: Objection to</p> <p>24 form.</p> <p>25 A. Again, we were not the portfolio</p>

<p style="text-align: right;">Page 102</p> <p>1 Confidential - Pugatch</p> <p>2 manager of HCLOF. We were not in control</p> <p>3 of those decisions or making</p> <p>4 recommendations on those decisions. That</p> <p>5 was the delegated authority of Highland,</p> <p>6 as the investment manager.</p> <p>7 Q. I'm not asking for that. I'm</p> <p>8 asking for your personal feelings toward a</p> <p>9 reset.</p> <p>10 MS. WEISGERBER: Same objection.</p> <p>11 He's only answering on behalf of</p> <p>12 himself, and it's been asked and</p> <p>13 answered three times since.</p> <p>14 MR. WILSON: Well, he hasn't</p> <p>15 answered the question. He's just told</p> <p>16 me they don't have the authority to do</p> <p>17 the reset.</p> <p>18 MS. WEISGERBER: And he told you</p> <p>19 the other information he'd be required</p> <p>20 to even have an opinion on it. So</p> <p>21 same objection stands. It's not a</p> <p>22 specific enough question for him.</p> <p>23 Mike, you're welcome, if you</p> <p>24 have, if you have an answer, you're</p> <p>25 welcome to give it.</p>	<p style="text-align: right;">Page 103</p> <p>1 Confidential - Pugatch</p> <p>2 A. Yeah, the investment guidelines</p> <p>3 of HCLOF, from the documents that we</p> <p>4 signed at the time we entered into the</p> <p>5 transaction, laid out the specific, again,</p> <p>6 investment guidelines that HCLOF would be</p> <p>7 guided under, including the opportunity to</p> <p>8 refinance or reset various CLOs over time,</p> <p>9 in accordance with Highland's, you know,</p> <p>10 expectations and ultimate decision to do</p> <p>11 so.</p> <p>12 Q. But did you believe, at this</p> <p>13 time, that a reset was appropriate?</p> <p>14 MS. WEISGERBER: Objection to</p> <p>15 form. This is asked and answered</p> <p>16 several times now, I think we should</p> <p>17 move on. He's given you an answer.</p> <p>18 MR. WILSON: Well, I want to</p> <p>19 know what his personal opinion was</p> <p>20 about whether the reset was</p> <p>21 appropriate.</p> <p>22 A. What reset are you referring to?</p> <p>23 Q. A reset as of October 10, 2018.</p> <p>24 At that time, did you believe that a reset</p> <p>25 was appropriate?</p>
<p style="text-align: right;">Page 104</p> <p>1 Confidential - Pugatch</p> <p>2 A. A reset of what?</p> <p>3 MS. WEISGERBER: Same objection.</p> <p>4 Q. A reset as been discussed all</p> <p>5 through this motion, the same reset we're</p> <p>6 talking about.</p> <p>7 MS. WEISGERBER: Objection.</p> <p>8 Same objections. I just don't see how</p> <p>9 he could possibly answer this vague</p> <p>10 question.</p> <p>11 Q. Okay. So William Scott,</p> <p>12 director of HCLOF, testified that he</p> <p>13 wanted to reset the Acis CLOs because if</p> <p>14 they don't, they are losing \$295,000 a</p> <p>15 week.</p> <p>16 Did you think that a reset was</p> <p>17 appropriate in line with what Mr. Scott</p> <p>18 believed?</p> <p>19 MR. MALONEY: Objection to form,</p> <p>20 foundation.</p> <p>21 MS. WEISGERBER: Same</p> <p>22 objections. And asked and answered</p> <p>23 numerous times.</p> <p>24 A. We were not managing the</p> <p>25 portfolio. We were an investor in a</p>	<p style="text-align: right;">Page 105</p> <p>1 Confidential - Pugatch</p> <p>2 company, an investment company that was</p> <p>3 managing this. We were not, I was not</p> <p>4 proximate enough to any of the underlying</p> <p>5 happenings of the look through CLO</p> <p>6 positions of HCLOF to have an informed</p> <p>7 view on this, at this time.</p> <p>8 Q. Is your testimony that you did</p> <p>9 not have an opinion as to whether the Acis</p> <p>10 CLO should be reset in late 2018?</p> <p>11 MS. WEISGERBER: Objection to</p> <p>12 form. Misstates testimony.</p> <p>13 A. My view is that the original</p> <p>14 investment guidelines here called for a</p> <p>15 reset or refinance of the CLOs and that</p> <p>16 Highland was subsequently in full control</p> <p>17 of whether or not to pursue this, and we,</p> <p>18 HarbourVest, as an investor had no ability</p> <p>19 to object or to force that on a go-forward</p> <p>20 basis.</p> <p>21 MR. WILSON: Objection.</p> <p>22 Nonresponsive.</p> <p>23 Q. I want to know your personal</p> <p>24 opinion of whether you thought a reset was</p> <p>25 appropriate in October of 2018.</p>

<p style="text-align: right;">Page 106</p> <p>1 Confidential - Pugatch</p> <p>2 MR. MORRIS: Objection to the</p> <p>3 form of the question. That's been</p> <p>4 asked and answered.</p> <p>5 MR. WILSON: He has yet to give</p> <p>6 his answer to –</p> <p>7 MR. MORRIS: He just told you he</p> <p>8 didn't have enough information. He</p> <p>9 just told you that, crystal clear.</p> <p>10 MR. WILSON: Well, I'm not going</p> <p>11 to argue with you, John, but I just</p> <p>12 want an answer to my question.</p> <p>13 His answer, he wouldn't agree</p> <p>14 with my, with my summation that he had</p> <p>15 no opinion, so I just want to know</p> <p>16 what his opinion is.</p> <p>17 MS. WEISGERBER: Same</p> <p>18 objections.</p> <p>19 You're not giving him enough</p> <p>20 information to answer the question,</p> <p>21 and at this point, it would be</p> <p>22 speculation. We can just keep going</p> <p>23 in circles on this, but your –</p> <p>24 MR. WILSON: His opinion would</p> <p>25 be speculation?</p>	<p style="text-align: right;">Page 107</p> <p>1 Confidential - Pugatch</p> <p>2 MS. WEISGERBER: He said that,</p> <p>3 he actually testified at some point</p> <p>4 that he doesn't recall specifics of</p> <p>5 the time, so that was another piece of</p> <p>6 the puzzle.</p> <p>7 I mean, I don't want to be</p> <p>8 coaching the witness or giving</p> <p>9 testimony here, but I think you're not</p> <p>10 listening to the things he's saying,</p> <p>11 John, just because you don't like it.</p> <p>12 BY MR. WILSON:</p> <p>13 Q. Mr. Pugatch, did you have an</p> <p>14 opinion, in October of 2019, about whether</p> <p>15 the Acis CLOs should be reset?</p> <p>16 MS. WEISGERBER: Objection to</p> <p>17 form.</p> <p>18 A. I don't recall any definitive</p> <p>19 opinion I would have had, but as stated,</p> <p>20 was not proximate enough to have an</p> <p>21 informed opinion, in any event.</p> <p>22 Q. And to your knowledge, have the</p> <p>23 Acis CLOs ever been reset?</p> <p>24 MS. WEISGERBER: Objection to</p> <p>25 form, foundation.</p>
<p style="text-align: right;">Page 108</p> <p>1 Confidential - Pugatch</p> <p>2 A. I do not believe that any of the</p> <p>3 Acis CLOs were ever reset.</p> <p>4 Q. All right. So who negotiated</p> <p>5 this claim, the settlement of this claim</p> <p>6 on behalf of HarbourVest?</p> <p>7 A. I did.</p> <p>8 Q. And who negotiated for the</p> <p>9 Debtor?</p> <p>10 A. Jim Seery.</p> <p>11 Q. And when did those negotiations</p> <p>12 begin?</p> <p>13 A. It started sometime in November,</p> <p>14 I believe.</p> <p>15 Q. And are you aware that Jim Seery</p> <p>16 has ever taken the position that the</p> <p>17 HarbourVest claim was worthless?</p> <p>18 MS. WEISGERBER: Objection to</p> <p>19 form, foundation.</p> <p>20 A. No, I'm not aware of that.</p> <p>21 Q. Has Jim Seery ever offered</p> <p>22 \$5 million to settle the HarbourVest</p> <p>23 claim?</p> <p>24 A. Not to my knowledge.</p> <p>25 MS. WEISGERBER: Objection to</p>	<p style="text-align: right;">Page 109</p> <p>1 Confidential - Pugatch</p> <p>2 form.</p> <p>3 MR. WILSON: I'm going to send</p> <p>4 out Exhibit 11.</p> <p>5 (Whereupon, Exhibit 11,</p> <p>6 Declaration of John A. Morris in</p> <p>7 Support of the Debtor's Motion For</p> <p>8 Entry of an Order Approving Settlement</p> <p>9 With Harbourvest (Claim Nos. 143, 147,</p> <p>10 149, 150, 153, 154) and Authorizing</p> <p>11 Actions, 82 pages, was marked for</p> <p>12 identification.)</p> <p>13 BY MR. WILSON:</p> <p>14 Q. I want pull this up on the</p> <p>15 screen share. This Exhibit 11 is the</p> <p>16 Declaration of John Morris in Support of</p> <p>17 the Debtor's 9019 Motion, bears</p> <p>18 Document 1631. And attached to this</p> <p>19 exhibit is a trim cut copy of the</p> <p>20 Settlement Agreement executed December 23,</p> <p>21 2020.</p> <p>22 And the Settlement Agreement has</p> <p>23 Paragraph 1, Settlement of Claims, that</p> <p>24 HarbourVest is going to receive a</p> <p>25 \$45 million unsecured, general unsecured</p>

<p style="text-align: right;">Page 110</p> <p>1 Confidential - Pugatch</p> <p>2 claim, and a \$35 million subordinated</p> <p>3 claim.</p> <p>4 And then Part B of that</p> <p>5 paragraph states that HarbourVest is going</p> <p>6 to transfer all its rights, titles, and</p> <p>7 interests to its investment in CLOF to the</p> <p>8 Debtor or its nominee.</p> <p>9 Is that your understanding of</p> <p>10 the general terms of this settlement?</p> <p>11 MS. WEISGERBER: Objection to</p> <p>12 form.</p> <p>13 A. Yes, it is.</p> <p>14 Q. Okay. And also in Paragraph 5,</p> <p>15 Each HarbourVest party agrees that it will</p> <p>16 vote all of HarbourVest claims held by</p> <p>17 such HarbourVest party to accept the plan.</p> <p>18 And I won't read all of that.</p> <p>19 But the gist of this paragraph is that</p> <p>20 HarbourVest is going to vote for the</p> <p>21 Debtor's proposed plan; is that correct?</p> <p>22 MS. WEISGERBER: Objection to</p> <p>23 form.</p> <p>24 A. Yes, correct.</p> <p>25 Q. And how did that term come to be</p>	<p style="text-align: right;">Page 111</p> <p>1 Confidential - Pugatch</p> <p>2 in this Settlement Agreement?</p> <p>3 MS. WEISGERBER: Objection to</p> <p>4 form.</p> <p>5 A. I believe it was put there as</p> <p>6 part of the drafting of the ultimate</p> <p>7 agreement to the fund.</p> <p>8 Q. Well, whose suggestion was it</p> <p>9 that it be added to the drafting?</p> <p>10 MS. WEISGERBER: Objection to</p> <p>11 form.</p> <p>12 A. I believe that it came from</p> <p>13 Debtor's counsel, as they took the lead on</p> <p>14 drafting the documentation here.</p> <p>15 Q. Did Jim Seery ever tell you that</p> <p>16 it was important to him that HarbourVest</p> <p>17 vote in support of the plan?</p> <p>18 MS. WEISGERBER: Objection to</p> <p>19 form.</p> <p>20 A. I don't recall that ever being</p> <p>21 discussed. Certainly it was not the</p> <p>22 prominent feature of any of the</p> <p>23 discussions or negotiations that I ever</p> <p>24 had with Jim.</p> <p>25 Q. Okay.</p>
<p style="text-align: right;">Page 112</p> <p>1 Confidential - Pugatch</p> <p>2 MR. WILSON: I'm going to take a</p> <p>3 ten-minute break, and I think I'm</p> <p>4 almost ready to wrap up. So I want to</p> <p>5 stop my screen share. And let's,</p> <p>6 well, let's start back at 2:30, and I</p> <p>7 think I'll be quick. Thank you.</p> <p>8 (Recess taken.)</p> <p>9 BY MR. WILSON:</p> <p>10 Q. Mr. Pugatch, earlier you</p> <p>11 testified that consistent with your</p> <p>12 declaration you filed that as of August</p> <p>13 31, 2020, the value of HCLOF was</p> <p>14 \$44.5 million. And then if we look at --</p> <p>15 I don't remember which --</p> <p>16 Okay. So this would have been</p> <p>17 Exhibit 7. I'll do a share screen.</p> <p>18 As of November 15, 2017 these</p> <p>19 shares were purchased at \$1.02 and change</p> <p>20 apiece, and there were a total number of</p> <p>21 143 million shares.</p> <p>22 Was the value of this investment</p> <p>23 roughly \$150 million, as of November 15,</p> <p>24 2017?</p> <p>25 MS. WEISGERBER: Objection to</p>	<p style="text-align: right;">Page 113</p> <p>1 Confidential - Pugatch</p> <p>2 form. Foundation.</p> <p>3 MR. MALONEY: Join.</p> <p>4 MS. WEISGERBER: I don't know,</p> <p>5 Mike, if you're comfortable doing that</p> <p>6 math or what.</p> <p>7 A. Yes, approximately that's</p> <p>8 correct.</p> <p>9 Q. Okay. And you know, and I've</p> <p>10 read your papers and you talk about</p> <p>11 attorneys' fees that you say weren't</p> <p>12 appropriate to be charged to HCLOF and</p> <p>13 that part of it, but as to the loss of</p> <p>14 value of the actual investment, what's</p> <p>15 your understanding of what led to that?</p> <p>16 MS. WEISGERBER: Objection to</p> <p>17 form. Objection to the extent it</p> <p>18 calls for a legal conclusion.</p> <p>19 Mike, to the extent you have a</p> <p>20 nonlegal opinion on that, that's not</p> <p>21 based on conversations with counsel,</p> <p>22 you can answer.</p> <p>23 A. Yeah, I think a lot of the value</p> <p>24 erosion was due to the inability to</p> <p>25 refinance, reset a number of the</p>

<p style="text-align: right;">Page 114</p> <p>1 Confidential - Pugatch</p> <p>2 underlying CLOs that was part of the</p> <p>3 original investment thesis here, largely</p> <p>4 as a result of the ongoing litigation,</p> <p>5 that Highland was involved in, and the</p> <p>6 subsequent Acis bankruptcy.</p> <p>7 Q. And so during the period of time</p> <p>8 when the injunction prohibited certain</p> <p>9 actions with respect to this investment,</p> <p>10 is it your opinion that this investment</p> <p>11 was losing value?</p> <p>12 MR. MALONEY: Objection.</p> <p>13 MS. WEISGERBER: Objection to</p> <p>14 form.</p> <p>15 A. Can you repeat the question,</p> <p>16 John?</p> <p>17 Q. Well, I guess I want to know,</p> <p>18 like, in a, on a timeline kind of basis,</p> <p>19 do you think that the significant</p> <p>20 reduction of value occurred prior to or</p> <p>21 after the confirmation of the Acis plan on</p> <p>22 February 1, 2019?</p> <p>23 MS. WEISGERBER: Objection to</p> <p>24 form. Objection to the extent it</p> <p>25 calls for a legal conclusion.</p>	<p style="text-align: right;">Page 115</p> <p>1 Confidential - Pugatch</p> <p>2 You can give your lay opinion,</p> <p>3 if you have one, Mike.</p> <p>4 A. I think it's all been as a</p> <p>5 result of the events leading up to the</p> <p>6 Acis bankruptcy, including the inability</p> <p>7 to refinance or reset the CLOs which would</p> <p>8 have been to the benefit of the CLO equity</p> <p>9 holders including HCLOF.</p> <p>10 Q. And so what, what was the cause</p> <p>11 of the inability to reset?</p> <p>12 MS. WEISGERBER: Same</p> <p>13 objections: form, foundation, legal</p> <p>14 conclusion.</p> <p>15 If you have a non-privileged</p> <p>16 answer, Mike, go ahead.</p> <p>17 A. Yeah, my understanding was</p> <p>18 originally the TRO, preventing Highland</p> <p>19 and HCLOF from pursuing that, and then</p> <p>20 subsequent to the Acis bankruptcy ruling,</p> <p>21 a similar injunction that remained around</p> <p>22 the inability for the equity holders of</p> <p>23 those CLOs to redeem or refinances or</p> <p>24 reset.</p> <p>25 Q. So do you -- is there any</p>
<p style="text-align: right;">Page 116</p> <p>1 Confidential - Pugatch</p> <p>2 component, in your opinion, of the loss of</p> <p>3 value of these investments due to</p> <p>4 portfolio mismanagement?</p> <p>5 MS. WEISGERBER: Objection to</p> <p>6 form, foundation, legal conclusion, or</p> <p>7 expert opinion, calling for</p> <p>8 speculation.</p> <p>9 If you have a view, Mike.</p> <p>10 A. Yeah. Can you be more specific</p> <p>11 with the question, John?</p> <p>12 Q. Well, I'll ask it a different</p> <p>13 way.</p> <p>14 Do you think that portfolio</p> <p>15 mismanagement was a portion of the cause</p> <p>16 of the reduction in value?</p> <p>17 MS. WEISGERBER: Same objection.</p> <p>18 A. I can't speculate as to, you</p> <p>19 know, the underlying management decisions</p> <p>20 around the CLOs, but what I do know is</p> <p>21 that the mismanagement and</p> <p>22 misrepresentations at the HCLOF level,</p> <p>23 that would ultimately result in the Acis</p> <p>24 bankruptcy and subsequent to that, the TRO</p> <p>25 and the inability to refinance or reset</p>	<p style="text-align: right;">Page 117</p> <p>1 Confidential - Pugatch</p> <p>2 that has been the, far and away, the</p> <p>3 largest contributor to loss of value</p> <p>4 within the portfolio.</p> <p>5 Q. One of the allegations that</p> <p>6 HarbourVest has made is that Highland</p> <p>7 improperly changed the portfolio manager.</p> <p>8 Is it your opinion that if that had not</p> <p>9 been done, the portfolio manager had not</p> <p>10 been changed at the inception of</p> <p>11 HarbourVest's investment, that that would</p> <p>12 have preserved any value of this fund?</p> <p>13 MR. MORRIS: Objection to the</p> <p>14 form of the question.</p> <p>15 MS. WEISGERBER: Same objection.</p> <p>16 Calling for speculation, hypothetical</p> <p>17 lay opinion.</p> <p>18 If you have testimony, go ahead,</p> <p>19 Mike.</p> <p>20 A. Sorry, could you just repeat the</p> <p>21 question, John? I want to make sure I'm</p> <p>22 answering it correctly.</p> <p>23 Q. I guess I just want to know, and</p> <p>24 I think you kind of hinted at this a</p> <p>25 little bit earlier today, but I guess what</p>

<p style="text-align: right;">Page 118</p> <p>1 Confidential - Pugatch</p> <p>2 I really want to know is do you think that</p> <p>3 the particular portfolio manager made a</p> <p>4 difference in the loss of value that HCLOF</p> <p>5 suffered?</p> <p>6 MS. WEISGERBER: Same</p> <p>7 objections.</p> <p>8 A. Again, it sounds like you're</p> <p>9 asking a different question there than</p> <p>10 what I thought I understood your question</p> <p>11 to be initially. What I would say to that</p> <p>12 is the decision originally to change the</p> <p>13 portfolio manager, and ultimately the</p> <p>14 events that took place following the</p> <p>15 Arbitration Award for Mr. Terry, resulted</p> <p>16 in the subsequent Acis bankruptcy, which</p> <p>17 in turn has led to the destruction of</p> <p>18 value, because of the inability to</p> <p>19 refinance or reset, the underlying CLOs.</p> <p>20 Q. So HarbourVest is not alleging</p> <p>21 that the portfolio manager made any</p> <p>22 particular decisions or participated in</p> <p>23 any mismanagement that led to reduction in</p> <p>24 value?</p> <p>25 MS. WEISGERBER: Objection to</p>	<p style="text-align: right;">Page 119</p> <p>1 Confidential - Pugatch</p> <p>2 form.</p> <p>3 A. When you're asking about</p> <p>4 portfolio manager, are we referring to the</p> <p>5 portfolio manager at the underlying CLO</p> <p>6 level or at the HCLOF level? I think</p> <p>7 there are two different levels here of</p> <p>8 portfolio management.</p> <p>9 Q. Well, I'm talking about the</p> <p>10 portfolio manager, and you can tell me</p> <p>11 which one it is, but which portfolio</p> <p>12 manager has the ability to, to impact the</p> <p>13 performance of these funds?</p> <p>14 MR. MORRIS: Objection.</p> <p>15 A. If you're referring to HCLOF,</p> <p>16 the --</p> <p>17 MS. WEISGERBER: Objection to</p> <p>18 form.</p> <p>19 A. -- investment manager, or the</p> <p>20 portfolio manager of HCLOF has the ability</p> <p>21 to drive value creation by virtue of its</p> <p>22 equity position in the underlying CLOs.</p> <p>23 Q. Well, which portfolio manager</p> <p>24 makes the day-to-day decisions about</p> <p>25 selling assets, trading assets, that, that</p>
<p style="text-align: right;">Page 120</p> <p>1 Confidential - Pugatch</p> <p>2 I guess --</p> <p>3 A. If you're referring to</p> <p>4 underlaying credits, that would be the</p> <p>5 portfolio manager in each of the</p> <p>6 individual CLOs. The impact in value to</p> <p>7 the equity investment in the CLOs is a</p> <p>8 decision at the HCLOF level, where the</p> <p>9 majority of that value erosion has</p> <p>10 resulted from the inability to refinance</p> <p>11 or reset those CLO entities.</p> <p>12 Q. And that's what we're talking</p> <p>13 about when you said that they, that</p> <p>14 Highland changed the portfolio manager,</p> <p>15 you're talking about at the HCLOF level,</p> <p>16 right?</p> <p>17 MS. WEISGERBER: Objection to</p> <p>18 form.</p> <p>19 A. Well, I was responding to the</p> <p>20 question that I thought you asked. I</p> <p>21 wasn't necessarily stating that.</p> <p>22 Q. I guess all I'm really trying to</p> <p>23 do here is just understand HarbourVest's</p> <p>24 position. And it sounds to me, and</p> <p>25 correct me if I'm wrong, it sounds to me</p>	<p style="text-align: right;">Page 121</p> <p>1 Confidential - Pugatch</p> <p>2 that what you're saying is that the</p> <p>3 diminution of value wasn't attributable to</p> <p>4 poor investment decisions by a portfolio</p> <p>5 manager, as much as it was the</p> <p>6 consequences in the Acis bankruptcy of the</p> <p>7 change in portfolio manager; is that fair?</p> <p>8 MS. WEISGERBER: Objection to</p> <p>9 form. Misstates testimony.</p> <p>10 A. Yes, it is. That is my general</p> <p>11 understanding, yes.</p> <p>12 MR. WILSON: Okay. No further</p> <p>13 questions.</p> <p>14 MR. MORRIS: All right. Well,</p> <p>15 thank you very much.</p> <p>16 THE REPORTER: Does anybody have</p> <p>17 any other questions?</p> <p>18 MR. KANE: Yes. This is John</p> <p>19 Kane with CLO Holdco. I'll jump on</p> <p>20 video. I've got some questions, but</p> <p>21 I'm going to be relatively short. If</p> <p>22 anybody else has a little bit heavier</p> <p>23 schedule, let me know.</p> <p>24 All right. I'll take that as a</p> <p>25 go-ahead.</p>

<p style="text-align: right;">Page 122</p> <p>1 Confidential - Pugatch</p> <p>2 EXAMINATION</p> <p>3 BY MR. KANE:</p> <p>4 Q. This is John Kane. I represent</p> <p>5 CLO Holdco.</p> <p>6 Hi, Mike Pugatch. It's nice to</p> <p>7 talk to you.</p> <p>8 A. Likewise.</p> <p>9 Q. I just wanted to briefly</p> <p>10 confirm. I believe you testified you</p> <p>11 participated in negotiations that lead to</p> <p>12 the Settlement Agreement, that is part of</p> <p>13 the 9019 motion, before the bankruptcy</p> <p>14 court; is that correct?</p> <p>15 A. Correct.</p> <p>16 Q. And did you actively negotiate</p> <p>17 the terms of that Settlement Agreement?</p> <p>18 A. Yes.</p> <p>19 Q. As in dollar amounts, what the</p> <p>20 consideration exchanged, how it would</p> <p>21 work, that kind of stuff, obviously with</p> <p>22 the assistance of counsel?</p> <p>23 A. Yes. All of that. The</p> <p>24 negotiations were, you know, over the</p> <p>25 course of a number of weeks and a number</p>	<p style="text-align: right;">Page 123</p> <p>1 Confidential - Pugatch</p> <p>2 of conversations directly with the Debtor,</p> <p>3 with counsel, all-hands calls, et cetera.</p> <p>4 Q. Okay. And as part of that in</p> <p>5 the Settlement Agreement, you say the</p> <p>6 HarbourVest entities were members in HCLOF</p> <p>7 are in essence selling their shares to the</p> <p>8 Debtor, and also in exchange getting some</p> <p>9 claims back in the Debtor's plan. Is that</p> <p>10 a fair summary?</p> <p>11 MS. WEISGERBER: Objection to</p> <p>12 form. Compound question.</p> <p>13 Q. Let me ask it a different way.</p> <p>14 A. Can you re-ask that, please?</p> <p>15 Q. Yeah. I'm happy to do that.</p> <p>16 Why don't you describe for me</p> <p>17 how you would summarize that settlement?</p> <p>18 A. Largely, as I think you just</p> <p>19 described it, which was in exchange for,</p> <p>20 in exchange for the, both the unsecured</p> <p>21 creditors' claim, and subordinated</p> <p>22 creditors' claim, that settlement value is</p> <p>23 in exchange for us transferring the</p> <p>24 interest in HCLOF to the Debtor, as part</p> <p>25 of that overall negotiating package.</p>
<p style="text-align: right;">Page 124</p> <p>1 Confidential - Pugatch</p> <p>2 Q. And what would you estimate, I</p> <p>3 going to have to imagine, let me rephrase</p> <p>4 the question.</p> <p>5 Have you guys done kind of an</p> <p>6 internal best guess of what your unsecured</p> <p>7 and subordinated claims would be, under</p> <p>8 the plan, the value?</p> <p>9 MS. WEISGERBER: Objection.</p> <p>10 Objection to form.</p> <p>11 A. Just to be clear, John, are you</p> <p>12 referring to the expected recovery value</p> <p>13 of our claims?</p> <p>14 Q. Yes, sir.</p> <p>15 MS. WEISGERBER: Objection to</p> <p>16 form. Can we just clarify, so you're</p> <p>17 talking about what they'll recover</p> <p>18 ultimately? Is that the question,</p> <p>19 John? I'm confused myself. I just</p> <p>20 want to be sure I am following.</p> <p>21 MR. KANE: Yeah. So I'm asking</p> <p>22 Mike how much he believes, based on</p> <p>23 his analysis, that HarbourVest is</p> <p>24 likely to recover from the \$45 million</p> <p>25 allowed general unsecured claim and</p>	<p style="text-align: right;">Page 125</p> <p>1 Confidential - Pugatch</p> <p>2 \$35 million allowed subordinated</p> <p>3 claim, if the settlement is approved</p> <p>4 and the plan is confirmed.</p> <p>5 MS. WEISGERBER: Objection to</p> <p>6 form.</p> <p>7 But you can answer, if you have</p> <p>8 an answer, Mike.</p> <p>9 A. We do have a sense. It's really</p> <p>10 a range of projected outcomes, as you can</p> <p>11 imagine, based on the recoveries, largely</p> <p>12 informed by conversations with the Debtor.</p> <p>13 Q. And what is that range of value?</p> <p>14 MS. WEISGERBER: Objection to</p> <p>15 form.</p> <p>16 A. Our understanding, again, based</p> <p>17 on those conversations, is that the</p> <p>18 general unsecured claim could be valued in</p> <p>19 a 75 to 80 cents on the dollar recovery.</p> <p>20 And then a, you know, that the junior</p> <p>21 class claim is really sort of upside</p> <p>22 potential, to the extent there is more</p> <p>23 recovery or more asset value of the</p> <p>24 estate, for the benefit of creditors over</p> <p>25 time.</p>

<p style="text-align: right;">Page 126</p> <p>1 Confidential - Pugatch</p> <p>2 Q. What is your understanding of</p> <p>3 the current value of the HarbourVest</p> <p>4 shares in HCLOF that would be transferred</p> <p>5 under this Agreement?</p> <p>6 A. It's roughly \$22.5 million of</p> <p>7 their value.</p> <p>8 Q. So doing a little bit of, you</p> <p>9 know, back-of-the-table-cloth math, how do</p> <p>10 you allocate value between the releases</p> <p>11 that you are receiving and the shares that</p> <p>12 you are transferring?</p> <p>13 MR. KANE: I'm sorry. Let me</p> <p>14 rephrase that. Let me ask that</p> <p>15 question differently.</p> <p>16 Q. In addition to the claims under</p> <p>17 the plan, HarbourVest is providing the</p> <p>18 Debt – sorry, in addition to the shares</p> <p>19 that are being transferred, HarbourVest is</p> <p>20 providing to the Debtor certain releases</p> <p>21 for its litigation claims; is that</p> <p>22 correct?</p> <p>23 MS. WEISGERBER: Objection to</p> <p>24 form.</p> <p>25 A. Correct.</p>	<p style="text-align: right;">Page 127</p> <p>1 Confidential - Pugatch</p> <p>2 Q. So how has HarbourVest allocated</p> <p>3 value, as far as this Settlement Agreement</p> <p>4 is concerned?</p> <p>5 And to make sure we're on the</p> <p>6 same page about what I'm asking,</p> <p>7 HarbourVest is trading a bundle of sticks,</p> <p>8 right? And there's really two things</p> <p>9 within that bundle of sticks, and please</p> <p>10 confirm that's correct, you're trading</p> <p>11 shares, and in addition, releases; is that</p> <p>12 right? In exchange you're getting back</p> <p>13 claims that have a potential future value.</p> <p>14 So, how have you allocated value</p> <p>15 among the shares transferred and the</p> <p>16 releases that are being granted?</p> <p>17 MR. MORRIS: Objection.</p> <p>18 MS. WEISGERBER: Objection.</p> <p>19 You can go ahead, Mike.</p> <p>20 A. Yeah. So ultimately we looked</p> <p>21 at it as a package, and so it was less</p> <p>22 about the attribution of value between the</p> <p>23 two different sticks, as you described it,</p> <p>24 and more about the overall package value</p> <p>25 in exchange for the transfer of our</p>
<p style="text-align: right;">Page 128</p> <p>1 Confidential - Pugatch</p> <p>2 interest and the release of the claims</p> <p>3 that we had outstanding as the Debtor.</p> <p>4 MR. KANE: Now, I want to turn</p> <p>5 your attention to what I've included</p> <p>6 in the chat. You can pull it down</p> <p>7 pretty easily if you want. But it</p> <p>8 would be Holdco Depo Exhibit 2. If</p> <p>9 that would be easier than a screen</p> <p>10 share, if you'd like, I'm happy to do</p> <p>11 that as well.</p> <p>12 MS. WEISGERBER: Which document</p> <p>13 is it, John? Because I just can't</p> <p>14 pull stuff off the Zoom right now.</p> <p>15 MR. KANE: Oh, I'm sorry. It's</p> <p>16 the Settlement Agreement with the</p> <p>17 attached exhibits. I can share my</p> <p>18 screen so we're all on the same page.</p> <p>19 Just to confirm we're looking at</p> <p>20 the same thing, here's the Settlement</p> <p>21 Agreement. There's a docket entry at</p> <p>22 the top so you can see it, 1631 filed</p> <p>23 by the Debtor 12/24/20.</p> <p>24 This is Exhibit 1 to the</p> <p>25 Declaration of John Morris in Support</p>	<p style="text-align: right;">Page 129</p> <p>1 Confidential - Pugatch</p> <p>2 of Debtor's Motion for an Entry</p> <p>3 Approving Settlement with HarbourVest.</p> <p>4 BY MR. KANE:</p> <p>5 Q. Now, this Settlement Agreement</p> <p>6 is a document that you assisted in</p> <p>7 negotiations; is that correct?</p> <p>8 A. Correct.</p> <p>9 Q. Okay. And here in Section 1B,</p> <p>10 this addresses the transfer of the shares</p> <p>11 of the HarbourVest entities to a Debtor</p> <p>12 affiliate; is that correct?</p> <p>13 MS. WEISGERBER: Objection to</p> <p>14 form.</p> <p>15 A. Correct.</p> <p>16 Q. Is that your understanding,</p> <p>17 Mr. Pugatch?</p> <p>18 A. Yes, correct.</p> <p>19 Q. Okay. Thank you. Section 4A,</p> <p>20 and is this your understanding that</p> <p>21 HarbourVest is representing that it has</p> <p>22 the authority to enter into this agreement</p> <p>23 and to transfer the shares to the Debtor's</p> <p>24 affiliate if this is approved?</p> <p>25 MS. WEISGERBER: Objection to</p>

<p style="text-align: right;">Page 130</p> <p>1 Confidential - Pugatch</p> <p>2 form. The document speaks for itself.</p> <p>3 Is that a question, John?</p> <p>4 MR. KANE: Yeah. I asked if</p> <p>5 that was his understanding, that this</p> <p>6 is a representation by HarbourVest</p> <p>7 that it has the authority to transfer</p> <p>8 the shares if the Settlement Agreement</p> <p>9 is approved.</p> <p>10 MS. WEISGERBER: Objection to</p> <p>11 form. Objection to the extent it</p> <p>12 calls for a legal conclusion.</p> <p>13 To the extent you have a</p> <p>14 nonlegal conclusion, non-privileged</p> <p>15 understanding, Mike, you can share</p> <p>16 that.</p> <p>17 A. Yeah, I'm just saying I can only</p> <p>18 answer that based on conversations with</p> <p>19 counsel.</p> <p>20 MR. KANE: Okay. I won't push</p> <p>21 that. That's fine.</p> <p>22 Q. If we keep going down here as</p> <p>23 part of this attachment, there's a</p> <p>24 Transfer Agreement, Exhibit A to the</p> <p>25 Settlement Agreement. Are you familiar</p>	<p style="text-align: right;">Page 131</p> <p>1 Confidential - Pugatch</p> <p>2 with this document?</p> <p>3 A. Yes. I've seen it.</p> <p>4 Q. And did you assist with the</p> <p>5 preparation or negotiation of this</p> <p>6 Agreement?</p> <p>7 A. Yes.</p> <p>8 Q. Okay. Did you understand that</p> <p>9 HarbourVest would need the consent of the</p> <p>10 HCLOF portfolio advisor to effectuate the</p> <p>11 transfer?</p> <p>12 MS. WEISGERBER: Objection to</p> <p>13 form. Objection to the extent it</p> <p>14 calls for a legal conclusion.</p> <p>15 Mike, if you have a view other</p> <p>16 than from privileged conversation, you</p> <p>17 can answer, otherwise do not answer.</p> <p>18 A. Yeah, I'm sorry. I can only</p> <p>19 answer that based on conversation with</p> <p>20 counsel and the read of the document.</p> <p>21 Q. So to make sure I understand</p> <p>22 that, you have no independent</p> <p>23 understanding of whether or not consent</p> <p>24 was required from the portfolio manager</p> <p>25 before you could effectuate a transfer; is</p>
<p style="text-align: right;">Page 132</p> <p>1 Confidential - Pugatch</p> <p>2 that correct?</p> <p>3 MS. WEISGERBER: Same objection.</p> <p>4 I think you can give your</p> <p>5 general understanding, but then not</p> <p>6 get into specific conversations.</p> <p>7 A. My understanding of that is</p> <p>8 based on conversations with counsel, but</p> <p>9 yes, that is my understanding, John.</p> <p>10 Q. Okay. I'm going to highlight a</p> <p>11 passage here. Can you see this</p> <p>12 highlighted area? "Whereas, the Portfolio</p> <p>13 Manager desires to consent to such</p> <p>14 transfers and to the admission of</p> <p>15 Transferee as a shareholder..."</p> <p>16 Were you aware of that</p> <p>17 provision?</p> <p>18 MS. WEISGERBER: Objection to</p> <p>19 form.</p> <p>20 A. Yes. It's in the document.</p> <p>21 Q. Do you have any understanding of</p> <p>22 why that provision was included in this</p> <p>23 agreement?</p> <p>24 MS. WEISGERBER: Objection to</p> <p>25 form. Objection to the extent it</p>	<p style="text-align: right;">Page 133</p> <p>1 Confidential - Pugatch</p> <p>2 calls for a privileged conversation.</p> <p>3 A. As I answered before, based on</p> <p>4 conversations with counsel, my</p> <p>5 understanding is that consent is requiring</p> <p>6 in connection to transfer.</p> <p>7 Q. I'd like to turn your attention</p> <p>8 now – this is a document you've seen</p> <p>9 before during your deposition. This is</p> <p>10 the member's agreement related to the</p> <p>11 Company for HCLOF. This is previously</p> <p>12 produced by the Debtor, that's why it's</p> <p>13 got the Bates stamp on it. This is dated</p> <p>14 November 15, 2017.</p> <p>15 Are you familiar with this</p> <p>16 document?</p> <p>17 A. Yes.</p> <p>18 Q. Do you see on Line 14, in the</p> <p>19 between, on Page 1 shows Highland HCF</p> <p>20 Advisor, Ltd. as the portfolio manager?</p> <p>21 A. Yes, I see that.</p> <p>22 Q. I know there was quite a bit</p> <p>23 of – quite a few questions about this</p> <p>24 earlier, but you understand that Highland</p> <p>25 HCF Advisor, Ltd. is still the HCLOF</p>

<p style="text-align: right;">Page 134</p> <p>1 Confidential - Pugatch</p> <p>2 portfolio manager?</p> <p>3 MS. WEISGERBER: Objection to</p> <p>4 form.</p> <p>5 A. Honestly, I don't have – I</p> <p>6 don't have enough information to answer</p> <p>7 that definitively.</p> <p>8 Q. Okay. Going back to the</p> <p>9 Settlement Agreement, there's a reference</p> <p>10 in here to a defined term, "portfolio</p> <p>11 manager."</p> <p>12 Do you see that?</p> <p>13 A. Yep.</p> <p>14 Q. And is this the same one that's</p> <p>15 listed in the Member Agreement, Highland</p> <p>16 HCF Advisor, Ltd.?</p> <p>17 A. I believe that seems to be the</p> <p>18 position, yes.</p> <p>19 Q. Okay. So when we're talking</p> <p>20 about down here, "Whereas, the Portfolio</p> <p>21 Manager desires to consent," this consent</p> <p>22 provision is referring to the same</p> <p>23 definition of portfolio manager that's</p> <p>24 included in this Member Agreement; is that</p> <p>25 correct?</p>	<p style="text-align: right;">Page 135</p> <p>1 Confidential - Pugatch</p> <p>2 MR. MORRIS: Objection to the</p> <p>3 form.</p> <p>4 MS. WEISGERBER: Objection –</p> <p>5 same objections. Objection to the</p> <p>6 extent it calls for privileged</p> <p>7 information.</p> <p>8 A. That sounds like a legal</p> <p>9 conclusion.</p> <p>10 Q. I would have thought it was</p> <p>11 reading, Mr. Pugatch.</p> <p>12 A. Well, if you're asking me to</p> <p>13 definitively confirm that, that sounds</p> <p>14 like a legal interpretation.</p> <p>15 Q. Let me ask that a different way.</p> <p>16 Do you understand that the</p> <p>17 portfolio manager is listed as Highland</p> <p>18 HCF Advisor, Ltd. in the Member Agreement?</p> <p>19 A. Yes.</p> <p>20 Q. And in this Transfer Agreement,</p> <p>21 the portfolio manager is listed as</p> <p>22 Highland HCF Advisor, Ltd.?</p> <p>23 A. Yes.</p> <p>24 Q. And those are the same entities?</p> <p>25 A. Yes.</p>
<p style="text-align: right;">Page 136</p> <p>1 Confidential - Pugatch</p> <p>2 Q. All right. Are you familiar</p> <p>3 with Section 6 of this Member Agreement?</p> <p>4 A. (Nods.)</p> <p>5 Q. Have you ever read this</p> <p>6 document?</p> <p>7 A. I have.</p> <p>8 Q. Okay. And can you give me your</p> <p>9 understanding of what must take place</p> <p>10 under this document for HarbourVest to</p> <p>11 transfer its shares?</p> <p>12 MS. WEISGERBER: Object to the</p> <p>13 form. Object to the extent it calls</p> <p>14 for a legal conclusion. Object to the</p> <p>15 extent it calls for any privileged</p> <p>16 information or conversations.</p> <p>17 Mike, to the extent you have an</p> <p>18 independent understanding, separate</p> <p>19 from conversations with counsel, you</p> <p>20 can answer the question.</p> <p>21 A. I would say my understanding of</p> <p>22 what's required in connection with the</p> <p>23 transfer is based on conversations with</p> <p>24 counsel.</p> <p>25 Q. Do you believe that the</p>	<p style="text-align: right;">Page 137</p> <p>1 Confidential - Pugatch</p> <p>2 HarbourVest entities can transfer its</p> <p>3 shares without obtaining the consent of</p> <p>4 the portfolio manager?</p> <p>5 MS. WEISGERBER: Objection to</p> <p>6 form. Objection to the extent it</p> <p>7 calls for a legal conclusion.</p> <p>8 Same instruction, Mike, as to</p> <p>9 privileged conversations.</p> <p>10 A. Again, my view on that would be</p> <p>11 based on conversations with counsel.</p> <p>12 Q. Are you aware of whether</p> <p>13 HarbourVest provided any notice to other</p> <p>14 members of its intent to transfer its</p> <p>15 shares to the Debtor's affiliate under the</p> <p>16 Settlement Agreement, other than the</p> <p>17 filing of the 9019 motion?</p> <p>18 MS. WEISGERBER: Same objection.</p> <p>19 But there is a factual question in</p> <p>20 there if you can answer it, Mike, but</p> <p>21 no privileged conversation.</p> <p>22 A. Yeah, I'm not aware of that.</p> <p>23 Q. Did you provide members 30 days</p> <p>24 after the receipt of notice of</p> <p>25 HarbourVest's intent to transfer its</p>

<p style="text-align: right;">Page 138</p> <p>1 Confidential - Pugatch</p> <p>2 shares to the Debtor's affiliate and</p> <p>3 provide those members with an opportunity</p> <p>4 to purchase their pro rata amount of the</p> <p>5 shares?</p> <p>6 MS. WEISGERBER: Same objection.</p> <p>7 A. No.</p> <p>8 Q. And just to make sure I'm not</p> <p>9 asking this question in a way that you</p> <p>10 don't understand what I'm asking: Do you</p> <p>11 see this highlighted provision here?</p> <p>12 A. Yes.</p> <p>13 Q. I'm asking whether HarbourVest</p> <p>14 provided members 30 days after the receipt</p> <p>15 of a notice letter and an opportunity to</p> <p>16 purchase their entire pro rata share of</p> <p>17 the shares proposed to be transferred by</p> <p>18 the HarbourVest entities?</p> <p>19 MS. WEISGERBER: Objection to</p> <p>20 form. Objection to the extent it</p> <p>21 calls for privileged conversations or</p> <p>22 a legal conclusion. Objection to the</p> <p>23 extent it's asking about one piece of</p> <p>24 the document.</p> <p>25 And you're welcome to look at</p>	<p style="text-align: right;">Page 139</p> <p>1 Confidential - Pugatch</p> <p>2 the full document if you'd like, Mike.</p> <p>3 I think it was one of the ones that</p> <p>4 was E-mailed as well, or maybe you</p> <p>5 were able to pull it down.</p> <p>6 THE WITNESS: Yeah, no, I was.</p> <p>7 Thank you.</p> <p>8 A. And I'm sorry, John, could you</p> <p>9 just repeat the question?</p> <p>10 BY MR. KANE:</p> <p>11 Q. Yeah, sure, absolutely. And I'm</p> <p>12 not calling for any conversations with</p> <p>13 counsel. I'm asking you if you know</p> <p>14 whether HarbourVest did something or not.</p> <p>15 So let's -- let's keep it to that, because</p> <p>16 I --</p> <p>17 MR. KANE: Erica, I appreciate</p> <p>18 your concerns, but I really don't want</p> <p>19 to have any disclosures from Mike</p> <p>20 about his discussions with you on</p> <p>21 whether something needed to be done or</p> <p>22 not. I'm asking simply the facts of</p> <p>23 whether HarbourVest did it or not.</p> <p>24 Q. So did HarbourVest provide</p> <p>25 notice, 30 days' notice, to the members</p>
<p style="text-align: right;">Page 140</p> <p>1 Confidential - Pugatch</p> <p>2 listed under this Member Agreement of</p> <p>3 HarbourVest's intent to transfer the</p> <p>4 shares that are the subject to the</p> <p>5 Settlement Agreement?</p> <p>6 A. No.</p> <p>7 Q. Has HarbourVest provided any</p> <p>8 members with a right of first refusal and</p> <p>9 a cash purchase price for which it would</p> <p>10 sell its shares instead of transferring</p> <p>11 those shares to the Debtor or the Debtor's</p> <p>12 affiliate under the Settlement Agreement?</p> <p>13 MS. WEISGERBER: Same</p> <p>14 objections. Objection to form.</p> <p>15 Objection to extent it calls for a</p> <p>16 legal conclusion or privileged</p> <p>17 conversations, including -- regarding</p> <p>18 the specifics of that provision.</p> <p>19 I don't think that's a purely</p> <p>20 factual question.</p> <p>21 Q. Did HarbourVest offer to sell</p> <p>22 the shares to the other members? That's</p> <p>23 not a factual question?</p> <p>24 MS. WEISGERBER: Objection --</p> <p>25 A. On the basis of that factual</p>	<p style="text-align: right;">Page 141</p> <p>1 Confidential - Pugatch</p> <p>2 question, no.</p> <p>3 Q. So let me ask this question</p> <p>4 again, I don't recall if I got an answer</p> <p>5 or not.</p> <p>6 Did HarbourVest affirmatively</p> <p>7 seek to obtain the consent of Highland HCF</p> <p>8 Advisors to transfer its shares to the</p> <p>9 Debtor affiliate under the Settlement</p> <p>10 Agreement?</p> <p>11 MS. WEISGERBER: Same</p> <p>12 objections. Same instruction</p> <p>13 regarding the privileged conversation.</p> <p>14 A. I mean, as a Highland-affiliated</p> <p>15 entity, the Debtor, who's obviously the</p> <p>16 other party here involved in the transfer,</p> <p>17 you know, was involved in these</p> <p>18 discussions.</p> <p>19 Q. I'm sorry. Would you mind</p> <p>20 clarifying? Did you say that Highland HCF</p> <p>21 Advisors was involved in those discussions</p> <p>22 or the Debtor was involved in those</p> <p>23 discussions and you assume Highland HCF</p> <p>24 Advisors was?</p> <p>25 MS. WEISGERBER: Objection to</p>

<p style="text-align: right;">Page 142</p> <p>1 Confidential - Pugatch</p> <p>2 form. Misstates testimony.</p> <p>3 A. Sorry, could you just repeat the</p> <p>4 question, please, John?</p> <p>5 Q. Yes, Mr. Pugatch.</p> <p>6 I'm actually just trying to get</p> <p>7 some clarification from you, because I</p> <p>8 don't think I understood your answer</p> <p>9 about -- I had asked just -- again, I</p> <p>10 don't want any correspondence with your</p> <p>11 counsel or what your counsel advised, I'm</p> <p>12 asking: Do you know whether HarbourVest</p> <p>13 sought written consent from Highland HCF</p> <p>14 Advisor for its -- or to transfer its</p> <p>15 shares to the Debtor or the Debtor's</p> <p>16 affiliate under the Settlement Agreement?</p> <p>17 MS. WEISGERBER: Same objection.</p> <p>18 A. My understanding is HarbourVest</p> <p>19 did not explicitly have those</p> <p>20 conversations or seek that consent.</p> <p>21 Q. Okay. Are you aware of whether</p> <p>22 HarbourVest received any written consent</p> <p>23 from Highland HCF Advisors, other than</p> <p>24 what's in the Transfer Agreement attached</p> <p>25 to the Settlement Agreement?</p>	<p style="text-align: right;">Page 143</p> <p>1 Confidential - Pugatch</p> <p>2 A. I am not.</p> <p>3 MS. WEISGERBER: Same objection.</p> <p>4 Q. Do you know if HarbourVest has</p> <p>5 any written consent? Not just to seek it,</p> <p>6 but do you know if HarbourVest has a piece</p> <p>7 of paper, other than the transfer</p> <p>8 agreement, in which Highland HCF advisors</p> <p>9 provided its consent to the transfer of</p> <p>10 shares to the Debtor's affiliate?</p> <p>11 MS. WEISGERBER: Same</p> <p>12 objections.</p> <p>13 A. I would have to speak with</p> <p>14 counsel. I am not aware of that directly,</p> <p>15 no.</p> <p>16 Q. Are you aware of whether</p> <p>17 HarbourVest had any correspondence with</p> <p>18 HCLOF representatives about effectuating</p> <p>19 the transfer of the shares to the Debtor's</p> <p>20 affiliate under the Settlement Agreement?</p> <p>21 MS. WEISGERBER: Same objection.</p> <p>22 You can answer.</p> <p>23 A. We have had discussions with</p> <p>24 them, yes.</p> <p>25 Q. Did HCLOF representatives</p>
<p style="text-align: right;">Page 144</p> <p>1 Confidential - Pugatch</p> <p>2 provide consent, whether written or</p> <p>3 otherwise, to the transfer?</p> <p>4 A. I am not aware that that consent</p> <p>5 has been provided as of yet.</p> <p>6 Q. Are you aware of whether any</p> <p>7 HarbourVest representatives have had</p> <p>8 conversations with the Debtor's</p> <p>9 representatives about the necessity of</p> <p>10 consent to the transfer of their shares?</p> <p>11 MS. WEISGERBER: Objection to</p> <p>12 form --</p> <p>13 MR. KANE: I'll re-ask the</p> <p>14 question. I want to clarify that</p> <p>15 point.</p> <p>16 BY MR. KANE:</p> <p>17 Q. Mr. Pugatch, are you aware of</p> <p>18 whether any HarbourVest representatives</p> <p>19 had conversations with the Debtor's</p> <p>20 representatives about the necessity of</p> <p>21 obtaining the HCLOF portfolio manager's</p> <p>22 written consent before transferring the</p> <p>23 shares to the Debtor's representative or</p> <p>24 affiliate under the terms of the</p> <p>25 Settlement Agreement?</p>	<p style="text-align: right;">Page 145</p> <p>1 Confidential - Pugatch</p> <p>2 MS. WEISGERBER: Objection to</p> <p>3 form.</p> <p>4 And, John, I'm sorry to do this,</p> <p>5 can you just clarify what you mean by</p> <p>6 "representative"?</p> <p>7 MR. KANE: Yeah. I mean,</p> <p>8 anybody that has agency authority to</p> <p>9 act on behalf of the Debtor in</p> <p>10 negotiations, in the preparation of</p> <p>11 the documents, in negotiation of the</p> <p>12 terms of the Settlement Agreement.</p> <p>13 I mean, I think that it's, you</p> <p>14 know, a pretty broad term here.</p> <p>15 MS. WEISGERBER: Objection to</p> <p>16 form. Objection to the extent it</p> <p>17 calls for discussions with counsel.</p> <p>18 As a factual matter, if you have</p> <p>19 an answer, you can give it.</p> <p>20 A. I'm aware of conversations that</p> <p>21 have taken place about all of the terms of</p> <p>22 the Transfer Agreement in connection with</p> <p>23 the settlement, with all parties.</p> <p>24 Q. Is it your understanding based</p> <p>25 on those conversations that written</p>

<p style="text-align: right;">Page 146</p> <p>1 Confidential - Pugatch</p> <p>2 consent of the portfolio manager as</p> <p>3 defined in the Transfer Agreement was</p> <p>4 required before the shares could be</p> <p>5 transferred under the Settlement</p> <p>6 Agreement?</p> <p>7 MS. WEISGERBER: Objection to</p> <p>8 the form. Objection to the extent it</p> <p>9 calls for a legal conclusion or</p> <p>10 privileged conversation. And I think</p> <p>11 that one does, John.</p> <p>12 A. Yeah, I can only answer that</p> <p>13 based on conversation with lawyers.</p> <p>14 Q. Wasn't the question whether –</p> <p>15 I'm sorry. Maybe I forgot my own</p> <p>16 question.</p> <p>17 But I thought it was based on</p> <p>18 your conversations with the Debtor's</p> <p>19 representative, was it your understanding,</p> <p>20 not based on your conversation with</p> <p>21 counsel.</p> <p>22 MS. WEISGERBER: Can you repeat</p> <p>23 the whole question because I</p> <p>24 definitely misunderstood it then too.</p> <p>25 Q. Okay. Based on your</p>	<p style="text-align: right;">Page 147</p> <p>1 Confidential - Pugatch</p> <p>2 conversations with the Debtor's</p> <p>3 representatives, was it your understanding</p> <p>4 that the consent of the portfolio manager</p> <p>5 was required for the shares to be</p> <p>6 transferred from the HarbourVest entities</p> <p>7 to the Debtor's affiliate under the terms</p> <p>8 of the Settlement Agreement?</p> <p>9 MS. WEISGERBER: Okay. Same</p> <p>10 objections. Also objection to the</p> <p>11 extent there is a common interest</p> <p>12 privilege.</p> <p>13 A. I don't recall having that</p> <p>14 explicit conversation with representative</p> <p>15 of the Debtor.</p> <p>16 MR. KANE: I'll pass the</p> <p>17 witness.</p> <p>18 Thank you, Mr. Pugatch.</p> <p>19 MR. MORRIS: Anybody else?</p> <p>20 Thank you, all.</p> <p>21 MS. WEISGERBER: Can we –</p> <p>22 before we break, could we have a</p> <p>23 two-minute break and then come back</p> <p>24 before we conclude.</p> <p>25 BY MS. WEISGERBER:</p>
<p style="text-align: right;">Page 148</p> <p>1 Confidential - Pugatch</p> <p>2 Q. Mr. Pugatch, during Mr. Wilson's</p> <p>3 questioning, I believe his last question</p> <p>4 related to identifying as between two</p> <p>5 choices the primary source or the cause of</p> <p>6 HarbourVest's damages.</p> <p>7 In your opinion, is – are</p> <p>8 HarbourVest damages attributable to any</p> <p>9 one cause?</p> <p>10 A. No, I would say there were</p> <p>11 multiple root causes of the damages and</p> <p>12 diminution in value that was suffered in</p> <p>13 connection with the investment.</p> <p>14 MS. WEISGERBER: Okay. I don't</p> <p>15 have any further questions.</p> <p>16 MR. WILSON: I think I'd like to</p> <p>17 ask a couple more.</p> <p>18 BY MR. WILSON:</p> <p>19 Q. Mr. Pugatch, I think you</p> <p>20 testified earlier that the investment in</p> <p>21 HCLOF was comprised of multiple CLOs,</p> <p>22 correct?</p> <p>23 A. Correct.</p> <p>24 Q. And some of those CLOs were</p> <p>25 managed by Acis, to your understanding?</p>	<p style="text-align: right;">Page 149</p> <p>1 Confidential - Pugatch</p> <p>2 MS. WEISGERBER: Objection.</p> <p>3 A. Correct.</p> <p>4 MS. WEISGERBER: Just to</p> <p>5 clarify, John, is this within the</p> <p>6 scope of the questions I asked</p> <p>7 Mr. Pugatch?</p> <p>8 MR. WILSON: I believe it is.</p> <p>9 I'm going to be really short. But</p> <p>10 so –</p> <p>11 MS. WEISGERBER: I would like to</p> <p>12 have a standing objection to the</p> <p>13 extent it's not within the scope of</p> <p>14 the questions that was asked to</p> <p>15 Mr. Pugatch.</p> <p>16 BY MR. WILSON:</p> <p>17 Q. So some of those CLOs you</p> <p>18 contend are managed by Acis?</p> <p>19 MS. WEISGERBER: Objection to</p> <p>20 form.</p> <p>21 A. A majority.</p> <p>22 Q. And just generally, do you</p> <p>23 contend that Highland managed the balance</p> <p>24 of those CLOs?</p> <p>25 MR. MORRIS: Objection to the</p>

<p style="text-align: right;">Page 150</p> <p>1 Confidential - Pugatch</p> <p>2 form of the question.</p> <p>3 MS. WEISGERBER: Objection.</p> <p>4 Same objection.</p> <p>5 A. Yes.</p> <p>6 Q. Yes. Okay. Thank you.</p> <p>7 And I just had two more</p> <p>8 questions.</p> <p>9 So, if there was going to be a</p> <p>10 reset, that would have to be done at the</p> <p>11 CLO level, each CLO would have to be</p> <p>12 reset?</p> <p>13 MR. MORRIS: Objection.</p> <p>14 MS. WEISGERBER: Objection to</p> <p>15 form.</p> <p>16 A. That is correct.</p> <p>17 Q. And do you know of any specific</p> <p>18 CLO that requested a reset but was not</p> <p>19 granted a reset?</p> <p>20 MR. MORRIS: Objection to form.</p> <p>21 MS. WEISGERBER: Same objection.</p> <p>22 And foundation.</p> <p>23 A. When you say "CLOs who requested</p> <p>24 a reset," can be more clear, please?</p> <p>25 Q. We just talked about how this</p>	<p style="text-align: right;">Page 151</p> <p>1 Confidential - Pugatch</p> <p>2 investment is comprised of multiple CLOs</p> <p>3 and each one of those CLOs would have to</p> <p>4 be reset, according to its own terms, I</p> <p>5 guess. Do you know of any one of those</p> <p>6 CLOs that requested a reset?</p> <p>7 MR. MORRIS: Objection to the</p> <p>8 form of the question.</p> <p>9 MS. WEISGERBER: Same objection.</p> <p>10 A. I'm aware of Highland having in</p> <p>11 its capacity as manager of the HCLOF</p> <p>12 having requested or pursued resets of</p> <p>13 certain of the Acis HCLOs.</p> <p>14 Q. Your understanding is that</p> <p>15 Highland requested a reset of the Acis</p> <p>16 CLOs?</p> <p>17 MS. WEISGERBER: Objection to</p> <p>18 form.</p> <p>19 A. I'm sorry. I'm trying to</p> <p>20 understand what you said.</p> <p>21 MS. WEISGERBER: I'm really</p> <p>22 wondering how this relates at all to</p> <p>23 the scope of the questions I asked Mr.</p> <p>24 Pugatch on follow up.</p> <p>25 I think it's time to wrap this</p>
<p style="text-align: right;">Page 152</p> <p>1 Confidential - Pugatch</p> <p>2 up, John.</p> <p>3 MR. WILSON: This was my last</p> <p>4 question, I just need an answer to it.</p> <p>5 And I think he tried to answer, but I</p> <p>6 didn't understand what he said.</p> <p>7 MS. WEISGERBER: Objection. Can</p> <p>8 you re-ask the question so we have a</p> <p>9 clear question.</p> <p>10 MR. WILSON: Well, Madam Court</p> <p>11 Reporter, can you read back his last</p> <p>12 response?</p> <p>13 (Record read.)</p> <p>14 BY MR. WILSON:</p> <p>15 Q. Can you repeat what you intended</p> <p>16 to answer to the last question?</p> <p>17 MS. WEISGERBER: Same objection.</p> <p>18 If you recall, Mike.</p> <p>19 A. I'm sorry, John. Can you just</p> <p>20 repeat the question, please, make sure I'm</p> <p>21 answering what you want me to answer.</p> <p>22 Q. My question is the same as it's</p> <p>23 been: Are you aware of any CLO that</p> <p>24 requested a reset and was not granted one?</p> <p>25 MS. WEISGERBER: Objection to</p>	<p style="text-align: right;">Page 153</p> <p>1 Confidential - Pugatch</p> <p>2 form. Objection to foundation.</p> <p>3 MR. MORRIS: Objection to the</p> <p>4 form of the question.</p> <p>5 A. Again, my understanding is the</p> <p>6 CLOs do not request the reset. Highland,</p> <p>7 as manager of HCLOF in its capacity as</p> <p>8 majority equity owner of certain of the</p> <p>9 CLOs, have requested a reset post our</p> <p>10 original investment.</p> <p>11 Q. Okay.</p> <p>12 MR. WILSON: I'll pass the</p> <p>13 witness.</p> <p>14 MS. WEISGERBER: I think we're</p> <p>15 done.</p> <p>16 THE REPORTER: Will everyone put</p> <p>17 their orders on the record, please?</p> <p>18 MR. MORRIS: John Morris for the</p> <p>19 Debtor. Expedited, please.</p> <p>20 MR. WILSON: John Wilson. I'm</p> <p>21 not sure what arrangements my office</p> <p>22 has previously made, but we want an</p> <p>23 expedited transcript, as well.</p> <p>24 THE REPORTER: Do you want a</p> <p>25 rough too?</p>

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1 Confidential - Pugatch	1
2 MR. WILSON: Yes, please.	2 ACKNOWLEDGEMENT OF DEPONENT
3 MR. MORRIS: Yes, please.	3
4 MS. WEISGERBER: Same for	4 I, MICHAEL PUGATCH, do hereby
5 HarbourVest, please.	5 acknowledge that I have read and
6 MR. MALONEY: I don't need an	6 examined the foregoing testimony, and
7 expedited transcript. I'd just be	7 the same is a true, correct and
8 happy to get one regular copy. I'll	8 complete transcription of the
9 take whatever you would produce in the	9 testimony given by me, and any
10 ordinary course. Same as what	10 corrections appear on the attached
11 everyone else ordered.	11 Errata sheet signed by me.
12 (Time Noted: 4:35 p.m. EDT.)	12
13	13
14	14 _____
15	15 (DATE) (SIGNATURE)
16	16
17	17
18	18
19	19
20	20
21	21
22	22
23	23
24	24
25	25

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1	1 ERRATA SHEET
2 CERTIFICATE OF SHORTHAND REPORTER-NOTARY	2 Case Name:
3 PUBLIC	3 Deposition Date:
4 I, Amanda Gorrone, the officer	4 Deponent:
5 before whom the foregoing deposition	5 Pg. No. Now Reads Should Read Reason
6 was taken, do hereby certify that the	6 _____
7 foregoing transcript is a true and	7 _____
8 correct record of the testimony given;	8 _____
9 that said testimony was taken by me	9 _____
10 stenographically and thereafter	10 _____
11 reduced to typewriting under my	11 _____
12 direction; and that I am neither	12 _____
13 counsel for, related to, nor employed	13 _____
14 by any of the parties to this case and	14 _____
15 have no interest, financial or	15 _____
16 otherwise, in its outcome.	16 _____
17 IN WITNESS WHEREOF, I have	17 _____
18 hereunto set my hand this 12th day of	18 _____
19 January, 2021.	19 _____
20	20
21 _____	21 _____
22 AMANDA GORRONE, CLR	22 Signature of Deponent
23 CLR NO: 052005 - 01	22 SUBSCRIBED AND SWORN BEFORE ME
24	23 THIS ____ DAY OF _____, 20__.
25 Notary Public in and for the State of New	24 _____
York	25 (Notary Public) MY COMMISSION EXPIRES: _____
County of Suffolk	

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EXHIBIT 8

005248

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**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

In re:

HIGHLAND CAPITAL MANAGEMENT, L.P.,¹

Debtor.

)
) Chapter 11
)
) Case No. 19-34054-sgj11
)
)
) **Re: Docket Nos. 1625, 1697, 1706,**
) **1707**

**DEBTOR'S OMNIBUS REPLY IN SUPPORT OF DEBTOR'S MOTION FOR
ENTRY OF AN ORDER APPROVING SETTLEMENT WITH HARBOURVEST
(CLAIM NOS. 143, 147, 149, 150, 153, 154), AND AUTHORIZING ACTIONS
CONSISTENT THEREWITH**

¹ The Debtor's last four digits of its taxpayer identification number are (6725). The headquarters and service address for the above-captioned Debtor is 300 Crescent Court, Suite 700, Dallas, TX 75201.



The above-captioned debtor and debtor-in-possession (the “Debtor”) hereby submits this reply (the “Reply”) in support of its *Motion for Entry of an Order Approving Settlement with HarbourVest (Claim No.143,147, 149, 150, 153, 154), and Authorizing Actions Consistent Therewith* [Docket No. 1625] (the “Motion”).² In further support of the Motion, the Debtor respectfully states as follows:

PRELIMINARY STATEMENT

1. If granted, the Motion will resolve a \$300 million general unsecured claim against the Debtor’s estate for less than \$16.8 million in actual value.³ The settlement is another solid achievement for the Debtor and – not surprisingly – is opposed by no one except Mr. Dondero and entities affiliated with him.

2. As discussed in the Motion, in November 2017, HarbourVest invested \$80 million in exchange for a 49.98% membership interest in HCLOF – an entity managed by a subsidiary of the Debtor. The balance of HCLOF’s interests are held by CLO Holdco, Ltd. (an entity affiliated with Mr. Dondero), the Debtor, and certain of the Debtor’s employees. Subsequent to its investment in HCLOF, HarbourVest incurred substantial losses on its investment in HCLOF and filed claims against the Debtor’s estate.

3. HarbourVest asserts claims for fraud, fraudulent inducement, fraudulent concealment, fraudulent misrepresentation, negligent misrepresentation, breach of fiduciary duty

² All capitalized terms used but not defined herein have the meanings given to them in the Motion.

³ Under the proposed settlement, HarbourVest would receive an allowed, general unsecured claim of \$45 million and an allowed, subordinated claim of \$35 million. Based on the estimated recovery for general unsecured creditors of 87.44% (which is a recovery based on certain outdated assumptions discussed *infra*), HarbourVest’s \$45 million general unsecured claim is estimated to be worth approximately \$39.3 million and the \$35 million subordinated claim, which is junior to the general unsecured claim, is currently estimated to have value only if there are litigation recoveries. In addition, HarbourVest is transferring to an affiliate of the Debtor its interest in HCLOF, which is estimated to be worth approximately \$22.5 million. Thus, HarbourVest’s estimated recovery on its general unsecured and subordinated claims is estimated at approximately \$16.8 million on a net economic basis. This estimate, however, is dated and is based on the claims that were settled as of the filing of the Debtor’s plan in November 2020.

and unfair prejudice (under Guernsey law), violations of state securities laws, and RICO. In furtherance of these claims, HarbourVest alleges it was misled by the Debtor and its employees, including Mr. Scott Ellington (then the Debtor's general counsel), and that subsequent to investing in HCLOF, Mr. Dondero and the Debtor used HCLOF both as a piggybank to fund the litigation against Acis Capital Management, L.P. ("Acis") and as a scapegoat for the Debtor's litigation strategy, in each case to HarbourVest's substantial detriment.

4. Specifically, HarbourVest alleges that:

- the Debtor and its employees, including Mr. Ellington, misled HarbourVest about its intentions with respect to Mr. Terry's arbitration award against Acis and orchestrated a series of fraudulent transfers and corporate restructurings, the true purpose of which was to denude Acis of assets and make it judgment proof;
- the Debtor and its employees, including Mr. Ellington, misled HarbourVest as to the intent and true purpose of these restructurings and led HarbourVest to believe that Mr. Terry's claims against Acis were meritless and a simple employment dispute that would not affect HarbourVest's investment;
- the Debtor, through Mr. Dondero, improperly exercised control over or misled HCLOF's Guernsey-based board of directors to cause HCLOF to engage in unnecessary, unwarranted, and resource-draining litigation against Acis;
- the Debtor improperly caused HCLOF to pay substantial legal fees of various entities in the Acis bankruptcy that were unwarranted, imprudent, and not properly chargeable to HCLOF; and
- the Debtor used HarbourVest as a scapegoat in its litigation against Acis by asserting that the Debtor's improper conduct and scorched-earth litigation strategy was at HarbourVest's request, which was untrue.

5. The Debtor believed, and continues to believe, that it has viable defenses to HarbourVest's claims. Nevertheless, those defenses would be subject to substantial factual disputes and would require expensive and time-consuming litigation that would likely be resolved only after a lengthy trial all while the Debtor (or its successor) assumes the risk that the defenses might fail. The evidence will show that the proposed settlement is the product of substantial, arm's length – and sometimes quite heated – negotiations between and among the

7. In distinction, the only objecting parties are Mr. Dondero, his family trusts (the Dugaboy Investment Trust (“Dugaboy”) and Get Good Trust (“Get Good,” and together with Dugaboy, the “Trusts”)), and CLO Holdco (a wholly-owned subsidiary of Mr. Dondero’s Charitable Donor Advised Fund, L.P. (the “DAF”)) (collectively, the “Objectors”). Each of the Objectors has only the most tenuous economic interest in and connection to the Debtor’s settlement with HarbourVest. Each of the Objectors is also controlled directly or indirectly by Mr. Dondero who has coordinated each of the Objectors litigation strategies against the Debtor.⁴ Mr. Dondero’s efforts to litigate every issue in this case – directly and by proxy – should be rebuffed, and the objections overruled. The following is a brief summary of the objections.

4

<u>Pleading</u>	<u>Objection/Reservation</u>	<u>Response</u>
<i>Objection of James Dondero</i> [Docket No. 1697] (the “ <u>Dondero Objection</u> ”)	Because HarbourVest was damaged by the injunction entered in Acis, the settlement seeks to revisit this Court’s rulings in Acis.	Mr. Dondero is misdirecting the Court. HarbourVest’s claim arises from the misrepresentations of Mr. Dondero, Mr. Ellington, and others, not this Court’s rulings in Acis, including the failure to disclose the fraudulent transfer of assets.
	The settlement is not fair and equitable because it does not address (1) Acis’s mismanagement, (2) how the Debtor is liable for HarbourVest’s damages, (3) the success on the merits, (4) the costs of litigation, and (5) the Debtor’s ability to realize the value of the HCLOF interests in light of the Acis injunction.	Mr. Dondero ignores the dangers of the litigation and HarbourVest’s claims against the estate for misrepresentation and overestimates the ability to resolve the litigation. The Debtor has assessed the value of the HCLOF interests in light of all factors, including the Acis injunction.
	The HarbourVest settlement represents a substantial windfall to HarbourVest.	Mr. Dondero ignores the economics of this case, which have value breaking in Class 8 (General Unsecured Claims). The value of the settlement is not \$60 million; it is approximately \$16.8 million against a claim of \$300 million. There is no windfall.
	The HarbourVest settlement is improper gerrymandering because it provides HarbourVest with a general unsecured claim and a subordinated claim in order to secure votes for the plan.	The HarbourVest settlement provides for the resolution of HarbourVest’s claim. It is nonsensical to think that the Debtor would reach a settlement with HarbourVest that would include HarbourVest’s rejection of the Debtor’s plan, and there is nothing wrong with requiring acceptance of a plan as part of a settlement. Further, the Debtor does not need HarbourVest’s Class 9 vote to confirm a plan.
<i>Objection of the Dugaboy Investment Trust and Get Good Trust</i> [Docket No. 1706] (the “ <u>Trusts Objection</u> ”)	The settlement represents a radical change in the Debtor’s earlier position on the HarbourVest settlement.	Mr. Dondero ignores the dangers of the litigation and HarbourVest’s claims against the estate for misrepresentation and overestimates the ability to resolve the litigation.
	The settlement appears to buy HarbourVest’s vote.	The HarbourVest settlement provides for the resolution of HarbourVest’s claim. It is nonsensical to think that the Debtor would reach a settlement with HarbourVest that would include HarbourVest’s rejection of the Debtor’s plan, and there is nothing wrong with requiring acceptance of a plan as part of a settlement. Further, the Debtor does not need HarbourVest’s Class 9 vote to confirm a plan.
	No information is provided as to whether the Debtor can acquire HarbourVest’s interest in HCLOF or the value of that interest to the estate.	As discussed below, the HCLOF interest will be transferred to a wholly-owned subsidiary of the Debtor. Mr. Seery will testify as to the benefit of the HCLOF interests to the estate.
<i>Objection of CLO Holdco</i> [Docket No. 1707] (“ <u>CLOH Objection</u> ”)	HarbourVest cannot transfer its interests in HCLOF unless it complies with the right of first refusal.	CLO Holdco misinterprets the operative agreements and tries to create ambiguity where none exists.

8. These objections are just the latest objections filed by Mr. Dondero and his related entities to any attempt by the Debtor to resolve this case,⁵ including the Debtor's settlement with Acis [Docket No. 1087] and the seven separate objections filed by Mr. Dondero and his related entities to the *Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.* [Docket No. 1472] (the "Plan").⁶ It will not shock this Court to hear that each of the Objectors is also objecting to the Plan. In contradistinction, the Debtor has heard this Court's admonishments about old Highland's culture of litigation as evidenced by this case, Acis's bankruptcy, and beyond. Although the Debtor has vigorously contested claims when appropriate, the Debtor has also sought to settle claims and limit the senseless fighting. The Debtor has successfully resolved the largest claims against the estate, including the claims of the Redeemer Committee, Acis, and, as recently announced to this Court, UBS. The Debtor would ask this Court to see through the pretense of the Dondero-related entities' objections to the HarbourVest settlement and approve it as a valid exercise of the Debtor's business judgment.

⁵ As an example of Mr. Dondero's litigiousness, on January 12, 2021, Mr. Dondero filed notice that he will be appealing the preliminary injunction entered against him earlier on January 12, 2021.

⁶ (1) *James Dondero's Objection to Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.* [Docket No. 1661]; (2) *Objection to Confirmation of the Debtor's Fifth Amended Plan of Reorganization* (filed by Get Good Trust, The Dugaboy Investment Trust) [Docket No. 1667]; (3) *Senior Employees' Limited Objection to Debtor's Fifth Amended Plan of Reorganization* (filed by Scott Ellington, Thomas Surgent, Frank Waterhouse, Isaac Leventon) [Docket No. 1669]; (4) *Objection to Confirmation of Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.* (filed by Highland Capital Management Fund Advisors, L.P., Highland Fixed Income Fund, Highland Funds I and its series, Highland Funds II and its series, Highland Global Allocation Fund, Highland Healthcare Opportunities Fund, Highland Income Fund, Highland Merger Arbitrage Fund, Highland Opportunistic Credit Fund, Highland Small-Cap Equity Fund, Highland Socially Responsible Equity Fund, Highland Total Return Fund, Highland/iBoxx Senior Loan ETF, NexPoint Advisors, L.P., NexPoint Capital, Inc., NexPoint Real Estate Strategies Fund, NexPoint Strategic Opportunities Fund) [Docket No. 1670]; (5) *NexPoint Real Estate Partners LLC's Objection to Debtor's Fifth Amended Plan of Reorganization* (filed by NexPoint Real Estate Partners LLC f/k/a HCRE Partners LLC) [Docket No. 1673]; (6) *CLO Holdco, Ltd.'s Joinder to Objection to Confirmation of Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. and Supplemental Objections to Plan Confirmation* [Docket No. 1675]; and (7) *NexBank's Objection to Debtor's Fifth Amended Plan of Reorganization* (filed by NexBank Title, Inc., NexBank Securities, Inc., NexBank Capital, Inc., and NexBank) [Docket No. 1676].

REPLY

A. Standing

9. **James Dondero.** In the Dondero Objection, Mr. Dondero asserts he is a “creditor, indirect equity security holder, and party in interest” in the Debtor’s bankruptcy. While that claim is ostensibly true, it is tenuous at best. On April 8, 2020, Mr. Dondero filed three unliquidated, contingent claims that he promised to update “in the next ninety days.”⁷ More than nine months later, Mr. Dondero has yet to “update” those claims to assert an actual claim against the Debtor’s estate.⁸

10. Mr. Dondero’s claim as an “indirect equity security holder” is also a stretch. Mr. Dondero holds no direct equity interest in the Debtor. Mr. Dondero instead owns 100% of Strand Advisors, Inc. (“Strand”), the Debtor’s general partner. Strand, however, holds only 0.25% of the total limited partnership interests in the Debtor through its ownership of Class A limited partnership interests. The Class A limited partnership interests are junior in priority of distribution to the Debtor’s Class B and Class C limited partnership interests. The Class A interests are also junior to all other claims filed against the Debtor. Finally, Mr. Dondero’s recovery on his indirect equity interest is junior to any claims against Strand itself. Consequently, before Mr. Dondero can recover on his “indirect” equity interest, the Debtor’s estate must be solvent, priority distributions to Class B and Class C creditors must be satisfied, and all claims against Strand must be satisfied.

11. **Dugaboy and Get Good.** Dugaboy and Get Good are sham Dondero “trusts” with only the most attenuated standing. Dugaboy has filed three proofs of claim [Claim Nos. 113; 131; 177]. In two of these claims, Dugaboy argues that (1) the Debtor is liable to Dugaboy

⁷ Mr. Dondero filed two other proofs of claim that he has since withdrawn with prejudice. See Docket No. 1460.

⁸ Without knowing the nature of the “updates,” the Debtor does not concede that any “updates” would have been procedurally proper and reserves the right to object to any proposed amendment to Mr. Dondero’s claims.

for its postpetition mismanagement of the Highland Multi Strategy Credit Fund, L.P., and (2) this Court should pierce the corporate veil and allow Dugaboy to sue the Debtor for a claim it ostensibly has against the Highland Select Equity Master Fund, L.P. – a Debtor-managed investment vehicle. The Debtor believes that each of the foregoing claims is frivolous and has objected to them. [Docket No. 906].

12. In its third claim, Dugaboy asserts a claim against the Debtor arising from its Class A limited partnership interest in the Debtor (which represents just 0.1866% of the total limited partnership interests in the Debtor). Similarly, Get Good filed three proofs of claim [Claim Nos. 120; 128; 129] arising from its prior ownership of limited partnership interests in the Debtor. Because each these claims arises from an equity interest, the Debtor will seek to subordinate them under 11 U.S.C. § 510 at the appropriate time. As set forth above, these interests are out of the money and are not expected to receive any economic recovery.

13. Consequently, Mr. Dondero, Dugaboy, and Get Good’s standing to object to the HarbourVest settlement is attenuated and their chances of recovery in this case are extremely speculative at best. *See In re Kutner*, 3 B.R. 422, 425 (Bankr. N.D. Tex. 1980) (finding that a party had standing only when it had a “pecuniary interest . . . directly affected by the bankruptcy proceeding”); *see also In re Flintkote Co.*, 486 B.R. 99, 114-15 (Bankr. D. Del. 2012), *aff’d*. 526 B.R. 515 (D. Del. 2014) (a claim that is speculative cannot confer party in interest standing). Mr. Dondero, Dugaboy, and Get Good’s minimal interest in the estate should not allow them to overrule the estate’s business judgment or veto settlements with creditors, especially when no actual creditors and constituents have objected. “[A] bankruptcy judge must not blindly follow the hue and cry of the most vocal special interest groups; rather, [the judge] should consider all salient factors . . . and . . . act to further the diverse interests of the debtor, creditors and equity

holders, alike.” *In re Lionel*, 722 F.2d 1063, 1071 (2d Cir. 1983).

B. Mr. Dondero’s Objection and his “Trusts” Objection Are Without Merit

14. As discussed in the Motion, under applicable Fifth Circuit precedent, a bankruptcy court may approve a compromise or settlement as long as the proposed settlement is fair, reasonable, and in the best interest of the estate. *See, e.g., In re Age Ref. Inc.*, 801 F.3d 530, 540 (5th Cir. 2015). In making this determination, courts look to the following factors:

- probability of success in the litigation, with due consideration for the uncertainty of law and fact;
- complexity and likely duration of the litigation and any attendant expense, inconvenience and delay; and
- all other factors bearing on the wisdom of the compromise, including (i) “the paramount interest of creditors with proper deference to their reasonable views” and (ii) whether the settlement is the product of arm’s length bargaining and not of fraud or collusion.

Official Comm. of Unsecured Creditors v. Cajun Elec. Power Coop. (In re Cajun Elec. Power Coop.), 119 F.3d 349, 356 (5th Cir. 1997) (citations omitted). *See also Age Ref. Inc.*, 801 F.3d at 540; *Conn. Gen. Life Ins. Co. v. United Cos. Fin. Corp. (In re Foster Mortgage Corp.)*, 68 F.3d 914, 918 (5th Cir. 1995).

15. **The Settlement Seeks to Revisit the Acis Orders.** In the Dondero Objection, Mr. Dondero argues that HarbourVest’s claim is based on the financial harm caused to HarbourVest from Acis’s bankruptcy and the orders entered in the Acis bankruptcy. Mr. Dondero extrapolates from this that HarbourVest is seeking to challenge this Court’s rulings in Acis. (Dondero Obj., ¶¶ 17-20) Mr. Dondero misinterprets HarbourVest’s claims and the dangers such claims pose to the Debtor’s estate.

16. HarbourVest’s claims are for fraud, fraudulent inducement, fraudulent concealment, fraudulent misrepresentation, negligent misrepresentation, breach of fiduciary duty

and unfair prejudice (under Guernsey law), violations of state securities laws, and RICO. HarbourVest is not arguing that Acis or this Court caused its damages; HarbourVest is arguing that *the Debtor* – led by Mr. Dondero – (a) misled HarbourVest as to the nature of Mr. Terry’s claims against the Debtor and the litigation with Acis, (b) knowingly and intentionally failed to disclose that the Debtor was engaged in the fraudulent transfer of assets to prevent Mr. Terry from collecting his judgment, and (c) that *the Debtor* – under the control of Mr. Dondero – improperly engaged in a crusade against Mr. Terry and Acis, which substantially damaged HarbourVest and its investment in HCLOF, in each case in order to induce HarbourVest to invest in HCLOF.

17. Again, HarbourVest does not contend that Acis caused its damages. Rather, HarbourVest contends that the fraudulent transfer of assets as part of the Debtor’s crusade against Mr. Terry and Acis and the false statements and omissions about those matters caused HarbourVest to make an investment it would never have made had Mr. Dondero and the Debtor been honest and transparent. The Acis litigation – in HarbourVest’s estimation – never should have happened. Acis did not cause HarbourVest’s damages. Mr. Dondero’s crusade against Mr. Terry and the Debtor’s allegedly fraudulent statements to HarbourVest about the fraudulent transfers, Mr. Terry and Acis caused HarbourVest’s damages.

18. **The HarbourVest Claim Lacks Merit.** In their objections, Mr. Dondero and the Trusts argue that the HarbourVest settlement is not fair and equitable and not in the best interests of the estate because (a) it does not address the Debtor’s arguments against the HarbourVest claims and (b) there is a lack of pending litigation seeking to narrow the claims against the estate. These arguments only summarily address the first two factors of *Cajun Electric*, which deal with success in the litigation, and, in doing so, mischaracterize the dangers to the Debtor’s estate

posed by HarbourVest's claims. (Dondero Obj., ¶¶ 21-25; Trusts Obj., ¶ 18(a))

19. Both the Dondero Objection and – to a much lesser extent - the “Trusts” Objection allege that (a) HarbourVest's losses were caused by Acis and its (mis)management of HCLOF's investments (Dondero Obj., ¶¶ 22, 24), (b) there is no contract that supports HarbourVest's claims (Dondero Obj. ¶ 23; Trusts Obj., ¶ 18(a)), (c) there is no causal connection between HarbourVest's losses and the Debtor's conduct (Dondero Obj., ¶ 24), and (d) the Debtor should litigate all or a portion of HarbourVest's claim before settling (Dondero Obj., ¶ 25). Again, though, as set forth above, both Mr. Dondero and the “Trusts” seek to shift the cause of HarbourVest's damages away from the Debtor's misrepresentations and to Mr. Terry's management of HCLOF's investments. This is simple misdirection.

20. HarbourVest's claims are that it invested in HCLOF based on the Debtor's fraudulent misrepresentations. Fraudulent misrepresentation sounds in tort, not contract. *See, e.g., Clark v. Constellation Brands, Inc.*, 348 Fed. Appx. 19, 21 (5th Cir. 2009) (referring to party's claim based on fraudulent misrepresentation as a tort); *Eastman Chem. Co. v. Niro, Inc.*, 80 F. Supp. 2d 712, 717 (S.D. Tex. 2000) (noting that party had common law duty not to commit intentional tort of fraudulent misrepresentation). There is thus no need for HarbourVest to point to a contractual provision to support its claim.⁹ Moreover, in order to defend against HarbourVest's claims, the Debtor would need to elicit evidence showing that its employees did not make misrepresentations to HarbourVest. Such a defense would require the Debtor to rely on the veracity of Mr. Ellington's testimony, among others. That is a high hurdle, and no reasonable person would expect the Debtor to stake the resolution of HarbourVest's \$300 million claim on the Debtor's ability to convince this Court that Mr. Ellington was telling HarbourVest

⁹ Subsequent to filing the Motion, the Objectors requested all agreements between HarbourVest, HCLOF, and the Debtor, and such agreements were provided.

the truth. This is especially true in light of the evidence supporting Mr. Ellington's recent termination for cause and the evidence recently provided by HarbourVest supporting its claim for fraudulent misrepresentations.

21. Finally, neither Mr. Dondero nor the "Trusts" even address the third factor analyzed by the Fifth Circuit: all other factors bearing on the wisdom of the compromise, including "the paramount interest of creditors with proper deference to their reasonable views." This is telling because no creditor or party in interest has objected to the settlement. Mr. Dondero and his proxies' preference for constant litigation should not outweigh the preference of the Debtor and its creditors for a reasonable and expeditious settlement of HarbourVest's claims.

22. **The HarbourVest Settlement Is a Windfall to HarbourVest.** Both the Dondero Objection and the "Trusts" Objection argue that the HarbourVest settlement represents a substantial windfall to HarbourVest. Both Mr. Dondero and the "Trusts" ignore the facts. Specifically, Mr. Dondero argues that HarbourVest is receiving \$60 million dollars in *actual* value for its claims. Mr. Dondero's contention, however, wrongly assumes that both the \$45 million general unsecured claim and the \$35 million subordinated claim provided to HarbourVest under the settlement will be paid 100% in full and that HarbourVest will receive \$80 million in cash. From that \$80 million, Mr. Dondero subtracts \$20 million, which represents the value Mr. Dondero ascribes to HarbourVest's interests in HCLOF that are being transferred to the Debtor. Mr. Dondero's math ignores the reality of this case.

23. The Debtor very clearly disclosed in the projections filed with the *Disclosure Statement for the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.*, [Docket No. 1473] (the "Projections") that general unsecured claims would receive an 87.44% recovery *only if* the claims of UBS, HarbourVest, Integrated Financial Associates, Inc., Mr.

Daugherty, and the Hunter Mountain Investment Trust were zero. Because of the Debtor's success in settling litigation, that assumption is proving to be inaccurate. Regardless, even if general unsecured claims receive a recovery of 87.44%, because the subordinated claims are junior to the general unsecured claims, the subordinated claims' projected recovery is currently zero. As such, assuming the HCLOF's interests are worth \$22.5 million,¹⁰ the actual recovery to HarbourVest will be less than \$16.8 million. This is not a windfall. HarbourVest's investment in HCLOF was \$80 million and its claim against the estate was over \$300 million. The settlement represents a substantial discount.

24. **Improper Gerrymandering and/or Vote Buying.** Each of Mr. Dondero and the Trusts argue in one form or another that the HarbourVest settlement is improper as it provides HarbourVest a windfall on its claims in exchange for HarbourVest voting to approve the Plan. These unsubstantiated allegations of vote buying should be disregarded. As an initial matter, and as set forth above, HarbourVest is *not* getting a windfall. HarbourVest is accepting a substantial discount in the settlement. HarbourVest's incentive to support the Plan comes from HarbourVest's determination that the Plan is in its best interests. There is also nothing shocking about a settling creditor supporting a plan. Indeed, it would be nonsensical for a creditor to settle its claims and then object to the plan that would pay those claims.

25. More importantly, HarbourVest's votes in Class 9 (Subordinated Claims) are not needed to confirm the Plan. As will be set forth in the voting declaration, Class 2 (Frontier Secured Claim), Class 7 (Convenience Claims), and Class 8 (General Unsecured Claims) have voted in favor of the Plan.¹¹ In brief, the Plan was approved without HarbourVest's Class 9 vote,

¹⁰ It is currently anticipated that Mr. James P. Seery, Jr., the Debtor's chief executive officer and chief restructuring officer, will testify as to the value of the HCLOF interests to the Debtor's estate.

¹¹ The Debtor anticipates that Mr. Dondero and his related entities will argue that neither Class 7 nor Class 8 voted to accept the Plan because of the votes cast against the Plan in those Classes by current and former Debtor

and the Debtor, therefore, has no need to “buy” HarbourVest’s Class 9 claims. Accordingly, any claims of gerrymandering or vote buying are without merit.

C. CLOH Objection

26. CLO Holdco (and to a much lesser extent, the “Trusts”) object to HarbourVest’s transfer of its interests in HCLOF as part of the settlement. Currently, the settlement contemplates that HarbourVest will transfer 100% of its collective interests in HCLOF to HCMLP Investments, LLC (“HCMLPI”), a wholly-owned subsidiary of the Debtor. As set forth in the *Transfer Agreement for Ordinary Shares of Highland CLO Funding, Ltd.* (which was appended as Exhibit A to the Settlement Agreement) [Docket No. 1631-1], each of the Debtor, HarbourVest, Highland HCF Advisors, Ltd. (HCLOF’s investment manager) (“HHCFA”), and HCLOF agree that HarbourVest is entitled to transfer its interests to HCMLPI pursuant to that certain *Members Agreement Relating to the Company*, dated November 15, 2017 (the “Members Agreement”),¹² without offering that interest to other investors in HCLOF.

27. The *only* party to object to the transfer of HarbourVest’s interests in HCLOF to HCMLPI is CLO Holdco. CLO Holdco holds approximately a 49.02% interest in HCLOF and is the wholly-owned subsidiary of the DAF, Mr. Dondero’s donor-advised fund. CLO Holdco argues that the Member Agreement requires HarbourVest to offer its interest first to the other investors in HCLOF before it can transfer its interests to HCMLPI. In so arguing, CLO Holdco attempts to create ambiguity in an unambiguous contract and to use that ambiguity to disrupt the Debtor’s settlement with HarbourVest.

28. As an initial matter, the Debtor and CLO Holdco agree that the transfer of HarbourVest’s interests in HCLOF to HCMLPI is governed by Article 6 (Transfers or Disposals

employees, including Mr. Ellington and Mr. Isaac Leventon. The Debtor will demonstrate at confirmation that those objections are without merit and that Class 7 and Class 8 voted to accept the Plan.

¹² A true and accurate copy of the Members Agreement is attached hereto as Exhibit A.

allowed under Section 6.1; it is a transfer to an “Affiliate of an initial Member.” CLO Holdco may, tongue in cheek, call this structure “convenient” but that sarcasm is an attempt to avoid the fact that the Members Agreement clearly allows HarbourVest to transfer its interest to HCMLPI without the consent of any party.¹³ The fact that CLO Holdco does not now like the language it previously agreed to when CLO Holdco and the Debtor were both controlled by Mr. Dondero is not a reason to re-write Section 6.1 of the Members Agreement.

31. Second, Section 6.2 of the Members Agreement is also unambiguous and, by its plain language, allows HarbourVest to “Transfer” its interests in HCLOF to “Affiliates of an initial Member” (*i.e.*, HCMLPI) without having to first offer those interests to the other Members (such obligation, the “ROFO”). CLO Holdco attempts to create ambiguity in Section 6.2 by arguing that it must be read in conjunction with Section 6.1 and that interpreting the plain language of Section 6.2 to allow HarbourVest to transfer its interests to HCMLPI without restriction makes certain other language surplus and meaningless. (CLOH Obj., ¶ 11-13) Again, CLO Holdco is attempting to create controversy and ambiguity where none exists.

32. Section 6.2 of the Members Agreement provides, in pertinent part:

(Members Agmt., § 6.2 (emphasis added)) Like Section 6.1, Section 6.2 is clear on its face. It exempts from the requirement to comply with the ROFO two categories of “Transfers”: (1) Transfers to “affiliates of an initial Member” from Members *other than* CLO Holdco and the

¹³ Although HHCFA's consent is not necessary for HarbourVest to transfer its interests to HCMLPI, HHCFA will consent to the transfer.

“Highland Principals” (*i.e.*, the Debtor and certain of its employees)¹⁴ and (2) Transfers from CLO Holdco or a Highland Principal to the Debtor, the Debtor’s “Affiliates,” or another Highland Principal. The fact that a narrower exemption is provided to CLO Holdco and the Debtor than to HarbourVest (or any other Member) under Section 6.2 is of no moment; the language says what it says and was agreed to by all Members, including CLO Holdco, when they executed the Members Agreement.

33. In addition, and although not relevant, the language of Section 6.2 makes sense in the context of the deal. Although CLO Holdco and the Debtor may have disclaimed an “Affiliate” relationship, they are related through Mr. Dondero and invest side by side with the Debtor in multiple deals.¹⁵ The different standards in Section 6.2 serve to ensure that HarbourVest’s (or any successor to HarbourVest) right to Transfer its shares without satisfying the ROFO is limited to three parties: (i) HarbourVest’s Affiliates, (ii) the Debtor’s Affiliates, and (iii) CLO Holdco’s Affiliates. This restriction keeps the relative voting power of each Member static and ensures that CLO Holdco and the Debtor, together, will *always* have more than fifty percent of HCLOF’s total interests and that HarbourVest will *always* have less than fifty percent. This counterintuitively also explains the greater restrictions placed on CLO Holdco and the “Highland Principals.” The Highland Principals include certain Debtor employees. Those employees – as well as CLO Holdco and the Debtor – are prohibited from transferring their HCLOF interests outside of the Dondero family. This restriction makes sense. If, for example, a Debtor employee wanted to transfer its interests to an Affiliate of HarbourVest, HarbourVest could have more than fifty percent of the HCLOF interests because of the thinness

¹⁴ “Highland Principals” means:

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] (Members Agmt., § 1.1)

¹⁵ There can be no real dispute that Mr. Dondero effectively controls CLO Holdco.

of the Dondero-family's majority (approximately 0.2%). At the time the Members Agreement was executed, CLO Holdco and the Debtor were under common control. Section 6.2 preserves those related entities' control over HCLOF by restricting transactions that would transfer that control unless the ROFO is complied with.

34. As such, and notwithstanding CLO Holdco's protestations, Section 6.1 and Section 6.2 are consistent as written and clear on their face. This consistency is further evidenced by HCLOF's Articles of Incorporation¹⁶ and HCLOF's offering memorandum, which each include language identical to Section 6.1 and 6.2 of the Members Agreement.¹⁷ It seems highly unlikely, if not implausible, that sophisticated parties such as CLO Holdco would include the exact same language in six separate places over three documents without a reason for that language and without the intent that such language be interpreted as it is clearly written – not as CLO Holdco now wants it to be interpreted. Accordingly, since HarbourVest is transferring its interests to HCMLPI, an Affiliate of an initial Member, the plain language of Section 6.2

¹⁶ See Articles of Incorporation, adopted November 15, 2017, a true and correct copy of which is attached hereto as Exhibit B.

[REDACTED]

(Articles of Incorporation, § 18.1)

[REDACTED]

(*Id.*, § 18.2)

¹⁷ See Offering Memorandum, dated November 15, 2017, a true and correct copy of which is attached hereto as Exhibit C.

[REDACTED]

(Offering Memorandum, page 89)

exempts HarbourVest from having to comply with the ROFO.

35. Third, and finally, CLO Holdco makes the nonsensical argument that because Section 6.2 provides different treatment to similarly situated Members that this Court should re-write Section 6.2. (CLOH Obj., ¶¶ 15-17) Contracts provide different treatment to ostensibly similarly situated parties all the time and no one objects that that creates an absurd result. It just means that different parties bargained for and received different rights.

36. CLO Holdco's attempt to justify why this Court should re-write the Members Agreement to correct the "disparate treatment" is also unavailing. As an example of the absurd result caused by the "disparate treatment," CLO Holdco states: "[B]ecause the HarbourVest Members are technically Affiliates of an initial member (each other), they could obtain control of all of the interests in HCLOF without any Member receiving a Right of First Refusal for any transfer." (*Id.*, ¶ 16) The scenario posited by CLO Holdco, however, is *exactly* the scenario prevented by the clear language of Section 6.2. For HarbourVest to obtain control of HCLOF, it would – as a matter of mathematical necessity – need the interests held by CLO Holdco (49.02%) and/or the Highland Principals (1% in the aggregate). Section 6.2, however, *expressly* prohibits CLO Holdco and the Highland Principals from transferring their interests to HarbourVest or its Affiliates without satisfying the ROFO. As set forth above, it is Section 6.2 that prevents control from being transferred away from the Dondero family without compliance with the ROFO. In fact, Section 6.2 would only break down if the limiting language in Section 6.2 were read out of it in the manner advocated by CLO Holdco.

37. Ultimately, Article 6 of the Members Agreement is clear as written and expressly allows HarbourVest to transfer its interests to HCMLPI. If CLO Holdco had an objection to the rights provided to HarbourVest under the Members Agreement, CLO Holdco

should have raised that objection three and a half years ago before agreeing to the Members Agreement. CLO Holdco should not be allowed to create ambiguity in an unambiguous contract or to re-write that agreement to impose additional restrictions on HarbourVest. *See Clardy Mfg. Co. v. Marine Midland Bus. Loans Inc.*, 88 F.3d 347, 352 (5th Cir. 1996) (enforcing the “unambiguous language in a contract as written,” noting that where a contract is unambiguous, a party may not create ambiguity or “give the contract a meaning different from that which its language imports”) (internal quotations omitted); *Texas v. Am. Tobacco Co.*, 463 F.3d 399, 407 (5th Cir. 2006) (“Courts interpreting unambiguous contracts are confined to the four corners of the document, and cannot look to extrinsic evidence to create an ambiguity.”).

38. It should go without saying, but CLO Holdco (and the other parties to the Members Agreement) should also be required to satisfy their obligations under the Members Agreement and execute the “Adherence Agreement” as required by Section 6.6 of the Members Agreement in connection with the Transfer of HarbourVest’s interests to HCMLPI or any other permitted Transfer.

39. Finally, and notably, although CLO Holdco spends considerable time arguing that HarbourVest should be required to comply with the ROFO, nowhere in the CLOH Objection does CLO Holdco state that it wishes to purchase HarbourVest’s interests in HCLOF. This omission is telling. CLO Holdco and the other Objectors have no interest in actually exercising their alleged right of first refusal contained in the Members Agreement. Rather, their only interest is in causing the Debtor to spend time and money responding to a legion of related (and coordinated) objections.¹⁸

¹⁸ *See Debtor’s Amended Witness and Exhibit List with Respect to Evidentiary Hearing to be Held on January 8, 2021* [Adv. Pro. 20-3190-sgj, Docket No. 46], Exhibit Q; Exhibit T (email from Mr. Dondero as forwarded to Mr. Ellington stating “Holy bananas..... make sure we object [to the HarbourVest Settlement]”); Exhibit Y.

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EXHIBIT 9

005271

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In Re:) **Case No. 19-34054-sgj-11**
) Chapter 11
)
HIGHLAND CAPITAL) Dallas, Texas
MANAGEMENT, L.P.,) Thursday, January 14, 2021
) 9:30 a.m. Docket
Debtor.)
) - MOTION TO PREPAY LOAN
) [1590]
) - MOTION TO COMPROMISE
) CONTROVERSY [1625]
) - MOTION TO ALLOW CLAIMS OF
) HARBOURVEST [1207]
)

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE STACEY G.C. JERNIGAN,
UNITED STATES BANKRUPTCY JUDGE.

WEBEX APPEARANCES:

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transcript produced by transcription service.

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1 DALLAS, TEXAS - JANUARY 14, 2021 - 9:41 A.M.

2 THE CLERK: All rise. The United States Bankruptcy
3 Court for the Northern District of Texas, Dallas Division, is
4 now in session, the Honorable Stacey Jernigan presiding.

5 THE COURT: Good morning. Please be seated. All
6 right. We're a little late getting started because we had
7 lots of reading material for the Court today. All right.
8 This is Judge Jernigan, and we have a couple of Highland
9 settings. The HarbourVest matters are the primary thing we
10 have set today, and then we also have a Debtor's motion
11 pursuant to protocols for authority for Highland Multi-Strat
12 to prepay a loan.

13 All right. Well, let's get a few appearances. First, for
14 the Debtor team, who do we have appearing this morning?

15 MR. POMERANTZ: Good morning, Your Honor. It's Jeff
16 Pomerantz, John Morris, and Greg Demo here on behalf of the
17 Debtor.

18 THE COURT: Okay. Thank you.

19 All right. We have objections on HarbourVest. Who do we
20 have appearing for Mr. Dondero this morning?

21 MR. WILSON: Your Honor, it's John Wilson, and I'm
22 also joined by Michael Lynn, John Bonds, and Bryan Assink.

23 THE COURT: Okay. I'm sorry. Could -- the court
24 reporter does yeoman's work in this case. Let me just make
25 sure we got all three of those names. Say again, Mr. Wilson.

1 MR. WILSON: John Bonds and Michael Lynn and Bryan
2 Assink.

3 THE COURT: Oh, okay. So, see, I thought I heard
4 somebody Wilson in all of that, which was why I was pressing
5 the issue.

6 All right. Is Mr. Dondero present on the video for
7 today's hearing?

8 MR. WILSON: I believe he is, Your Honor.

9 THE COURT: Mr. Dondero, could you confirm that you
10 are out there? (No response.) Okay. My court reporter says
11 he sees the name out there. Is he in your office?

12 MR. WILSON: Your Honor, he is appearing remotely
13 from my office. I'm not sure exactly where he's appearing
14 from.

15 THE COURT: Okay. Well, Mr. Dondero, if you're out
16 there and you're speaking up to confirm you're present, we're
17 not hearing you. Maybe your device is on mute. So please
18 unmute yourself.

19 (No response.)

20 THE COURT: All right. I'm going to take some other
21 appearances and you -- you need to try to communicate with
22 your client and let him know I need to confirm he's present.
23 Okay?

24 All right. Meanwhile, let's go to our other Objectors.
25 CLO Holdco. Who do we have appearing today?

1 MR. KANE: John Kane; Kane Russell Coleman & Logan;
2 on behalf of CLO Holdco.

3 THE COURT: All right. Thank you, Mr. Kane.

4 We had an objection from Dugaboy Investment Trust and Get
5 Good Trust. Who do we have appearing?

6 MR. DRAPER: Douglas Draper, Your Honor, for -- for
7 Draper.

8 THE COURT: All right. Thank you, Mr. Draper.

9 All right. I think those were the only written objections
10 we had. Mr. Pomerantz, do you confirm, we don't have any
11 other objectors for the motions set, correct?

12 MR. POMERANTZ: Your Honor, there was those three.

13 THE COURT: I'm sorry. I didn't catch your full
14 sentence.

15 MR. POMERANTZ: That is correct, Your Honor. There
16 were three objections to the motion.

17 THE COURT: Okay. Mr. Clemente, you're there for the
18 Creditors' Committee?

19 MR. CLEMENTE: Yes. Good morning, Your Honor. Matt
20 Clemente on behalf of the Official Committee of Unsecured
21 Creditors.

22 THE COURT: All right. Good morning. Thank you.
23 All right. We have a lot of other folks on the video. I'm
24 not going to go ahead and take a roll call of other lawyers.

25 MS. WEISGERBER: Your Honor?

1 THE COURT: Yes?

2 MS. WEISGERBER: Excuse me, Your Honor. It's Erica
3 Weisgerber from Debevoise on behalf of HarbourVest.

4 THE COURT: Okay.

5 MS. WEISGERBER: And I'm joined by Natasha Labovitz
6 and Dan Stroik --

7 THE COURT: Okay.

8 MS. WEISGERBER: -- from Debevoise as well.

9 THE COURT: Thank you. I was neglectful in not
10 getting your appearance, because, of course, you're at the
11 front and center of this motion to compromise, and I did see
12 that you filed a reply brief yesterday afternoon. Okay.
13 Thank you.

14 All right. Do we have -- do we have Mr. Dondero on the
15 line? I'm going to check again.

16 (No response.)

17 THE COURT: Mr. Dondero's counsel, I cannot hear you,
18 so please unmute your device.

19 MR. WILSON: Your Honor, it appears to me that Mr.
20 Dondero's device was unmuted as soon as you asked if he was
21 available. I sent him a communication a second ago asking if
22 he's having technical difficulties. I have not received a
23 response, so I --

24 MR. DONDERO: Hello. Can anybody hear me?

25 THE COURT: Oh.

1 MR. WILSON: Okay. I hear him.

2 THE COURT: Mr. Dondero?

3 MR. DONDERO: Hello?

4 THE COURT: Is that you?

5 MR. DONDERO: Yeah, it is. I've been on. I've heard
6 everything since the beginning. It's just we've had technical
7 difficulties. I couldn't use the Highland offices. We've
8 been trying to set up something else.

9 THE COURT: All right.

10 MR. DONDERO: But I'm on now, if -- yes.

11 THE COURT: All right. Very good. Well, I'm glad
12 we've got you.

13 All right. Well, Mr. Pomerantz, how did you want to
14 proceed this morning?

15 MR. POMERANTZ: Your Honor, we could take up the
16 HarbourVest motion first, and I will turn it over to John
17 Morris. He and Greg Demo will be handling that. And then
18 after that we can handle the other motion, which is unopposed.

19 THE COURT: All right. Mr. Morris?

20 MR. KANE: Your Honor, this is -- sorry. This is
21 John Kane for CLO Holdco. Just very briefly, if I may. And
22 this will affect, I think, the Debtor's case in chief, so I'll
23 expedite things a little bit, I believe.

24 CLO Holdco has had an opportunity to review the reply
25 briefing, and after doing so has gone back and scrubbed the

1 HCLOF corporate documents. Based on our analysis of Guernsey
2 law and some of the arguments of counsel in those pleadings
3 and our review of the appropriate documents, I obtained
4 authority from my client, Grant Scott, as Trustee for CLO
5 Holdco, to withdraw the CLO Holdco objection based on the
6 interpretation of the member agreement.

7 THE COURT: All right. Well, thank you for that, Mr.
8 Kane. I think that -- that eliminates one of the major
9 arguments that we had anticipated this morning. So, thank you
10 for that.

11 Any other housekeeping matters that maybe someone had that
12 I didn't ask about?

13 MS. MATSUMURA: Yes, Your Honor. This is Rebecca
14 Matsumura from King & Spalding representing Highland CLO
15 Funding, Ltd. I just wanted to put on the record, we -- our
16 client had requested that some of its organizational documents
17 be filed under seal. But we have given permission for the
18 parties to present the relevant excerpts, to the extent it's
19 still relevant after Mr. Kane's announcement, in court. And
20 we'd just ask that the underlying documents remain sealed, but
21 we're not going to object if they show them on a PowerPoint or
22 anything like that.

23 So, to the extent that you had that on your radar, I just
24 wanted to clear that up for the proceedings.

25 THE COURT: All right. Well, I did sign an order

1 late last night. I don't know if it's popped up on the
2 docket.

3 MS. MATSUMURA: Yes, Your Honor. That's what this
4 referred to. That was what -- these are the documents that
5 were being sealed. And so I just wanted to note, if you --
6 you know, if the Debtor puts up an excerpt of those documents
7 and you're like, wait a minute, didn't I seal those, that we
8 were the party that requested them be under seal and we're
9 fine with them being shown in court, as long as the underlying
10 documents aren't publicly accessible.

11 THE COURT: Okay. Got you. Thank you.

12 All right. Any other housekeeping matters?

13 MR. MORRIS: Yes, Your Honor. This is John Morris
14 from Pachulski Stang for the Debtor. Good morning.

15 THE COURT: Good morning.

16 MR. MORRIS: The only other matter that I wanted to
17 raise, and I can do it now or I can do it later, or Your Honor
18 may tell me that it's not appropriate to do at this time, is
19 to schedule the Debtor's motion to hold Mr. Dondero in
20 contempt for violation of the TRO.

21 THE COURT: All right. Well, let's do that at the
22 conclusion today. And please make sure I do it. I think I
23 was going to address this last Friday, and we went very late
24 and it slipped off my radar screen. But I did see from my
25 courtroom deputy that you all were reaching out to her

1 yesterday to get this set, and then Mr. Dondero's counsel
2 reached out to her and said, We're going to file an objection
3 to a setting next Wednesday, or I think you had asked for a
4 setting next Tuesday or Wednesday.

5 MR. MORRIS: I did.

6 THE COURT: And I don't -- I don't know if that
7 response/objection was ever filed last night. I haven't seen
8 it if it was. So, we'll -- please, make sure I don't forget.
9 We'll take that up at the end of today's matters. All right.
10 Well, --

11 MR. MORRIS: All right. So, --

12 MS. WEISGERBER: Your Honor, one last housekeeping
13 item from -- I'm joined this morning by Michael Pugatch of
14 HarbourVest, who will present some testimony this morning. I
15 just want to confirm he's on the line and confirm no
16 objections to him sitting in for the rest of the hearing.

17 THE COURT: All right. Mr. Pugatch, this is Judge
18 Jernigan. Could you respond? Are you there with us?

19 MR. PUGATCH: Yes. Good morning, Your Honor. Mike
20 Pugatch from HarbourVest here.

21 THE COURT: All right. Very good. I think we had
22 you testify once before in the Acis matter, if I'm not
23 mistaken. Maybe. Maybe not. Maybe I saw a video deposition.
24 I can't remember.

25 All right. So, we're going to let Mr. Pugatch sit in on

1 this. Anyone want to say anything about that? I consider him
2 a party representative, so I don't -- I don't think anyone
3 could invoke the Rule.

4 All right. Very good. Well, let's go forward if there
5 are no more housekeeping matters.

6 MR. MORRIS: Okay.

7 THE COURT: Mr. Morris?

8 MR. MORRIS: Thank you. Thank you very much, Your
9 Honor. John Morris; Pachulski Stang Ziehl & Jones; for the
10 Debtor.

11 It's a rather straightforward motion today. It's a motion
12 under Rule 9019, pursuant to which the Debtor requests the
13 Court's authority and approval to enter into a settlement
14 agreement with HarbourVest that will resolve a number of
15 claims that HarbourVest has filed against the Debtor.

16 What I -- the way I propose to proceed this morning, Your
17 Honor, is to give what I hope is an informative but relatively
18 brief opening statement. I'll defer to HarbourVest and its
19 counsel as to whether they want to make a presentation in
20 advance of the offer of evidence. Any objecting party, I
21 suppose, should then be given the opportunity to present their
22 case to the Court. Then the Debtor will call Jim Seery, the
23 Debtor's CEO and CRO. We will offer documents into evidence.
24 I would propose then that the objecting parties take the
25 opportunity to ask Mr. Seery any questions they'd like on the

1 matter.

2 After the Debtor rests, I think HarbourVest would like to
3 put Mr. Pugatch on the stand to offer some testimony on their
4 behalf. And I think that that will conclude the case. We can
5 finish up with some closing arguments as to what we believe
6 the evidence showed, but that's the way that I'd like to
7 proceed, if that's okay with the Court.

8 THE COURT: All right. That sounds fine.

9 OPENING STATEMENT ON BEHALF OF THE DEBTOR

10 MR. MORRIS: Okay. So, as I said, Your Honor, this
11 is a -- this should be a very straightforward motion under
12 Rule 9019. The standard is well-known to the Court. There
13 are four elements to a 9019 motion. The Debtor clearly has
14 the burden of proof on each one. And we easily meet that
15 burden, Your Honor.

16 The standard, just to be clear, the first part is that we
17 have to establish a probability of success, with due
18 consideration for uncertainty of law and fact. The second one
19 is the complexity, likely duration, expense and inconvenience
20 of the litigation. The third part of the test is the
21 paramount interest of creditors. And the fourth part of the
22 test is whether or not the proposed settlement was reached
23 after arm's-length negotiations.

24 The Debtor believes that it easily meets this standard,
25 and frankly, is a little bit frustrated that it's being forced

1 to incur the expense by Mr. Dondero in going through this
2 process.

3 A plain reading, a fair reading of the economics here
4 relative to the claim shows that this is a very reasonable
5 settlement. I don't need to go beyond that, Your Honor. I
6 don't even need to use the word reasonable. It surely meets
7 the lowest standard.

8 We've prepared a couple of demonstrative exhibits, Your
9 Honor. I'm going to use them with Mr. Seery. But I'd like to
10 just put one up on the screen now, if I may.

11 Ms. Canty, can you please put up Demonstrative Exhibit #3?

12 Demonstrative Exhibit #3 is an outline of the economics of
13 the settlement. It includes the various pieces, the
14 components that the parties have agreed to. And it shows, at
15 least from the Debtor's perspective, just what HarbourVest is
16 being given here.

17 Up on the screen is a demonstrative exhibit. It has
18 citations to the evidence that will be admitted by the Court.
19 The first line shows that HarbourVest will receive a \$45
20 million allowed general unsecured nonpriority claim. And that
21 -- that can be found at Debtor's Exhibit EE, Exhibit 1, at
22 Page 2.

23 That claim is discounted by the expected recovery that
24 general unsecured creditors are supposed to get. As of
25 November, in the liquidation analysis that was part of the

1 disclosure statement -- that's the citation in the footnote --
2 the Debtor believed that unsecured creditors were estimated to
3 recover approximately eighty-seven and a half cents on the
4 dollar. And so we just did the arithmetic there to get to the
5 net economic value of the proposed general unsecured claim.

6 And from that, we reduced \$22-1/2 million because that is
7 the net asset value of HarbourVest's interest in HCLOF, which,
8 pursuant to the settlement agreement, it will transfer back to
9 the Debtor, so that the net economic value is approximately
10 \$16.8 million.

11 You will hear testimony from Mr. Seery that this number
12 is, in fact, overstated, and it's overstated because, since
13 the time the disclosure statement was filed in November, a
14 number of events have occurred that will -- that have caused
15 the estimated recovery percentage to be reduced from
16 approximately 87-1/2 percent to something lower than that. We
17 don't have the exact number, Your Honor, but Mr. Seery will --
18 and the evidence will show that there's been more expenses,
19 that there's been some resolution of certain claims. There's
20 been some positive issues, too. But that number is probably
21 in the 70s somewhere.

22 And in any event, I think the point here is, Your Honor,
23 HarbourVest invested \$80 million in HCLOF, which was going to
24 participate in the investment in CLOs. They filed a claim for
25 \$300 million, through treble damages and other claims. But

1 the net economic impact of this is going to be somewhere
2 probably in between \$12 and \$14 million. I'll let Mr. Seery
3 give more precision to that. And it represents less than -- a
4 less than five percent recovery on the total claim.

5 And we think it's important for the Court to keep that in
6 mind. What are the economics here? Are we overpaying? Is
7 this an unreasonable settlement? And I think the evidence
8 will show that the Debtor is not, but that this settlement
9 that you see before you was the product of arm's length, and
10 I'm going to go in reverse order of the four-part test under
11 9019.

12 So, the last part is whether or not the settlement, the
13 proposed settlement was the product of arm's-length
14 negotiation. You'll hear lots of evidence that this
15 settlement that's up on the screen right now very much was the
16 product of arm's-length negotiation.

17 The third part of the test, Your Honor, is whether it
18 meets the paramount interest of creditors. You know,
19 regrettably, Mr. Dondero is the only purported creditor who is
20 objecting here. He may have done so through different
21 vehicles, but every objecting party here is a debtor [sic]
22 owned and controlled by Mr. Dondero. No other creditor -- not
23 the Creditors' Committee, UBS, Acis, Mr. Terry, Mr. Daugherty
24 -- nobody is objecting to this settlement except for Mr.
25 Dondero. And we believe that that highlights the Debtor's

1 ability to meet the third prong of the test, and that is these
2 are -- this settlement is in the paramount interest of
3 creditors.

4 Again, going in reverse, the second part of the test is
5 the complexity, duration, and expense of litigation. There
6 will be no disputed evidence that we meet -- the Debtor easily
7 meets this prong of the test. The evidence is going to show
8 that HarbourVest's claim is based on fraud, fraud in the
9 inducement, fraudulent statements and omissions, the kind of
10 case, Your Honor, that I'm sure you're familiar with that is
11 incredibly fact-intensive, that will be incredibly difficult
12 to navigate through. It will be prolonged, it will be
13 expensive, because you're necessarily relying on he said/she
14 said, basically. And so we're going to have to get testimony
15 from every person that spoke in connection with the events
16 leading up to the transaction. So we think the second prong
17 will be easily met, Your Honor.

18 And then the last prong -- the first prong, if you will --
19 is the likelihood of success on the merits. We think that the
20 settlement, the economic recovery that's up on the screen
21 here, which ultimately will be less than five percent of the
22 claimed amount, in and of itself shows that the settlement is
23 consistent with the Debtor's perception of its likely success
24 on the merits. I'm certain that HarbourVest disagrees, but
25 that's okay, we're here today and that's the Debtor's view,

1 and the Court is here to assess the Debtor's business judgment
2 and whether the Debtor has properly analyzed the issues and
3 gone through the process. And the evidence will show
4 conclusively that it will. That it has.

5 Mr. Seery will testify at some length as to the risks that
6 he saw. I think that you'll hear counsel for Mr. Dondero ask
7 both Mr. Seery and Mr. Pugatch a number of questions designed
8 to elicit testimony about this defense or that defense. And
9 it's a little -- it's a little ironic, Your Honor, because,
10 really, every defense that they're going to try to suggest to
11 the Court was a valid defense is a defense that the Debtor
12 considered. In fact, it's, you know, it's a little spooky,
13 how they've -- how they've been able to identify kind of the
14 arguments that the Debtor had already considered in the
15 prosecution of their objections here.

16 But be that as it may, the evidence will conclusively show
17 that the Debtor acted consistent with its fiduciary duties,
18 acted in the best interests of the Debtor's estate, acted
19 completely appropriately here in getting yet another very
20 solid achievement for the Debtor, leaving very few claims that
21 are disputed at this point, all but one of which I believe are
22 in the hands of Mr. Dondero.

23 So, that's what we think that the evidence will show.

24 I do want to express my appreciation to Mr. Kane for
25 reflecting on the arguments that we made with respect to the

1 ability of the Debtor to engage in the transfer or the
2 acquisition of the asset from HarbourVest. I would -- I would
3 respectfully request that we just enter into a short
4 stipulation on the record reflecting that the Debtor's
5 acquisition of HarbourVest's interests in HCLOF is compliant
6 with all of the applicable agreements between the parties.

7 And with that, Your Honor, I look forward to putting Mr.
8 Seery on the stand and presenting the Debtor's case.

9 THE COURT: All right. Other opening statements?

10 OPENING STATEMENT ON BEHALF OF CLO HOLDCO, LTD.

11 MR. KANE: Yes, Your Honor. Sorry. John Kane on
12 behalf of CLO Holdco.

13 In response to Mr. Morris, I'm not going to enter into a
14 stipulation on behalf of my client, but the Debtor is
15 compliant with all aspects of the contract. We withdrew our
16 objection, and we believe that's sufficient.

17 THE COURT: All right. Well, I'm content with that.
18 Other opening statements?

19 OPENING STATEMENT ON BEHALF OF HARBOURVEST

20 MS. WEISGERBER: Your Honor, Erica Weisgerber on
21 behalf of HarbourVest.

22 HarbourVest joins in Mr. Morris's comments in support of
23 the settlement, and we believe that the question of whether
24 the settlement between HarbourVest and the Debtor satisfies
25 the Rule 9019 standard is not even a close one.

1 Some Objectors have made arguments about the merits of
2 HarbourVest's claims, which is why we're here. As Your Honor
3 will hear this morning, HarbourVest has meaningful and
4 meritorious claims against Highland, but made the business
5 decision to avoid the time, expense, and inherent risk of
6 litigation in the interest of preserving value, both for
7 itself and for the estate.

8 Today, Michael Pugatch, a managing director of
9 HarbourVest, will testify before the Court. He'll explain
10 that HarbourVest claims against Highland arise out of certain
11 misrepresentations and omissions by Highland to HarbourVest in
12 connection with HarbourVest's purchase of an interest in
13 HCLOF, one of Highland's managed funds. Those
14 misrepresentations and omissions, as Your Honor will hear,
15 relate to Highland's litigation with its former employee,
16 Joshua Terry, and transfers that were conducted in 2017 to
17 strip Acis of value and prevent Mr. Terry from collecting on
18 an \$8 million judgment.

19 Mr. Pugatch will further explain that HarbourVest would
20 not have invested in HCLOF had it known the underlying facts
21 about those Acis transfers.

22 Mr. Pugatch will also testify that not only did
23 HarbourVest not know about those transfers, it learned about
24 those transfers when it was accused of orchestrating the
25 transfers itself in the Acis bankruptcy. Your Honor will hear

1 that the Acis trustee sought extensive discovery from
2 HarbourVest after numerous accusations that HarbourVest was
3 behind the transfers.

4 Mr. Pugatch will also testify that Highland charged legal
5 fees for itself and its affiliates to HCLOF, essentially
6 forcing HCLOF to fund the litigation involving the Acis
7 bankruptcy and Mr. Terry.

8 In total, HarbourVest's claims for damages are over a
9 hundred million dollars in investment-related losses, lost
10 profits, legal fees inappropriately charged to HCLOF, its own
11 legal fees. And that's before interest or trebling damages.

12 But HarbourVest stands ready to litigate its claims, but
13 following hard-fought and extensive negotiations with the
14 Debtors, the parties reached the settlement that's now before
15 the Court. Mr. Pugatch's testimony regarding the strong
16 factual bases for HarbourVest's claims against Highland and
17 its recoverable damages will further underscore the risks that
18 the Debtors faced if they chose to litigate these claims, and
19 why this settlement is fair, equitable, and in the best
20 interest of the estate.

21 THE COURT: All right. Thank you, Counsel.

22 Other opening statements?

23 OPENING STATEMENT ON BEHALF OF GET GOOD AND DUGABOY TRUSTS

24 MR. DRAPER: Your Honor, this is Douglas Draper on
25 behalf of one of the Objectors. I'd like to just make a few

1 comments with respect to what I've heard and what the Court is
2 going to hear.

3 The first issue I'd like to address is the comment by
4 counsel for the Debtor that no other party has objected. The
5 9019 motion is one of the issues that this Court has to rule
6 on, whether or not there was an objection or not. So the fact
7 that this may be -- bankruptcy is not a popularity contest and
8 not an issue of who votes for what and doesn't vote. This,
9 along with the 1129(a) tests, are clearly within your
10 province, and you need to listen carefully because you'll have
11 to make your own independent analysis whether my objection is
12 correct or incorrect.

13 Two other points I'd like to make that I think are very
14 salient. Number one is, if you look at the Debtor's
15 disclosure statement, it basically took the position that the
16 HarbourVest claim is of little or no value. And lo and
17 behold, thirty days later, there's a settlement that brings
18 about a significant recovery to HarbourVest. The timing is
19 interesting, and I think the Court needs to pay careful
20 attention to what transpired between the two dates.

21 And then the last point I'd like to make is, as you listen
22 to the evidence, and what I learned abundantly clear from
23 hearing the depositions, is that the claim of HarbourVest, if
24 there is a claim at all, is probably one hundred percent --
25 should be subordinated in that it appears to arise out of the

1 purchase or sale of a security. And, again, I would ask the
2 Court to listen carefully to this because that's what it
3 appears to be and that's what the evidence is going to show to
4 the Court.

5 THE COURT: All right. Mr. Draper, let me clarify
6 something I'm not sure if I heard you say or not. Were you
7 saying that the Court still needs to drill down on the issue
8 of whether the Debtor can acquire HarbourVest's interest in
9 HCLOF?

10 MR. DRAPER: No.

11 THE COURT: Okay. I was confused whether you were
12 saying I needed to take an independent look at that, now that
13 the objection has been withdrawn of Holdco. You are not
14 pressing that issue?

15 MR. DRAPER: No, I am not. Basically, I think it's
16 the fairness of the settlement. I think the transferability
17 of the interest is separate and apart from the fairness of the
18 settlement itself. I think the fairness -- the
19 transferability was a contractual issue between two parties
20 that the Court does not have to drill down on.

21 THE COURT: All right. I have another question for
22 you. I want to clarify your client's standing. Tell me --
23 I'm looking through a chart I printed out a while back. I
24 guess Dugaboy Investment Trust filed a couple of proofs of
25 claim; is that right?

1 MR. DRAPER: Yes.

2 THE COURT: Okay. What --

3 MR. DRAPER: And objections are pending.

4 THE COURT: Pardon?

5 MR. DRAPER: Objections to those claims are pending
6 before the Court, Your Honor, --

7 THE COURT: Okay.

8 MR. DRAPER: -- and have not been litigated.

9 THE COURT: And what about Get Good Trust?

10 MR. DRAPER: Get Good Trust has a proof of claim also
11 that objections are pending to. Pending.

12 THE COURT: Okay. I don't want to get too
13 sidetracked here, but I know standing was -- was mentioned as
14 a legal argument today. What is the basis for those proofs of
15 claim?

16 MR. DRAPER: The first one is, with respect to the
17 proof of claim for Dugaboy, there is an investment that
18 Dugaboy made that was then funneled, we believe, up to the
19 Debtor. And the -- the loan that exists, we believe is a
20 Debtor loan, as opposed to a loan to the entity that we made
21 the loans to.

22 And, again, it's a matter that the Court is going to hear.
23 The claim may or may not be allowed. It has not been
24 disallowed yet.

25 The second part to the Dugaboy ownership is we own an

1 interest in the Debtor. And so we are, in fact, a party in
2 interest.

3 THE COURT: Okay.

4 MR. DRAPER: It may be a small interest, but it is an
5 interest.

6 THE COURT: It has a limited partnership interest in
7 the Debtor?

8 MR. DRAPER: Yes.

9 THE COURT: Is that correct?

10 MR. DRAPER: Yes.

11 THE COURT: Okay. Well, I'll move forward. Thank
12 you.

13 Does that cover -- any other opening statements? I think
14 that covered everyone who was -- who filed some sort of
15 pleading today. No.

16 MR. WILSON: Your Honor, John Wilson on behalf of --

17 THE COURT: I'm sorry. I'm sorry.

18 MR. WILSON: -- Mr. Dondero.

19 THE COURT: I missed Mr. Dondero's counsel. I knew
20 we had visited at some point this morning. I just got
21 confused there. Go ahead, Mr. Wilson.

22 MR. WILSON: No problem, Your Honor. I was just
23 going to say that we will reserve our comments until after the
24 conclusion of the testimony.

25 THE COURT: All right. Very well.

1 Mr. Morris, you may call your first witness.

2 MR. MORRIS: Thank you, Your Honor. Before I do,
3 just two very, very quick points.

4 THE COURT: Okay.

5 MR. MORRIS: To be clear, Dugaboy's interest in the
6 Debtor is 0.1866 percent. Less than two-tenths of one
7 percent.

8 Secondly, the argument that Mr. Draper just made with
9 respect to subordination is one that appears in nobody's
10 papers. And, in fact, not only doesn't it appear in anybody's
11 papers, but Mr. Dondero, I believe, specifically took issue
12 with the fact that a portion of the consideration that
13 HarbourVest would receive would be on a subordinated basis,
14 and he would -- and I think he took the position there is no
15 basis to give them a subordinated claim.

16 So, I just wanted to point those items out to the Court,
17 not that I think either one makes a large difference today,
18 but I do want to deal with the facts.

19 THE COURT: Thank you.

20 MR. MORRIS: The Debtor would call -- you're welcome,
21 Your Honor. The Debtor calls Mr. James Seery.

22 THE COURT: All right. Mr. Seery, welcome back to
23 virtual court. If you could say, "Testing, one, two" so I can
24 see you and swear you in.

25 MR. SEERY: Testing, one, two.

Seery - Direct

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1 THE COURT: All right. I heard you but I'm not yet
2 seeing your video. Is your video turned on?

3 MR. SEERY: Video is on. Yes, Your Honor.

4 THE COURT: Okay. I see you now. Please raise your
5 right hand.

6 JAMES SEERY, DEBTOR'S WITNESS, SWORN

7 THE COURT: Thank you. Mr. Morris?

8 MR. MORRIS: Thank you, Your Honor.

9 DIRECT EXAMINATION

10 BY MR. MORRIS:

11 Q Good morning, Mr. Seery. Can you hear me?

12 A I can. Thank you, Mr. Morris.

13 Q Okay. Let's just cut to the chase here. Are you familiar
14 with HarbourVest's claims filed against the Debtor?

15 A I am, yes.

16 Q And did you personally review them?

17 A I did, yes.

18 Q Do you recall that over the summer the Debtor objected to
19 HarbourVest's claim?

20 A Yes, we did.

21 Q Why -- can you explain to the judge why Harbour -- why the
22 Debtor objected to HarbourVest's claim last summer?

23 A Sure. The HarbourVest claims, I believe there are about
24 six of them, initially were filed, and they were -- they were
25 relatively vague in terms of what the specifics of the claims

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1 were.

2 So, we saw the claims but didn't, frankly, pay a lot of
3 attention to the underlying transaction that was referred to
4 in the proofs of claim and the losses that HarbourVest had
5 claimed to suffer -- to suffer with respect to their purchase
6 of securities related to HCLOF and the damages caused by the
7 Acis case. So we filed a pretty pro forma objection. I
8 believe it was a simply stated objection that we didn't have
9 any record that there was anything in the Debtor's books and
10 records that they had a valid claim for any amount against the
11 Debtor.

12 Q Are you aware that HarbourVest subsequently filed a
13 response to the Debtor's objection to their claims?

14 A Yes. Yes, I am aware.

15 Q And did you familiarize yourself with that particular
16 response?

17 A I did indeed. It was a pretty extensive response, really
18 developing the full panoply of their claims, which included
19 claims for expenses relating to the Acis case, which
20 HarbourVest viewed as being improperly charged to HCLOF by its
21 manager, which is effectively Highland. Those expenses,
22 HarbourVest took the view, were excessive, had nothing to do
23 with the investment, and were simply a pursuit of a personal
24 vendetta against Mr. Terry and his interests by Mr. Dondero,
25 and using HCLOF's money to actually pursue those interests.

Seery - Direct

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1 In addition, and this was the first time we saw that,
2 HarbourVest brought forth its claims that it was entitled to
3 effectively rescind the transaction. And I say rescind the
4 transaction: In security parlance, they claim that they were
5 induced by fraud, I think as most are -- to enter into the
6 transaction.

7 As most are aware, the liability limitations in the OMs
8 and the exculpation in the documents are pretty broad, and
9 HarbourVest's position was that they weren't going to be
10 subject to those limitations because the actual transaction
11 that they entered into was a fraud on them, designed by Mr.
12 Dondero, Mr. Ellington, and the Highland team.

13 Q All right. Let's talk about your understanding, the
14 Debtor's understanding of the factual background to
15 HarbourVest's claim. What is your understanding of the
16 investment that HarbourVest made?

17 A Well, HarbourVest made an investment in the Highland CLO
18 business. The Highland CLO business was -- was Acis. And
19 effectively, the business had been separated, but in name
20 only. Acis was just a shell, with a few partners --
21 obviously, Mr. Terry as well -- but it was all Highland
22 personnel doing all the work.

23 And what they were trying to do with Acis was, in essence,
24 resuscitate a business that had been in a bit of a decline
25 from its pre-crisis heyday.

005299

Seery - Direct

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1 They were looking to take additional outside capital.

2 They would -- they would pay down or take money out of the
3 transaction, Highland would, or ultimately Mr. Dondero, and
4 they would -- they would seek to invest in Acis CLOs,
5 Highland's 1.0 CLOs. And then with respect to the Acis CLOs,
6 and potentially new CLOs, but with the Acis CLOs, they'd seek
7 to reset those and capture what they thought would be an
8 opportunity in the market to -- to really use the assets that
9 were there, not have to gather assets in the warehouse but be
10 able to use those assets to reset them to market prices for
11 the liabilities and then make money on the equity.

12 Q Do you have an understanding --

13 A Then --

14 Q I'm sorry. Go ahead.

15 A Why don't I continue? So, the transaction, they found
16 HarbourVest as a potential investor, and the basis of the
17 transaction was that they would make an investment into Acis.

18 Shortly before the transaction, and while they were doing
19 diligence, Mr. Terry received his arbitration award. I
20 believe that was in October of 2017. The transaction with
21 HarbourVest closed in mid- to late November of 2017. But Mr.
22 Terry was not an integral part. Indeed, he wasn't going to be
23 a key man. He had been long gone from Highland by that time.

24 What the -- I think you asked me originally what the basis
25 of their claim was. The transaction went forward, and the

005300

Seery - Direct

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1 basis of their claim is that they really were never -- nothing
2 was disclosed to them about the nature of the dispute with Mr.
3 Terry other than in the highest-level terms; the animosity
4 with respect to which that dispute was held by Highland and
5 potentially Mr. Terry; and really, how those costs would be
6 borne and risks be borne by the investment that they were
7 making.

8 That was, in essence, the transaction and the high-level
9 view of their claim.

10 Q Okay. Just a few very specific facts. Do you have an
11 understanding as to how much HarbourVest invested and what
12 they got in exchange for that investment?

13 A Yeah. HarbourVest invested in a couple tranches, and I
14 forget the exact dates, but approximately \$75 million
15 originally, and then they added another five. Some
16 distributions were made in the first half of 2018, putting
17 their net investment in the mid-seventies on the investment,
18 which now is worth about 22-1/2 million bucks.

19 Q And what percentage interest in HCLOF did HarbourVest
20 acquire, to the best of your knowledge?

21 A They have 49.98 percent of HCLOF. HCLOF, just to refresh
22 -- the Court is, I think, well aware of this, but to refresh,
23 is a Guernsey entity. Not -- not atypical for structures of
24 this type to use offshore jurisdictions and sell the
25 securities under -- at least to U.S. -- can't sell them to

005301

Seery - Direct

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1 U.S. investors unless they qualify, and these are sold under
2 Reg S to -- to investors that otherwise qualify. And
3 HarbourVest was investing in that transaction through the
4 Guernsey structure.

5 Q And do you have an understanding as to who owned the 50-
6 plus percent of HCLOF that HarbourVest was not going to
7 acquire?

8 A Yeah. There's -- you can tell by the name. HCLOF is
9 Highland CLO Funding. This is a Highland vehicle. So
10 Highland owned and controlled the vehicle. The DAF, which is
11 -- which is Dondero-controlled trusts, have the -- 49 percent.
12 Highland has, I believe, around .63-65 percent directly. And
13 then Highland employees at the time who were involved in the
14 business owned another small percentage.

15 So the majority was going to be controlled by Highland
16 through its control of DAF and its control of the employees
17 that worked for it. HarbourVest would be a minority investor.

18 Q Okay. And I believe you testified that the investment was
19 made in mid-November; is that right?

20 A That's correct. I think it was the 15th, may have been
21 the 17th of November.

22 Q And do you recall when in October the Terry arbitration
23 award was rendered?

24 A It was about a month before. I think it was right around
25 the 20th, the 17th to the 20th. I may be slightly wrong on

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1 each of those dates.

2 Q Okay. What is your understanding as to what happened
3 after the issuance of the award that is the basis or at least
4 one of the bases for HarbourVest's claim?

5 A I don't think there's -- I don't think there's any
6 dispute. And there certainly are judicial findings. Dondero
7 and Highland went about stripping Acis of all of its assets.
8 So, remember that Acis is not a separate standalone company,
9 in any event. It's controlled and dominated completely by
10 Highland at the time. But it did have contracts. And those
11 contracts had value.

12 So the first idea was to strip out the management contract
13 and put it into a separate vehicle, which we called HCF
14 Advisor, which Highland still owns. The second piece was to
15 strip out some valuable assets, the risk retention piece,
16 which was a loan that in essence was equity that Highland had
17 put into Acis but structured as a loan, as many of the
18 transactions we'll see down the road are, in order to deal
19 with some -- avoid taxes in any way possible. And that
20 structure, that value moved value out of Acis for the express
21 purpose of trying to run, in essence, the Highland business
22 back in Highland.

23 Remember, as I said, Acis is just a Highland business
24 moved to a separate shell. When Mr. Terry got his arbitration
25 award against Acis and was seeking to enforce it, it was

Seery - Direct

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1 pretty straightforward, let's take all the assets -- Dondero
2 scheme -- let's take all the assets and move them back into
3 Highland so Terry can't get anything.

4 Q And how does that scheme relate to the HarbourVest claim,
5 to the best of your knowledge?

6 A Well, HarbourVest -- HarbourVest's position is that they
7 invested in Acis and -- and whether Acis was called Acis or
8 called Highland, it doesn't really matter; there were valuable
9 assets in the -- in the entity that they were going to be
10 investing in through the equity in these CLOs and some of the
11 debt securities in those CLOs.

12 And then the stripping out and the fraudulent conveyances
13 out of Acis caused them damages because that's what left the
14 damage to Mr. Terry.

15 The quick math on Acis, by the way, is Acis has probably
16 lost, total damages, 175 million bucks. And that's pretty
17 easy. DAF lost 50. HarbourVest lost 50. Fifteen million of
18 fees charged to HCLOF. Another five million of fees, at
19 least, incurred by Mr. Terry. Ten million that went to Mr.
20 Terry, 15 to Highland fees, another five, plus Mr. Terry's
21 settlement in this case, over eight million bucks.

22 So HarbourVest's position, which, on a factual basis, you
23 know, is problematic for the estate, is, wait a second, we
24 invested in this vehicle with Highland. That was supposed to
25 invest in Highland CLOs. They were called Acis, but they were

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Seery - Direct

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1 Highland CLOs. And then you went about causing tremendous
2 damage to that vehicle that we ultimately were investing in,
3 and then charge us for the pleasure.

4 Q You used the phrase earlier "OM," I believe.

5 A Offering memorandum.

6 Q Offering memorandum? Can you just explain to the Court
7 your understanding of what an offering memorandum is?

8 A Typically, under U.S. law, and foreign jurisdictions have
9 similar laws, you have to have a document that explains the
10 securities that you're selling. And it goes into extreme
11 detail about the securities and the risks related to those
12 securities.

13 And the idea is not to have a document that tells you
14 whether it's a good investment or a bad investment, but it's a
15 document that discloses to the potential investor all of the
16 risks with respect to that security or related to the
17 investment over the duration of the security. It doesn't
18 predict the future, but it's supposed to make sure that it
19 gives you a very clean view of the past and a very clean view
20 of what the facts from the past are and how they would
21 implicate the future of the investment.

22 Q And in the course of its diligence, did the Debtor have an
23 opportunity to review the offering memorandum in the context
24 of the claims that were being asserted by HarbourVest?

25 A Oh, absolutely. It was originally effectively -- it's an

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Seery - Direct

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1 HCLOF offering memorandum. But as I said, HCLOF was managed
2 and controlled by Highland, and Highland originally prepared
3 it. And then, of course, in connection with -- with this
4 dispute and these claims, we reviewed it, both myself and my
5 legal team.

6 Q All right.

7 MR. MORRIS: Your Honor, the offering memorandum is
8 on the Debtor's exhibit list, and I think this is an
9 appropriate time to move into evidence Debtor's Exhibits A
10 through EE, all of which appear at **Docket No. 1732**.

11 THE COURT: 1732?

12 MR. MORRIS: It's the Debtor's Second Amended Witness
13 and Exhibit List.

14 THE COURT: All right. Any objection to admission of
15 A through EE?

16 MR. DRAPER: Douglas Draper. No objection, Your
17 Honor.

18 THE COURT: All right. Mr. --

19 MR. MORRIS: May I proceed?

20 THE COURT: Yeah. Mr. Wilson, did you want to
21 confirm no objection?

22 (Echoing.)

23 THE COURT: All right. Hearing no objection,
24 Debtor's A through EE are admitted.

25 (Debtor's Exhibits A through EE are received into

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Seery - Direct

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1 evidence.)

2 THE COURT: Go ahead, Mr. Morris.

3 MR. MORRIS: Thank you, Your Honor. The offering
4 memorandum itself is one of the documents that we filed under
5 seal, and we did so at the request of counsel to HCLOF. But
6 HCLOF has consented to our sharing up on the screen certain
7 very limited provisions of the document, without waiving the
8 request that the agreement otherwise be maintained under seal.

9 THE COURT: All right.

10 MR. MORRIS: So may I proceed on that basis, Your
11 Honor?

12 THE COURT: You may. Uh-huh.

13 MR. MORRIS: Okay. Ms. Canty, can you please put up
14 on the screen Demonstrative Exhibit #1? Okay. Can we just --
15 is there a way to just expand that just a bit, Ms. Canty?
16 Thank you very much. And if we could just scroll it up?
17 Thank you very much. Perfect.

18 Okay. So, Your Honor, this, as the footnote says, is an
19 excerpt from the offering memorandum that can be found at
20 Debtor's Exhibit AA. Double A. And this particular portion
21 of the offering memorandum is at Page 35.

22 THE COURT: Okay.

23 BY MR. MORRIS:

24 Q Mr. Seery, have you seen this portion of the offering
25 memorandum before?

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Seery - Direct

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1 A Yes, I have. But before I continue, I just -- I should
2 have checked. Are you able to hear me clearly? Am I speaking
3 too quickly or am I cutting out? I just want to make sure.
4 I'm using a different set of audio today.

5 THE COURT: All right.

6 MR. MORRIS: That's fine.

7 THE COURT: I hear you very well.

8 MR. MORRIS: Yeah.

9 THE COURT: So I think we're good right now. Thank
10 you.

11 THE WITNESS: Yeah. Thank you, Your Honor. I was
12 just checking.

13 THE COURT: Okay.

14 THE WITNESS: In response to your question, Mr.
15 Morris, yes, I have seen this before.

16 BY MR. MORRIS:

17 Q Okay. And can you -- did you form a view in doing the due
18 diligence as to the adequacy of this disclosure?

19 A Yes, I did.

20 Q Can you share your -- or share with Judge Jernigan the
21 Debtor's view as to the adequacy of this disclosure concerning
22 the litigation between Highland and Acis?

23 A With respect to the litigation between Highland and Acis,
24 or, really, between Acis, Highland, and Highland's principals
25 and Acis's principal, totally inadequate. The disclosure here

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Seery - Direct

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1 is very high-level. And if there were no other litigation
2 going on, it might serve to suffice. It basically says, In
3 our business, because we invest in distressed loans, there's a
4 lot of litigation around distressed investments, and that's
5 what we have. And then it says, We've talked with the
6 investor about other things and we're -- we think that's
7 enough.

8 Q Is there anything in this portion or anywhere in the
9 offering memorandum that you're aware of that disclosed to
10 HarbourVest that in the weeks leading up to the investment
11 Highland was engaged in the fraudulent transfer of assets away
12 from Acis?

13 A No. And I apologize, because I think it's -- I've
14 conflated two provisions. This one only deals with the very
15 high-level nature of the business. It doesn't give any
16 indication that there's any material litigation going on
17 elsewhere with respect to Acis.

18 I believe there's another provision that says, We -- we
19 have talked to -- oh, here -- I'm sorry. It is here.
20 Shareholders have had an opportunity to discuss with Highland
21 to their satisfaction all litigation matters against Highland
22 and its affiliates unrelated to its distressed business.

23 That, in my opinion, is wholly inadequate.

24 Q Okay.

25 MR. MORRIS: And let's put up -- actually, let's just

005309

**UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF
TEXAS, DALLAS DIVISION**

In Re: Highland Capital Management, L.P § Case No. **19-34054-SGJ11**

Charitable DAF Fund, L.P et al

Appellant

§

vs.

§

21-03067

Highland Capital Management, L.P

§

Appellee

§

3:23-CV-01503-B

[167] Order granting Defendant Highland Capital Management, L.P.'s Renewed motion to dismiss adversary proceeding (related document # [122](#)) Entered on 6/25/2023.

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APPELLANT RECORD

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**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

In re:	§ Chapter 11
	§
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§ Case No. 19-34054-sgj11
	§
Debtor.	§
	§
CHARITABLE DAF FUND, L.P. AND CLO	§
HOLDCO, LTD., DIRECTLY AND DERIVATIVELY	§
	§
Plaintiffs,	§ Adversary Proceeding No.
	§
vs.	§ 21-03067-sgj11
	§
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§
HIGHLAND HCF ADVISOR, LTD., AND	§
HIGHLAND CLO FUNDING LTD., NOMINALLY	§
	§
Defendant.	§
	§

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**APPELLANTS' SECOND AMENDED STATEMENT OF ISSUES
AND DESIGNATION OF RECORD ON APPEAL**

Pursuant to Rules 8009(a)(1)(A)-(B) and (a)(4) of the Federal Rules of Bankruptcy Procedure, The Charitable DAF Fund, L.P. and CLO Holdco, Ltd. ("Appellants") hereby designate the following items to be included in the record and identify the following issues with respect to

their appeal of the Order Granting Defendant Highland Capital Management, L.P.'s "Renewed Motion to Dismiss Complaint" [Adv. Proc. Doc. No. 122] which was entered by the United States Bankruptcy Court for the Northern District of Texas on June 25, 2023.

I. STATEMENT OF ISSUES TO BE PRESENTED ON APPEAL

- Whether the Bankruptcy Court had jurisdiction to rule on Highland Capital Management L.P.'s Renewed Motion to Dismiss Complaint
- Whether the Renewed Motion to Dismiss Complaint was improperly granted

II. DESIGNATION OF ITEMS TO BE INCLUDED IN THE RECORD

Vol. 1
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1. Notice of Appeal for Bankruptcy Case Adversary Proceeding No. 21-03067-sgj11 [Doc. 168].

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2. The judgment, order, or decree appealed from: Memorandum Opinion and Order Granting Defendant Highland Capital Management, L.P.'s "Renewed Motion to Dismiss Complaint" [Adv. Proc. Doc. No. 122] [Doc. 167].

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3. Docket Sheet kept by the Bankruptcy Clerk.

4. Documents listed below and as described in the Docket Sheet for Bankruptcy Case Proceeding No. 21-03067-sgj.

Vol. 2

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No.	Date Filed	Docket No.	Description/Document Text
1	9/29/21	1	(36 pgs; 3 docs) Adversary case 21-03067. ORDER REFERRING CASE NUMBER 21-CV-0842-B from U.S District Court for the Northern District of Texas, Dallas Division to U.S. Bankruptcy Court for Northern District of Texas, Dallas Division. Complaint by Charitable DAF Fund, LP, CLO Holdco, Ltd. against Highland Capital Management, LP, Highland HCF Advisor Ltd., Highland CLO Funding, Ltd. Fee Amount \$350 (Attachments: # 1 Original Complaint # 2 Docket Sheet from 3:20-cv-0842-B) Nature(s) of suit: 02 (Other (e.g. other actions that would have been brought in state court if unrelated to bankruptcy)). (Okafor, M.)
2	9/29/21	2	(1 pg) Supplemental Document (cover sheet) by CLO Holdco Ltd., Charitable DAF Fund (RE: related document(s)1 Adversary case 21-03067) [ORIGINALLY FILED IN 21-CV-0842 AS #2 ON 04/13/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)

Vol. 2 000139 000232 000239 000270 Thru Vol. 6	3	9/29/21	6	(93 pgs; 6 docs) MOTION for Leave to File First Amended Complaint filed by CLO Holdco Ltd., Charitable DAF Fund LP (Attachments: # 1 Exh 1_First Amended Complaint # 2 Exh 2_Motion for Authorization to Retain James Seery # 3 Exh 3_Order Approving Retention of James Seery # 4 Exh 4_Order Approving Settlement # 5 Proposed Order) (Bridges, Jonathan) (Entered: 04/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #6 ON 04/19/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
	4	9/29/21	22	(7 pgs; 2 docs) MOTION for an Order to Enforce the Order of Reference filed by Highland Capital Management LP. (Attachments: # 1 Exhibit(s) A--Proposed Order) (Annable, Zachery) Modified text on 5/20/2021 (mjr). (Entered: 05/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #22 ON 05/19/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
	5	9/29/21	23	(31 pgs) Brief/Memorandum in Support filed by Highland Capital Management LP re: 22 MOTION for an Order to Enforce the Order of Reference. (Annable, Zachery) Modified text on 5/20/2021 (mjr).(Entered: 05/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #23 ON 05/19/2021 IN U.S.DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
	6	9/29/21	24	(926 pgs; 29 docs) Appendix in Support filed by Highland Capital Management LP re: 23 Brief/Memorandum in Support. (Attachments: # 1 Appendix 1 # 2 Appendix 2 # 3 Appendix 3 # 4 Appendix 4 # 5 Appendix 5 # 6 Appendix 6 # 7 Appendix 7 # 8 Appendix 8 # 9 Appendix 9 # 10 Appendix10 # 11 Appendix 11 # 12 Appendix 12 # 13 Appendix 13 # 14 Appendix 14 # 15 Appendix 15 # 16 Appendix 16 # 17 Appendix 17 # 18 Appendix 18 # 19 Appendix 19 # 20 Appendix 20 # 21 Appendix 21# 22 Appendix 22 # 23 Appendix 23 # 24 Appendix 24 # 25 Appendix 25 # 26 Appendix 26 # 27 Appendix 27 # 28 Appendix 28) (Annable, Zachery) Modified linkage and text on 5/20/2021 (mjr). (Entered:05/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #24 ON 05/19/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
Vol. 7 001196	7	9/29/21	26	(7 pgs; 2 docs) MOTION to Dismiss Complaint filed by Highland Capital Management LP (Attachments: # 1 Exhibit(s) A--Proposed Order) (Annable, Zachery) Modified text on 5/28/2021 (jmg).(Entered: 05/27/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #26 ON 05/27/2021 IN U.S.DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)

Vol. 7 001203 thru Vol. 8	8	9/29/21	28	(508 pgs; 14 docs) Appendix in Support filed by Highland Capital Management LP (Attachments: # 1 Appendix 1 # 2 Appendix 2 # 3 Appendix 3 # 4 Appendix 4 # 5 Appendix 5 # 6 Appendix 6 # 7 Appendix 7 # 8 Appendix 8 # 9 Appendix 9 # 10 Appendix 10 # 11 Appendix 11 # 12 Appendix 12 # 13 Appendix 13) (Annable, Zachery) (Entered: 05/27/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #28 ON 05/27/2021 IN U.S. DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
Vol. 9 001711	9	9/29/21	33	(1 pg) Amended Civil Cover Sheet by CLO Holdco Ltd, Charitable DAF Fund LP. Amendment to 2 Supplemental Document. (Sbaiti, Mazin) Modified text on 6/23/2021 (mjr). (Entered: 06/22/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #33 ON 06/22/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001712	10	9/29/21	36	(26 pgs) RESPONSE filed by CLO Holdco Ltd, Charitable DAF Fund LP re: 22 MOTION for an Order to Enforce the Order of Reference (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #36 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001738	11	9/29/21	37	(22 pgs) Appendix in Support filed by CLO Holdco Ltd, Charitable DAF Fund LP re 36 Response/Objection Response to Motion for an Order to Enforce the Order of Reference (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #37 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001760	12	9/29/21	38	(45 pgs) RESPONSE filed by CLO Holdco Ltd, Charitable DAF Fund LP re: 26 MOTION to Dismiss (Defendant Highland Capital Management, L.P.'s Motion to Dismiss Complaint) (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #38 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001805	13	9/29/21	39	(88 pgs) Appendix in Support filed by CLO Holdco Ltd, Charitable DAF Fund LP re 38 Response/Objection to Defendant Highland Capital Management, L.P.'s Motion to Dismiss Complaint (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #39 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001893	14	9/29/21	42	(12 pgs) REPLY filed by Highland Capital Management LP re: 22 MOTION for an Order to Enforce the Order of Reference (Annable, Zachery) (Entered: 07/13/2021) [ORIGINALLY FILED IN 21-CV-0842AS #42 ON 07/13/2021 IN U.S.

			DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
VOL. 9	15	9/29/21	43 (852 pgs) Appendix in Support filed by Highland Capital Management LP re: 42 Reply. (Annable, Zachery) Modified text on 7/14/2021 (mjr). (Entered: 07/13/2021) [ORIGINALLY FILED IN 21-CV-0842AS #43 ON 07/13/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001905 thru vol. 13	16	9/29/21	45 (21 pgs) REPLY filed by Highland Capital Management LP re: 26 MOTION to Dismiss (Defendant Highland Capital Management, L.P.'s Motion to Dismiss Complaint) (Annable, Zachery) (Entered:07/13/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #44 ON 07/13/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002757	17	9/29/21	57 (7 pgs; 2 docs) MOTION to Dismiss and Joinder in Motion to Dismiss of Highland Capital Management, L.P. filed by Highland CLO Funding Ltd. (Attachments: # 1 Proposed Order) Attorney Paul R Bessette added to party Highland CLO Funding Ltd (pty:dft) (Bessette, Paul) (Entered: 08/30/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #57 ON 08/30/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002778	18	9/29/23	58 (12 pgs) Brief/Memorandum in Support filed by Highland CLO Funding Ltd. re 57 MOTION to Dismiss and Joinder in Motion to Dismiss of Highland Capital Management, L.P. (Bessette, Paul) (Entered: 08/30/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #58 ON 08/30/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002785	19	9/29/23	59 (80 pgs; 5 docs) Appendix in Support filed by Highland CLO Funding Ltd re 58 Brief/Memorandum in Support of Motion (Attachments: # 1 Exhibit(s) A - Jackson v Dear # 2 Exhibit(s) B - Prudential Assurance v. Newman # 3 Exhibit(s) C - Harbourvest Settlement Agreement # 4 Exhibit(s) D - Boleat Declaration) (Bessette, Paul) (Entered: 08/30/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #59 ON 08/30/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002797	20	9/29/21	64 (1 pg) ORDER OF REFERENCE: Pursuant to 28 U.S.C. § 157 and this District's Miscellaneous Order No. 33, this case is hereby REFERRED to Judge Stacey G. C. Jernigan of the United States Bankruptcy Court for the Northern District of Texas, Dallas Division, to be adjudicated as a matter related to the consolidated Chapter 11 Bankruptcy of Highland Capital Management, L.P., Chapter 11 Case No.19-34054. (Ordered by Judge Jane J. Boyle
002877			

Vol. 14				on 9/20/2021) (svc) (Entered: 09/20/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #64 ON 09/20/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002878	21	10/19/21	66	(5 pgs) Notice of hearing filed by Defendant Highland Capital Management, LP (RE: related document(s) 26 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP, 47 Motion to strike document filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 55 Motion to abate filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) Hearing to be held on 11/23/2021 at 09:30 AM at https://us-courts.webex.com/meet/jerniga for 26 and for 47 and for 55, (Annable, Zachery)
002883 thru Vol. 16	22	11/22/21	71	(509 pgs; 2 docs) Witness and Exhibit List <i>for Hearing on November 23, 2021</i> filed by Defendant Highland Capital Management, LP (RE: related document(s) 26 Motion to dismiss adversary proceeding). (Attachments: # 1 Exhibits 1-13) (Hayward, Melissa)
Vol. 17	23	11/22/21	72	(2 pgs) Witness List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 26 Motion to dismiss adversary proceeding, 47 Motion to strike (related document(s): 43 Document), 55 Motion to abate (related document(s) 1 Complaint), 69 Motion to abate <i>Plaintiffs' Amended Motion to Stay All Proceedings</i> (related document(s) 55 Motion to abate (related document(s) 1 Complaint))). (Sbaiti, Mazin)
003392				
003394	24	11/22/21	73	(189 pgs; 4 docs) Exhibit List <i>for November 23, 2021 hearing</i> filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 47 Motion to strike (related document(s): 43 Document), 55 Motion to abate (related document(s) 1 Complaint)). (Attachments: # 1 Exhibit 1_Defendant's Memorandum of Law in Support of Motion for Reconsideration # 2 Exhibit 2_Highland Memorandum in Support of Motion to Dismiss # 3 Exhibit 3_Order (I) Confirming Fifth Amended Plan of Reorganization of Highland) (Sbaiti, Mazin)
003583	25	12/7/21	80	(2 pgs) Order granting Highland CLO Funding, Ltd.'s motion to dismiss adversary as a party with prejudice (related document 57) Entered on 12/7/2021. (Okafor, Marcey) Modified text on 3/11/2022 (Okafor, Marcey).
003585	26	3/11/22	99	(26 pgs) Memorandum of Opinion and order granting motion to dismiss the adversary proceeding (RE: related document(s) 26 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP). Entered on 3/11/2022 (Okafor, Marcey)
003611	27	3/11/22	100	(26 pgs) Order granting motion to dismiss adversary proceeding with prejudice (related document #26) Entered on 3/11/2022. (Okafor, Marcey)

Vol. 18 003637	28	3/21/22	104	(29 pgs) Notice of appeal. Fee Amount \$298 filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 100 Order on motion to dismiss adversary proceeding). Appellant Designation due by 04/4/2022. (Sbaiti, Mazin)
003666	29	5/26/22	120	(177 pgs; 2 docs) Support/supplemental document <i>Motion to Supplement Appellate Record</i> filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 111 Appellant designation). (Attachments: # 1 Amended Transcript of January 14, 2021 Hearing) (Sbaiti, Mazin)
003843	30	6/9/22	121	(1 pg) DISTRICT COURT Order: Case 3:22-00695-B is hereby transferred to the docket of the Honorable Judge Jane J. Boyle for consolidation with The Charitable DAF Fund LP, et al. v. Highland Capital Management LP, Case No. 3:21-cv-3129-N. Judge Karen Gren Scholer no longer assigned to case.(RE: related document(s) 86 Notice of appeal filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 104 Notice of appeal filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Entered on 6/9/2022 (Whitaker, Sheniqua) (Entered: 06/10/2022)
003844	31	10/24/22	122	(7 pgs) Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP (Annable, Zachery)
003851	32	10/14/22	123	(31 pgs) Brief in support filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Annable, Zachery)
Vol. 19 003882 Thru Vol 20	33	10/14/22	124	(513 pgs; 15 docs) Support/supplemental document (<i>Appendix in Support of Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7 # 8 Exhibit 8 # 9 Exhibit 9 # 10 Exhibit 10 # 11 Exhibit 11 # 12 Exhibit 12 # 13 Exhibit 13 # 14 Exhibit 14) (Annable, Zachery)
Vol. 21 004395	34	10/27/22	126	(5 pgs) Notice of hearing (<i>Notice of Hearing and Briefing Schedule on Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP). Hearing to be held on 12/8/2022 at 09:30 AM at https://us-courts.webex.com/meet/jerniga for 122. (Annable, Zachery)

Vol. 21 004400 004410 004442 Thru Vol. 22	35	11/18/22	128	(10 pgs) Motion for withdrawal of reference. Fee amount \$188, filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (Sbaiti, Mazin)
	36	11/18/22	129	(32 pgs) Response opposed to (related document(s): 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP) filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Sbaiti, Mazin)
	37	11/18/22	130	(254 pgs; 2 docs) Response opposed to (related document(s): 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP) filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Attachments: # 1 Appendix) (Sbaiti, Mazin)
Vol. 22 004696 004717 004732 004737 004742	38	9/2/22	131	(21 pgs) DISTRICT COURT MEMORANDUM OPINION AND ORDER: The Court REVERSES and REMANDS the bankruptcy court's Motion to Dismiss Order and AFFIRMS the bankruptcy courts Motion to Stay Order. re: appeal on Civil Action number: Case 3:22-00695-B consolidated with 3:21-CV-3129-B, (RE: related document(s) 81 Order on motion to abate, 100 Order on motion to dismiss adversary proceeding). Entered on 9/2/2022 (Whitaker, Sheniqua) (Entered: 11/29/2022)
	39	12/2/22	133	(15 pgs) Reply to (related document(s): 129 Response filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 130 Response filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) filed by Defendant Highland Capital Management, LP. (Annable, Zachery)
	40	12/7/22	135	(5 pgs) Notice of hearing filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP). Hearing to be held on 1/25/2023 at 01:30 PM at https://us-courts.webex.com/meet/jerniga for 122, (Annable, Zachery)
	41	12/7/22	136	(5 pgs) Notice of hearing filed by Defendant Highland Capital Management, LP (RE: related document(s) 128 Motion for withdrawal of reference filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Status Conference to be held on 1/25/2023 at 01:30 PM at https://us-courts.webex.com/meet/jerniga . (Annable, Zachery).
	42	12/9/22	138	(3 pgs) Response opposed to (related document(s): 128 Motion for withdrawal of reference. Fee amount \$188, filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) filed by Defendant Highland Capital Management, LP. (Annable, Zachery)

Vol. 22 004745	43	12/9/22	139	(25 pgs) Brief in support filed by Defendant Highland Capital Management, LP (RE: related document(s) 138 Response). (Annable, Zachery)
Vol. 23 004770	44	12/9/22	140	(280 pgs; 8 docs) Support/supplemental document (<i>Appendix in Support of Highland Capital Management, L.P.'s Response to Renewed Motion to Withdraw the Reference</i>) filed by Defendant Highland Capital Management, LP (RE: related document(s) 138 Response). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7) (Annable, Zachery)
Vol. 24 005050	45	12/16/22	144	(6 pgs) Reply to (related document(s): 138 Response filed by Defendant Highland Capital Management, LP) filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Sbaiti, Mazin)
005056 Thru Vol. 25.	46	1/23/23	145	(514 pgs; 15 docs) Witness and Exhibit List filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7 # 8 Exhibit 8 # 9 Exhibit 9 # 10 Exhibit 10 # 11 Exhibit 11 # 12 Exhibit 12 # 13 Exhibit 13 # 14 Exhibit 14) (Annable, Zachery)
Vol. 26 005570	47	1/23/23	146	(280 pgs; 8 docs) Witness and Exhibit List filed by Defendant Highland Capital Management, LP (RE: related document(s) 128 Motion for withdrawal of reference. Fee amount \$188.). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7) (Annable, Zachery)
Vol. 27 005850	48	1/23/23	147	(221 pgs; 7 docs) Witness and Exhibit List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Attachments: # 1 Exhibit 1_Excerpts from July 14, 2020 Hearing Transcript # 2 Exhibit 2_HCLOF Members Agreement Relating to the Company # 3 Exhibit 3_HarbourVest Settlement Agreement # 4 Exhibit 4_Order Approving Debtor's Settlement with HarbourVest # 5 Exhibit 5_HCLOF Offering # 6 Exhibit 6 Amended and Restated Investment Advisory Agreement) (Sbaiti, Mazin)
006071	49	1/23/23	148	(3 pgs) Witness and Exhibit List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 128 Motion for withdrawal of reference. Fee amount \$188.). (Phillips, Louis)
Vol. 28 006074	50	1/25/23	150	(56 pgs; 2 docs) Amended Witness and Exhibit List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 147 List (witness/exhibit/generic), 149 List (witness/exhibit/generic)). (Attachments: # 1 Exh 7_Testimony of Mark Patrick at June 8, 2021 hearing) (Sbaiti, Mazin)

Vol. 28 006130	51	1/25/23	152	(3 pgs) Notice of Appearance and Request for Notice by Louis M. Phillips filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Phillips, Louis)
	52	1/25/23	154	(1 pg) Court admitted exhibits date of hearing January 25, 2023 (RE: related document(s) 128 Motion for withdrawal of reference, filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) (COURT ADMITTED DEFENDANT'S EXHIBITS #1, #2, #3, #4, #5 & #6 OFFERED BY ATTY GREG DEMO). (Edmond, Michael) (Entered: 01/27/2023)
Vol. 32 006925 006942 006960	53	2/6/23	158	Report and recommendation to the U.S. District Court by U.S. Bankruptcy Judge. (RE: related document(s) 128 Motion for withdrawal of reference filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Entered on 2/6/2023 (Okafor, Marcey)
	54	2/6/23	161	(18 pgs) DISTRICT COURT Notice of transmission of report and recommendation in re: renewed motion to withdraw reference. Civil Case # 3:22-cv-02802-S. (RE: related document(s) 158 Report and recommendation to the U.S. District Court by U.S. Bankruptcy Judge. (RE: related document(s) 128 Motion for withdrawal of reference filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Entered on 2/6/2023) (Whitaker, Sheniqua)
	55	4/3/23	165	(1 pg) DISTRICT COURT ORDER: The Court GRANTS the 11 Joint Motion to Transfer Proceeding and Consolidate Before Original Court and the above-numbered case (3:22-cv-02802-S) is transferred to the docket of the Honorable Judge Jane Boyle: Civil case 3:21-cv-00842-B (order referring case). (RE: related document(s) 1 Complaint filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 143 Notice of transmission of motion to withdraw reference). Entered on 4/3/2023 (Whitaker, Sheniqua) Modified on 4/10/2023 (Whitaker, Sheniqua). (Entered: 04/10/2023)

TRANSCRIPTS

006961	56	11/24/21	78	(104 pgs) Transcript regarding Hearing Held 11-23-2021 RE: Motion Hearing. THIS TRANSCRIPT WILL BE MADE ELECTRONICALLY AVAILABLE TO THE GENERAL PUBLIC 90 DAYS AFTER THE DATE OF FILING. TRANSCRIPT RELEASE DATE IS 02/22/2022. Until that time the transcript may be viewed at the Clerk's Office or a copy may be obtained from the official court transcriber. Court Reporter/Transcriber Liberty Transcripts/Dipti Patel, Telephone number 847-848-4907. (RE: related document(s) 75 Hearing held on 11/23/2021. (RE: related document(s) 55 MOTION to Stay filed by CLO Holdco Ltd, Charitable DAF Fund LP (Sbaiti, Mazin) (Entered: 08/26/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #55 ON 08/26/2021 IN U.S.
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			<p>DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)) (Appearances: J. Pomerantz and J. Morris for Highland Defendants; J. Jordan and P. Bessett for HCLOF; M. Sbaiti for Plaintiffs. Nonevidentiary hearing. Motion denied. Mr. Pomerantz to upload order.), 76 Hearing held on 11/23/2021. (RE: related document(s) 47 Motion to strike 43 Appendix in support filed by CLO Holdco, Ltd., Charitable DAF Fund, LP (Bridges, Jonathan) Modified text on 7/16/2021 (mjr). (Entered: 07/15/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #47 ON 07/15/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)) (Appearances: J. Pomerantz and J. Morris for Highland Defendants; J. Jordan and P. Bessett for HCLOF; M. Sbaiti for Plaintiffs. Nonevidentiary hearing. Motion denied (Plaintiffs acknowledged complained-of Appendices it did not relate to Motion to Dismiss). Mr. Pomerantz to upload order.)). Transcript to be made available to the public on 02/22/2022. (Patel, Dipti)</p>
57	2/21/23	164	<p>164 (112 pgs) Transcript regarding Hearing Held 1/25/23 RE: HEARING ON DEFENDANT HIGHLAND CAPITAL MANAGEMENT L.P.'S RENEWED MOTION TO DISMISS COMPLAINT (122) AND STATUS CONFERENCE RE: MOTION FOR WITHDRAWAL OF REFERENCE FILED BY PLAINTIFF CLO HOLDCO, LTD., PLAINTIFF CHARITABLE DAF FUND, LP (128). THIS TRANSCRIPT WILL BE MADE ELECTRONICALLY AVAILABLE TO THE GENERAL PUBLIC 90 DAYS AFTER THE DATE OF FILING. TRANSCRIPT RELEASE DATE IS 05/22/2023. Until that time the transcript may be viewed at the Clerk's Office or a copy may be obtained from the official court transcriber. Court Reporter/Transcriber Dipti Patel, Telephone number 847-848-4907. (RE: related document(s) 155 Hearing held on 1/25/2023. (RE: related document(s) 122 Motion to dismiss adversary proceeding, (Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint) filed by Defendant Highland Capital Management, LP filed by Defendant Highland Capital Management, LP) (Appearances: J. Morris and G. Demo for Movants; L. Phillips and M. Sbaiti for Plaintiffs. Evidentiary hearing (appendices). Court took matter under advisement.), 156 Hearing held on 1/25/2023. (RE: related document(s) 128 Motion for withdrawal of reference. Fee amount \$188, filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) (Appearances: J. Morris and G. Demo for Movants; L. Phillips and M. Sbaiti for Plaintiffs. Evidentiary hearing (appendices). Court announced it will recommend denial to District Court. Court is working on Report & Recommendation.)). Transcript to be made available to the public on 05/22/2023. (Patel, Dipti)</p>

Dated: July 14, 2023

Respectfully submitted,

SBAITI & COMPANY PLLC

/s/ Mazin A. Sbaiti

Mazin A. Sbaiti

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Counsel for Appellants

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was filed electronically through the Court's ECF system, which provides notice to all parties of interest, on this 14th day of July, 2023.

/s/ Mazin A. Sbaiti

Mazin A. Sbaiti

Seery - Direct

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1 move on.

2 BY MR. MORRIS:

3 Q Let's go to the settlement itself.

4 MR. MORRIS: Can we put back up Demonstrative Exhibit
5 #3?

6 BY MR. MORRIS:

7 Q Mr. Seery, can you see that?

8 A Yes, I can.

9 Q Does this generally describe the net economic recovery of
10 the HarbourVest settlement based on estimated recoveries for
11 general unsecured creditors as of November 2020?

12 A As of November 2020, it does. And you alluded to this in
13 your opening, but to be clear, the numbers have shifted.
14 Costs have increased. The -- so the -- effectively, the
15 numerator, in terms of distributable value that we estimate,
16 is lower. And settlements, the denominator, have also
17 increased. So the claims against the estate that have been
18 recognized have increased. And that, that probably takes it
19 down closer, in our view, to about seventy cents distribution,
20 a number closer to nine to ten million, maybe a little bit
21 less.

22 However, there's also some additional value that we -- we
23 believe we will recover directly. There are north of \$150
24 million of intercompany notes owed by Dondero entities to
25 Highland. A number of those notes are demand notes, and we've

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1 already made demand. We'll be initiating actions next week.
2 So those are -- those value, we believe, we'll recover
3 directly from Mr. Dondero and from related entities.

4 To the extent those related entities don't have value, we
5 feel very strongly about our ability to pierce the veil and
6 reach in to Mr. Dondero. And then his assets, either his
7 personal assets or the assets that he claims are in trusts.

8 In addition, there are a significant amount of notes that
9 were extended in two -- I believe around 2017, for no
10 consideration. Those notes were demand notes, I believe, and
11 then extended it 30 years. So they have 2047 maturities.
12 Those were probably going to have to be subject to fraudulent
13 conveyance type actions or -- or some sort of sale at a very
14 discounted value because third parties wouldn't want long-
15 dated notes with Mr. Dondero as the counterparty for very much
16 money.

17 Those -- they defaulted on some of those parties, so we
18 effectively turned them into demand notes. We've accelerated,
19 and we'll be bringing actions against those entities next week
20 as well.

21 So I think (garbled) have come up, so I apologize. One
22 way of saying I think the sixteen and a half is a bit high
23 right now, based upon what we know, but the value is going to
24 be higher than our estimate a couple of weeks ago because we
25 do believe we'll be able to recover on the notes.

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1 One additional caveat, just to be fully transparent here.
2 This summary with the 16.8 doesn't include the subordinated
3 piece of this -- of this claim and our resolution. That --
4 recovery of that piece will be dependent upon the success of
5 litigations.

6 In order for the subordinated piece to get paid, all
7 general unsecured claims in Class -- Classes 7 and 8 will have
8 to be paid in full. And then -- and then the subordinated
9 class in Class 9, which we believe UBS will have a piece of,
10 and HarbourVest will have a piece of by this settlement, those
11 will be able to recover, and those will be based upon other
12 claims of action against -- primarily against related parties.

13 Q And then that last point, is that what's reflected in
14 Footnote 3 on this page?

15 A That's correct, yes.

16 Q Okay. And just for the record, there's a reduction in
17 value of \$22-1/2 million. Do you see that?

18 A Yes.

19 Q And can you just explain to the Court what that is and how
20 that value was arrived at?

21 A Yes. I may be getting slightly ahead of you, Mr. Morris.
22 But to give the Court a reflection of the transaction -- and
23 we can go into the details in a moment -- ultimately, the
24 transaction we structured we think is very fair both
25 economically to the Debtor, but there -- there is some

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1 complexity to it to satisfy some of HarbourVest's concerns
2 that they be able to effectively rescind the transaction, at
3 least from an optical perspective. Value was important, but
4 optics were as well. The twenty-two and a half is the current
5 -- actually, the November value of HCL -- the HarbourVest
6 interests in HCLOF. And that's based upon Highland's
7 evaluation of those interests.

8 So we do believe that that is a fair value as of that
9 date. It has not gone down. It hasn't gone up explosively,
10 either, but it hasn't gone down. We think that's good, real
11 value. That value is in the Acis CLOs, the equity in those
12 CLOs, which is 2 through 6, that we -- we will be working with
13 the HCLOF folks to get Mr. Terry to monetize those assets and
14 those longer-dated CLOs.

15 In addition, I think it's 85 percent of the equity in Acis
16 7 -- Acis 7 is managed by Highland -- that is also beyond its
17 reinvestment period. And in talking to the directors -- and
18 they're new directors, and I'll get to that in a minute, for
19 HCLOF -- they'll seek to push Highland, which is the
20 reorganized Highland, to monetize that asset, with due regard
21 to fair value.

22 In addition, Harbour -- HCLOF owned a significant amount
23 of the preferred or equity pieces, if you will, in the
24 Highland CLO, 1.0 CLOs. As we've talked about, those are not
25 really CLOs. Those are effectively closed-end funds with

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1 illiquid assets, primarily illiquid assets in them. We've had
2 some dispute in front of the Court about selling the liquid
3 assets in them, which we can go into it another time. Those
4 are being liquidated in the market at fair value.

5 But HCLOF also is a significant holder of those preferred
6 shares, and those directors would -- have indicated to me that
7 they would like to see those interests also monetized.

8 Q All right. Let's shift gears for a moment to talk about
9 the diligence that the Debtor did before entering into this
10 agreement. Can you just describe for the Court generally the
11 diligence that was undertaken at your direction?

12 A Well, when we first received the reply to our objection,
13 we dug into that reply and the specifics in it very
14 aggressively. So we reviewed all of the underlying documents
15 related to the original transaction. We discussed with
16 counsel the legal basis for the HarbourVest claims. We
17 interviewed our own HCMLP employees who were involved in the
18 transaction and tested their recollection, specifically around
19 who dealt with HarbourVest, who had the discussions with
20 HarbourVest, what was disclosed to HarbourVest with respect to
21 the Terry dispute and the Acis litigation.

22 We also had done, as I think the Court is well aware from
23 prior 9019 testimony, extensive work around the transfers and
24 the issues related to Acis. So we were familiar with their
25 impact on HCLOF.

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1 We also did extensive work valuing the remaining HCLOF
2 interests to get a good feel of not only how much HarbourVest
3 originally invested, but how much they actually lost in this
4 transaction. And as I said, their original investment was
5 around, in total, in two tranches, about \$80 million, of which
6 they got about \$5 million back, and they've lost \$22 million.
7 So it -- I mean, remaining with \$22 million. So they've lost,
8 you know, in excess of \$50 million.

9 Q Do you recall whether the Debtor reviewed and analyzed all
10 of the documents that were cited in HarbourVest's response to
11 the Debtor's objection to the HarbourVest proofs of claim?

12 A Yeah. I think -- I forget, to be honest, which -- exactly
13 what documents were in there. But we went through their
14 objection with a fine-toothed comb, not only with respect to
15 the issues related to the Acis case, but also their references
16 to Guernsey law, other U.S. law, any of the documents between
17 the parties. And obviously, as I mentioned before, the
18 offering memorandum.

19 MR. MORRIS: Your Honor, I would just note for the
20 record that Debtor's Exhibits I through X are all of the
21 documents that are cited in HarbourVest's response to the
22 Debtor's objection to the HarbourVest proofs of claim, and
23 those are the documents that Mr. Seery just referred to.

24 THE COURT: All right.

25 MR. MORRIS: Just, they're in evidence now, and I

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1 just wanted the Court to understand why they're in evidence.

2 THE COURT: Okay. Thank you.

3 MR. MORRIS: You're welcome.

4 BY MR. MORRIS:

5 Q Let's talk about the Debtor and whether or not it had or
6 has any viable defenses. Did the Debtor form any views as to
7 whether or not it had any defenses to the HarbourVest claims?

8 A Yes, we did.

9 Q Can you describe for the Court the defenses that were
10 reviewed and analyzed by the Debtor?

11 A Yeah. I think we -- we had very significant defenses.
12 So, first and foremost, with respect to the original proof of
13 claim, as I mentioned earlier, it alluded to the expenses and
14 the overcharge. And I think with respect to the 15 million of
15 fees that were charged to HCLOF by Highland, we didn't have a
16 lot of defenses to that claim.

17 It's pretty clear, by any fair view of the Acis case, that
18 HCLOF, as the investor in the Acis CLOs and the Highland CLOs,
19 had no real responsibility for fighting with Acis and Josh
20 Terry and shouldn't have been charged those fees. I don't --
21 I don't think there's a legitimate investor that would
22 actually think that that was an appropriate amount to be
23 charged to a fund.

24 However, the claim was not as broad -- the proof of claim
25 was not as fulsome in terms of discussing and only vaguely

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1 referred to other damages. So we did -- we did, as a
2 threshold matter, think about whether we could argue that it
3 was time-barred because they had not met their obligations to
4 fully disclose under the proof of claim.

5 Secondly, we considered the defenses to the overall claim
6 of fraudulent inducement. Our perspective was that if we
7 could stop the claim of fraudulent inducement, the damages
8 would likely be limited to the 15 and maybe some -- some other
9 damages. With respect to the 15, again, the problem that we
10 had when we got past -- past motions for summary judgment is
11 the factual predicate for our defense was going to be that we
12 divulged these things to HarbourVest and that they did not
13 reasonably -- it was -- reasonably rely on some failure to
14 divulge because they're a sophisticated investor.

15 The problem with that defense is that our witnesses, which
16 really would have primarily been Mr. Dondero and Mr.
17 Ellington, and one other employee who runs the CLO business,
18 Mr. Covitz, would not be pretty good. They've been -- two of
19 them have been in front of this Court and they're not viewed
20 favorably and their testimony would be challenged and
21 potentially suspect.

22 So that gave us a real focus on trying to make sure that
23 we could, if we had to litigate, that we would litigate around
24 the fraudulent inducement.

25 As I said, reasonable reliance, what was disclosed, lack

1 of digging into the public record, because you don't have to
2 go far on Google to find "fraud" within two words of
3 "Highland," and the tremendous, you know, litigious nature of
4 Highland. You know, even at that point, when this investment
5 was made, aside from Mr. Terry's arbitration, which by that
6 point, at least by the time (inaudible) was public, there was,
7 you know, significant public disclosure around the Credit
8 Strat and the litigation, the Crusader litigation, the UBS
9 litigation, the, gosh knows, the Daugherty litigation.

10 So our defense was going to be that you should have
11 figured this out, you're a sophisticated investor, and you
12 should have been able to figure out that there was significant
13 risk that, with respect to Mr. Terry, that Mr. Dondero would
14 not stop litigating and that those costs would put significant
15 risk on the investment.

16 The problem with that, as I mentioned earlier, is that the
17 OM is wholly deficient. If you have a typical risk factor in
18 the offering memorandum, you would have disclosed that there
19 was a litigation with Mr. Terry, a former partner in the
20 business, and that the Debtor had no intention of settling it.
21 There was no intention of settling. That litigation would go
22 on. It could go on for years and it could result in
23 bankruptcy or attachments and other risks to the business, and
24 that the investor should be fully aware that the Offeror does
25 not intend to be involved in any -- or the manager, in any

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1 settlement with Mr. Terry, and the fact it undermined the
2 investment. That wasn't there.

3 But that was our preliminary focus, to try to stop fraud
4 in the inducement. And then we -- we had specific facts
5 related to that. You know, once they knew about the
6 bankruptcy in HarbourVest of -- I'm sorry, of Acis,
7 HarbourVest made a second funding, which was there was a -- it
8 was an initial \$75 million draw, and then a second, I believe,
9 about a \$5 million draw, which was in -- I believe in
10 February. And they made it without -- without objection, and
11 that was after the commencement of the bankruptcy.

12 In addition, they were -- they were active in the
13 bankruptcy, so the -- some of the things that happened in the
14 bankruptcy, there were many opportunities to settle that case,
15 from our examination, all of which were turned down to -- by
16 Mr. Dondero. But you don't see HarbourVest pounding the table
17 to settle, either, either with respect to the Oaktree
18 transaction or any other transaction.

19 Now, HarbourVest's defense to that is, well, we were
20 taking advice and all of our information from Highland, and we
21 were getting that information directly from senior folks at
22 Highland why -- what the value was and why we shouldn't do
23 those things. We thought that that would mitigate some of the
24 arguments that -- some of the damages that we might have, I'm
25 sorry, if we -- if we lost.

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1 But the focus at that point, you know, our legal strategy,
2 was can we stop HarbourVest at the very forefront to say,
3 You've got to come into the factual realm and get out of the
4 fraud in the inducement realm. And then the defenses and the
5 exculpations and the liability limitations in the documents
6 would also come into play.

7 So that -- those are some of the defenses that we focused
8 on and our analytical thinking around them.

9 Q So, if the Debtor had viable defenses, why is it settling?

10 A Well, this is a significant claim. And we -- we looked at
11 it with respect to both the impact on the case, but, really,
12 the merits of the claim.

13 As I said, there's really little dispute that the legal
14 fees should not have been charged to HarbourVest. We think
15 based upon the testimony in Acis, the suspect credibility of
16 those who would have been our witnesses, and the experience in
17 Acis that the Court has had in terms of the completely hell-
18 bent on litigation, it would be hard for anyone to justifiably
19 defend those fees being charged. So, as an initial matter, we
20 had exposure there.

21 In addition, if HarbourVest got by our defense of -- was
22 able, for example, to claim fraud in the inducement, then we
23 were open to significant damages.

24 We really didn't put much value, frankly, on the RICO part
25 of it. We think that that's waved around often to show treble

1 damages. Although in this case certainly somebody could lay
2 out the predicate acts and put forth a RICO-type argument, we
3 just didn't think that that had real merit in this commercial
4 dispute, even with a fraud claim.

5 But even without the trebling of the damages, there's no
6 dispute that HarbourVest lost more than \$50 million in this
7 investment. You know, we -- we thought about that risk as
8 well.

9 In addition, because the case would really be fact-based,
10 even if we had a high degree of confidence based upon our
11 discussions with our employees and the factual testimony, it
12 was going to be expensive to litigate this case, and time-
13 consuming.

14 And so we looked at the economic value, the potential
15 risks, and the actual value that we were giving up, and found
16 this to be an extremely, extremely reasonable settlement.

17 Importantly, and I think what drove it, you -- one of --
18 one of the things that drove it is another one of our defenses
19 on why, notwithstanding their -- what they held out as
20 meritorious claims, I don't think HarbourVest really wanted to
21 publicly litigate this claim. And we were aggressive in our
22 discussions with HarbourVest of how we would litigate it,
23 which would be quite publicly.

24 Now, that may or may not be fair, but that does put risk
25 on the counterparty. And so I think that helped drive the

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1 settlement.

2 In addition, the structure of the settlement we think is
3 extremely favorable to the Debtor and to the estate because,
4 rather than taking the full claim and putting it into a senior
5 unsecured position, we have bifurcated it. We did think about
6 whether this was a claim that could be subordinated under 510.
7 There won't be any arguments, I would be surprised if there's
8 arguments today that we didn't actually give to the Highland
9 employees who have given them to Mr. Dondero's respective
10 counsel.

11 We did structure it in a way that we thought gave
12 HarbourVest the opportunity to effectively claim a rescission,
13 even though that's not really what it is, and then be able to
14 claim that their recovery is based on the bankruptcy, which it
15 is, but not really dilute all the other stakeholders in the
16 case.

17 (Pause.)

18 THE COURT: Mr. Morris? Anything else?

19 MR. MORRIS: I can hear you, Your Honor.

20 THE COURT: Okay.

21 MR. MORRIS: I can hear you.

22 THE COURT: Okay. Now can you --

23 MR. MORRIS: I got cut off from Mr. Seery for a
24 moment.

25 THE COURT: Okay.

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1 BY MR. MORRIS:

2 Q Okay. I appreciate that. Are you done giving the
3 Debtor's basis for entering into this settlement, Mr. Seery,
4 if you can hear me?

5 A I think so, but I think as the Court has probably seen, I
6 can go on.

7 Q Yes.

8 A So I will try to be -- I'll try to be more concise. But
9 this was a -- this was a difficult settlement. We felt good
10 about our defenses. Felt that we could -- we could try them.
11 But it would be extremely expensive, time-consuming, and there
12 would be a lot of risk. And settling at a level which we
13 believe is actually below the damages that were clearly caused
14 only by the fees was a -- was a -- is a -- is a very
15 reasonable settlement.

16 Q Okay. Let's just talk about the process by which we got
17 to the settlement. Do you recall generally when the
18 settlement negotiations have -- were commenced?

19 A I believe it was -- was late summer, early -- early fall.

20 Q Okay. Before I move on, I just want to go back to the
21 Acis matter that you were talking about, one last issue. Do
22 you know how, if at all, the injunction that was entered in
23 the Acis bankruptcy impacted or related to the HarbourVest
24 claims?

25 A Yeah. I -- yes, I do. And I believe it -- it did. I

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1 think there's an argument, and we analyzed it thoroughly, that
2 the injunction effectively caused a lot of the damages.
3 Because if you look at the values of the equity that
4 HarbourVest had, the -- and HCLOF had in the CLOs, it went
5 down dramatically after the Trustee in the Acis case took over
6 and then subsequently, when the case was reorganized and Mr.
7 Terry took over, you know, with Brigade as the sub-advisor.

8 Now, that would -- you know, we would -- we could
9 certainly attempt to throw, in our defense, the causation at
10 Mr. Terry's feet or at Mr. Phelan's feet. HarbourVest's
11 retort is that none of this would have occurred but for the
12 burn-it-down litigation that Mr. Dondero engaged in with
13 Highland.

14 In addition, in Mr. Terry's defense, you know, he did try
15 multiple times with HCLOF, tried to petition, if you will, the
16 HCLOF entity to -- and directors, former directors, to reset
17 the CLOs to make them more economically viable, based upon the
18 current level of asset returns versus the debt costs in the
19 CLOs. And that was rejected by the HCLOF and the Debtor as
20 the controlling party of HCLOF. So, we thought about those
21 risks.

22 You know, similarly, the economic values in Acis 7 went
23 down pretty significantly from that date as well. So I think
24 there's -- there are some defenses, but that's really Mr.
25 Terry's issue, not our issue. So we thought about those

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1 issues, we analyzed them, and we certainly did all the work
2 around month-to-month reductions in NAVs and how different
3 events in the Acis case might have -- might have caused those
4 and was that some sort of break from the original
5 transgression that HarbourVest claims, which was the
6 fraudulent inducement.

7 Q Do you recall that in November HarbourVest's motion under
8 3018 was scheduled to be heard?

9 A Yes.

10 Q And can you just tell the Court your understanding of what
11 the 3018 motion was about?

12 A Well, the 3018 motion was going to be on voting. And we
13 took the view that it really was not -- it shouldn't have been
14 that big an issue and HarbourVest should have been content
15 with just taking their actual losses of roughly a \$50-\$60
16 million claim for voting purposes and then we would move on.

17 HarbourVest was very insistent that they have a \$300
18 million claim, because they took the position -- and with
19 extensive documentation; not only the pleadings they filed,
20 but also detailed decks that were prepared by their counsel,
21 which they had presented to us on the merits of their claim --
22 that they were going to litigate for -- the 3018 and for the
23 full \$300 million value.

24 And that became the genesis, if you will, of the
25 negotiations to settle.

1 So, we started talking about the 3018. It was very
2 contentious. My apologies to Ms. Weisgerber and her counsel,
3 her partners, because it was a significant and contentious
4 negotiating call. But the reasons for that I think were that
5 -- their insistence on litigating the 3018 and our view that
6 this was just, you know, another -- another of a series of
7 delays and costs in this case that we really were hoping to
8 avoid.

9 That led to Mr. Pugatch and I stepping away from counsel,
10 no offense to counsel, you know, ours and his, to begin
11 negotiations around the potential for a settlement. First, it
12 started with a 3018, and then, you know, argued that we would,
13 if we got past the 3018, we were going to litigate this,
14 because we effectively had -- thought we could get everyone
15 else done at -- in and around that time. And I think we were
16 also probably a little bit optimistic about UBS at that time
17 and the mediation, which subsequently we have settled. But
18 that was the genesis of those settlements.

19 Q And how did the structure, how did the Debtor and
20 HarbourVest derive at the structure whereby there is a general
21 unsecured claim, there is a subordinated piece, and there's
22 the takeback of the HCLOF interest?

23 A Well, as I outlined, we -- we aggressively set forth our
24 various defenses. Their position was that they -- they should
25 never have been in this transaction before. And they --

1 HarbourVest is, in essence, a fund of funds, and they have
2 investors, and it certainly wouldn't be their, I'm sure, the
3 best-performing asset in their portfolio, to have made this
4 investment and lost \$50 million over this period of time. So
5 they felt strongly that they should never have been in this
6 investment, and but for the failure to disclose and the
7 improper disclosures, they would not have been in this
8 investment.

9 So, optically, getting out of it was important to them,
10 and that led to our idea and construction of a subordinated
11 claim and the transfer of the HCLOF interests to the estate.

12 Importantly, the HCLOF interests, as I mentioned, are --
13 the investments are in the Acis CLOs controlled by Acis and
14 Mr. Terry. The reorganized Acis. As well as the 1.0 CLOs and
15 the Acis 7.

16 So we were keenly focused on, if we were going to get that
17 interest, would we then have the majority control in HCLOF,
18 which we will, and would we be able to drive the recoveries,
19 as opposed to what Highland typically does in these
20 investments is use other people's money, drive down the value,
21 and then try to buy back the interest on the cheap.

22 Q Just in terms of timing, because I think there was a
23 suggestion in one of the openings that there was something
24 untoward about the timing here: At the time the liquidation
25 analysis was prepared on November 24th, had the Debtor reached

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1 any agreement in principle with HarbourVest?

2 A If we had, it would have been reflected, so I don't -- I
3 don't think we were agreed by then. I don't recall the
4 specific dates, but if we had, it would have -- it would have
5 been reflected.

6 Q If I can refresh your recollection that the motion was
7 filed on December 24th, does that help form your understanding
8 or refresh your recollection that there was no agreement in
9 principle on November 24th?

10 A Yeah. Well, I'm quite sure there was no agreement in
11 principle or we would have reflected it minimally by a
12 footnote. There's -- there's no chance. It's a material
13 reduction in the claims pool that we were previously telling
14 people that, at least for purposes of distribution, like UBS
15 and a couple others we said we thought we would get to zero
16 on. So we didn't calculate in that amount. So I'm quite sure
17 we didn't have a deal when we filed the disclosure statement.

18 In terms of the timing, anyone who's done this business
19 for any degree of time knows that the crucible of bankruptcy
20 brings people to the settlement when they see something
21 happening in the case, and not before. I think HarbourVest
22 looked at our -- this is my supposition -- HarbourVest looked
23 at our plan, our ability to get this done, our settlement with
24 Redeemer, our settlement with Mr. Terry and Acis, and saw that
25 this plan was coming together, and if they didn't think about

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1 the settlement, they were going to think about not only the
2 risks that we laid forth for them with respect our defenses,
3 but also the opportunity to litigate with the Claimant Trustee
4 over a long period of time, which couldn't have been
5 particularly appetizing.

6 Q Can you describe for the Court the role played by the
7 independent board of Strand, the general partner of the
8 Debtor, in analyzing and participating in the approval
9 process?

10 A Yes. I think, as the Court is aware and I've testified
11 before, Mr. Russell Nelms and Mr. John Dubel are fellow
12 independent directors with me, appointed pursuant to the Court
13 order. They are kept abreast of every detail, and -- along
14 the way, not just in a summary form at the end. We have
15 reviewed and analyzed collectively each of the issues. Mr.
16 Dubel has extensive experience in these types of litigation
17 matters. Obviously, Mr. Nelms, from his -- both his practice
18 and his time on the bench, has a keen insight into how to
19 resolve and what the risks and benefits are from settling
20 litigation. So I consult them every step of the way.

21 Q And as part of this process, did the Debtor reach out to
22 the directors of HCLOF?

23 A Yes, we did. So, we reached out and we've had several
24 conversations on video chats with the directors. The
25 directors of HCLOF are two new gentlemen, Mr. Richard Boleat

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1 and Mr. Dicky Burwood. They are extremely professional. They
2 are exceptionally well-informed. They are truly careful, and
3 I would say very experienced professional not only directors,
4 but experienced in -- in these matters, both in respect of
5 structured finance as well as these types of vehicles and
6 litigation.

7 They were appointed by the old directors, Scott and
8 Bestwick, and they have been in control. They have outside
9 counsel, which is King & Spalding in the U.S. They have
10 Guernsey counsel. They have accountants and professional
11 advisors, and are being, in my opinion, exceptionally careful.
12 I've got -- very quickly developed a lot of respect for them,
13 and we consulted with them on this settlement and how it would
14 work.

15 They've been very clear that they represent HCLOF and they
16 work for the benefit of the equity, whomever owns it, and
17 taking a view that they would like to see these assets
18 monetized swiftly, with due regard to value, for the benefit
19 of the equity.

20 Q And is it your understanding that the directors of HCLOF
21 approved of this transaction?

22 A They -- I don't know that their approval was required.
23 It's really -- there are a number of hoops to jump through
24 under the documentation, including opinion of outside counsel
25 that we received from WilmerHale in terms of the effectiveness

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1 of the transfer under the documents. We had a negotiation
2 with -- with those directors, and making sure that we did
3 everything correct -- correctly, excuse me -- with respect to
4 the requirements for the transfer under the documents. And
5 they've indicated their support and acknowledgement that we're
6 doing it correctly.

7 I don't know if it's fair to say they approved it. I'd
8 just have to go check the documents. But they certainly
9 support it. And I think they generally support our position
10 with respect to how to move forward with the assets.

11 Q I appreciate that. I guess I meant approval with a small
12 a and not a capital A.

13 You mentioned WilmerHale. Who do they represent in all of
14 this?

15 A WilmerHale is the Debtor's outside corporate counsel, in
16 particular with respect to the fund issues that we don't
17 handle in-house. We have significant support for fund issues
18 from the expertise of Mr. Surgent, who's been the CCO, and he
19 is also a lawyer, with respect to, you know, some of the
20 difficult fund issues that Highland has. But when we use
21 outside counsel, we use WilmerHale for that, and they've been
22 -- they've been exceptional.

23 Q Okay. Just the last two points that were made in Mr.
24 Dondero's objection, I believe. Did the Debtor overpay in
25 this settlement in order to gain the support of HarbourVest in

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1 connection with its -- with the Debtor's attempt to get its
2 plan confirmed?

3 A Not in any way. My -- I believe the settlement is
4 extremely reasonable. As I testified, it's -- it's less than
5 the -- the actual value going out, depending on unless there's
6 successful litigation, and there well could be, is less than
7 on a pro forma basis the fees that were taken and charged to
8 HCLOF. We didn't do this for votes. We will have Class 2,
9 Class 7, Class 8, and Class 9. So I don't think that's a --
10 there's no vote purchasing, I think you called it. No, not at
11 all.

12 Q Yeah. Well, on that topic, I think the phrase that was
13 used was gerrymandering. Are you aware of the argument that's
14 been made that the subordinated claim was dropped in there in
15 order to gerrymander a positive vote for the impaired class of
16 Class 9, I believe?

17 A In a word, I would say that's preposterous. The -- as I
18 said, we have a number of classes that will vote for the plan.
19 The plan is -- the plan is a monetization plan. And if -- if
20 the creditors determine that they don't want to pursue this
21 plan, we'll go forward with another -- we'll try to get
22 another plan. We tried to have a grand bargain plan. We
23 tried to have a pot plan, as I've testified previously. I'm
24 quite certain that I've done more work on that than anyone
25 else, including Mr. Dondero and anybody who works for him.

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1 And he hasn't been willing to do that.

2 This is a -- this is a plan that's come together. We
3 think it's going to be in the best interests of the estate.
4 That'll be confirmation next week. Or two weeks, I guess.
5 But I don't see how this is any way related -- this settlement
6 is not any way related to the voting on that -- on that -- on
7 that plan.

8 Q Just to put the finest point on it, is the Debtor relying
9 on Class 9 to be the impaired consenting class?

10 A No. I think -- I think what I've -- as I said, I believe
11 we already have the votes in Class -- I think it's 2 or 3, 7,
12 8, and -- and 9 will vote in favor as well. So that won't be
13 an issue.

14 MR. MORRIS: Your Honor, I have no further questions
15 of Mr. Seery.

16 THE COURT: All right. Pass the witness. I'll ask
17 HarbourVest counsel first: Do you have any questions of Mr.
18 Seery?

19 MS. WEISGERBER: No, Your Honor.

20 THE COURT: All right. Thank you.

21 What about cross-examination? Mr. Dondero's counsel?

22 CROSS-EXAMINATION

23 BY MR. WILSON:

24 Q Mr. Seery, how are you doing today?

25 A I'm well, thank you.

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1 Q I'm John Wilson, and I represent Jim Dondero. I have a
2 few questions for you today.

3 Now, the HarbourVest proof of claims were filed on April
4 8th, 2020; is that your recollection?

5 A I believe that's correct. I don't recall the specific
6 date.

7 Q Okay. And do you know when you first became aware of the
8 HarbourVest claims?

9 A I believe it was early in the summer when we filed the
10 omnibus objection. It may have been in late spring, shortly
11 after that. I don't recall the specific date of the filing.

12 Q And before the time of the filing of the omnibus
13 objection, did Highland educate itself regarding the
14 HarbourVest proof of claims?

15 A I'm sorry, could you say that again? I didn't quite
16 understand it.

17 Q Before the omnibus objection was filed, did HarbourVest --
18 I'm sorry, did Highland educate itself on the HarbourVest
19 proof of claims?

20 A Not especially, no.

21 Q Okay. And -- but at some point, Highland did investigate
22 those proofs of claim, correct?

23 A That's correct.

24 Q And when would you -- when do you recall that that
25 investigation began?

1 A I don't recall the date, but the triggering event was
2 HarbourVest's response to our omnibus objection.

3 Q Okay. And that would have been filed September 11th of
4 2020?

5 A I'll take your representation. I don't -- I don't recall
6 the specific date.

7 Q Okay. And so when you began to investigate the
8 HarbourVest claims, what was your initial reaction?

9 A My initial reaction was that the -- the larger claims that
10 they were asserting -- the fraud in the inducement, the RICO
11 -- that those claims were, in my view, attorney-made and that
12 when we dug in and did the work, we saw that HarbourVest
13 clearly lost north of \$50 million on the investment. We had
14 just started to uncover the fee issue and saw the risk we had
15 there.

16 But I thought the bulk of those claims were attorney-made.
17 Clever, but attorney-made, as opposed to what I would think
18 are more legitimate. And so we started to develop our
19 defenses around that.

20 Q And was your initial reaction that the HarbourVest claims
21 were largely worthless?

22 A I think with respect to the claim around the fees, I
23 believed there was significant risk. With respect to the
24 other claims, I thought our defenses would make them
25 worthless, yes.

1 Q And did you ever represent to any party that the
2 HarbourVest claim was worth, at most, \$5 million?

3 A I think I represented often, including to HarbourVest,
4 that it was worth nothing. I don't recall if I specifically
5 said \$5 million. \$5 million would have been a nominal amount
6 to -- which is litigation costs. So it may -- it may have
7 been in my models that I put in that as a settlement amount,
8 but I -- I thought that there were valid and good defenses to
9 those larger claims.

10 Q And you recognize that HarbourVest was a large,
11 sophisticated investor, correct?

12 A Yes. I think they manage north of -- right around a
13 hundred billion dollars.

14 Q And you recognize that HarbourVest routinely structured
15 complex customized investments, correct?

16 A I believe that -- I don't know the intricate part of their
17 businesses, but as a fund of funds who does creative
18 investments, I think that they do do quite a bit of that.
19 This, I believe, was their first investment in the CLO space.

20 Q And it was not -- or I should say, you did not believe
21 that HarbourVest was simply a passive investor in HCLOF,
22 correct?

23 A I don't think that that's true, no.

24 Q You don't -- you don't believe that you denied their claim
25 to be a passive investor?

1 A Oh, I think -- I'm sure that in defense of their claims I
2 would argue that they were -- they were more than a passive
3 investor. But it was pretty clear when you look at the
4 structure of what they invested that there was an intent that
5 they be passive on their part. They didn't take a majority
6 interest.

7 In fact, Highland made it clear in the structure of the
8 deal that they couldn't -- it would be hard for them to get a
9 majority interest because Highland entities would control that
10 and Dondero-controlled entities or individuals would control
11 the majority.

12 I think that they -- they had hoped to be a passive
13 investor.

14 Q But was it not your position that HarbourVest was actually
15 an active, involved investor?

16 A I think our defense was going to be that they knew exactly
17 what was going on, that they participated, that they were
18 active, and that, indeed, that they were in and around some of
19 the subsequent issues in the Acis case.

20 Q And you understood that HarbourVest played a material role
21 in the various outcomes in the Acis bankruptcy case, correct?

22 A I don't believe that to be correct, no.

23 Q Have you ever made that representation to anyone before?

24 A Not -- not that I recall.

25 Q Well, do you recall giving statements to a reporter named

1 Syed Khaderi?

2 A I've never spoken to a reporter named Syed Khaderi in my
3 life.

4 Q Well, did you participate in the preparation of statements
5 to be given to Syed Khaderi?

6 A I've never heard of Syed Khaderi, nor have I participated
7 in any preparation of statements. I don't know who that is.

8 MR. WILSON: All right. I'm going to have Bryan
9 Assink put on the screen a document.

10 And Bryan, can you go to Page 7? Bottom of -- the top of
11 Page 7. Well, actually, before you do that, go to the very
12 top of the document.

13 BY MR. WILSON:

14 Q Now, Mr. Seery, are you familiar with Lucy Bannon?

15 A Yes.

16 Q And who is Lucy Bannon?

17 A She is the Highland public relations person.

18 MR. WILSON: Okay. Now go back to Page 7.

19 BY MR. WILSON:

20 Q Now, do you -- do you see on your screen an email of
21 September 14th from Syed Khaderi that says, Hi, Lucy, how are
22 you?

23 A Yes.

24 Q Have you seen this email before?

25 A Not that I recall, no.

1 Q All right. It continues on that, I saw the filing on
2 Friday about HarbourVest claims against Highland for a CLO
3 investment, and I'm looking to put out a report tomorrow
4 morning London time. Ahead of that, I wanted to check if
5 Highland would like to comment on the matter.

6 MR. MORRIS: Your Honor, this is -- the Debtor
7 respectfully objects. A, this document is not in evidence.
8 B, it's rank hearsay.

9 THE COURT: Response, Mr. Wilson?

10 MR. WILSON: Your Honor, I am attempting to
11 authenticate this document, but I'm using it in rebuttal to
12 the testimony that Mr. Seery just offered.

13 THE COURT: All right. I'll allow it. Overrule the
14 objection.

15 MR. WILSON: All right. Thank you, Your Honor.

16 BY MR. WILSON:

17 Q All right. Now, if we -- and oh, that September 14th
18 date, that was three days after the September 11th date that
19 we discussed was the date that HarbourVest filed its response
20 to the omnibus objection, correct?

21 A Yes. If that's the date that they filed it, then I -- if
22 you're representing that, I concede that the 14th is three
23 days after the 11th.

24 Q All right. And if you go back to the first page of this,
25 it looks like, on the following day, Lucy Bannon sends an

1 email to you, and is that your email address,
2 jpseeryjr@gmail.com?

3 A That's correct, yes.

4 Q And do you recall receiving this email from Lucy Bannon?

5 MR. MORRIS: Your Honor, I renew my objection that
6 this is hearsay. He's not rebutting anything that Mr. Seery
7 testified to. He testified that he'd never heard of the
8 gentleman at the bottom of the document. There's nothing in
9 this document that rebuts Mr. Seery's testimony at all.

10 THE COURT: Response, Mr. Wilson?

11 MR. WILSON: Well, I'm not -- I'm not trying to rebut
12 his statement that he hadn't -- that he hadn't heard of Syed
13 Khaderi. My rebuttal is attempted to -- attempting to show
14 that he has made various statements that he denied.

15 THE COURT: I'll overrule the objection.

16 BY MR. WILSON:

17 Q All right. So, back to this exhibit, Mr. Seery. You
18 recall receiving this email from Lucy Bannon on Tuesday,
19 September 15, 2020?

20 A Not specifically. But to be clear, I recall talking to
21 Lucy Bannon about the HCMLP dispute with HarbourVest.

22 Q Okay. And --

23 MR. WILSON: Bryan, can you go down to the next page?
24 Scroll down to where -- the James Seery email.

25 BY MR. WILSON:

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1 Q Do you see this email on your screen that's dated
2 September 15, 2020 at 10:33 p.m.?

3 A Yes, I do.

4 Q And do you recall sending this email to Lucy?

5 A Not specifically, no.

6 Q Well, do you deny that you sent this email to Lucy?

7 A It appears to be my email.

8 MR. WILSON: Your Honor, we would move to admit this
9 document into evidence as Dondero Exhibit Letter N.

10 THE COURT: Any objections?

11 MR. MORRIS: I would consent to the admission of Mr.
12 Seery's email, but the balance of it ought to be excluded as
13 hearsay.

14 THE COURT: What about that?

15 MR. WILSON: Well, Your Honor, I think that this
16 document -- and I'll get into this in a little more detail in
17 a second -- but I think this document is a combination of the
18 work product of Lucy Bannon and Mr. Seery in preparing a
19 response for the reporter who requested comment from Highland.

20 THE COURT: Okay. I --

21 MR. MORRIS: Your Honor, um, --

22 THE COURT: Go ahead.

23 MR. MORRIS: I just -- I do question how they got
24 this document, but that's for another day. That's number one.
25 Number two, in addition to the hearsay argument, I just --

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1 relevance grounds.

2 THE COURT: Okay. I'll allow the portion that is the
3 communication of Seery, that portion of Exhibit N. All right?

4 MR. WILSON: Okay. With due -- thank you, Your
5 Honor. With due respect, I -- to use that portion, I need to
6 refer to the portion below it, because he says, Good to submit
7 with your final edit/revisions. And so we need to know what
8 those final edit/revisions are, which are contained in the
9 email directly below that on the document that was four
10 minutes earlier in time.

11 THE COURT: All right. Fair enough. That'll be
12 allowed.

13 MR. WILSON: All right. Thank you, Your Honor.

14 (James Dondero's Exhibit N is received into evidence as
15 specified.)

16 MR. WILSON: So, Bryan, now can you scroll to the
17 next page? Oh, actually, let's just -- let's just stop at the
18 top -- at the bottom of the page. What's this statement?

19 BY MR. WILSON:

20 Q So, to be clear, Mr. Seery, when -- in response to Mr.
21 Khaderi's request for information and comment, you prepared
22 actually two responses, and one of those was a statement on
23 the record attributed to a spokesperson for HCMLP or something
24 along those lines. And then --

25 MR. WILSON: Can you scroll down to that next page?

1 BY MR. WILSON:

2 Q And this says -- I think part of this got cut off for some
3 reason, but it looks like the official statement is in
4 quotation marks. It says, "We dispute the allegations made in
5 the filing and believe the underlying claims are invalid and
6 will be found to be without merit. Our focus continues to be
7 treating all valid claims in a transparent, orderly, and
8 equitable manner, and vigorously disputing meritless in the
9 court. That focus will assure that HCMLP's reorganization
10 process -- progress is towards an efficient and equitable
11 resolution."

12 And then below that there's another section of this email
13 that says, Background/Clarification, Not for Attribution. And
14 do you know the purpose of this second section of the
15 response?

16 A Do I know the purpose of that? Yes.

17 Q And what would that purpose be?

18 A Ms. Bannon was speaking on background to reporters. As I
19 said earlier, I've -- I never heard of the gentleman from
20 London. If he's at the bottom of the email, I didn't pay any
21 mind, never heard of him. Nor have I heard it since. Ms.
22 Bannon didn't ever reference the specific person.

23 But she is the public relations person. So, as I
24 testified earlier, she does communicate with the press. And
25 as I previously testified when Mr. Morris questioned me, one

1 of our tactics and our defenses for HarbourVest was going to
2 be that we were going to be very public and aggressive about
3 the investment and it would have a negative impact or negative
4 perspective for viewers, in our opinion, about HarbourVest's
5 investment.

6 Q All right. Well, look with me in the middle of that
7 paragraph right after the closed parenthetical, where it says,
8 "But it's important to note the background of HarbourVest's
9 active and deep involvement in the investment of which it now
10 complains."

11 And so it was your position that HarbourVest had an active
12 and deep involvement in the investment, correct?

13 A No. I don't think that's correct. Ms. Bannon prepared
14 the statement, it was a litigation defense on background, and
15 that's our -- that was our position for this purpose. It was
16 not my view that they were active and deeply involved. They
17 were certainly involved. There's no doubt about it. But they
18 got all their information, in our estimation and our research,
19 from Highland.

20 Q But in any event, you would agree with me that four
21 minutes after receiving this email, you approved this
22 statement to go out to the reporter, correct?

23 A No, that's not correct. That's -- this portion is on
24 background. That statement doesn't go out. The previous
25 statement was the official statement. This is the background

1 discussion that she would have. So, no, she was not
2 authorized in any way whatsoever to send that out. She was
3 authorized to have conversations with those general facts.

4 MR. WILSON: Okay. Bryan, go to the top, or the
5 bottom of the page immediately preceding that. That's it.
6 Yes, that's it right there.

7 BY MR. WILSON:

8 Q Now, you'll see that this email from Lucy Bannon on
9 September 15, 2020 at 10:29 p.m. starts off, "Jim, let me know
10 what you think of the below. And, again, the first would be
11 on the record and the second will be sent for information
12 purposes to ensure accuracy, not for attribution."

13 So the intent was that this -- that this entire statement
14 be sent to the reporter, correct?

15 A I don't believe that's correct. I think when she goes on
16 background she doesn't send them a written doc. It's got to
17 be clear to the reporter, at least my understanding is that
18 what on background means -- I've been involved with this
19 before -- is that typically that's done orally. I don't know
20 if she's done it in a written statement before. I have never
21 seen that done in a written statement before. You give the
22 official statement and then you walk the reporter through your
23 other views on background. And you're not quoted. And it's
24 usually attributed to a source with knowledge.

25 Q Okay. We'll come back to that in a minute. The next

1 sentence after the one I just read to you --

2 MR. WILSON: Go back to where we were on the
3 background.

4 BY MR. WILSON:

5 Q Now, we just read you the sentence that starts with, "Then
6 it's important." The following sentence says, "HarbourVest
7 was not simply invested in HCLOF as an ignorant,
8 unsophisticated, passive investor, but was an active and
9 informed participant in the inception of its investment
10 through all of the Acis bankruptcy proceedings, and
11 HarbourVest played a material role in various outcomes related
12 to that case and its impact on HCLOF."

13 And is it -- did you not just tell me before we
14 investigated this document that HarbourVest did not play a
15 material role in the various outcomes of the Acis bankruptcy?

16 A I don't know exactly what I said, but I think that's
17 correct, after we'd done the research on it, yeah.

18 Q But you took the position in this email that you approved
19 to go out to a reporter that says that -- that HarbourVest was
20 an active and informed participant in the inception of -- of
21 its investment through all of the Acis bankruptcy proceedings
22 and played a material role in various outcomes related to that
23 case and its impact on HCLOF. Can we agree with that?

24 A Yes.

25 Q And then the final sentence of this paragraph says that,

1 We believe that neither the facts nor the law support
2 HarbourVest's, quote, We-were-too-lazy-to-know allegations.

3 Whose words were those, "We-were-too-lazy-to-know
4 allegations"?

5 A I don't recall. They may be mine. It's aggressive the
6 way I am, so that -- that may well be the case.

7 MR. WILSON: All right. Go -- go down to the next
8 page.

9 BY MR. WILSON:

10 Q And with respect your comment that that second paragraph
11 would not have gone to the reporter, look at this email in the
12 middle of the page from Lucy Bannon to Syed Khaderi, September
13 16, 2020, at 1:51 a.m. And --

14 MR. MORRIS: Your Honor, this I will object to as
15 hearsay. There is no witness here to testify to anything on
16 this document.

17 THE COURT: All right. How about that?

18 MR. WILSON: Well, it's -- well, scroll up just a
19 little bit. This email at the top of the page is three
20 minutes after the one in the middle of the page, where Lucy
21 Bannon is forwarding this to James Seery, saying, See below
22 for responses sent to *Creditflux*. Will follow up with the
23 story when it runs or with any other updates.

24 MR. MORRIS: Your Honor, these --

25 MR. WILSON: So I think this --

1 MR. MORRIS: These documents don't appear on the
2 witness list. They're not being offered to impeach anything.
3 They're just -- he's taking discovery as we sit here.

4 MR. WILSON: Your Honor, in response, I'm simply
5 trying to rebut the statements that Mr. Seery made. In fact,
6 he told me just a minute ago that that second paragraph would
7 not have gone out to the reporter. However, this email from
8 Lucy Bannon to Syed Khaderi directly rebuts that statement.

9 THE COURT: But your whole purpose in this line of
10 questioning, with an undisclosed document, is to rebut the
11 earlier testimony he gave before you even put this exhibit in
12 front of him.

13 MR. WILSON: I'm trying to rebut multiple statements
14 that Mr. Seery has made today, and I think it -- you know, if
15 he's going to testify that this information did not go out to
16 a reporter, I think I'm allowed to rebut that to demonstrate
17 that it did.

18 THE COURT: All right. Why didn't you disclose this
19 in advance? It's feeling less and less like an impeachment
20 document the more we go through it.

21 MR. WILSON: Your Honor, I did not -- I did not
22 actually have this document at the time we filed our witness
23 and exhibit list, but I would also say that I didn't have any
24 purpose to use it if I didn't need it for rebuttal.

25 THE COURT: Okay. First off, you're supposed to

1 disclose all exhibits you anticipate using except those for
2 purposes of impeachment. Okay? Not rebuttal, to be
3 technical.

4 So, if you didn't disclose this exhibit, the only way you
5 can use it, subject to other possible objections, is if you're
6 impeaching a statement. And I'm just saying I think we're
7 going beyond trying to impeach the original statement and now
8 we're trying to impeach statements he's made after seeing
9 portions of the document.

10 What did you mean, you didn't have this document in time
11 to disclose it?

12 MR. WILSON: Well, I actually just received this
13 document this morning, Your Honor.

14 THE COURT: Where did you receive it from?

15 MR. MORRIS: From who?

16 MR. WILSON: I -- I honestly do not know the source
17 of this document, although it was provided to me by my client.

18 MR. MORRIS: Your client being Mr. Dondero?

19 THE COURT: Could you answer that, Mr. Wilson?

20 MR. WILSON: Yes, that's -- yes, that's correct.

21 THE COURT: All right. I will -- that's --

22 MR. MORRIS: Your Honor, I'd like to --

23 THE COURT: That's a different can of worms. But for
24 now, I sustain the objection. You're done questioning on this
25 document.

1 MR. WILSON: That's fine, Your Honor. I can move on.

2 BY MR. WILSON:

3 Q Now, Mr. Seery, you would agree with me that whether or
4 not HarbourVest played an active role in the Acis bankruptcy,
5 it was kept apprised of the -- of the ongoings in the
6 bankruptcy? (Pause.) I'm sorry. Could you hear that?

7 A Yes. My understanding is that -- that they were.

8 Q And in fact, did Highland have weekly conference calls
9 with HarbourVest during the Acis bankruptcy to discuss what
10 was going on in the bankruptcy?

11 A I don't know if they were weekly. I've been told that
12 they had regular calls updating HarbourVest, yes.

13 Q Okay. And did Highland produce over 40,000 pages of
14 documents to HarbourVest related to the Acis bankruptcy?

15 A I'm not aware of that, no.

16 Q Have those documents been provided to you?

17 A I hope not.

18 Q So, in your role --

19 A I'm sorry. I don't -- I didn't receive 40,000 documents
20 from anybody.

21 Q Well, did you receive any number of documents that were
22 provided by Highland to HarbourVest during the Acis
23 bankruptcy?

24 A I wasn't involved in this during the Acis bankruptcy. I'm
25 sorry.

1 Q Well, I'm referring to, after you became involved in this
2 Highland bankruptcy, whether you were provided with these
3 documents that were sent from Highland to HarbourVest.

4 A I don't -- I don't know what the documents are. I've
5 reviewed tons of documents with respect to the HarbourVest
6 claims, but I don't know of the documents to which you're
7 referring.

8 Q Okay. And after you performed your investigation into the
9 HarbourVest claim, what was your opinion as to the cause in
10 the reduction in value of HarbourVest's investment in HCLOF?

11 A I think the main cause of the reduction in the investment
12 was the imposition of the Trustee and the failure of Highland
13 HCLOF and then subsequently with the injunction to reset the
14 CLOs.

15 You know, these are -- these are some of the worst-
16 performing CLOs in the market because they weren't reset. And
17 when the liabilities of the CLOs are set at a level to match
18 assets, and then liability -- the assets run off, and the
19 asset financings or the new deals come in at much lower
20 levels, and the obligations of the CLO are not reset, the
21 arbitrage that is the CLO shrinks. And that's what happened
22 to these CLOs.

23 Q And during the course of the Acis bankruptcy, Acis and
24 Brigade were given management responsibilities over the CLOs
25 and HCLOF, correct?

1 A I believe that the Trustee had the overall, and then
2 subsequently, with the confirmation of the plan, they took it
3 over. So I think that ultimately Mr. Terry had the management
4 authority, full management authority, and some advice through
5 Brigade. But I think technically it wasn't actually during
6 the Chapter 7. The Chapter 7 proceeding, I believe that Mr.
7 Phelan had the actual authority.

8 (Echoing.)

9 Q I'm sorry. And so your testimony is that Mr. Phelan had
10 the actual authority but he delegated that authority to Josh
11 Terry and Brigade?

12 A I think that's fair, yes.

13 Q And do you know when that occurred?

14 A I believe that the control of the CLOs was in July of
15 2018, and then the ultimate confirmation of the case was at
16 the very beginning of '19.

17 Q So, after being instituted as portfolio manager, and
18 during the time when Acis and Brigade were working under the
19 direction of the Trustee, who would have receive the fees for
20 managing those portfolios?

21 A I believe -- I don't know. I believe the -- that the Acis
22 estate would have received those fees.

23 Q And who -- and so is that your testimony, that prior to
24 confirmation the Acis estate would have received the
25 management fees?

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1 A I believe that -- I believe they would have if they were
2 the manager, yeah.

3 Q Okay. And who would have received the fees after
4 confirmation?

5 A Acis.

6 Q Okay. And who would have had the discretion to set the
7 amount of those management fees?

8 A They would be agreed to in the -- in the investment
9 management agreement.

10 Q They would be agreed to?

11 A Yes. As far as I've seen, I've -- I haven't seen
12 unilateral ability of a manager to set fees at its -- at its
13 whim.

14 Q So is it your understanding that Acis and Brigade ended up
15 charging substantially more fees than Highland had charged
16 when it was under Highland's management?

17 A I think the fees were -- the fees were -- the fees were
18 set by the agreement.

19 MR. MORRIS: Your Honor, I just object to the line of
20 questioning on relevance grounds. This is a 9019 hearing,
21 Your Honor. How -- I just don't think this has any relevance
22 at all.

23 THE COURT: All right. Mr. Wilson, what is the
24 relevance?

25 MR. WILSON: The relevance is that Mr. Seery has

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1 testified that these Acis CLOs were among the worst-performing
2 in the market, and frankly, we would agree with that, and I'm
3 trying to get his understanding as to why, because I think
4 there's direct relevance in the reason that the value of the
5 HarbourVest investment diminished.

6 MR. MORRIS: I don't think that was his testimony,
7 Your Honor. But at the end of the day, Your Honor has heard
8 the litany of reasons why the Debtor is entering into this
9 agreement. I just, I just think it's irrelevant, Your Honor.

10 THE COURT: All right. Mr. Wilson, I barely think
11 this is relevant. I mean, I'm going to give you some benefit
12 of the doubt on that because of, you know, the testimony that
13 HarbourVest lost \$50 million of value and --

14 (Echoing.)

15 THE COURT: -- maybe that shouldn't, you know, lie at
16 the feet of Highland. I think the compromise reflects that
17 they don't -- it doesn't lie entirely at the feet of Highland.
18 But, you know, maybe two or three more questions.

19 MR. WILSON: Yes. Thank you, Your Honor. And I
20 didn't have very much more on this point. But to be a hundred
21 percent honest, I can't remember my question right before the
22 objection.

23 THE WITNESS: I think you were asking me about the
24 fees and somehow alluding or implying that the manager could
25 unilaterally set fees.

1 The fees are set in the investment management contract.

2 The manager doesn't get to wake up on Wednesday and say, you
3 know, I'd like another half a basis point. It doesn't work
4 that way.

5 BY MR. WILSON:

6 Q But you would agree with me that the fees and expenses
7 charged to an investment would impact the performance of that
8 investment in the market?

9 A Absolutely.

10 Q Would you also agree with me that there was one CLO -- and
11 I think you referred to it in your direct testimony -- but CLO
12 7, which continued to be managed by Highland?

13 A That's correct.

14 Q And is it fair to say that CLO 7 exceeded the performance
15 of the CLOs that were managed by Acis and Brigade?

16 A I think that's fair. I don't -- I don't recall the
17 magnitude, but I think it's outperformed those -- those CLOs,
18 yes.

19 Q All right. Well, thank you. I want to turn your
20 attention to the portion of the settlement agreement that
21 deals with voting of the HarbourVest claim. How did
22 HarbourVest's commitment to vote for the plan become a part of
23 the settlement?

24 A Pretty straightforward negotiation. We -- in negotiating
25 the settlement, one of the key factors was the cost and

1 expense of the litigation, in addition to the risk on the --
2 on the fees, and whether we could wrap this up in a global
3 settlement now. So in my experience, it's fairly typical, we
4 would try to do this in every settlement, have the settling
5 party, be that the claimant, agree to support the case and the
6 plan.

7 You know, we did not do that with the Committee members,
8 although we wanted to. (Echoing) I frankly still wish I had.
9 Those little -- little bits that have been difficult
10 (echoing). The Committee members have a different interest in
11 (echoing) than their more global interest for creditors at
12 large, which is more difficult than traditionally in
13 bankruptcy cases, less likely to have a Committee member, a
14 sitting Committee member, actually support the (echoing) of
15 the plan.

16 THE COURT: Mr. Wilson, could you be careful to put
17 your device on mute every time you're not talking? Because
18 we're getting some feedback loop from you when Mr. Seery
19 answers your questions. Okay?

20 (Echoing continues.)

21 THE COURT: Like right now. I'm hearing feedback of
22 my own voice through your speakers.

23 Right, Mike? Isn't that what --

24 A VOICE: I am, too.

25 THE COURT: Yes. Okay. So please be sure you put

1 your device on mute whenever you are not speaking. All right.
2 Go ahead.

3 BY MR. WILSON:

4 Q I mean, I think you just answered this question, but there
5 was -- there was no similar voting provision in the Acis or
6 the Redeemer settlements, correct?

7 A There is not, no. And just as a -- by way of explanation,
8 if it's okay, the reason was my counsel advised against it. I
9 did ask for it.

10 Q Your counsel advised against putting that voting
11 requirement in the Acis and Redeemer settlements?

12 A For the reasons I stated. And in my experience, that's
13 consistent, where sitting members of Committees don't
14 generally sign up to resolve their own claims and support the
15 plan because of their larger fiduciary duties to the creditor
16 body as a whole.

17 Q And during the settlement negotiations of the HarbourVest
18 claim, was this commitment to vote a topic of discussion?

19 A Not -- not particularly, no. It was pretty clear that
20 HarbourVest, if they were going to agree to the settlement and
21 the numbers, could see structure. Obviously, it wanted to
22 understand what the potential distributions would be under the
23 plan, but this was not a hotly-negotiated point.

24 Q And would you consider HarbourVest's commitment to vote
25 for the plan an important part of the settlement?

1 A I think it's an important part of the settlement, that the
2 part of the settlement is the subordinated claim. We could
3 put that into presumably any plan. But our plan does -- does
4 have a Class 9 for that. So I think it's a -- it's a part of
5 the settlement that is important or we wouldn't have included
6 it. It clearly wraps everything up and moves us towards
7 confirmation.

8 Q And would you have made the deal with HarbourVest if they
9 had pushed back on the commitment to vote for the plan?

10 A Yeah, I would have.

11 Q All right. Thank you.

12 MR. WILSON: No further questions.

13 THE COURT: All right. Mr. Draper, anything from
14 you?

15 MR. DRAPER: Yes, Your Honor.

16 CROSS-EXAMINATION

17 BY MR. DRAPER:

18 Q Mr. Seery, I may not understand the settlement, and I
19 apologize, but the way I think the settlement reads, the
20 interest that you're acquiring, you have the right to place in
21 any entity. Is that my -- is that correct?

22 A I don't recall the -- the specifics, but just from a
23 structural standpoint, we wanted to be able to put it into a
24 subsidiary as opposed to putting it directly in HCMLP. If we
25 couldn't do that, we would -- we would put it into HCMLP. So

1 there wasn't a -- I don't recall the actual specifics, but we
2 certainly thought about holding that interest in a -- in a
3 subsidiary, just to have a cleaner hold.

4 Q Why aren't you putting it into the Debtor so the Court and
5 the estate have jurisdiction over that?

6 A I think the Court certainly has jurisdiction over an
7 entity that the estate owns a hundred percent of. I don't
8 think that's -- that's even a close call. So the important --

9 Q Now, --

10 A Can I finish?

11 Q Sure.

12 A You asked me why. To the extent that somebody thinks that
13 problematic, I will consent to the Court having complete
14 jurisdiction over it, since I control it a hundred percent.

15 Q No. The real reason is, if I remember correctly, Mr.
16 Dondero and Judge Lynn filed a motion to have some say or some
17 information as to sales by subsidiaries, and I think you took
18 the position that they weren't entitled to it. And so my
19 concern was that putting this in a subsidiary in a sense gave
20 you unfettered control without any review of the item.

21 A I don't -- I don't think that's the case where we --
22 there's a directly-held subsidiary where we own a hundred
23 percent of it. I don't think that that's the case.

24 Q Okay. But you're willing to (a) put this into the Debtor,
25 number one; and number two, have the estate and have the Court

1 have complete control over the disposition of it and its
2 actions, correct?

3 A That's not correct, no.

4 Q What -- what is incorrect about my statement?

5 A The debtor-in-possession has control of its assets. The
6 Court doesn't have complete control over its assets. There's
7 --

8 Q Well, --

9 A -- issues -- hold on a second. This is not -- this is not
10 a game and a trap. We put it in a subsidiary for specific
11 reasons. You asked why. I'm giving you the why. It's not to
12 hide it from anybody. We're not going to sell the asset
13 unless somebody comes up with a great price for it. We're
14 going to monetize the assets. We're going to control HCLOF by
15 a majority.

16 Q But, again, the issue is, if it's in the estate, the Court
17 has supervision over it. If it's not in the estate, the Court
18 has no supervision of it.

19 A I don't think that's correct, because the Court has
20 supervision over the estate, which owns a hundred percent of
21 the special-purpose entity that will own the shares.

22 Q Okay. All right. Now, let's talk about the \$15 million
23 that you discussed and the legal fees that were incurred. Is
24 that the total amount that was spent, or is -- or is that --
25 was the total amount \$30 million and HarbourVest was only

1 responsible for one half of it or functionally took the brunt
2 of one half of it?

3 A I think the total amount is between \$15 and \$20 million.
4 I don't have the exact numbers.

5 Q So, in fact, the HarbourVest loss due to its ownership
6 would have been one half of that, not \$15 million?

7 A Well, the vehicle lost the money. HarbourVest owned 49.98
8 percent of it, and Highland controlled the rest. So if you
9 allocate it that way, I suppose that would be a -- that's how
10 you would divide it, in -- roughly in half, yes.

11 Q And so HarbourVest's actual dollar loss due to the legal
12 fees is really the 49-point-whatever percent of \$15 million,
13 not \$15 million?

14 A I don't know if -- I certainly would argue that. I don't
15 think that HarbourVest has that position.

16 Q Okay. Now, in connection -- you were asked a question
17 about the documentation that was provided by Highland to
18 HarbourVest both during the bankruptcy of Acis and before.
19 You have control over the Harbour -- over the Highland server,
20 correct?

21 A I'm sorry. Can -- can we do two things? One is, Mr.
22 Draper, I can't see you, so it would be better if I could see
23 you during the questioning.

24 Q Okay.

25 A And could you repeat the question?

1 Q All right. I'll be happy to. You were asked a question
2 about the documentation that was provided by Highland to
3 HarbourVest during the Acis bankruptcy and meetings that took
4 place between the parties. Correct?

5 A Yes.

6 Q And you stated you were unaware of the material that was
7 sent over?

8 A I think I testified that I didn't receive the 40,000
9 documents that were mentioned.

10 Q Did you do any search or order a search of the Highland
11 server to see what material was sent over by any party to
12 HarbourVest to analyze what -- what information they had
13 available to them and what was provided to them?

14 A Yes, we did a search.

15 Q And did you review the documentation that was sent over?

16 A The -- the documentation that we looked at was very
17 specific to the investment and to the OM. So we didn't look
18 for the -- the supposed 40,000 documents, no.

19 Q Did you look for the material that was provided to them
20 during the Acis bankruptcy and the periodic meetings that you
21 discussed? Or that you testified to earlier?

22 A The answer is no.

23 Q One last question. I think, and just so I understand your
24 testimony, you've broken out the HarbourVest claim into two
25 pieces. One is the legal fee amount that we've just

1 discussed, and I gather the other piece of that is the fraud
2 in the inducement to enter into the CLO purchase?

3 A It's -- it's more -- it's much more than that.

4 Q Okay. Well, let me say it in a different way. The other
5 part of it is the losses as a result of the fraud in the
6 inducement to purchase the interest?

7 A I don't think that's -- that's fair. If I could explain?

8 Q Sure.

9 A Yeah. The legal fee piece is pretty clear. The other
10 piece starts with fraud in the inducement, but it's extensive
11 fraud claims. Fraud in the inducement, as I testified
12 earlier, would get them around the exculpation and liability
13 limitations in the OM. You don't get around all of those with
14 just the fraud. And so that's -- that's the split of that
15 claim. So the fraud in the inducement contains fraud
16 allegations. Even if you didn't have inducement, you'd have
17 other potential fraud claims.

18 Q But let me state it in a different fashion. But for the
19 investment, the fraud that you allege wouldn't have occurred?

20 A I -- HarbourVest alleges it.

21 Q No, I'm just -- in your analysis of the claim, but for the
22 inducement, the rest of the damages wouldn't have flowed?

23 A That's HarbourVest's position, yes. But for the fraud,
24 they wouldn't have made the investment.

25 Q All right.

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1 MR. DRAPER: I have nothing further for this witness.

2 THE COURT: All right. Any redirect, Mr. Morris?

3 MR. MORRIS: Just a few very questions, Your Honor.

4 Just a very few questions.

5 REDIRECT EXAMINATION

6 BY MR. MORRIS:

7 Q Mr. Seery, you were asked about that document that Lucy
8 prepared. Do you remember that?

9 A Yes, I do.

10 Q In your experience, don't defendants often deny liability
11 before entering into settlements, or even worse, getting
12 adverse judgments entered against them?

13 A Of course. Yes.

14 Q Okay. And in response to Mr. Draper's questions, isn't
15 the Guernsey claim another claim that the Debtor took into
16 account in assessing the potential risks of this settlement?

17 A There's a number of claims contained in it. As I
18 mentioned earlier, I mentioned the RICO claim. But there is a
19 Guernsey shadow director claim, which is not dissimilar to
20 U.S. claims that somebody effectively controls an enterprise,
21 notwithstanding them not having the official role.

22 Q Okay.

23 MR. MORRIS: I have nothing further, Your Honor.

24 THE COURT: All right. Any recross on that redirect?

25 All right.

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1 MR. WILSON: No, Your Honor.

2 MR. DRAPER: No, Your Honor.

3 THE COURT: Thank you. Mr. Seery, that concludes
4 your testimony. Thank you.

5 THE WITNESS: Thank you, Your Honor.

6 THE COURT: We need to take a bathroom break. Before
7 we do, I just want to be clear with what we have left. As I
8 understood it, we were having Mr. Pugatch from HarbourVest.
9 Mr. Morris, will that conclude the Debtor's evidence?
10 (Pause.) Okay. You were on mute, but I think you were saying
11 yes.

12 MR. MORRIS: Sorry. But to be clear, Debevoise is
13 going to be putting their witness on the stand.

14 THE COURT: Okay.

15 MR. MORRIS: But it's part of the evidence in support
16 of the motion.

17 THE COURT: All right. Do the Objectors have any
18 witnesses today?

19 MR. WILSON: Your Honor, Mr. Dondero intends to
20 examine Mr. Pugatch, but if he's going to be called by his
21 counsel, then we will do that as a cross-examination.

22 THE COURT: All right.

23 MR. DRAPER: This is Douglas Draper. I have no
24 witnesses.

25 THE COURT: Okay. All right. Well, I'm asking --

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1 well, I do want to ask: Can we get a time estimate
2 potentially for Mr. Pugatch?

3 MS. WEISGERBER: For my examination, Your Honor,
4 twenty minutes, perhaps.

5 THE COURT: Okay.

6 MS. WEISGERBER: Or less.

7 THE COURT: All right. Well, let me tell you what
8 we're going to do. We're going to take a ten-minute bathroom
9 break. But I have a 1:30 hearing and I have a 2:00 o'clock.
10 Well, I have a 1:30 docket, multiple matters, and a 2:00
11 o'clock docket. So, you know, I'm really intending that we
12 get finished in time to give me and my staff a little bit of a
13 lunch break before launching into the 1:30 docket, so I'm
14 hopeful we can get done around 1:00-ish. If we can't, then
15 we're going to have to reconvene, I'm going to say probably
16 3:00-ish Central time. So let's hope we can get through
17 everything. All right? Ten-minute break.

18 THE CLERK: All rise.

19 (A recess ensued from 11:58 a.m. until 12:08 p.m.)

20 THE CLERK: All rise.

21 THE COURT: All right. Please be seated. We're
22 going back on the record in the Highland matters. Do we have
23 everyone? It looks like we do. Ms. Weisgerber is going to
24 call the next witness; is that correct?

25 MS. WEISGERBER: Yes, Your Honor. We call Michael

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1 Pugatch of HarbourVest to the stand.

2 THE COURT: All right. Mr. Pugatch, if you could
3 turn on your video and say, "Testing one, two."

4 MR. PUGATCH: Two.

5 THE COURT: All right. There you are. Please raise
6 your right hand.

7 MICHAEL PUGATCH, HARBOURVEST'S WITNESS, SWORN

8 THE COURT: Thank you. You may proceed.

9 MS. WEISGERBER: Thank you, Your Honor.

10 DIRECT EXAMINATION

11 BY MS. WEISGERBER:

12 Q Good morning. Can you please state your name for the
13 record?

14 A Sure. It's Michael Pugatch.

15 Q And where do you work, Mr. Pugatch?

16 A HarbourVest Partners.

17 Q And what is your title?

18 A I'm a managing director in our secondary investment
19 group.

20 Q Did HarbourVest file claims in the Highland bankruptcy,
21 Mr. Pugatch?

22 A We did, yes. Several claims, in fact.

23 Q What was the basis for those claims?

24 A Yeah. Among other things, fraudulent inducement based on
25 misrepresentations and omissions on the part of Highland in

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1 connection with our original investment, mismanagement at the
2 HCLOF level, including inappropriate fees that were charged
3 to investors, among a number of other items as well.

4 Q Can you explain what you mean by misrepresentations made
5 to HarbourVest by Highland?

6 A Yeah, sure. So, you know, based on a number of
7 statements that were made to us around the litigation
8 involving Mr. Terry, some of the intentions found, the
9 structural changes that came to light with respect to HCLOF
10 and our investment, as well as the fact that the arbitration
11 award specifically against Mr. Terry would have no impact or
12 implication on Highland's sale or business.

13 Q And can you explain what you mean by omissions made by
14 Highland to HarbourVest?

15 A Sure. So I would say, really, the implications behind
16 the structural changes that were made at the time of our
17 investment into HCLOF. Also, the intention, clear intentions
18 that Highland had to never, in fact, pay the arbitration
19 award that came to light during our due diligence period to
20 Mr. -- to Mr. Terry as part of the investment. And
21 ultimately the -- what Highland went about doing in terms of
22 stripping assets of Acis that led to the material value
23 declines and destruction of value that we've experienced
24 since our investment.

25 Q You mentioned a diligence period. Did HarbourVest

1 conduct diligence on the investment?

2 A We did. We conducted very detailed due diligence, as we
3 do for all of our investments. That diligence period lasted
4 several months ahead of our investment decision.

5 Q And did HarbourVest conduct that diligence by itself?

6 A No. So, in addition to internal investment professionals
7 at HarbourVest, we engage with outside advisors, both
8 consultants as well as legal advisors, in connection with
9 that due diligence.

10 Q And did Highland answer all of HarbourVest's questions
11 during that diligence period?

12 A They did. And they were numerous. But yes, they
13 answered all the questions that we had for them.

14 Q Was the Terry dispute part of HarbourVest's diligence?

15 A It was. That came up as one of the outstanding items of
16 litigation as part of our due diligence.

17 Q I'm going to ask my colleague to pull up on the screen an
18 exhibit that was on our exhibit list as Items -- Exhibits 34
19 and 35. It's an August 15, 2017 email from Brad Eden to
20 Dustin Willard. Mr. Pugatch, do you recognize this document?

21 A I do, yes.

22 Q And what is it?

23 A This was an email sent to us during our due diligence
24 period in response to a request for more information on the
25 outstanding litigation that Highland was involved with.

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1 MS. WEISGERBER: And if my colleague can just scroll
2 to the attachment to that email.

3 BY MS. WEISGERBER:

4 Q And do you recall the attachment as well, Mr. Pugatch?

5 A Yes, I do.

6 MS. WEISGERBER: And if you can scroll back up to the
7 first email.

8 BY MS. WEISGERBER:

9 Q Who is Dustin Willard?

10 A Yes. Dustin is a colleague of mine at HarbourVest who
11 worked closely with me on this investment.

12 Q And you said that this document was shared with
13 HarbourVest during the diligence period before the HCLOF
14 investment?

15 A It was, correct.

16 Q Is it typical during diligence to receive a description
17 of litigation such as this?

18 A It is. It's a question that we always ask. Certainly a
19 component of our diligence to understand any outstanding
20 litigation on the part of our counterparty or manager that
21 we're investing in.

22 MS. WEISGERBER: Your Honor, I'd move to offer this
23 exhibit into evidence.

24 THE COURT: Any objection?

25 MR. DRAPER: No objection, Your Honor.

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1 MR. MORRIS: No objection from the Debtor, Your
2 Honor.

3 THE COURT: All right. What is the letter or number
4 for this exhibit?

5 MS. WEISGERBER: It's HarbourVest Exhibit 34.

6 THE COURT: All right. So HarbourVest Exhibit 34 is
7 admitted.

8 (HarbourVest's Exhibit 34 is received into evidence.)

9 THE COURT: And I need to be clear where it appears
10 on the docket. Can someone tell me?

11 MS. WEISGERBER: So, it's identified on our exhibit
12 list, not -- it's not attached to the exhibits. It is on the
13 docket. We were -- when we initially filed the exhibit list,
14 we were working out confidentiality issues. But it was
15 subsequently filed with our reply last night. It's at Docket
16 No. 1735 --

17 THE COURT: All right.

18 MS. WEISGERBER: -- at Pages A -- Pages A345 to A350.

19 THE COURT: All right. Very well. Thank you.

20 BY MS. WEISGERBER:

21 Q Mr. Pugatch, we'll just scroll down to the second page of
22 the attachment. Can you describe generally what the
23 litigation says regarding the Terry dispute?

24 A Yes. Generally speaking, this dispute was described as
25 an employee dispute, employment agreement dispute, with Mr.

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1 Terry, who was a former employee of Highland involved in
2 their CLO business, and is described by Highland to us really
3 having to do with a series of false claims, in their opinion,
4 but having to do with a disgruntled former employee.

5 Q And did it strike you as an unusual or significant
6 dispute?

7 A No. I would say we often -- we'll see, you know, former
8 employees with, you know, claims against a former employer in
9 connection with wrongful termination. I wouldn't say it's
10 extremely common, but certainly not entirely out of the
11 ordinary. And based on the explanations that we'd received
12 from Highland, seemed to be more of an ordinary-course type
13 former employee litigation suit.

14 Q Based on what you now know about the Terry dispute, do
15 you believe that this was an adequate disclosure regarding
16 the dispute?

17 A I would say very clearly not, you know, based on the
18 facts that came to light subsequently, the various rulings in
19 connection with the Acis bankruptcy case. What was very
20 clearly not stated are the actual facts and implications of
21 the ongoing litigation with Mr. Terry.

22 MS. WEISGERBER: I'd ask my colleague to put up the
23 next exhibit. Okay. So, this is on a HarbourVest exhibit
24 list, which is Document No. 1723. It's Exhibit 36 on that.
25 Same issue with respect to initially not filed, but it is on

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1 the docket at our response last evening at ECF No. 1735 at
2 Page A351.

3 THE COURT: Page what?

4 MS. WEISGERBER: A351.

5 THE COURT: A351. Thank you.

6 MS. WEISGERBER: You're welcome.

7 BY MS. WEISGERBER:

8 Q Mr. Pugatch, I just put up a November 29, 2017 email from
9 Hunter Covitz to Dustin Willard, Michael Pugatch, and Nick
10 Bellisario. Do you recall this document?

11 A I do, yes.

12 Q And what is this document?

13 A This was an email sent to us by Highland a couple weeks
14 after we closed on our investment on the (inaudible) in
15 response to a *Wall Street Journal* article that had come out
16 regarding Highland, a number of actions that they had taken,
17 and what Highland was articulating to us, a number of false
18 claims that had been made about Highland's prior actions, and
19 specifically trying to explain some of that and also share
20 with HarbourVest a letter that was being sent to the editor
21 of the *Wall Street Journal* highlighting, in their view, some
22 of the inaccuracies around the reporting.

23 Q And did you receive this document?

24 A We did, yes.

25 MS. WEISGERBER: I'd move to offer this, so

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1 HarbourVest Exhibit 36, into evidence.

2 THE COURT: Any objections?

3 MR. WILSON: Your Honor, John Wilson. I would object
4 as to the relevance of this document.

5 THE COURT: All right. What's your response?

6 MS. WEISGERBER: Your Honor, it shows
7 misrepresentations that the witness will testify how it
8 relates back to prior representations prior to HarbourVest's
9 investment, as well as misrepresentations at that time.

10 THE COURT: Okay. I overrule the objection. I'm
11 going to admit it.

12 (HarbourVest's Exhibit 36 is received into evidence.)

13 BY MS. WEISGERBER:

14 Q Mr. Pugatch, can you describe generally -- we spoke about
15 this a little bit -- just what this communication from
16 Highland was conveying to HarbourVest at the time?

17 A Yes. Specifically, again, responding to this *Wall Street*
18 *Journal* article that had been published, trying to defend,
19 again, Highland's own views why there were inaccuracies in
20 the reporting. But importantly, from our perspective, trying
21 to reassure us as to the fact that, you know, these
22 accusations would have no bearing and any results from it
23 would have no bearing on their ongoing business or
24 partnership or the investment that we had made in HCLOF.

25 MS. WEISGERBER: And if you can scroll to the second

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1 page.

2 BY MS. WEISGERBER:

3 Q We'll just look at the last paragraph of another email
4 from Mr. Covitz. Can you just read that first sentence of
5 the last paragraph?

6 A Sure. (reading) While the dispute has no impact on our
7 investment activities, as always, we welcome any questions
8 you may have.

9 Q Mr. Pugatch, was this email and the discussion regarding
10 the Terry dispute consistent with the representations made to
11 you prior to HarbourVest's investment into HCLOF?

12 A It was, yes. Both the message, the lack of any impact
13 that ultimately the dispute with Mr. Terry, the arbitration
14 award would have around Highland's ongoing CLO business, or
15 HCLOF specifically, was all, you know, very clear in this
16 document, but all consistent with the representations that
17 had been made to us leading up to our investment in the
18 middle of November 2017 as well.

19 Q Thank you.

20 MS. WEISGERBER: And you can take down the exhibit,
21 Emily. Thank you.

22 BY MS. WEISGERBER:

23 Q You mentioned, Mr. Pugatch, an arbitration award to Mr.
24 Terry. How did you learn about that arbitration award?

25 A That was initially disclosed to us by Highland as we were

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1 in the late stages of our diligence and closing process on
2 the investment into HCLOF.

3 Q And generally, what did Highland tell you about the
4 arbitration award?

5 A We were aware of its existence. We were aware of the
6 quantum of the award, I think it was around an \$8 million
7 arbitration award in the favor of Mr. Terry, and that was
8 following the litigation around the wrongful termination and
9 employee dispute that Highland had described to us
10 previously.

11 Q Did you ask to see a copy of the arbitration award?

12 A No, we did not.

13 Q Why not?

14 A Ultimately, we -- you know, the explanations that
15 Highland had provided to us all seemed very reasonable. We
16 relied on their representations that this was, again, nothing
17 more than a dispute with a former disgruntled employee, in
18 their words, that had no bearing or, you know, would not have
19 any bearing on our investment in HCLOF or their ongoing CLO
20 business, which all very clearly was not the case, as
21 we've -- as we've learned over the last several years.

22 Q Following learning about the arbitration award, did
23 HarbourVest do other diligence?

24 A We did. So, in addition to asking questions related to
25 the arbitration award and any impact that it would have, we

1 also spent some time diligencing a couple of structural
2 changes that were proposed by Highland, and, in fact, ended
3 up delaying the closing of our investment by about two weeks
4 as we vetted some of those structural changes that Highland
5 had proposed. Vetted those both, you know, internally with
6 Highland directly and with external counsel in order to make
7 sure that those structural changes were in fact legally sound
8 in ultimately making our investment.

9 Q And were those changes proposed following the arbitration
10 award?

11 A They were, yes.

12 Q Did Highland tell you the reason for the structural
13 changes?

14 A Yeah. So, so some of this -- and specifically, this
15 involved a change of the portfolio manager at the HCLOF level
16 that was really in connection with a rebranding as Highland
17 was going through a rebuild of its CLO business and wanting
18 to align, from a brand perspective, their business on an
19 ongoing basis with the Highland brand as opposed to the Acis
20 brand. But more specifically, in the case of a late change
21 from a structured standpoint, the -- part of the intention
22 and the investment thesis of HCLOF was to pursue a reset, a
23 refinancing of all the underlying CLOs as they approached the
24 end of their investment period or came out of their
25 investment period.

1 And in connection with that, in light of the arbitration
2 award, Highland's view was that there may be difficulties in
3 the market in resetting certain of those Acis CLOs with the
4 Acis brand associated with them, given, again, the existence
5 of the arbitration award and concerns in the market around
6 the Acis brand reputation.

7 Q And what did they tell you was the market view of Acis,
8 or the Acis brand?

9 A Yeah. Their view or their concern was that the, you
10 know, because of the existence of that arbitration award, the
11 brand would be viewed as toxic.

12 Q Didn't this put you on notice that perhaps there was
13 something wrong with the structural changes?

14 A I mean, we -- I mean, short answer, no. We ultimately
15 asked questions, we diligenced the legal structure, but
16 relied on the representations that were made to us by
17 Highland around the rationale for the structural changes,
18 that these are all changes that were within a Highland-
19 managed vehicle or sat below the vehicle that we were
20 investing in, and so ultimately were in Highland's purview,
21 was the representations that we relied on.

22 Q And did HarbourVest alone do that diligence of the
23 structural changes?

24 A So, no. I mean, in connection with the diligence that we
25 did internally and with Highland directly, we engaged with

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1 outside counsel who was working with us at the time to vet
2 those structural changes as well.

3 Q Did HarbourVest rely on Highland's representations
4 regarding the arbitration award and the structural changes in
5 making its investment in HCLOF?

6 A We did, absolutely.

7 Q If Highland had disclosed the nature of the structural
8 changes, of removing Acis as the portfolio manager and
9 related transfers, would HarbourVest have proceeded with its
10 investment?

11 A Definitively, no, we would not have.

12 Q Why not?

13 A I think the reality is if we had understood the intent,
14 you know, that Highland was ultimately undertaking here, we
15 would not have wanted to be any part of this, and certainly
16 getting dragged into all of this, the hassle, the value
17 destruction that we've seen on behalf of the investors and
18 the funds that we manage. And I would say, lastly, we just
19 full stop would not have done business with a firm who
20 engages with this type of behavior, had we actually known the
21 truth.

22 Q Mr. Pugatch, are you familiar with the bankruptcy that
23 followed of Acis?

24 A Yes.

25 Q And what was your -- or, did HarbourVest participate in

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1 that bankruptcy?

2 A So, initially, no. Subsequently, we ended up getting
3 dragged into that on account of a number of misstatements by
4 Highland about the role that HarbourVest had played as part
5 of our investment into HCLOF and some of that structure and
6 the structural changes that I alluded to.

7 Q How did HarbourVest learn about those misstatements in
8 the bankruptcy about HarbourVest's role?

9 A So, ultimately, those came to light on -- you know, on
10 account of the ongoing proceedings within the Acis bankruptcy
11 process, and specifically brought to light to us by the Acis
12 trustee at the time, who decided to pursue, you know, further
13 diligence or discovery around the claims that Highland had
14 made around HarbourVest's involvement in those changes.

15 Q And what is your understanding of what the allegations
16 were that caused the Acis trustee to investigate HarbourVest?

17 A Sure. So, you know, our understanding was that Highland
18 had made statements, again, false statements that HarbourVest
19 had actually instructed some of those structural changes,
20 that we were the ones that had said that we would not do
21 business with Acis and had ordered some of the underlying
22 transfer of assets or, again, structural changes, that, you
23 know, very clearly I would say were not the case. Also, that
24 HarbourVest was -- was calling the shots as it relates to any
25 of the ongoing management or future resets of the CLOs.

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1 Q Did HarbourVest instruct any of those structural changes
2 or transfers to occur?

3 A We did not. Absolutely not.

4 Q Why didn't HarbourVest itself appear in the Acis
5 bankruptcy and file a claim?

6 A Yeah. HarbourVest's role, again, in HCLOF, we were a
7 passive investor in a Highland-managed company. We had no
8 direct interaction with or relationship with Acis. There was
9 really no reason for us to be directly involved until we were
10 subsequently dragged into involvement on account of those
11 misstatements. And then at that point our focus really
12 pivoted to, you know, whether we needed to defend ourselves
13 against those accusations that had been made by Highland and
14 after a request for further information in discovery by the
15 Acis trustee.

16 Q Did HCLOF participate in the Acis bankruptcy?

17 A They did, yes.

18 Q Did HCLOF incur fees for participating in the Acis
19 bankruptcy?

20 A Yes. In fact, very meaningful fees, to the tune of well
21 in excess of \$15 million of legal fees, as we understand it,
22 that have been incurred, largely in connection with the
23 ongoing Acis bankruptcy and Highland's continued pursuit of
24 and in connection with the litigation with Mr. Terry, which
25 we firmly believe was entirely inappropriate that HCLOF and

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1 ultimately investors in HCLOF bear those expenses, which were
2 not just expenses of HCLOF but of Highland and a number of
3 other Highland affiliates.

4 Q Do those expenses form a basis of separate claims filed
5 by HarbourVest against Highland?

6 A They do, yes. One of the multiple claims that we had
7 filed against Highland.

8 Q And a few more questions, just for the record, Mr.
9 Pugatch. How much did HarbourVest initially invest in HCLOF?

10 A Sure. So, our initial investment in November of 2017 was
11 right about \$73-1/2 million, I believe.

12 Q Did HarbourVest invest any additional money in HCLOF?

13 A We did. There was a subsequent capital call investment
14 of about \$5 million, bringing our total investment to just
15 under \$80 million in aggregate.

16 Q When HarbourVest initially made the investment, did it
17 anticipate making a profit on it?

18 A We did, yes.

19 Q How much did HarbourVest anticipate earning from the
20 investment?

21 A Yeah. So, our -- based on the original \$73-1/2 million
22 investment, we had expected a total return of about \$137
23 million on that -- on that investment.

24 Q What was that projection based on?

25 A So, that projection was based on materials that we had

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1 received from Highland, their internal projection models on
2 the future performance of the underlying CLOs that we were
3 acquiring exposure to through our investment in HCLOF, and
4 was one of the inputs or formed the basis in connection with
5 our diligence that we ultimately ran different sensitivities
6 -- projections around and helped employ -- helped inform our
7 investment thesis.

8 Q Do you know the current value of HarbourVest's investment
9 in HCLOF?

10 A Yes. The current value is right around \$22-1/2 million.

11 Q So roughly how much has the investment itself decreased
12 from HarbourVest's initial investment?

13 A So, net of what was about \$4-1/2 million of distributions
14 that we received early on in the investment, we've lost, to
15 date, in excess of \$50 million on our original investment.

16 Q And just for -- to close out, Mr. Pugatch, knowing all
17 that you know, if HarbourVest had known that -- about the
18 nature of the transfers by Acis or Highland's intent with
19 respect to the arbitration award, would HarbourVest have made
20 this investment?

21 A No. The reality is, had we known the truth, or even had
22 a sense of the truth, the true intentions behind some of
23 those transfers and ultimately what would have happened, we
24 never would have made this investment, full stop.

25 Q Thank you, Mr. Pugatch.

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1 THE COURT: All right. I didn't hear you, Ms.
2 Weisgerber. Do you pass the witness?

3 MS. WEISGERBER: Yes, I pass the witness.

4 THE COURT: All right. Thank you.

5 Mr. Morris, any examination from you?

6 MR. MORRIS: No, thank you, Your Honor.

7 THE COURT: All right.

8 (Interruption.)

9 THE COURT: All right. I'm not sure whose voice that
10 was, but please, again, mute your devices when you're not
11 talking.

12 Any cross-examination of Mr. Pugatch? I'll start with
13 you, Mr. Wilson.

14 MR. WILSON: Yes, Your Honor.

15 THE COURT: Okay.

16 CROSS-EXAMINATION

17 BY MR. WILSON:

18 Q How are you -- I guess we're afternoon now. How are you
19 this afternoon, Mr. Pugatch?

20 A I'm doing well. Yourself?

21 Q I'm doing well as well. Do you recall that on Monday of
22 this week I took your deposition?

23 A Yes, I do.

24 Q And so you understand that my name is John Wilson and I
25 represent Jim Dondero, who has filed an objection to the 9019

1 motion filed by the Debtor?

2 I've got a few questions for you today. Has HarbourVest
3 been around for over 35 years?

4 A We have, yes.

5 Q And does HarbourVest have ten offices around the world?

6 A Correct, yes.

7 Q And does HarbourVest employ over 150 investment
8 professionals?

9 A Yes.

10 Q Does HarbourVest have over \$74 billion in assets under
11 management?

12 A Correct, yes.

13 Q And is HarbourVest's client base largely comprised of
14 institutional investors?

15 A Also correct.

16 Q And you would agree with me that HarbourVest is a
17 sophisticated investor, right?

18 A I would, yes.

19 Q How long have you worked for HarbourVest?

20 A I've been employed by HarbourVest for 17 years now.

21 Q And how long have you been a managing director?

22 A I've been a managing director for approximately six
23 years.

24 Q And you were, in fact, the managing director for the
25 investment that HarbourVest made in Highland CLO Funding,

1 Ltd., which has been referred to today as HCLOF, correct?

2 A I was, correct.

3 Q And HarbourVest, I think you just testified, invested
4 approximately \$73 million as its initial investment in HCLOF?

5 A Yes, correct.

6 Q And before HarbourVest made that investment, it had made
7 many investments of this type, correct?

8 A Yeah. We've made hundreds of investments into
9 partnerships over our history, correct.

10 Q So HarbourVest was well-experienced in evaluating and
11 deciding whether to invest in large investments, correct?

12 A It was, yes.

13 Q Now, in your -- and by your, I mean HarbourVest -- in the
14 response to the Debtor's omnibus objection, it says that by
15 summer 2017 HarbourVest was engaged in preliminary
16 discussions with Highland regarding the investment. Is that
17 a correct statement?

18 A Correct, yes.

19 Q And, in fact, those talks began in the second quarter of
20 2017, correct?

21 A Yes.

22 Q And so the investment closed ultimately on November 15th,
23 2017?

24 A Yes, that's correct.

25 Q So it's fair to say that HarbourVest considered and

1 evaluated this transaction for over six months before
2 investing its \$73 million, right?

3 A From the time of the initial conversations that we had
4 with Highland, yes.

5 Q And one of the reasons that it took over six months to
6 complete the investment is that HarbourVest performs due
7 diligence before it makes an investment, correct?

8 A Correct.

9 Q And when you're performing due diligence -- well, first
10 off, you would agree with me that that's a common practice
11 amongst sophisticated investors such as HarbourVest, correct?

12 A To perform due diligence?

13 Q Yes.

14 A Yes.

15 Q And describe -- describe what HarbourVest does in a
16 general sense when it performs its due diligence.

17 A Sure. So, we spend time with the manager -- in this
18 case, Highland -- certainly around the investment thesis, the
19 opportunity, receive materials around the underlying assets.
20 We take that and perform our own independent due diligence
21 around the value of those assets, perform due diligence on
22 the manager itself, the go-forward opportunity. In many
23 cases, and certainly in this case, engage with outside
24 advisors to assist with that due diligence. It's a very
25 robust and thorough process.

1 Q And by outside advisors, are you referring to the outside
2 counsel that you testified about earlier?

3 A Yes. Both outside counsel and outside consultants.

4 Q Okay. And so did you say that it's typical to engage
5 outside counsel when performing due diligence?

6 A Yes.

7 Q And which outside counsel did you retain with respect to
8 this due diligence?

9 A Debevoise and Plimpton as well as Milbank.

10 Q And during the course of HarbourVest's due diligence, did
11 it identify some items of concern?

12 A As with any investment, there are always items that are
13 identified that require further diligence, risks that are
14 identified that we look to mitigate through our due
15 diligence, et cetera.

16 Q And if Harbour -- I'm sorry, did you say something else?

17 A No.

18 Q You were finished? Okay. Now, if HarbourVest identifies
19 an item of concern, is it typical to request additional
20 information regarding those items of concern?

21 A It is, yes.

22 Q And so that actually happened with respect to the HCLOF
23 investment, correct?

24 A In certain cases, yes.

25 Q HarbourVest identified several litigation matters that it

1 had questions about, correct?

2 A Correct. As we would with any investment.

3 Q And it went back to Highland and asked them to explain
4 their position on those litigation matters?

5 A Correct.

6 Q And one of those litigation matters was the Joshua Terry
7 litigation, correct?

8 A Yes.

9 Q And at the time that HarbourVest was considering this
10 investment, beginning in the second quarter and continuing
11 through the summer, that Josh Terry litigation had not
12 resulted in an award or a final judgment, correct?

13 A Correct.

14 Q And I think we looked earlier at a document that your
15 counsel admitted as HarbourVest Exhibits 34 and 35. There
16 was an email from a HarbourVest -- or, I'm sorry, from a
17 Highland representative to a HarbourVest representative that
18 was discussing Highland's position on the litigation,
19 including the Terry litigation, correct?

20 A Are you referring to the document that we looked at
21 earlier?

22 Q I am. And I can put it on the screen if we need to.

23 A No. Right, I recall that, and yes, that's correct.

24 Q Okay. And just to be clear, that document, which stated
25 Highland's positions on the -- and summaries of the

1 litigation, was issued months before the arbitration award to
2 Josh Terry, correct?

3 A I don't remember the exact timing, but it was certainly
4 during our due diligence period and prior to the arbitration
5 award, yes.

6 Q Well, it seems to me that that email that you -- your
7 counsel admitted as an exhibit was issued in August of 2017.
8 Does that sound right to you?

9 A If that's what the email said, yes.

10 Q And if the Terry arbitration award came out in October,
11 then you would agree with me that that is several months
12 prior to the -- or at least two months prior to the
13 arbitration award?

14 A Yes.

15 Q And so when HarbourVest made requests of Highland to
16 provide information regarding its items of concern, Highland
17 complied with those requests, correct?

18 A It did, correct.

19 Q And was there ever a time when HarbourVest requested
20 Highland to provide information and that information was not
21 provided?

22 A Our requests for information, or at least, you know,
23 responses or color to a question, were always met either
24 with, you know, written or verbal communication back to us,
25 yeah.

1 Q And you would agree with me that, in fact, HarbourVest
2 delayed the closing of the investment by two weeks to
3 continue its due diligence, correct?

4 A Correct, related to the structural changes that were made
5 close to closing. That's right.

6 Q And after conducting that due diligence, HarbourVest
7 satisfied itself that the investment was sound?

8 A That the legal structure that had been put in place in
9 connection with those proposed changes by Highland was -- was
10 legally sound, yes, and on the back of, again, statements and
11 misrepresentations on the part of Highland around the nature
12 and potential impact to their ongoing CLO business and HCLOF.

13 MR. WILSON: Well, I'm going to object to the latter
14 part of your response as nonresponsive.

15 THE COURT: Sustained.

16 BY MR. WILSON:

17 Q Now, after you conducted the due diligence, HarbourVest
18 made the investment of \$73 million on November 15th, 2017,
19 correct?

20 A Correct.

21 Q And so I think you testified earlier that prior to that
22 investment HarbourVest had become aware that that Josh Terry
23 litigation had resulted in an arbitration award, correct?

24 A Yes.

25 Q But I think you've also testified that HarbourVest did

1 not request that Highland provide a copy of the arbitration
2 award, correct?

3 A That's correct.

4 Q And you further testified that you were represented by
5 outside counsel at the time, correct?

6 A Correct.

7 Q And as of Monday of this week, you had not reviewed that
8 arbitration award; is that correct?

9 A That's correct.

10 Q Have you reviewed that arbitration award since Monday of
11 this week?

12 A I have not.

13 Q But in any event, you testified that Highland told you
14 about the award?

15 A Yes.

16 Q And they told you the amount of the award?

17 A Yes.

18 Q And then they told you that the award had been converted
19 to a judgment?

20 A When you say the award had been converted to a judgment,
21 can you be more specific?

22 Q Well, I don't know how familiar you are with the
23 litigation process, but in this instance, that award was
24 taken to a court and the court entered a judgment on the
25 arbitration award. Did you -- were you aware of that?

1 A I don't recall the specific legal terms of judgment
2 against it. I was award of the existence of the arbitration
3 award and the -- and the obligation for Highland to comply
4 with that arbitration award.

5 Q And HarbourVest did not make an appearance in the Acis
6 bankruptcy, right?

7 A We did not.

8 Q But you were aware of the Acis bankruptcy, correct?

9 A Yes.

10 Q And you were kept apprised of the Acis bankruptcy by
11 Highland individuals, correct?

12 A We had conversations with a couple of Highland
13 individuals throughout the Acis bankruptcy process, yes.

14 Q Right. And in fact, you testified that you participated
15 in regular conference calls with Highland regarding that
16 bankruptcy?

17 A That's correct, yes.

18 Q And do you recall having been provided with over 40,000
19 documents by Highland related to the Acis bankruptcy?

20 A I do not recall that, no.

21 Q Would those documents have been provided to your outside
22 counsel, had you received them?

23 A I don't know the answer to that.

24 Q Did the outside counsel that represented you in the due
25 diligence continue to represent you throughout the Acis

1 bankruptcy?

2 A They did. One of the counsels did, correct.

3 Q And which counsel was that?

4 A Debevoise.

5 Q So was your counsel actively involved with monitoring the
6 Acis bankruptcy?

7 A They were, yes, particularly after we were ultimately
8 accused of having something to do with the original structure
9 and -- as a result of misstatements by Highland.

10 Q Did your counsel attend hearings in the Acis bankruptcy?

11 A I don't recall.

12 Q Are you familiar with the PACER system?

13 A I am not.

14 Q Now, I think that HarbourVest has been described as a
15 passive investor. You recall that description of HarbourVest
16 in this instance?

17 A Yes.

18 Q But, in fact, HarbourVest invested substantial assets
19 such that it owned a 49.98 percent share of HCLOF. Would you
20 agree with that?

21 A That's correct.

22 Q And in fact, the next largest investor was CLO Holdco,
23 which owned 49.02 percent of the shares, correct?

24 A That sounds right.

25 Q And there was an advisory board that was created pursuant

1 to the formation documents of this investment, correct?

2 A That's correct.

3 Q And in fact, that advisory board only had two members,
4 and one was a representative of HarbourVest and one was a
5 representative of CLO Holdco, correct?

6 A Correct.

7 Q And the advisor -- I'm sorry, the portfolio manager was
8 not allowed to disregard the recommendations of the advisory
9 board, correct?

10 A With respect to the limited set of items that the
11 advisory board could opine on, that is correct.

12 Q All right. I want to go over a couple of the
13 misrepresentations that HarbourVest has identified in its
14 filings related to its claim. The first one is -- and just
15 for the record, I'm reading from **Docket No. 1057** filed on
16 September 11, 2020, HarbourVest Response to Debtor's First
17 Omnibus Objection.

18 But the first misrepresentation identified in that
19 document says that Highland never informed HarbourVest that
20 Highland had no intention of paying the arbitration award.
21 And was -- was Highland obligated to pay the Josh Terry
22 arbitration award against Acis?

23 MR. MORRIS: Objection to the question to the extent
24 it calls for a legal conclusion.

25 THE COURT: Sustained.

1 MS. WEISGERBER: Join in that objection.

2 THE COURT: Sustained. I think --

3 BY MR. WILSON:

4 Q Your understanding was --

5 MR. WILSON: I'm sorry, Judge?

6 THE COURT: I sustained the objection as calling for
7 a legal conclusion. So, next question.

8 MR. WILSON: Yes, I -- I heard that. Thank you, Your
9 Honor.

10 BY MR. WILSON:

11 Q In your understanding, was Highland responsible for
12 paying the arbitration award to Josh Terry?

13 A My understanding is on the account of the fact that Acis
14 --

15 MS. WEISGERBER: Objection, Your Honor. Objection,
16 Your Honor, same basis.

17 THE COURT: Sustained. It was essentially the same
18 question.

19 MR. WILSON: Well, Your Honor, I didn't ask --

20 THE COURT: It was essentially the same question, Mr.
21 Wilson. Move on.

22 MR. WILSON: Okay.

23 BY MR. WILSON:

24 Q The next misrepresentation identified by HarbourVest said
25 that Highland did not inform HarbourVest that it undertook

1 the transfers to siphon assets away from Acis, LP and that
2 such transfers would prevent Mr. Terry from collecting on the
3 arbitration award. So the basis for that allegation would be
4 that Highland was siphoning assets from Acis to avoid having
5 Acis pay the arbitration award, correct?

6 A That -- that would be the implication, yes.

7 Q Okay. And then that misrepresentation continues on and
8 says that Highland represented to HarbourVest that it was
9 changing the portfolio manager because Acis was toxic. And
10 do you recall that representation being made to you?

11 A Yes, I do.

12 Q And would you agree with me that whether or not Acis is
13 toxic in the industry would be an opinion?

14 A I suppose it would be an opinion, but by the manager of
15 the vehicle responsible for managing the HCLOF investment and
16 the underlying CLOs. Yeah, we viewed the Acis name and the
17 Highland name as synonymous, if you will. I mean, Acis was a
18 subsidiary of Highland. For all intents and purposes, it was
19 the same from our perspective as we made the investment into
20 HCLOF.

21 Q So did HarbourVest have an independent understanding of
22 whether or not the Acis name was toxic in the industry?

23 A We did not, no. We relied on Highland's views of that as
24 manager of HCLOF.

25 MR. WILSON: Your Honor, just a brief housekeeping

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1 item. Did you say that we need to be done at 1:00 o'clock?

2 THE COURT: Well, I said I really wanted you to be
3 done by 1:00 o'clock because I have a 1:30 docket and a 2:00
4 o'clock docket and I'd rather not have to hang up 70-
5 something people and reconnect them again at 3:00 o'clock.
6 How close are you to being finished?

7 MR. WILSON: Well, --

8 THE COURT: This is going at a very slow pace.

9 MR. WILSON: Well, I apologize for that, Your Honor.
10 I think I've got at least ten more minutes, but -- but I know
11 we also have closing remarks. And I was just going to ask if
12 Your Honor had a preference of --

13 THE COURT: Keep going.

14 MR. WILSON: -- of breaking now --

15 THE COURT: Keep -- let's --

16 MR. WILSON: -- or keep going? Okay.

17 THE COURT: Let's talk fast and try to get through.
18 You know, even if I'm sacrificing lunch today, I don't want
19 to inconvenience 75 people this way. So we'll just probably
20 start our 1:30 hearing a little late and inconvenience those
21 people.

22 All right. Go ahead.

23 MR. WILSON: All right. Thank you, Your Honor.

24 BY MR. WILSON:

25 Q Did Acis form its -- I can't recall if you answered this

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1 question, but did Acis form its own opinion on whether or not
2 -- I'm sorry, strike that. Did HarbourVest form its own
3 opinion on whether or not the Acis name was toxic in the
4 industry?

5 MS. WEISGERBER: Objection, --

6 THE WITNESS: We did not. We didn't have a basis.

7 THE COURT: I'm sorry, did I have an objection?

8 BY MR. WILSON:

9 Q You did not --

10 THE COURT: Did I have an objection?

11 MS. WEISGERBER: Yeah. Objection. Yes. Objection,
12 asked and answered, Your Honor.

13 THE COURT: Overruled. He can answer.

14 BY MR. WILSON:

15 Q Okay. But --

16 A We did not.

17 Q Did Highland have the ability to investigate the Acis
18 name and make its own determination of whether that name was
19 toxic? I'm sorry, I think I'm misspeaking. HarbourVest.

20 A HarbourVest had the ability to do that, yes.

21 Q I apologize I misspoke. I meant HarbourVest. Did
22 HarbourVest have the ability to investigate that name and
23 determine if it was toxic?

24 A It was irrelevant to our investment thesis. And as I
25 said before, Acis was a subsidiary of Highland. We viewed

1 them as interchangeable in the context of our investment.

2 Q Okay. The next misrepresentation that you refer to says
3 that Highland indicated to HarbourVest that the dispute with
4 Mr. Terry would have no impact on its investment activities.
5 Would you agree with me that that is also an opinion?

6 A It was a statement that --

7 MS. WEISGERBER: Your Honor, I'm going to object to
8 the extent these questions are seeking a legal conclusion
9 regarding, you know, if something's an opinion or not.

10 THE COURT: Okay. Overruled. He can answer.

11 THE WITNESS: It was -- it was a statement that was
12 made to us by Highland and represented in multiple different
13 formats as fact. And a representation that we relied on in
14 connection with our investment.

15 BY MR. WILSON:

16 Q And finally, the misrepresentation, the last
17 misrepresentation identified, is that Highland expressed
18 confidence in the ability of HCLOF to reset or redeem the
19 CLOs. Would you agree with me that that statement is an
20 opinion?

21 A On the basis that it was the core investment thesis of
22 the -- of the investment of HCLOF. Again, whether that's
23 legally viewed as an opinion or a fact, it was -- it was
24 certainly the investment thesis that we made the investment
25 predicated upon.

1 Q And you just testified that you thought that Acis and
2 Highland were interchangeable from the perspective of the
3 investment opportunity, correct?

4 A Correct.

5 Q But you also accepted Highland's recommendation because
6 HarbourVest agreed that the change in the -- to a Highland
7 manager made commercial sense, correct?

8 A We took at face value what Highland recommended because
9 this all had to do with the structuring of an entity that
10 they fully managed with respect to multiple underlying
11 subsidiaries that weren't managed by Highland.

12 Q But would you agree that, at the time, you -- HarbourVest
13 thought that made commercial sense?

14 A It did not seem unreasonable to us based on the
15 explanation we were given.

16 Q Okay.

17 MR. WILSON: I want to refer to HarbourVest Exhibit
18 39.

19 (Pause.)

20 THE COURT: What are we waiting on? What are we
21 waiting on?

22 MR. WILSON: I'm trying to get the document on the
23 screen, Your Honor.

24 (Pause.)

25 THE COURT: We can't hear you. We can't hear you.

Pugatch - Cross

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1 MR. WILSON: I'm sorry. I'm sorry, Your Honor. I'm
2 speaking with my --

3 THE COURT: Okay.

4 MR. WILSON: -- co-counsel here.

5 THE COURT: All right.

6 (Pause.)

7 MS. WEISGERBER: Mr. Wilson, is it 39 or 38 that
8 you're referring to?

9 MR. WILSON: 39. HarbourVest 9019 motion on the
10 main -- on the Dondero file. And then there's the -- it's --
11 it's John -- and then there's the HarbourVest, and then the
12 exhibits are all in one file.

13 MS. WEISGERBER: Mr. Wilson, I'll just note that 39
14 was subject to confidentiality based on HCLOF's request.
15 HCLOF's counsel is present. I think they know it's an
16 excerpt. But I'd just -- that for HCLOF's counsel.

17 MR. WILSON: Well, is there an objection to showing
18 this document on the screen? Yes. All right. We're not
19 going to put Document 39 on the screen.

20 A VOICE: Yes.

21 MR. WILSON: All right. Scroll down to the next
22 page.

23 BY MR. WILSON:

24 Q This is a -- this is a document that was produced to us
25 this week, the Highland production. It appears to be a

005402

Pugatch - Cross

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1 Highland CLO Funding, Ltd. Statement of Operations for the
2 Year Ended 31 December 2017. Do you see at the top of that --
3 at the top of that document where it says total investment
4 income of \$26 million?

5 A I do, yes.

6 Q And total expenses were roughly \$1.8 million?

7 A Yes.

8 Q And then net change and unrealized depreciation on
9 investments and net realized loss on investments was \$4.26
10 million cumulative, resulting in a net increase in net assets
11 resulting from operations of \$20.224 million. Do you agree
12 with that?

13 A Yes.

14 Q Okay.

15 MR. WILSON: Go to the next one.

16 BY MR. WILSON:

17 Q And you understand that, in the course of the Acis
18 bankruptcy, the portfolio managers for certain of the CLOs
19 were changed by the Trustee, correct?

20 A Yes, around the underlying CLOs. That's -- that's my
21 understanding, yes.

22 Q And, in fact, Mr. Seery testified earlier today that that
23 occurred in the summer of 2018, correct?

24 MR. WILSON: Scroll.

25 THE WITNESS: I don't recall the timing, but that's

005403

1 what he testified to.

2 BY MR. WILSON:

3 Q Well, this document is HarbourVest Exhibit 40, and this is
4 the statement of operations for the financial year ended 31
5 December 2018. Here, the total investment income is only
6 \$11.1 million. Do you see that?

7 A I do.

8 Q And do you see where the expenses have increased to \$13.6
9 million?

10 A I do, yes.

11 MR. WILSON: Okay. Scroll down some more.

12 BY MR. WILSON:

13 Q And do you see where it says net change and unrealized
14 loss on investments of \$48.47 million?

15 A Yes.

16 Q And so after Acis and Brigade took over the managements of
17 these CLOs, we had a net decrease in net assets resulting from
18 operations of \$52.483 million in the year 2018, correct?

19 MS. WEISGERBER: Objection, Your Honor. Assumes a
20 fact not in evidence.

21 THE COURT: Overruled. He --

22 MR. WILSON: Your Honor, --

23 THE COURT: We're just looking at this statement and
24 testifying about it says, so I overrule the objection.

25 MR. WILSON: Thank you, Your Honor. Thank you, Your

Pugatch - Cross

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1 Honor. I'm now going to turn to HarbourVest Exhibit 41. All
2 right. I'll --

3 BY MR. WILSON:

4 Q Did you answer the question, Mr. Pugatch?

5 A No, I -- I would agree with the second part of your
6 statement that for the year 2018 the -- the loss was \$52
7 million. I don't -- I don't believe that jives with the first
8 part of your statement that that was after Acis and Brigade
9 took over. As I understand, that was in the middle of the
10 year.

11 Q But in any event, Acis and Brigade had been managing this
12 for at least six months of 2018 when that loss occurred,
13 correct?

14 A They had been managing a portion of the underlying CLO
15 portfolio held by Highland CLO Funding.

16 Q All right. We're now looking at Exhibit #41, which is the
17 Draft Unaudited Statement of Comprehensive Income, 31 December
18 2019. Total income has now dropped to \$4.664 million.

19 MR. WILSON: And scroll down.

20 BY MR. WILSON:

21 Q Expenditures are at \$3.645 million. And then it says
22 investment gains and losses net out to \$11.493 million, a
23 negative \$11.493 million. And --

24 MR. WILSON: Scroll down to the --

25 BY MR. WILSON:

005405

1 Q And so would you agree with me that in the year 2019,
2 HCLOF showed a net loss of \$10.476 million?

3 A Yes, that's what the financial statements say.

4 Q And in this year, the Acis CLOs were solely managed by
5 Acis and Brigade, correct?

6 A The Acis CLOs were. Yes, correct.

7 Q All right.

8 MR. WILSON: Now, go to 42.

9 BY MR. WILSON:

10 Q Now, this is HarbourVest #42.

11 MR. WILSON: Go down to the next page.

12 BY MR. WILSON:

13 Q And this is the Highland CLO Funding, Ltd. Unaudited
14 Condensed Statement of Operations for the Financial Period
15 Ended 30 June 2020. And so this is just half a year of
16 operations. And would you -- and this actually has a
17 comparison between 2019 and 2020. But do you see where it
18 says investment income has dropped from a million dollars in
19 the first half of 2019 to \$381,000 in the first half of 2020?

20 A Yes.

21 MR. WILSON: Okay. Scroll down.

22 BY MR. WILSON:

23 Q And do you see where, in the first half of 2019, total
24 expenses were \$1.85 million, and then in the first half of
25 2020 total expenses were \$2.16 million? Do you see that?

1 A I do.

2 Q And if you go down below that, where it says Net Realized
3 and Unrealized Gain/Loss on Investments, the first half of
4 2019 HCLOF lost \$12 million, and in the first half of 2020 it
5 lost \$39.472 million?

6 MR. MORRIS: Your Honor, I'm going to object. It's
7 John Morris for the Debtor. I'm happy to stipulate. In fact,
8 he can offer this document into evidence. There's no
9 foundation that Mr. Pugatch has any particularized knowledge
10 about any of the numbers behind this. All he's asking him to
11 do is to confirm what the document says. It says what it
12 says. But this -- I'll object on that basis, Your Honor.

13 THE COURT: All right. Mr. Wilson, what about it?
14 You're just getting him to read numbers off of these exhibits.

15 MR. WILSON: Well, --

16 THE COURT: Shall we just --

17 MR. WILSON: -- I understood --

18 THE COURT: -- by stipulation get them into evidence?

19 MR. WILSON: Well, --

20 MR. MORRIS: No objection, Your Honor.

21 MS. WEISGERBER: No objection.

22 THE COURT: All right. So these are exhibits what?
23 We've gone through 39, 41, and I don't know what else. 40,
24 maybe?

25 MR. WILSON: It was Exhibits 39, 40, 41, and 42 that

1 were on the HarbourVest exhibit list.

2 THE COURT: All right. Those will be admitted, and
3 we've already discussed what docket entry number they appear
4 at.

5 (HarbourVest's Exhibits 39 through 42 are received into
6 evidence.)

7 THE COURT: All right. Anything else? You told me
8 you had 10 more minutes about 15 minutes ago.

9 MR. WILSON: Well, I'm sorry if I -- I think I had
10 said I had at least ten more minutes, and I was looking at the
11 -- it was 10:50 [sic] and you wanted to quit at 1:00. So I do
12 have longer than that. I'm sorry, Your Honor.

13 THE COURT: Well, --

14 MR. WILSON: But --

15 THE COURT: -- I feel like I'm being --

16 MR. WILSON: -- I'll try to proffer --

17 THE COURT: Okay, Mr. Wilson, let me just tell you
18 something. I feel like I'm being disrespected now, and the
19 parties are. We really need to pick up the pace. I've told
20 you I've got a 1:30 docket -- with four or five matters on it,
21 by the way. I've got a 2:00 o'clock docket. I'm starting
22 them late. No one advised my courtroom deputy that we were
23 going to need all day today for this, okay? So you've got
24 five more minutes to wrap it up, and then, of course, I have
25 to go to Mr. Draper and see if he has cross. All right? So

1 please don't test my patience any more. Five minutes to
2 finish.

3 MR. DRAPER: Judge, I have no questions.

4 THE COURT: I didn't hear you, Mr. Draper. What did
5 you say?

6 MR. DRAPER: I have no questions.

7 THE COURT: All right. Very good.

8 MR. WILSON: I apologize, Your Honor. I was actually
9 trying to be respectful of your time when I informed you that
10 I had at least ten more minutes left at 12:50, but I will try
11 to be as expedient as I can as I finish up.

12 BY MR. WILSON:

13 Q And I don't see you on my screen.

14 MR. WILSON: You can take that document down.

15 THE WITNESS: Here.

16 BY MR. WILSON:

17 Q Mr. Pugatch, do you have an opinion as to what caused
18 these incredible losses of value at HCLOF?

19 MS. WEISGERBER: Objection to the extent it calls for
20 a legal conclusion.

21 THE COURT: Overruled. He can answer.

22 THE WITNESS: I would say that there's no one cause
23 for the decline in value. I can point to a number of
24 different things, including the exorbitant fees that were
25 charged to HCLOF, including the inability to be able to re --

1 refinance the CLOs on the part of HCLOF, all of which stems
2 from the actions that Highland took prior to our investment in
3 HCLOF.

4 BY MR. WILSON:

5 Q And you've -- I think it's been referenced several times
6 in HarbourVest's arguments that -- that the reset was a
7 fundamental -- the inability to get a reset was a fundamental
8 cause of the loss in value. Is that -- is that HarbourVest's
9 position?

10 A That -- that is a part of the -- the cause in the
11 declining value of the CLOs, yes.

12 Q And you would agree with me that a reset is fundamentally
13 a reset of interest rates, correct?

14 A Of the interest rates of the liabilities of the -- the
15 timing for repayment of those liabilities, yes.

16 Q Now, just say with -- for the sake of a hypothetical
17 example. If you had a home that was valued at \$5 million, or
18 let's just say \$500,000, let's make it more realistic. If you
19 had a \$500,000 home and you had a mortgage on that home at
20 five percent interest, your inability to refinance that home
21 at a lower interest rate would not affect the underlying value
22 of that home, correct?

23 MS. WEISGERBER: Objection, Your Honor. Hypothetical.
24 And objection to relevance as well.

25 THE COURT: Sustained.

Pugatch - Cross

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1 MS. WEISGERBER: Calls for speculation.

2 THE COURT: Sustained.

3 BY MR. WILSON:

4 Q Is there any reason to believe that the change in the
5 interest rate would have prevented the massive losses of
6 investment value that occurred in HCLOF?

7 MS. WEISGERBER: Object on the same grounds.

8 THE COURT: Sustained.

9 THE WITNESS: The short -- the short answer is yes,
10 with a -- with the amount of leverage --

11 MS. WEISGERBER: I --

12 THE WITNESS: -- that exists. Oh, sorry.

13 MS. WEISGERBER: The objection was sustained.

14 THE COURT: Yeah, I sustained the objection. That
15 means you don't answer.

16 THE WITNESS: I'm sorry, Your Honor.

17 BY MR. WILSON:

18 Q So, would you agree with me that if the expenses and the
19 fees charged by the portfolio manager increased dramatically,
20 that would -- that would impact the value of the investment,
21 correct?

22 MS. WEISGERBER: Objection on the same grounds, and
23 relevance. This is a 9019 hearing, Your Honor. We are not
24 here to try every minutia. And in fact, we're trying to avoid
25 a trial on the merits. And it feels like we're getting a bit

005411

1 far afield now.

2 THE COURT: I sustain.

3 MR. WILSON: All right. I'll pass the witness.

4 THE COURT: All right. Mr. Draper said he had no
5 cross. So, any redirect, Ms. Weisgerber?

6 MS. WEISGERBER: No, Your Honor.

7 THE COURT: All right. Mr. Morris, did you have any
8 redirect?

9 MR. MORRIS: I do not, Your Honor. I have a very
10 brief closing and then some additional remarks if -- if we
11 finish.

12 THE COURT: All right. So, Mr. Pugatch, that
13 concludes your testimony. Thank you. You're excused if you
14 want to be.

15 All right. So, as I understood it, there would be no more
16 evidence after this.

17 MR. WILSON: Well, Your Honor, along those lines, as
18 a housekeeping measure, I think everything on my exhibit list
19 is included on someone else's exhibit list, but just for belt
20 and suspenders I would move to admit all of the exhibits on
21 the -- on Mr. Dondero's exhibit list.

22 THE COURT: Well, is that agreed or not? Because we
23 didn't have a witness to get them in.

24 MR. MORRIS: No objection, Your Honor.

25 THE COURT: Any objection? All right. If there's no

1 objection, I'll --

2 MR. MORRIS: Your Honor, --

3 THE COURT: I'm sorry. Was there an objection? I
4 will admit Dondero Exhibits A through M, and those appear at
5 Docket Entry 1721, correct, Mr. Wilson?

6 MR. WILSON: That is correct, Your Honor.

7 THE COURT: All right.

8 MR. WILSON: That is correct, Your Honor.

9 (James Dondero's Exhibits A through M are received into
10 evidence.)

11 MR. WILSON: And one final matter is, during the
12 examination of Mr. Seery, you at least partially admitted
13 Dondero's Exhibit N, and I was wondering if we need to -- how
14 we'd need to submit that for the record.

15 THE COURT: Okay. First, I'm confused. I think you
16 said Mr. Terry's testimony. You --

17 MR. WILSON: I said Seery. I'm sorry.

18 THE COURT: Oh, Seery?

19 MR. WILSON: Or I may have said Terry, but I meant to
20 say Seery.

21 THE COURT: Okay. Maybe you said it. Okay. During
22 Mr. Seery's testimony -- oh, the email that I admitted a
23 portion of?

24 MR. WILSON: That is -- that's correct, Your Honor.

25 THE COURT: What -- what are you asking? It's not in

1 your notebook. Are you asking do you need to separately
2 submit it or what?

3 MR. WILSON: Yeah, I was just asking what the Court's
4 preference on how we submit that for the -- put it in the
5 record.

6 THE COURT: Okay. That was so garbled I didn't hear
7 you. You need to file that on the docket as a supplemental
8 exhibit that was admitted, okay?

9 MR. WILSON: Okay. Thank you, Your Honor.

10 THE COURT: All right. Closing arguments? Mr.
11 Morris?

12 CLOSING ARGUMENT ON BEHALF OF THE DEBTOR

13 MR. MORRIS: Yes, very briefly, Your Honor. The
14 Debtor easily meets the standard here. The settlement
15 consideration relative to the claim establishes and reflects
16 the likelihood of success on the merits.

17 You know, I've never -- I did hear Mr. Pugatch in the
18 deposition the other day, but I otherwise haven't heard from
19 him. I found him to be incredibly credible, Your Honor, and I
20 regret the fact that he and HarbourVest are being blamed twice
21 here. The fact that they got 40,000 documents or didn't read
22 the arbitration award, it's just -- it's a shame that they're
23 being dragged through this yet again.

24 The fact is, Your Honor, there is no evidence that they
25 made the disclosures that HarbourVest claims -- complains

1 about. They just don't. The fraudulent transfers led to the
2 bankruptcy, led to the appointment of a trustee, led to --
3 right? So, so it's -- that's why -- but they're getting
4 something for their claim.

5 It was a hard negotiation, Your Honor. There is no
6 dispute that if we litigated this it would be complex. It
7 would fact-intensive. The Debtor would be forced to rely upon
8 witnesses who are no longer employed by it. That it would be
9 expensive, for sure. There's no dispute about any of that.
10 There's no dispute that the creditor body has spoken loudly
11 here by unanimously refraining from objecting except for Mr.
12 Dondero and the entities controlled by him.

13 And you heard Mr. Seery's testimony. I think he
14 exhaustively informed the Court as to the process by which the
15 transaction was analyzed and negotiated, and there's no
16 evidence to the contrary that this was an arm's-length
17 negotiation.

18 Unless Your Honor has any questions, we would request that
19 the motion be granted.

20 THE COURT: Thank you. Ms. Weisgerber, your closing
21 argument?

22 CLOSING ARGUMENT ON BEHALF OF HARBOURVEST

23 MS. WEISGERBER: Sure. Thank you, Your Honor. I'll
24 also be brief. We again join in Mr. Morris's arguments and
25 comments.

1 The Court has now heard testimony from Mr. Pugatch
2 regarding the factual detail underlying HarbourVest's claims.
3 The Court has also heard about the significant damages that
4 HarbourVest stands to recover for those claims. And
5 HarbourVest came to this Court ready to litigate. It would --
6 it's ready to do so if needed. It believes it would prevail
7 on its claims if it had to do so.

8 But the Court also heard from Mr. Seery about his
9 understanding of HarbourVest's claims, his calculus, and his
10 decision to settle them. And we submit that nothing further
11 is needed by this Court in order to approve the settlement.
12 This is a question of the Debtor's business judgment. We're
13 not here to have a trial on the merits of HarbourVest's
14 claims. The Objectors have made various arguments, including
15 about the cause of HarbourVest's damages. But even the nature
16 of the legal claims that HarbourVest is asserting, some do not
17 require a loss causation. So we submit that's not even
18 relevant to the merits of the claims.

19 The settlement is clearly in the best interest of the
20 estate, and we respectfully request that the Court approve it.

21 THE COURT: Thank you. All right. Mr. Wilson, your
22 closing argument?

23 MR. LYNN: Michael Lynn. I will give the closing
24 argument, if that's satisfactory to the Court.

25 THE COURT: All right. Go ahead.

1 CLOSING ARGUMENT ON BEHALF OF JAMES DONDERO

2 MR. LYNN: Good afternoon, Your Honor. I just want
3 to make a few points, and I'll try to do it as quickly as
4 possible.

5 First, I feel compelled to address the argument of the
6 Debtor that Mr. Dondero is repeating his litigious behavior
7 from the Acis case. I don't know about the Acis case. I
8 wasn't involved except very, very peripherally. But with
9 respect to this case, we have only taken positions in court
10 that we believed -- that is, his lawyers -- believed were
11 warranted by law, facts as we knew them, and that are
12 consistent with professionalism. I'd be glad to explain any
13 position we took.

14 Often, through the Debtor's very persuasive powers, we
15 never had the chance to explain our position previously to the
16 Court. In fact, for the most part, as today, we have been
17 reactive rather than commencing proceedings. In fact, during
18 the first seven months of this case, we only appeared in court
19 a few times, when we felt we had to -- for example, when
20 discovery was being sought by the Creditors' Committee that we
21 feared might invade privilege. Then, much to the Debtor's
22 fury, we opposed the Acis 9019. We did so because we thought
23 it was too much.

24 Since, as the Court can see, the principal instigators of
25 litigation have been the Debtor, and to a lesser extent, the

1 Committee.

2 Indeed, in an apparent effort to drown Mr. Dondero and his
3 counsel in litigation, the Debtor has repeatedly sought court
4 action on a very short fuse, claiming need for expedited
5 hearing.

6 Perhaps the most startling example of this is the recent
7 contempt motion, for which there is no good reason for a quick
8 hearing. Resolution of that motion is not necessary to reach
9 the confirmation hearing. The motion could be heard after the
10 confirmation hearing. There is no need to put Mr. Dondero and
11 his professionals in a position where they have to respond in
12 a couple of days, two business days, and then will have two
13 days to prepare for trial.

14 Second, Your Honor, Mr. Seery has repeatedly asserted,
15 contrary to today's motion, that the HarbourVest claim was of
16 no merit. That is why, when he came in to settle for tens of
17 millions of dollars, we opposed this motion. It appears that
18 the motion is occurring without any cross-party discovery.
19 There is no consideration, apparently, of trying dispositive
20 -- dispositive motions first. There is no consideration for
21 junior classes of equity, which Mr. Seery has previously
22 opined were in the money. This, even though there's no reason
23 that this settlement is necessary pre-confirmation, unless Mr.
24 Seery wants HarbourVest's vote.

25 Third, for whatever reason, that seems to be the driving

1 factor for settling. On its face, the vote seems to be a key
2 factor of the settlement. About the longest provision of the
3 settlement agreement relates to voting. The motion itself --
4 in the motion itself, five of seven bullet points cited by the
5 Debtor for approval of the settlement deal with and emphasize
6 support of the plan or the vote that is to be cast for the
7 plan.

8 If the settlement is a good deal, it didn't need to have
9 as one of its parts the requirement that HarbourVest vote for
10 the plan.

11 Your Honor, I'll stop there. I know Your Honor would like
12 to get just a few minutes before your 1:30 docket. I've been
13 there and I understand that, and I do apologize for taking the
14 time we have, but I think that responsibility is shared with
15 the Debtor and HarbourVest.

16 Thank you, Your Honor.

17 THE COURT: All right. Thank you for that.

18 Mr. Draper, any closing argument from you?

19 CLOSING ARGUMENT ON BEHALF OF GET GOOD AND DUGABOY TRUSTS

20 MR. DRAPER: Yes, I have three comments. The first
21 is the claim -- the loss claim, absent the fraud claim, is, at
22 best, \$7 million. I think Mr. Seery's argument that a hundred
23 -- one hundred percent is attributable to there is just wrong.
24 If he and I both invested in a company 50-50 and it goes
25 broke, we only lost 50 cents each.

1 Number two, I think the Court heard the evidence. I think
2 this is, at best, a subordinated claim under 5 -- under the
3 Bankruptcy Code. It's really a "But for the
4 misrepresentations, we wouldn't have invested."

5 And the last one is the -- Judge Lynn represented the
6 voting, so I won't deal with that. But the one that troubles
7 me the most is the fact that this asset that is ultimately
8 being paid for in claim dollars that's being transferred over
9 to the Debtor and being put it outside the estate, outside the
10 purview of this Court, and placed in some subsidiary, this --
11 this transaction, if it is approved, must -- should contain a
12 provision that the asset that's being acquired come into the
13 Debtor and be owned by the Debtor.

14 THE COURT: All right.

15 MR. DRAPER: I have nothing further, Your Honor.

16 THE COURT: Thank you, Mr. Draper.

17 Mr. Morris, you get the last word since it's your motion.

18 MR. MORRIS: Very quickly, Your Honor. The
19 subordination argument doesn't hold water. This is not a
20 claim against the Debtor for the security; it's a claim for
21 fraud. Okay? So, so 510(b), if it was a claim against HCLOF,
22 that might make sense, but this is a claim against the Debtor.
23 And it's a Debtor -- it's a claim for fraud. That's number
24 one.

25 Number two, we need to keep this exactly as it's been

1 structured in order to avoid litigation. Mr. Seery told the
2 Court. I'm sure the Court can make its own assessment as to
3 Mr. Seery's credibility as to whether or not the Debtor is
4 intending to somehow get this asset beyond the Court.

5 But there are reasons why we've done this, Your Honor.
6 They could have made an objection on that basis. In fact, if
7 they did, it would be overruled, because there's no -- there's
8 no basis for this Court to find that somehow the Debtor and
9 Mr. Seery are doing something untoward to get assets away from
10 this Court's jurisdiction.

11 You know, I don't know what to say about Mr. Lynn's
12 commentary. Much of it had nothing to do with any evidence in
13 the record.

14 The fact remains, Your Honor, that this settlement is
15 fair. It's reasonable. It's in the best interest of the
16 estate. And we would respectfully request that the Court
17 grant the motion.

18 THE COURT: All right. Thank you. Well, I
19 appreciate all the arguments and evidence I have heard today.
20 I'm going to be brief in my ruling here, but I reserve the
21 right to supplement in a more fulsome written order, which I'm
22 going to instruct Mr. Morris to submit. I am approving the
23 motion to compromise the HarbourVest claim today, and I guess
24 subsumed in that is granting the motion to allow their claim
25 for 3018 voting purposes.

1 I in all ways find this compromise to meet the required
2 legal standard set forth in such cases as *TMT Trailer Ferry*,
3 *AWECO*, and *Foster Mortgage*, numerous other Fifth Circuit
4 cases.

5 First, I'm going to specifically say for the record that I
6 found both witnesses today, Mr. Seery and Mr. Pugatch, to be
7 very credible. Very credible testimony and meaningful
8 testimony was provided to the Court today. And based on that
9 testimony, I find, first, that this compromise was the product
10 of arm's-length negotiations. It was a hard-fought
11 negotiation, as far as I'm concerned. The Debtor objected to
12 these numerous HarbourVest proofs of claim. The Debtor did
13 not want to allow HarbourVest a significant claim for voting
14 purposes. I duly note the statements made in the disclosure
15 statement before this compromise was reached suggesting, you
16 know, the Debtor didn't think HarbourVest should have a large
17 claim.

18 That is consistent with everything I typically see in a
19 bankruptcy case when there's a claim objection. The objector
20 vehemently denies the claimant should have a proof of claim,
21 and then people sit down and think about the risks and rewards
22 of litigating things. And I believe very fervently that's
23 what happened here. There were good-faith, arm's-length
24 negotiations that resulted in this proposed compromise.

25 I find the compromise -- and I'll add to that point, on

1 the good-faith point, I find nothing sinister or improper
2 about the fact that the compromise includes a commitment of
3 HarbourVest to vote in favor of the plan. Again, we see this
4 a lot. You know, there's even a buzz word that doesn't even
5 exist in the Bankruptcy Code: "plan support agreement." You
6 know, we see those a lot -- you know, oftentimes negotiated
7 before the case, but sometimes after. You know, it may be
8 improper in certain situations, but there was nothing here
9 that troubles me about that component of the compromise.

10 I find the compromise to meet the paramount interest of
11 creditors here. Notably, we have very large creditors in this
12 case who have not objected. The *Foster Mortgage* case from the
13 Fifth Circuit tells me I am supposed to consider support or
14 opposition of creditors. No opposition of UBS. No opposition
15 of the Redeemer Committee Crusader Fund. No opposition from
16 Josh Terry or Acis. No opposition from Daugherty.

17 But moreover, when considering the paramount interest of
18 creditors, I find this compromise to be in all ways fair and
19 equitable and in the best interest of the estate, and
20 certainly within the range of reasonableness. The evidence
21 showed that HarbourVest asserted over \$300 million. Over \$300
22 million. Granted, that was based on all kinds of legal
23 theories that would be contested and expensive to litigate,
24 but the evidence also showed that they invested over \$70
25 million. You know, close to \$75 million. I forget the exact

1 number. \$75 or \$80 million, somewhere in that range. And now
2 the credible evidence is that investment is worth about \$22
3 million.

4 So, certainly, while the claim may not have, at the
5 ultimate end of the day in litigation, resulted in a \$300
6 million proof of claim, certainly, certainly there were strong
7 arguments for a very sizeable claim, more than this compromise
8 amount. So it's certainly fair and equitable and reasonable
9 when considering the complexity and duration of further
10 litigation, the risks and rewards, the expense, delay, and
11 likely success.

12 A couple of last things I'm going to say are these. I
13 understand, you know, there is vehement disagreement on the
14 part of our Objectors to the notion that Highland might have
15 caused a \$50 million loss to HarbourVest. But I will tell
16 you, for what it's worth -- I want the record clear that this
17 is part of my evaluation of the reasonableness of the
18 settlement -- my reaction is that, indeed, Highland's
19 litigation strategy in the Acis case caused HCLOF to lose a
20 huge portion of its value, to the detriment of HarbourVest.
21 You know, whether all evidence at the end of the day would
22 convince me of that, I don't know, but that's -- that is
23 definitely this judge's impression.

24 I'm very sympathetic to HarbourVest. It appears in all
25 ways from the record, not just the record before me today, but

1 the record in the Acis case that I presided over, that
2 Highland back then would have rather spent HarbourVest's
3 investment for HCLOF legal fees than let Josh Terry get paid
4 on his judgment. They were perfectly happy to direct the
5 spending of other people's money, is what the record suggested
6 to me.

7 And then, you know, I have alluded to this very recently,
8 as recently as last Friday: I can still remember Mr.
9 Ellington sitting on the witness stand over here to my left
10 and telling the Court, telling the parties under oath, that
11 HarbourVest -- he didn't use its name back then, okay? For
12 the first phase of the Acis case, or most of the Acis case, we
13 were told it was an investor from Boston. And at some point
14 someone even said their name begins with H. I mean, it seemed
15 almost humorous. But Mr. Ellington said it was they,
16 HarbourVest, the undisclosed investor, who was insistent that
17 the Acis name was toxic, and so that's what all of this had
18 been about: the rebranding, the wanting to extract or move
19 things away from Acis.

20 So, you know, I have heard for the -- well, at least the
21 second time today, from Mr. Pugatch, what I perceive to be
22 very credible testimony that that's just not the way it
23 happened.

24 And I guess the last thing I want to say here today, and
25 you know, I guess I have multiple reasons for saying this, not

1 just in connection with approving the settlement, you know,
2 I've heard about how the Acis CLOs, the HCLOF CLOs have lost,
3 you know, a crazy amount of value, that they underperform in
4 the market, that, you know, during the Acis/Brigade tenure
5 and, you know, they should have been reset. You know, I hope
6 those who have not been around as long as some of us in this
7 whole saga know that the -- Mr. Terry, Mr. Phelan, I think
8 Brigade, they all desperately wanted to reset these things,
9 but it was HCLOF, I believe directed by Highland, that wanted
10 to redeem, wanted to liquidate, take the pot of money,
11 warehouse it, and then do their own thing.

12 And there was, I think, from my vantage point, a
13 monumental effort to try to get everyone to the table to do
14 reasonable resets that would be good for the stakeholders at
15 HCLOF and be good for the creditors of Acis, including Josh
16 Terry. That was always the balancing act that most of us were
17 focused on during the Acis bankruptcy. But Highland, I
18 believe, directing HCLOF's strategy, just did not want the
19 resets to happen.

20 So, again, part of me, I suppose, just wants to make the
21 record clear on something that I fear not everyone is clear
22 about. And I say that because the comment was made that the
23 injunctions, the preliminary injunctions sought by the Acis
24 trustee caused the plummet in value, and I think that's just
25 not an accurate statement. I think litigation strategies are

1 what caused the plummet in value, and that's why I think
2 ultimately HarbourVest would potentially have a meritorious
3 claim here in a significant amount if this litigation were to
4 go forward.

5 So, I approve this under 9019. And again, Mr. Morris,
6 you'll upload an order.

7 It is now 1:41, so let's as quickly as possible hear the
8 other motion that I don't think had any objections. Mr.
9 Morris?

10 MR. MORRIS: Your Honor, just -- yes, just very
11 quickly, just four things.

12 With respect to the order, I just want to make it clear
13 that we are going to include a provision that specifically
14 authorizes the Debtor to engage in -- to receive from
15 HarbourVest the asset, you know, the HCLOF interest, and that
16 that's consistent with its obligations under the agreement.

17 The objection has been withdrawn, I think the evidence is
18 what it is, and we want to make sure that nobody thinks that
19 they're going to go to a different court somehow to challenge
20 the transfer. So I just want to put the Court on notice and
21 everybody on notice that we are going to put in a specific
22 finding as to that.

23 THE COURT: All right. Fair --

24 MR. MORRIS: Number two is --

25 THE COURT: Fair enough. I do specifically approve

1 that mechanism and find it is appropriate and supported by the
2 underlying agreements.

3 And just so you know, I spent some time noodling this
4 yesterday before I knew it was going to be settled, so I'm not
5 just casually doing that. I think it's fine.

6 Okay. Next?

7 MR. MORRIS: Thank you very much, Your Honor. Number
8 two, with respect to the motion to pay, there is no objection.
9 If we can just submit an order. Or if Your Honor has other
10 guidance for us, we're happy to take it.

11 THE COURT: Okay. Does anyone have anything they
12 want to say about that motion?

13 Again, I looked at it. I didn't see any objections. I
14 didn't see any problem with it. It's -- you know, you're
15 going through this exercise because of the earlier protocol
16 order.

17 MR. MORRIS: Correct.

18 THE COURT: All right. Well, if there's nothing,
19 then, I will approve that, finding there is good cause to
20 grant that motion.

21 MR. MORRIS: Okay.

22 THE COURT: All right. Is the only other
23 housekeeping matter --

24 MR. MORRIS: I --

25 THE COURT: -- we have the contempt motion?

1 MR. MORRIS: It is, and I do -- I do have to point
2 out how troubled the Debtor is to learn that Mr. Dondero was
3 still receiving documents from Highland as late as this
4 morning. It's got to be a violation of both the TRO -- I
5 guess it's now the preliminary injunction.

6 I would respectfully request -- I know that time is what
7 it is -- but maybe Mr. Dondero can answer now where he got the
8 document, who he got the document from, what other documents
9 he's gotten from the Debtor since Your Honor ordered him not
10 to communicate with the Debtor's employees.

11 This is not saying hello in the hallway. I mean, this is
12 just -- it is really troubling, Your Honor, and it's why we
13 need the contempt motion heard as soon as possible.

14 THE COURT: Well, Mr. Wilson, do you want to address
15 that? I think the words I heard were that you just got the
16 document this morning, and you got it from Mr. Dondero, but we
17 don't know where and when Mr. Dondero got it. Mr. Wilson, are
18 you there?

19 MR. LYNN: I'm afraid I'm back, Your Honor.

20 THE COURT: Okay.

21 MR. LYNN: I am not sure whether Mr. Dondero had it
22 in his files from some -- from back before he was asked not to
23 communicate with members or with employees of the Debtor. I
24 believe -- I believe he's with us, though I don't think he's
25 available by video.

1 Are you there, Mr. Dondero?

2 THE COURT: We can't hear you, Mr. Dondero.

3 MR. DONDERO: Judge?

4 THE COURT: Oh, go ahead.

5 MR. DONDERO: Can you hear me now?

6 THE COURT: Yes.

7 MR. DONDERO: Yes, I -- I -- when I moved offices, I
8 found it in a stack of paper, and --

9 MR. LYNN: I understand it shows that his microphone
10 is working.

11 THE COURT: Okay. Go ahead.

12 MR. DONDERO: Can you hear me?

13 THE COURT: Yes, go ahead.

14 MR. DONDERO: Yeah, I -- I'm sitting in new offices.
15 I've got everything in boxes. I was going through everything
16 yesterday, and I found those emails in a stack of papers and I
17 sent them over because I thought they would be relevant
18 relative to Seery's initial impression.

19 THE COURT: Okay. Well, let's talk about the timing
20 of this hearing. Mr. Morris, I'm going to -- I'm going to ask
21 you why --

22 MR. LYNN: Michael Lynn, Your Honor. I don't want to
23 waste the Court's time. We have not made available anything
24 to the Court objecting to the expedited hearing on the
25 contempt motion. We've been here.

1 I would say to Your Honor that if Mr. Dondero is indeed in
2 contempt, or was in contempt toward the motion, which has
3 nothing to do with the document that was presented as Dondero
4 Exhibit N, there is no need to hear this on an expedited
5 basis.

6 Every time we turn around, Your Honor, the Debtor is
7 asking that something be heard on an expedited basis. And we
8 have not opposed that. We have not fought that, to speak of,
9 to date. But this is getting a little ridiculous. We're
10 within days of confirmation of the Debtor's plan, and it is
11 simply a means of causing pain and suffering to Mr. Dondero
12 and those who are working with him and for him. And he does
13 have employees at NexPoint who are assisting him.

14 So we most strongly object to being put on a schedule
15 where we are expected to get a response to the contempt motion
16 on file by Monday, today being Thursday, and a weekend
17 intervening. And we strongly object to any setting of this
18 contempt motion on Tuesday or Wednesday. It is absurd, and it
19 is done solely, solely, Your Honor, to cause pain.

20 THE COURT: All right.

21 MR. MORRIS: Your Honor, if I may?

22 THE COURT: Please.

23 MR. MORRIS: Just very briefly, we had a hearing the
24 other day. The evidence is the exact same. The evidence is
25 crystal clear that the violations are meaningful, they're

1 substantial, and they are repeated.

2 After the TRO was entered into, Mr. Dondero and only Mr.
3 Dondero chose to interfere with the Debtor's business. Mr.
4 Dondero and only Mr. Dondero chose to communicate with the
5 Debtor's employees, not about saying hello in the hallway but
6 about coordinating a legal defense strategy against the
7 Debtor.

8 The need is immediate, Your Honor, and I would
9 respectfully request that the hearing be set for Tuesday or
10 Wednesday. They've had this motion now since the 7th of
11 January. They had a full evidentiary hearing, so they know
12 most of the evidence that's going to be presented. They have
13 a whole team of -- they have an army of lawyers, Your Honor,
14 and half a dozen firms working on behalf of Mr. Dondero and
15 his interests. For him to cry here, for him to cry that this
16 is too much is really -- it's obscene. It just is.

17 THE COURT: All right. I'm going to say a couple --

18 MR. LYNN: That is absurd.

19 THE COURT: I'm going to say a couple of things. One
20 is that I -- well, the one time I remember getting reversed
21 for holding someone in contempt of court, the District Court
22 felt like I had not given enough notice of that. The District
23 Courts, what they think is reasonable notice, is sometimes
24 very different from what the bankruptcy judges think. We're
25 used to going very lickety-split fast in the bankruptcy

1 courts. And the Courts of Appeals, District Court, Courts of
2 Appeals obviously, for good reason, are very concerned about
3 due process in this kind of context. So I'm sensitive to
4 that.

5 I'm also sensitive to the fact that it is monetary damages
6 that are being sought here to purge the contempt. Okay? The
7 shifting of attorneys' fees is basically what I understand is
8 being sought at this point. You know, we have a preliminary
9 injunction halting behavior at this point, and so I think
10 that's another reason I'm hesitant to give an emergency
11 hearing. I feel like monetary damages can wait and we can
12 give 21-plus days' notice of the hearing.

13 But I'm going to throw this out there as well. If I do
14 feel like there is a showing of contempt, if I do feel like
15 the phone -- as I told you the other day, I'm very, very
16 fixated on the phone that may have been destroyed or thrown
17 away, maybe at Mr. Dondero's suggestion. I mean, the
18 potential monetary sanction here may be very, very large if
19 the evidence plays out in the way I fear it might play out.
20 So I need to make sure everybody has adequate time to prepare
21 for that hearing and make sure I get all the evidence I need
22 to see. All right? Contempt of court is very, very, very,
23 very serious, and I don't think anyone would deny that.

24 So, with that, it was filed what day? January 4th? Is
25 that what I heard? Or --

1 MR. MORRIS: January 7th, I believe, Your Honor.

2 THE COURT: January 7th? All right. Well, Traci,
3 are you there? Hopefully, you're not in a hunger coma at this
4 point.

5 THE CLERK: I am here.

6 THE COURT: Okay. We have -- we're going to have to
7 go to that first week of February, right? Because we've got
8 the confirmation hearing that, you know, late in January, and
9 then --

10 THE CLERK: Yes. Uh-huh.

11 THE COURT: Okay. Do you have an available date to
12 give right now?

13 THE CLERK: How about -- if you're willing to hear
14 them on Friday, February 5th.

15 THE COURT: Okay. I can do that. February 5th at
16 9:30. Any -- anybody want to argue about that?

17 MR. MORRIS: Thank you, Your Honor. That's
18 acceptable to the Debtor.

19 THE COURT: Okay. Mr. Lynn, is that good with you?

20 MR. LYNN: We'll do that, Your Honor. I would say,
21 by the way, that I'll be happy to buy Mr. Seery, out of my own
22 pocket, five cell phones, which ought to make up for the one
23 that was lost, though I recognize that those cell phones will
24 not have on them the privileged information, the conversations
25 between his lawyers and Mr. Dondero that I imagine he was

1 looking forward to seeing.

2 THE COURT: Well, I wouldn't want him to see that
3 information, but I do think he's entitled to any nonprivileged
4 information, texting, or calls that are on that phone. So,
5 again, I'm either going to hear good explanations for that or
6 not, but it's something very concerning to me.

7 All right. So we have a game plan.

8 I'm going to ask, Did we have good-faith negotiations
9 between Dondero and the Committee and anything positive to
10 report? I'll ask Mr. Lynn and Mr. Clemente to weigh in.

11 MR. CLEMENTE: Yes, Your Honor. I'll go first, Your
12 Honor. Mr. Lynn and I have exchanged several emails over the
13 weekend, and the message that I sent to Mr. Lynn was very
14 clear. There had been a term sheet that Mr. Seery had sent
15 back to Mr. Dondero. I had asked Mr. Lynn to take a pencil
16 out and be very specific as to what it was Mr. Dondero was
17 prepared to do in connection with the pot plan. I instructed
18 him that some of the issues that the Committee still has is
19 obviously the overall value, along with the concept that's
20 signing up to a promise from Mr. Dondero to comply with
21 (indiscernible) as part of that value. As Your Honor may
22 understand, the Committee is obviously very skeptical of Mr.
23 Dondero's future performance under an agreement that he enters
24 into.

25 Those are but a couple of issues, Your Honor, that I

1 advised Mr. Lynn were very concerning to the Committee. And I
2 suggested to him that if he wanted to move things forward, the
3 best way to do it would be to come to us with a fulsome term
4 sheet that explained exactly what it was in clear and precise
5 detail that Mr. Dondero was proposing, and that would be the
6 best way to move the process forward, Your Honor.

7 THE COURT: All right. Mr. Lynn, anything to add to
8 that?

9 MR. LYNN: Well, Your Honor, my experience in
10 negotiations is that it is useful to agree on substantive
11 terms, or at least be in the ballpark, before term sheets are
12 exchanged. Long ago, a term sheet was prepared and presented
13 to the Committee. Ultimately, I think it was rejected, though
14 I don't know if we ever received a formal rejection.

15 I explained in my emails, which I'm happy to share with
16 the Court if Your Honor wants to see them, why I was reluctant
17 to try to put into a term sheet form the proposal that I
18 suggested to Mr. Clemente. As I said, I'm more than happy to
19 provide you with that email chain and let you form your own
20 judgment, Your Honor, as to whether we're proceeding in good
21 faith.

22 THE COURT: All right. Well I'm not going to ask --

23 MR. POMERANTZ: Your Honor? Your Honor, this is Jeff
24 Pomerantz.

25 THE COURT: -- to see any of that. Mr. Pomerantz?

1 MR. POMERANTZ: May I just be heard real quickly?

2 THE COURT: Sure.

3 MR. POMERANTZ: Your Honor, we also took Your Honor's
4 comments to heart. We, Mr. Seery and I, had an over-an-hour
5 conversation with Mr. Lynn and with Mr. Bonds. We provided
6 them with our thoughts as to what they needed to do in order
7 to move forward. Of course, it's not really the Debtor to
8 agree. It's the creditors to agree. But as Mr. Seery has
9 testified many times before and as I have told the Court, we
10 would support a plan that the Committee and Mr. Dondero could
11 get behind.

12 So we again -- I'm not going to divulge the nature of
13 those communications, but we suggested several things that Mr.
14 Dondero could do in order to move the ball forward, and
15 unfortunately, we have not seen any of those things done thus
16 far. So we are, at this point, not optimistic that there will
17 be a grand bargain plan.

18 THE COURT: All right.

19 MR. DONDERO: Your Honor, could I comment for a
20 second? This is Mr. Dondero.

21 THE COURT: If you and your counsel want you to
22 comment, you can comment.

23 MR. DONDERO: I'd love to do a pot plan. I would
24 love to reach some kind of settlement and everybody move on
25 with their lives. The estate started with \$360 million of

1 third-party assets and \$90 million of notes. The \$360 million
2 of third-party assets are down to \$130 million.

3 MR. POMERANTZ: Again, Your Honor, I must interrupt.
4 I did this at the last hearing, and it's not my practice to
5 interrupt, but issues regarding what the value is or not, it's
6 going to require a response, and that's not really before Your
7 Honor. I think before Your Honor is --

8 MR. DONDERO: Okay.

9 MR. POMERANTZ: -- have there been negotiations?
10 Have they been in good faith? If Mr. Dondero wanted to
11 address that, that's fine, but I object to having any
12 discussion at this point, especially with Mr. Dondero not even
13 under oath, on what the nature of the value of the assets and
14 why they have changed and what not.

15 THE COURT: Well, --

16 MR. POMERANTZ: It's just not appropriate.

17 THE COURT: I understand --

18 MR. DONDERO: Okay. Can I --

19 THE COURT: Stop.

20 MR. DONDERO: Can I -- can I finish?

21 THE COURT: Let me please respond to that. I
22 understand your concern, but I've heard from Mr. Seery
23 testimony many months ago about the value plummeting during
24 the case. And I asked why, and I got some explanations. This
25 is not evidence. This is just, you know, this is not going to

1 be binding in any way. Mr. Dondero can speak as to what he
2 thinks, you know, the situation is.

3 Go ahead, Mr. Dondero.

4 MR. DONDERO: Okay. I'm not trying to fixate on the
5 numbers. And as far as the third-party assets are, we would
6 be willing to pay -- I would be willing to pay for those. I'd
7 be willing to pay more, and even some value for the affiliate
8 notes that were really part of compensation agreements
9 throughout the history of Highland and avoid the POC
10 arguments. I'd be willing to pay for the assets and I'd be
11 willing to pay even more than that.

12 I have no transparency in terms of what the assets are,
13 and there's no fulsome discussion in terms of, well, here are
14 the assets, here are the notes, here's what we think the
15 values are, can you get to this number? It's just a -- you --
16 the -- it -- I don't view there is good-faith negotiations
17 going on because it's always just a: You need to put a big
18 number on a piece of paper; otherwise, you're going to get run
19 over.

20 And there's no back and forth going on, but it's not due
21 to a lack of willingness on my part. And maybe there needs to
22 be a committee set up. Maybe there needs to be, I don't know,
23 a mediator or an examiner or somebody to try and push through
24 the pot plan, but there's nothing happening. People are not
25 returning the judge's calls, I mean, Mr. Lynn's calls, or my

1 calls. They're -- there's -- despite efforts of our -- of my
2 own and a willingness of my own, there's no negotiations of
3 any sort going on at the moment.

4 THE COURT: All right. I don't want anyone to
5 respond to that. I know people have different views of what's
6 going on. But let me just say a couple of things, and then
7 we're done.

8 We do have a Committee in this case. We have a Committee
9 with very sophisticated members and very sophisticated
10 professionals. Okay? That's who I wanted you to be talking
11 to before the end of the day Tuesday.

12 We have had co-mediators in this case. Okay? And, you
13 know, I identified very sophisticated human beings for that
14 role. Okay? And in fact, there ended up being settlements
15 that flowed out of the co-mediator process.

16 We're now 15 months into the case. There are major,
17 significant compromises now: HarbourVest, UBS, Acis, Terry,
18 and Redeemer Committee. I hate to use a worn-out metaphor,
19 but the train is leaving the station. We've got confirmation.
20 I've pushed out two weeks. I mean, you all are either going
21 to get there in the next few days or we're just going to go
22 forward with I think what everyone, you know, would rather be
23 a pot plan, but if we can't get there, we're just going to
24 have to consider the plan that's on the table now. Okay?

25 You know, the Committee, again, they're sophisticated.

1 They can compare apples to oranges and decide whether the plan
2 on the table, with its risks of future litigation and
3 recoveries, whether it's better or worse than whatever
4 consideration you're offering, Mr. Dondero.

5 And you know, as we all know, there is distrust here,
6 there, and everywhere among these parties. So I can totally
7 understand them, you know, taking a hard line: We either get
8 all cash or we're just not going to mess with it. We don't
9 want to risk broken promises. We'd rather just do litigation.

10 So, anyway, that's as much as I'm going to say except I am
11 going to further direct good-faith negotiations. It sounds
12 like to me a written term sheet might be the appropriate next
13 step, given where I've heard things are at the moment. But,
14 you know, I guess we don't have any hearings between now and
15 the 26th, right? No Highland hearings that I can think of
16 between now and the 26th.

17 MR. POMERANTZ: I don't think so.

18 MR. MORRIS: I think that's correct, Your Honor.

19 THE COURT: So you have all this time --

20 MR. MORRIS: At the moment.

21 THE COURT: You have all this time to negotiate and
22 simultaneously get ready for the confirmation hearing without
23 any other battles. So I know you will use the time well.

24 All right. We're adjourned.

25 THE CLERK: All rise.

1 MR. BONDS: Thank you, Your Honor.

2 (Proceedings concluded at 2:04 p.m.)

3 --oOo--

20 CERTIFICATE

21 I certify that the foregoing is a correct transcript from
22 the electronic sound recording of the proceedings in the
above-entitled matter.

23 **/s/ Kathy Rehling**

01/16/2021

24 _____
25 Kathy Rehling, CETD-444
Certified Electronic Court Transcriber

Date

005442

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005445




CLERK, U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS

ENTERED

THE DATE OF ENTRY IS ON
THE COURT'S DOCKET

The following constitutes the ruling of the court and has the force and effect therein described.

Signed January 20, 2021


United States Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In re:

HIGHLAND CAPITAL MANAGEMENT, L.P.,¹

Debtor.

§
§
§
§
§
§

Chapter 11

Case No. 19-34054-sgj11

ORDER APPROVING DEBTOR'S SETTLEMENT
WITH HARBOURVEST (CLAIM NOS. 143, 147, 149, 150, 153, 154) AND
AUTHORIZING ACTIONS CONSISTENT THEREWITH

This matter having come before the Court on *Debtor's Motion for Entry of an Order Approving Settlement with HarbourVest (Claim Nos. 143, 147, 149, 150, 153, 154) and Authorizing Actions Consistent Therewith* [Docket No. 1625] (the "Motion"),² filed by Highland Capital Management, L.P., the debtor and debtor-in-possession (the "Debtor") in the above-captioned chapter 11 case (the "Bankruptcy Case"); and this Court having considered (a) the

¹ The Debtor's last four digits of its taxpayer identification number are (6725). The headquarters and service address for the above-captioned Debtor is 300 Crescent Court, Suite 700, Dallas, TX 75201.

² Capitalized terms used but not otherwise defined herein have the meanings ascribed to them in the Motion.



Motion; (b) the *Declaration of John A. Morris in Support of the Debtor's Motion for Entry of an Order Approving Settlement with HarbourVest (Claim Nos. 143, 147, 149, 150, 153, 154) and Authorizing Actions Consistent Therewith* [**Docket No. 1631**] (the "Morris Declaration"), and the exhibits annexed thereto, including the Settlement Agreement attached as **Exhibit "1"** (the "Settlement Agreement"); (c) the arguments and law cited in the Motion; (d) *James Dondero's Objection to Debtor's Motion for Entry of an Order Approving Settlement with HarbourVest* [**Docket No. 1697**] (the "Dondero Objection"), filed by James Dondero; (e) the *Objection to Debtor's Motion for Entry of an Order Approving Settlement with HarbourVest (Claim Nos. 143, 147, 149, 150, 153, 154) and Authorizing Actions Consistent Therewith* [**Docket No. 1706**] (the "Trusts' Objection"), filed by the Dugaboy Investment Trust ("Dugaboy") and Get Good Trust ("Get Good," and together with Dugaboy, the "Trusts"); (f) *CLO Holdco's Objection to HarbourVest Settlement* [**Docket No. 1707**] (the "CLOH Objection" and collectively, with the Dondero Objection and the Trusts' Objection, the "Objections"), filed by CLO Holdco, Ltd.; (g) the *Debtor's Omnibus Reply in Support of Debtor's Motion for Entry of an Order Approving Settlement with HarbourVest (Claim Nos. 143, 147, 149, 150, 153, 154), and Authorizing Actions Consistent Therewith* [**Docket No. 1731**] (the "Debtor's Reply"), filed by the Debtor; (h) the *HarbourVest Reply in Support of Debtor's Motion for Entry of an Order Approving Settlement with HarbourVest and Authorizing Actions Consistent Therewith* [**Docket No. 1734**] (the "HarbourVest Reply"), filed by HarbourVest 2017 Global Fund L.P., HarbourVest 2017 Global AIF L.P., HarbourVest Dover Street IX Investment L.P., HV International VIII Secondary L.P., HarbourVest Skew Base AIF L.P., and HarbourVest Partners L.P. (collectively, "HarbourVest"); (i) the testimonial and documentary evidence admitted into evidence during the hearing held on January 14, 2021 (the "Hearing"), including assessing the credibility of the witnesses; and (j) the

arguments made during the Hearing; and this Court having jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334; and this Court having found that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2); and this Court having found that venue of this proceeding and the Motion in this District is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and this Court having found that the relief requested in the Motion is in the best interests of the Debtor's estate, its creditors, and other parties-in-interest; and this Court having found the Settlement Agreement fair and equitable; and this Court having analyzed, for the reasons stated on the record, (1) the probability of success in litigating the claims subject to the Settlement Agreement, with due consideration for the uncertainty in fact and law, (2) the complexity and likely duration of litigation and any attendant expense, inconvenience, and delay, and (3) all other factors bearing on the wisdom of the compromise, including: (i) the best interests of the creditors, with proper deference to their reasonable views, and (ii) the extent to which the settlement is truly the product of arms-length bargaining, and not of fraud or collusion; and this Court having found that the Debtor's notice of the Motion and opportunity for a hearing on the Motion were appropriate under the circumstances and that no other notice need be provided; and this Court having determined that the legal and factual bases set forth in the Motion establish good cause for the relief granted herein; and upon all of the proceedings had before this Court; and after due deliberation and sufficient cause appearing therefor, it is hereby **ORDERED** that:

1. The Motion is **GRANTED** as set forth herein.
2. All objections to the Motion are overruled.
3. The Settlement Agreement, attached hereto as **Exhibit 1**, is approved in all respects pursuant to Rule 9019 of the Federal Rules of Bankruptcy Procedure.

4. All objections to the proofs of claim subject to the Motion³ are overruled as moot in light of the Court's approval of the Settlement Agreement.

5. The Debtor, HarbourVest, and all other parties are authorized to take any and all actions necessary and desirable to implement the Settlement Agreement without need of further approval or notice.

6. Pursuant to the express terms of the *Members Agreement Relating to the Company*, dated November 15, 2017, HarbourVest is authorized to transfer its interests in HCLOF to a wholly-owned and controlled subsidiary of the Debtor pursuant to the terms of the *Transfer Agreement for Ordinary Shares of Highland CLO Funding, Ltd.* without the need to obtain the consent of any party or to offer such interests first to any other investor in HCLOF.

7. The Court shall retain exclusive jurisdiction to hear and determine all matters arising from the implementation of this Order.

###End of Order###

³ This includes the *Debtor's First Omnibus Objection to Certain (A) Duplicate Claims; (B) Overstated Claims; (C) Late-Filed Claims; (D) Satisfied Claims; (E) No-Liability Claims; and (F) Insufficient-Documentation Claims [Docket No. 906]*.

EXHIBIT 1

SETTLEMENT AGREEMENT

This Settlement Agreement (the “Agreement”) is entered into as of December 23, 2020, between Highland Capital Management, L.P. (the “Debtor”), on the one hand, and HarbourVest 2017 Global Fund L.P., HarbourVest 2017 Global AIF L.P., HarbourVest Dover Street IX Investment L.P., HV International VIII Secondary L.P., HarbourVest Skew Base AIF L.P., and HarbourVest Partners L.P. (each, a “HarbourVest Party,” and collectively, “HarbourVest”), on the other hand. Each of the foregoing are sometimes referred to herein collectively as the “Parties” and individually as a “Party.”

RECITALS

WHEREAS, on October 16, 2019 (the “Petition Date”), the Debtor filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code (the “Bankruptcy Case”) in the Bankruptcy Court for the District of Delaware, Case No. 19-12239 (CSS) (the “Delaware Bankruptcy Court”);

WHEREAS, on December 4, 2019, the Delaware Bankruptcy Court entered an order transferring venue of the Debtor’s case to the Bankruptcy Court for the Northern District of Texas, Dallas Division, Case No. 19-34054-sgj (the “Bankruptcy Court”);

WHEREAS, prior to the Petition Date, HarbourVest invested in Highland CLO Funding, Ltd. f/k/a Acis Loan Funding, Ltd. (“HCLOF”) and acquired an a 49.98% ownership interest in HCLOF (the “HarbourVest Interests”);

WHEREAS, the portfolio manager for HCLOF is Highland HCF Advisor, Ltd., a subsidiary of the Debtor;

WHEREAS, on April 8, 2020, HarbourVest filed proofs of claim in the Bankruptcy Case, which are listed on the Debtor’s claims register as claim numbers 143, 147, 149, 150, 153, and 154 (the “HarbourVest Claims”), asserting claims against the Debtor relating to its investment in HCLOF;

WHEREAS, on July 30, 2020, the Debtor filed the *Debtor’s First Omnibus Objection to Certain (a) Duplicate Claims; (b) Overstated Claims; (c) Late-Filed Claims; (d) Satisfied Claims; (e) No Liability Claims; and (f) Insufficient-Documentation Claims* [**Docket No. 906**], in which the Debtor objected to the HarbourVest Claims;

WHEREAS, on September 11, 2020, HarbourVest filed the *HarbourVest Response to Debtor’s First Omnibus Objection to Creation (a) Duplicate Claims; (b) Overstated Claims; (c) Late-Filed Claims; (d) Satisfied Claims; (e) No Liability Claims; and (f) Insufficient-Documentation Claims* [**Docket No. 1057**] (the “HarbourVest Response”);

WHEREAS, on October 18, 2020, HarbourVest filed the *Motion of HarbourVest Pursuant to Rule 3018(a) of the Federal Rules of Bankruptcy Procedure for Temporary Allowance of Claims for Purposes of Voting to Accept or Reject the Plan* [**Docket No. 1207**] (the “3018 Motion” and together with the HarbourVest Response, the “HarbourVest Pleadings”);

WHEREAS, in the HarbourVest Pleadings, HarbourVest asserted, among other things, that the HarbourVest Claims included claims against the Debtor arising from fraudulent inducement, fraudulent concealment, fraudulent misrepresentation, breach of fiduciary duty, breach of securities laws, and misuse of assets and sought damages in excess of \$300,000,000;

WHEREAS, the Debtor disputes the HarbourVest Claims;

WHEREAS, on November 24, 2020, the Debtor filed the *Fifth Amended Plan of Reorganization for Highland Capital Management, L.P.* [**Docket No. 1472**] (as amended, the “Plan”).¹

WHEREAS, the Parties desire to enter into this Agreement which incorporates, formalizes, and finalizes the full and final resolution of the HarbourVest Claims and HarbourVest Pleadings; and

WHEREAS, this Agreement will be presented to the Bankruptcy Court for approval pursuant to **Federal Rule of Bankruptcy Procedure 9019** (“Rule 9019”).

NOW THEREFORE, in consideration of the above recitals, the covenants, conditions, and promises made herein, and other good and valuable consideration, the receipt of which is hereby acknowledged, the Parties agree as follows:

1. Settlement of Claims.

(a) In full and complete satisfaction of the HarbourVest Claims, HarbourVest will receive:

(i) an allowed, nonpriority general unsecured claim in the aggregate amount of \$45,000,000 (the “Allowed GUC Claim”); and

(ii) an allowed subordinated claim in the aggregate amount of \$35,000,000 (the “Allowed Subordinated Claim” and together with the Allowed GUC Claim, the “Allowed Claims”).

(b) On the Effective Date, HarbourVest will transfer all of its rights, title, and interest in the HarbourVest Interests to the Debtor or its nominee pursuant to the terms of the *Transfer Agreement for Ordinary Shares of Highland CLO Funding, Ltd.*, attached hereto as Exhibit A (the “Transfer Agreements”) and the Debtor or its nominee will become a shareholder of HCLOF with respect to the HarbourVest Interests. The terms of the Transfer Agreements are incorporated into this Agreement by reference.

2. Releases.

(a) Upon the Effective Date, and to the maximum extent permitted by law, each HarbourVest Party on behalf of itself and each of its current and former advisors, trustees, directors, officers, managers, members, partners, employees, beneficiaries, shareholders, agents,

¹ All capitalized terms used but not defined herein shall have the meanings given to them in the Plan.

participants, subsidiaries, parents, successors, designees, and assigns hereby forever, finally, fully, unconditionally, and completely releases, relieves, acquits, remises, and exonerates, and covenants never to sue, the Debtor, HCLOF, HCLOF's current and former directors, and the Debtor's current and former advisors, trustees, directors, officers, managers, members, partners, employees, beneficiaries, shareholders, agents, participants, subsidiaries, parents, affiliates, successors, designees, and assigns, except as expressly set forth below (the "Debtor Released Parties"), for and from any and all claims, debts, liabilities, demands, obligations, promises, acts, agreements, liens, losses, costs and expenses (including, without limitation, attorney's fees and related costs), damages, injuries, suits, actions, and causes of action of whatever kind or nature, whether known or unknown, suspected or unsuspected, matured or unmatured, liquidated or unliquidated, contingent or fixed, at law or in equity, statutory or otherwise, including, without limitation, any claims, defenses, and affirmative defenses, whether known or unknown, including, without limitation, those which were or could have been asserted in, in connection with, or with respect to the Bankruptcy Case (collectively, the "HarbourVest Released Claims").

(b) Upon the Effective Date, and to the maximum extent permitted by law, the Debtor hereby forever, finally, fully, unconditionally, and completely releases, relieves, acquits, remises, and exonerates, and covenants never to sue (i) each HarbourVest Party and (ii) each HarbourVest Party's current and former advisors, trustees, directors, officers, managers, members, partners, employees, beneficiaries, shareholders, agents, participants, subsidiaries, parents, affiliates, successors, designees, and assigns (the "HarbourVest Released Parties"), for and from any and all claims, debts, liabilities, demands, obligations, promises, acts, agreements, liens, losses, costs and expenses (including, without limitation, attorney's fees and related costs), damages, injuries, suits, actions, and causes of action of whatever kind or nature, whether known or unknown, suspected or unsuspected, matured or unmatured, liquidated or unliquidated, contingent or fixed, at law or in equity, statutory or otherwise, including, without limitation, any claims, defenses, and affirmative defenses, whether known or unknown, which were or could have been asserted in, in connection with, or with respect to the Bankruptcy Case (collectively, the "Debtor Released Claims"); *provided, however*, that notwithstanding anything herein to the contrary, the release contained in this Section 2(b) will apply to the HarbourVest Released Parties set forth in subsection (b)(ii) only with respect to Debtor Released Claims arising from or relating to HarbourVest's ownership of the HarbourVest Interests.

(c) Notwithstanding anything in this Agreement to the contrary, the releases set forth herein will not apply with respect to (i) the Allowed Claims, (ii) the claims of Charlotte Investor IV, L.P., or (iii) the duties, rights, or obligations of any Party under this Agreement or the Transfer Agreements.

3. **Agreement Subject to Bankruptcy Court Approval.** The effectiveness of this Agreement and the Parties' obligations hereunder are conditioned in all respects on the approval of this Agreement by the Bankruptcy Court. The Parties agree to cooperate and use reasonable efforts to have this Agreement approved by the Bankruptcy Court. The "Effective Date" will be the date of an order entered by the Bankruptcy Court approving this Agreement pursuant to a motion filed under Rule 9019.

4. **Representations and Warranties.** Subject in all respects to Section 3 hereof:

(a) each HarbourVest Party represents and warrants that (i) it has full authority to enter into this Agreement and to release the HarbourVest Released Claims and has not sold, transferred, or assigned any HarbourVest Released Claim to any other person or entity, (ii) no person or entity other than such HarbourVest Party has been, is, or will be authorized to bring, pursue, or enforce any HarbourVest Released Claim on behalf of, for the benefit of, or in the name of (whether directly or derivatively) of such HarbourVest Party; and (iii) HarbourVest owns all of the HCLOF Interests free and clear of any claims or interests; and

(b) the Debtor represents and warrants to HarbourVest that (i) it has full authority to enter into this Agreement and to release the Debtor Released Claims and (ii) no person or entity other than the Debtor has been, is, or will be authorized to bring, pursue, or enforce any Debtor Released Claim on behalf of, for the benefit of, or in the name of (whether directly or derivatively) of the Debtor Party.

5. **Plan Support.**

(a) Each HarbourVest Party hereby agrees that it will (a) vote all HarbourVest Claims held by such HarbourVest Party to accept the Plan, by delivering its duly executed and completed ballots accepting the Plan on a timely basis; and (b) not (i) change, withdraw, or revoke such vote (or cause or direct such vote to be changed withdrawn or revoked); (ii) exercise any right or remedy for the enforcement, collection, or recovery of any claim against the Debtor except in a manner consistent with this Agreement or the Plan, (iii) object to, impede, or take any action other action to interfere with, delay or postpone acceptance or confirmation of the Plan; (iv) directly or indirectly solicit, propose, file, support, participate in the formulation of or vote for, any restructuring, sale of assets (including pursuant to **11 U.S.C. § 363**), merger, workout, or plan of reorganization of the Debtor other than the Plan; or (v) otherwise take any action that would in any material respect interfere with, delay, or postpone the consummation of the Plan; provided, however, that such vote may be revoked (and, upon such revocation, deemed void ab initio) by such HarbourVest Party at any time following the termination of this agreement or the occurrence of a Support Termination Event (it being understood that any termination of this agreement shall entitle each HarbourVest Party to change its vote in accordance with section 1127(d) of the Bankruptcy Code), notwithstanding any voting deadline established by the Bankruptcy Court including without limitation the January 5, 2021, 5:00 p.m. (prevailing Central Time) deadline established by the *Order Approving Form of Ballots, Voting Deadline and Solicitation Procedures* [**Docket No. 1476**].

(b) In full resolution of the 3018 Motion, HarbourVest will have a general unsecured claim for voting purposes only in the amount of \$45,000,000.

(c) The obligations of the HarbourVest Parties under this Section 5 shall automatically terminate upon the occurrence of any of the following (each a “Support Termination Event”): (i) the effective date of the Plan, (ii) the withdrawal of the Plan, (iii) the entry of an order by the Bankruptcy Court (A) converting the Bankruptcy Case to a case under chapter 7 of the Bankruptcy Code or (B) appointing an examiner with expanded powers beyond those set forth in sections 1106(a)(3) and (4) of the Bankruptcy Code or a trustee in Bankruptcy

Case, or (iv) the failure of the Court to enter an order approving the terms of this Agreement and the settlement described herein pursuant to Rule 9019 prior to confirmation of the Plan.

6. **No Admission of Liability.** The Parties acknowledge that there is a bona fide dispute with respect to the HarbourVest Claims. Nothing in this Agreement will imply, an admission of liability, fault or wrongdoing by the Debtor, HarbourVest, or any other person, and the execution of this Agreement does not constitute an admission of liability, fault, or wrongdoing on the part of the Debtor, HarbourVest, or any other person.

7. **Successors-in-Interest.** This Agreement shall be binding upon and shall inure to the benefit of each of the Parties and their successors, and assigns.

8. **Notice.** Each notice and other communication hereunder will be in writing and will be sent by email and delivered or mailed by registered mail, receipt requested, and will be deemed to have been given on the date of its delivery, if delivered, and on the fifth full business day following the date of the mailing, if mailed to each of the Parties thereto at the following respective addresses or such other address as may be specified in any notice delivered or mailed as set forth below:

HARBOURVEST

HarbourVest Partners L.P.
Attention: Michael J. Pugatch
One Financial Center
Boston, MA 02111
Telephone No. 617-348-3712
E-mail: mpugatch@harbourvest.com

with a copy (which shall not constitute notice) to:

Debevoise & Plimpton LLP
Attention: M. Natasha Labovitz, Esq.
919 Third Avenue
New York, NY 10022
Telephone No. 212-909-6649
E-mail: nlabovitz@debevoise.com

THE DEBTOR

Highland Capital Management, L.P.
300 Crescent Court, Suite 700
Dallas, Texas 75201
Attention: James P. Seery, Jr.
Telephone No.: 972-628-4100
Facsimile No.: 972-628-4147
E-mail: jpseeryjr@gmail.com

with a copy (which shall not constitute notice) to:

Pachulski Stang Ziehl & Jones LLP
Attention: Jeffrey Pomerantz, Esq.
10100 Santa Monica Blvd., 13th Floor
Los Angeles, CA 90067
Telephone No.: 310-277-6910
Facsimile No.: 310-201-0760
E-mail: jpomerantz@pszjlaw.com

9. **Advice of Counsel.** Each Party represents that it has: (a) been adequately represented by independent legal counsel of its own choice, throughout all of the negotiations that preceded the execution of this Agreement; (b) executed this Agreement upon the advice of such counsel; (c) read this Agreement, and understands and assents to all the terms and conditions contained herein without any reservations; and (d) had the opportunity to have this Agreement and all the terms and conditions contained herein explained by independent counsel, who has answered any and all questions asked of such counsel, or which could have been asked of such counsel, including, but not limited to, with regard to the meaning and effect of any of the provisions of this Agreement.

10. **Entire Agreement.** This Agreement and the Transfer Agreement contain the entire agreement and understanding concerning the subject matter of this Agreement, and supersede and replace all prior negotiations and agreements, written or oral and executed or unexecuted, concerning such subject matter. Each of the Parties acknowledges that no other Party, nor any agent of or attorney for any such Party, has made any promise, representation or warranty, express or implied, written or oral, not otherwise contained in this Agreement to induce any Party to execute this Agreement. The Parties further acknowledge that they are not executing this Agreement in reliance on any promise, representation or warranty not contained in this Agreement, and that any such reliance would be unreasonable. This Agreement will not be waived or modified except by an agreement in writing signed by each Party or duly authorized representative of each Party.

11. **No Party Deemed Drafter.** The Parties acknowledge that the terms of this Agreement are contractual and are the result of arms'-length negotiations between the Parties and their chosen counsel. Each Party and its counsel cooperated in the drafting and preparation of this Agreement. In any construction to be made of this Agreement, the Agreement will not be construed against any Party.

12. **Future Cooperation.** The Parties agree to cooperate and execute such further documentation as is reasonably necessary to effectuate the intent of this Agreement.

13. **Counterparts.** This Agreement may be executed in counterparts with the same force and effect as if executed in one complete document. Each Party's signature hereto will signify acceptance of, and agreement to, the terms and provisions contained in this Agreement. Photographic, electronic, and facsimile copies of signed counterparts may be used in lieu of the originals of this Agreement for any purpose.

14. **Governing Law; Venue; Attorneys' Fees and Costs.** The Parties agree that this Agreement will be governed by and will be construed according to the laws of the State of Texas without regard to conflict-of-law principles. Each of the Parties hereby submits to the exclusive jurisdiction of the Bankruptcy Court during the pendency of the Bankruptcy Case and thereafter to the exclusive jurisdiction of the state and federal courts located in the Northern District of Texas, Dallas Division, with respect to any disputes arising from or out of this Agreement. In any action to enforce this Agreement, the prevailing party shall be entitled to recover its reasonable and necessary attorneys' fees and costs (including experts).

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IT IS HEREBY AGREED.

HIGHLAND CAPITAL MANAGEMENT, L.P.

By: /s/ James P. Seery, Jr.
Name: James P. Seery, Jr.
Its: CEO/CRO

HarbourVest 2017 Global Fund L.P., by HarbourVest 2017 Global Associates L.P., its General Partner, by HarbourVest GP LLC, its General Partner, by HarbourVest Partners, LLC, its Managing Member

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

HarbourVest 2017 Global AIF L.P., by HarbourVest Partners (Ireland) Limited, its Alternative Investment Fund Manager, by HarbourVest Partners L.P., its Duly Appointed Investment Manager, by HarbourVest Partners, LLC, its General Partner

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

HarbourVest Dover Street IX Investment L.P., by HarbourVest Partners L.P., its Duly Appointed Investment Manager, by HarbourVest Partners, LLC, its General Partner

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

HarbourVest Partners L.P., on behalf of funds and accounts under management, by HarbourVest Partners, LLC, its General Partner

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

**HarbourVest Skew Base AIF L.P., by HarbourVest Partners (Ireland) Limited, its
Alternative Investment Fund Manager, by HarbourVest Partners L.P., its Duly Appointed
Investment Manager, by HarbourVest Partners, LLC, its General Partner**

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

**HV International VIII Secondary L.P., by HIPEP VIII Associates L.P., its General
Partner, by HarbourVest GP LLC, its General Partner, by HarbourVest Partners, LLC,
its Managing Member**

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

Exhibit A

**TRANSFER AGREEMENT
FOR ORDINARY SHARES OF
HIGHLAND CLO FUNDING, LTD.**

This Transfer Agreement, dated as of January ____, 2021 (this “**Transfer Agreement**”), is entered into by and among Highland CLO Funding, Ltd. (the “**Fund**”), Highland HCF Advisor, Ltd. (the “**Portfolio Manager**”), HCMLP Investments, LLC (the “**Transferee**”) and each of the following: HarbourVest Dover Street IX Investment L.P., HarbourVest 2017 Global AIF L.P., HarbourVest 2017 Global Fund L.P., HV International VIII Secondary L.P., and HarbourVest Skew Base AIF L.P. (collectively, the “**Transferors**”).

WHEREAS, each Transferor is the record, legal and beneficial owner of the number of ordinary shares (“**Shares**”) of the Fund set forth opposite such Transferor’s name on Exhibit A hereto (with respect to each Transferor, the “**Transferred Shares**”).

WHEREAS the Transferee is an affiliate and wholly owned subsidiary of Highland Capital Management, L.P. (“**HCMLP**”) which is one of the initial members of the Fund.

WHEREAS, each Transferor wishes to transfer and assign 100% of its rights, title and interest as a shareholder in the Fund, including the Transferred Shares (the “**Interest**”) on the terms set forth in this Transfer Agreement.

WHEREAS, subject to and in connection with the approval of that certain Settlement Agreement, dated on or about the date hereof, by and among HCMLP and the Transferors (the “**Settlement Agreement**”), the Transferee desires that the Interest be transferred to Transferee and that thereafter the Transferee will become a Shareholder and the Transferors will no longer be Shareholders.

WHEREAS, the Portfolio Manager desires to consent to such transfers and to the admission of Transferee as a Shareholder on the terms set forth herein, and the Transferors and Transferee agree to such terms.

WHEREAS, the Fund desires to amend its records to reflect the foregoing transfers.

NOW, THEREFORE, the parties hereto agree as follows:

1. Transfer of Shares and Advisory Board

- a. Each Transferor hereby transfers and assigns all of its rights, title, and interest in its Interest to the Transferee, and the Transferee wishes to be admitted to the Fund as a Shareholder.
- b. In connection with the transfer of the Interest as contemplated herein, the Transferee shall be granted the right to appoint a representative to the Fund’s advisory board (the “**Advisory Board**”) to replace the Transferors’ appointed representative to the Advisory Board.

- c. Transferee hereby assumes all of Transferor's rights and obligations in respect of the Interest effective as of the Effective Date (as defined below) and acknowledge that thereafter Transferee shall be subject to the applicable terms and provisions of the Members' Agreement dated as of November 15, 2017 (the "**Members' Agreement**"), the Articles of Incorporation adopted November 15, 2017 (the "**Articles**") and the Subscription and transfer Agreement, dated as of November 15, 2017 among each Transferor, the Fund and the Portfolio Manager (the "**Subscription Agreement**", and together with the Members' Agreement and the Articles, the "**Fund Agreements**") with respect to the Interest. Transferee does not assume any liability or responsibility for any obligations or liabilities incurred by any Transferor prior to the Effective Date of the transfer.
 - d. Following the transfer, each Transferor shall have no further rights or obligations to any party hereunder in respect of the Interest under the Fund Agreements.
 - e. This Transfer Agreement, and the parties' obligations hereunder, are conditioned in all respects on the approval by the Bankruptcy Court for the Northern District of Texas, Dallas Division pursuant to **Federal Rule of Bankruptcy Procedure 9019** of (i) this Transfer Agreement and (ii) the Settlement Agreement, and each of the parties agree that no further action shall be required from any party for the transfer of the Interest to be effective except as described herein.
2. Transferee's Representations and Warranties. The Transferee represents and warrants to the Transferors, the Portfolio Manager, and the Fund as follows:
- a. This Transfer Agreement constitutes a valid and binding obligation of the Transferee, enforceable against it in accordance with its terms;
 - b. This Transfer Agreement has been duly and validly executed and delivered by or on behalf of the Transferee and such execution and delivery have been duly authorized by all necessary trust action of the Transferee;
 - c. The Transferee acknowledges receipt of, has read, and is familiar with, the Fund's Offering Memorandum for Placing Shares dated November 15, 2017 (the "**Offering Memorandum**") and the Fund Agreements;
 - d. The Transferee hereby accepts and receives the Interest from the Transferors for investment, and not with a view to the sale or distribution of any part thereof, and the Transferee has no present intention of selling, granting participations in, or otherwise distributing the same, but subject nevertheless to any requirement of law that the disposition of the Transferee's property shall at all times be within such Transferee's control; and
 - e. The Transferee is an "Eligible U.S. Investor" as defined in the Offering Memorandum.

3. Transferors' Representations and Warranties. Each Transferor represents and warrants to the Transferee, the Portfolio Manager, and the Fund as follows:
 - a. This Transfer Agreement constitutes a valid and binding obligation of the Transferor, enforceable against it in accordance with its terms;
 - b. This Transfer Agreement has been duly authorized, and duly and validly executed and delivered by the Transferor and such execution and delivery have been duly authorized by all necessary action of the Transferor; and
 - c. As of the date hereof, the Transferor has good and valid title to the Transferor's Interest, free and clear of any liens, vesting requirements or claims by others.
4. Consent to Transfer. Based in part on the representations and warranties of the Transferors and the Transferee which are included herein, and on the terms contained herein, the Portfolio Manager and the Fund hereby consent to the transfers of the Interest, the admission of the Transferee as a Shareholder and the Transferee's appointment of a representative to the Advisory Board, the Portfolio Manager's execution of this Transfer Agreement constituting its prior written consent to the transfers of the Interest for the purposes of article 18.1 of the Articles and this Transfer Agreement constituting express notice in writing to the Fund of the assignment set out at clause 1(c) above for the purposes of the Law of Property (Miscellaneous Provisions) (Guernsey) Law, 1979 (as amended).
5. Completion: As of the date of approval by the Bankruptcy Court for the Northern District of Texas, Dallas Division pursuant to Federal Rule of Bankruptcy Procedure 9019 of (i) this Transfer Agreement and (ii) the Settlement Agreement (the "**Effective Date**"):
 - a. each Transferor shall deliver or cause to be delivered to the Transferee a transfer instrument relating to the Transferred Shares duly executed and completed by that Transferor in favor of the Transferee; and
 - b. the Transferee shall deliver to the Transferors and the Fund a duly executed and dated Adherence Agreement (as defined in the Members' Agreement).

Prior to the Effective Date the Transferee shall procure that:

 - c. the board of directors of the Fund shall hold a meeting at which the transfer of the Shares to the Transferee shall be approved and registration in the register of members of the Fund shall be effected on the Effective Date.
6. Miscellaneous.
 - a. Each of the parties hereto agree to execute any further instruments and perform any further acts which are or may become reasonably necessary to carry out the intent of this Transfer Agreement or are reasonably requested by the Portfolio Manager, the Fund or a Transferor to complete the transfer of the Interest.

- b. The parties to this Transfer Agreement acknowledge that the terms of this Transfer Agreement are the result of arms'-length negotiations between the parties and their respective counsel. Each party and its counsel cooperated in the drafting and preparation of this Transfer Agreement. In any construction to be made of this Transfer Agreement, the language or drafting of this Transfer Agreement will not be construed against any party.
- c. This Transfer Agreement shall be governed by, and construed and enforced in accordance with, the internal substantive laws of the state of Delaware, without giving effect to conflicts of law principles.
- d. The representations, warranties and covenants of the Transferors and the Transferee shall remain in full force and effect following the transfer of the Interest, and the Fund and the Portfolio Manager thereafter may rely on all such representations, warranties and covenants.
- e. This Transfer Agreement may be executed in multiple counterparts, each of which shall be deemed to be an original, but all of which together shall constitute one and the same instrument. Photographic, electronic, and facsimile copies of signed counterparts may be used in lieu of the originals of this Transfer Agreement for any purpose.
- f. Captions of sections have been added only for convenience and shall not be deemed to be a part of this Transfer Agreement.
- g. This Transfer Agreement is among the parties hereto. No Person that is not a party hereto shall have any right herein as a third-party beneficiary or otherwise except as expressly contemplated hereby.

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Exhibit A

<u>Transferee Name</u>	<u>Number of Shares</u>	<u>Percentage</u>
HarbourVest Dover Street IX Investment L.P.	54,355,482.14	71.0096%
HarbourVest 2017 Global AIF L.P.	7,426,940.38	9.7025%
HarbourVest 2017 Global Fund L.P.	3,713,508.46	4.8513%
HV International VIII Secondary L.P.	9,946,780.11	12.9944%
HarbourVest Skew Base AIF L.P.	1,103,956.03	1.4422%

EXHIBIT 11

005469

At all relevant times, HCM was headed by CEO and potential party James P. Seery (“Seery”). Seery negotiated a settlement with the several Harbourvest² entities who owned 49.98% of HCLOF. The deal had HCM (or its designee) purchasing the Harbourvest membership interests in HCLOF for \$22.5 million. Recent revelations, however, show that the sale was predicated upon a sales price that was vastly below the Net Asset Value (“NAV”) of those interests. Upon information and belief, the NAV of HCLOF’s assets had risen precipitously, but was not disclosed to Harbourvest nor to Plaintiffs.

Under the Advisers Act, Defendants have a non-waivable duty of loyalty and candor, which includes its duty not to inside trade with its own investors, *i.e.*, not to trade with an investor to which HCM and Seery had access to superior non-public information. Upon information and belief, HCM’s internal compliance policies required by the Advisers Act would not generally have allowed a trade of this nature to go forward—meaning, the trade either was approved in spite of compliance rules preventing it, or the compliance protocols themselves were disabled or amended to a level that leaves Defendants HCM and HCLOF exposed to liability. Thus, Defendants have created an unacceptable perpetuation of exposure to liability.

Additionally, Defendants are liable for a pattern of conduct that gives rise to liability for their conduct of the enterprise consisting of HCM in relation to HCFA and HCLOF, through a pattern of concealment, misrepresentation, and violations of the securities rules. In the alternative, HCFA and HCM, are guilty of self-dealing, violations of the Advisers Act, and tortious interference by (a) not disclosing that Harbourvest had agreed to sell at a price well below the current NAV, and (b) diverting the Harbourvest opportunity to themselves.

² “Harbourvest” refers to the collective of Harbourvest Dover Street IX Investment, L.P., Harbourvest 2017 Global AIF, L.P., Harbourvest 2017 Global Fund, L.P., HV International VIII Secondary, L.P., and Harbourvest Skew Base AIF, L.P. Each was a member of Defendant Highland CLO Funding, Ltd.

For these reasons, judgment should be issued in Plaintiffs' favor.

II.

PARTIES

1. Plaintiff CLO Holdco, Ltd. is a limited company incorporated under the laws of the Cayman Islands.

2. Plaintiff Charitable DAF Fund, L.P., ("DAF") is a limited partnership formed under the laws of the Cayman Islands.

3. Defendant Highland Capital Management, L.P. is a limited partnership with its principal place of business at 300 Crescent Court, Suite 700, Dallas, Texas 75201. It may be served at its principal place of business or through its principal officer, James P. Seery, Jr., or through the Texas Secretary of State, or through any other means authorized by federal or state law.

4. Defendant Highland HCF Advisor, Ltd. is a limited company incorporated under the laws of the Cayman Islands. Its principal place of business is 300 Crescent Court, Suite 700, Dallas, Texas 75201. It is a registered investment adviser ("RIA") subject to the laws and regulations of the Investment Advisers Act of 1940 (the "Adviser's Act"). It is a wholly-owned subsidiary of Highland Capital Management, L.P.

5. Nominal Defendant Highland CLO Funding, Ltd. is a limited company incorporated under the laws of the Island of Guernsey. Its registered office is at First Floor, Dorey Court, Admiral Park, St. Peter Port, Guernsey GY1 6HJ, Channel Islands. Its principal place of business is 300 Crescent Court, Suite 700, Dallas, Texas 75201.

6. Potential party James P. Seery, Jr. ("Seery") is an officer and/or director and/or control person of Defendants Highland Capital Management, L.P., Highland CLO Funding, Ltd., and Highland HCF Advisor, Ltd., and is a citizen of and domiciled in Floral Park, New York.

III.

JURISDICTION AND VENUE

7. This Court has subject matter jurisdiction over this dispute under 28 U.S.C. § 1331 as one or more rights and/or causes of action arise under the laws of the United States. This Court has supplemental subject matter jurisdiction over all other claims under 28 U.S.C. § 1367.

8. Personal jurisdiction is proper over the Defendants because they reside and/or have continual contacts with the state of Texas, having regularly submitted to jurisdiction here. Jurisdiction is also proper under 18 U.S.C. § 1965(d).

9. Venue is proper in this Court under 28 U.S.C. § 1391(b) and (c) because one or more Defendants reside in this district and/or a substantial part of the events or omissions giving rise to the claim occurred or a substantial part of property that is the subject of the action is situated in this district. Venue in this district is further provided under 18 U.S.C. § 1965(d).

IV.

RELEVANT BACKGROUND

HCLOF IS FORMED

10. Plaintiff DAF is a charitable fund that helps several causes throughout the country, including providing funding for humanitarian issues (such as veteran's welfare associations and women's shelters), public works (such as museums, parks and zoos), and education (such as specialty schools in underserved communities). Its mission is critical.

11. Since 2012, DAF was advised by its registered investment adviser, Highland Capital Management, L.P., and its various subsidiaries, about where to invest. This relationship was governed by an Investment advisory Agreement.

12. At one point in 2017, HCM advised DAF to acquire 143,454,001 shares of HCLOF, with HCFA (a subsidiary of HCM) serving as the portfolio manager. DAF did so via a holding entity, Plaintiff CLO Holdco, Ltd.

13. On November 15, 2017, through a Subscription and Transfer Agreement, the DAF entered into an agreement with others to sell and transfer shares in HCLOF, wherein the DAF retained 49.02% in CLO Holdco.

14. Pursuant to that agreement, Harbourvest acquired the following interests in the following entities:

Harbourvest Dover Street IX Investment, L.P., acquired 35.49%;

Harbourvest 2017 Global AIF, L.P., acquired 2.42%;

Harbourvest 2017 lobal Fund, L.P., acquired 4.85%;

HV International VIII Secondary, L.P., acquired 6.5%; and

Harbourvest Skew Base AIF, L.P., acquired 0.72%;

for a total of 49.98% (altogether, the “Harbourvest interests”).

15. On or about October 16, 2019, Highland Capital Management filed for Chapter 11 bankruptcy in Delaware Bankruptcy Court, which was later transferred to the Northern District of Texas Bankruptcy Court, in the case styled *In Re: Highland Capital Management, L.P., Debtor*, Cause No. 19-34054, (the “HCM Bankruptcy” and the Court is the “Bankruptcy Court”).

The Harbourvest Settlement with Highland Capital Management in Bankruptcy

16. On April 8, 2020, Harbourvest submitted its proofs of claim in the HCM bankruptcy proceeding. Annexed to its proofs of claims was an explanation of the Proof of Claim and the basis therefor setting out various pre-petition allegations of wrongdoing by HCM. *See, e.g.*, Case No. 19-bk-34054, Doc. 1631-5.

17. The debtor, HCM, made an omnibus response to the proofs of claims, stating they were duplicative of each other, overstated, late, and otherwise meritless.

18. Harbourvest responded to the omnibus objections on September 11, 2020. *See* Cause No. 19-bk-34054, [Doc. 1057](#).

19. Harbourvest represented that it had invested in HCLOF, purchasing 49.98% of HCLOF's outstanding shares.

20. Plaintiff CLO Holdco was and is also a 49.02% holder of HCLOF's member interests.

21. In its Omnibus Response, Harbourvest explained that its claims included unliquidated legal claims for fraud, fraud in the inducement, RICO violations under 18 U.S.C. 1964, among others (the "Harbourvest Claims"). *See* Cause No. 19-bk-34054, [Doc. 1057](#).

22. The Harbourvest Claims centered on allegations that when Harbourvest was intending to invest in a pool of Collateralized Loan Obligations, or CLOs, that were then-managed by Acis Capital Management ("Acis"), a subsidiary of HCM, HCM failed to disclose key facts about ongoing litigation with a former employee, Josh Terry.

23. Harbourvest contended that HCM never sufficiently disclosed the underlying facts about the litigation with Terry, and HCM's then-intended strategy to fight Terry caused HCLOF to incur around \$15 million in legal fees and costs. It contended that had it known the nature of the lawsuit and how it would eventually turn out, Harbourvest never would have invested in HCLOF. *See* Cause No. 19-bk-34054, [Doc. 1057](#).

24. HCLOF's portfolio manager is HCFA. HCM is the parent of HCFA and is managed by its General Partner, Strand Management, who employs Seery and acts on behalf of HCM.

25. Before acceding to the Harbourvest interests, HCM was a 0.6% holder of HCLOF interests.

26. While even assuming Harbourvest's underlying claims were valid as far as the lost \$15 million went, the true damage of the legal fees to Harbourvest would have been 49.98% of the HCLOF losses (i.e., less than \$7.5 million). Harbourvest claimed that it had lost over \$100 million in the HCLOF transaction due to fraud, which, after trebling under the racketeering statute, it claimed it was entitled to over \$300 million in damages.

27. In truth, as of September 2020, Harbourvest had indeed lost some \$52 million due to the alleged diminishing value of the HCLOF assets (largely due to the underperformance of the Acis entities³)—and the values were starting to recover.

28. HCM denied the allegations in the Bankruptcy Court. Other than the claim for waste of corporate assets of \$15 million, HCM at all times viewed the Harbourvest legal claims as being worth near zero and having no merit.

29. On December 23, 2020, HCM moved the Court to approve a settlement between itself and Harbourvest. No discovery had taken place between the parties, and Plaintiff did not have any notice of the settlement terms or other factors prior to the motion's filing (or even during its pendency) in order to investigate its rights.

30. HCM set the hearing right after the Christmas and New Year's holidays, almost ensuring that no party would have the time to scrutinize the underpinnings of the deal.

31. On January 14, 2021, the Bankruptcy Court held an evidentiary hearing and approved the settlement in a bench ruling, overruling the objections to the settlement.

³ Acis was being managed by Joshua Terry. JP Morgan had listed the four ACIS entities under his management as the four worst performers of the 1200 CLOs it evaluated.

32. An integral part of the settlement was allowing \$45 million in unsecured claims that, at the time of the agreement, were expected to net Harbourvest around 70 cents on the dollar. In other words, Harbourvest was expected to recover around \$31,500,000 from the allowed claims.

33. As part of the consideration for the \$45 million in allowed claims, Harbourvest agreed to transfer all of its interests in HCLOF to HCM or its designee.

34. HCM and Seery rationalized the settlement value by allocating \$22.5 million of the net value of the \$45 million in unsecured claims as consideration to purchase Harbourvest's interests in HCLOF, meaning, if 70% of the unsecured claims—i.e., \$31.5 million—was realized, because \$22.5 million of that would be allocated to the purchase price of the Harbourvest interests in HCLOF, the true “settlement” for Harbourvest's legal claims was closer to \$9 million.

35. Plaintiffs here are taking no position at this time about the propriety of settling the Harbourvest legal claims for \$9 million. That is for another day.

36. At the core of this lawsuit is the fact that HCM purchased the Harbourvest interests in HCLOF for \$22.5 million knowing that they were worth far more than that.

37. It has recently come to light that, upon information and belief, the Harbourvest interests, as of December 31, 2020, were worth in excess of \$41,750,000, and they have continued to go up in value.

38. On November 30, 2020, which was less than a month prior to the filing of the Motion to Approve the Settlement, the net asset value of those interests was over \$34.5 million. Plaintiffs were never made aware of that.

39. The change is due to how the net asset value, or NAV, was calculated. The means and methods for calculating the “net asset value” of the assets of HCLOF are subject to and

governed by the regulations passed by the SEC pursuant to the Adviser's Act, and by HCM's internal policies and procedures.

40. Typically, the value of the securities reflected by a market price quote.

41. However, the underlying securities in HCLOF are not liquid and had not been traded in a long while.

42. There not having been any contemporaneous market quotations that could be used in good faith to set the marks⁴ meant that other prescribed methods of assessing the value of the interests, such as the NAV, would have been the proper substitutes.

43. Seery testified that the fair market value of the Harbourvest HCLOF interests was \$22.5 million. Even allowing some leeway there, it was off the mark by a mile.

44. Given the artifice described herein, Seery and the entity Defendants had to know that the representation of the fair market value was false. But it does not appear that they disclosed it to Harbourvest to whom they owed fiduciary duties as the RIA in charge of HCLOF, and they certainly did not disclose the truth to the Plaintiff.

45. It is either the case that (i) Defendants conducted the proper analysis to obtain a current value of the assets but decided to use a far lower valuation in order to whitewash the settlement or enrich the bankruptcy estate; *or* (ii) Defendants never conducted the proper current valuation, and therefore baselessly represented what the current value of the assets was, despite knowingly having no reasonable basis for making such a claim.

46. For years HCM had such internal procedures and compliance protocols. HCM was not allowed by its own compliance officers to trade with an investor where HCM had superior knowledge about the value of the assets, for example. While Plaintiff has no reason to believe that

⁴ The term "mark" is shorthand for an estimated or calculated value for a non-publicly traded instrument.

those procedures were scrapped in recent months, it can only assume that they were either overridden improperly or circumvented wholesale.

47. Upon finalizing the Harbourvest Settlement Agreement and making representations to the Bankruptcy Court to the Plaintiffs about the value of the Harbourvest Interests, Seery and HCM had a duty to use current values and not rely on old valuations of the assets or the HCLOF interests.

48. Given Defendants' actual or constructive knowledge that they were purchasing Harbourvest's Interests in HCLOF for a less than 50% of what those interests were worth—Defendants owed Plaintiff a fiduciary duty not to purchase them for themselves.

49. Defendants should have either had HCLOF repurchase the interests with cash, or offer those interests to Plaintiff and the other members *pro rata*, before HCM agreed to purchase them all lock, stock and barrel, for no up-front cash.

50. Indeed, had Plaintiff been offered those interests, it would have happily purchased them and therefore would have infused over \$20 million in cash into the estate for the purpose of executing the Harbourvest Settlement.

51. That Defendants (and to perhaps a lesser extent, the Unsecured Creditors Committee (the "UCC")) agreed to pay \$22.5 million for the HCLOF assets, where they had previously not consented to any such expenditure by the estate on behalf of HCLOF, strongly indicates their awareness that they were purchasing assets for far below market value.

52. The above is the most reasonable and plausible explanation for why Defendants and the UCC forwent raising as much as \$22.5 million in cash now in favor of hanging on to the HCLOF assets.

53. Indeed, in January 2021 Seery threatened Ethen Powell that “[Judge Jernigan] is laughing at you” and “we are coming after you” in response to the latter’s attempt to exercise his right as beneficial holder of the CLO, and pointing out a conflict of interest in Seery’s plan to liquidate the funds.

54. HCM’s threat, made by Seery, is tantamount to not only a declaration that he intends to liquidate the funds regardless of whether the investors want to do so, and whether it is in their best interests, but also that HCM intends to leverage what it views as the Bankruptcy Court’s sympathy to evade accountability.

V.

CAUSES OF ACTION

FIRST CAUSE OF ACTION *Breaches of Fiduciary Duty*

55. Plaintiffs respectfully incorporate the foregoing factual averments as if fully set forth herein and further alleges the following:

56. HCM is a registered investment advisor and acts on behalf of HCFA. Both are fiduciaries to Plaintiffs.

57. The Advisers Act establishes an unwaivable federal fiduciary duty for investment advisers.⁵

⁵ See e.g., *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 194 (1963); *Transamerica Mortg. Advisors (tama) v. Lewis*, 444 U.S. 11, 17 (1979) (“§ 206 establishes ‘federal fiduciary standards’ to govern the conduct of investment advisers.”); *Santa Fe Indus. v. Green*, 430 U.S. 462, 471, n.11 (1977) (in discussing *SEC v. Capital Gains*, stating that the Supreme Court’s reference to fraud in the “equitable” sense of the term was “premised on its recognition that Congress intended the Investment Advisers Act to establish federal fiduciary standards for investment advisers”). See also Investment Advisers Act Release No. 3060 (July 28, 2010) (“Under the Advisers Act, an adviser is a fiduciary whose duty is to serve the best interests of its clients, which includes an obligation not to subrogate clients’ interests to its own”) (citing Proxy Voting by Investment Advisers, Investment Advisers Act Release No. 2106 (Jan. 31, 2003)).

58. HCM and the DAF entered into an Amended and Restated Investment Advisory Agreement, executed between them on July 1, 2014 (the “RIA Agreement”). It renews annually and continued until the end of January 2021.

59. In addition to being the RIA to the DAF, HCM was appointed the DAF’s attorney-in-fact for certain actions, such as “to purchase or otherwise trade in Financial Instruments that have been approved by the General Partner.” RIA Agreement ¶ 4.

60. The RIA Agreement further commits HCM to value financial assets “in accordance with the then current valuation policy of the Investment Advisor [HCM], a copy of which will provided to the General Partner upon request.” RIA Agreement ¶ 5.

61. While HCM contracted for the recognition that it would be acting on behalf of others and could be in conflict with advice given the DAF, (RIA Agreement ¶ 12), nowhere did it purport to waive the fiduciary duties owed to the DAF not to trade as a principal in a manner that harmed the DAF.

62. HCFA owed a fiduciary duty to Holdco as an investor in HCLOF and to which HCFA was the portfolio manager. HCM owed a fiduciary duty to the DAF (and to Holdco as its subsidiary) pursuant to a written Advisory Agreement HCM and the DAF had where HCM agreed to provide sound investment advice and management functions.

63. As a registered investment adviser, HCM’s fiduciary duty is broad and applies to the entire advisor-client relationship.

64. The core of the fiduciary duty is to act in the best interest of their investors—the advisor must put the ends of the client before its own ends or the ends of a third party.

65. This is manifested in a duty of loyalty and a duty of utmost care. It also means that the RIA has to follow the terms of the company agreements and the regulations that apply to the investment vehicle.

66. The fiduciary duty that HCM and Seery owed to Plaintiff is predicated on trust and confidence. Section 204A of the Advisers Act requires investment advisors (whether SEC-registered or not) to establish, maintain, and enforce written policies and procedures reasonably designed to prevent the RIA from trading on material, non-public information. *See* 17 C.F.R. § 275.206(4)-7. That means that Plaintiff should be able to take Defendants at their word and not have to second guess or dig behind representations made by them.

67. The simple thesis of this claim is that Defendants HCFA and HCM breached their fiduciary duties by (i) insider trading with Harbourvest and concealing the rising NAV of the underlying assets—i.e., trading with Harbourvest on superior, non-public information that was neither revealed to Harbourvest nor to Plaintiff; (ii) concealing the value of the Harbourvest Interests; and (iii) diverting the investment opportunity in the Harbourvest entities to HCM (or its designee) without offering it to or making it available to Plaintiff or the DAF.

68. HCM, as part of its contractual advisory function with Plaintiffs, had expressly recommended the HCLOF investment to the DAF. Thus, diverting the opportunity for returns on its investment was an additional breach of fiduciary duty.

69. This violated a multitude of regulations under 27 C.F.R. part 275, in addition to Rules 10b-5 and 10b5-1. 17 CFR 240.10b5-1 (“Rule 10b5-1”) explains that one who trades while possessing non-public information is liable for insider trading, and they do not necessarily have to have *used* the specific inside information.

70. It also violated HCM’s own internal policies and procedures.

71. Also, the regulations impose obligations on Defendants to calculate a *current* valuation when communicating with an investor, such as what may or may not be taken into account, and what cannot pass muster as a current valuation. Upon information and belief, these regulations were not followed by the Defendants.

72. HCM's internal policies and procedures, which it promised to abide by both in the RIA Agreement and in its Form ADV SEC filing, provided for the means of properly calculating the value of the assets.

73. HCM either did not follow these policies, changed them to be out of compliance both with the Adviser Act regulations and its Form ADV representations, and/or simply misrepresented or concealed their results.

74. In so doing, because the fiduciary duty owed to Plaintiff is a broad one, and because Defendants' malfeasance directly implicates its relationship with Plaintiff, Defendants have breached the Advisers Act's fiduciary duties owed to Plaintiff as part of their fiduciary relationship.⁶

75. At no time between agreeing with Harbourvest to the purchase of its interests and the court approval did Defendants disclose to either Harbourvest or to Plaintiff (and the Bankruptcy Court for that matter) that the purchase was at below 50% the current net asset value as well, and when they failed to offer Plaintiff (and the other members of HCLOF) their right to purchase the interests pro rata at such advantageous valuations. Plaintiff's lost opportunity to

⁶ See Advisers Act Release No. 4197 (Sept. 17, 2015) (Commission Opinion) ("[O]nce an investment Advisory relationship is formed, the Advisers Act does not permit an adviser to exploit that fiduciary relationship by defrauding his client in any investment transaction connected to the Advisory relationship."); see also *SEC v. Lauer*, No. 03-80612-CIV, 2008 U.S. Dist. LEXIS 73026, at 90 (S.D. Fla. Sept. 24, 2008) ("Unlike the antifraud provisions of the Securities Act and the Exchange Act, Section 206 of the Advisers Act does not require that the activity be 'in the offer or sale of any' security or 'in connection with the purchase or sale of any security.'").

purchase has harmed Plaintiff. Plaintiff had been led to believe by the Defendants that the value of what was being purchased in the Harbourvest settlement by HCM (or its designee) was at fair market value. This representation, repeated again in the Bankruptcy Court during the Harbourvest confirmation, implicitly suggested that a proper current valuation had been performed.

76. Defendant's principal, Seery, testified in January 2021 that the then-current fair market value of Harbourvest's 49.98% interest in HCLOF was worth around \$22.5 million. But by then, it was worth almost double that amount and has continued to appreciate. Seery knew or should have known that fact because the value of some of the HCLOF assets had increased, and he had a duty to know the current value. His lack of actual knowledge, while potentially not overtly fraudulent, would nonetheless amount to a breach of fiduciary duty for acting without proper diligence and information that was plainly available.

77. Furthermore, HCLOF holds equity in MGM Studios and debt in CCS Medical via various CLO positions. But Seery, in his role as CEO of HCM, was made aware during an advisors meeting in December 2020 that Highland would have to restrict its trading in MGM because of its insider status due to activities that were likely to apply upward pressure on MGM's share price.

78. Furthermore, Seery controlled the Board of CCS Medical. And in or around October 2020, Seery was advocating an equatization that would have increased the value of the CCS securities by 25%, which was not reflected in the HCM report of the NAV of HCLOF's holdings.

79. Seery's knowledge is imputed to HCM.

80. Moreover, it is a breach of fiduciary duty to commit corporate waste, which is effectively what disposing of the HCLOF assets would constitute in a rising market, where there

is no demand for disposition by the investors (save for HCM, whose proper 0.6% interest could easily be sold to the DAF at fair value).

81. As holder of 0.6% of the HCLOF interests, and now assignee of the 49.98% Harbourvest Interests), HCM has essentially committed self-dealing by threatening to liquidate HCLOF now that it may be compelled to do so under its proposed liquidation plan, which perhaps inures to the short term goals of HCM but to the pecuniary detriment of the other holders of HCLOF whose upside will be prematurely truncated.

82. Seery and HCM should not be allowed to benefit from the breach of their fiduciary duties because doing so would also cause Plaintiffs irreparable harm. The means and methods of disposal would likely render the full scope of damages to the DAF not susceptible to specific calculation—particularly as they would relate to calculating the lost opportunity cost. Seery and HCM likely do not have the assets to pay a judgment to Plaintiffs that would be rendered, simply taking the lost appreciation of the HCLOF assets.

83. Defendants are thus liable for diverting a corporate opportunity or asset that would or should have been offered to Plaintiff and the other investors. Because federal law makes the duties invoked herein unwaivable, it is preposterous that HCM, as a 0.6% holder of HCLOF, deemed itself entitled to the all of the value and optionality of the below-market Harbourvest purchase.

84. Defendants cannot rely on any contractual provision that purports to waive this violation. Nothing in any agreement purports to permit, authorize or otherwise sanitize Defendants' self-dealing. All such provisions are void.

85. In the fourth quarter of 2020, Seery and HCM notified staff that they would be terminated on December 31, 2020. That termination was postponed to February 28, 2021.

Purchasing the Harbourvest assets without staffing necessary to be a functioning Registered Investment Advisor was a strategic reversal from prior filings that outlined canceling the CLO management contracts and allowing investors to replace Highland as manager.

86. Seery's compensation agreement with the UCC incentivizes him to expedite recoveries and to prevent transparency regarding the Harbourvest settlement.

87. What is more, Seery had previously testified that the management contracts for the funds—HCLOF included—were unprofitable, and that he intended to transfer them. But he later rejected offers to purchase those management contracts for fair value and instead decided to continue to manage the funds—which is what apparently gave rise to the Harbourvest Settlement, among others. He simultaneously rejected an offer for the Harbourvest assets of \$24 million, stating that they were worth much more than that.

88. Because of Defendants' malfeasance, Plaintiffs have lost over \$25 million in damages—a number that continues to rise—and the Defendants should not be able to obtain a windfall.

89. For the same reason, Defendants' malfeasance has also exposed HCLOF to a massive liability from Harbourvest since the assignment of those interests is now one that is likely unenforceable under the Advisers Act, Section 47(b), if there was unequal information.

90. HCM and HCFA are liable as principals for breach of fiduciary duty, as are the principals and compliance staff of each entity.

91. Plaintiffs seek disgorgement, damages, exemplary damages, attorneys' fees and costs. To the extent the Court determines that this claim had to have been brought derivatively on behalf of HCLOF, then Plaintiffs represent that any pre-suit demand would have been futile since asking HCM to bring suit against its principal, Seery, would have been futile.

SECOND CAUSE OF ACTION
Breach of HCLOF Company Agreement
(By Holdco against HCLOF, HCM and HCFA)

92. Plaintiffs respectfully incorporate the foregoing factual averments as if fully set forth herein and further alleges the following:

93. On November 15, 2017, the members of HCLOF, along with HCLOF and HCFA, executed the *Members Agreement Relating to the Company* (the “Company Agreement”).

94. The Company Agreement governs the rights and duties of the members of HCLOF.

95. Section 6.2 of HCLOF Company Agreement provides that when a member “other than ... CLO Holdco [Plaintiff] or a Highland Affiliate,” intends to sell its interest in HCLOF to a third party (i.e., not to an affiliate of the selling member), then the other members have the first right of refusal to purchase those interests pro rata for the same price that the member has agreed to sell.

96. Here, despite the fact that Harbourvest agreed to sell its interests in HCLOF for \$22.5 million when they were worth more than double that, Defendants did not offer Plaintiff the chance to buy its pro rata share of those interests at the same agreed price of \$22.5 million (adjusted pro rata).

97. The transfer and sale of the interests to HCM were accomplished as part of the Harbourvest Settlement which was approved by the Bankruptcy Court.

98. Plaintiff was not informed of the fact that Harbourvest had offered its shares to Defendant HCM for \$22.5 million—which was under 50% of their true value.

99. Plaintiff was not offered the right to purchase its pro rata share of the Harbourvest interests prior to the agreement being struck or prior to court approval being sought.

100. Had Plaintiff been allowed to do so, it would have obtained the interests with a net equity value over their purchase price worth in excess of \$20 million.

101. No discovery or opportunity to investigate was afforded Plaintiff prior to lodging an objection in the Bankruptcy Court.

102. Plaintiff is entitled to specific performance or, alternatively, disgorgement, constructive trust, damages, attorneys' fees and costs.

THIRD CAUSE OF ACTION
Negligence
(By the DAF and CLO Holdco against HCM and HCFA)

103. Plaintiffs respectfully incorporate the foregoing factual averments as if fully set forth herein, and further alleges the following:

104. Plaintiffs incorporate the foregoing causes of action and note that all the foregoing violations were breaches of the common law duty of care imposed by law on each of Seery, HCFA and HCM.

105. Each of these Defendants should have known that their actions were violations of the Advisers Act, HCM's internal policies and procedures, the Company Agreement, or all three.

106. Seery and HCM owed duties of care to Plaintiffs to follow HCM's internal policies and procedures regarding both the propriety and means of trading with a customer [Harbourvest], the propriety and means of trading as a principal in an account but in a manner adverse to another customer [the DAF and Holdco], and the proper means of valuing the CLOs and other assets held by HCLOF.

107. It would be foreseeable that failing to disclose the current value of the assets in the HCLOF would impact Plaintiffs negatively in a variety of ways.

108. It would be reasonably foreseeable that failing to correctly and accurately calculate the current net asset value of the market value of the interests would cause Plaintiffs to value the Harbourvest Interests differently.

109. It would be reasonably foreseeable that referring to old and antiquated market quotations and/or valuations of the HCLOF assets or interests would result in a mis-valuation of HCLOF and, therefore, a mis-valuation of the Harbourvest Interests.

110. Likewise, it would have been foreseeable that Plaintiff's failure to give Plaintiff the opportunity to purchase the Harbourvest shares at a \$22.5 million valuation would cause Plaintiff damages. Defendants knew that the value of those assets was rising. They further knew or should have known that whereas those assets were sold to HCM for an allowance of claims to be funded in the future, selling them to Plaintiff would have provided the estate with cash funds.

111. Defendants' negligence foreseeably and directly caused Plaintiff harm.

112. Plaintiff is thus entitled to damages.

FOURTH CAUSE OF ACTION
Racketeering Influenced Corrupt Organizations Act
(CLO Holdco and DAF against HCM)

113. Plaintiffs respectfully incorporate the foregoing factual averments as if fully set forth herein, and further alleges the following:

114. Defendants are liable for violations of the Racketeer Influenced and Corrupt Organizations ("RICO") Act, 18 U.S.C. § 1961 *et seq.*, for the conduct of an enterprise through a pattern of racketeering activity.

115. HCLOF constitutes an enterprise under the RICO Act. Additionally, or in the alternative, HCM, HCLA, and HCLOF constituted an association-in-fact enterprise. The purpose of the association-in-fact was the perpetuation of Seery's position at HCM and using the

Harbourvest settlement as a vehicle to enrich persons other than the HCLOF investors, including Holdco and the DAF, and the perpetuation of HCM's holdings in collateralized loan obligations owned by HCLOF, while attempting to deny Plaintiffs the benefit of its rights of ownership.

116. The association-in-fact was bound by informal and formal connections for years prior to the illicit purpose, and then changed when HCM joined it in order to achieve the association's illicit purpose. For example, HCM is the parent and control person over HCFA, which is the portfolio manager of HCLOF pursuant to a contractual agreement—both are registered investment advisors and provide advisory and management services to HCLOF.

117. Defendants injured Plaintiffs through their continuous course of conduct of the HCM-HCLA-HCLOF association-in-fact enterprise. HCM's actions (performed through Seery and others) constitute violations of the federal wire fraud, mail fraud, fraud in connection with a case under Title 11, and/or securities fraud laws, pursuant to **18 U.S.C. § 1961(1)(B)** and **(D)**.

118. HCM operated in such a way as to violate insider trading rules and regulations when it traded with Harbourvest while it had material, non-public information that it had not supplied to Harbourvest or to Plaintiffs.

119. In or about November 2020, HCM and Harbourvest entered into discussions about settling the Harbourvest Claims. Seery's conduct of HCLOF and HCLA on behalf of HCM through the interstate mails and/or wires caused HCM to agree to the purchase of Harbourvest's interests in HCLOF.

120. On or about each of September 30, 2020, through December 31, 2020, Seery, through his conduct of the enterprise, utilized the interstate wires and/or mails to obtain or arrive at valuations of the HCLOF interests. Seery's conduct of the enterprise caused them to cease

sending the valuation reports to Plaintiffs, which eventually allowed Plaintiffs to be misled into believing that Seery had properly valued the interests.

121. On or about September 30, 2020, Seery transmitted or caused to be transmitted though the interstate wires information to HCLOF investors from HCM (via HCFA), including Harbourvest, regarding the value of HCLOF interests and underlying assets.

122. Additionally, Seery operated HCM in such a way that he concealed the true value of the HCLOF interests by utilizing the interstate wires and mails to transmit communications to the court in the form of written representations on or about December 23, 2020, and then further transmitted verbal representations of the current market value (the vastly understated one) on January 14, 2021, during live testimony.

123. However, Harbourvest was denied the full picture and the true value of the underlying portfolio. At the end of October and November of 2020, HCM had updated the net asset values of the HCLOF portfolio. According to sources at HCM at the time, the HCLOF assets were worth north of \$72,969,492 as of November 30, 2020. Harbourvest's share of that would have been \$36,484,746.

124. The HCLOF net asset value had reached \$86,440,024 as of December 31, 2021, which means that by the time Seery was testifying in the Bankruptcy Court on January 14, 2021, the fair market value of the Harbourvest Assets was \$22.5 million, when it was actually closer to \$43,202,724. Seery, speaking on behalf of HCM, knew of the distinction in value.

125. On January 14, 2021, Seery also testified that he (implying HCM, HCLA and HCLOF) had valued the Harbourvest Assets at their current valuation and at fair market value. This was not true because the valuation that was used and testified to was ancient. The ostensible purpose of this concealment was to induce Plaintiff and other interest holdings to take no action.

126. In supporting HCM’s motion to the Bankruptcy Court to approve the Harbourvest Settlement, Seery omitted the fact that HCM was purchasing the interests at a massive discount, which would violate the letter and spirit of the Adviser’s Act.

127. Seery was informed in late December 2020 at an in-person meeting in Dallas to which Seery had to fly that HCLOF and HCM had to suspend trading in MGM Studios’ securities because Seery had learned from James Dondero, who was on the Board of MGM, of a potential purchase of the company. The news of the MGM purchase should have caused Seery to revalue the HCLOF investment in MGM.

128. In or around October 2020, Seery (who controls the Board of CSS Medical) was pursuing “equatization” of CSS Medical’s debt, which would have increased the value of certain securities by 25%. In several communications through the U.S. interstate wires and/or mails, and with Plaintiffs, and the several communications with Harbourvest during the negotiations of the settlement, Seery failed to disclose these changes which were responsible in part for the ever-growing value of the HCLOF CLO portfolio.

129. Seery was at all relevant times operating as an agent of HCM.

130. This series of related violations of the wire fraud, mail fraud, and securities fraud laws, in connection with the HCM bankruptcy, constitute a continuing pattern and practice of racketeering for the purpose of winning a windfall for HCM and himself--a nearly \$30,000,000 payday under the confirmation agreement.

131. The federal RICO statute makes it actionable for one’s conduct of an enterprise to include “fraud in connection with a [bankruptcy case]”. The Advisers’ Act antifraud provisions require full transparency and accountability to an advisers’ investors and clients and does not require a showing of reliance or materiality. The wire fraud provision likewise is violated when,

as here, the interstate wires are used as part of a “scheme or artifice ... for obtaining money or property by means of false ... pretenses, [or] representations[.]”

132. Accordingly, because Defendants’ conduct violated the wire fraud and mail fraud laws, and the Advisers’ Act antifraud provisions, and their acts and omissions were in connection with the HCM Bankruptcy proceedings under Title 11, they are sufficient to bring such conduct within the purview of the RICO civil action provisions, **18 U.S.C. § 1964**.

133. Plaintiffs are thus entitled to damages, treble damages, attorneys’ fees and costs of suit, in addition to all other injunctive or equitable relief to which they are justly entitled.

FIFTH CAUSE OF ACTION
Tortious Interference
(CLO Holdco against HCM)

134. Plaintiff respectfully incorporates the foregoing factual averments as if fully set forth herein and further alleges the following:

135. At all relevant times, HCM owned a 0.6% interest in HCLOF.

136. At all relevant times, Seery and HCM knew that Plaintiff had specific rights in HCLOF under the Company Agreement, § 6.2.

137. Section 6.2 of HCLOF Company agreement provides that when a member “other than ... CLO Holdco [Plaintiff] or a Highland Affiliate,” intends to sell its interest in HCLOF to a third party (i.e., not an affiliate of the member), then the other members have the first right of refusal to purchase those interests pro rata for the same price that the member has agreed to sell.

138. HCM, through Seery, tortiously interfered with Plaintiff’s contractual rights with HCLOF by, among other things, diverting the Harbourvest Interests in HCLOF to HCM without giving HCLOF or Plaintiff the option to purchase those assets at the same favorable price that HCM obtained them.

139. HCM and Seery tortiously interfered with Plaintiff's contractual rights with HCLOF by, among other things, misrepresenting the fair market value as \$22.5 million and concealing the current value of those interests.

140. But for HCM and Seery's tortious interference, Plaintiff would have been able to acquire the Harbourvest Interests at a highly favorable price. HCM and Seery's knowledge of the rights and intentional interference with these rights has caused damage to Plaintiff CLO Holdco.

141. Plaintiff is therefore entitled to damages from HCM and Seery, as well as exemplary damages.

VI.

JURY DEMAND

142. Plaintiff demands trial by jury on all claims so triable.

VII.

PRAYER FOR RELIEF

143. Wherefore, for the foregoing reasons, Plaintiffs respectfully pray that the Court enter judgment in its favor and against Defendants, jointly and severally, for:

- a. Actual damages;
- b. Disgorgement;
- c. Treble damages;
- d. Exemplary and punitive damages;
- e. Attorneys' fees and costs as allowed by common law, statute or contract;
- f. A constructive trust to avoid dissipation of assets;
- g. All such other relief to which Plaintiff is justly entitled.

Dated: April 12, 2021

Respectfully submitted,

SBAITI & COMPANY PLLC

/s/ Mazin A. Sbaiti

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EXHIBIT 12

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In re:	§	
HIGHLAND CAPITAL	§	
MANAGEMENT, L.P.,	§	
	§	
Debtor,	§	
-----	§	
THE CHARITABLE DAF FUND, L.P.	§	
and CLO HOLDCO, LTD.,	§	
	§	
Plaintiffs/Appellants,	§	
	§	
v.	§	CIVIL ACTION NO. 3:21-CV-3129-B
	§	
HIGHLAND CAPITAL	§	
MANAGEMENT, L.P.,	§	
	§	
Defendant/Appellee.	§	

MEMORANDUM OPINION AND ORDER

Before the Court are Appellants The Charitable DAF Fund, L.P. (Charitable DAF) and CLO Holdco, Ltd. (CLO Holdco)'s appeals from the bankruptcy court's Motion to Dismiss Order and Motion to Stay Order. For the reasons that follow, the Motion to Dismiss Order is **REVERSED** and **REMANDED**. The Motion to Stay Order is **AFFIRMED**.



I.

BACKGROUND¹

These are consolidated appeals from an adversary proceeding in a bankruptcy case. The Debtor, Highland Capital Management, L.P. (HCM), filed for Chapter 11 bankruptcy on October 16, 2019, in the United States Bankruptcy Court for the District of Delaware and that court transferred venue to the United States Bankruptcy Court for the North District of Texas. *In re Highland Cap. Mgmt. L.P.*, 2022 WL 780991, at *1 (Bankr. N.D. Tex. Mar. 11, 2022).

In 2017, Charitable DAF—through the holding entity CLO Holdco—purchased 49.02% of the available shares of Highland CLO Funding, Ltd. (HCLOF) based upon investment advice from HCM.² Doc. 9, Appellant’s Br., 5. Another entity, HarbourVest, acquired 49.98% of the HCLOF shares and HCM and its employees acquired the remaining 1%. *Id.*; Doc. 21, Appellee’s Br., 7. A company agreement (the HCLOF Member Agreement) governing the rights and obligations of HCLOF shareholders purportedly prohibited a member from “sell[ing] shares to another member without first providing all other members the right to purchase a pro rata portion thereof at the same price” (the Right of First Refusal). Doc. 9, Appellant’s Br., 6. The value of the HCLOF shares fluctuated throughout the bankruptcy proceedings; the actual value is one of the issues giving rise to some of Charitable DAF’s causes of action. *Id.* at 6–7; R. at 551–65.

¹ Because these are two consolidated appeals with separate appellate records, the Court indicates when it switches between the separate appellate records by footnotes. The Appellant’s Brief and record cites in this Background section are in Doc. 6 in case No. 3:22-CV-0695-B. Appellee’s Brief, which was filed after consolidation, is in case No. 21-CV-3129-B.

² Except where otherwise stated, the Court refers to Charitable DAF and CLO Holdco collectively as Charitable DAF because Charitable DAF controls and owns CLO Holdco and both entities have the same director. Doc. 21, Appellee’s Br., 7 & n.6. Appellant Charitable DAF does not dispute this relationship and imputes the actions of CLO Holdco to itself throughout Appellant’s brief. See Doc. 9, Appellant’s Br., 13–14 (imputing the Objection to both Appellants).

During the bankruptcy, “HarbourVest filed proof of claims against [HCM] totaling over \$300 million, notionally.” Doc. 9, Appellant’s Br., 6. As part of the settlement for these claims, “HarbourVest agreed to sell its interest in HCLOF to [HCM].” *Id.* at 8. HCM would then have majority ownership of HCLOF. *See id.* at 5; Doc. 21, Appellee’s Br., 7. “CLO Holdco filed an objection to the settlement, contending that the HCLOF Member Agreement entitled [CLO] Holdco to a Right of first Refusal” (the Objection). Doc. 9, Appellant’s Br., 8. At the beginning of the settlement hearing (the Rule 9019 Settlement Hearing), CLO Holdco withdrew its Objection. Doc. 21, Appellee’s Br., 10–11; R. at 6269–70. After overruling the remaining objections from the other parties, the bankruptcy court approved the HarbourVest Settlement. Doc. 9, Appellant’s Br., 9.

This Adversary Proceeding stems from the complaint filed by Appellants on April 12, 2021, in this Court in *Charitable DAF Fund, L.P. et al. v. Highland Capital Management, L.P., et al.*, Case No. 3:21-CV-0842-B. *Id.*; Complaint, *Charitable DAF Fund, L.P. v. Highland Cap. Mgmt., L.P.*, No. 3:21-CV-0842-B (N.D. Tex. Apr. 12, 2021), Doc. 1. On September 20, 2021, this Court referred that case to the bankruptcy court for “docket[ing] as an Adversary Proceeding associated with the consolidated Chapter 11 Bankruptcy of Highland Capital Management, L.P.” Order of Reference, *Charitable DAF Fund, L.P. v. Highland Cap. Mgmt., L.P.*, No. 3:21-CV-0842-B (N.D. Tex. Sept. 20, 2021), Doc. 64. During the Adversary Proceeding, Appellants moved for a stay of the case (the Motion to Stay) and Appellees moved to dismiss the case (the Motion to Dismiss). R. at 1634–67, 3248–52. On November 23, 2021, the bankruptcy court held a hearing on the Motion to Stay and Motion to Dismiss. *Id.* at 5951. The bankruptcy court denied the Motion to Stay at the hearing and later entered an order granting the Motion to Dismiss, dismissing all causes of action with prejudice. *Id.* at 5977; *In re Highland*, 2022 WL 780991, at *12. Appellants promptly appealed both orders; this

Court consolidated the appeals. *In re Highland Cap. Mgmt.*, 2022 WL 2193000, at *1, *4 (N.D. Tex. June 17, 2022). While the appeals were pending, the Fifth Circuit affirmed the HCM reorganization plan (the Plan), but vacated the exculpatory provision “as to all parties *except* [HCM], the Committee and its members, and the Independent Directors for conduct within the scope of their duties.” *Highland Cap. Mgmt., L.P. v. NexPoint Advisors, L.P.*, 2022 WL 3571094, at *14 (5th Cir. Aug. 19, 2022).

The appeals are fully briefed and ripe for review. The Court considers them below.

II.

LEGAL STANDARDS

Final judgments, orders, and decrees of a bankruptcy court may be appealed to a federal district court. 28 U.S.C. § 158(a). Because the district court functions as an appellate court in this scenario, it applies the same standards of review that federal appellate courts use when reviewing district court decisions. *In re Webb*, 954 F.2d 1102, 1103–04 (5th Cir. 1992) (citations omitted).

A. Rule 12(b)(6) Motion to Dismiss for Failure to State a Claim

Under Federal Rule of Civil Procedure 8(a)(2), a complaint must contain “a short and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). Rule 12(b)(6) authorizes a court to dismiss a plaintiff’s complaint for “failure to state a claim upon which relief can be granted.” Fed. R. Civ. P. 12(b)(6). In considering a Rule 12(b)(6) motion to dismiss, “[t]he court accepts all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff.” *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 205 (5th Cir. 2007). But the court will “not look beyond the face of the pleadings to determine whether relief should be granted based on the alleged facts.” *Spivey v. Robertson*, 197 F.3d 772, 774 (5th Cir. 1999).

To survive a motion to dismiss, plaintiffs must plead “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). “Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* “The plausibility standard is not akin to a ‘probability requirement’ but it asks for more than a sheer possibility that a defendant has acted unlawfully.” *Id.* (quoting *Twombly*, 550 U.S. at 556). When well-pleaded facts fail to meet this standard, “the complaint has alleged—but it has not shown—that the pleader is entitled to relief.” *Id.* at 679 (quotation marks and alterations omitted).

B. *Motion to Stay*

Incidental to a court’s inherent power to control its docket is the power to stay proceedings before it. *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936). A court considers four factors when determining whether to stay a case pending appeal: “(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.” *Veasey v. Perry*, 769 F.3d 890, 892 (5th Cir. 2014) (quoting *Nken v. Holder*, 556 U.S. 418, 426 (2009)). “The first two factors of the traditional standard are the most critical.” *Barber v. Bryant*, 833 F.3d 510, 511 (5th Cir. 2016) (quoting *Nken*, 556 U.S. at 434).

III.

ANALYSIS

The Court begins with the appeal of the Motion to Dismiss Order because it can only review the appeal of the Motion to Stay Order if it reverses the bankruptcy court's decision to dismiss the causes of action in the adversary proceeding. *In re Highland*, 2022 WL 2193000, at *2. Finding reversal of the Motion to Dismiss Order warranted, the Court then reviews the appeal of the Motion to Stay Order.

A. *Appeal of the Motion to Dismiss Order*³

Charitable DAF raises three issues in its appeal of the Motion to Dismiss Order: (1) whether the bankruptcy court “commit[ted] reversible error by sua sponte dismissing this action on the basis of collateral estoppel without giving notice and an opportunity to respond”; (2) whether collateral estoppel barred Charitable DAF's claims when the claims were adjudicated in a Rule 9019 Settlement Hearing; and (3) whether the bankruptcy court's application of judicial estoppel erroneously relied on a transcription error, an ostensibly inconsistent position of Charitable DAF, or a failure to conclude that “subsequently discovered evidence . . . render[ed] the ostensible inconsistency ‘inadvertent.’” Doc. 9, Appellant's Br., 2.

An appellate court reviews a dismissal under Rule 12(b)(6) de novo. *Stripling v. Jordan Prod. Co., LLC*, 234 F.3d 863, 868 (5th Cir. 2000). “[T]he application of collateral estoppel is” also reviewed de novo. *Id.* (quoting *United States v. Brackett*, 113 F.3d 1396, 1398 (5th Cir. 1997)). However, “a [bankruptcy] court's decision to invoke the equitable doctrine of judicial estoppel [is reviewed] for abuse of discretion.” *Cox v. Richards*, 761 F. App'x 244, 246 (5th Cir. 2019) (citing

³ For this appeal, the record and document citations are in case No. 3:22-CV-0695-B. However, Appellee's Brief is in case No. 21-CV-3129-B.

United States ex rel. Long v. GSDMIdea City, L.L.C., 798 F.3d 265, 271 (5th Cir. 2015)). Therefore, this Court reviews the bankruptcy court’s sua sponte invocation of collateral estoppel de novo, the application of collateral estoppel de novo, and the invocation of judicial estoppel for abuse of discretion. The Court addresses each in turn below.

1. Sua Sponte Dismissal

The bankruptcy court dismissed Charitable DAF’s claims with prejudice based on collateral estoppel—even though neither party raised the issue “per se”—finding their res judicata arguments relevant to the issue. *In re Highland*, 2022 WL 780991, at *7. The Court first considers whether the sua sponte application was proper.

Charitable DAF challenges the bankruptcy court’s sua sponte invocation of collateral estoppel to dismiss its claims. Doc. 9, Appellant’s Br., 11–12. Specifically, Charitable DAF argues that the bankruptcy court could “only do so if the ‘procedure employed is fair’—that is, if prior notice is given with adequate time for the plaintiff to prepare a response.” *Id.* at 12 (quoting *Carroll v. Fort James Corp.*, 470 F.3d 1171, 1177–78 (5th Cir. 2006)). The failure to provide “notice and an opportunity to dispute the claimed bases for dismissal is reversible error,” according to Charitable DAF. *Id.*

The Court disagrees. The Fifth Circuit has recognized two instances when a court may dismiss a case sua sponte on the basis of collateral estoppel: when (1) “both actions were brought in courts of the same district” or (2) “all of the relevant facts are contained in the record and . . . uncontroverted.” *OneBeacon Am. Ins. Co. v. Barnett*, 761 F. App’x 396, 399 (5th Cir. 2019) (first quoting *Trammell Crow Residential Co. v. Am. Prot. Ins. Co.*, 574 F. App’x 513, 522 (5th Cir. 2014); and then quoting *Mowbray v. Cameron Cnty.*, 274 F.3d 269, 281 (5th Cir. 2001)). This case easily

fits into the first category because all of the proceedings at issue took place in the bankruptcy court before the same judge. See *In re Highland*, 2022 WL 780991, at *7 (relying on the former category to dismiss the case). Thus, the bankruptcy court did not err by raising the collateral estoppel issue sua sponte.

This case is unlike the *Carroll* case cited by Charitable DAF, which did not involve collateral estoppel. 470 F.3d 1171. In *Carroll*, the Fifth Circuit held that a court may dismiss a case sua sponte under Federal Rule of Civil Procedure 12(b)(6) if the “procedure employed is fair[,]” which requires “both notice of the court’s intention and an opportunity to respond.” *Id.* at 1177 (quoting *Bazrowx v. Scott*, 136 F.3d 1053, 1054 (5th Cir. 1998)). The district court erred by not providing “notice or opportunity to be heard” and “did not even . . . mention [some of the dismissed] claims in its order of dismissal.” *Id.*

This case is more akin to *McIntyre v. Ben E. Keith Co.* where the Fifth Circuit upheld the district court’s sua sponte raising of the issue of res judicata to dismiss the case under Rule 12(b)(6). 754 F. App’x 262, 265 (5th Cir. 2018). In *McIntyre*, the plaintiff’s “Civil Rights Act and FLSA actions were brought before the same federal district court.” *Id.* Because the latter action closely resembled the former action, the Fifth Circuit found no reversible error with the district court’s raising the issue of res judicata sua sponte. *Id.*

First, dismissal for failure to state a claim like in *Carroll* and dismissal for collateral estoppel as in the instant case are conceptually and procedurally different. In the former, the plaintiff is in the process of attempting to “allege[] [their] best case,” *Bazrowx*, 136 F.3d at 1054, while collateral estoppel occurs after a plaintiff “alleged [their] best case” and fully litigated the issue. See *Allen v. McCurry*, 449 U.S. 90, 94 (1980). Put more succinctly, collateral estoppel eliminates “unnecessary

judicial waste” from repeated attempts at alleging the best case. *Arizona v. California*, 530 U.S. 392, 412 (2000) (quoting *United States v. Sioux Nation*, 448 U.S. 371, 432 (1980) (Rehnquist, J., dissenting)). Second, the parties addressed res judicata during oral argument and in their pleadings before the bankruptcy court. While res judicata is not collateral estoppel, it is closely related. *Hous. Prof'l Towing Ass'n v. City of Houston*, 812 F.3d 443, 447 (5th Cir. 2016) (“[R]es judicata encompasses two separate but linked preclusive doctrines: (1) true res judicata or claim preclusion and (2) collateral estoppel or issue preclusion.”). Thus, the bankruptcy court employed a fair procedure by allowing the parties to litigate the issues, including res judicata, before dismissing the case sua sponte. See generally *Carver v. Atwood*, 18 F.4th 494, 497 (5th Cir. 2021) (“District courts may, for appropriate reasons, dismiss cases *sua sponte*.”).

The Court next considers whether the bankruptcy court’s substantive application of collateral estoppel was proper.

2. Collateral Estoppel

“Collateral estoppel prevents litigation of an issue when: ‘(1) the identical issue was previously adjudicated; (2) the issue was actually litigated; and (3) the previous determination was necessary to the decision.’”⁴ *Bradberry v. Jefferson Cnty.*, 732 F.3d 540, 548 (5th Cir. 2013) (quoting *Pace v. Bogalusa City Sch. Bd.*, 403 F.3d 272, 290 (5th Cir. 2005)). “Relitigation of an issue is not precluded unless the facts and the legal standard used to assess them are the same in both proceedings.” *In re Southmark Corp.*, 163 F.3d at 932.

Charitable DAF attacks each element of collateral estoppel, so the Court addresses each

⁴ Appellant lists a fourth element occasionally referenced by the Fifth Circuit—“there is no special circumstance that would make it unfair to apply the doctrine”—but the Court finds no reason to address this possible fourth element in this case. See *In re Southmark Corp.*, 163 F.3d 925, 932 n.9 (5th Cir. 1999) (declining to apply the fourth element because appellant “failed to support it factually”).

element individually.

i. Identical issue

The bankruptcy court found “(a) consideration of the value that the estate was both receiving and paying, as well as (b) the potential existence of a ‘Right of First Refusal’ . . . [were] the gravamen of [Charitable DAF’s] Complaint.” *In re Highland*, 2022 WL 780991, at *9 (emphasis omitted). During the settlement hearing, the bankruptcy court had to determine whether the HarbourVest Settlement “was ‘fair and equitable’ and in the ‘best interests of creditors,’ and whether it was the ‘product of arms-length bargaining, and not of fraud or collusion[.]’” *Id.* at *8. This determination entailed “arguments and evidence regarding the methodology for the valuation of the HCLOF interest and the existence or non-existence of a ‘Right of First Refusal.’” *Id.*

Charitable DAF argues that the issues are not identical because the Objection “only addressed whether HarbourVest . . . had performed all conditions precedent to being able to transfer the interest to Highland *as another co-investor*” and did not present an identical claim “for breach of the HCLOF [Member] Agreement” and associated damages. Doc. 9, Appellant’s Br., 13–14. Further, “even if this one contract issue was fully . . . litigated,” only the second cause of action in Charitable DAF’s complaint arguably parallels that issue, according to Charitable DAF—the others are distinct. *Id.* at 14–15. Charitable DAF contends that these non-contract causes of action rely on evidence that was not known at the Rule 9019 Settlement Hearing, “stem from events that either occurred post-hearing, or were not discovered until after the hearing.” *Id.* at 15.

The Court finds the issues are identical. CLO Holdco’s Objection specifically argued:

Harbourvest has no authority to transfer its interests in HCLOF without first complying with the Right of First Refusal. The only way to effectuate such a transfer without first providing other members the Right of First Refusal is an intentionally

inaccurate interpretation of the Member Agreement's contractual provisions that would render specific passages redundant and meaningless.

R. at 4730. The bankruptcy court also heard argument and testimony from Seery, HCM's chief executive and chief restructuring officer, and Pugatch, a managing director of HarbourVest, about the valuation of HCLOF's assets at the settlement hearing. *Id.* at 6273, 6292, 6303–05 (“The twenty-two and a half [million] is the current—actually, the November value of HCLOF—the HarbourVest interests in HCLOF.”), 6358, 6374 (“The current value is right around \$22-1/2 million.”).

In the Original Complaint, Charitable DAF brought five causes of action: breach of fiduciary duties, breach of the HCLOF Member Agreement, negligence, RICO, and tortious interference. *Id.* at 551–65. The breach of fiduciary duties and negligence causes of action center around the alleged concealment of the rising value of HCLOF's assets and failing to offer the purchase of the assets to CLO Holdco or Charitable DAF before offering to HCM. *Id.* at 553–55, 559–60. The breach of the HCLOF Member Agreement cause of action encompasses the Right of First Refusal in the agreement. *Id.* at 558–59. The RICO cause of action alleges that HCM used mail and wire fraud “to obtain or arrive at valuations of the HCLOF interests,” and “conceal[] the true value of the HCLOF interests.” *Id.* at 560–64. Lastly, the tortious interference cause of action stems from HCM's alleged interference with CLO Holdco's Right of First Refusal in the Member Agreement and “misrepresenting the fair market value” of HCLOF's assets. *Id.* at 564–65. In sum, all of these causes of action involve either the valuation of HCLOF or the Right of First Refusal, so the issues are the same as those before the bankruptcy court at the Rule 2019 Settlement Hearing.

ii. *Actually Litigated*

The bankruptcy court found the same arguments were also actually litigated, reasoning:

The Bankruptcy Court would never have approved the HarbourVest Settlement if it thought the value being exchanged was not fair, or if it thought the HCLOF Interests could not be transferred and that someone might later sue the Debtor, claiming the Transfer was improper. All parties had the chance to argue and present evidence about this. The Bankruptcy Court made a ruling based on the evidence and argument.

In re Highland, 2022 WL 780991, at *9.

Charitable DAF argues that because the Objection was withdrawn and no one objected to the withdrawal, the issue asserted therein was not litigated. Doc. 9, Appellant's Br., 16. Additionally, it claims the Rule 9019 Settlement Hearing is not a mini-trial and, therefore, cannot serve as an opportunity for a party to litigate their claims. *Id.* at 17–18 (citing *Off. Comm. of Unsecured Creditors v. Moeller (In re Age Refin., Inc.)*, 801 F.3d 530, 541 (5th Cir. 2015)).

An issue is not actually litigated and, thus, precluded unless the legal standard in the prior action mirrors the legal standard of the latter action. *Copeland v. Merrill Lynch & Co.*, 47 F.3d 1415, 1422 (5th Cir. 1995) (citations omitted). The bankruptcy court approved the HarbourVest Settlement after applying the *Jackson Brewing* test, which considers:

(1) the probability of success in litigating the claims subject to the Settlement Agreement, with due consideration for the uncertainty in fact and law, (2) the complexity and likely duration of litigation and any attendant expense, inconvenience, and delay, and (3) all other factors bearing on the wisdom of the compromise, including: (i) the best interests of the creditors, with proper deference to their reasonable views, and (ii) the extent to which the settlement is truly the product of arms-length bargaining, and not of fraud or collusion.

R. at 5568; *see also In re Highland*, 2022 WL 780991, at *8 (quoting *Off. Comm. of Unsecured Creditors v. Moeller (In re Age Ref., Inc.)*, 801 F.3d 530, 540 (5th Cir. 2015)). Stated more succinctly, when faced with a settlement, the bankruptcy court ensures the “compromise is truly ‘fair and equitable’ and ‘in the best interest of the estate.’” *In re Jackson Brewing Co.*, 624 F.2d 599, 602 (5th

Cir. 1980) (quoting *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson* (TMT Trailer), 390 U.S. 414, 424 (1968)).

However, in the context of litigating actual claims—such as those asserted by Charitable DAF—a court applies a preponderance of the evidence standard, not the probability of success standard from *Jackson Brewing. Copeland*, 47 F.3d at 1423; *In re Zale Corp.*, 62 F.3d 746, 766 n.60 (5th Cir. 1995) (“We also note for future reference that the legal standard in a settlement hearing differs from that applicable in an adversary proceeding or state court trial Consequently, we doubt that the findings of the bankruptcy court in a settlement hearing would have preclusive effect in adversary proceedings or state court trials.”). See generally *Weaver v. Aquila Energy Mktg.*, 196 B.R. 945, 957 (S.D. Tex. 1996) (“[S]ettlement hearings and preference actions involve the application of different legal standards.”). “Examining whether a particular settlement is fair or equitable and in the best interest of the estate and creditors is a different inquiry, driven by different policies, than litigation of the actual claim.” *Copeland*, 47 F.3d at 1423. While the issues of the Right of First Refusal and the valuation of HCLOF were raised in the Rule 9019 Settlement Hearing, the parties did not fully litigate the issues as one would at trial, and the bankruptcy court did not resolve the issues according to a preponderance of the evidence standard. Because the bankruptcy court applied a legal standard in the Rule 9019 Settlement Hearing that is inapplicable to the adjudication of Charitable DAF’s causes of action, the issues were not actually litigated in the Rule 9019 Settlement Hearing and collateral estoppel does not apply.⁵ The Court **REVERSES** the bankruptcy court on this issue.

⁵ Having found the second element of collateral estoppel unmet, the Court need not address the third element—necessity of the previous determination to the prior decision.

3. Judicial Estoppel

The bankruptcy court found the elements of judicial estoppel met and barred the second and fifth causes of action, which rely on the Right of First Refusal. *In re Highland*, 2022 WL 780991, at *12. The Court now addresses whether judicial estoppel applies to Charitable DAF's second and fifth causes of action.

Judicial estoppel is an equitable common law doctrine aimed at preventing a party from asserting an inconsistent legal position from a previous proceeding. *In re Coastal Plains, Inc.*, 179 F.3d 197, 205 (5th Cir. 1999). "The purpose of the doctrine is 'to protect the integrity of the judicial process', by 'prevent[ing] parties from playing fast and loose with the courts to suit the exigencies of self interest.'" *Id.* (alteration in original) (quoting *Brandon v. Interfirst Corp.*, 858 F.2d 266, 268 (5th Cir. 1988)). A court examines three criteria when determining the applicability of judicial estoppel: "(1) the party against whom judicial estoppel is sought has asserted a legal position which is plainly inconsistent with a prior position; (2) a court accepted the prior position; and (3) the party did not act inadvertently." *Reed v. City of Arlington*, 650 F.3d 571, 574 (5th Cir. 2011) (en banc).

Charitable DAF raises arguments for each of the judicial estoppel elements, so the Court addresses each element below.

i. *Inconsistent legal position*

Charitable DAF argues that the bankruptcy court's determination relies on a transcription error that amounted to an admission of HCM's compliance with the Right of First Refusal. Doc. 9, Appellant's Br., 22–23. The corrected transcript makes clear that no admission was made on behalf of CLO Holdco, according to Charitable DAF. *Id.* at 23–24.

The relevant portion of the original transcript reads:

In response to Mr. Morris, I'm not going to enter into a stipulation on behalf of my client, **but** the Debtor is compliant with all aspects of the contract. We withdrew our objection, and we believe that's sufficient.

R. at 6280. The corrected transcript reads:

In response to Mr. Morris, I'm not going to enter into a stipulation on behalf of my client **that** the Debtor is compliant with all aspects of the contract. We withdrew our objection, and we believe that's sufficient.

Doc. 9-1, Appellant's Br. Ex. A, 4.

Accepting this version of the record, CLO Holdco refused to "enter into a short stipulation on the record reflecting that the Debtor's acquisition of HarbourVest's interests in HCLOF is compliant with all of the applicable agreements between the parties." *Id.*; R. at 6280. However, moments before this, CLO Holdco withdrew its Objection premised on the Right of First Refusal stating:

CLO Holdco has had an opportunity to review the reply briefing, and after doing so has gone back and scrubbed the HCLOF corporate documents. Based on our analysis of Guernsey law and some of the arguments of counsel in those pleadings and our review of the appropriate documents, I obtained authority from my client, Grant Scott, as Trustee for CLO Holdco, to withdraw the CLO Holdco objection based on the interpretation of the member agreement.

R. at 6269–70. The bankruptcy court's decision rests primarily on this earlier withdrawal of the Objection and only later buttresses its argument with the then-unknown transcription error. *In re Highland*, 2022 WL 780991, at *11 (following discussion of the withdrawal of the Objection with "[i]f that weren't enough" before mentioning the then-unknown transcription error). Thus, if the earlier withdrawal—without the transcription error—satisfies the first element of judicial estoppel then the bankruptcy court did not commit any error even if it referenced an incorrect transcription of the latter exchange.

The Court finds the bankruptcy court did not err in finding the first element of judicial estoppel. CLO Holdco made clear in the withdrawal of its objection that it no longer disputed the other parties' interpretation of the Right of First Refusal, which now forms the basis of Charitable DAF's second and fifth causes of action. *See R.* at 6269–70. Thus, the withdrawal of the objection put CLO Holdco on the opposite side of the legal argument that Charitable DAF now makes in its second and fifth causes of action. The first element of judicial estoppel is established because Charitable DAF has taken inconsistent positions in separate proceedings.

ii. *The bankruptcy court accepted the prior position*

The bankruptcy court solely relied on the withdrawal of the Objection to find the second element of judicial estoppel established. *In re Highland*, 2022 WL 780991, at *12. In the words of the bankruptcy court, it “perceived [this objection] as one of the major arguments that was relevant to the HarbourVest Settlement.” *Id.* “The [b]ankruptcy [c]ourt relied upon that withdrawal of CLO Holdco’s objection in making the determination to approve of the HarbourVest Settlement and, specifically, that Highland would not be running afoul of any obligation in entering into the HarbourVest Settlement.” *Id.*

Charitable DAF argues that there is no acceptance by the bankruptcy court of a prior position because without the transcription error, there is no admission and no inconsistent position. Doc. 9, Appellant’s Br., 25–26. Further, it contends that the withdrawal of the Objection is not the equivalent of stating the Right of First Refusal causes of action are meritless. *Id.* at 26–27.

The bankruptcy court did not err in finding the second element of judicial estoppel met because it necessarily relied on the change in CLO Holdco’s assessment of its Objection. The Right of First Refusal created a major obstacle to approval of the HarbourVest Settlement. When CLO

Holdco withdrew its Objection based on the Right of First Refusal, the Court had to accept CLO Holdco's position that the Right of First Refusal no longer posed an obstacle to the HarbourVest Settlement. Thus, the Court finds no error by the bankruptcy court for the second element of judicial estoppel.

iii. *Inadvertence of Charitable DAF*

The bankruptcy court did not examine the inadvertence of Charitable DAF in asserting inconsistent legal positions. See *In re Highland*, 2022 WL 780991, at *12.

Charitable DAF argues that it did not know the facts for several of its claims until after the settlement hearings, so it could not have asserted these claims at the hearing. Doc. 9, Appellant's Br., 27. Charitable DAF relies on the allegations surrounding the valuations of the HCLOF assets and the alleged acts violating the RICO statutes. *Id.* at 27–29. Additionally, the bankruptcy court did not address the inadvertence element for judicial estoppel and a failure to apply the correct legal standard is reversible error, Charitable DAF contends. Doc. 9, Appellant's Br., 27; Doc. 27, Appellant's Reply, 3–4.

The Court agrees with Appellant's last argument. A court abuses its discretion by applying the wrong legal standard. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990); *Def. Distrib. v. Bruck*, 30 F.4th 414, 427 (5th Cir. 2022). And the misapplication of a legal standard is reviewed de novo. *In re Woerner*, 783 F.3d 266, 270–71 (5th Cir. 2015). By not addressing the third element of judicial estoppel, the bankruptcy court applied the wrong legal standard. The Fifth Circuit implicitly recognized this third element—inadvertence—in *In re Coastal Plains, Inc.*, 179 F.3d at 206, 210, which the bankruptcy court cited for its legal standard. *In re Highland*, 2022 WL 780991, at *11. The Fifth Circuit has since clarified that “[t]his circuit . . . recognizes *three* particular requirements”

for judicial estoppel. *Kane v. Nat'l Union Fire Ins. Co.*, 535 F.3d 380, 386 (5th Cir. 2008) (emphasis added). Because the bankruptcy court did not address the inadvertence element in its order dismissing Charitable DAF's second and fifth causes of action, the bankruptcy court abused its discretion. While the district court finds no issue in the bankruptcy court's analysis of the first two elements of judicial estoppel, the bankruptcy court did not address this third element, warranting remand for determination by the bankruptcy court whether Charitable DAF acted inadvertently to change its legal position.

3. Leave to Amend

Charitable DAF requested leave to amend its complaint in its response to the motion to dismiss, R. at 2272–73, which the bankruptcy court denied by dismissing all claims with prejudice. *In re Highland*, 2022 WL 780991, at *12. The Court need not address this argument because, upon remand, the bankruptcy court will have the opportunity to reassess Charitable DAF's claims and determine whether amendment should be allowed under Federal Rule of Civil Procedure 15(a). *See Marucci Sports, L.L.C. v. Nat'l Collegiate Athletic Ass'n*, 751 F.3d 368, 378 (5th Cir. 2014) (listing factors a court considers when determining whether to allow amendment of the complaint).

C. Appeal of the Motion to Stay Order⁶

Appellant Charitable DAF raises one issue on appeal of the Motion to Stay Order: “Did the bankruptcy court err by proceeding with the case rather than staying it” when Charitable DAF was enjoined “from litigating any action against Appellee [HCM]”? Doc. 11, Appellant's Br., 2. The bankruptcy court denied Charitable DAF's Motion to Stay All Proceedings and the subsequent Amended Motion to Stay All Proceedings, reasoning:

⁶ For this appeal, the record and document citations are in case No. 3:21-CV-3129-B.

I just don't think that you have shown that, you know, either the exculpation clause or the injunction provisions of the plan somehow tie your hands in arguing the 12(b)(6) motion, defending against the 12(b)(6) motion today or I just think that your arguments reflect, frankly, a misunderstanding of how the injunction language and exculpation language applies here.

R. at 2087; *see also id.* at 4–5.

On appeal, Charitable DAF argues that the bankruptcy court erred in its denial of the motion for a stay because the Plan Confirmation Order's injunction prohibited Charitable DAF from participating in the case, “terminat[ing] any case or controversy and stripp[ing] the bankruptcy court of jurisdiction.” Doc. 11, Appellant's Br., 7. Accordingly, “[t]he bankruptcy court could only stay the case pending the [appeal of the Plan Confirmation Order's injunction], or dismiss the case as barred by the injunction[,]” Charitable DAF contends.” *Id.* at 9.

As noted above, the Fifth Circuit affirmed the Plan in all respects except one and specifically affirmed the injunction. *Highland*, 2022 WL 3571094, at *13–14. The injunction in the Plan provides that “all Enjoined Parties are and shall be permanently enjoined . . . from directly or indirectly (i) commencing, conducting, or continuing in any manner any suit, action, or other proceeding of any kind . . . against or affecting the Debtor or the property of the Debtor.” R. at 2401. And the term Enjoined Parties includes “(i) all Entities who have held, hold, or may hold Claims against or Equity Interests in the Debtor [and] . . . (iii) any Entity that has appeared and/or filed any motion, objection, or other pleading in this Chapter 11 Case.” *Id.* at 2358.

Relatedly, the Plan exculpates HCM⁷ “from, any claim, obligation, suit, judgment, damage, demand, debt, right, Cause of Action, remedy, loss, and liability for conduct occurring on or after the Petition Date in connection with or arising out of [execution of the Plan].” *Id.* at 2398. However, this exculpation provision⁸ does “not apply to (a) any acts or omissions of an Exculpated Party arising out of or related to acts or omissions that constitute bad faith, fraud, gross negligence, criminal misconduct, or willful misconduct or (b) [other specific entities actions].” *Id.* at 2398–99.

The bankruptcy court did not abuse its discretion⁹ in denying the motion for a stay of the case. The bankruptcy court found that the Plan’s injunction and exculpation provisions—which it *approved*—did not prevent Charitable DAF from pursuing its causes of action. *Id.* at 2087. In effect, the bankruptcy court held that Charitable DAF could continue to litigate its causes of action and the Court agrees. *See id.* Just like the bankruptcy court, this Court does not see how the injunction and exculpation provisions prohibit Charitable DAF from participating in the below action. The exculpation provision permits Charitable DAF to bring claims against HCM for “bad faith, fraud,

⁷ The Plan makes clear that the term Exculpated Party does not include Charitable DAF. R. at 2359 (“Exculpated Parties” means, collectively, (i) the Debtor . . . provided, however, that, for the avoidance of doubt, none of . . . the Charitable Donor Advised Fund, L.P. (and any of its subsidiaries, including CLO Holdco, Ltd., and managed entities) . . . is included in the term ‘Exculpated Party.’”).

⁸ Subsequently to this appeal, the Fifth Circuit vacated a portion of the exculpation provision. *Highland*, 2022 WL 3571094, at *12. The Fifth Circuit held that “the exculpation of certain non-debtors . . . was unlawful” so the court “str[uck] all exculpated parties from the Plan except for [HCM], the Committee and its members, and the Independent Debtors.” *Id.* Charitable DAF brings its causes of action against HCM, so what remains of the exculpation provision still applies to this case. *See id.*

⁹ The parties disagree on whether this Court reviews the denial of the stay for abuse of discretion or de novo. Doc. 11, Appellant’s Br., 6 (“Questions of law are reviewed de novo.”); Doc. 16, Appellee’s Br., 2 (“The Court reviews the bankruptcy court’s order for abuse of discretion.”). Charitable DAF does not pursue this argument in its Reply, so this argument is considered waived, *Black v. N. Panola Sch. Dist.*, 461 F.3d 584, 588 n.1 (5th Cir. 2006), as well as incorrect. *See Moore v. Tangipahoa Par. Sch. Bd.*, 507 F. App’x 389, 392 (5th Cir. 2013) (citing *Wildmon v. Berwick Universal Pictures*, 983 F.2d 21, 23 (5th Cir. 1992)) (“We review a district court’s denial of a stay pending appeal for abuse of discretion.”).

gross negligence, criminal misconduct, or willful misconduct” and Charitable DAF’s causes of action—breach of fiduciary duty, breach of contract, negligence, and RICO—appear to fit within these categories of claims. *Id.* at 490–504, 2398–99. Further, Charitable DAF continued to participate by responding to HCM’s motion to dismiss and participating in the hearing regarding the motion to dismiss. See Section III(A) *supra*. Lastly and importantly, Charitable DAF did not even attempt to address the traditional stay elements. R. at 2087 (“I guess one might say the traditional four-factor test for a stay of a proceeding has really not been the subject of the argument here for a stay.”). Without argument on the factors for a stay, this Court lacks any basis to overturn the bankruptcy court.

The bankruptcy court’s Motion to Stay Order is **AFFIRMED**.

IV.

CONCLUSION

For the foregoing reasons, the Court **REVERSES** and **REMANDS** the bankruptcy court’s Motion to Dismiss Order and **AFFIRMS** the bankruptcy court’s Motion to Stay Order.

SO ORDERED.

SIGNED: September 2, 2022.

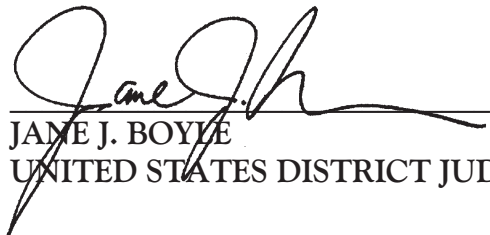

JANE J. BOYLE
UNITED STATES DISTRICT JUDGE

EXHIBIT 13

005518

Between

CLO HOLDCO, LTD.

And

HARBOURVEST DOVER STREET IX INVESTMENT L.P.

And

HARBOURVEST 2017 GLOBAL AIF L.P.

And

HARBOURVEST 2017 GLOBAL FUND L.P.

And

HV INTERNATIONAL VIII SECONDARY L.P.

And

HARBOURVEST SKEW BASE AIF L.P.

And

HIGHLAND CAPITAL MANAGEMENT, L.P.

And

LEE BLACKWELL PARKER, III

And

QUEST IRA, INC., FBO LEE B. PARKER III, ACCT. # 3058311

And

QUEST IRA, INC., FBO HUNTER COVITZ, ACCT. # 1469811

And

QUEST IRA, INC., FBO JON POGLITSCH, ACCT. # 1470612

And

QUEST IRA, INC., FBO NEIL DESAI, ACCT. # 3059211

And

HIGHLAND CLO FUNDING, LTD.

And

HIGHLAND HCF ADVISOR, LTD.

MEMBERS AGREEMENT RELATING TO THE COMPANY

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1. INTERPRETATION

1.1 the following words and expressions shall have the following meanings, unless they are inconsistent with the context:

“Advisers Act” shall mean the U.S. Investment Advisers Act of 1940, as amended from time to time, and the rules and regulations of the U.S. Securities and Exchange Commission promulgated thereunder;

"Agreement" means this agreement together with the Schedule;

"Articles" means the articles of incorporation of the Company as amended from time to time;

"Business" means the business of the Company as described in Recital (B);

"Business Day" means a day (other than a Saturday or Sunday) on which banks are open for ordinary banking business in Guernsey;

"Directors" means the directors of the Company from time to time;

“**CLO Holdco**” means CLO Holdco, Ltd. (or any permitted successor to the business of CLO Holdco, Ltd. or interest in the Company);

"Code" shall mean the U.S. Internal Revenue Code of 1986, as amended from time to time.

"Directors" means the directors of the Company from time to time;

“Dover IX” means HarbourVest Dover Street IX Investment L.P. (or any permitted successor to the business of HarbourVest Dover Street IX Investment L.P. or any interest in the Company);

“DOL” shall mean the U.S. Department of Labor, or any governmental agency that succeeds to the powers and functions thereof.

23981765.11. BUSINESS

"Dover IX" shall mean HarbourVest Dover Street IX Investment L.P. (or any permitted successor to the business of HarbourVest Dover Street IX Investment L.P. or interest in the Company);

"ERISA" shall mean the U.S. Employee Retirement Income Security Act of 1974, as amended from time to time;

"ERISA Member" shall mean a Member that (a) is a "benefit plan investor" (as such term is defined in the DOL Regulations as modified by section 3(42) of ERISA) subject to the fiduciary responsibility provisions of part 4 of title I of ERISA or is a "plan" (as such term is defined in section 4975(e) of the Code) subject to section 4975 of the Code or (b) is designated as an ERISA Member by the General Partner in writing on or before the date at which such ERISA Member is admitted to the Company;

"HarbourVest Entities" means: Dover IX; HarbourVest 2017 Global AIF L.P.; HarbourVest 2017 Global Fund L.P.; HV International VIII Secondary L.P.; and HarbourVest Skew Base AIF L.P. (or any of their respective permitted successors to their businesses or interests in the Company);

"Highland Principals" means: Highland Capital Management, L.P.; Lee Blackwell Parker, III, Quest IRA, Inc., fbo Lee B. Parker III Acct. # 3058311; Quest IRA, Inc., fbo Hunter Covitz Acct. # 1469811; Quest IRA, Inc., fbo Jon Poglitsch Acct. # 1470612; Quest IRA, Inc., fbo Neil Desai Acct. # 3059211 (or any of their respective permitted successors to their businesses or interests in the Company);

"Law" means the Companies (Guernsey) Law, 2008, as amended;

"Member" means a person whose name is from time to time entered in the register of members of the Company as the holder of shares in the Company;

"Parties" means the parties to this Agreement and any other person who agrees to be bound by the terms of this Agreement under an Adherence Agreement;

"Shares" means ordinary shares in the Company;

"Subsidiary" shall have the meaning ascribed to it in the Law;

"Subscription and Transfer Agreement" means the Subscription and Transfer Agreement, dated as of 15 November 2017, entered into by and among CLO HoldCo, Ltd. and each of the Members and acknowledged and agreed by the Company and the Portfolio Manager.

Any capitalized terms used herein without definition have the meanings specified in the Offering Memorandum.

- 1.2 any reference to the Parties being obliged to procure shall so far as they are able includes, without limitation, procuring by the exercise of votes which they directly or indirectly control at meetings of the Directors or general meetings of the Company;
- 1.3 any reference to a person includes, where appropriate, that person's heirs, personal representatives and successors;
- 1.4 any reference to a person includes any individual, body corporate, corporation, firm, unincorporated association, organisation, trust or partnership;
- 1.5 any reference to time shall be to Guernsey time;
- 1.6 except where the context otherwise requires words denoting the singular include the plural and vice versa and words denoting any one gender include all genders;

1.7 unless otherwise stated, a reference to a Clause or a Schedule is a reference to a Clause or a Schedule to this Agreement; and

1.8 Clause headings are for ease of reference only and do not affect the construction of any provision.

2. THE BUSINESS OF THE COMPANY

2.1 The Parties hereby agree that the objects and purpose of the Company shall be to carry on the Business.

2.2 The Parties shall so far as they are able (including without limitation by the exercise of votes which they directly or indirectly control at meetings of the Directors or general meetings of the Company) procure that (i) the Company's principal activities shall be the pursuit of the objects and purposes described in Clause 2.1 conducted in accordance with the provisions hereof and with the Offering Memorandum, the Subscription and Transfer Agreement and Articles of the Company and (ii) the Parties shall not take any action inconsistent with the provisions of the Offering Memorandum, including, without limitation the investment strategy set forth in the "Summary" and the applicable restrictions during and after the Investment Period and the suspension or termination of the Investment Period following a Key Person Event.

2.3 The Members shall (so long as they hold shares in the capital of the Company) use all reasonable endeavours to promote and develop the Business of the Company.

3. VOTING RIGHTS

3.1 The Parties agree that the following provisions of this Clause 3 shall apply during such period or periods as the Members parties hereto are Members.

3.2 The Parties shall procure that the Company shall not take any action at any meeting requiring the sanction of an ordinary or special resolution or by written resolution, in each case of the Directors or of the Members, without the affirmative vote or prior written consent, as applicable, of the Members totalling in the aggregate more than seventy-five percent (75%) of the Company, including, but not limited to, the following actions:

3.2.1 any issuance of new shares of the Company or a new class of shares of the Company or payment of any dividend by issuance of new shares of the Company, other than issuances of Shares pursuant to the Offering Memorandum and the Subscription and Transfer Agreement;

3.2.2 any alteration or cancellation of any rights of any Shares or of the Share capital of the Company,

3.2.3 any conversion or redemption of Shares, except pursuant to Clause 5.5,

3.2.4 any payment of commission in consideration for subscribing or agreeing to subscribe for any shares in the Company,

3.2.5 the creation of any lien on any Shares, except pursuant to the remedies in Clause 5.3. or

3.2.6 the suspension of the calculation of the NAV; other than a temporary suspension of the calculation of the NAV and NAV per Share by the Board of Directors during any period if it determines in good faith that such a suspension is warranted by extraordinary circumstances, including: (i) during any period when any market on which the Company's investments are quoted, traded or dealt in is closed, other than for ordinary holidays and weekends, or during periods in which dealings are restricted or suspended; (ii) during the existence of any state of affairs, including as a result of political, economic, military or monetary events or any circumstances outside the control of the Portfolio Manager or the Company, as a result of which,

in the reasonable opinion of the Portfolio Manager, the determination of the value of the assets of the Company, would not be reasonably practicable or would be seriously prejudicial to the Members taken as a whole; (iii) during any breakdown in the means of communication normally employed in determining the price or value of the Company's assets or liabilities, or of current prices in any market as aforesaid, or when for any other reason the prices or values of any assets or liabilities of the Company cannot reasonably be accurately ascertained within a reasonable time frame; (iv) during any period when the transfer of funds involved in the realization or acquisition of any investments cannot, in the reasonable opinion of the Portfolio Manager, be effected at normal rates of exchange; or (v) automatically upon liquidation of the Company.

4. **ADVISORY BOARD.**

- 4.1 Composition of Advisory Board. The Company shall establish an advisory board (the "**Advisory Board**") composed of two individuals, one of whom shall be a representative of CLO Holdco and one of whom shall be a representative of Dover IX (or, in each case, or any permitted successor to the interest in the Company of such Member). No voting member of the Advisory Board shall be a controlled Affiliate of the Portfolio Manager (including, for the avoidance of doubt, following a permitted transfer of CLO Holdco's interest to an Affiliate of the Portfolio Manager, if applicable), it being understood that for the purposes of this sentence none of CLO Holdco, its wholly-owned subsidiaries nor any of their respective directors or trustees shall be deemed to be a controlled Affiliate of the Portfolio Manager due to their pre-existing non-discretionary advisory relationship with the Portfolio Manager. None of the members of the Advisory Board shall receive any compensation (other than reimbursement for reasonable and documented out-of-pocket expenses) in connection with their position on the Advisory Board. The Company shall bear any fees, costs and expenses related to the Advisory Board.
- 4.2 Meetings of Advisory Board; Written Consents. The Advisory Board shall meet with the Portfolio Manager at such times as requested by the Portfolio Manager from time to time. The quorum for a meeting of the Advisory Board shall be all of its members entitled to vote. All actions taken by the Advisory Board shall be (i) by a unanimous vote of all of the members of the Advisory Board in attendance in a meeting at which a quorum is present and entitled to vote and not abstaining from voting or (ii) by a written consent in lieu of a meeting signed by all of the members of the Advisory Board entitled to consent and not abstaining from consenting. Meetings of the Advisory Board may be held in person, by telephone or by other electronic device.
- 4.3 Functions of Advisory Board. The Advisory Board shall provide (or determine not to provide) any consents or approvals expressly contemplated by this Agreement and the Offering Memorandum to be provided by the Advisory Board and, at the request of the Portfolio Manager in its sole discretion, provide general advice (which, for the avoidance of doubt, shall be non-binding) to the Portfolio Manager or the Company with regard to Company activities and operations and other matters. For the avoidance of doubt, no consent or approval of the Advisory Board shall be required for any action or determination expressly permitted or contemplated hereunder or in the Offering Memorandum and not conditioned on such a consent or approval. The Portfolio Manager shall not act contrary to the advice of the Advisory Board with respect to any action or determination expressly conditioned herein or in the Offering Memorandum on the consent or approval of the Advisory Board. Without limiting the foregoing, the Advisory Board shall be authorized to give any approval or consent required or deemed necessary or advisable under the Advisers Act on behalf of the Company and the Members, including under Section 206(3) of the Advisers Act. The Portfolio Manager may from time to time in its discretion request the Advisory Board to review and ratify certain Company matters. The consent of the Advisory Board shall be required to approve the following actions: (i) any extension of the Investment Period; (ii) any extension of the Term (other than an automatic extension following an extension of the Investment Period that has been approved by the Advisory Board); (iii) any allotment of additional equity securities by the Company; and (iv) any investment in a Related Obligation or any other transaction between the Company or any entity in which the Company holds a direct or indirect interest, on the one hand, and Highland or any of its Affiliates, on the other hand and (v) other matters as set forth in the Offering

Memorandum. Notwithstanding the foregoing or anything to the contrary set forth herein, no transaction that is specifically authorized in the governing documents of the Company shall require approval of the Advisory Board, including, without limitation, sales or securitizations of all or a portion of the Company's loan portfolio into new Qualifying CLOs (i.e. the transfer of warehoused assets into new Qualifying CLOs), investments in CLO Notes issued by CLOs managed by Highland Affiliates, and the NexBank Credit Facility and any Permitted NexBank Credit Facility Amendments, in each case as described in the Offering Memorandum. Any such approval, consent or ratification given by the Advisory Board shall be binding on the Company and the Members. Neither the Advisory Board nor any member thereof shall have the power to bind or act for or on behalf of the Company in any manner, and no shareholder who appoints a member of the Advisory Board shall be deemed to be an Affiliate of the Company or Highland solely by reason of such appointment.

- 4.4 Term of Members of Advisory Board. A member of the Advisory Board shall be deemed removed from the Advisory Board (i) if such member is no longer an officer, director, manager, trustee, employee, consultant or other representative of CLO Holdco or Dover IX, as applicable, or their respective Affiliates and shall be replaced as soon as practicable with a representative of CLO Holdco or Dover IX, or their respective Affiliates, as applicable, or (ii) if the Member represented by such member either becomes a Defaulting Member or such member ceases to be eligible to represent such Member pursuant to Clause 4.1.
- 4.5 No Duties to Other Members. No Advisory Board member who is the representative of any Member shall, to the extent permitted by law, owe a fiduciary duty to the Company or any other Member (other than the duty to act in good faith), and may, to the fullest extent permitted by law, in all instances act in such member's own interest and in the interest of the Member that appointed such member.

5. **DEFAULTING MEMBERS**

- 5.1 In the event any Member defaults in its obligation to pay the full amount of the purchase price of Shares called for settlement under the Subscription and Transfer Agreement on the applicable Settlement Date (such unpaid amount, an "**Outstanding Settlement Amount**"), the Portfolio Manager, on behalf of the Company, shall provide written or telephonic notice of such default to such Member. If such default is not cured within 5 business days after written (or if applicable telephonic or email) notice thereof given by the Portfolio Manager, on behalf of the Company, has been received by such Member, such Outstanding Settlement Amount shall automatically accrue interest on a retroactive basis from the date such Outstanding Settlement Amount was due at 12% (the "**Default Interest Rate**") (which interest, once paid, shall not be applied to the purchase of the unsettled Shares of such Member, but which will upon receipt be distributed pro rata to those Members who have funded any such Outstanding Settlement Amounts pursuant to this Clause 5). No such Shares which have failed to be settled will be issued to any Member until settlement of the full amount of the purchase price has been made. In addition, if such default is not cured within 10 business days after written or telephonic notice thereof given by the Portfolio Manager, on behalf of the Company, has been received by such Member (a "**Defaulting Member**"), the following provisions shall apply:
 - 5.2 Whenever the vote or consent of the Defaulting Member would otherwise be required or permitted hereunder or under the Articles, the Defaulting Member shall not be entitled to participate in such vote or consent in respect of his existing shareholding and with respect to any representative of such Defaulting Member on the Advisory Board, and such vote or consent shall be calculated as if such Defaulting Member were not a Member and, as applicable, any representative of such Defaulting Member on the Advisory Board were not a member of the Advisory Board.
 - 5.3 The Portfolio Manager, on behalf of the Company, may pursue and enforce all rights and remedies available, including the commencement of legal proceedings against the Defaulting Member to collect the Outstanding Settlement Amounts, together with interest thereon for the account of the Company from the date due at the Default Interest Rate, plus the costs and expenses of collection (including attorneys' fees and expenses).

- 5.4 The Portfolio Manager, on behalf of the Company, may (at the sole cost of the Defaulting Member) borrow funds from any person (other than the Defaulting Member or its Affiliates) to cover such shortfall and/or advance all or a portion of the Defaulting Member's Outstanding Settlement Amount to the Company on behalf of the Defaulting Member, and such advance shall be repaid by the Defaulting Member to the Portfolio Manager, on behalf of the Company, with interest for the account of the Portfolio Manager, on behalf of the Company, on the amount outstanding from time to time commencing on the date of the advance at the Default Interest Rate. To the extent the Portfolio Manager, on behalf of the Company, advances funds to the Company on behalf of a Defaulting Member, all distributions from the Company that would otherwise be made to the Defaulting Member shall be paid to the Portfolio Manager, on behalf of the Company, (with any such amounts being applied first against accrued but unpaid interest and then against principal), until all amounts payable by the Defaulting Member to the Portfolio Manager, on behalf of the Company, under this Clause 5.4 (including interest) have been paid in full.
- 5.5 The Portfolio Manager, on behalf of the Company, may elect, upon notice to the Defaulting Member, to redeem the Defaulting Member's shares in an amount equal to 50% of the outstanding amount existing as of the date of the default at a price of \$0.0001 per Share. Thereupon, the commitment of the Defaulting Member under the Subscription and Transfer Agreement shall be zero, the Defaulting Member shall not be obligated to make any further settlements, the voting capital of such Defaulting Member and of each other Member shall be re-determined as of the date of such default to reflect the new commitment of the Defaulting Member, and the Portfolio Manager shall revise the books and records of the Company to reflect the reduction of the commitment of the Defaulting Member. The Members agree (x) that the damages suffered by the Company as the result of a failure by a Member to settle a commitment to purchase Shares that is required by this Agreement cannot be estimated with reasonable accuracy and (y) that the foregoing provisions of this Clause 5.5 shall act as liquidated damages for the default by the Defaulting Member (which each Member hereby agrees are reasonable).
- 5.6 The Board may offer to the non-Defaulting Members (pro rata in accordance with their respective Commitments) the option of purchasing the Defaulting Member's unsettled Shares on the terms set forth in the applicable Settlement Notice (as defined in the Subscription and Transfer Agreement).
- 5.7 At the election of the Board, distributions of dividends otherwise payable to the Defaulting Member under the Articles shall not be paid to the Defaulting Member, but instead shall be applied against the amount of the Outstanding Settlement Amount (plus interest at the Default Interest Rate and related costs); provided that any amounts so applied shall be deemed to have been distributed to the Defaulting Member under the Articles.
- 5.8 The Portfolio Manager may send an amended or new Settlement Notice to the Members other than the Defaulting Member in an amount equal to the Defaulting Member's Outstanding Settlement Amount and otherwise in accordance with the Subscription and Transfer Agreement.
- 5.9 Each Defaulting Member further appoints the Portfolio Manager as agent and attorney-in-fact for the Defaulting Member and hereby grants to the Portfolio Manager an irrevocable power of attorney to take all actions necessary on its behalf to sell, assign, or transfer the commitment to purchase unsettled Shares of such Defaulting Member pursuant to Clause 5.6 or as necessary on its behalf to effect the other remedies or rights set forth in this Clause 5; provided that the Portfolio Manager shall not bind any Defaulting Member to an indemnification or other similar obligation which guarantees the financial performance of the Company or which exceeds the ability of the Defaulting Member to provide indemnification under applicable law.
6. **TRANSFERS OR DISPOSALS OF SHARES**
- 6.1 No Member shall sell, pledge, charge, mortgage, assign, assign by way of security, transfer, convey, exchange or otherwise dispose of its Shares or its commitment to settle purchases of Shares under the Subscription and Transfer Agreement (each a "**Transfer**"), other than to an Affiliate of an initial Member party hereto, without the prior written consent of the Portfolio

Manager, which consent shall be in the sole discretion of the Portfolio Manager; provided that no such Transfer shall be made unless in the opinion of counsel reasonably satisfactory to the Portfolio Manager (who may be counsel for the Company, and which requirement for an opinion may be waived, in whole or in part, in the sole discretion of the Portfolio Manager) that:

- 6.1.1 such Transfer would not require registration under the Securities Act or any state securities or "Blue Sky" laws or other laws applicable to the Shares to be assigned or transferred and is conducted in conformance with the restrictions set forth in the Offering Memorandum;
 - 6.1.2 such Transfer would not be reasonably likely to cause the Company to be subject to tax in any jurisdiction other than of its incorporation on a net income basis, not be reasonably likely to cause the Company to become subject to registration as an investment company under the Investment Company Act of 1940, as amended;
 - 6.1.3 such Transfer would not cause the Company to be considered to be an entity whose underlying assets are considered to include "plan assets" by reason of investment by an "employee benefit plan" or "plan" in such entity pursuant to the U.S. Plan Assets Regulations; and
 - 6.1.4 such sale, assignment, disposition or transfer would not to cause all or any portion of the assets of the Company to constitute "plan assets" under ERISA or the Code.
- 6.2 Prior to making any Transfer of Shares (other than Transfers to Affiliates of an initial Member or, in the case of CLO Holdco or a Highland Principal, to Highland, its Affiliates or another Highland Principal) a Member must first offer to the other Members a right to purchase the Shares, on a pro rata basis with respect to their current Shares, at the same price (which must be cash) as such Shares are proposed to be purchased by the prospective third party purchaser pursuant to an irrevocable offer letter. The other Members will have 30 days following receipt of the letter to determine whether to purchase their entire pro rata portion of the Shares proposed to be Transferred. If the other Members do not accept the offer, the Member may (subject to complying with the other Transfer restrictions in this Agreement) Transfer the applicable Shares that such Members have not elected to purchase to a third party at a price equal to or greater than the price described in the offer letter, provided that if the Member has not (a) entered into a definitive agreement to effect such sale within 90 days after the expiration of the period that the other Members have to accept the offer in the offer letter or (b) consummated the sale within 120 day after the entry into the definitive agreement to consummate the sale, it must comply with these right of first refusal procedures again. Any Member (other than the Member proposing to Transfer its Shares) may assign its right to purchase its pro rata portion of the Shares to any other Member (subject to complying with the other Transfer restrictions in this Agreement), any initial Member (other than the Member proposing to Transfer its Shares) may assign its right to purchase its pro rata portion of the Shares to an Affiliate (subject to complying with the other Transfer restrictions in this Agreement), and CLO Holdco and the Highland Principals (unless such Member is the Member proposing the Transfer its Shares) may assign its right to purchase its pro rata portion of the Shares to Highland, an Affiliate of Highland or other Highland Principals (subject to complying with the other Transfer restrictions in this Agreement).
- 6.3 No Highland Principal may transfer his or its interests in the Company other than (i) to a trust or other tax or estate planning vehicle or (ii) to the Portfolio Manager, its Affiliates or another Highland Principal upon the termination of such Highland Principal's (or the beneficial owner of such Highland Principal, if applicable) employment by Highland Capital Management, L.P.
- 6.4 Any transferor of any Share shall remain bound by the terms of this Agreement applicable to it prior to such transfer and that nothing in this Agreement shall constitute a waiver of any rights a Party to this Agreement may have by reason of a breach of this Agreement by a transferor prior to transfer. The transferor and/or the transferee shall bear all costs of any Transfer.
- 6.5 The Parties agree not to Transfer their Shares to any person unless such transferee agrees to be bound by the terms of this Agreement.
- 6.6 All Adherence Agreements executed pursuant to this Clause shall be executed by the transferee or allottee and each Party.

7. CONFIDENTIALITY

- 7.1 Each Party agrees to keep any information received by it pursuant to this Agreement or relating to the Business as confidential and not (save with the relevant Party's consent or as may be required by Law or the rules of any regulatory authority or any stock exchange) disclose to any person such information.
- 7.2 Notwithstanding the foregoing, the Parties agree that the HarbourVest Entities may disclose to their limited partners and prospective limited partners (including any agents of such limited partners or prospective limited partners), clients and applicable governmental agencies (a) the name and address of the Company, (b) the capital commitment and the remaining capital commitment, (c) the net asset value of such HarbourVest Entity's interest in the Company, (d) the amount of distributions that have been made to such HarbourVest Entity by the Company and the amount of contributions that have been made by such HarbourVest Entity to the Company, (e) such ratios and performance information calculated by such HarbourVest Entity using the information in clauses (a) through (d) above, including the ratio of net asset value plus distributions to contributions (i.e., the "multiple") and such HarbourVest Entity's internal rate of return with respect to its investment in the Company, and (f) tax information with respect to the Company.

8. DIVIDENDS

- 8.1 The Company agrees that it shall not, and the Portfolio Manager agrees it shall not cause the Company to, make any dividends except pursuant to the section titled “Summary—Dividend Policy” of the Offering Memorandum.

9. TERM OF THE COMPANY

- 9.1 Each Party agrees to cause the winding up and dissolution of the Company after the ten year anniversary of the date hereof (the “**Term**”); provided that the Portfolio Manager, in its reasonable discretion, may postpone dissolution of the Company for up to 180 days in order to facilitate orderly liquidation of the investments; provided, further, that the Term shall be automatically extended for any amount of time for which the Investment Period may be extended.
- 9.2 Notwithstanding the foregoing, the Term may be extended with the consent of the Portfolio Manager and the Advisory Board for up to two successive periods of one year each.

10. ERISA MATTERS

- 10.1 The Portfolio Manager, the Company and each Member shall use their reasonable best efforts to conduct the affairs and operations of the Company so as to limit investment in the Company by “benefit plan investors” (within the meaning of the DOL Regulations as modified by section 3(42) of ERISA) to less than the U.S. Plan Threshold. In the event the U.S. Plan Threshold is met or exceeded, the Portfolio Manager, on behalf of the Company, may require any Non-Qualified Holder that is a U.S. Plan Investor to sell or transfer their Shares to a person qualified to own the same that is not a U.S. Plan Investor within 30 days and within such 30 days and to provide the Company with satisfactory evidence of such sale or transfer such that such sale or transfer, together with other sale or transfers pursuant to this Clause, would result in the investment in the Company by “benefit plan investors” (within the meaning of the DOL Regulations as modified by section 3(42) of ERISA) to be less than the U.S. Plan Threshold. Where the conditions above are not satisfied within 30 days after the serving of the notice to transfer, such Non-Qualified Holder will be deemed, upon the expiration of such 30 days, to have forfeited their Shares.

11. TAX MATTERS

- 11.1 PFIC. For each fiscal year of the Company, the Company will no later than 120 days after the end of such fiscal year, commencing with the first fiscal year for which the Company is determined to be a PFIC (a "passive foreign investment company"), furnish to each of the

- ## 12. AMENDMENTS TO CERTAIN AGREEMENTS

- ## 13. FINANCIAL REPORTS

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- #### 14. TERMINATION AND LIQUIDATION

- 14.1.1 when one Party holds all the Shares;
- 14.1.2 when a resolution is passed by the Company's Members or creditors, or an order made by a court or other competent body or person instituting a process that shall lead to the Company being wound up and its assets being distributed among the Company's creditors, Members or other contributors; or
- 14.1.3 with the written consent of all the Parties.

- 14.3 Termination of this Agreement shall not affect any rights or liabilities that the Parties may have accrued under it.

- 14.4.1 all existing contracts of the Company are performed to the extent that there are sufficient resources;
- 14.4.2 the Company shall not enter into any new contractual obligations;
- 14.4.3 the Company is dissolved and its assets are distributed as soon as practical; and
- 14.4.4 any other proprietary information belonging to or originating from a Party shall be returned to it by the other Parties.

15. WHOLE AGREEMENT

15.1 This Agreement, and any documents referred to in it, constitute the whole agreement between the Parties and supersede any arrangements, understanding or previous agreement between them relating to the subject matter they cover.

15.2 Each Party acknowledges that in entering into this Agreement, and any documents referred to in it, it does not rely on, and shall have no remedy in respect of, any statement, representation, assurance or warranty of any person other than as expressly set out in this Agreement or those documents.

15.3 Nothing in this Clause 14 operates to limit or exclude any liability for fraud.

16. STATUS OF AGREEMENT

16.1 Each Party shall, to the extent that it is able to do so, exercise its voting rights and other powers in relation to the Company to procure that the provisions of this Agreement are properly and promptly observed and given full force and effect according to the spirit and intention of the Agreement.

16.2 If any provision in the memorandum of incorporation of the Company or the Articles conflicts with any provision of this Agreement, the provisions of this Agreement shall prevail as between the Parties. Each of the Parties shall, to the extent that it is able to do so, exercise its voting rights and other powers in relation to the Company to procure the modification of the memorandum of association of the Company or the Articles (as the case may be) in order to eliminate the conflict, but this Agreement shall not itself constitute a modification of the memorandum of association of the Company or the Articles.

17. ASSIGNMENTS

Save as expressly permitted by this Agreement, no person may assign, or grant any security interest over, any of its rights under this Agreement or any document referred to in it without the prior written consent of the Parties.

18. VARIATION AND WAIVER

18.1 A variation of this Agreement shall be in writing and signed by or on behalf of the Parties.

18.2 A waiver of any right under this Agreement is only effective if it is in writing and it applies only to the person to which the waiver is addressed and the circumstances for which it is given.

18.3 A person that waives a right in relation to one person, or takes or fails to take any action against that person, does not affect its rights against any other person.

19. SERVICE OF NOTICE

19.1 Any notice required to be given by any of the Parties may be sent by post or facsimile to the address and facsimile number of the addressee as set out in this Agreement, in either case marked for the attention of the relevant person named below, or to such other address and/or facsimile number and/or marked for the attention of such other person as the addressee may from time to time have notified for the purposes of this Clause.

19.1.1 to the Company:
Address:
First Floor, Dorey Court, Admiral Park
St Peter Port, Guernsey GY1 6HJ
Channel Islands

19.1.2 to CLO Holdco:

Address:
c/o Highland Capital Management, L.P.
300 Crescent Court, Suite 700
Dallas, TX 75201
Attn: General Counsel
Tel: +1 (972) 628-4100
Email: Notices@highlandcapital.com

- 19.1.3 to any HarbourVest Entity:
Address:
c/o HarbourVest Partners, LLC
One Financial Center, 44th Floor
Boston, MA 02111
USA
Attn: Michael Pugatch
Tel: +1 (617) 348-3712
F
Email: mpugatch@harbourvest.com
- 19.1.4 to any other Party: by post or hand delivery only to the address specified in the register of members of the Company.
- 19.2 Communications sent by post shall be deemed to have been received 24 hours after posting. Communications sent by facsimile transmission shall be deemed to have been received at the time the transmission has been received by the addressee **PROVIDED THAT** if the facsimile transmission, where permitted, is received after 5.00pm or on a day which is not a Business Day, it shall be deemed to have been received 11.00am the Business Day following thereafter.
- 19.3 In proving service by post it shall only be necessary to prove that the notice was contained in an envelope which was duly addressed and posted in accordance with this Clause and in the case of facsimile transmission it shall be necessary to prove that the facsimile was duly transmitted to the correct number.
20. **GENERAL**
- 20.1 Each of the Parties hereby agree not to enter into or abide by any agreement whether written or oral with any one or more of the other Parties in respect of the voting of Shares or the submission of Member resolutions to any Members for voting by them, or otherwise to direct or influence, or attempt to direct or influence, the day-to-day management of the Company, either directly or indirectly, other than in order to comply with the other terms of this Agreement or the Articles. In this regard, each of the Parties agrees to not to direct or influence or to attempt to direct or influence any of the Directors through any employment relationship that the Directors may have outside of the Company other than in order to comply with the other terms of this Agreement or the Articles. Each of the Parties hereby agree that this provision shall continue to apply to them whether or not they are or remain a Member.
- 20.2 Unless otherwise provided, all costs in connection with the negotiation, preparation, execution and performance of this Agreement, shall be borne by the Party that incurred the costs.
- 20.3 The Parties are not in partnership with each other and there is no relationship of principal and agent between them.
- 20.4 All transactions entered into between any Party and the Company shall be conducted in good faith and on the basis set out or referred to in this Agreement or, if not provided for in this Agreement, as may be agreed by the Parties and, in the absence of such agreement, on an arm's length basis.
- 20.5 Each Party shall at all times act in good faith towards the other Parties and shall use all reasonable endeavours to ensure that this Agreement is observed.

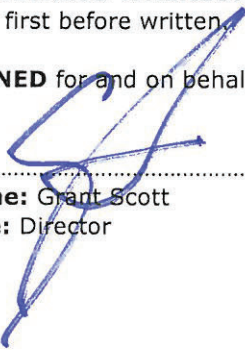
IN WITNESS WHEREOF the Parties hereto have caused this Agreement to be executed the day and year first before written.

SIGNED for and on behalf of **CLO HOLDCO, LTD.**

By:.....

Name: Grant Scott

Title: Director




SIGNED



Lee Blackwell Parker, III

SIGNED for and on behalf of
HIGHLAND CAPITAL MANAGEMENT, L.P.

By: Strand Advisors, Inc.,
its General Partner

By: 
Name: James Dondero
Title: President

SIGNED for and on behalf of
HIGHLAND HCF ADVISOR, LTD.


By:
Name: James Dondero
Title: President

SCHEDULE

Adherence Agreement

THIS ADHERENCE AGREEMENT is made on [●] 200[●]

BETWEEN:

- (1) [●] of [●] (the "**Covenantor**");
- (2) CLO HOLDCO, LTD. of [] (a "**Member**");
- (3) [●] of [] (a "**Member**");
- (4) [●] of [] (a "**Member**");
- (5) HIGHLAND CLO FUNDING, LTD., with registration number 60120 whose registered office is at First Floor, Dorey Court, Admiral Park, St Peter Port, Guernsey GY1 6HJ, Channel Islands (the "**Company**")
- (6) HIGHLAND HCF ADVISOR, LTD., registered address is at Maples Corporate Services Limited, PO Box 309, Ugland House, Grand Cayman, KY1-1104, Cayman Islands (the "**Portfolio Manager**").

RECITAL

This Agreement is supplemental to the members agreement made on November 15 2017 between the Members, the Portfolio Manager and the Company (the "**Members Agreement**").

IT IS HEREBY AGREED as follows:

1. The Covenantor hereby confirms that he has been supplied with a copy of the Members Agreement and hereby covenants with each of the parties thereto to observe, perform and be bound by all the terms of the Members Agreement as if it were a party thereto.
2. Each of the other parties to the Members Agreement hereby covenants with the Covenantor that the Covenantor shall be entitled to the benefit of the terms of the Members Agreement as if he were a party thereto.
3. This Agreement shall be governed by and construed in accordance with Guernsey law.

IN WITNESS of which this Agreement has been executed by the Covenantor and each of the parties to the Members Agreement on the date shown above.

EXHIBIT 14

005547

SECOND AMENDED AND RESTATED
INVESTMENT ADVISORY AGREEMENT

THIS SECOND AMENDED AND RESTATED INVESTMENT ADVISORY AGREEMENT (this “**Agreement**”), dated to be effective from January 1, 2017 (the “**Effective Date**”) is entered into by and between **Charitable DAF Fund, L.P.**, a Cayman Islands exempted limited partnership (the “**Fund**”), **Charitable DAF GP, LLC**, a limited liability company organized under the laws of the State of Delaware (the “**General Partner**”), the general partner of the Fund, and **Highland Capital Management, L.P.**, a limited partnership organized under the laws of the State of Delaware (the “**Investment Advisor**”). Each of the signatories hereto is sometimes referred to herein individually as a “**Party**” and collectively as the “**Parties**.”

RECITALS

WHEREAS, the Fund, the General Partner and the Investment Advisor entered into that certain Investment Advisory Agreement dated January 1, 2012 (the “**Original Agreement**”);

WHEREAS, the Parties amended and restated the Original Agreement in its entirety on the terms set forth in that certain Amended and Restated Investment Advisory Agreement dated July 1, 2014 (the “**Existing Agreement**”);

WHEREAS, the parties desire to amend and restate the Existing Agreement in its entirety with the terms as set forth in this Agreement effective as of the Effective Date;

NOW, THEREFORE, in consideration of the mutual covenants herein contained and for other good and valuable consideration, the receipt of which is hereby acknowledged, the Parties hereby agree, and the Existing Agreement is hereby amended and restated in its entirety, as follows:

1. Investment Advisory Services. Subject to Section 7, the Investment Advisor shall act as investment advisor to the Fund, the General Partner with respect to the Fund and its subsidiaries and shall provide investment advice with respect to the investment and reinvestment of the cash, Financial Instruments and other properties comprising the assets and liabilities of the Fund and its subsidiaries.

2. Custody. The Financial Instruments shall be held in the custody of Jefferies & Company, Inc. or one or more banks selected by the General Partner (each such bank, a “Custodian”). The General Partner will notify the Investment Advisor promptly of the proposed selection of any other Custodians. The Custodian shall at all times be responsible for the physical custody of the Financial Instruments; for the collection of interest, dividends, and other income attributable to the Financial Instruments; and for the exercise of rights and tenders on the Financial Instruments after consultation with and as then directed by the General Partner. At no time shall the Investment Advisor have possession of or maintain custody over any of the Financial Instruments. The Investment Advisor shall not be responsible for any loss incurred by reason of any act or omission of the Custodian.

3. Authority of the Investment Advisor. Subject to Section 7 of this Agreement, the Investment Advisor shall advise the General Partner on behalf of the Fund and/or its subsidiaries with respect to:

(a) investing, directly or indirectly, on margin or otherwise, in all types of securities and other financial instruments of United States and non-U.S. entities, including, without limitation, capital stock; all manner of equity securities (whether registered or unregistered, traded or privately offered, American Depositary Receipts, common or preferred); physical commodities; shares of beneficial interest; partnership interests, limited liability company interests and similar financial instruments; secured and unsecured debt (both corporate and sovereign, bank debt, vendor claims and/or other contractual claims); bonds, notes and debentures (whether subordinated, convertible or otherwise); currencies; interest rate, currency, equity and other derivative products, including, without limitation, (i) future contracts (and options thereon) relating to stock indices, currencies, United States Government securities, securities of non-U.S. governments, other financial instruments and all other commodities, (ii) swaps and contracts for difference, options, swaptions, rights, warrants, when-issued securities, caps, collars, floors, forward rate agreements, and repurchase and reverse repurchase agreements and other cash equivalents, (iii) spot and forward currency transactions and (iv) agreements relating to or securing such transactions; leases, including, without limitation, equipment lease certificates; equipment trust certificates; mortgage-backed securities and other similar instruments (including, without limitation, fixed-rate, pass-throughs, adjustable rate mortgages, collateralized mortgage obligations, stripped mortgage-backed securities and REMICs); loans; credit paper; accounts and notes receivable and payable held by trade or other creditors; trade acceptances and claims; contract and other claims; executory contracts; participations; mutual funds, exchange traded funds and similar financial instruments; money market funds and instruments; obligations of the United States, any state thereof, non-U.S. governments and instrumentalities of any of them; commercial paper; certificates of deposit; bankers' acceptances; trust receipts; letters of credit; choses in action; puts; calls; other obligations and instruments or evidences of indebtedness of whatever kind or nature; and real estate and any kind of interests in real estate; in each case, of any person, corporation, government or other entity whatsoever, whether or not publicly traded or readily marketable (each of such items, "*Financial Instruments*"), and the sale of Financial Instruments short and covering such sales.

(b) engaging in such other lawful Financial Instruments transactions;

(c) research and analysis;

(d) purchasing Financial Instruments and holding them for investment;

(e) entering into contracts for or in connection with investments in Financial Instruments;

(f) investing in other pooled investment vehicles, which investments shall be subject in each case to the terms and conditions of the respective governing document for each such vehicle;

(g) possessing, transferring, mortgaging, pledging or otherwise dealing in, and exercising all rights, powers, privileges and other incidents of ownership or possession with respect to Financial Instruments and other property and funds held or owned by the Fund and/or its subsidiaries;

(h) lending, either with or without security, any Financial Instruments, funds or other properties of the Funds, including by entering into reverse repurchase agreements, and, from time to time, undertaking leverage on behalf of the Fund;

(i) opening, maintaining and closing accounts, including margin and custodial accounts, with brokers and dealers, including brokers and dealers located outside the United States;

(j) opening, maintaining and closing accounts, including custodial accounts, with banks, including banks located outside the United States, and drawing checks or other orders for the payment of monies;

(k) combining purchase or sale orders on behalf of the Fund with orders for other accounts to which the Investment Advisor or any of its affiliates provides investment services (“***Other Accounts***”) and allocating the Financial Instruments or other assets so purchased or sold, on an average-price basis or in any other manner deemed fair and equitable to the Investment Advisor in its sole discretion, among such accounts;

(l) entering into arrangements with brokers to open “average price” accounts wherein orders placed during a trading day are placed on behalf of the Fund and Other Accounts and are allocated among such accounts using an average price;

(m) organizing one or more corporations and other entities formed to hold record title, as nominee for the Fund and/or its subsidiaries (whether alone or together with the Other Accounts), to Financial Instruments or funds of the Fund and/or its subsidiaries;

(n) causing the Fund and/or its subsidiaries to engage in (i) agency, agency cross, related party principal transactions with affiliates of the Investment Manager and (ii) cross transactions with Other Accounts, in each case, to the extent permitted by applicable laws;

(o) engaging personnel, whether part-time or full-time, and attorneys, independent accountants or such other persons (including, without limitation, finders, consultants and investment bankers); and

(p) voting of Financial Instruments, participation in arrangements with creditors, the institution and settlement or compromise of suits and administrative proceedings and other like or similar matters.

4. Policies of the Fund. The activities engaged in by the Investment Advisor on behalf of the Fund and/or its subsidiaries shall be subject to the policies and control of the General Partner.

The Investment Advisor shall submit such periodic reports to the General Partner regarding the Investment Advisor's activities hereunder as the General Partner may reasonably request and a representative of the Investment Advisor shall be available to meet with the General Partner and/or any other representative of the Fund or its subsidiaries as reasonably requested by the General Partner.

In furtherance of the foregoing, the General Partner hereby appoints the Investment Advisor as the Fund's attorney-in-fact, with full power of authority to act in the Fund's name and on its behalf with respect to the Fund, as follows:

(a) to purchase or otherwise trade in Financial Instruments that have been approved by the General Partner;

(b) to execute and combine purchase or sale orders on behalf of the Fund with orders for Other Accounts and allocate the Financial Instruments or other assets so purchased or sold, on an average-price basis or in any other manner deemed fair and equitable to the Investment Advisor in its sole discretion, among such accounts; *provided, however*, that such purchase or sale orders shall be market rates;

(c) to direct the Custodian to deliver funds or the Financial Instruments, but only in the course of effecting trading and investment transactions for the Fund and subject to such restrictions as may be contained in the custody agreement between the Custodian and the Fund;

(d) to enter into contracts, provide certifications or take any other actions necessary to effect any of the foregoing transactions; and

(e) to select brokers on the basis of best execution and in consideration of relevant factors, including, but not limited to, price quotes; the size of the transaction; the nature of the market for the security; the timing of the transaction; the difficulty of execution; the broker-dealer's expertise in the relevant market or sector; the extent to which the broker-dealer makes market in the security or has an access to such market; the broker-dealer's skill in positioning the relevant market; the broker-dealer's facilities, reliability, promptness and financial stability; the broker-dealer's reputation for diligence and integrity (including in correcting errors); confidentiality considerations; the quality and usefulness of research services and investment ideas presented by the broker-dealer; and other factors deemed appropriate by the Investment Advisor.

5. Valuation of Financial Instruments. Financial Instruments will be valued in accordance with the then current valuation policy of the Investment Advisor, a copy of which will be provided to the General Partner upon request.

6. Status of the Investment Advisor. The Investment Advisor shall, for all purposes, be an independent contractor and not an employee of the General Partner or the Fund or its subsidiaries, nor shall anything herein be construed as making the Fund or its subsidiaries or the General Partner, a partner, member or co-venturer with the Investment Advisor or any of its affiliates or clients. The Investment Advisor shall have no authority to act for, represent, bind or obligate the Fund or its subsidiaries or the General Partner except as specifically provided herein.

7. Investments. ALL ULTIMATE INVESTMENT DECISIONS WITH RESPECT TO THE FUND AND ITS SUBSIDIARIES SHALL AT ALL TIMES REST SOLELY WITH THE GENERAL PARTNER AND/OR THE OFFICERS/DIRECTORS OF THE APPLICABLE SUBSIDIARY, IT BEING EXPRESSLY UNDERSTOOD THAT THE GENERAL PARTNER AND/OR THE OFFICERS/DIRECTORS OF THE APPLICABLE SUBSIDIARY SHALL BE FREE TO ACCEPT AND OR REJECT ANY OF THE ADVICE RENDERED BY THE INVESTMENT MANAGER HEREUNDER FOR ANY REASON OR FOR NO REASON.

8. Reimbursement by the General Partner. The Investment Advisor may retain, in connection with its responsibilities hereunder, the services of others to assist in the investment advice to be given to the General Partner with respect to the Fund and/or its subsidiaries (any such appointee, a “***Sub-Advisor***”), including, but not limited to, any affiliate of the Investment Advisor, but payment for any such services shall be assumed by the Investment Advisor, and, therefore, neither the General Partner nor the Fund or any of its subsidiaries shall have any liability therefor; *provided, however*, that the Investment Advisor, in its sole discretion, may retain the services of independent third party professionals, including, without limitation, attorneys, accountants and consultants, to advise and assist it in connection with the performance of its activities on behalf of the General Partner with respect to the Fund and/or its subsidiaries hereunder, and the Fund shall bear full responsibility therefor and the expense of any fees and disbursements arising therefrom.

9. Expenses.

(a) The Fund shall pay or reimburse the Investment Advisor and its affiliates for all expenses related to the services hereunder, including, but not limited to, investment-related expenses, brokerage commissions and other transaction costs, expenses related to clearing and settlement charges, professional fees relating to legal, auditing or valuation services, any governmental, regulatory, licensing, filing or registration fees incurred in compliance with the rules of any self-regulatory organization or any federal, state or local laws, research-related expenses (including, without limitation, news and quotation equipment and services, investment and trading-related software, including, without limitation, trade order management software (i.e., software used to route trade orders)), accounting (including accounting software), tax preparation expenses, costs and expenses associated with reporting and providing information to the Fund, any taxes imposed upon the Fund (including, but not limited to, collateralized debt obligations managed by the Investment Advisor or its affiliates), fees relating to valuing the Financial Instruments, and extraordinary expenses. In no event shall any of the foregoing costs or expenses include any salaries, occupational expense or general overhead of the Investment Advisor. For the avoidance of doubt, (i) the cost of all third party expenses incurred in connection with this Agreement shall not exceed standard market rates (which may include standard soft dollar arrangements) and (ii) to the extent any of the foregoing expenses were incurred on behalf of, or benefit of a number of Investment Advisor’s advised accounts, such expenses shall be allocated pro rata among such accounts.

(b) To the extent that expenses to be borne by the Fund are paid by the Investment Advisor or by any Sub-Advisor, the Fund shall reimburse the Investment Advisor (or Sub-Advisors, as applicable) for such expenses so long as such expenses are at market rates.

10. Fees.

(a) The Fund shall pay the Investment Advisor a quarterly fee (the “**Management Fee**”) equal to 2.0% per annum (0.5% per quarter) of the Net Assets (as defined below) of the Fund, payable in advance at and calculated as of the first business day of each calendar quarter. For purposes of calculating the Management Fee, the Net Assets of the Fund will be determined before giving effect to any of the following amounts payable by the Fund generally or in respect of any Investment which are effective as of the date on which such determination is made: (i) any fee payable to the Investment Advisor as of the date on which such determination is made; (ii) any capital withdrawals or distributions payable by the Fund which are effective as of the date on which such determination is made; and (iii) withholding or other taxes, expenses of processing withdrawals and other items payable, any increases or decreases in any reserves, holdback or other amounts specially allocated ending as of the date on which such determination is made. The Management Fee shall be prorated for partial periods and any applicable excess fees should be returned to the Fund by the Investment Advisor. Capital contributions made to the Fund after the commencement of a calendar quarter shall be subject to a prorated Management Fee based on the number of days remaining during such quarter.

(b) Subject to clauses (c) and (d) below, at the end of each Calculation Period (as defined below), an amount equal to 20% of the net capital appreciation of the Fund’s Investments (as defined below) after deducting the Management Fee shall be paid to the Investment Advisor (the “**Performance Fee**”); *provided, however*, that the net capital appreciation upon which the calculation of the Performance is based shall be reduced to the extent of any unrecovered balance remaining in the Loss Recovery Account (as defined below) maintained on the books and records of the Fund. The amount of the unrecovered balance remaining in the Loss Recovery Account at the time of calculating the Performance Fee shall be the amount existing immediately prior to its reduction pursuant to the second clause of the second sentence of clause (c) below.

(c) There shall be established on the books of the Fund a memorandum account (the “**Loss Recovery Account**”), the opening balance of which shall be zero. At the end of each Calculation Period, the balance in the Loss Recovery Account shall be adjusted as follows: first, if there has been, in the aggregate, net capital depreciation of the Fund’s Investments (as adjusted pursuant to the last sentence of this paragraph) since the end of the immediately preceding Calculation Period (or with respect to the initial Calculation Period, since the Effective Date), an amount equal to such net capital depreciation shall be credited to the Loss Recovery Account, and, second, if there has been, in the aggregate, net capital appreciation of the Fund’s investments (as adjusted pursuant to the last sentence of this paragraph) since the end of the immediately preceding Calculation Period, an amount equal to such net capital appreciation, before taking into account any Performance Fee to be paid to the Investment Advisor, shall be debited to and reduce any unrecovered balance in the Loss Recovery Account, but not below zero. Solely for purposes of this paragraph, in determining the Loss Recovery Account, net capital appreciation and net capital

depreciation for any applicable Calculation Period shall be calculated by taking into account the amount of the Management Fee paid for such period.

(d) In the event that all or a portion of the Fund's capital is distributed or withdrawn while there exists an unrecovered balance in the Loss Recovery Account, the unrecovered balance in the Loss Recovery Account shall be reduced as of the beginning of the next Calculation Period by an amount equal to the product obtained by multiplying the balance in such Loss Recovery Account by a fraction, the numerator of which is the amount distributed or withdrawn with respect to the immediately preceding distribution or withdrawal date, and the denominator of which is the total fair value of the Fund's Investment immediately prior to such distribution or withdrawal.

(e) For purposes of this Section 10, the net capital appreciation and net capital depreciation of the Fund's Investments for any given period will be calculation in accordance with the then current valuation policy of the Investment Advisor, a copy of which will be provided upon the General Partner's request. As soon as reasonably practicable following the end of a Calculation Period, the Investment Advisor shall deliver, or cause to be delivered, to the General Partner a statement showing the calculation of the Performance Fee, if any, with respect to such Calculation Period. The Performance Fee, if any, shall be payable within three (3) business days of the General Partner's receipt of such statement.

(f) Payments due to the Investment Advisor shall be made by wire transfer to:

Bank Name: Compass Bank
ABA#: 113010547
FBO: Highland Capital Management, L.P. (Master Operating Account)
Acct#: 0025876342

(g) For purposes of this Section 10, the following terms have the definitions set forth below:

"Calculation Period" means the period commencing on the Effective Date (in the case of the initial Calculation Period) and thereafter each period commencing as of the day following the last day of the preceding Calculation Period, and ending as of the close of business on the first to occur of the following: (i) the last day of a calendar year; (ii) the distribution or withdrawal of capital of the Fund (but only with respect to such distributed or withdrawn amount); (iii) the permitted transfer of all or any portion of a partner's interest in the Fund; and (iv) the final capital distribution of the Fund following its dissolution;

"Investments" means all investments, securities, cash, receivables, financial instruments, contracts and other assets, whether tangible or intangible, owned by the Fund;

“**Net Assets**” means, with respect to the Fund as of any date, the excess of the total fair value of all Investments over the total liabilities, debts and obligations of the Fund, in each case, calculated on an accrual basis in accordance with accounting principles generally accepted in the United States and the then current valuation policy of the Service Provider, a copy of which will be provided to the General Partner upon request; and

“**Services Agreement**” means that certain Second Amended and Restated Service Agreement, dated effective as of the Effective Date, by and among the Parties, as amended, restated, modified and supplemented from time to time.

11. Exculpation; Indemnification.

(a) Whether or not herein expressly so provided, every provision of this Agreement relating to the conduct or affecting the liability of or affording protection to the Investment Advisor, its members or any of their respective affiliates and their respective partners, members, officers, directors, employees, shareholders and agents (including parties acting as agents for the execution of transactions) (each, a “**Covered Person**” and collectively, “**Covered Persons**”) shall be subject to the provisions of this Section.

(b) To the fullest extent permitted by law, no Covered Person shall be liable to the General Partner or the Fund or any of its subsidiaries or anyone for any reason whatsoever (including but not limited to (i) any act or omission by any Covered Person in connection with the conduct of the business of the General Partner or the Fund, that is determined by such Covered Person in good faith to be in or not opposed to the best interests of the General Partner or the Fund, (ii) any act or omission by any Covered Person based on the suggestions of any professional advisor of the General Partner or the Fund or any of its subsidiaries whom such Covered Person believes is authorized to make such suggestions on behalf of the General Partner or the Fund or any of its subsidiaries, (iii) any act or omission by the General Partner or the Fund or any of its subsidiaries, or (iv) any mistake, negligence, misconduct or bad faith of any broker or other agent of the General Partner or the Fund or any of its subsidiaries selected by Covered Person with reasonable care), unless any act or omission by such Covered Person constitutes willful misconduct or gross negligence by such Covered Person (as determined by a non-appealable judgment of a court of competent jurisdiction).

(c) Covered Persons may consult with legal counsel or accountants selected by such Covered Person and any act or omission by such Covered Person on behalf of the General Partner or the Fund or any of its subsidiaries or in furtherance of the business of the General Partner or the Fund or any of its subsidiaries in good faith in reliance on and in accordance with the advice of such counsel or accountants shall be full justification for the act or omission, and such Covered Person shall be fully protected in so acting or omitting to act if the counsel or accountants were selected with reasonable care.

(d) To the fullest extent permitted by law, the General Partner and the Fund and its subsidiaries shall indemnify and hold harmless Covered Persons (the “**Indemnified**

Party”), from and against any and all claims, liabilities, damages, losses, costs and expenses, including amounts paid in satisfaction of judgments, in compromises and settlements, as fines and penalties and legal or other costs and expenses of investigating or defending against any claim or alleged claim, of any nature whatsoever, known or unknown, liquidated or unliquidated, that are incurred by any Indemnified Party and arise out of or in connection with the business of the General Partner or the Fund or any of its subsidiaries, any investment made under or in connection with this Agreement, or the performance by the Indemnified Party of Covered Person’s responsibilities hereunder and against all taxes, charges, duties or levies incurred by such Covered Person or any Indemnified Party in connection with the General Partner or the Fund or any of its subsidiaries, provided that an Indemnified Party shall not be entitled to indemnification hereunder to the extent the Indemnified Party’s conduct constitutes willful misconduct or gross negligence (as determined by a non-appealable judgment of a court of competent jurisdiction). The termination of any proceeding by settlement, judgment, order or upon a plea of nolo contendere or its equivalent shall not, of itself, create a presumption that the Indemnified Party’s conduct constituted willful misconduct or gross negligence.

(e) Expenses incurred by an Indemnified Party in defense or settlement of any claim that shall be subject to a right of indemnification hereunder, shall be advanced by the General Partner prior to the final disposition thereof upon receipt of an undertaking by or on behalf of the Indemnified Party to repay the amount advanced to the extent that it shall be determined ultimately that the Indemnified Party is not entitled to be indemnified hereunder.

(f) The right of any Indemnified Party to the indemnification provided herein shall be cumulative of, and in addition to, any and all rights to which the Indemnified Party may otherwise be entitled by contract or as a matter of law or equity and shall be extended to the Indemnified Party’s successors, assigns and legal representatives.

(g) The provisions of this Section are expressly intended to confer benefits upon Covered Persons and such provisions shall remain operative and in full force and effect regardless of the expiration or any termination of this Agreement.

(h) In no event shall any Covered Person be liable for special, exemplary, punitive, indirect, or consequential loss, or damage of any kind whatsoever, including without limitation lost profits.

(i) No Covered Person shall be liable hereunder for any settlement of any action or claim effected without its written consent thereto.

(j) Pursuant to the exculpation and indemnification provisions described above, the Investment Advisor and each Indemnified Party will generally not be liable to the General Partner or the Fund for any act or omission (or alleged act or omission), absent bad faith, willful misconduct, fraud or gross negligence, and the General Partner and the Fund will generally be required to indemnify such persons against any Losses they may incur by reason of any act or omission (or alleged act or omission) related to the General Partner, the Fund or its subsidiaries, absent bad faith, willful misconduct, fraud or gross negligence. As a result of these provisions, the General Partner, the Fund and its subsidiaries, as applicable (not the Investment

Advisor or any other Indemnified Party) will be responsible for any Losses resulting from trading errors and similar human errors, absent bad faith, willful misconduct, fraud or gross negligence or the ability to waive or limit such Losses under applicable law. Trading errors might include, for example, keystroke errors that occur when entering trades into an electronic trading system or typographical or drafting errors related to derivatives contracts or similar agreements. Given the volume of transactions executed by the Investment Advisor and its affiliates on behalf of the Fund and/or its subsidiaries, the General Partner acknowledges that trading errors (and similar errors) will occur and that the General Partner will be responsible for any resulting Losses, even if such Losses result from the negligence (but not gross negligence) of the Investment Advisor or its affiliates.

12. Activities of the Investment Advisor and Others. The Investment Advisor, and its affiliates may engage, simultaneously with their investment management activities on behalf of the Fund, in other businesses, and may render services similar to those described in this Agreement to other individuals, companies, trusts or persons, and shall not by reason of such engaging in other businesses or rendering of services for others be deemed to be acting in conflict with the interests of the Fund. Notwithstanding the foregoing, the Investment Advisor and its affiliates shall devote as much time to provide advisory service to the General Partner with respect to the management of the Fund's assets as the Investment Advisor deems necessary and appropriate. In addition, the Investment Advisor or any of its affiliates, in their individual capacities, may engage in securities transactions which may be different than, and contrary to, the investment advice provided by the Investment Advisor to the General Partner with respect to the Fund. The Investment Advisor may give advice and recommend securities to, or buy securities for, accounts and other clients, which advice or securities may differ from advice given to, or securities recommended or bought for, the Fund, even though their investment objectives may be the same or similar. The Investment Advisor may recommend transactions in securities and other assets in which the Investment Advisor has an interest, including securities or other assets issued by affiliates of the Investment Manager. Each of the General Partner and the Fund acknowledges that it has received, reviewed and had an opportunity with respect to (a) a copy of Part 2 of the Investment Advisor's Form ADV, and (b) the supplemental disclosures attached hereto as Exhibit A, each of which further describes conflicts of interest relating to the Investment Advisor, its affiliates and their respective advised accounts.

13. Term. This Agreement shall remain in effect through an initial term concluding December 31, 2017 and shall be automatically extended for additional one-year terms thereafter, except that it may be terminated by the Investment Advisor, on the one hand, or by the General Partner and the Fund, on the other hand, upon at least 90 days' prior written notice to the General Partner or the Investment Advisor, as the case may be, prior to General Partner's fiscal year-end.

14. Miscellaneous.

(a) Notices. Any notice, consent or other communication made or given in connection with this Agreement shall be in writing and shall be deemed to have been duly given when delivered by hand or facsimile or five days after mailed by certified mail, return receipt requested, as follows:

If to the Investment Advisor, to:

Highland Capital Management, L.P.
300 Crescent Court, Suite 700
Dallas, Texas 75201
Telephone Number: (972) 628-4100
Facsimile Number: (972) 628-4147

If to the General Partner or the Fund, to:

Charitable DAF GP, LLC
4140 Park Lake Avenue, Suite 600
Raleigh, North Carolina 27612
Attention: Grant Scott
Telephone Number: (919) 854-1407
Facsimile Number: (919) 854-1401

(b) Entire Agreement. This Agreement contains all of the terms agreed upon or made by the parties relating to the subject matter of this Agreement, and supersedes all prior and contemporaneous agreements, negotiations, correspondence, undertakings and communications of the parties, oral or written, respecting such subject matter.

(c) Amendments and Waivers. No provision of this Agreement may be amended, modified, waived or discharged except as agreed to in writing by the parties. No amendment to this Agreement may be made without first obtaining the required approval from the Fund. The failure of a party to insist upon strict adherence to any term of this Agreement on any occasion shall not be considered a waiver thereof or deprive that party of the right thereafter to insist upon strict adherence to that term or any other term of this Agreement.

(d) Binding Effect; Assignment. This Agreement shall be binding upon and inure to the benefit of the General Partner, the Fund, the Investment Advisor, each Indemnified Party and their respective successors and permitted assigns. Any person that is not a signatory to this Agreement but is nevertheless conferred any rights or benefits hereunder (*e.g.*, officers, partners and personnel of the Investment Advisor and others who are entitled to indemnification hereunder) shall be entitled to such rights and benefits as if such person were a signatory hereto, and the rights and benefits of such person hereunder may not be impaired without such person's express written consent. No party to this Agreement may assign (as such term is defined under the U.S. Investment Advisers Act of 1940, as amended) all or any portion of its rights, obligations or liabilities under this Agreement without the prior written consent of the other parties to this Agreement; provided; however, that the Investment Advisor may assign all or any portion of its rights, obligations and liabilities hereunder to any of its affiliates at its discretion.

(e) Governing Law. Notwithstanding the place where this Agreement may be executed by any of the parties thereto, the parties expressly agree that all terms and provisions hereof shall be governed by and construed in accordance with the laws of the State of Texas applicable to agreements made and to be performed in that State.

(f) Jurisdiction; Venue; Waiver of Jury Trial. The Parties hereby agree that any action, claim, litigation, or proceeding of any kind whatsoever against any other Party in any way arising from or relating to this Agreement and all contemplated transactions, including claims sounding in contract, equity, tort, fraud and statute (“**Dispute**”) shall be submitted exclusively to the U.S. District Court for the Northern District of Texas or, if such court does not have subject matter jurisdiction, the courts of the State of Texas sitting in Dallas County, and any appellate court thereof (“**Enforcement Court**”). Each Party irrevocably and unconditionally submits to the exclusive personal and subject matter jurisdiction of the Enforcement Court for any Dispute and agrees to bring any Dispute only in the Enforcement Court. Each Party further agrees it shall not commence any Dispute in any forum, including administrative, arbitration, or litigation, other than the Enforcement Court. Each Party agrees that a final judgment in any such action, litigation, or proceeding is conclusive and may be enforced in other jurisdictions by suit on the judgment or in any other manner provided by law.

EACH PARTY IRREVOCABLY AND UNCONDITIONALLY WAIVES, TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW, ANY RIGHT IT MAY HAVE TO A TRIAL BY JURY IN ANY LEGAL ACTION, PROCEEDING, CAUSE OF ACTION OR COUNTERCLAIM ARISING OUT OF OR RELATING TO THIS AGREEMENT, INCLUDING ANY EXHIBITS, SCHEDULES, AND APPENDICES ATTACHED TO THIS AGREEMENT, OR THE TRANSACTIONS CONTEMPLATED HEREBY. EACH PARTY CERTIFIES AND ACKNOWLEDGES THAT (A) NO REPRESENTATIVE OF THE OTHER PARTY HAS REPRESENTED, EXPRESSLY OR OTHERWISE, THAT THE OTHER PARTY WOULD NOT SEEK TO ENFORCE THE FOREGOING WAIVER IN THE EVENT OF A LEGAL ACTION, (B) IT HAS CONSIDERED THE IMPLICATIONS OF THIS WAIVER, (C) IT MAKES THIS WAIVER KNOWINGLY AND VOLUNTARILY, AND (D) IT HAS BEEN INDUCED TO ENTER INTO THIS AGREEMENT BY, AMONG OTHER THINGS, THE MUTUAL WAIVERS AND CERTIFICATIONS IN THIS SECTION.

Nothing in this Section 14(f) shall be construed to limit either party’s right to obtain equitable or injunctive relief in a court of competent jurisdiction in appropriate circumstances.

(g) Headings. The headings contained in this Agreement are intended solely for convenience and shall not affect the rights of the parties to this Agreement.

(h) Counterparts. This Agreement may be signed in any number of counterparts with the same effect as if the signatures to each counterpart were upon a single instrument, and all such counterparts together shall be deemed an original of this Agreement.

(i) Survival. The provisions of Sections 8, 9, 10, 11 and 14 hereof shall survive the termination of this Agreement.

(j) Pronouns. All pronouns shall be deemed to refer to the masculine, feminine, neuter, singular or plural as the identity of the person or persons’ firm or company may require in the context thereof.

(k) Arm's-Length Agreement. The General Partner and the Fund have approved this Agreement and reviewed the activities described in Section 12 and in the Investment Advisor's Form ADV and the risks related thereto.

[Signature Page to Follow]

IN WITNESS WHEREOF the parties hereto have caused this Agreement to be executed to be effective from the date first written above.

HIGHLAND CAPITAL MANAGEMENT, L.P.

By: Strand Advisors, Inc., its general partner

By: _____

Name: James Dondero

Title: President

Date: 6/21/17

CHARITABLE DAF GP, LLC

By: _____

Name: Grant J. Scott

Title: Managing Member

Date:

CHARITABLE DAF FUND, L.P.

By: Charitable DAF GP, LLC, its general partner

By: _____

Name: Grant J. Scott

Title: Managing Member

Date:

IN WITNESS WHEREOF the parties hereto have caused this Agreement to be executed to be effective from the date first written above.

HIGHLAND CAPITAL MANAGEMENT, L.P.

By: Strand Advisors, Inc., its general partner

By: _____

Name: James Dondero

Title: President

Date:

CHARITABLE DAF GP, LLC

By: _____

Name: Grant J. Scott

Title: Managing Member

Date: 6/21/2017

CHARITABLE DAF FUND, L.P.

By: Charitable DAF GP, LLC, its general partner

By: _____

Name: Grant J. Scott

Title: Managing Member

Date: 6/21/2017

EXHIBIT A

Supplemental Disclosures

Potential Conflicts of Interest

The scope of the activities of Highland Capital Management, L.P. (the “*Investment Adviser*”), its affiliates, and the funds and clients managed or advised by the Investment Adviser or any of its affiliates may give rise to conflicts of interest or other restrictions and/or limitations imposed on Charitable DAF Fund, L.P. and its subsidiaries (collectively, the “*Fund*”) in the future that cannot be foreseen or mitigated at this time. The following briefly summarizes some of these conflicts, but is not intended to be an exhaustive list of all such conflicts. Additional conflicts are described in the Investment Adviser’s Form ADV. You are urged to review the Investment Adviser’s Form ADV in its entirety prior to investing in the Fund.¹

Highland Group & Highland Accounts. None of the Investment Adviser, its affiliates and their respective officers, directors, shareholders, members, partners, personnel and employees (collectively, the “*Highland Group*”) is precluded from engaging in or owning an interest in other business ventures or investment activities of any kind, whether or not such ventures are competitive with the Fund. The Investment Adviser is permitted to manage other client accounts, and does manage other client accounts, some of which may have objectives similar or identical to those of the Fund, including other collective investment vehicles that may be managed by the Highland Group and in which the Investment Adviser or any of its affiliates may have an equity interest.

The Fund will be subject to a number of actual and potential conflicts of interest involving the Highland Group including, among other things, the fact that: (i) the Highland Group conducts substantial investment activities for accounts, funds, collateralized debt obligations and collateralized loan obligations that invest in leveraged loans (collectively, “*CDOs*”) and other vehicles managed by members of the Highland Group (collectively, “*Highland Accounts*”) in which the Fund has no interest; (ii) the Highland Group advises Highland Accounts, which utilize the same, similar or different methodologies as the Fund and may have financial incentives (including, without limitation, as it relates to the composition of investors in such funds and accounts or to the Highland Group’s compensation arrangements) to favor certain Highland Accounts over the Fund; (iii) the Highland Group may use the strategy described herein in certain Highland Accounts; (iv) the Investment Adviser may give advice and recommend securities to, or buy or sell securities for, the Fund, which advice or securities may differ from advice given to, or securities recommended or bought or sold for, Highland Accounts; (v) the Investment Adviser has the discretion, to the extent permitted under applicable law, to use its affiliates as service providers to the Fund and its portfolio investments; (vi) certain investors affiliated with the Highland Group may choose to personally invest only in certain funds advised by the Highland Group and the amounts invested by them in such funds is expected to vary significantly; (vii) the Highland Group and Highland Accounts may actively engage in transactions in the same securities sought by the

¹ The Investment Adviser’s latest Form ADV filed and Part 2 Brochures can be accessed here: https://adviserinfo.sec.gov/IAPD/IAPDFirmSummary.aspx?ORG_PK=110126

Fund and, therefore, may compete with the Fund for investment opportunities or may hold positions opposite to positions maintained by the Fund; (viii) the Fund may invest in CDOs and Highland Accounts managed by members of the Highland Group; and (ix) the Investment Adviser will devote to the Fund only as much time as the Investment Adviser deems necessary and appropriate to manage the Fund's business.

The Investment Adviser undertakes to resolve conflicts in a fair and equitable basis, which in some instances may mean a resolution that would not maximize the benefit to the Fund's investors.

Allocation of Trading Opportunities. It is the policy of the Investment Adviser to allocate investment opportunities fairly and equitably over time. This means that such opportunities will be allocated among those accounts for which participation in the respective opportunity is considered appropriate, taking into account, among other considerations: (i) fiduciary duties owed to the accounts; (ii) the primary mandate of the accounts; (iii) the capital available to the accounts; (iv) any restrictions on the accounts and the investment opportunity; (v) the sourcing of the investment, size of the investment and amount of follow-on available related to the investment; (vi) whether the risk-return profile of the proposed investment is consistent with the account's objectives and program, whether such objectives are considered in light of the specific investment under consideration or in the context of the portfolio's overall holdings; (vii) the potential for the proposed investment to create an imbalance in the account's portfolio (taking into account expected inflows and outflows of capital); (viii) liquidity requirements of the account; (ix) potentially adverse tax consequences; (x) regulatory and other restrictions that would or could limit an account's ability to participate in a proposed investment; and (xi) the need to re-size risk in the account's portfolio.

The Investment Adviser has the authority to allocate trades to multiple Highland Accounts on an average price basis or on another basis it deems fair and equitable. Similarly, if an order for any accounts cannot be fully allocated under prevailing market conditions, the Investment Adviser may allocate the trades among different accounts on a basis it considers fair and equitable over time. One or more of the foregoing considerations may (and are often expected to) result in allocations among the Fund and one or more Highland Accounts on other than a *pari passu* basis. The Investment Adviser will allocate investment opportunities across its accounts for which the opportunities are appropriate, consistent with (i) its internal conflict of interest and allocation policies and (ii) the requirements of the U.S. Investment Advisers Act of 1940, as amended. The Investment Adviser will seek to allocate investment opportunities among such entities in a manner that is fair and equitable over time and consistent with its allocation policy. However, there is no assurance that such investment opportunities will be allocated to the Fund fairly or equitably in the short-term or over time and there can be no assurance that the Fund will be able to participate in all investment opportunities that are suitable for it.

The Investment Adviser and/or its affiliates may open "average price" accounts with brokers. In an "average price" account, purchase and sale orders placed during a trading day for the Fund, the Highland Accounts or affiliates of the Investment Adviser are combined, and securities bought and sold pursuant to such orders are allocated among such accounts on an average price basis.

Highland Group Trading. As part of their regular business, the members of the Highland Group hold, purchase, sell, trade or take other related actions both for their respective accounts and for the accounts of their respective clients, on a principal or agency basis, with respect to loans, securities and other investments and financial instruments of all types. The members of the Highland Group also provide investment advisory services, among other services, and engage in private equity, real estate and capital markets oriented investment activities. The members of the Highland Group will not be restricted in their performance of any such services or in the types of debt or equity investments which they may make. The members of the Highland Group may have economic interests in or other relationships with obligors or issuers in whose obligations or securities or credit exposures the Fund may invest. In particular, such persons may make and/or hold an investment in an obligor's or issuer's securities that may be *pari passu*, senior or junior in ranking to an investment in such obligor's or issuer's securities made and/or held by the Fund or in which partners, security holders, members, officers, directors, agents, personnel or employees of such persons serve on boards of directors or otherwise have ongoing relationships. Each of such ownership and other relationships may result in securities laws restrictions on transactions in such securities by the Fund and otherwise create conflicts of interest for the Fund. In such instances, the members of the Highland Group may in their discretion make investment recommendations and decisions that may be the same as or different from those made with respect to the Fund's investments. In connection with any such activities described above, the members of the Highland Group may hold, purchase, sell, trade or take other related actions in securities or investments of a type that may be suitable to investments for the Fund. The members of the Highland Group will not be required to offer such securities or investments to the Fund or provide notice of such activities to the Fund. In addition, in managing the Fund's portfolio, the Investment Adviser may take into account its relationship or the relationships of its affiliates with obligors and their respective affiliates, which may create conflicts of interest. Furthermore, in connection with actions taken in the ordinary course of business of the Investment Adviser in accordance with its fiduciary duties to its other clients, the Investment Adviser may take, or be required to take, actions which adversely affect the interests of the Fund.

The Highland Group has invested and may continue to invest in investments that would also be appropriate for the Fund. Such investments may be different from those made by the Fund. The Highland Group does not have any duty, in making or maintaining such investments, to act in a way that is favorable to the Fund or to offer any such opportunity to the Fund, subject to the Investment Adviser's internal allocation policy. The investment policies, fee arrangements and other circumstances applicable to such other accounts and investments may vary from those applicable to the Fund and its investments. The Highland Group may also provide advisory or other services for a customary fee with respect to investments made or held by the Fund, and neither the Fund nor its investors shall have any right to such fees. The Highland Group may also have ongoing relationships with, render services to or engage in transactions with other clients who make investments of a similar nature to those of the Fund, and with companies whose securities or properties are acquired by the Fund.

As further described below, in connection with the foregoing activities the Highland Group may from time to time come into possession of material nonpublic information that limits the ability of the Investment Adviser to effect a transaction for the Fund, and the Fund's investments may be constrained as a consequence of the Investment Adviser's inability to use such information for

advisory purposes or otherwise to effect transactions that otherwise may have been initiated on behalf of its clients, including the Fund.

Although the professional staff of the Investment Adviser will devote as much time to the Fund as the Investment Adviser deems appropriate to perform its duties in accordance with the Fund's advisory agreement and in accordance with reasonable commercial standards, the staff may have conflicts in allocating its time and services among the Fund and the Investment Adviser's other accounts.

Various Activities of the Investment Adviser and its Affiliates. The directors, officers, personnel, employees and agents of the Investment Adviser and its affiliates may, subject to applicable law, serve as directors (whether supervisory or managing), officers, personnel, employees, partners, agents, nominees or signatories or provide banking, agency, insurance and/or other services, and receive arm's length fees in connection with such services, for the Fund or its investments or other entities that operate in the same or a related line of business as the, for other clients managed by the Investment Adviser or its affiliates, or for any obligor or issuer in respect of the CDOs, and the Fund shall have no right to any such fees. In serving in these multiple capacities, they may have obligations to such other clients or investors in those entities, the fulfillment of which may not be in the best interests of the Fund. The Fund may compete with other Highland Accounts for capital and investment opportunities.

There is no limitation or restriction on the Investment Adviser or any of its affiliates with regard to acting as investment adviser or collateral manager (or in a similar role) to other parties or persons. This and other future activities of the Investment Adviser and/or its affiliates may give rise to additional conflicts of interest. Such conflicts may relate to obligations that the Investment Adviser's investment committee, the Investment Adviser or its affiliates have to other clients.

The Investment Adviser and its affiliates may participate in creditors or other committees with respect to the bankruptcy, restructuring or workout of an investment of the Fund or another account. In such circumstances, the Investment Adviser or its affiliates may take positions on behalf of themselves or another account that are adverse to the interests of the Fund.

The Investment Adviser and/or its affiliates may act as an underwriter, arranger or placement agent, or otherwise participate in the origination, structuring, negotiation, syndication or offering of CDOs, Highland Accounts and other investments purchased by the Fund. Such transactions shall be subject to fees that are intended to be no greater than arm's-length fees, and the Fund shall have no right to any such fees. There is no expectation for preferential access to transactions involving CDOs and Highland Accounts that are underwritten, originated, arranged or placed by the Investment Adviser and/or its affiliates and the Fund shall not have any right to any such fees.

Investments in Highland Accounts Managed by the Investment Manager or its Affiliates. The Fund may invest a significant portion of its capital in Highland Accounts. The Investment Adviser or its affiliates will receive senior and subordinated management fees and, in some cases, a performance-based allocation or fee with respect to its role as general partner and/or manager of the Highland Accounts. If the Fund invests in Highland Accounts in secondary transactions, the Fund will indirectly pay the fees (senior and subordinated) of such Highland Accounts and any

carried interest. If the Fund provides all of the equity for a Highland Account, there may be no third party with whom the amount of such fees, expenses and carried interest can be negotiated on an arm's-length basis. The Investment Adviser or its affiliates will have conflicting division of loyalties and responsibilities regarding the Fund and a Highland Account, and certain other conflicts of interest would be inherent in the situation. There can be no assurance that the interests of the Fund would not be subordinated to those of a Highland Account or to other interests of the Investment Adviser.

Multiple Levels of Fees. The Investment Adviser and the Highland Accounts are expected to impose management fees, other administrative fees, carried interest and other performance allocations on realized and unrealized appreciation in the value of the assets managed and other income. This may result in greater expense than if investors in the Fund were able to invest directly in the Highland Accounts or their respective underlying investments. Investors in the Fund should take into account that the return on their investment will be reduced to the extent of both levels of fees. The general partner or manager of a Highland Account may receive the economic benefit of certain fees from its portfolio companies for services and in connection with unconsummated transactions (e.g., break-up, placement, monitoring, directors', organizational and set-up fees and financial advisory fees).

Cross Transactions and Principal Transactions. The Investment Adviser may effect client cross-transactions where the Investment Adviser causes a transaction to be effected between the Fund and another client advised by it or any of its affiliates. The Investment Adviser may engage in a client cross-transaction involving the Fund any time that the Investment Adviser believes such transaction to be fair to the Fund and such other client.

The Investment Adviser may effect principal transactions where the Fund acquires securities from or sells securities to the Investment Adviser and/or its affiliates, in each case in accordance with applicable law, which will include the Investment Adviser obtaining independent consent on behalf of the Fund prior to engaging in any such principal transaction between the Fund and the Investment Adviser or its affiliates.

The Investment Adviser may advise the Fund to acquire or dispose of securities in cross trades between the Fund and other clients of the Investment Adviser or its affiliates in accordance with applicable legal and regulatory requirements. In addition, the Fund may invest in securities of obligors or issuers in which the Investment Adviser and/or its affiliates have a debt, equity or participation interest, and the holding and sale of such investments by the Fund may enhance the profitability of the Investment Adviser's own investments in such companies. Moreover, the Fund may invest in assets originated by the Investment Adviser or its affiliates. In each such case, the Investment Adviser and such affiliates may have a potentially conflicting division of loyalties and responsibilities regarding the Fund and the other parties to such trade. Under certain circumstances, the Investment Adviser and its affiliates may determine that it is appropriate to avoid such conflicts by selling a security at a fair value that has been calculated pursuant to the Investment Adviser's valuation procedures to another client managed or advised by the Investment Adviser or such affiliates. In addition, the Investment Adviser may enter into agency cross-transactions where it or any of its affiliates acts as broker for the Fund and for the other party to the transaction, to the extent permitted under applicable law. The Investment Adviser may obtain independent consent

in writing on behalf of the Fund, which consent may be provided by the managing member of the General Partner or any other independent party on behalf of the Fund, if any such transaction requires the consent of the Fund under Section 206(3) of the U.S. Investment Advisers Act of 1940, as amended.

Material Non-Public Information. There are generally no ethical screens or information barriers among the Investment Adviser and certain of its affiliates of the type that many firms implement to separate persons who make investment decisions from others who might possess material, non-public information that could influence such decisions. If the Investment Adviser, any of its personnel or its affiliates were to receive material non-public information about a particular obligor or issuer, or have an interest in causing the Fund to acquire a particular security, the Investment Adviser may be prevented from advising the Fund to purchase or sell such asset due to internal restrictions imposed on the Investment Adviser. Notwithstanding the maintenance of certain internal controls relating to the management of material nonpublic information, it is possible that such controls could fail and result in the Investment Adviser, or one of its investment professionals, buying or selling an asset while, at least constructively, in possession of material non-public information. Inadvertent trading on material nonpublic information could have adverse effects on the Investment Adviser's reputation, result in the imposition of regulatory or financial sanctions, and as a consequence, negatively impact the Investment Adviser's ability to perform its portfolio management services to the Fund. In addition, while the Investment Adviser and certain of its affiliates currently operate without information barriers on an integrated basis, such entities could be required by certain regulations, or decide that it is advisable, to establish information barriers. In such event, the Investment Adviser's ability to operate as an integrated platform could also be impaired, which would limit the Investment Adviser's access to personnel of its affiliates and potentially impair its ability to manage the Fund's investments.

Conflicts Relating to Equity and Debt Ownership by the Fund and Affiliates. In certain circumstances, the Fund and other client accounts may invest in securities or other instruments of the same issuer (or affiliated group of issuers) having a different seniority in the issuer's capital structure. If the issuer becomes insolvent, restructures or suffers financial distress, there may be a conflict between the interests in the Fund and those other accounts insofar as the issuer may be unable (or in the case of a restructuring prior to bankruptcy may be expected to be unable) to satisfy the claims of all classes of its creditors and security holders and the Fund and such other accounts may have competing claims for the remaining assets of such issuers. Under these circumstances it may not be feasible for the Investment Adviser to reconcile the conflicting interests in the Fund and such other accounts in a way that protects the Fund's interests. Additionally, the Investment Adviser or its nominees may in the future hold board or creditors' committee memberships which may require them to vote or take other actions in such capacities that might be conflicting with respect to certain funds managed by the Investment Adviser in that such votes or actions may favor the interests of one account over another account. Furthermore, the Investment Adviser's fiduciary responsibilities in these capacities might conflict with the best interests of the investors.

Other Fees. The Investment Adviser and its affiliates are permitted to receive consulting fees, investment banking fees, advisory fees, breakup fees, director's fees, closing fees, transaction fees and similar fees in connection with actual or contemplated investments. Such fees will not reduce

or offset the Management Fee. Conflicts of interest may also arise due to the allocation of such fees to or among co-investors.

Soft Dollars. The Investment Adviser's authority to use "soft dollar" credits generated by the Fund's securities transactions to pay for expenses that might otherwise have been borne by the Investment Adviser may give the Investment Adviser an incentive to select brokers or dealers for transactions, or to negotiate commission rates or other execution terms, in a manner that takes into account the soft dollar benefits received by the Investment Adviser rather than giving exclusive consideration to the interests of the Fund.

**UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF
TEXAS, DALLAS DIVISION**

In Re: Highland Capital Management, L.P § Case No. **19-34054-SGJ11**

Charitable DAF Fund, L.P et al

Appellant

§

vs.

§

21-03067

Highland Capital Management, L.P

§

Appellee

§

3:23-CV-01503-B

[167] Order granting Defendant Highland Capital Management, L.P.'s Renewed motion to dismiss adversary proceeding (related document # [122](#)) Entered on 6/25/2023.

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APPELLANT RECORD

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**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

In re:	§ Chapter 11
	§
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§ Case No. 19-34054-sgj11
	§
Debtor.	§
	§
CHARITABLE DAF FUND, L.P. AND CLO	§
HOLDCO, LTD., DIRECTLY AND DERIVATIVELY	§
	§
Plaintiffs,	§ Adversary Proceeding No.
	§
vs.	§ 21-03067-sgj11
	§
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§
HIGHLAND HCF ADVISOR, LTD., AND	§
HIGHLAND CLO FUNDING LTD., NOMINALLY	§
	§
Defendant.	§
	§

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**APPELLANTS' SECOND AMENDED STATEMENT OF ISSUES
AND DESIGNATION OF RECORD ON APPEAL**

Pursuant to Rules 8009(a)(1)(A)-(B) and (a)(4) of the Federal Rules of Bankruptcy Procedure, The Charitable DAF Fund, L.P. and CLO Holdco, Ltd. ("Appellants") hereby designate the following items to be included in the record and identify the following issues with respect to

their appeal of the Order Granting Defendant Highland Capital Management, L.P.'s "Renewed Motion to Dismiss Complaint" [Adv. Proc. Doc. No. 122] which was entered by the United States Bankruptcy Court for the Northern District of Texas on June 25, 2023.

I. STATEMENT OF ISSUES TO BE PRESENTED ON APPEAL

- Whether the Bankruptcy Court had jurisdiction to rule on Highland Capital Management L.P.'s Renewed Motion to Dismiss Complaint
- Whether the Renewed Motion to Dismiss Complaint was improperly granted

II. DESIGNATION OF ITEMS TO BE INCLUDED IN THE RECORD

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1. Notice of Appeal for Bankruptcy Case Adversary Proceeding No. 21-03067-sgj11 [Doc. 168].

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2. The judgment, order, or decree appealed from: Memorandum Opinion and Order Granting Defendant Highland Capital Management, L.P.'s "Renewed Motion to Dismiss Complaint" [Adv. Proc. Doc. No. 122] [Doc. 167].

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3. Docket Sheet kept by the Bankruptcy Clerk.

4. Documents listed below and as described in the Docket Sheet for Bankruptcy Case Proceeding No. 21-03067-sgj.

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No.	Date Filed	Docket No.	Description/Document Text
1	9/29/21	1	(36 pgs; 3 docs) Adversary case 21-03067. ORDER REFERRING CASE NUMBER 21-CV-0842-B from U.S District Court for the Northern District of Texas, Dallas Division to U.S. Bankruptcy Court for Northern District of Texas, Dallas Division. Complaint by Charitable DAF Fund, LP, CLO Holdco, Ltd. against Highland Capital Management, LP, Highland HCF Advisor Ltd., Highland CLO Funding, Ltd. Fee Amount \$350 (Attachments: # 1 Original Complaint # 2 Docket Sheet from 3:20-cv-0842-B) Nature(s) of suit: 02 (Other (e.g. other actions that would have been brought in state court if unrelated to bankruptcy)). (Okafor, M.)
2	9/29/21	2	(1 pg) Supplemental Document (cover sheet) by CLO Holdco Ltd., Charitable DAF Fund (RE: related document(s)1 Adversary case 21-03067) [ORIGINALLY FILED IN 21-CV-0842 AS #2 ON 04/13/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)

Vol. 2 000139 000232 000239 000270 Thru Vol. 6	3	9/29/21	6	(93 pgs; 6 docs) MOTION for Leave to File First Amended Complaint filed by CLO Holdco Ltd., Charitable DAF Fund LP (Attachments: # 1 Exh 1_First Amended Complaint # 2 Exh 2_Motion for Authorization to Retain James Seery # 3 Exh 3_Order Approving Retention of James Seery # 4 Exh 4_Order Approving Settlement # 5 Proposed Order) (Bridges, Jonathan) (Entered: 04/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #6 ON 04/19/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
	4	9/29/21	22	(7 pgs; 2 docs) MOTION for an Order to Enforce the Order of Reference filed by Highland Capital Management LP. (Attachments: # 1 Exhibit(s) A--Proposed Order) (Annable, Zachery) Modified text on 5/20/2021 (mjr). (Entered: 05/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #22 ON 05/19/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
	5	9/29/21	23	(31 pgs) Brief/Memorandum in Support filed by Highland Capital Management LP re: 22 MOTION for an Order to Enforce the Order of Reference. (Annable, Zachery) Modified text on 5/20/2021 (mjr).(Entered: 05/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #23 ON 05/19/2021 IN U.S.DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
	6	9/29/21	24	(926 pgs; 29 docs) Appendix in Support filed by Highland Capital Management LP re: 23 Brief/Memorandum in Support. (Attachments: # 1 Appendix 1 # 2 Appendix 2 # 3 Appendix 3 # 4 Appendix 4 # 5 Appendix 5 # 6 Appendix 6 # 7 Appendix 7 # 8 Appendix 8 # 9 Appendix 9 # 10 Appendix10 # 11 Appendix 11 # 12 Appendix 12 # 13 Appendix 13 # 14 Appendix 14 # 15 Appendix 15 # 16 Appendix 16 # 17 Appendix 17 # 18 Appendix 18 # 19 Appendix 19 # 20 Appendix 20 # 21 Appendix 21# 22 Appendix 22 # 23 Appendix 23 # 24 Appendix 24 # 25 Appendix 25 # 26 Appendix 26 # 27 Appendix 27 # 28 Appendix 28) (Annable, Zachery) Modified linkage and text on 5/20/2021 (mjr). (Entered:05/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #24 ON 05/19/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
Vol. 7 001196	7	9/29/21	26	(7 pgs; 2 docs) MOTION to Dismiss Complaint filed by Highland Capital Management LP (Attachments: # 1 Exhibit(s) A--Proposed Order) (Annable, Zachery) Modified text on 5/28/2021 (jmg).(Entered: 05/27/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #26 ON 05/27/2021 IN U.S.DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)

Vol. 7 001203 thru Vol 8	8	9/29/21	28	(508 pgs; 14 docs) Appendix in Support filed by Highland Capital Management LP (Attachments: # 1 Appendix 1 # 2 Appendix 2 # 3 Appendix 3 # 4 Appendix 4 # 5 Appendix 5 # 6 Appendix 6 # 7 Appendix 7 # 8 Appendix 8 # 9 Appendix 9 # 10 Appendix 10 # 11 Appendix 11 # 12 Appendix 12 # 13 Appendix 13) (Annable, Zachery) (Entered: 05/27/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #28 ON 05/27/2021 IN U.S. DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
Vol. 9 001711	9	9/29/21	33	(1 pg) Amended Civil Cover Sheet by CLO Holdco Ltd, Charitable DAF Fund LP. Amendment to 2 Supplemental Document. (Sbaiti, Mazin) Modified text on 6/23/2021 (mjr). (Entered: 06/22/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #33 ON 06/22/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001712	10	9/29/21	36	(26 pgs) RESPONSE filed by CLO Holdco Ltd, Charitable DAF Fund LP re: 22 MOTION for an Order to Enforce the Order of Reference (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #36 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001738	11	9/29/21	37	(22 pgs) Appendix in Support filed by CLO Holdco Ltd, Charitable DAF Fund LP re 36 Response/Objection Response to Motion for an Order to Enforce the Order of Reference (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #37 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001760	12	9/29/21	38	(45 pgs) RESPONSE filed by CLO Holdco Ltd, Charitable DAF Fund LP re: 26 MOTION to Dismiss (Defendant Highland Capital Management, L.P.'s Motion to Dismiss Complaint) (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #38 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001805	13	9/29/21	39	(88 pgs) Appendix in Support filed by CLO Holdco Ltd, Charitable DAF Fund LP re 38 Response/Objection to Defendant Highland Capital Management, L.P.'s Motion to Dismiss Complaint (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #39 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001893	14	9/29/21	42	(12 pgs) REPLY filed by Highland Capital Management LP re: 22 MOTION for an Order to Enforce the Order of Reference (Annable, Zachery) (Entered: 07/13/2021) [ORIGINALLY FILED IN 21-CV-0842AS #42 ON 07/13/2021 IN U.S.

			DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
VOL. 9	15	9/29/21	43 (852 pgs) Appendix in Support filed by Highland Capital Management LP re: 42 Reply. (Annable, Zachery) Modified text on 7/14/2021 (mjr). (Entered: 07/13/2021) [ORIGINALLY FILED IN 21-CV-0842AS #43 ON 07/13/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001905 thru Vol. 13	16	9/29/21	45 (21 pgs) REPLY filed by Highland Capital Management LP re: 26 MOTION to Dismiss (Defendant Highland Capital Management, L.P.'s Motion to Dismiss Complaint) (Annable, Zachery) (Entered: 07/13/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #44 ON 07/13/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002757	17	9/29/21	57 (7 pgs; 2 docs) MOTION to Dismiss and Joinder in Motion to Dismiss of Highland Capital Management, L.P. filed by Highland CLO Funding Ltd. (Attachments: # 1 Proposed Order) Attorney Paul R Bessette added to party Highland CLO Funding Ltd (pty:dft) (Bessette, Paul) (Entered: 08/30/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #57 ON 08/30/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002778	18	9/29/23	58 (12 pgs) Brief/Memorandum in Support filed by Highland CLO Funding Ltd. re 57 MOTION to Dismiss and Joinder in Motion to Dismiss of Highland Capital Management, L.P. (Bessette, Paul) (Entered: 08/30/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #58 ON 08/30/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002785	19	9/29/23	59 (80 pgs; 5 docs) Appendix in Support filed by Highland CLO Funding Ltd re 58 Brief/Memorandum in Support of Motion (Attachments: # 1 Exhibit(s) A - Jackson v Dear # 2 Exhibit(s) B - Prudential Assurance v. Newman # 3 Exhibit(s) C - Harbourvest Settlement Agreement # 4 Exhibit(s) D - Boleat Declaration) (Bessette, Paul) (Entered: 08/30/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #59 ON 08/30/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002797	20	9/29/21	64 (1 pg) ORDER OF REFERENCE: Pursuant to 28 U.S.C. § 157 and this District's Miscellaneous Order No. 33, this case is hereby REFERRED to Judge Stacey G. C. Jernigan of the United States Bankruptcy Court for the Northern District of Texas, Dallas Division, to be adjudicated as a matter related to the consolidated Chapter 11 Bankruptcy of Highland Capital Management, L.P., Chapter 11 Case No.19-34054. (Ordered by Judge Jane J. Boyle
002877			

Vol. 14				on 9/20/2021) (svc) (Entered: 09/20/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #64 ON 09/20/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002878	21	10/19/21	66	(5 pgs) Notice of hearing filed by Defendant Highland Capital Management, LP (RE: related document(s) 26 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP, 47 Motion to strike document filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 55 Motion to abate filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) Hearing to be held on 11/23/2021 at 09:30 AM at https://us-courts.webex.com/meet/jerniga for 26 and for 47 and for 55, (Annable, Zachery)
002883 thru Vol. 16	22	11/22/21	71	(509 pgs; 2 docs) Witness and Exhibit List <i>for Hearing on November 23, 2021</i> filed by Defendant Highland Capital Management, LP (RE: related document(s) 26 Motion to dismiss adversary proceeding). (Attachments: # 1 Exhibits 1-13) (Hayward, Melissa)
Vol. 17	23	11/22/21	72	(2 pgs) Witness List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 26 Motion to dismiss adversary proceeding, 47 Motion to strike (related document(s): 43 Document), 55 Motion to abate (related document(s) 1 Complaint), 69 Motion to abate <i>Plaintiffs' Amended Motion to Stay All Proceedings</i> (related document(s) 55 Motion to abate (related document(s) 1 Complaint))). (Sbaiti, Mazin)
003392				
003394	24	11/22/21	73	(189 pgs; 4 docs) Exhibit List <i>for November 23, 2021 hearing</i> filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 47 Motion to strike (related document(s): 43 Document), 55 Motion to abate (related document(s) 1 Complaint)). (Attachments: # 1 Exhibit 1_Defendant's Memorandum of Law in Support of Motion for Reconsideration # 2 Exhibit 2_Highland Memorandum in Support of Motion to Dismiss # 3 Exhibit 3_Order (I) Confirming Fifth Amended Plan of Reorganization of Highland) (Sbaiti, Mazin)
003583	25	12/7/21	80	(2 pgs) Order granting Highland CLO Funding, Ltd.'s motion to dismiss adversary as a party with prejudice (related document 57) Entered on 12/7/2021. (Okafor, Marcey) Modified text on 3/11/2022 (Okafor, Marcey).
003585	26	3/11/22	99	(26 pgs) Memorandum of Opinion and order granting motion to dismiss the adversary proceeding (RE: related document(s) 26 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP). Entered on 3/11/2022 (Okafor, Marcey)
003611	27	3/11/22	100	(26 pgs) Order granting motion to dismiss adversary proceeding with prejudice (related document #26) Entered on 3/11/2022. (Okafor, Marcey)

Vol. 18 003637	28	3/21/22	104	(29 pgs) Notice of appeal. Fee Amount \$298 filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 100 Order on motion to dismiss adversary proceeding). Appellant Designation due by 04/4/2022. (Sbaiti, Mazin)
003666	29	5/26/22	120	(177 pgs; 2 docs) Support/supplemental document <i>Motion to Supplement Appellate Record</i> filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 111 Appellant designation). (Attachments: # 1 Amended Transcript of January 14, 2021 Hearing) (Sbaiti, Mazin)
003843	30	6/9/22	121	(1 pg) DISTRICT COURT Order: Case 3:22-00695-B is hereby transferred to the docket of the Honorable Judge Jane J. Boyle for consolidation with The Charitable DAF Fund LP, et al. v. Highland Capital Management LP, Case No. 3:21-cv-3129-N. Judge Karen Gren Scholer no longer assigned to case.(RE: related document(s) 86 Notice of appeal filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 104 Notice of appeal filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Entered on 6/9/2022 (Whitaker, Sheniqua) (Entered: 06/10/2022)
003844	31	10/24/22	122	(7 pgs) Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP (Annable, Zachery)
003851	32	10/14/22	123	(31 pgs) Brief in support filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Annable, Zachery)
Vol. 19 003882 Thru Vol 20	33	10/14/22	124	(513 pgs; 15 docs) Support/supplemental document (<i>Appendix in Support of Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7 # 8 Exhibit 8 # 9 Exhibit 9 # 10 Exhibit 10 # 11 Exhibit 11 # 12 Exhibit 12 # 13 Exhibit 13 # 14 Exhibit 14) (Annable, Zachery)
Vol. 21 004395	34	10/27/22	126	(5 pgs) Notice of hearing (<i>Notice of Hearing and Briefing Schedule on Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP). Hearing to be held on 12/8/2022 at 09:30 AM at https://us-courts.webex.com/meet/jerniga for 122. (Annable, Zachery)

Vol. 21 004400 004410 004442 Thru Vol. 22	35	11/18/22	128	(10 pgs) Motion for withdrawal of reference. Fee amount \$188, filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (Sbaiti, Mazin)
	36	11/18/22	129	(32 pgs) Response opposed to (related document(s): 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP) filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Sbaiti, Mazin)
	37	11/18/22	130	(254 pgs; 2 docs) Response opposed to (related document(s): 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP) filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Attachments: # 1 Appendix) (Sbaiti, Mazin)
Vol. 22 004696 004717 004732 004737 004742	38	9/2/22	131	(21 pgs) DISTRICT COURT MEMORANDUM OPINION AND ORDER: The Court REVERSES and REMANDS the bankruptcy court's Motion to Dismiss Order and AFFIRMS the bankruptcy courts Motion to Stay Order. re: appeal on Civil Action number: Case 3:22-00695-B consolidated with 3:21-CV-3129-B, (RE: related document(s) 81 Order on motion to abate, 100 Order on motion to dismiss adversary proceeding). Entered on 9/2/2022 (Whitaker, Sheniqua) (Entered: 11/29/2022)
	39	12/2/22	133	(15 pgs) Reply to (related document(s): 129 Response filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 130 Response filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) filed by Defendant Highland Capital Management, LP. (Annable, Zachery)
	40	12/7/22	135	(5 pgs) Notice of hearing filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP). Hearing to be held on 1/25/2023 at 01:30 PM at https://us-courts.webex.com/meet/jerniga for 122, (Annable, Zachery)
	41	12/7/22	136	(5 pgs) Notice of hearing filed by Defendant Highland Capital Management, LP (RE: related document(s) 128 Motion for withdrawal of reference filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Status Conference to be held on 1/25/2023 at 01:30 PM at https://us-courts.webex.com/meet/jerniga . (Annable, Zachery).
	42	12/9/22	138	(3 pgs) Response opposed to (related document(s): 128 Motion for withdrawal of reference. Fee amount \$188, filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) filed by Defendant Highland Capital Management, LP. (Annable, Zachery)

Vol. 22 004745	43	12/9/22	139	(25 pgs) Brief in support filed by Defendant Highland Capital Management, LP (RE: related document(s) 138 Response). (Annable, Zachery)
Vol. 23 004770	44	12/9/22	140	(280 pgs; 8 docs) Support/supplemental document (<i>Appendix in Support of Highland Capital Management, L.P.'s Response to Renewed Motion to Withdraw the Reference</i>) filed by Defendant Highland Capital Management, LP (RE: related document(s) 138 Response). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7) (Annable, Zachery)
Vol. 24 005050	45	12/16/22	144	(6 pgs) Reply to (related document(s): 138 Response filed by Defendant Highland Capital Management, LP) filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Sbaiti, Mazin)
005056 Thru Vol. 25.	46	1/23/23	145	(514 pgs; 15 docs) Witness and Exhibit List filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7 # 8 Exhibit 8 # 9 Exhibit 9 # 10 Exhibit 10 # 11 Exhibit 11 # 12 Exhibit 12 # 13 Exhibit 13 # 14 Exhibit 14) (Annable, Zachery)
Vol. 26 005570	47	1/23/23	146	(280 pgs; 8 docs) Witness and Exhibit List filed by Defendant Highland Capital Management, LP (RE: related document(s) 128 Motion for withdrawal of reference. Fee amount \$188.). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7) (Annable, Zachery)
Vol. 27 005850	48	1/23/23	147	(221 pgs; 7 docs) Witness and Exhibit List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Attachments: # 1 Exhibit 1_Excerpts from July 14, 2020 Hearing Transcript # 2 Exhibit 2_HCLOF Members Agreement Relating to the Company # 3 Exhibit 3_HarbourVest Settlement Agreement # 4 Exhibit 4_Order Approving Debtor's Settlement with HarbourVest # 5 Exhibit 5_HCLOF Offering # 6 Exhibit 6 Amended and Restated Investment Advisory Agreement) (Sbaiti, Mazin)
006071	49	1/23/23	148	(3 pgs) Witness and Exhibit List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 128 Motion for withdrawal of reference. Fee amount \$188.). (Phillips, Louis)
Vol. 28 006074	50	1/25/23	150	(56 pgs; 2 docs) Amended Witness and Exhibit List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 147 List (witness/exhibit/generic), 149 List (witness/exhibit/generic)). (Attachments: # 1 Exh 7_Testimony of Mark Patrick at June 8, 2021 hearing) (Sbaiti, Mazin)

Vol. 28 006130	51	1/25/23	152	(3 pgs) Notice of Appearance and Request for Notice by Louis M. Phillips filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Phillips, Louis)
	52	1/25/23	154	(1 pg) Court admitted exhibits date of hearing January 25, 2023 (RE: related document(s) 128 Motion for withdrawal of reference, filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) (COURT ADMITTED DEFENDANT'S EXHIBITS #1, #2, #3, #4, #5 & #6 OFFERED BY ATTY GREG DEMO). (Edmond, Michael) (Entered: 01/27/2023)
Vol. 32 006925 006942 006960	53	2/6/23	158	Report and recommendation to the U.S. District Court by U.S. Bankruptcy Judge. (RE: related document(s) 128 Motion for withdrawal of reference filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Entered on 2/6/2023 (Okafor, Marcey)
	54	2/6/23	161	(18 pgs) DISTRICT COURT Notice of transmission of report and recommendation in re: renewed motion to withdraw reference. Civil Case # 3:22-cv-02802-S. (RE: related document(s) 158 Report and recommendation to the U.S. District Court by U.S. Bankruptcy Judge. (RE: related document(s) 128 Motion for withdrawal of reference filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Entered on 2/6/2023) (Whitaker, Sheniqua)
	55	4/3/23	165	(1 pg) DISTRICT COURT ORDER: The Court GRANTS the 11 Joint Motion to Transfer Proceeding and Consolidate Before Original Court and the above-numbered case (3:22-cv-02802-S) is transferred to the docket of the Honorable Judge Jane Boyle: Civil case 3:21-cv-00842-B (order referring case). (RE: related document(s) 1 Complaint filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 143 Notice of transmission of motion to withdraw reference). Entered on 4/3/2023 (Whitaker, Sheniqua) Modified on 4/10/2023 (Whitaker, Sheniqua). (Entered: 04/10/2023)

TRANSCRIPTS

006961	56	11/24/21	78	(104 pgs) Transcript regarding Hearing Held 11-23-2021 RE: Motion Hearing. THIS TRANSCRIPT WILL BE MADE ELECTRONICALLY AVAILABLE TO THE GENERAL PUBLIC 90 DAYS AFTER THE DATE OF FILING. TRANSCRIPT RELEASE DATE IS 02/22/2022. Until that time the transcript may be viewed at the Clerk's Office or a copy may be obtained from the official court transcriber. Court Reporter/Transcriber Liberty Transcripts/Dipti Patel, Telephone number 847-848-4907. (RE: related document(s) 75 Hearing held on 11/23/2021. (RE: related document(s) 55 MOTION to Stay filed by CLO Holdco Ltd, Charitable DAF Fund LP (Sbaiti, Mazin) (Entered: 08/26/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #55 ON 08/26/2021 IN U.S.
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			<p>DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)) (Appearances: J. Pomerantz and J. Morris for Highland Defendants; J. Jordan and P. Bessett for HCLOF; M. Sbaiti for Plaintiffs. Nonevidentiary hearing. Motion denied. Mr. Pomerantz to upload order.), 76 Hearing held on 11/23/2021. (RE: related document(s) 47 Motion to strike 43 Appendix in support filed by CLO Holdco, Ltd., Charitable DAF Fund, LP (Bridges, Jonathan) Modified text on 7/16/2021 (mjr). (Entered: 07/15/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #47 ON 07/15/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)) (Appearances: J. Pomerantz and J. Morris for Highland Defendants; J. Jordan and P. Bessett for HCLOF; M. Sbaiti for Plaintiffs. Nonevidentiary hearing. Motion denied (Plaintiffs acknowledged complained-of Appendices it did not relate to Motion to Dismiss). Mr. Pomerantz to upload order.)). Transcript to be made available to the public on 02/22/2022. (Patel, Dipti)</p>
57	2/21/23	164	<p>164 (112 pgs) Transcript regarding Hearing Held 1/25/23 RE: HEARING ON DEFENDANT HIGHLAND CAPITAL MANAGEMENT L.P.'S RENEWED MOTION TO DISMISS COMPLAINT (122) AND STATUS CONFERENCE RE: MOTION FOR WITHDRAWAL OF REFERENCE FILED BY PLAINTIFF CLO HOLDCO, LTD., PLAINTIFF CHARITABLE DAF FUND, LP (128). THIS TRANSCRIPT WILL BE MADE ELECTRONICALLY AVAILABLE TO THE GENERAL PUBLIC 90 DAYS AFTER THE DATE OF FILING. TRANSCRIPT RELEASE DATE IS 05/22/2023. Until that time the transcript may be viewed at the Clerk's Office or a copy may be obtained from the official court transcriber. Court Reporter/Transcriber Dipti Patel, Telephone number 847-848-4907. (RE: related document(s) 155 Hearing held on 1/25/2023. (RE: related document(s) 122 Motion to dismiss adversary proceeding, (Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint) filed by Defendant Highland Capital Management, LP filed by Defendant Highland Capital Management, LP) (Appearances: J. Morris and G. Demo for Movants; L. Phillips and M. Sbaiti for Plaintiffs. Evidentiary hearing (appendices). Court took matter under advisement.), 156 Hearing held on 1/25/2023. (RE: related document(s) 128 Motion for withdrawal of reference. Fee amount \$188, filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) (Appearances: J. Morris and G. Demo for Movants; L. Phillips and M. Sbaiti for Plaintiffs. Evidentiary hearing (appendices). Court announced it will recommend denial to District Court. Court is working on Report & Recommendation.)). Transcript to be made available to the public on 05/22/2023. (Patel, Dipti)</p>

Dated: July 14, 2023

Respectfully submitted,

SBAITI & COMPANY PLLC

/s/ Mazin A. Sbaiti

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was filed electronically through the Court's ECF system, which provides notice to all parties of interest, on this 14th day of July, 2023.

/s/ Mazin A. Sbaiti

Mazin A. Sbaiti

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**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

In re:)	
	)	Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P., ¹	)	Case No. 19-34054-sgj11
Reorganized Debtor.)	
In re: CHARITABLE DAF FUND, L.P., AND)	
CLO HOLDCO LTD.,	)	Adv. Pro. No. 21-03067-sgj
Plaintiffs,)	
vs.)	
HIGHLAND CAPITAL MANAGEMENT, L.P.,)	
HIGHLAND HCF ADVISOR, LTD., AND)	
HIGHLAND CLO FUNDING, LTD.,)	
Defendants)	

¹ The Reorganized Debtor's last four digits of its taxpayer identification number are (8357). The headquarters and service address for the Reorganized Debtor is 100 Crescent Court, Suite 1850, Dallas, TX 75201.

**REORGANIZED DEBTOR’S WITNESS AND EXHIBIT LIST WITH
RESPECT TO EVIDENTIARY HEARING TO BE HELD ON JANUARY 25, 2023**

Highland Capital Management, L.P. (the “Debtor”) submits the following witness and exhibit list with respect to CLO Holdco, Ltd. and Charitable DAF Fund, LP’s *Renewed Motion to Withdraw the Reference* [Docket No. 128], which the Court has set for hearing at 1:30 p.m. (Central Time) on January 25, 2023 (the “Hearing”) in the above-styled adversary proceeding (the “Adversary Proceeding”).

A. Witnesses:

1. Any witness identified by or called by any other party; and
2. Any witness necessary for rebuttal.

Exhibits:

Number	Exhibit	Offered	Admitted
1.	Transcript of November 23, 2021 hearing		
2.	Securities and Exchange Commission, C.F.R. Parts 275, <i>Prohibition on Fraud by Advisers to Certain Pooled Investment Vehicles</i> , Release No. IA-2628; File No. S7-25-06.		
3.	<i>Second Amended and Restated Investment Advisory Agreement</i> , dated to be effective January 1, 2017, by and between Charitable DAF Fund, L.P., Charitable DAF GP, LLC, and Highland Capital Management, L.P.		
4.	Securities and Exchange Commission, C.F.R. Parts 276, <i>Commission Interpretation Regarding Standard of Conduct for Investment Advisers</i> , Release No. IA-5248; File No. S7-07-18.		
5.	<i>In re Acis Capital Management, L.P., et al.</i> , Case No. 18-30264-sgj11, D.I. 497 (Bankr. N.D. Tex. Aug. 13, 2018)		
6.	<i>In re Acis Capital Management, L.P., et al.</i> , Case No. 18-30264-sgj11, D.I. 549 (Bankr. N.D. Tex. Sept. 4, 2018)		
7.	Transcript of August 3, 2022 Hearing, Adversary Proc. No. 22-03052-sgj (Bankr. N.D. Tex. August 3, 2022)		

Dated: January 23, 2023

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EXHIBIT 1

005573

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS (DALLAS)

IN RE:	.	Case No. 19-34054-11 (SGJ)
	.	
HIGHLAND CAPITAL	.	
MANAGEMENT, L.P.,	.	
	.	
	.	
Debtor.	.	
.	
	.	Adv. No. 21-03067 (SGJ)
CHARITABLE DAF FUND, LP,	.	
et al.,	.	
	.	
Plaintiffs,	.	Earle Cabell Federal Building
	.	1100 Commerce Street
v.	.	Dallas, Texas 75242
	.	
HIGHLAND CAPITAL,	.	
MANAGEMENT, L.P., et al.,	.	
	.	
Defendants.	.	Tuesday, November 23, 2021
. . . . .	.	9:40 a.m.

TRANSCRIPT OF HEARING ON
PLAINTIFFS' MOTION TO STAY ALL PROCEEDINGS (55);
PLAINTIFFS' MOTION TO STRIKE REPLY APPENDIX (47); AND
DEFENDANTS' MOTION TO DISMISS COMPLAINT (26)

BEFORE HONORABLE STACEY G. JERNIGAN
UNITED STATES BANKRUPTCY COURT JUDGE

TELEPHONIC APPEARANCES CONTINUED ON NEXT PAGE.

Audio Operator: Hawaii S. Jeng

Proceedings recorded by electronic sound recording, transcript
produced by a transcript service.

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005574

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3

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1 THE COURT: Good morning. Please be seated.

2 All right. We have a setting in the Charitable DAF
3 Fund, et al., v. Highland, Adversary 21-3067. We have three
4 motions that are set.

5 Let me get appearances from the Plaintiffs' counsel
6 first. Go ahead.

7 MR. SBAITI: Good morning, Your Honor. This is Mazin
8 Sbaiti for the Plaintiffs.

9 THE COURT: Okay. Thank you.

10 Now for the Defendants, who do we have appearing?

11 MR. POMERANTZ: Good morning, Your Honor. It's Jeff
12 Pomerantz and John Morris from Pachulski Stang Ziehl & Jones.
13 Your Honor, before -- I understand Your Honor is going to take
14 up the motion to stay first.

15 Before Your Honor does so, I have a procedural issue
16 relating to that motion that I would like to address the Court
17 after appearances are made.

18 THE COURT: All right. I assume that's all the
19 lawyer appearances for this adversary.

20 MR. JORDAN: Your Honor?

21 THE COURT: Oh, go ahead.

22 MR. JORDAN: Your Honor, we are a nominal defendant,
23 but John Jordan on behalf of Highland CLO Funding, Ltd.

24 THE COURT: Okay. Thank you. Sorry about that.

25 MR. BESSETTE: And, Your Honor, Paul Bessette, Mr.

1 Jordan's colleague is on the phone, as well.

2 THE COURT: Okay. Thank you.

3 All right. Anyone else I missed?

4 (No audible response)

5 THE COURT: All right. Mr. Pomerantz, your
6 procedural issue?

7 MR. POMERANTZ: Thank you, Your Honor.

8 Your Honor, I must once again bring to this Court's
9 attention a violation of the Court Rules by the various counsel
10 representing Mr. Dondero. This time it's by Mr. Sbaiti.

11 When the district court entered its order granting
12 Highland's motion to enforce the reference and referring this
13 matter to Your Honor, there were three matters on the Court's
14 docket, district court's docket that got transferred. First
15 was the motion to dismiss, second was the motion to stay, and
16 third was the motion to strike, which essentially has been
17 rendered moot.

18 The briefing was complete with respect to the first
19 two matters, the motion to dismiss and the motion to stay. And
20 all that remained for the Court to do was to set a hearing and
21 have oral argument. Your Honor, on October 13th, Your Honor
22 set a hearing for today for each of those two motions.
23 Nevertheless, on November 10th, almost a month after the Court
24 set the matters for hearing and after pleadings were closed,
25 Plaintiffs filed what they called their amended motion to stay.

1 As an initial matter, Your Honor, the amended motion
2 was not even filed in this adversary proceeding initially. It
3 was filed in the main case, and there was an error that Mr.
4 Sbaiti corrected on November 18th, five days before this
5 hearing. Plaintiff did not ask for leave of court to file any
6 further pleadings. They did not provide the time under the
7 local rules for response. And, in fact, they raised additional
8 arguments in their amended motion.

9 Well, Your Honor, we can certainly argue to the Court
10 that the amended motion constitutes a new motion, is untimely,
11 and the hearing should be continued to allow us to file a
12 response. We're not going to do that, Your Honor. As I will
13 discuss when it's my time to respond substantively to the
14 motion, the new arguments to stay the proceedings, the amended
15 motion are equally as frivolous as the arguments contained in
16 the original motion.

17 But I bring this to the Court's attention because,
18 again, it's extremely frustrating to have the lawyers
19 representing Mr. Dondero's related entities continue to act as
20 if the rules do not apply to them. Your Honor will recall just
21 a week or so ago, Your Honor made a -- we had a similar issue
22 in connection with the motion to dismiss. Failure to follow
23 the rules is unprofessional, and it's disrespectful not only to
24 Highland's professionals but also to the Court and it
25 interferes with Your Honor's ability to control your docket and

1 sufficiently prepare for contested matters.

2 At some point, Your Honor, there should be real
3 consequences for the continued violation of the rules. Having
4 said that, Your Honor, we are prepared to go forward with the
5 motion to stay today.

6 THE COURT: All right. Mr. Sbaiti, what say you?
7 I'm looking at Docket Entry Number 69 in the adversary
8 proceeding that was filed last Thursday. So, obviously, very,
9 very late in the game, shall we say. What is your response to
10 this?

11 MR. SBAITI: Your Honor, that was not filed in the
12 adversary as an error. When we asked one of our paralegals to
13 file it, we're not as familiar with the bankruptcy court system
14 and it was an error. It was corrected once the lawyers
15 realized it, which was last -- which was on November the 18th.
16 It was filed in, I guess in the main case. But it was simply
17 an inadvertent error, Your Honor.

18 MR. POMERANTZ: I would add, Your Honor, the original
19 motion filed inadvertently was November 10th. It still was not
20 timely. I think Mr. Sbaiti needs to answer the question of why
21 that was filed untimely, okay.

22 THE COURT: All right. Thank you, Mr. Sbaiti.

23 So, one of my pet peeves in life is people blaming
24 paralegals, by the way. But be that as it may, as Mr.
25 Pomerantz points out that it was still untimely the motion

8

1 filed in the underlying bankruptcy case November 10th. So what
2 is your --

3 MR. SBAITI: Your Honor, when we looked at the motion
4 and looked at the progression of the case, we filed an amended
5 motion simply to clarify our position. And really I don't
6 think we've changed our arguments all that much. We simply
7 clarified our position. We've seen amended motions filed in
8 the bankruptcy in our prior dealings, and so at that point, we
9 felt like there wasn't a rule explicitly saying we couldn't
10 have an amended motion.

11 But if it's untimely, Your Honor, you know, we don't
12 think it changes the underlying arguments. As Mr. Pomerantz
13 said, we don't think there's any prejudice to Highland either.

14 THE COURT: All right. Well, just to be clear, you
15 know, it's one thing in an underlying bankruptcy case to file
16 an amended motion after you've gotten a motion set for hearing
17 that might slightly adjust, you know, facts or relief sought.
18 And, of course, we independently look at it when it happens in
19 an underlying case to see do we need more notice to affected
20 parties.

21 But in an adversary proceeding, you know, you just
22 don't do this. All right? If you have some sort of
23 exceptional circumstances, you can file I guess a motion to
24 amend because I got to include this new information that didn't
25 exist. But you just don't do this, okay?

1 So I don't -- could you be clear what was the new
2 information? What was the new information that had to be
3 brought before the Court suddenly?

4 MR. SBAITI: Your Honor, there wasn't new
5 information. We were simply giving notice of our understanding
6 of where the legal arguments were going. The reason being is
7 that after those motions were filed and recently, the debtor
8 took the position in two other cases that they should be
9 dismissed pursuant to the permanent injunction.

10 And so that clarified for us at least a couple of
11 arguments that were unclear to us where the debtor stood on
12 whether or not the permanent injunction would be a basis to
13 dismiss or stay any of the claims that were pending. There are
14 two other claims pending in district court. Since we had filed
15 that motion, the debtor filed a motion to reconsider the stays
16 that were granted in those two courts. And then they also
17 moved to dismiss on the basis of the permanent injunction.

18 And so given that the debtor took the position that
19 they were willing to dismiss those cases based upon the
20 permanent injunction, it in many ways contravenes the position
21 they took in response to our motion which is that the -- for
22 example, they somewhat take the position in Paragraph 22, it
23 wasn't as clear then but it's clear -- it seems clearer now
24 that the permanent injunction is not relevant to whether or not
25 the case can go forward in any capacity.

10

1 And so we simply wanted to incorporate that, but it's
2 mainly legal argument about the choices that are before the
3 Court. That was really it. I mean, theoretically, I would
4 have made them for the first time during oral argument and we
5 thought we were doing something good by giving -- apprising the
6 Court in writing and giving notice of these arguments to the
7 other side by filing an amended motion. We didn't add new
8 evidence or anything like that.

9 MR. POMERANTZ: Your Honor, that argument is
10 completely disingenuous because our motion to dismiss and
11 motion for reconsideration that Mr. Sbaiti refers to is several
12 weeks ago, okay. It wasn't November 10th. It was several
13 weeks ago.

14 I will respond substantively why Mr. Sbaiti is wrong
15 and there's no inconsistent positions when it's my time to
16 speak. But for Mr. Sbaiti to say he was doing us a favor and
17 he was reacting to recent new information is just wrong, Your
18 Honor. And they should just not be continued to allowed to get
19 away with flouting the rules.

20 THE COURT: All right. Well, let me just say I'm
21 confused, maybe I should say baffled, about this amended
22 motion. You know, the motion to dismiss that is before the
23 Court for oral argument today isn't about the injunction, isn't
24 about the plan injunction. It's about res judicata and other
25 12(b)(6) arguments.

1 So I'm confused and I think, you know, it's been
2 clear for many months in this adversary proceeding, in
3 particular, the debtor's position on the plan injunction,
4 particularly, you know, in the whole argument on the motion to
5 leave to add Mr. Seery as a defendant.

6 So I'm confused, but we're going to go forward on the
7 argument today, whatever argument you want to make. And you've
8 been, I guess, forewarned. I will say that these last-minute
9 amended motions are not going to be tolerated, are not going to
10 be considered. And so, you know, I hope you won't do it again.
11 Your firm has already been sanctioned once in this adversary
12 proceeding. I'm sure we all remember.

13 So, you know, I'm just kind of baffled why you would
14 take a chance filing an amended motion without leave or somehow
15 getting it to the attention of the Court or running it by the
16 other parties for their consent to you doing it. But we're
17 going to go forward and just hear the arguments, okay. And so
18 --

19 MR. SBAITI: Thank you.

20 THE COURT: -- I'll hear your argument.

21 I'm letting people know I don't know where this time
22 estimate came on the calendar today, three hours. I don't know
23 if someone specifically expressed that. But I'm letting you
24 know at noon I have a swearing-in ceremony that I'm doing back
25 in my chambers. So I will stop at noon Central time.

1 And so does anyone think that's going to be a
2 problem?

3 MR. SBAITI: It should not be, Your Honor, from our
4 perspective.

5 THE COURT: Mr. Pomerantz?

6 MR. POMERANTZ: I don't believe so. Mr. Morris is
7 going to handle the motion to dismiss which is going to be the
8 bulk. My presentation on the motion to stay is only going to
9 be around ten minutes or so.

10 THE COURT: Okay. Thank you.

11 Mr. Sbaiti, your argument on the motion for stay.

12 MR. SBAITI: Thank you, Your Honor.

13 Your Honor, may I share my screen?

14 THE COURT: You may.

15 MR. SBAITI: I have a PowerPoint that can kind of --

16 THE COURT: Okay. You may.

17 MR. SBAITI: -- walk us through. Thank you.

18 Is Your Honor able to see my screen?

19 THE COURT: I can, yes.

20 MR. SBAITI: Thank you, Your Honor.

21 Your Honor, what I would point you to is, first, the
22 injunction language. This is what Your Honor's permanent
23 injunction says, and this is really what animates our motion to
24 stay. Our motion to stay is derived specifically because my
25 clients and I feel like our case has been enjoined by this

1 injunction, if not completely disposed of.

2 The language says that we're an enjoined:

3 "An enjoined party is permanently enjoined from
4 commencing, conducting, or continuing in any manner
5 any suit, action, or other proceeding of any kind
6 including any proceeding in a judicial, arbitral,
7 administrative, or other forum against or affecting
8 the debtor or the property of the debtor."

9 And then (v) of that injunction says:

10 "or acting or proceeding in any manner in any place
11 whatsoever that does not conform to or comply with
12 the provisions of the plan."

13 One of the things that was suggested in Paragraph 22
14 of their response was that the DAF and Holdco are not enjoined
15 parties. But the final plan defines an enjoined party in
16 Article 1(b) (56) as any entity who has or -- all entities who
17 have held, hold, or may hold claims against the debtor; any
18 entity that has appeared and/or filed any motion, objection, or
19 other pleading in this Chapter 11 case regardless of the
20 capacity in which such entity appeared and any other party in
21 interest. And, five, the related persons of each of the
22 foregoing.

23 Article 1(b) (22) defines a claim as any claim that's
24 defined in Section 1015 of the Bankruptcy Code. And Section
25 1015 of the Bankruptcy Code defines a claim as a right to

1 payment whether or not such right is reduced to judgment,
2 liquidated, unliquidated, fixed, contingent, matured,
3 unmatured, disputed, undisputed, legal, equitable, secured, or
4 unsecured.

5 So given this definition, when we've read this
6 injunction, we believed that we were enjoined parties, the DAF
7 and Holdco were both enjoined parties. They had appeared in
8 the -- they have claims. Obviously, those are the claims being
9 asserted here.

10 And so going back to the injunction language, we
11 believe this lawsuit has been disposed of by this permanent
12 injunction. We believe there's really only one or two things
13 that should probably happen with this lawsuit. Either it could
14 be dismissed based upon the permanent injunction or what we
15 proposed in our motion to stay is that the Court exercise its
16 inherent authority to simply stay the case pending the appeal
17 of this language, which is up on appeal in the Fifth Circuit
18 right now.

19 If that language, and if the injunction gets affirmed
20 by the Fifth Circuit, then certainly the dismissal can happen
21 once that affirmance happens and there's no harm, no foul, and
22 no one's wasted any time.

23 If they're not, if it's overturned, then, obviously,
24 the injunction would be vacated, presumably by the Fifth
25 Circuit. And at some point, if the Court decides not to enter

1 a similar injunction that would likewise dispose of this case,
2 then the case could proceed on the merits.

3 The issue we've identified both in our original
4 motion and as we fleshed out in our -- as a matter of law in
5 our amended motion to simply put a finer point on it is that
6 the merits are now -- have been disposed of. This injunction
7 ends this case, at least as far as we read it. It ends this
8 case irrespective of the underlying merits of the lawsuit,
9 which means that the lawsuit merits themselves have become moot
10 and any opinion or any attempt to resolve it is obviously an
11 advisory opinion by the Court.

12 So we really only see two ways that this could go
13 right now without either gutting the injunction or
14 circumventing it completely, which is to say that either the
15 case should be dismissed based upon the permanent injunction or
16 the case should be stayed based upon the permanent injunction.

17 Mr. Pomerantz or the debtors' brief suggests that,
18 well, the injunction doesn't prevent hearing pending motions.
19 But I would respectfully disagree with that. If you look at
20 the language, "commencing, conducting, or continuing in any
21 manner in any suit, action, or other proceeding against or
22 affecting the debtor."

23 As 12(b)(6) hearing, I would imagine, was intended to
24 fall under the umbrella of a proceeding. And us arguing a
25 12(b)(6) motion would us be conducting and maybe even

1 continuing the suit because we're trying to protect the merits
2 of the suit, which as I said are at this juncture already moot.

3 And so it comes down to I think a very simple
4 question, which is what do we do at this juncture. Do we just
5 simply dismiss the lawsuit in light of this permanent
6 injunction or stay the lawsuit in light of this permanent
7 injunction?

8 The debtor makes a lot of hay out of the fact that,
9 well, there are special rules that apply when you're trying to
10 stay a case pending appeal. But if you look at all of their
11 case law, it has to do with different circumstances where an
12 appeal -- where there's a matter on appeal that could
13 substantially affect the resolution of the case, which here we
14 think it actually could. But in those cases, those appeals
15 would affect the resolution of the case on the merits; whereas,
16 here, the question goes to whether or not a permanent
17 injunction that really has stopped us all in our tracks.

18 As soon as we understood this injunction and its
19 scope, we're the ones who reached out to the debtor's counsel
20 and asked them on a meet-and-confer whether or not they would
21 just agree to stay the matter. And we were a little bit
22 surprised by their reaction when they first didn't think that
23 this applied to our case, and we didn't understand how. And
24 then they changed their mind, said it did apply to our case but
25 they didn't think that we should stay the case. And they

1 didn't suggest let's just dismiss it based upon the permanent
2 injunction.

3 So it kind of comes down to the same small -- same
4 simple issue, Your Honor. There's this permanent injunction,
5 and I don't think there's any way for us to get around it at
6 this juncture.

7 THE COURT: Mr. Pomerantz:

8 MR. POMERANTZ: Yes, Your Honor.

9 I'm going to respond to several of the arguments Mr.
10 Sbaiti made in his motion, which apparently he's abandoned
11 because he only is focused on the injunction. And I'm also
12 going to tell Your Honor, what our arguments are because
13 despite Mr. Sbaiti's efforts, he's completely misquoted them.

14 So in the motion and the amended motion, the
15 Plaintiffs make several arguments why this Court should stay
16 the matter. First, they argue they're entitled to a stay
17 because the exculpation provision in the plan prohibits them
18 from proceeding against the Defendants in the action. And
19 there are several problems with that argument.

20 First, Mr. Sbaiti and the Plaintiffs don't even
21 attempt to meet the Fifth Circuit's standards for a stay
22 pending appeal because, of course, they can't. Mr. Sbaiti's
23 trying to sidestep the grounds for a stay pending appeal by
24 arguing it doesn't apply just is incorrect.

25 They would have to show that there is a likelihood of

1 success on the merits, they would suffer irreparable harm, the
2 debtor wouldn't suffer irreparable harm, and there is -- public
3 interest supports a stay. They can't do any of them.

4 In fact, as Your Honor is well aware, Your Honor
5 denied the actual appellants in that suit, in that order, the
6 confirmation order, a stay pending appeal and that was denied
7 by the district court and also denied by the Fifth Circuit
8 Court of Appeals.

9 The Plaintiffs didn't object to the plan, they are
10 not parties to the appeal, and they never sought a stay pending
11 appeal. So they really can't explain why they as really
12 strangers to the appeal are entitled to a stay of the
13 effectiveness of the plan when the actual appellants to that
14 order were denied a stay pending appeal up through the
15 appellate ladder.

16 Second, notwithstanding Mr. Sbaiti's arguments in the
17 motion, the exculpation provision is neither as broad nor does
18 it affect all the parties that are subject to this litigation.
19 There are three Defendants in the complaint. The only
20 Defendant that is covered by the exculpation provision is the
21 debtor. The exculpation provision does not apply HCF Advisors,
22 and it does not apply to Highland CLO Funding.

23 Also, while the exculpation provision does apply to
24 the debtor, it only exculpates the debtor from claims of
25 negligence. The complaint raises a variety of causes of action

1 that have nothing to do with negligence and would not be
2 covered by the exculpation provision.

3 But, Your Honor, the biggest problem with their
4 argument that the exculpation provision supports a stay is that
5 the exculpation -- the appeal of the exculpation provision has
6 nothing to do with this case. Why? Because the Fifth Circuit
7 appeal concerns whether the exculpation provision is
8 appropriate for parties other than the debtor. The debtor is
9 the only Defendant in this case that obtains the benefit of the
10 exculpation.

11 And there is no dispute, there was no dispute at
12 confirmation, there's no dispute in the case law, there's no
13 dispute in Pacific Lumber, there's no dispute in the appeal
14 that a plan can exculpate the debtor. So the Fifth Circuit
15 appeal doesn't implicate the exculpation provision and cannot
16 support a basis for a stay.

17 The next argument Mr. Sbaiti makes is the injunction
18 provision, and the injunction provision is on appeal to the
19 Fifth Circuit. But the aspect of the appeal of the injunction
20 is not the provision that Mr. Sbaiti points to.

21 And, again, as with the exculpation provision, the
22 same arguments about failure to obtain a stay, failure to be
23 party to the appeals, and failure to object to the plan apply,
24 as well. But as is the case with the exculpation provision,
25 the resolution of the appeal of the injunction provision will

1 not affect this case in any way.

2 They point to the portion of the injunction that
3 prohibits enjoined parties from directly or indirectly
4 continuing, commencing, or conducting in any manner any suit or
5 action proceeding against the debtor. They argue that they
6 cannot proceed without violating the injunction because the
7 injunction was intended to put all litigation against the
8 debtor to an end.

9 But, of course, Your Honor, that is not true. That
10 is not what the injunction is. The issue on appeal before the
11 Fifth Circuit as it relates to the injunction is whether the
12 injunction impermissibly enjoins parties from enforcing their
13 rights with respect to post-effective date commercial
14 relationships with the reorganized debtor. And, of course, we
15 argue that it's appropriate, but it has nothing to do with the
16 provision Mr. Sbaiti identified.

17 The appeal does not impact in any way whether a plan
18 can enjoin prosecution of claims that arose prior to the
19 effective date. And, of course, such a plan provision is
20 completely appropriate and is customary. The plan provided the
21 debtor as the plan provides all debtors with a fresh start and
22 enjoins litigation against the debtor.

23 But importantly, Your Honor, that does not mean as
24 Plaintiffs argue that any liability for pre-effective date
25 conduct just goes away and that creditors are left without a

1 remedy to pursue claims against the debtor for pre-effective
2 date conduct.

3 Rather, if they have a pre-petition claim in lieu of
4 their litigation that's pending, they file a pre-petition claim
5 against the estate and that matter is resolved in the claims
6 objection procedure. Or, as in the case here, when they make
7 an allegation that there is a post-petition claim, what do they
8 do? They file a request for payment of an administrative
9 claim, and this Court addresses the validity of the
10 administration claim. The lawsuit pending in another
11 jurisdiction stops, but the claim has to be resolved in the
12 bankruptcy court.

13 The only conduct that the injunction really prohibits
14 is them from proceeding with actions in other courts. It does
15 not deny them a remedy. Accordingly, their argument that they
16 cannot proceed with claims against the debtor because of the
17 injunction provision just lacks any merit and can't form the
18 basis for a stay.

19 Plaintiffs' next argument in their briefing is that
20 if the Court refuses to stay the complaint, they will file a
21 motion to withdraw the reference of this matter to the district
22 court. Your Honor, this is the biggest head-scratcher of them
23 all given how this complaint ended up before Your Honor. This
24 exact issue and Plaintiffs' arguments as to why the reference
25 should be withdrawn have already been fully briefed and decided

1 by the district court.

2 As Your Honor may recall, the Plaintiff filed this
3 action in the district court, conveniently failing to include
4 the bankruptcy case as a related case or mentioning that the
5 bankruptcy courts have related jurisdiction in the filings.
6 Your Honor may have had occasion to review the underlying
7 complaint when the debtor brought a motion for contempt against
8 counsel for Plaintiffs for pursuing a claim against Mr. Seery
9 in violation of Your Honor's January 9th, 2020 and July 16th,
10 2020 orders.

11 Your Honor issued an order finding counsel and
12 various parties in contempt which order is, of course, subject
13 to appeal. At the time we were litigating the contempt motion,
14 we filed two motions in district court. The first was a motion
15 to enforce the reference and have the district court send that
16 complaint to Your Honor. And that motion to enforce the
17 reference is now on Your Honor's docket at Number 22 and 23.

18 The second was the motion to dismiss which is before
19 Your Honor today. Plaintiffs oppose the motion to enforce the
20 reference arguing that mandatory withdrawal was required
21 because the matter involved consideration of non-bankruptcy
22 federal law, specifically federal securities laws and the
23 Investment Advisors' Act.

24 Plaintiffs further argue to the district court why
25 would you refer the case to the bankruptcy court if it's only

1 going to end up back in the district court upon mandatory
2 withdrawal of the reference. They argue to the district court
3 that would be a complete waste of time.

4 We filed our reply at Docket Number 42 explaining to
5 the district court why mandatory withdrawal of the reference
6 did not apply and why this case should be referred to Your
7 Honor. And what did the district court subsequently do? It
8 entered an order referring this action to Your Honor which is
9 why we are here today.

10 Plaintiffs now flout the district court's order of
11 reference by telling the Court that if the Court does not stay
12 the matter, they will file a motion to withdraw the reference
13 before Your Honor, and they attach virtually identical pleading
14 that they filed in opposition to our motion to enforce the
15 reference.

16 Plaintiffs did not disclose in their amended motion
17 that there was a fully-briefed motion to enforce the reference
18 before the district court. Plaintiffs' argument is
19 disingenuous and designed to mislead the Court.

20 The district court has only agreed that mandatary
21 withdrawal of the reference does not apply and this case
22 belongs in Your Honor. And while we cannot stop the Plaintiffs
23 from filing any motion before this Court, we want to put them
24 on notice that if they do file a motion for withdrawal of the
25 reference in light of the facts as I just stated them, we will

1 seek sanctions.

2 In any event, Your Honor, the fact that they may file
3 a motion for withdrawal of the reference at some point in the
4 future is not grounds to stay the matter.

5 Lastly, Your Honor, Plaintiffs argued in the opening
6 that Highland's position today in opposing the motion to stay
7 is inconsistent with positions Highland has taken in two other
8 lawsuits commenced by the Sbaiti firm. Like all of their other
9 arguments, they misrepresent the facts and are frivolous.

10 The Sbaiti firm filed a complaint on behalf of the
11 DAF in the district court arguing that Highland mismanaged
12 (audio drop). That complaint followed in the heels of an
13 almost identical complaint filed by Dugaboy asserting the same
14 claims.

15 And Your Honor may recall questioning Mr. Sbaiti at a
16 hearing in June how Dugaboy could pursue such a claim in the
17 district court if Dugaboy had a pending proof of administrative
18 claim on file in the bankruptcy case. Well, soon after that
19 hearing, Your Honor, the Dugaboy complaint was dismissed, and a
20 few days later the DAF complaint was filed. That complaint has
21 never been served on Highland.

22 The second lawsuit is also a lawsuit filed by the
23 Sbaiti firm on behalf of an entity called PCMG in the district
24 court. And PCMG previously held less than five one-hundredths
25 of a percent interest in a certain fund managed by highland.

1 The lawsuit alleges that Highland acted improperly to sell
2 certain assets of the fund, thereby damaging PCMG. That
3 complaint has also never been served on Highland.

4 The Plaintiffs sought a stay of those matters before
5 Highland could file a response, and the court -- the district
6 court's entered stays in those matters. And Highland has filed
7 motions for reconsideration and the motions to dismiss because
8 they violate the injunction.

9 But, importantly, Your Honor, if you read the
10 motions, Highland does not argue that Plaintiffs do not have a
11 remedy for the alleged wrongs they say they suffer. Rather,
12 Highland's argument is that any claims alleged in those
13 lawsuits, just like any claims alleged in the lawsuit before
14 Your Honor today, must proceed in bankruptcy court as part of
15 the claims objection process. That's where they will have
16 their day in court. The lawsuits don't go away. The
17 injunction prevents them from continuing on in district court.

18 Accordingly, Highland is being totally consistent in
19 all matters, and the litigations may not proceed there but must
20 proceed before Your Honor. And, of course, none of these three
21 matters are implicated by the Fifth Circuit appeal.

22 Your Honor, the amended motion was procedurally
23 improper and is substantively without merit. And for all these
24 reasons, we request that the Court deny the stay motion and
25 proceed with the hearing on the motion to dismiss.

1 Thank you, Your Honor.

2 THE COURT: All right.

3 Mr. Sbaiti, you get the last word.

4 MR. SBAITI: Thank you, Your Honor.

5 Your Honor, the administrative claim process that was
6 described as being the way that these claims were supposed to
7 proceed, by the language of the order that we read, does not
8 allow for these claims. Those claims are limited to a specific
9 category of claims that don't include the claims that are
10 alleged in this lawsuit.

11 And in any event, this lawsuit wasn't filed as an
12 administrative claim. So if that's the case and it needs to be
13 refiled or reasserted as an administrative claim, then I think
14 that's a subject for another day. All I know is that we have
15 this injunction right now that either should stay this case
16 pending the appeal, which I'll address the issue on appeal in a
17 moment, or it should be dismissed, perhaps without prejudice so
18 that it can be refiled properly as an administrative claim if
19 that's what's supposed to happen, because I guess this converts
20 the matter.

21 The appeal, the subject of the appeal as to the
22 injunction, Your Honor, the appeal actually encompasses many of
23 the issues that we're talking about in this case. Now Mr.
24 Pomerantz tries to narrow the scope of what's up on appeal, and
25 that may indeed be the argument that they're going to present

1 to the Fifth Circuit or that they've presented to the Fifth
2 Circuit.

3 But the actual issue up on appeal is the
4 enforceability and validity of the order for a variety of
5 reasons which includes the provision that we're talking about
6 and the enforceability of the provision that we're talking
7 about because it gets rid of particular claims. And I guess
8 the argument back is, no, it doesn't because there's now an
9 alternative means of going there.

10 Mr. Pomerantz says that we shouldn't have proffered a
11 motion to enforce the reference. That proffer, however, was
12 because Judge Boyle's reference to this Court didn't deal with
13 our motion to -- our cross-motion to withdraw the reference.
14 All it dealt with was their motion to enforce the reference as
15 a -- to enforce the standing order in the district court. And
16 that's all she ordered was she cited the standing order and the
17 statutes, I think it's 157(a), and that's really all it did.

18 So it left open the question of whether she wanted
19 Your Honor to deal with the withdrawal of the reference
20 specifically as to the 12(b)(6) issue in the first instance.
21 It didn't resolve the question. It doesn't purport to resolve
22 that question. And it's not unheard of for the district court
23 then to send the matter to the bankruptcy court and then to
24 piecemeal which proceedings the withdrawal of the reference is
25 applicable to and then all the other proceedings would stay

1 with Your Honor or with the bankruptcy court.

2 So we weren't flouting the district court's order,
3 and we certainly weren't flouting any of the previous orders.
4 And the threat of a sanction for simply exercising our rights
5 in due course is not well taken.

6 Now Mr. Pomerantz says, well, the DAF and CLO Holdco
7 are not parties to the appeal. I don't think that's relevant
8 because if the provision is struck by the Fifth Circuit, it's
9 not only struck for the appellants, it's struck as to all.
10 It's either valid or it's invalid. And even if it's declared
11 to be invalid only as to the appellants, it's not suddenly
12 valid as to everyone else who didn't appeal. That's not
13 generally how these appeals have worked.

14 If the Court doesn't stay this matter, Your Honor,
15 and doesn't dismiss it, we still maintain, Your Honor, that as
16 it stands today, the question on the merits have been mooted
17 and we cannot proceed. I think what Mr. Pomerantz is hoping
18 for or the debtor is hoping for is a provision where our hands
19 are potentially tied to argue the motion.

20 And if the Court tells us they're not, then we'll
21 certainly argue the 12(b)(6). But what I don't want to do is
22 argue a 12(b)(6) motion that on its face appears to violate the
23 permanent injunction and then be held in contempt for violating
24 that injunction.

25 And so that's why we've asked for the Court to either

1 stay the matter under its inherent jurisdiction or to -- if
2 you're going to -- if it's not going to be stayed, then we
3 believe it has to be dismissed according to the permanent
4 injunction as it stands right now.

5 THE COURT: All right.

6 The motion to stay is denied. The amended motion to
7 stay is likewise denied. This is an odd argument. I guess one
8 might say the traditional four-factor test for a stay of a
9 proceeding has really not been the subject of the argument here
10 for a stay.

11 So suffice it to say the four-prong test for a stay,
12 you know, hasn't been met here. There hasn't been a showing of
13 substantial likelihood of success on the merits or irreparable
14 injury if the stay's not granted or a stay will not
15 substantially harm others or the stay would serve a public
16 interest.

17 But going on to the arguments that were focused on by
18 movant, I just don't think that you have shown that, you know,
19 either the exculpation clause or the injunction provisions of
20 the plan somehow tie your hands in arguing the 12(b)(6) motion,
21 defending against the 12(b)(6) motion today or I just think
22 that your arguments reflect, frankly, a misunderstanding of how
23 the injunction language and exculpation language applies here.

24 So the motion for stay is denied, and I will ask Mr.
25 Pomerantz to submit an order reflecting the Court's ruling.

1 So it looks like we have another procedural matter,
2 Mr. Sbaiti. You filed a motion to strike reply appendix of the
3 Plaintiffs quite a while back. So did you want to present
4 that?

5 MR. SBAITI: Yes, Your Honor. I think it's a very
6 simple procedural issue.

7 Generally, a party that files a 12(b)(6) is limited
8 to the four corners of the complaint. And if there's a
9 contract incorporated or a document incorporated as an
10 intrinsic part of the complaint, you know, that's usually
11 considered under the 12(b)(6) motion.

12 What the Defendants did, what the debtor here did is
13 they filed a bunch of evidence in their 12(b)(6), essentially
14 attempting to argue it as a summary judgment. We raised that
15 in our response. So as part of our response, we objected to
16 all the evidence. But then on the reply, they filed a bunch
17 more evidence both without leave and improperly, basically
18 sandbagged us.

19 And so we raised two points for striking that
20 evidence. One was akin to the first argument, which is it's
21 not an evidentiary hearing. It's not an evidentiary process in
22 the first instance. A 12(b)(6) motion has to assume that the
23 facts pled are true, and then the question is whether they
24 state a claim.

25 And, secondly, adding them to the reply is especially

1 egregious because the reply is the last word. And we didn't
2 have an opportunity to respond, and we also don't think it's
3 relevant nor should we have to respond to a whole bunch of
4 extra evidence that was attached.

5 That's essentially the basis of our motion, Your
6 Honor.

7 MR. POMERANTZ: Your Honor, the simple answer to the
8 issue is we filed the reply of the appendix in connection with
9 the motion to enforce the reference. We didn't file it in
10 connection with the motion to dismiss. The motion to enforce
11 the reference is moot. So what Mr. Sbaiti, his whole argument
12 doesn't make any sense.

13 As a substantive matter, just there wasn't any
14 evidence. It was pointing to court pleadings, orders, and
15 stuff. So it's irrelevant. I don't know why it's still on the
16 docket. It shouldn't be on the docket since it related to the
17 motion to enforce the reference.

18 THE COURT: All right. Mr. Sbaiti, did you just
19 simply --

20 MR. SBAITI: Your Honor, much of that evidence was --

21 THE COURT: -- misunderstand or what?

22 MR. SBAITI: I think we might have because it was
23 filed as a separate item, and it may have been miscallendared or
24 misapplied on our system. But the way it was presented to us
25 when we got it was it appeared to be evidence in support of,

1 well, I guess both, but certainly evidence that was averted to
2 in the reply.

3 But if they're saying that the Court's not going to
4 consider it, then that moots the motion and I think we can move
5 on.

6 MR. POMERANTZ: Yes, Your Honor. I had nothing to do
7 with his motion. I guess there was another mistake on their
8 end. I guess that stuff happens occasionally.

9 THE COURT: Okay. All right. So I'll deny it as
10 based on a mistake that's been acknowledged here. And so with
11 that, let's have an order cleaning that up, as well, Mr.
12 Pomerantz, please.

13 With that, we'll move on to the Defendants' motion to
14 dismiss complaint. I think, Mr. Pomerantz, you said Mr. Morris
15 will be making this argument?

16 MR. POMERANTZ: That is correct, Your Honor.

17 THE COURT: All right.

18 Mr. Morris, I'll hear your argument.

19 MR. MORRIS: Good morning, Your Honor. John Morris
20 for Pachulski Stang Ziehl & Jones for the reorganized debtor.
21 Can you hear me okay?

22 THE COURT: I can. Thank you.

23 MR. MORRIS: Okay.

24 Your Honor, this is a bit like Groundhog's Day. I
25 believe that we're going to spend the next half hour or an hour

1 discussing the very issues that were before the Court earlier
2 this year on the HarbourVest 9019 motion.

3 As the Court will recall from the June 8 hearing,
4 there is a complaint that's been filed ostensibly by the DAF
5 and CLO Holdco. As Your Honor will recall, the testimony
6 established that Mark Patrick had just been installed as the
7 trustee, had no knowledge of the prior events, and Mr. Dondero
8 and Mr. Sbaiti spent quite some time together formulating this
9 particular complaint that is nothing less than a collateral
10 attack on the Court's prior order.

11 I'd like to, if I can, just walk through a PowerPoint
12 presentation to try to make the debtor's position quite clear,
13 if I may.

14 THE COURT: You may.

15 MR. MORRIS: And I would ask my assistant, Ms. Canty
16 (phonetic), to put up the first slide.

17 Your Honor, you'll recall that last December, the
18 debtor filed its motion under Rule 9019 for court approval of a
19 settlement. The debtor was completely and utterly transparent
20 in what the terms of the settlement were.

21 Very briefly, as set forth in Appendix 2 or Exhibit 2
22 which was the motion itself, in Paragraph 32, Your Honor, the
23 debtor set forth the terms of the transaction for which it was
24 seeking approval. Those terms included in the very first
25 bullet point a statement that HarbourVest shall transfer its

1 entire interest in CLOF to an entity to be designated by the
2 debtor.

3 And that's an important point that we'll talk about
4 in a number of different contexts, Your Honor. The debtor made
5 it very clear at the very first moment of this matter that it
6 was not going to acquire the asset but the asset was going to
7 be transferred to an entity to be designated by the debtor.
8 The debtor's motion filed last December clearly stated the
9 value of the interest that it would be acquiring in return.
10 That was also set forth in Paragraph 32 in a footnote.

11 It didn't say that it was the fair market value. It
12 said the method of valuation was the net asset value and gave a
13 valuation date of December 1st so that all parties in interest
14 who received the motion understood the economics of the deal.
15 And the deal that the debtor was asking the Court to approve
16 was one whereby HarbourVest would receive certain claims and in
17 exchange for those claims, they were going to transfer their
18 interest in CLO -- HCLOF.

19 The debtor also filed on the docket for all to see a
20 copy of the settlement agreement. The settlement agreement
21 sets forth the terms of the deal, including again the statement
22 that HarbourVest "will transfer all of its rights, title, and
23 interest in HCLOF." It actually says to an affiliate or an
24 entity to be designated by the debtor. And the transfer
25 agreement itself was also put on the docket.

1 So that's where things stood just before Christmas.
2 I know that there's some due process and other type arguments
3 that are in the Plaintiffs' opposition to the motion. But, of
4 course, the undisputed facts are that the debtor timely filed
5 the motion. The time period was consistent with all applicable
6 rules. Nobody ever asked the debtor for an extension of time.
7 Nobody ever filed a motion for an extension of time. And so
8 those due process arguments I think carry no weight at all.

9 So the debtor filed the motion. And if we can go to
10 the next slide, we see what the responses were, and there were
11 several. All of the responses, the only responses were
12 objections to the motion filed by Mr. Dondero and his certain
13 of his affiliated entities.

14 Mr. Dondero's objection can be summarized as follows.
15 He made the following observations and asserted the following
16 objections to the proposed settlement. The first thing he said
17 is that the settlement far exceeds the bounds of
18 reasonableness. Now, of course, one cannot make a
19 determination of reasonableness without having an understanding
20 of value. The debtor was giving something and it was getting
21 something.

22 And so Mr. Dondero understood that the issue of value
23 was front and center. If there was any mistake about it, he
24 also noted that he understood that as part of the settlement
25 and, again, I've written this incorrectly, HarbourVest will

1 transfer its entire interest in HCLOF to the debtor. That is
2 not what Mr. Dondero understood. In fact, Mr. Dondero
3 understood that it would transfer its entire interest in HCLOF
4 "to an entity to be designated by the debtor," again, making it
5 clear that he knew exactly what the debtor was doing here. And
6 that can be found at Appendix 4 in Footnote 3 on Page 1 if you
7 want the exact quote from Mr. Dondero's pleading.

8 In the same footnote, he also specifically
9 acknowledges that he understood the valuation. He understood
10 the method valuation. He understood the valuation date of
11 December 1st. And he urged the Court in his pleading to
12 scrutinize the settlement to make clear that the available
13 value of the investment should be realized by the debtor's
14 estate.

15 And this is such a critical point, Your Honor. His
16 concern was that by placing the value in an entity other than
17 the debtor itself, that the Court wouldn't have jurisdiction
18 over that asset. That was his concern. So not only did he
19 understand that the asset was going to be transferred to an
20 affiliate, he wanted to make sure that this Court had
21 jurisdiction over the asset.

22 And, of course, Mr. Seery in his testimony and
23 otherwise, we provided the Court with all the comfort it needed
24 to know that even though it was being assigned to a special-
25 purpose vehicle wholly-owned by the debtor, it would

1 nevertheless be subject to the Court's jurisdiction.

2 Mr. Dondero's trusts also filed an objection if we
3 can go to the next slide.

4 Dugaboy and Get Good represented by Douglas Draper
5 made the following observations and asserted the following
6 objections to the HarbourVest Settlement. They, too, made
7 clear that they understood that the asset was going to be
8 transferred to an entity designated by the debtor. They, too,
9 acknowledge that they understood that the debtor was valuing
10 the asset at approximately \$22 million as of December 1st. And
11 their objection was that the Court couldn't evaluate the
12 settlement without knowing how the asset was valued, without
13 knowing whether the debtor could acquire the asset, very
14 critical point.

15 These are the points that are made in the complaint.
16 These are the exact same points that are made in the complaint.
17 And also the Court couldn't evaluate the settlement unless they
18 understood that the value would be inure to the benefit of the
19 debtor's estate, again, mimicking Mr. Dondero's concern that by
20 placing the asset in an affiliate of the debtor, that it might
21 not be subject to the Court's jurisdiction.

22 Finally, and most importantly, if we can go to the
23 next slide. The Plaintiff, CLO Holdco, filed an objection to
24 the 9019 motion. And this is just so critical. And this is
25 the Groundhog Day aspect that I specifically speak of. CLO

1 Holdco's objection was based solely on its assertion that it
2 had a superior right to the opportunity to acquire the asset
3 that was being transferred by HarbourVest. It only made one
4 argument in support of its contention that it had a superior
5 right, but that argument was specifically premised on the
6 membership agreement, Section 6.1 and 6.2 of the membership
7 agreement.

8 CLO Holdco, the Plaintiff in the underlying action,
9 argued to this Court that HarbourVest had no authority to
10 transfer the asset without complying with the right of first
11 refusal that would give CLO Holdco the opportunity to take the
12 asset for itself. That's what this Court was told. CLO Holdco
13 didn't make this argument fleetingly. They provided an
14 extraordinarily detailed analysis of Sections 6.1 and 6.2 of
15 the membership agreement and concluded "that HarbourVest must
16 effectuate the right of first refusal before it can transfer
17 its interest in HCLOF. That was the objection. Objections
18 have consequences, as Your Honor knows.

19 If we can go to the next slide.

20 By filing an objection, CLO Holdco and the trusts and
21 Mr. Dondero became participants in the litigation.
22 Notwithstanding the Plaintiffs' arguments to the contrary, when
23 they file the objections, they participate in what's called a
24 contested matter. And in a contested matter, they had every
25 right to take all discovery on any issue that was related to

1 the 9019 motion, including the transfer, the disposition of the
2 asset to an affiliate of the debtor, the valuation of the asset
3 that's being received, the merits of the settlement itself, the
4 causes of action, whether, you know, what communications that
5 were, the negotiations, what did Mr. Seery and Mr. Pugatch
6 discuss? Right?

7 They could have taken any discovery they wanted. And
8 they did avail themselves of discovery, in fact. They did -- I
9 don't know why they did what they did, but they chose to take
10 one deposition, and that was Mr. Pugatch, okay.

11 His deposition transcript, I think is at Exhibit 7,
12 or Appendix Number 7, and it was a long deposition. It really
13 was. And they asked Mr. Pugatch at the deposition if he knew
14 what the value of the asset that was being transferred was.
15 And he said \$22.5 million. So it wasn't just Mr. Seery or the
16 debtor who was subscribing to this valuation. The party on the
17 other side of an arm's length negotiation was subscribing to
18 the exact same valuation.

19 The Plaintiffs could have taken whatever discovery
20 they wanted. This is a full and fair opportunity to
21 participate in the litigation. We proceeded to trial. Before
22 we got there, actually, the debtor filed its response to CLO
23 Holdco's objection and proffered its own very detailed and
24 apparently very persuasive analysis that CLO Holdco's objection
25 was without merit, that CLO Holdco had no right of first

1 refusal under the facts and circumstances as they existed, and
2 with Grant Scott, Mr. Dondero's childhood friend at the helm,
3 we got to Court for the contested hearing on the debtor's 9019
4 motion, and CLO Holdco withdrew their objection.

5 And I've put up on the screen just an excerpt of the
6 transcript because, you know, when we talk about whether or res
7 *judicata* should apply, because was there a hearing on the
8 merits? Was there a decision on the merits? Just look at the
9 words of CLO Holdco's lawyer. "CLO Holdco has had an
10 opportunity to review the reply briefing and after doing so has
11 gone back and scrubbed the HCLOF corporate documents based on
12 our analysis of Guernsey law."

13 And some of the arguments of counsel in those
14 pleadings and our review of the appropriate documents, counsel
15 obtained the authority from Mr. Scott to withdraw the CLO
16 Holdco objection based on the interpretation of the member
17 agreement. We were grateful for that and the Court
18 specifically said in response, "That eliminates one of the
19 major arguments that we had anticipated this morning."

20 Apparently, the Plaintiffs believe that those events
21 have no meaning and that this Court's reliance on CLO Holdco's
22 substantive withdrawal of its objection has no meaning. I
23 think they're wrong, and we'll get to that in a moment.

24 We proceeded with the hearing. Mr. Seery and
25 Mr. Pugatch testified at length. If you look at Footnote 3,

1 you'll see Mr. Seery testified for almost 70 pages of
2 testimony. Mr. Pugatch testified for almost 45 pages of
3 testimony. His testimony was exhaustive. And, again, any of
4 the objecting parties had the right to ask whatever questions
5 they want.

6 But I do want to just note a few things that aren't
7 up on the screen right now. If you go to Appendix 9, Your
8 Honor, which is the transcript of the hearing, at Page 13, you
9 will see that the very first thing I discussed in my opening
10 statement was the economics and how with a valuation of \$22.5
11 million this deal made sense for the debtor.

12 You will see from Pages 30 to 42 there is extensive
13 testimony from Mr. Seery about the amount and the value of the
14 asset. But the most important part of Mr. Seery's testimony is
15 that he explains how it came to be that HarbourVest agreed to
16 transfer its interest in HCLOF to an affiliate of the debtor.
17 And that came about, not because Mr. Seery or the debtor was
18 initially at all interested in doing this. The whole idea
19 originated with HarbourVest.

20 They wanted to extract themselves from the Highland
21 platform. They wanted to give this piece up. So there's no
22 conspiracy going on here. The unrebutted testimony that all of
23 the objecting parties had an opportunity to challenge was that
24 the whole idea originated with Mr. Pugatch and with
25 HarbourVest. I think that's an important point to take into

1 account.

2 And finally, again, from the hearing, if you look at
3 at Appendix 9, you'd also find that Mr. Pugatch, again,
4 testified, as he had in his deposition, as to the value of the
5 interest being transferred. So we completed the testimony. We
6 rested our case having had a full and fair opportunity to
7 contest the motion. The objecting parties rested as well. And
8 we got to the point where we had to prepare the notice, and we
9 were discussing that at the hearing, if we can go to the next
10 slide.

11 And it's very important, because again, this was all
12 done transparently, and it was all done on the record. And
13 after the close of evidence, I addressed the order that was
14 going to be prepared. I specifically said that I wanted to
15 make clear that we were going to include a provision, "that
16 specifically authorizes the debtor to engage in, to receive
17 HarbourVest the asset, you know, the HCLOF interest," right. I
18 wanted everybody to know that was what was going to happen, and
19 then I said, "The objection has been withdrawn." I think the
20 evidence is what it is and we want to make sure that nobody
21 thinks they're going to go to a different court somehow to
22 challenge the transfer. But yet, that is exactly what the
23 complaint seeks to do.

24 Having put everybody on notice as to where we were
25 going, as to what the evidence showed, the debtor drafted and

1 the Court adopted an order, and the order says, among other
2 things, that HarbourVest was authorized to transfer its
3 interest to the debtor. Actually, it says, "to a wholly owned
4 and controlled subsidiary of the debtor," pursuant to the
5 transfer agreement, "without the need to obtain the consent of
6 any party or to offer such interest first to any other investor
7 in HCLOF." So the Court heard the 9019 motion pursuant to a
8 Bankruptcy Rule and entered an order that was unambiguous and
9 that the Plaintiffs did not appeal from.

10 We can go to the next slide.

11 At a very high level, Your Honor, it is just crystal
12 clear that the complaint is just inextricably intertwined with
13 the 9019 proceedings and the order itself. I think Mr. Sbaiti
14 would agree with me that but for the order that approved the
15 transfer of the asset and the testimony about the value of that
16 asset, they have no claims.

17 Every single claim is predicated on what happened in
18 the 9019 hearing. Every single claim is predicated on the
19 Court's order approving the transfer of the asset and the
20 testimony and evidence that was adduced in relation to that
21 asset.

22 There were really only two issues that the Court -- I
23 mean, if you want to think about it at its most simplistic
24 level, the Court was being asked to assess, is it fair, is it
25 reasonable, is it legally permissible for the debtor to give

1 something. In this case, allowed claims and releases, and to
2 get something in return. In this case, HarbourVest's interest
3 in HCLOF and releases in return. And that is really the
4 gravamen of the complaint.

5 The complaint is based whether it's breach of
6 fiduciary duty or RICO or breach of contract or tortious
7 interference, whatever the claim is, none of them exist if the
8 debtor doesn't get this. They just don't exist. And that is
9 why the complaint and the proceeding are inextricably
10 intertwined. And if you just take a look at just one paragraph
11 of the pleading, it says at the core of this lawsuit is the
12 fact that HCM, that's the then debtor, purchased the
13 HarbourVest interests in HCLOF for \$22.5 million knowing that
14 they were worth far more than that. There's not a cause of
15 action that exists in the complaint that isn't dependent on
16 Paragraph 36.

17 So if we can go to the next slide with that
18 background, I'd like to argue why under 12(b), the complaint
19 should be dismissed because the claim should be barred under
20 the doctrine of *res judicata*. Luckily, Your Honor, there is at
21 least one area of agreement between the parties here, and that
22 is the purpose of the doctrine and the elements that have to be
23 satisfied in order to meet the burden of proof necessary to
24 have the claims barred. And in Footnote 1, you can -- I've
25 tried to just be helpful to the Court to show that we may not

1 cite to the exact same cases, but the parties agree that the
2 doctrine is intended to foreclose the re-litigation of claims
3 that were or could have been raised in a prior action and that
4 there's four elements that have to be satisfied for the
5 doctrine to apply.

6 The parties have to be either identical or at least
7 in privity, the judgment in the prior action had to have been
8 rendered by a court of competent jurisdiction. Number three,
9 the prior action had to have been concluded by a judgment on
10 the merits. And the last one is that the same claim or cause
11 of action was involved in both suits. So I just want to spend
12 a few minutes now, Your Honor, going through those four
13 elements to show the Court how easily the reorganized debtor
14 meets this standard.

15 If we can go to the next slide, I can take care of
16 the first two elements very quickly.

17 The first element, the debtor asserted that the
18 Plaintiffs were parties or in privity with parties to the prior
19 proceeding. That's at Paragraph 17 of the motion to dismiss.
20 The debtor relies on the deposition testimony of Grant Scott,
21 who was then the trustee of the DAF.

22 CLO Holdco is a wholly-owned subsidiary of the DAF,
23 or wholly controlled, in any event, and Mr. Scott's testimony
24 was that he was the only director and there were no employees
25 of either entity. So we, in our motion, put forth evidence to

1 establish the first element, and I don't believe, maybe I've
2 missed it. I don't believe that the Plaintiffs have contested
3 that element. If they have, I think Mr. Scott's testimony will
4 carry the day, in any event.

5 The second element as to whether or not a court of
6 competent jurisdiction is the entity or the court that rendered
7 the ruling. Of course, that's been met, too. The Plaintiffs,
8 in their opposition to the motion to dismiss, suggested that
9 the bankruptcy court would have lacked jurisdiction if their
10 cross motion to withdraw the reference was granted. They said
11 if the district court decides that mandatory withdrawal
12 applies, then it cannot find that the bankruptcy courts already
13 entered final judgment was rendered on Plaintiffs' causes of
14 action and had jurisdiction to do so. I think that's just a
15 clear misstatement of the law.

16 But in any event, Your Honor, at this point, I
17 believe it's irrelevant because the district court, in fact,
18 sent the case back to Your Honor and back to this Court. And
19 so, at the end of the day, Plaintiffs' argument doesn't hold
20 water because of the district court's ruling, which can be
21 found -- the order of reference can be found at Docket
22 Number 64. And so I think that easily takes care of the second
23 prong.

24 The third prong is whether -- if we can go to the
25 next slide -- the prior proceeding resulted in a judgment on

1 the merits. And this is really the critical point, Your Honor.
2 As the Court knows, the whole doctrine of *res judicata* is
3 designed to prevent, as the parties agree, the re-litigation of
4 claims. Stated another way, it's to bring finale. It's to
5 make sure that the Court doesn't hear the same claims and the
6 same issues that either were brought or that could have been
7 brought in a prior proceeding. And so, we believe that we
8 easily meet the standards set forth in the third prong. The
9 9019 order necessarily determined that the *quid pro quo* that I
10 described earlier was fair, reasonable, and legally
11 permissible.

12 Notwithstanding their assertions to the contrary, the
13 Plaintiffs are most definitely seeking to unwind at least one
14 half of the Court's order by belatedly claiming that they are
15 entitled to the benefit of the bargain while leaving Highland
16 burdened, frankly, with the claims that HarbourVest got as part
17 of the deal. I will tell you, Your Honor, and this is
18 argument, the debtor would never have asked for, and I don't
19 believe that the Court would ever have granted, the 9019 motion
20 if they thought that there was a risk in the future that
21 Highland wouldn't get the benefit of the bargain and it was
22 incumbent upon CLO Holdco and the DAF, and frankly, any party
23 in interest, to stand up and be counted and tell the Court and
24 the debtor, why the debtor was not entitled to do this deal and
25 CLO Holdco did that. They actually did.

1 They stood up and they filed an objection and they
2 said we have a superior right to this asset in the form of a
3 right of first refusal. They wound up folding in the face of
4 persuasive argument, and I respect the lawyer who did that. I
5 just do. But that was the time to speak up, and that's why it
6 is on the merits because that is exactly what *res judicata* is
7 intended to do. It's intended to have everybody put your cards
8 on the table. You don't put one card on the table and say, I'm
9 going to challenge this under 6.2 of the members agreement, but
10 I'm not going to tell you that I also think you owe me a
11 fiduciary duty under the Advisors Act or as the control party
12 or under any other theory that they had. They can't do that.
13 That's exactly what the problem is here.

14 If we can go to the next slide. Is it a judgment on
15 the merits? The debtor and the Court relied on CLO Holdco's
16 representation that it was withdrawing its argument, its claim,
17 its contention, its assertion that it had a superior right to
18 obtain the HarbourVest interest in HCLOF. Again, they did so
19 not whimsically, not because Mr. Kane was going to be out of
20 town and he couldn't make the hearing. He did it after, and I
21 don't think this matters frankly, but I think it's worth noting
22 that he did it after an extremely careful analysis. I would
23 tell you, Your Honor, that -- well, I would argue, Your Honor,
24 that even if Mr. Kane at CLO Holdco had never filed an
25 objection, if they'd never filed -- if they'd gotten notice

1 that this was happening and they sat silently, that would have
2 been enough for *res judicata* because the issue before the Court
3 was whether it was legally permissible for the debtor to
4 acquire this asset.

5 And if they had an obligation, if they owed a duty to
6 another party, it wouldn't have been legally permissible. And
7 if somebody believed that it wasn't legally permissible because
8 a duty was owed to them, they had an obligation to speak up.

9 And so I think it's very important, particularly for the
10 collateral estoppel argument that I'll make in a moment, that
11 CLO Holdco did in fact file an objection. It was based on the
12 breach of contract claim that's in their complaint. It's the
13 exact same claim. And they withdrew it. I think it's very,
14 very important. I think it highlights why *res judicata*
15 applies. I think it is the linchpin of the collateral estoppel
16 argument.

17 But at the end of the day, I think if they say
18 nothing, they should be estopped or precluded under *res*
19 *judicata* from now asserting -- it would be like -- I was
20 thinking about this earlier, Your Honor. If you'll remember
21 earlier this year, Mr. Dondero and his entities have kind of a
22 habit of withdrawing objections at the last minute. We had a
23 couple of sale hearings earlier this year. And the issue was
24 valuation, you know, and the process, and could the debtor meet
25 its burden of proving that the sale outside of the ordinary

1 course of business was in the debtor's best interest. And they
2 sold that restaurant. And Mr. Dondero objected. And at the
3 last second, they withdrew the objection. Did they sue
4 tomorrow? Does Your Honor really think that they could bring a
5 lawsuit tomorrow and say they just found a document or theory
6 on which the debtor had an obligation to give them a right of
7 first refusal, even though we've already closed on the
8 transaction, even though they were given notice of the
9 transaction, even though they filed an objection to the
10 transaction, even though they withdrew the objection? Would
11 the Court tolerate for one second a new pleading tomorrow from
12 Mr. Dondero that the debtor actually had a fiduciary duty to
13 give him a right of first refusal to buy that asset under
14 whatever theory, just because he pleads it and the Court has to
15 accept as true the allegations in the complaint? I think not.
16 And I think it's worth thinking about that to highlight just
17 how -- just how wrong this is.

18 Continuing on. You know, the Plaintiffs in
19 opposition say it can't be a trial on the merits because we
20 weren't parties. Of course they were parties. Again, they
21 filed an objection. They were the parties to the contested
22 matter, full stop. They rely on a case called Applewood and
23 they say, this is the very first point they make in their
24 brief. Applewood, if it wasn't *res judicata* in Applewood, how
25 could it possibly be *res judicata* here? But the facts are just

1 so inapposite, right?

2 In Applewood, you had a garden variety plan and
3 release where the debtor and the officers and directors got a
4 discharge. No objection to it. And a secured lender later on
5 sought to sue guarantors who happened to be officers and
6 directors. And the court, not surprisingly, said that the
7 confirmation order wouldn't prevent the secured lender from
8 going after the officers and directors, not in their
9 capacities, as such, but in their capacity as guarantors, which
10 were never part of the confirmation order. That just doesn't
11 apply here because here, we have the debtor making a motion
12 before the Court in which it sought permission and authority to
13 acquire a particular asset. Anybody who had a claim to that
14 asset should have stepped forward and put their cards on the
15 table.

16 And again, CLO Holdco put their cards on the table
17 and they lost, and they folded. To use the poker analogy, they
18 folded. And to hear them come into Court today and say we're
19 going to sue you because I reshuffled the deck, it's not right
20 and Applewood has no relevance.

21 Finally, Your Honor, you know, it's not on the
22 merits, they say, because you know, Mr. Seery and the debtor
23 hid the true value of the asset, and had we only known the true
24 value of the asset, we would have made all of these other
25 claims. The fact of the matter is, you either have a fiduciary

1 duty or you don't. And if you had a fiduciary duty, they
2 should have spoken up and they did only under 6.2, but they
3 did.

4 But here's the important part, Your Honor. Take the
5 allegations as true. You have to take all of the allegations
6 as true, not just some of them. And if you look at
7 Paragraph 127 of the complaint, and I would ask Ms. Canty to go
8 to Appendix 11 and let's just put Paragraph 127 up on the
9 board.

10 Here's the irony of the whole thing, right. The
11 whole complaint is based on the fact that somehow Mr. Seery was
12 engaged in insider trading. They accused him of insider
13 trading, and they say he didn't disclose the full value of the
14 asset. Just read Paragraph 127. James Dondero, who was on the
15 board of MGM, is the tippee. You've got an insider trading
16 case -- I mean, I don't represent MGM. I'm not with the SEC.
17 I don't know why Mr. Dondero thought he should be telling
18 Mr. Seery in December, 2020. It's not clear if it was before
19 or after the 9019 motion was filed. But Mr. Dondero is the
20 very source of information -- you can't make this up. He's the
21 very source of the information that he now complains Mr. Seery
22 didn't disclose.

23 Of course, Mr. Dondero, the trust, CLO Holdco could
24 have asked Mr. Seery at any time, how did you come up with your
25 valuation? Mr. Dondero, knowing that he had supplied to

1 Mr. Seery, according to Paragraph 27, please take it as true
2 for purposes of this motion only. He's the source of the
3 inside information. And now he has the audacity to come to
4 this Court, notwithstanding the Court's approval, all of the
5 time and money and effort spent in the 9019 process, and say,
6 Mr. Seery was wrong because he didn't tell CLO Holdco and the
7 DAF about the information that Mr. Dondero gave to Mr. Seery.
8 It's not right.

9 It was a judgment on the merits. And if Mr. Dondero
10 or the DAF or CLO Holdco or the trust wanted to challenge the
11 valuation, they had every opportunity to do so. And based on
12 Paragraph 127, if the Court accepts it as true, shame on them.
13 Shame on them for not pursuing this issue before. The guy gave
14 Mr. Seery, according to this allegation, and I'm just going to
15 leave it there, inside information. And he sits there in
16 silence, right? It says, look at the last sentence: "The news
17 of the MGM purchase should have caused Seery to revalue HCLOF's
18 investment." Seriously?

19 The third element is (indiscernible). The fourth
20 element, if we can go to the next slide.

21 Are they the same claims? Did the claims arise from
22 the same set of operative facts? I've addressed this pretty
23 clearly already, so I don't want to belabor the point. But
24 obviously, both the 9019 motion and the complaint arise solely
25 from the debtor's settlement with HarbourVest. The debtor's

1 acquisition of HarbourVest's interest in HCLOF and the debtor's
2 valuation of that interest. Without those three facts, there
3 is no complaint. It's just not credible to argue that the
4 fourth element is not met.

5 The case law is clear. It's quoted in the
6 Plaintiffs' opposition. It's not just the test of whether the
7 claims are the same. It's whether the claim is the same as
8 that which was brought or could have been brought.

9 In their opposition, the Plaintiffs contend that the
10 claims "did not write them until after the settlement was
11 consummated," and that the first time the plaintiffs heard
12 about the valuation of HarbourVest's interests was at the
13 January 14, 2021, hearing. I think I quoted that. If you
14 look, I don't know if it's Page 10 or Paragraph 10; the way I
15 wrote it, it's probably Page 10. I think that's a quote right
16 out of there. But of course, as we saw the debtor disclosed
17 the valuation in its very initial motion, CLO Holdco's counsel
18 elicited valuation testimony directly from Mr. Pugatch, so that
19 was before the hearing.

20 And of course, Mr. Dondero and the trusts both cited
21 in their objections the valuation. The notion that this was
22 not right, just -- it's contradicted by their own conduct,
23 their objections, their questions in deposition, the
24 information that was contained in the motion that they objected
25 to.

1 I do want to go off-script for just a minute, if we
2 could just take that down because I know that this is probably
3 something that Mr. Sbaiti may argue. And that is, well, gee,
4 but you have to take the allegation as true that Mr. Seery
5 wasn't honest, that Mr. Seery lied to the court. I don't
6 understand why there's not a fraud cause of action in there,
7 but there's not. But that's their theory.

8 And gee, how does he get to skate away Scott free if
9 he's allowed to do that with impunity, right? I will tell you,
10 Your Honor, of course you've seen Mr. Seery many times. You've
11 made your own assessments of his credibility. I'm not here to
12 argue the merits, but I will just say that the Defendants, if
13 ever forced to, will contest the allegation.

14 But here's the thing, and here's the important point
15 about, you know, whether or not he could lie with impunity and
16 say, I suspect that's where Mr. Sbaiti is going to want to go.

17 Mr. Seery said what he said. And he had a reason to
18 speak, and he spoke, and he said what he said and he told
19 everybody who would listen exactly what he was doing and how he
20 was doing it. For whatever reason, the objectors put the
21 valuation front and center. It's right in their objections.
22 They noted the objections. But for whatever reason, they did
23 nothing.

24 Whether they were negligent or whether they were
25 lying in wait is kind of irrelevant. They had a full and fair

1 opportunity to contest this issue. And if they had done so,
2 and the evidence proved what they're now alleging, they can't
3 tell you what would have happened. So, you know, HarbourVest
4 may have taken a different position. The Court may have done
5 something.

6 We're never going to know now because Mr. Seery and
7 the debtor are getting away with something, but because they
8 put in evidence that went unchallenged by Mr. Dondero and the
9 Plaintiffs. It simply went unchallenged. And they say, oh,
10 gee, that's because we didn't know. Well first of all, you
11 didn't ask. And second of all, again, the source of the inside
12 information, the reason that Mr. Seery should have known the
13 asset was worth more. The reason that he should have refrained
14 from trading and not engaged in insider information was
15 Paragraph 127. It was Mr. Dondero.

16 Here's another thing. If -- if again Mr. Seery had
17 not been honest with the Court and that was ever brought out,
18 Maybe HarbourVest -- maybe HarbourVest would have had a right
19 to complain. There's a lot in the complaint about oh,
20 HarbourVest was misled. The actual evidence that's in the
21 record, and this is part of res judicata, Mr. Seery testified
22 very clearly to the arm's length negotiation that took place.
23 He told the Court under oath that the negotiations were
24 contentious.

25 He told the Court under oath that in order to try to

1 resolve the case, he and Mr. Pugatch went off and had their own
2 private conversation without lawyers. They could have taken
3 discovery on any of that, right. What did you guys talk about?
4 It's certainly not privileged. They had every opportunity.
5 But what we do know is that Mr. Pugatch under oath, in
6 deposition, and at trial, said the value is \$22.5 million.

7 So I don't think Mr. Pugatch or HarbourVest is ever,
8 ever, every going to complain about the transaction they did.
9 Because of what the evidence simply shows. But again, you've
10 got the Plaintiffs in their complaint saying that somehow the
11 debtor and Mr. Seery in negotiating this transaction has now
12 exposed the debtor to liability. It just makes no sense.

13 So there was a time and there was a place to
14 challenge Mr. Seery. Somebody, you know, maybe HarbourVest
15 could have done something, maybe they could still do something.
16 I don't know. If they really think that there's a problem,
17 maybe we'll hear from HarbourVest someday. But the Plaintiffs
18 have no right to complain. They just don't. They knew
19 everything. They were the source of the inside information.
20 They sat on their hands, and they shouldn't be allowed to do
21 what they're doing now.

22 If we can go to the next slide. I want to move to
23 the next theory and try to finish this up. The next theory is
24 that the Plaintiffs' claims are barred by judicial estoppel.
25 The judicial estoppel argument is really, really very

1 straight-forward. And it's important because if the Court
2 thinks about this the way I do, it's that the whole issue of
3 valuation is completely irrelevant to the Plaintiffs unless
4 they can show that they were owed some kind of duty, that they
5 had some superior right to acquire the asset. But that's
6 exactly the issue that CLO Holdco relied upon and withdrew and
7 should now be estopped from pursuing. Right.

8 The legal standard, again the parties agree on, that
9 in order to be estopped, the party must take an inconsistent
10 position. And the party must have convinced the Court to
11 accept that position. Again, both prongs are easily met here
12 in just a few sentences from the January 14 hearing. You have
13 Mr. Kane saying that he understands and acknowledges and admits
14 that they have no superior right to the investment. And the
15 Court relying on that very representation in declining to
16 conduct a hearing and render a ruling on the merits of the
17 claim that was withdrawn. The objection that was withdrawn.

18 And for the avoidance of doubt, after Mr. Draper
19 spoke on behalf of the Trust, the Court, at Page 22 engaged in
20 the following colloquy. The Court asked Mr. Draper:

21 "THE COURT: Were you saying that the Court still
22 needs to drill down on the issue of whether the
23 debtor can acquire HarbourVest's interest in HCLOF.

24 "MR. DRAPER: No.

25 "THE COURT: Okay. I was confused whether you were

1 saying I needed to take an independent look of that.

2 Now that the objection has been withdrawn of CLO

3 Holdco, you're not pressing the issue.

4 "MR. DRAPER: No. I am not."

5 Okay. You can call it res judicata, you can call it
6 judicial estoppel, collateral estoppel, the two prongs are
7 easily met. They're taking an inconsistent position today and
8 through all kinds of different theories, including the one that
9 they withdrew, the Plaintiffs assert that they had a superior
10 right to acquire the interest from HarbourVest.

11 And they should have asserted those rights at the
12 hearing. That was the time. And they should be estopped now
13 from taking a completely inconsistent position from the one
14 that was before the Court. And I just do want to point out,
15 the statement from a case called Hall vs. G.E. Plastic. And
16 it's interesting, Your Honor, because there's only a few cases
17 that I focused on, because this is really more fact intensive.
18 And there isn't a dispute as to the, you know, the elements of
19 these matters.

20 But it is interesting that the Plaintiffs, you know,
21 generally ignore all of the cases that we cite to. One which
22 is Hall vs. G.E. Plastic, where the Court said that the focus
23 on the prior success or judicial acceptance requirements is to
24 minimize the degree of a party contradicting a Court's
25 determination, based on a party's prior position. That's the

1 whole point of the exercise. You can't do this. You can't do
2 this.

3 Just quickly, that leaves the individual arguments as to
4 each of the five causes of action and I just want to go through
5 some highlights. There's a negligence claim, Your Honor. And
6 we did not file a pleading, but the Court can certainly take
7 judicial notice of the fact that the effective date has
8 occurred. Under the effective date, the plan is now effective.
9 That includes the exculpation clause, as Mr. Pomerantz, I think
10 accurately and without contradiction pointed out earlier, the
11 exculpation clause applies specifically to the debtor and to
12 negligence claims. And that's not a matter that's at all
13 subject to appeal.

14 So I think just to add to the arguments that we have
15 in our papers, which I adopt and do not abandon for any
16 purpose, I would add to the argument on negligence, that it's
17 now precluded, as a result of the plan becoming effective.

18 The fiduciary duty count suffers from numerous defects. I
19 just want to point out a couple of them. They don't respond to
20 the argument under Corwin, that under the Advisor's Act, there
21 is no private right of action to sue for damages arising from a
22 breach of fiduciary duty. This claim rears its head in
23 virtually every single complaint. They've never addressed
24 Corwin. Corwin is binding on this Court, and it is unambiguous
25 that there is no private right of action to sue for damages for

1 breach of fiduciary duty under the Advisor's Act.

2 They ignore Goldstein. Goldstein is not from the
3 Fifth Circuit, but it's very persuasive authority that advisors
4 do not owe fiduciary duties to their individual investors.
5 Instead, they owe fiduciary duty to their client. Their client
6 is the entity with whom they're in contractual privity. And so
7 in this case, there's no fiduciary duty there, either.

8 The breach of contract claim. Again I just -- I
9 would just say quickly, Your Honor, it's barred under judicial
10 estoppel. Even if it wasn't, it's clear based on Mr. James'
11 analysis and admission that the debtor's, or the reorganized
12 debtor's interpretation of 6.2 is accurate. And you know, I
13 said this in the beginning. Now let me tie it in a bow because
14 the breach of contract claim, and the tortuous interference
15 claim are both tied to the same thing. And that is the
16 assertion that the Plaintiffs had a right under the membership
17 agreement, a right of first refusal.

18 And they basically say that the debtor was playing
19 games. That they shouldn't be able to get through 6.2 by
20 assigning it to an affiliate. And that's where I go back, Your
21 Honor, and just remind the Court that the debtor told the whole
22 world exactly what they were doing in their motion. And their
23 objections, Mr. Dondero and the Trusts both acknowledge to the
24 whole world that they understood exactly what was happening.

25 In fact, their concern was not that it was going to

1 the debtor, but that it might be going to an affiliate outside
2 of the bankruptcy court's jurisdiction. And for them to now
3 say, having taken all of those positions -- talk about
4 inconsistent positions. They should be barred from saying
5 today, that the use of an affiliate to effectuate the
6 transaction was wrongful, because they actually told the Court
7 that they needed to -- that the Court needed to make sure that
8 it had jurisdiction over the very entity they now say somehow
9 shouldn't have been allowed to get the asset.

10 It's a bit much. So that takes care of the tortuous
11 interference.

12 The RICO claim, Your Honor, again is a motion.
13 There's so many different aspects to it. But I don't think the
14 Court needs to get past the Supreme Court holdings in HJ, Inc.
15 Again, just simply ignored by the Plaintiffs in their
16 opposition to the motion to dismiss. In HJ, Inc., the Court --
17 the Supreme Court did an exhaustive analysis to try to
18 determine and ultimately did determine, what a pattern of
19 racketeering activity meant. And the Supreme Court came to the
20 following formulation. That it had to have two or more
21 predicate related offenses that amounted to a threat of
22 continued criminal activities.

23 You know, the notion here is that the debtor and Mr.
24 Seery engaged in insider trading. We've already -- I've
25 already mentioned that according to the complaint, which the

1 Court can take as true. Mr. Dondero, himself, was the tippee.
2 But be that as it may, they don't come close to meeting the
3 very high standards set forth by the Supreme Court in HJ, Inc.
4 to show that whatever conduct Mr. Seery and the debtor engaged
5 in, and if you take the allegations as true, in not telling
6 what the fair value of the asset was, that that doesn't amount
7 to a hill of beans for purposes of RICO. That you don't have
8 any, I think predicate acts. I think here's the Court,
9 predicate acts extending over a few weeks or months,
10 threatening no future criminal conduct, do not meet RICO
11 pleading grounds. Right.

12 Security fraud claims cannot be predicate acts for
13 purposes of RICO. That is also clear. And that is really, I
14 mean they say mail, wire and fraud. But what's really at heart
15 is the 10(b)(5). Okay, it's the 10(b)(5) claim. Again, Mr.
16 Seery being -- I mean Mr. Dondero being the tippee. But those
17 are just some of the reasons.

18 None of, you know, that the RICO claim fails. You
19 know, I'll otherwise rely on the papers, unless the Court has
20 specific questions as to any of the other pieces of the motion
21 to dismiss the RICO claim, or any other aspect of the
22 Defendants' motion. I think this is clear. I think we win, no
23 matter how you slice it. It's just wrong. It's just wrong.

24 This Court will never, ever have a final order if Mr.
25 Dondero is able to engineer complaints such as this, which seek

1 to assert claims that absolutely positively could have and
2 should have been brought at the time the debtor made its
3 motion.

4 Unless the Court has any questions, I have nothing
5 further.

6 THE COURT: I do not. All right.

7 Mr. Sbaiti, I'm going to let you have as much time as
8 Mr. Morris. He took 55 minutes. As I mentioned, I have a hard
9 stop at 12:00 to do a swearing in ceremony. So if you're not
10 finished in 40 minutes, then I'm going to have to take a break
11 and come back and let you finish. All right?

12 MR. SBAITI: Thank you, Your Honor. Although I don't
13 think I'm going to be much longer than 35-ish minutes.

14 THE COURT: Okay.

15 MR. SBAITI: if not less.

16 THE COURT: Okay.

17 MR. SBAITI: I think you'll be able to be done by --
18 we'll be able to be done by noon.

19 THE COURT: All right. Thank you.

20 MR. SBAITI: Thank you, Your Honor. Your Honor, may I
21 share my screen?

22 THE COURT: You may.

23 MR. SBAITI: Thank you, Your Honor. Do you see my
24 Power Point, Your Honor?

25 THE COURT: I do.

1 MR. SBAITI: Thank you, Your Honor. I don't know
2 what which one you see. Is it the --

3 THE COURT: I see presentation.

4 MR. SBAITI: With the full page?

5 THE COURT: Yes, uh-huh.

6 MR. SBAITI: Okay, yeah, great. I just want to make
7 sure we're on the right page. Thank you, Your Honor. So Your
8 Honor, the defendant debtor is a registered investment advisor.
9 And it all begins with that. And this where the distinctions
10 between what happened in the 9019 and I'll get to the elements
11 of res judicata through argument.

12 But the first thing that has to be identified is that
13 the Defendant is a registered investment advisor. The
14 objection filed by Holdco back during the 9019 was an objection
15 against HarbourVest selling its interest by filing the right of
16 first refusal. It did not deal with the investment advisor
17 feature of Highland's relationship. And I'll get to why the
18 9019 doesn't preclude these arguments today.

19 This is essentially the structure. Highland was the
20 investment advisor of HCLOF, and Holdco is an investor in
21 HCLOF. And so Highland would owe a fiduciary duty under the
22 Advisor's Act against -- to CLO Holdco.

23 Highland also had a direct advisor relationship with
24 the DAF. And so under the Investment Advisor's Act, it owed
25 fiduciary duties to both of those entities. The law governing

1 registered investment advisors is that it's a federally
2 recognized and defined fiduciary duties. The fiduciary duty to
3 there's a fiduciary duty to affirmatively keep the advisee
4 informed and the fiduciary duty not to self-deal, i.e., not to
5 trade ahead of an advisee and opportunity that an advisee would
6 want or expect and without the advisee's expressed informed
7 consent.

8 This is a federally recognized and defined fiduciary
9 duty and it's actionable under state fiduciary duty laws.
10 While Mr. Morris ended his argument by saying we didn't deal
11 with their case law saying that there's no private right of
12 action under the Advisor's Act, the fact of the matter is that
13 Judge Boyle, about ten years ago, found that a state -- the
14 breach of fiduciary duty claim can be predicated on breaches of
15 federally imposed fiduciary duties under the Advisor's Act.
16 And that's what Douglass v. Beakley held. And that's actually
17 what we cited in our response. So I'm not sure why he would
18 argue that we haven't addressed the issue of where does this
19 private right of action come from.

20 Federal Law supplies the rules of the relationship
21 and State Law provides the cause of action for those breaches.
22 Now the scope of that has been expounded upon by many cases.
23 The Fifth Circuit held in Laird, as a fiduciary, the standard
24 of care to which an investment advisor must adhere imposes an
25 affirmative duty of utmost good faith and full and fair

1 disclosure to all material facts, as well as an affirmative
2 obligation to employ reasonable care to avoid misleading his
3 clients.

4 The word "affirmative" there is important because it
5 means the investment advisor is not supposed to wait to be
6 asked. The investment advisor as an affirmative duty to
7 proactively provide the information to the client.

8 The next standard comes from the SEC. We call it the
9 SEC interpretation letter. It's a release that came out in
10 2019. And to meet it's duty of loyalty, an advisor must make
11 full and fair disclosure to its clients of all material facts
12 relating to the advisor relationship. Material facts relating
13 to the advisor relationship include the capacity at which the
14 firm is acting with respect to the advice provided.

15 The SEC had another release in 2000 -- or excuse me,
16 in that same release, the SEC said the duty of loyalty requires
17 that an advisor not subordinate its clients interests to its
18 own. In other word, an investment advisor must not place its
19 own interest ahead of its clients' interests. An advisor has a
20 duty to act in the client's best interest, not its own.

21 The SEC general instruction three to part 2 of Form
22 ADV, that every investment advisor has to pull out. And this
23 is cited in our papers. As a fiduciary, you must also seek to
24 avoid conflicts of interest with your clients, and at a
25 minimum, make full disclosure of all material conflicts of

1 interest between you and your clients that could affect the
2 advisor relationship. This obligation requires that you provide
3 the client with sufficiently specific facts, so that the client
4 is able to understand the conflicts of interest you have, and
5 the business practices in which you engage, and can give
6 informed consent to such conflicts or practices or reject them.

7 And, finally, the Third Circuit in Belmont said:

8 "Under the best interest test, an advisor may benefit
9 from a transaction recommended to a client if, and
10 only if, that benefit, and all related details of the
11 transaction are fully disclosed."

12 These fiduciary duties are unwaivable by the advisor.
13 Any condition, stipulation or provision binding any person to
14 waive compliance with any provision of this subchapter, or with
15 any rule, regulation or order thereunder shall be void.

16 So the lawsuit does not allege that the HarbourVest
17 settlement should be undone or unwound. I'd like to move to
18 that point. Mr. Morris says well, you have to unwind half of
19 the settlement. Maybe HarbourVest doesn't have to give back
20 what it got, but Highland would still be saddled with the cost
21 of the settlement, but not with the benefit of the settlement.

22 Well, actually that's not true. There's two points
23 that we would make on that. Number one, our suit is a suit for
24 damages. In other words, the suit would be a suit for money
25 damages, based on the difference between the value of the asset

1 and what HarbourVest or what the actual value of the asset that
2 was represented, \$22.5 million. So the second point, though,
3 is that even under a situation where CLO or Holdco or the DAF,
4 or even HCLOF were to purchase the HarbourVest suit, the
5 expectation would obviously be that they'd pay the \$22.5
6 million that Highland paid for it.

7 So Highland is -- so it's not unwinding, and there's
8 no saddling Highland with a burden that they didn't otherwise
9 have, I think that's a misrepresentation. But we're not
10 seeking to unwind the lawsuit -- or excuse me, unwind the
11 settlement.

12 Now Mr. Morris is correct, the representation of
13 value by Mr. Seery is -- is one of the main points here. And
14 the representation was that the value of the entire asset. Not
15 just the shares of MGM, but the value of the entire asset was
16 \$22.5 million. So in other word, nearly half of HCLOF was
17 represented to be worth \$22.5 million. It was argued by
18 counsel on Page 14 of the January 14th transcript, and then on
19 Page 112 of that transcript, Mr. Seery specifically says the
20 current value is right around \$22.5 million.

21 Now that was also in some of the filing papers and
22 Mr. Morris put up the evidence to Your Honor that Mr. Pugatch,
23 on behalf of HarbourVest also parroted that number. But
24 there's not any evidence today about where that number came
25 from, or whether he was simply relying on Highland's

1 representation of that value.

2 Now as a general rule, in these 12(B)(6) motions, as
3 I said before, we don't look at the evidence because the whole
4 point of discovery is to find out what's behind a lot of the
5 evidence. That's been quoted. The amount of evidence that
6 went into the 9019 motion as not necessarily full-blown
7 discovery.

8 I understand Mr. Morris saying well, they could have
9 asked the question. But as I just showed you, they shouldn't
10 have to ask the question. There should be fair and full
11 disclosure of all the material facts. And if it turns out,
12 which we believe it is true, that by January, the value of
13 HCLOF was twice what it was represented, or the HarbourVest
14 portion of HCLOF was twice as to what it was represented,
15 that's a material omission that Highland had an affirmative
16 duty to not misrepresent. Irrespective of the questions being
17 asked.

18 The DAF found out later on that the representation of
19 the value wasn't true. Now Mr. Morris talked for a very long
20 time about all the opportunities that somebody, Mr. Dondero,
21 somebody other than CLO Holdco. In addition to CLO Holdco,
22 could have asked the magic question to find out whether or not
23 they were telling the truth. But that runs right in the face
24 of the standards set forth by the SEC and by the Courts as to
25 the affirmative obligation of an advisor to disclose all the

1 material benefits that they're going to get as part of a trade.
2 The idea being that when you're a registered investment advisor
3 and you want to engage in a transaction, you make a full
4 disclosure and say this is the transaction. It's worth 41, but
5 I'm paying 22-1/2. But here's why I'd like to be able to do
6 it. And then that's the discussion that happens.

7 That clearly didn't happen here. And when it turned
8 out that there was this entirely huge upside that they were
9 gaining the benefit of, and maybe HarbourVest didn't care, that
10 that was a false statement. Now the reason we don't have a
11 common law fraud claim, or that we don't necessarily hang our
12 hat on a fraud claim is we don't have enough evidence as it
13 stands today, to specifically say that Mr. Seery intentionally
14 misrepresented that. Although we believe that it was grossly
15 reckless of him to do so. But we don't really need a fraud
16 claim with a gross recklessness standard. We have a breach of
17 fiduciary duty, which basically gets us to the same place.

18 So the timeline we have is September 30th was the
19 last valuation of HCLOF assets provided by HCMLP. And the
20 value of HCLOF, at that time, or the HarbourVest of that value,
21 would have been about 22.5 million. So what it appears to be
22 is that in January or in late December, the valuation that was
23 being done -- what was being reported, wasn't the current
24 valuation. It was the valuation as of the end of the third
25 quarter of 2020.

1 On December 22nd, the motion to approve the
2 settlement with HarbourVest was filed. HCMLP should have had
3 or would have had up-to-date valuations of the HCLOF assets,
4 but didn't necessarily disclose them as being different than
5 the 22.5 million. On January the 14th, Your Honor, held the
6 9019 hearing. And then that same day, Your Honor entered the
7 approval order.

8 And finally, in March, the DAF learns the true value
9 of HLOF assets as of January 2021 and starts to look into it.
10 Now Mr. Morris makes much of the fact that well, Mr. Dondero at
11 least knew that he had tipped them off, Mr. Seery. And if you
12 actually read Paragraph 127, you'll see specifically what it's
13 purported that he said. He said stop trading in the MGM
14 assets, because MGM might be in play. So you can't trade
15 because I'm an advisor, Mr. Dondero's an insider, he's the
16 tipper, not the tippee. Mr. Seery becomes the tippee under
17 that theory of the case, and he has to, and is required to,
18 because of their affiliation at the time, he's required to
19 cease trading. And that was the purpose of saying that.

20 The collateral issue that we point is that he at the
21 very least knew about that, and that should have caused him to
22 revalue, if he hadn't done so at the time. Not that, knowing
23 that alone is sufficient to know what the value of HCLOF
24 actually was on that date. That's a complete misrepresentation
25 of the point and purpose of that allegation.

1 And as Your Honor knows, under 12(B)(6)
2 jurisprudence, the way this is supposed to go is we get the
3 benefit of every inference based upon the allegations, not the
4 movant. So the first violation is that the debtor as an IRA
5 failed to affirmatively disclose the true current valuation of
6 HCLOF and failed to keep the DAF and CLO Holdco reasonably
7 informed of the value of the assets.

8 And the debtor as an IRA, failed to obtain CLO
9 Holdco's with the DAF's informed consent before it traded in
10 the asset, because it didn't have all of the information. The
11 typical remedy for breach of fiduciary duty is typically
12 damages for any loss suffered by the Plaintiff as a result of
13 the breach. I don't think there's a debate there.

14 So now we get to Mr. Morris' key argument. His key
15 argument is that we should be talking about res judicata. The
16 elements of res judicata and I think we agree is you have to
17 have identical parties in the action; the prior judgment was
18 rendered by a Court of competent jurisdiction; the final
19 judgment was final on the merits, and the cases involved the
20 same causes of action or the same transaction and nexus of
21 facts.

22 Now I'm going to skip to three, because I think
23 that's one of the key points that we disagree with them on.
24 There is no case, Your Honor, that we could find, and no case
25 that I read them citing that says an order on an 9019 has

1 preclusive effect under res judicata under an objector to the
2 settlement. We looked. We looked in the Fifth Circuit. We
3 looked outside of the Fifth Circuit. No District Court, no
4 Fifth Circuit Court of Appeals' opinion we could find held that
5 a 9019 order has res judicata effect on an objector's
6 objection. And I think the reason is pretty simple. Is it
7 doesn't.

8 Because the Plaintiff's claims, here our claims
9 hadn't even accrued. We have a four year statute of
10 limitations, but I think more importantly is that, as the Fifth
11 Circuit said, the 9019 motion grants the Court discretion.
12 It's not supposed to be a mini trial. The Court can approve a
13 settlement over even the valid objection of an objector. It's
14 not a trial on the merits. It's not supposed to be a trial on
15 the merits. It's not supposed to be a disposition on the
16 merits.

17 So the fact that Your Honor could have approved the
18 9019 settlement with HarbourVest, even if we had a valid
19 objection, means this isn't a disposition on the merits, as res
20 judicata would envision. It wasn't a trial on the merits, even
21 though it was withdrawn.

22 The other elements that we would point out to is that
23 neither the DAV nor Holdco were parties to the dispute between
24 HarbourVest and Highland. And this keys off of the issue that
25 I just raised. The cases that are cited by the debtor to Your

1 Honor all have to do with where one of the settling parties is
2 trying to undo the settlement for some collateral reason. And
3 the Courts have held, no, that's res judicata, because you were
4 a party to the action. HarbourVest brought the claims against
5 Highland. Highland settled those claims.

6 CLO Holdco was collateral to that settlement, it's
7 not a -- excuse me, collateral to that dispute. It's not a
8 party to that dispute. Its claims weren't being resolved by
9 the settlement. And while you have a notice to all creditors
10 and those objections can be raised, there was not inherently
11 any manner for resolving those objections on their own merits.
12 Only -- it was only resolved in so far as deciding whether or
13 not the settlement was in the best interest of the debtor,
14 which Your Honor decided, and we don't challenge that. But we
15 do argue that it caused damages and the debtor shouldn't get
16 off for those damages.

17 The fourth element is that the --

18 THE COURT: Just for the record, the standard in a
19 9019 context is not best interest of the debtor, right?

20 MR. SBAITI: Your Honor, I mean that's what the rule
21 says and Your Honor's order --

22 THE COURT: That is not what the rule says. The rule
23 is actually very sparsely worded and then we have Fifth Circuit
24 case law and U.S. Supreme Court law that talk about what the
25 standard is.

1 MR. SBAITI: Yes, Your Honor. And there are five --

2 THE COURT: And it's -- is it fair?

3 MR. SBAITI: There are five elements.

4 THE COURT: Is it fair and equitable and in the best
5 interest of the estate given a long list --

6 MR. SBAITI: Correct, Your Honor. And I didn't mean
7 to --

8 THE COURT: -- of considerations that the Court is
9 supposed to consider that "bear on the wisdom of the
10 settlement." Okay. So it's actually much more involved, is my
11 point, than is it in the best interest of the estate. Is it in
12 the best interest of the estate and fair and equitable given
13 all factors bearing on the wisdom of the compromise? And then
14 we have a long laundry list of things the Court should consider
15 as part of that analysis.

16 MR. SBAITI: That's a --

17 THE COURT: I just bring that up because if I'm still
18 -- my brain is still stuck five minutes ago on your comment
19 that you can't find any case saying that an order approving a
20 9019 compromise has res judicata effect on creditors. And it's
21 -- let me just say it's shocking to me that someone would argue
22 otherwise. Bankruptcy is a collective proceeding --

23 MR. SBAITI: Your Honor --

24 THE COURT: -- where creditors can weigh in and
25 object and raise whatever arguments they think the Court should

1 consider that bear on the wisdom of the compromise. And the
2 Fifth Circuit in Foster Mortgage has said the Court should give
3 great deference to the views of the creditors, the paramount
4 interest of creditors.

5 So it's a really sort of shocking proposition that
6 the order approving a 9019 compromise wouldn't have res
7 judicata effect on all parties and interests who got notice of
8 that. So if you have any elaboration on that, I'd like to hear
9 it.

10 MR. SBAITI: Your Honor, we looked at the Fifth
11 Circuit cases that they cited, which I believe included that
12 case. And even in that case, the point that we made in our
13 papers and the point I was trying to arrive at is that among
14 the factors, yes, the Court should give great deference to the
15 creditors. But among the factors is not that the objections
16 lack merit or are meritless or that they wouldn't be winnable
17 if they were simply standalone claims.

18 And that was really the only point I was trying to
19 make is that Your Honor has discretion. Granted it's -- as you
20 mentioned, it's not unfettered discretion. It's bounded by
21 standards and there are -- there is, I know, about five
22 standards Your Honor has to consider or the Court has to
23 consider. But among those, that laundry list of standards, is
24 not that the Court finds that any objection lacks merit. And
25 that was really the only point I was making.

1 And in terms of the case law, we looked at the Fifth
2 Circuit. We looked, frankly, outside the Fifth Circuit as much
3 as we could, and because this is actually not an easy one to
4 research, as it turned out, despite the language. And we also
5 looked for district court opinions in the Fifth Circuit to see
6 did any district court or did any court of appeals give this
7 type of approval to the standard that a 9019 order has res
8 judicata effect on a claim raised in an objection by a
9 creditor.

10 And we couldn't find any and I read all the cases
11 that Mr. Morris cited in his papers, and they didn't cite one
12 that explicitly said that. They tried to drive at it through
13 insinuation that, well, if the Court has to give great
14 deference or if the Court has to take into account the
15 underlying facts and the fact that there is discovery, surely
16 that must mean this is akin to the trial on the merits. And I
17 think that's where we simply disagree in good faith. I'm not
18 ascribing any bad intention. But we disagree that that's where
19 the law goes.

20 Res judicata is not -- while it's supposed to stop
21 the relitigation of issues, it is predicated on there having
22 been actual litigation of those issues. And when HarbourVest
23 and Highland settle a case and my clients show up with an
24 objection, even though they withdraw an objection, that, in our
25 opinion -- and we're asking the Court to see it our way -- is

1 not trial on the merits. It's not a disposition on the merits
2 of the objection in and of itself. Some objections we can --

3 THE COURT: But the context matters. In the context
4 of a 9019 compromise, the hearing is about look at the bonafide
5 ease of the settlement. And it's either fair and equitable and
6 in the best interest of the estate or not. And an objector can
7 say this is a terrible settlement and here's why it's a
8 terrible settlement and let me cross-examine the movant and let
9 me put on my own witness that will enlighten the Court as to
10 why this is a terrible settlement, why I say terrible, why it's
11 not fair and equitable.

12 That's your chance to convince the Court, don't
13 approve this settlement because there are, you know, 14
14 problems with it. And if you convince the Court, then you
15 convince the Court and it's not approved. If you don't, you
16 appeal, and we do have an appeal of the settlement order.

17 So, again, I'm not understanding the "res judicata
18 doesn't apply" argument.

19 MR. SBAITI: Your Honor, if I could riff on two
20 points based upon what you just said, if I could address those.

21 The first is there are clearly two kinds of
22 objections that get -- at least two kinds of objections that
23 get raised in these 9019 approval hearings. The two that you
24 heard recounted, some were this is bad for the estate. There's
25 reasons why we don't think the estate will benefit from it and

1 it will be harmed from it.

2 And those types of objections, which I believe mostly
3 comprise the objections that Mr. Morris was talking about
4 because they are concerns for the estate. And so creditors who
5 want to get money from the estate are concerned that the
6 settlement will not enter (phonetic) to the benefit of the
7 estate, and therefore, not enter to their benefit as creditors.
8 That's number one.

9 But those don't adhere in a lawsuit. Those aren't
10 claims for damages that the settlement is going to create for
11 the person objection or for the party objecting. There's a
12 whole separate set of objections similar to the ones HCLO
13 Holdco raised where that what inheres in the objection is this
14 is actually going to cause us some kind of damage.

15 And so, the factors though, don't require the Court
16 in those second set of instances to say, well, you know what?
17 Not only do I think you're wrong, but I think that your
18 lawsuit, the underlying causes of action that give rise to this
19 objection, have no merit on their own face, that the discovery
20 is not there to support them, that a jury is not going to find
21 there. I am now the trier or the Court is now the trier of
22 fact on the merits of the underlying causes of action that
23 animate the objection.

24 And that's where I believe we're diverging with the
25 debtor on the law. It goes too far to say that a 9019 hearing

1 where the Court in the end has discretion to approve it, even
2 over a meritorious objection by any party, regardless of what
3 bucket of objections the objection falls into. It goes -- our
4 argument today, Your Honor, and we're asking the Court to see
5 it our way, is that that would go too far. That an actual
6 cause of action shouldn't be eradicated simply because of the
7 9019 process because, as you pointed out, the Court does have
8 to go through a litany of factors.

9 And if the Court determines that it's fair and it's
10 more equitable to overrule the objection, the Court has that
11 discretion. And we're not here to unwind that discretion.

12 But the settlement process did violate certain
13 obligations and did cause my client damages. And that's what
14 we're saying isn't precluded.

15 THE COURT: Okay.

16 MR. SBAITI: The fourth element, Your Honor, which I
17 guess in many ways maps on to the argument I just made to Your
18 Honor is that the cases, the underlying cases, do not involve
19 the same claims. Plaintiffs' claims arise from the settlement
20 process itself and not from the underlying issues being settled
21 between HarbourVest and Highland. So that's why we think at
22 least three of the four elements aren't met here. And we'll
23 reserve on the papers, you know, whether jurisdiction was
24 applicable because I think that's probably water under the
25 bridge at this point in the oral argument.

1 Now, Mr. Morris attacks the case that we cite,
2 Applewood Chair vs. Three Rivers Planning. And he argues that,
3 well, this is not applicable. And the argument he made however
4 was he put it in the context of, well, the parties there, the
5 issue was you had guarantors who were not parties in their
6 capacity as guarantors. But that's not actually what the Court
7 held.

8 The Court didn't say that the release wasn't
9 applicable to them because they didn't appear as parties in
10 their guarantee capacities. They -- the Court held that, well,
11 the specific discharge language doesn't enumerate those
12 specific guarantees, and so therefore it's not released.

13 And where this dovetails, we believe, as closely as
14 we can, this isn't a 9019 case. This is a final confirmed
15 plan. But where it dovetails with what our argument is, is
16 that the Court there as well was essentially saying the
17 underlying causes of action weren't really presented to us, so
18 we're not -- we -- and the confirmation of the plan didn't
19 involve disposing of them, so we're not going to say that they
20 are precluded. And we think that that's as close an analogy as
21 we've found in the Fifth Circuit to the issues here today.

22 So I would say, Your Honor, that we believe that
23 dispenses with the res judicata argument. The judicial
24 estoppel argument, they conflate the language. I'll go back to
25 this for a second. They conflate the language of judicial

1 estoppel on the success of the claim. None of the cases they
2 cite on judicial estoppel involved where a party took a
3 position, withdrew their argument, and then the Court moved on.

4 Mr. Morris tries to convert a judicial estoppel claim
5 into a judicial reliance claim, which is not the purpose of the
6 doctrine and is not the doctrine at all. The doctrine is that
7 if you take a successful position in one court, you can't take
8 the opposite position in another court. CLO Holdco didn't take
9 a successful position in one court and then change its position
10 later on. In fact, its positions, as Mr. Morris stated, are
11 remarkably similar. They're not inconsistent, which is the
12 problem with their judicial estoppel argument. And we -- I
13 think we fairly briefed that in our papers and we'll otherwise
14 rest on the papers.

15 To deal -- to address the actual claims, again, I
16 come back to the idea of a fiduciary duty claim, which is our
17 lead claim. And to be clear, it's a state claim predicated on
18 the violation of federally imposed fiduciary duties.

19 And I'm looking for a clock to make sure I'm not
20 abusing Your Honor's time, and I don't have one right in front
21 of me because my screen -- my screen is up.

22 Your Honor, the Douglass v. Beakley case is, like I
23 said, is Judge Boyle's case. It specifically provides a cause
24 of action based upon violations of the Advisers Act. We also
25 cite about four or five other cases in footnote 8 of our

1 response from other circuits, including the Third Circuit, the
2 Belton case that I referred to earlier, all of which held that,
3 yes, a state fiduciary duty claim can be predicated on breaches
4 of a federal Advisers Act violation.

5 The other point that they make on the fiduciary duty
6 claim is they argue HCMLP doesn't owe fiduciary duties to CLO
7 Holdco. And the cases they cite, Your Honor, we dealt with in
8 the papers why they were distinguishable, because in those
9 cases they were dealing with the fact that there wasn't any
10 harm or any direct relationship. But what they ignore is the
11 actual language of the Advisers Act, which is important.

12 Well, first of all, Mr. Seery admitted in his own
13 testimony during the approval hearing in July of 2019 that he
14 says, "We owe." He says, "There are third party investors in
15 the fund -- in these funds who have no relation whatsoever to
16 Highland, and we owe them a fiduciary duty both to manage their
17 assets prudently, but also to seek to maximize value." I think
18 Mr. Seery was absolutely correct when he said that. Highland
19 owes fiduciary duties to the investors in the funds that
20 Highland manages. The core of our case is that Highland is
21 using or abusing the assets of the funds it managed in HCLOF
22 for its own enrichment, which is a classic breach of fiduciary
23 duty case under the Advisers Act.

24 Now -- excuse me. The other point that I would say,
25 Your Honor, is that there is a statutory basis for us to argue

1 a breach of fiduciary duty. Excuse me. I didn't mean to stop
2 sharing. I apologize.

3 Are you back with me, Your Honor, on my --

4 THE COURT: Yes.

5 MR. SBAITI: -- PowerPoint?

6 THE COURT: Yes.

7 MR. SBAITI: Sorry about that, Your Honor. I just
8 hit the wrong thing. I'm not very technologically savvy. Here
9 we go.

10 So Holdco is an investor in HCLOF, which is a pooled
11 investment vehicle. A pooled investment vehicle under the case
12 law we cite is simply defined as an investment vehicle that
13 doesn't publicly solicit investors and has few than 100
14 investors. Highland advises it. That's the same holding in
15 TransAmerica Mortgage, by the way, which we also cite.

16 15 U.S. C. Section 80(b)(6) establishes the federal
17 fiduciary standards to govern the conduct of registered
18 investment advisers. That's also the TransAmerica case. 15
19 U.S.C. Section 80(b)(6)(D) delegated to the SEC the power to
20 decide the scope of those duties that are imposed under the
21 statute. And so the SEC enacted 17 C.F.R. Section 275.206(4)-
22 8.

23 And it expressly states, and we cite the statute or
24 the regular in full in our papers, that the fiduciary duties
25 are owed to investors in the pooled investment vehicles. It

1 specifically says that. It talks about two different duties
2 owed and they're owed to the investors in the vehicles, which
3 means they're owed to Holdco as an investor in HCLOF, which is
4 the vehicle that Highland manages.

5 It's black and white in the regulation. And we
6 haven't seen any response. There was no response of that in
7 the reply that was filed, Your Honor. And so the argument that
8 there's not a fiduciary duty owed to Holdco because it's merely
9 an investor in HCLOF simply doesn't comport with the law.

10 And finally, the petition lays out the basis for our
11 claims including the applicable federal and state law.
12 Plaintiffs' response lays out why the legal arguments aren't
13 opposite at the 12(b)(6) stage and Rule 9(b) is met where
14 necessary under the federal claim. And I'm trying to unshare
15 so that I can get back to regular argument.

16 I'd like to briefly address Mr. Morris' argument,
17 Your Honor. Your Honor, I re-raise my argument that I made
18 before, which is that a 12(b)(6) motion and hearing is not the
19 appropriate time for all the evidence that was poured in here.
20 And I understand Mr. Morris' contention, well, it's really hard
21 to ignore all the history of this case. But a lot of that
22 history really boils down to things that were actually admitted
23 in the complaint. The complaint recognized there was a 9019.
24 But what Mr. Morris wants to do is go beyond that and to go to
25 what people said and what they must have meant. What Mr.

1 Dondero must have meant in his objection, what Dugaboy must
2 have meant by their objection, what Mr. Pugatch must have meant
3 by his testimony.

4 All of that is highly improper at this stage of the
5 proceeding, Your Honor. It's outside of the 12(b)(6) confines.
6 It's outside the four corners of the complaint. And we object
7 to all of that evidence being considered.

8 THE COURT: Let me --

9 MR. SBAITI: The question we --

10 THE COURT: Let me ask you about that procedural
11 point.

12 MR. SBAITI: Yes, Your Honor.

13 THE COURT: As we know, 12(d) provides that if
14 matters outside the pleadings are presented to and not excluded
15 by the Court in a 12(b)(6) motion, the motion must be treated
16 as one for a summary judgment under Rule 56 and all parties
17 must be given a reasonable opportunity to present all the
18 material that is pertinent to the motion.

19 Are you -- what are you arguing? That I should treat
20 it as a motion for summary judgment and give you more time to
21 present other materials? I mean, you both presented an
22 appendix, okay. And I'm telling you we're seeing this more and
23 more, I've noticed. People are going beyond the four corners
24 of a motion to dismiss and attaching things. And there's some,
25 you know, Fifth Circuit authority that says, well, if what is

1 attached is integral to understanding, you know, an allegation
2 or whatever in the pleading, you know, there is some discretion
3 to go outside the four corners.

4 So I'm trying to understand the point you're making
5 with this. Are you saying I should treat it as a motion for
6 summary judgment or do these attachments really -- you know, do
7 I have authority under the Fifth Circuit to consider them as
8 part of the 12(b)(6) motion or not?

9 MR. SBAITI: Typically, in our experience, Your
10 Honor, is when a summary or when a 12(b)(6) is going to be
11 treated as summary judgment under 12(d), the Court says that
12 and then the parties are given an opportunity, as you said, to
13 go do some discovery in order to put together the evidence and
14 materials to then come back and respond as a summary judgment.
15 We responded to a 12(b)(6) and objected to the evidence. If
16 the Court wants to treat it as a summary judgment, then we
17 would ask for an opportunity for -- to conduct discovery in
18 order to be able to respond as a summary judgment motion, but
19 we didn't -- because we responded to a 12(b)(6) --

20 THE COURT: You did the same thing though. You did
21 the same thing in your response. You submitted an appendix of
22 evidence, if you want to call it evidence. As someone pointed
23 out, it's stuff from the bankruptcy court record. I don't
24 think it went beyond what was already in the bankruptcy court.

25 MR. MORRIS: And if I -- can I be heard on this, Your

1 Honor?

2 THE COURT: You can. You can.

3 MR. MORRIS: Just to respond. This is really quite
4 simple. The motion to dismiss is based on res judicata. Res
5 judicata necessarily requires a review of what happened in
6 connection with the prior hearing. There's nothing that we
7 have identified or put forth in the appendix or on our exhibit
8 list except for the pleadings in the 9019, the transcripts, the
9 one deposition transcript, the one trial transcript, the
10 settlement agreement, the transfer agreement. I'd love to know
11 what the Court couldn't or shouldn't take judicial notice of.
12 There is no emails. There is no -- there is no -- there is no
13 extrinsic evidence, if you will. All of this is either on the
14 docket or was presented as part of the hearing.

15 THE COURT: Yeah. I'm just trying to ferret --

16 MR. MORRIS: And it's necessary. And it's necessary
17 for the motion.

18 THE COURT: Yeah. I'm just trying to ferret out the
19 procedural position that's being asserted here. And I don't
20 have the case cites off the top of my brain, but there is
21 authority from at least the Northern District judges, if not
22 the Fifth Circuit, saying in a 12(b)(6) motion I can take
23 judicial notice of items in the record. And then, you know,
24 there -- I know there's Fifth Circuit authority saying I can go
25 beyond the four corners in a 12(b) context if it's just basic,

1 you know, explaining things that are in allegations. You know,
2 such as --

3 MR. SBAITI: May I address that, Your Honor?

4 THE COURT: -- such as if a contract is in dispute,
5 okay. Like there's no way you can have a cause of action under
6 the contract and here's the contract. So I'm just trying to
7 nail down your procedural position here.

8 MR. SBAITI: Your Honor, the distinction I was trying
9 to make that I don't think I put as artfully as I might be able
10 to put now is in a 12(b)(6) if there's a contract, as you said,
11 if there's a legal document, a contract and order that's
12 integral to the case, Your Honor can take judicial notice of
13 that. Generally, a court can take judicial notice of filings
14 in a bankruptcy, the fact that they were filed.

15 So the transcripts, which Your Honor can't take
16 judicial notice of, is the truth of those. And that was what I
17 was objecting to is it's one thing for him to say an objection
18 was filed and therefore, because an objection was filed, that
19 should be it. That was your only chance. I'm not saying Mr.
20 Morris can't make that argument.

21 But when he goes beyond the fact of the filing or the
22 fact that there was a transcript or the fact that there was a
23 deposition and starts to read from the depositions or read from
24 the filings and say this is what those mean, that goes against
25 the 12(b)(6) parameters because, number one, now it's

1 substantive evidence and not simply a judicial notice of
2 something that's right there in front of the Court, i.e.,
3 something on its own docket. Because those statements and the
4 interpretation of those statements are subject to credibility
5 findings. They're subject to clarification. They're subject
6 to rebuttal. That's the purpose of discovery.

7 And so if Your Honor -- and Mr. Morris is right.
8 Usually, res judicata involves knowing what happened in the
9 prior proceedings. So if all he wants to do is rest on the
10 fact that an objection was filed by CLO Holdco and maybe even
11 other people, and that should be it and he thinks that's enough
12 for Your Honor to say res judicata applies, then I don't think
13 we have a problem. It's when he goes beyond that and says,
14 Your Honor, these people must have known and this is what they
15 meant by their argument, that's what I'm asking Your Honor not
16 to consider. And if Mr. Morris wants you to consider that,
17 that's a summary judgment motion and we should have the
18 opportunity to do discovery at the very least into the issues
19 he has now raised as supporting his res judicata defense which
20 he has the burden of proof on.

21 MR. MORRIS: Your Honor, this is one of the strangest
22 arguments I have ever heard. I'm allowed to offer the Court
23 and the Court is allowed to accept the documents, but I'm not
24 allowed to read them. I'm not allowed to make arguments. I
25 don't understand what that even means. If it were a contract,

1 I would be allowed to put the contract in front of Your Honor,
2 but I wouldn't be able to argue why the contract doesn't say
3 what the Plaintiff says. I don't get it.

4 THE COURT: Okay.

5 MR. MORRIS: That's --

6 THE COURT: Just I've heard enough on this. I don't
7 think we have moved into Rule 12(e), that realm of me needing
8 to treat this as a motion for summary judgment. I think the
9 so-called evidence, the appendix that was attached to the
10 motion as well as the appendix that was attached to Plaintiffs'
11 response, it's stuff that I can take judicial notice of that's
12 in the record of this Court and I can look at it. You know, it
13 is what it is, the record of this Court.

14 All right. So I have nine people waiting in
15 chambers. I'm trying to figure out should I take a break now
16 or are you fairly close to wrapping up. Either answer is fine,
17 Mr. Sbaiti. I just need to figure out who I make wait here.

18 MR. SBAITI: I have -- oh, I'm sorry. I didn't mean
19 to interrupt you, Your Honor. I was just going to say I have
20 five minutes left, but I know Mr. Morris probably wants to come
21 back. So if you want to break now and we can come back at
22 whenever the Court wants us to, we can do so.

23 THE COURT: All right. Why don't you make your final
24 five minutes and then we'll take a break?

25 MR. SBAITI: Okay. Thank you, Your Honor.

1 I just wanted to address some of the arguments that
2 Mr. Morris raised in his argument. The first thing is -- and I
3 addressed this in part -- but Mr. Morris makes a big deal about
4 paragraph 127 of the complaint and essentially suggests that
5 we're the -- or that Mr. Dondero is the perpetrator of a
6 nefarious scheme. Whereas, what the pleading actually says,
7 and I again encourage Your Honor to re-read -- to read it
8 specifically, is that Mr. Dondero warned Mr. Seery not to trade
9 in the stock and not to make any transactions because the stock
10 was going to appreciate in value.

11 That has two implications for us, Your Honor. Number
12 one, it means Mr. Seery was a tippee of insider information,
13 and number two, it means that Mr. Seery, if he did trade on
14 that information or if he did pass that information on to
15 someone else, that is a problem from the Advisers Act
16 standpoint, which is really the only purpose of saying that.

17 While paragraph 127 also says that that should have
18 caused Mr. Seery to revalue the NAV of HCLOF, it does not state
19 and we did not plead that the entire value of HCLOF is tied to
20 the MGM stock. So the insinuation that that somehow gave us
21 inside information about what the true value of HCLOF was and
22 we should have known or that Mr. Dondero should have known is
23 simply untrue.

24 The other argument Mr. -- that Mr. Morris likes to
25 harp on is that CLO Holdco withdrew its argument, but he

1 characterizes Mr. Kane's withdrawal testimony -- as he says,
2 Mr. Kane admitted that CLO Holdco lacked the superior right to
3 obtain the HarbourVest. If you read the very language that was
4 highlighted on Mr. Morris' slide, that's not what Mr. Kane
5 says. Mr. Kane says, "We've gone back to the drawing board.
6 We've read your reply. And my client has given me permission
7 to withdraw the argument or withdraw the objection." That's
8 all he said. There was not an admission that he was wrong.
9 There was not an admission that they had made a mistake. There
10 was simply an admission that they decided to withdraw the
11 objection for whatever reason.

12 Lastly, on the specific claims --

13 THE COURT: That's not an accurate description of the
14 record. He said he looked at --

15 MR. SBAITI: Your Honor, I was reading it along with
16 him.

17 THE COURT: -- Guernsey Law. And I don't know if his
18 words were deep dive.

19 MR. SBAITI: Yeah.

20 THE COURT: But he had looked at the agreements
21 extensively. That's just not what he said.

22 MR. SBAITI: And he said he was with -- Your Honor,
23 he said he was withdrawing. He didn't say we were wrong. He
24 didn't say we don't have a claim. What he said was, "We're
25 withdrawing the objection."

1 THE COURT: After doing an extensive look at the
2 agreements in Guernsey Law, okay, so.

3 MR. SBAITI: Sure. But, Your Honor, he might have --
4 he could just as easily thought we have a chance, but it's not
5 a good one. And frankly, we'll be here for 20 days and we're
6 withdrawing it for that reason because we'll live to fight
7 another day. Your Honor, there's an innumerable number. To
8 simply say that he admitted that they didn't have a correct
9 claim, it's just he didn't say that. That's all. That's the
10 only point I'm making.

11 Your Honor, I don't disagree with the debtor that the
12 Court's exculpation clause gets rid of the negligence claim
13 which was obviously filed before the effective date, so that
14 claim is gone.

15 And I think the last argument that Mr. Morris makes
16 on the RICO claim is the federal court, the Supreme Court
17 standard for pleading a RICO claim, that acts that only
18 continue for a few weeks are not -- don't set out a RICO claim.
19 Your Honor, in our response to that, we actually submitted an
20 amended complaint that shows that the type of acts we're
21 talking about, the pattern of the debtor using its investor
22 vehicles assets to liquidate is a long pattern and practice
23 than simply the HarbourVest suit. And so, we move to amend on
24 that basis to satisfy that pleading defect, which is the main
25 one that they focused on.

1 That's all I have, Your Honor.

2 THE COURT: All right. Thank you.

3 We're going to take a 15 minute break and come back.

4 I'll ask Mr. Jordan and Mr. Bessette did they have anything
5 they wanted to say today. I know they joined in the debtor's
6 motion. And then we'll let Mr. Morris have rebuttal.

7 All right. So we'll be back in 15 minutes.

8 THE CLERK: All rise.

9 MR. MORRIS: Thank you, Your Honor.

10 (Recess at 12:05 p.m./Reconvened at 12:23 p.m.)

11 THE CLERK: All rise.

12 THE COURT: All right. Please be seated.

13 We're back on the record in Charitable DAF v.
14 Highland Capital. All right. So I promised I was going to go
15 back to counsel for Highland CLO Funding, Ltd. So Mr. Jordan,
16 Mr. Bessette, is there anything you wanted to say for oral
17 argument?

18 MR. JORDAN: Thank you, Your Honor. John Jordan on
19 behalf of HCLOF.

20 Our points are two procedural points. The first is
21 as the Court anticipated, in our motion to dismiss filed back
22 in August, we joined in the motion to dismiss of Highland. And
23 so to the extent that the Court after deliberation is inclined
24 to grant that motion, we would ask that as a joining party,
25 HCLOF be pulled along with that.

1 The second procedural point is that back in our
2 motion to dismiss, we pointed out that the complaint does not
3 actually allege anything against HCLOF. In the story, we're
4 essentially the football and neither Oklahoma nor UT. And we
5 pointed that out as an additional argument to what you've heard
6 today. That motion was never responded to. The deadline by
7 agreement was extended to October 11th. And the lack of
8 response was, we believe, not inadvertent but simply an
9 acknowledgment that HCLOF is not a party that anything is being
10 claimed against.

11 It particularly makes sense since effectively and in
12 rough numbers, they're half owned by both sides. So for every
13 dollar that HCLOF spends hanging around the case, the parties
14 are paying essentially 100 cents collectively. So for that
15 reason, we would ask, and subject to Mr. Sbaiti's input,
16 whether the Court would ask us or direct us to upload an order
17 granting our motion as unopposed. We just feel like we don't
18 have any role in this case.

19 THE COURT: All right.

20 Mr. Sbaiti, what about that?

21 MR. SBAITI: Your Honor, they were originally added
22 as a nominal party. And as a nominal party, because of the
23 potential need to have a derivative action, I think that based
24 upon Highland's arguments and the arguments that we had, I
25 don't think the derivative action is necessary for us to

1 maintain on a go-forward basis. And so we don't oppose them
2 being dismissed.

3 THE COURT: All right. Then I assume, Mr. Morris,
4 you don't have any problem with this, correct?

5 MR. MORRIS: No, Your Honor.

6 THE COURT: Okay. So I'll look for the parties to
7 submit an agreed order of dismissal of HCLOF after the hearing.
8 All right?

9 MR. JORDAN: Thank you, Your Honor.

10 THE COURT: All right. Mr. Morris, you get the last
11 word.

12 MR. MORRIS: Thank you, Your Honor. I hope to be
13 relatively brief. I really just want to focus on the arguments
14 concerning whether or not the order that was entered by this
15 Court was an order that was entered on the merits.

16 As the Court is well aware, a 9019 motion filed by a
17 debtor is done so on notice. It is to give all parties in
18 interest an opportunity to be heard, not just as to whether or
19 not the debtor meets its burden of proof under Rule 9019 but
20 whether or not the Court can find, as it must, that the
21 proposed settlement is in the best interest of the estate.

22 The purpose of -- I mean that is the purpose of the
23 giving notice so that everybody has a chance to be heard. The
24 questions that the Court asked, the questions that every
25 bankruptcy court asks in a 9019 is can the debtor do this deal,

1 should the debtor do this deal, is it in the best interest of
2 the estate to do this deal.

3 And, you know, the idea that a 9019 order is somehow
4 res judicata only to the parties to a settlement is just
5 something that doesn't make any sense to me because it
6 abrogates so many rules that exist that allows and encourages
7 and requires parties who have objections to be heard.

8 Mr. Sbaiti's clients filed an objection. They
9 initiated a contested matter. They obtained rights. They were
10 litigants. They are litigants in a contested matter where
11 they're required to tell the Court what objections they have to
12 the settlement, and they did that.

13 Mr. Sbaiti, you know, told me that I wasn't allowed
14 to characterize the words that are used in the documents that
15 have now been admitted by the Court. And, yet, I heard him say
16 that maybe Mr. Kane (phonetic) really meant to tell Your Honor
17 that he was withdrawing the claim because he was going to save
18 it for another day.

19 I'd just ask the Court to look at the transcript. I
20 don't have to interpret it at all. And I'd ask the Court to
21 read the words. I can put them back up on the screen, but
22 they're pretty short. It's at Pages 7 and 8 of the transcript
23 of what Mr. Kane told you and what you said in response. It's
24 on the page, not my interpretation, and what the import of that
25 was.

1 Mr. Sbaiti believes, I guess, if one is allowed to
2 engage in such conduct without consequence, that one is allowed
3 to allow to file objections, cause the Court and the litigants
4 to participate, to give discovery, to write briefs, to do
5 analyses, withdraw it on the basis of their own good faith
6 analysis of Guernsey law of the documents and somehow say it's
7 irrelevant. Not what the law is, not what res judicata is
8 intended to do.

9 He should have put all of his cards on the table. In
10 fact, I think that Mr. Kane believed he was putting all of his
11 cards on the table because that's what he did. He filed a very
12 comprehensive objection. He asserted a right to the
13 opportunity that the debtor was proposing to take in the 9019
14 motion. That's what he was doing. He was objecting on the
15 basis that he claimed his client had a superior right to this
16 asset.

17 And he didn't -- like I said earlier, Your Honor, I
18 don't think he would be permitted, I don't think these claims
19 would fly today if no objection was filed. But the fact that
20 there was renders, I think, indisputable that there was a
21 finding on the merits, right. And the only reason that the
22 Court didn't rule on Mr. Kane's motion, the only reason the
23 Court didn't rule on it is because Mr. Kane withdrew it.

24 Is that really the way this process is supposed to
25 work, that one can tell the Court that after a review of the

1 documents, I'm going to withdraw the objection and then file a
2 claim for damages three months later with a different client,
3 with a different control person, with a different lawyer?

4 That's okay under doctrine of res judicata? I don't think so.

5 They had a full and fair opportunity. The fact that
6 this was somehow -- you know, they're denigrating the fact that
7 this was a 9019 motion. There's not supposed to be a mini-
8 trial. Your Honor had discretion as to what to do. Every
9 court in every bench trial has discretion as to what to do and
10 whether or not to overrule objections and whether or not to
11 sustain [sic] objections. That's what judges to.

12 And there's nothing offensive about the fact that it
13 happened in the context of a 9019 motion. They don't get to
14 sit on their hands and wait to fight another day. If they
15 believed that the debtor was exposing itself to liability, and
16 that's what they actually say in the opposition, that's what I
17 actually think they say in the complaint, accept it as true,
18 they believe that the debtor created liability for itself by
19 rendering -- by entering into this transaction.

20 Shouldn't they have raised their hand and said you
21 can't do this deal, right? And the only response to that --
22 they have to that is they had no idea about value. Paragraph
23 127, Your Honor, Mr. Dondero, the architect of this complaint,
24 as was proven on June 8th, knew very well about value. And it
25 doesn't matter that it was only MGM. Your Honor commented on

1 that at the June 8th hearing in a different context. But
2 everybody knows, right, it is. He sits on the board of MGM.

3 And I'm sorry if I called him a tippee instead of a
4 tipper. But if this complaint goes forward, we'll dig into
5 that real deep. But there's no reason it ought to, Your Honor.
6 This case ought to be dismissed on res judicata grounds. It
7 should be dismissed on judicial estoppel grounds. And it
8 should be dismissed for all the reasons that I said in my
9 argument in my brief.

10 But I do just want to close with one point, and that
11 is to read from a case called Goldstein, which I think I
12 alluded to earlier on this issue of whether there's a fiduciary
13 duty that's owed by an advisor to an investor and a fund:

14 "At best, it is counterintuitive to characterize the
15 investors in a hedge fund as the clients of the
16 advisors. The advisor owes fiduciary duties only to
17 the fund, not to the fund's investors."

18 There's a lot of discussion about fiduciary duties,
19 Your Honor. But to the extent that they have any basis to
20 defeat the motion to dismiss on res judicata or collateral
21 estoppel grounds, we hope and we trust and we know the Court
22 will review the case law vigorously to test some of the
23 assertions to that.

24 I have nothing further, Your Honor.

25 THE COURT: All right. Well, thank you to all of

1 you.

2 As a reminder, I don't think you need it, but as a
3 reminder, I am essentially acting as a magistrate for Judge
4 Boyle in this action. And whichever way I go on whichever
5 theories, I think she would expect a thorough write-up. It
6 would, of course, be in the form of a report and recommendation
7 for her to either adopt or not if I dispose of some or all of
8 the counts in the lawsuit.

9 Even to the extent I deny dismissal, even though the
10 rule typically does not require a court to make detailed
11 findings and conclusions in connection with a denial of a
12 motion to dismiss, again, since I'm sitting as a magistrate, I
13 think Judge Boyle would expect some thorough explanations and
14 reasoning from me.

15 So that's my way of saying I'm taking this under
16 advisement. I am going to drill down on some of the cases that
17 have been argued. I think some important issues are raised
18 here that need some thorough reasoning.

19 So I will do the best to get this out without too
20 much delay. I think there's probably zero chance, zero chance
21 I'm going to get it done by the end of the year. We're just
22 too behind with some of our under-advisements. But I will try
23 earnestly to get it out fairly soon after the first of the
24 year. All right?

25 Thank you. You all have a good holiday.

1 THE CLERK: All rise.

2 (Proceedings concluded at 12:37 p.m.)

3 * * * * *

4
5 C E R T I F I C A T I O N

6 We, DIPTI PATEL, KAREN WATSON, CRYSTAL THOMAS, AND
7 PATTIE MITCHELL, court approved transcribers, certify that the
8 foregoing is a correct transcript from the official electronic
9 sound recording of the proceedings in the above-entitled
10 matter, and to the best of my ability.

11
12 /s/ Dipti Patel

13 DIPTI PATEL, CET-997

14
15 /s/ Karen Watson

16 KAREN WATSON, CET-1039

17
18 /s/ Crystal Thomas

19 CRYSTAL THOMAS, CET-

20
21 /s/ Pattie Mitchell

22 PATTIE MITCHELL

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EXHIBIT 2

005678

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 275

[Release No. IA-2628; File No. S7-25-06]

RIN 3235-AJ67

Prohibition of Fraud by Advisers to Certain Pooled Investment Vehicles

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Securities and Exchange Commission is adopting a new rule that prohibits advisers to pooled investment vehicles from making false or misleading statements to, or otherwise defrauding, investors or prospective investors in those pooled vehicles. This rule is designed to clarify, in light of a recent court opinion, the Commission's ability to bring enforcement actions under the Investment Advisers Act of 1940 against investment advisers who defraud investors or prospective investors in a hedge fund or other pooled investment vehicle.

EFFECTIVE DATE: September 10, 2007.

FOR FURTHER INFORMATION CONTACT: David W. Blass, Assistant Director, Daniel S. Kahl, Branch Chief, or Vivien Liu, Senior Counsel, at 202-551-6787, Division of Investment Management, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-5041.

SUPPLEMENTARY INFORMATION: The Commission is adopting new rule 206(4)-8 under the Investment Advisers Act of 1940 ("Advisers Act").¹

¹ 15 U.S.C. 80b. Unless otherwise noted, when we refer to the Advisers Act, or any paragraph of the Advisers Act, we are referring to 15 U.S.C. 80b of the United States Code, at which the Advisers Act is codified.

I. INTRODUCTION

On December 13, 2006, we proposed a new rule under the Advisers Act that would prohibit advisers to pooled investment vehicles from defrauding investors or prospective investors in pooled investment vehicles they advise.² We proposed the rule in response to the opinion of the Court of Appeals for the District of Columbia Circuit in Goldstein v. SEC, which created some uncertainty regarding the application of sections 206(1) and 206(2) of the Advisers Act in certain cases where investors in a pool are defrauded by an investment adviser to that pool.³ In addressing the scope of the exemption from registration in section 203(b)(3) of the Advisers Act and the meaning of “client” as used in that section, the Court of Appeals expressed the view that, for purposes of sections 206(1) and (2) of the Advisers Act, the “client” of an investment adviser managing a pool is the pool itself, not an investor in the pool. As a result, it was unclear whether the Commission could continue to rely on sections 206(1) and (2) of the Advisers Act to bring enforcement actions in certain cases where investors in a pool are defrauded by an investment adviser to that pool.⁴

² Prohibition of Fraud by Advisers to Certain Pooled Investment Vehicles; Accredited Investors in Certain Private Investment Vehicles, Investment Advisers Act Release No. 2576 (Dec. 27, 2006) [72 FR 400 (Jan. 4, 2007)] (the “Proposing Release”). In the Proposing Release, we also proposed two new rules that would define the term “accredited natural person” under Regulation D and section 4(6) of the Securities Act of 1933 [15 USC 77d(6)] (“Securities Act”). As proposed, these rules would add to the existing definition of “accredited investor” and apply to private offerings of certain unregistered investment pools. On May 23, 2007, we voted to propose more general amendments to the definition of accredited investor. Proposed Modernization of Smaller Company Capital-Raising and Disclosure Requirements, Securities Act Release No. (, 2007) [72 FR (, 2007)]. We plan to defer consideration of our proposal to define the term accredited natural person until we have had the opportunity to evaluate fully the comments we received on that proposal together with those we receive on our May 2007 proposal.

³ 451 F.3d 873 (D.C. Cir. 2006) (“Goldstein”).

⁴ Prior to the issuance of the Goldstein decision, we brought enforcement actions against advisers alleging false and misleading statements to investors under sections 206(1) and (2) of the Advisers Act. See, e.g., SEC v. Kirk S. Wright, International Management Associates, LLC, Litigation Release No. 19581 (Feb. 28, 2006); SEC v. Wood River Capital Management, LLC,

In its opinion, the Court of Appeals distinguished sections 206(1) and (2) from section 206(4) of the Advisers Act, which is not limited to conduct aimed at clients or prospective clients of investment advisers.⁵ Section 206(4) provides us with rulemaking authority to define, and prescribe means reasonably designed to prevent, fraud by advisers.⁶ We proposed rule 206(4)-8 under this authority.

We received 45 comment letters in response to our proposal.⁷ Most commenters generally supported the proposal. Eighteen endorsed the rule as proposed, noting that the rule would strengthen the antifraud provisions of the Advisers Act or that the rule would clarify the Commission's enforcement authority with respect to advisers.⁸ Others, however, urged that we

Litigation Release No. 19428 (Oct. 13, 2005); SEC v. Samuel Israel III; Daniel E. Marino; Bayou Management, LLC; Bayou Accredited Fund, LLC; Bayou Affiliates Fund, LLC; Bayou No Leverage Fund, LLC; and Bayou Superfund, LLC, Litigation Release No. 19406 (Sept. 29, 2005); SEC v. Beacon Hill Asset Management LLC, Litigation Release No. 18745A (June 16, 2004).

⁵ See Goldstein, supra note 3, at note 6. See also United States v. Elliott, 62 F.3d 1304, 1311 (11th Cir. 1995).

⁶ Section 206(4) of the Advisers Act makes it unlawful for an investment adviser to “engage in any act, practice, or course of business which is fraudulent, deceptive, or manipulative” and authorizes us “by rules and regulations [to] define, and prescribe means reasonably designed to prevent, such acts, practices, and courses of business as are fraudulent, deceptive, or manipulative.”

⁷ We received over 600 comment letters that addressed the proposed amendments to the term “accredited natural person” under Regulation D and section 4(6) of the Securities Act. All of the public comments we received are available for inspection in our Public Reference Room at 100 F Street, NE, Washington DC, 20549 in File No. S7-25-06, or may be viewed at www.sec.gov/comments/s7-25-06/s72506.shtml.

⁸ E.g., Letter of the Alternative Investments Compliance Association (Mar. 5, 2007); Letter of the CFA Center for Financial Market Integrity (Mar. 9, 2007) (“CFA Center Letter”); Letter of the Coalition of Private Investment Companies (Mar. 9, 2007); Letter of the Commonwealth of Massachusetts (Mar. 9, 2007) (“Massachusetts Letter”); Letter of the Department of Banking of the State of Connecticut (Mar. 8, 2007); Letter of the North America Securities Administrators Association (Apr. 2, 2007) (“NASAA Letter”); and Letter of the U.S. Chamber of Commerce (Mar. 9, 2007). Another commenter observed that the proposed rules are broadly similar to current U.K. legislation and regulations. See Letter of Alternative Investment Management Association (Mar. 9, 2007) (“AIMA Letter”).

make revisions that would restrict the scope of the rule to more narrowly define the conduct or acts it prohibits.⁹

Today, we are adopting new rule 206(4)-8 as proposed. The rule prohibits advisers from (i) making false or misleading statements to investors or prospective investors in hedge funds and other pooled investment vehicles they advise, or (ii) otherwise defrauding these investors. The rule clarifies that an adviser's duty to refrain from fraudulent conduct under the federal securities laws extends to the relationship with ultimate investors and that the Commission may bring enforcement actions under the Advisers Act against investment advisers who defraud investors or prospective investors in those pooled investment vehicles.

II. DISCUSSION

Rule 206(4)-8 prohibits advisers to pooled investment vehicles from (i) making false or misleading statements to investors or prospective investors in those pools or (ii) otherwise defrauding those investors or prospective investors. We will enforce the rule through civil and administrative enforcement actions against advisers who violate it.

Section 206(4) authorizes the Commission to adopt rules and regulations that “define, and prescribe means reasonably designed to prevent, such acts, practices, and courses of business as are fraudulent, deceptive, or manipulative.” In adopting rule 206(4)-8, we intend to employ all of the broad authority that Congress provided us in section 206(4) and direct it at adviser conduct affecting an investor or potential investor in a pooled investment vehicle.

⁹ E.g., Letter of American Bar Association (Mar. 12, 2007) (“ABA Letter”); Letter of Davis Polk & Wardwell (Mar. 9, 2007) (“Davis Polk Letter”); Letter of Dechert LLP (Mar. 8, 2007) (“Dechert Letter”); Letter of New York City Bar (Mar. 8, 2007) (“NYCB Letter”); Letter of Schulte Roth & Zabel LLP (Mar. 9, 2007) (“Schulte Roth Letter”); and Letter of Sullivan & Cromwell LLP (Mar. 9, 2007) (“Sullivan & Cromwell Letter”).

A. Scope of Rule 206(4)-8

Some commenters questioned the scope of the rule, arguing that the Commission should define fraud.¹⁰ We believe that we have done so, only more broadly than some commenters would have us do. As the Proposing Release indicated, our intent is to prohibit all fraud on investors in pools managed by investment advisers. Congress expected that we would use the authority provided by section 206(4) to “promulgate general antifraud rules capable of flexibility.”¹¹ The terms material false statements or omissions and “acts, practices, and courses of business as are fraudulent, deceptive, or manipulative” encompass the well-developed body of law under the antifraud provisions of the federal securities laws. The legal authorities identifying the types of acts, practices, and courses of business that are fraudulent, deceptive, or manipulative under the federal securities laws are numerous, and we believe that the conduct prohibited by rule 206(4)-8 is sufficiently clear and well understood.¹²

¹⁰ E.g., ABA Letter, supra note 9; Letter of Debevoise & Plimpton LLP (Mar. 14, 2007); and NYCB Letter, supra note 9.

¹¹ S.Rep. No. 1760, 86th Cong., 2d. Sess. (June 28, 1960) at 4. See rule 206(4)-1(a)(5) [17 CFR 275.206(4)-1(a)(5)] under the Advisers Act; rule 17j-1(b) [17 CFR 270.17j-1(b)] under the Investment Company Act of 1940 [15 U.S.C. 80a-1] (“Investment Company Act”); and rule 13e-3(b)(1) [17 CFR 240.13e-3(b)(1)] under the Securities Exchange Act of 1934 [15 U.S.C. 77a] (“Exchange Act”).

¹² Loss, Seligman, & Paredes, Securities Regulation, Chap. 9 (Fraud) (Fourth Ed. 2006); Hazen, Treatise on The Law of Securities Regulation, Vol. 3, Ch. 12 (Manipulation and Fraud – Civil Liability; Implied Private Remedies; SEC Rule 10b-5; Fraud in Connection With the Purchase or Sale of Securities; Improper Trading on Nonpublic Material Information) (Fifth Ed. 2005). See, e.g., Superintendent of Insurance of New York v. Bankers Life & Casualty Co., 404 U.S. 6, 11 n. 7 (1971) (“We believe that section 10(b) and Rule 10b-5 prohibit *all* fraudulent schemes in connection with the purchase or sale of securities, whether the artifices employed involve a garden type variety of fraud, or present a unique form of deception. Novel or atypical methods should not provide immunity from the securities laws.” (quoting A. T. Brod & Co. v. Perlow, 375 F.2d 393, 397 (CA2 1967))); Santa Fe Industries, Inc. v. Green, 430 U.S. 462, 477 (1977) (“No doubt Congress meant to prohibit the full range of ingenious devices that might be used to manipulate securities prices.”). Moreover, the established legal principles are sufficiently flexible to encompass future novel factual scenarios. United States v. Brown, 555 F.2d 336, 339-40 (2d Cir. 1977) (“The fact that there is no litigated fact pattern precisely in point may constitute a tribute to the cupidity and ingenuity of the malefactors involved but hardly provides an escape from the penal sanctions of the securities fraud provisions here involved.”).

1. Investors and Prospective Investors

Rule 206(4)-8 prohibits investment advisers from making false or misleading statements to, or engaging in other fraud on, investors or prospective investors in a pooled investment vehicle they manage. The scope of the rule is modeled on that of sections 206(1) and (2) of the Advisers Act, which make unlawful fraud by advisers against clients or prospective clients. Rule 206(4)-8 prohibits false or misleading statements made, for example, to existing investors in account statements as well as to prospective investors in private placement memoranda, offering circulars, or responses to “requests for proposals,” electronic solicitations, and personal meetings arranged through capital introduction services.

Some commenters argued that the rule should not prohibit fraud against prospective investors in a pooled investment vehicle, asserting that such fraud does not actually harm investors until they, in fact, make an investment.¹³ We disagree. False or misleading statements and other frauds by advisers are no less objectionable when made in an attempt to draw in new investors than when made to existing investors.¹⁴ For similar policy reasons that we believe led Congress to apply the protections of sections 206(1) and (2) to prospective clients, we have decided to apply those of rule 206(4)-8 to prospective investors.¹⁵ We believe that prohibiting false or misleading statements made to, or other fraud on, any prospective investors is a means reasonably designed to prevent fraud.

¹³ Davis Polk Letter, supra note 9; Dechert Letter, supra note 9; NYCB Letter, supra note 9; Letter of the Securities Industry and Financial Markets Association (Mar. 9, 2007); Sullivan & Cromwell Letter, supra note 9.

¹⁴ See CFA Center Letter, supra note 8.

¹⁵ We have used the term “prospective investor” to give the term similar scope to the term “prospective client” in sections 206(1) and (2). See, e.g., In the Matter of Ralph Harold Seipel, 38 S.E.C. 256, 257-58 (1958) (the solicitation of clients is part of the activity of an investment adviser and it is immaterial for purposes of an enforcement action under sections 206(1) and (2) that an adviser engaging in fraudulent solicitations was not successful in his efforts to obtain clients).

2. Unregistered Investment Advisers

Rule 206(4)-8 applies to both registered and unregistered investment advisers.¹⁶ As we noted in the Proposing Release, many of our enforcement cases against advisers to pooled investment vehicles have been brought against advisers that are not registered under the Advisers Act, and we believe it is critical that we continue to be in a position to bring actions against unregistered advisers that manage pools and that defraud investors in those pools.¹⁷ The two commenters that expressed an explicit view on this aspect of the proposal supported our application of the rule to advisers that are not registered with the Commission.¹⁸

3. Pooled Investment Vehicles

The rule we are adopting today applies to investment advisers with respect to any “pooled investment vehicle” they advise. The rule defines a pooled investment vehicle¹⁹ as any investment company defined in section 3(a) of the Investment Company Act²⁰ and any privately offered pooled investment vehicle that is excluded from the definition of investment company by reason of either section 3(c)(1) or 3(c)(7) of the Investment Company Act.²¹ As a result, the rule

¹⁶ A few commenters requested that we clarify how we intend to apply rule 206(4)-8 to offshore advisers’ interaction with non-U.S. investors. See AIMA Letter, *supra* note 8; Letter of Jones Day (Mar. 9, 2007); Sullivan & Cromwell Letter, *supra* note 9. Our adoption of this rule will not alter our jurisdictional authority.

¹⁷ Proposing Release, *supra* note 2, at note 14.

¹⁸ Massachusetts Letter, *supra* note 8; NASAA Letter, *supra* note 8.

¹⁹ Rule 206(4)-8(b).

²⁰ 15 U.S.C. 80a-3(a). Unless otherwise noted, when we refer to the Investment Company Act, or any paragraph of the Investment Company Act, we are referring to 15 U.S.C. 80a of the United States Code, at which the Company Act is codified.

²¹ Section 3(c)(1) of the Investment Company Act excludes from the definition of investment company an issuer the securities (other than short-term paper) of which are beneficially owned by not more than 100 persons and that is not making or proposing to make a public offering of its securities. Section 3(c)(7) of the Investment Company Act excludes from the definition of investment company an issuer the outstanding securities of which are owned exclusively by persons who, at the time of acquisition of such securities, are “qualified purchasers” and that is not making or proposing to make a public offering of its securities. “Qualified purchaser” is

applies to advisers to hedge funds, private equity funds, venture capital funds, and other types of privately offered pools that invest in securities, as well as advisers to investment companies that are registered with us.²²

Several commenters supported applying the protection of the new antifraud rule to investors in all these kinds of pooled investment vehicles, noting, for example, that every investor, not just the wealthy or sophisticated that typically invest in private pools, should be protected from fraud.²³ Some other commenters urged us not to apply the rule to advisers to registered investment companies, arguing that the rule is unnecessary because other provisions of the federal securities laws prohibiting fraud are available to the Commission to address these matters.²⁴ They expressed concern that application of another antifraud provision with different elements would be burdensome. These commenters claimed that the rule would, for example, make it necessary for advisers to conduct extensive reviews of all communications with clients. But the other antifraud provisions available to us contain different elements because they were not specifically designed to address frauds by investment advisers with respect to investors in pooled investment vehicles. In some cases, the other antifraud provisions may not permit us to

defined in section 2(a)(51) of the Investment Company Act generally to include a natural person (or a company owned by two or more related natural persons) who owns not less than \$5,000,000 in investments; a person, acting for its own account or accounts of other qualified purchasers, who owns and invests on a discretionary basis, not less than \$25,000,000; and a trust whose trustee, and each of its settlors, is a qualified purchaser.

²² We have brought enforcement actions under the Advisers Act against advisers to these types of funds. See, e.g., In the Matter of Askin Capital Management, L.P and David J. Askin, Investment Advisers Act Release No. 1492 (May 23, 1995) (hedge fund); In the Matter of Thayer Capital Partners, Investment Advisers Act Release No. 2276 (Aug. 12, 2004) (private equity fund); SEC v. Michael A. Liberty, Litigation Release No. 19601 (Mar. 8, 2006) (venture capital fund).

²³ E.g., NASAA Letter, supra note 8.

²⁴ E.g., ABA Letter, supra note 9; Letter of Investment Adviser Association (Mar. 9, 2007); Letter of Investment Company Institute (Mar. 9, 2007) (“ICI Letter”); Sullivan & Cromwell Letter, supra note 9. Commenters noted in particular that section 34(b) of the Investment Company Act already prohibits an adviser from making fraudulent material statements or omissions in a fund’s registration statement or in required records.

proceed against the adviser.²⁵ As a result, the existing antifraud provisions may not be available to us in all cases. As we discussed above, before the Goldstein decision we had brought actions against advisers to mutual funds under sections 206(1) and (2) for defrauding investors in mutual funds.²⁶ Because, before the Goldstein decision, advisers to pooled investment vehicles operated with the understanding that the Advisers Act prohibited the conduct that this rule prohibits, we believe that advisers that are attentive to their traditional compliance responsibilities will not need to alter their business practices or take additional steps and incur new costs as a result of this rule's adoption.

B. Prohibition on False or Misleading Statements

Rule 206(4)-8(a)(1) prohibits any investment adviser to a pooled investment vehicle from making an untrue statement of a material fact to any investor or prospective investor in the pooled investment vehicle, or omitting to state a material fact necessary in order to make the statements made to any investor or prospective investor in the pooled investment vehicle, in the light of the circumstances under which they were made, not misleading.²⁷

The provision is very similar to those in many of our antifraud laws and rules that, depending upon the circumstances, may also be applicable to the same investor

²⁵ This may be the case with respect to section 34(b) of the Investment Company Act, for example, if the adviser's fraudulent statements are not made in a document described in that section, or with respect to rule 10b-5 under the Exchange Act, where the fraudulent conduct does not relate to a misstatement or omission in connection with the purchase or sale of any security.

²⁶ See, e.g., In the Matter of Van Kampen Investment Advisory Corp., Investment Advisers Act Release No. 1819 (Sept. 8, 1999); In the Matter of The Dreyfus Corporation, Investment Advisers Act Release No. 1870 (May 10, 2000); In the Matter of Federated Investment Management Company, Investment Advisers Act Release No. 2448 (Nov. 28, 2005).

²⁷ A fact is material if there is a substantial likelihood that a reasonable investor in making an investment decision would consider it as having significantly altered the total mix of information available. Basic, Inc. v. Levinson, 485 U.S. 224, 231-32 (1988); TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976). See also In the Matter of Van Kampen Investment Advisory Corp., supra note 26; In the Matter of the Dreyfus Corporation, supra note 26.

communications.²⁸ Sections 206(1) and (2) have imposed similar obligations on advisers since 1940 and, before Goldstein, were commonly accepted as imposing similar requirements on communications with investors in a fund. For these reasons, and because the nature of the duty to communicate without false statements is so well developed in current law, we believe that commenters' concerns about the breadth of the prohibition or any chilling effect the new rule might have on investor communications are misplaced.²⁹ Advisers to pooled investment vehicles attentive to their traditional compliance responsibilities will not need to alter their communications with investors.

Rule 206(4)-8(a)(1) prohibits advisers to pooled investment vehicles from making any materially false or misleading statements to investors in the pool regardless of whether the pool is offering, selling, or redeeming securities. While the new rule differs in this aspect from rule 10b-5 under the Exchange Act, the conduct prohibited is similar. The new rule prohibits, for example, materially false or misleading statements regarding investment strategies the pooled investment vehicle will pursue, the experience and credentials of the adviser (or its associated persons), the risks associated with an investment in the pool, the performance of the pool or other funds advised by the adviser, the valuation of the pool or investor accounts in it, and practices

²⁸ See, e.g., sections 12 and 17 of the Securities Act [15 U.S.C. 77l, 77q]; section 14 of the Exchange Act [15 U.S.C. 78n]; section 34 of the Investment Company Act; rules 156, 159, and 610 under the Securities Act [17 CFR 230.156, 230.159, 230.610]; rules 10b-5, 13e-3, 13e-4, and 15c1-2 under the Exchange Act [17 CFR 240.10b-5, 240.13e-3, 240.13e-4, 240.15c1-2]; and rule 17j-1 under the Investment Company Act [17 CFR 270.17j-1].

²⁹ Letter of Managed Funds Association (Mar. 9, 2007) ("MFA Letter"); NYCB Letter, supra note 9; Davis Polk Letter, supra note 9; Dechert Letter, supra note 9; Letter of Seward & Kissel LLP (Mar. 8, 2007) ("Seward & Kissel Letter").

the adviser follows in the operation of its advisory business such as how the adviser allocates investment opportunities.³⁰

C. Prohibition of Other Frauds

Rule 206(4)-8(a)(2) makes it a fraudulent, deceptive, or manipulative act, practice, or course of business for any investment adviser to a pooled investment vehicle to “otherwise engage in any act, practice, or course of business that is fraudulent, deceptive, or manipulative with respect to any investor or prospective investor in the pooled investment vehicle.”³¹ As we noted in the Proposing Release, the wording of this provision is drawn from the first sentence of section 206(4) and is designed to apply more broadly to deceptive conduct that may not involve statements.³²

Some commenters asserted that section 206(4) provides us authority only to adopt prophylactic rules that explicitly identify conduct that would be fraudulent under the new rule.³³ We believe our authority is broader. We do not believe that the commenters’ suggested approach would be consistent with the purposes of the Advisers Act or the protection of investors. That approach would have us adopt the rule prohibiting fraudulent communications but not fraudulent conduct.³⁴ But, section 206(4) itself specifically authorizes us to adopt rules defining and prescribing “acts, practices and courses of business,” (*i.e.*, conduct), and does not explicitly refer to communications, which, nonetheless, represent a form of an act, practice, or

³⁰ We have previously brought enforcement actions alleging these or similar types of frauds. See Proposing Release, supra note 2, at note 29.

³¹ Rule 206(4)-8(a)(2).

³² See Section II.C of the Proposing Release, supra note 2.

³³ ABA Letter, supra note 9; ICI Letter, supra note 24; Schulte Roth Letter, supra note 9; Sullivan & Cromwell Letter, supra note 9.

³⁴ See, e.g., ABA Letter, supra note 9.

course of business. In addition, rule 206(4)-8 as adopted would provide greater protection to investors in pooled investment vehicles.

Alternatively, commenters would have us adopt a rule prohibiting identified known fraudulent conduct or would have us provide detailed commentary describing specific forms of fraudulent conduct that the rule would prohibit.³⁵ Either approach would fail to prohibit fraudulent conduct we did not identify, and could provide a roadmap for those wishing to engage in fraudulent conduct. This approach would be inconsistent with our historical application of the federal securities laws under which broad prohibitions have been applied against specific harmful activity.

D. Other Matters

We noted in the Proposing Release that, unlike violations of rule 10b-5 under the Exchange Act, the Commission would not need to demonstrate that an adviser violating rule 206(4)-8 acted with scienter.³⁶ Commenters questioned whether the rule should encompass negligent conduct, arguing that it would “expand the concept of fraud itself beyond its original meaning.”³⁷ We read the language of section 206(4) as not by its terms limited to knowing or deliberate conduct. For example, section 206(4) encompasses “acts, practices, and courses of business as are . . . deceptive,” thereby reaching conduct that is negligently deceptive as well as conduct that is recklessly or deliberately deceptive. In addition, the Court of Appeals for the District of Columbia Circuit concluded that “scienter is not required under section 206(4).”³⁸

³⁵ Id.

³⁶ Section II.B of the Proposing Release, supra note 2.

³⁷ See ABA Letter, supra note 9 at page 3.

³⁸ SEC v. Steadman, 967 F.2d 636, at 647 (D.C. Cir. 1992). The court in Steadman analogized section 206(4) of the Advisers Act to section 17(a)(3) of the Securities Act, which the Supreme Court had held did not require a finding of scienter, id. (citing Aaron v. SEC, 446 U.S. 680 (1980)). In discussing section 17(a)(3) and its lack of a scienter requirement, the Steadman court

We believe use of a negligence standard also is appropriate as a method reasonably designed to prevent fraud. As the Supreme Court noted in U.S. v. O'Hagan, “[a] prophylactic measure, because its mission is to prevent, typically encompasses more than the core activity prohibited.”³⁹ In O'Hagan, the Court held that under section 14(e) “the Commission may prohibit acts, not themselves fraudulent under the common law or §10(b), if the prohibition is ‘reasonably designed to prevent . . . acts and practices [that] are fraudulent.’”⁴⁰ Along these lines, the prohibitions in rule 206(4)-8 are reasonably designed to prevent fraud. We believe that, by taking sufficient care to avoid negligent conduct, advisers will be more likely to avoid reckless deception. Since the Commission clearly is authorized to prescribe conduct that goes beyond fraud as a means reasonably designed to prevent fraud, prohibiting deceptive conduct done negligently is a way to accomplish this objective.

Rule 206(4)-8 does not create under the Advisers Act a fiduciary duty to investors or prospective investors in a pooled investment vehicle not otherwise imposed by law. Nor does the rule alter any duty or obligation an adviser has under the Advisers Act, any other federal law or regulation, or any state law or regulation (including state securities laws) to investors in a pooled investment vehicle it advises.⁴¹ The rule, for example, will permit us to bring an enforcement action against an investment adviser that violates a fiduciary duty imposed by other law if the violation of such law or obligation also constitutes an act, practice, or course of

observed that, similarly, a violation of section 206(2) of the Advisers Act could rest on a finding of simple negligence. Id. at 643, note 5. But see Aaron at 690-91 (citing Ernst & Ernst v. Hochfelder, 425 U.S. 185, 199 (1976)); cf. S. Rep. No. 1760, 86th Cong., 2d Sess. (June 28, 1960) at 8 and H. R. Rep. 2179, 86th Cong., 2d Sess. (Aug. 26, 1960) at 8 (comparing section 206(4) to section 15(c)(2) of the Exchange Act).

³⁹ U.S. v. O'Hagan, 521 U.S. 642, 672-73 (1997).

⁴⁰ Id. at 673.

⁴¹ For example, under the Uniform Limited Partnership Act, advisers who serve as general partners owe fiduciary duties to the limited partners. UNIF. LIMITED PARTNERSHIP ACT § 408 (2001).

business that is fraudulent, deceptive, or manipulative within the meaning of the rule and section 206(4).⁴²

Finally, the rule does not create a private right of action.⁴³

III. PAPERWORK REDUCTION ACT

The Paperwork Reduction Act of 1995 does not apply because rule 206(4)-8 does not impose a new “collection of information” within the meaning of the Paperwork Reduction Act of 1995. The rule does not create any filing, reporting, recordkeeping, or disclosure requirements for investment advisers subject to the rule. Accordingly, there is no “collection of information” under the Paperwork Reduction Act that requires the approval of the Office of Management and Budget under 44 U.S.C. 3501.

IV. COST-BENEFIT ANALYSIS

The Commission is sensitive to costs imposed by our rules and the benefits that derive from them. In the Proposing Release, we encouraged commenters to discuss any potential costs and benefits that we did not consider in our discussion. Three commenters addressed the issue of cost. Two of them stated their belief that the rule would increase advisers’ costs of compliance, by, for example, making it necessary for advisers to conduct extensive reviews of all communications with clients.⁴⁴ One stated that the rule would achieve a reasonable balance of

⁴² For example, if an adviser has a duty from a source other than the rule to make a material disclosure to an investor in a fund and negligently or deliberately fails to make the disclosure, the rule would apply to the failure.

⁴³ The Supreme Court has held that “there exists a limited private remedy under the Investment Advisers Act of 1940 to void an investment adviser’s contract, but that the Act confers no other private causes of action, legal or equitable.” *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11 at 24 (1979) (footnote omitted).

⁴⁴ NYCB Letter, *supra* note 9; Seward & Kissel Letter, *supra* note 29.

providing important benefits to investors at an acceptable cost.⁴⁵ None of the three commenters, however, provided analysis or empirical data in connection with their statements.

The rule makes it a fraudulent, deceptive, or manipulative act, practice, or course of business within the meaning of section 206(4) for any investment adviser to a pooled investment vehicle to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, to any investor or prospective investor in the pooled investment vehicle. The rule also makes it a fraudulent, deceptive, or manipulative act, practice, or course of business within the meaning of section 206(4) for any investment adviser to a pooled investment vehicle to otherwise engage in any act, practice, or course of business that is fraudulent, deceptive, or manipulative with respect to any investor or prospective investor in the pooled investment vehicle. For the reasons discussed, we do not believe that the rule will require advisers to incur new or additional costs.

Investment advisers to pooled investment vehicles should not be making untrue statements or omitting material facts or otherwise be engaged in fraud with respect to investors or prospective investors in pooled investment vehicles today, because federal authorities, state authorities, and private litigants often can, and do, seek redress from the adviser for the untrue statements or omissions or other frauds. In most cases, the conduct that the rule prohibits is already prohibited by federal securities statutes,⁴⁶ other federal statutes (including federal wire fraud statutes),⁴⁷ as well as state law.⁴⁸

⁴⁵ CFA Center Letter, supra note 8.

⁴⁶ See, e.g., section 10(b) of the Exchange Act [15 U.S.C. 78j(b)] and section 17(a) of the Securities Act [15 U.S.C. 77q] which would apply when the false statements are made “in connection with the purchase or sale of a security” or involve the “offer or sale” of a security, and section 34(b) of the Investment Company Act which makes it unlawful “to make any untrue statement of a

We recognize that there are costs involved in assuring that communications to investors and prospective investors do not contain untrue or misleading statements and preventing other frauds. Advisers have incurred, and will continue to incur, these costs due to the prohibitions and deterrent effect of the law and rules that apply under these circumstances. While each of the provisions noted above may have different limitation periods, apply in different factual circumstances, or require the government (or a private litigant) to prove different states of mind than the rule, as discussed above we believe that the multiple prohibitions against fraud, and the consequences under both criminal and civil law for fraud, should currently cause an adviser to take the precautions it deems necessary to refrain from such conduct.

Furthermore, prior to Goldstein, advisers operated with the understanding that the Advisers Act prohibited the same conduct that would be prohibited by the rule. Accordingly, we do not believe that advisers to pooled investment vehicles attentive to their traditional compliance responsibilities will need to take steps or alter their business practices in such a way that will require them to incur new or additional costs as a result of the adoption of the rule.

material fact in any registration statement, application, report, account, record, or other document filed or transmitted pursuant to [the Investment Company Act]”

⁴⁷ See, e.g., 18 U.S.C. 1341 (Frauds and Swindles) and 18 U.S.C. 1343 (Fraud by wire, radio, or television) which make it a criminal offense to use the mails or to communicate by means of wire, having devised a scheme to defraud or for obtaining money or property by means of false or fraudulent pretenses, and 18 U.S.C. 1957 (Engaging in monetary transactions in property derived from specified unlawful activity) which makes it a criminal racketeering offense to engage or attempt to engage in a transaction in criminally derived property of a value greater than \$10,000.

⁴⁸ See, e.g., Metro Communications Corp. BVI v. Advanced Mobilecomm Technologies, 854 A.2d 121, 156 (Del. Ch. 2004) (court held that plaintiff-former member of LLC had sufficiently alleged a common law fraud claim based on allegation that a series of reports by LLC’s managers contained misleading statements; court stated that “[i]n the usual fraud case, the speaking party who is subject to an accusation of fraud is on the opposite side of a commercial transaction from the plaintiff, who alleges that but for the material misstatements or omissions of the speaking party he would not have contracted with the speaking party”).

We also recognize that the rule may cause some advisers to pay more attention to the information they present to better guard against making an untrue or misleading statement to an investor or prospective investor and to reevaluate measures that are intended to prevent fraud. As a consequence, some advisers might seek guidance, legal or otherwise, and more closely review the information that they disseminate to investors and prospective investors and the antifraud related policies and procedures they have implemented. While increased concern about making false statements or committing fraud could be attributable to the new rule, advisers should already be incurring these costs to ensure truthfulness and prevent fraud, regardless of the rule, because of the myriad of laws or regulations that may already apply.

The principal benefit of the rule is that it clearly enables the Commission to bring enforcement actions under the Advisers Act, if an adviser to a pooled investment vehicle disseminates false or misleading information to investors or prospective investors or otherwise commits fraud with respect to any investor or prospective investor. As noted above, the existing antifraud provisions may not be available to us in all cases. Through our enforcement actions we are able to protect fund investor assets by stopping ongoing frauds,⁴⁹ barring persons that have committed certain specified violations or offenses from being associated with an investment adviser,⁵⁰ imposing penalties,⁵¹ seeking court orders to protect fund assets,⁵² and to order disgorgement of ill-gotten gains.⁵³ Moreover, we believe that rule 206(4)-8 will deter advisers to pooled investment vehicles from engaging in fraudulent conduct with respect to investors in

⁴⁹ See section 203(k) of the Advisers Act (Commission authority to issue cease and desist orders).

⁵⁰ See section 203(f) of the Advisers Act (Commission authority to bar a person from being associated with an investment adviser).

⁵¹ See section 203(i) of the Advisers Act (Commission authority to impose civil penalties).

⁵² See section 209(d) of the Advisers Act (Commission authority to seek injunctions and restraining orders in federal court).

⁵³ See section 203(j) of the Advisers Act (Commission authority to order disgorgement).

those pools and will provide investors with greater confidence when investing in pooled investment vehicles.

V. REGULATORY FLEXIBILITY ACT ANALYSIS

The Commission certified, pursuant to section 605(b) of the Regulatory Flexibility Act, that rule 206(4)-8 will not have a significant economic impact on a substantial number of small entities.⁵⁴ This certification was included in the Proposing Release.⁵⁵ While we encouraged written comment regarding this certification, none of the commenters responded to this request.

VI. STATUTORY AUTHORITY

We are adopting new rule 206(4)-8 pursuant to our authority set forth in sections 206(4) and 211(a) of the Advisers Act (15 U.S.C. 80b-6(4) and 80b-11(a)).

List of Subjects

17 CFR Part 275

Reporting and recordkeeping requirements, Securities.

VII. TEXT OF RULES

For the reasons set out in the preamble, Title 17, Chapter II of the Code of Federal Regulations is amended as follows:

PART 275 – RULES AND REGULATIONS, INVESTMENT ADVISERS ACT OF 1940

1. The authority citation for Part 275 continues to read in part as follows:

Authority: 15 U.S.C. 80b-2(a)(11)(F), 80b-2(a)(17), 80b-3, 80b-4, 80b-4a, 80b-6(4), 80b-6a, and 80b-11, unless otherwise noted.

* * * * *

⁵⁴ 5 U.S.C. 605(b).

⁵⁵ Section VII.A of the Proposing Release, supra note 2.

2. Section 275.206(4)-8 is added to read as follows:

§206(4)-8 Pooled investment vehicles.

(a) Prohibition. It shall constitute a fraudulent, deceptive, or manipulative act, practice, or course of business within the meaning of section 206(4) of the Act (15 U.S.C. 80b-6(4)) for any investment adviser to a pooled investment vehicle to:

(1) Make any untrue statement of a material fact or to omit to state a material fact necessary to make the statements made, in the light of the circumstances under which they were made, not misleading, to any investor or prospective investor in the pooled investment vehicle; or

(2) Otherwise engage in any act, practice, or course of business that is fraudulent, deceptive, or manipulative with respect to any investor or prospective investor in the pooled investment vehicle.

(b) Definition. For purposes of this section “pooled investment vehicle” means any investment company as defined in section 3(a) of the Investment Company Act of 1940 (15 U.S.C. 80a-3(a)) or any company that would be an investment company under section 3(a) of that Act but for the exclusion provided from that definition by either section 3(c)(1) or section 3(c)(7) of that Act (15 U.S.C. 80a-3(c)(1) or (7)).

By the Commission.

Nancy M. Morris
Secretary

August 3, 2007

EXHIBIT 3

005698

SECOND AMENDED AND RESTATED
INVESTMENT ADVISORY AGREEMENT

THIS SECOND AMENDED AND RESTATED INVESTMENT ADVISORY AGREEMENT (this “*Agreement*”), dated to be effective from January 1, 2017 (the “*Effective Date*”) is entered into by and between **Charitable DAF Fund, L.P.**, a Cayman Islands exempted limited partnership (the “*Fund*”), **Charitable DAF GP, LLC**, a limited liability company organized under the laws of the State of Delaware (the “*General Partner*”), the general partner of the Fund, and **Highland Capital Management, L.P.**, a limited partnership organized under the laws of the State of Delaware (the “*Investment Advisor*”). Each of the signatories hereto is sometimes referred to herein individually as a “*Party*” and collectively as the “*Parties*.”

RECITALS

WHEREAS, the Fund, the General Partner and the Investment Advisor entered into that certain Investment Advisory Agreement dated January 1, 2012 (the “*Original Agreement*”);

WHEREAS, the Parties amended and restated the Original Agreement in its entirety on the terms set forth in that certain Amended and Restated Investment Advisory Agreement dated July 1, 2014 (the “*Existing Agreement*”);

WHEREAS, the parties desire to amend and restate the Existing Agreement in its entirety with the terms as set forth in this Agreement effective as of the Effective Date;

NOW, THEREFORE, in consideration of the mutual covenants herein contained and for other good and valuable consideration, the receipt of which is hereby acknowledged, the Parties hereby agree, and the Existing Agreement is hereby amended and restated in its entirety, as follows:

1. Investment Advisory Services. Subject to Section 7, the Investment Advisor shall act as investment advisor to the Fund, the General Partner with respect to the Fund and its subsidiaries and shall provide investment advice with respect to the investment and reinvestment of the cash, Financial Instruments and other properties comprising the assets and liabilities of the Fund and its subsidiaries.

2. Custody. The Financial Instruments shall be held in the custody of Jefferies & Company, Inc. or one or more banks selected by the General Partner (each such bank, a “Custodian”). The General Partner will notify the Investment Advisor promptly of the proposed selection of any other Custodians. The Custodian shall at all times be responsible for the physical custody of the Financial Instruments; for the collection of interest, dividends, and other income attributable to the Financial Instruments; and for the exercise of rights and tenders on the Financial Instruments after consultation with and as then directed by the General Partner. At no time shall the Investment Advisor have possession of or maintain custody over any of the Financial Instruments. The Investment Advisor shall not be responsible for any loss incurred by reason of any act or omission of the Custodian.

3. Authority of the Investment Advisor. Subject to Section 7 of this Agreement, the Investment Advisor shall advise the General Partner on behalf of the Fund and/or its subsidiaries with respect to:

(a) investing, directly or indirectly, on margin or otherwise, in all types of securities and other financial instruments of United States and non-U.S. entities, including, without limitation, capital stock; all manner of equity securities (whether registered or unregistered, traded or privately offered, American Depository Receipts, common or preferred); physical commodities; shares of beneficial interest; partnership interests, limited liability company interests and similar financial instruments; secured and unsecured debt (both corporate and sovereign, bank debt, vendor claims and/or other contractual claims); bonds, notes and debentures (whether subordinated, convertible or otherwise); currencies; interest rate, currency, equity and other derivative products, including, without limitation, (i) future contracts (and options thereon) relating to stock indices, currencies, United States Government securities, securities of non-U.S. governments, other financial instruments and all other commodities, (ii) swaps and contracts for difference, options, swaptions, rights, warrants, when-issued securities, caps, collars, floors, forward rate agreements, and repurchase and reverse repurchase agreements and other cash equivalents, (iii) spot and forward currency transactions and (iv) agreements relating to or securing such transactions; leases, including, without limitation, equipment lease certificates; equipment trust certificates; mortgage-backed securities and other similar instruments (including, without limitation, fixed-rate, pass-throughs, adjustable rate mortgages, collateralized mortgage obligations, stripped mortgage-backed securities and REMICs); loans; credit paper; accounts and notes receivable and payable held by trade or other creditors; trade acceptances and claims; contract and other claims; executory contracts; participations; mutual funds, exchange traded funds and similar financial instruments; money market funds and instruments; obligations of the United States, any state thereof, non-U.S. governments and instrumentalities of any of them; commercial paper; certificates of deposit; bankers' acceptances; trust receipts; letters of credit; choses in action; puts; calls; other obligations and instruments or evidences of indebtedness of whatever kind or nature; and real estate and any kind of interests in real estate; in each case, of any person, corporation, government or other entity whatsoever, whether or not publicly traded or readily marketable (each of such items, "**Financial Instruments**"), and the sale of Financial Instruments short and covering such sales.

(b) engaging in such other lawful Financial Instruments transactions;

(c) research and analysis;

(d) purchasing Financial Instruments and holding them for investment;

(e) entering into contracts for or in connection with investments in Financial Instruments;

(f) investing in other pooled investment vehicles, which investments shall be subject in each case to the terms and conditions of the respective governing document for each such vehicle;

(g) possessing, transferring, mortgaging, pledging or otherwise dealing in, and exercising all rights, powers, privileges and other incidents of ownership or possession with respect to Financial Instruments and other property and funds held or owned by the Fund and/or its subsidiaries;

(h) lending, either with or without security, any Financial Instruments, funds or other properties of the Funds, including by entering into reverse repurchase agreements, and, from time to time, undertaking leverage on behalf of the Fund;

(i) opening, maintaining and closing accounts, including margin and custodial accounts, with brokers and dealers, including brokers and dealers located outside the United States;

(j) opening, maintaining and closing accounts, including custodial accounts, with banks, including banks located outside the United States, and drawing checks or other orders for the payment of monies;

(k) combining purchase or sale orders on behalf of the Fund with orders for other accounts to which the Investment Advisor or any of its affiliates provides investment services (“***Other Accounts***”) and allocating the Financial Instruments or other assets so purchased or sold, on an average-price basis or in any other manner deemed fair and equitable to the Investment Advisor in its sole discretion, among such accounts;

(l) entering into arrangements with brokers to open “average price” accounts wherein orders placed during a trading day are placed on behalf of the Fund and Other Accounts and are allocated among such accounts using an average price;

(m) organizing one or more corporations and other entities formed to hold record title, as nominee for the Fund and/or its subsidiaries (whether alone or together with the Other Accounts), to Financial Instruments or funds of the Fund and/or its subsidiaries;

(n) causing the Fund and/or its subsidiaries to engage in (i) agency, agency cross, related party principal transactions with affiliates of the Investment Manager and (ii) cross transactions with Other Accounts, in each case, to the extent permitted by applicable laws;

(o) engaging personnel, whether part-time or full-time, and attorneys, independent accountants or such other persons (including, without limitation, finders, consultants and investment bankers); and

(p) voting of Financial Instruments, participation in arrangements with creditors, the institution and settlement or compromise of suits and administrative proceedings and other like or similar matters.

4. Policies of the Fund. The activities engaged in by the Investment Advisor on behalf of the Fund and/or its subsidiaries shall be subject to the policies and control of the General Partner.

The Investment Advisor shall submit such periodic reports to the General Partner regarding the Investment Advisor's activities hereunder as the General Partner may reasonably request and a representative of the Investment Advisor shall be available to meet with the General Partner and/or any other representative of the Fund or its subsidiaries as reasonably requested by the General Partner.

In furtherance of the foregoing, the General Partner hereby appoints the Investment Advisor as the Fund's attorney-in-fact, with full power of authority to act in the Fund's name and on its behalf with respect to the Fund, as follows:

(a) to purchase or otherwise trade in Financial Instruments that have been approved by the General Partner;

(b) to execute and combine purchase or sale orders on behalf of the Fund with orders for Other Accounts and allocate the Financial Instruments or other assets so purchased or sold, on an average-price basis or in any other manner deemed fair and equitable to the Investment Advisor in its sole discretion, among such accounts; *provided, however*, that such purchase or sale orders shall be market rates;

(c) to direct the Custodian to deliver funds or the Financial Instruments, but only in the course of effecting trading and investment transactions for the Fund and subject to such restrictions as may be contained in the custody agreement between the Custodian and the Fund;

(d) to enter into contracts, provide certifications or take any other actions necessary to effect any of the foregoing transactions; and

(e) to select brokers on the basis of best execution and in consideration of relevant factors, including, but not limited to, price quotes; the size of the transaction; the nature of the market for the security; the timing of the transaction; the difficulty of execution; the broker-dealer's expertise in the relevant market or sector; the extent to which the broker-dealer makes market in the security or has an access to such market; the broker-dealer's skill in positioning the relevant market; the broker-dealer's facilities, reliability, promptness and financial stability; the broker-dealer's reputation for diligence and integrity (including in correcting errors); confidentiality considerations; the quality and usefulness of research services and investment ideas presented by the broker-dealer; and other factors deemed appropriate by the Investment Advisor.

5. Valuation of Financial Instruments. Financial Instruments will be valued in accordance with the then current valuation policy of the Investment Advisor, a copy of which will be provided to the General Partner upon request.

6. Status of the Investment Advisor. The Investment Advisor shall, for all purposes, be an independent contractor and not an employee of the General Partner or the Fund or its subsidiaries, nor shall anything herein be construed as making the Fund or its subsidiaries or the General Partner, a partner, member or co-venturer with the Investment Advisor or any of its affiliates or clients. The Investment Advisor shall have no authority to act for, represent, bind or obligate the Fund or its subsidiaries or the General Partner except as specifically provided herein.

7. Investments. ALL ULTIMATE INVESTMENT DECISIONS WITH RESPECT TO THE FUND AND ITS SUBSIDIARIES SHALL AT ALL TIMES REST SOLELY WITH THE GENERAL PARTNER AND/OR THE OFFICERS/DIRECTORS OF THE APPLICABLE SUBSIDIARY, IT BEING EXPRESSLY UNDERSTOOD THAT THE GENERAL PARTNER AND/OR THE OFFICERS/DIRECTORS OF THE APPLICABLE SUBSIDIARY SHALL BE FREE TO ACCEPT AND OR REJECT ANY OF THE ADVICE RENDERED BY THE INVESTMENT MANAGER HEREUNDER FOR ANY REASON OR FOR NO REASON.

8. Reimbursement by the General Partner. The Investment Advisor may retain, in connection with its responsibilities hereunder, the services of others to assist in the investment advice to be given to the General Partner with respect to the Fund and/or its subsidiaries (any such appointee, a “***Sub-Advisor***”), including, but not limited to, any affiliate of the Investment Advisor, but payment for any such services shall be assumed by the Investment Advisor, and, therefore, neither the General Partner nor the Fund or any of its subsidiaries shall have any liability therefor; *provided, however*, that the Investment Advisor, in its sole discretion, may retain the services of independent third party professionals, including, without limitation, attorneys, accountants and consultants, to advise and assist it in connection with the performance of its activities on behalf of the General Partner with respect to the Fund and/or its subsidiaries hereunder, and the Fund shall bear full responsibility therefor and the expense of any fees and disbursements arising therefrom.

9. Expenses.

(a) The Fund shall pay or reimburse the Investment Advisor and its affiliates for all expenses related to the services hereunder, including, but not limited to, investment-related expenses, brokerage commissions and other transaction costs, expenses related to clearing and settlement charges, professional fees relating to legal, auditing or valuation services, any governmental, regulatory, licensing, filing or registration fees incurred in compliance with the rules of any self-regulatory organization or any federal, state or local laws, research-related expenses (including, without limitation, news and quotation equipment and services, investment and trading-related software, including, without limitation, trade order management software (i.e., software used to route trade orders)), accounting (including accounting software), tax preparation expenses, costs and expenses associated with reporting and providing information to the Fund, any taxes imposed upon the Fund (including, but not limited to, collateralized debt obligations managed by the Investment Advisor or its affiliates), fees relating to valuing the Financial Instruments, and extraordinary expenses. In no event shall any of the foregoing costs or expenses include any salaries, occupational expense or general overhead of the Investment Advisor. For the avoidance of doubt, (i) the cost of all third party expenses incurred in connection with this Agreement shall not exceed standard market rates (which may include standard soft dollar arrangements) and (ii) to the extent any of the foregoing expenses were incurred on behalf of, or benefit of a number of Investment Advisor’s advised accounts, such expenses shall be allocated pro rata among such accounts.

(b) To the extent that expenses to be borne by the Fund are paid by the Investment Advisor or by any Sub-Advisor, the Fund shall reimburse the Investment Advisor (or Sub-Advisors, as applicable) for such expenses so long as such expenses are at market rates.

10. Fees.

(a) The Fund shall pay the Investment Advisor a quarterly fee (the “**Management Fee**”) equal to 2.0% per annum (0.5% per quarter) of the Net Assets (as defined below) of the Fund, payable in advance at and calculated as of the first business day of each calendar quarter. For purposes of calculating the Management Fee, the Net Assets of the Fund will be determined before giving effect to any of the following amounts payable by the Fund generally or in respect of any Investment which are effective as of the date on which such determination is made: (i) any fee payable to the Investment Advisor as of the date on which such determination is made; (ii) any capital withdrawals or distributions payable by the Fund which are effective as of the date on which such determination is made; and (iii) withholding or other taxes, expenses of processing withdrawals and other items payable, any increases or decreases in any reserves, holdback or other amounts specially allocated ending as of the date on which such determination is made. The Management Fee shall be prorated for partial periods and any applicable excess fees should be returned to the Fund by the Investment Advisor. Capital contributions made to the Fund after the commencement of a calendar quarter shall be subject to a prorated Management Fee based on the number of days remaining during such quarter.

(b) Subject to clauses (c) and (d) below, at the end of each Calculation Period (as defined below), an amount equal to 20% of the net capital appreciation of the Fund’s Investments (as defined below) after deducting the Management Fee shall be paid to the Investment Advisor (the “**Performance Fee**”); *provided, however*, that the net capital appreciation upon which the calculation of the Performance is based shall be reduced to the extent of any unrecovered balance remaining in the Loss Recovery Account (as defined below) maintained on the books and records of the Fund. The amount of the unrecovered balance remaining in the Loss Recovery Account at the time of calculating the Performance Fee shall be the amount existing immediately prior to its reduction pursuant to the second clause of the second sentence of clause (c) below.

(c) There shall be established on the books of the Fund a memorandum account (the “**Loss Recovery Account**”), the opening balance of which shall be zero. At the end of each Calculation Period, the balance in the Loss Recovery Account shall be adjusted as follows: first, if there has been, in the aggregate, net capital depreciation of the Fund’s Investments (as adjusted pursuant to the last sentence of this paragraph) since the end of the immediately preceding Calculation Period (or with respect to the initial Calculation Period, since the Effective Date), an amount equal to such net capital depreciation shall be credited to the Loss Recovery Account, and, second, if there has been, in the aggregate, net capital appreciation of the Fund’s investments (as adjusted pursuant to the last sentence of this paragraph) since the end of the immediately preceding Calculation Period, an amount equal to such net capital appreciation, before taking into account any Performance Fee to be paid to the Investment Advisor, shall be debited to and reduce any unrecovered balance in the Loss Recovery Account, but not below zero. Solely for purposes of this paragraph, in determining the Loss Recovery Account, net capital appreciation and net capital

depreciation for any applicable Calculation Period shall be calculated by taking into account the amount of the Management Fee paid for such period.

(d) In the event that all or a portion of the Fund's capital is distributed or withdrawn while there exists an unrecovered balance in the Loss Recovery Account, the unrecovered balance in the Loss Recovery Account shall be reduced as of the beginning of the next Calculation Period by an amount equal to the product obtained by multiplying the balance in such Loss Recovery Account by a fraction, the numerator of which is the amount distributed or withdrawn with respect to the immediately preceding distribution or withdrawal date, and the denominator of which is the total fair value of the Fund's Investment immediately prior to such distribution or withdrawal.

(e) For purposes of this Section 10, the net capital appreciation and net capital depreciation of the Fund's Investments for any given period will be calculation in accordance with the then current valuation policy of the Investment Advisor, a copy of which will be provided upon the General Partner's request. As soon as reasonably practicable following the end of a Calculation Period, the Investment Advisor shall deliver, or cause to be delivered, to the General Partner a statement showing the calculation of the Performance Fee, if any, with respect to such Calculation Period. The Performance Fee, if any, shall be payable within three (3) business days of the General Partner's receipt of such statement.

(f) Payments due to the Investment Advisor shall be made by wire transfer to:

Bank Name: Compass Bank
ABA#: 113010547
FBO: Highland Capital Management, L.P. (Master Operating
Account)
Acct#: 0025876342

(g) For purposes of this Section 10, the following terms have the definitions set forth below:

"Calculation Period" means the period commencing on the Effective Date (in the case of the initial Calculation Period) and thereafter each period commencing as of the day following the last day of the preceding Calculation Period, and ending as of the close of business on the first to occur of the following: (i) the last day of a calendar year; (ii) the distribution or withdrawal of capital of the Fund (but only with respect to such distributed or withdrawn amount); (iii) the permitted transfer of all or any portion of a partner's interest in the Fund; and (iv) the final capital distribution of the Fund following its dissolution;

"Investments" means all investments, securities, cash, receivables, financial instruments, contracts and other assets, whether tangible or intangible, owned by the Fund;

“**Net Assets**” means, with respect to the Fund as of any date, the excess of the total fair value of all Investments over the total liabilities, debts and obligations of the Fund, in each case, calculated on an accrual basis in accordance with accounting principles generally accepted in the United States and the then current valuation policy of the Service Provider, a copy of which will be provided to the General Partner upon request; and

“**Services Agreement**” means that certain Second Amended and Restated Service Agreement, dated effective as of the Effective Date, by and among the Parties, as amended, restated, modified and supplemented from time to time.

11. Exculpation; Indemnification.

(a) Whether or not herein expressly so provided, every provision of this Agreement relating to the conduct or affecting the liability of or affording protection to the Investment Advisor, its members or any of their respective affiliates and their respective partners, members, officers, directors, employees, shareholders and agents (including parties acting as agents for the execution of transactions) (each, a “**Covered Person**” and collectively, “**Covered Persons**”) shall be subject to the provisions of this Section.

(b) To the fullest extent permitted by law, no Covered Person shall be liable to the General Partner or the Fund or any of its subsidiaries or anyone for any reason whatsoever (including but not limited to (i) any act or omission by any Covered Person in connection with the conduct of the business of the General Partner or the Fund, that is determined by such Covered Person in good faith to be in or not opposed to the best interests of the General Partner or the Fund, (ii) any act or omission by any Covered Person based on the suggestions of any professional advisor of the General Partner or the Fund or any of its subsidiaries whom such Covered Person believes is authorized to make such suggestions on behalf of the General Partner or the Fund or any of its subsidiaries, (iii) any act or omission by the General Partner or the Fund or any of its subsidiaries, or (iv) any mistake, negligence, misconduct or bad faith of any broker or other agent of the General Partner or the Fund or any of its subsidiaries selected by Covered Person with reasonable care), unless any act or omission by such Covered Person constitutes willful misconduct or gross negligence by such Covered Person (as determined by a non-appealable judgment of a court of competent jurisdiction).

(c) Covered Persons may consult with legal counsel or accountants selected by such Covered Person and any act or omission by such Covered Person on behalf of the General Partner or the Fund or any of its subsidiaries or in furtherance of the business of the General Partner or the Fund or any of its subsidiaries in good faith in reliance on and in accordance with the advice of such counsel or accountants shall be full justification for the act or omission, and such Covered Person shall be fully protected in so acting or omitting to act if the counsel or accountants were selected with reasonable care.

(d) To the fullest extent permitted by law, the General Partner and the Fund and its subsidiaries shall indemnify and hold harmless Covered Persons (the “**Indemnified**

Party”), from and against any and all claims, liabilities, damages, losses, costs and expenses, including amounts paid in satisfaction of judgments, in compromises and settlements, as fines and penalties and legal or other costs and expenses of investigating or defending against any claim or alleged claim, of any nature whatsoever, known or unknown, liquidated or unliquidated, that are incurred by any Indemnified Party and arise out of or in connection with the business of the General Partner or the Fund or any of its subsidiaries, any investment made under or in connection with this Agreement, or the performance by the Indemnified Party of Covered Person’s responsibilities hereunder and against all taxes, charges, duties or levies incurred by such Covered Person or any Indemnified Party in connection with the General Partner or the Fund or any of its subsidiaries, provided that an Indemnified Party shall not be entitled to indemnification hereunder to the extent the Indemnified Party’s conduct constitutes willful misconduct or gross negligence (as determined by a non-appealable judgment of a court of competent jurisdiction). The termination of any proceeding by settlement, judgment, order or upon a plea of nolo contendere or its equivalent shall not, of itself, create a presumption that the Indemnified Party’s conduct constituted willful misconduct or gross negligence.

(e) Expenses incurred by an Indemnified Party in defense or settlement of any claim that shall be subject to a right of indemnification hereunder, shall be advanced by the General Partner prior to the final disposition thereof upon receipt of an undertaking by or on behalf of the Indemnified Party to repay the amount advanced to the extent that it shall be determined ultimately that the Indemnified Party is not entitled to be indemnified hereunder.

(f) The right of any Indemnified Party to the indemnification provided herein shall be cumulative of, and in addition to, any and all rights to which the Indemnified Party may otherwise be entitled by contract or as a matter of law or equity and shall be extended to the Indemnified Party’s successors, assigns and legal representatives.

(g) The provisions of this Section are expressly intended to confer benefits upon Covered Persons and such provisions shall remain operative and in full force and effect regardless of the expiration or any termination of this Agreement.

(h) In no event shall any Covered Person be liable for special, exemplary, punitive, indirect, or consequential loss, or damage of any kind whatsoever, including without limitation lost profits.

(i) No Covered Person shall be liable hereunder for any settlement of any action or claim effected without its written consent thereto.

(j) Pursuant to the exculpation and indemnification provisions described above, the Investment Advisor and each Indemnified Party will generally not be liable to the General Partner or the Fund for any act or omission (or alleged act or omission), absent bad faith, willful misconduct, fraud or gross negligence, and the General Partner and the Fund will generally be required to indemnify such persons against any Losses they may incur by reason of any act or omission (or alleged act or omission) related to the General Partner, the Fund or its subsidiaries, absent bad faith, willful misconduct, fraud or gross negligence. As a result of these provisions, the General Partner, the Fund and its subsidiaries, as applicable (not the Investment

Advisor or any other Indemnified Party) will be responsible for any Losses resulting from trading errors and similar human errors, absent bad faith, willful misconduct, fraud or gross negligence or the ability to waive or limit such Losses under applicable law. Trading errors might include, for example, keystroke errors that occur when entering trades into an electronic trading system or typographical or drafting errors related to derivatives contracts or similar agreements. Given the volume of transactions executed by the Investment Advisor and its affiliates on behalf of the Fund and/or its subsidiaries, the General Partner acknowledges that trading errors (and similar errors) will occur and that the General Partner will be responsible for any resulting Losses, even if such Losses result from the negligence (but not gross negligence) of the Investment Advisor or its affiliates.

12. Activities of the Investment Advisor and Others. The Investment Advisor, and its affiliates may engage, simultaneously with their investment management activities on behalf of the Fund, in other businesses, and may render services similar to those described in this Agreement to other individuals, companies, trusts or persons, and shall not by reason of such engaging in other businesses or rendering of services for others be deemed to be acting in conflict with the interests of the Fund. Notwithstanding the foregoing, the Investment Advisor and its affiliates shall devote as much time to provide advisory service to the General Partner with respect to the management of the Fund's assets as the Investment Advisor deems necessary and appropriate. In addition, the Investment Advisor or any of its affiliates, in their individual capacities, may engage in securities transactions which may be different than, and contrary to, the investment advice provided by the Investment Advisor to the General Partner with respect to the Fund. The Investment Advisor may give advice and recommend securities to, or buy securities for, accounts and other clients, which advice or securities may differ from advice given to, or securities recommended or bought for, the Fund, even though their investment objectives may be the same or similar. The Investment Advisor may recommend transactions in securities and other assets in which the Investment Advisor has an interest, including securities or other assets issued by affiliates of the Investment Manager. Each of the General Partner and the Fund acknowledges that it has received, reviewed and had an opportunity with respect to (a) a copy of Part 2 of the Investment Advisor's Form ADV, and (b) the supplemental disclosures attached hereto as Exhibit A, each of which further describes conflicts of interest relating to the Investment Advisor, its affiliates and their respective advised accounts.

13. Term. This Agreement shall remain in effect through an initial term concluding December 31, 2017 and shall be automatically extended for additional one-year terms thereafter, except that it may be terminated by the Investment Advisor, on the one hand, or by the General Partner and the Fund, on the other hand, upon at least 90 days' prior written notice to the General Partner or the Investment Advisor, as the case may be, prior to General Partner's fiscal year-end.

14. Miscellaneous.

(a) Notices. Any notice, consent or other communication made or given in connection with this Agreement shall be in writing and shall be deemed to have been duly given when delivered by hand or facsimile or five days after mailed by certified mail, return receipt requested, as follows:

If to the Investment Advisor, to:

Highland Capital Management, L.P.
300 Crescent Court, Suite 700
Dallas, Texas 75201
Telephone Number: (972) 628-4100
Facsimile Number: (972) 628-4147

If to the General Partner or the Fund, to:

Charitable DAF GP, LLC
4140 Park Lake Avenue, Suite 600
Raleigh, North Carolina 27612
Attention: Grant Scott
Telephone Number: (919) 854-1407
Facsimile Number: (919) 854-1401

(b) Entire Agreement. This Agreement contains all of the terms agreed upon or made by the parties relating to the subject matter of this Agreement, and supersedes all prior and contemporaneous agreements, negotiations, correspondence, undertakings and communications of the parties, oral or written, respecting such subject matter.

(c) Amendments and Waivers. No provision of this Agreement may be amended, modified, waived or discharged except as agreed to in writing by the parties. No amendment to this Agreement may be made without first obtaining the required approval from the Fund. The failure of a party to insist upon strict adherence to any term of this Agreement on any occasion shall not be considered a waiver thereof or deprive that party of the right thereafter to insist upon strict adherence to that term or any other term of this Agreement.

(d) Binding Effect; Assignment. This Agreement shall be binding upon and inure to the benefit of the General Partner, the Fund, the Investment Advisor, each Indemnified Party and their respective successors and permitted assigns. Any person that is not a signatory to this Agreement but is nevertheless conferred any rights or benefits hereunder (*e.g.*, officers, partners and personnel of the Investment Advisor and others who are entitled to indemnification hereunder) shall be entitled to such rights and benefits as if such person were a signatory hereto, and the rights and benefits of such person hereunder may not be impaired without such person's express written consent. No party to this Agreement may assign (as such term is defined under the U.S. Investment Advisers Act of 1940, as amended) all or any portion of its rights, obligations or liabilities under this Agreement without the prior written consent of the other parties to this Agreement; provided; however, that the Investment Advisor may assign all or any portion of its rights, obligations and liabilities hereunder to any of its affiliates at its discretion.

(e) Governing Law. Notwithstanding the place where this Agreement may be executed by any of the parties thereto, the parties expressly agree that all terms and provisions hereof shall be governed by and construed in accordance with the laws of the State of Texas applicable to agreements made and to be performed in that State.

(f) Jurisdiction; Venue; Waiver of Jury Trial. The Parties hereby agree that any action, claim, litigation, or proceeding of any kind whatsoever against any other Party in any way arising from or relating to this Agreement and all contemplated transactions, including claims sounding in contract, equity, tort, fraud and statute (“**Dispute**”) shall be submitted exclusively to the U.S. District Court for the Northern District of Texas or, if such court does not have subject matter jurisdiction, the courts of the State of Texas sitting in Dallas County, and any appellate court thereof (“**Enforcement Court**”). Each Party irrevocably and unconditionally submits to the exclusive personal and subject matter jurisdiction of the Enforcement Court for any Dispute and agrees to bring any Dispute only in the Enforcement Court. Each Party further agrees it shall not commence any Dispute in any forum, including administrative, arbitration, or litigation, other than the Enforcement Court. Each Party agrees that a final judgment in any such action, litigation, or proceeding is conclusive and may be enforced in other jurisdictions by suit on the judgment or in any other manner provided by law.

EACH PARTY IRREVOCABLY AND UNCONDITIONALLY WAIVES, TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW, ANY RIGHT IT MAY HAVE TO A TRIAL BY JURY IN ANY LEGAL ACTION, PROCEEDING, CAUSE OF ACTION OR COUNTERCLAIM ARISING OUT OF OR RELATING TO THIS AGREEMENT, INCLUDING ANY EXHIBITS, SCHEDULES, AND APPENDICES ATTACHED TO THIS AGREEMENT, OR THE TRANSACTIONS CONTEMPLATED HEREBY. EACH PARTY CERTIFIES AND ACKNOWLEDGES THAT (A) NO REPRESENTATIVE OF THE OTHER PARTY HAS REPRESENTED, EXPRESSLY OR OTHERWISE, THAT THE OTHER PARTY WOULD NOT SEEK TO ENFORCE THE FOREGOING WAIVER IN THE EVENT OF A LEGAL ACTION, (B) IT HAS CONSIDERED THE IMPLICATIONS OF THIS WAIVER, (C) IT MAKES THIS WAIVER KNOWINGLY AND VOLUNTARILY, AND (D) IT HAS BEEN INDUCED TO ENTER INTO THIS AGREEMENT BY, AMONG OTHER THINGS, THE MUTUAL WAIVERS AND CERTIFICATIONS IN THIS SECTION.

Nothing in this Section 14(f) shall be construed to limit either party’s right to obtain equitable or injunctive relief in a court of competent jurisdiction in appropriate circumstances.

(g) Headings. The headings contained in this Agreement are intended solely for convenience and shall not affect the rights of the parties to this Agreement.

(h) Counterparts. This Agreement may be signed in any number of counterparts with the same effect as if the signatures to each counterpart were upon a single instrument, and all such counterparts together shall be deemed an original of this Agreement.

(i) Survival. The provisions of Sections 8, 9, 10, 11 and 14 hereof shall survive the termination of this Agreement.

(j) Pronouns. All pronouns shall be deemed to refer to the masculine, feminine, neuter, singular or plural as the identity of the person or persons’ firm or company may require in the context thereof.

(k) Arm's-Length Agreement. The General Partner and the Fund have approved this Agreement and reviewed the activities described in Section 12 and in the Investment Advisor's Form ADV and the risks related thereto.

[Signature Page to Follow]

IN WITNESS WHEREOF the parties hereto have caused this Agreement to be executed
to be effective from the date first written above.

HIGHLAND CAPITAL MANAGEMENT, L.P.

By: Strand Advisors, Inc., its general partner

By: _____

Name: James Dondero

Title: President

Date: 6/21/17

CHARITABLE DAF GP, LLC

By: _____

Name: Grant J. Scott

Title: Managing Member

Date:

CHARITABLE DAF FUND, L.P.

By: Charitable DAF GP, LLC, its general
partner

By: _____

Name: Grant J. Scott

Title: Managing Member

Date:

IN WITNESS WHEREOF the parties hereto have caused this Agreement to be executed
to be effective from the date first written above.

HIGHLAND CAPITAL MANAGEMENT, L.P.

By: Strand Advisors, Inc., its general partner

By: _____

Name: James Dondero

Title: President

Date:

CHARITABLE DAF GP, LLC

By: _____

Name: Grant J. Scott

Title: Managing Member

Date: 6/21/2017

CHARITABLE DAF FUND, L.P.

By: Charitable DAF GP, LLC, its general
partner

By: _____

Name: Grant J. Scott

Title: Managing Member

Date: 6/21/2017

EXHIBIT A

Supplemental Disclosures

Potential Conflicts of Interest

The scope of the activities of Highland Capital Management, L.P. (the “**Investment Adviser**”), its affiliates, and the funds and clients managed or advised by the Investment Adviser or any of its affiliates may give rise to conflicts of interest or other restrictions and/or limitations imposed on Charitable DAF Fund, L.P. and its subsidiaries (collectively, the “**Fund**”) in the future that cannot be foreseen or mitigated at this time. The following briefly summarizes some of these conflicts, but is not intended to be an exhaustive list of all such conflicts. Additional conflicts are described in the Investment Adviser’s Form ADV. You are urged to review the Investment Adviser’s Form ADV in its entirety prior to investing in the Fund.¹

Highland Group & Highland Accounts. None of the Investment Adviser, its affiliates and their respective officers, directors, shareholders, members, partners, personnel and employees (collectively, the “**Highland Group**”) is precluded from engaging in or owning an interest in other business ventures or investment activities of any kind, whether or not such ventures are competitive with the Fund. The Investment Adviser is permitted to manage other client accounts, and does manage other client accounts, some of which may have objectives similar or identical to those of the Fund, including other collective investment vehicles that may be managed by the Highland Group and in which the Investment Adviser or any of its affiliates may have an equity interest.

The Fund will be subject to a number of actual and potential conflicts of interest involving the Highland Group including, among other things, the fact that: (i) the Highland Group conducts substantial investment activities for accounts, funds, collateralized debt obligations and collateralized loan obligations that invest in leveraged loans (collectively, “**CDOs**”) and other vehicles managed by members of the Highland Group (collectively, “**Highland Accounts**”) in which the Fund has no interest; (ii) the Highland Group advises Highland Accounts, which utilize the same, similar or different methodologies as the Fund and may have financial incentives (including, without limitation, as it relates to the composition of investors in such funds and accounts or to the Highland Group’s compensation arrangements) to favor certain Highland Accounts over the Fund; (iii) the Highland Group may use the strategy described herein in certain Highland Accounts; (iv) the Investment Adviser may give advice and recommend securities to, or buy or sell securities for, the Fund, which advice or securities may differ from advice given to, or securities recommended or bought or sold for, Highland Accounts; (v) the Investment Adviser has the discretion, to the extent permitted under applicable law, to use its affiliates as service providers to the Fund and its portfolio investments; (vi) certain investors affiliated with the Highland Group may choose to personally invest only in certain funds advised by the Highland Group and the amounts invested by them in such funds is expected to vary significantly; (vii) the Highland Group and Highland Accounts may actively engage in transactions in the same securities sought by the

¹ The Investment Adviser’s latest Form ADV filed and Part 2 Brochures can be accessed here: https://adviserinfo.sec.gov/IAPD/IAPDFirmSummary.aspx?ORG_PK=110126

Fund and, therefore, may compete with the Fund for investment opportunities or may hold positions opposite to positions maintained by the Fund; (viii) the Fund may invest in CDOs and Highland Accounts managed by members of the Highland Group; and (ix) the Investment Adviser will devote to the Fund only as much time as the Investment Adviser deems necessary and appropriate to manage the Fund's business.

The Investment Adviser undertakes to resolve conflicts in a fair and equitable basis, which in some instances may mean a resolution that would not maximize the benefit to the Fund's investors.

Allocation of Trading Opportunities. It is the policy of the Investment Adviser to allocate investment opportunities fairly and equitably over time. This means that such opportunities will be allocated among those accounts for which participation in the respective opportunity is considered appropriate, taking into account, among other considerations: (i) fiduciary duties owed to the accounts; (ii) the primary mandate of the accounts; (iii) the capital available to the accounts; (iv) any restrictions on the accounts and the investment opportunity; (v) the sourcing of the investment, size of the investment and amount of follow-on available related to the investment; (vi) whether the risk-return profile of the proposed investment is consistent with the account's objectives and program, whether such objectives are considered in light of the specific investment under consideration or in the context of the portfolio's overall holdings; (vii) the potential for the proposed investment to create an imbalance in the account's portfolio (taking into account expected inflows and outflows of capital); (viii) liquidity requirements of the account; (ix) potentially adverse tax consequences; (x) regulatory and other restrictions that would or could limit an account's ability to participate in a proposed investment; and (xi) the need to re-size risk in the account's portfolio.

The Investment Adviser has the authority to allocate trades to multiple Highland Accounts on an average price basis or on another basis it deems fair and equitable. Similarly, if an order for any accounts cannot be fully allocated under prevailing market conditions, the Investment Adviser may allocate the trades among different accounts on a basis it considers fair and equitable over time. One or more of the foregoing considerations may (and are often expected to) result in allocations among the Fund and one or more Highland Accounts on other than a *pari passu* basis. The Investment Adviser will allocate investment opportunities across its accounts for which the opportunities are appropriate, consistent with (i) its internal conflict of interest and allocation policies and (ii) the requirements of the U.S. Investment Advisers Act of 1940, as amended. The Investment Adviser will seek to allocate investment opportunities among such entities in a manner that is fair and equitable over time and consistent with its allocation policy. However, there is no assurance that such investment opportunities will be allocated to the Fund fairly or equitably in the short-term or over time and there can be no assurance that the Fund will be able to participate in all investment opportunities that are suitable for it.

The Investment Adviser and/or its affiliates may open "average price" accounts with brokers. In an "average price" account, purchase and sale orders placed during a trading day for the Fund, the Highland Accounts or affiliates of the Investment Adviser are combined, and securities bought and sold pursuant to such orders are allocated among such accounts on an average price basis.

Highland Group Trading. As part of their regular business, the members of the Highland Group hold, purchase, sell, trade or take other related actions both for their respective accounts and for the accounts of their respective clients, on a principal or agency basis, with respect to loans, securities and other investments and financial instruments of all types. The members of the Highland Group also provide investment advisory services, among other services, and engage in private equity, real estate and capital markets oriented investment activities. The members of the Highland Group will not be restricted in their performance of any such services or in the types of debt or equity investments which they may make. The members of the Highland Group may have economic interests in or other relationships with obligors or issuers in whose obligations or securities or credit exposures the Fund may invest. In particular, such persons may make and/or hold an investment in an obligor's or issuer's securities that may be *pari passu*, senior or junior in ranking to an investment in such obligor's or issuer's securities made and/or held by the Fund or in which partners, security holders, members, officers, directors, agents, personnel or employees of such persons serve on boards of directors or otherwise have ongoing relationships. Each of such ownership and other relationships may result in securities laws restrictions on transactions in such securities by the Fund and otherwise create conflicts of interest for the Fund. In such instances, the members of the Highland Group may in their discretion make investment recommendations and decisions that may be the same as or different from those made with respect to the Fund's investments. In connection with any such activities described above, the members of the Highland Group may hold, purchase, sell, trade or take other related actions in securities or investments of a type that may be suitable to investments for the Fund. The members of the Highland Group will not be required to offer such securities or investments to the Fund or provide notice of such activities to the Fund. In addition, in managing the Fund's portfolio, the Investment Adviser may take into account its relationship or the relationships of its affiliates with obligors and their respective affiliates, which may create conflicts of interest. Furthermore, in connection with actions taken in the ordinary course of business of the Investment Adviser in accordance with its fiduciary duties to its other clients, the Investment Adviser may take, or be required to take, actions which adversely affect the interests of the Fund.

The Highland Group has invested and may continue to invest in investments that would also be appropriate for the Fund. Such investments may be different from those made by the Fund. The Highland Group does not have any duty, in making or maintaining such investments, to act in a way that is favorable to the Fund or to offer any such opportunity to the Fund, subject to the Investment Adviser's internal allocation policy. The investment policies, fee arrangements and other circumstances applicable to such other accounts and investments may vary from those applicable to the Fund and its investments. The Highland Group may also provide advisory or other services for a customary fee with respect to investments made or held by the Fund, and neither the Fund nor its investors shall have any right to such fees. The Highland Group may also have ongoing relationships with, render services to or engage in transactions with other clients who make investments of a similar nature to those of the Fund, and with companies whose securities or properties are acquired by the Fund.

As further described below, in connection with the foregoing activities the Highland Group may from time to time come into possession of material nonpublic information that limits the ability of the Investment Adviser to effect a transaction for the Fund, and the Fund's investments may be constrained as a consequence of the Investment Adviser's inability to use such information for

advisory purposes or otherwise to effect transactions that otherwise may have been initiated on behalf of its clients, including the Fund.

Although the professional staff of the Investment Adviser will devote as much time to the Fund as the Investment Adviser deems appropriate to perform its duties in accordance with the Fund's advisory agreement and in accordance with reasonable commercial standards, the staff may have conflicts in allocating its time and services among the Fund and the Investment Adviser's other accounts.

Various Activities of the Investment Adviser and its Affiliates. The directors, officers, personnel, employees and agents of the Investment Adviser and its affiliates may, subject to applicable law, serve as directors (whether supervisory or managing), officers, personnel, employees, partners, agents, nominees or signatories or provide banking, agency, insurance and/or other services, and receive arm's length fees in connection with such services, for the Fund or its investments or other entities that operate in the same or a related line of business as the, for other clients managed by the Investment Adviser or its affiliates, or for any obligor or issuer in respect of the CDOs, and the Fund shall have no right to any such fees. In serving in these multiple capacities, they may have obligations to such other clients or investors in those entities, the fulfillment of which may not be in the best interests of the Fund. The Fund may compete with other Highland Accounts for capital and investment opportunities.

There is no limitation or restriction on the Investment Adviser or any of its affiliates with regard to acting as investment adviser or collateral manager (or in a similar role) to other parties or persons. This and other future activities of the Investment Adviser and/or its affiliates may give rise to additional conflicts of interest. Such conflicts may relate to obligations that the Investment Adviser's investment committee, the Investment Adviser or its affiliates have to other clients.

The Investment Adviser and its affiliates may participate in creditors or other committees with respect to the bankruptcy, restructuring or workout of an investment of the Fund or another account. In such circumstances, the Investment Adviser or its affiliates may take positions on behalf of themselves or another account that are adverse to the interests of the Fund.

The Investment Adviser and/or its affiliates may act as an underwriter, arranger or placement agent, or otherwise participate in the origination, structuring, negotiation, syndication or offering of CDOs, Highland Accounts and other investments purchased by the Fund. Such transactions shall be subject to fees that are intended to be no greater than arm's-length fees, and the Fund shall have no right to any such fees. There is no expectation for preferential access to transactions involving CDOs and Highland Accounts that are underwritten, originated, arranged or placed by the Investment Adviser and/or its affiliates and the Fund shall not have any right to any such fees.

Investments in Highland Accounts Managed by the Investment Manager or its Affiliates. The Fund may invest a significant portion of its capital in Highland Accounts. The Investment Adviser or its affiliates will receive senior and subordinated management fees and, in some cases, a performance-based allocation or fee with respect to its role as general partner and/or manager of the Highland Accounts. If the Fund invests in Highland Accounts in secondary transactions, the Fund will indirectly pay the fees (senior and subordinated) of such Highland Accounts and any

carried interest. If the Fund provides all of the equity for a Highland Account, there may be no third party with whom the amount of such fees, expenses and carried interest can be negotiated on an arm's-length basis. The Investment Adviser or its affiliates will have conflicting division of loyalties and responsibilities regarding the Fund and a Highland Account, and certain other conflicts of interest would be inherent in the situation. There can be no assurance that the interests of the Fund would not be subordinated to those of a Highland Account or to other interests of the Investment Adviser.

Multiple Levels of Fees. The Investment Adviser and the Highland Accounts are expected to impose management fees, other administrative fees, carried interest and other performance allocations on realized and unrealized appreciation in the value of the assets managed and other income. This may result in greater expense than if investors in the Fund were able to invest directly in the Highland Accounts or their respective underlying investments. Investors in the Fund should take into account that the return on their investment will be reduced to the extent of both levels of fees. The general partner or manager of a Highland Account may receive the economic benefit of certain fees from its portfolio companies for services and in connection with unconsummated transactions (e.g., break-up, placement, monitoring, directors', organizational and set-up fees and financial advisory fees).

Cross Transactions and Principal Transactions. The Investment Adviser may effect client cross-transactions where the Investment Adviser causes a transaction to be effected between the Fund and another client advised by it or any of its affiliates. The Investment Adviser may engage in a client cross-transaction involving the Fund any time that the Investment Adviser believes such transaction to be fair to the Fund and such other client.

The Investment Adviser may effect principal transactions where the Fund acquires securities from or sells securities to the Investment Adviser and/or its affiliates, in each case in accordance with applicable law, which will include the Investment Adviser obtaining independent consent on behalf of the Fund prior to engaging in any such principal transaction between the Fund and the Investment Adviser or its affiliates.

The Investment Adviser may advise the Fund to acquire or dispose of securities in cross trades between the Fund and other clients of the Investment Adviser or its affiliates in accordance with applicable legal and regulatory requirements. In addition, the Fund may invest in securities of obligors or issuers in which the Investment Adviser and/or its affiliates have a debt, equity or participation interest, and the holding and sale of such investments by the Fund may enhance the profitability of the Investment Adviser's own investments in such companies. Moreover, the Fund may invest in assets originated by the Investment Adviser or its affiliates. In each such case, the Investment Adviser and such affiliates may have a potentially conflicting division of loyalties and responsibilities regarding the Fund and the other parties to such trade. Under certain circumstances, the Investment Adviser and its affiliates may determine that it is appropriate to avoid such conflicts by selling a security at a fair value that has been calculated pursuant to the Investment Adviser's valuation procedures to another client managed or advised by the Investment Adviser or such affiliates. In addition, the Investment Adviser may enter into agency cross-transactions where it or any of its affiliates acts as broker for the Fund and for the other party to the transaction, to the extent permitted under applicable law. The Investment Adviser may obtain independent consent

in writing on behalf of the Fund, which consent may be provided by the managing member of the General Partner or any other independent party on behalf of the Fund, if any such transaction requires the consent of the Fund under Section 206(3) of the U.S. Investment Advisers Act of 1940, as amended.

Material Non-Public Information. There are generally no ethical screens or information barriers among the Investment Adviser and certain of its affiliates of the type that many firms implement to separate persons who make investment decisions from others who might possess material, non-public information that could influence such decisions. If the Investment Adviser, any of its personnel or its affiliates were to receive material non-public information about a particular obligor or issuer, or have an interest in causing the Fund to acquire a particular security, the Investment Adviser may be prevented from advising the Fund to purchase or sell such asset due to internal restrictions imposed on the Investment Adviser. Notwithstanding the maintenance of certain internal controls relating to the management of material nonpublic information, it is possible that such controls could fail and result in the Investment Adviser, or one of its investment professionals, buying or selling an asset while, at least constructively, in possession of material non-public information. Inadvertent trading on material nonpublic information could have adverse effects on the Investment Adviser's reputation, result in the imposition of regulatory or financial sanctions, and as a consequence, negatively impact the Investment Adviser's ability to perform its portfolio management services to the Fund. In addition, while the Investment Adviser and certain of its affiliates currently operate without information barriers on an integrated basis, such entities could be required by certain regulations, or decide that it is advisable, to establish information barriers. In such event, the Investment Adviser's ability to operate as an integrated platform could also be impaired, which would limit the Investment Adviser's access to personnel of its affiliates and potentially impair its ability to manage the Fund's investments.

Conflicts Relating to Equity and Debt Ownership by the Fund and Affiliates. In certain circumstances, the Fund and other client accounts may invest in securities or other instruments of the same issuer (or affiliated group of issuers) having a different seniority in the issuer's capital structure. If the issuer becomes insolvent, restructures or suffers financial distress, there may be a conflict between the interests in the Fund and those other accounts insofar as the issuer may be unable (or in the case of a restructuring prior to bankruptcy may be expected to be unable) to satisfy the claims of all classes of its creditors and security holders and the Fund and such other accounts may have competing claims for the remaining assets of such issuers. Under these circumstances it may not be feasible for the Investment Adviser to reconcile the conflicting interests in the Fund and such other accounts in a way that protects the Fund's interests. Additionally, the Investment Adviser or its nominees may in the future hold board or creditors' committee memberships which may require them to vote or take other actions in such capacities that might be conflicting with respect to certain funds managed by the Investment Adviser in that such votes or actions may favor the interests of one account over another account. Furthermore, the Investment Adviser's fiduciary responsibilities in these capacities might conflict with the best interests of the investors.

Other Fees. The Investment Adviser and its affiliates are permitted to receive consulting fees, investment banking fees, advisory fees, breakup fees, director's fees, closing fees, transaction fees and similar fees in connection with actual or contemplated investments. Such fees will not reduce

or offset the Management Fee. Conflicts of interest may also arise due to the allocation of such fees to or among co-investors.

Soft Dollars. The Investment Adviser's authority to use "soft dollar" credits generated by the Fund's securities transactions to pay for expenses that might otherwise have been borne by the Investment Adviser may give the Investment Adviser an incentive to select brokers or dealers for transactions, or to negotiate commission rates or other execution terms, in a manner that takes into account the soft dollar benefits received by the Investment Adviser rather than giving exclusive consideration to the interests of the Fund.

EXHIBIT 4

005721

Conformed to Federal Register version

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 276

[Release No. IA-5248; File No. S7-07-18]

RIN: 3235-AM36

Commission Interpretation Regarding Standard of Conduct for Investment Advisers

AGENCY: Securities and Exchange Commission.

ACTION: Interpretation.

SUMMARY: The Securities and Exchange Commission (the “SEC” or the “Commission”) is publishing an interpretation of the standard of conduct for investment advisers under the Investment Advisers Act of 1940 (the “Advisers Act” or the “Act”).

DATES: Effective July 12, 2019.

FOR FURTHER INFORMATION CONTACT: Olawalé Oriola, Senior Counsel; Matthew Cook, Senior Counsel; or Jennifer Songer, Branch Chief, at (202) 551-6787 or *IArules@sec.gov*, Investment Adviser Regulation Office, Division of Investment Management, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-8549.

SUPPLEMENTARY INFORMATION: The Commission is publishing an interpretation of the standard of conduct for investment advisers under the Advisers Act [15 U.S.C. 80b].¹

¹ 15 U.S.C. 80b. Unless otherwise noted, when we refer to the Advisers Act, or any paragraph of the Advisers Act, we are referring to 15 U.S.C. 80b of the United States Code, at which the Advisers Act is codified, and when we refer to rules under the Advisers Act, or any paragraph of these rules, we are referring to title 17, part 275 of the Code of Federal Regulations [17 CFR 275], in which these rules are published.

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I. INTRODUCTION

Under federal law, an investment adviser is a fiduciary.² The fiduciary duty an investment adviser owes to its client under the Advisers Act, which comprises a duty of care and a duty of loyalty, is important to the Commission's investor protection efforts. Also important to the Commission's investor protection efforts is the standard of conduct that a broker-dealer owes to a retail customer when it makes a recommendation of any securities transaction or investment strategy involving securities.³ Both investment advisers and broker-dealers play an important

² *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 194 (1963) ("SEC v. Capital Gains"); *see also infra* footnotes 34–44 and accompanying text; Investment Adviser Codes of Ethics, Investment Advisers Act Release No. 2256 (July 2, 2004); Compliance Programs of Investment Companies and Investment Advisers, Investment Advisers Act Release No. 2204 (Dec. 17, 2003); Electronic Filing by Investment Advisers; Proposed Amendments to Form ADV, Investment Advisers Act Release No. 1862 (Apr. 5, 2000). Investment advisers also have antifraud liability with respect to prospective clients under section 206 of the Advisers Act.

³ *See* Regulation Best Interest, Exchange Act Release No. 34-86031 (June 5, 2019) ("Reg. BI Adoption"). This final interpretation regarding the standard of conduct for investment advisers under the Advisers Act ("Final Interpretation") interprets section 206 of the Advisers Act, which is applicable to both SEC- and

role in our capital markets and our economy more broadly. Investment advisers and broker-dealers have different types of relationships with investors, offer different services, and have different compensation models. This variety is important because it presents investors with choices regarding the types of relationships they can have, the services they can receive, and how they can pay for those services.

On April 18, 2018, the Commission proposed rules and forms intended to enhance the required standard of conduct for broker-dealers⁴ and provide retail investors with clear and succinct information regarding the key aspects of their brokerage and advisory relationships.⁵ In connection with the publication of these proposals, the Commission published for comment a separate proposed interpretation regarding the standard of conduct for investment advisers under the Advisers Act (“Proposed Interpretation”).⁶ We stated in the Proposed Interpretation, and we continue to believe, that it is appropriate and beneficial to address in one release and reaffirm—and in some cases clarify—certain aspects of the fiduciary duty that an investment adviser owes

state-registered investment advisers, as well as other investment advisers that are exempt from registration or subject to a prohibition on registration under the Advisers Act. This Final Interpretation is intended to highlight the principles relevant to an adviser’s fiduciary duty. It is not, however, intended to be the exclusive resource for understanding these principles. Separately, in various circumstances, case law, statutes (such as the Employee Retirement Income Security Act of 1974 (“ERISA”)), and state law impose obligations on investment advisers. In some cases, these standards may differ from the standard enforced by the Commission.

⁴ Regulation Best Interest, Exchange Act Release No. 83062 (Apr. 18, 2018) (“Reg. BI Proposal”).

⁵ Form CRS Relationship Summary; Amendments to Form ADV; Required Disclosures in Retail Communications and Restrictions on the use of Certain Names or Titles, Investment Advisers Act Release No. 4888 (Apr. 18, 2018) (“Relationship Summary Proposal”).

⁶ Proposed Commission Interpretation Regarding Standard of Conduct for Investment Advisers; Request for Comment on Enhancing Investment Adviser Regulation, Investment Advisers Act Release No. 4889 (Apr. 18, 2018).

to its clients under section 206 of the Advisers Act.⁷ After considering the comments received, we are publishing this Final Interpretation with some clarifications to address comments.⁸

A. Overview of Comments

We received over 150 comment letters on our Proposed Interpretation from individuals, investment advisers, trade or professional organizations, law firms, consumer advocacy groups, and bar associations.⁹ Although many commenters generally agreed that the Proposed Interpretation was useful,¹⁰ some noted the challenges inherent in a Commission interpretation covering the broad scope of the fiduciary duty that an investment adviser owes to its clients under the Advisers Act.¹¹ Some of these commenters suggested modifications to or withdrawal

⁷ Further, the Commission recognizes that many advisers provide impersonal investment advice. *See, e.g.*, Advisers Act rule 203A-3 (defining “impersonal investment advice” in the context of defining “investment adviser representative” as “investment advisory services provided by means of written material or oral statements that do not purport to meet the objectives or needs of specific individuals or accounts”). This Final Interpretation does not address the extent to which the Advisers Act applies to different types of impersonal investment advice.

⁸ In the Proposed Interpretation, the Commission also requested comment on: licensing and continuing education requirements for personnel of SEC-registered investment advisers; delivery of account statements to clients with investment advisory accounts; and financial responsibility requirements for SEC-registered investment advisers, including fidelity bonds. We are continuing to evaluate the comments received in response.

⁹ Comment letters submitted in File No. S7-09-18 are available on the Commission’s website at <https://www.sec.gov/comments/s7-09-18/s70918.htm>. We also considered those comments submitted in File No. S7-08-18 (Comments on Relationship Summary Proposal) and File No. S7-07-18 (Comments on Reg. BI Proposal). Those comments are available on the Commission’s website at <https://www.sec.gov/comments/s7-08-18/s70818.htm> and <https://www.sec.gov/comments/s7-07-18/s70718.htm>.

¹⁰ *See, e.g.*, Comment Letter of North American Securities Administrators Association (Aug. 23, 2018) (“NASAA Letter”) (stating that the Proposed Interpretation is a “useful resource”); Comment Letter of Invesco (Aug. 7, 2018) (“Invesco Letter”) (agreeing that “there are benefits to having a clear statement regarding the fiduciary duty that applies to an investment adviser”).

¹¹ *See, e.g.*, Comment Letter of Pickard Djinis and Pisarri LLP (Aug. 7, 2018) (“Pickard Letter”) (noting the Commission’s “efforts to synthesize case law, legislative history, academic literature, prior Commission releases and other sources to produce a comprehensive explanation of the fiduciary standard of conduct”); Comment Letter of Dechert LLP (Aug. 7, 2018) (“Dechert Letter”) (“It is crucial that any universal interpretation of an adviser’s fiduciary duty be based on sound and time-tested principles. Given the difficulty of defining and encompassing all of an adviser’s responsibilities to its clients, while also accommodating the diversity of advisory arrangements, interpretive issues will arise in the future.”); Comment Letter of the Hedge Funds Subcommittee of the Federal Regulation of Securities Committee of the Business Law Section of the American Bar Association (Aug. 24, 2018) (“ABA Letter”) (“We note at

of the Proposed Interpretation.¹² Although most commenters agreed that an investment adviser's fiduciary duty comprises a duty of care and a duty of loyalty, as described in the Proposed Interpretation, they had differing views on aspects of the fiduciary duty and in some cases sought clarification on its application.¹³

Some commenters requested that we adopt rule text instead.¹⁴ The relationship between an investment adviser and its client has long been based on fiduciary principles not generally set forth in specific statute or rule text. We believe that this principles-based approach should continue as it expresses broadly the standard to which investment advisers are held while allowing them flexibility to meet that standard in the context of their specific services. In our view, adopting rule text is not necessary to achieve our goal in this Final Interpretation of reaffirming and in some cases clarifying certain aspects of the fiduciary duty.

the outset that it is difficult to capture the nature of an investment adviser's fiduciary duty in a broad statement that has universal applicability.”).

¹² See, e.g., Comment Letter of L.A. Schnase (Jul. 30, 2018) (urging the Commission not to issue the Proposed Interpretation in final form, or at least not without substantial rewriting or reshaping); Comment Letter of Money Management Institute (Aug. 7, 2018) (“MMI Letter”) (urging the Commission to “revise the interpretation so that it reflects the common law principles in which an investment adviser's fiduciary duty is grounded”); Dechert Letter (recommending that we withdraw the Proposed Interpretation and instead rely on existing authority and sources of law, as well as existing Commission practices for providing interpretive guidance, in order to define the source and scope of an investment adviser's fiduciary duty).

¹³ See, e.g., Comment Letter of Cambridge Investment Research Inc. (Aug. 7, 2018) (“Cambridge Letter”) (stating that “greater clarity on all aspects of an investment adviser's fiduciary duty will improve the ability to craft such policies and procedures, as well as support the elimination of confusion for retail clients and investment professionals”); Comment Letter of Institutional Limited Partners Association (Aug. 6, 2018) (“ILPA Letter 1”) (“Interpretation will provide more certainty regarding the fiduciary duties owed by private fund advisers to their clients.”); Comment Letter of New York City Bar Association (Jun. 26, 2018) (“NY City Bar Letter”) (stating that the uniform interpretation of an investment adviser's fiduciary duty is necessary).

¹⁴ Some commenters suggested that we codify the Proposed Interpretation. See, e.g., Comment Letter of Roy Tanga (Apr. 25, 2018); Comment Letter of Financial Engines (Aug. 6, 2018) (“Financial Engines Letter”); ILPA Letter 1; Comment Letter of AARP (Aug. 7, 2018) (“AARP Letter”); Comment Letter of Gordon Donohue (Aug. 6, 2018); Comment Letter of Financial Planning Coalition (Aug. 7, 2018) (“FPC Letter”).

II. INVESTMENT ADVISERS' FIDUCIARY DUTY

The Advisers Act establishes a federal fiduciary duty for investment advisers.¹⁵ This fiduciary duty is based on equitable common law principles and is fundamental to advisers' relationships with their clients under the Advisers Act.¹⁶ The investment adviser's fiduciary duty is broad and applies to the entire adviser-client relationship.¹⁷ The fiduciary duty to which advisers are subject is not specifically defined in the Advisers Act or in Commission rules, but reflects a Congressional recognition "of the delicate fiduciary nature of an investment advisory relationship" as well as a Congressional intent to "eliminate, or at least to expose, all conflicts of interest which might incline an investment adviser—consciously or unconsciously—to render advice which was not disinterested."¹⁸ An adviser's fiduciary duty is imposed under the

¹⁵ *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 17 (1979) ("Transamerica Mortgage v. Lewis") ("§ 206 establishes federal fiduciary standards to govern the conduct of investment advisers.") (quotation marks omitted); *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462, 471, n.11 (1977) (in discussing SEC v. Capital Gains, stating that the Supreme Court's reference to fraud in the "equitable" sense of the term was "premised on its recognition that Congress intended the Investment Advisers Act to establish federal fiduciary standards for investment advisers"); SEC v. Capital Gains, *supra* footnote 2; Amendments to Form ADV, Investment Advisers Act Release No. 3060 (July 28, 2010) ("Investment Advisers Act Release 3060") ("Under the Advisers Act, an adviser is a fiduciary whose duty is to serve the best interests of its clients, which includes an obligation not to subrogate clients' interests to its own," citing Proxy Voting by Investment Advisers, Investment Advisers Act Release No. 2106 (Jan. 31, 2003) ("Investment Advisers Act Release 2106")).

¹⁶ See SEC v. Capital Gains, *supra* footnote 2 (discussing the history of the Advisers Act, and how equitable principles influenced the common law of fraud and changed the suits brought against a fiduciary, "which Congress recognized the investment adviser to be").

¹⁷ The Commission has previously recognized the broad scope of section 206 of the Advisers Act in a variety of contexts. See, e.g., Investment Advisers Act Release 2106, *supra* footnote 15; Timbervest, LLC, et al., Advisers Act Release No. 4197 (Sept. 17, 2015) (Commission Opinion) ("[O]nce an investment advisory relationship is formed, the Advisers Act does not permit an adviser to exploit that fiduciary relationship by defrauding his client in any investment transaction connected to the advisory relationship."); see also SEC v. Lauer, 2008 WL 4372896, at 24 (S.D. Fla. Sept. 24, 2008) ("Unlike the antifraud provisions of the Securities Act and the Exchange Act, Section 206 of the Advisers Act does not require that the activity be 'in the offer or sale of any' security or 'in connection with the purchase or sale of any security.'"); Thomas P. Lemke & Gerald T. Lins, Regulation of Investment Advisers (2013 ed.), at § 2:30 ("[T]he SEC has ... applied [sections 206(1) and 206(2)] where fraud arose from an investment advisory relationship, even though the wrongdoing did not specifically involve securities.").

¹⁸ See SEC v. Capital Gains, *supra* footnote 2; see also In the Matter of Arleen W. Hughes, Exchange Act Release No. 4048 (Feb. 18, 1948) ("Arleen Hughes") (Commission Opinion) (discussing the relationship of

Advisers Act in recognition of the nature of the relationship between an investment adviser and a client and the desire “so far as is presently practicable to eliminate the abuses” that led to the enactment of the Advisers Act.¹⁹ It is made enforceable by the antifraud provisions of the Advisers Act.²⁰

An investment adviser’s fiduciary duty under the Advisers Act comprises a duty of care and a duty of loyalty.²¹ This fiduciary duty requires an adviser “to adopt the principal’s goals,

trust and confidence between the client and a dual registrant and stating that the registrant was a fiduciary and subject to liability under the antifraud provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934).

¹⁹ See SEC v. Capital Gains, *supra* footnote 2 (noting that the “declaration of policy” in the original bill, which became the Advisers Act, declared that “the national public interest and the interest of investors are adversely affected ... when the business of investment advisers is so conducted as to defraud or mislead investors, or to enable such advisers to relieve themselves of their fiduciary obligations to their clients. It is hereby declared that the policy and purposes of this title, in accordance with which the provisions of this title shall be interpreted, are to mitigate and, so far as is presently practicable to eliminate the abuses enumerated in this section”) (citing S. 3580, 76th Cong., 3d Sess., § 202 and Investment Trusts and Investment Companies, Report of the Securities and Exchange Commission, Pursuant to Section 30 of the Public Utility Holding Company Act of 1935, on Investment Counsel, Investment Management, Investment Supervisory, and Investment Advisory Services, H.R. Doc. No. 477, 76th Cong. 2d Sess., 1, at 28) (emphasis added).

²⁰ *Id.*; Transamerica Mortgage v. Lewis, *supra* footnote 15 (“[T]he Act’s legislative history leaves no doubt that Congress intended to impose enforceable fiduciary obligations.”). Some commenters questioned the standard to which the Advisers Act holds investment advisers. See, e.g., Comment Letter of Stark & Stark, PC (undated) (“The duty of care at common law and under the Advisers Act only requires that advisers not be negligent in performing their duties.”) (internal citation omitted); Comment Letter of Institutional Limited Partners Association (Nov. 21, 2018) (“ILPA Letter 2”) (“The Advisers Act standard is a lower simple ‘negligence’ standard.”). Claims arising under Advisers Act section 206(2) are not scienter-based and can be adequately pled with only a showing of negligence. *Robare Group, Ltd., et al. v. SEC*, 922 F.3d 468, 472 (D.C. Cir. 2019) (“Robare v. SEC”); *SEC v. Steadman*, 967 F.2d 636, 643, n.5 (D.C. Cir. 1992) (citing SEC v. Capital Gains, *supra* footnote 2) (“[A] violation of § 206(2) of the Investment Advisers Act may rest on a finding of simple negligence.”); *SEC v. DiBella*, 587 F.3d 553, 567 (2d Cir. 2009) (“the government need not show intent to make out a section 206(2) violation”); *SEC v. Gruss*, 859 F. Supp. 2d 653, 669 (S.D.N.Y. 2012) (“Claims arising under Section 206(2) are not scienter-based and can be adequately pled with only a showing of negligence.”). However, claims arising under Advisers Act section 206(1) require scienter. See, e.g., *Robare v. SEC*; *SEC v. Moran*, 922 F. Supp. 867, 896 (S.D.N.Y. 1996); *Carroll v. Bear, Stearns & Co.*, 416 F. Supp. 998, 1001 (S.D.N.Y. 1976).

²¹ See, e.g., Investment Advisers Act Release 2106, *supra* footnote 15. These duties were generally recognized by commenters. See, e.g., Comment Letter of Consumer Federation of America (Aug. 7, 2018) (“CFA Letter”); Comment Letter of the Investment Adviser Association (Aug. 6, 2018) (“IAA Letter”); Comment Letter of Investments & Wealth Institute (Aug. 6, 2018); Comment Letter of Raymond James (Aug. 7, 2018); FPC Comment Letter. But see Dechert Letter (questioning the sufficiency of support for a duty of care).

objectives, or ends.”²² This means the adviser must, at all times, serve the best interest of its client and not subordinate its client’s interest to its own. In other words, the investment adviser cannot place its own interests ahead of the interests of its client. This combination of care and loyalty obligations has been characterized as requiring the investment adviser to act in the “best interest” of its client at all times.²³ In our view, an investment adviser’s obligation to act in the best interest of its client is an overarching principle that encompasses both the duty of care and the duty of loyalty. As discussed in more detail below, in our view, the duty of care requires an investment adviser to provide investment advice in the best interest of its client, based on the client’s objectives. Under its duty of loyalty, an investment adviser must eliminate or make full and fair disclosure of all conflicts of interest which might incline an investment adviser—consciously or unconsciously—to render advice which is not disinterested such that a client can provide informed consent to the conflict.²⁴ We believe this is another part of an investment adviser’s obligation to act in the best interest of its client.

A. Application of Duty Determined by Scope of Relationship

An adviser’s fiduciary duty is imposed under the Advisers Act in recognition of the

²² Arthur B. Laby, *The Fiduciary Obligations as the Adoption of Ends*, 56 Buffalo Law Review 99 (2008); *see also* Restatement (Third) of Agency, §2.02 Scope of Actual Authority (2006) (describing a fiduciary’s authority in terms of the fiduciary’s reasonable understanding of the principal’s manifestations and objectives).

²³ Investment Advisers Act Release 3060, *supra* footnote 15 (adopting amendments to Form ADV and stating that “under the Advisers Act, an adviser is a fiduciary whose duty is to serve the best interests of its clients, which includes an obligation not to subrogate clients’ interests to its own,” citing Investment Advisers Act Release 2106, *supra* footnote 15). *See SEC v. Tambone*, 550 F.3d 106, 146 (1st Cir. 2008) (“SEC v. Tambone”) (“Section 206 imposes a fiduciary duty on investment advisers to act at all times in the best interest of the fund...”); *SEC v. Moran*, 944 F. Supp. 286, 297 (S.D.N.Y. 1996) (“SEC v. Moran”) (“Investment advisers are entrusted with the responsibility and duty to act in the best interest of their clients.”). Although most commenters agreed that an adviser has an obligation to act in its client’s best interest, some questioned whether the Proposed Interpretation appropriately considered the best interest obligation as part of the duty of care, or whether it instead should be considered part of the duty of loyalty. *See, e.g.*, MMI Letter; Comment Letter of Investment Company Institute (Aug. 7, 2018) (“ICI Letter”).

²⁴ *See infra* footnotes 67-70 and accompanying text for a more detailed discussion of informed consent and how it is generally considered on an objective basis and may be inferred.

nature of the relationship between an adviser and its client—a relationship of trust and confidence.²⁵ The adviser’s fiduciary duty is principles-based and applies to the entire relationship between the adviser and its client. The fiduciary duty follows the contours of the relationship between the adviser and its client, and the adviser and its client may shape that relationship by agreement, provided that there is full and fair disclosure and informed consent.²⁶ With regard to the scope of the adviser-client relationship, we recognize that investment advisers provide a wide range of services, from a single financial plan for which a client may pay a one-time fee, to ongoing portfolio management for which a client may pay a periodic fee based on the value of assets in the portfolio. Investment advisers also serve a large variety of clients, from retail clients with limited assets and investment knowledge and experience to institutional clients with very large portfolios and substantial knowledge, experience, and analytical resources.²⁷ In our experience, the principles-based fiduciary duty imposed by the Advisers Act has provided sufficient flexibility to serve as an effective standard of conduct for investment advisers, regardless of the services they provide or the types of clients they serve.

Although all investment advisers owe each of their clients a fiduciary duty under the Advisers Act, that fiduciary duty must be viewed in the context of the agreed-upon scope of the

²⁵ See, e.g., Hearings on S. 3580 before Subcommittee of the Senate Committee on Banking and Currency, 76th Cong., 3d Sess. (leading investment advisers emphasized their relationship of “trust and confidence” with their clients); SEC v. Capital Gains, *supra* footnote 2 (citing same).

²⁶ Several commenters asked that we clarify that an adviser and its client can tailor the scope of the relationship to which the fiduciary duty applies through contract. See, e.g., MMI Letter; Financial Engines Letter; ABA Letter.

²⁷ This Final Interpretation also applies to automated advisers, which are often colloquially referred to as “robo-advisers.” Automated advisers, like all SEC-registered investment advisers, are subject to all of the requirements of the Advisers Act, including the requirement that they provide advice consistent with the fiduciary duty they owe to their clients. See Division of Investment Management, Robo Advisers, IM Guidance Update No. 2017-02 (Feb. 2017), *available at* <https://www.sec.gov/investment/im-guidance-2017-02.pdf> (describing Commission staff’s guidance as to three distinct areas under the Advisers Act that automated advisers should consider, due to the nature of their business model, in seeking to comply with their obligations under the Advisers Act).

relationship between the adviser and the client. In particular, the specific obligations that flow from the adviser's fiduciary duty depend upon what functions the adviser, as agent, has agreed to assume for the client, its principal. For example, the obligations of an adviser providing comprehensive, discretionary advice in an ongoing relationship with a retail client (*e.g.*, monitoring and periodically adjusting a portfolio of equity and fixed income investments with limited restrictions on allocation) will be significantly different from the obligations of an adviser to a registered investment company or private fund where the contract defines the scope of the adviser's services and limitations on its authority with substantial specificity (*e.g.*, a mandate to manage a fixed income portfolio subject to specified parameters, including concentration limits and credit quality and maturity ranges).²⁸

While the application of the investment adviser's fiduciary duty will vary with the scope of the relationship, the relationship in all cases remains that of a fiduciary to the client. In other words, an adviser's federal fiduciary duty may not be waived, though it will apply in a manner that reflects the agreed-upon scope of the relationship.²⁹ A contract provision purporting to waive the adviser's federal fiduciary duty generally, such as (i) a statement that the adviser will not act as a fiduciary, (ii) a blanket waiver of all conflicts of interest, or (iii) a waiver of any

²⁸ See, *e.g.*, *infra* text following footnote 35.

²⁹ Because an adviser's federal fiduciary obligations are enforceable through section 206 of the Advisers Act, we would view a waiver of enforcement of section 206 as implicating section 215(a) of the Advisers Act, which provides that "any condition, stipulation or provision binding any person to waive compliance with any provision of this title. . . shall be void." See also Restatement (Third) of Agency, § 8.06 Principal's Consent (2006) ("[T]he law applicable to relationships of agency as defined in § 1.01 imposes mandatory limits on the circumstances under which an agent may be empowered to take disloyal action. These limits serve protective and cautionary purposes. Thus, an agreement that contains general or broad language purporting to release an agent in advance from the agent's general fiduciary obligation to the principal is not likely to be enforceable. This is because a broadly sweeping release of an agent's fiduciary duty may not reflect an adequately informed judgment on the part of the principal; if effective, the release would expose the principal to the risk that the agent will exploit the agent's position in ways not foreseeable by the principal at the time the principal agreed to the release. In contrast, when a principal consents to specific transactions or to specified types of conduct by the agent, the principal has a focused opportunity to assess risks that are more readily identifiable.").

specific obligation under the Advisers Act, would be inconsistent with the Advisers Act,³⁰
regardless of the sophistication of the client.³¹

³⁰ See sections 206 and 215(a). Commenters generally agreed that a client cannot waive an investment adviser's fiduciary duty through agreement. See Dechert Letter; Comment Letter of Ropes & Gray LLP (Aug. 7, 2018) ("Ropes & Gray Letter"), at n.20; see also *supra* footnote 29. In the Proposed Interpretation, we stated that "the investment adviser cannot disclose or negotiate away, and the investor cannot waive, the federal fiduciary duty." One commenter disputed this broad statement, believing that it called into question "the ability of an investment adviser and client to define the scope of the adviser's services and duties." ABA Letter; see also Financial Engines Letter. We have modified this statement to clarify that a general waiver of the fiduciary duty would violate that duty and to provide examples of such a general waiver.

³¹ Some commenters mentioned a 2007 No-Action Letter in which staff indicated that whether a clause in an advisory agreement that purports to limit an adviser's liability under that agreement (a so-called "hedge clause") would violate sections 206(1) and 206(2) of the Advisers Act depends on all of the surrounding facts and circumstances. Heitman Capital Management, LLC, SEC Staff No-Action Letter (Feb. 12, 2007) ("Heitman Letter"). A few commenters indicated that the Heitman Letter expanded the ability of investment advisers to private funds, and potentially other sophisticated clients, to disclaim their fiduciary duties under state law in an advisory agreement. See, e.g., ILPA Letter 1; ILPA Letter 2. The commenters' descriptions of the Heitman Letter suggest that it may have been applied incorrectly. The Heitman Letter does not address the scope or substance of an adviser's federal fiduciary duty; rather, it addresses the extent to which hedge clauses may be misleading in violation of the Advisers Act's antifraud provisions. Another commenter agreed with this reading of the Heitman Letter. See Comment Letter of American Investment Council (Feb. 25, 2019). In response to these comments, we express below the Commission's views about an adviser's obligations under sections 206(1) and 206(2) of the Advisers Act with respect to the use of hedge clauses. Accordingly, because we are expressing our views in this Final Interpretation, the Heitman Letter is withdrawn.

This Final Interpretation makes clear that an adviser's federal fiduciary duty may not be waived, though its application may be shaped by agreement. This Final Interpretation does not take a position on the scope or substance of any fiduciary duty that applies to an adviser under applicable state law. See *supra* footnote 3. The question of whether a hedge clause violates the Advisers Act's antifraud provisions depends on all of the surrounding facts and circumstances, including the particular circumstances of the client (e.g., sophistication). In our view, however, there are few (if any) circumstances in which a hedge clause in an agreement with a retail client would be consistent with those antifraud provisions, where the hedge clause purports to relieve the adviser from liability for conduct as to which the client has a non-waivable cause of action against the adviser provided by state or federal law. Such a hedge clause generally is likely to mislead those retail clients into not exercising their legal rights, in violation of the antifraud provisions, even where the agreement otherwise specifies that the client may continue to retain its non-waivable rights. Whether a hedge clause in an agreement with an institutional client would violate the Advisers Act's antifraud provisions will be determined based on the particular facts and circumstances. To the extent that a hedge clause creates a conflict of interest between an adviser and its client, the adviser must address the conflict as required by its duty of loyalty.

B. Duty of Care

As fiduciaries, investment advisers owe their clients a duty of care.³² The Commission has discussed the duty of care and its components in a number of contexts.³³ The duty of care includes, among other things: (i) the duty to provide advice that is in the best interest of the client, (ii) the duty to seek best execution of a client's transactions where the adviser has the responsibility to select broker-dealers to execute client trades, and (iii) the duty to provide advice and monitoring over the course of the relationship.

1. Duty to Provide Advice that is in the Best Interest of the Client

The duty of care includes a duty to provide investment advice that is in the best interest of the client, including a duty to provide advice that is suitable for the client.³⁴ In order to

³² See Investment Advisers Act Release 2106, *supra* footnote 15 (stating that under the Advisers Act, “an adviser is a fiduciary that owes each of its clients duties of care and loyalty with respect to all services undertaken on the client’s behalf, including proxy voting,” which is the subject of the release, and citing SEC v. Capital Gains *supra* footnote 2, to support this point). This Final Interpretation does not address the specifics of how an investment adviser might satisfy its fiduciary duty when voting proxies. See also Restatement (Third) of Agency, § 8.08 (discussing the duty of care that an agent owes its principal as a matter of common law); Tamar Frankel & Arthur B. Laby, *The Regulation of Money Managers* (updated 2017) (“Advice can be divided into three stages. The first determines the needs of the particular client. The second determines the portfolio strategy that would lead to meeting the client’s needs. The third relates to the choice of securities that the portfolio would contain. The duty of care relates to each of the stages and depends on the depth or extent of the advisers’ obligation towards their clients.”).

³³ See, e.g., Suitability of Investment Advice Provided by Investment Advisers; Custodial Account Statements for Certain Advisory Clients, Investment Advisers Act Release No. 1406 (Mar. 16, 1994) (“Investment Advisers Act Release 1406”) (stating that advisers have a duty of care and discussing advisers’ suitability obligations); Interpretive Release Concerning the Scope of Section 28(e) of the Securities Exchange Act of 1934 and Related Matters, Exchange Act Release No. 23170 (Apr. 28, 1986) (“Exchange Act Release 23170”) (“an adviser, as a fiduciary, owes its clients a duty of obtaining the best execution on securities transactions”). We highlight certain contexts, but not all, in which the Commission has addressed the duty of care. See, e.g., Investment Advisers Act Release 2106, *supra* footnote 15.

³⁴ In 1994, the Commission proposed a rule that would have made express the fiduciary obligation of investment advisers to make only suitable recommendations to a client. Investment Advisers Act Release 1406, *supra* footnote 33. Although never adopted, the rule was designed, among other things, to reflect the Commission’s interpretation of an adviser’s *existing* suitability obligation under the Advisers Act. In addition, we do not cite Investment Advisers Act Release 1406 as the source of authority for the view we express here, which at least one comment letter suggested, but cite it merely to show that the Commission has long held this view. See Comment Letter of the Managed Funds Association and the Alternative Investment Management Association (Aug. 7, 2018) (indicating that the Commission’s failure to adopt the proposed suitability rule means “investment advisers are not subject to an express ‘suitability’ standard

provide such advice, an adviser must have a reasonable understanding of the client's objectives. The basis for such a reasonable understanding generally would include, for retail clients, an understanding of the investment profile, or for institutional clients, an understanding of the investment mandate.³⁵ The duty to provide advice that is in the best interest of the client based on a reasonable understanding of the client's objectives is a critical component of the duty of care.

Reasonable Inquiry into Client's Objectives

How an adviser develops a reasonable understanding will vary based on the specific facts and circumstances, including the nature of the client, the scope of the adviser-client relationship, and the nature and complexity of the anticipated investment advice.

In order to develop a reasonable understanding of a retail client's objectives, an adviser should, at a minimum, make a reasonable inquiry into the client's financial situation, level of financial sophistication, investment experience, and financial goals (which we refer to collectively as the retail client's "investment profile"). For example, an adviser undertaking to formulate a comprehensive financial plan for a retail client would generally need to obtain a

under existing regulation"). We believe that this obligation to make only suitable recommendations to a client is part of an adviser's fiduciary duty to act in the best interest of its client. Accordingly, an adviser must provide investment advice that is suitable for its client in providing advice that is in the best interest of its client. *See* SEC v. Tambone, *supra* footnote 23 ("Section 206 imposes a fiduciary duty on investment advisers to act at all times in the best interest of the fund...."); SEC v. Moran, *supra* footnote 23 ("Investment advisers are entrusted with the responsibility and duty to act in the best interest of their clients.").

³⁵ Several commenters stated that the duty to make a reasonable inquiry into a client's investment profile may not apply in the institutional client context. *See, e.g.,* Comment Letter of BlackRock, Inc. (Aug. 7, 2018); Comment Letter of Teachers Insurance and Annuity Association of America (Aug. 7, 2018); Comment Letter of Allianz Global Investors U.S. LLC (Aug. 7, 2018) ("Allianz Letter"); Comment Letter of John Hancock Life Insurance Company (U.S.A.) (Aug. 3, 2018). Accordingly, we are describing the duty as a duty to have a reasonable understanding of the client's objectives. While not every client will have an investment profile, every client will have objectives. For example, an institutional client's objectives may be ascertained through its investment mandate.

range of personal and financial information about the client such as current income, investments, assets and debts, marital status, tax status, insurance policies, and financial goals.³⁶

In addition, it will generally be necessary for an adviser to a retail client to update the client's investment profile in order to maintain a reasonable understanding of the client's objectives and adjust the advice to reflect any changed circumstances.³⁷ The frequency with which the adviser must update the client's investment profile in order to consider changes to any advice the adviser provides would itself turn on the facts and circumstances, including whether the adviser is aware of events that have occurred that could render inaccurate or incomplete the investment profile on which the adviser currently bases its advice. For instance, in the case of a financial plan where the investment adviser also provides advice on an ongoing basis, a change in the relevant tax law or knowledge that the client has retired or experienced a change in marital status could trigger an obligation to make a new inquiry.

By contrast, in providing investment advice to institutional clients, the nature and extent of the reasonable inquiry into the client's objectives generally is shaped by the specific investment mandates from those clients. For example, an investment adviser engaged to advise on an institutional client's investment grade bond portfolio would need to gain a reasonable understanding of the client's objectives within that bond portfolio, but not the client's objectives

³⁶ Investment Advisers Act Release 1406, *supra* footnote 33. After making a reasonable inquiry into the client's investment profile, it generally would be reasonable for an adviser to rely on information provided by the client (or the client's agent) regarding the client's financial circumstances, and an adviser should not be held to have given advice not in its client's best interest if it is later shown that the client had misled the adviser concerning the information on which the advice was based.

³⁷ Such updating would not be needed with one-time investment advice. In the Proposed Interpretation, we stated that an adviser "must" update a client's investment profile in order to adjust the advice to reflect any changed circumstances. We believe that any obligation to update a client's investment profile, like the nature and extent of the reasonable inquiry into a retail client's objectives, turns on what is reasonable under the circumstances. Accordingly, we have revised the wording of this statement in this Final Interpretation.

within its entire investment portfolio. Similarly, an investment adviser whose client is a registered investment company or a private fund would need to have a reasonable understanding of the fund's investment guidelines and objectives. For advisers acting on specific investment mandates for institutional clients, particularly funds, we believe that the obligation to update the client's objectives would not be applicable except as may be set forth in the advisory agreement.

Reasonable belief that advice is in the best interest of the client

An investment adviser must have a reasonable belief that the advice it provides is in the best interest of the client based on the client's objectives. The formation of a reasonable belief would involve considering, for example, whether investments are recommended only to those clients who can and are willing to tolerate the risks of those investments and for whom the potential benefits may justify the risks.³⁸ Whether the advice is in a client's best interest must be evaluated in the context of the portfolio that the adviser manages for the client and the client's objectives.

For example, when an adviser is advising a retail client with a conservative investment objective, investing in certain derivatives may be in the client's best interest when they are used to hedge interest rate risk or other risks in the client's portfolio, whereas investing in certain directionally speculative derivatives on their own may not. For that same client, investing in a particular security on margin may not be in the client's best interest, even if investing in that same security without the use of margin may be in the client's best interest. However, for

³⁸ Item 8 of Part 2A of Form ADV requires an investment adviser to describe its methods of analysis and investment strategies and disclose that investing in securities involves risk of loss which clients should be prepared to bear. This item also requires that an adviser explain the material risks involved for each significant investment strategy or method of analysis it uses and particular type of security it recommends, with more detail if those risks are significant or unusual. Accordingly, investment advisers are required to identify and explain certain risks involved in their investment strategies and the types of securities they recommend. An investment adviser needs to consider those same risks in determining the clients to which the adviser recommends those investments.

example, when advising a financially sophisticated client, such as a fund or other sophisticated client that has an appropriate risk tolerance, it may be in the best interest of the client to invest in such derivatives or in securities on margin, or to invest in other complex instruments or other products that may have limited liquidity.

Similarly, when an adviser is assessing whether high risk products—such as penny stocks or other thinly-traded securities—are in a retail client’s best interest, the adviser should generally apply heightened scrutiny to whether such investments fall within the retail client’s risk tolerance and objectives. As another example, complex products such as inverse or leveraged exchange-traded products that are designed primarily as short-term trading tools for sophisticated investors may not be in the best interest of a retail client absent an identified, short-term, client-specific trading objective and, to the extent that such products are in the best interest of a retail client initially, they would require daily monitoring by the adviser.³⁹

A reasonable belief that investment advice is in the best interest of a client also requires that an adviser conduct a reasonable investigation into the investment sufficient not to base its advice on materially inaccurate or incomplete information.⁴⁰ We have taken enforcement action where an investment adviser did not independently or reasonably investigate securities before recommending them to clients.⁴¹

³⁹ See Exchange-Traded Funds, Securities Act Release No. 10515 (June 28, 2018); SEC staff and FINRA, Investor Alert, Leveraged and Inverse ETFs: Specialized Products with Extra Risks for Buy-and-Hold Investors (Aug. 1, 2009); SEC Office of Investor Education and Advocacy, Investor Bulletin: Exchange-Traded Funds (ETFs) (Aug. 2012); *see also* FINRA Regulatory Notice 09-31, Non-Traditional ETFs – FINRA Reminds Firms of Sales Practice Obligations Relating to Leveraged and Inverse Exchange-Traded Funds (June 2009).

⁴⁰ See, e.g., Concept Release on the U.S. Proxy System, Investment Advisers Act Release No. 3052 (July 14, 2010) (indicating that a fiduciary “has a duty of care requiring it to make a reasonable investigation to determine that it is not basing its recommendations on materially inaccurate or incomplete information”).

⁴¹ See, e.g., In the Matter of Larry C. Grossman, Investment Advisers Act Release No. 4543 (Sept. 30, 2016) (Commission Opinion) (“*In re* Grossman”) (in connection with imposing liability on a principal of a

The cost (including fees and compensation) associated with investment advice would generally be one of many important factors—such as an investment product’s or strategy’s investment objectives, characteristics (including any special or unusual features), liquidity, risks and potential benefits, volatility, likely performance in a variety of market and economic conditions, time horizon, and cost of exit—to consider when determining whether a security or investment strategy involving a security or securities is in the best interest of the client. When considering similar investment products or strategies, the fiduciary duty does not necessarily require an adviser to recommend the lowest cost investment product or strategy.

Moreover, an adviser would not satisfy its fiduciary duty to provide advice that is in the client’s best interest by simply advising its client to invest in the lowest cost (to the client) or least remunerative (to the investment adviser) investment product or strategy without any further analysis of other factors in the context of the portfolio that the adviser manages for the client and the client’s objective. Rather, the adviser could recommend a higher-cost investment or strategy if the adviser reasonably concludes that there are other factors about the investment or strategy that outweigh cost and make the investment or strategy in the best interest of the client, in light of that client’s objectives. For example, it might be consistent with an adviser’s fiduciary duty to advise a client with a high risk tolerance and significant investment experience to invest in a private equity fund with relatively higher fees and significantly less liquidity as compared with a fund that invests in publicly-traded companies if the private equity fund was in the client’s best

registered investment adviser for recommending offshore private investment funds to clients), *stayed in part*, Investment Advisers Act No. 4563 (Nov. 1, 2016), *response to remand*, Investment Advisers Act Release No. 4871 (Mar. 29, 2018) (reinstating the Sept. 30, 2016 opinion and order, except with respect to the disgorgement and prejudgment interest in light of the Supreme Court’s decision in *Kokesh v. SEC*, 137 S. Ct. 1635 (2017)).

interest because it provided exposure to an asset class that was appropriate in the context of the client's overall portfolio.

An adviser's fiduciary duty applies to all investment advice the investment adviser provides to clients, including advice about investment strategy, engaging a sub-adviser, and account type.⁴² Advice about account type includes advice about whether to open or invest through a certain type of account (*e.g.*, a commission-based brokerage account or a fee-based advisory account) and advice about whether to roll over assets from one account (*e.g.*, a retirement account) into a new or existing account that the adviser or an affiliate of the adviser manages.⁴³ In providing advice about account type, an adviser should consider all types of accounts offered by the adviser and acknowledge to a client when the account types the adviser offers are not in the client's best interest.⁴⁴

⁴² In addition, with respect to prospective clients, investment advisers have antifraud liability under section 206 of the Advisers Act, which, among other things, applies to transactions, practices, or courses of business which operate as a fraud or deceit upon prospective clients, including those regarding investment strategy, engaging a sub-adviser, and account type. We believe that, in order to avoid liability under this antifraud provision, an investment adviser should have sufficient information about the prospective client and its objectives to form a reasonable basis for advice before providing any advice about these matters. At the point in time at which the prospective client becomes a client of the investment adviser (*e.g.*, at account opening), the fiduciary duty applies. Accordingly, while advice to prospective clients about these matters must comply with the antifraud provisions under section 206 of the Advisers Act, the adviser must also satisfy its fiduciary duty with respect to any such advice (*e.g.*, regarding account type) when a prospective client becomes a client.

⁴³ We consider advice about "rollovers" to include advice about account type, in addition to any advice regarding the investments or investment strategy with respect to the assets to be rolled over, as the advice necessarily includes the advice about the account type into which assets are to be rolled over. As noted below, as a general matter, an adviser's duty to monitor extends to all personalized advice it provides to the client, including, for example, in an ongoing relationship, an evaluation of whether a client's account or program type (for example, a wrap account) continues to be in the client's best interest. *See infra* text accompanying footnote 52.

⁴⁴ Accordingly, in providing advice to a client or customer about account type, a financial professional who is dually licensed (*i.e.*, an associated person of a broker-dealer and a supervised person of an investment adviser (regardless of whether the professional works for a dual registrant, affiliated firms, or unaffiliated firms)) should consider all types of accounts offered (*i.e.*, both brokerage accounts and advisory accounts) when determining whether the advice is in the client's best interest. A financial professional who is only a supervised person of an investment adviser (regardless of whether that advisory firm is a dual registrant or affiliated with a broker-dealer) may only recommend an advisory account the adviser offers when the account is in the client's best interest. If a financial professional who is only a supervised person of an

2. Duty to Seek Best Execution

An investment adviser's duty of care includes a duty to seek best execution of a client's transactions where the adviser has the responsibility to select broker-dealers to execute client trades (typically in the case of discretionary accounts).⁴⁵ In meeting this obligation, an adviser must seek to obtain the execution of transactions for each of its clients such that the client's total cost or proceeds in each transaction are the most favorable under the circumstances. An adviser fulfills this duty by seeking to obtain the execution of securities transactions on behalf of a client with the goal of maximizing value for the client under the particular circumstances occurring at the time of the transaction. Maximizing value encompasses more than just minimizing cost. When seeking best execution, an adviser should consider "the full range and quality of a broker's services in placing brokerage including, among other things, the value of research provided as well as execution capability, commission rate, financial responsibility, and responsiveness" to the adviser.⁴⁶ In other words, the "determinative factor" is not the lowest possible commission cost, "but whether the transaction represents the best qualitative execution."⁴⁷ Further, an

investment adviser chooses to advise a client to consider a non-advisory account (or to speak with other personnel at a dual registrant or affiliate about a non-advisory account), that advice should be in the best interest of the client. This same framework applies in the case of a prospective client, but any advice or recommendation given to a prospective client would be subject to the antifraud provisions of the federal securities laws. *See supra* footnote 42 and Reg. BI Adoption, *supra* footnote 3.

⁴⁵ *See* Commission Guidance Regarding Client Commission Practices Under Section 28(e) of the Securities Exchange Act of 1934, Exchange Act Release No. 54165 (July 18, 2006) (stating that investment advisers have "best execution obligations"); Investment Advisers Act Release 3060, *supra* footnote 15 (discussing an adviser's best execution obligations in the context of directed brokerage arrangements and disclosure of soft dollar practices); *see also* Advisers Act rule 206(3)-2(c) (referring to adviser's duty of best execution of client transactions).

⁴⁶ Exchange Act Release 23170, *supra* footnote 33.

⁴⁷ *Id.*

investment adviser should “periodically and systematically” evaluate the execution it is receiving for clients.⁴⁸

3. Duty to Provide Advice and Monitoring over the Course of the Relationship

An investment adviser’s duty of care also encompasses the duty to provide advice and monitoring at a frequency that is in the best interest of the client, taking into account the scope of the agreed relationship.⁴⁹ For example, when the adviser has an ongoing relationship with a client and is compensated with a periodic asset-based fee, the adviser’s duty to provide advice and monitoring will be relatively extensive as is consistent with the nature of the relationship.⁵⁰ Conversely, absent an express agreement regarding the adviser’s monitoring obligation, when the adviser and the client have a relationship of limited duration, such as for the provision of a

⁴⁸ *Id.* The Advisers Act does not prohibit advisers from using an affiliated broker to execute client trades. However, the adviser’s use of such an affiliate involves a conflict of interest that must be fully and fairly disclosed and the client must provide informed consent to the conflict. *See also* Interpretation of Section 206(3) of the Investment Advisers Act of 1940, Investment Advisers Act Release No. 1732 (Jul. 17, 1998) (discussing application of section 206(3) of the Advisers Act to certain principal and agency transactions). Two commenters requested that we prescribe specific obligations related to best execution. Comment Letter of the Healthy Markets Association (Aug. 7, 2018); Comment Letter of ICE Data Services (Aug. 7, 2018). However, prescribing specific requirements of how an adviser might satisfy its best execution obligations is outside of the scope of this Final Interpretation.

⁴⁹ *Cf.* SEC v. Capital Gains, *supra* footnote 2 (describing advisers’ “basic function” as “furnishing to clients on a personal basis competent, unbiased, and continuous advice regarding the sound management of their investments” (quoting Investment Trusts and Investment Companies, Report of the Securities and Exchange Commission, Pursuant to Section 30 of the Public Utility Holding Company Act of 1935, on Investment Counsel, Investment Management, Investment Supervisory, and Investment Advisory Services, H.R. Doc. No. 477, 76th Cong. 2d Sess., 1, at 28)). *Cf.* Barbara Black, *Brokers and Advisers-What’s in a Name?*, 32 Fordham Journal of Corporate and Financial Law XI (2005) (“[W]here the investment adviser’s duties include management of the account, [the adviser] is under an obligation to monitor the performance of the account and to make appropriate changes in the portfolio.”); Arthur B. Laby, *Fiduciary Obligations of Broker-Dealers and Investment Advisers*, 55 Villanova Law Review 701 (2010) (“Laby Villanova Article”) (stating that the scope of an adviser’s activity can be altered by contract and that an adviser’s fiduciary duty would be commensurate with the scope of the relationship) (internal citations omitted).

⁵⁰ However, an adviser and client may scope the frequency of the adviser’s monitoring (*e.g.*, agreement to monitor quarterly or monthly and as appropriate in between based on market events), provided that there is full and fair disclosure and informed consent. We consider the frequency of monitoring, as well as any other material facts relating to the agreed frequency, such as whether there will also be interim monitoring when there are market events relevant to the client’s portfolio, to be a material fact relating to the advisory relationship about which an adviser must make full and fair disclosure and obtain informed consent as required by its fiduciary duty.

one-time financial plan for a one-time fee, the adviser is unlikely to have a duty to monitor. In other words, in the absence of any agreed limitation or expansion, the scope of the duty to monitor will be indicated by the duration and nature of the agreed advisory arrangement.⁵¹ As a general matter, an adviser's duty to monitor extends to all personalized advice it provides to the client, including, for example, in an ongoing relationship, an evaluation of whether a client's account or program type (for example, a wrap account) continues to be in the client's best interest.⁵²

C. Duty of Loyalty

The duty of loyalty requires that an adviser not subordinate its clients' interests to its own.⁵³ In other words, an investment adviser must not place its own interest ahead of its client's interests.⁵⁴ To meet its duty of loyalty, an adviser must make full and fair disclosure to its clients

⁵¹ See also Laby Villanova Article, *supra* footnote 49, at 728 (2010) ("If an adviser has agreed to provide continuous supervisory services, the scope of the adviser's fiduciary duty entails a continuous, ongoing duty to supervise the client's account, regardless of whether any trading occurs. This feature of the adviser's duty, even in a non-discretionary account, contrasts sharply with the duty of a broker administering a non-discretionary account, where no duty to monitor is required.") (internal citations omitted).

⁵² Investment advisers also may consider whether written policies and procedures relating to monitoring would be appropriate under Advisers Act rule 206(4)-7, which requires any investment adviser registered or required to be registered under the Advisers Act to adopt and implement written policies and procedures reasonably designed to prevent violation of the Advisers Act and the rules thereunder by the adviser and its supervised persons.

⁵³ Investment Advisers Act Release 3060, *supra* footnote 15 (adopting amendments to Form ADV and stating that "[u]nder the Advisers Act, an adviser is a fiduciary whose duty is to serve the best interests of its clients, which includes an obligation not to subrogate clients' interests to its own," citing Investment Advisers Act Release 2106, *supra* footnote 15). The duty of loyalty applies not just to advice regarding potential investments, but to all advice the investment adviser provides to an existing client, including advice about investment strategy, engaging a sub-adviser, and account type. See *supra* text accompanying footnotes 42-43.

⁵⁴ For example, an adviser cannot favor its own interests over those of a client, whether by favoring its own accounts or by favoring certain client accounts that pay higher fee rates to the adviser over other client accounts. The Commission has brought numerous enforcement actions against advisers that allocated trades to their own accounts and allocated less favorable or unprofitable trades to their clients' accounts. See, e.g., *SEC v. Strategic Capital Management, LLC and Michael J. Breton*, Litigation Release No. 23867 (June 23, 2017) (partial settlement) (adviser placed trades through a master brokerage account and then allocated profitable trades to adviser's account while placing unprofitable trades into the client accounts in

of all material facts relating to the advisory relationship.⁵⁵ Material facts relating to the advisory relationship include the capacity in which the firm is acting with respect to the advice provided. This will be particularly relevant for firms or individuals that are dually registered as broker-dealers and investment advisers and who serve the same client in both an advisory and a brokerage capacity. Thus, such firms and individuals generally should provide full and fair disclosure about the circumstances in which they intend to act in their brokerage capacity and the circumstances in which they intend to act in their advisory capacity. This disclosure may be accomplished through a variety of means, including, among others, written disclosure at the beginning of a relationship that clearly sets forth when the dual registrant would act in an advisory capacity and how it would provide notification of any changes in capacity.⁵⁶ Similarly, a dual registrant acting in its advisory capacity should disclose any circumstances under which its advice will be limited to a menu of certain products offered through its affiliated broker-dealer or affiliated investment adviser.

violation of fiduciary duty and contrary to disclosures). In the Proposed Interpretation, we stated that the duty of loyalty requires an adviser to “put its client’s interest first.” One commenter suggested that the requirement of an adviser to put its client’s interest “first” is very different from a requirement not to “subordinate” or “subrogate” clients’ interests, and is inconsistent with how the duty of loyalty had been applied in the past. *See* Comment Letter of the Asset Management Group of the Securities Industry and Financial Markets Association (Aug. 7, 2018) (“SIFMA AMG Letter”). Accordingly, we have revised the description of the duty of loyalty in this Final Interpretation to be more consistent with how we have previously described the duty. *See* Investment Advisers Act Release 3060, *supra* footnote 15 (“Under the Advisers Act, an adviser is a fiduciary whose duty is to serve the best interests of its clients, which includes an obligation not to subrogate clients’ interests to its own.”) (citing Investment Advisers Act Release 2106, *supra* footnote 15). In practice, referring to putting a client’s interest first is a plain English formulation commonly used by investment advisers to explain their duty of loyalty in a way that may be more understandable to retail clients.

⁵⁵ *See* SEC v. Capital Gains, *supra* footnote 2 (“Failure to disclose material facts must be deemed fraud or deceit within its intended meaning.”); Investment Advisers Act Release 3060, *supra* footnote 15 (“as a fiduciary, an adviser has an ongoing obligation to inform its clients of any material information that could affect the advisory relationship”); *see also* General Instruction 3 to Part 2 of Form ADV (“Under federal and state law, you are a fiduciary and must make full disclosure to your clients of all material facts relating to the advisory relationship.”).

⁵⁶ *See also* Reg. BI Adoption, *supra* footnote 3, at 99.

In addition, an adviser must eliminate or at least expose through full and fair disclosure all conflicts of interest which might incline an investment adviser—consciously or unconsciously—to render advice which was not disinterested.⁵⁷ We believe that while full and fair disclosure of all material facts relating to the advisory relationship or of conflicts of interest and a client’s informed consent prevent the presence of those material facts or conflicts themselves from violating the adviser’s fiduciary duty, such disclosure and consent do not themselves satisfy the adviser’s duty to act in the client’s best interest.⁵⁸ To illustrate what

⁵⁷ In the Proposed Interpretation, we stated that an adviser must seek to avoid conflicts of interest with its clients. Proposed Interpretation, *supra* footnote 6. Some commenters requested clarity on what it means to “seek to avoid” conflicts of interest. *See, e.g.*, Comment Letter of Schulte Roth & Zabel LLP (Aug. 8, 2018); ABA Letter (stating that this wording could be read to require an adviser to first seek to avoid a conflict, before addressing a conflict through disclosure, rather than being able to provide full and fair disclosure of a conflict, and only seek avoidance if the conflict cannot be addressed through disclosure). The Commission first used this phrasing when adopting amendments to the Form ADV Part 2 instructions. *See* Investment Advisers Act Release 3060, *supra* footnote 15 and General Instruction 3 to Part 2 of Form ADV (“As a fiduciary, you also must seek to avoid conflicts of interest with your clients, and, at a minimum, make full disclosure of all material conflicts of interest between you and your clients that could affect the advisory relationship.”). The release adopting this instruction clarifies the Commission’s intent that it capture the fiduciary duty described in SEC v. Capital Gains and Arleen Hughes. *See* Investment Advisers Act Release 3060, *supra* footnote 15, at n.4 and accompanying text (citing SEC v. Capital Gains, *supra* footnote 2, and Arleen Hughes, *supra* footnote 18, as the basis of this language). Both of these cases emphasized that the adviser, as a fiduciary, should seek to avoid conflicts, but at a minimum must make full and fair disclosure of the conflict and obtain the client’s informed consent. *See* SEC v. Capital Gains, *supra* footnote 2 (“The Advisers Act thus reflects . . . a congressional intent to eliminate, or at least to expose, all conflicts of interest which might incline an investment adviser—consciously or unconsciously—to render advice which was not disinterested.”); Arleen Hughes, *supra* footnote 18 (“Since loyalty to his trust is the first duty which a fiduciary owes to his principal, it is the general rule that a fiduciary must not put himself into a position where his own interests may come in conflict with those of his principal” but if a fiduciary “chooses to assume a role in which she is motivated by conflicting interests, . . . she may do so if, but only if, she obtains her client’s consent after disclosure . . .”). We believe the Commission’s reference to “seek to avoid” conflicts in the Form ADV Part 2 instructions is consistent with the Final Interpretation’s statement that an adviser “must eliminate or at least expose all conflicts of interest which might incline an investment adviser—consciously or unconsciously—to render advice which was not disinterested” as well as the substantively identical statements in SEC v. Capital Gains, *supra* footnote 2, and Arleen Hughes, *supra* footnote 18. While an adviser may satisfy its duty of loyalty by making full and fair disclosure of conflicts of interest and obtaining the client’s informed consent, an adviser is prohibited from overreaching or taking unfair advantage of a client’s trust.

⁵⁸ As noted above, an investment adviser’s obligation to act in the best interest of its client is an overarching principle that encompasses both the duty of care and the duty of loyalty. *See* SEC v. Tambone, *supra* footnote 23 (stating that Advisers Act section 206 “imposes a fiduciary duty on investment advisers to act at all times in the best interest of the fund . . . and includes an obligation to provide ‘full and fair disclosure of all material facts’”) (emphasis added) (citing SEC v. Capital Gains, *supra* footnote 2). We describe

constitutes full and fair disclosure, we are providing the following guidance on (i) the appropriate level of specificity, including the appropriateness of stating that an adviser “may” have a conflict, and (ii) considerations for disclosure regarding conflicts related to the allocation of investment opportunities among eligible clients.

In order for disclosure to be full and fair, it should be sufficiently specific so that a client is able to understand the material fact or conflict of interest and make an informed decision whether to provide consent.⁵⁹ For example, it would be inadequate to disclose that the adviser has “other clients” without describing how the adviser will manage conflicts between clients if and when they arise, or to disclose that the adviser has “conflicts” without further description.

above in this Final Interpretation how the application of an investment adviser’s fiduciary duty to its client will vary with the scope of the advisory relationship. *See supra* section II.A.

⁵⁹ Arleen Hughes, *supra* footnote 18, at 4 and 8 (stating, “[s]ince loyalty to his trust is the first duty which a fiduciary owes to his principal, it is the general rule that a fiduciary must not put himself into a position where his own interests may come in conflict with those of his principal. To prevent any conflict and the possible subordination of this duty to act solely for the benefit of his principal, a fiduciary at common law is forbidden to deal as an adverse party with his principal. An exception is made, however, where the principal gives his informed consent to such dealings,” and adding that, “[r]egistrant has an affirmative obligation to disclose all material facts to her clients in a manner which is clear enough so that a client is fully apprised of the facts and is in a position to give his informed consent.”); *see also Hughes v. Securities and Exchange Commission*, 174 F.2d 969 (1949) (affirming the SEC decision in Arleen Hughes); General Instruction 3 to Part 2 of Form ADV (stating that an adviser’s disclosure obligation “requires that [the adviser] provide the client with sufficiently specific facts so that the client is able to understand the conflicts of interest [the adviser has] and the business practices in which [the adviser] engage[s], and can give informed consent to such conflicts or practices or reject them”); Investment Advisers Act Release 3060, *supra* footnote 15; Restatement (Third) of Agency §8.06 (“Conduct by an agent that would otherwise constitute a breach of duty as stated in §§ 8.01, 8.02, 8.03, 8.04, and 8.05 [referencing the fiduciary duty] does not constitute a breach of duty if the principal consents to the conduct, provided that (a) in obtaining the principal’s consent, the agent (i) acts in good faith, (ii) discloses all material facts that the agent knows, has reason to know, or should know would reasonably affect the principal’s judgment unless the principal has manifested that such facts are already known by the principal or that the principal does not wish to know them, and (iii) otherwise deals fairly with the principal; and (b) the principal’s consent concerns either a specific act or transaction, or acts or transactions of a specified type that could reasonably be expected to occur in the ordinary course of the agency relationship.”). *See infra* footnotes 67-70 and accompanying text for a more detailed discussion of informed consent and how it is generally considered on an objective basis and may be inferred.

Similarly, disclosure that an adviser “may” have a particular conflict, without more, is not adequate when the conflict actually exists.⁶⁰ For example, we would consider the use of “may” inappropriate when the conflict exists with respect to some (but not all) types or classes of clients, advice, or transactions without additional disclosure specifying the types or classes of clients, advice, or transactions with respect to which the conflict exists. In addition, the use of “may” would be inappropriate if it simply precedes a list of all possible or potential conflicts regardless of likelihood and obfuscates actual conflicts to the point that a client cannot provide informed consent. On the other hand, the word “may” could be appropriately used to disclose to a client a potential conflict that does not currently exist but might reasonably present itself in the future.⁶¹

Whether the disclosure is full and fair will depend upon, among other things, the nature of the client, the scope of the services, and the material fact or conflict. Full and fair disclosure for an institutional client (including the specificity, level of detail, and explanation of terminology) can differ, in some cases significantly, from full and fair disclosure for a retail client because institutional clients generally have a greater capacity and more resources than

⁶⁰ We have brought enforcement actions in such cases. *See, e.g.*, In the Matter of The Robare Group, Ltd., et al., Investment Advisers Act Release No. 4566 (Nov. 7, 2016) (Commission Opinion) (finding, among other things, that adviser’s disclosure that it *may* receive a certain type of compensation was inadequate because it did not reveal that the adviser actually had an arrangement pursuant to which it received fees that presented a potential conflict of interest); *aff’d in part and rev’d in part on other grounds Robare v. SEC*, *supra* footnote 20; *In re Grossman*, *supra* footnote 41 (indicating that “the use of the prospective ‘may’ in [the relevant Form ADV disclosures] is misleading because it suggested the mere possibility that [the broker] would make a referral and/or be paid ‘referral fees’ at a later point, when in fact a commission-sharing arrangement was already in place and generating income”). *Cf. Dolphin & Bradbury, Inc. v. SEC*, 512 F.3d 634, 640 (D.C. Cir. 2008) (“The Commission noted the critical distinction between disclosing the risk that a future event *might* occur and disclosing actual knowledge the event *will* occur.”) (emphasis in original). For Form ADV Part 2 purposes, advisers are instructed that when they have a conflict or engage in a practice with respect to some (but not all) types or classes of clients, advice, or transactions, to indicate as such rather than disclosing that they “may” have the conflict or engage in the practice. General Instruction 2 to Part 2 of Form ADV.

⁶¹ We have added this example of a circumstance where “may” could be appropriately used in response to the request of some commenters. *See, e.g.*, Pickard Letter; ICI Letter; Ropes & Gray Letter; IAA Letter.

retail clients to analyze and understand complex conflicts and their ramifications.⁶²

Nevertheless, regardless of the nature of the client, the disclosure must be clear and detailed enough for the client to make an informed decision to consent to the conflict of interest or reject it.

When allocating investment opportunities among eligible clients, an adviser may face conflicts of interest either between its own interests and those of a client or among different clients.⁶³ If so, the adviser must eliminate or at least expose through full and fair disclosure the conflicts associated with its allocation policies, including how the adviser will allocate investment opportunities, such that a client can provide informed consent.⁶⁴ When allocating investment opportunities, an adviser is permitted to consider the nature and objectives of the client and the scope of the relationship.⁶⁵ An adviser need not have *pro rata* allocation policies, or any particular method of allocation, but, as with other conflicts and material facts, the

⁶² Arleen Hughes, *supra* footnote 18 (the “method and extent of disclosure depends upon the particular client involved,” and an unsophisticated client may require “a more extensive explanation than the informed investor”).

⁶³ See Restatement (Third) of Agency, § 8.01 General Fiduciary Principle (2006) (“Unless the principal consents, the general fiduciary principle, as elaborated by the more specific duties of loyalty stated in §§ 8.02 to 8.05, also requires that an agent refrain from using the agent’s position or the principal’s property to benefit the agent or a third party.”).

⁶⁴ The Commission has brought numerous enforcement actions alleging that advisers unfairly allocated client trades to preferred clients without making full and fair disclosure. See Staff of the U.S. Securities and Exchange Commission, *Study on Investment Advisers and Broker-Dealers As Required by Section 913 of the Dodd-Frank Wall Street Reform and Consumer Protection Act* (Jan. 2011), available at <https://www.sec.gov/news/studies/2011/913studyfinal.pdf>, at 23–24 (citing enforcement actions). This Final Interpretation sets forth the Commission’s views regarding what constitutes full and fair disclosure. See, e.g., *supra* text accompanying footnote 59; see also Barry Barbash and Jai Massari, *The Investment Advisers Act of 1940: Regulation by Accretion*, 39 Rutgers Law Journal 627 (2008) (stating that under section 206 of the Advisers Act and traditional notions of fiduciary and agency law, an adviser must not give preferential treatment to some clients or systematically exclude eligible clients from participating in specific opportunities without providing the clients with appropriate disclosure regarding the treatment).

⁶⁵ An adviser and a client may even agree that certain investment opportunities or categories of investment opportunities will not be allocated or offered to a client.

adviser's allocation practices must not prevent it from providing advice that is in the best interest of its clients.⁶⁶

While most commenters agreed that informed consent is a component of the fiduciary duty, a few commenters objected to what they saw as subjectivity in the use of the term "informed" to describe a client's consent to a disclosed conflict.⁶⁷ The fact that disclosure must be full and fair such that a client can provide informed consent does not require advisers to make an affirmative determination that a particular client understood the disclosure and that the client's consent to the conflict of interest was informed. Rather, disclosure should be designed to put a client in a position to be able to understand and provide informed consent to the conflict of interest. A client's informed consent can be either explicit or, depending on the facts and circumstances, implicit.⁶⁸ We believe, however, that it would not be consistent with an adviser's fiduciary duty to infer or accept client consent where the adviser was aware, or reasonably should have been aware, that the client did not understand the nature and import of the conflict.⁶⁹

⁶⁶ In the Proposed Interpretation, we stated that "in allocating investment opportunities among eligible clients, an adviser must treat all clients fairly." Some commenters interpreted this statement to mean that it would be impermissible for an adviser to allocate a particular investment to one eligible client instead of a second eligible client, even when the second client had received full and fair disclosure and provided informed consent to such an investment being allocated to the first client. *See, e.g.,* Ropes & Gray Letter; SIFMA AMG Letter. We have removed that sentence from this Final Interpretation and replaced it with this discussion that clarifies our views regarding allocation of investment opportunities.

⁶⁷ *See, e.g.,* Comment Letter of LPL Financial LLC (Aug. 7, 2018); Ropes & Gray Letter.

⁶⁸ We do not interpret an adviser's fiduciary duty to require that full and fair disclosure or informed consent be achieved in a written advisory contract or otherwise in writing. For example, an adviser could provide a client full and fair disclosure of all material facts relating to the advisory relationship as well as full and fair disclosure of all conflicts of interest which might incline the adviser, consciously or unconsciously, to render advice that was not disinterested, through a combination of Form ADV and other disclosure and the client could implicitly consent by entering into or continuing the investment advisory relationship with the adviser.

⁶⁹ *See* Arleen Hughes, *supra* footnote 18 ("Registrant cannot satisfy this duty by executing an agreement with her clients which the record shows some clients do not understand and which, in any event, does not contain the essential facts which she must communicate."). In the Proposed Interpretation, we stated that inferring or accepting client consent to a conflict would not be consistent with the fiduciary duty where "the material facts concerning the conflict could not be fully and fairly disclosed." Some commenters expressed

In some cases, conflicts may be of a nature and extent that it would be difficult to provide disclosure to clients that adequately conveys the material facts or the nature, magnitude, and potential effect of the conflict sufficient for a client to consent to or reject it.⁷⁰ In other cases, disclosure may not be specific enough for a client to understand whether and how the conflict could affect the advice it receives. For retail clients in particular, it may be difficult to provide disclosure regarding complex or extensive conflicts that is sufficiently specific, but also understandable. In all of these cases where an investment adviser cannot fully and fairly disclose a conflict of interest to a client such that the client can provide informed consent, the adviser should either *eliminate* the conflict or adequately *mitigate* (*i.e.*, modify practices to reduce) the conflict such that full and fair disclosure and informed consent are possible.

Full and fair disclosure of all material facts relating to the advisory relationship, and all conflicts of interest which might incline an investment adviser—consciously or unconsciously—to render advice which was not disinterested, can help clients and prospective clients in evaluating and selecting investment advisers. Accordingly, we require advisers to deliver to their clients a “brochure,” under Part 2A of Form ADV, which sets out minimum disclosure requirements, including disclosure of certain conflicts.⁷¹ Investment advisers are required to

agreement with this statement. *See, e.g.*, CFA Letter (agreeing that “advisers should be precluded from inferring or accepting client consent to a conflict” where the material facts concerning the conflict could not be fully and fairly disclosed). Other commenters expressed doubt that such disclosure could be impossible. *See, e.g.*, Allianz Letter (“[W]e have not encountered a situation in which we could not fully and fairly disclose the material facts, including the nature, extent, magnitude and potential effects of the conflict.”). In response to commenters, we have replaced the general statement about an inability to fully and fairly disclose material facts about the conflict with more specific examples of how advisers can make such full and fair disclosure. *See supra* text accompanying footnotes 59-66.

⁷⁰ As discussed above, institutional clients generally have a greater capacity and more resources than retail clients to analyze and understand complex conflicts and their ramifications. *See supra* text accompanying footnote 62.

⁷¹ Investment Advisers Act Release 3060, *supra* footnote 15; General Instruction 3 to Part 2 of Form ADV (“Under federal and state law, you are a fiduciary and must make full disclosure to your clients of all material facts relating to the advisory relationship. As a fiduciary, you also must seek to avoid conflicts of

deliver the brochure to a prospective client at or before entering into a contract so that the prospective client can use the information contained in the brochure to decide whether or not to enter into the advisory relationship.⁷² In a concurrent release, we are requiring all investment advisers to deliver to retail investors, at or before the time the adviser enters into an investment advisory agreement, a relationship summary, which would include, among other things, a plain English summary of certain of the firm's conflicts of interest, and would encourage retail investors to inquire about those conflicts.⁷³

III. ECONOMIC CONSIDERATIONS

As noted above, this Final Interpretation is intended to reaffirm, and in some cases clarify, certain aspects of an investment adviser's fiduciary duty under the Advisers Act. The Final Interpretation does not itself create any new legal obligations for advisers. Nonetheless, the Commission recognizes that to the extent an adviser's practices are not consistent with the Final Interpretation provided above, the Final Interpretation could have potential economic effects. We discuss these potential effects below.

interest with your clients, and, at a minimum, make full disclosure of all material conflicts of interest between you and your clients that could affect the advisory relationship. This obligation requires that you provide the client with sufficiently specific facts so that the client is able to understand the conflicts of interest you have and the business practices in which you engage, and can give informed consent to such conflicts or practices or reject them.”). *See also* Robare v. SEC, *supra* footnote 20 (“[R]egardless of what Form ADV requires, [investment advisers have] a fiduciary duty to fully and fairly reveal conflicts of interest to their clients.”).

⁷² Investment Advisers Act rule 204-3. *See* Investment Advisers Act Release 3060, *supra* footnote 15 (adopting amendments to Form ADV and stating that, “A client may use this disclosure to select his or her own adviser and evaluate the adviser’s business practices and conflicts on an ongoing basis. As a result, the disclosure clients and prospective clients receive is critical to their ability to make an informed decision about whether to engage an adviser and, having engaged the adviser, to manage that relationship.”). To the extent that the information required for inclusion in the brochure does not satisfy an adviser’s disclosure obligation, the adviser “may have to disclose to clients information not specifically required by Part 2 of Form ADV or in more detail than the brochure items might otherwise require” and this disclosure may be made “in [the] brochure or by some other means.” General Instruction 3 to Part 2 of Form ADV.

⁷³ Form CRS Relationship Summary; Amendments to Form ADV; Required Disclosures in Retail Communications and Restrictions on the use of Certain Names or Titles, Investment Advisers Act Release No. 5247 (June 5, 2019) (“Relationship Summary Adoption”).

A. Background

The Commission's interpretation of the standard of conduct for investment advisers under the Advisers Act set forth in this Final Interpretation would affect investment advisers and their associated persons as well as the clients of those investment advisers, and the market for financial advice more broadly.⁷⁴ As of December 31, 2018, there were 13,299 investment advisers registered with the Commission with over \$84 trillion in assets under management as well as 17,268 investment advisers registered with states with approximately \$334 billion in assets under management and 3,911 investment advisers who submit Form ADV as exempt reporting advisers.⁷⁵ As of December 31, 2018, there are approximately 41 million client accounts advised by SEC-registered investment advisers.⁷⁶

These investment advisers currently incur ongoing costs related to their compliance with their legal and regulatory obligations, including costs related to understanding the standard of conduct. We believe, based on the Commission's experience, that the interpretations set forth in this Final Interpretation are generally consistent with investment advisers' current understanding of their fiduciary duty under the Advisers Act.⁷⁷ However, we recognize that as the scope of the

⁷⁴ See Relationship Summary Proposal, *supra* footnote 5, at section IV.A (discussing the market for financial advice generally).

⁷⁵ Data on investment advisers is based on staff analysis of Form ADV, particularly Item 5.F.(2)(c) of Part 1A for Regulatory Assets under Management. Because this Final Interpretation interprets an adviser's fiduciary duty under section 206 of the Advisers Act, this interpretation would be applicable to both SEC- and state-registered investment advisers, as well as other investment advisers that are exempt from registration or subject to a prohibition on registration under the Advisers Act.

⁷⁶ Item 5.F.(2)(f) of Part 1A of Form ADV.

⁷⁷ See *supra* section II.B.i. For example, some commenters asked that we clarify from the Proposed Interpretation that an adviser and its client can tailor the scope of the relationship to which the fiduciary duty applies, through contract. See, e.g., MMI Letter; Financial Engines Letter; ABA Letter. See *supra* footnotes 67–69 and accompanying text, including clarifications addressing these commenters' concerns. More generally, some commenters requested clarifications from the Proposed Interpretation, and we are issuing this Final Interpretation to address those issues raised by commenters, as discussed in more detail above.

adviser-client relationship varies and in many cases can be broad, there may be certain current circumstances where investment advisers interpret their fiduciary duty to require something less, and other current circumstances where they interpret their fiduciary duty to require something more, than this Final Interpretation. We lack data to identify which investment advisers currently understand their fiduciary duty to require something different from the standard of conduct articulated in this Final Interpretation. Based on our experience over decades of interacting with the investment management industry as its primary regulator, however, we generally believe that it is not a significant portion of the market.

One commenter suggested that the Proposed Interpretation's discussion of how an adviser fulfills its fiduciary duty appeared to be based in the context of having as a client an individual investor, and not a fund.⁷⁸ This commenter indicated its concerns about the ability of a fund manager to infer consent from a client that is a fund, and that issues regarding inferring consent from funds could significantly increase compliance costs for venture capital funds.⁷⁹ Our discussion above in this Final Interpretation includes clarifications to address comments, and expressly acknowledges that while all investment advisers owe each of their clients a fiduciary duty, the specific application of the investment adviser's fiduciary duty must be viewed in the context of the agreed-upon scope of the adviser-client relationship.⁸⁰ This Final Interpretation, as compared to the Proposed Interpretation, includes significantly more examples of the application of the fiduciary duty to institutional clients, and clarifies the Commission's interpretation of what constitutes full and fair disclosure and informed consent, acknowledging a number of comments

⁷⁸ See Comment Letter of National Venture Capital Association (Aug. 7, 2018) ("NVCA Letter").

⁷⁹ *Id.*

⁸⁰ See *supra* section II.A.

on this topic.⁸¹ We believe that these clarifications will help address some of this commenter's concerns with respect to increased compliance costs for venture capital funds, in part by clarifying how the fiduciary duty can apply to institutional clients. We continue to believe, based on our experience with investment advisers to different types of clients, that advisers understand their fiduciary duty to be generally consistent with the standards of this Final Interpretation.

B. Potential Economic Effects

Based on our experience as the long-standing regulator of the investment adviser industry, the Commission's interpretation of the fiduciary duty under section 206 of the Advisers Act described in this Final Interpretation generally reaffirms the current practices of investment advisers. Therefore, we expect there to be no significant economic effects from this Final Interpretation. However, as with other circumstances in which the Commission speaks to the legal obligations of regulated entities, we acknowledge that affected firms, including those whose practices are consistent with the Commission's interpretation, incur costs to evaluate the Commission's interpretation and assess its applicability to them. Further, to the extent certain investment advisers currently understand the practices necessary to comply with their fiduciary duty to be different from those discussed in this Final Interpretation, there could be some economic effects, which we discuss below.

Clients of investment advisers

The typical relationship between an investment adviser and a client is a principal-agent relationship, where the principal (the client) hires an agent (the investment adviser) to perform

⁸¹ In particular, this Final Interpretation expressly notes our belief that a client generally may provide its informed consent implicitly "by entering into or continuing the investment advisory relationship with the adviser" after disclosure of a conflict of interest. *See supra* footnote 68.

some service (investment advisory services) on the principal's behalf.⁸² Because investors and investment advisers are likely to have different preferences and goals, the investment adviser relationship is subject to agency problems, including those resulting from conflicts: that is, investment advisers may take actions that increase their well-being at the expense of investors, thereby imposing agency costs on investors.⁸³ A fiduciary duty, such as the duty investment advisers owe their clients, can mitigate these agency problems and reduce agency costs by deterring investment advisers from taking actions that expose them to legal liability.⁸⁴

To the extent this Final Interpretation causes a change in behavior of those investment advisers, if any, who currently interpret their fiduciary duty to require something different from this Final Interpretation, we expect a potential reduction in agency problems and, consequently, a reduction of agency costs to the client.⁸⁵ For example, an adviser that, as part of its duty of loyalty, fully and fairly discloses⁸⁶ a conflict of interest and receives informed consent from its client with respect to the conflict may reduce agency costs by increasing the client's awareness of the conflict and improving the client's ability to monitor the adviser with respect to this conflict. Alternatively, the client may choose to not consent given the information the adviser

⁸² See, e.g., James A. Brickley, Clifford W. Smith, Jr. & Jerold L. Zimmerman, *Managerial Economics and Organizational Architecture* (2004), at 265 ("An agency relationship consists of an agreement under which one party, the principal, engages another party, the agent, to perform some service on the principal's behalf."); see also Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 *Journal of Financial Economics* 305-360 (1976) ("Jensen and Meckling").

⁸³ See, e.g., Jensen and Meckling, *supra* footnote 82.

⁸⁴ See, e.g., Frank H. Easterbrook & Daniel R. Fischel, *Contract and Fiduciary Duty*, 36 *Journal of Law & Economics* 425-46 (1993).

⁸⁵ To the extent that this Final Interpretation clarifies the fiduciary duty for investment advisers, one commenter suggested it may then clarify what clients expect of their investment advisers. See Cambridge Letter (stating that "greater clarity on all aspects of an investment adviser's fiduciary duty will improve the ability to craft such policies and procedures, as well as support the elimination of confusion for retail clients and investment professionals").

⁸⁶ As discussed above, whether such a disclosure is full and fair will depend upon, among other things, the nature of the client, the scope of the services, and the conflict. See *supra* section II.C.

discloses about a conflict of interest if the perceived risk associated with the conflict is too significant, and instead try to renegotiate the contract with the adviser or look for an alternative adviser or other financial professional. In addition, the obligation to fully and fairly disclose a current conflict may cause the adviser to take other actions, for example eliminating or adequately mitigating (*i.e.*, modifying practices to reduce) that conflict rather than taking the risk that the client will not provide informed consent or will look for an alternative adviser or other financial professional. The extent to which agency costs would be reduced by such a disclosure is difficult to assess given that we are unable to ascertain the total number of investment advisers that currently interpret their fiduciary duty to require something different from the Commission's interpretation,⁸⁷ and consequently we are not able to estimate the agency costs such advisers currently impose on investors. In addition, we believe that there may be potential benefits for clients of those investment advisers, if any, to the extent this Final Interpretation is effective at strengthening investment advisers' understanding of their obligations to their clients. Further, to the extent that this Final Interpretation enhances the understanding of any investment advisers of their duty of care, it may potentially raise the quality of investment advice and also lead to increased compliance with the duty to monitor, for example whether advice about an account or program type remains in the client's best interest, thereby increasing the likelihood that the advice fits with a client's objectives.

In addition, to the extent that this Final Interpretation causes some investment advisers to properly identify circumstances in which conflicts may be of a nature and extent that it would be

⁸⁷ One commenter did not agree that the discussion of fiduciary obligations in the Proposed Interpretation applied to advisers to funds as well as advisers to retail investors. *See* NVCA Letter. As discussed above, this Final Interpretation has clarified the discussion to address this commenter's concerns and acknowledges that the application of the fiduciary duty of an adviser to a retail client would be different from the specific application of the fiduciary duty of an adviser to a registered investment company or private fund.

difficult to provide disclosure to clients that adequately conveys the material facts or nature, magnitude, and potential effect of the conflict sufficient for clients to consent to it or reject it, or in which the disclosure may not be specific enough for clients to understand whether and how the conflict could affect the advice they receive, this Final Interpretation may lead those investment advisers to take additional steps to improve their disclosures or to determine whether adequately mitigating (*i.e.*, modifying practices to reduce) the conflict may be appropriate such that full and fair disclosure and informed consent are possible. This Final Interpretation may also cause some investment advisers to conclude in some circumstances that they cannot fully and fairly disclose a conflict of interest to a client such that the client can provide informed consent. We would expect that these advisers would either eliminate the conflict or adequately mitigate (*i.e.*, modify practices to reduce) the conflict such that full and fair disclosure and informed consent would be possible. Thus, to the extent this Final Interpretation would cause investment advisers to better understand their obligations and therefore to modify their business practices in ways that (i) reduce the likelihood that conflicts and other agency costs will cause an adviser to place its interests ahead of the interests of the client or (ii) help those advisers to provide full and fair disclosure, it would be expected to ameliorate the agency conflict between investment advisers and their clients. In turn, this may improve the quality of advice that the clients receive and therefore produce higher overall returns for clients and increase the efficiency of portfolio allocation. However, as discussed above, we would generally expect these effects to be minimal because we believe that the interpretations we are setting forth in this Final Interpretation are generally consistent with investment advisers' current understanding of their fiduciary duty under the Advisers Act. Finally, this Final Interpretation would also benefit

clients of investment advisers to the extent it assists the Commission in its oversight of investment advisers' compliance with their regulatory obligations.

Investment advisers and the market for investment advice

In general, we expect this Final Interpretation to affirm investment advisers' understanding of the fiduciary duty they owe their clients under the Advisers Act, reduce uncertainty for advisers, and facilitate their compliance. Further, by addressing in one release certain aspects of the fiduciary duty that an investment adviser owes to its clients under the Advisers Act, this Final Interpretation could reduce investment advisers' costs associated with comprehensively assessing their compliance obligations. We acknowledge that, as with other circumstances in which the Commission speaks to the legal obligations of regulated entities, affected firms, including those whose practices are consistent with the Commission's interpretation, incur costs to evaluate the Commission's interpretation and assess its applicability to them. Moreover, as discussed above, there may be certain investment advisers who currently understand their fiduciary duty to require something different from the fiduciary duty described in this Final Interpretation. Those investment advisers would experience an increase in their compliance costs as they change their systems, processes, disclosures, and behavior, and train their supervised persons, to align with this Final Interpretation. However, this increase in costs would be mitigated by potential benefits in efficiency for investment advisers that are able to understand aspects of their fiduciary duty by reference to a single Commission release that reaffirms—and in some cases clarifies—certain aspects of the fiduciary duty.⁸⁸ In addition, and as discussed above, in the case of an investment adviser that believed it owed its clients a lower

⁸⁸ As noted above, *supra* footnote 3, this Final Interpretation is intended to highlight the principles relevant to an adviser's fiduciary duty. It is not, however, intended to be the exclusive resource for understanding these principles.

standard of conduct, there will be client benefits from the ensuing adaptation of a higher standard of conduct and related change in policies and procedures.

Moreover, to the extent any investment advisers that understood their fiduciary duty to require something different from the fiduciary duty described in this Final Interpretation change their behavior to align with this Final Interpretation, there could also be some economic effects on the market for investment advice. For example, any improved compliance may not only reduce agency costs in current investment advisory relationships and increase the value of those relationships to current clients, it may also increase trust in the market for investment advice among all investors, which may result in more investors seeking advice from investment advisers. This may, in turn, benefit investors by improving the efficiency of their portfolio allocation. To the extent it is costly or difficult, at least in the short term, to expand the supply of investment advisory services to meet an increase in demand, any such new demand for investment advisory services could put some upward price pressure on fees. At the same time, however, if any such new demand increases the overall profitability of investment advisory services, then we expect it would encourage entry by new investment advisers—or hiring of new representatives by current investment advisers—such that competition would increase over time. Indeed, the recent growth in the investment adviser segment of the market, both in terms of number of firms and number of representatives,⁸⁹ may suggest that the costs of expanding the supply of investment advisory services are currently relatively low.

Additionally, we acknowledge that to the extent certain investment advisers recognize, as a result of this Final Interpretation, that their fiduciary duty is stricter than the fiduciary duty as they currently interpret it, it could potentially affect competition. Specifically, this Final

⁸⁹ See Relationship Summary Proposal, *supra* footnote 5, at section IV.A.1.d.

Interpretation of certain aspects of the standard of conduct for investment advisers may result in additional compliance costs for investment advisers seeking to meet their fiduciary duty. This increase in compliance costs, in turn, may discourage competition for client segments that generate lower revenues, such as clients with relatively low levels of financial assets, which could reduce the supply of investment advisory services and raise fees for these client segments. However, the investment advisers who already are complying with the understanding of their fiduciary duty reflected in this Final Interpretation, and who may therefore currently have a comparative cost disadvantage, could find it more profitable to compete for the clients of those investment advisers who would face higher compliance costs as a result of this Final Interpretation, which would mitigate negative effects on the supply of investment advisory services. Further, as noted above, there has been a recent growth trend in the supply of investment advisory services, which is likely to mitigate any potential negative supply effects from this Final Interpretation.⁹⁰

One commenter discussed that, in its view, any statement in the Proposed Interpretation that certain circumstances may require the elimination of material conflicts, rather than full and fair disclosure or the mitigation of such conflicts, could lead to an effect on the market and costs to advisers, if such a requirement would cause advisers who had not shared that interpretation to change their business models or product offerings or the ways in which they interact with

⁹⁰ Beyond having an effect on competition in the market for investment adviser services, it is possible that this Final Interpretation could affect competition between investment advisers and other providers of financial advice, such as broker-dealers, banks, and insurance companies. This may be the case if certain investors base their choice between an investment adviser and another provider of financial advice, at least in part, on their perception of the standards of conduct each owes to their customers. To the extent that this Final Interpretation increases investors' trust in investment advisers' overall compliance with their standard of conduct, certain of these investors may become more willing to hire an investment adviser rather than one of their non-investment adviser competitors. As a result, investment advisers as a group may become more competitive compared to that of other types of providers of financial advice. On the other hand, if this Final Interpretation raises costs for investment advisers, they could become less competitive with other financial advice providers.

clients.⁹¹ We disagree that this Final Interpretation includes a requirement to eliminate conflicts of interest. As discussed in more detail above, elimination of a conflict is one method of addressing that conflict; when appropriate advisers may also address the conflict by providing full and fair disclosure such that a client can provide informed consent to the conflict.⁹² Further, we believe that any potential costs or market effects resulting from investment advisers addressing conflicts of interest may be decreased by the flexibility advisers have to meet their federal fiduciary duty in the context of the specific scope of services that they provide to their clients, as discussed in this Final Interpretation.

The commenter also drew particular attention to the question of whether the Commission's discussion of the fiduciary duty in the Proposed Interpretation applied to advisers to institutional clients as well as those to retail clients. The same commenter indicated that failing to accommodate the application of the concepts in the Proposed Interpretation to sophisticated clients could risk changing the marketplace or limiting investment opportunities for sophisticated clients, increasing compliance burdens for advisers to sophisticated clients, or chilling innovation. As explained above, this Final Interpretation, as compared to the Proposed Interpretation, discusses in more detail the ability of investment advisers and different types of clients to shape the scope of the relationship to which the fiduciary duty applies.⁹³ In particular, this Final Interpretation acknowledges that while advisers owe each of their clients a fiduciary duty, the specific obligations of, for example, an adviser providing comprehensive, discretionary advice in an ongoing relationship with a retail client will be significantly different from the

⁹¹ See Dechert Letter.

⁹² See *supra* section II.C.

⁹³ See *supra* footnotes 78-81 and accompanying text.

obligations of an adviser to an institutional client, such as a registered investment company or private fund, where the contract defines the scope of the adviser's services and limitations on its authority with substantial specificity.⁹⁴

Finally, to the extent this Final Interpretation causes some investment advisers to reassess their compliance with their duty of loyalty, it could lead to a reduction in the expected profitability of advice relating to particular investments for which compliance costs would increase following the reassessment.⁹⁵ As a result, the number of investment advisers willing to advise a client to make these investments may be reduced. A decline in the supply of investment adviser advice regarding these types of investments could affect efficiency for investors; it could reduce the efficiency of portfolio allocation for those investors who might otherwise benefit from investment adviser advice regarding these types of investments and are no longer able to receive such advice. At the same time, if providing full and fair disclosure and appropriate monitoring for highly complex products (*e.g.*, those with a complex payout structure, such as those that include variable or contingent payments or payments to multiple parties) results in these products becoming less profitable for investment advisers, investment advisers may be discouraged from supplying advice regarding such products. However, investors may benefit from (1) no longer receiving inadequate disclosure or monitoring for such products, (2) potentially receiving advice regarding other, less complex or expensive products that may be more efficient for the investor, and (3) only receiving recommendations for highly complex or high cost products for which an

⁹⁴ See *supra* section II.A.

⁹⁵ For example, such products could include highly complex, high cost products with risk and return characteristics that are hard for retail investors to fully understand, or where the investment adviser and its representatives receive complicated payments from affiliates that create conflicts of interest that are difficult for retail investors to fully understand.

investment adviser can provide full and fair disclosure regarding its conflicts and appropriate monitoring.

List of Subjects in 17 CFR Part 276

Securities.

Amendments to the Code of Federal Regulations

For the reasons set out above, the Commission is amending Title 17, chapter II of the Code of Federal Regulations as set forth below:

PART 276—INTERPRETATIVE RELEASES RELATING TO THE INVESTMENT ADVISERS ACT OF 1940 AND GENERAL RULES AND REGULATIONS THEREUNDER

1. Part 276 is amended by adding Release No. IA–5428 and the release date of June 5, 2019, to the end of the list of interpretive releases to read as follows”

Subject	Release No.	Date	Fed. Reg. Vol. and Page
* * * * *			
Commission Interpretation Regarding Standard of Conduct for Investment Advisers	IA-5248	June 5, 2019	[Insert FR Volume Number] FR [Insert FR Page Number]

By the Commission.

Dated: June 5, 2019.

Vanessa A. Countryman,

Acting Secretary.

EXHIBIT 5

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**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

In re:	§	Case No. 18-30264-SGJ-11
	§	Case No. 18-30265-SGJ-11
ACIS CAPITAL MANAGEMENT, L.P. and	§	
ACIS CAPITAL MANAGEMENT GP, LLC,	§	(Jointly Administered Under Case No.
	§	18-30264-SGJ-11)
	§	
Debtors.	§	Chapter 11

**JOINT OBJECTION OF HIGHLAND CAPITAL MANAGEMENT, L.P. AND
HIGHLAND CLO FUNDING, LTD. TO FINAL APPROVAL OF DISCLOSURE
STATEMENT AND TO CONFIRMATION OF THE JOINT PLAN FOR ACIS CAPITAL
MANAGEMENT, L.P. AND ACIS CAPITAL MANAGEMENT GP, LLC**

Highland Capital Management, L.P. (“**Highland**”) and Highland CLO Funding, Ltd.
 (“**HCLOF**”) hereby file their joint objection (the “**Objection**”) to final approval of the
disclosure statement [**Doc. No. 442**] (as amended, the “**Disclosure Statement**”) and to
confirmation of the *First Amended Joint Plan for Acis Capital Management, L.P. and Acis*

Capital Management GP, LLC [Doc. No. 441] (as amended, the “**Plan**”),¹ and respectfully state as follows:²

I.
PRELIMINARY STATEMENT

“If at first you don’t succeed, try, try again.” –*William Edward Hickson*

1. In proposing Plans A, B and C, it would appear that the Chapter 11 Trustee has taken this old adage to heart. Although originally penned as a motivator to would-be teachers, in the context of these bankruptcy proceedings, this approach by the Chapter 11 Trustee has proven to be a colossal waste of time and resources at a cost to the estates that eclipses not only the value of the estates’ assets, but the very pre-petition claims the Chapter 11 Trustee is purportedly responsible for paying. The result of this case appears to be nothing more than functionally administratively insolvent estates with mountains of administrative claims continuing to accrue daily.

2. By their literal interpretation, the Chapter 11 Trustee’s Plans, supported by unequivocal admissions in his pleadings, establish that post-petition, he has intentionally breached pre-petition contractual obligations of the Debtors to create a purported \$100 million post-petition claim against the estates for an entity that had no claims against the estates when the Orders for Relief were entered. By his own account, he has rendered the estates administratively insolvent. Having thus admitted to putting the estates into this predicament—which under almost every other measure would be considered a flagrant breach of fiduciary

¹ Defined terms herein shall be as set forth in the Plan unless otherwise provided herein.

² HCLOF has filed no proof of claim in these cases, seeks no monetary relief from the Debtors, and has moved to amend its pending adversary proceeding claim to reflect that it no longer seeks the equitable claims that it sought previously (such claims are moot in any event). Nonetheless, HCLOF objects on the basis that the proposed plans propose either to take its property or alter its contractual and legal rights. HCLOF asserts no creditor standing in any of the objections set forth herein, and makes these objections as a party in interest given the substantial harm the plans propose to impose on it.

duty—he is now championing to “fix” the situation by either (i) taking non-estate property from the purported (involuntary) claimant and selling it along with some executory contracts of the estates that are otherwise valueless, then distributing the ill-gotten proceeds after carving off a substantial fee for himself, or (ii) re-writing multiple securities contracts to which the estates are not a party in order to not only insulate the estates from the consequences of his self-proclaimed intentional breach, but to radically alter the bargained-for rights of third party market participants in five collateralized loan obligation funds with over \$2 billion at stake, none of which ever belonged to the Debtors.

3. What the Chapter 11 Trustee is proposing under each of Plans A, B and C violates some of the most basic tenets of Title 11 and ignores the very confines of this Court’s jurisdiction. These Plans are patently unconfirmable with an unconscionable premise: that a Chapter 11 Trustee should be handsomely rewarded for an intentional post-petition breach of the estates pre-petition contractual obligations. Such a conclusion is beyond the pale no matter how allegedly noble the cause. These cases should be either dismissed or, at most, converted back to Chapter 7 liquidation.

II.

RELEVANT BACKGROUND

4. On January 30, 2018, Joshua N. Terry (“**Terry**”) filed involuntary petitions for relief under Chapter 7, Title 11 of the United States Code (the “**Bankruptcy Code**”) against Acis Capital Management, L.P. and Acis Capital Management GP, LLC (“**Acis GP**,” and with Acis LP, the “**Debtors**”). A Chapter 7 Trustee was thereafter appointed.

5. On May 4, 2018, the Chapter 7 Trustee filed an *Expedited Motion to Convert Cases to Chapter 11* [**Doc. No. 171**] (the “**Motion to Convert**”). Also on May 4, 2018, Terry filed an *Emergency Motion for an Order Appointing Trustee for the Chapter 11 Estates of Acis*

Capital Management, L.P. and Acis Capital Management GP, LLC Pursuant to Bankruptcy Code Section 1104(a) [Doc. No. 173] (the “**Motion to Appoint Chapter 11 Trustee**”).

6. On May 11, 2018, after a hearing on the matter, the Court entered orders granting the Motion to Convert [Doc. No. 205] and the Motion to Appoint Chapter 11 Trustee [Doc. No. 206]. Thereafter, the United States Trustee appointed Robin Phelan as Chapter 11 Trustee (the “**Chapter 11 Trustee**”).³

7. On July 5, 2018, the Chapter 11 Trustee filed the initial Plan [Doc. No. 383], which proposed three (3) alternatives – Plans A, B and C. In summary, Plan A of the Chapter 11 Trustee’s Plan proposes to transfer HCLOF’s Equity Notes, along with the portfolio management agreements (the “**PMAs**”) to which Acis LP is a counter-party, to a third party “plan funder,” which is Oaktree. Through this transaction, the Chapter 11 Trustee claims that all creditors will be satisfied in full. Alternatively, the Chapter 11 Trustee has proposed Plans B and C, which are effectively identical in their treatment of creditors and call for Acis LP to retain the PMAs and pay out creditors from future cash flow streams therefrom, as well as potential recoveries from estates’ causes of action. Both Plans B and C require radical modification to of the CLO Indentures, ostensibly to ensure the future income stream to the estates.

8. On July 13, 2018, the Chapter 11 Trustee filed (i) the Disclosure Statement [Doc. No. 405]; (ii) the *First Modification to the Joint Plan for Acis Capital Management, L.P. and Acis Capital Management GP, LLC* [Doc. No. 406]; and (iii) the *Motion for Entry of Order (A) Conditionally Approving Disclosure Statement; (B) Scheduling Combined Hearing on Final Approval of Disclosure Statement and Confirmation of Plan, and Setting Related Deadlines; (C)*

³ Mr. Phelan was initially appointed on May 11, 2018 as the Chapter 11 Trustee of Acis LP and was appointed on May 16, 2018 as the Chapter 11 Trustee of Acis GP.

Approving Forms for Voting and Notice; and (D) Granting Related Relief [Doc. No. 407] (the “**Motion for Conditional Approval**”).

9. On July 24, 2018, Highland and HCLOF filed respective objections to the Motion for Conditional Approval, [Doc. No. 431] and [Doc. No. 432]. On July 28, 2018, Highland filed a supplement to such objection [Doc. No. 440]. In each objection, Highland and HCLOF reserved rights to object to the final approval of the Disclosure Statement.

10. On July 29, 2018, the Chapter 11 Trustee amended the Plan and Disclosure Statement following an expedited hearing on the Motion for Conditional Approval held earlier that day. Thereafter, on July 30, 2018, the Court entered the *Order (I) Conditionally Approving Disclosure Statement, (II) Scheduling Combined Hearing on Final Approval of Disclosure Statement and Confirmation of Plan, and Setting Related Deadlines, (III) Approving Forms for Voting and Notice, and (IV) Approving Related Matters* [Doc. No. 446] (the “**Conditional Approval Order**”), conditionally approving the Disclosure Statement, setting an August 21, 2018 combined hearing for final approval of the Disclosure Statement and confirmation of the Plan, and setting related deadlines, including a compressed and expedited discovery schedule (the “**Discovery Schedule**”).

11. The Conditional Approval Order required the Chapter 11 Trustee to file a “**Limited Issues Brief**” on or before 4:00 p.m. on August 10, 2018, addressing: (a) issues related to section 1142 of the Bankruptcy Code in connection with the proposed transfer of HCLOF’s subordinated notes under the Plan A alternative, and (b) issues related to sections 365 and 1123(a)(5)(F) of the Bankruptcy Code in connection with the proposed modification of the existing Indentures under the proposed Plan B and Plan C (collectively, the “**Limited Issues**”).

Also as per the Conditional Approval Order, the deadline for parties to respond to the Limited Issues Brief is 4:00 p.m. on August 16, 2018.

12. Per the Discovery Schedule, the Chapter 11 Trustee filed the Limited Issues Brief on August 10, 2018 [Doc. No. 493]. Highland and/or HCLOF intend to timely respond to the Limited Issues Brief per the Discovery Schedule. As such, while certain Limited Issues are mentioned herein, Highland and HCLOF reserve all rights on those issues for subsequent objection. Per the Discovery Schedule, this joint objection is to cover matters other than the Limited Issues; provided, however, discovery is actually occurring after the deadline to file this objection. Thus, Highland and HCLOF reserve their rights to supplement these objections.

III. **OBJECTION**

13. In order to confirm the Plan, the Chapter 11 Trustee bears the burden of establishing the various provisions of Bankruptcy Code section 1129 by a preponderance of the evidence. *See In re Couture Hotel Corp.*, 536 B.R. 712, 732 (Bankr. N.D. Tex. 2015). The Plan is deficient on almost every applicable subsection of 1129 and, as a result, the Plan is unconfirmable as a matter of law.

A. The Bankruptcy Court Lacks Subject Matter Jurisdiction to Confirm the Plan

14. The Bankruptcy Court lacks subject matter jurisdiction over this proceeding and, therefore, proceeding with confirmation of any plan will be void *ab initio*. This Court should have dismissed the involuntary petitions that were filed by Joshua Terry in bad faith, and because this Court lacks subject matter jurisdiction over essentially a two-party dispute subject to arbitration. *See* Brief of Appellant Neutra (Case No. 3:18-cv-01056 (N.D. Tex.)), [Doc. No. 11].

15. Even assuming this Court has subject matter over this proceeding, the Plans violate the strictures of that jurisdiction in at least two critical and insurmountable ways:

- a. Plan A is premised on the taking of non-estate property without its owners consent; and
- b. Plans B and C are premised on radically altering non-estate executory contracts.

16. The Court's lack of subject matter jurisdiction is so fundamental, that frankly the Court need look no further. The Chapter 11 Trustee has presented the Court with patently unconfirmable Plans. Section 1129(a)(1) and (a)(2) require, respectively, that the plan and the plan proponent, comply with the applicable provisions of the Bankruptcy Code. The Chapter 11 Trustee's Plan A, however, asks this Court to exceed its constitutional and statutory authority to infringe upon the rights of a non-creditor and effect a taking of non-estate property (the "**Equity Notes**") via an equitable subrogation theory that is completely contrary to the law, and convert that non-estate property into "property of the estate," so that he can then sell it to a third party (Oaktree). This Court cannot approve this scheme because it has no jurisdiction to do so. Confirming Plan B or C likewise would require the Court to exceed its authority because both plans are premised on the nonconsensual alteration of non-executory contracts. Worse yet, the amendments will be to the detriment of third parties who are not creditors of these estates and who are not remotely implicated in these proceedings. This Court simply has no such jurisdiction.

17. It is fundamental that bankruptcy courts do not have subject matter jurisdiction over property that does not belong to a debtor's estate. *See TMT Procurement Corp. v. Vantage Drilling Co. (In re TMT Procurement Corp.)*, 764 F.3d 512, 525 (5th Cir. 2014) (bankruptcy court did not have in rem jurisdiction over assets that were not "property of the estate"); *see also Scott v. Bierman*, 429 F. App'x. 225, 231 (4th Cir. 2011) ("[A] bankruptcy court's jurisdiction does not extend to property not part of a debtor's estate."); *see also NovaCare Holdings, Inc. v. Mariner Post-Acute Network, Inc. (In re Mariner Post-Acute Network, Inc.)*, 267 B.R. 46, 59

(Bankr. D. Del. 2001) (same); *In re Funneman*, 155 B.R. 197, 199-200 (Bankr. S.D. Ill. 1993) (partnership property was not property of the debtor-partner's estate and, therefore, outside the court's subject matter jurisdiction).

18. These jurisdictional principles exist to protect the very type of non-debtor property interests that are at issue in this case. And they apply even when the property would benefit a debtor's estate. *See, e.g., Vineyard v. McKenzie (In re Quality Holstein Leasing)*, 752 F.2d 1009, 1013 (5th Cir. 1985) (noting the limitations placed on the trustee's strong arm powers by section 541, and stating that "Congress did not mean to authorize a bankruptcy estate to benefit from property that the debtor did not own.").

19. Before the Court can order a transfer of the Equity Notes to Oaktree, it would necessarily have to find that they constitute "property of the estate." If the Court cannot conclude that the Equity Notes are property of the estate, then it will lack jurisdiction to order their transfer by any means. *See, e.g., In re Murchison*, 54 B.R. 721, 725 (Bankr. N.D. Tex. 1985). (finding that the court was without jurisdiction to approve the sale of property that was not property of the estate: "Because the criterion of § 541(a)(1) has not been satisfied, § 363(b)(1) cannot apply.").

20. Section 541 of the Bankruptcy Code defines "property of the estate" as, in relevant part, (i) "all legal or equitable interests of the debtor in property as of the commence of the case," (ii) "[a]ny interest in property that the trustee recovers under section 329(b), 363(n), 543, 550, 553, or 723 of this title," and (iii) "[a]ny interest in property that the estate acquires after the commencement of the case." 11 U.S.C. §§ 541(a)(1), (a)(3), (a)(7).

⁴ Bankruptcy courts have been held to be without jurisdiction to order the sale of non-estate assets, even where the sale was entirely consensual. *See, e.g., First Nat'l Bank v. Community Trust Bank*, No. 05-1610, 2006 WL 724882, at *4 (W.D. La. Mar. 21, 2006) ("Since the property was not part of the bankruptcy estate, the Bankruptcy Court had no authority or jurisdiction to order the consensual sale and, therefore, the sale was void").

21. Neither the Chapter 11 Trustee nor his proposed transferee, Oaktree, dispute that the Equity Notes are the property of HCLOF. *See* July 6, 2018 Hrg. Tr. at 71:19-25; 119:11-18. Nor has the Chapter 11 Trustee obtained an interest in the Equity Notes via any of the Bankruptcy Code sections enumerated in section 541(a)(3). Thus, for the Equity Notes to be “property of the estate,” they would necessarily have to be “property that the estate[s] acquire after the commencement of the case” under section 541(a)(7).⁵

22. Upon first blush, that would seem to require only that the Chapter 11 Trustee prevail upon his equitable subrogation theory, thereby converting the Equity Notes into “property of the estate.” However, even if the Chapter 11 Trustee successfully can obtain ownership of the Equity Notes, such property acquired post-petition is not “property of the estate” under section 541(a)(7).

23. Under controlling Fifth Circuit law, section 541(a)(7) only applies to “property interest that are themselves traceable to ‘property of the estate’ or generated in the normal course of the debtor’s business.” *In re TMT Procurement Corp.*, 764 F.3d at 524-25 (“As we previously recognized in *In re McLain*, ‘Congress enacted § 541(a)(7) to clarify its intention that § 541 be an all-embracing definition and to ensure that property interests created with or by property of the estate are themselves property of the estate’) (citing *In re McLain*, 516 F.3d 301 (5th Cir. 2008)) (emphasis added); *see also In re Cent. Med. Ctr.*, 122 B.R. 568 (Bankr. E.D. Mo. 1990) (“Congress did not intend Section 541 ‘to enlarge a debtor’s rights against others beyond those

⁵ The Chapter 11 Trustee also does not, and cannot, dispute the axiom that the debtor in possession or trustee steps into the shoes of a debtor and possesses no greater rights than that of the debtor. *See Majestic Star Casino, LLC v. Barden Dev., Inc. (In re Majestic Star Casino, LLC)*, 716 F.3d 736, 748 (3d Cir. 2013) (“It is a given that the trustee or debtor-in-possession can assert no greater rights than the debtor himself had on the date the bankruptcy case was commenced.”) (internal alterations omitted)); *In re Gibraltar Res., Inc.*, 197 B.R. 246, 253 (Bankr. N.D. Tex. 1996) (“the general rule is that a trustee has no greater rights than the debtor and stands in the shoes of the debtor”); *In re Brooks*, 60 B.R. 155, 160 (Bankr. N.D. Tex. 1986) (“Of course, a bankruptcy trustee can acquire no greater rights in property than the debtor possessed.”) (citation omitted)). The Debtors had no right to sell the Equity Notes before the commencement of these bankruptcy cases and have no such rights now.

existing at the commencement of the case..”) (citing *In re N.S. Garrott & Sons*, 772 F.2d 462, 466 (8th Cir. 1985)). That is not the case with the Equity Notes, which are not traceable to any property of the estate, but under the Chapter 11 Trustee’s (unsupportable) theory, are property of the estate as a result of a subrogation right that purportedly vested with the estates post-petition.

24. The property at issue in *In re TMT Procurement* was certain corporate shares that were pledged by a non-debtor third party into a court-ordered escrow that served as the collateral for the debtors’ DIP loan. *In re TMT Procurement Corp.*, 764 F.3d at 524. The shares never belonged to the debtors at issue. *Id.* at 524-25. The corporation whose shares had been pledged appealed the orders of the district court (which had withdrawn the reference from the bankruptcy court), arguing that the district court did not have jurisdiction to issue orders with respect to the shares, which were not “property of the estate.” *Id.* at 522-23.

25. The Fifth Circuit, vacating the district court’s order, rejected the debtors’ argument that the shares were property of the estate under section 541(a)(7). In doing so, the Fifth Circuit made clear that: “[T]he Vantage Shares are not ‘property of the estate’ under § 541(a)(7) because they were not created with or by property of the estate, they were not acquired in the estate’s normal course of business, and they are not traceable to or arise out of any pre-petition interest included in the bankruptcy estate.” *Id.* at 525 (rejecting also the argument that the tracing limitation did not apply to corporate debtors in chapter 11 bankruptcies).

26. The Plan does not satisfy sections 1129(a)(1) and (a)(2) because it seeks to impermissibly expand the scope of estate property and requires the Court to exceed its jurisdiction. The Equity Notes were not “property of the estate” at the commencement of these cases and the Chapter 11 Trustee has not obtained the Equity Notes through one of the

enumerated sections in Section 541(a)(3). Nor are the Equity Notes traceable to any property of the estate. Therefore, the Plan cannot be confirmed. *See In re Cent. Med. Ctr.*, 122 B.R. at 573 (holding that the plan failed to satisfy section 1129(a) “[b]ecause the Plan violates Section 541(a) due to its improper expansion of the estate’s interest” in certain funds in which it only had a reversionary interest at the commencement of the case; the plan “baldly seeks to divest the bondholders of property which is rightfully theirs.”).

B. Sections 1129(a)(1), (3) – The Plan Violates the Bankruptcy Code and Violates Other Applicable Law

27. Bankruptcy Code section 1129(a)(1) requires that a plan comply “with the applicable provisions of this title,” and section 1129(a)(3) states that a plan cannot be proposed “by any means forbidden by law.” As to section 1129(a)(1), the Plan violates well-accepted tenets of bankruptcy law because the Chapter 11 Trustee seeks to (i) take possession of non-estate property and (ii) fundamentally alter non-debtor executory contracts. These are included among the Limited Issues and will be set forth in the response to the Limited Issues Brief.

28. As to section 1129(a)(3), despite the Chapter 11 Trustee’s obfuscations regarding “transfers” and other similar self-serving characterizations, the practical reality is that the Plan A transaction effects a sale of the Equity Notes to Oaktree. The Equity Notes are undoubtedly securities. *See Reves v. Ernst & Young*, 494 U.S. 56, 65 (1990); *Arco Capital Corps. Ltd. v. Deutsche Bank AG*, 949 F. Supp. 2d 532, 542-43 (S.D.N.Y. 2013) (finding sale of CLO notes to be a sale of a security under *Morrison v. Nat’l Australian Bank Ltd.*, 561 U.S. 247 (2010)). Any sale of securities must comport with the requirements of federal securities laws, including the Securities Act of 1933 (the “’33 Act”).⁶

⁶ Moreover, none of the Indentures or other relevant documents permit the Chapter 11 Trustee, on behalf of Acis, or otherwise, to market HCLOF’s Equity Notes for sale. The Chapter 11 Trustee cannot sell the Equity Notes in violation of the terms of the Indentures, and seek at the same time to retain the benefits of the Indentures.

29. Section 77e of the '33 Act makes it unlawful “to offer to sell or offer to buy . . . any security, unless a registration statement has been filed as to such security.” 15 U.S.C. § 77e(c).⁷ The Chapter 11 Trustee has not filed a registration statement covering his proposed sale of the Equity Notes.

30. Section 1145(a)(1) and (a)(2) do not absolve the Chapter 11 Trustee from compliance with these requirements because Oaktree is not receiving the Equity Notes on account of claims against the estates. *See also SEC v. Universal Express, Inc.*, 475 F. Supp. 2d 412, 425 (S.D.N.Y. 2007) (“[T]he section 1145(a) exemption is available only when the offerees are receiving the securities, at least in part, in exchange for claims against or interests in the debtor which they hold.” (internal citation omitted)).

31. The mechanism set forth in the Plan for the transfer of the Equity Notes makes plain that Oaktree is not the initial transferee (or subrogee). Instead, the initial transferee are the bankruptcy estates. As described, the estates will then transfer the notes to Oaktree. Because Oaktree will not be receiving the Equity Notes in exchange for claims or interests that Oaktree has against the Debtors, the section 1145(a) exemption cannot, and does not, apply.

32. Bankruptcy Code section 1145 provides a limited exemption when the Chapter 11 Trustee sells a security “of an issuer other than the debtor or an affiliate” 11 U.S.C. § 1145(a)(3). The exemption allows trustees to raise cash for an estate while protecting purchasers by requiring that adequate information about the securities is available. This “portfolio securities” exemption should be strictly construed because public policy strongly supports the registration of securities. *See Quinn & Co. v. S.E.C.*, 452 F.2d 943, 946 (10th Cir. 1971); 8

⁷ In any litigation or enforcement action, it would be the Chapter 11 Trustee’s burden to show the applicability of an exemption to this requirement. *E.g.*, *SEC v. Carrillo Huettell LLP*, No. 13 Civ. 1735(GBD)(JCF), 2017 WL 213067, at *3 n.7 (S.D.N.Y. Jan. 17, 2017). The Chapter 11 Trustee has not argued that any of these exemptions apply. *See* 15 U.S.C. § 77d (providing exemptions to registration requirements).

Collier on Bankr. ¶ 1145.02 (16th ed. 2018). This exemption requires that (1) the debtor own the security on the date the bankruptcy petition was filed; (2) any exempt securities are not securities of the debtor's affiliates; (3) the issuer of the securities is in full compliance with registration and disclosure laws; and (4) the volume of the securities sold be limited to less than 4% of shares outstanding. 11 U.S.C. § 1145(a)(3).

33. The Chapter 11 Trustee's Plan A transaction clearly does not qualify for this exemption. First, neither the Chapter 11 Trustee nor the Debtors owned the Equity Notes on the date the bankruptcy petition was filed, nor do they own them now. Second, the proposed sale would be far in excess of the 4% threshold permitted by the exemption. Because the section 1145 exemptions do not apply, the Chapter 11 Trustee will be in violation of the '33 Act.

34. In addition to violating the '33 Act, the Plan violates the Investment Advisors Act of 1940 (the "IAA"). It is clear that the Chapter 11 Trustee owes fiduciary duties to HCLOF and its investors. In agreeing to manage the CLO investments, Acis LP represented to the CLOs that it is "registered as an investment adviser" under the IAA and agreed to perform its portfolio management services consistent with the IAA. *See, e.g.*, 2013-1 PMA § 17(b)(i). The IAA imposes a fiduciary duty on Acis LP to act for the benefit of the CLO and its investors, including Equity Noteholders like HCLOF. *See Transamerica Mortg. Advisors v. Lewis*, 444 U.S. 11, 36 (1979) ("Congress intended to impose enforceable fiduciary obligations" in passing the Act); 15 U.S.C. § 80b-6.⁸ The scope of Acis LP's (and thus the Chapter 11 Trustee's) fiduciary duties is broad. The Chapter 11 Trustee's obligations include a duty to refrain from conduct that directly harms the CLOs, as well as the more general duty of undivided loyalty. *See Bullmore v. Banc of*

⁸ Acis LP also owes fiduciary duties as an investment advisor under New York's common law. *See Bullmore v. Ernst & Young Cayman Islands*, 846 N.Y.S.2d 145, 148 (N.Y. App. Div. 2007) ("Professionals such as investment advisors, who owe fiduciary duties to their clients, 'may be subject to tort liability for failure to exercise reasonable care, irrespective of their contractual duties'" (citations omitted)).

Am. Sec. LLC, 485 F. Supp. 2d 464, 471 (S.D.N.Y. 2007) (applying New York law). Each of the plans proposed by the Chapter 11 Trustee rest upon a flagrant violation of Acis LP's fiduciary duties: Plan A proposes to sell HCLOF's property without its consent and Plan B and Plan C propose to impermissibly modify the Indentures to strip HCLOF and the other noteholders of their right to call a redemption. These issues will be more thoroughly addressed in HCLOF and Highland's response to the Chapter 11 Trustee's Limited Issues Brief.

35. Moreover, the Chapter 11 Trustee cannot disclaim the duties he owes to the CLOs and the investors under the contracts and securities laws, including the IAA. In one analogous case, *In re New Center Hospital*, 200 B.R. 592 (E.D. Mich. 1996), the chapter 11 trustee sought to escape the duties of the debtor-hospital as the administrator of an employee benefit plan governed by ERISA. The chapter 11 trustee argued that if he were to administer the plan, he would be required to act solely in the interest of the ERISA plan beneficiaries which would be in conflict with his duties to the bankruptcy estates; therefore, he could not serve as an ERISA fiduciary and a bankruptcy estate fiduciary at the same time. *Id.* The district court rejected this argument and overturned the decision of the bankruptcy court, concluding that, "[t]he Bankruptcy Trustee assumes the position of the debtor as to that debtor's many obligations. Courts have held that statutory obligations that bind the debtor will subsequently bind the bankruptcy estate." *Id.* (internal citations omitted). Likewise, the Chapter 11 Trustee is bound to perform the obligations and duties of Acis LP under relevant contract and applicable law, including the IAA. Because the Chapter 11 Trustee has put forth a Plan that violates such duties, he cannot meet the section 1129(a)(3) standard that the Plan is not "forbidden by law."

C. Section 1129(a)(3) – The Plan Was Not Proposed in Good Faith

36. Bankruptcy Code section 1129(a)(3) further provides that a plan must be proposed in good faith. The Chapter 11 Trustee, as proponent of the Plan, bears the burden of

demonstrating that it was filed in good faith. *In re Barnes*, 309 B.R. 888, 892 (Bankr. N.D. Tex. 2003). A good faith plan “must fairly achieve a result consistent with the [Bankruptcy] Code.” *Id.* (quoting *In re Block Shim Dev. Co. – Irving*, 939 F.2d 289, 292 (5th Cir. 1991)). Good faith itself is “evaluated in light of the totality of the circumstances surrounding establishment of [the] plan, mindful of the purposes underlying the Bankruptcy Code.” *In re Village at Camp Bowie I, L.P.*, 710 F.3d 239, 247 (5th Cir. 2013). The ultimate goal of the analysis is to determine the “subjective motive” of a plan proponent. *In re Texas Star Refreshments, LLC*, 494 B.R. 684, 694 (Bankr. N.D. Tex. 2013).

37. The record demonstrates there was virtually no negotiation of the economic terms of the Oaktree proposal, and in particular there was no effort by the Chapter 11 Trustee to secure the highest possible price for the Equity Notes.⁹ The purported consideration for the PMAs was clearly based not on any actual metric of value for those contract rights, but on an amount necessary to pay Josh Terry’s claim. Certainly as to the Equity Notes, this was not a negotiation between a willing seller and a willing buyer – the seller was not even present. It is instead a scheme, concocted in bad faith, to take property from one party and provide a windfall to other parties.

38. Moreover, improper motives have tainted these bankruptcy cases from the beginning. Joshua Terry initiated these proceedings on the eve of a state court hearing to consider the very relief he then requested from this Court. From the very beginning, Terry has made clear his motivation for initiating the involuntary bankruptcy: to prevent Acis LP from

⁹ The Chapter 11 Trustee has testified that he engaged in no substantive negotiation concerning the sale price of the Equity Notes. See Transcript of July 6, 2018 hearing at 75:14-16; 76:6-8:

MR. MALONEY. Was there any negotiation over the price formula that they were proposing for the subordinated notes?

MR. PHELAN. No . . .

. . .

Q. Now you didn’t ask that they increase that at all?

A. No.

meeting its contractual obligation to effectuate the reset requested by the equity—so that the Debtors could continue to earn management fees they are not entitled to.¹⁰

39. The Chapter 11 Trustee has adopted Terry’s cause.

40. At the end of the day, these bankruptcy cases and the Plan amount to nothing but a free option play by Terry, the Chapter 11 Trustee, and Oaktree to monetize PMAs with less than nominal value, at the expense of Highland (who is effectively funding the administrative expenses of these cases on account of the substantial management fees being withheld from it) and HCLOF (who is being denied its contractual rights with non-debtor parties and stripped of its own property against its will to fund that payment). The Chapter 11 Trustee has nothing to lose from this strategy – he can turn an asset with little or no value into a big pay day for Terry and himself. Oaktree similarly has nothing to lose – if it doesn’t end up getting the Equity Notes, it walks away with all its expenses paid and a \$2.5 million break-up fee for its time.

41. In these circumstances, the Court should not make a good faith finding.

D. Section 1129(a)(5) – The Plan Does Not Properly Disclose or Address Insider Issues

42. Bankruptcy Code section 1129(a)(5)(A)(i) requires a plan proponent to disclose “The identity and affiliations of any individual proposed to serve, after confirmation of the plan, as a director, officer, or voting trustee of the debtor, an affiliate of the debtor participating in a joint plan with the debtor, or a successor to the debtor under the plan.” Under both Plan B and Plan C, Terry is slated to receive 100% of the equity in the Reorganized Debtor (as well as, inexplicably, any residual assets of the Acis Trust upon payment in full of all creditors). Terry therefore clearly comes within the definition of individuals described in section 1129(a)(5)(A)(i).

¹⁰ Among the things acknowledged by Terry at the involuntary trial in March 2018 was the fact that he “had no issues with the rest or refinance transaction. [Rather,] the issue was that these collateral-management agreements were transferred for no consideration to Acis.” March 21, 2018 Hrg. Tr. At 132:16-19. Note, however, that fees would not continue to be payable under the PMAs following a reset in any circumstance. *See also Id.* at 27:22-28:1: “Q: And you knew there was an extreme likelihood that the [reset] transaction was not going forward as a result of the bankruptcy filing, correct? MR. TERRY: Yes, that was our goal on filing the involuntary petitions.”

While Terry's identity is disclosed in Plans B and C, his affiliations are not. Specifically, the Chapter 11 Trustee makes no effort to describe Terry's relationship and affiliations with other parties in interest in this case including (without limitation) Oaktree, Brigade Capital Management, L.P., and Cortland Capital Markets Services LLC. Furthermore, the Chapter 11 Trustee does not disclose or otherwise describe the post-petition affiliation between Terry and the Chapter 11 Trustee himself. Discovery in this matter has revealed, and evidence at the confirmation hearing will further demonstrate, that Terry has essentially acted as the co-trustee in this case. This includes: taking it upon himself to market the Debtors' assets, introducing the Chapter 11 Trustee to Oaktree, participating in most substantive communications with Oaktree, and participating in the formulation of a Plan that (under Plans B and C) hands control of the Debtors over to him. On this record, it is clear that Terry's affiliations have not been disclosed, in violation of section 1129(a)(5)(A)(i).

43. While Terry's undisclosed affiliations is a significant issue in and of itself, the relationship between Terry and the Chapter 11 Trustee raises yet another, troubling issue. The facts of this case lead inexorably to the conclusion that Terry is an insider of the Plan proponent (i.e., the Chapter 11 Trustee). The term "insider" is defined in Bankruptcy Code section 101(31) to "include" parties who have certain officer, director, or ownership interests in a debtor. However, the concept of a non-statutory insider has been recognized by many courts, including the Supreme Court. *See U.S. Bank N.A. v. Village at Lakeside, LLC*, 138 S. Ct. 960 (2018). The Fifth Circuit has identified the following factors to consider when determining whether a party is non-statutory insider: (1) the closeness of the relationship between the party and the debtor; and (2) whether the transactions between the party and the debtor were conducted at arms-length. *Browning Interests v. Allison (In re Holloway)*, 955 F.2d 1008, 1011 (5th Cir. 1992).

Importantly, cases recognize that control over the debtor is not a requirement for determining non-statutory insider status. *See, e.g., In re The Village at Lakeridge, LLC*, 814 F.3d 993, 1001 (9th Cir. 2016); *Anstine v. Carl Zeiss Meditec AG (In re U.S. Med., Inc.)*, 531 F.3d 1272, 1277 n.5 (10th Cir. 2008).

44. The ultimate point of analyzing whether any party is an insider is to determine whether such party is using “their privileged position to disadvantage non-insider creditors.” *See In re South Beach Secs., Inc.*, 376 B.R. 881, 888 (Bankr. N.D. Ill. 2007). Insider status is also critical for determining whether a party’s desire to obtain, or maintain, control over a debtor is motivating the party. *See In re Rexford Props., LLC*, 557 B.R. 788, 799 (Bankr. C.D. Cal. 2016) (noting that insiders seeking to retain ownership of the reorganized debtor were “influenced by totally different considerations from those motivating the other creditors.”) (quoting *In re Featherworks Corp.*, 25 B.R. 634, 640 (1st Cir. BAP 1982)).

45. In this case, the Chapter 11 Trustee is the proponent of the Plan. Plan proponent insiders should be scrutinized because they, like a debtor insider, may be using a plan process to benefit their “privileged position.” For example, in *In re Allegheny Int’l, Inc.*, 118 B.R. 282 (Bankr. W.D. Pa. 1982), the court found that a non-debtor plan proponent (Japonica Partners, L.P.) was considered an insider because Japonica during the case had access to “voluminous and thorough” information available only to insiders. Moreover, the court noted that while Japonica “did not have actual control or legal decision making power [over the debtor] . . . [Japonica] attempted to influence, in not very subtle ways, decisions made by the debtor.” *Id.* at 298.

46. Terry’s actions fit perfectly into such a non-statutory insider analysis. A review of the Plan makes plain Terry’s favorable treatment. His claim is separately classified, the claim is treated the same as an entirely secured claim would be, despite the fact that Terry did not even

alleged his claim was fully secured, he is being permitted to use \$1 million to acquire Acis LP's equity, despite the fact that the claim on file is less than \$1 million, and the Chapter 11 Trustee has made no indication that Terry's secured claim may be avoided, despite the fact that the garnishment took place well within the 90-day pre-petition preference period.

47. In addition, while Terry is not in formal "control" of the Chapter 11 Trustee, Terry had access to voluminous insider information during the pendency of this case and he clearly influenced decisions made by the Chapter 11 Trustee. Nothing about the relationship between Terry and the Chapter 11 Trustee suggests that they acted at arms-length. Moreover, Terry used his close relationship to further his non-creditor motivation to put into place provisions that will allow him to take sole control over the Reorganized Debtor. Thus, Terry meets every single element for establishing that he is a non-statutory insider of the Plan proponent in this case. Moreover, any attempt by the Chapter 11 Trustee to distinguish the facts and cases on the basis that the Chapter 11 Trustee is not the same entity as the Debtors is specious. Once again, the Chapter 11 Trustee is the Plan proponent in this case. If a Chapter 11 trustee were able to hide behind an "I am not the debtor" argument, then it would follow that parties could engage in all manner of inside dealing and wrongful acts with a trustee with impunity. That makes no sense. The non-statutory insider analysis is designed to identify whether a party has a close relationship that allows the party to influence the process to further non-creditor goals (i.e., control). Terry meets that test with respect to the Plan proponent in this case. And, as discussed below, the fact that Terry is a non-statutory insider means the Chapter 11 Trustee cannot cram down the Plan.

E. Sections 1129(a)(7) and 1129(b) – The Plan Is Not In the Best Interest of Creditors and Is Not Fair And Equitable

48. Bankruptcy Code sections 1129(a)(7) and 1129(b) require that a plan be in the best interest of creditors and otherwise fair and equitable. First and foremost, Plans A, B, and C are premised on actions that are not supported by the law. How could it ever be in the best interest of creditors for a plan proponent to act outside the law? The Plan is a legal fallacy and, even if confirmed, will be the subject of years of litigation and ever-increasing administrative expense claims. That is not in the creditors' best interests.

49. Also, included in a best interest of creditors analysis is a determination that creditors who have not accepted the plan will receive no less under the Plan than they would in a hypothetical Chapter 7 liquidation. *In re Briscoe Enters., Ltd. II*, 994 F.2d 1160, 1167 (5th Cir. 1993). This requires a valuation analysis comparing what the creditor would receive if the property were sold today versus the value such creditor would receive as a creditor in a Chapter 7 case. *Id.*

50. The Chapter 11 Trustee cannot meet his burden on this valuation issue with respect to HCLOF.¹¹ It is undisputable that HCLOF was not a creditor as of the Petition Date. That is, the basis for the Chapter 11 Trustee asserting that HCLOF is a creditor is the equitable relief sought in an adversary proceeding brought by HCLOF against the Chapter 11 Trustee after the Petition Date. In a hypothetical Chapter 7 case, there would simply be an orderly liquidation and therefore no need to twist the law of equitable relief and subrogation to support a plan process and HCLOF would keep its subordinated notes. As such, any liquidation analysis by the Chapter 11 Trustee is a non-sequitur from the beginning because it would be based on the facially incorrect assumption that HCLOF was a creditor on the Petition Date. Moreover, even if

¹¹ As noted, HCLOF asserts no creditor standing.

that flaw is simply ignored (and there is no reason to do so), the valuation numbers do not add up. The Plan proposes to pay HCLOF amounts based entirely on a May 2018 letter sent by Highland. Evidence has shown in this case that circumstances have changed dramatically since May 2018, and further, that HCLOF values its Equity Notes much higher than what is being proposed under the Plan. The Chapter 11 Trustee bears the burden of rebutting that valuation evidence and, based on the record of this case, he will not be able to meet such burden. In fact, the Chapter 11 Trustee has not even substantively included HCLOF in its analysis purporting to satisfy section 1129(a)(7)¹² and he has advanced no expert witness to address the valuation issues necessary to do so at the confirmation hearing. Therefore, the Chapter 11 Trustee cannot satisfy the required test under section 1129(a)(7).

F. Sections 1129(a)(8), (10) and 1129(b) – The Plan Does Not Meet the Requirements for Cram Down

51. Bankruptcy Code sections 1129(a)(8) requires that each impaired class vote in favor of a plan. Bankruptcy Code section 1129(a)(10) permits a plan proponent to cram down a plan on non-voting classes, as long as one class of impaired creditors votes in favor of the plan. Insider votes are not counted for the purposes of consent under 1129(a)(10). Section 1129(b), in turn, requires in a cram down plan that the plan not unfairly discriminate and is fair and equitable to the non-voting creditors. Based on the record of this case, it is assumed that Class 3 (the Terry Secured Claim) will be the only class with the claim amount and numerosity to be deemed (according to the Chapter 11 Trustee) a consenting class. Therefore, in order to meet the cram down confirmation requirements, the Chapter 11 Trustee has the burden of showing that: (i) Terry is impaired; (ii) Terry is not an insider; and (iii) cramming the Plan down solely on

¹² The Chapter 11 Trustee's liquidation analysis is attached as Exhibit 2-D to the Disclosure Statement. The amount of the Class 2 HCLOF claim is listed as "TBD." *Id.*

Terry's vote does not unfairly discriminate and is fair and equitable to other creditors. The Chapter 11 Trustee cannot meet such a burden.

52. The Fifth Circuit interprets the concept of impairment broadly to include any alternation of a creditor's rights. *In re Village at Camp Bowie I, L.P.*, 710 F.3d at 245. However, a broad interpretation does not mean that the concept of impairment does not exist. The policy reason for requiring an impaired class to accept the plan under a cram down is to ensure that at least one group of creditors that is "hurt . . . nonetheless favors the plan." *In re One Times Square Assocs. Ltd. P'ship*, 165 B.R. 773, 776-77 (S.D.N.Y. 1994) (emphasis added).

53. Here, no viable argument can be made that Terry is impaired under Plan A because Plan A proposes to pay Terry in full with interest. The interest element, of course, compensates Terry for any delay in receiving what he alleges he is owed. Paying a creditor in full with interest is the very definition of non-impairment. Using a lone creditor, let alone an insider such as Terry, should not be sufficient to fulfill the section 1129(a)(10) requirement. This is a textbook case of using artificial impairment to generate an impaired accepting class.

54. Moreover, even if Terry were considered impaired under Plan A, Terry's votes should not be counted under any of the plans (A, B, or C) because Terry is a non-statutory insider. The basis for deeming Terry a non-statutory insider is set forth above. Because of his status as such, the Chapter 11 Trustee is prohibited by the plain language of section 1129(a)(10) from relying on Terry's votes to support a plan.

55. The final requirement for a cram down plan is that it is fair and equitable and does not unfairly discriminate. Whether a plan is proposed in good faith is a critical element of this determination. *See In re Village at Camp Bowie I, L.P.*, 710 F.3d at 247 (citing *In re Sandy Ridge Dev. Corp.*, 881 F.2d 1346 (5th Cir. 1989)). Because, as set forth above, the Chapter 11

Trustee is unable to establish that the Plan was proposed in good faith, he likewise will be unable to establish that he meets the cram down standard. The Plan also unfairly discriminates on a number of different bases. Moreover, the Chapter 11 Trustee provides no basis for classifying Highland's claims separately under the Plan, other than to gerrymander the classes.

G. Section 1129(a)(10) – The Plan's Claim Classifications are Improper

56. A further requirement under section 1129(a)(10) and related case law is that claims be properly classified under a plan. *See, e.g., In re Greystone III Joint Venture*, 995 F.2d 1274, 1279 (5th Cir. 1991) (prohibiting the gerrymandering of classes to create a consenting impaired class). Claims that are "substantially similar" must be classified together. Terry's claim treatment under the Plan is a blatant example of gerrymandering. Terry has alleged a partial secured claim based on pre-petition garnishment of certain funds. However, the garnishment occurred within the 90-day preference period and is *per se* avoidable. As such, Terry is nothing more than a general unsecured creditor in this case. His claim should be classified alongside other general unsecured creditors in Class 4.

57. Highland is a general unsecured creditor in the case, but its claim has been separately classified from other general unsecured creditors. Similarly, HCLOF is a Class 2 claimant under Plan A, but is effectively a Class 5B claimant under Plan B and Plan C. Presumably, the Chapter 11 Trustee bases such separate classification and disparate treatment on his allegation that Highland and/or HCLOF are liable for a fraudulent transfer. However, that matter remains subject to an on-going adversary proceeding. In other words, the Chapter 11 Trustee has simply made an allegation and is yet to prove his case. Permitting separate classification based on unproven allegations would seem an invitation for plan proponents to

engage in all manner of mischief in order to craft around the requirement that substantially similar claims be classified together.¹³

H. Section 1129(a)(11) – The Plan is Not Feasible

58. Bankruptcy Code section 1129(a)(11) has been interpreted to require a finding that a plan is economically feasible. This requires the Chapter 11 Trustee to demonstrate that the plan has a “reasonable assurance of commercial viability.” *In re Briscoe Enters., Ltd. II*, 994 F.2d at 1166. Moreover, the Chapter 11 Trustee must “present proof through reasonable projections that there will be sufficient cash flow to funder the [Plan].” *See In re Couture Hotel Corp.*, 536 B.R. 712, 737 (Bankr. N.D. Tex. 2015).

59. On the record before the Court, the Chapter 11 Trustee has failed to demonstrate sufficient funds to meet all the obligations set forth in the Plan. That includes the very substantial administrative expense burden that appears to have surpassed the total claims alleged by the Chapter 11 Trustee to be payable in this case.

I. The Plan Cannot Effect an Assumption and Assignment of the PMAs Without Consent.

60. The Plan A transaction cannot be confirmed because it proposes to assume and assign the PMAs to Oaktree (*see* Plan § 2.17(c)) in violation of section 365(c)(1) of the Bankruptcy Code and without the requisite consent. *See* 11 U.S.C. § 365(c)(1) (trustee “may not

¹³ HCLOF and Highland object to the Chapter 11 Trustee’s apparent attempt to litigate the fraudulent transfer claims currently pending in the adversary proceeding as part of the plan confirmation process. As set forth in their separately-filed joint motion to strike the expert report of Kevin Haggard of Miller Buckfire, any such attempts are procedurally improper and inconsistent with the parties’ understanding and agreed-upon schedule. Highland and HCLOF have a right under the Bankruptcy Code and applicable rules to litigate the fraudulent transfer claims in a proceeding subject to the heightened procedural protections available in an adversary proceeding—not in the context of a harried and accelerated confirmation process (a process of the Trustee’s own making). *See In re Mansaray-Ruffin*, 530 F.3d 230, 242 (3d Cir. 2008) (“[W]here the Rules require an adversary proceeding—which entails a fundamentally different, and heightened, level of procedural protections—to resolve a particular issue, a creditor has the due process right not to have that issue without one.”). The Court should not condone this type of “litigation by ambush.” *See In re Vidal*, No. 12-11758 BLS, 2013 WL 441605, at *5 (Bankr. D. Del. Feb. 5, 2013) (applying *Mansaray-Ruffin* to avoid “lien-stripping by ambush”).

assume or assign any executory contract . . . if applicable law excuses a party, other than the debtor, to such contract . . . from accepting performance from or rendering performance to an entity other than the debtor . . . and such party does not consent to such assumption or assignment”); *In re Cedar Chem. Corp.*, 294 B.R. 224, 232 (Bankr. S.D.N.Y. 2003) (“a contract otherwise unassignable under § 365(c)(1) can be assumed and assigned if the non-debtor party consents”). The IAA and New York state law provide the relevant “applicable law” prohibiting assignment and excusing HCLOF from accepting performance from anyone other than Acis and/or Highland.

61. The IAA prohibits the assumption and assignment of the PMAs to Oaktree without, among other things, the Equity Noteholders’ consent. Section 205(a)(2) of the IAA prohibits investment advisers (i.e., Acis LP) from entering into an investment advisory contract with a client (here, the CLOs) that “fails to provide, in substance, that no assignment of such contract shall be made by the investment adviser without the consent of the other party by the contract.” 15 U.S.C. § 80b-5(a)(2). Section 202(a)(1) of the IAA defines “assignment” generally to include “any direct or indirect transfer . . . of an investment advisory contract” by an adviser. 15 U.S.C. § 80b-2(a)(1) (emphasis added).

62. Section 14 of the PMAs (titled “Delegations/Assignments”) provides the provisions intended to satisfy section 205(a)(2) of the IAA. Those sections, in relevant part, prohibit Acis from assigning its responsibilities under the PMAs without the written consent of each relevant CLO, at least a majority of the Equity Notes of each CLO, at least a majority of the Controlling Class (as defined in the indentures), and satisfaction of the Global Rating Agency Condition. *See, e.g.*, 2013-1 PMA, § 14(a). Acis cannot transfer, either directly or indirectly, its responsibilities under the PMAs without first satisfying the requisite conditions, including

obtaining the written consent of a majority of the Equity Noteholders of each CLO (which the Chapter 11 Trustee has not obtained).

63. The *CWCapital Cobalt VR Ltd. v. CWCapital Invs. LLC*, No. 17 Civ. 9463, 2018 U.S. Dist. LEXIS 90174 (S.D.N.Y. May 23, 2018) case does not mandate a different result. First, the language the Trustee quotes is from a decades-old SEC no-action letter. *Id.* at *12 (quoting *SEC No-Action Letter, Am. Century Cos.*, 1997 WL 1879138, at *5 (Dec. 23, 1997)). SEC no-action letters are only binding with respect to the party requesting guidance, have no precedential value unless the SEC agrees to allow a party to rely on them, and the SEC is free to change their interpretation at any time. *See* SEC, Fast Answers, available at <https://www.sec.gov/fast-answers/answersnoactionhtm.html>. Second, CWCapital did not decide whether the IAA separately requires client consent. 2018 U.S. Dist. LEXIS 90174, at *12-13. Third, a reported case from a court in this District recently found to be well-pleaded a cause of action for “assigning the benefits of [an] agreement to provide investment advisory services to others” based on the IAA. *Douglass v. Beakley*, 900 F. Supp. 2d 736, 748 (N.D. Tex. 2012).

64. The proposed assumption and assignment undermines the public policy reasons for section 205(a)(2) of the IAA. The Chapter 11 Trustee’s transfer of portfolio management duties to Oaktree thus violates section 205(a)(2) of the IAA, and in turn, violates section 365(c)(1) of the Bankruptcy Code. The Chapter 11 Trustee and this Court cannot ignore the dictates of the IAA. *Cf. In re Adelphia Commc’ns Corp.*, 359 B.R. 65, 78-79 (Bankr. S.D.N.Y. 2007) (local ordinances provided “applicable law” that prohibited assignment).

65. The PMAs are also a personal services contract that cannot be assigned under New York law without consent. *See Wien & Malkin LLP v. Helmsley-Spear, Inc.*, 6 N.Y.3d 471, 482 (N.Y. 2006) (hotel management contract held below to be personal services contract;

“personal services contracts generally may not be assigned absent the principal's consent”) (citing 9 Corbin, Contracts § 865 [interim ed.]; 3 Farnsworth, Contracts §§ 11.4, 11.10 [3d ed]); *Marriott Int’l, Inc. v. Eden Roc, LLP*, 104 A.D.3d 583, 584 (N.Y. App. Div. 1st Dep’t 2013) (“The parties’ detailed management agreement places full discretion with plaintiffs to manage virtually every aspect of the hotel. Such an agreement, in which a party has discretion to execute tasks that cannot be objectively measured, is a classic example of a personal services contract that may not be enforced by injunction”); *see also* 6A N.Y. Jur., Assignments § 11 (“[T]he principle that all ordinary business contracts are assignable is subject to the exception that executory contracts for personal services or those involving a relationship of personal confidence are not assignable by one party unless the other party consents or waives the right to object. Thus, as a general rule, an employment contract for the performance of personal duties or services is not assignable by the employer so as to vest in the assignee the right to the labor of someone who never agreed to such employment. In fact, generally, no executory contract for personal services can be assigned by either party.”).

66. Under New York law, personal service contracts are generally those that depend on the skill or reputation of the performing party. *See In re Schick*, 235 B.R. 318, 323 (Bankr. S.D.N.Y. 1999) (“Faced with a state law restricting assignment . . . a court must inquire into its rationale and uphold the restriction under section 365(c) if the identity of the contracting party is material to the agreement”). As one bankruptcy court has stated with respect to New York law on the issue:

It is well settled that when an executory contract is of such a nature as to be based upon personal services or skills, or upon personal trust or confidence, the debtor-in-possession or trustee is unable to assume or assign the rights of the bankrupt in such contract. . . . It is patently unfair in such cases to require a non-debtor third party to accept performance from anyone other than the original contract vendee,

unless the contract clearly provides for the right to assign to another contract vendee.

In re Grove Rich Realty Corp., 200 B.R. 502, 510 (Bankr. E.D.N.Y. 1996); *see also Donald Rubin, Inc. v. Schwartz*, 559 N.Y.S. 2d 307, 310 (N.Y. App. Div. 1990) (describing a consulting agreement as being “in the nature of a personal services contract”); *Carbo Indus., Inc. v. Coastal Ref & Mktg., Inc.*, 154 F. App’x 218, 220 (2d Cir. 2005) (“this case does not fall within the limited exception developed for ‘personal services contracts’—*e.g.*, consulting contracts.”) (citing *Donald Rubin*, 559 N.Y.S. 2d at 310) (emphasis added).

67. As has been previously explained, HCLOF and its investors invested in reliance on the skill and expertise of Highland to manage the CLOs. In this case, a witness put on by the Chapter 11 Trustee – Zach Alpern of Stifel, Niocolas – testified to the fact investors pick sub-advisors based on the fact that different advisors “have different styles and make different creditor choices.”¹⁴ Mr. Alpern further testified that “equity holders make an informed decision when they make their investment and their opinion of the advisor is one of the considerations that they may make at the time of their investment, and it’s a consideration that they probably take into account whether they hold or sell that investment.”¹⁵

68. Replacing Acis/Highland with Oaktree/Brigade frustrates the investment objective of the parties, denies them the benefit of their bargain, and undermines and violates the IAA as well as black-letter New York law relating to personal service contracts. The assumption and assignment of the PMAs cannot be approved.

¹⁴ See Transcript of August 1, 2018 hearing on the Chapter 11 Trustee’s *Emergency Motion to Approve Replacement Sub-Advisory and Shared Services Providers, Brigade Capital Management, LP and Cortland Capital Markets Services LLC*, at 67:24-25.

¹⁵ *Id.* at 69:9-14.

J. The Disclosure Statement Should Not be Finally Approved

69. As to the Disclosure Statement, Highland and HCLOF renew their objections to its final approval based on the fact that it describes a patently unconfirmable Plan. *See In re Quigley Co.*, 377 B.R. 110, 115-16 (Bankr. S.D.N.Y. 2007); *In re Arnold*, 471 B.R. 578, 586 (Bankr. C.D. Cal. 2002).

**IV.
RESERVATION OF RIGHTS**

70. Nothing herein shall be construed as an admission of, or concession to, any fact contained in the Disclosure Statement or the Plan, and Highland and HCLOF reserve all rights to contest and rebut any and all factual allegations at the Confirmation Hearing. As previously mentioned herein, because discovery is ongoing per the Discovery Schedule, Highland and HCLOF reserve their rights to amend these Objections.

WHEREFORE, Highland and HCLOF respectfully request entry of an order (i) denying confirmation of the Plan; (ii) denying final approval of the Disclosure Statement; and (iii) granting such other and further relief to which Highland and HCLOF are entitled.

Dated: August 13, 2018

Respectfully submitted,

/s/ Jason B. Binford

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CERTIFICATE OF SERVICE

This is to certify that on August 13, 2018, a true and correct copy of the foregoing was served electronically via the Court's ECF system on those parties registered to receive such service.

/s/ Melina Bales

Melina Bales

EXHIBIT 6

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18-30264-sgj11 Acis Capital Management, L.P. - Court's Ruling on Plan Confirmation

Traci Ellison to: jbinford, honeil, emcgee, mbales, BBarnes, srosen, 08/30/2018 09:24 PM
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Dear Counsel:

The following is the court's ruling on the request of the Chapter 11 Trustee ("Acis Trustee") of Acis Capital Management, L.P. ("Acis") and Acis Capital Management GP, LLC (collectively, the "Debtors") to confirm the ***First Amended Joint Plan for the Debtors (the "Plan")***, as modified, which contains therein alternatives Plan A, Plan B, and Plan C.

The court will deny confirmation of Plans A, B, and C. Below is some of the court's reasoning.

Plans B and C

First, Plans B and C are unconfirmable because they contemplate the amendment of the various CLO Indentures to which Acis is not a party. Specifically, Section 3.24 (for Plan B) and Section 4.24 (for Plan C) each provide as follows:

"Amendment of Indentures. The Indentures shall be amended pursuant to section 1123(a)(5)(F) of the Bankruptcy Code to provide that the Acis CLOs cannot be called for redemption until the later of (a) the date on which all Allowed Claims against the Debtors have been paid in full, or (b) three (3) years after the Effective Date. In the event that the Acis CLOs are reset, any new indenture with respect to a reset CLO shall provide the reorganized Acis will continue as the portfolio manager and that the reset CLO cannot be called for redemption until the later of (y) the date on which all Allowed Claims against the Debtors have been paid in full, or (z) three (3) years after the Effective Date."

The court recognizes that section 1123(a)(5)(F) of the Bankruptcy Code provides that a Chapter 11 plan may provide for adequate means for the plan's implementation, ***such as cancellation or modification of any indenture*** or similar instrument. However, the court concludes that section 1123(a)(5)(F) applies only to an indenture on which the debtor is a party—namely the issuer. While the court understands that oftentimes multiple, intertwined agreements are sometimes read together and treated in many respects as one integrated document, and while the court recognizes that, in this case, the CLO Indentures and CLO PMAs (the latter of which Acis is party to) are very interrelated, the court does not believe that this gives Acis the right to amend the Indentures without every single party thereto otherwise agreeing. For this simple reason, the current Plans B and C will not be confirmed.

Plan A

Next, with regard to Plan A, the issues are much more complicated. But the court finds Plan A unconfirmable because—while HCLOF has repeatedly asked the Bankruptcy Court for relief, and has also made certain demands upon the CLO Issuers, the Indenture Trustee and the Acis Trustee with regard to optional redemptions—HCLOF is ***not the holder of a claim*** against Acis, as defined in Section 101(5) of the Bankruptcy Code, to which the doctrine of equitable subrogation

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can be applied.

Plan A, distilled to its essence, is premised upon: (1) treating HCLOF as an entity with a “claim” against Acis, pursuant to the Bankruptcy Code’s definition in section 101(5)(B), that can be provided for in an Acis plan as an unsecured claim (Class 2); (2) monetizing or liquidating that claim—by calculating the amount HCLOF would realize if HCLOF received exactly what it has demanded from the CLO Issuers, the Indenture Trustee, and the Acis Trustee; (3) paying the monetized/liquidated claim of HCLOF in cash in full on the Effective Date of the Plan, with cash that the Acis Trustee would receive from Plan funder Oaktree; (4) after payment of HCLOF on its liquidated/monetized claim, the Acis Trustee would be entitled to step into the shoes of HCLOF, and be the new holder of HCLOF’s Sub Notes, via the court’s application of the common law doctrine of equitable subrogation to the Acis Trustee—it is argued that this would be equitable, since the Acis Trustee would essentially be paying the CLO Issuers’ (a debtor’s) obligations on the Sub Notes to HCLOF (a creditor) and, thus, should be able to step into that creditor’s shoes to avert HCLOF’s double recovery; and (5) the Acis Trustee, after acquiring the Sub Notes through equitable subrogation, would convey those Sub Notes to Oaktree, the plan funder.

HCLOF, Highland Capital Management (“Highland”), and the CLO Issuers object to this use of equitable subrogation—essentially arguing that, no matter what one calls it, this is forcing a non-debtor party to sell its property that is not property of the estate. The court does not find this to be an easy analysis at all. To be sure, this is a novel proposed application of the equitable subrogation doctrine. To be sure, the Acis Trustee’s proposal, at first blush—and even after a second or third turn—looks a little like an effort to force a sale of non-debtor property. This would be a novel application of the equitable subrogation doctrine—which, admittedly, has grown from a somewhat narrow to a much broader doctrine over time, with the historical purpose always being to serve the interests of fairness and justice. It is worth noting that, initially, courts in New York attempted to limit the scope of equitable subrogation to apply only to persons standing directly in the place of a surety. Then, as courts in other states expanded the concept of equitable subrogation, so did the courts of New York, eventually expanding the concept to cover third party guarantors. It was further expanded to parties who pay off a mortgage and in the case of refinancing mortgagees. The doctrine essentially went from a narrow remedy only available to sureties, to a broad doctrine available to almost any party regardless of his legal interest.

But the court believes there are at least a couple of reasons the doctrine should not be applied here. First, the court does not believe HCLOF can be construed to have a “claim” against Acis, pursuant to section 101(5)(B) of the Bankruptcy Code.

The evidence (Exh. 38) was that HCLOF made statements in correspondence dated May 4, 2018, from HCLOF to U.S. Bank, the indenture trustee for all five Acis CLOs, arguing that Acis, as portfolio manager under the CLO-PMAs, was breaching its duties, and stating that both the CLO Issuer “and the Subordinated Noteholders have a claim for the losses caused by the actions of the Portfolio Manager and the Chapter 11 Trustee” and claiming setoff right against funds held by the indenture trustee belonging to the Debtors.

Additionally, the evidence was also that HCLOF has twice during the bankruptcy case purported to direct the CLO Issuers, the Indenture Trustee, and Acis “to effect an Optional Redemption of all Secured Notes and the Subordinated Notes in full.” Exhs. 20 & 21. In the second notice, HCLOF added language that this would be “for the express purpose of placement of a portion of the portfolio assets held by the Co-issuers into a warehouse arrangement or a total return swap or other derivatives arrangement with Highland Capital Management, L.P.” The end result of

this, of course, would be that the Debtor Acis would no longer have any assets to manage and no revenue stream to potentially pay its creditors.

Then, after the Trustee refused to effectuate an optional redemption, both HCLOF and Highland filed, on May 30, 2018, an adversary proceeding against the Acis Trustee, demanding that the Acis Trustee specifically perform and effectuate an optional redemption (the "Adversary"-- Adversary No. 18-03078-sgj). The Adversary Complaint states: *"Under the [CLO] funds' governing documents, the investors [e.g. HCLOF] have the right to have their money returned upon demand. Consequently, to mitigate their on-going losses, the investors have instructed the Indenture Trustee and Acis LP, as the putative portfolio manager of the funds, to sell the funds' assets through a redemption process provided for in the Indenture, and return the investors' money to be invested elsewhere with higher yields The Debtors, which are controlled by a Chapter 11 Trustee, have refused to authorize the necessary processes to effectuate a redemption of the funds to allow the return of the investors' money The investors are suffering daily losses because of the Chapter 11 Trustee's inaction. . . . The Plaintiffs file this Complaint to protect their interests and urge the Court to promptly enter a preliminary injunction enjoining the Chapter 11 Trustee from interfering with the redemption process and allowing the investors to have their money returned before they incur further losses."* Para. 2.

The Original Complaint went on to state that the ACIS CLO PMAs are valid and enforceable contracts between the CLOs and Acis LP. Under the PMAs, Acis LP provides investment advisory services to the CLOs. "Plaintiff HCLOF, who holds an equity position in the CLO, is a third-party beneficiary of the PMA. The Chapter 11 Trustee, as Acis LP's Chapter 11 trustee, has anticipatorily breached the PMA by communicating his refusal to effect the Subordinated Noteholders' requested redemption as required by the PMA. The Chapter 11 Trustee's breach has caused damage to HCLOF." Paragraphs 67-70. See also paras. 74-77; 81-84; 88-91; 95-98.

Subsequently, HCLOF withdrew its two sets of redemption notices and on August 10, 2018 (after appealing a bankruptcy court preliminary injunction in the Adversary and after also moving to withdraw the reference in the Adversary), moved to amend the Adversary to ask for only the following: *"Pursuant to 28 U.S.C. § 2201, HCLOF seeks a declaration that the Chapter 11 Trustee has no authority to sell or transfer HCLOF's property without HCLOF's consent. HCLOF seeks no money damages or other relief not sought in this Amended Complaint."*

Is this all enough for HCLOF to have a "claim" against the Debtor, pursuant to section 101(5)—in other words, does it amount to an assertion of a "right to an equitable remedy for breach of performance if such breach gives rise to a right to payment"—particularly when HCLOF has now withdrawn its two notices requesting the Indenture Trustee and Debtor commence an optional redemption process and has also sought to amend the Original Complaint to specify that it is not seeking any damages?

The court believes no. The five CLO PMAs specifically provide that there are *no third party beneficiaries* (except that four of the five CLO PMAs carve out the Indenture Trustee as a third party beneficiary). Thus, HCLOF—although it alleged in the Original Complaint—that it was an alleged "third party beneficiary," never had any basis to state that or to complain of Acis's alleged "anticipatory breach" of the CLO PMAs, as it purported to do in the Original Complaint. Moreover, there is, of course, no longer a PMA between Acis and HCLOF (f/k/a/ as ALF), as of October 27, 2017, as a result of the series of transactions that "the Highlands" apparently

orchestrated after the Josh Terry arbitration award and judgment. Thus, HCLOF cannot claim any breach of contract between Acis and HCLOF. Acis is technically not a party to the Indentures. Thus, as far as the court is aware, ***there is no contract between HCLOF and Acis whatsoever. If there is some theory under which HCLOF can assert liability against Acis , it has not been articulated.***

In summary, the court does not believe HCLOF (though it has made many threats and demands and filed an Adversary) has ever articulated a viable claim against Acis. Without a viable claim, the court does not believe the equitable subrogation doctrine asserted by the Acis Trustee works. And, without some sort of claim being validly asserted against Acis, any payment by it on account of the Sub Notes would appear to be voluntary.

The court recognizes that some courts have applied the equitable subrogation doctrine where a party paid a debt on which it had no liability and seemed to do it somewhat voluntarily—despite there being a long-standing exception to the doctrine for “voluntary payment.” The strongest example of this is the case of NY Stock Exchange v, Sloan, **1980 U.S. Dist. LEXIS 13316** (S.D.N.Y. Aug. 15. 2018). But it appears to this court that, in any case where a court has allowed equitable subrogation where “voluntariness” was somewhat in existence, ***there was a situation where there was a primary obligor who wasn't paying its obligation***. Here, the CLO Issuers are perfectly willing and able to perform their obligations. Thus, applying equitable subrogation here seems a bridge too far. The Acis Trustee would appear to an “officious meddler” (although with good motives) and—with no real exposure to HCLOF, in the court’s view—the payment of the Sub Notes obligations would be purely voluntary. The court recognizes that the Acis Trustee would be attempting to protect an interest of its own (the Acis PMA revenue stream) somewhat like the property developer in the Hamlet case. Hamlet v. Northeast, **64 A.D.3d 85** (N.Y App. Div. Second Dept. 2009). But, in Hamlet, the property developer who paid the Environmental fees to the town of Brookhaven, that the subcontractor had bonded and agreed to pay, was itself primarily liable on the Environmental fees (in other words, the Town had a claim against Hamlet). Again, equitable subrogation under the exact facts and circumstances of this case seems a bridge too far.

Miscellaneous Rulings

The court rules on a few miscellaneous matters that were contested, although it is denying confirmation. This may be useful for any future appeals or for any future proposed plans.

Assumption and Assignment of the PMAs would not violate section 365 of the Bankruptcy Code.

The court believes that the assumption of the CLO PMAs by the Acis Trustee and the assignment of the CLO PMAs to a third party (either Oaktree or Brigade or Cortland) would be permissible under section 365 of the Code. Section 365 of the Bankruptcy Code does not prohibit the Trustee from assigning its rights under the PMAs without the written consent of the CLOs, the Subordinated Noteholders, and others. Section 365(c)(1) of the Bankruptcy Code provides:

“The trustee may not assume or assign any executory contract . . . if . . . applicable law excuses a party, other than the debtor, to such contract . . . from accepting performance or rendering performance to an entity other than the debtor or debtor in possession, whether or not such contract . . . prohibits or restricts assignment of rights; and . . . such party does not consent to such assumption or assignment[.]”

11 U.S.C. § 365(c)(1).

The court overrules any objection that there is some applicable law that excuses the

counterparties to the PMAs (i.e., the CLO Issuers) from accepting performance from a party other than the debtor. First, these are not personal services contracts. Assessing whether a contract is a personal service contract "depends upon the subject of the contract, the circumstances of the case and the intent of the parties to the contract." *Leonard v. Gen. Motors Corp.* (In re Headquarters Dodge), 13 F.3d 674, 682-83 (3d Cir. 1993) (internal quotation marks omitted); see also *In re Compass Van & Storage Corp.*, 65 B.R. 1007, 1011-12 (Bankr. E.D.N.Y. 1986) ("Ascertaining whether a contract is personal posits on close distinctions, e.g., the nature and subject matter of the contract, the circumstances of the case placed in juxtaposition with the intention of the parties."). Even "clauses in the contract . . . attesting to a personal relationship will not be dispositive." *Leonard*, 13 F.3d at 683. Ultimately, if "the identity of that person or entity [rendering performance under the contract] is an essential element of the contract, and if the contract is non-assignable under applicable non-bankruptcy law then the estate cannot assign the contract." *Grove Rich Realty*, 200 B.R. at 507. Accordingly, in order to determine whether the PMAs are personal service contracts, the court must assess the particular circumstances in the case, the nature of the services provided by Acis under the PMAs, and whether such services are nondelegable. Highland contends that because the PMAs "depend on the skill and reputation of the performing party," the PMAs are personal service contracts, and thus unassignable. If this were the standard, the exception would swallow the rule—any prudent party contracting for another's services considers the other party's skill, expertise, and reputation—and any contract for services premised on the skill and reputation of the party providing services would be a personal service contract. It is not whether the party providing services is skilled and reputable—it is whether such services are unique in nature. See *Compass Van & Storage Corp.*, 65 B.R. at 1011. To support its contention, Highland cites New York cases under which hotel management contracts or consulting contracts were found to be personal service contracts. In the *Marriott* case cited by Highland, in which the court found the hotel management to be a personal service contract, the court observed that the hotel manager had "full discretion . . . to manage virtually every aspect of the hotel." *Marriott Int'l, Inc. v. Eden Roc, LLLP*, 104 A.D.3d 583, 584 (N.Y. App. Div. 1st Dep't 2013). *Marriott* is distinguishable. Here, Acis did not manage virtually every aspect of the CLOs. Pursuant to the Shared Services Agreement and Sub-Advisory Agreement, Acis LP delegated certain of its responsibilities under the PMAs to Highland. Accordingly, the personal qualities of Acis LP were not essential to performance under the PMAs. While the expertise of Acis LP was relevant to its selection as portfolio manager, such expertise is not unique—as demonstrated by the expertise and reputation of Oaktree, Brigade, and others who act as CLO portfolio managers. Also, importantly, the PMAs themselves provide that Acis may delegate the performance of its duties under the PMAs to third parties: "In providing services hereunder, the Portfolio Manager may employ third parties, including its Affiliates, to render advice (including investment advice), to provide services to arrange for trade execution and otherwise provide assistance to the Issuer, and to perform any of the Portfolio Manager's duties under this Agreement; provided that the Portfolio Manager shall not be relieved of any of its duties hereunder regardless of the performance of any services by third parties." 2014-3 PMA § 3(h)(iii). And although section 14 the PMAs requires consent for assignment, section 14 contemplates that an Affiliate assignee "has demonstrated ability, whether as an entity or by its personnel, to professionally and competently perform duties similar to those imposed upon the Portfolio Manager pursuant to this Agreement." *Id.* § 14(a). Further, sections 14 and 32 of the PMAs provide for merger, consolidation, or amalgamation of Acis with another company, where the resulting entity succeeds "to all or substantially all of the collateral management business of the Portfolio Manager." Pursuant to the terms of the PMAs themselves, the duties of Acis were not "so unique that the dut[ies were] thereby rendered nondelegable." See *Compass Van & Storage*, 65 B.R. at 1011 (citing RESTATEMENT (SECOND) OF CONTRACTS § 318(2) (1981)). As such, unlike personal service contracts, the PMAs do not "synthesize into those consensual agreements . . . distinctive characteristics that commit to a special knowledge, unique skill or talent, singular judgment and taste." *Compass*

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Van & Storage, 65 B.R. at 1011. Accordingly, because the duties of Acis LP under the PMAs are delegable (and were delegated) and are not unique, the PMAs cannot be personal service contracts that fall within the narrow exception of section 365(c)(1).

Additionally, Section 205(a)(2) of the Investment Advisors Act of 1940 ("IAA") is not a nonbankruptcy law that precludes assumption and assignment of the PMAs. Section 205(a)(2) of the IAA provides that a registered investment adviser (such as Acis) cannot enter into an investment advisory contract unless such contract provides "that no assignment of such contract shall be made by the investment adviser without the consent of the other party to the contract[.]" 15 U.S.C. § 80b-5(a)(2). Thus, this provision of the IAA merely requires that the PMAs contain an anti-assignment provision—the IAA is not "applicable law" that prohibits assumption or assignment without consent of the counterparties to the PMAs. Indeed, in the Southern District of New York, the court held:

"Section 205(a)(2) of the [IAA] . . . does not . . . prohibit an investment adviser's assignment of an investment advisory contract without client consent. The section merely provides that the contract must contain the specified provision. Thus, the assignment of a non-investment company advisory contract, without obtaining client consent, could constitute a breach of the advisory contract, but not a violation of Section 205(a)(2)."

CWCapital Cobalt VR Ltd. v. CWCapital Invs. LLC, 2018 U.S. Dist. LEXIS 90174, at *12 (S.D.N.Y. May 23, 2018). Assignment of the PMAs without consent of the counterparties simply constitutes breach of the PMAs, but the IAA is not "applicable law" that excuses the counterparties to the PMAs from accepting or rendering performance without such consent. Accordingly, the assignment of the PMAs to Oaktree does not violate the IAA or section 365(c)(1) of the Bankruptcy Code.

Preliminary Injunction

The preliminary injunction in place preventing HCLOF from pursuing optional redemptions will remain in place for now. The court believes there are automatic stay implications (section 362(a)(3)) with regard to HCLOF pursuing optional redemptions. The effect of an optional redemption is to *exercise control over the Acis PMAs and revenue stream* (property of the estate—see, e.g., Hometown Valley View v. Prime, 847 F.3d 302 (5th Cir. 2017)). While HCLOF is not itself a creditor (and while "the Highlands" entity separateness is not being challenged, and is not being disregarded by either the Acis Trustee, the court, or anyone else at this juncture), the court notes that HCLOF, Highland, and other Highland-related parties seem to work in tandem. Highland asserts a claim against Acis. Actions taken by HCLOF could be construed to be actions of Highland, an actual creditor. There is also a basis for keeping the preliminary injunction in place pending determination of the Acis Trustee's fraudulent transfer lawsuits. The evidence thus far has been compelling that numerous transfers after the Josh Terry judgment denuded Acis of value—perhaps even the ability to control its own destiny when the ALF PMA was essentially terminated without cause and Acis was made to sell its shares in ALF/HCLOF back to ALF/HCLOF. In the face of these facts, the court will be reluctant to terminate the preliminary injunction until this litigation is fully resolved.

End of Ruling

005802

Case 18-30264-sgj11 Doc 549 Filed 09/04/18 Entered 09/04/18 08:52:13 Desc
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Traci A. Ellison, Courtroom Deputy
to the Honorable Stacey G. C. Jernigan
U.S. Bankruptcy Court, Northern District of Texas
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005803

EXHIBIT 7

005804

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In Re:) **Case No. 19-34054-sgj-11**
) Chapter 11
)
HIGHLAND CAPITAL) Dallas, Texas
MANAGEMENT, L.P.,) August 3, 2022
) 2:30 p.m. Docket
Reorganized Debtor.)
)
)
CHARITABLE DAF FUND, L.P.,) **Adversary Proceeding 22-3052-sgj**
)
Plaintiff,)
)
v.) MOTION TO DISMISS ADVERSARY
) PROCEEDING FILED BY DEFENDANT
) HIGHLAND CAPITAL MANAGEMENT,
HIGHLAND CAPITAL) LP [19]
MANAGEMENT, L.P.,)
)
Defendant.)
)

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE STACEY G.C. JERNIGAN,
UNITED STATES BANKRUPTCY JUDGE.

APPEARANCES:

For the Plaintiff: Jonathan E. Bridges
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25 Proceedings recorded by electronic sound recording;
transcript produced by transcription service.

005806

1 DALLAS, TEXAS - AUGUST 3, 2022 - 2:37 P.M.

2 THE COURT: 22-3052. This is a motion to dismiss
3 adversary proceeding. For the Movant Highland, who do we have
4 appearing?

5 MR. DEMO: Your Honor, Greg Demo; Pachulski Stang
6 Ziehl & Jones; on behalf of Highland. Zachery Annable from
7 the Hayward firm is here as well. And we have Jim Seery.

8 THE COURT: Okay. Thank you.

9 All right. For Plaintiff/Respondent Charitable DAF, who
10 do we have appearing?

11 MR. BRIDGES: Jonathan Bridges here, Your Honor.

12 THE COURT: All right. Well, I've got the pleadings
13 here in front of me, and I saw an exhibit list of Movant/
14 Debtor, but I think the exhibits were just all of the
15 attachments to the amended motion to dismiss. Is that
16 correct?

17 MR. DEMO: That's --

18 THE COURT: Or the appendix, I should say?

19 MR. DEMO: That is absolutely correct.

20 THE COURT: Okay. All right. Well, I'll hear
21 Highland's argument.

22 MR. DEMO: And for the exhibits, we did have a
23 discussion with opposing counsel, counsel for the DAF.
24 Exhibit 17 is Mr. Seery's declaration. We filed the motion to
25 dismiss under both 12(b)(1) and 12(b)(6), and so Mr. Seery's

1 declaration we would like to formally enter into evidence
2 because that goes to what we believe is Plaintiff's lack of
3 standing and thus this Court's lack of jurisdiction. And we
4 do believe that extrinsic evidence is appropriate for that.

5 With respect to Exhibits 1 through 13 and then Exhibits 21
6 and 22, those are all documents that were filed on this
7 Court's docket and they consist of really three buckets:
8 either complaints or orders, the plan, and then transcripts.
9 All of those are on this Court's docket. And we would ask
10 your Court to take judicial notice of those. And I know that
11 Mr. Bridges may have some issues with that, but we do believe
12 that's appropriate for a 12(b)(6) motion.

13 THE COURT: All right. So you mentioned 17, the
14 Seery Declaration. 1 through 13, --

15 MR. DEMO: Yes, Your Honor.

16 THE COURT: 1 through 13, and 21 and 22. Or did I
17 mishear?

18 MR. DEMO: Yes. No, that's exactly right, Your
19 Honor.

20 THE COURT: So that's the universe of what you're
21 asking the Court to consider? You're not asking the Court to
22 consider 14, 15, and 18 through 20? I don't have them in
23 front of me to --

24 MR. DEMO: 14 -- we are not asking Your Honor to
25 consider 14, 15, 16, 18, 19, and 20.

1 THE COURT: Okay. All right. Mr. Bridges, what say
2 you about this?

3 MR. BRIDGES: Thank you, Your Honor. Counsel is
4 correct. We have no objection to Exhibit 17.

5 We do object to the remainder. And the remainder, our
6 objection is because they're not referenced in the pleading
7 and because they aren't actually evidence. What was filed,
8 especially what was filed in a different adversarial matter,
9 isn't evidence in this case. And that's the basis for our
10 objection.

11 MR. DEMO: Your Honor, if I may?

12 THE COURT: You may.

13 MR. DEMO: I guess the first thing is that they were
14 all referenced in the pleadings, Your Honor.

15 The second thing is that Your Honor can take judicial
16 notice of things on her docket, and all of these things are on
17 Your Honor's docket for purposes of the 12(b)(6) motion.

18 And I'm honestly a little surprised by Mr. Bridges'
19 arguments and by Plaintiff's arguments because they ask you to
20 do the exact same thing in their pleading. They ask you to
21 take judicial notice of two time entries that were filed in
22 the main docket here as evidence that we, Highland, had
23 knowledge of Plaintiff filing the complaint in the District
24 Court. And, you know, we're not going to quibble with that
25 because they are on your Court's dockets and we do believe

1 that you can take judicial notice of those.

2 And I can cite you Fifth Circuit case law, if you'd like,
3 but I think it's a fairly standard issue.

4 THE COURT: All right. I'll over --

5 MR. BRIDGES: Your Honor, one more thing?

6 THE COURT: Go ahead. Uh-huh.

7 MR. BRIDGES: I might be confused, Your Honor. My
8 objection was the failure to reference these documents in the
9 original complaint, the pending complaint in this adversary
10 proceeding, not to -- failure to have referenced them in the
11 briefing of this motion.

12 MR. DEMO: Your Honor, I don't think that changes it.
13 I mean, Your Honor is entitled to take judicial notice of
14 exhibits -- I mean, I'm sorry, of matters on her docket -- for
15 the purposes of our motion to dismiss. And all of these
16 pleadings and all of these exhibits and appendices -- the
17 witness and exhibit list were referenced in our motion to
18 dismiss. I don't think that changes anything.

19 THE COURT: All right. I overrule the objection. I
20 can take judicial notice of these items, and I will.

21 MR. DEMO: Thank you, Your Honor.

22 THE COURT: All right. You may proceed.

23 MR. DEMO: Thank you. Again, Your Honor, for
24 purposes of the record, Greg Demo; Pachulski Stang Ziehl &
25 Jones; on behalf of Highland Capital Management.

1 We were here today on -- originally on two motions to
2 dismiss. And our two motions to dismiss were generally
3 identical. The first motion to dismiss, which is going
4 forward today, is the motion -- I'm sorry, the motion to
5 dismiss the complaint filed by the Charitable DAF Fund, which
6 alleges that Highland breached its fiduciary obligations to
7 the DAF as an investor in Multi-Strat during the course of the
8 bankruptcy.

9 The second thing we were supposed to be here today on,
10 Your Honor, was a complaint -- a motion to dismiss the
11 complaint filed by PCMG Trading Partners XXIII. PCMG is
12 majority-owned by Jim Dondero and wholly controlled by Jim
13 Dondero. We did have PCMG contact us last week and offer to
14 withdraw that motion. We were happy to accept that offer
15 because we do think that it should have been dismissed.

16 That said, Your Honor, we were equally frustrated with
17 that offer, because the complaint was filed over a year ago.
18 Highland had to expend substantial resources briefing and
19 responding to motions. And then, on the eve of trial, when we
20 have a dispositive motion on file, they withdrew it. And that
21 is frustrating, Your Honor.

22 And it's doubly frustrating because Mr. Dondero has come
23 to this Court and tried to make an issue of the burn rate for
24 legal fees in this Court. And we think that -- that the
25 filing of the complaint and then the last-minute withdrawal of

1 the complaint is emblematic of what Mr. Dondero is doing here,
2 Your Honor.

3 That said, we are here only on one motion to dismiss. And
4 as I mentioned, it's our motion to dismiss Plaintiff's
5 complaint which alleges that Highland Capital Management
6 breached its fiduciary obligations to Plaintiff and those
7 fiduciary obligations arose under the Investment Advisors Act,
8 common law, and contract. And those breaches allegedly
9 occurred in mid-2020. And that was after the petition date,
10 after Your Honor appointed independent directors to manage the
11 bankruptcy, but before confirmation of the plan and before the
12 plan's effective date. And each of those causes of action
13 primarily revolve around the Plaintiff's contention that
14 Highland sold assets that it wasn't supposed to sell. In
15 other words, Highland sold assets that Mr. Dondero did not
16 want it to sell.

17 And I realize I mentioned the complaint was originally
18 filed in the District Court for the Northern District of
19 Texas. The District Court referred the complaint to Your
20 Honor in May of this year, and Highland filed its amended
21 motion to dismiss on May 22nd -- I'm sorry, May 27th, 2022.

22 And our motion to dismiss is simple, Your Honor, and it
23 amounts to one simple question: Are the causes -- should the
24 Court dismiss the complaint because the causes of action in
25 the complaint are administrative expense claims that should

1 have been filed in this Court and served on the Debtor prior
2 to the administrative expense claim bar date, which occurred
3 in September of 2021?

4 We believe the answer to that question is yes, Your Honor.
5 We believe it's unequivocally yes under black letter
6 bankruptcy law.

7 But as a separate and alternative basis for dismissal, we
8 believe that Plaintiff lacks both constitutional and
9 prudential standing, because (1) Plaintiff, the Charitable DAF
10 Fund, is not an investor in Multi-Strat, and that's what Mr.
11 Seery's declaration says; and (2) the Plaintiff did not allege
12 in the complaint how it was harmed by Highland's actions with
13 respect to Multi-Strat when it was not an investor in Multi-
14 Strat.

15 That's it, Your Honor. And we believe it is and should be
16 a simple matter.

17 Plaintiff, however, has made a belated and what we believe
18 is a procedurally-improper request to have the complaint
19 treated as a late-filed administrative claim by this Court.
20 We believe Your Honor should deny that request.

21 But before addressing the law, I think it's important,
22 Your Honor, to go through the facts and to go through the
23 timeline of this complaint, because what the facts and what
24 the timeline will show is that there was no inadvertent error,
25 Your Honor. There was a tactical and strategic decision to

1 file the complaint outside of this Court in the hopes that
2 this Court would not know about it and that it could be
3 adjudicated around Your Honor.

4 And Ms. Canty, can you please put up Slide 1?

5 And as you'll see, Your Honor, this is the timeline that
6 we would like to discuss. So, first, February 22nd, 2021.
7 Your Honor confirmed Highland's plan of reorganization.
8 Highland's plan, like all plans, included clear procedures for
9 dealing with administrative expense claims and stated --
10 again, we believe clearly -- that all administrative expense
11 claims are required to be filed within 45 days of the plan
12 effective date.

13 The next date we would bring Your Honor's attention to is
14 June 23rd, 2021. On June 23rd, the Dugaboy Investment Trust
15 filed a complaint in the Northern District of Texas, alleging
16 that Highland breached its fiduciary duties with respect to
17 Multi-Strat. We did not receive notice of that hearing -- of
18 that motion, of that complaint. But on June 25th, which is
19 the next day here, we had a hearing in front of Your Honor on
20 the Plaintiff the Charitable DAF's motion to reconsider the
21 order appointing Mr. Seery as Highland's chief restructuring
22 officer. During that hearing, we discovered that the Dugaboy
23 Investment Trust, Mr. Dondero's family trust, had filed its
24 complaint, and we brought that to Your Honor's attention.
25 Plaintiff's counsel at that June 25th hearing is the same

1 counsel in front of Your Honor today.

2 During that hearing, Your Honor rightly asked Plaintiff,
3 Plaintiff's counsel, about why it believed it could file
4 claims rightly before Your Honor in different courts. And
5 Your Honor rightly told Plaintiff to, and I'm quoting here,
6 "Go back and hit the books and be prepared to defend" filing
7 claims outside of this Court. After that hearing, Dugaboy
8 withdrew the Dugaboy complaint.

9 The next date I would call Your Honor's attention to is
10 July 22nd, 2021, approximately one month after that June
11 hearing. That's the date the complaint at issue today was
12 filed, Your Honor. The complaint -- and the complaint at
13 issue today was never served. Plaintiff filed a motion to
14 stay that complaint in the Northern District of Texas and
15 never served that motion to stay.

16 Moving forward, Your Honor, November 23rd, 2021. We are
17 here again in front of Your Honor on Plaintiff's complaint
18 with respect to the HarbourVest settlement. And Highland had
19 moved to dismiss that complaint. And again Plaintiff's
20 counsel at that hearing in front of Your Honor was the counsel
21 here today.

22 During that hearing, we also heard Plaintiff's motion to
23 stay the HarbourVest complaint pending resolution and pending
24 the appeal of Highland's plan of reorganization to the Fifth
25 Circuit.

1 Plaintiff's arguments concerning the plan injunction at
2 that hearing were essentially the exact same as the arguments
3 they make in the response to our motion to dismiss, that the
4 plan injunction prohibited them from doing anything. It
5 prohibited them from prosecuting the causes of action in the
6 complaint outside of this Court, which we agree with, but they
7 also argued it prohibited them from prosecuting the causes of
8 action in the complaint inside of this Court.

9 At that hearing, Your Honor -- and I'll backtrack just a
10 second after that -- at that hearing, Your Honor, Highland's
11 counsel was very clear on the record that they agreed that the
12 plan injunction prohibited litigation filed prior to the
13 effective date from occurring outside of this Court.
14 Highland, however, was also clear that Plaintiff did have a
15 remedy, and that remedy was to file the causes of action in
16 the complaint as a motion for allowance of an administrative
17 expense claim in this Court and prosecute them here.

18 At that hearing in November of 2021, Your Honor also told
19 Plaintiff's counsel that their arguments concerning the plan
20 injunction, and I'm quoting here, Your Honor, "reflect,
21 frankly, a misunderstanding of how the injunction language
22 applies."

23 Now, I'm going to backtrack, Your Honor, because I did
24 forget a very important date, and that's the August 11th, 2021
25 effective date of the plan. It is undisputed, Your Honor,

1 that Plaintiff received notice of that effective date, and
2 Plaintiff's counsel was separately noticed with that effective
3 date of the plan.

4 Those certificates of service are in Bankruptcy Docket No.
5 2747, and are included in our witness and exhibit list as
6 Exhibit 8. Again, it is undisputed that both Plaintiff's
7 counsel and Plaintiff had notice of the effective date of the
8 plan.

9 And it is also undisputed, Your Honor, that that notice
10 disclosed that all administrative expense claims had to be
11 filed with this Court and served on the Debtor within 45 days
12 of the effective date of the plan, which was September 25,
13 2021.

14 It is important to note that at no point in this timeline
15 to date did Plaintiff's counsel -- I'm sorry, did Plaintiff do
16 anything. Plaintiff did not file an administrative expense
17 claim. Plaintiff did not file a motion to have their
18 complaint allowed as timely filed. Plaintiff did nothing.

19 It was not until May of 2022 when the District Court
20 referred this action to Your Honor and after Highland filed
21 its amended motion to dismiss for Plaintiff's failure to
22 comply with the administrative expense claim bar date that
23 Plaintiff came into this Court asking leniency.

24 Plaintiff came into this Court in their response to the
25 motion to dismiss asking Your Honor to treat their claim as a

1 timely-filed administrative expense claim. But what this
2 timeline shows, Your Honor, and what the facts show, Your
3 Honor, is, again, that this was not an inadvertent mistake.
4 Plaintiff chose to file the complaint outside of this Court.
5 Plaintiff, with notice of the effective date and notice of the
6 administrative expense claim bar date, chose not to file an
7 administrative expense claim in this Court.

8 Plaintiff, with Your Honor's -- Your Honor's direct (audio
9 gap) in November of 2021 that they misunderstood the plan
10 injunction, still did nothing, Your Honor. It was not until
11 we moved to dismiss this action that Plaintiff requested, in a
12 procedurally-improper way, to have their claim treated as a
13 late-filed claim.

14 What we believe that shows, Your Honor, is that this was
15 tactical. That what Plaintiff actually wanted was to file
16 their claim in the District Court, which they did, and which
17 they did not give us notice of; to stay that action in the
18 District Court, which they did, and which they did not give us
19 notice of; and to have that complaint sit there in the
20 District Court until the Fifth Circuit overturned the plan,
21 and then and only then would they litigate that action, again,
22 away from Your Honor.

23 We believe that's highly improper, Your Honor.

24 That said, the legal question here is, again, very simple.
25 Does the complaint include administrative expense claims that

1 are now time-barred because they were not filed in this Court
2 by the September 2021 administrative expense claim bar date?
3 Again, we believe the answer to that question is a simple yes.
4 These are administrative expense claims.

5 Again, Plaintiff's complaint alleges that Highland
6 violated its fiduciary obligations to Plaintiff in mid-2020,
7 after the petition date, after appointment of independent
8 directors, before confirmation, and before the effective date,
9 at all times while Highland was the debtor-in-possession.

10 And as Your Honor knows, administrative expense claims,
11 generally speaking, are claims that arise under Section 503(b)
12 of the Code for the actual and necessary costs of preserving
13 the estate and that arise from the debtor-in-possession or
14 trustee's postpetition, pre-effective-date, ordinary-course
15 operation of the estate.

16 And the claims in the complaint are administrative expense
17 claims under 503(b) under the *Reading* exception which was
18 created by the Supreme Court in 1968 in *Reading Co. v. Brown*.
19 And as set forth in our brief, Your Honor, *Reading* is still
20 good law. It's routinely applied in the Fifth Circuit and
21 it's routinely applied in all circuits.

22 And *Reading*, Your Honor, (garbled) it includes not just
23 torts, but other claims arising from intentional or other
24 wrongful or -- wrongful acts as well. And the claims asserted
25 in the complaint are clearly administrative expense claims

1 under *Reading*. They are claims for intentional and/or
2 negligent violations of Highland's alleged fiduciary duty to
3 Plaintiff during the course of the bankruptcy.

4 And Ms. Canty, if you could please put up Slide 2.

5 Now, Plaintiff tries to dodge this by saying that the
6 definition of, quote, administrative expense claims and the
7 plan does not include the types of claims that they allege
8 here. But that's not the case, Your Honor. And the defined
9 term "Administrative Expense Claim" is in the middle box of
10 your screen. And as you'll see, it says it's any claim
11 allowed pursuant to Sections 503(b), 507(a)(2), 507(b), or
12 1114(2) of the Bankruptcy Code. Those include administrative
13 expense claims under the *Reading* exception, and they include
14 the administrative expense claims asserted in the complaint.

15 Those claims were required under the plan -- and the
16 provisions are all right here -- again to be filed in this
17 Court by September 2021. They were not.

18 And as I mentioned above, it is undisputed that Plaintiff
19 had notice of the plan, that Plaintiff had notice of the
20 administrative expense claim bar date. And it's also
21 undisputed that Plaintiff, represented by counsel, did not
22 file with this Court an administrative expense claim by
23 September 25th, 2021. Plaintiff's claims are now time-barred.

24 And we believe Your Honor's *Taco Bueno* opinion is on all
25 fours. In *Taco Bueno*, the claimant at least tried to file an

1 administrative expense claim with this Court by filing a proof
2 of claim on the claims register. Your Honor held that wasn't
3 good enough and it did not count as an administrative expense
4 claim, and Your Honor barred claimant's claim in *Taco Bueno* as
5 time-barred.

6 Here, similarly, Plaintiff, who's been represented at all
7 times by counsel, indisputably had notice and chose to file
8 the complaint in the District Court rather than complying with
9 the provisions of the plan and with the provisions of the
10 Bankruptcy Code. Under *Taco Bueno* and various cases, Your
11 Honor, this claim is time-barred.

12 And that should end the discussion, Your Honor, but it
13 doesn't, because Plaintiff, in its response to our motion to
14 dismiss, finally asked this Court for leniency and finally
15 asked this Court to treat the claim as, quote, a request for
16 an order permitting a late claim or otherwise to have it
17 treated as a timely administrative expense claim under **Federal**
18 **Rule of Civil Procedure 15**.

19 But that's not how it works, Your Honor. Section 502 of
20 the Code allows late-filed administrative expense claims only
21 for cause. But that requires a separate motion, and it
22 requires evidence, Your Honor. None of that happened here.
23 Instead, Plaintiff filed a one-line request to have it treated
24 as a late-filed claim, and it filed that request 16 months
25 after confirmation, 10 months after the bar date, and 8 months

1 after Your Honor rejected their argument on the plan
2 injunction.

3 There is no cause here. Plaintiff has provided no
4 evidence of it. It just asked for leniency based on a series
5 of what we believe are irrelevant arguments.

6 And that's where the facts again become important. As
7 Your Honor has said, facts matter. And the facts here, the
8 undisputed facts (garbled) Plaintiff and bely a finding of
9 cause or excusable neglect under *Pioneer*. Again, two
10 standards that Plaintiff has not even tried to argue.

11 And, again, Your Honor, what we believe the facts show is
12 that there was no inadvertent technical error here. There was
13 a considered and strategic plan to file these claims outside
14 of this Court in the hopes of avoiding Your Honor.

15 As in *Houbigant*, which we briefed in our paper, Plaintiff
16 is bound by those tactical decisions. And the complaint, Your
17 Honor, we would ask be dismissed with prejudice for failure to
18 state a -- I'm sorry, for failure to comply with the
19 administrative expense claim bar date.

20 And lastly, Your Honor, standing. In our motion to
21 dismiss, we sought an order dismissing this action under
22 12(b)(1) for lack of constitutional standing and also under
23 12(b)(6) for lack of prudential standing. And as stated in
24 our papers and in Mr. Seery's declaration -- which, again, is
25 Exhibit 17 on our witness and exhibit list -- the DAF, the

1 Plaintiff here, is not an investor in Multi-Strat. And all of
2 the allegations in the complaint, all of the causes of action
3 in the complaint, revolve around the DAF being an investor in
4 Multi-Strat, and Plaintiff did not plead how it could possibly
5 have standing as a non-investor.

6 Consequently, Your Honor, Plaintiff failed to plead
7 constitutional standing, failed to plead an injury, and failed
8 to plead prudential standing because it failed to plead how it
9 was the real party in interest under Section 17.

10 Now, Plaintiff makes various arguments in its response
11 about how it could have direct and/or derivative standing.
12 But, again, Your Honor, one, we believe those arguments are
13 meritless, and we believe that they're irrelevant, because
14 notwithstanding the liberal amendments standard in **Federal**
15 **Rule of Civil Procedure 15** and the language in **Federal Rule of**
16 **Civil Procedure 17**, we believe amendment here would be futile.
17 For all the reasons we discussed, the claims are time-barred.
18 And even if Plaintiff were able to amend its complaint to fix
19 the standing issues, Plaintiff in no world can unwind and turn
20 back the clock to be able to file the complaint in this Court
21 as an administrative expense claim by the administrative
22 expense claim bar date, which, again, was on September 25th,
23 2021.

24 For the foregoing reasons, Your Honor, we ask that you
25 dismiss the complaint with prejudice. And I'm happy to answer

1 any questions.

2 THE COURT: Okay. No questions right now.

3 MR. DEMO: Thank you.

4 THE COURT: Mr. Bridges?

5 MR. BRIDGES: Thank you, Your Honor. The last time I
6 appeared in this Court was at the June 25th, 2021 hearing that
7 counsel referenced. It's particularly memorable to me because
8 of being postponed due to symptoms from a cranky gallbladder.
9 The time before that I remember even better. That was the
10 only other time I was before you, Your Honor. The
11 particularly painful order that was the result of that
12 previous time is also very memorable to me.

13 My gallbladder is no longer with us, and that order, that
14 painful order, has been expunged at considerable costs. I was
15 hoping that meant today would be a fresh start. Apparently, I
16 need to go backwards just a little bit, perhaps.

17 At the June 25th hearing that counsel described, I did
18 argue. At the end, you did ask about a recently-filed lawsuit
19 that I didn't know anything about and told you so. You asked
20 if Mr. Sbaiti was available, and I believe we had to go get
21 him, and he answered your questions, and your exchange was
22 with him.

23 I'm afraid that, again, I am unprepared and largely not in
24 the know about the other matters that counsel has referenced.
25 I came to argue the motion that's at issue today in the

1 adversary proceeding that we're here for.

2 The *Federal Reporters*, Your Honor, I know that you know
3 this, they're full of opinions admonishing courts to favor
4 resolving cases on the merits. Ever since the code pleading
5 system was abolished, federal courts have expressed their bias
6 in favor of addressing the merits of cases, and I would be
7 remiss in failing to mention that here on Highland's motion to
8 dismiss this case on timeliness and standing grounds.

9 Rule 15 and Rule 17 of the Federal Rules of Civil
10 Procedure are among those aimed at getting cases to the
11 merits, and we relied on both of those in our brief.

12 The first issue raised in the briefs is the classification
13 of our allegations as an administrative expense claim. That
14 three-word term is capitalized in the plan, indicating that it
15 is a defined term. I read in the reply brief and heard
16 counsel argue just moments ago that Highland views this as
17 merely a naming convention and not as a limiting provision,
18 the defined term. And I see that as a reasonable view of
19 what's in the plan. But it does quite -- quite plainly appear
20 as a defined term, with a lengthy definition.

21 Although this is not a hill we would choose to die on, and
22 much of our response brief is devoted to alternative
23 arguments, we don't view the allegations in the complaint as
24 administrative in nature, nor as an expense, nor, perhaps most
25 importantly, as the result of an action that benefits the

1 estate, as both the plan definition and Section 503(b)
2 require.

3 Section 503(b) concerns only, quote, the costs and
4 expenses of preserving the estate. What the complaint alleges
5 in this matter is that the acts complained of were against the
6 interests of the estate and depleted the estate's assets.

7 For example, Paragraph 22, which sums up the factual
8 allegations in the complaint, reads as follows. Quote, "In
9 short, HCMLP caused Multi-Strat to sell the viatical pool at a
10 substantially discounted amount to curry favor with the
11 brokers and buyers in the marketplace, for no apparent benefit
12 to Multi-Strat's investors or the Debtor's estate."

13 This allegation does not on its face appear to be based on
14 the result of an action that benefits the estate.

15 The second issue concerns the consequences if we're wrong
16 about the first issue.

17 THE COURT: Let me --

18 MR. BRIDGES: The consequences --

19 THE COURT: Let me back up. Let me back up if you're
20 moving off that point. What about the Supreme Court --

21 MR. BRIDGES: Yes, Your Honor.

22 THE COURT: What about the Supreme Court's *Reading*
23 case or *Reading* case? If my memory -- it's been years since
24 I've read it, but I remember it pretty well. I believe that
25 involved a fire, right, a fire in a building that a trustee

1 was operating. Certainly, a fire and great damage caused to a
2 third party wouldn't seem on its face to benefit the estate,
3 as that phrasing is used in 503(b). But the U.S. Supreme
4 Court said something to the effect of, you know, he's doing
5 business and it's a cost of doing business that, you know,
6 you're going to sometimes have things like this happen. And
7 isn't that exactly the same sort of situation we have here if
8 your allegations are true?

9 MR. BRIDGES: I don't think so, Your Honor, although
10 I would -- would like to emphasize again this is not a hill
11 that we would choose to die on. But I think --

12 THE COURT: Am I correct --

13 MR. BRIDGES: -- two reasons distinguish --

14 THE COURT: -- in remembering the facts of that
15 famous U.S. Supreme Court case, that it involved a fire and
16 that the trustee who was operating the business, it was a
17 consequence of him operating the business? Am I correct in
18 remembering those facts?

19 MR. BRIDGES: That sounds correct to me, Your Honor,
20 but I don't pretend to remember it well enough to disagree
21 with you. I would like --

22 THE COURT: Mr. Demo, --

23 MR. BRIDGES: -- to distinguish it.

24 THE COURT: -- can you confirm or tell me if I'm
25 wrong?

1 MR. DEMO: Yeah. You're absolutely correct, Your
2 Honor. The trustee in that case accidentally burned down the
3 neighboring building, and the Supreme Court found that it was
4 still an administrative expense claim under the "*Reading*" or
5 "*Reading*" exception. And that exception provides that even
6 though burning down somebody else's house does not benefit the
7 estate, that it still counts as an administrative expense
8 claim under 503(b). And we have other case that comes --
9 other case law that comes after that that even broadens that,
10 Your Honor.

11 THE COURT: Yes. And I know the Fifth Circuit case
12 has cited that case in different opinions.

13 Okay. So, going back to that, Mr. Bridges, I mean, you
14 just argued 503(b) doesn't contemplate this type of claim that
15 -- or claims you're alleging in the action, but hasn't the
16 Supreme Court in fact said that it does apply to this kind of
17 thing?

18 MR. BRIDGES: Your Honor, no, I don't think so. And
19 the reasons are twofold. One is because the fire in that case
20 is not, I don't believe, the actions being complained of by
21 the plaintiff. Rather, actions that are to the benefit of the
22 estate result in negligently, accidentally, causing a fire.
23 And that is a significant difference from here, where the
24 actions allegedly being -- that we're alleging, that are
25 complained of, are actually actions against the interests of

1 the estate, selling out the estate on the cheap. Your Honor,
2 that is one distinction.

3 The other is that we're relying on the defined term, which
4 has different language from the actual Code, which was not at
5 issue in the other case.

6 Those are the two distinctions that I draw, Your Honor.

7 THE COURT: Well, if this is not --

8 MR. BRIDGES: The second issue --

9 THE COURT: -- a 503-type claim, then what kind of
10 claim would it be? It has to fit into some sort of category
11 here.

12 MR. BRIDGES: Your Honor, honestly, our position is
13 that the order itself creates -- the final plan creates a gap
14 by not identifying this as -- as that kind of -- as an
15 administrative priority claim.

16 THE COURT: Okay.

17 MR. BRIDGES: The second issue, Your Honor, concerns
18 the consequences if we're wrong about the first issue and that
19 the consequences need not be forfeiture.

20 Counsel raises concerns about the purpose of the
21 administrative claim bar date and the ability to distribute
22 funds. Those concerns certainly seen valid. But importantly,
23 they go to priority, not validity.

24 Not one of their policy arguments supports outright
25 dismissal of the complaint, which would amount to a default

1 and would have the effect of protecting the interests of
2 equity in this matter over the interests of a creditor.

3 Rule 15 allows for relation back of allegations from a
4 previous filing, and we believe it governs here. Highland
5 doesn't deny that it had notice of the complaint, so they
6 don't have prejudice from the timing of it. And there is
7 authority under the Code for allowing timely filing or
8 treating as timely the filing of one type of claim that was
9 submitted as another type of claim.

10 And on this, I'd point the Court to the Delaware
11 *Bluestream [sic] Brands* case, 2021 Bankr. LEXIS 1980, which
12 cites to the First Circuit and other cases allowing a timely
13 proof of claim to be treated as an administrative expense
14 claim.

15 THE COURT: Doesn't that --

16 MR. BRIDGES: I'm truly --

17 THE COURT: Doesn't that run contrary to my *Taco*
18 *Bueno* opinion?

19 MR. BRIDGES: Perhaps, Your Honor. It does cite your
20 opinion in a "*But see.*" And I again would defer to your
21 knowledge of the proceedings in that case. But I saw in the
22 opinion no argument whatsoever concerning the ability of the
23 creditor to seek relief on its proof of claim regarding the
24 same transaction. I read it not to exclude that.

25 Although the Court relied -- also, the Court relied on

1 prejudice to the creditors in that case if the administrative
2 claim had been allowed. Importantly, in this case, where
3 creditors can expect to be paid in full, no such prejudice
4 exists, or at least at this stage of the claim -- of the case
5 there is no evidence that any such prejudice to the creditors
6 exists.

7 I'm truly unsure how to respond to the accusation that the
8 decision to file this action in District Court was a strategic
9 one, a strategic decision. In some regards, certainly, all of
10 our decisions are strategic. But the implication that this
11 was somehow a nefarious decision that should inflame the Court
12 is simply untrue.

13 I think the timeline supports us in this, that at the time
14 of the filing of this lawsuit the plan was not yet effective,
15 so the route to bring an administrative claim, if that's what
16 this is, did not appear to be available to us without the plan
17 having gone effective.

18 Also, it appeared that it might not go effective for a
19 year or more while the appeal to the Fifth Circuit was
20 pending.

21 A few weeks later, I think it was less than three,
22 approximately 20 days later, when Highland elected to make the
23 plan effective, the injunction as we understand it precludes
24 us from serving them from that point forward, as doing so
25 would have been continuing with this case. The plan

1 injunction prevented us from doing so.

2 And so the accusation that we intentionally filed the
3 lawsuit and didn't serve them with process is really about a
4 three-week period that before we got them served we were
5 enjoined, as we understand the injunction, from doing so.

6 I have not heard from them that we're wrong on that
7 interpretation of the injunction. I know from their other
8 pleadings in this matter that they view the injunction as
9 applying to this matter. The only question I have is whether
10 they agree with our take that serving process would have been
11 continuing with the action.

12 THE COURT: Let me -- let me --

13 MR. BRIDGES: The notion that we --

14 THE COURT: -- double-check that I understand
15 something you said. I think what I heard you say was, because
16 the plan had not gone effective yet, therefore triggering
17 the 45-day deadline for filing administrative expense claims,
18 you had no other avenue here to pursue your claims except to
19 file the District Court lawsuit. Is that what I heard you
20 say, or am I misunderstanding?

21 MR. BRIDGES: Well, that's certainly more strongly
22 than I intended to say it. I don't think so, Your Honor. But
23 a similar vein, that the idea of filing a claim as required by
24 the final plan was not -- was not something that had gone into
25 effect yet. So thinking that that --

1 THE COURT: What do you mean? You can file a request
2 for allowance of administrative claim, heck, in the first 30
3 days of a bankruptcy case. You don't have to wait for the
4 Court to set a deadline.

5 MR. BRIDGES: Your Honor, --

6 THE COURT: You can file one at any time.

7 MR. BRIDGES: -- we did not have an effective
8 deadline. We did not know when that effective deadline would
9 go effective. That process, that procedure, did not appear to
10 be the one that was, what, most available to us.

11 THE COURT: Why not? Why not? Why not? There is
12 nothing that would have precluded you from filing a request
13 for allowance of administrative expense claim. People file
14 them throughout Chapter 11 cases frequently, --

15 MR. BRIDGES: The --

16 THE COURT: -- before there's ever a deadline set.

17 MR. BRIDGES: Your Honor, the answer to that question
18 is that reading the definition of what it was did not cause us
19 to believe that's what we had here. That is Issue #1 over
20 again.

21 One question -- again, one question is whether we are
22 right or wrong on Issue 1. And I'm hearing you loudly and
23 clearly that you don't agree with us on that.

24 But in connection with that, I don't, Your Honor, I don't
25 think a fair conclusion is that we knew better or should have

1 known better than to read the defined term and think that it
2 does not apply to the case that we brought.

3 Certainly, the final order -- I'm sorry, the plan was not
4 in effect yet, so we weren't governed by it at that time. And
5 I believe and urge the Court to consider that a plain reading
6 of that plan does not sound like on its face that our claim --
7 our complaint is within its four corners.

8 THE COURT: Did you worry about the automatic stay?

9 MR. BRIDGES: Yes, Your Honor.

10 THE COURT: Okay. What is your analysis there?

11 MR. BRIDGES: Your Honor, it was well more than a
12 year ago. I don't think I can remember that. It wasn't in
13 the briefing for today, and it's not fresh on my mind.

14 THE COURT: You're right. You're right, it wasn't in
15 the briefing. But, again, I'm just trying to put myself in
16 your brains and, you know, I don't -- I will say it's a gray
17 issue, because these are not prepetition claims, and usually
18 362 stays collection or actions aimed at pursuing prepetition
19 claims.

20 On the other hand, the relief sought in the DAF's
21 complaint asked for, among other things, disgorgement of all
22 ill-gotten gains, and also voiding of certain agreements of
23 Highland. This sounds potentially like exercising or an
24 attempt to exercise control over property of the estate. So,
25 again, it's something that weighs on me a little bit.

1 But, again, it's not the subject of the hearing today, but
2 I kind of am still interested in what your thought process
3 was. You know, it's a very risky thing to file a lawsuit
4 against a Chapter 11 debtor as opposed to filing a proof of
5 claim or a request for allowance of administrative claim. So
6 I just -- it would be helpful to hear what your analysis was
7 on that.

8 MR. BRIDGES: Perhaps this would be helpful as well,
9 Your Honor. At least as -- at least in my view and
10 experience, you do not have to be a bankruptcy lawyer to know
11 what the automatic stay is. An administrative expense claim
12 isn't the same kind of recognized concept, I believe.
13 Certainly, not to me.

14 And so the notion that what we were doing is sitting on
15 our hands rather than serving the complaint because of some
16 ulterior motive is just wrong. That's untrue. And generally
17 speaking, in this day and age, cases aren't dismissed without
18 reaching the merits simply because they weren't filed in the
19 right place or with the right forum.

20 Your Honor, that brings us to the third issue, which is
21 standing. Again, courts in this day and age do not dismiss
22 cases without reaching the merits simply because they were not
23 brought by the real party in interest. That's what Rule 17
24 says quite clearly. An opportunity for the real party in
25 interest to join must be provided. If -- if that's -- let me

1 back up. If -- because Highland admits that Plaintiff's
2 subsidiary, CLO Holdco, is an investor who would have
3 standing, that should end the matter there.

4 Moreover, the Plaintiff, the DAF, has alleged in
5 Paragraphs 7 and 11 of the complaint that it is an investor.
6 And frankly, Your Honor, I don't think that's incorrect when
7 you view that someone can invest indirectly. That is not a
8 peculiar concept, and I don't think it's a stretch to say that
9 that pleading that we are indirectly an investor is an invalid
10 one. And in Paragraph 54, it states quite clearly that, if
11 necessary, we are seeking to plead our claim derivatively.

12 That's all I have today, Your Honor. If there's more I
13 can answer, I will do my best.

14 THE COURT: Okay. So, am I hearing that the DAF
15 acknowledges that CLO Holdco, its one-hundred-percent
16 subsidiary, last I knew, that it is actually the investor in
17 Multi-Strat, not DAF? Am I hearing that?

18 MR. BRIDGES: Mostly yes, Your Honor. I'd like to
19 quibble around the edges. I believe it is not a one-hundred-
20 percent-owned subsidiary.

21 THE COURT: Okay.

22 MR. BRIDGES: My recollection is that it's --

23 THE COURT: Well, forget that hundred percent. But
24 the point is I'm hearing DAF acknowledge that it's CLO Holdco
25 that it is at least partly an owner of, if not mostly an owner

1 of, CLO Holdco is the one that invested in Multi-Strat.

2 MR. BRIDGES: I believe Highland is correct on that,
3 Your Honor. Yes.

4 THE COURT: Okay. So your argument is that the DAF
5 still would have standing because it should be considered an
6 indirect owner of interest in Multi-Strat?

7 MR. BRIDGES: Slightly different from that, Your
8 Honor. Not only is it an indirect investor, it also is
9 receiving investment device -- advice from Highland for the
10 purposes of directing its subsidiaries or counsel to these
11 subsidiaries or aiding them in making investment decisions.
12 So that investment advice and the contract claims are still
13 relevant, whether the investment by the DAF is direct or
14 indirect. The relationship is, in all important aspects, the
15 same, regardless of whether the investment in the ultimate
16 asset is a direct one or an indirect one.

17 And Your Honor, I don't believe there's anything unusual
18 about that relationship between a subsidiary and its -- and
19 its parent.

20 THE COURT: You don't think there's anything unusual
21 about what?

22 MR. BRIDGES: About the relationship --

23 THE COURT: About only naming the parent as a party,
24 not the subsidiary that actually owns the investment?

25 MR. BRIDGES: No, Your Honor. That's not what I was

1 referring to.

2 The relationship between a parent entity that uses
3 subsidiaries to make its investment is a not-unusual corporate
4 arrangement.

5 THE COURT: Oh, well, certainly. I wouldn't think it
6 would be. But I'm more focused on the parent being the
7 Plaintiff in the lawsuit and not the subsidiary.

8 MR. BRIDGES: Your Honor, I think that's what
9 derivative case law and the statutes that govern it are all
10 about. This is not a novel thing.

11 THE COURT: I think you've got it flip-flopped, don't
12 you? I mean, usually, derivative -- I mean, I guess I -- I
13 see what you're saying. The entity has a cause of action and
14 it won't bring it for whatever reason, so the shareholders --
15 here, I guess you're saying the DAF -- would ask for standing.
16 It doesn't seem like the same thing we usually -- the same
17 context we usually see derivative litigation brought in.
18 Would you acknowledge that?

19 MR. BRIDGES: I think in the federal courts what
20 you're referring to is shareholder derivative actions that
21 indeed tend to fit the paradigm you're talking about.

22 It is not unusual at all, however, for a majority owner of
23 an LLC to bring an action that is derivative on behalf of the
24 LLC, or a minority but a significant minority member of an LLC
25 or another type of company to bring such action. Shareholder

1 derivatives are not the only kind of derivative action.

2 THE COURT: Okay. I think that's all the questions I
3 have. Anything else?

4 (No response.)

5 THE COURT: Anything else? Okay. I guess -- that
6 was directed to you, Mr. Bridges. Anything else?

7 MR. BRIDGES: I'm sorry. Not from me, Your Honor.

8 THE COURT: All right. Mr. Demo, you have the last
9 word.

10 MR. DEMO: Thank you, Your Honor. And I'll be fairly
11 brief.

12 Mr. Bridges I think is still -- I'm sorry, not --
13 Plaintiff I think is still confused about what an
14 administrative claim, expense claim is and how the *Reading*
15 exception applies. In *Reading*, there was no benefit to
16 burning down somebody's house. In *A.I. [sic] Copeland*, which
17 is a Fifth Circuit case, a debtor improperly failed to turn
18 over tax claims -- I'm sorry, tax distributions, tax payments,
19 to the State of Texas, in violation of Texas statutes. That
20 was an administrative expense claim.

21 All of the claims here arise from Highland's alleged
22 intentional or negligent breach of its fiduciary duties to the
23 DAF -- again, not an investor in Multi-Strat, but that's what
24 was pled. All of those fall under the *Reading* exception.

25 And to Plaintiff's point about, you know, there not being

1 a benefit to the estate here, I would read you the last line
2 of Paragraph 49, which says that one of the breaches includes
3 utilizing the sale proceeds for its own names, namely -- I'm
4 sorry. Utilizing -- let me start over, Your Honor. It says,
5 "utilizing the sale proceeds for its own end, namely, to
6 enrich itself." That's Mr. Bridges, that's Plaintiff's
7 complaint. They are alleging that we took these actions to
8 benefit Highland during the course of the bankruptcy.

9 Either way you slice it, Your Honor, this is an
10 administrative expense claim. We think *Reading* is directly on
11 point, that they have pled a substantial benefit to the
12 estate. They basically pled that we took these assets and
13 absconded with them.

14 Either way you slice it, under *Reading*, it applies. Under
15 benefit to the estate, under their complaint, it applies.
16 This is an administrative expense claim and had to be filed by
17 the administrative expense claim bar date.

18 And, again, with respect to the plan injunction, Your
19 Honor, even if Mr. Bridges was right -- I'm sorry. Even if
20 Plaintiff were right, and they're not, and I do think a point
21 needs to be made here, is that Plaintiff is the only party,
22 Plaintiff and PCBM, are the only parties who did not
23 understand the plan. Even Mr. Dondero's other affiliates --
24 NexPoint, NexPoint Advisors, Highland Capital Management Fund
25 Advisors, and CPCM -- all were able to file administrative

1 expense claims in this Court on or substantially before the
2 administrative expense claims bar date. Plaintiff's
3 interpretation and confusion with the plan injunction applies
4 only to Plaintiff. They are on an island here.

5 And yes, it's also wrong. And even if Plaintiff were
6 confused about that when they filed their complaint in the
7 Northern District of Texas, they cannot say they were confused
8 about that after the November 2021 hearing, where Your Honor
9 told them bluntly and blatantly that they misunderstood the
10 plan injunction and where Highland told them that they were
11 not without a remedy, that their remedy was to file an
12 administrative expense claim in this Court.

13 So, even giving Plaintiff the benefit of the doubt that
14 they did innocently misunderstand the plan injunction, that
15 misunderstanding ended in November of 2021, eight months ago.
16 During that eight-month period, Plaintiff again did nothing.
17 Plaintiff only made a request, and a procedurally-improper
18 request, to have the claim treated as late-filed when it
19 responded to our motion to dismiss.

20 With respect to the policy here, Your Honor, I think Your
21 Honor nailed it in *Taco Bueno*. Bar dates are important.
22 Administrative expense bar dates are extremely important. And
23 so now I understand under **Federal Rule of Civil Procedure 15**
24 and all the other Federal Rules you do want to get to the
25 merits, but 503 applies here, Your Honor. There are separate

1 procedures dealing with administrative expense claims, and
2 those procedures are important to protect not just the Debtor
3 but all creditors in this matter.

4 This is not a two-party dispute. Bankruptcy is not a two-
5 party game. There are other creditors here who have been
6 waiting ten, ten years, a decade to be paid. And Plaintiff is
7 coming in and saying, you know what, we should get an
8 administrative expense claim. We should be able to take
9 a-hundred-cent dollars off the top. And they're doing that,
10 Your Honor, without any evidence whatsoever. No evidence of
11 cause under 503(a). No evidence under *Pioneer*. And not even
12 an attempt to plead them.

13 The policy here does not favor them. It favors the
14 estate. It favors all other creditors in this action who are
15 relying on the confirmed plan that has been confirmed for well
16 over a year now, Your Honor.

17 And the last thing I'll say on standing, I do think
18 Plaintiff's arguments on direct and derivative are just way
19 off. But I don't think they matter, Your Honor, because,
20 again, regardless of the liberal amendment standards in 15,
21 and regardless of the language in 17, amendment here is
22 futile. That is our point. It doesn't matter if they fix the
23 standing issues. Their complaint is still going to be time-
24 barred. And they still, like today, they still will have no
25 evidence of cause or excusable neglect to justify that

1 complaint.

2 Again, happy to answer any questions, Your Honor, but we
3 do think this is a straightforward matter. And with that,
4 I'll cede my time.

5 THE COURT: Okay. Thank you.

6 The Court is going to grant the motion to dismiss. And
7 I'm obviously going to write this up. But there's no question
8 whatsoever that the purported claims against Highland that
9 have been asserted in this action by the DAF concerning the
10 Multi-Strat sales of assets, they arise from postpetition
11 transactions, and to the extent the claims are valid, they
12 would have given rise to postpetition administrative expense
13 claims. There's just no -- there's no legitimate argument to
14 the contrary on that.

15 And so that means this is a Section 503(b) issue, not a
16 Rule 15 or a Rule 17 issue.

17 Not only did the plan provide a specific procedure for
18 filing administrative expense claims, but 503 of the
19 Bankruptcy Code also contemplates such a procedure.

20 And as this Court held in a lengthy opinion in the *Taco*
21 *Bueno* case, these procedures have to be strictly complied
22 with. It's very clear from the language of the Code, and the
23 legislative history, if the language of the Code weren't
24 clear, that proofs of claim are very different things than
25 postpetition claims that arise. You file a proof of claim, a

1 simple form, for a prepetition claim. It's deemed allowed if
2 no one objects. You don't even have to get an order. But,
3 again, as I explained in *Taco Bueno*, a 503 administrative
4 expense claim is a very different animal. Okay? You have to
5 put the world on notice.

6 As Mr. Demo said, it's not a two-party dispute. It's a
7 type of claim that potentially every unsecured creditor in the
8 case would care about and want to weigh in on. You're held to
9 strict proof.

10 And, again, as I noted from the Supreme Court *Reading*
11 case, the Supreme Court has said technically there doesn't
12 have to be a benefit to the estate. There are some things
13 that are just a cost of doing business. A fire to a
14 neighbor's building didn't benefit the estate, but still the
15 victim of that fire was entitled to an administrative expense
16 claim. But this is not even the stretch that a fire would be.
17 So there's just zero room for argument, I think, here that the
18 claims asserted in this action are of the nature of
19 administrative expense claims, postpetition claims, and a
20 request had to be filed by September 25th.

21 And to the extent a sentence or two in this response filed
22 July 5th, 2022 is a request to file a late-filed
23 administrative expense claim, I mean, it's procedurally
24 improper in every way. And so I'm not going to grant any
25 relief based on that.

1 Last, the standing issue. While I have the view that CLO
2 Holdco would have been the party aggrieved here if these
3 claims are valid, and there does appear to be a problem with
4 the standing of the Charitable DAF, I think this is a moot
5 point or an irrelevant point. While under 17 I could, in
6 different circumstances, allow the proper party to substitute
7 in, it would be an exercise in futility here because, again,
8 we're ten months past the deadline for a timely filing of an
9 administrative expense claim.

10 So, I will draft up an opinion and order in this regard.

11 Let me just throw this out here so no one is surprised or
12 on a different page. I don't think I have to do a report and
13 recommendation on this. And anyone who wants to weigh in can
14 weigh in, but as you know, --

15 MR. DEMO: Your Honor?

16 THE COURT: Oh.

17 MR. DEMO: I'm sorry. I was just agreeing with Your
18 Honor. This is the claims allowance process. This is a pure
19 core proceeding at this point.

20 THE COURT: Okay. And so certainly I'll also hear
21 from Mr. Bridges if he has a comment.

22 But the way I look at this is, okay, we start with the
23 point of Judge Godbey, I think it was, had this one. He *sua*
24 *sponte* referred this to the Bankruptcy Court. There wasn't a
25 report and recommendation where I said, I think you should

1 either not withdraw or withdraw but let the Bankruptcy Court
2 do pretrial matters. He just *sua sponte* did that. Okay?

3 But then a couple of additional points. Rule 7012(b)
4 says that a responsive pleading to a 12(b)(6) or a 12(b)(1),
5 any -- shall include a statement that the party does or does
6 not consent to the entry of final orders of judgment by the
7 Court. So I guess we could argue, does that apply to the
8 Movant or does it apply to the Respondent? But I think it
9 probably applies to the Respondent here, and so there was
10 just nothing in the response as to whether Respondent did or
11 did not consent to entry of a final order, so I would view
12 that as a waiver.

13 But most importantly of all, I guess, my third point on
14 this is I think this is an arising-in core matter, not merely
15 related to, where consent is necessary. Because certainly
16 the idea of do you need an administrative expense claim or
17 not and were the proper procedures followed, I think that's
18 core arising in.

19 So, for all of these reasons, I'm letting you know I'm
20 not doing this in a report and recommendation. I'm just
21 doing this in an opinion and order.

22 Mr. Bridges, anything you want to say about that?

23 MR. BRIDGES: Yes, Your Honor. If I could back up
24 and correct myself first. I think I was mistaken about CLO
25 Holdco. They are indeed, I am told, the hundred-percent

1 subsidiary of the Plaintiff, the Charitable DAF.

2 Secondly, yes, Your Honor, this is a Rule 12 motion in an
3 adversary proceeding. We would object to a final order and
4 ask you to issue a report and recommendation.

5 THE COURT: Well, you didn't put that in your
6 response. What is your comment about that?

7 MR. BRIDGES: Your Honor, my comment on that is I
8 feel -- I feel like my hands are tied by the injunction. We
9 haven't been able to file any motion for leave on fear of --
10 on pain of getting a ruling from this Court against us as to
11 the injunction, but we don't have clarity as to what we're
12 enjoined from and what we are not. And I guess that would be
13 my basis.

14 THE COURT: Okay. Well, I don't know what that has
15 to do it with putting a sentence in a response that's required
16 by 7012(b) saying whether you consent or don't consent. I
17 don't know what an injunction has to do with that.

18 But anyway, I do view this as an arising-in matter where
19 consent is probably irrelevant, but I'm just dotting all our
20 I's here.

21 All right. I will -- I've got one law clerk working on
22 one under-advisement of Highland that I think is pretty close.
23 I've got another law clerk working on another under-advisement
24 in Highland that is getting there. So I think I'll probably
25 just jot out a pretty fast opinion and order on this one,

44

1 because the facts on it are pretty simple, and I think
2 probably in a few days you'll have it.

3 All right. We're adjourned.

4 THE CLERK: All rise.

5 MR. DEMO: Thank you.

6 (Proceedings concluded at 3:44 p.m.)

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CERTIFICATE

21 I certify that the foregoing is a correct transcript from
22 the electronic sound recording of the proceedings in the
above-entitled matter.

23 **/s/ Kathy Rehling**

08/04/2022

24

25 _____
Kathy Rehling, CETD-444
Certified Electronic Court Transcriber

Date

005848

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2	PROCEEDINGS	3
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**UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF
TEXAS, DALLAS DIVISION**

In Re: Highland Capital Management, L.P § Case No. **19-34054-SGJ11**

Charitable DAF Fund, L.P et al

Appellant

§

vs.

§

21-03067

Highland Capital Management, L.P

§

Appellee

§

3:23-CV-01503-B

[167] Order granting Defendant Highland Capital Management, L.P.'s Renewed motion to dismiss adversary proceeding (related document # [122](#)) Entered on 6/25/2023.

Volume 27

APPELLANT RECORD

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**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

In re:	§ Chapter 11
	§
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§ Case No. 19-34054-sgj11
	§
Debtor.	§
	§
CHARITABLE DAF FUND, L.P. AND CLO	§
HOLDCO, LTD., DIRECTLY AND DERIVATIVELY	§
	§
Plaintiffs,	§ Adversary Proceeding No.
	§
vs.	§ 21-03067-sgj11
	§
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§
HIGHLAND HCF ADVISOR, LTD., AND	§
HIGHLAND CLO FUNDING LTD., NOMINALLY	§
	§
Defendant.	§
	§

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**APPELLANTS' SECOND AMENDED STATEMENT OF ISSUES
AND DESIGNATION OF RECORD ON APPEAL**

Pursuant to Rules 8009(a)(1)(A)-(B) and (a)(4) of the Federal Rules of Bankruptcy Procedure, The Charitable DAF Fund, L.P. and CLO Holdco, Ltd. ("Appellants") hereby designate the following items to be included in the record and identify the following issues with respect to

their appeal of the Order Granting Defendant Highland Capital Management, L.P.'s "Renewed Motion to Dismiss Complaint" [Adv. Proc. Doc. No. 122] which was entered by the United States Bankruptcy Court for the Northern District of Texas on June 25, 2023.

I. STATEMENT OF ISSUES TO BE PRESENTED ON APPEAL

- Whether the Bankruptcy Court had jurisdiction to rule on Highland Capital Management L.P.'s Renewed Motion to Dismiss Complaint
- Whether the Renewed Motion to Dismiss Complaint was improperly granted

II. DESIGNATION OF ITEMS TO BE INCLUDED IN THE RECORD

Vol. 1
000001

1. Notice of Appeal for Bankruptcy Case Adversary Proceeding No. 21-03067-sgj11 [Doc. 168].

000042

2. The judgment, order, or decree appealed from: Memorandum Opinion and Order Granting Defendant Highland Capital Management, L.P.'s "Renewed Motion to Dismiss Complaint" [Adv. Proc. Doc. No. 122] [Doc. 167].

000080

3. Docket Sheet kept by the Bankruptcy Clerk.

4. Documents listed below and as described in the Docket Sheet for Bankruptcy Case Proceeding No. 21-03067-sgj.

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000102

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No.	Date Filed	Docket No.	Description/Document Text
1	9/29/21	1	(36 pgs; 3 docs) Adversary case 21-03067. ORDER REFERRING CASE NUMBER 21-CV-0842-B from U.S District Court for the Northern District of Texas, Dallas Division to U.S. Bankruptcy Court for Northern District of Texas, Dallas Division. Complaint by Charitable DAF Fund, LP, CLO Holdco, Ltd. against Highland Capital Management, LP, Highland HCF Advisor Ltd., Highland CLO Funding, Ltd. Fee Amount \$350 (Attachments: # 1 Original Complaint # 2 Docket Sheet from 3:20-cv-0842-B) Nature(s) of suit: 02 (Other (e.g. other actions that would have been brought in state court if unrelated to bankruptcy)). (Okafor, M.)
2	9/29/21	2	(1 pg) Supplemental Document (cover sheet) by CLO Holdco Ltd., Charitable DAF Fund (RE: related document(s)1 Adversary case 21-03067) [ORIGINALLY FILED IN 21-CV-0842 AS #2 ON 04/13/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)

Vol. 2 000139 000232 000239 000270 Thru Vol. 6	3	9/29/21	6	(93 pgs; 6 docs) MOTION for Leave to File First Amended Complaint filed by CLO Holdco Ltd., Charitable DAF Fund LP (Attachments: # 1 Exh 1_First Amended Complaint # 2 Exh 2_Motion for Authorization to Retain James Seery # 3 Exh 3_Order Approving Retention of James Seery # 4 Exh 4_Order Approving Settlement # 5 Proposed Order) (Bridges, Jonathan) (Entered: 04/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #6 ON 04/19/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
	4	9/29/21	22	(7 pgs; 2 docs) MOTION for an Order to Enforce the Order of Reference filed by Highland Capital Management LP. (Attachments: # 1 Exhibit(s) A--Proposed Order) (Annable, Zachery) Modified text on 5/20/2021 (mjr). (Entered: 05/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #22 ON 05/19/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
	5	9/29/21	23	(31 pgs) Brief/Memorandum in Support filed by Highland Capital Management LP re: 22 MOTION for an Order to Enforce the Order of Reference. (Annable, Zachery) Modified text on 5/20/2021 (mjr).(Entered: 05/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #23 ON 05/19/2021 IN U.S.DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
	6	9/29/21	24	(926 pgs; 29 docs) Appendix in Support filed by Highland Capital Management LP re: 23 Brief/Memorandum in Support. (Attachments: # 1 Appendix 1 # 2 Appendix 2 # 3 Appendix 3 # 4 Appendix 4 # 5 Appendix 5 # 6 Appendix 6 # 7 Appendix 7 # 8 Appendix 8 # 9 Appendix 9 # 10 Appendix10 # 11 Appendix 11 # 12 Appendix 12 # 13 Appendix 13 # 14 Appendix 14 # 15 Appendix 15 # 16 Appendix 16 # 17 Appendix 17 # 18 Appendix 18 # 19 Appendix 19 # 20 Appendix 20 # 21 Appendix 21# 22 Appendix 22 # 23 Appendix 23 # 24 Appendix 24 # 25 Appendix 25 # 26 Appendix 26 # 27 Appendix 27 # 28 Appendix 28) (Annable, Zachery) Modified linkage and text on 5/20/2021 (mjr). (Entered:05/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #24 ON 05/19/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
Vol. 7 001196	7	9/29/21	26	(7 pgs; 2 docs) MOTION to Dismiss Complaint filed by Highland Capital Management LP (Attachments: # 1 Exhibit(s) A--Proposed Order) (Annable, Zachery) Modified text on 5/28/2021 (jmg).(Entered: 05/27/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #26 ON 05/27/2021 IN U.S.DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)

Vol. 7 001203 thru Vol. 8	8	9/29/21	28	(508 pgs; 14 docs) Appendix in Support filed by Highland Capital Management LP (Attachments: # 1 Appendix 1 # 2 Appendix 2 # 3 Appendix 3 # 4 Appendix 4 # 5 Appendix 5 # 6 Appendix 6 # 7 Appendix 7 # 8 Appendix 8 # 9 Appendix 9 # 10 Appendix 10 # 11 Appendix 11 # 12 Appendix 12 # 13 Appendix 13) (Annable, Zachery) (Entered: 05/27/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #28 ON 05/27/2021 IN U.S. DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
Vol. 9 001711	9	9/29/21	33	(1 pg) Amended Civil Cover Sheet by CLO Holdco Ltd, Charitable DAF Fund LP. Amendment to 2 Supplemental Document. (Sbaiti, Mazin) Modified text on 6/23/2021 (mjr). (Entered: 06/22/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #33 ON 06/22/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001712	10	9/29/21	36	(26 pgs) RESPONSE filed by CLO Holdco Ltd, Charitable DAF Fund LP re: 22 MOTION for an Order to Enforce the Order of Reference (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #36 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001738	11	9/29/21	37	(22 pgs) Appendix in Support filed by CLO Holdco Ltd, Charitable DAF Fund LP re 36 Response/Objection Response to Motion for an Order to Enforce the Order of Reference (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #37 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001760	12	9/29/21	38	(45 pgs) RESPONSE filed by CLO Holdco Ltd, Charitable DAF Fund LP re: 26 MOTION to Dismiss (Defendant Highland Capital Management, L.P.'s Motion to Dismiss Complaint) (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #38 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001805	13	9/29/21	39	(88 pgs) Appendix in Support filed by CLO Holdco Ltd, Charitable DAF Fund LP re 38 Response/Objection to Defendant Highland Capital Management, L.P.'s Motion to Dismiss Complaint (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #39 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001893	14	9/29/21	42	(12 pgs) REPLY filed by Highland Capital Management LP re: 22 MOTION for an Order to Enforce the Order of Reference (Annable, Zachery) (Entered: 07/13/2021) [ORIGINALLY FILED IN 21-CV-0842AS #42 ON 07/13/2021 IN U.S.

			DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
VOL. 9	15	9/29/21	43 (852 pgs) Appendix in Support filed by Highland Capital Management LP re: 42 Reply. (Annable, Zachery) Modified text on 7/14/2021 (mjr). (Entered: 07/13/2021) [ORIGINALLY FILED IN 21-CV-0842AS #43 ON 07/13/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001905 thru Vol. 13	16	9/29/21	45 (21 pgs) REPLY filed by Highland Capital Management LP re: 26 MOTION to Dismiss (Defendant Highland Capital Management, L.P.'s Motion to Dismiss Complaint) (Annable, Zachery) (Entered:07/13/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #44 ON 07/13/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002757	17	9/29/21	57 (7 pgs; 2 docs) MOTION to Dismiss and Joinder in Motion to Dismiss of Highland Capital Management, L.P. filed by Highland CLO Funding Ltd. (Attachments: # 1 Proposed Order) Attorney Paul R Bessette added to party Highland CLO Funding Ltd (pty:dft) (Bessette, Paul) (Entered: 08/30/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #57 ON 08/30/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002778	18	9/29/23	58 (12 pgs) Brief/Memorandum in Support filed by Highland CLO Funding Ltd. re 57 MOTION to Dismiss and Joinder in Motion to Dismiss of Highland Capital Management, L.P. (Bessette, Paul) (Entered: 08/30/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #58 ON 08/30/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002785	19	9/29/23	59 (80 pgs; 5 docs) Appendix in Support filed by Highland CLO Funding Ltd re 58 Brief/Memorandum in Support of Motion (Attachments: # 1 Exhibit(s) A - Jackson v Dear # 2 Exhibit(s) B - Prudential Assurance v. Newman # 3 Exhibit(s) C - Harbourvest Settlement Agreement # 4 Exhibit(s) D - Boleat Declaration) (Bessette, Paul) (Entered: 08/30/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #59 ON 08/30/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002797	20	9/29/21	64 (1 pg) ORDER OF REFERENCE: Pursuant to 28 U.S.C. § 157 and this District's Miscellaneous Order No. 33, this case is hereby REFERRED to Judge Stacey G. C. Jernigan of the United States Bankruptcy Court for the Northern District of Texas, Dallas Division, to be adjudicated as a matter related to the consolidated Chapter 11 Bankruptcy of Highland Capital Management, L.P., Chapter 11 Case No.19-34054. (Ordered by Judge Jane J. Boyle
002877			

Vol. 14 002878 002883 thru Vol. 16				on 9/20/2021) (svc) (Entered: 09/20/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #64 ON 09/20/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
	21	10/19/21	66	(5 pgs) Notice of hearing filed by Defendant Highland Capital Management, LP (RE: related document(s) 26 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP, 47 Motion to strike document filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 55 Motion to abate filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) Hearing to be held on 11/23/2021 at 09:30 AM at https://us-courts.webex.com/meet/jerniga for 26 and for 47 and for 55, (Annable, Zachery)
	22	11/22/21	71	(509 pgs; 2 docs) Witness and Exhibit List <i>for Hearing on November 23, 2021</i> filed by Defendant Highland Capital Management, LP (RE: related document(s) 26 Motion to dismiss adversary proceeding). (Attachments: # 1 Exhibits 1-13) (Hayward, Melissa)
Vol. 17 003392 003394 003583 003585 003611	23	11/22/21	72	(2 pgs) Witness List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 26 Motion to dismiss adversary proceeding, 47 Motion to strike (related document(s): 43 Document), 55 Motion to abate (related document(s) 1 Complaint), 69 Motion to abate <i>Plaintiffs' Amended Motion to Stay All Proceedings</i> (related document(s) 55 Motion to abate (related document(s) 1 Complaint))). (Sbaiti, Mazin)
	24	11/22/21	73	(189 pgs; 4 docs) Exhibit List <i>for November 23, 2021 hearing</i> filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 47 Motion to strike (related document(s): 43 Document), 55 Motion to abate (related document(s) 1 Complaint)). (Attachments: # 1 Exhibit 1_Defendant's Memorandum of Law in Support of Motion for Reconsideration # 2 Exhibit 2_Highland Memorandum in Support of Motion to Dismiss # 3 Exhibit 3_Order (I) Confirming Fifth Amended Plan of Reorganization of Highland) (Sbaiti, Mazin)
	25	12/7/21	80	(2 pgs) Order granting Highland CLO Funding, Ltd.'s motion to dismiss adversary as a party with prejudice (related document 57) Entered on 12/7/2021. (Okafor, Marcey) Modified text on 3/11/2022 (Okafor, Marcey).
	26	3/11/22	99	(26 pgs) Memorandum of Opinion and order granting motion to dismiss the adversary proceeding (RE: related document(s) 26 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP). Entered on 3/11/2022 (Okafor, Marcey)
	27	3/11/22	100	(26 pgs) Order granting motion to dismiss adversary proceeding with prejudice (related document #26) Entered on 3/11/2022. (Okafor, Marcey)

Vol. 18 003637	28	3/21/22	104	(29 pgs) Notice of appeal. Fee Amount \$298 filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 100 Order on motion to dismiss adversary proceeding). Appellant Designation due by 04/4/2022. (Sbaiti, Mazin)
003666	29	5/26/22	120	(177 pgs; 2 docs) Support/supplemental document <i>Motion to Supplement Appellate Record</i> filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 111 Appellant designation). (Attachments: # 1 Amended Transcript of January 14, 2021 Hearing) (Sbaiti, Mazin)
003843	30	6/9/22	121	(1 pg) DISTRICT COURT Order: Case 3:22-00695-B is hereby transferred to the docket of the Honorable Judge Jane J. Boyle for consolidation with The Charitable DAF Fund LP, et al. v. Highland Capital Management LP, Case No. 3:21-cv-3129-N. Judge Karen Gren Scholer no longer assigned to case.(RE: related document(s) 86 Notice of appeal filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 104 Notice of appeal filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Entered on 6/9/2022 (Whitaker, Sheniqua) (Entered: 06/10/2022)
003844	31	10/24/22	122	(7 pgs) Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP (Annable, Zachery)
003851	32	10/14/22	123	(31 pgs) Brief in support filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Annable, Zachery)
Vol. 19 003882 Thru Vol 20	33	10/14/22	124	(513 pgs; 15 docs) Support/supplemental document (<i>Appendix in Support of Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7 # 8 Exhibit 8 # 9 Exhibit 9 # 10 Exhibit 10 # 11 Exhibit 11 # 12 Exhibit 12 # 13 Exhibit 13 # 14 Exhibit 14) (Annable, Zachery)
Vol. 21 004395	34	10/27/22	126	(5 pgs) Notice of hearing (<i>Notice of Hearing and Briefing Schedule on Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP). Hearing to be held on 12/8/2022 at 09:30 AM at https://us-courts.webex.com/meet/jerniga for 122. (Annable, Zachery)

Vol. 21 004400 004410 004442 Thru Vol. 22	35	11/18/22	128	(10 pgs) Motion for withdrawal of reference. Fee amount \$188, filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (Sbaiti, Mazin)
	36	11/18/22	129	(32 pgs) Response opposed to (related document(s): 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP) filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Sbaiti, Mazin)
	37	11/18/22	130	(254 pgs; 2 docs) Response opposed to (related document(s): 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP) filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Attachments: # 1 Appendix) (Sbaiti, Mazin)
Vol. 22 004696 004717 004732 004737 004742	38	9/2/22	131	(21 pgs) DISTRICT COURT MEMORANDUM OPINION AND ORDER: The Court REVERSES and REMANDS the bankruptcy court's Motion to Dismiss Order and AFFIRMS the bankruptcy courts Motion to Stay Order. re: appeal on Civil Action number: Case 3:22-00695-B consolidated with 3:21-CV-3129-B, (RE: related document(s) 81 Order on motion to abate, 100 Order on motion to dismiss adversary proceeding). Entered on 9/2/2022 (Whitaker, Sheniqua) (Entered: 11/29/2022)
	39	12/2/22	133	(15 pgs) Reply to (related document(s): 129 Response filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 130 Response filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) filed by Defendant Highland Capital Management, LP. (Annable, Zachery)
	40	12/7/22	135	(5 pgs) Notice of hearing filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP). Hearing to be held on 1/25/2023 at 01:30 PM at https://us-courts.webex.com/meet/jerniga for 122, (Annable, Zachery)
	41	12/7/22	136	(5 pgs) Notice of hearing filed by Defendant Highland Capital Management, LP (RE: related document(s) 128 Motion for withdrawal of reference filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Status Conference to be held on 1/25/2023 at 01:30 PM at https://us-courts.webex.com/meet/jerniga . (Annable, Zachery).
	42	12/9/22	138	(3 pgs) Response opposed to (related document(s): 128 Motion for withdrawal of reference. Fee amount \$188, filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) filed by Defendant Highland Capital Management, LP. (Annable, Zachery)

Vol. 22 004745	43	12/9/22	139	(25 pgs) Brief in support filed by Defendant Highland Capital Management, LP (RE: related document(s) 138 Response). (Annable, Zachery)
Vol. 23 004770	44	12/9/22	140	(280 pgs; 8 docs) Support/supplemental document (<i>Appendix in Support of Highland Capital Management, L.P.'s Response to Renewed Motion to Withdraw the Reference</i>) filed by Defendant Highland Capital Management, LP (RE: related document(s) 138 Response). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7) (Annable, Zachery)
Vol. 24 005050	45	12/16/22	144	(6 pgs) Reply to (related document(s): 138 Response filed by Defendant Highland Capital Management, LP) filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Sbaiti, Mazin)
005056 Thru Vol. 25.	46	1/23/23	145	(514 pgs; 15 docs) Witness and Exhibit List filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7 # 8 Exhibit 8 # 9 Exhibit 9 # 10 Exhibit 10 # 11 Exhibit 11 # 12 Exhibit 12 # 13 Exhibit 13 # 14 Exhibit 14) (Annable, Zachery)
Vol. 26 005570	47	1/23/23	146	(280 pgs; 8 docs) Witness and Exhibit List filed by Defendant Highland Capital Management, LP (RE: related document(s) 128 Motion for withdrawal of reference. Fee amount \$188.). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7) (Annable, Zachery)
Vol. 27 005850	48	1/23/23	147	(221 pgs; 7 docs) Witness and Exhibit List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Attachments: # 1 Exhibit 1_Excerpts from July 14, 2020 Hearing Transcript # 2 Exhibit 2_HCLOF Members Agreement Relating to the Company # 3 Exhibit 3_HarbourVest Settlement Agreement # 4 Exhibit 4_Order Approving Debtor's Settlement with HarbourVest # 5 Exhibit 5_HCLOF Offering # 6 Exhibit 6 Amended and Restated Investment Advisory Agreement) (Sbaiti, Mazin)
006071	49	1/23/23	148	(3 pgs) Witness and Exhibit List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 128 Motion for withdrawal of reference. Fee amount \$188.). (Phillips, Louis)
Vol. 28 006074	50	1/25/23	150	(56 pgs; 2 docs) Amended Witness and Exhibit List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 147 List (witness/exhibit/generic), 149 List (witness/exhibit/generic)). (Attachments: # 1 Exh 7_Testimony of Mark Patrick at June 8, 2021 hearing) (Sbaiti, Mazin)

Vol. 28 006130 006133 Thru Vol. 31	51	1/25/23	152	(3 pgs) Notice of Appearance and Request for Notice by Louis M. Phillips filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Phillips, Louis)
	52	1/25/23	154	(1 pg) Court admitted exhibits date of hearing January 25, 2023 (RE: related document(s) 128 Motion for withdrawal of reference, filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) (COURT ADMITTED DEFENDANT'S EXHIBITS #1, #2, #3, #4, #5 & #6 OFFERED BY ATTY GREG DEMO). (Edmond, Michael) (Entered: 01/27/2023)
Vol. 32 006925 006942 006960	53	2/6/23	158	Report and recommendation to the U.S. District Court by U.S. Bankruptcy Judge. (RE: related document(s) 128 Motion for withdrawal of reference filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Entered on 2/6/2023 (Okafor, Marcey)
	54	2/6/23	161	(18 pgs) DISTRICT COURT Notice of transmission of report and recommendation in re: renewed motion to withdraw reference. Civil Case # 3:22-cv-02802-S. (RE: related document(s) 158 Report and recommendation to the U.S. District Court by U.S. Bankruptcy Judge. (RE: related document(s) 128 Motion for withdrawal of reference filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Entered on 2/6/2023) (Whitaker, Sheniqua)
	55	4/3/23	165	(1 pg) DISTRICT COURT ORDER: The Court GRANTS the 11 Joint Motion to Transfer Proceeding and Consolidate Before Original Court and the above-numbered case (3:22-cv-02802-S) is transferred to the docket of the Honorable Judge Jane Boyle: Civil case 3:21-cv-00842-B (order referring case). (RE: related document(s) 1 Complaint filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 143 Notice of transmission of motion to withdraw reference). Entered on 4/3/2023 (Whitaker, Sheniqua) Modified on 4/10/2023 (Whitaker, Sheniqua). (Entered: 04/10/2023)

TRANSCRIPTS

006961	56	11/24/21	78	(104 pgs) Transcript regarding Hearing Held 11-23-2021 RE: Motion Hearing. THIS TRANSCRIPT WILL BE MADE ELECTRONICALLY AVAILABLE TO THE GENERAL PUBLIC 90 DAYS AFTER THE DATE OF FILING. TRANSCRIPT RELEASE DATE IS 02/22/2022. Until that time the transcript may be viewed at the Clerk's Office or a copy may be obtained from the official court transcriber. Court Reporter/Transcriber Liberty Transcripts/Dipti Patel, Telephone number 847-848-4907. (RE: related document(s) 75 Hearing held on 11/23/2021. (RE: related document(s) 55 MOTION to Stay filed by CLO Holdco Ltd, Charitable DAF Fund LP (Sbaiti, Mazin) (Entered: 08/26/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #55 ON 08/26/2021 IN U.S.
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			<p>DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)) (Appearances: J. Pomerantz and J. Morris for Highland Defendants; J. Jordan and P. Bessett for HCLOF; M. Sbaiti for Plaintiffs. Nonevidentiary hearing. Motion denied. Mr. Pomerantz to upload order.), 76 Hearing held on 11/23/2021. (RE: related document(s) 47 Motion to strike 43 Appendix in support filed by CLO Holdco, Ltd., Charitable DAF Fund, LP (Bridges, Jonathan) Modified text on 7/16/2021 (mjr). (Entered: 07/15/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #47 ON 07/15/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)) (Appearances: J. Pomerantz and J. Morris for Highland Defendants; J. Jordan and P. Bessett for HCLOF; M. Sbaiti for Plaintiffs. Nonevidentiary hearing. Motion denied (Plaintiffs acknowledged complained-of Appendices it did not relate to Motion to Dismiss). Mr. Pomerantz to upload order.)). Transcript to be made available to the public on 02/22/2022. (Patel, Dipti)</p>
57	2/21/23	164	<p>164 (112 pgs) Transcript regarding Hearing Held 1/25/23 RE: HEARING ON DEFENDANT HIGHLAND CAPITAL MANAGEMENT L.P.'S RENEWED MOTION TO DISMISS COMPLAINT (122) AND STATUS CONFERENCE RE: MOTION FOR WITHDRAWAL OF REFERENCE FILED BY PLAINTIFF CLO HOLDCO, LTD., PLAINTIFF CHARITABLE DAF FUND, LP (128). THIS TRANSCRIPT WILL BE MADE ELECTRONICALLY AVAILABLE TO THE GENERAL PUBLIC 90 DAYS AFTER THE DATE OF FILING. TRANSCRIPT RELEASE DATE IS 05/22/2023. Until that time the transcript may be viewed at the Clerk's Office or a copy may be obtained from the official court transcriber. Court Reporter/Transcriber Dipti Patel, Telephone number 847-848-4907. (RE: related document(s) 155 Hearing held on 1/25/2023. (RE: related document(s) 122 Motion to dismiss adversary proceeding, (Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint) filed by Defendant Highland Capital Management, LP filed by Defendant Highland Capital Management, LP) (Appearances: J. Morris and G. Demo for Movants; L. Phillips and M. Sbaiti for Plaintiffs. Evidentiary hearing (appendices). Court took matter under advisement.), 156 Hearing held on 1/25/2023. (RE: related document(s) 128 Motion for withdrawal of reference. Fee amount \$188, filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) (Appearances: J. Morris and G. Demo for Movants; L. Phillips and M. Sbaiti for Plaintiffs. Evidentiary hearing (appendices). Court announced it will recommend denial to District Court. Court is working on Report & Recommendation.)). Transcript to be made available to the public on 05/22/2023. (Patel, Dipti)</p>

Dated: July 14, 2023

Respectfully submitted,

SBAITI & COMPANY PLLC

/s/ Mazin A. Sbaiti

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Counsel for Appellants

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was filed electronically through the Court's ECF system, which provides notice to all parties of interest, on this 14th day of July, 2023.

/s/ Mazin A. Sbaiti

Mazin A. Sbaiti

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*Counsel for Charitable DAF Fund, L.P.
and CLO Holdco, Ltd.*

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

In re:	§	Chapter 11
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	Case No. 19-34054-sgj11
	§	
Debtor.	§	
	§	
CHARITABLE DAF FUND, L.P. AND CLO	§	
HOLDCO, LTD., DIRECTLY AND DERIVATIVELY	§	
	§	
Plaintiffs,	§	Adversary Proceeding No.
	§	
vs.	§	21-03067-sgj
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	
HIGHLAND HCF ADVISOR, LTD., AND	§	
HIGHLAND CLO FUNDING LTD., NOMINALLY	§	
	§	
Defendants.	§	
	§	

**PLAINTIFFS' WITNESS AND EXHIBIT LIST REGARDING HEARING ON
HIGHLAND CAPITAL MANAGEMENT, L.P.'S RENEWED MOTION TO DISMISS
COMPLAINT TO BE HELD ON JANUARY 25, 2023**

Plaintiffs submit the following witness and exhibit list regarding Defendant Highland
Capital Management, L.P.'s Renewed Motion to Dismiss Complaint.

WITNESSES:

1. Any witness identified or called by any other party;
2. Any witness for impeachment or rebuttal.

EXHIBITS:

No.	Exhibit	Offered	Admitted
1	Excerpts from Transcript of Hearing on Application to Employ James P. Seery, Jr. on July 14, 2020 (APP_0003 – 0014)		
2	Highland CLO Funding – Members Agreement Relating to the Company (APP_0015 – 0042)		
3	HarbourVest Settlement Agreement (APP_0043 – 0061)		
4	Order Approving Debtor’s Settlement with HarbourVest (APP_0062 – 0084)		
5	HCLOF Offering (APP_0085-0206)		
6	Amended and Restated Investment Advisory Agreement (APP_0207 – 0221)		
7	Transcript of January 14, 2021 hearing		
	All exhibits necessary for impeachment and/or rebuttal purposes.		
	All exhibits identified by or offered by any other party for the hearing on Highland Capital Management, L.P.’s Renewed Motion to Dismiss.		

Dated: January 23, 2023

Respectfully submitted,

SBAITI & COMPANY PLLC

/s/ Mazin A. Sbaiti

Mazin A. Sbaiti

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Jonathan Bridges

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Counsel for Plaintiffs

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In Re:) **Case No. 19-34054-sgj11**
)
)
HIGHLAND CAPITAL) Dallas, Texas
MANAGEMENT, L.P.,) July 14, 2020
) 1:30 p.m. Docket
Debtor.)
) APPLICATIONS TO EMPLOY JAMES
) P. SEERY AND DEVELOPMENT
) SPECIALISTS, INC. (774, 775)
)

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE STACEY G.C. JERNIGAN,
UNITED STATES BANKRUPTCY JUDGE.

WEBEX/TELEPHONIC APPEARANCES:

For the Debtors: Jeffrey N. Pomerantz
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For the Debtors: John A. Morris
Greg Demo
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Melissa S. Hayward
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EXHIBIT

1

exhibitster.com

05852

Seery - Direct

16

1 matter as well as financing in distressed matters during that
2 time.

3 In 1999, I went to the business side and I began to manage
4 distressed assets at Lehman Brothers as well as a leverage
5 finance business. That grew into my running the risky finance
6 business as well as the loan business at Lehman globally,
7 which included high-grade loans, high-yield loans, trading and
8 sales of those products, a big part of distressed, all of
9 restructuring, all of asset management, and all of the hedging
10 of the portfolio that we had.

11 From there, I left Lehman with a small group and sold it
12 to Barclay's. I moved on and ran a hedge fund with two former
13 partners of mine who are the founding partners called River
14 Birch Capital. It was a long-short credit fund; mostly
15 credit, though we did structured finance as well, and we also
16 handled some equities.

17 Q Okay. Let's spend a few minutes, as a preview, talking
18 about the Debtor and its business. And let's start with the
19 basics. Is there a way you can summarize the business of the
20 Debtor?

21 A I think, from a high level, the best way to think about
22 the Debtor is that it's a registered investment advisor. As a
23 registered investment advisor, which is really any advisor of
24 third-party money over \$25 million, it has to register with
25 the SEC, and it manages funds in many different ways.

005853

Seery - Direct

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1 The Debtor manages approximately \$200 million current
2 values -- it was more than that at the start of the case -- of
3 its own assets. It doesn't have to be a registered investment
4 advisor for those assets, but it does manage its own assets,
5 which include directly-owned securities; loans from mostly
6 related entities, but not all; and investments in certain
7 funds which it also manages.

8 In addition, the Debtor manages about roughly \$2 billion
9 in -- \$2 billion in total managed assets, around \$2 billion in
10 CLO assets, and then other entities, which are hedge funds or
11 PE style.

12 In addition, the Debtor provides shared services for
13 approximately \$6 billion of assets. Those are assets that are
14 owned by related entities but not owned by Debtor-owned or
15 managed entities. And those are a combination of back office
16 services, which include timely reporting, asset management,
17 legal and compliance support, trading and research support,
18 but not the actual management of the assets.

19 The Debtors run -- and I think the way to think about it
20 is on a functional basis; at least, that's the way I think
21 about it -- and there's really six areas. There's corporate
22 management; finance, accounting and tax; trading and research;
23 private equity and fund investing; compliance and legal; and
24 then structured equity, which really includes all of the CLO
25 businesses.

005854

Seery - Direct

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1 The goals of the Debtor generally are what you'd expect
2 out of an asset manager. A little bit different than most
3 because the Debtor does own assets, which is a little
4 different than when money asset managers typically hold assets
5 away from the asset manager. But number one, discharge
6 Highland's, which I'll call Highland (inaudible), LP, duties
7 to investors in the funds. Those are fiduciary duties under
8 the Investment Advisors Act. Each day, you've got to make
9 sure that you do that first and foremost.

10 Number two, create positive MPD in each of the funds that
11 we manage, either through sales, purchases, or hedging.

12 Next, make sure that we report timely finances of our own
13 assets, including in the funds, but also, to the third-party
14 investors. Maximize the value of HCMLP's owned assets. And
15 then operate as efficiently as possible for the lowest cost.

16 That's essentially how the Debtor -- how we think about
17 the Debtor from a functional perspective. It's got about 70
18 employees laid out in those areas that I mentioned, and each
19 of those employees every day usually think about those goals
20 and try to discharge their duties by focusing on those goals.

21 Q Thank you, Mr. Seery. And can you describe for the Court
22 how those 70 or so employees are organized? Is there an
23 internal corporate structure that you're working with?

24 A Yeah. The way -- the way -- I apologize. The way we
25 think about it is, as I said, corporate management, which is

005855

Seery - Direct

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1 really HR and overseeing the function that it's filling every
2 day, that's been really -- because Mr. Dondero was removed
3 from management. It used to all roll up to him. That's been
4 effectively rolling up to me since February.

5 Finance, accounting, and tax. Each of these businesses
6 every day require certain amounts of liquidity. Each of them
7 have requirements that they have to pay out to investors.
8 Each of them have expenses. And all of them have different
9 kinds of tax either obligations or reporting. Those are
10 managed by Frank Waterhouse as the CFO. (inaudible), sorry.

11 Trading and research. With respect to the assets, they're
12 not -- they're not static assets. Many of them do get traded
13 on a regular basis. A gentleman, Joe Sowin, heads up the
14 trading of the liquid assets. John Povish (phonetic) heads up
15 the research and the trading of the more illiquid assets, but
16 not PE. In addition, we have PE assets that require some
17 management every day, including Board seats. That's a
18 gentleman by the name of Cameron Baynard, and also he will
19 fund investments in that area. J.P. Sevilla is responsible
20 for working with Cameron on those investments and leading that
21 team.

22 Importantly, because of the nature of what the Debtor
23 does, the fiduciary obligations, as well as the
24 responsibilities to each investor and the legal overlay, we
25 have a robust compliance and legal department. That's headed

005856

Seery - Direct

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1 by Thomas Surgent and Scott Ellington. Scott: more focused
2 on transactional issues with respect to legal. He is actually
3 general counsel. Everything that has do with compliance, the
4 interrelatedness of the funds, trading between funds or
5 positions that are shared across funds, which are many, runs
6 through Thomas Surgent and his team.

7 And finally, structured equity. Sitting on top of the
8 structured finance business that we have, understanding those
9 assets, particularly of two billion-ish assets in CLOs, that's
10 headed by Hunter Covitz.

11 Q Can you describe for the Court your interaction with each
12 of the department heads that you just identified?

13 A Well, depending on the nature of the issue each day, I
14 have at least -- I'd say generally at least weekly contact
15 with most, often daily contact with most. So, for example,
16 when there are trading issues, particularly as the market was
17 extremely volatile with respect to unliquid securities, Joe
18 Sowin and I were on the phone several times a day.

19 Relating to the COVID issues, Brian Collins, who heads the
20 HR group, and I were on the phone several times a day.

21 Relating to structured equity, depending on what's
22 happening with a particular fund or what's happening in loan
23 prices, I speak to Hunter Covitz. And it goes down the line.

24 So it really depends on each of the areas and what's going
25 on in the business, but I try to touch base with each of those

005857

Seery - Direct

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1 department heads on a regular basis.

2 Frank Waterhouse, of course, is at least weekly. We have
3 a standing call every week to make sure that we're focused on
4 liquidity, which is always a concern in a Chapter 11, and
5 Frank and his team are on that call and prepare weekly
6 materials for us.

7 Q Okay.

8 MR. MORRIS: Your Honor, before I move to the next
9 area of questions, the work of the Board, I just wanted to see
10 if the Court had any questions on the corporate organizational
11 structure, the internal structure of the business, or any of
12 the matters that Mr. Seery touched on?

13 THE COURT: I do not. And I do have in front of me a
14 demonstrative aid that Mr. Annable sent over ahead of time, so
15 I appreciate that as well.

16 MR. MORRIS: Okay. Your Honor, I think Mr. Seery
17 covered much of what's on that document, but if you'd like him
18 to go through that, we're happy to do it.

19 THE COURT: No, that's fine.

20 MR. MORRIS: Okay.

21 BY MR. MORRIS:

22 Q Then let's shift gears a little bit and start talking
23 about the work of the Independent Board itself. The
24 Independent Board was appointed in mid-January; is that right?

25 A Yeah. It was the first -- January 9th, the first week of

005858

Seery - Direct

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1 January, and we started working that afternoon.

2 Q Okay. Can you describe for the Court what the -- the
3 Board's initial focus? What were you focused on?

4 A Well, if you think about the areas that I just mentioned
5 previously, the Board initially, for lack of a better term,
6 gang-tackled everything. So we tried to make sure that we had
7 a broad base of understanding among the three of us with
8 respect to the business.

9 I, because of my background, had a lot more familiarity
10 with asset management, these type of asset security
11 businesses. But we wanted to make sure that each of us was at
12 least facile with the main areas that we had to understand.
13 First was operations. How does the company run each day?
14 Particularly, how was it going to run without Mr. Dondero?
15 And I went through some of those functional areas and how we
16 thought about those and who head each of those.

17 Next in the -- I don't mean to say it's second, because
18 it's always first, but liquidity. What did the Debtors'
19 liquidity look like? How are we going to manage that
20 liquidity, not just for the near-term, but also for the
21 medium-term, and then even into the slightly longer-term? We
22 had to think about what assets are there, what money those
23 assets might need that we would have to invest in them, and
24 whether there was liquidity in those assets that we can create
25 liquidity in order to fund the Debtors' business.

005859

Seery - Direct

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1 Personnel, we needed a good opportunity to understand who
2 did what, not just in the senior managers that I mentioned,
3 but deeper into the staff, because we're going to rely on
4 those folks. Particularly worked through with DSI.

5 As I mentioned, the Debtor, unlike a lot of other asset
6 managers, owns a lot of assets. It's a disparate group of
7 assets, but getting a feel and understanding for what those
8 assets were, what the critical issues surrounding those assets
9 are, who managed them day-to-day: We wanted to make sure that
10 each of the directors had a good (inaudible) and understanding
11 of those issues that might arise with respect to those assets,
12 and a good sense of how quickly those issues could, you know,
13 further arise.

14 We also had to get a very good understanding of each of
15 the funds that we manage. As I said, the Investment Advisors
16 Act puts a fiduciary duty on Highland Capital to discharge its
17 duty to the investors. So while we have duties to the estate,
18 we also have duties, as I mentioned in my last testimony, to
19 each of the investors in the funds.

20 Now, some of them are related parties, and those are a
21 little bit easier. Some of them are owned by Highland. But
22 there are third-party investors in these funds who have no
23 relation whatsoever to Highland, and we owe them a fiduciary
24 duty both to manage their assets prudently but also to seek to
25 maximize value. And we wanted to make sure we had a good

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Seery - Direct

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1 understanding of that.

2 Finally, with respect to the shared service arrangements,
3 we needed to get an understanding of that \$6 billion in assets
4 and how our business, HCMLP, worked with those -- those shared
5 service counterparties and exactly who did what for whom.
6 It's very complicated because it had been run much more on a
7 functional basis than on a line basis from each contract. So
8 it's not as if your employees are allocated to NexBank. It's
9 the whole panoply of businesses that we enter into, and
10 providing those services to NexBank, not through a central
11 point but through whatever requests come in from the counter-
12 parties. So we needed a good understanding of what those
13 contracts looked and what those obligations were.

14 A VOICE: John, you're on mute.

15 MR. MORRIS: Thank you.

16 BY MR. MORRIS:

17 Q All of that work was going on in the first weeks of the
18 appointment of the Board?

19 A Yeah, it would not be fair to say we could do that in a
20 couple weeks. So it took far longer than that. But that
21 didn't mean that issues didn't start to arise immediately in
22 February. And so, while we were learning, we were also
23 starting to get a feel for different things that could happen
24 in the company.

25 As in many companies, immediately, one of the first things

005861

Seery - Direct

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1 you have to deal with is, particularly at the beginning of the
2 year, what does compensation look like; who are the -- what do
3 promotions look like; are you going to be able to hold this
4 team together to service these assets? And yeah, we had that,
5 with an additional wrinkle that Highland's payment structure
6 defers a significant amount of compensation to its employees,
7 and it vests over time, and it has the very typical provision
8 that if you are not there when it vests -- when it is going to
9 be paid, actually, not when it vests. Even if you're vested,
10 if you're not there when it gets paid, you're not entitled to
11 it. And so understanding who was owed what; how the vesting
12 worked; what the compensation structure looked like compared
13 to third parties, was one of the first things we had to do.
14 And Highland has an extremely robust review process. Brian
15 Collins manages it. It's first-rate. It goes through both
16 360 in terms of what other employees think of each other as
17 well as bottoms up, in terms of performance. And then it has
18 a top-down component, which ultimately ran through Mr.
19 Dondero. Since he was effectively removed from that role, the
20 Board had to jump in and get a full understanding with Brian
21 about what the process looked like; how it was going to work;
22 how it compared to other firms; and whether we could go
23 forward with it. And that was one of the motions that was
24 brought early to the Court.

25 A Let's talk a minute about the transactional work that the

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1 yesterday counsel for Mr. Dondero filed a joinder in the
2 Debtors' objection to Acis's claim. So, again, just thinking
3 about this in the context of mediation, I think, with that
4 joinder, they will be a necessary party. So, going back to
5 Mr. Seery's point, this is not just --

6 THE COURT: Oh, absolutely. Mr. Dondero is --

7 MS. PATEL: -- a two-party --

8 THE COURT: -- going to be a required party in
9 mediation. Absolutely. So, --

10 MS. PATEL: Thank you, Your Honor.

11 THE COURT: All right. Well, if there's nothing
12 further, we'll see you on the 21st. And, again, my courtroom
13 deputy may be reaching out before then if we've got things
14 nailed down on mediation.

15 (Proceedings concluded at 4:54 p.m.)

16 --oOo--

17

18

19

20

CERTIFICATE

21

22 I certify that the foregoing is a correct transcript to
23 the best of my ability from the electronic sound recording of
24 the proceedings in the above-entitled matter.

25

/s/ Kathy Rehling

07/16/2020

26

27

Kathy Rehling, CETD-444
Certified Electronic Court Transcriber

Date

Between

CLO HOLDCO, LTD.

And

HARBOURVEST DOVER STREET IX INVESTMENT L.P.

And

HARBOURVEST 2017 GLOBAL AIF L.P.

And

HARBOURVEST 2017 GLOBAL FUND L.P.

And

HV INTERNATIONAL VIII SECONDARY L.P.

And

HARBOURVEST SKEW BASE AIF L.P.

And

HIGHLAND CAPITAL MANAGEMENT, L.P.

And

LEE BLACKWELL PARKER, III

And

QUEST IRA, INC., FBO LEE B. PARKER III, ACCT. # 3058311

And

QUEST IRA, INC., FBO HUNTER COVITZ, ACCT. # 1469811

And

QUEST IRA, INC., FBO JON POGLITSCH, ACCT. # 1470612

And

QUEST IRA, INC., FBO NEIL DESAI, ACCT. # 3059211

And

HIGHLAND CLO FUNDING, LTD.

And

HIGHLAND HCF ADVISOR, LTD.

MEMBERS AGREEMENT RELATING TO THE COMPANY



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THIS AGREEMENT is made the 15th day of November 2017

BETWEEN

- (1) **CLO HOLDCO, LTD.** whose registered office address is at Intertrust Corporate Services (Cayman) Limited, 190 Elgin Avenue, George Town, Grand Cayman KY1-9005, Cayman Islands;
- (2) **HARBOURVEST DOVER IX INVESTMENT L.P.** of c/o HarbourVest Partners, LLC, One Financial Center, 44th Floor, Boston, MA 02111, USA
- (3) **HARBOURVEST 2017 GLOBAL AIF L.P.** of c/o HarbourVest Partners, LLC, One Financial Center, 44th Floor, Boston, MA 02111, USA
- (4) **HARBOURVEST 2017 GLOBAL FUND L.P.** of c/o HarbourVest Partners, LLC, One Financial Center, 44th Floor, Boston, MA 02111, USA
- (5) **HV INTERNATIONAL VIII SECONDARY L.P.** of c/o HarbourVest Partners, LLC, One Financial Center, 44th Floor, Boston, MA 02111, USA
- (6) **HARBOURVEST SKEW BASE AIF L.P.** of c/o HarbourVest Partners, LLC, One Financial Center, 44th Floor, Boston, MA 02111, USA
- (7) **HIGHLAND CAPITAL MANAGEMENT, L.P.** of 300 Crescent Court, Suite 700, Dallas, Texas 75201, USA
- (8) **LEE BLACKWELL PARKER, III** of 300 Crescent Court, Suite 700, Dallas, Texas 75201, USA
- (9) **QUEST IRA, INC., FBO LEE B. PARKER III, ACCT. # 3058311** of 17171 Park Row #100, Houston, Texas 77084, USA
- (10) **QUEST IRA, INC., FBO HUNTER COVITZ, ACCT. # 1469811** of 17171 Park Row #100, Houston, Texas 77084, USA
- (11) **QUEST IRA, INC., FBO JON POGLITSCH, ACCT. # 1470612** of 17171 Park Row #100, Houston, Texas 77084, USA
- (12) **QUEST IRA, INC., FBO NEIL DESAI, ACCT. # 3059211** of 17171 Park Row #100, Houston, Texas 77084, USA

(together the "**Members**") and

- (13) **HIGHLAND CLO FUNDING, LTD.**, with registration number 60120 whose registered office is at First Floor, Dorey Court, Admiral Park, St Peter Port, Guernsey GY1 6HJ, Channel Islands (the "**Company**") and
- (14) **HIGHLAND HCF ADVISOR, LTD.**, whose registered address is at Maples Corporate Services Limited, PO Box 309, Ugland House, Grand Cayman, KY1-1104, Cayman Islands (the "**Portfolio Manager**").

WHEREAS:

- (A) The Company is a limited company incorporated under the laws of the Island of Guernsey on 30 March 2015.
- (B) The Company has been established to provide its investors with exposure to CLO Notes on both a direct basis and indirect basis and senior secured loans on an indirect basis, through the use of the investments described in its investment policy as set forth in the Offering Memorandum dated 15 November 2017, the (the "**Offering Memorandum**"), subject to the restrictions set forth therein.

- (C) The Members are the owners of the entire issued capital of the Company.
- (D) The Parties are entering into this Agreement to regulate the relationship between them and the operation and management of the Company.

OPERATIVE PROVISIONS

1. INTERPRETATION

In this Agreement, including the Schedule:

- 1.1 the following words and expressions shall have the following meanings, unless they are inconsistent with the context:

"Adherence Agreement" means the agreement under which a person agrees to be bound by the terms of this Agreement in the form substantially similar as set out in the Schedule;

"Advisers Act" shall mean the U.S. Investment Advisers Act of 1940, as amended from time to time, and the rules and regulations of the U.S. Securities and Exchange Commission promulgated thereunder;

"Affiliate" means, with respect to a person, (i) any other person who, directly or indirectly, is in control of, or controlled by, or is under common control with, such person or (ii) any other person who is a director, officer or employee (a) of such person, (b) of any subsidiary or parent company of such person or (c) of any person described in clause (i) above. For the purposes of this definition, control of a person shall mean the power, direct or indirect, (i) to vote more than 50% of the securities having ordinary voting power for the election of directors of such persons or (ii) to direct or cause the direction of the management and policies of such person whether by contract or otherwise. For purposes of this definition, the management of an account by one person for the benefit of any other person shall not constitute "control" of such other person and no entity shall be deemed an "Affiliate" of the Company solely because the administrator or its Affiliates serve as administrator or share trustee for such entity;

"Agreement" means this agreement together with the Schedule;

"Articles" means the articles of incorporation of the Company as amended from time to time;

"Business" means the business of the Company as described in Recital (B);

"Business Day" means a day (other than a Saturday or Sunday) on which banks are open for ordinary banking business in Guernsey;

"Directors" means the directors of the Company from time to time;

"CLO Holdco" means CLO Holdco, Ltd. (or any permitted successor to the business of CLO Holdco, Ltd. or interest in the Company);

"Code" shall mean the U.S. Internal Revenue Code of 1986, as amended from time to time.

"Directors" means the directors of the Company from time to time;

"Dover IX" means HarbourVest Dover Street IX Investment L.P. (or any permitted successor to the business of HarbourVest Dover Street IX Investment L.P. or any interest in the Company);

"DOL" shall mean the U.S. Department of Labor, or any governmental agency that succeeds to the powers and functions thereof.

"DOL Regulations" shall mean the regulations of the DOL included within 29 C.F.R. section 2510.3-101.

"Dover IX" shall mean HarbourVest Dover Street IX Investment L.P. (or any permitted successor to the business of HarbourVest Dover Street IX Investment L.P. or interest in the Company);

"ERISA" shall mean the U.S. Employee Retirement Income Security Act of 1974, as amended from time to time;

"ERISA Member" shall mean a Member that (a) is a "benefit plan investor" (as such term is defined in the DOL Regulations as modified by section 3(42) of ERISA) subject to the fiduciary responsibility provisions of part 4 of title I of ERISA or is a "plan" (as such term is defined in section 4975(e) of the Code) subject to section 4975 of the Code or (b) is designated as an ERISA Member by the General Partner in writing on or before the date at which such ERISA Member is admitted to the Company;

"HarbourVest Entities" means: Dover IX; HarbourVest 2017 Global AIF L.P.; HarbourVest 2017 Global Fund L.P.; HV International VIII Secondary L.P.; and HarbourVest Skew Base AIF L.P. (or any of their respective permitted successors to their businesses or interests in the Company);

"Highland Principals" means: Highland Capital Management, L.P.; Lee Blackwell Parker, III, Quest IRA, Inc., fbo Lee B. Parker III Acct. # 3058311; Quest IRA, Inc., fbo Hunter Covitz Acct. # 1469811; Quest IRA, Inc., fbo Jon Poglitsch Acct. # 1470612; Quest IRA, Inc., fbo Neil Desai Acct. # 3059211 (or any of their respective permitted successors to their businesses or interests in the Company);

"Law" means the Companies (Guernsey) Law, 2008, as amended;

"Member" means a person whose name is from time to time entered in the register of members of the Company as the holder of shares in the Company;

"Parties" means the parties to this Agreement and any other person who agrees to be bound by the terms of this Agreement under an Adherence Agreement;

"Shares" means ordinary shares in the Company;

"Subsidiary" shall have the meaning ascribed to it in the Law;

"Subscription and Transfer Agreement" means the Subscription and Transfer Agreement, dated as of 15 November 2017, entered into by and among CLO HoldCo, Ltd. and each of the Members and acknowledged and agreed by the Company and the Portfolio Manager.

Any capitalized terms used herein without definition have the meanings specified in the Offering Memorandum.

- 1.2 any reference to the Parties being obliged to procure shall so far as they are able includes, without limitation, procuring by the exercise of votes which they directly or indirectly control at meetings of the Directors or general meetings of the Company;
- 1.3 any reference to a person includes, where appropriate, that person's heirs, personal representatives and successors;
- 1.4 any reference to a person includes any individual, body corporate, corporation, firm, unincorporated association, organisation, trust or partnership;
- 1.5 any reference to time shall be to Guernsey time;
- 1.6 except where the context otherwise requires words denoting the singular include the plural and vice versa and words denoting any one gender include all genders;

1.7 unless otherwise stated, a reference to a Clause or a Schedule is a reference to a Clause or a Schedule to this Agreement; and

1.8 Clause headings are for ease of reference only and do not affect the construction of any provision.

2. THE BUSINESS OF THE COMPANY

2.1 The Parties hereby agree that the objects and purpose of the Company shall be to carry on the Business.

2.2 The Parties shall so far as they are able (including without limitation by the exercise of votes which they directly or indirectly control at meetings of the Directors or general meetings of the Company) procure that (i) the Company's principal activities shall be the pursuit of the objects and purposes described in Clause 2.1 conducted in accordance with the provisions hereof and with the Offering Memorandum, the Subscription and Transfer Agreement and Articles of the Company and (ii) the Parties shall not take any action inconsistent with the provisions of the Offering Memorandum, including, without limitation the investment strategy set forth in the "Summary" and the applicable restrictions during and after the Investment Period and the suspension or termination of the Investment Period following a Key Person Event.

2.3 The Members shall (so long as they hold shares in the capital of the Company) use all reasonable endeavours to promote and develop the Business of the Company.

3. VOTING RIGHTS

3.1 The Parties agree that the following provisions of this Clause 3 shall apply during such period or periods as the Members parties hereto are Members.

3.2 The Parties shall procure that the Company shall not take any action at any meeting requiring the sanction of an ordinary or special resolution or by written resolution, in each case of the Directors or of the Members, without the affirmative vote or prior written consent, as applicable, of the Members totalling in the aggregate more than seventy-five percent (75%) of the Company, including, but not limited to, the following actions:

3.2.1 any issuance of new shares of the Company or a new class of shares of the Company or payment of any dividend by issuance of new shares of the Company, other than issuances of Shares pursuant to the Offering Memorandum and the Subscription and Transfer Agreement;

3.2.2 any alteration or cancellation of any rights of any Shares or of the Share capital of the Company,

3.2.3 any conversion or redemption of Shares, except pursuant to Clause 5.5,

3.2.4 any payment of commission in consideration for subscribing or agreeing to subscribe for any shares in the Company,

3.2.5 the creation of any lien on any Shares, except pursuant to the remedies in Clause 5.3. or

3.2.6 the suspension of the calculation of the NAV; other than a temporary suspension of the calculation of the NAV and NAV per Share by the Board of Directors during any period if it determines in good faith that such a suspension is warranted by extraordinary circumstances, including: (i) during any period when any market on which the Company's investments are quoted, traded or dealt in is closed, other than for ordinary holidays and weekends, or during periods in which dealings are restricted or suspended; (ii) during the existence of any state of affairs, including as a result of political, economic, military or monetary events or any circumstances outside the control of the Portfolio Manager or the Company, as a result of which,

in the reasonable opinion of the Portfolio Manager, the determination of the value of the assets of the Company, would not be reasonably practicable or would be seriously prejudicial to the Members taken as a whole; (iii) during any breakdown in the means of communication normally employed in determining the price or value of the Company's assets or liabilities, or of current prices in any market as aforesaid, or when for any other reason the prices or values of any assets or liabilities of the Company cannot reasonably be accurately ascertained within a reasonable time frame; (iv) during any period when the transfer of funds involved in the realization or acquisition of any investments cannot, in the reasonable opinion of the Portfolio Manager, be effected at normal rates of exchange; or (v) automatically upon liquidation of the Company.

4. **ADVISORY BOARD.**

- 4.1 Composition of Advisory Board. The Company shall establish an advisory board (the "**Advisory Board**") composed of two individuals, one of whom shall be a representative of CLO Holdco and one of whom shall be a representative of Dover IX (or, in each case, or any permitted successor to the interest in the Company of such Member). No voting member of the Advisory Board shall be a controlled Affiliate of the Portfolio Manager (including, for the avoidance of doubt, following a permitted transfer of CLO Holdco's interest to an Affiliate of the Portfolio Manager, if applicable), it being understood that for the purposes of this sentence none of CLO Holdco, its wholly-owned subsidiaries nor any of their respective directors or trustees shall be deemed to be a controlled Affiliate of the Portfolio Manager due to their pre-existing non-discretionary advisory relationship with the Portfolio Manager. None of the members of the Advisory Board shall receive any compensation (other than reimbursement for reasonable and documented out-of-pocket expenses) in connection with their position on the Advisory Board. The Company shall bear any fees, costs and expenses related to the Advisory Board.
- 4.2 Meetings of Advisory Board; Written Consents. The Advisory Board shall meet with the Portfolio Manager at such times as requested by the Portfolio Manager from time to time. The quorum for a meeting of the Advisory Board shall be all of its members entitled to vote. All actions taken by the Advisory Board shall be (i) by a unanimous vote of all of the members of the Advisory Board in attendance in a meeting at which a quorum is present and entitled to vote and not abstaining from voting or (ii) by a written consent in lieu of a meeting signed by all of the members of the Advisory Board entitled to consent and not abstaining from consenting. Meetings of the Advisory Board may be held in person, by telephone or by other electronic device.
- 4.3 Functions of Advisory Board. The Advisory Board shall provide (or determine not to provide) any consents or approvals expressly contemplated by this Agreement and the Offering Memorandum to be provided by the Advisory Board and, at the request of the Portfolio Manager in its sole discretion, provide general advice (which, for the avoidance of doubt, shall be non-binding) to the Portfolio Manager or the Company with regard to Company activities and operations and other matters. For the avoidance of doubt, no consent or approval of the Advisory Board shall be required for any action or determination expressly permitted or contemplated hereunder or in the Offering Memorandum and not conditioned on such a consent or approval. The Portfolio Manager shall not act contrary to the advice of the Advisory Board with respect to any action or determination expressly conditioned herein or in the Offering Memorandum on the consent or approval of the Advisory Board. Without limiting the foregoing, the Advisory Board shall be authorized to give any approval or consent required or deemed necessary or advisable under the Advisers Act on behalf of the Company and the Members, including under Section 206(3) of the Advisers Act. The Portfolio Manager may from time to time in its discretion request the Advisory Board to review and ratify certain Company matters. The consent of the Advisory Board shall be required to approve the following actions: (i) any extension of the Investment Period; (ii) any extension of the Term (other than an automatic extension following an extension of the Investment Period that has been approved by the Advisory Board); (iii) any allotment of additional equity securities by the Company; and (iv) any investment in a Related Obligation or any other transaction between the Company or any entity in which the Company holds a direct or indirect interest, on the one hand, and Highland or any of its Affiliates, on the other hand and (v) other matters as set forth in the Offering

Memorandum. Notwithstanding the foregoing or anything to the contrary set forth herein, no transaction that is specifically authorized in the governing documents of the Company shall require approval of the Advisory Board, including, without limitation, sales or securitizations of all or a portion of the Company's loan portfolio into new Qualifying CLOs (i.e. the transfer of warehoused assets into new Qualifying CLOs), investments in CLO Notes issued by CLOs managed by Highland Affiliates, and the NexBank Credit Facility and any Permitted NexBank Credit Facility Amendments, in each case as described in the Offering Memorandum. Any such approval, consent or ratification given by the Advisory Board shall be binding on the Company and the Members. Neither the Advisory Board nor any member thereof shall have the power to bind or act for or on behalf of the Company in any manner, and no shareholder who appoints a member of the Advisory Board shall be deemed to be an Affiliate of the Company or Highland solely by reason of such appointment.

- 4.4 Term of Members of Advisory Board. A member of the Advisory Board shall be deemed removed from the Advisory Board (i) if such member is no longer an officer, director, manager, trustee, employee, consultant or other representative of CLO Holdco or Dover IX, as applicable, or their respective Affiliates and shall be replaced as soon as practicable with a representative of CLO Holdco or Dover IX, or their respective Affiliates, as applicable, or (ii) if the Member represented by such member either becomes a Defaulting Member or such member ceases to be eligible to represent such Member pursuant to Clause 4.1.
- 4.5 No Duties to Other Members. No Advisory Board member who is the representative of any Member shall, to the extent permitted by law, owe a fiduciary duty to the Company or any other Member (other than the duty to act in good faith), and may, to the fullest extent permitted by law, in all instances act in such member's own interest and in the interest of the Member that appointed such member.

5. **DEFAULTING MEMBERS**

- 5.1 In the event any Member defaults in its obligation to pay the full amount of the purchase price of Shares called for settlement under the Subscription and Transfer Agreement on the applicable Settlement Date (such unpaid amount, an "**Outstanding Settlement Amount**"), the Portfolio Manager, on behalf of the Company, shall provide written or telephonic notice of such default to such Member. If such default is not cured within 5 business days after written (or if applicable telephonic or email) notice thereof given by the Portfolio Manager, on behalf of the Company, has been received by such Member, such Outstanding Settlement Amount shall automatically accrue interest on a retroactive basis from the date such Outstanding Settlement Amount was due at 12% (the "**Default Interest Rate**") (which interest, once paid, shall not be applied to the purchase of the unsettled Shares of such Member, but which will upon receipt be distributed pro rata to those Members who have funded any such Outstanding Settlement Amounts pursuant to this Clause 5). No such Shares which have failed to be settled will be issued to any Member until settlement of the full amount of the purchase price has been made. In addition, if such default is not cured within 10 business days after written or telephonic notice thereof given by the Portfolio Manager, on behalf of the Company, has been received by such Member (a "**Defaulting Member**"), the following provisions shall apply:
 - 5.2 Whenever the vote or consent of the Defaulting Member would otherwise be required or permitted hereunder or under the Articles, the Defaulting Member shall not be entitled to participate in such vote or consent in respect of his existing shareholding and with respect to any representative of such Defaulting Member on the Advisory Board, and such vote or consent shall be calculated as if such Defaulting Member were not a Member and, as applicable, any representative of such Defaulting Member on the Advisory Board were not a member of the Advisory Board.
 - 5.3 The Portfolio Manager, on behalf of the Company, may pursue and enforce all rights and remedies available, including the commencement of legal proceedings against the Defaulting Member to collect the Outstanding Settlement Amounts, together with interest thereon for the account of the Company from the date due at the Default Interest Rate, plus the costs and expenses of collection (including attorneys' fees and expenses).

- 5.4 The Portfolio Manager, on behalf of the Company, may (at the sole cost of the Defaulting Member) borrow funds from any person (other than the Defaulting Member or its Affiliates) to cover such shortfall and/or advance all or a portion of the Defaulting Member's Outstanding Settlement Amount to the Company on behalf of the Defaulting Member, and such advance shall be repaid by the Defaulting Member to the Portfolio Manager, on behalf of the Company, with interest for the account of the Portfolio Manager, on behalf of the Company, on the amount outstanding from time to time commencing on the date of the advance at the Default Interest Rate. To the extent the Portfolio Manager, on behalf of the Company, advances funds to the Company on behalf of a Defaulting Member, all distributions from the Company that would otherwise be made to the Defaulting Member shall be paid to the Portfolio Manager, on behalf of the Company, (with any such amounts being applied first against accrued but unpaid interest and then against principal), until all amounts payable by the Defaulting Member to the Portfolio Manager, on behalf of the Company, under this Clause 5.4 (including interest) have been paid in full.
- 5.5 The Portfolio Manager, on behalf of the Company, may elect, upon notice to the Defaulting Member, to redeem the Defaulting Member's shares in an amount equal to 50% of the outstanding amount existing as of the date of the default at a price of \$0.0001 per Share. Thereupon, the commitment of the Defaulting Member under the Subscription and Transfer Agreement shall be zero, the Defaulting Member shall not be obligated to make any further settlements, the voting capital of such Defaulting Member and of each other Member shall be re-determined as of the date of such default to reflect the new commitment of the Defaulting Member, and the Portfolio Manager shall revise the books and records of the Company to reflect the reduction of the commitment of the Defaulting Member. The Members agree (x) that the damages suffered by the Company as the result of a failure by a Member to settle a commitment to purchase Shares that is required by this Agreement cannot be estimated with reasonable accuracy and (y) that the foregoing provisions of this Clause 5.5 shall act as liquidated damages for the default by the Defaulting Member (which each Member hereby agrees are reasonable).
- 5.6 The Board may offer to the non-Defaulting Members (pro rata in accordance with their respective Commitments) the option of purchasing the Defaulting Member's unsettled Shares on the terms set forth in the applicable Settlement Notice (as defined in the Subscription and Transfer Agreement).
- 5.7 At the election of the Board, distributions of dividends otherwise payable to the Defaulting Member under the Articles shall not be paid to the Defaulting Member, but instead shall be applied against the amount of the Outstanding Settlement Amount (plus interest at the Default Interest Rate and related costs); provided that any amounts so applied shall be deemed to have been distributed to the Defaulting Member under the Articles.
- 5.8 The Portfolio Manager may send an amended or new Settlement Notice to the Members other than the Defaulting Member in an amount equal to the Defaulting Member's Outstanding Settlement Amount and otherwise in accordance with the Subscription and Transfer Agreement.
- 5.9 Each Defaulting Member further appoints the Portfolio Manager as agent and attorney-in-fact for the Defaulting Member and hereby grants to the Portfolio Manager an irrevocable power of attorney to take all actions necessary on its behalf to sell, assign, or transfer the commitment to purchase unsettled Shares of such Defaulting Member pursuant to Clause 5.6 or as necessary on its behalf to effect the other remedies or rights set forth in this Clause 5; provided that the Portfolio Manager shall not bind any Defaulting Member to an indemnification or other similar obligation which guarantees the financial performance of the Company or which exceeds the ability of the Defaulting Member to provide indemnification under applicable law.

6. TRANSFERS OR DISPOSALS OF SHARES

- 6.1 No Member shall sell, pledge, charge, mortgage, assign, assign by way of security, transfer, convey, exchange or otherwise dispose of its Shares or its commitment to settle purchases of Shares under the Subscription and Transfer Agreement (each a "**Transfer**"), other than to an Affiliate of an initial Member party hereto, without the prior written consent of the Portfolio

- Manager, which consent shall be in the sole discretion of the Portfolio Manager; provided that no such Transfer shall be made unless in the opinion of counsel reasonably satisfactory to the Portfolio Manager (who may be counsel for the Company, and which requirement for an opinion may be waived, in whole or in part, in the sole discretion of the Portfolio Manager) that:
- 6.1.1 such Transfer would not require registration under the Securities Act or any state securities or "Blue Sky" laws or other laws applicable to the Shares to be assigned or transferred and is conducted in conformance with the restrictions set forth in the Offering Memorandum;
 - 6.1.2 such Transfer would not be reasonably likely to cause the Company to be subject to tax in any jurisdiction other than of its incorporation on a net income basis, not be reasonably likely to cause the Company to become subject to registration as an investment company under the Investment Company Act of 1940, as amended;
 - 6.1.3 such Transfer would not cause the Company to be considered to be an entity whose underlying assets are considered to include "plan assets" by reason of investment by an "employee benefit plan" or "plan" in such entity pursuant to the U.S. Plan Assets Regulations; and
 - 6.1.4 such sale, assignment, disposition or transfer would not cause all or any portion of the assets of the Company to constitute "plan assets" under ERISA or the Code.
- 6.2 Prior to making any Transfer of Shares (other than Transfers to Affiliates of an initial Member or, in the case of CLO Holdco or a Highland Principal, to Highland, its Affiliates or another Highland Principal) a Member must first offer to the other Members a right to purchase the Shares, on a pro rata basis with respect to their current Shares, at the same price (which must be cash) as such Shares are proposed to be purchased by the prospective third party purchaser pursuant to an irrevocable offer letter. The other Members will have 30 days following receipt of the letter to determine whether to purchase their entire pro rata portion of the Shares proposed to be Transferred. If the other Members do not accept the offer, the Member may (subject to complying with the other Transfer restrictions in this Agreement) Transfer the applicable Shares that such Members have not elected to purchase to a third party at a price equal to or greater than the price described in the offer letter, provided that if the Member has not (a) entered into a definitive agreement to effect such sale within 90 days after the expiration of the period that the other Members have to accept the offer in the offer letter or (b) consummated the sale within 120 day after the entry into the definitive agreement to consummate the sale, it must comply with these right of first refusal procedures again. Any Member (other than the Member proposing to Transfer its Shares) may assign its right to purchase its pro rata portion of the Shares to any other Member (subject to complying with the other Transfer restrictions in this Agreement), any initial Member (other than the Member proposing to Transfer its Shares) may assign its right to purchase its pro rata portion of the Shares to an Affiliate (subject to complying with the other Transfer restrictions in this Agreement), and CLO Holdco and the Highland Principals (unless such Member is the Member proposing the Transfer its Shares) may assign its right to purchase its pro rata portion of the Shares to Highland, an Affiliate of Highland or other Highland Principals (subject to complying with the other Transfer restrictions in this Agreement).
- 6.3 No Highland Principal may transfer his or its interests in the Company other than (i) to a trust or other tax or estate planning vehicle or (ii) to the Portfolio Manager, its Affiliates or another Highland Principal upon the termination of such Highland Principal's (or the beneficial owner of such Highland Principal, if applicable) employment by Highland Capital Management, L.P.
- 6.4 Any transferor of any Share shall remain bound by the terms of this Agreement applicable to it prior to such transfer and that nothing in this Agreement shall constitute a waiver of any rights a Party to this Agreement may have by reason of a breach of this Agreement by a transferor prior to transfer. The transferor and/or the transferee shall bear all costs of any Transfer.
- 6.5 The Parties agree not to Transfer their Shares to any person unless such transferee agrees to be bound by the terms of this Agreement.
- 6.6 All Adherence Agreements executed pursuant to this Clause shall be executed by the transferee or allottee and each Party.

7. **CONFIDENTIALITY**

- 7.1 Each Party agrees to keep any information received by it pursuant to this Agreement or relating to the Business as confidential and not (save with the relevant Party's consent or as may be required by Law or the rules of any regulatory authority or any stock exchange) disclose to any person such information.
- 7.2 Notwithstanding the foregoing, the Parties agree that the HarbourVest Entities may disclose to their limited partners and prospective limited partners (including any agents of such limited partners or prospective limited partners), clients and applicable governmental agencies (a) the name and address of the Company, (b) the capital commitment and the remaining capital commitment, (c) the net asset value of such HarbourVest Entity's interest in the Company, (d) the amount of distributions that have been made to such HarbourVest Entity by the Company and the amount of contributions that have been made by such HarbourVest Entity to the Company, (e) such ratios and performance information calculated by such HarbourVest Entity using the information in clauses (a) through (d) above, including the ratio of net asset value plus distributions to contributions (i.e., the "multiple") and such HarbourVest Entity's internal rate of return with respect to its investment in the Company, and (f) tax information with respect to the Company.

8. **DIVIDENDS**

- 8.1 The Company agrees that it shall not, and the Portfolio Manager agrees it shall not cause the Company to, make any dividends except pursuant to the section titled "Summary—Dividend Policy" of the Offering Memorandum.

9. **TERM OF THE COMPANY**

- 9.1 Each Party agrees to cause the winding up and dissolution of the Company after the ten year anniversary of the date hereof (the "**Term**"); provided that the Portfolio Manager, in its reasonable discretion, may postpone dissolution of the Company for up to 180 days in order to facilitate orderly liquidation of the investments; provided, further, that the Term shall be automatically extended for any amount of time for which the Investment Period may be extended.
- 9.2 Notwithstanding the foregoing, the Term may be extended with the consent of the Portfolio Manager and the Advisory Board for up to two successive periods of one year each.

10. **ERISA MATTERS**

- 10.1 The Portfolio Manager, the Company and each Member shall use their reasonable best efforts to conduct the affairs and operations of the Company so as to limit investment in the Company by "benefit plan investors" (within the meaning of the DOL Regulations as modified by section 3(42) of ERISA) to less than the U.S. Plan Threshold. In the event the U.S. Plan Threshold is met or exceeded, the Portfolio Manager, on behalf of the Company, may require any Non-Qualified Holder that is a U.S. Plan Investor to sell or transfer their Shares to a person qualified to own the same that is not a U.S. Plan Investor within 30 days and within such 30 days and to provide the Company with satisfactory evidence of such sale or transfer such that such sale or transfer, together with other sale or transfers pursuant to this Clause, would result in the investment in the Company by "benefit plan investors" (within the meaning of the DOL Regulations as modified by section 3(42) of ERISA) to be less than the U.S. Plan Threshold. Where the conditions above are not satisfied within 30 days after the serving of the notice to transfer, such Non-Qualified Holder will be deemed, upon the expiration of such 30 days, to have forfeited their Shares.

11. **TAX MATTERS**

- 11.1 PFIC. For each fiscal year of the Company, the Company will no later than 120 days after the end of such fiscal year, commencing with the first fiscal year for which the Company is determined to be a PFIC (a "passive foreign investment company"), furnish to each of the

HarbourVest Entities (x) all information necessary to permit such HarbourVest Entity or any of its partners to complete United States Internal Revenue Service Form 8621 with respect to their interests in the Company and (y) a PFIC Annual Information Statement under section 1295(b) of the Code with respect to the Company; provided that if the Company is unable to furnish such final information and Statement within such 120 days, then the Company shall use its reasonable best efforts to furnish estimates of such information and Statement on or before the 120th day after the end of such fiscal year.

- 11.2 CFC. The Company shall furnish to each of the HarbourVest Entities within 120 days after the end of each fiscal year of the Company, a United States Internal Revenue Service Form 5471 for such fiscal year, completed for all information concerning the Company required to be filed by such HarbourVest Entity or any of its partners (i.e., all portions applicable to the relevant category of filer other than page 1 items A-D and page 2 Schedule B), to the extent such Form 5471 is required to be filed by such HarbourVest Entity or any of its partners; provided that if the Company is unable to furnish such final information within such 120 days, then the Company shall use its reasonable best efforts to furnish estimates of such information on or before the 120th day after the end of each fiscal year.
- 11.3 Other Tax Information. The Company shall furnish to each of the HarbourVest Entities (a) within 120 days after the end of each fiscal year of the Company such other information reasonably requested by the HarbourVest Entities that any HarbourVest Entity may require in order for it or any of its partners to comply with its U.S. federal income tax reporting obligations with respect to its interest in the Company; provided that if the Company is unable to furnish such final information within such 120 days, then the Company shall use its reasonable best efforts to furnish estimates of such information on or before the 120th day after the end of such fiscal year and (b) promptly upon request such other information reasonably requested by such HarbourVest Entity in order to withhold tax or to file tax returns and reports or to furnish tax information to any of its partners with respect to the Company.
- 11.4 Withholding and Other Taxes. The Company will use reasonable best efforts to acquire investments that will not result in withholding or other taxes being imposed directly or indirectly on the Company by any jurisdiction with respect to income or distributions from such investments.

12. **AMENDMENTS TO CERTAIN AGREEMENTS**

- 12.1 The Portfolio Manager and the Company shall not amend or terminate, or agree to amend or terminate, the Memorandum or Articles of Incorporation of the Company or that certain Portfolio Management Agreement between the Portfolio Manager and the Company dated as of the date hereof (the "**Management Agreement**") without the consent of the Parties.
- 12.2 The Portfolio Manager agrees that it shall not assign its rights, duties and obligations under the Management Agreement without the consent of the Members totalling in the aggregate more than seventy-five percent (75%) of the Company. Notwithstanding the foregoing, the Portfolio Manager may, without the consent of the Members, assign any of its rights or obligations under the Management Agreement to an Affiliate; provided that such Affiliate (A) has demonstrated ability, whether as an entity or by its personnel, to professionally and competently perform duties similar to those imposed upon the Portfolio Manager pursuant to the Management Agreement, (B) has the legal right and capacity to act as Portfolio Manager thereunder and (C) shall not cause the Company or the pool of collateral to become required to register under the provisions of the Investment Company Act and such action does not cause the company to be subject to tax in any jurisdiction outside of its jurisdiction of incorporation.
- 12.3 The Company agrees that it shall not hire any portfolio manager without the consent of the Parties and such new portfolio manager shall be required to join and abide by this Agreement.

13. **FINANCIAL REPORTS**

- 13.1 The books and records of account of the Company shall be audited as of the end of each fiscal year of the Company by a nationally recognized independent public accounting firm selected by

the Portfolio Manager that is registered with, and subject to regular inspection as of the commencement of the professional engagement period, and as of each calendar year-end, by, the Public Company Accounting Oversight Board in accordance with its rules. During the Term, the Portfolio Manager or the Company shall prepare and mail, deliver by fax, email or other electronic means or otherwise make available a financial report (audited in the case of a report sent as of the end of a fiscal year and unaudited in the case of a report sent as of the end of a quarter) to each Member on or before the 120th day after the end of each fiscal year and the 45th day after the end of each of the first three quarters of each fiscal year, setting forth for such fiscal year or quarter (a) the assets and liabilities of the Company as of the end of such fiscal year or quarter; (b) the net profit or net loss of the Company for such fiscal year or quarter; and (c) such Member's closing capital account balance as of the end of such fiscal year or quarter; provided that if the Portfolio Manager or the Company is unable to furnish final information with respect to any of the above, then the Portfolio Manager or the Company shall use its reasonable best efforts to furnish estimates of such information on or before the 120th day after the end of each fiscal year and the 45th day after the end of the first three quarters of each fiscal year. On or before the 60th day after the end of each fiscal year, the Portfolio Manager or the Company shall provide to each Member an unaudited draft of the financial report for such fiscal year.

- 13.2 After the end of each fiscal year or quarter, the Portfolio Manager or the Company shall cause to be delivered to the Advisory Board a reasonably detailed summary of the expenses incurred by the Company during such period.

14. **TERMINATION AND LIQUIDATION**

- 14.1 Save as provided for in Clause 13.2, this Agreement shall terminate:

- 14.1.1 when one Party holds all the Shares;
- 14.1.2 when a resolution is passed by the Company's Members or creditors, or an order made by a court or other competent body or person instituting a process that shall lead to the Company being wound up and its assets being distributed among the Company's creditors, Members or other contributors; or
- 14.1.3 with the written consent of all the Parties.

- 14.2 The following provisions of this Agreement remain in full force after termination: Clause 1 (Interpretation), Clause 7 (Confidentiality), this Clause, Clause 14 (Whole Agreement), Clause 16 (Assignments), Clause 17 (Variation and Waiver), Clause 18 (Service of Notice), Clause 19 (General) and Clause 21 (Governing Law and Jurisdiction).

- 14.3 Termination of this Agreement shall not affect any rights or liabilities that the Parties may have accrued under it.

- 14.4 Where the Company is to be wound up and its assets distributed, the Parties shall agree a suitable basis for dealing with the interests and assets of the Company and shall endeavour to ensure that:

- 14.4.1 all existing contracts of the Company are performed to the extent that there are sufficient resources;
- 14.4.2 the Company shall not enter into any new contractual obligations;
- 14.4.3 the Company is dissolved and its assets are distributed as soon as practical; and
- 14.4.4 any other proprietary information belonging to or originating from a Party shall be returned to it by the other Parties.

15. **WHOLE AGREEMENT**

- 15.1 This Agreement, and any documents referred to in it, constitute the whole agreement between the Parties and supersede any arrangements, understanding or previous agreement between them relating to the subject matter they cover.
- 15.2 Each Party acknowledges that in entering into this Agreement, and any documents referred to in it, it does not rely on, and shall have no remedy in respect of, any statement, representation, assurance or warranty of any person other than as expressly set out in this Agreement or those documents.
- 15.3 Nothing in this Clause 14 operates to limit or exclude any liability for fraud.

16. **STATUS OF AGREEMENT**

- 16.1 Each Party shall, to the extent that it is able to do so, exercise its voting rights and other powers in relation to the Company to procure that the provisions of this Agreement are properly and promptly observed and given full force and effect according to the spirit and intention of the Agreement.
- 16.2 If any provision in the memorandum of incorporation of the Company or the Articles conflicts with any provision of this Agreement, the provisions of this Agreement shall prevail as between the Parties. Each of the Parties shall, to the extent that it is able to do so, exercise its voting rights and other powers in relation to the Company to procure the modification of the memorandum of association of the Company or the Articles (as the case may be) in order to eliminate the conflict, but this Agreement shall not itself constitute a modification of the memorandum of association of the Company or the Articles.

17. **ASSIGNMENTS**

Save as expressly permitted by this Agreement, no person may assign, or grant any security interest over, any of its rights under this Agreement or any document referred to in it without the prior written consent of the Parties.

18. **VARIATION AND WAIVER**

- 18.1 A variation of this Agreement shall be in writing and signed by or on behalf of the Parties.
- 18.2 A waiver of any right under this Agreement is only effective if it is in writing and it applies only to the person to which the waiver is addressed and the circumstances for which it is given.
- 18.3 A person that waives a right in relation to one person, or takes or fails to take any action against that person, does not affect its rights against any other person.

19. **SERVICE OF NOTICE**

- 19.1 Any notice required to be given by any of the Parties may be sent by post or facsimile to the address and facsimile number of the addressee as set out in this Agreement, in either case marked for the attention of the relevant person named below, or to such other address and/or facsimile number and/or marked for the attention of such other person as the addressee may from time to time have notified for the purposes of this Clause.

19.1.1 to the Company:
Address:
First Floor, Dorey Court, Admiral Park
St Peter Port, Guernsey GY1 6HJ
Channel Islands

19.1.2 to CLO Holdco:

Address:
c/o Highland Capital Management, L.P.
300 Crescent Court, Suite 700
Dallas, TX 75201
Attn: General Counsel
Tel: +1 (972) 628-4100
Email: Notices@highlandcapital.com

19.1.3 to any HarbourVest Entity:

Address:
c/o HarbourVest Partners, LLC
One Financial Center, 44th Floor
Boston, MA 02111
USA
Attn: Michael Pugatch
Tel: +1 (617) 348-3712
F
Email: mpugatch@harbourvest.com

19.1.4 to any other Party: by post or hand delivery only to the address specified in the register of members of the Company.

19.2 Communications sent by post shall be deemed to have been received 24 hours after posting. Communications sent by facsimile transmission shall be deemed to have been received at the time the transmission has been received by the addressee **PROVIDED THAT** if the facsimile transmission, where permitted, is received after 5.00pm or on a day which is not a Business Day, it shall be deemed to have been received 11.00am the Business Day following thereafter.

19.3 In proving service by post it shall only be necessary to prove that the notice was contained in an envelope which was duly addressed and posted in accordance with this Clause and in the case of facsimile transmission it shall be necessary to prove that the facsimile was duly transmitted to the correct number.

20. **GENERAL**

20.1 Each of the Parties hereby agree not to enter into or abide by any agreement whether written or oral with any one or more of the other Parties in respect of the voting of Shares or the submission of Member resolutions to any Members for voting by them, or otherwise to direct or influence, or attempt to direct or influence, the day-to-day management of the Company, either directly or indirectly, other than in order to comply with the other terms of this Agreement or the Articles. In this regard, each of the Parties agrees to not to direct or influence or to attempt to direct or influence any of the Directors through any employment relationship that the Directors may have outside of the Company other than in order to comply with the other terms of this Agreement or the Articles. Each of the Parties hereby agree that this provision shall continue to apply to them whether or not they are or remain a Member.

20.2 Unless otherwise provided, all costs in connection with the negotiation, preparation, execution and performance of this Agreement, shall be borne by the Party that incurred the costs.

20.3 The Parties are not in partnership with each other and there is no relationship of principal and agent between them.

20.4 All transactions entered into between any Party and the Company shall be conducted in good faith and on the basis set out or referred to in this Agreement or, if not provided for in this Agreement, as may be agreed by the Parties and, in the absence of such agreement, on an arm's length basis.

20.5 Each Party shall at all times act in good faith towards the other Parties and shall use all reasonable endeavours to ensure that this Agreement is observed.

20.6 Each Party shall promptly execute and deliver all such documents, and do all such things, as the other Parties may from time to time reasonably require for the purpose of giving full effect to the provisions of this Agreement.

20.7 This Agreement may be executed in any number of counterparts, each of which is an original and which together have the same effect as if each Party had signed the same document. This Agreement may not be amended except with the consent of each Party.

21. STATUS OF AGREEMENT

21.1 The Parties shall, when necessary, exercise their powers of voting and any other rights and powers they have to amend, waive or suspend a conflicting provision in the Articles to the extent necessary to permit the Company and its Business to be administered as provided in this Agreement.

21.2 If there is an inconsistency between any of the provisions of this agreement and the provisions of the Articles, the provisions of this agreement shall prevail as between the Parties.

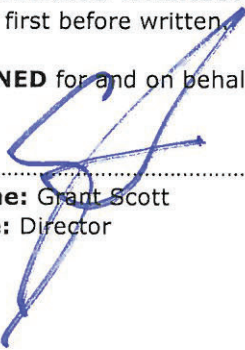
22. GOVERNING LAW AND JURISDICTION

This Agreement shall be governed by and construed in accordance with the laws of the Island of Guernsey and each of the Parties submits to the non-exclusive jurisdiction of the Royal Courts of the Island of Guernsey.

[Signature Page Follows.]

IN WITNESS WHEREOF the Parties hereto have caused this Agreement to be executed the day and year first before written.

SIGNED for and on behalf of **CLO HOLDCO, LTD.**

By:.....

Name: Grant Scott

Title: Director

SIGNED for and on behalf of
HARBOURVEST DOVER STREET IX INVESTMENT L.P.

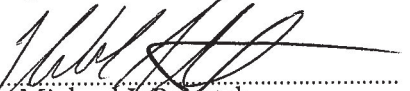
By: HarbourVest Partners (Europe) Limited,
its Alternative Investment Fund Manager

By: 

Name: Michael J. Pugatch
Title: Authorized Person

SIGNED for and on behalf of
HARBOURVEST 2017 GLOBAL AIF L.P.

By: HarbourVest Partners (Europe) Limited,
its Alternative Investment Fund Manager

By: 

Name: Michael J. Pugatch
Title: Authorized Person

SIGNED for and on behalf of
HARBOURVEST 2017 GLOBAL FUND L.P.

By: HarbourVest 2017 Global Associates L.P.,
its General Partner

By: HarbourVest GP LLC,
its General Partner

By: HarbourVest Partners, LLC,
its Managing Member

By: 

Name: Michael J. Pugatch
Title: Managing Director

SIGNED for and on behalf of
HV INTERNATIONAL VIII SECONDARY L.P.

By: HIPEP VIII Associates L.P.

Its General Partner

By: HarbourVest GP LLC

Its General Partner

By: HarbourVest Partners, LLC

Its Managing Member

By: 

Name: Michael J. Pugatch

Title: Managing Director

SIGNED for and on behalf of
HARBOURVEST SKEW BASE AIF L.P.

By: HarbourVest Partners (Europe) Limited,
its Alternative Investment Fund Manager

By: 

Name: Michael J. Pugatch

Title: Authorized Person


SIGNED



.....
Lee Blackwell Parker, III

SIGNED for and on behalf of
QUEST IRA, INC.
FBO LEE B. PARKER III, ACCT. # 3058311

Read and approved

By: 
Name: *Emmanuel Maciel*
Title: *transactions supervisor*

X 

SIGNED for and on behalf of
QUEST IRA, INC.
FBO HUNTER COVITZ, ACCT. # 1469811

By:
Name:
Title:

SIGNED for and on behalf of
QUEST IRA, INC.
FBO JON POGLITSCH, ACCT. # 1470612

By:
Name:
Title:


SIGNED for and on behalf of
QUEST IRA, INC.
FBO NEIL DESAI, ACCT. # 3059211

By:
Name:
Title:

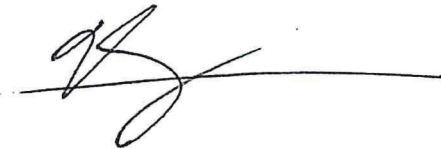
SIGNED for and on behalf of
QUEST IRA, INC.
FBO LEE B. PARKER III, ACCT. # 3058311

By:.....
Name:
Title:

SIGNED for and on behalf of
QUEST IRA, INC.
FBO HUNTER COVITZ, ACCT. # 1469811

By: 
Name: Emmanuel Mader
Title: Transaction Supervisor

Read & approved



SIGNED for and on behalf of
QUEST IRA, INC.
FBO JON POGLITSCH, ACCT. # 1470612

By:.....
Name:
Title:

SIGNED for and on behalf of
QUEST IRA, INC.
FBO NEIL DESAI, ACCT. # 3059211

By:.....
Name:
Title:


SIGNED for and on behalf of
QUEST IRA, INC.
FBO LEE B. PARKER III, ACCT. # 3058311

By:.....
Name:
Title:

SIGNED for and on behalf of
QUEST IRA, INC.
FBO HUNTER COVITZ, ACCT. # 1469811

By:.....
Name:
Title:

SIGNED for and on behalf of
QUEST IRA, INC.
FBO JON POGLITSCH, ACCT. # 1470612

By: 
Name: Emmanuel Mager
Title: Transactions Supervisor

Read and Approved:

 11/7/17

SIGNED for and on behalf of
QUEST IRA, INC.
FBO NEIL DESAI, ACCT. # 3059211

By:.....
Name:
Title:

SIGNED for and on behalf of
QUEST IRA, INC.
FBO LEE B. PARKER III, ACCT. # 3058311

By:.....
Name:
Title:

SIGNED for and on behalf of
QUEST IRA, INC.
FBO HUNTER COVITZ, ACCT. # 1469811

By:.....
Name:
Title:

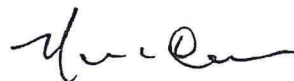
SIGNED for and on behalf of
QUEST IRA, INC.
FBO JON POGLITSCH, ACCT. # 1470612

By:.....
Name:
Title:

SIGNED for and on behalf of
QUEST IRA, INC.
FBO NEIL DESAI, ACCT. # 3059211

By:.....
Name: Emmanuel Madet
Title: Transactional Supervisor

Read and approved



SIGNED for and on behalf of
HIGHLAND CAPITAL MANAGEMENT, L.P.

By: Strand Advisors, Inc.,
its General Partner



By:

Name: James Dondero

Title: President

SIGNED for and on behalf of
HIGHLAND HCF ADVISOR, LTD.


By:
Name: James Dondero
Title: President

SIGNED for and on behalf of
HIGHLAND CLO FUNDING, LTD.

By:

Name: William Scott

Title: Director



SCHEDULE

Adherence Agreement

THIS ADHERENCE AGREEMENT is made on [•] 200[•]

BETWEEN:

- (1) [•] of [•] (the "**Covenantor**");
- (2) CLO HOLDCO, LTD. of [] (a "**Member**");
- (3) [•] of [] (a "**Member**");
- (4) [•] of [] (a "**Member**");
- (5) HIGHLAND CLO FUNDING, LTD., with registration number 60120 whose registered office is at First Floor, Dorey Court, Admiral Park, St Peter Port, Guernsey GY1 6HJ, Channel Islands (the "**Company**")
- (6) HIGHLAND HCF ADVISOR, LTD., registered address is at Maples Corporate Services Limited, PO Box 309, Ugland House, Grand Cayman, KY1-1104, Cayman Islands (the "**Portfolio Manager**").

RECITAL

This Agreement is supplemental to the members agreement made on November 15 2017 between the Members, the Portfolio Manager and the Company (the "**Members Agreement**").

IT IS HEREBY AGREED as follows:

1. The Covenantor hereby confirms that he has been supplied with a copy of the Members Agreement and hereby covenants with each of the parties thereto to observe, perform and be bound by all the terms of the Members Agreement as if it were a party thereto.
2. Each of the other parties to the Members Agreement hereby covenants with the Covenantor that the Covenantor shall be entitled to the benefit of the terms of the Members Agreement as if he were a party thereto.
3. This Agreement shall be governed by and construed in accordance with Guernsey law.

IN WITNESS of which this Agreement has been executed by the Covenantor and each of the parties to the Members Agreement on the date shown above.

SETTLEMENT AGREEMENT

This Settlement Agreement (the “Agreement”) is entered into as of December 23, 2020, between Highland Capital Management, L.P. (the “Debtor”), on the one hand, and HarbourVest 2017 Global Fund L.P., HarbourVest 2017 Global AIF L.P., HarbourVest Dover Street IX Investment L.P., HV International VIII Secondary L.P., HarbourVest Skew Base AIF L.P., and HarbourVest Partners L.P. (each, a “HarbourVest Party,” and collectively, “HarbourVest”), on the other hand. Each of the foregoing are sometimes referred to herein collectively as the “Parties” and individually as a “Party.”

RECITALS

WHEREAS, on October 16, 2019 (the “Petition Date”), the Debtor filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code (the “Bankruptcy Case”) in the Bankruptcy Court for the District of Delaware, Case No. 19-12239 (CSS) (the “Delaware Bankruptcy Court”);

WHEREAS, on December 4, 2019, the Delaware Bankruptcy Court entered an order transferring venue of the Debtor’s case to the Bankruptcy Court for the Northern District of Texas, Dallas Division, Case No. 19-34054-sgj (the “Bankruptcy Court”);

WHEREAS, prior to the Petition Date, HarbourVest invested in Highland CLO Funding, Ltd. f/k/a Acis Loan Funding, Ltd. (“HCLOF”) and acquired an a 49.98% ownership interest in HCLOF (the “HarbourVest Interests”);

WHEREAS, the portfolio manager for HCLOF is Highland HCF Advisor, Ltd., a subsidiary of the Debtor;

WHEREAS, on April 8, 2020, HarbourVest filed proofs of claim in the Bankruptcy Case, which are listed on the Debtor’s claims register as claim numbers 143, 147, 149, 150, 153, and 154 (the “HarbourVest Claims”), asserting claims against the Debtor relating to its investment in HCLOF;

WHEREAS, on July 30, 2020, the Debtor filed the *Debtor’s First Omnibus Objection to Certain (a) Duplicate Claims; (b) Overstated Claims; (c) Late-Filed Claims; (d) Satisfied Claims; (e) No Liability Claims; and (f) Insufficient-Documentation Claims* [Docket No. 906], in which the Debtor objected to the HarbourVest Claims;

WHEREAS, on September 11, 2020, HarbourVest filed the *HarbourVest Response to Debtor’s First Omnibus Objection to Creation (a) Duplicate Claims; (b) Overstated Claims; (c) Late-Filed Claims; (d) Satisfied Claims; (e) No Liability Claims; and (f) Insufficient-Documentation Claims* [Docket No. 1057] (the “HarbourVest Response”);

WHEREAS, on October 18, 2020, HarbourVest filed the *Motion of HarbourVest Pursuant to Rule 3018(a) of the Federal Rules of Bankruptcy Procedure for Temporary Allowance of Claims for Purposes of Voting to Accept or Reject the Plan* [Docket No. 1207] (the “3018 Motion” and together with the HarbourVest Response, the “HarbourVest Pleadings”);

WHEREAS, in the HarbourVest Pleadings, HarbourVest asserted, among other things, that the HarbourVest Claims included claims against the Debtor arising from fraudulent inducement, fraudulent concealment, fraudulent misrepresentation, breach of fiduciary duty, breach of securities laws, and misuse of assets and sought damages in excess of \$300,000,000;

WHEREAS, the Debtor disputes the HarbourVest Claims;

WHEREAS, on November 24, 2020, the Debtor filed the *Fifth Amended Plan of Reorganization for Highland Capital Management, L.P.* [Docket No. 1472] (as amended, the “Plan”).¹

WHEREAS, the Parties desire to enter into this Agreement which incorporates, formalizes, and finalizes the full and final resolution of the HarbourVest Claims and HarbourVest Pleadings; and

WHEREAS, this Agreement will be presented to the Bankruptcy Court for approval pursuant to Federal Rule of Bankruptcy Procedure 9019 (“Rule 9019”).

NOW THEREFORE, in consideration of the above recitals, the covenants, conditions, and promises made herein, and other good and valuable consideration, the receipt of which is hereby acknowledged, the Parties agree as follows:

1. Settlement of Claims.

(a) In full and complete satisfaction of the HarbourVest Claims, HarbourVest will receive:

(i) an allowed, nonpriority general unsecured claim in the aggregate amount of \$45,000,000 (the “Allowed GUC Claim”); and

(ii) an allowed subordinated claim in the aggregate amount of \$35,000,000 (the “Allowed Subordinated Claim” and together with the Allowed GUC Claim, the “Allowed Claims”).

(b) On the Effective Date, HarbourVest will transfer all of its rights, title, and interest in the HarbourVest Interests to the Debtor or its nominee pursuant to the terms of the *Transfer Agreement for Ordinary Shares of Highland CLO Funding, Ltd.*, attached hereto as Exhibit A (the “Transfer Agreements”) and the Debtor or its nominee will become a shareholder of HCLOF with respect to the HarbourVest Interests. The terms of the Transfer Agreements are incorporated into this Agreement by reference.

2. Releases.

(a) Upon the Effective Date, and to the maximum extent permitted by law, each HarbourVest Party on behalf of itself and each of its current and former advisors, trustees, directors, officers, managers, members, partners, employees, beneficiaries, shareholders, agents,

¹ All capitalized terms used but not defined herein shall have the meanings given to them in the Plan.

participants, subsidiaries, parents, successors, designees, and assigns hereby forever, finally, fully, unconditionally, and completely releases, relieves, acquits, remises, and exonerates, and covenants never to sue, the Debtor, HCLOF, HCLOF's current and former directors, and the Debtor's current and former advisors, trustees, directors, officers, managers, members, partners, employees, beneficiaries, shareholders, agents, participants, subsidiaries, parents, affiliates, successors, designees, and assigns, except as expressly set forth below (the "Debtor Released Parties"), for and from any and all claims, debts, liabilities, demands, obligations, promises, acts, agreements, liens, losses, costs and expenses (including, without limitation, attorney's fees and related costs), damages, injuries, suits, actions, and causes of action of whatever kind or nature, whether known or unknown, suspected or unsuspected, matured or unmatured, liquidated or unliquidated, contingent or fixed, at law or in equity, statutory or otherwise, including, without limitation, any claims, defenses, and affirmative defenses, whether known or unknown, including, without limitation, those which were or could have been asserted in, in connection with, or with respect to the Bankruptcy Case (collectively, the "HarbourVest Released Claims").

(b) Upon the Effective Date, and to the maximum extent permitted by law, the Debtor hereby forever, finally, fully, unconditionally, and completely releases, relieves, acquits, remises, and exonerates, and covenants never to sue (i) each HarbourVest Party and (ii) each HarbourVest Party's current and former advisors, trustees, directors, officers, managers, members, partners, employees, beneficiaries, shareholders, agents, participants, subsidiaries, parents, affiliates, successors, designees, and assigns (the "HarbourVest Released Parties"), for and from any and all claims, debts, liabilities, demands, obligations, promises, acts, agreements, liens, losses, costs and expenses (including, without limitation, attorney's fees and related costs), damages, injuries, suits, actions, and causes of action of whatever kind or nature, whether known or unknown, suspected or unsuspected, matured or unmatured, liquidated or unliquidated, contingent or fixed, at law or in equity, statutory or otherwise, including, without limitation, any claims, defenses, and affirmative defenses, whether known or unknown, which were or could have been asserted in, in connection with, or with respect to the Bankruptcy Case (collectively, the "Debtor Released Claims"); *provided, however*, that notwithstanding anything herein to the contrary, the release contained in this Section 2(b) will apply to the HarbourVest Released Parties set forth in subsection (b)(ii) only with respect to Debtor Released Claims arising from or relating to HarbourVest's ownership of the HarbourVest Interests.

(c) Notwithstanding anything in this Agreement to the contrary, the releases set forth herein will not apply with respect to (i) the Allowed Claims, (ii) the claims of Charlotte Investor IV, L.P., or (iii) the duties, rights, or obligations of any Party under this Agreement or the Transfer Agreements.

3. **Agreement Subject to Bankruptcy Court Approval.** The effectiveness of this Agreement and the Parties' obligations hereunder are conditioned in all respects on the approval of this Agreement by the Bankruptcy Court. The Parties agree to cooperate and use reasonable efforts to have this Agreement approved by the Bankruptcy Court. The "Effective Date" will be the date of an order entered by the Bankruptcy Court approving this Agreement pursuant to a motion filed under Rule 9019.

4. **Representations and Warranties.** Subject in all respects to Section 3 hereof:

(a) each HarbourVest Party represents and warrants that (i) it has full authority to enter into this Agreement and to release the HarbourVest Released Claims and has not sold, transferred, or assigned any HarbourVest Released Claim to any other person or entity, (ii) no person or entity other than such HarbourVest Party has been, is, or will be authorized to bring, pursue, or enforce any HarbourVest Released Claim on behalf of, for the benefit of, or in the name of (whether directly or derivatively) of such HarbourVest Party; and (iii) HarbourVest owns all of the HCLOF Interests free and clear of any claims or interests; and

(b) the Debtor represents and warrants to HarbourVest that (i) it has full authority to enter into this Agreement and to release the Debtor Released Claims and (ii) no person or entity other than the Debtor has been, is, or will be authorized to bring, pursue, or enforce any Debtor Released Claim on behalf of, for the benefit of, or in the name of (whether directly or derivatively) of the Debtor Party.

5. **Plan Support.**

(a) Each HarbourVest Party hereby agrees that it will (a) vote all HarbourVest Claims held by such HarbourVest Party to accept the Plan, by delivering its duly executed and completed ballots accepting the Plan on a timely basis; and (b) not (i) change, withdraw, or revoke such vote (or cause or direct such vote to be changed withdrawn or revoked); (ii) exercise any right or remedy for the enforcement, collection, or recovery of any claim against the Debtor except in a manner consistent with this Agreement or the Plan, (iii) object to, impede, or take any action other action to interfere with, delay or postpone acceptance or confirmation of the Plan; (iv) directly or indirectly solicit, propose, file, support, participate in the formulation of or vote for, any restructuring, sale of assets (including pursuant to 11 U.S.C. § 363), merger, workout, or plan of reorganization of the Debtor other than the Plan; or (v) otherwise take any action that would in any material respect interfere with, delay, or postpone the consummation of the Plan; provided, however, that such vote may be revoked (and, upon such revocation, deemed void ab initio) by such HarbourVest Party at any time following the termination of this agreement or the occurrence of a Support Termination Event (it being understood that any termination of this agreement shall entitle each HarbourVest Party to change its vote in accordance with section 1127(d) of the Bankruptcy Code), notwithstanding any voting deadline established by the Bankruptcy Court including without limitation the January 5, 2021, 5:00 p.m. (prevailing Central Time) deadline established by the *Order Approving Form of Ballots, Voting Deadline and Solicitation Procedures* [Docket No. 1476].

(b) In full resolution of the 3018 Motion, HarbourVest will have a general unsecured claim for voting purposes only in the amount of \$45,000,000.

(c) The obligations of the HarbourVest Parties under this Section 5 shall automatically terminate upon the occurrence of any of the following (each a “Support Termination Event”): (i) the effective date of the Plan, (ii) the withdrawal of the Plan, (iii) the entry of an order by the Bankruptcy Court (A) converting the Bankruptcy Case to a case under chapter 7 of the Bankruptcy Code or (B) appointing an examiner with expanded powers beyond those set forth in sections 1106(a)(3) and (4) of the Bankruptcy Code or a trustee in Bankruptcy

Case, or (iv) the failure of the Court to enter an order approving the terms of this Agreement and the settlement described herein pursuant to Rule 9019 prior to confirmation of the Plan.

6. **No Admission of Liability.** The Parties acknowledge that there is a bona fide dispute with respect to the HarbourVest Claims. Nothing in this Agreement will imply, an admission of liability, fault or wrongdoing by the Debtor, HarbourVest, or any other person, and the execution of this Agreement does not constitute an admission of liability, fault, or wrongdoing on the part of the Debtor, HarbourVest, or any other person.

7. **Successors-in-Interest.** This Agreement shall be binding upon and shall inure to the benefit of each of the Parties and their successors, and assigns.

8. **Notice.** Each notice and other communication hereunder will be in writing and will be sent by email and delivered or mailed by registered mail, receipt requested, and will be deemed to have been given on the date of its delivery, if delivered, and on the fifth full business day following the date of the mailing, if mailed to each of the Parties thereto at the following respective addresses or such other address as may be specified in any notice delivered or mailed as set forth below:

HARBOURVEST

HarbourVest Partners L.P.
Attention: Michael J. Pugatch
One Financial Center
Boston, MA 02111
Telephone No. 617-348-3712
E-mail: mpugatch@harbourvest.com

with a copy (which shall not constitute notice) to:

Debevoise & Plimpton LLP
Attention: M. Natasha Labovitz, Esq.
919 Third Avenue
New York, NY 10022
Telephone No. 212-909-6649
E-mail: nlabovitz@debevoise.com

THE DEBTOR

Highland Capital Management, L.P.
300 Crescent Court, Suite 700
Dallas, Texas 75201
Attention: James P. Seery, Jr.
Telephone No.: 972-628-4100
Facsimile No.: 972-628-4147
E-mail: jpseeryjr@gmail.com

with a copy (which shall not constitute notice) to:

Pachulski Stang Ziehl & Jones LLP
Attention: Jeffrey Pomerantz, Esq.
10100 Santa Monica Blvd., 13th Floor
Los Angeles, CA 90067
Telephone No.: 310-277-6910
Facsimile No.: 310-201-0760
E-mail: jpomerantz@pszjlaw.com

9. **Advice of Counsel.** Each Party represents that it has: (a) been adequately represented by independent legal counsel of its own choice, throughout all of the negotiations that preceded the execution of this Agreement; (b) executed this Agreement upon the advice of such counsel; (c) read this Agreement, and understands and assents to all the terms and conditions contained herein without any reservations; and (d) had the opportunity to have this Agreement and all the terms and conditions contained herein explained by independent counsel, who has answered any and all questions asked of such counsel, or which could have been asked of such counsel, including, but not limited to, with regard to the meaning and effect of any of the provisions of this Agreement.

10. **Entire Agreement.** This Agreement and the Transfer Agreement contain the entire agreement and understanding concerning the subject matter of this Agreement, and supersede and replace all prior negotiations and agreements, written or oral and executed or unexecuted, concerning such subject matter. Each of the Parties acknowledges that no other Party, nor any agent of or attorney for any such Party, has made any promise, representation or warranty, express or implied, written or oral, not otherwise contained in this Agreement to induce any Party to execute this Agreement. The Parties further acknowledge that they are not executing this Agreement in reliance on any promise, representation or warranty not contained in this Agreement, and that any such reliance would be unreasonable. This Agreement will not be waived or modified except by an agreement in writing signed by each Party or duly authorized representative of each Party.

11. **No Party Deemed Drafter.** The Parties acknowledge that the terms of this Agreement are contractual and are the result of arms'-length negotiations between the Parties and their chosen counsel. Each Party and its counsel cooperated in the drafting and preparation of this Agreement. In any construction to be made of this Agreement, the Agreement will not be construed against any Party.

12. **Future Cooperation.** The Parties agree to cooperate and execute such further documentation as is reasonably necessary to effectuate the intent of this Agreement.

13. **Counterparts.** This Agreement may be executed in counterparts with the same force and effect as if executed in one complete document. Each Party's signature hereto will signify acceptance of, and agreement to, the terms and provisions contained in this Agreement. Photographic, electronic, and facsimile copies of signed counterparts may be used in lieu of the originals of this Agreement for any purpose.

[Remainder of Page Intentionally Blank]

IT IS HEREBY AGREED.

HIGHLAND CAPITAL MANAGEMENT, L.P.

By: /s/ James P. Seery, Jr.
Name: James P. Seery, Jr.
Its: CEO/CRO

HarbourVest 2017 Global Fund L.P., by HarbourVest 2017 Global Associates L.P., its General Partner, by HarbourVest GP LLC, its General Partner, by HarbourVest Partners, LLC, its Managing Member

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

HarbourVest 2017 Global AIF L.P., by HarbourVest Partners (Ireland) Limited, its Alternative Investment Fund Manager, by HarbourVest Partners L.P., its Duly Appointed Investment Manager, by HarbourVest Partners, LLC, its General Partner

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

HarbourVest Dover Street IX Investment L.P., by HarbourVest Partners L.P., its Duly Appointed Investment Manager, by HarbourVest Partners, LLC, its General Partner

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

HarbourVest Partners L.P., on behalf of funds and accounts under management, by HarbourVest Partners, LLC, its General Partner

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

**HarbourVest Skew Base AIF L.P., by HarbourVest Partners (Ireland) Limited, its
Alternative Investment Fund Manager, by HarbourVest Partners L.P., its Duly Appointed
Investment Manager, by HarbourVest Partners, LLC, its General Partner**

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

**HV International VIII Secondary L.P., by HIPEP VIII Associates L.P., its General
Partner, by HarbourVest GP LLC, its General Partner, by HarbourVest Partners, LLC,
its Managing Member**

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

Exhibit A

TRANSFER AGREEMENT
FOR ORDINARY SHARES OF
HIGHLAND CLO FUNDING, LTD.

This Transfer Agreement, dated as of December [REDACTED], 2020 (this “**Transfer Agreement**”), is entered into by and among Highland CLO Funding, Ltd. (the “**Fund**”), Highland HCF Advisor, Ltd. (the “**Portfolio Manager**”), HCMLP Investments, LLC (the “**Transferee**”) and each of the following: HarbourVest Dover Street IX Investment L.P., HarbourVest 2017 Global AIF L.P., HarbourVest 2017 Global Fund L.P., HV International VIII Secondary L.P., and HarbourVest Skew Base AIF L.P. (collectively, the “**Transferors**”).

WHEREAS, each Transferor is the record, legal and beneficial owner of the number of ordinary shares (“**Shares**”) of the Fund set forth opposite such Transferor’s name on Exhibit A hereto (with respect to each Transferor, the “**Transferred Shares**”).

WHEREAS the Transferee is an affiliate and wholly owned subsidiary of Highland Capital Management, L.P. (“**HCMLP**”) which is one of the initial members of the Fund.

WHEREAS, each Transferor wishes to transfer and assign 100% of its rights, title and interest as a shareholder in the Fund, including the Transferred Shares (the “**Interest**”) on the terms set forth in this Transfer Agreement.

WHEREAS, subject to and in connection with the approval of that certain Settlement Agreement, dated on or about the date hereof, by and among HCMLP and the Transferors (the “**Settlement Agreement**”), the Transferee desires that the Interest be transferred to Transferee and that thereafter the Transferee will become a Shareholder and the Transferors will no longer be Shareholders.

WHEREAS, the Portfolio Manager desires to consent to such transfers and to the admission of Transferee as a Shareholder on the terms set forth herein, and the Transferors and Transferee agree to such terms.

WHEREAS, the Fund desires to amend its records to reflect the foregoing transfers.

NOW, THEREFORE, the parties hereto agree as follows:

1. Transfer of Shares and Advisory Board

- a. Each Transferor hereby transfers and assigns all of its rights, title, and interest in its Interest to the Transferee, and the Transferee wishes to be admitted to the Fund as a Shareholder.
- b. In connection with the transfer of the Interest as contemplated herein, the Transferee shall be granted the right to appoint a representative to the Fund’s advisory board (the “**Advisory Board**”) to replace the Transferors’ appointed representative to the Advisory Board.

- c. Transferee hereby assumes all of Transferor's rights and obligations in respect of the Interest effective as of the Effective Date (as defined below) and acknowledge that thereafter Transferee shall be subject to the applicable terms and provisions of the Members' Agreement dated as of November 15, 2017 (the "**Members' Agreement**"), the Articles of Incorporation adopted November 15, 2017 (the "**Articles**") and the Subscription and transfer Agreement, dated as of November 15, 2017 among each Transferor, the Fund and the Portfolio Manager (the "**Subscription Agreement**", and together with the Members' Agreement and the Articles, the "**Fund Agreements**") with respect to the Interest. Transferee does not assume any liability or responsibility for any obligations or liabilities incurred by any Transferor prior to the Effective Date of the transfer.
 - d. Following the transfer, each Transferor shall have no further rights or obligations to any party hereunder in respect of the Interest under the Fund Agreements.
 - e. This Transfer Agreement, and the parties' obligations hereunder, are conditioned in all respects on the approval by the Bankruptcy Court for the Northern District of Texas, Dallas Division pursuant to Federal Rule of Bankruptcy Procedure 9019 of (i) this Transfer Agreement and (ii) the Settlement Agreement, and each of the parties agree that no further action shall be required from any party for the transfer of the Interest to be effective except as described herein.
2. Transferee's Representations and Warranties. The Transferee represents and warrants to the Transferors, the Portfolio Manager, and the Fund as follows:
- a. This Transfer Agreement constitutes a valid and binding obligation of the Transferee, enforceable against it in accordance with its terms;
 - b. This Transfer Agreement has been duly and validly executed and delivered by or on behalf of the Transferee and such execution and delivery have been duly authorized by all necessary trust action of the Transferee;
 - c. The Transferee acknowledges receipt of, has read, and is familiar with, the Fund's Offering Memorandum for Placing Shares dated November 15, 2017 (the "**Offering Memorandum**") and the Fund Agreements;
 - d. The Transferee hereby accepts and receives the Interest from the Transferors for investment, and not with a view to the sale or distribution of any part thereof, and the Transferee has no present intention of selling, granting participations in, or otherwise distributing the same, but subject nevertheless to any requirement of law that the disposition of the Transferee's property shall at all times be within such Transferee's control; and
 - e. The Transferee is an "Eligible U.S. Investor" as defined in the Offering Memorandum.

3. Transferors' Representations and Warranties. Each Transferor represents and warrants to the Transferee, the Portfolio Manager, and the Fund as follows:
 - a. This Transfer Agreement constitutes a valid and binding obligation of the Transferor, enforceable against it in accordance with its terms;
 - b. This Transfer Agreement has been duly authorized, and duly and validly executed and delivered by the Transferor and such execution and delivery have been duly authorized by all necessary action of the Transferor; and
 - c. As of the date hereof, the Transferor has good and valid title to the Transferor's Interest, free and clear of any liens, vesting requirements or claims by others.
4. Consent to Transfer. Based in part on the representations and warranties of the Transferors and the Transferee which are included herein, and on the terms contained herein, the Portfolio Manager and the Fund hereby consent to the transfers of the Interest, the admission of the Transferee as a Shareholder and the Transferee's appointment of a representative to the Advisory Board, the Portfolio Manager's execution of this Transfer Agreement constituting its prior written consent to the transfers of the Interest for the purposes of article 18.1 of the Articles and this Transfer Agreement constituting express notice in writing to the Fund of the assignment set out at clause 1(c) above for the purposes of the Law of Property (Miscellaneous Provisions) (Guernsey) Law, 1979 (as amended).
5. Completion: As of the date of approval by the Bankruptcy Court for the Northern District of Texas, Dallas Division pursuant to Federal Rule of Bankruptcy Procedure 9019 of (i) this Transfer Agreement and (ii) the Settlement Agreement (the "**Effective Date**"):
 - a. each Transferor shall deliver or cause to be delivered to the Transferee a transfer instrument relating to the Transferred Shares duly executed and completed by that Transferor in favor of the Transferee; and
 - b. the Transferee shall deliver to the Transferors and the Fund a duly executed and dated Adherence Agreement (as defined in the Members' Agreement).

Prior to the Effective Date the Transferee shall procure that:

 - c. the board of directors of the Fund shall hold a meeting at which the transfer of the Shares to the Transferee shall be approved and registration in the register of members of the Fund shall be effected on the Effective Date.
6. Miscellaneous.
 - a. Each of the parties hereto agree to execute any further instruments and perform any further acts which are or may become reasonably necessary to carry out the intent of this Transfer Agreement or are reasonably requested by the Portfolio Manager, the Fund or a Transferor to complete the transfer of the Interest.

4

[Additional Signatures on Following Page]

IN WITNESS WHEREOF, the undersigned have executed this Transfer Agreement as of the date first above written.

TRANSFERORS:

HarbourVest Dover Street IX Investment L.P.

By: HarbourVest Partners L.P., its Duly Appointed Investment Manager

By: HarbourVest Partners, LLC

By: _____

Name: Michael Pugatch

Title: Managing Director

HV International VIII Secondary L.P.

By: HIPEP VIII Associates L.P.
Its General Partner

By: HarbourVest GP LLC
Its General Partner

By: HarbourVest Partners, LLC
Its Managing Member

By: _____

Name: Michael Pugatch

Title: Managing Director

HarbourVest 2017 Global AIF L.P.

By: HarbourVest Partners (Ireland) Limited
Its Alternative Investment Fund Manager

By: HarbourVest Partners L.P.
Its Duly Appointed Investment Manager

By: HarbourVest Partners, LLC
Its General Partner

By: _____

Name: Michael Pugatch

Title: Managing Director

HarbourVest Skew Base AIF L.P.

By: HarbourVest Partners (Ireland) Limited
Its Alternative Investment Fund Manager

By: HarbourVest Partners L.P.
Its Duly Appointed Investment Manager

By: HarbourVest Partners, LLC
Its General Partner

By: _____

Name: Michael Pugatch

Title: Managing Director

HarbourVest 2017 Global Fund L.P.

By: HarbourVest 2017 Global Associates L.P.
Its General Partner

By: HarbourVest GP LLC
Its General Partner

By: HarbourVest Partners, LLC
Its Managing Member

By: _____

Name: Michael Pugatch

Title: Managing Director

Exhibit A

<u>Transferee Name</u>	<u>Number of Shares</u>	<u>Percentage</u>
HarbourVest Dover Street IX Investment L.P.	[REDACTED]	[REDACTED]
HarbourVest 2017 Global AIF L.P.	[REDACTED]	[REDACTED]
HarbourVest 2017 Global Fund L.P.	[REDACTED]	[REDACTED]
HV International VIII Secondary L.P.	[REDACTED]	[REDACTED]
HarbourVest Skew Base AIF L.P.	[REDACTED]	[REDACTED]



CLERK, U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS

ENTERED

**THE DATE OF ENTRY IS ON
THE COURT'S DOCKET**

The following constitutes the ruling of the court and has the force and effect therein described.

Signed January 20, 2021

Stacy L. C. Jones
United States Bankruptcy Judge

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

In re:

HIGHLAND CAPITAL MANAGEMENT, L.P.,¹

Debtor.

Chapter 11

Case No. 19-34054-sgj11

**ORDER APPROVING DEBTOR'S SETTLEMENT
WITH HARBOURVEST (CLAIM NOS. 143, 147, 149, 150, 153, 154) AND
AUTHORIZING ACTIONS CONSISTENT THEREWITH**

This matter having come before the Court on *Debtor's Motion for Entry of an Order Approving Settlement with HarbourVest* (Claim Nos. 143, 147, 149, 150, 153, 154) and *Authorizing Actions Consistent Therewith* [Docket No. 1625] (the “Motion”),² filed by Highland Capital Management, L.P., the debtor and debtor-in-possession (the “Debtor”) in the above-captioned chapter 11 case (the “Bankruptcy Case”); and this Court having considered (a) the

¹ The Debtor's last four digits of its taxpayer identification number are (6725). The headquarters and service address for the above-captioned Debtor is 300 Crescent Court, Suite 700, Dallas, TX 75201.

² Capitalized terms used but not otherwise defined herein have the meanings ascribed to them in the Motion.

EXHIBIT 1

WHEREAS, in the HarbourVest Pleadings, HarbourVest asserted, among other things, that the HarbourVest Claims included claims against the Debtor arising from fraudulent inducement, fraudulent concealment, fraudulent misrepresentation, breach of fiduciary duty, breach of securities laws, and misuse of assets and sought damages in excess of \$300,000,000;

WHEREAS, the Debtor disputes the HarbourVest Claims;

WHEREAS, on November 24, 2020, the Debtor filed the *Fifth Amended Plan of Reorganization for Highland Capital Management, L.P.* [Docket No. 1472] (as amended, the “Plan”).¹

WHEREAS, the Parties desire to enter into this Agreement which incorporates, formalizes, and finalizes the full and final resolution of the HarbourVest Claims and HarbourVest Pleadings; and

WHEREAS, this Agreement will be presented to the Bankruptcy Court for approval pursuant to Federal Rule of Bankruptcy Procedure 9019 (“Rule 9019”).

NOW THEREFORE, in consideration of the above recitals, the covenants, conditions, and promises made herein, and other good and valuable consideration, the receipt of which is hereby acknowledged, the Parties agree as follows:

1. Settlement of Claims.

(a) In full and complete satisfaction of the HarbourVest Claims, HarbourVest will receive:

(i) an allowed, nonpriority general unsecured claim in the aggregate amount of \$45,000,000 (the “Allowed GUC Claim”); and

(ii) an allowed subordinated claim in the aggregate amount of \$35,000,000 (the “Allowed Subordinated Claim” and together with the Allowed GUC Claim, the “Allowed Claims”).

(b) On the Effective Date, HarbourVest will transfer all of its rights, title, and interest in the HarbourVest Interests to the Debtor or its nominee pursuant to the terms of the *Transfer Agreement for Ordinary Shares of Highland CLO Funding, Ltd.*, attached hereto as Exhibit A (the “Transfer Agreements”) and the Debtor or its nominee will become a shareholder of HCLOF with respect to the HarbourVest Interests. The terms of the Transfer Agreements are incorporated into this Agreement by reference.

2. Releases.

(a) Upon the Effective Date, and to the maximum extent permitted by law, each HarbourVest Party on behalf of itself and each of its current and former advisors, trustees, directors, officers, managers, members, partners, employees, beneficiaries, shareholders, agents,

¹ All capitalized terms used but not defined herein shall have the meanings given to them in the Plan.

participants, subsidiaries, parents, successors, designees, and assigns hereby forever, finally, fully, unconditionally, and completely releases, relieves, acquits, remises, and exonerates, and covenants never to sue, the Debtor, HCLOF, HCLOF's current and former directors, and the Debtor's current and former advisors, trustees, directors, officers, managers, members, partners, employees, beneficiaries, shareholders, agents, participants, subsidiaries, parents, affiliates, successors, designees, and assigns, except as expressly set forth below (the "Debtor Released Parties"), for and from any and all claims, debts, liabilities, demands, obligations, promises, acts, agreements, liens, losses, costs and expenses (including, without limitation, attorney's fees and related costs), damages, injuries, suits, actions, and causes of action of whatever kind or nature, whether known or unknown, suspected or unsuspected, matured or unmatured, liquidated or unliquidated, contingent or fixed, at law or in equity, statutory or otherwise, including, without limitation, any claims, defenses, and affirmative defenses, whether known or unknown, including, without limitation, those which were or could have been asserted in, in connection with, or with respect to the Bankruptcy Case (collectively, the "HarbourVest Released Claims").

(b) Upon the Effective Date, and to the maximum extent permitted by law, the Debtor hereby forever, finally, fully, unconditionally, and completely releases, relieves, acquits, remises, and exonerates, and covenants never to sue (i) each HarbourVest Party and (ii) each HarbourVest Party's current and former advisors, trustees, directors, officers, managers, members, partners, employees, beneficiaries, shareholders, agents, participants, subsidiaries, parents, affiliates, successors, designees, and assigns (the "HarbourVest Released Parties"), for and from any and all claims, debts, liabilities, demands, obligations, promises, acts, agreements, liens, losses, costs and expenses (including, without limitation, attorney's fees and related costs), damages, injuries, suits, actions, and causes of action of whatever kind or nature, whether known or unknown, suspected or unsuspected, matured or unmatured, liquidated or unliquidated, contingent or fixed, at law or in equity, statutory or otherwise, including, without limitation, any claims, defenses, and affirmative defenses, whether known or unknown, which were or could have been asserted in, in connection with, or with respect to the Bankruptcy Case (collectively, the "Debtor Released Claims"); *provided, however*, that notwithstanding anything herein to the contrary, the release contained in this Section 2(b) will apply to the HarbourVest Released Parties set forth in subsection (b)(ii) only with respect to Debtor Released Claims arising from or relating to HarbourVest's ownership of the HarbourVest Interests.

(c) Notwithstanding anything in this Agreement to the contrary, the releases set forth herein will not apply with respect to (i) the Allowed Claims, (ii) the claims of Charlotte Investor IV, L.P., or (iii) the duties, rights, or obligations of any Party under this Agreement or the Transfer Agreements.

3. **Agreement Subject to Bankruptcy Court Approval.** The effectiveness of this Agreement and the Parties' obligations hereunder are conditioned in all respects on the approval of this Agreement by the Bankruptcy Court. The Parties agree to cooperate and use reasonable efforts to have this Agreement approved by the Bankruptcy Court. The "Effective Date" will be the date of an order entered by the Bankruptcy Court approving this Agreement pursuant to a motion filed under Rule 9019.

4. **Representations and Warranties.** Subject in all respects to Section 3 hereof:

(a) each HarbourVest Party represents and warrants that (i) it has full authority to enter into this Agreement and to release the HarbourVest Released Claims and has not sold, transferred, or assigned any HarbourVest Released Claim to any other person or entity, (ii) no person or entity other than such HarbourVest Party has been, is, or will be authorized to bring, pursue, or enforce any HarbourVest Released Claim on behalf of, for the benefit of, or in the name of (whether directly or derivatively) of such HarbourVest Party; and (iii) HarbourVest owns all of the HCLOF Interests free and clear of any claims or interests; and

(b) the Debtor represents and warrants to HarbourVest that (i) it has full authority to enter into this Agreement and to release the Debtor Released Claims and (ii) no person or entity other than the Debtor has been, is, or will be authorized to bring, pursue, or enforce any Debtor Released Claim on behalf of, for the benefit of, or in the name of (whether directly or derivatively) of the Debtor Party.

5. **Plan Support.**

(a) Each HarbourVest Party hereby agrees that it will (a) vote all HarbourVest Claims held by such HarbourVest Party to accept the Plan, by delivering its duly executed and completed ballots accepting the Plan on a timely basis; and (b) not (i) change, withdraw, or revoke such vote (or cause or direct such vote to be changed withdrawn or revoked); (ii) exercise any right or remedy for the enforcement, collection, or recovery of any claim against the Debtor except in a manner consistent with this Agreement or the Plan, (iii) object to, impede, or take any action other action to interfere with, delay or postpone acceptance or confirmation of the Plan; (iv) directly or indirectly solicit, propose, file, support, participate in the formulation of or vote for, any restructuring, sale of assets (including pursuant to 11 U.S.C. § 363), merger, workout, or plan of reorganization of the Debtor other than the Plan; or (v) otherwise take any action that would in any material respect interfere with, delay, or postpone the consummation of the Plan; provided, however, that such vote may be revoked (and, upon such revocation, deemed void ab initio) by such HarbourVest Party at any time following the termination of this agreement or the occurrence of a Support Termination Event (it being understood that any termination of this agreement shall entitle each HarbourVest Party to change its vote in accordance with section 1127(d) of the Bankruptcy Code), notwithstanding any voting deadline established by the Bankruptcy Court including without limitation the January 5, 2021, 5:00 p.m. (prevailing Central Time) deadline established by the *Order Approving Form of Ballots, Voting Deadline and Solicitation Procedures* [Docket No. 1476].

(b) In full resolution of the 3018 Motion, HarbourVest will have a general unsecured claim for voting purposes only in the amount of \$45,000,000.

(c) The obligations of the HarbourVest Parties under this Section 5 shall automatically terminate upon the occurrence of any of the following (each a “Support Termination Event”): (i) the effective date of the Plan, (ii) the withdrawal of the Plan, (iii) the entry of an order by the Bankruptcy Court (A) converting the Bankruptcy Case to a case under chapter 7 of the Bankruptcy Code or (B) appointing an examiner with expanded powers beyond those set forth in sections 1106(a)(3) and (4) of the Bankruptcy Code or a trustee in Bankruptcy

Case, or (iv) the failure of the Court to enter an order approving the terms of this Agreement and the settlement described herein pursuant to Rule 9019 prior to confirmation of the Plan.

6. **No Admission of Liability.** The Parties acknowledge that there is a bona fide dispute with respect to the HarbourVest Claims. Nothing in this Agreement will imply, an admission of liability, fault or wrongdoing by the Debtor, HarbourVest, or any other person, and the execution of this Agreement does not constitute an admission of liability, fault, or wrongdoing on the part of the Debtor, HarbourVest, or any other person.

7. **Successors-in-Interest.** This Agreement shall be binding upon and shall inure to the benefit of each of the Parties and their successors, and assigns.

8. **Notice.** Each notice and other communication hereunder will be in writing and will be sent by email and delivered or mailed by registered mail, receipt requested, and will be deemed to have been given on the date of its delivery, if delivered, and on the fifth full business day following the date of the mailing, if mailed to each of the Parties thereto at the following respective addresses or such other address as may be specified in any notice delivered or mailed as set forth below:

HARBOURVEST

HarbourVest Partners L.P.
Attention: Michael J. Pugatch
One Financial Center
Boston, MA 02111
Telephone No. 617-348-3712
E-mail: mpugatch@harbourvest.com

with a copy (which shall not constitute notice) to:

Debevoise & Plimpton LLP
Attention: M. Natasha Labovitz, Esq.
919 Third Avenue
New York, NY 10022
Telephone No. 212-909-6649
E-mail: nlabovitz@debevoise.com

THE DEBTOR

Highland Capital Management, L.P.
300 Crescent Court, Suite 700
Dallas, Texas 75201
Attention: James P. Seery, Jr.
Telephone No.: 972-628-4100
Facsimile No.: 972-628-4147
E-mail: jpseeryjr@gmail.com

with a copy (which shall not constitute notice) to:

Pachulski Stang Ziehl & Jones LLP
Attention: Jeffrey Pomerantz, Esq.
10100 Santa Monica Blvd., 13th Floor
Los Angeles, CA 90067
Telephone No.: 310-277-6910
Facsimile No.: 310-201-0760
E-mail: jpomerantz@pszjlaw.com

9. **Advice of Counsel.** Each Party represents that it has: (a) been adequately represented by independent legal counsel of its own choice, throughout all of the negotiations that preceded the execution of this Agreement; (b) executed this Agreement upon the advice of such counsel; (c) read this Agreement, and understands and assents to all the terms and conditions contained herein without any reservations; and (d) had the opportunity to have this Agreement and all the terms and conditions contained herein explained by independent counsel, who has answered any and all questions asked of such counsel, or which could have been asked of such counsel, including, but not limited to, with regard to the meaning and effect of any of the provisions of this Agreement.

10. **Entire Agreement.** This Agreement and the Transfer Agreement contain the entire agreement and understanding concerning the subject matter of this Agreement, and supersede and replace all prior negotiations and agreements, written or oral and executed or unexecuted, concerning such subject matter. Each of the Parties acknowledges that no other Party, nor any agent of or attorney for any such Party, has made any promise, representation or warranty, express or implied, written or oral, not otherwise contained in this Agreement to induce any Party to execute this Agreement. The Parties further acknowledge that they are not executing this Agreement in reliance on any promise, representation or warranty not contained in this Agreement, and that any such reliance would be unreasonable. This Agreement will not be waived or modified except by an agreement in writing signed by each Party or duly authorized representative of each Party.

11. **No Party Deemed Drafter.** The Parties acknowledge that the terms of this Agreement are contractual and are the result of arms'-length negotiations between the Parties and their chosen counsel. Each Party and its counsel cooperated in the drafting and preparation of this Agreement. In any construction to be made of this Agreement, the Agreement will not be construed against any Party.

12. **Future Cooperation.** The Parties agree to cooperate and execute such further documentation as is reasonably necessary to effectuate the intent of this Agreement.

13. **Counterparts.** This Agreement may be executed in counterparts with the same force and effect as if executed in one complete document. Each Party's signature hereto will signify acceptance of, and agreement to, the terms and provisions contained in this Agreement. Photographic, electronic, and facsimile copies of signed counterparts may be used in lieu of the originals of this Agreement for any purpose.

14. **Governing Law; Venue; Attorneys' Fees and Costs.** The Parties agree that this Agreement will be governed by and will be construed according to the laws of the State of Texas without regard to conflict-of-law principles. Each of the Parties hereby submits to the exclusive jurisdiction of the Bankruptcy Court during the pendency of the Bankruptcy Case and thereafter to the exclusive jurisdiction of the state and federal courts located in the Northern District of Texas, Dallas Division, with respect to any disputes arising from or out of this Agreement. In any action to enforce this Agreement, the prevailing party shall be entitled to recover its reasonable and necessary attorneys' fees and costs (including experts).

[Remainder of Page Intentionally Blank]

IT IS HEREBY AGREED.

HIGHLAND CAPITAL MANAGEMENT, L.P.

By: /s/ James P. Seery, Jr.
Name: James P. Seery, Jr.
Its: CEO/CRO

HarbourVest 2017 Global Fund L.P., by HarbourVest 2017 Global Associates L.P., its General Partner, by HarbourVest GP LLC, its General Partner, by HarbourVest Partners, LLC, its Managing Member

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

HarbourVest 2017 Global AIF L.P., by HarbourVest Partners (Ireland) Limited, its Alternative Investment Fund Manager, by HarbourVest Partners L.P., its Duly Appointed Investment Manager, by HarbourVest Partners, LLC, its General Partner

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

HarbourVest Dover Street IX Investment L.P., by HarbourVest Partners L.P., its Duly Appointed Investment Manager, by HarbourVest Partners, LLC, its General Partner

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

HarbourVest Partners L.P., on behalf of funds and accounts under management, by HarbourVest Partners, LLC, its General Partner

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

**HarbourVest Skew Base AIF L.P., by HarbourVest Partners (Ireland) Limited, its
Alternative Investment Fund Manager, by HarbourVest Partners L.P., its Duly Appointed
Investment Manager, by HarbourVest Partners, LLC, its General Partner**

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

**HV International VIII Secondary L.P., by HIPEP VIII Associates L.P., its General
Partner, by HarbourVest GP LLC, its General Partner, by HarbourVest Partners, LLC,
its Managing Member**

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

Exhibit A

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Exhibit A

<u>Transferee Name</u>	<u>Number of Shares</u>	<u>Percentage</u>
HarbourVest Dover Street IX Investment L.P.	54,355,482.14	71.0096%
HarbourVest 2017 Global AIF L.P.	7,426,940.38	9.7025%
HarbourVest 2017 Global Fund L.P.	3,713,508.46	4.8513%
HV International VIII Secondary L.P.	9,946,780.11	12.9944%
HarbourVest Skew Base AIF L.P.	1,103,956.03	1.4422%

THIS DOCUMENT IS IMPORTANT AND REQUIRES YOUR IMMEDIATE ATTENTION. If you are in any doubt as to the action you should take or the contents of this document, you are recommended to seek your own independent financial advice immediately from your stockbroker, bank, solicitor, accountant, or other appropriate independent financial adviser, who is authorised under the Financial Services and Markets Act 2000, as amended (“FSMA”) if you are in the United Kingdom, or from another appropriately authorised independent financial adviser if you are in a territory outside the United Kingdom.

A copy of this document, which comprises an offering memorandum (the “Offering Memorandum”) relating to Highland CLO Funding, Ltd. (the “Company”) in connection with the issue of Placing Shares in the Company, is available at the Company’s registered office upon request.

The Placing Shares are only suitable for investors: (i) who understand the potential risk of capital loss and that there may be limited liquidity in the underlying investments of the Company; (ii) for whom an investment in the Placing Shares is part of a diversified investment programme; and (iii) who fully understand and are willing to assume the risks involved in such an investment programme. It should be remembered that the price of the Placing Shares and the income from them can go down as well as up and that investors may not receive, on the sale or cancellation of the Placing Shares, the amount that they invested.

The Company and its directors (whose names appear in the section of this Offering Memorandum entitled “*Company Directors and Administration*”) (the “**Directors**”) accept responsibility for the information contained in this Offering Memorandum. To the best of the knowledge of the Company and the Directors (who have taken all reasonable care to ensure that such is the case), the information contained in the Offering Memorandum is in accordance with the facts and contains no omission likely to affect its import. The Directors have taken all reasonable care to ensure that the facts stated in the Offering Memorandum are true and accurate in all material respects, and that there are no other facts the omission of which would make misleading any statement in this Offering Memorandum, whether of facts or of opinion. All the Directors accept responsibility accordingly.

Potential investors should read the whole of this Offering Memorandum when considering an investment in the Placing Shares and, in particular, attention is drawn to the section of this Offering Memorandum entitled “*Risk Factors*” on pages 18 to 47 of this Offering Memorandum.

HIGHLAND CLO FUNDING, LTD.

(a closed-ended investment company limited by shares incorporated under the laws of Guernsey with registered number 60120)

Placing for a target issue of U.S. \$153,000,000 of Placing Shares

This Offering Memorandum does not constitute or form part of any offer or invitation to sell, or the solicitation of an offer to acquire or subscribe for, any securities other than the securities to which it relates or any offer or invitation to sell or issue, or any solicitation of any offer to purchase or subscribe for such securities by any person in any circumstances in which such offer or solicitation is unlawful.

The Placing Shares have not been and will not be registered under the U.S. Securities Act of 1933 (the “**U.S. Securities Act**”) or under the securities laws of any state or other jurisdiction of the United States. The Placing Shares may not be offered, sold, exercised, resold, transferred or delivered, directly or indirectly, within the United States or to, or for the account or benefit of, U.S. Persons, except pursuant to an exemption from, or in a transaction not subject to, the registration requirements of the U.S. Securities Act and in compliance with any applicable securities laws of any state or other jurisdiction in the United States.

The Company has not been and will not be registered under the U.S. Investment Company Act of 1940, as amended (the “**U.S. Investment Company Act**”) and investors will not be entitled to the benefits of the U.S. Investment Company Act. There will be no public offer of the Placing Shares in the United States.

Neither the U.S. Securities and Exchange Commission (the “SEC”) nor any state securities commission has approved or disapproved of the Placing Shares or passed upon or endorsed the merits of the offering of the Placing Shares or the adequacy or accuracy of this Offering Memorandum. Any representation to the contrary is a criminal offence in the United States.

Except with the express written consent of the Company given in respect of an investment in the Company, the Placing Shares may not be acquired by: (i) investors using assets of: (A) an “employee benefit plan” as defined in Section 3(3)

EXHIBIT

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exhibitmaker.com

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of the United States Employee Retirement Income Security Act of 1974, as amended (“ERISA”) that is subject to Title I of ERISA; (B) a “plan” as defined in Section 4975 of the United States Internal Revenue Code of 1986, as amended (the “U.S. Tax Code”), including an individual retirement account or other arrangement that is subject to Section 4975 of the U.S. Tax Code; or (C) an entity whose underlying assets are considered to include “plan assets” by reason of investment by an “employee benefit plan” or “plan” described in preceding clause (A) or (B) in such entity pursuant to the U.S. Plan Assets Regulations; or (ii) a governmental, church, non-U.S. or other employee benefit plan that is subject to any federal, state, local or non-U.S. law that is substantially similar to the provisions of Title I of ERISA or Section 4975 of the U.S. Tax Code, unless its purchase, holding, and disposition of the Placing Shares will not constitute or result in a non-exempt violation of any such substantially similar law.

The distribution of this Offering Memorandum and the offer of the Placing Shares in certain jurisdictions may be restricted by law. No action has been or will be taken to permit the possession, issue or distribution of this Offering Memorandum (or any other offering or publicity material relating to the Placing Shares) in any jurisdiction where action for that purpose may be required or doing so is restricted by law. Accordingly, neither this Offering Memorandum, nor any advertisement, nor any other offering material may be distributed or published in any jurisdiction except under circumstances that will result in compliance with any applicable laws and regulations. Persons into whose possession this Offering Memorandum comes should inform themselves about and observe any such restrictions. None of the Company or any of its affiliates or advisors accepts any legal responsibility for any breach by any person, whether or not a prospective investor, of any such restrictions.

In addition, the Placing Shares are subject to restrictions on transferability and resale in certain jurisdictions and may not be transferred or resold except as permitted under applicable securities laws and regulations. Investors may be required to bear the financial risks of their investment in the Placing Shares for an indefinite period of time. Any failure to comply with these restrictions may constitute a violation of the securities laws of any such jurisdictions. For further information on restrictions on offers, sales and transfers of the Placing Shares, please refer to the section of this Offering Memorandum entitled “Purchase and Transfer Restrictions” in “Placing Arrangements”.

In making an investment decision, each investor must rely on their own examination, analysis and enquiry of the Company and the terms of the Placing including the merits and risks involved. The investors also acknowledge that they have relied only on the information contained in this document. No person has been authorised to give any information or make any representations other than those contained in this Offering Memorandum and, if given or made, such information or representations must not be relied on as having been so authorised. Neither the delivery of this Offering Memorandum nor any subscription or sale made under it shall, under any circumstances, create any implication that there has been no change in the affairs of the Company since the date of this document or that the information in it is correct as of any subsequent time.

None of the Company or any of its representatives is making any representation to any prospective investor in respect of the Placing Shares regarding the legality of an investment in the Placing Shares by such prospective investor under the laws applicable to such prospective investor.

The contents of this Offering Memorandum should not be construed as legal, financial or tax advice. Each prospective investor should consult his, her or its own legal, financial or tax adviser for legal, financial or tax advice.

The Company is a registered closed-ended collective investment scheme pursuant to The Protection of Investors (Bailiwick of Guernsey) Law, 1987, as amended and the Registered Collective Investment Schemes Rules 2015 issued by the Guernsey Financial Services Commission. Neither the Guernsey Financial Services Commission nor the States of Guernsey take any responsibility for the soundness of the Company or for the correctness of any statements made or opinions expressed with regard to it.

If you are in any doubt about the contents of this Offering Memorandum you should consult your accountant, legal or professional adviser or financial adviser.

This Offering Memorandum has not been reviewed by the Guernsey Financial Services Commission and, in granting registration, the Guernsey Financial Services Commission has relied upon specific warranties provided by State Street (Guernsey) Limited, the Company’s designated administrator.

It should be remembered that the price of securities and the income from them can go down as well as up.

You are wholly responsible for ensuring that all aspects of the Company are acceptable to you. Investment in the Company may involve special risks that could lead to a loss of all or a substantial portion of such investment.

Unless you fully understand and accept the nature of the Company and the potential risks inherent in this Company you should not invest in the Company.

This Offering Memorandum is dated November 15, 2017.

IMPORTANT NOTICES

Investors should rely only on the information contained in this Offering Memorandum. No person has been authorised to give any information or to make any representations in connection with the Placing other than those contained in this Offering Memorandum and, if given or made, such information or representations must not be relied upon as having been authorised by or on behalf of the Company. Neither the delivery of this Offering Memorandum nor any subscription or sale made under this Offering Memorandum shall, under any circumstances, create any implication that there has been no change in the business or affairs of the Company since the date of this Offering Memorandum or that the information contained in this Offering Memorandum is correct as of any time subsequent to its date.

The contents of this Offering Memorandum are not to be construed as legal, financial, business, investment or tax advice. Each prospective investor should consult his or her own legal adviser, financial adviser or tax adviser for legal, financial or tax advice in relation to any purchase or proposed purchase of Placing Shares.

An investment in the Placing Shares is suitable only for institutional, professional and high net worth investors, private client fund managers and brokers and other investors who are capable of evaluating the merits and risks of such an investment and/or who have received advice from their fund manager or broker regarding such an investment and who have sufficient resources to be able to bear losses (which may equal the whole amount invested) that may result from such an investment. An investment in the Placing Shares should constitute part of a diversified investment portfolio. Accordingly, typical investors in the Company are expected to be institutional, professional and high net worth investors, private client fund managers and brokers and other investors who understand the risks involved in investing in the Company and/or who have received advice from their fund manager or broker regarding investment in the Company.

In making an investment decision, each investor must rely on their own examination, analysis and enquiry of the Company and the terms of the Placing including the merits and risks involved. Investors who purchase Placing Shares will be deemed to have acknowledged that no person has been authorised to give any information or make any representations other than those contained in this Offering Memorandum and, if given or made, such information or representations must not be relied on as having been authorised by the Company.

General

Prospective investors should not treat the contents of this Offering Memorandum as advice relating to legal, taxation, investment or any other matters. Prospective investors should inform themselves as to: (a) the legal requirements within their own countries for the purchase, holding, transfer, redemption or other disposal of Placing Shares; (b) any foreign exchange restrictions applicable to the purchase, holding, transfer, redemption or other disposal of Placing Shares which they might encounter; and (c) the income and other tax consequences which may apply in their own countries as a result of the purchase, holding, transfer, redemption or other disposal of Placing Shares. Prospective investors must rely on their own representatives, including their own legal advisers, financial advisers and accountants, as to legal, tax, investment or any other related matters concerning the Company and an investment therein.

Statements made in this Offering Memorandum are based on the law and practice currently in force and are subject to changes therein. This Offering Memorandum should be read in its entirety before making any application for Placing Shares.

Application will be made to the appropriate securities exchange for the Placing Shares to be admitted when deemed appropriate by the Company.

All times and dates referred to in this Offering Memorandum are, unless otherwise stated, references to Guernsey times and dates and are subject to change without further notice.

Capitalised terms contained in this Offering Memorandum shall have the meanings set out in the Offering memorandum and/or in the section of this Offering Memorandum entitled “Definitions”, save where the context indicates otherwise.

Restrictions on distribution and sale

The distribution of this Offering Memorandum and the offering and sale of securities offered hereby in certain jurisdictions may be restricted by law. Persons in possession of this Offering Memorandum are required to inform themselves about and observe any such restrictions. This Offering Memorandum may not be used for, or in connection with, and does not constitute, any offer to sell, or solicitation to purchase, any such securities in any jurisdiction in which solicitation would be unlawful.

For a description of restrictions on offers, sales and transfers of Shares, please refer to the sections of this Offering Memorandum entitled “Selling restrictions” below and “Purchase and Transfer Restrictions” in “Placing Arrangements”. Save as set out in these sections, there are no restrictions on the transfer of Shares under the Articles.

Forward-looking statements

This Offering Memorandum includes statements that are, or may be deemed to be, “forward-looking statements”. These forward-looking statements can be identified by the use of forward-looking terminology, including the terms “believes”, “estimates”, “anticipates”, “expects”, “intends”, “plans”, “projects”, “targets”, “aims”, “may”, “will” or “should” or, in each case, their negative or other variations or comparable terminology. These forward-looking statements include all matters that are not historical facts. They appear in a number of places throughout this Offering Memorandum and include statements regarding the intentions, beliefs or current expectations of the Company concerning, amongst other things, the investment objective and investment policy, investment strategy, financing strategies, investment performance, results of operations, financial condition, prospects, and dividend/distribution policy of the Company, and the markets in which the Company, and their respective portfolios of investments, invest and/or operate. By their nature, forward-looking statements involve risks (including those set out in the section of this Offering Memorandum entitled “Risk Factors”) and uncertainties because they relate to events and depend on circumstances that may or may not occur in the future. Forward-looking statements are not guarantees of future performance. The Company’s actual investment performance, results of operations, financial condition, dividend policy and the development of its investment strategy financing strategies may differ materially from the impression created by the forward-looking statements contained in this Offering Memorandum. In addition, even if the investment performance, results of operations, financial condition of the Company, and the development of its financing strategies, are consistent with the forward-looking statements contained in this Offering Memorandum, those results or developments may not be indicative of results or developments in subsequent periods. Important factors that could cause these differences include, but are not limited to:

- changes in economic conditions generally and the Company’s ability to achieve its investment objective and target returns and target dividends for investors;
- the ability of the Company to invest the cash on its balance sheet and the proceeds of the Placing on a timely basis within the investment objective and investment policy;
- foreign exchange mismatches with respect to exposed assets;
- changes in the interest rates and/or credit spreads, as well as the success of the Company’s investment strategy in relation to such changes and the management of the un-invested proceeds of the Placing;
- impairments in the value of the investments;
- the availability and cost of capital for future investments;
- the departure of key personnel employed by the Portfolio Manager;

- changes in laws or regulations, including tax laws, or new interpretations or applications of laws and regulations, that are applicable to the Company; and
- general economic trends and other external factors, including those resulting from war, incidents of terrorism or responses to such events.

Given these uncertainties, prospective investors are cautioned not to place any undue reliance on such forward-looking statements. Prospective investors should carefully review the “*Risk Factors*” section of this Offering Memorandum before making an investment decision. Forward-looking statements speak only as at the date of this Offering Memorandum. Although the Company undertakes no obligation to revise or update any forward-looking statements contained herein (save where required by the Offering Memorandum Rules), whether as a result of new information, future events, conditions or circumstances, any change in the Company’s expectations with regard thereto or otherwise, prospective investors are advised to consult any communications made directly to them by the Company and/or any additional disclosures through announcements that the Company may make through a website to be created or through the Administrator.

Selling Restrictions

This Offering Memorandum does not constitute, and may not be used for the purposes of, an offer or an invitation to apply for any Placing Shares by any person: (i) in any jurisdiction in which such offer or invitation is not authorised; or (ii) in any jurisdiction in which the person making such offer or invitation is not qualified to do so; or (iii) to any person to whom it is unlawful to make such offer or invitation. The distribution of this Offering Memorandum and the offering of Placing Shares in certain jurisdictions may be restricted. Accordingly, persons into whose possession this Offering Memorandum comes are required to inform themselves about and observe any restrictions as to the offer or sale of Placing Shares and the distribution of this Offering Memorandum under the laws and regulations of any jurisdiction in connection with any applications for Placing Shares, including obtaining any requisite governmental or other consent and observing any other formality prescribed in such jurisdiction.

Bailiwick of Guernsey

The Company has been established in Guernsey as a registered collective investment scheme under the RCIS Rules.

Further information in relation to the regulatory treatment of registered closed-ended investment funds domiciled in Guernsey may be found on the website of the Guernsey Financial Services Commission at www.gfsc.gg.

This Offering Memorandum is prepared, and a copy of it has been sent to the Guernsey Financial Services Commission, in accordance with the RCIS Rules.

The Commission takes no responsibility for the financial soundness of the Company or for the correctness of any statements made or opinions expressed with regard to it.

The applicant is strongly recommended to read and consider this Offering Memorandum before completing an application.

This Offering Memorandum has not been approved by the GFSC and neither the GFSC nor the States of Guernsey Policy Council takes any responsibility for the financial soundness of the Company or for the correctness of any of the statements made or opinions expressed with regard to it.

European Economic Area

In relation to each member state of the European Economic Area which has implemented the Prospectus Directive (each, a “**Relevant Member State**”), no Placing Shares have been offered or will be offered pursuant to the Placing to the public in that Relevant Member State prior to the publication of a prospectus in relation to the Placing Shares which has been approved by the competent authority in that Relevant Member State, or, where appropriate, approved in another Relevant Member State and notified to the competent authority in that Relevant Member State, all in accordance with the Prospectus Directive, except that offers of Placing Shares to the public may be made at any time

under the following exemptions under the Prospectus Directive, if they are implemented in that Relevant Member State:

- (a) to any legal entity which is a qualified investor as defined in the Prospectus Directive;
- (b) to fewer than 150 natural or legal persons (other than qualified investors as defined in the Prospectus Directive) in such Relevant Member State; or
- (c) in any other circumstances falling within Article 3(2) of the Prospectus Directive,

provided that no such offer of Placing Shares shall result in a requirement for the publication of a prospectus pursuant to Article 3 of the Prospectus Directive or a supplemental prospectus pursuant to Article 16 of the Prospectus Directive or any measure implementing the Prospectus Directive in a Relevant Member State and each person who initially acquires any Placing Shares or to whom any offer is made under the Placing will be deemed to have represented, acknowledged and agreed that it is a “qualified investor” within the meaning of Article 2(1)(e) of the Prospectus Directive.

For the purposes of this provision, the expression an “**offer to the public**” in relation to any offer of Placing Shares in any Relevant Member State means a communication in any form and by any means presenting sufficient information on the terms of the offer and any Placing Shares to be offered so as to enable an investor to decide to purchase or subscribe for the Placing Shares, as the same may be varied in that Relevant Member State by any measure implementing the Prospectus Directive in that Relevant Member State and the expression “**Prospectus Directive**” means Directive 2003/71/EC (and the amendments thereto, including 2010 PD Amending Directive, to the extent implemented in the Relevant Member State) and includes any relevant implementing measure in each Relevant Member State and the expression “**2010 PD Amending Directive**” means Directive 2010/73/EU.

The distribution of this Offering Memorandum in other jurisdictions may be restricted by law and therefore persons into whose possession this Offering Memorandum comes should inform themselves about and observe any such restrictions.

The Company is an alternative investment fund for the purpose of the AIFMD. The Placing Shares may only be marketed to prospective investors which are domiciled or have a registered office in a member state of the European Economic Area (“**EEA Persons**”) in which marketing has been registered or authorised (as applicable) under the relevant national implementation of Article 42 of AIFMD and in such cases only to EEA Persons which are Professional Investors or any other category of person to which such marketing is permitted under the national laws of such member state.

This Offering Memorandum is not intended for, should not be relied on by and should not be construed as an offer (or any other form of marketing) to any other EEA Person.

A “Professional Investor” is an investor who is considered to be a professional client or who may, on request, be treated as a professional client within the relevant national implementation of Annex II of Directive 2004/39/EC (Markets in Financial Instruments Directive) and the AIFMD.

Each EEA Person who initially acquires Placing Shares or to whom any offer is made will be deemed to have represented, warranted to and agreed with the entity placing such shares and the Company that (a) it is a “qualified investor” within the meaning of the law in that relevant member state implementing Article 2.1(e) of the Prospectus Directive and (b) , that it is a Professional Investor or other person to whom Placing Shares in the Company may lawfully be marketed under the AIFMD or under the national laws of that relevant member state.

The distribution of this Offering Memorandum in other jurisdictions may be restricted by law and therefore persons into whose possession this Offering Memorandum comes should inform themselves about and observe any such restrictions

Switzerland

This Offering Memorandum may only be freely circulated and Shares in the Company may only be freely offered, distributed or sold to regulated financial intermediaries such as banks, securities dealers, fund management companies,

asset managers of collective investment schemes and central banks as well as to regulated insurance companies. Circulating this Offering Memorandum and offering, distributing or selling Shares in the Company to other persons or entities including qualified investors as defined in the Federal Act on Collective Investment Schemes (“CISA”) and its implementing Ordinance (“CISO”) may trigger, in particular, (i) licensing/prudential supervision requirements for the distributor, (ii) a requirement to appoint a representative and paying agent in Switzerland and (iii) the necessity of a written distribution agreement between the representative in Switzerland and the distributor. Accordingly, legal advice should be sought before providing this Offering Memorandum to and offering, distributing, selling or on-selling Shares of the Company to any other persons or entities. This Offering Memorandum does not constitute an issuance prospectus pursuant to Articles 652a or 1156 of the Swiss Code of Obligations and may not comply with the information standards required thereunder. The Shares will not be listed on the SIX Swiss Exchange, and consequently, the information presented in this document does not necessarily comply with the information standards set out in the relevant listing rules. The documentation of the Company has not been and will not be approved, and may not be able to be approved, by the Swiss Financial Market Supervisory Authority (“FINMA”) under the CISA. Therefore, investors do not benefit from protection under the CISA or supervision by the FINMA. This Offering Memorandum does not constitute investment advice. It may only be used by those persons to whom it has been handed out in connection with the Shares and may neither be copied or directly/indirectly distributed or made available to other persons.

United States

The Placing Shares have not been and will not be registered under the U.S. Securities Act or with any securities regulatory authority of any state or other jurisdiction of the United States and the Placing Shares may not be offered, sold, exercised, resold, transferred or delivered, directly or indirectly, within the United States or to, or for the account or benefit of, U.S. Persons, except pursuant to an exemption from, or in a transaction not subject to, the registration requirements of the U.S. Securities Act and in compliance with any applicable securities laws of any state or other jurisdiction in the United States. There will be no public offer of the Placing Shares in the United States.

Subject to certain exceptions as described herein, the Placing is only being made outside the United States to non-U.S. Persons in reliance on Regulation S under the U.S. Securities Act.

In addition, prospective investors should note that, except with the express written consent of the Company given in respect of an investment in the Company, the Placing Shares may not be acquired by: (i) investors using assets of: (A) an “employee benefit plan” as defined in Section 3(3) of ERISA that is subject to Title I of ERISA; (B) a “plan” as defined in Section 4975 of the U.S. Tax Code, including an individual retirement account or other arrangement that is subject to Section 4975 of the U.S. Tax Code; or (C) an entity whose underlying assets are considered to include “plan assets” by reason of investment by an “employee benefit plan” or “plan” described in preceding clause (A) or (B) in such entity pursuant to the U.S. Plan Assets Regulations; or (ii) a governmental, church, non-U.S. or other employee benefit plan that is subject to any federal, state, local or non-U.S. law that is substantially similar to the provisions of Title I of ERISA or Section 4975 of the U.S. Tax Code, unless its purchase, holding, and disposition of the Placing Shares will not constitute or result in a non-exempt violation of any such substantially similar law.

If 25 per cent or more of any class of equity in the Company is owned, directly or indirectly, by U.S. Plan Investors that are subject to Title I of ERISA or Section 4975 of the U.S. Tax Code, the assets of the Company will be deemed to be “plan assets”, subject to the constraints of ERISA and Section 4975 of the U.S. Tax Code. This would result, among other things, in: (i) the application of the prudence and fiduciary responsibilities standards of ERISA to investments made by the Company, and (ii) the possibility that certain transactions that the Company and its subsidiaries might enter into, or may have entered into in the ordinary course of business, might constitute or result in non-exempt prohibited transactions under Section 406 of ERISA and/or Section 4975 of the U.S. Tax Code and might have to be rescinded. A non-exempt prohibited transaction may also result in the imposition of an excise tax under the U.S. Tax Code upon a “party in interest” (as defined in ERISA) or “disqualified person” (as defined in the U.S. Tax Code), with whom a plan engages in the transaction. The Company will use commercially reasonable efforts to restrict ownership by U.S. Plan Investors of equity in the Company. However, no assurance can be given that investment by U.S. Plan Investors will not exceed 25 per cent or more of any class of equity in the Company.

For a description of restrictions on offers, sales and transfers of Placing Shares, please refer to the section of this Offering Memorandum entitled “*Purchase and Transfer Restrictions*” in “*Placing Arrangements*”.

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SUMMARY

The following is an overview of the transaction structure and is qualified in its entirety by, and should be read in conjunction with, the more detailed information appearing elsewhere in this Offering Memorandum and related documents referred to herein. Capitalised terms not specifically defined in this Offering Memorandum have the meanings set out in the section of this Offering Memorandum entitled “*Definitions*” below. For a discussion of certain risk factors to be considered in connection with an investment in the Shares, see “*Risk Factors*”.

The Company:

Highland CLO Funding, Ltd. (formerly known as Acis Loan Funding, Ltd.) (the “**Company**”) is a closed-ended investment company limited by shares incorporated on 30 March 2015 under the laws of Guernsey with registered number 60120. The Company changed its name from Acis Loan Funding, Ltd. to Highland CLO Funding, Ltd. on October 27, 2017.

The Company holds a partial, indirect ownership in Highland CLO Management, LLC (“**Highland CLO Management**”), a Delaware series limited liability company established to manage Highland CLOs, act as a “majority-owned affiliate” for purposes of the U.S. Risk Retention Rules and as an “originator” for purposes of EU Retention Requirements and to hold with respect to Highland CLOs the required risk retention interests required under, and in accordance with, the U.S. Retention Rules and/or the EU Retention Requirements, as applicable (such interests with respect to any CLO, the applicable “**Retention Interest**”). Highland CLO Management is also partly held (on an indirect basis through Highland HCF Advisor) by Highland Capital Management, L.P. (“**Highland**”), a Delaware limited partnership, which controls the major economic decisions of Highland CLO Management.

The Company holds a partial, indirect ownership in ACIS CLO Management, LLC (“**Acis CLO Management**” and together with Highland CLO Management, the “**Management Companies**” and each, a “**Management Company**”), a Delaware series limited liability company established to manage Acis CLO 2017-7, Ltd. (“**Acis CLO 7**”), act as a “majority-owned affiliate” for purposes of the U.S. Risk Retention Rules and to hold the Retention Interests with respect to Acis CLO 7 required under, and in accordance with, the U.S. Retention Rules. Acis CLO Management is also partly held (on an indirect basis) by Acis Capital Management, L.P. (“**Acis**”), a Delaware limited partnership, which controls the major economic decisions of Acis CLO Management.

Each of Highland or Acis, as applicable, may hold their respective indirect ownership interests in the applicable Management Companies through, or transfer such interests to, affiliates that are intended to be, directly or indirectly, majority controlled, are majority controlled by or are under common majority control with, Highland or Acis, as applicable, with the intention that the Management Companies will remain their respective “majority-owned affiliates” for purposes of the U.S. Risk Retention Rules.

Investment Objective:

The Company’s investment objective is to provide Shareholders with stable and growing income returns, and to grow the capital value of the investment portfolio through opportunistic exposure to CLO Notes, investments in new issue CLOs sponsored by Highland and Acis CLO 7 through its interests in the Management Companies and CLO Income Notes, respectively, and senior secured loans primarily for the purpose of enabling Highland CLO Management to qualify as an “originator” for purposes of the EU Retention Requirements, on both a direct basis and indirect basis, through the use of the investments described in its investment policy and through use of leverage,

including, any Revolving Credit Facility, Warehouse Loan Facilities, total return swaps or repurchase agreements, in addition to secured loan facilities. With respect to the Company's investments, except with respect to Designated CLO Resets or Designated CLO Refinancings, if applicable, it is expected that the Portfolio Manager intends to seek monetization of such investments in the ordinary course in its discretion; provided that at the end of the Term, the Portfolio Manager, in its reasonable discretion may postpone dissolution of the Company for up to 180 days to facilitate the orderly liquidation of the investments.

Investment policy:

The Company's investment policy is to focus on synergistic investments in the following areas.

Loan Investments

The Company will invest on an indirect basis in a diverse portfolio of predominantly floating rate senior secured loans (or on a direct basis for the primary purpose of enabling Highland CLO Management to qualify as an "originator" for purposes of the EU Retention Requirements), all of which will have at least one rating, which may be public or private, from Moody's Investor Services, Inc. ("**Moody's**"), Standard & Poor's Financial Services LLC ("**S&P**") or Fitch Group, Inc. ("**Fitch**"). Initially, the Company's loan investments will be focused in the U.S., but depending on market conditions the Company may also invest in similar types of loans in Europe. Accordingly, there is no limit on the maximum U.S. or European exposure. Investments in U.S. or European loans may be made through a U.S. or European originator subsidiary of the Company. The Company intends to invest directly only in those senior secured loans to obligors with total potential indebtedness under all applicable loan agreements, indentures and other underlying instruments at least \$250,000,000 that would generally satisfy the eligibility criteria for Highland CLOs and (without limiting the foregoing):

- Such loan is not currently deferring the payment of any accrued and unpaid interest that otherwise would have been due and continues to remain unpaid;
- Such loan provides for a fixed amount of principal payable in cash on scheduled payment dates and/or at maturity and does not by its terms provide for earlier amortization or prepayment at a price less than par;
- Such loan is not an obligation issued by Highland, any of its controlled affiliates that are investment funds or any other investment fund whose investments are primarily managed by Highland or any affiliate or company that is controlled by Highland, an affiliate thereof, or an account, fund, client or portfolio established and controlled by Highland or an affiliate thereof (a "**Related Obligation**");
- Such loan is neither an equity security nor by its terms is convertible into or exchangeable for an equity security and does not include an attached warrant to purchase equity securities;
- Such loan is not a bridge loan; and

- Such loan is not a zero coupon loan.

Financing of Loan Portfolios / Securitization

It is intended that the Company will periodically seek to sell or securitise all or a portion of its loan portfolio, held directly or indirectly, into new Highland CLOs where Highland CLO Management acts as CLO Manager. In doing so, Highland CLO Management may seek to adopt the “originator” model to address the Origination Requirements (as defined below) applicable to such Highland CLOs to the extent such Highland CLOs sought to comply with EU Retention Requirements. As a result, Highland CLO Management will be required to commit to: (a) establishing the relevant CLO and (b) selling certain loan investments to the relevant CLO which it has purchased for its own account initially. In addition, under current guidance, prior to closing date of the relevant CLO, Highland CLO Management expects to sell investments to the relevant CLO such that the required percentage of the total securitised exposures held by the CLO issuer will have come from Highland CLO Management (collectively, the “**Origination Requirements**”).

CLO Notes

The Company will from time to time invest directly or indirectly (through affiliates and subsidiaries, including the Management Companies, as more fully described below) in CLO Notes issued by Acis CLO 7, Highland CLOs, CLOs where Acis is the CLO Manager, (“**Acis Legacy CLOs**”), CLOs where Highland is the CLO Manager, (“**Highland Legacy CLOs**” and together with the Highland CLOs, Acis CLO 7 and the Acis Legacy CLOs, the “**Managed CLOs**”) or CLOs managed by other asset managers.

With respect to each such investment, Highland CLO Management, and Acis CLO Management with respect to Acis CLO 7, will acquire the percentages and tranches of CLO Notes necessary to enable the related CLO to meet the U.S. Risk Retention Rules and, if applicable, the EU Retention Requirements.

With respect to any such investments in Highland CLOs where Highland CLO Management acts as CLO Manager, it is expected that Highland CLO Management will be a “relying adviser” of Highland. With respect to Acis CLO 7, Acis CLO Management is a “relying adviser” of Acis. It is further expected that Highland or Acis, as applicable, will act as a “sponsor” of such Managed CLOs for purposes of the U.S. Risk Retention Rules and will treat the applicable Management Company as its “majority-owned affiliate” under the U.S. Risk Retention Rules. All management and incentive fees received from such Managed CLO will be paid to the applicable Management Company pursuant to the relevant portfolio management agreement, which will then pay the majority of such fees to Highland or Acis, as applicable, in its roles as Staff and Services Provider and as Sub-Advisor. The applicable Management Company may also seek to act as “originator” for purposes of the EU Retention Requirements with respect to such Managed CLOs as described above.

Each CLO in which the Company directly or indirectly holds CLO Notes will have its own eligibility criteria and portfolio limits. These limits are designed to ensure the portfolio of loans within the CLO meets a prescribed level of diversity and quality as set by the relevant rating agencies rating securities issued by such CLO. The applicable CLO Manager, including Highland CLO Management with respect to new Highland CLOs or Acis CLO Management with respect to Acis CLO 7, intends to identify and actively manage loans

which meet those criteria and limits within each CLO. The eligibility criteria and portfolio limits within a CLO will typically include the following required criteria and may include some or all of the following expected criteria:

- a limit on the weighted average life of the portfolio;
- a limit on the weighted average rating of the portfolio;
- a limit on the maximum amount of portfolio assets with a rating lower than B-/B3/B-; and
- a limit on the minimum diversity of the portfolio.
- a limit on the minimum weighted average of the prescribed rating agency recovery rate;
- a limit on the minimum amount of senior secured assets;
- a limit on the maximum aggregate exposure to second lien loans, high yield bonds, mezzanine loans and unsecured loans;
- a limit on the maximum portfolio exposure to covenant-lite loans;
- an exclusion of project finance loans;
- an exclusion of structured finance securities;
- an exclusion on investing in the debt of companies domiciled in countries with a local currency sub investment grade rating; and
- an exclusion of leases.

The above are not intended to be an exhaustive list of the eligibility criteria and portfolio limits within a typical CLO and the inclusion or exclusion of such limits and their absolute levels are subject to change depending on market conditions.

Act as Risk Retention Provider

The Company may also invest in, provide loans to, or purchase performance-linked notes from, asset management subsidiaries, affiliated with the Company, the Portfolio Manager, Highland, Acis or the Management Companies and which may act as the asset manager of certain U.S. or European CLOs in order to satisfy the U.S. Risk Retention Rules or EU Retention Requirements.

Allocation of Investment Opportunities

Highland CLO Management will serve as CLO Manager to each newly-issued Highland CLO during the Investment Period.

During the Investment Period, the Company shall receive priority allocations with respect to all CLO Income Note investment opportunities with respect to new issue Highland CLOs, over the account of the Portfolio Manager, its affiliates and other clients, including other investment funds and client accounts, including those which follow an investment program substantially similar to that of the Business (such other clients, funds and accounts, collectively, the “**Other Accounts**”). For the avoidance of doubt, the Portfolio

Manager shall otherwise allocate investment opportunities among the Company and Highland and its affiliates and Other Accounts in accordance with its allocation policy which requires allocations among clients to be fair and equitable over time. *See “Risk Factors—Risks Relating to Conflicts of Interest—The Company will be subject to various conflicts of interest involving the Portfolio Manager and its affiliates”.*

Investment Restrictions:

During the Investment Period, the Company may invest up to \$250,000,000 in CLO Income Notes for new Highland CLOs as follows: (a) up to \$150,000,000 in the aggregate from new capital contributions; and (b) up to \$100,000,000 in the aggregate from proceeds received from existing seed portfolio investments and investments in new Highland CLOs, net of dividends paid, and amortization and interest payments on Company borrowings from committed credit facilities.

The Company may not, without the consent of the Advisory Board, invest in any CLO Notes or CLO Income Notes of new Highland CLOs that are not Qualifying CLOs. A “**Qualifying CLO**” is a Highland CLO (a) pursuant to which Highland, the Portfolio Manager, Highland CLO Management or any of its affiliates does not charge subordinate management fees in excess of 0.00%, senior management fees in excess of 0.15% or incentive management fees in excess of 0.00% and (b) which does not have a reinvestment period longer than 5 years; *provided* that, if the Portfolio Manager has provided reasonable evidence to the Advisory Board that a substantial portion of new issue CLOs have reinvestment periods longer than 5 years (the “**RP Condition**”), the consent of the Advisory Board to invest in any Highland CLO that meets clause (a) of the definition of Qualifying CLOs only shall not be unreasonably withheld, conditioned or delayed.

During the Investment Period, the Company shall be permitted to invest in a refinancing or “reset” with respect to the following CLOs (which may extend the re-investment period and/or term of such CLOs, subject to the proviso below) managed by Highland affiliates (the “**Designated CLO Resets**”):

Acis CLO 2013-1, Ltd.
Acis CLO 2014-3, Ltd.
Acis CLO 2014-4, Ltd.
Acis CLO 2014-5, Ltd.
Acis CLO 2015-6, Ltd.

provided that, with respect to Acis CLO 2014-3, Ltd., Acis CLO 2014-4, Ltd. and Acis CLO 2014-5, Ltd., any such Designated CLO Reset may not extend the re-investment period beyond 2.25 years of the date of such Designated CLO Reset.

During the Investment Period, the Company shall be permitted to invest in a refinancing with respect to Acis CLO 7 (which may not extend the re-investment period or term of such CLO) (the “**Designated CLO Refinancing**”).

For the avoidance of doubt, following the expiration of the Investment Period, the Company shall not consummate an investment in any “reset” with respect to CLO Income Notes held by the Company. In addition, the Company shall not permit a reset with respect to any CLO Income Notes of Managed CLOs

that it holds, unless such CLO Income Notes of Managed CLOs are fully redeemed.

The Company shall not invest in the CLO Income Notes of a new issue Highland CLO unless it is the 100% owner of the CLO Income Notes not forming part of the Retention Interest acquired by Highland CLO Management.

Indirect Actions

Neither the Portfolio Manager nor the Company may take any action indirectly through controlled subsidiaries that either the Portfolio Manager or the Company is not permitted to undertake directly as set forth herein.

Borrowing:

It is expected that the Company will have access to one or more committed credit facilities and will use advances under such facilities, together with the proceeds of the Shares, to purchase future senior secured loans (for the primary purpose of enabling Highland CLO Management to qualify as an “originator” for purposes of the EU Retention Requirements) or other assets. Such facilities may take the form of any Revolving Credit Facility, Warehouse Loan Facilities, total return swaps or repurchase agreements, in addition to secured loan facilities. In addition to such facilities, the Company will be permitted to borrow money for day to day administration and cash management purposes.

Borrowing Limits

Notwithstanding the foregoing or anything to the contrary set forth herein, as of the time any such debt is incurred, the Company’s maximum gross leverage exposure (excluding the Warehouse Loan Facilities) pursuant to (a) committed secured loan facilities and any other borrowing (other than described in clause (b)) shall not exceed (i) during the Investment Period, the greater of (x) 15% of the Company’s gross asset value and (y) \$50,000,000 and (ii) after the Investment Period, 15% of the Company’s gross asset value, and (b) repurchase agreements shall not exceed 75% of the Company’s gross asset value.

For purposes of the limits regarding repurchase agreements set forth in clause (b) above, the “gross asset value” of the Company shall exclude financing for CLO Notes held by a Management Company as part of a “vertical” Retention Interest (including for the Designated CLO Resets), the NexBank Credit Facility, any Warehouse Loan Facilities and cash equivalents.

Warehouse Loan Facilities

One or more multi-currency warehouse lending facilities may be entered into from time to time between (i) the Company and (ii) a warehouse provider (the “**Warehouse Loan Facilities**”), pursuant to which the Company is able to draw multi-currency loans from time to time in order to purchase assets for its portfolio. The Warehouse Loan Facilities will be entered into on market standard terms, as negotiated between the Company and the relevant warehouse provider in each case and will include a senior security package in favour of the warehouse provider.

Hedging and Derivatives

Without the consent of the Advisory Board, the Company may only use hedging or derivatives to hedge investments consistent with the Company's investment objectives, and not for speculative purposes.

Repurchase Agreements

The Company may not use repurchase agreements to finance the purchase of CLO Income Notes, however, the Company may pledge any already owned CLO Income Notes as additional collateral under repurchase agreements.

Revolving Credit Facility

The Company may enter into a secured revolving credit facility with a committed amount of \$50,000,000 for working capital purposes (a "**Revolving Credit Facility**")

NexBank Credit Facility

The Company currently has a secured term credit facility provided by NexBank SSB, a Texas savings bank, with a principal amount of \$22,158,337, as of September 30, 2017 (the "**NexBank Credit Facility**"). The Company may, from time to time, increase its borrowing under the NexBank Credit Facility up to a maximum principal amount of \$30,000,000 at any time without the consent of the Advisory Board, but subject to the limitations set forth above in "*Borrowing Limits*". The terms of the NexBank Credit Facility, and of any increase in the principal amount thereto, shall be at or better than market standard terms and shall be promptly disclosed to the Advisory Board (any such amended terms, the "**Permitted NexBank Credit Facility Amendments**").

Advisory Board:

The Company shall form and assemble an advisory board (the "**Advisory Board**") composed of individuals who shall be representatives of certain Shareholders selected by the Portfolio Manager in its sole discretion in order to (a) provide advice to the Portfolio Manager with respect to certain issues involving conflicts of interest in any transaction or relationship between the Company and the Portfolio Manager or any of its employees or affiliates that are presented to the Advisory Board by the Portfolio Manager, and (b) be required to approve the following actions:

- Any extension of the Investment Period;
- Any extension of the Term (other than an automatic extension following an extension of the Investment Period that has been approved by the Advisory Board);
- Any allotment of additional equity securities by the Company; and
- Any investment in a Related Obligation or any other transaction between the Company or any entity in which the Company holds a direct or indirect interest, on the one hand, and Highland or any of its affiliates, on the other hand.

Notwithstanding the foregoing or anything to the contrary set forth herein, no transaction that is specifically authorized in the governing documents of the Company shall require approval of the Advisory Board, including, without limitation, sales or securitizations of all or a portion of the Company's loan portfolio into new Qualifying CLOs (i.e. the transfer of warehoused assets into

new Qualifying CLOs), investments in CLO Notes issued by CLOs managed by Highland affiliates, and the NexBank Credit Facility and any Permitted NexBank Credit Facility Amendments.

No voting member of the Advisory Board shall be a controlled affiliate of Highland, it being understood that none of CLO Holdco, Ltd., its wholly-owned subsidiaries or any of their respective directors or trustees shall be deemed to be a controlled affiliate of Highland due to their pre-existing non-discretionary advisory relationship with Highland.

Each member of the Advisory Board shall owe no fiduciary or other duties to the Company or the shareholders and may act solely in the interest of the shareholder that it represents.

Neither the Advisory Board nor any member thereof shall have the power to bind or act for or on behalf of the Company in any manner, and no shareholder who appoints a member of the Advisory Board shall be deemed to be an affiliate of the Company, the Portfolio Manager or Highland solely by reason of such appointment.

Investment Period:

The Company's assets may be invested and, subject to the terms and conditions set forth in the "Dividend Policy" section below, reinvested for a period commencing on the Closing Date of the Placing and ending on April 30, 2020 (the "Investment Period"), subject to two additional one-year extensions with the consent of the Advisory Board (as hereinafter defined) and the Portfolio Manager; provided that the Term will automatically be extended by an identical length of time in the event of an extension of the Investment Period.

Termination of Investment Period following Key Person Event

The Portfolio Manager will promptly provide each Shareholder with written notice in the event that any two of James Dondero, Mark Okada, Trey Parker or Hunter Covitz (collectively, the "Key Persons") cease to devote such time to the affairs of the Company as is sufficient to effectively manage the operations of the Company (a "Key Person Event"), as determined by the Portfolio Manager in its reasonable discretion, taking into account such factors as it shall deem relevant in its reasonable discretion. The Portfolio Manager will promptly provide each Shareholder with written notice in the event of the termination of employment of any Key Person.

The Investment Period will be terminated immediately upon a Key Person Event. The Investment Period shall resume in the event that (i) the Portfolio Manager obtains or receives notice of the written election or vote of the Advisory Board to reinstate the Investment Period, or (ii) one or more Qualified Replacements (as defined below) are appointed in place of (or in addition to) the then existing Key Persons to cure the Key Person Event, in which event the Investment Period will continue until its termination as otherwise described herein without further regard to such Key Person Event.

For purposes of this Offering Memorandum, a "Qualified Replacement" means a person nominated by the Portfolio Manager and approved by the Advisory Board, such approval not to be unreasonably withheld, conditioned or delayed, as a replacement for any existing Key Person or as an additional Key Person; provided that the Advisory Board will provide notice of its

approval or disapproval of any person nominated to be a Qualified Replacement within 10 business days of such nomination.

For the avoidance of doubt, during any cessation of the Investment Period following a Key Person Event, (i) the Portfolio Manager may continue to require Placees to purchase Shares pursuant to the subscription and transfer agreement to fund (a) any indebtedness of the Company permitted hereunder incurred prior to the end of the Investment Period (including to repay outstanding indebtedness under any Warehouse Loan Facilities) or (b) the completion, no later than 180 days after the expiration of the Investment Period, new issue Highland CLOs that were in process at the time of such Key Person Event and (ii) the Company shall not receive priority allocations with respect to all CLO Income Note investment opportunities with respect to new issue Highland CLOs until the Investment Period resumes.

Term:

The term of the Company will end (and the Company thereafter will be wound up and dissolved) on the ten-year anniversary of the date of the Placing (the “**Term**”), subject to (a) automatic extension in the event of an extension of the Investment Period and (b) two additional one-year extension with the consent of the Portfolio Manager and the Advisory Board, or such earlier date after the end of the Investment Period on which the Portfolio Manager determines to terminate and wind up the Company following the receipt by the Company of all amounts reasonably expected by the Portfolio Manager to be received with respect to the Company’s assets or the sale thereof during the term and in a manner that will not cause the Company, the Portfolio Manager, Highland, Acis, the Management Companies or any subsidiary thereof to violate any applicable law or contract.

The Company has been established as a closed-ended vehicle. Accordingly, there is no right or entitlement attaching to Shares that allows them to be redeemed or repurchased by the Company at the option of the Shareholder.

**Placing Arrangements –
Investment Period Subscription
Commitment:**

The Company is seeking aggregate subscriptions to purchase Placing Shares in an aggregate amount of up to approximately U.S. \$153 million.

Placees will commit under a subscription and transfer agreement to purchase Shares to be settled from time to time during the Investment Period. The Portfolio Manager may call such Shares for settlement from time to time on a pro rata basis upon 10 Business Days’ notice to the Placees in such amounts as may be specified by the Portfolio Manager.

Upon the expiration of the Investment Period, all Placees will be released from any further obligation with respect to purchase Shares under their subscriptions, except to the extent necessary to:

(i) complete, no later than 180 days after the expiration of the Investment Period, the purchase of Shares pursuant to written commitments, letters of intent or similar contractual commitments that were in process as of the end of the Investment Period; and

(ii) fund any indebtedness of the Company permitted hereunder incurred prior to the end of the Investment Period (including to repay outstanding indebtedness under any Warehouse Loan Facilities).

Shares will be issued at a price per Share based on the most recent quarterly determined NAV of the Company.

The maximum number of Shares to be issued by the Company is an amount of Shares equal to U.S. \$153 million and there is no minimum number of Shares. Fractions of Placing Shares will be issued.

On the Closing Date, Placees will acquire Shares of existing Shareholders at a price per Share based on the NAV of the Company as of September 30, 2017, adjusted with respect to a dividend of \$9,000,000 on October 10, 2017, and a buyback of the Shares of Acis Capital Management, L.P. on October 24, 2017 (the “**Adjusted NAV**”) such that Placees and existing Shareholders will hold currently existing Shares on a *pro rata* basis and existing Shareholders will commit, as Placees under a subscription and transfer agreement, to purchase Shares such that new and existing Shareholders will hold both existing Shares and commitments on *pro rata* basis.

The Board may deduct from any dividend payable to any Shareholder on or in respect of a Share all sums of money (if any) presently payable by him to the Company on account of calls with respect to existing Shares, or calls of commitments to purchase Shares pursuant to the subscription and transfer agreement or otherwise.

A Shareholder that defaults in respect of its obligation to purchase Shares pursuant to the terms of the subscription and transfer agreement will be subject to customary default provisions.

The Board may retain any dividend or other monies payable on or in respect of a Share on which the Company has a lien and may apply the same in or towards satisfaction of the liabilities or obligations in respect of which the lien exists.

Highland Principal Commitment

Certain principals of Highland will subscribe, directly or indirectly, for \$3,000,000 of Shares in the aggregate.

Regulatory status:

The Company is a registered closed-ended investment company incorporated in Guernsey with limited liability on 30 March 2015 under the provisions of the Companies Law, with registered number 60120. The Company is regulated by the GFSC, and is not regulated by any regulator other than the GFSC.

Typical investors:

Investment in the Company is only suitable for Professional Investors as defined in the AIFMD and any other person to whom the Placing Shares may be lawfully offered.

Applicant’s service providers:

Portfolio Manager

Highland HCF Advisor, Ltd. (“**Highland HCF Advisor**”) has been appointed as the Portfolio Manager to the Company pursuant to the Portfolio Management Agreement. In that capacity, the Portfolio Manager will select the portfolio of investments and instruct the Custodian with respect to any acquisition, disposition or sale of investments and provide certain support and assistance (including back and middle office functions), personnel and credit and market research and analysis in connection with the origination and ongoing management of the portfolio by the Company. Under the Portfolio Management Agreement, the Company shall pay to the Portfolio Manager an amount equivalent to all reasonable third party costs and expenses incurred by

the Portfolio Manager in the performance of its obligations thereunder, together with any irrecoverable VAT arising on such costs and expenses.

The Portfolio Manager has entered into a Master Sub-Advisory Agreement (the “**HCF Sub-Advisory Agreement**”) and a Staff and Services Agreement (the “**HCF Staff and Services Agreement**”, together with the Sub-Advisory Agreement, the “**HCF Services Agreements**”) with Highland Capital Management, L.P. under which Highland Capital Management, L.P. provides investment research and recommendations and operational support to the Portfolio Manager, including services that may be used in connection with the Portfolio Manager’s recommendations regarding the composition, nature and timing of changes to the Company’s portfolio, the due diligence of actual or potential investments, the execution of investment transactions, and certain loan services and administrative services.

Highland CLO Management has a Master Sub-Advisory Agreement (the “**HCLOM Sub-Advisory Agreement**”) and a Staff and Services Agreement (the “**HCLOM Staff and Services Agreement**”, together with the HCLOM Sub-Advisory Agreement, the “**HCLOM Services Agreements**”) in place with Highland, pursuant to which Highland provides credit research and operational support to Highland CLO Management, including services in connection with determining the composition, nature and timing of changes to portfolios of Highland CLOs for which Highland CLO Management acts as CLO Manager, the due diligence of actual or potential investments, the execution of investment transactions approved by the Highland CLO Management, and certain loan services and administrative services.

Acis (an affiliate of Highland) has entered into a Master Sub-Advisory Agreement (the “**ACM Sub-Advisory Agreement**”) and a Staff and Services Agreement (the “**ACM Staff and Services Agreement**”, together with the ACM Sub-Advisory Agreement, the “**ACM Services Agreements**”) with Highland under which Highland provides investment research and recommendations and operational support to Acis, including services in connection with determining the composition, nature and timing of changes to portfolios of Acis CLOs for which Acis acts as CLO Manager, the due diligence of actual or potential investments, the execution of investment transactions approved by Acis, and certain loan services and administrative services.

Acis CLO Management has entered into a Master Sub-Advisory Agreement (the “**ACLOM Sub-Advisory Agreement**”, and together with the HCF Sub-Advisory Agreement, the HCLOM Sub-Advisory Agreement and the ACM Sub-Advisory Agreement, the “**Sub-Advisory Agreements**”) and a Staff and Services Agreement (the “**ACLOM Staff and Services Agreement**”, and the ACLOM Staff and Services Agreement together with the HCF Staff and Services Agreement, the HCLOM Staff and Services Agreement and the ACM Staff and Services Agreement, the “**Staff and Services Agreements**”, and the ACLOM Staff and Services Agreement together with the ACLOM Sub-Advisory Agreement, the “**ACLOM Services Agreements**” and the ACLOM Services Agreements with the HCF Services Agreements, the HCLOM Services Agreements and the ACM Services Agreements, the “**Services Agreements**”) in place with Acis, pursuant to which Acis provides credit research and operational support to Acis CLO Management, including services in connection with determining the composition, nature and timing of changes to portfolios of Acis CLO 7 for which Acis CLO Management acts as CLO Manager, the due diligence of actual or potential investments, the

execution of investment transactions approved by Acis CLO Management, and certain loan services and administrative services.

No management fees will be payable by the Company pursuant to any Services Agreement; it being understood that each of the Management Companies will pay (i) eleven-fifteenths (11/15^{ths}) of the total 0.15% senior management fee received from Acis CLO 7 and the Highland CLOs to affiliates of Highland pursuant to the applicable Services Agreements, and (ii) following any Designated CLO Reset, a portion of the management fees received from any CLO subject to such Designated CLO Reset to affiliates of Highland pursuant to the applicable Services Agreements, other than an amount equivalent to a senior management fee of 0.04%.

Administrator

State Street (Guernsey) Limited has been appointed as administrator to the Company pursuant to the Administration Agreement. In such capacity, the Administrator is responsible for the day-to-day administration of the Company. Under the terms of the Administration Agreement, the Administrator is entitled to an annual administration fee of up to 7 bps per annum of the Net Asset Value of the Company calculated and payable monthly in arrears, and other miscellaneous fees and expenses reimbursed, in each case, as determined in the Administration Agreement.

Operating Expenses:

Except as provided below, the Portfolio Manager will pay all of its own Overhead without reimbursement by the Company.

Subject to the following paragraph, the Company shall pay or reimburse the Portfolio Manager and its affiliates for all Operating Expenses. See “Company Directors and Administration—The Portfolio Manager—Highland Fees”.

Exculpation:

The Portfolio Manager will assume no responsibility under the Portfolio Management Agreement other than to render the services called for thereunder and affecting the duties and functions that have been delegated to it thereunder in good faith and, subject to the standard of conduct described in the next succeeding sentence. The Portfolio Manager will not be responsible for any action or inaction of the Company in declining to follow any advice, recommendation or direction of the Portfolio Manager.

The Portfolio Manager, its affiliates, any officer, director, secretary, manager, employee or any direct or indirect partner, member, stockholder, agent or legal representative (e.g., executors, guardians and trustees) of the Portfolio Manager and its affiliates, including persons formerly serving in such capacities, any person who serves at the request of the Portfolio Manager or the Board pursuant to the Articles, on behalf of the Company as an officer, director, secretary, manager, partner, member, employee, stockholder, agent or legal representative of any other person serving at the request of the Portfolio Manager or the Board pursuant to the Articles on behalf of the Company in such capacity as listed above, each member of the Advisory Board and each member of any subcommittee thereof and any assignees or successors of the foregoing (each, an “**Indemnified Person**”) will incur no liability to the Company or any Shareholder in the absence of a finding by any court or governmental body of competent jurisdiction in a final, non-appealable judgment that the commission by such person of an action, or the omission by such person to take an action, constitutes bad faith, gross

negligence or wilful misconduct (a **“Triggering Event”**), except as otherwise required by applicable law (including the Companies Law). Any claims arising from a Triggering Event shall be limited to actual out-of-pocket damages incurred as a direct consequence of the Triggering Event, and shall not include punitive, consequential or other damages or lost profits.

Indemnification:

To the fullest extent permitted by applicable law, the Company will be required to indemnify each Indemnified Person against all losses, liabilities, damages, expenses or costs (including any claim, judgment, award, settlement, reasonable legal and other professional fees and disbursements and other costs or expenses incurred in connection with the defence of any proceeding, whether or not matured or unmatured or whether or not asserted or brought due to contractual or other restrictions, joint or several) other than those arising from suits, disputes or actions by Highland, its affiliates or principals, Other Accounts or CLO HoldCo, Ltd. (collectively, the **“Indemnified Losses”**) incurred by such Indemnified Person or to which such Indemnified Person may be subject by reason of its activities in connection with the conduct of the business or affairs of the Company, unless such losses result from an Indemnified Person’s Triggering Event.

The Indemnified Persons shall be entitled to advancement of expenses as they are incurred in connection with the investigation, defence or resolution of any claim that may be subject to indemnification, subject to providing an undertaking to repay any amounts ultimately determined not to be subject to indemnification due to a Triggering Event.

Each member of the Advisory Board and each member of any subcommittee thereof and, solely in connection with matters relating to the Advisory Board or such subcommittee, the Shareholder and/or other person or entity on whose behalf such Advisory Board member or subcommittee member serves, will have the benefit of similar exculpation and indemnification rights unless it has not acted in good faith.

Notwithstanding the foregoing or anything to the contrary set forth herein, the Company will not provide for the exculpation or indemnification of any Indemnified Person for any liability (including liability under U.S. federal securities laws which, under certain circumstances, impose liability even on persons that act in good faith), to the extent that such liability may not be waived, modified or limited under applicable law.

Under the Companies Law, any indemnity provided (directly or indirectly) by the Company to a Director, or an associated company, or a body corporate which is an overseas company and a subsidiary of the company, against any liability attaching to him in connection with any negligence, default, breach of duty or breach of trust in relation to the Company is void, except in certain circumstances.

Regulatory status of Portfolio Manager:

Highland HCF Advisor is a relying adviser of Highland Capital Management, L.P., an investment adviser registered under the Investment Advisers Act of 1940, as amended (the **“Investment Advisers Act”**) and, as such, is subject to the provisions of the Investment Advisers Act.

Regulatory status of Custodian:

The Custodian of the Company is State Street Custodial Services (Ireland) Limited, which is authorised as an Investment Business Firm under Section

10 of the Irish Investment Intermediaries Act, 1995 (as amended), will provide custody and banking services.

Calculation of Net Asset Value: The Company intends to publish the Net Asset Value per Share on a quarterly basis, within 15 Business Days following the relevant quarter-end. Notice will be provided by the Administrator by e-mail.

Portfolio: The Company is currently invested in CLO Income Notes in the following Managed CLOs in the following amounts:

Acis CLOs: Aggregate Outstanding Amount (U.S.\$)

ACIS CLO 2013-1 Ltd.	\$18,558,000.00
ACIS CLO 2014-3 Ltd.	\$39,750,000.00
ACIS CLO 2014-4 Ltd.	\$50,750,000.00
ACIS CLO 2014-5 Ltd.	\$53,000,000.00
ACIS CLO 2015-6, Ltd.	\$51,850,000.00

Highland Legacy CLOs: Aggregate Outstanding Amount (U.S.\$)

Rockwall CDO, Ltd.	\$14,000,000.00
Brentwood CLO, Ltd.	\$12,000,000.00
Grayson CLO, Ltd.	\$5,900,000.00
Liberty CLO, Ltd.	\$17,000,000.00
HP CDO, Ltd.	\$1,621,542.70
Greenbriar CLO, Ltd.	\$18,000,000.00
Gleneagles CLO, Ltd.	\$1,250,000.00

ACIS CLO Management Aggregate Outstanding Amount (U.S.\$)

Acis CLO 7	\$17,850,000.00
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Net Asset Value: As of September 30, 2017, the unaudited net asset value per share of the Net Asset Value was US \$157,081,118.91. A special dividend in the aggregate amount of US \$9,000,000 was paid on October 10, 2017, and a buyback of Shares from Acis Capital Management, L.P. was made on October 24, 2017, for an aggregate purchase price of \$991,180.13.

Type and class of securities: The Shares being offered under the Placing are ordinary shares of no par value in the capital of the Company.

Currency of the securities issue: U.S. Dollar

Number of securities in issue: The issued share capital of the Company (all of which shares have been fully paid) as of the date of this Offering Memorandum consists of 143,454,001 million Shares.

There are no non-paid up Shares in issue.

Description of the rights attaching to the securities: The holders of the Shares shall be entitled to receive, and to participate in, any dividends declared in relation to the Shares that they hold.

On a winding-up or a return of capital by the Company, the net assets of the Company attributable to the Shares shall be divided pro rata among the holders of the Shares.

The Shares shall carry the right to receive notice of, attend and vote at general meetings of the Company.

Unless otherwise authorised by a special resolution, the Company shall not allot equity securities on any terms unless the Company has first made an offer to each person who holds Shares to allot to him, on the same or more favourable terms, such proportion of those equity securities that is as nearly as practicable (fractions being disregarded) equal to the proportion held by the relevant person of the Shares.

Restrictions on the free transferability of the securities:

The Company has elected to impose certain restrictions (pursuant to its Articles) on the Placing and on the future trading of the Shares so that the Company will not be required to register the offer and sale of the Shares under the U.S. Securities Act, so that the Company will not have an obligation to register as an investment company under the U.S. Investment Company Act and related rules and to address certain ERISA, U.S. Tax Code and other considerations. These transfer restrictions, which will remain in effect until the Company determines in its sole discretion to remove them, may adversely affect the ability of Shareholders to trade the Shares. Due to the restrictions described below, potential investors in the United States and U.S. Persons (including persons acting for the account or benefit of any U.S. Person) are advised to consult legal counsel prior to making any offer, resale, exercise, pledge or other transfer of the Shares.

Subject to certain exceptions, the Placing is only being made outside the United States to non-U.S. Persons in reliance on Regulation S under the U.S. Securities Act.

Dividend policy:

Whilst not forming part of the investment objective or policy of the Company, dividends will be payable in respect of each calendar quarter, payable in the month following the end of such quarter. During the Investment Period, any interest, proceeds from the realization of portfolio investments or other cash generated by the portfolio in excess of the dividends paid to Shareholders as provided below will be reinvested by the Company with the objective of growing the NAV.

During the Investment Period, on the 15th of February, May, August and November of each calendar year, beginning May 15, 2018 (each a “**Quarterly Dividend Date**”), after satisfaction of all expenses, debts, liabilities and obligations of the Company, the Company will pay a dividend to each Shareholder at a rate of at least 8% per annum, based on such Shareholder’s aggregate capital contributions as of the prior Quarterly Dividend Date (the “**Target Dividend**”).

Following the Investment Period, after satisfaction of all expenses, debts, liabilities and obligations of the Company, any interest, proceeds from the realization of portfolio investments or other cash generated by the portfolio will be distributed by the Company to the Shareholders as a dividend on each Quarterly Dividend Date in accordance with the distribution priority as follows (the “**Distribution Priority**”):

First, 100% to the Shareholders *pro rata* based on the number of Shares held until each Shareholder has received (i) pursuant to this clause (i), aggregate distributions from the Company equal to all capital contributions made by such Shareholder plus (ii) an amount necessary for such Shareholder to

receive a cumulative rate of return of 8.0% per annum, compounded annually, on such Shareholder's aggregate capital contributions;

Second, 100% to the Portfolio Manager until the Portfolio Manager has received aggregate distributions from the Company equal to 20% of the sum of all distributions made in excess of aggregate capital contributions made by Shareholders;

Third, 80% to the Shareholders *pro rata* based on the number of Shares held and 20% to the Portfolio Manager until each Shareholder has received aggregate distributions from the Company equal to all capital contributions made by such Shareholder plus an amount necessary for such Shareholder to receive a cumulative rate of return of 16% per annum, compounded annually, on such Shareholder's aggregate capital contributions; and

Thereafter, 70% to the Shareholders *pro rata* based on the number of Shares held and 30% to the Portfolio Manager.

For purposes of this section, references herein to a "Shareholder" shall include Highland HCF Advisor in its capacity as a shareholder of the Company, if applicable, and references to "aggregate distributions" received by the "Portfolio Manager" shall not include any distributions received by Highland HCF Advisor in its capacity as a Shareholder.

The total net proceeds and an estimate of the total expenses of the issue/offer, including estimated expenses charged to the investor by the issuer or the offeror:

The Net Placing Proceeds are expected to be approximately U.S. \$153 million.

The initial expenses of the Company are those which are necessary for the Placing, and shall not exceed U.S. \$750,000. These expenses will be paid on or around the Placing and will include, without limitation: the cost of settlement and escrow arrangements; printing, advertising and distribution costs; legal fees; and any other applicable expenses.

Reasons for the offer and use of proceeds:

The Company is making the offer in order to raise the Net Placing Proceeds which will be invested in accordance with the Company's investment objective and policy, including its indirect investment in the Management Companies.

Expenses related to the Placing:

All costs associated with the Placing will be borne by the Company after the Placing and therefore the Net Placing Proceeds will be lower than the Gross Placing Proceeds immediately following the Placing.

Ongoing annual expenses:

The Company currently estimates that its total annual expenses for 2017 will be approximately \$525,000 per annum, and will provide the Advisory Board with updated estimates and reasonable detail from time to time upon request. For the avoidance of doubt, except as expressly set forth in the section titled "*Company Directors and Administration—Portfolio Manager—Highland Fees*", the Portfolio Manager will pay all of its own operating, overhead and administrative expenses, including all costs and expenses on account on employee compensation, employee benefits and rent without reimbursement by the Company

These expenses will include the following:

The Portfolio Manager, Highland, Acis and the Management Companies

Please see below in section titled “*Company Directors and Administration—Portfolio Manager—Highland Fees*”.

Administrator

Under the terms of the Administration Agreement, the Administrator is entitled to an annual administration fee of up to 7 bps of the Net Asset Value of the Company per annum, payable monthly in arrears, and other miscellaneous fees and expenses reimbursed, in each case, as determined in the agreement.

Custodian

Under the terms of the Custody Agreement, the Custodian is entitled to receive transaction charges and sub custodian charges will be recovered by the Custodian from the Company as they are incurred by the relevant sub custodian. All such charges shall be charged at normal commercial rates.

Directors

The Directors are remunerated for their services at a fee of £35,000 per annum (£40,000 for the Chairman). For more information in relation to the remuneration of the Directors, please refer to the section of this Offering Memorandum entitled “Memorandum and Articles” in “Additional Information on the Company”.

Operating Expenses

All Operating Expenses shall be borne by the Company. All reasonably and properly incurred out-of-pocket expenses of the Administrator, the Custodian, and the Directors relating to the Company are borne by the Company.

The amount of charges and expenses which are borne by an investor may vary from year to year.

For more information on expenses charged during the most recent financial year, prospective investors should review the Company’s annual audited financial statements (if any) for the prior financial year.

Terms and conditions of the offer:

An amount of Shares equal to U.S. \$153 million are being marketed and are available for subscription of commitments under the Placing until the Closing Date.

Shares will be issued under the Placing at a price per Share based on the most recent quarterly determined NAV of the Company. The maximum number of Shares to be issued by the Company is an amount of Shares equal to U.S. \$153 million and there is no minimum number of Shares.

Placees may acquire Shares pursuant to a combination of issuance and transfer from existing Shareholders.

Placees may also enter into commitments to acquire Shares pursuant to a combination of issuance and transfer from existing Shareholders.

The Placing is not being underwritten.

Press Releases:

Neither the Portfolio Manager, the Company nor any Shareholder shall issue or approve any press release or other announcement referring to the identity

of a Shareholder without the prior written consent of the applicable Shareholder.

RISK FACTORS

Investment in the Company should be regarded as long term in nature and involving a high degree of risk. Accordingly, prospective investors should consider carefully all of the information set out in this Offering Memorandum and the risks relating to the Company and the Shares including, in particular, the risks described below which are not presented in any order of priority and may not be an exhaustive list or explanation of all the risks which investors may face when making an investment in the Shares and should be used as guidance only.

Only those risks which are believed to be material and currently known to the Company in relation to itself and its industry as at the date of this Offering Memorandum have been disclosed. Additional risks and uncertainties not currently known, or deemed immaterial at the date of this Offering Memorandum, may also have an adverse effect on the business, results of operations, financial conditions and prospects of the Company and its net asset value. Potential investors should review this Offering Memorandum carefully and in its entirety and consult with their professional advisers before making an application to invest in the Shares.

Prospective investors should note that the risks relating to the Company and the Shares summarised in the section of this document headed “Summary” are the risks that the Directors believe to be the most essential to an assessment by a prospective investor of whether to consider an investment in the Shares. However, as the risks which the Company faces relate to events and depend on circumstances that may or may not occur in the future, prospective investors should consider not only the information on the key risks summarised in the section of this document headed “Summary” but also, among other things, the risks and uncertainties described below.

RISKS RELATING TO THE COMPANY

The Company is a recently incorporated company incorporated under the laws of Guernsey with limited history

The Company was incorporated under the laws of Guernsey on 30 March 2015. It commenced operations after the initial Placing in August 2015. As the Company has a limited operating history, investors have limited information on which to evaluate the Company’s ability to achieve its investment objective or implement its investment strategy and provide a satisfactory investment return. An investment in the Company is therefore subject to all the risks and uncertainties associated with a recently formed business, including the risk that the Company will not achieve its investment objective and that the value of an investment in the Company could decline substantially as a consequence. Any failure by the Company to do so may adversely affect its business, financial condition, results of operations and/or its NAV.

The Company’s returns and operating cash flows depend on many factors, including the price and performance of the investments, the availability and liquidity of investment opportunities falling within the Company’s investment objective and policy, the level and volatility of interest rates, readily accessible short-term borrowings, the conditions in the financial markets and economy, the financial performance of obligors under the investments and the Company’s ability successfully to operate its business and execute its investment strategy. There can be no assurance that the Company’s investment strategy will be successful.

The Company’s target return and target dividend yield are based on estimates and assumptions that are inherently subject to significant business and economic uncertainties and contingencies, and the actual return and dividend yield may be materially lower than the target return and target dividend yield and could be negative

The Company’s target return and target dividend yield set forth in this Offering Memorandum are targets only and are based on estimates and assumptions concerning the performance of its investment portfolio which will be subject to a variety of factors including, without limitation, the availability of investment opportunities, asset mix, value, volatility, holding periods, performance of underlying portfolio debt issuers, investment liquidity, borrower default, changes in current market conditions, interest rates, government regulations or other policies, the worldwide economic environment, changes in law and taxation, natural disasters, terrorism, social unrest and civil disturbances or the occurrence of risks described elsewhere in this Offering Memorandum, which are inherently subject to significant business, economic and market uncertainties and contingencies, all of which are beyond the control of the Company and which may adversely affect the Company’s ability to achieve its target return and target dividend yield. Such

targets are based on market conditions and the economic environment at the time of assessing the proposed targets and the assumption that the Company will be able to implement its investment policy and strategy successfully, and are therefore subject to change. There is no guarantee or assurance that the target return and/or target dividend yield can be achieved at or near the levels set forth in this Offering Memorandum. Accordingly, the Company's actual rate of return and actual dividend yield achieved may be materially lower than the targets, or may result in a loss. A failure to achieve the target return and/or target dividend yield set forth in this Offering Memorandum may adversely affect the Company's business, financial condition, results of operations and/or its NAV.

An investment in the Company will be a speculative investment of a long-term nature and involving a high degree of risk. Shareholders could lose all or a substantial portion of their investment in the Company. Shareholders must have the financial ability, sophistication, experience and willingness to bear the risks of an investment in the Company.

Material changes affecting global debt and equity capital markets may have a negative effect on the Company's business, financial condition, results of operations, and/or its NAV

The global financial markets have experienced extreme volatility and disruption in recent years, as evidenced by a lack of liquidity in the equity and debt capital markets, significant write-offs in the financial services sector, the repricing of credit risk in the credit market and the failure of major financial institutions. Despite actions of governmental authorities, these events contributed to general economic conditions that have materially and adversely affected the broader financial and credit markets and reduced, and in certain circumstances, significantly reduced, the availability of debt and equity capital.

Further, within the banking sector, the default of any institution could lead to defaults by other institutions. Concerns about, or default by, one institution could lead to significant liquidity problems, losses or defaults by other institutions, because the commercial soundness of many financial institutions may be closely related as a result of their credit, trading, clearing or other relationships. This risk is sometimes referred to as "systemic risk" and may adversely affect other third parties with whom the Company deals. The Company may therefore be exposed to systemic risk when the Company deals with various third parties whose creditworthiness may be exposed to such systemic risk.

Recurring market deterioration may materially adversely affect the ability of an issuer whose debt obligations form part of the Company's portfolio, or an issuer whose debt obligations form part of a CLO in which the Company holds CLO Notes, to service its debts or refinance its outstanding debt. Further, such financial market disruptions may have a negative effect on the valuations of the investments (and, by extension, on the Company's NAV), and on the potential for liquidity events involving such investments. In the future, non-performing assets in the Company's portfolio may cause the value of that portfolio to decrease (and, by extension and/or its the NAV to decrease). Adverse economic conditions may also decrease the value of any security obtained in relation to any of the investments.

Conversely, in the event of sustained market improvement, the Company may have access to a reduced number of attractive potential investment opportunities, which also may result in limited returns to Shareholders.

The Company's NAV is subject to valuation risk and the Company can provide no assurance that the NAVs it records from time to time will ultimately be realised

The Company's NAV will be calculated by third parties and will be subject to valuation risk (see the risk factor entitled "*The investments may be difficult to value accurately and, as a result, the Company may be subject to valuation risk*"). If a valuation estimate provided to the Company by a third party subsequently proves to be incorrect, no adjustment to any previously calculated NAV will be made. Any acquisitions or disposals of Shares based on previous erroneous NAVs may result in losses for shareholders.

The investments held by the Company will be valued quarterly and the Company's Net Asset Value will be calculated based on these values. Therefore, the actual value of the investments at any given time may be different from the value based on which the Company's latest Net Asset Value has been calculated.

Investors should note that where a loan becomes subject to a Forward Purchase Agreement (described further in the section of this Offering Memorandum entitled "*Additional Information on the Company*") the Company will (subject to certain conditions as set out in the section of this Offering Memorandum entitled "*Additional Information on the*

Company”) neither receive the gain nor bear the loss that occurs between the date when the loan is added to the Forward Purchase Agreement and the date when the transfer occurs.

Each of the Company, the Portfolio Manager, Acis and the Management Companies is reliant on Highland (acting in its different capacities), asset management subsidiaries and other third party service providers to carry on their businesses and a failure by one or more service providers may materially disrupt the business of the Company and or the Management Companies

The Company has no employees and its directors have all been appointed on a non-executive basis. Highland HCF Advisor will, as part of the services to be provided under the terms of the Portfolio Management Agreement, be responsible for selecting the portfolio of investments and the acquisition, disposition or sale of investments and providing the Company with the necessary personnel, credit research and other resources to perform the functions necessary to the business of the Company. In addition, Highland or its affiliates, including the Portfolio Manager, Acis or the Management Companies, may also act as CLO Manager in respect of the Managed CLOs from time to time. The Company may also invest in, provide debt financing to, or purchase performance-linked notes from, asset management subsidiaries, affiliated with the Company, the Portfolio Manager, Highland or Acis, including the Management Companies, and which may act as the asset manager of certain U.S. or European CLOs in order to satisfy certain U.S. or European risk retention requirements. Therefore, the Company is reliant upon the performance of Highland and/or its affiliates, asset management subsidiaries of the Company and other third party service providers for the performance of certain functions.

Highland CLO Management relies on Highland for access to its employees (which are shared with Highland). Acis CLO Management relies on Acis for access to its employees (which are shared with Acis). Highland and Acis, as applicable, will, as part of the services to be provided under the terms of the Staff and Services Agreements, be responsible for providing the Company with the necessary credit research, back office and other resources to perform the functions necessary to the business of each of the Management Companies, including its management of CLOs. Therefore, each of the Management Companies is reliant upon the performance of Highland and Acis, as applicable, for the performance of essential functions, and may be unable to properly manage CLOs without the support of Highland or Acis, as applicable.

Failure by any service provider to carry out its obligations to the Company or the applicable Management Company in accordance with the applicable duty of care and skill, or at all, or termination of any such appointment may adversely affect the Company’s or the applicable Management Company’s, as applicable, business, financial condition, results of operations and/or its NAV.

In the event that it is necessary for the Company or the applicable Management Company to replace any third party service provider, it may be that the transition process takes time, increases costs and may adversely affect the Company’s or the applicable Management Company’s, as applicable, business, financial condition, results of operations and/or its NAV.

The Shares will be subordinated to the rights of any secured Warehouse Loan Facility Provider or holder of any other future indebtedness or preference shares of the Company.

The Company is permitted to issue preference shares and incur indebtedness, including secured debt in the form of one or more Warehouse Loan Facilities or other lending facilities. Such preference shares and indebtedness will rank ahead of the Shares in respect of any distributions or payments by the Company to Shareholders. In an enforcement scenario under any Warehouse Loan Facility, the provider(s) of such facilities will have the ability to enforce their security over the assets of the Company and to dispose of or liquidate (on their own behalf or through a security trustee or receiver) the assets of the Company in a manner which is beyond the control of the Company. In such an enforcement scenario, there is no guarantee that there will be sufficient proceeds from the disposal or liquidation of the Company assets to repay any amounts due and payable on the Shares and this may adversely affect the performance of the Company’s business, financial condition, results of operations and/or its NAV.

Exculpation and Indemnification

The Articles contain provisions that, subject to applicable law, reduce or modify the duties that the Indemnified Persons would otherwise owe to the Company and the Shareholders. The Portfolio Manager will assume no

responsibility under the Portfolio Management Agreement other than to render the services called for thereunder and affecting the duties and functions that have been delegated to it thereunder in good faith and, subject to the standard of conduct described in the next succeeding sentence. The Portfolio Manager will not be responsible for any action or inaction of the Company in declining to follow any advice, recommendation or direction of the Portfolio Manager. Further, Indemnified Persons will incur no liability to the Company or any Shareholder in the absence of a Triggering Event, except as otherwise required by applicable law (including the Companies Law). Any claims arising from a Triggering Event shall be limited to actual out-of-pocket damages incurred as a direct consequence of the Triggering Event, and shall not include punitive, consequential or other damages or lost profits.

Under the Articles, the Company, to the fullest extent permitted by applicable law (including the Companies Law), will indemnify each Indemnified Person against all Indemnified Losses to which an Indemnified Person may become subject by reason of any acts or omissions or any alleged acts or omissions arising out of such Indemnified Person's or any other person's activities in connection with the conduct of the business or affairs of the Company and/or an investment, unless such Indemnified Losses result from any action or omission which constitutes, with respect to such person, a Triggering Event; provided, that notwithstanding the foregoing, the members of the Advisory Board or members of any subcommittee thereof shall be subject only to a duty of good faith (it being understood that, to the fullest extent permitted by applicable law, any such member, in determining to take or refrain from taking any action, shall be permitted to take into consideration only the interests of the Shareholder and/or other person represented by such member and, in so doing, shall, to the fullest extent permitted by applicable law, be considered to have acted in good faith). Any claims arising from a Triggering Event shall be limited to actual out-of-pocket damages incurred as a direct consequence of the Triggering Event, and shall not include punitive, consequential or other damages or lost profits.

The fees, costs and expenses (whether or not advanced) and other liabilities resulting from the Company's indemnification obligations are generally operating expenses and will be paid by or otherwise satisfied out of the assets of the Company. The application of the foregoing standards may result in Shareholders having a more limited right of action in certain cases than they would in the absence of such standards. In particular, a "gross negligence" standard of care has been held in some jurisdictions to involve conduct that is closer to wilful misconduct. Even though such provisions in the Articles will not act as a waiver on the part of any Shareholder of any of its rights under applicable U.S. securities laws or other laws, the applicability of which is not permitted to be waived, the Company may bear significant financial losses even where such losses were caused by the negligence (even if heightened) of such Indemnified Persons.

RISKS RELATING TO THE INVESTMENT STRATEGY

General Background relating to the United States and European Risk Retention Requirements

Effective for CLOs on December 24, 2016, the so-called "risk retention" rules promulgated by U.S. federal regulators under the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "**Dodd-Frank Act**") require a "securitizer" or "sponsor" (which in the case of a CLO is considered the collateral manager) to retain directly or through a "majority-owned affiliate" at least 5% of the credit risk of the securitized assets. Highland CLO Management is being formed with intention of acting as a "majority-owned affiliate" of Highland as a "sponsor" for purposes of holding the applicable Retention Interest under U.S. Risk Retention Rules with respect to Managed CLOs and to provide a vehicle whereby the Company can invest in Managed CLOs. Acis CLO Management is intended to act as a "majority-owned affiliate" of Acis as a "sponsor" for purposes of holding the applicable Retention Interest under U.S. Risk Retention Rules with respect to Acis CLO 7 and to provide a vehicle whereby the Company can invest in Acis CLO 7.

The CLOs in which the Company invests may be structured with the intent to be compliant with the European risk retention requirements for securitisation transactions, meaning, collectively, (i) Articles 404-410 of Regulation (EU) No 575/2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No. 648/2012 (the "**CRR**") as supplemented by Commission Delegated Regulation (EU) No. 625/2014 (the "**CRR Retention Requirements**") (ii) Articles 51-54 of the Commission Delegated Regulation (EU) No 231/2013 (the "**AIFMD Level 2 Regulation**") implementing Article 17 of Directive 2011/61/EU on Alternative Investment Fund Managers (the "**AIFMD**"), and (iii) Article 254-257 of the Commission Delegated Regulation (EU) 2015/35 implementing Article 135(2) of Directive 2009/138/EC on the taking-up and pursuit of the business of Insurance and Reinsurance, as amended by Directive 201/51/EU (and as supplemented by Articles 254-257 of Commission

Delegated Regulation (EU) 2015/35) (the “**Solvency II Level 2 Regulation**”), each together with any applicable guidance, technical standards and related documents published by any European regulator in relation thereto and any implementing laws or regulations in force in any Member State of the European Union (together with the CRR Retention Requirements and the AIFMD Level 2 Regulation, the “**EU Retention Requirements**” and, together with the risk retention requirements under the U.S. Risk Retention Rules, the “**Retention Requirements**”). Any such Company investments in CLOs intended to be compliant with the EU Retention Requirements will continue to be subject to the EU Retention Requirements. However, it is expected that, going forward, the Company’s investments in CLOs will be done primarily on an indirect basis through its indirect interest in the Management Companies. As used herein, any reference to the Company’s investments in CLOs or CLO Retention Notes shall be deemed to refer primarily to (i) prior to the formation of the Management Companies, the CLO securities the Company acquired directly and (ii) following the formation of the Management Companies, the indirect interests in CLOs it intends to hold through the applicable Management Company. Furthermore, any reference to Managed CLOs or CLOs managed by Highland, Acis, the Portfolio Manager and the Management Companies shall be deemed to refer primarily to (i) for CLOs formed prior to the formation of Acis, CLOs managed by Highland (ii) for CLOs formed after the formation of Acis and prior to the formation of Acis CLO Management, CLOs managed by Acis, (iii) for CLOs formed following the formation of Acis CLO Management and prior to the formation of Highland CLO Management, CLOs managed by Acis CLO Management and (iv) for CLOs formed following the formation of Highland CLO Management, CLOs managed by Highland CLO Management.

Although the Company, the Portfolio Manager, Highland, Acis and the Management Companies intend to comply with the Retention Requirements, there has been no explicit guidance regarding how entities may be structured for this purpose and therefore the regulatory environment in which the CLOs intend to operate is highly uncertain. There can be no assurance that applicable governmental authorities will agree that any of the transactions, structures or arrangements entered into by the Company, Highland, Acis or the applicable Management Company, and the manner in which it expects to hold retention interests, will satisfy the Retention Requirements, including any transactions pursuant to which Highland or Acis, as applicable, may hold their respective indirect ownership interests in the applicable Management Companies through, or transfer such interests to, affiliates that are intended to be, directly or indirectly, majority controlled, are majority controlled by or are under common majority control with, Highland or Acis, as applicable, with the intention that the Management Companies will remain their respective “majority-owned affiliates” for purposes of the U.S. Risk Retention Rules. If such transactions, structures or arrangements are determined not to comply with the Retention Requirements, Highland, Acis, the applicable Management Company or the Company (as applicable) could become subject to regulatory action which could in turn materially and adversely affect the Company and/or the potential return to shareholders. The impact of the Retention Requirements on the securitization market is also unclear and such rules may negatively impact the value of the CLOs and their underlying assets.

The investments may be difficult to value accurately and, as a result, the Company may be subject to valuation risk

The Company’s portfolio may at any given time include, directly and indirectly, securities or other financial instruments or obligations which are very thinly traded, for which no market exists or which are restricted as to their transferability under applicable securities laws. These investments may be extremely difficult to value accurately. Further, because of overall size or concentration in particular markets of positions held by the Company, the value of its investments which can be liquidated may differ, sometimes significantly, from their valuations. Third party pricing information may not be available for certain positions held by the Company. Investments to be held by the Company may trade with significant bid-ask spreads. The Company is entitled to rely, without independent investigation, upon pricing information and valuations furnished by third parties, including pricing services and valuation sources. In the absence of fraud, gross negligence (under New York law), bad faith or manifest error, valuation determinations in accordance with the Company’s valuation policy will be conclusive and binding.

Market factors may result in the failure of the investment strategy

Strategy risk is associated with the failure or deterioration of an investment strategy such that most or all investment managers employing that strategy suffer losses. Strategy-specific losses may result from excessive concentration by multiple market participants in the same investment or general economic or other events that adversely affect particular strategies (for example the disruption of historical pricing relationships). Furthermore, an imbalance of supply and demand favouring borrowers could result in yield compression, higher leverage and less favourable terms to the detriment of all investors in the relevant asset class. The investment strategy employed by the Company is speculative

and involves substantial risk of loss in the event of a failure or deterioration in the financial markets, although the Company has certain investment limits which define to a degree how it invests. As a result, the Company's investment strategy may fail, and it may be difficult for the Company to amend its investment strategy quickly or at all should certain market factors appear, which may adversely affect the Company's business, financial condition, results of operations and/or its NAV.

The investment strategy of the Company includes investing predominantly in CLO Notes, and, under certain circumstances, asset management subsidiaries, all of which are subject to a risk of loss of principal

The investment strategy of the Company consists of investing predominantly in CLO Notes, directly and indirectly through its investment in the Management Companies, and, under certain circumstances, asset management subsidiaries. The company may also invest in senior secured loans (for the primary purpose of enabling Highland CLO Management to qualify as an "originator" for purposes of the EU Retention Requirements). Such investments may be considered to be subject to a level of risk in the case of deterioration of general economic conditions, which might increase the risk of loss of principal or investment. This could result in losses to the Company which could have a material adverse effect on the Company's business, financial condition, results of operations and/or its NAV.

In the event of a default in relation to an investment, the Company or the CLO in which the Company holds CLO Notes will bear a risk of loss of principal, and accrued interest

Performance and investor yield on the Company's investments (including both direct investments by the Company in senior secured loans (for the primary purpose of enabling Highland CLO Management to qualify as an "originator" for purposes of the EU Retention Requirements) and investments in senior secured loans held by CLOs in which the Company holds CLO Notes) may be affected by the default or perceived credit impairment of such investments and by general or sector specific credit spread widening. Credit risks associated with the investments include (among others): (i) the possibility that earnings of an obligor may be insufficient to meet its debt service obligations; (ii) an obligor's assets declining in value; and (iii) the declining creditworthiness, default and potential for insolvency of an obligor during periods of rising interest rates and economic downturn. An economic downturn and/or rising interest rates could severely disrupt the market for the investments and adversely affect the value of the investments and the ability of the obligors thereof or the CLO to repay principal and interest. In turn, this may adversely affect the Company's business, financial condition, results of operations and/or its NAV.

In the event of a default in relation to an investment held by the Company or a CLO in which the Company holds CLO Notes, the Company will bear a risk of loss of principal and accrued interest on that investment. Any such investment may become defaulted for a variety of reasons, including non-payment of principal or interest, as well as breaches of contractual covenants. A defaulted investment may become subject to workout negotiations or may be restructured by, for example, reducing the interest rate, a write-down of the principal, and/or changes to its terms and conditions. Any such process may be extensive and protracted over time, and therefore may result in substantial uncertainty with respect to the ultimate recovery on the defaulted investment. In addition, significant costs might be imposed on the lender, further affecting the value of the investment. The liquidity in such defaulted investments may also be limited and, where a defaulted investment is sold, it is unlikely that the proceeds from such sale will be equal to the amount of unpaid principal and interest owed on that investment. This would adversely affect the value of the Company's investment portfolio and, by extension, its business, financial condition, results of operations and/or its NAV.

In the case of secured loans, restructuring can be an expensive and lengthy process which could have a material negative effect on the Company's anticipated return on the restructured loan. By way of example, it would not be unusual for any costs of enforcement to be paid out in full before the repayment of interest and principal. This would substantially reduce the Company's anticipated return on the restructured loan.

The illiquidity of investments may have an adverse impact on their price and the Company's ability to trade in them or require significant time for capital gains to materialise

Credit markets may from time to time become less liquid, leading to valuation losses on the investments making it difficult to acquire or dispose of them at prices the Company considers their fair value. Accordingly, this may impair the Company's ability to respond to market movements and the Company may experience adverse price movements upon liquidation of such investments. Liquidation of portions of the portfolio under these circumstances could produce realised losses. The size of the Company's positions may magnify the effect of a decrease in market liquidity for such

instruments. Settlement of transactions may be subject to delay and uncertainty. Such illiquidity may result from various factors, such as the nature of the instrument being traded, or the nature and/or maturity of the market in which it is being traded, the size of the position being traded, or lack of an established market for the relevant securities. Even where there is an established market, the price and/or liquidity of instruments in that market may be materially affected by certain factors.

The investment objective of the Company is to provide investors with stable income returns and capital appreciation from exposure on an indirect basis to a portfolio of predominantly floating rate senior secured loans, CLO Notes and, under certain circumstances, asset management subsidiaries. Investments which are in the form of loans are not as easily purchased or sold as publicly traded securities due to the unique and more customised nature of the debt agreement and the private syndication process. As a result, there may be a significant period between the date that the Company makes an investment and the date that any capital gain or loss on such investment is realised. Moreover, the sale of restricted and illiquid securities may result in higher brokerage charges or dealer discounts and other selling expenses than the sale of securities eligible for trading on national securities exchanges or in the over-the-counter markets. Further, the Company may not be able readily to dispose of such illiquid investments and, in some cases, may be contractually prohibited from disposing of such investments for a specified period of time, which could materially and adversely affect the Company's business, financial condition, results of operations and/or its NAV. See further the risk factor titled "*The Company will be unable to liquidate, sell, hedge or otherwise mitigate its credit risk under or associated with the CLO Retention Notes until such time as the securities of the relevant CLO have been redeemed in full (whether at final maturity or early redemption)*" below.

The Company may hold a relatively concentrated portfolio

The Company may hold a relatively concentrated portfolio. There is a risk that the Company could be subject to significant losses if any obligor, especially one with whom the Company had a concentration of investments, were to default or suffer some other material adverse change. The level of defaults in the portfolio and the losses suffered on such defaults may increase in the event of adverse financial or credit market conditions. Any of these factors could adversely affect the value of the Company's investment portfolio and, by extension, its business, financial condition, results of operations and/or its NAV.

A significant portion of the Company's investment portfolio is expected to comprise directly or indirectly of Managed CLOs advised by Highland, Acis, the Portfolio Manager or a Management Company, as the CLO Manager. The performance of the Company's portfolio depends heavily on the skills of Highland, Acis, the Portfolio Manager and the Management Companies, as applicable, in analyzing, selecting and managing the relevant CLOs. See further the sections titled "*Risks Relating to Highland and Acis*" and "*Conflicts of Interest*" below.

The Company may be exposed to foreign exchange risk, which may have an adverse impact on the value of its assets and on its results of operations

The base currency of the Company is the U.S. Dollar. Certain of the Company's assets may be invested in securities and other investments which are denominated in other currencies. Accordingly, the Company will necessarily be subject to foreign exchange risks and the value of its assets may be affected unfavourably by fluctuations in currency rates. Although the Company may utilise financial instruments to hedge against declines in the value of such assets as a result of changes in currency exchange rates, it is not obliged to do so and may terminate any hedge contract at any time. Moreover, it may not be possible for the Company to hedge against a particular change or event at an acceptable price or at all. In addition, there can be no assurance that any attempt to hedge against a particular change or event would be successful, and any such hedging failure could materially and adversely affect the Company's business, financial condition, results of operations and/or its NAV.

The hedging arrangements of the Company may not be successful

The Company's economic risks cannot be effectively hedged. However, in connection with the financing of certain investments, the Company may employ hedging techniques designed to reduce the risks of adverse movements in interest rates, securities' prices and/or currency exchange rates. However, some residual risk may remain as a result of imperfections and inconsistencies in the market and/or in the hedging contract. While such hedging transactions may reduce certain risks, they create others. The Company directly or indirectly (through affiliates and subsidiaries) will not be permitted to enter into hedging with respect to the CLO Retention Notes.

The Company may utilise certain derivative instruments (including, without limitation, single-name credit default swaps, credit default swap and loan credit default swap indexes, equity futures and equity indexes) for hedging purposes. However, even if used primarily for hedging purposes, the prices of derivative instruments are highly volatile, and acquiring or selling such instruments involves certain leveraged risks. There may be an imperfect correlation between the instrument acquired for hedging purposes and the investments or market sectors being hedged, in which case, a speculative element is added to the highly leveraged position acquired through a derivative instrument primarily for hedging purposes. In particular, the investments which are in the form of loans may, in certain circumstances, be repaid at any time on short notice at no cost, and accordingly the hedging of interest rate or currency risk in such circumstances may be less precise than is the case with investments in the public securities market.

Furthermore, default by any hedging counterparty in the performance of its obligations could subject the investments to unwanted credit and market risks. Accordingly, although the Company may benefit from the use of hedging strategies, failure to properly hedge the market risk in the investments and/or default of a counterparty in the performance of its obligations under a hedging contract may have a material adverse effect on the Company's business, financial condition, results of operations and/or its NAV, and such material adverse effects may exceed those which may have resulted had no hedging strategy been employed.

Under certain hedging contracts that the Company may enter into, the Company may be required to grant security interests over some of its assets to the relevant counterparty as collateral

In connection with certain hedging contracts, the Company may be required to grant security interests over some of its assets to the relevant counterparty to such hedging contract as collateral. Such hedging contracts typically will give the counterparty the right to terminate the agreement upon the occurrence of certain events. Such termination events may include, among others, a failure by the Company to pay amounts owed when due, a failure to provide required reports or financial statements, a decline in the value of the investments secured as collateral, a failure to maintain sufficient collateral coverage, a failure by the Company to comply with its investment policy and any investment restrictions, key changes in the Company's management, a significant reduction in the Company's Net Asset Value, and material violations of the terms, representations, warranties or covenants contained in the hedging contract, as well as other events determined by the counterparty. If a termination event were to occur, there may be a material adverse effect on the Company's business, financial condition, results of operations and/or its NAV.

The use of leverage by the Company may increase the volatility of returns and providers of leverage would rank ahead of investors in the Company in the event of insolvency

The Company may employ leverage in order to increase investment exposure with a view to achieving its target return, in the form of one or more committed credit facilities. Leverage may come in the form of CLO securitizations.

While leverage presents opportunities for increasing total returns, it can also have the effect of increasing the volatility of the Shares, including the risk of total loss of the amount invested. If income and capital appreciation on investments made with borrowed funds are less than the costs of the leverage, the Net Asset Value will decrease. The effect of the use of leverage is to increase the investment exposure, the result of which is that, in a market that moves adversely, the possible resulting loss to investors' capital would be greater than if leverage were not used. As a result of leverage, small changes in the value of the underlying assets may cause a relatively large change in the value of the Company. Many financial instruments used to employ leverage are subject to variation or other interim margin requirements, which may force premature liquidation of investments. Investors should be aware that the use of leverage by the Company can be considered to multiply the leverage effect on their investment returns in the Company. As described above, while this effect may be beneficial when markets' movements are favourable, it may result in a substantial loss of capital when markets' movements are unfavourable.

In addition, such leverage may involve granting of security or the outright transfer of specific investments in the portfolio. Since there is no security created in respect of the Shares, any insolvency of the Shareholders could rank behind the Company's financing and hedging counterparties, whose claims will be considered as indebtedness of the Company and may be secured. Leverage does create opportunities for greater total returns on the investments but simultaneously may create special risk considerations by magnifying changes in the total value of the Net Asset Value and in the yield on the investments held by the Company.

In addition, to the extent leverage is employed, the Company may be required to refinance transactions from time to time. On each refinancing, the applicable counterparty may choose to re-negotiate the terms of each transaction or indeed not to refinance the transaction at all. To the extent refinancing facilities are not available in the market at economic rates or at all, the Company may be required to sell assets at disadvantageous prices. Any such deleveraging may result in losses on investments which could be severe and accordingly could have a material adverse effect on the Company's business, financial condition, results of operations and/or its NAV.

Interest rate fluctuations could expose the Company to additional costs and losses

The prices of the investments that may be held by the Company tend to be sensitive to interest rate fluctuations and unexpected fluctuations in interest rates could cause the corresponding prices of a position to move in directions which were not initially anticipated. In addition, interest rate increases generally will increase the interest carrying costs of borrowed securities and leveraged investments. Further, the Company may invest in both floating and fixed rate securities and interest rate movements will affect those respective securities differently. In particular, when interest rates rise significantly the value of fixed interest rate securities often fall. Furthermore, to the extent that interest rate assumptions underlie the hedging of a particular position, fluctuations in interest rates could invalidate those underlying assumptions and expose the Company to additional costs and losses. Any of the above factors could materially and adversely affect the Company's business, financial condition, results of operations and/or its NAV.

Additional Information about LIBOR

In a speech on 27 July 2017, Andrew Bailey, the Chief Executive of the Financial Conduct Authority ("FCA"), announced the FCA's intention to cease sustaining LIBOR from the end of 2021.

The FCA has statutory powers to compel panel banks to contribute to LIBOR where necessary. The FCA has decided not to ask, or to require, that panel banks continue to submit contributions to LIBOR beyond the end of 2021. The FCA has indicated that the current panel banks will voluntarily sustain LIBOR until the end of 2021. The FCA does not intend to sustain LIBOR through using its influence or legal powers beyond that date. The FCA's intention is that after 2021, it will no longer be necessary for the FCA to persuade, or to compel, banks to submit to LIBOR due to the development of alternative benchmark rates, which the FCA suggested should be based on transactions and not on reference rates that do not have active underlying markets to support them. As of the date of this Offering Memorandum, no specific alternative rates have been generally agreed in the CLO market.

It is possible that the LIBOR administrator, ICE Benchmark Administration, and the panel banks could continue to produce LIBOR on the current basis after 2021, if they are willing and able to do so. However, the survival of LIBOR in its current form, or at all, is not guaranteed after 2021 and, if LIBOR in its current form does not survive, it could cause a disruption in the credit markets generally, which could negatively impact the market value and/or transferability of the Notes.

It is currently unclear how LIBOR would be determined pursuant to existing underlying CLO indentures if LIBOR ceased to exist. If an alternative or a successor benchmark rate were determined, it may increase the risk of a mismatch between the interest rate applicable to the underlying loan assets and the interest rate applicable to the underlying collateral obligations of the CLOs held by the Company. Such mismatch could have a material adverse effect on the value and liquidity of the CLO Notes held by the Company.

Investors should be aware that: (a) any of these changes or any other changes to LIBOR could affect the level of the published rate, including to cause it to be lower and/or more volatile than it would otherwise be; (b) if the applicable rate of interest on any collateral obligation held by the Company is calculated with reference to a currency or tenor which is discontinued, such rate of interest will then be determined by the provisions of the affected collateral obligation, which may include determination by the relevant calculation agent in its discretion; (c) the administrator of LIBOR will not have any involvement in the collateral obligations or notes linked to those obligations and may take any actions in respect of LIBOR without regard to the effect of such actions on the collateral obligations or the notes; and (d) any uncertainty in the value of LIBOR or the admissions made by financial institutions that LIBOR has been manipulated or any uncertainty in the prominence of LIBOR as a benchmark interest rate due to the recent regulatory reforms may adversely affect liquidity of the collateral obligations or the notes in the secondary market and their market value. Any of the above or any other significant change to the setting of LIBOR could materially and adversely affect the Company's business, financial condition, results of operations and/or its NAV.

In the event of the insolvency of an obligor in respect of an investment, or of an underlying obligor in respect of an investment, the return on such investment to the Company may be adversely impacted by the insolvency regime or insolvency regimes which may apply to that obligor or underlying obligor and any of their respective assets

In the event of the insolvency of an obligor in respect of an investment (and in the case of the CLO Notes, the obligors of the assets within the relevant CLO's portfolio), the Company's (or the CLO issuer's, in the case of CLO Notes) recovery of amounts outstanding in insolvency proceedings may be impacted by the insolvency regimes in force in the jurisdiction of incorporation of such obligor or in the jurisdiction in which such obligor mainly conducts its business (if different from the jurisdiction of incorporation), and/or in the jurisdiction in which the assets of such obligor are located. Such insolvency regimes impose rules for the protection of creditors and may adversely affect the ability to recover such amounts as are outstanding from the insolvent obligor under the investment, which may adversely affect the Company's business, financial condition, results of operations and/or its NAV.

Similarly, the ability of obligors to recover amounts owing to them from insolvent underlying obligors may be adversely impacted by any such insolvency regimes applicable to those underlying obligors, which in turn may adversely affect the abilities of those obligors to make payments due under the investment to the Company on a full or timely basis.

In particular, it should be noted that the United States and a number of European jurisdictions operate unpredictable insolvency regimes which may cause delays to the recovery of amounts owed by insolvent obligors or underlying obligors subject to those regimes. The different insolvency regimes applicable in the different jurisdictions result in a corresponding variability of recovery rates for senior secured loans, entered into or issued in such jurisdictions, any of which may have a material adverse effect on the performance of a CLO and, by extension, the Company's business, financial condition, results of operations and/or its NAV.

A CLO issuer may be subject to losses on investments as a result of insolvency or clawback legislation and/or fraudulent conveyance findings by courts

Various laws enacted for the protection of creditors and stakeholders may apply to certain investments that are debt obligations, although the existence and applicability of such laws will vary between jurisdictions. For example, if a court were to find that an obligor did not receive fair consideration or reasonably equivalent value for incurring indebtedness evidenced by an investment and the grant of any security interest securing such investment, and, after giving effect to such indebtedness, the obligor: (i) was insolvent; (ii) was engaged in a business for which the assets remaining in such obligor constituted unreasonably small capital; or (iii) intended to incur, or believed that it would incur, debts beyond its ability to pay such debts as they mature, such court may: (a) invalidate such indebtedness and such security interest as a fraudulent conveyance; (b) subordinate such indebtedness to existing or future creditors of the obligor; or (c) recover amounts previously paid by the obligor (including to a CLO issuer) in satisfaction of such indebtedness or proceeds of such security interest previously applied in satisfaction of such indebtedness. In addition, if an obligor in whose debt a CLO issuer has an investment becomes insolvent, any payment made on such investment may be subject to avoidance, cancellation and/or clawback as a "preference" if made within a certain period of time (which for example under some current laws may be as long as two years) before insolvency.

In general, if payments on an investment are voidable, whether as fraudulent conveyances, extortionate transactions or preferences, such payments may be recaptured either from the initial recipient or from subsequent transferees of such payments. To the extent that any such payments are recaptured from a CLO issuer, there will be an adverse effect on the performance of the CLO issuer and, by extension, on the Company's business, financial condition, results of operations and/or its NAV.

The due diligence process that the Company plans to undertake in evaluating specific investment opportunities may not reveal all facts that may be relevant in connection with such investment opportunities and any corporate mismanagement, fraud or accounting irregularities may materially affect the integrity of the Company's due diligence on investment opportunities

When conducting due diligence and making an assessment regarding an investment, the Company will be required to rely on resources available to it, including internal sources of information as well as information provided by existing and potential obligors, any equity sponsor(s), lenders and other independent sources. The due diligence process may at times be required to rely on limited or incomplete information.

The Portfolio Manager will select investments on the Company's behalf in part on the basis of information and data relating to potential investments filed with various government regulators and publicly available or made directly available to the Portfolio Manager by the entities filing such information or third parties. Although the Portfolio Manager will evaluate all such information and data and seek independent corroboration when it considers it appropriate and reasonably available, the Portfolio Manager will not be in a position to confirm the completeness, genuineness or accuracy of such information and data. The Portfolio Manager is dependent upon the integrity of the management of the entities filing such information and of such third parties as well as the financial reporting process in general.

The value of an investment made by the Portfolio Manager on the Company's behalf may be affected by fraud, misrepresentation or omission on the part of an obligor, underlying obligor, any related parties to such obligor or underlying obligor, or by other parties to the investment (or any related collateral and security arrangements). Such fraud, misrepresentation or omission may adversely affect the value of the investment and/or the value of the collateral underlying the investment in question and may adversely affect the ability of the Portfolio Manager's on the Company's behalf to enforce its contractual rights relating to that investment or the relevant obligor's ability to repay the principal or interest on the investment.

Investment analysis and decisions by the Portfolio Manager may be undertaken on an expedited basis in order to make it possible for the Portfolio Manager to take advantage of short-lived investment opportunities. In such cases, the available information at the time of an investment decision may be limited, inaccurate and/or incomplete. Furthermore, the Portfolio Manager may not have sufficient time to evaluate fully such information even if it is available.

Accordingly, the Portfolio Manager cannot guarantee that the due diligence investigation it carries out with respect to any investment opportunity will reveal or highlight all relevant facts that may be necessary or helpful in evaluating such investment opportunity. Any failure by the Portfolio Manager to identify relevant facts through the due diligence process may cause it to make inappropriate investment decisions, which may have a material adverse effect on the Company's business, financial condition, results of operations and/or its NAV.

The collateral and security arrangements attached to an investment may not have been properly created or perfected, or may be subject to other legal or regulatory restrictions

The collateral and security arrangements in relation to secured obligations in which the Company may invest (and the security arrangements relating to the underlying assets of CLOs) will be subject to such security or collateral having been correctly created and perfected and any applicable legal or regulatory requirements which may restrict the giving of collateral or security by an obligor, such as, for example, thin capitalisation, over-indebtedness, financial assistance and corporate benefit requirements. If the investments do not benefit from the expected collateral or security arrangements, this may adversely affect the value of, or in the event of a default, the recovery of principal or interest from, such investments. Accordingly, any such failure properly to create or perfect collateral and security interests attaching to the investments may adversely affect the performance of the CLO issuer and/or the Company and, by extension, the Company's business, financial condition, results of operations and/or its NAV.

The investments will be based in part on valuations of collateral which are subject to assumptions and factors that may be incomplete, inherently uncertain or subject to change

A component of the Company's analysis of the desirability of making a given investment relates to the estimated residual or recovery value of such investments in the event of the insolvency of the obligor (and in the case of the CLO Notes, the obligors of the assets within the relevant CLO's portfolio). This residual or recovery value will be driven primarily by the value of the anticipated future cash flows of the obligor's business and by the value of any underlying assets constituting the collateral for such investment. The anticipated future cash flows of the obligor's business and the value of collateral can, however, be extremely difficult to predict as in certain circumstances market quotations and third party pricing information may not be available. If the recovery value of the collateral associated with the investments in which the Company or a CLO issuer invests decreases or is materially worse than expected by the Company or a CLO issuer (as applicable), such a decrease or deficiency may affect the value of the investments made by the Company or a CLO issuer. Accordingly, there will be an adverse effect on the performance of the CLO issuer and/or the Company and, by extension, on the Company's business, financial condition, results of operations and/or its NAV.

CLO Income Notes are volatile and interest and principal payments payable on the CLO Income Notes are not fixed

CLO Income Notes are the most subordinated tranche of a CLO and all payments of principal and interest on such CLO Income Notes are fully subordinated. Interest and principal payments are not fixed but are based on residual amounts available to make such payments. As a result, payments on such CLO Income Notes will be made by the CLO issuer to the extent of available funds, and no payments thereon will be made until amongst other things (a) the payment of certain costs, fees and expenses have been made and (b) interest and principal (respectively) has been paid on the more senior notes of the CLO. Non-payment of interest or principal on such CLO Income Notes will be unlikely to cause an event of default in relation to the CLO issuer.

CLO Income Notes represent a highly leveraged investment in the underlying assets of the CLO issuer. Accordingly, it is expected that changes in the market value of such CLO Income Notes will be greater than changes in the market value of the underlying assets of the CLO issuer, which themselves are subject to credit, liquidity, interest rate and other risks. Utilisation of leverage is a speculative investment technique and involves certain risks to investors and will generally magnify the CLO Income Notes investors' opportunities for gain and risk of loss. In certain scenarios, the CLO Income Notes may be subject to a partial or a 100 per cent loss of invested capital. CLO Income Notes represent the most junior securities in a leveraged capital structure. As a result, any deterioration in performance of the asset portfolio of a CLO issuer, including defaults and losses, a reduction of realised yield or other factors, will be borne first by holders of such CLO Income Notes prior to the rest of the capital structure.

CLO Income Notes are a limited recourse obligation of the CLO issuer

CLO Income Notes are a limited recourse obligation of a CLO issuer and amounts payable on CLO Income Notes are payable solely from amounts received in respect of the collateral of the CLO issuer. Payments on CLO Income Notes prior to and following enforcement of the security over the collateral of a CLO issuer are subordinated to the prior payment of certain costs, fees and expenses of, or payable by, the CLO issuer and to payment of principal and interest on more senior notes of the CLO issuer. The holders of CLO Income Notes must rely solely on distributions on the collateral of the CLO for payment of principal and interest, if any, on the CLO Income Notes. There can be no assurance that the distributions on the collateral of a CLO will be sufficient to make payments on the CLO Income Notes. If distributions are insufficient to make payments on the CLO Income Notes, no other assets of the CLO issuer will be available for payment of the deficiency and following realisation of the collateral and the application of the proceeds thereof, the obligations of the CLO issuer to pay such deficiency shall be extinguished. Such shortfall will be borne in the first instance by the CLO Income Notes.

In addition, at any time whilst the CLO Income Notes are outstanding in a CLO, no CLO Income Notes holder shall be entitled to institute against the related CLO issuer, or join in any institution against such CLO issuer of, any bankruptcy, reorganization, arrangement, insolvency, examinership, winding up or liquidation proceedings under any applicable bankruptcy or similar law in connection with any obligations of the CLO issuer relating to the CLO Income Notes or otherwise owed to the CLO Income Notes holder, save for lodging a claim in the liquidation of the CLO issuer which is initiated by another party or taking proceedings to obtain a declaration as to the obligations of the CLO issuer, nor shall it have a claim arising in respect of the share capital of the CLO issuer.

Furthermore, following the establishment of the Management Companies, CLO Income Notes may not be held directly by the Company. As such the Company's interest in the CLO Income Notes may be indirect, and the Management Company, not the Company, will be entitled to exercise voting rights associated with the CLO Income Notes.

CLO Notes have limited liquidity

In addition to the restrictions mentioned in the section titled "*The Company will be unable to liquidate, sell, hedge or otherwise mitigate its credit risk under or associated with the CLO Retention Notes until such time as the securities of the relevant CLO have been redeemed in full (whether at final maturity or early redemption)*", there will usually be a limited market for notes representing collateralised loan obligations (including the CLO Notes). There is no guarantee that any party to a CLO transaction will make a secondary market in relation to the CLO Notes. There can be no assurance that a secondary market for any CLO Notes will develop or, if a secondary market does develop, that it will provide the holders of CLO Notes with liquidity of investment or that it will continue for the life of such notes. As a result, the Company may have to hold the CLO Notes for an indefinite period of time or until their early

redemption date or maturity date. Where a market does exist, to the extent that an investor wants to sell the CLO Notes, the price may, or may not, be at a discount from the outstanding principal amount. There may be additional restrictions on divestment in the terms and conditions of CLO Notes.

Investments in asset management subsidiaries may subject the Company to increased regulatory scrutiny or disputes related to CLOs or other investments managed by such asset management subsidiaries

As part of its business, the Portfolio Manager may advise the Company to invest in asset management subsidiaries, affiliated with the Company, Highland, Acis, the Portfolio Manager or the Management Companies and which may act as the asset manager of certain U.S. or European CLOs in order to satisfy certain U.S. or European risk retention requirements. Asset managers of U.S. or European CLOs operate in a highly regulated environment, and are subject to a comprehensive statutory and regulatory regime as well as oversight by governmental agencies. In light of the current conditions in the global financial markets and economy, regulators have increased their focus on the regulation of asset managers in the U.S. and Europe. New or modified regulations and related regulatory guidance, including under Basel III and the Dodd-Frank Act, may have unforeseen or unintended adverse effects on asset managers of CLOs. These international regulations could limit an asset management subsidiary from pursuing certain business opportunities and/or impose additional costs, and otherwise indirectly materially adversely affect the Company's business operations and have other negative consequences.

Investors will not have control over the CLO management activities of the Portfolio Manager, Highland, Acis or the Management Companies in CLOs

The Portfolio Manager, Highland, Acis and/or the Management Companies, in the capacity of CLO Manager of a CLO, will have the discretion to make collateral management decisions for such CLO, including with respect to asset selection, disposition and amendments of the underlying loans. In exercising such discretion, the Portfolio Manager, Highland, Acis and/or the applicable Management Company will be responsible to act solely in the best interests of the applicable CLO issuer, not the Company or any Investor. Any amendment, waiver or modification of an investment could postpone the receipt of payments in respect of such investment and/or reduce distributions to Investors. The shareholders will have no right to compel the Portfolio Manager, Highland, Acis or the Management Companies, in their roles as CLO Manager to take or refrain from taking any actions or decisions, and the actions or decisions taken by the Portfolio Manager, Highland, Acis or the Management Companies as CLO Manager may expose the Investors to losses on their investment.

United States retention requirements may affect future actions of the Company and negatively impact the leveraged loan market

As part of its business, the Company may invest in asset management subsidiaries, affiliated with the Company, the Portfolio Manager, Highland, Acis or the Management Companies and which may act as the asset manager of certain CLOs in order to satisfy the U.S. Risk Retention Rules.

On October 21, 2014, the U.S. Risk Retention Rules were issued and became effective on December 24, 2016 with respect to asset-backed securities collateralized by assets other than residential mortgages. The statements contained herein regarding how compliance with the U.S. Risk Retention Rules may be achieved by a CLO are solely based on publicly available information as of the date hereof. Except with respect to asset-backed securities transactions that satisfy certain exemptions, the U.S. Risk Retention Rules generally require one of the sponsors of asset-backed securities or a "majority-owned affiliate" thereof to retain not less than 5% of the credit risk of the assets collateralizing asset-backed securities. The preamble to the rule text in the U.S. Risk Retention Rules indicates that a party that organizes and initiates a securitization would be the "sponsor." In the case of many collateralized loan obligation transactions, the entity acting as collateral manager typically organizes and initiates a transaction and, therefore, would be considered the "sponsor" for U.S. Risk Retention Rules purposes, as further discussed in the preamble. The U.S. Risk Retention Rules provide that if there is more than one "sponsor" of a securitization transaction, each "sponsor" is to ensure that at least one "sponsor" (or its "majority-owned affiliate") retains the requisite U.S. Retention Interest.

It is expected that Highland or Acis, as applicable, will agree to act as "sponsor" for purposes of Managed CLOs in which the Company invests, but there can be no assurance, and no representation, made that any Governmental Authority will agree that such is the case. Each of Highland and Acis intends to treat the applicable Management Company as its "majority-owned affiliate" due to holding by it (or by affiliates that are intended to be, directly or

indirectly, majority controlled, are majority controlled by or are under common majority control with Highland or Acis, as applicable) of a controlling financial interest in such Management Company as determined under GAAP, although there can be no assurance that such Management Companies will maintain treatment as a “majority-owned affiliates” of Highland or Acis as “sponsors” given the lack of guidance in the U.S. Risk Retention Rules with respect to such affiliated situations. Moreover, there can be no guarantee that Highland or Acis will be able to maintain the treatment of such Management Company as a “majority-owned affiliate,” particularly if GAAP regulations or interpretations change over time.

Each of Highland or Acis, as applicable, may also hold their respective indirect ownership interests in the applicable Management Companies through, or transfer such interests to, affiliates that are intended to be, directly or indirectly, majority controlled, are majority controlled by or are under common majority control with, Highland or Acis, as applicable, with the intention that the Management Companies will remain their respective “majority-owned affiliates” for purposes of the U.S. Risk Retention Rules. There can be no assurance that following any such transfer any Governmental entity will agree that the applicable Management Company will remain a “majority-owned affiliate” of Highland or Acis, as applicable.

At this time, each potential investor should understand that there is uncertainty with respect to what is required to comply with the U.S. Risk Retention Rules in certain circumstances, and therefore there can be no assurance that, with respect to any Managed CLO or other CLO in which the Company invests, the applicable credit risk retention and disclosures with respect to such CLO will enable the applicable CLO Manager or U.S. retention holder to comply with the U.S. Risk Retention Rules.

In addition, there are a number of future uncertainties surrounding, U.S. Risk Retention Rules for CLO Managers, including: (i) the ultimate results of litigation currently in process brought by the Loan Syndications and Trading Association (LSTA), a major industry trade association, challenging, among other things, the regulators’ application of U.S. Risk Retention Rules to collateral managers of typical so-called open market CLOs, (ii) proposed legislation designed to exclude from U.S. Risk Retention Rules, collateral managers of certain defined “QCLOs” (qualified CLOs) and (iii) future directives and interpretations by Governmental Authorities with respect to the U.S. Risk Retention Rules. If such publicly available information is altered as a result of the foregoing (or anything else), there can be no assurance that, with respect to any Managed CLO or other CLO in which the Company invests, the applicable credit risk retention and disclosures would be viewed by any Governmental Authority as sufficient to meet the requirements under the U.S. Risk Retention Rules. The failure to satisfy the requirements of the U.S. Risk Retention Rules may have a material and adverse effect on the market value and/or liquidity of the applicable CLO Notes and on Highland, Acis and the Management Companies and the Company’s investments therein.

The failure by the Portfolio Manager, Highland, Acis and/or the Management Companies to comply with the U.S. Risk Retention Rules may have a material and adverse effect on the Company and/or the Portfolio Manager

The failure by the Portfolio Manager, Highland, Acis and/or the applicable Management Company to comply with the U.S. Risk Retention Rules with respect to any Managed CLO may result in regulatory actions and other proceedings being brought against the Portfolio Manager, Highland, Acis and/or the applicable Management Company, which could result in such person being required, among other things, to pay damages, transfer interests and/or acquire additional CLO Notes (which may or may not be available at such time for acquisition) or be subject to cease and desist orders or other regulatory action. In addition, a failure to remedy non-compliance with the U.S. Risk Retention Rules may also trigger a “cause” event under the applicable CLO Management Agreement and/or subject the Portfolio Manager, Highland, Acis and/or the applicable Management Company to adverse publicity and reputational risk resulting from such non-compliance. In addition, given the lack of clarity under the U.S. Risk Retention Rules with respect to the identity of the party responsible for holding U.S. risk retention interests upon a resignation or removal of a CLO Manager or an if the Portfolio Manager, Highland, Acis and/or the applicable Management Company resigns or the applicable holders of CLO Notes desire to remove the Portfolio Manager in connection with any such “cause” event, there may be no successor CLO Manager willing to accept appointment as such, in which case the Portfolio Manager, Highland, Acis and/or the applicable Management Company will be required to continue to act as CLO Manager under the applicable CLO Management Agreement. Further, given such lack of clarity under the U.S. Risk Retention Rules with respect to the identity of the party responsible for holding U.S. risk retention interests, there can be no assurance that Highland or Acis, as applicable, will be able to maintain compliance with the U.S. Risk Retention Rules following any transfer of ownership interests in an entity holding Retention Interests by Highland or Acis to their respective affiliates that are, directly or indirectly, majority controlled,

are majority controlled by or are under common majority control with, Highland or Acis, as applicable, particularly in situations involving CLOs which have already been issued when the related transfer occurs. As a result of any of the foregoing, the failure of the Portfolio Manager, Highland, Acis and/or the applicable Management Company to comply with the U.S. Risk Retention Rules may have a material and adverse effect on the market value and/or liquidity of the Company's investment in the applicable CLO Notes as well as on the business, condition (financial or otherwise), assets, operations or prospects of the Portfolio Manager, Highland, Acis and/or the applicable Management Company and the Company.

The Company will be unable to liquidate, sell, hedge or otherwise mitigate its credit risk under or associated with the CLO Retention Notes until such time as the securities of the relevant CLO have been redeemed in full (whether at final maturity or early redemption)

In connection with the intention to comply with the Retention Requirements, each Management Company will need to, amongst other things, (a) on the closing date of a Managed CLO, commit to purchase and retain CLO Notes held in the form and at least the minimum required under the applicable Retention Requirements, as applicable, for the relevant CLO (the "CLO Retention Notes") and (b) undertake that, for so long as any securities of the CLO remain outstanding (including the CLO Retention Notes), it will retain its interest in the CLO Retention Notes and will not (except to the extent permitted by the EU Retention Requirements, the accompanying regulatory technical standards or any other related guidance published by the European Securities and Markets Authority) sell, hedge or otherwise mitigate its credit risk under or associated with such CLO Retention Notes. The Company or the applicable Management Company, as applicable, may make certain representations and/or give certain undertakings in favour of Managed CLOs (and/or certain other transaction parties) in respect of its ongoing retention of the CLO Retention Notes and regarding its agreement to sell certain assets to such Managed CLOs from time to time. There are currently transactions in the market which are similar to the Managed CLOs, however if an applicable regulatory authority supervising investors in a Managed CLO were to conclude that the applicable Management Company was not holding the CLO Retention Notes in accordance with the CRR, it is possible, but far from certain, that this may negatively impact the investors in such Managed CLO. If such investors decided to take action against the Company or the applicable Management Company as a result of any negative impact, this may have an adverse effect on the Company's financial performance and prospects.

In addition, with the intention of achieving classification as an "originator" (as defined in the CRR) and complying with the CRR Retention Requirements if applicable to the relevant CLO, the applicable Management Company would be required to meet the Origination Requirements.

As a result of the above commitments, the applicable Management Company will be unable to liquidate, sell, hedge or otherwise mitigate its credit risk under or associated with the CLO Retention Notes until such time as the securities of the relevant CLO have been redeemed in full (whether at final maturity or early redemption). Consequently, if any shares were to become due and repayable in connection with any resolution for their redemption, the Company, the applicable Management Company will not be obliged to immediately sell, transfer or liquidate the CLO Retention Notes and the proceeds of such CLO Retention Notes (if any) will not be available until the final maturity or early redemption in full of the securities of the relevant CLO. In addition, cash held by the Company will not be able to be used to repay any shares to the extent that such repayment could leave the Company unable to continue to originate and sell assets to the CLO issuers in order to ensure that during the relevant CLO's reinvestment period the Company, the applicable Management Company has met the Origination Requirements.

The Company or the applicable Management Company directly or indirectly, may hold a controlling equity stake in the Managed CLOs; accordingly, upon exercise by the Company or the applicable Management Company an early redemption option will result in a full redemption of the applicable CLO securities. Neither the Company nor the applicable Management Company will generally be able to exercise any early redemption options during a "non-call period" (generally lasting two years) after the closing date of the CLO. As a result of this feature and the EU Retention Requirements, the relevant CLO Retention Notes will not be permitted to be sold, transferred or liquidated during this time. In addition, even after an early redemption option is permitted to be exercised, such an option usually contains a number of conditions to its exercise including, but not limited to, a threshold that the liquidation value of the CLO collateral exceed an amount which would pay (a) all expenses of the CLO and (b) principal and accrued interest on the CLO Notes senior to the CLO Income Notes. If the liquidation value of the portfolio will not achieve this threshold at the time the Company intends to exercise its early redemption option, the CLO will not be able to be optionally redeemed by the Company at such time. In such circumstances, the Company or the applicable Management Company

may not redeem the CLO Retention Notes until their final stated maturity (which may be in excess of 12 years), therefore producing no proceeds to pay to Shareholders until this point.

Potential non-compliance with or changes to the United States and European risk retention requirements

The purchase and retention of the CLO Retention Notes in a CLO will be undertaken by the Company or the applicable Management Company with the intention of achieving compliance with the U.S. Risk Retention Rules and/or the EU Retention Requirements by the relevant CLO.

The U.S. Risk Retention Rules and/or EU Retention Requirements may be amended, supplemented or revoked from time to time. There is no guarantee that existing CLOs or future CLOs will be grandfathered into the regime which results from such amendments, supplements or revocations and, as such, the CLOs in which the applicable Management Company is retaining the CLO Retention Notes, may become non-compliant with the U.S. Risk Retention Rules and/or EU Retention Requirements.

Liability for breach of a risk retention letter

The arranger of a CLO and certain other parties of a CLO in which a Management Company agrees to hold the CLO Retention Notes (in such capacity, the “**Retention Holder**”) will require the applicable Management Company to execute a risk retention letter. Under a risk retention letter the applicable Retention Holder will typically be required to, amongst other things, make certain representations, warranties and undertakings: (a) in relation to its acquisition and retention of the CLO Retention Notes for the life of the CLO; and (b) regarding its agreement to sell assets to the relevant CLO from time to time. If the applicable Retention Holder sells or is forced to sell the CLO Retention Notes prior to the maturity of the relevant CLO, or the applicable Retention Holder holds insufficient cash or investments to continually sell the assets to the CLO as described above or for any other reason the applicable Retention Holder is not considered to be an “originator” (as such term is defined in the CRR), the Company may be in breach of the terms of the related risk retention letter. In such circumstances the arranger of the relevant CLO and the other parties to the related risk retention letter would have recourse to the applicable Retention Holder for losses incurred as a result of such breach. Such claims may reduce, or entirely diminish any cash or assets of the Company which may have been available to make payments on the Shares.

RISKS RELATING TO HIGHLAND AND ACIS

Past Performance Not Indicative of Future Results

The past performance of Highland and Acis and their principals and affiliates in other portfolios or investment vehicles, including, without limitation their outstanding CLO transactions, may not be indicative of the results that the Company may be able to achieve. Similarly, the past performance of Highland, Acis and their principals and affiliates over a particular period may not necessarily be indicative of the results that may be expected in future periods. Furthermore, the nature of, and risks associated with, the Company’s investments may differ substantially from those investments and strategies undertaken historically by Highland, Acis and their principals and affiliates. There can be no assurance that Highland’s or Acis’ investment recommendations will perform as well as past investments of Highland or Acis or their principals and affiliates, that the Company will be able to avoid losses or that the Company will be able to make investments similar to the past investments of Highland, Acis and their principals and affiliates. In addition, such past investments may have been made utilizing a leveraged capital structure, an asset mix and fee arrangements that are different from the anticipated capital structure, asset mix and fee arrangements of the Company. Moreover, because the investment criteria that govern investments in the Company’s portfolio do not govern the investments and investment strategies of Highland, Acis and their principals and affiliates generally, such investments conducted in accordance with such criteria, and the results they yield, are not directly comparable with, and may differ substantially from other investments undertaken by Highland, Acis and their principals and affiliates.

Acis, as CLO Manager, Relies on Highland to Perform Certain Services

Acis currently relies on Highland, a U.S. SEC-registered investment adviser under common control with Acis, pursuant to the ACM Services Agreements, to provide investment research and recommendations and operational support to Acis, including services in connection with credit research, due diligence of actual or potential investments,

the execution of investment transactions, and certain loan services and administrative services. If Highland does not continue to provide such services to Acis, or there is a departure or inability of certain Highland personnel to provide such services to Acis, there can be no assurances that Acis would be able to find a substitute service provider with the same experience as, or on the same terms as its ACM Services Agreements with, Highland. The inability of Acis to perform its duties under the applicable CLO Management Agreements or the ACLOM Services Agreements in accordance with the standard of care specified therein due to the termination of the Services Agreements could result in removal of Acis or Acis CLO Management, as applicable, under the applicable CLO Management Agreements for the Acis CLOs and Acis CLO 7.

Litigation Involving Highland and Acis

Highland and Acis currently are and have been previously subject to various legal proceedings, many of which have been due to the nature of operating in the distressed loan business in the U.S. The legal process is often the route of last resort to recover amounts due from delinquent borrowers. Shareholders have had an opportunity to discuss with Highland to their satisfaction all litigation matters against Highland and its affiliates unrelated to its distressed business. We currently do not anticipate these proceedings will have a material negative impact to the Company.

Failure to Comply with Investment Advisers Act May Have an Adverse Effect on the Portfolio Manager's Performance

Highland HCF Advisor and Highland CLO Management are relying advisers of Highland, and Highland is a registered investment adviser registered under the Investment Advisers Act and, as such, is subject to the provisions of the Investment Advisers Act. Acis CLO Management is a relying adviser of Acis, and Acis is a registered investment adviser registered under the Investment Advisers Act and, as such, is subject to the provisions of the Investment Advisers Act. Failure to comply with the requirements imposed on the Portfolio Manager, Highland, Acis and/or the Management Companies under the Investment Advisers Act may have a significant adverse effect on the Portfolio Manager, Highland, Acis and/or the applicable Management Company. The Portfolio Manager, Highland's, Acis' and/or the applicable Management Company's ability to act as CLO Manager for Managed CLOs in which the Company holds CLO Notes may also be adversely affected by negative publicity arising from any regulatory compliance failures or other inappropriate behavior attributed to or any other negative publicity related to the Portfolio Manager, Highland, Acis and/or the applicable Management Company, any affiliate thereof or any of their respective investment professionals.

SEC enforcement actions

There can be no assurance that the Portfolio Manager, Highland, Acis and/or the Management Companies or their affiliates will avoid regulatory examination and possibly enforcement actions. Recent SEC enforcement actions and settlements involving U.S.-based private fund advisers have involved a number of issues, including the undisclosed allocation of the fees, costs and expenses related to unconsummated co-investment transactions (i.e., the allocation of broken deal expenses), undisclosed legal fee arrangements affording the applicable adviser with greater discounts than those afforded to funds advised by such adviser. Although each of the Portfolio Manager, Highland, Acis and the Management Companies believe the foregoing practices to have been common historically amongst private fund advisers within the U.S. private funds industry, if the SEC or any other governmental authority, regulatory agency or similar body may take issue with, or in the case of insufficient disclosure regarding acceleration of certain special fees as described below, may continue to take issue with, past or future practices of the Portfolio Manager, Highland, Acis or the Management Companies or any of their affiliates as they pertain to any of the foregoing. In such instances, the Portfolio Manager, Highland, Acis or the Management Companies and/or such affiliates may be at risk for regulatory sanction. Even if an investigation or proceeding did not result in a sanction or the sanction imposed against the Portfolio Manager, Highland, Acis or the Management Companies was small in monetary amount, the Portfolio Manager, Highland, Acis and/or the applicable Management Company or their respective affiliates may be subject to adverse publicity relating to the investigation, proceeding or imposition of any such sanction.

Potential litigation and regulatory actions may materially and adversely affect the Portfolio Manager, Highland, Acis and/or the Management Companies

There can be no assurance that the Portfolio Manager, Highland, Acis and/or the Management Companies or their affiliates will avoid potential third party or other litigation or regulatory actions under existing laws (including the U.S. Risk Retention Requirements) or laws enacted in the future. Recent SEC enforcement actions and settlements involving U.S.-based private fund advisers have involved a number of issues, including undisclosed legal fee arrangements affording the applicable adviser with greater discounts than those afforded to funds advised by such adviser and the undisclosed acceleration of certain special fees. In addition, the failure by the Portfolio Manager, Highland, Acis and/or the Management Companies to comply with the U.S. Risk Retention Rules may result in regulatory actions and other proceedings being brought against the Portfolio Manager, Highland, Acis and/or the Management Companies. If the SEC or any other Governmental Authority takes issue with the practices of the Portfolio Manager, Highland, Acis and/or the Management Companies or any of their affiliates as they pertain to any of the foregoing, the Portfolio Manager, Highland, Acis and/or the Management Companies and/or any such affiliates will be at risk for regulatory sanction. Even if an investigation or proceeding did not result in a sanction or the sanction imposed against the Portfolio Manager, Highland, Acis and/or the Management Companies and/or such affiliates was small in monetary amount, the adverse publicity relating to the investigation, proceeding or imposition of these sanctions could harm the Company, the Portfolio Manager, Highland, Acis and/or the Management Companies and/or their respective affiliates' reputations which may adversely affect the market value and/or liquidity of the Debt. There is also a material risk that Governmental Authorities in the United States and beyond will continue to adopt new laws or regulations (including tax laws or regulations), or change existing laws or regulations, or enhance the interpretation or enforcement of existing laws and regulations including the U.S. Risk Retention Rules. Any such events or changes could occur during the term of the Debt and may materially and adversely affect the Portfolio Manager, Highland, Acis and/or the Management Companies and its ability to operate and/or pursue its management strategies on behalf of the Issuer. Such risks are often difficult or impossible to predict, avoid or mitigate in advance.

Dependence on Highland, Acis and other collateral managers of CLOs

A significant portion of the Company's investment portfolio will comprise of its investment in the Management Companies and in Managed CLOs. The Company's investment portfolio may also include CLOs managed by other asset managers. The performance of the Company's portfolio depends heavily on the skills of the Portfolio Manager, Highland, Acis, the Management Companies or such other asset managers in analyzing, selecting and managing the relevant CLOs. As a result, the Company and the CLOs will be highly dependent on the financial and managerial experience of certain investment professionals associated with the Portfolio Manager, Highland, Acis, the Management Companies and the other asset managers, none of whom is under any contractual obligation to the Company or such CLOs to continue to be associated with the Portfolio Manager, Highland, Acis, the applicable Management Company or such other collateral manager for the term of the Company or any particular CLO. The loss of one or more of these individuals could have a material adverse effect on the performance of the Company and the relevant CLO.

Furthermore, the Portfolio Manager has informed the Company that these investment professionals are also actively involved in other investment activities and will not be able to devote all of their time to the Company's business and affairs. In addition, individuals not currently associated with the Portfolio Manager may become associated with the Portfolio Manager and the performance of the Company and the Managed CLOs may also depend on the financial and managerial experience of such individuals. Moreover, the Portfolio Management Agreement may be terminated under certain circumstances.

The Company generally may not terminate the Portfolio Management Agreement, even in the event of the Portfolio Manager's poor performance

The Portfolio Management Agreement was negotiated between related parties and its terms may not be as favorable as if it had been negotiated with unaffiliated third parties. The Company may choose not to enforce, or to enforce less vigorously, certain of its rights under the Portfolio Management Agreement in an effort to maintain its ongoing relationship with the Portfolio Manager or Highland Capital Management, L.P., as the case may be.

Termination of the Portfolio Management Agreement is difficult and costly. In order to terminate the Portfolio Management Agreement without cause, the Company must (i) be required to register as an investment company under the provisions of the Investment Company Act of 1940 and it must notify the Portfolio Manager of such

requirement, (ii) the portfolio must be liquidated in full and its financing arrangements must have been terminated or redeemed in full, or (iii) it must reach a mutual agreement with the Portfolio Manager to terminate the agreement. The initial term of the Portfolio Management Agreement is three years, with automatic renewals of three years thereafter. The Company may not choose to not renew the Portfolio Management Agreement.

The Company's ability to terminate the Portfolio Management Agreement for "cause" is limited, including grounds of wilful violation of the Portfolio Management Agreement by the Portfolio Manager and fraud or criminal activity. However, poor performance by the Portfolio Manager is not grounds for termination for cause under the Portfolio Management Agreement. See "*Material Contracts*"

RISKS RELATING TO CONFLICTS OF INTEREST

Various Potential and Actual Conflicts of Interest

Various potential and actual conflicts of interest may arise from the overall investment activity of the Portfolio Manager, Highland, its clients and its affiliates. The following briefly summarizes some of these conflicts, but is not intended to be an exhaustive list of all such conflicts.

The Company will be subject to various conflicts of interest involving the Portfolio Manager and its affiliates

The following briefly summarizes certain potential and actual conflicts of interest which may arise from the overall investment activity of the Portfolio Manager, Highland, its clients and its affiliates, but is not intended to be an exhaustive list of all such conflicts. The scope of the activities of the Portfolio Manager, Highland, its affiliates, and the funds and clients managed or advised by Highland or any of its affiliates may give rise to conflicts of interest or other restrictions and/or limitations imposed on the Company in the future that cannot be foreseen or mitigated at this time.

As part of their regular business, the Portfolio Manager, Highland, its affiliates and their respective officers, directors, trustees, shareholders, members, partners, personnel and employees and their respective funds and investment accounts (collectively, the "**Related Parties**") hold, purchase, sell, trade or take other related actions both for their respective accounts and for the accounts of their respective clients, on a principal or agency basis, with respect to loans, securities and other investments and financial instruments of all types. The Portfolio Manager, its affiliates and their respective officers, directors, shareholders, members, partners, personnel and employees also provide investment advisory services, among other services, and engage in private equity, real estate and capital markets-oriented investment activities. The Related Parties will not be restricted in their performance of any such services or in the types of debt or equity investments which they may make. The Related Parties may have economic interests in or other relationships with obligors or issuers in whose obligations or securities or credit exposures the Company and/or the Managed CLOs may invest. In particular, the Related Parties may make and/or hold an investment in an obligor's or issuer's securities that may be *pari passu*, senior or junior in ranking to an investment in such obligor's or issuer's securities made and/or held by the Company and/or the Managed CLOs, or in which partners, security holders, members, officers, directors, agents, personnel or employees of such Related Parties serve on boards of directors or otherwise have ongoing relationships. Each of such ownership and other relationships may result in securities laws restrictions on transactions in such securities by the Company and/or the Managed CLOs and otherwise create conflicts of interest for the Company and/or the Managed CLOs. In such instances, the Related Parties may in their discretion make investment recommendations and decisions that may be the same as or different from those made with respect to the Company's and/or the Managed CLOs' investments. In connection with any such activities described above, the Related Parties may hold, purchase, sell, trade or take other related actions in securities or investments of a type that may be suitable to be included as investments by the Company and/or Managed CLOs. Other than with respect to new issue Highland CLOs as described below, the Related Parties will not be required to offer such securities or investments to the Company or Managed CLOs or provide notice of such activities to the Company or Managed CLOs. In addition, in providing services under the Portfolio Management Agreement and the CLO Management Agreements, the Portfolio Manager may take into account its relationship or the relationships of its affiliates with obligors and their respective affiliates, which may create conflicts of interest. Furthermore, in connection with actions taken in the ordinary course of business of the Portfolio Manager in accordance with its fiduciary duties to its other clients, the Portfolio Manager may take, or be required to take, actions which adversely affect the interests of the Company and/or Managed CLOs. Except as otherwise set forth herein, including with respect to Qualifying CLOs, Designated CLO Resets, Designated CLO

Refinancings and the NexBank Facility and any Permitted NexBank Credit Facility Amendments, the consent of the Advisory Board will be required with respect to transactions with any Related Party.

The Related Parties invested and may continue to make investments that would also be appropriate for the Company, the Portfolio Manager, the Management Companies and/or the Managed CLOs. Such investments may be different from those recommended to the Company or made on behalf of the Managed CLOs or the Management Companies. Neither the Portfolio Manager nor any Related Entity has any duty, in making or maintaining such investments, to act in a way that is favorable to the Company, the Management Companies and/or the Managed CLOs or to offer any such opportunity to the Company, other than with respect to new issue Highland CLOs as described below, or the Managed CLOs. The investment policies, fee arrangements and other circumstances applicable to such other parties may vary from those applicable to the Company, the Portfolio Manager, Highland, Acis, the Management Companies and the Managed CLOs. The Portfolio Manager and/or any Related Entity may also provide advisory or other services for a customary fee to issuers or obligors whose debt obligations or other securities are held by the Company, the Portfolio Manager, Highland, Acis, the Management Companies and/or the Managed CLOs, and neither the Shareholders nor the Company shall have any right to such fees. The Portfolio Manager, Highland, Acis, the Management Companies and/or any Related Entity may also have ongoing relationships with, render services to or engage in transactions with other clients, including other issuers of collateralized loan obligations and collateralized debt obligations, who invest in assets of a similar nature to those of the Company, the Portfolio Manager, Highland, Acis, the Management Companies and/or the Managed CLOs, and with companies whose securities or loans are acquired by the Company, the Portfolio Manager, Highland, Acis, the Management Companies and/or the Managed CLOs, and may own equity or debt securities issued by obligors of debt held by the Company, the Portfolio Manager, Highland, Acis, the Management Companies and/or the Managed CLOs. In connection with the foregoing activities, the Portfolio Manager, Highland, Acis, the Management Companies and/or any Related Entity may from time to time come into possession of material nonpublic information that limits the ability of the Portfolio Manager to advise the Company or the Management Companies or effect a transaction for Managed CLOs, and the Company's, the Management Companies' and/or the Managed CLOs' investments may be constrained as a consequence of Highland's or Acis' inability to use such information for advisory purposes or otherwise to effect transactions that otherwise may have been initiated on behalf of its clients, including the Company, the Management Companies and/or the Managed CLOs. In addition, officers or affiliates of the Portfolio Manager, Highland, Acis and/or Related Parties may possess information relating to obligors of debt held by the Company, the Management Companies and/or the Managed CLOs that is not known to the individuals at the Portfolio Manager responsible for monitoring such investments and performing the other obligations under the Portfolio Management Agreement or CLO Management Agreements.

During the Investment Period, the Company shall receive priority allocations with respect to all CLO Income Note investment opportunities with respect to new issue Highland CLOs, over the account of the Portfolio Manager, its affiliates and Other Accounts. For the avoidance of doubt, the Portfolio Manager shall otherwise allocate investment opportunities among the Company and Highland and its affiliates and Other Accounts in accordance with its allocation policy which requires allocations among clients to be fair and equitable over time as described below. The Portfolio Manager, Highland, Acis and their affiliates may, from time to time, be presented with investment opportunities, other than with respect to new issue Highland CLOs during the Investment Period, that fall within the investment objectives of the Company, the Management Companies and/or the Managed CLOs and other clients, funds or other investment accounts managed by Highland, Acis or their affiliates, and in such circumstances, the Portfolio Manager, Highland, Acis and their affiliates expect to allocate such opportunities among the Company, the Management Companies and/or the Managed CLOs and such other clients, funds or other investment accounts on a basis that the Portfolio Manager, Highland, Acis and their affiliates determine in good faith is appropriate taking into consideration such factors as the fiduciary duties owed to the Company, the Management Companies, the Managed CLOs and such other clients, funds or other investment accounts, the primary mandates of the Company, the Management Companies, the Managed CLOs and such other clients, funds or other investment accounts, the capital available to the Company, the Management Companies, the Managed CLOs and such other clients, funds or other investment accounts, any restrictions on investment, the sourcing of the transaction, the size of the transaction, the amount of potential follow-on investing that may be required for such investment and the other investments of the Company, the Management Companies, the Managed CLOs and such other clients, funds or other investment accounts, the relation of such opportunity to the investment strategy of the Company, the Management Companies and/or the Managed CLOs and such other clients, funds or other investment accounts, reasons of portfolio balance and any other consideration deemed relevant by the Portfolio Manager, Highland, Acis

and their affiliates in good faith. Subject to the Company's priority allocation with respect to new issue Highland CLOs, the Portfolio Manager, will allocate investment opportunities across the entities for which such opportunities are appropriate, consistent with (1) its internal conflict of interest and allocation policies and (2) the requirements of the Investment Advisers Act. The Portfolio Manager, will seek to allocate investment opportunities among such entities in a manner that is fair and equitable over time and consistent with its allocation policy. However, there is no assurance that such investment opportunities will be allocated to the Company, the Management Companies and/or the Managed CLOs fairly or equitably in the short term or over time and there can be no assurance that the Company, the Management Companies and/or any of the Managed CLOs will be able to participate in all such investment opportunities that are suitable for it.

Although the professional staff of the Portfolio Manager will devote as much time to the Company as the Portfolio Manager deems appropriate to perform its duties in accordance with the Portfolio Management Agreement and in accordance with reasonable commercial standards, the staff may have conflicts in allocating its time and services among the Company and the Portfolio Manager's other accounts.

The directors, officers, personnel, employees and agents of the Portfolio Manager and its Related Parties may, subject to applicable law, serve as directors (whether supervisory or managing), officers, personnel, employees, partners, agents, nominees or signatories, and receive arm's length fees in connection with such service, for the Company or entities that operate in the same or a related line of business as the Company or the Management Companies, or of other clients managed by the Portfolio Manager or its affiliates, or for any obligor or issuer in respect of the debt, equity securities or other investments held by the Company, the Management Companies and/or Managed CLOs, or any affiliate thereof, to the extent permitted by their governing instruments, or by any resolutions duly adopted by the Company, such other entities, or any obligor or issuer (or any affiliate thereof) in respect of any of the debt, equity securities or other investments held by the Company, the Management Companies and/or Managed CLOs pursuant to their respective governing instruments, and neither the Company, The applicable Management Company nor the Managed CLOs shall have the right to any such fees.

As further described below, the Portfolio Manager and its Related Parties may effect client cross-transactions where the Portfolio Manager advises the Company or a Management Company, or causes a Managed CLO, to effect a transaction between the Company, the applicable Management Company or such Managed CLO, as applicable, and another client advised by the Portfolio Manager or any of its affiliates. The Portfolio Manager, may engage in a client cross-transaction involving the Company, the Management Companies and/or Managed CLOs any time that the Portfolio Manager believes such transaction to be fair to the Company, the applicable Management Company and/or the Managed CLOs, as applicable, and such other client. By purchasing Shares of the Company, a Shareholder is deemed to have consented to such client cross-transactions between the Company, the applicable Management Company and another client of the Portfolio Manager or one of its Related Parties.

As further described below, the Portfolio Manager may effect principal transactions where Highland advises the Company, or causes a Managed CLO, to make and/or hold an investment, including an investment in securities, in which the Portfolio Manager and/or its affiliates have a debt, equity or participation interest, in each case in accordance with applicable law, which may include the Portfolio Manager obtaining the consent and approval of the Advisory Board of the Company prior to engaging in any such principal transaction between the Company and the Portfolio Manager or its affiliates. By purchasing Shares of the Company, a Shareholder is deemed to have consented to such procedures relating to principal transactions between the Company and the Portfolio Manager or its Related Entities, subject to consent of the Advisory Board. In addition, in the event a Managed CLO engages in a principal trade, consent of the client may consist of consent of the board of directors of such Managed CLO (or certain professionals contracted by the board of directors, to the extent relevant), and none of the Company or its Shareholders will have any additional consent rights with respect to such transaction.

The Portfolio Manager may advise the Company, or direct the Managed CLOs, to acquire or dispose of investments in cross trades between the Company or the Managed CLOs, as applicable, and other clients of the Portfolio Manager or its affiliates in accordance with applicable legal and regulatory requirements. In addition, the Company and/or the Managed CLOs may invest in securities of obligors or issuers in which the Portfolio Manager and/or its affiliates have a debt, equity or participation interest, and the holding and sale of such investments by the Company and/or Managed CLOs may enhance the profitability of the Portfolio Manager's own investments in such companies. Moreover, the Company and Managed CLOs may invest in assets originated by the Portfolio Manager or its affiliates. In each such case, the Portfolio Manager and such affiliates may have a potentially conflicting division

of loyalties and responsibilities regarding the Company or the Managed CLOs, as applicable, and the other parties to such trade. Under certain circumstances, the Portfolio Manager and its affiliates may determine that it is appropriate to mitigate such conflicts by selling an investment at a fair value that has been calculated pursuant to the Portfolio Manager's valuation procedures to another client managed or advised by the Portfolio Manager or such affiliates. In addition, the Portfolio Manager may enter into agency cross-transactions where it or any of its affiliates acts as broker for the Company or a Managed CLO, as applicable, and for the other party to the transaction, to the extent permitted under applicable law. The Portfolio Manager may obtain the Company's written consent as provided herein if any such transaction requires the consent of the Company under Section 206(3) of the Investment Advisers Act.

The Portfolio Manager and/or its Related Parties may participate in creditor committees or other committees with respect to the bankruptcy, restructuring or workout of obligors or issuers of debt obligations or securities held by the Company and/or the Managed CLOs. In such circumstances, the Portfolio Manager may take positions on behalf of itself or Related Parties that are adverse to the interests of the Company or the Managed CLOs in the relevant investment.

The Portfolio Manager and/or its Related Parties may act as an underwriter, arranger or placement or administrative agent, or otherwise participate in the origination, structuring, negotiation, syndication, administration or offering of CLOs or any senior secured loans purchased by the Company. Such transactions are on an arm's-length basis and may be subject to arm's-length fees. There is no expectation for preferential access to transactions involving CLOs or senior secured loans that are underwritten, originated, arranged or placed by the Portfolio Manager and/or its affiliates and the Company shall not have any right to any such fees.

There is no limitation or restriction on the Portfolio Manager or any of its Related Parties with regard to acting as investment adviser or collateral manager (or in a similar role) to other parties or persons. This and other future activities of the Portfolio Manager and/or its Related Parties may give rise to additional conflicts of interest. Such conflicts may relate to obligations that the Portfolio Manager's investment committee, the Portfolio Manager or its affiliates have to other clients.

The members of the Portfolio Manager's investment committee serve or may serve as personnel, officers, directors or principals of entities that operate in the same or a related line of business as the Company, or of other clients managed by the Portfolio Manager or its affiliates. In serving in these multiple capacities, they may have obligations to such other clients or investors in those entities, the fulfillment of which may not be in the best interests of the Company. The Company may compete with other entities managed by the Portfolio Manager and its affiliates for capital and investment opportunities.

There are generally no ethical screens or information barriers among the Portfolio Manager and certain of its affiliates of the type that many firms implement to separate persons who make investment decisions from others who might possess material, non-public information that could influence such decisions. If the Portfolio Manager, any of its personnel or its affiliates were to receive material non-public information about a particular obligor, issuer or CLO, or have an interest in causing the Company or a Managed CLO to acquire a particular CLO security, the Portfolio Manager may be prevented from causing the Company or Managed CLO to purchase or sell such asset due to internal restrictions imposed on the Portfolio Manager. Notwithstanding the maintenance of certain internal controls relating to the management of material non-public information, it is possible that such controls could fail and result in the Portfolio Manager, or one of its investment professionals, buying or selling an asset while, at least constructively, in possession of material non-public information. Inadvertent trading on material non-public information could have adverse effects on the Portfolio Manager's reputation, result in the imposition of regulatory or financial sanctions, and as a consequence, negatively impact the Portfolio Manager's ability to perform its portfolio management services to the Company and the Managed CLOs. In addition, while the Portfolio Manager and certain of its affiliates currently operate without information barriers on an integrated basis, such entities could be required by certain regulations, or decide that it is advisable, to establish information barriers. In such event, the Portfolio Manager's ability to operate as an integrated platform could also be impaired, which would limit the Portfolio Manager's access to personnel of its affiliates and potentially impair its ability to advise the Company and manage the Managed CLOs' investments.

RISKS RELATING TO AN INVESTMENT IN THE SHARES

Shareholders have no right to have their Shares redeemed or repurchased by the Company

The Company has been established as a closed-ended vehicle. Accordingly, there is no right or entitlement attaching to the Shares that allows them to be redeemed or repurchased by the Company at the option of the Shareholder.

There is no public market for the Shares, and a market for the Shares may never develop, which could result in Shareholders being unable to monetize their investment.

The Shares have not been registered under any securities exchange, and, unless so registered, may not be offered or sold except pursuant to an exemption from the applicable securities exchange regulator. It is not expected that the Shares will be listed on any securities exchange in the future. The Shares are newly issued securities for which there is no established trading market. In the absence of an active trading market, Shareholders may be unable to resell the Shares at the time and for the price desired or at all. The Company can provide no assurances that the Shares will not subsequently trade below the price at which they are purchased pursuant to this Offering Memorandum.

In connection with the Company filing any registration for any securities exchange, the Company will agree to use commercially reasonable efforts to satisfy the criteria for listing and list and thereafter maintain the listing on such exchange or market so long as it is in the best interests of the Company. Each market or exchange has initial listing criteria, including criteria related to minimum bid price, public float, market makers, minimum number of round lot holders and board independence requirements that the Company can give no assurance that it will meet. The Company's inability to list or include the Shares on a securities exchange could affect the ability of Shareholders to sell their Shares subsequent to the declaration of the effectiveness of any registration statement, and consequently adversely affect the value of such Shares. In such case, Shareholders would find it more difficult to dispose of, or to obtain accurate quotations as to the market value of, the Shares. In addition, the Company would have more difficulty attracting the attention of market analysts to cover it in their research. If the Shares are approved for listing or inclusion on a securities exchange, the Company will have no prior reporting history, and thus there is no way to determine the prices or volumes at which the Shares will trade. The Company can give no assurances as to the development or liquidity of any trading market for the Shares. Shareholders may not be able to resell their Shares at or near their original acquisition price, or at any price.

In the event a market for the Shares does develop, the Shares may trade at a discount to the Net Asset Value per Share and Shareholders may be unable to realise their Shares at the Net Asset Value per Share or at any other price

The Shares may trade at a discount to the Net Asset Value per Share for a variety of reasons, including due to market or economic conditions or to the extent investors undervalue the Company.

Subject to the Companies Law, under its Articles, the Company may issue additional securities, including Shares, for any purpose. Any additional issuances by the Company, or the possibility of such issue, may cause the price of the Shares to decline.

The existence of a liquid market in the Shares cannot be guaranteed

The Shares may be admitted to a securities exchange at some point in the future, however there can be no guarantee that a liquid market in the Shares will develop or be sustained or that the Shares will trade at prices close to the Net Asset Value per Share. The number of Shares to be issued pursuant to the Placing is not yet known, and there may be a limited number of holders of Shares. Limited numbers and/or holders of Shares may mean that there is limited liquidity in such Shares which may affect: (i) a Shareholder's ability to realise some or all of their investment; (ii) the price at which such Shareholder can effect such realisation; and/or (iii) the price at which Shares trade in the secondary market. Accordingly, Shareholders may be unable to realise their investment at Net Asset Value per Share or at all.

The Shares will be subject to purchase and transfer restrictions in the Placing and in secondary transactions in the future

The Company intends to restrict the ownership and holding of its Shares so that none of its assets will constitute “plan assets” under the U.S. Plan Assets Regulations. The Company intends to impose such restrictions based on deemed representations in the case of a subscription of Shares. If the Company’s assets were deemed to be “plan assets” of any plan subject to Title I of ERISA or Section 4975 of the U.S. Tax Code (“**U.S. Plan**”), pursuant to Section 3(42) of ERISA and U.S. Department of Labor regulations promulgated under ERISA by the U.S. Department of Labor and codified at **29 C.F.R. Section 2510.3-101** as amended by Section 3(42) of ERISA (collectively, the “**U.S. Plan Asset Regulations**”) then: (i) the prudence and other fiduciary responsibility standards of ERISA would apply to investments made by the Company; and (ii) certain transactions that the Company or a subsidiary of the Company may enter into, or may have entered into, in the ordinary course of business might constitute or result in non-exempt prohibited transactions under Section 406 of ERISA or Section 4975 of the U.S. Tax Code and might have to be rescinded. Governmental plans and certain church plans, while not subject to Title I of ERISA or Section 4975 of the U.S. Tax Code, may nevertheless be subject to other State, local or other laws or regulations that would have the same effect as the U.S. Plan Asset Regulations so as to cause the underlying assets of the Company to be treated as assets of an investing entity by virtue of its investment (or any beneficial interest) in the Company and thereby subject the Company (or other persons responsible for the investment and operation of the Company assets) to laws or regulations that are similar to the fiduciary responsibility or prohibited transaction provisions contained in Title I of ERISA or Section 4975 of the U.S. Tax Code.

Each purchaser and subsequent transferee of the Shares will be deemed to represent and warrant that no portion of the assets used to acquire or hold its interest in the Shares constitutes or will constitute the assets of any U.S. Plan. The Articles of the Company provide that the Board of Directors may refuse to register a transfer of Shares to any person they believe to be a Non-Qualified Holder or a U.S. Plan investor. If any Shares are owned directly or beneficially by a person believed by the Board of Directors to be a Non-Qualified Holder or a U.S. Plan investor, the Board of Directors may give notice to such person requiring him either (i) to provide the Board of Directors within 30 days of receipt of such notice with sufficient satisfactory documentary evidence to satisfy the Board of Directors that such person is not a Non-Qualified Holder or a U.S. Plan investor, or (ii) to sell or transfer their Shares to a person qualified to own the same within 30 days and within such 30 days to provide the Board of Directors with satisfactory evidence of such sale or transfer. Where condition (i) or (ii) is not satisfied within 30 days after the serving of the notice, the person will be deemed, upon the expiration of such 30 days, to have forfeited their Shares.

In addition, the Placing Shares may not be offered, sold, exercised, resold, transferred or delivered, directly or indirectly, within the United States or to, or for the account or benefit of, U.S. Persons, except pursuant to an exemption from, or in a transaction not subject to, the registration requirements of the U.S. Securities Act and in compliance with any applicable securities laws of any state or other jurisdiction in the United States. For more information, refer to “Risks relating to regulation and taxation - The Company is not, and does not intend to become, registered in the United States as an investment company under the U.S. Investment Company Act and related rules” in this section of this Offering Memorandum.

For more information on purchase and transfer restrictions, prospective investors should refer to the section of this Offering Memorandum entitled “*Purchase and Transfer Restrictions*” in “*Placing Arrangements*”.

RISKS RELATING TO REGULATION AND TAXATION

Changes in law or regulations, or a failure to comply with any laws or regulations, may adversely affect the respective businesses, investments and performance of the Company

The Company is subject to laws and regulations enacted by national and local governments.

On June 23, 2016, in a public referendum, the United Kingdom voted to leave the European Union. On March 29, 2017, the United Kingdom triggered Article 50 of the Treaty on European Union (“**Article 50**”) by formally notifying the European Council of the United Kingdom’s intention to withdraw from the European Union. In accordance with Article 50, the European Union shall negotiate and conclude a withdrawal agreement with the United Kingdom within 2 years of the United Kingdom triggering Article 50, although the European Council in agreement with the United Kingdom may decide to extend this period. The United Kingdom’s decision to leave the European Union has caused,

and is anticipated to continue to cause, significant new uncertainties and instability in both domestic and global financial markets. These uncertainties could have a material adverse effect on the various obligors' ability to make payments due under the assets within the CLO portfolios, which in turn could have a material adverse effect on the Company's financial condition, results of operations and/or its NAV.

The Company is subject to, and is required to comply with, certain regulatory requirements that are applicable to registered investment schemes which are domiciled in Guernsey.

The laws and regulations affecting the Company are evolving and any changes in such laws and regulations may have an adverse effect on the ability of the Company to carry on its business. Any such changes may also have an adverse effect on the ability of the Company to pursue the investment policies, and may adversely affect the Company's business, financial condition, results of operations and/or its NAV.

Certain income of the Company may be subject to U.S. withholding tax, and changes in tax law may adversely affect the Company

The Company intends to make loan investments in the United States that will qualify for the "portfolio interest exemption" from U.S. withholding on interest. However, if the Company is not eligible for the portfolio interest exemption with respect to a loan paying U.S.-source interest, interest payments to the Company could be subject to a 30% withholding tax. In addition, there can be no assurance that, as a result of any change in any applicable law, rule or regulation or interpretation thereof, U.S.-source interest or other payments on the loans that were not subject to withholding tax when purchased will not in the future become subject to U.S. or other withholding tax or that the amount or rate of withholding tax to which a payment on a loan is subject might not increase.

In addition, if the Company acquires equity interests in U.S. entities, either as a result of a direct purchase or as a result of loans previously purchased by the Company being converted into equity interests, the Company could be subject to 30% U.S. withholding tax on any U.S.-source dividends. If the Company is deemed to be engaged in a trade or business in the United States as a result of its ownership of an equity interest in an entity treated as fiscally transparent in the United States or certain other investments, the Company could be subject to a tax on net income with respect to income from such equity interest or other investments, as well as a "branch profits" tax, with a combined U.S. tax rate with respect to such equity interest or other investments of approximately 54%.

If the Company is subject to U.S. withholding tax on payments from investments or is subject to U.S. net income tax, such tax would reduce the amounts available to make payments on the Placing Shares. The extent to which other source country withholding taxes may apply to the Issuer's income will depend on the actual composition of its assets.

The European Directive on Alternative Investment Fund Managers may impair marketing of the Shares to EU investors

The AIFMD was transposed into the national legislation of a number of EEA member states on 22 July 2013. The Company will be considered an Alternative Investment Fund ("AIF") for the purposes of AIFMD. AIFMD will allow the continued marketing of AIFs, such as the Company, under national private placement regimes where EEA member states choose to implement AIFMD national private placement regimes. In relation to the Company, such marketing will be subject to registration under the AIFMD in those EU member states where there will be marketing of the Shares to investors. To permit marketing, appropriate cooperation agreements must be in place between the supervisory authorities of the relevant EEA member states in which the Shares are being marketed and the jurisdiction of both the Company and the Portfolio Manager, as the AIFM of the Company.

Accordingly, the ability of the Portfolio Manager to market the Shares in the EEA will depend on the relevant EEA state permitting the marketing of non-EEA managed funds, the continuing status of Guernsey and the USA in relation to AIFMD and the Portfolio Manager's willingness to comply with the relevant provisions of AIFMD and the other requirements of the national private placement regimes of individual EEA states, the requirements of which may restrict the Company's ability to raise additional capital from the issue of new Shares in one or more EEA state.

Additionally, it should be noted that what is and what is not "marketing" under AIFMD can vary between EEA member states, in some cases covering most promotional activity in respect of a fund and in some cases covering only material that is sufficiently specific or precise in respect of information relating to the terms of the fund that it could

alone form the basis of a decision to invest in the fund. This in turn means that the type of promotional activity that will require registration under AIFMD can also vary between EEA member states.

However, what is and what is not “marketing” under AIFMD remains a developing area and regulatory guidance in many EEA member states is limited. It is possible that European Securities and Markets Authority (“ESMA”) or an EEA national regulator may change its policy approach in the future or that ESMA, the European Commission or another European entity, regulatory or legislative body may have a different interpretation at a later date of what constitutes marketing under AIFMD.

If it was held that certain promotional material in respect of the fund constitutes marketing under AIFMD and was provided to investors in an EEA member state without the Company having been registered in that EEA member state for marketing under AIFMD by the Portfolio Manager, the Portfolio Manager may face regulatory sanctions as a result of non-compliance with AIFMD, and the enforceability of agreements with Shareholders may be affected.

ESMA has also consulted on the possible extension of the passport for marketing and managing under AIFMD to non-EEA based managers (the marketing and managing passports are currently only available to EEA based AIFMs) and delivered advice to the European Commission on 18 July 2016 on whether, amongst other things, the passporting regime should be extended to the management and/or marketing of AIFs by non-EEA based managers.

This advice regarding extending the passport to US domiciled AIFMs was qualified, meaning it is currently not clear if the passporting regime will be extended to the Portfolio Manager as an AIFM, nor is it clear that the European Commission consider that this advice contains a positive assessment of a sufficient number of non-EEA countries to extend the passport to these countries. If the European Commission were to consider there were sufficient grounds to extend the passport and adopted the requisite delegated act extending the passport, the national private placement regimes which are currently applicable to non-EEA AIFMs and non-EEA AIFs in EEA member states will temporarily continue to co-exist with this new non-EEA passport (the “**Third Country Passport**”).

However, three years after the adoption of this delegated act, ESMA is required to issue an opinion on the functioning of the Third Country Passport and advise on the potential termination of the current national private placement regimes. If the national private placement regimes were then abolished, an AIF could not be marketed into Europe by a non-EEA AIFM except by way of the Third Country Passport, meaning in this scenario the Portfolio Manager would not be able to market the Shares in the Company in the EEA.

Any regulatory changes arising from implementation of the AIFMD (or otherwise) that limit the Company’s ability to carry on its business or to market future issues of its Shares may materially adversely affect the Company’s ability to carry out its investment policy successfully and to achieve its investment objective, which in turn may adversely affect the Company’s business, financial condition, results of operations and/or its NAV.

Final regulations implementing the “Volcker Rule” in the United States of America were issued in December 2013 and became effective by operation of law on 1 April 2014, subject to a conformance period. The final Volcker Rule regulations revised the November 2011 proposed regulations and include certain changes to the treatment of foreign funds and non-U.S. bank investors. If the Volcker Rule applies to an investor’s ownership of Shares, the investor may be forced to sell its shares, or the continued ownership of such shares may be subject to certain restrictions.

On 21 July 2010, U.S. President Barack Obama signed into law the Dodd-Frank Wall Street Reform and Consumer Protection Act and certain provisions therein known as the “Volcker Rule.” On 10 December 2013, the final Volcker Rule regulations (the “**Final Regulations**”) were issued by U.S. regulators. The Final Regulations are effective from 1 April 2014, subject to a conformance period ending on 21 July 2015 (which may be extended). The Volcker Rule generally restricts certain non-U.S. banks and affiliated financial firms, collectively identified as “banking entities,” from investing in and sponsoring “covered funds.” In the event that a non-U.S. bank is deemed to be a “banking entity” and the Company is deemed to be a “covered fund” for purposes of the Volcker Rule, the non-U.S. bank’s ownership of the Shares may be subject to investment restrictions. If so, the non-U.S. bank may be required to divest the Shares by the end of the conformance period. Depending on market conditions and other factors, if an investor is required to liquidate its investment in the Shares during the conformance period, it may suffer a loss from the price at which it purchased the Shares.

If the Company becomes subject to tax on a net income basis in any tax jurisdiction, including Guernsey or the United Kingdom, the Company's financial condition and prospects could be materially and adversely affected

The Company intends to conduct its affairs so that it will not be treated as UK resident for taxation purposes, or as having a permanent establishment or otherwise being engaged in a trade or business, in the UK. The Company intends that it will not be subject to tax on a net income basis in any country. There can be no assurance, however, that the net income of the Company will not become subject to income tax in one or more countries, including Guernsey and the United Kingdom, as a result of unanticipated activities performed by the Company, adverse developments or changes in law, contrary conclusions by the relevant tax authorities, changes in the Directors' personal circumstances or management errors, or other causes. The imposition of any such unanticipated net income taxes could materially reduce the post-tax returns available for distributions on the Shares, and consequently may adversely affect the Company's business, financial condition, results of operations and/or its NAV.

Changes in taxation legislation, or the rate of taxation, may adversely affect the Company

Any change in the tax status of the Company, or in taxation legislation or practice in Guernsey, the United Kingdom or elsewhere could affect the value of the investments held by the Company or the Company's ability to achieve its investment objectives or alter the post-tax returns to Shareholders. Statements in this Offering Memorandum concerning the taxation of Shareholders and/or the Company are based upon current Guernsey and United Kingdom law and published practice as at the date of this Offering Memorandum, which law and practice is, in principle, subject to change (potentially with retrospective effect) that could adversely affect the ability of the Company to meet its investment objective and which could adversely affect the taxation of Shareholders and/or the Company.

Potential investors are urged to consult their tax advisers with respect to their particular tax situations and the tax effect of an investment in the Company.

Possible Financial Transaction Tax

On 14 February 2013, the European Commission issued proposals, including a draft Directive (the "Commission's Proposal") for a financial transaction tax ("FTT") to be adopted in certain participating EU member states (including Belgium, Germany, Estonia, Greece, Spain, France, Italy, Austria, Portugal, Slovenia and Slovakia (the "Participating Member States"), although Estonia has since stated that it will not participate). If the Commission's Proposal was adopted in its current form, the FTT would be a tax primarily on "financial institutions" in relation to "financial transactions" (which would include the conclusion or modification of derivative contracts and the purchase and sale of financial instruments).

Under the Commission's Proposal, the FTT could apply in certain circumstances to persons both within and outside of the Participating Member States. Generally, it would apply where at least one party is a financial institution, and at least one party is established in a Participating Member State. A financial institution may be, or be deemed to be, "established" in a Participating Member State in a broad range of circumstances, including (a) by transacting with a person established in a Participating Member State or (b) where the financial instrument which is subject to the financial transaction is issued in a Participating Member State.

The FTT proposal remains subject to negotiation between the Participating Member States. It may therefore be altered prior to implementation, the timing of which remains unclear. Additional EU member states may decide to participate.

In addition to the FTT, certain countries (such as France and Italy) have unilaterally introduced or announced their own financial transaction tax, and other countries may follow suit. There is therefore a risk that a financial transaction tax may be incurred on certain transactions entered into by the Company. Any such financial transaction tax may adversely affect the cost of investment or hedging strategies pursued by the Company as well as the value and liquidity of certain assets within the Company, such as securities, derivatives and structured finance securities.

Different regulatory, tax or other treatment of the Company or the Shares in different jurisdictions, or changes to such treatment in different jurisdictions, may adversely impact shareholders in certain jurisdictions

For regulatory, tax and other purposes, the Company and the Shares may be treated in different ways in different jurisdictions. For instance, in certain jurisdictions and for certain purposes, the Shares may be treated as more akin to

holding units in a collective investment scheme. Furthermore, in certain jurisdictions, the treatment of the Company and/or the Shares may be uncertain or subject to change, or it may differ depending on the availability of certain information or disclosure by the Company of that information. The Company may be subject, therefore, to financially and logistically onerous requirements to disclose any or all of such information or to prepare or disclose such information in a form or manner which satisfies the regulatory, tax or other authorities in certain jurisdictions. The Company may elect not to disclose such information or prepare such information in a form which satisfies such authorities. Therefore Shareholders in such jurisdictions may be unable to satisfy the regulatory requirements to which they are subject.

The Company is not, and does not intend to become, registered in the United States as an investment company under the U.S. Investment Company Act and related rules

The Company has not, does not intend to, and may be unable to, become registered in the United States as an investment company under the U.S. Investment Company Act. The U.S. Investment Company Act provides certain protections to U.S. investors and imposes certain restrictions on companies that are registered as investment companies. As the Company is not so registered, and does not intend to so register, none of these protections or restrictions is or will be applicable to the Company. In addition, to avoid being required to register as an investment company under the U.S. Investment Company Act and to avoid violating the U.S. Investment Company Act, the Company has implemented restrictions on the purchase of the Shares by persons who are located in the United States or are U.S. Persons (or are acting for the account or benefit of any U.S. Person). For more information, prospective investors should refer to the section of this Offering Memorandum entitled “Purchase and Transfer Restrictions” in in “Placing Arrangements”.

Certain payments to the Company will in the future be subject to 30 per cent withholding tax unless the Company agrees to certain reporting and withholding requirements and certain Shareholders will be required to provide the Company with required information so that the Company may comply with its obligations under FATCA

Under Sections 1471 through 1474 of the U.S. Internal Revenue Code (commonly referred to as “FATCA”), Financial Institutions are required to use enhanced due diligence procedures to identify U.S. persons who have invested in either non-U.S. financial accounts or non-U.S. entities. Pursuant to FATCA, certain payments of (or attributable to) U.S.-source income, and the proceeds of sales of property that give rise to U.S.-source payments, will be subject to 30 per cent withholding tax with effect from 1 July 2014 unless the Company agrees to certain reporting and withholding requirements.

The United States and Guernsey have entered into an Intergovernmental Agreement (“US IGA”) to implement FATCA. Under the terms of the US IGA, the Company may be obliged to comply with the provisions of FATCA as enacted by the Guernsey legislation implementing the US IGA (the “Guernsey IGA Legislation”), rather than directly complying with the U.S. Treasury Regulations implementing FATCA. Under the terms of the US IGA, Guernsey resident entities that comply with the requirements of the Guernsey IGA Legislation will be treated as compliant with FATCA and, as a result, will not be subject to withholding tax under FATCA (“FATCA Withholding”) on payments they receive and will not be required to withhold under FATCA on payments they make.

The Company expects that it will be considered to be a Guernsey resident financial institution and therefore will be required to comply with the requirements of the Guernsey IGA Legislation.

Under the Guernsey IGA Legislation, the Company will be required to register with the United States Internal Revenue Service (“IRS”) and report to the Guernsey President of the Policy & Resources Committee certain holdings by and payments made to certain U.S. investors in the Company, as well as to non-U.S. financial institutions that do not comply with the terms of the Guernsey IGA Legislation. Under the terms of the US IGA, such information will be onward reported by the Guernsey President of the Policy & Resources Committee to the United States under the general information exchange provisions of the United States-Guernsey Agreement for the Exchange of Information Relating to Taxes.

Further, even if the Company is not characterised under FATCA as a Financial Institution, it nevertheless may become subject to such 30 per cent withholding tax on certain U.S.-source payments to it unless it either provides information to withholding agents with respect to its U.S. Controlling Persons or certifies that it has no such U.S. Controlling Persons.

As a result, Shareholders may be required to provide any information that the Company determines necessary in order to allow the Company to satisfy its obligations under FATCA.

Additional intergovernmental agreements similar to the US IGA have been entered into or are under discussion by other jurisdictions with the United States. Different rules than those described above may apply depending on whether a payee is resident in a jurisdiction that has entered into an intergovernmental agreement to implement FATCA.

In addition to the US IGA, Guernsey and the United Kingdom have entered into an inter-governmental agreement (“UK IGA”) for the implementation of information exchange arrangements, based on FATCA, whereby relevant financial information held in Guernsey in respect of a person or entity who is resident in the UK for tax purposes will be reported to the Guernsey President of the Policy & Resources Committee for onward reporting to the UK’s HM Revenue and Customs. Under the UK IGA, the Company may be required to provide information to the Guernsey authorities about investors and their interests in the Company in order to fully discharge its reporting obligations and, in the event of any failure or inability to comply with the proposed arrangements, may suffer a financial penalty or other sanction under Guernsey law.

The scope and application of FATCA Withholding and information reporting pursuant to the terms of FATCA and the IGAs are subject to review by the United States, the United Kingdom, Guernsey and other IGA governments, and the rules may change. Although the UK IGA and US IGA have been ratified by Guernsey’s parliament, guidance published to date has been in draft format only and therefore, while the Company intends to comply with applicable law, it cannot be predicted at this time what the full impact on the Company and the Company’s reporting responsibilities pursuant to the UK IGA and US IGA will be. Shareholders should consult with their own tax advisors regarding the application of FATCA to their particular circumstances.

OECD’s Base Erosion Profit Shifting (“BEPS”) Action Points

In 2013, the OECD published its report on Addressing Base Erosion and Profit Shifting (“BEPS”) and its Action Plan on BEPS. The aim of the report and Action Plan was to address and reduce aggressive international tax planning. BEPS remains an ongoing project. On 5 October 2015, the OECD published its final reports, analyses and sets of recommendations (deliverables) with a view to implementing internationally agreed and binding rules which could result in material changes to relevant tax legislation of participating OECD countries. The final package of deliverables was subsequently approved by the G20 Finance Ministers on 8 October 2015. On 24 November 2016, the OECD announced that more than 100 jurisdictions concluded negotiations on a multilateral instrument that will amend their respective tax treaties (more than 2,000 tax treaties worldwide) in order to implement the tax treaty-related BEPS recommendations, although the effective date of such multilateral instrument remains uncertain. A first high level signing ceremony took place on 7 June 2017 where 68 countries signed the multilateral instrument. It is currently anticipated that the multilateral instrument will enter into force after five countries have ratified it. The multilateral instrument will then enter into effect for a specific tax treaty after all parties to that treaty have ratified the multilateral instrument. The final actions to be implemented in the tax legislation of the countries in which the Company will have investments, in the countries where the Company is domiciled or resident, or changes in tax treaties negotiated by these countries, could adversely affect the returns from the Company to its investors.

COMPANY, ITS INVESTMENT OBJECTIVE, POLICY AND STRATEGY

COMPANY

Highland CLO Funding, Ltd. (formerly known as Acis Loan Funding, Ltd.) (the “**Company**”) was incorporated on 30 March 2015 and registered under the laws of Guernsey (registration number 60120) pursuant to the Companies Law. The Company changed its name on October 27, 2017. The Company is an investment company established to provide its investors with exposure to CLO Notes on both a direct basis and indirect basis and senior secured loans on an indirect basis, through the use of the investments described in its investment policy, including through the Management Companies.

The Company is seeking to raise U.S. \$153 million through the Placing to invest in accordance with its investment objective and policy. Applications to an appropriate securities exchange may be made when deemed appropriate by the Company.

Investment in the Company is only suitable for institutional, professional and high net worth investors, private client fund managers and brokers and other investors who understand the risks involved in investing in the Company and/or who have received advice from their fund manager or broker regarding investment in the Company.

INVESTMENT OBJECTIVE

The Company’s investment objective is to provide Shareholders with stable and growing income returns, and to grow the capital value of the investment portfolio through opportunistic exposure to CLO Notes, investments in new issue CLOs sponsored by Highland and Acis CLO 7 through its interests in the Management Companies and CLO Income Notes, respectively, and senior secured loans primarily for the purpose of enabling Highland CLO Management to qualify as an “originator” for purposes of the EU Retention Requirements, on both a direct basis and indirect basis, through the use of the investments described in its investment policy and through use of leverage, any Revolving Credit Facility, Warehouse Loan Facilities, total return swaps or repurchase agreements, in addition to secured loan facilities. With respect to the Company’s investments, except with respect to Designated CLO Resets or Designated CLO Refinancings, if applicable, it is expected that the Portfolio Manager intends to seek monetization of such investments in the ordinary course in its discretion; provided that at the end of the Term, the Portfolio Manager, in its reasonable discretion may postpone dissolution of the Company for up to 180 days to facilitate the orderly liquidation of the investments.

Highland HCF Advisor, in its capacity as the Portfolio Manager under the Portfolio Management Agreement, will manage the Company’s investments. In addition, the Portfolio Manager, Highland, Highland CLO Management, or another affiliate of Highland, in the capacity of the CLO Manager, may also manage Highland CLOs and the Portfolio Manager Highland, Acis, Acis CLO Management, or another affiliate of Acis, in the capacity of the CLO Manager, may also manage Managed CLOs, in each case, pursuant to CLO Management Agreements to be entered into from time to time.

INVESTMENT POLICY

Overview

The Company’s investment policy is to focus on synergistic investments in the following areas.

Loan Investments

The Company will invest on an indirect basis in a diverse portfolio of predominantly floating rate senior secured loans (or on a direct basis for the primary purpose of enabling Highland CLO Management to qualify as an “originator” for purposes of the EU Retention Requirements), all of which will have at least one rating, which may be public or private, from Moody’s, S&P or Fitch. Initially, the Company’s loan investments will be focused in the U.S., but depending on market conditions the Company may also invest in similar types of loans in Europe. Accordingly, there is no limit on the maximum U.S. or European exposure. Investments in U.S. or European loans may be made through a U.S. or European originator subsidiary of the Company. The Company intends to invest directly only in those senior secured loans to obligors with total potential indebtedness under all applicable loan agreements, indentures and other

underlying instruments at least \$250,000,000 that would generally satisfy the eligibility criteria for Highland CLOs and set forth in “*Summary—Investment Policy—Loan Investments*”.

Financing of Loan Portfolios / Securitization

It is intended that the Company will periodically seek to sell or securitise all or a portion of its loan portfolio, held directly or indirectly, into new Highland CLOs where Highland CLO Management acts as CLO Manager. In doing so, Highland CLO Management may seek to adopt the “originator” model to address the Origination Requirements (as defined below) applicable to such Highland CLOs to the extent such Highland CLOs sought to comply with EU Retention Requirements. As a result, Highland CLO Management, will be required to commit to: (a) establishing the relevant CLO and (b) selling certain loan investments to the relevant CLO which it has purchased for its own account initially. In addition, under current guidance, prior to closing date of the relevant CLO, Highland CLO Management expects to sell investments to the relevant CLO to satisfy the Origination Requirements.

CLO Notes

The Company will from time to time invest directly or indirectly (through affiliates and subsidiaries, including the Management Companies, as more fully described below) in CLO Notes issued by Managed CLOs or CLOs managed by other asset managers as set forth in “*Summary—Investment Policy—CLO Notes*”.

The Company is currently invested in CLO Income Notes issued by Managed CLOs managed by Highland, Acis and Acis CLO Management. Following the Placing, the Company will invest indirectly through the Management Companies in CLO Notes.

Act as Risk Retention Provider

The Company may also invest in, provide loans to, or purchase performance-linked notes from asset management subsidiaries, affiliated with the Company, the Portfolio Manager, Highland or Acis and which may act as the asset manager of certain U.S. or European CLOs in order to satisfy certain U.S. Risk Retention Rules or EU Retention Requirements.

Allocation of Investment Opportunities

Highland CLO Management will serve as CLO Manager to each newly-issued Highland CLO during the Investment Period.

During the Investment Period, the Company shall receive priority allocations with respect to all CLO Income Note investment opportunities with respect to new issue Highland CLOs, over the account of the Portfolio Manager, its affiliates and Other Accounts as set forth in “*Summary—Investment Policy—Allocation of Investment Opportunities*”.

INVESTMENT RESTRICTIONS

The Company will, at all times, invest and manage its assets in a way which is consistent with its object of spreading investment risk and in accordance with the investment policy set out in “*—Investment Policy*”.

In the event of any breach of the Company’s investment policy or of the investment restrictions applicable to the Company, Shareholders will be informed of the actions to be taken by the Company (at the time of such a breach) by an announcement issued by the Administrator.

During the Investment Period, the Company may invest up to \$250,000,000 in CLO Income Notes for new Highland CLOs as follows: (a) up to \$150,000,000 in the aggregate from new capital contributions; and (b) up to \$100,000,000 in the aggregate from proceeds received from existing seed portfolio investments and investments in new Highland CLOs, net of dividends paid, and amortization and interest payments on Company borrowings from committed credit facilities.

The Company may not, without the consent of the Advisory Board, invest in any CLO Notes or CLO Income Notes of new Highland CLOs that are not Qualifying CLOs as set forth in “*Summary—Investment Restrictions*”; provided that, if the Portfolio Manager has satisfied the RP Condition, the consent of the Advisory Board to invest in any

Highland CLO that meets clause (a) of the definition of Qualifying CLOs only shall not be unreasonably withheld, conditioned or delayed.

During the Investment Period, the Company shall be permitted to invest in “resets” with respect to the Designated CLO Resets and refinancings with respect to the Designated CLO Refinancings, each as set forth in “*Summary—Investment Restrictions*”.

The Company shall not invest in the CLO Income Notes of a new-issue Highland CLO unless it is the 100% owner of the CLO Income Notes not forming part of the Retention Interest acquired by Highland CLO Management.

BORROWING

Subject to the limitations set forth in “*Summary-Borrowing*”, it is expected that the Company will have access to one or more committed credit facilities. Such facilities may take the form of any Revolving Credit Facility, Warehouse Loan Facilities, total return swaps or repurchase agreements, in addition to secured loan facilities. It is expected that the Company will use advances under such facilities, together with the proceeds of the Shares, to purchase future senior secured loans (acquired for the primary purpose of enabling Highland CLO Management to qualify as an “originator” for purposes of the EU Retention Requirements) and other assets. In addition to such facilities, the Company will be permitted to borrow money for day to day administration and cash management purposes.

CHANGES TO INVESTMENT OBJECTIVE AND POLICY

Any material change to the investment objective and policy of the Company would be made only with the approval of Shareholders.

INVESTMENT STRATEGY

Whether the senior secured loans or other assets are held directly by the Company (with respect to senior secured loans for the purpose of enabling Highland CLO Management to qualify as an “originator” for purposes of the EU Retention Requirements) or indirectly via CLO Notes or its investment in the applicable Management Company it is the Company’s intention that, in any case, the portfolios will be actively managed (by the Portfolio Manager, Highland, Acis, the applicable Management Company, an asset manager subsidiary or the applicable CLO Manager, as the case may be) to minimise default risk and potential loss through comprehensive credit analysis performed by the Portfolio Manager, Highland, Acis, the applicable Management Company or the applicable CLO Manager (as applicable).

Whilst the intention is to pursue an active, non-benchmark total return strategy, Highland HCF Advisor as the Company’s Portfolio Manager will be cognisant of the positioning of the loan portfolios against relevant indices. Accordingly, Highland HCF Advisor will track the returns and volatility of such indices, while seeking to outperform them on a consistent basis. In-depth, fundamental credit research dictates name selection and sector over-weights/under-weights relative to the benchmark, backstopped by constant portfolio monitoring and risk oversight. The Portfolio Manager will typically look to diversify the Company’s portfolios to avoid the risk that any one obligor or industry will adversely impact overall returns. The investment strategy also places an emphasis on loan portfolio liquidity to ensure that if the Company’s credit outlook changes, it is free to respond quickly and effectively to reduce or mitigate risk in its portfolio. The Portfolio Manager believes this investment strategy will be successful in the future as a result of its emphasis on risk management, capital preservation and fundamental credit research. The Portfolio Manager believes the best way to control and mitigate risk is by remaining disciplined in market cycles, by making careful credit decisions and maintaining adequate diversification.

Leverage and Expected Returns

It is anticipated that any borrowing for the purpose of investing directly in senior secured loans (acquired for the primary purpose of enabling Highland CLO Management to qualify as an “originator” for purposes of the EU Retention Requirements) will be in the form of a term Warehouse Loan Facility, however the Company has entered into the NexBank Credit Facility and may enter into any Revolving Credit Facility, Warehouse Loan Facilities, total return swaps, repurchase agreements or other facilities to facilitate the acquisition or financing of loans. Loans purchased using such borrowings will typically be held for no more than 12 months before being sold to a Highland

CLO. Except in relation to the CLO Retention Notes it holds, the Company may enter into hedging and derivatives transactions pursuant to its investment activities, for the purposes of efficient portfolio management.

The Company does not currently grant any guarantee under any leveraging arrangement. The grant of any such guarantee would be disclosed to investors in accordance with the AIFMD Rules.

Any proposed changes to the Company's investment objective and policy will be subject to the process described in the section titled "*Changes to Investment Objective and Policy*" above in this section of the Offering Memorandum.

Collateral and Asset Re-use Arrangements

Any collateral and asset re-use arrangements of the Company will vary according to the brokers and/or trading counterparties which it may use (each a "**Trading Counterparty**").

The Company may be required to deliver collateral from time to time to its Trading Counterparties, under the terms of the relevant trading agreements, by posting initial margin and/or variation margin and on a mark-to-market basis. The Company may also deposit collateral as security with a Trading Counterparty. The treatment of such collateral varies according to the type of transaction and where it is traded. Under such arrangements, the cash, securities and other assets deposited as collateral will generally become the absolute property of the Trading Counterparty, the Trading Counterparty will have the right to use such collateral.

Where collateral is reused by a Trading Counterparty, the Company will have an unsecured right to the return of equivalent assets and such collateral will be at risk in the event of the insolvency of a Trading Counterparty.

Any changes to the right of re-use of collateral will be disclosed to investors in accordance with the AIFMD Rules.

Current Investments of the Company

In order to facilitate a timely investment of the proceeds of the Placing and to take advantage of existing opportunities, the Company is currently invested in CLO Income Notes issued by Managed CLOs managed by the Portfolio Manager, Highland, Acis and Acis CLO Management. The details of such CLOs are set out in "*The Current CLO Portfolio*".

Following the Placing, the Company will acquire further assets and fund origination by Highland CLO Management of new Highland CLOs and it is expected that the Net Placing Proceeds will be substantially invested in CLO Notes upon closing. The Company may also, from time to time: (i) hold assets within its portfolio to maturity; (ii) sell assets within its portfolio to the market; or (iii) sell assets within its portfolio to another CLO which is not Managed CLO.

TARGET RETURN AND DIVIDEND POLICY

Target Total Return

Whilst not forming part of the investment objective or policy of the Company, on the basis of current market conditions as at the date of this Offering Memorandum, the Company is targeting an annualised mid-teen total return over the medium-term, once the Net Placing Proceeds are substantially invested (through the Company) in CLO Notes (the "**Target Total Return**"). The Company intends to seek to deliver this return through a combination of dividend payments and capital appreciation.

Target Dividend Yield and Policy

Whilst not forming part of the investment objective or policy of the Company, dividends will be payable in respect of each calendar quarter, payable in the month following the end of such quarter.

During the Investment Period, on each Quarterly Dividend Date, beginning May 15, 2018, the Company will target the Target Dividend. During the Investment Period, excess cash or interest from the portfolio will be reinvested by the Company with the objective of growing the NAV.

Following the Investment Period, excess cash, interest and proceeds from the realization of portfolio investments after satisfaction of all expenses, debts, liabilities and obligations of the Company will be distributed by the Company to the Shareholders as a dividend on the Quarterly Dividend Date in accordance with the Distribution Priority as set forth in “*Summary-Dividend Policy*”.

To the extent the Company does not have available funds on hand to meet the Target Dividend with respect to any Quarterly Payment Date, the Board of Directors may suspend dividends if, in consultation with the Portfolio Manager, it determines that a sale of assets to produce proceeds to meet the Target Dividend would not be in the best interests of the Company and/or would not produce a sale price reflective of the value of the assets.

The Board may deduct from any dividend payable to any Shareholder on or in respect of a Share all sums of money (if any) presently payable by him to the Company on account of calls with respect to existing Shares, or calls of commitments to purchase Shares pursuant to the subscription and transfer agreement or otherwise.

The actual dividend generated by the Company in pursuing its investment objective will, however, depend on a wide range of factors including, but not limited to, general economic and market conditions, fluctuations in currency exchange rates, prevailing interest rates and credit spreads, the terms of the investments made by the Company and the risks highlighted in the “*Risk Factors*” section of this Offering Memorandum. Dividend payments may be suspended by Board of Directors in its absolute discretion, including, without limitation, in the event of adverse, or perceived adverse, market conditions.

The Target Total Return and the Target Dividend should not be taken as an indication of the Company’s expected future performance or results. The Target Total Return and the Target Dividend are targets only and there is no guarantee that they can or will be achieved and should not be seen as an indication of the Company’s expected or actual return. Target returns are hypothetical and are neither guarantees nor predictions or projections of future performance. Actual events and conditions may differ materially from the assumptions used to establish the Target Total Return and Target Dividend. Accordingly, investors should not place any reliance on the Target Total Return or the Target Dividend in deciding whether to invest in Shares.

Furthermore, the future performance of the Company may be materially adversely affected by the risks discussed in the section of this Offering Memorandum entitled “*Risk Factors*”.

FURTHER ISSUES OF SHARES

The Directors will have authority to allot further Shares in the share capital of the Company following the Placing subject to the subscription and transfer agreement. Further issues of Shares beyond the issuances contemplated in the subscription and transfer agreement would only be made subject to consent of the Advisory Board, as described in “*Summary—Advisory Board*” if the Directors determine such issues to be necessary to protect the Company, consistent with the Board’s duties to the Company, and in the best interests of Shareholders and the Company as a whole. Relevant factors in making such determination include net asset performance, share price rating and perceived investor demand. In the case of further issues of Shares (or sales of Shares from treasury), except as permitted by the Shareholders, such Shares will only be issued at prices which are not less than the then prevailing Net Asset Value per Share (as estimated by the Directors).

There are no provisions of Guernsey law which confer rights of pre-emption in respect of the allotment of Shares. The Articles, however, contain pre-emption rights in relation to allotments of Shares for cash.

VALUATION

Net Asset Value

As of September 30, 2017, the unaudited net asset value per share of the Net Asset Value was US \$157,081,118.91. A special dividend in the aggregate amount of US \$9,000,000 was paid on October 10, 2017, and a buyback of Shares from Acis Capital Management, L.P. was made on October 24, 2017, for an aggregate purchase price of \$991,180.13.

Publication of Net Asset Value

The Company intends to publish the Net Asset Value per Share as calculated in accordance with the process described below, on a quarterly basis (within 15 Business Days following the relevant month-end). Notice will be provided either by a website to be created or investors may elect to be contacted by the Administrator by e-mail. The Net Asset Value will be calculated by the Administrator on the basis of the valuation policy established by the Directors from time to time. The Company's initial valuation policy is described below.

Valuation of the portfolio

It is intended that, in accordance with its investment objective and policy set out above, the Company will invest in: (a) senior secured loans and other debt securities on both a direct basis (for the primary purpose of enabling Highland CLO Management to qualify as an "originator" for purposes of the EU Retention Requirements) and indirect basis, including through the use of leverage via repurchase facilities and Warehouse Loan Facilities, and for the purpose of enabling Highland CLO Management to qualify as an "originator" for purposes of the EU Retention Requirements; (b) CLO Notes, and any other assets held by management subsidiaries; and (c) interests in the Management Companies, and will value such instruments in accordance with the valuation policy established by the Portfolio Manager from time to time.

The Company (meaning for the purposes of the valuation of assets described herein, the Company itself, the Portfolio Manager or the Administrator under the ultimate supervision of the Board) will generally compute the value of the instruments and other assets of the Company as of the close of business on the last day of each fiscal period and on any other date selected by the Board in its sole discretion. In addition, the Company must compute the value of the instruments that are being distributed in-kind as of their date of distribution in accordance with the Company's Memorandum and Articles of Association. In determining the value of the assets of the Company, no value is placed on the goodwill or name of the Company, or the office records, files, statistical data or any similar intangible assets of the Company not normally reflected in the Company's accounting records, but there must be taken into consideration any related items of income earned but not received, expenses incurred but not yet paid, liabilities fixed or contingent, prepaid expenses to the extent not otherwise reflected in the books of account, and the value of options or commitments to purchase or sell instruments pursuant to agreements entered into on or prior to such valuation date.

A copy of the Company's valuation policy is available upon request.

The value of each instrument and other asset of the Company and the net worth of the Company as a whole determined pursuant the Company's Memorandum and Articles of Association are conclusive and binding on all of the members of the Company and all persons claiming through or under them.

Suspension of the calculation of Net Asset Value

The Directors may at any time, but are not obliged to, temporarily suspend the calculation of the NAV and NAV per Share during any period if it determines that such a suspension is warranted by extraordinary circumstances, including: (i) during any period when any market on which the Company's investments are quoted, traded or dealt in is closed, other than for ordinary holidays and weekends, or during periods in which dealings are restricted or suspended; (ii) during the existence of any state of affairs, including as a result of political, economic, military or monetary events or any circumstances outside the control, as a result of which, in the reasonable opinion of the Portfolio Manager, the determination of the value of the assets of the Company, would not be reasonably practicable or would be seriously prejudicial to the shareholders; (iii) during any breakdown in the means of communication normally employed in determining the price or value of the Company's assets or liabilities, or of current prices in any market as aforesaid, or when for any other reason the prices or values of any assets or liabilities of the Company cannot reasonably be

accurately ascertained within a reasonable time frame; (iv) during any period when the transfer of funds involved in the realization or acquisition of any investments cannot, in the reasonable opinion of the Portfolio Manager, be effected at normal rates of exchange; or (v) automatically upon liquidation of the Company.

Shareholders will be informed by e-mail from the Administrator in the event that the calculation of the NAV per Share is suspended as described above.

REPORTS AND ACCOUNTS

The accounting period of the Company ends on 31 December, in each year, and the audited annual accounts will be provided to Shareholders within four months of the year end to which they relate. The Company shall report its results of operations and financial position in U.S. Dollars. The Company's first accounts were prepared for the period ending 31 December 2015.

The audited annual accounts will also be available at the registered office of the Administrator and the Company.

The financial statements of the Company will be prepared in accordance with GAAP, and the annual accounts will be audited. The Company's financial statements, which will be the responsibility of its Board, will consist of a statement of comprehensive income, statement of financial position, statement of cash flows, statement of changes in equity, related notes and any additional information that the Board deems appropriate or that is required by applicable law.

It is expected that the CLOs and any Warehouse Loan Facilities established will not be consolidated in the Company's GAAP financial statements, although such assessment will depend on the facts and circumstances.

Any disclosures required to be made to Shareholders pursuant to the AIFMD will be contained either in the Company's periodic reports or communicated to Shareholders in written form.

THE CURRENT CLO PORTFOLIO

The Company is currently invested in CLO Income Notes in the following Managed CLOs in the following amounts (the “**Current CLO Portfolio**”):

CLOs:	Aggregate Outstanding Amount (U.S.\$)
ACIS CLO 2013-1 Ltd.	\$18,558,000.00
ACIS CLO 2014-3 Ltd.	\$39,750,000.00
ACIS CLO 2014-4 Ltd.	\$50,750,000.00
ACIS CLO 2014-5 Ltd.	\$53,000,000.00
ACIS CLO 2015-6, Ltd.	\$51,850,000.00
Acis CLO 2017-7, Ltd.	\$17,850,000.00
Rockwall CDO, Ltd.	\$14,000,000.00
Brentwood CLO, Ltd.	\$12,000,000.00
Grayson CLO, Ltd.	\$5,900,000.00
Liberty CLO, Ltd.	\$17,000,000.00
HP CDO, Ltd.	\$1,621,542.70
Greenbriar CLO, Ltd.	\$18,000,000.00
Gleneagles CLO, Ltd.	\$1,250,000.00

Valuation of the Current Portfolio

Information regarding the Current Portfolio and its valuation as of 30 September 2017 has been made available to all Placees free of charge.

Information on the historic performance of the Company is available upon request from the Portfolio Manager. Such information will be updated periodically in accordance with the AIFMD Rules.

MARKET OPPORTUNITY

INVESTMENT OPPORTUNITY

The Company intends to invest in CLO Notes of CLOs which are compliant with the U.S. Risk Retention Rules and which may be compliant with the EU Retention Requirements (as defined above) and in senior secured loans (for the primary purpose of enabling Highland CLO Management to qualify as an “originator” for purposes of the EU Retention Requirements). In pursuance of this intention, the Company will invest in each of the Management Companies which will, pursuant to the EU Retention Requirements, need to, amongst other things: (a) on the closing date of a CLO it establishes, commit to purchase “material net economic interest” equal to at least five per cent of the maximum portfolio principal amount of the assets in the CLO and (b) undertake that, for so long as any securities of the CLO remain outstanding (including any CLO Retention Notes), it will retain its interest in the CLO and will not (except to the extent permitted by the EU Retention Requirements) sell, hedge or otherwise mitigate its credit risk under or associated with such CLO. This five per cent material net economic interest in the CLO can, amongst other methods, be retained through the holding of a vertical strip of all issued tranches (AAA-rated notes to equity) or a retention holding in the first loss tranche or a combination thereof. The EU Retention Requirements prohibit many significant European investors from investing in any securitisation which does not comply with them.

In addition, with the intention of achieving classification as an “originator” (as defined in the CRR) and complying with the CRR Retention Requirements with respect to Highland CLOs, Highland CLO Management will be required to meet the Origination Requirements.

Highland CLO Management may seek to adopt the “originator” model to address the EU Retention Requirements for its CLOs and intends to be treated as a “majority-owned affiliated” of Highland in order to comply with the U.S. Risk Retention Rules.

In addition to its current holdings, the Company may buy floating rate senior secured loans from the primary and secondary market before selling the assets to one or more CLOs which it establishes and for which Highland CLO Management will act as a retention provider, thereby offering investors wholesale access to senior secured loans acquired by the Company and retained CLO Income Notes.

The Portfolio Manager will be responsible for selecting and monitoring the performance of the investments. The Company’s purchase and sale decisions (with certain exceptions) will be taken by Highland HCF Advisors as Portfolio Manager pursuant to the Portfolio Management Agreement. Further details on the investment process are set out in the section of this Offering Memorandum entitled “*Investment Process*”.

INVESTMENT PROCESS

Highland HCF Advisor as Portfolio Manager and CLO Manager

The Company has entered into a Portfolio Management Agreement with Highland HCF Advisor as the Portfolio Manager. Pursuant to the Portfolio Management Agreement, Highland HCF Advisor will, at its discretion, select the portfolio of investments and instruct the Custodian with respect to any acquisition, disposition or sale of investments and provide certain support services to the Company. The performance of the Company's portfolio will depend heavily on the skills of Highland HCF Advisor in analyzing, selecting and managing the investments. The Portfolio Manager has entered into Services Agreements with Highland Capital Management, L.P. under which the Portfolio Manager has agreed to make its investment research and recommendations and back-office support services available to Highland HCF Advisor. Further details are set out in the section of this offering memorandum entitled "Investment Process" and "Additional Information on the Company".

Based in Dallas, Texas, Highland is an SEC Registered Investment Adviser founded in 1993 that specializes in senior secured bank loans, high yield bonds, structured products and equities. Highland issued its first CLO in 1996, and Highland and its affiliates have since issued and managed over U.S. \$28 billion of CLOs and CDOs consisting of 40 separate vehicles. As of August 31, 2017, Highland and its affiliates, managed or serviced approximately U.S. \$13.4 billion in senior secured bank loans, high yield bonds, structured products and other assets for banks, insurance companies, pension plans, foundations and high net worth individuals.

The Portfolio Manager, Highland, Acis and/or the Management Companies, may act as CLO Manager(s) in relation to the Managed CLOs pursuant to CLO Management Agreements. The Portfolio Manager, Highland, Acis and/or the applicable Management Company as CLO Manager is responsible for purchasing and selling of collateral obligations and performing certain other advisory and administrative tasks for and on behalf of the Managed CLOs in each case subject to the provisions of the applicable CLO Management Agreement and any applicable provisions of the indenture.

Highland HCF Advisor is a relying adviser of Highland. Highland is an SEC Registered Investment Adviser and currently manages CLOs and other managed accounts and investment funds. Highland CLO Management is a relying adviser of Highland and will manage Highland CLOs. Highland CLO Management has the HCLOM Services Agreements in place with Highland, pursuant to which Highland provides credit research and operational support to Highland CLO Management, including services in connection with determining the composition, nature and timing of changes to the Highland CLO Management portfolio, the due diligence of actual or potential investments, the execution of investment transactions approved by Highland CLO Management, and certain loan services and administrative services.

Acis is an SEC Registered Investment Adviser and currently manages CLOs and other managed accounts and investment funds. Acis CLO Management is a relying adviser of Acis and currently manages ACIS CLO 2017-7. Acis is an affiliate of Highland and is 100% owned by Highland senior management, and was established by James Dondero and Mark Okada to focus on managing traditional CLOs that invest in liquid, broadly syndicated bank loans and secondary CLO investments. Acis has the ACM Services Agreements in place with Highland, pursuant to which Highland provides investment research and recommendations and operational support to Acis, including services in connection with the Portfolio Manager's recommendations with respect to the composition, nature and timing of changes to the Company's portfolio, the due diligence of actual or potential investments, the execution of investment transactions, and certain loan services and administrative services. Acis CLO Management has the ACLOM Services Agreements in place with Acis, pursuant to which Acis provides credit research and operational support to Acis CLO Management, including services in connection with determining the composition, nature and timing of changes to the ACIS CLO Management portfolio, the due diligence of actual or potential investments, the execution of investment transactions approved by ACIS CLO Management, and certain loan services and administrative services. All final credit decisions are made by the Highland individuals referenced below.

Investment Philosophy

Highland's investment philosophy centers on being investors first. The firm has 25 years of experience investing in alternative strategies through multiple cycles. Highland is a recognized pioneer in bank loan asset management and

CLO issuance. The firm invests a meaningful amount of capital in the portfolios they manage, with market value in excess of \$250 million invested alongside our clients, as of September 30, 2017.

Highland's investment philosophy is rooted in a value-driven approach that combines rigorous bottom-up credit underwriting with top-down risk analysis to optimize risk-adjusted performance of portfolios. The firm integrates risk management throughout its investment process and maintains a culture of a high level of compliance. Highland focuses on attractive risk/return arbitrage opportunities where the firm can add value. Highland seeks to generate alpha by implementing checks and balances that allow the firm to identify risks, mitigate volatility, and quickly ascertain and sell losers.

While participating in the larger, liquid bank loan asset class, Highland continues to capture market inefficiencies in this over the counter (OTC) market through mispricings that it identifies via robust fundamental analysis, proactive diligence and monitoring, and nimble trading capabilities. Given the scale of the firm's investment resources, Highland is able to follow and manage investment portfolio names more closely. Highland credit research analysts manage 20-30 credits per analyst versus most peers, who manage 40-50 credits per analyst. In addition, the firm's dedicated trading desk and active dialogue with the Street enable Highland to identify technical dislocations and opportunities. The firm's high conviction investment philosophy and active portfolio management style versus peers have been key drivers of creating alpha for clients over time.

Investment Monitoring and Risk Management

Risk management is integrated into all levels of the investment process, from research, to portfolio construction and management, to ongoing monitoring. Highland conducts extensive position and portfolio monitoring activities on a daily basis. Portfolio risk is reviewed using internally generated daily, weekly, and monthly reports which measure transaction compliance including investor-mandated metrics such as portfolio concentrations or required test scores, as well as compliance with evolving internal positioning targets. Individual position risk is monitored in a number of ways, including Highland's extensive proprietary intranet system (Highland Online Management Engine or "HOME"), which pulls together data from their various data providers (Wall Street Office, LPC, Moody's, S&P, MarkIt, S&P LCD, CSFB Index) to provide a comprehensive portfolio/risk management system. The system allows the CLO team to monitor metrics at any level of aggregation (instrument, issuer, portfolio, fund and across the platform). Additionally, the system is designed to be scalable and with flexibility to enable future data inputs and reporting requirements.

For both Managed CLOs and for the underlying loans, the HOME intranet system allows Highland to monitor portfolios on a real-time, ongoing basis by receiving alerts showing positions with the largest daily/weekly/monthly mark change, as well as alerts on downgrades/upgrades, and when their credit analyst has changed his opinion on a broadly syndicated loan.

Allocation Policy

Highland and its affiliates may, from time to time, be presented with investment opportunities that fall within the investment objectives of the Company and the Managed CLOs and other clients, funds or other investment accounts managed by Highland or its affiliates, and in such circumstances, subject to the Company's priority allocation with respect to CLO Income Notes of new issue Highland CLOs Highland and its affiliates expect to allocate such opportunities among the Company, the Managed CLOs and such other clients, funds or other investment accounts on a basis that Highland and its affiliates determine in good faith is appropriate taking into consideration such factors as the fiduciary duties owed to the Company, the Managed CLOs and such other clients, funds or other investment accounts, the primary mandates of the Company, the Managed CLOs and such other clients, funds or other investment accounts, the capital available to the Company, the Managed CLOs and such other clients, funds or other investment accounts, any restrictions on investment, the sourcing of the transaction, the size of the transaction, the amount of potential follow-on investing that may be required for such investment and the other collateral obligations of the Company, the Managed CLOs and such other clients, funds or other investment accounts, the relation of such opportunity to the investment strategy of the Company, the Managed CLOs and such other clients, funds or other investment accounts, reasons of portfolio balance and any other consideration deemed relevant by Highland and its affiliates in good faith. Subject to the Company's priority allocation with respect to CLO Income Notes of new issue Highland CLOs, Highland will allocate investment opportunities across the entities for which such opportunities are

appropriate, consistent with (1) its internal conflict of interest and allocation policies and (2) the requirements of the Investment Advisers Act. Highland will seek to allocate investment opportunities among such entities in a manner that is fair and equitable over time and consistent with its allocation policy. However, there is no assurance that such investment opportunities will be allocated to the Company and the Managed CLOs fairly or equitably in the short term or over time and there can be no assurance that the Company and the Managed CLOs will be able to participate in all such investment opportunities that are suitable for it.

Biographies of the Highland Key Personnel

The Portfolio Manager will use the services of the key personnel set forth below, although it may not necessarily continue to use their services during the entire term of the Portfolio Management Agreement. Of these, Trey Parker and Hunter Covitz (and such other personnel as may be determined from time to time) will be made available by the Portfolio Manager to the Company pursuant to the Portfolio Management Agreement.

Although the persons described above are currently employed by Highland and are engaged in the activities of the Portfolio Manager, such persons may not necessarily continue to be employed by the Portfolio Manager during the entire term of the Portfolio Management Agreement and, if so employed, may not remain engaged in the activities of the Portfolio Manager.

James Dondero, CFA, CMA

Co-Founder, President

Mr. Dondero is President of Highland CLO Management and Acis CLO Management, LLC and Co-Founder and President of Highland Capital Management, L.P. (an alternative asset manager specializing in high-yield fixed income investments) and Acis Capital Management, L.P. Mr. Dondero has over 30 years of experience in the credit and equity markets, focused largely on high-yield and distressed investing. Under Mr. Dondero's leadership, Highland and Acis have been a pioneer in both developing the collateralized loan obligation (CLO) market and advancing credit-oriented solutions for institutional and retail investors worldwide, including product offerings such as institutional separate accounts, CLOs, hedge funds, private equity funds, mutual funds, REITs, and ETFs. Mr. Dondero is the Chairman and President of NexPoint Residential Trust, Inc. (NYSE:NXRT), is Chairman of NexBank Capital, Inc., Cornerstone Healthcare Group Holding, Inc., and CCS Medical, Inc., and a board member of Jernigan Capital, Inc. (NYSE:JCAP), and MGM Holdings, Inc. He also serves on the Southern Methodist University Cox School of Business Executive Board. A dedicated philanthropist, Mr. Dondero actively supports initiatives in education, veterans affairs, and public policy. Prior to founding Highland in 1993, Mr. Dondero was involved in creating the GIC subsidiary of Protective Life, where as Chief Investment Officer he helped take the company from inception to over \$2 billion between 1989 and 1993. Between 1985 and 1989, Mr. Dondero was a corporate bond analyst and then portfolio manager at American Express. Mr. Dondero began his career in 1984 as an analyst in the JP Morgan training program. Mr. Dondero graduated from the University of Virginia where he earned highest honors (Beta Gamma Sigma, Beta Alpha Psi) from the McIntire School of Commerce with dual majors in accounting and finance. He has received certification as Certified Public Accountant (CPA) and Certified Managerial Accountant (CMA) and has earned the right to use the Chartered Financial Analyst (CFA) designation.

Mark Okada, CFA

Co-Founder, Co-Chief Investment Officer

Mr. Okada is Co-Founder of Highland CLO Management and Acis CLO Management, LLC and Co-Founder and Co-Chief Investment Officer of Highland Capital Management, L.P. and Acis Capital Management, L.P. Responsible for overseeing investment activities for various strategies within Highland and Acis, Mr. Okada is a pioneer in the development of the bank loan market and has over 30 years of credit experience. He is responsible for structuring one of the industry's first arbitrage CLOs and was actively involved in the development of Highland's bank loan separate account and mutual fund platforms. Mr. Okada received a BA in Economics and a BA in Psychology, cum laude, from the University of California, Los Angeles. He has earned the right to use the Chartered Financial Analyst designation. Mr. Okada is a Director of NexBank, Chairman of the Board of Directors of Common Grace Ministries, Inc., is on the Board of Directors for Education is Freedom, and also serves on the GrowSouth Fund advisory board.

Trey Parker

Partner, Portfolio Manager and Co-Chief Investment Officer

Mr. Parker is Partner, Portfolio Manager and Co-Chief Investment Officer at Highland Capital Management, L.P., and serves on the Investment Manager's Investment Committee. Prior to his current role, Mr. Parker was Head of Credit and covered a number of the industrial verticals, as well as parts of tech, media and telecom for the Investment Manager and worked on the Distressed & Special Situations investment team at Highland. Prior to joining Highland in March 2007, Mr. Parker was a Senior Associate at Hunt Special Situations Group, L.P., a Private Equity group focused on distressed and special situation investing. Mr. Parker was responsible for sourcing, executing and monitoring control Private Equity investments across a variety of industries. Prior to joining Hunt, Mr. Parker was an analyst at BMO Merchant Banking, a Private Equity group affiliated with the Bank of Montreal. While at BMO, Mr. Parker completed a number of LBO and mezzanine investment transactions. Prior to joining BMO, Mr. Parker worked in sales and trading for First Union Securities and Morgan Stanley. Mr. Parker received an MBA with concentrations in Finance, Strategy and Entrepreneurship from the University of Chicago Booth School of Business and a BA in Economics and Business from the Virginia Military Institute. Mr. Parker serves on the Board of Directors of Omnimax Holdings, Inc., TerreStar Corporation, JHT Holdings, Inc., and a non-profit organization, the Juvenile Diabetes Research Foundation (Dallas chapter).

Hunter Covitz, CPA

Managing Director, Structured Products

Mr. Covitz is a Managing Director and Portfolio Manager at Highland Capital Management, L.P. He is responsible for all CLOs, separate accounts, and hedge funds managed by Acis Capital Management, L.P., as well as all CLOs managed by Highland. Mr. Covitz serves on Highland's investment committee and leads the structured products investment team. Since joining Highland in 2003, Mr. Covitz has been instrumental in the structuring, warehousing, ramping, and ongoing portfolio management of over 30 Highland and Acis-originated CLOs. Prior to joining Highland, Mr. Covitz served as a tax consultant at Deloitte & Touche and KBA Group LLP, where he focused on high-net worth individuals and middle-market companies. He received both his MS and BBA in Accounting from the University of Oklahoma. Mr. Covitz is a licensed Certified Public Accountant.

Neil Desai

Portfolio Manager, Structured Products

Mr. Desai is a Portfolio Manager of Structured Products at Highland Capital Management, L.P. He is focused on sourcing and trading structured products for Highland's CLOs, hedge funds, mutual funds and separate accounts in the primary and secondary markets. Prior to joining Highland in August 2015, Mr. Desai was a Director in Pfizer Inc.'s Treasury organization where he built and ran Pfizer's structured products business. Prior to Pfizer, Mr. Desai spent several years structuring and trading various structured products at Barclays Capital and its spin-off hedge fund, C12 capital. Mr. Desai received both a Bachelor's and Master's degree in Computer Science & Electrical Engineering from MIT.

COMPANY DIRECTORS AND ADMINISTRATION

DIRECTORS

The Directors are responsible for managing the business affairs of the Company in accordance with the Articles and have overall responsibility for the Company's activities including the appointment of the service providers. The Directors may delegate certain functions to other parties such as the Administrator. The Directors have appointed Highland HCF Advisor as Portfolio Manager and delegated the investment management and risk management of the Company's investments to the Portfolio Manager pursuant to the Portfolio Management Agreement.

The Board comprises two Directors, both of whom are independent of Highland and Acis.

The address of the Directors, all of whom are non-executive, is the registered office of the Company. The Directors of the Company are as follows:

William Scott (Chairman)

William Scott, a Guernsey resident, acts as an independent non-executive Director of the Company. Mr. Scott also currently serves as independent non-executive director of a number of investment companies and funds. From 2003 to 2004, Mr. Scott worked as Senior Vice President with FRM Investment Management Limited. Previously, Mr. Scott was a director at Rea Brothers (which became part of the Close Brothers group in 1999 and where he was a director of Close Bank Guernsey Limited) (1989-2002) and Assistant Investment Manager with the London Residuary Body Superannuation Scheme (1987-1989). Mr. Scott graduated from the University of Edinburgh in 1982 and is a Chartered Accountant having qualified with Arthur Young (now E&Y) in 1987. Mr. Scott also holds the Securities Institute Diploma and is a Chartered Fellow of the Chartered Institute for Securities & Investment. He is also a Chartered Wealth Manager.

Heather Bestwick

Heather Bestwick, a Jersey resident, acts as an independent non-executive Director of the Company. She qualified as an English solicitor with Norton Rose, and worked in their London and Athens offices for eight years. In 1999 she joined Walkers in the Cayman Islands, qualifying as a Cayman Islands attorney and Notary Public, and became a partner in 2003. Her practice encompassed hedge funds, private equity, structured finance, secured lending and yacht registration and finance. Ms. Bestwick moved to Jersey in 2007 to become Managing Partner of the Walkers Jersey office. She joined Jersey Finance in 2010 as Technical Director and Deputy Chief Executive, leading the development of finance industry legislation on behalf of industry and liaising with the regulator and government. Ms. Bestwick is a member of the Channel Islands committee of the Association of Investment Companies.

Management functions of the Board of Directors

As there are no employees of the Company, the Board performs certain management functions, which include the overseeing of the Company's investment policy and investment strategy and the supervision of any delegated responsibilities to third-party service providers, and has the ultimate responsibility for the management and operations of the Company.

The Company has appointed Highland HCF Advisor as Portfolio Manager and delegated the investment management and risk management of the Company's investments to the Portfolio Manager pursuant to the Portfolio Management Agreement.

CORPORATE GOVERNANCE

The Directors are committed to maintaining high standards of corporate governance. Insofar as the Directors believe it to be appropriate and relevant to the Company, it is their intention that the Company should comply with best practice standards for the business carried on by the Company.

On 1 January 2012, the GFSC's Finance Sector Code of Corporate Governance (the "GFSC Code") came into effect. The GFSC has stated in the GFSC Code that companies which report against the UK Corporate Governance Code are

deemed to meet the requirements of the GFSC Code, and need take no further action. Other than as set out below, the Company currently complies with, and will comply with, the GFSC Code.

The Company does not have a senior independent director because all of its Directors are non-executive and the Company has a Chairman. There are no other instances of non-compliance with the UK Corporate Governance Code by the Company as at the date of this Offering Memorandum.

Audit Committee

The Company has established an Audit Committee, which comprises all the Directors. The Company's Audit Committee meets formally at least twice a year for the purpose, amongst other things, of considering the appointment, independence and remuneration of the Auditor and to review the Company's annual financial reports. Where audit-related and/or non-audit services are to be provided by the Auditors, full consideration of the financial and other implications on the independence of the Auditors arising from any such engagement will be considered before proceeding. Heather Bestwick acts as chairman of the Audit Committee. The responsibilities of the Audit Committee includes monitoring the integrity of the Company's results and financial statements, reviewing reports received from the Administrator on the adequacy and the effectiveness of the Company's internal controls and risk management systems, considering annually whether there is a need for an effectiveness of the Company's internal audit function and assessing the ongoing suitability of the Auditors and ensuring their co-ordination with any internal audit function.

The chairmanship of the Audit Committee and each Director's performance is reviewed annually by the Chairman and the performance of the Chairman is assessed by the other Directors.

Advisory Board

The Company has established an Advisory Board, which composed of individuals who shall be representatives of certain Shareholders. See "*Summary—Advisory Board*".

PORTFOLIO MANAGER

Highland HCF Advisor will act as Portfolio Manager to the Company (pursuant to the Portfolio Management Agreement) and may act (either itself or through an affiliate) as the CLO Manager to Managed CLOs.

Pursuant to the Portfolio Management Agreement, the Portfolio Manager will select the portfolio of investments and instruct the Custodian with respect to any acquisition, disposition or sale of investments and be responsible for the business decisions and carry on the day-to-day management of the Company's business and implementation of its investment objective and policy.

Highland Fees

Highland HCF Advisor will receive, in consideration for its services pursuant to the Portfolio Management Agreement, an amount equivalent to all Operating Expenses incurred by the Portfolio Manager in the performance of its obligations thereunder as described below, together with any irrecoverable VAT arising on such costs and expenses. Except as provided below, the Portfolio Manager will pay all of its own operating, overhead and administrative expenses, including all costs and expenses on account on employee compensation, employee benefits and rent ("**Overhead**") without reimbursement by the Company.

The Company shall pay or reimburse the Portfolio Manager and its affiliates for only for reasonable third party costs and expenses related to the services hereunder, including, but not limited to investment-related expenses, brokerage commissions and other transaction costs, expenses related to clearing and settlement charges, actual out-of-pocket professional fees relating to, trustee, administration, tax, accounting, legal, auditing or valuation services, any governmental, regulatory, licensing, filing or registration fees incurred in connection with the Company's compliance with the rules of any self-regulatory organization or any federal, state or local laws, research-related expenses (including, without limitation, news and quotation equipment and services, investment and trading-related software, including, without limitation, trade order management software (i.e., software used to route trade orders)), accounting (including accounting software), tax preparation expenses, costs and expenses associated with reporting and providing information to the Company, any taxes imposed upon the Company (including, but not limited to, any

irrecoverable VAT arising on such costs and expenses), fees relating to valuing the financial instruments, extraordinary expenses and the Company's indemnification obligations (including those incurred in connection with indemnifying indemnified persons, including advancing such amounts) (collectively, the "**Operating Expenses**"). In the event any fees or expenses are for services used by, or attributable to, other persons advised by Highland HCF Advisor or its affiliates, including, but not limited to, any fees or expenses for software or subscription-based services, the Company shall only reimburse the Portfolio Manager for its pro rata share of such expenses, as determined by the Portfolio Manager in good faith.

For the avoidance of doubt, (i) the cost of all third party expenses incurred by the Portfolio Manager in connection with the Portfolio Management Agreement shall not exceed standard market rates (which may include standard soft dollar arrangements) and (ii) to the extent any of the foregoing expenses were incurred on behalf of, or benefit of a number of Portfolio Manager's advised accounts, such expenses shall be allocated pro rata among such accounts.

To the extent that expenses to be borne by the Company are paid by the Portfolio Manager or by any services provider, the Company shall reimburse the Portfolio Manager (or the relevant services provider, as applicable) for such expenses so long as such expenses are determined on an arm's length basis.

The Portfolio Manager will also receive distributions pursuant to the Distribution Priority following the Investment Period, after satisfaction of all expenses, debts, liabilities and obligations of the Company and the Shareholders have receive a cumulative rate of return of 8.0% per annum, compounded annually. See "*Summary—Dividend Policy*".

Further details regarding the Portfolio Manager and Highland are set out in the section of this Offering Memorandum entitled "*Investment Process*". Further details regarding the Portfolio Management Agreement are set out in the section of this Offering Memorandum entitled "*Additional Information on the Company*".

CLO MANAGER

In addition, the Portfolio Manager, Highland, Acis and/or the Management Companies (or one of their affiliates), as CLO Manager, may also manage Managed CLOs pursuant to management agreements ("**CLO Management Agreements**") to be entered into from time to time. The applicable CLO Manager will receive customary fees, in consideration for its services as the CLO Manager, from each of the Managed CLOs it manages.

ADMINISTRATOR

State Street (Guernsey) Limited has been appointed as Administrator of the Company pursuant to the Administration Agreement (further details of which are set out in the section of this Offering Memorandum entitled "*Material Contracts*" in "*Additional Information on the Company*"). In such capacity, the Administrator is responsible for the day-to-day administration of the Company (including but not limited to the calculation and publication of the estimated quarterly NAV) and general secretarial functions required by the Companies Law (including but not limited to the maintenance of the Company's accounting and statutory records). Prospective investors should note that it is not possible for the Administrator to provide any investment advice to investors.

The Administrator is a private limited company, created under the laws of Guernsey on 17 March 2000 whose registered office is situated at First Floor, Dorey Court, Admiral Park, St Peter Port, Guernsey GY1 6HJ, Channel Islands. The Administrator is licensed under the POI Law, with the GFSC to carry out controlled investment business. The Administrator's principal business activity is providing securities services.

CUSTODIAN

State Street Custodial Services (Ireland) Limited has been appointed as Custodian of the Company pursuant to the Custody Agreement (further details of which are set out in the section of this Offering Memorandum entitled "*Material Contracts*" in "*Additional Information on the Company*"). In acting as custodian of the Company's investments, the Custodian shall provide for the safekeeping of certificates of deposit, shares, notes and in general any instrument evidencing the ownership of securities and may take custody of cash and other assets. Assets will be held in a custody account and registered in the name of the Company or the Custodian, its delegate or a nominee.

The Custodian, which is authorised as an Investment Business Firm under Section 10 of the Irish Investment Intermediaries Act, 1995 (as amended), will provide custody and banking services.

FEES AND EXPENSES

The expenses of the Company related to the Placing are described in “*Summary—Expenses related to the Placing*”.

The Company’s ongoing expenses are described in “*Summary—Ongoing annual expenses*”.

For more information on expenses charged during the most recent financial year, prospective investors should review the Company’s annual audited financial statements (if any) for the prior financial year.

MEETINGS AND REPORTS TO SHAREHOLDERS

All general meetings of the Company shall be held in Guernsey.

The Company’s audited annual report and accounts will be prepared to 31 December, each year, and it is expected that copies will be sent to Shareholders at the end of April each year. Shareholders will also receive an unaudited interim report each year covering the six months from 1 January to 30 June, expected to be despatched at the end of August each year.

The Company’s accounts are drawn up in U.S. Dollars and in compliance with GAAP.

The following information will be disclosed to investors at the same time as the annual financial statements and may be provided at other times by way of a report and/or letter sent to investors by the Portfolio Manager or the Administrator:

- (a) the percentage of the assets of the Company that are subject to special arrangements arising from their illiquid nature;
- (b) any new arrangements for managing the liquidity of the Company;
- (c) the current risk profile of the Company and the risk management systems employed by the Portfolio Manager to manage those risks; and
- (d) the total amount of leverage employed by the Company.

Any changes to the following information will be provided by the Portfolio Manager or the Administrator to investors without undue delay and may be provided by email:

- (a) the maximum level of leverage which the Portfolio Manager may employ on behalf of the Company;
- (b) the right of re-use of collateral or any changes to any guarantee granted under any leveraging arrangement; and
- (c) activation of liquidity management tools.

PLACING ARRANGEMENTS

THE PLACING

The target number of Placing Shares to be issued pursuant to the Placing is an amount of Shares equal to U.S. \$153 million. As at the date of this Offering Memorandum, the actual number of Placing Shares to be issued under the Placing is not known.

The results of the Placing will be released by the Company, including details of the number of Placing Shares allotted (or such other date as may be notified by the Company). The Directors are under no obligation to issue share certificates unless requested to do so by a Shareholder. No temporary documents of title will be issued.

The Company is seeking aggregate subscriptions to purchase Placing Shares in an aggregate amount of US \$153 million.

Placees will commit under the subscription and transfer agreement to purchase Shares to be settled from time to time during the Investment Period. The Portfolio Manager may call such Shares for settlement from time to time on a pro rata basis upon 10 Business Days' notice to the Placees in such amounts as may be specified by the Portfolio Manager.

Upon the expiration of the Investment Period, all Placees will be released from any further obligation with respect to purchase Shares under their subscriptions, except to the extent necessary to:

- (i) complete, no later than 180 days after the expiration of the Investment Period, the purchase of Shares pursuant to written commitments, letters of intent or similar contractual commitments that were in process as of the end of the Investment Period; and
- (ii) fund any indebtedness of the Company permitted hereunder incurred prior to the end of the Investment Period (including to repay outstanding indebtedness under any Warehouse Loan Facilities).

Shares will be issued at a price per Share based on the most recent quarterly determined NAV of the Company.

The maximum number of Shares to be issued by the Company is an amount of Shares equal to U.S. \$153 million and there is no minimum number of Shares. Fractions of Placing Shares will be issued.

On the Closing Date, Placees will acquire Shares of existing Shareholders at a price per Share based on the Adjusted NAV such that Placees and existing Shareholders will hold currently existing Shares on a *pro rata* basis and existing Shareholders will commit, as Placees under a subscription and transfer agreement, to purchase Shares such that new and existing Shareholders will hold both existing Shares and commitments on pro rata basis.

The Board may deduct from any dividend payable to any Shareholder on or in respect of a Share all sums of money (if any) presently payable by him to the Company on account of calls with respect to existing Shares, or calls of commitments to purchase Shares pursuant to the subscription and transfer agreement or otherwise.

A Shareholder that defaults in respect of its obligation to purchase Shares pursuant to the terms of the subscription and transfer agreement will be subject to customary default provisions.

The Board may retain any dividend or other monies payable on or in respect of a Share on which the Company has a lien and may apply the same in or towards satisfaction of the liabilities or obligations in respect of which the lien exists.

Highland Principal Commitment

Certain principals of Highland will subscribe, directly or indirectly, for \$3,000,000 of Shares in the aggregate.

TIME AND DATE OF THE OPENING AND CLOSING OF THE OFFER

This subscription is open for a fixed offer period only. This period runs from November 15, 2017, the offer opening date, until 17:00 in Guernsey on the Closing Date. Only fully completed applications received by this date with cleared funds in the Company's nominated account will be acceptable for investment.

USE OF PROCEEDS

The Net Placing Proceeds will depend on the number of Placing Shares issued pursuant to the Placing. The Portfolio Manager intends to invest the Net Placing Proceeds in accordance with the Company's investment policy (further details of the Company's investment process and strategy are set out in the section of this Offering Memorandum entitled "*Company, its Investment Objective, Policy and Strategy*").

DEALINGS

The Company does not guarantee that at any particular time any market maker(s) will be willing to make a market in the Placing Shares, nor does it guarantee the price at which a market will be made in the Placing Shares. Accordingly, the dealing price of the Placing Shares may not necessarily reflect changes in the Net Asset Value per Share. Furthermore, the level of the liquidity in the Placing Shares can vary significantly.

SCALING BACK AND ALLOCATION

If aggregate applications for Placing Shares exceed 325 million Shares, being the maximum number of Shares to be issued pursuant to the Placing, it will be necessary to scale back applications under the Placing. The Company reserves the right to decline in whole or in part any application for Placing Shares pursuant to the Placing.

GENERAL

Pursuant to anti-money laundering laws and regulations with which the Company must comply in the UK and Guernsey, the Company (and its agents) may require evidence in connection with any application for Placing Shares, including further identification of the applicant(s), before any Placing Shares are issued.

In the event that there are any significant changes affecting any of the matters described in this Offering Memorandum or where any significant new matters have arisen after the publication of this Offering Memorandum, the Company will publish a notice to investors. Such notice will give details of the significant change(s) or the significant new matter(s). In the event that the Company is required to publish any notice, applicants who have applied for Placing Shares shall have at least two clear business days following the publication of the relevant notice within which to withdraw their offer to subscribe for Placing Shares in its entirety. The right to withdraw an application to subscribe for Placing Shares in these circumstances will be available to all investors in the Placing. If the application is not withdrawn within the time limits set out in the relevant notice, any application for Placing Shares will remain valid and binding.

The Directors may, in their absolute discretion, waive the minimum application amounts in respect of any particular application for Placing Shares under the Placing.

Should the Placing be aborted or fail to complete for any reason, monies received will be returned without interest at the risk of the applicant to the bank account from which the money was received forthwith following such abort or failure, as the case may be.

CLEARING AND SETTLEMENT

Payment for the Placing Shares should be made in accordance with settlement instructions to be provided to Placees by or on behalf of the Company. To the extent that any application for Placing Shares is rejected in whole or in part (whether by scaling back or otherwise), monies received will be returned without interest at the risk of the applicant.

PURCHASE AND TRANSFER RESTRICTIONS

This Offering Memorandum does not constitute an offer to sell, or the solicitation of an offer to acquire or subscribe for, Placing Shares in any jurisdiction where such an offer or solicitation is unlawful or would impose any unfulfilled registration, qualification, publication or approval requirements on the Company.

The Company has elected to impose the restrictions described below on the Placing and on the future trading of the Placing Shares so that the Company will not be required to register the offer and sale of the Placing Shares under the U.S. Securities Act, so that the Company will not have an obligation to register as an investment company under the U.S. Investment Company Act and related rules and to address certain ERISA, U.S. Tax Code and other considerations. The Company and its agents will not be obligated to recognise any resale or other transfer of the Placing Shares made other than in compliance with the restrictions described below.

Restrictions due to lack of registration under the U.S. Securities Act and U.S. Investment Company Act

The Placing Shares have not been and will not be registered under the U.S. Securities Act or with any securities regulatory authority of any state or other jurisdiction of the United States and the Placing Shares may not be offered, sold, exercised, resold, transferred or delivered, directly or indirectly, within the United States or to, or for the account or benefit of, U.S. Persons, except pursuant to an exemption from, or in a transaction not subject to, the registration requirements of the U.S. Securities Act and in compliance with any applicable securities laws of any state or other jurisdiction in the United States. There will be no public offer of the Placing Shares in the United States.

Subject to certain exceptions as described herein, the Placing is only being made outside the United States to non-U.S. Persons in reliance on Regulation S under the U.S. Securities Act.

In addition, except with the express written consent of the Company given in respect of an investment in the Company, the Placing Shares may not be acquired by (i) investors using assets of (A) an “employee benefit plan” as defined in section 3(3) of ERISA that is subject to Title I of ERISA; (B) a “plan” as defined in Section 4975 of the U.S. Code, including an individual retirement account or other arrangement that is subject to Section 4975 of the U.S. Code; or (C) an entity which is deemed to hold the assets of any of the foregoing types of plans, accounts or arrangements that is subject to Title I of ERISA or Section 4975 of the U.S. Code; or (ii) a governmental, church, non-U.S. or other employee benefit plan that is subject to any federal, state, local or non-U.S. law that is substantially similar to the provisions of Title I of ERISA or Section 4975 of the U.S. Code, unless its purchase, holding, and disposition of the Placing Shares will not constitute or result in a non-exempt violation of any such substantially similar law.

Subscriber and Shareholder warranties

By participating in the Placing, each subscriber acknowledges and agrees that it will (for itself and any person(s) procured by it to subscribe for Shares and any nominee(s) for any such person(s)) be further deemed to represent and warrant to the Company that:

- (a) if it is located outside the United States, it is not a U.S. Person, it is acquiring the Shares in an offshore transaction meeting the requirements of Regulation S and it is not acquiring the Shares for the account or benefit of a U.S. Person;
- (b) if it is located inside the United States or is a U.S. Person, it is an Eligible U.S. Investor and has received, read, understood and, prior to its receipt of any Shares pursuant to the Placing, returned an executed a U.S. Investor Letter to the Company;
- (c) it acknowledges that the Shares have not been and will not be registered under the U.S. Securities Act or with any securities regulatory authority of any state or other jurisdiction of the United States and may not be offered or sold in the United States or to, or for the account or benefit of, U.S. Persons absent registration or an exemption from registration under the U.S. Securities Act;
- (d) it acknowledges that the Company has not registered under the U.S. Investment Company Act and that the Company has put in place restrictions for transactions not involving any public offering in the United States, and to ensure that the Company is not and will not be required to register under the U.S. Investment Company Act;
- (e) unless the Company expressly consents in writing otherwise, no portion of the assets used to purchase, and no portion of the assets used to hold, the Shares or any beneficial interest therein constitutes or will constitute the assets of (i) an “employee benefit plan” as defined in Section 3(3) of ERISA that is subject to Title I of ERISA; (ii) a “plan” as defined in Section 4975 of the U.S. Code, including an individual retirement account

or other arrangement that is subject to Section 4975 of the U.S. Code; or (iii) an entity which is deemed to hold the assets of any of the foregoing types of plans, accounts or arrangements that is subject to Title I of ERISA or Section 4975 of the U.S. Code. In addition, if an investor is a governmental, church, non-U.S. or other employee benefit plan that is subject to any federal, state, local or non-U.S. law that is substantially similar to the provisions of Title I of ERISA or Section 4975 of the U.S. Code, its purchase, holding, and disposition of the Shares must not constitute or result in a non-exempt violation of any such substantially similar law;

- (f) that if any Shares offered and sold are issued in certificated form, then such certificates evidencing ownership will contain a legend substantially to the following effect unless otherwise determined by the Company in accordance with applicable law:

“THE COMPANY HAS NOT BEEN REGISTERED UNDER THE UNITED STATES INVESTMENT COMPANY ACT OF 1940, AS AMENDED (THE “INVESTMENT COMPANY ACT”) AND THE SECURITY EVIDENCED HEREBY HAS NOT BEEN REGISTERED UNDER THE UNITED STATES SECURITIES ACT OF 1933, AS AMENDED (THE “SECURITIES ACT”), AND MAY NOT BE OFFERED, SOLD, PLEDGED OR OTHERWISE TRANSFERRED EXCEPT (A) OUTSIDE THE UNITED STATES TO A NON-US PERSON (AS DEFINED IN RULE 902 OF REGULATION S, “US PERSON”) THAT IS NOT A US RESIDENT FOR THE PURPOSES OF THE INVESTMENT COMPANY ACT (A “US RESIDENT”) IN ACCORDANCE WITH RULE 903 OR 904 OF REGULATION S UNDER THE SECURITIES ACT (AND NOT IN A PRE-ARRANGED TRANSACTION RESULTING IN THE RESALE OF SUCH SECURITY INTO THE UNITED STATES) OR (B) PURSUANT TO AN EXEMPTION FROM REGISTRATION UNDER THE SECURITIES ACT AND UNDER CIRCUMSTANCES WHICH WILL NOT REQUIRE THE COMPANY TO REGISTER UNDER THE INVESTMENT COMPANY ACT (PROVIDED THAT, IF SUCH TRANSFER PURSUANT TO THIS CLAUSE (B) IS TO A US PERSON OR A US RESIDENT, THE PURCHASER IS A QUALIFIED PURCHASER WITHIN THE MEANING OF SECTION 3(c)(7) OF THE INVESTMENT COMPANY ACT) AND, IN EACH CASE IN ACCORDANCE WITH ANY APPLICABLE SECURITIES LAWS OF THE STATES OF THE UNITED STATES AND OTHER JURISDICTIONS. THE HOLDER OF THIS SECURITY AGREES THAT IT WILL COMPLY WITH THE FOREGOING RESTRICTIONS. NO REPRESENTATION CAN BE MADE AS TO THE AVAILABILITY OF ANY EXEMPTION UNDER THE SECURITIES ACT FOR RESALES OF THE SECURITY.

THE HOLDER ACKNOWLEDGES THAT THE COMPANY RESERVES THE RIGHT PRIOR TO ANY SALE OR OTHER TRANSFER TO REQUIRE THE DELIVERY OF SUCH CERTIFICATIONS, LEGAL OPINIONS AND OTHER INFORMATION AS THE COMPANY MAY REASONABLY REQUIRE TO CONFIRM THAT THE PROPOSED SALE OR OTHER TRANSFER COMPLIES WITH THE FOREGOING RESTRICTIONS.

IF A BENEFICIAL OWNER OF THIS SECURITY WHO IS REQUIRED TO BE A QUALIFIED PURCHASER WITHIN THE MEANING OF SECTION 3(c)(7) OF THE INVESTMENT COMPANY ACT IS AT ANY TIME NOT SUCH A QUALIFIED PURCHASER, THE COMPANY MAY (A) REQUIRE SUCH BENEFICIAL OWNER TO SELL THIS SECURITY TO A PERSON WHO IS NOT A US PERSON OR A US RESIDENT OR WHO IS A US PERSON WHO IS ALSO A QUALIFIED PURCHASER AND WHO IS OTHERWISE QUALIFIED TO PURCHASE SUCH SECURITY IN A TRANSACTION EXEMPT FROM REGISTRATION UNDER THE SECURITIES ACT OR (B) SELL THIS SECURITY ON BEHALF OF THE BENEFICIAL OWNER AT THE BEST PRICE REASONABLY OBTAINABLE TO A PERSON WHO IS NOT A US PERSON OR WHO IS A US PERSON OR A US RESIDENT WHO IS ALSO A QUALIFIED PURCHASER AND WHO IS OTHERWISE QUALIFIED TO PURCHASE SUCH SECURITY IN A TRANSACTION EXEMPT FROM REGISTRATION UNDER THE SECURITIES ACT.

THE HOLDER OF THIS SECURITY IS DEEMED TO HAVE ACKNOWLEDGED THAT THIS LEGEND WILL NOT BE REMOVED FROM THIS SECURITY FOR AS LONG AS THE COMPANY RELIES ON SECTION 3(c)(7) OF THE INVESTMENT COMPANY ACT”;

- (g) if in the future the investor decides to offer, sell, transfer, assign or otherwise dispose of the Shares, it will do so only in compliance with an exemption from the registration requirements of the U.S. Securities Act and under circumstances which will not require the Company to register under the U.S. Investment Company Act. It acknowledges that any sale, transfer, assignment, pledge or other disposal made other than in compliance with such laws and the above stated restrictions will be subject to the compulsory transfer provisions as provided in the Articles;
- (h) if in the future it decides to offer, resell, pledge or otherwise transfer any of the Shares, such Shares may be offered, resold, pledged or otherwise transferred only (A) outside the United States to persons not known to be U.S. Persons in an offshore transaction in accordance with Rule 904 of Regulation S under the U.S. Securities Act, (B) in a transaction that does not require registration under the U.S. Securities Act or any applicable United States securities laws and regulations or require the Company to register under the U.S. Investment Company Act, subject to, if requested by the Company, delivery of an opinion of counsel of recognised standing in form and substance reasonably satisfactory to the Company, or (C) to the Company;
- (i) it is purchasing the Shares for its own account or for one or more investment accounts for which it is acting as a fiduciary or agent, in each case for investment only, and not with a view to or for sale or other transfer in connection with any distribution of the Shares in any manner that would violate the U.S. Securities Act, the U.S. Investment Company Act or any other applicable securities laws;
- (j) it acknowledges that the Company reserves the right to make inquiries of any holder of the Shares or interests therein at any time as to such person's status under the U.S. federal securities laws and to require any such person that has not satisfied the Company that holding by such person will not violate or require registration under the U.S. securities laws to transfer such Shares or interests in accordance with the Articles;
- (k) it acknowledges and understands that the Company is required to comply with FATCA and that the Company will follow FATCA's extensive reporting and withholding requirements. The subscriber agrees to furnish any information and documents the Company may from time to time request, including but not limited to information required under FATCA;
- (l) it is entitled to acquire the Shares under the laws of all relevant jurisdictions which apply to it, it has fully observed all such laws and obtained all governmental and other consents which may be required thereunder and complied with all necessary formalities and it has paid all issue, transfer or other taxes due in connection with its acceptance in any jurisdiction of the Shares and that it has not taken any action, or omitted to take any action, which may result in the Company or its directors, officers, agents, employees and advisers being in breach of the laws of any jurisdiction in connection with the Placing or its acceptance of participation in the Placing;
- (m) it has received, carefully read and understands this Offering Memorandum, and has not, directly or indirectly, distributed, forwarded, transferred or otherwise transmitted this Offering Memorandum or any other presentation or offering materials concerning the Shares to within the United States or to any U.S. Persons, nor will it do any of the foregoing; and
- (n) if it is acquiring any Shares as a fiduciary or agent for one or more accounts, the investor has sole investment discretion with respect to each such account and full power and authority to make such foregoing representations, warranties, acknowledgements and agreements on behalf of each such account.

The Company and its directors, officers, agents, employees, advisers and others will rely upon the truth and accuracy of the foregoing representations, warranties, acknowledgments and agreements.

If any of the representations, warranties, acknowledgments or agreements made by the investor are no longer accurate or have not been complied with, the investor will immediately notify the Company.

TAXATION

GENERAL

The information below, which relates only to Guernsey and UK taxation, summarises the advice received by the Board and is applicable to the Company (except insofar as express reference is made to the treatment of other persons) to persons who are resident or ordinarily resident in Guernsey or the United Kingdom for taxation purposes and who hold Placing Shares as an investment. It is based on current Guernsey and UK tax law and published practice, respectively, which law or practice is, in principle, subject to any subsequent changes therein (potentially with retrospective effect). Certain Shareholders, such as dealers in securities, collective investment schemes, insurance companies and persons acquiring their Placing Shares in connection with their employment may be taxed differently and are not considered. The tax consequences for each Shareholder of investing in the Company may depend upon the Shareholder's own tax position and upon the relevant laws of any jurisdiction to which the Shareholder is subject.

If you are in any doubt about your tax position, you should consult your professional adviser.

GUERNSEY

The Directors intend to conduct the Company's affairs such that, based on current law and practice of the relevant tax authorities, the Company will not become resident for tax purposes in any other territory other than Guernsey.

The Company

The Company has been granted tax exempt status by the Director of Income Tax in Guernsey pursuant to the Income Tax (Exempt Bodies) (Guernsey) Ordinance, 1989. The Company will need to reapply annually for exempt status, an application that currently incurs a fee of £1,200 per annum. It is expected that the Company will continue to apply for exempt status annually.

Once exempt status has been granted, the Company is not considered resident in Guernsey for Guernsey income tax purposes and will be exempt from tax in Guernsey on both bank deposit interest and any income that does not have its source in Guernsey. It is not anticipated that any income other than bank deposit interest will arise in Guernsey and therefore the Company is not expected to incur any additional liability to Guernsey tax.

Shareholders

Non-Guernsey resident Shareholders will not be subject to any income tax in Guernsey in respect of or in connection with the acquisition, holding or disposal of any shares owned by them. Such Shareholders will receive dividends without deduction of Guernsey income tax.

Any Shareholders who are resident in Guernsey will be subject to Guernsey income tax on any dividends paid to such persons but will not suffer any deduction of tax by the Company from any such dividends payable where the Company is granted tax exempt status. The Company is however required to provide the Director of Income Tax the names, addresses and gross amount of any income paid to Guernsey resident shareholders during the previous year when renewing the Company's exempt tax status each year.

At present Guernsey does not levy taxes upon capital gains, capital transfer, wealth, sales or turnover (unless the varying of investments and turning of such investments to account is a business or part of a business), nor are there any estate duties save for registration fees and an ad valorem duty for a Guernsey grant of representation where the deceased dies leaving assets in Guernsey which require presentation of such a grant. No stamp duty is chargeable in Guernsey on the issue, transfer, switching or redemption of Shares in the Company.

FATCA

The US Hiring Incentives to Restore Employment Act resulted in the introduction of legislation in the US known as the Foreign Account Tax Compliance Act (**FATCA**) which has the effect that a 30 per cent withholding tax may be imposed on payments of US source income and certain payments of proceeds from the sale of property that could give rise to US source income unless there is compliance with requirements for the Company to report on an annual basis the identity of, and certain other information about, direct and indirect US investors in the Company to the relevant

Guernsey authority for onward transmission to the US Internal Revenue Service (**IRS**). An investor that fails to provide the required information to the Company may be subject to the 30 per cent withholding tax with respect to its share of any such payments directly or indirectly attributable to US investments of the Company, and the Company might be required to terminate such investor's investment in the Company.

On 13 December 2013 an intergovernmental agreement was entered into between Guernsey and the US in respect of FATCA (the **IGA**), which agreement was enacted into Guernsey law as of 30 June 2014 by the Income Tax (Approved International Agreements) (Implementation) (United Kingdom and United States of America) Regulations, 2014. Guidance notes currently in draft form have been issued by the relevant Guernsey authority to provide practical assistance on the reporting obligations of affected businesses under the IGA.

Although the Company will attempt to satisfy any obligations imposed on it to avoid the imposition of such withholding tax, no assurance can be given that the Company will be able to satisfy these obligations. If the Company becomes subject to a withholding tax as a result of FATCA, the return of all Shareholders may be materially affected.

This summary of Guernsey taxation issues can only provide a general overview of this area and it is not a description of all the tax considerations that may be relevant to a decision to invest in the Company. The summary of certain Guernsey tax issues is based on the laws and regulations in force as of the date of this document and may be subject to any changes in Guernsey law occurring after such date. Legal advice should be taken with regard to individual circumstances. Any person who is in any doubt as to his tax position or where he is resident, or otherwise subject to taxation, in a jurisdiction other than Guernsey, should consult his professional adviser.

UNITED KINGDOM

The following statements are intended as a general guide to certain UK tax considerations relating to an investment in Shares and do not purport to be a complete analysis of all potential UK tax consequences of holding Shares. They are based on current UK legislation and current published practice of HMRC, which may change, possibly with retroactive effect. Except insofar as express reference is made to the treatment of non-UK tax residents and non-UK domiciled individuals, they apply only to Shareholders who are resident and domiciled (in the case of individuals) or resident (in the case of companies) for tax purposes in (and only in) the UK, who hold their Shares as an investment (other than under an individual savings account) and who are the absolute beneficial owners of both the Shares and any dividends paid on them. The statements are not addressed to Shareholders who hold Shares in connection with a trade, profession or vocation carried on in the UK through a branch or agency (or, in the case of a corporate Shareholder, in connection with a trade in the UK carried on through a permanent establishment or otherwise). The tax position of certain categories of Shareholders who are subject to special rules (such as persons acquiring their Shares in connection with employment, dealers in securities, insurance companies and collective investment schemes) is not considered.

Taxation of the Company

As the Company is an alternative investment fund for the purpose of the Alternative Investment Fund Managers Regulations 2013, it should not be considered to be UK resident for UK tax purposes. Accordingly, and provided that the Company does not carry on a trade in the UK through a permanent establishment situated therein for UK corporation tax purposes or through a branch or agency situated in the UK which would bring it within the charge to income tax, the Company will not be subject to UK corporation tax or income tax on income and capital gains arising to it save as noted below in relation to possible withholding tax on certain UK source income. The Directors intend that the affairs of the Company are conducted so that no such permanent establishment, branch or agency will arise insofar as this is within their control, but it cannot be guaranteed that the conditions necessary to prevent any such permanent establishment, branch or agency coming into being will at all times be satisfied.

Interest and other income received by the Company which has a UK source may be subject to withholding taxes in the UK.

Disposals of Shares

Each class of Shares will constitute a relevant interest in an "offshore fund" for the purposes of UK taxation. Under the UK's offshore fund legislation, any gain arising on the sale, redemption or other disposal of shares in an offshore

fund (which may include an in specie redemption by the Company) held by persons who are resident in the UK for tax purposes will be taxed at the time of such sale, disposal or redemption as income and not as a capital gain. This does not apply, however, where the relevant offshore fund is accepted by HMRC as a “reporting fund” throughout the period during which the relevant interests were held.

It is not currently intended that the Company will apply for reporting fund status under the offshore funds regime in respect of any Shares. Accordingly, Shareholders who are resident in the UK for taxation purposes may be liable to UK income taxation in respect of gains arising from the sale, redemption or other disposal of their Shares. Such gains may remain taxable notwithstanding any general or specific UK capital gains tax exemption or allowance available to a Shareholder and may result in certain Shareholders incurring a proportionately greater UK taxation charge. Any losses arising on the disposal of Shares by Shareholders who are resident in the UK will be eligible for capital gains loss relief. The Directors may launch one or more classes of Shares in future certified by HMRC as reporting funds for the purposes of UK taxation.

Dividends

Any dividends received by UK resident individual Shareholders (or deemed to be received in the case of any future class of Shares with reporting fund status) will generally be subject to UK income tax whether or not such distributions are reinvested.

Dividends received by a UK resident Shareholder (or deemed to be received in the case of any future class of Shares with reporting fund status) within the charge to corporation tax should be exempt from tax in respect of dividends paid by the Company, although it should be noted that this exemption is subject to certain exclusions and specific anti-avoidance rules (particularly in the case of “small companies”, as defined in section 931S of the Corporation Tax Act 2009 (“CTA 2009”)).

Other UK taxation considerations

The attention of non-corporate Shareholders who are resident in the UK is drawn to the provisions of Chapter 2 of Part 13 of the UK Income Tax Act 2007. These provisions are aimed at preventing the avoidance of income tax by individuals through transactions resulting in the transfer of assets or income to persons (including companies) resident or domiciled abroad and may render them liable for income tax in respect of undistributed income and profits of the Company. This legislation will, however, not apply if such a Shareholder can satisfy HMRC that either:

- (i) it would not be reasonable to draw the conclusion from all the circumstances of the case, that the purpose of avoiding liability to taxation was the purpose, or one of the purposes, for which the relevant transactions or any of them were effected;
- (ii) all the relevant transactions are genuine commercial transactions and it would not be reasonable to draw the conclusion, from all the circumstances of the case, that any one or more of the transactions was more than incidentally designed for the purpose of avoiding liability to taxation; or
- (iii) all the relevant transactions were genuine, arm’s length transactions and if the Shareholder were liable to tax under Chapter 2 of Part 13 in respect of such transactions such liability would constitute an unjustified and disproportionate restriction on a freedom protected by Title II or IV of Part Three of the Treaty on the Functioning of the European Union or Part II or III of the EEA Agreement.

Chapter 3 of Part 6 of the CTA 2009 provides that, if at any time in an accounting period a corporate Shareholder within the charge to UK corporation tax holds an interest in an offshore fund and there is a time in that period when that fund fails to satisfy the “non-qualifying investments test”, the interest held by such a corporate Shareholder will be treated for the accounting period as if it were rights under a creditor relationship for the purposes of the rules relating to the taxation of most corporate debt contained in the CTA 2009 (the “Corporate Debt Regime”). Shares will (as explained above) constitute interests in an offshore fund and, on the basis of the current investment policies of the Company, it is likely that the “non-qualifying investments test” will not be met. In circumstances where the test is not so satisfied (for example where the Company invests in cash, securities or debt instruments or open-ended companies that themselves do not satisfy the “non-qualifying investments test” and the market value of such investments exceeds

60 per cent. of the market value of all its investments at any time), the Shares in the relevant class will be treated for corporation tax purposes as within the Corporate Debt Regime. As a consequence, all returns on the Shares in respect of each corporate Shareholder's accounting period during which the test is not met (including gains, profits and deficits and exchange gains and losses) will be taxed or relieved as an income receipt or expense on a fair value accounting basis. Accordingly, a corporate Shareholder in the Company may, depending on its own circumstances, incur a charge to corporation tax on an unrealised increase in the value of its holding of Shares (and, likewise, obtain relief against corporation tax for an unrealised reduction in the value of its holding of Shares). The provisions relating to non-reporting funds (outlined above) would not then apply to such corporate shareholders and the effect of the provisions relating to holdings in controlled foreign companies (outlined below) would then be substantially mitigated.

Part 9A of TIOPA 2010 subjects UK resident companies to tax on the profits of companies not so resident (such as the Company) in which they have an interest. The provisions, broadly, affect UK resident companies which hold, alone or together with certain other associated persons, shares which confer a right to at least 25 per cent. of the profits of a non-resident company (a "25% Interest") where that non-resident company is controlled by persons who are resident in the UK and is subject to a lower level of taxation in its territory of residence. The legislation is not directed towards the taxation of capital gains. In addition, these provisions will not apply if the shareholder reasonably believes that it does not hold a 25% Interest in the Company throughout the relevant accounting period.

The attention of persons resident in the UK for taxation purposes is drawn to the provisions of section 13 of the Taxation of Chargeable Gains Act 1992 ("section 13"). Section 13 applies to a "participator" for UK taxation purposes (which term includes a shareholder) if at any time when any gain accrues to the Company which constitutes a chargeable gain for those purposes, at the same time, the Company is itself controlled by a sufficiently small number of persons so as to render the Company a body corporate that would, were it to have been resident in the UK for taxation purposes, be a "close" company for those purposes. The provisions of section 13 could, if applied, result in any such person who is a "participator" in the Company being treated for the purposes of UK taxation of chargeable gains as if a part of any chargeable gain accruing to the Company had accrued to that person directly, that part being equal to the proportion of the gain that corresponds on a just and reasonable basis to that person's proportionate interest in the Company as a "participator". No liability under section 13 could be incurred by such a person however, where such proportion does not exceed one quarter of the gain. In addition, exemptions may also apply where none of the acquisition, holding or disposal of the assets had a tax avoidance main purpose or where the relevant gains arise on the disposal of assets used only for the purposes of genuine, economically significant business activities carried on outside the UK.

In the case of UK resident individuals domiciled outside the UK, section 13 applies only to gains relating to UK situate assets of the Company and gains relating to non-UK situate assets if such gains are remitted to the UK.

Stamp duty and stamp duty reserve tax

No UK stamp duty or stamp duty reserve tax will be payable on an issue of Shares. UK stamp duty at the rate of 0.5% of the value of the consideration for the transfer of any Shares (rounded up where necessary to the nearest £5) may become payable on any instrument of transfer of the Shares which is executed within the UK, or which relates to any property situated, or to any matter or thing done or to be done, in the UK. Provided, as is the intention, that the Shares are not registered in any register kept in the UK by or on behalf of the Company and are not paired with shares issued by a body corporate incorporated in the UK, any agreement to transfer the Shares will not be subject to stamp duty reserve tax.

Inheritance tax

A liability to UK inheritance tax on Shares may arise in the event of the death of or on the making of certain categories of lifetime transfers by an individual Shareholder domiciled or deemed to be domiciled in the UK for inheritance tax purposes.

The Common Reporting Standard

Drawing extensively on the intergovernmental approach to implementing US FATCA, the OECD developed the Common Reporting Standard ("CRS") to address the issue of offshore tax evasion on a global basis. Aimed at maximizing efficiency and reducing cost for financial institutions, the CRS provides a common standard for due

diligence, reporting and exchange of financial account information. Pursuant to the CRS, tax authorities in participating CRS jurisdictions will obtain from reporting financial institutions, and automatically exchange with other participating tax authorities in which the Shareholders of the reporting financial institution are resident on an annual basis, financial account and personal information with respect to all reportable accounts identified by financial institutions on the basis of common due diligence and reporting procedures. The first information exchanges are expected to begin in September 2017. Guernsey has legislated to implement the CRS. As a result, the Company will be required to comply with the CRS due diligence and reporting requirements, as adopted by Guernsey. Shareholders may be required to provide additional information to the Company to enable the Company to satisfy its obligations under the CRS. Failure to provide requested information may subject a Shareholder to liability for any resulting penalties or other charges and/or mandatory termination of its interest in the Company.

If you are in any doubt as to your tax position, you should consult your professional adviser.

SHAREHOLDERS OF THE COMPANY

So far as the Company is aware, as at November 15 2017 (being the latest practicable date prior to publication of this document) CLO Holdco, Ltd. is the sole Shareholder and holds directly or indirectly 5% or more of the Company's voting rights.

Immediately following the Placing the following persons will hold directly or indirectly the following percentages of the Company's voting rights:

Name	Immediately prior to the Placing		Immediately following the Placing	
	Number of Shares	% of voting rights in respect of the issued share capital	Number of Shares	% of voting rights in respect of the issued share capital
CLO Holdco, Ltd.	143,454,001.00	100.00%	70,314,387.44	49.02%
HarbourVest Dover Street IX Investment L.P.	0.00	0.00%	50,917,791.20	35.49%
HarbourVest 2017 Global Fund L.P.	0.00	0.00%	3,478,649.09	2.42%
HarbourVest 2017 Global AIF L.P.	0.00	0.00%	6,957,226.48	4.85%
HV International VIII Secondary L.P.	0.00	0.00%	9,317,699.94	6.50%
HarbourVest Skew Base AIF L.P.	0.00	0.00%	1,034,136.77	0.72%
Highland Capital Management, L.P.	0.00	0.00%	898,708.98	0.63%
Lee Blackwell Parker, III	0.00	0.00%	94,173.23	0.07%
Quest IRA, Inc., fbo Lee B. Parker III, Acct. # 3058311	0.00	0.00%	58,798.51	0.04%
Quest IRA, Inc., fbo Hunter Covitz, Acct. # 1469811	0.00	0.00%	239,018.34	0.17%
Quest IRA, Inc., fbo Jon Poglitsch, Acct. # 1470612	0.00	0.00%	95,607.34	0.07%
Quest IRA, Inc., fbo Neil Desai, Acct. # 3059211	0.00	0.00%	47,803.67	0.03%

Save as set out above in this section of this Offering Memorandum, the Company is not aware of any person who holds, or who will immediately following the Placing hold, as shareholder directly or indirectly, 5% or more of the voting rights of the Company.

None of the Shareholders referred to in the table set forth in above has voting rights which differ from those of any other Shareholder in respect of any Shares held by them.

Save as set out in this above in this section of this Offering Memorandum, the Company is not aware of any person who immediately following the Placing directly or indirectly, jointly or severally, will own sufficient shares to exercise control over the Company.

ADDITIONAL INFORMATION ON THE COMPANY

INCORPORATION AND ADMINISTRATION

The Company is a registered closed-ended investment company incorporated in Guernsey with limited liability on 30 March 2015 under the provisions of the Companies Law, with registered number 60120. The Company continues to be registered and domiciled in Guernsey. The registered office and principal place of business of the Company is First Floor, Dorey Court, Admiral Park, St Peter Port, Guernsey GY1 6HJ, Channel Islands (telephone number 01481 715601). The statutory records of the Company are kept at this address. The Company operates and issues shares in accordance with the Companies Law and ordinances and regulations made thereunder and has no employees. The Company shall have an unlimited life.

The Company is regulated by the GFSC and is not regulated by any regulator other than the GFSC.

The Company's accounting period will end on 31 December, of each year, with the first year end on 31 December 2015.

PricewaterhouseCoopers CI LLP of Royal Bank Place, 1 Gategny Esplanade, St Peter Port, Guernsey GY1 4ND has been the only Auditors of the Company since incorporation. PricewaterhouseCoopers CI LLP is a member of the Institute of Chartered Accountants of England & Wales. The Shareholders have the power, under the Companies Law, to appoint the auditor at each AGM or remove the auditor by ordinary resolution.

The annual report and accounts will be prepared according to GAAP.

Save for its entry into the material contracts summarised in "*Material Contracts*" of this section of this Offering Memorandum and certain non-material contracts, since its incorporation the Company has not incurred borrowings, issued any debt securities, incurred any contingent liabilities or made any guarantees, nor granted any charges or mortgages.

Save as set out in "*Share Capital*" below, there have been no changes to the issued share capital of the Company since incorporation.

SHARE CAPITAL

On incorporation, the share capital of the Company consisted of one ordinary share of no par value. The Placing Shares will be issued in the form of participating ordinary shares having the rights set out in the Articles. Shareholders have no right to have their Shares redeemed.

As at the date of this Offering Memorandum, the Company's issued and fully paid up share capital is 143,454,001 shares of no par value.

None of the Shareholders has voting rights attaching to Shares that they hold which are different to the voting rights attached to any other Shares of the same class in the Company.

As at the date of this Offering Memorandum, the memorandum of incorporation provides that there is no limit on the number of shares of any class which the Company is authorised to issue.

The Directors have absolute authority under the Articles to allot the Shares to be issued pursuant to the Placing and are expected to do so shortly prior to the Placing.

No share or loan capital of the Company is under option or has been agreed, conditionally or unconditionally, to be put under option.

DIRECTORS' AND OTHER INTERESTS

As at the date of this Offering Memorandum, none of the Directors or any person connected with any of the Directors has a Shareholding or any other interest in the share capital of the Company. The Directors and their connected persons may, however, subscribe for Shares pursuant to the Placing.

The Directors are not aware of any person or persons who, following the Placing, will or could, directly or indirectly, jointly or severally, exercise control over the Company and there are no arrangements known to the Directors the operation of which may subsequently result in change of control of the Company, other than as disclosed above in “Shareholders of the Company” on page 75 of this Offering Memorandum.

There are no outstanding loans from the Company to any of the Directors or any outstanding guarantees provided by the Company in respect of any obligation of any of the Directors.

The aggregate remuneration and benefits in kind of the Directors in respect of the Company’s accounting period ending on 31 December 2017, which will be payable out of the assets of the Company, is not expected to exceed £150,000. No amount has been set aside or accrued by the Company to provide pension, retirement or other similar benefits.

No Director has a service contract with the Company, nor are any such contracts proposed. The Directors have been appointed through letters of appointment which can be terminated in accordance with the Articles and without compensation. The notice period specified in the Articles for the removal of Directors is one month. The Articles provide that the office of Director shall be terminated by, among other things: (i) written resignation; (ii) unauthorised absences from board meetings for 12 months or more; (iii) written request of the other Directors; and (iv) an ordinary resolution.

None of the Directors has, or has had, an interest in any transaction which is or was unusual in its nature or conditions or significant to the business of the Company and which has been effected by the Company since its incorporation.

In addition to their directorships of the Company, the Directors hold or have held the directorships and are or were members of the partnerships, as listed in the table below, over or within the past five years.

<i>Name</i>	<i>Current directorships/partnerships</i>	<i>Past directorships/partnerships</i>
William Scott	Aberdeen Global Infrastructure GP Limited (name changed from Lloyds Bank Global Infrastructure GP Limited 15 May 2014)	BMS Specialist Debt Fund Limited (applied for voluntary strike-off 29 September 2014)
	Aberdeen Global Infrastructure GP II Limited	Cinven Capital Management (G3) Limited
	Aberdeen Infrastructure Finance GP Limited (name changed from Uberior Infrastructure Finance GP Limited 7 August 2014)	FCA Catalyst Fund SPC (formerly FCM Catalyst Fund SPC)
	Aberdeen Infrastructure Spain Co-Invest II GP Limited	FCA Catalyst Master Fund SPC (formerly FCM Catalyst Master Fund SPC)
	Absolute Alpha Fund PCC Limited	FCA Trading SPC (formerly FCM Trading SPC)
	AcenciA Debt Strategies Limited	Financial Risk Management Diversified Fund Limited
	AHL Strategies PCC Limited	Financial Risk Management Matrio Fund Limited
	Axiom European Financial Debt Fund Limited	Financial Ventures Limited
	Cinven Capital Management (V) General Partner Limited	FRM Access II Fund SPC
	Cinven Capital Management (VI) General Partner Limited	FRM Customised Diversified Fund Limited
	Cinven Capital Management (G4) Limited	FRM Diversified II Fund SPC
	Cinven Limited	FRM Diversified II Master Fund Limited
	Class N AHL 2.5XL Trading Limited	FRM Diversified III Fund PCC Limited
	Class P Global Futures EUR Trading Limited	FRM Diversified III Master Fund Limited
	Hanseatic Asset Management LBG	FRM Equity Alpha Limited

Highland CLO Funding, Ltd.	FRM Credit Strategies Fund PCC Limited
KCSB Properties Limited	FRM Credit Strategies Master Fund PCC Limited
MAN AHL Diversified PCC Limited	FRM Global Diversified Fund
Pershing Square Holdings Limited	FRM Phoenix Fund Limited (name changed from FRM Financials Limited 10 June 2008)
Sandbourne Asset Management Limited (name changed from Sandbourne Asset Management Guernsey Limited 26 June 2015)	FRM Sigma Fund Limited
Sandbourne PCC Limited	FRM Strategic Fund PCC Limited
Savile AD4 Limited	FRM Strategic Master Fund Limited
Savile AD7 Limited	FRM Tail Hedge Limited
Savile AD8 Limited	FRM Thames Fund General Partner 1 Limited
Savile AD9 Limited	Invista European Real Estate Trust SICAF
SPL Guernsey ICC Limited (formerly Arch Guernsey ICC Limited)	Land Race Limited
The Flight and Partners Recovery Fund Limited	OldCo Limited (name changed from Axiom European Financial Debt Limited 25 September 2015)
30 St. Mary Axe Management Limited Partnership Incorporated	Principia TR-S 40 Ltd
	Property Income & Growth Fund Limited
	PSource Structured Debt Fund Limited
	PSource Structured Debt SPV II Inc
	Sandbourne Fund
	Savile AD2 Limited
	Savile ANG1 Limited
	Savile APG1 Limited
	Savile APG3 Limited
	Savile Durham 1 Limited
	Savile Exeter 1 Limited
	Savile ML1 Limited
	Secured Real Estate Finance Limited (dormant after unsatisfactory fundraising)
	TBH Guernsey Limited
	Threadneedle Asset Backed Income Limited (dormant after unsatisfactory fundraising)
	UCAP Investment Management Fund PCC Limited (name changed from Utrup Investment Management Fund PCC Limited 7 February 14)
	UCAP Investment Management Limited (name changed from Utrup Investment Management Limited 7 February 14)
	WyeTree RMBS Opportunities Fund Limited (name changed from WyeTree Opportunities

Fund Limited 29 May 2014)

<i>Name</i>	<i>Current directorships/partnerships</i>	<i>Past directorships/partnerships</i>
Heather Bestwick	Andium Homes Limited	Jersey Finance Limited
	Deutsche International Corporate Services Limited	Walkers Limited
	Equiom (Jersey) Limited	Walkers Capital Markets Limited
	Highland CLO Funding, Ltd.	Walkers Pension Services (Jersey) Limited
	Equiom (Guernsey) Limited	Walkers Property Services (Jersey) Limited
	Sole Shipping SO II GP Limited	Homelink (Jersey) Limited
	Sole Shipping SO Adviser Limited	Altamas Resources Limited
	EPE Special Opportunities plc	BSREP Marina Village (Jersey) Limited
		Altair Partners Limited
		Cyan Blue Topco Limited
		Century Limited
		Fundamental Global Corporate Secured Loan Fund Limited
		AEP 2003 Limited
		AEP 2008 Limited
		AEP 2012 Limited
		Invision Capital Partners IV Limited
		Invision IV Co-invest General Partner Limited
		Invision Capital Partners V Limited
		Triton Advisers Limited
		GCP Infrastructure OEIC Limited
		Equiom Trust Company (CI) Limited
		Rokos Capital Management (GP) Limited
		Rokos Intermediate (Jersey) Limited

As at the date of this Offering Memorandum, there are no potential conflicts of interest between any duties to the Company of any of the Directors and their private interests and/or other duties. There are no lock up provisions regarding the disposal by any of the Directors of any Shares.

Save as set out in immediately following paragraph below, as at the date of this Offering Memorandum:

- (a) none of the Directors has had any convictions in relation to fraudulent offences for at least the previous five years;
- (b) save as detailed above, none of the Directors was a director of a company, a member of an administrative, management or supervisory body or a senior manager of a company within the previous five years which has entered into any bankruptcy, receivership or liquidation proceedings;
- (c) none of the Directors has been subject to any official public incrimination and/or sanctions by statutory or regulatory authorities (including designated professional bodies) or has been

disqualified by a court from acting as a member of the administrative, management or supervisory bodies of an issuer or from acting in the management or conduct of the affairs of any issuer for at least the previous five years; and

- (d) none of the Directors are aware of any contract or arrangement subsisting in which they are materially interested and which is significant to the business of the Company which is not otherwise disclosed in this Offering Memorandum.

In respect of the declaration in the immediately preceding paragraph above, certain of the Directors have been directors of entities which have been dissolved. To the best of each Director's knowledge, no such entity, upon its dissolution, was insolvent or owed any amounts to creditors.

The Company maintains directors' and officers' liability insurance on behalf of the Directors at the expense of the Company.

No employees of the Administrator have any service contracts with the Company.

MATERIAL CONTRACTS

The following are all of the contracts, not being contracts entered into in the ordinary course of business, that have been entered into by the Company since its incorporation and are, or may be, material or that contain any provision under which the Company has any obligation or entitlement which is or may be material to it as at the date of this Offering Memorandum.

Administration Agreement

An administration agreement dated 10 August 2015 between (i) the Company and (ii) the Administrator, whereby the Administrator was appointed to act as administrator of the Company and provide related administrative, compliance and treasury services (the "**Administration Agreement**").

Under the terms of the Administration Agreement, the Administrator is entitled to an annual administration fee of up to 7 bps per annum of the Net Asset Value of the Company per annum, payable monthly in arrears, and other miscellaneous fees and expenses reimbursed, in each case, as determined in the Administration Agreement.

The Administration Agreement may be terminated by either party on not less than three months written notice (or such shorter notice as the parties may agree). The Administration Agreement may be terminated immediately by either party: (i) in the event that either party shall go into liquidation or receivership or an examiner shall be appointed to the Company (except for a voluntary liquidation for the purposes of reconstruction or amalgamation upon terms previously approved in writing by the notifying party, such approval not to be unreasonably withheld or delayed) or be unable to pay its debts as they fall due or commits any act of bankruptcy under the laws of an applicable jurisdiction; or (ii) if the other party commits any material breach of the provisions of the Administration Agreement and, if such breach is capable of remedy shall not have remedied that within 30 days after the service of written notice requiring it to be remedied; (iii) if it shall become illegal or impossible without breach of any applicable laws and for reasons reasonably outside the control of the relevant party for any party to fulfil its obligations hereunder; or (iv) if any changes to the Administration Agreement are required as a consequence of any financial services regulation which may in the future bind any of the parties thereto and which cannot be agreed between the parties. The appointment of the Administrator shall also automatically terminate forthwith if the Administrator shall become or be deemed to become resident for tax purposes in the United Kingdom or in any other place or places outside Guernsey in circumstances which cause the Company to become liable to pay any taxes which it would not otherwise be liable to pay.

The Company has given certain market standard indemnities in favour of the Administrator in respect of the Administrator's potential losses in carrying out its responsibilities under the Administration Agreement.

The Administration Agreement is governed by the laws of Guernsey.

Portfolio Management Agreement

A Portfolio Management Agreement dated November 15, 2017 between (i) the Company and (ii) the Portfolio Manager (the “**Portfolio Management Agreement**”), pursuant to which the Company appointed the Portfolio Manager to select the portfolio of investments and instruct the Custodian with respect to any acquisition, disposition or sale of investments and provide certain support and assistance (including back and middle office functions), personnel and credit and market research and analysis in connection with the investment and ongoing management of the portfolio.

The Portfolio Management Agreement may be terminated in the event of (A) the Company determining in good faith that the Company or the portfolio has become required to register as an investment company under the provisions of the Investment Company Act (where there is no available exemption), and the Company has given prior notice to the Portfolio Manager of such requirement, (B) the date on which the portfolio has been liquidated in full and the Company’s financing arrangements have been terminated or redeemed in full and (C) such other date as agreed between the Company and the Portfolio Manager.

In addition, the Portfolio Management Agreement may be terminated, and the Portfolio Manager removed for “Cause” by the Advisory Board or by the Board of Directors upon 30 business days’ prior written notice to the Portfolio Manager.

As defined in the Portfolio Management Agreement, “Cause” means any one of the following events: (a) the Portfolio Manager wilfully violates, or takes any action that it knows breaches any material provision of the Portfolio Management Agreement or the Offering Memorandum applicable to it in bad faith (not including a wilful and intentional breach that results from a good faith dispute regarding reasonable alternative courses of action or interpretation of instructions); (b) the Portfolio Manager breaches in any respect any provision of the Portfolio Management Agreement or any terms of the Offering Memorandum applicable to it (other than as covered by clause (a) and except for any such violations or breaches that have not had, or could not, either individually or in the aggregate, reasonably be expected to have, a material adverse effect on the Company) and fails to cure such breach within 30 days of the Portfolio Manager receiving notice of such breach, unless, if such breach is remediable, the Portfolio Manager has taken action that the Portfolio Manager believes in good faith will remedy such breach, and such action does remedy such breach, within sixty (60) days after the Portfolio Manager receives notice thereof; (c) the Portfolio Manager is wound up or dissolved or there is appointed over it or a substantial portion of its assets a receiver, administrator, administrative receiver, trustee or similar officer; or the Portfolio Manager (i) ceases to be able to, or admits in writing its inability to, pay its debts as they become due and payable, or makes a general assignment for the benefit of, or enters into any composition or arrangement with, its creditors generally; (ii) applies for or consents (by admission of material allegations of a petition or otherwise) to the appointment of a receiver, trustee, assignee, custodian, liquidator or sequestrator (or other similar official) of the Portfolio Manager or of any substantial part of its properties or assets, or authorizes such an application or consent, or proceedings seeking such appointment are commenced without such authorization, consent or application against the Portfolio Manager and continue undismissed for sixty (60) days; (iii) authorizes or files a voluntary petition in bankruptcy, or applies for or consents (by admission of material allegations of a petition or otherwise) to the application of any bankruptcy, reorganization, arrangement, readjustment of debt, insolvency or dissolution, or authorizes such application or consent, or proceedings to such end are instituted against the Portfolio Manager without such authorization, application or consent and are approved as properly instituted and remain undismissed for sixty (60) days or result in adjudication of bankruptcy or insolvency; or (iv) permits or suffers all or any substantial part of its properties or assets to be sequestered or attached by court order and the order remains undismissed for sixty (60) days; (d) the occurrence of an act by the Portfolio Manager that constitutes fraud or criminal activity in the performance of its obligations under the Portfolio Management Agreement (as determined pursuant to a final adjudication by a court of competent jurisdiction), or the Portfolio Manager being indicted for a criminal offense materially related to its business of providing asset management services; or (e) any Key Person of the Portfolio Manager (in the performance of his or her investment management duties) is convicted for a criminal offense materially related to the business of the Portfolio Manager providing asset management services and continues to have responsibility for the performance by the Portfolio Manager hereunder for a period of ten (10) days after such conviction.

The Portfolio Management Agreement provides that if any of the events specified in the definition of “Cause” occurs, the Portfolio Manager will give prompt written notice thereof to the Company upon the Portfolio Manager’s becoming aware of the occurrence of such event. The Advisory Board and/or the Board of Directors may waive any event

described in (a), (b), (d), or (e) above as a basis for termination of the Portfolio Management Agreement and removal of the Portfolio Manager under the terms of the Portfolio Management Agreement.

Any resignation or removal of the Portfolio Manager will only be effective on the satisfaction of certain conditions set out in the Portfolio Management Agreement.

Under the Portfolio Management Agreement, the Portfolio Manager agrees to perform its obligations thereunder, with reasonable care (a) using a degree of skill and attention no less than that which the Portfolio Manager exercises with respect to comparable assets that it manages for itself and others having similar investment objectives and restrictions, and (b) to the extent not inconsistent with the foregoing, in a manner consistent with the Portfolio Manager's customary standards, policies and procedures in performing its duties under the Portfolio Management Agreement (the "**Standard of Care**"); provided that the Portfolio Manager will not be liable for any loss or damages resulting from any failure to satisfy the Standard of Care except to the extent any act or omission of the Portfolio Manager constitutes a Portfolio Manager Breach (as defined below). The Standard of Care may change from time to time to reflect changes by the Portfolio Manager to its customary standards, policies and procedures provided that such customary standards, policies and procedures are at least as rigorous as the foregoing.

The Portfolio Manager will not be liable (whether directly or indirectly, in contract or in tort or otherwise) to the Company under the Portfolio Management Agreement for liabilities incurred by the Company as a result of or arising out of or in connection with the performance by the Portfolio Manager under the Portfolio Management Agreement, or for any losses or damages resulting from any failure to satisfy the Standard of Care except to the extent such liabilities were incurred by reason of acts or omissions constituting bad faith, fraud, wilful misconduct or due to the gross negligence (with such term given its meaning under New York law) or reckless disregard of the duties and obligations of the Portfolio Manager (a "**Portfolio Manager Breach**").

Under the Portfolio Management Agreement, the Company will be required to indemnify the Portfolio Manager and its affiliates, managers, directors, officers, secretaries, partners, agents and employees, from and against all liabilities incurred in connection with the Portfolio Management Agreement (except to the extent such liabilities are incurred as a result of any acts or omissions of the Portfolio Manager which constitute a Portfolio Manager Breach).

The Portfolio Manager is able to resign its role under the Portfolio Management Agreement upon 90 days' written notice to the Company. Whilst the resignation will not be effective until the date as of which a successor adviser has been appointed, it may be difficult to locate an alternative adviser as a successor. In addition, the Portfolio Manager may immediately resign by providing written notice to the Company upon the occurrence of certain events relating to the Company such as, amongst others, the failure of the Company to comply in any material respect with any investment policy or investment objective to which it is bound to comply, a wilful breach or knowing violation by the Company of a material provision of the Portfolio Management Agreement or the occurrence of insolvency proceedings in respect of the Company.

Under the Portfolio Management Agreement, the Portfolio Manager agrees to the provision of certain human resources as may be necessary to enable the Company to conduct any matters related to its portfolio of assets.

Under the Portfolio Management Agreement, the Company shall pay to the Portfolio Manager an amount equivalent to all reasonable third party costs and expenses incurred by the Portfolio Manager in the performance of its obligations thereunder, together with any irrecoverable VAT arising on such costs and expenses.

The Portfolio Management Agreement is governed by the laws of the State of Texas.

Predecessor and Interim Portfolio Management Agreements and Terminations

Prior to the current Portfolio Management Agreement, the Company held a Portfolio Management Agreement dated 22 December 2016 (the "**Predecessor Portfolio Management Agreement**") between (i) the Company and (ii) Acis as the predecessor portfolio manager (the "**Predecessor Portfolio Manager**"), pursuant to which the Company appointed Acis as the Predecessor Portfolio Manager to select the portfolio of investments and instruct the Custodian with respect to any acquisition, disposition or sale of investments and provide certain support and assistance (including back and middle office functions), personnel and credit and market research and analysis in connection with the investment and ongoing management of the portfolio.

The terms of the Predecessor Portfolio Management Agreement were substantially similar to the terms of the Portfolio Management Agreement.

The Predecessor Portfolio Management Agreement was governed by the laws of the State of Texas.

The Predecessor Portfolio Management Agreement was terminated pursuant to a Portfolio Management Agreement dated October 27, 2017 (the “**Interim Portfolio Management Agreement**”) between (i) the Company and (ii) the Portfolio Manager and agreed and acknowledged by the Predecessor Portfolio Manager, pursuant to which the Company appointed Highland HCF as the Portfolio Manager to select the portfolio of investments and instruct the Custodian with respect to any acquisition, disposition or sale of investments and provide certain support and assistance (including back and middle office functions), personnel and credit and market research and analysis in connection with the investment and ongoing management of the portfolio. Pursuant to the Interim Portfolio Management Agreement, (x) the Predecessor Portfolio Management Agreement was cancelled and terminated in its entirety, (y) each party thereto released the other party from all claims, suits or causes of action arising out of or relating to the Predecessor Portfolio Management Agreement and (z) each party ratified prior transactions effected in accordance with the Predecessor Portfolio Management Agreement.

The terms of the Interim Portfolio Management Agreement were substantially similar to the terms of the Portfolio Management Agreement.

The Interim Portfolio Management Agreement was terminated pursuant to the Portfolio Management Agreement. Pursuant to the Interim Portfolio Management Agreement, (x) the Predecessor Portfolio Management Agreement was cancelled and terminated in its entirety and (y) each party ratified prior transactions effected in accordance with the Interim Portfolio Management Agreement.

The Interim Portfolio Management Agreement was governed by the laws of the State of Texas.

Subscription and Transfer Agreement

A Subscription and Transfer Agreement dated November 15, 2017 (the “**Subscription and Transfer Agreement**”) entered into by and among the Company, the Portfolio Manager, CLO Holdco, Ltd., HarbourVest Dover Street IX Investment L.P., HarbourVest 2017 Global AIF L.P., HarbourVest 2017 Global Fund L.P., HV International VIII Secondary L.P., HarbourVest Skew Base AIF L.P., Highland Capital Management, L.P., Lee Blackwell Parker, III, Quest IRA, Inc., fbo Lee B. Parker, III, Acct., Quest IRA, Inc., fbo Hunter Covitz, Acct., Quest IRA, Inc., fbo Jon Poglitsch, Acct. and Quest IRA, Inc., fbo Neil Desai, Acct., pursuant to which CLO Holdco, Ltd., as the existing Shareholder, agrees to transfer a portion of its shares to the new Shareholders listed above.

Under the Subscription and Transfer Agreement, CLO Holdco, Ltd. agreed to provide an indemnity to the new Shareholders relating to certain liabilities arising prior to the date of the transfer of Shares.

Further, each of the Shareholders subscribed to purchase Shares on a pro rata basis pursuant to commitments under the Subscription and Transfer Agreement, to be called for settlement by the Portfolio Manager from time to time during the Investment Period and at such time issued (including in the form of fractional shares).

The Subscription and Transfer Agreement may be terminated by mutual agreement of the parties.

The Subscription and Transfer Agreement is governed by the laws of Guernsey.

Members' Agreement

A Shareholders' Agreement relating to the Company dated November 15, 2017 (the “**Shareholder's Agreement**”), among CLO HoldCo, Ltd., HarbourVest Dover Street IX Investment L.P., HarbourVest 2017 Global AIF L.P., HarbourVest 2017 Global Fund L.P., HV International VIII Secondary L.P., HarbourVest Skew Base AIF L.P., Highland Capital Management, L.P., Lee Blackwell Parker, III, Quest IRA, Inc., fbo Lee B. Parker, III, Acct., Quest IRA, Inc., fbo Hunter Covitz, Acct., Quest IRA, Inc., fbo Jon Poglitsch, Acct., Quest IRA, Inc., fbo Neil Desai, Acct., the Company and the Portfolio Manager, which contemplates certain agreements of commercial terms among the Shareholders with respect to the formation of an Advisory Board, voting matters and the Shareholders' commitments to settle subscriptions for the Placing Shares.

Pursuant to the Shareholders' Agreement, the Shareholders set forth their rights in respect of the Company with respect to their voting rights, the composition and function of the Advisory Board, provisions with respect to Shareholders defaulting on commitments to settle Shares, indemnification and restrictions on the transfers or disposals of Shares.

The Shareholders' Agreement will be terminated when one party holds all the Shares, when a resolution is passed by the Shareholders or creditors of the Company or with the written consent of the parties.

The Shareholders' Agreement is governed by the laws of Guernsey.

NexBank Credit Facility

The Company currently has the NexBank Credit Facility with a principal amount of \$22,158,337, as of September 30, 2017. The NexBank Credit Facility is governed by an Amended and Restated Loan Agreement dated as of 17 January 2017 that provides for quarterly payments of principal and interest at 5.00% *per annum* and a maturity on November 23, 2021.

Warehouse Loan Facilities

One or more multi-currency Warehouse Loan Facilities may be entered into from time to time between (i) the Company and (ii) a warehouse provider as described in "*Summary-Borrowing-Warehouse Loan Facilities*".

Forward Purchase Agreements

Forward Purchase Agreements may be entered into from time to time, between (i) the Company and (ii) a CLO (each, a "**Forward Purchase Agreement**"), pursuant to which the Company may from time to time enter into sale and purchase contracts with a CLO with respect to the assets of the Company ("**Forward Sales**"). Such Forward Sales are with a view to effectively managing its access to wholesale funding and exposure to undesirable market price volatilities of its portfolio. Such Forward Purchase Agreements may be entered into at the same time or shortly after the origination or acquisition of the relevant asset by the Company, at a later date, or not at all. Where a loan becomes subject to a Forward Purchase Agreement, the Company will (subject to the conditions set out below) neither receive the gain nor bear the loss that occurs between the date when the loan is added to the Forward Purchase Agreement and the date when the transfer occurs.

Each Forward Sale will be conditional upon:

- the occurrence of the closing date of the relevant CLO; and
- the assets that are the subject of such Forward Sale satisfying a set of eligibility criteria on the closing date of the relevant CLO as agreed between the Company and the relevant CLO.

The Forward Purchase Agreements will contain standard limited recourse and non-petition provisions with respect to the Company and with respect to the relevant CLO.

The governing law of the Forward Purchase Agreements will be English or New York law.

Custody Agreement

A custody agreement dated 10 August 2015 between (i) the Company and (ii) the Custodian (the "**Custody Agreement**"), whereby the Custodian was appointed to act as custodian of the Company's investments, cash and other assets.

The Custodian provides custody services in respect of such of the property of the Company which is delivered to and accepted by the Custodian as and when such custody services may be required. Securities are held by the Custodian in one or more accounts registered in the name of the Company or of the Custodian, its delegate or a nominee. The securities are separately designated in the books of the Custodian as belonging to the Company.

Under the terms of the Custody Agreement, the Custodian is entitled to receive transaction charges and sub-custodian charges will be recovered by the Custodian from the Company as they are incurred by the relevant sub-custodian. All such charges shall be charged at normal commercial rates.

The Custody Agreement shall continue for an initial period of six months and thereafter may be terminated by either of the parties hereto on giving ninety (90) days' prior written notice to the other party hereto, provided that the appointment of the Custodian shall not terminate before the appointment of a replacement Custodian provided always if a replacement custodian is not appointed within six months from the date of the relevant termination notice, the Custody Agreement shall terminate in any event. It may be terminated without notice in certain specified circumstances including the insolvency of either party.

The Custodian has a market standard indemnity from the Company in relation to liabilities incurred other than as a result of its negligence, fraud, bad faith, wilful default or recklessness in carrying out its responsibilities under the Custody Agreement.

The Custody Agreement is governed by the laws of Ireland.

MEMORANDUM AND ARTICLES

Memorandum of Incorporation

The Memorandum of Incorporation provides that the Company's objects are unrestricted and it shall therefore have the full power and authority to carry out any object not prohibited by the Companies Law, or any other law of Guernsey.

Articles of Incorporation

The Articles of Incorporation of the Company contain provisions, *inter alia*, to the following effect.

Share Capital

The Company may issue an unlimited number of Shares of no par value each, including Unclassified Shares which may be designated and issued as Ordinary Shares or otherwise as the Directors may from time to time determine.

Ordinary Shares

The rights attaching to the Ordinary Shares shall be as follows:

- (a) As to income – subject to the rights of any Ordinary Shares which may be issued with special rights or privileges, the Ordinary Shares of each class carry the right to receive all income of the Company attributable to the Ordinary Shares, and to participate in any distribution of such income by the Company, pro rata to the relative Net Asset Values of each of the classes of Ordinary Shares and, within each such class, income shall be divided *pari passu* amongst the holders of Ordinary Shares of that class in proportion to the number of Ordinary Shares of such class held by them.
- (b) As to capital – on a winding up of the Company or other return of capital (other than by way of a repurchase or redemption of Ordinary Shares in accordance with the provision of the Articles and the Companies Law), the surplus assets of the Company attributable to the Ordinary Shares remaining after payment of all creditors shall, subject to the rights of any Ordinary Shares that may be issued with special rights or privileges, be divided amongst the holders of Ordinary Shares of each class pro rata to the relative Net Asset Values of each of the classes of the Ordinary Shares and, within each such class, such assets shall be divided *pari passu* amongst the holders of Ordinary Shares of that class in proportion to the number of Ordinary Shares of that class held by them.
- (c) As to voting – the holders of the Ordinary Shares shall be entitled to receive notice of and to attend, speak and vote at general meetings of the Company.

General

Without prejudice to any special rights previously conferred on the holders of any existing Shares or class of Shares, any Share (or option, warrant or other right in respect of a Share) in the Company may be issued with such preferred, deferred or other special rights or restrictions, whether as to dividend, voting, return of capital or otherwise, as the Board may determine.

Offers to Shareholders to be on a pre-emptive basis

- (a) The Company shall not allot equity securities to a person on any terms unless:
 - (i) it has made an offer to each person who holds equity securities of the same class in the Company to allot to him on the same or more favourable terms a proportion of those securities that is as nearly as practicable equal to the proportion in number held by him of the share capital of the Company; and
 - (ii) the period during which any such offer may be accepted has expired or the Company has received notice of the acceptance or refusal of every offer so made.
- (b) Securities that the Company has offered to allot to a holder of equity securities in accordance with the preceding may be allotted to him, or anyone in whose favour he has renounced his right to their allotment, without contravening the restriction referred to in above.
- (c) Shares held by the Company as treasury shares shall be disregarded for the purposes of the restriction referred to in the second preceding paragraph, so that the Company is not treated as a person who holds equity shares; and the treasury shares are not treated as forming part of the equity share capital of the Company.
- (d) Any offer required to be made by the Company pursuant to the restriction referred to above should be made by a notice (given in accordance with “—*Notices*” below) and such offer must state a period during which such offer may be accepted and such offer shall not be withdrawn before the end of that period. Such period must be a period of at least 21 days beginning on the date on which such offer is deemed to be delivered or received (as the case may be), pursuant to “—*Notices*” below.
- (e) The restriction referred to above shall not apply in relation to the allotment of bonus shares, nor to a particular allotment of equity securities if these are, or are to be, wholly or partly paid otherwise than in cash.
- (f) The Company may by special resolution resolve that the restriction referred to above shall be excluded or that the restriction referred to in above shall apply with such modifications as may be specified in the resolution:
 - (i) generally in relation to the allotment by the Company of equity securities;
 - (ii) in relation to allotments of a particular description; or
 - (iii) in relation to a specified allotment of equity securities;

and any such resolution must: (A) state the maximum number of equity securities in respect of which the restriction referred to above is excluded or modified; and (B) specify the date on which such exclusion or modifications will expire, which must be not more than five years from the date on which the resolution is passed.

- (g) Any resolution passed pursuant to the provisions referred to in the preceding paragraph may:
 - (i) be renewed or further renewed by special resolution of the Company for a further period not exceeding five years; and

- (ii) be revoked or varied at any time by special resolution of the Company.
- (h) Notwithstanding that any such resolution referred to in the two preceding paragraphs has expired, the Directors may allot equity securities in pursuance of an offer or agreement previously made by the Company if the resolution enabled the Company to make an offer or agreement that would or might require equity securities to be allotted after it expired.
- (i) In relation to an offer to allot securities, a reference (however expressed) to the holder of shares of any description is to whoever was the holder of shares of that description at the close of business on a date to be specified in the offer and the specified date must fall within the period of 28 days immediately before the date of the offer.

Issue of Shares

Subject to “—*Offers to Shareholders to be on a pre-emptive basis*”, the unissued Shares shall be at the disposal of the Board, which is authorised to allot or grant options, warrants or other rights over or otherwise dispose of them to such persons on such terms and conditions and at such times as the Board determines but so that no Share shall be issued at a discount except in accordance with the Companies Law and so that the amount payable on application on each Share shall be fixed by the Board.

Variation of class rights

If at any time the share capital is divided into different classes of Shares, the rights attached to any class (unless otherwise provided by the terms of issue) may, whether or not the Company is being wound up, be varied with the consent in writing of the holders of three-fourths of the issued Shares of that class or with the sanction of a special resolution of the holders of the Shares of that class.

Winding up

The term of the Placing will commence on the date of the Placing and will end (and the Company thereafter will be wound up and dissolved) at the end of the Term, subject to extension as described in “*Summary-Term*”.

If the Company is wound up whether voluntarily or otherwise the liquidator may with the sanction of a special resolution divide among the Shareholders in specie any part of the assets of the Company and may with the like sanction vest any part of the assets of the Company in trustees upon such trusts for the benefit of the Shareholders as the liquidator with the like sanction shall think fit.

If any of the securities or other assets to be divided as aforesaid involve a liability to calls or otherwise any person entitled under such division to any of the said assets may within fourteen (14) clear days after the passing of the special resolution, by notice in writing, direct the liquidator to sell his proportion and pay him the net proceeds and the liquidator shall, if practicable, act accordingly.

Disclosure of Third Party Interests in Shares

The Directors shall have power, if required for any regulatory purposes, by notice in writing to require any Shareholder to disclose to the Company the identity of any person (other than the Shareholder) who has an interest in the Shares held by the Shareholder and the nature of such interest. Any such notice shall require any information in response to such notice to be given in writing within the prescribed period which is 28 days after service of the notice or 14 days if the Shares concerned represent 0.25 per cent or more in value of the issued Shares of the relevant class or such other reasonable period as the Directors may determine. If any Shareholder has been duly served with such a notice and is in default for the prescribed period in supplying to the Company the information required by such notice, the Directors may serve a direction notice upon such Shareholder. The direction notice may direct that in respect of the Shares in respect of which the default has occurred (the “default Shares”) and any other Shares held by the Shareholder, the Shareholder shall not be entitled to vote (either personally or by representative or by proxy) in general meetings or class meetings. Where the default Shares represent at least 0.25 per cent of the class of Shares concerned, the direction notice may additionally direct that dividends on such shares will be retained by the Company (without interest) and

that no transfer of the Shares (other than a transfer approved under the Articles) shall be registered until the default is rectified.

Dividends

Subject to compliance with Section 304 of the Companies Law and the Distribution Priority, the Board may at any time declare and pay such dividends as appear to be justified by the position of the Company. The Board may also declare and pay any fixed dividend which is payable on any Shares half-yearly or otherwise on fixed dates whenever the position, in the opinion of the Board, so justifies. Dividend payments may be suspended by the Directors in their absolute discretion, including, without limitation, in the event of adverse, or perceived adverse, market conditions.

The method of payment of dividends shall be at the discretion of the Board and the Portfolio Manager.

No dividend shall be paid in excess of the amounts permitted by the Companies Law or approved by the Board.

Unless and to the extent that the rights attached to any Shares or the terms of issue thereof otherwise provide, all dividends shall be declared and paid pro rata according to the number of Shares held by each Shareholder. For the avoidance of doubt, where there is more than one class of Shares in issue, dividends declared in respect of any class of Share shall be declared and paid pro rata according to the number of Shares of the relevant class held by each Shareholder.

With the sanction of the Company in general meeting by way of a special resolution, any dividend may be paid wholly or in part by the distribution of specific assets and, in particular, of paid-up Shares of the Company. Where any difficulty arises in regard to such distribution, the Board may settle the same as it thinks expedient and in particular may issue fractional Shares and fix the value for distribution of such specific assets and may determine that cash payments shall be made to any Shareholders upon the basis of the value so fixed in order to adjust the rights of Shareholders and may vest any such specific assets in trustees for the Shareholders entitled as may seem expedient to the Board.

Any dividend interest or other monies payable in cash in respect of Shares may be paid by cheque or warrant sent through the post to the registered address of the holder or, in the case of joint holders, to the registered address of that one of the joint holders who is first named on the register. Any one of two or more joint holders may give effectual receipts for any dividends, interest or other monies payable in respect of their joint holdings. In addition, any such dividend or other sum may be paid by any bank or other funds transfer system or such other means and to or through such person as the holder or joint holders (as the case may be) may in writing direct, and the Company shall have no responsibility for any sums lost or delayed in the course of any such transfer or where it has acted on any such directions. Any one of two or more joint holders may give effectual receipts for any dividends, interest, bonuses or other monies payable in respect of their joint holdings.

No dividend or other monies payable on or in respect of a Share shall bear interest against the Company.

All unclaimed dividends may be invested or otherwise made use of by the Board for the benefit of the Company until claimed and the Company shall not be constituted a trustee in respect thereof. All dividends unclaimed for a period of six years after having been declared shall be forfeited and shall revert to the Company.

Transfer of Shares

No Shareholder shall sell, pledge, charge, mortgage, assign, assign by way of security, transfer, convey, exchange or otherwise dispose of its Shares or its commitment to settle purchases of Shares under the Subscription and Transfer Agreement (each a “**Transfer**”, other than to an Affiliate of an initial Shareholder party hereto, without the prior written consent of the Portfolio Manager, which consent shall be in the sole discretion of the Portfolio Manager; provided that no such Transfer shall be made unless in the opinion of counsel reasonably satisfactory to the Portfolio Manager (who may be counsel for the Company, and which requirement for an opinion may be waived, in whole or in part, in the sole discretion of the Portfolio Manager) that:

- (a) such Transfer would not require registration under the Securities Act or any state securities or “Blue Sky” laws or other laws applicable to the Shares to be assigned or transferred and is conducted in conformance with the restrictions set forth in this Offering Memorandum;
- (b) such Transfer would not be reasonably likely to cause the Company to be subject to tax in any jurisdiction other than of its incorporation on a net income basis, not be reasonably likely to cause the Company to become subject to registration as an investment company under the U.S. Investment Company Act;
- (c) such Transfer would not cause the Company to be considered to be an entity whose underlying assets are considered to include “plan assets” by reason of investment by an “employee benefit plan” or “plan” in such entity pursuant to the U.S. Plan Assets Regulations; and
- (d) such sale, assignment, disposition or transfer would not to cause all or any portion of the assets of the Company to constitute “plan assets” under ERISA or the U.S. Tax Code.

Prior to making any Transfer of Shares (other than Transfers to Affiliates of an initial Shareholder or, in the case of CLO Holdco or a Highland Principal (as defined in the Members' Agreement), to Highland, its Affiliates or another Highland Principal) a Shareholder must first offer to the other Shareholders a right to purchase the Shares, on a pro rata basis with respect to their current Shares, at the same price (which must be cash) as such Shares are proposed to be purchased by the prospective third party purchaser pursuant to an irrevocable offer letter. The other Shareholders will have 30 days following receipt of the letter to determine whether to purchase their entire pro rata portion of the Shares proposed to be Transferred. If the other Shareholders do not accept the offer, the Shareholder may (subject to complying with the other Transfer restrictions in the Articles) Transfer the applicable Shares that such Shareholders have not elected to purchase to a third party at a price equal to or greater than the price described in the offer letter, provided that if the Shareholder has not (a) entered into a definitive agreement to effect such sale within 90 days after the expiration of the period that the other Shareholders have to accept the offer in the offer letter or (b) consummated the sale within 120 day after the entry into the definitive agreement to consummate the sale, it must comply with these right of first refusal procedures again. Any Shareholder (other than the Shareholder proposing to Transfer its Shares) may assign its right to purchase its pro rata portion of the Shares to any other Shareholder (subject to complying with the other Transfer restrictions in the Articles), any initial Shareholder (other than the Shareholder proposing to Transfer its Shares) may assign its right to purchase its pro rata portion of the Shares to an Affiliate (subject to complying with the other Transfer restrictions in the Articles), and CLO Holdco or the Highland Principals (unless such Shareholder is the Shareholder proposing the Transfer its shares) may assign its right to purchase its pro rata portion of the Shares to Highland, an Affiliate of Highland or other Highland Principals (subject to complying with the other Transfer restrictions in the Articles).

Subject to the Articles and such of the restrictions of the Articles as may be applicable, any Shareholder may transfer all or any of his certificated Shares by an instrument of transfer in any usual or common form or in any other form which the Board may approve. The instrument of transfer of a certificated Share shall be signed by or on behalf of the transferor and, unless the Share is fully paid, by or on behalf of the transferee. An instrument of transfer of a certificated Share need not be under seal.

The Board may, in its absolute discretion and without giving a reason, decline to transfer, convert or register any transfer of any Share in certificated form which is not fully paid or on which the Company has a lien. The Directors may also refuse to register a transfer of Shares unless it is in respect of only one class of Shares, it is in favour of a single transferee or not more than four joint transferees; and in the case of a Share in certificated form, having been delivered for registration to the Office or such other place as the Board may decide, it is accompanied by the certificate(s) for the Shares to which it relates and such other evidence as the Board may reasonably require to prove the right of the transferor to make the transfer.

The Board may, in its absolute discretion, decline to register a transfer of any Shares to any person whose ownership may result in a person holding Shares in violation of the transfer restrictions published by the Company, from time to time.

The Directors may, in their absolute discretion, refuse to register a transfer of any Shares to a person that they have reason to believe is (i) an “employee benefit plan” (within the meaning of Section 3(3) of ERISA) that is subject to Part 4 of Title 1 of ERISA, (ii) a plan, individual retirement account or other arrangement that is subject to Section

4975 of the U.S. Internal Revenue Code of 1986, as amended (the “**U.S. Tax Code**”) or any other state, local laws or regulations that would have the same effect as regulations promulgated under ERISA by the U.S. Department of Labor and codified at **29 C.F.R. Section 2510.3-101** to cause the underlying assets of the Company to be treated as assets of that investing entity by virtue of its investment (or any beneficial interest) in the Company and thereby subject the Company and the Portfolio Manager (or other persons responsible for the investment and operation of the Company’s assets) to laws or regulations that are similar to the fiduciary responsibility or prohibited transaction provisions contained in Title I of ERISA or Section 4975 of the U.S. Tax Code, (iii) an entity whose underlying assets are considered to include “plan assets” of any such plan, account or arrangement (each of (i), (ii) and (iii) in this paragraph a “**Plan**”) or (iv) any person in circumstances where the holding of Shares by such person would (a) give rise to an obligation on the Company to register as an “investment company” under the Investment Company Act (as defined in the Articles) (including because the holder of the Shares is not a “qualified purchaser” as defined in the Investment Company Act), (b) preclude the Company from relying on the exception to the definition of “investment company” contained in Section 3(c)(7) of the Investment Company Act, (c) give rise to an obligation on the Company to register its Shares under the Exchange Act, the Securities Act or any similar legislation (each as defined in the Articles), (d) result in the Company not being considered a “Foreign Private Issuer” as that term is defined by Rule 3b-4(c) promulgated under the Exchange Act, (e) give rise to an obligation on the Portfolio Manager to register as a commodity pool operator or commodity trading advisor under the U.S. Commodity Exchange Act of 1974, as amended, (f) cause the Company to be a “controlled foreign corporation” for the purposes of the U.S. Tax Code, or cause the Company to suffer any pecuniary disadvantage (including any excise tax, penalties or liabilities under ERISA or the U.S. Tax Code), or (g) give rise to the Company or the Portfolio Manager becoming subject to any U.S. law or regulation determined to be detrimental to it (each such person in this paragraph a “**Prohibited U.S. Person**”). Each person acquiring Shares shall by virtue of such acquisition be deemed to have represented to the Company that they are not a Prohibited U.S. Person.

If the Board refuses to register the transfer of a Share it shall, within two months after the date on which the transfer was lodged with the Company, send notice of the refusal to the transferee.

The registration of transfers may be suspended at such times and for such periods (not exceeding 30 days in the aggregate in any one calendar year) as the Board may decide on giving notice in *La Gazette Officielle* and either generally or in respect of a particular class of Share.

Compulsory redemptions of Shares by the Company

The Company may redeem all or any of the Shares at any time subject to and in accordance with the provisions of the Members' Agreement and the Articles.

A Director is authorised to do all such acts and things as shall be necessary or expedient and to execute any documents deemed necessary or desirable in each case to complete any redemption of Shares subject to and in accordance with the Members' Agreement and the Articles.

The redemption of Shares under the Articles shall be deemed to be effective from the close of business on the relevant redemption date at which time any Shares which are so redeemed shall forthwith be cancelled and the name of the relevant Shareholder(s) be removed from the Register. Upon the redemption of a Share being effected pursuant to the Members' Agreement and the Articles, a Shareholder shall cease to be entitled to any rights in respect thereof save for payment of the redemption proceeds.

Purchase of Shares

The Company may, at the discretion of the Board, purchase any of its own Shares, whether or not they are redeemable, and may pay the purchase price in respect of such purchase to the fullest extent permitted by the Companies Law.

Notices

A notice or other communication may be given by the Company to any Shareholder by any means as set out in Section 523 of the Companies Law.

Any notice or other document, if served by post (including registered post, recorded delivery service or ordinary letter post), shall be deemed to have been served 48 hours after the time when the letter containing the same is posted and in proving such service it shall be sufficient to prove that the letter containing the notice or document was properly posted.

Any notice or other document that may be sent by the Company by courier will be deemed to be received 24 hours after the time at which it was despatched.

A notice may be given by the Company to the joint holders of a Share by giving the notice to the joint holder first named in the register in respect of the Share.

Any notice or other communication sent to the address of any Shareholder shall, notwithstanding the death, disability or insolvency of such Shareholder and whether the Company has notice thereof, be deemed to have been duly served in respect of any Share registered in the name of such Shareholder as sole or joint holder and such service shall, for all purposes, be deemed a sufficient service of such notice or document on all persons interested (whether jointly with or as claiming through or under him) in any such Share.

All Shareholders shall be deemed to have agreed to accept communication from the Company by electronic means in accordance with sections 524 and 526 and schedule 3 of the Companies Law unless a Shareholder notifies the Company otherwise. Such notification must be in writing and signed by the Shareholder and delivered to the Company's registered office or such other place as the Board directs. A Shareholder shall be entitled to require the Company to send him a version of a document or information in hard copy form.

Every person who becomes entitled to a Share shall be bound by any notice in respect of that Share which, before his name is entered in the register of members, has been duly given to a person from which he derives his title.

General meetings

General meetings shall be held once at least in each calendar year in accordance with Section 199 of the Companies Law but so that not more than fifteen (15) months may elapse between one annual general meeting and the next. At each such annual general meeting shall be laid copies of the Company's most recent accounts, Directors' report and, if applicable, the auditor's report in accordance with Section 252 of the Companies Law. The requirement for an annual general meeting may be waived by the shareholders in accordance with Section 201 of the Companies Law. Other meetings of the Company shall be called extraordinary general meetings.

All general meetings shall be held in Guernsey.

A shareholder participating by video link or telephone conference call or other electronic or telephonic means of communication in a meeting at which a quorum is present shall be treated as having attended that meeting, provided that the shareholders present at the meeting can hear and speak to the participating shareholder.

A video link or telephone conference call or other electronic or telephonic means of communication in which a quorum of shareholders participates and all participants can hear and speak to each other shall be a valid meeting which shall be deemed to take place where the Chairman is present unless the shareholders resolve otherwise.

Any general meeting convened by the Board, unless its time shall have been fixed by the Company in a general meeting or unless convened in pursuance of a requisition, may be postponed by the Board by notice in writing and the meeting shall, subject to any further postponement or adjournment, be held at the postponed date for the purpose of transacting the business covered by the original notice.

The Board may, whenever it thinks fit, and shall on the requisition of shareholders who hold more than ten per cent (10%) of such of the capital of the Company as carries the right to vote at general meetings (excluding any capital held as treasury shares) in accordance with Sections 203 and 204 of the Companies Law, proceed to convene a general meeting.

Notice of general meetings

A general meeting of the Company (other than an adjourned meeting) must be called by notice of at least 14 clear days.

A general meeting may be called by shorter notice than otherwise required if all the Shareholders entitled to attend and vote so agree.

Notices and other documents may be sent in electronic form or published on a website in accordance with Section 208 of the Companies Law.

Notice of a general meeting of the Company must be sent to every Shareholder (being only persons registered as a Shareholder), every Director and every alternate Director registered as such.

Notice of a general meeting of the Company must state the time and date of the meeting, state the place of the meeting, specify any special business to be put to the meeting (as defined in the Articles), contain the information required under Section 178(6)(a) of the Companies Law in respect of a resolution which is to be proposed as a special resolution at the meeting, contain the information required under Section 179(6)(a) of the Companies Law in respect of a resolution which is to be proposed as a waiver resolution at the meeting, and contain the information required under Section 180(3)(a) of the Companies Law in respect of a resolution which is to be proposed as a unanimous resolution at the meeting.

Notice of a general meeting must state the general nature of the business to be dealt with at the meeting.

The accidental omission to give notice of any meeting to or the non-receipt of such notice by any Shareholder shall not invalidate any resolution or any proposed resolution otherwise duly approved.

Conflicts of interest

A Director must, immediately after becoming aware of the fact that he is interested in a transaction or proposed transaction with the Company, disclose to the Board in accordance with section 162 of the Companies Law the nature and extent of that interest.

The obligation referred to above does not apply if:

- (a) the transaction or proposed transaction is between the Director and the Company; and
- (b) the transaction or proposed transaction is or is to be entered into in the ordinary course of the Company's business and on usual terms and conditions.

A general disclosure to the Board to the effect that a Director has an interest (as director, officer, employee, member or otherwise) in a party and is to be regarded as interested in any transaction which may after the date of the disclosure be entered into with that party is sufficient disclosure of interest in relation to that transaction.

Nothing referred to above in this section applies in relation to:

- (a) remuneration or other benefit given to a Director;
- (b) insurance purchased or maintained for a Director in accordance with Section 158 of the Companies Law; or
- (c) a qualifying third party indemnification provision provided for a Director in accordance with Section 159 of the Companies Law.

Subject to the paragraph below, a Director is interested in a transaction to which the Company is a party if such Director:

- (a) is a party to, or may derive a material benefit from, the transaction;

- (b) has a material financial interest in another party to the transaction;
- (c) is a director, officer, employee or member of another party (other than a party which is an associated company) who may derive a material financial benefit from the transaction;
- (d) is the parent, child or spouse of another party who may derive a material financial benefit from the transaction; or
- (e) is otherwise directly or indirectly materially interested in the transaction.

A Director is not interested in a transaction to which the Company is a party if the transaction comprises only the giving by the Company of security to a third party which has no connection with the Director, at the request of the third party, in respect of a debt or obligation of the Company for which the Director or another person has personally assumed responsibility in whole or in part under a guarantee, indemnity or security.

Save as provided in the Articles, a Director shall not vote in respect of any contract or arrangement or any other proposal whatsoever in which he has any material interest otherwise than by virtue of his interest in Shares or debentures or other securities of or otherwise through the Company. A Director may be counted in the quorum at a meeting in relation to any resolution on which he is debarred from voting.

A Director shall (in the absence of some other material interest than is indicated below) be entitled to vote (and be counted in the quorum) in respect of any resolution concerning any of the following matters, namely:

- (a) the giving of any guarantee, security or indemnity to him in respect of money lent or obligations incurred by him at the request of or for the benefit of the Company or any of its subsidiaries;
- (b) the giving of any guarantee, security or indemnity to a third party in respect of a debt or obligation of the Company or any of its subsidiaries for which he himself has assumed responsibility in whole or in part under a guarantee or indemnity or by the giving of security;
- (c) any proposal concerning an offer of Shares or debentures or other securities of or by the Company or any of its subsidiaries for subscription or purchase in which offer he is or is to be interested as a participant in the underwriting or sub-underwriting thereof; or
- (d) any proposal concerning any other company in which he is interested, directly or indirectly and whether as an officer or shareholder or otherwise howsoever, provided that he is not the holder of or beneficially interested in one per cent or more of the issued shares of such company (or of any third company through which his interest is derived) or of the voting rights available to shareholders of the relevant company (any such interest being deemed for these purposes to be a material interest in all circumstances).

Where proposals are under consideration concerning the appointment (including fixing or varying the terms of appointment) of two or more Directors to offices or employment with the Company or any company in which the Company is interested, the Directors may be counted in the quorum for the consideration of such proposals and such proposals may be divided and considered in relation to each Director separately and in such case each of the Directors concerned (if not debarred from voting under the provisions referred to above) shall be entitled to vote (and be counted in the quorum) in respect of each resolution except that concerning his own appointment.

If any question shall arise at any meeting as to the materiality of a Director's interest or as to the entitlement of any Director to vote and such question is not resolved by his voluntarily agreeing to abstain from voting, such question shall be referred to the chairman of the meeting and his ruling in relation to any other Director shall be final and conclusive except in a case where the nature or extent of the interests of the Director concerned have not been fairly disclosed.

The Company may by ordinary resolution suspend or relax the provisions referred to above to any extent or ratify any transaction not duly authorised by reason of a contravention of any of the paragraphs above.

Subject to the provisions referred to above the Directors may exercise the voting power conferred by the shares in any other company held or owned by the Company or exercisable by them as directors of such other company in such manner in all respects as they think fit (including the exercise thereof in favour of any resolution appointing themselves or any of them director, managing director, managers or other officer of such company or voting or providing for the payment or remuneration to the directors, managing director, manager or other officer of such company).

A Director may hold any other office or place of profit under the Company (other than the office of Auditor) in conjunction with his office of Director on such terms as to tenure of office or otherwise as the Directors may determine.

Subject to due disclosure in accordance with the provisions referred to in this section, no Director or intending Director shall be disqualified by his office from contracting with the Company as vendor, purchaser or otherwise, nor shall any such contract or arrangement entered into by or on behalf of the Company in which any Director is in any way interested render the Director liable to account to the Company for any profit realised by any such contract or arrangement by reason of such Director holding that office or of the fiduciary relationship thereby established.

Any Director may act by himself or his firm in a professional capacity for the Company and he or his firm shall be entitled to remuneration for professional services as if he were not a Director, provided that nothing herein contained shall authorise a Director or his firm to act as Auditor to the Company.

Any Director may continue to be or become a director, managing director, manager or other officer or member of any company in which the Company may be interested and (unless otherwise agreed) no such Director shall be accountable for any remuneration or other benefits received by him as a director, managing director, manager or other officer or member of any such other company.

Remuneration and appointment of Directors

The ordinary remuneration of the Directors who do not hold executive office for their services (excluding amounts payable under any other sub-paragraph of the Articles) shall not exceed in aggregate £150,000 per annum or such higher amount as the Company may from time to time by ordinary resolution determine. Such remuneration shall be deemed to accrue from day to day. The Directors shall also be paid all reasonable out-of-pocket travelling, hotel and other expenses properly incurred by them in attending and returning from meetings of the Directors or any committee of the Directors or general meetings of the Company or in connection with the business of the Company. In addition, the Board may award additional remuneration to any Director engaged in exceptional work at the request of the Board on a time spent basis.

The Board shall have power at any time to appoint any person eligible in accordance with Section 137 of the Companies Law to be a Director either to fill a casual vacancy or as an addition to the existing Directors but so that the total number of Directors shall not at any time exceed the number, if any, fixed pursuant to the Articles. Any Director so appointed shall hold office only until the next following annual general meeting and shall then be eligible for re-election. Without prejudice to the powers of the Board, the Company in general meeting may appoint any person to be a Director either to fill a casual vacancy or as an additional Director.

The Directors may at any time appoint one or more of their body (other than a Director resident in the United Kingdom) to the office of managing director for such term and at such remuneration and upon such terms as they determine.

Disqualification of Directors

No person other than a Director retiring at a general meeting shall, unless recommended by the Directors, be eligible for election by the Company to the office of Director unless, not less than 14 clear days before the date appointed for the meeting there shall have been left at the Company's registered office notice in writing signed by a Shareholder duly qualified to attend and vote at the meeting for which such notice is given of his intention to propose such person for election together with notice in writing signed by that person of his willingness to be elected.

A Director shall cease to hold office: (i) if the Director (not being a person holding for a fixed term an executive office subject to termination if he ceases for any reason to be a Director) resigns his office by written notice signed by him sent to or deposited at the registered office of the Company, (ii) if he shall have absented himself from meetings of the Board for a consecutive period of 12 months and the Board resolves that his office shall be vacated, (iii) if he

dies or becomes of unsound mind or incapable, (iv) if he becomes insolvent, suspends payment or compounds with his creditors, (v) if he is requested to resign by written notice signed by all his co-Directors, (vi) if the Company in general meeting shall declare that he shall cease to be a Director, (vii) if he becomes resident in the United Kingdom and, as a result thereof, a majority of the Directors are resident in the United Kingdom, (viii) if he becomes ineligible to be a Director in accordance with section 137 of the Companies Law or (ix) if he becomes prohibited from being a Director by reason of any order made under any provisions or any law or enactment.

Indemnities

The Directors, company secretary and officers of the Company and their respective heirs and executors shall, to the extent permitted by Section 157 of the Companies Law, be fully indemnified out of the assets and profits of the Company from and against all actions expenses and liabilities which they or their respective heirs or executors may incur by reason of any contract entered into or any act in or about the execution of their respective offices or trusts except such (if any) as they shall incur by or through their own negligence, default, breach of duty or breach of trust respectively and none of them shall be answerable for the acts, receipts, neglects or defaults of the others of them or for joining in any receipt for the sake of conformity or for any bankers or other person with whom any monies or assets of the Company may be lodged or deposited for safe custody or for any bankers or other persons into whose hands any money or assets of the Company may come or for any defects of title of the Company to any property purchased or for insufficiency or deficiency of or defect in title of the Company to any security upon which any monies of the Company shall be placed out or invested or for any loss misfortune or damage resulting from any such cause as aforesaid or which may happen in or about the execution of their respective offices or trusts, except if the same shall happen by or through their own negligence, default, breach of duty or breach of trust.

To the fullest extent permitted by applicable law (including the Companies Law) and subject to compliance with this Offering Memorandum, the Portfolio Manager, its affiliates, any officer, director, secretary, manager, employee or any direct or indirect partner, member, stockholder, agent or legal representative (including executors, guardians and trustees) of the Portfolio Manager and its affiliates, including persons formerly serving in such capacities, any person who serves at the request of the Portfolio Manager or the Board pursuant to the Articles, on behalf of the Company as an officer, director, secretary, manager, partner, member, employee, stockholder, agent or legal representative of any other person serving at the request of the Portfolio Manager or the Board pursuant to the Articles on behalf of the Company in such capacity as listed above, each member of the Advisory Board and each member of any subcommittee thereof and any assignees or successors of the foregoing (each, an **"Indemnified Person"**) shall be fully indemnified against all losses, liabilities, damages, expenses or costs (including any claim, judgment, award, settlement, reasonable legal and other professional fees and disbursements and other costs or expenses incurred in connection with the defence of any proceeding, whether or not matured or unmatured or whether or not asserted or brought due to contractual or other restrictions, joint or several) other than those arising from suits, disputes or actions by Highland, its affiliates or principals, Other Accounts or CLO HoldCo, Ltd. (collectively, the **"Indemnified Losses"**) to which an Indemnified Person may become subject by reason of any acts or omissions or any alleged acts or omissions arising out of such Indemnified Person's or any other person's activities in connection with the conduct of the business or affairs of the Company and/or an investment, unless such Indemnified Losses result from any action or omission which constitutes, with respect to such person, a Triggering Event; provided, that notwithstanding the foregoing, the members of the Advisory Board or members of any subcommittee thereof shall be subject only to a duty of good faith (it being understood that, to the fullest extent permitted by applicable law, any such member, in determining to take or refrain from taking any action, shall be permitted to take into consideration only the interests of the Shareholder and/or other person represented by such member and, in so doing, shall, to the fullest extent permitted by applicable law, be considered to have acted in good faith). Any claims arising from a Triggering Event shall be limited to actual out-of-pocket damages incurred as a direct consequence of the Triggering Event, and shall not include punitive, consequential or other damages or lost profits.

Borrowing powers

Subject to the restrictions set forth in this Offering Memorandum, the Board may exercise all the powers of the Company to borrow money (in whatever currency the Board determines from time to time) and to mortgage, hypothecate, pledge or charge all or part of its undertaking property and uncalled capital and to issue debentures and other securities, whether outright or as collateral security for any liability or obligation of the Company or of any third party, subject to any limits on borrowings adopted by the Board from time to time. The Board may exercise all the

powers of the Company to engage in currency or interest rate hedging in the interests of efficient portfolio management.

Forfeiture and surrender of Shares

Any Share in respect of which a notice requiring payment of an unpaid call or instalment, together with any interest which may have accrued and any expenses which may have been incurred, has been served may, at any time before payment has been made, be forfeited by a resolution of the Directors to that effect. Such forfeiture shall include all dividends declared in respect of the forfeited Share and not actually paid before the forfeiture.

The Board may accept from any Shareholder on such terms as agreed a surrender of any Shares in respect of which there is a liability for calls. Any surrendered Share may be disposed of in the same manner as a forfeited share.

If any Shares are owned directly or beneficially by a person believed by the Directors to be a Prohibited U.S. Person, the Directors may give notice to such person requiring them either (i) to provide the Directors within 30 days of receipt of such notice with sufficient satisfactory documentary evidence to satisfy the Directors that such person is not a Prohibited U.S. Person or (ii) to sell or transfer their Shares to a person qualified to own the same within 30 days and within such 30 days to provide the Directors with satisfactory evidence of such sale or transfer. Where condition (i) or (ii) is not satisfied within 30 days after the serving of the notice, the person will be deemed, upon the expiration of such 30 days, to have forfeited their Shares.

LITIGATION

There are no, and have not been in the last 12 months, any governmental, legal or arbitration proceedings, nor, so far as the Company is aware, are any such proceedings pending or threatened, which may have, or have in the recent past had, a significant effect on the Company's financial position or profitability.

RELATED PARTY TRANSACTIONS

Other than as set out in the section of this Offering Memorandum entitled "*Material Contracts*" (including the NexBank Credit Facility), "*Investment Policy—Company Borrowing*" and cross-transactions as described in "*Risk Factors—Risks Relating to Conflicts of Interest—The Company will be subject to various conflicts of interest involving the Portfolio Manager and its affiliates*" the Company has not entered into any related party transactions. The consent of the Advisory Board will be required with respect to transactions with any Related Party.

GENERAL

Highland may be regarded as the promoter of the Company. Save as disclosed in this section of this Offering Memorandum, no amount or benefit has been paid, or given, to the promoter or any of its subsidiaries since the incorporation of the Company and none is intended to be paid, or given. Highland is a limited partnership, established under the laws of the State of Delaware in the U.S. with its registered office at 1209 Orange Street, in the City of Wilmington, County of New Castle, Delaware 19801.

The Net Placing Proceeds available for investment by the Company following the Placing will be approximately U.S. \$153 million (less any amounts retained for working capital purposes) and these proceeds will be invested in accordance with the Company's investment policy described in the section of this Offering Memorandum entitled "*The Company*". Since incorporation, the Company has not commenced operations, and therefore has not generated earnings. As the Shares do not have a par value, the Placing Price consists solely of share premium.

None of the Shares available under the Placing are being underwritten.

Application will be made to the appropriate securities exchange for the Placing Shares to be admitted when deemed appropriate by the Company.

The Company does not own any premises and does not lease any premises.

THIRD PARTY SOURCES

Where third party information has been referenced in this Offering Memorandum, the source of that third party information has been disclosed. Where information contained in this Offering Memorandum has been so sourced, the Company confirms that such information has been accurately reproduced and, as far as the Company is aware and able to ascertain from information published by such third parties, no facts have been omitted which would render the reproduced information inaccurate or misleading.

Highland has given and not withdrawn its written consent to the issue of this Offering Memorandum with references to its name in the form and context in which such references appear. Highland accepts responsibility for information attributed to it in this Offering Memorandum and declares that, having taken all reasonable care to ensure that such is the case, the information attributed to it in this Offering Memorandum is, to the best of its knowledge, in accordance with the facts and contains no omission likely to affect its import.

Each of the Management Companies has given and, as at the date of this Offering Memorandum, has not withdrawn its written consent to the issue of this Offering Memorandum with references to its name in the form and context in which such references appear. Each of the Management Companies accepts responsibility for information attributed to it in this Offering Memorandum and declares that, having taken all reasonable care to ensure that such is the case, the information attributed to it in this Offering Memorandum is, to the best of its knowledge, in accordance with the facts and contains no omission likely to affect its import.

WORKING CAPITAL

The Company is of the opinion that the working capital available to the Group is sufficient for the present requirements of the Company, that is, for at least the next 12 months from the date of this Offering Memorandum.

CAPITALISATION AND INDEBTEDNESS

As at the date of this Offering Memorandum, the Company:

- (a) does not have any secured, unsecured or unguaranteed indebtedness, including indirect and contingent, other than the NexBank Credit Facility;
- (b) has not granted any mortgage or charge over any of its assets, other than that granted under the NexBank Credit Facility; and
- (c) does not have any contingent liabilities or guarantees.

As at the date of this Offering Memorandum, the Company's issued and fully paid up share capital consisted of 143,454,001 Shares of no par value.

DOCUMENTS AVAILABLE FOR INSPECTION

Copies of the Articles, the constitutional documents of the Company, the material contracts referred to in "*Material Contracts*" above and this Offering Memorandum will be available for inspection at the registered office of the Company during normal business hours on any weekday (Saturdays and public holidays excepted) up to and including the date of the Placing.

Copies of this Offering Memorandum may be obtained, free of charge during normal business hours on any weekday (bank and public holidays excepted) at the Company's registered office up to and including the date of the Placing.

RELATIONSHIP BETWEEN SHAREHOLDERS, THE COMPANY AND SERVICE PROVIDERS

The Company is a registered closed-ended investment company incorporated in Guernsey with limited liability on 30 March 2015. While prospective investors will acquire an interest in the Company on subscribing for Placing Shares, the Company is the sole legal and/or beneficial owner of its investments. Consequently, Shareholders have no direct legal or beneficial interest in those investments. The liability of Shareholders for the debts and other obligations of the Company is limited to the amount unpaid, if any, on the Placing Shares held by them.

Shareholders' rights in respect of their investment in the Company are governed by the Articles, the Companies Law and the investment terms set out in this Offering Memorandum.

RIGHTS AGAINST THIRD PARTIES, INCLUDING THIRD PARTY SERVICE PROVIDERS

As the Company has no employees and the Directors have all been appointed on a non-executive basis, the Company is reliant on the performance of service providers listed in this Offering Memorandum (the "**Service Providers**").

Without prejudice to any potential right of action in tort that a Shareholder may have to bring a claim against a Service Provider, each Shareholder's contractual relationship in respect of its investment in Shares is with the Company only. Therefore, no Shareholder will have any contractual claim against any Service Provider with respect to such Service Provider's default.

JURISDICTION AND APPLICABLE LAW

As noted above, Shareholders' rights are governed by the Articles, the Companies Law and the terms set out in this Offering Memorandum. By subscribing for Placing Shares, investors agree to be bound by the Articles, the Companies Law and the terms set out in this Offering Memorandum.

Information on the existence or not of any legal instruments providing for the recognition and enforcement of judgments in the territory where the Company is established is as follows. A final and conclusive judgement under which a sum of money is payable (not being a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or penalty) obtained in the superior courts in the reciprocating countries set out in the Judgments (Reciprocal Enforcement) (Guernsey) Law 1957 (the "**1957 Law**") (which includes the Supreme Court and the Senior Courts of England and Wales, excluding the Crown Court), after a hearing on the merits would be recognised as a valid judgement by the Guernsey courts and would be enforceable in accordance with and subject to the provisions of the 1957 Law.

The Guernsey courts would also recognise, without reconsideration of the merits and assuming proper service of process and assumption of jurisdiction in accordance with the laws of the relevant jurisdiction, any final and conclusive judgement under which affixed or ascertainable sum of money is payable (not being a sum payable in respect of taxes or other charges or a like nature or in respect of a fine or other penalty) obtained in a court not recognised by the 1957 Law provided that the judgment was not obtained by fraud or in a manner opposed to the principles of natural justice and recognition of the judgment is not contrary to public policy as applied by the Guernsey courts.

FAIR TREATMENT AND PREFERENTIAL TREATMENT OF INVESTORS

The Directors owe certain fiduciary duties to the Company which require them, among other things, to act in good faith and in what they consider to be the best interests of the Company. In doing so, the Directors will act in a manner that ensures the fair treatment of investors.

Under the AIFMD Rules, the Portfolio Manager as AIFM must treat all investors fairly. The Portfolio Manager ensures the fair treatment of investors through its decision-making procedures and organisational structure which (1) identify any preferential treatment, or the right thereto, accorded to investors and (2) ensure that any such preferential treatment does not result in an overall disadvantage to other investors.

In addition, the Portfolio Manager monitors the terms of side arrangements entered into with investors in relation to their investment in the Company to seek to ensure the fair treatment of investors. In so doing, the Portfolio Manager takes into consideration whether such side arrangements are in accordance with side arrangements previously entered into.

The Portfolio Manager may enter into side letters in relation to the Company and its investments with certain individual investors covering, *inter alia*, *capacity*, *provision of additional information*, *fees*, *most favoured investor commitments*, *individual investor approval requirements*, *transfer rights and confirmations of how expenses will be borne*. Such information may provide the recipient greater insights into the Company activities than is included in standard reports to investors. In entering into any side letters, the Company will act in the best interests of the investors as a whole.

Information on such side letters will be disclosed to investors in accordance with the AIFMD.

TERMS AND CONDITIONS OF THE PLACING

INTRODUCTION

Each Placee which confirms its agreement (whether orally or in writing) to subscribe for Placing Shares under the Placing will be bound by these terms and conditions and will be deemed to have accepted them.

The Company may require any Placee to agree to such further terms and/or conditions and/or give such additional warranties and/or representations as it (in its absolute discretion) sees fit and/or may require any such Placee to execute a separate placing letter (a “**Placing Letter**”).

AGREEMENT TO SUBSCRIBE FOR PLACING SHARES

Any Placee agrees to become a member of the Company and agrees to subscribe for those Placing Shares allocated to it at the Placing Price in respect of the Placing Shares allocated to the Placee. To the fullest extent permitted by law, each Placee acknowledges and agrees that it will not be entitled to exercise any remedy of rescission at any time. This does not affect any other rights the Placee may have.

PAYMENT FOR PLACING SHARES

Each Placee must pay the Placing Price for the Placing Shares issued to the Placee in the manner and by the time directed by the Company. If any Placee fails to pay as so directed and/or by the time required, the relevant Placee’s application for Placing Shares shall be rejected.

REPRESENTATIONS AND WARRANTIES

By agreeing to subscribe for Placing Shares, each Placee which will enter into a commitment to subscribe for Placing Shares will (for itself and any person(s) procured by it to subscribe for Placing Shares and any nominee(s) for any such person(s)) agree, represent and warrant to the Company that:

- (a) in agreeing to subscribe for Placing Shares under the Placing, it is relying solely on this Offering Memorandum and any subsequent notice published by the Company subsequent to the date of this Offering Memorandum and not on any other information given, or representation or statement made at any time, by any person concerning the Company or the Placing. It agrees that none of the Company nor any of its respective officers, agents or employees, will have any liability for any other information or representation. It irrevocably and unconditionally waives any rights it may have in respect of any other information or representation;
- (b) if the laws of any territory or jurisdiction outside the United Kingdom are applicable to its agreement to subscribe for Placing Shares under the Placing, it warrants that it has complied with all such laws, obtained all governmental and other consents which may be required, complied with all requisite formalities and paid any issue, transfer or other taxes due in connection with its placing commitment in any territory and that it has not taken any action or omitted to take any action which will result in the Company or any of its respective officers, agents, affiliates or employees acting in breach of the regulatory or legal requirements, directly or indirectly, of any territory or jurisdiction outside the United Kingdom in connection with the Placing;
- (c) it does not have a registered address in, and is not a citizen, resident or national of, any jurisdiction in which it is unlawful to make or accept an offer of the Placing Shares and it is not acting on a non-discretionary basis for any such person;
- (d) it agrees that, having had the opportunity to read this Offering Memorandum, it shall be deemed to have had notice of all information and representations contained in this Offering Memorandum, that it is acquiring Placing Shares solely on the basis of this Offering Memorandum and any subsequent notice published by the Company subsequent to the date of this Offering Memorandum and no other information and that in accepting a participation in the Placing it has had access to all information it believes necessary or appropriate in connection with its decision to subscribe for Placing Shares;

- (e) it acknowledges that no person is authorised in connection with the Placing to give any information or make any representation other than as contained in this Offering Memorandum and any subsequent notice published by the Company subsequent to the date of this Offering Memorandum and, if given or made, any information or representation must not be relied upon as having been authorised by the Company;
- (f) it is not applying as, nor is it applying as nominee or agent for, a person who is or may be liable to notify and account for tax under the Stamp Duty Reserve Tax Regulations 1986 at any of the increased rates referred to in section 67, 70, 93 or 96 (depository receipts and clearance services) of the Finance Act 1986;
- (g) it accepts that none of the Placing Shares have been or will be registered under the laws of any Restricted Territory. Accordingly, the Placing Shares may not be offered, sold, issued or delivered, directly or indirectly, within any Restricted Territory unless an exemption from any registration requirement is available;
- (h) if it is receiving the offer in circumstances under which the laws or regulations of a jurisdiction other than the United Kingdom would apply, that it is a person to whom the Placing Shares may be lawfully offered under that other jurisdiction's laws and regulations;
- (i) if it is a resident in the EEA (other than the United Kingdom), it is a "Qualified Investor" within the meaning of the law in the Relevant Member State implementing Article 2(1)(e)(i), (ii) or (iii) of the Prospectus Directive;
- (j) if it is outside the United Kingdom, neither this Offering Memorandum nor any other offering, marketing or other material in connection with the Placing constitutes an invitation, offer or promotion to, or arrangement with, it or any person whom it is procuring to subscribe for Placing Shares pursuant to the Placing unless, in the relevant territory, such offer, invitation or other course of conduct could lawfully be made to it or such person and such documents or materials could lawfully be provided to it or such person and Placing Shares could lawfully be distributed to and subscribed and held by it or such person without compliance with any unfulfilled approval, registration or other regulatory or legal requirements;
- (k) it acknowledges the representations, warranties and agreements set out in this Offering Memorandum, including those set out in the section of this Offering Memorandum entitled "*Purchase and Transfer Restrictions*" in "*Placing Arrangements*", and further acknowledges that it is not a U.S. Person, it is not located within the United States, it is subscribing for Placing Shares in an "offshore transaction" as defined in Regulation S and it is not acquiring the Placing Shares for the account or benefit of a U.S. Person, and where it is subscribing for Placing Shares for one or more managed, discretionary or advisory accounts, it is authorised in writing for each such account: (i) to subscribe for the Placing Shares for each such account; (ii) to make on each such account's behalf the representations, warranties and agreements set out in this Offering Memorandum or in any Placing Letter, where relevant; and (iii) to receive on behalf of each such account any documentation relating to the Placing in the form provided by the Company. It agrees that the provision of this paragraph shall survive any resale of the Placing Shares by or on behalf of any such account;
- (l) it is acting as principal only in respect of the Placing, or, if it is acting for any other person (i) it is and will remain liable to the Company for the performance of all its obligations as a placee in respect of the Placing (regardless of the fact that it is acting for another person), (ii) it is both an "authorised person" for the purposes of FSMA and a "qualified investor" as defined at Article 2.1(e)(i) of Directive 2003/71/EC (known as Prospectus Directive) acting as agent for such person, and (iii) such person is either (1) a FSMA Qualified Investor or (2) its "client" (as defined in section 86(2) of FSMA) that has engaged it to act as his agent on terms which enable it to make decisions concerning the Placing or any other offers of transferable securities on his behalf without reference to him;
- (m) it has not and will not offer or sell any Placing Shares to persons in the United Kingdom, except to persons whose ordinary activities involve them in acquiring, holding, managing or disposing of investments (as principal or agent) for the purposes of their business or otherwise in circumstances which

- have not resulted and which will not result in an offer to the public in the United Kingdom within the meaning of section 102B of the FSMA;
- (n) it is an “eligible counterparty” within the meaning of Chapter 3 of the FCA’s Conduct of Business Sourcebook and it is subscribing for or purchasing the Shares for investment only and not for resale or distribution;
 - (o) it irrevocably appoints any Director of the Company to be its agent and on its behalf (without any obligation or duty to do so), to sign, execute and deliver any documents and do all acts, matters and things as may be necessary for, or incidental to, its subscription for all or any of the Placing Shares for which it has given a commitment under the Placing, in the event of its own failure to do so;
 - (p) it accepts that if the Placing does not proceed or such Placing Shares are not admitted to a securities exchange for any reason whatsoever, then none of the Company or any of its affiliates, nor persons controlling, controlled by or under common control with any of them nor any of their respective employees, agents, officers, members, stockholders, partners or representatives, shall have any liability whatsoever to it or any other person;
 - (q) it has not taken any action or omitted to take any action which will or may result in the Company or any of its directors, officers, agents, affiliates, employees or advisers being in breach of the legal or regulatory requirements of any territory in connection with the Placing or its subscription of Placing Shares pursuant to the Placing;
 - (r) in connection with its participation in the Placing it has observed all relevant legislation and regulations, in particular (but without limitation) those relating to money laundering and countering terrorist financing and that its placing commitment is only made on the basis that it accepts full responsibility for any requirement to identify and verify the identity of its clients and other persons in respect of whom it has applied. In addition, it warrants that it is a person: (i) subject to the Money Laundering Regulations 2007 in force in the United Kingdom; or (ii) subject to the Money Laundering Directive (2005/60/EC of the European Parliament and of the EC Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing); or (iii) subject to the Guernsey AML Requirements; or (iv) acting in the course of a business in relation to which an overseas regulatory authority exercises regulatory functions and is based or incorporated in, or formed under the law of, a country in which there are in force provisions at least equivalent to those required by the Money Laundering Directive;
 - (s) due to anti-money laundering and the countering of terrorist financing requirements, the Company may require proof of identity of the Placee and related parties and verification of the source of the payment before the placing commitment can be processed and that, in the event of delay or failure by the Placee to produce any information required for verification purposes, the Company may refuse to accept the placing commitment and the subscription moneys relating thereto. It holds harmless and will indemnify the Company against any liability, loss or cost ensuing due to the failure to process the placing commitment, if such information as has been required has not been provided by it or has not been provided timeously;
 - (t) any person in Guernsey involved in the business of the Company who knows or suspects or has reasonable grounds for knowing or suspecting that any other person (including the Company or any person subscribing for Placing Shares) is involved in money laundering activities, is under an obligation to report such suspicion to the relevant authorities pursuant to the Guernsey AML Requirements. Similar disclosures may be required under other legislation;
 - (u) it and each person or body (including, without limitation, any local authority or the managers of any pension fund) on whose behalf it accepts Placing Shares pursuant to the Placing or to whom it allocates such Placing Shares have the capacity and authority to enter into and to perform their obligations as a Placee of the Placing Shares and will honour those obligations;

- (v) it confirms that it is not acquiring the Placing Shares using the assets of: (i)(A) an “employee benefit plan” as defined in Section 3(3) of ERISA that is subject to Title I of ERISA; (B) a “plan” as defined in Section 4975 of the U.S. Tax Code, including an individual retirement account or other arrangement that is subject to Section 4975 of the U.S. Tax Code; or (C) an entity whose underlying assets are considered to include “plan assets” by reason of investment by an “employee benefit plan” or “plan” described in preceding clause (A) or (B) in such entity pursuant to the U.S. Plan Assets Regulations; or (ii) a governmental, church, non-U.S. or other employee benefit plan that is subject to any federal, state, local or non-U.S. law that is substantially similar to the provisions of Title I of ERISA or Section 4975 of the U.S. Tax Code, unless its purchase, holding, and disposition of the Placing Shares will not constitute or result in a non-exempt violation of any such substantially similar law;
- (w) the representations, undertakings and warranties contained in this Offering Memorandum or in any Placing Letter, where relevant, are irrevocable. It acknowledges that the Company and its affiliates will rely upon the truth and accuracy of such representations and warranties and it agrees that if any of the representations or warranties made or deemed to have been made by its subscription of the Shares are no longer accurate, it shall promptly notify the Company;
- (x) nothing has been done or will be done by it in relation to the Placing that has resulted or could result in any person being required to publish a prospectus in relation to the Company or to any ordinary shares in accordance with FSMA or the Prospectus Rules or in accordance with any other laws applicable in any part of the European Union or the European Economic Area;
- (y) it accepts that the allocation of Placing Shares shall be determined by the Company in its absolute discretion and that such persons may scale down any placing commitments for this purpose on such basis as they may determine; and
- (z) time shall be of the essence as regards its obligations to settle payment for the Placing Shares and to comply with its other obligations under the Placing; and
- (aa) it has been provided an opportunity to ask questions of, and have received satisfactory answers thereto from, the Company, the Portfolio Manager, Highland, Acis and/or their respective affiliates, as applicable, regarding the Company’s assets and the terms and conditions of the offering of the Placing Shares, and it and its representatives have obtained all additional information requested of the Company, the Portfolio Manager, Highland, Acis and/or their respective affiliates, as applicable and to the extent such information is in their possession or reasonably obtainable thereby without undue expense or burden, in order to respond to any inquiries it has made regarding the offering of the Placing Shares. In connection with the offering of the Shares, it is not relying upon any statements other than those statements contained in the Offering Memorandum. It are not relying on the Company, the Portfolio Manager, Highland, Acis and/or their respective any of its respective affiliates or any of its partners, members, managers, shareholders, officers, employees, shared personnel, representatives, consultants, advisors, attorneys or agents for legal, investment or tax advice. It has sought independent legal, investment and tax advice to the extent that it has deemed necessary or appropriate in connection with its decision to subscribe for the Placing Shares.

SUPPLY AND DISCLOSURE OF INFORMATION

If the Administrator or the Company or any of their agents request any information in connection with a Placee’s agreement to subscribe for Placing Shares under the Placing or to comply with any relevant legislation, such Placee must promptly disclose it to them.

DATA PROTECTION

Pursuant to the Data Protection (Bailiwick of Guernsey) Law, 2001, as amended (the “**DP Law**”) and any successor legislation, the Company and/or the Administrator may hold personal data (as defined in the DP Law) relating to past and present Shareholders.

Such personal data held is used by those parties in relation to the Placing and to maintain a register of the Shareholders and mailing lists and this may include sharing such data with third parties in one or more of the countries mentioned below when (a) effecting the payment of dividends and redemption proceeds to Shareholders (in each case, where applicable) and, if applicable, the payment of commissions to third parties; and (b) filing returns of Shareholders and their respective transactions in shares with statutory bodies and regulatory authorities. Personal data may be retained on record for a period exceeding six years after it is no longer used.

The countries referred to above include, but need not be limited to, those in the European Economic Area or the European Union and any of their respective dependent territories overseas, Andorra, Argentina, Canada, State of Israel, New Zealand, Switzerland and the Eastern Republic of Uruguay.

By becoming registered as a holder of Placing Shares in the Company a person becomes a data subject (as defined in the DP Law) and is deemed to have consented to the processing by the Company and the Administrator of any personal data relating to them in the manner described above.

The Company will be the “data controller” in respect of the personal data, but has appointed the Administrator as a “data processor” of such data (each as defined in the DP Law). Details of the registration of the Company as data controller can be found on the website of the Guernsey Data Protection Commissioner: www.dpr.gov.gg.

MISCELLANEOUS

The rights and remedies of the Company and the Administrator under these terms and conditions are in addition to any rights and remedies which would otherwise be available to each of them and the exercise or partial exercise of one will not prevent the exercise of others.

On the acceptance of their placing commitment, if a Placee is a discretionary fund manager, that Placee may be asked to disclose in writing or orally the jurisdiction in which its funds are managed or owned. All documents provided in connection with the Placing will be sent at the Placee’s risk. They may be returned by post to such Placee at the address notified by such Placee.

Each Placee agrees to be bound by the Articles (as amended from time to time) once the Placing Shares, which the Placee has agreed to subscribe for pursuant to the Placing, have been acquired by the Placee. The contract to subscribe for Placing Shares under the Placing and the appointments and authorities mentioned in this Offering Memorandum will be governed by, and construed in accordance with, the laws of England. For the exclusive benefit of the Company and the Administrator, each Placee irrevocably submits to the jurisdiction of the courts of England and Wales and waives any objection to proceedings in any such court on the ground of venue or on the ground that proceedings have been brought in an inconvenient forum. This does not prevent an action being taken against a Placee in any other jurisdiction.

In the case of a joint agreement to subscribe for Placing Shares under the Placing, references to a “Placee” in these terms and conditions are to each of the Placees who are a party to that joint agreement and their liability is joint and several.

The Company expressly reserves the right to modify the Placing (including, without limitation, its timetable and settlement) at any time prior to the date of the Placing.

PLACING STATISTICS

Target Gross Placing Proceeds*	U.S. \$153 million
Minimum expected initial Net Asset Value per Share**	U.S. \$1.02535

* The target size of the Placing is U.S. \$153 million. The number of Placing Shares to be issued, and therefore the Gross Placing Proceeds, is not known as at the date of this Offering Memorandum.

** NAV per Share immediately following Placing based on the NAV of the Company as at September 30, 2017, as adjusted with respect to a dividend of US \$ 9 million on October 10, 2017, and a buyback of Shares from Acis Capital Management, L.P. for an aggregate purchase price of \$991,180.13 on October 24, 2017.

DEFINITIONS

The following definitions apply in this Offering Memorandum unless the context otherwise requires:

“2010 PD Amending Directive”	Directive 2010/73/EU of the European Parliament and of the Council of 24 November 2010 amending Directives 2003/71/EC on the prospectus to be published when securities are offered to the public or admitted to trading and 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market
“Accredited Investor”	an as “accredited investor” as defined in Rule 501(a) of Regulation D under the Securities Act
“Acis”	Acis Capital Management, L.P.
“Acis CLO Management”	Acis CLO Management, LLC
“Acis Legacy CLO”	a CLO in which Acis is the CLO manager
“Administration Agreement”	the agreement dated 10 August 2015 between the Company and the Administrator, a summary of which is set out in the section of this Offering Memorandum entitled “ <i>Additional Information on the Company</i> ”
“Administrator”	State Street (Guernsey) Limited, or such other person or persons from time to time appointed by the Company
“affiliate” or “affiliated”	with respect to a person, (i) any other person who, directly or indirectly, is in control of, or controlled by, or is under common control with, such person or (ii) any other person who is a director, officer or employee (a) of such person, (b) of any subsidiary or parent company of such person or (c) of any person described in clause (i) above. For the purposes of this definition, control of a person shall mean the power, direct or indirect, (i) to vote more than 50% of the securities having ordinary voting power for the election of directors of such persons or (ii) to direct or cause the direction of the management and policies of such person whether by contract or otherwise. For purposes of this definition, the management of an account by one person for the benefit of any other person shall not constitute “control” of such other person and no entity shall be deemed an “affiliate” of the Company solely because the Administrator or its affiliates serve as administrator or share trustee for such entity
“AIF”	an alternative investment fund, as defined in the AIFMD
“AIFM”	an alternative investment fund manager, as defined in the AIFMD
“AIFMD”	Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directive 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010

“AIFMD Rules”	any implementing legislation and regulations under AIFMD including, without limitation, Commission Delegated Regulation (EU) No 231/2013 supplementing the AIFMD with regard to exemptions, general operating conditions, depositaries, leverage, transparency, supervision and other applicable regulations implementing the AIFMD, in each case as may be altered, amended, added to or cancelled from time to time
“Application Form”	the application form for Shares, which is available upon request;
“Approved Pricing Source”	in relation to loans, Markit Partners or any other entity appointed from time to time and in relation to CLO Notes, Thomson Reuters or any other entity appointed from time to time
“Articles”	the articles of incorporation of the Company
“Audit Committee”	the audit committee of the Company, as more fully described in the section of this Offering Memorandum entitled “ <i>Audit Committee</i> ” in “ <i>Company Directors and Administration</i> ”
“Auditor”	PricewaterhouseCoopers CI LLP, or such other person or persons from time to time appointed by the Company
“bps”	basis point
“Business Day”	a day on which the banks in Guernsey and the United Kingdom are normally open for business
“certificated” or “certificated form”	not in uncertificated form
“Chairman”	the chairman of the Board
“CLO”	a special purpose vehicle which issues notes backed by a pool of collateral consisting primarily of loans
“CLO Income Notes”	the most subordinated tranche of debt issued by a CLO (which may be represented by a debt or equity security)
“CLO Manager”	the entity acting as manager in a CLO pursuant to the relevant CLO Management Agreement
“CLO Notes”	notes representing tranches of debt issued by a CLO, including CLO Income Notes (which may be represented by a debt or equity security)
“Closing Date”	November 15, 2017
“Companies Law”	the Companies (Guernsey) Law 2008, as amended, extended or replaced and any ordinance, statutory instrument or regulation made thereunder
“Company”	Highland CLO Funding, Ltd., a closed-ended investment company incorporated in Guernsey under the Companies Law on 30 March 2015 with registration number 60120
“CRR”	Regulation 575/2013 of the European Parliament and of the Council on prudential requirements for credit institutions and investment firms

“CRR Retention Requirements”	the retention requirements contained in the CRR as amended from time to time and including any guidance or any technical standards published in relation thereto
“Custodian”	State Street Custodial Services (Ireland) Limited
“Custody Agreement”	the agreement dated 10 August 2015 between the Company and the Custodian, further details of which are set out in the section of this Offering Memorandum entitled “ <i>Additional Information on the Company</i> ”
“Directors” or “Board” or “Board of Directors”	the directors of the Company
“DP Law”	The Data Protection (Bailiwick of Guernsey) Law, 2001, as amended
“EEA”	the European Economic Area being the countries included as such in the Agreement on European Economic Area, dated 1 January 1994, among Iceland, Liechtenstein, Norway, the European Community and the EU Member States, as may be modified, supplemented or replaced
“Eligible U.S. Investor”	a U.S. Person who is reasonably believed to be (x) a Qualified Institutional Buyer and a Qualified Purchaser (y) an Accredited Investor and a Qualified Purchaser or (z) an Accredited Investor and a Knowledgeable Employee with respect to the Company and to whom the Company is privately placing a certain number of the Placing Shares in reliance on exemptions from registration under the U.S. Securities Act and the U.S. Investment Company Act
“ERISA”	the U.S. Employee Retirement Income Security Act of 1974, as amended from time to time, and the applicable regulations thereunder
“EU”	the European Union
“EU Member State”	a member country of the EU
“EU Retention Requirements”	has the meaning given to it in the section of this Offering Memorandum entitled “ <i>Risk Factors</i> ”
“EU Savings Tax Directive”	Council Directive 2003/48/EC of 3 June 2003 on taxation of savings income in the form of interest payments
“EURIBOR”	Euro interbank offered rate, a benchmark interest rate
“Euro” or “€”	the lawful currency of the EU
“FATCA”	the U.S. Foreign Account Tax Compliance Act 2010
“FATCA Withholding”	has the meaning given to it in the section of this Offering Memorandum entitled “ <i>Risk Factors</i> ”
“Financial Conduct Authority” or “FCA”	the UK Financial Conduct Authority and any successor regulatory authority

“Forward Purchase Agreement”	agreements which may be entered into from time to time between the Company and a CLO pursuant to which the Company may, from time to time, enter into sale and purchase contracts with a CLO with respect to certain assets of the Company
“FSMA”	the Financial Services and Markets Act 2000 of the United Kingdom, as amended
“FTT”	the European Commission’s proposal for a Directive for a common financial transaction tax in certain EU Member States
“GFSC” or “Commission”	the Guernsey Financial Services Commission
“GFSC Code”	the Finance Sector Code of Corporate Governance published by the Commission
“Gross Placing Proceeds”	the aggregate value of the Placing Shares
“Guernsey AML Requirements”	The Criminal Justice (Proceeds of Crime) (Bailiwick of Guernsey) Law, 1999, the Criminal Justice (Proceeds of Crime) (Financial Services Businesses) (Bailiwick of Guernsey) Regulations 2007 and the Handbook of Financial Services Business (in each case as amended) and any other regulations relating to prevention of use of the financial system for the purpose of money laundering and made pursuant thereto
“Guernsey IGA Legislation”	Guernsey legislation implementing the IGA
“Highland”	Highland Capital Management, L.P.
“Highland CLO”	a CLO in which Highland or Highland CLO Management (or their affiliate) or a wholly owned subsidiary of the Company advised by Highland is the collateral manager
“Highland CLO Management”	Highland CLO Management, LLC
“Highland HCF Advisor”	Highland HCF Advisor, Ltd.
“Highland Legacy CLO”	a CLO in which Highland is the CLO manager
“HMRC”	Her Majesty’s Revenue and Customs
“IRR”	internal rate of return
“IRS”	U.S. Internal Revenue Service
“Knowledgeable Employee”	a “knowledgeable employee” as defined in Rule 3c-5 promulgated under the Investment Company Act
“LIBOR”	London interbank offered rate, a benchmark interest rate
“Managed CLO”	any Acis Legacy CLO, Acis CLO 7, any Highland CLO or any Highland Legacy CLO
“Market Abuse Directive”	Directive 2003/6/EC of the European Parliament and of the Council on insider dealing and market manipulation (market abuse)
“Memorandum”	the memorandum of incorporation of the Company

“Money Laundering Directive”	2005/60/EC of the European Parliament and of the EC Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing
“Net Asset Value” or “NAV”	gross assets less liabilities (including accrued but unpaid fees) determined in accordance with the section of this Offering Memorandum entitled “ <i>Net Asset Value</i> ” in “ <i>The Company</i> ”
“Net Asset Value per Share” or “NAV per Share”	the Net Asset Value divided by the number of Shares in issue at the relevant time
“Net Placing Proceeds”	the Gross Placing Proceeds less any offering expenses and any amounts retained for working capital purposes
“Non-Qualified Holder”	any person whose ownership of Shares (i) may result in the U.S. Plan Threshold being exceeded causing the Company’s assets to be deemed “plan assets” for the purpose of ERISA or the U.S. Tax Code; (ii) may cause the Company to be required to register as an “investment company” under the U.S. Investment Company Act (including because the holder of the shares is not a “qualified purchaser” as defined in the U.S. Investment Company Act) or to lose an exemption or a status thereunder to which it might be entitled; (iii) may cause the Company to have to register under the U.S. Exchange Act or any similar legislation; (iv) may cause the Company not to be considered a “Foreign Private Issuer” as such term is defined in rule 3b-4(c) under the U.S. Exchange Act; (v) may result in a person holding shares in violation of the transfer restrictions published by the Company, from time to time; and (vi) may cause the Company to be a “controlled foreign corporation” for the purposes of the U.S. Tax Code
“Offering Memorandum”	this offering memorandum
“Ordinary Shares”	ordinary shares of no par value each in the capital of the Company
“Placee”	a person subscribing for Shares under the Placing
“Placing”	the placing of Placing Shares at the Placing Price to one or more investors
“Placing Price”	As of a given date, the price per Ordinary Share determined in reference to the most recent quarterly determined NAV
“Placing Shares”	Shares to be issued by the Company pursuant to the Placing
“POI Law”	The Protection of Investors (Bailiwick of Guernsey) Law, 1987, as amended
“Portfolio Management Agreement”	the agreement dated 22 December 2016 between the Company and the Portfolio Manager pursuant to which the Portfolio Manager will provide certain support and personnel to the Company
“Portfolio Manager”	Highland HCF Advisor acting as Portfolio Manager to the Company pursuant to the Portfolio Management Agreement
“Prospectus Directive”	Directive 2003/71/EC of the European Parliament and of the Council on the prospectus to be published when securities are offered to the public or admitted to trading
“Provider”	the provider of any Warehouse Loan to the Company

“Qualified Institutional Buyers”	has the meaning given in Regulation 144A of the U.S. Securities Act
“Qualified Purchasers”	has the meaning given in the U.S. Investment Company Act
“RCIS Rules”	the Registered Collective Investment Schemes Rules 2015
“Register”	the register of Shareholders
“Regulation S”	Regulation S promulgated under the U.S. Securities Act
“Relevant Member State”	each member state of the European Economic Area which has implemented the Prospectus Directive
“Restricted Shareholders”	Shareholders who are resident in, or citizens of, a Restricted Territory
“Restricted Territory”	the United States and any other jurisdiction where the extension or availability of the Placing would breach any applicable law
“RTS”	the Regulatory Technical Standards, published by the European Commission
“SDRT”	UK Stamp Duty Reserve Tax
“SEC”	the U.S. Securities and Exchange Commission
“Services Agreements”	the Staff and Services Agreement and the Sub-Advisory Agreement
“Share”	a share in the capital of the Company (of whatever class) and having such rights and being subject to such restrictions as are contained in the Articles
“Shareholder”	a holder of Shares
“Shareholding”	a holding of Shares
“UK” or “United Kingdom”	the United Kingdom of Great Britain and Northern Ireland
“UK Corporate Governance Code”	the UK Corporate Governance Code as published by the Financial Reporting Council
“United States” or “U.S.”	the United States of America, its territories and possessions, any state of the United States of America and the District of Columbia
“U.S. Dollar” or “U.S.\$”	the lawful currency of the United States
“U.S. Exchange Act”	the U.S. Securities Exchange Act of 1934, as amended
“U.S. Investment Company Act”	the U.S. Investment Company Act of 1940, as amended
“U.S. Person”	has the meaning given in Regulation S under the U.S. Securities Act
“U.S. Plan”	any plan subject to Title 1 of ERISA or section 4975 of the U.S. Tax Code
“U.S. Plan Assets Regulations”	the regulations promulgated by the U.S. Department of Labor at 29 CFR 2510.3-101, as modified by section 3(42) of ERISA
“U.S. Plan Investor”	(i) an “employee benefit plan” as defined in section 3(3) of ERISA that is subject to Title I of ERISA; (ii) a “plan” as defined in Section 4975 of the U.S. Tax Code, including an individual retirement account or other arrangement that is subject to Section 4975 of the U.S. Tax Code; or

(iii) an entity whose underlying assets are considered to include “plan assets” by reason of investment by an “employee benefit plan” or “plan” described in the preceding clause (i) or (ii) in such entity pursuant to the U.S. Plan Assets Regulations

“U.S. Plan Threshold”

ownership by benefit plan investors, as defined under section 3(42) of ERISA, in the aggregate of 25 per cent or more of the value of any class of equity in the Company (calculated by excluding the value of any equity interest held by any person (other than a benefit plan investor, as defined under section 3(42) of ERISA) that has discretionary authority or control with respect to the assets of the Company or that provides investment advice for a fee (direct or indirect) with respect to such assets, or any affiliate of such a person); the term shall be amended to reflect such new ownership threshold that may be established by a change in the U.S. Plan Asset Regulations or other applicable law

“U.S. Risk Retention Rules”

the United States federal interagency credit risk retention rules, codified at 17 C.F.R. Part 246.

“U.S. Securities Act”

the U.S. Securities Act of 1933, as amended

“U.S. Tax Code”

the U.S. Internal Revenue Code of 1986, as amended

“VAT”

value added tax or a similar consumption tax

DIRECTORS, ADVISERS AND SERVICE PROVIDERS

Directors

Heather Bestwick
William Scott

All c/o the Company's registered office

Registered Office

First Floor, Dorey Court
Admiral Park
St Peter Port
Guernsey
GY1 6HJ
Channel Islands

Portfolio Manager and Adviser

Highland HCF Advisor, Ltd.
c/o Maples Corporate Services Limited
PO Box 309, Ugland House
Grand Cayman, KY1-1104
Cayman Islands

Legal Advisers to the Company (as to Guernsey law)

Mourant Ozannes
PO Box 186
1 Le Marchant Street
St Peter Port
Guernsey GY1 4HP
Channel Islands

**Legal Advisers to the Company
(as to English law)**

Dechert LLP
160 Queen Victoria Street
London
EC4V 4QQ
United Kingdom

Administrator/Company Secretary

State Street (Guernsey) Limited
First Floor, Dorey Court
Admiral Park
St Peter Port, Guernsey GY1 6HJ
Channel Islands

Custodian & Principal Bankers

State Street Custodial Services (Ireland) Limited
No. 78
Sir John Rogerson's Quay
Dublin
Ireland

Corporate Services Provider

State Street Guernsey (Limited)
First Floor, Dorey Court
Admiral Park,
St Peter Port, Guernsey GY1 6HJ
Channel Islands

Auditors

PricewaterhouseCoopers CI LLP
Royal Bank Place
1 Glatigny Esplanade
St Peter Port
Guernsey
GY1 4ND
Channel Islands

AMENDED AND RESTATED
INVESTMENT ADVISORY AGREEMENT

THIS AMENDED AND RESTATED INVESTMENT ADVISORY AGREEMENT (this “*Agreement*”), dated to be effective from July 1, 2014 is entered into by and between **Charitable DAF Fund, L.P.**, a Cayman Islands exempted limited partnership (the “*Fund*”), **Charitable DAF GP, LLC**, a limited liability company organized under the laws of the State of Delaware (the “*General Partner*”), the general partner of the Fund, and **Highland Capital Management, L.P.**, a limited partnership organized under the laws of the State of Delaware (the “*Investment Advisor*”).

RECITALS

WHEREAS, the Fund, the General Partner and the Investment Advisor are parties to that certain Investment Advisory Agreement dated January 1, 2012 (the “*Original Agreement*”);

WHEREAS, the parties desire to amend and restate the Original Agreement in its entirety with the terms as set forth in this Agreement effective as of the Effective Date;

NOW, THEREFORE, in consideration of the mutual covenants herein contained and for other good and valuable consideration, the receipt of which is hereby acknowledged, the parties hereto agree as follows:

1. Investment Advisory Services. Subject to Section 7, the Investment Advisor shall act as investment advisor to the Fund, the General Partner with respect to the Fund and its subsidiaries and shall provide investment advice with respect to the investment and reinvestment of the cash, Financial Instruments and other properties comprising the assets and liabilities of the Fund and its subsidiaries.

2. Custody. The Financial Instruments shall be held in the custody of Jefferies & Company, Inc. or one or more banks selected by the General Partner (each such bank, a “Custodian”). The General Partner will notify the Investment Advisor promptly of the proposed selection of any other Custodians. The Custodian shall at all times be responsible for the physical custody of the Financial Instruments; for the collection of interest, dividends, and other income attributable to the Financial Instruments; and for the exercise of rights and tenders on the Financial Instruments after consultation with and as then directed by the General Partner. At no time shall the Investment Advisor have possession of or maintain custody over any of the



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Financial Instruments. The Investment Advisor shall not be responsible for any loss incurred by reason of any act or omission of the Custodian.

3. Authority of the Investment Advisor. Subject to Section 7 of this Agreement, the Investment Advisor shall advise the General Partner on behalf of the Fund and/or its subsidiaries with respect to:

(a) investing, directly or indirectly, on margin or otherwise, in all types of securities and other financial instruments of United States and non-U.S. entities, including, without limitation, capital stock; all manner of equity securities (whether registered or unregistered, traded or privately offered, American Depository Receipts, common or preferred); physical commodities; shares of beneficial interest; partnership interests, limited liability company interests and similar financial instruments; secured and unsecured debt (both corporate and sovereign, bank debt, vendor claims and/or other contractual claims); bonds, notes and debentures (whether subordinated, convertible or otherwise); currencies; interest rate, currency, equity and other derivative products, including, without limitation, (i) future contracts (and options thereon) relating to stock indices, currencies, United States Government securities, securities of non-U.S. governments, other financial instruments and all other commodities, (ii) swaps and contracts for difference, options, swaptions, rights, warrants, when-issued securities, caps, collars, floors, forward rate agreements, and repurchase and reverse repurchase agreements and other cash equivalents, (iii) spot and forward currency transactions and (iv) agreements relating to or securing such transactions; leases, including, without limitation, equipment lease certificates; equipment trust certificates; mortgage-backed securities and other similar instruments (including, without limitation, fixed-rate, pass-throughs, adjustable rate mortgages, collateralized mortgage obligations, stripped mortgage-backed securities and REMICs); loans; credit paper; accounts and notes receivable and payable held by trade or other creditors; trade acceptances and claims; contract and other claims; executory contracts; participations; mutual funds, exchange traded funds and similar financial instruments; money market funds and instruments; obligations of the United States, any state thereof, non-U.S. governments and instrumentalities of any of them; commercial paper; certificates of deposit; bankers' acceptances; trust receipts; letters of credit; choses in action; puts; calls; other obligations and instruments or evidences of indebtedness of whatever kind or nature; and real estate and any kind of interests in

real estate; in each case, of any person, corporation, government or other entity whatsoever, whether or not publicly traded or readily marketable (each of such items, “***Financial Instruments***”), and the sale of Financial Instruments short and covering such sales.

- (b) engaging in such other lawful Financial Instruments transactions;
- (c) research and analysis;
- (d) purchasing Financial Instruments and holding them for investment;
- (e) entering into contracts for or in connection with investments in Financial Instruments;
- (f) investing in other pooled investment vehicles, which investments shall be subject in each case to the terms and conditions of the respective governing document for each such vehicle;
- (g) possessing, transferring, mortgaging, pledging or otherwise dealing in, and exercising all rights, powers, privileges and other incidents of ownership or possession with respect to Financial Instruments and other property and funds held or owned by the Fund and/or its subsidiaries;
- (h) lending, either with or without security, any Financial Instruments, funds or other properties of the Funds, including by entering into reverse repurchase agreements, and, from time to time, undertaking leverage on behalf of the Fund;
- (i) opening, maintaining and closing accounts, including margin and custodial accounts, with brokers and dealers, including brokers and dealers located outside the United States;
- (j) opening, maintaining and closing accounts, including custodial accounts, with banks, including banks located outside the United States, and drawing checks or other orders for the payment of monies;

(k) combining purchase or sale orders on behalf of the Fund with orders for other accounts to which the Investment Advisor or any of its affiliates provides investment services (“***Other Accounts***”) and allocating the Financial Instruments or other assets so purchased or sold, on an average-price basis or in any other manner deemed fair and equitable to the Investment Advisor in its sole discretion, among such accounts;

(l) entering into arrangements with brokers to open “average price” accounts wherein orders placed during a trading day are placed on behalf of the Fund and Other Accounts and are allocated among such accounts using an average price;

(m) organizing one or more corporations and other entities formed to hold record title, as nominee for the Fund and/or its subsidiaries (whether alone or together with the Other Accounts), to Financial Instruments or funds of the Fund and/or its subsidiaries;

(n) causing the Fund and/or its subsidiaries to engage in (i) agency, agency cross, related party principal transactions with affiliates of the Investment Manager and (ii) cross transactions with Other Accounts, in each case, to the extent permitted by applicable laws;

(o) engaging personnel, whether part-time or full-time, and attorneys, independent accountants or such other persons (including, without limitation, finders, consultants and investment bankers); and

(p) voting of Financial Instruments, participation in arrangements with creditors, the institution and settlement or compromise of suits and administrative proceedings and other like or similar matters.

4. Policies of the Fund. The activities engaged in by the Investment Advisor on behalf of the Fund and/or its subsidiaries shall be subject to the policies and control of the General Partner.

The Investment Advisor shall submit such periodic reports to the General Partner regarding the Investment Advisor’s activities hereunder as the General Partner may reasonably request and a representative of the Investment Advisor shall be available to meet with the

General Partner and/or any other representative of the Fund or its subsidiaries as reasonably requested by the General Partner.

In furtherance of the foregoing, the General Partner hereby appoints the Investment Advisor as the Fund's attorney-in-fact, with full power of authority to act in the Fund's name and on its behalf with respect to the Fund, as follows:

(a) to purchase or otherwise trade in Financial Instruments that have been approved by the General Partner;

(b) to execute and combine purchase or sale orders on behalf of the Fund with orders for Other Accounts and allocate the Financial Instruments or other assets so purchased or sold, on an average-price basis or in any other manner deemed fair and equitable to the Investment Advisor in its sole discretion, among such accounts; *provided, however*, that such purchase or sale orders shall be market rates;

(c) to direct the Custodian to deliver funds or the Financial Instruments, but only in the course of effecting trading and investment transactions for the Fund and subject to such restrictions as may be contained in the custody agreement between the Custodian and the Fund;

(d) to enter into contracts, provide certifications or take any other actions necessary to effect any of the foregoing transactions; and

(e) to select brokers on the basis of best execution and in consideration of relevant factors, including, but not limited to, price quotes; the size of the transaction; the nature of the market for the security; the timing of the transaction; the difficulty of execution; the broker-dealer's expertise in the relevant market or sector; the extent to which the broker-dealer makes market in the security or has an access to such market; the broker-dealer's skill in positioning the relevant market; the broker-dealer's facilities, reliability, promptness and financial stability; the broker-dealer's reputation for diligence and integrity (including in correcting errors); confidentiality considerations; the quality and usefulness of research services and investment ideas presented by the broker-dealer; and other factors deemed appropriate by the Investment Advisor.

5. Valuation of Financial Instruments. Financial Instruments will be valued in accordance with the then current valuation policy of the Investment Advisor, a copy of which will be provided to the General Partner upon request.

6. Status of the Investment Advisor. The Investment Advisor shall, for all purposes, be an independent contractor and not an employee of the General Partner or the Fund or its subsidiaries, nor shall anything herein be construed as making the Fund or its subsidiaries or the General Partner, a partner, member or co-venturer with the Investment Advisor or any of its affiliates or clients. The Investment Advisor shall have no authority to act for, represent, bind or obligate the Fund or its subsidiaries or the General Partner except as specifically provided herein.

7. Investments. ALL ULTIMATE INVESTMENT DECISIONS WITH RESPECT TO THE FUND AND ITS SUBSIDIARIES SHALL AT ALL TIMES REST SOLELY WITH THE GENERAL PARTNER AND/OR THE OFFICERS/DIRECTORS OF THE APPLICABLE SUBSIDIARY, IT BEING EXPRESSLY UNDERSTOOD THAT THE GENERAL PARTNER AND/OR THE OFFICERS/DIRECTORS OF THE APPLICABLE SUBSIDIARY SHALL BE FREE TO ACCEPT AND OR REJECT ANY OF THE ADVICE RENDERED BY THE INVESTMENT MANAGER HEREUNDER FOR ANY REASON OR FOR NO REASON.

8. Reimbursement by the General Partner. The Investment Advisor may retain, in connection with its responsibilities hereunder, the services of others to assist in the investment advice to be given to the General Partner with respect to the Fund and/or its subsidiaries (any such appointee, a "***Sub-Advisor***"), including, but not limited to, any affiliate of the Investment Advisor, but payment for any such services shall be assumed by the Investment Advisor, and, therefore, neither the General Partner nor the Fund or any of its subsidiaries shall have any liability therefor; *provided, however*, that the Investment Advisor, in its sole discretion, may retain the services of independent third party professionals, including, without limitation, attorneys, accountants and consultants, to advise and assist it in connection with the performance of its activities on behalf of the General Partner with respect to the Fund and/or its subsidiaries

hereunder, and the Fund shall bear full responsibility therefor and the expense of any fees and disbursements arising therefrom.

9. Expenses.

(a) The Fund shall pay or reimburse the Investment Advisor and its affiliates for all expenses related to the services hereunder, including, but not limited to, investment-related expenses, brokerage commissions and other transaction costs, expenses related to clearing and settlement charges, professional fees relating to legal, auditing or valuation services, any governmental, regulatory, licensing, filing or registration fees incurred in compliance with the rules of any self-regulatory organization or any federal, state or local laws, research-related expenses (including, without limitation, news and quotation equipment and services, investment and trading-related software, including, without limitation, trade order management software (i.e., software used to route trade orders)), accounting (including accounting software), tax preparation expenses, costs and expenses associated with reporting and providing information to the Fund, any taxes imposed upon the Fund (including, but not limited to, collateralized debt obligations managed by the Investment Advisor or its affiliates), fees relating to valuing the Financial Instruments, and extraordinary expenses. In no event shall any of the foregoing costs or expenses include any salaries, occupational expense or general overhead of the Investment Advisor. For the avoidance of doubt, (i) the cost of all third party expenses incurred in connection with this Agreement shall not exceed standard market rates (which may include standard soft dollar arrangements) and (ii) to the extent any of the foregoing expenses were incurred on behalf of, or benefit of a number of Investment Advisor's advised accounts, such expenses shall be allocated pro rata among such accounts.

(b) To the extent that expenses to be borne by the Fund are paid by the Investment Advisor or by any Sub-Advisor, the Fund shall reimburse the Investment Advisor (or Sub-Advisors, as applicable) for such expenses so long as such expenses are at market rates.

10. Fees. Without limiting the expense reimbursements set forth above, the Investment Advisor shall provide the Fund with the services described herein for 100 bps per annum (25 bps per quarter) of the market value of the Equity Investments (defined below) and 50 bps per annum (12.5 bps per quarter) of the market value of the Debt Investments (defined

below), calculated as of the last business day of each calendar quarter (the “**Calculation Date**”), payable quarterly in arrears by the 45th business day following the end of each quarter, provided that the Investment Advisor shall deliver to the General Partner on or before the 30th business day following the end of each calendar quarter a statement showing the calculation of the fee for such quarter. For purposes hereof, the “**Equity Investments**” shall mean those Financial Instruments which are equity investments held by the Fund (either directly or indirectly through a subsidiary vehicle) on the Calculation Date, and “**Debt Investments**” shall mean those Financial Instruments which are debt investments held by the Fund (either directly or indirectly through a subsidiary vehicle) on the Calculation Date. For the avoidance of doubt, the Financial Instruments shall be valued as of each Calculation Date in accordance with the then current valuation policy of the Investment Advisor. Notwithstanding the foregoing, neither the term “Equity Investments” nor the term “Debt Investments” shall include any Financial Instruments with respect to which the Investment Advisor or any affiliate thereof already receives management fees.

11. Exculation; Indemnification.

(a) Whether or not herein expressly so provided, every provision of this Agreement relating to the conduct or affecting the liability of or affording protection to the Investment Advisor, its members or any of their respective affiliates and their respective partners, members, officers, directors, employees, shareholders and agents (including parties acting as agents for the execution of transactions) (each, a “**Covered Person**” and collectively, “**Covered Persons**”) shall be subject to the provisions of this Section.

(b) To the fullest extent permitted by law, no Covered Person shall be liable to the General Partner or the Fund or any of its subsidiaries or anyone for any reason whatsoever (including but not limited to (i) any act or omission by any Covered Person in connection with the conduct of the business of the General Partner or the Fund, that is determined by such Covered Person in good faith to be in or not opposed to the best interests of the General Partner or the Fund, (ii) any act or omission by any Covered Person based on the suggestions of any professional advisor of the General Partner or the Fund or any of its subsidiaries whom such Covered Person believes is authorized to make such suggestions on

behalf of the General Partner or the Fund or any of its subsidiaries, (iii) any act or omission by the General Partner or the Fund or any of its subsidiaries, or (iv) any mistake, negligence, misconduct or bad faith of any broker or other agent of the General Partner or the Fund or any of its subsidiaries selected by Covered Person with reasonable care), unless any act or omission by such Covered Person constitutes willful misconduct or gross negligence by such Covered Person (as determined by a non-appealable judgment of a court of competent jurisdiction).

(c) Covered Persons may consult with legal counsel or accountants selected by such Covered Person and any act or omission by such Covered Person on behalf of the General Partner or the Fund or any of its subsidiaries or in furtherance of the business of the General Partner or the Fund or any of its subsidiaries in good faith in reliance on and in accordance with the advice of such counsel or accountants shall be full justification for the act or omission, and such Covered Person shall be fully protected in so acting or omitting to act if the counsel or accountants were selected with reasonable care.

(d) To the fullest extent permitted by law, the General Partner and the Fund and its subsidiaries shall indemnify and hold harmless Covered Persons (the “**Indemnified Party**”), from and against any and all claims, liabilities, damages, losses, costs and expenses, including amounts paid in satisfaction of judgments, in compromises and settlements, as fines and penalties and legal or other costs and expenses of investigating or defending against any claim or alleged claim, of any nature whatsoever, known or unknown, liquidated or unliquidated, that are incurred by any Indemnified Party and arise out of or in connection with the business of the General Partner or the Fund or any of its subsidiaries, any investment made under or in connection with this Agreement, or the performance by the Indemnified Party of Covered Person’s responsibilities hereunder and against all taxes, charges, duties or levies incurred by such Covered Person or any Indemnified Party in connection with the General Partner or the Fund or any of its subsidiaries, provided that an Indemnified Party shall not be entitled to indemnification hereunder to the extent the Indemnified Party’s conduct constitutes willful misconduct or gross negligence (as determined by a non-appealable judgment of a court of competent jurisdiction). The termination of any proceeding by settlement, judgment, order or upon a plea of nolo contendere or its equivalent shall not, of itself, create a presumption that the Indemnified Party’s conduct constituted willful misconduct or gross negligence.

(e) Expenses incurred by an Indemnified Party in defense or settlement of any claim that shall be subject to a right of indemnification hereunder, shall be advanced by the General Partner prior to the final disposition thereof upon receipt of an undertaking by or on behalf of the Indemnified Party to repay the amount advanced to the extent that it shall be determined ultimately that the Indemnified Party is not entitled to be indemnified hereunder.

(f) The right of any Indemnified Party to the indemnification provided herein shall be cumulative of, and in addition to, any and all rights to which the Indemnified Party may otherwise be entitled by contract or as a matter of law or equity and shall be extended to the Indemnified Party's successors, assigns and legal representatives.

(g) The provisions of this Section are expressly intended to confer benefits upon Covered Persons and such provisions shall remain operative and in full force and effect regardless of the expiration or any termination of this Agreement.

(h) In no event shall any Covered Person be liable for special, exemplary, punitive, indirect, or consequential loss, or damage of any kind whatsoever, including without limitation lost profits.

(i) No Covered Person shall be liable hereunder for any settlement of any action or claim effected without its written consent thereto.

(j) Pursuant to the exculpation and indemnification provisions described above, the Investment Advisor and each Indemnified Party will generally not be liable to the General Partner or the Fund for any act or omission (or alleged act or omission), absent bad faith, willful misconduct, fraud or gross negligence, and the General Partner and the Fund will generally be required to indemnify such persons against any Losses they may incur by reason of any act or omission (or alleged act or omission) related to the General Partner, the Fund or its subsidiaries, absent bad faith, willful misconduct, fraud or gross negligence. As a result of these provisions, the General Partner, the Fund and its subsidiaries, as applicable (not the Investment Advisor or any other Indemnified Party) will be responsible for any Losses resulting from trading errors and similar human errors, absent bad faith, willful misconduct,

fraud or gross negligence or the ability to waive or limit such Losses under applicable law. Trading errors might include, for example, keystroke errors that occur when entering trades into an electronic trading system or typographical or drafting errors related to derivatives contracts or similar agreements. Given the volume of transactions executed by the Investment Advisor and its affiliates on behalf of the Fund and/or its subsidiaries, the General Partner acknowledges that trading errors (and similar errors) will occur and that the General Partner will be responsible for any resulting Losses, even if such Losses result from the negligence (but not gross negligence) of the Investment Advisor or its affiliates.

12. Activities of the Investment Advisor and Others. The Investment Advisor, and its affiliates may engage, simultaneously with their investment management activities on behalf of the Fund, in other businesses, and may render services similar to those described in this Agreement to other individuals, companies, trusts or persons, and shall not by reason of such engaging in other businesses or rendering of services for others be deemed to be acting in conflict with the interests of the Fund. Notwithstanding the foregoing, the Investment Advisor and its affiliates shall devote as much time to provide advisory service to the General Partner with respect to the management of the Fund's assets as the Investment Advisor deems necessary and appropriate. In addition, the Investment Advisor or any of its affiliates, in their individual capacities, may engage in securities transactions which may be different than, and contrary to, the investment advice provided by the Investment Advisor to the General Partner with respect to the Fund. The Investment Advisor may give advice and recommend securities to, or buy securities for, accounts and other clients, which advice or securities may differ from advice given to, or securities recommended or bought for, the Fund, even though their investment objectives may be the same or similar. The Investment Advisor may recommend transactions in securities and other assets in which the Investment Advisor has an interest, including securities or other assets issued by affiliates of the Investment Manager. Each of the General Partner and the Fund acknowledges that it has received a copy of Part 2 of the Investment Advisor's Form ADV, which further describes conflicts of interest, including the Investment Advisor, its affiliates and their respective advised accounts.

13. Term. This Agreement shall remain in effect through an initial term concluding December 31, 2014 and shall be automatically extended for additional one-year

terms thereafter, except that it may be terminated by the Investment Advisor, on the one hand, or by the General Partner and the Fund, on the other hand, upon at least 90 days' prior written notice to the General Partner or the Investment Advisor, as the case may be, prior to General Partner's fiscal year-end.

14. Miscellaneous.

(a) Notices. Any notice, consent or other communication made or given in connection with this Agreement shall be in writing and shall be deemed to have been duly given when delivered by hand or facsimile or five days after mailed by certified mail, return receipt requested, as follows:

If to the Investment Advisor, to:

Highland Capital Management, L.P.
300 Crescent Court, Suite 700
Dallas, Texas 75201
Telephone Number: (972) 628-4100
Facsimile Number: (972) 628-4147

If to the General Partner or the Fund, to:

Charitable DAF GP, LLC
4140 Park Lake Avenue, Suite 600
Raleigh, North Carolina 27612
Attention: Grant Scott
Telephone Number: (919) 854-1407
Facsimile Number: (919) 854-1401

(b) Entire Agreement. This Agreement contains all of the terms agreed upon or made by the parties relating to the subject matter of this Agreement, and supersedes all prior and contemporaneous agreements, negotiations, correspondence, undertakings and communications of the parties, oral or written, respecting such subject matter.

(c) Amendments and Waivers. No provision of this Agreement may be amended, modified, waived or discharged except as agreed to in writing by the parties. No amendment to this Agreement may be made without first obtaining the required approval from the Fund. The failure of a party to insist upon strict adherence to any term of this Agreement on

any occasion shall not be considered a waiver thereof or deprive that party of the right thereafter to insist upon strict adherence to that term or any other term of this Agreement.

(d) Binding Effect; Assignment. This Agreement shall be binding upon and inure to the benefit of the General Partner, the Fund, the Investment Advisor, each Indemnified Party and their respective successors and permitted assigns. Any person that is not a signatory to this Agreement but is nevertheless conferred any rights or benefits hereunder (*e.g.*, officers, partners and personnel of the Investment Advisor and others who are entitled to indemnification hereunder) shall be entitled to such rights and benefits as if such person were a signatory hereto, and the rights and benefits of such person hereunder may not be impaired without such person's express written consent. No party to this Agreement may assign (as such term is defined under the U.S. Investment Advisers Act of 1940, as amended) all or any portion of its rights, obligations or liabilities under this Agreement without the prior written consent of the other parties to this Agreement; provided; however, that the Investment Advisor may assign all or any portion of its rights, obligations and liabilities hereunder to any of its affiliates at its discretion.

(e) Governing Law. Notwithstanding the place where this Agreement may be executed by any of the parties thereto, the parties expressly agree that all terms and provisions hereof shall be governed by and construed in accordance with the laws of the State of Texas applicable to agreements made and to be performed in that State.

(f) Arbitration. (i) Any controversy or claim or dispute arising out of or relating to this Agreement or the breach, termination, enforcement, interpretation or validity thereof (a “**Disputed Matter**”) shall be handled exclusively pursuant to the following procedures. In the event of any Disputed Matter, the parties agree that upon written notice of such Disputed Matter sent by one party to the party, the parties shall arbitrate the Disputed Matter pursuant to this Section 14(f) unless the parties expressly agree in writing to resolve the Disputed Matter in another manner through mediation or otherwise. The arbitration shall be conducted pursuant to the commercial arbitration rules of the American Arbitration Association in Dallas, Texas. Any arbitration pursuant to this Agreement unless otherwise agreed to by the parties shall be conducted by a panel of three (3) arbitrators mutually selected by the parties from a list of

arbitrators determined in accordance with the American Arbitration Association's arbitrator selection procedure.

(ii) The judgment upon the award rendered in any such arbitration shall be final and binding upon the parties and may be entered in any court having jurisdiction thereof. All fees and expenses of the arbitrator and all other expenses of the arbitration shall be paid by the non-prevailing party in such arbitration. The arbitrator shall have no authority to impose any punitive or consequential damages.

(iii) Nothing in this Section 14(f) shall be construed to limit either party's right to obtain equitable or injunctive relief in a court of competent jurisdiction in appropriate circumstances.

(g) Headings. The headings contained in this Agreement are intended solely for convenience and shall not affect the rights of the parties to this Agreement.

(h) Counterparts. This Agreement may be signed in any number of counterparts with the same effect as if the signatures to each counterpart were upon a single instrument, and all such counterparts together shall be deemed an original of this Agreement.

(i) Survival. The provisions of Sections 8, 9, 10, 11 and 14 hereof shall survive the termination of this Agreement.

(j) Pronouns. All pronouns shall be deemed to refer to the masculine, feminine, neuter, singular or plural as the identity of the person or persons' firm or company may require in the context thereof.

(k) Arm's-Length Agreement. The General Partner and the Fund have approved this Agreement and reviewed the activities described in Section 12 and in the Investment Advisor's Form ADV and the risks related thereto.

[Signature Page to Follow]

IN WITNESS WHEREOF the parties hereto have caused this Agreement to be executed to be effective from the date first written above.

HIGHLAND CAPITAL MANAGEMENT, L.P.

By: Strand Advisors, Inc., its general partner

By:  _____

Name: James Dondero

Title: President

Date: August 26, 2014

CHARITABLE DAF GP, LLC

By:  _____

Name: Grant J. Scott

Title: Managing Member

Date: August 26, 2014

CHARITABLE DAF FUND, L.P.

By: Charitable DAF GP, LLC, its general partner

By:  _____

Name: Grant J. Scott

Title: Managing Member

Date: August 26, 2014

KELLY HART PITRE

Louis M. Phillips (#10505)
One American Place
301 Main Street, Suite 1600
Baton Rouge, LA 70801-1916
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KELLY HART & HALLMAN

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Fort Worth, Texas 76102
Telephone: (817) 332-2500
Telecopier: (817) 878-9280

*Special Purpose for Charitable DAF Fund, L.P.
and CLO Holdco, Ltd. with respect to Withdrawal of Reference Motion*

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

In re:	§	Case No. 19-34054-sgj11
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	Chapter 11
	§	
Debtor	§	
	§	
	§	
CHARITABLE DAF FUND, L.P. AND CLO HOLDCO, LTD., DIRECTLY AND DERIVATIVELY	§	
Plaintiff	§	
v.	§	Case No. 21-03067-sgj
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P., HIGHLAND HCF ADVISOR, LTD., AND HIGHLAND CLO FUNDING LTD., NOMINALLY ,	§	
Defendant	§	

**PLAINTIFFS' WITNESS AND EXHIBIT LIST REGARDING ON
RENEWED MOTION TO WITHDRAW THE REFERENCE TO BE HELD ON
JANUARY 25, 2023 AT 1:30 PM**

Plaintiffs submit the following witness and exhibit list regarding the *Renewed Motion to Withdraw the Reference* [Docket No. 128] (the “Withdrawal of Reference Motion”), which the Court has set for hearing at 1:30 p.m. (Central Time) on January 25, 2023 (the “Hearing”) in the above-styled adversary proceeding (the “Adversary Proceeding”).

A. Witnesses:

1. Any witness identified by or called by another party; and
2. Any witness necessary for rebuttal.

B. Exhibits:

Number	Exhibit	Offered	Admitted
1.	Any document entered or filed in the Adversary Proceeding or underlying Bankruptcy Case, including exhibits thereto		
2.	All exhibits identified by or offered by any other party at the Hearing		

Plaintiffs reserve the right to amend this *Exhibit and Witness List* before the Hearing to identify additional witnesses or exhibits.

[signature block on following page]

Respectfully submitted:

KELLY HART PITRE

/s/ **Louis M. Phillips**

Louis M. Phillips (#10505)

One American Place

301 Main Street, Suite 1600

Baton Rouge, LA 70801-1916

Telephone: (225) 381-9643

Facsimile: (225) 336-9763

Email: louis.phillips@kellyhart.com

Amelia L. Hurt (LA #36817, TX #24092553)

400 Poydras Street, Suite 1812

New Orleans, LA 70130

Telephone: (504) 522-1812

Facsimile: (504) 522-1813

Email: amelia.hurt@kellyhart.com

and

KELLY HART & HALLMAN

Hugh G. Connor II

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hugh.connor@kellyhart.com

Michael D. Anderson

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michael.anderson@kellyhart.com

Katherine T. Hopkins

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katherine.hopkins@kellyhart.com

201 Main Street, Suite 2500

Fort Worth, Texas 76102

Telephone: (817) 332-2500

*Special Purpose for Plaintiffs for Withdrawal of
Reference Motion*

CERTIFICATE OF SERVICE

I, undersigned counsel, hereby certify that a true and correct copy of the above and foregoing document and all attachments thereto were sent via electronic mail via the Court's ECF system to all parties authorized to receive electronic notice in this case on this January 23, 2023 , including counsel for the Reorganized Debtor in compliance with this Court's Local Rule 9014-1(c) and (d).

/s/ **Louis M. Phillips**

Louis M. Phillips

**UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF
TEXAS, DALLAS DIVISION**

In Re: Highland Capital Management, L.P § Case No. **19-34054-SGJ11**

Charitable DAF Fund, L.P et al

Appellant

§

vs.

§

21-03067

Highland Capital Management, L.P

§

Appellee

§

3:23-CV-01503-B

[167] Order granting Defendant Highland Capital Management, L.P.'s Renewed motion to dismiss adversary proceeding (related document # [122](#)) Entered on 6/25/2023.

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APPELLANT RECORD

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*Counsel for The Charitable DAF Fund, L.P.
and CLO Holdco, Ltd.*

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

In re:	§ Chapter 11
	§
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§ Case No. 19-34054-sgj11
	§
Debtor.	§
	§
CHARITABLE DAF FUND, L.P. AND CLO	§
HOLDCO, LTD., DIRECTLY AND DERIVATIVELY	§
	§
Plaintiffs,	§ Adversary Proceeding No.
	§
vs.	§ 21-03067-sgj11
	§
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§
HIGHLAND HCF ADVISOR, LTD., AND	§
HIGHLAND CLO FUNDING LTD., NOMINALLY	§
	§
Defendant.	§
	§

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**APPELLANTS' SECOND AMENDED STATEMENT OF ISSUES
AND DESIGNATION OF RECORD ON APPEAL**

Pursuant to Rules 8009(a)(1)(A)-(B) and (a)(4) of the Federal Rules of Bankruptcy Procedure, The Charitable DAF Fund, L.P. and CLO Holdco, Ltd. ("Appellants") hereby designate the following items to be included in the record and identify the following issues with respect to

their appeal of the Order Granting Defendant Highland Capital Management, L.P.'s "Renewed Motion to Dismiss Complaint" [Adv. Proc. Doc. No. 122] which was entered by the United States Bankruptcy Court for the Northern District of Texas on June 25, 2023.

I. STATEMENT OF ISSUES TO BE PRESENTED ON APPEAL

- Whether the Bankruptcy Court had jurisdiction to rule on Highland Capital Management L.P.'s Renewed Motion to Dismiss Complaint
- Whether the Renewed Motion to Dismiss Complaint was improperly granted

II. DESIGNATION OF ITEMS TO BE INCLUDED IN THE RECORD

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1. Notice of Appeal for Bankruptcy Case Adversary Proceeding No. 21-03067-sgj11 [Doc. 168].

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2. The judgment, order, or decree appealed from: Memorandum Opinion and Order Granting Defendant Highland Capital Management, L.P.'s "Renewed Motion to Dismiss Complaint" [Adv. Proc. Doc. No. 122] [Doc. 167].

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3. Docket Sheet kept by the Bankruptcy Clerk.

4. Documents listed below and as described in the Docket Sheet for Bankruptcy Case Proceeding No. 21-03067-sgj.

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No.	Date Filed	Docket No.	Description/Document Text
1	9/29/21	1	(36 pgs; 3 docs) Adversary case 21-03067. ORDER REFERRING CASE NUMBER 21-CV-0842-B from U.S District Court for the Northern District of Texas, Dallas Division to U.S. Bankruptcy Court for Northern District of Texas, Dallas Division. Complaint by Charitable DAF Fund, LP, CLO Holdco, Ltd. against Highland Capital Management, LP, Highland HCF Advisor Ltd., Highland CLO Funding, Ltd. Fee Amount \$350 (Attachments: # 1 Original Complaint # 2 Docket Sheet from 3:20-cv-0842-B) Nature(s) of suit: 02 (Other (e.g. other actions that would have been brought in state court if unrelated to bankruptcy)). (Okafor, M.)
2	9/29/21	2	(1 pg) Supplemental Document (cover sheet) by CLO Holdco Ltd., Charitable DAF Fund (RE: related document(s)1 Adversary case 21-03067) [ORIGINALLY FILED IN 21-CV-0842 AS #2 ON 04/13/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)

Vol. 2 000139 000232 000239 000270 Thru Vol. 6	3	9/29/21	6	(93 pgs; 6 docs) MOTION for Leave to File First Amended Complaint filed by CLO Holdco Ltd., Charitable DAF Fund LP (Attachments: # 1 Exh 1_First Amended Complaint # 2 Exh 2_Motion for Authorization to Retain James Seery # 3 Exh 3_Order Approving Retention of James Seery # 4 Exh 4_Order Approving Settlement # 5 Proposed Order) (Bridges, Jonathan) (Entered: 04/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #6 ON 04/19/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
	4	9/29/21	22	(7 pgs; 2 docs) MOTION for an Order to Enforce the Order of Reference filed by Highland Capital Management LP. (Attachments: # 1 Exhibit(s) A--Proposed Order) (Annable, Zachery) Modified text on 5/20/2021 (mjr). (Entered: 05/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #22 ON 05/19/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
	5	9/29/21	23	(31 pgs) Brief/Memorandum in Support filed by Highland Capital Management LP re: 22 MOTION for an Order to Enforce the Order of Reference. (Annable, Zachery) Modified text on 5/20/2021 (mjr).(Entered: 05/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #23 ON 05/19/2021 IN U.S.DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
	6	9/29/21	24	(926 pgs; 29 docs) Appendix in Support filed by Highland Capital Management LP re: 23 Brief/Memorandum in Support. (Attachments: # 1 Appendix 1 # 2 Appendix 2 # 3 Appendix 3 # 4 Appendix 4 # 5 Appendix 5 # 6 Appendix 6 # 7 Appendix 7 # 8 Appendix 8 # 9 Appendix 9 # 10 Appendix10 # 11 Appendix 11 # 12 Appendix 12 # 13 Appendix 13 # 14 Appendix 14 # 15 Appendix 15 # 16 Appendix 16 # 17 Appendix 17 # 18 Appendix 18 # 19 Appendix 19 # 20 Appendix 20 # 21 Appendix 21# 22 Appendix 22 # 23 Appendix 23 # 24 Appendix 24 # 25 Appendix 25 # 26 Appendix 26 # 27 Appendix 27 # 28 Appendix 28) (Annable, Zachery) Modified linkage and text on 5/20/2021 (mjr). (Entered:05/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #24 ON 05/19/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
Vol. 7 001196	7	9/29/21	26	(7 pgs; 2 docs) MOTION to Dismiss Complaint filed by Highland Capital Management LP (Attachments: # 1 Exhibit(s) A--Proposed Order) (Annable, Zachery) Modified text on 5/28/2021 (jmg).(Entered: 05/27/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #26 ON 05/27/2021 IN U.S.DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)

Vol. 7 001203 thru Vol. 8	8	9/29/21	28	(508 pgs; 14 docs) Appendix in Support filed by Highland Capital Management LP (Attachments: # 1 Appendix 1 # 2 Appendix 2 # 3 Appendix 3 # 4 Appendix 4 # 5 Appendix 5 # 6 Appendix 6 # 7 Appendix 7 # 8 Appendix 8 # 9 Appendix 9 # 10 Appendix 10 # 11 Appendix 11 # 12 Appendix 12 # 13 Appendix 13) (Annable, Zachery) (Entered: 05/27/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #28 ON 05/27/2021 IN U.S. DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
Vol. 9 001711	9	9/29/21	33	(1 pg) Amended Civil Cover Sheet by CLO Holdco Ltd, Charitable DAF Fund LP. Amendment to 2 Supplemental Document. (Sbaiti, Mazin) Modified text on 6/23/2021 (mjr). (Entered: 06/22/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #33 ON 06/22/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001712	10	9/29/21	36	(26 pgs) RESPONSE filed by CLO Holdco Ltd, Charitable DAF Fund LP re: 22 MOTION for an Order to Enforce the Order of Reference (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #36 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001738	11	9/29/21	37	(22 pgs) Appendix in Support filed by CLO Holdco Ltd, Charitable DAF Fund LP re 36 Response/Objection Response to Motion for an Order to Enforce the Order of Reference (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #37 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001760	12	9/29/21	38	(45 pgs) RESPONSE filed by CLO Holdco Ltd, Charitable DAF Fund LP re: 26 MOTION to Dismiss (Defendant Highland Capital Management, L.P.'s Motion to Dismiss Complaint) (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #38 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001805	13	9/29/21	39	(88 pgs) Appendix in Support filed by CLO Holdco Ltd, Charitable DAF Fund LP re 38 Response/Objection to Defendant Highland Capital Management, L.P.'s Motion to Dismiss Complaint (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #39 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001893	14	9/29/21	42	(12 pgs) REPLY filed by Highland Capital Management LP re: 22 MOTION for an Order to Enforce the Order of Reference (Annable, Zachery) (Entered: 07/13/2021) [ORIGINALLY FILED IN 21-CV-0842AS #42 ON 07/13/2021 IN U.S.

			DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
VOL. 9	15	9/29/21	43 (852 pgs) Appendix in Support filed by Highland Capital Management LP re: 42 Reply. (Annable, Zachery) Modified text on 7/14/2021 (mjr). (Entered: 07/13/2021) [ORIGINALLY FILED IN 21-CV-0842AS #43 ON 07/13/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001905 thru Vol. 13	16	9/29/21	45 (21 pgs) REPLY filed by Highland Capital Management LP re: 26 MOTION to Dismiss (Defendant Highland Capital Management, L.P.'s Motion to Dismiss Complaint) (Annable, Zachery) (Entered:07/13/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #44 ON 07/13/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002757	17	9/29/21	57 (7 pgs; 2 docs) MOTION to Dismiss and Joinder in Motion to Dismiss of Highland Capital Management, L.P. filed by Highland CLO Funding Ltd. (Attachments: # 1 Proposed Order) Attorney Paul R Bessette added to party Highland CLO Funding Ltd (pty:dft) (Bessette, Paul) (Entered: 08/30/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #57 ON 08/30/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002778	18	9/29/23	58 (12 pgs) Brief/Memorandum in Support filed by Highland CLO Funding Ltd. re 57 MOTION to Dismiss and Joinder in Motion to Dismiss of Highland Capital Management, L.P. (Bessette, Paul) (Entered: 08/30/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #58 ON 08/30/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002785	19	9/29/23	59 (80 pgs; 5 docs) Appendix in Support filed by Highland CLO Funding Ltd re 58 Brief/Memorandum in Support of Motion (Attachments: # 1 Exhibit(s) A - Jackson v Dear # 2 Exhibit(s) B - Prudential Assurance v. Newman # 3 Exhibit(s) C - Harbourvest Settlement Agreement # 4 Exhibit(s) D - Boleat Declaration) (Bessette, Paul) (Entered: 08/30/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #59 ON 08/30/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002797	20	9/29/21	64 (1 pg) ORDER OF REFERENCE: Pursuant to 28 U.S.C. § 157 and this District's Miscellaneous Order No. 33, this case is hereby REFERRED to Judge Stacey G. C. Jernigan of the United States Bankruptcy Court for the Northern District of Texas, Dallas Division, to be adjudicated as a matter related to the consolidated Chapter 11 Bankruptcy of Highland Capital Management, L.P., Chapter 11 Case No.19-34054. (Ordered by Judge Jane J. Boyle
002877			

Vol. 14				on 9/20/2021) (svc) (Entered: 09/20/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #64 ON 09/20/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
	21	10/19/21	66	(5 pgs) Notice of hearing filed by Defendant Highland Capital Management, LP (RE: related document(s) 26 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP, 47 Motion to strike document filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 55 Motion to abate filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) Hearing to be held on 11/23/2021 at 09:30 AM at https://us-courts.webex.com/meet/jerniga for 26 and for 47 and for 55, (Annable, Zachery)
002878				
002883	22	11/22/21	71	(509 pgs; 2 docs) Witness and Exhibit List <i>for Hearing on November 23, 2021</i> filed by Defendant Highland Capital Management, LP (RE: related document(s) 26 Motion to dismiss adversary proceeding). (Attachments: # 1 Exhibits 1-13) (Hayward, Melissa)
thru Vol. 16				
Vol. 17	23	11/22/21	72	(2 pgs) Witness List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 26 Motion to dismiss adversary proceeding, 47 Motion to strike (related document(s): 43 Document), 55 Motion to abate (related document(s) 1 Complaint), 69 Motion to abate <i>Plaintiffs' Amended Motion to Stay All Proceedings</i> (related document(s) 55 Motion to abate (related document(s) 1 Complaint))). (Sbaiti, Mazin)
003392				
003394	24	11/22/21	73	(189 pgs; 4 docs) Exhibit List <i>for November 23, 2021 hearing</i> filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 47 Motion to strike (related document(s): 43 Document), 55 Motion to abate (related document(s) 1 Complaint)). (Attachments: # 1 Exhibit 1_Defendant's Memorandum of Law in Support of Motion for Reconsideration # 2 Exhibit 2_Highland Memorandum in Support of Motion to Dismiss # 3 Exhibit 3_Order (I) Confirming Fifth Amended Plan of Reorganization of Highland) (Sbaiti, Mazin)
003583	25	12/7/21	80	(2 pgs) Order granting Highland CLO Funding, Ltd.'s motion to dismiss adversary as a party with prejudice (related document 57) Entered on 12/7/2021. (Okafor, Marcey) Modified text on 3/11/2022 (Okafor, Marcey).
003585	26	3/11/22	99	(26 pgs) Memorandum of Opinion and order granting motion to dismiss the adversary proceeding (RE: related document(s) 26 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP). Entered on 3/11/2022 (Okafor, Marcey)
003611	27	3/11/22	100	(26 pgs) Order granting motion to dismiss adversary proceeding with prejudice (related document #26) Entered on 3/11/2022. (Okafor, Marcey)

Vol. 18 003637	28	3/21/22	104	(29 pgs) Notice of appeal. Fee Amount \$298 filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 100 Order on motion to dismiss adversary proceeding). Appellant Designation due by 04/4/2022. (Sbaiti, Mazin)
003666	29	5/26/22	120	(177 pgs; 2 docs) Support/supplemental document <i>Motion to Supplement Appellate Record</i> filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 111 Appellant designation). (Attachments: # 1 Amended Transcript of January 14, 2021 Hearing) (Sbaiti, Mazin)
003843	30	6/9/22	121	(1 pg) DISTRICT COURT Order: Case 3:22-00695-B is hereby transferred to the docket of the Honorable Judge Jane J. Boyle for consolidation with The Charitable DAF Fund LP, et al. v. Highland Capital Management LP, Case No. 3:21-cv-3129-N. Judge Karen Gren Scholer no longer assigned to case.(RE: related document(s) 86 Notice of appeal filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 104 Notice of appeal filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Entered on 6/9/2022 (Whitaker, Sheniqua) (Entered: 06/10/2022)
003844	31	10/24/22	122	(7 pgs) Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP (Annable, Zachery)
003851	32	10/14/22	123	(31 pgs) Brief in support filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Annable, Zachery)
Vol. 19 003882 Thru Vol 20	33	10/14/22	124	(513 pgs; 15 docs) Support/supplemental document (<i>Appendix in Support of Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7 # 8 Exhibit 8 # 9 Exhibit 9 # 10 Exhibit 10 # 11 Exhibit 11 # 12 Exhibit 12 # 13 Exhibit 13 # 14 Exhibit 14) (Annable, Zachery)
Vol. 21 004395	34	10/27/22	126	(5 pgs) Notice of hearing (<i>Notice of Hearing and Briefing Schedule on Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP). Hearing to be held on 12/8/2022 at 09:30 AM at https://us-courts.webex.com/meet/jerniga for 122. (Annable, Zachery)

Vol. 21 004400 004410 004442 Thru Vol. 22	35	11/18/22	128	(10 pgs) Motion for withdrawal of reference. Fee amount \$188, filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (Sbaiti, Mazin)
	36	11/18/22	129	(32 pgs) Response opposed to (related document(s): 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP) filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Sbaiti, Mazin)
	37	11/18/22	130	(254 pgs; 2 docs) Response opposed to (related document(s): 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP) filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Attachments: # 1 Appendix) (Sbaiti, Mazin)
Vol. 22 004696 004717 004732 004737 004742	38	9/2/22	131	(21 pgs) DISTRICT COURT MEMORANDUM OPINION AND ORDER: The Court REVERSES and REMANDS the bankruptcy court's Motion to Dismiss Order and AFFIRMS the bankruptcy courts Motion to Stay Order. re: appeal on Civil Action number: Case 3:22-00695-B consolidated with 3:21-CV-3129-B, (RE: related document(s) 81 Order on motion to abate, 100 Order on motion to dismiss adversary proceeding). Entered on 9/2/2022 (Whitaker, Sheniqua) (Entered: 11/29/2022)
	39	12/2/22	133	(15 pgs) Reply to (related document(s): 129 Response filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 130 Response filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) filed by Defendant Highland Capital Management, LP. (Annable, Zachery)
	40	12/7/22	135	(5 pgs) Notice of hearing filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP). Hearing to be held on 1/25/2023 at 01:30 PM at https://us-courts.webex.com/meet/jerniga for 122, (Annable, Zachery)
	41	12/7/22	136	(5 pgs) Notice of hearing filed by Defendant Highland Capital Management, LP (RE: related document(s) 128 Motion for withdrawal of reference filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Status Conference to be held on 1/25/2023 at 01:30 PM at https://us-courts.webex.com/meet/jerniga . (Annable, Zachery).
	42	12/9/22	138	(3 pgs) Response opposed to (related document(s): 128 Motion for withdrawal of reference. Fee amount \$188, filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) filed by Defendant Highland Capital Management, LP. (Annable, Zachery)

Vol. 22 004745	43	12/9/22	139	(25 pgs) Brief in support filed by Defendant Highland Capital Management, LP (RE: related document(s) 138 Response). (Annable, Zachery)
Vol. 23 004770	44	12/9/22	140	(280 pgs; 8 docs) Support/supplemental document (<i>Appendix in Support of Highland Capital Management, L.P.'s Response to Renewed Motion to Withdraw the Reference</i>) filed by Defendant Highland Capital Management, LP (RE: related document(s) 138 Response). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7) (Annable, Zachery)
Vol. 24 005050	45	12/16/22	144	(6 pgs) Reply to (related document(s): 138 Response filed by Defendant Highland Capital Management, LP) filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Sbaiti, Mazin)
005056 Thru Vol. 25.	46	1/23/23	145	(514 pgs; 15 docs) Witness and Exhibit List filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7 # 8 Exhibit 8 # 9 Exhibit 9 # 10 Exhibit 10 # 11 Exhibit 11 # 12 Exhibit 12 # 13 Exhibit 13 # 14 Exhibit 14) (Annable, Zachery)
Vol. 26 005570	47	1/23/23	146	(280 pgs; 8 docs) Witness and Exhibit List filed by Defendant Highland Capital Management, LP (RE: related document(s) 128 Motion for withdrawal of reference. Fee amount \$188.). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7) (Annable, Zachery)
Vol. 27 005850	48	1/23/23	147	(221 pgs; 7 docs) Witness and Exhibit List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Attachments: # 1 Exhibit 1_Excerpts from July 14, 2020 Hearing Transcript # 2 Exhibit 2_HCLOF Members Agreement Relating to the Company # 3 Exhibit 3_HarbourVest Settlement Agreement # 4 Exhibit 4_Order Approving Debtor's Settlement with HarbourVest # 5 Exhibit 5_HCLOF Offering # 6 Exhibit 6 Amended and Restated Investment Advisory Agreement) (Sbaiti, Mazin)
006071	49	1/23/23	148	(3 pgs) Witness and Exhibit List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 128 Motion for withdrawal of reference. Fee amount \$188.). (Phillips, Louis)
Vol. 28 006074	50	1/25/23	150	(56 pgs; 2 docs) Amended Witness and Exhibit List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 147 List (witness/exhibit/generic), 149 List (witness/exhibit/generic)). (Attachments: # 1 Exh 7_Testimony of Mark Patrick at June 8, 2021 hearing) (Sbaiti, Mazin)

Vol. 28 006130	51	1/25/23	152	(3 pgs) Notice of Appearance and Request for Notice by Louis M. Phillips filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Phillips, Louis)
	52	1/25/23	154	(1 pg) Court admitted exhibits date of hearing January 25, 2023 (RE: related document(s) 128 Motion for withdrawal of reference, filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) (COURT ADMITTED DEFENDANT'S EXHIBITS #1, #2, #3, #4, #5 & #6 OFFERED BY ATTY GREG DEMO). (Edmond, Michael) (Entered: 01/27/2023)
Vol. 32 006925 006942 006960	53	2/6/23	158	Report and recommendation to the U.S. District Court by U.S. Bankruptcy Judge. (RE: related document(s) 128 Motion for withdrawal of reference filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Entered on 2/6/2023 (Okafor, Marcey)
	54	2/6/23	161	(18 pgs) DISTRICT COURT Notice of transmission of report and recommendation in re: renewed motion to withdraw reference. Civil Case # 3:22-cv-02802-S. (RE: related document(s) 158 Report and recommendation to the U.S. District Court by U.S. Bankruptcy Judge. (RE: related document(s) 128 Motion for withdrawal of reference filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Entered on 2/6/2023) (Whitaker, Sheniqua)
	55	4/3/23	165	(1 pg) DISTRICT COURT ORDER: The Court GRANTS the 11 Joint Motion to Transfer Proceeding and Consolidate Before Original Court and the above-numbered case (3:22-cv-02802-S) is transferred to the docket of the Honorable Judge Jane Boyle: Civil case 3:21-cv-00842-B (order referring case). (RE: related document(s) 1 Complaint filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 143 Notice of transmission of motion to withdraw reference). Entered on 4/3/2023 (Whitaker, Sheniqua) Modified on 4/10/2023 (Whitaker, Sheniqua). (Entered: 04/10/2023)

TRANSCRIPTS

006961	56	11/24/21	78	(104 pgs) Transcript regarding Hearing Held 11-23-2021 RE: Motion Hearing. THIS TRANSCRIPT WILL BE MADE ELECTRONICALLY AVAILABLE TO THE GENERAL PUBLIC 90 DAYS AFTER THE DATE OF FILING. TRANSCRIPT RELEASE DATE IS 02/22/2022. Until that time the transcript may be viewed at the Clerk's Office or a copy may be obtained from the official court transcriber. Court Reporter/Transcriber Liberty Transcripts/Dipti Patel, Telephone number 847-848-4907. (RE: related document(s) 75 Hearing held on 11/23/2021. (RE: related document(s) 55 MOTION to Stay filed by CLO Holdco Ltd, Charitable DAF Fund LP (Sbaiti, Mazin) (Entered: 08/26/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #55 ON 08/26/2021 IN U.S.
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			<p>DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)) (Appearances: J. Pomerantz and J. Morris for Highland Defendants; J. Jordan and P. Bessett for HCLOF; M. Sbaiti for Plaintiffs. Nonevidentiary hearing. Motion denied. Mr. Pomerantz to upload order.), 76 Hearing held on 11/23/2021. (RE: related document(s) 47 Motion to strike 43 Appendix in support filed by CLO Holdco, Ltd., Charitable DAF Fund, LP (Bridges, Jonathan) Modified text on 7/16/2021 (mjr). (Entered: 07/15/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #47 ON 07/15/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)) (Appearances: J. Pomerantz and J. Morris for Highland Defendants; J. Jordan and P. Bessett for HCLOF; M. Sbaiti for Plaintiffs. Nonevidentiary hearing. Motion denied (Plaintiffs acknowledged complained-of Appendices it did not relate to Motion to Dismiss). Mr. Pomerantz to upload order.)). Transcript to be made available to the public on 02/22/2022. (Patel, Dipti)</p>
57	2/21/23	164	<p>164 (112 pgs) Transcript regarding Hearing Held 1/25/23 RE: HEARING ON DEFENDANT HIGHLAND CAPITAL MANAGEMENT L.P.'S RENEWED MOTION TO DISMISS COMPLAINT (122) AND STATUS CONFERENCE RE: MOTION FOR WITHDRAWAL OF REFERENCE FILED BY PLAINTIFF CLO HOLDCO, LTD., PLAINTIFF CHARITABLE DAF FUND, LP (128). THIS TRANSCRIPT WILL BE MADE ELECTRONICALLY AVAILABLE TO THE GENERAL PUBLIC 90 DAYS AFTER THE DATE OF FILING. TRANSCRIPT RELEASE DATE IS 05/22/2023. Until that time the transcript may be viewed at the Clerk's Office or a copy may be obtained from the official court transcriber. Court Reporter/Transcriber Dipti Patel, Telephone number 847-848-4907. (RE: related document(s) 155 Hearing held on 1/25/2023. (RE: related document(s) 122 Motion to dismiss adversary proceeding, (Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint) filed by Defendant Highland Capital Management, LP filed by Defendant Highland Capital Management, LP) (Appearances: J. Morris and G. Demo for Movants; L. Phillips and M. Sbaiti for Plaintiffs. Evidentiary hearing (appendices). Court took matter under advisement.), 156 Hearing held on 1/25/2023. (RE: related document(s) 128 Motion for withdrawal of reference. Fee amount \$188, filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) (Appearances: J. Morris and G. Demo for Movants; L. Phillips and M. Sbaiti for Plaintiffs. Evidentiary hearing (appendices). Court announced it will recommend denial to District Court. Court is working on Report & Recommendation.)). Transcript to be made available to the public on 05/22/2023. (Patel, Dipti)</p>

Dated: July 14, 2023

Respectfully submitted,

SBAITI & COMPANY PLLC

/s/ Mazin A. Sbaiti

Mazin A. Sbaiti

Texas Bar No. 24058096

Jonathan Bridges

Texas Bar No. 24028835

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jeb@sbaitilaw.com

Counsel for Appellants

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was filed electronically through the Court's ECF system, which provides notice to all parties of interest, on this 14th day of July, 2023.

/s/ Mazin A. Sbaiti

Mazin A. Sbaiti

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*Counsel for Charitable DAF Fund, L.P.
and CLO Holdco, Ltd.*

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

In re:	§	Chapter 11
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	Case No. 19-34054-sgj11
	§	
Debtor.	§	
	§	
CHARITABLE DAF FUND, L.P. AND CLO	§	
HOLDCO, LTD., DIRECTLY AND DERIVATIVELY	§	
	§	
Plaintiffs,	§	Adversary Proceeding No.
	§	
vs.	§	21-03067-sgj
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	
HIGHLAND HCF ADVISOR, LTD., AND	§	
HIGHLAND CLO FUNDING LTD., NOMINALLY	§	
	§	
Defendants.	§	
	§	

**PLAINTIFFS' CORRECTED AMENDED WITNESS AND
EXHIBIT LIST REGARDING HEARING ON HIGHLAND CAPITAL
MANAGEMENT, L.P.'S RENEWED MOTION TO DISMISS COMPLAINT
TO BE HELD ON JANUARY 25, 2023**

Plaintiffs submit the following corrected amended witness and exhibit list regarding
Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint.

WITNESSES:

1. Any witness identified or called by any other party;
2. Any witness for impeachment or rebuttal.

EXHIBITS:

No.	Exhibit	Offered	Admitted
1	Excerpts from Transcript of Hearing on Application to Employ James P. Seery, Jr. on July 14, 2020 (APP_0003 – 0014)		
2	Highland CLO Funding – Members Agreement Relating to the Company (APP_0015 – 0042)		
3	HarbourVest Settlement Agreement (APP_0043 – 0061)		
4	Order Approving Debtor’s Settlement with HarbourVest (APP_0062 – 0084)		
5	HCLOF Offering (APP_0085-0206)		
6	Amended and Restated Investment Advisory Agreement (APP_0207 – 0221)		
7	Testimony of Mark Patrick at June 8, 2021 hearing		
	All exhibits necessary for impeachment and/or rebuttal purposes.		
	All exhibits identified by or offered by any other party for the hearing on Highland Capital Management, L.P.’s Renewed Motion to Dismiss.		

Dated: January 24, 2023

Respectfully submitted,

SBAITI & COMPANY PLLC

/s/ Mazin A. Sbaiti

Mazin A. Sbaiti

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Counsel for Plaintiffs

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In Re:) **Case No. 19-34054-sgj-11**
) Chapter 11
)
HIGHLAND CAPITAL) Dallas, Texas
MANAGEMENT, L.P.,) Tuesday, June 8, 2021
9:30 a.m. Docket
Debtor.)
) - SHOW CAUSE HEARING (2255)
) - MOTION TO MODIFY ORDER
) AUTHORIZING RETENTION OF
) JAMES SEERY (2248)
) - MOTION FOR ORDER FURTHER
) EXTENDING THE PERIOD WITHIN
) WHICH DEBTOR MAY REMOVE
) ACTIONS (2304)

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE STACEY G.C. JERNIGAN,
UNITED STATES BANKRUPTCY JUDGE.

APPEARANCES:

For the Debtor: Jeffrey Nathan Pomerantz
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For the Debtor: John A. Morris
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For the Debtor: Zachery Z. Annable
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EXHIBIT

7

exhibits.sticker.com

1 APPEARANCES, cont'd.:

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3 CLO Holdco, Show Cause Jonathan E. Bridges
4 Respondents, Movants, SBAITI & COMPANY, PLLC
5 and Sbaiti & Company: Chase Tower
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17 For the Official Committee of Unsecured Creditors: Matthew A. Clemente
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23 Recorded by: Michael F. Edmond, Sr.
24 UNITED STATES BANKRUPTCY COURT
1100 Commerce Street, 12th Floor
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(214) 753-2062

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1 Transcribed by: Kathy Rehling
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23 Proceedings recorded by electronic sound recording;
24 transcript produced by transcription service.
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Patrick - Direct

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1 our witness stand and I'll swear you in. Please raise your
2 right hand.

3 (The witness is sworn.)

4 THE COURT: All right. Please take a seat.

5 MARK PATRICK, DEBTOR'S WITNESS, SWORN

6 DIRECT EXAMINATION

7 BY MR. MORRIS:

8 Q Good afternoon, Mr. Patrick.

9 A Good afternoon.

10 Q Can you hear me okay?

11 A Yes, I can.

12 Q Okay. You have before you several sets of binders.

13 They're rather large. But when I deposed you on Friday, we
14 did that virtually. Now, I may direct you specifically to one
15 of the binders or one of the documents from time to time, so I
16 just wanted you to know that those were in front of you and
17 that I may be doing that.

18 Mr. Patrick, since March 1st, 2001 [sic], you've been
19 employed by Highland Consultants, right?

20 A I believe the name is Highgate Consultants doing business
21 as Skyview Group.

22 Q Okay. And that's an entity that was created by certain
23 former Highland employees, correct?

24 A That is my understanding, correct.

25 Q And your understanding is that Mr. Dondero doesn't have an

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Patrick - Direct

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1 ownership interest in that entity, correct?

2 A That he does not. That is correct.

3 Q And your understanding is that he's not an employee of
4 that -- of Skyview, correct?

5 A That is correct.

6 Q Prior to joining Skyview on March 1st, you had worked at
7 Highland Capital Management, LP for about 13 years, correct?

8 A Correct.

9 Q Joining in, I believe, early 2008?

10 A Correct.

11 Q Okay. I'm going to refer to Highland Capital Management,
12 LP from time to time as HCMLP. Is that okay?

13 A Yes.

14 Q While at HCMLP, you served as a tax counselor, correct?

15 A No, I would like to distinguish that. I did have the
16 title tax counsel. However, essentially all my activities
17 were in a non-lawyer capacity, being the client
18 representative. I would engage other outside law firms to
19 provide legal advice.

20 Q Okay. So you are an attorney, correct?

21 A Yes, I am.

22 Q But essentially everything you did at Highland during your
23 13 years was in a non-lawyer capacity, correct?

24 A Correct.

25 Q In fact, you didn't even work in the legal department; is

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1 that right?

2 A That is correct. I worked for the tax department.

3 Q Okay. Let's talk about how you became the authorized
4 representative of the Plaintiffs. You are, in fact,
5 authorized representative today of CLO Holdco, Ltd. and
6 Charitable DAF, LP, correct?

7 A Charitable DAF Fund, LP. Correct.

8 Q And those are the two entities that filed the complaint in
9 the United States District Court against the Debtor and two
10 other entities, correct?

11 A Correct.

12 Q And may I refer to those two entities going forward as the
13 Plaintiffs?

14 A Yes.

15 Q You became the authorized representative of the Plaintiffs
16 on March 24th, 2021, the day you and Mr. Scott executed
17 certain transfer documents, correct?

18 A Correct.

19 Q And you had no authority to act on behalf of either of the
20 Plaintiffs before March 24th, correct?

21 A Correct.

22 Q The DAF controls about \$200 million in assets, correct?

23 A The Plaintiffs, you mean? CLO Holdco and Charitable DAF
24 Fund, LP.

25 Q Yes.

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1 A Around there.

2 Q Okay. Let me try and just ask that again, and thank you
3 for correcting me. To the best of your knowledge, the
4 Plaintiffs control about \$200 million in assets, correct?

5 A Net assets, correct.

6 Q Okay. And that asset base is derived largely from HCMLP,
7 Mr. Dondero, or Mr. Dondero's trusts, correct?

8 A Can you restate that question again, Mr. Morris?

9 Q Sure. The asset base that you just referred to is derived
10 largely from HCMLP, Mr. Dondero, or donor trusts?

11 A The way I would characterize it -- you're using the word
12 derived. I would characterize it with respect to certain
13 charitable donations --

14 Q Uh-huh.

15 A -- that were -- that were made at certain time periods,
16 where the donors gave up complete dominion and control over
17 the respective assets and at that time claimed a federal
18 income tax deduction for that.

19 I do -- I do believe that, as far as the donor group, as
20 you specified, Highland Capital Management, I recall, provided
21 a donation to a Charitable Remainder Trust that eventually had
22 expired and that eventually such assets went into the
23 supporting organizations. And then I do believe Mr. Dondero
24 also contributed to the Charitable Remainder Trust No. 2,
25 which seeded substantial amounts of the original assets that

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1 were eventually composed of the \$200 million. And then from
2 time to time I do believe that Mr. Dondero's trusts made
3 charitable donations to their respective supporting
4 organizations.

5 Q Okay. Thank you.

6 A Is that responsive?

7 Q It is. It's very responsive. Thank you very much. So,
8 to the best of your knowledge, the charitable donations that
9 were made that form the bases of the assets came from those
10 three -- primarily from those three sources, correct?

11 A Well, you know, there's two different trusts. There's the
12 Dugaboy Trust and the Get Good Trust.

13 Q Okay.

14 A Then you have Mr. Dondero and Highland Capital Management.
15 So I would say four sources.

16 Q Okay. All right. Thank you. Prior to assuming your role
17 as the authorized representative of the Plaintiff, you had
18 never had meaningful responsibility for making investment
19 decisions, correct?

20 A I'm sorry. You kind of talk a little bit fast. Please
21 slow it down --

22 Q That's okay.

23 A -- and restate it. Thank you.

24 Q And I appreciate that. And any time you don't understand
25 what I'm saying or I speak too fast, please do exactly what

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1 you're doing. You're doing fine.

2 Prior to assuming your role as the authorized
3 representative of the Plaintiffs, you never had any meaningful
4 responsibility making investment decisions. Is that correct?

5 A To whom?

6 Q For anybody.

7 A Well, during my deposition, I believe I testified that I
8 make investment decisions with respect to my family. Family
9 and friends come to me and they ask me for investment
10 decisions. I was -- in my deposition, I indicated to you that
11 I was a board member of a nonprofit called the 500, Inc. They
12 had received a donation of stock in Yahoo!, and the members
13 there looked to me for financial guidance. As an undergrad at
14 the University of Miami, I was a -- I was a finance major, and
15 so I do have a variety of background with respect to
16 investments.

17 Q Okay. So you told me that from time to time friends and
18 family members come to you for investing advice. Is that
19 right?

20 A That is correct.

21 Q And when you were a young lawyer you were on the board of
22 a nonprofit that received a donation of Yahoo! stock and the
23 board looked to you for guidance. Is that correct?

24 THE COURT: Just a moment. I think there's an
25 objection.

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1 MR. MORRIS: Uh-huh.

2 THE COURT: Go ahead.

3 MR. ANDERSON: So far -- relevance, Your Honor. This
4 is way out of the bounds of the contempt proceeding. You
5 know, what he did as a young person with Yahoo! stock. We're
6 here to -- he authorized the lawsuit. They filed the lawsuit.
7 That's it. Getting into all this peripheral stuff is
8 completely irrelevant.

9 THE COURT: Your response?

10 MR. MORRIS: My response, Your Honor, is very simple.
11 Mr. Patrick assumed responsibility, and you're going to be
12 told that he exercised full and complete authority over a \$200
13 million fund that was created by Mr. Dondero, --

14 THE COURT: Okay.

15 MR. MORRIS: -- that funds -- that is funded
16 virtually by Mr. Dondero, and for which -- Mr. Patrick is a
17 lovely man, and I don't mean to disparage him at all -- but he
18 has no meaningful experience in investing at all.

19 THE COURT: All right. Counsel, I overrule. I think
20 there's potential relevance.

21 And may I remind people that when you're back at counsel
22 table, please make sure you speak your objections into the
23 microphone. Thank you.

24 BY MR. MORRIS:

25 Q When you were a young lawyer, sir, you were on the board

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1 of a nonprofit that received a donation of Yahoo! stock and
2 the board looked to you for guidance, correct?

3 A Yes, correct.

4 Q And -- but during your 13 years at Highland, you never had
5 formal responsibility for making investment decisions,
6 correct?

7 A That is correct.

8 Q Yeah. In fact, other than investment opportunities that
9 you personally presented where you served as a co-decider, you
10 never had any responsibility or authority to make investment
11 decisions on behalf of HCMLP or any of its affiliated
12 entities, correct?

13 A That is correct.

14 Q And at least during your deposition, you couldn't identify
15 a single opportunity where you actually had the authority and
16 did authorize the execution of a transaction on behalf of
17 HCMLP or any of its affiliates, correct?

18 A Correct.

19 Q And yet today you are now solely responsible for making
20 all investment decisions with respect to a \$200 million
21 charitable fund, correct?

22 A Yes, but I get some help. I've engaged an outside third
23 party called ValueScope, and they have been as -- effectively
24 working as a "gatekeeper" for me, and I look to them for
25 investment guidance and advice, and I informally look to Mr.

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1 Dondero since the time period of when I took control on March
2 24th for any questions I may have with respect to the
3 portfolio. So I don't feel like I'm all by myself in making
4 decisions.

5 Q Okay. I didn't mean to suggest that you were, sir, and I
6 apologize if you took it that way. I was just asking the
7 question, you are the person now solely responsible for making
8 the investment decisions, correct?

9 A Yes.

10 Q Okay. Let's talk about the circumstances that led to the
11 filing of the complaint for a bit. On April 12, 2021, you
12 caused the Plaintiffs to commence an action against HCMLP and
13 two other entities, correct?

14 A Correct.

15 Q Okay. One of the binders -- you've got a couple of
16 binders in front of you. If you look at the bottom, one of
17 them says Volume 1 of 2, Exhibits 1 through 18. And if you
18 could grab that one and turn to Exhibit 12. Do you have that,
19 sir?

20 A It says -- it says the original complaint. Is that the
21 right one?

22 Q That is the right one. And just as I said when we were
23 doing this virtually last Friday, if I ask you a question
24 about a particular document, you should always feel free to
25 review as much of the document as you think you need to

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Patrick - Direct

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1 competently and fully answer the question. Okay?

2 A Okay. Thank you.

3 Q All right. You instructed the Sbaiti firm to file that
4 complaint on behalf of the Plaintiffs, correct?

5 A Correct.

6 Q And to the best of your recollection, the Plaintiffs
7 returned -- retained the Sbaiti firm in April, correct?

8 A Correct.

9 Q So the Sbaiti firm was retained no more than twelve days
10 before the complaint was filed, correct?

11 A Correct.

12 Q You personally retained the Sbaiti firm, correct?

13 A Correct.

14 Q And the idea of filing this complaint originated with the
15 Sbaiti firm, correct?

16 A Correct.

17 Q Before filing -- withdrawn. Before becoming the
18 Plaintiffs' authorized representative, you hadn't had any
19 communications with anyone about potential claims that might
20 be brought against the Debtor arising out of the HarbourVest
21 settlement, correct?

22 A That is correct.

23 Q Now, after you became the Plaintiffs' authorized
24 representative, Mr. Dondero communicated with the Sbaiti firm
25 about the complaint that's marked as Exhibit 12, correct?

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1 A Yes. After he brought certain information to myself and
2 then that I engaged the Sbaiti firm to launch an
3 investigation, I also wanted Mr. Dondero to work with the
4 Sbaiti firm with respect to their investigation of the
5 underlying facts.

6 Q Okay. Mr. Dondero did not discuss the complaint with you,
7 but he did communicate with the Sbaiti firm about the
8 complaint, correct?

9 A I believe -- yeah. I heard you slip in at the end "the
10 complaint." I know he communicated with the Sbaiti firm. I
11 can't -- I can't say what he said or didn't say with respect
12 to the -- the actual complaint.

13 Q Okay. But Mr. Dondero got involved in the process
14 initially when he brought some information to your attention
15 concerning the HarbourVest transaction, correct?

16 A Correct.

17 Q And he came to you with the HarbourVest information after
18 you assumed your role as the authorized representative of the
19 Plaintiffs on March 24th, correct?

20 A That is correct.

21 Q At the time he came to you, you did not have any specific
22 knowledge about the HarbourVest transaction, correct?

23 A I did not have specific knowledge with respect to the
24 allegations that were laid out and the facts with respect to
25 the original complaint. I think I had just had a general

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1 awareness that there was a HarbourVest something or other, but
2 the specific aspects of it, I was unaware.

3 Q Okay. And you had no reason to believe that Mr. Seery had
4 done anything wrong with respect to the HarbourVest
5 transaction at the time you became the Plaintiffs' authorized
6 representative, correct?

7 A That is correct.

8 Q But you recall very specifically that some time after
9 March 24th Mr. Dondero told you that an investment opportunity
10 was essentially usurped or taken away, to the Plaintiffs' harm
11 and for the benefit of HCMLP, correct?

12 A That is correct.

13 Q And after Mr. Dondero brought this information to your
14 attention, you hired the Sbaiti firm to launch an
15 investigation into the facts, correct?

16 A Correct.

17 Q You had never worked with the Sbaiti firm before, correct?

18 A That is correct.

19 Q And you had hired many firms as a tax counselor at HCMLP,
20 but not the Sbaiti firm until now. Correct?

21 A That is correct.

22 Q You got to the Sbaiti firm through a recommendation from
23 D.C. Sauter, correct?

24 A Correct.

25 Q Mr. Sauter is the in-house counsel, the in-house general

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1 counsel at NexPoint Advisors, correct?

2 A Correct.

3 Q You didn't ask Mr. Sauter for a recommendation for a
4 lawyer; he just volunteered that you should use the Sbaiti
5 firm. Correct?

6 A That is correct.

7 Q And you never used -- considered using another firm, did
8 you?

9 A When they were presented to me, they appeared to have all
10 the sufficient skills necessary to undertake this action, and
11 so I don't recall interviewing any other firms.

12 Q Okay. Now, after bringing the matter to your action, Mr.
13 Dondero communicated directly with the Sbaiti firm in relation
14 to the investigation that was being undertaken. Correct?

15 A That is correct.

16 Q But you weren't privy to the communications between Mr.
17 Dondero and the Sbaiti firm, correct?

18 A I did not participate in those conversations as the --
19 what I, again, considered Mr. Dondero as the investment
20 advisor to the portfolio, and he was very versant in the
21 assets. I wanted him to participate in the investigation that
22 the Sbaiti firm was undertaking prior to the filing of this
23 complaint.

24 Q Let's talk for a minute about the notion of Mr. Dondero
25 being the investment advisor. Until recently, the entity

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1 known as the DAF had an investment advisory committee with HC
2 -- an investment advisory agreement with HCMLP. Correct?

3 A It's my understanding that the investment advisory
4 agreement existed with the Plaintiffs, CLO Holdco, as well as
5 Charitable DAF Fund, LP, up and to the end of February,
6 throughout the HarbourVest transaction.

7 Q Okay. And since February, the Plaintiffs do not have an
8 investment advisory agreement with anybody, correct?

9 A That is correct.

10 Q Okay. So Mr. Dondero, if he serves as an investment
11 advisor, it's on an informal basis. Is that fair?

12 A After I took control, he serves as an informal investment
13 advisor.

14 Q Okay. So there's no contract that you're aware of between
15 either of the Plaintiffs and Mr. Dondero pursuant to which he
16 is authorized to act as the investment advisor for the
17 Plaintiffs, correct?

18 A That is correct.

19 Q Okay. When you communicated with Grant Scott --
20 withdrawn. You know who Grant Scott is, right?

21 A Yes, I do.

22 Q He's the gentleman who preceded you as the authorized
23 representative of the Plaintiffs, correct?

24 A Yes.

25 Q Okay. You communicated with Mr. Scott from time to time

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Patrick - Direct

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1 during February and March 2021, correct?

2 A February and March are the dates? Yes.

3 Q Yeah. And from February 1st until March 21st -- well,
4 withdrawn. Prior to March 24th, 2021, Mr. Scott was the
5 Plaintiffs' authorized representative, correct?

6 A Correct.

7 Q And you have no recollection of discussing with Mr. Scott
8 at any time prior to March 24th any aspect of the HarbourVest
9 settlement with Mr. Scott. Correct?

10 A Correct.

11 Q And you have no recollection of discussing whether the
12 Plaintiffs had potential claims that might be brought against
13 the Debtor. Correct? Withdrawn. Let me ask a better
14 question.

15 You have no recollection of discussing with Mr. Scott at
16 any time prior to March 24th whether the Plaintiffs had
17 potential claims against the Debtor. Correct?

18 A That is correct.

19 Q You and Mr. Scott never discussed whether either of --
20 either of the Plaintiffs had potential claims against Mr.
21 Seery. Correct?

22 A Correct.

23 Q Okay. At the time that you became their authorized
24 representative, you had no knowledge that the Plaintiffs would
25 be filing a complaint against the Debtors relating to the

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Patrick - Direct

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1 HarbourVest settlement less than three weeks later, correct?

2 A That is correct.

3 Q Okay. Now, if you look at Page 2 of the complaint, you'll
4 see at the top it refers to Mr. Seery as a potential party.

5 Do you see that?

6 A Yes, I do.

7 Q Okay. You don't know why Mr. Seery was named --
8 withdrawn. You don't know why Mr. Seery was not named as a
9 defendant in the complaint, correct?

10 A No, I -- that's correct. I do not know why he was not
11 named. That's in the purview of the Sbaiti firm.

12 Q Okay. And the Sbaiti firm also made the decision to name
13 Mr. Seery on Page 2 there as a potential party when drafting
14 the complaint, correct?

15 A That's what the document says.

16 Q And you weren't involved in the decision to identify Mr.
17 Seery as a potential party, correct?

18 A That is correct. Again, I rely on the law firm to decide
19 what parties to bring a suit to -- against.

20 Q Okay. Okay. Do you recall the other day we talked about
21 a document called the July order?

22 A Yes.

23 Q Okay. That's in -- that's in Tab 16 in your binder, if
24 you can turn to that. And take a moment to look at it, if
25 you'd like. And my first question is simply whether this is

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1 the July order, as you understand it.

2 (Pause.)

3 A Yes, it is. I was just looking for the gatekeeper
4 provision. It looks like it's Paragraph 5. So, --

5 Q Okay. Thank you for that. About a week after the
6 complaint was filed, you authorized the Plaintiffs to file a
7 motion in the District Court for leave to amend the
8 Plaintiffs' complaint to add Mr. Seery as a defendant.
9 Correct?

10 A I authorized the filing of a motion in Federal District
11 Court that would ask the Federal District Court whether or not
12 Jim Seery could be named in the original complaint with
13 respect to the gatekeeper provision cited in that motion and
14 with respect to the arguments that were made in that motion.

15 Q Okay. Just to be clear, if you turn to Exhibit 17, the
16 next tab, --

17 A I'm here.

18 Q -- do you see that document is called Plaintiffs' Motion
19 for Leave to File First Amended Complaint?

20 A Yes.

21 Q And that's the document that you authorized the Plaintiffs
22 to file on or about April 19th, correct?

23 A Correct.

24 Q Okay. And can we refer to that document as the motion to
25 amend?

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1 A Yes.

2 Q Okay. You were aware of the July order at Tab 16 before
3 you authorized the filing of the motion to amend. Correct?

4 A Yes, because it's cited in the motion itself.

5 Q Okay. And at the time that you authorized the filing of
6 the motion to amend, you understood that the July order was
7 still in effect. Correct?

8 A Yes, because it was referenced in the motion, so my
9 assumption would be it would still be in effect.

10 Q Okay. Before the motion to amend was filed, you're -- you
11 are aware that my firm and the Sbaiti firm communicated by
12 email about the propriety of filing the motion to amend?

13 A Before it was filed? Communications between your firm and
14 the Sbaiti firm? I would have to have my recollection
15 refreshed.

16 Q I'll just ask the question a different way. Did you know
17 before you authorized the filing of the motion to amend that
18 my firm and the Sbaiti firm had engaged in an email exchange
19 about the propriety of filing the motion to amend in the
20 District Court?

21 A It's my recollection -- and again, I could be wrong here
22 -- but I thought the email exchange occurred after the fact,
23 not before. But again, I -- I just --

24 Q Okay. In any event, on April 19th, the motion to amend
25 was filed. Correct?

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1 A Correct.

2 Q That's the document that is Exhibit 17. And you
3 personally authorized the Sbaiti firm to file the motion to
4 amend on behalf of the Plaintiffs, correct?

5 A Correct.

6 Q And you authorized the filing of the motion to amend with
7 knowledge -- withdrawn.

8 Can you read the first sentence of the motion to amend out
9 loud, please?

10 A Yeah. (reading) Plaintiffs submit this motion under Rule
11 15 of the Federal Rules of Civil Procedure for one purpose:
12 to name as defendant one James P. Seery, Jr., the CEO of
13 defendant Highland Capital Management, LP (HCM) and the chief
14 perpetrator of the wrongdoing that forms the basis of the
15 Plaintiffs' causes of action.

16 Q And does that fairly state the purpose of the motion?

17 MR. SBAITI: Objection, Your Honor. Asks him to make
18 a legal conclusion about the purpose of the legal motion filed
19 in court that he didn't draft.

20 THE COURT: Okay. I overrule. You can answer if you
21 have an answer.

22 THE WITNESS: It's always been my general
23 understanding that the purpose of filing this motion was to go
24 to the Federal District Court and ask that Court of reference
25 to this Court whether or not Mr. Seery could be named with

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1 respect to the original complaint, citing again the gatekeeper
2 provisions and citing the various arguments that we've heard
3 much earlier.

4 BY MR. MORRIS:

5 Q Okay. You personally didn't learn anything between April
6 9th, when the complaint was filed, and April 19th, when the
7 motion to amend was filed, that caused you to authorize the
8 filing of the motion to amend, correct?

9 A That is correct.

10 Q In fact, you relied on the Sbaiti firm with respect to
11 decisions concerning the timing of the motion to amend.
12 Correct?

13 A Correct.

14 Q And you had no knowledge of whether anyone acting on
15 behalf of the Plaintiffs ever served the Debtor with a copy of
16 the motion to amend. Correct?

17 A Yes. I have no knowledge.

18 Q Okay. And you have no knowledge that the Sbaiti firm ever
19 provided my firm with a copy of the motion to amend. Correct?

20 A I cannot recall one way or another.

21 Q Okay. You never instructed anyone on behalf -- acting on
22 behalf of the Plaintiffs to inform the Debtor that the motion
23 to amend had been filed, correct?

24 A That is correct.

25 Q And that's because you relied on the Sbaiti firm on

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Patrick - Direct

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1 procedural issues, correct?

2 A That is correct.

3 Q You didn't consider waiting until the Debtor --

4 (Interruption.)

5 Q -- had appeared in the action before authorizing the
6 filing of the motion --

7 A Yeah, --

8 THE COURT: Yes. Y'all are being a little bit loud.
9 Okay.

10 A VOICE: Sorry.

11 MR. MORRIS: No problem.

12 MR. PHILLIPS: I've heard that before, Your Honor,
13 and I apologize.

14 THE COURT: I bet you have. Thank you.

15 MR. MORRIS: Admonish Mr. Phillips, please.

16 THE COURT: Okay.

17 MR. MORRIS: He's always the wild card.

18 MR. PHILLIPS: I admonish --

19 MR. MORRIS: He's always the wild card.

20 MR. PHILLIPS: I admonish myself.

21 THE COURT: All right. I think he got the message.
22 Continue.

23 BY MR. MORRIS:

24 Q You didn't consider waiting until the Debtor had appeared
25 in the action before filing the motion to amend, correct?

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Patrick - Direct

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1 A Again, I am the client and I rely upon the law firm that's
2 engaged with respect to making legal decisions as to the
3 timing and notice and appearance and what have you. I'm a tax
4 lawyer.

5 Q Okay. You wanted the District Court to grant the relief
6 that the Plaintiffs were seeking. Correct?

7 A I wanted the District Court to consider, under the
8 gatekeeper provisions of this Court, whether or not Mr. Seery
9 could be named in the original complaint. That's -- that,
10 from my perspective, is what was desired.

11 Q All right. You wanted the District Court to grant the
12 relief that the Plaintiffs were seeking, correct?

13 MR. SBAITI: Objection, Your Honor. Asked and
14 answered.

15 THE COURT: Overruled.

16 THE WITNESS: Again, I would characterize this motion
17 as not necessarily asking for specific relief, but asking the
18 Federal District Court whether or not, under the gatekeeper
19 provision, that Mr. Seery could be named on there. What
20 happens after that would be a second step. So I kind of -- I
21 dispute that characterization.

22 BY MR. MORRIS:

23 Q All right. I'm going to cross my fingers and hope that
24 Ms. Canty is on the line, and I would ask her to put up Page
25 57 from Mr. Patrick's deposition transcript.

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1 THE COURT: There it is.

2 MR. MORRIS: There it is. It's like magic. Can we
3 go down to Lines 18 through 20?

4 BY MR. MORRIS:

5 Q Mr. Patrick, during the deposition on Friday, did I ask
6 you this question and did you give me this answer? Question,
7 "Did you want the Court to grant the relief you were seeking?"
8 Answer, "Yes."

9 A I -- and it was qualified with respect to Lines 12 through
10 17. In my view, when I answered yes, I was simply restating
11 what I stated in Line 12. I wanted the District Court to
12 consider this motion as to whether or not Mr. Seery could be
13 named in the original complaint or the amended complaint
14 pursuant to the existing gatekeeper rules and the arguments
15 that were made in that motion. That's -- that's what I
16 wanted. And so then when I was asked, did you want the Court
17 to grant the relief that you were seeking, when I answered
18 yes, it was from that perspective.

19 Q Okay. Thank you very much. If the District Court had
20 granted the relief that you were seeking, you would have
21 authorized the Sbaiti firm to file the amended complaint
22 naming Mr. Seery as a defendant if the Sbaiti firm recommended
23 that you do so. Correct?

24 A If the Sbaiti firm recommended that I do so. That is
25 correct.

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1 Q Okay. Let's talk for a little bit about the line of
2 succession for the DAF and CLO Holdco. Can we please go to
3 Exhibit 25, which is in the other binder? It's in the other
4 binder, sir.

5 (Pause.)

6 Q I guess you could look on the screen or you can look in
7 the binder, whatever's easier for you.

8 A Yeah. I prefer the screen. I prefer the screen.

9 Q Okay.

10 A It's much easier.

11 Q All right. We've got it in both spots. But do you have
12 Exhibit 25 in front of you, sir?

13 A Yes, I do.

14 Q All right. Do you know what it is?

15 A This is the organizational chart depicting a variety of
16 charitable entities as well as entities that are commonly
17 referred to the DAF. However, when I look at this chart, I do
18 not look at and see just boxes, what I see is the humanitarian
19 effort that these boxes represent.

20 MR. MORRIS: Your Honor, may I interrupt?

21 THE COURT: You may.

22 MR. MORRIS: Okay.

23 BY MR. MORRIS:

24 Q I appreciate that, and when your lawyers get up to ask you
25 questions, I bet they'll want to know just what you were about

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1 to tell me. But I just want to understand what this chart is.

2 This chart is the DAF, CLO Holdco, structure chart. Correct?

3 A Correct.

4 Q Okay. And you were personally involved in creating this
5 organizational structure, correct?

6 A I -- yes.

7 Q Okay. And from time to time, the Charitable DAF Holdco
8 Limited distributes cash to the foundations that are above it.
9 Correct?

10 A Correct.

11 Q All right. I want to talk a little bit more specifically
12 about how this happens. The source of the cash distributed by
13 Charitable DAF Holdco Limited is CLO Holdco, Ltd., that
14 entity, the Cayman Islands entity near the bottom. Correct?

15 MR. ANDERSON: Your Honor, I have an objection.
16 Completely irrelevant. I'm objecting on relevance grounds.
17 This has nothing to do with the contempt proceeding. We've
18 already gone over that he authorized the filing of the
19 complaint, that he authorized the filing of the motion to
20 amend. It's all in the record. This is completely irrelevant
21 at this point.

22 THE COURT: Okay. Relevance objection. Your
23 response?

24 MR. MORRIS: I believe that it's relevant to the
25 Debtor's motion to hold Mr. Dondero in contempt for pursuing

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1 claims against Mr. Seery, in violation of the July 7 order. I
2 think an understanding of what the Plaintiffs are, how they're
3 funded, and Mr. Dondero's interest in pursuing claims on
4 behalf of those entities is relevant to the -- to the -- just
5 -- it's just against him. It's not against their clients,
6 frankly. It's just against Mr. Dondero.

7 THE COURT: I overrule.

8 MR. MORRIS: I'll try and -- I'll try and make this
9 quick, though.

10 BY MR. MORRIS:

11 Q CLO Holdco had two primary sources of capital. Is that
12 right?

13 A Two primary sources of capital?

14 Q Let me ask it differently. There was a Charitable
15 Remainder Trust that was going to expire in 2011, correct?

16 A That is correct.

17 Q And that Charitable Remainder Trust had certain CLO equity
18 assets, correct?

19 A Correct.

20 Q And the donor to that Charitable Remainder Trust was
21 Highland Capital Management, LP. Correct?

22 A Not correct. After my deposition, I refreshed my memory.
23 There were two Charitable Remainder Trusts that existed, which
24 I think in my mind caused a little bit of confusion. The
25 Charitable Remainder Trust No. 2, which is the one that

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1 expired in 2011, was originally funded by Mr. Dondero.

2 Q Okay. So, so the Charitable Remainder Trust that we were
3 talking about on Friday wasn't seeded with capital from
4 Highland Capital Management, it came from Mr. Dondero
5 personally?

6 A That is correct.

7 Q Okay. Thank you. And the other primary source of capital
8 was the Dallas Foundation, the entity that's in the upper
9 left-hand corner of the chart. Is that correct?

10 A No.

11 Q The -- you didn't tell me that the other day?

12 A You said -- you're pointing to the Dallas Foundation.
13 That's a 501(c)(3) organization.

14 Q I apologize. Did you tell me the other day that the
15 Dallas Foundation was the second source of capital for HCLO
16 Hold Company?

17 A No, I did not. You --

18 (Pause.)

19 Q Maybe I know the source of the confusion. Is the Highland
20 Dallas Foundation something different?

21 A Yes. On this organizational chart, you'll see that it has
22 an indication, it's a supporting organization.

23 Q Ah, okay. So, so let me restate the question, then. The
24 second primary source of capital for CLO Holdco, Ltd. is the
25 Highland Dallas Foundation. Do I have that right?

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1 A Yes.

2 Q Okay. And the sources of that entity's capital were
3 grantor trusts and possibly Mr. Dondero personally. Correct?

4 A In addition -- per my refreshing my recollection from our
5 deposition, the other Charitable Remainder Trust, I believe
6 Charitable Remainder Trust No. 1, which expired later, also
7 sent a donation, if you will, or assets to -- and I cannot
8 recall specifically whether it was just the Highland Dallas
9 Foundation or the other supporting organizations that you see
10 on this chart.

11 Q But the source of that -- the source of the assets that
12 became the second Charitable Remainder Trust was Highland
13 Capital Management, LP. Is that right?

14 A I think that is accurate from my recollection. And again,
15 I'm talking about Charitable Remainder Trust No. 1.

16 Q Okay. So is it fair to say -- I'm just going to try and
17 summarize, if I can. Is it fair to say that CLO Holdco, Ltd.
18 is the investment arm of the organizational structure on this
19 page?

20 A Yes.

21 Q And is it fair to say that nearly all of the assets that
22 are in there derived from either Mr. Dondero, one of his
23 trusts, or Highland Capital Management, LP?

24 A Yes. It's like the Bill Gates Foundation or the
25 Rockefeller Foundation. These come from the folks that make

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1 their donations and put their name on it.

2 Q Okay.

3 MR. MORRIS: Now, now, Your Honor, I'm going to go
4 back just for a few minutes to how Mr. Scott got appointed,
5 because I think that lays kind of the groundwork for his
6 replacement. It won't take long.

7 THE COURT: Okay. I have a question either --

8 MR. MORRIS: Sure.

9 THE COURT: -- for you or the witness. I'm sorry,
10 but --

11 MR. MORRIS: Sure. Yeah.

12 THE COURT: -- the organizational chart, it's not
13 meant to show everything that might be connected to this
14 substructure, right? Because doesn't CLO Holdco, Ltd. own
15 49.02 percent of HCLOF, --

16 MR. MORRIS: That --

17 THE COURT: -- which gets us into the whole
18 HarbourVest transaction issue?

19 MR. MORRIS: You're exactly right, Your Honor.

20 THE COURT: Okay.

21 MR. MORRIS: But that's just an investment that HCLO
22 Holdco made.

23 THE COURT: Right.

24 MR. MORRIS: Right? And so I -- let me ask the
25 witness, actually.

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1 THE COURT: Okay. Thank you. Thank you.

2 MR. MORRIS: Let me ask the witness. Yeah.

3 THE COURT: I just want my brain --

4 MR. MORRIS: Right.

5 THE COURT: -- to be complete on this chart.

6 BY MR. MORRIS:

7 Q Mr. Patrick, there are three entities under CLO Holdco,
8 Ltd. Do you see that?

9 A Yes.

10 Q And does CLO Holdco, Ltd. own one hundred percent of the
11 interests in each of those three entities?

12 A Yes.

13 Q Do you know why those three entities are depicted on this
14 particular chart? Is it because they're wholly-owned
15 subsidiaries?

16 A Correct.

17 Q Okay. And CLO Holdco, Ltd. has interests in other
18 companies. Isn't that right?

19 A It has other investments. That is correct.

20 Q And the reason that they're not depicted on here is
21 because they're not wholly-owned subsidiaries, they're just
22 investments; is that fair?

23 A That is fair.

24 MR. MORRIS: Does that--?

25 THE COURT: Yes.

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1 MR. MORRIS: Okay.

2 THE COURT: Uh-huh.

3 BY MR. MORRIS:

4 Q So, so let's go back to Mr. Grant for a moment. Mr.
5 Scott, rather. Mr. Dondero was actually the original general
6 partner. If you look at this chart, while it's still up here,
7 you see on the left there's Charitable DAF GP, LLC?

8 A Yes.

9 Q And the Charitable DAF GP, LLC is the general partner of
10 the Charitable DAF Fund, LP. Correct?

11 A Correct.

12 Q And on this chart, Grant Scott was the managing member of
13 Charitable DAF GP, LLC. Right?

14 A Correct.

15 Q Okay. But Mr. Dondero was the original general partner of
16 that entity, correct?

17 A That is correct. But I do want to point out, I just note
18 that the GP interest is indicating a one percent interest and
19 the 99 interest to Charitable DAF Holdco. I believe that's
20 incorrect. It's a hundred percent by Charitable DAF Holdco,
21 Ltd., and the Charitable DAF GP interest is a noneconomic
22 interest. So that should actually reflect a zero percent to
23 the extent it may indicate some sort of profits or otherwise.

24 Q Okay. Thank you for the clarification. Can you turn to
25 Exhibit 26, please, in your binder? And is it your

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1 understanding that that is the amended and restated LLC
2 agreement for the DAF GP, LLC?

3 A Yes.

4 Q Okay. And this was amended and restated effective as of
5 January 1st, 2012, correct?

6 A Yes.

7 Q And if you go to the last page, you'll see there are
8 signatures for Mr. Scott and Mr. Dondero, correct?

9 A Yes.

10 Q And Mr. Dondero is identified as the forming -- former
11 managing member and Mr. Scott is identified as the new
12 managing member. Correct?

13 A Correct. That's what the document says.

14 Q And it's your understanding that Mr. Dondero had the
15 authority to select his successor. Correct?

16 A Correct.

17 Q In fact, it's based on your understanding of documents and
18 your recollection that Mr. Dondero personally selected Mr.
19 Scott as the person he was going to transfer control to,
20 correct?

21 A Upon advice of Highland Capital Management's tax
22 compliance officer, Mr. Tom Surgent.

23 Q What advice did Mr. Surgent give?

24 A He gave advice that, because Mr. Dondero -- and this is
25 what I came to an understanding after the fact of this

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Patrick - Direct

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1 transaction, because I was not a part of it -- that by Mr.
2 Dondero holding that GP interest, that it would be -- the
3 Plaintiffs, if you will, would be an affiliate entity for
4 regulatory purposes, and so he advised that if he -- if Mr.
5 Dondero transferred his GP interest to Mr. Scott, it would no
6 longer be an affiliate, is my recollection.

7 Q Okay. You didn't appoint Mr. Scott, did you?

8 A No.

9 Q That was Mr. Dondero. Is that right?

10 A Yes.

11 Q Okay. Let's go to 2021. Let's come back to the current
12 time. Sometime in February, Mr. Scott called you to ask about
13 the mechanics of how he could resign. Correct?

14 A That is correct.

15 Q But the decision to have you replace Mr. Scott was not
16 made until March 24th, the day you sent an email to Mr. Scott
17 with the transfer documents. Correct?

18 A That is correct.

19 Q And it's your understanding that he could have transferred
20 the management shares and control of the DAF to anyone in the
21 world. Correct?

22 A Correct.

23 Q That's what the docu... that he had the authority under
24 the documentation, as you understood it, to freely trade or
25 transfer the management shares. Correct?

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Patrick - Direct

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1 A Wait. Now, let's be precise here.

2 Q Okay.

3 A Are you talking about the GP interests or the management
4 shares held by Charitable DAF Holdco, Ltd.?

5 Q Let's start with the management shares. Can you explain
6 to the Court what the management shares are?

7 MR. ANDERSON: Your Honor? Hang on one second. Your
8 Honor, I want to object again on relevance. We're going way
9 beyond the scope of the contempt issue, whether or not --

10 MR. MORRIS: This is about control.

11 MR. ANDERSON: -- the motion to amend somehow
12 violated the prior order of this Court. Getting into the
13 management structure, transfer of shares, that's way outside
14 the bounds. I object on relevance.

15 THE COURT: Okay. Relevance objection?

16 MR. MORRIS: Your Honor, they have probably 30
17 documents, maybe 20 documents, on their exhibit list that
18 relate to management and control. I'm asking questions about
19 management and control. Okay? This is important, again, to
20 (a) establish his authority, but (b) the circumstances under
21 which he came to be the purported control person.

22 THE COURT: Okay. Overruled. Go ahead.

23 THE WITNESS: It might be helpful to look at the
24 organizational chart, but if not -- but I'll describe it to
25 you again. With respect to the entity called --

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Patrick - Direct

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1 MR. MORRIS: Hold on one second. Can we put up the
2 organizational chart again, Ms. Canty, if you can? There you
3 go.

4 THE WITNESS: Okay. So with respect to the
5 Charitable DAF Holdco, Ltd., it is my understanding that Mr.
6 Scott, he organized that entity when he was the independent
7 director of the Charitable Remainder Trust, and he caused the
8 issuance of the management shares to be issued to himself.
9 And then those are, again, noneconomic shares, but they are
10 control shares over that entity.

11 And I think, to answer your question, is -- it -- he alone
12 decides who he can transfer those shares to.

13 BY MR. MORRIS:

14 Q Do I have this right, that whoever holds the noneconomic
15 management shares has the sole authority to appoint the
16 representatives for each of the Charitable DAF entities and
17 CLO Holdco? It's kind of a magic ticket, if you will?

18 A It -- I think there's a -- the answer really is no from a
19 legal standpoint, because Charitable DAF Holdco is a limited
20 partner in Charitable DAF Fund, LP, so it does not have
21 authority -- authority under all -- the respective entities
22 underneath that. It could cause a redemption, if you will, of
23 Charitable DAF Fund. And so, really, the authority -- the
24 trickle-down authority that you're referencing is with respect
25 to his holding of the Charitable DAF GP, LLC interest. It's a

Patrick - Direct

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1 member-managed Delaware limited liability company. And from
2 that, he -- that authority kind of trickles down to where he
3 can appoint directorships.

4 Q All right. I think I want to just follow up on that a
5 bit. Which entity is the issuer of the manager shares, the
6 management shares?

7 A Yeah, the -- per the organizational chart, it is accurate,
8 it's the Charitable DAF Holdco, Ltd. which issued the
9 management shares to Mr. Scott.

10 Q Okay. And that's why you have the arrow from Mr. Scott
11 into that entity?

12 A Correct.

13 Q And do those -- does the holder of the management shares
14 have the authority to control the Charitable DAF Holdco, Ltd.?

15 A Yes.

16 Q Okay. And as the control person for the Charitable DAF
17 Holdco, Ltd., they own a hundred -- withdrawn. Charitable DAF
18 Holdco Limited owns a hundred percent of the limited
19 partnership interests of the Charitable DAF Fund, LP.

20 Correct?

21 A Correct.

22 Q And so does the holder of that hundred percent limited
23 partnership interest have the authority to decide who acts on
24 behalf of the Charitable DAF Fund, LP?

25 A I would say no. I mean, you know, just -- I would love to

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Patrick - Direct

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1 read the partnership agreement again. But I, conceptually,
2 what I know with partnerships, I would say the limited partner
3 would not. It would be through the Charitable DAF GP, LLC
4 interest.

5 Q The one on the left, the general partner?

6 A The general partner.

7 Q I see. So when Mr. Scott transferred to you the one
8 hundred percent of the management shares as well as the title
9 of the managing member of the Charitable DAF GP, LLC, did
10 those two events give you the authority to control the
11 entities below it?

12 A Yes.

13 Q Thank you. And so prior to the time that he transferred
14 those interests to you, is it your understanding that Mr.
15 Scott had the unilateral right to transfer those interests to
16 anybody in the world?

17 A Yes.

18 Q Okay. And you have that right today, don't you?

19 A Yes, I do.

20 Q If you wanted, you could transfer it to me, right?

21 A Yes, I could.

22 Q Okay. But of all the people in the world, Mr. Scott
23 decided to transfer the management shares and the managing
24 member title of the DAF GP to you, correct?

25 A Restate that question again?

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Patrick - Direct

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1 Q Of all the people in the world, Mr. Scott decided to
2 transfer it to you, correct?

3 A Yeah. Mr. Scott transferred those interests to me.

4 Q Okay. And you accepted them, right?

5 A Yes.

6 Q You're not getting paid anything for taking on this
7 responsibility, correct?

8 A I am not paid by any of the entities depicted on this
9 chart.

10 Q And Mr. Scott used to get \$5,000 a month, didn't he?

11 A I believe that's what he testified to.

12 Q Yeah. But you don't get anything, right?

13 A Correct.

14 Q In fact, you get the exact same salary and compensation
15 from Skyview that you had before you became the authorized
16 representative of the DAF entities and CLO Holdco. Correct?

17 A Correct.

18 MR. MORRIS: Okay. Your Honor, if I may just take a
19 moment, I may be done.

20 THE COURT: Okay.

21 (Pause.)

22 MR. MORRIS: Your Honor, I have no further questions.

23 THE COURT: All right. Pass the witness. Any
24 examination of the witness?

25 CROSS-EXAMINATION

006116

1 BY MR. ANDERSON:

2 Q Mr. Patrick, I just had a few follow-up questions. When
3 you authorized the filing of the lawsuit against Highland
4 Capital Management, LP, Highland HCF Advisor Limited, and
5 Highland CLO Funding, Limited, when that lawsuit was filed in
6 April of this year, was Mr. Seery included as a defendant?

7 A No.

8 Q Have the two Plaintiffs in that lawsuit, have they
9 commenced any lawsuit against Mr. Seery?

10 A No.

11 Q Have they pursued any lawsuit against Mr. Seery?

12 A No.

13 Q Have they pursued a claim or cause of action against Mr.
14 Seery?

15 A No.

16 Q At most, did the Plaintiffs file a motion for leave to add
17 Mr. Seery as a defendant?

18 MR. MORRIS: Objection, Your Honor. To the extent
19 that any of these questions are legal conclusions, I object.
20 He's using the word pursue. If he's trying -- if he's then
21 going to argue that, But the witness testified that he didn't
22 pursue and that's somehow a finding of fact, I object.

23 THE COURT: Okay. I understand.

24 MR. MORRIS: Yeah.

25 THE COURT: But I overrule. He can answer.

1 MR. MORRIS: That's fine.

2 THE WITNESS: Can you restate the question again?

3 BY MR. ANDERSON:

4 Q Sure. On behalf of the Plaintiffs -- well, strike that.

5 Did the Plaintiffs pursue a claim or cause of action against

6 Mr. Seery?

7 A No.

8 Q At most, did the Plaintiffs file a motion for leave to

9 file an amended complaint regarding Mr. Seery?

10 A Yes. But, again, I viewed the motion as simply asking the

11 Federal District Court whether Mr. Seery could or could not be

12 named in a complaint, and then the next step might be how the

13 Federal District Court might rule with respect to that.

14 Q And we have -- it's Tab 17 in the binders in front of you.

15 That is Plaintiffs' motion for leave. If you could turn to

16 that, please.

17 A Yes. I've got it open.

18 Q Is the Court's July order, the Bankruptcy Court's July

19 order, is it mentioned on the first page and then throughout

20 the motion for leave to amend?

21 A Yes, it is. I see it quoted verbatim on Page 2 under

22 Background.

23 Q Was the Court's order hidden at all from the District

24 Court?

25 A The document speaks for itself. It's very transparent.

Patrick - Cross

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1 Q Was there any effort whatsoever to hide the prior order of
2 the Bankruptcy Court?

3 A No.

4 MR. ANDERSON: Pass the witness.

5 THE COURT: Okay. Other examination?

6 MR. SBAITI: Yes, Your Honor. Just a couple of
7 questions.

8 CROSS-EXAMINATION

9 BY MR. SBAITI:

10 Q Do you mind flipping to Exhibit 25, which I believe is the
11 org chart, the one that you were looking at before?

12 A Okay.

13 Q It'll still be in --

14 A Okay. Yeah.

15 Q -- the defense binder. No reason to swap out right now.

16 A I've got the right binders. Some of them are repeatable
17 exhibits, so --

18 Q Yeah.

19 A -- I have to grab the right binder. Yes.

20 Q As this org chart would sit today, is the only difference
21 that Grant Scott's name would instead be Mark Patrick?

22 A Yes.

23 Q Was there ever a period of time where Jim Dondero's name
24 would sit instead of Grant Scott's name prior?

25 A Yes, originally, when this -- yes.

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1 Q So did Mr. Dondero both have the control shares of the GP,
2 LLC and DAF Holdco Limited?

3 A No, I believe not. I believe he only held the Charitable
4 DAF GP interest and that Mr. Scott at all times held the
5 Charitable DAF Holdco, LTD interest, until he decided to
6 transfer it to me.

7 Q Can you just tell us how Mr. Scott came to hold the
8 control shares of the Charitable DAF Holdco, LTD?

9 A When he was the independent trustee of the Charitable
10 Remainder Trust, he caused that -- the creation of that
11 entity, and that's how he became in receipt of those
12 management shares.

13 Q And does the Charitable DAF GP, LLC have any control over
14 Charitable DAF Fund, LP's actions or activities?

15 A Yes, it does.

16 Q What kind of control is that?

17 A I would describe complete control. It's the managing
18 member of that entity and can -- and effectively owns, you
19 know, the hundred percent interest in the respective
20 subsidiaries, and so the control follows down.

21 Q And when did Mr. Scott replace Mr. Dondero as the GP --
22 managing member of the GP?

23 A Well, I think as the -- and Mr. Morris had shown me with
24 respect to that transfer occurring on March 2012.

25 Q So nine years ago?

Patrick - Cross

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1 A Yes.

2 Q Does Mr. Dondero today exercise any control over the
3 activities of the DAF Charitable -- the Charitable DAF, GP or
4 the Charitable DAF Holdco, LTD?

5 A No.

6 Q Is he a board member of sorts for either of those
7 entities?

8 A No.

9 Q Is he a board members of CLO Holdco?

10 A No.

11 Q Does he have any decision-making authority at CLO Holdco?

12 A None.

13 Q The decision to authorize the lawsuit and the decision to
14 authorize the motion that you've been asked about, who made
15 that authorization?

16 A I did.

17 Q Did you have to ask for anyone's permission?

18 A No.

19 MR. SBAITI: No more questions, Your Honor.

20 THE COURT: Okay. Any -- I guess Mr. Taylor, no.

21 All right. Any redirect?

22 REDIRECT EXAMINATION

23 BY MR. MORRIS:

24 Q Since becoming the authorized representative of the
25 Plaintiffs, have you ever made a decision on behalf of those

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1 entities that Mr. Dondero disagreed with?

2 A I have made decisions that were adverse to Mr. Dondero's
3 financial -- financial decision. I mean, financial interests.
4 Whether he disagreed with them or not, I don't -- he has not
5 communicated them to me. But they have been adverse, at least
6 two very strong instances.

7 Q Have you ever -- have you ever talked to him about making
8 a decision that would be adverse to his interests? Did he
9 tell -- did --

10 A I didn't -- I don't -- I did not discuss with him prior to
11 making the decisions that I made that were adverse to his
12 economic interests.

13 MR. MORRIS: Okay. No further questions, Your Honor.

14 THE COURT: Any further examination? Recross on that
15 redirect?

16 MR. ANDERSON: No further questions.

17 MR. SBAITI: No further questions, Your Honor.

18 MR. ANDERSON: Sorry.

19 THE COURT: Nothing?

20 MR. ANDERSON: I think we're good.

21 THE COURT: Okay. I have one question, Mr. Patrick.
22 My brain sometimes goes in weird directions.

23 EXAMINATION BY THE COURT

24 THE COURT: I'm just curious. What are these Cayman
25 Island entities, charitable organizations formed in the Cayman

1 Islands?

2 THE WITNESS: Yeah. I'll keep it as simple as I can,
3 even though I'm a tax lawyer, so I won't get into the tax
4 rules, but the Cayman structure is modeled after what you
5 typically see in the investment management industry, and so I
6 -- and I won't reference specific entities here with respect
7 to the Highland case, but I think you'll note some
8 similarities, if you think about it. They're -- it's
9 described as an offshore master fund structure where you have
10 a -- and that would be the Charitable DAF Fund that's
11 organized offshore, usually in the Cayman or Bermuda Islands,
12 where the general partner, typically, in the industry, holds
13 the management --

14 THE COURT: Yeah. Let --

15 THE WITNESS: Okay.

16 THE COURT: -- me just stop you. I've seen this
17 enough --

18 THE WITNESS: Yeah, it's

19 THE COURT: -- to know that it happens in the
20 investment world. But in --

21 THE WITNESS: Yeah.

22 THE COURT: You know, usually, I see 501(c)(3), you
23 know, domestically-created entities for charitable purposes,
24 so I'm just curious.

25 THE WITNESS: Yes.

1 THE COURT: Uh-huh.

2 THE WITNESS: The offshore master fund structure
3 typically will have two different types of -- they call it
4 foreign feeder funds. One foreign feeder fund is meant to
5 accommodate foreign investors; the other foreign feeder fund
6 is meant to accommodate U.S. tax-exempt investors.

7 Why, why is it structured that way? In order to avoid
8 something called -- I was trying not to be wonkish -- UBTI.
9 That's, let's see, Un -- Unrelated Trader Business Income. I
10 probably have that slightly wrong. But it's essentially,
11 it's a means to avoid active business income, which includes
12 debt finance income, which is what these CLOs tend to be, that
13 would throw off income that would be taxable normally if the
14 exempts did not go through this foreign blocker, and it
15 converts that UBTI income -- it's called (inaudible) income --
16 into passive income that flows -- that flows up to the
17 charities.

18 And so it's very typical that you'll have a U.S. tax-
19 exempt investor, when they make an investment in a fund,
20 prefer to go through an offshore feeder fund, which is
21 actually Charitable DAF Holdco, LTD. That's essentially what,
22 from a tax perspective, represents as a UBTI blocker entity.
23 And then you have the offshore investments being held offshore
24 because there's a variety of safe harbors where the receipt of
25 interest, the portfolio interest exception, is not taxable.

Patrick - Examination by the Court

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1 The creation of capital gains or losses under the -- they call
2 it the trading, 864(b) trading safe harbor, is not taxable.
3 So that's why you'll find these structures operating offshore
4 to rely on those safe harbor provisions as well as -- as well
5 as what I indicated with respect to the two type blocker
6 entities. It's very typical and industry practice to organize
7 these way. And so when this was set --

8 THE COURT: It's very typical in the charitable world
9 to --

10 THE WITNESS: In the investment management --

11 THE COURT: -- form this way?

12 THE WITNESS: In the investment management world,
13 when you have charitable entities that are taking some
14 exposure to assets that are levered, to set this structure up
15 in this way. It was modeled after -- they just call them
16 offshore master fund structures. They're known as Mickey
17 Mouse structures, where you'll have U.S. investors --

18 THE COURT: Yes. I -- yes, I --

19 THE WITNESS: -- enter through a U.S. partnership,
20 and the foreign investors enter through a blocker.

21 THE COURT: It was really just the charitable aspect
22 of this that I was --

23 THE WITNESS: Yeah. Yeah.

24 THE COURT: -- getting at.

25 THE WITNESS: Yeah. No, but I'm just trying to

1 emphasize if --

2 THE COURT: All right. It's --

3 THE WITNESS: Yeah.

4 THE COURT: -- neither here nor there. All right.

5 MR. SBAITI: Your Honor, may I ask a slightly
6 clarifying leading question on that, because I think I
7 understand what he was trying to say, just for the record?

8 THE COURT: Well, --

9 MR. MORRIS: I object.

10 THE COURT: -- I tell you what. Anyone who wants to
11 ask one follow-up question on the judge's question can do so.
12 Okay? You can go first.

13 MR. SBAITI: I'll approach, Your Honor.

14 THE COURT: Okay.

15 RECROSS-EXAMINATION

16 BY MR. SBAITI:

17 Q Would it be a fair summary of what you were saying a
18 minute ago that the reason the bottom end of that structure is
19 offshore is so that it doesn't get taxed before the money
20 reaches the charities on the U.S. side?

21 A Tax -- it converts the nature of the income that is being
22 thrown off by the investments so that it becomes a tax
23 friendly income to the tax-exempt entity. Passive income.
24 That's --

25 Q So, essentially, --

1 THE COURT: Okay. Okay.

2 MR. SBAITI: -- so it doesn't get taxed before it
3 hits the --

4 THE COURT: I said one question.

5 MR. SBAITI: Sorry, Your Honor.

6 THE COURT: Okay. He answered it.

7 MR. PHILLIPS: And I have one question, Your Honor

8 THE COURT: Okay.

9 MR. PHILLIPS: I don't know if I need to ask this
10 question, but I'd rather not ask you if I need to ask it.

11 THE COURT: Go ahead.

12 MR. PHILLIPS: But if I do, you know, I could --

13 THE COURT: Go ahead.

14 MR. PHILLIPS: Well, okay.

15 RECROSS-EXAMINATION

16 BY MR. PHILLIPS:

17 Q We've talked about the offshore structure. Are the
18 foundations in the top two tiers of the organizational chart
19 offshore entities?

20 A No.

21 Q They're --

22 A They're onshore entities. They're tax-exempt entities.

23 Q Thank you.

24 A The investments are offshore.

25 Q Thank you.

Patrick - Further Redirect

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1 THE COURT: Mr. Morris? One question.

2 FURTHER REDIRECT EXAMINATION

3 BY MR. MORRIS:

4 Q Do you hold yourself out as an expert on the
5 organizational structures in the Caribbean for charitable
6 organizations?

7 A I hold myself out as a tax professional versant on setting
8 up offshore master fund structures. It's sort of a bread-and-
9 butter thing. But there are plenty of people that can testify
10 that this is very typical.

11 Q Uh-huh. Okay.

12 THE COURT: Okay. Thank you.

13 All right. You are excused, Mr. Patrick. I suppose
14 you'll want to stay around. I don't know if you'll
15 potentially be recalled today.

16 (The witness steps down.)

17 THE COURT: All right. We should take a lunch break.
18 I'm going to put this out for a democratic vote. Forty-five
19 minutes? Is that good with everyone?

20 MR. SBAITI: Do we have to leave the building to eat,
21 Your Honor, or is there food in the building?

22 THE COURT: I think --

23 MR. SBAITI: I'm sorry to ask that question, but --

24 THE COURT: Yes. You know what, there used to be a
25 very bad cafeteria, but I think it closed. Right, Mike? So,

006128

1 THE COURT: I guess I'll see you Thursday on the
2 WebEx. Thank you.

3 THE CLERK: All rise.

4 (Proceedings concluded at 6:00 p.m.)

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CERTIFICATE

21 I certify that the foregoing is a correct transcript from
22 the electronic sound recording of the proceedings in the
above-entitled matter.

23 **/s/ Kathy Rehling**

06/09/2021

24

25

Kathy Rehling, CETD-444
Certified Electronic Court Transcriber

Date

006129

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***Special Purpose for Charitable DAF Fund, L.P.
and CLO Holdco, Ltd. with respect to Withdrawal of Reference Motion***

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

In re:	§	Case No. 19-34054-sgj11
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	Chapter 11
	§	
Debtor	§	
	§	
	§	
CHARITABLE DAF FUND, L.P. AND CLO HOLDCO, LTD., DIRECTLY AND DERIVATIVELY	§	
Plaintiff	§	

v.

§ Case No. 21-03067-sgj
§
§
§
§
§
§

HIGHLAND CAPITAL MANAGEMENT,
L.P., HIGHLAND HCF ADVISOR, LTD.,
AND HIGHLAND CLO FUNDING LTD.,
NOMINALLY,
Defendant

**NOTICE OF APPEARANCE OF SPECIAL PURPOSE COUNSEL WITH RESPECT TO
THE RENEWED MOTION TO WITHDRAW THE REFERENCE TO BE HELD ON
JANUARY 25, 2023 AT 1:30 PM**

PLEASE TAKE NOTICE THAT undersigned counsel (“Kelly Hart”) files this *Notice of Appearance as Special Purpose Counsel* with respect to the *Renewed Motion to Withdraw the Reference* [Docket No. 128] (the “Withdrawal of Reference Motion”), which the Court has set for hearing at 1:30 p.m. (Central Time) on January 25, 2023 (the “Hearing”) in the above-styled adversary proceeding (the “Adversary Proceeding”). Kelly Hart’s representation of Plaintiffs in this Adversary Proceeding is for the limited purpose of the Hearing with respect to the Withdrawal of Reference Motion.

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/s/ Louis M. Phillips

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*Special Purpose for Plaintiffs for Withdrawal of
Reference Motion*

CERTIFICATE OF SERVICE

I, undersigned counsel, hereby certify that a true and correct copy of the above and foregoing document and all attachments thereto were sent via electronic mail via the Court's ECF system to all parties authorized to receive electronic notice in this case on this January 25, 2023.

/s/ **Louis M. Phillips**

Louis M. Phillips

BTXN 208 (rev. 07/09)

IN RE: Charitable DAF Fund, LP et
al v. Highland Capital Management,
LP et al

Status Conference: Motion For Withdrawal of
Reference filed by Plaintiff CLO Holdco, Ltd., &
Charitable DAF Fund, LP., **doc. #128**

Case #
21-03067-sgj

DEBTOR

TYPE OF HEARING

Charitable DAF Fund, LP et al

VS

Highland Capital
Management, LP et al

PLAINTIFF / MOVANT

**DEFENDANT /
RESPONDENT**

Louise M. Phillips & Mazin Ahmad
Sbaiti

ATTORNEY

Gregory V. Demo &
John A. Morris

ATTORNEY

EXHIBITS

SEE EXHIBIT LIST

Exhibit #1 – Excerpts from Transcript of hearing on
Application to Employ James P. Seery, Jr.

Exhibit #2 – Highland CLO Funding – Members
Agreement relating to the Company

Exhibit #3 – HarbourVest Settlement Agreement

Exhibit #4 – Order Approving Debtor's Settlement
with HarbourVest

Exhibit #5 – HCLOF Offering

Exhibit #6 – Amended and Restated Investment
Advisory Agreement

Michael Edmond

REPORTED BY

January
25, 2023

HEARING
DATE

Stacey G Jernigan

JUDGE PRESIDING

006133

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*Counsel for Charitable DAF Fund, L.P.
and CLO Holdco, Ltd.*

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

In re:	§	Chapter 11
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	Case No. 19-34054-sgj11
	§	
Debtor.	§	
CHARITABLE DAF FUND, L.P. AND CLO	§	
HOLDCO, LTD., DIRECTLY AND DERIVATIVELY	§	
	§	
Plaintiffs,	§	Adversary Proceeding No.
	§	
vs.	§	21-03067-sgj
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	
HIGHLAND HCF ADVISOR, LTD., AND	§	
HIGHLAND CLO FUNDING LTD., NOMINALLY	§	
	§	
Defendants.	§	
	§	

**PLAINTIFFS' WITNESS AND EXHIBIT LIST REGARDING HEARING ON
HIGHLAND CAPITAL MANAGEMENT, L.P.'S RENEWED MOTION TO DISMISS
COMPLAINT TO BE HELD ON JANUARY 25, 2023**

Plaintiffs submit the following witness and exhibit list regarding Defendant Highland
Capital Management, L.P.'s Renewed Motion to Dismiss Complaint.

WITNESSES:

1. Any witness identified or called by any other party;
2. Any witness for impeachment or rebuttal.

EXHIBITS:

No.	Exhibit	Offered	Admitted
1	Excerpts from Transcript of Hearing on Application to Employ James P. Seery, Jr. on July 14, 2020 (APP_0003 – 0014)		
2	Highland CLO Funding – Members Agreement Relating to the Company (APP_0015 – 0042)		
3	HarbourVest Settlement Agreement (APP_0043 – 0061)		
4	Order Approving Debtor’s Settlement with HarbourVest (APP_0062 – 0084)		
5	HCLOF Offering (APP_0085-0206)		
6	Amended and Restated Investment Advisory Agreement (APP_0207 – 0221)		
7	Transcript of January 14, 2021 hearing		
	All exhibits necessary for impeachment and/or rebuttal purposes.		
	All exhibits identified by or offered by any other party for the hearing on Highland Capital Management, L.P.’s Renewed Motion to Dismiss.		

Dated: January 23, 2023

Respectfully submitted,

SBAITI & COMPANY PLLC

/s/ Mazin A. Sbaiti

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Counsel for Plaintiffs

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In Re:) **Case No. 19-34054-sgj11**
)
)
HIGHLAND CAPITAL) Dallas, Texas
MANAGEMENT, L.P.,) July 14, 2020
) 1:30 p.m. Docket
Debtor.)
) APPLICATIONS TO EMPLOY JAMES
) P. SEERY AND DEVELOPMENT
) SPECIALISTS, INC. (774, 775)
)

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE STACEY G.C. JERNIGAN,
UNITED STATES BANKRUPTCY JUDGE.

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EXHIBIT

1

006136

Seery - Direct

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1 matter as well as financing in distressed matters during that
2 time.

3 In 1999, I went to the business side and I began to manage
4 distressed assets at Lehman Brothers as well as a leverage
5 finance business. That grew into my running the risky finance
6 business as well as the loan business at Lehman globally,
7 which included high-grade loans, high-yield loans, trading and
8 sales of those products, a big part of distressed, all of
9 restructuring, all of asset management, and all of the hedging
10 of the portfolio that we had.

11 From there, I left Lehman with a small group and sold it
12 to Barclay's. I moved on and ran a hedge fund with two former
13 partners of mine who are the founding partners called River
14 Birch Capital. It was a long-short credit fund; mostly
15 credit, though we did structured finance as well, and we also
16 handled some equities.

17 Q Okay. Let's spend a few minutes, as a preview, talking
18 about the Debtor and its business. And let's start with the
19 basics. Is there a way you can summarize the business of the
20 Debtor?

21 A I think, from a high level, the best way to think about
22 the Debtor is that it's a registered investment advisor. As a
23 registered investment advisor, which is really any advisor of
24 third-party money over \$25 million, it has to register with
25 the SEC, and it manages funds in many different ways.

006137

Seery - Direct

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1 The Debtor manages approximately \$200 million current
2 values -- it was more than that at the start of the case -- of
3 its own assets. It doesn't have to be a registered investment
4 advisor for those assets, but it does manage its own assets,
5 which include directly-owned securities; loans from mostly
6 related entities, but not all; and investments in certain
7 funds which it also manages.

8 In addition, the Debtor manages about roughly \$2 billion
9 in -- \$2 billion in total managed assets, around \$2 billion in
10 CLO assets, and then other entities, which are hedge funds or
11 PE style.

12 In addition, the Debtor provides shared services for
13 approximately \$6 billion of assets. Those are assets that are
14 owned by related entities but not owned by Debtor-owned or
15 managed entities. And those are a combination of back office
16 services, which include timely reporting, asset management,
17 legal and compliance support, trading and research support,
18 but not the actual management of the assets.

19 The Debtors run -- and I think the way to think about it
20 is on a functional basis; at least, that's the way I think
21 about it -- and there's really six areas. There's corporate
22 management; finance, accounting and tax; trading and research;
23 private equity and fund investing; compliance and legal; and
24 then structured equity, which really includes all of the CLO
25 businesses.

006138

Seery - Direct

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1 The goals of the Debtor generally are what you'd expect
2 out of an asset manager. A little bit different than most
3 because the Debtor does own assets, which is a little
4 different than when money asset managers typically hold assets
5 away from the asset manager. But number one, discharge
6 Highland's, which I'll call Highland (inaudible), LP, duties
7 to investors in the funds. Those are fiduciary duties under
8 the Investment Advisors Act. Each day, you've got to make
9 sure that you do that first and foremost.

10 Number two, create positive MPD in each of the funds that
11 we manage, either through sales, purchases, or hedging.

12 Next, make sure that we report timely finances of our own
13 assets, including in the funds, but also, to the third-party
14 investors. Maximize the value of HCMLP's owned assets. And
15 then operate as efficiently as possible for the lowest cost.

16 That's essentially how the Debtor -- how we think about
17 the Debtor from a functional perspective. It's got about 70
18 employees laid out in those areas that I mentioned, and each
19 of those employees every day usually think about those goals
20 and try to discharge their duties by focusing on those goals.

21 Q Thank you, Mr. Seery. And can you describe for the Court
22 how those 70 or so employees are organized? Is there an
23 internal corporate structure that you're working with?

24 A Yeah. The way -- the way -- I apologize. The way we
25 think about it is, as I said, corporate management, which is

Seery - Direct

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1 really HR and overseeing the function that it's filling every
2 day, that's been really -- because Mr. Dondero was removed
3 from management. It used to all roll up to him. That's been
4 effectively rolling up to me since February.

5 Finance, accounting, and tax. Each of these businesses
6 every day require certain amounts of liquidity. Each of them
7 have requirements that they have to pay out to investors.
8 Each of them have expenses. And all of them have different
9 kinds of tax either obligations or reporting. Those are
10 managed by Frank Waterhouse as the CFO. (inaudible), sorry.

11 Trading and research. With respect to the assets, they're
12 not -- they're not static assets. Many of them do get traded
13 on a regular basis. A gentleman, Joe Sowin, heads up the
14 trading of the liquid assets. John Povish (phonetic) heads up
15 the research and the trading of the more illiquid assets, but
16 not PE. In addition, we have PE assets that require some
17 management every day, including Board seats. That's a
18 gentleman by the name of Cameron Baynard, and also he will
19 fund investments in that area. J.P. Sevilla is responsible
20 for working with Cameron on those investments and leading that
21 team.

22 Importantly, because of the nature of what the Debtor
23 does, the fiduciary obligations, as well as the
24 responsibilities to each investor and the legal overlay, we
25 have a robust compliance and legal department. That's headed

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Seery - Direct

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1 by Thomas Surgent and Scott Ellington. Scott: more focused
2 on transactional issues with respect to legal. He is actually
3 general counsel. Everything that has do with compliance, the
4 interrelatedness of the funds, trading between funds or
5 positions that are shared across funds, which are many, runs
6 through Thomas Surgent and his team.

7 And finally, structured equity. Sitting on top of the
8 structured finance business that we have, understanding those
9 assets, particularly of two billion-ish assets in CLOs, that's
10 headed by Hunter Covitz.

11 Q Can you describe for the Court your interaction with each
12 of the department heads that you just identified?

13 A Well, depending on the nature of the issue each day, I
14 have at least -- I'd say generally at least weekly contact
15 with most, often daily contact with most. So, for example,
16 when there are trading issues, particularly as the market was
17 extremely volatile with respect to unliquid securities, Joe
18 Sowin and I were on the phone several times a day.

19 Relating to the COVID issues, Brian Collins, who heads the
20 HR group, and I were on the phone several times a day.

21 Relating to structured equity, depending on what's
22 happening with a particular fund or what's happening in loan
23 prices, I speak to Hunter Covitz. And it goes down the line.

24 So it really depends on each of the areas and what's going
25 on in the business, but I try to touch base with each of those

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Seery - Direct

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1 department heads on a regular basis.

2 Frank Waterhouse, of course, is at least weekly. We have
3 a standing call every week to make sure that we're focused on
4 liquidity, which is always a concern in a Chapter 11, and
5 Frank and his team are on that call and prepare weekly
6 materials for us.

7 Q Okay.

8 MR. MORRIS: Your Honor, before I move to the next
9 area of questions, the work of the Board, I just wanted to see
10 if the Court had any questions on the corporate organizational
11 structure, the internal structure of the business, or any of
12 the matters that Mr. Seery touched on?

13 THE COURT: I do not. And I do have in front of me a
14 demonstrative aid that Mr. Annable sent over ahead of time, so
15 I appreciate that as well.

16 MR. MORRIS: Okay. Your Honor, I think Mr. Seery
17 covered much of what's on that document, but if you'd like him
18 to go through that, we're happy to do it.

19 THE COURT: No, that's fine.

20 MR. MORRIS: Okay.

21 BY MR. MORRIS:

22 Q Then let's shift gears a little bit and start talking
23 about the work of the Independent Board itself. The
24 Independent Board was appointed in mid-January; is that right?

25 A Yeah. It was the first -- January 9th, the first week of

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Seery - Direct

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1 January, and we started working that afternoon.

2 Q Okay. Can you describe for the Court what the -- the
3 Board's initial focus? What were you focused on?

4 A Well, if you think about the areas that I just mentioned
5 previously, the Board initially, for lack of a better term,
6 gang-tackled everything. So we tried to make sure that we had
7 a broad base of understanding among the three of us with
8 respect to the business.

9 I, because of my background, had a lot more familiarity
10 with asset management, these type of asset security
11 businesses. But we wanted to make sure that each of us was at
12 least facile with the main areas that we had to understand.
13 First was operations. How does the company run each day?
14 Particularly, how was it going to run without Mr. Dondero?
15 And I went through some of those functional areas and how we
16 thought about those and who head each of those.

17 Next in the -- I don't mean to say it's second, because
18 it's always first, but liquidity. What did the Debtors'
19 liquidity look like? How are we going to manage that
20 liquidity, not just for the near-term, but also for the
21 medium-term, and then even into the slightly longer-term? We
22 had to think about what assets are there, what money those
23 assets might need that we would have to invest in them, and
24 whether there was liquidity in those assets that we can create
25 liquidity in order to fund the Debtors' business.

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Seery - Direct

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1 Personnel, we needed a good opportunity to understand who
2 did what, not just in the senior managers that I mentioned,
3 but deeper into the staff, because we're going to rely on
4 those folks. Particularly worked through with DSI.

5 As I mentioned, the Debtor, unlike a lot of other asset
6 managers, owns a lot of assets. It's a disparate group of
7 assets, but getting a feel and understanding for what those
8 assets were, what the critical issues surrounding those assets
9 are, who managed them day-to-day: We wanted to make sure that
10 each of the directors had a good (inaudible) and understanding
11 of those issues that might arise with respect to those assets,
12 and a good sense of how quickly those issues could, you know,
13 further arise.

14 We also had to get a very good understanding of each of
15 the funds that we manage. As I said, the Investment Advisors
16 Act puts a fiduciary duty on Highland Capital to discharge its
17 duty to the investors. So while we have duties to the estate,
18 we also have duties, as I mentioned in my last testimony, to
19 each of the investors in the funds.

20 Now, some of them are related parties, and those are a
21 little bit easier. Some of them are owned by Highland. But
22 there are third-party investors in these funds who have no
23 relation whatsoever to Highland, and we owe them a fiduciary
24 duty both to manage their assets prudently but also to seek to
25 maximize value. And we wanted to make sure we had a good

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Seery - Direct

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1 understanding of that.

2 Finally, with respect to the shared service arrangements,
3 we needed to get an understanding of that \$6 billion in assets
4 and how our business, HCMLP, worked with those -- those shared
5 service counterparties and exactly who did what for whom.
6 It's very complicated because it had been run much more on a
7 functional basis than on a line basis from each contract. So
8 it's not as if your employees are allocated to NexBank. It's
9 the whole panoply of businesses that we enter into, and
10 providing those services to NexBank, not through a central
11 point but through whatever requests come in from the counter-
12 parties. So we needed a good understanding of what those
13 contracts looked and what those obligations were.

14 A VOICE: John, you're on mute.

15 MR. MORRIS: Thank you.

16 BY MR. MORRIS:

17 Q All of that work was going on in the first weeks of the
18 appointment of the Board?

19 A Yeah, it would not be fair to say we could do that in a
20 couple weeks. So it took far longer than that. But that
21 didn't mean that issues didn't start to arise immediately in
22 February. And so, while we were learning, we were also
23 starting to get a feel for different things that could happen
24 in the company.

25 As in many companies, immediately, one of the first things

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Seery - Direct

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1 you have to deal with is, particularly at the beginning of the
2 year, what does compensation look like; who are the -- what do
3 promotions look like; are you going to be able to hold this
4 team together to service these assets? And yeah, we had that,
5 with an additional wrinkle that Highland's payment structure
6 defers a significant amount of compensation to its employees,
7 and it vests over time, and it has the very typical provision
8 that if you are not there when it vests -- when it is going to
9 be paid, actually, not when it vests. Even if you're vested,
10 if you're not there when it gets paid, you're not entitled to
11 it. And so understanding who was owed what; how the vesting
12 worked; what the compensation structure looked like compared
13 to third parties, was one of the first things we had to do.
14 And Highland has an extremely robust review process. Brian
15 Collins manages it. It's first-rate. It goes through both
16 360 in terms of what other employees think of each other as
17 well as bottoms up, in terms of performance. And then it has
18 a top-down component, which ultimately ran through Mr.
19 Dondero. Since he was effectively removed from that role, the
20 Board had to jump in and get a full understanding with Brian
21 about what the process looked like; how it was going to work;
22 how it compared to other firms; and whether we could go
23 forward with it. And that was one of the motions that was
24 brought early to the Court.
25 A Let's talk a minute about the transactional work that the

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1 yesterday counsel for Mr. Dondero filed a joinder in the
2 Debtors' objection to Acis's claim. So, again, just thinking
3 about this in the context of mediation, I think, with that
4 joinder, they will be a necessary party. So, going back to
5 Mr. Seery's point, this is not just --

6 THE COURT: Oh, absolutely. Mr. Dondero is --

7 MS. PATEL: -- a two-party --

8 THE COURT: -- going to be a required party in
9 mediation. Absolutely. So, --

10 MS. PATEL: Thank you, Your Honor.

11 THE COURT: All right. Well, if there's nothing
12 further, we'll see you on the 21st. And, again, my courtroom
13 deputy may be reaching out before then if we've got things
14 nailed down on mediation.

15 (Proceedings concluded at 4:54 p.m.)

16 --oOo--

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CERTIFICATE

21

22 I certify that the foregoing is a correct transcript to
23 the best of my ability from the electronic sound recording of
24 the proceedings in the above-entitled matter.

25

/s/ Kathy Rehling

07/16/2020

26

27
28 Kathy Rehling, CETD-444
29 Certified Electronic Court Transcriber

Date

Between

CLO HOLDCO, LTD.

And

HARBOURVEST DOVER STREET IX INVESTMENT L.P.

And

HARBOURVEST 2017 GLOBAL AIF L.P.

And

HARBOURVEST 2017 GLOBAL FUND L.P.

And

HV INTERNATIONAL VIII SECONDARY L.P.

And

HARBOURVEST SKEW BASE AIF L.P.

And

HIGHLAND CAPITAL MANAGEMENT, L.P.

And

LEE BLACKWELL PARKER, III

And

QUEST IRA, INC., FBO LEE B. PARKER III, ACCT. # 3058311

And

QUEST IRA, INC., FBO HUNTER COVITZ, ACCT. # 1469811

And

QUEST IRA, INC., FBO JON POGLITSCH, ACCT. # 1470612

And

QUEST IRA, INC., FBO NEIL DESAI, ACCT. # 3059211

And

HIGHLAND CLO FUNDING, LTD.

And

HIGHLAND HCF ADVISOR, LTD.

MEMBERS AGREEMENT RELATING TO THE COMPANY



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THIS AGREEMENT is made the 15th day of November 2017

BETWEEN

- (1) **CLO HOLDCO, LTD.** whose registered office address is at Intertrust Corporate Services (Cayman) Limited, 190 Elgin Avenue, George Town, Grand Cayman KY1-9005, Cayman Islands;
- (2) **HARBOURVEST DOVER IX INVESTMENT L.P.** of c/o HarbourVest Partners, LLC, One Financial Center, 44th Floor, Boston, MA 02111, USA
- (3) **HARBOURVEST 2017 GLOBAL AIF L.P.** of c/o HarbourVest Partners, LLC, One Financial Center, 44th Floor, Boston, MA 02111, USA
- (4) **HARBOURVEST 2017 GLOBAL FUND L.P.** of c/o HarbourVest Partners, LLC, One Financial Center, 44th Floor, Boston, MA 02111, USA
- (5) **HV INTERNATIONAL VIII SECONDARY L.P.** of c/o HarbourVest Partners, LLC, One Financial Center, 44th Floor, Boston, MA 02111, USA
- (6) **HARBOURVEST SKEW BASE AIF L.P.** of c/o HarbourVest Partners, LLC, One Financial Center, 44th Floor, Boston, MA 02111, USA
- (7) **HIGHLAND CAPITAL MANAGEMENT, L.P.** of 300 Crescent Court, Suite 700, Dallas, Texas 75201, USA
- (8) **LEE BLACKWELL PARKER, III** of 300 Crescent Court, Suite 700, Dallas, Texas 75201, USA
- (9) **QUEST IRA, INC., FBO LEE B. PARKER III, ACCT. # 3058311** of 17171 Park Row #100, Houston, Texas 77084, USA
- (10) **QUEST IRA, INC., FBO HUNTER COVITZ, ACCT. # 1469811** of 17171 Park Row #100, Houston, Texas 77084, USA
- (11) **QUEST IRA, INC., FBO JON POGLITSCH, ACCT. # 1470612** of 17171 Park Row #100, Houston, Texas 77084, USA
- (12) **QUEST IRA, INC., FBO NEIL DESAI, ACCT. # 3059211** of 17171 Park Row #100, Houston, Texas 77084, USA

(together the "**Members**") and

- (13) **HIGHLAND CLO FUNDING, LTD.**, with registration number 60120 whose registered office is at First Floor, Dorey Court, Admiral Park, St Peter Port, Guernsey GY1 6HJ, Channel Islands (the "**Company**") and
- (14) **HIGHLAND HCF ADVISOR, LTD.**, whose registered address is at Maples Corporate Services Limited, PO Box 309, Ugland House, Grand Cayman, KY1-1104, Cayman Islands (the "**Portfolio Manager**").

WHEREAS:

- (A) The Company is a limited company incorporated under the laws of the Island of Guernsey on 30 March 2015.
- (B) The Company has been established to provide its investors with exposure to CLO Notes on both a direct basis and indirect basis and senior secured loans on an indirect basis, through the use of the investments described in its investment policy as set forth in the Offering Memorandum dated 15 November 2017, the (the "**Offering Memorandum**"), subject to the restrictions set forth therein.

- (C) The Members are the owners of the entire issued capital of the Company.
- (D) The Parties are entering into this Agreement to regulate the relationship between them and the operation and management of the Company.

OPERATIVE PROVISIONS

1. INTERPRETATION

In this Agreement, including the Schedule:

- 1.1 the following words and expressions shall have the following meanings, unless they are inconsistent with the context:

"Adherence Agreement" means the agreement under which a person agrees to be bound by the terms of this Agreement in the form substantially similar as set out in the Schedule;

"Advisers Act" shall mean the U.S. Investment Advisers Act of 1940, as amended from time to time, and the rules and regulations of the U.S. Securities and Exchange Commission promulgated thereunder;

"Affiliate" means, with respect to a person, (i) any other person who, directly or indirectly, is in control of, or controlled by, or is under common control with, such person or (ii) any other person who is a director, officer or employee (a) of such person, (b) of any subsidiary or parent company of such person or (c) of any person described in clause (i) above. For the purposes of this definition, control of a person shall mean the power, direct or indirect, (i) to vote more than 50% of the securities having ordinary voting power for the election of directors of such persons or (ii) to direct or cause the direction of the management and policies of such person whether by contract or otherwise. For purposes of this definition, the management of an account by one person for the benefit of any other person shall not constitute "control" of such other person and no entity shall be deemed an "Affiliate" of the Company solely because the administrator or its Affiliates serve as administrator or share trustee for such entity;

"Agreement" means this agreement together with the Schedule;

"Articles" means the articles of incorporation of the Company as amended from time to time;

"Business" means the business of the Company as described in Recital (B);

"Business Day" means a day (other than a Saturday or Sunday) on which banks are open for ordinary banking business in Guernsey;

"Directors" means the directors of the Company from time to time;

"CLO Holdco" means CLO Holdco, Ltd. (or any permitted successor to the business of CLO Holdco, Ltd. or interest in the Company);

"Code" shall mean the U.S. Internal Revenue Code of 1986, as amended from time to time.

"Directors" means the directors of the Company from time to time;

"Dover IX" means HarbourVest Dover Street IX Investment L.P. (or any permitted successor to the business of HarbourVest Dover Street IX Investment L.P. or any interest in the Company);

"DOL" shall mean the U.S. Department of Labor, or any governmental agency that succeeds to the powers and functions thereof.

"DOL Regulations" shall mean the regulations of the DOL included within 29 C.F.R. section 2510.3-101.

"Dover IX" shall mean HarbourVest Dover Street IX Investment L.P. (or any permitted successor to the business of HarbourVest Dover Street IX Investment L.P. or interest in the Company);

"ERISA" shall mean the U.S. Employee Retirement Income Security Act of 1974, as amended from time to time;

"ERISA Member" shall mean a Member that (a) is a "benefit plan investor" (as such term is defined in the DOL Regulations as modified by section 3(42) of ERISA) subject to the fiduciary responsibility provisions of part 4 of title I of ERISA or is a "plan" (as such term is defined in section 4975(e) of the Code) subject to section 4975 of the Code or (b) is designated as an ERISA Member by the General Partner in writing on or before the date at which such ERISA Member is admitted to the Company;

"HarbourVest Entities" means: Dover IX; HarbourVest 2017 Global AIF L.P.; HarbourVest 2017 Global Fund L.P.; HV International VIII Secondary L.P.; and HarbourVest Skew Base AIF L.P. (or any of their respective permitted successors to their businesses or interests in the Company);

"Highland Principals" means: Highland Capital Management, L.P.; Lee Blackwell Parker, III, Quest IRA, Inc., fbo Lee B. Parker III Acct. # 3058311; Quest IRA, Inc., fbo Hunter Covitz Acct. # 1469811; Quest IRA, Inc., fbo Jon Poglitsch Acct. # 1470612; Quest IRA, Inc., fbo Neil Desai Acct. # 3059211 (or any of their respective permitted successors to their businesses or interests in the Company);

"Law" means the Companies (Guernsey) Law, 2008, as amended;

"Member" means a person whose name is from time to time entered in the register of members of the Company as the holder of shares in the Company;

"Parties" means the parties to this Agreement and any other person who agrees to be bound by the terms of this Agreement under an Adherence Agreement;

"Shares" means ordinary shares in the Company;

"Subsidiary" shall have the meaning ascribed to it in the Law;

"Subscription and Transfer Agreement" means the Subscription and Transfer Agreement, dated as of 15 November 2017, entered into by and among CLO HoldCo, Ltd. and each of the Members and acknowledged and agreed by the Company and the Portfolio Manager.

Any capitalized terms used herein without definition have the meanings specified in the Offering Memorandum.

- 1.2 any reference to the Parties being obliged to procure shall so far as they are able includes, without limitation, procuring by the exercise of votes which they directly or indirectly control at meetings of the Directors or general meetings of the Company;
- 1.3 any reference to a person includes, where appropriate, that person's heirs, personal representatives and successors;
- 1.4 any reference to a person includes any individual, body corporate, corporation, firm, unincorporated association, organisation, trust or partnership;
- 1.5 any reference to time shall be to Guernsey time;
- 1.6 except where the context otherwise requires words denoting the singular include the plural and vice versa and words denoting any one gender include all genders;

1.7 unless otherwise stated, a reference to a Clause or a Schedule is a reference to a Clause or a Schedule to this Agreement; and

1.8 Clause headings are for ease of reference only and do not affect the construction of any provision.

2. THE BUSINESS OF THE COMPANY

2.1 The Parties hereby agree that the objects and purpose of the Company shall be to carry on the Business.

2.2 The Parties shall so far as they are able (including without limitation by the exercise of votes which they directly or indirectly control at meetings of the Directors or general meetings of the Company) procure that (i) the Company's principal activities shall be the pursuit of the objects and purposes described in Clause 2.1 conducted in accordance with the provisions hereof and with the Offering Memorandum, the Subscription and Transfer Agreement and Articles of the Company and (ii) the Parties shall not take any action inconsistent with the provisions of the Offering Memorandum, including, without limitation the investment strategy set forth in the "Summary" and the applicable restrictions during and after the Investment Period and the suspension or termination of the Investment Period following a Key Person Event.

2.3 The Members shall (so long as they hold shares in the capital of the Company) use all reasonable endeavours to promote and develop the Business of the Company.

3. VOTING RIGHTS

3.1 The Parties agree that the following provisions of this Clause 3 shall apply during such period or periods as the Members parties hereto are Members.

3.2 The Parties shall procure that the Company shall not take any action at any meeting requiring the sanction of an ordinary or special resolution or by written resolution, in each case of the Directors or of the Members, without the affirmative vote or prior written consent, as applicable, of the Members totalling in the aggregate more than seventy-five percent (75%) of the Company, including, but not limited to, the following actions:

3.2.1 any issuance of new shares of the Company or a new class of shares of the Company or payment of any dividend by issuance of new shares of the Company, other than issuances of Shares pursuant to the Offering Memorandum and the Subscription and Transfer Agreement;

3.2.2 any alteration or cancellation of any rights of any Shares or of the Share capital of the Company,

3.2.3 any conversion or redemption of Shares, except pursuant to Clause 5.5,

3.2.4 any payment of commission in consideration for subscribing or agreeing to subscribe for any shares in the Company,

3.2.5 the creation of any lien on any Shares, except pursuant to the remedies in Clause 5.3. or

3.2.6 the suspension of the calculation of the NAV; other than a temporary suspension of the calculation of the NAV and NAV per Share by the Board of Directors during any period if it determines in good faith that such a suspension is warranted by extraordinary circumstances, including: (i) during any period when any market on which the Company's investments are quoted, traded or dealt in is closed, other than for ordinary holidays and weekends, or during periods in which dealings are restricted or suspended; (ii) during the existence of any state of affairs, including as a result of political, economic, military or monetary events or any circumstances outside the control of the Portfolio Manager or the Company, as a result of which,

in the reasonable opinion of the Portfolio Manager, the determination of the value of the assets of the Company, would not be reasonably practicable or would be seriously prejudicial to the Members taken as a whole; (iii) during any breakdown in the means of communication normally employed in determining the price or value of the Company's assets or liabilities, or of current prices in any market as aforesaid, or when for any other reason the prices or values of any assets or liabilities of the Company cannot reasonably be accurately ascertained within a reasonable time frame; (iv) during any period when the transfer of funds involved in the realization or acquisition of any investments cannot, in the reasonable opinion of the Portfolio Manager, be effected at normal rates of exchange; or (v) automatically upon liquidation of the Company.

4. **ADVISORY BOARD.**

- 4.1 **Composition of Advisory Board.** The Company shall establish an advisory board (the "**Advisory Board**") composed of two individuals, one of whom shall be a representative of CLO Holdco and one of whom shall be a representative of Dover IX (or, in each case, or any permitted successor to the interest in the Company of such Member). No voting member of the Advisory Board shall be a controlled Affiliate of the Portfolio Manager (including, for the avoidance of doubt, following a permitted transfer of CLO Holdco's interest to an Affiliate of the Portfolio Manager, if applicable), it being understood that for the purposes of this sentence none of CLO Holdco, its wholly-owned subsidiaries nor any of their respective directors or trustees shall be deemed to be a controlled Affiliate of the Portfolio Manager due to their pre-existing non-discretionary advisory relationship with the Portfolio Manager. None of the members of the Advisory Board shall receive any compensation (other than reimbursement for reasonable and documented out-of-pocket expenses) in connection with their position on the Advisory Board. The Company shall bear any fees, costs and expenses related to the Advisory Board.
- 4.2 **Meetings of Advisory Board; Written Consents.** The Advisory Board shall meet with the Portfolio Manager at such times as requested by the Portfolio Manager from time to time. The quorum for a meeting of the Advisory Board shall be all of its members entitled to vote. All actions taken by the Advisory Board shall be (i) by a unanimous vote of all of the members of the Advisory Board in attendance in a meeting at which a quorum is present and entitled to vote and not abstaining from voting or (ii) by a written consent in lieu of a meeting signed by all of the members of the Advisory Board entitled to consent and not abstaining from consenting. Meetings of the Advisory Board may be held in person, by telephone or by other electronic device.
- 4.3 **Functions of Advisory Board.** The Advisory Board shall provide (or determine not to provide) any consents or approvals expressly contemplated by this Agreement and the Offering Memorandum to be provided by the Advisory Board and, at the request of the Portfolio Manager in its sole discretion, provide general advice (which, for the avoidance of doubt, shall be non-binding) to the Portfolio Manager or the Company with regard to Company activities and operations and other matters. For the avoidance of doubt, no consent or approval of the Advisory Board shall be required for any action or determination expressly permitted or contemplated hereunder or in the Offering Memorandum and not conditioned on such a consent or approval. The Portfolio Manager shall not act contrary to the advice of the Advisory Board with respect to any action or determination expressly conditioned herein or in the Offering Memorandum on the consent or approval of the Advisory Board. Without limiting the foregoing, the Advisory Board shall be authorized to give any approval or consent required or deemed necessary or advisable under the Advisers Act on behalf of the Company and the Members, including under Section 206(3) of the Advisers Act. The Portfolio Manager may from time to time in its discretion request the Advisory Board to review and ratify certain Company matters. The consent of the Advisory Board shall be required to approve the following actions: (i) any extension of the Investment Period; (ii) any extension of the Term (other than an automatic extension following an extension of the Investment Period that has been approved by the Advisory Board); (iii) any allotment of additional equity securities by the Company; and (iv) any investment in a Related Obligation or any other transaction between the Company or any entity in which the Company holds a direct or indirect interest, on the one hand, and Highland or any of its Affiliates, on the other hand and (v) other matters as set forth in the Offering

Memorandum. Notwithstanding the foregoing or anything to the contrary set forth herein, no transaction that is specifically authorized in the governing documents of the Company shall require approval of the Advisory Board, including, without limitation, sales or securitizations of all or a portion of the Company's loan portfolio into new Qualifying CLOs (i.e. the transfer of warehoused assets into new Qualifying CLOs), investments in CLO Notes issued by CLOs managed by Highland Affiliates, and the NexBank Credit Facility and any Permitted NexBank Credit Facility Amendments, in each case as described in the Offering Memorandum. Any such approval, consent or ratification given by the Advisory Board shall be binding on the Company and the Members. Neither the Advisory Board nor any member thereof shall have the power to bind or act for or on behalf of the Company in any manner, and no shareholder who appoints a member of the Advisory Board shall be deemed to be an Affiliate of the Company or Highland solely by reason of such appointment.

- 4.4 Term of Members of Advisory Board. A member of the Advisory Board shall be deemed removed from the Advisory Board (i) if such member is no longer an officer, director, manager, trustee, employee, consultant or other representative of CLO Holdco or Dover IX, as applicable, or their respective Affiliates and shall be replaced as soon as practicable with a representative of CLO Holdco or Dover IX, or their respective Affiliates, as applicable, or (ii) if the Member represented by such member either becomes a Defaulting Member or such member ceases to be eligible to represent such Member pursuant to Clause 4.1.
- 4.5 No Duties to Other Members. No Advisory Board member who is the representative of any Member shall, to the extent permitted by law, owe a fiduciary duty to the Company or any other Member (other than the duty to act in good faith), and may, to the fullest extent permitted by law, in all instances act in such member's own interest and in the interest of the Member that appointed such member.

5. **DEFAULTING MEMBERS**

- 5.1 In the event any Member defaults in its obligation to pay the full amount of the purchase price of Shares called for settlement under the Subscription and Transfer Agreement on the applicable Settlement Date (such unpaid amount, an "**Outstanding Settlement Amount**"), the Portfolio Manager, on behalf of the Company, shall provide written or telephonic notice of such default to such Member. If such default is not cured within 5 business days after written (or if applicable telephonic or email) notice thereof given by the Portfolio Manager, on behalf of the Company, has been received by such Member, such Outstanding Settlement Amount shall automatically accrue interest on a retroactive basis from the date such Outstanding Settlement Amount was due at 12% (the "**Default Interest Rate**") (which interest, once paid, shall not be applied to the purchase of the unsettled Shares of such Member, but which will upon receipt be distributed pro rata to those Members who have funded any such Outstanding Settlement Amounts pursuant to this Clause 5). No such Shares which have failed to be settled will be issued to any Member until settlement of the full amount of the purchase price has been made. In addition, if such default is not cured within 10 business days after written or telephonic notice thereof given by the Portfolio Manager, on behalf of the Company, has been received by such Member (a "**Defaulting Member**"), the following provisions shall apply:
 - 5.2 Whenever the vote or consent of the Defaulting Member would otherwise be required or permitted hereunder or under the Articles, the Defaulting Member shall not be entitled to participate in such vote or consent in respect of his existing shareholding and with respect to any representative of such Defaulting Member on the Advisory Board, and such vote or consent shall be calculated as if such Defaulting Member were not a Member and, as applicable, any representative of such Defaulting Member on the Advisory Board were not a member of the Advisory Board.
 - 5.3 The Portfolio Manager, on behalf of the Company, may pursue and enforce all rights and remedies available, including the commencement of legal proceedings against the Defaulting Member to collect the Outstanding Settlement Amounts, together with interest thereon for the account of the Company from the date due at the Default Interest Rate, plus the costs and expenses of collection (including attorneys' fees and expenses).

- 5.4 The Portfolio Manager, on behalf of the Company, may (at the sole cost of the Defaulting Member) borrow funds from any person (other than the Defaulting Member or its Affiliates) to cover such shortfall and/or advance all or a portion of the Defaulting Member's Outstanding Settlement Amount to the Company on behalf of the Defaulting Member, and such advance shall be repaid by the Defaulting Member to the Portfolio Manager, on behalf of the Company, with interest for the account of the Portfolio Manager, on behalf of the Company, on the amount outstanding from time to time commencing on the date of the advance at the Default Interest Rate. To the extent the Portfolio Manager, on behalf of the Company, advances funds to the Company on behalf of a Defaulting Member, all distributions from the Company that would otherwise be made to the Defaulting Member shall be paid to the Portfolio Manager, on behalf of the Company, (with any such amounts being applied first against accrued but unpaid interest and then against principal), until all amounts payable by the Defaulting Member to the Portfolio Manager, on behalf of the Company, under this Clause 5.4 (including interest) have been paid in full.
- 5.5 The Portfolio Manager, on behalf of the Company, may elect, upon notice to the Defaulting Member, to redeem the Defaulting Member's shares in an amount equal to 50% of the outstanding amount existing as of the date of the default at a price of \$0.0001 per Share. Thereupon, the commitment of the Defaulting Member under the Subscription and Transfer Agreement shall be zero, the Defaulting Member shall not be obligated to make any further settlements, the voting capital of such Defaulting Member and of each other Member shall be re-determined as of the date of such default to reflect the new commitment of the Defaulting Member, and the Portfolio Manager shall revise the books and records of the Company to reflect the reduction of the commitment of the Defaulting Member. The Members agree (x) that the damages suffered by the Company as the result of a failure by a Member to settle a commitment to purchase Shares that is required by this Agreement cannot be estimated with reasonable accuracy and (y) that the foregoing provisions of this Clause 5.5 shall act as liquidated damages for the default by the Defaulting Member (which each Member hereby agrees are reasonable).
- 5.6 The Board may offer to the non-Defaulting Members (pro rata in accordance with their respective Commitments) the option of purchasing the Defaulting Member's unsettled Shares on the terms set forth in the applicable Settlement Notice (as defined in the Subscription and Transfer Agreement).
- 5.7 At the election of the Board, distributions of dividends otherwise payable to the Defaulting Member under the Articles shall not be paid to the Defaulting Member, but instead shall be applied against the amount of the Outstanding Settlement Amount (plus interest at the Default Interest Rate and related costs); provided that any amounts so applied shall be deemed to have been distributed to the Defaulting Member under the Articles.
- 5.8 The Portfolio Manager may send an amended or new Settlement Notice to the Members other than the Defaulting Member in an amount equal to the Defaulting Member's Outstanding Settlement Amount and otherwise in accordance with the Subscription and Transfer Agreement.
- 5.9 Each Defaulting Member further appoints the Portfolio Manager as agent and attorney-in-fact for the Defaulting Member and hereby grants to the Portfolio Manager an irrevocable power of attorney to take all actions necessary on its behalf to sell, assign, or transfer the commitment to purchase unsettled Shares of such Defaulting Member pursuant to Clause 5.6 or as necessary on its behalf to effect the other remedies or rights set forth in this Clause 5; provided that the Portfolio Manager shall not bind any Defaulting Member to an indemnification or other similar obligation which guarantees the financial performance of the Company or which exceeds the ability of the Defaulting Member to provide indemnification under applicable law.

6. TRANSFERS OR DISPOSALS OF SHARES

- 6.1 No Member shall sell, pledge, charge, mortgage, assign, assign by way of security, transfer, convey, exchange or otherwise dispose of its Shares or its commitment to settle purchases of Shares under the Subscription and Transfer Agreement (each a "**Transfer**"), other than to an Affiliate of an initial Member party hereto, without the prior written consent of the Portfolio

- Manager, which consent shall be in the sole discretion of the Portfolio Manager; provided that no such Transfer shall be made unless in the opinion of counsel reasonably satisfactory to the Portfolio Manager (who may be counsel for the Company, and which requirement for an opinion may be waived, in whole or in part, in the sole discretion of the Portfolio Manager) that:
- 6.1.1 such Transfer would not require registration under the Securities Act or any state securities or "Blue Sky" laws or other laws applicable to the Shares to be assigned or transferred and is conducted in conformance with the restrictions set forth in the Offering Memorandum;
 - 6.1.2 such Transfer would not be reasonably likely to cause the Company to be subject to tax in any jurisdiction other than of its incorporation on a net income basis, not be reasonably likely to cause the Company to become subject to registration as an investment company under the Investment Company Act of 1940, as amended;
 - 6.1.3 such Transfer would not cause the Company to be considered to be an entity whose underlying assets are considered to include "plan assets" by reason of investment by an "employee benefit plan" or "plan" in such entity pursuant to the U.S. Plan Assets Regulations; and
 - 6.1.4 such sale, assignment, disposition or transfer would not cause all or any portion of the assets of the Company to constitute "plan assets" under ERISA or the Code.
- 6.2 Prior to making any Transfer of Shares (other than Transfers to Affiliates of an initial Member or, in the case of CLO Holdco or a Highland Principal, to Highland, its Affiliates or another Highland Principal) a Member must first offer to the other Members a right to purchase the Shares, on a pro rata basis with respect to their current Shares, at the same price (which must be cash) as such Shares are proposed to be purchased by the prospective third party purchaser pursuant to an irrevocable offer letter. The other Members will have 30 days following receipt of the letter to determine whether to purchase their entire pro rata portion of the Shares proposed to be Transferred. If the other Members do not accept the offer, the Member may (subject to complying with the other Transfer restrictions in this Agreement) Transfer the applicable Shares that such Members have not elected to purchase to a third party at a price equal to or greater than the price described in the offer letter, provided that if the Member has not (a) entered into a definitive agreement to effect such sale within 90 days after the expiration of the period that the other Members have to accept the offer in the offer letter or (b) consummated the sale within 120 day after the entry into the definitive agreement to consummate the sale, it must comply with these right of first refusal procedures again. Any Member (other than the Member proposing to Transfer its Shares) may assign its right to purchase its pro rata portion of the Shares to any other Member (subject to complying with the other Transfer restrictions in this Agreement), any initial Member (other than the Member proposing to Transfer its Shares) may assign its right to purchase its pro rata portion of the Shares to an Affiliate (subject to complying with the other Transfer restrictions in this Agreement), and CLO Holdco and the Highland Principals (unless such Member is the Member proposing the Transfer its Shares) may assign its right to purchase its pro rata portion of the Shares to Highland, an Affiliate of Highland or other Highland Principals (subject to complying with the other Transfer restrictions in this Agreement).
- 6.3 No Highland Principal may transfer his or its interests in the Company other than (i) to a trust or other tax or estate planning vehicle or (ii) to the Portfolio Manager, its Affiliates or another Highland Principal upon the termination of such Highland Principal's (or the beneficial owner of such Highland Principal, if applicable) employment by Highland Capital Management, L.P.
- 6.4 Any transferor of any Share shall remain bound by the terms of this Agreement applicable to it prior to such transfer and that nothing in this Agreement shall constitute a waiver of any rights a Party to this Agreement may have by reason of a breach of this Agreement by a transferor prior to transfer. The transferor and/or the transferee shall bear all costs of any Transfer.
- 6.5 The Parties agree not to Transfer their Shares to any person unless such transferee agrees to be bound by the terms of this Agreement.
- 6.6 All Adherence Agreements executed pursuant to this Clause shall be executed by the transferee or allottee and each Party.

7. **CONFIDENTIALITY**

- 7.1 Each Party agrees to keep any information received by it pursuant to this Agreement or relating to the Business as confidential and not (save with the relevant Party's consent or as may be required by Law or the rules of any regulatory authority or any stock exchange) disclose to any person such information.
- 7.2 Notwithstanding the foregoing, the Parties agree that the HarbourVest Entities may disclose to their limited partners and prospective limited partners (including any agents of such limited partners or prospective limited partners), clients and applicable governmental agencies (a) the name and address of the Company, (b) the capital commitment and the remaining capital commitment, (c) the net asset value of such HarbourVest Entity's interest in the Company, (d) the amount of distributions that have been made to such HarbourVest Entity by the Company and the amount of contributions that have been made by such HarbourVest Entity to the Company, (e) such ratios and performance information calculated by such HarbourVest Entity using the information in clauses (a) through (d) above, including the ratio of net asset value plus distributions to contributions (i.e., the "multiple") and such HarbourVest Entity's internal rate of return with respect to its investment in the Company, and (f) tax information with respect to the Company.

8. **DIVIDENDS**

- 8.1 The Company agrees that it shall not, and the Portfolio Manager agrees it shall not cause the Company to, make any dividends except pursuant to the section titled "Summary—Dividend Policy" of the Offering Memorandum.

9. **TERM OF THE COMPANY**

- 9.1 Each Party agrees to cause the winding up and dissolution of the Company after the ten year anniversary of the date hereof (the "**Term**"); provided that the Portfolio Manager, in its reasonable discretion, may postpone dissolution of the Company for up to 180 days in order to facilitate orderly liquidation of the investments; provided, further, that the Term shall be automatically extended for any amount of time for which the Investment Period may be extended.
- 9.2 Notwithstanding the foregoing, the Term may be extended with the consent of the Portfolio Manager and the Advisory Board for up to two successive periods of one year each.

10. **ERISA MATTERS**

- 10.1 The Portfolio Manager, the Company and each Member shall use their reasonable best efforts to conduct the affairs and operations of the Company so as to limit investment in the Company by "benefit plan investors" (within the meaning of the DOL Regulations as modified by section 3(42) of ERISA) to less than the U.S. Plan Threshold. In the event the U.S. Plan Threshold is met or exceeded, the Portfolio Manager, on behalf of the Company, may require any Non-Qualified Holder that is a U.S. Plan Investor to sell or transfer their Shares to a person qualified to own the same that is not a U.S. Plan Investor within 30 days and within such 30 days and to provide the Company with satisfactory evidence of such sale or transfer such that such sale or transfer, together with other sale or transfers pursuant to this Clause, would result in the investment in the Company by "benefit plan investors" (within the meaning of the DOL Regulations as modified by section 3(42) of ERISA) to be less than the U.S. Plan Threshold. Where the conditions above are not satisfied within 30 days after the serving of the notice to transfer, such Non-Qualified Holder will be deemed, upon the expiration of such 30 days, to have forfeited their Shares.

11. **TAX MATTERS**

- 11.1 PFIC. For each fiscal year of the Company, the Company will no later than 120 days after the end of such fiscal year, commencing with the first fiscal year for which the Company is determined to be a PFIC (a "passive foreign investment company"), furnish to each of the

HarbourVest Entities (x) all information necessary to permit such HarbourVest Entity or any of its partners to complete United States Internal Revenue Service Form 8621 with respect to their interests in the Company and (y) a PFIC Annual Information Statement under section 1295(b) of the Code with respect to the Company; provided that if the Company is unable to furnish such final information and Statement within such 120 days, then the Company shall use its reasonable best efforts to furnish estimates of such information and Statement on or before the 120th day after the end of such fiscal year.

- 11.2 CFC. The Company shall furnish to each of the HarbourVest Entities within 120 days after the end of each fiscal year of the Company, a United States Internal Revenue Service Form 5471 for such fiscal year, completed for all information concerning the Company required to be filed by such HarbourVest Entity or any of its partners (i.e., all portions applicable to the relevant category of filer other than page 1 items A-D and page 2 Schedule B), to the extent such Form 5471 is required to be filed by such HarbourVest Entity or any of its partners; provided that if the Company is unable to furnish such final information within such 120 days, then the Company shall use its reasonable best efforts to furnish estimates of such information on or before the 120th day after the end of each fiscal year.
- 11.3 Other Tax Information. The Company shall furnish to each of the HarbourVest Entities (a) within 120 days after the end of each fiscal year of the Company such other information reasonably requested by the HarbourVest Entities that any HarbourVest Entity may require in order for it or any of its partners to comply with its U.S. federal income tax reporting obligations with respect to its interest in the Company; provided that if the Company is unable to furnish such final information within such 120 days, then the Company shall use its reasonable best efforts to furnish estimates of such information on or before the 120th day after the end of such fiscal year and (b) promptly upon request such other information reasonably requested by such HarbourVest Entity in order to withhold tax or to file tax returns and reports or to furnish tax information to any of its partners with respect to the Company.
- 11.4 Withholding and Other Taxes. The Company will use reasonable best efforts to acquire investments that will not result in withholding or other taxes being imposed directly or indirectly on the Company by any jurisdiction with respect to income or distributions from such investments.

12. **AMENDMENTS TO CERTAIN AGREEMENTS**

- 12.1 The Portfolio Manager and the Company shall not amend or terminate, or agree to amend or terminate, the Memorandum or Articles of Incorporation of the Company or that certain Portfolio Management Agreement between the Portfolio Manager and the Company dated as of the date hereof (the "**Management Agreement**") without the consent of the Parties.
- 12.2 The Portfolio Manager agrees that it shall not assign its rights, duties and obligations under the Management Agreement without the consent of the Members totalling in the aggregate more than seventy-five percent (75%) of the Company. Notwithstanding the foregoing, the Portfolio Manager may, without the consent of the Members, assign any of its rights or obligations under the Management Agreement to an Affiliate; provided that such Affiliate (A) has demonstrated ability, whether as an entity or by its personnel, to professionally and competently perform duties similar to those imposed upon the Portfolio Manager pursuant to the Management Agreement, (B) has the legal right and capacity to act as Portfolio Manager thereunder and (C) shall not cause the Company or the pool of collateral to become required to register under the provisions of the Investment Company Act and such action does not cause the company to be subject to tax in any jurisdiction outside of its jurisdiction of incorporation.
- 12.3 The Company agrees that it shall not hire any portfolio manager without the consent of the Parties and such new portfolio manager shall be required to join and abide by this Agreement.

13. **FINANCIAL REPORTS**

- 13.1 The books and records of account of the Company shall be audited as of the end of each fiscal year of the Company by a nationally recognized independent public accounting firm selected by

the Portfolio Manager that is registered with, and subject to regular inspection as of the commencement of the professional engagement period, and as of each calendar year-end, by, the Public Company Accounting Oversight Board in accordance with its rules. During the Term, the Portfolio Manager or the Company shall prepare and mail, deliver by fax, email or other electronic means or otherwise make available a financial report (audited in the case of a report sent as of the end of a fiscal year and unaudited in the case of a report sent as of the end of a quarter) to each Member on or before the 120th day after the end of each fiscal year and the 45th day after the end of each of the first three quarters of each fiscal year, setting forth for such fiscal year or quarter (a) the assets and liabilities of the Company as of the end of such fiscal year or quarter; (b) the net profit or net loss of the Company for such fiscal year or quarter; and (c) such Member's closing capital account balance as of the end of such fiscal year or quarter; provided that if the Portfolio Manager or the Company is unable to furnish final information with respect to any of the above, then the Portfolio Manager or the Company shall use its reasonable best efforts to furnish estimates of such information on or before the 120th day after the end of each fiscal year and the 45th day after the end of the first three quarters of each fiscal year. On or before the 60th day after the end of each fiscal year, the Portfolio Manager or the Company shall provide to each Member an unaudited draft of the financial report for such fiscal year.

- 13.2 After the end of each fiscal year or quarter, the Portfolio Manager or the Company shall cause to be delivered to the Advisory Board a reasonably detailed summary of the expenses incurred by the Company during such period.

14. **TERMINATION AND LIQUIDATION**

- 14.1 Save as provided for in Clause 13.2, this Agreement shall terminate:

- 14.1.1 when one Party holds all the Shares;
- 14.1.2 when a resolution is passed by the Company's Members or creditors, or an order made by a court or other competent body or person instituting a process that shall lead to the Company being wound up and its assets being distributed among the Company's creditors, Members or other contributors; or
- 14.1.3 with the written consent of all the Parties.

- 14.2 The following provisions of this Agreement remain in full force after termination: Clause 1 (Interpretation), Clause 7 (Confidentiality), this Clause, Clause 14 (Whole Agreement), Clause 16 (Assignments), Clause 17 (Variation and Waiver), Clause 18 (Service of Notice), Clause 19 (General) and Clause 21 (Governing Law and Jurisdiction).

- 14.3 Termination of this Agreement shall not affect any rights or liabilities that the Parties may have accrued under it.

- 14.4 Where the Company is to be wound up and its assets distributed, the Parties shall agree a suitable basis for dealing with the interests and assets of the Company and shall endeavour to ensure that:

- 14.4.1 all existing contracts of the Company are performed to the extent that there are sufficient resources;
- 14.4.2 the Company shall not enter into any new contractual obligations;
- 14.4.3 the Company is dissolved and its assets are distributed as soon as practical; and
- 14.4.4 any other proprietary information belonging to or originating from a Party shall be returned to it by the other Parties.

15. **WHOLE AGREEMENT**

- 15.1 This Agreement, and any documents referred to in it, constitute the whole agreement between the Parties and supersede any arrangements, understanding or previous agreement between them relating to the subject matter they cover.
- 15.2 Each Party acknowledges that in entering into this Agreement, and any documents referred to in it, it does not rely on, and shall have no remedy in respect of, any statement, representation, assurance or warranty of any person other than as expressly set out in this Agreement or those documents.
- 15.3 Nothing in this Clause 14 operates to limit or exclude any liability for fraud.

16. **STATUS OF AGREEMENT**

- 16.1 Each Party shall, to the extent that it is able to do so, exercise its voting rights and other powers in relation to the Company to procure that the provisions of this Agreement are properly and promptly observed and given full force and effect according to the spirit and intention of the Agreement.
- 16.2 If any provision in the memorandum of incorporation of the Company or the Articles conflicts with any provision of this Agreement, the provisions of this Agreement shall prevail as between the Parties. Each of the Parties shall, to the extent that it is able to do so, exercise its voting rights and other powers in relation to the Company to procure the modification of the memorandum of association of the Company or the Articles (as the case may be) in order to eliminate the conflict, but this Agreement shall not itself constitute a modification of the memorandum of association of the Company or the Articles.

17. **ASSIGNMENTS**

Save as expressly permitted by this Agreement, no person may assign, or grant any security interest over, any of its rights under this Agreement or any document referred to in it without the prior written consent of the Parties.

18. **VARIATION AND WAIVER**

- 18.1 A variation of this Agreement shall be in writing and signed by or on behalf of the Parties.
- 18.2 A waiver of any right under this Agreement is only effective if it is in writing and it applies only to the person to which the waiver is addressed and the circumstances for which it is given.
- 18.3 A person that waives a right in relation to one person, or takes or fails to take any action against that person, does not affect its rights against any other person.

19. **SERVICE OF NOTICE**

- 19.1 Any notice required to be given by any of the Parties may be sent by post or facsimile to the address and facsimile number of the addressee as set out in this Agreement, in either case marked for the attention of the relevant person named below, or to such other address and/or facsimile number and/or marked for the attention of such other person as the addressee may from time to time have notified for the purposes of this Clause.

19.1.1 to the Company:
Address:
First Floor, Dorey Court, Admiral Park
St Peter Port, Guernsey GY1 6HJ
Channel Islands

19.1.2 to CLO Holdco:

Address:
c/o Highland Capital Management, L.P.
300 Crescent Court, Suite 700
Dallas, TX 75201
Attn: General Counsel
Tel: +1 (972) 628-4100
Email: Notices@highlandcapital.com

19.1.3 to any HarbourVest Entity:

Address:
c/o HarbourVest Partners, LLC
One Financial Center, 44th Floor
Boston, MA 02111
USA
Attn: Michael Pugatch
Tel: +1 (617) 348-3712
F
Email: mpugatch@harbourvest.com

19.1.4 to any other Party: by post or hand delivery only to the address specified in the register of members of the Company.

19.2 Communications sent by post shall be deemed to have been received 24 hours after posting. Communications sent by facsimile transmission shall be deemed to have been received at the time the transmission has been received by the addressee **PROVIDED THAT** if the facsimile transmission, where permitted, is received after 5.00pm or on a day which is not a Business Day, it shall be deemed to have been received 11.00am the Business Day following thereafter.

19.3 In proving service by post it shall only be necessary to prove that the notice was contained in an envelope which was duly addressed and posted in accordance with this Clause and in the case of facsimile transmission it shall be necessary to prove that the facsimile was duly transmitted to the correct number.

20. **GENERAL**

20.1 Each of the Parties hereby agree not to enter into or abide by any agreement whether written or oral with any one or more of the other Parties in respect of the voting of Shares or the submission of Member resolutions to any Members for voting by them, or otherwise to direct or influence, or attempt to direct or influence, the day-to-day management of the Company, either directly or indirectly, other than in order to comply with the other terms of this Agreement or the Articles. In this regard, each of the Parties agrees to not to direct or influence or to attempt to direct or influence any of the Directors through any employment relationship that the Directors may have outside of the Company other than in order to comply with the other terms of this Agreement or the Articles. Each of the Parties hereby agree that this provision shall continue to apply to them whether or not they are or remain a Member.

20.2 Unless otherwise provided, all costs in connection with the negotiation, preparation, execution and performance of this Agreement, shall be borne by the Party that incurred the costs.

20.3 The Parties are not in partnership with each other and there is no relationship of principal and agent between them.

20.4 All transactions entered into between any Party and the Company shall be conducted in good faith and on the basis set out or referred to in this Agreement or, if not provided for in this Agreement, as may be agreed by the Parties and, in the absence of such agreement, on an arm's length basis.

20.5 Each Party shall at all times act in good faith towards the other Parties and shall use all reasonable endeavours to ensure that this Agreement is observed.

20.6 Each Party shall promptly execute and deliver all such documents, and do all such things, as the other Parties may from time to time reasonably require for the purpose of giving full effect to the provisions of this Agreement.

20.7 This Agreement may be executed in any number of counterparts, each of which is an original and which together have the same effect as if each Party had signed the same document. This Agreement may not be amended except with the consent of each Party.

21. STATUS OF AGREEMENT

21.1 The Parties shall, when necessary, exercise their powers of voting and any other rights and powers they have to amend, waive or suspend a conflicting provision in the Articles to the extent necessary to permit the Company and its Business to be administered as provided in this Agreement.

21.2 If there is an inconsistency between any of the provisions of this agreement and the provisions of the Articles, the provisions of this agreement shall prevail as between the Parties.

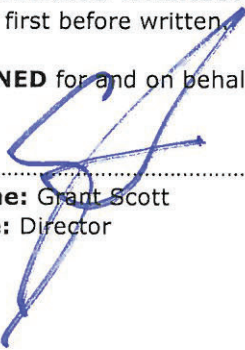
22. GOVERNING LAW AND JURISDICTION

This Agreement shall be governed by and construed in accordance with the laws of the Island of Guernsey and each of the Parties submits to the non-exclusive jurisdiction of the Royal Courts of the Island of Guernsey.

[Signature Page Follows.]

IN WITNESS WHEREOF the Parties hereto have caused this Agreement to be executed the day and year first before written.

SIGNED for and on behalf of **CLO HOLDCO, LTD.**

By:.....

Name: Grant Scott

Title: Director

SIGNED for and on behalf of
HARBOURVEST DOVER STREET IX INVESTMENT L.P.

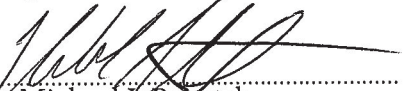
By: HarbourVest Partners (Europe) Limited,
its Alternative Investment Fund Manager

By: 

Name: Michael J. Pugatch
Title: Authorized Person

SIGNED for and on behalf of
HARBOURVEST 2017 GLOBAL AIF L.P.

By: HarbourVest Partners (Europe) Limited,
its Alternative Investment Fund Manager

By: 

Name: Michael J. Pugatch
Title: Authorized Person

SIGNED for and on behalf of
HARBOURVEST 2017 GLOBAL FUND L.P.

By: HarbourVest 2017 Global Associates L.P.,
its General Partner

By: HarbourVest GP LLC,
its General Partner

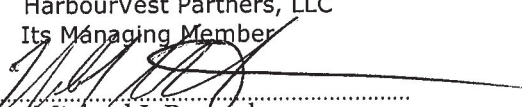
By: HarbourVest Partners, LLC,
its Managing Member

By: 

Name: Michael J. Pugatch
Title: Managing Director

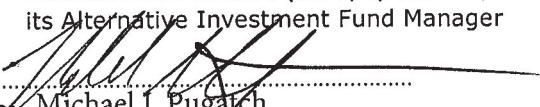
SIGNED for and on behalf of
HV INTERNATIONAL VIII SECONDARY L.P.

By: HIPEP VIII Associates L.P.
Its General Partner
By: HarbourVest GP LLC
Its General Partner
By: HarbourVest Partners, LLC
Its Managing Member

By: 
Name: Michael J. Pugatch
Title: Managing Director

SIGNED for and on behalf of
HARBOURVEST SKEW BASE AIF L.P.

By: HarbourVest Partners (Europe) Limited,
its Alternative Investment Fund Manager

By: 
Name: Michael J. Pugatch
Title: Authorized Person


SIGNED



.....
Lee Blackwell Parker, III

SIGNED for and on behalf of
QUEST IRA, INC.
FBO LEE B. PARKER III, ACCT. # 3058311

Read and approved

By: 
Name: *Emmanuel Maciel*
Title: *transactions supervisor*

X 

SIGNED for and on behalf of
QUEST IRA, INC.
FBO HUNTER COVITZ, ACCT. # 1469811

By:
Name:
Title:

SIGNED for and on behalf of
QUEST IRA, INC.
FBO JON POGLITSCH, ACCT. # 1470612

By:
Name:
Title:


SIGNED for and on behalf of
QUEST IRA, INC.
FBO NEIL DESAI, ACCT. # 3059211

By:
Name:
Title:

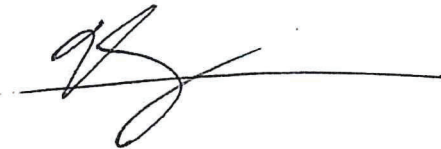
SIGNED for and on behalf of
QUEST IRA, INC.
FBO LEE B. PARKER III, ACCT. # 3058311

By:.....
Name:
Title:

SIGNED for and on behalf of
QUEST IRA, INC.
FBO HUNTER COVITZ, ACCT. # 1469811

By: 
Name: *Emmanuel Mader*
Title: *Transaction Supervisor*

Read & approved



SIGNED for and on behalf of
QUEST IRA, INC.
FBO JON POGLITSCH, ACCT. # 1470612

By:.....
Name:
Title:

SIGNED for and on behalf of
QUEST IRA, INC.
FBO NEIL DESAI, ACCT. # 3059211

By:.....
Name:
Title:


SIGNED for and on behalf of
QUEST IRA, INC.
FBO LEE B. PARKER III, ACCT. # 3058311


By:.....
Name:
Title:

SIGNED for and on behalf of
QUEST IRA, INC.
FBO HUNTER COVITZ, ACCT. # 1469811

By:.....
Name:
Title:

SIGNED for and on behalf of
QUEST IRA, INC.
FBO JON POGLITSCH, ACCT. # 1470612

By: 
Name: Emmanuel Mager
Title: Transactions Supervisor

Read and Approved:
 11/7/17

SIGNED for and on behalf of
QUEST IRA, INC.
FBO NEIL DESAI, ACCT. # 3059211

By:.....
Name:
Title:

SIGNED for and on behalf of
QUEST IRA, INC.
FBO LEE B. PARKER III, ACCT. # 3058311

By:.....
Name:
Title:


SIGNED for and on behalf of
QUEST IRA, INC.
FBO HUNTER COVITZ, ACCT. # 1469811

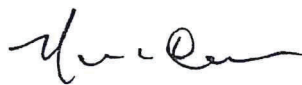
By:.....
Name:
Title:

SIGNED for and on behalf of
QUEST IRA, INC.
FBO JON POGLITSCH, ACCT. # 1470612

By:.....
Name:
Title:

SIGNED for and on behalf of
QUEST IRA, INC.
FBO NEIL DESAI, ACCT. # 3059211

By: 
Name: Emmanuel Madet
Title: Transaction Supervisor

Read and approved


SIGNED for and on behalf of
HIGHLAND CAPITAL MANAGEMENT, L.P.

By: Strand Advisors, Inc.,
its General Partner



By:

Name: James Dondero

Title: President

SIGNED for and on behalf of
HIGHLAND HCF ADVISOR, LTD.


By:
Name: James Dondero
Title: President

SIGNED for and on behalf of
HIGHLAND CLO FUNDING, LTD.

By: 

Name: William Scott

Title: Director

SCHEDULE

Adherence Agreement

THIS ADHERENCE AGREEMENT is made on [●] 200[●]

BETWEEN:

- (1) [●] of [●] (the "**Covenantor**");
- (2) CLO HOLDCO, LTD. of [] (a "**Member**");
- (3) [●] of [] (a "**Member**");
- (4) [●] of [] (a "**Member**");
- (5) HIGHLAND CLO FUNDING, LTD., with registration number 60120 whose registered office is at First Floor, Dorey Court, Admiral Park, St Peter Port, Guernsey GY1 6HJ, Channel Islands (the "**Company**")
- (6) HIGHLAND HCF ADVISOR, LTD., registered address is at Maples Corporate Services Limited, PO Box 309, Ugland House, Grand Cayman, KY1-1104, Cayman Islands (the "**Portfolio Manager**").

RECITAL

This Agreement is supplemental to the members agreement made on November 15 2017 between the Members, the Portfolio Manager and the Company (the "**Members Agreement**").

IT IS HEREBY AGREED as follows:

1. The Covenantor hereby confirms that he has been supplied with a copy of the Members Agreement and hereby covenants with each of the parties thereto to observe, perform and be bound by all the terms of the Members Agreement as if it were a party thereto.
2. Each of the other parties to the Members Agreement hereby covenants with the Covenantor that the Covenantor shall be entitled to the benefit of the terms of the Members Agreement as if he were a party thereto.
3. This Agreement shall be governed by and construed in accordance with Guernsey law.

IN WITNESS of which this Agreement has been executed by the Covenantor and each of the parties to the Members Agreement on the date shown above.

SETTLEMENT AGREEMENT

This Settlement Agreement (the “Agreement”) is entered into as of December 23, 2020, between Highland Capital Management, L.P. (the “Debtor”), on the one hand, and HarbourVest 2017 Global Fund L.P., HarbourVest 2017 Global AIF L.P., HarbourVest Dover Street IX Investment L.P., HV International VIII Secondary L.P., HarbourVest Skew Base AIF L.P., and HarbourVest Partners L.P. (each, a “HarbourVest Party,” and collectively, “HarbourVest”), on the other hand. Each of the foregoing are sometimes referred to herein collectively as the “Parties” and individually as a “Party.”

RECITALS

WHEREAS, on October 16, 2019 (the “Petition Date”), the Debtor filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code (the “Bankruptcy Case”) in the Bankruptcy Court for the District of Delaware, Case No. 19-12239 (CSS) (the “Delaware Bankruptcy Court”);

WHEREAS, on December 4, 2019, the Delaware Bankruptcy Court entered an order transferring venue of the Debtor’s case to the Bankruptcy Court for the Northern District of Texas, Dallas Division, Case No. 19-34054-sgj (the “Bankruptcy Court”);

WHEREAS, prior to the Petition Date, HarbourVest invested in Highland CLO Funding, Ltd. f/k/a Acis Loan Funding, Ltd. (“HCLOF”) and acquired an a 49.98% ownership interest in HCLOF (the “HarbourVest Interests”);

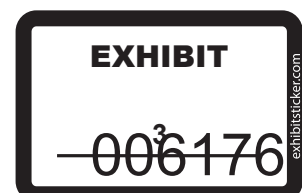
WHEREAS, the portfolio manager for HCLOF is Highland HCF Advisor, Ltd., a subsidiary of the Debtor;

WHEREAS, on April 8, 2020, HarbourVest filed proofs of claim in the Bankruptcy Case, which are listed on the Debtor’s claims register as claim numbers 143, 147, 149, 150, 153, and 154 (the “HarbourVest Claims”), asserting claims against the Debtor relating to its investment in HCLOF;

WHEREAS, on July 30, 2020, the Debtor filed the *Debtor’s First Omnibus Objection to Certain (a) Duplicate Claims; (b) Overstated Claims; (c) Late-Filed Claims; (d) Satisfied Claims; (e) No Liability Claims; and (f) Insufficient-Documentation Claims* [Docket No. 906], in which the Debtor objected to the HarbourVest Claims;

WHEREAS, on September 11, 2020, HarbourVest filed the *HarbourVest Response to Debtor’s First Omnibus Objection to Creation (a) Duplicate Claims; (b) Overstated Claims; (c) Late-Filed Claims; (d) Satisfied Claims; (e) No Liability Claims; and (f) Insufficient-Documentation Claims* [Docket No. 1057] (the “HarbourVest Response”);

WHEREAS, on October 18, 2020, HarbourVest filed the *Motion of HarbourVest Pursuant to Rule 3018(a) of the Federal Rules of Bankruptcy Procedure for Temporary Allowance of Claims for Purposes of Voting to Accept or Reject the Plan* [Docket No. 1207] (the “3018 Motion” and together with the HarbourVest Response, the “HarbourVest Pleadings”);



WHEREAS, in the HarbourVest Pleadings, HarbourVest asserted, among other things, that the HarbourVest Claims included claims against the Debtor arising from fraudulent inducement, fraudulent concealment, fraudulent misrepresentation, breach of fiduciary duty, breach of securities laws, and misuse of assets and sought damages in excess of \$300,000,000;

WHEREAS, the Debtor disputes the HarbourVest Claims;

WHEREAS, on November 24, 2020, the Debtor filed the *Fifth Amended Plan of Reorganization for Highland Capital Management, L.P.* [Docket No. 1472] (as amended, the “Plan”).¹

WHEREAS, the Parties desire to enter into this Agreement which incorporates, formalizes, and finalizes the full and final resolution of the HarbourVest Claims and HarbourVest Pleadings; and

WHEREAS, this Agreement will be presented to the Bankruptcy Court for approval pursuant to Federal Rule of Bankruptcy Procedure 9019 (“Rule 9019”).

NOW THEREFORE, in consideration of the above recitals, the covenants, conditions, and promises made herein, and other good and valuable consideration, the receipt of which is hereby acknowledged, the Parties agree as follows:

1. Settlement of Claims.

(a) In full and complete satisfaction of the HarbourVest Claims, HarbourVest will receive:

(i) an allowed, nonpriority general unsecured claim in the aggregate amount of \$45,000,000 (the “Allowed GUC Claim”); and

(ii) an allowed subordinated claim in the aggregate amount of \$35,000,000 (the “Allowed Subordinated Claim” and together with the Allowed GUC Claim, the “Allowed Claims”).

(b) On the Effective Date, HarbourVest will transfer all of its rights, title, and interest in the HarbourVest Interests to the Debtor or its nominee pursuant to the terms of the *Transfer Agreement for Ordinary Shares of Highland CLO Funding, Ltd.*, attached hereto as Exhibit A (the “Transfer Agreements”) and the Debtor or its nominee will become a shareholder of HCLOF with respect to the HarbourVest Interests. The terms of the Transfer Agreements are incorporated into this Agreement by reference.

2. Releases.

(a) Upon the Effective Date, and to the maximum extent permitted by law, each HarbourVest Party on behalf of itself and each of its current and former advisors, trustees, directors, officers, managers, members, partners, employees, beneficiaries, shareholders, agents,

¹ All capitalized terms used but not defined herein shall have the meanings given to them in the Plan.

participants, subsidiaries, parents, successors, designees, and assigns hereby forever, finally, fully, unconditionally, and completely releases, relieves, acquits, remises, and exonerates, and covenants never to sue, the Debtor, HCLOF, HCLOF's current and former directors, and the Debtor's current and former advisors, trustees, directors, officers, managers, members, partners, employees, beneficiaries, shareholders, agents, participants, subsidiaries, parents, affiliates, successors, designees, and assigns, except as expressly set forth below (the "Debtor Released Parties"), for and from any and all claims, debts, liabilities, demands, obligations, promises, acts, agreements, liens, losses, costs and expenses (including, without limitation, attorney's fees and related costs), damages, injuries, suits, actions, and causes of action of whatever kind or nature, whether known or unknown, suspected or unsuspected, matured or unmatured, liquidated or unliquidated, contingent or fixed, at law or in equity, statutory or otherwise, including, without limitation, any claims, defenses, and affirmative defenses, whether known or unknown, including, without limitation, those which were or could have been asserted in, in connection with, or with respect to the Bankruptcy Case (collectively, the "HarbourVest Released Claims").

(b) Upon the Effective Date, and to the maximum extent permitted by law, the Debtor hereby forever, finally, fully, unconditionally, and completely releases, relieves, acquits, remises, and exonerates, and covenants never to sue (i) each HarbourVest Party and (ii) each HarbourVest Party's current and former advisors, trustees, directors, officers, managers, members, partners, employees, beneficiaries, shareholders, agents, participants, subsidiaries, parents, affiliates, successors, designees, and assigns (the "HarbourVest Released Parties"), for and from any and all claims, debts, liabilities, demands, obligations, promises, acts, agreements, liens, losses, costs and expenses (including, without limitation, attorney's fees and related costs), damages, injuries, suits, actions, and causes of action of whatever kind or nature, whether known or unknown, suspected or unsuspected, matured or unmatured, liquidated or unliquidated, contingent or fixed, at law or in equity, statutory or otherwise, including, without limitation, any claims, defenses, and affirmative defenses, whether known or unknown, which were or could have been asserted in, in connection with, or with respect to the Bankruptcy Case (collectively, the "Debtor Released Claims"); *provided, however*, that notwithstanding anything herein to the contrary, the release contained in this Section 2(b) will apply to the HarbourVest Released Parties set forth in subsection (b)(ii) only with respect to Debtor Released Claims arising from or relating to HarbourVest's ownership of the HarbourVest Interests.

(c) Notwithstanding anything in this Agreement to the contrary, the releases set forth herein will not apply with respect to (i) the Allowed Claims, (ii) the claims of Charlotte Investor IV, L.P., or (iii) the duties, rights, or obligations of any Party under this Agreement or the Transfer Agreements.

3. **Agreement Subject to Bankruptcy Court Approval.** The effectiveness of this Agreement and the Parties' obligations hereunder are conditioned in all respects on the approval of this Agreement by the Bankruptcy Court. The Parties agree to cooperate and use reasonable efforts to have this Agreement approved by the Bankruptcy Court. The "Effective Date" will be the date of an order entered by the Bankruptcy Court approving this Agreement pursuant to a motion filed under Rule 9019.

4. **Representations and Warranties.** Subject in all respects to Section 3 hereof:

(a) each HarbourVest Party represents and warrants that (i) it has full authority to enter into this Agreement and to release the HarbourVest Released Claims and has not sold, transferred, or assigned any HarbourVest Released Claim to any other person or entity, (ii) no person or entity other than such HarbourVest Party has been, is, or will be authorized to bring, pursue, or enforce any HarbourVest Released Claim on behalf of, for the benefit of, or in the name of (whether directly or derivatively) of such HarbourVest Party; and (iii) HarbourVest owns all of the HCLOF Interests free and clear of any claims or interests; and

(b) the Debtor represents and warrants to HarbourVest that (i) it has full authority to enter into this Agreement and to release the Debtor Released Claims and (ii) no person or entity other than the Debtor has been, is, or will be authorized to bring, pursue, or enforce any Debtor Released Claim on behalf of, for the benefit of, or in the name of (whether directly or derivatively) of the Debtor Party.

5. **Plan Support.**

(a) Each HarbourVest Party hereby agrees that it will (a) vote all HarbourVest Claims held by such HarbourVest Party to accept the Plan, by delivering its duly executed and completed ballots accepting the Plan on a timely basis; and (b) not (i) change, withdraw, or revoke such vote (or cause or direct such vote to be changed withdrawn or revoked); (ii) exercise any right or remedy for the enforcement, collection, or recovery of any claim against the Debtor except in a manner consistent with this Agreement or the Plan, (iii) object to, impede, or take any action other action to interfere with, delay or postpone acceptance or confirmation of the Plan; (iv) directly or indirectly solicit, propose, file, support, participate in the formulation of or vote for, any restructuring, sale of assets (including pursuant to 11 U.S.C. § 363), merger, workout, or plan of reorganization of the Debtor other than the Plan; or (v) otherwise take any action that would in any material respect interfere with, delay, or postpone the consummation of the Plan; provided, however, that such vote may be revoked (and, upon such revocation, deemed void ab initio) by such HarbourVest Party at any time following the termination of this agreement or the occurrence of a Support Termination Event (it being understood that any termination of this agreement shall entitle each HarbourVest Party to change its vote in accordance with section 1127(d) of the Bankruptcy Code), notwithstanding any voting deadline established by the Bankruptcy Court including without limitation the January 5, 2021, 5:00 p.m. (prevailing Central Time) deadline established by the *Order Approving Form of Ballots, Voting Deadline and Solicitation Procedures* [Docket No. 1476].

(b) In full resolution of the 3018 Motion, HarbourVest will have a general unsecured claim for voting purposes only in the amount of \$45,000,000.

(c) The obligations of the HarbourVest Parties under this Section 5 shall automatically terminate upon the occurrence of any of the following (each a “Support Termination Event”): (i) the effective date of the Plan, (ii) the withdrawal of the Plan, (iii) the entry of an order by the Bankruptcy Court (A) converting the Bankruptcy Case to a case under chapter 7 of the Bankruptcy Code or (B) appointing an examiner with expanded powers beyond those set forth in sections 1106(a)(3) and (4) of the Bankruptcy Code or a trustee in Bankruptcy

Case, or (iv) the failure of the Court to enter an order approving the terms of this Agreement and the settlement described herein pursuant to Rule 9019 prior to confirmation of the Plan.

6. **No Admission of Liability.** The Parties acknowledge that there is a bona fide dispute with respect to the HarbourVest Claims. Nothing in this Agreement will imply, an admission of liability, fault or wrongdoing by the Debtor, HarbourVest, or any other person, and the execution of this Agreement does not constitute an admission of liability, fault, or wrongdoing on the part of the Debtor, HarbourVest, or any other person.

7. **Successors-in-Interest.** This Agreement shall be binding upon and shall inure to the benefit of each of the Parties and their successors, and assigns.

8. **Notice.** Each notice and other communication hereunder will be in writing and will be sent by email and delivered or mailed by registered mail, receipt requested, and will be deemed to have been given on the date of its delivery, if delivered, and on the fifth full business day following the date of the mailing, if mailed to each of the Parties thereto at the following respective addresses or such other address as may be specified in any notice delivered or mailed as set forth below:

HARBOURVEST

HarbourVest Partners L.P.
Attention: Michael J. Pugatch
One Financial Center
Boston, MA 02111
Telephone No. 617-348-3712
E-mail: mpugatch@harbourvest.com

with a copy (which shall not constitute notice) to:

Debevoise & Plimpton LLP
Attention: M. Natasha Labovitz, Esq.
919 Third Avenue
New York, NY 10022
Telephone No. 212-909-6649
E-mail: nlabovitz@debevoise.com

THE DEBTOR

Highland Capital Management, L.P.
300 Crescent Court, Suite 700
Dallas, Texas 75201
Attention: James P. Seery, Jr.
Telephone No.: 972-628-4100
Facsimile No.: 972-628-4147
E-mail: jpseeryjr@gmail.com

with a copy (which shall not constitute notice) to:

Pachulski Stang Ziehl & Jones LLP
Attention: Jeffrey Pomerantz, Esq.
10100 Santa Monica Blvd., 13th Floor
Los Angeles, CA 90067
Telephone No.: 310-277-6910
Facsimile No.: 310-201-0760
E-mail: jpomerantz@pszjlaw.com

9. **Advice of Counsel.** Each Party represents that it has: (a) been adequately represented by independent legal counsel of its own choice, throughout all of the negotiations that preceded the execution of this Agreement; (b) executed this Agreement upon the advice of such counsel; (c) read this Agreement, and understands and assents to all the terms and conditions contained herein without any reservations; and (d) had the opportunity to have this Agreement and all the terms and conditions contained herein explained by independent counsel, who has answered any and all questions asked of such counsel, or which could have been asked of such counsel, including, but not limited to, with regard to the meaning and effect of any of the provisions of this Agreement.

10. **Entire Agreement.** This Agreement and the Transfer Agreement contain the entire agreement and understanding concerning the subject matter of this Agreement, and supersede and replace all prior negotiations and agreements, written or oral and executed or unexecuted, concerning such subject matter. Each of the Parties acknowledges that no other Party, nor any agent of or attorney for any such Party, has made any promise, representation or warranty, express or implied, written or oral, not otherwise contained in this Agreement to induce any Party to execute this Agreement. The Parties further acknowledge that they are not executing this Agreement in reliance on any promise, representation or warranty not contained in this Agreement, and that any such reliance would be unreasonable. This Agreement will not be waived or modified except by an agreement in writing signed by each Party or duly authorized representative of each Party.

11. **No Party Deemed Drafter.** The Parties acknowledge that the terms of this Agreement are contractual and are the result of arms'-length negotiations between the Parties and their chosen counsel. Each Party and its counsel cooperated in the drafting and preparation of this Agreement. In any construction to be made of this Agreement, the Agreement will not be construed against any Party.

12. **Future Cooperation.** The Parties agree to cooperate and execute such further documentation as is reasonably necessary to effectuate the intent of this Agreement.

13. **Counterparts.** This Agreement may be executed in counterparts with the same force and effect as if executed in one complete document. Each Party's signature hereto will signify acceptance of, and agreement to, the terms and provisions contained in this Agreement. Photographic, electronic, and facsimile copies of signed counterparts may be used in lieu of the originals of this Agreement for any purpose.

14. **Governing Law; Venue; Attorneys' Fees and Costs.** The Parties agree that this Agreement will be governed by and will be construed according to the laws of the State of Texas without regard to conflict-of-law principles. Each of the Parties hereby submits to the exclusive jurisdiction of the Bankruptcy Court during the pendency of the Bankruptcy Case and thereafter to the exclusive jurisdiction of the state and federal courts located in the Northern District of Texas, Dallas Division, with respect to any disputes arising from or out of this Agreement. In any action to enforce this Agreement, the prevailing party shall be entitled to recover its reasonable and necessary attorneys' fees and costs (including experts).

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IT IS HEREBY AGREED.

HIGHLAND CAPITAL MANAGEMENT, L.P.

By: /s/ James P. Seery, Jr.
Name: James P. Seery, Jr.
Its: CEO/CRO

HarbourVest 2017 Global Fund L.P., by HarbourVest 2017 Global Associates L.P., its General Partner, by HarbourVest GP LLC, its General Partner, by HarbourVest Partners, LLC, its Managing Member

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

HarbourVest 2017 Global AIF L.P., by HarbourVest Partners (Ireland) Limited, its Alternative Investment Fund Manager, by HarbourVest Partners L.P., its Duly Appointed Investment Manager, by HarbourVest Partners, LLC, its General Partner

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

HarbourVest Dover Street IX Investment L.P., by HarbourVest Partners L.P., its Duly Appointed Investment Manager, by HarbourVest Partners, LLC, its General Partner

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

HarbourVest Partners L.P., on behalf of funds and accounts under management, by HarbourVest Partners, LLC, its General Partner

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

**HarbourVest Skew Base AIF L.P., by HarbourVest Partners (Ireland) Limited, its
Alternative Investment Fund Manager, by HarbourVest Partners L.P., its Duly Appointed
Investment Manager, by HarbourVest Partners, LLC, its General Partner**

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

**HV International VIII Secondary L.P., by HIPEP VIII Associates L.P., its General
Partner, by HarbourVest GP LLC, its General Partner, by HarbourVest Partners, LLC,
its Managing Member**

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

Exhibit A

TRANSFER AGREEMENT
FOR ORDINARY SHARES OF
HIGHLAND CLO FUNDING, LTD.

This Transfer Agreement, dated as of December [REDACTED], 2020 (this “**Transfer Agreement**”), is entered into by and among Highland CLO Funding, Ltd. (the “**Fund**”), Highland HCF Advisor, Ltd. (the “**Portfolio Manager**”), HCMLP Investments, LLC (the “**Transferee**”) and each of the following: HarbourVest Dover Street IX Investment L.P., HarbourVest 2017 Global AIF L.P., HarbourVest 2017 Global Fund L.P., HV International VIII Secondary L.P., and HarbourVest Skew Base AIF L.P. (collectively, the “**Transferors**”).

WHEREAS, each Transferor is the record, legal and beneficial owner of the number of ordinary shares (“**Shares**”) of the Fund set forth opposite such Transferor’s name on Exhibit A hereto (with respect to each Transferor, the “**Transferred Shares**”).

WHEREAS the Transferee is an affiliate and wholly owned subsidiary of Highland Capital Management, L.P. (“**HCMLP**”) which is one of the initial members of the Fund.

WHEREAS, each Transferor wishes to transfer and assign 100% of its rights, title and interest as a shareholder in the Fund, including the Transferred Shares (the “**Interest**”) on the terms set forth in this Transfer Agreement.

WHEREAS, subject to and in connection with the approval of that certain Settlement Agreement, dated on or about the date hereof, by and among HCMLP and the Transferors (the “**Settlement Agreement**”), the Transferee desires that the Interest be transferred to Transferee and that thereafter the Transferee will become a Shareholder and the Transferors will no longer be Shareholders.

WHEREAS, the Portfolio Manager desires to consent to such transfers and to the admission of Transferee as a Shareholder on the terms set forth herein, and the Transferors and Transferee agree to such terms.

WHEREAS, the Fund desires to amend its records to reflect the foregoing transfers.

NOW, THEREFORE, the parties hereto agree as follows:

1. Transfer of Shares and Advisory Board

- a. Each Transferor hereby transfers and assigns all of its rights, title, and interest in its Interest to the Transferee, and the Transferee wishes to be admitted to the Fund as a Shareholder.
- b. In connection with the transfer of the Interest as contemplated herein, the Transferee shall be granted the right to appoint a representative to the Fund’s advisory board (the “**Advisory Board**”) to replace the Transferors’ appointed representative to the Advisory Board.

- c. Transferee hereby assumes all of Transferor's rights and obligations in respect of the Interest effective as of the Effective Date (as defined below) and acknowledge that thereafter Transferee shall be subject to the applicable terms and provisions of the Members' Agreement dated as of November 15, 2017 (the "**Members' Agreement**"), the Articles of Incorporation adopted November 15, 2017 (the "**Articles**") and the Subscription and transfer Agreement, dated as of November 15, 2017 among each Transferor, the Fund and the Portfolio Manager (the "**Subscription Agreement**", and together with the Members' Agreement and the Articles, the "**Fund Agreements**") with respect to the Interest. Transferee does not assume any liability or responsibility for any obligations or liabilities incurred by any Transferor prior to the Effective Date of the transfer.
 - d. Following the transfer, each Transferor shall have no further rights or obligations to any party hereunder in respect of the Interest under the Fund Agreements.
 - e. This Transfer Agreement, and the parties' obligations hereunder, are conditioned in all respects on the approval by the Bankruptcy Court for the Northern District of Texas, Dallas Division pursuant to Federal Rule of Bankruptcy Procedure 9019 of (i) this Transfer Agreement and (ii) the Settlement Agreement, and each of the parties agree that no further action shall be required from any party for the transfer of the Interest to be effective except as described herein.
2. Transferee's Representations and Warranties. The Transferee represents and warrants to the Transferors, the Portfolio Manager, and the Fund as follows:
- a. This Transfer Agreement constitutes a valid and binding obligation of the Transferee, enforceable against it in accordance with its terms;
 - b. This Transfer Agreement has been duly and validly executed and delivered by or on behalf of the Transferee and such execution and delivery have been duly authorized by all necessary trust action of the Transferee;
 - c. The Transferee acknowledges receipt of, has read, and is familiar with, the Fund's Offering Memorandum for Placing Shares dated November 15, 2017 (the "**Offering Memorandum**") and the Fund Agreements;
 - d. The Transferee hereby accepts and receives the Interest from the Transferors for investment, and not with a view to the sale or distribution of any part thereof, and the Transferee has no present intention of selling, granting participations in, or otherwise distributing the same, but subject nevertheless to any requirement of law that the disposition of the Transferee's property shall at all times be within such Transferee's control; and
 - e. The Transferee is an "Eligible U.S. Investor" as defined in the Offering Memorandum.

3. Transferors' Representations and Warranties. Each Transferor represents and warrants to the Transferee, the Portfolio Manager, and the Fund as follows:
 - a. This Transfer Agreement constitutes a valid and binding obligation of the Transferor, enforceable against it in accordance with its terms;
 - b. This Transfer Agreement has been duly authorized, and duly and validly executed and delivered by the Transferor and such execution and delivery have been duly authorized by all necessary action of the Transferor; and
 - c. As of the date hereof, the Transferor has good and valid title to the Transferor's Interest, free and clear of any liens, vesting requirements or claims by others.
4. Consent to Transfer. Based in part on the representations and warranties of the Transferors and the Transferee which are included herein, and on the terms contained herein, the Portfolio Manager and the Fund hereby consent to the transfers of the Interest, the admission of the Transferee as a Shareholder and the Transferee's appointment of a representative to the Advisory Board, the Portfolio Manager's execution of this Transfer Agreement constituting its prior written consent to the transfers of the Interest for the purposes of article 18.1 of the Articles and this Transfer Agreement constituting express notice in writing to the Fund of the assignment set out at clause 1(c) above for the purposes of the Law of Property (Miscellaneous Provisions) (Guernsey) Law, 1979 (as amended).
5. Completion: As of the date of approval by the Bankruptcy Court for the Northern District of Texas, Dallas Division pursuant to Federal Rule of Bankruptcy Procedure 9019 of (i) this Transfer Agreement and (ii) the Settlement Agreement (the "**Effective Date**"):
 - a. each Transferor shall deliver or cause to be delivered to the Transferee a transfer instrument relating to the Transferred Shares duly executed and completed by that Transferor in favor of the Transferee; and
 - b. the Transferee shall deliver to the Transferors and the Fund a duly executed and dated Adherence Agreement (as defined in the Members' Agreement).

Prior to the Effective Date the Transferee shall procure that:

 - c. the board of directors of the Fund shall hold a meeting at which the transfer of the Shares to the Transferee shall be approved and registration in the register of members of the Fund shall be effected on the Effective Date.
6. Miscellaneous.
 - a. Each of the parties hereto agree to execute any further instruments and perform any further acts which are or may become reasonably necessary to carry out the intent of this Transfer Agreement or are reasonably requested by the Portfolio Manager, the Fund or a Transferor to complete the transfer of the Interest.

- b. The parties to this Transfer Agreement acknowledge that the terms of this Transfer Agreement are the result of arms'-length negotiations between the parties and their respective counsel. Each party and its counsel cooperated in the drafting and preparation of this Transfer Agreement. In any construction to be made of this Transfer Agreement, the language or drafting of this Transfer Agreement will not be construed against any party.
- c. This Transfer Agreement shall be governed by, and construed and enforced in accordance with, the internal substantive laws of the state of Delaware, without giving effect to conflicts of law principles.
- d. The representations, warranties and covenants of the Transferors and the Transferee shall remain in full force and effect following the transfer of the Interest, and the Fund and the Portfolio Manager thereafter may rely on all such representations, warranties and covenants.
- e. This Transfer Agreement may be executed in multiple counterparts, each of which shall be deemed to be an original, but all of which together shall constitute one and the same instrument. Photographic, electronic, and facsimile copies of signed counterparts may be used in lieu of the originals of this Transfer Agreement for any purpose.
- f. Captions of sections have been added only for convenience and shall not be deemed to be a part of this Transfer Agreement.
- g. This Transfer Agreement is among the parties hereto. No Person that is not a party hereto shall have any right herein as a third-party beneficiary or otherwise except as expressly contemplated hereby.

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[Additional Signatures on Following Page]

HarbourVest 2017 Global Fund L.P.

By: HarbourVest 2017 Global Associates L.P.
Its General Partner

By: HarbourVest GP LLC
Its General Partner

By: HarbourVest Partners, LLC
Its Managing Member

By: _____

Name: Michael Pugatch

Title: Managing Director

Exhibit A

<u>Transferee Name</u>	<u>Number of Shares</u>	<u>Percentage</u>
HarbourVest Dover Street IX Investment L.P.	[REDACTED]	[REDACTED]
HarbourVest 2017 Global AIF L.P.	[REDACTED]	[REDACTED]
HarbourVest 2017 Global Fund L.P.	[REDACTED]	[REDACTED]
HV International VIII Secondary L.P.	[REDACTED]	[REDACTED]
HarbourVest Skew Base AIF L.P.	[REDACTED]	[REDACTED]

ENTERED

The following constitutes the ruling of the court and has the force and effect therein described.

Harry G. C. Jones
United States Bankruptcy Judge

§ Chapter 11
§
§
§ Case No. 19-34054-sgj1
§
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Motion; (b) the *Declaration of John A. Morris in Support of the Debtor’s Motion for Entry of an Order Approving Settlement with HarbourVest (Claim Nos. 143, 147, 149, 150, 153, 154) and Authorizing Actions Consistent Therewith* [Docket No. 1631] (the “Morris Declaration”), and the exhibits annexed thereto, including the Settlement Agreement attached as **Exhibit “1”** (the “Settlement Agreement”); (c) the arguments and law cited in the Motion; (d) *James Dondero’s Objection to Debtor’s Motion for Entry of an Order Approving Settlement with HarbourVest* [Docket No. 1697] (the “Dondero Objection”), filed by James Dondero; (e) the *Objection to Debtor’s Motion for Entry of an Order Approving Settlement with HarbourVest (Claim Nos. 143, 147, 149, 150, 153, 154) and Authorizing Actions Consistent Therewith* [Docket No. 1706] (the “Trusts’ Objection”), filed by the Dugaboy Investment Trust (“Dugaboy”) and Get Good Trust (“Get Good,” and together with Dugaboy, the “Trusts”); (f) *CLO Holdco’s Objection to HarbourVest Settlement* [Docket No. 1707] (the “CLOH Objection” and collectively, with the Dondero Objection and the Trusts’ Objection, the “Objections”), filed by CLO Holdco, Ltd.; (g) the *Debtor’s Omnibus Reply in Support of Debtor’s Motion for Entry of an Order Approving Settlement with HarbourVest (Claim Nos. 143, 147, 149, 150, 153, 154), and Authorizing Actions Consistent Therewith* [Docket No. 1731] (the “Debtor’s Reply”), filed by the Debtor; (h) the *HarbourVest Reply in Support of Debtor’s Motion for Entry of an Order Approving Settlement with HarbourVest and Authorizing Actions Consistent Therewith* [Docket No. 1734] (the “HarbourVest Reply”), filed by HarbourVest 2017 Global Fund L.P., HarbourVest 2017 Global AIF L.P., HarbourVest Dover Street IX Investment L.P., HV International VIII Secondary L.P., HarbourVest Skew Base AIF L.P., and HarbourVest Partners L.P. (collectively, “HarbourVest”); (i) the testimonial and documentary evidence admitted into evidence during the hearing held on January 14, 2021 (the “Hearing”), including assessing the credibility of the witnesses; and (j) the

arguments made during the Hearing; and this Court having jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334; and this Court having found that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2); and this Court having found that venue of this proceeding and the Motion in this District is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and this Court having found that the relief requested in the Motion is in the best interests of the Debtor's estate, its creditors, and other parties-in-interest; and this Court having found the Settlement Agreement fair and equitable; and this Court having analyzed, for the reasons stated on the record, (1) the probability of success in litigating the claims subject to the Settlement Agreement, with due consideration for the uncertainty in fact and law, (2) the complexity and likely duration of litigation and any attendant expense, inconvenience, and delay, and (3) all other factors bearing on the wisdom of the compromise, including: (i) the best interests of the creditors, with proper deference to their reasonable views, and (ii) the extent to which the settlement is truly the product of arms-length bargaining, and not of fraud or collusion; and this Court having found that the Debtor's notice of the Motion and opportunity for a hearing on the Motion were appropriate under the circumstances and that no other notice need be provided; and this Court having determined that the legal and factual bases set forth in the Motion establish good cause for the relief granted herein; and upon all of the proceedings had before this Court; and after due deliberation and sufficient cause appearing therefor, it is hereby **ORDERED** that:

1. The Motion is **GRANTED** as set forth herein.
2. All objections to the Motion are overruled.
3. The Settlement Agreement, attached hereto as **Exhibit 1**, is approved in all respects pursuant to Rule 9019 of the Federal Rules of Bankruptcy Procedure.

4. All objections to the proofs of claim subject to the Motion³ are overruled as moot in light of the Court's approval of the Settlement Agreement.

5. The Debtor, HarbourVest, and all other parties are authorized to take any and all actions necessary and desirable to implement the Settlement Agreement without need of further approval or notice.

6. Pursuant to the express terms of the *Members Agreement Relating to the Company*, dated November 15, 2017, HarbourVest is authorized to transfer its interests in HCLOF to a wholly-owned and controlled subsidiary of the Debtor pursuant to the terms of the *Transfer Agreement for Ordinary Shares of Highland CLO Funding, Ltd.* without the need to obtain the consent of any party or to offer such interests first to any other investor in HCLOF.

7. The Court shall retain exclusive jurisdiction to hear and determine all matters arising from the implementation of this Order.

###End of Order###

³ This includes the *Debtor's First Omnibus Objection to Certain (A) Duplicate Claims; (B) Overstated Claims; (C) Late-Filed Claims; (D) Satisfied Claims; (E) No-Liability Claims; and (F) Insufficient-Documentation Claims* [Docket No. 906].

EXHIBIT 1

SETTLEMENT AGREEMENT

This Settlement Agreement (the “Agreement”) is entered into as of December 23, 2020, between Highland Capital Management, L.P. (the “Debtor”), on the one hand, and HarbourVest 2017 Global Fund L.P., HarbourVest 2017 Global AIF L.P., HarbourVest Dover Street IX Investment L.P., HV International VIII Secondary L.P., HarbourVest Skew Base AIF L.P., and HarbourVest Partners L.P. (each, a “HarbourVest Party,” and collectively, “HarbourVest”), on the other hand. Each of the foregoing are sometimes referred to herein collectively as the “Parties” and individually as a “Party.”

RECITALS

WHEREAS, on October 16, 2019 (the “Petition Date”), the Debtor filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code (the “Bankruptcy Case”) in the Bankruptcy Court for the District of Delaware, Case No. 19-12239 (CSS) (the “Delaware Bankruptcy Court”);

WHEREAS, on December 4, 2019, the Delaware Bankruptcy Court entered an order transferring venue of the Debtor’s case to the Bankruptcy Court for the Northern District of Texas, Dallas Division, Case No. 19-34054-sgj (the “Bankruptcy Court”);

WHEREAS, prior to the Petition Date, HarbourVest invested in Highland CLO Funding, Ltd. f/k/a Acis Loan Funding, Ltd. (“HCLOF”) and acquired an a 49.98% ownership interest in HCLOF (the “HarbourVest Interests”);

WHEREAS, the portfolio manager for HCLOF is Highland HCF Advisor, Ltd., a subsidiary of the Debtor;

WHEREAS, on April 8, 2020, HarbourVest filed proofs of claim in the Bankruptcy Case, which are listed on the Debtor’s claims register as claim numbers 143, 147, 149, 150, 153, and 154 (the “HarbourVest Claims”), asserting claims against the Debtor relating to its investment in HCLOF;

WHEREAS, on July 30, 2020, the Debtor filed the *Debtor’s First Omnibus Objection to Certain (a) Duplicate Claims; (b) Overstated Claims; (c) Late-Filed Claims; (d) Satisfied Claims; (e) No Liability Claims; and (f) Insufficient-Documentation Claims* [Docket No. 906], in which the Debtor objected to the HarbourVest Claims;

WHEREAS, on September 11, 2020, HarbourVest filed the *HarbourVest Response to Debtor’s First Omnibus Objection to Creation (a) Duplicate Claims; (b) Overstated Claims; (c) Late-Filed Claims; (d) Satisfied Claims; (e) No Liability Claims; and (f) Insufficient-Documentation Claims* [Docket No. 1057] (the “HarbourVest Response”);

WHEREAS, on October 18, 2020, HarbourVest filed the *Motion of HarbourVest Pursuant to Rule 3018(a) of the Federal Rules of Bankruptcy Procedure for Temporary Allowance of Claims for Purposes of Voting to Accept or Reject the Plan* [Docket No. 1207] (the “3018 Motion” and together with the HarbourVest Response, the “HarbourVest Pleadings”);

WHEREAS, in the HarbourVest Pleadings, HarbourVest asserted, among other things, that the HarbourVest Claims included claims against the Debtor arising from fraudulent inducement, fraudulent concealment, fraudulent misrepresentation, breach of fiduciary duty, breach of securities laws, and misuse of assets and sought damages in excess of \$300,000,000;

WHEREAS, the Debtor disputes the HarbourVest Claims;

WHEREAS, on November 24, 2020, the Debtor filed the *Fifth Amended Plan of Reorganization for Highland Capital Management, L.P.* [Docket No. 1472] (as amended, the “Plan”).¹

WHEREAS, the Parties desire to enter into this Agreement which incorporates, formalizes, and finalizes the full and final resolution of the HarbourVest Claims and HarbourVest Pleadings; and

WHEREAS, this Agreement will be presented to the Bankruptcy Court for approval pursuant to Federal Rule of Bankruptcy Procedure 9019 (“Rule 9019”).

NOW THEREFORE, in consideration of the above recitals, the covenants, conditions, and promises made herein, and other good and valuable consideration, the receipt of which is hereby acknowledged, the Parties agree as follows:

1. Settlement of Claims.

(a) In full and complete satisfaction of the HarbourVest Claims, HarbourVest will receive:

(i) an allowed, nonpriority general unsecured claim in the aggregate amount of \$45,000,000 (the “Allowed GUC Claim”); and

(ii) an allowed subordinated claim in the aggregate amount of \$35,000,000 (the “Allowed Subordinated Claim” and together with the Allowed GUC Claim, the “Allowed Claims”).

(b) On the Effective Date, HarbourVest will transfer all of its rights, title, and interest in the HarbourVest Interests to the Debtor or its nominee pursuant to the terms of the *Transfer Agreement for Ordinary Shares of Highland CLO Funding, Ltd.*, attached hereto as Exhibit A (the “Transfer Agreements”) and the Debtor or its nominee will become a shareholder of HCLOF with respect to the HarbourVest Interests. The terms of the Transfer Agreements are incorporated into this Agreement by reference.

2. Releases.

(a) Upon the Effective Date, and to the maximum extent permitted by law, each HarbourVest Party on behalf of itself and each of its current and former advisors, trustees, directors, officers, managers, members, partners, employees, beneficiaries, shareholders, agents,

¹ All capitalized terms used but not defined herein shall have the meanings given to them in the Plan.

participants, subsidiaries, parents, successors, designees, and assigns hereby forever, finally, fully, unconditionally, and completely releases, relieves, acquits, remises, and exonerates, and covenants never to sue, the Debtor, HCLOF, HCLOF's current and former directors, and the Debtor's current and former advisors, trustees, directors, officers, managers, members, partners, employees, beneficiaries, shareholders, agents, participants, subsidiaries, parents, affiliates, successors, designees, and assigns, except as expressly set forth below (the "Debtor Released Parties"), for and from any and all claims, debts, liabilities, demands, obligations, promises, acts, agreements, liens, losses, costs and expenses (including, without limitation, attorney's fees and related costs), damages, injuries, suits, actions, and causes of action of whatever kind or nature, whether known or unknown, suspected or unsuspected, matured or unmatured, liquidated or unliquidated, contingent or fixed, at law or in equity, statutory or otherwise, including, without limitation, any claims, defenses, and affirmative defenses, whether known or unknown, including, without limitation, those which were or could have been asserted in, in connection with, or with respect to the Bankruptcy Case (collectively, the "HarbourVest Released Claims").

(b) Upon the Effective Date, and to the maximum extent permitted by law, the Debtor hereby forever, finally, fully, unconditionally, and completely releases, relieves, acquits, remises, and exonerates, and covenants never to sue (i) each HarbourVest Party and (ii) each HarbourVest Party's current and former advisors, trustees, directors, officers, managers, members, partners, employees, beneficiaries, shareholders, agents, participants, subsidiaries, parents, affiliates, successors, designees, and assigns (the "HarbourVest Released Parties"), for and from any and all claims, debts, liabilities, demands, obligations, promises, acts, agreements, liens, losses, costs and expenses (including, without limitation, attorney's fees and related costs), damages, injuries, suits, actions, and causes of action of whatever kind or nature, whether known or unknown, suspected or unsuspected, matured or unmatured, liquidated or unliquidated, contingent or fixed, at law or in equity, statutory or otherwise, including, without limitation, any claims, defenses, and affirmative defenses, whether known or unknown, which were or could have been asserted in, in connection with, or with respect to the Bankruptcy Case (collectively, the "Debtor Released Claims"); *provided, however*, that notwithstanding anything herein to the contrary, the release contained in this Section 2(b) will apply to the HarbourVest Released Parties set forth in subsection (b)(ii) only with respect to Debtor Released Claims arising from or relating to HarbourVest's ownership of the HarbourVest Interests.

(c) Notwithstanding anything in this Agreement to the contrary, the releases set forth herein will not apply with respect to (i) the Allowed Claims, (ii) the claims of Charlotte Investor IV, L.P., or (iii) the duties, rights, or obligations of any Party under this Agreement or the Transfer Agreements.

3. **Agreement Subject to Bankruptcy Court Approval.** The effectiveness of this Agreement and the Parties' obligations hereunder are conditioned in all respects on the approval of this Agreement by the Bankruptcy Court. The Parties agree to cooperate and use reasonable efforts to have this Agreement approved by the Bankruptcy Court. The "Effective Date" will be the date of an order entered by the Bankruptcy Court approving this Agreement pursuant to a motion filed under Rule 9019.

4. **Representations and Warranties.** Subject in all respects to Section 3 hereof:

(a) each HarbourVest Party represents and warrants that (i) it has full authority to enter into this Agreement and to release the HarbourVest Released Claims and has not sold, transferred, or assigned any HarbourVest Released Claim to any other person or entity, (ii) no person or entity other than such HarbourVest Party has been, is, or will be authorized to bring, pursue, or enforce any HarbourVest Released Claim on behalf of, for the benefit of, or in the name of (whether directly or derivatively) of such HarbourVest Party; and (iii) HarbourVest owns all of the HCLOF Interests free and clear of any claims or interests; and

(b) the Debtor represents and warrants to HarbourVest that (i) it has full authority to enter into this Agreement and to release the Debtor Released Claims and (ii) no person or entity other than the Debtor has been, is, or will be authorized to bring, pursue, or enforce any Debtor Released Claim on behalf of, for the benefit of, or in the name of (whether directly or derivatively) of the Debtor Party.

5. **Plan Support.**

(a) Each HarbourVest Party hereby agrees that it will (a) vote all HarbourVest Claims held by such HarbourVest Party to accept the Plan, by delivering its duly executed and completed ballots accepting the Plan on a timely basis; and (b) not (i) change, withdraw, or revoke such vote (or cause or direct such vote to be changed withdrawn or revoked); (ii) exercise any right or remedy for the enforcement, collection, or recovery of any claim against the Debtor except in a manner consistent with this Agreement or the Plan, (iii) object to, impede, or take any action other action to interfere with, delay or postpone acceptance or confirmation of the Plan; (iv) directly or indirectly solicit, propose, file, support, participate in the formulation of or vote for, any restructuring, sale of assets (including pursuant to 11 U.S.C. § 363), merger, workout, or plan of reorganization of the Debtor other than the Plan; or (v) otherwise take any action that would in any material respect interfere with, delay, or postpone the consummation of the Plan; provided, however, that such vote may be revoked (and, upon such revocation, deemed void ab initio) by such HarbourVest Party at any time following the termination of this agreement or the occurrence of a Support Termination Event (it being understood that any termination of this agreement shall entitle each HarbourVest Party to change its vote in accordance with section 1127(d) of the Bankruptcy Code), notwithstanding any voting deadline established by the Bankruptcy Court including without limitation the January 5, 2021, 5:00 p.m. (prevailing Central Time) deadline established by the *Order Approving Form of Ballots, Voting Deadline and Solicitation Procedures* [Docket No. 1476].

(b) In full resolution of the 3018 Motion, HarbourVest will have a general unsecured claim for voting purposes only in the amount of \$45,000,000.

(c) The obligations of the HarbourVest Parties under this Section 5 shall automatically terminate upon the occurrence of any of the following (each a “Support Termination Event”): (i) the effective date of the Plan, (ii) the withdrawal of the Plan, (iii) the entry of an order by the Bankruptcy Court (A) converting the Bankruptcy Case to a case under chapter 7 of the Bankruptcy Code or (B) appointing an examiner with expanded powers beyond those set forth in sections 1106(a)(3) and (4) of the Bankruptcy Code or a trustee in Bankruptcy

Case, or (iv) the failure of the Court to enter an order approving the terms of this Agreement and the settlement described herein pursuant to Rule 9019 prior to confirmation of the Plan.

6. **No Admission of Liability.** The Parties acknowledge that there is a bona fide dispute with respect to the HarbourVest Claims. Nothing in this Agreement will imply, an admission of liability, fault or wrongdoing by the Debtor, HarbourVest, or any other person, and the execution of this Agreement does not constitute an admission of liability, fault, or wrongdoing on the part of the Debtor, HarbourVest, or any other person.

7. **Successors-in-Interest.** This Agreement shall be binding upon and shall inure to the benefit of each of the Parties and their successors, and assigns.

8. **Notice.** Each notice and other communication hereunder will be in writing and will be sent by email and delivered or mailed by registered mail, receipt requested, and will be deemed to have been given on the date of its delivery, if delivered, and on the fifth full business day following the date of the mailing, if mailed to each of the Parties thereto at the following respective addresses or such other address as may be specified in any notice delivered or mailed as set forth below:

HARBOURVEST

HarbourVest Partners L.P.
Attention: Michael J. Pugatch
One Financial Center
Boston, MA 02111
Telephone No. 617-348-3712
E-mail: mpugatch@harbourvest.com

with a copy (which shall not constitute notice) to:

Debevoise & Plimpton LLP
Attention: M. Natasha Labovitz, Esq.
919 Third Avenue
New York, NY 10022
Telephone No. 212-909-6649
E-mail: nlabovitz@debevoise.com

THE DEBTOR

Highland Capital Management, L.P.
300 Crescent Court, Suite 700
Dallas, Texas 75201
Attention: James P. Seery, Jr.
Telephone No.: 972-628-4100
Facsimile No.: 972-628-4147
E-mail: jpseeryjr@gmail.com

with a copy (which shall not constitute notice) to:

Pachulski Stang Ziehl & Jones LLP
Attention: Jeffrey Pomerantz, Esq.
10100 Santa Monica Blvd., 13th Floor
Los Angeles, CA 90067
Telephone No.: 310-277-6910
Facsimile No.: 310-201-0760
E-mail: jpomerantz@pszjlaw.com

9. **Advice of Counsel.** Each Party represents that it has: (a) been adequately represented by independent legal counsel of its own choice, throughout all of the negotiations that preceded the execution of this Agreement; (b) executed this Agreement upon the advice of such counsel; (c) read this Agreement, and understands and assents to all the terms and conditions contained herein without any reservations; and (d) had the opportunity to have this Agreement and all the terms and conditions contained herein explained by independent counsel, who has answered any and all questions asked of such counsel, or which could have been asked of such counsel, including, but not limited to, with regard to the meaning and effect of any of the provisions of this Agreement.

10. **Entire Agreement.** This Agreement and the Transfer Agreement contain the entire agreement and understanding concerning the subject matter of this Agreement, and supersede and replace all prior negotiations and agreements, written or oral and executed or unexecuted, concerning such subject matter. Each of the Parties acknowledges that no other Party, nor any agent of or attorney for any such Party, has made any promise, representation or warranty, express or implied, written or oral, not otherwise contained in this Agreement to induce any Party to execute this Agreement. The Parties further acknowledge that they are not executing this Agreement in reliance on any promise, representation or warranty not contained in this Agreement, and that any such reliance would be unreasonable. This Agreement will not be waived or modified except by an agreement in writing signed by each Party or duly authorized representative of each Party.

11. **No Party Deemed Drafter.** The Parties acknowledge that the terms of this Agreement are contractual and are the result of arms'-length negotiations between the Parties and their chosen counsel. Each Party and its counsel cooperated in the drafting and preparation of this Agreement. In any construction to be made of this Agreement, the Agreement will not be construed against any Party.

12. **Future Cooperation.** The Parties agree to cooperate and execute such further documentation as is reasonably necessary to effectuate the intent of this Agreement.

13. **Counterparts.** This Agreement may be executed in counterparts with the same force and effect as if executed in one complete document. Each Party's signature hereto will signify acceptance of, and agreement to, the terms and provisions contained in this Agreement. Photographic, electronic, and facsimile copies of signed counterparts may be used in lieu of the originals of this Agreement for any purpose.

14. **Governing Law; Venue; Attorneys' Fees and Costs.** The Parties agree that this Agreement will be governed by and will be construed according to the laws of the State of Texas without regard to conflict-of-law principles. Each of the Parties hereby submits to the exclusive jurisdiction of the Bankruptcy Court during the pendency of the Bankruptcy Case and thereafter to the exclusive jurisdiction of the state and federal courts located in the Northern District of Texas, Dallas Division, with respect to any disputes arising from or out of this Agreement. In any action to enforce this Agreement, the prevailing party shall be entitled to recover its reasonable and necessary attorneys' fees and costs (including experts).

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IT IS HEREBY AGREED.

HIGHLAND CAPITAL MANAGEMENT, L.P.

By: /s/ James P. Seery, Jr.
Name: James P. Seery, Jr.
Its: CEO/CRO

HarbourVest 2017 Global Fund L.P., by HarbourVest 2017 Global Associates L.P., its General Partner, by HarbourVest GP LLC, its General Partner, by HarbourVest Partners, LLC, its Managing Member

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

HarbourVest 2017 Global AIF L.P., by HarbourVest Partners (Ireland) Limited, its Alternative Investment Fund Manager, by HarbourVest Partners L.P., its Duly Appointed Investment Manager, by HarbourVest Partners, LLC, its General Partner

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

HarbourVest Dover Street IX Investment L.P., by HarbourVest Partners L.P., its Duly Appointed Investment Manager, by HarbourVest Partners, LLC, its General Partner

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

HarbourVest Partners L.P., on behalf of funds and accounts under management, by HarbourVest Partners, LLC, its General Partner

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

**HarbourVest Skew Base AIF L.P., by HarbourVest Partners (Ireland) Limited, its
Alternative Investment Fund Manager, by HarbourVest Partners L.P., its Duly Appointed
Investment Manager, by HarbourVest Partners, LLC, its General Partner**

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

**HV International VIII Secondary L.P., by HIPEP VIII Associates L.P., its General
Partner, by HarbourVest GP LLC, its General Partner, by HarbourVest Partners, LLC,
its Managing Member**

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

Exhibit A

- c. Transferee hereby assumes all of Transferor's rights and obligations in respect of the Interest effective as of the Effective Date (as defined below) and acknowledge that thereafter Transferee shall be subject to the applicable terms and provisions of the Members' Agreement dated as of November 15, 2017 (the "**Members' Agreement**"), the Articles of Incorporation adopted November 15, 2017 (the "**Articles**") and the Subscription and transfer Agreement, dated as of November 15, 2017 among each Transferor, the Fund and the Portfolio Manager (the "**Subscription Agreement**", and together with the Members' Agreement and the Articles, the "**Fund Agreements**") with respect to the Interest. Transferee does not assume any liability or responsibility for any obligations or liabilities incurred by any Transferor prior to the Effective Date of the transfer.
 - d. Following the transfer, each Transferor shall have no further rights or obligations to any party hereunder in respect of the Interest under the Fund Agreements.
 - e. This Transfer Agreement, and the parties' obligations hereunder, are conditioned in all respects on the approval by the Bankruptcy Court for the Northern District of Texas, Dallas Division pursuant to Federal Rule of Bankruptcy Procedure 9019 of (i) this Transfer Agreement and (ii) the Settlement Agreement, and each of the parties agree that no further action shall be required from any party for the transfer of the Interest to be effective except as described herein.
2. Transferee's Representations and Warranties. The Transferee represents and warrants to the Transferors, the Portfolio Manager, and the Fund as follows:
- a. This Transfer Agreement constitutes a valid and binding obligation of the Transferee, enforceable against it in accordance with its terms;
 - b. This Transfer Agreement has been duly and validly executed and delivered by or on behalf of the Transferee and such execution and delivery have been duly authorized by all necessary trust action of the Transferee;
 - c. The Transferee acknowledges receipt of, has read, and is familiar with, the Fund's Offering Memorandum for Placing Shares dated November 15, 2017 (the "**Offering Memorandum**") and the Fund Agreements;
 - d. The Transferee hereby accepts and receives the Interest from the Transferors for investment, and not with a view to the sale or distribution of any part thereof, and the Transferee has no present intention of selling, granting participations in, or otherwise distributing the same, but subject nevertheless to any requirement of law that the disposition of the Transferee's property shall at all times be within such Transferee's control; and
 - e. The Transferee is an "Eligible U.S. Investor" as defined in the Offering Memorandum.

3. Transferors' Representations and Warranties. Each Transferor represents and warrants to the Transferee, the Portfolio Manager, and the Fund as follows:
 - a. This Transfer Agreement constitutes a valid and binding obligation of the Transferor, enforceable against it in accordance with its terms;
 - b. This Transfer Agreement has been duly authorized, and duly and validly executed and delivered by the Transferor and such execution and delivery have been duly authorized by all necessary action of the Transferor; and
 - c. As of the date hereof, the Transferor has good and valid title to the Transferor's Interest, free and clear of any liens, vesting requirements or claims by others.
4. Consent to Transfer. Based in part on the representations and warranties of the Transferors and the Transferee which are included herein, and on the terms contained herein, the Portfolio Manager and the Fund hereby consent to the transfers of the Interest, the admission of the Transferee as a Shareholder and the Transferee's appointment of a representative to the Advisory Board, the Portfolio Manager's execution of this Transfer Agreement constituting its prior written consent to the transfers of the Interest for the purposes of article 18.1 of the Articles and this Transfer Agreement constituting express notice in writing to the Fund of the assignment set out at clause 1(c) above for the purposes of the Law of Property (Miscellaneous Provisions) (Guernsey) Law, 1979 (as amended).
5. Completion: As of the date of approval by the Bankruptcy Court for the Northern District of Texas, Dallas Division pursuant to Federal Rule of Bankruptcy Procedure 9019 of (i) this Transfer Agreement and (ii) the Settlement Agreement (the "**Effective Date**"):
 - a. each Transferor shall deliver or cause to be delivered to the Transferee a transfer instrument relating to the Transferred Shares duly executed and completed by that Transferor in favor of the Transferee; and
 - b. the Transferee shall deliver to the Transferors and the Fund a duly executed and dated Adherence Agreement (as defined in the Members' Agreement).

Prior to the Effective Date the Transferee shall procure that:

 - c. the board of directors of the Fund shall hold a meeting at which the transfer of the Shares to the Transferee shall be approved and registration in the register of members of the Fund shall be effected on the Effective Date.
6. Miscellaneous.
 - a. Each of the parties hereto agree to execute any further instruments and perform any further acts which are or may become reasonably necessary to carry out the intent of this Transfer Agreement or are reasonably requested by the Portfolio Manager, the Fund or a Transferor to complete the transfer of the Interest.

- b. The parties to this Transfer Agreement acknowledge that the terms of this Transfer Agreement are the result of arms'-length negotiations between the parties and their respective counsel. Each party and its counsel cooperated in the drafting and preparation of this Transfer Agreement. In any construction to be made of this Transfer Agreement, the language or drafting of this Transfer Agreement will not be construed against any party.
- c. This Transfer Agreement shall be governed by, and construed and enforced in accordance with, the internal substantive laws of the state of Delaware, without giving effect to conflicts of law principles.
- d. The representations, warranties and covenants of the Transferors and the Transferee shall remain in full force and effect following the transfer of the Interest, and the Fund and the Portfolio Manager thereafter may rely on all such representations, warranties and covenants.
- e. This Transfer Agreement may be executed in multiple counterparts, each of which shall be deemed to be an original, but all of which together shall constitute one and the same instrument. Photographic, electronic, and facsimile copies of signed counterparts may be used in lieu of the originals of this Transfer Agreement for any purpose.
- f. Captions of sections have been added only for convenience and shall not be deemed to be a part of this Transfer Agreement.
- g. This Transfer Agreement is among the parties hereto. No Person that is not a party hereto shall have any right herein as a third-party beneficiary or otherwise except as expressly contemplated hereby.

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Exhibit A

<u>Transferee Name</u>	<u>Number of Shares</u>	<u>Percentage</u>
HarbourVest Dover Street IX Investment L.P.	54,355,482.14	71.0096%
HarbourVest 2017 Global AIF L.P.	7,426,940.38	9.7025%
HarbourVest 2017 Global Fund L.P.	3,713,508.46	4.8513%
HV International VIII Secondary L.P.	9,946,780.11	12.9944%
HarbourVest Skew Base AIF L.P.	1,103,956.03	1.4422%

THIS DOCUMENT IS IMPORTANT AND REQUIRES YOUR IMMEDIATE ATTENTION. If you are in any doubt as to the action you should take or the contents of this document, you are recommended to seek your own independent financial advice immediately from your stockbroker, bank, solicitor, accountant, or other appropriate independent financial adviser, who is authorised under the Financial Services and Markets Act 2000, as amended (“FSMA”) if you are in the United Kingdom, or from another appropriately authorised independent financial adviser if you are in a territory outside the United Kingdom.

A copy of this document, which comprises an offering memorandum (the “Offering Memorandum”) relating to Highland CLO Funding, Ltd. (the “Company”) in connection with the issue of Placing Shares in the Company, is available at the Company’s registered office upon request.

The Placing Shares are only suitable for investors: (i) who understand the potential risk of capital loss and that there may be limited liquidity in the underlying investments of the Company; (ii) for whom an investment in the Placing Shares is part of a diversified investment programme; and (iii) who fully understand and are willing to assume the risks involved in such an investment programme. It should be remembered that the price of the Placing Shares and the income from them can go down as well as up and that investors may not receive, on the sale or cancellation of the Placing Shares, the amount that they invested.

The Company and its directors (whose names appear in the section of this Offering Memorandum entitled “*Company Directors and Administration*”) (the “**Directors**”) accept responsibility for the information contained in this Offering Memorandum. To the best of the knowledge of the Company and the Directors (who have taken all reasonable care to ensure that such is the case), the information contained in the Offering Memorandum is in accordance with the facts and contains no omission likely to affect its import. The Directors have taken all reasonable care to ensure that the facts stated in the Offering Memorandum are true and accurate in all material respects, and that there are no other facts the omission of which would make misleading any statement in this Offering Memorandum, whether of facts or of opinion. All the Directors accept responsibility accordingly.

Potential investors should read the whole of this Offering Memorandum when considering an investment in the Placing Shares and, in particular, attention is drawn to the section of this Offering Memorandum entitled “*Risk Factors*” on pages 18 to 47 of this Offering Memorandum.

HIGHLAND CLO FUNDING, LTD.

(a closed-ended investment company limited by shares incorporated under the laws of Guernsey with registered number 60120)

Placing for a target issue of U.S. \$153,000,000 of Placing Shares

This Offering Memorandum does not constitute or form part of any offer or invitation to sell, or the solicitation of an offer to acquire or subscribe for, any securities other than the securities to which it relates or any offer or invitation to sell or issue, or any solicitation of any offer to purchase or subscribe for such securities by any person in any circumstances in which such offer or solicitation is unlawful.

The Placing Shares have not been and will not be registered under the U.S. Securities Act of 1933 (the “**U.S. Securities Act**”) or under the securities laws of any state or other jurisdiction of the United States. The Placing Shares may not be offered, sold, exercised, resold, transferred or delivered, directly or indirectly, within the United States or to, or for the account or benefit of, U.S. Persons, except pursuant to an exemption from, or in a transaction not subject to, the registration requirements of the U.S. Securities Act and in compliance with any applicable securities laws of any state or other jurisdiction in the United States.

The Company has not been and will not be registered under the U.S. Investment Company Act of 1940, as amended (the “**U.S. Investment Company Act**”) and investors will not be entitled to the benefits of the U.S. Investment Company Act. There will be no public offer of the Placing Shares in the United States.

Neither the U.S. Securities and Exchange Commission (the “SEC”) nor any state securities commission has approved or disapproved of the Placing Shares or passed upon or endorsed the merits of the offering of the Placing Shares or the adequacy or accuracy of this Offering Memorandum. Any representation to the contrary is a criminal offence in the United States.

Except with the express written consent of the Company given in respect of an investment in the Company, the Placing Shares may not be acquired by: (i) investors using assets of: (A) an “employee benefit plan” as defined in Section 3(3)

EXHIBIT

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of the United States Employee Retirement Income Security Act of 1974, as amended (“ERISA”) that is subject to Title I of ERISA; (B) a “plan” as defined in Section 4975 of the United States Internal Revenue Code of 1986, as amended (the “U.S. Tax Code”), including an individual retirement account or other arrangement that is subject to Section 4975 of the U.S. Tax Code; or (C) an entity whose underlying assets are considered to include “plan assets” by reason of investment by an “employee benefit plan” or “plan” described in preceding clause (A) or (B) in such entity pursuant to the U.S. Plan Assets Regulations; or (ii) a governmental, church, non-U.S. or other employee benefit plan that is subject to any federal, state, local or non-U.S. law that is substantially similar to the provisions of Title I of ERISA or Section 4975 of the U.S. Tax Code, unless its purchase, holding, and disposition of the Placing Shares will not constitute or result in a non-exempt violation of any such substantially similar law.

The distribution of this Offering Memorandum and the offer of the Placing Shares in certain jurisdictions may be restricted by law. No action has been or will be taken to permit the possession, issue or distribution of this Offering Memorandum (or any other offering or publicity material relating to the Placing Shares) in any jurisdiction where action for that purpose may be required or doing so is restricted by law. Accordingly, neither this Offering Memorandum, nor any advertisement, nor any other offering material may be distributed or published in any jurisdiction except under circumstances that will result in compliance with any applicable laws and regulations. Persons into whose possession this Offering Memorandum comes should inform themselves about and observe any such restrictions. None of the Company or any of its affiliates or advisors accepts any legal responsibility for any breach by any person, whether or not a prospective investor, of any such restrictions.

In addition, the Placing Shares are subject to restrictions on transferability and resale in certain jurisdictions and may not be transferred or resold except as permitted under applicable securities laws and regulations. Investors may be required to bear the financial risks of their investment in the Placing Shares for an indefinite period of time. Any failure to comply with these restrictions may constitute a violation of the securities laws of any such jurisdictions. For further information on restrictions on offers, sales and transfers of the Placing Shares, please refer to the section of this Offering Memorandum entitled “Purchase and Transfer Restrictions” in “Placing Arrangements”.

In making an investment decision, each investor must rely on their own examination, analysis and enquiry of the Company and the terms of the Placing including the merits and risks involved. The investors also acknowledge that they have relied only on the information contained in this document. No person has been authorised to give any information or make any representations other than those contained in this Offering Memorandum and, if given or made, such information or representations must not be relied on as having been so authorised. Neither the delivery of this Offering Memorandum nor any subscription or sale made under it shall, under any circumstances, create any implication that there has been no change in the affairs of the Company since the date of this document or that the information in it is correct as of any subsequent time.

None of the Company or any of its representatives is making any representation to any prospective investor in respect of the Placing Shares regarding the legality of an investment in the Placing Shares by such prospective investor under the laws applicable to such prospective investor.

The contents of this Offering Memorandum should not be construed as legal, financial or tax advice. Each prospective investor should consult his, her or its own legal, financial or tax adviser for legal, financial or tax advice.

The Company is a registered closed-ended collective investment scheme pursuant to The Protection of Investors (Bailiwick of Guernsey) Law, 1987, as amended and the Registered Collective Investment Schemes Rules 2015 issued by the Guernsey Financial Services Commission. Neither the Guernsey Financial Services Commission nor the States of Guernsey take any responsibility for the soundness of the Company or for the correctness of any statements made or opinions expressed with regard to it.

If you are in any doubt about the contents of this Offering Memorandum you should consult your accountant, legal or professional adviser or financial adviser.

This Offering Memorandum has not been reviewed by the Guernsey Financial Services Commission and, in granting registration, the Guernsey Financial Services Commission has relied upon specific warranties provided by State Street (Guernsey) Limited, the Company’s designated administrator.

It should be remembered that the price of securities and the income from them can go down as well as up.

You are wholly responsible for ensuring that all aspects of the Company are acceptable to you. Investment in the Company may involve special risks that could lead to a loss of all or a substantial portion of such investment.

Unless you fully understand and accept the nature of the Company and the potential risks inherent in this Company you should not invest in the Company.

This Offering Memorandum is dated November 15, 2017.

IMPORTANT NOTICES

Investors should rely only on the information contained in this Offering Memorandum. No person has been authorised to give any information or to make any representations in connection with the Placing other than those contained in this Offering Memorandum and, if given or made, such information or representations must not be relied upon as having been authorised by or on behalf of the Company. Neither the delivery of this Offering Memorandum nor any subscription or sale made under this Offering Memorandum shall, under any circumstances, create any implication that there has been no change in the business or affairs of the Company since the date of this Offering Memorandum or that the information contained in this Offering Memorandum is correct as of any time subsequent to its date.

The contents of this Offering Memorandum are not to be construed as legal, financial, business, investment or tax advice. Each prospective investor should consult his or her own legal adviser, financial adviser or tax adviser for legal, financial or tax advice in relation to any purchase or proposed purchase of Placing Shares.

An investment in the Placing Shares is suitable only for institutional, professional and high net worth investors, private client fund managers and brokers and other investors who are capable of evaluating the merits and risks of such an investment and/or who have received advice from their fund manager or broker regarding such an investment and who have sufficient resources to be able to bear losses (which may equal the whole amount invested) that may result from such an investment. An investment in the Placing Shares should constitute part of a diversified investment portfolio. Accordingly, typical investors in the Company are expected to be institutional, professional and high net worth investors, private client fund managers and brokers and other investors who understand the risks involved in investing in the Company and/or who have received advice from their fund manager or broker regarding investment in the Company.

In making an investment decision, each investor must rely on their own examination, analysis and enquiry of the Company and the terms of the Placing including the merits and risks involved. Investors who purchase Placing Shares will be deemed to have acknowledged that no person has been authorised to give any information or make any representations other than those contained in this Offering Memorandum and, if given or made, such information or representations must not be relied on as having been authorised by the Company.

General

Prospective investors should not treat the contents of this Offering Memorandum as advice relating to legal, taxation, investment or any other matters. Prospective investors should inform themselves as to: (a) the legal requirements within their own countries for the purchase, holding, transfer, redemption or other disposal of Placing Shares; (b) any foreign exchange restrictions applicable to the purchase, holding, transfer, redemption or other disposal of Placing Shares which they might encounter; and (c) the income and other tax consequences which may apply in their own countries as a result of the purchase, holding, transfer, redemption or other disposal of Placing Shares. Prospective investors must rely on their own representatives, including their own legal advisers, financial advisers and accountants, as to legal, tax, investment or any other related matters concerning the Company and an investment therein.

Statements made in this Offering Memorandum are based on the law and practice currently in force and are subject to changes therein. This Offering Memorandum should be read in its entirety before making any application for Placing Shares.

Application will be made to the appropriate securities exchange for the Placing Shares to be admitted when deemed appropriate by the Company.

All times and dates referred to in this Offering Memorandum are, unless otherwise stated, references to Guernsey times and dates and are subject to change without further notice.

Capitalised terms contained in this Offering Memorandum shall have the meanings set out in the Offering memorandum and/or in the section of this Offering Memorandum entitled “Definitions”, save where the context indicates otherwise.

Restrictions on distribution and sale

The distribution of this Offering Memorandum and the offering and sale of securities offered hereby in certain jurisdictions may be restricted by law. Persons in possession of this Offering Memorandum are required to inform themselves about and observe any such restrictions. This Offering Memorandum may not be used for, or in connection with, and does not constitute, any offer to sell, or solicitation to purchase, any such securities in any jurisdiction in which solicitation would be unlawful.

For a description of restrictions on offers, sales and transfers of Shares, please refer to the sections of this Offering Memorandum entitled “Selling restrictions” below and “Purchase and Transfer Restrictions” in “Placing Arrangements”. Save as set out in these sections, there are no restrictions on the transfer of Shares under the Articles.

Forward-looking statements

This Offering Memorandum includes statements that are, or may be deemed to be, “forward-looking statements”. These forward-looking statements can be identified by the use of forward-looking terminology, including the terms “believes”, “estimates”, “anticipates”, “expects”, “intends”, “plans”, “projects”, “targets”, “aims”, “may”, “will” or “should” or, in each case, their negative or other variations or comparable terminology. These forward-looking statements include all matters that are not historical facts. They appear in a number of places throughout this Offering Memorandum and include statements regarding the intentions, beliefs or current expectations of the Company concerning, amongst other things, the investment objective and investment policy, investment strategy, financing strategies, investment performance, results of operations, financial condition, prospects, and dividend/distribution policy of the Company, and the markets in which the Company, and their respective portfolios of investments, invest and/or operate. By their nature, forward-looking statements involve risks (including those set out in the section of this Offering Memorandum entitled “Risk Factors”) and uncertainties because they relate to events and depend on circumstances that may or may not occur in the future. Forward-looking statements are not guarantees of future performance. The Company’s actual investment performance, results of operations, financial condition, dividend policy and the development of its investment strategy financing strategies may differ materially from the impression created by the forward-looking statements contained in this Offering Memorandum. In addition, even if the investment performance, results of operations, financial condition of the Company, and the development of its financing strategies, are consistent with the forward-looking statements contained in this Offering Memorandum, those results or developments may not be indicative of results or developments in subsequent periods. Important factors that could cause these differences include, but are not limited to:

- changes in economic conditions generally and the Company’s ability to achieve its investment objective and target returns and target dividends for investors;
- the ability of the Company to invest the cash on its balance sheet and the proceeds of the Placing on a timely basis within the investment objective and investment policy;
- foreign exchange mismatches with respect to exposed assets;
- changes in the interest rates and/or credit spreads, as well as the success of the Company’s investment strategy in relation to such changes and the management of the un-invested proceeds of the Placing;
- impairments in the value of the investments;
- the availability and cost of capital for future investments;
- the departure of key personnel employed by the Portfolio Manager;

- changes in laws or regulations, including tax laws, or new interpretations or applications of laws and regulations, that are applicable to the Company; and
- general economic trends and other external factors, including those resulting from war, incidents of terrorism or responses to such events.

Given these uncertainties, prospective investors are cautioned not to place any undue reliance on such forward-looking statements. Prospective investors should carefully review the “*Risk Factors*” section of this Offering Memorandum before making an investment decision. Forward-looking statements speak only as at the date of this Offering Memorandum. Although the Company undertakes no obligation to revise or update any forward-looking statements contained herein (save where required by the Offering Memorandum Rules), whether as a result of new information, future events, conditions or circumstances, any change in the Company’s expectations with regard thereto or otherwise, prospective investors are advised to consult any communications made directly to them by the Company and/or any additional disclosures through announcements that the Company may make through a website to be created or through the Administrator.

Selling Restrictions

This Offering Memorandum does not constitute, and may not be used for the purposes of, an offer or an invitation to apply for any Placing Shares by any person: (i) in any jurisdiction in which such offer or invitation is not authorised; or (ii) in any jurisdiction in which the person making such offer or invitation is not qualified to do so; or (iii) to any person to whom it is unlawful to make such offer or invitation. The distribution of this Offering Memorandum and the offering of Placing Shares in certain jurisdictions may be restricted. Accordingly, persons into whose possession this Offering Memorandum comes are required to inform themselves about and observe any restrictions as to the offer or sale of Placing Shares and the distribution of this Offering Memorandum under the laws and regulations of any jurisdiction in connection with any applications for Placing Shares, including obtaining any requisite governmental or other consent and observing any other formality prescribed in such jurisdiction.

Bailiwick of Guernsey

The Company has been established in Guernsey as a registered collective investment scheme under the RCIS Rules.

Further information in relation to the regulatory treatment of registered closed-ended investment funds domiciled in Guernsey may be found on the website of the Guernsey Financial Services Commission at www.gfsc.gg.

This Offering Memorandum is prepared, and a copy of it has been sent to the Guernsey Financial Services Commission, in accordance with the RCIS Rules.

The Commission takes no responsibility for the financial soundness of the Company or for the correctness of any statements made or opinions expressed with regard to it.

The applicant is strongly recommended to read and consider this Offering Memorandum before completing an application.

This Offering Memorandum has not been approved by the GFSC and neither the GFSC nor the States of Guernsey Policy Council takes any responsibility for the financial soundness of the Company or for the correctness of any of the statements made or opinions expressed with regard to it.

European Economic Area

In relation to each member state of the European Economic Area which has implemented the Prospectus Directive (each, a “**Relevant Member State**”), no Placing Shares have been offered or will be offered pursuant to the Placing to the public in that Relevant Member State prior to the publication of a prospectus in relation to the Placing Shares which has been approved by the competent authority in that Relevant Member State, or, where appropriate, approved in another Relevant Member State and notified to the competent authority in that Relevant Member State, all in accordance with the Prospectus Directive, except that offers of Placing Shares to the public may be made at any time

under the following exemptions under the Prospectus Directive, if they are implemented in that Relevant Member State:

- (a) to any legal entity which is a qualified investor as defined in the Prospectus Directive;
- (b) to fewer than 150 natural or legal persons (other than qualified investors as defined in the Prospectus Directive) in such Relevant Member State; or
- (c) in any other circumstances falling within Article 3(2) of the Prospectus Directive,

provided that no such offer of Placing Shares shall result in a requirement for the publication of a prospectus pursuant to Article 3 of the Prospectus Directive or a supplemental prospectus pursuant to Article 16 of the Prospectus Directive or any measure implementing the Prospectus Directive in a Relevant Member State and each person who initially acquires any Placing Shares or to whom any offer is made under the Placing will be deemed to have represented, acknowledged and agreed that it is a “qualified investor” within the meaning of Article 2(1)(e) of the Prospectus Directive.

For the purposes of this provision, the expression an “**offer to the public**” in relation to any offer of Placing Shares in any Relevant Member State means a communication in any form and by any means presenting sufficient information on the terms of the offer and any Placing Shares to be offered so as to enable an investor to decide to purchase or subscribe for the Placing Shares, as the same may be varied in that Relevant Member State by any measure implementing the Prospectus Directive in that Relevant Member State and the expression “**Prospectus Directive**” means Directive 2003/71/EC (and the amendments thereto, including 2010 PD Amending Directive, to the extent implemented in the Relevant Member State) and includes any relevant implementing measure in each Relevant Member State and the expression “**2010 PD Amending Directive**” means Directive 2010/73/EU.

The distribution of this Offering Memorandum in other jurisdictions may be restricted by law and therefore persons into whose possession this Offering Memorandum comes should inform themselves about and observe any such restrictions.

The Company is an alternative investment fund for the purpose of the AIFMD. The Placing Shares may only be marketed to prospective investors which are domiciled or have a registered office in a member state of the European Economic Area (“**EEA Persons**”) in which marketing has been registered or authorised (as applicable) under the relevant national implementation of Article 42 of AIFMD and in such cases only to EEA Persons which are Professional Investors or any other category of person to which such marketing is permitted under the national laws of such member state.

This Offering Memorandum is not intended for, should not be relied on by and should not be construed as an offer (or any other form of marketing) to any other EEA Person.

A “Professional Investor” is an investor who is considered to be a professional client or who may, on request, be treated as a professional client within the relevant national implementation of Annex II of Directive 2004/39/EC (Markets in Financial Instruments Directive) and the AIFMD.

Each EEA Person who initially acquires Placing Shares or to whom any offer is made will be deemed to have represented, warranted to and agreed with the entity placing such shares and the Company that (a) it is a “qualified investor” within the meaning of the law in that relevant member state implementing Article 2.1(e) of the Prospectus Directive and (b) , that it is a Professional Investor or other person to whom Placing Shares in the Company may lawfully be marketed under the AIFMD or under the national laws of that relevant member state.

The distribution of this Offering Memorandum in other jurisdictions may be restricted by law and therefore persons into whose possession this Offering Memorandum comes should inform themselves about and observe any such restrictions

Switzerland

This Offering Memorandum may only be freely circulated and Shares in the Company may only be freely offered, distributed or sold to regulated financial intermediaries such as banks, securities dealers, fund management companies,

asset managers of collective investment schemes and central banks as well as to regulated insurance companies. Circulating this Offering Memorandum and offering, distributing or selling Shares in the Company to other persons or entities including qualified investors as defined in the Federal Act on Collective Investment Schemes (“CISA”) and its implementing Ordinance (“CISO”) may trigger, in particular, (i) licensing/prudential supervision requirements for the distributor, (ii) a requirement to appoint a representative and paying agent in Switzerland and (iii) the necessity of a written distribution agreement between the representative in Switzerland and the distributor. Accordingly, legal advice should be sought before providing this Offering Memorandum to and offering, distributing, selling or on-selling Shares of the Company to any other persons or entities. This Offering Memorandum does not constitute an issuance prospectus pursuant to Articles 652a or 1156 of the Swiss Code of Obligations and may not comply with the information standards required thereunder. The Shares will not be listed on the SIX Swiss Exchange, and consequently, the information presented in this document does not necessarily comply with the information standards set out in the relevant listing rules. The documentation of the Company has not been and will not be approved, and may not be able to be approved, by the Swiss Financial Market Supervisory Authority (“FINMA”) under the CISA. Therefore, investors do not benefit from protection under the CISA or supervision by the FINMA. This Offering Memorandum does not constitute investment advice. It may only be used by those persons to whom it has been handed out in connection with the Shares and may neither be copied or directly/indirectly distributed or made available to other persons.

United States

The Placing Shares have not been and will not be registered under the U.S. Securities Act or with any securities regulatory authority of any state or other jurisdiction of the United States and the Placing Shares may not be offered, sold, exercised, resold, transferred or delivered, directly or indirectly, within the United States or to, or for the account or benefit of, U.S. Persons, except pursuant to an exemption from, or in a transaction not subject to, the registration requirements of the U.S. Securities Act and in compliance with any applicable securities laws of any state or other jurisdiction in the United States. There will be no public offer of the Placing Shares in the United States.

Subject to certain exceptions as described herein, the Placing is only being made outside the United States to non-U.S. Persons in reliance on Regulation S under the U.S. Securities Act.

In addition, prospective investors should note that, except with the express written consent of the Company given in respect of an investment in the Company, the Placing Shares may not be acquired by: (i) investors using assets of: (A) an “employee benefit plan” as defined in Section 3(3) of ERISA that is subject to Title I of ERISA; (B) a “plan” as defined in Section 4975 of the U.S. Tax Code, including an individual retirement account or other arrangement that is subject to Section 4975 of the U.S. Tax Code; or (C) an entity whose underlying assets are considered to include “plan assets” by reason of investment by an “employee benefit plan” or “plan” described in preceding clause (A) or (B) in such entity pursuant to the U.S. Plan Assets Regulations; or (ii) a governmental, church, non-U.S. or other employee benefit plan that is subject to any federal, state, local or non-U.S. law that is substantially similar to the provisions of Title I of ERISA or Section 4975 of the U.S. Tax Code, unless its purchase, holding, and disposition of the Placing Shares will not constitute or result in a non-exempt violation of any such substantially similar law.

If 25 per cent or more of any class of equity in the Company is owned, directly or indirectly, by U.S. Plan Investors that are subject to Title I of ERISA or Section 4975 of the U.S. Tax Code, the assets of the Company will be deemed to be “plan assets”, subject to the constraints of ERISA and Section 4975 of the U.S. Tax Code. This would result, among other things, in: (i) the application of the prudence and fiduciary responsibilities standards of ERISA to investments made by the Company, and (ii) the possibility that certain transactions that the Company and its subsidiaries might enter into, or may have entered into in the ordinary course of business, might constitute or result in non-exempt prohibited transactions under Section 406 of ERISA and/or Section 4975 of the U.S. Tax Code and might have to be rescinded. A non-exempt prohibited transaction may also result in the imposition of an excise tax under the U.S. Tax Code upon a “party in interest” (as defined in ERISA) or “disqualified person” (as defined in the U.S. Tax Code), with whom a plan engages in the transaction. The Company will use commercially reasonable efforts to restrict ownership by U.S. Plan Investors of equity in the Company. However, no assurance can be given that investment by U.S. Plan Investors will not exceed 25 per cent or more of any class of equity in the Company.

For a description of restrictions on offers, sales and transfers of Placing Shares, please refer to the section of this Offering Memorandum entitled “*Purchase and Transfer Restrictions*” in “*Placing Arrangements*”.

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SUMMARY

The following is an overview of the transaction structure and is qualified in its entirety by, and should be read in conjunction with, the more detailed information appearing elsewhere in this Offering Memorandum and related documents referred to herein. Capitalised terms not specifically defined in this Offering Memorandum have the meanings set out in the section of this Offering Memorandum entitled “*Definitions*” below. For a discussion of certain risk factors to be considered in connection with an investment in the Shares, see “*Risk Factors*”.

The Company:

Highland CLO Funding, Ltd. (formerly known as Acis Loan Funding, Ltd.) (the “**Company**”) is a closed-ended investment company limited by shares incorporated on 30 March 2015 under the laws of Guernsey with registered number 60120. The Company changed its name from Acis Loan Funding, Ltd. to Highland CLO Funding, Ltd. on October 27, 2017.

The Company holds a partial, indirect ownership in Highland CLO Management, LLC (“**Highland CLO Management**”), a Delaware series limited liability company established to manage Highland CLOs, act as a “majority-owned affiliate” for purposes of the U.S. Risk Retention Rules and as an “originator” for purposes of EU Retention Requirements and to hold with respect to Highland CLOs the required risk retention interests required under, and in accordance with, the U.S. Retention Rules and/or the EU Retention Requirements, as applicable (such interests with respect to any CLO, the applicable “**Retention Interest**”). Highland CLO Management is also partly held (on an indirect basis through Highland HCF Advisor) by Highland Capital Management, L.P. (“**Highland**”), a Delaware limited partnership, which controls the major economic decisions of Highland CLO Management.

The Company holds a partial, indirect ownership in ACIS CLO Management, LLC (“**Acis CLO Management**” and together with Highland CLO Management, the “**Management Companies**” and each, a “**Management Company**”), a Delaware series limited liability company established to manage Acis CLO 2017-7, Ltd. (“**Acis CLO 7**”), act as a “majority-owned affiliate” for purposes of the U.S. Risk Retention Rules and to hold the Retention Interests with respect to Acis CLO 7 required under, and in accordance with, the U.S. Retention Rules. Acis CLO Management is also partly held (on an indirect basis) by Acis Capital Management, L.P. (“**Acis**”), a Delaware limited partnership, which controls the major economic decisions of Acis CLO Management.

Each of Highland or Acis, as applicable, may hold their respective indirect ownership interests in the applicable Management Companies through, or transfer such interests to, affiliates that are intended to be, directly or indirectly, majority controlled, are majority controlled by or are under common majority control with, Highland or Acis, as applicable, with the intention that the Management Companies will remain their respective “majority-owned affiliates” for purposes of the U.S. Risk Retention Rules.

Investment Objective:

The Company’s investment objective is to provide Shareholders with stable and growing income returns, and to grow the capital value of the investment portfolio through opportunistic exposure to CLO Notes, investments in new issue CLOs sponsored by Highland and Acis CLO 7 through its interests in the Management Companies and CLO Income Notes, respectively, and senior secured loans primarily for the purpose of enabling Highland CLO Management to qualify as an “originator” for purposes of the EU Retention Requirements, on both a direct basis and indirect basis, through the use of the investments described in its investment policy and through use of leverage,

including, any Revolving Credit Facility, Warehouse Loan Facilities, total return swaps or repurchase agreements, in addition to secured loan facilities. With respect to the Company's investments, except with respect to Designated CLO Resets or Designated CLO Refinancings, if applicable, it is expected that the Portfolio Manager intends to seek monetization of such investments in the ordinary course in its discretion; provided that at the end of the Term, the Portfolio Manager, in its reasonable discretion may postpone dissolution of the Company for up to 180 days to facilitate the orderly liquidation of the investments.

Investment policy:

The Company's investment policy is to focus on synergistic investments in the following areas.

Loan Investments

The Company will invest on an indirect basis in a diverse portfolio of predominantly floating rate senior secured loans (or on a direct basis for the primary purpose of enabling Highland CLO Management to qualify as an "originator" for purposes of the EU Retention Requirements), all of which will have at least one rating, which may be public or private, from Moody's Investor Services, Inc. ("**Moody's**"), Standard & Poor's Financial Services LLC ("**S&P**") or Fitch Group, Inc. ("**Fitch**"). Initially, the Company's loan investments will be focused in the U.S., but depending on market conditions the Company may also invest in similar types of loans in Europe. Accordingly, there is no limit on the maximum U.S. or European exposure. Investments in U.S. or European loans may be made through a U.S. or European originator subsidiary of the Company. The Company intends to invest directly only in those senior secured loans to obligors with total potential indebtedness under all applicable loan agreements, indentures and other underlying instruments at least \$250,000,000 that would generally satisfy the eligibility criteria for Highland CLOs and (without limiting the foregoing):

- Such loan is not currently deferring the payment of any accrued and unpaid interest that otherwise would have been due and continues to remain unpaid;
- Such loan provides for a fixed amount of principal payable in cash on scheduled payment dates and/or at maturity and does not by its terms provide for earlier amortization or prepayment at a price less than par;
- Such loan is not an obligation issued by Highland, any of its controlled affiliates that are investment funds or any other investment fund whose investments are primarily managed by Highland or any affiliate or company that is controlled by Highland, an affiliate thereof, or an account, fund, client or portfolio established and controlled by Highland or an affiliate thereof (a "**Related Obligation**");
- Such loan is neither an equity security nor by its terms is convertible into or exchangeable for an equity security and does not include an attached warrant to purchase equity securities;
- Such loan is not a bridge loan; and

- Such loan is not a zero coupon loan.

Financing of Loan Portfolios / Securitization

It is intended that the Company will periodically seek to sell or securitise all or a portion of its loan portfolio, held directly or indirectly, into new Highland CLOs where Highland CLO Management acts as CLO Manager. In doing so, Highland CLO Management may seek to adopt the “originator” model to address the Origination Requirements (as defined below) applicable to such Highland CLOs to the extent such Highland CLOs sought to comply with EU Retention Requirements. As a result, Highland CLO Management will be required to commit to: (a) establishing the relevant CLO and (b) selling certain loan investments to the relevant CLO which it has purchased for its own account initially. In addition, under current guidance, prior to closing date of the relevant CLO, Highland CLO Management expects to sell investments to the relevant CLO such that the required percentage of the total securitised exposures held by the CLO issuer will have come from Highland CLO Management (collectively, the “**Origination Requirements**”).

CLO Notes

The Company will from time to time invest directly or indirectly (through affiliates and subsidiaries, including the Management Companies, as more fully described below) in CLO Notes issued by Acis CLO 7, Highland CLOs, CLOs where Acis is the CLO Manager, (“**Acis Legacy CLOs**”), CLOs where Highland is the CLO Manager, (“**Highland Legacy CLOs**” and together with the Highland CLOs, Acis CLO 7 and the Acis Legacy CLOs, the “**Managed CLOs**”) or CLOs managed by other asset managers.

With respect to each such investment, Highland CLO Management, and Acis CLO Management with respect to Acis CLO 7, will acquire the percentages and tranches of CLO Notes necessary to enable the related CLO to meet the U.S. Risk Retention Rules and, if applicable, the EU Retention Requirements.

With respect to any such investments in Highland CLOs where Highland CLO Management acts as CLO Manager, it is expected that Highland CLO Management will be a “relying adviser” of Highland. With respect to Acis CLO 7, Acis CLO Management is a “relying adviser” of Acis. It is further expected that Highland or Acis, as applicable, will act as a “sponsor” of such Managed CLOs for purposes of the U.S. Risk Retention Rules and will treat the applicable Management Company as its “majority-owned affiliate” under the U.S. Risk Retention Rules. All management and incentive fees received from such Managed CLO will be paid to the applicable Management Company pursuant to the relevant portfolio management agreement, which will then pay the majority of such fees to Highland or Acis, as applicable, in its roles as Staff and Services Provider and as Sub-Advisor. The applicable Management Company may also seek to act as “originator” for purposes of the EU Retention Requirements with respect to such Managed CLOs as described above.

Each CLO in which the Company directly or indirectly holds CLO Notes will have its own eligibility criteria and portfolio limits. These limits are designed to ensure the portfolio of loans within the CLO meets a prescribed level of diversity and quality as set by the relevant rating agencies rating securities issued by such CLO. The applicable CLO Manager, including Highland CLO Management with respect to new Highland CLOs or Acis CLO Management with respect to Acis CLO 7, intends to identify and actively manage loans

which meet those criteria and limits within each CLO. The eligibility criteria and portfolio limits within a CLO will typically include the following required criteria and may include some or all of the following expected criteria:

- a limit on the weighted average life of the portfolio;
- a limit on the weighted average rating of the portfolio;
- a limit on the maximum amount of portfolio assets with a rating lower than B-/B3/B-; and
- a limit on the minimum diversity of the portfolio.
- a limit on the minimum weighted average of the prescribed rating agency recovery rate;
- a limit on the minimum amount of senior secured assets;
- a limit on the maximum aggregate exposure to second lien loans, high yield bonds, mezzanine loans and unsecured loans;
- a limit on the maximum portfolio exposure to covenant-lite loans;
- an exclusion of project finance loans;
- an exclusion of structured finance securities;
- an exclusion on investing in the debt of companies domiciled in countries with a local currency sub investment grade rating; and
- an exclusion of leases.

The above are not intended to be an exhaustive list of the eligibility criteria and portfolio limits within a typical CLO and the inclusion or exclusion of such limits and their absolute levels are subject to change depending on market conditions.

Act as Risk Retention Provider

The Company may also invest in, provide loans to, or purchase performance-linked notes from, asset management subsidiaries, affiliated with the Company, the Portfolio Manager, Highland, Acis or the Management Companies and which may act as the asset manager of certain U.S. or European CLOs in order to satisfy the U.S. Risk Retention Rules or EU Retention Requirements.

Allocation of Investment Opportunities

Highland CLO Management will serve as CLO Manager to each newly-issued Highland CLO during the Investment Period.

During the Investment Period, the Company shall receive priority allocations with respect to all CLO Income Note investment opportunities with respect to new issue Highland CLOs, over the account of the Portfolio Manager, its affiliates and other clients, including other investment funds and client accounts, including those which follow an investment program substantially similar to that of the Business (such other clients, funds and accounts, collectively, the “**Other Accounts**”). For the avoidance of doubt, the Portfolio

Manager shall otherwise allocate investment opportunities among the Company and Highland and its affiliates and Other Accounts in accordance with its allocation policy which requires allocations among clients to be fair and equitable over time. *See “Risk Factors—Risks Relating to Conflicts of Interest—The Company will be subject to various conflicts of interest involving the Portfolio Manager and its affiliates”.*

Investment Restrictions:

During the Investment Period, the Company may invest up to \$250,000,000 in CLO Income Notes for new Highland CLOs as follows: (a) up to \$150,000,000 in the aggregate from new capital contributions; and (b) up to \$100,000,000 in the aggregate from proceeds received from existing seed portfolio investments and investments in new Highland CLOs, net of dividends paid, and amortization and interest payments on Company borrowings from committed credit facilities.

The Company may not, without the consent of the Advisory Board, invest in any CLO Notes or CLO Income Notes of new Highland CLOs that are not Qualifying CLOs. A “**Qualifying CLO**” is a Highland CLO (a) pursuant to which Highland, the Portfolio Manager, Highland CLO Management or any of its affiliates does not charge subordinate management fees in excess of 0.00%, senior management fees in excess of 0.15% or incentive management fees in excess of 0.00% and (b) which does not have a reinvestment period longer than 5 years; *provided* that, if the Portfolio Manager has provided reasonable evidence to the Advisory Board that a substantial portion of new issue CLOs have reinvestment periods longer than 5 years (the “**RP Condition**”), the consent of the Advisory Board to invest in any Highland CLO that meets clause (a) of the definition of Qualifying CLOs only shall not be unreasonably withheld, conditioned or delayed.

During the Investment Period, the Company shall be permitted to invest in a refinancing or “reset” with respect to the following CLOs (which may extend the re-investment period and/or term of such CLOs, subject to the proviso below) managed by Highland affiliates (the “**Designated CLO Resets**”):

Acis CLO 2013-1, Ltd.
Acis CLO 2014-3, Ltd.
Acis CLO 2014-4, Ltd.
Acis CLO 2014-5, Ltd.
Acis CLO 2015-6, Ltd.

provided that, with respect to Acis CLO 2014-3, Ltd., Acis CLO 2014-4, Ltd. and Acis CLO 2014-5, Ltd., any such Designated CLO Reset may not extend the re-investment period beyond 2.25 years of the date of such Designated CLO Reset.

During the Investment Period, the Company shall be permitted to invest in a refinancing with respect to Acis CLO 7 (which may not extend the re-investment period or term of such CLO) (the “**Designated CLO Refinancing**”).

For the avoidance of doubt, following the expiration of the Investment Period, the Company shall not consummate an investment in any “reset” with respect to CLO Income Notes held by the Company. In addition, the Company shall not permit a reset with respect to any CLO Income Notes of Managed CLOs

that it holds, unless such CLO Income Notes of Managed CLOs are fully redeemed.

The Company shall not invest in the CLO Income Notes of a new issue Highland CLO unless it is the 100% owner of the CLO Income Notes not forming part of the Retention Interest acquired by Highland CLO Management.

Indirect Actions

Neither the Portfolio Manager nor the Company may take any action indirectly through controlled subsidiaries that either the Portfolio Manager or the Company is not permitted to undertake directly as set forth herein.

Borrowing:

It is expected that the Company will have access to one or more committed credit facilities and will use advances under such facilities, together with the proceeds of the Shares, to purchase future senior secured loans (for the primary purpose of enabling Highland CLO Management to qualify as an “originator” for purposes of the EU Retention Requirements) or other assets. Such facilities may take the form of any Revolving Credit Facility, Warehouse Loan Facilities, total return swaps or repurchase agreements, in addition to secured loan facilities. In addition to such facilities, the Company will be permitted to borrow money for day to day administration and cash management purposes.

Borrowing Limits

Notwithstanding the foregoing or anything to the contrary set forth herein, as of the time any such debt is incurred, the Company’s maximum gross leverage exposure (excluding the Warehouse Loan Facilities) pursuant to (a) committed secured loan facilities and any other borrowing (other than described in clause (b)) shall not exceed (i) during the Investment Period, the greater of (x) 15% of the Company’s gross asset value and (y) \$50,000,000 and (ii) after the Investment Period, 15% of the Company’s gross asset value, and (b) repurchase agreements shall not exceed 75% of the Company’s gross asset value.

For purposes of the limits regarding repurchase agreements set forth in clause (b) above, the “gross asset value” of the Company shall exclude financing for CLO Notes held by a Management Company as part of a “vertical” Retention Interest (including for the Designated CLO Resets), the NexBank Credit Facility, any Warehouse Loan Facilities and cash equivalents.

Warehouse Loan Facilities

One or more multi-currency warehouse lending facilities may be entered into from time to time between (i) the Company and (ii) a warehouse provider (the “**Warehouse Loan Facilities**”), pursuant to which the Company is able to draw multi-currency loans from time to time in order to purchase assets for its portfolio. The Warehouse Loan Facilities will be entered into on market standard terms, as negotiated between the Company and the relevant warehouse provider in each case and will include a senior security package in favour of the warehouse provider.

Hedging and Derivatives

Without the consent of the Advisory Board, the Company may only use hedging or derivatives to hedge investments consistent with the Company's investment objectives, and not for speculative purposes.

Repurchase Agreements

The Company may not use repurchase agreements to finance the purchase of CLO Income Notes, however, the Company may pledge any already owned CLO Income Notes as additional collateral under repurchase agreements.

Revolving Credit Facility

The Company may enter into a secured revolving credit facility with a committed amount of \$50,000,000 for working capital purposes (a "**Revolving Credit Facility**")

NexBank Credit Facility

The Company currently has a secured term credit facility provided by NexBank SSB, a Texas savings bank, with a principal amount of \$22,158,337, as of September 30, 2017 (the "**NexBank Credit Facility**"). The Company may, from time to time, increase its borrowing under the NexBank Credit Facility up to a maximum principal amount of \$30,000,000 at any time without the consent of the Advisory Board, but subject to the limitations set forth above in "*Borrowing Limits*". The terms of the NexBank Credit Facility, and of any increase in the principal amount thereto, shall be at or better than market standard terms and shall be promptly disclosed to the Advisory Board (any such amended terms, the "**Permitted NexBank Credit Facility Amendments**").

Advisory Board:

The Company shall form and assemble an advisory board (the "**Advisory Board**") composed of individuals who shall be representatives of certain Shareholders selected by the Portfolio Manager in its sole discretion in order to (a) provide advice to the Portfolio Manager with respect to certain issues involving conflicts of interest in any transaction or relationship between the Company and the Portfolio Manager or any of its employees or affiliates that are presented to the Advisory Board by the Portfolio Manager, and (b) be required to approve the following actions:

- Any extension of the Investment Period;
- Any extension of the Term (other than an automatic extension following an extension of the Investment Period that has been approved by the Advisory Board);
- Any allotment of additional equity securities by the Company; and
- Any investment in a Related Obligation or any other transaction between the Company or any entity in which the Company holds a direct or indirect interest, on the one hand, and Highland or any of its affiliates, on the other hand.

Notwithstanding the foregoing or anything to the contrary set forth herein, no transaction that is specifically authorized in the governing documents of the Company shall require approval of the Advisory Board, including, without limitation, sales or securitizations of all or a portion of the Company's loan portfolio into new Qualifying CLOs (i.e. the transfer of warehoused assets into

new Qualifying CLOs), investments in CLO Notes issued by CLOs managed by Highland affiliates, and the NexBank Credit Facility and any Permitted NexBank Credit Facility Amendments.

No voting member of the Advisory Board shall be a controlled affiliate of Highland, it being understood that none of CLO Holdco, Ltd., its wholly-owned subsidiaries or any of their respective directors or trustees shall be deemed to be a controlled affiliate of Highland due to their pre-existing non-discretionary advisory relationship with Highland.

Each member of the Advisory Board shall owe no fiduciary or other duties to the Company or the shareholders and may act solely in the interest of the shareholder that it represents.

Neither the Advisory Board nor any member thereof shall have the power to bind or act for or on behalf of the Company in any manner, and no shareholder who appoints a member of the Advisory Board shall be deemed to be an affiliate of the Company, the Portfolio Manager or Highland solely by reason of such appointment.

Investment Period:

The Company's assets may be invested and, subject to the terms and conditions set forth in the "Dividend Policy" section below, reinvested for a period commencing on the Closing Date of the Placing and ending on April 30, 2020 (the "**Investment Period**"), subject to two additional one-year extensions with the consent of the Advisory Board (as hereinafter defined) and the Portfolio Manager; provided that the Term will automatically be extended by an identical length of time in the event of an extension of the Investment Period.

Termination of Investment Period following Key Person Event

The Portfolio Manager will promptly provide each Shareholder with written notice in the event that any two of James Dondero, Mark Okada, Trey Parker or Hunter Covitz (collectively, the "**Key Persons**") cease to devote such time to the affairs of the Company as is sufficient to effectively manage the operations of the Company (a "**Key Person Event**"), as determined by the Portfolio Manager in its reasonable discretion, taking into account such factors as it shall deem relevant in its reasonable discretion. The Portfolio Manager will promptly provide each Shareholder with written notice in the event of the termination of employment of any Key Person.

The Investment Period will be terminated immediately upon a Key Person Event. The Investment Period shall resume in the event that (i) the Portfolio Manager obtains or receives notice of the written election or vote of the Advisory Board to reinstate the Investment Period, or (ii) one or more Qualified Replacements (as defined below) are appointed in place of (or in addition to) the then existing Key Persons to cure the Key Person Event, in which event the Investment Period will continue until its termination as otherwise described herein without further regard to such Key Person Event.

For purposes of this Offering Memorandum, a "**Qualified Replacement**" means a person nominated by the Portfolio Manager and approved by the Advisory Board, such approval not to be unreasonably withheld, conditioned or delayed, as a replacement for any existing Key Person or as an additional Key Person; provided that the Advisory Board will provide notice of its

approval or disapproval of any person nominated to be a Qualified Replacement within 10 business days of such nomination.

For the avoidance of doubt, during any cessation of the Investment Period following a Key Person Event, (i) the Portfolio Manager may continue to require Placees to purchase Shares pursuant to the subscription and transfer agreement to fund (a) any indebtedness of the Company permitted hereunder incurred prior to the end of the Investment Period (including to repay outstanding indebtedness under any Warehouse Loan Facilities) or (b) the completion, no later than 180 days after the expiration of the Investment Period, new issue Highland CLOs that were in process at the time of such Key Person Event and (ii) the Company shall not receive priority allocations with respect to all CLO Income Note investment opportunities with respect to new issue Highland CLOs until the Investment Period resumes.

Term:

The term of the Company will end (and the Company thereafter will be wound up and dissolved) on the ten-year anniversary of the date of the Placing (the “Term”), subject to (a) automatic extension in the event of an extension of the Investment Period and (b) two additional one-year extension with the consent of the Portfolio Manager and the Advisory Board, or such earlier date after the end of the Investment Period on which the Portfolio Manager determines to terminate and wind up the Company following the receipt by the Company of all amounts reasonably expected by the Portfolio Manager to be received with respect to the Company’s assets or the sale thereof during the term and in a manner that will not cause the Company, the Portfolio Manager, Highland, Acis, the Management Companies or any subsidiary thereof to violate any applicable law or contract.

The Company has been established as a closed-ended vehicle. Accordingly, there is no right or entitlement attaching to Shares that allows them to be redeemed or repurchased by the Company at the option of the Shareholder.

**Placing Arrangements –
Investment Period Subscription
Commitment:**

The Company is seeking aggregate subscriptions to purchase Placing Shares in an aggregate amount of up to approximately U.S. \$153 million.

Placees will commit under a subscription and transfer agreement to purchase Shares to be settled from time to time during the Investment Period. The Portfolio Manager may call such Shares for settlement from time to time on a pro rata basis upon 10 Business Days’ notice to the Placees in such amounts as may be specified by the Portfolio Manager.

Upon the expiration of the Investment Period, all Placees will be released from any further obligation with respect to purchase Shares under their subscriptions, except to the extent necessary to:

(i) complete, no later than 180 days after the expiration of the Investment Period, the purchase of Shares pursuant to written commitments, letters of intent or similar contractual commitments that were in process as of the end of the Investment Period; and

(ii) fund any indebtedness of the Company permitted hereunder incurred prior to the end of the Investment Period (including to repay outstanding indebtedness under any Warehouse Loan Facilities).

Shares will be issued at a price per Share based on the most recent quarterly determined NAV of the Company.

The maximum number of Shares to be issued by the Company is an amount of Shares equal to U.S. \$153 million and there is no minimum number of Shares. Fractions of Placing Shares will be issued.

On the Closing Date, Placees will acquire Shares of existing Shareholders at a price per Share based on the NAV of the Company as of September 30, 2017, adjusted with respect to a dividend of \$9,000,000 on October 10, 2017, and a buyback of the Shares of Acis Capital Management, L.P. on October 24, 2017 (the “**Adjusted NAV**”) such that Placees and existing Shareholders will hold currently existing Shares on a *pro rata* basis and existing Shareholders will commit, as Placees under a subscription and transfer agreement, to purchase Shares such that new and existing Shareholders will hold both existing Shares and commitments on *pro rata* basis.

The Board may deduct from any dividend payable to any Shareholder on or in respect of a Share all sums of money (if any) presently payable by him to the Company on account of calls with respect to existing Shares, or calls of commitments to purchase Shares pursuant to the subscription and transfer agreement or otherwise.

A Shareholder that defaults in respect of its obligation to purchase Shares pursuant to the terms of the subscription and transfer agreement will be subject to customary default provisions.

The Board may retain any dividend or other monies payable on or in respect of a Share on which the Company has a lien and may apply the same in or towards satisfaction of the liabilities or obligations in respect of which the lien exists.

Highland Principal Commitment

Certain principals of Highland will subscribe, directly or indirectly, for \$3,000,000 of Shares in the aggregate.

Regulatory status:

The Company is a registered closed-ended investment company incorporated in Guernsey with limited liability on 30 March 2015 under the provisions of the Companies Law, with registered number 60120. The Company is regulated by the GFSC, and is not regulated by any regulator other than the GFSC.

Typical investors:

Investment in the Company is only suitable for Professional Investors as defined in the AIFMD and any other person to whom the Placing Shares may be lawfully offered.

Applicant’s service providers:

Portfolio Manager

Highland HCF Advisor, Ltd. (“**Highland HCF Advisor**”) has been appointed as the Portfolio Manager to the Company pursuant to the Portfolio Management Agreement. In that capacity, the Portfolio Manager will select the portfolio of investments and instruct the Custodian with respect to any acquisition, disposition or sale of investments and provide certain support and assistance (including back and middle office functions), personnel and credit and market research and analysis in connection with the origination and ongoing management of the portfolio by the Company. Under the Portfolio Management Agreement, the Company shall pay to the Portfolio Manager an amount equivalent to all reasonable third party costs and expenses incurred by

the Portfolio Manager in the performance of its obligations thereunder, together with any irrecoverable VAT arising on such costs and expenses.

The Portfolio Manager has entered into a Master Sub-Advisory Agreement (the “**HCF Sub-Advisory Agreement**”) and a Staff and Services Agreement (the “**HCF Staff and Services Agreement**”, together with the Sub-Advisory Agreement, the “**HCF Services Agreements**”) with Highland Capital Management, L.P. under which Highland Capital Management, L.P. provides investment research and recommendations and operational support to the Portfolio Manager, including services that may be used in connection with the Portfolio Manager’s recommendations regarding the composition, nature and timing of changes to the Company’s portfolio, the due diligence of actual or potential investments, the execution of investment transactions, and certain loan services and administrative services.

Highland CLO Management has a Master Sub-Advisory Agreement (the “**HCLOM Sub-Advisory Agreement**”) and a Staff and Services Agreement (the “**HCLOM Staff and Services Agreement**”, together with the HCLOM Sub-Advisory Agreement, the “**HCLOM Services Agreements**”) in place with Highland, pursuant to which Highland provides credit research and operational support to Highland CLO Management, including services in connection with determining the composition, nature and timing of changes to portfolios of Highland CLOs for which Highland CLO Management acts as CLO Manager, the due diligence of actual or potential investments, the execution of investment transactions approved by the Highland CLO Management, and certain loan services and administrative services.

Acis (an affiliate of Highland) has entered into a Master Sub-Advisory Agreement (the “**ACM Sub-Advisory Agreement**”) and a Staff and Services Agreement (the “**ACM Staff and Services Agreement**”, together with the ACM Sub-Advisory Agreement, the “**ACM Services Agreements**”) with Highland under which Highland provides investment research and recommendations and operational support to Acis, including services in connection with determining the composition, nature and timing of changes to portfolios of Acis CLOs for which Acis acts as CLO Manager, the due diligence of actual or potential investments, the execution of investment transactions approved by Acis, and certain loan services and administrative services.

Acis CLO Management has entered into a Master Sub-Advisory Agreement (the “**ACLOM Sub-Advisory Agreement**”, and together with the HCF Sub-Advisory Agreement, the HCLOM Sub-Advisory Agreement and the ACM Sub-Advisory Agreement, the “**Sub-Advisory Agreements**”) and a Staff and Services Agreement (the “**ACLOM Staff and Services Agreement**”, and the ACLOM Staff and Services Agreement together with the HCF Staff and Services Agreement, the HCLOM Staff and Services Agreement and the ACM Staff and Services Agreement, the “**Staff and Services Agreements**”, and the ACLOM Staff and Services Agreement together with the ACLOM Sub-Advisory Agreement, the “**ACLOM Services Agreements**” and the ACLOM Services Agreements with the HCF Services Agreements, the HCLOM Services Agreements and the ACM Services Agreements, the “**Services Agreements**”) in place with Acis, pursuant to which Acis provides credit research and operational support to Acis CLO Management, including services in connection with determining the composition, nature and timing of changes to portfolios of Acis CLO 7 for which Acis CLO Management acts as CLO Manager, the due diligence of actual or potential investments, the

execution of investment transactions approved by Acis CLO Management, and certain loan services and administrative services.

No management fees will be payable by the Company pursuant to any Services Agreement; it being understood that each of the Management Companies will pay (i) eleven-fifteenths (11/15^{ths}) of the total 0.15% senior management fee received from Acis CLO 7 and the Highland CLOs to affiliates of Highland pursuant to the applicable Services Agreements, and (ii) following any Designated CLO Reset, a portion of the management fees received from any CLO subject to such Designated CLO Reset to affiliates of Highland pursuant to the applicable Services Agreements, other than an amount equivalent to a senior management fee of 0.04%.

Administrator

State Street (Guernsey) Limited has been appointed as administrator to the Company pursuant to the Administration Agreement. In such capacity, the Administrator is responsible for the day-to-day administration of the Company. Under the terms of the Administration Agreement, the Administrator is entitled to an annual administration fee of up to 7 bps per annum of the Net Asset Value of the Company calculated and payable monthly in arrears, and other miscellaneous fees and expenses reimbursed, in each case, as determined in the Administration Agreement.

Operating Expenses:

Except as provided below, the Portfolio Manager will pay all of its own Overhead without reimbursement by the Company.

Subject to the following paragraph, the Company shall pay or reimburse the Portfolio Manager and its affiliates for all Operating Expenses. See “Company Directors and Administration—The Portfolio Manager—Highland Fees”.

Exculpation:

The Portfolio Manager will assume no responsibility under the Portfolio Management Agreement other than to render the services called for thereunder and affecting the duties and functions that have been delegated to it thereunder in good faith and, subject to the standard of conduct described in the next succeeding sentence. The Portfolio Manager will not be responsible for any action or inaction of the Company in declining to follow any advice, recommendation or direction of the Portfolio Manager.

The Portfolio Manager, its affiliates, any officer, director, secretary, manager, employee or any direct or indirect partner, member, stockholder, agent or legal representative (e.g., executors, guardians and trustees) of the Portfolio Manager and its affiliates, including persons formerly serving in such capacities, any person who serves at the request of the Portfolio Manager or the Board pursuant to the Articles, on behalf of the Company as an officer, director, secretary, manager, partner, member, employee, stockholder, agent or legal representative of any other person serving at the request of the Portfolio Manager or the Board pursuant to the Articles on behalf of the Company in such capacity as listed above, each member of the Advisory Board and each member of any subcommittee thereof and any assignees or successors of the foregoing (each, an “**Indemnified Person**”) will incur no liability to the Company or any Shareholder in the absence of a finding by any court or governmental body of competent jurisdiction in a final, non-appealable judgment that the commission by such person of an action, or the omission by such person to take an action, constitutes bad faith, gross

negligence or wilful misconduct (a “**Triggering Event**”), except as otherwise required by applicable law (including the Companies Law). Any claims arising from a Triggering Event shall be limited to actual out-of-pocket damages incurred as a direct consequence of the Triggering Event, and shall not include punitive, consequential or other damages or lost profits.

Indemnification:

To the fullest extent permitted by applicable law, the Company will be required to indemnify each Indemnified Person against all losses, liabilities, damages, expenses or costs (including any claim, judgment, award, settlement, reasonable legal and other professional fees and disbursements and other costs or expenses incurred in connection with the defence of any proceeding, whether or not matured or unmatured or whether or not asserted or brought due to contractual or other restrictions, joint or several) other than those arising from suits, disputes or actions by Highland, its affiliates or principals, Other Accounts or CLO HoldCo, Ltd. (collectively, the “**Indemnified Losses**”) incurred by such Indemnified Person or to which such Indemnified Person may be subject by reason of its activities in connection with the conduct of the business or affairs of the Company, unless such losses result from an Indemnified Person’s Triggering Event.

The Indemnified Persons shall be entitled to advancement of expenses as they are incurred in connection with the investigation, defence or resolution of any claim that may be subject to indemnification, subject to providing an undertaking to repay any amounts ultimately determined not to be subject to indemnification due to a Triggering Event.

Each member of the Advisory Board and each member of any subcommittee thereof and, solely in connection with matters relating to the Advisory Board or such subcommittee, the Shareholder and/or other person or entity on whose behalf such Advisory Board member or subcommittee member serves, will have the benefit of similar exculpation and indemnification rights unless it has not acted in good faith.

Notwithstanding the foregoing or anything to the contrary set forth herein, the Company will not provide for the exculpation or indemnification of any Indemnified Person for any liability (including liability under U.S. federal securities laws which, under certain circumstances, impose liability even on persons that act in good faith), to the extent that such liability may not be waived, modified or limited under applicable law.

Under the Companies Law, any indemnity provided (directly or indirectly) by the Company to a Director, or an associated company, or a body corporate which is an overseas company and a subsidiary of the company, against any liability attaching to him in connection with any negligence, default, breach of duty or breach of trust in relation to the Company is void, except in certain circumstances.

Regulatory status of Portfolio Manager:

Highland HCF Advisor is a relying adviser of Highland Capital Management, L.P., an investment adviser registered under the Investment Advisers Act of 1940, as amended (the “**Investment Advisers Act**”) and, as such, is subject to the provisions of the Investment Advisers Act.

Regulatory status of Custodian:

The Custodian of the Company is State Street Custodial Services (Ireland) Limited, which is authorised as an Investment Business Firm under Section

10 of the Irish Investment Intermediaries Act, 1995 (as amended), will provide custody and banking services.

Calculation of Net Asset Value: The Company intends to publish the Net Asset Value per Share on a quarterly basis, within 15 Business Days following the relevant quarter-end. Notice will be provided by the Administrator by e-mail.

Portfolio: The Company is currently invested in CLO Income Notes in the following Managed CLOs in the following amounts:

Acis CLOs: Aggregate Outstanding Amount (U.S.\$)

ACIS CLO 2013-1 Ltd.	\$18,558,000.00
ACIS CLO 2014-3 Ltd.	\$39,750,000.00
ACIS CLO 2014-4 Ltd.	\$50,750,000.00
ACIS CLO 2014-5 Ltd.	\$53,000,000.00
ACIS CLO 2015-6, Ltd.	\$51,850,000.00

Highland Legacy CLOs: Aggregate Outstanding Amount (U.S.\$)

Rockwall CDO, Ltd.	\$14,000,000.00
Brentwood CLO, Ltd.	\$12,000,000.00
Grayson CLO, Ltd.	\$5,900,000.00
Liberty CLO, Ltd.	\$17,000,000.00
HP CDO, Ltd.	\$1,621,542.70
Greenbriar CLO, Ltd.	\$18,000,000.00
Gleneagles CLO, Ltd.	\$1,250,000.00

ACIS CLO Management Aggregate Outstanding Amount (U.S.\$)

Acis CLO 7	\$17,850,000.00
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Net Asset Value: As of September 30, 2017, the unaudited net asset value per share of the Net Asset Value was US \$157,081,118.91. A special dividend in the aggregate amount of US \$9,000,000 was paid on October 10, 2017, and a buyback of Shares from Acis Capital Management, L.P. was made on October 24, 2017, for an aggregate purchase price of \$991,180.13.

Type and class of securities: The Shares being offered under the Placing are ordinary shares of no par value in the capital of the Company.

Currency of the securities issue: U.S. Dollar

Number of securities in issue: The issued share capital of the Company (all of which shares have been fully paid) as of the date of this Offering Memorandum consists of 143,454,001 million Shares.

There are no non-paid up Shares in issue.

Description of the rights attaching to the securities: The holders of the Shares shall be entitled to receive, and to participate in, any dividends declared in relation to the Shares that they hold.

On a winding-up or a return of capital by the Company, the net assets of the Company attributable to the Shares shall be divided pro rata among the holders of the Shares.

The Shares shall carry the right to receive notice of, attend and vote at general meetings of the Company.

Unless otherwise authorised by a special resolution, the Company shall not allot equity securities on any terms unless the Company has first made an offer to each person who holds Shares to allot to him, on the same or more favourable terms, such proportion of those equity securities that is as nearly as practicable (fractions being disregarded) equal to the proportion held by the relevant person of the Shares.

Restrictions on the free transferability of the securities:

The Company has elected to impose certain restrictions (pursuant to its Articles) on the Placing and on the future trading of the Shares so that the Company will not be required to register the offer and sale of the Shares under the U.S. Securities Act, so that the Company will not have an obligation to register as an investment company under the U.S. Investment Company Act and related rules and to address certain ERISA, U.S. Tax Code and other considerations. These transfer restrictions, which will remain in effect until the Company determines in its sole discretion to remove them, may adversely affect the ability of Shareholders to trade the Shares. Due to the restrictions described below, potential investors in the United States and U.S. Persons (including persons acting for the account or benefit of any U.S. Person) are advised to consult legal counsel prior to making any offer, resale, exercise, pledge or other transfer of the Shares.

Subject to certain exceptions, the Placing is only being made outside the United States to non-U.S. Persons in reliance on Regulation S under the U.S. Securities Act.

Dividend policy:

Whilst not forming part of the investment objective or policy of the Company, dividends will be payable in respect of each calendar quarter, payable in the month following the end of such quarter. During the Investment Period, any interest, proceeds from the realization of portfolio investments or other cash generated by the portfolio in excess of the dividends paid to Shareholders as provided below will be reinvested by the Company with the objective of growing the NAV.

During the Investment Period, on the 15th of February, May, August and November of each calendar year, beginning May 15, 2018 (each a “**Quarterly Dividend Date**”), after satisfaction of all expenses, debts, liabilities and obligations of the Company, the Company will pay a dividend to each Shareholder at a rate of at least 8% per annum, based on such Shareholder’s aggregate capital contributions as of the prior Quarterly Dividend Date (the “**Target Dividend**”).

Following the Investment Period, after satisfaction of all expenses, debts, liabilities and obligations of the Company, any interest, proceeds from the realization of portfolio investments or other cash generated by the portfolio will be distributed by the Company to the Shareholders as a dividend on each Quarterly Dividend Date in accordance with the distribution priority as follows (the “**Distribution Priority**”):

First, 100% to the Shareholders *pro rata* based on the number of Shares held until each Shareholder has received (i) pursuant to this clause (i), aggregate distributions from the Company equal to all capital contributions made by such Shareholder plus (ii) an amount necessary for such Shareholder to

receive a cumulative rate of return of 8.0% per annum, compounded annually, on such Shareholder's aggregate capital contributions;

Second, 100% to the Portfolio Manager until the Portfolio Manager has received aggregate distributions from the Company equal to 20% of the sum of all distributions made in excess of aggregate capital contributions made by Shareholders;

Third, 80% to the Shareholders *pro rata* based on the number of Shares held and 20% to the Portfolio Manager until each Shareholder has received aggregate distributions from the Company equal to all capital contributions made by such Shareholder plus an amount necessary for such Shareholder to receive a cumulative rate of return of 16% per annum, compounded annually, on such Shareholder's aggregate capital contributions; and

Thereafter, 70% to the Shareholders *pro rata* based on the number of Shares held and 30% to the Portfolio Manager.

For purposes of this section, references herein to a "Shareholder" shall include Highland HCF Advisor in its capacity as a shareholder of the Company, if applicable, and references to "aggregate distributions" received by the "Portfolio Manager" shall not include any distributions received by Highland HCF Advisor in its capacity as a Shareholder.

The total net proceeds and an estimate of the total expenses of the issue/offer, including estimated expenses charged to the investor by the issuer or the offeror:

The Net Placing Proceeds are expected to be approximately U.S. \$153 million.

The initial expenses of the Company are those which are necessary for the Placing, and shall not exceed U.S. \$750,000. These expenses will be paid on or around the Placing and will include, without limitation: the cost of settlement and escrow arrangements; printing, advertising and distribution costs; legal fees; and any other applicable expenses.

Reasons for the offer and use of proceeds:

The Company is making the offer in order to raise the Net Placing Proceeds which will be invested in accordance with the Company's investment objective and policy, including its indirect investment in the Management Companies.

Expenses related to the Placing:

All costs associated with the Placing will be borne by the Company after the Placing and therefore the Net Placing Proceeds will be lower than the Gross Placing Proceeds immediately following the Placing.

Ongoing annual expenses:

The Company currently estimates that its total annual expenses for 2017 will be approximately \$525,000 per annum, and will provide the Advisory Board with updated estimates and reasonable detail from time to time upon request. For the avoidance of doubt, except as expressly set forth in the section titled "*Company Directors and Administration—Portfolio Manager—Highland Fees*", the Portfolio Manager will pay all of its own operating, overhead and administrative expenses, including all costs and expenses on account on employee compensation, employee benefits and rent without reimbursement by the Company

These expenses will include the following:

The Portfolio Manager, Highland, Acis and the Management Companies

Please see below in section titled “*Company Directors and Administration—Portfolio Manager—Highland Fees*”.

Administrator

Under the terms of the Administration Agreement, the Administrator is entitled to an annual administration fee of up to 7 bps of the Net Asset Value of the Company per annum, payable monthly in arrears, and other miscellaneous fees and expenses reimbursed, in each case, as determined in the agreement.

Custodian

Under the terms of the Custody Agreement, the Custodian is entitled to receive transaction charges and sub custodian charges will be recovered by the Custodian from the Company as they are incurred by the relevant sub custodian. All such charges shall be charged at normal commercial rates.

Directors

The Directors are remunerated for their services at a fee of £35,000 per annum (£40,000 for the Chairman). For more information in relation to the remuneration of the Directors, please refer to the section of this Offering Memorandum entitled “Memorandum and Articles” in “Additional Information on the Company”.

Operating Expenses

All Operating Expenses shall be borne by the Company. All reasonably and properly incurred out-of-pocket expenses of the Administrator, the Custodian, and the Directors relating to the Company are borne by the Company.

The amount of charges and expenses which are borne by an investor may vary from year to year.

For more information on expenses charged during the most recent financial year, prospective investors should review the Company’s annual audited financial statements (if any) for the prior financial year.

Terms and conditions of the offer:

An amount of Shares equal to U.S. \$153 million are being marketed and are available for subscription of commitments under the Placing until the Closing Date.

Shares will be issued under the Placing at a price per Share based on the most recent quarterly determined NAV of the Company. The maximum number of Shares to be issued by the Company is an amount of Shares equal to U.S. \$153 million and there is no minimum number of Shares.

Placees may acquire Shares pursuant to a combination of issuance and transfer from existing Shareholders.

Placees may also enter into commitments to acquire Shares pursuant to a combination of issuance and transfer from existing Shareholders.

The Placing is not being underwritten.

Press Releases:

Neither the Portfolio Manager, the Company nor any Shareholder shall issue or approve any press release or other announcement referring to the identity

of a Shareholder without the prior written consent of the applicable Shareholder.

RISK FACTORS

Investment in the Company should be regarded as long term in nature and involving a high degree of risk. Accordingly, prospective investors should consider carefully all of the information set out in this Offering Memorandum and the risks relating to the Company and the Shares including, in particular, the risks described below which are not presented in any order of priority and may not be an exhaustive list or explanation of all the risks which investors may face when making an investment in the Shares and should be used as guidance only.

Only those risks which are believed to be material and currently known to the Company in relation to itself and its industry as at the date of this Offering Memorandum have been disclosed. Additional risks and uncertainties not currently known, or deemed immaterial at the date of this Offering Memorandum, may also have an adverse effect on the business, results of operations, financial conditions and prospects of the Company and its net asset value. Potential investors should review this Offering Memorandum carefully and in its entirety and consult with their professional advisers before making an application to invest in the Shares.

Prospective investors should note that the risks relating to the Company and the Shares summarised in the section of this document headed “Summary” are the risks that the Directors believe to be the most essential to an assessment by a prospective investor of whether to consider an investment in the Shares. However, as the risks which the Company faces relate to events and depend on circumstances that may or may not occur in the future, prospective investors should consider not only the information on the key risks summarised in the section of this document headed “Summary” but also, among other things, the risks and uncertainties described below.

RISKS RELATING TO THE COMPANY

The Company is a recently incorporated company incorporated under the laws of Guernsey with limited history

The Company was incorporated under the laws of Guernsey on 30 March 2015. It commenced operations after the initial Placing in August 2015. As the Company has a limited operating history, investors have limited information on which to evaluate the Company’s ability to achieve its investment objective or implement its investment strategy and provide a satisfactory investment return. An investment in the Company is therefore subject to all the risks and uncertainties associated with a recently formed business, including the risk that the Company will not achieve its investment objective and that the value of an investment in the Company could decline substantially as a consequence. Any failure by the Company to do so may adversely affect its business, financial condition, results of operations and/or its NAV.

The Company’s returns and operating cash flows depend on many factors, including the price and performance of the investments, the availability and liquidity of investment opportunities falling within the Company’s investment objective and policy, the level and volatility of interest rates, readily accessible short-term borrowings, the conditions in the financial markets and economy, the financial performance of obligors under the investments and the Company’s ability successfully to operate its business and execute its investment strategy. There can be no assurance that the Company’s investment strategy will be successful.

The Company’s target return and target dividend yield are based on estimates and assumptions that are inherently subject to significant business and economic uncertainties and contingencies, and the actual return and dividend yield may be materially lower than the target return and target dividend yield and could be negative

The Company’s target return and target dividend yield set forth in this Offering Memorandum are targets only and are based on estimates and assumptions concerning the performance of its investment portfolio which will be subject to a variety of factors including, without limitation, the availability of investment opportunities, asset mix, value, volatility, holding periods, performance of underlying portfolio debt issuers, investment liquidity, borrower default, changes in current market conditions, interest rates, government regulations or other policies, the worldwide economic environment, changes in law and taxation, natural disasters, terrorism, social unrest and civil disturbances or the occurrence of risks described elsewhere in this Offering Memorandum, which are inherently subject to significant business, economic and market uncertainties and contingencies, all of which are beyond the control of the Company and which may adversely affect the Company’s ability to achieve its target return and target dividend yield. Such

targets are based on market conditions and the economic environment at the time of assessing the proposed targets and the assumption that the Company will be able to implement its investment policy and strategy successfully, and are therefore subject to change. There is no guarantee or assurance that the target return and/or target dividend yield can be achieved at or near the levels set forth in this Offering Memorandum. Accordingly, the Company's actual rate of return and actual dividend yield achieved may be materially lower than the targets, or may result in a loss. A failure to achieve the target return and/or target dividend yield set forth in this Offering Memorandum may adversely affect the Company's business, financial condition, results of operations and/or its NAV.

An investment in the Company will be a speculative investment of a long-term nature and involving a high degree of risk. Shareholders could lose all or a substantial portion of their investment in the Company. Shareholders must have the financial ability, sophistication, experience and willingness to bear the risks of an investment in the Company.

Material changes affecting global debt and equity capital markets may have a negative effect on the Company's business, financial condition, results of operations, and/or its NAV

The global financial markets have experienced extreme volatility and disruption in recent years, as evidenced by a lack of liquidity in the equity and debt capital markets, significant write-offs in the financial services sector, the repricing of credit risk in the credit market and the failure of major financial institutions. Despite actions of governmental authorities, these events contributed to general economic conditions that have materially and adversely affected the broader financial and credit markets and reduced, and in certain circumstances, significantly reduced, the availability of debt and equity capital.

Further, within the banking sector, the default of any institution could lead to defaults by other institutions. Concerns about, or default by, one institution could lead to significant liquidity problems, losses or defaults by other institutions, because the commercial soundness of many financial institutions may be closely related as a result of their credit, trading, clearing or other relationships. This risk is sometimes referred to as "systemic risk" and may adversely affect other third parties with whom the Company deals. The Company may therefore be exposed to systemic risk when the Company deals with various third parties whose creditworthiness may be exposed to such systemic risk.

Recurring market deterioration may materially adversely affect the ability of an issuer whose debt obligations form part of the Company's portfolio, or an issuer whose debt obligations form part of a CLO in which the Company holds CLO Notes, to service its debts or refinance its outstanding debt. Further, such financial market disruptions may have a negative effect on the valuations of the investments (and, by extension, on the Company's NAV), and on the potential for liquidity events involving such investments. In the future, non-performing assets in the Company's portfolio may cause the value of that portfolio to decrease (and, by extension and/or its the NAV to decrease). Adverse economic conditions may also decrease the value of any security obtained in relation to any of the investments.

Conversely, in the event of sustained market improvement, the Company may have access to a reduced number of attractive potential investment opportunities, which also may result in limited returns to Shareholders.

The Company's NAV is subject to valuation risk and the Company can provide no assurance that the NAVs it records from time to time will ultimately be realised

The Company's NAV will be calculated by third parties and will be subject to valuation risk (see the risk factor entitled "*The investments may be difficult to value accurately and, as a result, the Company may be subject to valuation risk*"). If a valuation estimate provided to the Company by a third party subsequently proves to be incorrect, no adjustment to any previously calculated NAV will be made. Any acquisitions or disposals of Shares based on previous erroneous NAVs may result in losses for shareholders.

The investments held by the Company will be valued quarterly and the Company's Net Asset Value will be calculated based on these values. Therefore, the actual value of the investments at any given time may be different from the value based on which the Company's latest Net Asset Value has been calculated.

Investors should note that where a loan becomes subject to a Forward Purchase Agreement (described further in the section of this Offering Memorandum entitled "*Additional Information on the Company*") the Company will (subject to certain conditions as set out in the section of this Offering Memorandum entitled "*Additional Information on the*

Company”) neither receive the gain nor bear the loss that occurs between the date when the loan is added to the Forward Purchase Agreement and the date when the transfer occurs.

Each of the Company, the Portfolio Manager, Acis and the Management Companies is reliant on Highland (acting in its different capacities), asset management subsidiaries and other third party service providers to carry on their businesses and a failure by one or more service providers may materially disrupt the business of the Company and or the Management Companies

The Company has no employees and its directors have all been appointed on a non-executive basis. Highland HCF Advisor will, as part of the services to be provided under the terms of the Portfolio Management Agreement, be responsible for selecting the portfolio of investments and the acquisition, disposition or sale of investments and providing the Company with the necessary personnel, credit research and other resources to perform the functions necessary to the business of the Company. In addition, Highland or its affiliates, including the Portfolio Manager, Acis or the Management Companies, may also act as CLO Manager in respect of the Managed CLOs from time to time. The Company may also invest in, provide debt financing to, or purchase performance-linked notes from, asset management subsidiaries, affiliated with the Company, the Portfolio Manager, Highland or Acis, including the Management Companies, and which may act as the asset manager of certain U.S. or European CLOs in order to satisfy certain U.S. or European risk retention requirements. Therefore, the Company is reliant upon the performance of Highland and/or its affiliates, asset management subsidiaries of the Company and other third party service providers for the performance of certain functions.

Highland CLO Management relies on Highland for access to its employees (which are shared with Highland). Acis CLO Management relies on Acis for access to its employees (which are shared with Acis). Highland and Acis, as applicable, will, as part of the services to be provided under the terms of the Staff and Services Agreements, be responsible for providing the Company with the necessary credit research, back office and other resources to perform the functions necessary to the business of each of the Management Companies, including its management of CLOs. Therefore, each of the Management Companies is reliant upon the performance of Highland and Acis, as applicable, for the performance of essential functions, and may be unable to properly manage CLOs without the support of Highland or Acis, as applicable.

Failure by any service provider to carry out its obligations to the Company or the applicable Management Company in accordance with the applicable duty of care and skill, or at all, or termination of any such appointment may adversely affect the Company’s or the applicable Management Company’s, as applicable, business, financial condition, results of operations and/or its NAV.

In the event that it is necessary for the Company or the applicable Management Company to replace any third party service provider, it may be that the transition process takes time, increases costs and may adversely affect the Company’s or the applicable Management Company’s, as applicable, business, financial condition, results of operations and/or its NAV.

The Shares will be subordinated to the rights of any secured Warehouse Loan Facility Provider or holder of any other future indebtedness or preference shares of the Company.

The Company is permitted to issue preference shares and incur indebtedness, including secured debt in the form of one or more Warehouse Loan Facilities or other lending facilities. Such preference shares and indebtedness will rank ahead of the Shares in respect of any distributions or payments by the Company to Shareholders. In an enforcement scenario under any Warehouse Loan Facility, the provider(s) of such facilities will have the ability to enforce their security over the assets of the Company and to dispose of or liquidate (on their own behalf or through a security trustee or receiver) the assets of the Company in a manner which is beyond the control of the Company. In such an enforcement scenario, there is no guarantee that there will be sufficient proceeds from the disposal or liquidation of the Company assets to repay any amounts due and payable on the Shares and this may adversely affect the performance of the Company’s business, financial condition, results of operations and/or its NAV.

Exculpation and Indemnification

The Articles contain provisions that, subject to applicable law, reduce or modify the duties that the Indemnified Persons would otherwise owe to the Company and the Shareholders. The Portfolio Manager will assume no

responsibility under the Portfolio Management Agreement other than to render the services called for thereunder and affecting the duties and functions that have been delegated to it thereunder in good faith and, subject to the standard of conduct described in the next succeeding sentence. The Portfolio Manager will not be responsible for any action or inaction of the Company in declining to follow any advice, recommendation or direction of the Portfolio Manager. Further, Indemnified Persons will incur no liability to the Company or any Shareholder in the absence of a Triggering Event, except as otherwise required by applicable law (including the Companies Law). Any claims arising from a Triggering Event shall be limited to actual out-of-pocket damages incurred as a direct consequence of the Triggering Event, and shall not include punitive, consequential or other damages or lost profits.

Under the Articles, the Company, to the fullest extent permitted by applicable law (including the Companies Law), will indemnify each Indemnified Person against all Indemnified Losses to which an Indemnified Person may become subject by reason of any acts or omissions or any alleged acts or omissions arising out of such Indemnified Person's or any other person's activities in connection with the conduct of the business or affairs of the Company and/or an investment, unless such Indemnified Losses result from any action or omission which constitutes, with respect to such person, a Triggering Event; provided, that notwithstanding the foregoing, the members of the Advisory Board or members of any subcommittee thereof shall be subject only to a duty of good faith (it being understood that, to the fullest extent permitted by applicable law, any such member, in determining to take or refrain from taking any action, shall be permitted to take into consideration only the interests of the Shareholder and/or other person represented by such member and, in so doing, shall, to the fullest extent permitted by applicable law, be considered to have acted in good faith). Any claims arising from a Triggering Event shall be limited to actual out-of-pocket damages incurred as a direct consequence of the Triggering Event, and shall not include punitive, consequential or other damages or lost profits.

The fees, costs and expenses (whether or not advanced) and other liabilities resulting from the Company's indemnification obligations are generally operating expenses and will be paid by or otherwise satisfied out of the assets of the Company. The application of the foregoing standards may result in Shareholders having a more limited right of action in certain cases than they would in the absence of such standards. In particular, a "gross negligence" standard of care has been held in some jurisdictions to involve conduct that is closer to wilful misconduct. Even though such provisions in the Articles will not act as a waiver on the part of any Shareholder of any of its rights under applicable U.S. securities laws or other laws, the applicability of which is not permitted to be waived, the Company may bear significant financial losses even where such losses were caused by the negligence (even if heightened) of such Indemnified Persons.

RISKS RELATING TO THE INVESTMENT STRATEGY

General Background relating to the United States and European Risk Retention Requirements

Effective for CLOs on December 24, 2016, the so-called "risk retention" rules promulgated by U.S. federal regulators under the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "**Dodd-Frank Act**") require a "securitizer" or "sponsor" (which in the case of a CLO is considered the collateral manager) to retain directly or through a "majority-owned affiliate" at least 5% of the credit risk of the securitized assets. Highland CLO Management is being formed with intention of acting as a "majority-owned affiliate" of Highland as a "sponsor" for purposes of holding the applicable Retention Interest under U.S. Risk Retention Rules with respect to Managed CLOs and to provide a vehicle whereby the Company can invest in Managed CLOs. Acis CLO Management is intended to act as a "majority-owned affiliate" of Acis as a "sponsor" for purposes of holding the applicable Retention Interest under U.S. Risk Retention Rules with respect to Acis CLO 7 and to provide a vehicle whereby the Company can invest in Acis CLO 7.

The CLOs in which the Company invests may be structured with the intent to be compliant with the European risk retention requirements for securitisation transactions, meaning, collectively, (i) Articles 404-410 of Regulation (EU) No 575/2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No. 648/2012 (the "**CRR**") as supplemented by Commission Delegated Regulation (EU) No. 625/2014 (the "**CRR Retention Requirements**") (ii) Articles 51-54 of the Commission Delegated Regulation (EU) No 231/2013 (the "**AIFMD Level 2 Regulation**") implementing Article 17 of Directive 2011/61/EU on Alternative Investment Fund Managers (the "**AIFMD**"), and (iii) Article 254-257 of the Commission Delegated Regulation (EU) 2015/35 implementing Article 135(2) of Directive 2009/138/EC on the taking-up and pursuit of the business of Insurance and Reinsurance, as amended by Directive 201/51/EU (and as supplemented by Articles 254-257 of Commission

Delegated Regulation (EU) 2015/35) (the “**Solvency II Level 2 Regulation**”), each together with any applicable guidance, technical standards and related documents published by any European regulator in relation thereto and any implementing laws or regulations in force in any Member State of the European Union (together with the CRR Retention Requirements and the AIFMD Level 2 Regulation, the “**EU Retention Requirements**” and, together with the risk retention requirements under the U.S. Risk Retention Rules, the “**Retention Requirements**”). Any such Company investments in CLOs intended to be compliant with the EU Retention Requirements will continue to be subject to the EU Retention Requirements. However, it is expected that, going forward, the Company’s investments in CLOs will be done primarily on an indirect basis through its indirect interest in the Management Companies. As used herein, any reference to the Company’s investments in CLOs or CLO Retention Notes shall be deemed to refer primarily to (i) prior to the formation of the Management Companies, the CLO securities the Company acquired directly and (ii) following the formation of the Management Companies, the indirect interests in CLOs it intends to hold through the applicable Management Company. Furthermore, any reference to Managed CLOs or CLOs managed by Highland, Acis, the Portfolio Manager and the Management Companies shall be deemed to refer primarily to (i) for CLOs formed prior to the formation of Acis, CLOs managed by Highland (ii) for CLOs formed after the formation of Acis and prior to the formation of Acis CLO Management, CLOs managed by Acis, (iii) for CLOs formed following the formation of Acis CLO Management and prior to the formation of Highland CLO Management, CLOs managed by Acis CLO Management and (iv) for CLOs formed following the formation of Highland CLO Management, CLOs managed by Highland CLO Management.

Although the Company, the Portfolio Manager, Highland, Acis and the Management Companies intend to comply with the Retention Requirements, there has been no explicit guidance regarding how entities may be structured for this purpose and therefore the regulatory environment in which the CLOs intend to operate is highly uncertain. There can be no assurance that applicable governmental authorities will agree that any of the transactions, structures or arrangements entered into by the Company, Highland, Acis or the applicable Management Company, and the manner in which it expects to hold retention interests, will satisfy the Retention Requirements, including any transactions pursuant to which Highland or Acis, as applicable, may hold their respective indirect ownership interests in the applicable Management Companies through, or transfer such interests to, affiliates that are intended to be, directly or indirectly, majority controlled, are majority controlled by or are under common majority control with, Highland or Acis, as applicable, with the intention that the Management Companies will remain their respective “majority-owned affiliates” for purposes of the U.S. Risk Retention Rules. If such transactions, structures or arrangements are determined not to comply with the Retention Requirements, Highland, Acis, the applicable Management Company or the Company (as applicable) could become subject to regulatory action which could in turn materially and adversely affect the Company and/or the potential return to shareholders. The impact of the Retention Requirements on the securitization market is also unclear and such rules may negatively impact the value of the CLOs and their underlying assets.

The investments may be difficult to value accurately and, as a result, the Company may be subject to valuation risk

The Company’s portfolio may at any given time include, directly and indirectly, securities or other financial instruments or obligations which are very thinly traded, for which no market exists or which are restricted as to their transferability under applicable securities laws. These investments may be extremely difficult to value accurately. Further, because of overall size or concentration in particular markets of positions held by the Company, the value of its investments which can be liquidated may differ, sometimes significantly, from their valuations. Third party pricing information may not be available for certain positions held by the Company. Investments to be held by the Company may trade with significant bid-ask spreads. The Company is entitled to rely, without independent investigation, upon pricing information and valuations furnished by third parties, including pricing services and valuation sources. In the absence of fraud, gross negligence (under New York law), bad faith or manifest error, valuation determinations in accordance with the Company’s valuation policy will be conclusive and binding.

Market factors may result in the failure of the investment strategy

Strategy risk is associated with the failure or deterioration of an investment strategy such that most or all investment managers employing that strategy suffer losses. Strategy-specific losses may result from excessive concentration by multiple market participants in the same investment or general economic or other events that adversely affect particular strategies (for example the disruption of historical pricing relationships). Furthermore, an imbalance of supply and demand favouring borrowers could result in yield compression, higher leverage and less favourable terms to the detriment of all investors in the relevant asset class. The investment strategy employed by the Company is speculative

and involves substantial risk of loss in the event of a failure or deterioration in the financial markets, although the Company has certain investment limits which define to a degree how it invests. As a result, the Company's investment strategy may fail, and it may be difficult for the Company to amend its investment strategy quickly or at all should certain market factors appear, which may adversely affect the Company's business, financial condition, results of operations and/or its NAV.

The investment strategy of the Company includes investing predominantly in CLO Notes, and, under certain circumstances, asset management subsidiaries, all of which are subject to a risk of loss of principal

The investment strategy of the Company consists of investing predominantly in CLO Notes, directly and indirectly through its investment in the Management Companies, and, under certain circumstances, asset management subsidiaries. The company may also invest in senior secured loans (for the primary purpose of enabling Highland CLO Management to qualify as an "originator" for purposes of the EU Retention Requirements). Such investments may be considered to be subject to a level of risk in the case of deterioration of general economic conditions, which might increase the risk of loss of principal or investment. This could result in losses to the Company which could have a material adverse effect on the Company's business, financial condition, results of operations and/or its NAV.

In the event of a default in relation to an investment, the Company or the CLO in which the Company holds CLO Notes will bear a risk of loss of principal, and accrued interest

Performance and investor yield on the Company's investments (including both direct investments by the Company in senior secured loans (for the primary purpose of enabling Highland CLO Management to qualify as an "originator" for purposes of the EU Retention Requirements) and investments in senior secured loans held by CLOs in which the Company holds CLO Notes) may be affected by the default or perceived credit impairment of such investments and by general or sector specific credit spread widening. Credit risks associated with the investments include (among others): (i) the possibility that earnings of an obligor may be insufficient to meet its debt service obligations; (ii) an obligor's assets declining in value; and (iii) the declining creditworthiness, default and potential for insolvency of an obligor during periods of rising interest rates and economic downturn. An economic downturn and/or rising interest rates could severely disrupt the market for the investments and adversely affect the value of the investments and the ability of the obligors thereof or the CLO to repay principal and interest. In turn, this may adversely affect the Company's business, financial condition, results of operations and/or its NAV.

In the event of a default in relation to an investment held by the Company or a CLO in which the Company holds CLO Notes, the Company will bear a risk of loss of principal and accrued interest on that investment. Any such investment may become defaulted for a variety of reasons, including non-payment of principal or interest, as well as breaches of contractual covenants. A defaulted investment may become subject to workout negotiations or may be restructured by, for example, reducing the interest rate, a write-down of the principal, and/or changes to its terms and conditions. Any such process may be extensive and protracted over time, and therefore may result in substantial uncertainty with respect to the ultimate recovery on the defaulted investment. In addition, significant costs might be imposed on the lender, further affecting the value of the investment. The liquidity in such defaulted investments may also be limited and, where a defaulted investment is sold, it is unlikely that the proceeds from such sale will be equal to the amount of unpaid principal and interest owed on that investment. This would adversely affect the value of the Company's investment portfolio and, by extension, its business, financial condition, results of operations and/or its NAV.

In the case of secured loans, restructuring can be an expensive and lengthy process which could have a material negative effect on the Company's anticipated return on the restructured loan. By way of example, it would not be unusual for any costs of enforcement to be paid out in full before the repayment of interest and principal. This would substantially reduce the Company's anticipated return on the restructured loan.

The illiquidity of investments may have an adverse impact on their price and the Company's ability to trade in them or require significant time for capital gains to materialise

Credit markets may from time to time become less liquid, leading to valuation losses on the investments making it difficult to acquire or dispose of them at prices the Company considers their fair value. Accordingly, this may impair the Company's ability to respond to market movements and the Company may experience adverse price movements upon liquidation of such investments. Liquidation of portions of the portfolio under these circumstances could produce realised losses. The size of the Company's positions may magnify the effect of a decrease in market liquidity for such

instruments. Settlement of transactions may be subject to delay and uncertainty. Such illiquidity may result from various factors, such as the nature of the instrument being traded, or the nature and/or maturity of the market in which it is being traded, the size of the position being traded, or lack of an established market for the relevant securities. Even where there is an established market, the price and/or liquidity of instruments in that market may be materially affected by certain factors.

The investment objective of the Company is to provide investors with stable income returns and capital appreciation from exposure on an indirect basis to a portfolio of predominantly floating rate senior secured loans, CLO Notes and, under certain circumstances, asset management subsidiaries. Investments which are in the form of loans are not as easily purchased or sold as publicly traded securities due to the unique and more customised nature of the debt agreement and the private syndication process. As a result, there may be a significant period between the date that the Company makes an investment and the date that any capital gain or loss on such investment is realised. Moreover, the sale of restricted and illiquid securities may result in higher brokerage charges or dealer discounts and other selling expenses than the sale of securities eligible for trading on national securities exchanges or in the over-the-counter markets. Further, the Company may not be able readily to dispose of such illiquid investments and, in some cases, may be contractually prohibited from disposing of such investments for a specified period of time, which could materially and adversely affect the Company's business, financial condition, results of operations and/or its NAV. See further the risk factor titled "*The Company will be unable to liquidate, sell, hedge or otherwise mitigate its credit risk under or associated with the CLO Retention Notes until such time as the securities of the relevant CLO have been redeemed in full (whether at final maturity or early redemption)*" below.

The Company may hold a relatively concentrated portfolio

The Company may hold a relatively concentrated portfolio. There is a risk that the Company could be subject to significant losses if any obligor, especially one with whom the Company had a concentration of investments, were to default or suffer some other material adverse change. The level of defaults in the portfolio and the losses suffered on such defaults may increase in the event of adverse financial or credit market conditions. Any of these factors could adversely affect the value of the Company's investment portfolio and, by extension, its business, financial condition, results of operations and/or its NAV.

A significant portion of the Company's investment portfolio is expected to comprise directly or indirectly of Managed CLOs advised by Highland, Acis, the Portfolio Manager or a Management Company, as the CLO Manager. The performance of the Company's portfolio depends heavily on the skills of Highland, Acis, the Portfolio Manager and the Management Companies, as applicable, in analyzing, selecting and managing the relevant CLOs. See further the sections titled "*Risks Relating to Highland and Acis*" and "*Conflicts of Interest*" below.

The Company may be exposed to foreign exchange risk, which may have an adverse impact on the value of its assets and on its results of operations

The base currency of the Company is the U.S. Dollar. Certain of the Company's assets may be invested in securities and other investments which are denominated in other currencies. Accordingly, the Company will necessarily be subject to foreign exchange risks and the value of its assets may be affected unfavourably by fluctuations in currency rates. Although the Company may utilise financial instruments to hedge against declines in the value of such assets as a result of changes in currency exchange rates, it is not obliged to do so and may terminate any hedge contract at any time. Moreover, it may not be possible for the Company to hedge against a particular change or event at an acceptable price or at all. In addition, there can be no assurance that any attempt to hedge against a particular change or event would be successful, and any such hedging failure could materially and adversely affect the Company's business, financial condition, results of operations and/or its NAV.

The hedging arrangements of the Company may not be successful

The Company's economic risks cannot be effectively hedged. However, in connection with the financing of certain investments, the Company may employ hedging techniques designed to reduce the risks of adverse movements in interest rates, securities' prices and/or currency exchange rates. However, some residual risk may remain as a result of imperfections and inconsistencies in the market and/or in the hedging contract. While such hedging transactions may reduce certain risks, they create others. The Company directly or indirectly (through affiliates and subsidiaries) will not be permitted to enter into hedging with respect to the CLO Retention Notes.

The Company may utilise certain derivative instruments (including, without limitation, single-name credit default swaps, credit default swap and loan credit default swap indexes, equity futures and equity indexes) for hedging purposes. However, even if used primarily for hedging purposes, the prices of derivative instruments are highly volatile, and acquiring or selling such instruments involves certain leveraged risks. There may be an imperfect correlation between the instrument acquired for hedging purposes and the investments or market sectors being hedged, in which case, a speculative element is added to the highly leveraged position acquired through a derivative instrument primarily for hedging purposes. In particular, the investments which are in the form of loans may, in certain circumstances, be repaid at any time on short notice at no cost, and accordingly the hedging of interest rate or currency risk in such circumstances may be less precise than is the case with investments in the public securities market.

Furthermore, default by any hedging counterparty in the performance of its obligations could subject the investments to unwanted credit and market risks. Accordingly, although the Company may benefit from the use of hedging strategies, failure to properly hedge the market risk in the investments and/or default of a counterparty in the performance of its obligations under a hedging contract may have a material adverse effect on the Company's business, financial condition, results of operations and/or its NAV, and such material adverse effects may exceed those which may have resulted had no hedging strategy been employed.

Under certain hedging contracts that the Company may enter into, the Company may be required to grant security interests over some of its assets to the relevant counterparty as collateral

In connection with certain hedging contracts, the Company may be required to grant security interests over some of its assets to the relevant counterparty to such hedging contract as collateral. Such hedging contracts typically will give the counterparty the right to terminate the agreement upon the occurrence of certain events. Such termination events may include, among others, a failure by the Company to pay amounts owed when due, a failure to provide required reports or financial statements, a decline in the value of the investments secured as collateral, a failure to maintain sufficient collateral coverage, a failure by the Company to comply with its investment policy and any investment restrictions, key changes in the Company's management, a significant reduction in the Company's Net Asset Value, and material violations of the terms, representations, warranties or covenants contained in the hedging contract, as well as other events determined by the counterparty. If a termination event were to occur, there may be a material adverse effect on the Company's business, financial condition, results of operations and/or its NAV.

The use of leverage by the Company may increase the volatility of returns and providers of leverage would rank ahead of investors in the Company in the event of insolvency

The Company may employ leverage in order to increase investment exposure with a view to achieving its target return, in the form of one or more committed credit facilities. Leverage may come in the form of CLO securitizations.

While leverage presents opportunities for increasing total returns, it can also have the effect of increasing the volatility of the Shares, including the risk of total loss of the amount invested. If income and capital appreciation on investments made with borrowed funds are less than the costs of the leverage, the Net Asset Value will decrease. The effect of the use of leverage is to increase the investment exposure, the result of which is that, in a market that moves adversely, the possible resulting loss to investors' capital would be greater than if leverage were not used. As a result of leverage, small changes in the value of the underlying assets may cause a relatively large change in the value of the Company. Many financial instruments used to employ leverage are subject to variation or other interim margin requirements, which may force premature liquidation of investments. Investors should be aware that the use of leverage by the Company can be considered to multiply the leverage effect on their investment returns in the Company. As described above, while this effect may be beneficial when markets' movements are favourable, it may result in a substantial loss of capital when markets' movements are unfavourable.

In addition, such leverage may involve granting of security or the outright transfer of specific investments in the portfolio. Since there is no security created in respect of the Shares, any insolvency of the Shareholders could rank behind the Company's financing and hedging counterparties, whose claims will be considered as indebtedness of the Company and may be secured. Leverage does create opportunities for greater total returns on the investments but simultaneously may create special risk considerations by magnifying changes in the total value of the Net Asset Value and in the yield on the investments held by the Company.

In addition, to the extent leverage is employed, the Company may be required to refinance transactions from time to time. On each refinancing, the applicable counterparty may choose to re-negotiate the terms of each transaction or indeed not to refinance the transaction at all. To the extent refinancing facilities are not available in the market at economic rates or at all, the Company may be required to sell assets at disadvantageous prices. Any such deleveraging may result in losses on investments which could be severe and accordingly could have a material adverse effect on the Company's business, financial condition, results of operations and/or its NAV.

Interest rate fluctuations could expose the Company to additional costs and losses

The prices of the investments that may be held by the Company tend to be sensitive to interest rate fluctuations and unexpected fluctuations in interest rates could cause the corresponding prices of a position to move in directions which were not initially anticipated. In addition, interest rate increases generally will increase the interest carrying costs of borrowed securities and leveraged investments. Further, the Company may invest in both floating and fixed rate securities and interest rate movements will affect those respective securities differently. In particular, when interest rates rise significantly the value of fixed interest rate securities often fall. Furthermore, to the extent that interest rate assumptions underlie the hedging of a particular position, fluctuations in interest rates could invalidate those underlying assumptions and expose the Company to additional costs and losses. Any of the above factors could materially and adversely affect the Company's business, financial condition, results of operations and/or its NAV.

Additional Information about LIBOR

In a speech on 27 July 2017, Andrew Bailey, the Chief Executive of the Financial Conduct Authority ("FCA"), announced the FCA's intention to cease sustaining LIBOR from the end of 2021.

The FCA has statutory powers to compel panel banks to contribute to LIBOR where necessary. The FCA has decided not to ask, or to require, that panel banks continue to submit contributions to LIBOR beyond the end of 2021. The FCA has indicated that the current panel banks will voluntarily sustain LIBOR until the end of 2021. The FCA does not intend to sustain LIBOR through using its influence or legal powers beyond that date. The FCA's intention is that after 2021, it will no longer be necessary for the FCA to persuade, or to compel, banks to submit to LIBOR due to the development of alternative benchmark rates, which the FCA suggested should be based on transactions and not on reference rates that do not have active underlying markets to support them. As of the date of this Offering Memorandum, no specific alternative rates have been generally agreed in the CLO market.

It is possible that the LIBOR administrator, ICE Benchmark Administration, and the panel banks could continue to produce LIBOR on the current basis after 2021, if they are willing and able to do so. However, the survival of LIBOR in its current form, or at all, is not guaranteed after 2021 and, if LIBOR in its current form does not survive, it could cause a disruption in the credit markets generally, which could negatively impact the market value and/or transferability of the Notes.

It is currently unclear how LIBOR would be determined pursuant to existing underlying CLO indentures if LIBOR ceased to exist. If an alternative or a successor benchmark rate were determined, it may increase the risk of a mismatch between the interest rate applicable to the underlying loan assets and the interest rate applicable to the underlying collateral obligations of the CLOs held by the Company. Such mismatch could have a material adverse effect on the value and liquidity of the CLO Notes held by the Company.

Investors should be aware that: (a) any of these changes or any other changes to LIBOR could affect the level of the published rate, including to cause it to be lower and/or more volatile than it would otherwise be; (b) if the applicable rate of interest on any collateral obligation held by the Company is calculated with reference to a currency or tenor which is discontinued, such rate of interest will then be determined by the provisions of the affected collateral obligation, which may include determination by the relevant calculation agent in its discretion; (c) the administrator of LIBOR will not have any involvement in the collateral obligations or notes linked to those obligations and may take any actions in respect of LIBOR without regard to the effect of such actions on the collateral obligations or the notes; and (d) any uncertainty in the value of LIBOR or the admissions made by financial institutions that LIBOR has been manipulated or any uncertainty in the prominence of LIBOR as a benchmark interest rate due to the recent regulatory reforms may adversely affect liquidity of the collateral obligations or the notes in the secondary market and their market value. Any of the above or any other significant change to the setting of LIBOR could materially and adversely affect the Company's business, financial condition, results of operations and/or its NAV.

In the event of the insolvency of an obligor in respect of an investment, or of an underlying obligor in respect of an investment, the return on such investment to the Company may be adversely impacted by the insolvency regime or insolvency regimes which may apply to that obligor or underlying obligor and any of their respective assets

In the event of the insolvency of an obligor in respect of an investment (and in the case of the CLO Notes, the obligors of the assets within the relevant CLO's portfolio), the Company's (or the CLO issuer's, in the case of CLO Notes) recovery of amounts outstanding in insolvency proceedings may be impacted by the insolvency regimes in force in the jurisdiction of incorporation of such obligor or in the jurisdiction in which such obligor mainly conducts its business (if different from the jurisdiction of incorporation), and/or in the jurisdiction in which the assets of such obligor are located. Such insolvency regimes impose rules for the protection of creditors and may adversely affect the ability to recover such amounts as are outstanding from the insolvent obligor under the investment, which may adversely affect the Company's business, financial condition, results of operations and/or its NAV.

Similarly, the ability of obligors to recover amounts owing to them from insolvent underlying obligors may be adversely impacted by any such insolvency regimes applicable to those underlying obligors, which in turn may adversely affect the abilities of those obligors to make payments due under the investment to the Company on a full or timely basis.

In particular, it should be noted that the United States and a number of European jurisdictions operate unpredictable insolvency regimes which may cause delays to the recovery of amounts owed by insolvent obligors or underlying obligors subject to those regimes. The different insolvency regimes applicable in the different jurisdictions result in a corresponding variability of recovery rates for senior secured loans, entered into or issued in such jurisdictions, any of which may have a material adverse effect on the performance of a CLO and, by extension, the Company's business, financial condition, results of operations and/or its NAV.

A CLO issuer may be subject to losses on investments as a result of insolvency or clawback legislation and/or fraudulent conveyance findings by courts

Various laws enacted for the protection of creditors and stakeholders may apply to certain investments that are debt obligations, although the existence and applicability of such laws will vary between jurisdictions. For example, if a court were to find that an obligor did not receive fair consideration or reasonably equivalent value for incurring indebtedness evidenced by an investment and the grant of any security interest securing such investment, and, after giving effect to such indebtedness, the obligor: (i) was insolvent; (ii) was engaged in a business for which the assets remaining in such obligor constituted unreasonably small capital; or (iii) intended to incur, or believed that it would incur, debts beyond its ability to pay such debts as they mature, such court may: (a) invalidate such indebtedness and such security interest as a fraudulent conveyance; (b) subordinate such indebtedness to existing or future creditors of the obligor; or (c) recover amounts previously paid by the obligor (including to a CLO issuer) in satisfaction of such indebtedness or proceeds of such security interest previously applied in satisfaction of such indebtedness. In addition, if an obligor in whose debt a CLO issuer has an investment becomes insolvent, any payment made on such investment may be subject to avoidance, cancellation and/or clawback as a "preference" if made within a certain period of time (which for example under some current laws may be as long as two years) before insolvency.

In general, if payments on an investment are voidable, whether as fraudulent conveyances, extortionate transactions or preferences, such payments may be recaptured either from the initial recipient or from subsequent transferees of such payments. To the extent that any such payments are recaptured from a CLO issuer, there will be an adverse effect on the performance of the CLO issuer and, by extension, on the Company's business, financial condition, results of operations and/or its NAV.

The due diligence process that the Company plans to undertake in evaluating specific investment opportunities may not reveal all facts that may be relevant in connection with such investment opportunities and any corporate mismanagement, fraud or accounting irregularities may materially affect the integrity of the Company's due diligence on investment opportunities

When conducting due diligence and making an assessment regarding an investment, the Company will be required to rely on resources available to it, including internal sources of information as well as information provided by existing and potential obligors, any equity sponsor(s), lenders and other independent sources. The due diligence process may at times be required to rely on limited or incomplete information.

The Portfolio Manager will select investments on the Company's behalf in part on the basis of information and data relating to potential investments filed with various government regulators and publicly available or made directly available to the Portfolio Manager by the entities filing such information or third parties. Although the Portfolio Manager will evaluate all such information and data and seek independent corroboration when it considers it appropriate and reasonably available, the Portfolio Manager will not be in a position to confirm the completeness, genuineness or accuracy of such information and data. The Portfolio Manager is dependent upon the integrity of the management of the entities filing such information and of such third parties as well as the financial reporting process in general.

The value of an investment made by the Portfolio Manager on the Company's behalf may be affected by fraud, misrepresentation or omission on the part of an obligor, underlying obligor, any related parties to such obligor or underlying obligor, or by other parties to the investment (or any related collateral and security arrangements). Such fraud, misrepresentation or omission may adversely affect the value of the investment and/or the value of the collateral underlying the investment in question and may adversely affect the ability of the Portfolio Manager's on the Company's behalf to enforce its contractual rights relating to that investment or the relevant obligor's ability to repay the principal or interest on the investment.

Investment analysis and decisions by the Portfolio Manager may be undertaken on an expedited basis in order to make it possible for the Portfolio Manager to take advantage of short-lived investment opportunities. In such cases, the available information at the time of an investment decision may be limited, inaccurate and/or incomplete. Furthermore, the Portfolio Manager may not have sufficient time to evaluate fully such information even if it is available.

Accordingly, the Portfolio Manager cannot guarantee that the due diligence investigation it carries out with respect to any investment opportunity will reveal or highlight all relevant facts that may be necessary or helpful in evaluating such investment opportunity. Any failure by the Portfolio Manager to identify relevant facts through the due diligence process may cause it to make inappropriate investment decisions, which may have a material adverse effect on the Company's business, financial condition, results of operations and/or its NAV.

The collateral and security arrangements attached to an investment may not have been properly created or perfected, or may be subject to other legal or regulatory restrictions

The collateral and security arrangements in relation to secured obligations in which the Company may invest (and the security arrangements relating to the underlying assets of CLOs) will be subject to such security or collateral having been correctly created and perfected and any applicable legal or regulatory requirements which may restrict the giving of collateral or security by an obligor, such as, for example, thin capitalisation, over-indebtedness, financial assistance and corporate benefit requirements. If the investments do not benefit from the expected collateral or security arrangements, this may adversely affect the value of, or in the event of a default, the recovery of principal or interest from, such investments. Accordingly, any such failure properly to create or perfect collateral and security interests attaching to the investments may adversely affect the performance of the CLO issuer and/or the Company and, by extension, the Company's business, financial condition, results of operations and/or its NAV.

The investments will be based in part on valuations of collateral which are subject to assumptions and factors that may be incomplete, inherently uncertain or subject to change

A component of the Company's analysis of the desirability of making a given investment relates to the estimated residual or recovery value of such investments in the event of the insolvency of the obligor (and in the case of the CLO Notes, the obligors of the assets within the relevant CLO's portfolio). This residual or recovery value will be driven primarily by the value of the anticipated future cash flows of the obligor's business and by the value of any underlying assets constituting the collateral for such investment. The anticipated future cash flows of the obligor's business and the value of collateral can, however, be extremely difficult to predict as in certain circumstances market quotations and third party pricing information may not be available. If the recovery value of the collateral associated with the investments in which the Company or a CLO issuer invests decreases or is materially worse than expected by the Company or a CLO issuer (as applicable), such a decrease or deficiency may affect the value of the investments made by the Company or a CLO issuer. Accordingly, there will be an adverse effect on the performance of the CLO issuer and/or the Company and, by extension, on the Company's business, financial condition, results of operations and/or its NAV.

CLO Income Notes are volatile and interest and principal payments payable on the CLO Income Notes are not fixed

CLO Income Notes are the most subordinated tranche of a CLO and all payments of principal and interest on such CLO Income Notes are fully subordinated. Interest and principal payments are not fixed but are based on residual amounts available to make such payments. As a result, payments on such CLO Income Notes will be made by the CLO issuer to the extent of available funds, and no payments thereon will be made until amongst other things (a) the payment of certain costs, fees and expenses have been made and (b) interest and principal (respectively) has been paid on the more senior notes of the CLO. Non-payment of interest or principal on such CLO Income Notes will be unlikely to cause an event of default in relation to the CLO issuer.

CLO Income Notes represent a highly leveraged investment in the underlying assets of the CLO issuer. Accordingly, it is expected that changes in the market value of such CLO Income Notes will be greater than changes in the market value of the underlying assets of the CLO issuer, which themselves are subject to credit, liquidity, interest rate and other risks. Utilisation of leverage is a speculative investment technique and involves certain risks to investors and will generally magnify the CLO Income Notes investors' opportunities for gain and risk of loss. In certain scenarios, the CLO Income Notes may be subject to a partial or a 100 per cent loss of invested capital. CLO Income Notes represent the most junior securities in a leveraged capital structure. As a result, any deterioration in performance of the asset portfolio of a CLO issuer, including defaults and losses, a reduction of realised yield or other factors, will be borne first by holders of such CLO Income Notes prior to the rest of the capital structure.

CLO Income Notes are a limited recourse obligation of the CLO issuer

CLO Income Notes are a limited recourse obligation of a CLO issuer and amounts payable on CLO Income Notes are payable solely from amounts received in respect of the collateral of the CLO issuer. Payments on CLO Income Notes prior to and following enforcement of the security over the collateral of a CLO issuer are subordinated to the prior payment of certain costs, fees and expenses of, or payable by, the CLO issuer and to payment of principal and interest on more senior notes of the CLO issuer. The holders of CLO Income Notes must rely solely on distributions on the collateral of the CLO for payment of principal and interest, if any, on the CLO Income Notes. There can be no assurance that the distributions on the collateral of a CLO will be sufficient to make payments on the CLO Income Notes. If distributions are insufficient to make payments on the CLO Income Notes, no other assets of the CLO issuer will be available for payment of the deficiency and following realisation of the collateral and the application of the proceeds thereof, the obligations of the CLO issuer to pay such deficiency shall be extinguished. Such shortfall will be borne in the first instance by the CLO Income Notes.

In addition, at any time whilst the CLO Income Notes are outstanding in a CLO, no CLO Income Notes holder shall be entitled to institute against the related CLO issuer, or join in any institution against such CLO issuer of, any bankruptcy, reorganization, arrangement, insolvency, examinership, winding up or liquidation proceedings under any applicable bankruptcy or similar law in connection with any obligations of the CLO issuer relating to the CLO Income Notes or otherwise owed to the CLO Income Notes holder, save for lodging a claim in the liquidation of the CLO issuer which is initiated by another party or taking proceedings to obtain a declaration as to the obligations of the CLO issuer, nor shall it have a claim arising in respect of the share capital of the CLO issuer.

Furthermore, following the establishment of the Management Companies, CLO Income Notes may not be held directly by the Company. As such the Company's interest in the CLO Income Notes may be indirect, and the Management Company, not the Company, will be entitled to exercise voting rights associated with the CLO Income Notes.

CLO Notes have limited liquidity

In addition to the restrictions mentioned in the section titled "*The Company will be unable to liquidate, sell, hedge or otherwise mitigate its credit risk under or associated with the CLO Retention Notes until such time as the securities of the relevant CLO have been redeemed in full (whether at final maturity or early redemption)*", there will usually be a limited market for notes representing collateralised loan obligations (including the CLO Notes). There is no guarantee that any party to a CLO transaction will make a secondary market in relation to the CLO Notes. There can be no assurance that a secondary market for any CLO Notes will develop or, if a secondary market does develop, that it will provide the holders of CLO Notes with liquidity of investment or that it will continue for the life of such notes. As a result, the Company may have to hold the CLO Notes for an indefinite period of time or until their early

redemption date or maturity date. Where a market does exist, to the extent that an investor wants to sell the CLO Notes, the price may, or may not, be at a discount from the outstanding principal amount. There may be additional restrictions on divestment in the terms and conditions of CLO Notes.

Investments in asset management subsidiaries may subject the Company to increased regulatory scrutiny or disputes related to CLOs or other investments managed by such asset management subsidiaries

As part of its business, the Portfolio Manager may advise the Company to invest in asset management subsidiaries, affiliated with the Company, Highland, Acis, the Portfolio Manager or the Management Companies and which may act as the asset manager of certain U.S. or European CLOs in order to satisfy certain U.S. or European risk retention requirements. Asset managers of U.S. or European CLOs operate in a highly regulated environment, and are subject to a comprehensive statutory and regulatory regime as well as oversight by governmental agencies. In light of the current conditions in the global financial markets and economy, regulators have increased their focus on the regulation of asset managers in the U.S. and Europe. New or modified regulations and related regulatory guidance, including under Basel III and the Dodd-Frank Act, may have unforeseen or unintended adverse effects on asset managers of CLOs. These international regulations could limit an asset management subsidiary from pursuing certain business opportunities and/or impose additional costs, and otherwise indirectly materially adversely affect the Company's business operations and have other negative consequences.

Investors will not have control over the CLO management activities of the Portfolio Manager, Highland, Acis or the Management Companies in CLOs

The Portfolio Manager, Highland, Acis and/or the Management Companies, in the capacity of CLO Manager of a CLO, will have the discretion to make collateral management decisions for such CLO, including with respect to asset selection, disposition and amendments of the underlying loans. In exercising such discretion, the Portfolio Manager, Highland, Acis and/or the applicable Management Company will be responsible to act solely in the best interests of the applicable CLO issuer, not the Company or any Investor. Any amendment, waiver or modification of an investment could postpone the receipt of payments in respect of such investment and/or reduce distributions to Investors. The shareholders will have no right to compel the Portfolio Manager, Highland, Acis or the Management Companies, in their roles as CLO Manager to take or refrain from taking any actions or decisions, and the actions or decisions taken by the Portfolio Manager, Highland, Acis or the Management Companies as CLO Manager may expose the Investors to losses on their investment.

United States retention requirements may affect future actions of the Company and negatively impact the leveraged loan market

As part of its business, the Company may invest in asset management subsidiaries, affiliated with the Company, the Portfolio Manager, Highland, Acis or the Management Companies and which may act as the asset manager of certain CLOs in order to satisfy the U.S. Risk Retention Rules.

On October 21, 2014, the U.S. Risk Retention Rules were issued and became effective on December 24, 2016 with respect to asset-backed securities collateralized by assets other than residential mortgages. The statements contained herein regarding how compliance with the U.S. Risk Retention Rules may be achieved by a CLO are solely based on publicly available information as of the date hereof. Except with respect to asset-backed securities transactions that satisfy certain exemptions, the U.S. Risk Retention Rules generally require one of the sponsors of asset-backed securities or a "majority-owned affiliate" thereof to retain not less than 5% of the credit risk of the assets collateralizing asset-backed securities. The preamble to the rule text in the U.S. Risk Retention Rules indicates that a party that organizes and initiates a securitization would be the "sponsor." In the case of many collateralized loan obligation transactions, the entity acting as collateral manager typically organizes and initiates a transaction and, therefore, would be considered the "sponsor" for U.S. Risk Retention Rules purposes, as further discussed in the preamble. The U.S. Risk Retention Rules provide that if there is more than one "sponsor" of a securitization transaction, each "sponsor" is to ensure that at least one "sponsor" (or its "majority-owned affiliate") retains the requisite U.S. Retention Interest.

It is expected that Highland or Acis, as applicable, will agree to act as "sponsor" for purposes of Managed CLOs in which the Company invests, but there can be no assurance, and no representation, made that any Governmental Authority will agree that such is the case. Each of Highland and Acis intends to treat the applicable Management Company as its "majority-owned affiliate" due to holding by it (or by affiliates that are intended to be, directly or

indirectly, majority controlled, are majority controlled by or are under common majority control with Highland or Acis, as applicable) of a controlling financial interest in such Management Company as determined under GAAP, although there can be no assurance that such Management Companies will maintain treatment as a “majority-owned affiliates” of Highland or Acis as “sponsors” given the lack of guidance in the U.S. Risk Retention Rules with respect to such affiliated situations. Moreover, there can be no guarantee that Highland or Acis will be able to maintain the treatment of such Management Company as a “majority-owned affiliate,” particularly if GAAP regulations or interpretations change over time.

Each of Highland or Acis, as applicable, may also hold their respective indirect ownership interests in the applicable Management Companies through, or transfer such interests to, affiliates that are intended to be, directly or indirectly, majority controlled, are majority controlled by or are under common majority control with, Highland or Acis, as applicable, with the intention that the Management Companies will remain their respective “majority-owned affiliates” for purposes of the U.S. Risk Retention Rules. There can be no assurance that following any such transfer any Governmental entity will agree that the applicable Management Company will remain a “majority-owned affiliate” of Highland or Acis, as applicable.

At this time, each potential investor should understand that there is uncertainty with respect to what is required to comply with the U.S. Risk Retention Rules in certain circumstances, and therefore there can be no assurance that, with respect to any Managed CLO or other CLO in which the Company invests, the applicable credit risk retention and disclosures with respect to such CLO will enable the applicable CLO Manager or U.S. retention holder to comply with the U.S. Risk Retention Rules.

In addition, there are a number of future uncertainties surrounding, U.S. Risk Retention Rules for CLO Managers, including: (i) the ultimate results of litigation currently in process brought by the Loan Syndications and Trading Association (LSTA), a major industry trade association, challenging, among other things, the regulators’ application of U.S. Risk Retention Rules to collateral managers of typical so-called open market CLOs, (ii) proposed legislation designed to exclude from U.S. Risk Retention Rules, collateral managers of certain defined “QCLOs” (qualified CLOs) and (iii) future directives and interpretations by Governmental Authorities with respect to the U.S. Risk Retention Rules. If such publicly available information is altered as a result of the foregoing (or anything else), there can be no assurance that, with respect to any Managed CLO or other CLO in which the Company invests, the applicable credit risk retention and disclosures would be viewed by any Governmental Authority as sufficient to meet the requirements under the U.S. Risk Retention Rules. The failure to satisfy the requirements of the U.S. Risk Retention Rules may have a material and adverse effect on the market value and/or liquidity of the applicable CLO Notes and on Highland, Acis and the Management Companies and the Company’s investments therein.

The failure by the Portfolio Manager, Highland, Acis and/or the Management Companies to comply with the U.S. Risk Retention Rules may have a material and adverse effect on the Company and/or the Portfolio Manager

The failure by the Portfolio Manager, Highland, Acis and/or the applicable Management Company to comply with the U.S. Risk Retention Rules with respect to any Managed CLO may result in regulatory actions and other proceedings being brought against the Portfolio Manager, Highland, Acis and/or the applicable Management Company, which could result in such person being required, among other things, to pay damages, transfer interests and/or acquire additional CLO Notes (which may or may not be available at such time for acquisition) or be subject to cease and desist orders or other regulatory action. In addition, a failure to remedy non-compliance with the U.S. Risk Retention Rules may also trigger a “cause” event under the applicable CLO Management Agreement and/or subject the Portfolio Manager, Highland, Acis and/or the applicable Management Company to adverse publicity and reputational risk resulting from such non-compliance. In addition, given the lack of clarity under the U.S. Risk Retention Rules with respect to the identity of the party responsible for holding U.S. risk retention interests upon a resignation or removal of a CLO Manager or an if the Portfolio Manager, Highland, Acis and/or the applicable Management Company resigns or the applicable holders of CLO Notes desire to remove the Portfolio Manager in connection with any such “cause” event, there may be no successor CLO Manager willing to accept appointment as such, in which case the Portfolio Manager, Highland, Acis and/or the applicable Management Company will be required to continue to act as CLO Manager under the applicable CLO Management Agreement. Further, given such lack of clarity under the U.S. Risk Retention Rules with respect to the identity of the party responsible for holding U.S. risk retention interests, there can be no assurance that Highland or Acis, as applicable, will be able to maintain compliance with the U.S. Risk Retention Rules following any transfer of ownership interests in an entity holding Retention Interests by Highland or Acis to their respective affiliates that are, directly or indirectly, majority controlled,

are majority controlled by or are under common majority control with, Highland or Acis, as applicable, particularly in situations involving CLOs which have already been issued when the related transfer occurs. As a result of any of the foregoing, the failure of the Portfolio Manager, Highland, Acis and/or the applicable Management Company to comply with the U.S. Risk Retention Rules may have a material and adverse effect on the market value and/or liquidity of the Company's investment in the applicable CLO Notes as well as on the business, condition (financial or otherwise), assets, operations or prospects of the Portfolio Manager, Highland, Acis and/or the applicable Management Company and the Company.

The Company will be unable to liquidate, sell, hedge or otherwise mitigate its credit risk under or associated with the CLO Retention Notes until such time as the securities of the relevant CLO have been redeemed in full (whether at final maturity or early redemption)

In connection with the intention to comply with the Retention Requirements, each Management Company will need to, amongst other things, (a) on the closing date of a Managed CLO, commit to purchase and retain CLO Notes held in the form and at least the minimum required under the applicable Retention Requirements, as applicable, for the relevant CLO (the "CLO Retention Notes") and (b) undertake that, for so long as any securities of the CLO remain outstanding (including the CLO Retention Notes), it will retain its interest in the CLO Retention Notes and will not (except to the extent permitted by the EU Retention Requirements, the accompanying regulatory technical standards or any other related guidance published by the European Securities and Markets Authority) sell, hedge or otherwise mitigate its credit risk under or associated with such CLO Retention Notes. The Company or the applicable Management Company, as applicable, may make certain representations and/or give certain undertakings in favour of Managed CLOs (and/or certain other transaction parties) in respect of its ongoing retention of the CLO Retention Notes and regarding its agreement to sell certain assets to such Managed CLOs from time to time. There are currently transactions in the market which are similar to the Managed CLOs, however if an applicable regulatory authority supervising investors in a Managed CLO were to conclude that the applicable Management Company was not holding the CLO Retention Notes in accordance with the CRR, it is possible, but far from certain, that this may negatively impact the investors in such Managed CLO. If such investors decided to take action against the Company or the applicable Management Company as a result of any negative impact, this may have an adverse effect on the Company's financial performance and prospects.

In addition, with the intention of achieving classification as an "originator" (as defined in the CRR) and complying with the CRR Retention Requirements if applicable to the relevant CLO, the applicable Management Company would be required to meet the Origination Requirements.

As a result of the above commitments, the applicable Management Company will be unable to liquidate, sell, hedge or otherwise mitigate its credit risk under or associated with the CLO Retention Notes until such time as the securities of the relevant CLO have been redeemed in full (whether at final maturity or early redemption). Consequently, if any shares were to become due and repayable in connection with any resolution for their redemption, the Company, the applicable Management Company will not be obliged to immediately sell, transfer or liquidate the CLO Retention Notes and the proceeds of such CLO Retention Notes (if any) will not be available until the final maturity or early redemption in full of the securities of the relevant CLO. In addition, cash held by the Company will not be able to be used to repay any shares to the extent that such repayment could leave the Company unable to continue to originate and sell assets to the CLO issuers in order to ensure that during the relevant CLO's reinvestment period the Company, the applicable Management Company has met the Origination Requirements.

The Company or the applicable Management Company directly or indirectly, may hold a controlling equity stake in the Managed CLOs; accordingly, upon exercise by the Company or the applicable Management Company an early redemption option will result in a full redemption of the applicable CLO securities. Neither the Company nor the applicable Management Company will generally be able to exercise any early redemption options during a "non-call period" (generally lasting two years) after the closing date of the CLO. As a result of this feature and the EU Retention Requirements, the relevant CLO Retention Notes will not be permitted to be sold, transferred or liquidated during this time. In addition, even after an early redemption option is permitted to be exercised, such an option usually contains a number of conditions to its exercise including, but not limited to, a threshold that the liquidation value of the CLO collateral exceed an amount which would pay (a) all expenses of the CLO and (b) principal and accrued interest on the CLO Notes senior to the CLO Income Notes. If the liquidation value of the portfolio will not achieve this threshold at the time the Company intends to exercise its early redemption option, the CLO will not be able to be optionally redeemed by the Company at such time. In such circumstances, the Company or the applicable Management Company

may not redeem the CLO Retention Notes until their final stated maturity (which may be in excess of 12 years), therefore producing no proceeds to pay to Shareholders until this point.

Potential non-compliance with or changes to the United States and European risk retention requirements

The purchase and retention of the CLO Retention Notes in a CLO will be undertaken by the Company or the applicable Management Company with the intention of achieving compliance with the U.S. Risk Retention Rules and/or the EU Retention Requirements by the relevant CLO.

The U.S. Risk Retention Rules and/or EU Retention Requirements may be amended, supplemented or revoked from time to time. There is no guarantee that existing CLOs or future CLOs will be grandfathered into the regime which results from such amendments, supplements or revocations and, as such, the CLOs in which the applicable Management Company is retaining the CLO Retention Notes, may become non-compliant with the U.S. Risk Retention Rules and/or EU Retention Requirements.

Liability for breach of a risk retention letter

The arranger of a CLO and certain other parties of a CLO in which a Management Company agrees to hold the CLO Retention Notes (in such capacity, the “**Retention Holder**”) will require the applicable Management Company to execute a risk retention letter. Under a risk retention letter the applicable Retention Holder will typically be required to, amongst other things, make certain representations, warranties and undertakings: (a) in relation to its acquisition and retention of the CLO Retention Notes for the life of the CLO; and (b) regarding its agreement to sell assets to the relevant CLO from time to time. If the applicable Retention Holder sells or is forced to sell the CLO Retention Notes prior to the maturity of the relevant CLO, or the applicable Retention Holder holds insufficient cash or investments to continually sell the assets to the CLO as described above or for any other reason the applicable Retention Holder is not considered to be an “originator” (as such term is defined in the CRR), the Company may be in breach of the terms of the related risk retention letter. In such circumstances the arranger of the relevant CLO and the other parties to the related risk retention letter would have recourse to the applicable Retention Holder for losses incurred as a result of such breach. Such claims may reduce, or entirely diminish any cash or assets of the Company which may have been available to make payments on the Shares.

RISKS RELATING TO HIGHLAND AND ACIS

Past Performance Not Indicative of Future Results

The past performance of Highland and Acis and their principals and affiliates in other portfolios or investment vehicles, including, without limitation their outstanding CLO transactions, may not be indicative of the results that the Company may be able to achieve. Similarly, the past performance of Highland, Acis and their principals and affiliates over a particular period may not necessarily be indicative of the results that may be expected in future periods. Furthermore, the nature of, and risks associated with, the Company’s investments may differ substantially from those investments and strategies undertaken historically by Highland, Acis and their principals and affiliates. There can be no assurance that Highland’s or Acis’ investment recommendations will perform as well as past investments of Highland or Acis or their principals and affiliates, that the Company will be able to avoid losses or that the Company will be able to make investments similar to the past investments of Highland, Acis and their principals and affiliates. In addition, such past investments may have been made utilizing a leveraged capital structure, an asset mix and fee arrangements that are different from the anticipated capital structure, asset mix and fee arrangements of the Company. Moreover, because the investment criteria that govern investments in the Company’s portfolio do not govern the investments and investment strategies of Highland, Acis and their principals and affiliates generally, such investments conducted in accordance with such criteria, and the results they yield, are not directly comparable with, and may differ substantially from other investments undertaken by Highland, Acis and their principals and affiliates.

Acis, as CLO Manager, Relies on Highland to Perform Certain Services

Acis currently relies on Highland, a U.S. SEC-registered investment adviser under common control with Acis, pursuant to the ACM Services Agreements, to provide investment research and recommendations and operational support to Acis, including services in connection with credit research, due diligence of actual or potential investments,

the execution of investment transactions, and certain loan services and administrative services. If Highland does not continue to provide such services to Acis, or there is a departure or inability of certain Highland personnel to provide such services to Acis, there can be no assurances that Acis would be able to find a substitute service provider with the same experience as, or on the same terms as its ACM Services Agreements with, Highland. The inability of Acis to perform its duties under the applicable CLO Management Agreements or the ACLOM Services Agreements in accordance with the standard of care specified therein due to the termination of the Services Agreements could result in removal of Acis or Acis CLO Management, as applicable, under the applicable CLO Management Agreements for the Acis CLOs and Acis CLO 7.

Litigation Involving Highland and Acis

Highland and Acis currently are and have been previously subject to various legal proceedings, many of which have been due to the nature of operating in the distressed loan business in the U.S. The legal process is often the route of last resort to recover amounts due from delinquent borrowers. Shareholders have had an opportunity to discuss with Highland to their satisfaction all litigation matters against Highland and its affiliates unrelated to its distressed business. We currently do not anticipate these proceedings will have a material negative impact to the Company.

Failure to Comply with Investment Advisers Act May Have an Adverse Effect on the Portfolio Manager's Performance

Highland HCF Advisor and Highland CLO Management are relying advisers of Highland, and Highland is a registered investment adviser registered under the Investment Advisers Act and, as such, is subject to the provisions of the Investment Advisers Act. Acis CLO Management is a relying adviser of Acis, and Acis is a registered investment adviser registered under the Investment Advisers Act and, as such, is subject to the provisions of the Investment Advisers Act. Failure to comply with the requirements imposed on the Portfolio Manager, Highland, Acis and/or the Management Companies under the Investment Advisers Act may have a significant adverse effect on the Portfolio Manager, Highland, Acis and/or the applicable Management Company. The Portfolio Manager, Highland's, Acis' and/or the applicable Management Company's ability to act as CLO Manager for Managed CLOs in which the Company holds CLO Notes may also be adversely affected by negative publicity arising from any regulatory compliance failures or other inappropriate behavior attributed to or any other negative publicity related to the Portfolio Manager, Highland, Acis and/or the applicable Management Company, any affiliate thereof or any of their respective investment professionals.

SEC enforcement actions

There can be no assurance that the Portfolio Manager, Highland, Acis and/or the Management Companies or their affiliates will avoid regulatory examination and possibly enforcement actions. Recent SEC enforcement actions and settlements involving U.S.-based private fund advisers have involved a number of issues, including the undisclosed allocation of the fees, costs and expenses related to unconsummated co-investment transactions (i.e., the allocation of broken deal expenses), undisclosed legal fee arrangements affording the applicable adviser with greater discounts than those afforded to funds advised by such adviser. Although each of the Portfolio Manager, Highland, Acis and the Management Companies believe the foregoing practices to have been common historically amongst private fund advisers within the U.S. private funds industry, if the SEC or any other governmental authority, regulatory agency or similar body may take issue with, or in the case of insufficient disclosure regarding acceleration of certain special fees as described below, may continue to take issue with, past or future practices of the Portfolio Manager, Highland, Acis or the Management Companies or any of their affiliates as they pertain to any of the foregoing. In such instances, the Portfolio Manager, Highland, Acis or the Management Companies and/or such affiliates may be at risk for regulatory sanction. Even if an investigation or proceeding did not result in a sanction or the sanction imposed against the Portfolio Manager, Highland, Acis or the Management Companies was small in monetary amount, the Portfolio Manager, Highland, Acis and/or the applicable Management Company or their respective affiliates may be subject to adverse publicity relating to the investigation, proceeding or imposition of any such sanction.

Potential litigation and regulatory actions may materially and adversely affect the Portfolio Manager, Highland, Acis and/or the Management Companies

There can be no assurance that the Portfolio Manager, Highland, Acis and/or the Management Companies or their affiliates will avoid potential third party or other litigation or regulatory actions under existing laws (including the U.S. Risk Retention Requirements) or laws enacted in the future. Recent SEC enforcement actions and settlements involving U.S.-based private fund advisers have involved a number of issues, including undisclosed legal fee arrangements affording the applicable adviser with greater discounts than those afforded to funds advised by such adviser and the undisclosed acceleration of certain special fees. In addition, the failure by the Portfolio Manager, Highland, Acis and/or the Management Companies to comply with the U.S. Risk Retention Rules may result in regulatory actions and other proceedings being brought against the Portfolio Manager, Highland, Acis and/or the Management Companies. If the SEC or any other Governmental Authority takes issue with the practices of the Portfolio Manager, Highland, Acis and/or the Management Companies or any of their affiliates as they pertain to any of the foregoing, the Portfolio Manager, Highland, Acis and/or the Management Companies and/or any such affiliates will be at risk for regulatory sanction. Even if an investigation or proceeding did not result in a sanction or the sanction imposed against the Portfolio Manager, Highland, Acis and/or the Management Companies and/or such affiliates was small in monetary amount, the adverse publicity relating to the investigation, proceeding or imposition of these sanctions could harm the Company, the Portfolio Manager, Highland, Acis and/or the Management Companies and/or their respective affiliates' reputations which may adversely affect the market value and/or liquidity of the Debt. There is also a material risk that Governmental Authorities in the United States and beyond will continue to adopt new laws or regulations (including tax laws or regulations), or change existing laws or regulations, or enhance the interpretation or enforcement of existing laws and regulations including the U.S. Risk Retention Rules. Any such events or changes could occur during the term of the Debt and may materially and adversely affect the Portfolio Manager, Highland, Acis and/or the Management Companies and its ability to operate and/or pursue its management strategies on behalf of the Issuer. Such risks are often difficult or impossible to predict, avoid or mitigate in advance.

Dependence on Highland, Acis and other collateral managers of CLOs

A significant portion of the Company's investment portfolio will comprise of its investment in the Management Companies and in Managed CLOs. The Company's investment portfolio may also include CLOs managed by other asset managers. The performance of the Company's portfolio depends heavily on the skills of the Portfolio Manager, Highland, Acis, the Management Companies or such other asset managers in analyzing, selecting and managing the relevant CLOs. As a result, the Company and the CLOs will be highly dependent on the financial and managerial experience of certain investment professionals associated with the Portfolio Manager, Highland, Acis, the Management Companies and the other asset managers, none of whom is under any contractual obligation to the Company or such CLOs to continue to be associated with the Portfolio Manager, Highland, Acis, the applicable Management Company or such other collateral manager for the term of the Company or any particular CLO. The loss of one or more of these individuals could have a material adverse effect on the performance of the Company and the relevant CLO.

Furthermore, the Portfolio Manager has informed the Company that these investment professionals are also actively involved in other investment activities and will not be able to devote all of their time to the Company's business and affairs. In addition, individuals not currently associated with the Portfolio Manager may become associated with the Portfolio Manager and the performance of the Company and the Managed CLOs may also depend on the financial and managerial experience of such individuals. Moreover, the Portfolio Management Agreement may be terminated under certain circumstances.

The Company generally may not terminate the Portfolio Management Agreement, even in the event of the Portfolio Manager's poor performance

The Portfolio Management Agreement was negotiated between related parties and its terms may not be as favorable as if it had been negotiated with unaffiliated third parties. The Company may choose not to enforce, or to enforce less vigorously, certain of its rights under the Portfolio Management Agreement in an effort to maintain its ongoing relationship with the Portfolio Manager or Highland Capital Management, L.P., as the case may be.

Termination of the Portfolio Management Agreement is difficult and costly. In order to terminate the Portfolio Management Agreement without cause, the Company must (i) be required to register as an investment company under the provisions of the Investment Company Act of 1940 and it must notify the Portfolio Manager of such

requirement, (ii) the portfolio must be liquidated in full and its financing arrangements must have been terminated or redeemed in full, or (iii) it must reach a mutual agreement with the Portfolio Manager to terminate the agreement. The initial term of the Portfolio Management Agreement is three years, with automatic renewals of three years thereafter. The Company may not choose to not renew the Portfolio Management Agreement.

The Company's ability to terminate the Portfolio Management Agreement for "cause" is limited, including grounds of wilful violation of the Portfolio Management Agreement by the Portfolio Manager and fraud or criminal activity. However, poor performance by the Portfolio Manager is not grounds for termination for cause under the Portfolio Management Agreement. See "*Material Contracts*"

RISKS RELATING TO CONFLICTS OF INTEREST

Various Potential and Actual Conflicts of Interest

Various potential and actual conflicts of interest may arise from the overall investment activity of the Portfolio Manager, Highland, its clients and its affiliates. The following briefly summarizes some of these conflicts, but is not intended to be an exhaustive list of all such conflicts.

The Company will be subject to various conflicts of interest involving the Portfolio Manager and its affiliates

The following briefly summarizes certain potential and actual conflicts of interest which may arise from the overall investment activity of the Portfolio Manager, Highland, its clients and its affiliates, but is not intended to be an exhaustive list of all such conflicts. The scope of the activities of the Portfolio Manager, Highland, its affiliates, and the funds and clients managed or advised by Highland or any of its affiliates may give rise to conflicts of interest or other restrictions and/or limitations imposed on the Company in the future that cannot be foreseen or mitigated at this time.

As part of their regular business, the Portfolio Manager, Highland, its affiliates and their respective officers, directors, trustees, shareholders, members, partners, personnel and employees and their respective funds and investment accounts (collectively, the "**Related Parties**") hold, purchase, sell, trade or take other related actions both for their respective accounts and for the accounts of their respective clients, on a principal or agency basis, with respect to loans, securities and other investments and financial instruments of all types. The Portfolio Manager, its affiliates and their respective officers, directors, shareholders, members, partners, personnel and employees also provide investment advisory services, among other services, and engage in private equity, real estate and capital markets-oriented investment activities. The Related Parties will not be restricted in their performance of any such services or in the types of debt or equity investments which they may make. The Related Parties may have economic interests in or other relationships with obligors or issuers in whose obligations or securities or credit exposures the Company and/or the Managed CLOs may invest. In particular, the Related Parties may make and/or hold an investment in an obligor's or issuer's securities that may be *pari passu*, senior or junior in ranking to an investment in such obligor's or issuer's securities made and/or held by the Company and/or the Managed CLOs, or in which partners, security holders, members, officers, directors, agents, personnel or employees of such Related Parties serve on boards of directors or otherwise have ongoing relationships. Each of such ownership and other relationships may result in securities laws restrictions on transactions in such securities by the Company and/or the Managed CLOs and otherwise create conflicts of interest for the Company and/or the Managed CLOs. In such instances, the Related Parties may in their discretion make investment recommendations and decisions that may be the same as or different from those made with respect to the Company's and/or the Managed CLOs' investments. In connection with any such activities described above, the Related Parties may hold, purchase, sell, trade or take other related actions in securities or investments of a type that may be suitable to be included as investments by the Company and/or Managed CLOs. Other than with respect to new issue Highland CLOs as described below, the Related Parties will not be required to offer such securities or investments to the Company or Managed CLOs or provide notice of such activities to the Company or Managed CLOs. In addition, in providing services under the Portfolio Management Agreement and the CLO Management Agreements, the Portfolio Manager may take into account its relationship or the relationships of its affiliates with obligors and their respective affiliates, which may create conflicts of interest. Furthermore, in connection with actions taken in the ordinary course of business of the Portfolio Manager in accordance with its fiduciary duties to its other clients, the Portfolio Manager may take, or be required to take, actions which adversely affect the interests of the Company and/or Managed CLOs. Except as otherwise set forth herein, including with respect to Qualifying CLOs, Designated CLO Resets, Designated CLO

Refinancings and the NexBank Facility and any Permitted NexBank Credit Facility Amendments, the consent of the Advisory Board will be required with respect to transactions with any Related Party.

The Related Parties invested and may continue to make investments that would also be appropriate for the Company, the Portfolio Manager, the Management Companies and/or the Managed CLOs. Such investments may be different from those recommended to the Company or made on behalf of the Managed CLOs or the Management Companies. Neither the Portfolio Manager nor any Related Entity has any duty, in making or maintaining such investments, to act in a way that is favorable to the Company, the Management Companies and/or the Managed CLOs or to offer any such opportunity to the Company, other than with respect to new issue Highland CLOs as described below, or the Managed CLOs. The investment policies, fee arrangements and other circumstances applicable to such other parties may vary from those applicable to the Company, the Portfolio Manager, Highland, Acis, the Management Companies and the Managed CLOs. The Portfolio Manager and/or any Related Entity may also provide advisory or other services for a customary fee to issuers or obligors whose debt obligations or other securities are held by the Company, the Portfolio Manager, Highland, Acis, the Management Companies and/or the Managed CLOs, and neither the Shareholders nor the Company shall have any right to such fees. The Portfolio Manager, Highland, Acis, the Management Companies and/or any Related Entity may also have ongoing relationships with, render services to or engage in transactions with other clients, including other issuers of collateralized loan obligations and collateralized debt obligations, who invest in assets of a similar nature to those of the Company, the Portfolio Manager, Highland, Acis, the Management Companies and/or the Managed CLOs, and with companies whose securities or loans are acquired by the Company, the Portfolio Manager, Highland, Acis, the Management Companies and/or the Managed CLOs, and may own equity or debt securities issued by obligors of debt held by the Company, the Portfolio Manager, Highland, Acis, the Management Companies and/or the Managed CLOs. In connection with the foregoing activities, the Portfolio Manager, Highland, Acis, the Management Companies and/or any Related Entity may from time to time come into possession of material nonpublic information that limits the ability of the Portfolio Manager to advise the Company or the Management Companies or effect a transaction for Managed CLOs, and the Company's, the Management Companies' and/or the Managed CLOs' investments may be constrained as a consequence of Highland's or Acis' inability to use such information for advisory purposes or otherwise to effect transactions that otherwise may have been initiated on behalf of its clients, including the Company, the Management Companies and/or the Managed CLOs. In addition, officers or affiliates of the Portfolio Manager, Highland, Acis and/or Related Parties may possess information relating to obligors of debt held by the Company, the Management Companies and/or the Managed CLOs that is not known to the individuals at the Portfolio Manager responsible for monitoring such investments and performing the other obligations under the Portfolio Management Agreement or CLO Management Agreements.

During the Investment Period, the Company shall receive priority allocations with respect to all CLO Income Note investment opportunities with respect to new issue Highland CLOs, over the account of the Portfolio Manager, its affiliates and Other Accounts. For the avoidance of doubt, the Portfolio Manager shall otherwise allocate investment opportunities among the Company and Highland and its affiliates and Other Accounts in accordance with its allocation policy which requires allocations among clients to be fair and equitable over time as described below. The Portfolio Manager, Highland, Acis and their affiliates may, from time to time, be presented with investment opportunities, other than with respect to new issue Highland CLOs during the Investment Period, that fall within the investment objectives of the Company, the Management Companies and/or the Managed CLOs and other clients, funds or other investment accounts managed by Highland, Acis or their affiliates, and in such circumstances, the Portfolio Manager, Highland, Acis and their affiliates expect to allocate such opportunities among the Company, the Management Companies and/or the Managed CLOs and such other clients, funds or other investment accounts on a basis that the Portfolio Manager, Highland, Acis and their affiliates determine in good faith is appropriate taking into consideration such factors as the fiduciary duties owed to the Company, the Management Companies, the Managed CLOs and such other clients, funds or other investment accounts, the primary mandates of the Company, the Management Companies, the Managed CLOs and such other clients, funds or other investment accounts, the capital available to the Company, the Management Companies, the Managed CLOs and such other clients, funds or other investment accounts, any restrictions on investment, the sourcing of the transaction, the size of the transaction, the amount of potential follow-on investing that may be required for such investment and the other investments of the Company, the Management Companies, the Managed CLOs and such other clients, funds or other investment accounts, the relation of such opportunity to the investment strategy of the Company, the Management Companies and/or the Managed CLOs and such other clients, funds or other investment accounts, reasons of portfolio balance and any other consideration deemed relevant by the Portfolio Manager, Highland, Acis

and their affiliates in good faith. Subject to the Company's priority allocation with respect to new issue Highland CLOs, the Portfolio Manager, will allocate investment opportunities across the entities for which such opportunities are appropriate, consistent with (1) its internal conflict of interest and allocation policies and (2) the requirements of the Investment Advisers Act. The Portfolio Manager, will seek to allocate investment opportunities among such entities in a manner that is fair and equitable over time and consistent with its allocation policy. However, there is no assurance that such investment opportunities will be allocated to the Company, the Management Companies and/or the Managed CLOs fairly or equitably in the short term or over time and there can be no assurance that the Company, the Management Companies and/or any of the Managed CLOs will be able to participate in all such investment opportunities that are suitable for it.

Although the professional staff of the Portfolio Manager will devote as much time to the Company as the Portfolio Manager deems appropriate to perform its duties in accordance with the Portfolio Management Agreement and in accordance with reasonable commercial standards, the staff may have conflicts in allocating its time and services among the Company and the Portfolio Manager's other accounts.

The directors, officers, personnel, employees and agents of the Portfolio Manager and its Related Parties may, subject to applicable law, serve as directors (whether supervisory or managing), officers, personnel, employees, partners, agents, nominees or signatories, and receive arm's length fees in connection with such service, for the Company or entities that operate in the same or a related line of business as the Company or the Management Companies, or of other clients managed by the Portfolio Manager or its affiliates, or for any obligor or issuer in respect of the debt, equity securities or other investments held by the Company, the Management Companies and/or Managed CLOs, or any affiliate thereof, to the extent permitted by their governing instruments, or by any resolutions duly adopted by the Company, such other entities, or any obligor or issuer (or any affiliate thereof) in respect of any of the debt, equity securities or other investments held by the Company, the Management Companies and/or Managed CLOs pursuant to their respective governing instruments, and neither the Company, The applicable Management Company nor the Managed CLOs shall have the right to any such fees.

As further described below, the Portfolio Manager and its Related Parties may effect client cross-transactions where the Portfolio Manager advises the Company or a Management Company, or causes a Managed CLO, to effect a transaction between the Company, the applicable Management Company or such Managed CLO, as applicable, and another client advised by the Portfolio Manager or any of its affiliates. The Portfolio Manager, may engage in a client cross-transaction involving the Company, the Management Companies and/or Managed CLOs any time that the Portfolio Manager believes such transaction to be fair to the Company, the applicable Management Company and/or the Managed CLOs, as applicable, and such other client. By purchasing Shares of the Company, a Shareholder is deemed to have consented to such client cross-transactions between the Company, the applicable Management Company and another client of the Portfolio Manager or one of its Related Parties.

As further described below, the Portfolio Manager may effect principal transactions where Highland advises the Company, or causes a Managed CLO, to make and/or hold an investment, including an investment in securities, in which the Portfolio Manager and/or its affiliates have a debt, equity or participation interest, in each case in accordance with applicable law, which may include the Portfolio Manager obtaining the consent and approval of the Advisory Board of the Company prior to engaging in any such principal transaction between the Company and the Portfolio Manager or its affiliates. By purchasing Shares of the Company, a Shareholder is deemed to have consented to such procedures relating to principal transactions between the Company and the Portfolio Manager or its Related Entities, subject to consent of the Advisory Board. In addition, in the event a Managed CLO engages in a principal trade, consent of the client may consist of consent of the board of directors of such Managed CLO (or certain professionals contracted by the board of directors, to the extent relevant), and none of the Company or its Shareholders will have any additional consent rights with respect to such transaction.

The Portfolio Manager may advise the Company, or direct the Managed CLOs, to acquire or dispose of investments in cross trades between the Company or the Managed CLOs, as applicable, and other clients of the Portfolio Manager or its affiliates in accordance with applicable legal and regulatory requirements. In addition, the Company and/or the Managed CLOs may invest in securities of obligors or issuers in which the Portfolio Manager and/or its affiliates have a debt, equity or participation interest, and the holding and sale of such investments by the Company and/or Managed CLOs may enhance the profitability of the Portfolio Manager's own investments in such companies. Moreover, the Company and Managed CLOs may invest in assets originated by the Portfolio Manager or its affiliates. In each such case, the Portfolio Manager and such affiliates may have a potentially conflicting division

of loyalties and responsibilities regarding the Company or the Managed CLOs, as applicable, and the other parties to such trade. Under certain circumstances, the Portfolio Manager and its affiliates may determine that it is appropriate to mitigate such conflicts by selling an investment at a fair value that has been calculated pursuant to the Portfolio Manager's valuation procedures to another client managed or advised by the Portfolio Manager or such affiliates. In addition, the Portfolio Manager may enter into agency cross-transactions where it or any of its affiliates acts as broker for the Company or a Managed CLO, as applicable, and for the other party to the transaction, to the extent permitted under applicable law. The Portfolio Manager may obtain the Company's written consent as provided herein if any such transaction requires the consent of the Company under Section 206(3) of the Investment Advisers Act.

The Portfolio Manager and/or its Related Parties may participate in creditor committees or other committees with respect to the bankruptcy, restructuring or workout of obligors or issuers of debt obligations or securities held by the Company and/or the Managed CLOs. In such circumstances, the Portfolio Manager may take positions on behalf of itself or Related Parties that are adverse to the interests of the Company or the Managed CLOs in the relevant investment.

The Portfolio Manager and/or its Related Parties may act as an underwriter, arranger or placement or administrative agent, or otherwise participate in the origination, structuring, negotiation, syndication, administration or offering of CLOs or any senior secured loans purchased by the Company. Such transactions are on an arm's-length basis and may be subject to arm's-length fees. There is no expectation for preferential access to transactions involving CLOs or senior secured loans that are underwritten, originated, arranged or placed by the Portfolio Manager and/or its affiliates and the Company shall not have any right to any such fees.

There is no limitation or restriction on the Portfolio Manager or any of its Related Parties with regard to acting as investment adviser or collateral manager (or in a similar role) to other parties or persons. This and other future activities of the Portfolio Manager and/or its Related Parties may give rise to additional conflicts of interest. Such conflicts may relate to obligations that the Portfolio Manager's investment committee, the Portfolio Manager or its affiliates have to other clients.

The members of the Portfolio Manager's investment committee serve or may serve as personnel, officers, directors or principals of entities that operate in the same or a related line of business as the Company, or of other clients managed by the Portfolio Manager or its affiliates. In serving in these multiple capacities, they may have obligations to such other clients or investors in those entities, the fulfillment of which may not be in the best interests of the Company. The Company may compete with other entities managed by the Portfolio Manager and its affiliates for capital and investment opportunities.

There are generally no ethical screens or information barriers among the Portfolio Manager and certain of its affiliates of the type that many firms implement to separate persons who make investment decisions from others who might possess material, non-public information that could influence such decisions. If the Portfolio Manager, any of its personnel or its affiliates were to receive material non-public information about a particular obligor, issuer or CLO, or have an interest in causing the Company or a Managed CLO to acquire a particular CLO security, the Portfolio Manager may be prevented from causing the Company or Managed CLO to purchase or sell such asset due to internal restrictions imposed on the Portfolio Manager. Notwithstanding the maintenance of certain internal controls relating to the management of material non-public information, it is possible that such controls could fail and result in the Portfolio Manager, or one of its investment professionals, buying or selling an asset while, at least constructively, in possession of material non-public information. Inadvertent trading on material non-public information could have adverse effects on the Portfolio Manager's reputation, result in the imposition of regulatory or financial sanctions, and as a consequence, negatively impact the Portfolio Manager's ability to perform its portfolio management services to the Company and the Managed CLOs. In addition, while the Portfolio Manager and certain of its affiliates currently operate without information barriers on an integrated basis, such entities could be required by certain regulations, or decide that it is advisable, to establish information barriers. In such event, the Portfolio Manager's ability to operate as an integrated platform could also be impaired, which would limit the Portfolio Manager's access to personnel of its affiliates and potentially impair its ability to advise the Company and manage the Managed CLOs' investments.

RISKS RELATING TO AN INVESTMENT IN THE SHARES

Shareholders have no right to have their Shares redeemed or repurchased by the Company

The Company has been established as a closed-ended vehicle. Accordingly, there is no right or entitlement attaching to the Shares that allows them to be redeemed or repurchased by the Company at the option of the Shareholder.

There is no public market for the Shares, and a market for the Shares may never develop, which could result in Shareholders being unable to monetize their investment.

The Shares have not been registered under any securities exchange, and, unless so registered, may not be offered or sold except pursuant to an exemption from the applicable securities exchange regulator. It is not expected that the Shares will be listed on any securities exchange in the future. The Shares are newly issued securities for which there is no established trading market. In the absence of an active trading market, Shareholders may be unable to resell the Shares at the time and for the price desired or at all. The Company can provide no assurances that the Shares will not subsequently trade below the price at which they are purchased pursuant to this Offering Memorandum.

In connection with the Company filing any registration for any securities exchange, the Company will agree to use commercially reasonable efforts to satisfy the criteria for listing and list and thereafter maintain the listing on such exchange or market so long as it is in the best interests of the Company. Each market or exchange has initial listing criteria, including criteria related to minimum bid price, public float, market makers, minimum number of round lot holders and board independence requirements that the Company can give no assurance that it will meet. The Company's inability to list or include the Shares on a securities exchange could affect the ability of Shareholders to sell their Shares subsequent to the declaration of the effectiveness of any registration statement, and consequently adversely affect the value of such Shares. In such case, Shareholders would find it more difficult to dispose of, or to obtain accurate quotations as to the market value of, the Shares. In addition, the Company would have more difficulty attracting the attention of market analysts to cover it in their research. If the Shares are approved for listing or inclusion on a securities exchange, the Company will have no prior reporting history, and thus there is no way to determine the prices or volumes at which the Shares will trade. The Company can give no assurances as to the development or liquidity of any trading market for the Shares. Shareholders may not be able to resell their Shares at or near their original acquisition price, or at any price.

In the event a market for the Shares does develop, the Shares may trade at a discount to the Net Asset Value per Share and Shareholders may be unable to realise their Shares at the Net Asset Value per Share or at any other price

The Shares may trade at a discount to the Net Asset Value per Share for a variety of reasons, including due to market or economic conditions or to the extent investors undervalue the Company.

Subject to the Companies Law, under its Articles, the Company may issue additional securities, including Shares, for any purpose. Any additional issuances by the Company, or the possibility of such issue, may cause the price of the Shares to decline.

The existence of a liquid market in the Shares cannot be guaranteed

The Shares may be admitted to a securities exchange at some point in the future, however there can be no guarantee that a liquid market in the Shares will develop or be sustained or that the Shares will trade at prices close to the Net Asset Value per Share. The number of Shares to be issued pursuant to the Placing is not yet known, and there may be a limited number of holders of Shares. Limited numbers and/or holders of Shares may mean that there is limited liquidity in such Shares which may affect: (i) a Shareholder's ability to realise some or all of their investment; (ii) the price at which such Shareholder can effect such realisation; and/or (iii) the price at which Shares trade in the secondary market. Accordingly, Shareholders may be unable to realise their investment at Net Asset Value per Share or at all.

The Shares will be subject to purchase and transfer restrictions in the Placing and in secondary transactions in the future

The Company intends to restrict the ownership and holding of its Shares so that none of its assets will constitute “plan assets” under the U.S. Plan Assets Regulations. The Company intends to impose such restrictions based on deemed representations in the case of a subscription of Shares. If the Company’s assets were deemed to be “plan assets” of any plan subject to Title I of ERISA or Section 4975 of the U.S. Tax Code (“**U.S. Plan**”), pursuant to Section 3(42) of ERISA and U.S. Department of Labor regulations promulgated under ERISA by the U.S. Department of Labor and codified at 29 C.F.R. Section 2510.3-101 as amended by Section 3(42) of ERISA (collectively, the “**U.S. Plan Asset Regulations**”) then: (i) the prudence and other fiduciary responsibility standards of ERISA would apply to investments made by the Company; and (ii) certain transactions that the Company or a subsidiary of the Company may enter into, or may have entered into, in the ordinary course of business might constitute or result in non-exempt prohibited transactions under Section 406 of ERISA or Section 4975 of the U.S. Tax Code and might have to be rescinded. Governmental plans and certain church plans, while not subject to Title I of ERISA or Section 4975 of the U.S. Tax Code, may nevertheless be subject to other State, local or other laws or regulations that would have the same effect as the U.S. Plan Asset Regulations so as to cause the underlying assets of the Company to be treated as assets of an investing entity by virtue of its investment (or any beneficial interest) in the Company and thereby subject the Company (or other persons responsible for the investment and operation of the Company assets) to laws or regulations that are similar to the fiduciary responsibility or prohibited transaction provisions contained in Title I of ERISA or Section 4975 of the U.S. Tax Code.

Each purchaser and subsequent transferee of the Shares will be deemed to represent and warrant that no portion of the assets used to acquire or hold its interest in the Shares constitutes or will constitute the assets of any U.S. Plan. The Articles of the Company provide that the Board of Directors may refuse to register a transfer of Shares to any person they believe to be a Non-Qualified Holder or a U.S. Plan investor. If any Shares are owned directly or beneficially by a person believed by the Board of Directors to be a Non-Qualified Holder or a U.S. Plan investor, the Board of Directors may give notice to such person requiring him either (i) to provide the Board of Directors within 30 days of receipt of such notice with sufficient satisfactory documentary evidence to satisfy the Board of Directors that such person is not a Non-Qualified Holder or a U.S. Plan investor, or (ii) to sell or transfer their Shares to a person qualified to own the same within 30 days and within such 30 days to provide the Board of Directors with satisfactory evidence of such sale or transfer. Where condition (i) or (ii) is not satisfied within 30 days after the serving of the notice, the person will be deemed, upon the expiration of such 30 days, to have forfeited their Shares.

In addition, the Placing Shares may not be offered, sold, exercised, resold, transferred or delivered, directly or indirectly, within the United States or to, or for the account or benefit of, U.S. Persons, except pursuant to an exemption from, or in a transaction not subject to, the registration requirements of the U.S. Securities Act and in compliance with any applicable securities laws of any state or other jurisdiction in the United States. For more information, refer to “Risks relating to regulation and taxation - The Company is not, and does not intend to become, registered in the United States as an investment company under the U.S. Investment Company Act and related rules” in this section of this Offering Memorandum.

For more information on purchase and transfer restrictions, prospective investors should refer to the section of this Offering Memorandum entitled “*Purchase and Transfer Restrictions*” in “*Placing Arrangements*”.

RISKS RELATING TO REGULATION AND TAXATION

Changes in law or regulations, or a failure to comply with any laws or regulations, may adversely affect the respective businesses, investments and performance of the Company

The Company is subject to laws and regulations enacted by national and local governments.

On June 23, 2016, in a public referendum, the United Kingdom voted to leave the European Union. On March 29, 2017, the United Kingdom triggered Article 50 of the Treaty on European Union (“**Article 50**”) by formally notifying the European Council of the United Kingdom’s intention to withdraw from the European Union. In accordance with Article 50, the European Union shall negotiate and conclude a withdrawal agreement with the United Kingdom within 2 years of the United Kingdom triggering Article 50, although the European Council in agreement with the United Kingdom may decide to extend this period. The United Kingdom’s decision to leave the European Union has caused,

and is anticipated to continue to cause, significant new uncertainties and instability in both domestic and global financial markets. These uncertainties could have a material adverse effect on the various obligors' ability to make payments due under the assets within the CLO portfolios, which in turn could have a material adverse effect on the Company's financial condition, results of operations and/or its NAV.

The Company is subject to, and is required to comply with, certain regulatory requirements that are applicable to registered investment schemes which are domiciled in Guernsey.

The laws and regulations affecting the Company are evolving and any changes in such laws and regulations may have an adverse effect on the ability of the Company to carry on its business. Any such changes may also have an adverse effect on the ability of the Company to pursue the investment policies, and may adversely affect the Company's business, financial condition, results of operations and/or its NAV.

Certain income of the Company may be subject to U.S. withholding tax, and changes in tax law may adversely affect the Company

The Company intends to make loan investments in the United States that will qualify for the "portfolio interest exemption" from U.S. withholding on interest. However, if the Company is not eligible for the portfolio interest exemption with respect to a loan paying U.S.-source interest, interest payments to the Company could be subject to a 30% withholding tax. In addition, there can be no assurance that, as a result of any change in any applicable law, rule or regulation or interpretation thereof, U.S.-source interest or other payments on the loans that were not subject to withholding tax when purchased will not in the future become subject to U.S. or other withholding tax or that the amount or rate of withholding tax to which a payment on a loan is subject might not increase.

In addition, if the Company acquires equity interests in U.S. entities, either as a result of a direct purchase or as a result of loans previously purchased by the Company being converted into equity interests, the Company could be subject to 30% U.S. withholding tax on any U.S.-source dividends. If the Company is deemed to be engaged in a trade or business in the United States as a result of its ownership of an equity interest in an entity treated as fiscally transparent in the United States or certain other investments, the Company could be subject to a tax on net income with respect to income from such equity interest or other investments, as well as a "branch profits" tax, with a combined U.S. tax rate with respect to such equity interest or other investments of approximately 54%.

If the Company is subject to U.S. withholding tax on payments from investments or is subject to U.S. net income tax, such tax would reduce the amounts available to make payments on the Placing Shares. The extent to which other source country withholding taxes may apply to the Issuer's income will depend on the actual composition of its assets.

The European Directive on Alternative Investment Fund Managers may impair marketing of the Shares to EU investors

The AIFMD was transposed into the national legislation of a number of EEA member states on 22 July 2013. The Company will be considered an Alternative Investment Fund ("AIF") for the purposes of AIFMD. AIFMD will allow the continued marketing of AIFs, such as the Company, under national private placement regimes where EEA member states choose to implement AIFMD national private placement regimes. In relation to the Company, such marketing will be subject to registration under the AIFMD in those EU member states where there will be marketing of the Shares to investors. To permit marketing, appropriate cooperation agreements must be in place between the supervisory authorities of the relevant EEA member states in which the Shares are being marketed and the jurisdiction of both the Company and the Portfolio Manager, as the AIFM of the Company.

Accordingly, the ability of the Portfolio Manager to market the Shares in the EEA will depend on the relevant EEA state permitting the marketing of non-EEA managed funds, the continuing status of Guernsey and the USA in relation to AIFMD and the Portfolio Manager's willingness to comply with the relevant provisions of AIFMD and the other requirements of the national private placement regimes of individual EEA states, the requirements of which may restrict the Company's ability to raise additional capital from the issue of new Shares in one or more EEA state.

Additionally, it should be noted that what is and what is not "marketing" under AIFMD can vary between EEA member states, in some cases covering most promotional activity in respect of a fund and in some cases covering only material that is sufficiently specific or precise in respect of information relating to the terms of the fund that it could

alone form the basis of a decision to invest in the fund. This in turn means that the type of promotional activity that will require registration under AIFMD can also vary between EEA member states.

However, what is and what is not “marketing” under AIFMD remains a developing area and regulatory guidance in many EEA member states is limited. It is possible that European Securities and Markets Authority (“ESMA”) or an EEA national regulator may change its policy approach in the future or that ESMA, the European Commission or another European entity, regulatory or legislative body may have a different interpretation at a later date of what constitutes marketing under AIFMD.

If it was held that certain promotional material in respect of the fund constitutes marketing under AIFMD and was provided to investors in an EEA member state without the Company having been registered in that EEA member state for marketing under AIFMD by the Portfolio Manager, the Portfolio Manager may face regulatory sanctions as a result of non-compliance with AIFMD, and the enforceability of agreements with Shareholders may be affected.

ESMA has also consulted on the possible extension of the passport for marketing and managing under AIFMD to non-EEA based managers (the marketing and managing passports are currently only available to EEA based AIFMs) and delivered advice to the European Commission on 18 July 2016 on whether, amongst other things, the passporting regime should be extended to the management and/or marketing of AIFs by non-EEA based managers.

This advice regarding extending the passport to US domiciled AIFMs was qualified, meaning it is currently not clear if the passporting regime will be extended to the Portfolio Manager as an AIFM, nor is it clear that the European Commission consider that this advice contains a positive assessment of a sufficient number of non-EEA countries to extend the passport to these countries. If the European Commission were to consider there were sufficient grounds to extend the passport and adopted the requisite delegated act extending the passport, the national private placement regimes which are currently applicable to non-EEA AIFMs and non-EEA AIFs in EEA member states will temporarily continue to co-exist with this new non-EEA passport (the “**Third Country Passport**”).

However, three years after the adoption of this delegated act, ESMA is required to issue an opinion on the functioning of the Third Country Passport and advise on the potential termination of the current national private placement regimes. If the national private placement regimes were then abolished, an AIF could not be marketed into Europe by a non-EEA AIFM except by way of the Third Country Passport, meaning in this scenario the Portfolio Manager would not be able to market the Shares in the Company in the EEA.

Any regulatory changes arising from implementation of the AIFMD (or otherwise) that limit the Company’s ability to carry on its business or to market future issues of its Shares may materially adversely affect the Company’s ability to carry out its investment policy successfully and to achieve its investment objective, which in turn may adversely affect the Company’s business, financial condition, results of operations and/or its NAV.

Final regulations implementing the “Volcker Rule” in the United States of America were issued in December 2013 and became effective by operation of law on 1 April 2014, subject to a conformance period. The final Volcker Rule regulations revised the November 2011 proposed regulations and include certain changes to the treatment of foreign funds and non-U.S. bank investors. If the Volcker Rule applies to an investor’s ownership of Shares, the investor may be forced to sell its shares, or the continued ownership of such shares may be subject to certain restrictions.

On 21 July 2010, U.S. President Barack Obama signed into law the Dodd-Frank Wall Street Reform and Consumer Protection Act and certain provisions therein known as the “Volcker Rule.” On 10 December 2013, the final Volcker Rule regulations (the “**Final Regulations**”) were issued by U.S. regulators. The Final Regulations are effective from 1 April 2014, subject to a conformance period ending on 21 July 2015 (which may be extended). The Volcker Rule generally restricts certain non-U.S. banks and affiliated financial firms, collectively identified as “banking entities,” from investing in and sponsoring “covered funds.” In the event that a non-U.S. bank is deemed to be a “banking entity” and the Company is deemed to be a “covered fund” for purposes of the Volcker Rule, the non-U.S. bank’s ownership of the Shares may be subject to investment restrictions. If so, the non-U.S. bank may be required to divest the Shares by the end of the conformance period. Depending on market conditions and other factors, if an investor is required to liquidate its investment in the Shares during the conformance period, it may suffer a loss from the price at which it purchased the Shares.

If the Company becomes subject to tax on a net income basis in any tax jurisdiction, including Guernsey or the United Kingdom, the Company's financial condition and prospects could be materially and adversely affected

The Company intends to conduct its affairs so that it will not be treated as UK resident for taxation purposes, or as having a permanent establishment or otherwise being engaged in a trade or business, in the UK. The Company intends that it will not be subject to tax on a net income basis in any country. There can be no assurance, however, that the net income of the Company will not become subject to income tax in one or more countries, including Guernsey and the United Kingdom, as a result of unanticipated activities performed by the Company, adverse developments or changes in law, contrary conclusions by the relevant tax authorities, changes in the Directors' personal circumstances or management errors, or other causes. The imposition of any such unanticipated net income taxes could materially reduce the post-tax returns available for distributions on the Shares, and consequently may adversely affect the Company's business, financial condition, results of operations and/or its NAV.

Changes in taxation legislation, or the rate of taxation, may adversely affect the Company

Any change in the tax status of the Company, or in taxation legislation or practice in Guernsey, the United Kingdom or elsewhere could affect the value of the investments held by the Company or the Company's ability to achieve its investment objectives or alter the post-tax returns to Shareholders. Statements in this Offering Memorandum concerning the taxation of Shareholders and/or the Company are based upon current Guernsey and United Kingdom law and published practice as at the date of this Offering Memorandum, which law and practice is, in principle, subject to change (potentially with retrospective effect) that could adversely affect the ability of the Company to meet its investment objective and which could adversely affect the taxation of Shareholders and/or the Company.

Potential investors are urged to consult their tax advisers with respect to their particular tax situations and the tax effect of an investment in the Company.

Possible Financial Transaction Tax

On 14 February 2013, the European Commission issued proposals, including a draft Directive (the "Commission's Proposal") for a financial transaction tax ("FTT") to be adopted in certain participating EU member states (including Belgium, Germany, Estonia, Greece, Spain, France, Italy, Austria, Portugal, Slovenia and Slovakia (the "Participating Member States"), although Estonia has since stated that it will not participate). If the Commission's Proposal was adopted in its current form, the FTT would be a tax primarily on "financial institutions" in relation to "financial transactions" (which would include the conclusion or modification of derivative contracts and the purchase and sale of financial instruments).

Under the Commission's Proposal, the FTT could apply in certain circumstances to persons both within and outside of the Participating Member States. Generally, it would apply where at least one party is a financial institution, and at least one party is established in a Participating Member State. A financial institution may be, or be deemed to be, "established" in a Participating Member State in a broad range of circumstances, including (a) by transacting with a person established in a Participating Member State or (b) where the financial instrument which is subject to the financial transaction is issued in a Participating Member State.

The FTT proposal remains subject to negotiation between the Participating Member States. It may therefore be altered prior to implementation, the timing of which remains unclear. Additional EU member states may decide to participate.

In addition to the FTT, certain countries (such as France and Italy) have unilaterally introduced or announced their own financial transaction tax, and other countries may follow suit. There is therefore a risk that a financial transaction tax may be incurred on certain transactions entered into by the Company. Any such financial transaction tax may adversely affect the cost of investment or hedging strategies pursued by the Company as well as the value and liquidity of certain assets within the Company, such as securities, derivatives and structured finance securities.

Different regulatory, tax or other treatment of the Company or the Shares in different jurisdictions, or changes to such treatment in different jurisdictions, may adversely impact shareholders in certain jurisdictions

For regulatory, tax and other purposes, the Company and the Shares may be treated in different ways in different jurisdictions. For instance, in certain jurisdictions and for certain purposes, the Shares may be treated as more akin to

holding units in a collective investment scheme. Furthermore, in certain jurisdictions, the treatment of the Company and/or the Shares may be uncertain or subject to change, or it may differ depending on the availability of certain information or disclosure by the Company of that information. The Company may be subject, therefore, to financially and logistically onerous requirements to disclose any or all of such information or to prepare or disclose such information in a form or manner which satisfies the regulatory, tax or other authorities in certain jurisdictions. The Company may elect not to disclose such information or prepare such information in a form which satisfies such authorities. Therefore Shareholders in such jurisdictions may be unable to satisfy the regulatory requirements to which they are subject.

The Company is not, and does not intend to become, registered in the United States as an investment company under the U.S. Investment Company Act and related rules

The Company has not, does not intend to, and may be unable to, become registered in the United States as an investment company under the U.S. Investment Company Act. The U.S. Investment Company Act provides certain protections to U.S. investors and imposes certain restrictions on companies that are registered as investment companies. As the Company is not so registered, and does not intend to so register, none of these protections or restrictions is or will be applicable to the Company. In addition, to avoid being required to register as an investment company under the U.S. Investment Company Act and to avoid violating the U.S. Investment Company Act, the Company has implemented restrictions on the purchase of the Shares by persons who are located in the United States or are U.S. Persons (or are acting for the account or benefit of any U.S. Person). For more information, prospective investors should refer to the section of this Offering Memorandum entitled “Purchase and Transfer Restrictions” in in “Placing Arrangements”.

Certain payments to the Company will in the future be subject to 30 per cent withholding tax unless the Company agrees to certain reporting and withholding requirements and certain Shareholders will be required to provide the Company with required information so that the Company may comply with its obligations under FATCA

Under Sections 1471 through 1474 of the U.S. Internal Revenue Code (commonly referred to as “FATCA”), Financial Institutions are required to use enhanced due diligence procedures to identify U.S. persons who have invested in either non-U.S. financial accounts or non-U.S. entities. Pursuant to FATCA, certain payments of (or attributable to) U.S.-source income, and the proceeds of sales of property that give rise to U.S.-source payments, will be subject to 30 per cent withholding tax with effect from 1 July 2014 unless the Company agrees to certain reporting and withholding requirements.

The United States and Guernsey have entered into an Intergovernmental Agreement (“US IGA”) to implement FATCA. Under the terms of the US IGA, the Company may be obliged to comply with the provisions of FATCA as enacted by the Guernsey legislation implementing the US IGA (the “Guernsey IGA Legislation”), rather than directly complying with the U.S. Treasury Regulations implementing FATCA. Under the terms of the US IGA, Guernsey resident entities that comply with the requirements of the Guernsey IGA Legislation will be treated as compliant with FATCA and, as a result, will not be subject to withholding tax under FATCA (“FATCA Withholding”) on payments they receive and will not be required to withhold under FATCA on payments they make.

The Company expects that it will be considered to be a Guernsey resident financial institution and therefore will be required to comply with the requirements of the Guernsey IGA Legislation.

Under the Guernsey IGA Legislation, the Company will be required to register with the United States Internal Revenue Service (“IRS”) and report to the Guernsey President of the Policy & Resources Committee certain holdings by and payments made to certain U.S. investors in the Company, as well as to non-U.S. financial institutions that do not comply with the terms of the Guernsey IGA Legislation. Under the terms of the US IGA, such information will be onward reported by the Guernsey President of the Policy & Resources Committee to the United States under the general information exchange provisions of the United States-Guernsey Agreement for the Exchange of Information Relating to Taxes.

Further, even if the Company is not characterised under FATCA as a Financial Institution, it nevertheless may become subject to such 30 per cent withholding tax on certain U.S.-source payments to it unless it either provides information to withholding agents with respect to its U.S. Controlling Persons or certifies that it has no such U.S. Controlling Persons.

As a result, Shareholders may be required to provide any information that the Company determines necessary in order to allow the Company to satisfy its obligations under FATCA.

Additional intergovernmental agreements similar to the US IGA have been entered into or are under discussion by other jurisdictions with the United States. Different rules than those described above may apply depending on whether a payee is resident in a jurisdiction that has entered into an intergovernmental agreement to implement FATCA.

In addition to the US IGA, Guernsey and the United Kingdom have entered into an inter-governmental agreement (“UK IGA”) for the implementation of information exchange arrangements, based on FATCA, whereby relevant financial information held in Guernsey in respect of a person or entity who is resident in the UK for tax purposes will be reported to the Guernsey President of the Policy & Resources Committee for onward reporting to the UK’s HM Revenue and Customs. Under the UK IGA, the Company may be required to provide information to the Guernsey authorities about investors and their interests in the Company in order to fully discharge its reporting obligations and, in the event of any failure or inability to comply with the proposed arrangements, may suffer a financial penalty or other sanction under Guernsey law.

The scope and application of FATCA Withholding and information reporting pursuant to the terms of FATCA and the IGAs are subject to review by the United States, the United Kingdom, Guernsey and other IGA governments, and the rules may change. Although the UK IGA and US IGA have been ratified by Guernsey’s parliament, guidance published to date has been in draft format only and therefore, while the Company intends to comply with applicable law, it cannot be predicted at this time what the full impact on the Company and the Company’s reporting responsibilities pursuant to the UK IGA and US IGA will be. Shareholders should consult with their own tax advisors regarding the application of FATCA to their particular circumstances.

OECD’s Base Erosion Profit Shifting (“BEPS”) Action Points

In 2013, the OECD published its report on Addressing Base Erosion and Profit Shifting (“BEPS”) and its Action Plan on BEPS. The aim of the report and Action Plan was to address and reduce aggressive international tax planning. BEPS remains an ongoing project. On 5 October 2015, the OECD published its final reports, analyses and sets of recommendations (deliverables) with a view to implementing internationally agreed and binding rules which could result in material changes to relevant tax legislation of participating OECD countries. The final package of deliverables was subsequently approved by the G20 Finance Ministers on 8 October 2015. On 24 November 2016, the OECD announced that more than 100 jurisdictions concluded negotiations on a multilateral instrument that will amend their respective tax treaties (more than 2,000 tax treaties worldwide) in order to implement the tax treaty-related BEPS recommendations, although the effective date of such multilateral instrument remains uncertain. A first high level signing ceremony took place on 7 June 2017 where 68 countries signed the multilateral instrument. It is currently anticipated that the multilateral instrument will enter into force after five countries have ratified it. The multilateral instrument will then enter into effect for a specific tax treaty after all parties to that treaty have ratified the multilateral instrument. The final actions to be implemented in the tax legislation of the countries in which the Company will have investments, in the countries where the Company is domiciled or resident, or changes in tax treaties negotiated by these countries, could adversely affect the returns from the Company to its investors.

**UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF
TEXAS, DALLAS DIVISION**

In Re: Highland Capital Management, L.P § Case No. **19-34054-SGJ11**

Charitable DAF Fund, L.P et al

Appellant

§

vs.

§

21-03067

Highland Capital Management, L.P

§

Appellee

§

3:23-CV-01503-B

[167] Order granting Defendant Highland Capital Management, L.P.'s Renewed motion to dismiss adversary proceeding (related document # [122](#)) Entered on 6/25/2023.

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APPELLANT RECORD

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**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

In re:	§ Chapter 11
	§
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§ Case No. 19-34054-sgj11
	§
Debtor.	§
	§
CHARITABLE DAF FUND, L.P. AND CLO	§
HOLDCO, LTD., DIRECTLY AND DERIVATIVELY	§
	§
Plaintiffs,	§ Adversary Proceeding No.
	§
vs.	§ 21-03067-sgj11
	§
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§
HIGHLAND HCF ADVISOR, LTD., AND	§
HIGHLAND CLO FUNDING LTD., NOMINALLY	§
	§
Defendant.	§
	§

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**APPELLANTS' SECOND AMENDED STATEMENT OF ISSUES
AND DESIGNATION OF RECORD ON APPEAL**

Pursuant to Rules 8009(a)(1)(A)-(B) and (a)(4) of the Federal Rules of Bankruptcy Procedure, The Charitable DAF Fund, L.P. and CLO Holdco, Ltd. ("Appellants") hereby designate the following items to be included in the record and identify the following issues with respect to

their appeal of the Order Granting Defendant Highland Capital Management, L.P.'s "Renewed Motion to Dismiss Complaint" [Adv. Proc. Doc. No. 122] which was entered by the United States Bankruptcy Court for the Northern District of Texas on June 25, 2023.

I. STATEMENT OF ISSUES TO BE PRESENTED ON APPEAL

- Whether the Bankruptcy Court had jurisdiction to rule on Highland Capital Management L.P.'s Renewed Motion to Dismiss Complaint
- Whether the Renewed Motion to Dismiss Complaint was improperly granted

II. DESIGNATION OF ITEMS TO BE INCLUDED IN THE RECORD

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1. Notice of Appeal for Bankruptcy Case Adversary Proceeding No. 21-03067-sgj11 [Doc. 168].

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2. The judgment, order, or decree appealed from: Memorandum Opinion and Order Granting Defendant Highland Capital Management, L.P.'s "Renewed Motion to Dismiss Complaint" [Adv. Proc. Doc. No. 122] [Doc. 167].

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3. Docket Sheet kept by the Bankruptcy Clerk.

4. Documents listed below and as described in the Docket Sheet for Bankruptcy Case Proceeding No. 21-03067-sgj.

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No.	Date Filed	Docket No.	Description/Document Text
1	9/29/21	1	(36 pgs; 3 docs) Adversary case 21-03067. ORDER REFERRING CASE NUMBER 21-CV-0842-B from U.S District Court for the Northern District of Texas, Dallas Division to U.S. Bankruptcy Court for Northern District of Texas, Dallas Division. Complaint by Charitable DAF Fund, LP, CLO Holdco, Ltd. against Highland Capital Management, LP, Highland HCF Advisor Ltd., Highland CLO Funding, Ltd. Fee Amount \$350 (Attachments: # 1 Original Complaint # 2 Docket Sheet from 3:20-cv-0842-B) Nature(s) of suit: 02 (Other (e.g. other actions that would have been brought in state court if unrelated to bankruptcy)). (Okafor, M.)
2	9/29/21	2	(1 pg) Supplemental Document (cover sheet) by CLO Holdco Ltd., Charitable DAF Fund (RE: related document(s)1 Adversary case 21-03067) [ORIGINALLY FILED IN 21-CV-0842 AS #2 ON 04/13/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)

Vol. 2 000139 000232 000239 000270 Thru Vol. 6	3	9/29/21	6	(93 pgs; 6 docs) MOTION for Leave to File First Amended Complaint filed by CLO Holdco Ltd., Charitable DAF Fund LP (Attachments: # 1 Exh 1_First Amended Complaint # 2 Exh 2_Motion for Authorization to Retain James Seery # 3 Exh 3_Order Approving Retention of James Seery # 4 Exh 4_Order Approving Settlement # 5 Proposed Order) (Bridges, Jonathan) (Entered: 04/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #6 ON 04/19/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
	4	9/29/21	22	(7 pgs; 2 docs) MOTION for an Order to Enforce the Order of Reference filed by Highland Capital Management LP. (Attachments: # 1 Exhibit(s) A--Proposed Order) (Annable, Zachery) Modified text on 5/20/2021 (mjr). (Entered: 05/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #22 ON 05/19/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
	5	9/29/21	23	(31 pgs) Brief/Memorandum in Support filed by Highland Capital Management LP re: 22 MOTION for an Order to Enforce the Order of Reference. (Annable, Zachery) Modified text on 5/20/2021 (mjr).(Entered: 05/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #23 ON 05/19/2021 IN U.S.DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
	6	9/29/21	24	(926 pgs; 29 docs) Appendix in Support filed by Highland Capital Management LP re: 23 Brief/Memorandum in Support. (Attachments: # 1 Appendix 1 # 2 Appendix 2 # 3 Appendix 3 # 4 Appendix 4 # 5 Appendix 5 # 6 Appendix 6 # 7 Appendix 7 # 8 Appendix 8 # 9 Appendix 9 # 10 Appendix10 # 11 Appendix 11 # 12 Appendix 12 # 13 Appendix 13 # 14 Appendix 14 # 15 Appendix 15 # 16 Appendix 16 # 17 Appendix 17 # 18 Appendix 18 # 19 Appendix 19 # 20 Appendix 20 # 21 Appendix 21# 22 Appendix 22 # 23 Appendix 23 # 24 Appendix 24 # 25 Appendix 25 # 26 Appendix 26 # 27 Appendix 27 # 28 Appendix 28) (Annable, Zachery) Modified linkage and text on 5/20/2021 (mjr). (Entered:05/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #24 ON 05/19/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
Vol. 7 001196	7	9/29/21	26	(7 pgs; 2 docs) MOTION to Dismiss Complaint filed by Highland Capital Management LP (Attachments: # 1 Exhibit(s) A--Proposed Order) (Annable, Zachery) Modified text on 5/28/2021 (jmg).(Entered: 05/27/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #26 ON 05/27/2021 IN U.S.DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)

Vol. 7 001203 thru Vol. 8	8	9/29/21	28	(508 pgs; 14 docs) Appendix in Support filed by Highland Capital Management LP (Attachments: # 1 Appendix 1 # 2 Appendix 2 # 3 Appendix 3 # 4 Appendix 4 # 5 Appendix 5 # 6 Appendix 6 # 7 Appendix 7 # 8 Appendix 8 # 9 Appendix 9 # 10 Appendix 10 # 11 Appendix 11 # 12 Appendix 12 # 13 Appendix 13) (Annable, Zachery) (Entered: 05/27/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #28 ON 05/27/2021 IN U.S. DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
Vol. 9 001711	9	9/29/21	33	(1 pg) Amended Civil Cover Sheet by CLO Holdco Ltd, Charitable DAF Fund LP. Amendment to 2 Supplemental Document. (Sbaiti, Mazin) Modified text on 6/23/2021 (mjr). (Entered: 06/22/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #33 ON 06/22/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001712	10	9/29/21	36	(26 pgs) RESPONSE filed by CLO Holdco Ltd, Charitable DAF Fund LP re: 22 MOTION for an Order to Enforce the Order of Reference (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #36 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001738	11	9/29/21	37	(22 pgs) Appendix in Support filed by CLO Holdco Ltd, Charitable DAF Fund LP re 36 Response/Objection Response to Motion for an Order to Enforce the Order of Reference (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #37 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001760	12	9/29/21	38	(45 pgs) RESPONSE filed by CLO Holdco Ltd, Charitable DAF Fund LP re: 26 MOTION to Dismiss (Defendant Highland Capital Management, L.P.'s Motion to Dismiss Complaint) (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #38 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001805	13	9/29/21	39	(88 pgs) Appendix in Support filed by CLO Holdco Ltd, Charitable DAF Fund LP re 38 Response/Objection to Defendant Highland Capital Management, L.P.'s Motion to Dismiss Complaint (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #39 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001893	14	9/29/21	42	(12 pgs) REPLY filed by Highland Capital Management LP re: 22 MOTION for an Order to Enforce the Order of Reference (Annable, Zachery) (Entered: 07/13/2021) [ORIGINALLY FILED IN 21-CV-0842AS #42 ON 07/13/2021 IN U.S.

			DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
VOL. 9	15	9/29/21	43 (852 pgs) Appendix in Support filed by Highland Capital Management LP re: 42 Reply. (Annable, Zachery) Modified text on 7/14/2021 (mjr). (Entered: 07/13/2021) [ORIGINALLY FILED IN 21-CV-0842AS #43 ON 07/13/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001905 thru Vol. 13	16	9/29/21	45 (21 pgs) REPLY filed by Highland Capital Management LP re: 26 MOTION to Dismiss (Defendant Highland Capital Management, L.P.'s Motion to Dismiss Complaint) (Annable, Zachery) (Entered: 07/13/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #44 ON 07/13/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002757	17	9/29/21	57 (7 pgs; 2 docs) MOTION to Dismiss and Joinder in Motion to Dismiss of Highland Capital Management, L.P. filed by Highland CLO Funding Ltd. (Attachments: # 1 Proposed Order) Attorney Paul R Bessette added to party Highland CLO Funding Ltd (pty:dft) (Bessette, Paul) (Entered: 08/30/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #57 ON 08/30/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002778	18	9/29/23	58 (12 pgs) Brief/Memorandum in Support filed by Highland CLO Funding Ltd. re 57 MOTION to Dismiss and Joinder in Motion to Dismiss of Highland Capital Management, L.P. (Bessette, Paul) (Entered: 08/30/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #58 ON 08/30/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002785	19	9/29/23	59 (80 pgs; 5 docs) Appendix in Support filed by Highland CLO Funding Ltd re 58 Brief/Memorandum in Support of Motion (Attachments: # 1 Exhibit(s) A - Jackson v Dear # 2 Exhibit(s) B - Prudential Assurance v. Newman # 3 Exhibit(s) C - Harbourvest Settlement Agreement # 4 Exhibit(s) D - Boleat Declaration) (Bessette, Paul) (Entered: 08/30/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #59 ON 08/30/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002797	20	9/29/21	64 (1 pg) ORDER OF REFERENCE: Pursuant to 28 U.S.C. § 157 and this District's Miscellaneous Order No. 33, this case is hereby REFERRED to Judge Stacey G. C. Jernigan of the United States Bankruptcy Court for the Northern District of Texas, Dallas Division, to be adjudicated as a matter related to the consolidated Chapter 11 Bankruptcy of Highland Capital Management, L.P., Chapter 11 Case No.19-34054. (Ordered by Judge Jane J. Boyle
002877			

Vol. 14 002878 002883 thru Vol. 16				on 9/20/2021) (svc) (Entered: 09/20/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #64 ON 09/20/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
	21	10/19/21	66	(5 pgs) Notice of hearing filed by Defendant Highland Capital Management, LP (RE: related document(s) 26 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP, 47 Motion to strike document filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 55 Motion to abate filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) Hearing to be held on 11/23/2021 at 09:30 AM at https://us-courts.webex.com/meet/jerniga for 26 and for 47 and for 55, (Annable, Zachery)
	22	11/22/21	71	(509 pgs; 2 docs) Witness and Exhibit List <i>for Hearing on November 23, 2021</i> filed by Defendant Highland Capital Management, LP (RE: related document(s) 26 Motion to dismiss adversary proceeding). (Attachments: # 1 Exhibits 1-13) (Hayward, Melissa)
Vol. 17 003392 003394 003583 003585 003611	23	11/22/21	72	(2 pgs) Witness List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 26 Motion to dismiss adversary proceeding, 47 Motion to strike (related document(s): 43 Document), 55 Motion to abate (related document(s) 1 Complaint), 69 Motion to abate <i>Plaintiffs' Amended Motion to Stay All Proceedings</i> (related document(s) 55 Motion to abate (related document(s) 1 Complaint))). (Sbaiti, Mazin)
	24	11/22/21	73	(189 pgs; 4 docs) Exhibit List <i>for November 23, 2021 hearing</i> filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 47 Motion to strike (related document(s): 43 Document), 55 Motion to abate (related document(s) 1 Complaint)). (Attachments: # 1 Exhibit 1_Defendant's Memorandum of Law in Support of Motion for Reconsideration # 2 Exhibit 2_Highland Memorandum in Support of Motion to Dismiss # 3 Exhibit 3_Order (I) Confirming Fifth Amended Plan of Reorganization of Highland) (Sbaiti, Mazin)
	25	12/7/21	80	(2 pgs) Order granting Highland CLO Funding, Ltd.'s motion to dismiss adversary as a party with prejudice (related document 57) Entered on 12/7/2021. (Okafor, Marcey) Modified text on 3/11/2022 (Okafor, Marcey).
	26	3/11/22	99	(26 pgs) Memorandum of Opinion and order granting motion to dismiss the adversary proceeding (RE: related document(s) 26 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP). Entered on 3/11/2022 (Okafor, Marcey)
	27	3/11/22	100	(26 pgs) Order granting motion to dismiss adversary proceeding with prejudice (related document #26) Entered on 3/11/2022. (Okafor, Marcey)

Vol. 18 003637	28	3/21/22	104	(29 pgs) Notice of appeal. Fee Amount \$298 filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 100 Order on motion to dismiss adversary proceeding). Appellant Designation due by 04/4/2022. (Sbaiti, Mazin)
003666	29	5/26/22	120	(177 pgs; 2 docs) Support/supplemental document <i>Motion to Supplement Appellate Record</i> filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 111 Appellant designation). (Attachments: # 1 Amended Transcript of January 14, 2021 Hearing) (Sbaiti, Mazin)
003843	30	6/9/22	121	(1 pg) DISTRICT COURT Order: Case 3:22-00695-B is hereby transferred to the docket of the Honorable Judge Jane J. Boyle for consolidation with The Charitable DAF Fund LP, et al. v. Highland Capital Management LP, Case No. 3:21-cv-3129-N. Judge Karen Gren Scholer no longer assigned to case.(RE: related document(s) 86 Notice of appeal filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 104 Notice of appeal filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Entered on 6/9/2022 (Whitaker, Sheniqua) (Entered: 06/10/2022)
003844	31	10/24/22	122	(7 pgs) Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP (Annable, Zachery)
003851	32	10/14/22	123	(31 pgs) Brief in support filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Annable, Zachery)
Vol. 19 003882 Thru Vol 20	33	10/14/22	124	(513 pgs; 15 docs) Support/supplemental document (<i>Appendix in Support of Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7 # 8 Exhibit 8 # 9 Exhibit 9 # 10 Exhibit 10 # 11 Exhibit 11 # 12 Exhibit 12 # 13 Exhibit 13 # 14 Exhibit 14) (Annable, Zachery)
Vol. 21 004395	34	10/27/22	126	(5 pgs) Notice of hearing (<i>Notice of Hearing and Briefing Schedule on Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP). Hearing to be held on 12/8/2022 at 09:30 AM at https://us-courts.webex.com/meet/jerniga for 122. (Annable, Zachery)

Vol. 21 004400 004410 004442 Thru Vol. 22	35	11/18/22	128	(10 pgs) Motion for withdrawal of reference. Fee amount \$188, filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (Sbaiti, Mazin)
	36	11/18/22	129	(32 pgs) Response opposed to (related document(s): 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP) filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Sbaiti, Mazin)
	37	11/18/22	130	(254 pgs; 2 docs) Response opposed to (related document(s): 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP) filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Attachments: # 1 Appendix) (Sbaiti, Mazin)
Vol. 22 004696 004717 004732 004737 004742	38	9/2/22	131	(21 pgs) DISTRICT COURT MEMORANDUM OPINION AND ORDER: The Court REVERSES and REMANDS the bankruptcy court's Motion to Dismiss Order and AFFIRMS the bankruptcy courts Motion to Stay Order. re: appeal on Civil Action number: Case 3:22-00695-B consolidated with 3:21-CV-3129-B, (RE: related document(s) 81 Order on motion to abate, 100 Order on motion to dismiss adversary proceeding). Entered on 9/2/2022 (Whitaker, Sheniqua) (Entered: 11/29/2022)
	39	12/2/22	133	(15 pgs) Reply to (related document(s): 129 Response filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 130 Response filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) filed by Defendant Highland Capital Management, LP. (Annable, Zachery)
	40	12/7/22	135	(5 pgs) Notice of hearing filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP). Hearing to be held on 1/25/2023 at 01:30 PM at https://us-courts.webex.com/meet/jerniga for 122, (Annable, Zachery)
	41	12/7/22	136	(5 pgs) Notice of hearing filed by Defendant Highland Capital Management, LP (RE: related document(s) 128 Motion for withdrawal of reference filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Status Conference to be held on 1/25/2023 at 01:30 PM at https://us-courts.webex.com/meet/jerniga . (Annable, Zachery).
	42	12/9/22	138	(3 pgs) Response opposed to (related document(s): 128 Motion for withdrawal of reference. Fee amount \$188, filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) filed by Defendant Highland Capital Management, LP. (Annable, Zachery)

Vol. 22 004745	43	12/9/22	139	(25 pgs) Brief in support filed by Defendant Highland Capital Management, LP (RE: related document(s) 138 Response). (Annable, Zachery)
Vol. 23 004770	44	12/9/22	140	(280 pgs; 8 docs) Support/supplemental document (<i>Appendix in Support of Highland Capital Management, L.P.'s Response to Renewed Motion to Withdraw the Reference</i>) filed by Defendant Highland Capital Management, LP (RE: related document(s) 138 Response). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7) (Annable, Zachery)
Vol. 24 005050	45	12/16/22	144	(6 pgs) Reply to (related document(s): 138 Response filed by Defendant Highland Capital Management, LP) filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Sbaiti, Mazin)
005056 Thru Vol. 25.	46	1/23/23	145	(514 pgs; 15 docs) Witness and Exhibit List filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7 # 8 Exhibit 8 # 9 Exhibit 9 # 10 Exhibit 10 # 11 Exhibit 11 # 12 Exhibit 12 # 13 Exhibit 13 # 14 Exhibit 14) (Annable, Zachery)
Vol. 26 005570	47	1/23/23	146	(280 pgs; 8 docs) Witness and Exhibit List filed by Defendant Highland Capital Management, LP (RE: related document(s) 128 Motion for withdrawal of reference. Fee amount \$188.). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7) (Annable, Zachery)
Vol. 27 005850	48	1/23/23	147	(221 pgs; 7 docs) Witness and Exhibit List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Attachments: # 1 Exhibit 1_Excerpts from July 14, 2020 Hearing Transcript # 2 Exhibit 2_HCLOF Members Agreement Relating to the Company # 3 Exhibit 3_HarbourVest Settlement Agreement # 4 Exhibit 4_Order Approving Debtor's Settlement with HarbourVest # 5 Exhibit 5_HCLOF Offering # 6 Exhibit 6 Amended and Restated Investment Advisory Agreement) (Sbaiti, Mazin)
006071	49	1/23/23	148	(3 pgs) Witness and Exhibit List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 128 Motion for withdrawal of reference. Fee amount \$188.). (Phillips, Louis)
Vol. 28 006074	50	1/25/23	150	(56 pgs; 2 docs) Amended Witness and Exhibit List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 147 List (witness/exhibit/generic), 149 List (witness/exhibit/generic)). (Attachments: # 1 Exh 7_Testimony of Mark Patrick at June 8, 2021 hearing) (Sbaiti, Mazin)

Vol. 28 006130	51	1/25/23	152	(3 pgs) Notice of Appearance and Request for Notice by Louis M. Phillips filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Phillips, Louis)
	52	1/25/23	154	(1 pg) Court admitted exhibits date of hearing January 25, 2023 (RE: related document(s) 128 Motion for withdrawal of reference, filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) (COURT ADMITTED DEFENDANT'S EXHIBITS #1, #2, #3, #4, #5 & #6 OFFERED BY ATTY GREG DEMO). (Edmond, Michael) (Entered: 01/27/2023)
Vol. 32 006925 006942 006960	53	2/6/23	158	Report and recommendation to the U.S. District Court by U.S. Bankruptcy Judge. (RE: related document(s) 128 Motion for withdrawal of reference filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Entered on 2/6/2023 (Okafor, Marcey)
	54	2/6/23	161	(18 pgs) DISTRICT COURT Notice of transmission of report and recommendation in re: renewed motion to withdraw reference. Civil Case # 3:22-cv-02802-S. (RE: related document(s) 158 Report and recommendation to the U.S. District Court by U.S. Bankruptcy Judge. (RE: related document(s) 128 Motion for withdrawal of reference filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Entered on 2/6/2023) (Whitaker, Sheniqua)
	55	4/3/23	165	(1 pg) DISTRICT COURT ORDER: The Court GRANTS the 11 Joint Motion to Transfer Proceeding and Consolidate Before Original Court and the above-numbered case (3:22-cv-02802-S) is transferred to the docket of the Honorable Judge Jane Boyle: Civil case 3:21-cv-00842-B (order referring case). (RE: related document(s) 1 Complaint filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 143 Notice of transmission of motion to withdraw reference). Entered on 4/3/2023 (Whitaker, Sheniqua) Modified on 4/10/2023 (Whitaker, Sheniqua). (Entered: 04/10/2023)

TRANSCRIPTS

006961	56	11/24/21	78	(104 pgs) Transcript regarding Hearing Held 11-23-2021 RE: Motion Hearing. THIS TRANSCRIPT WILL BE MADE ELECTRONICALLY AVAILABLE TO THE GENERAL PUBLIC 90 DAYS AFTER THE DATE OF FILING. TRANSCRIPT RELEASE DATE IS 02/22/2022. Until that time the transcript may be viewed at the Clerk's Office or a copy may be obtained from the official court transcriber. Court Reporter/Transcriber Liberty Transcripts/Dipti Patel, Telephone number 847-848-4907. (RE: related document(s) 75 Hearing held on 11/23/2021. (RE: related document(s) 55 MOTION to Stay filed by CLO Holdco Ltd, Charitable DAF Fund LP (Sbaiti, Mazin) (Entered: 08/26/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #55 ON 08/26/2021 IN U.S.
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			<p>DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)) (Appearances: J. Pomerantz and J. Morris for Highland Defendants; J. Jordan and P. Bessett for HCLOF; M. Sbaiti for Plaintiffs. Nonevidentiary hearing. Motion denied. Mr. Pomerantz to upload order.), 76 Hearing held on 11/23/2021. (RE: related document(s) 47 Motion to strike 43 Appendix in support filed by CLO Holdco, Ltd., Charitable DAF Fund, LP (Bridges, Jonathan) Modified text on 7/16/2021 (mjr). (Entered: 07/15/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #47 ON 07/15/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)) (Appearances: J. Pomerantz and J. Morris for Highland Defendants; J. Jordan and P. Bessett for HCLOF; M. Sbaiti for Plaintiffs. Nonevidentiary hearing. Motion denied (Plaintiffs acknowledged complained-of Appendices it did not relate to Motion to Dismiss). Mr. Pomerantz to upload order.)). Transcript to be made available to the public on 02/22/2022. (Patel, Dipti)</p>
57	2/21/23	164	<p>164 (112 pgs) Transcript regarding Hearing Held 1/25/23 RE: HEARING ON DEFENDANT HIGHLAND CAPITAL MANAGEMENT L.P.'S RENEWED MOTION TO DISMISS COMPLAINT (122) AND STATUS CONFERENCE RE: MOTION FOR WITHDRAWAL OF REFERENCE FILED BY PLAINTIFF CLO HOLDCO, LTD., PLAINTIFF CHARITABLE DAF FUND, LP (128). THIS TRANSCRIPT WILL BE MADE ELECTRONICALLY AVAILABLE TO THE GENERAL PUBLIC 90 DAYS AFTER THE DATE OF FILING. TRANSCRIPT RELEASE DATE IS 05/22/2023. Until that time the transcript may be viewed at the Clerk's Office or a copy may be obtained from the official court transcriber. Court Reporter/Transcriber Dipti Patel, Telephone number 847-848-4907. (RE: related document(s) 155 Hearing held on 1/25/2023. (RE: related document(s) 122 Motion to dismiss adversary proceeding, (Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint) filed by Defendant Highland Capital Management, LP filed by Defendant Highland Capital Management, LP) (Appearances: J. Morris and G. Demo for Movants; L. Phillips and M. Sbaiti for Plaintiffs. Evidentiary hearing (appendices). Court took matter under advisement.), 156 Hearing held on 1/25/2023. (RE: related document(s) 128 Motion for withdrawal of reference. Fee amount \$188, filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) (Appearances: J. Morris and G. Demo for Movants; L. Phillips and M. Sbaiti for Plaintiffs. Evidentiary hearing (appendices). Court announced it will recommend denial to District Court. Court is working on Report & Recommendation.)). Transcript to be made available to the public on 05/22/2023. (Patel, Dipti)</p>

Dated: July 14, 2023

Respectfully submitted,

SBAITI & COMPANY PLLC

/s/ Mazin A. Sbaiti

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Counsel for Appellants

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was filed electronically through the Court's ECF system, which provides notice to all parties of interest, on this 14th day of July, 2023.

/s/ Mazin A. Sbaiti

Mazin A. Sbaiti

COMPANY, ITS INVESTMENT OBJECTIVE, POLICY AND STRATEGY

COMPANY

Highland CLO Funding, Ltd. (formerly known as Acis Loan Funding, Ltd.) (the “**Company**”) was incorporated on 30 March 2015 and registered under the laws of Guernsey (registration number 60120) pursuant to the Companies Law. The Company changed its name on October 27, 2017. The Company is an investment company established to provide its investors with exposure to CLO Notes on both a direct basis and indirect basis and senior secured loans on an indirect basis, through the use of the investments described in its investment policy, including through the Management Companies.

The Company is seeking to raise U.S. \$153 million through the Placing to invest in accordance with its investment objective and policy. Applications to an appropriate securities exchange may be made when deemed appropriate by the Company.

Investment in the Company is only suitable for institutional, professional and high net worth investors, private client fund managers and brokers and other investors who understand the risks involved in investing in the Company and/or who have received advice from their fund manager or broker regarding investment in the Company.

INVESTMENT OBJECTIVE

The Company’s investment objective is to provide Shareholders with stable and growing income returns, and to grow the capital value of the investment portfolio through opportunistic exposure to CLO Notes, investments in new issue CLOs sponsored by Highland and Acis CLO 7 through its interests in the Management Companies and CLO Income Notes, respectively, and senior secured loans primarily for the purpose of enabling Highland CLO Management to qualify as an “originator” for purposes of the EU Retention Requirements, on both a direct basis and indirect basis, through the use of the investments described in its investment policy and through use of leverage, any Revolving Credit Facility, Warehouse Loan Facilities, total return swaps or repurchase agreements, in addition to secured loan facilities. With respect to the Company’s investments, except with respect to Designated CLO Resets or Designated CLO Refinancings, if applicable, it is expected that the Portfolio Manager intends to seek monetization of such investments in the ordinary course in its discretion; provided that at the end of the Term, the Portfolio Manager, in its reasonable discretion may postpone dissolution of the Company for up to 180 days to facilitate the orderly liquidation of the investments.

Highland HCF Advisor, in its capacity as the Portfolio Manager under the Portfolio Management Agreement, will manage the Company’s investments. In addition, the Portfolio Manager, Highland, Highland CLO Management, or another affiliate of Highland, in the capacity of the CLO Manager, may also manage Highland CLOs and the Portfolio Manager Highland, Acis, Acis CLO Management, or another affiliate of Acis, in the capacity of the CLO Manager, may also manage Managed CLOs, in each case, pursuant to CLO Management Agreements to be entered into from time to time.

INVESTMENT POLICY

Overview

The Company’s investment policy is to focus on synergistic investments in the following areas.

Loan Investments

The Company will invest on an indirect basis in a diverse portfolio of predominantly floating rate senior secured loans (or on a direct basis for the primary purpose of enabling Highland CLO Management to qualify as an “originator” for purposes of the EU Retention Requirements), all of which will have at least one rating, which may be public or private, from Moody’s, S&P or Fitch. Initially, the Company’s loan investments will be focused in the U.S., but depending on market conditions the Company may also invest in similar types of loans in Europe. Accordingly, there is no limit on the maximum U.S. or European exposure. Investments in U.S. or European loans may be made through a U.S. or European originator subsidiary of the Company. The Company intends to invest directly only in those senior secured loans to obligors with total potential indebtedness under all applicable loan agreements, indentures and other

underlying instruments at least \$250,000,000 that would generally satisfy the eligibility criteria for Highland CLOs and set forth in “*Summary—Investment Policy—Loan Investments*”.

Financing of Loan Portfolios / Securitization

It is intended that the Company will periodically seek to sell or securitise all or a portion of its loan portfolio, held directly or indirectly, into new Highland CLOs where Highland CLO Management acts as CLO Manager. In doing so, Highland CLO Management may seek to adopt the “originator” model to address the Origination Requirements (as defined below) applicable to such Highland CLOs to the extent such Highland CLOs sought to comply with EU Retention Requirements. As a result, Highland CLO Management, will be required to commit to: (a) establishing the relevant CLO and (b) selling certain loan investments to the relevant CLO which it has purchased for its own account initially. In addition, under current guidance, prior to closing date of the relevant CLO, Highland CLO Management expects to sell investments to the relevant CLO to satisfy the Origination Requirements.

CLO Notes

The Company will from time to time invest directly or indirectly (through affiliates and subsidiaries, including the Management Companies, as more fully described below) in CLO Notes issued by Managed CLOs or CLOs managed by other asset managers as set forth in “*Summary—Investment Policy—CLO Notes*”.

The Company is currently invested in CLO Income Notes issued by Managed CLOs managed by Highland, Acis and Acis CLO Management. Following the Placing, the Company will invest indirectly through the Management Companies in CLO Notes.

Act as Risk Retention Provider

The Company may also invest in, provide loans to, or purchase performance-linked notes from asset management subsidiaries, affiliated with the Company, the Portfolio Manager, Highland or Acis and which may act as the asset manager of certain U.S. or European CLOs in order to satisfy certain U.S. Risk Retention Rules or EU Retention Requirements.

Allocation of Investment Opportunities

Highland CLO Management will serve as CLO Manager to each newly-issued Highland CLO during the Investment Period.

During the Investment Period, the Company shall receive priority allocations with respect to all CLO Income Note investment opportunities with respect to new issue Highland CLOs, over the account of the Portfolio Manager, its affiliates and Other Accounts as set forth in “*Summary—Investment Policy—Allocation of Investment Opportunities*”.

INVESTMENT RESTRICTIONS

The Company will, at all times, invest and manage its assets in a way which is consistent with its object of spreading investment risk and in accordance with the investment policy set out in “*—Investment Policy*”.

In the event of any breach of the Company’s investment policy or of the investment restrictions applicable to the Company, Shareholders will be informed of the actions to be taken by the Company (at the time of such a breach) by an announcement issued by the Administrator.

During the Investment Period, the Company may invest up to \$250,000,000 in CLO Income Notes for new Highland CLOs as follows: (a) up to \$150,000,000 in the aggregate from new capital contributions; and (b) up to \$100,000,000 in the aggregate from proceeds received from existing seed portfolio investments and investments in new Highland CLOs, net of dividends paid, and amortization and interest payments on Company borrowings from committed credit facilities.

The Company may not, without the consent of the Advisory Board, invest in any CLO Notes or CLO Income Notes of new Highland CLOs that are not Qualifying CLOs as set forth in “*Summary—Investment Restrictions*”; provided that, if the Portfolio Manager has satisfied the RP Condition, the consent of the Advisory Board to invest in any

Highland CLO that meets clause (a) of the definition of Qualifying CLOs only shall not be unreasonably withheld, conditioned or delayed.

During the Investment Period, the Company shall be permitted to invest in “resets” with respect to the Designated CLO Resets and refinancings with respect to the Designated CLO Refinancings, each as set forth in “*Summary—Investment Restrictions*”.

The Company shall not invest in the CLO Income Notes of a new-issue Highland CLO unless it is the 100% owner of the CLO Income Notes not forming part of the Retention Interest acquired by Highland CLO Management.

BORROWING

Subject to the limitations set forth in “*Summary-Borrowing*”, it is expected that the Company will have access to one or more committed credit facilities. Such facilities may take the form of any Revolving Credit Facility, Warehouse Loan Facilities, total return swaps or repurchase agreements, in addition to secured loan facilities. It is expected that the Company will use advances under such facilities, together with the proceeds of the Shares, to purchase future senior secured loans (acquired for the primary purpose of enabling Highland CLO Management to qualify as an “originator” for purposes of the EU Retention Requirements) and other assets. In addition to such facilities, the Company will be permitted to borrow money for day to day administration and cash management purposes.

CHANGES TO INVESTMENT OBJECTIVE AND POLICY

Any material change to the investment objective and policy of the Company would be made only with the approval of Shareholders.

INVESTMENT STRATEGY

Whether the senior secured loans or other assets are held directly by the Company (with respect to senior secured loans for the purpose of enabling Highland CLO Management to qualify as an “originator” for purposes of the EU Retention Requirements) or indirectly via CLO Notes or its investment in the applicable Management Company it is the Company’s intention that, in any case, the portfolios will be actively managed (by the Portfolio Manager, Highland, Acis, the applicable Management Company, an asset manager subsidiary or the applicable CLO Manager, as the case may be) to minimise default risk and potential loss through comprehensive credit analysis performed by the Portfolio Manager, Highland, Acis, the applicable Management Company or the applicable CLO Manager (as applicable).

Whilst the intention is to pursue an active, non-benchmark total return strategy, Highland HCF Advisor as the Company’s Portfolio Manager will be cognisant of the positioning of the loan portfolios against relevant indices. Accordingly, Highland HCF Advisor will track the returns and volatility of such indices, while seeking to outperform them on a consistent basis. In-depth, fundamental credit research dictates name selection and sector over-weights/under-weights relative to the benchmark, backstopped by constant portfolio monitoring and risk oversight. The Portfolio Manager will typically look to diversify the Company’s portfolios to avoid the risk that any one obligor or industry will adversely impact overall returns. The investment strategy also places an emphasis on loan portfolio liquidity to ensure that if the Company’s credit outlook changes, it is free to respond quickly and effectively to reduce or mitigate risk in its portfolio. The Portfolio Manager believes this investment strategy will be successful in the future as a result of its emphasis on risk management, capital preservation and fundamental credit research. The Portfolio Manager believes the best way to control and mitigate risk is by remaining disciplined in market cycles, by making careful credit decisions and maintaining adequate diversification.

Leverage and Expected Returns

It is anticipated that any borrowing for the purpose of investing directly in senior secured loans (acquired for the primary purpose of enabling Highland CLO Management to qualify as an “originator” for purposes of the EU Retention Requirements) will be in the form of a term Warehouse Loan Facility, however the Company has entered into the NexBank Credit Facility and may enter into any Revolving Credit Facility, Warehouse Loan Facilities, total return swaps, repurchase agreements or other facilities to facilitate the acquisition or financing of loans. Loans purchased using such borrowings will typically be held for no more than 12 months before being sold to a Highland

CLO. Except in relation to the CLO Retention Notes it holds, the Company may enter into hedging and derivatives transactions pursuant to its investment activities, for the purposes of efficient portfolio management.

The Company does not currently grant any guarantee under any leveraging arrangement. The grant of any such guarantee would be disclosed to investors in accordance with the AIFMD Rules.

Any proposed changes to the Company's investment objective and policy will be subject to the process described in the section titled "*Changes to Investment Objective and Policy*" above in this section of the Offering Memorandum.

Collateral and Asset Re-use Arrangements

Any collateral and asset re-use arrangements of the Company will vary according to the brokers and/or trading counterparties which it may use (each a "**Trading Counterparty**").

The Company may be required to deliver collateral from time to time to its Trading Counterparties, under the terms of the relevant trading agreements, by posting initial margin and/or variation margin and on a mark-to-market basis. The Company may also deposit collateral as security with a Trading Counterparty. The treatment of such collateral varies according to the type of transaction and where it is traded. Under such arrangements, the cash, securities and other assets deposited as collateral will generally become the absolute property of the Trading Counterparty, the Trading Counterparty will have the right to use such collateral.

Where collateral is reused by a Trading Counterparty, the Company will have an unsecured right to the return of equivalent assets and such collateral will be at risk in the event of the insolvency of a Trading Counterparty.

Any changes to the right of re-use of collateral will be disclosed to investors in accordance with the AIFMD Rules.

Current Investments of the Company

In order to facilitate a timely investment of the proceeds of the Placing and to take advantage of existing opportunities, the Company is currently invested in CLO Income Notes issued by Managed CLOs managed by the Portfolio Manager, Highland, Acis and Acis CLO Management. The details of such CLOs are set out in "*The Current CLO Portfolio*".

Following the Placing, the Company will acquire further assets and fund origination by Highland CLO Management of new Highland CLOs and it is expected that the Net Placing Proceeds will be substantially invested in CLO Notes upon closing. The Company may also, from time to time: (i) hold assets within its portfolio to maturity; (ii) sell assets within its portfolio to the market; or (iii) sell assets within its portfolio to another CLO which is not Managed CLO.

TARGET RETURN AND DIVIDEND POLICY

Target Total Return

Whilst not forming part of the investment objective or policy of the Company, on the basis of current market conditions as at the date of this Offering Memorandum, the Company is targeting an annualised mid-teen total return over the medium-term, once the Net Placing Proceeds are substantially invested (through the Company) in CLO Notes (the "**Target Total Return**"). The Company intends to seek to deliver this return through a combination of dividend payments and capital appreciation.

Target Dividend Yield and Policy

Whilst not forming part of the investment objective or policy of the Company, dividends will be payable in respect of each calendar quarter, payable in the month following the end of such quarter.

During the Investment Period, on each Quarterly Dividend Date, beginning May 15, 2018, the Company will target the Target Dividend. During the Investment Period, excess cash or interest from the portfolio will be reinvested by the Company with the objective of growing the NAV.

Following the Investment Period, excess cash, interest and proceeds from the realization of portfolio investments after satisfaction of all expenses, debts, liabilities and obligations of the Company will be distributed by the Company to the Shareholders as a dividend on the Quarterly Dividend Date in accordance with the Distribution Priority as set forth in “*Summary-Dividend Policy*”.

To the extent the Company does not have available funds on hand to meet the Target Dividend with respect to any Quarterly Payment Date, the Board of Directors may suspend dividends if, in consultation with the Portfolio Manager, it determines that a sale of assets to produce proceeds to meet the Target Dividend would not be in the best interests of the Company and/or would not produce a sale price reflective of the value of the assets.

The Board may deduct from any dividend payable to any Shareholder on or in respect of a Share all sums of money (if any) presently payable by him to the Company on account of calls with respect to existing Shares, or calls of commitments to purchase Shares pursuant to the subscription and transfer agreement or otherwise.

The actual dividend generated by the Company in pursuing its investment objective will, however, depend on a wide range of factors including, but not limited to, general economic and market conditions, fluctuations in currency exchange rates, prevailing interest rates and credit spreads, the terms of the investments made by the Company and the risks highlighted in the “*Risk Factors*” section of this Offering Memorandum. Dividend payments may be suspended by Board of Directors in its absolute discretion, including, without limitation, in the event of adverse, or perceived adverse, market conditions.

The Target Total Return and the Target Dividend should not be taken as an indication of the Company’s expected future performance or results. The Target Total Return and the Target Dividend are targets only and there is no guarantee that they can or will be achieved and should not be seen as an indication of the Company’s expected or actual return. Target returns are hypothetical and are neither guarantees nor predictions or projections of future performance. Actual events and conditions may differ materially from the assumptions used to establish the Target Total Return and Target Dividend. Accordingly, investors should not place any reliance on the Target Total Return or the Target Dividend in deciding whether to invest in Shares.

Furthermore, the future performance of the Company may be materially adversely affected by the risks discussed in the section of this Offering Memorandum entitled “*Risk Factors*”.

FURTHER ISSUES OF SHARES

The Directors will have authority to allot further Shares in the share capital of the Company following the Placing subject to the subscription and transfer agreement. Further issues of Shares beyond the issuances contemplated in the subscription and transfer agreement would only be made subject to consent of the Advisory Board, as described in “*Summary—Advisory Board*” if the Directors determine such issues to be necessary to protect the Company, consistent with the Board’s duties to the Company, and in the best interests of Shareholders and the Company as a whole. Relevant factors in making such determination include net asset performance, share price rating and perceived investor demand. In the case of further issues of Shares (or sales of Shares from treasury), except as permitted by the Shareholders, such Shares will only be issued at prices which are not less than the then prevailing Net Asset Value per Share (as estimated by the Directors).

There are no provisions of Guernsey law which confer rights of pre-emption in respect of the allotment of Shares. The Articles, however, contain pre-emption rights in relation to allotments of Shares for cash.

VALUATION

Net Asset Value

As of September 30, 2017, the unaudited net asset value per share of the Net Asset Value was US \$157,081,118.91. A special dividend in the aggregate amount of US \$9,000,000 was paid on October 10, 2017, and a buyback of Shares from Acis Capital Management, L.P. was made on October 24, 2017, for an aggregate purchase price of \$991,180.13.

Publication of Net Asset Value

The Company intends to publish the Net Asset Value per Share as calculated in accordance with the process described below, on a quarterly basis (within 15 Business Days following the relevant month-end). Notice will be provided either by a website to be created or investors may elect to be contacted by the Administrator by e-mail. The Net Asset Value will be calculated by the Administrator on the basis of the valuation policy established by the Directors from time to time. The Company's initial valuation policy is described below.

Valuation of the portfolio

It is intended that, in accordance with its investment objective and policy set out above, the Company will invest in: (a) senior secured loans and other debt securities on both a direct basis (for the primary purpose of enabling Highland CLO Management to qualify as an "originator" for purposes of the EU Retention Requirements) and indirect basis, including through the use of leverage via repurchase facilities and Warehouse Loan Facilities, and for the purpose of enabling Highland CLO Management to qualify as an "originator" for purposes of the EU Retention Requirements; (b) CLO Notes, and any other assets held by management subsidiaries; and (c) interests in the Management Companies, and will value such instruments in accordance with the valuation policy established by the Portfolio Manager from time to time.

The Company (meaning for the purposes of the valuation of assets described herein, the Company itself, the Portfolio Manager or the Administrator under the ultimate supervision of the Board) will generally compute the value of the instruments and other assets of the Company as of the close of business on the last day of each fiscal period and on any other date selected by the Board in its sole discretion. In addition, the Company must compute the value of the instruments that are being distributed in-kind as of their date of distribution in accordance with the Company's Memorandum and Articles of Association. In determining the value of the assets of the Company, no value is placed on the goodwill or name of the Company, or the office records, files, statistical data or any similar intangible assets of the Company not normally reflected in the Company's accounting records, but there must be taken into consideration any related items of income earned but not received, expenses incurred but not yet paid, liabilities fixed or contingent, prepaid expenses to the extent not otherwise reflected in the books of account, and the value of options or commitments to purchase or sell instruments pursuant to agreements entered into on or prior to such valuation date.

A copy of the Company's valuation policy is available upon request.

The value of each instrument and other asset of the Company and the net worth of the Company as a whole determined pursuant the Company's Memorandum and Articles of Association are conclusive and binding on all of the members of the Company and all persons claiming through or under them.

Suspension of the calculation of Net Asset Value

The Directors may at any time, but are not obliged to, temporarily suspend the calculation of the NAV and NAV per Share during any period if it determines that such a suspension is warranted by extraordinary circumstances, including: (i) during any period when any market on which the Company's investments are quoted, traded or dealt in is closed, other than for ordinary holidays and weekends, or during periods in which dealings are restricted or suspended; (ii) during the existence of any state of affairs, including as a result of political, economic, military or monetary events or any circumstances outside the control, as a result of which, in the reasonable opinion of the Portfolio Manager, the determination of the value of the assets of the Company, would not be reasonably practicable or would be seriously prejudicial to the shareholders; (iii) during any breakdown in the means of communication normally employed in determining the price or value of the Company's assets or liabilities, or of current prices in any market as aforesaid, or when for any other reason the prices or values of any assets or liabilities of the Company cannot reasonably be

accurately ascertained within a reasonable time frame; (iv) during any period when the transfer of funds involved in the realization or acquisition of any investments cannot, in the reasonable opinion of the Portfolio Manager, be effected at normal rates of exchange; or (v) automatically upon liquidation of the Company.

Shareholders will be informed by e-mail from the Administrator in the event that the calculation of the NAV per Share is suspended as described above.

REPORTS AND ACCOUNTS

The accounting period of the Company ends on 31 December, in each year, and the audited annual accounts will be provided to Shareholders within four months of the year end to which they relate. The Company shall report its results of operations and financial position in U.S. Dollars. The Company's first accounts were prepared for the period ending 31 December 2015.

The audited annual accounts will also be available at the registered office of the Administrator and the Company.

The financial statements of the Company will be prepared in accordance with GAAP, and the annual accounts will be audited. The Company's financial statements, which will be the responsibility of its Board, will consist of a statement of comprehensive income, statement of financial position, statement of cash flows, statement of changes in equity, related notes and any additional information that the Board deems appropriate or that is required by applicable law.

It is expected that the CLOs and any Warehouse Loan Facilities established will not be consolidated in the Company's GAAP financial statements, although such assessment will depend on the facts and circumstances.

Any disclosures required to be made to Shareholders pursuant to the AIFMD will be contained either in the Company's periodic reports or communicated to Shareholders in written form.

THE CURRENT CLO PORTFOLIO

The Company is currently invested in CLO Income Notes in the following Managed CLOs in the following amounts (the “**Current CLO Portfolio**”):

CLOs:	Aggregate Outstanding Amount (U.S.\$)
ACIS CLO 2013-1 Ltd.	\$18,558,000.00
ACIS CLO 2014-3 Ltd.	\$39,750,000.00
ACIS CLO 2014-4 Ltd.	\$50,750,000.00
ACIS CLO 2014-5 Ltd.	\$53,000,000.00
ACIS CLO 2015-6, Ltd.	\$51,850,000.00
Acis CLO 2017-7, Ltd.	\$17,850,000.00
Rockwall CDO, Ltd.	\$14,000,000.00
Brentwood CLO, Ltd.	\$12,000,000.00
Grayson CLO, Ltd.	\$5,900,000.00
Liberty CLO, Ltd.	\$17,000,000.00
HP CDO, Ltd.	\$1,621,542.70
Greenbriar CLO, Ltd.	\$18,000,000.00
Gleneagles CLO, Ltd.	\$1,250,000.00

Valuation of the Current Portfolio

Information regarding the Current Portfolio and its valuation as of 30 September 2017 has been made available to all Placees free of charge.

Information on the historic performance of the Company is available upon request from the Portfolio Manager. Such information will be updated periodically in accordance with the AIFMD Rules.

MARKET OPPORTUNITY

INVESTMENT OPPORTUNITY

The Company intends to invest in CLO Notes of CLOs which are compliant with the U.S. Risk Retention Rules and which may be compliant with the EU Retention Requirements (as defined above) and in senior secured loans (for the primary purpose of enabling Highland CLO Management to qualify as an “originator” for purposes of the EU Retention Requirements). In pursuance of this intention, the Company will invest in each of the Management Companies which will, pursuant to the EU Retention Requirements, need to, amongst other things: (a) on the closing date of a CLO it establishes, commit to purchase “material net economic interest” equal to at least five per cent of the maximum portfolio principal amount of the assets in the CLO and (b) undertake that, for so long as any securities of the CLO remain outstanding (including any CLO Retention Notes), it will retain its interest in the CLO and will not (except to the extent permitted by the EU Retention Requirements) sell, hedge or otherwise mitigate its credit risk under or associated with such CLO. This five per cent material net economic interest in the CLO can, amongst other methods, be retained through the holding of a vertical strip of all issued tranches (AAA-rated notes to equity) or a retention holding in the first loss tranche or a combination thereof. The EU Retention Requirements prohibit many significant European investors from investing in any securitisation which does not comply with them.

In addition, with the intention of achieving classification as an “originator” (as defined in the CRR) and complying with the CRR Retention Requirements with respect to Highland CLOs, Highland CLO Management will be required to meet the Origination Requirements.

Highland CLO Management may seek to adopt the “originator” model to address the EU Retention Requirements for its CLOs and intends to be treated as a “majority-owned affiliated” of Highland in order to comply with the U.S. Risk Retention Rules.

In addition to its current holdings, the Company may buy floating rate senior secured loans from the primary and secondary market before selling the assets to one or more CLOs which it establishes and for which Highland CLO Management will act as a retention provider, thereby offering investors wholesale access to senior secured loans acquired by the Company and retained CLO Income Notes.

The Portfolio Manager will be responsible for selecting and monitoring the performance of the investments. The Company’s purchase and sale decisions (with certain exceptions) will be taken by Highland HCF Advisors as Portfolio Manager pursuant to the Portfolio Management Agreement. Further details on the investment process are set out in the section of this Offering Memorandum entitled “*Investment Process*”.

INVESTMENT PROCESS

Highland HCF Advisor as Portfolio Manager and CLO Manager

The Company has entered into a Portfolio Management Agreement with Highland HCF Advisor as the Portfolio Manager. Pursuant to the Portfolio Management Agreement, Highland HCF Advisor will, at its discretion, select the portfolio of investments and instruct the Custodian with respect to any acquisition, disposition or sale of investments and provide certain support services to the Company. The performance of the Company's portfolio will depend heavily on the skills of Highland HCF Advisor in analyzing, selecting and managing the investments. The Portfolio Manager has entered into Services Agreements with Highland Capital Management, L.P. under which the Portfolio Manager has agreed to make its investment research and recommendations and back-office support services available to Highland HCF Advisor. Further details are set out in the section of this offering memorandum entitled "Investment Process" and "Additional Information on the Company".

Based in Dallas, Texas, Highland is an SEC Registered Investment Adviser founded in 1993 that specializes in senior secured bank loans, high yield bonds, structured products and equities. Highland issued its first CLO in 1996, and Highland and its affiliates have since issued and managed over U.S. \$28 billion of CLOs and CDOs consisting of 40 separate vehicles. As of August 31, 2017, Highland and its affiliates, managed or serviced approximately U.S. \$13.4 billion in senior secured bank loans, high yield bonds, structured products and other assets for banks, insurance companies, pension plans, foundations and high net worth individuals.

The Portfolio Manager, Highland, Acis and/or the Management Companies, may act as CLO Manager(s) in relation to the Managed CLOs pursuant to CLO Management Agreements. The Portfolio Manager, Highland, Acis and/or the applicable Management Company as CLO Manager is responsible for purchasing and selling of collateral obligations and performing certain other advisory and administrative tasks for and on behalf of the Managed CLOs in each case subject to the provisions of the applicable CLO Management Agreement and any applicable provisions of the indenture.

Highland HCF Advisor is a relying adviser of Highland. Highland is an SEC Registered Investment Adviser and currently manages CLOs and other managed accounts and investment funds. Highland CLO Management is a relying adviser of Highland and will manage Highland CLOs. Highland CLO Management has the HCLOM Services Agreements in place with Highland, pursuant to which Highland provides credit research and operational support to Highland CLO Management, including services in connection with determining the composition, nature and timing of changes to the Highland CLO Management portfolio, the due diligence of actual or potential investments, the execution of investment transactions approved by Highland CLO Management, and certain loan services and administrative services.

Acis is an SEC Registered Investment Adviser and currently manages CLOs and other managed accounts and investment funds. Acis CLO Management is a relying adviser of Acis and currently manages ACIS CLO 2017-7. Acis is an affiliate of Highland and is 100% owned by Highland senior management, and was established by James Dondero and Mark Okada to focus on managing traditional CLOs that invest in liquid, broadly syndicated bank loans and secondary CLO investments. Acis has the ACM Services Agreements in place with Highland, pursuant to which Highland provides investment research and recommendations and operational support to Acis, including services in connection with the Portfolio Manager's recommendations with respect to the composition, nature and timing of changes to the Company's portfolio, the due diligence of actual or potential investments, the execution of investment transactions, and certain loan services and administrative services. Acis CLO Management has the ACLOM Services Agreements in place with Acis, pursuant to which Acis provides credit research and operational support to Acis CLO Management, including services in connection with determining the composition, nature and timing of changes to the ACIS CLO Management portfolio, the due diligence of actual or potential investments, the execution of investment transactions approved by ACIS CLO Management, and certain loan services and administrative services. All final credit decisions are made by the Highland individuals referenced below.

Investment Philosophy

Highland's investment philosophy centers on being investors first. The firm has 25 years of experience investing in alternative strategies through multiple cycles. Highland is a recognized pioneer in bank loan asset management and

CLO issuance. The firm invests a meaningful amount of capital in the portfolios they manage, with market value in excess of \$250 million invested alongside our clients, as of September 30, 2017.

Highland's investment philosophy is rooted in a value-driven approach that combines rigorous bottom-up credit underwriting with top-down risk analysis to optimize risk-adjusted performance of portfolios. The firm integrates risk management throughout its investment process and maintains a culture of a high level of compliance. Highland focuses on attractive risk/return arbitrage opportunities where the firm can add value. Highland seeks to generate alpha by implementing checks and balances that allow the firm to identify risks, mitigate volatility, and quickly ascertain and sell losers.

While participating in the larger, liquid bank loan asset class, Highland continues to capture market inefficiencies in this over the counter (OTC) market through mispricings that it identifies via robust fundamental analysis, proactive diligence and monitoring, and nimble trading capabilities. Given the scale of the firm's investment resources, Highland is able to follow and manage investment portfolio names more closely. Highland credit research analysts manage 20-30 credits per analyst versus most peers, who manage 40-50 credits per analyst. In addition, the firm's dedicated trading desk and active dialogue with the Street enable Highland to identify technical dislocations and opportunities. The firm's high conviction investment philosophy and active portfolio management style versus peers have been key drivers of creating alpha for clients over time.

Investment Monitoring and Risk Management

Risk management is integrated into all levels of the investment process, from research, to portfolio construction and management, to ongoing monitoring. Highland conducts extensive position and portfolio monitoring activities on a daily basis. Portfolio risk is reviewed using internally generated daily, weekly, and monthly reports which measure transaction compliance including investor-mandated metrics such as portfolio concentrations or required test scores, as well as compliance with evolving internal positioning targets. Individual position risk is monitored in a number of ways, including Highland's extensive proprietary intranet system (Highland Online Management Engine or "HOME"), which pulls together data from their various data providers (Wall Street Office, LPC, Moody's, S&P, MarkIt, S&P LCD, CSFB Index) to provide a comprehensive portfolio/risk management system. The system allows the CLO team to monitor metrics at any level of aggregation (instrument, issuer, portfolio, fund and across the platform). Additionally, the system is designed to be scalable and with flexibility to enable future data inputs and reporting requirements.

For both Managed CLOs and for the underlying loans, the HOME intranet system allows Highland to monitor portfolios on a real-time, ongoing basis by receiving alerts showing positions with the largest daily/weekly/monthly mark change, as well as alerts on downgrades/upgrades, and when their credit analyst has changed his opinion on a broadly syndicated loan.

Allocation Policy

Highland and its affiliates may, from time to time, be presented with investment opportunities that fall within the investment objectives of the Company and the Managed CLOs and other clients, funds or other investment accounts managed by Highland or its affiliates, and in such circumstances, subject to the Company's priority allocation with respect to CLO Income Notes of new issue Highland CLOs Highland and its affiliates expect to allocate such opportunities among the Company, the Managed CLOs and such other clients, funds or other investment accounts on a basis that Highland and its affiliates determine in good faith is appropriate taking into consideration such factors as the fiduciary duties owed to the Company, the Managed CLOs and such other clients, funds or other investment accounts, the primary mandates of the Company, the Managed CLOs and such other clients, funds or other investment accounts, the capital available to the Company, the Managed CLOs and such other clients, funds or other investment accounts, any restrictions on investment, the sourcing of the transaction, the size of the transaction, the amount of potential follow-on investing that may be required for such investment and the other collateral obligations of the Company, the Managed CLOs and such other clients, funds or other investment accounts, the relation of such opportunity to the investment strategy of the Company, the Managed CLOs and such other clients, funds or other investment accounts, reasons of portfolio balance and any other consideration deemed relevant by Highland and its affiliates in good faith. Subject to the Company's priority allocation with respect to CLO Income Notes of new issue Highland CLOs, Highland will allocate investment opportunities across the entities for which such opportunities are

appropriate, consistent with (1) its internal conflict of interest and allocation policies and (2) the requirements of the Investment Advisers Act. Highland will seek to allocate investment opportunities among such entities in a manner that is fair and equitable over time and consistent with its allocation policy. However, there is no assurance that such investment opportunities will be allocated to the Company and the Managed CLOs fairly or equitably in the short term or over time and there can be no assurance that the Company and the Managed CLOs will be able to participate in all such investment opportunities that are suitable for it.

Biographies of the Highland Key Personnel

The Portfolio Manager will use the services of the key personnel set forth below, although it may not necessarily continue to use their services during the entire term of the Portfolio Management Agreement. Of these, Trey Parker and Hunter Covitz (and such other personnel as may be determined from time to time) will be made available by the Portfolio Manager to the Company pursuant to the Portfolio Management Agreement.

Although the persons described above are currently employed by Highland and are engaged in the activities of the Portfolio Manager, such persons may not necessarily continue to be employed by the Portfolio Manager during the entire term of the Portfolio Management Agreement and, if so employed, may not remain engaged in the activities of the Portfolio Manager.

James Dondero, CFA, CMA

Co-Founder, President

Mr. Dondero is President of Highland CLO Management and Acis CLO Management, LLC and Co-Founder and President of Highland Capital Management, L.P. (an alternative asset manager specializing in high-yield fixed income investments) and Acis Capital Management, L.P. Mr. Dondero has over 30 years of experience in the credit and equity markets, focused largely on high-yield and distressed investing. Under Mr. Dondero's leadership, Highland and Acis have been a pioneer in both developing the collateralized loan obligation (CLO) market and advancing credit-oriented solutions for institutional and retail investors worldwide, including product offerings such as institutional separate accounts, CLOs, hedge funds, private equity funds, mutual funds, REITs, and ETFs. Mr. Dondero is the Chairman and President of NexPoint Residential Trust, Inc. (NYSE:NXRT), is Chairman of NexBank Capital, Inc., Cornerstone Healthcare Group Holding, Inc., and CCS Medical, Inc., and a board member of Jernigan Capital, Inc. (NYSE:JCAP), and MGM Holdings, Inc. He also serves on the Southern Methodist University Cox School of Business Executive Board. A dedicated philanthropist, Mr. Dondero actively supports initiatives in education, veterans affairs, and public policy. Prior to founding Highland in 1993, Mr. Dondero was involved in creating the GIC subsidiary of Protective Life, where as Chief Investment Officer he helped take the company from inception to over \$2 billion between 1989 and 1993. Between 1985 and 1989, Mr. Dondero was a corporate bond analyst and then portfolio manager at American Express. Mr. Dondero began his career in 1984 as an analyst in the JP Morgan training program. Mr. Dondero graduated from the University of Virginia where he earned highest honors (Beta Gamma Sigma, Beta Alpha Psi) from the McIntire School of Commerce with dual majors in accounting and finance. He has received certification as Certified Public Accountant (CPA) and Certified Managerial Accountant (CMA) and has earned the right to use the Chartered Financial Analyst (CFA) designation.

Mark Okada, CFA

Co-Founder, Co-Chief Investment Officer

Mr. Okada is Co-Founder of Highland CLO Management and Acis CLO Management, LLC and Co-Founder and Co-Chief Investment Officer of Highland Capital Management, L.P. and Acis Capital Management, L.P. Responsible for overseeing investment activities for various strategies within Highland and Acis, Mr. Okada is a pioneer in the development of the bank loan market and has over 30 years of credit experience. He is responsible for structuring one of the industry's first arbitrage CLOs and was actively involved in the development of Highland's bank loan separate account and mutual fund platforms. Mr. Okada received a BA in Economics and a BA in Psychology, cum laude, from the University of California, Los Angeles. He has earned the right to use the Chartered Financial Analyst designation. Mr. Okada is a Director of NexBank, Chairman of the Board of Directors of Common Grace Ministries, Inc., is on the Board of Directors for Education is Freedom, and also serves on the GrowSouth Fund advisory board.

Trey Parker

Partner, Portfolio Manager and Co-Chief Investment Officer

Mr. Parker is Partner, Portfolio Manager and Co-Chief Investment Officer at Highland Capital Management, L.P., and serves on the Investment Manager's Investment Committee. Prior to his current role, Mr. Parker was Head of Credit and covered a number of the industrial verticals, as well as parts of tech, media and telecom for the Investment Manager and worked on the Distressed & Special Situations investment team at Highland. Prior to joining Highland in March 2007, Mr. Parker was a Senior Associate at Hunt Special Situations Group, L.P., a Private Equity group focused on distressed and special situation investing. Mr. Parker was responsible for sourcing, executing and monitoring control Private Equity investments across a variety of industries. Prior to joining Hunt, Mr. Parker was an analyst at BMO Merchant Banking, a Private Equity group affiliated with the Bank of Montreal. While at BMO, Mr. Parker completed a number of LBO and mezzanine investment transactions. Prior to joining BMO, Mr. Parker worked in sales and trading for First Union Securities and Morgan Stanley. Mr. Parker received an MBA with concentrations in Finance, Strategy and Entrepreneurship from the University of Chicago Booth School of Business and a BA in Economics and Business from the Virginia Military Institute. Mr. Parker serves on the Board of Directors of Omnimax Holdings, Inc., TerreStar Corporation, JHT Holdings, Inc., and a non-profit organization, the Juvenile Diabetes Research Foundation (Dallas chapter).

Hunter Covitz, CPA

Managing Director, Structured Products

Mr. Covitz is a Managing Director and Portfolio Manager at Highland Capital Management, L.P. He is responsible for all CLOs, separate accounts, and hedge funds managed by Acis Capital Management, L.P., as well as all CLOs managed by Highland. Mr. Covitz serves on Highland's investment committee and leads the structured products investment team. Since joining Highland in 2003, Mr. Covitz has been instrumental in the structuring, warehousing, ramping, and ongoing portfolio management of over 30 Highland and Acis-originated CLOs. Prior to joining Highland, Mr. Covitz served as a tax consultant at Deloitte & Touche and KBA Group LLP, where he focused on high-net worth individuals and middle-market companies. He received both his MS and BBA in Accounting from the University of Oklahoma. Mr. Covitz is a licensed Certified Public Accountant.

Neil Desai

Portfolio Manager, Structured Products

Mr. Desai is a Portfolio Manager of Structured Products at Highland Capital Management, L.P. He is focused on sourcing and trading structured products for Highland's CLOs, hedge funds, mutual funds and separate accounts in the primary and secondary markets. Prior to joining Highland in August 2015, Mr. Desai was a Director in Pfizer Inc.'s Treasury organization where he built and ran Pfizer's structured products business. Prior to Pfizer, Mr. Desai spent several years structuring and trading various structured products at Barclays Capital and its spin-off hedge fund, C12 capital. Mr. Desai received both a Bachelor's and Master's degree in Computer Science & Electrical Engineering from MIT.

COMPANY DIRECTORS AND ADMINISTRATION

DIRECTORS

The Directors are responsible for managing the business affairs of the Company in accordance with the Articles and have overall responsibility for the Company's activities including the appointment of the service providers. The Directors may delegate certain functions to other parties such as the Administrator. The Directors have appointed Highland HCF Advisor as Portfolio Manager and delegated the investment management and risk management of the Company's investments to the Portfolio Manager pursuant to the Portfolio Management Agreement.

The Board comprises two Directors, both of whom are independent of Highland and Acis.

The address of the Directors, all of whom are non-executive, is the registered office of the Company. The Directors of the Company are as follows:

William Scott (Chairman)

William Scott, a Guernsey resident, acts as an independent non-executive Director of the Company. Mr. Scott also currently serves as independent non-executive director of a number of investment companies and funds. From 2003 to 2004, Mr. Scott worked as Senior Vice President with FRM Investment Management Limited. Previously, Mr. Scott was a director at Rea Brothers (which became part of the Close Brothers group in 1999 and where he was a director of Close Bank Guernsey Limited) (1989-2002) and Assistant Investment Manager with the London Residuary Body Superannuation Scheme (1987-1989). Mr. Scott graduated from the University of Edinburgh in 1982 and is a Chartered Accountant having qualified with Arthur Young (now E&Y) in 1987. Mr. Scott also holds the Securities Institute Diploma and is a Chartered Fellow of the Chartered Institute for Securities & Investment. He is also a Chartered Wealth Manager.

Heather Bestwick

Heather Bestwick, a Jersey resident, acts as an independent non-executive Director of the Company. She qualified as an English solicitor with Norton Rose, and worked in their London and Athens offices for eight years. In 1999 she joined Walkers in the Cayman Islands, qualifying as a Cayman Islands attorney and Notary Public, and became a partner in 2003. Her practice encompassed hedge funds, private equity, structured finance, secured lending and yacht registration and finance. Ms. Bestwick moved to Jersey in 2007 to become Managing Partner of the Walkers Jersey office. She joined Jersey Finance in 2010 as Technical Director and Deputy Chief Executive, leading the development of finance industry legislation on behalf of industry and liaising with the regulator and government. Ms. Bestwick is a member of the Channel Islands committee of the Association of Investment Companies.

Management functions of the Board of Directors

As there are no employees of the Company, the Board performs certain management functions, which include the overseeing of the Company's investment policy and investment strategy and the supervision of any delegated responsibilities to third-party service providers, and has the ultimate responsibility for the management and operations of the Company.

The Company has appointed Highland HCF Advisor as Portfolio Manager and delegated the investment management and risk management of the Company's investments to the Portfolio Manager pursuant to the Portfolio Management Agreement.

CORPORATE GOVERNANCE

The Directors are committed to maintaining high standards of corporate governance. Insofar as the Directors believe it to be appropriate and relevant to the Company, it is their intention that the Company should comply with best practice standards for the business carried on by the Company.

On 1 January 2012, the GFSC's Finance Sector Code of Corporate Governance (the "GFSC Code") came into effect. The GFSC has stated in the GFSC Code that companies which report against the UK Corporate Governance Code are

deemed to meet the requirements of the GFSC Code, and need take no further action. Other than as set out below, the Company currently complies with, and will comply with, the GFSC Code.

The Company does not have a senior independent director because all of its Directors are non-executive and the Company has a Chairman. There are no other instances of non-compliance with the UK Corporate Governance Code by the Company as at the date of this Offering Memorandum.

Audit Committee

The Company has established an Audit Committee, which comprises all the Directors. The Company's Audit Committee meets formally at least twice a year for the purpose, amongst other things, of considering the appointment, independence and remuneration of the Auditor and to review the Company's annual financial reports. Where audit-related and/or non-audit services are to be provided by the Auditors, full consideration of the financial and other implications on the independence of the Auditors arising from any such engagement will be considered before proceeding. Heather Bestwick acts as chairman of the Audit Committee. The responsibilities of the Audit Committee includes monitoring the integrity of the Company's results and financial statements, reviewing reports received from the Administrator on the adequacy and the effectiveness of the Company's internal controls and risk management systems, considering annually whether there is a need for an effectiveness of the Company's internal audit function and assessing the ongoing suitability of the Auditors and ensuring their co-ordination with any internal audit function.

The chairmanship of the Audit Committee and each Director's performance is reviewed annually by the Chairman and the performance of the Chairman is assessed by the other Directors.

Advisory Board

The Company has established an Advisory Board, which composed of individuals who shall be representatives of certain Shareholders. See "*Summary—Advisory Board*".

PORTFOLIO MANAGER

Highland HCF Advisor will act as Portfolio Manager to the Company (pursuant to the Portfolio Management Agreement) and may act (either itself or through an affiliate) as the CLO Manager to Managed CLOs.

Pursuant to the Portfolio Management Agreement, the Portfolio Manager will select the portfolio of investments and instruct the Custodian with respect to any acquisition, disposition or sale of investments and be responsible for the business decisions and carry on the day-to-day management of the Company's business and implementation of its investment objective and policy.

Highland Fees

Highland HCF Advisor will receive, in consideration for its services pursuant to the Portfolio Management Agreement, an amount equivalent to all Operating Expenses incurred by the Portfolio Manager in the performance of its obligations thereunder as described below, together with any irrecoverable VAT arising on such costs and expenses. Except as provided below, the Portfolio Manager will pay all of its own operating, overhead and administrative expenses, including all costs and expenses on account on employee compensation, employee benefits and rent ("**Overhead**") without reimbursement by the Company.

The Company shall pay or reimburse the Portfolio Manager and its affiliates for only for reasonable third party costs and expenses related to the services hereunder, including, but not limited to investment-related expenses, brokerage commissions and other transaction costs, expenses related to clearing and settlement charges, actual out-of-pocket professional fees relating to, trustee, administration, tax, accounting, legal, auditing or valuation services, any governmental, regulatory, licensing, filing or registration fees incurred in connection with the Company's compliance with the rules of any self-regulatory organization or any federal, state or local laws, research-related expenses (including, without limitation, news and quotation equipment and services, investment and trading-related software, including, without limitation, trade order management software (i.e., software used to route trade orders)), accounting (including accounting software), tax preparation expenses, costs and expenses associated with reporting and providing information to the Company, any taxes imposed upon the Company (including, but not limited to, any

irrecoverable VAT arising on such costs and expenses), fees relating to valuing the financial instruments, extraordinary expenses and the Company's indemnification obligations (including those incurred in connection with indemnifying indemnified persons, including advancing such amounts) (collectively, the "**Operating Expenses**"). In the event any fees or expenses are for services used by, or attributable to, other persons advised by Highland HCF Advisor or its affiliates, including, but not limited to, any fees or expenses for software or subscription-based services, the Company shall only reimburse the Portfolio Manager for its pro rata share of such expenses, as determined by the Portfolio Manager in good faith.

For the avoidance of doubt, (i) the cost of all third party expenses incurred by the Portfolio Manager in connection with the Portfolio Management Agreement shall not exceed standard market rates (which may include standard soft dollar arrangements) and (ii) to the extent any of the foregoing expenses were incurred on behalf of, or benefit of a number of Portfolio Manager's advised accounts, such expenses shall be allocated pro rata among such accounts.

To the extent that expenses to be borne by the Company are paid by the Portfolio Manager or by any services provider, the Company shall reimburse the Portfolio Manager (or the relevant services provider, as applicable) for such expenses so long as such expenses are determined on an arm's length basis.

The Portfolio Manager will also receive distributions pursuant to the Distribution Priority following the Investment Period, after satisfaction of all expenses, debts, liabilities and obligations of the Company and the Shareholders have receive a cumulative rate of return of 8.0% per annum, compounded annually. See "*Summary—Dividend Policy*".

Further details regarding the Portfolio Manager and Highland are set out in the section of this Offering Memorandum entitled "*Investment Process*". Further details regarding the Portfolio Management Agreement are set out in the section of this Offering Memorandum entitled "*Additional Information on the Company*".

CLO MANAGER

In addition, the Portfolio Manager, Highland, Acis and/or the Management Companies (or one of their affiliates), as CLO Manager, may also manage Managed CLOs pursuant to management agreements ("**CLO Management Agreements**") to be entered into from time to time. The applicable CLO Manager will receive customary fees, in consideration for its services as the CLO Manager, from each of the Managed CLOs it manages.

ADMINISTRATOR

State Street (Guernsey) Limited has been appointed as Administrator of the Company pursuant to the Administration Agreement (further details of which are set out in the section of this Offering Memorandum entitled "*Material Contracts*" in "*Additional Information on the Company*"). In such capacity, the Administrator is responsible for the day-to-day administration of the Company (including but not limited to the calculation and publication of the estimated quarterly NAV) and general secretarial functions required by the Companies Law (including but not limited to the maintenance of the Company's accounting and statutory records). Prospective investors should note that it is not possible for the Administrator to provide any investment advice to investors.

The Administrator is a private limited company, created under the laws of Guernsey on 17 March 2000 whose registered office is situated at First Floor, Dorey Court, Admiral Park, St Peter Port, Guernsey GY1 6HJ, Channel Islands. The Administrator is licensed under the POI Law, with the GFSC to carry out controlled investment business. The Administrator's principal business activity is providing securities services.

CUSTODIAN

State Street Custodial Services (Ireland) Limited has been appointed as Custodian of the Company pursuant to the Custody Agreement (further details of which are set out in the section of this Offering Memorandum entitled "*Material Contracts*" in "*Additional Information on the Company*"). In acting as custodian of the Company's investments, the Custodian shall provide for the safekeeping of certificates of deposit, shares, notes and in general any instrument evidencing the ownership of securities and may take custody of cash and other assets. Assets will be held in a custody account and registered in the name of the Company or the Custodian, its delegate or a nominee.

The Custodian, which is authorised as an Investment Business Firm under Section 10 of the Irish Investment Intermediaries Act, 1995 (as amended), will provide custody and banking services.

FEES AND EXPENSES

The expenses of the Company related to the Placing are described in “*Summary—Expenses related to the Placing*”.

The Company’s ongoing expenses are described in “*Summary—Ongoing annual expenses*”.

For more information on expenses charged during the most recent financial year, prospective investors should review the Company’s annual audited financial statements (if any) for the prior financial year.

MEETINGS AND REPORTS TO SHAREHOLDERS

All general meetings of the Company shall be held in Guernsey.

The Company’s audited annual report and accounts will be prepared to 31 December, each year, and it is expected that copies will be sent to Shareholders at the end of April each year. Shareholders will also receive an unaudited interim report each year covering the six months from 1 January to 30 June, expected to be despatched at the end of August each year.

The Company’s accounts are drawn up in U.S. Dollars and in compliance with GAAP.

The following information will be disclosed to investors at the same time as the annual financial statements and may be provided at other times by way of a report and/or letter sent to investors by the Portfolio Manager or the Administrator:

- (a) the percentage of the assets of the Company that are subject to special arrangements arising from their illiquid nature;
- (b) any new arrangements for managing the liquidity of the Company;
- (c) the current risk profile of the Company and the risk management systems employed by the Portfolio Manager to manage those risks; and
- (d) the total amount of leverage employed by the Company.

Any changes to the following information will be provided by the Portfolio Manager or the Administrator to investors without undue delay and may be provided by email:

- (a) the maximum level of leverage which the Portfolio Manager may employ on behalf of the Company;
- (b) the right of re-use of collateral or any changes to any guarantee granted under any leveraging arrangement; and
- (c) activation of liquidity management tools.

PLACING ARRANGEMENTS

THE PLACING

The target number of Placing Shares to be issued pursuant to the Placing is an amount of Shares equal to U.S. \$153 million. As at the date of this Offering Memorandum, the actual number of Placing Shares to be issued under the Placing is not known.

The results of the Placing will be released by the Company, including details of the number of Placing Shares allotted (or such other date as may be notified by the Company). The Directors are under no obligation to issue share certificates unless requested to do so by a Shareholder. No temporary documents of title will be issued.

The Company is seeking aggregate subscriptions to purchase Placing Shares in an aggregate amount of US \$153 million.

Placees will commit under the subscription and transfer agreement to purchase Shares to be settled from time to time during the Investment Period. The Portfolio Manager may call such Shares for settlement from time to time on a pro rata basis upon 10 Business Days' notice to the Placees in such amounts as may be specified by the Portfolio Manager.

Upon the expiration of the Investment Period, all Placees will be released from any further obligation with respect to purchase Shares under their subscriptions, except to the extent necessary to:

- (i) complete, no later than 180 days after the expiration of the Investment Period, the purchase of Shares pursuant to written commitments, letters of intent or similar contractual commitments that were in process as of the end of the Investment Period; and
- (ii) fund any indebtedness of the Company permitted hereunder incurred prior to the end of the Investment Period (including to repay outstanding indebtedness under any Warehouse Loan Facilities).

Shares will be issued at a price per Share based on the most recent quarterly determined NAV of the Company.

The maximum number of Shares to be issued by the Company is an amount of Shares equal to U.S. \$153 million and there is no minimum number of Shares. Fractions of Placing Shares will be issued.

On the Closing Date, Placees will acquire Shares of existing Shareholders at a price per Share based on the Adjusted NAV such that Placees and existing Shareholders will hold currently existing Shares on a *pro rata* basis and existing Shareholders will commit, as Placees under a subscription and transfer agreement, to purchase Shares such that new and existing Shareholders will hold both existing Shares and commitments on pro rata basis.

The Board may deduct from any dividend payable to any Shareholder on or in respect of a Share all sums of money (if any) presently payable by him to the Company on account of calls with respect to existing Shares, or calls of commitments to purchase Shares pursuant to the subscription and transfer agreement or otherwise.

A Shareholder that defaults in respect of its obligation to purchase Shares pursuant to the terms of the subscription and transfer agreement will be subject to customary default provisions.

The Board may retain any dividend or other monies payable on or in respect of a Share on which the Company has a lien and may apply the same in or towards satisfaction of the liabilities or obligations in respect of which the lien exists.

Highland Principal Commitment

Certain principals of Highland will subscribe, directly or indirectly, for \$3,000,000 of Shares in the aggregate.

TIME AND DATE OF THE OPENING AND CLOSING OF THE OFFER

This subscription is open for a fixed offer period only. This period runs from November 15, 2017, the offer opening date, until 17:00 in Guernsey on the Closing Date. Only fully completed applications received by this date with cleared funds in the Company's nominated account will be acceptable for investment.

USE OF PROCEEDS

The Net Placing Proceeds will depend on the number of Placing Shares issued pursuant to the Placing. The Portfolio Manager intends to invest the Net Placing Proceeds in accordance with the Company's investment policy (further details of the Company's investment process and strategy are set out in the section of this Offering Memorandum entitled "*Company, its Investment Objective, Policy and Strategy*").

DEALINGS

The Company does not guarantee that at any particular time any market maker(s) will be willing to make a market in the Placing Shares, nor does it guarantee the price at which a market will be made in the Placing Shares. Accordingly, the dealing price of the Placing Shares may not necessarily reflect changes in the Net Asset Value per Share. Furthermore, the level of the liquidity in the Placing Shares can vary significantly.

SCALING BACK AND ALLOCATION

If aggregate applications for Placing Shares exceed 325 million Shares, being the maximum number of Shares to be issued pursuant to the Placing, it will be necessary to scale back applications under the Placing. The Company reserves the right to decline in whole or in part any application for Placing Shares pursuant to the Placing.

GENERAL

Pursuant to anti-money laundering laws and regulations with which the Company must comply in the UK and Guernsey, the Company (and its agents) may require evidence in connection with any application for Placing Shares, including further identification of the applicant(s), before any Placing Shares are issued.

In the event that there are any significant changes affecting any of the matters described in this Offering Memorandum or where any significant new matters have arisen after the publication of this Offering Memorandum, the Company will publish a notice to investors. Such notice will give details of the significant change(s) or the significant new matter(s). In the event that the Company is required to publish any notice, applicants who have applied for Placing Shares shall have at least two clear business days following the publication of the relevant notice within which to withdraw their offer to subscribe for Placing Shares in its entirety. The right to withdraw an application to subscribe for Placing Shares in these circumstances will be available to all investors in the Placing. If the application is not withdrawn within the time limits set out in the relevant notice, any application for Placing Shares will remain valid and binding.

The Directors may, in their absolute discretion, waive the minimum application amounts in respect of any particular application for Placing Shares under the Placing.

Should the Placing be aborted or fail to complete for any reason, monies received will be returned without interest at the risk of the applicant to the bank account from which the money was received forthwith following such abort or failure, as the case may be.

CLEARING AND SETTLEMENT

Payment for the Placing Shares should be made in accordance with settlement instructions to be provided to Placees by or on behalf of the Company. To the extent that any application for Placing Shares is rejected in whole or in part (whether by scaling back or otherwise), monies received will be returned without interest at the risk of the applicant.

PURCHASE AND TRANSFER RESTRICTIONS

This Offering Memorandum does not constitute an offer to sell, or the solicitation of an offer to acquire or subscribe for, Placing Shares in any jurisdiction where such an offer or solicitation is unlawful or would impose any unfulfilled registration, qualification, publication or approval requirements on the Company.

The Company has elected to impose the restrictions described below on the Placing and on the future trading of the Placing Shares so that the Company will not be required to register the offer and sale of the Placing Shares under the U.S. Securities Act, so that the Company will not have an obligation to register as an investment company under the U.S. Investment Company Act and related rules and to address certain ERISA, U.S. Tax Code and other considerations. The Company and its agents will not be obligated to recognise any resale or other transfer of the Placing Shares made other than in compliance with the restrictions described below.

Restrictions due to lack of registration under the U.S. Securities Act and U.S. Investment Company Act

The Placing Shares have not been and will not be registered under the U.S. Securities Act or with any securities regulatory authority of any state or other jurisdiction of the United States and the Placing Shares may not be offered, sold, exercised, resold, transferred or delivered, directly or indirectly, within the United States or to, or for the account or benefit of, U.S. Persons, except pursuant to an exemption from, or in a transaction not subject to, the registration requirements of the U.S. Securities Act and in compliance with any applicable securities laws of any state or other jurisdiction in the United States. There will be no public offer of the Placing Shares in the United States.

Subject to certain exceptions as described herein, the Placing is only being made outside the United States to non-U.S. Persons in reliance on Regulation S under the U.S. Securities Act.

In addition, except with the express written consent of the Company given in respect of an investment in the Company, the Placing Shares may not be acquired by (i) investors using assets of (A) an “employee benefit plan” as defined in section 3(3) of ERISA that is subject to Title I of ERISA; (B) a “plan” as defined in Section 4975 of the U.S. Code, including an individual retirement account or other arrangement that is subject to Section 4975 of the U.S. Code; or (C) an entity which is deemed to hold the assets of any of the foregoing types of plans, accounts or arrangements that is subject to Title I of ERISA or Section 4975 of the U.S. Code; or (ii) a governmental, church, non-U.S. or other employee benefit plan that is subject to any federal, state, local or non-U.S. law that is substantially similar to the provisions of Title I of ERISA or Section 4975 of the U.S. Code, unless its purchase, holding, and disposition of the Placing Shares will not constitute or result in a non-exempt violation of any such substantially similar law.

Subscriber and Shareholder warranties

By participating in the Placing, each subscriber acknowledges and agrees that it will (for itself and any person(s) procured by it to subscribe for Shares and any nominee(s) for any such person(s)) be further deemed to represent and warrant to the Company that:

- (a) if it is located outside the United States, it is not a U.S. Person, it is acquiring the Shares in an offshore transaction meeting the requirements of Regulation S and it is not acquiring the Shares for the account or benefit of a U.S. Person;
- (b) if it is located inside the United States or is a U.S. Person, it is an Eligible U.S. Investor and has received, read, understood and, prior to its receipt of any Shares pursuant to the Placing, returned an executed a U.S. Investor Letter to the Company;
- (c) it acknowledges that the Shares have not been and will not be registered under the U.S. Securities Act or with any securities regulatory authority of any state or other jurisdiction of the United States and may not be offered or sold in the United States or to, or for the account or benefit of, U.S. Persons absent registration or an exemption from registration under the U.S. Securities Act;
- (d) it acknowledges that the Company has not registered under the U.S. Investment Company Act and that the Company has put in place restrictions for transactions not involving any public offering in the United States, and to ensure that the Company is not and will not be required to register under the U.S. Investment Company Act;
- (e) unless the Company expressly consents in writing otherwise, no portion of the assets used to purchase, and no portion of the assets used to hold, the Shares or any beneficial interest therein constitutes or will constitute the assets of (i) an “employee benefit plan” as defined in Section 3(3) of ERISA that is subject to Title I of ERISA; (ii) a “plan” as defined in Section 4975 of the U.S. Code, including an individual retirement account

or other arrangement that is subject to Section 4975 of the U.S. Code; or (iii) an entity which is deemed to hold the assets of any of the foregoing types of plans, accounts or arrangements that is subject to Title I of ERISA or Section 4975 of the U.S. Code. In addition, if an investor is a governmental, church, non-U.S. or other employee benefit plan that is subject to any federal, state, local or non-U.S. law that is substantially similar to the provisions of Title I of ERISA or Section 4975 of the U.S. Code, its purchase, holding, and disposition of the Shares must not constitute or result in a non-exempt violation of any such substantially similar law;

- (f) that if any Shares offered and sold are issued in certificated form, then such certificates evidencing ownership will contain a legend substantially to the following effect unless otherwise determined by the Company in accordance with applicable law:

“THE COMPANY HAS NOT BEEN REGISTERED UNDER THE UNITED STATES INVESTMENT COMPANY ACT OF 1940, AS AMENDED (THE “INVESTMENT COMPANY ACT”) AND THE SECURITY EVIDENCED HEREBY HAS NOT BEEN REGISTERED UNDER THE UNITED STATES SECURITIES ACT OF 1933, AS AMENDED (THE “SECURITIES ACT”), AND MAY NOT BE OFFERED, SOLD, PLEDGED OR OTHERWISE TRANSFERRED EXCEPT (A) OUTSIDE THE UNITED STATES TO A NON-US PERSON (AS DEFINED IN RULE 902 OF REGULATION S, “US PERSON”) THAT IS NOT A US RESIDENT FOR THE PURPOSES OF THE INVESTMENT COMPANY ACT (A “US RESIDENT”) IN ACCORDANCE WITH RULE 903 OR 904 OF REGULATION S UNDER THE SECURITIES ACT (AND NOT IN A PRE-ARRANGED TRANSACTION RESULTING IN THE RESALE OF SUCH SECURITY INTO THE UNITED STATES) OR (B) PURSUANT TO AN EXEMPTION FROM REGISTRATION UNDER THE SECURITIES ACT AND UNDER CIRCUMSTANCES WHICH WILL NOT REQUIRE THE COMPANY TO REGISTER UNDER THE INVESTMENT COMPANY ACT (PROVIDED THAT, IF SUCH TRANSFER PURSUANT TO THIS CLAUSE (B) IS TO A US PERSON OR A US RESIDENT, THE PURCHASER IS A QUALIFIED PURCHASER WITHIN THE MEANING OF SECTION 3(c)(7) OF THE INVESTMENT COMPANY ACT) AND, IN EACH CASE IN ACCORDANCE WITH ANY APPLICABLE SECURITIES LAWS OF THE STATES OF THE UNITED STATES AND OTHER JURISDICTIONS. THE HOLDER OF THIS SECURITY AGREES THAT IT WILL COMPLY WITH THE FOREGOING RESTRICTIONS. NO REPRESENTATION CAN BE MADE AS TO THE AVAILABILITY OF ANY EXEMPTION UNDER THE SECURITIES ACT FOR REALES OF THE SECURITY.

THE HOLDER ACKNOWLEDGES THAT THE COMPANY RESERVES THE RIGHT PRIOR TO ANY SALE OR OTHER TRANSFER TO REQUIRE THE DELIVERY OF SUCH CERTIFICATIONS, LEGAL OPINIONS AND OTHER INFORMATION AS THE COMPANY MAY REASONABLY REQUIRE TO CONFIRM THAT THE PROPOSED SALE OR OTHER TRANSFER COMPLIES WITH THE FOREGOING RESTRICTIONS.

IF A BENEFICIAL OWNER OF THIS SECURITY WHO IS REQUIRED TO BE A QUALIFIED PURCHASER WITHIN THE MEANING OF SECTION 3(c)(7) OF THE INVESTMENT COMPANY ACT IS AT ANY TIME NOT SUCH A QUALIFIED PURCHASER, THE COMPANY MAY (A) REQUIRE SUCH BENEFICIAL OWNER TO SELL THIS SECURITY TO A PERSON WHO IS NOT A US PERSON OR A US RESIDENT OR WHO IS A US PERSON WHO IS ALSO A QUALIFIED PURCHASER AND WHO IS OTHERWISE QUALIFIED TO PURCHASE SUCH SECURITY IN A TRANSACTION EXEMPT FROM REGISTRATION UNDER THE SECURITIES ACT OR (B) SELL THIS SECURITY ON BEHALF OF THE BENEFICIAL OWNER AT THE BEST PRICE REASONABLY OBTAINABLE TO A PERSON WHO IS NOT A US PERSON OR WHO IS A US PERSON OR A US RESIDENT WHO IS ALSO A QUALIFIED PURCHASER AND WHO IS OTHERWISE QUALIFIED TO PURCHASE SUCH SECURITY IN A TRANSACTION EXEMPT FROM REGISTRATION UNDER THE SECURITIES ACT.

THE HOLDER OF THIS SECURITY IS DEEMED TO HAVE ACKNOWLEDGED THAT THIS LEGEND WILL NOT BE REMOVED FROM THIS SECURITY FOR AS LONG AS THE COMPANY RELIES ON SECTION 3(c)(7) OF THE INVESTMENT COMPANY ACT”;

- (g) if in the future the investor decides to offer, sell, transfer, assign or otherwise dispose of the Shares, it will do so only in compliance with an exemption from the registration requirements of the U.S. Securities Act and under circumstances which will not require the Company to register under the U.S. Investment Company Act. It acknowledges that any sale, transfer, assignment, pledge or other disposal made other than in compliance with such laws and the above stated restrictions will be subject to the compulsory transfer provisions as provided in the Articles;
- (h) if in the future it decides to offer, resell, pledge or otherwise transfer any of the Shares, such Shares may be offered, resold, pledged or otherwise transferred only (A) outside the United States to persons not known to be U.S. Persons in an offshore transaction in accordance with Rule 904 of Regulation S under the U.S. Securities Act, (B) in a transaction that does not require registration under the U.S. Securities Act or any applicable United States securities laws and regulations or require the Company to register under the U.S. Investment Company Act, subject to, if requested by the Company, delivery of an opinion of counsel of recognised standing in form and substance reasonably satisfactory to the Company, or (C) to the Company;
- (i) it is purchasing the Shares for its own account or for one or more investment accounts for which it is acting as a fiduciary or agent, in each case for investment only, and not with a view to or for sale or other transfer in connection with any distribution of the Shares in any manner that would violate the U.S. Securities Act, the U.S. Investment Company Act or any other applicable securities laws;
- (j) it acknowledges that the Company reserves the right to make inquiries of any holder of the Shares or interests therein at any time as to such person's status under the U.S. federal securities laws and to require any such person that has not satisfied the Company that holding by such person will not violate or require registration under the U.S. securities laws to transfer such Shares or interests in accordance with the Articles;
- (k) it acknowledges and understands that the Company is required to comply with FATCA and that the Company will follow FATCA's extensive reporting and withholding requirements. The subscriber agrees to furnish any information and documents the Company may from time to time request, including but not limited to information required under FATCA;
- (l) it is entitled to acquire the Shares under the laws of all relevant jurisdictions which apply to it, it has fully observed all such laws and obtained all governmental and other consents which may be required thereunder and complied with all necessary formalities and it has paid all issue, transfer or other taxes due in connection with its acceptance in any jurisdiction of the Shares and that it has not taken any action, or omitted to take any action, which may result in the Company or its directors, officers, agents, employees and advisers being in breach of the laws of any jurisdiction in connection with the Placing or its acceptance of participation in the Placing;
- (m) it has received, carefully read and understands this Offering Memorandum, and has not, directly or indirectly, distributed, forwarded, transferred or otherwise transmitted this Offering Memorandum or any other presentation or offering materials concerning the Shares to within the United States or to any U.S. Persons, nor will it do any of the foregoing; and
- (n) if it is acquiring any Shares as a fiduciary or agent for one or more accounts, the investor has sole investment discretion with respect to each such account and full power and authority to make such foregoing representations, warranties, acknowledgements and agreements on behalf of each such account.

The Company and its directors, officers, agents, employees, advisers and others will rely upon the truth and accuracy of the foregoing representations, warranties, acknowledgments and agreements.

If any of the representations, warranties, acknowledgments or agreements made by the investor are no longer accurate or have not been complied with, the investor will immediately notify the Company.

TAXATION

GENERAL

The information below, which relates only to Guernsey and UK taxation, summarises the advice received by the Board and is applicable to the Company (except insofar as express reference is made to the treatment of other persons) to persons who are resident or ordinarily resident in Guernsey or the United Kingdom for taxation purposes and who hold Placing Shares as an investment. It is based on current Guernsey and UK tax law and published practice, respectively, which law or practice is, in principle, subject to any subsequent changes therein (potentially with retrospective effect). Certain Shareholders, such as dealers in securities, collective investment schemes, insurance companies and persons acquiring their Placing Shares in connection with their employment may be taxed differently and are not considered. The tax consequences for each Shareholder of investing in the Company may depend upon the Shareholder's own tax position and upon the relevant laws of any jurisdiction to which the Shareholder is subject.

If you are in any doubt about your tax position, you should consult your professional adviser.

GUERNSEY

The Directors intend to conduct the Company's affairs such that, based on current law and practice of the relevant tax authorities, the Company will not become resident for tax purposes in any other territory other than Guernsey.

The Company

The Company has been granted tax exempt status by the Director of Income Tax in Guernsey pursuant to the Income Tax (Exempt Bodies) (Guernsey) Ordinance, 1989. The Company will need to reapply annually for exempt status, an application that currently incurs a fee of £1,200 per annum. It is expected that the Company will continue to apply for exempt status annually.

Once exempt status has been granted, the Company is not considered resident in Guernsey for Guernsey income tax purposes and will be exempt from tax in Guernsey on both bank deposit interest and any income that does not have its source in Guernsey. It is not anticipated that any income other than bank deposit interest will arise in Guernsey and therefore the Company is not expected to incur any additional liability to Guernsey tax.

Shareholders

Non-Guernsey resident Shareholders will not be subject to any income tax in Guernsey in respect of or in connection with the acquisition, holding or disposal of any shares owned by them. Such Shareholders will receive dividends without deduction of Guernsey income tax.

Any Shareholders who are resident in Guernsey will be subject to Guernsey income tax on any dividends paid to such persons but will not suffer any deduction of tax by the Company from any such dividends payable where the Company is granted tax exempt status. The Company is however required to provide the Director of Income Tax the names, addresses and gross amount of any income paid to Guernsey resident shareholders during the previous year when renewing the Company's exempt tax status each year.

At present Guernsey does not levy taxes upon capital gains, capital transfer, wealth, sales or turnover (unless the varying of investments and turning of such investments to account is a business or part of a business), nor are there any estate duties save for registration fees and an ad valorem duty for a Guernsey grant of representation where the deceased dies leaving assets in Guernsey which require presentation of such a grant. No stamp duty is chargeable in Guernsey on the issue, transfer, switching or redemption of Shares in the Company.

FATCA

The US Hiring Incentives to Restore Employment Act resulted in the introduction of legislation in the US known as the Foreign Account Tax Compliance Act (**FATCA**) which has the effect that a 30 per cent withholding tax may be imposed on payments of US source income and certain payments of proceeds from the sale of property that could give rise to US source income unless there is compliance with requirements for the Company to report on an annual basis the identity of, and certain other information about, direct and indirect US investors in the Company to the relevant

Guernsey authority for onward transmission to the US Internal Revenue Service (**IRS**). An investor that fails to provide the required information to the Company may be subject to the 30 per cent withholding tax with respect to its share of any such payments directly or indirectly attributable to US investments of the Company, and the Company might be required to terminate such investor's investment in the Company.

On 13 December 2013 an intergovernmental agreement was entered into between Guernsey and the US in respect of FATCA (the **IGA**), which agreement was enacted into Guernsey law as of 30 June 2014 by the Income Tax (Approved International Agreements) (Implementation) (United Kingdom and United States of America) Regulations, 2014. Guidance notes currently in draft form have been issued by the relevant Guernsey authority to provide practical assistance on the reporting obligations of affected businesses under the IGA.

Although the Company will attempt to satisfy any obligations imposed on it to avoid the imposition of such withholding tax, no assurance can be given that the Company will be able to satisfy these obligations. If the Company becomes subject to a withholding tax as a result of FATCA, the return of all Shareholders may be materially affected.

This summary of Guernsey taxation issues can only provide a general overview of this area and it is not a description of all the tax considerations that may be relevant to a decision to invest in the Company. The summary of certain Guernsey tax issues is based on the laws and regulations in force as of the date of this document and may be subject to any changes in Guernsey law occurring after such date. Legal advice should be taken with regard to individual circumstances. Any person who is in any doubt as to his tax position or where he is resident, or otherwise subject to taxation, in a jurisdiction other than Guernsey, should consult his professional adviser.

UNITED KINGDOM

The following statements are intended as a general guide to certain UK tax considerations relating to an investment in Shares and do not purport to be a complete analysis of all potential UK tax consequences of holding Shares. They are based on current UK legislation and current published practice of HMRC, which may change, possibly with retroactive effect. Except insofar as express reference is made to the treatment of non-UK tax residents and non-UK domiciled individuals, they apply only to Shareholders who are resident and domiciled (in the case of individuals) or resident (in the case of companies) for tax purposes in (and only in) the UK, who hold their Shares as an investment (other than under an individual savings account) and who are the absolute beneficial owners of both the Shares and any dividends paid on them. The statements are not addressed to Shareholders who hold Shares in connection with a trade, profession or vocation carried on in the UK through a branch or agency (or, in the case of a corporate Shareholder, in connection with a trade in the UK carried on through a permanent establishment or otherwise). The tax position of certain categories of Shareholders who are subject to special rules (such as persons acquiring their Shares in connection with employment, dealers in securities, insurance companies and collective investment schemes) is not considered.

Taxation of the Company

As the Company is an alternative investment fund for the purpose of the Alternative Investment Fund Managers Regulations 2013, it should not be considered to be UK resident for UK tax purposes. Accordingly, and provided that the Company does not carry on a trade in the UK through a permanent establishment situated therein for UK corporation tax purposes or through a branch or agency situated in the UK which would bring it within the charge to income tax, the Company will not be subject to UK corporation tax or income tax on income and capital gains arising to it save as noted below in relation to possible withholding tax on certain UK source income. The Directors intend that the affairs of the Company are conducted so that no such permanent establishment, branch or agency will arise insofar as this is within their control, but it cannot be guaranteed that the conditions necessary to prevent any such permanent establishment, branch or agency coming into being will at all times be satisfied.

Interest and other income received by the Company which has a UK source may be subject to withholding taxes in the UK.

Disposals of Shares

Each class of Shares will constitute a relevant interest in an "offshore fund" for the purposes of UK taxation. Under the UK's offshore fund legislation, any gain arising on the sale, redemption or other disposal of shares in an offshore

fund (which may include an in specie redemption by the Company) held by persons who are resident in the UK for tax purposes will be taxed at the time of such sale, disposal or redemption as income and not as a capital gain. This does not apply, however, where the relevant offshore fund is accepted by HMRC as a “reporting fund” throughout the period during which the relevant interests were held.

It is not currently intended that the Company will apply for reporting fund status under the offshore funds regime in respect of any Shares. Accordingly, Shareholders who are resident in the UK for taxation purposes may be liable to UK income taxation in respect of gains arising from the sale, redemption or other disposal of their Shares. Such gains may remain taxable notwithstanding any general or specific UK capital gains tax exemption or allowance available to a Shareholder and may result in certain Shareholders incurring a proportionately greater UK taxation charge. Any losses arising on the disposal of Shares by Shareholders who are resident in the UK will be eligible for capital gains loss relief. The Directors may launch one or more classes of Shares in future certified by HMRC as reporting funds for the purposes of UK taxation.

Dividends

Any dividends received by UK resident individual Shareholders (or deemed to be received in the case of any future class of Shares with reporting fund status) will generally be subject to UK income tax whether or not such distributions are reinvested.

Dividends received by a UK resident Shareholder (or deemed to be received in the case of any future class of Shares with reporting fund status) within the charge to corporation tax should be exempt from tax in respect of dividends paid by the Company, although it should be noted that this exemption is subject to certain exclusions and specific anti-avoidance rules (particularly in the case of “small companies”, as defined in section 931S of the Corporation Tax Act 2009 (“CTA 2009”)).

Other UK taxation considerations

The attention of non-corporate Shareholders who are resident in the UK is drawn to the provisions of Chapter 2 of Part 13 of the UK Income Tax Act 2007. These provisions are aimed at preventing the avoidance of income tax by individuals through transactions resulting in the transfer of assets or income to persons (including companies) resident or domiciled abroad and may render them liable for income tax in respect of undistributed income and profits of the Company. This legislation will, however, not apply if such a Shareholder can satisfy HMRC that either:

- (i) it would not be reasonable to draw the conclusion from all the circumstances of the case, that the purpose of avoiding liability to taxation was the purpose, or one of the purposes, for which the relevant transactions or any of them were effected;
- (ii) all the relevant transactions are genuine commercial transactions and it would not be reasonable to draw the conclusion, from all the circumstances of the case, that any one or more of the transactions was more than incidentally designed for the purpose of avoiding liability to taxation; or
- (iii) all the relevant transactions were genuine, arm’s length transactions and if the Shareholder were liable to tax under Chapter 2 of Part 13 in respect of such transactions such liability would constitute an unjustified and disproportionate restriction on a freedom protected by Title II or IV of Part Three of the Treaty on the Functioning of the European Union or Part II or III of the EEA Agreement.

Chapter 3 of Part 6 of the CTA 2009 provides that, if at any time in an accounting period a corporate Shareholder within the charge to UK corporation tax holds an interest in an offshore fund and there is a time in that period when that fund fails to satisfy the “non-qualifying investments test”, the interest held by such a corporate Shareholder will be treated for the accounting period as if it were rights under a creditor relationship for the purposes of the rules relating to the taxation of most corporate debt contained in the CTA 2009 (the “Corporate Debt Regime”). Shares will (as explained above) constitute interests in an offshore fund and, on the basis of the current investment policies of the Company, it is likely that the “non-qualifying investments test” will not be met. In circumstances where the test is not so satisfied (for example where the Company invests in cash, securities or debt instruments or open-ended companies that themselves do not satisfy the “non-qualifying investments test” and the market value of such investments exceeds

60 per cent. of the market value of all its investments at any time), the Shares in the relevant class will be treated for corporation tax purposes as within the Corporate Debt Regime. As a consequence, all returns on the Shares in respect of each corporate Shareholder's accounting period during which the test is not met (including gains, profits and deficits and exchange gains and losses) will be taxed or relieved as an income receipt or expense on a fair value accounting basis. Accordingly, a corporate Shareholder in the Company may, depending on its own circumstances, incur a charge to corporation tax on an unrealised increase in the value of its holding of Shares (and, likewise, obtain relief against corporation tax for an unrealised reduction in the value of its holding of Shares). The provisions relating to non-reporting funds (outlined above) would not then apply to such corporate shareholders and the effect of the provisions relating to holdings in controlled foreign companies (outlined below) would then be substantially mitigated.

Part 9A of TIOPA 2010 subjects UK resident companies to tax on the profits of companies not so resident (such as the Company) in which they have an interest. The provisions, broadly, affect UK resident companies which hold, alone or together with certain other associated persons, shares which confer a right to at least 25 per cent. of the profits of a non-resident company (a "25% Interest") where that non-resident company is controlled by persons who are resident in the UK and is subject to a lower level of taxation in its territory of residence. The legislation is not directed towards the taxation of capital gains. In addition, these provisions will not apply if the shareholder reasonably believes that it does not hold a 25% Interest in the Company throughout the relevant accounting period.

The attention of persons resident in the UK for taxation purposes is drawn to the provisions of section 13 of the Taxation of Chargeable Gains Act 1992 ("section 13"). Section 13 applies to a "participator" for UK taxation purposes (which term includes a shareholder) if at any time when any gain accrues to the Company which constitutes a chargeable gain for those purposes, at the same time, the Company is itself controlled by a sufficiently small number of persons so as to render the Company a body corporate that would, were it to have been resident in the UK for taxation purposes, be a "close" company for those purposes. The provisions of section 13 could, if applied, result in any such person who is a "participator" in the Company being treated for the purposes of UK taxation of chargeable gains as if a part of any chargeable gain accruing to the Company had accrued to that person directly, that part being equal to the proportion of the gain that corresponds on a just and reasonable basis to that person's proportionate interest in the Company as a "participator". No liability under section 13 could be incurred by such a person however, where such proportion does not exceed one quarter of the gain. In addition, exemptions may also apply where none of the acquisition, holding or disposal of the assets had a tax avoidance main purpose or where the relevant gains arise on the disposal of assets used only for the purposes of genuine, economically significant business activities carried on outside the UK.

In the case of UK resident individuals domiciled outside the UK, section 13 applies only to gains relating to UK situate assets of the Company and gains relating to non-UK situate assets if such gains are remitted to the UK.

Stamp duty and stamp duty reserve tax

No UK stamp duty or stamp duty reserve tax will be payable on an issue of Shares. UK stamp duty at the rate of 0.5% of the value of the consideration for the transfer of any Shares (rounded up where necessary to the nearest £5) may become payable on any instrument of transfer of the Shares which is executed within the UK, or which relates to any property situated, or to any matter or thing done or to be done, in the UK. Provided, as is the intention, that the Shares are not registered in any register kept in the UK by or on behalf of the Company and are not paired with shares issued by a body corporate incorporated in the UK, any agreement to transfer the Shares will not be subject to stamp duty reserve tax.

Inheritance tax

A liability to UK inheritance tax on Shares may arise in the event of the death of or on the making of certain categories of lifetime transfers by an individual Shareholder domiciled or deemed to be domiciled in the UK for inheritance tax purposes.

The Common Reporting Standard

Drawing extensively on the intergovernmental approach to implementing US FATCA, the OECD developed the Common Reporting Standard ("CRS") to address the issue of offshore tax evasion on a global basis. Aimed at maximizing efficiency and reducing cost for financial institutions, the CRS provides a common standard for due

diligence, reporting and exchange of financial account information. Pursuant to the CRS, tax authorities in participating CRS jurisdictions will obtain from reporting financial institutions, and automatically exchange with other participating tax authorities in which the Shareholders of the reporting financial institution are resident on an annual basis, financial account and personal information with respect to all reportable accounts identified by financial institutions on the basis of common due diligence and reporting procedures. The first information exchanges are expected to begin in September 2017. Guernsey has legislated to implement the CRS. As a result, the Company will be required to comply with the CRS due diligence and reporting requirements, as adopted by Guernsey. Shareholders may be required to provide additional information to the Company to enable the Company to satisfy its obligations under the CRS. Failure to provide requested information may subject a Shareholder to liability for any resulting penalties or other charges and/or mandatory termination of its interest in the Company.

If you are in any doubt as to your tax position, you should consult your professional adviser.

SHAREHOLDERS OF THE COMPANY

So far as the Company is aware, as at November 15 2017 (being the latest practicable date prior to publication of this document) CLO Holdco, Ltd. is the sole Shareholder and holds directly or indirectly 5% or more of the Company's voting rights.

Immediately following the Placing the following persons will hold directly or indirectly the following percentages of the Company's voting rights:

Name	Immediately prior to the Placing		Immediately following the Placing	
	Number of Shares	% of voting rights in respect of the issued share capital	Number of Shares	% of voting rights in respect of the issued share capital
CLO Holdco, Ltd.	143,454,001.00	100.00%	70,314,387.44	49.02%
HarbourVest Dover Street IX Investment L.P.	0.00	0.00%	50,917,791.20	35.49%
HarbourVest 2017 Global Fund L.P.	0.00	0.00%	3,478,649.09	2.42%
HarbourVest 2017 Global AIF L.P.	0.00	0.00%	6,957,226.48	4.85%
HV International VIII Secondary L.P.	0.00	0.00%	9,317,699.94	6.50%
HarbourVest Skew Base AIF L.P.	0.00	0.00%	1,034,136.77	0.72%
Highland Capital Management, L.P.	0.00	0.00%	898,708.98	0.63%
Lee Blackwell Parker, III	0.00	0.00%	94,173.23	0.07%
Quest IRA, Inc., fbo Lee B. Parker III, Acct. # 3058311	0.00	0.00%	58,798.51	0.04%
Quest IRA, Inc., fbo Hunter Covitz, Acct. # 1469811	0.00	0.00%	239,018.34	0.17%
Quest IRA, Inc., fbo Jon Poglitsch, Acct. # 1470612	0.00	0.00%	95,607.34	0.07%
Quest IRA, Inc., fbo Neil Desai, Acct. # 3059211	0.00	0.00%	47,803.67	0.03%

Save as set out above in this section of this Offering Memorandum, the Company is not aware of any person who holds, or who will immediately following the Placing hold, as shareholder directly or indirectly, 5% or more of the voting rights of the Company.

None of the Shareholders referred to in the table set forth in above has voting rights which differ from those of any other Shareholder in respect of any Shares held by them.

Save as set out in this above in this section of this Offering Memorandum, the Company is not aware of any person who immediately following the Placing directly or indirectly, jointly or severally, will own sufficient shares to exercise control over the Company.

ADDITIONAL INFORMATION ON THE COMPANY

INCORPORATION AND ADMINISTRATION

The Company is a registered closed-ended investment company incorporated in Guernsey with limited liability on 30 March 2015 under the provisions of the Companies Law, with registered number 60120. The Company continues to be registered and domiciled in Guernsey. The registered office and principal place of business of the Company is First Floor, Dorey Court, Admiral Park, St Peter Port, Guernsey GY1 6HJ, Channel Islands (telephone number 01481 715601). The statutory records of the Company are kept at this address. The Company operates and issues shares in accordance with the Companies Law and ordinances and regulations made thereunder and has no employees. The Company shall have an unlimited life.

The Company is regulated by the GFSC and is not regulated by any regulator other than the GFSC.

The Company's accounting period will end on 31 December, of each year, with the first year end on 31 December 2015.

PricewaterhouseCoopers CI LLP of Royal Bank Place, 1 Gategny Esplanade, St Peter Port, Guernsey GY1 4ND has been the only Auditors of the Company since incorporation. PricewaterhouseCoopers CI LLP is a member of the Institute of Chartered Accountants of England & Wales. The Shareholders have the power, under the Companies Law, to appoint the auditor at each AGM or remove the auditor by ordinary resolution.

The annual report and accounts will be prepared according to GAAP.

Save for its entry into the material contracts summarised in "*Material Contracts*" of this section of this Offering Memorandum and certain non-material contracts, since its incorporation the Company has not incurred borrowings, issued any debt securities, incurred any contingent liabilities or made any guarantees, nor granted any charges or mortgages.

Save as set out in "*Share Capital*" below, there have been no changes to the issued share capital of the Company since incorporation.

SHARE CAPITAL

On incorporation, the share capital of the Company consisted of one ordinary share of no par value. The Placing Shares will be issued in the form of participating ordinary shares having the rights set out in the Articles. Shareholders have no right to have their Shares redeemed.

As at the date of this Offering Memorandum, the Company's issued and fully paid up share capital is 143,454,001 shares of no par value.

None of the Shareholders has voting rights attaching to Shares that they hold which are different to the voting rights attached to any other Shares of the same class in the Company.

As at the date of this Offering Memorandum, the memorandum of incorporation provides that there is no limit on the number of shares of any class which the Company is authorised to issue.

The Directors have absolute authority under the Articles to allot the Shares to be issued pursuant to the Placing and are expected to do so shortly prior to the Placing.

No share or loan capital of the Company is under option or has been agreed, conditionally or unconditionally, to be put under option.

DIRECTORS' AND OTHER INTERESTS

As at the date of this Offering Memorandum, none of the Directors or any person connected with any of the Directors has a Shareholding or any other interest in the share capital of the Company. The Directors and their connected persons may, however, subscribe for Shares pursuant to the Placing.

The Directors are not aware of any person or persons who, following the Placing, will or could, directly or indirectly, jointly or severally, exercise control over the Company and there are no arrangements known to the Directors the operation of which may subsequently result in change of control of the Company, other than as disclosed above in “Shareholders of the Company” on page 75 of this Offering Memorandum.

There are no outstanding loans from the Company to any of the Directors or any outstanding guarantees provided by the Company in respect of any obligation of any of the Directors.

The aggregate remuneration and benefits in kind of the Directors in respect of the Company’s accounting period ending on 31 December 2017, which will be payable out of the assets of the Company, is not expected to exceed £150,000. No amount has been set aside or accrued by the Company to provide pension, retirement or other similar benefits.

No Director has a service contract with the Company, nor are any such contracts proposed. The Directors have been appointed through letters of appointment which can be terminated in accordance with the Articles and without compensation. The notice period specified in the Articles for the removal of Directors is one month. The Articles provide that the office of Director shall be terminated by, among other things: (i) written resignation; (ii) unauthorised absences from board meetings for 12 months or more; (iii) written request of the other Directors; and (iv) an ordinary resolution.

None of the Directors has, or has had, an interest in any transaction which is or was unusual in its nature or conditions or significant to the business of the Company and which has been effected by the Company since its incorporation.

In addition to their directorships of the Company, the Directors hold or have held the directorships and are or were members of the partnerships, as listed in the table below, over or within the past five years.

<i>Name</i>	<i>Current directorships/partnerships</i>	<i>Past directorships/partnerships</i>
William Scott	Aberdeen Global Infrastructure GP Limited (name changed from Lloyds Bank Global Infrastructure GP Limited 15 May 2014)	BMS Specialist Debt Fund Limited (applied for voluntary strike-off 29 September 2014)
	Aberdeen Global Infrastructure GP II Limited	Cinven Capital Management (G3) Limited
	Aberdeen Infrastructure Finance GP Limited (name changed from Uberior Infrastructure Finance GP Limited 7 August 2014)	FCA Catalyst Fund SPC (formerly FCM Catalyst Fund SPC)
	Aberdeen Infrastructure Spain Co-Invest II GP Limited	FCA Catalyst Master Fund SPC (formerly FCM Catalyst Master Fund SPC)
	Absolute Alpha Fund PCC Limited	FCA Trading SPC (formerly FCM Trading SPC)
	AcenciA Debt Strategies Limited	Financial Risk Management Diversified Fund Limited
	AHL Strategies PCC Limited	Financial Risk Management Matrio Fund Limited
	Axiom European Financial Debt Fund Limited	Financial Ventures Limited
	Cinven Capital Management (V) General Partner Limited	FRM Access II Fund SPC
	Cinven Capital Management (VI) General Partner Limited	FRM Customised Diversified Fund Limited
	Cinven Capital Management (G4) Limited	FRM Diversified II Fund SPC
	Cinven Limited	FRM Diversified II Master Fund Limited
	Class N AHL 2.5XL Trading Limited	FRM Diversified III Fund PCC Limited
	Class P Global Futures EUR Trading Limited	FRM Diversified III Master Fund Limited
	Hanseatic Asset Management LBG	FRM Equity Alpha Limited

Highland CLO Funding, Ltd.	FRM Credit Strategies Fund PCC Limited
KCSB Properties Limited	FRM Credit Strategies Master Fund PCC Limited
MAN AHL Diversified PCC Limited	FRM Global Diversified Fund
Pershing Square Holdings Limited	FRM Phoenix Fund Limited (name changed from FRM Financials Limited 10 June 2008)
Sandbourne Asset Management Limited (name changed from Sandbourne Asset Management Guernsey Limited 26 June 2015)	FRM Sigma Fund Limited
Sandbourne PCC Limited	FRM Strategic Fund PCC Limited
Savile AD4 Limited	FRM Strategic Master Fund Limited
Savile AD7 Limited	FRM Tail Hedge Limited
Savile AD8 Limited	FRM Thames Fund General Partner 1 Limited
Savile AD9 Limited	Invista European Real Estate Trust SICAF
SPL Guernsey ICC Limited (formerly Arch Guernsey ICC Limited)	Land Race Limited
The Flight and Partners Recovery Fund Limited	OldCo Limited (name changed from Axiom European Financial Debt Limited 25 September 2015)
30 St. Mary Axe Management Limited Partnership Incorporated	Principia TR-S 40 Ltd
	Property Income & Growth Fund Limited
	PSource Structured Debt Fund Limited
	PSource Structured Debt SPV II Inc
	Sandbourne Fund
	Savile AD2 Limited
	Savile ANG1 Limited
	Savile APG1 Limited
	Savile APG3 Limited
	Savile Durham 1 Limited
	Savile Exeter 1 Limited
	Savile ML1 Limited
	Secured Real Estate Finance Limited (dormant after unsatisfactory fundraising)
	TBH Guernsey Limited
	Threadneedle Asset Backed Income Limited (dormant after unsatisfactory fundraising)
	UCAP Investment Management Fund PCC Limited (name changed from Utrup Investment Management Fund PCC Limited 7 February 14)
	UCAP Investment Management Limited (name changed from Utrup Investment Management Limited 7 February 14)
	WyeTree RMBS Opportunities Fund Limited (name changed from WyeTree Opportunities

Fund Limited 29 May 2014)

<i>Name</i>	<i>Current directorships/partnerships</i>	<i>Past directorships/partnerships</i>
Heather Bestwick	Andium Homes Limited	Jersey Finance Limited
	Deutsche International Corporate Services Limited	Walkers Limited
	Equiom (Jersey) Limited	Walkers Capital Markets Limited
	Highland CLO Funding, Ltd.	Walkers Pension Services (Jersey) Limited
	Equiom (Guernsey) Limited	Walkers Property Services (Jersey) Limited
	Sole Shipping SO II GP Limited	Homelink (Jersey) Limited
	Sole Shipping SO Adviser Limited	Altamas Resources Limited
	EPE Special Opportunities plc	BSREP Marina Village (Jersey) Limited
		Altair Partners Limited
		Cyan Blue Topco Limited
		Century Limited
		Fundamental Global Corporate Secured Loan Fund Limited
		AEP 2003 Limited
		AEP 2008 Limited
		AEP 2012 Limited
		Invision Capital Partners IV Limited
		Invision IV Co-invest General Partner Limited
		Invision Capital Partners V Limited
		Triton Advisers Limited
		GCP Infrastructure OEIC Limited
		Equiom Trust Company (CI) Limited
		Rokos Capital Management (GP) Limited
		Rokos Intermediate (Jersey) Limited

As at the date of this Offering Memorandum, there are no potential conflicts of interest between any duties to the Company of any of the Directors and their private interests and/or other duties. There are no lock up provisions regarding the disposal by any of the Directors of any Shares.

Save as set out in immediately following paragraph below, as at the date of this Offering Memorandum:

- (a) none of the Directors has had any convictions in relation to fraudulent offences for at least the previous five years;
- (b) save as detailed above, none of the Directors was a director of a company, a member of an administrative, management or supervisory body or a senior manager of a company within the previous five years which has entered into any bankruptcy, receivership or liquidation proceedings;
- (c) none of the Directors has been subject to any official public incrimination and/or sanctions by statutory or regulatory authorities (including designated professional bodies) or has been

disqualified by a court from acting as a member of the administrative, management or supervisory bodies of an issuer or from acting in the management or conduct of the affairs of any issuer for at least the previous five years; and

- (d) none of the Directors are aware of any contract or arrangement subsisting in which they are materially interested and which is significant to the business of the Company which is not otherwise disclosed in this Offering Memorandum.

In respect of the declaration in the immediately preceding paragraph above, certain of the Directors have been directors of entities which have been dissolved. To the best of each Director's knowledge, no such entity, upon its dissolution, was insolvent or owed any amounts to creditors.

The Company maintains directors' and officers' liability insurance on behalf of the Directors at the expense of the Company.

No employees of the Administrator have any service contracts with the Company.

MATERIAL CONTRACTS

The following are all of the contracts, not being contracts entered into in the ordinary course of business, that have been entered into by the Company since its incorporation and are, or may be, material or that contain any provision under which the Company has any obligation or entitlement which is or may be material to it as at the date of this Offering Memorandum.

Administration Agreement

An administration agreement dated 10 August 2015 between (i) the Company and (ii) the Administrator, whereby the Administrator was appointed to act as administrator of the Company and provide related administrative, compliance and treasury services (the "**Administration Agreement**").

Under the terms of the Administration Agreement, the Administrator is entitled to an annual administration fee of up to 7 bps per annum of the Net Asset Value of the Company per annum, payable monthly in arrears, and other miscellaneous fees and expenses reimbursed, in each case, as determined in the Administration Agreement.

The Administration Agreement may be terminated by either party on not less than three months written notice (or such shorter notice as the parties may agree). The Administration Agreement may be terminated immediately by either party: (i) in the event that either party shall go into liquidation or receivership or an examiner shall be appointed to the Company (except for a voluntary liquidation for the purposes of reconstruction or amalgamation upon terms previously approved in writing by the notifying party, such approval not to be unreasonably withheld or delayed) or be unable to pay its debts as they fall due or commits any act of bankruptcy under the laws of an applicable jurisdiction; or (ii) if the other party commits any material breach of the provisions of the Administration Agreement and, if such breach is capable of remedy shall not have remedied that within 30 days after the service of written notice requiring it to be remedied; (iii) if it shall become illegal or impossible without breach of any applicable laws and for reasons reasonably outside the control of the relevant party for any party to fulfil its obligations hereunder; or (iv) if any changes to the Administration Agreement are required as a consequence of any financial services regulation which may in the future bind any of the parties thereto and which cannot be agreed between the parties. The appointment of the Administrator shall also automatically terminate forthwith if the Administrator shall become or be deemed to become resident for tax purposes in the United Kingdom or in any other place or places outside Guernsey in circumstances which cause the Company to become liable to pay any taxes which it would not otherwise be liable to pay.

The Company has given certain market standard indemnities in favour of the Administrator in respect of the Administrator's potential losses in carrying out its responsibilities under the Administration Agreement.

The Administration Agreement is governed by the laws of Guernsey.

Portfolio Management Agreement

A Portfolio Management Agreement dated November 15, 2017 between (i) the Company and (ii) the Portfolio Manager (the “**Portfolio Management Agreement**”), pursuant to which the Company appointed the Portfolio Manager to select the portfolio of investments and instruct the Custodian with respect to any acquisition, disposition or sale of investments and provide certain support and assistance (including back and middle office functions), personnel and credit and market research and analysis in connection with the investment and ongoing management of the portfolio.

The Portfolio Management Agreement may be terminated in the event of (A) the Company determining in good faith that the Company or the portfolio has become required to register as an investment company under the provisions of the Investment Company Act (where there is no available exemption), and the Company has given prior notice to the Portfolio Manager of such requirement, (B) the date on which the portfolio has been liquidated in full and the Company’s financing arrangements have been terminated or redeemed in full and (C) such other date as agreed between the Company and the Portfolio Manager.

In addition, the Portfolio Management Agreement may be terminated, and the Portfolio Manager removed for “Cause” by the Advisory Board or by the Board of Directors upon 30 business days’ prior written notice to the Portfolio Manager.

As defined in the Portfolio Management Agreement, “Cause” means any one of the following events: (a) the Portfolio Manager wilfully violates, or takes any action that it knows breaches any material provision of the Portfolio Management Agreement or the Offering Memorandum applicable to it in bad faith (not including a wilful and intentional breach that results from a good faith dispute regarding reasonable alternative courses of action or interpretation of instructions); (b) the Portfolio Manager breaches in any respect any provision of the Portfolio Management Agreement or any terms of the Offering Memorandum applicable to it (other than as covered by clause (a) and except for any such violations or breaches that have not had, or could not, either individually or in the aggregate, reasonably be expected to have, a material adverse effect on the Company) and fails to cure such breach within 30 days of the Portfolio Manager receiving notice of such breach, unless, if such breach is remediable, the Portfolio Manager has taken action that the Portfolio Manager believes in good faith will remedy such breach, and such action does remedy such breach, within sixty (60) days after the Portfolio Manager receives notice thereof; (c) the Portfolio Manager is wound up or dissolved or there is appointed over it or a substantial portion of its assets a receiver, administrator, administrative receiver, trustee or similar officer; or the Portfolio Manager (i) ceases to be able to, or admits in writing its inability to, pay its debts as they become due and payable, or makes a general assignment for the benefit of, or enters into any composition or arrangement with, its creditors generally; (ii) applies for or consents (by admission of material allegations of a petition or otherwise) to the appointment of a receiver, trustee, assignee, custodian, liquidator or sequestrator (or other similar official) of the Portfolio Manager or of any substantial part of its properties or assets, or authorizes such an application or consent, or proceedings seeking such appointment are commenced without such authorization, consent or application against the Portfolio Manager and continue undismissed for sixty (60) days; (iii) authorizes or files a voluntary petition in bankruptcy, or applies for or consents (by admission of material allegations of a petition or otherwise) to the application of any bankruptcy, reorganization, arrangement, readjustment of debt, insolvency or dissolution, or authorizes such application or consent, or proceedings to such end are instituted against the Portfolio Manager without such authorization, application or consent and are approved as properly instituted and remain undismissed for sixty (60) days or result in adjudication of bankruptcy or insolvency; or (iv) permits or suffers all or any substantial part of its properties or assets to be sequestered or attached by court order and the order remains undismissed for sixty (60) days; (d) the occurrence of an act by the Portfolio Manager that constitutes fraud or criminal activity in the performance of its obligations under the Portfolio Management Agreement (as determined pursuant to a final adjudication by a court of competent jurisdiction), or the Portfolio Manager being indicted for a criminal offense materially related to its business of providing asset management services; or (e) any Key Person of the Portfolio Manager (in the performance of his or her investment management duties) is convicted for a criminal offense materially related to the business of the Portfolio Manager providing asset management services and continues to have responsibility for the performance by the Portfolio Manager hereunder for a period of ten (10) days after such conviction.

The Portfolio Management Agreement provides that if any of the events specified in the definition of “Cause” occurs, the Portfolio Manager will give prompt written notice thereof to the Company upon the Portfolio Manager’s becoming aware of the occurrence of such event. The Advisory Board and/or the Board of Directors may waive any event

described in (a), (b), (d), or (e) above as a basis for termination of the Portfolio Management Agreement and removal of the Portfolio Manager under the terms of the Portfolio Management Agreement.

Any resignation or removal of the Portfolio Manager will only be effective on the satisfaction of certain conditions set out in the Portfolio Management Agreement.

Under the Portfolio Management Agreement, the Portfolio Manager agrees to perform its obligations thereunder, with reasonable care (a) using a degree of skill and attention no less than that which the Portfolio Manager exercises with respect to comparable assets that it manages for itself and others having similar investment objectives and restrictions, and (b) to the extent not inconsistent with the foregoing, in a manner consistent with the Portfolio Manager's customary standards, policies and procedures in performing its duties under the Portfolio Management Agreement (the "**Standard of Care**"); provided that the Portfolio Manager will not be liable for any loss or damages resulting from any failure to satisfy the Standard of Care except to the extent any act or omission of the Portfolio Manager constitutes a Portfolio Manager Breach (as defined below). The Standard of Care may change from time to time to reflect changes by the Portfolio Manager to its customary standards, policies and procedures provided that such customary standards, policies and procedures are at least as rigorous as the foregoing.

The Portfolio Manager will not be liable (whether directly or indirectly, in contract or in tort or otherwise) to the Company under the Portfolio Management Agreement for liabilities incurred by the Company as a result of or arising out of or in connection with the performance by the Portfolio Manager under the Portfolio Management Agreement, or for any losses or damages resulting from any failure to satisfy the Standard of Care except to the extent such liabilities were incurred by reason of acts or omissions constituting bad faith, fraud, wilful misconduct or due to the gross negligence (with such term given its meaning under New York law) or reckless disregard of the duties and obligations of the Portfolio Manager (a "**Portfolio Manager Breach**").

Under the Portfolio Management Agreement, the Company will be required to indemnify the Portfolio Manager and its affiliates, managers, directors, officers, secretaries, partners, agents and employees, from and against all liabilities incurred in connection with the Portfolio Management Agreement (except to the extent such liabilities are incurred as a result of any acts or omissions of the Portfolio Manager which constitute a Portfolio Manager Breach).

The Portfolio Manager is able to resign its role under the Portfolio Management Agreement upon 90 days' written notice to the Company. Whilst the resignation will not be effective until the date as of which a successor adviser has been appointed, it may be difficult to locate an alternative adviser as a successor. In addition, the Portfolio Manager may immediately resign by providing written notice to the Company upon the occurrence of certain events relating to the Company such as, amongst others, the failure of the Company to comply in any material respect with any investment policy or investment objective to which it is bound to comply, a wilful breach or knowing violation by the Company of a material provision of the Portfolio Management Agreement or the occurrence of insolvency proceedings in respect of the Company.

Under the Portfolio Management Agreement, the Portfolio Manager agrees to the provision of certain human resources as may be necessary to enable the Company to conduct any matters related to its portfolio of assets.

Under the Portfolio Management Agreement, the Company shall pay to the Portfolio Manager an amount equivalent to all reasonable third party costs and expenses incurred by the Portfolio Manager in the performance of its obligations thereunder, together with any irrecoverable VAT arising on such costs and expenses.

The Portfolio Management Agreement is governed by the laws of the State of Texas.

Predecessor and Interim Portfolio Management Agreements and Terminations

Prior to the current Portfolio Management Agreement, the Company held a Portfolio Management Agreement dated 22 December 2016 (the "**Predecessor Portfolio Management Agreement**") between (i) the Company and (ii) Acis as the predecessor portfolio manager (the "**Predecessor Portfolio Manager**"), pursuant to which the Company appointed Acis as the Predecessor Portfolio Manager to select the portfolio of investments and instruct the Custodian with respect to any acquisition, disposition or sale of investments and provide certain support and assistance (including back and middle office functions), personnel and credit and market research and analysis in connection with the investment and ongoing management of the portfolio.

The terms of the Predecessor Portfolio Management Agreement were substantially similar to the terms of the Portfolio Management Agreement.

The Predecessor Portfolio Management Agreement was governed by the laws of the State of Texas.

The Predecessor Portfolio Management Agreement was terminated pursuant to a Portfolio Management Agreement dated October 27, 2017 (the “**Interim Portfolio Management Agreement**”) between (i) the Company and (ii) the Portfolio Manager and agreed and acknowledged by the Predecessor Portfolio Manager, pursuant to which the Company appointed Highland HCF as the Portfolio Manager to select the portfolio of investments and instruct the Custodian with respect to any acquisition, disposition or sale of investments and provide certain support and assistance (including back and middle office functions), personnel and credit and market research and analysis in connection with the investment and ongoing management of the portfolio. Pursuant to the Interim Portfolio Management Agreement, (x) the Predecessor Portfolio Management Agreement was cancelled and terminated in its entirety, (y) each party thereto released the other party from all claims, suits or causes of action arising out of or relating to the Predecessor Portfolio Management Agreement and (z) each party ratified prior transactions effected in accordance with the Predecessor Portfolio Management Agreement.

The terms of the Interim Portfolio Management Agreement were substantially similar to the terms of the Portfolio Management Agreement.

The Interim Portfolio Management Agreement was terminated pursuant to the Portfolio Management Agreement. Pursuant to the Interim Portfolio Management Agreement, (x) the Predecessor Portfolio Management Agreement was cancelled and terminated in its entirety and (y) each party ratified prior transactions effected in accordance with the Interim Portfolio Management Agreement.

The Interim Portfolio Management Agreement was governed by the laws of the State of Texas.

Subscription and Transfer Agreement

A Subscription and Transfer Agreement dated November 15, 2017 (the “**Subscription and Transfer Agreement**”) entered into by and among the Company, the Portfolio Manager, CLO Holdco, Ltd., HarbourVest Dover Street IX Investment L.P., HarbourVest 2017 Global AIF L.P., HarbourVest 2017 Global Fund L.P., HV International VIII Secondary L.P., HarbourVest Skew Base AIF L.P., Highland Capital Management, L.P., Lee Blackwell Parker, III, Quest IRA, Inc., fbo Lee B. Parker, III, Acct., Quest IRA, Inc., fbo Hunter Covitz, Acct., Quest IRA, Inc., fbo Jon Poglitsch, Acct. and Quest IRA, Inc., fbo Neil Desai, Acct., pursuant to which CLO Holdco, Ltd., as the existing Shareholder, agrees to transfer a portion of its shares to the new Shareholders listed above.

Under the Subscription and Transfer Agreement, CLO Holdco, Ltd. agreed to provide an indemnity to the new Shareholders relating to certain liabilities arising prior to the date of the transfer of Shares.

Further, each of the Shareholders subscribed to purchase Shares on a pro rata basis pursuant to commitments under the Subscription and Transfer Agreement, to be called for settlement by the Portfolio Manager from time to time during the Investment Period and at such time issued (including in the form of fractional shares).

The Subscription and Transfer Agreement may be terminated by mutual agreement of the parties.

The Subscription and Transfer Agreement is governed by the laws of Guernsey.

Members' Agreement

A Shareholders' Agreement relating to the Company dated November 15, 2017 (the “**Shareholder's Agreement**”), among CLO HoldCo, Ltd., HarbourVest Dover Street IX Investment L.P., HarbourVest 2017 Global AIF L.P., HarbourVest 2017 Global Fund L.P., HV International VIII Secondary L.P., HarbourVest Skew Base AIF L.P., Highland Capital Management, L.P., Lee Blackwell Parker, III, Quest IRA, Inc., fbo Lee B. Parker, III, Acct., Quest IRA, Inc., fbo Hunter Covitz, Acct., Quest IRA, Inc., fbo Jon Poglitsch, Acct., Quest IRA, Inc., fbo Neil Desai, Acct., the Company and the Portfolio Manager, which contemplates certain agreements of commercial terms among the Shareholders with respect to the formation of an Advisory Board, voting matters and the Shareholders' commitments to settle subscriptions for the Placing Shares.

Pursuant to the Shareholders' Agreement, the Shareholders set forth their rights in respect of the Company with respect to their voting rights, the composition and function of the Advisory Board, provisions with respect to Shareholders defaulting on commitments to settle Shares, indemnification and restrictions on the transfers or disposals of Shares.

The Shareholders' Agreement will be terminated when one party holds all the Shares, when a resolution is passed by the Shareholders or creditors of the Company or with the written consent of the parties.

The Shareholders' Agreement is governed by the laws of Guernsey.

NexBank Credit Facility

The Company currently has the NexBank Credit Facility with a principal amount of \$22,158,337, as of September 30, 2017. The NexBank Credit Facility is governed by an Amended and Restated Loan Agreement dated as of 17 January 2017 that provides for quarterly payments of principal and interest at 5.00% *per annum* and a maturity on November 23, 2021.

Warehouse Loan Facilities

One or more multi-currency Warehouse Loan Facilities may be entered into from time to time between (i) the Company and (ii) a warehouse provider as described in "*Summary-Borrowing-Warehouse Loan Facilities*".

Forward Purchase Agreements

Forward Purchase Agreements may be entered into from time to time, between (i) the Company and (ii) a CLO (each, a "**Forward Purchase Agreement**"), pursuant to which the Company may from time to time enter into sale and purchase contracts with a CLO with respect to the assets of the Company ("**Forward Sales**"). Such Forward Sales are with a view to effectively managing its access to wholesale funding and exposure to undesirable market price volatilities of its portfolio. Such Forward Purchase Agreements may be entered into at the same time or shortly after the origination or acquisition of the relevant asset by the Company, at a later date, or not at all. Where a loan becomes subject to a Forward Purchase Agreement, the Company will (subject to the conditions set out below) neither receive the gain nor bear the loss that occurs between the date when the loan is added to the Forward Purchase Agreement and the date when the transfer occurs.

Each Forward Sale will be conditional upon:

- the occurrence of the closing date of the relevant CLO; and
- the assets that are the subject of such Forward Sale satisfying a set of eligibility criteria on the closing date of the relevant CLO as agreed between the Company and the relevant CLO.

The Forward Purchase Agreements will contain standard limited recourse and non-petition provisions with respect to the Company and with respect to the relevant CLO.

The governing law of the Forward Purchase Agreements will be English or New York law.

Custody Agreement

A custody agreement dated 10 August 2015 between (i) the Company and (ii) the Custodian (the "**Custody Agreement**"), whereby the Custodian was appointed to act as custodian of the Company's investments, cash and other assets.

The Custodian provides custody services in respect of such of the property of the Company which is delivered to and accepted by the Custodian as and when such custody services may be required. Securities are held by the Custodian in one or more accounts registered in the name of the Company or of the Custodian, its delegate or a nominee. The securities are separately designated in the books of the Custodian as belonging to the Company.

Under the terms of the Custody Agreement, the Custodian is entitled to receive transaction charges and sub-custodian charges will be recovered by the Custodian from the Company as they are incurred by the relevant sub-custodian. All such charges shall be charged at normal commercial rates.

The Custody Agreement shall continue for an initial period of six months and thereafter may be terminated by either of the parties hereto on giving ninety (90) days' prior written notice to the other party hereto, provided that the appointment of the Custodian shall not terminate before the appointment of a replacement Custodian provided always if a replacement custodian is not appointed within six months from the date of the relevant termination notice, the Custody Agreement shall terminate in any event. It may be terminated without notice in certain specified circumstances including the insolvency of either party.

The Custodian has a market standard indemnity from the Company in relation to liabilities incurred other than as a result of its negligence, fraud, bad faith, wilful default or recklessness in carrying out its responsibilities under the Custody Agreement.

The Custody Agreement is governed by the laws of Ireland.

MEMORANDUM AND ARTICLES

Memorandum of Incorporation

The Memorandum of Incorporation provides that the Company's objects are unrestricted and it shall therefore have the full power and authority to carry out any object not prohibited by the Companies Law, or any other law of Guernsey.

Articles of Incorporation

The Articles of Incorporation of the Company contain provisions, *inter alia*, to the following effect.

Share Capital

The Company may issue an unlimited number of Shares of no par value each, including Unclassified Shares which may be designated and issued as Ordinary Shares or otherwise as the Directors may from time to time determine.

Ordinary Shares

The rights attaching to the Ordinary Shares shall be as follows:

- (a) As to income – subject to the rights of any Ordinary Shares which may be issued with special rights or privileges, the Ordinary Shares of each class carry the right to receive all income of the Company attributable to the Ordinary Shares, and to participate in any distribution of such income by the Company, pro rata to the relative Net Asset Values of each of the classes of Ordinary Shares and, within each such class, income shall be divided *pari passu* amongst the holders of Ordinary Shares of that class in proportion to the number of Ordinary Shares of such class held by them.
- (b) As to capital – on a winding up of the Company or other return of capital (other than by way of a repurchase or redemption of Ordinary Shares in accordance with the provision of the Articles and the Companies Law), the surplus assets of the Company attributable to the Ordinary Shares remaining after payment of all creditors shall, subject to the rights of any Ordinary Shares that may be issued with special rights or privileges, be divided amongst the holders of Ordinary Shares of each class pro rata to the relative Net Asset Values of each of the classes of the Ordinary Shares and, within each such class, such assets shall be divided *pari passu* amongst the holders of Ordinary Shares of that class in proportion to the number of Ordinary Shares of that class held by them.
- (c) As to voting – the holders of the Ordinary Shares shall be entitled to receive notice of and to attend, speak and vote at general meetings of the Company.

General

Without prejudice to any special rights previously conferred on the holders of any existing Shares or class of Shares, any Share (or option, warrant or other right in respect of a Share) in the Company may be issued with such preferred, deferred or other special rights or restrictions, whether as to dividend, voting, return of capital or otherwise, as the Board may determine.

Offers to Shareholders to be on a pre-emptive basis

- (a) The Company shall not allot equity securities to a person on any terms unless:
 - (i) it has made an offer to each person who holds equity securities of the same class in the Company to allot to him on the same or more favourable terms a proportion of those securities that is as nearly as practicable equal to the proportion in number held by him of the share capital of the Company; and
 - (ii) the period during which any such offer may be accepted has expired or the Company has received notice of the acceptance or refusal of every offer so made.
- (b) Securities that the Company has offered to allot to a holder of equity securities in accordance with the preceding may be allotted to him, or anyone in whose favour he has renounced his right to their allotment, without contravening the restriction referred to in above.
- (c) Shares held by the Company as treasury shares shall be disregarded for the purposes of the restriction referred to in the second preceding paragraph, so that the Company is not treated as a person who holds equity shares; and the treasury shares are not treated as forming part of the equity share capital of the Company.
- (d) Any offer required to be made by the Company pursuant to the restriction referred to above should be made by a notice (given in accordance with “—*Notices*” below) and such offer must state a period during which such offer may be accepted and such offer shall not be withdrawn before the end of that period. Such period must be a period of at least 21 days beginning on the date on which such offer is deemed to be delivered or received (as the case may be), pursuant to “—*Notices*” below.
- (e) The restriction referred to above shall not apply in relation to the allotment of bonus shares, nor to a particular allotment of equity securities if these are, or are to be, wholly or partly paid otherwise than in cash.
- (f) The Company may by special resolution resolve that the restriction referred to above shall be excluded or that the restriction referred to in above shall apply with such modifications as may be specified in the resolution:
 - (i) generally in relation to the allotment by the Company of equity securities;
 - (ii) in relation to allotments of a particular description; or
 - (iii) in relation to a specified allotment of equity securities;and any such resolution must: (A) state the maximum number of equity securities in respect of which the restriction referred to above is excluded or modified; and (B) specify the date on which such exclusion or modifications will expire, which must be not more than five years from the date on which the resolution is passed.
- (g) Any resolution passed pursuant to the provisions referred to in the preceding paragraph may:
 - (i) be renewed or further renewed by special resolution of the Company for a further period not exceeding five years; and

- (ii) be revoked or varied at any time by special resolution of the Company.
- (h) Notwithstanding that any such resolution referred to in the two preceding paragraphs has expired, the Directors may allot equity securities in pursuance of an offer or agreement previously made by the Company if the resolution enabled the Company to make an offer or agreement that would or might require equity securities to be allotted after it expired.
- (i) In relation to an offer to allot securities, a reference (however expressed) to the holder of shares of any description is to whoever was the holder of shares of that description at the close of business on a date to be specified in the offer and the specified date must fall within the period of 28 days immediately before the date of the offer.

Issue of Shares

Subject to “—*Offers to Shareholders to be on a pre-emptive basis*”, the unissued Shares shall be at the disposal of the Board, which is authorised to allot or grant options, warrants or other rights over or otherwise dispose of them to such persons on such terms and conditions and at such times as the Board determines but so that no Share shall be issued at a discount except in accordance with the Companies Law and so that the amount payable on application on each Share shall be fixed by the Board.

Variation of class rights

If at any time the share capital is divided into different classes of Shares, the rights attached to any class (unless otherwise provided by the terms of issue) may, whether or not the Company is being wound up, be varied with the consent in writing of the holders of three-fourths of the issued Shares of that class or with the sanction of a special resolution of the holders of the Shares of that class.

Winding up

The term of the Placing will commence on the date of the Placing and will end (and the Company thereafter will be wound up and dissolved) at the end of the Term, subject to extension as described in “*Summary-Term*”.

If the Company is wound up whether voluntarily or otherwise the liquidator may with the sanction of a special resolution divide among the Shareholders in specie any part of the assets of the Company and may with the like sanction vest any part of the assets of the Company in trustees upon such trusts for the benefit of the Shareholders as the liquidator with the like sanction shall think fit.

If any of the securities or other assets to be divided as aforesaid involve a liability to calls or otherwise any person entitled under such division to any of the said assets may within fourteen (14) clear days after the passing of the special resolution, by notice in writing, direct the liquidator to sell his proportion and pay him the net proceeds and the liquidator shall, if practicable, act accordingly.

Disclosure of Third Party Interests in Shares

The Directors shall have power, if required for any regulatory purposes, by notice in writing to require any Shareholder to disclose to the Company the identity of any person (other than the Shareholder) who has an interest in the Shares held by the Shareholder and the nature of such interest. Any such notice shall require any information in response to such notice to be given in writing within the prescribed period which is 28 days after service of the notice or 14 days if the Shares concerned represent 0.25 per cent or more in value of the issued Shares of the relevant class or such other reasonable period as the Directors may determine. If any Shareholder has been duly served with such a notice and is in default for the prescribed period in supplying to the Company the information required by such notice, the Directors may serve a direction notice upon such Shareholder. The direction notice may direct that in respect of the Shares in respect of which the default has occurred (the “default Shares”) and any other Shares held by the Shareholder, the Shareholder shall not be entitled to vote (either personally or by representative or by proxy) in general meetings or class meetings. Where the default Shares represent at least 0.25 per cent of the class of Shares concerned, the direction notice may additionally direct that dividends on such shares will be retained by the Company (without interest) and

that no transfer of the Shares (other than a transfer approved under the Articles) shall be registered until the default is rectified.

Dividends

Subject to compliance with Section 304 of the Companies Law and the Distribution Priority, the Board may at any time declare and pay such dividends as appear to be justified by the position of the Company. The Board may also declare and pay any fixed dividend which is payable on any Shares half-yearly or otherwise on fixed dates whenever the position, in the opinion of the Board, so justifies. Dividend payments may be suspended by the Directors in their absolute discretion, including, without limitation, in the event of adverse, or perceived adverse, market conditions.

The method of payment of dividends shall be at the discretion of the Board and the Portfolio Manager.

No dividend shall be paid in excess of the amounts permitted by the Companies Law or approved by the Board.

Unless and to the extent that the rights attached to any Shares or the terms of issue thereof otherwise provide, all dividends shall be declared and paid pro rata according to the number of Shares held by each Shareholder. For the avoidance of doubt, where there is more than one class of Shares in issue, dividends declared in respect of any class of Share shall be declared and paid pro rata according to the number of Shares of the relevant class held by each Shareholder.

With the sanction of the Company in general meeting by way of a special resolution, any dividend may be paid wholly or in part by the distribution of specific assets and, in particular, of paid-up Shares of the Company. Where any difficulty arises in regard to such distribution, the Board may settle the same as it thinks expedient and in particular may issue fractional Shares and fix the value for distribution of such specific assets and may determine that cash payments shall be made to any Shareholders upon the basis of the value so fixed in order to adjust the rights of Shareholders and may vest any such specific assets in trustees for the Shareholders entitled as may seem expedient to the Board.

Any dividend interest or other monies payable in cash in respect of Shares may be paid by cheque or warrant sent through the post to the registered address of the holder or, in the case of joint holders, to the registered address of that one of the joint holders who is first named on the register. Any one of two or more joint holders may give effectual receipts for any dividends, interest or other monies payable in respect of their joint holdings. In addition, any such dividend or other sum may be paid by any bank or other funds transfer system or such other means and to or through such person as the holder or joint holders (as the case may be) may in writing direct, and the Company shall have no responsibility for any sums lost or delayed in the course of any such transfer or where it has acted on any such directions. Any one of two or more joint holders may give effectual receipts for any dividends, interest, bonuses or other monies payable in respect of their joint holdings.

No dividend or other monies payable on or in respect of a Share shall bear interest against the Company.

All unclaimed dividends may be invested or otherwise made use of by the Board for the benefit of the Company until claimed and the Company shall not be constituted a trustee in respect thereof. All dividends unclaimed for a period of six years after having been declared shall be forfeited and shall revert to the Company.

Transfer of Shares

No Shareholder shall sell, pledge, charge, mortgage, assign, assign by way of security, transfer, convey, exchange or otherwise dispose of its Shares or its commitment to settle purchases of Shares under the Subscription and Transfer Agreement (each a “**Transfer**”, other than to an Affiliate of an initial Shareholder party hereto, without the prior written consent of the Portfolio Manager, which consent shall be in the sole discretion of the Portfolio Manager; provided that no such Transfer shall be made unless in the opinion of counsel reasonably satisfactory to the Portfolio Manager (who may be counsel for the Company, and which requirement for an opinion may be waived, in whole or in part, in the sole discretion of the Portfolio Manager) that:

- (a) such Transfer would not require registration under the Securities Act or any state securities or “Blue Sky” laws or other laws applicable to the Shares to be assigned or transferred and is conducted in conformance with the restrictions set forth in this Offering Memorandum;
- (b) such Transfer would not be reasonably likely to cause the Company to be subject to tax in any jurisdiction other than of its incorporation on a net income basis, not be reasonably likely to cause the Company to become subject to registration as an investment company under the U.S. Investment Company Act;
- (c) such Transfer would not cause the Company to be considered to be an entity whose underlying assets are considered to include “plan assets” by reason of investment by an “employee benefit plan” or “plan” in such entity pursuant to the U.S. Plan Assets Regulations; and
- (d) such sale, assignment, disposition or transfer would not to cause all or any portion of the assets of the Company to constitute “plan assets” under ERISA or the U.S. Tax Code.

Prior to making any Transfer of Shares (other than Transfers to Affiliates of an initial Shareholder or, in the case of CLO Holdco or a Highland Principal (as defined in the Members' Agreement), to Highland, its Affiliates or another Highland Principal) a Shareholder must first offer to the other Shareholders a right to purchase the Shares, on a pro rata basis with respect to their current Shares, at the same price (which must be cash) as such Shares are proposed to be purchased by the prospective third party purchaser pursuant to an irrevocable offer letter. The other Shareholders will have 30 days following receipt of the letter to determine whether to purchase their entire pro rata portion of the Shares proposed to be Transferred. If the other Shareholders do not accept the offer, the Shareholder may (subject to complying with the other Transfer restrictions in the Articles) Transfer the applicable Shares that such Shareholders have not elected to purchase to a third party at a price equal to or greater than the price described in the offer letter, provided that if the Shareholder has not (a) entered into a definitive agreement to effect such sale within 90 days after the expiration of the period that the other Shareholders have to accept the offer in the offer letter or (b) consummated the sale within 120 day after the entry into the definitive agreement to consummate the sale, it must comply with these right of first refusal procedures again. Any Shareholder (other than the Shareholder proposing to Transfer its Shares) may assign its right to purchase its pro rata portion of the Shares to any other Shareholder (subject to complying with the other Transfer restrictions in the Articles), any initial Shareholder (other than the Shareholder proposing to Transfer its Shares) may assign its right to purchase its pro rata portion of the Shares to an Affiliate (subject to complying with the other Transfer restrictions in the Articles), and CLO Holdco or the Highland Principals (unless such Shareholder is the Shareholder proposing the Transfer its shares) may assign its right to purchase its pro rata portion of the Shares to Highland, an Affiliate of Highland or other Highland Principals (subject to complying with the other Transfer restrictions in the Articles).

Subject to the Articles and such of the restrictions of the Articles as may be applicable, any Shareholder may transfer all or any of his certificated Shares by an instrument of transfer in any usual or common form or in any other form which the Board may approve. The instrument of transfer of a certificated Share shall be signed by or on behalf of the transferor and, unless the Share is fully paid, by or on behalf of the transferee. An instrument of transfer of a certificated Share need not be under seal.

The Board may, in its absolute discretion and without giving a reason, decline to transfer, convert or register any transfer of any Share in certificated form which is not fully paid or on which the Company has a lien. The Directors may also refuse to register a transfer of Shares unless it is in respect of only one class of Shares, it is in favour of a single transferee or not more than four joint transferees; and in the case of a Share in certificated form, having been delivered for registration to the Office or such other place as the Board may decide, it is accompanied by the certificate(s) for the Shares to which it relates and such other evidence as the Board may reasonably require to prove the right of the transferor to make the transfer.

The Board may, in its absolute discretion, decline to register a transfer of any Shares to any person whose ownership may result in a person holding Shares in violation of the transfer restrictions published by the Company, from time to time.

The Directors may, in their absolute discretion, refuse to register a transfer of any Shares to a person that they have reason to believe is (i) an “employee benefit plan” (within the meaning of Section 3(3) of ERISA) that is subject to Part 4 of Title 1 of ERISA, (ii) a plan, individual retirement account or other arrangement that is subject to Section

4975 of the U.S. Internal Revenue Code of 1986, as amended (the “**U.S. Tax Code**”) or any other state, local laws or regulations that would have the same effect as regulations promulgated under ERISA by the U.S. Department of Labor and codified at 29 C.F.R. Section 2510.3-101 to cause the underlying assets of the Company to be treated as assets of that investing entity by virtue of its investment (or any beneficial interest) in the Company and thereby subject the Company and the Portfolio Manager (or other persons responsible for the investment and operation of the Company’s assets) to laws or regulations that are similar to the fiduciary responsibility or prohibited transaction provisions contained in Title I of ERISA or Section 4975 of the U.S. Tax Code, (iii) an entity whose underlying assets are considered to include “plan assets” of any such plan, account or arrangement (each of (i), (ii) and (iii) in this paragraph a “**Plan**”) or (iv) any person in circumstances where the holding of Shares by such person would (a) give rise to an obligation on the Company to register as an “investment company” under the Investment Company Act (as defined in the Articles) (including because the holder of the Shares is not a “qualified purchaser” as defined in the Investment Company Act), (b) preclude the Company from relying on the exception to the definition of “investment company” contained in Section 3(c)(7) of the Investment Company Act, (c) give rise to an obligation on the Company to register its Shares under the Exchange Act, the Securities Act or any similar legislation (each as defined in the Articles), (d) result in the Company not being considered a “Foreign Private Issuer” as that term is defined by Rule 3b-4(c) promulgated under the Exchange Act, (e) give rise to an obligation on the Portfolio Manager to register as a commodity pool operator or commodity trading advisor under the U.S. Commodity Exchange Act of 1974, as amended, (f) cause the Company to be a “controlled foreign corporation” for the purposes of the U.S. Tax Code, or cause the Company to suffer any pecuniary disadvantage (including any excise tax, penalties or liabilities under ERISA or the U.S. Tax Code), or (g) give rise to the Company or the Portfolio Manager becoming subject to any U.S. law or regulation determined to be detrimental to it (each such person in this paragraph a “**Prohibited U.S. Person**”). Each person acquiring Shares shall by virtue of such acquisition be deemed to have represented to the Company that they are not a Prohibited U.S. Person.

If the Board refuses to register the transfer of a Share it shall, within two months after the date on which the transfer was lodged with the Company, send notice of the refusal to the transferee.

The registration of transfers may be suspended at such times and for such periods (not exceeding 30 days in the aggregate in any one calendar year) as the Board may decide on giving notice in *La Gazette Officielle* and either generally or in respect of a particular class of Share.

Compulsory redemptions of Shares by the Company

The Company may redeem all or any of the Shares at any time subject to and in accordance with the provisions of the Members' Agreement and the Articles.

A Director is authorised to do all such acts and things as shall be necessary or expedient and to execute any documents deemed necessary or desirable in each case to complete any redemption of Shares subject to and in accordance with the Members' Agreement and the Articles.

The redemption of Shares under the Articles shall be deemed to be effective from the close of business on the relevant redemption date at which time any Shares which are so redeemed shall forthwith be cancelled and the name of the relevant Shareholder(s) be removed from the Register. Upon the redemption of a Share being effected pursuant to the Members' Agreement and the Articles, a Shareholder shall cease to be entitled to any rights in respect thereof save for payment of the redemption proceeds.

Purchase of Shares

The Company may, at the discretion of the Board, purchase any of its own Shares, whether or not they are redeemable, and may pay the purchase price in respect of such purchase to the fullest extent permitted by the Companies Law.

Notices

A notice or other communication may be given by the Company to any Shareholder by any means as set out in Section 523 of the Companies Law.

Any notice or other document, if served by post (including registered post, recorded delivery service or ordinary letter post), shall be deemed to have been served 48 hours after the time when the letter containing the same is posted and in proving such service it shall be sufficient to prove that the letter containing the notice or document was properly posted.

Any notice or other document that may be sent by the Company by courier will be deemed to be received 24 hours after the time at which it was despatched.

A notice may be given by the Company to the joint holders of a Share by giving the notice to the joint holder first named in the register in respect of the Share.

Any notice or other communication sent to the address of any Shareholder shall, notwithstanding the death, disability or insolvency of such Shareholder and whether the Company has notice thereof, be deemed to have been duly served in respect of any Share registered in the name of such Shareholder as sole or joint holder and such service shall, for all purposes, be deemed a sufficient service of such notice or document on all persons interested (whether jointly with or as claiming through or under him) in any such Share.

All Shareholders shall be deemed to have agreed to accept communication from the Company by electronic means in accordance with sections 524 and 526 and schedule 3 of the Companies Law unless a Shareholder notifies the Company otherwise. Such notification must be in writing and signed by the Shareholder and delivered to the Company's registered office or such other place as the Board directs. A Shareholder shall be entitled to require the Company to send him a version of a document or information in hard copy form.

Every person who becomes entitled to a Share shall be bound by any notice in respect of that Share which, before his name is entered in the register of members, has been duly given to a person from which he derives his title.

General meetings

General meetings shall be held once at least in each calendar year in accordance with Section 199 of the Companies Law but so that not more than fifteen (15) months may elapse between one annual general meeting and the next. At each such annual general meeting shall be laid copies of the Company's most recent accounts, Directors' report and, if applicable, the auditor's report in accordance with Section 252 of the Companies Law. The requirement for an annual general meeting may be waived by the shareholders in accordance with Section 201 of the Companies Law. Other meetings of the Company shall be called extraordinary general meetings.

All general meetings shall be held in Guernsey.

A shareholder participating by video link or telephone conference call or other electronic or telephonic means of communication in a meeting at which a quorum is present shall be treated as having attended that meeting, provided that the shareholders present at the meeting can hear and speak to the participating shareholder.

A video link or telephone conference call or other electronic or telephonic means of communication in which a quorum of shareholders participates and all participants can hear and speak to each other shall be a valid meeting which shall be deemed to take place where the Chairman is present unless the shareholders resolve otherwise.

Any general meeting convened by the Board, unless its time shall have been fixed by the Company in a general meeting or unless convened in pursuance of a requisition, may be postponed by the Board by notice in writing and the meeting shall, subject to any further postponement or adjournment, be held at the postponed date for the purpose of transacting the business covered by the original notice.

The Board may, whenever it thinks fit, and shall on the requisition of shareholders who hold more than ten per cent (10%) of such of the capital of the Company as carries the right to vote at general meetings (excluding any capital held as treasury shares) in accordance with Sections 203 and 204 of the Companies Law, proceed to convene a general meeting.

Notice of general meetings

A general meeting of the Company (other than an adjourned meeting) must be called by notice of at least 14 clear days.

A general meeting may be called by shorter notice than otherwise required if all the Shareholders entitled to attend and vote so agree.

Notices and other documents may be sent in electronic form or published on a website in accordance with Section 208 of the Companies Law.

Notice of a general meeting of the Company must be sent to every Shareholder (being only persons registered as a Shareholder), every Director and every alternate Director registered as such.

Notice of a general meeting of the Company must state the time and date of the meeting, state the place of the meeting, specify any special business to be put to the meeting (as defined in the Articles), contain the information required under Section 178(6)(a) of the Companies Law in respect of a resolution which is to be proposed as a special resolution at the meeting, contain the information required under Section 179(6)(a) of the Companies Law in respect of a resolution which is to be proposed as a waiver resolution at the meeting, and contain the information required under Section 180(3)(a) of the Companies Law in respect of a resolution which is to be proposed as a unanimous resolution at the meeting.

Notice of a general meeting must state the general nature of the business to be dealt with at the meeting.

The accidental omission to give notice of any meeting to or the non-receipt of such notice by any Shareholder shall not invalidate any resolution or any proposed resolution otherwise duly approved.

Conflicts of interest

A Director must, immediately after becoming aware of the fact that he is interested in a transaction or proposed transaction with the Company, disclose to the Board in accordance with section 162 of the Companies Law the nature and extent of that interest.

The obligation referred to above does not apply if:

- (a) the transaction or proposed transaction is between the Director and the Company; and
- (b) the transaction or proposed transaction is or is to be entered into in the ordinary course of the Company's business and on usual terms and conditions.

A general disclosure to the Board to the effect that a Director has an interest (as director, officer, employee, member or otherwise) in a party and is to be regarded as interested in any transaction which may after the date of the disclosure be entered into with that party is sufficient disclosure of interest in relation to that transaction.

Nothing referred to above in this section applies in relation to:

- (a) remuneration or other benefit given to a Director;
- (b) insurance purchased or maintained for a Director in accordance with Section 158 of the Companies Law; or
- (c) a qualifying third party indemnification provision provided for a Director in accordance with Section 159 of the Companies Law.

Subject to the paragraph below, a Director is interested in a transaction to which the Company is a party if such Director:

- (a) is a party to, or may derive a material benefit from, the transaction;

- (b) has a material financial interest in another party to the transaction;
- (c) is a director, officer, employee or member of another party (other than a party which is an associated company) who may derive a material financial benefit from the transaction;
- (d) is the parent, child or spouse of another party who may derive a material financial benefit from the transaction; or
- (e) is otherwise directly or indirectly materially interested in the transaction.

A Director is not interested in a transaction to which the Company is a party if the transaction comprises only the giving by the Company of security to a third party which has no connection with the Director, at the request of the third party, in respect of a debt or obligation of the Company for which the Director or another person has personally assumed responsibility in whole or in part under a guarantee, indemnity or security.

Save as provided in the Articles, a Director shall not vote in respect of any contract or arrangement or any other proposal whatsoever in which he has any material interest otherwise than by virtue of his interest in Shares or debentures or other securities of or otherwise through the Company. A Director may be counted in the quorum at a meeting in relation to any resolution on which he is debarred from voting.

A Director shall (in the absence of some other material interest than is indicated below) be entitled to vote (and be counted in the quorum) in respect of any resolution concerning any of the following matters, namely:

- (a) the giving of any guarantee, security or indemnity to him in respect of money lent or obligations incurred by him at the request of or for the benefit of the Company or any of its subsidiaries;
- (b) the giving of any guarantee, security or indemnity to a third party in respect of a debt or obligation of the Company or any of its subsidiaries for which he himself has assumed responsibility in whole or in part under a guarantee or indemnity or by the giving of security;
- (c) any proposal concerning an offer of Shares or debentures or other securities of or by the Company or any of its subsidiaries for subscription or purchase in which offer he is or is to be interested as a participant in the underwriting or sub-underwriting thereof; or
- (d) any proposal concerning any other company in which he is interested, directly or indirectly and whether as an officer or shareholder or otherwise howsoever, provided that he is not the holder of or beneficially interested in one per cent or more of the issued shares of such company (or of any third company through which his interest is derived) or of the voting rights available to shareholders of the relevant company (any such interest being deemed for these purposes to be a material interest in all circumstances).

Where proposals are under consideration concerning the appointment (including fixing or varying the terms of appointment) of two or more Directors to offices or employment with the Company or any company in which the Company is interested, the Directors may be counted in the quorum for the consideration of such proposals and such proposals may be divided and considered in relation to each Director separately and in such case each of the Directors concerned (if not debarred from voting under the provisions referred to above) shall be entitled to vote (and be counted in the quorum) in respect of each resolution except that concerning his own appointment.

If any question shall arise at any meeting as to the materiality of a Director's interest or as to the entitlement of any Director to vote and such question is not resolved by his voluntarily agreeing to abstain from voting, such question shall be referred to the chairman of the meeting and his ruling in relation to any other Director shall be final and conclusive except in a case where the nature or extent of the interests of the Director concerned have not been fairly disclosed.

The Company may by ordinary resolution suspend or relax the provisions referred to above to any extent or ratify any transaction not duly authorised by reason of a contravention of any of the paragraphs above.

Subject to the provisions referred to above the Directors may exercise the voting power conferred by the shares in any other company held or owned by the Company or exercisable by them as directors of such other company in such manner in all respects as they think fit (including the exercise thereof in favour of any resolution appointing themselves or any of them director, managing director, managers or other officer of such company or voting or providing for the payment or remuneration to the directors, managing director, manager or other officer of such company).

A Director may hold any other office or place of profit under the Company (other than the office of Auditor) in conjunction with his office of Director on such terms as to tenure of office or otherwise as the Directors may determine.

Subject to due disclosure in accordance with the provisions referred to in this section, no Director or intending Director shall be disqualified by his office from contracting with the Company as vendor, purchaser or otherwise, nor shall any such contract or arrangement entered into by or on behalf of the Company in which any Director is in any way interested render the Director liable to account to the Company for any profit realised by any such contract or arrangement by reason of such Director holding that office or of the fiduciary relationship thereby established.

Any Director may act by himself or his firm in a professional capacity for the Company and he or his firm shall be entitled to remuneration for professional services as if he were not a Director, provided that nothing herein contained shall authorise a Director or his firm to act as Auditor to the Company.

Any Director may continue to be or become a director, managing director, manager or other officer or member of any company in which the Company may be interested and (unless otherwise agreed) no such Director shall be accountable for any remuneration or other benefits received by him as a director, managing director, manager or other officer or member of any such other company.

Remuneration and appointment of Directors

The ordinary remuneration of the Directors who do not hold executive office for their services (excluding amounts payable under any other sub-paragraph of the Articles) shall not exceed in aggregate £150,000 per annum or such higher amount as the Company may from time to time by ordinary resolution determine. Such remuneration shall be deemed to accrue from day to day. The Directors shall also be paid all reasonable out-of-pocket travelling, hotel and other expenses properly incurred by them in attending and returning from meetings of the Directors or any committee of the Directors or general meetings of the Company or in connection with the business of the Company. In addition, the Board may award additional remuneration to any Director engaged in exceptional work at the request of the Board on a time spent basis.

The Board shall have power at any time to appoint any person eligible in accordance with Section 137 of the Companies Law to be a Director either to fill a casual vacancy or as an addition to the existing Directors but so that the total number of Directors shall not at any time exceed the number, if any, fixed pursuant to the Articles. Any Director so appointed shall hold office only until the next following annual general meeting and shall then be eligible for re-election. Without prejudice to the powers of the Board, the Company in general meeting may appoint any person to be a Director either to fill a casual vacancy or as an additional Director.

The Directors may at any time appoint one or more of their body (other than a Director resident in the United Kingdom) to the office of managing director for such term and at such remuneration and upon such terms as they determine.

Disqualification of Directors

No person other than a Director retiring at a general meeting shall, unless recommended by the Directors, be eligible for election by the Company to the office of Director unless, not less than 14 clear days before the date appointed for the meeting there shall have been left at the Company's registered office notice in writing signed by a Shareholder duly qualified to attend and vote at the meeting for which such notice is given of his intention to propose such person for election together with notice in writing signed by that person of his willingness to be elected.

A Director shall cease to hold office: (i) if the Director (not being a person holding for a fixed term an executive office subject to termination if he ceases for any reason to be a Director) resigns his office by written notice signed by him sent to or deposited at the registered office of the Company, (ii) if he shall have absented himself from meetings of the Board for a consecutive period of 12 months and the Board resolves that his office shall be vacated, (iii) if he

dies or becomes of unsound mind or incapable, (iv) if he becomes insolvent, suspends payment or compounds with his creditors, (v) if he is requested to resign by written notice signed by all his co-Directors, (vi) if the Company in general meeting shall declare that he shall cease to be a Director, (vii) if he becomes resident in the United Kingdom and, as a result thereof, a majority of the Directors are resident in the United Kingdom, (viii) if he becomes ineligible to be a Director in accordance with section 137 of the Companies Law or (ix) if he becomes prohibited from being a Director by reason of any order made under any provisions or any law or enactment.

Indemnities

The Directors, company secretary and officers of the Company and their respective heirs and executors shall, to the extent permitted by Section 157 of the Companies Law, be fully indemnified out of the assets and profits of the Company from and against all actions expenses and liabilities which they or their respective heirs or executors may incur by reason of any contract entered into or any act in or about the execution of their respective offices or trusts except such (if any) as they shall incur by or through their own negligence, default, breach of duty or breach of trust respectively and none of them shall be answerable for the acts, receipts, neglects or defaults of the others of them or for joining in any receipt for the sake of conformity or for any bankers or other person with whom any monies or assets of the Company may be lodged or deposited for safe custody or for any bankers or other persons into whose hands any money or assets of the Company may come or for any defects of title of the Company to any property purchased or for insufficiency or deficiency of or defect in title of the Company to any security upon which any monies of the Company shall be placed out or invested or for any loss misfortune or damage resulting from any such cause as aforesaid or which may happen in or about the execution of their respective offices or trusts, except if the same shall happen by or through their own negligence, default, breach of duty or breach of trust.

To the fullest extent permitted by applicable law (including the Companies Law) and subject to compliance with this Offering Memorandum, the Portfolio Manager, its affiliates, any officer, director, secretary, manager, employee or any direct or indirect partner, member, stockholder, agent or legal representative (including executors, guardians and trustees) of the Portfolio Manager and its affiliates, including persons formerly serving in such capacities, any person who serves at the request of the Portfolio Manager or the Board pursuant to the Articles, on behalf of the Company as an officer, director, secretary, manager, partner, member, employee, stockholder, agent or legal representative of any other person serving at the request of the Portfolio Manager or the Board pursuant to the Articles on behalf of the Company in such capacity as listed above, each member of the Advisory Board and each member of any subcommittee thereof and any assignees or successors of the foregoing (each, an **"Indemnified Person"**) shall be fully indemnified against all losses, liabilities, damages, expenses or costs (including any claim, judgment, award, settlement, reasonable legal and other professional fees and disbursements and other costs or expenses incurred in connection with the defence of any proceeding, whether or not matured or unmatured or whether or not asserted or brought due to contractual or other restrictions, joint or several) other than those arising from suits, disputes or actions by Highland, its affiliates or principals, Other Accounts or CLO HoldCo, Ltd. (collectively, the **"Indemnified Losses"**) to which an Indemnified Person may become subject by reason of any acts or omissions or any alleged acts or omissions arising out of such Indemnified Person's or any other person's activities in connection with the conduct of the business or affairs of the Company and/or an investment, unless such Indemnified Losses result from any action or omission which constitutes, with respect to such person, a Triggering Event; provided, that notwithstanding the foregoing, the members of the Advisory Board or members of any subcommittee thereof shall be subject only to a duty of good faith (it being understood that, to the fullest extent permitted by applicable law, any such member, in determining to take or refrain from taking any action, shall be permitted to take into consideration only the interests of the Shareholder and/or other person represented by such member and, in so doing, shall, to the fullest extent permitted by applicable law, be considered to have acted in good faith). Any claims arising from a Triggering Event shall be limited to actual out-of-pocket damages incurred as a direct consequence of the Triggering Event, and shall not include punitive, consequential or other damages or lost profits.

Borrowing powers

Subject to the restrictions set forth in this Offering Memorandum, the Board may exercise all the powers of the Company to borrow money (in whatever currency the Board determines from time to time) and to mortgage, hypothecate, pledge or charge all or part of its undertaking property and uncalled capital and to issue debentures and other securities, whether outright or as collateral security for any liability or obligation of the Company or of any third party, subject to any limits on borrowings adopted by the Board from time to time. The Board may exercise all the

powers of the Company to engage in currency or interest rate hedging in the interests of efficient portfolio management.

Forfeiture and surrender of Shares

Any Share in respect of which a notice requiring payment of an unpaid call or instalment, together with any interest which may have accrued and any expenses which may have been incurred, has been served may, at any time before payment has been made, be forfeited by a resolution of the Directors to that effect. Such forfeiture shall include all dividends declared in respect of the forfeited Share and not actually paid before the forfeiture.

The Board may accept from any Shareholder on such terms as agreed a surrender of any Shares in respect of which there is a liability for calls. Any surrendered Share may be disposed of in the same manner as a forfeited share.

If any Shares are owned directly or beneficially by a person believed by the Directors to be a Prohibited U.S. Person, the Directors may give notice to such person requiring them either (i) to provide the Directors within 30 days of receipt of such notice with sufficient satisfactory documentary evidence to satisfy the Directors that such person is not a Prohibited U.S. Person or (ii) to sell or transfer their Shares to a person qualified to own the same within 30 days and within such 30 days to provide the Directors with satisfactory evidence of such sale or transfer. Where condition (i) or (ii) is not satisfied within 30 days after the serving of the notice, the person will be deemed, upon the expiration of such 30 days, to have forfeited their Shares.

LITIGATION

There are no, and have not been in the last 12 months, any governmental, legal or arbitration proceedings, nor, so far as the Company is aware, are any such proceedings pending or threatened, which may have, or have in the recent past had, a significant effect on the Company's financial position or profitability.

RELATED PARTY TRANSACTIONS

Other than as set out in the section of this Offering Memorandum entitled "*Material Contracts*" (including the NexBank Credit Facility), "*Investment Policy—Company Borrowing*" and cross-transactions as described in "*Risk Factors—Risks Relating to Conflicts of Interest—The Company will be subject to various conflicts of interest involving the Portfolio Manager and its affiliates*" the Company has not entered into any related party transactions. The consent of the Advisory Board will be required with respect to transactions with any Related Party.

GENERAL

Highland may be regarded as the promoter of the Company. Save as disclosed in this section of this Offering Memorandum, no amount or benefit has been paid, or given, to the promoter or any of its subsidiaries since the incorporation of the Company and none is intended to be paid, or given. Highland is a limited partnership, established under the laws of the State of Delaware in the U.S. with its registered office at 1209 Orange Street, in the City of Wilmington, County of New Castle, Delaware 19801.

The Net Placing Proceeds available for investment by the Company following the Placing will be approximately U.S. \$153 million (less any amounts retained for working capital purposes) and these proceeds will be invested in accordance with the Company's investment policy described in the section of this Offering Memorandum entitled "*The Company*". Since incorporation, the Company has not commenced operations, and therefore has not generated earnings. As the Shares do not have a par value, the Placing Price consists solely of share premium.

None of the Shares available under the Placing are being underwritten.

Application will be made to the appropriate securities exchange for the Placing Shares to be admitted when deemed appropriate by the Company.

The Company does not own any premises and does not lease any premises.

THIRD PARTY SOURCES

Where third party information has been referenced in this Offering Memorandum, the source of that third party information has been disclosed. Where information contained in this Offering Memorandum has been so sourced, the Company confirms that such information has been accurately reproduced and, as far as the Company is aware and able to ascertain from information published by such third parties, no facts have been omitted which would render the reproduced information inaccurate or misleading.

Highland has given and not withdrawn its written consent to the issue of this Offering Memorandum with references to its name in the form and context in which such references appear. Highland accepts responsibility for information attributed to it in this Offering Memorandum and declares that, having taken all reasonable care to ensure that such is the case, the information attributed to it in this Offering Memorandum is, to the best of its knowledge, in accordance with the facts and contains no omission likely to affect its import.

Each of the Management Companies has given and, as at the date of this Offering Memorandum, has not withdrawn its written consent to the issue of this Offering Memorandum with references to its name in the form and context in which such references appear. Each of the Management Companies accepts responsibility for information attributed to it in this Offering Memorandum and declares that, having taken all reasonable care to ensure that such is the case, the information attributed to it in this Offering Memorandum is, to the best of its knowledge, in accordance with the facts and contains no omission likely to affect its import.

WORKING CAPITAL

The Company is of the opinion that the working capital available to the Group is sufficient for the present requirements of the Company, that is, for at least the next 12 months from the date of this Offering Memorandum.

CAPITALISATION AND INDEBTEDNESS

As at the date of this Offering Memorandum, the Company:

- (a) does not have any secured, unsecured or unguaranteed indebtedness, including indirect and contingent, other than the NexBank Credit Facility;
- (b) has not granted any mortgage or charge over any of its assets, other than that granted under the NexBank Credit Facility; and
- (c) does not have any contingent liabilities or guarantees.

As at the date of this Offering Memorandum, the Company's issued and fully paid up share capital consisted of 143,454,001 Shares of no par value.

DOCUMENTS AVAILABLE FOR INSPECTION

Copies of the Articles, the constitutional documents of the Company, the material contracts referred to in "*Material Contracts*" above and this Offering Memorandum will be available for inspection at the registered office of the Company during normal business hours on any weekday (Saturdays and public holidays excepted) up to and including the date of the Placing.

Copies of this Offering Memorandum may be obtained, free of charge during normal business hours on any weekday (bank and public holidays excepted) at the Company's registered office up to and including the date of the Placing.

RELATIONSHIP BETWEEN SHAREHOLDERS, THE COMPANY AND SERVICE PROVIDERS

The Company is a registered closed-ended investment company incorporated in Guernsey with limited liability on 30 March 2015. While prospective investors will acquire an interest in the Company on subscribing for Placing Shares, the Company is the sole legal and/or beneficial owner of its investments. Consequently, Shareholders have no direct legal or beneficial interest in those investments. The liability of Shareholders for the debts and other obligations of the Company is limited to the amount unpaid, if any, on the Placing Shares held by them.

Shareholders' rights in respect of their investment in the Company are governed by the Articles, the Companies Law and the investment terms set out in this Offering Memorandum.

RIGHTS AGAINST THIRD PARTIES, INCLUDING THIRD PARTY SERVICE PROVIDERS

As the Company has no employees and the Directors have all been appointed on a non-executive basis, the Company is reliant on the performance of service providers listed in this Offering Memorandum (the "**Service Providers**").

Without prejudice to any potential right of action in tort that a Shareholder may have to bring a claim against a Service Provider, each Shareholder's contractual relationship in respect of its investment in Shares is with the Company only. Therefore, no Shareholder will have any contractual claim against any Service Provider with respect to such Service Provider's default.

JURISDICTION AND APPLICABLE LAW

As noted above, Shareholders' rights are governed by the Articles, the Companies Law and the terms set out in this Offering Memorandum. By subscribing for Placing Shares, investors agree to be bound by the Articles, the Companies Law and the terms set out in this Offering Memorandum.

Information on the existence or not of any legal instruments providing for the recognition and enforcement of judgments in the territory where the Company is established is as follows. A final and conclusive judgement under which a sum of money is payable (not being a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or penalty) obtained in the superior courts in the reciprocating countries set out in the Judgments (Reciprocal Enforcement) (Guernsey) Law 1957 (the "**1957 Law**") (which includes the Supreme Court and the Senior Courts of England and Wales, excluding the Crown Court), after a hearing on the merits would be recognised as a valid judgement by the Guernsey courts and would be enforceable in accordance with and subject to the provisions of the 1957 Law.

The Guernsey courts would also recognise, without reconsideration of the merits and assuming proper service of process and assumption of jurisdiction in accordance with the laws of the relevant jurisdiction, any final and conclusive judgement under which affixed or ascertainable sum of money is payable (not being a sum payable in respect of taxes or other charges or a like nature or in respect of a fine or other penalty) obtained in a court not recognised by the 1957 Law provided that the judgment was not obtained by fraud or in a manner opposed to the principles of natural justice and recognition of the judgment is not contrary to public policy as applied by the Guernsey courts.

FAIR TREATMENT AND PREFERENTIAL TREATMENT OF INVESTORS

The Directors owe certain fiduciary duties to the Company which require them, among other things, to act in good faith and in what they consider to be the best interests of the Company. In doing so, the Directors will act in a manner that ensures the fair treatment of investors.

Under the AIFMD Rules, the Portfolio Manager as AIFM must treat all investors fairly. The Portfolio Manager ensures the fair treatment of investors through its decision-making procedures and organisational structure which (1) identify any preferential treatment, or the right thereto, accorded to investors and (2) ensure that any such preferential treatment does not result in an overall disadvantage to other investors.

In addition, the Portfolio Manager monitors the terms of side arrangements entered into with investors in relation to their investment in the Company to seek to ensure the fair treatment of investors. In so doing, the Portfolio Manager takes into consideration whether such side arrangements are in accordance with side arrangements previously entered into.

The Portfolio Manager may enter into side letters in relation to the Company and its investments with certain individual investors covering, *inter alia*, *capacity*, *provision of additional information*, *fees*, *most favoured investor commitments*, *individual investor approval requirements*, *transfer rights and confirmations of how expenses will be borne*. Such information may provide the recipient greater insights into the Company activities than is included in standard reports to investors. In entering into any side letters, the Company will act in the best interests of the investors as a whole.

Information on such side letters will be disclosed to investors in accordance with the AIFMD.

TERMS AND CONDITIONS OF THE PLACING

INTRODUCTION

Each Placee which confirms its agreement (whether orally or in writing) to subscribe for Placing Shares under the Placing will be bound by these terms and conditions and will be deemed to have accepted them.

The Company may require any Placee to agree to such further terms and/or conditions and/or give such additional warranties and/or representations as it (in its absolute discretion) sees fit and/or may require any such Placee to execute a separate placing letter (a “**Placing Letter**”).

AGREEMENT TO SUBSCRIBE FOR PLACING SHARES

Any Placee agrees to become a member of the Company and agrees to subscribe for those Placing Shares allocated to it at the Placing Price in respect of the Placing Shares allocated to the Placee. To the fullest extent permitted by law, each Placee acknowledges and agrees that it will not be entitled to exercise any remedy of rescission at any time. This does not affect any other rights the Placee may have.

PAYMENT FOR PLACING SHARES

Each Placee must pay the Placing Price for the Placing Shares issued to the Placee in the manner and by the time directed by the Company. If any Placee fails to pay as so directed and/or by the time required, the relevant Placee’s application for Placing Shares shall be rejected.

REPRESENTATIONS AND WARRANTIES

By agreeing to subscribe for Placing Shares, each Placee which will enter into a commitment to subscribe for Placing Shares will (for itself and any person(s) procured by it to subscribe for Placing Shares and any nominee(s) for any such person(s)) agree, represent and warrant to the Company that:

- (a) in agreeing to subscribe for Placing Shares under the Placing, it is relying solely on this Offering Memorandum and any subsequent notice published by the Company subsequent to the date of this Offering Memorandum and not on any other information given, or representation or statement made at any time, by any person concerning the Company or the Placing. It agrees that none of the Company nor any of its respective officers, agents or employees, will have any liability for any other information or representation. It irrevocably and unconditionally waives any rights it may have in respect of any other information or representation;
- (b) if the laws of any territory or jurisdiction outside the United Kingdom are applicable to its agreement to subscribe for Placing Shares under the Placing, it warrants that it has complied with all such laws, obtained all governmental and other consents which may be required, complied with all requisite formalities and paid any issue, transfer or other taxes due in connection with its placing commitment in any territory and that it has not taken any action or omitted to take any action which will result in the Company or any of its respective officers, agents, affiliates or employees acting in breach of the regulatory or legal requirements, directly or indirectly, of any territory or jurisdiction outside the United Kingdom in connection with the Placing;
- (c) it does not have a registered address in, and is not a citizen, resident or national of, any jurisdiction in which it is unlawful to make or accept an offer of the Placing Shares and it is not acting on a non-discretionary basis for any such person;
- (d) it agrees that, having had the opportunity to read this Offering Memorandum, it shall be deemed to have had notice of all information and representations contained in this Offering Memorandum, that it is acquiring Placing Shares solely on the basis of this Offering Memorandum and any subsequent notice published by the Company subsequent to the date of this Offering Memorandum and no other information and that in accepting a participation in the Placing it has had access to all information it believes necessary or appropriate in connection with its decision to subscribe for Placing Shares;

- (e) it acknowledges that no person is authorised in connection with the Placing to give any information or make any representation other than as contained in this Offering Memorandum and any subsequent notice published by the Company subsequent to the date of this Offering Memorandum and, if given or made, any information or representation must not be relied upon as having been authorised by the Company;
- (f) it is not applying as, nor is it applying as nominee or agent for, a person who is or may be liable to notify and account for tax under the Stamp Duty Reserve Tax Regulations 1986 at any of the increased rates referred to in section 67, 70, 93 or 96 (depository receipts and clearance services) of the Finance Act 1986;
- (g) it accepts that none of the Placing Shares have been or will be registered under the laws of any Restricted Territory. Accordingly, the Placing Shares may not be offered, sold, issued or delivered, directly or indirectly, within any Restricted Territory unless an exemption from any registration requirement is available;
- (h) if it is receiving the offer in circumstances under which the laws or regulations of a jurisdiction other than the United Kingdom would apply, that it is a person to whom the Placing Shares may be lawfully offered under that other jurisdiction's laws and regulations;
- (i) if it is a resident in the EEA (other than the United Kingdom), it is a "Qualified Investor" within the meaning of the law in the Relevant Member State implementing Article 2(1)(e)(i), (ii) or (iii) of the Prospectus Directive;
- (j) if it is outside the United Kingdom, neither this Offering Memorandum nor any other offering, marketing or other material in connection with the Placing constitutes an invitation, offer or promotion to, or arrangement with, it or any person whom it is procuring to subscribe for Placing Shares pursuant to the Placing unless, in the relevant territory, such offer, invitation or other course of conduct could lawfully be made to it or such person and such documents or materials could lawfully be provided to it or such person and Placing Shares could lawfully be distributed to and subscribed and held by it or such person without compliance with any unfulfilled approval, registration or other regulatory or legal requirements;
- (k) it acknowledges the representations, warranties and agreements set out in this Offering Memorandum, including those set out in the section of this Offering Memorandum entitled "*Purchase and Transfer Restrictions*" in "*Placing Arrangements*", and further acknowledges that it is not a U.S. Person, it is not located within the United States, it is subscribing for Placing Shares in an "offshore transaction" as defined in Regulation S and it is not acquiring the Placing Shares for the account or benefit of a U.S. Person, and where it is subscribing for Placing Shares for one or more managed, discretionary or advisory accounts, it is authorised in writing for each such account: (i) to subscribe for the Placing Shares for each such account; (ii) to make on each such account's behalf the representations, warranties and agreements set out in this Offering Memorandum or in any Placing Letter, where relevant; and (iii) to receive on behalf of each such account any documentation relating to the Placing in the form provided by the Company. It agrees that the provision of this paragraph shall survive any resale of the Placing Shares by or on behalf of any such account;
- (l) it is acting as principal only in respect of the Placing, or, if it is acting for any other person (i) it is and will remain liable to the Company for the performance of all its obligations as a placee in respect of the Placing (regardless of the fact that it is acting for another person), (ii) it is both an "authorised person" for the purposes of FSMA and a "qualified investor" as defined at Article 2.1(e)(i) of Directive 2003/71/EC (known as Prospectus Directive) acting as agent for such person, and (iii) such person is either (1) a FSMA Qualified Investor or (2) its "client" (as defined in section 86(2) of FSMA) that has engaged it to act as his agent on terms which enable it to make decisions concerning the Placing or any other offers of transferable securities on his behalf without reference to him;
- (m) it has not and will not offer or sell any Placing Shares to persons in the United Kingdom, except to persons whose ordinary activities involve them in acquiring, holding, managing or disposing of investments (as principal or agent) for the purposes of their business or otherwise in circumstances which

- have not resulted and which will not result in an offer to the public in the United Kingdom within the meaning of section 102B of the FSMA;
- (n) it is an “eligible counterparty” within the meaning of Chapter 3 of the FCA’s Conduct of Business Sourcebook and it is subscribing for or purchasing the Shares for investment only and not for resale or distribution;
 - (o) it irrevocably appoints any Director of the Company to be its agent and on its behalf (without any obligation or duty to do so), to sign, execute and deliver any documents and do all acts, matters and things as may be necessary for, or incidental to, its subscription for all or any of the Placing Shares for which it has given a commitment under the Placing, in the event of its own failure to do so;
 - (p) it accepts that if the Placing does not proceed or such Placing Shares are not admitted to a securities exchange for any reason whatsoever, then none of the Company or any of its affiliates, nor persons controlling, controlled by or under common control with any of them nor any of their respective employees, agents, officers, members, stockholders, partners or representatives, shall have any liability whatsoever to it or any other person;
 - (q) it has not taken any action or omitted to take any action which will or may result in the Company or any of its directors, officers, agents, affiliates, employees or advisers being in breach of the legal or regulatory requirements of any territory in connection with the Placing or its subscription of Placing Shares pursuant to the Placing;
 - (r) in connection with its participation in the Placing it has observed all relevant legislation and regulations, in particular (but without limitation) those relating to money laundering and countering terrorist financing and that its placing commitment is only made on the basis that it accepts full responsibility for any requirement to identify and verify the identity of its clients and other persons in respect of whom it has applied. In addition, it warrants that it is a person: (i) subject to the Money Laundering Regulations 2007 in force in the United Kingdom; or (ii) subject to the Money Laundering Directive (2005/60/EC of the European Parliament and of the EC Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing); or (iii) subject to the Guernsey AML Requirements; or (iv) acting in the course of a business in relation to which an overseas regulatory authority exercises regulatory functions and is based or incorporated in, or formed under the law of, a country in which there are in force provisions at least equivalent to those required by the Money Laundering Directive;
 - (s) due to anti-money laundering and the countering of terrorist financing requirements, the Company may require proof of identity of the Placee and related parties and verification of the source of the payment before the placing commitment can be processed and that, in the event of delay or failure by the Placee to produce any information required for verification purposes, the Company may refuse to accept the placing commitment and the subscription moneys relating thereto. It holds harmless and will indemnify the Company against any liability, loss or cost ensuing due to the failure to process the placing commitment, if such information as has been required has not been provided by it or has not been provided timeously;
 - (t) any person in Guernsey involved in the business of the Company who knows or suspects or has reasonable grounds for knowing or suspecting that any other person (including the Company or any person subscribing for Placing Shares) is involved in money laundering activities, is under an obligation to report such suspicion to the relevant authorities pursuant to the Guernsey AML Requirements. Similar disclosures may be required under other legislation;
 - (u) it and each person or body (including, without limitation, any local authority or the managers of any pension fund) on whose behalf it accepts Placing Shares pursuant to the Placing or to whom it allocates such Placing Shares have the capacity and authority to enter into and to perform their obligations as a Placee of the Placing Shares and will honour those obligations;

- (v) it confirms that it is not acquiring the Placing Shares using the assets of: (i)(A) an “employee benefit plan” as defined in Section 3(3) of ERISA that is subject to Title I of ERISA; (B) a “plan” as defined in Section 4975 of the U.S. Tax Code, including an individual retirement account or other arrangement that is subject to Section 4975 of the U.S. Tax Code; or (C) an entity whose underlying assets are considered to include “plan assets” by reason of investment by an “employee benefit plan” or “plan” described in preceding clause (A) or (B) in such entity pursuant to the U.S. Plan Assets Regulations; or (ii) a governmental, church, non-U.S. or other employee benefit plan that is subject to any federal, state, local or non-U.S. law that is substantially similar to the provisions of Title I of ERISA or Section 4975 of the U.S. Tax Code, unless its purchase, holding, and disposition of the Placing Shares will not constitute or result in a non-exempt violation of any such substantially similar law;
- (w) the representations, undertakings and warranties contained in this Offering Memorandum or in any Placing Letter, where relevant, are irrevocable. It acknowledges that the Company and its affiliates will rely upon the truth and accuracy of such representations and warranties and it agrees that if any of the representations or warranties made or deemed to have been made by its subscription of the Shares are no longer accurate, it shall promptly notify the Company;
- (x) nothing has been done or will be done by it in relation to the Placing that has resulted or could result in any person being required to publish a prospectus in relation to the Company or to any ordinary shares in accordance with FSMA or the Prospectus Rules or in accordance with any other laws applicable in any part of the European Union or the European Economic Area;
- (y) it accepts that the allocation of Placing Shares shall be determined by the Company in its absolute discretion and that such persons may scale down any placing commitments for this purpose on such basis as they may determine; and
- (z) time shall be of the essence as regards its obligations to settle payment for the Placing Shares and to comply with its other obligations under the Placing; and
- (aa) it has been provided an opportunity to ask questions of, and have received satisfactory answers thereto from, the Company, the Portfolio Manager, Highland, Acis and/or their respective affiliates, as applicable, regarding the Company’s assets and the terms and conditions of the offering of the Placing Shares, and it and its representatives have obtained all additional information requested of the Company, the Portfolio Manager, Highland, Acis and/or their respective affiliates, as applicable and to the extent such information is in their possession or reasonably obtainable thereby without undue expense or burden, in order to respond to any inquiries it has made regarding the offering of the Placing Shares. In connection with the offering of the Shares, it is not relying upon any statements other than those statements contained in the Offering Memorandum. It are not relying on the Company, the Portfolio Manager, Highland, Acis and/or their respective any of its respective affiliates or any of its partners, members, managers, shareholders, officers, employees, shared personnel, representatives, consultants, advisors, attorneys or agents for legal, investment or tax advice. It has sought independent legal, investment and tax advice to the extent that it has deemed necessary or appropriate in connection with its decision to subscribe for the Placing Shares.

SUPPLY AND DISCLOSURE OF INFORMATION

If the Administrator or the Company or any of their agents request any information in connection with a Placee’s agreement to subscribe for Placing Shares under the Placing or to comply with any relevant legislation, such Placee must promptly disclose it to them.

DATA PROTECTION

Pursuant to the Data Protection (Bailiwick of Guernsey) Law, 2001, as amended (the “**DP Law**”) and any successor legislation, the Company and/or the Administrator may hold personal data (as defined in the DP Law) relating to past and present Shareholders.

Such personal data held is used by those parties in relation to the Placing and to maintain a register of the Shareholders and mailing lists and this may include sharing such data with third parties in one or more of the countries mentioned below when (a) effecting the payment of dividends and redemption proceeds to Shareholders (in each case, where applicable) and, if applicable, the payment of commissions to third parties; and (b) filing returns of Shareholders and their respective transactions in shares with statutory bodies and regulatory authorities. Personal data may be retained on record for a period exceeding six years after it is no longer used.

The countries referred to above include, but need not be limited to, those in the European Economic Area or the European Union and any of their respective dependent territories overseas, Andorra, Argentina, Canada, State of Israel, New Zealand, Switzerland and the Eastern Republic of Uruguay.

By becoming registered as a holder of Placing Shares in the Company a person becomes a data subject (as defined in the DP Law) and is deemed to have consented to the processing by the Company and the Administrator of any personal data relating to them in the manner described above.

The Company will be the “data controller” in respect of the personal data, but has appointed the Administrator as a “data processor” of such data (each as defined in the DP Law). Details of the registration of the Company as data controller can be found on the website of the Guernsey Data Protection Commissioner: www.dpr.gov.gg.

MISCELLANEOUS

The rights and remedies of the Company and the Administrator under these terms and conditions are in addition to any rights and remedies which would otherwise be available to each of them and the exercise or partial exercise of one will not prevent the exercise of others.

On the acceptance of their placing commitment, if a Placee is a discretionary fund manager, that Placee may be asked to disclose in writing or orally the jurisdiction in which its funds are managed or owned. All documents provided in connection with the Placing will be sent at the Placee’s risk. They may be returned by post to such Placee at the address notified by such Placee.

Each Placee agrees to be bound by the Articles (as amended from time to time) once the Placing Shares, which the Placee has agreed to subscribe for pursuant to the Placing, have been acquired by the Placee. The contract to subscribe for Placing Shares under the Placing and the appointments and authorities mentioned in this Offering Memorandum will be governed by, and construed in accordance with, the laws of England. For the exclusive benefit of the Company and the Administrator, each Placee irrevocably submits to the jurisdiction of the courts of England and Wales and waives any objection to proceedings in any such court on the ground of venue or on the ground that proceedings have been brought in an inconvenient forum. This does not prevent an action being taken against a Placee in any other jurisdiction.

In the case of a joint agreement to subscribe for Placing Shares under the Placing, references to a “Placee” in these terms and conditions are to each of the Placees who are a party to that joint agreement and their liability is joint and several.

The Company expressly reserves the right to modify the Placing (including, without limitation, its timetable and settlement) at any time prior to the date of the Placing.

PLACING STATISTICS

Target Gross Placing Proceeds*	U.S. \$153 million
Minimum expected initial Net Asset Value per Share**	U.S. \$1.02535

* The target size of the Placing is U.S. \$153 million. The number of Placing Shares to be issued, and therefore the Gross Placing Proceeds, is not known as at the date of this Offering Memorandum.

** NAV per Share immediately following Placing based on the NAV of the Company as at September 30, 2017, as adjusted with respect to a dividend of US \$ 9 million on October 10, 2017, and a buyback of Shares from Acis Capital Management, L.P. for an aggregate purchase price of \$991,180.13 on October 24, 2017.

DEFINITIONS

The following definitions apply in this Offering Memorandum unless the context otherwise requires:

“2010 PD Amending Directive”	Directive 2010/73/EU of the European Parliament and of the Council of 24 November 2010 amending Directives 2003/71/EC on the prospectus to be published when securities are offered to the public or admitted to trading and 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market
“Accredited Investor”	an as “accredited investor” as defined in Rule 501(a) of Regulation D under the Securities Act
“Acis”	Acis Capital Management, L.P.
“Acis CLO Management”	Acis CLO Management, LLC
“Acis Legacy CLO”	a CLO in which Acis is the CLO manager
“Administration Agreement”	the agreement dated 10 August 2015 between the Company and the Administrator, a summary of which is set out in the section of this Offering Memorandum entitled “ <i>Additional Information on the Company</i> ”
“Administrator”	State Street (Guernsey) Limited, or such other person or persons from time to time appointed by the Company
“affiliate” or “affiliated”	with respect to a person, (i) any other person who, directly or indirectly, is in control of, or controlled by, or is under common control with, such person or (ii) any other person who is a director, officer or employee (a) of such person, (b) of any subsidiary or parent company of such person or (c) of any person described in clause (i) above. For the purposes of this definition, control of a person shall mean the power, direct or indirect, (i) to vote more than 50% of the securities having ordinary voting power for the election of directors of such persons or (ii) to direct or cause the direction of the management and policies of such person whether by contract or otherwise. For purposes of this definition, the management of an account by one person for the benefit of any other person shall not constitute “control” of such other person and no entity shall be deemed an “affiliate” of the Company solely because the Administrator or its affiliates serve as administrator or share trustee for such entity
“AIF”	an alternative investment fund, as defined in the AIFMD
“AIFM”	an alternative investment fund manager, as defined in the AIFMD
“AIFMD”	Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directive 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010

“AIFMD Rules”	any implementing legislation and regulations under AIFMD including, without limitation, Commission Delegated Regulation (EU) No 231/2013 supplementing the AIFMD with regard to exemptions, general operating conditions, depositaries, leverage, transparency, supervision and other applicable regulations implementing the AIFMD, in each case as may be altered, amended, added to or cancelled from time to time
“Application Form”	the application form for Shares, which is available upon request;
“Approved Pricing Source”	in relation to loans, Markit Partners or any other entity appointed from time to time and in relation to CLO Notes, Thomson Reuters or any other entity appointed from time to time
“Articles”	the articles of incorporation of the Company
“Audit Committee”	the audit committee of the Company, as more fully described in the section of this Offering Memorandum entitled “ <i>Audit Committee</i> ” in “ <i>Company Directors and Administration</i> ”
“Auditor”	PricewaterhouseCoopers CI LLP, or such other person or persons from time to time appointed by the Company
“bps”	basis point
“Business Day”	a day on which the banks in Guernsey and the United Kingdom are normally open for business
“certificated” or “certificated form”	not in uncertificated form
“Chairman”	the chairman of the Board
“CLO”	a special purpose vehicle which issues notes backed by a pool of collateral consisting primarily of loans
“CLO Income Notes”	the most subordinated tranche of debt issued by a CLO (which may be represented by a debt or equity security)
“CLO Manager”	the entity acting as manager in a CLO pursuant to the relevant CLO Management Agreement
“CLO Notes”	notes representing tranches of debt issued by a CLO, including CLO Income Notes (which may be represented by a debt or equity security)
“Closing Date”	November 15, 2017
“Companies Law”	the Companies (Guernsey) Law 2008, as amended, extended or replaced and any ordinance, statutory instrument or regulation made thereunder
“Company”	Highland CLO Funding, Ltd., a closed-ended investment company incorporated in Guernsey under the Companies Law on 30 March 2015 with registration number 60120
“CRR”	Regulation 575/2013 of the European Parliament and of the Council on prudential requirements for credit institutions and investment firms

“CRR Retention Requirements”	the retention requirements contained in the CRR as amended from time to time and including any guidance or any technical standards published in relation thereto
“Custodian”	State Street Custodial Services (Ireland) Limited
“Custody Agreement”	the agreement dated 10 August 2015 between the Company and the Custodian, further details of which are set out in the section of this Offering Memorandum entitled “ <i>Additional Information on the Company</i> ”
“Directors” or “Board” or “Board of Directors”	the directors of the Company
“DP Law”	The Data Protection (Bailiwick of Guernsey) Law, 2001, as amended
“EEA”	the European Economic Area being the countries included as such in the Agreement on European Economic Area, dated 1 January 1994, among Iceland, Liechtenstein, Norway, the European Community and the EU Member States, as may be modified, supplemented or replaced
“Eligible U.S. Investor”	a U.S. Person who is reasonably believed to be (x) a Qualified Institutional Buyer and a Qualified Purchaser (y) an Accredited Investor and a Qualified Purchaser or (z) an Accredited Investor and a Knowledgeable Employee with respect to the Company and to whom the Company is privately placing a certain number of the Placing Shares in reliance on exemptions from registration under the U.S. Securities Act and the U.S. Investment Company Act
“ERISA”	the U.S. Employee Retirement Income Security Act of 1974, as amended from time to time, and the applicable regulations thereunder
“EU”	the European Union
“EU Member State”	a member country of the EU
“EU Retention Requirements”	has the meaning given to it in the section of this Offering Memorandum entitled “ <i>Risk Factors</i> ”
“EU Savings Tax Directive”	Council Directive 2003/48/EC of 3 June 2003 on taxation of savings income in the form of interest payments
“EURIBOR”	Euro interbank offered rate, a benchmark interest rate
“Euro” or “€”	the lawful currency of the EU
“FATCA”	the U.S. Foreign Account Tax Compliance Act 2010
“FATCA Withholding”	has the meaning given to it in the section of this Offering Memorandum entitled “ <i>Risk Factors</i> ”
“Financial Conduct Authority” or “FCA”	the UK Financial Conduct Authority and any successor regulatory authority

“Forward Purchase Agreement”	agreements which may be entered into from time to time between the Company and a CLO pursuant to which the Company may, from time to time, enter into sale and purchase contracts with a CLO with respect to certain assets of the Company
“FSMA”	the Financial Services and Markets Act 2000 of the United Kingdom, as amended
“FTT”	the European Commission’s proposal for a Directive for a common financial transaction tax in certain EU Member States
“GFSC” or “Commission”	the Guernsey Financial Services Commission
“GFSC Code”	the Finance Sector Code of Corporate Governance published by the Commission
“Gross Placing Proceeds”	the aggregate value of the Placing Shares
“Guernsey AML Requirements”	The Criminal Justice (Proceeds of Crime) (Bailiwick of Guernsey) Law, 1999, the Criminal Justice (Proceeds of Crime) (Financial Services Businesses) (Bailiwick of Guernsey) Regulations 2007 and the Handbook of Financial Services Business (in each case as amended) and any other regulations relating to prevention of use of the financial system for the purpose of money laundering and made pursuant thereto
“Guernsey IGA Legislation”	Guernsey legislation implementing the IGA
“Highland”	Highland Capital Management, L.P.
“Highland CLO”	a CLO in which Highland or Highland CLO Management (or their affiliate) or a wholly owned subsidiary of the Company advised by Highland is the collateral manager
“Highland CLO Management”	Highland CLO Management, LLC
“Highland HCF Advisor”	Highland HCF Advisor, Ltd.
“Highland Legacy CLO”	a CLO in which Highland is the CLO manager
“HMRC”	Her Majesty’s Revenue and Customs
“IRR”	internal rate of return
“IRS”	U.S. Internal Revenue Service
“Knowledgeable Employee”	a “knowledgeable employee” as defined in Rule 3c-5 promulgated under the Investment Company Act
“LIBOR”	London interbank offered rate, a benchmark interest rate
“Managed CLO”	any Acis Legacy CLO, Acis CLO 7, any Highland CLO or any Highland Legacy CLO
“Market Abuse Directive”	Directive 2003/6/EC of the European Parliament and of the Council on insider dealing and market manipulation (market abuse)
“Memorandum”	the memorandum of incorporation of the Company

“Money Laundering Directive”	2005/60/EC of the European Parliament and of the EC Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing
“Net Asset Value” or “NAV”	gross assets less liabilities (including accrued but unpaid fees) determined in accordance with the section of this Offering Memorandum entitled “ <i>Net Asset Value</i> ” in “ <i>The Company</i> ”
“Net Asset Value per Share” or “NAV per Share”	the Net Asset Value divided by the number of Shares in issue at the relevant time
“Net Placing Proceeds”	the Gross Placing Proceeds less any offering expenses and any amounts retained for working capital purposes
“Non-Qualified Holder”	any person whose ownership of Shares (i) may result in the U.S. Plan Threshold being exceeded causing the Company’s assets to be deemed “plan assets” for the purpose of ERISA or the U.S. Tax Code; (ii) may cause the Company to be required to register as an “investment company” under the U.S. Investment Company Act (including because the holder of the shares is not a “qualified purchaser” as defined in the U.S. Investment Company Act) or to lose an exemption or a status thereunder to which it might be entitled; (iii) may cause the Company to have to register under the U.S. Exchange Act or any similar legislation; (iv) may cause the Company not to be considered a “Foreign Private Issuer” as such term is defined in rule 3b-4(c) under the U.S. Exchange Act; (v) may result in a person holding shares in violation of the transfer restrictions published by the Company, from time to time; and (vi) may cause the Company to be a “controlled foreign corporation” for the purposes of the U.S. Tax Code
“Offering Memorandum”	this offering memorandum
“Ordinary Shares”	ordinary shares of no par value each in the capital of the Company
“Placee”	a person subscribing for Shares under the Placing
“Placing”	the placing of Placing Shares at the Placing Price to one or more investors
“Placing Price”	As of a given date, the price per Ordinary Share determined in reference to the most recent quarterly determined NAV
“Placing Shares”	Shares to be issued by the Company pursuant to the Placing
“POI Law”	The Protection of Investors (Bailiwick of Guernsey) Law, 1987, as amended
“Portfolio Management Agreement”	the agreement dated 22 December 2016 between the Company and the Portfolio Manager pursuant to which the Portfolio Manager will provide certain support and personnel to the Company
“Portfolio Manager”	Highland HCF Advisor acting as Portfolio Manager to the Company pursuant to the Portfolio Management Agreement
“Prospectus Directive”	Directive 2003/71/EC of the European Parliament and of the Council on the prospectus to be published when securities are offered to the public or admitted to trading
“Provider”	the provider of any Warehouse Loan to the Company

“Qualified Institutional Buyers”	has the meaning given in Regulation 144A of the U.S. Securities Act
“Qualified Purchasers”	has the meaning given in the U.S. Investment Company Act
“RCIS Rules”	the Registered Collective Investment Schemes Rules 2015
“Register”	the register of Shareholders
“Regulation S”	Regulation S promulgated under the U.S. Securities Act
“Relevant Member State”	each member state of the European Economic Area which has implemented the Prospectus Directive
“Restricted Shareholders”	Shareholders who are resident in, or citizens of, a Restricted Territory
“Restricted Territory”	the United States and any other jurisdiction where the extension or availability of the Placing would breach any applicable law
“RTS”	the Regulatory Technical Standards, published by the European Commission
“SDRT”	UK Stamp Duty Reserve Tax
“SEC”	the U.S. Securities and Exchange Commission
“Services Agreements”	the Staff and Services Agreement and the Sub-Advisory Agreement
“Share”	a share in the capital of the Company (of whatever class) and having such rights and being subject to such restrictions as are contained in the Articles
“Shareholder”	a holder of Shares
“Shareholding”	a holding of Shares
“UK” or “United Kingdom”	the United Kingdom of Great Britain and Northern Ireland
“UK Corporate Governance Code”	the UK Corporate Governance Code as published by the Financial Reporting Council
“United States” or “U.S.”	the United States of America, its territories and possessions, any state of the United States of America and the District of Columbia
“U.S. Dollar” or “U.S.\$”	the lawful currency of the United States
“U.S. Exchange Act”	the U.S. Securities Exchange Act of 1934, as amended
“U.S. Investment Company Act”	the U.S. Investment Company Act of 1940, as amended
“U.S. Person”	has the meaning given in Regulation S under the U.S. Securities Act
“U.S. Plan”	any plan subject to Title 1 of ERISA or section 4975 of the U.S. Tax Code
“U.S. Plan Assets Regulations”	the regulations promulgated by the U.S. Department of Labor at 29 CFR 2510.3-101, as modified by section 3(42) of ERISA
“U.S. Plan Investor”	(i) an “employee benefit plan” as defined in section 3(3) of ERISA that is subject to Title I of ERISA; (ii) a “plan” as defined in Section 4975 of the U.S. Tax Code, including an individual retirement account or other arrangement that is subject to Section 4975 of the U.S. Tax Code; or

(iii) an entity whose underlying assets are considered to include “plan assets” by reason of investment by an “employee benefit plan” or “plan” described in the preceding clause (i) or (ii) in such entity pursuant to the U.S. Plan Assets Regulations

“U.S. Plan Threshold”

ownership by benefit plan investors, as defined under section 3(42) of ERISA, in the aggregate of 25 per cent or more of the value of any class of equity in the Company (calculated by excluding the value of any equity interest held by any person (other than a benefit plan investor, as defined under section 3(42) of ERISA) that has discretionary authority or control with respect to the assets of the Company or that provides investment advice for a fee (direct or indirect) with respect to such assets, or any affiliate of such a person); the term shall be amended to reflect such new ownership threshold that may be established by a change in the U.S. Plan Asset Regulations or other applicable law

“U.S. Risk Retention Rules”

the United States federal interagency credit risk retention rules, codified at 17 C.F.R. Part 246.

“U.S. Securities Act”

the U.S. Securities Act of 1933, as amended

“U.S. Tax Code”

the U.S. Internal Revenue Code of 1986, as amended

“VAT”

value added tax or a similar consumption tax

DIRECTORS, ADVISERS AND SERVICE PROVIDERS

Directors

Heather Bestwick
William Scott

All c/o the Company's registered office

Registered Office

First Floor, Dorey Court
Admiral Park
St Peter Port
Guernsey
GY1 6HJ
Channel Islands

Portfolio Manager and Adviser

Highland HCF Advisor, Ltd.
c/o Maples Corporate Services Limited
PO Box 309, Ugland House
Grand Cayman, KY1-1104
Cayman Islands

Legal Advisers to the Company (as to Guernsey law)

Mourant Ozannes
PO Box 186
1 Le Marchant Street
St Peter Port
Guernsey GY1 4HP
Channel Islands

**Legal Advisers to the Company
(as to English law)**

Dechert LLP
160 Queen Victoria Street
London
EC4V 4QQ
United Kingdom

Administrator/Company Secretary

State Street (Guernsey) Limited
First Floor, Dorey Court
Admiral Park
St Peter Port, Guernsey GY1 6HJ
Channel Islands

Custodian & Principal Bankers

State Street Custodial Services (Ireland) Limited
No. 78
Sir John Rogerson's Quay
Dublin
Ireland

Corporate Services Provider

State Street Guernsey (Limited)
First Floor, Dorey Court
Admiral Park,
St Peter Port, Guernsey GY1 6HJ
Channel Islands

Auditors

PricewaterhouseCoopers CI LLP
Royal Bank Place
1 Glatigny Esplanade
St Peter Port
Guernsey
GY1 4ND
Channel Islands

AMENDED AND RESTATED
INVESTMENT ADVISORY AGREEMENT

THIS AMENDED AND RESTATED INVESTMENT ADVISORY AGREEMENT (this “*Agreement*”), dated to be effective from July 1, 2014 is entered into by and between **Charitable DAF Fund, L.P.**, a Cayman Islands exempted limited partnership (the “*Fund*”), **Charitable DAF GP, LLC**, a limited liability company organized under the laws of the State of Delaware (the “*General Partner*”), the general partner of the Fund, and **Highland Capital Management, L.P.**, a limited partnership organized under the laws of the State of Delaware (the “*Investment Advisor*”).

RECITALS

WHEREAS, the Fund, the General Partner and the Investment Advisor are parties to that certain Investment Advisory Agreement dated January 1, 2012 (the “*Original Agreement*”);

WHEREAS, the parties desire to amend and restate the Original Agreement in its entirety with the terms as set forth in this Agreement effective as of the Effective Date;

NOW, THEREFORE, in consideration of the mutual covenants herein contained and for other good and valuable consideration, the receipt of which is hereby acknowledged, the parties hereto agree as follows:

1. Investment Advisory Services. Subject to Section 7, the Investment Advisor shall act as investment advisor to the Fund, the General Partner with respect to the Fund and its subsidiaries and shall provide investment advice with respect to the investment and reinvestment of the cash, Financial Instruments and other properties comprising the assets and liabilities of the Fund and its subsidiaries.

2. Custody. The Financial Instruments shall be held in the custody of Jefferies & Company, Inc. or one or more banks selected by the General Partner (each such bank, a “Custodian”). The General Partner will notify the Investment Advisor promptly of the proposed selection of any other Custodians. The Custodian shall at all times be responsible for the physical custody of the Financial Instruments; for the collection of interest, dividends, and other income attributable to the Financial Instruments; and for the exercise of rights and tenders on the Financial Instruments after consultation with and as then directed by the General Partner. At no time shall the Investment Advisor have possession of or maintain custody over any of the



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Financial Instruments. The Investment Advisor shall not be responsible for any loss incurred by reason of any act or omission of the Custodian.

3. Authority of the Investment Advisor. Subject to Section 7 of this Agreement, the Investment Advisor shall advise the General Partner on behalf of the Fund and/or its subsidiaries with respect to:

(a) investing, directly or indirectly, on margin or otherwise, in all types of securities and other financial instruments of United States and non-U.S. entities, including, without limitation, capital stock; all manner of equity securities (whether registered or unregistered, traded or privately offered, American Depository Receipts, common or preferred); physical commodities; shares of beneficial interest; partnership interests, limited liability company interests and similar financial instruments; secured and unsecured debt (both corporate and sovereign, bank debt, vendor claims and/or other contractual claims); bonds, notes and debentures (whether subordinated, convertible or otherwise); currencies; interest rate, currency, equity and other derivative products, including, without limitation, (i) future contracts (and options thereon) relating to stock indices, currencies, United States Government securities, securities of non-U.S. governments, other financial instruments and all other commodities, (ii) swaps and contracts for difference, options, swaptions, rights, warrants, when-issued securities, caps, collars, floors, forward rate agreements, and repurchase and reverse repurchase agreements and other cash equivalents, (iii) spot and forward currency transactions and (iv) agreements relating to or securing such transactions; leases, including, without limitation, equipment lease certificates; equipment trust certificates; mortgage-backed securities and other similar instruments (including, without limitation, fixed-rate, pass-throughs, adjustable rate mortgages, collateralized mortgage obligations, stripped mortgage-backed securities and REMICs); loans; credit paper; accounts and notes receivable and payable held by trade or other creditors; trade acceptances and claims; contract and other claims; executory contracts; participations; mutual funds, exchange traded funds and similar financial instruments; money market funds and instruments; obligations of the United States, any state thereof, non-U.S. governments and instrumentalities of any of them; commercial paper; certificates of deposit; bankers' acceptances; trust receipts; letters of credit; choses in action; puts; calls; other obligations and instruments or evidences of indebtedness of whatever kind or nature; and real estate and any kind of interests in

real estate; in each case, of any person, corporation, government or other entity whatsoever, whether or not publicly traded or readily marketable (each of such items, “***Financial Instruments***”), and the sale of Financial Instruments short and covering such sales.

- (b) engaging in such other lawful Financial Instruments transactions;
- (c) research and analysis;
- (d) purchasing Financial Instruments and holding them for investment;
- (e) entering into contracts for or in connection with investments in Financial Instruments;
- (f) investing in other pooled investment vehicles, which investments shall be subject in each case to the terms and conditions of the respective governing document for each such vehicle;
- (g) possessing, transferring, mortgaging, pledging or otherwise dealing in, and exercising all rights, powers, privileges and other incidents of ownership or possession with respect to Financial Instruments and other property and funds held or owned by the Fund and/or its subsidiaries;
- (h) lending, either with or without security, any Financial Instruments, funds or other properties of the Funds, including by entering into reverse repurchase agreements, and, from time to time, undertaking leverage on behalf of the Fund;
- (i) opening, maintaining and closing accounts, including margin and custodial accounts, with brokers and dealers, including brokers and dealers located outside the United States;
- (j) opening, maintaining and closing accounts, including custodial accounts, with banks, including banks located outside the United States, and drawing checks or other orders for the payment of monies;

(k) combining purchase or sale orders on behalf of the Fund with orders for other accounts to which the Investment Advisor or any of its affiliates provides investment services (“*Other Accounts*”) and allocating the Financial Instruments or other assets so purchased or sold, on an average-price basis or in any other manner deemed fair and equitable to the Investment Advisor in its sole discretion, among such accounts;

(l) entering into arrangements with brokers to open “average price” accounts wherein orders placed during a trading day are placed on behalf of the Fund and Other Accounts and are allocated among such accounts using an average price;

(m) organizing one or more corporations and other entities formed to hold record title, as nominee for the Fund and/or its subsidiaries (whether alone or together with the Other Accounts), to Financial Instruments or funds of the Fund and/or its subsidiaries;

(n) causing the Fund and/or its subsidiaries to engage in (i) agency, agency cross, related party principal transactions with affiliates of the Investment Manager and (ii) cross transactions with Other Accounts, in each case, to the extent permitted by applicable laws;

(o) engaging personnel, whether part-time or full-time, and attorneys, independent accountants or such other persons (including, without limitation, finders, consultants and investment bankers); and

(p) voting of Financial Instruments, participation in arrangements with creditors, the institution and settlement or compromise of suits and administrative proceedings and other like or similar matters.

4. Policies of the Fund. The activities engaged in by the Investment Advisor on behalf of the Fund and/or its subsidiaries shall be subject to the policies and control of the General Partner.

The Investment Advisor shall submit such periodic reports to the General Partner regarding the Investment Advisor’s activities hereunder as the General Partner may reasonably request and a representative of the Investment Advisor shall be available to meet with the

General Partner and/or any other representative of the Fund or its subsidiaries as reasonably requested by the General Partner.

In furtherance of the foregoing, the General Partner hereby appoints the Investment Advisor as the Fund's attorney-in-fact, with full power of authority to act in the Fund's name and on its behalf with respect to the Fund, as follows:

(a) to purchase or otherwise trade in Financial Instruments that have been approved by the General Partner;

(b) to execute and combine purchase or sale orders on behalf of the Fund with orders for Other Accounts and allocate the Financial Instruments or other assets so purchased or sold, on an average-price basis or in any other manner deemed fair and equitable to the Investment Advisor in its sole discretion, among such accounts; *provided, however*, that such purchase or sale orders shall be market rates;

(c) to direct the Custodian to deliver funds or the Financial Instruments, but only in the course of effecting trading and investment transactions for the Fund and subject to such restrictions as may be contained in the custody agreement between the Custodian and the Fund;

(d) to enter into contracts, provide certifications or take any other actions necessary to effect any of the foregoing transactions; and

(e) to select brokers on the basis of best execution and in consideration of relevant factors, including, but not limited to, price quotes; the size of the transaction; the nature of the market for the security; the timing of the transaction; the difficulty of execution; the broker-dealer's expertise in the relevant market or sector; the extent to which the broker-dealer makes market in the security or has an access to such market; the broker-dealer's skill in positioning the relevant market; the broker-dealer's facilities, reliability, promptness and financial stability; the broker-dealer's reputation for diligence and integrity (including in correcting errors); confidentiality considerations; the quality and usefulness of research services and investment ideas presented by the broker-dealer; and other factors deemed appropriate by the Investment Advisor.

5. Valuation of Financial Instruments. Financial Instruments will be valued in accordance with the then current valuation policy of the Investment Advisor, a copy of which will be provided to the General Partner upon request.

6. Status of the Investment Advisor. The Investment Advisor shall, for all purposes, be an independent contractor and not an employee of the General Partner or the Fund or its subsidiaries, nor shall anything herein be construed as making the Fund or its subsidiaries or the General Partner, a partner, member or co-venturer with the Investment Advisor or any of its affiliates or clients. The Investment Advisor shall have no authority to act for, represent, bind or obligate the Fund or its subsidiaries or the General Partner except as specifically provided herein.

7. Investments. ALL ULTIMATE INVESTMENT DECISIONS WITH RESPECT TO THE FUND AND ITS SUBSIDIARIES SHALL AT ALL TIMES REST SOLELY WITH THE GENERAL PARTNER AND/OR THE OFFICERS/DIRECTORS OF THE APPLICABLE SUBSIDIARY, IT BEING EXPRESSLY UNDERSTOOD THAT THE GENERAL PARTNER AND/OR THE OFFICERS/DIRECTORS OF THE APPLICABLE SUBSIDIARY SHALL BE FREE TO ACCEPT AND OR REJECT ANY OF THE ADVICE RENDERED BY THE INVESTMENT MANAGER HEREUNDER FOR ANY REASON OR FOR NO REASON.

8. Reimbursement by the General Partner. The Investment Advisor may retain, in connection with its responsibilities hereunder, the services of others to assist in the investment advice to be given to the General Partner with respect to the Fund and/or its subsidiaries (any such appointee, a “***Sub-Advisor***”), including, but not limited to, any affiliate of the Investment Advisor, but payment for any such services shall be assumed by the Investment Advisor, and, therefore, neither the General Partner nor the Fund or any of its subsidiaries shall have any liability therefor; *provided, however*, that the Investment Advisor, in its sole discretion, may retain the services of independent third party professionals, including, without limitation, attorneys, accountants and consultants, to advise and assist it in connection with the performance of its activities on behalf of the General Partner with respect to the Fund and/or its subsidiaries

hereunder, and the Fund shall bear full responsibility therefor and the expense of any fees and disbursements arising therefrom.

9. Expenses.

(a) The Fund shall pay or reimburse the Investment Advisor and its affiliates for all expenses related to the services hereunder, including, but not limited to, investment-related expenses, brokerage commissions and other transaction costs, expenses related to clearing and settlement charges, professional fees relating to legal, auditing or valuation services, any governmental, regulatory, licensing, filing or registration fees incurred in compliance with the rules of any self-regulatory organization or any federal, state or local laws, research-related expenses (including, without limitation, news and quotation equipment and services, investment and trading-related software, including, without limitation, trade order management software (i.e., software used to route trade orders)), accounting (including accounting software), tax preparation expenses, costs and expenses associated with reporting and providing information to the Fund, any taxes imposed upon the Fund (including, but not limited to, collateralized debt obligations managed by the Investment Advisor or its affiliates), fees relating to valuing the Financial Instruments, and extraordinary expenses. In no event shall any of the foregoing costs or expenses include any salaries, occupational expense or general overhead of the Investment Advisor. For the avoidance of doubt, (i) the cost of all third party expenses incurred in connection with this Agreement shall not exceed standard market rates (which may include standard soft dollar arrangements) and (ii) to the extent any of the foregoing expenses were incurred on behalf of, or benefit of a number of Investment Advisor's advised accounts, such expenses shall be allocated pro rata among such accounts.

(b) To the extent that expenses to be borne by the Fund are paid by the Investment Advisor or by any Sub-Advisor, the Fund shall reimburse the Investment Advisor (or Sub-Advisors, as applicable) for such expenses so long as such expenses are at market rates.

10. Fees. Without limiting the expense reimbursements set forth above, the Investment Advisor shall provide the Fund with the services described herein for 100 bps per annum (25 bps per quarter) of the market value of the Equity Investments (defined below) and 50 bps per annum (12.5 bps per quarter) of the market value of the Debt Investments (defined

below), calculated as of the last business day of each calendar quarter (the “**Calculation Date**”), payable quarterly in arrears by the 45th business day following the end of each quarter, provided that the Investment Advisor shall deliver to the General Partner on or before the 30th business day following the end of each calendar quarter a statement showing the calculation of the fee for such quarter. For purposes hereof, the “**Equity Investments**” shall mean those Financial Instruments which are equity investments held by the Fund (either directly or indirectly through a subsidiary vehicle) on the Calculation Date, and “**Debt Investments**” shall mean those Financial Instruments which are debt investments held by the Fund (either directly or indirectly through a subsidiary vehicle) on the Calculation Date. For the avoidance of doubt, the Financial Instruments shall be valued as of each Calculation Date in accordance with the then current valuation policy of the Investment Advisor. Notwithstanding the foregoing, neither the term “Equity Investments” nor the term “Debt Investments” shall include any Financial Instruments with respect to which the Investment Advisor or any affiliate thereof already receives management fees.

11. Exculation; Indemnification.

(a) Whether or not herein expressly so provided, every provision of this Agreement relating to the conduct or affecting the liability of or affording protection to the Investment Advisor, its members or any of their respective affiliates and their respective partners, members, officers, directors, employees, shareholders and agents (including parties acting as agents for the execution of transactions) (each, a “**Covered Person**” and collectively, “**Covered Persons**”) shall be subject to the provisions of this Section.

(b) To the fullest extent permitted by law, no Covered Person shall be liable to the General Partner or the Fund or any of its subsidiaries or anyone for any reason whatsoever (including but not limited to (i) any act or omission by any Covered Person in connection with the conduct of the business of the General Partner or the Fund, that is determined by such Covered Person in good faith to be in or not opposed to the best interests of the General Partner or the Fund, (ii) any act or omission by any Covered Person based on the suggestions of any professional advisor of the General Partner or the Fund or any of its subsidiaries whom such Covered Person believes is authorized to make such suggestions on

behalf of the General Partner or the Fund or any of its subsidiaries, (iii) any act or omission by the General Partner or the Fund or any of its subsidiaries, or (iv) any mistake, negligence, misconduct or bad faith of any broker or other agent of the General Partner or the Fund or any of its subsidiaries selected by Covered Person with reasonable care), unless any act or omission by such Covered Person constitutes willful misconduct or gross negligence by such Covered Person (as determined by a non-appealable judgment of a court of competent jurisdiction).

(c) Covered Persons may consult with legal counsel or accountants selected by such Covered Person and any act or omission by such Covered Person on behalf of the General Partner or the Fund or any of its subsidiaries or in furtherance of the business of the General Partner or the Fund or any of its subsidiaries in good faith in reliance on and in accordance with the advice of such counsel or accountants shall be full justification for the act or omission, and such Covered Person shall be fully protected in so acting or omitting to act if the counsel or accountants were selected with reasonable care.

(d) To the fullest extent permitted by law, the General Partner and the Fund and its subsidiaries shall indemnify and hold harmless Covered Persons (the “**Indemnified Party**”), from and against any and all claims, liabilities, damages, losses, costs and expenses, including amounts paid in satisfaction of judgments, in compromises and settlements, as fines and penalties and legal or other costs and expenses of investigating or defending against any claim or alleged claim, of any nature whatsoever, known or unknown, liquidated or unliquidated, that are incurred by any Indemnified Party and arise out of or in connection with the business of the General Partner or the Fund or any of its subsidiaries, any investment made under or in connection with this Agreement, or the performance by the Indemnified Party of Covered Person’s responsibilities hereunder and against all taxes, charges, duties or levies incurred by such Covered Person or any Indemnified Party in connection with the General Partner or the Fund or any of its subsidiaries, provided that an Indemnified Party shall not be entitled to indemnification hereunder to the extent the Indemnified Party’s conduct constitutes willful misconduct or gross negligence (as determined by a non-appealable judgment of a court of competent jurisdiction). The termination of any proceeding by settlement, judgment, order or upon a plea of nolo contendere or its equivalent shall not, of itself, create a presumption that the Indemnified Party’s conduct constituted willful misconduct or gross negligence.

(e) Expenses incurred by an Indemnified Party in defense or settlement of any claim that shall be subject to a right of indemnification hereunder, shall be advanced by the General Partner prior to the final disposition thereof upon receipt of an undertaking by or on behalf of the Indemnified Party to repay the amount advanced to the extent that it shall be determined ultimately that the Indemnified Party is not entitled to be indemnified hereunder.

(f) The right of any Indemnified Party to the indemnification provided herein shall be cumulative of, and in addition to, any and all rights to which the Indemnified Party may otherwise be entitled by contract or as a matter of law or equity and shall be extended to the Indemnified Party's successors, assigns and legal representatives.

(g) The provisions of this Section are expressly intended to confer benefits upon Covered Persons and such provisions shall remain operative and in full force and effect regardless of the expiration or any termination of this Agreement.

(h) In no event shall any Covered Person be liable for special, exemplary, punitive, indirect, or consequential loss, or damage of any kind whatsoever, including without limitation lost profits.

(i) No Covered Person shall be liable hereunder for any settlement of any action or claim effected without its written consent thereto.

(j) Pursuant to the exculpation and indemnification provisions described above, the Investment Advisor and each Indemnified Party will generally not be liable to the General Partner or the Fund for any act or omission (or alleged act or omission), absent bad faith, willful misconduct, fraud or gross negligence, and the General Partner and the Fund will generally be required to indemnify such persons against any Losses they may incur by reason of any act or omission (or alleged act or omission) related to the General Partner, the Fund or its subsidiaries, absent bad faith, willful misconduct, fraud or gross negligence. As a result of these provisions, the General Partner, the Fund and its subsidiaries, as applicable (not the Investment Advisor or any other Indemnified Party) will be responsible for any Losses resulting from trading errors and similar human errors, absent bad faith, willful misconduct,

fraud or gross negligence or the ability to waive or limit such Losses under applicable law. Trading errors might include, for example, keystroke errors that occur when entering trades into an electronic trading system or typographical or drafting errors related to derivatives contracts or similar agreements. Given the volume of transactions executed by the Investment Advisor and its affiliates on behalf of the Fund and/or its subsidiaries, the General Partner acknowledges that trading errors (and similar errors) will occur and that the General Partner will be responsible for any resulting Losses, even if such Losses result from the negligence (but not gross negligence) of the Investment Advisor or its affiliates.

12. Activities of the Investment Advisor and Others. The Investment Advisor, and its affiliates may engage, simultaneously with their investment management activities on behalf of the Fund, in other businesses, and may render services similar to those described in this Agreement to other individuals, companies, trusts or persons, and shall not by reason of such engaging in other businesses or rendering of services for others be deemed to be acting in conflict with the interests of the Fund. Notwithstanding the foregoing, the Investment Advisor and its affiliates shall devote as much time to provide advisory service to the General Partner with respect to the management of the Fund's assets as the Investment Advisor deems necessary and appropriate. In addition, the Investment Advisor or any of its affiliates, in their individual capacities, may engage in securities transactions which may be different than, and contrary to, the investment advice provided by the Investment Advisor to the General Partner with respect to the Fund. The Investment Advisor may give advice and recommend securities to, or buy securities for, accounts and other clients, which advice or securities may differ from advice given to, or securities recommended or bought for, the Fund, even though their investment objectives may be the same or similar. The Investment Advisor may recommend transactions in securities and other assets in which the Investment Advisor has an interest, including securities or other assets issued by affiliates of the Investment Manager. Each of the General Partner and the Fund acknowledges that it has received a copy of Part 2 of the Investment Advisor's Form ADV, which further describes conflicts of interest, including the Investment Advisor, its affiliates and their respective advised accounts.

13. Term. This Agreement shall remain in effect through an initial term concluding December 31, 2014 and shall be automatically extended for additional one-year

terms thereafter, except that it may be terminated by the Investment Advisor, on the one hand, or by the General Partner and the Fund, on the other hand, upon at least 90 days' prior written notice to the General Partner or the Investment Advisor, as the case may be, prior to General Partner's fiscal year-end.

14. Miscellaneous.

(a) Notices. Any notice, consent or other communication made or given in connection with this Agreement shall be in writing and shall be deemed to have been duly given when delivered by hand or facsimile or five days after mailed by certified mail, return receipt requested, as follows:

If to the Investment Advisor, to:

Highland Capital Management, L.P.
300 Crescent Court, Suite 700
Dallas, Texas 75201
Telephone Number: (972) 628-4100
Facsimile Number: (972) 628-4147

If to the General Partner or the Fund, to:

Charitable DAF GP, LLC
4140 Park Lake Avenue, Suite 600
Raleigh, North Carolina 27612
Attention: Grant Scott
Telephone Number: (919) 854-1407
Facsimile Number: (919) 854-1401

(b) Entire Agreement. This Agreement contains all of the terms agreed upon or made by the parties relating to the subject matter of this Agreement, and supersedes all prior and contemporaneous agreements, negotiations, correspondence, undertakings and communications of the parties, oral or written, respecting such subject matter.

(c) Amendments and Waivers. No provision of this Agreement may be amended, modified, waived or discharged except as agreed to in writing by the parties. No amendment to this Agreement may be made without first obtaining the required approval from the Fund. The failure of a party to insist upon strict adherence to any term of this Agreement on

any occasion shall not be considered a waiver thereof or deprive that party of the right thereafter to insist upon strict adherence to that term or any other term of this Agreement.

(d) Binding Effect; Assignment. This Agreement shall be binding upon and inure to the benefit of the General Partner, the Fund, the Investment Advisor, each Indemnified Party and their respective successors and permitted assigns. Any person that is not a signatory to this Agreement but is nevertheless conferred any rights or benefits hereunder (*e.g.*, officers, partners and personnel of the Investment Advisor and others who are entitled to indemnification hereunder) shall be entitled to such rights and benefits as if such person were a signatory hereto, and the rights and benefits of such person hereunder may not be impaired without such person's express written consent. No party to this Agreement may assign (as such term is defined under the U.S. Investment Advisers Act of 1940, as amended) all or any portion of its rights, obligations or liabilities under this Agreement without the prior written consent of the other parties to this Agreement; provided; however, that the Investment Advisor may assign all or any portion of its rights, obligations and liabilities hereunder to any of its affiliates at its discretion.

(e) Governing Law. Notwithstanding the place where this Agreement may be executed by any of the parties thereto, the parties expressly agree that all terms and provisions hereof shall be governed by and construed in accordance with the laws of the State of Texas applicable to agreements made and to be performed in that State.

(f) Arbitration. (i) Any controversy or claim or dispute arising out of or relating to this Agreement or the breach, termination, enforcement, interpretation or validity thereof (a “**Disputed Matter**”) shall be handled exclusively pursuant to the following procedures. In the event of any Disputed Matter, the parties agree that upon written notice of such Disputed Matter sent by one party to the party, the parties shall arbitrate the Disputed Matter pursuant to this Section 14(f) unless the parties expressly agree in writing to resolve the Disputed Matter in another manner through mediation or otherwise. The arbitration shall be conducted pursuant to the commercial arbitration rules of the American Arbitration Association in Dallas, Texas. Any arbitration pursuant to this Agreement unless otherwise agreed to by the parties shall be conducted by a panel of three (3) arbitrators mutually selected by the parties from a list of

arbitrators determined in accordance with the American Arbitration Association's arbitrator selection procedure.

(ii) The judgment upon the award rendered in any such arbitration shall be final and binding upon the parties and may be entered in any court having jurisdiction thereof. All fees and expenses of the arbitrator and all other expenses of the arbitration shall be paid by the non-prevailing party in such arbitration. The arbitrator shall have no authority to impose any punitive or consequential damages.

(iii) Nothing in this Section 14(f) shall be construed to limit either party's right to obtain equitable or injunctive relief in a court of competent jurisdiction in appropriate circumstances.

(g) Headings. The headings contained in this Agreement are intended solely for convenience and shall not affect the rights of the parties to this Agreement.

(h) Counterparts. This Agreement may be signed in any number of counterparts with the same effect as if the signatures to each counterpart were upon a single instrument, and all such counterparts together shall be deemed an original of this Agreement.

(i) Survival. The provisions of Sections 8, 9, 10, 11 and 14 hereof shall survive the termination of this Agreement.

(j) Pronouns. All pronouns shall be deemed to refer to the masculine, feminine, neuter, singular or plural as the identity of the person or persons' firm or company may require in the context thereof.

(k) Arm's-Length Agreement. The General Partner and the Fund have approved this Agreement and reviewed the activities described in Section 12 and in the Investment Advisor's Form ADV and the risks related thereto.

[Signature Page to Follow]

IN WITNESS WHEREOF the parties hereto have caused this Agreement to be executed
to be effective from the date first written above.

HIGHLAND CAPITAL MANAGEMENT, L.P.

By: Strand Advisors, Inc., its general partner

By: 

Name: James Dondero

Title: President

Date: August 26, 2014

CHARITABLE DAF GP, LLC

By: 

Name: Grant J. Scott

Title: Managing Member

Date: August 26, 2014

CHARITABLE DAF FUND, L.P.

By: Charitable DAF GP, LLC, its general partner

By: 

Name: Grant J. Scott

Title: Managing Member

Date: August 26, 2014

SBAITI & COMPANY PLLC
Mazin A. Sbaiti (TX Bar No. 24058096)
Jonathan Bridges (TX Bar No. 24028835)
2200 Ross Avenue, Suite 4900W
Dallas, TX 75201
T: (214) 432-2899
F: (214) 853-4367

*Counsel for Charitable DAF Fund, L.P.
and CLO Holdco, Ltd.*

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

In re:	§ Chapter 11
	§
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§ Case No. 19-34054-sgj11
	§
Debtor.	§
	§
CHARITABLE DAF FUND, L.P. AND CLO	§
HOLDCO, LTD., DIRECTLY AND DERIVATIVELY	§
	§
Plaintiffs,	§ Adversary Proceeding No.
	§
vs.	§ 21-03067-sgj
	§
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§
HIGHLAND HCF ADVISOR, LTD., AND	§
HIGHLAND CLO FUNDING LTD., NOMINALLY	§
	§
Defendants.	§
	§

**PLAINTIFFS' CORRECTED AMENDED WITNESS AND
EXHIBIT LIST REGARDING HEARING ON HIGHLAND CAPITAL
MANAGEMENT, L.P.'S RENEWED MOTION TO DISMISS COMPLAINT
TO BE HELD ON JANUARY 25, 2023**

Plaintiffs submit the following corrected amended witness and exhibit list regarding
Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint.

WITNESSES:

1. Any witness identified or called by any other party;
2. Any witness for impeachment or rebuttal.

EXHIBITS:

No.	Exhibit	Offered	Admitted
1	Excerpts from Transcript of Hearing on Application to Employ James P. Seery, Jr. on July 14, 2020 (APP_0003 – 0014)		
2	Highland CLO Funding – Members Agreement Relating to the Company (APP_0015 – 0042)		
3	HarbourVest Settlement Agreement (APP_0043 – 0061)		
4	Order Approving Debtor’s Settlement with HarbourVest (APP_0062 – 0084)		
5	HCLOF Offering (APP_0085-0206)		
6	Amended and Restated Investment Advisory Agreement (APP_0207 – 0221)		
7	Testimony of Mark Patrick at June 8, 2021 hearing		
	All exhibits necessary for impeachment and/or rebuttal purposes.		
	All exhibits identified by or offered by any other party for the hearing on Highland Capital Management, L.P.’s Renewed Motion to Dismiss.		

Dated: January 24, 2023

Respectfully submitted,

SBAITI & COMPANY PLLC

/s/ Mazin A. Sbaiti

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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In Re:) **Case No. 19-34054-sgj-11**
) Chapter 11
)
HIGHLAND CAPITAL) Dallas, Texas
MANAGEMENT, L.P.,) Tuesday, June 8, 2021
) 9:30 a.m. Docket
Debtor.)
) - SHOW CAUSE HEARING (2255)
) - MOTION TO MODIFY ORDER
) AUTHORIZING RETENTION OF
) JAMES SEERY (2248)
) - MOTION FOR ORDER FURTHER
) EXTENDING THE PERIOD WITHIN
) WHICH DEBTOR MAY REMOVE
) ACTIONS (2304)

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE STACEY G.C. JERNIGAN,
UNITED STATES BANKRUPTCY JUDGE.

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EXHIBIT

7

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1 APPEARANCES, cont'd.:

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23 Proceedings recorded by electronic sound recording;
24 transcript produced by transcription service.
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006359

Patrick - Direct

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1 our witness stand and I'll swear you in. Please raise your
2 right hand.

3 (The witness is sworn.)

4 THE COURT: All right. Please take a seat.

5 MARK PATRICK, DEBTOR'S WITNESS, SWORN

6 DIRECT EXAMINATION

7 BY MR. MORRIS:

8 Q Good afternoon, Mr. Patrick.

9 A Good afternoon.

10 Q Can you hear me okay?

11 A Yes, I can.

12 Q Okay. You have before you several sets of binders.

13 They're rather large. But when I deposed you on Friday, we
14 did that virtually. Now, I may direct you specifically to one
15 of the binders or one of the documents from time to time, so I
16 just wanted you to know that those were in front of you and
17 that I may be doing that.

18 Mr. Patrick, since March 1st, 2001 [sic], you've been
19 employed by Highland Consultants, right?

20 A I believe the name is Highgate Consultants doing business
21 as Skyview Group.

22 Q Okay. And that's an entity that was created by certain
23 former Highland employees, correct?

24 A That is my understanding, correct.

25 Q And your understanding is that Mr. Dondero doesn't have an

006360

Patrick - Direct

96

1 ownership interest in that entity, correct?

2 A That he does not. That is correct.

3 Q And your understanding is that he's not an employee of
4 that -- of Skyview, correct?

5 A That is correct.

6 Q Prior to joining Skyview on March 1st, you had worked at
7 Highland Capital Management, LP for about 13 years, correct?

8 A Correct.

9 Q Joining in, I believe, early 2008?

10 A Correct.

11 Q Okay. I'm going to refer to Highland Capital Management,
12 LP from time to time as HCMLP. Is that okay?

13 A Yes.

14 Q While at HCMLP, you served as a tax counselor, correct?

15 A No, I would like to distinguish that. I did have the
16 title tax counsel. However, essentially all my activities
17 were in a non-lawyer capacity, being the client
18 representative. I would engage other outside law firms to
19 provide legal advice.

20 Q Okay. So you are an attorney, correct?

21 A Yes, I am.

22 Q But essentially everything you did at Highland during your
23 13 years was in a non-lawyer capacity, correct?

24 A Correct.

25 Q In fact, you didn't even work in the legal department; is

006361

Patrick - Direct

97

1 that right?

2 A That is correct. I worked for the tax department.

3 Q Okay. Let's talk about how you became the authorized
4 representative of the Plaintiffs. You are, in fact,
5 authorized representative today of CLO Holdco, Ltd. and
6 Charitable DAF, LP, correct?

7 A Charitable DAF Fund, LP. Correct.

8 Q And those are the two entities that filed the complaint in
9 the United States District Court against the Debtor and two
10 other entities, correct?

11 A Correct.

12 Q And may I refer to those two entities going forward as the
13 Plaintiffs?

14 A Yes.

15 Q You became the authorized representative of the Plaintiffs
16 on March 24th, 2021, the day you and Mr. Scott executed
17 certain transfer documents, correct?

18 A Correct.

19 Q And you had no authority to act on behalf of either of the
20 Plaintiffs before March 24th, correct?

21 A Correct.

22 Q The DAF controls about \$200 million in assets, correct?

23 A The Plaintiffs, you mean? CLO Holdco and Charitable DAF
24 Fund, LP.

25 Q Yes.

006362

Patrick - Direct

98

1 A Around there.

2 Q Okay. Let me try and just ask that again, and thank you
3 for correcting me. To the best of your knowledge, the
4 Plaintiffs control about \$200 million in assets, correct?

5 A Net assets, correct.

6 Q Okay. And that asset base is derived largely from HCMLP,
7 Mr. Dondero, or Mr. Dondero's trusts, correct?

8 A Can you restate that question again, Mr. Morris?

9 Q Sure. The asset base that you just referred to is derived
10 largely from HCMLP, Mr. Dondero, or donor trusts?

11 A The way I would characterize it -- you're using the word
12 derived. I would characterize it with respect to certain
13 charitable donations --

14 Q Uh-huh.

15 A -- that were -- that were made at certain time periods,
16 where the donors gave up complete dominion and control over
17 the respective assets and at that time claimed a federal
18 income tax deduction for that.

19 I do -- I do believe that, as far as the donor group, as
20 you specified, Highland Capital Management, I recall, provided
21 a donation to a Charitable Remainder Trust that eventually had
22 expired and that eventually such assets went into the
23 supporting organizations. And then I do believe Mr. Dondero
24 also contributed to the Charitable Remainder Trust No. 2,
25 which seeded substantial amounts of the original assets that

006363

Patrick - Direct

99

1 were eventually composed of the \$200 million. And then from
2 time to time I do believe that Mr. Dondero's trusts made
3 charitable donations to their respective supporting
4 organizations.

5 Q Okay. Thank you.

6 A Is that responsive?

7 Q It is. It's very responsive. Thank you very much. So,
8 to the best of your knowledge, the charitable donations that
9 were made that form the bases of the assets came from those
10 three -- primarily from those three sources, correct?

11 A Well, you know, there's two different trusts. There's the
12 Dugaboy Trust and the Get Good Trust.

13 Q Okay.

14 A Then you have Mr. Dondero and Highland Capital Management.
15 So I would say four sources.

16 Q Okay. All right. Thank you. Prior to assuming your role
17 as the authorized representative of the Plaintiff, you had
18 never had meaningful responsibility for making investment
19 decisions, correct?

20 A I'm sorry. You kind of talk a little bit fast. Please
21 slow it down --

22 Q That's okay.

23 A -- and restate it. Thank you.

24 Q And I appreciate that. And any time you don't understand
25 what I'm saying or I speak too fast, please do exactly what

006364

Patrick - Direct

100

1 you're doing. You're doing fine.

2 Prior to assuming your role as the authorized
3 representative of the Plaintiffs, you never had any meaningful
4 responsibility making investment decisions. Is that correct?

5 A To whom?

6 Q For anybody.

7 A Well, during my deposition, I believe I testified that I
8 make investment decisions with respect to my family. Family
9 and friends come to me and they ask me for investment
10 decisions. I was -- in my deposition, I indicated to you that
11 I was a board member of a nonprofit called the 500, Inc. They
12 had received a donation of stock in Yahoo!, and the members
13 there looked to me for financial guidance. As an undergrad at
14 the University of Miami, I was a -- I was a finance major, and
15 so I do have a variety of background with respect to
16 investments.

17 Q Okay. So you told me that from time to time friends and
18 family members come to you for investing advice. Is that
19 right?

20 A That is correct.

21 Q And when you were a young lawyer you were on the board of
22 a nonprofit that received a donation of Yahoo! stock and the
23 board looked to you for guidance. Is that correct?

24 THE COURT: Just a moment. I think there's an
25 objection.

006365

Patrick - Direct

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1 MR. MORRIS: Uh-huh.

2 THE COURT: Go ahead.

3 MR. ANDERSON: So far -- relevance, Your Honor. This
4 is way out of the bounds of the contempt proceeding. You
5 know, what he did as a young person with Yahoo! stock. We're
6 here to -- he authorized the lawsuit. They filed the lawsuit.
7 That's it. Getting into all this peripheral stuff is
8 completely irrelevant.

9 THE COURT: Your response?

10 MR. MORRIS: My response, Your Honor, is very simple.
11 Mr. Patrick assumed responsibility, and you're going to be
12 told that he exercised full and complete authority over a \$200
13 million fund that was created by Mr. Dondero, --

14 THE COURT: Okay.

15 MR. MORRIS: -- that funds -- that is funded
16 virtually by Mr. Dondero, and for which -- Mr. Patrick is a
17 lovely man, and I don't mean to disparage him at all -- but he
18 has no meaningful experience in investing at all.

19 THE COURT: All right. Counsel, I overrule. I think
20 there's potential relevance.

21 And may I remind people that when you're back at counsel
22 table, please make sure you speak your objections into the
23 microphone. Thank you.

24 BY MR. MORRIS:

25 Q When you were a young lawyer, sir, you were on the board

006366

Patrick - Direct

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1 of a nonprofit that received a donation of Yahoo! stock and
2 the board looked to you for guidance, correct?

3 A Yes, correct.

4 Q And -- but during your 13 years at Highland, you never had
5 formal responsibility for making investment decisions,
6 correct?

7 A That is correct.

8 Q Yeah. In fact, other than investment opportunities that
9 you personally presented where you served as a co-decider, you
10 never had any responsibility or authority to make investment
11 decisions on behalf of HCMLP or any of its affiliated
12 entities, correct?

13 A That is correct.

14 Q And at least during your deposition, you couldn't identify
15 a single opportunity where you actually had the authority and
16 did authorize the execution of a transaction on behalf of
17 HCMLP or any of its affiliates, correct?

18 A Correct.

19 Q And yet today you are now solely responsible for making
20 all investment decisions with respect to a \$200 million
21 charitable fund, correct?

22 A Yes, but I get some help. I've engaged an outside third
23 party called ValueScope, and they have been as -- effectively
24 working as a "gatekeeper" for me, and I look to them for
25 investment guidance and advice, and I informally look to Mr.

006367

Patrick - Direct

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1 Dondero since the time period of when I took control on March
2 24th for any questions I may have with respect to the
3 portfolio. So I don't feel like I'm all by myself in making
4 decisions.

5 Q Okay. I didn't mean to suggest that you were, sir, and I
6 apologize if you took it that way. I was just asking the
7 question, you are the person now solely responsible for making
8 the investment decisions, correct?

9 A Yes.

10 Q Okay. Let's talk about the circumstances that led to the
11 filing of the complaint for a bit. On April 12, 2021, you
12 caused the Plaintiffs to commence an action against HCMLP and
13 two other entities, correct?

14 A Correct.

15 Q Okay. One of the binders -- you've got a couple of
16 binders in front of you. If you look at the bottom, one of
17 them says Volume 1 of 2, Exhibits 1 through 18. And if you
18 could grab that one and turn to Exhibit 12. Do you have that,
19 sir?

20 A It says -- it says the original complaint. Is that the
21 right one?

22 Q That is the right one. And just as I said when we were
23 doing this virtually last Friday, if I ask you a question
24 about a particular document, you should always feel free to
25 review as much of the document as you think you need to

006368

Patrick - Direct

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1 competently and fully answer the question. Okay?

2 A Okay. Thank you.

3 Q All right. You instructed the Sbaiti firm to file that
4 complaint on behalf of the Plaintiffs, correct?

5 A Correct.

6 Q And to the best of your recollection, the Plaintiffs
7 returned -- retained the Sbaiti firm in April, correct?

8 A Correct.

9 Q So the Sbaiti firm was retained no more than twelve days
10 before the complaint was filed, correct?

11 A Correct.

12 Q You personally retained the Sbaiti firm, correct?

13 A Correct.

14 Q And the idea of filing this complaint originated with the
15 Sbaiti firm, correct?

16 A Correct.

17 Q Before filing -- withdrawn. Before becoming the
18 Plaintiffs' authorized representative, you hadn't had any
19 communications with anyone about potential claims that might
20 be brought against the Debtor arising out of the HarbourVest
21 settlement, correct?

22 A That is correct.

23 Q Now, after you became the Plaintiffs' authorized
24 representative, Mr. Dondero communicated with the Sbaiti firm
25 about the complaint that's marked as Exhibit 12, correct?

006369

Patrick - Direct

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1 A Yes. After he brought certain information to myself and
2 then that I engaged the Sbaiti firm to launch an
3 investigation, I also wanted Mr. Dondero to work with the
4 Sbaiti firm with respect to their investigation of the
5 underlying facts.

6 Q Okay. Mr. Dondero did not discuss the complaint with you,
7 but he did communicate with the Sbaiti firm about the
8 complaint, correct?

9 A I believe -- yeah. I heard you slip in at the end "the
10 complaint." I know he communicated with the Sbaiti firm. I
11 can't -- I can't say what he said or didn't say with respect
12 to the -- the actual complaint.

13 Q Okay. But Mr. Dondero got involved in the process
14 initially when he brought some information to your attention
15 concerning the HarbourVest transaction, correct?

16 A Correct.

17 Q And he came to you with the HarbourVest information after
18 you assumed your role as the authorized representative of the
19 Plaintiffs on March 24th, correct?

20 A That is correct.

21 Q At the time he came to you, you did not have any specific
22 knowledge about the HarbourVest transaction, correct?

23 A I did not have specific knowledge with respect to the
24 allegations that were laid out and the facts with respect to
25 the original complaint. I think I had just had a general

006370

Patrick - Direct

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1 awareness that there was a HarbourVest something or other, but
2 the specific aspects of it, I was unaware.

3 Q Okay. And you had no reason to believe that Mr. Seery had
4 done anything wrong with respect to the HarbourVest
5 transaction at the time you became the Plaintiffs' authorized
6 representative, correct?

7 A That is correct.

8 Q But you recall very specifically that some time after
9 March 24th Mr. Dondero told you that an investment opportunity
10 was essentially usurped or taken away, to the Plaintiffs' harm
11 and for the benefit of HCMLP, correct?

12 A That is correct.

13 Q And after Mr. Dondero brought this information to your
14 attention, you hired the Sbaiti firm to launch an
15 investigation into the facts, correct?

16 A Correct.

17 Q You had never worked with the Sbaiti firm before, correct?

18 A That is correct.

19 Q And you had hired many firms as a tax counselor at HCMLP,
20 but not the Sbaiti firm until now. Correct?

21 A That is correct.

22 Q You got to the Sbaiti firm through a recommendation from
23 D.C. Sauter, correct?

24 A Correct.

25 Q Mr. Sauter is the in-house counsel, the in-house general

006371

Patrick - Direct

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1 counsel at NexPoint Advisors, correct?

2 A Correct.

3 Q You didn't ask Mr. Sauter for a recommendation for a
4 lawyer; he just volunteered that you should use the Sbaiti
5 firm. Correct?

6 A That is correct.

7 Q And you never used -- considered using another firm, did
8 you?

9 A When they were presented to me, they appeared to have all
10 the sufficient skills necessary to undertake this action, and
11 so I don't recall interviewing any other firms.

12 Q Okay. Now, after bringing the matter to your action, Mr.
13 Dondero communicated directly with the Sbaiti firm in relation
14 to the investigation that was being undertaken. Correct?

15 A That is correct.

16 Q But you weren't privy to the communications between Mr.
17 Dondero and the Sbaiti firm, correct?

18 A I did not participate in those conversations as the --
19 what I, again, considered Mr. Dondero as the investment
20 advisor to the portfolio, and he was very versant in the
21 assets. I wanted him to participate in the investigation that
22 the Sbaiti firm was undertaking prior to the filing of this
23 complaint.

24 Q Let's talk for a minute about the notion of Mr. Dondero
25 being the investment advisor. Until recently, the entity

006372

Patrick - Direct

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1 known as the DAF had an investment advisory committee with HC
2 -- an investment advisory agreement with HCMLP. Correct?

3 A It's my understanding that the investment advisory
4 agreement existed with the Plaintiffs, CLO Holdco, as well as
5 Charitable DAF Fund, LP, up and to the end of February,
6 throughout the HarbourVest transaction.

7 Q Okay. And since February, the Plaintiffs do not have an
8 investment advisory agreement with anybody, correct?

9 A That is correct.

10 Q Okay. So Mr. Dondero, if he serves as an investment
11 advisor, it's on an informal basis. Is that fair?

12 A After I took control, he serves as an informal investment
13 advisor.

14 Q Okay. So there's no contract that you're aware of between
15 either of the Plaintiffs and Mr. Dondero pursuant to which he
16 is authorized to act as the investment advisor for the
17 Plaintiffs, correct?

18 A That is correct.

19 Q Okay. When you communicated with Grant Scott --
20 withdrawn. You know who Grant Scott is, right?

21 A Yes, I do.

22 Q He's the gentleman who preceded you as the authorized
23 representative of the Plaintiffs, correct?

24 A Yes.

25 Q Okay. You communicated with Mr. Scott from time to time

006373

Patrick - Direct

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1 during February and March 2021, correct?

2 A February and March are the dates? Yes.

3 Q Yeah. And from February 1st until March 21st -- well,
4 withdrawn. Prior to March 24th, 2021, Mr. Scott was the
5 Plaintiffs' authorized representative, correct?

6 A Correct.

7 Q And you have no recollection of discussing with Mr. Scott
8 at any time prior to March 24th any aspect of the HarbourVest
9 settlement with Mr. Scott. Correct?

10 A Correct.

11 Q And you have no recollection of discussing whether the
12 Plaintiffs had potential claims that might be brought against
13 the Debtor. Correct? Withdrawn. Let me ask a better
14 question.

15 You have no recollection of discussing with Mr. Scott at
16 any time prior to March 24th whether the Plaintiffs had
17 potential claims against the Debtor. Correct?

18 A That is correct.

19 Q You and Mr. Scott never discussed whether either of --
20 either of the Plaintiffs had potential claims against Mr.
21 Seery. Correct?

22 A Correct.

23 Q Okay. At the time that you became their authorized
24 representative, you had no knowledge that the Plaintiffs would
25 be filing a complaint against the Debtors relating to the

006374

Patrick - Direct

110

1 HarbourVest settlement less than three weeks later, correct?

2 A That is correct.

3 Q Okay. Now, if you look at Page 2 of the complaint, you'll
4 see at the top it refers to Mr. Seery as a potential party.

5 Do you see that?

6 A Yes, I do.

7 Q Okay. You don't know why Mr. Seery was named --
8 withdrawn. You don't know why Mr. Seery was not named as a
9 defendant in the complaint, correct?

10 A No, I -- that's correct. I do not know why he was not
11 named. That's in the purview of the Sbaiti firm.

12 Q Okay. And the Sbaiti firm also made the decision to name
13 Mr. Seery on Page 2 there as a potential party when drafting
14 the complaint, correct?

15 A That's what the document says.

16 Q And you weren't involved in the decision to identify Mr.
17 Seery as a potential party, correct?

18 A That is correct. Again, I rely on the law firm to decide
19 what parties to bring a suit to -- against.

20 Q Okay. Okay. Do you recall the other day we talked about
21 a document called the July order?

22 A Yes.

23 Q Okay. That's in -- that's in Tab 16 in your binder, if
24 you can turn to that. And take a moment to look at it, if
25 you'd like. And my first question is simply whether this is

006375

Patrick - Direct

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1 the July order, as you understand it.

2 (Pause.)

3 A Yes, it is. I was just looking for the gatekeeper
4 provision. It looks like it's Paragraph 5. So, --

5 Q Okay. Thank you for that. About a week after the
6 complaint was filed, you authorized the Plaintiffs to file a
7 motion in the District Court for leave to amend the
8 Plaintiffs' complaint to add Mr. Seery as a defendant.
9 Correct?

10 A I authorized the filing of a motion in Federal District
11 Court that would ask the Federal District Court whether or not
12 Jim Seery could be named in the original complaint with
13 respect to the gatekeeper provision cited in that motion and
14 with respect to the arguments that were made in that motion.

15 Q Okay. Just to be clear, if you turn to Exhibit 17, the
16 next tab, --

17 A I'm here.

18 Q -- do you see that document is called Plaintiffs' Motion
19 for Leave to File First Amended Complaint?

20 A Yes.

21 Q And that's the document that you authorized the Plaintiffs
22 to file on or about April 19th, correct?

23 A Correct.

24 Q Okay. And can we refer to that document as the motion to
25 amend?

006376

Patrick - Direct

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1 A Yes.

2 Q Okay. You were aware of the July order at Tab 16 before
3 you authorized the filing of the motion to amend. Correct?

4 A Yes, because it's cited in the motion itself.

5 Q Okay. And at the time that you authorized the filing of
6 the motion to amend, you understood that the July order was
7 still in effect. Correct?

8 A Yes, because it was referenced in the motion, so my
9 assumption would be it would still be in effect.

10 Q Okay. Before the motion to amend was filed, you're -- you
11 are aware that my firm and the Sbaiti firm communicated by
12 email about the propriety of filing the motion to amend?

13 A Before it was filed? Communications between your firm and
14 the Sbaiti firm? I would have to have my recollection
15 refreshed.

16 Q I'll just ask the question a different way. Did you know
17 before you authorized the filing of the motion to amend that
18 my firm and the Sbaiti firm had engaged in an email exchange
19 about the propriety of filing the motion to amend in the
20 District Court?

21 A It's my recollection -- and again, I could be wrong here
22 -- but I thought the email exchange occurred after the fact,
23 not before. But again, I -- I just --

24 Q Okay. In any event, on April 19th, the motion to amend
25 was filed. Correct?

006377

Patrick - Direct

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1 A Correct.

2 Q That's the document that is Exhibit 17. And you
3 personally authorized the Sbaiti firm to file the motion to
4 amend on behalf of the Plaintiffs, correct?

5 A Correct.

6 Q And you authorized the filing of the motion to amend with
7 knowledge -- withdrawn.

8 Can you read the first sentence of the motion to amend out
9 loud, please?

10 A Yeah. (reading) Plaintiffs submit this motion under Rule
11 15 of the Federal Rules of Civil Procedure for one purpose:
12 to name as defendant one James P. Seery, Jr., the CEO of
13 defendant Highland Capital Management, LP (HCM) and the chief
14 perpetrator of the wrongdoing that forms the basis of the
15 Plaintiffs' causes of action.

16 Q And does that fairly state the purpose of the motion?

17 MR. SBAITI: Objection, Your Honor. Asks him to make
18 a legal conclusion about the purpose of the legal motion filed
19 in court that he didn't draft.

20 THE COURT: Okay. I overrule. You can answer if you
21 have an answer.

22 THE WITNESS: It's always been my general
23 understanding that the purpose of filing this motion was to go
24 to the Federal District Court and ask that Court of reference
25 to this Court whether or not Mr. Seery could be named with

006378

Patrick - Direct

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1 respect to the original complaint, citing again the gatekeeper
2 provisions and citing the various arguments that we've heard
3 much earlier.

4 BY MR. MORRIS:

5 Q Okay. You personally didn't learn anything between April
6 9th, when the complaint was filed, and April 19th, when the
7 motion to amend was filed, that caused you to authorize the
8 filing of the motion to amend, correct?

9 A That is correct.

10 Q In fact, you relied on the Sbaiti firm with respect to
11 decisions concerning the timing of the motion to amend.
12 Correct?

13 A Correct.

14 Q And you had no knowledge of whether anyone acting on
15 behalf of the Plaintiffs ever served the Debtor with a copy of
16 the motion to amend. Correct?

17 A Yes. I have no knowledge.

18 Q Okay. And you have no knowledge that the Sbaiti firm ever
19 provided my firm with a copy of the motion to amend. Correct?

20 A I cannot recall one way or another.

21 Q Okay. You never instructed anyone on behalf -- acting on
22 behalf of the Plaintiffs to inform the Debtor that the motion
23 to amend had been filed, correct?

24 A That is correct.

25 Q And that's because you relied on the Sbaiti firm on

006379

Patrick - Direct

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1 procedural issues, correct?

2 A That is correct.

3 Q You didn't consider waiting until the Debtor --

4 (Interruption.)

5 Q -- had appeared in the action before authorizing the
6 filing of the motion --

7 A Yeah, --

8 THE COURT: Yes. Y'all are being a little bit loud.
9 Okay.

10 A VOICE: Sorry.

11 MR. MORRIS: No problem.

12 MR. PHILLIPS: I've heard that before, Your Honor,
13 and I apologize.

14 THE COURT: I bet you have. Thank you.

15 MR. MORRIS: Admonish Mr. Phillips, please.

16 THE COURT: Okay.

17 MR. MORRIS: He's always the wild card.

18 MR. PHILLIPS: I admonish --

19 MR. MORRIS: He's always the wild card.

20 MR. PHILLIPS: I admonish myself.

21 THE COURT: All right. I think he got the message.
22 Continue.

23 BY MR. MORRIS:

24 Q You didn't consider waiting until the Debtor had appeared
25 in the action before filing the motion to amend, correct?

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Patrick - Direct

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1 A Again, I am the client and I rely upon the law firm that's
2 engaged with respect to making legal decisions as to the
3 timing and notice and appearance and what have you. I'm a tax
4 lawyer.

5 Q Okay. You wanted the District Court to grant the relief
6 that the Plaintiffs were seeking. Correct?

7 A I wanted the District Court to consider, under the
8 gatekeeper provisions of this Court, whether or not Mr. Seery
9 could be named in the original complaint. That's -- that,
10 from my perspective, is what was desired.

11 Q All right. You wanted the District Court to grant the
12 relief that the Plaintiffs were seeking, correct?

13 MR. SBAITI: Objection, Your Honor. Asked and
14 answered.

15 THE COURT: Overruled.

16 THE WITNESS: Again, I would characterize this motion
17 as not necessarily asking for specific relief, but asking the
18 Federal District Court whether or not, under the gatekeeper
19 provision, that Mr. Seery could be named on there. What
20 happens after that would be a second step. So I kind of -- I
21 dispute that characterization.

22 BY MR. MORRIS:

23 Q All right. I'm going to cross my fingers and hope that
24 Ms. Canty is on the line, and I would ask her to put up Page
25 57 from Mr. Patrick's deposition transcript.

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Patrick - Direct

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1 THE COURT: There it is.

2 MR. MORRIS: There it is. It's like magic. Can we
3 go down to Lines 18 through 20?

4 BY MR. MORRIS:

5 Q Mr. Patrick, during the deposition on Friday, did I ask
6 you this question and did you give me this answer? Question,
7 "Did you want the Court to grant the relief you were seeking?"
8 Answer, "Yes."

9 A I -- and it was qualified with respect to Lines 12 through
10 17. In my view, when I answered yes, I was simply restating
11 what I stated in Line 12. I wanted the District Court to
12 consider this motion as to whether or not Mr. Seery could be
13 named in the original complaint or the amended complaint
14 pursuant to the existing gatekeeper rules and the arguments
15 that were made in that motion. That's -- that's what I
16 wanted. And so then when I was asked, did you want the Court
17 to grant the relief that you were seeking, when I answered
18 yes, it was from that perspective.

19 Q Okay. Thank you very much. If the District Court had
20 granted the relief that you were seeking, you would have
21 authorized the Sbaiti firm to file the amended complaint
22 naming Mr. Seery as a defendant if the Sbaiti firm recommended
23 that you do so. Correct?

24 A If the Sbaiti firm recommended that I do so. That is
25 correct.

006382

Patrick - Direct

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1 Q Okay. Let's talk for a little bit about the line of
2 succession for the DAF and CLO Holdco. Can we please go to
3 Exhibit 25, which is in the other binder? It's in the other
4 binder, sir.

5 (Pause.)

6 Q I guess you could look on the screen or you can look in
7 the binder, whatever's easier for you.

8 A Yeah. I prefer the screen. I prefer the screen.

9 Q Okay.

10 A It's much easier.

11 Q All right. We've got it in both spots. But do you have
12 Exhibit 25 in front of you, sir?

13 A Yes, I do.

14 Q All right. Do you know what it is?

15 A This is the organizational chart depicting a variety of
16 charitable entities as well as entities that are commonly
17 referred to the DAF. However, when I look at this chart, I do
18 not look at and see just boxes, what I see is the humanitarian
19 effort that these boxes represent.

20 MR. MORRIS: Your Honor, may I interrupt?

21 THE COURT: You may.

22 MR. MORRIS: Okay.

23 BY MR. MORRIS:

24 Q I appreciate that, and when your lawyers get up to ask you
25 questions, I bet they'll want to know just what you were about

006383

Patrick - Direct

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1 to tell me. But I just want to understand what this chart is.

2 This chart is the DAF, CLO Holdco, structure chart. Correct?

3 A Correct.

4 Q Okay. And you were personally involved in creating this
5 organizational structure, correct?

6 A I -- yes.

7 Q Okay. And from time to time, the Charitable DAF Holdco
8 Limited distributes cash to the foundations that are above it.
9 Correct?

10 A Correct.

11 Q All right. I want to talk a little bit more specifically
12 about how this happens. The source of the cash distributed by
13 Charitable DAF Holdco Limited is CLO Holdco, Ltd., that
14 entity, the Cayman Islands entity near the bottom. Correct?

15 MR. ANDERSON: Your Honor, I have an objection.
16 Completely irrelevant. I'm objecting on relevance grounds.
17 This has nothing to do with the contempt proceeding. We've
18 already gone over that he authorized the filing of the
19 complaint, that he authorized the filing of the motion to
20 amend. It's all in the record. This is completely irrelevant
21 at this point.

22 THE COURT: Okay. Relevance objection. Your
23 response?

24 MR. MORRIS: I believe that it's relevant to the
25 Debtor's motion to hold Mr. Dondero in contempt for pursuing

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Patrick - Direct

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1 claims against Mr. Seery, in violation of the July 7 order. I
2 think an understanding of what the Plaintiffs are, how they're
3 funded, and Mr. Dondero's interest in pursuing claims on
4 behalf of those entities is relevant to the -- to the -- just
5 -- it's just against him. It's not against their clients,
6 frankly. It's just against Mr. Dondero.

7 THE COURT: I overrule.

8 MR. MORRIS: I'll try and -- I'll try and make this
9 quick, though.

10 BY MR. MORRIS:

11 Q CLO Holdco had two primary sources of capital. Is that
12 right?

13 A Two primary sources of capital?

14 Q Let me ask it differently. There was a Charitable
15 Remainder Trust that was going to expire in 2011, correct?

16 A That is correct.

17 Q And that Charitable Remainder Trust had certain CLO equity
18 assets, correct?

19 A Correct.

20 Q And the donor to that Charitable Remainder Trust was
21 Highland Capital Management, LP. Correct?

22 A Not correct. After my deposition, I refreshed my memory.
23 There were two Charitable Remainder Trusts that existed, which
24 I think in my mind caused a little bit of confusion. The
25 Charitable Remainder Trust No. 2, which is the one that

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Patrick - Direct

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1 expired in 2011, was originally funded by Mr. Dondero.

2 Q Okay. So, so the Charitable Remainder Trust that we were
3 talking about on Friday wasn't seeded with capital from
4 Highland Capital Management, it came from Mr. Dondero
5 personally?

6 A That is correct.

7 Q Okay. Thank you. And the other primary source of capital
8 was the Dallas Foundation, the entity that's in the upper
9 left-hand corner of the chart. Is that correct?

10 A No.

11 Q The -- you didn't tell me that the other day?

12 A You said -- you're pointing to the Dallas Foundation.
13 That's a 501(c)(3) organization.

14 Q I apologize. Did you tell me the other day that the
15 Dallas Foundation was the second source of capital for HCLO
16 Hold Company?

17 A No, I did not. You --

18 (Pause.)

19 Q Maybe I know the source of the confusion. Is the Highland
20 Dallas Foundation something different?

21 A Yes. On this organizational chart, you'll see that it has
22 an indication, it's a supporting organization.

23 Q Ah, okay. So, so let me restate the question, then. The
24 second primary source of capital for CLO Holdco, Ltd. is the
25 Highland Dallas Foundation. Do I have that right?

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Patrick - Direct

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1 A Yes.

2 Q Okay. And the sources of that entity's capital were
3 grantor trusts and possibly Mr. Dondero personally. Correct?

4 A In addition -- per my refreshing my recollection from our
5 deposition, the other Charitable Remainder Trust, I believe
6 Charitable Remainder Trust No. 1, which expired later, also
7 sent a donation, if you will, or assets to -- and I cannot
8 recall specifically whether it was just the Highland Dallas
9 Foundation or the other supporting organizations that you see
10 on this chart.

11 Q But the source of that -- the source of the assets that
12 became the second Charitable Remainder Trust was Highland
13 Capital Management, LP. Is that right?

14 A I think that is accurate from my recollection. And again,
15 I'm talking about Charitable Remainder Trust No. 1.

16 Q Okay. So is it fair to say -- I'm just going to try and
17 summarize, if I can. Is it fair to say that CLO Holdco, Ltd.
18 is the investment arm of the organizational structure on this
19 page?

20 A Yes.

21 Q And is it fair to say that nearly all of the assets that
22 are in there derived from either Mr. Dondero, one of his
23 trusts, or Highland Capital Management, LP?

24 A Yes. It's like the Bill Gates Foundation or the
25 Rockefeller Foundation. These come from the folks that make

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Patrick - Direct

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1 their donations and put their name on it.

2 Q Okay.

3 MR. MORRIS: Now, now, Your Honor, I'm going to go
4 back just for a few minutes to how Mr. Scott got appointed,
5 because I think that lays kind of the groundwork for his
6 replacement. It won't take long.

7 THE COURT: Okay. I have a question either --

8 MR. MORRIS: Sure.

9 THE COURT: -- for you or the witness. I'm sorry,
10 but --

11 MR. MORRIS: Sure. Yeah.

12 THE COURT: -- the organizational chart, it's not
13 meant to show everything that might be connected to this
14 substructure, right? Because doesn't CLO Holdco, Ltd. own
15 49.02 percent of HCLOF, --

16 MR. MORRIS: That --

17 THE COURT: -- which gets us into the whole
18 HarbourVest transaction issue?

19 MR. MORRIS: You're exactly right, Your Honor.

20 THE COURT: Okay.

21 MR. MORRIS: But that's just an investment that HCLO
22 Holdco made.

23 THE COURT: Right.

24 MR. MORRIS: Right? And so I -- let me ask the
25 witness, actually.

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Patrick - Direct

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1 THE COURT: Okay. Thank you. Thank you.

2 MR. MORRIS: Let me ask the witness. Yeah.

3 THE COURT: I just want my brain --

4 MR. MORRIS: Right.

5 THE COURT: -- to be complete on this chart.

6 BY MR. MORRIS:

7 Q Mr. Patrick, there are three entities under CLO Holdco,
8 Ltd. Do you see that?

9 A Yes.

10 Q And does CLO Holdco, Ltd. own one hundred percent of the
11 interests in each of those three entities?

12 A Yes.

13 Q Do you know why those three entities are depicted on this
14 particular chart? Is it because they're wholly-owned
15 subsidiaries?

16 A Correct.

17 Q Okay. And CLO Holdco, Ltd. has interests in other
18 companies. Isn't that right?

19 A It has other investments. That is correct.

20 Q And the reason that they're not depicted on here is
21 because they're not wholly-owned subsidiaries, they're just
22 investments; is that fair?

23 A That is fair.

24 MR. MORRIS: Does that--?

25 THE COURT: Yes.

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Patrick - Direct

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1 MR. MORRIS: Okay.

2 THE COURT: Uh-huh.

3 BY MR. MORRIS:

4 Q So, so let's go back to Mr. Grant for a moment. Mr.
5 Scott, rather. Mr. Dondero was actually the original general
6 partner. If you look at this chart, while it's still up here,
7 you see on the left there's Charitable DAF GP, LLC?

8 A Yes.

9 Q And the Charitable DAF GP, LLC is the general partner of
10 the Charitable DAF Fund, LP. Correct?

11 A Correct.

12 Q And on this chart, Grant Scott was the managing member of
13 Charitable DAF GP, LLC. Right?

14 A Correct.

15 Q Okay. But Mr. Dondero was the original general partner of
16 that entity, correct?

17 A That is correct. But I do want to point out, I just note
18 that the GP interest is indicating a one percent interest and
19 the 99 interest to Charitable DAF Holdco. I believe that's
20 incorrect. It's a hundred percent by Charitable DAF Holdco,
21 Ltd., and the Charitable DAF GP interest is a noneconomic
22 interest. So that should actually reflect a zero percent to
23 the extent it may indicate some sort of profits or otherwise.

24 Q Okay. Thank you for the clarification. Can you turn to
25 Exhibit 26, please, in your binder? And is it your

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Patrick - Direct

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1 understanding that that is the amended and restated LLC
2 agreement for the DAF GP, LLC?

3 A Yes.

4 Q Okay. And this was amended and restated effective as of
5 January 1st, 2012, correct?

6 A Yes.

7 Q And if you go to the last page, you'll see there are
8 signatures for Mr. Scott and Mr. Dondero, correct?

9 A Yes.

10 Q And Mr. Dondero is identified as the forming -- former
11 managing member and Mr. Scott is identified as the new
12 managing member. Correct?

13 A Correct. That's what the document says.

14 Q And it's your understanding that Mr. Dondero had the
15 authority to select his successor. Correct?

16 A Correct.

17 Q In fact, it's based on your understanding of documents and
18 your recollection that Mr. Dondero personally selected Mr.
19 Scott as the person he was going to transfer control to,
20 correct?

21 A Upon advice of Highland Capital Management's tax
22 compliance officer, Mr. Tom Surgent.

23 Q What advice did Mr. Surgent give?

24 A He gave advice that, because Mr. Dondero -- and this is
25 what I came to an understanding after the fact of this

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Patrick - Direct

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1 transaction, because I was not a part of it -- that by Mr.
2 Dondero holding that GP interest, that it would be -- the
3 Plaintiffs, if you will, would be an affiliate entity for
4 regulatory purposes, and so he advised that if he -- if Mr.
5 Dondero transferred his GP interest to Mr. Scott, it would no
6 longer be an affiliate, is my recollection.

7 Q Okay. You didn't appoint Mr. Scott, did you?

8 A No.

9 Q That was Mr. Dondero. Is that right?

10 A Yes.

11 Q Okay. Let's go to 2021. Let's come back to the current
12 time. Sometime in February, Mr. Scott called you to ask about
13 the mechanics of how he could resign. Correct?

14 A That is correct.

15 Q But the decision to have you replace Mr. Scott was not
16 made until March 24th, the day you sent an email to Mr. Scott
17 with the transfer documents. Correct?

18 A That is correct.

19 Q And it's your understanding that he could have transferred
20 the management shares and control of the DAF to anyone in the
21 world. Correct?

22 A Correct.

23 Q That's what the docu... that he had the authority under
24 the documentation, as you understood it, to freely trade or
25 transfer the management shares. Correct?

006392

Patrick - Direct

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1 A Wait. Now, let's be precise here.

2 Q Okay.

3 A Are you talking about the GP interests or the management
4 shares held by Charitable DAF Holdco, Ltd.?

5 Q Let's start with the management shares. Can you explain
6 to the Court what the management shares are?

7 MR. ANDERSON: Your Honor? Hang on one second. Your
8 Honor, I want to object again on relevance. We're going way
9 beyond the scope of the contempt issue, whether or not --

10 MR. MORRIS: This is about control.

11 MR. ANDERSON: -- the motion to amend somehow
12 violated the prior order of this Court. Getting into the
13 management structure, transfer of shares, that's way outside
14 the bounds. I object on relevance.

15 THE COURT: Okay. Relevance objection?

16 MR. MORRIS: Your Honor, they have probably 30
17 documents, maybe 20 documents, on their exhibit list that
18 relate to management and control. I'm asking questions about
19 management and control. Okay? This is important, again, to
20 (a) establish his authority, but (b) the circumstances under
21 which he came to be the purported control person.

22 THE COURT: Okay. Overruled. Go ahead.

23 THE WITNESS: It might be helpful to look at the
24 organizational chart, but if not -- but I'll describe it to
25 you again. With respect to the entity called --

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Patrick - Direct

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1 MR. MORRIS: Hold on one second. Can we put up the
2 organizational chart again, Ms. Canty, if you can? There you
3 go.

4 THE WITNESS: Okay. So with respect to the
5 Charitable DAF Holdco, Ltd., it is my understanding that Mr.
6 Scott, he organized that entity when he was the independent
7 director of the Charitable Remainder Trust, and he caused the
8 issuance of the management shares to be issued to himself.
9 And then those are, again, noneconomic shares, but they are
10 control shares over that entity.

11 And I think, to answer your question, is -- it -- he alone
12 decides who he can transfer those shares to.

13 BY MR. MORRIS:

14 Q Do I have this right, that whoever holds the noneconomic
15 management shares has the sole authority to appoint the
16 representatives for each of the Charitable DAF entities and
17 CLO Holdco? It's kind of a magic ticket, if you will?

18 A It -- I think there's a -- the answer really is no from a
19 legal standpoint, because Charitable DAF Holdco is a limited
20 partner in Charitable DAF Fund, LP, so it does not have
21 authority -- authority under all -- the respective entities
22 underneath that. It could cause a redemption, if you will, of
23 Charitable DAF Fund. And so, really, the authority -- the
24 trickle-down authority that you're referencing is with respect
25 to his holding of the Charitable DAF GP, LLC interest. It's a

006394

Patrick - Direct

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1 member-managed Delaware limited liability company. And from
2 that, he -- that authority kind of trickles down to where he
3 can appoint directorships.

4 Q All right. I think I want to just follow up on that a
5 bit. Which entity is the issuer of the manager shares, the
6 management shares?

7 A Yeah, the -- per the organizational chart, it is accurate,
8 it's the Charitable DAF Holdco, Ltd. which issued the
9 management shares to Mr. Scott.

10 Q Okay. And that's why you have the arrow from Mr. Scott
11 into that entity?

12 A Correct.

13 Q And do those -- does the holder of the management shares
14 have the authority to control the Charitable DAF Holdco, Ltd.?

15 A Yes.

16 Q Okay. And as the control person for the Charitable DAF
17 Holdco, Ltd., they own a hundred -- withdrawn. Charitable DAF
18 Holdco Limited owns a hundred percent of the limited
19 partnership interests of the Charitable DAF Fund, LP.

20 Correct?

21 A Correct.

22 Q And so does the holder of that hundred percent limited
23 partnership interest have the authority to decide who acts on
24 behalf of the Charitable DAF Fund, LP?

25 A I would say no. I mean, you know, just -- I would love to

006395

Patrick - Direct

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1 read the partnership agreement again. But I, conceptually,
2 what I know with partnerships, I would say the limited partner
3 would not. It would be through the Charitable DAF GP, LLC
4 interest.

5 Q The one on the left, the general partner?

6 A The general partner.

7 Q I see. So when Mr. Scott transferred to you the one
8 hundred percent of the management shares as well as the title
9 of the managing member of the Charitable DAF GP, LLC, did
10 those two events give you the authority to control the
11 entities below it?

12 A Yes.

13 Q Thank you. And so prior to the time that he transferred
14 those interests to you, is it your understanding that Mr.
15 Scott had the unilateral right to transfer those interests to
16 anybody in the world?

17 A Yes.

18 Q Okay. And you have that right today, don't you?

19 A Yes, I do.

20 Q If you wanted, you could transfer it to me, right?

21 A Yes, I could.

22 Q Okay. But of all the people in the world, Mr. Scott
23 decided to transfer the management shares and the managing
24 member title of the DAF GP to you, correct?

25 A Restate that question again?

006396

Patrick - Direct

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1 Q Of all the people in the world, Mr. Scott decided to
2 transfer it to you, correct?

3 A Yeah. Mr. Scott transferred those interests to me.

4 Q Okay. And you accepted them, right?

5 A Yes.

6 Q You're not getting paid anything for taking on this
7 responsibility, correct?

8 A I am not paid by any of the entities depicted on this
9 chart.

10 Q And Mr. Scott used to get \$5,000 a month, didn't he?

11 A I believe that's what he testified to.

12 Q Yeah. But you don't get anything, right?

13 A Correct.

14 Q In fact, you get the exact same salary and compensation
15 from Skyview that you had before you became the authorized
16 representative of the DAF entities and CLO Holdco. Correct?

17 A Correct.

18 MR. MORRIS: Okay. Your Honor, if I may just take a
19 moment, I may be done.

20 THE COURT: Okay.

21 (Pause.)

22 MR. MORRIS: Your Honor, I have no further questions.

23 THE COURT: All right. Pass the witness. Any
24 examination of the witness?

25 CROSS-EXAMINATION

006397

Patrick - Cross

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1 BY MR. ANDERSON:

2 Q Mr. Patrick, I just had a few follow-up questions. When
3 you authorized the filing of the lawsuit against Highland
4 Capital Management, LP, Highland HCF Advisor Limited, and
5 Highland CLO Funding, Limited, when that lawsuit was filed in
6 April of this year, was Mr. Seery included as a defendant?

7 A No.

8 Q Have the two Plaintiffs in that lawsuit, have they
9 commenced any lawsuit against Mr. Seery?

10 A No.

11 Q Have they pursued any lawsuit against Mr. Seery?

12 A No.

13 Q Have they pursued a claim or cause of action against Mr.
14 Seery?

15 A No.

16 Q At most, did the Plaintiffs file a motion for leave to add
17 Mr. Seery as a defendant?

18 MR. MORRIS: Objection, Your Honor. To the extent
19 that any of these questions are legal conclusions, I object.
20 He's using the word pursue. If he's trying -- if he's then
21 going to argue that, But the witness testified that he didn't
22 pursue and that's somehow a finding of fact, I object.

23 THE COURT: Okay. I understand.

24 MR. MORRIS: Yeah.

25 THE COURT: But I overrule. He can answer.

006398

1 MR. MORRIS: That's fine.

2 THE WITNESS: Can you restate the question again?

3 BY MR. ANDERSON:

4 Q Sure. On behalf of the Plaintiffs -- well, strike that.

5 Did the Plaintiffs pursue a claim or cause of action against

6 Mr. Seery?

7 A No.

8 Q At most, did the Plaintiffs file a motion for leave to

9 file an amended complaint regarding Mr. Seery?

10 A Yes. But, again, I viewed the motion as simply asking the

11 Federal District Court whether Mr. Seery could or could not be

12 named in a complaint, and then the next step might be how the

13 Federal District Court might rule with respect to that.

14 Q And we have -- it's Tab 17 in the binders in front of you.

15 That is Plaintiffs' motion for leave. If you could turn to

16 that, please.

17 A Yes. I've got it open.

18 Q Is the Court's July order, the Bankruptcy Court's July

19 order, is it mentioned on the first page and then throughout

20 the motion for leave to amend?

21 A Yes, it is. I see it quoted verbatim on Page 2 under

22 Background.

23 Q Was the Court's order hidden at all from the District

24 Court?

25 A The document speaks for itself. It's very transparent.

Patrick - Cross

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1 Q Was there any effort whatsoever to hide the prior order of
2 the Bankruptcy Court?

3 A No.

4 MR. ANDERSON: Pass the witness.

5 THE COURT: Okay. Other examination?

6 MR. SBAITI: Yes, Your Honor. Just a couple of
7 questions.

8 CROSS-EXAMINATION

9 BY MR. SBAITI:

10 Q Do you mind flipping to Exhibit 25, which I believe is the
11 org chart, the one that you were looking at before?

12 A Okay.

13 Q It'll still be in --

14 A Okay. Yeah.

15 Q -- the defense binder. No reason to swap out right now.

16 A I've got the right binders. Some of them are repeatable
17 exhibits, so --

18 Q Yeah.

19 A -- I have to grab the right binder. Yes.

20 Q As this org chart would sit today, is the only difference
21 that Grant Scott's name would instead be Mark Patrick?

22 A Yes.

23 Q Was there ever a period of time where Jim Dondero's name
24 would sit instead of Grant Scott's name prior?

25 A Yes, originally, when this -- yes.

006400

1 Q So did Mr. Dondero both have the control shares of the GP,
2 LLC and DAF Holdco Limited?

3 A No, I believe not. I believe he only held the Charitable
4 DAF GP interest and that Mr. Scott at all times held the
5 Charitable DAF Holdco, LTD interest, until he decided to
6 transfer it to me.

7 Q Can you just tell us how Mr. Scott came to hold the
8 control shares of the Charitable DAF Holdco, LTD?

9 A When he was the independent trustee of the Charitable
10 Remainder Trust, he caused that -- the creation of that
11 entity, and that's how he became in receipt of those
12 management shares.

13 Q And does the Charitable DAF GP, LLC have any control over
14 Charitable DAF Fund, LP's actions or activities?

15 A Yes, it does.

16 Q What kind of control is that?

17 A I would describe complete control. It's the managing
18 member of that entity and can -- and effectively owns, you
19 know, the hundred percent interest in the respective
20 subsidiaries, and so the control follows down.

21 Q And when did Mr. Scott replace Mr. Dondero as the GP --
22 managing member of the GP?

23 A Well, I think as the -- and Mr. Morris had shown me with
24 respect to that transfer occurring on March 2012.

25 Q So nine years ago?

Patrick - Cross

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1 A Yes.

2 Q Does Mr. Dondero today exercise any control over the
3 activities of the DAF Charitable -- the Charitable DAF, GP or
4 the Charitable DAF Holdco, LTD?

5 A No.

6 Q Is he a board member of sorts for either of those
7 entities?

8 A No.

9 Q Is he a board members of CLO Holdco?

10 A No.

11 Q Does he have any decision-making authority at CLO Holdco?

12 A None.

13 Q The decision to authorize the lawsuit and the decision to
14 authorize the motion that you've been asked about, who made
15 that authorization?

16 A I did.

17 Q Did you have to ask for anyone's permission?

18 A No.

19 MR. SBAITI: No more questions, Your Honor.

20 THE COURT: Okay. Any -- I guess Mr. Taylor, no.

21 All right. Any redirect?

22 REDIRECT EXAMINATION

23 BY MR. MORRIS:

24 Q Since becoming the authorized representative of the
25 Plaintiffs, have you ever made a decision on behalf of those

006402

1 entities that Mr. Dondero disagreed with?

2 A I have made decisions that were adverse to Mr. Dondero's
3 financial -- financial decision. I mean, financial interests.
4 Whether he disagreed with them or not, I don't -- he has not
5 communicated them to me. But they have been adverse, at least
6 two very strong instances.

7 Q Have you ever -- have you ever talked to him about making
8 a decision that would be adverse to his interests? Did he
9 tell -- did --

10 A I didn't -- I don't -- I did not discuss with him prior to
11 making the decisions that I made that were adverse to his
12 economic interests.

13 MR. MORRIS: Okay. No further questions, Your Honor.

14 THE COURT: Any further examination? Recross on that
15 redirect?

16 MR. ANDERSON: No further questions.

17 MR. SBAITI: No further questions, Your Honor.

18 MR. ANDERSON: Sorry.

19 THE COURT: Nothing?

20 MR. ANDERSON: I think we're good.

21 THE COURT: Okay. I have one question, Mr. Patrick.
22 My brain sometimes goes in weird directions.

23 EXAMINATION BY THE COURT

24 THE COURT: I'm just curious. What are these Cayman
25 Island entities, charitable organizations formed in the Cayman

1 Islands?

2 THE WITNESS: Yeah. I'll keep it as simple as I can,
3 even though I'm a tax lawyer, so I won't get into the tax
4 rules, but the Cayman structure is modeled after what you
5 typically see in the investment management industry, and so I
6 -- and I won't reference specific entities here with respect
7 to the Highland case, but I think you'll note some
8 similarities, if you think about it. They're -- it's
9 described as an offshore master fund structure where you have
10 a -- and that would be the Charitable DAF Fund that's
11 organized offshore, usually in the Cayman or Bermuda Islands,
12 where the general partner, typically, in the industry, holds
13 the management --

14 THE COURT: Yeah. Let --

15 THE WITNESS: Okay.

16 THE COURT: -- me just stop you. I've seen this
17 enough --

18 THE WITNESS: Yeah, it's

19 THE COURT: -- to know that it happens in the
20 investment world. But in --

21 THE WITNESS: Yeah.

22 THE COURT: You know, usually, I see 501(c)(3), you
23 know, domestically-created entities for charitable purposes,
24 so I'm just curious.

25 THE WITNESS: Yes.

1 THE COURT: Uh-huh.

2 THE WITNESS: The offshore master fund structure
3 typically will have two different types of -- they call it
4 foreign feeder funds. One foreign feeder fund is meant to
5 accommodate foreign investors; the other foreign feeder fund
6 is meant to accommodate U.S. tax-exempt investors.

7 Why, why is it structured that way? In order to avoid
8 something called -- I was trying not to be wonkish -- UBTI.
9 That's, let's see, Un -- Unrelated Trader Business Income. I
10 probably have that slightly wrong. But it's essentially,
11 it's a means to avoid active business income, which includes
12 debt finance income, which is what these CLOs tend to be, that
13 would throw off income that would be taxable normally if the
14 exempts did not go through this foreign blocker, and it
15 converts that UBTI income -- it's called (inaudible) income --
16 into passive income that flows -- that flows up to the
17 charities.

18 And so it's very typical that you'll have a U.S. tax-
19 exempt investor, when they make an investment in a fund,
20 prefer to go through an offshore feeder fund, which is
21 actually Charitable DAF Holdco, LTD. That's essentially what,
22 from a tax perspective, represents as a UBTI blocker entity.
23 And then you have the offshore investments being held offshore
24 because there's a variety of safe harbors where the receipt of
25 interest, the portfolio interest exception, is not taxable.

Patrick - Examination by the Court

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1 The creation of capital gains or losses under the -- they call
2 it the trading, 864(b) trading safe harbor, is not taxable.
3 So that's why you'll find these structures operating offshore
4 to rely on those safe harbor provisions as well as -- as well
5 as what I indicated with respect to the two type blocker
6 entities. It's very typical and industry practice to organize
7 these way. And so when this was set --

8 THE COURT: It's very typical in the charitable world
9 to --

10 THE WITNESS: In the investment management --

11 THE COURT: -- form this way?

12 THE WITNESS: In the investment management world,
13 when you have charitable entities that are taking some
14 exposure to assets that are levered, to set this structure up
15 in this way. It was modeled after -- they just call them
16 offshore master fund structures. They're known as Mickey
17 Mouse structures, where you'll have U.S. investors --

18 THE COURT: Yes. I -- yes, I --

19 THE WITNESS: -- enter through a U.S. partnership,
20 and the foreign investors enter through a blocker.

21 THE COURT: It was really just the charitable aspect
22 of this that I was --

23 THE WITNESS: Yeah. Yeah.

24 THE COURT: -- getting at.

25 THE WITNESS: Yeah. No, but I'm just trying to

1 emphasize if --

2 THE COURT: All right. It's --

3 THE WITNESS: Yeah.

4 THE COURT: -- neither here nor there. All right.

5 MR. SBAITI: Your Honor, may I ask a slightly
6 clarifying leading question on that, because I think I
7 understand what he was trying to say, just for the record?

8 THE COURT: Well, --

9 MR. MORRIS: I object.

10 THE COURT: -- I tell you what. Anyone who wants to
11 ask one follow-up question on the judge's question can do so.
12 Okay? You can go first.

13 MR. SBAITI: I'll approach, Your Honor.

14 THE COURT: Okay.

15 RECROSS-EXAMINATION

16 BY MR. SBAITI:

17 Q Would it be a fair summary of what you were saying a
18 minute ago that the reason the bottom end of that structure is
19 offshore is so that it doesn't get taxed before the money
20 reaches the charities on the U.S. side?

21 A Tax -- it converts the nature of the income that is being
22 thrown off by the investments so that it becomes a tax
23 friendly income to the tax-exempt entity. Passive income.
24 That's --

25 Q So, essentially, --

1 THE COURT: Okay. Okay.

2 MR. SBAITI: -- so it doesn't get taxed before it
3 hits the --

4 THE COURT: I said one question.

5 MR. SBAITI: Sorry, Your Honor.

6 THE COURT: Okay. He answered it.

7 MR. PHILLIPS: And I have one question, Your Honor

8 THE COURT: Okay.

9 MR. PHILLIPS: I don't know if I need to ask this
10 question, but I'd rather not ask you if I need to ask it.

11 THE COURT: Go ahead.

12 MR. PHILLIPS: But if I do, you know, I could --

13 THE COURT: Go ahead.

14 MR. PHILLIPS: Well, okay.

15 RECROSS-EXAMINATION

16 BY MR. PHILLIPS:

17 Q We've talked about the offshore structure. Are the
18 foundations in the top two tiers of the organizational chart
19 offshore entities?

20 A No.

21 Q They're --

22 A They're onshore entities. They're tax-exempt entities.

23 Q Thank you.

24 A The investments are offshore.

25 Q Thank you.

Patrick - Further Redirect

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1 THE COURT: Mr. Morris? One question.

2 FURTHER REDIRECT EXAMINATION

3 BY MR. MORRIS:

4 Q Do you hold yourself out as an expert on the
5 organizational structures in the Caribbean for charitable
6 organizations?

7 A I hold myself out as a tax professional versant on setting
8 up offshore master fund structures. It's sort of a bread-and-
9 butter thing. But there are plenty of people that can testify
10 that this is very typical.

11 Q Uh-huh. Okay.

12 THE COURT: Okay. Thank you.

13 All right. You are excused, Mr. Patrick. I suppose
14 you'll want to stay around. I don't know if you'll
15 potentially be recalled today.

16 (The witness steps down.)

17 THE COURT: All right. We should take a lunch break.
18 I'm going to put this out for a democratic vote. Forty-five
19 minutes? Is that good with everyone?

20 MR. SBAITI: Do we have to leave the building to eat,
21 Your Honor, or is there food in the building?

22 THE COURT: I think --

23 MR. SBAITI: I'm sorry to ask that question, but --

24 THE COURT: Yes. You know what, there used to be a
25 very bad cafeteria, but I think it closed. Right, Mike? So,

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1 THE COURT: I guess I'll see you Thursday on the
2 WebEx. Thank you.

3 THE CLERK: All rise.

4 (Proceedings concluded at 6:00 p.m.)

5 --oOo--

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CERTIFICATE

21

22

I certify that the foregoing is a correct transcript from
the electronic sound recording of the proceedings in the
above-entitled matter.

23

/s/ Kathy Rehling

06/09/2021

24

25

Kathy Rehling, CETD-444
Certified Electronic Court Transcriber

Date

006410

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Counsel for Highland Capital Management, L.P.

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

In re:)	
	)	Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P., ¹	)	Case No. 19-34054-sgj11
Reorganized Debtor.)	
In re: CHARITABLE DAF FUND, L.P., AND CLO HOLDCO LTD.,	)	Adv. Pro. No. 21-03067-sgj
Plaintiffs,)	
vs.)	
HIGHLAND CAPITAL MANAGEMENT, L.P., HIGHLAND HCF ADVISOR, LTD., AND HIGHLAND CLO FUNDING, LTD.,)	
Defendants)	

¹ The Reorganized Debtor's last four digits of its taxpayer identification number are (8357). The headquarters and service address for the Reorganized Debtor is 100 Crescent Court, Suite 1850, Dallas, TX 75201.

**REORGANIZED DEBTOR’S WITNESS AND EXHIBIT LIST WITH
RESPECT TO EVIDENTIARY HEARING TO BE HELD ON JANUARY 25, 2023**

Highland Capital Management, L.P. (the “Debtor”) submits the following witness and exhibit list with respect to *Defendant Highland Capital Management, L.P.’s Renewed Motion to Dismiss Complaint* [Docket No. 122], which the Court has set for hearing at 1:30 p.m. (Central Time) on January 25, 2023 (the “Hearing”) in the above-styled adversary proceeding (the “Adversary Proceeding”).

A. Witnesses:

1. Any witness identified by or called by any other party; and
2. Any witness necessary for rebuttal.

Exhibits:

Number	Exhibit	Offered	Admitted
1.	HarbourVest 2017 Global Fund L.P. Proof of Claim No. 143, HarbourVest 2017 Global AIF L.P., Proof of Claim No. 147, HarbourVest Dover Street IX Investment L.P., Proof of Claim No. 150, HV International VIII Secondary L.P., Proof of Claim No. 153, HarbourVest Skew Base AIF L.P., Proof of Claim No. 154, and HarbourVest Partners L.P., Proof of Claim No. 149.		
2.	<i>Motion for Entry of an Order Approving Settlement with HarbourVest (Claim Nos. 143, 147, 149, 150, 153, 154) and Authorizing Actions Consistent Therewith</i> [Bankr. Docket No. 1625]		
3.	<i>Settlement Agreement and Transfer Agreement for Ordinary Shares of Highland CLO Funding, Ltd.</i> [Bankr. Docket No. 1631-1]		
4.	<i>James Dondero’s Objection to the Debtor’s Motion for Entry of an Order Approving Settlement with HarbourVest</i> [Bankr. Docket No. 1697]		
5.	<i>The Dugaboy Investment Trust and Get Good Trust’s Objection to the Debtor’s Motion for Entry of an Order Approving Settlement with HarbourVest (Claim Nos. 143, 147, 149, 150, 153, 154) and Authorizing Actions Consistent Therewith</i> [Bankr. Docket No. 1706]		
6.	<i>CLO Holdco, Ltd.’s Objection to HarbourVest Settlement</i> [Bankr. Docket No. 1707]		

Number	Exhibit	Offered	Admitted
7.	Deposition Transcript of Michael Pugatch, January 21, 2021		
8.	<i>Debtor's Omnibus Reply in Support of Debtor's Motion for Entry of an Order Approving Settlement with HarbourVest (Claim Nos. 143, 147, 149, 150, 153, 154) and Authorizing Actions Consistent Therewith</i> [Bankr. Docket No. 1731]		
9.	Hearing Transcript, January 14, 2021		
10.	<i>Order Approving Debtor's Settlement with HarbourVest (Claim Nos. 143, 147, 149, 150, 153, 154) and Authorizing Actions Consistent Therewith</i> [Bankr. Docket No. 1788]		
11.	<i>Original Complaint</i> , Case No. 21-cv-00842-B, Docket No. 1 (N.D. Tex. Apr. 12, 2021)		
12.	<i>Memorandum Opinion and Order</i> , Case No. 21-cv-03129-B, Docket No. 28 (N.D. Tex. September 2, 2021)		
13.	Members Agreement, November 15, 2017		
14.	Second Amended and Restated Investment Advisory Agreement		

Dated: January 23, 2023

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-and-

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/s/ Zachery Z. Annable

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Counsel for Highland Capital Management, L.P.

EXHIBIT 1

CLAIM 143

Fill in this information to identify the case:

Debtor Highland Capital Management, L.P.

United States Bankruptcy Court for the: Northern District of Texas
(State)

Case number 19-34054

Official Form 410 Proof of Claim

04/19

Read the instructions before filling out this form. This form is for making a claim for payment in a bankruptcy case. Do not use this form to make a request for payment of an administrative expense. Make such a request according to 11 U.S.C. § 503.

Filers must leave out or redact information that is entitled to privacy on this form or on any attached documents. Attach redacted copies or any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, judgments, mortgages, and security agreements. Do not send original documents; they may be destroyed after scanning. If the documents are not available, explain in an attachment.

A person who files a fraudulent claim could be fined up to \$500,000, imprisoned for up to 5 years, or both. 18 U.S.C. §§ 152, 157, and 3571.

Fill in all the information about the claim as of the date the case was filed. That date is on the notice of bankruptcy (Form 309) that you received.

Part 1: Identify the Claim

1. Who is the current creditor?	<u>HarbourVest 2017 Global Fund L.P.</u> Name of the current creditor (the person or entity to be paid for this claim)	
	Other names the creditor used with the debtor _____	
2. Has this claim been acquired from someone else?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. From whom? _____	
3. Where should notices and payments to the creditor be sent?	Where should notices to the creditor be sent? <u>HarbourVest 2017 Global Fund L.P.</u> <u>Attn: Erica Weisgerber</u> <u>Debevoise and Plimpton LLP</u> <u>919 Third Avenue</u> <u>New York, NY 10022, U.S.A.</u> Contact phone <u>2129096000</u> Contact email <u>eweisgerber@debevoise.com</u>	Where should payments to the creditor be sent? (if different) <u>See summary page</u> Contact phone <u>6173483773</u> Contact email <u>agoren@harbourvest.com</u>
	Federal Rule of Bankruptcy Procedure (FRBP) 2002(g) Uniform claim identifier for electronic payments in chapter 13 (if you use one): _____	
4. Does this claim amend one already filed?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Claim number on court claims registry (if known) _____ Filed on _____ MM / DD / YYYY	
5. Do you know if anyone else has filed a proof of claim for this claim?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Who made the earlier filing? _____	



Part 2: Give Information About the Claim as of the Date the Case Was Filed

6. Do you have any number you use to identify the debtor?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Last 4 digits of the debtor's account or any number you use to identify the debtor: ____
7. How much is the claim? \$ <u>See Annex</u>	Does this amount include interest or other charges? <input type="checkbox"/> No <input type="checkbox"/> Yes. Attach statement itemizing interest, fees, expenses, or other charges required by Bankruptcy Rule 3001(c)(2)(A).
8. What is the basis of the claim?	Examples: Goods sold, money loaned, lease, services performed, personal injury or wrongful death, or credit card. Attach redacted copies of any documents supporting the claim required by Bankruptcy Rule 3001(c). Limit disclosing information that is entitled to privacy, such as health care information. <u>See Annex</u>
9. Is all or part of the claim secured?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. The claim is secured by a lien on property. Nature or property: <input type="checkbox"/> Real estate: If the claim is secured by the debtor's principle residence, file a <i>Mortgage Proof of Claim Attachment</i> (Official Form 410-A) with this <i>Proof of Claim</i> . <input type="checkbox"/> Motor vehicle <input type="checkbox"/> Other. Describe: _____ Basis for perfection: _____ Attach redacted copies of documents, if any, that show evidence of perfection of a security interest (for example, a mortgage, lien, certificate of title, financing statement, or other document that shows the lien has been filed or recorded.) Value of property: \$ _____ Amount of the claim that is secured: \$ _____ Amount of the claim that is unsecured: \$ _____ (The sum of the secured and unsecured amount should match the amount in line 7.) Amount necessary to cure any default as of the date of the petition: \$ _____ Annual Interest Rate (when case was filed) _____ % <input type="checkbox"/> Fixed <input type="checkbox"/> Variable
10. Is this claim based on a lease?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Amount necessary to cure any default as of the date of the petition. \$ _____
11. Is this claim subject to a right of setoff?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Identify the property: _____



12. Is all or part of the claim entitled to priority under 11 U.S.C. § 507(a)? A claim may be partly priority and partly nonpriority. For example, in some categories, the law limits the amount entitled to priority.	<input checked="" type="checkbox"/> No	Amount entitled to priority \$ _____ \$ _____ \$ _____ \$ _____ \$ _____ \$ _____
	<input type="checkbox"/> Yes. Check all that apply:	
	<input type="checkbox"/> Domestic support obligations (including alimony and child support) under 11 U.S.C. § 507(a)(1)(A) or (a)(1)(B).	
	<input type="checkbox"/> Up to \$3,025* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use. 11 U.S.C. § 507(a)(7).	
	<input type="checkbox"/> Wages, salaries, or commissions (up to \$13,650*) earned within 180 days before the bankruptcy petition is filed or the debtor's business ends, whichever is earlier. 11 U.S.C. § 507(a)(4).	
	<input type="checkbox"/> Taxes or penalties owed to governmental units. 11 U.S.C. § 507(a)(8).	
	<input type="checkbox"/> Contributions to an employee benefit plan. 11 U.S.C. § 507(a)(5).	
<input type="checkbox"/> Other. Specify subsection of 11 U.S.C. § 507(a)() that applies.	\$ _____	
* Amounts are subject to adjustment on 4/01/22 and every 3 years after that for cases begun on or after the date of adjustment.		
13. Is all or part of the claim pursuant to 11 U.S.C. § 503(b)(9)?	<input checked="" type="checkbox"/> No	
	<input type="checkbox"/> Yes. Indicate the amount of your claim arising from the value of any goods received by the debtor within 20 days before the date of commencement of the above case, in which the goods have been sold to the Debtor in the ordinary course of such Debtor's business. Attach documentation supporting such claim.	
	\$ _____	

Part 3: Sign Below

The person completing this proof of claim must sign and date it. FRBP 9011(b).

If you file this claim electronically, FRBP 5005(a)(2) authorizes courts to establish local rules specifying what a signature is.

A person who files a fraudulent claim could be fined up to \$500,000, imprisoned for up to 5 years, or both. 18 U.S.C. §§ 152, 157, and 3571.

Check the appropriate box:

- ☐ I am the creditor.
- ☒ I am the creditor's attorney or authorized agent.
- ☐ I am the trustee, or the debtor, or their authorized agent. Bankruptcy Rule 3004.
- ☐ I am a guarantor, surety, endorser, or other codebtor. Bankruptcy Rule 3005.

I understand that an authorized signature on this *Proof of Claim* serves as an acknowledgement that when calculating the amount of the claim, the creditor gave the debtor credit for any payments received toward the debt.

I have examined the information in this *Proof of Claim* and have reasonable belief that the information is true and correct.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on date 04/08/2020
MM / DD / YYYY

/s/Michael Pugatch
Signature

Print the name of the person who is completing and signing this claim:

Name Michael Pugatch
First name Middle name Last name

Title Managing Director - Company: HarbourVest 2017 Global Fund L.P., by Harbo

Company by HarbourVest GP LLC, its General Partner, by HarbourVest Partners, LL
Identify the corporate servicer as the company if the authorized agent is a servicer.

Address

Contact phone _____ Email _____



For phone assistance: Domestic (877) 573-3984 | International (310) 751-1829

Debtor: 19-34054 - Highland Capital Management, L.P. District: Northern District of Texas, Dallas Division		
Creditor: HarbourVest 2017 Global Fund L.P. Attn: Erica Weisgerber Debevoise and Plimpton LLP 919 Third Avenue New York, NY, 10022 U.S.A. Phone: 2129096000 Phone 2: Fax: Email: eweisgerber@debevoise.com	Has Supporting Documentation: Yes, supporting documentation successfully uploaded Related Document Statement:	
	Has Related Claim: No Related Claim Filed By:	
	Filing Party: Authorized agent	
Disbursement/Notice Parties: HarbourVest 2017 Global Fund L.P. c/o HarbourVest Partners, LLC One Financial Center Boston, MA, 02111 U.S.A. Phone: 6173483773 Phone 2: Fax: E-mail: agoren@harbourvest.com DISBURSEMENT ADDRESS		
Other Names Used with Debtor:	Amends Claim: No Acquired Claim: No	
Basis of Claim: See Annex	Last 4 Digits: No	Uniform Claim Identifier:
Total Amount of Claim: See Annex	Includes Interest or Charges: None	
Has Priority Claim: No	Priority Under:	
Has Secured Claim: No Amount of 503(b)(9): No Based on Lease: No Subject to Right of Setoff: No	Nature of Secured Amount: Value of Property: Annual Interest Rate: Arrearage Amount: Basis for Perfection: Amount Unsecured:	
Submitted By: Michael Pugatch on 08-Apr-2020 4:40:16 p.m. Eastern Time Title: Managing Director - Company: HarbourVest 2017 Global Fund L.P., by HarbourVest 2017 Global Associates L.P., its Gen Partner Company: by HarbourVest GP LLC, its General Partner, by HarbourVest Partners, LLC, its Managing Member		

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

In re:

Highland Capital Management, L.P.

Debtor.

Chapter 11

Case No. 19-34054 (SGJ)

ANNEX TO PROOF OF CLAIM

1. This annex (the “Annex”) is part of and is incorporated by reference into the attached proof of claim (together with the Annex, the “Proof of Claim”) and describes in more detail the claims of HarbourVest 2017 Global Fund L.P. (the “Claimant”) against the debtor Highland Capital Management, L.P. (the “Debtor”).

2. The Claimant is a limited partner in one of the Debtor’s managed vehicles, Highland CLO Funding, Ltd. (“HCLOF”). Acis Capital Management GP, L.L.C. and Acis Capital Management L.P. (together, “Acis”), the portfolio manager for HCLOF, filed for chapter 11 in the United States Bankruptcy Court for the Northern District of Texas (the “Court”) on January 30, 2018. The Acis bankruptcy filing resulted from a dispute between Debtor and its former employee, Joshua Terry, who served as portfolio manager for Debtor’s collateral loan obligations funds (“CLO”) business. *See, e.g., Findings of Fact and Conclusions of Law in Support of Orders for Relief Issued After Trial on Contested Involuntary Bankruptcy Petition (“Involuntary Petition Ruling”)* [Case No. 18-30264 (SGJ), Dkt. No. 118]. As noted in more detail in the Court’s *Bench Ruling and Memorandum of Law in Support of: (A) Final Approval of Disclosure Statement; and (B) Confirmation of Chapter 11 Trustee’s Third Amended Joint Plan (“Confirmation Ruling”)* [Case No. 18-30264 (SGJ), Dkt. No 827] and related filings in the Acis

bankruptcy cases, there has been extensive litigation regarding alleged improper conduct associated with the management of, and transactions relating to, Acis, including transactions with and related to HCLOF. *See, e.g., id.; Second Amended Complaint* [Case No. 18-03078(SGJ), Dkt. No. 157].

3. Due to the Acis bankruptcy and certain conduct alleged to have been undertaken by the Debtor (to whom Acis subcontracted its functions) and Debtor's employees (who were officers, employees, and agents of Acis), the Claimant has suffered significant harm. Such harm includes, but is not limited to, financial harm resulting from, among other things (i) court orders in the Acis bankruptcy that prevented certain CLOs in which HCLOF was invested from being refinanced or reset and court orders that otherwise regulated the activity of HCLOF; and (ii) significant fees and expenses related to the Acis bankruptcy that were charged to HCLOF. *See, e.g., Involuntary Petition Ruling* ¶ 27; *see also Confirmation Ruling*.

4. Claimant hereby files this Claim to assert any and all of its rights to payment, remedies, and other claims (including contingent or unliquidated claims) against the Debtor in connection with and relating to the foregoing harm, including for any amounts due or owed under the various agreements with the Debtor in connection with HCLOF (including, but not limited to, the Subscription and Transfer Agreement for Ordinary Shares Highland CLO Funding, Ltd., dated as of November 15, 2017, the Members Agreement Relating to the Company, dated as of November 15, 2017, the Highland CLO Funding, Ltd. Offering Memorandum dated November 15, 2017), and any and all legal and equitable claims or causes of action relating to the foregoing harm.

5. The Claimant has not attached the documentation supporting this Claim to this Proof of Claim because the documentation is voluminous and the Debtor has copies of such

documents. However, any requested relevant documents will be provided to the Official Committee of Unsecured Creditors, the Court, the United States Trustee and the Debtor in the event of a dispute regarding this Proof of Claim and will be made available for review by other parties in interest as appropriate upon reasonable request and after consultation with the Debtor and execution of appropriate confidentiality agreements.

6. This Proof of Claim is filed with a full reservation of rights, including the right to amend, update, modify, supplement or otherwise revise this Proof of Claim in any respect at any time. The filing of this Proof of Claim is not and should not be construed to be: (a) a waiver or release of any of the Claimant's rights against any person, entity or property accruing to it against the Debtor and its estate; (b) a waiver of the Claimant's rights to assert that 28 U.S.C. § 157(b)(2)(C) is unconstitutional; (c) a consent or submission by the Claimant, or waiver of the Claimant's rights to object, to the jurisdiction of this Court with respect to the subject matter of any of the claims described herein, or any objection or other proceeding commenced with respect to any of the claims described herein, or any other proceeding commenced in the Debtor's chapter 11 case against or otherwise involving the Claimant; (d) a waiver or release of any right of the Claimant, or consent by the Claimant, to a trial by jury in this or any other court or proceeding; (e) a waiver or release of, or any limitation on, any right of the Claimant to have orders entered only after *de novo* review by a United States District Judge; (f) an election of remedies; or (g) a waiver of, or any other limitation on, any right of the Claimant to request withdrawal of the reference with respect to any matter, including, without limitation, any matter relating to this Proof of Claim.

7. Claimant's express reservation of all rights and causes of action, includes, without limitation, contingent or unliquidated rights that it or its affiliates may have against the Debtor,

as well as defenses, offsets and counterclaims. This description and classification of claims by the Claimant is not a concession or admission as to the correct characterization or treatment of any such claims or a waiver of any rights of the Claimant.

8. Furthermore, the Claimant expressly reserves its rights to (a) file additional proofs of claim for additional claims that may be based on the same or additional documents or facts or other liability or indebtedness of the Debtor to the Claimant under contract or otherwise; (b) assert claims for cure of defaults in any agreement that the Debtor or any trustee appointed in this chapter 11 case may seek to assume; (c) assert any and all other claims, causes of action, defenses, offsets or counterclaims against the Debtor or any other parties; (d) file a request for payment of an administrative expense under 11 U.S.C. §§ 503 and 507 for any or all of the claims or rights of payment described above and any additional amounts; and (e) seek recovery through any relevant third parties, including any of the Debtor's insurance coverage providers.

9. This Proof of Claim does not encompass all claims that the Claimant or its affiliates may have that arise after the Petition Date and are entitled to administrative priority, and the Claimant expressly reserves its right to file such claim or any similar claim at the appropriate time, including any such post-petition claims arising under these service contracts.

10. This Proof of Claim is filed without prejudice to the filing by the Claimant of additional proofs of claim or requests for payment with respect to any other indebtedness, liability or obligation of the Debtor. The Claimant does not, by this Proof of Claim or any amendment or other action, waive any rights with respect to any scheduled claim.

11. The Claimant reserves the right to withdraw, amend, clarify, modify or supplement this Proof of Claim to assert additional claims, causes of action or additional grounds for this Proof of Claim (including adding any additional contracts, agreements, obligations or

other relationships between the Claimant and the Debtor), as well as the right to file any separate or additional proofs of claim with respect to the claims set forth herein or otherwise, including for the purpose of fixing and liquidating any contingent or unliquidated claim set forth herein, or to file additional proofs of claim in respect of additional amounts or for any other reason.

12. In executing and filing this Proof of Claim, the Claimant does not submit to the jurisdiction of the Bankruptcy Court for the Northern District of Texas for any purpose other than with respect to this Proof of Claim against the Debtor, and does not waive or release any rights or remedies against any other person or entity that may be liable for all or part of this Proof of Claim.

13. The Claimant otherwise reserves its rights, and nothing herein shall prejudice the Claimant's rights, under any order of the Court previously entered in this chapter 11 case.

14. Payments on account of this Proof of Claim should be sent to the Claimant at the address specified for notices to the Claimant in Part 1.3 of the Proof of Claim.

CLAIM 147

Fill in this information to identify the case:

Debtor Highland Capital Management, L.P.

United States Bankruptcy Court for the: Northern District of Texas
(State)

Case number 19-34054

Official Form 410
Proof of Claim

04/19

Read the instructions before filling out this form. This form is for making a claim for payment in a bankruptcy case. Do not use this form to make a request for payment of an administrative expense. Make such a request according to 11 U.S.C. § 503.

Filers must leave out or redact information that is entitled to privacy on this form or on any attached documents. Attach redacted copies or any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, judgments, mortgages, and security agreements. Do not send original documents; they may be destroyed after scanning. If the documents are not available, explain in an attachment.

A person who files a fraudulent claim could be fined up to \$500,000, imprisoned for up to 5 years, or both. 18 U.S.C. §§ 152, 157, and 3571.

Fill in all the information about the claim as of the date the case was filed. That date is on the notice of bankruptcy (Form 309) that you received.

Part 1: Identify the Claim

1. Who is the current creditor?	<u>HarbourVest 2017 Global AIF L.P.</u> Name of the current creditor (the person or entity to be paid for this claim)	
	Other names the creditor used with the debtor _____	
2. Has this claim been acquired from someone else?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. From whom? _____	
3. Where should notices and payments to the creditor be sent?	Where should notices to the creditor be sent? <u>HarbourVest 2017 Global AIF L.P.</u> <u>Attn: Erica Weisgerber</u> <u>Debevoise and Plimpton LLP</u> <u>919 Third Avenue</u> <u>New York, NY 10022, U.S.A.</u> Contact phone <u>2129096000</u> Contact email <u>eweisgerber@debevoise.com</u>	Where should payments to the creditor be sent? (if different) <u>See summary page</u> Contact phone <u>6173483773</u> Contact email <u>agoren@harbourvest.com</u>
	Federal Rule of Bankruptcy Procedure (FRBP) 2002(g) Uniform claim identifier for electronic payments in chapter 13 (if you use one): _____	
4. Does this claim amend one already filed?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Claim number on court claims registry (if known) _____ Filed on _____ MM / DD / YYYY	
5. Do you know if anyone else has filed a proof of claim for this claim?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Who made the earlier filing? _____	

Part 2: Give Information About the Claim as of the Date the Case Was Filed

6. Do you have any number you use to identify the debtor?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Last 4 digits of the debtor's account or any number you use to identify the debtor: ____
7. How much is the claim? \$ <u>See Annex</u>	Does this amount include interest or other charges? <input type="checkbox"/> No <input type="checkbox"/> Yes. Attach statement itemizing interest, fees, expenses, or other charges required by Bankruptcy Rule 3001(c)(2)(A).
8. What is the basis of the claim?	Examples: Goods sold, money loaned, lease, services performed, personal injury or wrongful death, or credit card. Attach redacted copies of any documents supporting the claim required by Bankruptcy Rule 3001(c). Limit disclosing information that is entitled to privacy, such as health care information. <u>See Annex</u>
9. Is all or part of the claim secured?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. The claim is secured by a lien on property. Nature or property: <input type="checkbox"/> Real estate: If the claim is secured by the debtor's principle residence, file a <i>Mortgage Proof of Claim Attachment</i> (Official Form 410-A) with this <i>Proof of Claim</i> . <input type="checkbox"/> Motor vehicle <input type="checkbox"/> Other. Describe: _____ Basis for perfection: _____ Attach redacted copies of documents, if any, that show evidence of perfection of a security interest (for example, a mortgage, lien, certificate of title, financing statement, or other document that shows the lien has been filed or recorded.) Value of property: \$ _____ Amount of the claim that is secured: \$ _____ Amount of the claim that is unsecured: \$ _____ (The sum of the secured and unsecured amount should match the amount in line 7.) Amount necessary to cure any default as of the date of the petition: \$ _____ Annual Interest Rate (when case was filed) _____ % <input type="checkbox"/> Fixed <input type="checkbox"/> Variable
10. Is this claim based on a lease?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Amount necessary to cure any default as of the date of the petition. \$ _____
11. Is this claim subject to a right of setoff?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Identify the property: _____

12. Is all or part of the claim entitled to priority under 11 U.S.C. § 507(a)? A claim may be partly priority and partly nonpriority. For example, in some categories, the law limits the amount entitled to priority.	<input checked="" type="checkbox"/> No	Amount entitled to priority \$ _____ \$ _____ \$ _____ \$ _____ \$ _____ \$ _____
	<input type="checkbox"/> Yes. Check all that apply:	
	<input type="checkbox"/> Domestic support obligations (including alimony and child support) under 11 U.S.C. § 507(a)(1)(A) or (a)(1)(B).	
	<input type="checkbox"/> Up to \$3,025* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use. 11 U.S.C. § 507(a)(7).	
	<input type="checkbox"/> Wages, salaries, or commissions (up to \$13,650*) earned within 180 days before the bankruptcy petition is filed or the debtor's business ends, whichever is earlier. 11 U.S.C. § 507(a)(4).	
	<input type="checkbox"/> Taxes or penalties owed to governmental units. 11 U.S.C. § 507(a)(8).	
	<input type="checkbox"/> Contributions to an employee benefit plan. 11 U.S.C. § 507(a)(5).	
<input type="checkbox"/> Other. Specify subsection of 11 U.S.C. § 507(a)() that applies.	\$ _____	
* Amounts are subject to adjustment on 4/01/22 and every 3 years after that for cases begun on or after the date of adjustment.		
13. Is all or part of the claim pursuant to 11 U.S.C. § 503(b)(9)?	<input checked="" type="checkbox"/> No	
	<input type="checkbox"/> Yes. Indicate the amount of your claim arising from the value of any goods received by the debtor within 20 days before the date of commencement of the above case, in which the goods have been sold to the Debtor in the ordinary course of such Debtor's business. Attach documentation supporting such claim.	
	\$ _____	

Part 3: Sign Below

The person completing this proof of claim must sign and date it. FRBP 9011(b).

If you file this claim electronically, FRBP 5005(a)(2) authorizes courts to establish local rules specifying what a signature is.

A person who files a fraudulent claim could be fined up to \$500,000, imprisoned for up to 5 years, or both. 18 U.S.C. §§ 152, 157, and 3571.

Check the appropriate box:

- ☐ I am the creditor.
- ☒ I am the creditor's attorney or authorized agent.
- ☐ I am the trustee, or the debtor, or their authorized agent. Bankruptcy Rule 3004.
- ☐ I am a guarantor, surety, endorser, or other codebtor. Bankruptcy Rule 3005.

I understand that an authorized signature on this *Proof of Claim* serves as an acknowledgement that when calculating the amount of the claim, the creditor gave the debtor credit for any payments received toward the debt.

I have examined the information in this *Proof of Claim* and have reasonable belief that the information is true and correct.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on date 04/08/2020
MM / DD / YYYY

/s/Michael Pugatch
Signature

Print the name of the person who is completing and signing this claim:

Name Michael Pugatch
First name Middle name Last name

Title Managing Director-Company: HarbourVest 2017 Global AIF L.P., by HarbourV

Company Inv Fund Mgr, by HarbourVest Partners L.P., its Duly Appointed Investme
Identify the corporate servicer as the company if the authorized agent is a servicer.

Address

Contact phone _____ Email _____



For phone assistance: Domestic (877) 573-3984 | International (310) 751-1829

Debtor: 19-34054 - Highland Capital Management, L.P. District: Northern District of Texas, Dallas Division		
Creditor: HarbourVest 2017 Global AIF L.P. Attn: Erica Weisgerber Debevoise and Plimpton LLP 919 Third Avenue New York, NY, 10022 U.S.A. Phone: 2129096000 Phone 2: Fax: Email: eweisgerber@debevoise.com	Has Supporting Documentation: Yes, supporting documentation successfully uploaded Related Document Statement:	
	Has Related Claim: No Related Claim Filed By:	
	Filing Party: Authorized agent	
Disbursement/Notice Parties: HarbourVest 2017 Global AIF L.P. c/o HarbourVest Partners, LLC One Financial Center Boston, MA, 02111 Phone: 6173483773 Phone 2: Fax: E-mail: agoren@harbourvest.com DISBURSEMENT ADDRESS		
Other Names Used with Debtor:	Amends Claim: No Acquired Claim: No	
Basis of Claim: See Annex	Last 4 Digits: No	Uniform Claim Identifier:
Total Amount of Claim: See Annex	Includes Interest or Charges: None	
Has Priority Claim: No	Priority Under:	
Has Secured Claim: No Amount of 503(b)(9): No Based on Lease: No Subject to Right of Setoff: No	Nature of Secured Amount: Value of Property: Annual Interest Rate: Arrearage Amount: Basis for Perfection: Amount Unsecured:	
Submitted By: Michael Pugatch on 08-Apr-2020 4:49:59 p.m. Eastern Time Title: Managing Director-Company: HarbourVest 2017 Global AIF L.P., by HarbourVest Partners Ireland Limited, its Alternative Company: Inv Fund Mgr, by HarbourVest Partners L.P., its Duly Appointed Investment Manager, by HarbourVest Partners, LLC, its Gen Ptr		

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

In re:

Highland Capital Management, L.P.

Debtor.

Chapter 11

Case No. 19-34054 (SGJ)

ANNEX TO PROOF OF CLAIM

1. This annex (the “Annex”) is part of and is incorporated by reference into the attached proof of claim (together with the Annex, the “Proof of Claim”) and describes in more detail the claims of HarbourVest 2017 Global AIF L.P. (the “Claimant”) against the debtor Highland Capital Management, L.P. (the “Debtor”).

2. The Claimant is a limited partner in one of the Debtor’s managed vehicles, Highland CLO Funding, Ltd. (“HCLOF”). Acis Capital Management GP, L.L.C. and Acis Capital Management L.P. (together, “Acis”), the portfolio manager for HCLOF, filed for chapter 11 in the United States Bankruptcy Court for the Northern District of Texas (the “Court”) on January 30, 2018. The Acis bankruptcy filing resulted from a dispute between Debtor and its former employee, Joshua Terry, who served as portfolio manager for Debtor’s collateral loan obligations funds (“CLO”) business. *See, e.g., Findings of Fact and Conclusions of Law in Support of Orders for Relief Issued After Trial on Contested Involuntary Bankruptcy Petition (“Involuntary Petition Ruling”) [Case No. 18-30264 (SGJ), Dkt. No. 118].* As noted in more detail in the Court’s *Bench Ruling and Memorandum of Law in Support of: (A) Final Approval of Disclosure Statement; and (B) Confirmation of Chapter 11 Trustee’s Third Amended Joint Plan (“Confirmation Ruling”) [Case No. 18-30264 (SGJ), Dkt. No 827]* and related filings in the Acis

006431

bankruptcy cases, there has been extensive litigation regarding alleged improper conduct associated with the management of, and transactions relating to, Acis, including transactions with and related to HCLOF. *See, e.g., id.; Second Amended Complaint* [Case No. 18-03078(SGJ), Dkt. No. 157].

3. Due to the Acis bankruptcy and certain conduct alleged to have been undertaken by the Debtor (to whom Acis subcontracted its functions) and Debtor's employees (who were officers, employees, and agents of Acis), the Claimant has suffered significant harm. Such harm includes, but is not limited to, financial harm resulting from, among other things (i) court orders in the Acis bankruptcy that prevented certain CLOs in which HCLOF was invested from being refinanced or reset and court orders that otherwise regulated the activity of HCLOF; and (ii) significant fees and expenses related to the Acis bankruptcy that were charged to HCLOF. *See, e.g., Involuntary Petition Ruling* ¶ 27; *see also Confirmation Ruling*.

4. Claimant hereby files this Claim to assert any and all of its rights to payment, remedies, and other claims (including contingent or unliquidated claims) against the Debtor in connection with and relating to the foregoing harm, including for any amounts due or owed under the various agreements with the Debtor in connection with HCLOF (including, but not limited to, the Subscription and Transfer Agreement for Ordinary Shares Highland CLO Funding, Ltd., dated as of November 15, 2017, the Members Agreement Relating to the Company, dated as of November 15, 2017, the Highland CLO Funding, Ltd. Offering Memorandum dated November 15, 2017), and any and all legal and equitable claims or causes of action relating to the foregoing harm.

5. The Claimant has not attached the documentation supporting this Claim to this Proof of Claim because the documentation is voluminous and the Debtor has copies of such

documents. However, any requested relevant documents will be provided to the Official Committee of Unsecured Creditors, the Court, the United States Trustee and the Debtor in the event of a dispute regarding this Proof of Claim and will be made available for review by other parties in interest as appropriate upon reasonable request and after consultation with the Debtor and execution of appropriate confidentiality agreements.

6. This Proof of Claim is filed with a full reservation of rights, including the right to amend, update, modify, supplement or otherwise revise this Proof of Claim in any respect at any time. The filing of this Proof of Claim is not and should not be construed to be: (a) a waiver or release of any of the Claimant's rights against any person, entity or property accruing to it against the Debtor and its estate; (b) a waiver of the Claimant's rights to assert that 28 U.S.C. § 157(b)(2)(C) is unconstitutional; (c) a consent or submission by the Claimant, or waiver of the Claimant's rights to object, to the jurisdiction of this Court with respect to the subject matter of any of the claims described herein, or any objection or other proceeding commenced with respect to any of the claims described herein, or any other proceeding commenced in the Debtor's chapter 11 case against or otherwise involving the Claimant; (d) a waiver or release of any right of the Claimant, or consent by the Claimant, to a trial by jury in this or any other court or proceeding; (e) a waiver or release of, or any limitation on, any right of the Claimant to have orders entered only after *de novo* review by a United States District Judge; (f) an election of remedies; or (g) a waiver of, or any other limitation on, any right of the Claimant to request withdrawal of the reference with respect to any matter, including, without limitation, any matter relating to this Proof of Claim.

7. Claimant's express reservation of all rights and causes of action, includes, without limitation, contingent or unliquidated rights that it or its affiliates may have against the Debtor,

as well as defenses, offsets and counterclaims. This description and classification of claims by the Claimant is not a concession or admission as to the correct characterization or treatment of any such claims or a waiver of any rights of the Claimant.

8. Furthermore, the Claimant expressly reserves its rights to (a) file additional proofs of claim for additional claims that may be based on the same or additional documents or facts or other liability or indebtedness of the Debtor to the Claimant under contract or otherwise; (b) assert claims for cure of defaults in any agreement that the Debtor or any trustee appointed in this chapter 11 case may seek to assume; (c) assert any and all other claims, causes of action, defenses, offsets or counterclaims against the Debtor or any other parties; (d) file a request for payment of an administrative expense under 11 U.S.C. §§ 503 and 507 for any or all of the claims or rights of payment described above and any additional amounts; and (e) seek recovery through any relevant third parties, including any of the Debtor's insurance coverage providers.

9. This Proof of Claim does not encompass all claims that the Claimant or its affiliates may have that arise after the Petition Date and are entitled to administrative priority, and the Claimant expressly reserves its right to file such claim or any similar claim at the appropriate time, including any such post-petition claims arising under these service contracts.

10. This Proof of Claim is filed without prejudice to the filing by the Claimant of additional proofs of claim or requests for payment with respect to any other indebtedness, liability or obligation of the Debtor. The Claimant does not, by this Proof of Claim or any amendment or other action, waive any rights with respect to any scheduled claim.

11. The Claimant reserves the right to withdraw, amend, clarify, modify or supplement this Proof of Claim to assert additional claims, causes of action or additional grounds for this Proof of Claim (including adding any additional contracts, agreements, obligations or

other relationships between the Claimant and the Debtor), as well as the right to file any separate or additional proofs of claim with respect to the claims set forth herein or otherwise, including for the purpose of fixing and liquidating any contingent or unliquidated claim set forth herein, or to file additional proofs of claim in respect of additional amounts or for any other reason.

12. In executing and filing this Proof of Claim, the Claimant does not submit to the jurisdiction of the Bankruptcy Court for the Northern District of Texas for any purpose other than with respect to this Proof of Claim against the Debtor, and does not waive or release any rights or remedies against any other person or entity that may be liable for all or part of this Proof of Claim.

13. The Claimant otherwise reserves its rights, and nothing herein shall prejudice the Claimant's rights, under any order of the Court previously entered in this chapter 11 case.

14. Payments on account of this Proof of Claim should be sent to the Claimant at the address specified for notices to the Claimant in Part 1.3 of the Proof of Claim.

CLAIM 150

006436

Fill in this information to identify the case:

Debtor Highland Capital Management, L.P.

United States Bankruptcy Court for the: Northern District of Texas
(State)

Case number 19-34054

Official Form 410
Proof of Claim

04/19

Read the instructions before filling out this form. This form is for making a claim for payment in a bankruptcy case. Do not use this form to make a request for payment of an administrative expense. Make such a request according to 11 U.S.C. § 503.

Filers must leave out or redact information that is entitled to privacy on this form or on any attached documents. Attach redacted copies or any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, judgments, mortgages, and security agreements. Do not send original documents; they may be destroyed after scanning. If the documents are not available, explain in an attachment.

A person who files a fraudulent claim could be fined up to \$500,000, imprisoned for up to 5 years, or both. 18 U.S.C. §§ 152, 157, and 3571.

Fill in all the information about the claim as of the date the case was filed. That date is on the notice of bankruptcy (Form 309) that you received.

Part 1: Identify the Claim

1. Who is the current creditor?	<u>HarbourVest Dover Street IX Investment L.P.</u> Name of the current creditor (the person or entity to be paid for this claim)	
	Other names the creditor used with the debtor _____	
2. Has this claim been acquired from someone else?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. From whom? _____	
3. Where should notices and payments to the creditor be sent?	Where should notices to the creditor be sent? See summary page	Where should payments to the creditor be sent? (if different) See summary page
Federal Rule of Bankruptcy Procedure (FRBP) 2002(g)	Contact phone <u>2129096000</u> Contact email <u>eweisgerber@debevoise.com</u>	Contact phone <u>6173483773</u> Contact email <u>agoren@harbourvest.com</u>
	Uniform claim identifier for electronic payments in chapter 13 (if you use one): _____	
4. Does this claim amend one already filed?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Claim number on court claims registry (if known) _____ Filed on _____ MM / DD / YYYY	
5. Do you know if anyone else has filed a proof of claim for this claim?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Who made the earlier filing? _____	

Part 2: Give Information About the Claim as of the Date the Case Was Filed

6. Do you have any number you use to identify the debtor?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Last 4 digits of the debtor's account or any number you use to identify the debtor: ____
7. How much is the claim? \$ <u>See Annex</u>	Does this amount include interest or other charges? <input type="checkbox"/> No <input type="checkbox"/> Yes. Attach statement itemizing interest, fees, expenses, or other charges required by Bankruptcy Rule 3001(c)(2)(A).
8. What is the basis of the claim?	Examples: Goods sold, money loaned, lease, services performed, personal injury or wrongful death, or credit card. Attach redacted copies of any documents supporting the claim required by Bankruptcy Rule 3001(c). Limit disclosing information that is entitled to privacy, such as health care information. <u>See Annex</u>
9. Is all or part of the claim secured?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. The claim is secured by a lien on property. Nature or property: <input type="checkbox"/> Real estate: If the claim is secured by the debtor's principle residence, file a <i>Mortgage Proof of Claim Attachment</i> (Official Form 410-A) with this <i>Proof of Claim</i> . <input type="checkbox"/> Motor vehicle <input type="checkbox"/> Other. Describe: _____ Basis for perfection: _____ Attach redacted copies of documents, if any, that show evidence of perfection of a security interest (for example, a mortgage, lien, certificate of title, financing statement, or other document that shows the lien has been filed or recorded.) Value of property: \$ _____ Amount of the claim that is secured: \$ _____ Amount of the claim that is unsecured: \$ _____ (The sum of the secured and unsecured amount should match the amount in line 7.) Amount necessary to cure any default as of the date of the petition: \$ _____ Annual Interest Rate (when case was filed) _____ % <input type="checkbox"/> Fixed <input type="checkbox"/> Variable
10. Is this claim based on a lease?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Amount necessary to cure any default as of the date of the petition. \$ _____
11. Is this claim subject to a right of setoff?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Identify the property: _____

12. Is all or part of the claim entitled to priority under 11 U.S.C. § 507(a)? A claim may be partly priority and partly nonpriority. For example, in some categories, the law limits the amount entitled to priority.	<input checked="" type="checkbox"/> No	Amount entitled to priority \$ _____ \$ _____ \$ _____ \$ _____ \$ _____ \$ _____
	<input type="checkbox"/> Yes. Check all that apply:	
	<input type="checkbox"/> Domestic support obligations (including alimony and child support) under 11 U.S.C. § 507(a)(1)(A) or (a)(1)(B).	
	<input type="checkbox"/> Up to \$3,025* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use. 11 U.S.C. § 507(a)(7).	
	<input type="checkbox"/> Wages, salaries, or commissions (up to \$13,650*) earned within 180 days before the bankruptcy petition is filed or the debtor's business ends, whichever is earlier. 11 U.S.C. § 507(a)(4).	
	<input type="checkbox"/> Taxes or penalties owed to governmental units. 11 U.S.C. § 507(a)(8).	
	<input type="checkbox"/> Contributions to an employee benefit plan. 11 U.S.C. § 507(a)(5).	
<input type="checkbox"/> Other. Specify subsection of 11 U.S.C. § 507(a)() that applies.	\$ _____	
* Amounts are subject to adjustment on 4/01/22 and every 3 years after that for cases begun on or after the date of adjustment.		
13. Is all or part of the claim pursuant to 11 U.S.C. § 503(b)(9)?	<input checked="" type="checkbox"/> No	
	<input type="checkbox"/> Yes. Indicate the amount of your claim arising from the value of any goods received by the debtor within 20 days before the date of commencement of the above case, in which the goods have been sold to the Debtor in the ordinary course of such Debtor's business. Attach documentation supporting such claim. \$ _____	

Part 3: Sign Below

The person completing this proof of claim must sign and date it. FRBP 9011(b).

If you file this claim electronically, FRBP 5005(a)(2) authorizes courts to establish local rules specifying what a signature is.

A person who files a fraudulent claim could be fined up to \$500,000, imprisoned for up to 5 years, or both. 18 U.S.C. §§ 152, 157, and 3571.

Check the appropriate box:

- ☐ I am the creditor.
- ☒ I am the creditor's attorney or authorized agent.
- ☐ I am the trustee, or the debtor, or their authorized agent. Bankruptcy Rule 3004.
- ☐ I am a guarantor, surety, endorser, or other codebtor. Bankruptcy Rule 3005.

I understand that an authorized signature on this *Proof of Claim* serves as an acknowledgement that when calculating the amount of the claim, the creditor gave the debtor credit for any payments received toward the debt.

I have examined the information in this *Proof of Claim* and have reasonable belief that the information is true and correct.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on date 04/08/2020
MM / DD / YYYY

/s/Michael Pugatch
Signature

Print the name of the person who is completing and signing this claim:

Name Michael Pugatch
First name Middle name Last name

Title Managing Director-Company: HarbourVest Dover Street IX Investment L.P.,

Company Inv Fund Mgr, by HarbourVest Partners L.P., its Duly Appointed Investme
Identify the corporate servicer as the company if the authorized agent is a servicer.

Address

Contact phone

Email

For phone assistance: Domestic (877) 573-3984 | International (310) 751-1829

Debtor: 19-34054 - Highland Capital Management, L.P. District: Northern District of Texas, Dallas Division		
Creditor: HarbourVest Dover Street IX Investment L.P. Attn: Erica Weisgerber Debevoise and Plimpton LLP 919 Third Avenue New York, NY, 10022 U.S.A. Phone: 2129096000 Phone 2: Fax: Email: eweisgerber@debevoise.com	Has Supporting Documentation: Yes, supporting documentation successfully uploaded Related Document Statement:	
	Has Related Claim: No Related Claim Filed By:	
	Filing Party: Authorized agent	
Disbursement/Notice Parties: HarbourVest Dover Street IX Investment L.P. c/o HarbourVest Partners, LLC One Financial Center Boston, MA, 02111 U.S.A. Phone: 6173483773 Phone 2: Fax: E-mail: agoren@harbourvest.com DISBURSEMENT ADDRESS		
Other Names Used with Debtor:	Amends Claim: No Acquired Claim: No	
Basis of Claim: See Annex	Last 4 Digits: No	Uniform Claim Identifier:
Total Amount of Claim: See Annex	Includes Interest or Charges: None	
Has Priority Claim: No	Priority Under:	
Has Secured Claim: No Amount of 503(b)(9): No Based on Lease: No Subject to Right of Setoff: No	Nature of Secured Amount: Value of Property: Annual Interest Rate: Arrearage Amount: Basis for Perfection: Amount Unsecured:	
Submitted By: Michael Pugatch on 08-Apr-2020 4:59:00 p.m. Eastern Time Title: Managing Director-Company: HarbourVest Dover Street IX Investment L.P., by HarbourVest Partners Ireland Limited, its Alter Company: Inv Fund Mgr, by HarbourVest Partners L.P., its Duly Appointed Investment Manager, by HarbourVest Partners, LLC, its Gen Ptr		

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

In re:

Highland Capital Management, L.P.

Debtor.

Chapter 11

Case No. 19-34054 (SGJ)

ANNEX TO PROOF OF CLAIM

1. This annex (the “Annex”) is part of and is incorporated by reference into the attached proof of claim (together with the Annex, the “Proof of Claim”) and describes in more detail the claims of HarbourVest Dover Street IX Investment L.P. (the “Claimant”) against the debtor Highland Capital Management, L.P. (the “Debtor”).

2. The Claimant is a limited partner in one of the Debtor’s managed vehicles, Highland CLO Funding, Ltd. (“HCLOF”). Acis Capital Management GP, L.L.C. and Acis Capital Management L.P. (together, “Acis”), the portfolio manager for HCLOF, filed for chapter 11 in the United States Bankruptcy Court for the Northern District of Texas (the “Court”) on January 30, 2018. The Acis bankruptcy filing resulted from a dispute between Debtor and its former employee, Joshua Terry, who served as portfolio manager for Debtor’s collateral loan obligations funds (“CLO”) business. *See, e.g., Findings of Fact and Conclusions of Law in Support of Orders for Relief Issued After Trial on Contested Involuntary Bankruptcy Petition (“Involuntary Petition Ruling”) [Case No. 18-30264 (SGJ), Dkt. No. 118].* As noted in more detail in the Court’s *Bench Ruling and Memorandum of Law in Support of: (A) Final Approval of Disclosure Statement; and (B) Confirmation of Chapter 11 Trustee’s Third Amended Joint Plan (“Confirmation Ruling”) [Case No. 18-30264 (SGJ), Dkt. No 827]* and related filings in the Acis

006441

bankruptcy cases, there has been extensive litigation regarding alleged improper conduct associated with the management of, and transactions relating to, Acis, including transactions with and related to HCLOF. *See, e.g., id.; Second Amended Complaint* [Case No. 18-03078(SGJ), Dkt. No. 157].

3. Due to the Acis bankruptcy and certain conduct alleged to have been undertaken by the Debtor (to whom Acis subcontracted its functions) and Debtor's employees (who were officers, employees, and agents of Acis), the Claimant has suffered significant harm. Such harm includes, but is not limited to, financial harm resulting from, among other things (i) court orders in the Acis bankruptcy that prevented certain CLOs in which HCLOF was invested from being refinanced or reset and court orders that otherwise regulated the activity of HCLOF; and (ii) significant fees and expenses related to the Acis bankruptcy that were charged to HCLOF. *See, e.g., Involuntary Petition Ruling* ¶ 27; *see also Confirmation Ruling*.

4. Claimant hereby files this Claim to assert any and all of its rights to payment, remedies, and other claims (including contingent or unliquidated claims) against the Debtor in connection with and relating to the foregoing harm, including for any amounts due or owed under the various agreements with the Debtor in connection with HCLOF (including, but not limited to, the Subscription and Transfer Agreement for Ordinary Shares Highland CLO Funding, Ltd., dated as of November 15, 2017, the Members Agreement Relating to the Company, dated as of November 15, 2017, the Highland CLO Funding, Ltd. Offering Memorandum dated November 15, 2017), and any and all legal and equitable claims or causes of action relating to the foregoing harm.

5. The Claimant has not attached the documentation supporting this Claim to this Proof of Claim because the documentation is voluminous and the Debtor has copies of such

documents. However, any requested relevant documents will be provided to the Official Committee of Unsecured Creditors, the Court, the United States Trustee and the Debtor in the event of a dispute regarding this Proof of Claim and will be made available for review by other parties in interest as appropriate upon reasonable request and after consultation with the Debtor and execution of appropriate confidentiality agreements.

6. This Proof of Claim is filed with a full reservation of rights, including the right to amend, update, modify, supplement or otherwise revise this Proof of Claim in any respect at any time. The filing of this Proof of Claim is not and should not be construed to be: (a) a waiver or release of any of the Claimant's rights against any person, entity or property accruing to it against the Debtor and its estate; (b) a waiver of the Claimant's rights to assert that 28 U.S.C. § 157(b)(2)(C) is unconstitutional; (c) a consent or submission by the Claimant, or waiver of the Claimant's rights to object, to the jurisdiction of this Court with respect to the subject matter of any of the claims described herein, or any objection or other proceeding commenced with respect to any of the claims described herein, or any other proceeding commenced in the Debtor's chapter 11 case against or otherwise involving the Claimant; (d) a waiver or release of any right of the Claimant, or consent by the Claimant, to a trial by jury in this or any other court or proceeding; (e) a waiver or release of, or any limitation on, any right of the Claimant to have orders entered only after *de novo* review by a United States District Judge; (f) an election of remedies; or (g) a waiver of, or any other limitation on, any right of the Claimant to request withdrawal of the reference with respect to any matter, including, without limitation, any matter relating to this Proof of Claim.

7. Claimant's express reservation of all rights and causes of action, includes, without limitation, contingent or unliquidated rights that it or its affiliates may have against the Debtor,

as well as defenses, offsets and counterclaims. This description and classification of claims by the Claimant is not a concession or admission as to the correct characterization or treatment of any such claims or a waiver of any rights of the Claimant.

8. Furthermore, the Claimant expressly reserves its rights to (a) file additional proofs of claim for additional claims that may be based on the same or additional documents or facts or other liability or indebtedness of the Debtor to the Claimant under contract or otherwise; (b) assert claims for cure of defaults in any agreement that the Debtor or any trustee appointed in this chapter 11 case may seek to assume; (c) assert any and all other claims, causes of action, defenses, offsets or counterclaims against the Debtor or any other parties; (d) file a request for payment of an administrative expense under 11 U.S.C. §§ 503 and 507 for any or all of the claims or rights of payment described above and any additional amounts; and (e) seek recovery through any relevant third parties, including any of the Debtor's insurance coverage providers.

9. This Proof of Claim does not encompass all claims that the Claimant or its affiliates may have that arise after the Petition Date and are entitled to administrative priority, and the Claimant expressly reserves its right to file such claim or any similar claim at the appropriate time, including any such post-petition claims arising under these service contracts.

10. This Proof of Claim is filed without prejudice to the filing by the Claimant of additional proofs of claim or requests for payment with respect to any other indebtedness, liability or obligation of the Debtor. The Claimant does not, by this Proof of Claim or any amendment or other action, waive any rights with respect to any scheduled claim.

11. The Claimant reserves the right to withdraw, amend, clarify, modify or supplement this Proof of Claim to assert additional claims, causes of action or additional grounds for this Proof of Claim (including adding any additional contracts, agreements, obligations or

other relationships between the Claimant and the Debtor), as well as the right to file any separate or additional proofs of claim with respect to the claims set forth herein or otherwise, including for the purpose of fixing and liquidating any contingent or unliquidated claim set forth herein, or to file additional proofs of claim in respect of additional amounts or for any other reason.

12. In executing and filing this Proof of Claim, the Claimant does not submit to the jurisdiction of the Bankruptcy Court for the Northern District of Texas for any purpose other than with respect to this Proof of Claim against the Debtor, and does not waive or release any rights or remedies against any other person or entity that may be liable for all or part of this Proof of Claim.

13. The Claimant otherwise reserves its rights, and nothing herein shall prejudice the Claimant's rights, under any order of the Court previously entered in this chapter 11 case.

14. Payments on account of this Proof of Claim should be sent to the Claimant at the address specified for notices to the Claimant in Part 1.3 of the Proof of Claim.

CLAIM 153

006446

Fill in this information to identify the case:

Debtor Highland Capital Management, L.P.

United States Bankruptcy Court for the: Northern District of Texas
(State)

Case number 19-34054

Official Form 410
Proof of Claim

04/19

Read the instructions before filling out this form. This form is for making a claim for payment in a bankruptcy case. Do not use this form to make a request for payment of an administrative expense. Make such a request according to 11 U.S.C. § 503.

Filers must leave out or redact information that is entitled to privacy on this form or on any attached documents. Attach redacted copies or any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, judgments, mortgages, and security agreements. Do not send original documents; they may be destroyed after scanning. If the documents are not available, explain in an attachment.

A person who files a fraudulent claim could be fined up to \$500,000, imprisoned for up to 5 years, or both. 18 U.S.C. §§ 152, 157, and 3571.

Fill in all the information about the claim as of the date the case was filed. That date is on the notice of bankruptcy (Form 309) that you received.

Part 1: Identify the Claim

1. Who is the current creditor?	<u>HV International VIII Secondary L.P.</u> Name of the current creditor (the person or entity to be paid for this claim)	
	Other names the creditor used with the debtor _____	
2. Has this claim been acquired from someone else?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. From whom? _____	
3. Where should notices and payments to the creditor be sent?	Where should notices to the creditor be sent? <u>HV International VIII Secondary L.P.</u> <u>Attn: Erica Weisgerber</u> <u>Debevoise and Plimpton LLP</u> <u>919 Third Avenue</u> <u>New York, NY 10022, U.S.A.</u> Contact phone <u>2129096000</u> Contact email <u>eweisgerber@debevoise.com</u>	Where should payments to the creditor be sent? (if different) <u>See summary page</u> Contact phone <u>6173483773</u> Contact email <u>agoren@harbourvest.com</u>
	Federal Rule of Bankruptcy Procedure (FRBP) 2002(g) Uniform claim identifier for electronic payments in chapter 13 (if you use one): _____	
4. Does this claim amend one already filed?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Claim number on court claims registry (if known) _____ Filed on _____ MM / DD / YYYY	
5. Do you know if anyone else has filed a proof of claim for this claim?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Who made the earlier filing? _____	



Part 2: Give Information About the Claim as of the Date the Case Was Filed

6. Do you have any number you use to identify the debtor?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Last 4 digits of the debtor's account or any number you use to identify the debtor: ____
7. How much is the claim? \$ <u>See Annex</u>	Does this amount include interest or other charges? <input type="checkbox"/> No <input type="checkbox"/> Yes. Attach statement itemizing interest, fees, expenses, or other charges required by Bankruptcy Rule 3001(c)(2)(A).
8. What is the basis of the claim?	Examples: Goods sold, money loaned, lease, services performed, personal injury or wrongful death, or credit card. Attach redacted copies of any documents supporting the claim required by Bankruptcy Rule 3001(c). Limit disclosing information that is entitled to privacy, such as health care information. <u>See Annex</u>
9. Is all or part of the claim secured?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. The claim is secured by a lien on property. Nature or property: <input type="checkbox"/> Real estate: If the claim is secured by the debtor's principle residence, file a <i>Mortgage Proof of Claim Attachment</i> (Official Form 410-A) with this <i>Proof of Claim</i> . <input type="checkbox"/> Motor vehicle <input type="checkbox"/> Other. Describe: _____ Basis for perfection: _____ Attach redacted copies of documents, if any, that show evidence of perfection of a security interest (for example, a mortgage, lien, certificate of title, financing statement, or other document that shows the lien has been filed or recorded.) Value of property: \$ _____ Amount of the claim that is secured: \$ _____ Amount of the claim that is unsecured: \$ _____ (The sum of the secured and unsecured amount should match the amount in line 7.) Amount necessary to cure any default as of the date of the petition: \$ _____ Annual Interest Rate (when case was filed) _____ % <input type="checkbox"/> Fixed <input type="checkbox"/> Variable
10. Is this claim based on a lease?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Amount necessary to cure any default as of the date of the petition. \$ _____
11. Is this claim subject to a right of setoff?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Identify the property: _____



12. Is all or part of the claim entitled to priority under 11 U.S.C. § 507(a)?

☒ No

☐ Yes. Check all that apply:

Amount entitled to priority

A claim may be partly priority and partly nonpriority. For example, in some categories, the law limits the amount entitled to priority.

☐ Domestic support obligations (including alimony and child support) under 11 U.S.C. § 507(a)(1)(A) or (a)(1)(B).

\$ _____

☐ Up to \$3,025* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use. 11 U.S.C. § 507(a)(7).

\$ _____

☐ Wages, salaries, or commissions (up to \$13,650* earned within 180 days before the bankruptcy petition is filed or the debtor's business ends, whichever is earlier. 11 U.S.C. § 507(a)(4).

\$ _____

☐ Taxes or penalties owed to governmental units. 11 U.S.C. § 507(a)(8).

\$ _____

☐ Contributions to an employee benefit plan. 11 U.S.C. § 507(a)(5).

\$ _____

☐ Other. Specify subsection of 11 U.S.C. § 507(a)() that applies.

\$ _____

* Amounts are subject to adjustment on 4/01/22 and every 3 years after that for cases begun on or after the date of adjustment.

13. Is all or part of the claim pursuant to 11 U.S.C. § 503(b)(9)?

☒ No

☐ Yes. Indicate the amount of your claim arising from the value of any goods received by the debtor within 20 days before the date of commencement of the above case, in which the goods have been sold to the Debtor in the ordinary course of such Debtor's business. Attach documentation supporting such claim.

\$ _____

Part 3: Sign Below

The person completing this proof of claim must sign and date it. FRBP 9011(b).

If you file this claim electronically, FRBP 5005(a)(2) authorizes courts to establish local rules specifying what a signature is.

A person who files a fraudulent claim could be fined up to \$500,000, imprisoned for up to 5 years, or both. 18 U.S.C. §§ 152, 157, and 3571.

Check the appropriate box:

☐ I am the creditor.

☒ I am the creditor's attorney or authorized agent.

☐ I am the trustee, or the debtor, or their authorized agent. Bankruptcy Rule 3004.

☐ I am a guarantor, surety, endorser, or other codebtor. Bankruptcy Rule 3005.

I understand that an authorized signature on this *Proof of Claim* serves as an acknowledgement that when calculating the amount of the claim, the creditor gave the debtor credit for any payments received toward the debt.

I have examined the information in this *Proof of Claim* and have reasonable belief that the information is true and correct.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on date 04/08/2020
MM / DD / YYYY

/s/Michael Pugatch
Signature

Print the name of the person who is completing and signing this claim:

Name Michael Pugatch
First name Middle name Last name

Title Managing Director-Company: HV International VIII Secondary L.P., by HII

Company by HarbourVest GP LLC, its General Partner, by HarbourVest Partners, LL
Identify the corporate servicer as the company if the authorized agent is a servicer.

Address

Contact phone _____

Email _____



For phone assistance: Domestic (877) 573-3984 | International (310) 751-1829

Debtor: 19-34054 - Highland Capital Management, L.P. District: Northern District of Texas, Dallas Division		
Creditor: HV International VIII Secondary L.P. Attn: Erica Weisgerber Debevoise and Plimpton LLP 919 Third Avenue New York, NY, 10022 U.S.A. Phone: 2129096000 Phone 2: Fax: Email: eweisgerber@debevoise.com	Has Supporting Documentation: Yes, supporting documentation successfully uploaded Related Document Statement:	
	Has Related Claim: No Related Claim Filed By:	
	Filing Party: Authorized agent	
Disbursement/Notice Parties: HV International VIII Secondary L.P. c/o HarbourVest Partners, LLC One Financial Center Boston, MA, 02111 U.S.A. Phone: 6173483773 Phone 2: Fax: E-mail: agoren@harbourvest.com DISBURSEMENT ADDRESS		
Other Names Used with Debtor:	Amends Claim: No Acquired Claim: No	
Basis of Claim: See Annex	Last 4 Digits: No	Uniform Claim Identifier:
Total Amount of Claim: See Annex	Includes Interest or Charges: None	
Has Priority Claim: No	Priority Under:	
Has Secured Claim: No Amount of 503(b)(9): No Based on Lease: No Subject to Right of Setoff: No	Nature of Secured Amount: Value of Property: Annual Interest Rate: Arrearage Amount: Basis for Perfection: Amount Unsecured:	
Submitted By: Michael Pugatch on 08-Apr-2020 5:16:54 p.m. Eastern Time Title: Managing Director-Company: HV International VIII Secondary L.P., by HIPEP VIII Associates L.P., its General Partner, Company: by HarbourVest GP LLC, its General Partner, by HarbourVest Partners, LLC, its Managing Member		

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

In re:

Highland Capital Management, L.P.

Debtor.

Chapter 11

Case No. 19-34054 (SGJ)

ANNEX TO PROOF OF CLAIM

1. This annex (the “Annex”) is part of and is incorporated by reference into the attached proof of claim (together with the Annex, the “Proof of Claim”) and describes in more detail the claims of HV International VIII Secondary L.P. (the “Claimant”) against the debtor Highland Capital Management, L.P. (the “Debtor”).

2. The Claimant is a limited partner in one of the Debtor’s managed vehicles, Highland CLO Funding, Ltd. (“HCLOF”). Acis Capital Management GP, L.L.C. and Acis Capital Management L.P. (together, “Acis”), the portfolio manager for HCLOF, filed for chapter 11 in the United States Bankruptcy Court for the Northern District of Texas (the “Court”) on January 30, 2018. The Acis bankruptcy filing resulted from a dispute between Debtor and its former employee, Joshua Terry, who served as portfolio manager for Debtor’s collateral loan obligations funds (“CLO”) business. *See, e.g., Findings of Fact and Conclusions of Law in Support of Orders for Relief Issued After Trial on Contested Involuntary Bankruptcy Petition (“Involuntary Petition Ruling”) [Case No. 18-30264 (SGJ), Dkt. No. 118].* As noted in more detail in the Court’s *Bench Ruling and Memorandum of Law in Support of: (A) Final Approval of Disclosure Statement; and (B) Confirmation of Chapter 11 Trustee’s Third Amended Joint Plan (“Confirmation Ruling”) [Case No. 18-30264 (SGJ), Dkt. No 827]* and related filings in the Acis

bankruptcy cases, there has been extensive litigation regarding alleged improper conduct associated with the management of, and transactions relating to, Acis, including transactions with and related to HCLOF. *See, e.g., id.; Second Amended Complaint* [Case No. 18-03078(SGJ), Dkt. No. 157].

3. Due to the Acis bankruptcy and certain conduct alleged to have been undertaken by the Debtor (to whom Acis subcontracted its functions) and Debtor's employees (who were officers, employees, and agents of Acis), the Claimant has suffered significant harm. Such harm includes, but is not limited to, financial harm resulting from, among other things (i) court orders in the Acis bankruptcy that prevented certain CLOs in which HCLOF was invested from being refinanced or reset and court orders that otherwise regulated the activity of HCLOF; and (ii) significant fees and expenses related to the Acis bankruptcy that were charged to HCLOF. *See, e.g., Involuntary Petition Ruling* ¶ 27; *see also Confirmation Ruling*.

4. Claimant hereby files this Claim to assert any and all of its rights to payment, remedies, and other claims (including contingent or unliquidated claims) against the Debtor in connection with and relating to the foregoing harm, including for any amounts due or owed under the various agreements with the Debtor in connection with HCLOF (including, but not limited to, the Subscription and Transfer Agreement for Ordinary Shares Highland CLO Funding, Ltd., dated as of November 15, 2017, the Members Agreement Relating to the Company, dated as of November 15, 2017, the Highland CLO Funding, Ltd. Offering Memorandum dated November 15, 2017), and any and all legal and equitable claims or causes of action relating to the foregoing harm.

5. The Claimant has not attached the documentation supporting this Claim to this Proof of Claim because the documentation is voluminous and the Debtor has copies of such

documents. However, any requested relevant documents will be provided to the Official Committee of Unsecured Creditors, the Court, the United States Trustee and the Debtor in the event of a dispute regarding this Proof of Claim and will be made available for review by other parties in interest as appropriate upon reasonable request and after consultation with the Debtor and execution of appropriate confidentiality agreements.

6. This Proof of Claim is filed with a full reservation of rights, including the right to amend, update, modify, supplement or otherwise revise this Proof of Claim in any respect at any time. The filing of this Proof of Claim is not and should not be construed to be: (a) a waiver or release of any of the Claimant's rights against any person, entity or property accruing to it against the Debtor and its estate; (b) a waiver of the Claimant's rights to assert that 28 U.S.C. § 157(b)(2)(C) is unconstitutional; (c) a consent or submission by the Claimant, or waiver of the Claimant's rights to object, to the jurisdiction of this Court with respect to the subject matter of any of the claims described herein, or any objection or other proceeding commenced with respect to any of the claims described herein, or any other proceeding commenced in the Debtor's chapter 11 case against or otherwise involving the Claimant; (d) a waiver or release of any right of the Claimant, or consent by the Claimant, to a trial by jury in this or any other court or proceeding; (e) a waiver or release of, or any limitation on, any right of the Claimant to have orders entered only after *de novo* review by a United States District Judge; (f) an election of remedies; or (g) a waiver of, or any other limitation on, any right of the Claimant to request withdrawal of the reference with respect to any matter, including, without limitation, any matter relating to this Proof of Claim.

7. Claimant's express reservation of all rights and causes of action, includes, without limitation, contingent or unliquidated rights that it or its affiliates may have against the Debtor,

as well as defenses, offsets and counterclaims. This description and classification of claims by the Claimant is not a concession or admission as to the correct characterization or treatment of any such claims or a waiver of any rights of the Claimant.

8. Furthermore, the Claimant expressly reserves its rights to (a) file additional proofs of claim for additional claims that may be based on the same or additional documents or facts or other liability or indebtedness of the Debtor to the Claimant under contract or otherwise; (b) assert claims for cure of defaults in any agreement that the Debtor or any trustee appointed in this chapter 11 case may seek to assume; (c) assert any and all other claims, causes of action, defenses, offsets or counterclaims against the Debtor or any other parties; (d) file a request for payment of an administrative expense under 11 U.S.C. §§ 503 and 507 for any or all of the claims or rights of payment described above and any additional amounts; and (e) seek recovery through any relevant third parties, including any of the Debtor's insurance coverage providers.

9. This Proof of Claim does not encompass all claims that the Claimant or its affiliates may have that arise after the Petition Date and are entitled to administrative priority, and the Claimant expressly reserves its right to file such claim or any similar claim at the appropriate time, including any such post-petition claims arising under these service contracts.

10. This Proof of Claim is filed without prejudice to the filing by the Claimant of additional proofs of claim or requests for payment with respect to any other indebtedness, liability or obligation of the Debtor. The Claimant does not, by this Proof of Claim or any amendment or other action, waive any rights with respect to any scheduled claim.

11. The Claimant reserves the right to withdraw, amend, clarify, modify or supplement this Proof of Claim to assert additional claims, causes of action or additional grounds for this Proof of Claim (including adding any additional contracts, agreements, obligations or

other relationships between the Claimant and the Debtor), as well as the right to file any separate or additional proofs of claim with respect to the claims set forth herein or otherwise, including for the purpose of fixing and liquidating any contingent or unliquidated claim set forth herein, or to file additional proofs of claim in respect of additional amounts or for any other reason.

12. In executing and filing this Proof of Claim, the Claimant does not submit to the jurisdiction of the Bankruptcy Court for the Northern District of Texas for any purpose other than with respect to this Proof of Claim against the Debtor, and does not waive or release any rights or remedies against any other person or entity that may be liable for all or part of this Proof of Claim.

13. The Claimant otherwise reserves its rights, and nothing herein shall prejudice the Claimant's rights, under any order of the Court previously entered in this chapter 11 case.

14. Payments on account of this Proof of Claim should be sent to the Claimant at the address specified for notices to the Claimant in Part 1.3 of the Proof of Claim.

CLAIM 154

Fill in this information to identify the case:

Debtor Highland Capital Management, L.P.

United States Bankruptcy Court for the: Northern District of Texas
(State)

Case number 19-34054

Official Form 410
Proof of Claim

04/19

Read the instructions before filling out this form. This form is for making a claim for payment in a bankruptcy case. Do not use this form to make a request for payment of an administrative expense. Make such a request according to 11 U.S.C. § 503.

Filers must leave out or redact information that is entitled to privacy on this form or on any attached documents. Attach redacted copies or any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, judgments, mortgages, and security agreements. Do not send original documents; they may be destroyed after scanning. If the documents are not available, explain in an attachment.

A person who files a fraudulent claim could be fined up to \$500,000, imprisoned for up to 5 years, or both. 18 U.S.C. §§ 152, 157, and 3571.

Fill in all the information about the claim as of the date the case was filed. That date is on the notice of bankruptcy (Form 309) that you received.

Part 1: Identify the Claim

1. Who is the current creditor?	<u>HarbourVest Skew Base AIF L.P.</u> Name of the current creditor (the person or entity to be paid for this claim)	
	Other names the creditor used with the debtor _____	
2. Has this claim been acquired from someone else?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. From whom? _____	
3. Where should notices and payments to the creditor be sent?	Where should notices to the creditor be sent? <u>HarbourVest Skew Base AIF L.P.</u> <u>Attn: Erica Weisgerber</u> <u>Debevoise and Plimpton LLP</u> <u>919 Third Avenue</u> <u>New York, NY 10022, U.S.A.</u> Contact phone <u>2129096000</u> Contact email <u>eweisgerber@debevoise.com</u>	Where should payments to the creditor be sent? (if different) <u>See summary page</u> Contact phone <u>6173483773</u> Contact email <u>agoren@harbourvest.com</u>
	Federal Rule of Bankruptcy Procedure (FRBP) 2002(g) Uniform claim identifier for electronic payments in chapter 13 (if you use one): _____	
4. Does this claim amend one already filed?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Claim number on court claims registry (if known) _____ Filed on _____ MM / DD / YYYY	
5. Do you know if anyone else has filed a proof of claim for this claim?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Who made the earlier filing? _____	

Part 2: Give Information About the Claim as of the Date the Case Was Filed

6. Do you have any number you use to identify the debtor?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Last 4 digits of the debtor's account or any number you use to identify the debtor: ____
7. How much is the claim? \$ <u>See Annex</u>	Does this amount include interest or other charges? <input type="checkbox"/> No <input type="checkbox"/> Yes. Attach statement itemizing interest, fees, expenses, or other charges required by Bankruptcy Rule 3001(c)(2)(A).
8. What is the basis of the claim?	Examples: Goods sold, money loaned, lease, services performed, personal injury or wrongful death, or credit card. Attach redacted copies of any documents supporting the claim required by Bankruptcy Rule 3001(c). Limit disclosing information that is entitled to privacy, such as health care information. <u>See Annex</u>
9. Is all or part of the claim secured?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. The claim is secured by a lien on property. Nature or property: <input type="checkbox"/> Real estate: If the claim is secured by the debtor's principle residence, file a <i>Mortgage Proof of Claim Attachment</i> (Official Form 410-A) with this <i>Proof of Claim</i> . <input type="checkbox"/> Motor vehicle <input type="checkbox"/> Other. Describe: _____ Basis for perfection: _____ Attach redacted copies of documents, if any, that show evidence of perfection of a security interest (for example, a mortgage, lien, certificate of title, financing statement, or other document that shows the lien has been filed or recorded.) Value of property: \$ _____ Amount of the claim that is secured: \$ _____ Amount of the claim that is unsecured: \$ _____ (The sum of the secured and unsecured amount should match the amount in line 7.) Amount necessary to cure any default as of the date of the petition: \$ _____ Annual Interest Rate (when case was filed) _____ % <input type="checkbox"/> Fixed <input type="checkbox"/> Variable
10. Is this claim based on a lease?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Amount necessary to cure any default as of the date of the petition. \$ _____
11. Is this claim subject to a right of setoff?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Identify the property: _____

12. Is all or part of the claim entitled to priority under 11 U.S.C. § 507(a)? A claim may be partly priority and partly nonpriority. For example, in some categories, the law limits the amount entitled to priority.	<input checked="" type="checkbox"/> No	Amount entitled to priority \$ _____ \$ _____ \$ _____ \$ _____ \$ _____ \$ _____
	<input type="checkbox"/> Yes. Check all that apply:	
	<input type="checkbox"/> Domestic support obligations (including alimony and child support) under 11 U.S.C. § 507(a)(1)(A) or (a)(1)(B).	
	<input type="checkbox"/> Up to \$3,025* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use. 11 U.S.C. § 507(a)(7).	
	<input type="checkbox"/> Wages, salaries, or commissions (up to \$13,650*) earned within 180 days before the bankruptcy petition is filed or the debtor's business ends, whichever is earlier. 11 U.S.C. § 507(a)(4).	
	<input type="checkbox"/> Taxes or penalties owed to governmental units. 11 U.S.C. § 507(a)(8).	
	<input type="checkbox"/> Contributions to an employee benefit plan. 11 U.S.C. § 507(a)(5).	
<input type="checkbox"/> Other. Specify subsection of 11 U.S.C. § 507(a)() that applies.	\$ _____	
* Amounts are subject to adjustment on 4/01/22 and every 3 years after that for cases begun on or after the date of adjustment.		
13. Is all or part of the claim pursuant to 11 U.S.C. § 503(b)(9)?	<input checked="" type="checkbox"/> No	
	<input type="checkbox"/> Yes. Indicate the amount of your claim arising from the value of any goods received by the debtor within 20 days before the date of commencement of the above case, in which the goods have been sold to the Debtor in the ordinary course of such Debtor's business. Attach documentation supporting such claim.	
	\$ _____	

Part 3: Sign Below

The person completing this proof of claim must sign and date it. FRBP 9011(b).

If you file this claim electronically, FRBP 5005(a)(2) authorizes courts to establish local rules specifying what a signature is.

A person who files a fraudulent claim could be fined up to \$500,000, imprisoned for up to 5 years, or both. 18 U.S.C. §§ 152, 157, and 3571.

Check the appropriate box:

- ☐ I am the creditor.
- ☒ I am the creditor's attorney or authorized agent.
- ☐ I am the trustee, or the debtor, or their authorized agent. Bankruptcy Rule 3004.
- ☐ I am a guarantor, surety, endorser, or other codebtor. Bankruptcy Rule 3005.

I understand that an authorized signature on this *Proof of Claim* serves as an acknowledgement that when calculating the amount of the claim, the creditor gave the debtor credit for any payments received toward the debt.

I have examined the information in this *Proof of Claim* and have reasonable belief that the information is true and correct.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on date 04/08/2020
MM / DD / YYYY

/s/Michael Pugatch
Signature

Print the name of the person who is completing and signing this claim:

Name Michael Pugatch
First name Middle name Last name

Title Managing Director-Company: HarbourVest Skew Base AIF L.P., by HarbourVest

Company Fund Manager, by HarbourVest Partners L.P., its Duly Appointed Investme
Identify the corporate servicer as the company if the authorized agent is a servicer.

Address

Contact phone _____ Email _____

For phone assistance: Domestic (877) 573-3984 | International (310) 751-1829

Debtor: 19-34054 - Highland Capital Management, L.P. District: Northern District of Texas, Dallas Division		
Creditor: HarbourVest Skew Base AIF L.P. Attn: Erica Weisgerber Debevoise and Plimpton LLP 919 Third Avenue New York, NY, 10022 U.S.A. Phone: 2129096000 Phone 2: Fax: Email: eweisgerber@debevoise.com	Has Supporting Documentation: Yes, supporting documentation successfully uploaded Related Document Statement:	
	Has Related Claim: No Related Claim Filed By:	
	Filing Party: Authorized agent	
Disbursement/Notice Parties: HarbourVest Skew Base AIF L.P. c/o HarbourVest Partners, LLC One Financial Center Boston, MA, 02111 Phone: 6173483773 Phone 2: Fax: E-mail: agoren@harbourvest.com DISBURSEMENT ADDRESS		
Other Names Used with Debtor:	Amends Claim: No Acquired Claim: No	
Basis of Claim: See Annex	Last 4 Digits: No	Uniform Claim Identifier:
Total Amount of Claim: See Annex	Includes Interest or Charges: None	
Has Priority Claim: No	Priority Under:	
Has Secured Claim: No Amount of 503(b)(9): No Based on Lease: No Subject to Right of Setoff: No	Nature of Secured Amount: Value of Property: Annual Interest Rate: Arrearage Amount: Basis for Perfection: Amount Unsecured:	
Submitted By: Michael Pugatch on 08-Apr-2020 5:11:50 p.m. Eastern Time Title: Managing Director-Company: HarbourVest Skew Base AIF L.P., by HarbourVest Partners Ireland Limited, its Alternative Inv Company: Fund Manager, by HarbourVest Partners L.P., its Duly Appointed Investment Manager, by HarbourVest Partners, LLC, its Gen Ptr		

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

In re:

Highland Capital Management, L.P.

Debtor.

Chapter 11

Case No. 19-34054 (SGJ)

ANNEX TO PROOF OF CLAIM

1. This annex (the “Annex”) is part of and is incorporated by reference into the attached proof of claim (together with the Annex, the “Proof of Claim”) and describes in more detail the claims of HarbourVest Skew Base AIF L.P. (the “Claimant”) against the debtor Highland Capital Management, L.P. (the “Debtor”).

2. The Claimant is a limited partner in one of the Debtor’s managed vehicles, Highland CLO Funding, Ltd. (“HCLOF”). Acis Capital Management GP, L.L.C. and Acis Capital Management L.P. (together, “Acis”), the portfolio manager for HCLOF, filed for chapter 11 in the United States Bankruptcy Court for the Northern District of Texas (the “Court”) on January 30, 2018. The Acis bankruptcy filing resulted from a dispute between Debtor and its former employee, Joshua Terry, who served as portfolio manager for Debtor’s collateral loan obligations funds (“CLO”) business. *See, e.g., Findings of Fact and Conclusions of Law in Support of Orders for Relief Issued After Trial on Contested Involuntary Bankruptcy Petition* (“Involuntary Petition Ruling”) [Case No. 18-30264 (SGJ), Dkt. No. 118]. As noted in more detail in the Court’s *Bench Ruling and Memorandum of Law in Support of: (A) Final Approval of Disclosure Statement; and (B) Confirmation of Chapter 11 Trustee’s Third Amended Joint Plan* (“Confirmation Ruling”) [Case No. 18-30264 (SGJ), Dkt. No 827] and related filings

in the Acis bankruptcy cases, there has been extensive litigation regarding alleged improper conduct associated with the management of, and transactions relating to, Acis, including transactions with and related to HCLOF. *See, e.g., id.; Second Amended Complaint* [Case No. 18-03078(SGJ), Dkt. No. 157].

3. Due to the Acis bankruptcy and certain conduct alleged to have been undertaken by the Debtor (to whom Acis subcontracted its functions) and Debtor's employees (who were officers, employees, and agents of Acis), the Claimant has suffered significant harm. Such harm includes, but is not limited to, financial harm resulting from, among other things (i) court orders in the Acis bankruptcy that prevented certain CLOs in which HCLOF was invested from being refinanced or reset and court orders that otherwise regulated the activity of HCLOF; and (ii) significant fees and expenses related to the Acis bankruptcy that were charged to HCLOF. *See, e.g., Involuntary Petition Ruling* ¶ 27; *see also Confirmation Ruling*.

4. Claimant hereby files this Claim to assert any and all of its rights to payment, remedies, and other claims (including contingent or unliquidated claims) against the Debtor in connection with and relating to the foregoing harm, including for any amounts due or owed under the various agreements with the Debtor in connection with HCLOF (including, but not limited to, the Subscription and Transfer Agreement for Ordinary Shares Highland CLO Funding, Ltd., dated as of November 15, 2017, the Members Agreement Relating to the Company, dated as of November 15, 2017, the Highland CLO Funding, Ltd. Offering Memorandum dated November 15, 2017), and any and all legal and equitable claims or causes of action relating to the foregoing harm.

5. The Claimant has not attached the documentation supporting this Claim to this Proof of Claim because the documentation is voluminous and the Debtor has copies of such

documents. However, any requested relevant documents will be provided to the Official Committee of Unsecured Creditors, the Court, the United States Trustee and the Debtor in the event of a dispute regarding this Proof of Claim and will be made available for review by other parties in interest as appropriate upon reasonable request and after consultation with the Debtor and execution of appropriate confidentiality agreements.

6. This Proof of Claim is filed with a full reservation of rights, including the right to amend, update, modify, supplement or otherwise revise this Proof of Claim in any respect at any time. The filing of this Proof of Claim is not and should not be construed to be: (a) a waiver or release of any of the Claimant's rights against any person, entity or property accruing to it against the Debtor and its estate; (b) a waiver of the Claimant's rights to assert that 28 U.S.C. § 157(b)(2)(C) is unconstitutional; (c) a consent or submission by the Claimant, or waiver of the Claimant's rights to object, to the jurisdiction of this Court with respect to the subject matter of any of the claims described herein, or any objection or other proceeding commenced with respect to any of the claims described herein, or any other proceeding commenced in the Debtor's chapter 11 case against or otherwise involving the Claimant; (d) a waiver or release of any right of the Claimant, or consent by the Claimant, to a trial by jury in this or any other court or proceeding; (e) a waiver or release of, or any limitation on, any right of the Claimant to have orders entered only after *de novo* review by a United States District Judge; (f) an election of remedies; or (g) a waiver of, or any other limitation on, any right of the Claimant to request withdrawal of the reference with respect to any matter, including, without limitation, any matter relating to this Proof of Claim.

7. Claimant's express reservation of all rights and causes of action, includes, without limitation, contingent or unliquidated rights that it or its affiliates may have against the Debtor,

as well as defenses, offsets and counterclaims. This description and classification of claims by the Claimant is not a concession or admission as to the correct characterization or treatment of any such claims or a waiver of any rights of the Claimant.

8. Furthermore, the Claimant expressly reserves its rights to (a) file additional proofs of claim for additional claims that may be based on the same or additional documents or facts or other liability or indebtedness of the Debtor to the Claimant under contract or otherwise; (b) assert claims for cure of defaults in any agreement that the Debtor or any trustee appointed in this chapter 11 case may seek to assume; (c) assert any and all other claims, causes of action, defenses, offsets or counterclaims against the Debtor or any other parties; (d) file a request for payment of an administrative expense under 11 U.S.C. §§ 503 and 507 for any or all of the claims or rights of payment described above and any additional amounts; and (e) seek recovery through any relevant third parties, including any of the Debtor's insurance coverage providers.

9. This Proof of Claim does not encompass all claims that the Claimant or its affiliates may have that arise after the Petition Date and are entitled to administrative priority, and the Claimant expressly reserves its right to file such claim or any similar claim at the appropriate time, including any such post-petition claims arising under these service contracts.

10. This Proof of Claim is filed without prejudice to the filing by the Claimant of additional proofs of claim or requests for payment with respect to any other indebtedness, liability or obligation of the Debtor. The Claimant does not, by this Proof of Claim or any amendment or other action, waive any rights with respect to any scheduled claim.

11. The Claimant reserves the right to withdraw, amend, clarify, modify or supplement this Proof of Claim to assert additional claims, causes of action or additional grounds for this Proof of Claim (including adding any additional contracts, agreements, obligations or

other relationships between the Claimant and the Debtor), as well as the right to file any separate or additional proofs of claim with respect to the claims set forth herein or otherwise, including for the purpose of fixing and liquidating any contingent or unliquidated claim set forth herein, or to file additional proofs of claim in respect of additional amounts or for any other reason.

12. In executing and filing this Proof of Claim, the Claimant does not submit to the jurisdiction of the Bankruptcy Court for the Northern District of Texas for any purpose other than with respect to this Proof of Claim against the Debtor, and does not waive or release any rights or remedies against any other person or entity that may be liable for all or part of this Proof of Claim.

13. The Claimant otherwise reserves its rights, and nothing herein shall prejudice the Claimant's rights, under any order of the Court previously entered in this chapter 11 case.

14. Payments on account of this Proof of Claim should be sent to the Claimant at the address specified for notices to the Claimant in Part 1.3 of the Proof of Claim.

CLAIM 149

006466

Fill in this information to identify the case:

Debtor Highland Capital Management, L.P.

United States Bankruptcy Court for the: Northern District of Texas
(State)

Case number 19-34054

Official Form 410
Proof of Claim

04/19

Read the instructions before filling out this form. This form is for making a claim for payment in a bankruptcy case. Do not use this form to make a request for payment of an administrative expense. Make such a request according to 11 U.S.C. § 503.

Filers must leave out or redact information that is entitled to privacy on this form or on any attached documents. Attach redacted copies or any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, judgments, mortgages, and security agreements. Do not send original documents; they may be destroyed after scanning. If the documents are not available, explain in an attachment.

A person who files a fraudulent claim could be fined up to \$500,000, imprisoned for up to 5 years, or both. 18 U.S.C. §§ 152, 157, and 3571.

Fill in all the information about the claim as of the date the case was filed. That date is on the notice of bankruptcy (Form 309) that you received.

Part 1: Identify the Claim

1. Who is the current creditor?	<u>HarbourVest Partners L.P. on behalf of funds and accounts under management</u> Name of the current creditor (the person or entity to be paid for this claim)	
	Other names the creditor used with the debtor _____	
2. Has this claim been acquired from someone else?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. From whom? _____	
3. Where should notices and payments to the creditor be sent?	Where should notices to the creditor be sent? See summary page	Where should payments to the creditor be sent? (if different) See summary page
Federal Rule of Bankruptcy Procedure (FRBP) 2002(g)	Contact phone <u>2129096000</u> Contact email <u>eweisgerber@debevoise.com</u>	Contact phone <u>6173483773</u> Contact email <u>agoren@harbourvest.com</u>
	Uniform claim identifier for electronic payments in chapter 13 (if you use one): _____	
4. Does this claim amend one already filed?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Claim number on court claims registry (if known) _____ Filed on _____ MM / DD / YYYY	
5. Do you know if anyone else has filed a proof of claim for this claim?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Who made the earlier filing? _____	



Part 2: Give Information About the Claim as of the Date the Case Was Filed

6. Do you have any number you use to identify the debtor?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Last 4 digits of the debtor's account or any number you use to identify the debtor: ____
7. How much is the claim? \$ <u>See Annex</u>	Does this amount include interest or other charges? <input type="checkbox"/> No <input type="checkbox"/> Yes. Attach statement itemizing interest, fees, expenses, or other charges required by Bankruptcy Rule 3001(c)(2)(A).
8. What is the basis of the claim?	Examples: Goods sold, money loaned, lease, services performed, personal injury or wrongful death, or credit card. Attach redacted copies of any documents supporting the claim required by Bankruptcy Rule 3001(c). Limit disclosing information that is entitled to privacy, such as health care information. <u>See Annex</u>
9. Is all or part of the claim secured?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. The claim is secured by a lien on property. Nature or property: <input type="checkbox"/> Real estate: If the claim is secured by the debtor's principle residence, file a <i>Mortgage Proof of Claim Attachment</i> (Official Form 410-A) with this <i>Proof of Claim</i> . <input type="checkbox"/> Motor vehicle <input type="checkbox"/> Other. Describe: _____ Basis for perfection: _____ Attach redacted copies of documents, if any, that show evidence of perfection of a security interest (for example, a mortgage, lien, certificate of title, financing statement, or other document that shows the lien has been filed or recorded.) Value of property: \$ _____ Amount of the claim that is secured: \$ _____ Amount of the claim that is unsecured: \$ _____ (The sum of the secured and unsecured amount should match the amount in line 7.) Amount necessary to cure any default as of the date of the petition: \$ _____ Annual Interest Rate (when case was filed) _____ % <input type="checkbox"/> Fixed <input type="checkbox"/> Variable
10. Is this claim based on a lease?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Amount necessary to cure any default as of the date of the petition. \$ _____
11. Is this claim subject to a right of setoff?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Identify the property: _____



12. Is all or part of the claim entitled to priority under 11 U.S.C. § 507(a)? A claim may be partly priority and partly nonpriority. For example, in some categories, the law limits the amount entitled to priority.	<div style="display: flex; justify-content: space-between;"><div><input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Check all that apply:</div><div style="text-align: right; background-color: #f0f0f0; padding: 2px 5px;">Amount entitled to priority</div></div> <div style="margin-top: 10px;"><div style="display: flex; justify-content: space-between;"><input type="checkbox"/> Domestic support obligations (including alimony and child support) under 11 U.S.C. § 507(a)(1)(A) or (a)(1)(B). <div style="width: 150px; border-bottom: 1px solid black; text-align: right;">\$</div></div><div style="display: flex; justify-content: space-between;"><input type="checkbox"/> Up to \$3,025* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use. 11 U.S.C. § 507(a)(7). <div style="width: 150px; border-bottom: 1px solid black; text-align: right;">\$</div></div><div style="display: flex; justify-content: space-between;"><input type="checkbox"/> Wages, salaries, or commissions (up to \$13,650*) earned within 180 days before the bankruptcy petition is filed or the debtor's business ends, whichever is earlier. 11 U.S.C. § 507(a)(4). <div style="width: 150px; border-bottom: 1px solid black; text-align: right;">\$</div></div><div style="display: flex; justify-content: space-between;"><input type="checkbox"/> Taxes or penalties owed to governmental units. 11 U.S.C. § 507(a)(8). <div style="width: 150px; border-bottom: 1px solid black; text-align: right;">\$</div></div><div style="display: flex; justify-content: space-between;"><input type="checkbox"/> Contributions to an employee benefit plan. 11 U.S.C. § 507(a)(5). <div style="width: 150px; border-bottom: 1px solid black; text-align: right;">\$</div></div><div style="display: flex; justify-content: space-between;"><input type="checkbox"/> Other. Specify subsection of 11 U.S.C. § 507(a)() that applies. <div style="width: 150px; border-bottom: 1px solid black; text-align: right;">\$</div></div></div> <div style="margin-top: 10px; font-size: small;">* Amounts are subject to adjustment on 4/01/22 and every 3 years after that for cases begun on or after the date of adjustment.</div>
13. Is all or part of the claim pursuant to 11 U.S.C. § 503(b)(9)?	<div><input checked="" type="checkbox"/> No</div> <div><input type="checkbox"/> Yes. Indicate the amount of your claim arising from the value of any goods received by the debtor within 20 days before the date of commencement of the above case, in which the goods have been sold to the Debtor in the ordinary course of such Debtor's business. Attach documentation supporting such claim. \$ _____</div>

Part 3: Sign Below

The person completing this proof of claim must sign and date it. FRBP 9011(b).

If you file this claim electronically, FRBP 5005(a)(2) authorizes courts to establish local rules specifying what a signature is.

A person who files a fraudulent claim could be fined up to \$500,000, imprisoned for up to 5 years, or both. 18 U.S.C. §§ 152, 157, and 3571.

Check the appropriate box:

- ☐ I am the creditor.
- ☒ I am the creditor's attorney or authorized agent.
- ☐ I am the trustee, or the debtor, or their authorized agent. Bankruptcy Rule 3004.
- ☐ I am a guarantor, surety, endorser, or other codebtor. Bankruptcy Rule 3005.

I understand that an authorized signature on this *Proof of Claim* serves as an acknowledgement that when calculating the amount of the claim, the creditor gave the debtor credit for any payments received toward the debt.

I have examined the information in this *Proof of Claim* and have reasonable belief that the information is true and correct.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on date 04/08/2020
MM / DD / YYYY

/s/Michael Pugatch
Signature

Print the name of the person who is completing and signing this claim:

Name Michael Pugatch
First name Middle name Last name

Title Managing Director

Company HarbourVest Partners L.P., on behalf of funds and accounts under manage
Identify the corporate servicer as the company if the authorized agent is a servicer.

Address

Contact phone _____ Email _____

For phone assistance: Domestic (877) 573-3984 | International (310) 751-1829

Debtor: 19-34054 - Highland Capital Management, L.P. District: Northern District of Texas, Dallas Division		
Creditor: HarbourVest Partners L.P. on behalf of funds and accounts under management Attn: Erica Weisgerber Debevoise and Plimpton LLP 919 Third Avenue New York, NY, 10022 U.S.A. Phone: 2129096000 Phone 2: Fax: Email: eweisgerber@debevoise.com	Has Supporting Documentation: Yes, supporting documentation successfully uploaded Related Document Statement:	
	Has Related Claim: No Related Claim Filed By:	
	Filing Party: Authorized agent	
Disbursement/Notice Parties: HarbourVest Partners L.P. c/o HarbourVest Partners, LLC One Financial Center Boston, MA, 02111 U.S.A. Phone: 6173483773 Phone 2: Fax: E-mail: agoren@harbourvest.com DISBURSEMENT ADDRESS		
Other Names Used with Debtor:	Amends Claim: No Acquired Claim: No	
Basis of Claim: See Annex	Last 4 Digits: No	Uniform Claim Identifier:
Total Amount of Claim: See Annex	Includes Interest or Charges: None	
Has Priority Claim: No	Priority Under:	
Has Secured Claim: No Amount of 503(b)(9): No Based on Lease: No Subject to Right of Setoff: No	Nature of Secured Amount: Value of Property: Annual Interest Rate: Arrearage Amount: Basis for Perfection: Amount Unsecured:	
Submitted By: Michael Pugatch on 08-Apr-2020 5:06:59 p.m. Eastern Time Title: Managing Director Company: HarbourVest Partners L.P., on behalf of funds and accounts under management, by HarbourVest Partners, LLC, its Gen Partner		

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

In re:

Highland Capital Management, L.P.

Debtor.

Chapter 11

Case No. 19-34054 (SGJ)

ANNEX TO PROOF OF CLAIM

1. This annex (the “Annex”) is part of and is incorporated by reference into the attached proof of claim (together with the Annex, the “Proof of Claim”) and describes in more detail the claims of HarbourVest Partners L.P. on behalf of funds and accounts under management (the “Claimant”) against the debtor Highland Capital Management, L.P. (the “Debtor”).

2. The Claimant manages investment funds that are limited partners in one of the Debtor’s managed vehicles, Highland CLO Funding, Ltd. (“HCLOF”). Acis Capital Management GP, L.L.C. and Acis Capital Management L.P. (together, “Acis”), the portfolio manager for HCLOF, filed for chapter 11 in the United States Bankruptcy Court for the Northern District of Texas (the “Court”) on January 30, 2018. The Acis bankruptcy filing resulted from a dispute between Debtor and its former employee, Joshua Terry, who served as portfolio manager for Debtor’s collateral loan obligations funds (“CLO”) business. *See, e.g., Findings of Fact and Conclusions of Law in Support of Orders for Relief Issued After Trial on Contested Involuntary Bankruptcy Petition* (“Involuntary Petition Ruling”) [Case No. 18-30264 (SGJ), Dkt. No. 118]. As noted in more detail in the Court’s *Bench Ruling and Memorandum of Law in Support of: (A) Final Approval of Disclosure Statement; and (B) Confirmation of Chapter 11 Trustee’s Third*

Amended Joint Plan (“Confirmation Ruling”) [Case No. 18-30264 (SGJ), Dkt. No 827] and related filings in the Acis bankruptcy cases, there has been extensive litigation regarding alleged improper conduct associated with the management of, and transactions relating to, Acis, including transactions with and related to HCLOF. *See, e.g., id.; Second Amended Complaint* [Case No. 18-03078(SGJ), Dkt. No. 157].

3. Due to the Acis bankruptcy and certain conduct alleged to have been undertaken by the Debtor (to whom Acis subcontracted its functions) and Debtor’s employees (who were officers, employees, and agents of Acis), the Claimant has suffered significant harm. Such harm includes, but is not limited to, financial harm resulting from, among other things (i) court orders in the Acis bankruptcy that prevented certain CLOs in which HCLOF was invested from being refinanced or reset and court orders that otherwise regulated the activity of HCLOF; and (ii) significant fees and expenses related to the Acis bankruptcy that were charged to HCLOF. *See, e.g., Involuntary Petition Ruling* ¶ 27; *see also Confirmation Ruling*.

4. Claimant hereby files this Claim to assert any and all of its rights to payment, remedies, and other claims (including contingent or unliquidated claims) against the Debtor in connection with and relating to the foregoing harm, including for any amounts due or owed under the various agreements with the Debtor in connection with HCLOF (including, but not limited to, the Subscription and Transfer Agreement for Ordinary Shares Highland CLO Funding, Ltd., dated as of November 15, 2017, the Members Agreement Relating to the Company, dated as of November 15, 2017, the Highland CLO Funding, Ltd. Offering Memorandum dated November 15, 2017), and any and all legal and equitable claims or causes of action relating to the foregoing harm.

5. The Claimant has not attached the documentation supporting this Claim to this Proof of Claim because the documentation is voluminous and the Debtor has copies of such documents. However, any requested relevant documents will be provided to the Official Committee of Unsecured Creditors, the Court, the United States Trustee and the Debtor in the event of a dispute regarding this Proof of Claim and will be made available for review by other parties in interest as appropriate upon reasonable request and after consultation with the Debtor and execution of appropriate confidentiality agreements.

6. This Proof of Claim is filed with a full reservation of rights, including the right to amend, update, modify, supplement or otherwise revise this Proof of Claim in any respect at any time. The filing of this Proof of Claim is not and should not be construed to be: (a) a waiver or release of any of the Claimant's rights against any person, entity or property accruing to it against the Debtor and its estate; (b) a waiver of the Claimant's rights to assert that 28 U.S.C. § 157(b)(2)(C) is unconstitutional; (c) a consent or submission by the Claimant, or waiver of the Claimant's rights to object, to the jurisdiction of this Court with respect to the subject matter of any of the claims described herein, or any objection or other proceeding commenced with respect to any of the claims described herein, or any other proceeding commenced in the Debtor's chapter 11 case against or otherwise involving the Claimant; (d) a waiver or release of any right of the Claimant, or consent by the Claimant, to a trial by jury in this or any other court or proceeding; (e) a waiver or release of, or any limitation on, any right of the Claimant to have orders entered only after *de novo* review by a United States District Judge; (f) an election of remedies; or (g) a waiver of, or any other limitation on, any right of the Claimant to request withdrawal of the reference with respect to any matter, including, without limitation, any matter relating to this Proof of Claim.

**UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF
TEXAS, DALLAS DIVISION**

In Re: Highland Capital Management, L.P § Case No. **19-34054-SGJ11**

Charitable DAF Fund, L.P et al

Appellant

§

vs.

§

21-03067

Highland Capital Management, L.P

§

Appellee

§

3:23-CV-01503-B

[167] Order granting Defendant Highland Capital Management, L.P.'s Renewed motion to dismiss adversary proceeding (related document # [122](#)) Entered on 6/25/2023.

Volume 30

APPELLANT RECORD

SBAITI & COMPANY PLLC
Mazin A. Sbaiti (TX Bar No. 24058096)
Jonathan Bridges (TX Bar No. 24028835)
J.P. Morgan Chase Tower
2200 Ross Avenue, Suite 4900W
Dallas, TX 75201
T: (214) 432-2899
F: (214) 853-4367

*Counsel for The Charitable DAF Fund, L.P.
and CLO Holdco, Ltd.*

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

In re:	§ Chapter 11
	§
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§ Case No. 19-34054-sgj11
	§
Debtor.	§
	§
CHARITABLE DAF FUND, L.P. AND CLO	§
HOLDCO, LTD., DIRECTLY AND DERIVATIVELY	§
	§
Plaintiffs,	§ Adversary Proceeding No.
	§
vs.	§ 21-03067-sgj11
	§
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§
HIGHLAND HCF ADVISOR, LTD., AND	§
HIGHLAND CLO FUNDING LTD., NOMINALLY	§
	§
Defendant.	§
	§

INDEX

**APPELLANTS' SECOND AMENDED STATEMENT OF ISSUES
AND DESIGNATION OF RECORD ON APPEAL**

Pursuant to Rules 8009(a)(1)(A)-(B) and (a)(4) of the Federal Rules of Bankruptcy Procedure, The Charitable DAF Fund, L.P. and CLO Holdco, Ltd. ("Appellants") hereby designate the following items to be included in the record and identify the following issues with respect to

their appeal of the Order Granting Defendant Highland Capital Management, L.P.'s "Renewed Motion to Dismiss Complaint" [Adv. Proc. Doc. No. 122] which was entered by the United States Bankruptcy Court for the Northern District of Texas on June 25, 2023.

I. STATEMENT OF ISSUES TO BE PRESENTED ON APPEAL

- Whether the Bankruptcy Court had jurisdiction to rule on Highland Capital Management L.P.'s Renewed Motion to Dismiss Complaint
- Whether the Renewed Motion to Dismiss Complaint was improperly granted

II. DESIGNATION OF ITEMS TO BE INCLUDED IN THE RECORD

Vol. 1
000001

1. Notice of Appeal for Bankruptcy Case Adversary Proceeding No. 21-03067-sgj11 [Doc. 168].

000042

2. The judgment, order, or decree appealed from: Memorandum Opinion and Order Granting Defendant Highland Capital Management, L.P.'s "Renewed Motion to Dismiss Complaint" [Adv. Proc. Doc. No. 122] [Doc. 167].

000080

3. Docket Sheet kept by the Bankruptcy Clerk.

4. Documents listed below and as described in the Docket Sheet for Bankruptcy Case Proceeding No. 21-03067-sgj.

Vol. 2

000102

000138

No.	Date Filed	Docket No.	Description/Document Text
1	9/29/21	1	(36 pgs; 3 docs) Adversary case 21-03067. ORDER REFERRING CASE NUMBER 21-CV-0842-B from U.S District Court for the Northern District of Texas, Dallas Division to U.S. Bankruptcy Court for Northern District of Texas, Dallas Division. Complaint by Charitable DAF Fund, LP, CLO Holdco, Ltd. against Highland Capital Management, LP, Highland HCF Advisor Ltd., Highland CLO Funding, Ltd. Fee Amount \$350 (Attachments: # 1 Original Complaint # 2 Docket Sheet from 3:20-cv-0842-B) Nature(s) of suit: 02 (Other (e.g. other actions that would have been brought in state court if unrelated to bankruptcy)). (Okafor, M.)
2	9/29/21	2	(1 pg) Supplemental Document (cover sheet) by CLO Holdco Ltd., Charitable DAF Fund (RE: related document(s)1 Adversary case 21-03067) [ORIGINALLY FILED IN 21-CV-0842 AS #2 ON 04/13/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)

Vol. 2 000139 000232 000239 000270 Thru Vol. 6	3	9/29/21	6	(93 pgs; 6 docs) MOTION for Leave to File First Amended Complaint filed by CLO Holdco Ltd., Charitable DAF Fund LP (Attachments: # 1 Exh 1_First Amended Complaint # 2 Exh 2_Motion for Authorization to Retain James Seery # 3 Exh 3_Order Approving Retention of James Seery # 4 Exh 4_Order Approving Settlement # 5 Proposed Order) (Bridges, Jonathan) (Entered: 04/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #6 ON 04/19/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
	4	9/29/21	22	(7 pgs; 2 docs) MOTION for an Order to Enforce the Order of Reference filed by Highland Capital Management LP. (Attachments: # 1 Exhibit(s) A--Proposed Order) (Annable, Zachery) Modified text on 5/20/2021 (mjr). (Entered: 05/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #22 ON 05/19/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
	5	9/29/21	23	(31 pgs) Brief/Memorandum in Support filed by Highland Capital Management LP re: 22 MOTION for an Order to Enforce the Order of Reference. (Annable, Zachery) Modified text on 5/20/2021 (mjr).(Entered: 05/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #23 ON 05/19/2021 IN U.S.DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
	6	9/29/21	24	(926 pgs; 29 docs) Appendix in Support filed by Highland Capital Management LP re: 23 Brief/Memorandum in Support. (Attachments: # 1 Appendix 1 # 2 Appendix 2 # 3 Appendix 3 # 4 Appendix 4 # 5 Appendix 5 # 6 Appendix 6 # 7 Appendix 7 # 8 Appendix 8 # 9 Appendix 9 # 10 Appendix10 # 11 Appendix 11 # 12 Appendix 12 # 13 Appendix 13 # 14 Appendix 14 # 15 Appendix 15 # 16 Appendix 16 # 17 Appendix 17 # 18 Appendix 18 # 19 Appendix 19 # 20 Appendix 20 # 21 Appendix 21# 22 Appendix 22 # 23 Appendix 23 # 24 Appendix 24 # 25 Appendix 25 # 26 Appendix 26 # 27 Appendix 27 # 28 Appendix 28) (Annable, Zachery) Modified linkage and text on 5/20/2021 (mjr). (Entered:05/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #24 ON 05/19/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
Vol. 7 001196	7	9/29/21	26	(7 pgs; 2 docs) MOTION to Dismiss Complaint filed by Highland Capital Management LP (Attachments: # 1 Exhibit(s) A--Proposed Order) (Annable, Zachery) Modified text on 5/28/2021 (jmg).(Entered: 05/27/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #26 ON 05/27/2021 IN U.S.DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)

Vol. 7 001203 thru Vol. 8	8	9/29/21	28	(508 pgs; 14 docs) Appendix in Support filed by Highland Capital Management LP (Attachments: # 1 Appendix 1 # 2 Appendix 2 # 3 Appendix 3 # 4 Appendix 4 # 5 Appendix 5 # 6 Appendix 6 # 7 Appendix 7 # 8 Appendix 8 # 9 Appendix 9 # 10 Appendix 10 # 11 Appendix 11 # 12 Appendix 12 # 13 Appendix 13) (Annable, Zachery) (Entered: 05/27/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #28 ON 05/27/2021 IN U.S. DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
Vol. 9 001711	9	9/29/21	33	(1 pg) Amended Civil Cover Sheet by CLO Holdco Ltd, Charitable DAF Fund LP. Amendment to 2 Supplemental Document. (Sbaiti, Mazin) Modified text on 6/23/2021 (mjr). (Entered: 06/22/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #33 ON 06/22/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001712	10	9/29/21	36	(26 pgs) RESPONSE filed by CLO Holdco Ltd, Charitable DAF Fund LP re: 22 MOTION for an Order to Enforce the Order of Reference (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #36 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001738	11	9/29/21	37	(22 pgs) Appendix in Support filed by CLO Holdco Ltd, Charitable DAF Fund LP re 36 Response/Objection Response to Motion for an Order to Enforce the Order of Reference (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #37 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001760	12	9/29/21	38	(45 pgs) RESPONSE filed by CLO Holdco Ltd, Charitable DAF Fund LP re: 26 MOTION to Dismiss (Defendant Highland Capital Management, L.P.'s Motion to Dismiss Complaint) (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #38 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001805	13	9/29/21	39	(88 pgs) Appendix in Support filed by CLO Holdco Ltd, Charitable DAF Fund LP re 38 Response/Objection to Defendant Highland Capital Management, L.P.'s Motion to Dismiss Complaint (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #39 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001893	14	9/29/21	42	(12 pgs) REPLY filed by Highland Capital Management LP re: 22 MOTION for an Order to Enforce the Order of Reference (Annable, Zachery) (Entered: 07/13/2021) [ORIGINALLY FILED IN 21-CV-0842AS #42 ON 07/13/2021 IN U.S.

			DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
VOL. 9	15	9/29/21	43 (852 pgs) Appendix in Support filed by Highland Capital Management LP re: 42 Reply. (Annable, Zachery) Modified text on 7/14/2021 (mjr). (Entered: 07/13/2021) [ORIGINALLY FILED IN 21-CV-0842AS #43 ON 07/13/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001905 thru Vol. 13	16	9/29/21	45 (21 pgs) REPLY filed by Highland Capital Management LP re: 26 MOTION to Dismiss (Defendant Highland Capital Management, L.P.'s Motion to Dismiss Complaint) (Annable, Zachery) (Entered: 07/13/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #44 ON 07/13/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002757	17	9/29/21	57 (7 pgs; 2 docs) MOTION to Dismiss and Joinder in Motion to Dismiss of Highland Capital Management, L.P. filed by Highland CLO Funding Ltd. (Attachments: # 1 Proposed Order) Attorney Paul R Bessette added to party Highland CLO Funding Ltd (pty:dft) (Bessette, Paul) (Entered: 08/30/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #57 ON 08/30/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002778	18	9/29/23	58 (12 pgs) Brief/Memorandum in Support filed by Highland CLO Funding Ltd. re 57 MOTION to Dismiss and Joinder in Motion to Dismiss of Highland Capital Management, L.P. (Bessette, Paul) (Entered: 08/30/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #58 ON 08/30/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002785	19	9/29/23	59 (80 pgs; 5 docs) Appendix in Support filed by Highland CLO Funding Ltd re 58 Brief/Memorandum in Support of Motion (Attachments: # 1 Exhibit(s) A - Jackson v Dear # 2 Exhibit(s) B - Prudential Assurance v. Newman # 3 Exhibit(s) C - Harbourvest Settlement Agreement # 4 Exhibit(s) D - Boleat Declaration) (Bessette, Paul) (Entered: 08/30/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #59 ON 08/30/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002797	20	9/29/21	64 (1 pg) ORDER OF REFERENCE: Pursuant to 28 U.S.C. § 157 and this District's Miscellaneous Order No. 33, this case is hereby REFERRED to Judge Stacey G. C. Jernigan of the United States Bankruptcy Court for the Northern District of Texas, Dallas Division, to be adjudicated as a matter related to the consolidated Chapter 11 Bankruptcy of Highland Capital Management, L.P., Chapter 11 Case No.19-34054. (Ordered by Judge Jane J. Boyle
002877			

Vol. 14 002878 002883 thru Vol. 16				on 9/20/2021) (svc) (Entered: 09/20/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #64 ON 09/20/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
	21	10/19/21	66	(5 pgs) Notice of hearing filed by Defendant Highland Capital Management, LP (RE: related document(s) 26 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP, 47 Motion to strike document filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 55 Motion to abate filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) Hearing to be held on 11/23/2021 at 09:30 AM at https://us-courts.webex.com/meet/jerniga for 26 and for 47 and for 55, (Annable, Zachery)
	22	11/22/21	71	(509 pgs; 2 docs) Witness and Exhibit List <i>for Hearing on November 23, 2021</i> filed by Defendant Highland Capital Management, LP (RE: related document(s) 26 Motion to dismiss adversary proceeding). (Attachments: # 1 Exhibits 1-13) (Hayward, Melissa)
Vol. 17 003392 003394 003583 003585 003611	23	11/22/21	72	(2 pgs) Witness List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 26 Motion to dismiss adversary proceeding, 47 Motion to strike (related document(s): 43 Document), 55 Motion to abate (related document(s) 1 Complaint), 69 Motion to abate <i>Plaintiffs' Amended Motion to Stay All Proceedings</i> (related document(s) 55 Motion to abate (related document(s) 1 Complaint))). (Sbaiti, Mazin)
	24	11/22/21	73	(189 pgs; 4 docs) Exhibit List <i>for November 23, 2021 hearing</i> filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 47 Motion to strike (related document(s): 43 Document), 55 Motion to abate (related document(s) 1 Complaint)). (Attachments: # 1 Exhibit 1_Defendant's Memorandum of Law in Support of Motion for Reconsideration # 2 Exhibit 2_Highland Memorandum in Support of Motion to Dismiss # 3 Exhibit 3_Order (I) Confirming Fifth Amended Plan of Reorganization of Highland) (Sbaiti, Mazin)
	25	12/7/21	80	(2 pgs) Order granting Highland CLO Funding, Ltd.'s motion to dismiss adversary as a party with prejudice (related document 57) Entered on 12/7/2021. (Okafor, Marcey) Modified text on 3/11/2022 (Okafor, Marcey).
	26	3/11/22	99	(26 pgs) Memorandum of Opinion and order granting motion to dismiss the adversary proceeding (RE: related document(s) 26 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP). Entered on 3/11/2022 (Okafor, Marcey)
	27	3/11/22	100	(26 pgs) Order granting motion to dismiss adversary proceeding with prejudice (related document #26) Entered on 3/11/2022. (Okafor, Marcey)

Vol. 18 003637	28	3/21/22	104	(29 pgs) Notice of appeal. Fee Amount \$298 filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 100 Order on motion to dismiss adversary proceeding). Appellant Designation due by 04/4/2022. (Sbaiti, Mazin)
003666	29	5/26/22	120	(177 pgs; 2 docs) Support/supplemental document <i>Motion to Supplement Appellate Record</i> filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 111 Appellant designation). (Attachments: # 1 Amended Transcript of January 14, 2021 Hearing) (Sbaiti, Mazin)
003843	30	6/9/22	121	(1 pg) DISTRICT COURT Order: Case 3:22-00695-B is hereby transferred to the docket of the Honorable Judge Jane J. Boyle for consolidation with The Charitable DAF Fund LP, et al. v. Highland Capital Management LP, Case No. 3:21-cv-3129-N. Judge Karen Gren Scholer no longer assigned to case.(RE: related document(s) 86 Notice of appeal filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 104 Notice of appeal filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Entered on 6/9/2022 (Whitaker, Sheniqua) (Entered: 06/10/2022)
003844	31	10/24/22	122	(7 pgs) Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP (Annable, Zachery)
003851	32	10/14/22	123	(31 pgs) Brief in support filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Annable, Zachery)
Vol. 19 003882 Thru Vol 20	33	10/14/22	124	(513 pgs; 15 docs) Support/supplemental document (<i>Appendix in Support of Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7 # 8 Exhibit 8 # 9 Exhibit 9 # 10 Exhibit 10 # 11 Exhibit 11 # 12 Exhibit 12 # 13 Exhibit 13 # 14 Exhibit 14) (Annable, Zachery)
Vol. 21 004395	34	10/27/22	126	(5 pgs) Notice of hearing (<i>Notice of Hearing and Briefing Schedule on Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP). Hearing to be held on 12/8/2022 at 09:30 AM at https://us-courts.webex.com/meet/jerniga for 122. (Annable, Zachery)

Vol. 21 004400 004410 004442 Thru Vol. 22	35	11/18/22	128	(10 pgs) Motion for withdrawal of reference. Fee amount \$188, filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (Sbaiti, Mazin)
	36	11/18/22	129	(32 pgs) Response opposed to (related document(s): 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP) filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Sbaiti, Mazin)
	37	11/18/22	130	(254 pgs; 2 docs) Response opposed to (related document(s): 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP) filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Attachments: # 1 Appendix) (Sbaiti, Mazin)
Vol. 22 004696 004717 004732 004737 004742	38	9/2/22	131	(21 pgs) DISTRICT COURT MEMORANDUM OPINION AND ORDER: The Court REVERSES and REMANDS the bankruptcy court's Motion to Dismiss Order and AFFIRMS the bankruptcy courts Motion to Stay Order. re: appeal on Civil Action number: Case 3:22-00695-B consolidated with 3:21-CV-3129-B, (RE: related document(s) 81 Order on motion to abate, 100 Order on motion to dismiss adversary proceeding). Entered on 9/2/2022 (Whitaker, Sheniqua) (Entered: 11/29/2022)
	39	12/2/22	133	(15 pgs) Reply to (related document(s): 129 Response filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 130 Response filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) filed by Defendant Highland Capital Management, LP. (Annable, Zachery)
	40	12/7/22	135	(5 pgs) Notice of hearing filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP). Hearing to be held on 1/25/2023 at 01:30 PM at https://us-courts.webex.com/meet/jerniga for 122, (Annable, Zachery)
	41	12/7/22	136	(5 pgs) Notice of hearing filed by Defendant Highland Capital Management, LP (RE: related document(s) 128 Motion for withdrawal of reference filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Status Conference to be held on 1/25/2023 at 01:30 PM at https://us-courts.webex.com/meet/jerniga . (Annable, Zachery).
	42	12/9/22	138	(3 pgs) Response opposed to (related document(s): 128 Motion for withdrawal of reference. Fee amount \$188, filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) filed by Defendant Highland Capital Management, LP. (Annable, Zachery)

Vol. 22 004745	43	12/9/22	139	(25 pgs) Brief in support filed by Defendant Highland Capital Management, LP (RE: related document(s) 138 Response). (Annable, Zachery)
Vol. 23 004770	44	12/9/22	140	(280 pgs; 8 docs) Support/supplemental document (<i>Appendix in Support of Highland Capital Management, L.P.'s Response to Renewed Motion to Withdraw the Reference</i>) filed by Defendant Highland Capital Management, LP (RE: related document(s) 138 Response). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7) (Annable, Zachery)
Vol. 24 005050	45	12/16/22	144	(6 pgs) Reply to (related document(s): 138 Response filed by Defendant Highland Capital Management, LP) filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Sbaiti, Mazin)
005056 Thru Vol. 25.	46	1/23/23	145	(514 pgs; 15 docs) Witness and Exhibit List filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7 # 8 Exhibit 8 # 9 Exhibit 9 # 10 Exhibit 10 # 11 Exhibit 11 # 12 Exhibit 12 # 13 Exhibit 13 # 14 Exhibit 14) (Annable, Zachery)
Vol. 26 005570	47	1/23/23	146	(280 pgs; 8 docs) Witness and Exhibit List filed by Defendant Highland Capital Management, LP (RE: related document(s) 128 Motion for withdrawal of reference. Fee amount \$188.). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7) (Annable, Zachery)
Vol. 27 005850	48	1/23/23	147	(221 pgs; 7 docs) Witness and Exhibit List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Attachments: # 1 Exhibit 1_Excerpts from July 14, 2020 Hearing Transcript # 2 Exhibit 2_HCLOF Members Agreement Relating to the Company # 3 Exhibit 3_HarbourVest Settlement Agreement # 4 Exhibit 4_Order Approving Debtor's Settlement with HarbourVest # 5 Exhibit 5_HCLOF Offering # 6 Exhibit 6 Amended and Restated Investment Advisory Agreement) (Sbaiti, Mazin)
006071	49	1/23/23	148	(3 pgs) Witness and Exhibit List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 128 Motion for withdrawal of reference. Fee amount \$188.). (Phillips, Louis)
Vol. 28 006074	50	1/25/23	150	(56 pgs; 2 docs) Amended Witness and Exhibit List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 147 List (witness/exhibit/generic), 149 List (witness/exhibit/generic)). (Attachments: # 1 Exh 7_Testimony of Mark Patrick at June 8, 2021 hearing) (Sbaiti, Mazin)

Vol. 28 006130	51	1/25/23	152	(3 pgs) Notice of Appearance and Request for Notice by Louis M. Phillips filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Phillips, Louis)
	52	1/25/23	154	(1 pg) Court admitted exhibits date of hearing January 25, 2023 (RE: related document(s) 128 Motion for withdrawal of reference, filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) (COURT ADMITTED DEFENDANT'S EXHIBITS #1, #2, #3, #4, #5 & #6 OFFERED BY ATTY GREG DEMO). (Edmond, Michael) (Entered: 01/27/2023)
Vol. 32 006925 006942 006960	53	2/6/23	158	Report and recommendation to the U.S. District Court by U.S. Bankruptcy Judge. (RE: related document(s) 128 Motion for withdrawal of reference filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Entered on 2/6/2023 (Okafor, Marcey)
	54	2/6/23	161	(18 pgs) DISTRICT COURT Notice of transmission of report and recommendation in re: renewed motion to withdraw reference. Civil Case # 3:22-cv-02802-S. (RE: related document(s) 158 Report and recommendation to the U.S. District Court by U.S. Bankruptcy Judge. (RE: related document(s) 128 Motion for withdrawal of reference filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Entered on 2/6/2023) (Whitaker, Sheniqua)
	55	4/3/23	165	(1 pg) DISTRICT COURT ORDER: The Court GRANTS the 11 Joint Motion to Transfer Proceeding and Consolidate Before Original Court and the above-numbered case (3:22-cv-02802-S) is transferred to the docket of the Honorable Judge Jane Boyle: Civil case 3:21-cv-00842-B (order referring case). (RE: related document(s) 1 Complaint filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 143 Notice of transmission of motion to withdraw reference). Entered on 4/3/2023 (Whitaker, Sheniqua) Modified on 4/10/2023 (Whitaker, Sheniqua). (Entered: 04/10/2023)

TRANSCRIPTS

006961	56	11/24/21	78	(104 pgs) Transcript regarding Hearing Held 11-23-2021 RE: Motion Hearing. THIS TRANSCRIPT WILL BE MADE ELECTRONICALLY AVAILABLE TO THE GENERAL PUBLIC 90 DAYS AFTER THE DATE OF FILING. TRANSCRIPT RELEASE DATE IS 02/22/2022. Until that time the transcript may be viewed at the Clerk's Office or a copy may be obtained from the official court transcriber. Court Reporter/Transcriber Liberty Transcripts/Dipti Patel, Telephone number 847-848-4907. (RE: related document(s) 75 Hearing held on 11/23/2021. (RE: related document(s) 55 MOTION to Stay filed by CLO Holdco Ltd, Charitable DAF Fund LP (Sbaiti, Mazin) (Entered: 08/26/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #55 ON 08/26/2021 IN U.S.
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			<p>DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)) (Appearances: J. Pomerantz and J. Morris for Highland Defendants; J. Jordan and P. Bessett for HCLOF; M. Sbaiti for Plaintiffs. Nonevidentiary hearing. Motion denied. Mr. Pomerantz to upload order.), 76 Hearing held on 11/23/2021. (RE: related document(s) 47 Motion to strike 43 Appendix in support filed by CLO Holdco, Ltd., Charitable DAF Fund, LP (Bridges, Jonathan) Modified text on 7/16/2021 (mjr). (Entered: 07/15/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #47 ON 07/15/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)) (Appearances: J. Pomerantz and J. Morris for Highland Defendants; J. Jordan and P. Bessett for HCLOF; M. Sbaiti for Plaintiffs. Nonevidentiary hearing. Motion denied (Plaintiffs acknowledged complained-of Appendices it did not relate to Motion to Dismiss). Mr. Pomerantz to upload order.)). Transcript to be made available to the public on 02/22/2022. (Patel, Dipti)</p>
57	2/21/23	164	<p>164 (112 pgs) Transcript regarding Hearing Held 1/25/23 RE: HEARING ON DEFENDANT HIGHLAND CAPITAL MANAGEMENT L.P.'S RENEWED MOTION TO DISMISS COMPLAINT (122) AND STATUS CONFERENCE RE: MOTION FOR WITHDRAWAL OF REFERENCE FILED BY PLAINTIFF CLO HOLDCO, LTD., PLAINTIFF CHARITABLE DAF FUND, LP (128). THIS TRANSCRIPT WILL BE MADE ELECTRONICALLY AVAILABLE TO THE GENERAL PUBLIC 90 DAYS AFTER THE DATE OF FILING. TRANSCRIPT RELEASE DATE IS 05/22/2023. Until that time the transcript may be viewed at the Clerk's Office or a copy may be obtained from the official court transcriber. Court Reporter/Transcriber Dipti Patel, Telephone number 847-848-4907. (RE: related document(s) 155 Hearing held on 1/25/2023. (RE: related document(s) 122 Motion to dismiss adversary proceeding, (Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint) filed by Defendant Highland Capital Management, LP filed by Defendant Highland Capital Management, LP) (Appearances: J. Morris and G. Demo for Movants; L. Phillips and M. Sbaiti for Plaintiffs. Evidentiary hearing (appendices). Court took matter under advisement.), 156 Hearing held on 1/25/2023. (RE: related document(s) 128 Motion for withdrawal of reference. Fee amount \$188, filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) (Appearances: J. Morris and G. Demo for Movants; L. Phillips and M. Sbaiti for Plaintiffs. Evidentiary hearing (appendices). Court announced it will recommend denial to District Court. Court is working on Report & Recommendation.)). Transcript to be made available to the public on 05/22/2023. (Patel, Dipti)</p>

Dated: July 14, 2023

Respectfully submitted,

SBAITI & COMPANY PLLC

/s/ Mazin A. Sbaiti

Mazin A. Sbaiti

Texas Bar No. 24058096

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Counsel for Appellants

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was filed electronically through the Court's ECF system, which provides notice to all parties of interest, on this 14th day of July, 2023.

/s/ Mazin A. Sbaiti

Mazin A. Sbaiti

7. Claimant's express reservation of all rights and causes of action, includes, without limitation, contingent or unliquidated rights that it or its affiliates may have against the Debtor, as well as defenses, offsets and counterclaims. This description and classification of claims by the Claimant is not a concession or admission as to the correct characterization or treatment of any such claims or a waiver of any rights of the Claimant.

8. Furthermore, the Claimant expressly reserves its rights to (a) file additional proofs of claim for additional claims that may be based on the same or additional documents or facts or other liability or indebtedness of the Debtor to the Claimant under contract or otherwise; (b) assert claims for cure of defaults in any agreement that the Debtor or any trustee appointed in this chapter 11 case may seek to assume; (c) assert any and all other claims, causes of action, defenses, offsets or counterclaims against the Debtor or any other parties; (d) file a request for payment of an administrative expense under 11 U.S.C. §§ 503 and 507 for any or all of the claims or rights of payment described above and any additional amounts; and (e) seek recovery through any relevant third parties, including any of the Debtor's insurance coverage providers.

9. This Proof of Claim does not encompass all claims that the Claimant or its affiliates may have that arise after the Petition Date and are entitled to administrative priority, and the Claimant expressly reserves its right to file such claim or any similar claim at the appropriate time, including any such post-petition claims arising under these service contracts.

10. This Proof of Claim is filed without prejudice to the filing by the Claimant of additional proofs of claim or requests for payment with respect to any other indebtedness, liability or obligation of the Debtor. The Claimant does not, by this Proof of Claim or any amendment or other action, waive any rights with respect to any scheduled claim.

11. The Claimant reserves the right to withdraw, amend, clarify, modify or supplement this Proof of Claim to assert additional claims, causes of action or additional grounds for this Proof of Claim (including adding any additional contracts, agreements, obligations or other relationships between the Claimant and the Debtor), as well as the right to file any separate or additional proofs of claim with respect to the claims set forth herein or otherwise, including for the purpose of fixing and liquidating any contingent or unliquidated claim set forth herein, or to file additional proofs of claim in respect of additional amounts or for any other reason.

12. In executing and filing this Proof of Claim, the Claimant does not submit to the jurisdiction of the Bankruptcy Court for the Northern District of Texas for any purpose other than with respect to this Proof of Claim against the Debtor, and does not waive or release any rights or remedies against any other person or entity that may be liable for all or part of this Proof of Claim.

13. The Claimant otherwise reserves its rights, and nothing herein shall prejudice the Claimant's rights, under any order of the Court previously entered in this chapter 11 case.

14. Payments on account of this Proof of Claim should be sent to the Claimant at the address specified for notices to the Claimant in Part 1.3 of the Proof of Claim.

EXHIBIT 2

006476

PACHULSKI STANG ZIEHL & JONES LLP
Jeffrey N. Pomerantz (CA Bar No. 143717) (*admitted pro hac vice*)
Ira D. Kharasch (CA Bar No. 109084) (*admitted pro hac vice*)
John A. Morris (NY Bar No. 266326) (*admitted pro hac vice*)
Gregory V. Demo (NY Bar No. 5371992) (*admitted pro hac vice*)
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Facsimile: (972) 755-7110

Counsel for the Debtor and Debtor-in-Possession

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

In re:	§	
	§	Chapter 11
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P., ¹	§	Case No. 19-34054-sgj11
	§	
Debtor.	§	

**DEBTOR'S MOTION FOR ENTRY OF AN ORDER APPROVING
SETTLEMENT WITH HARBOURVEST (CLAIM NOS. 143, 147, 149, 150, 153, 154)
AND AUTHORIZING ACTIONS CONSISTENT THEREWITH**

TO THE HONORABLE STACEY G. C. JERNIGAN,
UNITED STATES BANKRUPTCY JUDGE:

¹ The last four digits of the Debtor's taxpayer identification number are 6725. The headquarters and service address for the Debtor is 300 Crescent Court, Suite 700, Dallas, TX 75201.



Highland Capital Management, L.P., the above-captioned debtor and debtor-in-possession (“Highland” or the “Debtor”), files this motion (the “Motion”) for entry of an order, substantially in the form attached hereto as **Exhibit A**, pursuant to Rule 9019 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), approving a settlement agreement (the “Settlement Agreement”),² a copy of which is attached as Exhibit 1 to the *Declaration of John A. Morris in Support of the Debtor’s Motion for Entry of an Order Approving Settlement with HarbourVest (Claim Nos. 143, 147, 149, 150, 153, 154) and Authorizing Actions Consistent Therewith* being filed simultaneously with this Motion (“Morris Dec.”), that, among other things, fully and finally resolves the proofs of claim filed by HarbourVest 2017 Global Fund L.P., HarbourVest 2017 Global AIF L.P., HarbourVest Dover Street IX Investment L.P., HV International VIII Secondary L.P., HarbourVest Skew Base AIF L.P., and HarbourVest Partners L.P. (collectively, “HarbourVest”). In support of this Motion, the Debtor represents as follows:

JURISDICTION

1. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2). Venue in this District is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

2. The statutory predicates for the relief sought herein are sections 105(a) and 363 of title 11 of the United States Code (the “Bankruptcy Code”), and Rule 9019 of the Bankruptcy Rules.

² All capitalized terms used but not defined herein shall have the meanings given to them in the Settlement Agreement.

RELEVANT BACKGROUND

A. Procedural Background

3. On October 16, 2019 (the “Petition Date”), the Debtor filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code in the Bankruptcy Court for the District of Delaware, Case No. 19-12239 (CSS) (the “Delaware Court”).

4. On October 29, 2019, the official committee of unsecured creditors (the “Committee”) was appointed by the U.S. Trustee in the Delaware Court.

5. On December 4, 2019, the Delaware Court entered an order transferring venue of the Debtor’s case to this Court [Docket No. 186].³

6. On December 27, 2019, the Debtor filed that certain *Motion of the Debtor for Approval of Settlement with the Official Committee of Unsecured Creditors Regarding Governance of the Debtor and Procedures for Operations in the Ordinary Course* [Docket No. 281] (the “Settlement Motion”). This Court approved the Settlement Motion on January 9, 2020 [Docket No. 339] (the “Settlement Order”).

7. In connection with the Settlement Order, an independent board of directors was constituted at the Debtor’s general partner, Strand Advisors, Inc., and certain operating protocols were instituted.

8. On July 16, 2020, this Court entered an order appointing James P. Seery, Jr., as the Debtor’s chief executive officer and chief restructuring officer [Docket No. 854].

9. The Debtor has continued in the possession of its property and has continued to operate and manage its business as a debtor-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No trustee or examiner has been appointed in this chapter 11 case.

³ All docket numbers refer to the docket maintained by this Court.

Acis of assets by fraudulently transferring virtually all of its assets and attempting to transfer its profitable portfolio management contracts to non-Acis, Debtor-related entities.

19. Unaware of the fraudulent transfers or the true purposes of the Structural Changes, and in reliance on representations made by the Debtor, HarbourVest closed on its Investment in HCLOF on November 15, 2017.

20. After discovering the transfers that occurred between Highland and Acis between October and December 2017 following the Arbitration Award (the “Transfers”), on January 24, 2018, Terry moved for a temporary restraining order (the “TRO”) from the Texas state court on the grounds that the Transfers were pursued for the purpose of rendering Acis LP judgment-proof. The state court granted the TRO, enjoining the Debtor from transferring any CLO management contracts or other assets away from Acis LP.

21. On January 30, 2018, Mr. Terry filed involuntary bankruptcy petitions against Acis LP and its general partner, Acis Capital Management GP, LLC. *See In re Acis Capital Management, L.P.*, Case No. 18-30264-sgj11 (Bankr. N.D. Tex. 2018) and *In re Acis Capital Management GP, LLC*, Case No. 18-30265-sgj11 (Bankr. N.D. Tex. 2018) (collectively, the “Acis Bankruptcy Case”). The Bankruptcy Court overruled the Debtor’s objection, granted the involuntary petitions, and appointed a chapter 11 trustee (the “Acis Trustee”). A long sequence of events subsequently transpired, all of which relate to HarbourVest’s claims, including:

- On May 31, 2018, the Court issued a *sua sponte* TRO preventing any actions in furtherance of the optional redemptions or other liquidation of the Acis CLOs.
- On June 14, 2018, HCLOF withdrew optional redemption notices.
- The TRO expired on June 15, 2018, and HCLOF noticed the Acis Trustee that it was requesting an optional redemption.

- HCLOF's request was withdrawn on July 6, 2018, and on June 21, 2018, the Acis Trustee sought an injunction preventing Highland/HCLOF from seeking further redemptions (the "Preliminary Injunction").
- The Court granted the Preliminary Injunction on July 10, 2018, pending the Acis Trustee's attempts to confirm a plan or resolve the Acis Bankruptcy.
- On August 30, 2018, the Court denied confirmation of the First Amended Joint Plan for Acis, and held that the Preliminary Injunction must stay in place on the ground that the "evidence thus far has been compelling that numerous transfers after the Josh Terry judgment denuded Acis of value."
- After the Debtor made various statements implicating HarbourVest in the Transfers, the Acis Trustee investigated HarbourVest's involvement in such Transfers, including extensive discovery and taking a 30(b)(6) deposition of HarbourVest's managing director, Michael Pugatch, on November 17, 2018.
- On March 20, 2019, HCLOF sent a letter to Acis LP stating that it was not interested in pursuing, or able to pursue, a CLO reset transaction.

**D. The Parties' Pleadings and Positions Concerning HarbourVest's
Proofs of Claim**

22. On April 8, 2020, HarbourVest filed proofs of claim against Highland that were subsequently denoted by the Debtor's claims agents as claim numbers 143, 147, 149, 150, 153, and 154, respectively (collectively, the "Proofs of Claim"). Morris Dec. Exhibits 2-7.

23. The Proofs of Claim assert, among other things, that HarbourVest suffered significant harm due to conduct undertaken by the Debtor and the Debtor's employees, including "financial harm resulting from (i) court orders in the Acis Bankruptcy that prevented certain CLOs in which HCLOF was invested from being refinanced or reset and court orders that otherwise relegated the activity of HCLOF [*i.e.*, the Preliminary Injunction]; and (ii) significant fees and expenses related to the Acis Bankruptcy that were charged to HCLOF." *See, e.g.*, Morris Dec. Exhibit 2 ¶3.

24. HarbourVest also asserted "any and all of its right to payment, remedies, and other claims (including contingent or unliquidated claims) against the Debtor in connection with and relating to the forgoing harm, including for any amounts due or owed under the various

agreements with the Debtor in connection with relating to” the Operative Documents “and any and all legal and equitable claims or causes of action relating to the forgoing harm.” *See, e.g.*, Morris Dec. Exhibit 2 ¶4.

25. Highland subsequently objected to HarbourVest’s Proofs of Claim on the grounds that they were no-liability claims. [Docket No. 906] (the “Claim Objection”).

26. On September 11, 2020, HarbourVest filed its Response. The Response articulated specified claims under U.S. federal and state and Guernsey law, including claims for fraud, fraudulent concealment, fraudulent inducement, fraudulent misrepresentation, negligent misrepresentation (collectively, the “Fraud Claims”), U.S. State and Federal Securities Law Claims (the “Securities Claims”), violations of the Federal Racketeer Influenced and Corrupt Organizations Act (“RICO”), breach of fiduciary duty and misuse of fund assets, and an unfair prejudice claim under Guernsey law (collectively, with the Proofs of Claim, the “HarbourVest Claims”).

27. On October 18, 2020, HarbourVest filed its *Motion of HarbourVest Pursuant to Rule 3018 of the Federal Rules of Bankruptcy Procedure for Temporary Allowance of Claims for Purposes of Voting to Accept or Reject the Plan* [Docket No. 1207] (the “3018 Motion”). In its 3018 Motion, HarbourVest sought for its Claims to be temporarily allowed for voting purposes in the amount of more than \$300 million (based largely on a theory of treble damages).

E. Settlement Discussions

28. In October, the parties discussed the possibility of resolving the Rule 3018 Motion.

29. In November, the parties broadened the discussions in an attempt to reach a global resolution of the HarbourVest Claims. In the pursuit thereof, the parties and their

counsel participated in several conference calls where they engaged in a spirited exchange of perspectives concerning the facts and the law.

30. During follow up meetings, the parties' interests became more defined. Specifically, HarbourVest sought to maximize its recovery while fully extracting itself from the Investment, while the Debtor sought to minimize the HarbourVest Claims consistent with its perceptions of the facts and law.

31. After the parties' interests became more defined, the principals engaged in a series of direct, arm's-length, telephonic negotiations that ultimately lead to the settlement, whose terms are summarized below.

F. Summary of Settlement Terms

32. The Settlement Agreement contains the following material terms, among others:

- HarbourVest shall transfer its entire interest in HCLOF to an entity to be designated by the Debtor;⁵
- HarbourVest shall receive an allowed, general unsecured, non-priority claim in the amount of \$45 million and shall vote its Class 8 claim in that amount to support the Plan;
- HarbourVest shall receive a subordinated, allowed, general unsecured, non-priority claim in the amount of \$35 million and shall vote its Class 9 claim in that amount to support the Plan;
- HarbourVest will support confirmation of the Debtor's Plan, including, but not limited to, voting its claims in support of the Plan;
- The HarbourVest Claims shall be allowed in the aggregate amount of \$45 million for voting purposes;
- HarbourVest will support the Debtor's pursuit of its pending Plan of Reorganization; and
- The parties shall exchange mutual releases.

⁵ The NAV for HarbourVest's 49.98% interest in HCLOF was estimated to be approximately \$22 million as of December 1, 2020.

37. First, although the Debtor believes that it has valid defenses to the HarbourVest Claims, there is no guarantee that the Debtor would succeed in its litigation with HarbourVest. Indeed, to establish its defenses, the Debtor would be required to rely, at least in part, on the credibility of witnesses whose veracity has already been called into question by this Court. Moreover, it will be difficult to dispute that the Transfers precipitated the Acis Bankruptcy, and, ultimately, the imposition of the Bankruptcy Court's TRO that restricted HCLOF's ability to reset or redeem the CLOs and that is at the core of the HarbourVest Claims.

006487

40. Finally, the Settlement Agreement was unquestionably negotiated at arm's-length. The terms of the settlement are the result of numerous, ongoing discussions and negotiations between the parties and their counsel and represent neither party's "best case scenario." Indeed, the Settlement Agreement should be approved as a rational exercise of the Debtor's business judgment made after due deliberation of the facts and circumstances concerning HarbourVest's Claims.

41. No previous request for the relief sought herein has been made to this, or any other, Court.

42. Notice of this Motion shall be given to the following parties or, in lieu thereof, to their counsel, if known: (a) counsel for HarbourVest; (b) the Office of the United States Trustee; (c) the Office of the United States Attorney for the Northern District of Texas; (d) the Debtor's principal secured parties; (e) counsel to the Committee; and (f) parties requesting notice pursuant to Bankruptcy Rule 2002. The Debtor submits that, in light of the nature of the relief requested, no other or further notice need be given.

EXHIBIT 3

006490

SETTLEMENT AGREEMENT

This Settlement Agreement (the “Agreement”) is entered into as of December 23, 2020, between Highland Capital Management, L.P. (the “Debtor”), on the one hand, and HarbourVest 2017 Global Fund L.P., HarbourVest 2017 Global AIF L.P., HarbourVest Dover Street IX Investment L.P., HV International VIII Secondary L.P., HarbourVest Skew Base AIF L.P., and HarbourVest Partners L.P. (each, a “HarbourVest Party,” and collectively, “HarbourVest”), on the other hand. Each of the foregoing are sometimes referred to herein collectively as the “Parties” and individually as a “Party.”

RECITALS

WHEREAS, on October 16, 2019 (the “Petition Date”), the Debtor filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code (the “Bankruptcy Case”) in the Bankruptcy Court for the District of Delaware, Case No. 19-12239 (CSS) (the “Delaware Bankruptcy Court”);

WHEREAS, on December 4, 2019, the Delaware Bankruptcy Court entered an order transferring venue of the Debtor’s case to the Bankruptcy Court for the Northern District of Texas, Dallas Division, Case No. 19-34054-sgj (the “Bankruptcy Court”);

WHEREAS, prior to the Petition Date, HarbourVest invested in Highland CLO Funding, Ltd. f/k/a Acis Loan Funding, Ltd. (“HCLOF”) and acquired an a 49.98% ownership interest in HCLOF (the “HarbourVest Interests”);

WHEREAS, the portfolio manager for HCLOF is Highland HCF Advisor, Ltd., a subsidiary of the Debtor;

WHEREAS, on April 8, 2020, HarbourVest filed proofs of claim in the Bankruptcy Case, which are listed on the Debtor’s claims register as claim numbers 143, 147, 149, 150, 153, and 154 (the “HarbourVest Claims”), asserting claims against the Debtor relating to its investment in HCLOF;

WHEREAS, on July 30, 2020, the Debtor filed the *Debtor’s First Omnibus Objection to Certain (a) Duplicate Claims; (b) Overstated Claims; (c) Late-Filed Claims; (d) Satisfied Claims; (e) No Liability Claims; and (f) Insufficient-Documentation Claims* [Docket No. 906], in which the Debtor objected to the HarbourVest Claims;

WHEREAS, on September 11, 2020, HarbourVest filed the *HarbourVest Response to Debtor’s First Omnibus Objection to Creation (a) Duplicate Claims; (b) Overstated Claims; (c) Late-Filed Claims; (d) Satisfied Claims; (e) No Liability Claims; and (f) Insufficient-Documentation Claims* [Docket No. 1057] (the “HarbourVest Response”);

WHEREAS, on October 18, 2020, HarbourVest filed the *Motion of HarbourVest Pursuant to Rule 3018(a) of the Federal Rules of Bankruptcy Procedure for Temporary Allowance of Claims for Purposes of Voting to Accept or Reject the Plan* [Docket No. 1207] (the “3018 Motion” and together with the HarbourVest Response, the “HarbourVest Pleadings”);

WHEREAS, in the HarbourVest Pleadings, HarbourVest asserted, among other things, that the HarbourVest Claims included claims against the Debtor arising from fraudulent inducement, fraudulent concealment, fraudulent misrepresentation, breach of fiduciary duty, breach of securities laws, and misuse of assets and sought damages in excess of \$300,000,000;

WHEREAS, the Debtor disputes the HarbourVest Claims;

WHEREAS, on November 24, 2020, the Debtor filed the *Fifth Amended Plan of Reorganization for Highland Capital Management, L.P.* [Docket No. 1472] (as amended, the “Plan”).¹

WHEREAS, the Parties desire to enter into this Agreement which incorporates, formalizes, and finalizes the full and final resolution of the HarbourVest Claims and HarbourVest Pleadings; and

WHEREAS, this Agreement will be presented to the Bankruptcy Court for approval pursuant to Federal Rule of Bankruptcy Procedure 9019 (“Rule 9019”).

NOW THEREFORE, in consideration of the above recitals, the covenants, conditions, and promises made herein, and other good and valuable consideration, the receipt of which is hereby acknowledged, the Parties agree as follows:

1. **Settlement of Claims.**

(a) In full and complete satisfaction of the HarbourVest Claims, HarbourVest will receive:

(i) an allowed, nonpriority general unsecured claim in the aggregate amount of \$45,000,000 (the “Allowed GUC Claim”); and

(ii) an allowed subordinated claim in the aggregate amount of \$35,000,000 (the “Allowed Subordinated Claim” and together with the Allowed GUC Claim, the “Allowed Claims”).

(b) On the Effective Date, HarbourVest will transfer all of its rights, title, and interest in the HarbourVest Interests to the Debtor or its nominee pursuant to the terms of the *Transfer Agreement for Ordinary Shares of Highland CLO Funding, Ltd.*, attached hereto as Exhibit A (the “Transfer Agreements”) and the Debtor or its nominee will become a shareholder of HCLOF with respect to the HarbourVest Interests. The terms of the Transfer Agreements are incorporated into this Agreement by reference.

2. **Releases.**

(a) Upon the Effective Date, and to the maximum extent permitted by law, each HarbourVest Party on behalf of itself and each of its current and former advisors, trustees, directors, officers, managers, members, partners, employees, beneficiaries, shareholders, agents,

¹ All capitalized terms used but not defined herein shall have the meanings given to them in the Plan.

participants, subsidiaries, parents, successors, designees, and assigns hereby forever, finally, fully, unconditionally, and completely releases, relieves, acquits, remises, and exonerates, and covenants never to sue, the Debtor, HCLOF, HCLOF's current and former directors, and the Debtor's current and former advisors, trustees, directors, officers, managers, members, partners, employees, beneficiaries, shareholders, agents, participants, subsidiaries, parents, affiliates, successors, designees, and assigns, except as expressly set forth below (the "Debtor Released Parties"), for and from any and all claims, debts, liabilities, demands, obligations, promises, acts, agreements, liens, losses, costs and expenses (including, without limitation, attorney's fees and related costs), damages, injuries, suits, actions, and causes of action of whatever kind or nature, whether known or unknown, suspected or unsuspected, matured or unmatured, liquidated or unliquidated, contingent or fixed, at law or in equity, statutory or otherwise, including, without limitation, any claims, defenses, and affirmative defenses, whether known or unknown, including, without limitation, those which were or could have been asserted in, in connection with, or with respect to the Bankruptcy Case (collectively, the "HarbourVest Released Claims").

(b) Upon the Effective Date, and to the maximum extent permitted by law, the Debtor hereby forever, finally, fully, unconditionally, and completely releases, relieves, acquits, remises, and exonerates, and covenants never to sue (i) each HarbourVest Party and (ii) each HarbourVest Party's current and former advisors, trustees, directors, officers, managers, members, partners, employees, beneficiaries, shareholders, agents, participants, subsidiaries, parents, affiliates, successors, designees, and assigns (the "HarbourVest Released Parties"), for and from any and all claims, debts, liabilities, demands, obligations, promises, acts, agreements, liens, losses, costs and expenses (including, without limitation, attorney's fees and related costs), damages, injuries, suits, actions, and causes of action of whatever kind or nature, whether known or unknown, suspected or unsuspected, matured or unmatured, liquidated or unliquidated, contingent or fixed, at law or in equity, statutory or otherwise, including, without limitation, any claims, defenses, and affirmative defenses, whether known or unknown, which were or could have been asserted in, in connection with, or with respect to the Bankruptcy Case (collectively, the "Debtor Released Claims"); *provided, however*, that notwithstanding anything herein to the contrary, the release contained in this Section 2(b) will apply to the HarbourVest Released Parties set forth in subsection (b)(ii) only with respect to Debtor Released Claims arising from or relating to HarbourVest's ownership of the HarbourVest Interests.

(c) Notwithstanding anything in this Agreement to the contrary, the releases set forth herein will not apply with respect to (i) the Allowed Claims, (ii) the claims of Charlotte Investor IV, L.P., or (iii) the duties, rights, or obligations of any Party under this Agreement or the Transfer Agreements.

3. **Agreement Subject to Bankruptcy Court Approval.** The effectiveness of this Agreement and the Parties' obligations hereunder are conditioned in all respects on the approval of this Agreement by the Bankruptcy Court. The Parties agree to cooperate and use reasonable efforts to have this Agreement approved by the Bankruptcy Court. The "Effective Date" will be the date of an order entered by the Bankruptcy Court approving this Agreement pursuant to a motion filed under Rule 9019.

4. **Representations and Warranties.** Subject in all respects to Section 3 hereof:

(a) each HarbourVest Party represents and warrants that (i) it has full authority to enter into this Agreement and to release the HarbourVest Released Claims and has not sold, transferred, or assigned any HarbourVest Released Claim to any other person or entity, (ii) no person or entity other than such HarbourVest Party has been, is, or will be authorized to bring, pursue, or enforce any HarbourVest Released Claim on behalf of, for the benefit of, or in the name of (whether directly or derivatively) of such HarbourVest Party; and (iii) HarbourVest owns all of the HCLOF Interests free and clear of any claims or interests; and

(b) the Debtor represents and warrants to HarbourVest that (i) it has full authority to enter into this Agreement and to release the Debtor Released Claims and (ii) no person or entity other than the Debtor has been, is, or will be authorized to bring, pursue, or enforce any Debtor Released Claim on behalf of, for the benefit of, or in the name of (whether directly or derivatively) of the Debtor Party.

5. **Plan Support.**

(a) Each HarbourVest Party hereby agrees that it will (a) vote all HarbourVest Claims held by such HarbourVest Party to accept the Plan, by delivering its duly executed and completed ballots accepting the Plan on a timely basis; and (b) not (i) change, withdraw, or revoke such vote (or cause or direct such vote to be changed withdrawn or revoked); (ii) exercise any right or remedy for the enforcement, collection, or recovery of any claim against the Debtor except in a manner consistent with this Agreement or the Plan, (iii) object to, impede, or take any action other action to interfere with, delay or postpone acceptance or confirmation of the Plan; (iv) directly or indirectly solicit, propose, file, support, participate in the formulation of or vote for, any restructuring, sale of assets (including pursuant to 11 U.S.C. § 363), merger, workout, or plan of reorganization of the Debtor other than the Plan; or (v) otherwise take any action that would in any material respect interfere with, delay, or postpone the consummation of the Plan; provided, however, that such vote may be revoked (and, upon such revocation, deemed void ab initio) by such HarbourVest Party at any time following the termination of this agreement or the occurrence of a Support Termination Event (it being understood that any termination of this agreement shall entitle each HarbourVest Party to change its vote in accordance with section 1127(d) of the Bankruptcy Code), notwithstanding any voting deadline established by the Bankruptcy Court including without limitation the January 5, 2021, 5:00 p.m. (prevailing Central Time) deadline established by the *Order Approving Form of Ballots, Voting Deadline and Solicitation Procedures* [Docket No. 1476].

(b) In full resolution of the 3018 Motion, HarbourVest will have a general unsecured claim for voting purposes only in the amount of \$45,000,000.

(c) The obligations of the HarbourVest Parties under this Section 5 shall automatically terminate upon the occurrence of any of the following (each a “Support Termination Event”): (i) the effective date of the Plan, (ii) the withdrawal of the Plan, (iii) the entry of an order by the Bankruptcy Court (A) converting the Bankruptcy Case to a case under chapter 7 of the Bankruptcy Code or (B) appointing an examiner with expanded powers beyond those set forth in sections 1106(a)(3) and (4) of the Bankruptcy Code or a trustee in Bankruptcy

Case, or (iv) the failure of the Court to enter an order approving the terms of this Agreement and the settlement described herein pursuant to Rule 9019 prior to confirmation of the Plan.

6. **No Admission of Liability.** The Parties acknowledge that there is a bona fide dispute with respect to the HarbourVest Claims. Nothing in this Agreement will imply, an admission of liability, fault or wrongdoing by the Debtor, HarbourVest, or any other person, and the execution of this Agreement does not constitute an admission of liability, fault, or wrongdoing on the part of the Debtor, HarbourVest, or any other person.

7. **Successors-in-Interest.** This Agreement shall be binding upon and shall inure to the benefit of each of the Parties and their successors, and assigns.

8. **Notice.** Each notice and other communication hereunder will be in writing and will be sent by email and delivered or mailed by registered mail, receipt requested, and will be deemed to have been given on the date of its delivery, if delivered, and on the fifth full business day following the date of the mailing, if mailed to each of the Parties thereto at the following respective addresses or such other address as may be specified in any notice delivered or mailed as set forth below:

HARBOURVEST

HarbourVest Partners L.P.
Attention: Michael J. Pugatch
One Financial Center
Boston, MA 02111
Telephone No. 617-348-3712
E-mail: mpugatch@harbourvest.com

with a copy (which shall not constitute notice) to:

Debevoise & Plimpton LLP
Attention: M. Natasha Labovitz, Esq.
919 Third Avenue
New York, NY 10022
Telephone No. 212-909-6649
E-mail: nlabovitz@debevoise.com

THE DEBTOR

Highland Capital Management, L.P.
300 Crescent Court, Suite 700
Dallas, Texas 75201
Attention: James P. Seery, Jr.
Telephone No.: 972-628-4100
Facsimile No.: 972-628-4147
E-mail: jpseeryjr@gmail.com

with a copy (which shall not constitute notice) to:

Pachulski Stang Ziehl & Jones LLP
Attention: Jeffrey Pomerantz, Esq.
10100 Santa Monica Blvd., 13th Floor
Los Angeles, CA 90067
Telephone No.: 310-277-6910
Facsimile No.: 310-201-0760
E-mail: jpomerantz@pszjlaw.com

9. **Advice of Counsel.** Each Party represents that it has: (a) been adequately represented by independent legal counsel of its own choice, throughout all of the negotiations that preceded the execution of this Agreement; (b) executed this Agreement upon the advice of such counsel; (c) read this Agreement, and understands and assents to all the terms and conditions contained herein without any reservations; and (d) had the opportunity to have this Agreement and all the terms and conditions contained herein explained by independent counsel, who has answered any and all questions asked of such counsel, or which could have been asked of such counsel, including, but not limited to, with regard to the meaning and effect of any of the provisions of this Agreement.

10. **Entire Agreement.** This Agreement and the Transfer Agreement contain the entire agreement and understanding concerning the subject matter of this Agreement, and supersede and replace all prior negotiations and agreements, written or oral and executed or unexecuted, concerning such subject matter. Each of the Parties acknowledges that no other Party, nor any agent of or attorney for any such Party, has made any promise, representation or warranty, express or implied, written or oral, not otherwise contained in this Agreement to induce any Party to execute this Agreement. The Parties further acknowledge that they are not executing this Agreement in reliance on any promise, representation or warranty not contained in this Agreement, and that any such reliance would be unreasonable. This Agreement will not be waived or modified except by an agreement in writing signed by each Party or duly authorized representative of each Party.

11. **No Party Deemed Drafter.** The Parties acknowledge that the terms of this Agreement are contractual and are the result of arms'-length negotiations between the Parties and their chosen counsel. Each Party and its counsel cooperated in the drafting and preparation of this Agreement. In any construction to be made of this Agreement, the Agreement will not be construed against any Party.

12. **Future Cooperation.** The Parties agree to cooperate and execute such further documentation as is reasonably necessary to effectuate the intent of this Agreement.

13. **Counterparts.** This Agreement may be executed in counterparts with the same force and effect as if executed in one complete document. Each Party's signature hereto will signify acceptance of, and agreement to, the terms and provisions contained in this Agreement. Photographic, electronic, and facsimile copies of signed counterparts may be used in lieu of the originals of this Agreement for any purpose.

14. **Governing Law; Venue; Attorneys' Fees and Costs.** The Parties agree that this Agreement will be governed by and will be construed according to the laws of the State of Texas without regard to conflict-of-law principles. Each of the Parties hereby submits to the exclusive jurisdiction of the Bankruptcy Court during the pendency of the Bankruptcy Case and thereafter to the exclusive jurisdiction of the state and federal courts located in the Northern District of Texas, Dallas Division, with respect to any disputes arising from or out of this Agreement. In any action to enforce this Agreement, the prevailing party shall be entitled to recover its reasonable and necessary attorneys' fees and costs (including experts).

[Remainder of Page Intentionally Blank]

IT IS HEREBY AGREED.

HIGHLAND CAPITAL MANAGEMENT, L.P.

By: /s/ James P. Seery, Jr.
Name: James P. Seery, Jr.
Its: CEO/CRO

HarbourVest 2017 Global Fund L.P., by HarbourVest 2017 Global Associates L.P., its General Partner, by HarbourVest GP LLC, its General Partner, by HarbourVest Partners, LLC, its Managing Member

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

HarbourVest 2017 Global AIF L.P., by HarbourVest Partners (Ireland) Limited, its Alternative Investment Fund Manager, by HarbourVest Partners L.P., its Duly Appointed Investment Manager, by HarbourVest Partners, LLC, its General Partner

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

HarbourVest Dover Street IX Investment L.P., by HarbourVest Partners L.P., its Duly Appointed Investment Manager, by HarbourVest Partners, LLC, its General Partner

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

HarbourVest Partners L.P., on behalf of funds and accounts under management, by HarbourVest Partners, LLC, its General Partner

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

**HarbourVest Skew Base AIF L.P., by HarbourVest Partners (Ireland) Limited, its
Alternative Investment Fund Manager, by HarbourVest Partners L.P., its Duly Appointed
Investment Manager, by HarbourVest Partners, LLC, its General Partner**

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

**HV International VIII Secondary L.P., by HIPEP VIII Associates L.P., its General
Partner, by HarbourVest GP LLC, its General Partner, by HarbourVest Partners, LLC,
its Managing Member**

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

Exhibit A

TRANSFER AGREEMENT
FOR ORDINARY SHARES OF
HIGHLAND CLO FUNDING, LTD.

This Transfer Agreement, dated as of December [REDACTED], 2020 (this “**Transfer Agreement**”), is entered into by and among Highland CLO Funding, Ltd. (the “**Fund**”), Highland HCF Advisor, Ltd. (the “**Portfolio Manager**”), HCMLP Investments, LLC (the “**Transferee**”) and each of the following: HarbourVest Dover Street IX Investment L.P., HarbourVest 2017 Global AIF L.P., HarbourVest 2017 Global Fund L.P., HV International VIII Secondary L.P., and HarbourVest Skew Base AIF L.P. (collectively, the “**Transferors**”).

WHEREAS, each Transferor is the record, legal and beneficial owner of the number of ordinary shares (“**Shares**”) of the Fund set forth opposite such Transferor’s name on Exhibit A hereto (with respect to each Transferor, the “**Transferred Shares**”).

WHEREAS the Transferee is an affiliate and wholly owned subsidiary of Highland Capital Management, L.P. (“**HCMLP**”) which is one of the initial members of the Fund.

WHEREAS, each Transferor wishes to transfer and assign 100% of its rights, title and interest as a shareholder in the Fund, including the Transferred Shares (the “**Interest**”) on the terms set forth in this Transfer Agreement.

WHEREAS, subject to and in connection with the approval of that certain Settlement Agreement, dated on or about the date hereof, by and among HCMLP and the Transferors (the “**Settlement Agreement**”), the Transferee desires that the Interest be transferred to Transferee and that thereafter the Transferee will become a Shareholder and the Transferors will no longer be Shareholders.

WHEREAS, the Portfolio Manager desires to consent to such transfers and to the admission of Transferee as a Shareholder on the terms set forth herein, and the Transferors and Transferee agree to such terms.

WHEREAS, the Fund desires to amend its records to reflect the foregoing transfers.

NOW, THEREFORE, the parties hereto agree as follows:

1. Transfer of Shares and Advisory Board

- a. Each Transferor hereby transfers and assigns all of its rights, title, and interest in its Interest to the Transferee, and the Transferee wishes to be admitted to the Fund as a Shareholder.
- b. In connection with the transfer of the Interest as contemplated herein, the Transferee shall be granted the right to appoint a representative to the Fund’s advisory board (the “**Advisory Board**”) to replace the Transferors’ appointed representative to the Advisory Board.

- c. Transferee hereby assumes all of Transferor's rights and obligations in respect of the Interest effective as of the Effective Date (as defined below) and acknowledge that thereafter Transferee shall be subject to the applicable terms and provisions of the Members' Agreement dated as of November 15, 2017 (the "**Members' Agreement**"), the Articles of Incorporation adopted November 15, 2017 (the "**Articles**") and the Subscription and transfer Agreement, dated as of November 15, 2017 among each Transferor, the Fund and the Portfolio Manager (the "**Subscription Agreement**", and together with the Members' Agreement and the Articles, the "**Fund Agreements**") with respect to the Interest. Transferee does not assume any liability or responsibility for any obligations or liabilities incurred by any Transferor prior to the Effective Date of the transfer.
 - d. Following the transfer, each Transferor shall have no further rights or obligations to any party hereunder in respect of the Interest under the Fund Agreements.
 - e. This Transfer Agreement, and the parties' obligations hereunder, are conditioned in all respects on the approval by the Bankruptcy Court for the Northern District of Texas, Dallas Division pursuant to Federal Rule of Bankruptcy Procedure 9019 of (i) this Transfer Agreement and (ii) the Settlement Agreement, and each of the parties agree that no further action shall be required from any party for the transfer of the Interest to be effective except as described herein.
2. Transferee's Representations and Warranties. The Transferee represents and warrants to the Transferors, the Portfolio Manager, and the Fund as follows:
- a. This Transfer Agreement constitutes a valid and binding obligation of the Transferee, enforceable against it in accordance with its terms;
 - b. This Transfer Agreement has been duly and validly executed and delivered by or on behalf of the Transferee and such execution and delivery have been duly authorized by all necessary trust action of the Transferee;
 - c. The Transferee acknowledges receipt of, has read, and is familiar with, the Fund's Offering Memorandum for Placing Shares dated November 15, 2017 (the "**Offering Memorandum**") and the Fund Agreements;
 - d. The Transferee hereby accepts and receives the Interest from the Transferors for investment, and not with a view to the sale or distribution of any part thereof, and the Transferee has no present intention of selling, granting participations in, or otherwise distributing the same, but subject nevertheless to any requirement of law that the disposition of the Transferee's property shall at all times be within such Transferee's control; and
 - e. The Transferee is an "Eligible U.S. Investor" as defined in the Offering Memorandum.

3. Transferors' Representations and Warranties. Each Transferor represents and warrants to the Transferee, the Portfolio Manager, and the Fund as follows:
 - a. This Transfer Agreement constitutes a valid and binding obligation of the Transferor, enforceable against it in accordance with its terms;
 - b. This Transfer Agreement has been duly authorized, and duly and validly executed and delivered by the Transferor and such execution and delivery have been duly authorized by all necessary action of the Transferor; and
 - c. As of the date hereof, the Transferor has good and valid title to the Transferor's Interest, free and clear of any liens, vesting requirements or claims by others.
4. Consent to Transfer. Based in part on the representations and warranties of the Transferors and the Transferee which are included herein, and on the terms contained herein, the Portfolio Manager and the Fund hereby consent to the transfers of the Interest, the admission of the Transferee as a Shareholder and the Transferee's appointment of a representative to the Advisory Board, the Portfolio Manager's execution of this Transfer Agreement constituting its prior written consent to the transfers of the Interest for the purposes of article 18.1 of the Articles and this Transfer Agreement constituting express notice in writing to the Fund of the assignment set out at clause 1(c) above for the purposes of the Law of Property (Miscellaneous Provisions) (Guernsey) Law, 1979 (as amended).
5. Completion: As of the date of approval by the Bankruptcy Court for the Northern District of Texas, Dallas Division pursuant to Federal Rule of Bankruptcy Procedure 9019 of (i) this Transfer Agreement and (ii) the Settlement Agreement (the "**Effective Date**"):
 - a. each Transferor shall deliver or cause to be delivered to the Transferee a transfer instrument relating to the Transferred Shares duly executed and completed by that Transferor in favor of the Transferee; and
 - b. the Transferee shall deliver to the Transferors and the Fund a duly executed and dated Adherence Agreement (as defined in the Members' Agreement).

Prior to the Effective Date the Transferee shall procure that:

 - c. the board of directors of the Fund shall hold a meeting at which the transfer of the Shares to the Transferee shall be approved and registration in the register of members of the Fund shall be effected on the Effective Date.
6. Miscellaneous.
 - a. Each of the parties hereto agree to execute any further instruments and perform any further acts which are or may become reasonably necessary to carry out the intent of this Transfer Agreement or are reasonably requested by the Portfolio Manager, the Fund or a Transferor to complete the transfer of the Interest.

- b. The parties to this Transfer Agreement acknowledge that the terms of this Transfer Agreement are the result of arms'-length negotiations between the parties and their respective counsel. Each party and its counsel cooperated in the drafting and preparation of this Transfer Agreement. In any construction to be made of this Transfer Agreement, the language or drafting of this Transfer Agreement will not be construed against any party.
- c. This Transfer Agreement shall be governed by, and construed and enforced in accordance with, the internal substantive laws of the state of Delaware, without giving effect to conflicts of law principles.
- d. The representations, warranties and covenants of the Transferors and the Transferee shall remain in full force and effect following the transfer of the Interest, and the Fund and the Portfolio Manager thereafter may rely on all such representations, warranties and covenants.
- e. This Transfer Agreement may be executed in multiple counterparts, each of which shall be deemed to be an original, but all of which together shall constitute one and the same instrument. Photographic, electronic, and facsimile copies of signed counterparts may be used in lieu of the originals of this Transfer Agreement for any purpose.
- f. Captions of sections have been added only for convenience and shall not be deemed to be a part of this Transfer Agreement.
- g. This Transfer Agreement is among the parties hereto. No Person that is not a party hereto shall have any right herein as a third-party beneficiary or otherwise except as expressly contemplated hereby.

[Remainder of Page Intentionally Blank]

IN WITNESS WHEREOF, the undersigned have executed this Transfer Agreement as of the date first above written.

TRANSFeree:

HCMLP Investments, LLC

By: Highland Capital Management, L.P.

Its: Member

By: _____

Name: James P. Seery, Jr.

Title: Chief Executive Officer

PORTFOLIO MANAGER:

Highland HCF Advisor, Ltd.

By: _____

Name: James P. Seery, Jr.

Title: President

FUND:

Highland CLO Funding, Ltd.

By: _____

Name:

Title:

[Additional Signatures on Following Page]

HarbourVest 2017 Global Fund L.P.

By: HarbourVest 2017 Global Associates L.P.
Its General Partner

By: HarbourVest GP LLC
Its General Partner

By: HarbourVest Partners, LLC
Its Managing Member

By: _____

Name: Michael Pugatch

Title: Managing Director

Exhibit A

<u>Transferee Name</u>	<u>Number of Shares</u>	<u>Percentage</u>
HarbourVest Dover Street IX Investment L.P.	[REDACTED]	[REDACTED]
HarbourVest 2017 Global AIF L.P.	[REDACTED]	[REDACTED]
HarbourVest 2017 Global Fund L.P.	[REDACTED]	[REDACTED]
HV International VIII Secondary L.P.	[REDACTED]	[REDACTED]
HarbourVest Skew Base AIF L.P.	[REDACTED]	[REDACTED]

EXHIBIT 4

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D. Michael Lynn
State Bar I.D. No. 12736500
John Y. Bonds, III
State Bar I.D. No. 02589100
John T. Wilson, IV
State Bar I.D. No. 24033344
Bryan C. Assink
State Bar I.D. No. 24089009
BONDS ELLIS EPPICH SCHAFFER JONES LLP
420 Throckmorton Street, Suite 1000
Fort Worth, Texas 76102
(817) 405-6900 telephone
(817) 405-6902 facsimile

ATTORNEYS FOR JAMES DONDERO

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE:	§	
	§	
HIGHLAND CAPITAL MANAGEMENT,	§	Case No. 19-34054
L.P.,	§	
	§	
Debtor.	§	Chapter 11

**JAMES DONDERO’S OBJECTION TO DEBTOR’S MOTION FOR ENTRY
OF AN ORDER APPROVING SETTLEMENT WITH HARBOURVEST
[Relates to Docket No. 1625]**

James Dondero (“Respondent”), a creditor, indirect equity security holder, and party in interest in the above-captioned bankruptcy case, hereby files this Objection to *Debtor’s Motion for Entry of an Order Approving Settlement with HarbourVest (Claim Nos. 143, 147, 149, 150, 153, 154)* [Docket No. 1625] (the “Motion”) filed by Highland Capital Management, L.P. (the “Debtor”). Through the Motion, the Debtor seeks approval of its compromise with HarbourVest 2017 Global Fund L.P., HarbourVest 2017 Global AIF L.P., HarbourVest Dover Street IX Investment L.P., HV International VIII Secondary L.P., HarbourVest Skew Base AIF L.P., and HarbourVest Partners L.P. (collectively, “HarbourVest”) pursuant to Rule 9019 of the Federal



Rules of Bankruptcy Procedure (the “Bankruptcy Rules”). In support of this objection, Respondent respectfully represents as follows:

I. INTRODUCTION

1. Under Bankruptcy Rule 9019, the Bankruptcy Court is tasked with making an independent judgment on the merits of a proposed settlement to ensure that the proposed settlement is “fair, equitable, and in the best interest of the estate.”¹ While Respondent recognizes the Debtor’s efforts in arranging a settlement, there are at least three significant issues with the terms of the settlement that merit denial of the Motion: (i) the proposed settlement is not reasonable or in the best interest of the estate given the weakness of the HarbourVest Claim (as hereinafter defined); (ii) the proposed settlement is a blatant attempt to purchase votes in support of Debtor’s plan by giving HarbourVest a significant claim to which it would not otherwise be entitled; and (iii) the proposed settlement seeks to improperly classify the HarbourVest Claim² in two separate classes in order to gerrymander an affirmative vote on its reorganization plan. Moreover, the proposed settlement does not satisfy the factors for approval fixed by case law. On information and belief, Debtor’s CEO/CRO, Mr. Seery, has previously asserted on multiple occasions that the HarbourVest Claim had no value and that the Debtor could resolve such claim for no more than \$5 million. While Respondent and Mr. Seery have had a number of disagreements in this case, Respondent agrees with Mr. Seery’s initial conclusion that the HarbourVest Claim is substantially without merit. Respondent understands that any settlement will not necessarily provide the best possible outcome for the Debtor, but in this instance the proposed settlement far exceeds the bounds of reasonableness and, on its face, is an attempt by the Debtor to purchase votes in favor

¹ See *In re Jackson Brewing Co.*, 624 F.2d 599, 602 (5th Cir. 1980).

² While HarbourVest has filed a number of claims, each filed claim is exactly the same except in the name of the claimant. See Claim Nos. 143, 147, 149, 150, 153, and 154.

of confirmation of its Plan. Given the Debtor's prior positions as to the merits of HarbourVest Claim it is necessary for the Court to closely scrutinize the settlement to determine why the Debtor now believes granting HarbourVest a net claim of nearly \$60 million³ resulting from HarbourVest's investment in a non-debtor entity (which was and is managed by a non-debtor) to be in the best interest of the estate. Upon close scrutiny, Respondent believes the Court will find that the proposed settlement is not reasonable or in the best interest of the estate and the Motion therefore should be denied.

II. BACKGROUND

2. On October 16, 2019 (the "Petition Date"), the Debtor filed a voluntary petition for relief under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code") in the U.S. Bankruptcy Court for the District of Delaware, Case No. 19-12239 (CSS) (the "Delaware Court").

3. On October 29, 2019, the Official Committee of Unsecured Creditors (the "Committee") was appointed by the U.S. Trustee in Delaware.

4. On December 4, 2019, the Delaware Court entered an order transferring venue of the Debtor's Bankruptcy Case to this Court [Docket No. 186].

5. On December 27, 2019, the Debtor filed that certain *Motion of the Debtor for Approval of Settlement with the Official Committee of Unsecured Creditors Regarding Governance of the Debtor and Procedures for Operations in the Ordinary Course* [Docket No. 281] (the "Settlement Motion"). This Court approved the Settlement Motion on January 9, 2020 [Docket No. 339] (the "Settlement Order").

³ The proposed settlement provides that HarbourVest shall receive an allowed general unsecured (Class 8) claim in the amount of \$45 million and an allowed subordinated general unsecured (Class 9) claim in the amount of \$35 million. As part of the settlement, HarbourVest will then transfer its entire interest in Highland CLO Funding, Ltd. ("HCLOF") to an entity to be designated by the Debtor. The Debtor states that the value of this interest is approximately \$22 million as of December 1, 2020.

8. On April 8, 2020, HarbourVest filed Proofs of Claim Numbers 143, 149, 149, 150, 153, and 154 (collectively, the “HarbourVest Claim”)⁴.

10. On September 11, 2020, HarbourVest filed *HarbourVest Response to Debtor’s First Omnibus Objection to Certain (A) Duplicate Claims; (B) Overstated Claims; (C) Late-Filed Claims; (D) Satisfied Claims; (E) No Liability Claims; and (F) Insufficient-Documentation Claims* [Docket No. 1057] (the “HarbourVest Response”).

III. LEGAL STANDARD

⁴ While HarbourVest has filed a number of claims, each filed claim is exactly the same except in the name of the claimant. *See* Claim Nos. 143, 147, 149, 150, 153, and 154.

U.S. at 424; *In re AWECO, Inc.*, 725 F.2d 293, 298 (5th Cir. 1984). The terms “fair and equitable,” commonly referred to as the “absolute priority rule,” mean that (i) senior interests are entitled to full priority over junior interests; and (ii) the compromise is reasonable in relation to the likely rewards of litigation. *In re Cajun Electric Power Coop.*, 119 F.3d 349, 355 (5th Cir. 1997); *In re Jackson Brewing Co.*, 624 F.2d 599, 602 (5th Cir. 1980).

13. In determining whether a proposed compromise is fair and equitable, a Court should consider the following factors:

- (i) the probabilities of ultimate success should the claim be litigated;
- (ii) the complexity, expense, and likely duration of litigating the claim;
- (iii) the difficulties of collecting a judgment rendered from such litigation; and,
- (iv) all other factors relevant to a full and fair assessment of the wisdom of the compromise.

TMT Trailer, 390 U.S. at 424.

14. In considering whether to approve a proposed compromise, the bankruptcy judge “may not simply accept the trustee’s word that the settlement is reasonable, nor may he merely ‘rubber stamp’ the trustee’s proposal.” *In re Am. Res. Corp.*, 841 F.2d 159, 162 (7th Cir. 1987). “[T]he bankruptcy judge must apprise himself of all facts necessary to evaluate the settlement and make an informed and independent judgment about the settlement.” *See TMT Trailer*, 390 U.S. at 424, 434.

15. While the trustee’s business judgment is entitled to a certain deference, “business judgment is not alone determinative of the issue of court approval.” *See In re Endoscopy Ctr. of S. Nev., LLC*, 451 B.R. 527, 536 (Bankr. D. Nev. 2011). Further, the business judgment rule does not provide a debtor with “unfettered freedom” to do as it wishes. *See In re Pilgrim’s Pride Corp.*, 403 B.R. 413, 426 (Bankr. N.D. Tex. 2009) (“[A]s a fiduciary holding its estate in trust and responsible

to the court, a debtor in possession must administer its case and conduct its business in a fashion amenable to the scrutiny to be expected from creditor and court oversight.”). The Court must conduct an “intelligent, objective and educated evaluation”⁵ of the proposed settlement “to ensure that the settlement is fair, equitable, and in the best interest of the estate and creditors.” *See In re Mirant Corp.*, 348 B.R. 725, 739 (Bankr. N.D. Tex. 2006) (quoting *Conn. Gen. Life Ins. Co. v. Foster Mortgage Corp. (In re Foster Mortgage Corp.)*, 68 F.3d 914, 917 (5th Cir. 1995)).

IV. ARGUMENT AND AUTHORITIES

16. As discussed in detail below, there are three significant issues with the terms of the settlement that merit denial of the Motion: (i) the proposed settlement is not reasonable or in the best interest of the estate given the weakness of the HarbourVest Claim; (ii) the proposed settlement is a blatant attempt to purchase votes in support of Debtor’s plan by giving HarbourVest a substantial claim to which it is not entitled; and (iii) the proposed settlement seeks to improperly classify HarbourVest’s one claim in two separate classes in order to gerrymander an affirmative vote on its reorganization plan. For these and certain additional reasons as discussed below, the Motion should be denied.

A. Through its Claim, HarbourVest Seeks to Revisit this Court’s Orders in the Acis Case

17. As an initial matter, through its proofs of claim, HarbourVest appears to be second guessing the Court’s judgment in the Chapter 11 case of Acis Capital Management, LP and Acis Capital Management GP, LLC (collectively, “Acis”) and seeking to revisit the Court’s orders entered in that case years ago. HarbourVest appears to be arguing that the TRO and injunction

⁵ *In re Jackson Brewing Co.*, 624 F.2d 599, 602 (5th Cir. 1980) (“To assure a proper compromise the bankruptcy judge, must be apprised of all the necessary facts for an intelligent, objective and educated evaluation. He must compare the terms of the compromise with the likely rewards of litigation.”).

24. Given these issues, among many others, the HarbourVest Claim is unsustainable both from a liability and damages standpoint and there are many very high hurdles HarbourVest would have to clear in seeking to prove liability against the Debtor and in proving its damages. For a long period of time, its investment was managed by Acis and the investment's performance was directly tied to Acis's inadequate performance as portfolio manager. Further, the value of

C. The Proposed Settlement is an Improper Attempt by the Debtor to Purchase Votes in Support of its Plan and the Separate Classification of the HarbourVest Claim Constitutes Gerrymandering in Violation of 11 U.S.C. § 1122

27. Section 1122 of the Bankruptcy Code provides as follows:

11 U.S.C. § 1122.

29. “Section 1122 consequently must contemplate some limits on classification of claims of similar priority. A fair reading of both subsections suggests that ordinarily substantially similar claims, those which share common priority and rights against the debtor’s estate, should be placed in the same class.” *Id.* at 1278.

There must be some limit on a debtor's power to classify creditors in such a manner. . . . Unless there is some requirement of keeping similar claims together, nothing would stand in the way of a debtor seeking out a few impaired creditors (or even one such creditor) who will vote for the plan and placing them in their own class.

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32. There are a number of other reasons for the Court to closely scrutinize the proposed settlement that may warrant denial of the Motion.

JAMES DONDERO'S OBJECTION TO THE DEBTOR'S MOTION FOR ENTRY OF AN ORDER APPROVING SETTLEMENT WITH HARBOURVEST

35. Third, while the Motion addresses the factor of probability of success in the litigation, it does not discuss in detail the cost of doing so in relation to the amount to be paid to HarbourVest under the settlement or the likelihood that the Debtor will succeed in the litigation. In addition, unlike the claims filed by Acis and UBS, the HarbourVest Claim does not arise from pending litigation. At this point, relatively little litigation has occurred and the parties have not addressed threshold issues that might dramatically narrow the scope of the HarbourVest Claim. Rule 9019 requires an analysis as to whether the probability of success in litigation is outweighed by the consideration achieved under the settlement. *See In re Jackson Brewing Co.*, 624 F.2d 599, 602 (5th Cir. 1980) (The Court must “compare the terms of the compromise with the likely rewards

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EXHIBIT 5

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 Attorneys for The Dugaboy Investment Trust and Get Good Trust

UNITED STATES BANKRUPTCY COURT FOR THE
 NORTHERN DISTRICT OF TEXAS
 DALLAS DIVISION

IN RE:	*	Chapter 11
	*	
	*	Case No. 19-34054sgj11
HIGHLAND CAPITAL MANAGEMENT, L.P.	*	
	*	
Debtor	*	

**OBJECTION TO DEBTOR’S MOTION FOR ENTRY OF AN ORDER APPROVING
 SETTLEMENT WITH HARBOURVEST (CLAIM NOS. 143, 147, 149, 150, 153, 154)
 AND AUTHORIZING ACTIONS CONSISTENT THEREWITH**

The Dugaboy Investment Trust and Get Good Trust (jointly, “Objectors”), submit this Objection for the purpose of objecting to the *Debtor’s Motion for Entry of an Order Approving Settlement with HarbourVest (Claim Nos. 143, 147, 149, 150, 153, 154) and Authorizing Actions Consistent Therewith* [Dkt. #1625] (the “Motion”) filed by Highland Capital Management, L.P. (the “Debtor”). Through the Motion, the Debtor seeks approval of its compromise with HarbourVest 2017 Global Fund L.P., HarbourVest 2017 Global AIF L.P., HarbourVest Dover Street IX Investment L.P., HV International VIII Secondary L.P., HarbourVest Skew Base AIF L.P., and HarbourVest Partners L.P. (collectively, “HarbourVest”) pursuant to Rule 9019 of the



Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”). In support of this objection, Objectors respectfully represent as follows:

I. INTRODUCTION

1. Objectors recognize that Courts favorably view settlements and, as a matter of course, generally approve settlements as being in the best interest of the bankruptcy estate. The settlement proposed herein, however, is different than other settlements inasmuch as it represents a 180 degree departure from the Debtor’s own analysis of the Claim of HarbourVest and the fact that the settlement is tied to HarbourVest approving the Debtor’s plan. Little or no information is provided by the Debtor as to why its initial analysis was flawed and what information or legal principal it discovered to change a zero claim into a massive claim that will have a significant impact on the recovery to creditors.

II. BACKGROUND

2. On October 16, 2019 (the “Petition Date”), the Debtor filed a voluntary petition for relief under chapter 11 of title 11 of the United States Code (the “Bankruptcy Code”) in the U.S. Bankruptcy Court for the District of Delaware, Case No. 19-12239 (CSS) (the “Delaware Court”).

3. On October 29, 2019, the Official Committee of Unsecured Creditors (the “Committee”) was appointed by the U.S. Trustee in Delaware.

4. On December 4, 2019, the venue of this case was transferred. [Dkt. #186].

5. On July 16, 2020, this Court entered an order authorizing the Debtor to employ James P. Seery, Jr. as Chief Executive Officer and Chief Restructuring Officer of the Debtor. [See Dkt. #854].

6. On April 8, 2020, HarbourVest filed Proofs of Claim Numbers 143, 149, 149, 150, 153, and 154 (collectively, the “HarbourVest Claim”)¹.

7. On July 30, 2020, the Debtor filed *Debtor’s First Omnibus Objection to Certain (A) Duplicate Claims; (B) Overstated Claims; (C) Late-Filed Claims; (D) Satisfied Claims; (E) No Liability Claims; and (F) Insufficient-Documentation Claims* [Dkt. #906] (the “Debtor Objection”), which contained an objection to the HarbourVest Claim.

8. On September 11, 2020, HarbourVest filed *HarbourVest Response to Debtor’s First Omnibus Objection to Certain (A) Duplicate Claims; (B) Overstated Claims; (C) Late-Filed Claims; (D) Satisfied Claims; (E) No Liability Claims; and (F) Insufficient-Documentation Claims* [Dkt. #1057] (the “HarbourVest Response”).

9. The Debtor, in its *Disclosure Statement for the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.* [Dkt. #1473 pgs. 40-41], described its position relative to the HarbourVest Claim as follows:

The Debtor intends to **vigorously** defend the HarbourVest Claims on various grounds The HarbourVest Entities invested approximately \$80,000,000.00 in HCLOF but seek an allowed claim in excess of 300 million dollars (after giving effect to treble damages for the alleged RICO violations)

10. On December 23, 2020, the Debtor filed the Motion seeking approval of a proposed settlement of the HarbourVest Claim under Rule 9019. [Dkt. # 1625].

11. The proposed settlement provides HarbourVest with the following:

- a. An allowed, general unsecured claim in the amount of \$45,000,000.00 [Dkt. #1625 pg. 9 pp.f]; and

¹ While HarbourVest has filed a number of claims, each filed claim is exactly the same except in the name of the claimant. See Claim Nos. 143, 147, 149, 150, 153, and 154.

- b. A \$35,000,000 claim in Class 9 [Dkt. #1625 pg. 9 pp.f].
12. An integral element of the settlement requires that HarbourVest will “support confirmation of the Debtor’s Plan including, but not limited to, voting its claims in support of the Plan.”
13. The settlement also contains a provision that HarbourVest will transfer its entire interest in HCLOF to an entity to be designated by the Debtor. It is unclear whether HarbourVest has a right to transfer the interest and secondly, what the Debtor will do with the interest [Dkt. #1625 pp.f].
14. The sole support for the Motion is the Declaration of John Morris [Dkt. #1631] which fails to account for the enormous change in the Debtor’s position between November 24, 2020 when the Disclosure Statement was approved and December 23, 2020 when the Motion was filed, a period of less than thirty (30) days.
15. The Declaration of John Morris [Dkt. #1631] also contains no information as to the potential cost of the litigation, whether HarbourVest can transfer the interest or reasons, other than conclusory reasons, as to why the settlement is beneficial to the estate. The Debtor makes the assertion that the interest it is acquiring was worth \$22,000,000.00 as of December 1, 2020 without advising as to the basis for the valuation. Is it a book value and, if not, what was the methodology employed to arrive at the valuation? The Court has no basis to evaluate the settlement without essential information as to 1) how the asset being acquired is valued; 2) can the Debtor acquire the interest; and 3) how will the Debtor bring value to the estate in connection with the interest inasmuch as the Debtor has discretion as to where to place the asset to be acquired.

A. LEGAL STANDARDS

16. The law relative to approval of motions pursuant to BR 9019 is well settled. The settlement must be fair and equitable. *See In re Jackson Brewing Co.*, 624 F.2d 599, 602 (5th Cir. 1980). The factors the Court should consider are the following:

- (i) the probabilities of ultimate success should the claim be litigated;
- (ii) the complexity, expense, and likely duration of litigating the claim;
- (iii) the difficulties of collecting a judgment rendered from such litigation; and,
- (iv) all other factors relevant to a full and fair assessment of the wisdom of the compromise.

Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414 (1968).

17. Although the Debtor's business judgment is entitled to a certain deference, "business judgment" is not alone determinative of the issue of court approval. *See In re Endoscopy Ctr. of S. Nev., LLC*, 451 B.R. 527, 536 (Bankr. D. Nev. 2011). However, notwithstanding the business judgment rule, a debtor does not have unfettered freedom to do what it wishes. *See In re Pilgrim's Pride Corp.*, 403 B.R. 413, 426 (Bankr. N.D. Tex. 2009) ("[A]s a fiduciary holding its estate in trust and responsible to the court, a debtor in possession must administer its case and conduct its business in a fashion amenable to the scrutiny to be expected from creditor and court oversight.").

B. ISSUES WITH THE SETTLEMENT

18. Objectors believe that the following issues are not explained or addressed in the Motion and, thus, the Motion should be denied:

- a) The settlement represents a radical change in the Debtor's position that was set forth in its Disclosure Statement. While the Debtor asserts that its position is

based on its fear of parties' oral testimony, the size of the transactions at issue make the case a document case, as opposed to who said what, when and how. A review of the applicable documents to determine whether they support the Debtor's initial position is warranted, as opposed to stating that the case is based upon the credibility of a witness. This settlement is not the settlement of an automobile accident where the parties are disputing who ran a red light;

- b) The settlement requires HarbourVest to support and vote in favor of the Debtor's Plan. On its face this appears to be vote buying. The settlement should not be conditioned upon HarbourVest's support or non-support of the Plan and its vote in favor or against the Plan; and
- c) No information is provided as to whether the Debtor can acquire the interest in HCLOF, liquidate the interest, who will receive the interest, or how will the estate benefit from the interest to be acquired.

CONCLUSION

The settlement with HarbourVest has too many questions to be approved on the record before this Court and the parties, due to the Notice of the Motion, the holidays and the press of other litigation in this case, do not have the time to adequately investigate the propriety of the settlement.

January 8, 2021

Respectfully submitted,

/s/Douglas S. Draper.

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CERTIFICATE OF SERVICE

I do hereby certify that on the 8th day of January, 2021, a copy of the above and foregoing *Objection To Debtor's Motion For Entry Of An Order Approving Settlement With Harbourvest (Claim Nos. 143, 147, 149, 150, 153, 154) And Authorizing Actions Consistent Therewith* has been served electronically to all parties entitled to receive electronic notice in this matter through the Court's ECF system as follows:

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EXHIBIT 6

006537

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ATTORNEYS FOR CLO HOLDCO, LTD.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In re:	§	
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	Case No. 19-34054-SGJ
	§	
Debtor.	§	Chapter 11
	§	

CLO HOLDCO, LTD.'S OBJECTION TO HARBOURVEST SETTLEMENT

TO THE HONORABLE STACEY G. JERNIGAN, U.S. BANKRUPTCY JUDGE:

CLO Holdco, Ltd. ("**CLO Holdco**") respectfully files this *Objection to Harbourvest Settlement* (the "**Harbourvest Settlement Objection**") which seeks entry of an order from this Court denying the Debtor's *Motion for Entry of an Order Approving Settlement with Harbourvest (Claims Nos. 143, 147, 149, 150, 153, 154) and Authorizing Actions Consistent Therewith* (the "**Harbourvest Settlement Motion**") for the reasons stated below. In support of the Harbourvest Settlement Objection, CLO Holdco respectfully states as follows:

I.
BACKGROUND

A. TRANSFERRING SHARES IN HCLOF



1. CLO Holdco owns 75,061,630.55 shares, or about 49.02% of Highland CLO Funding, Ltd. ("**HCLOF**"). Other shareholders include Harbourvest 2017 Global AIF L.P., Harbourvest Global Fund L.P., Harbourvest Dover Street IX Investment L.P., and Harbourvest Skew Base AIF L.P., and HV International VIII Secondary L.P. (collectively, "**Harbourvest**"). Harbourvest owns approximately 49.98% of HCLOF. The remaining 1% is owned by the Debtor and a five other investors.

2. HCLOF is governed by a *Members Agreement Relating to the Company* dated November 15, 2017 by and between each of the members of HCLOF, including Harbourvest, the Debtor, and CLO Holdco (the "**Member Agreement**"). A copy of that agreement is attached hereto as **Exhibit A**.

3. Section 6 of the Member Agreement addresses the "Transfer or Disposals of Shares." MEMBER AGREEMENT, § 6. The Member Agreement places strict restrictions on the sale or transfer of shares to entities other than the initial Member's own affiliates. *See id.* at §§ 6.1, 6.2. Before a Member can transfer its interests to a party other than its own affiliates it must: (i) obtain the prior written consent of the Portfolio Manager; and (ii) "offer to the other Members a right to purchase the Shares, on a pro rata basis with respect to their current Shares, at the same price (which must be cash) as such Shares are proposed to be purchased by the prospective third party purchaser pursuant to an irrevocable offer letter" (the "**Right of First Refusal**"). *Id.* As further stated in section 6.2 of the Member Agreement, "The other Members will have 30 days following receipt of the letter to determine whether to purchase their entire pro rata portion of the Shares proposed to be Transferred." *Id.* at § 6.2.

B. THE HARBOURVEST SETTLEMENT

4. On December 23, 2020, the Debtor filed the Harbourvest Settlement Motion. On the following day, the Debtor filed a copy of the Settlement Agreement referenced in the

6. As detailed below, CLO Holdco objects to the Harbourvest Settlement Motion because Harbourvest has no authority to transfer its interests in HCLOF without first complying with the Right of First Refusal. The only way to effectuate such a transfer without first providing other members the Right of First Refusal is an intentionally inaccurate interpretation of the Member Agreement's contractual provisions that would render specific passages redundant and meaningless. More simply put, the only way Harbourvest and the Debtor could effectuate the Settlement Agreement is by violating fundamental tenets of contract interpretation.

A. CONTRACT INTERPRETATION – AVOIDING REDUNDANCIES AND SURPLUS LANGUAGE

CLO HOLDCO, LTD.'S OBJECTION TO HARBOURVEST SETTLEMENT

inconsistency. A specific provision will not be set aside in favor of a catch-all clause." *Broad v. Rockwell Int'l Corp.*, 642 F.2d 929, 947 (5th Cir. 1981) (internal citations omitted); and *see Hawthorne Land Co. v. Equilon Pipeline Co., LLC*, 309 F.3d 888, 892–93 (5th Cir. 2002); *Luv N' Care, Ltd. v. Grupo Rimar*, 844 F.3d 442, 447 (5th Cir. 2016); *Wooley*, 51 F.Appx. at 930.

8. Reconciliation of terms that would otherwise render other parts of a contract redundant is fundamental to proper contract interpretation. *Hawthorne Land*, 309 F.3d at 892-93. As the Fifth Circuit explained in *Hawthorne Land*, "each provision of a contract must be read in light of the other provisions so that each is given the meaning suggested by the contract as a whole. A contract should be interpreted so as to avoid neutralizing or ignoring a provision or treating it as surplusage." *Id.* (internal citations and quotations omitted). In other words, provisions of a contract should be read to create harmony, not internal inconsistencies, redundancies, and unnecessary surplus language. *See, e.g., Luv N' Care*, 844 F.3d at 447 (overturning district court on appeal by interpreting contract in manner that eliminated perceived redundancy).

B. ANALYZING THE MEMBER AGREEMENT

9. Section 6.1 of the Member Agreement will almost certainly be cited by the Debtor and Harbourvest as authority for their entry into the Settlement Agreement, regardless of whether other Members or the Portfolio Manager consent. It states, in pertinent part, that:

No Member shall sell, pledge, charge, mortgage, assign, assign by way of security, transfer, convey, exchange or otherwise dispose of its Shares or its commitment to settle purchases of Shares under the Subscription and Transfer Agreement (each a "Transfer"), other than to an Affiliate of an initial Member party hereto, without the prior written consent of the Portfolio Manager...

MEMBER AGREEMENT, § 6.1. Harbourvest will likely stress that under the terms of the Member Agreement, it can transfer its interests so long as the transfer is to "an Affiliate of an initial Member." Indeed, the Debtor will no doubt point out to this Court that Harbourvest is

conveniently transferring its interests in HCLOF to an Affiliate of the Debtor, and that the Debtor is an initial Member listed in the Member Agreement.

10. Section 6.1, however, must be read in the context of the Member Agreement, and in conjunction with the transfer restrictions found in section 6.2. Read together it is clear that the consent exception allowing a transfer in 6.1 was intended to allow a Member to transfer its shares to *its* own Affiliate, without required consents and effectuating a Right of First Refusal. Doing so would allow inter-company transfers within a corporate structure without the need for complicated procedures. Applying Fifth Circuit precedent, this interpretation fits squarely within the agreement and gives weight to the terms of section 6.2 of the Member Agreement, as explained below.

(i) Surplusage – Specific Allowance of Transfers by CLO Holdco to Debtor Affiliates

11. Recall that both CLO Holdco and the Debtor are initial Members to the Member Agreement. MEMBER AGREEMENT, p. 3. Section 6.2 of the Member Agreement states, in pertinent part, that "Prior to making any Transfer of Shares (other than Transfers to Affiliates of an initial Member or, *in the case of CLO Holdco or a Highland Principal, to Highland, its Affiliates or another Highland Principal*) a Member must first..." comply with the Right of First Refusal. *Id.* at § 6.2 (emphasis added). The italicized language above is important for two reasons: (i) it specifically enumerates that CLO Holdco can transfer its interests to Debtor Affiliates without having to pursue the Right of First Refusal; and (ii) it allows only limited transfers between Members, as opposed to between a Member and an Affiliate of an initial Member.

12. If, as the Debtor and Harbourvest will likely argue, Members are allowed to transfer their interests to any Affiliates of any other initial Members, there is absolutely no need for the Member Agreement to specifically authorize CLO Holdco to transfer its interests to the Debtor's Affiliates. Per Fifth Circuit fundamentals of contract interpretation, that purported redundancy

should not be discarded as mere surplusage, and the Member Agreement should be interpreted in a manner that gives weight to that provision. *Hawthorne Land*, 309 F.3d at 892-93.

13. If the Member Agreement is read to literally allow all "Transfers to Affiliates of an initial Member" there would be no reason to expressly set forth allowed transfers between specific Members and other Member's Affiliates. If the Member Agreement sought to list all allowed transfers between Members and their Affiliates, it should have similarly noted that any Member could transfer its interest to any Harbourvest Member entity, as each Harbourvest Member entity is an Affiliate of the other Harbourvest Member entities. Alternatively, if the specific enumeration of CLO Holdco and the Highland Principals' transfer rights was surplusage, it would presumably have listed other parties' rights, or had inclusive language such as "including but not limited to" or "for example." The Member Agreement lacks such language and, as a result, should be interpreted in a manner that both gives weight to the specific provision while reconciling other provisions of the contract.

(ii) Absurd Results – Disparate Transfer Rights Between Members

14. Note that the Member Agreement does not generally allow a transfer of interests from Member to Member unless specifically enumerated. Section 6.2 specifically allows only CLO Holdco and the Highland Principals to make transfers to other Members, but those other Members include only the Debtor or another Highland Principal. MEMBER AGREEMENT, § 6.2. It does not allow the Debtor to transfer interests to any Member, and does not expressly allow any Member, other than limited transfers by CLO Holdco and the Highland Principals, to transfer interests to any other Member. *Id.* For instance, if the Debtor wished to transfer its interests to CLO Holdco, it would first have to offer all of the other Members their Right of First Refusal. *Id.*

15. Similarly, if Harbourvest wished to transfer its interest to CLO Holdco, it could not do so without first providing the Right of First Refusal to all other Members. *Id.* As noted above,

however, allowing a Member to transfer its interest to an Affiliate of any initial Member would allow all of the Members to transfer their interests to any Harbourvest Member entity, as the Harbourvest Members are Affiliates of each other. Given the specific enumeration of CLO Holdco and the Highland Principals' rights to inter-Member transfers, it would be inconsistent to expand that specific provision to allow all transfers by all Members to any Harbourvest entity without first providing a Right of First Refusal.

16. Such a reading would lead to absurd results. It would grant similarly situated Members profoundly disparate rights under the agreement, and could easily lead to manipulation. For instance, because the Harbourvest Members are technically Affiliates of an initial Member (each other), they could obtain control of all of the interests in HCLOF without any Member receiving a Right of First Refusal for any transfer. No other Member could do that. For instance, if CLO Holdco wished to acquire other Members' interests, the transferring member (including Harbourvest) would have to offer a Right of First Refusal in every instance. To resolve that potential disparate treatment—though CLO Holdco and Harbourvest own nearly identical ownership interests in HCLOF—CLO Holdco would have to form an Affiliate and acquire interests through the Affiliate. That simply cannot be the intended result of the Member Agreement.

17. Instead, the Member Agreement must be read to require Harbourvest to provide a Right of First Refusal to the other Members of HCLOF before transferring its interests to either the Debtor or the Transferee.

C. THE RIGHT OF FIRST REFUSAL IN BANKRUPTCY

18. Most cases addressing third party rights of first refusal in bankruptcy involve the assignment of leases and landlords' rights of first refusal. In those cases, courts analyze whether such a provision in the debtor's contract is a defacto restriction on assignment that may be excised

WHEREFORE, CLO Holdco requests that this Court grant the Objection and enter an order denying the Harbourvest Settlement Motion.

Respectfully submitted,

By: /s/ John J. Kane
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CLO HOLDCO, LTD.'S OBJECTION TO HARBOURVEST SETTLEMENT

EXHIBIT 7

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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE:

CHAPTER 11

CASE NO.

HIGHLAND CAPITAL 19-34054-
MANAGEMENT, L.P. SGJLL

Debtor.

Confidential - Under Protective Order

REMOTE DEPOSITION OF
MICHAEL PUGATCH
Zoom Videoconference
01/11/2021
1:07 P.M. (EDT)

REPORTED BY: AMANDA GORRONO, CLR
CLR NO. 052005-01
JOB NO. 188591

Page 2		Page 3	
1		1	
2	01/11/2021	2	A P P E A R A N C E S: (Via Remote)
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4		4	Attorneys for Debtor
5		5	780 Third Avenue
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7	PUGATCH, held virtually via Zoom	7	BY: JOHN MORRIS, ESQ.
8	Videoconferencing, pursuant to the	8	HAYLEY WINOGRAD, ESQ.
9	Federal Rules of Civil Procedure before	9	
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1		1	
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<p style="text-align: right;">Page 8</p> <p>1</p> <p>2 MR. WILSON: I'm John Wilson</p> <p>3 with the firm of Bonds Ellis Eppich</p> <p>4 Schafer Jones LP. And I represent Jim</p> <p>5 Dondero.</p> <p>6 MR. MORRIS: John Morris and</p> <p>7 Hayley Winograd of Pachulski Stang</p> <p>8 Ziehl & Jones for the Debtor.</p> <p>9 MS. WEISGERBER: Erica</p> <p>10 Weisgerber from Debevoise & Plimpton</p> <p>11 for HarbourVest.</p> <p>12 MR. KANE: John Kane of Kane</p> <p>13 Russell Coleman & Logan, for CLO</p> <p>14 Holdco Limited.</p> <p>15 MR. DRAPER: Douglas Draper of</p> <p>16 Heller Draper & Horn, for The Dugaboy</p> <p>17 Investment Trust and the Get Good</p> <p>18 Trust.</p> <p>19 MS. McLAUGHLIN: Shannon</p> <p>20 McLaughlin from Latham & Watkins LLP</p> <p>21 for UBS.</p> <p>22 MR. MALONEY: Mark Maloney from</p> <p>23 King & Spalding, on behalf of Highland</p> <p>24 CLO Funding Limited.</p> <p>25 MS. WEISGERBER: I'm joined on</p>	<p style="text-align: right;">Page 9</p> <p>1</p> <p>2 the line by my colleagues from</p> <p>3 Debevoise, Natasha Labovitz and Emily</p> <p>4 Hush, and Aliza Goren from HarbourVest</p> <p>5 is on the line, as well.</p> <p>6 MR. WILSON: As a preliminary</p> <p>7 matter, the witness' counsel has</p> <p>8 produced some documents to us that</p> <p>9 they've requested be subject to the</p> <p>10 confidentially order or a brief</p> <p>11 protective order entered at Document</p> <p>12 Number 382, in this case.</p> <p>13 And she's also requested that</p> <p>14 all counsel and participants in this</p> <p>15 deposition agree to be bound by the</p> <p>16 terms of that order, because some of</p> <p>17 the documents that were produced are</p> <p>18 stamped "confidential," and they want</p> <p>19 to maintain that confidentially.</p> <p>20 Do we have an agreement of all</p> <p>21 counsel and participants on the</p> <p>22 deposition to be bound by the terms of</p> <p>23 that agreed protective order?</p> <p>24 (All agreed.)</p> <p>25 MS. WEISGERBER: Okay. I think</p>

<p style="text-align: right;">Page 10</p> <p>1 Confidential - Pugatch</p> <p>2 that was everyone. Thank you all for</p> <p>3 confirming. And the deposition will</p> <p>4 be marked "confidential" until and</p> <p>5 unless HarbourVest designates the</p> <p>6 testimony otherwise.</p> <p>7 MR. WILSON: And that's fine.</p> <p>8 (Whereupon, a request for</p> <p>9 Transcript be marked Confidential</p> <p>10 under the Protective Order was made.)</p> <p>11 MICHAEL PUGATCH,</p> <p>12 called as a witness, having been</p> <p>13 first duly affirmed by a Notary Public of</p> <p>14 the State of New York, was examined and</p> <p>15 testified as follows:</p> <p>16 EXAMINATION</p> <p>17 BY MR. WILSON:</p> <p>18 Q. All right. Mr. Pugatch, how do</p> <p>19 you pronounce your name? I'm sorry.</p> <p>20 A. Yep, you've got it. Pugatch.</p> <p>21 Q. Pugatch. Okay. Can you state</p> <p>22 your full name for the record?</p> <p>23 A. Yeah. Michael Pugatch.</p> <p>24 Q. Okay. And you've been</p> <p>25 designated by HarbourVest to discuss some</p>	<p style="text-align: right;">Page 11</p> <p>1 Confidential - Pugatch</p> <p>2 matters related to the 9019 motion. And</p> <p>3 specifically we asked that HarbourVest</p> <p>4 produce a witness who could talk about the</p> <p>5 negotiations of the settlement with the</p> <p>6 Debtor, and also the factual allegations</p> <p>7 underlying HarbourVest's Proof of Claim,</p> <p>8 and those described in HarbourVest's</p> <p>9 response to the claim objection, including</p> <p>10 without limitation, its investment with</p> <p>11 Acis/HCLOF in the alleged representations</p> <p>12 made by the Debtor and/or Acis/HCLOF to</p> <p>13 HarbourVest, and any and all agreements</p> <p>14 entered into between HarbourVest and any</p> <p>15 other party related to its investment.</p> <p>16 Do you agree that you're the</p> <p>17 best person to talk about these matters on</p> <p>18 behalf of HarbourVest?</p> <p>19 A. Yes. Yes.</p> <p>20 Q. Okay. Have you given a</p> <p>21 deposition before?</p> <p>22 A. I have.</p> <p>23 Q. Okay. So you understand how it</p> <p>24 works that you're under oath, and that I'm</p> <p>25 going to be asking questions and you're</p>
<p style="text-align: right;">Page 12</p> <p>1 Confidential - Pugatch</p> <p>2 going to be giving answers. If at any</p> <p>3 time I ask a question that you don't</p> <p>4 understand, or we've had some problems</p> <p>5 with sometimes connectivity issues with</p> <p>6 Zoom. But yeah, any time that you don't</p> <p>7 understand my question or you didn't catch</p> <p>8 it, I'll be happy to repeat it.</p> <p>9 Also, one thing I found with</p> <p>10 Zoom is that it's easier to talk over</p> <p>11 people. I'll try not to talk over you. I</p> <p>12 would ask that you try to ensure that I've</p> <p>13 finished asking my question before you</p> <p>14 start your answer. And I will likewise</p> <p>15 try to ensure that you've finished your</p> <p>16 answer before start my next question.</p> <p>17 And at any time during this</p> <p>18 deposition if you feel the need to take a</p> <p>19 break, that's totally okay with me. The</p> <p>20 one thing that I would ask is if I've just</p> <p>21 asked a question, that you answer the</p> <p>22 question before requesting the break.</p> <p>23 And if we have that agreement</p> <p>24 and the ground rules, then I think I'm</p> <p>25 ready to start asking you my questions.</p>	<p style="text-align: right;">Page 13</p> <p>1 Confidential - Pugatch</p> <p>2 A. Sounds good.</p> <p>3 Q. What's your current address?</p> <p>4 A. 47 Wayne Road in Needham,</p> <p>5 Massachusetts.</p> <p>6 Q. Okay. And where are you located</p> <p>7 today?</p> <p>8 A. At that address.</p> <p>9 Q. Okay. That's your home address?</p> <p>10 A. Correct.</p> <p>11 Q. And is anyone in the room with</p> <p>12 you there?</p> <p>13 A. No.</p> <p>14 Q. And did you talk with anyone</p> <p>15 about your deposition today?</p> <p>16 A. Only counsel.</p> <p>17 Q. Okay. And did you go over the</p> <p>18 facts of the underlying investment and the</p> <p>19 settlement negotiations with your counsel?</p> <p>20 MS. WEISGERBER: I'm going to</p> <p>21 object on privilege grounds. He</p> <p>22 can – he prepared for the deposition</p> <p>23 with counsel. I don't think you can</p> <p>24 inquire into specifics of the</p> <p>25 preparation.</p>

<p style="text-align: right;">Page 14</p> <p>1 Confidential - Pugatch</p> <p>2 MR. WILSON: Okay. Well, you</p> <p>3 know, he was designated to talk about</p> <p>4 these matters, and I'm just asking if</p> <p>5 he discussed these matters with his</p> <p>6 counsel his before his testimony.</p> <p>7 That's all. I'm not asking the</p> <p>8 substance of those communications.</p> <p>9 MS. WEISGERBER: You're asking</p> <p>10 about conversations with counsel. How</p> <p>11 about you just ask if he's prepared to</p> <p>12 talk about those topics today?</p> <p>13 MR. WILSON: Okay.</p> <p>14 BY MR. WILSON:</p> <p>15 Q. Are you prepared to talk about</p> <p>16 those topics today?</p> <p>17 A. Yes.</p> <p>18 Q. Okay. Now, HarbourVest has</p> <p>19 filed several proofs of claim in this</p> <p>20 matter, and it looks like those are</p> <p>21 numbered 143 on behalf of HarbourVest,</p> <p>22 217 Global Fund L.P., and 144 HarbourVest</p> <p>23 2017 Global AIF, 149 HarbourVest Partners</p> <p>24 L.P., 150 HarbourVest Dover Street, IX</p> <p>25 Investment L.P., 153 HarbourVest – or I'm</p>	<p style="text-align: right;">Page 15</p> <p>1 Confidential - Pugatch</p> <p>2 sorry, HV International VIII Secondary</p> <p>3 L.P., and 154 HarbourVest Skew Base AIF</p> <p>4 LP.</p> <p>5 And you're here to talk on</p> <p>6 behalf of all of those entities, and you</p> <p>7 have, for purpose of this settlement and</p> <p>8 you're – the 9019 motion, these proofs of</p> <p>9 claim are all lumped together as one</p> <p>10 claim; is that correct?</p> <p>11 MS. WEISGERBER: I'm just going</p> <p>12 to object quickly and clarify that</p> <p>13 he's not here as a 30(b)(6) witness,</p> <p>14 but he is here as someone from</p> <p>15 HarbourVest who signed those proofs of</p> <p>16 claim. So with that, I'll let you</p> <p>17 continue.</p> <p>18 A. I'll just answered the question,</p> <p>19 yes, as a representative on behalf of all</p> <p>20 of those entities. I would defer to</p> <p>21 counsel, from a legal perspective, whether</p> <p>22 these are treated as a single or separate</p> <p>23 claims.</p> <p>24 MR. WILSON: Okay. And we can</p> <p>25 move on for now.</p>
<p style="text-align: right;">Page 16</p> <p>1 Confidential - Pugatch</p> <p>2 I'm going to submit the first</p> <p>3 exhibit. It's going to be Exhibit</p> <p>4 No. 1 to the deposition. I'm sending</p> <p>5 it by E-mail, and I'm also going to</p> <p>6 use a share screen.</p> <p>7 (Whereupon, Exhibit 1, Proof of</p> <p>8 Claim 143 filed 4/08/2020 nine pages,</p> <p>9 was marked for identification.)</p> <p>10 MR. WILSON: So this document</p> <p>11 right here is Claim Number 143 filed</p> <p>12 on April 8, 2020, and this one is</p> <p>13 filed on behalf of HarbourVest 2017</p> <p>14 Global Fund L.P.</p> <p>15 If we go down, scroll to the</p> <p>16 annex to proof of claim, it's Page 5</p> <p>17 of the document. It says that the</p> <p>18 Claimant is a limited partner in one</p> <p>19 of the Debtor's managed vehicles,</p> <p>20 Highland CLO Funding, Ltd.</p> <p>21 And I'm going to now send out an</p> <p>22 E-mail with Exhibit No. 2. I'm going</p> <p>23 to pull this Exhibit No. 2 document up</p> <p>24 on the share screen, as well. I guess</p> <p>25 that's right.</p>	<p style="text-align: right;">Page 17</p> <p>1 Confidential - Pugatch</p> <p>2 (Whereupon, Exhibit 2, Proof of</p> <p>3 Claim 149 filed 4/08/2020 nine pages,</p> <p>4 was marked for identification.)</p> <p>5 BY MR. WILSON:</p> <p>6 Q. Can you see the official proof,</p> <p>7 official form 410 proof of claim on your</p> <p>8 screen?</p> <p>9 A. The first one that you shared?</p> <p>10 Q. I'm now on Exhibit No. 2. Is it</p> <p>11 showing up on your screen?</p> <p>12 A. No.</p> <p>13 Q. Okay. Actually, I'm sorry. Is</p> <p>14 it now showing up on your screen?</p> <p>15 A. Now, it's showing up, yep.</p> <p>16 Q. Okay. So this one is Proof of</p> <p>17 Claim 149, filed on the same date. And</p> <p>18 this one's filed on behalf HarbourVest</p> <p>19 Partners L.P. And I'm going to scroll</p> <p>20 down to the annex to proof of claim, which</p> <p>21 looks largely like the annex to the</p> <p>22 previous proof of claim we looked at.</p> <p>23 But this one says, in Paragraph</p> <p>24 No. 2, the Claimant manages investment</p> <p>25 funds that are limited partners in one of</p>

<p style="text-align: right;">Page 18</p> <p>1 Confidential - Pugatch</p> <p>2 the Debtor's managed vehicles, Highland</p> <p>3 CLO Funding, Ltd.</p> <p>4 And can you tell me why this</p> <p>5 HarbourVest Partners L.P. filed a separate</p> <p>6 proof of claim, from the entities that</p> <p>7 were investors in HCLOF?</p> <p>8 A. I would only be able to answer</p> <p>9 that, based on conversations with counsel.</p> <p>10 Q. But in any event, HarbourVest</p> <p>11 Partners L.P. did not invest in HCLOF,</p> <p>12 correct?</p> <p>13 A. Not directly on behalf of</p> <p>14 itself, no.</p> <p>15 Q. All right. I'm going to stop</p> <p>16 that share screen.</p> <p>17 MR. WILSON: And this is going</p> <p>18 to be Exhibit Number 3.</p> <p>19 (Whereupon, Exhibit 3,</p> <p>20 Declaration of Michael Pugatch in</p> <p>21 Support of Motion of HarbourVest</p> <p>22 Pursuant to Rule 3018(a), was marked</p> <p>23 for identification.)</p> <p>24 MR. WILSON: And Exhibit No. 3</p> <p>25 that I've just submitted via E-mail,</p>	<p style="text-align: right;">Page 19</p> <p>1 Confidential - Pugatch</p> <p>2 and I'm about to put it up on the</p> <p>3 screen, is the Declaration of</p> <p>4 HarbourVest. Let me get it up here,</p> <p>5 so you can see it. This is the</p> <p>6 declaration of Michael Pugatch in</p> <p>7 support of motion of HarbourVest</p> <p>8 pursuant to Rule 3018(a).</p> <p>9 BY MR. WILSON:</p> <p>10 Q. Have you seen this document</p> <p>11 before?</p> <p>12 A. Yes.</p> <p>13 Q. And, in fact, this is your</p> <p>14 declaration; is that correct?</p> <p>15 A. Yes.</p> <p>16 Q. And at the first line of this,</p> <p>17 of Paragraph 1 says that you're the</p> <p>18 managing director of HarbourVest Partners</p> <p>19 LLC?</p> <p>20 A. Correct.</p> <p>21 Q. And how is HarbourVest Partners</p> <p>22 LLC connected to these claims?</p> <p>23 A. That is the corporate entity or</p> <p>24 managing member of all of the underlying</p> <p>25 funds that are managed on behalf of</p>
<p style="text-align: right;">Page 20</p> <p>1 Confidential - Pugatch</p> <p>2 HarbourVest Partners L.P.</p> <p>3 Q. And you're the managing director</p> <p>4 of that entity?</p> <p>5 A. A managing director to that</p> <p>6 entity, yes.</p> <p>7 Q. You said "a managing director,"</p> <p>8 are there others?</p> <p>9 A. Yes.</p> <p>10 Q. Who are the others?</p> <p>11 A. There are over 50 managing</p> <p>12 directors at HarbourVest Partners LLC.</p> <p>13 Q. And are you the managing</p> <p>14 director that has charge of this</p> <p>15 particular HarbourVest investment, the one</p> <p>16 in HCLOF?</p> <p>17 A. Yes.</p> <p>18 MR. WILSON: All right. I beg</p> <p>19 your patience. I'm trying to conduct</p> <p>20 this deposition solo. I've got a lot</p> <p>21 of stuff I've got to go through. So</p> <p>22 I'll do my best to do it efficiently.</p> <p>23 But this next exhibit I'm going</p> <p>24 to submit is going to be Exhibit No.</p> <p>25 4. I'm sending it in the E-mail now.</p>	<p style="text-align: right;">Page 21</p> <p>1 Confidential - Pugatch</p> <p>2 (Whereupon, Exhibit 4, Member</p> <p>3 Agreement 28 pages, was marked for</p> <p>4 identification.)</p> <p>5 BY MR. WILSON:</p> <p>6 Q. Can you see this on your share</p> <p>7 screen?</p> <p>8 A. I can.</p> <p>9 Q. This is the Members Agreement</p> <p>10 relating to the Company.</p> <p>11 A. (Nods.)</p> <p>12 Q. I'm just going to scroll down.</p> <p>13 Okay. So this is the signature page for</p> <p>14 the HarbourVest entities that were</p> <p>15 invested in this company. And it says</p> <p>16 that you were the authorized person to</p> <p>17 sign on behalf of the first two entities:</p> <p>18 HarbourVest Dover Street, HarbourVest 2017</p> <p>19 Global, and then the next one here it says</p> <p>20 you're managing director. And here we see</p> <p>21 that HarbourVest Partners LLC.</p> <p>22 And if we scroll down, we see</p> <p>23 that you're the managing director of</p> <p>24 HarbourVest Partners LLC, again, on behalf</p> <p>25 of HV International, and that you're an</p>

<p style="text-align: right;">Page 22</p> <p>1 Confidential - Pugatch</p> <p>2 authorized person on behalf of HarbourVest</p> <p>3 Skew Base.</p> <p>4 So you signed all these</p> <p>5 agreements on behalf of the HarbourVest</p> <p>6 entities, when HarbourVest made its</p> <p>7 investment in HCLOF. Would that be</p> <p>8 correct?</p> <p>9 A. Correct.</p> <p>10 Q. Okay. Sorry that was</p> <p>11 cumbersome, but I needed to get through</p> <p>12 it.</p> <p>13 MR. WILSON: I'm going to now</p> <p>14 stop that share screen. And I'll need</p> <p>15 to go to Exhibit No. 5. I'm E-mailing</p> <p>16 out Exhibit No. 5 right now.</p> <p>17 (Whereupon, Exhibit 5,</p> <p>18 HarbourVest Response to Debtor's First</p> <p>19 Omnibus Objection 617 pages, was</p> <p>20 marked for identification.)</p> <p>21 BY MR. WILSON:</p> <p>22 Q. This is -- I'll do another share</p> <p>23 screen -- this is Docket 1057 filed in the</p> <p>24 Highland bankruptcy. And this is</p> <p>25 HarbourVest Response to Debtor's First</p>	<p style="text-align: right;">Page 23</p> <p>1 Confidential - Pugatch</p> <p>2 Omnibus Objection.</p> <p>3 Did you participate in the</p> <p>4 creation of this document?</p> <p>5 A. Yes.</p> <p>6 Q. So you had an opportunity to</p> <p>7 review this document, before it was filed?</p> <p>8 A. Correct.</p> <p>9 Q. And you agree with the</p> <p>10 statements and the positions taken in this</p> <p>11 document?</p> <p>12 A. I do.</p> <p>13 Q. All right. So what this says in</p> <p>14 Paragraph 8, that by the summer of 2017,</p> <p>15 HarbourVest was engaged in preliminary</p> <p>16 discussions with Highland, regarding the</p> <p>17 investment.</p> <p>18 First off, why was HarbourVest</p> <p>19 engaged in preliminary discussions with</p> <p>20 Highland?</p> <p>21 A. Highland had approached</p> <p>22 HarbourVest with an investment</p> <p>23 opportunity. This was really borne out of</p> <p>24 discussions that we had with them around a</p> <p>25 couple of investment opportunities, that</p>
<p style="text-align: right;">Page 24</p> <p>1 Confidential - Pugatch</p> <p>2 this opportunity with HCLOF being the one</p> <p>3 that by the summer of 2017, as stated</p> <p>4 here, was in, was advancing through</p> <p>5 discussions.</p> <p>6 Q. And which individuals at</p> <p>7 Highland were you engaged in discussions</p> <p>8 with? By "you," I mean HarbourVest.</p> <p>9 A. Yeah, I mean, originally it was</p> <p>10 through a couple of members of their</p> <p>11 investor relations team. My first point</p> <p>12 of contact was with Brad Eden, and then</p> <p>13 subsequently progressed to a larger subset</p> <p>14 of employees of Highland.</p> <p>15 Q. And who on behalf of HarbourVest</p> <p>16 was engaging in these discussions?</p> <p>17 A. It was primarily myself, my</p> <p>18 colleague, or two -- two colleagues</p> <p>19 primarily, alongside myself.</p> <p>20 Q. I'm sorry. I didn't catch the</p> <p>21 last part.</p> <p>22 A. Sorry. Myself and two other</p> <p>23 colleagues primarily.</p> <p>24 Q. And who are these two other</p> <p>25 colleagues?</p>	<p style="text-align: right;">Page 25</p> <p>1 Confidential - Pugatch</p> <p>2 A. Dustin Willard and then a more</p> <p>3 junior member of the HarbourVest team.</p> <p>4 Q. When you say "the HarbourVest</p> <p>5 team," what does that mean?</p> <p>6 A. So the broader investment team</p> <p>7 and specifically in this context, the</p> <p>8 secondary investment team at HarbourVest,</p> <p>9 that this was an opportunity for.</p> <p>10 Q. So who made the final decision,</p> <p>11 on behalf of HarbourVest, to make this</p> <p>12 investment?</p> <p>13 A. Ultimately it was a decision</p> <p>14 made by the investment committee of</p> <p>15 HarbourVest.</p> <p>16 Q. And who's on that investment</p> <p>17 committee?</p> <p>18 A. It's a four-member committee</p> <p>19 comprised of managing directors within the</p> <p>20 firm.</p> <p>21 Q. And who are those managing</p> <p>22 directors?</p> <p>23 A. I don't recall at the time who</p> <p>24 the members were. I can tell you the</p> <p>25 members now, of that committee. It has</p>

<p style="text-align: right;">Page 26</p> <p>1 Confidential - Pugatch</p> <p>2 changed or evolved over time.</p> <p>3 Q. And that committee included you?</p> <p>4 A. I was involved in the</p> <p>5 decisionmaking of that, yes, correct.</p> <p>6 Q. So you were part of the four-man</p> <p>7 committee that made this decision?</p> <p>8 A. Yes.</p> <p>9 Q. All right. I'm going to go back</p> <p>10 to what we've marked as Exhibit 3, which</p> <p>11 is your declaration. And it says in</p> <p>12 Paragraph 2, that HarbourVest is a passive</p> <p>13 minority investor in Highland CLO funds,</p> <p>14 HCLOF, and by the way, I haven't stated</p> <p>15 this before, but in this deposition if I</p> <p>16 say HCLOF, I'm going to be referring to</p> <p>17 Highland CLO funds.</p> <p>18 But it says that the vehicle is</p> <p>19 managed by Highland Capital Management,</p> <p>20 L.P.</p> <p>21 And why do you say that that</p> <p>22 vehicle was managed by Highland Capital</p> <p>23 Management, L.P.?</p> <p>24 A. I believe that is the named</p> <p>25 investment manager of HCLOF, per the</p>	<p style="text-align: right;">Page 27</p> <p>1 Confidential - Pugatch</p> <p>2 organization documents of that vehicle.</p> <p>3 Q. You believe that that was the</p> <p>4 investment manager on the organization</p> <p>5 documents, which --</p> <p>6 A. Of the various transaction</p> <p>7 documents that we entered into, in</p> <p>8 connection with our investment.</p> <p>9 Q. Would those have been the</p> <p>10 documents that you had entered on November</p> <p>11 the 15 of 2017?</p> <p>12 A. Yes.</p> <p>13 Q. Okay. It says that HarbourVest</p> <p>14 initially invested \$73,522,928 for roughly</p> <p>15 49 percent interest in HCLOF; and more</p> <p>16 specifically, that would be a 49.98</p> <p>17 percent interest in HCLOF, correct?</p> <p>18 A. Sounds right, yes.</p> <p>19 Q. Okay. And then HarbourVest</p> <p>20 contributed an additional \$4,998,501</p> <p>21 following a capital call, and it's</p> <p>22 received three dividends, each totally</p> <p>23 \$1,570,429.</p> <p>24 Is all of that correct?</p> <p>25 A. Yes.</p>
<p style="text-align: right;">Page 28</p> <p>1 Confidential - Pugatch</p> <p>2 Q. And has HarbourVest received any</p> <p>3 additional dividends, since the making of</p> <p>4 this declaration?</p> <p>5 A. No, we have not.</p> <p>6 Q. Now, I want to skip down to</p> <p>7 Paragraph 3, where it says that</p> <p>8 HarbourVest expected proceeds from the</p> <p>9 original HCLOF investment were projected</p> <p>10 to exceed 135 million.</p> <p>11 Do you agree with that?</p> <p>12 A. That was the original projected</p> <p>13 value of the investment, yes.</p> <p>14 Q. Well, whose expectation was</p> <p>15 that?</p> <p>16 A. Those were figures, as I recall,</p> <p>17 that were originally provided to us by</p> <p>18 Highland to form the basis of our due</p> <p>19 diligence that we went through, and</p> <p>20 penultimately were included as part of our</p> <p>21 investment thesis in making the</p> <p>22 investment.</p> <p>23 Q. So your testimony is that</p> <p>24 Highland told you that your investment</p> <p>25 would be worth over \$135 million?</p>	<p style="text-align: right;">Page 29</p> <p>1 Confidential - Pugatch</p> <p>2 A. Yes.</p> <p>3 MS. WEISGERBER: Objection to</p> <p>4 the form. Misstates testimony.</p> <p>5 Go ahead, Mike.</p> <p>6 A. That was, that was part of our</p> <p>7 original due diligence, on the investment</p> <p>8 opportunity.</p> <p>9 Q. When you say part of your due</p> <p>10 diligence, are you saying that the number</p> <p>11 originated from Highland or that the</p> <p>12 number originated from your due diligence</p> <p>13 operations?</p> <p>14 MS. WEISGERBER: Objection to</p> <p>15 form.</p> <p>16 A. The number originally came from</p> <p>17 Highland and formed the basis upon which</p> <p>18 we conducted due diligence on the</p> <p>19 investment opportunity.</p> <p>20 Q. And after performing due</p> <p>21 diligence, you were satisfied that that</p> <p>22 was a reasonable projection?</p> <p>23 A. Yes.</p> <p>24 Q. And what was the, what was the</p> <p>25 estimated date, in which the value of your</p>

<p style="text-align: right;">Page 30</p> <p>1 Confidential - Pugatch</p> <p>2 investment would exceed the \$135 million?</p> <p>3 MS. WEISGERBER: Objection to</p> <p>4 form.</p> <p>5 A. I don't recall exactly. That</p> <p>6 would have been over, over several years.</p> <p>7 And again, this was the -- this was the</p> <p>8 projected value based on the original</p> <p>9 investment or the assets that were held by</p> <p>10 HCLOF, at the time of our investment.</p> <p>11 Q. Now, when you talk about a</p> <p>12 portfolio manager -- I'm sorry, when you</p> <p>13 talk about investment manager, are you</p> <p>14 referring to the portfolio manager?</p> <p>15 A. No.</p> <p>16 Q. So what's the difference in an</p> <p>17 investment manager and a portfolio</p> <p>18 manager?</p> <p>19 A. So in the context of this</p> <p>20 investment, the investment manager. We --</p> <p>21 we had -- HarbourVest had an investment</p> <p>22 with HCLOF. Highland was the investment</p> <p>23 manager of HCLOF that in turn held equity</p> <p>24 positions in a variety of CLOs, which had</p> <p>25 various portfolio managers associated with</p>	<p style="text-align: right;">Page 31</p> <p>1 Confidential - Pugatch</p> <p>2 those, all Highland affiliates.</p> <p>3 Q. And so who was the portfolio</p> <p>4 manager for the HarbourVest investment in</p> <p>5 HCLOF?</p> <p>6 MS. WEISGERBER: Objection to</p> <p>7 form.</p> <p>8 A. There were various underling</p> <p>9 portfolio managers, depending on the</p> <p>10 underlying CLO position.</p> <p>11 Q. Well, who was the initial</p> <p>12 portfolio manager?</p> <p>13 A. So, again it would depend on</p> <p>14 which underlying assets we're talking</p> <p>15 about. HCLOF was a diversified portfolio</p> <p>16 of multiple underlying CLO equity</p> <p>17 positions, all with portfolio managers</p> <p>18 that were Highland affiliates, as we</p> <p>19 understood it.</p> <p>20 Q. Well, I'm going to go back to</p> <p>21 Exhibit 1, Paragraph 2, this says, in the</p> <p>22 second sentence, "Acis Capital Management</p> <p>23 GP, LLC, and Acis Capital Management,</p> <p>24 L.P., together Acis, the portfolio manager</p> <p>25 for HCLOF," and then it continues on,</p>
<p style="text-align: right;">Page 32</p> <p>1 Confidential - Pugatch</p> <p>2 "filed for Chapter 11."</p> <p>3 Is this proof of claim correct,</p> <p>4 when it states that Acis Capital</p> <p>5 Management GP, LLC, and Acis Capital</p> <p>6 Management, L.P., were the portfolio</p> <p>7 manager for HCLOF?</p> <p>8 MS. WEISGERBER: Objection to</p> <p>9 form.</p> <p>10 A. I know that there was an issue</p> <p>11 with the portfolio manager for at least</p> <p>12 the Acis CLOs that were held by HCLOF.</p> <p>13 Q. Well, how do you distinguish</p> <p>14 between the Acis CLOs and the Highland</p> <p>15 CLOs? Is that based on who was managing</p> <p>16 them?</p> <p>17 MS. WEISGERBER: Objection to</p> <p>18 form.</p> <p>19 A. Again, they were all underlying</p> <p>20 investments of HCLOF. We didn't</p> <p>21 distinguish the portfolio manager, if you</p> <p>22 will, of those vehicles, other than again</p> <p>23 they were Highland affiliates.</p> <p>24 Q. But it's fair to say that Acis</p> <p>25 was managing at least a portion of the</p>	<p style="text-align: right;">Page 33</p> <p>1 Confidential - Pugatch</p> <p>2 HCLOF investment, correct?</p> <p>3 A. Correct. The underlying</p> <p>4 investments held by HCLOF, correct.</p> <p>5 Q. And did anything -- from the</p> <p>6 time that you -- well, let's just go to</p> <p>7 the -- I think we had the members</p> <p>8 agreement up a second ago. This would</p> <p>9 have been Exhibit 4.</p> <p>10 Yeah, right here. No. 14,</p> <p>11 Highland HCF Advisor, Ltd. is listed as</p> <p>12 the portfolio manager on the members</p> <p>13 agreement.</p> <p>14 Is that accurate, that Highland</p> <p>15 HCF Advisor, Ltd. was the portfolio</p> <p>16 manager?</p> <p>17 MS. WEISGERBER: Objection to</p> <p>18 form. Can you state as of what date</p> <p>19 you're asking, Counsel?</p> <p>20 MR. WILSON: Well, the date of</p> <p>21 this memorandum is, it says right</p> <p>22 here, 15 November 2017.</p> <p>23 BY MR. WILSON:</p> <p>24 Q. So as of the date November 15,</p> <p>25 2017, who was the portfolio manager for</p>

<p style="text-align: right;">Page 34</p> <p>1 Confidential - Pugatch</p> <p>2 this investment?</p> <p>3 A. I don't recall the specific</p> <p>4 names of the various entities that sat</p> <p>5 below the HCLOF level or below Highland</p> <p>6 Capital, as the investment manager of</p> <p>7 HCLOF.</p> <p>8 Q. Well, are you familiar with a</p> <p>9 company called Brigade?</p> <p>10 A. Yes.</p> <p>11 Q. And was that company a</p> <p>12 sub-manager of this investment?</p> <p>13 MS. WEISGERBER: Objection to</p> <p>14 form.</p> <p>15 A. Not at the time of our</p> <p>16 investment.</p> <p>17 Q. Not at the time. Well, when did</p> <p>18 the portfolio managers begin to change in</p> <p>19 this investment?</p> <p>20 MS. WEISGERBER: Objection to</p> <p>21 form.</p> <p>22 A. Do you mean subsequent to our</p> <p>23 investment?</p> <p>24 Q. Yes.</p> <p>25 A. So as I understand it in</p>	<p style="text-align: right;">Page 35</p> <p>1 Confidential - Pugatch</p> <p>2 connection with the Acis bankruptcy that</p> <p>3 took place, there was a change in the</p> <p>4 underlying either portfolio manager of</p> <p>5 certain of the CLOs, the Acis-managed CLOs</p> <p>6 or Acis-branded CLOs, I should say, and/or</p> <p>7 sub-advisor of those CLOs.</p> <p>8 Q. And was that at the direction of</p> <p>9 the Chapter 11 trustee?</p> <p>10 MS. WEISGERBER: Objection.</p> <p>11 A. That's my understanding.</p> <p>12 Q. And so when this investment was</p> <p>13 initially made, was Highland HCF Advisor,</p> <p>14 Ltd. the portfolio manager of the entire</p> <p>15 investment?</p> <p>16 MS. WEISGERBER: Objection to</p> <p>17 form.</p> <p>18 A. I don't recall the specifics</p> <p>19 underneath the HCLOF entity.</p> <p>20 Q. Well, there aren't any other</p> <p>21 portfolio managers listed on this</p> <p>22 document, that I can see.</p> <p>23 Is there any place in this</p> <p>24 document that you can point me to that</p> <p>25 would identify another portfolio manager?</p>
<p style="text-align: right;">Page 36</p> <p>1 Confidential - Pugatch</p> <p>2 MS. WEISGERBER: Objection to</p> <p>3 form. The document speaks for itself.</p> <p>4 A. Again, I think we may be</p> <p>5 distinguishing here between portfolio</p> <p>6 manager at the HCLOF level and portfolio</p> <p>7 manager sub-advisor, again, I'm not sure</p> <p>8 the proper terminology as it relates to</p> <p>9 each of the underlying CLOs that were</p> <p>10 partially owned by HCLOF.</p> <p>11 Q. Well, after the Acis bankruptcy</p> <p>12 was filed, and after the Chapter 11</p> <p>13 trustee appointed Acis as a portfolio</p> <p>14 manager of at least part of HCLOF, did</p> <p>15 Highland HCF Advisor continue to serve as</p> <p>16 portfolio manager?</p> <p>17 MS. WEISGERBER: Objection to</p> <p>18 form.</p> <p>19 A. All of HarbourVest's interaction</p> <p>20 was with Highland as the investment</p> <p>21 manager of HCLOF. My understanding of the</p> <p>22 change in those entities related to the</p> <p>23 portfolio management of the underlying</p> <p>24 Acis CLOs, not a change in the portfolio</p> <p>25 manager, at the HCLOF level.</p>	<p style="text-align: right;">Page 37</p> <p>1 Confidential - Pugatch</p> <p>2 Q. Well, Highland is listed as a</p> <p>3 member under this -- Highland Capital</p> <p>4 Management LLP is listed as a member under</p> <p>5 this Member Agreement; is that correct?</p> <p>6 MS. WEISGERBER: Objection to</p> <p>7 form.</p> <p>8 A. If that's what the document</p> <p>9 says, yes.</p> <p>10 Q. I'm going to look -- let me stop</p> <p>11 my share screen for a second.</p> <p>12 All right. I'm now at the top</p> <p>13 of Page 5 of this Exhibit 4, where it</p> <p>14 says, "Dover IX shall mean HarbourVest</p> <p>15 Dover Street IX Investment L.P."</p> <p>16 And Dover IX was the largest</p> <p>17 single investor of the HarbourVest Group;</p> <p>18 is that correct?</p> <p>19 A. Correct.</p> <p>20 Q. All right. I'm now going to go</p> <p>21 down to Paragraph 5. I'm sorry, it's not</p> <p>22 Paragraph 5. Paragraph 4, where it says</p> <p>23 "Composition of Advisory Board" in</p> <p>24 Paragraph 4.1, The Company shall establish</p> <p>25 an Advisory Board composed of two</p>

<p style="text-align: right;">Page 38</p> <p>1 Confidential - Pugatch</p> <p>2 individuals, one of whom shall be a</p> <p>3 representative of CLO Holdco and one of</p> <p>4 whom shall be a representative of</p> <p>5 Dover IX.</p> <p>6 And did this Advisory Board get</p> <p>7 created?</p> <p>8 A. I believe it was created, yes.</p> <p>9 Q. And who was the representative</p> <p>10 for CLO Holdco on the Advisory Board?</p> <p>11 A. I don't know.</p> <p>12 Q. Who was the representative for</p> <p>13 Dover IX on the Advisory Board?</p> <p>14 A. I can't recall whether it was</p> <p>15 myself or one other colleague who jointly</p> <p>16 manages this investment with me.</p> <p>17 Q. You don't recall if you were on</p> <p>18 the Advisory Board?</p> <p>19 A. The Advisory Board never met</p> <p>20 formally under its capacity as an Advisory</p> <p>21 Board.</p> <p>22 Q. Well, if you look down in</p> <p>23 Paragraph 4.3, I've got my mouse pointed</p> <p>24 here, I don't know if you can see it.</p> <p>25 About two-thirds of the way down in this</p>	<p style="text-align: right;">Page 39</p> <p>1 Confidential - Pugatch</p> <p>2 paragraph it says, "The consent of the</p> <p>3 Advisory Board shall be required to</p> <p>4 approve the following actions," and then</p> <p>5 it lists a number of things.</p> <p>6 Did the Advisory Board not have</p> <p>7 to – was it not required that the</p> <p>8 Advisory Board ever meet, because they</p> <p>9 didn't take any of these actions?</p> <p>10 MS. WEISGERBER: Objection.</p> <p>11 Objection to form.</p> <p>12 A. There may have been one or two</p> <p>13 actions taken by the Advisory Board, I'm</p> <p>14 looking at the list here to see what those</p> <p>15 may even have been, during the duration of</p> <p>16 our investment; but if so, those would</p> <p>17 have been written resolutions or written</p> <p>18 consents, as opposed to any meeting that</p> <p>19 was convened amongst the entire Advisory</p> <p>20 Board.</p> <p>21 Q. Okay. And the entire Advisory</p> <p>22 Board is just two individuals, correct?</p> <p>23 A. Correct, that's my</p> <p>24 understanding.</p> <p>25 Q. Okay. And if you go up a few</p>
<p style="text-align: right;">Page 40</p> <p>1 Confidential - Pugatch</p> <p>2 sentences above that in Paragraph 4.3 it</p> <p>3 says, The portfolio manager shall not act</p> <p>4 contrary to advice of the Advisory Board</p> <p>5 with respect to any action or</p> <p>6 determination expressly conditioned herein</p> <p>7 or in the offering memorandum on the</p> <p>8 consider approval of the Advisory Board.</p> <p>9 So the portfolio manager did not</p> <p>10 have the authority to disregard the advice</p> <p>11 of the Advisory Board; is that correct?</p> <p>12 MS. WEISGERBER: Objection to</p> <p>13 form; misstates the document.</p> <p>14 A. With respect to the limited role</p> <p>15 that the Advisory Board would have to</p> <p>16 play, yes, that would be my read.</p> <p>17 Q. Now, what is your understanding</p> <p>18 of a reset transaction?</p> <p>19 A. Has to do with a refinancing and</p> <p>20 reset of the investment period of an</p> <p>21 underlying CLO.</p> <p>22 Q. And would a reset transaction be</p> <p>23 contained within this – these actions</p> <p>24 that the Advisory Board's consent is</p> <p>25 required to approve?</p>	<p style="text-align: right;">Page 41</p> <p>1 Confidential - Pugatch</p> <p>2 A. No, it would not.</p> <p>3 MS. WEISGERBER: Objection.</p> <p>4 MR. MALONEY: Join.</p> <p>5 Q. It would not?</p> <p>6 A. It would not.</p> <p>7 Q. Well, if a reset was to be</p> <p>8 proposed, who would have the discretion to</p> <p>9 make that decision to enter a reset</p> <p>10 transaction?</p> <p>11 MS. WEISGERBER: Objection to</p> <p>12 form and foundation.</p> <p>13 MR. MALONEY: Join.</p> <p>14 A. That would be Highland as the</p> <p>15 manager of HCLOF, who owns the equity</p> <p>16 position to the underlying CLOs.</p> <p>17 Q. So you're saying that Highland</p> <p>18 would have the exclusive authority to</p> <p>19 enter a reset transaction?</p> <p>20 A. Correct.</p> <p>21 MS. WEISGERBER: Objection to</p> <p>22 form.</p> <p>23 MR. MALONEY: Join.</p> <p>24 Q. What if HarbourVest objected to</p> <p>25 a reset transaction? Would it have any</p>

<p style="text-align: right;">Page 42</p> <p>1 Confidential - Pugatch</p> <p>2 rights or remedies, in your understanding?</p> <p>3 MS. WEISGERBER: I'm going to</p> <p>4 object to form. And also just object</p> <p>5 to the extent that this is calling for</p> <p>6 legal conclusions.</p> <p>7 Mike --</p> <p>8 MR. WILSON: I've ask the</p> <p>9 witness, within his understanding of</p> <p>10 the way this investment worked.</p> <p>11 MS. WEISGERBER: If you have an</p> <p>12 understanding separate from any other</p> <p>13 conversations with counsel, Mike, you</p> <p>14 can certainly answer.</p> <p>15 A. Within my understanding,</p> <p>16 HarbourVest would not have had any ability</p> <p>17 or rights to object to a reset or for</p> <p>18 similar actions by Highland, as the</p> <p>19 manager of the HCLOF.</p> <p>20 Q. Okay. And just to, just for</p> <p>21 clarity, in 4.2 it says that, All actions</p> <p>22 taken by the Advisory Board shall be (i)</p> <p>23 by a unanimous vote of all of the members</p> <p>24 of the Advisory Board in attendance; or</p> <p>25 (ii), by written consent in lieu of a</p>	<p style="text-align: right;">Page 43</p> <p>1 Confidential - Pugatch</p> <p>2 meeting signed by all of the members of</p> <p>3 the Advisory Board.</p> <p>4 And we've talked about how there</p> <p>5 were two members, one of which represented</p> <p>6 CLO Holdco and one of which represented</p> <p>7 HarbourVest, and it was your testimony</p> <p>8 that you don't recall a meeting ever being</p> <p>9 conducted that you believed that there had</p> <p>10 been some written consents issued by the</p> <p>11 Advisory Board; is that correct?</p> <p>12 MS. WEISGERBER: Objection to</p> <p>13 form.</p> <p>14 A. That is my recollection, yes.</p> <p>15 Q. I'm sorry? I didn't hear your</p> <p>16 answer.</p> <p>17 A. That is my recollection, yes.</p> <p>18 Q. Okay. So what is the Advisory</p> <p>19 Board's general function in your</p> <p>20 understanding?</p> <p>21 MS. WEISGERBER: Objection to</p> <p>22 form.</p> <p>23 You can answer, Mike, if you</p> <p>24 know, other than, you know, legal</p> <p>25 conclusions, things like that, legal</p>
<p style="text-align: right;">Page 44</p> <p>1 Confidential - Pugatch</p> <p>2 advice.</p> <p>3 And also, Mike, you're welcome</p> <p>4 to look at the document, I think John</p> <p>5 is E-mailing you the documents as</p> <p>6 well. I don't know if you have the</p> <p>7 full document in front of you.</p> <p>8 THE WITNESS: Yeah, I can pull</p> <p>9 it up here.</p> <p>10 A. I mean, my understanding is the</p> <p>11 Advisory Board, the Advisory Board's</p> <p>12 involvement is as spelled as in Section</p> <p>13 4.3 of the agreement that you have on the</p> <p>14 screen. And that is the extent of the</p> <p>15 role that the Advisory Board would play.</p> <p>16 Q. Well, but as a practical matter,</p> <p>17 what did that entail?</p> <p>18 MS. WEISGERBER: Objection to</p> <p>19 form.</p> <p>20 A. Again, as a practical matter,</p> <p>21 the listed items, which I can't see, that</p> <p>22 are off the screen further down in 4.3 are</p> <p>23 the items that would require approval by</p> <p>24 the Advisory Board.</p> <p>25 Q. But other than those items, the</p>	<p style="text-align: right;">Page 45</p> <p>1 Confidential - Pugatch</p> <p>2 Advisory Board was not a routine part of</p> <p>3 the decision-making of the portfolio</p> <p>4 manager?</p> <p>5 MS. WEISGERBER: Objection to</p> <p>6 form.</p> <p>7 A. Not at all.</p> <p>8 Q. Did you say "not at all"?</p> <p>9 A. Not at all, no.</p> <p>10 Q. I'm going to refer back to</p> <p>11 Exhibit 5, which was Document -- or Docket</p> <p>12 1057. I'll put that back on the share</p> <p>13 screen. I wanted you to scroll, sorry.</p> <p>14 It's a long document.</p> <p>15 I want you to look at</p> <p>16 Paragraph 37, which should be on your</p> <p>17 screen. And it says that these are</p> <p>18 misrepresentations that HarbourVest</p> <p>19 alleges were made by Highland. And the</p> <p>20 first bullet point states that, "Highland</p> <p>21 never informed HarbourVest that Highland</p> <p>22 had no intention of paying the Arbitration</p> <p>23 Award and was undertaking steps to ensure</p> <p>24 that Mr. Terry could not collect on his</p> <p>25 judgment."</p>

<p style="text-align: right;">Page 46</p> <p>1 Confidential - Pugatch</p> <p>2 Now, Mr. Terry did not have an</p> <p>3 arbitration award against Highland; is</p> <p>4 that correct?</p> <p>5 MS. WEISGERBER: Objection to</p> <p>6 form and foundation.</p> <p>7 A. My understanding is there was an</p> <p>8 Arbitration Award, awarded for the benefit</p> <p>9 of Mr. Terry.</p> <p>10 Q. But that award was against Acis,</p> <p>11 correct?</p> <p>12 MS. WEISGERBER: Objection to</p> <p>13 form.</p> <p>14 A. I don't know all of the details.</p> <p>15 I do know that Acis was a subsidiary of</p> <p>16 Highland, and there was an arbitration</p> <p>17 award that was for the benefit of</p> <p>18 Mr. Terry.</p> <p>19 Q. But you would agree with me that</p> <p>20 if, if Highland, or I'm sorry if Mr. Terry</p> <p>21 had an arbitration award against Acis,</p> <p>22 then Highland would not have any</p> <p>23 obligation to pay that award?</p> <p>24 MR. MORRIS: Objection to the</p> <p>25 form of the question.</p>	<p style="text-align: right;">Page 47</p> <p>1 Confidential - Pugatch</p> <p>2 MS. WEISGERBER: Objection to</p> <p>3 the form. Objection to the extent</p> <p>4 that it calls for a legal conclusion.</p> <p>5 I don't -- Mike, if you have a</p> <p>6 layman's understanding of the answer</p> <p>7 to that question, you're welcome to</p> <p>8 answer. But if not, don't answer.</p> <p>9 A. My understanding was Acis was a</p> <p>10 controlled subsidiary of Highland's.</p> <p>11 Q. Okay. Well, the next bullet</p> <p>12 point says that, "Highland did not inform</p> <p>13 HarbourVest that it undertook the</p> <p>14 transfers to siphon assets away from Acis,</p> <p>15 L.P., and that such transfers would</p> <p>16 prevent Mr. Terry from collecting on the</p> <p>17 Arbitration Award."</p> <p>18 So if your understanding was</p> <p>19 that Highland was responsible for the</p> <p>20 arbitration award, then why is it relevant</p> <p>21 that Highland siphoned assets away from</p> <p>22 Acis, L.P.?</p> <p>23 MS. WEISGERBER: Objection to</p> <p>24 form. Misstates testimony.</p> <p>25 Can you clarify that question,</p>
<p style="text-align: right;">Page 48</p> <p>1 Confidential - Pugatch</p> <p>2 John? I think the beginning of it was</p> <p>3 a little muddled.</p> <p>4 BY MR. WILSON:</p> <p>5 Q. Well, this objection says that</p> <p>6 Highland had -- or response to objection,</p> <p>7 says that Highland had no intention of</p> <p>8 paying the arbitration award, but that</p> <p>9 seems to conflict with the next bullet</p> <p>10 point that says that it undertook</p> <p>11 transfers to siphon assets away from Acis,</p> <p>12 L.P., to prevent Mr. Terry from collecting</p> <p>13 on the arbitration award.</p> <p>14 So where were those assets being</p> <p>15 siphoned to?</p> <p>16 MS. WEISGERBER: Objection to</p> <p>17 form and foundation.</p> <p>18 If you're capable of answering</p> <p>19 that question, Mike, you can.</p> <p>20 A. I don't know the specific</p> <p>21 details of where those assets were</p> <p>22 siphoned off to, other than it was to</p> <p>23 another Highland affiliate.</p> <p>24 Q. The next sentence says that,</p> <p>25 "Highland simply did not inform</p>	<p style="text-align: right;">Page 49</p> <p>1 Confidential - Pugatch</p> <p>2 HarbourVest and represented to HarbourVest</p> <p>3 that the reason for changing the portfolio</p> <p>4 manager for HCLOF was because Acis was</p> <p>5 toxic in the industry."</p> <p>6 Do you see that?</p> <p>7 A. Yes.</p> <p>8 Q. And it seems when I read these</p> <p>9 documents that have been filed in the</p> <p>10 Highland bankruptcy, and also the Acis</p> <p>11 bankruptcy, that there's a difference in</p> <p>12 position as to which entity, being either</p> <p>13 Highland or HarbourVest, had the belief</p> <p>14 that the Acis name was toxic. Can you</p> <p>15 shed any light on that?</p> <p>16 MS. WEISGERBER: Objection to</p> <p>17 form.</p> <p>18 A. I can unequivocally say that the</p> <p>19 idea to change the portfolio manager or</p> <p>20 the idea that the Acis brand was toxic did</p> <p>21 not come from HarbourVest.</p> <p>22 Q. That was not at HarbourVest's</p> <p>23 suggestion or insistence?</p> <p>24 A. Absolutely not.</p> <p>25 Q. Well, whose suggestion was it</p>

<p style="text-align: right;">Page 50</p> <p>1 Confidential - Pugatch</p> <p>2 that the Acis name was toxic?</p> <p>3 A. Somebody at Highland.</p> <p>4 Q. Do you know who?</p> <p>5 A. I don't recall the conversation</p> <p>6 where that first came up or who said, or</p> <p>7 who at Highland said that.</p> <p>8 Q. But that conversation did occur</p> <p>9 prior to HarbourVest's investment?</p> <p>10 A. Yes.</p> <p>11 Q. So Acis was previously the</p> <p>12 portfolio manager for HCLOF prior to</p> <p>13 November 15, 2017, and now November 17 --</p> <p>14 or 15th, 2017, the portfolio manager was</p> <p>15 changed.</p> <p>16 And what is HarbourVest's</p> <p>17 position as to why that change in</p> <p>18 portfolio manager damaged it?</p> <p>19 MS. WEISGERBER: Objection;</p> <p>20 form, objection to the extent it calls</p> <p>21 for a legal conclusion.</p> <p>22 Mike, you can answer --</p> <p>23 MR. WILSON: I'm not asking for</p> <p>24 a -- with all due respect, I'm not</p> <p>25 asking for a legal conclusion. I'm</p>	<p style="text-align: right;">Page 51</p> <p>1 Confidential - Pugatch</p> <p>2 asking for his understanding why the</p> <p>3 change in the portfolio manager</p> <p>4 damaged HarbourVest.</p> <p>5 MS. WEISGERBER: Same objection.</p> <p>6 You can provide any</p> <p>7 non-privileged answer that you have,</p> <p>8 Mike, if any.</p> <p>9 A. Ultimately my understanding is</p> <p>10 that that change in portfolio manager and</p> <p>11 the subsequent litigation between Acis,</p> <p>12 Highland, and Josh Terry led to material</p> <p>13 diminution in value, as it relates to the</p> <p>14 underlying assets of HCLOF stemming from</p> <p>15 Highland's decision not to comply with the</p> <p>16 arbitration award to Mr. Terry.</p> <p>17 Q. Okay. Now, if you go up to</p> <p>18 Page 4 in this document, it says that on</p> <p>19 October 27th, and this is Paragraph 11</p> <p>20 now, "On October 27, 2017, Acis' portfolio</p> <p>21 management rights for HCLOF were</p> <p>22 transferred to Highland HCF"; is that</p> <p>23 correct?</p> <p>24 A. That sounds right, yes.</p> <p>25 Q. And this is over two weeks prior</p>
<p style="text-align: right;">Page 52</p> <p>1 Confidential - Pugatch</p> <p>2 to HarbourVest's investment, correct?</p> <p>3 A. Correct.</p> <p>4 Q. So HarbourVest had full</p> <p>5 knowledge that that the portfolio manager</p> <p>6 of HCLOF was being changed prior to its</p> <p>7 investment, correct?</p> <p>8 A. Correct.</p> <p>9 MS. WEISGERBER: Objection to</p> <p>10 form.</p> <p>11 And just to clarify, you're</p> <p>12 asking him, HarbourVest, he's</p> <p>13 testifying on behalf of himself. I</p> <p>14 could just take a standing objection</p> <p>15 to that because I know sometimes</p> <p>16 you're just saying HarbourVest meaning</p> <p>17 Mike, so...</p> <p>18 BY MR. WILSON:</p> <p>19 Q. Okay. And just to be clear,</p> <p>20 HCLOF changed its portfolio manager on</p> <p>21 October 27, 2017, but after the Acis</p> <p>22 bankruptcy was initiated the Chapter 11</p> <p>23 trustee made changes to the portfolio</p> <p>24 manager, correct?</p> <p>25 MS. WEISGERBER: Objection to</p>	<p style="text-align: right;">Page 53</p> <p>1 Confidential - Pugatch</p> <p>2 form, foundation.</p> <p>3 A. I know there were changes</p> <p>4 subsequent to the Acis bankruptcy, to the</p> <p>5 underlying management of the Acis CLOs.</p> <p>6 Q. All right. I'm going to go back</p> <p>7 to Paragraph 37, and I want to look at</p> <p>8 these next two bullet points.</p> <p>9 It says that, in the third</p> <p>10 bullet point, that "Highland indicated to</p> <p>11 HarbourVest that the dispute with</p> <p>12 Mr. Terry (which appeared on a litigation</p> <p>13 schedule presented to HarbourVest during</p> <p>14 diligence) would have no impact on</p> <p>15 investment activities."</p> <p>16 And that would be the opinion of</p> <p>17 Highland, correct?</p> <p>18 MS. WEISGERBER: Objection to</p> <p>19 form. The opinion of Highland? Is</p> <p>20 that what you meant to ask?</p> <p>21 MR. WILSON: Right.</p> <p>22 BY MR. WILSON:</p> <p>23 Q. That's Highland expressing its</p> <p>24 opinion to HarbourVest, correct?</p> <p>25 MS. WEISGERBER: Objection to</p>

<p style="text-align: right;">Page 54</p> <p>1 Confidential - Pugatch</p> <p>2 form.</p> <p>3 A. I would just say Highland</p> <p>4 presented that as facts to HarbourVest.</p> <p>5 Q. Okay. And the next one, it says</p> <p>6 that "Highland expressed confidence in the</p> <p>7 ability of HCLOF to reset or redeem the</p> <p>8 CLOs notwithstanding that Highland was</p> <p>9 using HCLOF as part of its scheme to avoid</p> <p>10 the pending Arbitration Award."</p> <p>11 That's again an opinion, right,</p> <p>12 that Highland expressed confidence in the</p> <p>13 ability of HCLOF?</p> <p>14 MS. WEISGERBER: Objection to</p> <p>15 form. Objection to the extent it</p> <p>16 calls for a legal conclusion.</p> <p>17 A. Ultimately, their ability, or</p> <p>18 HCLOF's ability to reset or redeem the</p> <p>19 CLOs would be subject to market conditions</p> <p>20 and the ability to actually affect those</p> <p>21 transactions, but they expressed their,</p> <p>22 you know, their belief or view in HCLOF's</p> <p>23 ability to do that notwithstanding the,</p> <p>24 that change in portfolio manager.</p> <p>25 Q. Well, in Paragraph 39 on that</p>	<p style="text-align: right;">Page 55</p> <p>1 Confidential - Pugatch</p> <p>2 same page, it says, "In reliance on</p> <p>3 Highland's misrepresentations and</p> <p>4 omissions, HarbourVest invested in HCLOF."</p> <p>5 Now, HarbourVest is a</p> <p>6 sophisticated investor, correct?</p> <p>7 A. Correct.</p> <p>8 Q. And if we were to go to</p> <p>9 Paragraph 36, it says, right here in the</p> <p>10 middle, "These facts were material:</p> <p>11 indeed, HarbourVest expressed concern and</p> <p>12 requested further information regarding</p> <p>13 the Transfers, the Arbitration Award, and</p> <p>14 their implications for HCLOF, and the</p> <p>15 investment's closing date was delayed."</p> <p>16 And the closing date was</p> <p>17 ultimately November 15, 2017, correct?</p> <p>18 A. Correct.</p> <p>19 Q. What was the initial closing</p> <p>20 date that had to be delayed?</p> <p>21 A. I believe it was scheduled for</p> <p>22 November 1st.</p> <p>23 Q. So HarbourVest had full</p> <p>24 knowledge of these facts that it, that it</p> <p>25 lays out here forming the basis of the</p>
<p style="text-align: right;">Page 56</p> <p>1 Confidential - Pugatch</p> <p>2 alleged misrepresentations, and they</p> <p>3 requested further information regarding</p> <p>4 those facts.</p> <p>5 Did they receive any further</p> <p>6 information?</p> <p>7 MR. MORRIS: Objection to the</p> <p>8 form of the question.</p> <p>9 MS. WEISGERBER: Objection to</p> <p>10 form. Misstates testimony.</p> <p>11 A. We did have subsequent</p> <p>12 conversations and, I believe, receive</p> <p>13 subsequent information describing the</p> <p>14 intent around, and the, you know, new</p> <p>15 structure, pro forma structure, of the</p> <p>16 action that Highland had undertaken. And</p> <p>17 part of the reason for the delay in the</p> <p>18 closing was to ensure that we had adequate</p> <p>19 time to diligence those changes, ask</p> <p>20 questions, in connection with a thorough</p> <p>21 due diligence process, and ensure that the</p> <p>22 underlying legal structure was still</p> <p>23 sound.</p> <p>24 Q. And HarbourVest was investing</p> <p>25 over \$73 million, correct?</p>	<p style="text-align: right;">Page 57</p> <p>1 Confidential - Pugatch</p> <p>2 A. Right.</p> <p>3 Q. And HarbourVest had made</p> <p>4 investments of this nature previously,</p> <p>5 correct?</p> <p>6 A. We did.</p> <p>7 MS. WEISGERBER: Objection to</p> <p>8 form.</p> <p>9 A. HarbourVest has made hundreds of</p> <p>10 investment over its years, yes.</p> <p>11 Q. And HarbourVest has conducted</p> <p>12 due diligence regarding its investments in</p> <p>13 the past, correct?</p> <p>14 A. Correct.</p> <p>15 Q. And HarbourVest received</p> <p>16 additional information on items of concern</p> <p>17 and reviewed that information and</p> <p>18 satisfied itself that this was an</p> <p>19 appropriate investment, correct?</p> <p>20 MS. WEISGERBER: Objection to</p> <p>21 form. Misstates testimony.</p> <p>22 A. On the back of</p> <p>23 misrepresentations by Highland, yes.</p> <p>24 MR. WILSON: Well, I think</p> <p>25 that's nonresponsive and I object.</p>

<p style="text-align: right;">Page 58</p> <p>1 Confidential - Pugatch</p> <p>2 Q. I'm just, I'm just, reading from</p> <p>3 your pleading that you filed in the</p> <p>4 bankruptcy, where you say that these were</p> <p>5 material facts, and HarbourVest sought</p> <p>6 more information regarding these facts.</p> <p>7 And then you've testified that they</p> <p>8 performed additional due diligence</p> <p>9 regarding that information they received,</p> <p>10 and then they determined that the</p> <p>11 investment was appropriate, correct?</p> <p>12 MS. WEISGERBER: Objection to</p> <p>13 form. Misstates testimony.</p> <p>14 Go ahead, Mike.</p> <p>15 A. Yeah, that is correct, on the</p> <p>16 back of the additional information we</p> <p>17 received from Highland.</p> <p>18 And I would add, with, you know,</p> <p>19 with the benefit of external advisors and</p> <p>20 outside counsel reviewing those structural</p> <p>21 changes, as well.</p> <p>22 Q. All right. Thank you.</p> <p>23 Now, going back to your</p> <p>24 declaration, which we've marked as</p> <p>25 Exhibit 3, Paragraph 3 says that "The</p>	<p style="text-align: right;">Page 59</p> <p>1 Confidential - Pugatch</p> <p>2 unaudited net asset value of HCLOF, as of</p> <p>3 August 31, 2020, was \$44,587,820."</p> <p>4 And is that a – is that a book</p> <p>5 value, I guess?</p> <p>6 A. That is a fair market value, in</p> <p>7 accordance with the valuation policy of</p> <p>8 HCLOF.</p> <p>9 Q. Do you happen to know the net</p> <p>10 asset value of HCLOF as of February 1,</p> <p>11 2019? And I don't want an exact number, I</p> <p>12 just want an approximation.</p> <p>13 A. No, I do not.</p> <p>14 Q. Do you know where I could get</p> <p>15 that information?</p> <p>16 A. Presumably from the Debtor.</p> <p>17 Q. We'll come back to this in a</p> <p>18 minute, but I'm going to –</p> <p>19 MS. WEISGERBER: I think we've</p> <p>20 been going about an hour, John, if we</p> <p>21 can take a quick break.</p> <p>22 MR. WILSON: Yeah, a break is</p> <p>23 fine.</p> <p>24 MS. WEISGERBER: Actually,</p> <p>25 Mike...</p>
<p style="text-align: right;">Page 60</p> <p>1 Confidential - Pugatch</p> <p>2 MR. WILSON: I'm sorry? I</p> <p>3 didn't hear you.</p> <p>4 MS. WEISGERBER: It can be up to</p> <p>5 Mike.</p> <p>6 Mike, do you want to take a</p> <p>7 quick break? Do you want to keep</p> <p>8 going?</p> <p>9 MR. WILSON: No, we can, if</p> <p>10 y'all need a break, we can take a</p> <p>11 break, like 10, 15 minutes.</p> <p>12 THE WITNESS: Yeah, why don't we</p> <p>13 take a break, please.</p> <p>14 MR. WILSON: What do y'all</p> <p>15 prefer? 10, 15?</p> <p>16 MS. WEISGERBER: Ten minutes is</p> <p>17 fine.</p> <p>18 Mike, is that good with you.</p> <p>19 THE WITNESS: Yeah, ten-minute</p> <p>20 break is fine.</p> <p>21 MR. WILSON: Okay. Well, we'll</p> <p>22 break till, let's say, 1:20 central</p> <p>23 time.</p> <p>24 THE WITNESS: Perfect.</p> <p>25 MR. WILSON: All right. Thanks</p>	<p style="text-align: right;">Page 61</p> <p>1 Confidential - Pugatch</p> <p>2 guys.</p> <p>3 (Recess taken.)</p> <p>4 MR. WILSON: Yes, I just sent</p> <p>5 out an E-mail with Exhibit 6, and I'm</p> <p>6 going to pull that up on the screen</p> <p>7 share, as well.</p> <p>8 (Whereupon, Exhibit 6, Offering</p> <p>9 Memorandum 122 pages, was marked for</p> <p>10 identification.)</p> <p>11 BY MR. WILSON:</p> <p>12 Q. All right. So this is the</p> <p>13 Offering Memorandum, and I'm looking at</p> <p>14 the bottom of Page 1 – I mean, the top of</p> <p>15 Page 1, I'm sorry.</p> <p>16 The Company that was being</p> <p>17 invested in is Highland CLO Funding, Ltd.</p> <p>18 Do you see that, Mr. Pugatch?</p> <p>19 MS. WEISGERBER: Objection to</p> <p>20 form.</p> <p>21 A. I do. Okay.</p> <p>22 Q. And then this document defines</p> <p>23 Highland, as Highland Capital Management,</p> <p>24 L.P. Do you see that?</p> <p>25 A. Yes.</p>

<p style="text-align: right;">Page 62</p> <p>1 Confidential - Pugatch</p> <p>2 Q. Okay. Now, if we go down to, I</p> <p>3 guess it's Page 8 of this document, and</p> <p>4 this first full paragraph at the top, it</p> <p>5 says, "No voting member of the Advisory</p> <p>6 Board shall be a controlled affiliate of</p> <p>7 Highland."</p> <p>8 Do you see that?</p> <p>9 A. I do.</p> <p>10 Q. And then it also says that, "It</p> <p>11 being understood that none of CLO Holdco</p> <p>12 Ltd., it's wholly-owned subsidiaries, or</p> <p>13 any of their respective directors or</p> <p>14 trustees shall be deemed to be a</p> <p>15 controlled affiliate of Highland, due to</p> <p>16 their preexisting non-discretionary</p> <p>17 advisory relationship with Highland."</p> <p>18 Do you see that?</p> <p>19 A. Yes.</p> <p>20 Q. So there were no affiliates of</p> <p>21 Highland on the Advisory Board, correct?</p> <p>22 MS. WEISGERBER: Objection to</p> <p>23 form.</p> <p>24 A. For voting purposes under the</p> <p>25 document, that is how this reads, correct.</p>	<p style="text-align: right;">Page 63</p> <p>1 Confidential - Pugatch</p> <p>2 MR. WILSON: All right. I'm</p> <p>3 going to turn to the next exhibit.</p> <p>4 And this is going to be Exhibit No. 7</p> <p>5 coming in the E-mail. I'm also going</p> <p>6 to put Exhibit No. 7 on the screen.</p> <p>7 (Whereupon, Exhibit 7, Share</p> <p>8 Subscription and Transfer Agreement 31</p> <p>9 pages, was marked for identification.)</p> <p>10 Q. All right. Do you see that?</p> <p>11 The "Subscription and Transfer Agreement</p> <p>12 For Ordinary Shares"?</p> <p>13 A. Yep.</p> <p>14 Q. All right. So what this</p> <p>15 document says is that, it repeats that</p> <p>16 Highland HCLF Advisory Ltd. is the</p> <p>17 portfolio manager. Highland CLO Funding</p> <p>18 Ltd. is the fund, and CLO Holdco Ltd. is</p> <p>19 the existing shareholder.</p> <p>20 And if we go down to the bottom</p> <p>21 half of this page, it says that</p> <p>22 HarbourVest was acquiring its shares in</p> <p>23 this investment from CLO Holdco, correct?</p> <p>24 A. Yes.</p> <p>25 MS. WEISGERBER: Objection to</p>
<p style="text-align: right;">Page 64</p> <p>1 Confidential - Pugatch</p> <p>2 form.</p> <p>3 Q. And prior to the date of this</p> <p>4 document, which I believe is November 15,</p> <p>5 2017, CLO Holdco held 100 percent of the</p> <p>6 shares of HCLOF, correct?</p> <p>7 MS. WEISGERBER: Objection to</p> <p>8 form, foundation.</p> <p>9 A. I don't recall. I know they</p> <p>10 were the largest, the largest investor. I</p> <p>11 don't recall if it was 100 percent.</p> <p>12 Q. Well, if you look at the chart</p> <p>13 below Paragraph A, it says that CLO Holdco</p> <p>14 Ltd. immediately prior to the placing on</p> <p>15 100 percent share percentage.</p> <p>16 Do you have any reason to</p> <p>17 disagree with that?</p> <p>18 A. No.</p> <p>19 MS. WEISGERBER: Objection to</p> <p>20 form.</p> <p>21 Q. All right. Now, below CLO</p> <p>22 Holdco Ltd., these are the five</p> <p>23 HarbourVest entities that have filed</p> <p>24 proofs of claim in this bankruptcy,</p> <p>25 correct?</p>	<p style="text-align: right;">Page 65</p> <p>1 Confidential - Pugatch</p> <p>2 MS. WEISGERBER: Objection to</p> <p>3 form.</p> <p>4 A. Those are the five HarbourVest</p> <p>5 entities with a direct investment in</p> <p>6 HCLOF.</p> <p>7 Q. And each one of those entities</p> <p>8 has filed a proof of claim in this</p> <p>9 bankruptcy, correct?</p> <p>10 A. Yes.</p> <p>11 Q. And the largest – I think we</p> <p>12 discussed this earlier, but Dover Street</p> <p>13 IX is the largest of those investors, with</p> <p>14 a 35.49 percent share percentage, correct?</p> <p>15 MS. WEISGERBER: Objection to</p> <p>16 form.</p> <p>17 A. Correct.</p> <p>18 Q. And if you take the total of</p> <p>19 those investments of the HarbourVest</p> <p>20 entities, you get a 49.98 percent total.</p> <p>21 Is that your understanding?</p> <p>22 MS. WEISGERBER: Objection to</p> <p>23 form.</p> <p>24 A. I know it has 49 percent, and</p> <p>25 some percentage. I'll take your math as</p>

<p style="text-align: right;">Page 66</p> <p>1 Confidential - Pugatch</p> <p>2 correct.</p> <p>3 Q. And 49.98 percent is larger than</p> <p>4 the next largest shareholder, which is CLO</p> <p>5 Holdco which is 49.02 percent, correct?</p> <p>6 MS. WEISGERBER: Objection to</p> <p>7 form.</p> <p>8 A. In taking all of the HarbourVest</p> <p>9 entities, collectively, yes, correct.</p> <p>10 Q. And so I want to go back to</p> <p>11 earlier where we saw in documents filed by</p> <p>12 HarbourVest, where it refers to itself as</p> <p>13 a passive investor. What do you, I</p> <p>14 apologize if I've already asked you this</p> <p>15 question, but what do you mean by passive</p> <p>16 investor?</p> <p>17 A. Meaning we were a minority</p> <p>18 investor in HCLOF. HCLOF was fully</p> <p>19 controlled by Highland as the investment</p> <p>20 manager. So HarbourVest did not have any</p> <p>21 governance, rights, or control as it</p> <p>22 related to the ongoing investment</p> <p>23 management and decisionmaking of HCLOF.</p> <p>24 Q. HarbourVest has the largest</p> <p>25 percentage of the shares of any of these</p>	<p style="text-align: right;">Page 67</p> <p>1 Confidential - Pugatch</p> <p>2 investors, correct?</p> <p>3 MS. WEISGERBER: Objection to</p> <p>4 form.</p> <p>5 A. Taken collectively, yes.</p> <p>6 Q. And HarbourVest owned one of the</p> <p>7 two spots on the Advisory Board, correct?</p> <p>8 MS. WEISGERBER: Objection to</p> <p>9 form.</p> <p>10 A. Correct.</p> <p>11 Q. And if you look down below the</p> <p>12 HarbourVest entities on this chart, you</p> <p>13 see that Highland Capital Management, L.P.</p> <p>14 is purchasing a .63 percent interest,</p> <p>15 correct?</p> <p>16 MS. WEISGERBER: Objection to</p> <p>17 form. The document speaks for itself.</p> <p>18 A. According to the document, yes.</p> <p>19 Q. Do you have any reason to</p> <p>20 disagree with that document?</p> <p>21 MS. WEISGERBER: Objection to</p> <p>22 form.</p> <p>23 A. I do not.</p> <p>24 MR. WILSON: All right. I'm</p> <p>25 going to stop that screen share. I'm</p>
<p style="text-align: right;">Page 68</p> <p>1 Confidential - Pugatch</p> <p>2 going to E-mail out the next exhibit.</p> <p>3 This was Exhibit 8 that I just sent,</p> <p>4 and I'll pull it up on the screen</p> <p>5 share.</p> <p>6 (Whereupon, Exhibit 8, E-mail</p> <p>7 08/15/2017, was marked for</p> <p>8 identification.)</p> <p>9 Q. Now, I'll represent to you that</p> <p>10 I received this document this morning from</p> <p>11 your counsel. Do you recognize this</p> <p>12 E-mail? Have you seen it before?</p> <p>13 A. Yes, I have.</p> <p>14 Q. And this E-mail is sent by Brad</p> <p>15 Eden. I think you mentioned that he was</p> <p>16 one of the representatives that was</p> <p>17 involved in the pre-investment discussions</p> <p>18 with Highland?</p> <p>19 A. Correct.</p> <p>20 Q. And I think you told me that</p> <p>21 Dustin Willard was involved in those</p> <p>22 discussions on the HarbourVest side,</p> <p>23 correct?</p> <p>24 A. Correct.</p> <p>25 Q. And so this is an E-mail sent on</p>	<p style="text-align: right;">Page 69</p> <p>1 Confidential - Pugatch</p> <p>2 August 15, 2017 from Brad Eden to Dustin</p> <p>3 Willard. Are you familiar with Thomas</p> <p>4 Surgent?</p> <p>5 A. Yes.</p> <p>6 Q. Was he involved in those</p> <p>7 discussions with you and HarbourVest as</p> <p>8 well?</p> <p>9 A. In some of those discussions,</p> <p>10 yes.</p> <p>11 Q. Okay. So when it says, "Dustin,</p> <p>12 attached is a legal summary. Of course,</p> <p>13 Thomas is available to answer any</p> <p>14 follow-up questions." Do you know if</p> <p>15 Thomas was consulted with any follow-up</p> <p>16 questions?</p> <p>17 A. I recall --</p> <p>18 MS. WEISGERBER: Objection to</p> <p>19 form.</p> <p>20 A. -- having follow-up</p> <p>21 conversations with Highland, I don't --</p> <p>22 around these legal summaries. I don't</p> <p>23 recall with whom.</p> <p>24 Q. Okay. And just to show you the</p> <p>25 attachment that's referenced in the</p>

<p style="text-align: right;">Page 70</p> <p>1 Confidential - Pugatch</p> <p>2 E-mail, this says that SEC financial</p> <p>3 crisis matter crusader, Terry, Daugherty</p> <p>4 and UBS. So and then I guess these are --</p> <p>5 this is information provided by Highland</p> <p>6 to HarbourVest regarding these matters.</p> <p>7 Why were these particular matters</p> <p>8 addressed in this E-mail, to your</p> <p>9 knowledge?</p> <p>10 MS. WEISGERBER: Objection to</p> <p>11 form and foundation.</p> <p>12 A. These were all outstanding</p> <p>13 litigation matters that we had become</p> <p>14 aware of in connection with our diligence</p> <p>15 that we asked for a further explanation</p> <p>16 from Highland on the underlying substance.</p> <p>17 Q. Now, did you become</p> <p>18 independently aware of these in the course</p> <p>19 of your due diligence, or were these</p> <p>20 brought to your attention by Highland</p> <p>21 first?</p> <p>22 A. I don't know.</p> <p>23 MS. WEISGERBER: Objection to</p> <p>24 form.</p> <p>25 Q. You don't know?</p>	<p style="text-align: right;">Page 71</p> <p>1 Confidential - Pugatch</p> <p>2 A. (Nods.)</p> <p>3 Q. Okay. And particularly with</p> <p>4 respect to Mr. Terry, is it your opinion</p> <p>5 that there are any material</p> <p>6 misrepresentations made in this summary?</p> <p>7 MS. WEISGERBER: Objection to</p> <p>8 form. Objection to the extent it</p> <p>9 calls for a legal conclusion.</p> <p>10 Mike, to the extent you have an</p> <p>11 answer that does not infringe on</p> <p>12 conversations with counsel, you can</p> <p>13 provide it.</p> <p>14 A. Yeah, I would say our</p> <p>15 understanding or interpretation of that,</p> <p>16 or the answer to that question would be</p> <p>17 based on conversations with counsel.</p> <p>18 Q. Well, this document was provided</p> <p>19 to you in the course of the discussions</p> <p>20 prior to HarbourVest's investment, and</p> <p>21 you've stated that Highland, or you've</p> <p>22 taken the position that Highland made</p> <p>23 material misrepresentations to</p> <p>24 HarbourVest, in the course of these</p> <p>25 discussions.</p>
<p style="text-align: right;">Page 72</p> <p>1 Confidential - Pugatch</p> <p>2 Does this document evidence</p> <p>3 those material misrepresentations?</p> <p>4 MS. WEISGERBER: Objection to</p> <p>5 form. Objection to the extent it</p> <p>6 calls for a legal conclusion.</p> <p>7 A. Yeah, same answer as previous.</p> <p>8 Q. Well, I'm not asking you for a</p> <p>9 legal conclusion. I'm asking you are</p> <p>10 there misrepresentations in this document</p> <p>11 that you claim Highland made?</p> <p>12 MS. WEISGERBER: Same</p> <p>13 objections.</p> <p>14 I think misrepresentations calls</p> <p>15 for a legal conclusion regarding legal</p> <p>16 misrepresentations, actionable</p> <p>17 misrepresentations. So if he doesn't</p> <p>18 have any non-privileged testimony to</p> <p>19 give, he can't give any testimony.</p> <p>20 MR. WILSON: Well, I'm here</p> <p>21 today to investigate HarbourVest's</p> <p>22 claim and one of the basis of</p> <p>23 HarbourVest's claim is</p> <p>24 misrepresentation. So I'm trying to</p> <p>25 figure out what those</p>	<p style="text-align: right;">Page 73</p> <p>1 Confidential - Pugatch</p> <p>2 misrepresentations were.</p> <p>3 And I would ask that the witness</p> <p>4 tell me if there's a misrepresentation</p> <p>5 in this document that was provided in</p> <p>6 this E-mail.</p> <p>7 MS. WEISGERBER: Same</p> <p>8 objections.</p> <p>9 Mike, if you have a general</p> <p>10 understanding of, generally,</p> <p>11 misrepresentations that HarbourVest</p> <p>12 believes were made in connection or</p> <p>13 regarding the Terry litigation,</p> <p>14 et cetera, you can provide that</p> <p>15 information.</p> <p>16 THE WITNESS: Yeah, sure.</p> <p>17 A. So in general, my understanding</p> <p>18 and the way that Highland had</p> <p>19 characterized the ongoing litigation with</p> <p>20 Mr. Terry was that it was nothing more</p> <p>21 than an employment dispute with a former</p> <p>22 employee and that, you know, the</p> <p>23 arbitration -- well, actually, it was</p> <p>24 before the Arbitration Board, but the</p> <p>25 ongoing litigation had no impact, bearing,</p>

<p style="text-align: right;">Page 74</p> <p>1 Confidential - Pugatch</p> <p>2 or ultimate result on the underlying CLOs</p> <p>3 that Highland managed, including the Acis</p> <p>4 CLOs.</p> <p>5 Q. So you're saying that</p> <p>6 Highland –</p> <p>7 MR. MORRIS: John, I'm sorry to</p> <p>8 interrupt. Before you go on, somebody</p> <p>9 with the initials DSD just joined the</p> <p>10 deposition. Can you please identify</p> <p>11 yourself?</p> <p>12 MR. DRAPER: This is Douglas</p> <p>13 Draper. I just changed machines.</p> <p>14 MR. MORRIS: Okay. No problem,</p> <p>15 Doug. Thank you.</p> <p>16 BY MR. WILSON:</p> <p>17 Q. So, and I'm not trying to put</p> <p>18 words in your mouth, but is the gist of</p> <p>19 what you're telling me that Highland</p> <p>20 represented that this was a minor dispute</p> <p>21 with a former employee and it would not</p> <p>22 affect its CLO business?</p> <p>23 A. Correct.</p> <p>24 MS. WEISGERBER: Objection to</p> <p>25 form.</p>	<p style="text-align: right;">Page 75</p> <p>1 Confidential - Pugatch</p> <p>2 A. Correct.</p> <p>3 Q. Well, are there any more</p> <p>4 specific E-mails or written</p> <p>5 communications, that you're aware of, that</p> <p>6 would contain misrepresentations by</p> <p>7 Highland to HarbourVest?</p> <p>8 MS. WEISGERBER: Objection to</p> <p>9 form.</p> <p>10 Are you asking about from</p> <p>11 today's production, or are you asking</p> <p>12 about just, in general?</p> <p>13 MR. WILSON: Well, you produced</p> <p>14 two E-mails to us today. I'm just</p> <p>15 asking if there's anything else he's</p> <p>16 aware of where there's written</p> <p>17 misrepresentations from Highland to</p> <p>18 HarbourVest.</p> <p>19 MS. WEISGERBER: Mike, if you</p> <p>20 have an answer separate from</p> <p>21 conversations with lawyers, et cetera,</p> <p>22 you can certainly answer.</p> <p>23 A. Yeah, my understanding of the</p> <p>24 documents I reviewed that were part of the</p> <p>25 production to you earlier today, there is</p>
<p style="text-align: right;">Page 76</p> <p>1 Confidential - Pugatch</p> <p>2 another document that would also include</p> <p>3 misrepresentations on the part of this,</p> <p>4 the Terry lawsuit and ultimate impact on</p> <p>5 the CLO business.</p> <p>6 BY MR. WILSON:</p> <p>7 Q. And what document is that?</p> <p>8 A. That was the E-mail, E-mail with</p> <p>9 an attachment around a response to a Wall</p> <p>10 Street Journal article and some of the</p> <p>11 content in the E-mail itself.</p> <p>12 Q. Okay. We'll look at that one.</p> <p>13 What was the – HarbourVest had</p> <p>14 seen the Terry Arbitration Award, correct?</p> <p>15 MS. WEISGERBER: Objection to</p> <p>16 form.</p> <p>17 Q. Prior to making its investment</p> <p>18 in HCLOF?</p> <p>19 A. We were aware of the existence</p> <p>20 and the outcome of the Arbitration Award.</p> <p>21 Q. Had you read the Arbitration</p> <p>22 Award?</p> <p>23 A. No.</p> <p>24 Q. Well, how did you know the</p> <p>25 substance of the Arbitration Award without</p>	<p style="text-align: right;">Page 77</p> <p>1 Confidential - Pugatch</p> <p>2 reading it?</p> <p>3 MS. WEISGERBER: Objection to</p> <p>4 form.</p> <p>5 A. We were informed by Highland of</p> <p>6 the outcome of the ongoing litigation and</p> <p>7 the outcome of the Arbitration Award.</p> <p>8 Q. Was that part of the</p> <p>9 documentation that you requested Highland</p> <p>10 provide you to continue your due</p> <p>11 diligence, before making the investment?</p> <p>12 MS. WEISGERBER: Objection to</p> <p>13 form.</p> <p>14 A. We certainly requested more</p> <p>15 color around the outcome of that, and any</p> <p>16 impact that it could have to HCLOF or the</p> <p>17 ongoing viability of Highland's CLO</p> <p>18 business.</p> <p>19 Q. And what, what were you provided</p> <p>20 with respect to the Terry Arbitration</p> <p>21 Award?</p> <p>22 MS. WEISGERBER: Objection to</p> <p>23 form.</p> <p>24 A. The existence of that award, the</p> <p>25 quantum of that award, the judgment of</p>

<p style="text-align: right;">Page 78</p> <p>1 Confidential - Pugatch</p> <p>2 just under \$8 million in connection with</p> <p>3 that award. That was the information that</p> <p>4 was disclosed at – and represented as a</p> <p>5 settlement or, you know, arbitration</p> <p>6 ruling, in connection with the employee</p> <p>7 litigation, wrongful termination suit.</p> <p>8 Q. So did HarbourVest not request a</p> <p>9 copy of the Arbitration Award to review?</p> <p>10 MS. WEISGERBER: Objection to</p> <p>11 form.</p> <p>12 A. We did not specifically, no.</p> <p>13 Q. And so, to this day, have you</p> <p>14 read the Arbitration Award?</p> <p>15 A. I have not.</p> <p>16 MS. WEISGERBER: Objection to</p> <p>17 form.</p> <p>18 Q. You have not?</p> <p>19 A. I have not.</p> <p>20 MR. WILSON: Okay. I think my</p> <p>21 last E-mail went out with Exhibit 9 on</p> <p>22 it. I will pull that up.</p> <p>23 Q. Can you see that on the screen</p> <p>24 share?</p> <p>25 A. Yes.</p>	<p style="text-align: right;">Page 79</p> <p>1 Confidential - Pugatch</p> <p>2 (Whereupon, Exhibit 9,</p> <p>3 11/29/2017 E-mail with cover letter</p> <p>4 Highland Capital Management, was</p> <p>5 marked for identification.)</p> <p>6 Q. Okay. So I think this is out of</p> <p>7 order, but this should have been first in</p> <p>8 the exhibit. But this is an E-mail from</p> <p>9 Hunter Covitz to Dustin Willard, Michael</p> <p>10 Pugatch and Nick Bellisario, carbon copies</p> <p>11 to Trey Parker and Brad Eden.</p> <p>12 And Trey Parker and Brad Eden</p> <p>13 are Highland affiliates, right?</p> <p>14 A. Yes.</p> <p>15 Q. And we've talked about Dustin</p> <p>16 Willard. Who's Nick Bellisario?</p> <p>17 A. He was another member of the</p> <p>18 HarbourVest team.</p> <p>19 Q. And was he on the, the</p> <p>20 four-member board that you talked about</p> <p>21 earlier, that made the investment</p> <p>22 decision?</p> <p>23 A. No, he was the junior member of</p> <p>24 the investment team that I alluded to.</p> <p>25 Q. Okay. And this, this E-mail</p>
<p style="text-align: right;">Page 80</p> <p>1 Confidential - Pugatch</p> <p>2 came out about two weeks after the</p> <p>3 HarbourVest investment, correct?</p> <p>4 A. Correct.</p> <p>5 Q. And it's your opinion or</p> <p>6 position that this E-mail contains</p> <p>7 misrepresentations that Highland made to</p> <p>8 HarbourVest?</p> <p>9 MS. WEISGERBER: Objection to</p> <p>10 form. Objection to the extent it</p> <p>11 calls for a legal conclusion.</p> <p>12 A. Yes.</p> <p>13 Q. And there was a Wall Street</p> <p>14 Journal article that had come out shortly</p> <p>15 before this E-mail, correct?</p> <p>16 A. Correct.</p> <p>17 Q. And how did you became aware of</p> <p>18 that Wall Street Journal article?</p> <p>19 A. I certainly would have seen it.</p> <p>20 I may have been sent it separately by</p> <p>21 Highland, I don't recall.</p> <p>22 Q. You don't recall if you saw it</p> <p>23 independently or Highland telling you</p> <p>24 about it?</p> <p>25 A. I don't.</p>	<p style="text-align: right;">Page 81</p> <p>1 Confidential - Pugatch</p> <p>2 Q. And what did you – what was</p> <p>3 your reaction to receiving these E-mails</p> <p>4 from Highland regarding that article?</p> <p>5 MS. WEISGERBER: Objection to</p> <p>6 form.</p> <p>7 A. The article or the accusations</p> <p>8 in the article were something that</p> <p>9 required more explanation from our</p> <p>10 perspective.</p> <p>11 Q. And attached to this E-mail</p> <p>12 was – we just scrolled through it a</p> <p>13 second ago – but a letter from James</p> <p>14 Dondero that was sent to the</p> <p>15 editor-in-chief of the Wall Street</p> <p>16 Journal, Mr. Gerard Baker, on November</p> <p>17 28th.</p> <p>18 And did you read this</p> <p>19 attachment?</p> <p>20 A. Yes.</p> <p>21 Q. And did this attachment to this</p> <p>22 E-mail aleve your concerns that you had</p> <p>23 regarding the article?</p> <p>24 MS. WEISGERBER: Objection to</p> <p>25 form.</p>

<p style="text-align: right;">Page 82</p> <p>1 Confidential - Pugatch</p> <p>2 A. I wouldn't say alleviated the</p> <p>3 concerns but certainly provided an</p> <p>4 explanation or refute to some of the</p> <p>5 claims made in the, in the article.</p> <p>6 Q. And do you contend that this</p> <p>7 letter that was written to Gerard Baker</p> <p>8 and provided later to HarbourVest was a</p> <p>9 material misrepresentation?</p> <p>10 MS. WEISGERBER: Objection to</p> <p>11 form.</p> <p>12 Don't answer that, Mike. It</p> <p>13 calls for a legal conclusion.</p> <p>14 MR. WILSON: I'm asking for his</p> <p>15 understanding.</p> <p>16 Q. Do you contend that there's</p> <p>17 misrepresentations in this letter?</p> <p>18 MS. WEISGERBER: Material</p> <p>19 misrepresentations absolutely calls</p> <p>20 for a legal conclusion, John.</p> <p>21 MR. WILSON: Well, I've</p> <p>22 shortened it to misrepresentations.</p> <p>23 So I just want to know if he thinks</p> <p>24 there's anything that's misrepresented</p> <p>25 in this letter.</p>	<p style="text-align: right;">Page 83</p> <p>1 Confidential - Pugatch</p> <p>2 MS. WEISGERBER: Same</p> <p>3 objections.</p> <p>4 Mike, if you have an</p> <p>5 understanding, separate from</p> <p>6 conversations with lawyers, you can</p> <p>7 answer.</p> <p>8 A. I would need to reread the</p> <p>9 letter to definitively answer that outside</p> <p>10 of conversations with counsel.</p> <p>11 Q. But to be clear, this letter was</p> <p>12 issued two weeks after HarbourVest's</p> <p>13 investment, correct?</p> <p>14 A. Correct.</p> <p>15 MS. WEISGERBER: Objection;</p> <p>16 asked and answered.</p> <p>17 MR. WILSON: I'm going to now</p> <p>18 send out the next exhibit, which is</p> <p>19 going to be Exhibit No. 10.</p> <p>20 (Whereupon, Exhibit 10, 2004</p> <p>21 Examination of Investor in Highland</p> <p>22 CLO Funding Ltd. 10/10/2018, was</p> <p>23 marked for identification.)</p> <p>24 MR. WILSON: It just went</p> <p>25 through. So I'm going to pull it up</p>
<p style="text-align: right;">Page 84</p> <p>1 Confidential - Pugatch</p> <p>2 on my screen share.</p> <p>3 So this Exhibit 10, the document</p> <p>4 I received this morning, filed in the</p> <p>5 Acis bankruptcy, it looks like, well,</p> <p>6 let's see, dated in, dated October 10,</p> <p>7 2018.</p> <p>8 BY MR. WILSON:</p> <p>9 Q. Have you seen this document</p> <p>10 before?</p> <p>11 A. Yes.</p> <p>12 Q. And it's a motion for 2004</p> <p>13 Examination of Investor in Highland CLO</p> <p>14 Funding, Ltd., correct?</p> <p>15 A. Sorry. Was there a question,</p> <p>16 John?</p> <p>17 Q. Yeah. I was just asking you to</p> <p>18 confirm that this was the motion for 2004</p> <p>19 Examination of Investor in Highland CLO</p> <p>20 Funding?</p> <p>21 A. Yes.</p> <p>22 Q. And so if I scroll down to</p> <p>23 Paragraph 6, which is on, it looks like</p> <p>24 it's on Page 4. In the second sentence,</p> <p>25 it says that "Although HCLOF/ALF was a one</p>	<p style="text-align: right;">Page 85</p> <p>1 Confidential - Pugatch</p> <p>2 time wholly-owned by an affiliate of</p> <p>3 Highland, it did an offering memorandum in</p> <p>4 November of 2017 and as a result, is now</p> <p>5 owned 49.985% by certain affiliates of a</p> <p>6 large investor and manager of private</p> <p>7 equity funds."</p> <p>8 And that's defined as investor.</p> <p>9 So the Investor is the HarbourVest</p> <p>10 entities collectively, correct?</p> <p>11 A. Correct.</p> <p>12 Q. All right. And then the next</p> <p>13 sentence, says that "Despite its large</p> <p>14 ownership percentage in HCLOF in the</p> <p>15 alleged millions in losses that will</p> <p>16 result if the Acis CLOs are not reset to</p> <p>17 make them consistent with prevailing</p> <p>18 market conditions the Investor has not yet</p> <p>19 appeared in this case or taken any</p> <p>20 position in this bankruptcy case."</p> <p>21 Do you see that?</p> <p>22 A. I do.</p> <p>23 Q. Is that correct?</p> <p>24 MS. WEISGERBER: Objection to</p> <p>25 form.</p>

<p style="text-align: right;">Page 86</p> <p>1 Confidential - Pugatch</p> <p>2 A. Is what correct?</p> <p>3 Q. Well, I guess, I'm most</p> <p>4 concerned with this last part of the</p> <p>5 sentence. It starts with "The Investor</p> <p>6 has not yet appeared in this case or taken</p> <p>7 any position in the bankruptcy case."</p> <p>8 Do you agree with that?</p> <p>9 MS. WEISGERBER: Objection to</p> <p>10 form.</p> <p>11 Mike, if you want to look at the</p> <p>12 whole document, you're welcome to.</p> <p>13 This is not a document that's a</p> <p>14 HarbourVest-prepared document.</p> <p>15 BY MR. WILSON:</p> <p>16 Q. Maybe a better way of asking the</p> <p>17 question is: As of the date of this</p> <p>18 document, which was in October of 2018,</p> <p>19 had HarbourVest appeared in the Acis</p> <p>20 bankruptcy?</p> <p>21 A. No, we did not.</p> <p>22 Q. And had they asserted any</p> <p>23 positions regarding the Acis bankruptcy?</p> <p>24 A. Not through the court.</p> <p>25 MS. WEISGERBER: Objection to</p>	<p style="text-align: right;">Page 87</p> <p>1 Confidential - Pugatch</p> <p>2 form.</p> <p>3 Q. Okay. Had Highland encouraged</p> <p>4 HarbourVest to participate in the Acis</p> <p>5 bankruptcy?</p> <p>6 MS. WEISGERBER: Objection to</p> <p>7 form.</p> <p>8 A. No.</p> <p>9 Q. They did not?</p> <p>10 MS. WEISGERBER: Objection to</p> <p>11 form.</p> <p>12 Q. Highland did not encourage</p> <p>13 HarbourVest to participate in the Acis</p> <p>14 bankruptcy?</p> <p>15 A. When you say "participate," can</p> <p>16 you define that, please.</p> <p>17 Q. Well, appear in the case, as</p> <p>18 stated in this motion.</p> <p>19 A. No, they had not.</p> <p>20 Q. Did Harbour – I'm sorry – did</p> <p>21 Highland keep HarbourVest apprised of the</p> <p>22 events that occurred in the Acis</p> <p>23 bankruptcy?</p> <p>24 MS. WEISGERBER: Objection to</p> <p>25 form. I'm just going to restate my</p>
<p style="text-align: right;">Page 88</p> <p>1 Confidential - Pugatch</p> <p>2 objection to the extent you're asking</p> <p>3 questions about HarbourVest. This is</p> <p>4 Mr. Pugatch answering, based on his</p> <p>5 knowledge.</p> <p>6 A. We were kept informed from time</p> <p>7 to time throughout the Acis bankruptcy</p> <p>8 proceeding.</p> <p>9 Q. Well, did you, in fact, have</p> <p>10 weekly conference calls with Highland</p> <p>11 representatives regarding the Acis</p> <p>12 bankruptcy?</p> <p>13 MS. WEISGERBER: Objection to</p> <p>14 form.</p> <p>15 A. I don't recall them being</p> <p>16 weekly, no.</p> <p>17 Q. You can agree with me you</p> <p>18 participated in the conference calls with</p> <p>19 Highland regarding the Acis bankruptcy?</p> <p>20 A. Yes.</p> <p>21 MS. WEISGERBER: Same objection.</p> <p>22 Q. And on what, on what –</p> <p>23 MR. WILSON: Sorry. Strike</p> <p>24 that.</p> <p>25 Q. With what regularity would you</p>	<p style="text-align: right;">Page 89</p> <p>1 Confidential - Pugatch</p> <p>2 estimate those conference calls occurred,</p> <p>3 if it's not weekly?</p> <p>4 MS. WEISGERBER: Objection to</p> <p>5 form.</p> <p>6 A. From memory, maybe once, once a</p> <p>7 month on average. Sometimes more</p> <p>8 frequently, sometimes less frequently.</p> <p>9 Q. Did Highland provide you with</p> <p>10 documents and evidence that were filed in</p> <p>11 the Acis bankruptcy?</p> <p>12 MS. WEISGERBER: Objection to</p> <p>13 form.</p> <p>14 We're really starting to get</p> <p>15 pretty far afield here, John, from</p> <p>16 HarbourVest. You know, I'm not sure</p> <p>17 where you're going with this. This is</p> <p>18 a settlement motion that's teed up for</p> <p>19 the court.</p> <p>20 You're welcome to keep going,</p> <p>21 but at some point we're going to cut</p> <p>22 it off.</p> <p>23 MR. WILSON: Well, I think – I</p> <p>24 don't think I'm going to go too far</p> <p>25 down this path, but I think this</p>

<p style="text-align: right;">Page 90</p> <p>1 Confidential - Pugatch</p> <p>2 directly relates to the claims that</p> <p>3 HarbourVest has made. But I'll repeat</p> <p>4 my question.</p> <p>5 BY MR. WILSON:</p> <p>6 Q. Did Highland provide HarbourVest</p> <p>7 with documents and evidence that were</p> <p>8 filed in the Acis bankruptcy?</p> <p>9 MS. WEISGERBER: Objection to</p> <p>10 form.</p> <p>11 A. I don't recall what documents</p> <p>12 Highland may have provided to us, at that</p> <p>13 point in time.</p> <p>14 Q. I don't want you to recall</p> <p>15 specific documents that were provided, but</p> <p>16 did, did Highland provide documents from</p> <p>17 the Acis bankruptcy to HarbourVest?</p> <p>18 MS. WEISGERBER: Objection to</p> <p>19 form. Asked and answered.</p> <p>20 A. I don't recall.</p> <p>21 Q. You don't recall?</p> <p>22 A. (Nods.)</p> <p>23 Q. Would you dispute that between</p> <p>24 2018 and 2019 that Highland provided over</p> <p>25 40,000 pages of documents related to the</p>	<p style="text-align: right;">Page 91</p> <p>1 Confidential - Pugatch</p> <p>2 Acis bankruptcy to HarbourVest?</p> <p>3 MS. WEISGERBER: Objection to</p> <p>4 form, foundation.</p> <p>5 A. I don't know and I don't recall.</p> <p>6 Q. And the Acis plan became</p> <p>7 effective on February 1st, 2019. Is that</p> <p>8 your understanding?</p> <p>9 A. I believe so, yes.</p> <p>10 Q. And do you -- I asked you this</p> <p>11 earlier, but I'm going to ask again. Do</p> <p>12 you have any understanding of what the</p> <p>13 value of HCLOF was, at that date?</p> <p>14 A. I don't recall.</p> <p>15 MS. WEISGERBER: Objection to</p> <p>16 form.</p> <p>17 Q. You don't?</p> <p>18 A. I don't recall, no.</p> <p>19 Q. And there was an injunction put</p> <p>20 in place in the Acis bankruptcy that</p> <p>21 prevented certain actions with respect to</p> <p>22 HCLOF, correct?</p> <p>23 MS. WEISGERBER: Objection to</p> <p>24 form, foundation.</p> <p>25 MR. MALONEY: Join.</p>
<p style="text-align: right;">Page 92</p> <p>1 Confidential - Pugatch</p> <p>2 A. Yes.</p> <p>3 Q. Now, I'm going to go back up to</p> <p>4 Paragraph 2. This says that Acis LP</p> <p>5 manages the Acis CLOs, that certain</p> <p>6 portfolio management agreement between</p> <p>7 Acis, and then it goes on. So what are</p> <p>8 the Acis CLOs, as it relates to the</p> <p>9 investment that HarbourVest made?</p> <p>10 MR. MALONEY: Objection to the</p> <p>11 form of the question.</p> <p>12 MS. WEISGERBER: Objection to</p> <p>13 form.</p> <p>14 A. The Acis CLOs -- or HCLOF owned</p> <p>15 equity in certain of the Acis CLOs as a</p> <p>16 portion of its investment portfolio.</p> <p>17 Q. And I think you were trying to</p> <p>18 distinguish earlier between who the</p> <p>19 portfolio manager was. And that would</p> <p>20 depend on whether it was an Acis CLO or a</p> <p>21 Highland CLO; is that correct?</p> <p>22 MR. MALONEY: Objection to form.</p> <p>23 MS. WEISGERBER: Objection to</p> <p>24 form, misstates testimony.</p> <p>25 A. I was referencing the portfolio</p>	<p style="text-align: right;">Page 93</p> <p>1 Confidential - Pugatch</p> <p>2 manager of the underlying CLOs, yes.</p> <p>3 Q. But we can agree that Acis had</p> <p>4 responsibility for managing at least a</p> <p>5 portion of HCLOF, correct?</p> <p>6 A. Highland --</p> <p>7 MR. WILSON: Objection to form.</p> <p>8 MR. MALONEY: Objection to form</p> <p>9 as well, foundation, and legal</p> <p>10 conclusion.</p> <p>11 (Reporter clarification.)</p> <p>12 A. It's my understanding it's</p> <p>13 Highlands' subsidiaries, yes.</p> <p>14 Q. Okay. Well, I'm going to go</p> <p>15 down to Paragraph 4, at the top of your</p> <p>16 screen here where it says, "Recently</p> <p>17 William Scott, the director of HCLOF,</p> <p>18 testified that he wants to reset the Acis</p> <p>19 CLOs to bring them in line with current</p> <p>20 market interest rates, that the inability</p> <p>21 to do the reset is causing damages to</p> <p>22 HCLOF in the amount of approximately</p> <p>23 \$295,000 per week."</p> <p>24 Is that an accurate statement?</p> <p>25 MS. WEISGERBER: Objection to</p>

<p style="text-align: right;">Page 94</p> <p>1 Confidential - Pugatch</p> <p>2 form and foundation.</p> <p>3 MR. MALONEY: Mark Maloney.</p> <p>4 Object to form and foundation.</p> <p>5 A. I don't know. You'd have to ask</p> <p>6 William Scott.</p> <p>7 Q. Well, were you aware, I mean,</p> <p>8 there's a citation to a, well, I don't</p> <p>9 know if there's a citation on this one.</p> <p>10 But it says that he recently testified.</p> <p>11 Were you aware that he testified that he</p> <p>12 wanted to reset the Acis CLOs?</p> <p>13 MS. WEISGERBER: Same objection.</p> <p>14 We're really getting far afield.</p> <p>15 MR. WILSON: I'm just asking if</p> <p>16 he was aware that this statement</p> <p>17 occurred.</p> <p>18 A. At some point in time, yes, I</p> <p>19 became aware of that.</p> <p>20 Q. Okay. Do you agree that the</p> <p>21 inability to do a reset was causing</p> <p>22 damages in the amount of \$295,000 per</p> <p>23 week?</p> <p>24 MS. WEISGERBER: Objection to</p> <p>25 form and foundation. This is not a</p>	<p style="text-align: right;">Page 95</p> <p>1 Confidential - Pugatch</p> <p>2 HarbourVest-prepared document.</p> <p>3 MR. WILSON: Well, I understand</p> <p>4 that. I'm just asking if he agrees</p> <p>5 with it.</p> <p>6 A. I don't have enough information</p> <p>7 to assess that, specifically the \$295,000</p> <p>8 per week number.</p> <p>9 Q. I want to go down to Paragraph 7</p> <p>10 of this document, and this is going to be</p> <p>11 at the top of Page 5. It says</p> <p>12 "Mr. Ellington also testified that because</p> <p>13 it would be putting in additional capital</p> <p>14 in connection with any reset CLOs, the</p> <p>15 Investor," and we discussed that that's</p> <p>16 HarbourVest, "had the ability to start</p> <p>17 'calling the shots' and dictate the terms</p> <p>18 of any reset transactions."</p> <p>19 Do you agree with that?</p> <p>20 A. No.</p> <p>21 MS. WEISGERBER: Objection to</p> <p>22 form.</p> <p>23 Q. I want to go down to Paragraph</p> <p>24 9.</p> <p>25 It says, "The Trustee also needs</p>
<p style="text-align: right;">Page 96</p> <p>1 Confidential - Pugatch</p> <p>2 information regarding whether the Investor</p> <p>3 presently has any concerns about pursuing</p> <p>4 reset transactions with the Reorganized</p> <p>5 Acis and Brigade, under the plan now that</p> <p>6 Acis has been able to successfully serve</p> <p>7 as the portfolio manager for the Acis CLOs</p> <p>8 on a post-petition basis, and there are no</p> <p>9 impediments to the ability of the</p> <p>10 Reorganized Acis and Brigade to pursue a</p> <p>11 reset on the Acis CLOs."</p> <p>12 Do you know whether the Investor</p> <p>13 had any concerns about pursuing a reset?</p> <p>14 MS. WEISGERBER: Objection to</p> <p>15 form, foundation.</p> <p>16 A. The context of a reset or</p> <p>17 refinancing of the various CLOs in HCLOF</p> <p>18 was part of the original investment</p> <p>19 thesis. So there would not have been</p> <p>20 concerns about the ability to do so. Our</p> <p>21 concerns were more in the inability to do</p> <p>22 so, as a result of the Acis bankruptcy.</p> <p>23 Q. But here, you've got the Trustee</p> <p>24 representing in Paragraph 5, that</p> <p>25 according to the Trustee's Second Amended</p>	<p style="text-align: right;">Page 97</p> <p>1 Confidential - Pugatch</p> <p>2 Joint Plan, it provides for such a reset</p> <p>3 to be performed by the Reorganized Acis</p> <p>4 and supervised by Brigade Capital</p> <p>5 Management.</p> <p>6 And it appears to me that the</p> <p>7 Trustee is trying to get the Investor's</p> <p>8 position on whether a reset should be</p> <p>9 pursued. And I'm just asking you whether</p> <p>10 HarbourVest objected to a reset at this</p> <p>11 time?</p> <p>12 MS. WEISGERBER: I'm going to</p> <p>13 object to all of the colloquy before.</p> <p>14 I'm going to object to any extent</p> <p>15 Mike's being asked about what the</p> <p>16 Trustee wanted or viewed. If you want</p> <p>17 to ask your question in isolation, go</p> <p>18 ahead.</p> <p>19 Q. What was HarbourVest's position</p> <p>20 regarding a reset, as of the date that</p> <p>21 this was filed, and I'll look again,</p> <p>22 October 10, 2018?</p> <p>23 MS. WEISGERBER: Objection to</p> <p>24 form. Objection to the extent it's</p> <p>25 asking HarbourVest's position. And I</p>

<p style="text-align: right;">Page 98</p> <p>1 Confidential - Pugatch</p> <p>2 cannot conceive how this is relevant</p> <p>3 to the 9019 motion before the court</p> <p>4 right now.</p> <p>5 Nonetheless, Mike, if you have</p> <p>6 an answer, on behalf of yourself, you</p> <p>7 can answer.</p> <p>8 A. HarbourVest was a passive</p> <p>9 minority investor in HCLOF. It had no</p> <p>10 ability to control the underlying</p> <p>11 portfolio management or ability to reset,</p> <p>12 refinance, or call in any of the equity of</p> <p>13 the underlying CLOs. That was all under</p> <p>14 the purview of Highland.</p> <p>15 Q. Did you understand that</p> <p>16 Mr. Ellington had given sworn testimony</p> <p>17 that the Investor is the party calling the</p> <p>18 shots for HCLOF, with respect to any reset</p> <p>19 transactions?</p> <p>20 MS. WEISGERBER: Objection to</p> <p>21 form.</p> <p>22 A. I did become aware of it, yes.</p> <p>23 Q. When did you become aware of</p> <p>24 that?</p> <p>25 A. At some point subsequent to that</p>	<p style="text-align: right;">Page 99</p> <p>1 Confidential - Pugatch</p> <p>2 testimony being given.</p> <p>3 Q. But was it when you read this</p> <p>4 motion that we're looking at as</p> <p>5 Exhibit 10?</p> <p>6 MS. WEISGERBER: Objection to</p> <p>7 form.</p> <p>8 A. It may have been. I don't</p> <p>9 recall the exact time or medium that I</p> <p>10 became aware of that.</p> <p>11 Q. Was a deposition given as a</p> <p>12 result of this motion?</p> <p>13 MS. WEISGERBER: Objection to</p> <p>14 form. If you have the whole document,</p> <p>15 Mike, that may make sense.</p> <p>16 MR. WILSON: Well, this motion</p> <p>17 at the top says it's a Motion for 2004</p> <p>18 Examination of Investor. And then</p> <p>19 attached to this motion are some</p> <p>20 document requests, and then deposition</p> <p>21 topics for a corporate representative</p> <p>22 of the Investor, and then a proposed</p> <p>23 order.</p> <p>24 BY MR. WILSON:</p> <p>25 Q. Do you recall whether a</p>
<p style="text-align: right;">Page 100</p> <p>1 Confidential - Pugatch</p> <p>2 deposition was given, after this motion</p> <p>3 was filed?</p> <p>4 A. Yes.</p> <p>5 Q. And who was the designated</p> <p>6 deponent?</p> <p>7 A. I was.</p> <p>8 Q. And were documents produced, as</p> <p>9 a result of this?</p> <p>10 A. Yes, there were.</p> <p>11 Q. And were you asked at that</p> <p>12 deposition what the Investor's position on</p> <p>13 a reset was?</p> <p>14 MS. WEISGERBER: Objection to</p> <p>15 form.</p> <p>16 If you recall.</p> <p>17 A. I don't recall specifically that</p> <p>18 question being asked.</p> <p>19 Q. Well, do you know what</p> <p>20 the Debtor's position -- I'm sorry, the</p> <p>21 Debtor's -- the Investor's position on a</p> <p>22 reset was as of that day?</p> <p>23 MS. WEISGERBER: Objection to</p> <p>24 form. Asked and answered.</p> <p>25 A. I would just say again, in</p>	<p style="text-align: right;">Page 101</p> <p>1 Confidential - Pugatch</p> <p>2 general, the original investment thesis</p> <p>3 here was predicated on a refinancing reset</p> <p>4 of the various CLOs, and we were not in</p> <p>5 control as a passive minority investor</p> <p>6 here to --</p> <p>7 Q. Well, you said you weren't in</p> <p>8 control, but what would HarbourVest's</p> <p>9 preference have been?</p> <p>10 MS. WEISGERBER: Objection to</p> <p>11 form.</p> <p>12 A. I do not recall.</p> <p>13 MS. WEISGERBER: If you recall.</p> <p>14 A. I don't recall the specifics</p> <p>15 around what Acis CLO were referring to</p> <p>16 here or what the specific implications of</p> <p>17 a reset were at that time; but regardless,</p> <p>18 that was a decision for the investment</p> <p>19 manager of HCLO.</p> <p>20 Q. But was it your opinion, your</p> <p>21 personal opinion, that a reset was</p> <p>22 appropriate?</p> <p>23 MS. WEISGERBER: Objection to</p> <p>24 form.</p> <p>25 A. Again, we were not the portfolio</p>

<p style="text-align: right;">Page 102</p> <p>1 Confidential - Pugatch</p> <p>2 manager of HCLOF. We were not in control</p> <p>3 of those decisions or making</p> <p>4 recommendations on those decisions. That</p> <p>5 was the delegated authority of Highland,</p> <p>6 as the investment manager.</p> <p>7 Q. I'm not asking for that. I'm</p> <p>8 asking for your personal feelings toward a</p> <p>9 reset.</p> <p>10 MS. WEISGERBER: Same objection.</p> <p>11 He's only answering on behalf of</p> <p>12 himself, and it's been asked and</p> <p>13 answered three times since.</p> <p>14 MR. WILSON: Well, he hasn't</p> <p>15 answered the question. He's just told</p> <p>16 me they don't have the authority to do</p> <p>17 the reset.</p> <p>18 MS. WEISGERBER: And he told you</p> <p>19 the other information he'd be required</p> <p>20 to even have an opinion on it. So</p> <p>21 same objection stands. It's not a</p> <p>22 specific enough question for him.</p> <p>23 Mike, you're welcome, if you</p> <p>24 have, if you have an answer, you're</p> <p>25 welcome to give it.</p>	<p style="text-align: right;">Page 103</p> <p>1 Confidential - Pugatch</p> <p>2 A. Yeah, the investment guidelines</p> <p>3 of HCLOF, from the documents that we</p> <p>4 signed at the time we entered into the</p> <p>5 transaction, laid out the specific, again,</p> <p>6 investment guidelines that HCLOF would be</p> <p>7 guided under, including the opportunity to</p> <p>8 refinance or reset various CLOs over time,</p> <p>9 in accordance with Highland's, you know,</p> <p>10 expectations and ultimate decision to do</p> <p>11 so.</p> <p>12 Q. But did you believe, at this</p> <p>13 time, that a reset was appropriate?</p> <p>14 MS. WEISGERBER: Objection to</p> <p>15 form. This is asked and answered</p> <p>16 several times now, I think we should</p> <p>17 move on. He's given you an answer.</p> <p>18 MR. WILSON: Well, I want to</p> <p>19 know what his personal opinion was</p> <p>20 about whether the reset was</p> <p>21 appropriate.</p> <p>22 A. What reset are you referring to?</p> <p>23 Q. A reset as of October 10, 2018.</p> <p>24 At that time, did you believe that a reset</p> <p>25 was appropriate?</p>
<p style="text-align: right;">Page 104</p> <p>1 Confidential - Pugatch</p> <p>2 A. A reset of what?</p> <p>3 MS. WEISGERBER: Same objection.</p> <p>4 Q. A reset as been discussed all</p> <p>5 through this motion, the same reset we're</p> <p>6 talking about.</p> <p>7 MS. WEISGERBER: Objection.</p> <p>8 Same objections. I just don't see how</p> <p>9 he could possibly answer this vague</p> <p>10 question.</p> <p>11 Q. Okay. So William Scott,</p> <p>12 director of HCLOF, testified that he</p> <p>13 wanted to reset the Acis CLOs because if</p> <p>14 they don't, they are losing \$295,000 a</p> <p>15 week.</p> <p>16 Did you think that a reset was</p> <p>17 appropriate in line with what Mr. Scott</p> <p>18 believed?</p> <p>19 MR. MALONEY: Objection to form,</p> <p>20 foundation.</p> <p>21 MS. WEISGERBER: Same</p> <p>22 objections. And asked and answered</p> <p>23 numerous times.</p> <p>24 A. We were not managing the</p> <p>25 portfolio. We were an investor in a</p>	<p style="text-align: right;">Page 105</p> <p>1 Confidential - Pugatch</p> <p>2 company, an investment company that was</p> <p>3 managing this. We were not, I was not</p> <p>4 proximate enough to any of the underlying</p> <p>5 happenings of the look through CLO</p> <p>6 positions of HCLOF to have an informed</p> <p>7 view on this, at this time.</p> <p>8 Q. Is your testimony that you did</p> <p>9 not have an opinion as to whether the Acis</p> <p>10 CLO should be reset in late 2018?</p> <p>11 MS. WEISGERBER: Objection to</p> <p>12 form. Misstates testimony.</p> <p>13 A. My view is that the original</p> <p>14 investment guidelines here called for a</p> <p>15 reset or refinance of the CLOs and that</p> <p>16 Highland was subsequently in full control</p> <p>17 of whether or not to pursue this, and we,</p> <p>18 HarbourVest, as an investor had no ability</p> <p>19 to object or to force that on a go-forward</p> <p>20 basis.</p> <p>21 MR. WILSON: Objection.</p> <p>22 Nonresponsive.</p> <p>23 Q. I want to know your personal</p> <p>24 opinion of whether you thought a reset was</p> <p>25 appropriate in October of 2018.</p>

<p style="text-align: right;">Page 106</p> <p>1 Confidential - Pugatch</p> <p>2 MR. MORRIS: Objection to the</p> <p>3 form of the question. That's been</p> <p>4 asked and answered.</p> <p>5 MR. WILSON: He has yet to give</p> <p>6 his answer to –</p> <p>7 MR. MORRIS: He just told you he</p> <p>8 didn't have enough information. He</p> <p>9 just told you that, crystal clear.</p> <p>10 MR. WILSON: Well, I'm not going</p> <p>11 to argue with you, John, but I just</p> <p>12 want an answer to my question.</p> <p>13 His answer, he wouldn't agree</p> <p>14 with my, with my summation that he had</p> <p>15 no opinion, so I just want to know</p> <p>16 what his opinion is.</p> <p>17 MS. WEISGERBER: Same</p> <p>18 objections.</p> <p>19 You're not giving him enough</p> <p>20 information to answer the question,</p> <p>21 and at this point, it would be</p> <p>22 speculation. We can just keep going</p> <p>23 in circles on this, but your –</p> <p>24 MR. WILSON: His opinion would</p> <p>25 be speculation?</p>	<p style="text-align: right;">Page 107</p> <p>1 Confidential - Pugatch</p> <p>2 MS. WEISGERBER: He said that,</p> <p>3 he actually testified at some point</p> <p>4 that he doesn't recall specifics of</p> <p>5 the time, so that was another piece of</p> <p>6 the puzzle.</p> <p>7 I mean, I don't want to be</p> <p>8 coaching the witness or giving</p> <p>9 testimony here, but I think you're not</p> <p>10 listening to the things he's saying,</p> <p>11 John, just because you don't like it.</p> <p>12 BY MR. WILSON:</p> <p>13 Q. Mr. Pugatch, did you have an</p> <p>14 opinion, in October of 2019, about whether</p> <p>15 the Acis CLOs should be reset?</p> <p>16 MS. WEISGERBER: Objection to</p> <p>17 form.</p> <p>18 A. I don't recall any definitive</p> <p>19 opinion I would have had, but as stated,</p> <p>20 was not proximate enough to have an</p> <p>21 informed opinion, in any event.</p> <p>22 Q. And to your knowledge, have the</p> <p>23 Acis CLOs ever been reset?</p> <p>24 MS. WEISGERBER: Objection to</p> <p>25 form, foundation.</p>
<p style="text-align: right;">Page 108</p> <p>1 Confidential - Pugatch</p> <p>2 A. I do not believe that any of the</p> <p>3 Acis CLOs were ever reset.</p> <p>4 Q. All right. So who negotiated</p> <p>5 this claim, the settlement of this claim</p> <p>6 on behalf of HarbourVest?</p> <p>7 A. I did.</p> <p>8 Q. And who negotiated for the</p> <p>9 Debtor?</p> <p>10 A. Jim Seery.</p> <p>11 Q. And when did those negotiations</p> <p>12 begin?</p> <p>13 A. It started sometime in November,</p> <p>14 I believe.</p> <p>15 Q. And are you aware that Jim Seery</p> <p>16 has ever taken the position that the</p> <p>17 HarbourVest claim was worthless?</p> <p>18 MS. WEISGERBER: Objection to</p> <p>19 form, foundation.</p> <p>20 A. No, I'm not aware of that.</p> <p>21 Q. Has Jim Seery ever offered</p> <p>22 \$5 million to settle the HarbourVest</p> <p>23 claim?</p> <p>24 A. Not to my knowledge.</p> <p>25 MS. WEISGERBER: Objection to</p>	<p style="text-align: right;">Page 109</p> <p>1 Confidential - Pugatch</p> <p>2 form.</p> <p>3 MR. WILSON: I'm going to send</p> <p>4 out Exhibit 11.</p> <p>5 (Whereupon, Exhibit 11,</p> <p>6 Declaration of John A. Morris in</p> <p>7 Support of the Debtor's Motion For</p> <p>8 Entry of an Order Approving Settlement</p> <p>9 With Harbourvest (Claim Nos. 143, 147,</p> <p>10 149, 150, 153, 154) and Authorizing</p> <p>11 Actions, 82 pages, was marked for</p> <p>12 identification.)</p> <p>13 BY MR. WILSON:</p> <p>14 Q. I want pull this up on the</p> <p>15 screen share. This Exhibit 11 is the</p> <p>16 Declaration of John Morris in Support of</p> <p>17 the Debtor's 9019 Motion, bears</p> <p>18 Document 1631. And attached to this</p> <p>19 exhibit is a trim cut copy of the</p> <p>20 Settlement Agreement executed December 23,</p> <p>21 2020.</p> <p>22 And the Settlement Agreement has</p> <p>23 Paragraph 1, Settlement of Claims, that</p> <p>24 HarbourVest is going to receive a</p> <p>25 \$45 million unsecured, general unsecured</p>

<p style="text-align: right;">Page 110</p> <p>1 Confidential - Pugatch</p> <p>2 claim, and a \$35 million subordinated</p> <p>3 claim.</p> <p>4 And then Part B of that</p> <p>5 paragraph states that HarbourVest is going</p> <p>6 to transfer all its rights, titles, and</p> <p>7 interests to its investment in CLOF to the</p> <p>8 Debtor or its nominee.</p> <p>9 Is that your understanding of</p> <p>10 the general terms of this settlement?</p> <p>11 MS. WEISGERBER: Objection to</p> <p>12 form.</p> <p>13 A. Yes, it is.</p> <p>14 Q. Okay. And also in Paragraph 5,</p> <p>15 Each HarbourVest party agrees that it will</p> <p>16 vote all of HarbourVest claims held by</p> <p>17 such HarbourVest party to accept the plan.</p> <p>18 And I won't read all of that.</p> <p>19 But the gist of this paragraph is that</p> <p>20 HarbourVest is going to vote for the</p> <p>21 Debtor's proposed plan; is that correct?</p> <p>22 MS. WEISGERBER: Objection to</p> <p>23 form.</p> <p>24 A. Yes, correct.</p> <p>25 Q. And how did that term come to be</p>	<p style="text-align: right;">Page 111</p> <p>1 Confidential - Pugatch</p> <p>2 in this Settlement Agreement?</p> <p>3 MS. WEISGERBER: Objection to</p> <p>4 form.</p> <p>5 A. I believe it was put there as</p> <p>6 part of the drafting of the ultimate</p> <p>7 agreement to the fund.</p> <p>8 Q. Well, whose suggestion was it</p> <p>9 that it be added to the drafting?</p> <p>10 MS. WEISGERBER: Objection to</p> <p>11 form.</p> <p>12 A. I believe that it came from</p> <p>13 Debtor's counsel, as they took the lead on</p> <p>14 drafting the documentation here.</p> <p>15 Q. Did Jim Seery ever tell you that</p> <p>16 it was important to him that HarbourVest</p> <p>17 vote in support of the plan?</p> <p>18 MS. WEISGERBER: Objection to</p> <p>19 form.</p> <p>20 A. I don't recall that ever being</p> <p>21 discussed. Certainly it was not the</p> <p>22 prominent feature of any of the</p> <p>23 discussions or negotiations that I ever</p> <p>24 had with Jim.</p> <p>25 Q. Okay.</p>
<p style="text-align: right;">Page 112</p> <p>1 Confidential - Pugatch</p> <p>2 MR. WILSON: I'm going to take a</p> <p>3 ten-minute break, and I think I'm</p> <p>4 almost ready to wrap up. So I want to</p> <p>5 stop my screen share. And let's,</p> <p>6 well, let's start back at 2:30, and I</p> <p>7 think I'll be quick. Thank you.</p> <p>8 (Recess taken.)</p> <p>9 BY MR. WILSON:</p> <p>10 Q. Mr. Pugatch, earlier you</p> <p>11 testified that consistent with your</p> <p>12 declaration you filed that as of August</p> <p>13 31, 2020, the value of HCLOF was</p> <p>14 \$44.5 million. And then if we look at --</p> <p>15 I don't remember which --</p> <p>16 Okay. So this would have been</p> <p>17 Exhibit 7. I'll do a share screen.</p> <p>18 As of November 15, 2017 these</p> <p>19 shares were purchased at \$1.02 and change</p> <p>20 apiece, and there were a total number of</p> <p>21 143 million shares.</p> <p>22 Was the value of this investment</p> <p>23 roughly \$150 million, as of November 15,</p> <p>24 2017?</p> <p>25 MS. WEISGERBER: Objection to</p>	<p style="text-align: right;">Page 113</p> <p>1 Confidential - Pugatch</p> <p>2 form. Foundation.</p> <p>3 MR. MALONEY: Join.</p> <p>4 MS. WEISGERBER: I don't know,</p> <p>5 Mike, if you're comfortable doing that</p> <p>6 math or what.</p> <p>7 A. Yes, approximately that's</p> <p>8 correct.</p> <p>9 Q. Okay. And you know, and I've</p> <p>10 read your papers and you talk about</p> <p>11 attorneys' fees that you say weren't</p> <p>12 appropriate to be charged to HCLOF and</p> <p>13 that part of it, but as to the loss of</p> <p>14 value of the actual investment, what's</p> <p>15 your understanding of what led to that?</p> <p>16 MS. WEISGERBER: Objection to</p> <p>17 form. Objection to the extent it</p> <p>18 calls for a legal conclusion.</p> <p>19 Mike, to the extent you have a</p> <p>20 nonlegal opinion on that, that's not</p> <p>21 based on conversations with counsel,</p> <p>22 you can answer.</p> <p>23 A. Yeah, I think a lot of the value</p> <p>24 erosion was due to the inability to</p> <p>25 refinance, reset a number of the</p>

<p style="text-align: right;">Page 114</p> <p>1 Confidential - Pugatch</p> <p>2 underlying CLOs that was part of the</p> <p>3 original investment thesis here, largely</p> <p>4 as a result of the ongoing litigation,</p> <p>5 that Highland was involved in, and the</p> <p>6 subsequent Acis bankruptcy.</p> <p>7 Q. And so during the period of time</p> <p>8 when the injunction prohibited certain</p> <p>9 actions with respect to this investment,</p> <p>10 is it your opinion that this investment</p> <p>11 was losing value?</p> <p>12 MR. MALONEY: Objection.</p> <p>13 MS. WEISGERBER: Objection to</p> <p>14 form.</p> <p>15 A. Can you repeat the question,</p> <p>16 John?</p> <p>17 Q. Well, I guess I want to know,</p> <p>18 like, in a, on a timeline kind of basis,</p> <p>19 do you think that the significant</p> <p>20 reduction of value occurred prior to or</p> <p>21 after the confirmation of the Acis plan on</p> <p>22 February 1, 2019?</p> <p>23 MS. WEISGERBER: Objection to</p> <p>24 form. Objection to the extent it</p> <p>25 calls for a legal conclusion.</p>	<p style="text-align: right;">Page 115</p> <p>1 Confidential - Pugatch</p> <p>2 You can give your lay opinion,</p> <p>3 if you have one, Mike.</p> <p>4 A. I think it's all been as a</p> <p>5 result of the events leading up to the</p> <p>6 Acis bankruptcy, including the inability</p> <p>7 to refinance or reset the CLOs which would</p> <p>8 have been to the benefit of the CLO equity</p> <p>9 holders including HCLOF.</p> <p>10 Q. And so what, what was the cause</p> <p>11 of the inability to reset?</p> <p>12 MS. WEISGERBER: Same</p> <p>13 objections: form, foundation, legal</p> <p>14 conclusion.</p> <p>15 If you have a non-privileged</p> <p>16 answer, Mike, go ahead.</p> <p>17 A. Yeah, my understanding was</p> <p>18 originally the TRO, preventing Highland</p> <p>19 and HCLOF from pursuing that, and then</p> <p>20 subsequent to the Acis bankruptcy ruling,</p> <p>21 a similar injunction that remained around</p> <p>22 the inability for the equity holders of</p> <p>23 those CLOs to redeem or refinance or</p> <p>24 reset.</p> <p>25 Q. So do you -- is there any</p>
<p style="text-align: right;">Page 116</p> <p>1 Confidential - Pugatch</p> <p>2 component, in your opinion, of the loss of</p> <p>3 value of these investments due to</p> <p>4 portfolio mismanagement?</p> <p>5 MS. WEISGERBER: Objection to</p> <p>6 form, foundation, legal conclusion, or</p> <p>7 expert opinion, calling for</p> <p>8 speculation.</p> <p>9 If you have a view, Mike.</p> <p>10 A. Yeah. Can you be more specific</p> <p>11 with the question, John?</p> <p>12 Q. Well, I'll ask it a different</p> <p>13 way.</p> <p>14 Do you think that portfolio</p> <p>15 mismanagement was a portion of the cause</p> <p>16 of the reduction in value?</p> <p>17 MS. WEISGERBER: Same objection.</p> <p>18 A. I can't speculate as to, you</p> <p>19 know, the underlying management decisions</p> <p>20 around the CLOs, but what I do know is</p> <p>21 that the mismanagement and</p> <p>22 misrepresentations at the HCLOF level,</p> <p>23 that would ultimately result in the Acis</p> <p>24 bankruptcy and subsequent to that, the TRO</p> <p>25 and the inability to refinance or reset</p>	<p style="text-align: right;">Page 117</p> <p>1 Confidential - Pugatch</p> <p>2 that has been the, far and away, the</p> <p>3 largest contributor to loss of value</p> <p>4 within the portfolio.</p> <p>5 Q. One of the allegations that</p> <p>6 HarbourVest has made is that Highland</p> <p>7 improperly changed the portfolio manager.</p> <p>8 Is it your opinion that if that had not</p> <p>9 been done, the portfolio manager had not</p> <p>10 been changed at the inception of</p> <p>11 HarbourVest's investment, that that would</p> <p>12 have preserved any value of this fund?</p> <p>13 MR. MORRIS: Objection to the</p> <p>14 form of the question.</p> <p>15 MS. WEISGERBER: Same objection.</p> <p>16 Calling for speculation, hypothetical</p> <p>17 lay opinion.</p> <p>18 If you have testimony, go ahead,</p> <p>19 Mike.</p> <p>20 A. Sorry, could you just repeat the</p> <p>21 question, John? I want to make sure I'm</p> <p>22 answering it correctly.</p> <p>23 Q. I guess I just want to know, and</p> <p>24 I think you kind of hinted at this a</p> <p>25 little bit earlier today, but I guess what</p>

<p style="text-align: right;">Page 118</p> <p>1 Confidential - Pugatch</p> <p>2 I really want to know is do you think that</p> <p>3 the particular portfolio manager made a</p> <p>4 difference in the loss of value that HCLOF</p> <p>5 suffered?</p> <p>6 MS. WEISGERBER: Same</p> <p>7 objections.</p> <p>8 A. Again, it sounds like you're</p> <p>9 asking a different question there than</p> <p>10 what I thought I understood your question</p> <p>11 to be initially. What I would say to that</p> <p>12 is the decision originally to change the</p> <p>13 portfolio manager, and ultimately the</p> <p>14 events that took place following the</p> <p>15 Arbitration Award for Mr. Terry, resulted</p> <p>16 in the subsequent Acis bankruptcy, which</p> <p>17 in turn has led to the destruction of</p> <p>18 value, because of the inability to</p> <p>19 refinance or reset, the underlying CLOs.</p> <p>20 Q. So HarbourVest is not alleging</p> <p>21 that the portfolio manager made any</p> <p>22 particular decisions or participated in</p> <p>23 any mismanagement that led to reduction in</p> <p>24 value?</p> <p>25 MS. WEISGERBER: Objection to</p>	<p style="text-align: right;">Page 119</p> <p>1 Confidential - Pugatch</p> <p>2 form.</p> <p>3 A. When you're asking about</p> <p>4 portfolio manager, are we referring to the</p> <p>5 portfolio manager at the underlying CLO</p> <p>6 level or at the HCLOF level? I think</p> <p>7 there are two different levels here of</p> <p>8 portfolio management.</p> <p>9 Q. Well, I'm talking about the</p> <p>10 portfolio manager, and you can tell me</p> <p>11 which one it is, but which portfolio</p> <p>12 manager has the ability to, to impact the</p> <p>13 performance of these funds?</p> <p>14 MR. MORRIS: Objection.</p> <p>15 A. If you're referring to HCLOF,</p> <p>16 the --</p> <p>17 MS. WEISGERBER: Objection to</p> <p>18 form.</p> <p>19 A. -- investment manager, or the</p> <p>20 portfolio manager of HCLOF has the ability</p> <p>21 to drive value creation by virtue of its</p> <p>22 equity position in the underlying CLOs.</p> <p>23 Q. Well, which portfolio manager</p> <p>24 makes the day-to-day decisions about</p> <p>25 selling assets, trading assets, that, that</p>
<p style="text-align: right;">Page 120</p> <p>1 Confidential - Pugatch</p> <p>2 I guess --</p> <p>3 A. If you're referring to</p> <p>4 underlaying credits, that would be the</p> <p>5 portfolio manager in each of the</p> <p>6 individual CLOs. The impact in value to</p> <p>7 the equity investment in the CLOs is a</p> <p>8 decision at the HCLOF level, where the</p> <p>9 majority of that value erosion has</p> <p>10 resulted from the inability to refinance</p> <p>11 or reset those CLO entities.</p> <p>12 Q. And that's what we're talking</p> <p>13 about when you said that they, that</p> <p>14 Highland changed the portfolio manager,</p> <p>15 you're talking about at the HCLOF level,</p> <p>16 right?</p> <p>17 MS. WEISGERBER: Objection to</p> <p>18 form.</p> <p>19 A. Well, I was responding to the</p> <p>20 question that I thought you asked. I</p> <p>21 wasn't necessarily stating that.</p> <p>22 Q. I guess all I'm really trying to</p> <p>23 do here is just understand HarbourVest's</p> <p>24 position. And it sounds to me, and</p> <p>25 correct me if I'm wrong, it sounds to me</p>	<p style="text-align: right;">Page 121</p> <p>1 Confidential - Pugatch</p> <p>2 that what you're saying is that the</p> <p>3 diminution of value wasn't attributable to</p> <p>4 poor investment decisions by a portfolio</p> <p>5 manager, as much as it was the</p> <p>6 consequences in the Acis bankruptcy of the</p> <p>7 change in portfolio manager; is that fair?</p> <p>8 MS. WEISGERBER: Objection to</p> <p>9 form. Misstates testimony.</p> <p>10 A. Yes, it is. That is my general</p> <p>11 understanding, yes.</p> <p>12 MR. WILSON: Okay. No further</p> <p>13 questions.</p> <p>14 MR. MORRIS: All right. Well,</p> <p>15 thank you very much.</p> <p>16 THE REPORTER: Does anybody have</p> <p>17 any other questions?</p> <p>18 MR. KANE: Yes. This is John</p> <p>19 Kane with CLO Holdco. I'll jump on</p> <p>20 video. I've got some questions, but</p> <p>21 I'm going to be relatively short. If</p> <p>22 anybody else has a little bit heavier</p> <p>23 schedule, let me know.</p> <p>24 All right. I'll take that as a</p> <p>25 go-ahead.</p>

<p style="text-align: right;">Page 122</p> <p>1 Confidential - Pugatch</p> <p>2 EXAMINATION</p> <p>3 BY MR. KANE:</p> <p>4 Q. This is John Kane. I represent</p> <p>5 CLO Holdco.</p> <p>6 Hi, Mike Pugatch. It's nice to</p> <p>7 talk to you.</p> <p>8 A. Likewise.</p> <p>9 Q. I just wanted to briefly</p> <p>10 confirm. I believe you testified you</p> <p>11 participated in negotiations that lead to</p> <p>12 the Settlement Agreement, that is part of</p> <p>13 the 9019 motion, before the bankruptcy</p> <p>14 court; is that correct?</p> <p>15 A. Correct.</p> <p>16 Q. And did you actively negotiate</p> <p>17 the terms of that Settlement Agreement?</p> <p>18 A. Yes.</p> <p>19 Q. As in dollar amounts, what the</p> <p>20 consideration exchanged, how it would</p> <p>21 work, that kind of stuff, obviously with</p> <p>22 the assistance of counsel?</p> <p>23 A. Yes. All of that. The</p> <p>24 negotiations were, you know, over the</p> <p>25 course of a number of weeks and a number</p>	<p style="text-align: right;">Page 123</p> <p>1 Confidential - Pugatch</p> <p>2 of conversations directly with the Debtor,</p> <p>3 with counsel, all-hands calls, et cetera.</p> <p>4 Q. Okay. And as part of that in</p> <p>5 the Settlement Agreement, you say the</p> <p>6 HarbourVest entities were members in HCLOF</p> <p>7 are in essence selling their shares to the</p> <p>8 Debtor, and also in exchange getting some</p> <p>9 claims back in the Debtor's plan. Is that</p> <p>10 a fair summary?</p> <p>11 MS. WEISGERBER: Objection to</p> <p>12 form. Compound question.</p> <p>13 Q. Let me ask it a different way.</p> <p>14 A. Can you re-ask that, please?</p> <p>15 Q. Yeah. I'm happy to do that.</p> <p>16 Why don't you describe for me</p> <p>17 how you would summarize that settlement?</p> <p>18 A. Largely, as I think you just</p> <p>19 described it, which was in exchange for,</p> <p>20 in exchange for the, both the unsecured</p> <p>21 creditors' claim, and subordinated</p> <p>22 creditors' claim, that settlement value is</p> <p>23 in exchange for us transferring the</p> <p>24 interest in HCLOF to the Debtor, as part</p> <p>25 of that overall negotiating package.</p>
<p style="text-align: right;">Page 124</p> <p>1 Confidential - Pugatch</p> <p>2 Q. And what would you estimate, I</p> <p>3 going to have to imagine, let me rephrase</p> <p>4 the question.</p> <p>5 Have you guys done kind of an</p> <p>6 internal best guess of what your unsecured</p> <p>7 and subordinated claims would be, under</p> <p>8 the plan, the value?</p> <p>9 MS. WEISGERBER: Objection.</p> <p>10 Objection to form.</p> <p>11 A. Just to be clear, John, are you</p> <p>12 referring to the expected recovery value</p> <p>13 of our claims?</p> <p>14 Q. Yes, sir.</p> <p>15 MS. WEISGERBER: Objection to</p> <p>16 form. Can we just clarify, so you're</p> <p>17 talking about what they'll recover</p> <p>18 ultimately? Is that the question,</p> <p>19 John? I'm confused myself. I just</p> <p>20 want to be sure I am following.</p> <p>21 MR. KANE: Yeah. So I'm asking</p> <p>22 Mike how much he believes, based on</p> <p>23 his analysis, that HarbourVest is</p> <p>24 likely to recover from the \$45 million</p> <p>25 allowed general unsecured claim and</p>	<p style="text-align: right;">Page 125</p> <p>1 Confidential - Pugatch</p> <p>2 \$35 million allowed subordinated</p> <p>3 claim, if the settlement is approved</p> <p>4 and the plan is confirmed.</p> <p>5 MS. WEISGERBER: Objection to</p> <p>6 form.</p> <p>7 But you can answer, if you have</p> <p>8 an answer, Mike.</p> <p>9 A. We do have a sense. It's really</p> <p>10 a range of projected outcomes, as you can</p> <p>11 imagine, based on the recoveries, largely</p> <p>12 informed by conversations with the Debtor.</p> <p>13 Q. And what is that range of value?</p> <p>14 MS. WEISGERBER: Objection to</p> <p>15 form.</p> <p>16 A. Our understanding, again, based</p> <p>17 on those conversations, is that the</p> <p>18 general unsecured claim could be valued in</p> <p>19 a 75 to 80 cents on the dollar recovery.</p> <p>20 And then a, you know, that the junior</p> <p>21 class claim is really sort of upside</p> <p>22 potential, to the extent there is more</p> <p>23 recovery or more asset value of the</p> <p>24 estate, for the benefit of creditors over</p> <p>25 time.</p>

<p style="text-align: right;">Page 126</p> <p>1 Confidential - Pugatch</p> <p>2 Q. What is your understanding of</p> <p>3 the current value of the HarbourVest</p> <p>4 shares in HCLOF that would be transferred</p> <p>5 under this Agreement?</p> <p>6 A. It's roughly \$22.5 million of</p> <p>7 their value.</p> <p>8 Q. So doing a little bit of, you</p> <p>9 know, back-of-the-table-cloth math, how do</p> <p>10 you allocate value between the releases</p> <p>11 that you are receiving and the shares that</p> <p>12 you are transferring?</p> <p>13 MR. KANE: I'm sorry. Let me</p> <p>14 rephrase that. Let me ask that</p> <p>15 question differently.</p> <p>16 Q. In addition to the claims under</p> <p>17 the plan, HarbourVest is providing the</p> <p>18 Debt – sorry, in addition to the shares</p> <p>19 that are being transferred, HarbourVest is</p> <p>20 providing to the Debtor certain releases</p> <p>21 for its litigation claims; is that</p> <p>22 correct?</p> <p>23 MS. WEISGERBER: Objection to</p> <p>24 form.</p> <p>25 A. Correct.</p>	<p style="text-align: right;">Page 127</p> <p>1 Confidential - Pugatch</p> <p>2 Q. So how has HarbourVest allocated</p> <p>3 value, as far as this Settlement Agreement</p> <p>4 is concerned?</p> <p>5 And to make sure we're on the</p> <p>6 same page about what I'm asking,</p> <p>7 HarbourVest is trading a bundle of sticks,</p> <p>8 right? And there's really two things</p> <p>9 within that bundle of sticks, and please</p> <p>10 confirm that's correct, you're trading</p> <p>11 shares, and in addition, releases; is that</p> <p>12 right? In exchange you're getting back</p> <p>13 claims that have a potential future value.</p> <p>14 So, how have you allocated value</p> <p>15 among the shares transferred and the</p> <p>16 releases that are being granted?</p> <p>17 MR. MORRIS: Objection.</p> <p>18 MS. WEISGERBER: Objection.</p> <p>19 You can go ahead, Mike.</p> <p>20 A. Yeah. So ultimately we looked</p> <p>21 at it as a package, and so it was less</p> <p>22 about the attribution of value between the</p> <p>23 two different sticks, as you described it,</p> <p>24 and more about the overall package value</p> <p>25 in exchange for the transfer of our</p>
<p style="text-align: right;">Page 128</p> <p>1 Confidential - Pugatch</p> <p>2 interest and the release of the claims</p> <p>3 that we had outstanding as the Debtor.</p> <p>4 MR. KANE: Now, I want to turn</p> <p>5 your attention to what I've included</p> <p>6 in the chat. You can pull it down</p> <p>7 pretty easily if you want. But it</p> <p>8 would be Holdco Depo Exhibit 2. If</p> <p>9 that would be easier than a screen</p> <p>10 share, if you'd like, I'm happy to do</p> <p>11 that as well.</p> <p>12 MS. WEISGERBER: Which document</p> <p>13 is it, John? Because I just can't</p> <p>14 pull stuff off the Zoom right now.</p> <p>15 MR. KANE: Oh, I'm sorry. It's</p> <p>16 the Settlement Agreement with the</p> <p>17 attached exhibits. I can share my</p> <p>18 screen so we're all on the same page.</p> <p>19 Just to confirm we're looking at</p> <p>20 the same thing, here's the Settlement</p> <p>21 Agreement. There's a docket entry at</p> <p>22 the top so you can see it, 1631 filed</p> <p>23 by the Debtor 12/24/20.</p> <p>24 This is Exhibit 1 to the</p> <p>25 Declaration of John Morris in Support</p>	<p style="text-align: right;">Page 129</p> <p>1 Confidential - Pugatch</p> <p>2 of Debtor's Motion for an Entry</p> <p>3 Approving Settlement with HarbourVest.</p> <p>4 BY MR. KANE:</p> <p>5 Q. Now, this Settlement Agreement</p> <p>6 is a document that you assisted in</p> <p>7 negotiations; is that correct?</p> <p>8 A. Correct.</p> <p>9 Q. Okay. And here in Section 1B,</p> <p>10 this addresses the transfer of the shares</p> <p>11 of the HarbourVest entities to a Debtor</p> <p>12 affiliate; is that correct?</p> <p>13 MS. WEISGERBER: Objection to</p> <p>14 form.</p> <p>15 A. Correct.</p> <p>16 Q. Is that your understanding,</p> <p>17 Mr. Pugatch?</p> <p>18 A. Yes, correct.</p> <p>19 Q. Okay. Thank you. Section 4A,</p> <p>20 and is this your understanding that</p> <p>21 HarbourVest is representing that it has</p> <p>22 the authority to enter into this agreement</p> <p>23 and to transfer the shares to the Debtor's</p> <p>24 affiliate if this is approved?</p> <p>25 MS. WEISGERBER: Objection to</p>

<p style="text-align: right;">Page 130</p> <p>1 Confidential - Pugatch</p> <p>2 form. The document speaks for itself.</p> <p>3 Is that a question, John?</p> <p>4 MR. KANE: Yeah. I asked if</p> <p>5 that was his understanding, that this</p> <p>6 is a representation by HarbourVest</p> <p>7 that it has the authority to transfer</p> <p>8 the shares if the Settlement Agreement</p> <p>9 is approved.</p> <p>10 MS. WEISGERBER: Objection to</p> <p>11 form. Objection to the extent it</p> <p>12 calls for a legal conclusion.</p> <p>13 To the extent you have a</p> <p>14 nonlegal conclusion, non-privileged</p> <p>15 understanding, Mike, you can share</p> <p>16 that.</p> <p>17 A. Yeah, I'm just saying I can only</p> <p>18 answer that based on conversations with</p> <p>19 counsel.</p> <p>20 MR. KANE: Okay. I won't push</p> <p>21 that. That's fine.</p> <p>22 Q. If we keep going down here as</p> <p>23 part of this attachment, there's a</p> <p>24 Transfer Agreement, Exhibit A to the</p> <p>25 Settlement Agreement. Are you familiar</p>	<p style="text-align: right;">Page 131</p> <p>1 Confidential - Pugatch</p> <p>2 with this document?</p> <p>3 A. Yes. I've seen it.</p> <p>4 Q. And did you assist with the</p> <p>5 preparation or negotiation of this</p> <p>6 Agreement?</p> <p>7 A. Yes.</p> <p>8 Q. Okay. Did you understand that</p> <p>9 HarbourVest would need the consent of the</p> <p>10 HCLOF portfolio advisor to effectuate the</p> <p>11 transfer?</p> <p>12 MS. WEISGERBER: Objection to</p> <p>13 form. Objection to the extent it</p> <p>14 calls for a legal conclusion.</p> <p>15 Mike, if you have a view other</p> <p>16 than from privileged conversation, you</p> <p>17 can answer, otherwise do not answer.</p> <p>18 A. Yeah, I'm sorry. I can only</p> <p>19 answer that based on conversation with</p> <p>20 counsel and the read of the document.</p> <p>21 Q. So to make sure I understand</p> <p>22 that, you have no independent</p> <p>23 understanding of whether or not consent</p> <p>24 was required from the portfolio manager</p> <p>25 before you could effectuate a transfer; is</p>
<p style="text-align: right;">Page 132</p> <p>1 Confidential - Pugatch</p> <p>2 that correct?</p> <p>3 MS. WEISGERBER: Same objection.</p> <p>4 I think you can give your</p> <p>5 general understanding, but then not</p> <p>6 get into specific conversations.</p> <p>7 A. My understanding of that is</p> <p>8 based on conversations with counsel, but</p> <p>9 yes, that is my understanding, John.</p> <p>10 Q. Okay. I'm going to highlight a</p> <p>11 passage here. Can you see this</p> <p>12 highlighted area? "Whereas, the Portfolio</p> <p>13 Manager desires to consent to such</p> <p>14 transfers and to the admission of</p> <p>15 Transferee as a shareholder..."</p> <p>16 Were you aware of that</p> <p>17 provision?</p> <p>18 MS. WEISGERBER: Objection to</p> <p>19 form.</p> <p>20 A. Yes. It's in the document.</p> <p>21 Q. Do you have any understanding of</p> <p>22 why that provision was included in this</p> <p>23 agreement?</p> <p>24 MS. WEISGERBER: Objection to</p> <p>25 form. Objection to the extent it</p>	<p style="text-align: right;">Page 133</p> <p>1 Confidential - Pugatch</p> <p>2 calls for a privileged conversation.</p> <p>3 A. As I answered before, based on</p> <p>4 conversations with counsel, my</p> <p>5 understanding is that consent is requiring</p> <p>6 in connection to transfer.</p> <p>7 Q. I'd like to turn your attention</p> <p>8 now – this is a document you've seen</p> <p>9 before during your deposition. This is</p> <p>10 the member's agreement related to the</p> <p>11 Company for HCLOF. This is previously</p> <p>12 produced by the Debtor, that's why it's</p> <p>13 got the Bates stamp on it. This is dated</p> <p>14 November 15, 2017.</p> <p>15 Are you familiar with this</p> <p>16 document?</p> <p>17 A. Yes.</p> <p>18 Q. Do you see on Line 14, in the</p> <p>19 between, on Page 1 shows Highland HCF</p> <p>20 Advisor, Ltd. as the portfolio manager?</p> <p>21 A. Yes, I see that.</p> <p>22 Q. I know there was quite a bit</p> <p>23 of – quite a few questions about this</p> <p>24 earlier, but you understand that Highland</p> <p>25 HCF Advisor, Ltd. is still the HCLOF</p>

<p style="text-align: right;">Page 134</p> <p>1 Confidential - Pugatch</p> <p>2 portfolio manager?</p> <p>3 MS. WEISGERBER: Objection to</p> <p>4 form.</p> <p>5 A. Honestly, I don't have – I</p> <p>6 don't have enough information to answer</p> <p>7 that definitively.</p> <p>8 Q. Okay. Going back to the</p> <p>9 Settlement Agreement, there's a reference</p> <p>10 in here to a defined term, "portfolio</p> <p>11 manager."</p> <p>12 Do you see that?</p> <p>13 A. Yep.</p> <p>14 Q. And is this the same one that's</p> <p>15 listed in the Member Agreement, Highland</p> <p>16 HCF Advisor, Ltd.?</p> <p>17 A. I believe that seems to be the</p> <p>18 position, yes.</p> <p>19 Q. Okay. So when we're talking</p> <p>20 about down here, "Whereas, the Portfolio</p> <p>21 Manager desires to consent," this consent</p> <p>22 provision is referring to the same</p> <p>23 definition of portfolio manager that's</p> <p>24 included in this Member Agreement; is that</p> <p>25 correct?</p>	<p style="text-align: right;">Page 135</p> <p>1 Confidential - Pugatch</p> <p>2 MR. MORRIS: Objection to the</p> <p>3 form.</p> <p>4 MS. WEISGERBER: Objection –</p> <p>5 same objections. Objection to the</p> <p>6 extent it calls for privileged</p> <p>7 information.</p> <p>8 A. That sounds like a legal</p> <p>9 conclusion.</p> <p>10 Q. I would have thought it was</p> <p>11 reading, Mr. Pugatch.</p> <p>12 A. Well, if you're asking me to</p> <p>13 definitively confirm that, that sounds</p> <p>14 like a legal interpretation.</p> <p>15 Q. Let me ask that a different way.</p> <p>16 Do you understand that the</p> <p>17 portfolio manager is listed as Highland</p> <p>18 HCF Advisor, Ltd. in the Member Agreement?</p> <p>19 A. Yes.</p> <p>20 Q. And in this Transfer Agreement,</p> <p>21 the portfolio manager is listed as</p> <p>22 Highland HCF Advisor, Ltd.?</p> <p>23 A. Yes.</p> <p>24 Q. And those are the same entities?</p> <p>25 A. Yes.</p>
<p style="text-align: right;">Page 136</p> <p>1 Confidential - Pugatch</p> <p>2 Q. All right. Are you familiar</p> <p>3 with Section 6 of this Member Agreement?</p> <p>4 A. (Nods.)</p> <p>5 Q. Have you ever read this</p> <p>6 document?</p> <p>7 A. I have.</p> <p>8 Q. Okay. And can you give me your</p> <p>9 understanding of what must take place</p> <p>10 under this document for HarbourVest to</p> <p>11 transfer its shares?</p> <p>12 MS. WEISGERBER: Object to the</p> <p>13 form. Object to the extent it calls</p> <p>14 for a legal conclusion. Object to the</p> <p>15 extent it calls for any privileged</p> <p>16 information or conversations.</p> <p>17 Mike, to the extent you have an</p> <p>18 independent understanding, separate</p> <p>19 from conversations with counsel, you</p> <p>20 can answer the question.</p> <p>21 A. I would say my understanding of</p> <p>22 what's required in connection with the</p> <p>23 transfer is based on conversations with</p> <p>24 counsel.</p> <p>25 Q. Do you believe that the</p>	<p style="text-align: right;">Page 137</p> <p>1 Confidential - Pugatch</p> <p>2 HarbourVest entities can transfer its</p> <p>3 shares without obtaining the consent of</p> <p>4 the portfolio manager?</p> <p>5 MS. WEISGERBER: Objection to</p> <p>6 form. Objection to the extent it</p> <p>7 calls for a legal conclusion.</p> <p>8 Same instruction, Mike, as to</p> <p>9 privileged conversations.</p> <p>10 A. Again, my view on that would be</p> <p>11 based on conversations with counsel.</p> <p>12 Q. Are you aware of whether</p> <p>13 HarbourVest provided any notice to other</p> <p>14 members of its intent to transfer its</p> <p>15 shares to the Debtor's affiliate under the</p> <p>16 Settlement Agreement, other than the</p> <p>17 filing of the 9019 motion?</p> <p>18 MS. WEISGERBER: Same objection.</p> <p>19 But there is a factual question in</p> <p>20 there if you can answer it, Mike, but</p> <p>21 no privileged conversation.</p> <p>22 A. Yeah, I'm not aware of that.</p> <p>23 Q. Did you provide members 30 days</p> <p>24 after the receipt of notice of</p> <p>25 HarbourVest's intent to transfer its</p>

<p style="text-align: right;">Page 138</p> <p>1 Confidential - Pugatch</p> <p>2 shares to the Debtor's affiliate and</p> <p>3 provide those members with an opportunity</p> <p>4 to purchase their pro rata amount of the</p> <p>5 shares?</p> <p>6 MS. WEISGERBER: Same objection.</p> <p>7 A. No.</p> <p>8 Q. And just to make sure I'm not</p> <p>9 asking this question in a way that you</p> <p>10 don't understand what I'm asking: Do you</p> <p>11 see this highlighted provision here?</p> <p>12 A. Yes.</p> <p>13 Q. I'm asking whether HarbourVest</p> <p>14 provided members 30 days after the receipt</p> <p>15 of a notice letter and an opportunity to</p> <p>16 purchase their entire pro rata share of</p> <p>17 the shares proposed to be transferred by</p> <p>18 the HarbourVest entities?</p> <p>19 MS. WEISGERBER: Objection to</p> <p>20 form. Objection to the extent it</p> <p>21 calls for privileged conversations or</p> <p>22 a legal conclusion. Objection to the</p> <p>23 extent it's asking about one piece of</p> <p>24 the document.</p> <p>25 And you're welcome to look at</p>	<p style="text-align: right;">Page 139</p> <p>1 Confidential - Pugatch</p> <p>2 the full document if you'd like, Mike.</p> <p>3 I think it was one of the ones that</p> <p>4 was E-mailed as well, or maybe you</p> <p>5 were able to pull it down.</p> <p>6 THE WITNESS: Yeah, no, I was.</p> <p>7 Thank you.</p> <p>8 A. And I'm sorry, John, could you</p> <p>9 just repeat the question?</p> <p>10 BY MR. KANE:</p> <p>11 Q. Yeah, sure, absolutely. And I'm</p> <p>12 not calling for any conversations with</p> <p>13 counsel. I'm asking you if you know</p> <p>14 whether HarbourVest did something or not.</p> <p>15 So let's -- let's keep it to that, because</p> <p>16 I --</p> <p>17 MR. KANE: Erica, I appreciate</p> <p>18 your concerns, but I really don't want</p> <p>19 to have any disclosures from Mike</p> <p>20 about his discussions with you on</p> <p>21 whether something needed to be done or</p> <p>22 not. I'm asking simply the facts of</p> <p>23 whether HarbourVest did it or not.</p> <p>24 Q. So did HarbourVest provide</p> <p>25 notice, 30 days' notice, to the members</p>
<p style="text-align: right;">Page 140</p> <p>1 Confidential - Pugatch</p> <p>2 listed under this Member Agreement of</p> <p>3 HarbourVest's intent to transfer the</p> <p>4 shares that are the subject to the</p> <p>5 Settlement Agreement?</p> <p>6 A. No.</p> <p>7 Q. Has HarbourVest provided any</p> <p>8 members with a right of first refusal and</p> <p>9 a cash purchase price for which it would</p> <p>10 sell its shares instead of transferring</p> <p>11 those shares to the Debtor or the Debtor's</p> <p>12 affiliate under the Settlement Agreement?</p> <p>13 MS. WEISGERBER: Same</p> <p>14 objections. Objection to form.</p> <p>15 Objection to extent it calls for a</p> <p>16 legal conclusion or privileged</p> <p>17 conversations, including -- regarding</p> <p>18 the specifics of that provision.</p> <p>19 I don't think that's a purely</p> <p>20 factual question.</p> <p>21 Q. Did HarbourVest offer to sell</p> <p>22 the shares to the other members? That's</p> <p>23 not a factual question?</p> <p>24 MS. WEISGERBER: Objection --</p> <p>25 A. On the basis of that factual</p>	<p style="text-align: right;">Page 141</p> <p>1 Confidential - Pugatch</p> <p>2 question, no.</p> <p>3 Q. So let me ask this question</p> <p>4 again, I don't recall if I got an answer</p> <p>5 or not.</p> <p>6 Did HarbourVest affirmatively</p> <p>7 seek to obtain the consent of Highland HCF</p> <p>8 Advisors to transfer its shares to the</p> <p>9 Debtor affiliate under the Settlement</p> <p>10 Agreement?</p> <p>11 MS. WEISGERBER: Same</p> <p>12 objections. Same instruction</p> <p>13 regarding the privileged conversation.</p> <p>14 A. I mean, as a Highland-affiliated</p> <p>15 entity, the Debtor, who's obviously the</p> <p>16 other party here involved in the transfer,</p> <p>17 you know, was involved in these</p> <p>18 discussions.</p> <p>19 Q. I'm sorry. Would you mind</p> <p>20 clarifying? Did you say that Highland HCF</p> <p>21 Advisors was involved in those discussions</p> <p>22 or the Debtor was involved in those</p> <p>23 discussions and you assume Highland HCF</p> <p>24 Advisors was?</p> <p>25 MS. WEISGERBER: Objection to</p>

<p style="text-align: right;">Page 142</p> <p>1 Confidential - Pugatch</p> <p>2 form. Misstates testimony.</p> <p>3 A. Sorry, could you just repeat the</p> <p>4 question, please, John?</p> <p>5 Q. Yes, Mr. Pugatch.</p> <p>6 I'm actually just trying to get</p> <p>7 some clarification from you, because I</p> <p>8 don't think I understood your answer</p> <p>9 about -- I had asked just -- again, I</p> <p>10 don't want any correspondence with your</p> <p>11 counsel or what your counsel advised, I'm</p> <p>12 asking: Do you know whether HarbourVest</p> <p>13 sought written consent from Highland HCF</p> <p>14 Advisor for its -- or to transfer its</p> <p>15 shares to the Debtor or the Debtor's</p> <p>16 affiliate under the Settlement Agreement?</p> <p>17 MS. WEISGERBER: Same objection.</p> <p>18 A. My understanding is HarbourVest</p> <p>19 did not explicitly have those</p> <p>20 conversations or seek that consent.</p> <p>21 Q. Okay. Are you aware of whether</p> <p>22 HarbourVest received any written consent</p> <p>23 from Highland HCF Advisors, other than</p> <p>24 what's in the Transfer Agreement attached</p> <p>25 to the Settlement Agreement?</p>	<p style="text-align: right;">Page 143</p> <p>1 Confidential - Pugatch</p> <p>2 A. I am not.</p> <p>3 MS. WEISGERBER: Same objection.</p> <p>4 Q. Do you know if HarbourVest has</p> <p>5 any written consent? Not just to seek it,</p> <p>6 but do you know if HarbourVest has a piece</p> <p>7 of paper, other than the transfer</p> <p>8 agreement, in which Highland HCF advisors</p> <p>9 provided its consent to the transfer of</p> <p>10 shares to the Debtor's affiliate?</p> <p>11 MS. WEISGERBER: Same</p> <p>12 objections.</p> <p>13 A. I would have to speak with</p> <p>14 counsel. I am not aware of that directly,</p> <p>15 no.</p> <p>16 Q. Are you aware of whether</p> <p>17 HarbourVest had any correspondence with</p> <p>18 HCLOF representatives about effectuating</p> <p>19 the transfer of the shares to the Debtor's</p> <p>20 affiliate under the Settlement Agreement?</p> <p>21 MS. WEISGERBER: Same objection.</p> <p>22 You can answer.</p> <p>23 A. We have had discussions with</p> <p>24 them, yes.</p> <p>25 Q. Did HCLOF representatives</p>
<p style="text-align: right;">Page 144</p> <p>1 Confidential - Pugatch</p> <p>2 provide consent, whether written or</p> <p>3 otherwise, to the transfer?</p> <p>4 A. I am not aware that that consent</p> <p>5 has been provided as of yet.</p> <p>6 Q. Are you aware of whether any</p> <p>7 HarbourVest representatives have had</p> <p>8 conversations with the Debtor's</p> <p>9 representatives about the necessity of</p> <p>10 consent to the transfer of their shares?</p> <p>11 MS. WEISGERBER: Objection to</p> <p>12 form --</p> <p>13 MR. KANE: I'll re-ask the</p> <p>14 question. I want to clarify that</p> <p>15 point.</p> <p>16 BY MR. KANE:</p> <p>17 Q. Mr. Pugatch, are you aware of</p> <p>18 whether any HarbourVest representatives</p> <p>19 had conversations with the Debtor's</p> <p>20 representatives about the necessity of</p> <p>21 obtaining the HCLOF portfolio manager's</p> <p>22 written consent before transferring the</p> <p>23 shares to the Debtor's representative or</p> <p>24 affiliate under the terms of the</p> <p>25 Settlement Agreement?</p>	<p style="text-align: right;">Page 145</p> <p>1 Confidential - Pugatch</p> <p>2 MS. WEISGERBER: Objection to</p> <p>3 form.</p> <p>4 And, John, I'm sorry to do this,</p> <p>5 can you just clarify what you mean by</p> <p>6 "representative"?</p> <p>7 MR. KANE: Yeah. I mean,</p> <p>8 anybody that has agency authority to</p> <p>9 act on behalf of the Debtor in</p> <p>10 negotiations, in the preparation of</p> <p>11 the documents, in negotiation of the</p> <p>12 terms of the Settlement Agreement.</p> <p>13 I mean, I think that it's, you</p> <p>14 know, a pretty broad term here.</p> <p>15 MS. WEISGERBER: Objection to</p> <p>16 form. Objection to the extent it</p> <p>17 calls for discussions with counsel.</p> <p>18 As a factual matter, if you have</p> <p>19 an answer, you can give it.</p> <p>20 A. I'm aware of conversations that</p> <p>21 have taken place about all of the terms of</p> <p>22 the Transfer Agreement in connection with</p> <p>23 the settlement, with all parties.</p> <p>24 Q. Is it your understanding based</p> <p>25 on those conversations that written</p>

<p style="text-align: right;">Page 146</p> <p>1 Confidential - Pugatch</p> <p>2 consent of the portfolio manager as</p> <p>3 defined in the Transfer Agreement was</p> <p>4 required before the shares could be</p> <p>5 transferred under the Settlement</p> <p>6 Agreement?</p> <p>7 MS. WEISGERBER: Objection to</p> <p>8 the form. Objection to the extent it</p> <p>9 calls for a legal conclusion or</p> <p>10 privileged conversation. And I think</p> <p>11 that one does, John.</p> <p>12 A. Yeah, I can only answer that</p> <p>13 based on conversation with lawyers.</p> <p>14 Q. Wasn't the question whether –</p> <p>15 I'm sorry. Maybe I forgot my own</p> <p>16 question.</p> <p>17 But I thought it was based on</p> <p>18 your conversations with the Debtor's</p> <p>19 representative, was it your understanding,</p> <p>20 not based on your conversation with</p> <p>21 counsel.</p> <p>22 MS. WEISGERBER: Can you repeat</p> <p>23 the whole question because I</p> <p>24 definitely misunderstood it then too.</p> <p>25 Q. Okay. Based on your</p>	<p style="text-align: right;">Page 147</p> <p>1 Confidential - Pugatch</p> <p>2 conversations with the Debtor's</p> <p>3 representatives, was it your understanding</p> <p>4 that the consent of the portfolio manager</p> <p>5 was required for the shares to be</p> <p>6 transferred from the HarbourVest entities</p> <p>7 to the Debtor's affiliate under the terms</p> <p>8 of the Settlement Agreement?</p> <p>9 MS. WEISGERBER: Okay. Same</p> <p>10 objections. Also objection to the</p> <p>11 extent there is a common interest</p> <p>12 privilege.</p> <p>13 A. I don't recall having that</p> <p>14 explicit conversation with representative</p> <p>15 of the Debtor.</p> <p>16 MR. KANE: I'll pass the</p> <p>17 witness.</p> <p>18 Thank you, Mr. Pugatch.</p> <p>19 MR. MORRIS: Anybody else?</p> <p>20 Thank you, all.</p> <p>21 MS. WEISGERBER: Can we –</p> <p>22 before we break, could we have a</p> <p>23 two-minute break and then come back</p> <p>24 before we conclude.</p> <p>25 BY MS. WEISGERBER:</p>
<p style="text-align: right;">Page 148</p> <p>1 Confidential - Pugatch</p> <p>2 Q. Mr. Pugatch, during Mr. Wilson's</p> <p>3 questioning, I believe his last question</p> <p>4 related to identifying as between two</p> <p>5 choices the primary source or the cause of</p> <p>6 HarbourVest's damages.</p> <p>7 In your opinion, is – are</p> <p>8 HarbourVest damages attributable to any</p> <p>9 one cause?</p> <p>10 A. No, I would say there were</p> <p>11 multiple root causes of the damages and</p> <p>12 diminution in value that was suffered in</p> <p>13 connection with the investment.</p> <p>14 MS. WEISGERBER: Okay. I don't</p> <p>15 have any further questions.</p> <p>16 MR. WILSON: I think I'd like to</p> <p>17 ask a couple more.</p> <p>18 BY MR. WILSON:</p> <p>19 Q. Mr. Pugatch, I think you</p> <p>20 testified earlier that the investment in</p> <p>21 HCLOF was comprised of multiple CLOs,</p> <p>22 correct?</p> <p>23 A. Correct.</p> <p>24 Q. And some of those CLOs were</p> <p>25 managed by Acis, to your understanding?</p>	<p style="text-align: right;">Page 149</p> <p>1 Confidential - Pugatch</p> <p>2 MS. WEISGERBER: Objection.</p> <p>3 A. Correct.</p> <p>4 MS. WEISGERBER: Just to</p> <p>5 clarify, John, is this within the</p> <p>6 scope of the questions I asked</p> <p>7 Mr. Pugatch?</p> <p>8 MR. WILSON: I believe it is.</p> <p>9 I'm going to be really short. But</p> <p>10 so –</p> <p>11 MS. WEISGERBER: I would like to</p> <p>12 have a standing objection to the</p> <p>13 extent it's not within the scope of</p> <p>14 the questions that was asked to</p> <p>15 Mr. Pugatch.</p> <p>16 BY MR. WILSON:</p> <p>17 Q. So some of those CLOs you</p> <p>18 contend are managed by Acis?</p> <p>19 MS. WEISGERBER: Objection to</p> <p>20 form.</p> <p>21 A. A majority.</p> <p>22 Q. And just generally, do you</p> <p>23 contend that Highland managed the balance</p> <p>24 of those CLOs?</p> <p>25 MR. MORRIS: Objection to the</p>

<p style="text-align: right;">Page 150</p> <p>1 Confidential - Pugatch</p> <p>2 form of the question.</p> <p>3 MS. WEISGERBER: Objection.</p> <p>4 Same objection.</p> <p>5 A. Yes.</p> <p>6 Q. Yes. Okay. Thank you.</p> <p>7 And I just had two more</p> <p>8 questions.</p> <p>9 So, if there was going to be a</p> <p>10 reset, that would have to be done at the</p> <p>11 CLO level, each CLO would have to be</p> <p>12 reset?</p> <p>13 MR. MORRIS: Objection.</p> <p>14 MS. WEISGERBER: Objection to</p> <p>15 form.</p> <p>16 A. That is correct.</p> <p>17 Q. And do you know of any specific</p> <p>18 CLO that requested a reset but was not</p> <p>19 granted a reset?</p> <p>20 MR. MORRIS: Objection to form.</p> <p>21 MS. WEISGERBER: Same objection.</p> <p>22 And foundation.</p> <p>23 A. When you say "CLOs who requested</p> <p>24 a reset," can be more clear, please?</p> <p>25 Q. We just talked about how this</p>	<p style="text-align: right;">Page 151</p> <p>1 Confidential - Pugatch</p> <p>2 investment is comprised of multiple CLOs</p> <p>3 and each one of those CLOs would have to</p> <p>4 be reset, according to its own terms, I</p> <p>5 guess. Do you know of any one of those</p> <p>6 CLOs that requested a reset?</p> <p>7 MR. MORRIS: Objection to the</p> <p>8 form of the question.</p> <p>9 MS. WEISGERBER: Same objection.</p> <p>10 A. I'm aware of Highland having in</p> <p>11 its capacity as manager of the HCLOF</p> <p>12 having requested or pursued resets of</p> <p>13 certain of the Acis HCLOs.</p> <p>14 Q. Your understanding is that</p> <p>15 Highland requested a reset of the Acis</p> <p>16 CLOs?</p> <p>17 MS. WEISGERBER: Objection to</p> <p>18 form.</p> <p>19 A. I'm sorry. I'm trying to</p> <p>20 understand what you said.</p> <p>21 MS. WEISGERBER: I'm really</p> <p>22 wondering how this relates at all to</p> <p>23 the scope of the questions I asked Mr.</p> <p>24 Pugatch on follow up.</p> <p>25 I think it's time to wrap this</p>
<p style="text-align: right;">Page 152</p> <p>1 Confidential - Pugatch</p> <p>2 up, John.</p> <p>3 MR. WILSON: This was my last</p> <p>4 question, I just need an answer to it.</p> <p>5 And I think he tried to answer, but I</p> <p>6 didn't understand what he said.</p> <p>7 MS. WEISGERBER: Objection. Can</p> <p>8 you re-ask the question so we have a</p> <p>9 clear question.</p> <p>10 MR. WILSON: Well, Madam Court</p> <p>11 Reporter, can you read back his last</p> <p>12 response?</p> <p>13 (Record read.)</p> <p>14 BY MR. WILSON:</p> <p>15 Q. Can you repeat what you intended</p> <p>16 to answer to the last question?</p> <p>17 MS. WEISGERBER: Same objection.</p> <p>18 If you recall, Mike.</p> <p>19 A. I'm sorry, John. Can you just</p> <p>20 repeat the question, please, make sure I'm</p> <p>21 answering what you want me to answer.</p> <p>22 Q. My question is the same as it's</p> <p>23 been: Are you aware of any CLO that</p> <p>24 requested a reset and was not granted one?</p> <p>25 MS. WEISGERBER: Objection to</p>	<p style="text-align: right;">Page 153</p> <p>1 Confidential - Pugatch</p> <p>2 form. Objection to foundation.</p> <p>3 MR. MORRIS: Objection to the</p> <p>4 form of the question.</p> <p>5 A. Again, my understanding is the</p> <p>6 CLOs do not request the reset. Highland,</p> <p>7 as manager of HCLOF in its capacity as</p> <p>8 majority equity owner of certain of the</p> <p>9 CLOs, have requested a reset post our</p> <p>10 original investment.</p> <p>11 Q. Okay.</p> <p>12 MR. WILSON: I'll pass the</p> <p>13 witness.</p> <p>14 MS. WEISGERBER: I think we're</p> <p>15 done.</p> <p>16 THE REPORTER: Will everyone put</p> <p>17 their orders on the record, please?</p> <p>18 MR. MORRIS: John Morris for the</p> <p>19 Debtor. Expedited, please.</p> <p>20 MR. WILSON: John Wilson. I'm</p> <p>21 not sure what arrangements my office</p> <p>22 has previously made, but we want an</p> <p>23 expedited transcript, as well.</p> <p>24 THE REPORTER: Do you want a</p> <p>25 rough too?</p>

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1 Confidential - Pugatch	1
2 MR. WILSON: Yes, please.	2 ACKNOWLEDGEMENT OF DEPONENT
3 MR. MORRIS: Yes, please.	3
4 MS. WEISGERBER: Same for	4 I, MICHAEL PUGATCH, do hereby
5 HarbourVest, please.	5 acknowledge that I have read and
6 MR. MALONEY: I don't need an	6 examined the foregoing testimony, and
7 expedited transcript. I'd just be	7 the same is a true, correct and
8 happy to get one regular copy. I'll	8 complete transcription of the
9 take whatever you would produce in the	9 testimony given by me, and any
10 ordinary course. Same as what	10 corrections appear on the attached
11 everyone else ordered.	11 Errata sheet signed by me.
12 (Time Noted: 4:35 p.m. EDT.)	12
13	13
14	14 _____
15	15 (DATE) (SIGNATURE)
16	16
17	17
18	18
19	19
20	20
21	21
22	22
23	23
24	24
25	25

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1	1 ERRATA SHEET
2 CERTIFICATE OF SHORTHAND REPORTER-NOTARY	2 Case Name:
3 PUBLIC	3 Deposition Date:
4 I, Amanda Gorrone, the officer	4 Deponent:
5 before whom the foregoing deposition	5 Pg. No. Now Reads Should Read Reason
6 was taken, do hereby certify that the	6 _____
7 foregoing transcript is a true and	7 _____
8 correct record of the testimony given;	8 _____
9 that said testimony was taken by me	9 _____
10 stenographically and thereafter	10 _____
11 reduced to typewriting under my	11 _____
12 direction; and that I am neither	12 _____
13 counsel for, related to, nor employed	13 _____
14 by any of the parties to this case and	14 _____
15 have no interest, financial or	15 _____
16 otherwise, in its outcome.	16 _____
17 IN WITNESS WHEREOF, I have	17 _____
18 hereunto set my hand this 12th day of	18 _____
19 January, 2021.	19 _____
20	20
21 _____	21 _____
22 AMANDA GORRONE, CLR	22 Signature of Deponent
23 CLR NO: 052005 - 01	22 SUBSCRIBED AND SWORN BEFORE ME
24	23 THIS ____ DAY OF _____, 20__.
25 Notary Public in and for the State of New	24 _____
York	25 (Notary Public) MY COMMISSION EXPIRES: _____
County of Suffolk	

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EXHIBIT 8

006603

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**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

In re:	)	Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P., ¹	)	Case No. 19-34054-sgj11
Debtor.	)	Re: Docket Nos. 1625, 1697, 1706, 1707

**DEBTOR'S OMNIBUS REPLY IN SUPPORT OF DEBTOR'S MOTION FOR
ENTRY OF AN ORDER APPROVING SETTLEMENT WITH HARBOURVEST
(CLAIM NOS. 143, 147, 149, 150, 153, 154), AND AUTHORIZING ACTIONS
CONSISTENT THEREWITH**

¹ The Debtor's last four digits of its taxpayer identification number are (6725). The headquarters and service address for the above-captioned Debtor is 300 Crescent Court, Suite 700, Dallas, TX 75201.



The above-captioned debtor and debtor-in-possession (the “Debtor”) hereby submits this reply (the “Reply”) in support of its *Motion for Entry of an Order Approving Settlement with HarbourVest (Claim No.143,147, 149, 150, 153, 154), and Authorizing Actions Consistent Therewith* [Docket No. 1625] (the “Motion”).² In further support of the Motion, the Debtor respectfully states as follows:

PRELIMINARY STATEMENT

1. If granted, the Motion will resolve a \$300 million general unsecured claim against the Debtor’s estate for less than \$16.8 million in actual value.³ The settlement is another solid achievement for the Debtor and – not surprisingly – is opposed by no one except Mr. Dondero and entities affiliated with him.

2. As discussed in the Motion, in November 2017, HarbourVest invested \$80 million in exchange for a 49.98% membership interest in HCLOF – an entity managed by a subsidiary of the Debtor. The balance of HCLOF’s interests are held by CLO Holdco, Ltd. (an entity affiliated with Mr. Dondero), the Debtor, and certain of the Debtor’s employees. Subsequent to its investment in HCLOF, HarbourVest incurred substantial losses on its investment in HCLOF and filed claims against the Debtor’s estate.

3. HarbourVest asserts claims for fraud, fraudulent inducement, fraudulent concealment, fraudulent misrepresentation, negligent misrepresentation, breach of fiduciary duty

² All capitalized terms used but not defined herein have the meanings given to them in the Motion.

³ Under the proposed settlement, HarbourVest would receive an allowed, general unsecured claim of \$45 million and an allowed, subordinated claim of \$35 million. Based on the estimated recovery for general unsecured creditors of 87.44% (which is a recovery based on certain outdated assumptions discussed *infra*), HarbourVest’s \$45 million general unsecured claim is estimated to be worth approximately \$39.3 million and the \$35 million subordinated claim, which is junior to the general unsecured claim, is currently estimated to have value only if there are litigation recoveries. In addition, HarbourVest is transferring to an affiliate of the Debtor its interest in HCLOF, which is estimated to be worth approximately \$22.5 million. Thus, HarbourVest’s estimated recovery on its general unsecured and subordinated claims is estimated at approximately \$16.8 million on a net economic basis. This estimate, however, is dated and is based on the claims that were settled as of the filing of the Debtor’s plan in November 2020.

and unfair prejudice (under Guernsey law), violations of state securities laws, and RICO. In furtherance of these claims, HarbourVest alleges it was misled by the Debtor and its employees, including Mr. Scott Ellington (then the Debtor's general counsel), and that subsequent to investing in HCLOF, Mr. Dondero and the Debtor used HCLOF both as a piggybank to fund the litigation against Acis Capital Management, L.P. ("Acis") and as a scapegoat for the Debtor's litigation strategy, in each case to HarbourVest's substantial detriment.

4. Specifically, HarbourVest alleges that:

- the Debtor and its employees, including Mr. Ellington, misled HarbourVest about its intentions with respect to Mr. Terry's arbitration award against Acis and orchestrated a series of fraudulent transfers and corporate restructurings, the true purpose of which was to denude Acis of assets and make it judgment proof;
- the Debtor and its employees, including Mr. Ellington, misled HarbourVest as to the intent and true purpose of these restructurings and led HarbourVest to believe that Mr. Terry's claims against Acis were meritless and a simple employment dispute that would not affect HarbourVest's investment;
- the Debtor, through Mr. Dondero, improperly exercised control over or misled HCLOF's Guernsey-based board of directors to cause HCLOF to engage in unnecessary, unwarranted, and resource-draining litigation against Acis;
- the Debtor improperly caused HCLOF to pay substantial legal fees of various entities in the Acis bankruptcy that were unwarranted, imprudent, and not properly chargeable to HCLOF; and
- the Debtor used HarbourVest as a scapegoat in its litigation against Acis by asserting that the Debtor's improper conduct and scorched-earth litigation strategy was at HarbourVest's request, which was untrue.

5. The Debtor believed, and continues to believe, that it has viable defenses to HarbourVest's claims. Nevertheless, those defenses would be subject to substantial factual disputes and would require expensive and time-consuming litigation that would likely be resolved only after a lengthy trial all while the Debtor (or its successor) assumes the risk that the defenses might fail. The evidence will show that the proposed settlement is the product of substantial, arm's length – and sometimes quite heated – negotiations between and among the

principals and their counsel. The evidence will also show that one of HarbourVest's primary concerns in settling its claim was that part of that settlement would include the extrication of HarbourVest from the Highland web of entities and the related litigation. The proposed settlement accomplishes that and does so in compliance with HCLOF's governing agreements.

6. Pursuant to the proposed settlement, (a) HarbourVest will receive (i) an allowed, general unsecured claim in the amount of \$45 million, and (ii) an allowed, subordinated claim in the amount of \$35 million; (b) HarbourVest will transfer its 49.98% interest in HCLOF (valued at approximately \$22.5 million) to a wholly-owned subsidiary of the Debtor; and (c) the parties will exchange mutual and general releases. The Debtor believes that the proposed settlement is reasonable and results from the valid and proper exercise of its business judgment. And the Debtor's creditors apparently agree. None of the major parties-in-interest or creditors in this case has objected to the Motion: not the Committee, the Redeemer Committee, Acis, Patrick Daugherty, or UBS.

7. In distinction, the only objecting parties are Mr. Dondero, his family trusts (the Dugaboy Investment Trust ("Dugaboy") and Get Good Trust ("Get Good," and together with Dugaboy, the "Trusts")), and CLO Holdco (a wholly-owned subsidiary of Mr. Dondero's Charitable Donor Advised Fund, L.P. (the "DAF")) (collectively, the "Objectors"). Each of the Objectors has only the most tenuous economic interest in and connection to the Debtor's settlement with HarbourVest. Each of the Objectors is also controlled directly or indirectly by Mr. Dondero who has coordinated each of the Objectors litigation strategies against the Debtor.⁴ Mr. Dondero's efforts to litigate every issue in this case – directly and by proxy – should be rebuffed, and the objections overruled. The following is a brief summary of the objections.

⁴ See *Debtor's Amended Witness and Exhibit List with Respect to Evidentiary Hearing to be Held on January 8, 2021* [Adv. Pro. 20-3190-sgj, Docket No. 46], Exhibit Q.

<u>Pleading</u>	<u>Objection/Reservation</u>	<u>Response</u>
<i>Objection of James Dondero</i> [Docket No. 1697] (the “ <u>Dondero Objection</u> ”)	Because HarbourVest was damaged by the injunction entered in Acis, the settlement seeks to revisit this Court’s rulings in Acis.	Mr. Dondero is misdirecting the Court. HarbourVest’s claim arises from the misrepresentations of Mr. Dondero, Mr. Ellington, and others, not this Court’s rulings in Acis, including the failure to disclose the fraudulent transfer of assets.
	The settlement is not fair and equitable because it does not address (1) Acis’s mismanagement, (2) how the Debtor is liable for HarbourVest’s damages, (3) the success on the merits, (4) the costs of litigation, and (5) the Debtor’s ability to realize the value of the HCLOF interests in light of the Acis injunction.	Mr. Dondero ignores the dangers of the litigation and HarbourVest’s claims against the estate for misrepresentation and overestimates the ability to resolve the litigation. The Debtor has assessed the value of the HCLOF interests in light of all factors, including the Acis injunction.
	The HarbourVest settlement represents a substantial windfall to HarbourVest.	Mr. Dondero ignores the economics of this case, which have value breaking in Class 8 (General Unsecured Claims). The value of the settlement is not \$60 million; it is approximately \$16.8 million against a claim of \$300 million. There is no windfall.
	The HarbourVest settlement is improper gerrymandering because it provides HarbourVest with a general unsecured claim and a subordinated claim in order to secure votes for the plan.	The HarbourVest settlement provides for the resolution of HarbourVest’s claim. It is nonsensical to think that the Debtor would reach a settlement with HarbourVest that would include HarbourVest’s rejection of the Debtor’s plan, and there is nothing wrong with requiring acceptance of a plan as part of a settlement. Further, the Debtor does not need HarbourVest’s Class 9 vote to confirm a plan.
<i>Objection of the Dugaboy Investment Trust and Get Good Trust</i> [Docket No. 1706] (the “ <u>Trusts Objection</u> ”)	The settlement represents a radical change in the Debtor’s earlier position on the HarbourVest settlement.	Mr. Dondero ignores the dangers of the litigation and HarbourVest’s claims against the estate for misrepresentation and overestimates the ability to resolve the litigation.
	The settlement appears to buy HarbourVest’s vote.	The HarbourVest settlement provides for the resolution of HarbourVest’s claim. It is nonsensical to think that the Debtor would reach a settlement with HarbourVest that would include HarbourVest’s rejection of the Debtor’s plan, and there is nothing wrong with requiring acceptance of a plan as part of a settlement. Further, the Debtor does not need HarbourVest’s Class 9 vote to confirm a plan.
	No information is provided as to whether the Debtor can acquire HarbourVest’s interest in HCLOF or the value of that interest to the estate.	As discussed below, the HCLOF interest will be transferred to a wholly-owned subsidiary of the Debtor. Mr. Seery will testify as to the benefit of the HCLOF interests to the estate.
<i>Objection of CLO Holdco</i> [Docket No. 1707] (“ <u>CLOH Objection</u> ”)	HarbourVest cannot transfer its interests in HCLOF unless it complies with the right of first refusal.	CLO Holdco misinterprets the operative agreements and tries to create ambiguity where none exists.

8. These objections are just the latest objections filed by Mr. Dondero and his related entities to any attempt by the Debtor to resolve this case,⁵ including the Debtor's settlement with Acis [Docket No. 1087] and the seven separate objections filed by Mr. Dondero and his related entities to the *Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.* [Docket No. 1472] (the "Plan").⁶ It will not shock this Court to hear that each of the Objectors is also objecting to the Plan. In contradistinction, the Debtor has heard this Court's admonishments about old Highland's culture of litigation as evidenced by this case, Acis's bankruptcy, and beyond. Although the Debtor has vigorously contested claims when appropriate, the Debtor has also sought to settle claims and limit the senseless fighting. The Debtor has successfully resolved the largest claims against the estate, including the claims of the Redeemer Committee, Acis, and, as recently announced to this Court, UBS. The Debtor would ask this Court to see through the pretense of the Dondero-related entities' objections to the HarbourVest settlement and approve it as a valid exercise of the Debtor's business judgment.

⁵ As an example of Mr. Dondero's litigiousness, on January 12, 2021, Mr. Dondero filed notice that he will be appealing the preliminary injunction entered against him earlier on January 12, 2021.

⁶ (1) *James Dondero's Objection to Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.* [Docket No. 1661]; (2) *Objection to Confirmation of the Debtor's Fifth Amended Plan of Reorganization* (filed by Get Good Trust, The Dugaboy Investment Trust) [Docket No. 1667]; (3) *Senior Employees' Limited Objection to Debtor's Fifth Amended Plan of Reorganization* (filed by Scott Ellington, Thomas Surgent, Frank Waterhouse, Isaac Leventon) [Docket No. 1669]; (4) *Objection to Confirmation of Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.* (filed by Highland Capital Management Fund Advisors, L.P., Highland Fixed Income Fund, Highland Funds I and its series, Highland Funds II and its series, Highland Global Allocation Fund, Highland Healthcare Opportunities Fund, Highland Income Fund, Highland Merger Arbitrage Fund, Highland Opportunistic Credit Fund, Highland Small-Cap Equity Fund, Highland Socially Responsible Equity Fund, Highland Total Return Fund, Highland/iBoxx Senior Loan ETF, NexPoint Advisors, L.P., NexPoint Capital, Inc., NexPoint Real Estate Strategies Fund, NexPoint Strategic Opportunities Fund) [Docket No. 1670]; (5) *NexPoint Real Estate Partners LLC's Objection to Debtor's Fifth Amended Plan of Reorganization* (filed by NexPoint Real Estate Partners LLC f/k/a HCRE Partners LLC) [Docket No. 1673]; (6) *CLO Holdco, Ltd.'s Joinder to Objection to Confirmation of Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. and Supplemental Objections to Plan Confirmation* [Docket No. 1675]; and (7) *NexBank's Objection to Debtor's Fifth Amended Plan of Reorganization* (filed by NexBank Title, Inc., NexBank Securities, Inc., NexBank Capital, Inc., and NexBank) [Docket No. 1676].

9. **James Dondero.** In the Dondero Objection, Mr. Dondero asserts he is a “creditor, indirect equity security holder, and party in interest” in the Debtor’s bankruptcy. While that claim is ostensibly true, it is tenuous at best. On April 8, 2020, Mr. Dondero filed three unliquidated, contingent claims that he promised to update “in the next ninety days.”⁷ More than nine months later, Mr. Dondero has yet to “update” those claims to assert an actual claim against the Debtor’s estate.⁸

11. **Dugaboy and Get Good.** Dugaboy and Get Good are sham Dondero “trusts” with only the most attenuated standing. Dugaboy has filed three proofs of claim [Claim Nos. 113; 131; 177]. In two of these claims, Dugaboy argues that (1) the Debtor is liable to Dugaboy

⁸ Without knowing the nature of the “updates,” the Debtor does not concede that any “updates” would have been procedurally proper and reserves the right to object to any proposed amendment to Mr. Dondero’s claims.

for its postpetition mismanagement of the Highland Multi Strategy Credit Fund, L.P., and (2) this Court should pierce the corporate veil and allow Dugaboy to sue the Debtor for a claim it ostensibly has against the Highland Select Equity Master Fund, L.P. – a Debtor-managed investment vehicle. The Debtor believes that each of the foregoing claims is frivolous and has objected to them. [Docket No. 906].

12. In its third claim, Dugaboy asserts a claim against the Debtor arising from its Class A limited partnership interest in the Debtor (which represents just 0.1866% of the total limited partnership interests in the Debtor). Similarly, Get Good filed three proofs of claim [Claim Nos. 120; 128; 129] arising from its prior ownership of limited partnership interests in the Debtor. Because each these claims arises from an equity interest, the Debtor will seek to subordinate them under 11 U.S.C. § 510 at the appropriate time. As set forth above, these interests are out of the money and are not expected to receive any economic recovery.

13. Consequently, Mr. Dondero, Dugaboy, and Get Good’s standing to object to the HarbourVest settlement is attenuated and their chances of recovery in this case are extremely speculative at best. *See In re Kutner*, 3 B.R. 422, 425 (Bankr. N.D. Tex. 1980) (finding that a party had standing only when it had a “pecuniary interest . . . directly affected by the bankruptcy proceeding”); *see also In re Flintkote Co.*, 486 B.R. 99, 114-15 (Bankr. D. Del. 2012), *aff’d*. 526 B.R. 515 (D. Del. 2014) (a claim that is speculative cannot confer party in interest standing). Mr. Dondero, Dugaboy, and Get Good’s minimal interest in the estate should not allow them to overrule the estate’s business judgment or veto settlements with creditors, especially when no actual creditors and constituents have objected. “[A] bankruptcy judge must not blindly follow the hue and cry of the most vocal special interest groups; rather, [the judge] should consider all salient factors . . . and . . . act to further the diverse interests of the debtor, creditors and equity

holders, alike.” *In re Lionel*, 722 F.2d 1063, 1071 (2d Cir. 1983).

B. Mr. Dondero’s Objection and his “Trusts” Objection Are Without Merit

14. As discussed in the Motion, under applicable Fifth Circuit precedent, a bankruptcy court may approve a compromise or settlement as long as the proposed settlement is fair, reasonable, and in the best interest of the estate. *See, e.g., In re Age Ref. Inc.*, 801 F.3d 530, 540 (5th Cir. 2015). In making this determination, courts look to the following factors:

- probability of success in the litigation, with due consideration for the uncertainty of law and fact;
- complexity and likely duration of the litigation and any attendant expense, inconvenience and delay; and
- all other factors bearing on the wisdom of the compromise, including (i) “the paramount interest of creditors with proper deference to their reasonable views” and (ii) whether the settlement is the product of arm’s length bargaining and not of fraud or collusion.

Official Comm. of Unsecured Creditors v. Cajun Elec. Power Coop. (In re Cajun Elec. Power Coop.), 119 F.3d 349, 356 (5th Cir. 1997) (citations omitted). *See also Age Ref. Inc.*, 801 F.3d at 540; *Conn. Gen. Life Ins. Co. v. United Cos. Fin. Corp. (In re Foster Mortgage Corp.)*, 68 F.3d 914, 918 (5th Cir. 1995).

15. **The Settlement Seeks to Revisit the Acis Orders.** In the Dondero Objection, Mr. Dondero argues that HarbourVest’s claim is based on the financial harm caused to HarbourVest from Acis’s bankruptcy and the orders entered in the Acis bankruptcy. Mr. Dondero extrapolates from this that HarbourVest is seeking to challenge this Court’s rulings in Acis. (Dondero Obj., ¶¶ 17-20) Mr. Dondero misinterprets HarbourVest’s claims and the dangers such claims pose to the Debtor’s estate.

16. HarbourVest’s claims are for fraud, fraudulent inducement, fraudulent concealment, fraudulent misrepresentation, negligent misrepresentation, breach of fiduciary duty

and unfair prejudice (under Guernsey law), violations of state securities laws, and RICO. HarbourVest is not arguing that Acis or this Court caused its damages; HarbourVest is arguing that *the Debtor* – led by Mr. Dondero – (a) misled HarbourVest as to the nature of Mr. Terry’s claims against the Debtor and the litigation with Acis, (b) knowingly and intentionally failed to disclose that the Debtor was engaged in the fraudulent transfer of assets to prevent Mr. Terry from collecting his judgment, and (c) that *the Debtor* – under the control of Mr. Dondero – improperly engaged in a crusade against Mr. Terry and Acis, which substantially damaged HarbourVest and its investment in HCLOF, in each case in order to induce HarbourVest to invest in HCLOF.

17. Again, HarbourVest does not contend that Acis caused its damages. Rather, HarbourVest contends that the fraudulent transfer of assets as part of the Debtor’s crusade against Mr. Terry and Acis and the false statements and omissions about those matters caused HarbourVest to make an investment it would never have made had Mr. Dondero and the Debtor been honest and transparent. The Acis litigation – in HarbourVest’s estimation – never should have happened. Acis did not cause HarbourVest’s damages. Mr. Dondero’s crusade against Mr. Terry and the Debtor’s allegedly fraudulent statements to HarbourVest about the fraudulent transfers, Mr. Terry and Acis caused HarbourVest’s damages.

18. **The HarbourVest Claim Lacks Merit.** In their objections, Mr. Dondero and the Trusts argue that the HarbourVest settlement is not fair and equitable and not in the best interests of the estate because (a) it does not address the Debtor’s arguments against the HarbourVest claims and (b) there is a lack of pending litigation seeking to narrow the claims against the estate. These arguments only summarily address the first two factors of *Cajun Electric*, which deal with success in the litigation, and, in doing so, mischaracterize the dangers to the Debtor’s estate

posed by HarbourVest's claims. (Dondero Obj., ¶¶ 21-25; Trusts Obj., ¶ 18(a))

19. Both the Dondero Objection and – to a much lesser extent - the “Trusts” Objection allege that (a) HarbourVest's losses were caused by Acis and its (mis)management of HCLOF's investments (Dondero Obj., ¶¶ 22, 24), (b) there is no contract that supports HarbourVest's claims (Dondero Obj. ¶ 23; Trusts Obj., ¶ 18(a)), (c) there is no causal connection between HarbourVest's losses and the Debtor's conduct (Dondero Obj., ¶ 24), and (d) the Debtor should litigate all or a portion of HarbourVest's claim before settling (Dondero Obj., ¶ 25). Again, though, as set forth above, both Mr. Dondero and the “Trusts” seek to shift the cause of HarbourVest's damages away from the Debtor's misrepresentations and to Mr. Terry's management of HCLOF's investments. This is simple misdirection.

20. HarbourVest's claims are that it invested in HCLOF based on the Debtor's fraudulent misrepresentations. Fraudulent misrepresentation sounds in tort, not contract. *See, e.g., Clark v. Constellation Brands, Inc.*, 348 Fed. Appx. 19, 21 (5th Cir. 2009) (referring to party's claim based on fraudulent misrepresentation as a tort); *Eastman Chem. Co. v. Niro, Inc.*, 80 F. Supp. 2d 712, 717 (S.D. Tex. 2000) (noting that party had common law duty not to commit intentional tort of fraudulent misrepresentation). There is thus no need for HarbourVest to point to a contractual provision to support its claim.⁹ Moreover, in order to defend against HarbourVest's claims, the Debtor would need to elicit evidence showing that its employees did not make misrepresentations to HarbourVest. Such a defense would require the Debtor to rely on the veracity of Mr. Ellington's testimony, among others. That is a high hurdle, and no reasonable person would expect the Debtor to stake the resolution of HarbourVest's \$300 million claim on the Debtor's ability to convince this Court that Mr. Ellington was telling HarbourVest

⁹ Subsequent to filing the Motion, the Objectors requested all agreements between HarbourVest, HCLOF, and the Debtor, and such agreements were provided.

the truth. This is especially true in light of the evidence supporting Mr. Ellington's recent termination for cause and the evidence recently provided by HarbourVest supporting its claim for fraudulent misrepresentations.

21. Finally, neither Mr. Dondero nor the "Trusts" even address the third factor analyzed by the Fifth Circuit: all other factors bearing on the wisdom of the compromise, including "the paramount interest of creditors with proper deference to their reasonable views." This is telling because no creditor or party in interest has objected to the settlement. Mr. Dondero and his proxies' preference for constant litigation should not outweigh the preference of the Debtor and its creditors for a reasonable and expeditious settlement of HarbourVest's claims.

22. **The HarbourVest Settlement Is a Windfall to HarbourVest.** Both the Dondero Objection and the "Trusts" Objection argue that the HarbourVest settlement represents a substantial windfall to HarbourVest. Both Mr. Dondero and the "Trusts" ignore the facts. Specifically, Mr. Dondero argues that HarbourVest is receiving \$60 million dollars in *actual* value for its claims. Mr. Dondero's contention, however, wrongly assumes that both the \$45 million general unsecured claim and the \$35 million subordinated claim provided to HarbourVest under the settlement will be paid 100% in full and that HarbourVest will receive \$80 million in cash. From that \$80 million, Mr. Dondero subtracts \$20 million, which represents the value Mr. Dondero ascribes to HarbourVest's interests in HCLOF that are being transferred to the Debtor. Mr. Dondero's math ignores the reality of this case.

23. The Debtor very clearly disclosed in the projections filed with the *Disclosure Statement for the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.*, [Docket No. 1473] (the "Projections") that general unsecured claims would receive an 87.44% recovery *only if* the claims of UBS, HarbourVest, Integrated Financial Associates, Inc., Mr.

Daugherty, and the Hunter Mountain Investment Trust were zero. Because of the Debtor's success in settling litigation, that assumption is proving to be inaccurate. Regardless, even if general unsecured claims receive a recovery of 87.44%, because the subordinated claims are junior to the general unsecured claims, the subordinated claims' projected recovery is currently zero. As such, assuming the HCLOF's interests are worth \$22.5 million,¹⁰ the actual recovery to HarbourVest will be less than \$16.8 million. This is not a windfall. HarbourVest's investment in HCLOF was \$80 million and its claim against the estate was over \$300 million. The settlement represents a substantial discount.

24. **Improper Gerrymandering and/or Vote Buying.** Each of Mr. Dondero and the Trusts argue in one form or another that the HarbourVest settlement is improper as it provides HarbourVest a windfall on its claims in exchange for HarbourVest voting to approve the Plan. These unsubstantiated allegations of vote buying should be disregarded. As an initial matter, and as set forth above, HarbourVest is *not* getting a windfall. HarbourVest is accepting a substantial discount in the settlement. HarbourVest's incentive to support the Plan comes from HarbourVest's determination that the Plan is in its best interests. There is also nothing shocking about a settling creditor supporting a plan. Indeed, it would be nonsensical for a creditor to settle its claims and then object to the plan that would pay those claims.

25. More importantly, HarbourVest's votes in Class 9 (Subordinated Claims) are not needed to confirm the Plan. As will be set forth in the voting declaration, Class 2 (Frontier Secured Claim), Class 7 (Convenience Claims), and Class 8 (General Unsecured Claims) have voted in favor of the Plan.¹¹ In brief, the Plan was approved without HarbourVest's Class 9 vote,

¹⁰ It is currently anticipated that Mr. James P. Seery, Jr., the Debtor's chief executive officer and chief restructuring officer, will testify as to the value of the HCLOF interests to the Debtor's estate.

¹¹ The Debtor anticipates that Mr. Dondero and his related entities will argue that neither Class 7 nor Class 8 voted to accept the Plan because of the votes cast against the Plan in those Classes by current and former Debtor

and the Debtor, therefore, has no need to “buy” HarbourVest’s Class 9 claims. Accordingly, any claims of gerrymandering or vote buying are without merit.

C. CLOH Objection

26. CLO Holdco (and to a much lesser extent, the “Trusts”) object to HarbourVest’s transfer of its interests in HCLOF as part of the settlement. Currently, the settlement contemplates that HarbourVest will transfer 100% of its collective interests in HCLOF to HCMLP Investments, LLC (“HCMLPI”), a wholly-owned subsidiary of the Debtor. As set forth in the *Transfer Agreement for Ordinary Shares of Highland CLO Funding, Ltd.* (which was appended as Exhibit A to the Settlement Agreement) [Docket No. 1631-1], each of the Debtor, HarbourVest, Highland HCF Advisors, Ltd. (HCLOF’s investment manager) (“HHCFA”), and HCLOF agree that HarbourVest is entitled to transfer its interests to HCMLPI pursuant to that certain *Members Agreement Relating to the Company*, dated November 15, 2017 (the “Members Agreement”),¹² without offering that interest to other investors in HCLOF.

27. The *only* party to object to the transfer of HarbourVest’s interests in HCLOF to HCMLPI is CLO Holdco. CLO Holdco holds approximately a 49.02% interest in HCLOF and is the wholly-owned subsidiary of the DAF, Mr. Dondero’s donor-advised fund. CLO Holdco argues that the Member Agreement requires HarbourVest to offer its interest first to the other investors in HCLOF before it can transfer its interests to HCMLPI. In so arguing, CLO Holdco attempts to create ambiguity in an unambiguous contract and to use that ambiguity to disrupt the Debtor’s settlement with HarbourVest.

28. As an initial matter, the Debtor and CLO Holdco agree that the transfer of HarbourVest’s interests in HCLOF to HCMLPI is governed by Article 6 (Transfers or Disposals

employees, including Mr. Ellington and Mr. Isaac Leventon. The Debtor will demonstrate at confirmation that those objections are without merit and that Class 7 and Class 8 voted to accept the Plan.

¹² A true and accurate copy of the Members Agreement is attached hereto as Exhibit A.

of Shares) of the Members Agreement (an agreement governed by Guernsey law). (CLOH Obj., ¶ 3) The parties diverge, however, as to how to interpret Article 6. The Debtor, as set forth below, believes Article 6 is clear in that it allows HarbourVest to transfer its interests in HCLOF to any “Affiliate of an initial Member party” without requiring the right of first refusal in Section 6.2 of the Members Agreement. CLO Holdco’s position appears to be that the Members Agreement, despite its clear language, should be interpreted as limiting transfers to an “initial Member’s *own* affiliates” and that any other transfer requires the consent of HHCFA and satisfaction of the right of first refusal. (*Id.* (emphasis added)) CLO Holdco’s reading is contrary to the actual language of the Members Agreement.

29. First, Section 6.1 of the Members Agreement provides, in pertinent part:

[REDACTED]

(Members Agmt, § 6.1 (emphasis added)) Under the Members Agreement, “Affiliate” is defined, in pertinent part, as “[REDACTED]

[REDACTED]

(*Id.*, § 1.1) A “Member” in turn is a [REDACTED].” The “initial Member[s]” are the initial Members of HCLOF listed on the first page of the Members Agreement and include the Debtor, HarbourVest, and CLO Holdco.

30. As such, under the plain language of Section 6.1, HarbourVest is entitled – without the consent of any party – to “Transfer” its interests in HCLOF to an “Affiliate” of any of the Debtor, HarbourVest, or CLO Holdco. And that is exactly what is contemplated by the settlement. HarbourVest is transferring its interests to HCMLPI, a wholly owned and controlled subsidiary of the Debtor, and therefore an “Affiliate” of the Debtor. That transfer is indisputably

allowed under Section 6.1; it is a transfer to an “Affiliate of an initial Member.” CLO Holdco may, tongue in cheek, call this structure “convenient” but that sarcasm is an attempt to avoid the fact that the Members Agreement clearly allows HarbourVest to transfer its interest to HCMLPI without the consent of any party.¹³ The fact that CLO Holdco does not now like the language it previously agreed to when CLO Holdco and the Debtor were both controlled by Mr. Dondero is not a reason to re-write Section 6.1 of the Members Agreement.

31. Second, Section 6.2 of the Members Agreement is also unambiguous and, by its plain language, allows HarbourVest to “Transfer” its interests in HCLOF to “Affiliates of an initial Member” (*i.e.*, HCMLPI) without having to first offer those interests to the other Members (such obligation, the “ROFO”). CLO Holdco attempts to create ambiguity in Section 6.2 by arguing that it must be read in conjunction with Section 6.1 and that interpreting the plain language of Section 6.2 to allow HarbourVest to transfer its interests to HCMLPI without restriction makes certain other language surplus and meaningless. (CLOH Obj., ¶ 11-13) Again, CLO Holdco is attempting to create controversy and ambiguity where none exists.

32. Section 6.2 of the Members Agreement provides, in pertinent part:

[REDACTED]

(Members Agmt., § 6.2 (emphasis added)) Like Section 6.1, Section 6.2 is clear on its face. It exempts from the requirement to comply with the ROFO two categories of “Transfers”: (1) Transfers to “affiliates of an initial Member” from Members *other than* CLO Holdco and the

¹³ Although HHCFA’s consent is not necessary for HarbourVest to transfer its interests to HCMLPI, HHCFA will consent to the transfer.

“Highland Principals” (*i.e.*, the Debtor and certain of its employees)¹⁴ and (2) Transfers from CLO Holdco or a Highland Principal to the Debtor, the Debtor’s “Affiliates,” or another Highland Principal. The fact that a narrower exemption is provided to CLO Holdco and the Debtor than to HarbourVest (or any other Member) under Section 6.2 is of no moment; the language says what it says and was agreed to by all Members, including CLO Holdco, when they executed the Members Agreement.

33. In addition, and although not relevant, the language of Section 6.2 makes sense in the context of the deal. Although CLO Holdco and the Debtor may have disclaimed an “Affiliate” relationship, they are related through Mr. Dondero and invest side by side with the Debtor in multiple deals.¹⁵ The different standards in Section 6.2 serve to ensure that HarbourVest’s (or any successor to HarbourVest) right to Transfer its shares without satisfying the ROFO is limited to three parties: (i) HarbourVest’s Affiliates, (ii) the Debtor’s Affiliates, and (iii) CLO Holdco’s Affiliates. This restriction keeps the relative voting power of each Member static and ensures that CLO Holdco and the Debtor, together, will *always* have more than fifty percent of HCLOF’s total interests and that HarbourVest will *always* have less than fifty percent. This counterintuitively also explains the greater restrictions placed on CLO Holdco and the “Highland Principals.” The Highland Principals include certain Debtor employees. Those employees – as well as CLO Holdco and the Debtor – are prohibited from transferring their HCLOF interests outside of the Dondero family. This restriction makes sense. If, for example, a Debtor employee wanted to transfer its interests to an Affiliate of HarbourVest, HarbourVest could have more than fifty percent of the HCLOF interests because of the thinness

¹⁴ “Highland Principals” means:

[REDACTED]

(Members Agmt., § 1.1)

¹⁵ There can be no real dispute that Mr. Dondero effectively controls CLO Holdco.

of the Dondero-family's majority (approximately 0.2%). At the time the Members Agreement was executed, CLO Holdco and the Debtor were under common control. Section 6.2 preserves those related entities' control over HCLOF by restricting transactions that would transfer that control unless the ROFO is complied with.

34. As such, and notwithstanding CLO Holdco's protestations, Section 6.1 and Section 6.2 are consistent as written and clear on their face. This consistency is further evidenced by HCLOF's Articles of Incorporation¹⁶ and HCLOF's offering memorandum, which each include language identical to Section 6.1 and 6.2 of the Members Agreement.¹⁷ It seems highly unlikely, if not implausible, that sophisticated parties such as CLO Holdco would include the exact same language in six separate places over three documents without a reason for that language and without the intent that such language be interpreted as it is clearly written – not as CLO Holdco now wants it to be interpreted. Accordingly, since HarbourVest is transferring its interests to HCMLPI, an Affiliate of an initial Member, the plain language of Section 6.2

¹⁶ See Articles of Incorporation, adopted November 15, 2017, a true and correct copy of which is attached hereto as Exhibit B.

[REDACTED]

(Articles of Incorporation, § 18.1)

[REDACTED]

(*Id.*, § 18.2)

¹⁷ See Offering Memorandum, dated November 15, 2017, a true and correct copy of which is attached hereto as Exhibit C.

[REDACTED]

(Offering Memorandum, page 89)

exempts HarbourVest from having to comply with the ROFO.

35. Third, and finally, CLO Holdco makes the nonsensical argument that because Section 6.2 provides different treatment to similarly situated Members that this Court should re-write Section 6.2. (CLOH Obj., ¶¶ 15-17) Contracts provide different treatment to ostensibly similarly situated parties all the time and no one objects that that creates an absurd result. It just means that different parties bargained for and received different rights.

36. CLO Holdco's attempt to justify why this Court should re-write the Members Agreement to correct the "disparate treatment" is also unavailing. As an example of the absurd result caused by the "disparate treatment," CLO Holdco states: "[B]ecause the HarbourVest Members are technically Affiliates of an initial member (each other), they could obtain control of all of the interests in HCLOF without any Member receiving a Right of First Refusal for any transfer." (*Id.*, ¶ 16) The scenario posited by CLO Holdco, however, is *exactly* the scenario prevented by the clear language of Section 6.2. For HarbourVest to obtain control of HCLOF, it would – as a matter of mathematical necessity – need the interests held by CLO Holdco (49.02%) and/or the Highland Principals (1% in the aggregate). Section 6.2, however, *expressly* prohibits CLO Holdco and the Highland Principals from transferring their interests to HarbourVest or its Affiliates without satisfying the ROFO. As set forth above, it is Section 6.2 that prevents control from being transferred away from the Dondero family without compliance with the ROFO. In fact, Section 6.2 would only break down if the limiting language in Section 6.2 were read out of it in the manner advocated by CLO Holdco.

37. Ultimately, Article 6 of the Members Agreement is clear as written and expressly allows HarbourVest to transfer its interests to HCMLPI. If CLO Holdco had an objection to the rights provided to HarbourVest under the Members Agreement, CLO Holdco

should have raised that objection three and a half years ago before agreeing to the Members Agreement. CLO Holdco should not be allowed to create ambiguity in an unambiguous contract or to re-write that agreement to impose additional restrictions on HarbourVest. *See Clardy Mfg. Co. v. Marine Midland Bus. Loans Inc.*, 88 F.3d 347, 352 (5th Cir. 1996) (enforcing the “unambiguous language in a contract as written,” noting that where a contract is unambiguous, a party may not create ambiguity or “give the contract a meaning different from that which its language imports”) (internal quotations omitted); *Texas v. Am. Tobacco Co.*, 463 F.3d 399, 407 (5th Cir. 2006) (“Courts interpreting unambiguous contracts are confined to the four corners of the document, and cannot look to extrinsic evidence to create an ambiguity.”).

38. It should go without saying, but CLO Holdco (and the other parties to the Members Agreement) should also be required to satisfy their obligations under the Members Agreement and execute the “Adherence Agreement” as required by Section 6.6 of the Members Agreement in connection with the Transfer of HarbourVest’s interests to HCMLPI or any other permitted Transfer.

39. Finally, and notably, although CLO Holdco spends considerable time arguing that HarbourVest should be required to comply with the ROFO, nowhere in the CLOH Objection does CLO Holdco state that it wishes to purchase HarbourVest’s interests in HCLOF. This omission is telling. CLO Holdco and the other Objectors have no interest in actually exercising their alleged right of first refusal contained in the Members Agreement. Rather, their only interest is in causing the Debtor to spend time and money responding to a legion of related (and coordinated) objections.¹⁸

¹⁸ *See Debtor’s Amended Witness and Exhibit List with Respect to Evidentiary Hearing to be Held on January 8, 2021* [Adv. Pro. 20-3190-sgj, Docket No. 46], Exhibit Q; Exhibit T (email from Mr. Dondero as forwarded to Mr. Ellington stating “Holy bananas..... make sure we object [to the HarbourVest Settlement]”); Exhibit Y.

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WHEREFORE, for the reasons set forth above and in the Motion, the Debtor respectfully requests that the Court grant the Motion.

Dated: January 13, 2021

PACHULSKI STANG ZIEHL & JONES LLP

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Ira D. Kharasch (CA Bar No. 109084) (*pro hac vice*)
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Counsel for the Debtor and Debtor-in-Possession

EXHIBIT 9

006626

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In Re:) **Case No. 19-34054-sgj-11**
) Chapter 11
)
HIGHLAND CAPITAL) Dallas, Texas
MANAGEMENT, L.P.,) Thursday, January 14, 2021
) 9:30 a.m. Docket
Debtor.)
) - MOTION TO PREPAY LOAN
) [1590]
) - MOTION TO COMPROMISE
) CONTROVERSY [1625]
) - MOTION TO ALLOW CLAIMS OF
) HARBOURVEST [1207]
)

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE STACEY G.C. JERNIGAN,
UNITED STATES BANKRUPTCY JUDGE.

WEBEX APPEARANCES:

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006627

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25 Proceedings recorded by electronic sound recording;
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006628

1 DALLAS, TEXAS - JANUARY 14, 2021 - 9:41 A.M.

2 THE CLERK: All rise. The United States Bankruptcy
3 Court for the Northern District of Texas, Dallas Division, is
4 now in session, the Honorable Stacey Jernigan presiding.

5 THE COURT: Good morning. Please be seated. All
6 right. We're a little late getting started because we had
7 lots of reading material for the Court today. All right.
8 This is Judge Jernigan, and we have a couple of Highland
9 settings. The HarbourVest matters are the primary thing we
10 have set today, and then we also have a Debtor's motion
11 pursuant to protocols for authority for Highland Multi-Strat
12 to prepay a loan.

13 All right. Well, let's get a few appearances. First, for
14 the Debtor team, who do we have appearing this morning?

15 MR. POMERANTZ: Good morning, Your Honor. It's Jeff
16 Pomerantz, John Morris, and Greg Demo here on behalf of the
17 Debtor.

18 THE COURT: Okay. Thank you.

19 All right. We have objections on HarbourVest. Who do we
20 have appearing for Mr. Dondero this morning?

21 MR. WILSON: Your Honor, it's John Wilson, and I'm
22 also joined by Michael Lynn, John Bonds, and Bryan Assink.

23 THE COURT: Okay. I'm sorry. Could -- the court
24 reporter does yeoman's work in this case. Let me just make
25 sure we got all three of those names. Say again, Mr. Wilson.

1 MR. WILSON: John Bonds and Michael Lynn and Bryan
2 Assink.

3 THE COURT: Oh, okay. So, see, I thought I heard
4 somebody Wilson in all of that, which was why I was pressing
5 the issue.

6 All right. Is Mr. Dondero present on the video for
7 today's hearing?

8 MR. WILSON: I believe he is, Your Honor.

9 THE COURT: Mr. Dondero, could you confirm that you
10 are out there? (No response.) Okay. My court reporter says
11 he sees the name out there. Is he in your office?

12 MR. WILSON: Your Honor, he is appearing remotely
13 from my office. I'm not sure exactly where he's appearing
14 from.

15 THE COURT: Okay. Well, Mr. Dondero, if you're out
16 there and you're speaking up to confirm you're present, we're
17 not hearing you. Maybe your device is on mute. So please
18 unmute yourself.

19 (No response.)

20 THE COURT: All right. I'm going to take some other
21 appearances and you -- you need to try to communicate with
22 your client and let him know I need to confirm he's present.
23 Okay?

24 All right. Meanwhile, let's go to our other Objectors.
25 CLO Holdco. Who do we have appearing today?

1 MR. KANE: John Kane; Kane Russell Coleman & Logan;
2 on behalf of CLO Holdco.

3 THE COURT: All right. Thank you, Mr. Kane.

4 We had an objection from Dugaboy Investment Trust and Get
5 Good Trust. Who do we have appearing?

6 MR. DRAPER: Douglas Draper, Your Honor, for -- for
7 Draper.

8 THE COURT: All right. Thank you, Mr. Draper.

9 All right. I think those were the only written objections
10 we had. Mr. Pomerantz, do you confirm, we don't have any
11 other objectors for the motions set, correct?

12 MR. POMERANTZ: Your Honor, there was those three.

13 THE COURT: I'm sorry. I didn't catch your full
14 sentence.

15 MR. POMERANTZ: That is correct, Your Honor. There
16 were three objections to the motion.

17 THE COURT: Okay. Mr. Clemente, you're there for the
18 Creditors' Committee?

19 MR. CLEMENTE: Yes. Good morning, Your Honor. Matt
20 Clemente on behalf of the Official Committee of Unsecured
21 Creditors.

22 THE COURT: All right. Good morning. Thank you.
23 All right. We have a lot of other folks on the video. I'm
24 not going to go ahead and take a roll call of other lawyers.

25 MS. WEISGERBER: Your Honor?

1 THE COURT: Yes?

2 MS. WEISGERBER: Excuse me, Your Honor. It's Erica
3 Weisgerber from Debevoise on behalf of HarbourVest.

4 THE COURT: Okay.

5 MS. WEISGERBER: And I'm joined by Natasha Labovitz
6 and Dan Stroik --

7 THE COURT: Okay.

8 MS. WEISGERBER: -- from Debevoise as well.

9 THE COURT: Thank you. I was neglectful in not
10 getting your appearance, because, of course, you're at the
11 front and center of this motion to compromise, and I did see
12 that you filed a reply brief yesterday afternoon. Okay.
13 Thank you.

14 All right. Do we have -- do we have Mr. Dondero on the
15 line? I'm going to check again.

16 (No response.)

17 THE COURT: Mr. Dondero's counsel, I cannot hear you,
18 so please unmute your device.

19 MR. WILSON: Your Honor, it appears to me that Mr.
20 Dondero's device was unmuted as soon as you asked if he was
21 available. I sent him a communication a second ago asking if
22 he's having technical difficulties. I have not received a
23 response, so I --

24 MR. DONDERO: Hello. Can anybody hear me?

25 THE COURT: Oh.

1 MR. WILSON: Okay. I hear him.

2 THE COURT: Mr. Dondero?

3 MR. DONDERO: Hello?

4 THE COURT: Is that you?

5 MR. DONDERO: Yeah, it is. I've been on. I've heard
6 everything since the beginning. It's just we've had technical
7 difficulties. I couldn't use the Highland offices. We've
8 been trying to set up something else.

9 THE COURT: All right.

10 MR. DONDERO: But I'm on now, if -- yes.

11 THE COURT: All right. Very good. Well, I'm glad
12 we've got you.

13 All right. Well, Mr. Pomerantz, how did you want to
14 proceed this morning?

15 MR. POMERANTZ: Your Honor, we could take up the
16 HarbourVest motion first, and I will turn it over to John
17 Morris. He and Greg Demo will be handling that. And then
18 after that we can handle the other motion, which is unopposed.

19 THE COURT: All right. Mr. Morris?

20 MR. KANE: Your Honor, this is -- sorry. This is
21 John Kane for CLO Holdco. Just very briefly, if I may. And
22 this will affect, I think, the Debtor's case in chief, so I'll
23 expedite things a little bit, I believe.

24 CLO Holdco has had an opportunity to review the reply
25 briefing, and after doing so has gone back and scrubbed the

1 HCLOF corporate documents. Based on our analysis of Guernsey
2 law and some of the arguments of counsel in those pleadings
3 and our review of the appropriate documents, I obtained
4 authority from my client, Grant Scott, as Trustee for CLO
5 Holdco, to withdraw the CLO Holdco objection based on the
6 interpretation of the member agreement.

7 THE COURT: All right. Well, thank you for that, Mr.
8 Kane. I think that -- that eliminates one of the major
9 arguments that we had anticipated this morning. So, thank you
10 for that.

11 Any other housekeeping matters that maybe someone had that
12 I didn't ask about?

13 MS. MATSUMURA: Yes, Your Honor. This is Rebecca
14 Matsumura from King & Spalding representing Highland CLO
15 Funding, Ltd. I just wanted to put on the record, we -- our
16 client had requested that some of its organizational documents
17 be filed under seal. But we have given permission for the
18 parties to present the relevant excerpts, to the extent it's
19 still relevant after Mr. Kane's announcement, in court. And
20 we'd just ask that the underlying documents remain sealed, but
21 we're not going to object if they show them on a PowerPoint or
22 anything like that.

23 So, to the extent that you had that on your radar, I just
24 wanted to clear that up for the proceedings.

25 THE COURT: All right. Well, I did sign an order

1 late last night. I don't know if it's popped up on the
2 docket.

3 MS. MATSUMURA: Yes, Your Honor. That's what this
4 referred to. That was what -- these are the documents that
5 were being sealed. And so I just wanted to note, if you --
6 you know, if the Debtor puts up an excerpt of those documents
7 and you're like, wait a minute, didn't I seal those, that we
8 were the party that requested them be under seal and we're
9 fine with them being shown in court, as long as the underlying
10 documents aren't publicly accessible.

11 THE COURT: Okay. Got you. Thank you.

12 All right. Any other housekeeping matters?

13 MR. MORRIS: Yes, Your Honor. This is John Morris
14 from Pachulski Stang for the Debtor. Good morning.

15 THE COURT: Good morning.

16 MR. MORRIS: The only other matter that I wanted to
17 raise, and I can do it now or I can do it later, or Your Honor
18 may tell me that it's not appropriate to do at this time, is
19 to schedule the Debtor's motion to hold Mr. Dondero in
20 contempt for violation of the TRO.

21 THE COURT: All right. Well, let's do that at the
22 conclusion today. And please make sure I do it. I think I
23 was going to address this last Friday, and we went very late
24 and it slipped off my radar screen. But I did see from my
25 courtroom deputy that you all were reaching out to her

1 yesterday to get this set, and then Mr. Dondero's counsel
2 reached out to her and said, We're going to file an objection
3 to a setting next Wednesday, or I think you had asked for a
4 setting next Tuesday or Wednesday.

5 MR. MORRIS: I did.

6 THE COURT: And I don't -- I don't know if that
7 response/objection was ever filed last night. I haven't seen
8 it if it was. So, we'll -- please, make sure I don't forget.
9 We'll take that up at the end of today's matters. All right.
10 Well, --

11 MR. MORRIS: All right. So, --

12 MS. WEISGERBER: Your Honor, one last housekeeping
13 item from -- I'm joined this morning by Michael Pugatch of
14 HarbourVest, who will present some testimony this morning. I
15 just want to confirm he's on the line and confirm no
16 objections to him sitting in for the rest of the hearing.

17 THE COURT: All right. Mr. Pugatch, this is Judge
18 Jernigan. Could you respond? Are you there with us?

19 MR. PUGATCH: Yes. Good morning, Your Honor. Mike
20 Pugatch from HarbourVest here.

21 THE COURT: All right. Very good. I think we had
22 you testify once before in the Acis matter, if I'm not
23 mistaken. Maybe. Maybe not. Maybe I saw a video deposition.
24 I can't remember.

25 All right. So, we're going to let Mr. Pugatch sit in on

1 this. Anyone want to say anything about that? I consider him
2 a party representative, so I don't -- I don't think anyone
3 could invoke the Rule.

4 All right. Very good. Well, let's go forward if there
5 are no more housekeeping matters.

6 MR. MORRIS: Okay.

7 THE COURT: Mr. Morris?

8 MR. MORRIS: Thank you. Thank you very much, Your
9 Honor. John Morris; Pachulski Stang Ziehl & Jones; for the
10 Debtor.

11 It's a rather straightforward motion today. It's a motion
12 under Rule 9019, pursuant to which the Debtor requests the
13 Court's authority and approval to enter into a settlement
14 agreement with HarbourVest that will resolve a number of
15 claims that HarbourVest has filed against the Debtor.

16 What I -- the way I propose to proceed this morning, Your
17 Honor, is to give what I hope is an informative but relatively
18 brief opening statement. I'll defer to HarbourVest and its
19 counsel as to whether they want to make a presentation in
20 advance of the offer of evidence. Any objecting party, I
21 suppose, should then be given the opportunity to present their
22 case to the Court. Then the Debtor will call Jim Seery, the
23 Debtor's CEO and CRO. We will offer documents into evidence.
24 I would propose then that the objecting parties take the
25 opportunity to ask Mr. Seery any questions they'd like on the

1 matter.

2 After the Debtor rests, I think HarbourVest would like to
3 put Mr. Pugatch on the stand to offer some testimony on their
4 behalf. And I think that that will conclude the case. We can
5 finish up with some closing arguments as to what we believe
6 the evidence showed, but that's the way that I'd like to
7 proceed, if that's okay with the Court.

8 THE COURT: All right. That sounds fine.

9 OPENING STATEMENT ON BEHALF OF THE DEBTOR

10 MR. MORRIS: Okay. So, as I said, Your Honor, this
11 is a -- this should be a very straightforward motion under
12 Rule 9019. The standard is well-known to the Court. There
13 are four elements to a 9019 motion. The Debtor clearly has
14 the burden of proof on each one. And we easily meet that
15 burden, Your Honor.

16 The standard, just to be clear, the first part is that we
17 have to establish a probability of success, with due
18 consideration for uncertainty of law and fact. The second one
19 is the complexity, likely duration, expense and inconvenience
20 of the litigation. The third part of the test is the
21 paramount interest of creditors. And the fourth part of the
22 test is whether or not the proposed settlement was reached
23 after arm's-length negotiations.

24 The Debtor believes that it easily meets this standard,
25 and frankly, is a little bit frustrated that it's being forced

1 to incur the expense by Mr. Dondero in going through this
2 process.

3 A plain reading, a fair reading of the economics here
4 relative to the claim shows that this is a very reasonable
5 settlement. I don't need to go beyond that, Your Honor. I
6 don't even need to use the word reasonable. It surely meets
7 the lowest standard.

8 We've prepared a couple of demonstrative exhibits, Your
9 Honor. I'm going to use them with Mr. Seery. But I'd like to
10 just put one up on the screen now, if I may.

11 Ms. Canty, can you please put up Demonstrative Exhibit #3?

12 Demonstrative Exhibit #3 is an outline of the economics of
13 the settlement. It includes the various pieces, the
14 components that the parties have agreed to. And it shows, at
15 least from the Debtor's perspective, just what HarbourVest is
16 being given here.

17 Up on the screen is a demonstrative exhibit. It has
18 citations to the evidence that will be admitted by the Court.
19 The first line shows that HarbourVest will receive a \$45
20 million allowed general unsecured nonpriority claim. And that
21 -- that can be found at Debtor's Exhibit EE, Exhibit 1, at
22 Page 2.

23 That claim is discounted by the expected recovery that
24 general unsecured creditors are supposed to get. As of
25 November, in the liquidation analysis that was part of the

1 disclosure statement -- that's the citation in the footnote --
2 the Debtor believed that unsecured creditors were estimated to
3 recover approximately eighty-seven and a half cents on the
4 dollar. And so we just did the arithmetic there to get to the
5 net economic value of the proposed general unsecured claim.

6 And from that, we reduced \$22-1/2 million because that is
7 the net asset value of HarbourVest's interest in HCLOF, which,
8 pursuant to the settlement agreement, it will transfer back to
9 the Debtor, so that the net economic value is approximately
10 \$16.8 million.

11 You will hear testimony from Mr. Seery that this number
12 is, in fact, overstated, and it's overstated because, since
13 the time the disclosure statement was filed in November, a
14 number of events have occurred that will -- that have caused
15 the estimated recovery percentage to be reduced from
16 approximately 87-1/2 percent to something lower than that. We
17 don't have the exact number, Your Honor, but Mr. Seery will --
18 and the evidence will show that there's been more expenses,
19 that there's been some resolution of certain claims. There's
20 been some positive issues, too. But that number is probably
21 in the 70s somewhere.

22 And in any event, I think the point here is, Your Honor,
23 HarbourVest invested \$80 million in HCLOF, which was going to
24 participate in the investment in CLOs. They filed a claim for
25 \$300 million, through treble damages and other claims. But

1 the net economic impact of this is going to be somewhere
2 probably in between \$12 and \$14 million. I'll let Mr. Seery
3 give more precision to that. And it represents less than -- a
4 less than five percent recovery on the total claim.

5 And we think it's important for the Court to keep that in
6 mind. What are the economics here? Are we overpaying? Is
7 this an unreasonable settlement? And I think the evidence
8 will show that the Debtor is not, but that this settlement
9 that you see before you was the product of arm's length, and
10 I'm going to go in reverse order of the four-part test under
11 9019.

12 So, the last part is whether or not the settlement, the
13 proposed settlement was the product of arm's-length
14 negotiation. You'll hear lots of evidence that this
15 settlement that's up on the screen right now very much was the
16 product of arm's-length negotiation.

17 The third part of the test, Your Honor, is whether it
18 meets the paramount interest of creditors. You know,
19 regrettably, Mr. Dondero is the only purported creditor who is
20 objecting here. He may have done so through different
21 vehicles, but every objecting party here is a debtor [sic]
22 owned and controlled by Mr. Dondero. No other creditor -- not
23 the Creditors' Committee, UBS, Acis, Mr. Terry, Mr. Daugherty
24 -- nobody is objecting to this settlement except for Mr.
25 Dondero. And we believe that that highlights the Debtor's

1 ability to meet the third prong of the test, and that is these
2 are -- this settlement is in the paramount interest of
3 creditors.

4 Again, going in reverse, the second part of the test is
5 the complexity, duration, and expense of litigation. There
6 will be no disputed evidence that we meet -- the Debtor easily
7 meets this prong of the test. The evidence is going to show
8 that HarbourVest's claim is based on fraud, fraud in the
9 inducement, fraudulent statements and omissions, the kind of
10 case, Your Honor, that I'm sure you're familiar with that is
11 incredibly fact-intensive, that will be incredibly difficult
12 to navigate through. It will be prolonged, it will be
13 expensive, because you're necessarily relying on he said/she
14 said, basically. And so we're going to have to get testimony
15 from every person that spoke in connection with the events
16 leading up to the transaction. So we think the second prong
17 will be easily met, Your Honor.

18 And then the last prong -- the first prong, if you will --
19 is the likelihood of success on the merits. We think that the
20 settlement, the economic recovery that's up on the screen
21 here, which ultimately will be less than five percent of the
22 claimed amount, in and of itself shows that the settlement is
23 consistent with the Debtor's perception of its likely success
24 on the merits. I'm certain that HarbourVest disagrees, but
25 that's okay, we're here today and that's the Debtor's view,

1 and the Court is here to assess the Debtor's business judgment
2 and whether the Debtor has properly analyzed the issues and
3 gone through the process. And the evidence will show
4 conclusively that it will. That it has.

5 Mr. Seery will testify at some length as to the risks that
6 he saw. I think that you'll hear counsel for Mr. Dondero ask
7 both Mr. Seery and Mr. Pugatch a number of questions designed
8 to elicit testimony about this defense or that defense. And
9 it's a little -- it's a little ironic, Your Honor, because,
10 really, every defense that they're going to try to suggest to
11 the Court was a valid defense is a defense that the Debtor
12 considered. In fact, it's, you know, it's a little spooky,
13 how they've -- how they've been able to identify kind of the
14 arguments that the Debtor had already considered in the
15 prosecution of their objections here.

16 But be that as it may, the evidence will conclusively show
17 that the Debtor acted consistent with its fiduciary duties,
18 acted in the best interests of the Debtor's estate, acted
19 completely appropriately here in getting yet another very
20 solid achievement for the Debtor, leaving very few claims that
21 are disputed at this point, all but one of which I believe are
22 in the hands of Mr. Dondero.

23 So, that's what we think that the evidence will show.

24 I do want to express my appreciation to Mr. Kane for
25 reflecting on the arguments that we made with respect to the

1 ability of the Debtor to engage in the transfer or the
2 acquisition of the asset from HarbourVest. I would -- I would
3 respectfully request that we just enter into a short
4 stipulation on the record reflecting that the Debtor's
5 acquisition of HarbourVest's interests in HCLOF is compliant
6 with all of the applicable agreements between the parties.

7 And with that, Your Honor, I look forward to putting Mr.
8 Seery on the stand and presenting the Debtor's case.

9 THE COURT: All right. Other opening statements?

10 OPENING STATEMENT ON BEHALF OF CLO HOLDCO, LTD.

11 MR. KANE: Yes, Your Honor. Sorry. John Kane on
12 behalf of CLO Holdco.

13 In response to Mr. Morris, I'm not going to enter into a
14 stipulation on behalf of my client, but the Debtor is
15 compliant with all aspects of the contract. We withdrew our
16 objection, and we believe that's sufficient.

17 THE COURT: All right. Well, I'm content with that.
18 Other opening statements?

19 OPENING STATEMENT ON BEHALF OF HARBOURVEST

20 MS. WEISGERBER: Your Honor, Erica Weisgerber on
21 behalf of HarbourVest.

22 HarbourVest joins in Mr. Morris's comments in support of
23 the settlement, and we believe that the question of whether
24 the settlement between HarbourVest and the Debtor satisfies
25 the Rule 9019 standard is not even a close one.

1 Some Objectors have made arguments about the merits of
2 HarbourVest's claims, which is why we're here. As Your Honor
3 will hear this morning, HarbourVest has meaningful and
4 meritorious claims against Highland, but made the business
5 decision to avoid the time, expense, and inherent risk of
6 litigation in the interest of preserving value, both for
7 itself and for the estate.

8 Today, Michael Pugatch, a managing director of
9 HarbourVest, will testify before the Court. He'll explain
10 that HarbourVest claims against Highland arise out of certain
11 misrepresentations and omissions by Highland to HarbourVest in
12 connection with HarbourVest's purchase of an interest in
13 HCLOF, one of Highland's managed funds. Those
14 misrepresentations and omissions, as Your Honor will hear,
15 relate to Highland's litigation with its former employee,
16 Joshua Terry, and transfers that were conducted in 2017 to
17 strip Acis of value and prevent Mr. Terry from collecting on
18 an \$8 million judgment.

19 Mr. Pugatch will further explain that HarbourVest would
20 not have invested in HCLOF had it known the underlying facts
21 about those Acis transfers.

22 Mr. Pugatch will also testify that not only did
23 HarbourVest not know about those transfers, it learned about
24 those transfers when it was accused of orchestrating the
25 transfers itself in the Acis bankruptcy. Your Honor will hear

1 that the Acis trustee sought extensive discovery from
2 HarbourVest after numerous accusations that HarbourVest was
3 behind the transfers.

4 Mr. Pugatch will also testify that Highland charged legal
5 fees for itself and its affiliates to HCLOF, essentially
6 forcing HCLOF to fund the litigation involving the Acis
7 bankruptcy and Mr. Terry.

8 In total, HarbourVest's claims for damages are over a
9 hundred million dollars in investment-related losses, lost
10 profits, legal fees inappropriately charged to HCLOF, its own
11 legal fees. And that's before interest or trebling damages.

12 But HarbourVest stands ready to litigate its claims, but
13 following hard-fought and extensive negotiations with the
14 Debtors, the parties reached the settlement that's now before
15 the Court. Mr. Pugatch's testimony regarding the strong
16 factual bases for HarbourVest's claims against Highland and
17 its recoverable damages will further underscore the risks that
18 the Debtors faced if they chose to litigate these claims, and
19 why this settlement is fair, equitable, and in the best
20 interest of the estate.

21 THE COURT: All right. Thank you, Counsel.

22 Other opening statements?

23 OPENING STATEMENT ON BEHALF OF GET GOOD AND DUGABOY TRUSTS

24 MR. DRAPER: Your Honor, this is Douglas Draper on
25 behalf of one of the Objectors. I'd like to just make a few

1 comments with respect to what I've heard and what the Court is
2 going to hear.

3 The first issue I'd like to address is the comment by
4 counsel for the Debtor that no other party has objected. The
5 9019 motion is one of the issues that this Court has to rule
6 on, whether or not there was an objection or not. So the fact
7 that this may be -- bankruptcy is not a popularity contest and
8 not an issue of who votes for what and doesn't vote. This,
9 along with the 1129(a) tests, are clearly within your
10 province, and you need to listen carefully because you'll have
11 to make your own independent analysis whether my objection is
12 correct or incorrect.

13 Two other points I'd like to make that I think are very
14 salient. Number one is, if you look at the Debtor's
15 disclosure statement, it basically took the position that the
16 HarbourVest claim is of little or no value. And lo and
17 behold, thirty days later, there's a settlement that brings
18 about a significant recovery to HarbourVest. The timing is
19 interesting, and I think the Court needs to pay careful
20 attention to what transpired between the two dates.

21 And then the last point I'd like to make is, as you listen
22 to the evidence, and what I learned abundantly clear from
23 hearing the depositions, is that the claim of HarbourVest, if
24 there is a claim at all, is probably one hundred percent --
25 should be subordinated in that it appears to arise out of the

1 purchase or sale of a security. And, again, I would ask the
2 Court to listen carefully to this because that's what it
3 appears to be and that's what the evidence is going to show to
4 the Court.

5 THE COURT: All right. Mr. Draper, let me clarify
6 something I'm not sure if I heard you say or not. Were you
7 saying that the Court still needs to drill down on the issue
8 of whether the Debtor can acquire HarbourVest's interest in
9 HCLOF?

10 MR. DRAPER: No.

11 THE COURT: Okay. I was confused whether you were
12 saying I needed to take an independent look at that, now that
13 the objection has been withdrawn of Holdco. You are not
14 pressing that issue?

15 MR. DRAPER: No, I am not. Basically, I think it's
16 the fairness of the settlement. I think the transferability
17 of the interest is separate and apart from the fairness of the
18 settlement itself. I think the fairness -- the
19 transferability was a contractual issue between two parties
20 that the Court does not have to drill down on.

21 THE COURT: All right. I have another question for
22 you. I want to clarify your client's standing. Tell me --
23 I'm looking through a chart I printed out a while back. I
24 guess Dugaboy Investment Trust filed a couple of proofs of
25 claim; is that right?

1 MR. DRAPER: Yes.

2 THE COURT: Okay. What --

3 MR. DRAPER: And objections are pending.

4 THE COURT: Pardon?

5 MR. DRAPER: Objections to those claims are pending
6 before the Court, Your Honor, --

7 THE COURT: Okay.

8 MR. DRAPER: -- and have not been litigated.

9 THE COURT: And what about Get Good Trust?

10 MR. DRAPER: Get Good Trust has a proof of claim also
11 that objections are pending to. Pending.

12 THE COURT: Okay. I don't want to get too
13 sidetracked here, but I know standing was -- was mentioned as
14 a legal argument today. What is the basis for those proofs of
15 claim?

16 MR. DRAPER: The first one is, with respect to the
17 proof of claim for Dugaboy, there is an investment that
18 Dugaboy made that was then funneled, we believe, up to the
19 Debtor. And the -- the loan that exists, we believe is a
20 Debtor loan, as opposed to a loan to the entity that we made
21 the loans to.

22 And, again, it's a matter that the Court is going to hear.
23 The claim may or may not be allowed. It has not been
24 disallowed yet.

25 The second part to the Dugaboy ownership is we own an

1 interest in the Debtor. And so we are, in fact, a party in
2 interest.

3 THE COURT: Okay.

4 MR. DRAPER: It may be a small interest, but it is an
5 interest.

6 THE COURT: It has a limited partnership interest in
7 the Debtor?

8 MR. DRAPER: Yes.

9 THE COURT: Is that correct?

10 MR. DRAPER: Yes.

11 THE COURT: Okay. Well, I'll move forward. Thank
12 you.

13 Does that cover -- any other opening statements? I think
14 that covered everyone who was -- who filed some sort of
15 pleading today. No.

16 MR. WILSON: Your Honor, John Wilson on behalf of --

17 THE COURT: I'm sorry. I'm sorry.

18 MR. WILSON: -- Mr. Dondero.

19 THE COURT: I missed Mr. Dondero's counsel. I knew
20 we had visited at some point this morning. I just got
21 confused there. Go ahead, Mr. Wilson.

22 MR. WILSON: No problem, Your Honor. I was just
23 going to say that we will reserve our comments until after the
24 conclusion of the testimony.

25 THE COURT: All right. Very well.

1 Mr. Morris, you may call your first witness.

2 MR. MORRIS: Thank you, Your Honor. Before I do,
3 just two very, very quick points.

4 THE COURT: Okay.

5 MR. MORRIS: To be clear, Dugaboy's interest in the
6 Debtor is 0.1866 percent. Less than two-tenths of one
7 percent.

8 Secondly, the argument that Mr. Draper just made with
9 respect to subordination is one that appears in nobody's
10 papers. And, in fact, not only doesn't it appear in anybody's
11 papers, but Mr. Dondero, I believe, specifically took issue
12 with the fact that a portion of the consideration that
13 HarbourVest would receive would be on a subordinated basis,
14 and he would -- and I think he took the position there is no
15 basis to give them a subordinated claim.

16 So, I just wanted to point those items out to the Court,
17 not that I think either one makes a large difference today,
18 but I do want to deal with the facts.

19 THE COURT: Thank you.

20 MR. MORRIS: The Debtor would call -- you're welcome,
21 Your Honor. The Debtor calls Mr. James Seery.

22 THE COURT: All right. Mr. Seery, welcome back to
23 virtual court. If you could say, "Testing, one, two" so I can
24 see you and swear you in.

25 MR. SEERY: Testing, one, two.

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1 THE COURT: All right. I heard you but I'm not yet
2 seeing your video. Is your video turned on?

3 MR. SEERY: Video is on. Yes, Your Honor.

4 THE COURT: Okay. I see you now. Please raise your
5 right hand.

6 JAMES SEERY, DEBTOR'S WITNESS, SWORN

7 THE COURT: Thank you. Mr. Morris?

8 MR. MORRIS: Thank you, Your Honor.

9 DIRECT EXAMINATION

10 BY MR. MORRIS:

11 Q Good morning, Mr. Seery. Can you hear me?

12 A I can. Thank you, Mr. Morris.

13 Q Okay. Let's just cut to the chase here. Are you familiar
14 with HarbourVest's claims filed against the Debtor?

15 A I am, yes.

16 Q And did you personally review them?

17 A I did, yes.

18 Q Do you recall that over the summer the Debtor objected to
19 HarbourVest's claim?

20 A Yes, we did.

21 Q Why -- can you explain to the judge why Harbour -- why the
22 Debtor objected to HarbourVest's claim last summer?

23 A Sure. The HarbourVest claims, I believe there are about
24 six of them, initially were filed, and they were -- they were
25 relatively vague in terms of what the specifics of the claims

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1 were.

2 So, we saw the claims but didn't, frankly, pay a lot of
3 attention to the underlying transaction that was referred to
4 in the proofs of claim and the losses that HarbourVest had
5 claimed to suffer -- to suffer with respect to their purchase
6 of securities related to HCLOF and the damages caused by the
7 Acis case. So we filed a pretty pro forma objection. I
8 believe it was a simply stated objection that we didn't have
9 any record that there was anything in the Debtor's books and
10 records that they had a valid claim for any amount against the
11 Debtor.

12 Q Are you aware that HarbourVest subsequently filed a
13 response to the Debtor's objection to their claims?

14 A Yes. Yes, I am aware.

15 Q And did you familiarize yourself with that particular
16 response?

17 A I did indeed. It was a pretty extensive response, really
18 developing the full panoply of their claims, which included
19 claims for expenses relating to the Acis case, which
20 HarbourVest viewed as being improperly charged to HCLOF by its
21 manager, which is effectively Highland. Those expenses,
22 HarbourVest took the view, were excessive, had nothing to do
23 with the investment, and were simply a pursuit of a personal
24 vendetta against Mr. Terry and his interests by Mr. Dondero,
25 and using HCLOF's money to actually pursue those interests.

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1 In addition, and this was the first time we saw that,
2 HarbourVest brought forth its claims that it was entitled to
3 effectively rescind the transaction. And I say rescind the
4 transaction: In security parlance, they claim that they were
5 induced by fraud, I think as most are -- to enter into the
6 transaction.

7 As most are aware, the liability limitations in the OMs
8 and the exculpation in the documents are pretty broad, and
9 HarbourVest's position was that they weren't going to be
10 subject to those limitations because the actual transaction
11 that they entered into was a fraud on them, designed by Mr.
12 Dondero, Mr. Ellington, and the Highland team.

13 Q All right. Let's talk about your understanding, the
14 Debtor's understanding of the factual background to
15 HarbourVest's claim. What is your understanding of the
16 investment that HarbourVest made?

17 A Well, HarbourVest made an investment in the Highland CLO
18 business. The Highland CLO business was -- was Acis. And
19 effectively, the business had been separated, but in name
20 only. Acis was just a shell, with a few partners --
21 obviously, Mr. Terry as well -- but it was all Highland
22 personnel doing all the work.

23 And what they were trying to do with Acis was, in essence,
24 resuscitate a business that had been in a bit of a decline
25 from its pre-crisis heyday.

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1 They were looking to take additional outside capital.

2 They would -- they would pay down or take money out of the
3 transaction, Highland would, or ultimately Mr. Dondero, and
4 they would -- they would seek to invest in Acis CLOs,
5 Highland's 1.0 CLOs. And then with respect to the Acis CLOs,
6 and potentially new CLOs, but with the Acis CLOs, they'd seek
7 to reset those and capture what they thought would be an
8 opportunity in the market to -- to really use the assets that
9 were there, not have to gather assets in the warehouse but be
10 able to use those assets to reset them to market prices for
11 the liabilities and then make money on the equity.

12 Q Do you have an understanding --

13 A Then --

14 Q I'm sorry. Go ahead.

15 A Why don't I continue? So, the transaction, they found
16 HarbourVest as a potential investor, and the basis of the
17 transaction was that they would make an investment into Acis.

18 Shortly before the transaction, and while they were doing
19 diligence, Mr. Terry received his arbitration award. I
20 believe that was in October of 2017. The transaction with
21 HarbourVest closed in mid- to late November of 2017. But Mr.
22 Terry was not an integral part. Indeed, he wasn't going to be
23 a key man. He had been long gone from Highland by that time.

24 What the -- I think you asked me originally what the basis
25 of their claim was. The transaction went forward, and the

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1 basis of their claim is that they really were never -- nothing
2 was disclosed to them about the nature of the dispute with Mr.
3 Terry other than in the highest-level terms; the animosity
4 with respect to which that dispute was held by Highland and
5 potentially Mr. Terry; and really, how those costs would be
6 borne and risks be borne by the investment that they were
7 making.

8 That was, in essence, the transaction and the high-level
9 view of their claim.

10 Q Okay. Just a few very specific facts. Do you have an
11 understanding as to how much HarbourVest invested and what
12 they got in exchange for that investment?

13 A Yeah. HarbourVest invested in a couple tranches, and I
14 forget the exact dates, but approximately \$75 million
15 originally, and then they added another five. Some
16 distributions were made in the first half of 2018, putting
17 their net investment in the mid-seventies on the investment,
18 which now is worth about 22-1/2 million bucks.

19 Q And what percentage interest in HCLOF did HarbourVest
20 acquire, to the best of your knowledge?

21 A They have 49.98 percent of HCLOF. HCLOF, just to refresh
22 -- the Court is, I think, well aware of this, but to refresh,
23 is a Guernsey entity. Not -- not atypical for structures of
24 this type to use offshore jurisdictions and sell the
25 securities under -- at least to U.S. -- can't sell them to

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1 U.S. investors unless they qualify, and these are sold under
2 Reg S to -- to investors that otherwise qualify. And
3 HarbourVest was investing in that transaction through the
4 Guernsey structure.

5 Q And do you have an understanding as to who owned the 50-
6 plus percent of HCLOF that HarbourVest was not going to
7 acquire?

8 A Yeah. There's -- you can tell by the name. HCLOF is
9 Highland CLO Funding. This is a Highland vehicle. So
10 Highland owned and controlled the vehicle. The DAF, which is
11 -- which is Dondero-controlled trusts, have the -- 49 percent.
12 Highland has, I believe, around .63-65 percent directly. And
13 then Highland employees at the time who were involved in the
14 business owned another small percentage.

15 So the majority was going to be controlled by Highland
16 through its control of DAF and its control of the employees
17 that worked for it. HarbourVest would be a minority investor.

18 Q Okay. And I believe you testified that the investment was
19 made in mid-November; is that right?

20 A That's correct. I think it was the 15th, may have been
21 the 17th of November.

22 Q And do you recall when in October the Terry arbitration
23 award was rendered?

24 A It was about a month before. I think it was right around
25 the 20th, the 17th to the 20th. I may be slightly wrong on

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1 each of those dates.

2 Q Okay. What is your understanding as to what happened
3 after the issuance of the award that is the basis or at least
4 one of the bases for HarbourVest's claim?

5 A I don't think there's -- I don't think there's any
6 dispute. And there certainly are judicial findings. Dondero
7 and Highland went about stripping Acis of all of its assets.
8 So, remember that Acis is not a separate standalone company,
9 in any event. It's controlled and dominated completely by
10 Highland at the time. But it did have contracts. And those
11 contracts had value.

12 So the first idea was to strip out the management contract
13 and put it into a separate vehicle, which we called HCF
14 Advisor, which Highland still owns. The second piece was to
15 strip out some valuable assets, the risk retention piece,
16 which was a loan that in essence was equity that Highland had
17 put into Acis but structured as a loan, as many of the
18 transactions we'll see down the road are, in order to deal
19 with some -- avoid taxes in any way possible. And that
20 structure, that value moved value out of Acis for the express
21 purpose of trying to run, in essence, the Highland business
22 back in Highland.

23 Remember, as I said, Acis is just a Highland business
24 moved to a separate shell. When Mr. Terry got his arbitration
25 award against Acis and was seeking to enforce it, it was

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1 pretty straightforward, let's take all the assets -- Dondero
2 scheme -- let's take all the assets and move them back into
3 Highland so Terry can't get anything.

4 Q And how does that scheme relate to the HarbourVest claim,
5 to the best of your knowledge?

6 A Well, HarbourVest -- HarbourVest's position is that they
7 invested in Acis and -- and whether Acis was called Acis or
8 called Highland, it doesn't really matter; there were valuable
9 assets in the -- in the entity that they were going to be
10 investing in through the equity in these CLOs and some of the
11 debt securities in those CLOs.

12 And then the stripping out and the fraudulent conveyances
13 out of Acis caused them damages because that's what left the
14 damage to Mr. Terry.

15 The quick math on Acis, by the way, is Acis has probably
16 lost, total damages, 175 million bucks. And that's pretty
17 easy. DAF lost 50. HarbourVest lost 50. Fifteen million of
18 fees charged to HCLOF. Another five million of fees, at
19 least, incurred by Mr. Terry. Ten million that went to Mr.
20 Terry, 15 to Highland fees, another five, plus Mr. Terry's
21 settlement in this case, over eight million bucks.

22 So HarbourVest's position, which, on a factual basis, you
23 know, is problematic for the estate, is, wait a second, we
24 invested in this vehicle with Highland. That was supposed to
25 invest in Highland CLOs. They were called Acis, but they were

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1 Highland CLOs. And then you went about causing tremendous
2 damage to that vehicle that we ultimately were investing in,
3 and then charge us for the pleasure.

4 Q You used the phrase earlier "OM," I believe.

5 A Offering memorandum.

6 Q Offering memorandum? Can you just explain to the Court
7 your understanding of what an offering memorandum is?

8 A Typically, under U.S. law, and foreign jurisdictions have
9 similar laws, you have to have a document that explains the
10 securities that you're selling. And it goes into extreme
11 detail about the securities and the risks related to those
12 securities.

13 And the idea is not to have a document that tells you
14 whether it's a good investment or a bad investment, but it's a
15 document that discloses to the potential investor all of the
16 risks with respect to that security or related to the
17 investment over the duration of the security. It doesn't
18 predict the future, but it's supposed to make sure that it
19 gives you a very clean view of the past and a very clean view
20 of what the facts from the past are and how they would
21 implicate the future of the investment.

22 Q And in the course of its diligence, did the Debtor have an
23 opportunity to review the offering memorandum in the context
24 of the claims that were being asserted by HarbourVest?

25 A Oh, absolutely. It was originally effectively -- it's an

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1 HCLOF offering memorandum. But as I said, HCLOF was managed
2 and controlled by Highland, and Highland originally prepared
3 it. And then, of course, in connection with -- with this
4 dispute and these claims, we reviewed it, both myself and my
5 legal team.

6 Q All right.

7 MR. MORRIS: Your Honor, the offering memorandum is
8 on the Debtor's exhibit list, and I think this is an
9 appropriate time to move into evidence Debtor's Exhibits A
10 through EE, all of which appear at Docket No. 1732.

11 THE COURT: 1732?

12 MR. MORRIS: It's the Debtor's Second Amended Witness
13 and Exhibit List.

14 THE COURT: All right. Any objection to admission of
15 A through EE?

16 MR. DRAPER: Douglas Draper. No objection, Your
17 Honor.

18 THE COURT: All right. Mr. --

19 MR. MORRIS: May I proceed?

20 THE COURT: Yeah. Mr. Wilson, did you want to
21 confirm no objection?

22 (Echoing.)

23 THE COURT: All right. Hearing no objection,
24 Debtor's A through EE are admitted.

25 (Debtor's Exhibits A through EE are received into

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1 evidence.)

2 THE COURT: Go ahead, Mr. Morris.

3 MR. MORRIS: Thank you, Your Honor. The offering
4 memorandum itself is one of the documents that we filed under
5 seal, and we did so at the request of counsel to HCLOF. But
6 HCLOF has consented to our sharing up on the screen certain
7 very limited provisions of the document, without waiving the
8 request that the agreement otherwise be maintained under seal.

9 THE COURT: All right.

10 MR. MORRIS: So may I proceed on that basis, Your
11 Honor?

12 THE COURT: You may. Uh-huh.

13 MR. MORRIS: Okay. Ms. Canty, can you please put up
14 on the screen Demonstrative Exhibit #1? Okay. Can we just --
15 is there a way to just expand that just a bit, Ms. Canty?
16 Thank you very much. And if we could just scroll it up?
17 Thank you very much. Perfect.

18 Okay. So, Your Honor, this, as the footnote says, is an
19 excerpt from the offering memorandum that can be found at
20 Debtor's Exhibit AA. Double A. And this particular portion
21 of the offering memorandum is at Page 35.

22 THE COURT: Okay.

23 BY MR. MORRIS:

24 Q Mr. Seery, have you seen this portion of the offering
25 memorandum before?

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1 A Yes, I have. But before I continue, I just -- I should
2 have checked. Are you able to hear me clearly? Am I speaking
3 too quickly or am I cutting out? I just want to make sure.
4 I'm using a different set of audio today.

5 THE COURT: All right.

6 MR. MORRIS: That's fine.

7 THE COURT: I hear you very well.

8 MR. MORRIS: Yeah.

9 THE COURT: So I think we're good right now. Thank
10 you.

11 THE WITNESS: Yeah. Thank you, Your Honor. I was
12 just checking.

13 THE COURT: Okay.

14 THE WITNESS: In response to your question, Mr.
15 Morris, yes, I have seen this before.

16 BY MR. MORRIS:

17 Q Okay. And can you -- did you form a view in doing the due
18 diligence as to the adequacy of this disclosure?

19 A Yes, I did.

20 Q Can you share your -- or share with Judge Jernigan the
21 Debtor's view as to the adequacy of this disclosure concerning
22 the litigation between Highland and Acis?

23 A With respect to the litigation between Highland and Acis,
24 or, really, between Acis, Highland, and Highland's principals
25 and Acis's principal, totally inadequate. The disclosure here

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1 is very high-level. And if there were no other litigation
2 going on, it might serve to suffice. It basically says, In
3 our business, because we invest in distressed loans, there's a
4 lot of litigation around distressed investments, and that's
5 what we have. And then it says, We've talked with the
6 investor about other things and we're -- we think that's
7 enough.

8 Q Is there anything in this portion or anywhere in the
9 offering memorandum that you're aware of that disclosed to
10 HarbourVest that in the weeks leading up to the investment
11 Highland was engaged in the fraudulent transfer of assets away
12 from Acis?

13 A No. And I apologize, because I think it's -- I've
14 conflated two provisions. This one only deals with the very
15 high-level nature of the business. It doesn't give any
16 indication that there's any material litigation going on
17 elsewhere with respect to Acis.

18 I believe there's another provision that says, We -- we
19 have talked to -- oh, here -- I'm sorry. It is here.
20 Shareholders have had an opportunity to discuss with Highland
21 to their satisfaction all litigation matters against Highland
22 and its affiliates unrelated to its distressed business.

23 That, in my opinion, is wholly inadequate.

24 Q Okay.

25 MR. MORRIS: And let's put up -- actually, let's just

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1 move on.

2 BY MR. MORRIS:

3 Q Let's go to the settlement itself.

4 MR. MORRIS: Can we put back up Demonstrative Exhibit
5 #3?

6 BY MR. MORRIS:

7 Q Mr. Seery, can you see that?

8 A Yes, I can.

9 Q Does this generally describe the net economic recovery of
10 the HarbourVest settlement based on estimated recoveries for
11 general unsecured creditors as of November 2020?

12 A As of November 2020, it does. And you alluded to this in
13 your opening, but to be clear, the numbers have shifted.
14 Costs have increased. The -- so the -- effectively, the
15 numerator, in terms of distributable value that we estimate,
16 is lower. And settlements, the denominator, have also
17 increased. So the claims against the estate that have been
18 recognized have increased. And that, that probably takes it
19 down closer, in our view, to about seventy cents distribution,
20 a number closer to nine to ten million, maybe a little bit
21 less.

22 However, there's also some additional value that we -- we
23 believe we will recover directly. There are north of \$150
24 million of intercompany notes owed by Dondero entities to
25 Highland. A number of those notes are demand notes, and we've

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1 already made demand. We'll be initiating actions next week.
2 So those are -- those value, we believe, we'll recover
3 directly from Mr. Dondero and from related entities.

4 To the extent those related entities don't have value, we
5 feel very strongly about our ability to pierce the veil and
6 reach in to Mr. Dondero. And then his assets, either his
7 personal assets or the assets that he claims are in trusts.

8 In addition, there are a significant amount of notes that
9 were extended in two -- I believe around 2017, for no
10 consideration. Those notes were demand notes, I believe, and
11 then extended it 30 years. So they have 2047 maturities.
12 Those were probably going to have to be subject to fraudulent
13 conveyance type actions or -- or some sort of sale at a very
14 discounted value because third parties wouldn't want long-
15 dated notes with Mr. Dondero as the counterparty for very much
16 money.

17 Those -- they defaulted on some of those parties, so we
18 effectively turned them into demand notes. We've accelerated,
19 and we'll be bringing actions against those entities next week
20 as well.

21 So I think (garbled) have come up, so I apologize. One
22 way of saying I think the sixteen and a half is a bit high
23 right now, based upon what we know, but the value is going to
24 be higher than our estimate a couple of weeks ago because we
25 do believe we'll be able to recover on the notes.

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1 One additional caveat, just to be fully transparent here.
2 This summary with the 16.8 doesn't include the subordinated
3 piece of this -- of this claim and our resolution. That --
4 recovery of that piece will be dependent upon the success of
5 litigations.

6 In order for the subordinated piece to get paid, all
7 general unsecured claims in Class -- Classes 7 and 8 will have
8 to be paid in full. And then -- and then the subordinated
9 class in Class 9, which we believe UBS will have a piece of,
10 and HarbourVest will have a piece of by this settlement, those
11 will be able to recover, and those will be based upon other
12 claims of action against -- primarily against related parties.

13 Q And then that last point, is that what's reflected in
14 Footnote 3 on this page?

15 A That's correct, yes.

16 Q Okay. And just for the record, there's a reduction in
17 value of \$22-1/2 million. Do you see that?

18 A Yes.

19 Q And can you just explain to the Court what that is and how
20 that value was arrived at?

21 A Yes. I may be getting slightly ahead of you, Mr. Morris.
22 But to give the Court a reflection of the transaction -- and
23 we can go into the details in a moment -- ultimately, the
24 transaction we structured we think is very fair both
25 economically to the Debtor, but there -- there is some

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1 complexity to it to satisfy some of HarbourVest's concerns
2 that they be able to effectively rescind the transaction, at
3 least from an optical perspective. Value was important, but
4 optics were as well. The twenty-two and a half is the current
5 -- actually, the November value of HCL -- the HarbourVest
6 interests in HCLOF. And that's based upon Highland's
7 evaluation of those interests.

8 So we do believe that that is a fair value as of that
9 date. It has not gone down. It hasn't gone up explosively,
10 either, but it hasn't gone down. We think that's good, real
11 value. That value is in the Acis CLOs, the equity in those
12 CLOs, which is 2 through 6, that we -- we will be working with
13 the HCLOF folks to get Mr. Terry to monetize those assets and
14 those longer-dated CLOs.

15 In addition, I think it's 85 percent of the equity in Acis
16 7 -- Acis 7 is managed by Highland -- that is also beyond its
17 reinvestment period. And in talking to the directors -- and
18 they're new directors, and I'll get to that in a minute, for
19 HCLOF -- they'll seek to push Highland, which is the
20 reorganized Highland, to monetize that asset, with due regard
21 to fair value.

22 In addition, Harbour -- HCLOF owned a significant amount
23 of the preferred or equity pieces, if you will, in the
24 Highland CLO, 1.0 CLOs. As we've talked about, those are not
25 really CLOs. Those are effectively closed-end funds with

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1 illiquid assets, primarily illiquid assets in them. We've had
2 some dispute in front of the Court about selling the liquid
3 assets in them, which we can go into it another time. Those
4 are being liquidated in the market at fair value.

5 But HCLOF also is a significant holder of those preferred
6 shares, and those directors would -- have indicated to me that
7 they would like to see those interests also monetized.

8 Q All right. Let's shift gears for a moment to talk about
9 the diligence that the Debtor did before entering into this
10 agreement. Can you just describe for the Court generally the
11 diligence that was undertaken at your direction?

12 A Well, when we first received the reply to our objection,
13 we dug into that reply and the specifics in it very
14 aggressively. So we reviewed all of the underlying documents
15 related to the original transaction. We discussed with
16 counsel the legal basis for the HarbourVest claims. We
17 interviewed our own HCMLP employees who were involved in the
18 transaction and tested their recollection, specifically around
19 who dealt with HarbourVest, who had the discussions with
20 HarbourVest, what was disclosed to HarbourVest with respect to
21 the Terry dispute and the Acis litigation.

22 We also had done, as I think the Court is well aware from
23 prior 9019 testimony, extensive work around the transfers and
24 the issues related to Acis. So we were familiar with their
25 impact on HCLOF.

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1 We also did extensive work valuing the remaining HCLOF
2 interests to get a good feel of not only how much HarbourVest
3 originally invested, but how much they actually lost in this
4 transaction. And as I said, their original investment was
5 around, in total, in two tranches, about \$80 million, of which
6 they got about \$5 million back, and they've lost \$22 million.
7 So it -- I mean, remaining with \$22 million. So they've lost,
8 you know, in excess of \$50 million.

9 Q Do you recall whether the Debtor reviewed and analyzed all
10 of the documents that were cited in HarbourVest's response to
11 the Debtor's objection to the HarbourVest proofs of claim?

12 A Yeah. I think -- I forget, to be honest, which -- exactly
13 what documents were in there. But we went through their
14 objection with a fine-toothed comb, not only with respect to
15 the issues related to the Acis case, but also their references
16 to Guernsey law, other U.S. law, any of the documents between
17 the parties. And obviously, as I mentioned before, the
18 offering memorandum.

19 MR. MORRIS: Your Honor, I would just note for the
20 record that Debtor's Exhibits I through X are all of the
21 documents that are cited in HarbourVest's response to the
22 Debtor's objection to the HarbourVest proofs of claim, and
23 those are the documents that Mr. Seery just referred to.

24 THE COURT: All right.

25 MR. MORRIS: Just, they're in evidence now, and I

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1 just wanted the Court to understand why they're in evidence.

2 THE COURT: Okay. Thank you.

3 MR. MORRIS: You're welcome.

4 BY MR. MORRIS:

5 Q Let's talk about the Debtor and whether or not it had or
6 has any viable defenses. Did the Debtor form any views as to
7 whether or not it had any defenses to the HarbourVest claims?

8 A Yes, we did.

9 Q Can you describe for the Court the defenses that were
10 reviewed and analyzed by the Debtor?

11 A Yeah. I think we -- we had very significant defenses.
12 So, first and foremost, with respect to the original proof of
13 claim, as I mentioned earlier, it alluded to the expenses and
14 the overcharge. And I think with respect to the 15 million of
15 fees that were charged to HCLOF by Highland, we didn't have a
16 lot of defenses to that claim.

17 It's pretty clear, by any fair view of the Acis case, that
18 HCLOF, as the investor in the Acis CLOs and the Highland CLOs,
19 had no real responsibility for fighting with Acis and Josh
20 Terry and shouldn't have been charged those fees. I don't --
21 I don't think there's a legitimate investor that would
22 actually think that that was an appropriate amount to be
23 charged to a fund.

24 However, the claim was not as broad -- the proof of claim
25 was not as fulsome in terms of discussing and only vaguely

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1 referred to other damages. So we did -- we did, as a
2 threshold matter, think about whether we could argue that it
3 was time-barred because they had not met their obligations to
4 fully disclose under the proof of claim.

5 Secondly, we considered the defenses to the overall claim
6 of fraudulent inducement. Our perspective was that if we
7 could stop the claim of fraudulent inducement, the damages
8 would likely be limited to the 15 and maybe some -- some other
9 damages. With respect to the 15, again, the problem that we
10 had when we got past -- past motions for summary judgment is
11 the factual predicate for our defense was going to be that we
12 divulged these things to HarbourVest and that they did not
13 reasonably -- it was -- reasonably rely on some failure to
14 divulge because they're a sophisticated investor.

15 The problem with that defense is that our witnesses, which
16 really would have primarily been Mr. Dondero and Mr.
17 Ellington, and one other employee who runs the CLO business,
18 Mr. Covitz, would not be pretty good. They've been -- two of
19 them have been in front of this Court and they're not viewed
20 favorably and their testimony would be challenged and
21 potentially suspect.

22 So that gave us a real focus on trying to make sure that
23 we could, if we had to litigate, that we would litigate around
24 the fraudulent inducement.

25 As I said, reasonable reliance, what was disclosed, lack

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1 of digging into the public record, because you don't have to
2 go far on Google to find "fraud" within two words of
3 "Highland," and the tremendous, you know, litigious nature of
4 Highland. You know, even at that point, when this investment
5 was made, aside from Mr. Terry's arbitration, which by that
6 point, at least by the time (inaudible) was public, there was,
7 you know, significant public disclosure around the Credit
8 Strat and the litigation, the Crusader litigation, the UBS
9 litigation, the, gosh knows, the Daugherty litigation.

10 So our defense was going to be that you should have
11 figured this out, you're a sophisticated investor, and you
12 should have been able to figure out that there was significant
13 risk that, with respect to Mr. Terry, that Mr. Dondero would
14 not stop litigating and that those costs would put significant
15 risk on the investment.

16 The problem with that, as I mentioned earlier, is that the
17 OM is wholly deficient. If you have a typical risk factor in
18 the offering memorandum, you would have disclosed that there
19 was a litigation with Mr. Terry, a former partner in the
20 business, and that the Debtor had no intention of settling it.
21 There was no intention of settling. That litigation would go
22 on. It could go on for years and it could result in
23 bankruptcy or attachments and other risks to the business, and
24 that the investor should be fully aware that the Offeror does
25 not intend to be involved in any -- or the manager, in any

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**UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF
TEXAS, DALLAS DIVISION**

In Re: Highland Capital Management, L.P § Case No. **19-34054-SGJ11**

Charitable DAF Fund, L.P et al

Appellant

§

vs.

§

21-03067

Highland Capital Management, L.P

§

Appellee

§

3:23-CV-01503-B

[167] Order granting Defendant Highland Capital Management, L.P.'s Renewed motion to dismiss adversary proceeding (related document # [122](#)) Entered on 6/25/2023.

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APPELLANT RECORD

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**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

In re:	§ Chapter 11
	§
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§ Case No. 19-34054-sgj11
	§
Debtor.	§
	§
CHARITABLE DAF FUND, L.P. AND CLO	§
HOLDCO, LTD., DIRECTLY AND DERIVATIVELY	§
	§
Plaintiffs,	§ Adversary Proceeding No.
	§
vs.	§ 21-03067-sgj11
	§
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§
HIGHLAND HCF ADVISOR, LTD., AND	§
HIGHLAND CLO FUNDING LTD., NOMINALLY	§
	§
Defendant.	§
	§

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**APPELLANTS' SECOND AMENDED STATEMENT OF ISSUES
AND DESIGNATION OF RECORD ON APPEAL**

Pursuant to Rules 8009(a)(1)(A)-(B) and (a)(4) of the Federal Rules of Bankruptcy Procedure, The Charitable DAF Fund, L.P. and CLO Holdco, Ltd. ("Appellants") hereby designate the following items to be included in the record and identify the following issues with respect to

their appeal of the Order Granting Defendant Highland Capital Management, L.P.'s "Renewed Motion to Dismiss Complaint" [Adv. Proc. Doc. No. 122] which was entered by the United States Bankruptcy Court for the Northern District of Texas on June 25, 2023.

I. STATEMENT OF ISSUES TO BE PRESENTED ON APPEAL

- Whether the Bankruptcy Court had jurisdiction to rule on Highland Capital Management L.P.'s Renewed Motion to Dismiss Complaint
- Whether the Renewed Motion to Dismiss Complaint was improperly granted

II. DESIGNATION OF ITEMS TO BE INCLUDED IN THE RECORD

Vol. 1
000001

1. Notice of Appeal for Bankruptcy Case Adversary Proceeding No. 21-03067-sgj11 [Doc. 168].

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2. The judgment, order, or decree appealed from: Memorandum Opinion and Order Granting Defendant Highland Capital Management, L.P.'s "Renewed Motion to Dismiss Complaint" [Adv. Proc. Doc. No. 122] [Doc. 167].

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3. Docket Sheet kept by the Bankruptcy Clerk.

4. Documents listed below and as described in the Docket Sheet for Bankruptcy Case Proceeding No. 21-03067-sgj.

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No.	Date Filed	Docket No.	Description/Document Text
1	9/29/21	1	(36 pgs; 3 docs) Adversary case 21-03067. ORDER REFERRING CASE NUMBER 21-CV-0842-B from U.S District Court for the Northern District of Texas, Dallas Division to U.S. Bankruptcy Court for Northern District of Texas, Dallas Division. Complaint by Charitable DAF Fund, LP, CLO Holdco, Ltd. against Highland Capital Management, LP, Highland HCF Advisor Ltd., Highland CLO Funding, Ltd. Fee Amount \$350 (Attachments: # 1 Original Complaint # 2 Docket Sheet from 3:20-cv-0842-B) Nature(s) of suit: 02 (Other (e.g. other actions that would have been brought in state court if unrelated to bankruptcy)). (Okafor, M.)
2	9/29/21	2	(1 pg) Supplemental Document (cover sheet) by CLO Holdco Ltd., Charitable DAF Fund (RE: related document(s)1 Adversary case 21-03067) [ORIGINALLY FILED IN 21-CV-0842 AS #2 ON 04/13/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)

Vol. 2 000139 000232 000239 000270 Thru Vol. 6	3	9/29/21	6	(93 pgs; 6 docs) MOTION for Leave to File First Amended Complaint filed by CLO Holdco Ltd., Charitable DAF Fund LP (Attachments: # 1 Exh 1_First Amended Complaint # 2 Exh 2_Motion for Authorization to Retain James Seery # 3 Exh 3_Order Approving Retention of James Seery # 4 Exh 4_Order Approving Settlement # 5 Proposed Order) (Bridges, Jonathan) (Entered: 04/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #6 ON 04/19/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
	4	9/29/21	22	(7 pgs; 2 docs) MOTION for an Order to Enforce the Order of Reference filed by Highland Capital Management LP. (Attachments: # 1 Exhibit(s) A--Proposed Order) (Annable, Zachery) Modified text on 5/20/2021 (mjr). (Entered: 05/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #22 ON 05/19/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
	5	9/29/21	23	(31 pgs) Brief/Memorandum in Support filed by Highland Capital Management LP re: 22 MOTION for an Order to Enforce the Order of Reference. (Annable, Zachery) Modified text on 5/20/2021 (mjr).(Entered: 05/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #23 ON 05/19/2021 IN U.S.DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
	6	9/29/21	24	(926 pgs; 29 docs) Appendix in Support filed by Highland Capital Management LP re: 23 Brief/Memorandum in Support. (Attachments: # 1 Appendix 1 # 2 Appendix 2 # 3 Appendix 3 # 4 Appendix 4 # 5 Appendix 5 # 6 Appendix 6 # 7 Appendix 7 # 8 Appendix 8 # 9 Appendix 9 # 10 Appendix10 # 11 Appendix 11 # 12 Appendix 12 # 13 Appendix 13 # 14 Appendix 14 # 15 Appendix 15 # 16 Appendix 16 # 17 Appendix 17 # 18 Appendix 18 # 19 Appendix 19 # 20 Appendix 20 # 21 Appendix 21# 22 Appendix 22 # 23 Appendix 23 # 24 Appendix 24 # 25 Appendix 25 # 26 Appendix 26 # 27 Appendix 27 # 28 Appendix 28) (Annable, Zachery) Modified linkage and text on 5/20/2021 (mjr). (Entered:05/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #24 ON 05/19/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
Vol. 7 001196	7	9/29/21	26	(7 pgs; 2 docs) MOTION to Dismiss Complaint filed by Highland Capital Management LP (Attachments: # 1 Exhibit(s) A--Proposed Order) (Annable, Zachery) Modified text on 5/28/2021 (jmg).(Entered: 05/27/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #26 ON 05/27/2021 IN U.S.DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)

Vol. 7 001203 thru Vol 8	8	9/29/21	28	(508 pgs; 14 docs) Appendix in Support filed by Highland Capital Management LP (Attachments: # 1 Appendix 1 # 2 Appendix 2 # 3 Appendix 3 # 4 Appendix 4 # 5 Appendix 5 # 6 Appendix 6 # 7 Appendix 7 # 8 Appendix 8 # 9 Appendix 9 # 10 Appendix 10 # 11 Appendix 11 # 12 Appendix 12 # 13 Appendix 13) (Annable, Zachery) (Entered: 05/27/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #28 ON 05/27/2021 IN U.S. DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
Vol. 9 001711	9	9/29/21	33	(1 pg) Amended Civil Cover Sheet by CLO Holdco Ltd, Charitable DAF Fund LP. Amendment to 2 Supplemental Document. (Sbaiti, Mazin) Modified text on 6/23/2021 (mjr). (Entered: 06/22/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #33 ON 06/22/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001712	10	9/29/21	36	(26 pgs) RESPONSE filed by CLO Holdco Ltd, Charitable DAF Fund LP re: 22 MOTION for an Order to Enforce the Order of Reference (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #36 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001738	11	9/29/21	37	(22 pgs) Appendix in Support filed by CLO Holdco Ltd, Charitable DAF Fund LP re 36 Response/Objection Response to Motion for an Order to Enforce the Order of Reference (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #37 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001760	12	9/29/21	38	(45 pgs) RESPONSE filed by CLO Holdco Ltd, Charitable DAF Fund LP re: 26 MOTION to Dismiss (Defendant Highland Capital Management, L.P.'s Motion to Dismiss Complaint) (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #38 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001805	13	9/29/21	39	(88 pgs) Appendix in Support filed by CLO Holdco Ltd, Charitable DAF Fund LP re 38 Response/Objection to Defendant Highland Capital Management, L.P.'s Motion to Dismiss Complaint (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #39 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001893	14	9/29/21	42	(12 pgs) REPLY filed by Highland Capital Management LP re: 22 MOTION for an Order to Enforce the Order of Reference (Annable, Zachery) (Entered: 07/13/2021) [ORIGINALLY FILED IN 21-CV-0842AS #42 ON 07/13/2021 IN U.S.

			DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
VOL. 9	15	9/29/21	43 (852 pgs) Appendix in Support filed by Highland Capital Management LP re: 42 Reply. (Annable, Zachery) Modified text on 7/14/2021 (mjr). (Entered: 07/13/2021) [ORIGINALLY FILED IN 21-CV-0842AS #43 ON 07/13/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001905 thru Vol. 13	16	9/29/21	45 (21 pgs) REPLY filed by Highland Capital Management LP re: 26 MOTION to Dismiss (Defendant Highland Capital Management, L.P.'s Motion to Dismiss Complaint) (Annable, Zachery) (Entered:07/13/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #44 ON 07/13/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002757	17	9/29/21	57 (7 pgs; 2 docs) MOTION to Dismiss and Joinder in Motion to Dismiss of Highland Capital Management, L.P. filed by Highland CLO Funding Ltd. (Attachments: # 1 Proposed Order) Attorney Paul R Bessette added to party Highland CLO Funding Ltd (pty:dft) (Bessette, Paul) (Entered: 08/30/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #57 ON 08/30/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002778	18	9/29/23	58 (12 pgs) Brief/Memorandum in Support filed by Highland CLO Funding Ltd. re 57 MOTION to Dismiss and Joinder in Motion to Dismiss of Highland Capital Management, L.P. (Bessette, Paul) (Entered: 08/30/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #58 ON 08/30/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002785	19	9/29/23	59 (80 pgs; 5 docs) Appendix in Support filed by Highland CLO Funding Ltd re 58 Brief/Memorandum in Support of Motion (Attachments: # 1 Exhibit(s) A - Jackson v Dear # 2 Exhibit(s) B - Prudential Assurance v. Newman # 3 Exhibit(s) C - Harbourvest Settlement Agreement # 4 Exhibit(s) D - Boleat Declaration) (Bessette, Paul) (Entered: 08/30/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #59 ON 08/30/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002797	20	9/29/21	64 (1 pg) ORDER OF REFERENCE: Pursuant to 28 U.S.C. § 157 and this District's Miscellaneous Order No. 33, this case is hereby REFERRED to Judge Stacey G. C. Jernigan of the United States Bankruptcy Court for the Northern District of Texas, Dallas Division, to be adjudicated as a matter related to the consolidated Chapter 11 Bankruptcy of Highland Capital Management, L.P., Chapter 11 Case No.19-34054. (Ordered by Judge Jane J. Boyle
002877			

Vol. 14				on 9/20/2021) (svc) (Entered: 09/20/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #64 ON 09/20/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002878	21	10/19/21	66	(5 pgs) Notice of hearing filed by Defendant Highland Capital Management, LP (RE: related document(s) 26 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP, 47 Motion to strike document filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 55 Motion to abate filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) Hearing to be held on 11/23/2021 at 09:30 AM at https://us-courts.webex.com/meet/jerniga for 26 and for 47 and for 55, (Annable, Zachery)
002883 thru Vol. 16	22	11/22/21	71	(509 pgs; 2 docs) Witness and Exhibit List <i>for Hearing on November 23, 2021</i> filed by Defendant Highland Capital Management, LP (RE: related document(s) 26 Motion to dismiss adversary proceeding). (Attachments: # 1 Exhibits 1-13) (Hayward, Melissa)
Vol. 17	23	11/22/21	72	(2 pgs) Witness List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 26 Motion to dismiss adversary proceeding, 47 Motion to strike (related document(s): 43 Document), 55 Motion to abate (related document(s) 1 Complaint), 69 Motion to abate <i>Plaintiffs' Amended Motion to Stay All Proceedings</i> (related document(s) 55 Motion to abate (related document(s) 1 Complaint))). (Sbaiti, Mazin)
003392				
003394	24	11/22/21	73	(189 pgs; 4 docs) Exhibit List <i>for November 23, 2021 hearing</i> filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 47 Motion to strike (related document(s): 43 Document), 55 Motion to abate (related document(s) 1 Complaint)). (Attachments: # 1 Exhibit 1_Defendant's Memorandum of Law in Support of Motion for Reconsideration # 2 Exhibit 2_Highland Memorandum in Support of Motion to Dismiss # 3 Exhibit 3_Order (I) Confirming Fifth Amended Plan of Reorganization of Highland) (Sbaiti, Mazin)
003583	25	12/7/21	80	(2 pgs) Order granting Highland CLO Funding, Ltd.'s motion to dismiss adversary as a party with prejudice (related document 57) Entered on 12/7/2021. (Okafor, Marcey) Modified text on 3/11/2022 (Okafor, Marcey).
003585	26	3/11/22	99	(26 pgs) Memorandum of Opinion and order granting motion to dismiss the adversary proceeding (RE: related document(s) 26 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP). Entered on 3/11/2022 (Okafor, Marcey)
003611	27	3/11/22	100	(26 pgs) Order granting motion to dismiss adversary proceeding with prejudice (related document #26) Entered on 3/11/2022. (Okafor, Marcey)

Vol. 18 003637	28	3/21/22	104	(29 pgs) Notice of appeal. Fee Amount \$298 filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 100 Order on motion to dismiss adversary proceeding). Appellant Designation due by 04/4/2022. (Sbaiti, Mazin)
003666	29	5/26/22	120	(177 pgs; 2 docs) Support/supplemental document <i>Motion to Supplement Appellate Record</i> filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 111 Appellant designation). (Attachments: # 1 Amended Transcript of January 14, 2021 Hearing) (Sbaiti, Mazin)
003843	30	6/9/22	121	(1 pg) DISTRICT COURT Order: Case 3:22-00695-B is hereby transferred to the docket of the Honorable Judge Jane J. Boyle for consolidation with The Charitable DAF Fund LP, et al. v. Highland Capital Management LP, Case No. 3:21-cv-3129-N. Judge Karen Gren Scholer no longer assigned to case.(RE: related document(s) 86 Notice of appeal filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 104 Notice of appeal filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Entered on 6/9/2022 (Whitaker, Sheniqua) (Entered: 06/10/2022)
003844	31	10/24/22	122	(7 pgs) Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP (Annable, Zachery)
003851	32	10/14/22	123	(31 pgs) Brief in support filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Annable, Zachery)
Vol. 19 003882 Thru Vol 20	33	10/14/22	124	(513 pgs; 15 docs) Support/supplemental document (<i>Appendix in Support of Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7 # 8 Exhibit 8 # 9 Exhibit 9 # 10 Exhibit 10 # 11 Exhibit 11 # 12 Exhibit 12 # 13 Exhibit 13 # 14 Exhibit 14) (Annable, Zachery)
Vol. 21 004395	34	10/27/22	126	(5 pgs) Notice of hearing (<i>Notice of Hearing and Briefing Schedule on Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP). Hearing to be held on 12/8/2022 at 09:30 AM at https://us-courts.webex.com/meet/jerniga for 122. (Annable, Zachery)

Vol. 21 004400 004410 004442 Thru Vol. 22	35	11/18/22	128	(10 pgs) Motion for withdrawal of reference. Fee amount \$188, filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (Sbaiti, Mazin)
	36	11/18/22	129	(32 pgs) Response opposed to (related document(s): 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP) filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Sbaiti, Mazin)
	37	11/18/22	130	(254 pgs; 2 docs) Response opposed to (related document(s): 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP) filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Attachments: # 1 Appendix) (Sbaiti, Mazin)
Vol. 22 004696 004717 004732 004737 004742	38	9/2/22	131	(21 pgs) DISTRICT COURT MEMORANDUM OPINION AND ORDER: The Court REVERSES and REMANDS the bankruptcy court's Motion to Dismiss Order and AFFIRMS the bankruptcy courts Motion to Stay Order. re: appeal on Civil Action number: Case 3:22-00695-B consolidated with 3:21-CV-3129-B, (RE: related document(s) 81 Order on motion to abate, 100 Order on motion to dismiss adversary proceeding). Entered on 9/2/2022 (Whitaker, Sheniqua) (Entered: 11/29/2022)
	39	12/2/22	133	(15 pgs) Reply to (related document(s): 129 Response filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 130 Response filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) filed by Defendant Highland Capital Management, LP. (Annable, Zachery)
	40	12/7/22	135	(5 pgs) Notice of hearing filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP). Hearing to be held on 1/25/2023 at 01:30 PM at https://us-courts.webex.com/meet/jerniga for 122, (Annable, Zachery)
	41	12/7/22	136	(5 pgs) Notice of hearing filed by Defendant Highland Capital Management, LP (RE: related document(s) 128 Motion for withdrawal of reference filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Status Conference to be held on 1/25/2023 at 01:30 PM at https://us-courts.webex.com/meet/jerniga . (Annable, Zachery).
	42	12/9/22	138	(3 pgs) Response opposed to (related document(s): 128 Motion for withdrawal of reference. Fee amount \$188, filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) filed by Defendant Highland Capital Management, LP. (Annable, Zachery)

Vol. 22 004745	43	12/9/22	139	(25 pgs) Brief in support filed by Defendant Highland Capital Management, LP (RE: related document(s) 138 Response). (Annable, Zachery)
Vol. 23 004770	44	12/9/22	140	(280 pgs; 8 docs) Support/supplemental document (<i>Appendix in Support of Highland Capital Management, L.P.'s Response to Renewed Motion to Withdraw the Reference</i>) filed by Defendant Highland Capital Management, LP (RE: related document(s) 138 Response). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7) (Annable, Zachery)
Vol. 24 005050	45	12/16/22	144	(6 pgs) Reply to (related document(s): 138 Response filed by Defendant Highland Capital Management, LP) filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Sbaiti, Mazin)
005056 Thru Vol. 25.	46	1/23/23	145	(514 pgs; 15 docs) Witness and Exhibit List filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7 # 8 Exhibit 8 # 9 Exhibit 9 # 10 Exhibit 10 # 11 Exhibit 11 # 12 Exhibit 12 # 13 Exhibit 13 # 14 Exhibit 14) (Annable, Zachery)
Vol. 26 005570	47	1/23/23	146	(280 pgs; 8 docs) Witness and Exhibit List filed by Defendant Highland Capital Management, LP (RE: related document(s) 128 Motion for withdrawal of reference. Fee amount \$188.). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7) (Annable, Zachery)
Vol. 27 005850	48	1/23/23	147	(221 pgs; 7 docs) Witness and Exhibit List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Attachments: # 1 Exhibit 1_Excerpts from July 14, 2020 Hearing Transcript # 2 Exhibit 2_HCLOF Members Agreement Relating to the Company # 3 Exhibit 3_HarbourVest Settlement Agreement # 4 Exhibit 4_Order Approving Debtor's Settlement with HarbourVest # 5 Exhibit 5_HCLOF Offering # 6 Exhibit 6 Amended and Restated Investment Advisory Agreement) (Sbaiti, Mazin)
006071	49	1/23/23	148	(3 pgs) Witness and Exhibit List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 128 Motion for withdrawal of reference. Fee amount \$188.). (Phillips, Louis)
Vol. 28 006074	50	1/25/23	150	(56 pgs; 2 docs) Amended Witness and Exhibit List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 147 List (witness/exhibit/generic), 149 List (witness/exhibit/generic)). (Attachments: # 1 Exh 7_Testimony of Mark Patrick at June 8, 2021 hearing) (Sbaiti, Mazin)

Vol. 28 006130	51	1/25/23	152	(3 pgs) Notice of Appearance and Request for Notice by Louis M. Phillips filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Phillips, Louis)
	52	1/25/23	154	(1 pg) Court admitted exhibits date of hearing January 25, 2023 (RE: related document(s) 128 Motion for withdrawal of reference, filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) (COURT ADMITTED DEFENDANT'S EXHIBITS #1, #2, #3, #4, #5 & #6 OFFERED BY ATTY GREG DEMO). (Edmond, Michael) (Entered: 01/27/2023)
Vol. 32 006925 006942 006960	53	2/6/23	158	Report and recommendation to the U.S. District Court by U.S. Bankruptcy Judge. (RE: related document(s) 128 Motion for withdrawal of reference filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Entered on 2/6/2023 (Okafor, Marcey)
	54	2/6/23	161	(18 pgs) DISTRICT COURT Notice of transmission of report and recommendation in re: renewed motion to withdraw reference. Civil Case # 3:22-cv-02802-S. (RE: related document(s) 158 Report and recommendation to the U.S. District Court by U.S. Bankruptcy Judge. (RE: related document(s) 128 Motion for withdrawal of reference filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Entered on 2/6/2023) (Whitaker, Sheniqua)
	55	4/3/23	165	(1 pg) DISTRICT COURT ORDER: The Court GRANTS the 11 Joint Motion to Transfer Proceeding and Consolidate Before Original Court and the above-numbered case (3:22-cv-02802-S) is transferred to the docket of the Honorable Judge Jane Boyle: Civil case 3:21-cv-00842-B (order referring case). (RE: related document(s) 1 Complaint filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 143 Notice of transmission of motion to withdraw reference). Entered on 4/3/2023 (Whitaker, Sheniqua) Modified on 4/10/2023 (Whitaker, Sheniqua). (Entered: 04/10/2023)

TRANSCRIPTS

006961	56	11/24/21	78	(104 pgs) Transcript regarding Hearing Held 11-23-2021 RE: Motion Hearing. THIS TRANSCRIPT WILL BE MADE ELECTRONICALLY AVAILABLE TO THE GENERAL PUBLIC 90 DAYS AFTER THE DATE OF FILING. TRANSCRIPT RELEASE DATE IS 02/22/2022. Until that time the transcript may be viewed at the Clerk's Office or a copy may be obtained from the official court transcriber. Court Reporter/Transcriber Liberty Transcripts/Dipti Patel, Telephone number 847-848-4907. (RE: related document(s) 75 Hearing held on 11/23/2021. (RE: related document(s) 55 MOTION to Stay filed by CLO Holdco Ltd, Charitable DAF Fund LP (Sbaiti, Mazin) (Entered: 08/26/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #55 ON 08/26/2021 IN U.S.
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			<p>DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)) (Appearances: J. Pomerantz and J. Morris for Highland Defendants; J. Jordan and P. Bessett for HCLOF; M. Sbaiti for Plaintiffs. Nonevidentiary hearing. Motion denied. Mr. Pomerantz to upload order.), 76 Hearing held on 11/23/2021. (RE: related document(s) 47 Motion to strike 43 Appendix in support filed by CLO Holdco, Ltd., Charitable DAF Fund, LP (Bridges, Jonathan) Modified text on 7/16/2021 (mjr). (Entered: 07/15/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #47 ON 07/15/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)) (Appearances: J. Pomerantz and J. Morris for Highland Defendants; J. Jordan and P. Bessett for HCLOF; M. Sbaiti for Plaintiffs. Nonevidentiary hearing. Motion denied (Plaintiffs acknowledged complained-of Appendices it did not relate to Motion to Dismiss). Mr. Pomerantz to upload order.)). Transcript to be made available to the public on 02/22/2022. (Patel, Dipti)</p>
57	2/21/23	164	<p>164 (112 pgs) Transcript regarding Hearing Held 1/25/23 RE: HEARING ON DEFENDANT HIGHLAND CAPITAL MANAGEMENT L.P.'S RENEWED MOTION TO DISMISS COMPLAINT (122) AND STATUS CONFERENCE RE: MOTION FOR WITHDRAWAL OF REFERENCE FILED BY PLAINTIFF CLO HOLDCO, LTD., PLAINTIFF CHARITABLE DAF FUND, LP (128). THIS TRANSCRIPT WILL BE MADE ELECTRONICALLY AVAILABLE TO THE GENERAL PUBLIC 90 DAYS AFTER THE DATE OF FILING. TRANSCRIPT RELEASE DATE IS 05/22/2023. Until that time the transcript may be viewed at the Clerk's Office or a copy may be obtained from the official court transcriber. Court Reporter/Transcriber Dipti Patel, Telephone number 847-848-4907. (RE: related document(s) 155 Hearing held on 1/25/2023. (RE: related document(s) 122 Motion to dismiss adversary proceeding, (Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint) filed by Defendant Highland Capital Management, LP filed by Defendant Highland Capital Management, LP) (Appearances: J. Morris and G. Demo for Movants; L. Phillips and M. Sbaiti for Plaintiffs. Evidentiary hearing (appendices). Court took matter under advisement.), 156 Hearing held on 1/25/2023. (RE: related document(s) 128 Motion for withdrawal of reference. Fee amount \$188, filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) (Appearances: J. Morris and G. Demo for Movants; L. Phillips and M. Sbaiti for Plaintiffs. Evidentiary hearing (appendices). Court announced it will recommend denial to District Court. Court is working on Report & Recommendation.)). Transcript to be made available to the public on 05/22/2023. (Patel, Dipti)</p>

Dated: July 14, 2023

Respectfully submitted,

SBAITI & COMPANY PLLC

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was filed electronically through the Court's ECF system, which provides notice to all parties of interest, on this 14th day of July, 2023.

/s/ Mazin A. Sbaiti

Mazin A. Sbaiti

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1 settlement with Mr. Terry, and the fact it undermined the
2 investment. That wasn't there.

3 But that was our preliminary focus, to try to stop fraud
4 in the inducement. And then we -- we had specific facts
5 related to that. You know, once they knew about the
6 bankruptcy in HarbourVest of -- I'm sorry, of Acis,
7 HarbourVest made a second funding, which was there was a -- it
8 was an initial \$75 million draw, and then a second, I believe,
9 about a \$5 million draw, which was in -- I believe in
10 February. And they made it without -- without objection, and
11 that was after the commencement of the bankruptcy.

12 In addition, they were -- they were active in the
13 bankruptcy, so the -- some of the things that happened in the
14 bankruptcy, there were many opportunities to settle that case,
15 from our examination, all of which were turned down to -- by
16 Mr. Dondero. But you don't see HarbourVest pounding the table
17 to settle, either, either with respect to the Oaktree
18 transaction or any other transaction.

19 Now, HarbourVest's defense to that is, well, we were
20 taking advice and all of our information from Highland, and we
21 were getting that information directly from senior folks at
22 Highland why -- what the value was and why we shouldn't do
23 those things. We thought that that would mitigate some of the
24 arguments that -- some of the damages that we might have, I'm
25 sorry, if we -- if we lost.

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1 But the focus at that point, you know, our legal strategy,
2 was can we stop HarbourVest at the very forefront to say,
3 You've got to come into the factual realm and get out of the
4 fraud in the inducement realm. And then the defenses and the
5 exculpations and the liability limitations in the documents
6 would also come into play.

7 So that -- those are some of the defenses that we focused
8 on and our analytical thinking around them.

9 Q So, if the Debtor had viable defenses, why is it settling?

10 A Well, this is a significant claim. And we -- we looked at
11 it with respect to both the impact on the case, but, really,
12 the merits of the claim.

13 As I said, there's really little dispute that the legal
14 fees should not have been charged to HarbourVest. We think
15 based upon the testimony in Acis, the suspect credibility of
16 those who would have been our witnesses, and the experience in
17 Acis that the Court has had in terms of the completely hell-
18 bent on litigation, it would be hard for anyone to justifiably
19 defend those fees being charged. So, as an initial matter, we
20 had exposure there.

21 In addition, if HarbourVest got by our defense of -- was
22 able, for example, to claim fraud in the inducement, then we
23 were open to significant damages.

24 We really didn't put much value, frankly, on the RICO part
25 of it. We think that that's waved around often to show treble

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1 damages. Although in this case certainly somebody could lay
2 out the predicate acts and put forth a RICO-type argument, we
3 just didn't think that that had real merit in this commercial
4 dispute, even with a fraud claim.

5 But even without the trebling of the damages, there's no
6 dispute that HarbourVest lost more than \$50 million in this
7 investment. You know, we -- we thought about that risk as
8 well.

9 In addition, because the case would really be fact-based,
10 even if we had a high degree of confidence based upon our
11 discussions with our employees and the factual testimony, it
12 was going to be expensive to litigate this case, and time-
13 consuming.

14 And so we looked at the economic value, the potential
15 risks, and the actual value that we were giving up, and found
16 this to be an extremely, extremely reasonable settlement.

17 Importantly, and I think what drove it, you -- one of --
18 one of the things that drove it is another one of our defenses
19 on why, notwithstanding their -- what they held out as
20 meritorious claims, I don't think HarbourVest really wanted to
21 publicly litigate this claim. And we were aggressive in our
22 discussions with HarbourVest of how we would litigate it,
23 which would be quite publicly.

24 Now, that may or may not be fair, but that does put risk
25 on the counterparty. And so I think that helped drive the

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1 settlement.

2 In addition, the structure of the settlement we think is
3 extremely favorable to the Debtor and to the estate because,
4 rather than taking the full claim and putting it into a senior
5 unsecured position, we have bifurcated it. We did think about
6 whether this was a claim that could be subordinated under 510.
7 There won't be any arguments, I would be surprised if there's
8 arguments today that we didn't actually give to the Highland
9 employees who have given them to Mr. Dondero's respective
10 counsel.

11 We did structure it in a way that we thought gave
12 HarbourVest the opportunity to effectively claim a rescission,
13 even though that's not really what it is, and then be able to
14 claim that their recovery is based on the bankruptcy, which it
15 is, but not really dilute all the other stakeholders in the
16 case.

17 (Pause.)

18 THE COURT: Mr. Morris? Anything else?

19 MR. MORRIS: I can hear you, Your Honor.

20 THE COURT: Okay.

21 MR. MORRIS: I can hear you.

22 THE COURT: Okay. Now can you --

23 MR. MORRIS: I got cut off from Mr. Seery for a
24 moment.

25 THE COURT: Okay.

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1 BY MR. MORRIS:

2 Q Okay. I appreciate that. Are you done giving the
3 Debtor's basis for entering into this settlement, Mr. Seery,
4 if you can hear me?

5 A I think so, but I think as the Court has probably seen, I
6 can go on.

7 Q Yes.

8 A So I will try to be -- I'll try to be more concise. But
9 this was a -- this was a difficult settlement. We felt good
10 about our defenses. Felt that we could -- we could try them.
11 But it would be extremely expensive, time-consuming, and there
12 would be a lot of risk. And settling at a level which we
13 believe is actually below the damages that were clearly caused
14 only by the fees was a -- was a -- is a -- is a very
15 reasonable settlement.

16 Q Okay. Let's just talk about the process by which we got
17 to the settlement. Do you recall generally when the
18 settlement negotiations have -- were commenced?

19 A I believe it was -- was late summer, early -- early fall.

20 Q Okay. Before I move on, I just want to go back to the
21 Acis matter that you were talking about, one last issue. Do
22 you know how, if at all, the injunction that was entered in
23 the Acis bankruptcy impacted or related to the HarbourVest
24 claims?

25 A Yeah. I -- yes, I do. And I believe it -- it did. I

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1 think there's an argument, and we analyzed it thoroughly, that
2 the injunction effectively caused a lot of the damages.
3 Because if you look at the values of the equity that
4 HarbourVest had, the -- and HCLOF had in the CLOs, it went
5 down dramatically after the Trustee in the Acis case took over
6 and then subsequently, when the case was reorganized and Mr.
7 Terry took over, you know, with Brigade as the sub-advisor.

8 Now, that would -- you know, we would -- we could
9 certainly attempt to throw, in our defense, the causation at
10 Mr. Terry's feet or at Mr. Phelan's feet. HarbourVest's
11 retort is that none of this would have occurred but for the
12 burn-it-down litigation that Mr. Dondero engaged in with
13 Highland.

14 In addition, in Mr. Terry's defense, you know, he did try
15 multiple times with HCLOF, tried to petition, if you will, the
16 HCLOF entity to -- and directors, former directors, to reset
17 the CLOs to make them more economically viable, based upon the
18 current level of asset returns versus the debt costs in the
19 CLOs. And that was rejected by the HCLOF and the Debtor as
20 the controlling party of HCLOF. So, we thought about those
21 risks.

22 You know, similarly, the economic values in Acis 7 went
23 down pretty significantly from that date as well. So I think
24 there's -- there are some defenses, but that's really Mr.
25 Terry's issue, not our issue. So we thought about those

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1 issues, we analyzed them, and we certainly did all the work
2 around month-to-month reductions in NAVs and how different
3 events in the Acis case might have -- might have caused those
4 and was that some sort of break from the original
5 transgression that HarbourVest claims, which was the
6 fraudulent inducement.

7 Q Do you recall that in November HarbourVest's motion under
8 3018 was scheduled to be heard?

9 A Yes.

10 Q And can you just tell the Court your understanding of what
11 the 3018 motion was about?

12 A Well, the 3018 motion was going to be on voting. And we
13 took the view that it really was not -- it shouldn't have been
14 that big an issue and HarbourVest should have been content
15 with just taking their actual losses of roughly a \$50-\$60
16 million claim for voting purposes and then we would move on.

17 HarbourVest was very insistent that they have a \$300
18 million claim, because they took the position -- and with
19 extensive documentation; not only the pleadings they filed,
20 but also detailed decks that were prepared by their counsel,
21 which they had presented to us on the merits of their claim --
22 that they were going to litigate for -- the 3018 and for the
23 full \$300 million value.

24 And that became the genesis, if you will, of the
25 negotiations to settle.

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1 So, we started talking about the 3018. It was very
2 contentious. My apologies to Ms. Weisgerber and her counsel,
3 her partners, because it was a significant and contentious
4 negotiating call. But the reasons for that I think were that
5 -- their insistence on litigating the 3018 and our view that
6 this was just, you know, another -- another of a series of
7 delays and costs in this case that we really were hoping to
8 avoid.

9 That led to Mr. Pugatch and I stepping away from counsel,
10 no offense to counsel, you know, ours and his, to begin
11 negotiations around the potential for a settlement. First, it
12 started with a 3018, and then, you know, argued that we would,
13 if we got past the 3018, we were going to litigate this,
14 because we effectively had -- thought we could get everyone
15 else done at -- in and around that time. And I think we were
16 also probably a little bit optimistic about UBS at that time
17 and the mediation, which subsequently we have settled. But
18 that was the genesis of those settlements.

19 Q And how did the structure, how did the Debtor and
20 HarbourVest derive at the structure whereby there is a general
21 unsecured claim, there is a subordinated piece, and there's
22 the takeback of the HCLOF interest?

23 A Well, as I outlined, we -- we aggressively set forth our
24 various defenses. Their position was that they -- they should
25 never have been in this transaction before. And they --

1 HarbourVest is, in essence, a fund of funds, and they have
2 investors, and it certainly wouldn't be their, I'm sure, the
3 best-performing asset in their portfolio, to have made this
4 investment and lost \$50 million over this period of time. So
5 they felt strongly that they should never have been in this
6 investment, and but for the failure to disclose and the
7 improper disclosures, they would not have been in this
8 investment.

9 So, optically, getting out of it was important to them,
10 and that led to our idea and construction of a subordinated
11 claim and the transfer of the HCLOF interests to the estate.

12 Importantly, the HCLOF interests, as I mentioned, are --
13 the investments are in the Acis CLOs controlled by Acis and
14 Mr. Terry. The reorganized Acis. As well as the 1.0 CLOs and
15 the Acis 7.

16 So we were keenly focused on, if we were going to get that
17 interest, would we then have the majority control in HCLOF,
18 which we will, and would we be able to drive the recoveries,
19 as opposed to what Highland typically does in these
20 investments is use other people's money, drive down the value,
21 and then try to buy back the interest on the cheap.

22 Q Just in terms of timing, because I think there was a
23 suggestion in one of the openings that there was something
24 untoward about the timing here: At the time the liquidation
25 analysis was prepared on November 24th, had the Debtor reached

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1 any agreement in principle with HarbourVest?

2 A If we had, it would have been reflected, so I don't -- I
3 don't think we were agreed by then. I don't recall the
4 specific dates, but if we had, it would have -- it would have
5 been reflected.

6 Q If I can refresh your recollection that the motion was
7 filed on December 24th, does that help form your understanding
8 or refresh your recollection that there was no agreement in
9 principle on November 24th?

10 A Yeah. Well, I'm quite sure there was no agreement in
11 principle or we would have reflected it minimally by a
12 footnote. There's -- there's no chance. It's a material
13 reduction in the claims pool that we were previously telling
14 people that, at least for purposes of distribution, like UBS
15 and a couple others we said we thought we would get to zero
16 on. So we didn't calculate in that amount. So I'm quite sure
17 we didn't have a deal when we filed the disclosure statement.

18 In terms of the timing, anyone who's done this business
19 for any degree of time knows that the crucible of bankruptcy
20 brings people to the settlement when they see something
21 happening in the case, and not before. I think HarbourVest
22 looked at our -- this is my supposition -- HarbourVest looked
23 at our plan, our ability to get this done, our settlement with
24 Redeemer, our settlement with Mr. Terry and Acis, and saw that
25 this plan was coming together, and if they didn't think about

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1 the settlement, they were going to think about not only the
2 risks that we laid forth for them with respect our defenses,
3 but also the opportunity to litigate with the Claimant Trustee
4 over a long period of time, which couldn't have been
5 particularly appetizing.

6 Q Can you describe for the Court the role played by the
7 independent board of Strand, the general partner of the
8 Debtor, in analyzing and participating in the approval
9 process?

10 A Yes. I think, as the Court is aware and I've testified
11 before, Mr. Russell Nelms and Mr. John Dubel are fellow
12 independent directors with me, appointed pursuant to the Court
13 order. They are kept abreast of every detail, and -- along
14 the way, not just in a summary form at the end. We have
15 reviewed and analyzed collectively each of the issues. Mr.
16 Dubel has extensive experience in these types of litigation
17 matters. Obviously, Mr. Nelms, from his -- both his practice
18 and his time on the bench, has a keen insight into how to
19 resolve and what the risks and benefits are from settling
20 litigation. So I consult them every step of the way.

21 Q And as part of this process, did the Debtor reach out to
22 the directors of HCLOF?

23 A Yes, we did. So, we reached out and we've had several
24 conversations on video chats with the directors. The
25 directors of HCLOF are two new gentlemen, Mr. Richard Boleat

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1 and Mr. Dicky Burwood. They are extremely professional. They
2 are exceptionally well-informed. They are truly careful, and
3 I would say very experienced professional not only directors,
4 but experienced in -- in these matters, both in respect of
5 structured finance as well as these types of vehicles and
6 litigation.

7 They were appointed by the old directors, Scott and
8 Bestwick, and they have been in control. They have outside
9 counsel, which is King & Spalding in the U.S. They have
10 Guernsey counsel. They have accountants and professional
11 advisors, and are being, in my opinion, exceptionally careful.
12 I've got -- very quickly developed a lot of respect for them,
13 and we consulted with them on this settlement and how it would
14 work.

15 They've been very clear that they represent HCLOF and they
16 work for the benefit of the equity, whomever owns it, and
17 taking a view that they would like to see these assets
18 monetized swiftly, with due regard to value, for the benefit
19 of the equity.

20 Q And is it your understanding that the directors of HCLOF
21 approved of this transaction?

22 A They -- I don't know that their approval was required.
23 It's really -- there are a number of hoops to jump through
24 under the documentation, including opinion of outside counsel
25 that we received from WilmerHale in terms of the effectiveness

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1 of the transfer under the documents. We had a negotiation
2 with -- with those directors, and making sure that we did
3 everything correct -- correctly, excuse me -- with respect to
4 the requirements for the transfer under the documents. And
5 they've indicated their support and acknowledgement that we're
6 doing it correctly.

7 I don't know if it's fair to say they approved it. I'd
8 just have to go check the documents. But they certainly
9 support it. And I think they generally support our position
10 with respect to how to move forward with the assets.

11 Q I appreciate that. I guess I meant approval with a small
12 a and not a capital A.

13 You mentioned WilmerHale. Who do they represent in all of
14 this?

15 A WilmerHale is the Debtor's outside corporate counsel, in
16 particular with respect to the fund issues that we don't
17 handle in-house. We have significant support for fund issues
18 from the expertise of Mr. Surgent, who's been the CCO, and he
19 is also a lawyer, with respect to, you know, some of the
20 difficult fund issues that Highland has. But when we use
21 outside counsel, we use WilmerHale for that, and they've been
22 -- they've been exceptional.

23 Q Okay. Just the last two points that were made in Mr.
24 Dondero's objection, I believe. Did the Debtor overpay in
25 this settlement in order to gain the support of HarbourVest in

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1 connection with its -- with the Debtor's attempt to get its
2 plan confirmed?

3 A Not in any way. My -- I believe the settlement is
4 extremely reasonable. As I testified, it's -- it's less than
5 the -- the actual value going out, depending on unless there's
6 successful litigation, and there well could be, is less than
7 on a pro forma basis the fees that were taken and charged to
8 HCLOF. We didn't do this for votes. We will have Class 2,
9 Class 7, Class 8, and Class 9. So I don't think that's a --
10 there's no vote purchasing, I think you called it. No, not at
11 all.

12 Q Yeah. Well, on that topic, I think the phrase that was
13 used was gerrymandering. Are you aware of the argument that's
14 been made that the subordinated claim was dropped in there in
15 order to gerrymander a positive vote for the impaired class of
16 Class 9, I believe?

17 A In a word, I would say that's preposterous. The -- as I
18 said, we have a number of classes that will vote for the plan.
19 The plan is -- the plan is a monetization plan. And if -- if
20 the creditors determine that they don't want to pursue this
21 plan, we'll go forward with another -- we'll try to get
22 another plan. We tried to have a grand bargain plan. We
23 tried to have a pot plan, as I've testified previously. I'm
24 quite certain that I've done more work on that than anyone
25 else, including Mr. Dondero and anybody who works for him.

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1 And he hasn't been willing to do that.

2 This is a -- this is a plan that's come together. We
3 think it's going to be in the best interests of the estate.
4 That'll be confirmation next week. Or two weeks, I guess.
5 But I don't see how this is any way related -- this settlement
6 is not any way related to the voting on that -- on that -- on
7 that plan.

8 Q Just to put the finest point on it, is the Debtor relying
9 on Class 9 to be the impaired consenting class?

10 A No. I think -- I think what I've -- as I said, I believe
11 we already have the votes in Class -- I think it's 2 or 3, 7,
12 8, and -- and 9 will vote in favor as well. So that won't be
13 an issue.

14 MR. MORRIS: Your Honor, I have no further questions
15 of Mr. Seery.

16 THE COURT: All right. Pass the witness. I'll ask
17 HarbourVest counsel first: Do you have any questions of Mr.
18 Seery?

19 MS. WEISGERBER: No, Your Honor.

20 THE COURT: All right. Thank you.

21 What about cross-examination? Mr. Dondero's counsel?

22 CROSS-EXAMINATION

23 BY MR. WILSON:

24 Q Mr. Seery, how are you doing today?

25 A I'm well, thank you.

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1 Q I'm John Wilson, and I represent Jim Dondero. I have a
2 few questions for you today.

3 Now, the HarbourVest proof of claims were filed on April
4 8th, 2020; is that your recollection?

5 A I believe that's correct. I don't recall the specific
6 date.

7 Q Okay. And do you know when you first became aware of the
8 HarbourVest claims?

9 A I believe it was early in the summer when we filed the
10 omnibus objection. It may have been in late spring, shortly
11 after that. I don't recall the specific date of the filing.

12 Q And before the time of the filing of the omnibus
13 objection, did Highland educate itself regarding the
14 HarbourVest proof of claims?

15 A I'm sorry, could you say that again? I didn't quite
16 understand it.

17 Q Before the omnibus objection was filed, did HarbourVest --
18 I'm sorry, did Highland educate itself on the HarbourVest
19 proof of claims?

20 A Not especially, no.

21 Q Okay. And -- but at some point, Highland did investigate
22 those proofs of claim, correct?

23 A That's correct.

24 Q And when would you -- when do you recall that that
25 investigation began?

1 A I don't recall the date, but the triggering event was
2 HarbourVest's response to our omnibus objection.

3 Q Okay. And that would have been filed September 11th of
4 2020?

5 A I'll take your representation. I don't -- I don't recall
6 the specific date.

7 Q Okay. And so when you began to investigate the
8 HarbourVest claims, what was your initial reaction?

9 A My initial reaction was that the -- the larger claims that
10 they were asserting -- the fraud in the inducement, the RICO
11 -- that those claims were, in my view, attorney-made and that
12 when we dug in and did the work, we saw that HarbourVest
13 clearly lost north of \$50 million on the investment. We had
14 just started to uncover the fee issue and saw the risk we had
15 there.

16 But I thought the bulk of those claims were attorney-made.
17 Clever, but attorney-made, as opposed to what I would think
18 are more legitimate. And so we started to develop our
19 defenses around that.

20 Q And was your initial reaction that the HarbourVest claims
21 were largely worthless?

22 A I think with respect to the claim around the fees, I
23 believed there was significant risk. With respect to the
24 other claims, I thought our defenses would make them
25 worthless, yes.

1 Q And did you ever represent to any party that the
2 HarbourVest claim was worth, at most, \$5 million?

3 A I think I represented often, including to HarbourVest,
4 that it was worth nothing. I don't recall if I specifically
5 said \$5 million. \$5 million would have been a nominal amount
6 to -- which is litigation costs. So it may -- it may have
7 been in my models that I put in that as a settlement amount,
8 but I -- I thought that there were valid and good defenses to
9 those larger claims.

10 Q And you recognize that HarbourVest was a large,
11 sophisticated investor, correct?

12 A Yes. I think they manage north of -- right around a
13 hundred billion dollars.

14 Q And you recognize that HarbourVest routinely structured
15 complex customized investments, correct?

16 A I believe that -- I don't know the intricate part of their
17 businesses, but as a fund of funds who does creative
18 investments, I think that they do do quite a bit of that.
19 This, I believe, was their first investment in the CLO space.

20 Q And it was not -- or I should say, you did not believe
21 that HarbourVest was simply a passive investor in HCLOF,
22 correct?

23 A I don't think that that's true, no.

24 Q You don't -- you don't believe that you denied their claim
25 to be a passive investor?

1 A Oh, I think -- I'm sure that in defense of their claims I
2 would argue that they were -- they were more than a passive
3 investor. But it was pretty clear when you look at the
4 structure of what they invested that there was an intent that
5 they be passive on their part. They didn't take a majority
6 interest.

7 In fact, Highland made it clear in the structure of the
8 deal that they couldn't -- it would be hard for them to get a
9 majority interest because Highland entities would control that
10 and Dondero-controlled entities or individuals would control
11 the majority.

12 I think that they -- they had hoped to be a passive
13 investor.

14 Q But was it not your position that HarbourVest was actually
15 an active, involved investor?

16 A I think our defense was going to be that they knew exactly
17 what was going on, that they participated, that they were
18 active, and that, indeed, that they were in and around some of
19 the subsequent issues in the Acis case.

20 Q And you understood that HarbourVest played a material role
21 in the various outcomes in the Acis bankruptcy case, correct?

22 A I don't believe that to be correct, no.

23 Q Have you ever made that representation to anyone before?

24 A Not -- not that I recall.

25 Q Well, do you recall giving statements to a reporter named

1 Syed Khaderi?

2 A I've never spoken to a reporter named Syed Khaderi in my
3 life.

4 Q Well, did you participate in the preparation of statements
5 to be given to Syed Khaderi?

6 A I've never heard of Syed Khaderi, nor have I participated
7 in any preparation of statements. I don't know who that is.

8 MR. WILSON: All right. I'm going to have Bryan
9 Assink put on the screen a document.

10 And Bryan, can you go to Page 7? Bottom of -- the top of
11 Page 7. Well, actually, before you do that, go to the very
12 top of the document.

13 BY MR. WILSON:

14 Q Now, Mr. Seery, are you familiar with Lucy Bannon?

15 A Yes.

16 Q And who is Lucy Bannon?

17 A She is the Highland public relations person.

18 MR. WILSON: Okay. Now go back to Page 7.

19 BY MR. WILSON:

20 Q Now, do you -- do you see on your screen an email of
21 September 14th from Syed Khaderi that says, Hi, Lucy, how are
22 you?

23 A Yes.

24 Q Have you seen this email before?

25 A Not that I recall, no.

1 Q All right. It continues on that, I saw the filing on
2 Friday about HarbourVest claims against Highland for a CLO
3 investment, and I'm looking to put out a report tomorrow
4 morning London time. Ahead of that, I wanted to check if
5 Highland would like to comment on the matter.

6 MR. MORRIS: Your Honor, this is -- the Debtor
7 respectfully objects. A, this document is not in evidence.
8 B, it's rank hearsay.

9 THE COURT: Response, Mr. Wilson?

10 MR. WILSON: Your Honor, I am attempting to
11 authenticate this document, but I'm using it in rebuttal to
12 the testimony that Mr. Seery just offered.

13 THE COURT: All right. I'll allow it. Overrule the
14 objection.

15 MR. WILSON: All right. Thank you, Your Honor.

16 BY MR. WILSON:

17 Q All right. Now, if we -- and oh, that September 14th
18 date, that was three days after the September 11th date that
19 we discussed was the date that HarbourVest filed its response
20 to the omnibus objection, correct?

21 A Yes. If that's the date that they filed it, then I -- if
22 you're representing that, I concede that the 14th is three
23 days after the 11th.

24 Q All right. And if you go back to the first page of this,
25 it looks like, on the following day, Lucy Bannon sends an

1 email to you, and is that your email address,
2 jpseeryjr@gmail.com?

3 A That's correct, yes.

4 Q And do you recall receiving this email from Lucy Bannon?

5 MR. MORRIS: Your Honor, I renew my objection that
6 this is hearsay. He's not rebutting anything that Mr. Seery
7 testified to. He testified that he'd never heard of the
8 gentleman at the bottom of the document. There's nothing in
9 this document that rebuts Mr. Seery's testimony at all.

10 THE COURT: Response, Mr. Wilson?

11 MR. WILSON: Well, I'm not -- I'm not trying to rebut
12 his statement that he hadn't -- that he hadn't heard of Syed
13 Khaderi. My rebuttal is attempted to -- attempting to show
14 that he has made various statements that he denied.

15 THE COURT: I'll overrule the objection.

16 BY MR. WILSON:

17 Q All right. So, back to this exhibit, Mr. Seery. You
18 recall receiving this email from Lucy Bannon on Tuesday,
19 September 15, 2020?

20 A Not specifically. But to be clear, I recall talking to
21 Lucy Bannon about the HCMLP dispute with HarbourVest.

22 Q Okay. And --

23 MR. WILSON: Bryan, can you go down to the next page?
24 Scroll down to where -- the James Seery email.

25 BY MR. WILSON:

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1 Q Do you see this email on your screen that's dated
2 September 15, 2020 at 10:33 p.m.?

3 A Yes, I do.

4 Q And do you recall sending this email to Lucy?

5 A Not specifically, no.

6 Q Well, do you deny that you sent this email to Lucy?

7 A It appears to be my email.

8 MR. WILSON: Your Honor, we would move to admit this
9 document into evidence as Dondero Exhibit Letter N.

10 THE COURT: Any objections?

11 MR. MORRIS: I would consent to the admission of Mr.
12 Seery's email, but the balance of it ought to be excluded as
13 hearsay.

14 THE COURT: What about that?

15 MR. WILSON: Well, Your Honor, I think that this
16 document -- and I'll get into this in a little more detail in
17 a second -- but I think this document is a combination of the
18 work product of Lucy Bannon and Mr. Seery in preparing a
19 response for the reporter who requested comment from Highland.

20 THE COURT: Okay. I --

21 MR. MORRIS: Your Honor, um, --

22 THE COURT: Go ahead.

23 MR. MORRIS: I just -- I do question how they got
24 this document, but that's for another day. That's number one.
25 Number two, in addition to the hearsay argument, I just --

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1 relevance grounds.

2 THE COURT: Okay. I'll allow the portion that is the
3 communication of Seery, that portion of Exhibit N. All right?

4 MR. WILSON: Okay. With due -- thank you, Your
5 Honor. With due respect, I -- to use that portion, I need to
6 refer to the portion below it, because he says, Good to submit
7 with your final edit/revisions. And so we need to know what
8 those final edit/revisions are, which are contained in the
9 email directly below that on the document that was four
10 minutes earlier in time.

11 THE COURT: All right. Fair enough. That'll be
12 allowed.

13 MR. WILSON: All right. Thank you, Your Honor.

14 (James Dondero's Exhibit N is received into evidence as
15 specified.)

16 MR. WILSON: So, Bryan, now can you scroll to the
17 next page? Oh, actually, let's just -- let's just stop at the
18 top -- at the bottom of the page. What's this statement?

19 BY MR. WILSON:

20 Q So, to be clear, Mr. Seery, when -- in response to Mr.
21 Khaderi's request for information and comment, you prepared
22 actually two responses, and one of those was a statement on
23 the record attributed to a spokesperson for HCMLP or something
24 along those lines. And then --

25 MR. WILSON: Can you scroll down to that next page?

1 BY MR. WILSON:

2 Q And this says -- I think part of this got cut off for some
3 reason, but it looks like the official statement is in
4 quotation marks. It says, "We dispute the allegations made in
5 the filing and believe the underlying claims are invalid and
6 will be found to be without merit. Our focus continues to be
7 treating all valid claims in a transparent, orderly, and
8 equitable manner, and vigorously disputing meritless in the
9 court. That focus will assure that HCMLP's reorganization
10 process -- progress is towards an efficient and equitable
11 resolution."

12 And then below that there's another section of this email
13 that says, Background/Clarification, Not for Attribution. And
14 do you know the purpose of this second section of the
15 response?

16 A Do I know the purpose of that? Yes.

17 Q And what would that purpose be?

18 A Ms. Bannon was speaking on background to reporters. As I
19 said earlier, I've -- I never heard of the gentleman from
20 London. If he's at the bottom of the email, I didn't pay any
21 mind, never heard of him. Nor have I heard it since. Ms.
22 Bannon didn't ever reference the specific person.

23 But she is the public relations person. So, as I
24 testified earlier, she does communicate with the press. And
25 as I previously testified when Mr. Morris questioned me, one

1 of our tactics and our defenses for HarbourVest was going to
2 be that we were going to be very public and aggressive about
3 the investment and it would have a negative impact or negative
4 perspective for viewers, in our opinion, about HarbourVest's
5 investment.

6 Q All right. Well, look with me in the middle of that
7 paragraph right after the closed parenthetical, where it says,
8 "But it's important to note the background of HarbourVest's
9 active and deep involvement in the investment of which it now
10 complains."

11 And so it was your position that HarbourVest had an active
12 and deep involvement in the investment, correct?

13 A No. I don't think that's correct. Ms. Bannon prepared
14 the statement, it was a litigation defense on background, and
15 that's our -- that was our position for this purpose. It was
16 not my view that they were active and deeply involved. They
17 were certainly involved. There's no doubt about it. But they
18 got all their information, in our estimation and our research,
19 from Highland.

20 Q But in any event, you would agree with me that four
21 minutes after receiving this email, you approved this
22 statement to go out to the reporter, correct?

23 A No, that's not correct. That's -- this portion is on
24 background. That statement doesn't go out. The previous
25 statement was the official statement. This is the background

1 discussion that she would have. So, no, she was not
2 authorized in any way whatsoever to send that out. She was
3 authorized to have conversations with those general facts.

4 MR. WILSON: Okay. Bryan, go to the top, or the
5 bottom of the page immediately preceding that. That's it.
6 Yes, that's it right there.

7 BY MR. WILSON:

8 Q Now, you'll see that this email from Lucy Bannon on
9 September 15, 2020 at 10:29 p.m. starts off, "Jim, let me know
10 what you think of the below. And, again, the first would be
11 on the record and the second will be sent for information
12 purposes to ensure accuracy, not for attribution."

13 So the intent was that this -- that this entire statement
14 be sent to the reporter, correct?

15 A I don't believe that's correct. I think when she goes on
16 background she doesn't send them a written doc. It's got to
17 be clear to the reporter, at least my understanding is that
18 what on background means -- I've been involved with this
19 before -- is that typically that's done orally. I don't know
20 if she's done it in a written statement before. I have never
21 seen that done in a written statement before. You give the
22 official statement and then you walk the reporter through your
23 other views on background. And you're not quoted. And it's
24 usually attributed to a source with knowledge.

25 Q Okay. We'll come back to that in a minute. The next

1 sentence after the one I just read to you --

2 MR. WILSON: Go back to where we were on the
3 background.

4 BY MR. WILSON:

5 Q Now, we just read you the sentence that starts with, "Then
6 it's important." The following sentence says, "HarbourVest
7 was not simply invested in HCLOF as an ignorant,
8 unsophisticated, passive investor, but was an active and
9 informed participant in the inception of its investment
10 through all of the Acis bankruptcy proceedings, and
11 HarbourVest played a material role in various outcomes related
12 to that case and its impact on HCLOF."

13 And is it -- did you not just tell me before we
14 investigated this document that HarbourVest did not play a
15 material role in the various outcomes of the Acis bankruptcy?

16 A I don't know exactly what I said, but I think that's
17 correct, after we'd done the research on it, yeah.

18 Q But you took the position in this email that you approved
19 to go out to a reporter that says that -- that HarbourVest was
20 an active and informed participant in the inception of -- of
21 its investment through all of the Acis bankruptcy proceedings
22 and played a material role in various outcomes related to that
23 case and its impact on HCLOF. Can we agree with that?

24 A Yes.

25 Q And then the final sentence of this paragraph says that,

1 We believe that neither the facts nor the law support
2 HarbourVest's, quote, We-were-too-lazy-to-know allegations.

3 Whose words were those, "We-were-too-lazy-to-know
4 allegations"?

5 A I don't recall. They may be mine. It's aggressive the
6 way I am, so that -- that may well be the case.

7 MR. WILSON: All right. Go -- go down to the next
8 page.

9 BY MR. WILSON:

10 Q And with respect your comment that that second paragraph
11 would not have gone to the reporter, look at this email in the
12 middle of the page from Lucy Bannon to Syed Khaderi, September
13 16, 2020, at 1:51 a.m. And --

14 MR. MORRIS: Your Honor, this I will object to as
15 hearsay. There is no witness here to testify to anything on
16 this document.

17 THE COURT: All right. How about that?

18 MR. WILSON: Well, it's -- well, scroll up just a
19 little bit. This email at the top of the page is three
20 minutes after the one in the middle of the page, where Lucy
21 Bannon is forwarding this to James Seery, saying, See below
22 for responses sent to *Creditflux*. Will follow up with the
23 story when it runs or with any other updates.

24 MR. MORRIS: Your Honor, these --

25 MR. WILSON: So I think this --

1 MR. MORRIS: These documents don't appear on the
2 witness list. They're not being offered to impeach anything.
3 They're just -- he's taking discovery as we sit here.

4 MR. WILSON: Your Honor, in response, I'm simply
5 trying to rebut the statements that Mr. Seery made. In fact,
6 he told me just a minute ago that that second paragraph would
7 not have gone out to the reporter. However, this email from
8 Lucy Bannon to Syed Khaderi directly rebuts that statement.

9 THE COURT: But your whole purpose in this line of
10 questioning, with an undisclosed document, is to rebut the
11 earlier testimony he gave before you even put this exhibit in
12 front of him.

13 MR. WILSON: I'm trying to rebut multiple statements
14 that Mr. Seery has made today, and I think it -- you know, if
15 he's going to testify that this information did not go out to
16 a reporter, I think I'm allowed to rebut that to demonstrate
17 that it did.

18 THE COURT: All right. Why didn't you disclose this
19 in advance? It's feeling less and less like an impeachment
20 document the more we go through it.

21 MR. WILSON: Your Honor, I did not -- I did not
22 actually have this document at the time we filed our witness
23 and exhibit list, but I would also say that I didn't have any
24 purpose to use it if I didn't need it for rebuttal.

25 THE COURT: Okay. First off, you're supposed to

1 disclose all exhibits you anticipate using except those for
2 purposes of impeachment. Okay? Not rebuttal, to be
3 technical.

4 So, if you didn't disclose this exhibit, the only way you
5 can use it, subject to other possible objections, is if you're
6 impeaching a statement. And I'm just saying I think we're
7 going beyond trying to impeach the original statement and now
8 we're trying to impeach statements he's made after seeing
9 portions of the document.

10 What did you mean, you didn't have this document in time
11 to disclose it?

12 MR. WILSON: Well, I actually just received this
13 document this morning, Your Honor.

14 THE COURT: Where did you receive it from?

15 MR. MORRIS: From who?

16 MR. WILSON: I -- I honestly do not know the source
17 of this document, although it was provided to me by my client.

18 MR. MORRIS: Your client being Mr. Dondero?

19 THE COURT: Could you answer that, Mr. Wilson?

20 MR. WILSON: Yes, that's -- yes, that's correct.

21 THE COURT: All right. I will -- that's --

22 MR. MORRIS: Your Honor, I'd like to --

23 THE COURT: That's a different can of worms. But for
24 now, I sustain the objection. You're done questioning on this
25 document.

1 MR. WILSON: That's fine, Your Honor. I can move on.

2 BY MR. WILSON:

3 Q Now, Mr. Seery, you would agree with me that whether or
4 not HarbourVest played an active role in the Acis bankruptcy,
5 it was kept apprised of the -- of the ongoings in the
6 bankruptcy? (Pause.) I'm sorry. Could you hear that?

7 A Yes. My understanding is that -- that they were.

8 Q And in fact, did Highland have weekly conference calls
9 with HarbourVest during the Acis bankruptcy to discuss what
10 was going on in the bankruptcy?

11 A I don't know if they were weekly. I've been told that
12 they had regular calls updating HarbourVest, yes.

13 Q Okay. And did Highland produce over 40,000 pages of
14 documents to HarbourVest related to the Acis bankruptcy?

15 A I'm not aware of that, no.

16 Q Have those documents been provided to you?

17 A I hope not.

18 Q So, in your role --

19 A I'm sorry. I don't -- I didn't receive 40,000 documents
20 from anybody.

21 Q Well, did you receive any number of documents that were
22 provided by Highland to HarbourVest during the Acis
23 bankruptcy?

24 A I wasn't involved in this during the Acis bankruptcy. I'm
25 sorry.

1 Q Well, I'm referring to, after you became involved in this
2 Highland bankruptcy, whether you were provided with these
3 documents that were sent from Highland to HarbourVest.

4 A I don't -- I don't know what the documents are. I've
5 reviewed tons of documents with respect to the HarbourVest
6 claims, but I don't know of the documents to which you're
7 referring.

8 Q Okay. And after you performed your investigation into the
9 HarbourVest claim, what was your opinion as to the cause in
10 the reduction in value of HarbourVest's investment in HCLOF?

11 A I think the main cause of the reduction in the investment
12 was the imposition of the Trustee and the failure of Highland
13 HCLOF and then subsequently with the injunction to reset the
14 CLOs.

15 You know, these are -- these are some of the worst-
16 performing CLOs in the market because they weren't reset. And
17 when the liabilities of the CLOs are set at a level to match
18 assets, and then liability -- the assets run off, and the
19 asset financings or the new deals come in at much lower
20 levels, and the obligations of the CLO are not reset, the
21 arbitrage that is the CLO shrinks. And that's what happened
22 to these CLOs.

23 Q And during the course of the Acis bankruptcy, Acis and
24 Brigade were given management responsibilities over the CLOs
25 and HCLOF, correct?

1 A I believe that the Trustee had the overall, and then
2 subsequently, with the confirmation of the plan, they took it
3 over. So I think that ultimately Mr. Terry had the management
4 authority, full management authority, and some advice through
5 Brigade. But I think technically it wasn't actually during
6 the Chapter 7. The Chapter 7 proceeding, I believe that Mr.
7 Phelan had the actual authority.

8 (Echoing.)

9 Q I'm sorry. And so your testimony is that Mr. Phelan had
10 the actual authority but he delegated that authority to Josh
11 Terry and Brigade?

12 A I think that's fair, yes.

13 Q And do you know when that occurred?

14 A I believe that the control of the CLOs was in July of
15 2018, and then the ultimate confirmation of the case was at
16 the very beginning of '19.

17 Q So, after being instituted as portfolio manager, and
18 during the time when Acis and Brigade were working under the
19 direction of the Trustee, who would have receive the fees for
20 managing those portfolios?

21 A I believe -- I don't know. I believe the -- that the Acis
22 estate would have received those fees.

23 Q And who -- and so is that your testimony, that prior to
24 confirmation the Acis estate would have received the
25 management fees?

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1 A I believe that -- I believe they would have if they were
2 the manager, yeah.

3 Q Okay. And who would have received the fees after
4 confirmation?

5 A Acis.

6 Q Okay. And who would have had the discretion to set the
7 amount of those management fees?

8 A They would be agreed to in the -- in the investment
9 management agreement.

10 Q They would be agreed to?

11 A Yes. As far as I've seen, I've -- I haven't seen
12 unilateral ability of a manager to set fees at its -- at its
13 whim.

14 Q So is it your understanding that Acis and Brigade ended up
15 charging substantially more fees than Highland had charged
16 when it was under Highland's management?

17 A I think the fees were -- the fees were -- the fees were
18 set by the agreement.

19 MR. MORRIS: Your Honor, I just object to the line of
20 questioning on relevance grounds. This is a 9019 hearing,
21 Your Honor. How -- I just don't think this has any relevance
22 at all.

23 THE COURT: All right. Mr. Wilson, what is the
24 relevance?

25 MR. WILSON: The relevance is that Mr. Seery has

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1 testified that these Acis CLOs were among the worst-performing
2 in the market, and frankly, we would agree with that, and I'm
3 trying to get his understanding as to why, because I think
4 there's direct relevance in the reason that the value of the
5 HarbourVest investment diminished.

6 MR. MORRIS: I don't think that was his testimony,
7 Your Honor. But at the end of the day, Your Honor has heard
8 the litany of reasons why the Debtor is entering into this
9 agreement. I just, I just think it's irrelevant, Your Honor.

10 THE COURT: All right. Mr. Wilson, I barely think
11 this is relevant. I mean, I'm going to give you some benefit
12 of the doubt on that because of, you know, the testimony that
13 HarbourVest lost \$50 million of value and --

14 (Echoing.)

15 THE COURT: -- maybe that shouldn't, you know, lie at
16 the feet of Highland. I think the compromise reflects that
17 they don't -- it doesn't lie entirely at the feet of Highland.
18 But, you know, maybe two or three more questions.

19 MR. WILSON: Yes. Thank you, Your Honor. And I
20 didn't have very much more on this point. But to be a hundred
21 percent honest, I can't remember my question right before the
22 objection.

23 THE WITNESS: I think you were asking me about the
24 fees and somehow alluding or implying that the manager could
25 unilaterally set fees.

1 The fees are set in the investment management contract.

2 The manager doesn't get to wake up on Wednesday and say, you
3 know, I'd like another half a basis point. It doesn't work
4 that way.

5 BY MR. WILSON:

6 Q But you would agree with me that the fees and expenses
7 charged to an investment would impact the performance of that
8 investment in the market?

9 A Absolutely.

10 Q Would you also agree with me that there was one CLO -- and
11 I think you referred to it in your direct testimony -- but CLO
12 7, which continued to be managed by Highland?

13 A That's correct.

14 Q And is it fair to say that CLO 7 exceeded the performance
15 of the CLOs that were managed by Acis and Brigade?

16 A I think that's fair. I don't -- I don't recall the
17 magnitude, but I think it's outperformed those -- those CLOs,
18 yes.

19 Q All right. Well, thank you. I want to turn your
20 attention to the portion of the settlement agreement that
21 deals with voting of the HarbourVest claim. How did
22 HarbourVest's commitment to vote for the plan become a part of
23 the settlement?

24 A Pretty straightforward negotiation. We -- in negotiating
25 the settlement, one of the key factors was the cost and

1 expense of the litigation, in addition to the risk on the --
2 on the fees, and whether we could wrap this up in a global
3 settlement now. So in my experience, it's fairly typical, we
4 would try to do this in every settlement, have the settling
5 party, be that the claimant, agree to support the case and the
6 plan.

7 You know, we did not do that with the Committee members,
8 although we wanted to. (Echoing) I frankly still wish I had.
9 Those little -- little bits that have been difficult
10 (echoing). The Committee members have a different interest in
11 (echoing) than their more global interest for creditors at
12 large, which is more difficult than traditionally in
13 bankruptcy cases, less likely to have a Committee member, a
14 sitting Committee member, actually support the (echoing) of
15 the plan.

16 THE COURT: Mr. Wilson, could you be careful to put
17 your device on mute every time you're not talking? Because
18 we're getting some feedback loop from you when Mr. Seery
19 answers your questions. Okay?

20 (Echoing continues.)

21 THE COURT: Like right now. I'm hearing feedback of
22 my own voice through your speakers.

23 Right, Mike? Isn't that what --

24 A VOICE: I am, too.

25 THE COURT: Yes. Okay. So please be sure you put

1 your device on mute whenever you are not speaking. All right.
2 Go ahead.

3 BY MR. WILSON:

4 Q I mean, I think you just answered this question, but there
5 was -- there was no similar voting provision in the Acis or
6 the Redeemer settlements, correct?

7 A There is not, no. And just as a -- by way of explanation,
8 if it's okay, the reason was my counsel advised against it. I
9 did ask for it.

10 Q Your counsel advised against putting that voting
11 requirement in the Acis and Redeemer settlements?

12 A For the reasons I stated. And in my experience, that's
13 consistent, where sitting members of Committees don't
14 generally sign up to resolve their own claims and support the
15 plan because of their larger fiduciary duties to the creditor
16 body as a whole.

17 Q And during the settlement negotiations of the HarbourVest
18 claim, was this commitment to vote a topic of discussion?

19 A Not -- not particularly, no. It was pretty clear that
20 HarbourVest, if they were going to agree to the settlement and
21 the numbers, could see structure. Obviously, it wanted to
22 understand what the potential distributions would be under the
23 plan, but this was not a hotly-negotiated point.

24 Q And would you consider HarbourVest's commitment to vote
25 for the plan an important part of the settlement?

1 A I think it's an important part of the settlement, that the
2 part of the settlement is the subordinated claim. We could
3 put that into presumably any plan. But our plan does -- does
4 have a Class 9 for that. So I think it's a -- it's a part of
5 the settlement that is important or we wouldn't have included
6 it. It clearly wraps everything up and moves us towards
7 confirmation.

8 Q And would you have made the deal with HarbourVest if they
9 had pushed back on the commitment to vote for the plan?

10 A Yeah, I would have.

11 Q All right. Thank you.

12 MR. WILSON: No further questions.

13 THE COURT: All right. Mr. Draper, anything from
14 you?

15 MR. DRAPER: Yes, Your Honor.

16 CROSS-EXAMINATION

17 BY MR. DRAPER:

18 Q Mr. Seery, I may not understand the settlement, and I
19 apologize, but the way I think the settlement reads, the
20 interest that you're acquiring, you have the right to place in
21 any entity. Is that my -- is that correct?

22 A I don't recall the -- the specifics, but just from a
23 structural standpoint, we wanted to be able to put it into a
24 subsidiary as opposed to putting it directly in HCMLP. If we
25 couldn't do that, we would -- we would put it into HCMLP. So

1 there wasn't a -- I don't recall the actual specifics, but we
2 certainly thought about holding that interest in a -- in a
3 subsidiary, just to have a cleaner hold.

4 Q Why aren't you putting it into the Debtor so the Court and
5 the estate have jurisdiction over that?

6 A I think the Court certainly has jurisdiction over an
7 entity that the estate owns a hundred percent of. I don't
8 think that's -- that's even a close call. So the important --

9 Q Now, --

10 A Can I finish?

11 Q Sure.

12 A You asked me why. To the extent that somebody thinks that
13 problematic, I will consent to the Court having complete
14 jurisdiction over it, since I control it a hundred percent.

15 Q No. The real reason is, if I remember correctly, Mr.
16 Dondero and Judge Lynn filed a motion to have some say or some
17 information as to sales by subsidiaries, and I think you took
18 the position that they weren't entitled to it. And so my
19 concern was that putting this in a subsidiary in a sense gave
20 you unfettered control without any review of the item.

21 A I don't -- I don't think that's the case where we --
22 there's a directly-held subsidiary where we own a hundred
23 percent of it. I don't think that that's the case.

24 Q Okay. But you're willing to (a) put this into the Debtor,
25 number one; and number two, have the estate and have the Court

1 have complete control over the disposition of it and its
2 actions, correct?

3 A That's not correct, no.

4 Q What -- what is incorrect about my statement?

5 A The debtor-in-possession has control of its assets. The
6 Court doesn't have complete control over its assets. There's
7 --

8 Q Well, --

9 A -- issues -- hold on a second. This is not -- this is not
10 a game and a trap. We put it in a subsidiary for specific
11 reasons. You asked why. I'm giving you the why. It's not to
12 hide it from anybody. We're not going to sell the asset
13 unless somebody comes up with a great price for it. We're
14 going to monetize the assets. We're going to control HCLOF by
15 a majority.

16 Q But, again, the issue is, if it's in the estate, the Court
17 has supervision over it. If it's not in the estate, the Court
18 has no supervision of it.

19 A I don't think that's correct, because the Court has
20 supervision over the estate, which owns a hundred percent of
21 the special-purpose entity that will own the shares.

22 Q Okay. All right. Now, let's talk about the \$15 million
23 that you discussed and the legal fees that were incurred. Is
24 that the total amount that was spent, or is -- or is that --
25 was the total amount \$30 million and HarbourVest was only

1 responsible for one half of it or functionally took the brunt
2 of one half of it?

3 A I think the total amount is between \$15 and \$20 million.
4 I don't have the exact numbers.

5 Q So, in fact, the HarbourVest loss due to its ownership
6 would have been one half of that, not \$15 million?

7 A Well, the vehicle lost the money. HarbourVest owned 49.98
8 percent of it, and Highland controlled the rest. So if you
9 allocate it that way, I suppose that would be a -- that's how
10 you would divide it, in -- roughly in half, yes.

11 Q And so HarbourVest's actual dollar loss due to the legal
12 fees is really the 49-point-whatever percent of \$15 million,
13 not \$15 million?

14 A I don't know if -- I certainly would argue that. I don't
15 think that HarbourVest has that position.

16 Q Okay. Now, in connection -- you were asked a question
17 about the documentation that was provided by Highland to
18 HarbourVest both during the bankruptcy of Acis and before.
19 You have control over the Harbour -- over the Highland server,
20 correct?

21 A I'm sorry. Can -- can we do two things? One is, Mr.
22 Draper, I can't see you, so it would be better if I could see
23 you during the questioning.

24 Q Okay.

25 A And could you repeat the question?

1 Q All right. I'll be happy to. You were asked a question
2 about the documentation that was provided by Highland to
3 HarbourVest during the Acis bankruptcy and meetings that took
4 place between the parties. Correct?

5 A Yes.

6 Q And you stated you were unaware of the material that was
7 sent over?

8 A I think I testified that I didn't receive the 40,000
9 documents that were mentioned.

10 Q Did you do any search or order a search of the Highland
11 server to see what material was sent over by any party to
12 HarbourVest to analyze what -- what information they had
13 available to them and what was provided to them?

14 A Yes, we did a search.

15 Q And did you review the documentation that was sent over?

16 A The -- the documentation that we looked at was very
17 specific to the investment and to the OM. So we didn't look
18 for the -- the supposed 40,000 documents, no.

19 Q Did you look for the material that was provided to them
20 during the Acis bankruptcy and the periodic meetings that you
21 discussed? Or that you testified to earlier?

22 A The answer is no.

23 Q One last question. I think, and just so I understand your
24 testimony, you've broken out the HarbourVest claim into two
25 pieces. One is the legal fee amount that we've just

1 discussed, and I gather the other piece of that is the fraud
2 in the inducement to enter into the CLO purchase?

3 A It's -- it's more -- it's much more than that.

4 Q Okay. Well, let me say it in a different way. The other
5 part of it is the losses as a result of the fraud in the
6 inducement to purchase the interest?

7 A I don't think that's -- that's fair. If I could explain?

8 Q Sure.

9 A Yeah. The legal fee piece is pretty clear. The other
10 piece starts with fraud in the inducement, but it's extensive
11 fraud claims. Fraud in the inducement, as I testified
12 earlier, would get them around the exculpation and liability
13 limitations in the OM. You don't get around all of those with
14 just the fraud. And so that's -- that's the split of that
15 claim. So the fraud in the inducement contains fraud
16 allegations. Even if you didn't have inducement, you'd have
17 other potential fraud claims.

18 Q But let me state it in a different fashion. But for the
19 investment, the fraud that you allege wouldn't have occurred?

20 A I -- HarbourVest alleges it.

21 Q No, I'm just -- in your analysis of the claim, but for the
22 inducement, the rest of the damages wouldn't have flowed?

23 A That's HarbourVest's position, yes. But for the fraud,
24 they wouldn't have made the investment.

25 Q All right.

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1 MR. DRAPER: I have nothing further for this witness.

2 THE COURT: All right. Any redirect, Mr. Morris?

3 MR. MORRIS: Just a few very questions, Your Honor.

4 Just a very few questions.

5 REDIRECT EXAMINATION

6 BY MR. MORRIS:

7 Q Mr. Seery, you were asked about that document that Lucy
8 prepared. Do you remember that?

9 A Yes, I do.

10 Q In your experience, don't defendants often deny liability
11 before entering into settlements, or even worse, getting
12 adverse judgments entered against them?

13 A Of course. Yes.

14 Q Okay. And in response to Mr. Draper's questions, isn't
15 the Guernsey claim another claim that the Debtor took into
16 account in assessing the potential risks of this settlement?

17 A There's a number of claims contained in it. As I
18 mentioned earlier, I mentioned the RICO claim. But there is a
19 Guernsey shadow director claim, which is not dissimilar to
20 U.S. claims that somebody effectively controls an enterprise,
21 notwithstanding them not having the official role.

22 Q Okay.

23 MR. MORRIS: I have nothing further, Your Honor.

24 THE COURT: All right. Any recross on that redirect?

25 All right.

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1 MR. WILSON: No, Your Honor.

2 MR. DRAPER: No, Your Honor.

3 THE COURT: Thank you. Mr. Seery, that concludes
4 your testimony. Thank you.

5 THE WITNESS: Thank you, Your Honor.

6 THE COURT: We need to take a bathroom break. Before
7 we do, I just want to be clear with what we have left. As I
8 understood it, we were having Mr. Pugatch from HarbourVest.
9 Mr. Morris, will that conclude the Debtor's evidence?
10 (Pause.) Okay. You were on mute, but I think you were saying
11 yes.

12 MR. MORRIS: Sorry. But to be clear, Debevoise is
13 going to be putting their witness on the stand.

14 THE COURT: Okay.

15 MR. MORRIS: But it's part of the evidence in support
16 of the motion.

17 THE COURT: All right. Do the Objectors have any
18 witnesses today?

19 MR. WILSON: Your Honor, Mr. Dondero intends to
20 examine Mr. Pugatch, but if he's going to be called by his
21 counsel, then we will do that as a cross-examination.

22 THE COURT: All right.

23 MR. DRAPER: This is Douglas Draper. I have no
24 witnesses.

25 THE COURT: Okay. All right. Well, I'm asking --

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1 well, I do want to ask: Can we get a time estimate
2 potentially for Mr. Pugatch?

3 MS. WEISGERBER: For my examination, Your Honor,
4 twenty minutes, perhaps.

5 THE COURT: Okay.

6 MS. WEISGERBER: Or less.

7 THE COURT: All right. Well, let me tell you what
8 we're going to do. We're going to take a ten-minute bathroom
9 break. But I have a 1:30 hearing and I have a 2:00 o'clock.
10 Well, I have a 1:30 docket, multiple matters, and a 2:00
11 o'clock docket. So, you know, I'm really intending that we
12 get finished in time to give me and my staff a little bit of a
13 lunch break before launching into the 1:30 docket, so I'm
14 hopeful we can get done around 1:00-ish. If we can't, then
15 we're going to have to reconvene, I'm going to say probably
16 3:00-ish Central time. So let's hope we can get through
17 everything. All right? Ten-minute break.

18 THE CLERK: All rise.

19 (A recess ensued from 11:58 a.m. until 12:08 p.m.)

20 THE CLERK: All rise.

21 THE COURT: All right. Please be seated. We're
22 going back on the record in the Highland matters. Do we have
23 everyone? It looks like we do. Ms. Weisgerber is going to
24 call the next witness; is that correct?

25 MS. WEISGERBER: Yes, Your Honor. We call Michael

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1 Pugatch of HarbourVest to the stand.

2 THE COURT: All right. Mr. Pugatch, if you could
3 turn on your video and say, "Testing one, two."

4 MR. PUGATCH: Two.

5 THE COURT: All right. There you are. Please raise
6 your right hand.

7 MICHAEL PUGATCH, HARBOURVEST'S WITNESS, SWORN

8 THE COURT: Thank you. You may proceed.

9 MS. WEISGERBER: Thank you, Your Honor.

10 DIRECT EXAMINATION

11 BY MS. WEISGERBER:

12 Q Good morning. Can you please state your name for the
13 record?

14 A Sure. It's Michael Pugatch.

15 Q And where do you work, Mr. Pugatch?

16 A HarbourVest Partners.

17 Q And what is your title?

18 A I'm a managing director in our secondary investment
19 group.

20 Q Did HarbourVest file claims in the Highland bankruptcy,
21 Mr. Pugatch?

22 A We did, yes. Several claims, in fact.

23 Q What was the basis for those claims?

24 A Yeah. Among other things, fraudulent inducement based on
25 misrepresentations and omissions on the part of Highland in

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1 connection with our original investment, mismanagement at the
2 HCLOF level, including inappropriate fees that were charged
3 to investors, among a number of other items as well.

4 Q Can you explain what you mean by misrepresentations made
5 to HarbourVest by Highland?

6 A Yeah, sure. So, you know, based on a number of
7 statements that were made to us around the litigation
8 involving Mr. Terry, some of the intentions found, the
9 structural changes that came to light with respect to HCLOF
10 and our investment, as well as the fact that the arbitration
11 award specifically against Mr. Terry would have no impact or
12 implication on Highland's sale or business.

13 Q And can you explain what you mean by omissions made by
14 Highland to HarbourVest?

15 A Sure. So I would say, really, the implications behind
16 the structural changes that were made at the time of our
17 investment into HCLOF. Also, the intention, clear intentions
18 that Highland had to never, in fact, pay the arbitration
19 award that came to light during our due diligence period to
20 Mr. -- to Mr. Terry as part of the investment. And
21 ultimately the -- what Highland went about doing in terms of
22 stripping assets of Acis that led to the material value
23 declines and destruction of value that we've experienced
24 since our investment.

25 Q You mentioned a diligence period. Did HarbourVest

1 conduct diligence on the investment?

2 A We did. We conducted very detailed due diligence, as we
3 do for all of our investments. That diligence period lasted
4 several months ahead of our investment decision.

5 Q And did HarbourVest conduct that diligence by itself?

6 A No. So, in addition to internal investment professionals
7 at HarbourVest, we engage with outside advisors, both
8 consultants as well as legal advisors, in connection with
9 that due diligence.

10 Q And did Highland answer all of HarbourVest's questions
11 during that diligence period?

12 A They did. And they were numerous. But yes, they
13 answered all the questions that we had for them.

14 Q Was the Terry dispute part of HarbourVest's diligence?

15 A It was. That came up as one of the outstanding items of
16 litigation as part of our due diligence.

17 Q I'm going to ask my colleague to pull up on the screen an
18 exhibit that was on our exhibit list as Items -- Exhibits 34
19 and 35. It's an August 15, 2017 email from Brad Eden to
20 Dustin Willard. Mr. Pugatch, do you recognize this document?

21 A I do, yes.

22 Q And what is it?

23 A This was an email sent to us during our due diligence
24 period in response to a request for more information on the
25 outstanding litigation that Highland was involved with.

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1 MS. WEISGERBER: And if my colleague can just scroll
2 to the attachment to that email.

3 BY MS. WEISGERBER:

4 Q And do you recall the attachment as well, Mr. Pugatch?

5 A Yes, I do.

6 MS. WEISGERBER: And if you can scroll back up to the
7 first email.

8 BY MS. WEISGERBER:

9 Q Who is Dustin Willard?

10 A Yes. Dustin is a colleague of mine at HarbourVest who
11 worked closely with me on this investment.

12 Q And you said that this document was shared with
13 HarbourVest during the diligence period before the HCLOF
14 investment?

15 A It was, correct.

16 Q Is it typical during diligence to receive a description
17 of litigation such as this?

18 A It is. It's a question that we always ask. Certainly a
19 component of our diligence to understand any outstanding
20 litigation on the part of our counterparty or manager that
21 we're investing in.

22 MS. WEISGERBER: Your Honor, I'd move to offer this
23 exhibit into evidence.

24 THE COURT: Any objection?

25 MR. DRAPER: No objection, Your Honor.

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1 MR. MORRIS: No objection from the Debtor, Your
2 Honor.

3 THE COURT: All right. What is the letter or number
4 for this exhibit?

5 MS. WEISGERBER: It's HarbourVest Exhibit 34.

6 THE COURT: All right. So HarbourVest Exhibit 34 is
7 admitted.

8 (HarbourVest's Exhibit 34 is received into evidence.)

9 THE COURT: And I need to be clear where it appears
10 on the docket. Can someone tell me?

11 MS. WEISGERBER: So, it's identified on our exhibit
12 list, not -- it's not attached to the exhibits. It is on the
13 docket. We were -- when we initially filed the exhibit list,
14 we were working out confidentiality issues. But it was
15 subsequently filed with our reply last night. It's at Docket
16 No. 1735 --

17 THE COURT: All right.

18 MS. WEISGERBER: -- at Pages A -- Pages A345 to A350.

19 THE COURT: All right. Very well. Thank you.

20 BY MS. WEISGERBER:

21 Q Mr. Pugatch, we'll just scroll down to the second page of
22 the attachment. Can you describe generally what the
23 litigation says regarding the Terry dispute?

24 A Yes. Generally speaking, this dispute was described as
25 an employee dispute, employment agreement dispute, with Mr.

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1 Terry, who was a former employee of Highland involved in
2 their CLO business, and is described by Highland to us really
3 having to do with a series of false claims, in their opinion,
4 but having to do with a disgruntled former employee.

5 Q And did it strike you as an unusual or significant
6 dispute?

7 A No. I would say we often -- we'll see, you know, former
8 employees with, you know, claims against a former employer in
9 connection with wrongful termination. I wouldn't say it's
10 extremely common, but certainly not entirely out of the
11 ordinary. And based on the explanations that we'd received
12 from Highland, seemed to be more of an ordinary-course type
13 former employee litigation suit.

14 Q Based on what you now know about the Terry dispute, do
15 you believe that this was an adequate disclosure regarding
16 the dispute?

17 A I would say very clearly not, you know, based on the
18 facts that came to light subsequently, the various rulings in
19 connection with the Acis bankruptcy case. What was very
20 clearly not stated are the actual facts and implications of
21 the ongoing litigation with Mr. Terry.

22 MS. WEISGERBER: I'd ask my colleague to put up the
23 next exhibit. Okay. So, this is on a HarbourVest exhibit
24 list, which is Document No. 1723. It's Exhibit 36 on that.
25 Same issue with respect to initially not filed, but it is on

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1 the docket at our response last evening at ECF No. 1735 at
2 Page A351.

3 THE COURT: Page what?

4 MS. WEISGERBER: A351.

5 THE COURT: A351. Thank you.

6 MS. WEISGERBER: You're welcome.

7 BY MS. WEISGERBER:

8 Q Mr. Pugatch, I just put up a November 29, 2017 email from
9 Hunter Covitz to Dustin Willard, Michael Pugatch, and Nick
10 Bellisario. Do you recall this document?

11 A I do, yes.

12 Q And what is this document?

13 A This was an email sent to us by Highland a couple weeks
14 after we closed on our investment on the (inaudible) in
15 response to a *Wall Street Journal* article that had come out
16 regarding Highland, a number of actions that they had taken,
17 and what Highland was articulating to us, a number of false
18 claims that had been made about Highland's prior actions, and
19 specifically trying to explain some of that and also share
20 with HarbourVest a letter that was being sent to the editor
21 of the *Wall Street Journal* highlighting, in their view, some
22 of the inaccuracies around the reporting.

23 Q And did you receive this document?

24 A We did, yes.

25 MS. WEISGERBER: I'd move to offer this, so

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1 HarbourVest Exhibit 36, into evidence.

2 THE COURT: Any objections?

3 MR. WILSON: Your Honor, John Wilson. I would object
4 as to the relevance of this document.

5 THE COURT: All right. What's your response?

6 MS. WEISGERBER: Your Honor, it shows
7 misrepresentations that the witness will testify how it
8 relates back to prior representations prior to HarbourVest's
9 investment, as well as misrepresentations at that time.

10 THE COURT: Okay. I overrule the objection. I'm
11 going to admit it.

12 (HarbourVest's Exhibit 36 is received into evidence.)

13 BY MS. WEISGERBER:

14 Q Mr. Pugatch, can you describe generally -- we spoke about
15 this a little bit -- just what this communication from
16 Highland was conveying to HarbourVest at the time?

17 A Yes. Specifically, again, responding to this *Wall Street*
18 *Journal* article that had been published, trying to defend,
19 again, Highland's own views why there were inaccuracies in
20 the reporting. But importantly, from our perspective, trying
21 to reassure us as to the fact that, you know, these
22 accusations would have no bearing and any results from it
23 would have no bearing on their ongoing business or
24 partnership or the investment that we had made in HCLOF.

25 MS. WEISGERBER: And if you can scroll to the second

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1 page.

2 BY MS. WEISGERBER:

3 Q We'll just look at the last paragraph of another email
4 from Mr. Covitz. Can you just read that first sentence of
5 the last paragraph?

6 A Sure. (reading) While the dispute has no impact on our
7 investment activities, as always, we welcome any questions
8 you may have.

9 Q Mr. Pugatch, was this email and the discussion regarding
10 the Terry dispute consistent with the representations made to
11 you prior to HarbourVest's investment into HCLOF?

12 A It was, yes. Both the message, the lack of any impact
13 that ultimately the dispute with Mr. Terry, the arbitration
14 award would have around Highland's ongoing CLO business, or
15 HCLOF specifically, was all, you know, very clear in this
16 document, but all consistent with the representations that
17 had been made to us leading up to our investment in the
18 middle of November 2017 as well.

19 Q Thank you.

20 MS. WEISGERBER: And you can take down the exhibit,
21 Emily. Thank you.

22 BY MS. WEISGERBER:

23 Q You mentioned, Mr. Pugatch, an arbitration award to Mr.
24 Terry. How did you learn about that arbitration award?

25 A That was initially disclosed to us by Highland as we were

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1 in the late stages of our diligence and closing process on
2 the investment into HCLOF.

3 Q And generally, what did Highland tell you about the
4 arbitration award?

5 A We were aware of its existence. We were aware of the
6 quantum of the award, I think it was around an \$8 million
7 arbitration award in the favor of Mr. Terry, and that was
8 following the litigation around the wrongful termination and
9 employee dispute that Highland had described to us
10 previously.

11 Q Did you ask to see a copy of the arbitration award?

12 A No, we did not.

13 Q Why not?

14 A Ultimately, we -- you know, the explanations that
15 Highland had provided to us all seemed very reasonable. We
16 relied on their representations that this was, again, nothing
17 more than a dispute with a former disgruntled employee, in
18 their words, that had no bearing or, you know, would not have
19 any bearing on our investment in HCLOF or their ongoing CLO
20 business, which all very clearly was not the case, as
21 we've -- as we've learned over the last several years.

22 Q Following learning about the arbitration award, did
23 HarbourVest do other diligence?

24 A We did. So, in addition to asking questions related to
25 the arbitration award and any impact that it would have, we

1 also spent some time diligencing a couple of structural
2 changes that were proposed by Highland, and, in fact, ended
3 up delaying the closing of our investment by about two weeks
4 as we vetted some of those structural changes that Highland
5 had proposed. Vetted those both, you know, internally with
6 Highland directly and with external counsel in order to make
7 sure that those structural changes were in fact legally sound
8 in ultimately making our investment.

9 Q And were those changes proposed following the arbitration
10 award?

11 A They were, yes.

12 Q Did Highland tell you the reason for the structural
13 changes?

14 A Yeah. So, so some of this -- and specifically, this
15 involved a change of the portfolio manager at the HCLOF level
16 that was really in connection with a rebranding as Highland
17 was going through a rebuild of its CLO business and wanting
18 to align, from a brand perspective, their business on an
19 ongoing basis with the Highland brand as opposed to the Acis
20 brand. But more specifically, in the case of a late change
21 from a structured standpoint, the -- part of the intention
22 and the investment thesis of HCLOF was to pursue a reset, a
23 refinancing of all the underlying CLOs as they approached the
24 end of their investment period or came out of their
25 investment period.

1 And in connection with that, in light of the arbitration
2 award, Highland's view was that there may be difficulties in
3 the market in resetting certain of those Acis CLOs with the
4 Acis brand associated with them, given, again, the existence
5 of the arbitration award and concerns in the market around
6 the Acis brand reputation.

7 Q And what did they tell you was the market view of Acis,
8 or the Acis brand?

9 A Yeah. Their view or their concern was that the, you
10 know, because of the existence of that arbitration award, the
11 brand would be viewed as toxic.

12 Q Didn't this put you on notice that perhaps there was
13 something wrong with the structural changes?

14 A I mean, we -- I mean, short answer, no. We ultimately
15 asked questions, we diligenced the legal structure, but
16 relied on the representations that were made to us by
17 Highland around the rationale for the structural changes,
18 that these are all changes that were within a Highland-
19 managed vehicle or sat below the vehicle that we were
20 investing in, and so ultimately were in Highland's purview,
21 was the representations that we relied on.

22 Q And did HarbourVest alone do that diligence of the
23 structural changes?

24 A So, no. I mean, in connection with the diligence that we
25 did internally and with Highland directly, we engaged with

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1 outside counsel who was working with us at the time to vet
2 those structural changes as well.

3 Q Did HarbourVest rely on Highland's representations
4 regarding the arbitration award and the structural changes in
5 making its investment in HCLOF?

6 A We did, absolutely.

7 Q If Highland had disclosed the nature of the structural
8 changes, of removing Acis as the portfolio manager and
9 related transfers, would HarbourVest have proceeded with its
10 investment?

11 A Definitively, no, we would not have.

12 Q Why not?

13 A I think the reality is if we had understood the intent,
14 you know, that Highland was ultimately undertaking here, we
15 would not have wanted to be any part of this, and certainly
16 getting dragged into all of this, the hassle, the value
17 destruction that we've seen on behalf of the investors and
18 the funds that we manage. And I would say, lastly, we just
19 full stop would not have done business with a firm who
20 engages with this type of behavior, had we actually known the
21 truth.

22 Q Mr. Pugatch, are you familiar with the bankruptcy that
23 followed of Acis?

24 A Yes.

25 Q And what was your -- or, did HarbourVest participate in

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1 that bankruptcy?

2 A So, initially, no. Subsequently, we ended up getting
3 dragged into that on account of a number of misstatements by
4 Highland about the role that HarbourVest had played as part
5 of our investment into HCLOF and some of that structure and
6 the structural changes that I alluded to.

7 Q How did HarbourVest learn about those misstatements in
8 the bankruptcy about HarbourVest's role?

9 A So, ultimately, those came to light on -- you know, on
10 account of the ongoing proceedings within the Acis bankruptcy
11 process, and specifically brought to light to us by the Acis
12 trustee at the time, who decided to pursue, you know, further
13 diligence or discovery around the claims that Highland had
14 made around HarbourVest's involvement in those changes.

15 Q And what is your understanding of what the allegations
16 were that caused the Acis trustee to investigate HarbourVest?

17 A Sure. So, you know, our understanding was that Highland
18 had made statements, again, false statements that HarbourVest
19 had actually instructed some of those structural changes,
20 that we were the ones that had said that we would not do
21 business with Acis and had ordered some of the underlying
22 transfer of assets or, again, structural changes, that, you
23 know, very clearly I would say were not the case. Also, that
24 HarbourVest was -- was calling the shots as it relates to any
25 of the ongoing management or future resets of the CLOs.

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1 Q Did HarbourVest instruct any of those structural changes
2 or transfers to occur?

3 A We did not. Absolutely not.

4 Q Why didn't HarbourVest itself appear in the Acis
5 bankruptcy and file a claim?

6 A Yeah. HarbourVest's role, again, in HCLOF, we were a
7 passive investor in a Highland-managed company. We had no
8 direct interaction with or relationship with Acis. There was
9 really no reason for us to be directly involved until we were
10 subsequently dragged into involvement on account of those
11 misstatements. And then at that point our focus really
12 pivoted to, you know, whether we needed to defend ourselves
13 against those accusations that had been made by Highland and
14 after a request for further information in discovery by the
15 Acis trustee.

16 Q Did HCLOF participate in the Acis bankruptcy?

17 A They did, yes.

18 Q Did HCLOF incur fees for participating in the Acis
19 bankruptcy?

20 A Yes. In fact, very meaningful fees, to the tune of well
21 in excess of \$15 million of legal fees, as we understand it,
22 that have been incurred, largely in connection with the
23 ongoing Acis bankruptcy and Highland's continued pursuit of
24 and in connection with the litigation with Mr. Terry, which
25 we firmly believe was entirely inappropriate that HCLOF and

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1 ultimately investors in HCLOF bear those expenses, which were
2 not just expenses of HCLOF but of Highland and a number of
3 other Highland affiliates.

4 Q Do those expenses form a basis of separate claims filed
5 by HarbourVest against Highland?

6 A They do, yes. One of the multiple claims that we had
7 filed against Highland.

8 Q And a few more questions, just for the record, Mr.
9 Pugatch. How much did HarbourVest initially invest in HCLOF?

10 A Sure. So, our initial investment in November of 2017 was
11 right about \$73-1/2 million, I believe.

12 Q Did HarbourVest invest any additional money in HCLOF?

13 A We did. There was a subsequent capital call investment
14 of about \$5 million, bringing our total investment to just
15 under \$80 million in aggregate.

16 Q When HarbourVest initially made the investment, did it
17 anticipate making a profit on it?

18 A We did, yes.

19 Q How much did HarbourVest anticipate earning from the
20 investment?

21 A Yeah. So, our -- based on the original \$73-1/2 million
22 investment, we had expected a total return of about \$137
23 million on that -- on that investment.

24 Q What was that projection based on?

25 A So, that projection was based on materials that we had

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1 received from Highland, their internal projection models on
2 the future performance of the underlying CLOs that we were
3 acquiring exposure to through our investment in HCLOF, and
4 was one of the inputs or formed the basis in connection with
5 our diligence that we ultimately ran different sensitivities
6 -- projections around and helped employ -- helped inform our
7 investment thesis.

8 Q Do you know the current value of HarbourVest's investment
9 in HCLOF?

10 A Yes. The current value is right around \$22-1/2 million.

11 Q So roughly how much has the investment itself decreased
12 from HarbourVest's initial investment?

13 A So, net of what was about \$4-1/2 million of distributions
14 that we received early on in the investment, we've lost, to
15 date, in excess of \$50 million on our original investment.

16 Q And just for -- to close out, Mr. Pugatch, knowing all
17 that you know, if HarbourVest had known that -- about the
18 nature of the transfers by Acis or Highland's intent with
19 respect to the arbitration award, would HarbourVest have made
20 this investment?

21 A No. The reality is, had we known the truth, or even had
22 a sense of the truth, the true intentions behind some of
23 those transfers and ultimately what would have happened, we
24 never would have made this investment, full stop.

25 Q Thank you, Mr. Pugatch.

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1 THE COURT: All right. I didn't hear you, Ms.
2 Weisgerber. Do you pass the witness?

3 MS. WEISGERBER: Yes, I pass the witness.

4 THE COURT: All right. Thank you.

5 Mr. Morris, any examination from you?

6 MR. MORRIS: No, thank you, Your Honor.

7 THE COURT: All right.

8 (Interruption.)

9 THE COURT: All right. I'm not sure whose voice that
10 was, but please, again, mute your devices when you're not
11 talking.

12 Any cross-examination of Mr. Pugatch? I'll start with
13 you, Mr. Wilson.

14 MR. WILSON: Yes, Your Honor.

15 THE COURT: Okay.

16 CROSS-EXAMINATION

17 BY MR. WILSON:

18 Q How are you -- I guess we're afternoon now. How are you
19 this afternoon, Mr. Pugatch?

20 A I'm doing well. Yourself?

21 Q I'm doing well as well. Do you recall that on Monday of
22 this week I took your deposition?

23 A Yes, I do.

24 Q And so you understand that my name is John Wilson and I
25 represent Jim Dondero, who has filed an objection to the 9019

1 motion filed by the Debtor?

2 I've got a few questions for you today. Has HarbourVest
3 been around for over 35 years?

4 A We have, yes.

5 Q And does HarbourVest have ten offices around the world?

6 A Correct, yes.

7 Q And does HarbourVest employ over 150 investment
8 professionals?

9 A Yes.

10 Q Does HarbourVest have over \$74 billion in assets under
11 management?

12 A Correct, yes.

13 Q And is HarbourVest's client base largely comprised of
14 institutional investors?

15 A Also correct.

16 Q And you would agree with me that HarbourVest is a
17 sophisticated investor, right?

18 A I would, yes.

19 Q How long have you worked for HarbourVest?

20 A I've been employed by HarbourVest for 17 years now.

21 Q And how long have you been a managing director?

22 A I've been a managing director for approximately six
23 years.

24 Q And you were, in fact, the managing director for the
25 investment that HarbourVest made in Highland CLO Funding,

1 Ltd., which has been referred to today as HCLOF, correct?

2 A I was, correct.

3 Q And HarbourVest, I think you just testified, invested
4 approximately \$73 million as its initial investment in HCLOF?

5 A Yes, correct.

6 Q And before HarbourVest made that investment, it had made
7 many investments of this type, correct?

8 A Yeah. We've made hundreds of investments into
9 partnerships over our history, correct.

10 Q So HarbourVest was well-experienced in evaluating and
11 deciding whether to invest in large investments, correct?

12 A It was, yes.

13 Q Now, in your -- and by your, I mean HarbourVest -- in the
14 response to the Debtor's omnibus objection, it says that by
15 summer 2017 HarbourVest was engaged in preliminary
16 discussions with Highland regarding the investment. Is that
17 a correct statement?

18 A Correct, yes.

19 Q And, in fact, those talks began in the second quarter of
20 2017, correct?

21 A Yes.

22 Q And so the investment closed ultimately on November 15th,
23 2017?

24 A Yes, that's correct.

25 Q So it's fair to say that HarbourVest considered and

1 evaluated this transaction for over six months before
2 investing its \$73 million, right?

3 A From the time of the initial conversations that we had
4 with Highland, yes.

5 Q And one of the reasons that it took over six months to
6 complete the investment is that HarbourVest performs due
7 diligence before it makes an investment, correct?

8 A Correct.

9 Q And when you're performing due diligence -- well, first
10 off, you would agree with me that that's a common practice
11 amongst sophisticated investors such as HarbourVest, correct?

12 A To perform due diligence?

13 Q Yes.

14 A Yes.

15 Q And describe -- describe what HarbourVest does in a
16 general sense when it performs its due diligence.

17 A Sure. So, we spend time with the manager -- in this
18 case, Highland -- certainly around the investment thesis, the
19 opportunity, receive materials around the underlying assets.
20 We take that and perform our own independent due diligence
21 around the value of those assets, perform due diligence on
22 the manager itself, the go-forward opportunity. In many
23 cases, and certainly in this case, engage with outside
24 advisors to assist with that due diligence. It's a very
25 robust and thorough process.

1 Q And by outside advisors, are you referring to the outside
2 counsel that you testified about earlier?

3 A Yes. Both outside counsel and outside consultants.

4 Q Okay. And so did you say that it's typical to engage
5 outside counsel when performing due diligence?

6 A Yes.

7 Q And which outside counsel did you retain with respect to
8 this due diligence?

9 A Debevoise and Plimpton as well as Milbank.

10 Q And during the course of HarbourVest's due diligence, did
11 it identify some items of concern?

12 A As with any investment, there are always items that are
13 identified that require further diligence, risks that are
14 identified that we look to mitigate through our due
15 diligence, et cetera.

16 Q And if Harbour -- I'm sorry, did you say something else?

17 A No.

18 Q You were finished? Okay. Now, if HarbourVest identifies
19 an item of concern, is it typical to request additional
20 information regarding those items of concern?

21 A It is, yes.

22 Q And so that actually happened with respect to the HCLOF
23 investment, correct?

24 A In certain cases, yes.

25 Q HarbourVest identified several litigation matters that it

1 had questions about, correct?

2 A Correct. As we would with any investment.

3 Q And it went back to Highland and asked them to explain
4 their position on those litigation matters?

5 A Correct.

6 Q And one of those litigation matters was the Joshua Terry
7 litigation, correct?

8 A Yes.

9 Q And at the time that HarbourVest was considering this
10 investment, beginning in the second quarter and continuing
11 through the summer, that Josh Terry litigation had not
12 resulted in an award or a final judgment, correct?

13 A Correct.

14 Q And I think we looked earlier at a document that your
15 counsel admitted as HarbourVest Exhibits 34 and 35. There
16 was an email from a HarbourVest -- or, I'm sorry, from a
17 Highland representative to a HarbourVest representative that
18 was discussing Highland's position on the litigation,
19 including the Terry litigation, correct?

20 A Are you referring to the document that we looked at
21 earlier?

22 Q I am. And I can put it on the screen if we need to.

23 A No. Right, I recall that, and yes, that's correct.

24 Q Okay. And just to be clear, that document, which stated
25 Highland's positions on the -- and summaries of the

1 litigation, was issued months before the arbitration award to
2 Josh Terry, correct?

3 A I don't remember the exact timing, but it was certainly
4 during our due diligence period and prior to the arbitration
5 award, yes.

6 Q Well, it seems to me that that email that you -- your
7 counsel admitted as an exhibit was issued in August of 2017.
8 Does that sound right to you?

9 A If that's what the email said, yes.

10 Q And if the Terry arbitration award came out in October,
11 then you would agree with me that that is several months
12 prior to the -- or at least two months prior to the
13 arbitration award?

14 A Yes.

15 Q And so when HarbourVest made requests of Highland to
16 provide information regarding its items of concern, Highland
17 complied with those requests, correct?

18 A It did, correct.

19 Q And was there ever a time when HarbourVest requested
20 Highland to provide information and that information was not
21 provided?

22 A Our requests for information, or at least, you know,
23 responses or color to a question, were always met either
24 with, you know, written or verbal communication back to us,
25 yeah.

1 Q And you would agree with me that, in fact, HarbourVest
2 delayed the closing of the investment by two weeks to
3 continue its due diligence, correct?

4 A Correct, related to the structural changes that were made
5 close to closing. That's right.

6 Q And after conducting that due diligence, HarbourVest
7 satisfied itself that the investment was sound?

8 A That the legal structure that had been put in place in
9 connection with those proposed changes by Highland was -- was
10 legally sound, yes, and on the back of, again, statements and
11 misrepresentations on the part of Highland around the nature
12 and potential impact to their ongoing CLO business and HCLOF.

13 MR. WILSON: Well, I'm going to object to the latter
14 part of your response as nonresponsive.

15 THE COURT: Sustained.

16 BY MR. WILSON:

17 Q Now, after you conducted the due diligence, HarbourVest
18 made the investment of \$73 million on November 15th, 2017,
19 correct?

20 A Correct.

21 Q And so I think you testified earlier that prior to that
22 investment HarbourVest had become aware that that Josh Terry
23 litigation had resulted in an arbitration award, correct?

24 A Yes.

25 Q But I think you've also testified that HarbourVest did

1 not request that Highland provide a copy of the arbitration
2 award, correct?

3 A That's correct.

4 Q And you further testified that you were represented by
5 outside counsel at the time, correct?

6 A Correct.

7 Q And as of Monday of this week, you had not reviewed that
8 arbitration award; is that correct?

9 A That's correct.

10 Q Have you reviewed that arbitration award since Monday of
11 this week?

12 A I have not.

13 Q But in any event, you testified that Highland told you
14 about the award?

15 A Yes.

16 Q And they told you the amount of the award?

17 A Yes.

18 Q And then they told you that the award had been converted
19 to a judgment?

20 A When you say the award had been converted to a judgment,
21 can you be more specific?

22 Q Well, I don't know how familiar you are with the
23 litigation process, but in this instance, that award was
24 taken to a court and the court entered a judgment on the
25 arbitration award. Did you -- were you aware of that?

1 A I don't recall the specific legal terms of judgment
2 against it. I was award of the existence of the arbitration
3 award and the -- and the obligation for Highland to comply
4 with that arbitration award.

5 Q And HarbourVest did not make an appearance in the Acis
6 bankruptcy, right?

7 A We did not.

8 Q But you were aware of the Acis bankruptcy, correct?

9 A Yes.

10 Q And you were kept apprised of the Acis bankruptcy by
11 Highland individuals, correct?

12 A We had conversations with a couple of Highland
13 individuals throughout the Acis bankruptcy process, yes.

14 Q Right. And in fact, you testified that you participated
15 in regular conference calls with Highland regarding that
16 bankruptcy?

17 A That's correct, yes.

18 Q And do you recall having been provided with over 40,000
19 documents by Highland related to the Acis bankruptcy?

20 A I do not recall that, no.

21 Q Would those documents have been provided to your outside
22 counsel, had you received them?

23 A I don't know the answer to that.

24 Q Did the outside counsel that represented you in the due
25 diligence continue to represent you throughout the Acis

1 bankruptcy?

2 A They did. One of the counsels did, correct.

3 Q And which counsel was that?

4 A Debevoise.

5 Q So was your counsel actively involved with monitoring the
6 Acis bankruptcy?

7 A They were, yes, particularly after we were ultimately
8 accused of having something to do with the original structure
9 and -- as a result of misstatements by Highland.

10 Q Did your counsel attend hearings in the Acis bankruptcy?

11 A I don't recall.

12 Q Are you familiar with the PACER system?

13 A I am not.

14 Q Now, I think that HarbourVest has been described as a
15 passive investor. You recall that description of HarbourVest
16 in this instance?

17 A Yes.

18 Q But, in fact, HarbourVest invested substantial assets
19 such that it owned a 49.98 percent share of HCLOF. Would you
20 agree with that?

21 A That's correct.

22 Q And in fact, the next largest investor was CLO Holdco,
23 which owned 49.02 percent of the shares, correct?

24 A That sounds right.

25 Q And there was an advisory board that was created pursuant

1 to the formation documents of this investment, correct?

2 A That's correct.

3 Q And in fact, that advisory board only had two members,
4 and one was a representative of HarbourVest and one was a
5 representative of CLO Holdco, correct?

6 A Correct.

7 Q And the advisor -- I'm sorry, the portfolio manager was
8 not allowed to disregard the recommendations of the advisory
9 board, correct?

10 A With respect to the limited set of items that the
11 advisory board could opine on, that is correct.

12 Q All right. I want to go over a couple of the
13 misrepresentations that HarbourVest has identified in its
14 filings related to its claim. The first one is -- and just
15 for the record, I'm reading from Docket No. 1057 filed on
16 September 11, 2020, HarbourVest Response to Debtor's First
17 Omnibus Objection.

18 But the first misrepresentation identified in that
19 document says that Highland never informed HarbourVest that
20 Highland had no intention of paying the arbitration award.
21 And was -- was Highland obligated to pay the Josh Terry
22 arbitration award against Acis?

23 MR. MORRIS: Objection to the question to the extent
24 it calls for a legal conclusion.

25 THE COURT: Sustained.

1 MS. WEISGERBER: Join in that objection.

2 THE COURT: Sustained. I think --

3 BY MR. WILSON:

4 Q Your understanding was --

5 MR. WILSON: I'm sorry, Judge?

6 THE COURT: I sustained the objection as calling for
7 a legal conclusion. So, next question.

8 MR. WILSON: Yes, I -- I heard that. Thank you, Your
9 Honor.

10 BY MR. WILSON:

11 Q In your understanding, was Highland responsible for
12 paying the arbitration award to Josh Terry?

13 A My understanding is on the account of the fact that Acis
14 --

15 MS. WEISGERBER: Objection, Your Honor. Objection,
16 Your Honor, same basis.

17 THE COURT: Sustained. It was essentially the same
18 question.

19 MR. WILSON: Well, Your Honor, I didn't ask --

20 THE COURT: It was essentially the same question, Mr.
21 Wilson. Move on.

22 MR. WILSON: Okay.

23 BY MR. WILSON:

24 Q The next misrepresentation identified by HarbourVest said
25 that Highland did not inform HarbourVest that it undertook

1 the transfers to siphon assets away from Acis, LP and that
2 such transfers would prevent Mr. Terry from collecting on the
3 arbitration award. So the basis for that allegation would be
4 that Highland was siphoning assets from Acis to avoid having
5 Acis pay the arbitration award, correct?

6 A That -- that would be the implication, yes.

7 Q Okay. And then that misrepresentation continues on and
8 says that Highland represented to HarbourVest that it was
9 changing the portfolio manager because Acis was toxic. And
10 do you recall that representation being made to you?

11 A Yes, I do.

12 Q And would you agree with me that whether or not Acis is
13 toxic in the industry would be an opinion?

14 A I suppose it would be an opinion, but by the manager of
15 the vehicle responsible for managing the HCLOF investment and
16 the underlying CLOs. Yeah, we viewed the Acis name and the
17 Highland name as synonymous, if you will. I mean, Acis was a
18 subsidiary of Highland. For all intents and purposes, it was
19 the same from our perspective as we made the investment into
20 HCLOF.

21 Q So did HarbourVest have an independent understanding of
22 whether or not the Acis name was toxic in the industry?

23 A We did not, no. We relied on Highland's views of that as
24 manager of HCLOF.

25 MR. WILSON: Your Honor, just a brief housekeeping

1 item. Did you say that we need to be done at 1:00 o'clock?

2 THE COURT: Well, I said I really wanted you to be
3 done by 1:00 o'clock because I have a 1:30 docket and a 2:00
4 o'clock docket and I'd rather not have to hang up 70-
5 something people and reconnect them again at 3:00 o'clock.
6 How close are you to being finished?

7 MR. WILSON: Well, --

8 THE COURT: This is going at a very slow pace.

9 MR. WILSON: Well, I apologize for that, Your Honor.
10 I think I've got at least ten more minutes, but -- but I know
11 we also have closing remarks. And I was just going to ask if
12 Your Honor had a preference of --

13 THE COURT: Keep going.

14 MR. WILSON: -- of breaking now --

15 THE COURT: Keep -- let's --

16 MR. WILSON: -- or keep going? Okay.

17 THE COURT: Let's talk fast and try to get through.
18 You know, even if I'm sacrificing lunch today, I don't want
19 to inconvenience 75 people this way. So we'll just probably
20 start our 1:30 hearing a little late and inconvenience those
21 people.

22 All right. Go ahead.

23 MR. WILSON: All right. Thank you, Your Honor.

24 BY MR. WILSON:

25 Q Did Acis form its -- I can't recall if you answered this

1 question, but did Acis form its own opinion on whether or not
2 -- I'm sorry, strike that. Did HarbourVest form its own
3 opinion on whether or not the Acis name was toxic in the
4 industry?

5 MS. WEISGERBER: Objection, --

6 THE WITNESS: We did not. We didn't have a basis.

7 THE COURT: I'm sorry, did I have an objection?

8 BY MR. WILSON:

9 Q You did not --

10 THE COURT: Did I have an objection?

11 MS. WEISGERBER: Yeah. Objection. Yes. Objection,
12 asked and answered, Your Honor.

13 THE COURT: Overruled. He can answer.

14 BY MR. WILSON:

15 Q Okay. But --

16 A We did not.

17 Q Did Highland have the ability to investigate the Acis
18 name and make its own determination of whether that name was
19 toxic? I'm sorry, I think I'm misspeaking. HarbourVest.

20 A HarbourVest had the ability to do that, yes.

21 Q I apologize I misspoke. I meant HarbourVest. Did
22 HarbourVest have the ability to investigate that name and
23 determine if it was toxic?

24 A It was irrelevant to our investment thesis. And as I
25 said before, Acis was a subsidiary of Highland. We viewed

1 them as interchangeable in the context of our investment.

2 Q Okay. The next misrepresentation that you refer to says
3 that Highland indicated to HarbourVest that the dispute with
4 Mr. Terry would have no impact on its investment activities.
5 Would you agree with me that that is also an opinion?

6 A It was a statement that --

7 MS. WEISGERBER: Your Honor, I'm going to object to
8 the extent these questions are seeking a legal conclusion
9 regarding, you know, if something's an opinion or not.

10 THE COURT: Okay. Overruled. He can answer.

11 THE WITNESS: It was -- it was a statement that was
12 made to us by Highland and represented in multiple different
13 formats as fact. And a representation that we relied on in
14 connection with our investment.

15 BY MR. WILSON:

16 Q And finally, the misrepresentation, the last
17 misrepresentation identified, is that Highland expressed
18 confidence in the ability of HCLOF to reset or redeem the
19 CLOs. Would you agree with me that that statement is an
20 opinion?

21 A On the basis that it was the core investment thesis of
22 the -- of the investment of HCLOF. Again, whether that's
23 legally viewed as an opinion or a fact, it was -- it was
24 certainly the investment thesis that we made the investment
25 predicated upon.

1 Q And you just testified that you thought that Acis and
2 Highland were interchangeable from the perspective of the
3 investment opportunity, correct?

4 A Correct.

5 Q But you also accepted Highland's recommendation because
6 HarbourVest agreed that the change in the -- to a Highland
7 manager made commercial sense, correct?

8 A We took at face value what Highland recommended because
9 this all had to do with the structuring of an entity that
10 they fully managed with respect to multiple underlying
11 subsidiaries that weren't managed by Highland.

12 Q But would you agree that, at the time, you -- HarbourVest
13 thought that made commercial sense?

14 A It did not seem unreasonable to us based on the
15 explanation we were given.

16 Q Okay.

17 MR. WILSON: I want to refer to HarbourVest Exhibit
18 39.

19 (Pause.)

20 THE COURT: What are we waiting on? What are we
21 waiting on?

22 MR. WILSON: I'm trying to get the document on the
23 screen, Your Honor.

24 (Pause.)

25 THE COURT: We can't hear you. We can't hear you.

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1 MR. WILSON: I'm sorry. I'm sorry, Your Honor. I'm
2 speaking with my --

3 THE COURT: Okay.

4 MR. WILSON: -- co-counsel here.

5 THE COURT: All right.

6 (Pause.)

7 MS. WEISGERBER: Mr. Wilson, is it 39 or 38 that
8 you're referring to?

9 MR. WILSON: 39. HarbourVest 9019 motion on the
10 main -- on the Dondero file. And then there's the -- it's --
11 it's John -- and then there's the HarbourVest, and then the
12 exhibits are all in one file.

13 MS. WEISGERBER: Mr. Wilson, I'll just note that 39
14 was subject to confidentiality based on HCLOF's request.
15 HCLOF's counsel is present. I think they know it's an
16 excerpt. But I'd just -- that for HCLOF's counsel.

17 MR. WILSON: Well, is there an objection to showing
18 this document on the screen? Yes. All right. We're not
19 going to put Document 39 on the screen.

20 A VOICE: Yes.

21 MR. WILSON: All right. Scroll down to the next
22 page.

23 BY MR. WILSON:

24 Q This is a -- this is a document that was produced to us
25 this week, the Highland production. It appears to be a

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1 Highland CLO Funding, Ltd. Statement of Operations for the
2 Year Ended 31 December 2017. Do you see at the top of that --
3 at the top of that document where it says total investment
4 income of \$26 million?

5 A I do, yes.

6 Q And total expenses were roughly \$1.8 million?

7 A Yes.

8 Q And then net change and unrealized depreciation on
9 investments and net realized loss on investments was \$4.26
10 million cumulative, resulting in a net increase in net assets
11 resulting from operations of \$20.224 million. Do you agree
12 with that?

13 A Yes.

14 Q Okay.

15 MR. WILSON: Go to the next one.

16 BY MR. WILSON:

17 Q And you understand that, in the course of the Acis
18 bankruptcy, the portfolio managers for certain of the CLOs
19 were changed by the Trustee, correct?

20 A Yes, around the underlying CLOs. That's -- that's my
21 understanding, yes.

22 Q And, in fact, Mr. Seery testified earlier today that that
23 occurred in the summer of 2018, correct?

24 MR. WILSON: Scroll.

25 THE WITNESS: I don't recall the timing, but that's

1 what he testified to.

2 BY MR. WILSON:

3 Q Well, this document is HarbourVest Exhibit 40, and this is
4 the statement of operations for the financial year ended 31
5 December 2018. Here, the total investment income is only
6 \$11.1 million. Do you see that?

7 A I do.

8 Q And do you see where the expenses have increased to \$13.6
9 million?

10 A I do, yes.

11 MR. WILSON: Okay. Scroll down some more.

12 BY MR. WILSON:

13 Q And do you see where it says net change and unrealized
14 loss on investments of \$48.47 million?

15 A Yes.

16 Q And so after Acis and Brigade took over the managements of
17 these CLOs, we had a net decrease in net assets resulting from
18 operations of \$52.483 million in the year 2018, correct?

19 MS. WEISGERBER: Objection, Your Honor. Assumes a
20 fact not in evidence.

21 THE COURT: Overruled. He --

22 MR. WILSON: Your Honor, --

23 THE COURT: We're just looking at this statement and
24 testifying about it says, so I overrule the objection.

25 MR. WILSON: Thank you, Your Honor. Thank you, Your

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1 Honor. I'm now going to turn to HarbourVest Exhibit 41. All
2 right. I'll --

3 BY MR. WILSON:

4 Q Did you answer the question, Mr. Pugatch?

5 A No, I -- I would agree with the second part of your
6 statement that for the year 2018 the -- the loss was \$52
7 million. I don't -- I don't believe that jives with the first
8 part of your statement that that was after Acis and Brigade
9 took over. As I understand, that was in the middle of the
10 year.

11 Q But in any event, Acis and Brigade had been managing this
12 for at least six months of 2018 when that loss occurred,
13 correct?

14 A They had been managing a portion of the underlying CLO
15 portfolio held by Highland CLO Funding.

16 Q All right. We're now looking at Exhibit #41, which is the
17 Draft Unaudited Statement of Comprehensive Income, 31 December
18 2019. Total income has now dropped to \$4.664 million.

19 MR. WILSON: And scroll down.

20 BY MR. WILSON:

21 Q Expenditures are at \$3.645 million. And then it says
22 investment gains and losses net out to \$11.493 million, a
23 negative \$11.493 million. And --

24 MR. WILSON: Scroll down to the --

25 BY MR. WILSON:

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1 Q And so would you agree with me that in the year 2019,
2 HCLOF showed a net loss of \$10.476 million?

3 A Yes, that's what the financial statements say.

4 Q And in this year, the Acis CLOs were solely managed by
5 Acis and Brigade, correct?

6 A The Acis CLOs were. Yes, correct.

7 Q All right.

8 MR. WILSON: Now, go to 42.

9 BY MR. WILSON:

10 Q Now, this is HarbourVest #42.

11 MR. WILSON: Go down to the next page.

12 BY MR. WILSON:

13 Q And this is the Highland CLO Funding, Ltd. Unaudited
14 Condensed Statement of Operations for the Financial Period
15 Ended 30 June 2020. And so this is just half a year of
16 operations. And would you -- and this actually has a
17 comparison between 2019 and 2020. But do you see where it
18 says investment income has dropped from a million dollars in
19 the first half of 2019 to \$381,000 in the first half of 2020?

20 A Yes.

21 MR. WILSON: Okay. Scroll down.

22 BY MR. WILSON:

23 Q And do you see where, in the first half of 2019, total
24 expenses were \$1.85 million, and then in the first half of
25 2020 total expenses were \$2.16 million? Do you see that?

1 A I do.

2 Q And if you go down below that, where it says Net Realized
3 and Unrealized Gain/Loss on Investments, the first half of
4 2019 HCLOF lost \$12 million, and in the first half of 2020 it
5 lost \$39.472 million?

6 MR. MORRIS: Your Honor, I'm going to object. It's
7 John Morris for the Debtor. I'm happy to stipulate. In fact,
8 he can offer this document into evidence. There's no
9 foundation that Mr. Pugatch has any particularized knowledge
10 about any of the numbers behind this. All he's asking him to
11 do is to confirm what the document says. It says what it
12 says. But this -- I'll object on that basis, Your Honor.

13 THE COURT: All right. Mr. Wilson, what about it?
14 You're just getting him to read numbers off of these exhibits.

15 MR. WILSON: Well, --

16 THE COURT: Shall we just --

17 MR. WILSON: -- I understood --

18 THE COURT: -- by stipulation get them into evidence?

19 MR. WILSON: Well, --

20 MR. MORRIS: No objection, Your Honor.

21 MS. WEISGERBER: No objection.

22 THE COURT: All right. So these are exhibits what?
23 We've gone through 39, 41, and I don't know what else. 40,
24 maybe?

25 MR. WILSON: It was Exhibits 39, 40, 41, and 42 that

1 were on the HarbourVest exhibit list.

2 THE COURT: All right. Those will be admitted, and
3 we've already discussed what docket entry number they appear
4 at.

5 (HarbourVest's Exhibits 39 through 42 are received into
6 evidence.)

7 THE COURT: All right. Anything else? You told me
8 you had 10 more minutes about 15 minutes ago.

9 MR. WILSON: Well, I'm sorry if I -- I think I had
10 said I had at least ten more minutes, and I was looking at the
11 -- it was 10:50 [sic] and you wanted to quit at 1:00. So I do
12 have longer than that. I'm sorry, Your Honor.

13 THE COURT: Well, --

14 MR. WILSON: But --

15 THE COURT: -- I feel like I'm being --

16 MR. WILSON: -- I'll try to proffer --

17 THE COURT: Okay, Mr. Wilson, let me just tell you
18 something. I feel like I'm being disrespected now, and the
19 parties are. We really need to pick up the pace. I've told
20 you I've got a 1:30 docket -- with four or five matters on it,
21 by the way. I've got a 2:00 o'clock docket. I'm starting
22 them late. No one advised my courtroom deputy that we were
23 going to need all day today for this, okay? So you've got
24 five more minutes to wrap it up, and then, of course, I have
25 to go to Mr. Draper and see if he has cross. All right? So

1 please don't test my patience any more. Five minutes to
2 finish.

3 MR. DRAPER: Judge, I have no questions.

4 THE COURT: I didn't hear you, Mr. Draper. What did
5 you say?

6 MR. DRAPER: I have no questions.

7 THE COURT: All right. Very good.

8 MR. WILSON: I apologize, Your Honor. I was actually
9 trying to be respectful of your time when I informed you that
10 I had at least ten more minutes left at 12:50, but I will try
11 to be as expedient as I can as I finish up.

12 BY MR. WILSON:

13 Q And I don't see you on my screen.

14 MR. WILSON: You can take that document down.

15 THE WITNESS: Here.

16 BY MR. WILSON:

17 Q Mr. Pugatch, do you have an opinion as to what caused
18 these incredible losses of value at HCLOF?

19 MS. WEISGERBER: Objection to the extent it calls for
20 a legal conclusion.

21 THE COURT: Overruled. He can answer.

22 THE WITNESS: I would say that there's no one cause
23 for the decline in value. I can point to a number of
24 different things, including the exorbitant fees that were
25 charged to HCLOF, including the inability to be able to re --

1 refinance the CLOs on the part of HCLOF, all of which stems
2 from the actions that Highland took prior to our investment in
3 HCLOF.

4 BY MR. WILSON:

5 Q And you've -- I think it's been referenced several times
6 in HarbourVest's arguments that -- that the reset was a
7 fundamental -- the inability to get a reset was a fundamental
8 cause of the loss in value. Is that -- is that HarbourVest's
9 position?

10 A That -- that is a part of the -- the cause in the
11 declining value of the CLOs, yes.

12 Q And you would agree with me that a reset is fundamentally
13 a reset of interest rates, correct?

14 A Of the interest rates of the liabilities of the -- the
15 timing for repayment of those liabilities, yes.

16 Q Now, just say with -- for the sake of a hypothetical
17 example. If you had a home that was valued at \$5 million, or
18 let's just say \$500,000, let's make it more realistic. If you
19 had a \$500,000 home and you had a mortgage on that home at
20 five percent interest, your inability to refinance that home
21 at a lower interest rate would not affect the underlying value
22 of that home, correct?

23 MS. WEISGERBER: Objection, Your Honor. Hypothetical.
24 And objection to relevance as well.

25 THE COURT: Sustained.

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1 MS. WEISGERBER: Calls for speculation.

2 THE COURT: Sustained.

3 BY MR. WILSON:

4 Q Is there any reason to believe that the change in the
5 interest rate would have prevented the massive losses of
6 investment value that occurred in HCLOF?

7 MS. WEISGERBER: Object on the same grounds.

8 THE COURT: Sustained.

9 THE WITNESS: The short -- the short answer is yes,
10 with a -- with the amount of leverage --

11 MS. WEISGERBER: I --

12 THE WITNESS: -- that exists. Oh, sorry.

13 MS. WEISGERBER: The objection was sustained.

14 THE COURT: Yeah, I sustained the objection. That
15 means you don't answer.

16 THE WITNESS: I'm sorry, Your Honor.

17 BY MR. WILSON:

18 Q So, would you agree with me that if the expenses and the
19 fees charged by the portfolio manager increased dramatically,
20 that would -- that would impact the value of the investment,
21 correct?

22 MS. WEISGERBER: Objection on the same grounds, and
23 relevance. This is a 9019 hearing, Your Honor. We are not
24 here to try every minutia. And in fact, we're trying to avoid
25 a trial on the merits. And it feels like we're getting a bit

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1 far afield now.

2 THE COURT: I sustain.

3 MR. WILSON: All right. I'll pass the witness.

4 THE COURT: All right. Mr. Draper said he had no
5 cross. So, any redirect, Ms. Weisgerber?

6 MS. WEISGERBER: No, Your Honor.

7 THE COURT: All right. Mr. Morris, did you have any
8 redirect?

9 MR. MORRIS: I do not, Your Honor. I have a very
10 brief closing and then some additional remarks if -- if we
11 finish.

12 THE COURT: All right. So, Mr. Pugatch, that
13 concludes your testimony. Thank you. You're excused if you
14 want to be.

15 All right. So, as I understood it, there would be no more
16 evidence after this.

17 MR. WILSON: Well, Your Honor, along those lines, as
18 a housekeeping measure, I think everything on my exhibit list
19 is included on someone else's exhibit list, but just for belt
20 and suspenders I would move to admit all of the exhibits on
21 the -- on Mr. Dondero's exhibit list.

22 THE COURT: Well, is that agreed or not? Because we
23 didn't have a witness to get them in.

24 MR. MORRIS: No objection, Your Honor.

25 THE COURT: Any objection? All right. If there's no

1 objection, I'll --

2 MR. MORRIS: Your Honor, --

3 THE COURT: I'm sorry. Was there an objection? I
4 will admit Dondero Exhibits A through M, and those appear at
5 Docket Entry 1721, correct, Mr. Wilson?

6 MR. WILSON: That is correct, Your Honor.

7 THE COURT: All right.

8 MR. WILSON: That is correct, Your Honor.

9 (James Dondero's Exhibits A through M are received into
10 evidence.)

11 MR. WILSON: And one final matter is, during the
12 examination of Mr. Seery, you at least partially admitted
13 Dondero's Exhibit N, and I was wondering if we need to -- how
14 we'd need to submit that for the record.

15 THE COURT: Okay. First, I'm confused. I think you
16 said Mr. Terry's testimony. You --

17 MR. WILSON: I said Seery. I'm sorry.

18 THE COURT: Oh, Seery?

19 MR. WILSON: Or I may have said Terry, but I meant to
20 say Seery.

21 THE COURT: Okay. Maybe you said it. Okay. During
22 Mr. Seery's testimony -- oh, the email that I admitted a
23 portion of?

24 MR. WILSON: That is -- that's correct, Your Honor.

25 THE COURT: What -- what are you asking? It's not in

1 your notebook. Are you asking do you need to separately
2 submit it or what?

3 MR. WILSON: Yeah, I was just asking what the Court's
4 preference on how we submit that for the -- put it in the
5 record.

6 THE COURT: Okay. That was so garbled I didn't hear
7 you. You need to file that on the docket as a supplemental
8 exhibit that was admitted, okay?

9 MR. WILSON: Okay. Thank you, Your Honor.

10 THE COURT: All right. Closing arguments? Mr.
11 Morris?

12 CLOSING ARGUMENT ON BEHALF OF THE DEBTOR

13 MR. MORRIS: Yes, very briefly, Your Honor. The
14 Debtor easily meets the standard here. The settlement
15 consideration relative to the claim establishes and reflects
16 the likelihood of success on the merits.

17 You know, I've never -- I did hear Mr. Pugatch in the
18 deposition the other day, but I otherwise haven't heard from
19 him. I found him to be incredibly credible, Your Honor, and I
20 regret the fact that he and HarbourVest are being blamed twice
21 here. The fact that they got 40,000 documents or didn't read
22 the arbitration award, it's just -- it's a shame that they're
23 being dragged through this yet again.

24 The fact is, Your Honor, there is no evidence that they
25 made the disclosures that HarbourVest claims -- complains

1 about. They just don't. The fraudulent transfers led to the
2 bankruptcy, led to the appointment of a trustee, led to --
3 right? So, so it's -- that's why -- but they're getting
4 something for their claim.

5 It was a hard negotiation, Your Honor. There is no
6 dispute that if we litigated this it would be complex. It
7 would fact-intensive. The Debtor would be forced to rely upon
8 witnesses who are no longer employed by it. That it would be
9 expensive, for sure. There's no dispute about any of that.
10 There's no dispute that the creditor body has spoken loudly
11 here by unanimously refraining from objecting except for Mr.
12 Dondero and the entities controlled by him.

13 And you heard Mr. Seery's testimony. I think he
14 exhaustively informed the Court as to the process by which the
15 transaction was analyzed and negotiated, and there's no
16 evidence to the contrary that this was an arm's-length
17 negotiation.

18 Unless Your Honor has any questions, we would request that
19 the motion be granted.

20 THE COURT: Thank you. Ms. Weisgerber, your closing
21 argument?

22 CLOSING ARGUMENT ON BEHALF OF HARBOURVEST

23 MS. WEISGERBER: Sure. Thank you, Your Honor. I'll
24 also be brief. We again join in Mr. Morris's arguments and
25 comments.

1 The Court has now heard testimony from Mr. Pugatch
2 regarding the factual detail underlying HarbourVest's claims.
3 The Court has also heard about the significant damages that
4 HarbourVest stands to recover for those claims. And
5 HarbourVest came to this Court ready to litigate. It would --
6 it's ready to do so if needed. It believes it would prevail
7 on its claims if it had to do so.

8 But the Court also heard from Mr. Seery about his
9 understanding of HarbourVest's claims, his calculus, and his
10 decision to settle them. And we submit that nothing further
11 is needed by this Court in order to approve the settlement.
12 This is a question of the Debtor's business judgment. We're
13 not here to have a trial on the merits of HarbourVest's
14 claims. The Objectors have made various arguments, including
15 about the cause of HarbourVest's damages. But even the nature
16 of the legal claims that HarbourVest is asserting, some do not
17 require a loss causation. So we submit that's not even
18 relevant to the merits of the claims.

19 The settlement is clearly in the best interest of the
20 estate, and we respectfully request that the Court approve it.

21 THE COURT: Thank you. All right. Mr. Wilson, your
22 closing argument?

23 MR. LYNN: Michael Lynn. I will give the closing
24 argument, if that's satisfactory to the Court.

25 THE COURT: All right. Go ahead.

1 CLOSING ARGUMENT ON BEHALF OF JAMES DONDERO

2 MR. LYNN: Good afternoon, Your Honor. I just want
3 to make a few points, and I'll try to do it as quickly as
4 possible.

5 First, I feel compelled to address the argument of the
6 Debtor that Mr. Dondero is repeating his litigious behavior
7 from the Acis case. I don't know about the Acis case. I
8 wasn't involved except very, very peripherally. But with
9 respect to this case, we have only taken positions in court
10 that we believed -- that is, his lawyers -- believed were
11 warranted by law, facts as we knew them, and that are
12 consistent with professionalism. I'd be glad to explain any
13 position we took.

14 Often, through the Debtor's very persuasive powers, we
15 never had the chance to explain our position previously to the
16 Court. In fact, for the most part, as today, we have been
17 reactive rather than commencing proceedings. In fact, during
18 the first seven months of this case, we only appeared in court
19 a few times, when we felt we had to -- for example, when
20 discovery was being sought by the Creditors' Committee that we
21 feared might invade privilege. Then, much to the Debtor's
22 fury, we opposed the Acis 9019. We did so because we thought
23 it was too much.

24 Since, as the Court can see, the principal instigators of
25 litigation have been the Debtor, and to a lesser extent, the

1 Committee.

2 Indeed, in an apparent effort to drown Mr. Dondero and his
3 counsel in litigation, the Debtor has repeatedly sought court
4 action on a very short fuse, claiming need for expedited
5 hearing.

6 Perhaps the most startling example of this is the recent
7 contempt motion, for which there is no good reason for a quick
8 hearing. Resolution of that motion is not necessary to reach
9 the confirmation hearing. The motion could be heard after the
10 confirmation hearing. There is no need to put Mr. Dondero and
11 his professionals in a position where they have to respond in
12 a couple of days, two business days, and then will have two
13 days to prepare for trial.

14 Second, Your Honor, Mr. Seery has repeatedly asserted,
15 contrary to today's motion, that the HarbourVest claim was of
16 no merit. That is why, when he came in to settle for tens of
17 millions of dollars, we opposed this motion. It appears that
18 the motion is occurring without any cross-party discovery.
19 There is no consideration, apparently, of trying dispositive
20 -- dispositive motions first. There is no consideration for
21 junior classes of equity, which Mr. Seery has previously
22 opined were in the money. This, even though there's no reason
23 that this settlement is necessary pre-confirmation, unless Mr.
24 Seery wants HarbourVest's vote.

25 Third, for whatever reason, that seems to be the driving

1 factor for settling. On its face, the vote seems to be a key
2 factor of the settlement. About the longest provision of the
3 settlement agreement relates to voting. The motion itself --
4 in the motion itself, five of seven bullet points cited by the
5 Debtor for approval of the settlement deal with and emphasize
6 support of the plan or the vote that is to be cast for the
7 plan.

8 If the settlement is a good deal, it didn't need to have
9 as one of its parts the requirement that HarbourVest vote for
10 the plan.

11 Your Honor, I'll stop there. I know Your Honor would like
12 to get just a few minutes before your 1:30 docket. I've been
13 there and I understand that, and I do apologize for taking the
14 time we have, but I think that responsibility is shared with
15 the Debtor and HarbourVest.

16 Thank you, Your Honor.

17 THE COURT: All right. Thank you for that.

18 Mr. Draper, any closing argument from you?

19 CLOSING ARGUMENT ON BEHALF OF GET GOOD AND DUGABOY TRUSTS

20 MR. DRAPER: Yes, I have three comments. The first
21 is the claim -- the loss claim, absent the fraud claim, is, at
22 best, \$7 million. I think Mr. Seery's argument that a hundred
23 -- one hundred percent is attributable to there is just wrong.
24 If he and I both invested in a company 50-50 and it goes
25 broke, we only lost 50 cents each.

1 Number two, I think the Court heard the evidence. I think
2 this is, at best, a subordinated claim under 5 -- under the
3 Bankruptcy Code. It's really a "But for the
4 misrepresentations, we wouldn't have invested."

5 And the last one is the -- Judge Lynn represented the
6 voting, so I won't deal with that. But the one that troubles
7 me the most is the fact that this asset that is ultimately
8 being paid for in claim dollars that's being transferred over
9 to the Debtor and being put it outside the estate, outside the
10 purview of this Court, and placed in some subsidiary, this --
11 this transaction, if it is approved, must -- should contain a
12 provision that the asset that's being acquired come into the
13 Debtor and be owned by the Debtor.

14 THE COURT: All right.

15 MR. DRAPER: I have nothing further, Your Honor.

16 THE COURT: Thank you, Mr. Draper.

17 Mr. Morris, you get the last word since it's your motion.

18 MR. MORRIS: Very quickly, Your Honor. The
19 subordination argument doesn't hold water. This is not a
20 claim against the Debtor for the security; it's a claim for
21 fraud. Okay? So, so 510(b), if it was a claim against HCLOF,
22 that might make sense, but this is a claim against the Debtor.
23 And it's a Debtor -- it's a claim for fraud. That's number
24 one.

25 Number two, we need to keep this exactly as it's been

1 structured in order to avoid litigation. Mr. Seery told the
2 Court. I'm sure the Court can make its own assessment as to
3 Mr. Seery's credibility as to whether or not the Debtor is
4 intending to somehow get this asset beyond the Court.

5 But there are reasons why we've done this, Your Honor.
6 They could have made an objection on that basis. In fact, if
7 they did, it would be overruled, because there's no -- there's
8 no basis for this Court to find that somehow the Debtor and
9 Mr. Seery are doing something untoward to get assets away from
10 this Court's jurisdiction.

11 You know, I don't know what to say about Mr. Lynn's
12 commentary. Much of it had nothing to do with any evidence in
13 the record.

14 The fact remains, Your Honor, that this settlement is
15 fair. It's reasonable. It's in the best interest of the
16 estate. And we would respectfully request that the Court
17 grant the motion.

18 THE COURT: All right. Thank you. Well, I
19 appreciate all the arguments and evidence I have heard today.
20 I'm going to be brief in my ruling here, but I reserve the
21 right to supplement in a more fulsome written order, which I'm
22 going to instruct Mr. Morris to submit. I am approving the
23 motion to compromise the HarbourVest claim today, and I guess
24 subsumed in that is granting the motion to allow their claim
25 for 3018 voting purposes.

1 I in all ways find this compromise to meet the required
2 legal standard set forth in such cases as *TMT Trailer Ferry*,
3 *AWECO*, and *Foster Mortgage*, numerous other Fifth Circuit
4 cases.

5 First, I'm going to specifically say for the record that I
6 found both witnesses today, Mr. Seery and Mr. Pugatch, to be
7 very credible. Very credible testimony and meaningful
8 testimony was provided to the Court today. And based on that
9 testimony, I find, first, that this compromise was the product
10 of arm's-length negotiations. It was a hard-fought
11 negotiation, as far as I'm concerned. The Debtor objected to
12 these numerous HarbourVest proofs of claim. The Debtor did
13 not want to allow HarbourVest a significant claim for voting
14 purposes. I duly note the statements made in the disclosure
15 statement before this compromise was reached suggesting, you
16 know, the Debtor didn't think HarbourVest should have a large
17 claim.

18 That is consistent with everything I typically see in a
19 bankruptcy case when there's a claim objection. The objector
20 vehemently denies the claimant should have a proof of claim,
21 and then people sit down and think about the risks and rewards
22 of litigating things. And I believe very fervently that's
23 what happened here. There were good-faith, arm's-length
24 negotiations that resulted in this proposed compromise.

25 I find the compromise -- and I'll add to that point, on

1 the good-faith point, I find nothing sinister or improper
2 about the fact that the compromise includes a commitment of
3 HarbourVest to vote in favor of the plan. Again, we see this
4 a lot. You know, there's even a buzz word that doesn't even
5 exist in the Bankruptcy Code: "plan support agreement." You
6 know, we see those a lot -- you know, oftentimes negotiated
7 before the case, but sometimes after. You know, it may be
8 improper in certain situations, but there was nothing here
9 that troubles me about that component of the compromise.

10 I find the compromise to meet the paramount interest of
11 creditors here. Notably, we have very large creditors in this
12 case who have not objected. The *Foster Mortgage* case from the
13 Fifth Circuit tells me I am supposed to consider support or
14 opposition of creditors. No opposition of UBS. No opposition
15 of the Redeemer Committee Crusader Fund. No opposition from
16 Josh Terry or Acis. No opposition from Daugherty.

17 But moreover, when considering the paramount interest of
18 creditors, I find this compromise to be in all ways fair and
19 equitable and in the best interest of the estate, and
20 certainly within the range of reasonableness. The evidence
21 showed that HarbourVest asserted over \$300 million. Over \$300
22 million. Granted, that was based on all kinds of legal
23 theories that would be contested and expensive to litigate,
24 but the evidence also showed that they invested over \$70
25 million. You know, close to \$75 million. I forget the exact

1 number. \$75 or \$80 million, somewhere in that range. And now
2 the credible evidence is that investment is worth about \$22
3 million.

4 So, certainly, while the claim may not have, at the
5 ultimate end of the day in litigation, resulted in a \$300
6 million proof of claim, certainly, certainly there were strong
7 arguments for a very sizeable claim, more than this compromise
8 amount. So it's certainly fair and equitable and reasonable
9 when considering the complexity and duration of further
10 litigation, the risks and rewards, the expense, delay, and
11 likely success.

12 A couple of last things I'm going to say are these. I
13 understand, you know, there is vehement disagreement on the
14 part of our Objectors to the notion that Highland might have
15 caused a \$50 million loss to HarbourVest. But I will tell
16 you, for what it's worth -- I want the record clear that this
17 is part of my evaluation of the reasonableness of the
18 settlement -- my reaction is that, indeed, Highland's
19 litigation strategy in the Acis case caused HCLOF to lose a
20 huge portion of its value, to the detriment of HarbourVest.
21 You know, whether all evidence at the end of the day would
22 convince me of that, I don't know, but that's -- that is
23 definitely this judge's impression.

24 I'm very sympathetic to HarbourVest. It appears in all
25 ways from the record, not just the record before me today, but

1 the record in the Acis case that I presided over, that
2 Highland back then would have rather spent HarbourVest's
3 investment for HCLOF legal fees than let Josh Terry get paid
4 on his judgment. They were perfectly happy to direct the
5 spending of other people's money, is what the record suggested
6 to me.

7 And then, you know, I have alluded to this very recently,
8 as recently as last Friday: I can still remember Mr.
9 Ellington sitting on the witness stand over here to my left
10 and telling the Court, telling the parties under oath, that
11 HarbourVest -- he didn't use its name back then, okay? For
12 the first phase of the Acis case, or most of the Acis case, we
13 were told it was an investor from Boston. And at some point
14 someone even said their name begins with H. I mean, it seemed
15 almost humorous. But Mr. Ellington said it was they,
16 HarbourVest, the undisclosed investor, who was insistent that
17 the Acis name was toxic, and so that's what all of this had
18 been about: the rebranding, the wanting to extract or move
19 things away from Acis.

20 So, you know, I have heard for the -- well, at least the
21 second time today, from Mr. Pugatch, what I perceive to be
22 very credible testimony that that's just not the way it
23 happened.

24 And I guess the last thing I want to say here today, and
25 you know, I guess I have multiple reasons for saying this, not

1 just in connection with approving the settlement, you know,
2 I've heard about how the Acis CLOs, the HCLOF CLOs have lost,
3 you know, a crazy amount of value, that they underperform in
4 the market, that, you know, during the Acis/Brigade tenure
5 and, you know, they should have been reset. You know, I hope
6 those who have not been around as long as some of us in this
7 whole saga know that the -- Mr. Terry, Mr. Phelan, I think
8 Brigade, they all desperately wanted to reset these things,
9 but it was HCLOF, I believe directed by Highland, that wanted
10 to redeem, wanted to liquidate, take the pot of money,
11 warehouse it, and then do their own thing.

12 And there was, I think, from my vantage point, a
13 monumental effort to try to get everyone to the table to do
14 reasonable resets that would be good for the stakeholders at
15 HCLOF and be good for the creditors of Acis, including Josh
16 Terry. That was always the balancing act that most of us were
17 focused on during the Acis bankruptcy. But Highland, I
18 believe, directing HCLOF's strategy, just did not want the
19 resets to happen.

20 So, again, part of me, I suppose, just wants to make the
21 record clear on something that I fear not everyone is clear
22 about. And I say that because the comment was made that the
23 injunctions, the preliminary injunctions sought by the Acis
24 trustee caused the plummet in value, and I think that's just
25 not an accurate statement. I think litigation strategies are

1 what caused the plummet in value, and that's why I think
2 ultimately HarbourVest would potentially have a meritorious
3 claim here in a significant amount if this litigation were to
4 go forward.

5 So, I approve this under 9019. And again, Mr. Morris,
6 you'll upload an order.

7 It is now 1:41, so let's as quickly as possible hear the
8 other motion that I don't think had any objections. Mr.
9 Morris?

10 MR. MORRIS: Your Honor, just -- yes, just very
11 quickly, just four things.

12 With respect to the order, I just want to make it clear
13 that we are going to include a provision that specifically
14 authorizes the Debtor to engage in -- to receive from
15 HarbourVest the asset, you know, the HCLOF interest, and that
16 that's consistent with its obligations under the agreement.

17 The objection has been withdrawn, I think the evidence is
18 what it is, and we want to make sure that nobody thinks that
19 they're going to go to a different court somehow to challenge
20 the transfer. So I just want to put the Court on notice and
21 everybody on notice that we are going to put in a specific
22 finding as to that.

23 THE COURT: All right. Fair --

24 MR. MORRIS: Number two is --

25 THE COURT: Fair enough. I do specifically approve

1 that mechanism and find it is appropriate and supported by the
2 underlying agreements.

3 And just so you know, I spent some time noodling this
4 yesterday before I knew it was going to be settled, so I'm not
5 just casually doing that. I think it's fine.

6 Okay. Next?

7 MR. MORRIS: Thank you very much, Your Honor. Number
8 two, with respect to the motion to pay, there is no objection.
9 If we can just submit an order. Or if Your Honor has other
10 guidance for us, we're happy to take it.

11 THE COURT: Okay. Does anyone have anything they
12 want to say about that motion?

13 Again, I looked at it. I didn't see any objections. I
14 didn't see any problem with it. It's -- you know, you're
15 going through this exercise because of the earlier protocol
16 order.

17 MR. MORRIS: Correct.

18 THE COURT: All right. Well, if there's nothing,
19 then, I will approve that, finding there is good cause to
20 grant that motion.

21 MR. MORRIS: Okay.

22 THE COURT: All right. Is the only other
23 housekeeping matter --

24 MR. MORRIS: I --

25 THE COURT: -- we have the contempt motion?

1 MR. MORRIS: It is, and I do -- I do have to point
2 out how troubled the Debtor is to learn that Mr. Dondero was
3 still receiving documents from Highland as late as this
4 morning. It's got to be a violation of both the TRO -- I
5 guess it's now the preliminary injunction.

6 I would respectfully request -- I know that time is what
7 it is -- but maybe Mr. Dondero can answer now where he got the
8 document, who he got the document from, what other documents
9 he's gotten from the Debtor since Your Honor ordered him not
10 to communicate with the Debtor's employees.

11 This is not saying hello in the hallway. I mean, this is
12 just -- it is really troubling, Your Honor, and it's why we
13 need the contempt motion heard as soon as possible.

14 THE COURT: Well, Mr. Wilson, do you want to address
15 that? I think the words I heard were that you just got the
16 document this morning, and you got it from Mr. Dondero, but we
17 don't know where and when Mr. Dondero got it. Mr. Wilson, are
18 you there?

19 MR. LYNN: I'm afraid I'm back, Your Honor.

20 THE COURT: Okay.

21 MR. LYNN: I am not sure whether Mr. Dondero had it
22 in his files from some -- from back before he was asked not to
23 communicate with members or with employees of the Debtor. I
24 believe -- I believe he's with us, though I don't think he's
25 available by video.

1 Are you there, Mr. Dondero?

2 THE COURT: We can't hear you, Mr. Dondero.

3 MR. DONDERO: Judge?

4 THE COURT: Oh, go ahead.

5 MR. DONDERO: Can you hear me now?

6 THE COURT: Yes.

7 MR. DONDERO: Yes, I -- I -- when I moved offices, I
8 found it in a stack of paper, and --

9 MR. LYNN: I understand it shows that his microphone
10 is working.

11 THE COURT: Okay. Go ahead.

12 MR. DONDERO: Can you hear me?

13 THE COURT: Yes, go ahead.

14 MR. DONDERO: Yeah, I -- I'm sitting in new offices.
15 I've got everything in boxes. I was going through everything
16 yesterday, and I found those emails in a stack of papers and I
17 sent them over because I thought they would be relevant
18 relative to Seery's initial impression.

19 THE COURT: Okay. Well, let's talk about the timing
20 of this hearing. Mr. Morris, I'm going to -- I'm going to ask
21 you why --

22 MR. LYNN: Michael Lynn, Your Honor. I don't want to
23 waste the Court's time. We have not made available anything
24 to the Court objecting to the expedited hearing on the
25 contempt motion. We've been here.

1 I would say to Your Honor that if Mr. Dondero is indeed in
2 contempt, or was in contempt toward the motion, which has
3 nothing to do with the document that was presented as Dondero
4 Exhibit N, there is no need to hear this on an expedited
5 basis.

6 Every time we turn around, Your Honor, the Debtor is
7 asking that something be heard on an expedited basis. And we
8 have not opposed that. We have not fought that, to speak of,
9 to date. But this is getting a little ridiculous. We're
10 within days of confirmation of the Debtor's plan, and it is
11 simply a means of causing pain and suffering to Mr. Dondero
12 and those who are working with him and for him. And he does
13 have employees at NexPoint who are assisting him.

14 So we most strongly object to being put on a schedule
15 where we are expected to get a response to the contempt motion
16 on file by Monday, today being Thursday, and a weekend
17 intervening. And we strongly object to any setting of this
18 contempt motion on Tuesday or Wednesday. It is absurd, and it
19 is done solely, solely, Your Honor, to cause pain.

20 THE COURT: All right.

21 MR. MORRIS: Your Honor, if I may?

22 THE COURT: Please.

23 MR. MORRIS: Just very briefly, we had a hearing the
24 other day. The evidence is the exact same. The evidence is
25 crystal clear that the violations are meaningful, they're

1 substantial, and they are repeated.

2 After the TRO was entered into, Mr. Dondero and only Mr.
3 Dondero chose to interfere with the Debtor's business. Mr.
4 Dondero and only Mr. Dondero chose to communicate with the
5 Debtor's employees, not about saying hello in the hallway but
6 about coordinating a legal defense strategy against the
7 Debtor.

8 The need is immediate, Your Honor, and I would
9 respectfully request that the hearing be set for Tuesday or
10 Wednesday. They've had this motion now since the 7th of
11 January. They had a full evidentiary hearing, so they know
12 most of the evidence that's going to be presented. They have
13 a whole team of -- they have an army of lawyers, Your Honor,
14 and half a dozen firms working on behalf of Mr. Dondero and
15 his interests. For him to cry here, for him to cry that this
16 is too much is really -- it's obscene. It just is.

17 THE COURT: All right. I'm going to say a couple --

18 MR. LYNN: That is absurd.

19 THE COURT: I'm going to say a couple of things. One
20 is that I -- well, the one time I remember getting reversed
21 for holding someone in contempt of court, the District Court
22 felt like I had not given enough notice of that. The District
23 Courts, what they think is reasonable notice, is sometimes
24 very different from what the bankruptcy judges think. We're
25 used to going very lickety-split fast in the bankruptcy

1 courts. And the Courts of Appeals, District Court, Courts of
2 Appeals obviously, for good reason, are very concerned about
3 due process in this kind of context. So I'm sensitive to
4 that.

5 I'm also sensitive to the fact that it is monetary damages
6 that are being sought here to purge the contempt. Okay? The
7 shifting of attorneys' fees is basically what I understand is
8 being sought at this point. You know, we have a preliminary
9 injunction halting behavior at this point, and so I think
10 that's another reason I'm hesitant to give an emergency
11 hearing. I feel like monetary damages can wait and we can
12 give 21-plus days' notice of the hearing.

13 But I'm going to throw this out there as well. If I do
14 feel like there is a showing of contempt, if I do feel like
15 the phone -- as I told you the other day, I'm very, very
16 fixated on the phone that may have been destroyed or thrown
17 away, maybe at Mr. Dondero's suggestion. I mean, the
18 potential monetary sanction here may be very, very large if
19 the evidence plays out in the way I fear it might play out.
20 So I need to make sure everybody has adequate time to prepare
21 for that hearing and make sure I get all the evidence I need
22 to see. All right? Contempt of court is very, very, very,
23 very serious, and I don't think anyone would deny that.

24 So, with that, it was filed what day? January 4th? Is
25 that what I heard? Or --

1 MR. MORRIS: January 7th, I believe, Your Honor.

2 THE COURT: January 7th? All right. Well, Traci,
3 are you there? Hopefully, you're not in a hunger coma at this
4 point.

5 THE CLERK: I am here.

6 THE COURT: Okay. We have -- we're going to have to
7 go to that first week of February, right? Because we've got
8 the confirmation hearing that, you know, late in January, and
9 then --

10 THE CLERK: Yes. Uh-huh.

11 THE COURT: Okay. Do you have an available date to
12 give right now?

13 THE CLERK: How about -- if you're willing to hear
14 them on Friday, February 5th.

15 THE COURT: Okay. I can do that. February 5th at
16 9:30. Any -- anybody want to argue about that?

17 MR. MORRIS: Thank you, Your Honor. That's
18 acceptable to the Debtor.

19 THE COURT: Okay. Mr. Lynn, is that good with you?

20 MR. LYNN: We'll do that, Your Honor. I would say,
21 by the way, that I'll be happy to buy Mr. Seery, out of my own
22 pocket, five cell phones, which ought to make up for the one
23 that was lost, though I recognize that those cell phones will
24 not have on them the privileged information, the conversations
25 between his lawyers and Mr. Dondero that I imagine he was

1 looking forward to seeing.

2 THE COURT: Well, I wouldn't want him to see that
3 information, but I do think he's entitled to any nonprivileged
4 information, texting, or calls that are on that phone. So,
5 again, I'm either going to hear good explanations for that or
6 not, but it's something very concerning to me.

7 All right. So we have a game plan.

8 I'm going to ask, Did we have good-faith negotiations
9 between Dondero and the Committee and anything positive to
10 report? I'll ask Mr. Lynn and Mr. Clemente to weigh in.

11 MR. CLEMENTE: Yes, Your Honor. I'll go first, Your
12 Honor. Mr. Lynn and I have exchanged several emails over the
13 weekend, and the message that I sent to Mr. Lynn was very
14 clear. There had been a term sheet that Mr. Seery had sent
15 back to Mr. Dondero. I had asked Mr. Lynn to take a pencil
16 out and be very specific as to what it was Mr. Dondero was
17 prepared to do in connection with the pot plan. I instructed
18 him that some of the issues that the Committee still has is
19 obviously the overall value, along with the concept that's
20 signing up to a promise from Mr. Dondero to comply with
21 (indiscernible) as part of that value. As Your Honor may
22 understand, the Committee is obviously very skeptical of Mr.
23 Dondero's future performance under an agreement that he enters
24 into.

25 Those are but a couple of issues, Your Honor, that I

1 advised Mr. Lynn were very concerning to the Committee. And I
2 suggested to him that if he wanted to move things forward, the
3 best way to do it would be to come to us with a fulsome term
4 sheet that explained exactly what it was in clear and precise
5 detail that Mr. Dondero was proposing, and that would be the
6 best way to move the process forward, Your Honor.

7 THE COURT: All right. Mr. Lynn, anything to add to
8 that?

9 MR. LYNN: Well, Your Honor, my experience in
10 negotiations is that it is useful to agree on substantive
11 terms, or at least be in the ballpark, before term sheets are
12 exchanged. Long ago, a term sheet was prepared and presented
13 to the Committee. Ultimately, I think it was rejected, though
14 I don't know if we ever received a formal rejection.

15 I explained in my emails, which I'm happy to share with
16 the Court if Your Honor wants to see them, why I was reluctant
17 to try to put into a term sheet form the proposal that I
18 suggested to Mr. Clemente. As I said, I'm more than happy to
19 provide you with that email chain and let you form your own
20 judgment, Your Honor, as to whether we're proceeding in good
21 faith.

22 THE COURT: All right. Well I'm not going to ask --

23 MR. POMERANTZ: Your Honor? Your Honor, this is Jeff
24 Pomerantz.

25 THE COURT: -- to see any of that. Mr. Pomerantz?

1 MR. POMERANTZ: May I just be heard real quickly?

2 THE COURT: Sure.

3 MR. POMERANTZ: Your Honor, we also took Your Honor's
4 comments to heart. We, Mr. Seery and I, had an over-an-hour
5 conversation with Mr. Lynn and with Mr. Bonds. We provided
6 them with our thoughts as to what they needed to do in order
7 to move forward. Of course, it's not really the Debtor to
8 agree. It's the creditors to agree. But as Mr. Seery has
9 testified many times before and as I have told the Court, we
10 would support a plan that the Committee and Mr. Dondero could
11 get behind.

12 So we again -- I'm not going to divulge the nature of
13 those communications, but we suggested several things that Mr.
14 Dondero could do in order to move the ball forward, and
15 unfortunately, we have not seen any of those things done thus
16 far. So we are, at this point, not optimistic that there will
17 be a grand bargain plan.

18 THE COURT: All right.

19 MR. DONDERO: Your Honor, could I comment for a
20 second? This is Mr. Dondero.

21 THE COURT: If you and your counsel want you to
22 comment, you can comment.

23 MR. DONDERO: I'd love to do a pot plan. I would
24 love to reach some kind of settlement and everybody move on
25 with their lives. The estate started with \$360 million of

1 third-party assets and \$90 million of notes. The \$360 million
2 of third-party assets are down to \$130 million.

3 MR. POMERANTZ: Again, Your Honor, I must interrupt.
4 I did this at the last hearing, and it's not my practice to
5 interrupt, but issues regarding what the value is or not, it's
6 going to require a response, and that's not really before Your
7 Honor. I think before Your Honor is --

8 MR. DONDERO: Okay.

9 MR. POMERANTZ: -- have there been negotiations?
10 Have they been in good faith? If Mr. Dondero wanted to
11 address that, that's fine, but I object to having any
12 discussion at this point, especially with Mr. Dondero not even
13 under oath, on what the nature of the value of the assets and
14 why they have changed and what not.

15 THE COURT: Well, --

16 MR. POMERANTZ: It's just not appropriate.

17 THE COURT: I understand --

18 MR. DONDERO: Okay. Can I --

19 THE COURT: Stop.

20 MR. DONDERO: Can I -- can I finish?

21 THE COURT: Let me please respond to that. I
22 understand your concern, but I've heard from Mr. Seery
23 testimony many months ago about the value plummeting during
24 the case. And I asked why, and I got some explanations. This
25 is not evidence. This is just, you know, this is not going to

1 be binding in any way. Mr. Dondero can speak as to what he
2 thinks, you know, the situation is.

3 Go ahead, Mr. Dondero.

4 MR. DONDERO: Okay. I'm not trying to fixate on the
5 numbers. And as far as the third-party assets are, we would
6 be willing to pay -- I would be willing to pay for those. I'd
7 be willing to pay more, and even some value for the affiliate
8 notes that were really part of compensation agreements
9 throughout the history of Highland and avoid the POC
10 arguments. I'd be willing to pay for the assets and I'd be
11 willing to pay even more than that.

12 I have no transparency in terms of what the assets are,
13 and there's no fulsome discussion in terms of, well, here are
14 the assets, here are the notes, here's what we think the
15 values are, can you get to this number? It's just a -- you --
16 the -- it -- I don't view there is good-faith negotiations
17 going on because it's always just a: You need to put a big
18 number on a piece of paper; otherwise, you're going to get run
19 over.

20 And there's no back and forth going on, but it's not due
21 to a lack of willingness on my part. And maybe there needs to
22 be a committee set up. Maybe there needs to be, I don't know,
23 a mediator or an examiner or somebody to try and push through
24 the pot plan, but there's nothing happening. People are not
25 returning the judge's calls, I mean, Mr. Lynn's calls, or my

1 calls. They're -- there's -- despite efforts of our -- of my
2 own and a willingness of my own, there's no negotiations of
3 any sort going on at the moment.

4 THE COURT: All right. I don't want anyone to
5 respond to that. I know people have different views of what's
6 going on. But let me just say a couple of things, and then
7 we're done.

8 We do have a Committee in this case. We have a Committee
9 with very sophisticated members and very sophisticated
10 professionals. Okay? That's who I wanted you to be talking
11 to before the end of the day Tuesday.

12 We have had co-mediators in this case. Okay? And, you
13 know, I identified very sophisticated human beings for that
14 role. Okay? And in fact, there ended up being settlements
15 that flowed out of the co-mediator process.

16 We're now 15 months into the case. There are major,
17 significant compromises now: HarbourVest, UBS, Acis, Terry,
18 and Redeemer Committee. I hate to use a worn-out metaphor,
19 but the train is leaving the station. We've got confirmation.
20 I've pushed out two weeks. I mean, you all are either going
21 to get there in the next few days or we're just going to go
22 forward with I think what everyone, you know, would rather be
23 a pot plan, but if we can't get there, we're just going to
24 have to consider the plan that's on the table now. Okay?

25 You know, the Committee, again, they're sophisticated.

1 They can compare apples to oranges and decide whether the plan
2 on the table, with its risks of future litigation and
3 recoveries, whether it's better or worse than whatever
4 consideration you're offering, Mr. Dondero.

5 And you know, as we all know, there is distrust here,
6 there, and everywhere among these parties. So I can totally
7 understand them, you know, taking a hard line: We either get
8 all cash or we're just not going to mess with it. We don't
9 want to risk broken promises. We'd rather just do litigation.

10 So, anyway, that's as much as I'm going to say except I am
11 going to further direct good-faith negotiations. It sounds
12 like to me a written term sheet might be the appropriate next
13 step, given where I've heard things are at the moment. But,
14 you know, I guess we don't have any hearings between now and
15 the 26th, right? No Highland hearings that I can think of
16 between now and the 26th.

17 MR. POMERANTZ: I don't think so.

18 MR. MORRIS: I think that's correct, Your Honor.

19 THE COURT: So you have all this time --

20 MR. MORRIS: At the moment.

21 THE COURT: You have all this time to negotiate and
22 simultaneously get ready for the confirmation hearing without
23 any other battles. So I know you will use the time well.

24 All right. We're adjourned.

25 THE CLERK: All rise.

MR. BONDS: Thank you, Your Honor.

(Proceedings concluded at 2:04 p.m.)

--oOo--

CERTIFICATE

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

/s/ Kathy Rehling

01/16/2021

Kathy Rehling, CETD-444
Certified Electronic Court Transcriber

Date

006797

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EXHIBIT 10

006800




CLERK, U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS

ENTERED

THE DATE OF ENTRY IS ON
THE COURT'S DOCKET

The following constitutes the ruling of the court and has the force and effect therein described.

Signed January 20, 2021


United States Bankruptcy Judge

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

In re:

HIGHLAND CAPITAL MANAGEMENT, L.P.,¹

Debtor.

§
§
§
§
§
§

Chapter 11

Case No. 19-34054-sgj11

**ORDER APPROVING DEBTOR'S SETTLEMENT
WITH HARBOURVEST (CLAIM NOS. 143, 147, 149, 150, 153, 154) AND
AUTHORIZING ACTIONS CONSISTENT THEREWITH**

This matter having come before the Court on *Debtor's Motion for Entry of an Order Approving Settlement with HarbourVest (Claim Nos. 143, 147, 149, 150, 153, 154) and Authorizing Actions Consistent Therewith* [Docket No. 1625] (the "Motion"),² filed by Highland Capital Management, L.P., the debtor and debtor-in-possession (the "Debtor") in the above-captioned chapter 11 case (the "Bankruptcy Case"); and this Court having considered (a) the

¹ The Debtor's last four digits of its taxpayer identification number are (6725). The headquarters and service address for the above-captioned Debtor is 300 Crescent Court, Suite 700, Dallas, TX 75201.

² Capitalized terms used but not otherwise defined herein have the meanings ascribed to them in the Motion.



Motion; (b) the *Declaration of John A. Morris in Support of the Debtor's Motion for Entry of an Order Approving Settlement with HarbourVest (Claim Nos. 143, 147, 149, 150, 153, 154) and Authorizing Actions Consistent Therewith* [Docket No. 1631] (the "Morris Declaration"), and the exhibits annexed thereto, including the Settlement Agreement attached as **Exhibit "1"** (the "Settlement Agreement"); (c) the arguments and law cited in the Motion; (d) *James Dondero's Objection to Debtor's Motion for Entry of an Order Approving Settlement with HarbourVest* [Docket No. 1697] (the "Dondero Objection"), filed by James Dondero; (e) the *Objection to Debtor's Motion for Entry of an Order Approving Settlement with HarbourVest (Claim Nos. 143, 147, 149, 150, 153, 154) and Authorizing Actions Consistent Therewith* [Docket No. 1706] (the "Trusts' Objection"), filed by the Dugaboy Investment Trust ("Dugaboy") and Get Good Trust ("Get Good," and together with Dugaboy, the "Trusts"); (f) *CLO Holdco's Objection to HarbourVest Settlement* [Docket No. 1707] (the "CLOH Objection" and collectively, with the Dondero Objection and the Trusts' Objection, the "Objections"), filed by CLO Holdco, Ltd.; (g) the *Debtor's Omnibus Reply in Support of Debtor's Motion for Entry of an Order Approving Settlement with HarbourVest (Claim Nos. 143, 147, 149, 150, 153, 154), and Authorizing Actions Consistent Therewith* [Docket No. 1731] (the "Debtor's Reply"), filed by the Debtor; (h) the *HarbourVest Reply in Support of Debtor's Motion for Entry of an Order Approving Settlement with HarbourVest and Authorizing Actions Consistent Therewith* [Docket No. 1734] (the "HarbourVest Reply"), filed by HarbourVest 2017 Global Fund L.P., HarbourVest 2017 Global AIF L.P., HarbourVest Dover Street IX Investment L.P., HV International VIII Secondary L.P., HarbourVest Skew Base AIF L.P., and HarbourVest Partners L.P. (collectively, "HarbourVest"); (i) the testimonial and documentary evidence admitted into evidence during the hearing held on January 14, 2021 (the "Hearing"), including assessing the credibility of the witnesses; and (j) the

arguments made during the Hearing; and this Court having jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334; and this Court having found that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2); and this Court having found that venue of this proceeding and the Motion in this District is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and this Court having found that the relief requested in the Motion is in the best interests of the Debtor's estate, its creditors, and other parties-in-interest; and this Court having found the Settlement Agreement fair and equitable; and this Court having analyzed, for the reasons stated on the record, (1) the probability of success in litigating the claims subject to the Settlement Agreement, with due consideration for the uncertainty in fact and law, (2) the complexity and likely duration of litigation and any attendant expense, inconvenience, and delay, and (3) all other factors bearing on the wisdom of the compromise, including: (i) the best interests of the creditors, with proper deference to their reasonable views, and (ii) the extent to which the settlement is truly the product of arms-length bargaining, and not of fraud or collusion; and this Court having found that the Debtor's notice of the Motion and opportunity for a hearing on the Motion were appropriate under the circumstances and that no other notice need be provided; and this Court having determined that the legal and factual bases set forth in the Motion establish good cause for the relief granted herein; and upon all of the proceedings had before this Court; and after due deliberation and sufficient cause appearing therefor, it is hereby **ORDERED** that:

1. The Motion is **GRANTED** as set forth herein.
2. All objections to the Motion are overruled.
3. The Settlement Agreement, attached hereto as **Exhibit 1**, is approved in all respects pursuant to Rule 9019 of the Federal Rules of Bankruptcy Procedure.

4. All objections to the proofs of claim subject to the Motion³ are overruled as moot in light of the Court's approval of the Settlement Agreement.

5. The Debtor, HarbourVest, and all other parties are authorized to take any and all actions necessary and desirable to implement the Settlement Agreement without need of further approval or notice.

6. Pursuant to the express terms of the *Members Agreement Relating to the Company*, dated November 15, 2017, HarbourVest is authorized to transfer its interests in HCLOF to a wholly-owned and controlled subsidiary of the Debtor pursuant to the terms of the *Transfer Agreement for Ordinary Shares of Highland CLO Funding, Ltd.* without the need to obtain the consent of any party or to offer such interests first to any other investor in HCLOF.

7. The Court shall retain exclusive jurisdiction to hear and determine all matters arising from the implementation of this Order.

###End of Order###

³ This includes the *Debtor's First Omnibus Objection to Certain (A) Duplicate Claims; (B) Overstated Claims; (C) Late-Filed Claims; (D) Satisfied Claims; (E) No-Liability Claims; and (F) Insufficient-Documentation Claims* [Docket No. 906].

EXHIBIT 1

006805

SETTLEMENT AGREEMENT

This Settlement Agreement (the “Agreement”) is entered into as of December 23, 2020, between Highland Capital Management, L.P. (the “Debtor”), on the one hand, and HarbourVest 2017 Global Fund L.P., HarbourVest 2017 Global AIF L.P., HarbourVest Dover Street IX Investment L.P., HV International VIII Secondary L.P., HarbourVest Skew Base AIF L.P., and HarbourVest Partners L.P. (each, a “HarbourVest Party,” and collectively, “HarbourVest”), on the other hand. Each of the foregoing are sometimes referred to herein collectively as the “Parties” and individually as a “Party.”

RECITALS

WHEREAS, on October 16, 2019 (the “Petition Date”), the Debtor filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code (the “Bankruptcy Case”) in the Bankruptcy Court for the District of Delaware, Case No. 19-12239 (CSS) (the “Delaware Bankruptcy Court”);

WHEREAS, on December 4, 2019, the Delaware Bankruptcy Court entered an order transferring venue of the Debtor’s case to the Bankruptcy Court for the Northern District of Texas, Dallas Division, Case No. 19-34054-sgj (the “Bankruptcy Court”);

WHEREAS, prior to the Petition Date, HarbourVest invested in Highland CLO Funding, Ltd. f/k/a Acis Loan Funding, Ltd. (“HCLOF”) and acquired an a 49.98% ownership interest in HCLOF (the “HarbourVest Interests”);

WHEREAS, the portfolio manager for HCLOF is Highland HCF Advisor, Ltd., a subsidiary of the Debtor;

WHEREAS, on April 8, 2020, HarbourVest filed proofs of claim in the Bankruptcy Case, which are listed on the Debtor’s claims register as claim numbers 143, 147, 149, 150, 153, and 154 (the “HarbourVest Claims”), asserting claims against the Debtor relating to its investment in HCLOF;

WHEREAS, on July 30, 2020, the Debtor filed the *Debtor’s First Omnibus Objection to Certain (a) Duplicate Claims; (b) Overstated Claims; (c) Late-Filed Claims; (d) Satisfied Claims; (e) No Liability Claims; and (f) Insufficient-Documentation Claims* [Docket No. 906], in which the Debtor objected to the HarbourVest Claims;

WHEREAS, on September 11, 2020, HarbourVest filed the *HarbourVest Response to Debtor’s First Omnibus Objection to Creation (a) Duplicate Claims; (b) Overstated Claims; (c) Late-Filed Claims; (d) Satisfied Claims; (e) No Liability Claims; and (f) Insufficient-Documentation Claims* [Docket No. 1057] (the “HarbourVest Response”);

WHEREAS, on October 18, 2020, HarbourVest filed the *Motion of HarbourVest Pursuant to Rule 3018(a) of the Federal Rules of Bankruptcy Procedure for Temporary Allowance of Claims for Purposes of Voting to Accept or Reject the Plan* [Docket No. 1207] (the “3018 Motion” and together with the HarbourVest Response, the “HarbourVest Pleadings”);

WHEREAS, in the HarbourVest Pleadings, HarbourVest asserted, among other things, that the HarbourVest Claims included claims against the Debtor arising from fraudulent inducement, fraudulent concealment, fraudulent misrepresentation, breach of fiduciary duty, breach of securities laws, and misuse of assets and sought damages in excess of \$300,000,000;

WHEREAS, the Debtor disputes the HarbourVest Claims;

WHEREAS, on November 24, 2020, the Debtor filed the *Fifth Amended Plan of Reorganization for Highland Capital Management, L.P.* [Docket No. 1472] (as amended, the “Plan”).¹

WHEREAS, the Parties desire to enter into this Agreement which incorporates, formalizes, and finalizes the full and final resolution of the HarbourVest Claims and HarbourVest Pleadings; and

WHEREAS, this Agreement will be presented to the Bankruptcy Court for approval pursuant to Federal Rule of Bankruptcy Procedure 9019 (“Rule 9019”).

NOW THEREFORE, in consideration of the above recitals, the covenants, conditions, and promises made herein, and other good and valuable consideration, the receipt of which is hereby acknowledged, the Parties agree as follows:

1. Settlement of Claims.

(a) In full and complete satisfaction of the HarbourVest Claims, HarbourVest will receive:

(i) an allowed, nonpriority general unsecured claim in the aggregate amount of \$45,000,000 (the “Allowed GUC Claim”); and

(ii) an allowed subordinated claim in the aggregate amount of \$35,000,000 (the “Allowed Subordinated Claim” and together with the Allowed GUC Claim, the “Allowed Claims”).

(b) On the Effective Date, HarbourVest will transfer all of its rights, title, and interest in the HarbourVest Interests to the Debtor or its nominee pursuant to the terms of the *Transfer Agreement for Ordinary Shares of Highland CLO Funding, Ltd.*, attached hereto as Exhibit A (the “Transfer Agreements”) and the Debtor or its nominee will become a shareholder of HCLOF with respect to the HarbourVest Interests. The terms of the Transfer Agreements are incorporated into this Agreement by reference.

2. Releases.

(a) Upon the Effective Date, and to the maximum extent permitted by law, each HarbourVest Party on behalf of itself and each of its current and former advisors, trustees, directors, officers, managers, members, partners, employees, beneficiaries, shareholders, agents,

¹ All capitalized terms used but not defined herein shall have the meanings given to them in the Plan.

participants, subsidiaries, parents, successors, designees, and assigns hereby forever, finally, fully, unconditionally, and completely releases, relieves, acquits, remises, and exonerates, and covenants never to sue, the Debtor, HCLOF, HCLOF's current and former directors, and the Debtor's current and former advisors, trustees, directors, officers, managers, members, partners, employees, beneficiaries, shareholders, agents, participants, subsidiaries, parents, affiliates, successors, designees, and assigns, except as expressly set forth below (the "Debtor Released Parties"), for and from any and all claims, debts, liabilities, demands, obligations, promises, acts, agreements, liens, losses, costs and expenses (including, without limitation, attorney's fees and related costs), damages, injuries, suits, actions, and causes of action of whatever kind or nature, whether known or unknown, suspected or unsuspected, matured or unmatured, liquidated or unliquidated, contingent or fixed, at law or in equity, statutory or otherwise, including, without limitation, any claims, defenses, and affirmative defenses, whether known or unknown, including, without limitation, those which were or could have been asserted in, in connection with, or with respect to the Bankruptcy Case (collectively, the "HarbourVest Released Claims").

(b) Upon the Effective Date, and to the maximum extent permitted by law, the Debtor hereby forever, finally, fully, unconditionally, and completely releases, relieves, acquits, remises, and exonerates, and covenants never to sue (i) each HarbourVest Party and (ii) each HarbourVest Party's current and former advisors, trustees, directors, officers, managers, members, partners, employees, beneficiaries, shareholders, agents, participants, subsidiaries, parents, affiliates, successors, designees, and assigns (the "HarbourVest Released Parties"), for and from any and all claims, debts, liabilities, demands, obligations, promises, acts, agreements, liens, losses, costs and expenses (including, without limitation, attorney's fees and related costs), damages, injuries, suits, actions, and causes of action of whatever kind or nature, whether known or unknown, suspected or unsuspected, matured or unmatured, liquidated or unliquidated, contingent or fixed, at law or in equity, statutory or otherwise, including, without limitation, any claims, defenses, and affirmative defenses, whether known or unknown, which were or could have been asserted in, in connection with, or with respect to the Bankruptcy Case (collectively, the "Debtor Released Claims"); *provided, however*, that notwithstanding anything herein to the contrary, the release contained in this Section 2(b) will apply to the HarbourVest Released Parties set forth in subsection (b)(ii) only with respect to Debtor Released Claims arising from or relating to HarbourVest's ownership of the HarbourVest Interests.

(c) Notwithstanding anything in this Agreement to the contrary, the releases set forth herein will not apply with respect to (i) the Allowed Claims, (ii) the claims of Charlotte Investor IV, L.P., or (iii) the duties, rights, or obligations of any Party under this Agreement or the Transfer Agreements.

3. **Agreement Subject to Bankruptcy Court Approval.** The effectiveness of this Agreement and the Parties' obligations hereunder are conditioned in all respects on the approval of this Agreement by the Bankruptcy Court. The Parties agree to cooperate and use reasonable efforts to have this Agreement approved by the Bankruptcy Court. The "Effective Date" will be the date of an order entered by the Bankruptcy Court approving this Agreement pursuant to a motion filed under Rule 9019.

4. **Representations and Warranties.** Subject in all respects to Section 3 hereof:

(a) each HarbourVest Party represents and warrants that (i) it has full authority to enter into this Agreement and to release the HarbourVest Released Claims and has not sold, transferred, or assigned any HarbourVest Released Claim to any other person or entity, (ii) no person or entity other than such HarbourVest Party has been, is, or will be authorized to bring, pursue, or enforce any HarbourVest Released Claim on behalf of, for the benefit of, or in the name of (whether directly or derivatively) of such HarbourVest Party; and (iii) HarbourVest owns all of the HCLOF Interests free and clear of any claims or interests; and

(b) the Debtor represents and warrants to HarbourVest that (i) it has full authority to enter into this Agreement and to release the Debtor Released Claims and (ii) no person or entity other than the Debtor has been, is, or will be authorized to bring, pursue, or enforce any Debtor Released Claim on behalf of, for the benefit of, or in the name of (whether directly or derivatively) of the Debtor Party.

5. **Plan Support.**

(a) Each HarbourVest Party hereby agrees that it will (a) vote all HarbourVest Claims held by such HarbourVest Party to accept the Plan, by delivering its duly executed and completed ballots accepting the Plan on a timely basis; and (b) not (i) change, withdraw, or revoke such vote (or cause or direct such vote to be changed withdrawn or revoked); (ii) exercise any right or remedy for the enforcement, collection, or recovery of any claim against the Debtor except in a manner consistent with this Agreement or the Plan, (iii) object to, impede, or take any action other action to interfere with, delay or postpone acceptance or confirmation of the Plan; (iv) directly or indirectly solicit, propose, file, support, participate in the formulation of or vote for, any restructuring, sale of assets (including pursuant to 11 U.S.C. § 363), merger, workout, or plan of reorganization of the Debtor other than the Plan; or (v) otherwise take any action that would in any material respect interfere with, delay, or postpone the consummation of the Plan; provided, however, that such vote may be revoked (and, upon such revocation, deemed void ab initio) by such HarbourVest Party at any time following the termination of this agreement or the occurrence of a Support Termination Event (it being understood that any termination of this agreement shall entitle each HarbourVest Party to change its vote in accordance with section 1127(d) of the Bankruptcy Code), notwithstanding any voting deadline established by the Bankruptcy Court including without limitation the January 5, 2021, 5:00 p.m. (prevailing Central Time) deadline established by the *Order Approving Form of Ballots, Voting Deadline and Solicitation Procedures* [Docket No. 1476].

(b) In full resolution of the 3018 Motion, HarbourVest will have a general unsecured claim for voting purposes only in the amount of \$45,000,000.

(c) The obligations of the HarbourVest Parties under this Section 5 shall automatically terminate upon the occurrence of any of the following (each a “Support Termination Event”): (i) the effective date of the Plan, (ii) the withdrawal of the Plan, (iii) the entry of an order by the Bankruptcy Court (A) converting the Bankruptcy Case to a case under chapter 7 of the Bankruptcy Code or (B) appointing an examiner with expanded powers beyond those set forth in sections 1106(a)(3) and (4) of the Bankruptcy Code or a trustee in Bankruptcy

Case, or (iv) the failure of the Court to enter an order approving the terms of this Agreement and the settlement described herein pursuant to Rule 9019 prior to confirmation of the Plan.

6. **No Admission of Liability.** The Parties acknowledge that there is a bona fide dispute with respect to the HarbourVest Claims. Nothing in this Agreement will imply, an admission of liability, fault or wrongdoing by the Debtor, HarbourVest, or any other person, and the execution of this Agreement does not constitute an admission of liability, fault, or wrongdoing on the part of the Debtor, HarbourVest, or any other person.

7. **Successors-in-Interest.** This Agreement shall be binding upon and shall inure to the benefit of each of the Parties and their successors, and assigns.

8. **Notice.** Each notice and other communication hereunder will be in writing and will be sent by email and delivered or mailed by registered mail, receipt requested, and will be deemed to have been given on the date of its delivery, if delivered, and on the fifth full business day following the date of the mailing, if mailed to each of the Parties thereto at the following respective addresses or such other address as may be specified in any notice delivered or mailed as set forth below:

HARBOURVEST

HarbourVest Partners L.P.
Attention: Michael J. Pugatch
One Financial Center
Boston, MA 02111
Telephone No. 617-348-3712
E-mail: mpugatch@harbourvest.com

with a copy (which shall not constitute notice) to:

Debevoise & Plimpton LLP
Attention: M. Natasha Labovitz, Esq.
919 Third Avenue
New York, NY 10022
Telephone No. 212-909-6649
E-mail: nlabovitz@debevoise.com

THE DEBTOR

Highland Capital Management, L.P.
300 Crescent Court, Suite 700
Dallas, Texas 75201
Attention: James P. Seery, Jr.
Telephone No.: 972-628-4100
Facsimile No.: 972-628-4147
E-mail: jpseeryjr@gmail.com

with a copy (which shall not constitute notice) to:

Pachulski Stang Ziehl & Jones LLP
Attention: Jeffrey Pomerantz, Esq.
10100 Santa Monica Blvd., 13th Floor
Los Angeles, CA 90067
Telephone No.: 310-277-6910
Facsimile No.: 310-201-0760
E-mail: jpomerantz@pszjlaw.com

9. **Advice of Counsel.** Each Party represents that it has: (a) been adequately represented by independent legal counsel of its own choice, throughout all of the negotiations that preceded the execution of this Agreement; (b) executed this Agreement upon the advice of such counsel; (c) read this Agreement, and understands and assents to all the terms and conditions contained herein without any reservations; and (d) had the opportunity to have this Agreement and all the terms and conditions contained herein explained by independent counsel, who has answered any and all questions asked of such counsel, or which could have been asked of such counsel, including, but not limited to, with regard to the meaning and effect of any of the provisions of this Agreement.

10. **Entire Agreement.** This Agreement and the Transfer Agreement contain the entire agreement and understanding concerning the subject matter of this Agreement, and supersede and replace all prior negotiations and agreements, written or oral and executed or unexecuted, concerning such subject matter. Each of the Parties acknowledges that no other Party, nor any agent of or attorney for any such Party, has made any promise, representation or warranty, express or implied, written or oral, not otherwise contained in this Agreement to induce any Party to execute this Agreement. The Parties further acknowledge that they are not executing this Agreement in reliance on any promise, representation or warranty not contained in this Agreement, and that any such reliance would be unreasonable. This Agreement will not be waived or modified except by an agreement in writing signed by each Party or duly authorized representative of each Party.

11. **No Party Deemed Drafter.** The Parties acknowledge that the terms of this Agreement are contractual and are the result of arms'-length negotiations between the Parties and their chosen counsel. Each Party and its counsel cooperated in the drafting and preparation of this Agreement. In any construction to be made of this Agreement, the Agreement will not be construed against any Party.

12. **Future Cooperation.** The Parties agree to cooperate and execute such further documentation as is reasonably necessary to effectuate the intent of this Agreement.

13. **Counterparts.** This Agreement may be executed in counterparts with the same force and effect as if executed in one complete document. Each Party's signature hereto will signify acceptance of, and agreement to, the terms and provisions contained in this Agreement. Photographic, electronic, and facsimile copies of signed counterparts may be used in lieu of the originals of this Agreement for any purpose.

14. **Governing Law; Venue; Attorneys' Fees and Costs.** The Parties agree that this Agreement will be governed by and will be construed according to the laws of the State of Texas without regard to conflict-of-law principles. Each of the Parties hereby submits to the exclusive jurisdiction of the Bankruptcy Court during the pendency of the Bankruptcy Case and thereafter to the exclusive jurisdiction of the state and federal courts located in the Northern District of Texas, Dallas Division, with respect to any disputes arising from or out of this Agreement. In any action to enforce this Agreement, the prevailing party shall be entitled to recover its reasonable and necessary attorneys' fees and costs (including experts).

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IT IS HEREBY AGREED.

HIGHLAND CAPITAL MANAGEMENT, L.P.

By: /s/ James P. Seery, Jr.
Name: James P. Seery, Jr.
Its: CEO/CRO

HarbourVest 2017 Global Fund L.P., by HarbourVest 2017 Global Associates L.P., its General Partner, by HarbourVest GP LLC, its General Partner, by HarbourVest Partners, LLC, its Managing Member

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

HarbourVest 2017 Global AIF L.P., by HarbourVest Partners (Ireland) Limited, its Alternative Investment Fund Manager, by HarbourVest Partners L.P., its Duly Appointed Investment Manager, by HarbourVest Partners, LLC, its General Partner

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

HarbourVest Dover Street IX Investment L.P., by HarbourVest Partners L.P., its Duly Appointed Investment Manager, by HarbourVest Partners, LLC, its General Partner

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

HarbourVest Partners L.P., on behalf of funds and accounts under management, by HarbourVest Partners, LLC, its General Partner

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

**HarbourVest Skew Base AIF L.P., by HarbourVest Partners (Ireland) Limited, its
Alternative Investment Fund Manager, by HarbourVest Partners L.P., its Duly Appointed
Investment Manager, by HarbourVest Partners, LLC, its General Partner**

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

**HV International VIII Secondary L.P., by HIPEP VIII Associates L.P., its General
Partner, by HarbourVest GP LLC, its General Partner, by HarbourVest Partners, LLC,
its Managing Member**

By: /s/ Michael Pugatch
Name: Michael Pugatch
Its: Managing Director

Exhibit A

**TRANSFER AGREEMENT
FOR ORDINARY SHARES OF
HIGHLAND CLO FUNDING, LTD.**

This Transfer Agreement, dated as of January ____, 2021 (this “**Transfer Agreement**”), is entered into by and among Highland CLO Funding, Ltd. (the “**Fund**”), Highland HCF Advisor, Ltd. (the “**Portfolio Manager**”), HCMLP Investments, LLC (the “**Transferee**”) and each of the following: HarbourVest Dover Street IX Investment L.P., HarbourVest 2017 Global AIF L.P., HarbourVest 2017 Global Fund L.P., HV International VIII Secondary L.P., and HarbourVest Skew Base AIF L.P. (collectively, the “**Transferors**”).

WHEREAS, each Transferor is the record, legal and beneficial owner of the number of ordinary shares (“**Shares**”) of the Fund set forth opposite such Transferor’s name on Exhibit A hereto (with respect to each Transferor, the “**Transferred Shares**”).

WHEREAS the Transferee is an affiliate and wholly owned subsidiary of Highland Capital Management, L.P. (“**HCMLP**”) which is one of the initial members of the Fund.

WHEREAS, each Transferor wishes to transfer and assign 100% of its rights, title and interest as a shareholder in the Fund, including the Transferred Shares (the “**Interest**”) on the terms set forth in this Transfer Agreement.

WHEREAS, subject to and in connection with the approval of that certain Settlement Agreement, dated on or about the date hereof, by and among HCMLP and the Transferors (the “**Settlement Agreement**”), the Transferee desires that the Interest be transferred to Transferee and that thereafter the Transferee will become a Shareholder and the Transferors will no longer be Shareholders.

WHEREAS, the Portfolio Manager desires to consent to such transfers and to the admission of Transferee as a Shareholder on the terms set forth herein, and the Transferors and Transferee agree to such terms.

WHEREAS, the Fund desires to amend its records to reflect the foregoing transfers.

NOW, THEREFORE, the parties hereto agree as follows:

1. Transfer of Shares and Advisory Board

- a. Each Transferor hereby transfers and assigns all of its rights, title, and interest in its Interest to the Transferee, and the Transferee wishes to be admitted to the Fund as a Shareholder.
- b. In connection with the transfer of the Interest as contemplated herein, the Transferee shall be granted the right to appoint a representative to the Fund’s advisory board (the “**Advisory Board**”) to replace the Transferors’ appointed representative to the Advisory Board.

- c. Transferee hereby assumes all of Transferor's rights and obligations in respect of the Interest effective as of the Effective Date (as defined below) and acknowledge that thereafter Transferee shall be subject to the applicable terms and provisions of the Members' Agreement dated as of November 15, 2017 (the "**Members' Agreement**"), the Articles of Incorporation adopted November 15, 2017 (the "**Articles**") and the Subscription and transfer Agreement, dated as of November 15, 2017 among each Transferor, the Fund and the Portfolio Manager (the "**Subscription Agreement**", and together with the Members' Agreement and the Articles, the "**Fund Agreements**") with respect to the Interest. Transferee does not assume any liability or responsibility for any obligations or liabilities incurred by any Transferor prior to the Effective Date of the transfer.
 - d. Following the transfer, each Transferor shall have no further rights or obligations to any party hereunder in respect of the Interest under the Fund Agreements.
 - e. This Transfer Agreement, and the parties' obligations hereunder, are conditioned in all respects on the approval by the Bankruptcy Court for the Northern District of Texas, Dallas Division pursuant to Federal Rule of Bankruptcy Procedure 9019 of (i) this Transfer Agreement and (ii) the Settlement Agreement, and each of the parties agree that no further action shall be required from any party for the transfer of the Interest to be effective except as described herein.
2. Transferee's Representations and Warranties. The Transferee represents and warrants to the Transferors, the Portfolio Manager, and the Fund as follows:
- a. This Transfer Agreement constitutes a valid and binding obligation of the Transferee, enforceable against it in accordance with its terms;
 - b. This Transfer Agreement has been duly and validly executed and delivered by or on behalf of the Transferee and such execution and delivery have been duly authorized by all necessary trust action of the Transferee;
 - c. The Transferee acknowledges receipt of, has read, and is familiar with, the Fund's Offering Memorandum for Placing Shares dated November 15, 2017 (the "**Offering Memorandum**") and the Fund Agreements;
 - d. The Transferee hereby accepts and receives the Interest from the Transferors for investment, and not with a view to the sale or distribution of any part thereof, and the Transferee has no present intention of selling, granting participations in, or otherwise distributing the same, but subject nevertheless to any requirement of law that the disposition of the Transferee's property shall at all times be within such Transferee's control; and
 - e. The Transferee is an "Eligible U.S. Investor" as defined in the Offering Memorandum.

3. Transferors' Representations and Warranties. Each Transferor represents and warrants to the Transferee, the Portfolio Manager, and the Fund as follows:
 - a. This Transfer Agreement constitutes a valid and binding obligation of the Transferor, enforceable against it in accordance with its terms;
 - b. This Transfer Agreement has been duly authorized, and duly and validly executed and delivered by the Transferor and such execution and delivery have been duly authorized by all necessary action of the Transferor; and
 - c. As of the date hereof, the Transferor has good and valid title to the Transferor's Interest, free and clear of any liens, vesting requirements or claims by others.
4. Consent to Transfer. Based in part on the representations and warranties of the Transferors and the Transferee which are included herein, and on the terms contained herein, the Portfolio Manager and the Fund hereby consent to the transfers of the Interest, the admission of the Transferee as a Shareholder and the Transferee's appointment of a representative to the Advisory Board, the Portfolio Manager's execution of this Transfer Agreement constituting its prior written consent to the transfers of the Interest for the purposes of article 18.1 of the Articles and this Transfer Agreement constituting express notice in writing to the Fund of the assignment set out at clause 1(c) above for the purposes of the Law of Property (Miscellaneous Provisions) (Guernsey) Law, 1979 (as amended).
5. Completion: As of the date of approval by the Bankruptcy Court for the Northern District of Texas, Dallas Division pursuant to Federal Rule of Bankruptcy Procedure 9019 of (i) this Transfer Agreement and (ii) the Settlement Agreement (the "**Effective Date**"):
 - a. each Transferor shall deliver or cause to be delivered to the Transferee a transfer instrument relating to the Transferred Shares duly executed and completed by that Transferor in favor of the Transferee; and
 - b. the Transferee shall deliver to the Transferors and the Fund a duly executed and dated Adherence Agreement (as defined in the Members' Agreement).

Prior to the Effective Date the Transferee shall procure that:

 - c. the board of directors of the Fund shall hold a meeting at which the transfer of the Shares to the Transferee shall be approved and registration in the register of members of the Fund shall be effected on the Effective Date.
6. Miscellaneous.
 - a. Each of the parties hereto agree to execute any further instruments and perform any further acts which are or may become reasonably necessary to carry out the intent of this Transfer Agreement or are reasonably requested by the Portfolio Manager, the Fund or a Transferor to complete the transfer of the Interest.

- b. The parties to this Transfer Agreement acknowledge that the terms of this Transfer Agreement are the result of arms'-length negotiations between the parties and their respective counsel. Each party and its counsel cooperated in the drafting and preparation of this Transfer Agreement. In any construction to be made of this Transfer Agreement, the language or drafting of this Transfer Agreement will not be construed against any party.
- c. This Transfer Agreement shall be governed by, and construed and enforced in accordance with, the internal substantive laws of the state of Delaware, without giving effect to conflicts of law principles.
- d. The representations, warranties and covenants of the Transferors and the Transferee shall remain in full force and effect following the transfer of the Interest, and the Fund and the Portfolio Manager thereafter may rely on all such representations, warranties and covenants.
- e. This Transfer Agreement may be executed in multiple counterparts, each of which shall be deemed to be an original, but all of which together shall constitute one and the same instrument. Photographic, electronic, and facsimile copies of signed counterparts may be used in lieu of the originals of this Transfer Agreement for any purpose.
- f. Captions of sections have been added only for convenience and shall not be deemed to be a part of this Transfer Agreement.
- g. This Transfer Agreement is among the parties hereto. No Person that is not a party hereto shall have any right herein as a third-party beneficiary or otherwise except as expressly contemplated hereby.

[Remainder of Page Intentionally Blank]

HarbourVest 2017 Global Fund L.P.

By: HarbourVest 2017 Global Associates L.P.
Its General Partner

By: HarbourVest GP LLC
Its General Partner

By: HarbourVest Partners, LLC
Its Managing Member

By: _____

Name: Michael Pugatch

Title: Managing Director

[Signature Page to Transfer of Ordinary Shares of Highland CLO Funding, Ltd.]

Exhibit A

<u>Transferee Name</u>	<u>Number of Shares</u>	<u>Percentage</u>
HarbourVest Dover Street IX Investment L.P.	54,355,482.14	71.0096%
HarbourVest 2017 Global AIF L.P.	7,426,940.38	9.7025%
HarbourVest 2017 Global Fund L.P.	3,713,508.46	4.8513%
HV International VIII Secondary L.P.	9,946,780.11	12.9944%
HarbourVest Skew Base AIF L.P.	1,103,956.03	1.4422%

EXHIBIT 11

006824

CHARITABLE DAF FUND, L.P.
and CLO HOLDCO, LTD.,
directly and derivatively,

V.

Cause No. _____

Defendants.

I.

This action arises out of the acts and omissions of Defendant Highland Capital Management, L.P. (“HCM”), which is the general manager of Highland HCF Advisor, Ltd. (“HCFA”), both of which are registered investment advisers under the Investment Advisers Act of 1940 (the “Advisers Act”),¹ and nominal Defendant Highland CLO Funding, Ltd. (“HCLOF”) (HCM and HCFA each a “Defendant,” or together, “Defendants”). The acts and omissions which have recently come to light reveal breaches of fiduciary duty, a pattern of violations of the Advisers Act’s anti-fraud provisions, and concealed breaches of the HCLOF Company Agreement, among others, which have caused and/or likely will cause Plaintiffs damages.



At all relevant times, HCM was headed by CEO and potential party James P. Seery (“Seery”). Seery negotiated a settlement with the several Harbourvest² entities who owned 49.98% of HCLOF. The deal had HCM (or its designee) purchasing the Harbourvest membership interests in HCLOF for \$22.5 million. Recent revelations, however, show that the sale was predicated upon a sales price that was vastly below the Net Asset Value (“NAV”) of those interests. Upon information and belief, the NAV of HCLOF’s assets had risen precipitously, but was not disclosed to Harbourvest nor to Plaintiffs.

Under the Advisers Act, Defendants have a non-waivable duty of loyalty and candor, which includes its duty not to inside trade with its own investors, *i.e.*, not to trade with an investor to which HCM and Seery had access to superior non-public information. Upon information and belief, HCM’s internal compliance policies required by the Advisers Act would not generally have allowed a trade of this nature to go forward—meaning, the trade either was approved in spite of compliance rules preventing it, or the compliance protocols themselves were disabled or amended to a level that leaves Defendants HCM and HCLOF exposed to liability. Thus, Defendants have created an unacceptable perpetuation of exposure to liability.

Additionally, Defendants are liable for a pattern of conduct that gives rise to liability for their conduct of the enterprise consisting of HCM in relation to HCFA and HCLOF, through a pattern of concealment, misrepresentation, and violations of the securities rules. In the alternative, HCFA and HCM, are guilty of self-dealing, violations of the Advisers Act, and tortious interference by (a) not disclosing that Harbourvest had agreed to sell at a price well below the current NAV, and (b) diverting the Harbourvest opportunity to themselves.

² “Harbourvest” refers to the collective of Harbourvest Dover Street IX Investment, L.P., Harbourvest 2017 Global AIF, L.P., Harbourvest 2017 Global Fund, L.P., HV International VIII Secondary, L.P., and Harbourvest Skew Base AIF, L.P. Each was a member of Defendant Highland CLO Funding, Ltd.

For these reasons, judgment should be issued in Plaintiffs' favor.

II.

PARTIES

1. Plaintiff CLO Holdco, Ltd. is a limited company incorporated under the laws of the Cayman Islands.

2. Plaintiff Charitable DAF Fund, L.P., ("DAF") is a limited partnership formed under the laws of the Cayman Islands.

3. Defendant Highland Capital Management, L.P. is a limited partnership with its principal place of business at 300 Crescent Court, Suite 700, Dallas, Texas 75201. It may be served at its principal place of business or through its principal officer, James P. Seery, Jr., or through the Texas Secretary of State, or through any other means authorized by federal or state law.

4. Defendant Highland HCF Advisor, Ltd. is a limited company incorporated under the laws of the Cayman Islands. Its principal place of business is 300 Crescent Court, Suite 700, Dallas, Texas 75201. It is a registered investment adviser ("RIA") subject to the laws and regulations of the Investment Advisers Act of 1940 (the "Adviser's Act"). It is a wholly-owned subsidiary of Highland Capital Management, L.P.

5. Nominal Defendant Highland CLO Funding, Ltd. is a limited company incorporated under the laws of the Island of Guernsey. Its registered office is at First Floor, Dorey Court, Admiral Park, St. Peter Port, Guernsey GY1 6HJ, Channel Islands. Its principal place of business is 300 Crescent Court, Suite 700, Dallas, Texas 75201.

6. Potential party James P. Seery, Jr. ("Seery") is an officer and/or director and/or control person of Defendants Highland Capital Management, L.P., Highland CLO Funding, Ltd., and Highland HCF Advisor, Ltd., and is a citizen of and domiciled in Floral Park, New York.

III.

JURISDICTION AND VENUE

7. This Court has subject matter jurisdiction over this dispute under 28 U.S.C. § 1331 as one or more rights and/or causes of action arise under the laws of the United States. This Court has supplemental subject matter jurisdiction over all other claims under 28 U.S.C. § 1367.

8. Personal jurisdiction is proper over the Defendants because they reside and/or have continual contacts with the state of Texas, having regularly submitted to jurisdiction here. Jurisdiction is also proper under 18 U.S.C. § 1965(d).

9. Venue is proper in this Court under 28 U.S.C. § 1391(b) and (c) because one or more Defendants reside in this district and/or a substantial part of the events or omissions giving rise to the claim occurred or a substantial part of property that is the subject of the action is situated in this district. Venue in this district is further provided under 18 U.S.C. § 1965(d).

IV.

RELEVANT BACKGROUND

HCLOF IS FORMED

10. Plaintiff DAF is a charitable fund that helps several causes throughout the country, including providing funding for humanitarian issues (such as veteran's welfare associations and women's shelters), public works (such as museums, parks and zoos), and education (such as specialty schools in underserved communities). Its mission is critical.

11. Since 2012, DAF was advised by its registered investment adviser, Highland Capital Management, L.P., and its various subsidiaries, about where to invest. This relationship was governed by an Investment advisory Agreement.

12. At one point in 2017, HCM advised DAF to acquire 143,454,001 shares of HCLOF, with HCFA (a subsidiary of HCM) serving as the portfolio manager. DAF did so via a holding entity, Plaintiff CLO Holdco, Ltd.

13. On November 15, 2017, through a Subscription and Transfer Agreement, the DAF entered into an agreement with others to sell and transfer shares in HCLOF, wherein the DAF retained 49.02% in CLO Holdco.

14. Pursuant to that agreement, Harbourvest acquired the following interests in the following entities:

Harbourvest Dover Street IX Investment, L.P., acquired 35.49%;

Harbourvest 2017 Global AIF, L.P., acquired 2.42%;

Harbourvest 2017 lobal Fund, L.P., acquired 4.85%;

HV International VIII Secondary, L.P., acquired 6.5%; and

Harbourvest Skew Base AIF, L.P., acquired 0.72%;

for a total of 49.98% (altogether, the “Harbourvest interests”).

15. On or about October 16, 2019, Highland Capital Management filed for Chapter 11 bankruptcy in Delaware Bankruptcy Court, which was later transferred to the Northern District of Texas Bankruptcy Court, in the case styled *In Re: Highland Capital Management, L.P., Debtor*, Cause No. 19-34054, (the “HCM Bankruptcy” and the Court is the “Bankruptcy Court”).

The Harbourvest Settlement with Highland Capital Management in Bankruptcy

16. On April 8, 2020, Harbourvest submitted its proofs of claim in the HCM bankruptcy proceeding. Annexed to its proofs of claims was an explanation of the Proof of Claim and the basis therefor setting out various pre-petition allegations of wrongdoing by HCM. *See, e.g.*, Case No. 19-bk-34054, Doc. 1631-5.

17. The debtor, HCM, made an omnibus response to the proofs of claims, stating they were duplicative of each other, overstated, late, and otherwise meritless.

18. Harbourvest responded to the omnibus objections on September 11, 2020. *See* Cause No. 19-bk-34054, Doc. 1057.

19. Harbourvest represented that it had invested in HCLOF, purchasing 49.98% of HCLOF's outstanding shares.

20. Plaintiff CLO Holdco was and is also a 49.02% holder of HCLOF's member interests.

21. In its Omnibus Response, Harbourvest explained that its claims included unliquidated legal claims for fraud, fraud in the inducement, RICO violations under 18 U.S.C. 1964, among others (the "Harbourvest Claims"). *See* Cause No. 19-bk-34054, Doc. 1057.

22. The Harbourvest Claims centered on allegations that when Harbourvest was intending to invest in a pool of Collateralized Loan Obligations, or CLOs, that were then-managed by Acis Capital Management ("Acis"), a subsidiary of HCM, HCM failed to disclose key facts about ongoing litigation with a former employee, Josh Terry.

23. Harbourvest contended that HCM never sufficiently disclosed the underlying facts about the litigation with Terry, and HCM's then-intended strategy to fight Terry caused HCLOF to incur around \$15 million in legal fees and costs. It contended that had it known the nature of the lawsuit and how it would eventually turn out, Harbourvest never would have invested in HCLOF. *See* Cause No. 19-bk-34054, Doc. 1057.

24. HCLOF's portfolio manager is HCFA. HCM is the parent of HCFA and is managed by its General Partner, Strand Management, who employs Seery and acts on behalf of HCM.

25. Before acceding to the Harbourvest interests, HCM was a 0.6% holder of HCLOF interests.

26. While even assuming Harbourvest's underlying claims were valid as far as the lost \$15 million went, the true damage of the legal fees to Harbourvest would have been 49.98% of the HCLOF losses (i.e., less than \$7.5 million). Harbourvest claimed that it had lost over \$100 million in the HCLOF transaction due to fraud, which, after trebling under the racketeering statute, it claimed it was entitled to over \$300 million in damages.

27. In truth, as of September 2020, Harbourvest had indeed lost some \$52 million due to the alleged diminishing value of the HCLOF assets (largely due to the underperformance of the Acis entities³)—and the values were starting to recover.

28. HCM denied the allegations in the Bankruptcy Court. Other than the claim for waste of corporate assets of \$15 million, HCM at all times viewed the Harbourvest legal claims as being worth near zero and having no merit.

29. On December 23, 2020, HCM moved the Court to approve a settlement between itself and Harbourvest. No discovery had taken place between the parties, and Plaintiff did not have any notice of the settlement terms or other factors prior to the motion's filing (or even during its pendency) in order to investigate its rights.

30. HCM set the hearing right after the Christmas and New Year's holidays, almost ensuring that no party would have the time to scrutinize the underpinnings of the deal.

31. On January 14, 2021, the Bankruptcy Court held an evidentiary hearing and approved the settlement in a bench ruling, overruling the objections to the settlement.

³ Acis was being managed by Joshua Terry. JP Morgan had listed the four ACIS entities under his management as the four worst performers of the 1200 CLOs it evaluated.

32. An integral part of the settlement was allowing \$45 million in unsecured claims that, at the time of the agreement, were expected to net Harbourvest around 70 cents on the dollar. In other words, Harbourvest was expected to recover around \$31,500,000 from the allowed claims.

33. As part of the consideration for the \$45 million in allowed claims, Harbourvest agreed to transfer all of its interests in HCLOF to HCM or its designee.

34. HCM and Seery rationalized the settlement value by allocating \$22.5 million of the net value of the \$45 million in unsecured claims as consideration to purchase Harbourvest's interests in HCLOF, meaning, if 70% of the unsecured claims—i.e., \$31.5 million—was realized, because \$22.5 million of that would be allocated to the purchase price of the Harbourvest interests in HCLOF, the true “settlement” for Harbourvest's legal claims was closer to \$9 million.

35. Plaintiffs here are taking no position at this time about the propriety of settling the Harbourvest legal claims for \$9 million. That is for another day.

36. At the core of this lawsuit is the fact that HCM purchased the Harbourvest interests in HCLOF for \$22.5 million knowing that they were worth far more than that.

37. It has recently come to light that, upon information and belief, the Harbourvest interests, as of December 31, 2020, were worth in excess of \$41,750,000, and they have continued to go up in value.

38. On November 30, 2020, which was less than a month prior to the filing of the Motion to Approve the Settlement, the net asset value of those interests was over \$34.5 million. Plaintiffs were never made aware of that.

39. The change is due to how the net asset value, or NAV, was calculated. The means and methods for calculating the “net asset value” of the assets of HCLOF are subject to and

governed by the regulations passed by the SEC pursuant to the Adviser's Act, and by HCM's internal policies and procedures.

40. Typically, the value of the securities reflected by a market price quote.

41. However, the underlying securities in HCLOF are not liquid and had not been traded in a long while.

42. There not having been any contemporaneous market quotations that could be used in good faith to set the marks⁴ meant that other prescribed methods of assessing the value of the interests, such as the NAV, would have been the proper substitutes.

43. Seery testified that the fair market value of the Harbourvest HCLOF interests was \$22.5 million. Even allowing some leeway there, it was off the mark by a mile.

44. Given the artifice described herein, Seery and the entity Defendants had to know that the representation of the fair market value was false. But it does not appear that they disclosed it to Harbourvest to whom they owed fiduciary duties as the RIA in charge of HCLOF, and they certainly did not disclose the truth to the Plaintiff.

45. It is either the case that (i) Defendants conducted the proper analysis to obtain a current value of the assets but decided to use a far lower valuation in order to whitewash the settlement or enrich the bankruptcy estate; *or* (ii) Defendants never conducted the proper current valuation, and therefore baselessly represented what the current value of the assets was, despite knowingly having no reasonable basis for making such a claim.

46. For years HCM had such internal procedures and compliance protocols. HCM was not allowed by its own compliance officers to trade with an investor where HCM had superior knowledge about the value of the assets, for example. While Plaintiff has no reason to believe that

⁴ The term "mark" is shorthand for an estimated or calculated value for a non-publicly traded instrument.

those procedures were scrapped in recent months, it can only assume that they were either overridden improperly or circumvented wholesale.

47. Upon finalizing the Harbourvest Settlement Agreement and making representations to the Bankruptcy Court to the Plaintiffs about the value of the Harbourvest Interests, Seery and HCM had a duty to use current values and not rely on old valuations of the assets or the HCLOF interests.

48. Given Defendants' actual or constructive knowledge that they were purchasing Harbourvest's Interests in HCLOF for a less than 50% of what those interests were worth—Defendants owed Plaintiff a fiduciary duty not to purchase them for themselves.

49. Defendants should have either had HCLOF repurchase the interests with cash, or offer those interests to Plaintiff and the other members *pro rata*, before HCM agreed to purchase them all lock, stock and barrel, for no up-front cash.

50. Indeed, had Plaintiff been offered those interests, it would have happily purchased them and therefore would have infused over \$20 million in cash into the estate for the purpose of executing the Harbourvest Settlement.

51. That Defendants (and to perhaps a lesser extent, the Unsecured Creditors Committee (the "UCC")) agreed to pay \$22.5 million for the HCLOF assets, where they had previously not consented to any such expenditure by the estate on behalf of HCLOF, strongly indicates their awareness that they were purchasing assets for far below market value.

52. The above is the most reasonable and plausible explanation for why Defendants and the UCC forwent raising as much as \$22.5 million in cash now in favor of hanging on to the HCLOF assets.

53. Indeed, in January 2021 Seery threatened Ethen Powell that “[Judge Jernigan] is laughing at you” and “we are coming after you” in response to the latter’s attempt to exercise his right as beneficial holder of the CLO, and pointing out a conflict of interest in Seery’s plan to liquidate the funds.

54. HCM’s threat, made by Seery, is tantamount to not only a declaration that he intends to liquidate the funds regardless of whether the investors want to do so, and whether it is in their best interests, but also that HCM intends to leverage what it views as the Bankruptcy Court’s sympathy to evade accountability.

V.

CAUSES OF ACTION

FIRST CAUSE OF ACTION *Breaches of Fiduciary Duty*

55. Plaintiffs respectfully incorporate the foregoing factual averments as if fully set forth herein and further alleges the following:

56. HCM is a registered investment advisor and acts on behalf of HCFA. Both are fiduciaries to Plaintiffs.

57. The Advisers Act establishes an unwaivable federal fiduciary duty for investment advisers.⁵

⁵ See e.g., *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 194 (1963); *Transamerica Mortg. Advisors (tama) v. Lewis*, 444 U.S. 11, 17 (1979) (“§ 206 establishes ‘federal fiduciary standards’ to govern the conduct of investment advisers.”); *Santa Fe Indus. v. Green*, 430 U.S. 462, 471, n.11 (1977) (in discussing *SEC v. Capital Gains*, stating that the Supreme Court’s reference to fraud in the “equitable” sense of the term was “premised on its recognition that Congress intended the Investment Advisers Act to establish federal fiduciary standards for investment advisers”). See also Investment Advisers Act Release No. 3060 (July 28, 2010) (“Under the Advisers Act, an adviser is a fiduciary whose duty is to serve the best interests of its clients, which includes an obligation not to subrogate clients’ interests to its own”) (citing Proxy Voting by Investment Advisers, Investment Advisers Act Release No. 2106 (Jan. 31, 2003)).

58. HCM and the DAF entered into an Amended and Restated Investment Advisory Agreement, executed between them on July 1, 2014 (the “RIA Agreement”). It renews annually and continued until the end of January 2021.

59. In addition to being the RIA to the DAF, HCM was appointed the DAF’s attorney-in-fact for certain actions, such as “to purchase or otherwise trade in Financial Instruments that have been approved by the General Partner.” RIA Agreement ¶ 4.

60. The RIA Agreement further commits HCM to value financial assets “in accordance with the then current valuation policy of the Investment Advisor [HCM], a copy of which will provided to the General Partner upon request.” RIA Agreement ¶ 5.

61. While HCM contracted for the recognition that it would be acting on behalf of others and could be in conflict with advice given the DAF, (RIA Agreement ¶ 12), nowhere did it purport to waive the fiduciary duties owed to the DAF not to trade as a principal in a manner that harmed the DAF.

62. HCFA owed a fiduciary duty to Holdco as an investor in HCLOF and to which HCFA was the portfolio manager. HCM owed a fiduciary duty to the DAF (and to Holdco as its subsidiary) pursuant to a written Advisory Agreement HCM and the DAF had where HCM agreed to provide sound investment advice and management functions.

63. As a registered investment adviser, HCM’s fiduciary duty is broad and applies to the entire advisor-client relationship.

64. The core of the fiduciary duty is to act in the best interest of their investors—the advisor must put the ends of the client before its own ends or the ends of a third party.

65. This is manifested in a duty of loyalty and a duty of utmost care. It also means that the RIA has to follow the terms of the company agreements and the regulations that apply to the investment vehicle.

66. The fiduciary duty that HCM and Seery owed to Plaintiff is predicated on trust and confidence. Section 204A of the Advisers Act requires investment advisors (whether SEC-registered or not) to establish, maintain, and enforce written policies and procedures reasonably designed to prevent the RIA from trading on material, non-public information. *See* 17 C.F.R. § 275.206(4)-7. That means that Plaintiff should be able to take Defendants at their word and not have to second guess or dig behind representations made by them.

67. The simple thesis of this claim is that Defendants HCFA and HCM breached their fiduciary duties by (i) insider trading with Harbourvest and concealing the rising NAV of the underlying assets—i.e., trading with Harbourvest on superior, non-public information that was neither revealed to Harbourvest nor to Plaintiff; (ii) concealing the value of the Harbourvest Interests; and (iii) diverting the investment opportunity in the Harbourvest entities to HCM (or its designee) without offering it to or making it available to Plaintiff or the DAF.

68. HCM, as part of its contractual advisory function with Plaintiffs, had expressly recommended the HCLOF investment to the DAF. Thus, diverting the opportunity for returns on its investment was an additional breach of fiduciary duty.

69. This violated a multitude of regulations under 27 C.F.R. part 275, in addition to Rules 10b-5 and 10b5-1. 17 CFR 240.10b5-1 (“Rule 10b5-1”) explains that one who trades while possessing non-public information is liable for insider trading, and they do not necessarily have to have *used* the specific inside information.

70. It also violated HCM’s own internal policies and procedures.

71. Also, the regulations impose obligations on Defendants to calculate a *current* valuation when communicating with an investor, such as what may or may not be taken into account, and what cannot pass muster as a current valuation. Upon information and belief, these regulations were not followed by the Defendants.

72. HCM's internal policies and procedures, which it promised to abide by both in the RIA Agreement and in its Form ADV SEC filing, provided for the means of properly calculating the value of the assets.

73. HCM either did not follow these policies, changed them to be out of compliance both with the Adviser Act regulations and its Form ADV representations, and/or simply misrepresented or concealed their results.

74. In so doing, because the fiduciary duty owed to Plaintiff is a broad one, and because Defendants' malfeasance directly implicates its relationship with Plaintiff, Defendants have breached the Advisers Act's fiduciary duties owed to Plaintiff as part of their fiduciary relationship.⁶

75. At no time between agreeing with Harbourvest to the purchase of its interests and the court approval did Defendants disclose to either Harbourvest or to Plaintiff (and the Bankruptcy Court for that matter) that the purchase was at below 50% the current net asset value as well, and when they failed to offer Plaintiff (and the other members of HCLOF) their right to purchase the interests pro rata at such advantageous valuations. Plaintiff's lost opportunity to

⁶ See Advisers Act Release No. 4197 (Sept. 17, 2015) (Commission Opinion) (“[O]nce an investment Advisory relationship is formed, the Advisers Act does not permit an adviser to exploit that fiduciary relationship by defrauding his client in any investment transaction connected to the Advisory relationship.”); see also *SEC v. Lauer*, No. 03-80612-CIV, 2008 U.S. Dist. LEXIS 73026, at 90 (S.D. Fla. Sept. 24, 2008) (“Unlike the antifraud provisions of the Securities Act and the Exchange Act, Section 206 of the Advisers Act does not require that the activity be ‘in the offer or sale of any’ security or ‘in connection with the purchase or sale of any security.’”).

purchase has harmed Plaintiff. Plaintiff had been led to believe by the Defendants that the value of what was being purchased in the Harbourvest settlement by HCM (or its designee) was at fair market value. This representation, repeated again in the Bankruptcy Court during the Harbourvest confirmation, implicitly suggested that a proper current valuation had been performed.

76. Defendant's principal, Seery, testified in January 2021 that the then-current fair market value of Harbourvest's 49.98% interest in HCLOF was worth around \$22.5 million. But by then, it was worth almost double that amount and has continued to appreciate. Seery knew or should have known that fact because the value of some of the HCLOF assets had increased, and he had a duty to know the current value. His lack of actual knowledge, while potentially not overtly fraudulent, would nonetheless amount to a breach of fiduciary duty for acting without proper diligence and information that was plainly available.

77. Furthermore, HCLOF holds equity in MGM Studios and debt in CCS Medical via various CLO positions. But Seery, in his role as CEO of HCM, was made aware during an advisors meeting in December 2020 that Highland would have to restrict its trading in MGM because of its insider status due to activities that were likely to apply upward pressure on MGM's share price.

78. Furthermore, Seery controlled the Board of CCS Medical. And in or around October 2020, Seery was advocating an equatization that would have increased the value of the CCS securities by 25%, which was not reflected in the HCM report of the NAV of HCLOF's holdings.

79. Seery's knowledge is imputed to HCM.

80. Moreover, it is a breach of fiduciary duty to commit corporate waste, which is effectively what disposing of the HCLOF assets would constitute in a rising market, where there

is no demand for disposition by the investors (save for HCM, whose proper 0.6% interest could easily be sold to the DAF at fair value).

81. As holder of 0.6% of the HCLOF interests, and now assignee of the 49.98% Harbourvest Interests), HCM has essentially committed self-dealing by threatening to liquidate HCLOF now that it may be compelled to do so under its proposed liquidation plan, which perhaps inures to the short term goals of HCM but to the pecuniary detriment of the other holders of HCLOF whose upside will be prematurely truncated.

82. Seery and HCM should not be allowed to benefit from the breach of their fiduciary duties because doing so would also cause Plaintiffs irreparable harm. The means and methods of disposal would likely render the full scope of damages to the DAF not susceptible to specific calculation—particularly as they would relate to calculating the lost opportunity cost. Seery and HCM likely do not have the assets to pay a judgment to Plaintiffs that would be rendered, simply taking the lost appreciation of the HCLOF assets.

83. Defendants are thus liable for diverting a corporate opportunity or asset that would or should have been offered to Plaintiff and the other investors. Because federal law makes the duties invoked herein unwaivable, it is preposterous that HCM, as a 0.6% holder of HCLOF, deemed itself entitled to the all of the value and optionality of the below-market Harbourvest purchase.

84. Defendants cannot rely on any contractual provision that purports to waive this violation. Nothing in any agreement purports to permit, authorize or otherwise sanitize Defendants' self-dealing. All such provisions are void.

85. In the fourth quarter of 2020, Seery and HCM notified staff that they would be terminated on December 31, 2020. That termination was postponed to February 28, 2021.

Purchasing the Harbourvest assets without staffing necessary to be a functioning Registered Investment Advisor was a strategic reversal from prior filings that outlined canceling the CLO management contracts and allowing investors to replace Highland as manager.

86. Seery's compensation agreement with the UCC incentivizes him to expedite recoveries and to prevent transparency regarding the Harbourvest settlement.

87. What is more, Seery had previously testified that the management contracts for the funds—HCLOF included—were unprofitable, and that he intended to transfer them. But he later rejected offers to purchase those management contracts for fair value and instead decided to continue to manage the funds—which is what apparently gave rise to the Harbourvest Settlement, among others. He simultaneously rejected an offer for the Harbourvest assets of \$24 million, stating that they were worth much more than that.

88. Because of Defendants' malfeasance, Plaintiffs have lost over \$25 million in damages—a number that continues to rise—and the Defendants should not be able to obtain a windfall.

89. For the same reason, Defendants' malfeasance has also exposed HCLOF to a massive liability from Harbourvest since the assignment of those interests is now one that is likely unenforceable under the Advisers Act, Section 47(b), if there was unequal information.

90. HCM and HCFA are liable as principals for breach of fiduciary duty, as are the principals and compliance staff of each entity.

91. Plaintiffs seek disgorgement, damages, exemplary damages, attorneys' fees and costs. To the extent the Court determines that this claim had to have been brought derivatively on behalf of HCLOF, then Plaintiffs represent that any pre-suit demand would have been futile since asking HCM to bring suit against its principal, Seery, would have been futile.

SECOND CAUSE OF ACTION
Breach of HCLOF Company Agreement
(By Holdco against HCLOF, HCM and HCFA)

92. Plaintiffs respectfully incorporate the foregoing factual averments as if fully set forth herein and further alleges the following:

93. On November 15, 2017, the members of HCLOF, along with HCLOF and HCFA, executed the *Members Agreement Relating to the Company* (the “Company Agreement”).

94. The Company Agreement governs the rights and duties of the members of HCLOF.

95. Section 6.2 of HCLOF Company Agreement provides that when a member “other than ... CLO Holdco [Plaintiff] or a Highland Affiliate,” intends to sell its interest in HCLOF to a third party (i.e., not to an affiliate of the selling member), then the other members have the first right of refusal to purchase those interests pro rata for the same price that the member has agreed to sell.

96. Here, despite the fact that Harbourvest agreed to sell its interests in HCLOF for \$22.5 million when they were worth more than double that, Defendants did not offer Plaintiff the chance to buy its pro rata share of those interests at the same agreed price of \$22.5 million (adjusted pro rata).

97. The transfer and sale of the interests to HCM were accomplished as part of the Harbourvest Settlement which was approved by the Bankruptcy Court.

98. Plaintiff was not informed of the fact that Harbourvest had offered its shares to Defendant HCM for \$22.5 million—which was under 50% of their true value.

99. Plaintiff was not offered the right to purchase its pro rata share of the Harbourvest interests prior to the agreement being struck or prior to court approval being sought.

100. Had Plaintiff been allowed to do so, it would have obtained the interests with a net equity value over their purchase price worth in excess of \$20 million.

101. No discovery or opportunity to investigate was afforded Plaintiff prior to lodging an objection in the Bankruptcy Court.

102. Plaintiff is entitled to specific performance or, alternatively, disgorgement, constructive trust, damages, attorneys' fees and costs.

THIRD CAUSE OF ACTION
Negligence
(By the DAF and CLO Holdco against HCM and HCFA)

103. Plaintiffs respectfully incorporate the foregoing factual averments as if fully set forth herein, and further alleges the following:

104. Plaintiffs incorporate the foregoing causes of action and note that all the foregoing violations were breaches of the common law duty of care imposed by law on each of Seery, HCFA and HCM.

105. Each of these Defendants should have known that their actions were violations of the Advisers Act, HCM's internal policies and procedures, the Company Agreement, or all three.

106. Seery and HCM owed duties of care to Plaintiffs to follow HCM's internal policies and procedures regarding both the propriety and means of trading with a customer [Harbourvest], the propriety and means of trading as a principal in an account but in a manner adverse to another customer [the DAF and Holdco], and the proper means of valuing the CLOs and other assets held by HCLOF.

107. It would be foreseeable that failing to disclose the current value of the assets in the HCLOF would impact Plaintiffs negatively in a variety of ways.

108. It would be reasonably foreseeable that failing to correctly and accurately calculate the current net asset value of the market value of the interests would cause Plaintiffs to value the Harbourvest Interests differently.

109. It would be reasonably foreseeable that referring to old and antiquated market quotations and/or valuations of the HCLOF assets or interests would result in a mis-valuation of HCLOF and, therefore, a mis-valuation of the Harbourvest Interests.

110. Likewise, it would have been foreseeable that Plaintiff's failure to give Plaintiff the opportunity to purchase the Harbourvest shares at a \$22.5 million valuation would cause Plaintiff damages. Defendants knew that the value of those assets was rising. They further knew or should have known that whereas those assets were sold to HCM for an allowance of claims to be funded in the future, selling them to Plaintiff would have provided the estate with cash funds.

111. Defendants' negligence foreseeably and directly caused Plaintiff harm.

112. Plaintiff is thus entitled to damages.

FOURTH CAUSE OF ACTION
Racketeering Influenced Corrupt Organizations Act
(CLO Holdco and DAF against HCM)

113. Plaintiffs respectfully incorporate the foregoing factual averments as if fully set forth herein, and further alleges the following:

114. Defendants are liable for violations of the Racketeer Influenced and Corrupt Organizations ("RICO") Act, 18 U.S.C. § 1961 *et seq.*, for the conduct of an enterprise through a pattern of racketeering activity.

115. HCLOF constitutes an enterprise under the RICO Act. Additionally, or in the alternative, HCM, HCLA, and HCLOF constituted an association-in-fact enterprise. The purpose of the association-in-fact was the perpetuation of Seery's position at HCM and using the

Harbourvest settlement as a vehicle to enrich persons other than the HCLOF investors, including Holdco and the DAF, and the perpetuation of HCM's holdings in collateralized loan obligations owned by HCLOF, while attempting to deny Plaintiffs the benefit of its rights of ownership.

116. The association-in-fact was bound by informal and formal connections for years prior to the elicited purpose, and then changed when HCM joined it in order to achieve the association's illicit purpose. For example, HCM is the parent and control person over HCFA, which is the portfolio manager of HCLOF pursuant to a contractual agreement—both are registered investment advisors and provide advisory and management services to HCLOF.

117. Defendants injured Plaintiffs through their continuous course of conduct of the HCM-HCLA-HCLOF association-in-fact enterprise. HCM's actions (performed through Seery and others) constitute violations of the federal wire fraud, mail fraud, fraud in connection with a case under Title 11, and/or securities fraud laws, pursuant to 18 U.S.C. § 1961(1)(B) and (D).

118. HCM operated in such a way as to violate insider trading rules and regulations when it traded with Harbourvest while it had material, non-public information that it had not supplied to Harbourvest or to Plaintiffs.

119. In or about November 2020, HCM and Harbourvest entered into discussions about settling the Harbourvest Claims. Seery's conduct of HCLOF and HCLA on behalf of HCM through the interstate mails and/or wires caused HCM to agree to the purchase of Harbourvest's interests in HCLOF.

120. On or about each of September 30, 2020, through December 31, 2020, Seery, through his conduct of the enterprise, utilized the interstate wires and/or mails to obtain or arrive at valuations of the HCLOF interests. Seery's conduct of the enterprise caused them to cease

sending the valuation reports to Plaintiffs, which eventually allowed Plaintiffs to be misled into believing that Seery had properly valued the interests.

121. On or about September 30, 2020, Seery transmitted or caused to be transmitted though the interstate wires information to HCLOF investors from HCM (via HCFA), including Harbourvest, regarding the value of HCLOF interests and underlying assets.

122. Additionally, Seery operated HCM in such a way that he concealed the true value of the HCLOF interests by utilizing the interstate wires and mails to transmit communications to the court in the form of written representations on or about December 23, 2020, and then further transmitted verbal representations of the current market value (the vastly understated one) on January 14, 2021, during live testimony.

123. However, Harbourvest was denied the full picture and the true value of the underlying portfolio. At the end of October and November of 2020, HCM had updated the net asset values of the HCLOF portfolio. According to sources at HCM at the time, the HCLOF assets were worth north of \$72,969,492 as of November 30, 2020. Harbourvest's share of that would have been \$36,484,746.

124. The HCLOF net asset value had reached \$86,440,024 as of December 31, 2021, which means that by the time Seery was testifying in the Bankruptcy Court on January 14, 2021, the fair market value of the Harbourvest Assets was \$22.5 million, when it was actually closer to \$43,202,724. Seery, speaking on behalf of HCM, knew of the distinction in value.

125. On January 14, 2021, Seery also testified that he (implying HCM, HCLA and HCLOF) had valued the Harbourvest Assets at their current valuation and at fair market value. This was not true because the valuation that was used and testified to was ancient. The ostensible purpose of this concealment was to induce Plaintiff and other interest holdings to take no action.

126. In supporting HCM’s motion to the Bankruptcy Court to approve the Harbourvest Settlement, Seery omitted the fact that HCM was purchasing the interests at a massive discount, which would violate the letter and spirit of the Adviser’s Act.

127. Seery was informed in late December 2020 at an in-person meeting in Dallas to which Seery had to fly that HCLOF and HCM had to suspend trading in MGM Studios’ securities because Seery had learned from James Dondero, who was on the Board of MGM, of a potential purchase of the company. The news of the MGM purchase should have caused Seery to revalue the HCLOF investment in MGM.

128. In or around October 2020, Seery (who controls the Board of CSS Medical) was pursuing “equatization” of CSS Medical’s debt, which would have increased the value of certain securities by 25%. In several communications through the U.S. interstate wires and/or mails, and with Plaintiffs, and the several communications with Harbourvest during the negotiations of the settlement, Seery failed to disclose these changes which were responsible in part for the ever-growing value of the HCLOF CLO portfolio.

129. Seery was at all relevant times operating as an agent of HCM.

130. This series of related violations of the wire fraud, mail fraud, and securities fraud laws, in connection with the HCM bankruptcy, constitute a continuing pattern and practice of racketeering for the purpose of winning a windfall for HCM and himself--a nearly \$30,000,000 payday under the confirmation agreement.

131. The federal RICO statute makes it actionable for one’s conduct of an enterprise to include “fraud in connection with a [bankruptcy case]”. The Advisers’ Act antifraud provisions require full transparency and accountability to an advisers’ investors and clients and does not require a showing of reliance or materiality. The wire fraud provision likewise is violated when,

as here, the interstate wires are used as part of a “scheme or artifice ... for obtaining money or property by means of false ... pretenses, [or] representations[.]”

132. Accordingly, because Defendants’ conduct violated the wire fraud and mail fraud laws, and the Advisers’ Act antifraud provisions, and their acts and omissions were in connection with the HCM Bankruptcy proceedings under Title 11, they are sufficient to bring such conduct within the purview of the RICO civil action provisions, 18 U.S.C. § 1964.

133. Plaintiffs are thus entitled to damages, treble damages, attorneys’ fees and costs of suit, in addition to all other injunctive or equitable relief to which they are justly entitled.

FIFTH CAUSE OF ACTION
Tortious Interference
(CLO Holdco against HCM)

134. Plaintiff respectfully incorporates the foregoing factual averments as if fully set forth herein and further alleges the following:

135. At all relevant times, HCM owned a 0.6% interest in HCLOF.

136. At all relevant times, Seery and HCM knew that Plaintiff had specific rights in HCLOF under the Company Agreement, § 6.2.

137. Section 6.2 of HCLOF Company agreement provides that when a member “other than ... CLO Holdco [Plaintiff] or a Highland Affiliate,” intends to sell its interest in HCLOF to a third party (i.e., not an affiliate of the member), then the other members have the first right of refusal to purchase those interests pro rata for the same price that the member has agreed to sell.

138. HCM, through Seery, tortiously interfered with Plaintiff’s contractual rights with HCLOF by, among other things, diverting the Harbourvest Interests in HCLOF to HCM without giving HCLOF or Plaintiff the option to purchase those assets at the same favorable price that HCM obtained them.

139. HCM and Seery tortiously interfered with Plaintiff's contractual rights with HCLOF by, among other things, misrepresenting the fair market value as \$22.5 million and concealing the current value of those interests.

140. But for HCM and Seery's tortious interference, Plaintiff would have been able to acquire the Harbourvest Interests at a highly favorable price. HCM and Seery's knowledge of the rights and intentional interference with these rights has caused damage to Plaintiff CLO Holdco.

141. Plaintiff is therefore entitled to damages from HCM and Seery, as well as exemplary damages.

VI.

JURY DEMAND

142. Plaintiff demands trial by jury on all claims so triable.

VII.

PRAYER FOR RELIEF

143. Wherefore, for the foregoing reasons, Plaintiffs respectfully pray that the Court enter judgment in its favor and against Defendants, jointly and severally, for:

- a. Actual damages;
- b. Disgorgement;
- c. Treble damages;
- d. Exemplary and punitive damages;
- e. Attorneys' fees and costs as allowed by common law, statute or contract;
- f. A constructive trust to avoid dissipation of assets;
- g. All such other relief to which Plaintiff is justly entitled.

Dated: April 12, 2021

Respectfully submitted,

SBAITI & COMPANY PLLC

/s/ Mazin A. Sbaiti

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EXHIBIT 12

006851

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In re:	§	
HIGHLAND CAPITAL	§	
MANAGEMENT, L.P.,	§	
	§	
Debtor,	§	
-----	§	
THE CHARITABLE DAF FUND, L.P.	§	
and CLO HOLDCO, LTD.,	§	
	§	
Plaintiffs/Appellants,	§	
	§	
v.	§	CIVIL ACTION NO. 3:21-CV-3129-B
	§	
HIGHLAND CAPITAL	§	
MANAGEMENT, L.P.,	§	
	§	
Defendant/Appellee.	§	

MEMORANDUM OPINION AND ORDER

Before the Court are Appellants The Charitable DAF Fund, L.P. (Charitable DAF) and CLO Holdco, Ltd. (CLO Holdco)’s appeals from the bankruptcy court’s Motion to Dismiss Order and Motion to Stay Order. For the reasons that follow, the Motion to Dismiss Order is **REVERSED** and **REMANDED**. The Motion to Stay Order is **AFFIRMED**.



I.

BACKGROUND¹

These are consolidated appeals from an adversary proceeding in a bankruptcy case. The Debtor, Highland Capital Management, L.P. (HCM), filed for Chapter 11 bankruptcy on October 16, 2019, in the United States Bankruptcy Court for the District of Delaware and that court transferred venue to the United States Bankruptcy Court for the North District of Texas. *In re Highland Cap. Mgmt. L.P.*, 2022 WL 780991, at *1 (Bankr. N.D. Tex. Mar. 11, 2022).

In 2017, Charitable DAF—through the holding entity CLO Holdco—purchased 49.02% of the available shares of Highland CLO Funding, Ltd. (HCLOF) based upon investment advice from HCM.² Doc. 9, Appellant’s Br., 5. Another entity, HarbourVest, acquired 49.98% of the HCLOF shares and HCM and its employees acquired the remaining 1%. *Id.*; Doc. 21, Appellee’s Br., 7. A company agreement (the HCLOF Member Agreement) governing the rights and obligations of HCLOF shareholders purportedly prohibited a member from “sell[ing] shares to another member without first providing all other members the right to purchase a pro rata portion thereof at the same price” (the Right of First Refusal). Doc. 9, Appellant’s Br., 6. The value of the HCLOF shares fluctuated throughout the bankruptcy proceedings; the actual value is one of the issues giving rise to some of Charitable DAF’s causes of action. *Id.* at 6–7; R. at 551–65.

¹ Because these are two consolidated appeals with separate appellate records, the Court indicates when it switches between the separate appellate records by footnotes. The Appellant’s Brief and record cites in this Background section are in Doc. 6 in case No. 3:22-CV-0695-B. Appellee’s Brief, which was filed after consolidation, is in case No. 21-CV-3129-B.

² Except where otherwise stated, the Court refers to Charitable DAF and CLO Holdco collectively as Charitable DAF because Charitable DAF controls and owns CLO Holdco and both entities have the same director. Doc. 21, Appellee’s Br., 7 & n.6. Appellant Charitable DAF does not dispute this relationship and imputes the actions of CLO Holdco to itself throughout Appellant’s brief. See Doc. 9, Appellant’s Br., 13–14 (imputing the Objection to both Appellants).

During the bankruptcy, “HarbourVest filed proof of claims against [HCM] totaling over \$300 million, notionally.” Doc. 9, Appellant’s Br., 6. As part of the settlement for these claims, “HarbourVest agreed to sell its interest in HCLOF to [HCM].” *Id.* at 8. HCM would then have majority ownership of HCLOF. *See id.* at 5; Doc. 21, Appellee’s Br., 7. “CLO Holdco filed an objection to the settlement, contending that the HCLOF Member Agreement entitled [CLO] Holdco to a Right of first Refusal” (the Objection). Doc. 9, Appellant’s Br., 8. At the beginning of the settlement hearing (the Rule 9019 Settlement Hearing), CLO Holdco withdrew its Objection. Doc. 21, Appellee’s Br., 10–11; R. at 6269–70. After overruling the remaining objections from the other parties, the bankruptcy court approved the HarbourVest Settlement. Doc. 9, Appellant’s Br., 9.

This Adversary Proceeding stems from the complaint filed by Appellants on April 12, 2021, in this Court in *Charitable DAF Fund, L.P. et al. v. Highland Capital Management, L.P., et al.*, Case No. 3:21-CV-0842-B. *Id.*; Complaint, *Charitable DAF Fund, L.P. v. Highland Cap. Mgmt., L.P.*, No. 3:21-CV-0842-B (N.D. Tex. Apr. 12, 2021), Doc. 1. On September 20, 2021, this Court referred that case to the bankruptcy court for “docket[ing] as an Adversary Proceeding associated with the consolidated Chapter 11 Bankruptcy of Highland Capital Management, L.P.” Order of Reference, *Charitable DAF Fund, L.P. v. Highland Cap. Mgmt., L.P.*, No. 3:21-CV-0842-B (N.D. Tex. Sept. 20, 2021), Doc. 64. During the Adversary Proceeding, Appellants moved for a stay of the case (the Motion to Stay) and Appellees moved to dismiss the case (the Motion to Dismiss). R. at 1634–67, 3248–52. On November 23, 2021, the bankruptcy court held a hearing on the Motion to Stay and Motion to Dismiss. *Id.* at 5951. The bankruptcy court denied the Motion to Stay at the hearing and later entered an order granting the Motion to Dismiss, dismissing all causes of action with prejudice. *Id.* at 5977; *In re Highland*, 2022 WL 780991, at *12. Appellants promptly appealed both orders; this

Court consolidated the appeals. *In re Highland Cap. Mgmt.*, 2022 WL 2193000, at *1, *4 (N.D. Tex. June 17, 2022). While the appeals were pending, the Fifth Circuit affirmed the HCM reorganization plan (the Plan), but vacated the exculpatory provision “as to all parties *except* [HCM], the Committee and its members, and the Independent Directors for conduct within the scope of their duties.” *Highland Cap. Mgmt., L.P. v. NexPoint Advisors, L.P.*, 2022 WL 3571094, at *14 (5th Cir. Aug. 19, 2022).

The appeals are fully briefed and ripe for review. The Court considers them below.

II.

LEGAL STANDARDS

Final judgments, orders, and decrees of a bankruptcy court may be appealed to a federal district court. 28 U.S.C. § 158(a). Because the district court functions as an appellate court in this scenario, it applies the same standards of review that federal appellate courts use when reviewing district court decisions. *In re Webb*, 954 F.2d 1102, 1103–04 (5th Cir. 1992) (citations omitted).

A. *Rule 12(b)(6) Motion to Dismiss for Failure to State a Claim*

Under Federal Rule of Civil Procedure 8(a)(2), a complaint must contain “a short and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). Rule 12(b)(6) authorizes a court to dismiss a plaintiff’s complaint for “failure to state a claim upon which relief can be granted.” Fed. R. Civ. P. 12(b)(6). In considering a Rule 12(b)(6) motion to dismiss, “[t]he court accepts all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff.” *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 205 (5th Cir. 2007). But the court will “not look beyond the face of the pleadings to determine whether relief should be granted based on the alleged facts.” *Spivey v. Robertson*, 197 F.3d 772, 774 (5th Cir. 1999).

To survive a motion to dismiss, plaintiffs must plead “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). “Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* “The plausibility standard is not akin to a ‘probability requirement’ but it asks for more than a sheer possibility that a defendant has acted unlawfully.” *Id.* (quoting *Twombly*, 550 U.S. at 556). When well-pleaded facts fail to meet this standard, “the complaint has alleged—but it has not shown—that the pleader is entitled to relief.” *Id.* at 679 (quotation marks and alterations omitted).

B. *Motion to Stay*

Incidental to a court’s inherent power to control its docket is the power to stay proceedings before it. *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936). A court considers four factors when determining whether to stay a case pending appeal: “(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.” *Veasey v. Perry*, 769 F.3d 890, 892 (5th Cir. 2014) (quoting *Nken v. Holder*, 556 U.S. 418, 426 (2009)). “The first two factors of the traditional standard are the most critical.” *Barber v. Bryant*, 833 F.3d 510, 511 (5th Cir. 2016) (quoting *Nken*, 556 U.S. at 434).

III.

ANALYSIS

The Court begins with the appeal of the Motion to Dismiss Order because it can only review the appeal of the Motion to Stay Order if it reverses the bankruptcy court's decision to dismiss the causes of action in the adversary proceeding. *In re Highland*, 2022 WL 2193000, at *2. Finding reversal of the Motion to Dismiss Order warranted, the Court then reviews the appeal of the Motion to Stay Order.

A. *Appeal of the Motion to Dismiss Order*³

Charitable DAF raises three issues in its appeal of the Motion to Dismiss Order: (1) whether the bankruptcy court “commit[ted] reversible error by sua sponte dismissing this action on the basis of collateral estoppel without giving notice and an opportunity to respond”; (2) whether collateral estoppel barred Charitable DAF's claims when the claims were adjudicated in a Rule 9019 Settlement Hearing; and (3) whether the bankruptcy court's application of judicial estoppel erroneously relied on a transcription error, an ostensibly inconsistent position of Charitable DAF, or a failure to conclude that “subsequently discovered evidence . . . render[ed] the ostensible inconsistency ‘inadvertent.’” Doc. 9, Appellant's Br., 2.

An appellate court reviews a dismissal under Rule 12(b)(6) de novo. *Stripling v. Jordan Prod. Co., LLC*, 234 F.3d 863, 868 (5th Cir. 2000). “[T]he application of collateral estoppel is” also reviewed de novo. *Id.* (quoting *United States v. Brackett*, 113 F.3d 1396, 1398 (5th Cir. 1997)). However, “a [bankruptcy] court's decision to invoke the equitable doctrine of judicial estoppel [is reviewed] for abuse of discretion.” *Cox v. Richards*, 761 F. App'x 244, 246 (5th Cir. 2019) (citing

³ For this appeal, the record and document citations are in case No. 3:22-CV-0695-B. However, Appellee's Brief is in case No. 21-CV-3129-B.

United States ex rel. Long v. GSDMIdea City, L.L.C., 798 F.3d 265, 271 (5th Cir. 2015)). Therefore, this Court reviews the bankruptcy court’s sua sponte invocation of collateral estoppel de novo, the application of collateral estoppel de novo, and the invocation of judicial estoppel for abuse of discretion. The Court addresses each in turn below.

1. Sua Sponte Dismissal

The bankruptcy court dismissed Charitable DAF’s claims with prejudice based on collateral estoppel—even though neither party raised the issue “per se”—finding their res judicata arguments relevant to the issue. *In re Highland*, 2022 WL 780991, at *7. The Court first considers whether the sua sponte application was proper.

Charitable DAF challenges the bankruptcy court’s sua sponte invocation of collateral estoppel to dismiss its claims. Doc. 9, Appellant’s Br., 11–12. Specifically, Charitable DAF argues that the bankruptcy court could “only do so if the ‘procedure employed is fair’—that is, if prior notice is given with adequate time for the plaintiff to prepare a response.” *Id.* at 12 (quoting *Carroll v. Fort James Corp.*, 470 F.3d 1171, 1177–78 (5th Cir. 2006)). The failure to provide “notice and an opportunity to dispute the claimed bases for dismissal is reversible error,” according to Charitable DAF. *Id.*

The Court disagrees. The Fifth Circuit has recognized two instances when a court may dismiss a case sua sponte on the basis of collateral estoppel: when (1) “both actions were brought in courts of the same district” or (2) “all of the relevant facts are contained in the record and . . . uncontroverted.” *OneBeacon Am. Ins. Co. v. Barnett*, 761 F. App’x 396, 399 (5th Cir. 2019) (first quoting *Trammell Crow Residential Co. v. Am. Prot. Ins. Co.*, 574 F. App’x 513, 522 (5th Cir. 2014); and then quoting *Mowbray v. Cameron Cnty.*, 274 F.3d 269, 281 (5th Cir. 2001)). This case easily

fits into the first category because all of the proceedings at issue took place in the bankruptcy court before the same judge. See *In re Highland*, 2022 WL 780991, at *7 (relying on the former category to dismiss the case). Thus, the bankruptcy court did not err by raising the collateral estoppel issue sua sponte.

This case is unlike the *Carroll* case cited by Charitable DAF, which did not involve collateral estoppel. 470 F.3d 1171. In *Carroll*, the Fifth Circuit held that a court may dismiss a case sua sponte under Federal Rule of Civil Procedure 12(b)(6) if the “procedure employed is fair[,]” which requires “both notice of the court’s intention and an opportunity to respond.” *Id.* at 1177 (quoting *Bazrowx v. Scott*, 136 F.3d 1053, 1054 (5th Cir. 1998)). The district court erred by not providing “notice or opportunity to be heard” and “did not even . . . mention [some of the dismissed] claims in its order of dismissal.” *Id.*

This case is more akin to *McIntyre v. Ben E. Keith Co.* where the Fifth Circuit upheld the district court’s sua sponte raising of the issue of res judicata to dismiss the case under Rule 12(b)(6). 754 F. App’x 262, 265 (5th Cir. 2018). In *McIntyre*, the plaintiff’s “Civil Rights Act and FLSA actions were brought before the same federal district court.” *Id.* Because the latter action closely resembled the former action, the Fifth Circuit found no reversible error with the district court’s raising the issue of res judicata sua sponte. *Id.*

First, dismissal for failure to state a claim like in *Carroll* and dismissal for collateral estoppel as in the instant case are conceptually and procedurally different. In the former, the plaintiff is in the process of attempting to “allege[] [their] best case,” *Bazrowx*, 136 F.3d at 1054, while collateral estoppel occurs after a plaintiff “alleged [their] best case” and fully litigated the issue. See *Allen v. McCurry*, 449 U.S. 90, 94 (1980). Put more succinctly, collateral estoppel eliminates “unnecessary

judicial waste” from repeated attempts at alleging the best case. *Arizona v. California*, 530 U.S. 392, 412 (2000) (quoting *United States v. Sioux Nation*, 448 U.S. 371, 432 (1980) (Rehnquist, J., dissenting)). Second, the parties addressed res judicata during oral argument and in their pleadings before the bankruptcy court. While res judicata is not collateral estoppel, it is closely related. *Hous. Prof'l Towing Ass'n v. City of Houston*, 812 F.3d 443, 447 (5th Cir. 2016) (“[R]es judicata encompasses two separate but linked preclusive doctrines: (1) true res judicata or claim preclusion and (2) collateral estoppel or issue preclusion.”). Thus, the bankruptcy court employed a fair procedure by allowing the parties to litigate the issues, including res judicata, before dismissing the case sua sponte. See generally *Carver v. Atwood*, 18 F.4th 494, 497 (5th Cir. 2021) (“District courts may, for appropriate reasons, dismiss cases *sua sponte*.”).

The Court next considers whether the bankruptcy court’s substantive application of collateral estoppel was proper.

2. Collateral Estoppel

“Collateral estoppel prevents litigation of an issue when: ‘(1) the identical issue was previously adjudicated; (2) the issue was actually litigated; and (3) the previous determination was necessary to the decision.’”⁴ *Bradberry v. Jefferson Cnty.*, 732 F.3d 540, 548 (5th Cir. 2013) (quoting *Pace v. Bogalusa City Sch. Bd.*, 403 F.3d 272, 290 (5th Cir. 2005)). “Relitigation of an issue is not precluded unless the facts and the legal standard used to assess them are the same in both proceedings.” *In re Southmark Corp.*, 163 F.3d at 932.

Charitable DAF attacks each element of collateral estoppel, so the Court addresses each

⁴ Appellant lists a fourth element occasionally referenced by the Fifth Circuit—“there is no special circumstance that would make it unfair to apply the doctrine”—but the Court finds no reason to address this possible fourth element in this case. See *In re Southmark Corp.*, 163 F.3d 925, 932 n.9 (5th Cir. 1999) (declining to apply the fourth element because appellant “failed to support it factually”).

element individually.

i. Identical issue

The bankruptcy court found “(a) consideration of the value that the estate was both receiving and paying, as well as (b) the potential existence of a ‘Right of First Refusal’ . . . [were] the gravamen of [Charitable DAF’s] Complaint.” *In re Highland*, 2022 WL 780991, at *9 (emphasis omitted). During the settlement hearing, the bankruptcy court had to determine whether the HarbourVest Settlement “was ‘fair and equitable’ and in the ‘best interests of creditors,’ and whether it was the ‘product of arms-length bargaining, and not of fraud or collusion[.]’” *Id.* at *8. This determination entailed “arguments and evidence regarding the methodology for the valuation of the HCLOF interest and the existence or non-existence of a ‘Right of First Refusal.’” *Id.*

Charitable DAF argues that the issues are not identical because the Objection “only addressed whether HarbourVest . . . had performed all conditions precedent to being able to transfer the interest to Highland *as another co-investor*” and did not present an identical claim “for breach of the HCLOF [Member] Agreement” and associated damages. Doc. 9, Appellant’s Br., 13–14. Further, “even if this one contract issue was fully . . . litigated,” only the second cause of action in Charitable DAF’s complaint arguably parallels that issue, according to Charitable DAF—the others are distinct. *Id.* at 14–15. Charitable DAF contends that these non-contract causes of action rely on evidence that was not known at the Rule 9019 Settlement Hearing, “stem from events that either occurred post-hearing, or were not discovered until after the hearing.” *Id.* at 15.

The Court finds the issues are identical. CLO Holdco’s Objection specifically argued:

Harbourvest has no authority to transfer its interests in HCLOF without first complying with the Right of First Refusal. The only way to effectuate such a transfer without first providing other members the Right of First Refusal is an intentionally

inaccurate interpretation of the Member Agreement’s contractual provisions that would render specific passages redundant and meaningless.

R. at 4730. The bankruptcy court also heard argument and testimony from Seery, HCM’s chief executive and chief restructuring officer, and Pugatch, a managing director of HarbourVest, about the valuation of HCLOF’s assets at the settlement hearing. *Id.* at 6273, 6292, 6303–05 (“The twenty-two and a half [million] is the current—actually, the November value of HCLOF—the HarbourVest interests in HCLOF.”), 6358, 6374 (“The current value is right around \$22-1/2 million.”).

In the Original Complaint, Charitable DAF brought five causes of action: breach of fiduciary duties, breach of the HCLOF Member Agreement, negligence, RICO, and tortious interference. *Id.* at 551–65. The breach of fiduciary duties and negligence causes of action center around the alleged concealment of the rising value of HCLOF’s assets and failing to offer the purchase of the assets to CLO Holdco or Charitable DAF before offering to HCM. *Id.* at 553–55, 559–60. The breach of the HCLOF Member Agreement cause of action encompasses the Right of First Refusal in the agreement. *Id.* at 558–59. The RICO cause of action alleges that HCM used mail and wire fraud “to obtain or arrive at valuations of the HCLOF interests,” and “conceal[] the true value of the HCLOF interests.” *Id.* at 560–64. Lastly, the tortious interference cause of action stems from HCM’s alleged interference with CLO Holdco’s Right of First Refusal in the Member Agreement and “misrepresenting the fair market value” of HCLOF’s assets. *Id.* at 564–65. In sum, all of these causes of action involve either the valuation of HCLOF or the Right of First Refusal, so the issues are the same as those before the bankruptcy court at the Rule 2019 Settlement Hearing.

ii. *Actually Litigated*

The bankruptcy court found the same arguments were also actually litigated, reasoning:

The Bankruptcy Court would never have approved the HarbourVest Settlement if it thought the value being exchanged was not fair, or if it thought the HCLOF Interests could not be transferred and that someone might later sue the Debtor, claiming the Transfer was improper. All parties had the chance to argue and present evidence about this. The Bankruptcy Court made a ruling based on the evidence and argument.

In re Highland, 2022 WL 780991, at *9.

Charitable DAF argues that because the Objection was withdrawn and no one objected to the withdrawal, the issue asserted therein was not litigated. Doc. 9, Appellant's Br., 16. Additionally, it claims the Rule 9019 Settlement Hearing is not a mini-trial and, therefore, cannot serve as an opportunity for a party to litigate their claims. *Id.* at 17–18 (citing *Off. Comm. of Unsecured Creditors v. Moeller (In re Age Refin., Inc.)*, 801 F.3d 530, 541 (5th Cir. 2015)).

An issue is not actually litigated and, thus, precluded unless the legal standard in the prior action mirrors the legal standard of the latter action. *Copeland v. Merrill Lynch & Co.*, 47 F.3d 1415, 1422 (5th Cir. 1995) (citations omitted). The bankruptcy court approved the HarbourVest Settlement after applying the *Jackson Brewing* test, which considers:

(1) the probability of success in litigating the claims subject to the Settlement Agreement, with due consideration for the uncertainty in fact and law, (2) the complexity and likely duration of litigation and any attendant expense, inconvenience, and delay, and (3) all other factors bearing on the wisdom of the compromise, including: (i) the best interests of the creditors, with proper deference to their reasonable views, and (ii) the extent to which the settlement is truly the product of arms-length bargaining, and not of fraud or collusion.

R. at 5568; *see also In re Highland*, 2022 WL 780991, at *8 (quoting *Off. Comm. of Unsecured Creditors v. Moeller (In re Age Ref., Inc.)*, 801 F.3d 530, 540 (5th Cir. 2015)). Stated more succinctly, when faced with a settlement, the bankruptcy court ensures the “compromise is truly ‘fair and equitable’ and ‘in the best interest of the estate.’” *In re Jackson Brewing Co.*, 624 F.2d 599, 602 (5th

Cir. 1980) (quoting *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson* (TMT Trailer), 390 U.S. 414, 424 (1968)).

However, in the context of litigating actual claims—such as those asserted by Charitable DAF—a court applies a preponderance of the evidence standard, not the probability of success standard from *Jackson Brewing. Copeland*, 47 F.3d at 1423; *In re Zale Corp.*, 62 F.3d 746, 766 n.60 (5th Cir. 1995) (“We also note for future reference that the legal standard in a settlement hearing differs from that applicable in an adversary proceeding or state court trial Consequently, we doubt that the findings of the bankruptcy court in a settlement hearing would have preclusive effect in adversary proceedings or state court trials.”). See generally *Weaver v. Aquila Energy Mktg.*, 196 B.R. 945, 957 (S.D. Tex. 1996) (“[S]ettlement hearings and preference actions involve the application of different legal standards.”). “Examining whether a particular settlement is fair or equitable and in the best interest of the estate and creditors is a different inquiry, driven by different policies, than litigation of the actual claim.” *Copeland*, 47 F.3d at 1423. While the issues of the Right of First Refusal and the valuation of HCLOF were raised in the Rule 9019 Settlement Hearing, the parties did not fully litigate the issues as one would at trial, and the bankruptcy court did not resolve the issues according to a preponderance of the evidence standard. Because the bankruptcy court applied a legal standard in the Rule 9019 Settlement Hearing that is inapplicable to the adjudication of Charitable DAF’s causes of action, the issues were not actually litigated in the Rule 9019 Settlement Hearing and collateral estoppel does not apply.⁵ The Court **REVERSES** the bankruptcy court on this issue.

⁵ Having found the second element of collateral estoppel unmet, the Court need not address the third element—necessity of the previous determination to the prior decision.

3. Judicial Estoppel

The bankruptcy court found the elements of judicial estoppel met and barred the second and fifth causes of action, which rely on the Right of First Refusal. *In re Highland*, 2022 WL 780991, at *12. The Court now addresses whether judicial estoppel applies to Charitable DAF's second and fifth causes of action.

Judicial estoppel is an equitable common law doctrine aimed at preventing a party from asserting an inconsistent legal position from a previous proceeding. *In re Coastal Plains, Inc.*, 179 F.3d 197, 205 (5th Cir. 1999). "The purpose of the doctrine is 'to protect the integrity of the judicial process', by 'prevent[ing] parties from playing fast and loose with the courts to suit the exigencies of self interest.'" *Id.* (alteration in original) (quoting *Brandon v. Interfirst Corp.*, 858 F.2d 266, 268 (5th Cir. 1988)). A court examines three criteria when determining the applicability of judicial estoppel: "(1) the party against whom judicial estoppel is sought has asserted a legal position which is plainly inconsistent with a prior position; (2) a court accepted the prior position; and (3) the party did not act inadvertently." *Reed v. City of Arlington*, 650 F.3d 571, 574 (5th Cir. 2011) (en banc).

Charitable DAF raises arguments for each of the judicial estoppel elements, so the Court addresses each element below.

i. Inconsistent legal position

Charitable DAF argues that the bankruptcy court's determination relies on a transcription error that amounted to an admission of HCM's compliance with the Right of First Refusal. Doc. 9, Appellant's Br., 22–23. The corrected transcript makes clear that no admission was made on behalf of CLO Holdco, according to Charitable DAF. *Id.* at 23–24.

The relevant portion of the original transcript reads:

In response to Mr. Morris, I'm not going to enter into a stipulation on behalf of my client, **but** the Debtor is compliant with all aspects of the contract. We withdrew our objection, and we believe that's sufficient.

R. at 6280. The corrected transcript reads:

In response to Mr. Morris, I'm not going to enter into a stipulation on behalf of my client **that** the Debtor is compliant with all aspects of the contract. We withdrew our objection, and we believe that's sufficient.

Doc. 9-1, Appellant's Br. Ex. A, 4.

Accepting this version of the record, CLO Holdco refused to "enter into a short stipulation on the record reflecting that the Debtor's acquisition of HarbourVest's interests in HCLOF is compliant with all of the applicable agreements between the parties." *Id.*; R. at 6280. However, moments before this, CLO Holdco withdrew its Objection premised on the Right of First Refusal stating:

CLO Holdco has had an opportunity to review the reply briefing, and after doing so has gone back and scrubbed the HCLOF corporate documents. Based on our analysis of Guernsey law and some of the arguments of counsel in those pleadings and our review of the appropriate documents, I obtained authority from my client, Grant Scott, as Trustee for CLO Holdco, to withdraw the CLO Holdco objection based on the interpretation of the member agreement.

R. at 6269–70. The bankruptcy court's decision rests primarily on this earlier withdrawal of the Objection and only later buttresses its argument with the then-unknown transcription error. *In re Highland*, 2022 WL 780991, at *11 (following discussion of the withdrawal of the Objection with "[i]f that weren't enough" before mentioning the then-unknown transcription error). Thus, if the earlier withdrawal—without the transcription error—satisfies the first element of judicial estoppel then the bankruptcy court did not commit any error even if it referenced an incorrect transcription of the latter exchange.

The Court finds the bankruptcy court did not err in finding the first element of judicial estoppel. CLO Holdco made clear in the withdrawal of its objection that it no longer disputed the other parties' interpretation of the Right of First Refusal, which now forms the basis of Charitable DAF's second and fifth causes of action. *See R.* at 6269–70. Thus, the withdrawal of the objection put CLO Holdco on the opposite side of the legal argument that Charitable DAF now makes in its second and fifth causes of action. The first element of judicial estoppel is established because Charitable DAF has taken inconsistent positions in separate proceedings.

ii. *The bankruptcy court accepted the prior position*

The bankruptcy court solely relied on the withdrawal of the Objection to find the second element of judicial estoppel established. *In re Highland*, 2022 WL 780991, at *12. In the words of the bankruptcy court, it “perceived [this objection] as one of the major arguments that was relevant to the HarbourVest Settlement.” *Id.* “The [b]ankruptcy [c]ourt relied upon that withdrawal of CLO Holdco’s objection in making the determination to approve of the HarbourVest Settlement and, specifically, that Highland would not be running afoul of any obligation in entering into the HarbourVest Settlement.” *Id.*

Charitable DAF argues that there is no acceptance by the bankruptcy court of a prior position because without the transcription error, there is no admission and no inconsistent position. Doc. 9, Appellant’s Br., 25–26. Further, it contends that the withdrawal of the Objection is not the equivalent of stating the Right of First Refusal causes of action are meritless. *Id.* at 26–27.

The bankruptcy court did not err in finding the second element of judicial estoppel met because it necessarily relied on the change in CLO Holdco’s assessment of its Objection. The Right of First Refusal created a major obstacle to approval of the HarbourVest Settlement. When CLO

Holdco withdrew its Objection based on the Right of First Refusal, the Court had to accept CLO Holdco's position that the Right of First Refusal no longer posed an obstacle to the HarbourVest Settlement. Thus, the Court finds no error by the bankruptcy court for the second element of judicial estoppel.

iii. *Inadvertence of Charitable DAF*

The bankruptcy court did not examine the inadvertence of Charitable DAF in asserting inconsistent legal positions. See *In re Highland*, 2022 WL 780991, at *12.

Charitable DAF argues that it did not know the facts for several of its claims until after the settlement hearings, so it could not have asserted these claims at the hearing. Doc. 9, Appellant's Br., 27. Charitable DAF relies on the allegations surrounding the valuations of the HCLOF assets and the alleged acts violating the RICO statutes. *Id.* at 27–29. Additionally, the bankruptcy court did not address the inadvertence element for judicial estoppel and a failure to apply the correct legal standard is reversible error, Charitable DAF contends. Doc. 9, Appellant's Br., 27; Doc. 27, Appellant's Reply, 3–4.

The Court agrees with Appellant's last argument. A court abuses its discretion by applying the wrong legal standard. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990); *Def. Distrib. v. Bruck*, 30 F.4th 414, 427 (5th Cir. 2022). And the misapplication of a legal standard is reviewed de novo. *In re Woerner*, 783 F.3d 266, 270–71 (5th Cir. 2015). By not addressing the third element of judicial estoppel, the bankruptcy court applied the wrong legal standard. The Fifth Circuit implicitly recognized this third element—inadvertence—in *In re Coastal Plains, Inc.*, 179 F.3d at 206, 210, which the bankruptcy court cited for its legal standard. *In re Highland*, 2022 WL 780991, at *11. The Fifth Circuit has since clarified that “[t]his circuit . . . recognizes *three* particular requirements”

for judicial estoppel. *Kane v. Nat'l Union Fire Ins. Co.*, 535 F.3d 380, 386 (5th Cir. 2008) (emphasis added). Because the bankruptcy court did not address the inadvertence element in its order dismissing Charitable DAF's second and fifth causes of action, the bankruptcy court abused its discretion. While the district court finds no issue in the bankruptcy court's analysis of the first two elements of judicial estoppel, the bankruptcy court did not address this third element, warranting remand for determination by the bankruptcy court whether Charitable DAF acted inadvertently to change its legal position.

3. Leave to Amend

Charitable DAF requested leave to amend its complaint in its response to the motion to dismiss, R. at 2272–73, which the bankruptcy court denied by dismissing all claims with prejudice. *In re Highland*, 2022 WL 780991, at *12. The Court need not address this argument because, upon remand, the bankruptcy court will have the opportunity to reassess Charitable DAF's claims and determine whether amendment should be allowed under Federal Rule of Civil Procedure 15(a). See *Marucci Sports, L.L.C. v. Nat'l Collegiate Athletic Ass'n*, 751 F.3d 368, 378 (5th Cir. 2014) (listing factors a court considers when determining whether to allow amendment of the complaint).

C. Appeal of the Motion to Stay Order⁶

Appellant Charitable DAF raises one issue on appeal of the Motion to Stay Order: “Did the bankruptcy court err by proceeding with the case rather than staying it” when Charitable DAF was enjoined “from litigating any action against Appellee [HCM]”? Doc. 11, Appellant's Br., 2. The bankruptcy court denied Charitable DAF's Motion to Stay All Proceedings and the subsequent Amended Motion to Stay All Proceedings, reasoning:

⁶ For this appeal, the record and document citations are in case No. 3:21-CV-3129-B.

I just don't think that you have shown that, you know, either the exculpation clause or the injunction provisions of the plan somehow tie your hands in arguing the 12(b)(6) motion, defending against the 12(b)(6) motion today or I just think that your arguments reflect, frankly, a misunderstanding of how the injunction language and exculpation language applies here.

R. at 2087; *see also id.* at 4–5.

On appeal, Charitable DAF argues that the bankruptcy court erred in its denial of the motion for a stay because the Plan Confirmation Order's injunction prohibited Charitable DAF from participating in the case, “terminat[ing] any case or controversy and stripp[ing] the bankruptcy court of jurisdiction.” Doc. 11, Appellant's Br., 7. Accordingly, “[t]he bankruptcy court could only stay the case pending the [appeal of the Plan Confirmation Order's injunction], or dismiss the case as barred by the injunction[,]” Charitable DAF contends.” *Id.* at 9.

As noted above, the Fifth Circuit affirmed the Plan in all respects except one and specifically affirmed the injunction. *Highland*, 2022 WL 3571094, at *13–14. The injunction in the Plan provides that “all Enjoined Parties are and shall be permanently enjoined . . . from directly or indirectly (i) commencing, conducting, or continuing in any manner any suit, action, or other proceeding of any kind . . . against or affecting the Debtor or the property of the Debtor.” R. at 2401. And the term Enjoined Parties includes “(i) all Entities who have held, hold, or may hold Claims against or Equity Interests in the Debtor [and] . . . (iii) any Entity that has appeared and/or filed any motion, objection, or other pleading in this Chapter 11 Case.” *Id.* at 2358.

Relatedly, the Plan exculpates HCM⁷ “from, any claim, obligation, suit, judgment, damage, demand, debt, right, Cause of Action, remedy, loss, and liability for conduct occurring on or after the Petition Date in connection with or arising out of [execution of the Plan].” *Id.* at 2398. However, this exculpation provision⁸ does “not apply to (a) any acts or omissions of an Exculpated Party arising out of or related to acts or omissions that constitute bad faith, fraud, gross negligence, criminal misconduct, or willful misconduct or (b) [other specific entities actions].” *Id.* at 2398–99.

The bankruptcy court did not abuse its discretion⁹ in denying the motion for a stay of the case. The bankruptcy court found that the Plan’s injunction and exculpation provisions—which it *approved*—did not prevent Charitable DAF from pursuing its causes of action. *Id.* at 2087. In effect, the bankruptcy court held that Charitable DAF could continue to litigate its causes of action and the Court agrees. *See id.* Just like the bankruptcy court, this Court does not see how the injunction and exculpation provisions prohibit Charitable DAF from participating in the below action. The exculpation provision permits Charitable DAF to bring claims against HCM for “bad faith, fraud,

⁷ The Plan makes clear that the term Exculpated Party does not include Charitable DAF. R. at 2359 (“Exculpated Parties” means, collectively, (i) the Debtor . . . provided, however, that, for the avoidance of doubt, none of . . . the Charitable Donor Advised Fund, L.P. (and any of its subsidiaries, including CLO Holdco, Ltd., and managed entities) . . . is included in the term ‘Exculpated Party.’”).

⁸ Subsequently to this appeal, the Fifth Circuit vacated a portion of the exculpation provision. *Highland*, 2022 WL 3571094, at *12. The Fifth Circuit held that “the exculpation of certain non-debtors . . . was unlawful” so the court “str[uck] all exculpated parties from the Plan except for [HCM], the Committee and its members, and the Independent Debtors.” *Id.* Charitable DAF brings its causes of action against HCM, so what remains of the exculpation provision still applies to this case. *See id.*

⁹ The parties disagree on whether this Court reviews the denial of the stay for abuse of discretion or de novo. Doc. 11, Appellant’s Br., 6 (“Questions of law are reviewed de novo.”); Doc. 16, Appellee’s Br., 2 (“The Court reviews the bankruptcy court’s order for abuse of discretion.”). Charitable DAF does not pursue this argument in its Reply, so this argument is considered waived, *Black v. N. Panola Sch. Dist.*, 461 F.3d 584, 588 n.1 (5th Cir. 2006), as well as incorrect. *See Moore v. Tangipahoa Par. Sch. Bd.*, 507 F. App’x 389, 392 (5th Cir. 2013) (citing *Wildmon v. Berwick Universal Pictures*, 983 F.2d 21, 23 (5th Cir. 1992)) (“We review a district court’s denial of a stay pending appeal for abuse of discretion.”).

gross negligence, criminal misconduct, or willful misconduct” and Charitable DAF’s causes of action—breach of fiduciary duty, breach of contract, negligence, and RICO—appear to fit within these categories of claims. *Id.* at 490–504, 2398–99. Further, Charitable DAF continued to participate by responding to HCM’s motion to dismiss and participating in the hearing regarding the motion to dismiss. See Section III(A) *supra*. Lastly and importantly, Charitable DAF did not even attempt to address the traditional stay elements. R. at 2087 (“I guess one might say the traditional four-factor test for a stay of a proceeding has really not been the subject of the argument here for a stay.”). Without argument on the factors for a stay, this Court lacks any basis to overturn the bankruptcy court.

The bankruptcy court’s Motion to Stay Order is **AFFIRMED**.

IV.

CONCLUSION

For the foregoing reasons, the Court **REVERSES** and **REMANDS** the bankruptcy court’s Motion to Dismiss Order and **AFFIRMS** the bankruptcy court’s Motion to Stay Order.

SO ORDERED.

SIGNED: September 2, 2022.

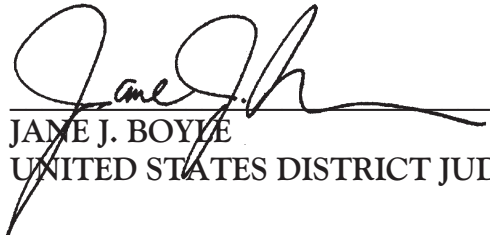

JANE J. BOYLE
UNITED STATES DISTRICT JUDGE

EXHIBIT 13

006873

Between

CLO HOLDCO, LTD.

And

HARBOURVEST DOVER STREET IX INVESTMENT L.P.

And

HARBOURVEST 2017 GLOBAL AIF L.P.

And

HARBOURVEST 2017 GLOBAL FUND L.P.

And

HV INTERNATIONAL VIII SECONDARY L.P.

And

HARBOURVEST SKEW BASE AIF L.P.

And

HIGHLAND CAPITAL MANAGEMENT, L.P.

And

LEE BLACKWELL PARKER, III

And

QUEST IRA, INC., FBO LEE B. PARKER III, ACCT. # 3058311

And

QUEST IRA, INC., FBO HUNTER COVITZ, ACCT. # 1469811

And

QUEST IRA, INC., FBO JON POGLITSCH, ACCT. # 1470612

And

QUEST IRA, INC., FBO NEIL DESAI, ACCT. # 3059211

And

HIGHLAND CLO FUNDING, LTD.

And

HIGHLAND HCF ADVISOR, LTD.

MEMBERS AGREEMENT RELATING TO THE COMPANY

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"Dover IX" shall mean HarbourVest Dover Street IX Investment L.P. (or any permitted successor to the business of HarbourVest Dover Street IX Investment L.P. or interest in the Company);

"ERISA" shall mean the U.S. Employee Retirement Income Security Act of 1974, as amended from time to time;

"ERISA Member" shall mean a Member that (a) is a "benefit plan investor" (as such term is defined in the DOL Regulations as modified by section 3(42) of ERISA) subject to the fiduciary responsibility provisions of part 4 of title I of ERISA or is a "plan" (as such term is defined in section 4975(e) of the Code) subject to section 4975 of the Code or (b) is designated as an ERISA Member by the General Partner in writing on or before the date at which such ERISA Member is admitted to the Company;

"HarbourVest Entities" means: Dover IX; HarbourVest 2017 Global AIF L.P.; HarbourVest 2017 Global Fund L.P.; HV International VIII Secondary L.P.; and HarbourVest Skew Base AIF L.P. (or any of their respective permitted successors to their businesses or interests in the Company);

"Highland Principals" means: Highland Capital Management, L.P.; Lee Blackwell Parker, III, Quest IRA, Inc., fbo Lee B. Parker III Acct. # 3058311; Quest IRA, Inc., fbo Hunter Covitz Acct. # 1469811; Quest IRA, Inc., fbo Jon Poglitsch Acct. # 1470612; Quest IRA, Inc., fbo Neil Desai Acct. # 3059211 (or any of their respective permitted successors to their businesses or interests in the Company);

"Law" means the Companies (Guernsey) Law, 2008, as amended;

"Member" means a person whose name is from time to time entered in the register of members of the Company as the holder of shares in the Company;

"Parties" means the parties to this Agreement and any other person who agrees to be bound by the terms of this Agreement under an Adherence Agreement;

"Shares" means ordinary shares in the Company;

"Subsidiary" shall have the meaning ascribed to it in the Law;

"Subscription and Transfer Agreement" means the Subscription and Transfer Agreement, dated as of 15 November 2017, entered into by and among CLO HoldCo, Ltd. and each of the Members and acknowledged and agreed by the Company and the Portfolio Manager.

Any capitalized terms used herein without definition have the meanings specified in the Offering Memorandum.

- 1.2 any reference to the Parties being obliged to procure shall so far as they are able includes, without limitation, procuring by the exercise of votes which they directly or indirectly control at meetings of the Directors or general meetings of the Company;
- 1.3 any reference to a person includes, where appropriate, that person's heirs, personal representatives and successors;
- 1.4 any reference to a person includes any individual, body corporate, corporation, firm, unincorporated association, organisation, trust or partnership;
- 1.5 any reference to time shall be to Guernsey time;
- 1.6 except where the context otherwise requires words denoting the singular include the plural and vice versa and words denoting any one gender include all genders;

1.7 unless otherwise stated, a reference to a Clause or a Schedule is a reference to a Clause or a Schedule to this Agreement; and

1.8 Clause headings are for ease of reference only and do not affect the construction of any provision.

2. THE BUSINESS OF THE COMPANY

2.1 The Parties hereby agree that the objects and purpose of the Company shall be to carry on the Business.

2.2 The Parties shall so far as they are able (including without limitation by the exercise of votes which they directly or indirectly control at meetings of the Directors or general meetings of the Company) procure that (i) the Company's principal activities shall be the pursuit of the objects and purposes described in Clause 2.1 conducted in accordance with the provisions hereof and with the Offering Memorandum, the Subscription and Transfer Agreement and Articles of the Company and (ii) the Parties shall not take any action inconsistent with the provisions of the Offering Memorandum, including, without limitation the investment strategy set forth in the "Summary" and the applicable restrictions during and after the Investment Period and the suspension or termination of the Investment Period following a Key Person Event.

2.3 The Members shall (so long as they hold shares in the capital of the Company) use all reasonable endeavours to promote and develop the Business of the Company.

3. VOTING RIGHTS

3.1 The Parties agree that the following provisions of this Clause 3 shall apply during such period or periods as the Members parties hereto are Members.

3.2 The Parties shall procure that the Company shall not take any action at any meeting requiring the sanction of an ordinary or special resolution or by written resolution, in each case of the Directors or of the Members, without the affirmative vote or prior written consent, as applicable, of the Members totalling in the aggregate more than seventy-five percent (75%) of the Company, including, but not limited to, the following actions:

3.2.1 any issuance of new shares of the Company or a new class of shares of the Company or payment of any dividend by issuance of new shares of the Company, other than issuances of Shares pursuant to the Offering Memorandum and the Subscription and Transfer Agreement;

3.2.2 any alteration or cancellation of any rights of any Shares or of the Share capital of the Company,

3.2.3 any conversion or redemption of Shares, except pursuant to Clause 5.5,

3.2.4 any payment of commission in consideration for subscribing or agreeing to subscribe for any shares in the Company,

3.2.5 the creation of any lien on any Shares, except pursuant to the remedies in Clause 5.3. or

3.2.6 the suspension of the calculation of the NAV; other than a temporary suspension of the calculation of the NAV and NAV per Share by the Board of Directors during any period if it determines in good faith that such a suspension is warranted by extraordinary circumstances, including: (i) during any period when any market on which the Company's investments are quoted, traded or dealt in is closed, other than for ordinary holidays and weekends, or during periods in which dealings are restricted or suspended; (ii) during the existence of any state of affairs, including as a result of political, economic, military or monetary events or any circumstances outside the control of the Portfolio Manager or the Company, as a result of which,

in the reasonable opinion of the Portfolio Manager, the determination of the value of the assets of the Company, would not be reasonably practicable or would be seriously prejudicial to the Members taken as a whole; (iii) during any breakdown in the means of communication normally employed in determining the price or value of the Company's assets or liabilities, or of current prices in any market as aforesaid, or when for any other reason the prices or values of any assets or liabilities of the Company cannot reasonably be accurately ascertained within a reasonable time frame; (iv) during any period when the transfer of funds involved in the realization or acquisition of any investments cannot, in the reasonable opinion of the Portfolio Manager, be effected at normal rates of exchange; or (v) automatically upon liquidation of the Company.

4. **ADVISORY BOARD.**

- 4.1 Composition of Advisory Board. The Company shall establish an advisory board (the "**Advisory Board**") composed of two individuals, one of whom shall be a representative of CLO Holdco and one of whom shall be a representative of Dover IX (or, in each case, or any permitted successor to the interest in the Company of such Member). No voting member of the Advisory Board shall be a controlled Affiliate of the Portfolio Manager (including, for the avoidance of doubt, following a permitted transfer of CLO Holdco's interest to an Affiliate of the Portfolio Manager, if applicable), it being understood that for the purposes of this sentence none of CLO Holdco, its wholly-owned subsidiaries nor any of their respective directors or trustees shall be deemed to be a controlled Affiliate of the Portfolio Manager due to their pre-existing non-discretionary advisory relationship with the Portfolio Manager. None of the members of the Advisory Board shall receive any compensation (other than reimbursement for reasonable and documented out-of-pocket expenses) in connection with their position on the Advisory Board. The Company shall bear any fees, costs and expenses related to the Advisory Board.
- 4.2 Meetings of Advisory Board; Written Consents. The Advisory Board shall meet with the Portfolio Manager at such times as requested by the Portfolio Manager from time to time. The quorum for a meeting of the Advisory Board shall be all of its members entitled to vote. All actions taken by the Advisory Board shall be (i) by a unanimous vote of all of the members of the Advisory Board in attendance in a meeting at which a quorum is present and entitled to vote and not abstaining from voting or (ii) by a written consent in lieu of a meeting signed by all of the members of the Advisory Board entitled to consent and not abstaining from consenting. Meetings of the Advisory Board may be held in person, by telephone or by other electronic device.
- 4.3 Functions of Advisory Board. The Advisory Board shall provide (or determine not to provide) any consents or approvals expressly contemplated by this Agreement and the Offering Memorandum to be provided by the Advisory Board and, at the request of the Portfolio Manager in its sole discretion, provide general advice (which, for the avoidance of doubt, shall be non-binding) to the Portfolio Manager or the Company with regard to Company activities and operations and other matters. For the avoidance of doubt, no consent or approval of the Advisory Board shall be required for any action or determination expressly permitted or contemplated hereunder or in the Offering Memorandum and not conditioned on such a consent or approval. The Portfolio Manager shall not act contrary to the advice of the Advisory Board with respect to any action or determination expressly conditioned herein or in the Offering Memorandum on the consent or approval of the Advisory Board. Without limiting the foregoing, the Advisory Board shall be authorized to give any approval or consent required or deemed necessary or advisable under the Advisers Act on behalf of the Company and the Members, including under Section 206(3) of the Advisers Act. The Portfolio Manager may from time to time in its discretion request the Advisory Board to review and ratify certain Company matters. The consent of the Advisory Board shall be required to approve the following actions: (i) any extension of the Investment Period; (ii) any extension of the Term (other than an automatic extension following an extension of the Investment Period that has been approved by the Advisory Board); (iii) any allotment of additional equity securities by the Company; and (iv) any investment in a Related Obligation or any other transaction between the Company or any entity in which the Company holds a direct or indirect interest, on the one hand, and Highland or any of its Affiliates, on the other hand and (v) other matters as set forth in the Offering

Memorandum. Notwithstanding the foregoing or anything to the contrary set forth herein, no transaction that is specifically authorized in the governing documents of the Company shall require approval of the Advisory Board, including, without limitation, sales or securitizations of all or a portion of the Company's loan portfolio into new Qualifying CLOs (i.e. the transfer of warehoused assets into new Qualifying CLOs), investments in CLO Notes issued by CLOs managed by Highland Affiliates, and the NexBank Credit Facility and any Permitted NexBank Credit Facility Amendments, in each case as described in the Offering Memorandum. Any such approval, consent or ratification given by the Advisory Board shall be binding on the Company and the Members. Neither the Advisory Board nor any member thereof shall have the power to bind or act for or on behalf of the Company in any manner, and no shareholder who appoints a member of the Advisory Board shall be deemed to be an Affiliate of the Company or Highland solely by reason of such appointment.

- 4.4 Term of Members of Advisory Board. A member of the Advisory Board shall be deemed removed from the Advisory Board (i) if such member is no longer an officer, director, manager, trustee, employee, consultant or other representative of CLO Holdco or Dover IX, as applicable, or their respective Affiliates and shall be replaced as soon as practicable with a representative of CLO Holdco or Dover IX, or their respective Affiliates, as applicable, or (ii) if the Member represented by such member either becomes a Defaulting Member or such member ceases to be eligible to represent such Member pursuant to Clause 4.1.
- 4.5 No Duties to Other Members. No Advisory Board member who is the representative of any Member shall, to the extent permitted by law, owe a fiduciary duty to the Company or any other Member (other than the duty to act in good faith), and may, to the fullest extent permitted by law, in all instances act in such member's own interest and in the interest of the Member that appointed such member.

5. **DEFAULTING MEMBERS**

- 5.1 In the event any Member defaults in its obligation to pay the full amount of the purchase price of Shares called for settlement under the Subscription and Transfer Agreement on the applicable Settlement Date (such unpaid amount, an "**Outstanding Settlement Amount**"), the Portfolio Manager, on behalf of the Company, shall provide written or telephonic notice of such default to such Member. If such default is not cured within 5 business days after written (or if applicable telephonic or email) notice thereof given by the Portfolio Manager, on behalf of the Company, has been received by such Member, such Outstanding Settlement Amount shall automatically accrue interest on a retroactive basis from the date such Outstanding Settlement Amount was due at 12% (the "**Default Interest Rate**") (which interest, once paid, shall not be applied to the purchase of the unsettled Shares of such Member, but which will upon receipt be distributed pro rata to those Members who have funded any such Outstanding Settlement Amounts pursuant to this Clause 5). No such Shares which have failed to be settled will be issued to any Member until settlement of the full amount of the purchase price has been made. In addition, if such default is not cured within 10 business days after written or telephonic notice thereof given by the Portfolio Manager, on behalf of the Company, has been received by such Member (a "**Defaulting Member**"), the following provisions shall apply:
- 5.2 Whenever the vote or consent of the Defaulting Member would otherwise be required or permitted hereunder or under the Articles, the Defaulting Member shall not be entitled to participate in such vote or consent in respect of his existing shareholding and with respect to any representative of such Defaulting Member on the Advisory Board, and such vote or consent shall be calculated as if such Defaulting Member were not a Member and, as applicable, any representative of such Defaulting Member on the Advisory Board were not a member of the Advisory Board.
- 5.3 The Portfolio Manager, on behalf of the Company, may pursue and enforce all rights and remedies available, including the commencement of legal proceedings against the Defaulting Member to collect the Outstanding Settlement Amounts, together with interest thereon for the account of the Company from the date due at the Default Interest Rate, plus the costs and expenses of collection (including attorneys' fees and expenses).

- 5.4 The Portfolio Manager, on behalf of the Company, may (at the sole cost of the Defaulting Member) borrow funds from any person (other than the Defaulting Member or its Affiliates) to cover such shortfall and/or advance all or a portion of the Defaulting Member's Outstanding Settlement Amount to the Company on behalf of the Defaulting Member, and such advance shall be repaid by the Defaulting Member to the Portfolio Manager, on behalf of the Company, with interest for the account of the Portfolio Manager, on behalf of the Company, on the amount outstanding from time to time commencing on the date of the advance at the Default Interest Rate. To the extent the Portfolio Manager, on behalf of the Company, advances funds to the Company on behalf of a Defaulting Member, all distributions from the Company that would otherwise be made to the Defaulting Member shall be paid to the Portfolio Manager, on behalf of the Company, (with any such amounts being applied first against accrued but unpaid interest and then against principal), until all amounts payable by the Defaulting Member to the Portfolio Manager, on behalf of the Company, under this Clause 5.4 (including interest) have been paid in full.
- 5.5 The Portfolio Manager, on behalf of the Company, may elect, upon notice to the Defaulting Member, to redeem the Defaulting Member's shares in an amount equal to 50% of the outstanding amount existing as of the date of the default at a price of \$0.0001 per Share. Thereupon, the commitment of the Defaulting Member under the Subscription and Transfer Agreement shall be zero, the Defaulting Member shall not be obligated to make any further settlements, the voting capital of such Defaulting Member and of each other Member shall be re-determined as of the date of such default to reflect the new commitment of the Defaulting Member, and the Portfolio Manager shall revise the books and records of the Company to reflect the reduction of the commitment of the Defaulting Member. The Members agree (x) that the damages suffered by the Company as the result of a failure by a Member to settle a commitment to purchase Shares that is required by this Agreement cannot be estimated with reasonable accuracy and (y) that the foregoing provisions of this Clause 5.5 shall act as liquidated damages for the default by the Defaulting Member (which each Member hereby agrees are reasonable).
- 5.6 The Board may offer to the non-Defaulting Members (pro rata in accordance with their respective Commitments) the option of purchasing the Defaulting Member's unsettled Shares on the terms set forth in the applicable Settlement Notice (as defined in the Subscription and Transfer Agreement).
- 5.7 At the election of the Board, distributions of dividends otherwise payable to the Defaulting Member under the Articles shall not be paid to the Defaulting Member, but instead shall be applied against the amount of the Outstanding Settlement Amount (plus interest at the Default Interest Rate and related costs); provided that any amounts so applied shall be deemed to have been distributed to the Defaulting Member under the Articles.
- 5.8 The Portfolio Manager may send an amended or new Settlement Notice to the Members other than the Defaulting Member in an amount equal to the Defaulting Member's Outstanding Settlement Amount and otherwise in accordance with the Subscription and Transfer Agreement.
- 5.9 Each Defaulting Member further appoints the Portfolio Manager as agent and attorney-in-fact for the Defaulting Member and hereby grants to the Portfolio Manager an irrevocable power of attorney to take all actions necessary on its behalf to sell, assign, or transfer the commitment to purchase unsettled Shares of such Defaulting Member pursuant to Clause 5.6 or as necessary on its behalf to effect the other remedies or rights set forth in this Clause 5; provided that the Portfolio Manager shall not bind any Defaulting Member to an indemnification or other similar obligation which guarantees the financial performance of the Company or which exceeds the ability of the Defaulting Member to provide indemnification under applicable law.

6. TRANSFERS OR DISPOSALS OF SHARES

- 6.1 No Member shall sell, pledge, charge, mortgage, assign, assign by way of security, transfer, convey, exchange or otherwise dispose of its Shares or its commitment to settle purchases of Shares under the Subscription and Transfer Agreement (each a "**Transfer**"), other than to an Affiliate of an initial Member party hereto, without the prior written consent of the Portfolio

Manager, which consent shall be in the sole discretion of the Portfolio Manager; provided that no such Transfer shall be made unless in the opinion of counsel reasonably satisfactory to the Portfolio Manager (who may be counsel for the Company, and which requirement for an opinion may be waived, in whole or in part, in the sole discretion of the Portfolio Manager) that:

- 6.1.1 such Transfer would not require registration under the Securities Act or any state securities or "Blue Sky" laws or other laws applicable to the Shares to be assigned or transferred and is conducted in conformance with the restrictions set forth in the Offering Memorandum;
 - 6.1.2 such Transfer would not be reasonably likely to cause the Company to be subject to tax in any jurisdiction other than of its incorporation on a net income basis, not be reasonably likely to cause the Company to become subject to registration as an investment company under the Investment Company Act of 1940, as amended;
 - 6.1.3 such Transfer would not cause the Company to be considered to be an entity whose underlying assets are considered to include "plan assets" by reason of investment by an "employee benefit plan" or "plan" in such entity pursuant to the U.S. Plan Assets Regulations; and
 - 6.1.4 such sale, assignment, disposition or transfer would not to cause all or any portion of the assets of the Company to constitute "plan assets" under ERISA or the Code.
- 6.2 Prior to making any Transfer of Shares (other than Transfers to Affiliates of an initial Member or, in the case of CLO Holdco or a Highland Principal, to Highland, its Affiliates or another Highland Principal) a Member must first offer to the other Members a right to purchase the Shares, on a pro rata basis with respect to their current Shares, at the same price (which must be cash) as such Shares are proposed to be purchased by the prospective third party purchaser pursuant to an irrevocable offer letter. The other Members will have 30 days following receipt of the letter to determine whether to purchase their entire pro rata portion of the Shares proposed to be Transferred. If the other Members do not accept the offer, the Member may (subject to complying with the other Transfer restrictions in this Agreement) Transfer the applicable Shares that such Members have not elected to purchase to a third party at a price equal to or greater than the price described in the offer letter, provided that if the Member has not (a) entered into a definitive agreement to effect such sale within 90 days after the expiration of the period that the other Members have to accept the offer in the offer letter or (b) consummated the sale within 120 day after the entry into the definitive agreement to consummate the sale, it must comply with these right of first refusal procedures again. Any Member (other than the Member proposing to Transfer its Shares) may assign its right to purchase its pro rata portion of the Shares to any other Member (subject to complying with the other Transfer restrictions in this Agreement), any initial Member (other than the Member proposing to Transfer its Shares) may assign its right to purchase its pro rata portion of the Shares to an Affiliate (subject to complying with the other Transfer restrictions in this Agreement), and CLO Holdco and the Highland Principals (unless such Member is the Member proposing the Transfer its Shares) may assign its right to purchase its pro rata portion of the Shares to Highland, an Affiliate of Highland or other Highland Principals (subject to complying with the other Transfer restrictions in this Agreement).
- 6.3 No Highland Principal may transfer his or its interests in the Company other than (i) to a trust or other tax or estate planning vehicle or (ii) to the Portfolio Manager, its Affiliates or another Highland Principal upon the termination of such Highland Principal's (or the beneficial owner of such Highland Principal, if applicable) employment by Highland Capital Management, L.P.
- 6.4 Any transferor of any Share shall remain bound by the terms of this Agreement applicable to it prior to such transfer and that nothing in this Agreement shall constitute a waiver of any rights a Party to this Agreement may have by reason of a breach of this Agreement by a transferor prior to transfer. The transferor and/or the transferee shall bear all costs of any Transfer.
- 6.5 The Parties agree not to Transfer their Shares to any person unless such transferee agrees to be bound by the terms of this Agreement.
- 6.6 All Adherence Agreements executed pursuant to this Clause shall be executed by the transferee or allottee and each Party.

HarbourVest Entities (x) all information necessary to permit such HarbourVest Entity or any of its partners to complete United States Internal Revenue Service Form 8621 with respect to their interests in the Company and (y) a PFIC Annual Information Statement under section 1295(b) of the Code with respect to the Company; provided that if the Company is unable to furnish such final information and Statement within such 120 days, then the Company shall use its reasonable best efforts to furnish estimates of such information and Statement on or before the 120th day after the end of such fiscal year.

- 11.2 CFC. The Company shall furnish to each of the HarbourVest Entities within 120 days after the end of each fiscal year of the Company, a United States Internal Revenue Service Form 5471 for such fiscal year, completed for all information concerning the Company required to be filed by such HarbourVest Entity or any of its partners (i.e., all portions applicable to the relevant category of filer other than page 1 items A-D and page 2 Schedule B), to the extent such Form 5471 is required to be filed by such HarbourVest Entity or any of its partners; provided that if the Company is unable to furnish such final information within such 120 days, then the Company shall use its reasonable best efforts to furnish estimates of such information on or before the 120th day after the end of each fiscal year.
- 11.3 Other Tax Information. The Company shall furnish to each of the HarbourVest Entities (a) within 120 days after the end of each fiscal year of the Company such other information reasonably requested by the HarbourVest Entities that any HarbourVest Entity may require in order for it or any of its partners to comply with its U.S. federal income tax reporting obligations with respect to its interest in the Company; provided that if the Company is unable to furnish such final information within such 120 days, then the Company shall use its reasonable best efforts to furnish estimates of such information on or before the 120th day after the end of such fiscal year and (b) promptly upon request such other information reasonably requested by such HarbourVest Entity in order to withhold tax or to file tax returns and reports or to furnish tax information to any of its partners with respect to the Company.
- 11.4 Withholding and Other Taxes. The Company will use reasonable best efforts to acquire investments that will not result in withholding or other taxes being imposed directly or indirectly on the Company by any jurisdiction with respect to income or distributions from such investments.

12. **AMENDMENTS TO CERTAIN AGREEMENTS**

- 12.1 The Portfolio Manager and the Company shall not amend or terminate, or agree to amend or terminate, the Memorandum or Articles of Incorporation of the Company or that certain Portfolio Management Agreement between the Portfolio Manager and the Company dated as of the date hereof (the "**Management Agreement**") without the consent of the Parties.
- 12.2 The Portfolio Manager agrees that it shall not assign its rights, duties and obligations under the Management Agreement without the consent of the Members totalling in the aggregate more than seventy-five percent (75%) of the Company. Notwithstanding the foregoing, the Portfolio Manager may, without the consent of the Members, assign any of its rights or obligations under the Management Agreement to an Affiliate; provided that such Affiliate (A) has demonstrated ability, whether as an entity or by its personnel, to professionally and competently perform duties similar to those imposed upon the Portfolio Manager pursuant to the Management Agreement, (B) has the legal right and capacity to act as Portfolio Manager thereunder and (C) shall not cause the Company or the pool of collateral to become required to register under the provisions of the Investment Company Act and such action does not cause the company to be subject to tax in any jurisdiction outside of its jurisdiction of incorporation.
- 12.3 The Company agrees that it shall not hire any portfolio manager without the consent of the Parties and such new portfolio manager shall be required to join and abide by this Agreement.

13. **FINANCIAL REPORTS**

- 13.1 The books and records of account of the Company shall be audited as of the end of each fiscal year of the Company by a nationally recognized independent public accounting firm selected by

the Portfolio Manager that is registered with, and subject to regular inspection as of the commencement of the professional engagement period, and as of each calendar year-end, by, the Public Company Accounting Oversight Board in accordance with its rules. During the Term, the Portfolio Manager or the Company shall prepare and mail, deliver by fax, email or other electronic means or otherwise make available a financial report (audited in the case of a report sent as of the end of a fiscal year and unaudited in the case of a report sent as of the end of a quarter) to each Member on or before the 120th day after the end of each fiscal year and the 45th day after the end of each of the first three quarters of each fiscal year, setting forth for such fiscal year or quarter (a) the assets and liabilities of the Company as of the end of such fiscal year or quarter; (b) the net profit or net loss of the Company for such fiscal year or quarter; and (c) such Member's closing capital account balance as of the end of such fiscal year or quarter; provided that if the Portfolio Manager or the Company is unable to furnish final information with respect to any of the above, then the Portfolio Manager or the Company shall use its reasonable best efforts to furnish estimates of such information on or before the 120th day after the end of each fiscal year and the 45th day after the end of the first three quarters of each fiscal year. On or before the 60th day after the end of each fiscal year, the Portfolio Manager or the Company shall provide to each Member an unaudited draft of the financial report for such fiscal year.

- 13.2 After the end of each fiscal year or quarter, the Portfolio Manager or the Company shall cause to be delivered to the Advisory Board a reasonably detailed summary of the expenses incurred by the Company during such period.

14. TERMINATION AND LIQUIDATION

- 14.1 Save as provided for in Clause 13.2, this Agreement shall terminate:

- 14.1.1 when one Party holds all the Shares;
- 14.1.2 when a resolution is passed by the Company's Members or creditors, or an order made by a court or other competent body or person instituting a process that shall lead to the Company being wound up and its assets being distributed among the Company's creditors, Members or other contributors; or
- 14.1.3 with the written consent of all the Parties.

- 14.2 The following provisions of this Agreement remain in full force after termination: Clause 1 (Interpretation), Clause 7 (Confidentiality), this Clause, Clause 14 (Whole Agreement), Clause 16 (Assignments), Clause 17 (Variation and Waiver), Clause 18 (Service of Notice), Clause 19 (General) and Clause 21 (Governing Law and Jurisdiction).

- 14.3 Termination of this Agreement shall not affect any rights or liabilities that the Parties may have accrued under it.

- 14.4 Where the Company is to be wound up and its assets distributed, the Parties shall agree a suitable basis for dealing with the interests and assets of the Company and shall endeavour to ensure that:

- 14.4.1 all existing contracts of the Company are performed to the extent that there are sufficient resources;
- 14.4.2 the Company shall not enter into any new contractual obligations;
- 14.4.3 the Company is dissolved and its assets are distributed as soon as practical; and
- 14.4.4 any other proprietary information belonging to or originating from a Party shall be returned to it by the other Parties.

15. **WHOLE AGREEMENT**

- 15.1 This Agreement, and any documents referred to in it, constitute the whole agreement between the Parties and supersede any arrangements, understanding or previous agreement between them relating to the subject matter they cover.
- 15.2 Each Party acknowledges that in entering into this Agreement, and any documents referred to in it, it does not rely on, and shall have no remedy in respect of, any statement, representation, assurance or warranty of any person other than as expressly set out in this Agreement or those documents.
- 15.3 Nothing in this Clause 14 operates to limit or exclude any liability for fraud.

16. **STATUS OF AGREEMENT**

- 16.1 Each Party shall, to the extent that it is able to do so, exercise its voting rights and other powers in relation to the Company to procure that the provisions of this Agreement are properly and promptly observed and given full force and effect according to the spirit and intention of the Agreement.
- 16.2 If any provision in the memorandum of incorporation of the Company or the Articles conflicts with any provision of this Agreement, the provisions of this Agreement shall prevail as between the Parties. Each of the Parties shall, to the extent that it is able to do so, exercise its voting rights and other powers in relation to the Company to procure the modification of the memorandum of association of the Company or the Articles (as the case may be) in order to eliminate the conflict, but this Agreement shall not itself constitute a modification of the memorandum of association of the Company or the Articles.

17. **ASSIGNMENTS**

Save as expressly permitted by this Agreement, no person may assign, or grant any security interest over, any of its rights under this Agreement or any document referred to in it without the prior written consent of the Parties.

18. **VARIATION AND WAIVER**

- 18.1 A variation of this Agreement shall be in writing and signed by or on behalf of the Parties.
- 18.2 A waiver of any right under this Agreement is only effective if it is in writing and it applies only to the person to which the waiver is addressed and the circumstances for which it is given.
- 18.3 A person that waives a right in relation to one person, or takes or fails to take any action against that person, does not affect its rights against any other person.

19. **SERVICE OF NOTICE**

- 19.1 Any notice required to be given by any of the Parties may be sent by post or facsimile to the address and facsimile number of the addressee as set out in this Agreement, in either case marked for the attention of the relevant person named below, or to such other address and/or facsimile number and/or marked for the attention of such other person as the addressee may from time to time have notified for the purposes of this Clause.

19.1.1 to the Company:
Address:
First Floor, Dorey Court, Admiral Park
St Peter Port, Guernsey GY1 6HJ
Channel Islands

19.1.2 to CLO Holdco:

Address:
c/o Highland Capital Management, L.P.
300 Crescent Court, Suite 700
Dallas, TX 75201
Attn: General Counsel
Tel: +1 (972) 628-4100
Email: Notices@highlandcapital.com

19.1.3 to any HarbourVest Entity:

Address:
c/o HarbourVest Partners, LLC
One Financial Center, 44th Floor
Boston, MA 02111
USA
Attn: Michael Pugatch
Tel: +1 (617) 348-3712
F
Email: mpugatch@harbourvest.com

19.1.4 to any other Party: by post or hand delivery only to the address specified in the register of members of the Company.

19.2 Communications sent by post shall be deemed to have been received 24 hours after posting. Communications sent by facsimile transmission shall be deemed to have been received at the time the transmission has been received by the addressee **PROVIDED THAT** if the facsimile transmission, where permitted, is received after 5.00pm or on a day which is not a Business Day, it shall be deemed to have been received 11.00am the Business Day following thereafter.

19.3 In proving service by post it shall only be necessary to prove that the notice was contained in an envelope which was duly addressed and posted in accordance with this Clause and in the case of facsimile transmission it shall be necessary to prove that the facsimile was duly transmitted to the correct number.

20. **GENERAL**

20.1 Each of the Parties hereby agree not to enter into or abide by any agreement whether written or oral with any one or more of the other Parties in respect of the voting of Shares or the submission of Member resolutions to any Members for voting by them, or otherwise to direct or influence, or attempt to direct or influence, the day-to-day management of the Company, either directly or indirectly, other than in order to comply with the other terms of this Agreement or the Articles. In this regard, each of the Parties agrees to not to direct or influence or to attempt to direct or influence any of the Directors through any employment relationship that the Directors may have outside of the Company other than in order to comply with the other terms of this Agreement or the Articles. Each of the Parties hereby agree that this provision shall continue to apply to them whether or not they are or remain a Member.

20.2 Unless otherwise provided, all costs in connection with the negotiation, preparation, execution and performance of this Agreement, shall be borne by the Party that incurred the costs.

20.3 The Parties are not in partnership with each other and there is no relationship of principal and agent between them.

20.4 All transactions entered into between any Party and the Company shall be conducted in good faith and on the basis set out or referred to in this Agreement or, if not provided for in this Agreement, as may be agreed by the Parties and, in the absence of such agreement, on an arm's length basis.

20.5 Each Party shall at all times act in good faith towards the other Parties and shall use all reasonable endeavours to ensure that this Agreement is observed.

20.6 Each Party shall promptly execute and deliver all such documents, and do all such things, as the other Parties may from time to time reasonably require for the purpose of giving full effect to the provisions of this Agreement.

20.7 This Agreement may be executed in any number of counterparts, each of which is an original and which together have the same effect as if each Party had signed the same document. This Agreement may not be amended except with the consent of each Party.

21. STATUS OF AGREEMENT

21.1 The Parties shall, when necessary, exercise their powers of voting and any other rights and powers they have to amend, waive or suspend a conflicting provision in the Articles to the extent necessary to permit the Company and its Business to be administered as provided in this Agreement.

21.2 If there is an inconsistency between any of the provisions of this agreement and the provisions of the Articles, the provisions of this agreement shall prevail as between the Parties.

22. GOVERNING LAW AND JURISDICTION

This Agreement shall be governed by and construed in accordance with the laws of the Island of Guernsey and each of the Parties submits to the non-exclusive jurisdiction of the Royal Courts of the Island of Guernsey.

[Signature Page Follows.]

SIGNED



Lee Blackwell Parker, III

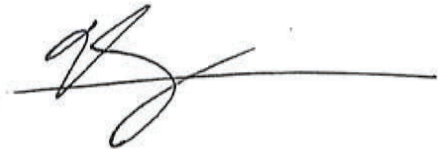
SIGNED for and on behalf of
QUEST IRA, INC.
FBO LEE B. PARKER III, ACCT. # 3058311

By:.....
Name:
Title:

SIGNED for and on behalf of
QUEST IRA, INC.
FBO HUNTER COVITZ, ACCT. # 1469811

By:.....
Name: *Emmanuel Mager*
Title: *Transaction Supervisor*

Read & Approved



SIGNED for and on behalf of
QUEST IRA, INC.
FBO JON POGLITSCH, ACCT. # 1470612

By:.....
Name:
Title:

SIGNED for and on behalf of
QUEST IRA, INC.
FBO NEIL DESAI, ACCT. # 3059211

By:.....
Name:
Title:

SIGNED for and on behalf of
QUEST IRA, INC.
FBO LEE B. PARKER III, ACCT. # 3058311

By:.....
Name:
Title:

SIGNED for and on behalf of
QUEST IRA, INC.
FBO HUNTER COVITZ, ACCT. # 1469811

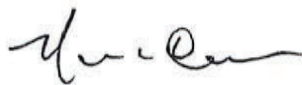
By:.....
Name:
Title:

SIGNED for and on behalf of
QUEST IRA, INC.
FBO JON POGLITSCH, ACCT. # 1470612

By:.....
Name:
Title:

SIGNED for and on behalf of
QUEST IRA, INC.
FBO NEIL DESAI, ACCT. # 3059211

By:.....
Name: Emmanuel Mader
Title: Transaction Supervisor

Read and approved


SIGNED for and on behalf of
HIGHLAND CAPITAL MANAGEMENT, L.P.

By: Strand Advisors, Inc.,
its General Partner




By:

Name: James Dondero

Title: President

SIGNED for and on behalf of
HIGHLAND HCF ADVISOR, LTD.


By:
Name: James Dondero
Title: President

SCHEDULE

Adherence Agreement

THIS ADHERENCE AGREEMENT is made on [•] 200[•]

BETWEEN:

- (1) [•] of [•] (the "**Covenantor**");
- (2) CLO HOLDCO, LTD. of [] (a "**Member**");
- (3) [•] of [] (a "**Member**");
- (4) [•] of [] (a "**Member**");
- (5) HIGHLAND CLO FUNDING, LTD., with registration number 60120 whose registered office is at First Floor, Dorey Court, Admiral Park, St Peter Port, Guernsey GY1 6HJ, Channel Islands (the "**Company**");
- (6) HIGHLAND HCF ADVISOR, LTD., registered address is at Maples Corporate Services Limited, PO Box 309, Ugland House, Grand Cayman, KY1-1104, Cayman Islands (the "**Portfolio Manager**").

RECITAL

This Agreement is supplemental to the members agreement made on November 15 2017 between the Members, the Portfolio Manager and the Company (the "**Members Agreement**").

IT IS HEREBY AGREED as follows:

1. The Covenantor hereby confirms that he has been supplied with a copy of the Members Agreement and hereby covenants with each of the parties thereto to observe, perform and be bound by all the terms of the Members Agreement as if it were a party thereto.
2. Each of the other parties to the Members Agreement hereby covenants with the Covenantor that the Covenantor shall be entitled to the benefit of the terms of the Members Agreement as if he were a party thereto.
3. This Agreement shall be governed by and construed in accordance with Guernsey law.

IN WITNESS of which this Agreement has been executed by the Covenantor and each of the parties to the Members Agreement on the date shown above.

EXHIBIT 14

006902

SECOND AMENDED AND RESTATED
INVESTMENT ADVISORY AGREEMENT

THIS SECOND AMENDED AND RESTATED INVESTMENT ADVISORY AGREEMENT (this “**Agreement**”), dated to be effective from January 1, 2017 (the “**Effective Date**”) is entered into by and between **Charitable DAF Fund, L.P.**, a Cayman Islands exempted limited partnership (the “**Fund**”), **Charitable DAF GP, LLC**, a limited liability company organized under the laws of the State of Delaware (the “**General Partner**”), the general partner of the Fund, and **Highland Capital Management, L.P.**, a limited partnership organized under the laws of the State of Delaware (the “**Investment Advisor**”). Each of the signatories hereto is sometimes referred to herein individually as a “**Party**” and collectively as the “**Parties**.”

RECITALS

WHEREAS, the Fund, the General Partner and the Investment Advisor entered into that certain Investment Advisory Agreement dated January 1, 2012 (the “**Original Agreement**”);

WHEREAS, the Parties amended and restated the Original Agreement in its entirety on the terms set forth in that certain Amended and Restated Investment Advisory Agreement dated July 1, 2014 (the “**Existing Agreement**”);

WHEREAS, the parties desire to amend and restate the Existing Agreement in its entirety with the terms as set forth in this Agreement effective as of the Effective Date;

NOW, THEREFORE, in consideration of the mutual covenants herein contained and for other good and valuable consideration, the receipt of which is hereby acknowledged, the Parties hereby agree, and the Existing Agreement is hereby amended and restated in its entirety, as follows:

1. Investment Advisory Services. Subject to Section 7, the Investment Advisor shall act as investment advisor to the Fund, the General Partner with respect to the Fund and its subsidiaries and shall provide investment advice with respect to the investment and reinvestment of the cash, Financial Instruments and other properties comprising the assets and liabilities of the Fund and its subsidiaries.

2. Custody. The Financial Instruments shall be held in the custody of Jefferies & Company, Inc. or one or more banks selected by the General Partner (each such bank, a “Custodian”). The General Partner will notify the Investment Advisor promptly of the proposed selection of any other Custodians. The Custodian shall at all times be responsible for the physical custody of the Financial Instruments; for the collection of interest, dividends, and other income attributable to the Financial Instruments; and for the exercise of rights and tenders on the Financial Instruments after consultation with and as then directed by the General Partner. At no time shall the Investment Advisor have possession of or maintain custody over any of the Financial Instruments. The Investment Advisor shall not be responsible for any loss incurred by reason of any act or omission of the Custodian.

3. Authority of the Investment Advisor. Subject to Section 7 of this Agreement, the Investment Advisor shall advise the General Partner on behalf of the Fund and/or its subsidiaries with respect to:

(a) investing, directly or indirectly, on margin or otherwise, in all types of securities and other financial instruments of United States and non-U.S. entities, including, without limitation, capital stock; all manner of equity securities (whether registered or unregistered, traded or privately offered, American Depositary Receipts, common or preferred); physical commodities; shares of beneficial interest; partnership interests, limited liability company interests and similar financial instruments; secured and unsecured debt (both corporate and sovereign, bank debt, vendor claims and/or other contractual claims); bonds, notes and debentures (whether subordinated, convertible or otherwise); currencies; interest rate, currency, equity and other derivative products, including, without limitation, (i) future contracts (and options thereon) relating to stock indices, currencies, United States Government securities, securities of non-U.S. governments, other financial instruments and all other commodities, (ii) swaps and contracts for difference, options, swaptions, rights, warrants, when-issued securities, caps, collars, floors, forward rate agreements, and repurchase and reverse repurchase agreements and other cash equivalents, (iii) spot and forward currency transactions and (iv) agreements relating to or securing such transactions; leases, including, without limitation, equipment lease certificates; equipment trust certificates; mortgage-backed securities and other similar instruments (including, without limitation, fixed-rate, pass-throughs, adjustable rate mortgages, collateralized mortgage obligations, stripped mortgage-backed securities and REMICs); loans; credit paper; accounts and notes receivable and payable held by trade or other creditors; trade acceptances and claims; contract and other claims; executory contracts; participations; mutual funds, exchange traded funds and similar financial instruments; money market funds and instruments; obligations of the United States, any state thereof, non-U.S. governments and instrumentalities of any of them; commercial paper; certificates of deposit; bankers' acceptances; trust receipts; letters of credit; choses in action; puts; calls; other obligations and instruments or evidences of indebtedness of whatever kind or nature; and real estate and any kind of interests in real estate; in each case, of any person, corporation, government or other entity whatsoever, whether or not publicly traded or readily marketable (each of such items, "**Financial Instruments**"), and the sale of Financial Instruments short and covering such sales.

(b) engaging in such other lawful Financial Instruments transactions;

(c) research and analysis;

(d) purchasing Financial Instruments and holding them for investment;

(e) entering into contracts for or in connection with investments in Financial Instruments;

(f) investing in other pooled investment vehicles, which investments shall be subject in each case to the terms and conditions of the respective governing document for each such vehicle;

(g) possessing, transferring, mortgaging, pledging or otherwise dealing in, and exercising all rights, powers, privileges and other incidents of ownership or possession with respect to Financial Instruments and other property and funds held or owned by the Fund and/or its subsidiaries;

(h) lending, either with or without security, any Financial Instruments, funds or other properties of the Funds, including by entering into reverse repurchase agreements, and, from time to time, undertaking leverage on behalf of the Fund;

(i) opening, maintaining and closing accounts, including margin and custodial accounts, with brokers and dealers, including brokers and dealers located outside the United States;

(j) opening, maintaining and closing accounts, including custodial accounts, with banks, including banks located outside the United States, and drawing checks or other orders for the payment of monies;

(k) combining purchase or sale orders on behalf of the Fund with orders for other accounts to which the Investment Advisor or any of its affiliates provides investment services (“**Other Accounts**”) and allocating the Financial Instruments or other assets so purchased or sold, on an average-price basis or in any other manner deemed fair and equitable to the Investment Advisor in its sole discretion, among such accounts;

(l) entering into arrangements with brokers to open “average price” accounts wherein orders placed during a trading day are placed on behalf of the Fund and Other Accounts and are allocated among such accounts using an average price;

(m) organizing one or more corporations and other entities formed to hold record title, as nominee for the Fund and/or its subsidiaries (whether alone or together with the Other Accounts), to Financial Instruments or funds of the Fund and/or its subsidiaries;

(n) causing the Fund and/or its subsidiaries to engage in (i) agency, agency cross, related party principal transactions with affiliates of the Investment Manager and (ii) cross transactions with Other Accounts, in each case, to the extent permitted by applicable laws;

(o) engaging personnel, whether part-time or full-time, and attorneys, independent accountants or such other persons (including, without limitation, finders, consultants and investment bankers); and

(p) voting of Financial Instruments, participation in arrangements with creditors, the institution and settlement or compromise of suits and administrative proceedings and other like or similar matters.

4. Policies of the Fund. The activities engaged in by the Investment Advisor on behalf of the Fund and/or its subsidiaries shall be subject to the policies and control of the General Partner.

The Investment Advisor shall submit such periodic reports to the General Partner regarding the Investment Advisor's activities hereunder as the General Partner may reasonably request and a representative of the Investment Advisor shall be available to meet with the General Partner and/or any other representative of the Fund or its subsidiaries as reasonably requested by the General Partner.

In furtherance of the foregoing, the General Partner hereby appoints the Investment Advisor as the Fund's attorney-in-fact, with full power of authority to act in the Fund's name and on its behalf with respect to the Fund, as follows:

(a) to purchase or otherwise trade in Financial Instruments that have been approved by the General Partner;

(b) to execute and combine purchase or sale orders on behalf of the Fund with orders for Other Accounts and allocate the Financial Instruments or other assets so purchased or sold, on an average-price basis or in any other manner deemed fair and equitable to the Investment Advisor in its sole discretion, among such accounts; *provided, however*, that such purchase or sale orders shall be market rates;

(c) to direct the Custodian to deliver funds or the Financial Instruments, but only in the course of effecting trading and investment transactions for the Fund and subject to such restrictions as may be contained in the custody agreement between the Custodian and the Fund;

(d) to enter into contracts, provide certifications or take any other actions necessary to effect any of the foregoing transactions; and

(e) to select brokers on the basis of best execution and in consideration of relevant factors, including, but not limited to, price quotes; the size of the transaction; the nature of the market for the security; the timing of the transaction; the difficulty of execution; the broker-dealer's expertise in the relevant market or sector; the extent to which the broker-dealer makes market in the security or has an access to such market; the broker-dealer's skill in positioning the relevant market; the broker-dealer's facilities, reliability, promptness and financial stability; the broker-dealer's reputation for diligence and integrity (including in correcting errors); confidentiality considerations; the quality and usefulness of research services and investment ideas presented by the broker-dealer; and other factors deemed appropriate by the Investment Advisor.

5. Valuation of Financial Instruments. Financial Instruments will be valued in accordance with the then current valuation policy of the Investment Advisor, a copy of which will be provided to the General Partner upon request.

6. Status of the Investment Advisor. The Investment Advisor shall, for all purposes, be an independent contractor and not an employee of the General Partner or the Fund or its subsidiaries, nor shall anything herein be construed as making the Fund or its subsidiaries or the General Partner, a partner, member or co-venturer with the Investment Advisor or any of its affiliates or clients. The Investment Advisor shall have no authority to act for, represent, bind or obligate the Fund or its subsidiaries or the General Partner except as specifically provided herein.

7. Investments. ALL ULTIMATE INVESTMENT DECISIONS WITH RESPECT TO THE FUND AND ITS SUBSIDIARIES SHALL AT ALL TIMES REST SOLELY WITH THE GENERAL PARTNER AND/OR THE OFFICERS/DIRECTORS OF THE APPLICABLE SUBSIDIARY, IT BEING EXPRESSLY UNDERSTOOD THAT THE GENERAL PARTNER AND/OR THE OFFICERS/DIRECTORS OF THE APPLICABLE SUBSIDIARY SHALL BE FREE TO ACCEPT AND OR REJECT ANY OF THE ADVICE RENDERED BY THE INVESTMENT MANAGER HEREUNDER FOR ANY REASON OR FOR NO REASON.

8. Reimbursement by the General Partner. The Investment Advisor may retain, in connection with its responsibilities hereunder, the services of others to assist in the investment advice to be given to the General Partner with respect to the Fund and/or its subsidiaries (any such appointee, a “***Sub-Advisor***”), including, but not limited to, any affiliate of the Investment Advisor, but payment for any such services shall be assumed by the Investment Advisor, and, therefore, neither the General Partner nor the Fund or any of its subsidiaries shall have any liability therefor; *provided, however*, that the Investment Advisor, in its sole discretion, may retain the services of independent third party professionals, including, without limitation, attorneys, accountants and consultants, to advise and assist it in connection with the performance of its activities on behalf of the General Partner with respect to the Fund and/or its subsidiaries hereunder, and the Fund shall bear full responsibility therefor and the expense of any fees and disbursements arising therefrom.

9. Expenses.

(a) The Fund shall pay or reimburse the Investment Advisor and its affiliates for all expenses related to the services hereunder, including, but not limited to, investment-related expenses, brokerage commissions and other transaction costs, expenses related to clearing and settlement charges, professional fees relating to legal, auditing or valuation services, any governmental, regulatory, licensing, filing or registration fees incurred in compliance with the rules of any self-regulatory organization or any federal, state or local laws, research-related expenses (including, without limitation, news and quotation equipment and services, investment and trading-related software, including, without limitation, trade order management software (i.e., software used to route trade orders)), accounting (including accounting software), tax preparation expenses, costs and expenses associated with reporting and providing information to the Fund, any taxes imposed upon the Fund (including, but not limited to, collateralized debt obligations managed by the Investment Advisor or its affiliates), fees relating to valuing the Financial Instruments, and extraordinary expenses. In no event shall any of the foregoing costs or expenses include any salaries, occupational expense or general overhead of the Investment Advisor. For the avoidance of doubt, (i) the cost of all third party expenses incurred in connection with this Agreement shall not exceed standard market rates (which may include standard soft dollar arrangements) and (ii) to the extent any of the foregoing expenses were incurred on behalf of, or benefit of a number of Investment Advisor’s advised accounts, such expenses shall be allocated pro rata among such accounts.

(b) To the extent that expenses to be borne by the Fund are paid by the Investment Advisor or by any Sub-Advisor, the Fund shall reimburse the Investment Advisor (or Sub-Advisors, as applicable) for such expenses so long as such expenses are at market rates.

10. Fees.

(a) The Fund shall pay the Investment Advisor a quarterly fee (the “**Management Fee**”) equal to 2.0% per annum (0.5% per quarter) of the Net Assets (as defined below) of the Fund, payable in advance at and calculated as of the first business day of each calendar quarter. For purposes of calculating the Management Fee, the Net Assets of the Fund will be determined before giving effect to any of the following amounts payable by the Fund generally or in respect of any Investment which are effective as of the date on which such determination is made: (i) any fee payable to the Investment Advisor as of the date on which such determination is made; (ii) any capital withdrawals or distributions payable by the Fund which are effective as of the date on which such determination is made; and (iii) withholding or other taxes, expenses of processing withdrawals and other items payable, any increases or decreases in any reserves, holdback or other amounts specially allocated ending as of the date on which such determination is made. The Management Fee shall be prorated for partial periods and any applicable excess fees should be returned to the Fund by the Investment Advisor. Capital contributions made to the Fund after the commencement of a calendar quarter shall be subject to a prorated Management Fee based on the number of days remaining during such quarter.

(b) Subject to clauses (c) and (d) below, at the end of each Calculation Period (as defined below), an amount equal to 20% of the net capital appreciation of the Fund’s Investments (as defined below) after deducting the Management Fee shall be paid to the Investment Advisor (the “**Performance Fee**”); *provided, however*, that the net capital appreciation upon which the calculation of the Performance is based shall be reduced to the extent of any unrecovered balance remaining in the Loss Recovery Account (as defined below) maintained on the books and records of the Fund. The amount of the unrecovered balance remaining in the Loss Recovery Account at the time of calculating the Performance Fee shall be the amount existing immediately prior to its reduction pursuant to the second clause of the second sentence of clause (c) below.

(c) There shall be established on the books of the Fund a memorandum account (the “**Loss Recovery Account**”), the opening balance of which shall be zero. At the end of each Calculation Period, the balance in the Loss Recovery Account shall be adjusted as follows: first, if there has been, in the aggregate, net capital depreciation of the Fund’s Investments (as adjusted pursuant to the last sentence of this paragraph) since the end of the immediately preceding Calculation Period (or with respect to the initial Calculation Period, since the Effective Date), an amount equal to such net capital depreciation shall be credited to the Loss Recovery Account, and, second, if there has been, in the aggregate, net capital appreciation of the Fund’s investments (as adjusted pursuant to the last sentence of this paragraph) since the end of the immediately preceding Calculation Period, an amount equal to such net capital appreciation, before taking into account any Performance Fee to be paid to the Investment Advisor, shall be debited to and reduce any unrecovered balance in the Loss Recovery Account, but not below zero. Solely for purposes of this paragraph, in determining the Loss Recovery Account, net capital appreciation and net capital

depreciation for any applicable Calculation Period shall be calculated by taking into account the amount of the Management Fee paid for such period.

(d) In the event that all or a portion of the Fund's capital is distributed or withdrawn while there exists an unrecovered balance in the Loss Recovery Account, the unrecovered balance in the Loss Recovery Account shall be reduced as of the beginning of the next Calculation Period by an amount equal to the product obtained by multiplying the balance in such Loss Recovery Account by a fraction, the numerator of which is the amount distributed or withdrawn with respect to the immediately preceding distribution or withdrawal date, and the denominator of which is the total fair value of the Fund's Investment immediately prior to such distribution or withdrawal.

(e) For purposes of this Section 10, the net capital appreciation and net capital depreciation of the Fund's Investments for any given period will be calculation in accordance with the then current valuation policy of the Investment Advisor, a copy of which will be provided upon the General Partner's request. As soon as reasonably practicable following the end of a Calculation Period, the Investment Advisor shall deliver, or cause to be delivered, to the General Partner a statement showing the calculation of the Performance Fee, if any, with respect to such Calculation Period. The Performance Fee, if any, shall be payable within three (3) business days of the General Partner's receipt of such statement.

(f) Payments due to the Investment Advisor shall be made by wire transfer to:

Bank Name: Compass Bank
ABA#: 113010547
FBO: Highland Capital Management, L.P. (Master Operating Account)
Acct#: 0025876342

(g) For purposes of this Section 10, the following terms have the definitions set forth below:

"Calculation Period" means the period commencing on the Effective Date (in the case of the initial Calculation Period) and thereafter each period commencing as of the day following the last day of the preceding Calculation Period, and ending as of the close of business on the first to occur of the following: (i) the last day of a calendar year; (ii) the distribution or withdrawal of capital of the Fund (but only with respect to such distributed or withdrawn amount); (iii) the permitted transfer of all or any portion of a partner's interest in the Fund; and (iv) the final capital distribution of the Fund following its dissolution;

"Investments" means all investments, securities, cash, receivables, financial instruments, contracts and other assets, whether tangible or intangible, owned by the Fund;

“**Net Assets**” means, with respect to the Fund as of any date, the excess of the total fair value of all Investments over the total liabilities, debts and obligations of the Fund, in each case, calculated on an accrual basis in accordance with accounting principles generally accepted in the United States and the then current valuation policy of the Service Provider, a copy of which will be provided to the General Partner upon request; and

“**Services Agreement**” means that certain Second Amended and Restated Service Agreement, dated effective as of the Effective Date, by and among the Parties, as amended, restated, modified and supplemented from time to time.

11. Exculpation; Indemnification.

(a) Whether or not herein expressly so provided, every provision of this Agreement relating to the conduct or affecting the liability of or affording protection to the Investment Advisor, its members or any of their respective affiliates and their respective partners, members, officers, directors, employees, shareholders and agents (including parties acting as agents for the execution of transactions) (each, a “**Covered Person**” and collectively, “**Covered Persons**”) shall be subject to the provisions of this Section.

(b) To the fullest extent permitted by law, no Covered Person shall be liable to the General Partner or the Fund or any of its subsidiaries or anyone for any reason whatsoever (including but not limited to (i) any act or omission by any Covered Person in connection with the conduct of the business of the General Partner or the Fund, that is determined by such Covered Person in good faith to be in or not opposed to the best interests of the General Partner or the Fund, (ii) any act or omission by any Covered Person based on the suggestions of any professional advisor of the General Partner or the Fund or any of its subsidiaries whom such Covered Person believes is authorized to make such suggestions on behalf of the General Partner or the Fund or any of its subsidiaries, (iii) any act or omission by the General Partner or the Fund or any of its subsidiaries, or (iv) any mistake, negligence, misconduct or bad faith of any broker or other agent of the General Partner or the Fund or any of its subsidiaries selected by Covered Person with reasonable care), unless any act or omission by such Covered Person constitutes willful misconduct or gross negligence by such Covered Person (as determined by a non-appealable judgment of a court of competent jurisdiction).

(c) Covered Persons may consult with legal counsel or accountants selected by such Covered Person and any act or omission by such Covered Person on behalf of the General Partner or the Fund or any of its subsidiaries or in furtherance of the business of the General Partner or the Fund or any of its subsidiaries in good faith in reliance on and in accordance with the advice of such counsel or accountants shall be full justification for the act or omission, and such Covered Person shall be fully protected in so acting or omitting to act if the counsel or accountants were selected with reasonable care.

(d) To the fullest extent permitted by law, the General Partner and the Fund and its subsidiaries shall indemnify and hold harmless Covered Persons (the “**Indemnified**

Party”), from and against any and all claims, liabilities, damages, losses, costs and expenses, including amounts paid in satisfaction of judgments, in compromises and settlements, as fines and penalties and legal or other costs and expenses of investigating or defending against any claim or alleged claim, of any nature whatsoever, known or unknown, liquidated or unliquidated, that are incurred by any Indemnified Party and arise out of or in connection with the business of the General Partner or the Fund or any of its subsidiaries, any investment made under or in connection with this Agreement, or the performance by the Indemnified Party of Covered Person’s responsibilities hereunder and against all taxes, charges, duties or levies incurred by such Covered Person or any Indemnified Party in connection with the General Partner or the Fund or any of its subsidiaries, provided that an Indemnified Party shall not be entitled to indemnification hereunder to the extent the Indemnified Party’s conduct constitutes willful misconduct or gross negligence (as determined by a non-appealable judgment of a court of competent jurisdiction). The termination of any proceeding by settlement, judgment, order or upon a plea of nolo contendere or its equivalent shall not, of itself, create a presumption that the Indemnified Party’s conduct constituted willful misconduct or gross negligence.

(e) Expenses incurred by an Indemnified Party in defense or settlement of any claim that shall be subject to a right of indemnification hereunder, shall be advanced by the General Partner prior to the final disposition thereof upon receipt of an undertaking by or on behalf of the Indemnified Party to repay the amount advanced to the extent that it shall be determined ultimately that the Indemnified Party is not entitled to be indemnified hereunder.

(f) The right of any Indemnified Party to the indemnification provided herein shall be cumulative of, and in addition to, any and all rights to which the Indemnified Party may otherwise be entitled by contract or as a matter of law or equity and shall be extended to the Indemnified Party’s successors, assigns and legal representatives.

(g) The provisions of this Section are expressly intended to confer benefits upon Covered Persons and such provisions shall remain operative and in full force and effect regardless of the expiration or any termination of this Agreement.

(h) In no event shall any Covered Person be liable for special, exemplary, punitive, indirect, or consequential loss, or damage of any kind whatsoever, including without limitation lost profits.

(i) No Covered Person shall be liable hereunder for any settlement of any action or claim effected without its written consent thereto.

(j) Pursuant to the exculpation and indemnification provisions described above, the Investment Advisor and each Indemnified Party will generally not be liable to the General Partner or the Fund for any act or omission (or alleged act or omission), absent bad faith, willful misconduct, fraud or gross negligence, and the General Partner and the Fund will generally be required to indemnify such persons against any Losses they may incur by reason of any act or omission (or alleged act or omission) related to the General Partner, the Fund or its subsidiaries, absent bad faith, willful misconduct, fraud or gross negligence. As a result of these provisions, the General Partner, the Fund and its subsidiaries, as applicable (not the Investment

Advisor or any other Indemnified Party) will be responsible for any Losses resulting from trading errors and similar human errors, absent bad faith, willful misconduct, fraud or gross negligence or the ability to waive or limit such Losses under applicable law. Trading errors might include, for example, keystroke errors that occur when entering trades into an electronic trading system or typographical or drafting errors related to derivatives contracts or similar agreements. Given the volume of transactions executed by the Investment Advisor and its affiliates on behalf of the Fund and/or its subsidiaries, the General Partner acknowledges that trading errors (and similar errors) will occur and that the General Partner will be responsible for any resulting Losses, even if such Losses result from the negligence (but not gross negligence) of the Investment Advisor or its affiliates.

12. Activities of the Investment Advisor and Others. The Investment Advisor, and its affiliates may engage, simultaneously with their investment management activities on behalf of the Fund, in other businesses, and may render services similar to those described in this Agreement to other individuals, companies, trusts or persons, and shall not by reason of such engaging in other businesses or rendering of services for others be deemed to be acting in conflict with the interests of the Fund. Notwithstanding the foregoing, the Investment Advisor and its affiliates shall devote as much time to provide advisory service to the General Partner with respect to the management of the Fund's assets as the Investment Advisor deems necessary and appropriate. In addition, the Investment Advisor or any of its affiliates, in their individual capacities, may engage in securities transactions which may be different than, and contrary to, the investment advice provided by the Investment Advisor to the General Partner with respect to the Fund. The Investment Advisor may give advice and recommend securities to, or buy securities for, accounts and other clients, which advice or securities may differ from advice given to, or securities recommended or bought for, the Fund, even though their investment objectives may be the same or similar. The Investment Advisor may recommend transactions in securities and other assets in which the Investment Advisor has an interest, including securities or other assets issued by affiliates of the Investment Manager. Each of the General Partner and the Fund acknowledges that it has received, reviewed and had an opportunity with respect to (a) a copy of Part 2 of the Investment Advisor's Form ADV, and (b) the supplemental disclosures attached hereto as Exhibit A, each of which further describes conflicts of interest relating to the Investment Advisor, its affiliates and their respective advised accounts.

13. Term. This Agreement shall remain in effect through an initial term concluding December 31, 2017 and shall be automatically extended for additional one-year terms thereafter, except that it may be terminated by the Investment Advisor, on the one hand, or by the General Partner and the Fund, on the other hand, upon at least 90 days' prior written notice to the General Partner or the Investment Advisor, as the case may be, prior to General Partner's fiscal year-end.

14. Miscellaneous.

(a) Notices. Any notice, consent or other communication made or given in connection with this Agreement shall be in writing and shall be deemed to have been duly given when delivered by hand or facsimile or five days after mailed by certified mail, return receipt requested, as follows:

If to the Investment Advisor, to:

Highland Capital Management, L.P.
300 Crescent Court, Suite 700
Dallas, Texas 75201
Telephone Number: (972) 628-4100
Facsimile Number: (972) 628-4147

If to the General Partner or the Fund, to:

Charitable DAF GP, LLC
4140 Park Lake Avenue, Suite 600
Raleigh, North Carolina 27612
Attention: Grant Scott
Telephone Number: (919) 854-1407
Facsimile Number: (919) 854-1401

(b) Entire Agreement. This Agreement contains all of the terms agreed upon or made by the parties relating to the subject matter of this Agreement, and supersedes all prior and contemporaneous agreements, negotiations, correspondence, undertakings and communications of the parties, oral or written, respecting such subject matter.

(c) Amendments and Waivers. No provision of this Agreement may be amended, modified, waived or discharged except as agreed to in writing by the parties. No amendment to this Agreement may be made without first obtaining the required approval from the Fund. The failure of a party to insist upon strict adherence to any term of this Agreement on any occasion shall not be considered a waiver thereof or deprive that party of the right thereafter to insist upon strict adherence to that term or any other term of this Agreement.

(d) Binding Effect; Assignment. This Agreement shall be binding upon and inure to the benefit of the General Partner, the Fund, the Investment Advisor, each Indemnified Party and their respective successors and permitted assigns. Any person that is not a signatory to this Agreement but is nevertheless conferred any rights or benefits hereunder (*e.g.*, officers, partners and personnel of the Investment Advisor and others who are entitled to indemnification hereunder) shall be entitled to such rights and benefits as if such person were a signatory hereto, and the rights and benefits of such person hereunder may not be impaired without such person's express written consent. No party to this Agreement may assign (as such term is defined under the U.S. Investment Advisers Act of 1940, as amended) all or any portion of its rights, obligations or liabilities under this Agreement without the prior written consent of the other parties to this Agreement; provided; however, that the Investment Advisor may assign all or any portion of its rights, obligations and liabilities hereunder to any of its affiliates at its discretion.

(e) Governing Law. Notwithstanding the place where this Agreement may be executed by any of the parties thereto, the parties expressly agree that all terms and provisions hereof shall be governed by and construed in accordance with the laws of the State of Texas applicable to agreements made and to be performed in that State.

(f) Jurisdiction; Venue; Waiver of Jury Trial. The Parties hereby agree that any action, claim, litigation, or proceeding of any kind whatsoever against any other Party in any way arising from or relating to this Agreement and all contemplated transactions, including claims sounding in contract, equity, tort, fraud and statute (“**Dispute**”) shall be submitted exclusively to the U.S. District Court for the Northern District of Texas or, if such court does not have subject matter jurisdiction, the courts of the State of Texas sitting in Dallas County, and any appellate court thereof (“**Enforcement Court**”). Each Party irrevocably and unconditionally submits to the exclusive personal and subject matter jurisdiction of the Enforcement Court for any Dispute and agrees to bring any Dispute only in the Enforcement Court. Each Party further agrees it shall not commence any Dispute in any forum, including administrative, arbitration, or litigation, other than the Enforcement Court. Each Party agrees that a final judgment in any such action, litigation, or proceeding is conclusive and may be enforced in other jurisdictions by suit on the judgment or in any other manner provided by law.

EACH PARTY IRREVOCABLY AND UNCONDITIONALLY WAIVES, TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW, ANY RIGHT IT MAY HAVE TO A TRIAL BY JURY IN ANY LEGAL ACTION, PROCEEDING, CAUSE OF ACTION OR COUNTERCLAIM ARISING OUT OF OR RELATING TO THIS AGREEMENT, INCLUDING ANY EXHIBITS, SCHEDULES, AND APPENDICES ATTACHED TO THIS AGREEMENT, OR THE TRANSACTIONS CONTEMPLATED HEREBY. EACH PARTY CERTIFIES AND ACKNOWLEDGES THAT (A) NO REPRESENTATIVE OF THE OTHER PARTY HAS REPRESENTED, EXPRESSLY OR OTHERWISE, THAT THE OTHER PARTY WOULD NOT SEEK TO ENFORCE THE FOREGOING WAIVER IN THE EVENT OF A LEGAL ACTION, (B) IT HAS CONSIDERED THE IMPLICATIONS OF THIS WAIVER, (C) IT MAKES THIS WAIVER KNOWINGLY AND VOLUNTARILY, AND (D) IT HAS BEEN INDUCED TO ENTER INTO THIS AGREEMENT BY, AMONG OTHER THINGS, THE MUTUAL WAIVERS AND CERTIFICATIONS IN THIS SECTION.

Nothing in this Section 14(f) shall be construed to limit either party’s right to obtain equitable or injunctive relief in a court of competent jurisdiction in appropriate circumstances.

(g) Headings. The headings contained in this Agreement are intended solely for convenience and shall not affect the rights of the parties to this Agreement.

(h) Counterparts. This Agreement may be signed in any number of counterparts with the same effect as if the signatures to each counterpart were upon a single instrument, and all such counterparts together shall be deemed an original of this Agreement.

(i) Survival. The provisions of Sections 8, 9, 10, 11 and 14 hereof shall survive the termination of this Agreement.

(j) Pronouns. All pronouns shall be deemed to refer to the masculine, feminine, neuter, singular or plural as the identity of the person or persons’ firm or company may require in the context thereof.

(k) Arm's-Length Agreement. The General Partner and the Fund have approved this Agreement and reviewed the activities described in Section 12 and in the Investment Advisor's Form ADV and the risks related thereto.

[Signature Page to Follow]

IN WITNESS WHEREOF the parties hereto have caused this Agreement to be executed to be effective from the date first written above.

HIGHLAND CAPITAL MANAGEMENT, L.P.

By: Strand Advisors, Inc., its general partner

By: _____

Name: James Dondero

Title: President

Date: 6/21/17

CHARITABLE DAF GP, LLC

By: _____

Name: Grant J. Scott

Title: Managing Member

Date:

CHARITABLE DAF FUND, L.P.

By: Charitable DAF GP, LLC, its general partner

By: _____

Name: Grant J. Scott

Title: Managing Member

Date:

IN WITNESS WHEREOF the parties hereto have caused this Agreement to be executed to be effective from the date first written above.

HIGHLAND CAPITAL MANAGEMENT, L.P.

By: Strand Advisors, Inc., its general partner

By: _____

Name: James Dondero

Title: President

Date:

CHARITABLE DAF GP, LLC

By: _____

Name: Grant J. Scott

Title: Managing Member

Date: 6/21/2017

CHARITABLE DAF FUND, L.P.

By: Charitable DAF GP, LLC, its general partner

By: _____

Name: Grant J. Scott

Title: Managing Member

Date: 6/21/2017

EXHIBIT A

Supplemental Disclosures

Potential Conflicts of Interest

The scope of the activities of Highland Capital Management, L.P. (the “*Investment Adviser*”), its affiliates, and the funds and clients managed or advised by the Investment Adviser or any of its affiliates may give rise to conflicts of interest or other restrictions and/or limitations imposed on Charitable DAF Fund, L.P. and its subsidiaries (collectively, the “*Fund*”) in the future that cannot be foreseen or mitigated at this time. The following briefly summarizes some of these conflicts, but is not intended to be an exhaustive list of all such conflicts. Additional conflicts are described in the Investment Adviser’s Form ADV. You are urged to review the Investment Adviser’s Form ADV in its entirety prior to investing in the Fund.¹

Highland Group & Highland Accounts. None of the Investment Adviser, its affiliates and their respective officers, directors, shareholders, members, partners, personnel and employees (collectively, the “*Highland Group*”) is precluded from engaging in or owning an interest in other business ventures or investment activities of any kind, whether or not such ventures are competitive with the Fund. The Investment Adviser is permitted to manage other client accounts, and does manage other client accounts, some of which may have objectives similar or identical to those of the Fund, including other collective investment vehicles that may be managed by the Highland Group and in which the Investment Adviser or any of its affiliates may have an equity interest.

The Fund will be subject to a number of actual and potential conflicts of interest involving the Highland Group including, among other things, the fact that: (i) the Highland Group conducts substantial investment activities for accounts, funds, collateralized debt obligations and collateralized loan obligations that invest in leveraged loans (collectively, “*CDOs*”) and other vehicles managed by members of the Highland Group (collectively, “*Highland Accounts*”) in which the Fund has no interest; (ii) the Highland Group advises Highland Accounts, which utilize the same, similar or different methodologies as the Fund and may have financial incentives (including, without limitation, as it relates to the composition of investors in such funds and accounts or to the Highland Group’s compensation arrangements) to favor certain Highland Accounts over the Fund; (iii) the Highland Group may use the strategy described herein in certain Highland Accounts; (iv) the Investment Adviser may give advice and recommend securities to, or buy or sell securities for, the Fund, which advice or securities may differ from advice given to, or securities recommended or bought or sold for, Highland Accounts; (v) the Investment Adviser has the discretion, to the extent permitted under applicable law, to use its affiliates as service providers to the Fund and its portfolio investments; (vi) certain investors affiliated with the Highland Group may choose to personally invest only in certain funds advised by the Highland Group and the amounts invested by them in such funds is expected to vary significantly; (vii) the Highland Group and Highland Accounts may actively engage in transactions in the same securities sought by the

¹ The Investment Adviser’s latest Form ADV filed and Part 2 Brochures can be accessed here: https://adviserinfo.sec.gov/IAPD/IAPDFirmSummary.aspx?ORG_PK=110126

Fund and, therefore, may compete with the Fund for investment opportunities or may hold positions opposite to positions maintained by the Fund; (viii) the Fund may invest in CDOs and Highland Accounts managed by members of the Highland Group; and (ix) the Investment Adviser will devote to the Fund only as much time as the Investment Adviser deems necessary and appropriate to manage the Fund's business.

The Investment Adviser undertakes to resolve conflicts in a fair and equitable basis, which in some instances may mean a resolution that would not maximize the benefit to the Fund's investors.

Allocation of Trading Opportunities. It is the policy of the Investment Adviser to allocate investment opportunities fairly and equitably over time. This means that such opportunities will be allocated among those accounts for which participation in the respective opportunity is considered appropriate, taking into account, among other considerations: (i) fiduciary duties owed to the accounts; (ii) the primary mandate of the accounts; (iii) the capital available to the accounts; (iv) any restrictions on the accounts and the investment opportunity; (v) the sourcing of the investment, size of the investment and amount of follow-on available related to the investment; (vi) whether the risk-return profile of the proposed investment is consistent with the account's objectives and program, whether such objectives are considered in light of the specific investment under consideration or in the context of the portfolio's overall holdings; (vii) the potential for the proposed investment to create an imbalance in the account's portfolio (taking into account expected inflows and outflows of capital); (viii) liquidity requirements of the account; (ix) potentially adverse tax consequences; (x) regulatory and other restrictions that would or could limit an account's ability to participate in a proposed investment; and (xi) the need to re-size risk in the account's portfolio.

The Investment Adviser has the authority to allocate trades to multiple Highland Accounts on an average price basis or on another basis it deems fair and equitable. Similarly, if an order for any accounts cannot be fully allocated under prevailing market conditions, the Investment Adviser may allocate the trades among different accounts on a basis it considers fair and equitable over time. One or more of the foregoing considerations may (and are often expected to) result in allocations among the Fund and one or more Highland Accounts on other than a *pari passu* basis. The Investment Adviser will allocate investment opportunities across its accounts for which the opportunities are appropriate, consistent with (i) its internal conflict of interest and allocation policies and (ii) the requirements of the U.S. Investment Advisers Act of 1940, as amended. The Investment Adviser will seek to allocate investment opportunities among such entities in a manner that is fair and equitable over time and consistent with its allocation policy. However, there is no assurance that such investment opportunities will be allocated to the Fund fairly or equitably in the short-term or over time and there can be no assurance that the Fund will be able to participate in all investment opportunities that are suitable for it.

The Investment Adviser and/or its affiliates may open "average price" accounts with brokers. In an "average price" account, purchase and sale orders placed during a trading day for the Fund, the Highland Accounts or affiliates of the Investment Adviser are combined, and securities bought and sold pursuant to such orders are allocated among such accounts on an average price basis.

Highland Group Trading. As part of their regular business, the members of the Highland Group hold, purchase, sell, trade or take other related actions both for their respective accounts and for the accounts of their respective clients, on a principal or agency basis, with respect to loans, securities and other investments and financial instruments of all types. The members of the Highland Group also provide investment advisory services, among other services, and engage in private equity, real estate and capital markets oriented investment activities. The members of the Highland Group will not be restricted in their performance of any such services or in the types of debt or equity investments which they may make. The members of the Highland Group may have economic interests in or other relationships with obligors or issuers in whose obligations or securities or credit exposures the Fund may invest. In particular, such persons may make and/or hold an investment in an obligor's or issuer's securities that may be *pari passu*, senior or junior in ranking to an investment in such obligor's or issuer's securities made and/or held by the Fund or in which partners, security holders, members, officers, directors, agents, personnel or employees of such persons serve on boards of directors or otherwise have ongoing relationships. Each of such ownership and other relationships may result in securities laws restrictions on transactions in such securities by the Fund and otherwise create conflicts of interest for the Fund. In such instances, the members of the Highland Group may in their discretion make investment recommendations and decisions that may be the same as or different from those made with respect to the Fund's investments. In connection with any such activities described above, the members of the Highland Group may hold, purchase, sell, trade or take other related actions in securities or investments of a type that may be suitable to investments for the Fund. The members of the Highland Group will not be required to offer such securities or investments to the Fund or provide notice of such activities to the Fund. In addition, in managing the Fund's portfolio, the Investment Adviser may take into account its relationship or the relationships of its affiliates with obligors and their respective affiliates, which may create conflicts of interest. Furthermore, in connection with actions taken in the ordinary course of business of the Investment Adviser in accordance with its fiduciary duties to its other clients, the Investment Adviser may take, or be required to take, actions which adversely affect the interests of the Fund.

The Highland Group has invested and may continue to invest in investments that would also be appropriate for the Fund. Such investments may be different from those made by the Fund. The Highland Group does not have any duty, in making or maintaining such investments, to act in a way that is favorable to the Fund or to offer any such opportunity to the Fund, subject to the Investment Adviser's internal allocation policy. The investment policies, fee arrangements and other circumstances applicable to such other accounts and investments may vary from those applicable to the Fund and its investments. The Highland Group may also provide advisory or other services for a customary fee with respect to investments made or held by the Fund, and neither the Fund nor its investors shall have any right to such fees. The Highland Group may also have ongoing relationships with, render services to or engage in transactions with other clients who make investments of a similar nature to those of the Fund, and with companies whose securities or properties are acquired by the Fund.

As further described below, in connection with the foregoing activities the Highland Group may from time to time come into possession of material nonpublic information that limits the ability of the Investment Adviser to effect a transaction for the Fund, and the Fund's investments may be constrained as a consequence of the Investment Adviser's inability to use such information for

advisory purposes or otherwise to effect transactions that otherwise may have been initiated on behalf of its clients, including the Fund.

Although the professional staff of the Investment Adviser will devote as much time to the Fund as the Investment Adviser deems appropriate to perform its duties in accordance with the Fund's advisory agreement and in accordance with reasonable commercial standards, the staff may have conflicts in allocating its time and services among the Fund and the Investment Adviser's other accounts.

Various Activities of the Investment Adviser and its Affiliates. The directors, officers, personnel, employees and agents of the Investment Adviser and its affiliates may, subject to applicable law, serve as directors (whether supervisory or managing), officers, personnel, employees, partners, agents, nominees or signatories or provide banking, agency, insurance and/or other services, and receive arm's length fees in connection with such services, for the Fund or its investments or other entities that operate in the same or a related line of business as the, for other clients managed by the Investment Adviser or its affiliates, or for any obligor or issuer in respect of the CDOs, and the Fund shall have no right to any such fees. In serving in these multiple capacities, they may have obligations to such other clients or investors in those entities, the fulfillment of which may not be in the best interests of the Fund. The Fund may compete with other Highland Accounts for capital and investment opportunities.

There is no limitation or restriction on the Investment Adviser or any of its affiliates with regard to acting as investment adviser or collateral manager (or in a similar role) to other parties or persons. This and other future activities of the Investment Adviser and/or its affiliates may give rise to additional conflicts of interest. Such conflicts may relate to obligations that the Investment Adviser's investment committee, the Investment Adviser or its affiliates have to other clients.

The Investment Adviser and its affiliates may participate in creditors or other committees with respect to the bankruptcy, restructuring or workout of an investment of the Fund or another account. In such circumstances, the Investment Adviser or its affiliates may take positions on behalf of themselves or another account that are adverse to the interests of the Fund.

The Investment Adviser and/or its affiliates may act as an underwriter, arranger or placement agent, or otherwise participate in the origination, structuring, negotiation, syndication or offering of CDOs, Highland Accounts and other investments purchased by the Fund. Such transactions shall be subject to fees that are intended to be no greater than arm's-length fees, and the Fund shall have no right to any such fees. There is no expectation for preferential access to transactions involving CDOs and Highland Accounts that are underwritten, originated, arranged or placed by the Investment Adviser and/or its affiliates and the Fund shall not have any right to any such fees.

Investments in Highland Accounts Managed by the Investment Manager or its Affiliates. The Fund may invest a significant portion of its capital in Highland Accounts. The Investment Adviser or its affiliates will receive senior and subordinated management fees and, in some cases, a performance-based allocation or fee with respect to its role as general partner and/or manager of the Highland Accounts. If the Fund invests in Highland Accounts in secondary transactions, the Fund will indirectly pay the fees (senior and subordinated) of such Highland Accounts and any

carried interest. If the Fund provides all of the equity for a Highland Account, there may be no third party with whom the amount of such fees, expenses and carried interest can be negotiated on an arm's-length basis. The Investment Adviser or its affiliates will have conflicting division of loyalties and responsibilities regarding the Fund and a Highland Account, and certain other conflicts of interest would be inherent in the situation. There can be no assurance that the interests of the Fund would not be subordinated to those of a Highland Account or to other interests of the Investment Adviser.

Multiple Levels of Fees. The Investment Adviser and the Highland Accounts are expected to impose management fees, other administrative fees, carried interest and other performance allocations on realized and unrealized appreciation in the value of the assets managed and other income. This may result in greater expense than if investors in the Fund were able to invest directly in the Highland Accounts or their respective underlying investments. Investors in the Fund should take into account that the return on their investment will be reduced to the extent of both levels of fees. The general partner or manager of a Highland Account may receive the economic benefit of certain fees from its portfolio companies for services and in connection with unconsummated transactions (e.g., break-up, placement, monitoring, directors', organizational and set-up fees and financial advisory fees).

Cross Transactions and Principal Transactions. The Investment Adviser may effect client cross-transactions where the Investment Adviser causes a transaction to be effected between the Fund and another client advised by it or any of its affiliates. The Investment Adviser may engage in a client cross-transaction involving the Fund any time that the Investment Adviser believes such transaction to be fair to the Fund and such other client.

The Investment Adviser may effect principal transactions where the Fund acquires securities from or sells securities to the Investment Adviser and/or its affiliates, in each case in accordance with applicable law, which will include the Investment Adviser obtaining independent consent on behalf of the Fund prior to engaging in any such principal transaction between the Fund and the Investment Adviser or its affiliates.

The Investment Adviser may advise the Fund to acquire or dispose of securities in cross trades between the Fund and other clients of the Investment Adviser or its affiliates in accordance with applicable legal and regulatory requirements. In addition, the Fund may invest in securities of obligors or issuers in which the Investment Adviser and/or its affiliates have a debt, equity or participation interest, and the holding and sale of such investments by the Fund may enhance the profitability of the Investment Adviser's own investments in such companies. Moreover, the Fund may invest in assets originated by the Investment Adviser or its affiliates. In each such case, the Investment Adviser and such affiliates may have a potentially conflicting division of loyalties and responsibilities regarding the Fund and the other parties to such trade. Under certain circumstances, the Investment Adviser and its affiliates may determine that it is appropriate to avoid such conflicts by selling a security at a fair value that has been calculated pursuant to the Investment Adviser's valuation procedures to another client managed or advised by the Investment Adviser or such affiliates. In addition, the Investment Adviser may enter into agency cross-transactions where it or any of its affiliates acts as broker for the Fund and for the other party to the transaction, to the extent permitted under applicable law. The Investment Adviser may obtain independent consent

in writing on behalf of the Fund, which consent may be provided by the managing member of the General Partner or any other independent party on behalf of the Fund, if any such transaction requires the consent of the Fund under Section 206(3) of the U.S. Investment Advisers Act of 1940, as amended.

Material Non-Public Information. There are generally no ethical screens or information barriers among the Investment Adviser and certain of its affiliates of the type that many firms implement to separate persons who make investment decisions from others who might possess material, non-public information that could influence such decisions. If the Investment Adviser, any of its personnel or its affiliates were to receive material non-public information about a particular obligor or issuer, or have an interest in causing the Fund to acquire a particular security, the Investment Adviser may be prevented from advising the Fund to purchase or sell such asset due to internal restrictions imposed on the Investment Adviser. Notwithstanding the maintenance of certain internal controls relating to the management of material nonpublic information, it is possible that such controls could fail and result in the Investment Adviser, or one of its investment professionals, buying or selling an asset while, at least constructively, in possession of material non-public information. Inadvertent trading on material nonpublic information could have adverse effects on the Investment Adviser's reputation, result in the imposition of regulatory or financial sanctions, and as a consequence, negatively impact the Investment Adviser's ability to perform its portfolio management services to the Fund. In addition, while the Investment Adviser and certain of its affiliates currently operate without information barriers on an integrated basis, such entities could be required by certain regulations, or decide that it is advisable, to establish information barriers. In such event, the Investment Adviser's ability to operate as an integrated platform could also be impaired, which would limit the Investment Adviser's access to personnel of its affiliates and potentially impair its ability to manage the Fund's investments.

Conflicts Relating to Equity and Debt Ownership by the Fund and Affiliates. In certain circumstances, the Fund and other client accounts may invest in securities or other instruments of the same issuer (or affiliated group of issuers) having a different seniority in the issuer's capital structure. If the issuer becomes insolvent, restructures or suffers financial distress, there may be a conflict between the interests in the Fund and those other accounts insofar as the issuer may be unable (or in the case of a restructuring prior to bankruptcy may be expected to be unable) to satisfy the claims of all classes of its creditors and security holders and the Fund and such other accounts may have competing claims for the remaining assets of such issuers. Under these circumstances it may not be feasible for the Investment Adviser to reconcile the conflicting interests in the Fund and such other accounts in a way that protects the Fund's interests. Additionally, the Investment Adviser or its nominees may in the future hold board or creditors' committee memberships which may require them to vote or take other actions in such capacities that might be conflicting with respect to certain funds managed by the Investment Adviser in that such votes or actions may favor the interests of one account over another account. Furthermore, the Investment Adviser's fiduciary responsibilities in these capacities might conflict with the best interests of the investors.

Other Fees. The Investment Adviser and its affiliates are permitted to receive consulting fees, investment banking fees, advisory fees, breakup fees, director's fees, closing fees, transaction fees and similar fees in connection with actual or contemplated investments. Such fees will not reduce

or offset the Management Fee. Conflicts of interest may also arise due to the allocation of such fees to or among co-investors.

Soft Dollars. The Investment Adviser's authority to use "soft dollar" credits generated by the Fund's securities transactions to pay for expenses that might otherwise have been borne by the Investment Adviser may give the Investment Adviser an incentive to select brokers or dealers for transactions, or to negotiate commission rates or other execution terms, in a manner that takes into account the soft dollar benefits received by the Investment Adviser rather than giving exclusive consideration to the interests of the Fund.

**UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF
TEXAS, DALLAS DIVISION**

In Re: Highland Capital Management, L.P § Case No. **19-34054-SGJ11**

Charitable DAF Fund, L.P et al

Appellant

§

vs.

§

21-03067

Highland Capital Management, L.P

§

Appellee

§

3:23-CV-01503-B

[167] Order granting Defendant Highland Capital Management, L.P.'s Renewed motion to dismiss adversary proceeding (related document # [122](#)) Entered on 6/25/2023.

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APPELLANT RECORD

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**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

In re:	§ Chapter 11
	§
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§ Case No. 19-34054-sgj11
	§
Debtor.	§
	§
CHARITABLE DAF FUND, L.P. AND CLO	§
HOLDCO, LTD., DIRECTLY AND DERIVATIVELY	§
	§
Plaintiffs,	§ Adversary Proceeding No.
	§
vs.	§ 21-03067-sgj11
	§
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§
HIGHLAND HCF ADVISOR, LTD., AND	§
HIGHLAND CLO FUNDING LTD., NOMINALLY	§
	§
Defendant.	§
	§

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**APPELLANTS' SECOND AMENDED STATEMENT OF ISSUES
AND DESIGNATION OF RECORD ON APPEAL**

Pursuant to Rules 8009(a)(1)(A)-(B) and (a)(4) of the Federal Rules of Bankruptcy Procedure, The Charitable DAF Fund, L.P. and CLO Holdco, Ltd. ("Appellants") hereby designate the following items to be included in the record and identify the following issues with respect to

their appeal of the Order Granting Defendant Highland Capital Management, L.P.'s "Renewed Motion to Dismiss Complaint" [Adv. Proc. Doc. No. 122] which was entered by the United States Bankruptcy Court for the Northern District of Texas on June 25, 2023.

I. STATEMENT OF ISSUES TO BE PRESENTED ON APPEAL

- Whether the Bankruptcy Court had jurisdiction to rule on Highland Capital Management L.P.'s Renewed Motion to Dismiss Complaint
- Whether the Renewed Motion to Dismiss Complaint was improperly granted

II. DESIGNATION OF ITEMS TO BE INCLUDED IN THE RECORD

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1. Notice of Appeal for Bankruptcy Case Adversary Proceeding No. 21-03067-sgj11 [Doc. 168].

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2. The judgment, order, or decree appealed from: Memorandum Opinion and Order Granting Defendant Highland Capital Management, L.P.'s "Renewed Motion to Dismiss Complaint" [Adv. Proc. Doc. No. 122] [Doc. 167].

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3. Docket Sheet kept by the Bankruptcy Clerk.

4. Documents listed below and as described in the Docket Sheet for Bankruptcy Case Proceeding No. 21-03067-sgj.

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No.	Date Filed	Docket No.	Description/Document Text
1	9/29/21	1	(36 pgs; 3 docs) Adversary case 21-03067. ORDER REFERRING CASE NUMBER 21-CV-0842-B from U.S District Court for the Northern District of Texas, Dallas Division to U.S. Bankruptcy Court for Northern District of Texas, Dallas Division. Complaint by Charitable DAF Fund, LP, CLO Holdco, Ltd. against Highland Capital Management, LP, Highland HCF Advisor Ltd., Highland CLO Funding, Ltd. Fee Amount \$350 (Attachments: # 1 Original Complaint # 2 Docket Sheet from 3:20-cv-0842-B) Nature(s) of suit: 02 (Other (e.g. other actions that would have been brought in state court if unrelated to bankruptcy)). (Okafor, M.)
2	9/29/21	2	(1 pg) Supplemental Document (cover sheet) by CLO Holdco Ltd., Charitable DAF Fund (RE: related document(s)1 Adversary case 21-03067) [ORIGINALLY FILED IN 21-CV-0842 AS #2 ON 04/13/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)

Vol. 2 000139 000232 000239 000270 Thru Vol. 6	3	9/29/21	6	(93 pgs; 6 docs) MOTION for Leave to File First Amended Complaint filed by CLO Holdco Ltd., Charitable DAF Fund LP (Attachments: # 1 Exh 1_First Amended Complaint # 2 Exh 2_Motion for Authorization to Retain James Seery # 3 Exh 3_Order Approving Retention of James Seery # 4 Exh 4_Order Approving Settlement # 5 Proposed Order) (Bridges, Jonathan) (Entered: 04/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #6 ON 04/19/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
	4	9/29/21	22	(7 pgs; 2 docs) MOTION for an Order to Enforce the Order of Reference filed by Highland Capital Management LP. (Attachments: # 1 Exhibit(s) A--Proposed Order) (Annable, Zachery) Modified text on 5/20/2021 (mjr). (Entered: 05/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #22 ON 05/19/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
	5	9/29/21	23	(31 pgs) Brief/Memorandum in Support filed by Highland Capital Management LP re: 22 MOTION for an Order to Enforce the Order of Reference. (Annable, Zachery) Modified text on 5/20/2021 (mjr).(Entered: 05/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #23 ON 05/19/2021 IN U.S.DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
	6	9/29/21	24	(926 pgs; 29 docs) Appendix in Support filed by Highland Capital Management LP re: 23 Brief/Memorandum in Support. (Attachments: # 1 Appendix 1 # 2 Appendix 2 # 3 Appendix 3 # 4 Appendix 4 # 5 Appendix 5 # 6 Appendix 6 # 7 Appendix 7 # 8 Appendix 8 # 9 Appendix 9 # 10 Appendix10 # 11 Appendix 11 # 12 Appendix 12 # 13 Appendix 13 # 14 Appendix 14 # 15 Appendix 15 # 16 Appendix 16 # 17 Appendix 17 # 18 Appendix 18 # 19 Appendix 19 # 20 Appendix 20 # 21 Appendix 21# 22 Appendix 22 # 23 Appendix 23 # 24 Appendix 24 # 25 Appendix 25 # 26 Appendix 26 # 27 Appendix 27 # 28 Appendix 28) (Annable, Zachery) Modified linkage and text on 5/20/2021 (mjr). (Entered:05/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #24 ON 05/19/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
Vol. 7 001196	7	9/29/21	26	(7 pgs; 2 docs) MOTION to Dismiss Complaint filed by Highland Capital Management LP (Attachments: # 1 Exhibit(s) A--Proposed Order) (Annable, Zachery) Modified text on 5/28/2021 (jmg).(Entered: 05/27/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #26 ON 05/27/2021 IN U.S.DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)

Vol. 7 001203 thru Vol 8	8	9/29/21	28	(508 pgs; 14 docs) Appendix in Support filed by Highland Capital Management LP (Attachments: # 1 Appendix 1 # 2 Appendix 2 # 3 Appendix 3 # 4 Appendix 4 # 5 Appendix 5 # 6 Appendix 6 # 7 Appendix 7 # 8 Appendix 8 # 9 Appendix 9 # 10 Appendix 10 # 11 Appendix 11 # 12 Appendix 12 # 13 Appendix 13) (Annable, Zachery) (Entered: 05/27/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #28 ON 05/27/2021 IN U.S. DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
Vol. 9 001711	9	9/29/21	33	(1 pg) Amended Civil Cover Sheet by CLO Holdco Ltd, Charitable DAF Fund LP. Amendment to 2 Supplemental Document. (Sbaiti, Mazin) Modified text on 6/23/2021 (mjr). (Entered: 06/22/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #33 ON 06/22/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001712	10	9/29/21	36	(26 pgs) RESPONSE filed by CLO Holdco Ltd, Charitable DAF Fund LP re: 22 MOTION for an Order to Enforce the Order of Reference (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #36 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001738	11	9/29/21	37	(22 pgs) Appendix in Support filed by CLO Holdco Ltd, Charitable DAF Fund LP re 36 Response/Objection Response to Motion for an Order to Enforce the Order of Reference (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #37 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001760	12	9/29/21	38	(45 pgs) RESPONSE filed by CLO Holdco Ltd, Charitable DAF Fund LP re: 26 MOTION to Dismiss (Defendant Highland Capital Management, L.P.'s Motion to Dismiss Complaint) (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #38 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001805	13	9/29/21	39	(88 pgs) Appendix in Support filed by CLO Holdco Ltd, Charitable DAF Fund LP re 38 Response/Objection to Defendant Highland Capital Management, L.P.'s Motion to Dismiss Complaint (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #39 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001893	14	9/29/21	42	(12 pgs) REPLY filed by Highland Capital Management LP re: 22 MOTION for an Order to Enforce the Order of Reference (Annable, Zachery) (Entered: 07/13/2021) [ORIGINALLY FILED IN 21-CV-0842AS #42 ON 07/13/2021 IN U.S.

			DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
VOL. 9	15	9/29/21	43 (852 pgs) Appendix in Support filed by Highland Capital Management LP re: 42 Reply. (Annable, Zachery) Modified text on 7/14/2021 (mjr). (Entered: 07/13/2021) [ORIGINALLY FILED IN 21-CV-0842AS #43 ON 07/13/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001905 thru Vol. 13	16	9/29/21	45 (21 pgs) REPLY filed by Highland Capital Management LP re: 26 MOTION to Dismiss (Defendant Highland Capital Management, L.P.'s Motion to Dismiss Complaint) (Annable, Zachery) (Entered:07/13/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #44 ON 07/13/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002757	17	9/29/21	57 (7 pgs; 2 docs) MOTION to Dismiss and Joinder in Motion to Dismiss of Highland Capital Management, L.P. filed by Highland CLO Funding Ltd. (Attachments: # 1 Proposed Order) Attorney Paul R Bessette added to party Highland CLO Funding Ltd (pty:dft) (Bessette, Paul) (Entered: 08/30/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #57 ON 08/30/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002778	18	9/29/23	58 (12 pgs) Brief/Memorandum in Support filed by Highland CLO Funding Ltd. re 57 MOTION to Dismiss and Joinder in Motion to Dismiss of Highland Capital Management, L.P. (Bessette, Paul) (Entered: 08/30/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #58 ON 08/30/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002785	19	9/29/23	59 (80 pgs; 5 docs) Appendix in Support filed by Highland CLO Funding Ltd re 58 Brief/Memorandum in Support of Motion (Attachments: # 1 Exhibit(s) A - Jackson v Dear # 2 Exhibit(s) B - Prudential Assurance v. Newman # 3 Exhibit(s) C - Harbourvest Settlement Agreement # 4 Exhibit(s) D - Boleat Declaration) (Bessette, Paul) (Entered: 08/30/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #59 ON 08/30/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002797	20	9/29/21	64 (1 pg) ORDER OF REFERENCE: Pursuant to 28 U.S.C. § 157 and this District's Miscellaneous Order No. 33, this case is hereby REFERRED to Judge Stacey G. C. Jernigan of the United States Bankruptcy Court for the Northern District of Texas, Dallas Division, to be adjudicated as a matter related to the consolidated Chapter 11 Bankruptcy of Highland Capital Management, L.P., Chapter 11 Case No.19-34054. (Ordered by Judge Jane J. Boyle
002877			

Vol. 14 002878 002883 thru Vol. 16				on 9/20/2021) (svc) (Entered: 09/20/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #64 ON 09/20/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
	21	10/19/21	66	(5 pgs) Notice of hearing filed by Defendant Highland Capital Management, LP (RE: related document(s) 26 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP, 47 Motion to strike document filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 55 Motion to abate filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) Hearing to be held on 11/23/2021 at 09:30 AM at https://us-courts.webex.com/meet/jerniga for 26 and for 47 and for 55, (Annable, Zachery)
	22	11/22/21	71	(509 pgs; 2 docs) Witness and Exhibit List <i>for Hearing on November 23, 2021</i> filed by Defendant Highland Capital Management, LP (RE: related document(s) 26 Motion to dismiss adversary proceeding). (Attachments: # 1 Exhibits 1-13) (Hayward, Melissa)
Vol. 17 003392 003394 003583 003585 003611	23	11/22/21	72	(2 pgs) Witness List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 26 Motion to dismiss adversary proceeding, 47 Motion to strike (related document(s): 43 Document), 55 Motion to abate (related document(s) 1 Complaint), 69 Motion to abate <i>Plaintiffs' Amended Motion to Stay All Proceedings</i> (related document(s) 55 Motion to abate (related document(s) 1 Complaint))). (Sbaiti, Mazin)
	24	11/22/21	73	(189 pgs; 4 docs) Exhibit List <i>for November 23, 2021 hearing</i> filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 47 Motion to strike (related document(s): 43 Document), 55 Motion to abate (related document(s) 1 Complaint)). (Attachments: # 1 Exhibit 1_Defendant's Memorandum of Law in Support of Motion for Reconsideration # 2 Exhibit 2_Highland Memorandum in Support of Motion to Dismiss # 3 Exhibit 3_Order (I) Confirming Fifth Amended Plan of Reorganization of Highland) (Sbaiti, Mazin)
	25	12/7/21	80	(2 pgs) Order granting Highland CLO Funding, Ltd.'s motion to dismiss adversary as a party with prejudice (related document 57) Entered on 12/7/2021. (Okafor, Marcey) Modified text on 3/11/2022 (Okafor, Marcey).
	26	3/11/22	99	(26 pgs) Memorandum of Opinion and order granting motion to dismiss the adversary proceeding (RE: related document(s) 26 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP). Entered on 3/11/2022 (Okafor, Marcey)
	27	3/11/22	100	(26 pgs) Order granting motion to dismiss adversary proceeding with prejudice (related document #26) Entered on 3/11/2022. (Okafor, Marcey)

Vol. 18 003637	28	3/21/22	104	(29 pgs) Notice of appeal. Fee Amount \$298 filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 100 Order on motion to dismiss adversary proceeding). Appellant Designation due by 04/4/2022. (Sbaiti, Mazin)
003666	29	5/26/22	120	(177 pgs; 2 docs) Support/supplemental document <i>Motion to Supplement Appellate Record</i> filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 111 Appellant designation). (Attachments: # 1 Amended Transcript of January 14, 2021 Hearing) (Sbaiti, Mazin)
003843	30	6/9/22	121	(1 pg) DISTRICT COURT Order: Case 3:22-00695-B is hereby transferred to the docket of the Honorable Judge Jane J. Boyle for consolidation with The Charitable DAF Fund LP, et al. v. Highland Capital Management LP, Case No. 3:21-cv-3129-N. Judge Karen Gren Scholer no longer assigned to case.(RE: related document(s) 86 Notice of appeal filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 104 Notice of appeal filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Entered on 6/9/2022 (Whitaker, Sheniqua) (Entered: 06/10/2022)
003844	31	10/24/22	122	(7 pgs) Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP (Annable, Zachery)
003851	32	10/14/22	123	(31 pgs) Brief in support filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Annable, Zachery)
Vol. 19 003882 Thru Vol 20	33	10/14/22	124	(513 pgs; 15 docs) Support/supplemental document (<i>Appendix in Support of Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7 # 8 Exhibit 8 # 9 Exhibit 9 # 10 Exhibit 10 # 11 Exhibit 11 # 12 Exhibit 12 # 13 Exhibit 13 # 14 Exhibit 14) (Annable, Zachery)
Vol. 21 004395	34	10/27/22	126	(5 pgs) Notice of hearing (<i>Notice of Hearing and Briefing Schedule on Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP). Hearing to be held on 12/8/2022 at 09:30 AM at https://us-courts.webex.com/meet/jerniga for 122. (Annable, Zachery)

Vol. 21 004400 004410 004442 Thru Vol. 22	35	11/18/22	128	(10 pgs) Motion for withdrawal of reference. Fee amount \$188, filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (Sbaiti, Mazin)
	36	11/18/22	129	(32 pgs) Response opposed to (related document(s): 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP) filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Sbaiti, Mazin)
	37	11/18/22	130	(254 pgs; 2 docs) Response opposed to (related document(s): 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP) filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Attachments: # 1 Appendix) (Sbaiti, Mazin)
Vol. 22 004696 004717 004732 004737 004742	38	9/2/22	131	(21 pgs) DISTRICT COURT MEMORANDUM OPINION AND ORDER: The Court REVERSES and REMANDS the bankruptcy court's Motion to Dismiss Order and AFFIRMS the bankruptcy courts Motion to Stay Order. re: appeal on Civil Action number: Case 3:22-00695-B consolidated with 3:21-CV-3129-B, (RE: related document(s) 81 Order on motion to abate, 100 Order on motion to dismiss adversary proceeding). Entered on 9/2/2022 (Whitaker, Sheniqua) (Entered: 11/29/2022)
	39	12/2/22	133	(15 pgs) Reply to (related document(s): 129 Response filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 130 Response filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) filed by Defendant Highland Capital Management, LP. (Annable, Zachery)
	40	12/7/22	135	(5 pgs) Notice of hearing filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP). Hearing to be held on 1/25/2023 at 01:30 PM at https://us-courts.webex.com/meet/jerniga for 122, (Annable, Zachery)
	41	12/7/22	136	(5 pgs) Notice of hearing filed by Defendant Highland Capital Management, LP (RE: related document(s) 128 Motion for withdrawal of reference filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Status Conference to be held on 1/25/2023 at 01:30 PM at https://us-courts.webex.com/meet/jerniga . (Annable, Zachery).
	42	12/9/22	138	(3 pgs) Response opposed to (related document(s): 128 Motion for withdrawal of reference. Fee amount \$188, filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) filed by Defendant Highland Capital Management, LP. (Annable, Zachery)

Vol. 22 004745	43	12/9/22	139	(25 pgs) Brief in support filed by Defendant Highland Capital Management, LP (RE: related document(s) 138 Response). (Annable, Zachery)
Vol. 23 004770	44	12/9/22	140	(280 pgs; 8 docs) Support/supplemental document (<i>Appendix in Support of Highland Capital Management, L.P.'s Response to Renewed Motion to Withdraw the Reference</i>) filed by Defendant Highland Capital Management, LP (RE: related document(s) 138 Response). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7) (Annable, Zachery)
Vol. 24 005050	45	12/16/22	144	(6 pgs) Reply to (related document(s): 138 Response filed by Defendant Highland Capital Management, LP) filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Sbaiti, Mazin)
005056 Thru Vol. 25.	46	1/23/23	145	(514 pgs; 15 docs) Witness and Exhibit List filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7 # 8 Exhibit 8 # 9 Exhibit 9 # 10 Exhibit 10 # 11 Exhibit 11 # 12 Exhibit 12 # 13 Exhibit 13 # 14 Exhibit 14) (Annable, Zachery)
Vol. 26 005570	47	1/23/23	146	(280 pgs; 8 docs) Witness and Exhibit List filed by Defendant Highland Capital Management, LP (RE: related document(s) 128 Motion for withdrawal of reference. Fee amount \$188.). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7) (Annable, Zachery)
Vol. 27 005850	48	1/23/23	147	(221 pgs; 7 docs) Witness and Exhibit List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Attachments: # 1 Exhibit 1_Excerpts from July 14, 2020 Hearing Transcript # 2 Exhibit 2_HCLOF Members Agreement Relating to the Company # 3 Exhibit 3_HarbourVest Settlement Agreement # 4 Exhibit 4_Order Approving Debtor's Settlement with HarbourVest # 5 Exhibit 5_HCLOF Offering # 6 Exhibit 6 Amended and Restated Investment Advisory Agreement) (Sbaiti, Mazin)
006071	49	1/23/23	148	(3 pgs) Witness and Exhibit List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 128 Motion for withdrawal of reference. Fee amount \$188.). (Phillips, Louis)
Vol. 28 006074	50	1/25/23	150	(56 pgs; 2 docs) Amended Witness and Exhibit List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 147 List (witness/exhibit/generic), 149 List (witness/exhibit/generic)). (Attachments: # 1 Exh 7_Testimony of Mark Patrick at June 8, 2021 hearing) (Sbaiti, Mazin)

Vol. 28 006130 006133 Thru Vol. 31	51	1/25/23	152	(3 pgs) Notice of Appearance and Request for Notice by Louis M. Phillips filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Phillips, Louis)
	52	1/25/23	154	(1 pg) Court admitted exhibits date of hearing January 25, 2023 (RE: related document(s) 128 Motion for withdrawal of reference, filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) (COURT ADMITTED DEFENDANT'S EXHIBITS #1, #2, #3, #4, #5 & #6 OFFERED BY ATTY GREG DEMO). (Edmond, Michael) (Entered: 01/27/2023)
Vol. 32 006925 006942 006960	53	2/6/23	158	Report and recommendation to the U.S. District Court by U.S. Bankruptcy Judge. (RE: related document(s) 128 Motion for withdrawal of reference filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Entered on 2/6/2023 (Okafor, Marcey)
	54	2/6/23	161	(18 pgs) DISTRICT COURT Notice of transmission of report and recommendation in re: renewed motion to withdraw reference. Civil Case # 3:22-cv-02802-S. (RE: related document(s) 158 Report and recommendation to the U.S. District Court by U.S. Bankruptcy Judge. (RE: related document(s) 128 Motion for withdrawal of reference filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Entered on 2/6/2023) (Whitaker, Sheniqua)
	55	4/3/23	165	(1 pg) DISTRICT COURT ORDER: The Court GRANTS the 11 Joint Motion to Transfer Proceeding and Consolidate Before Original Court and the above-numbered case (3:22-cv-02802-S) is transferred to the docket of the Honorable Judge Jane Boyle: Civil case 3:21-cv-00842-B (order referring case). (RE: related document(s) 1 Complaint filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 143 Notice of transmission of motion to withdraw reference). Entered on 4/3/2023 (Whitaker, Sheniqua) Modified on 4/10/2023 (Whitaker, Sheniqua). (Entered: 04/10/2023)

TRANSCRIPTS

006961	56	11/24/21	78	(104 pgs) Transcript regarding Hearing Held 11-23-2021 RE: Motion Hearing. THIS TRANSCRIPT WILL BE MADE ELECTRONICALLY AVAILABLE TO THE GENERAL PUBLIC 90 DAYS AFTER THE DATE OF FILING. TRANSCRIPT RELEASE DATE IS 02/22/2022. Until that time the transcript may be viewed at the Clerk's Office or a copy may be obtained from the official court transcriber. Court Reporter/Transcriber Liberty Transcripts/Dipti Patel, Telephone number 847-848-4907. (RE: related document(s) 75 Hearing held on 11/23/2021. (RE: related document(s) 55 MOTION to Stay filed by CLO Holdco Ltd, Charitable DAF Fund LP (Sbaiti, Mazin) (Entered: 08/26/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #55 ON 08/26/2021 IN U.S.
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			<p>DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)) (Appearances: J. Pomerantz and J. Morris for Highland Defendants; J. Jordan and P. Bessett for HCLOF; M. Sbaiti for Plaintiffs. Nonevidentiary hearing. Motion denied. Mr. Pomerantz to upload order.), 76 Hearing held on 11/23/2021. (RE: related document(s) 47 Motion to strike 43 Appendix in support filed by CLO Holdco, Ltd., Charitable DAF Fund, LP (Bridges, Jonathan) Modified text on 7/16/2021 (mjr). (Entered: 07/15/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #47 ON 07/15/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)) (Appearances: J. Pomerantz and J. Morris for Highland Defendants; J. Jordan and P. Bessett for HCLOF; M. Sbaiti for Plaintiffs. Nonevidentiary hearing. Motion denied (Plaintiffs acknowledged complained-of Appendices it did not relate to Motion to Dismiss). Mr. Pomerantz to upload order.)). Transcript to be made available to the public on 02/22/2022. (Patel, Dipti)</p>
57	2/21/23	164	<p>164 (112 pgs) Transcript regarding Hearing Held 1/25/23 RE: HEARING ON DEFENDANT HIGHLAND CAPITAL MANAGEMENT L.P.'S RENEWED MOTION TO DISMISS COMPLAINT (122) AND STATUS CONFERENCE RE: MOTION FOR WITHDRAWAL OF REFERENCE FILED BY PLAINTIFF CLO HOLDCO, LTD., PLAINTIFF CHARITABLE DAF FUND, LP (128). THIS TRANSCRIPT WILL BE MADE ELECTRONICALLY AVAILABLE TO THE GENERAL PUBLIC 90 DAYS AFTER THE DATE OF FILING. TRANSCRIPT RELEASE DATE IS 05/22/2023. Until that time the transcript may be viewed at the Clerk's Office or a copy may be obtained from the official court transcriber. Court Reporter/Transcriber Dipti Patel, Telephone number 847-848-4907. (RE: related document(s) 155 Hearing held on 1/25/2023. (RE: related document(s) 122 Motion to dismiss adversary proceeding, (Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint) filed by Defendant Highland Capital Management, LP filed by Defendant Highland Capital Management, LP) (Appearances: J. Morris and G. Demo for Movants; L. Phillips and M. Sbaiti for Plaintiffs. Evidentiary hearing (appendices). Court took matter under advisement.), 156 Hearing held on 1/25/2023. (RE: related document(s) 128 Motion for withdrawal of reference. Fee amount \$188, filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) (Appearances: J. Morris and G. Demo for Movants; L. Phillips and M. Sbaiti for Plaintiffs. Evidentiary hearing (appendices). Court announced it will recommend denial to District Court. Court is working on Report & Recommendation.)). Transcript to be made available to the public on 05/22/2023. (Patel, Dipti)</p>

Dated: July 14, 2023

Respectfully submitted,

SBAITI & COMPANY PLLC

/s/ Mazin A. Sbaiti

Mazin A. Sbaiti

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Counsel for Appellants

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was filed electronically through the Court's ECF system, which provides notice to all parties of interest, on this 14th day of July, 2023.

/s/ Mazin A. Sbaiti

Mazin A. Sbaiti



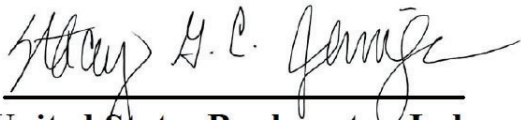
CLERK, U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS

ENTERED

THE DATE OF ENTRY IS ON
THE COURT'S DOCKET

The following constitutes the ruling of the court and has the force and effect therein described.

Signed February 6, 2023


United States Bankruptcy Judge

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

IN RE:	§	
	§	
HIGHLAND CAPITAL MANAGEMENT	§	BANKR. CASE NO. 19-34054-SGJ-11
L.P.,	§	(CHAPTER 11)
REORGANIZED DEBTOR.	§	
	§	
CHARITABLE DAF FUND, L.P. and	§	
CLO HOLDCO, LTD.,	§	
	§	
PLAINTIFFS,	§	
	§	
VS.	§	ADV. PRO. NO. 21-03067-sgj
	§	
HIGHLAND CAPITAL MANAGEMENT,	§	CIV. ACT. NO. 3:22-cv-02802-S
L.P.,	§	CIV. ACT. NO. 3:21-cv-0842-B
	§	
DEFENDANT.	§	

REPORT AND RECOMMENDATION TO THE DISTRICT COURT
ON "RENEWED MOTION TO WITHDRAW THE REFERENCE"
[BANKR. DOC. NO. 128]

006925

I. INTRODUCTION

The above-referenced adversary proceeding is related to the now long-running Chapter 11 bankruptcy case of Highland Capital Management, L.P. (“Highland,” the “Debtor,” or sometimes the “Reorganized Debtor”). Highland is the main Defendant in this action, which was filed by Charitable DAF Fund, L.P. and CLO Holdco, Ltd. (“Plaintiffs”) on April 12, 2021, in the District Court (*during* Highland’s bankruptcy case and *prior* to the effective date of Highland’s Chapter 11 plan) and assigned to Judge Jane Boyle. For the *second* time since this action was filed, the Plaintiffs are urging the District Court to withdraw the reference from the bankruptcy court. The *first* time that Plaintiffs urged it (unsuccessfully) was on June 29, 2021, to Judge Boyle, in Civil Action No. 3:21-cv-0842-B, in response to Defendant’s motion to *enforce* the reference and in their cross-motion thereto, in which Plaintiffs specifically urged the District Court to find that mandatory withdrawal of the reference under 28 U.S.C. § 157(d) applied to the action and so enforcing the reference (and, thus, sending the action to the bankruptcy court) would be pointless. Judge Boyle entered an order on September 20, 2021, granting Defendant’s motion to enforce the reference, referring the action to this bankruptcy court “to be adjudicated as a matter related to the consolidated Chapter 11 Bankruptcy of Highland Capital Management, L.P., Chapter 11 Case No. 19-34054.”¹ Plaintiffs brought their “Renewed Motion to Withdraw the Reference” (“Renewed MTWR”) on November 18, 2022,² more than a year after Judge Boyle rejected their arguments and referred the action to the bankruptcy court. The Renewed MTWR was transmitted to the District Court on December 15, 2022 and assigned to a different district judge – Judge Karen Scholer – under the above-referenced civil action number.³ Much has happened during this time

¹ See *Order of Reference*, Civ. Act. No. 3:21-cv-0842-B, Doc. No. 64.

² See *Renewed Motion to Withdraw the Reference*, Adv. Pro. 21-3067-sgj, Bankr. Doc. No. 128.

³ See Civ. Act. No. 3:22-02802-S, Doc. No. 1.

span. This “jurisdictional ping pong” (as it might fairly be described) is best understood with the timeline of relevant events set forth in Part III below. But first, a description of the parties is in order.

II. THE PARTIES

Highland is the main Defendant in this action. There were originally two other Defendants: (a) Highland CLO Funding, Ltd. (“HCLOF”), a Guernsey-based investment vehicle that is now past its investment period, and (b) Highland HCF Advisors, Ltd. (“HCFA”), which has been described as a non-debtor, wholly owned subsidiary of Highland, which served as a portfolio manager for HCLOF. HCLOF was dismissed with prejudice from this action on December 7, 2021 [Bankr. Doc. No. 80]. The other Defendant, HCFA, has never appeared in this action, and it appears it was never served with the summons and complaint.⁴ The court is unclear why—perhaps it was dissolved as part of the Highland reorganization or has no assets.

The Plaintiffs are CLO Holdco Ltd. (“CLO Holdco”) and Charitable DAF Fund, L.P. (“DAF”). DAF is CLO Holdco’s parent company. Both Plaintiffs are Cayman Island entities and are affiliated with Highland’s former chief executive officer and founder (James Dondero). Plaintiff CLO Holdco also happens to own a 49.02% equity interest in the dismissed Defendant HCLOF.

For ease of reference—and because there are a very large number of lawsuits pending in the Northern District of Texas involving Highland and its affiliates—this action presently before the

⁴ Highland noted on page 3 of its *Motion for an Order Extending the Time to File a Responsive Pleading*, filed in the District Court on May 6, 2021, at Doc. No. 9 (and entered on the bankruptcy court docket on September 29, 2021 at Bankr. Doc. No. 9) that “[w]hile Highland agreed to accept service on its own behalf, it could not and did not accept service on behalf of the other defendants, Highland HCF Advisors, Ltd. and Highland CLO Funding, Ltd. (together, the “Other Defendants”)” and that “to the best of Highland’s knowledge, the Other Defendants have not been served with the Complaint such that the time for each of them to serve a responsive pleading has not begun to run.” A *Waiver of Service of Summons* with respect to HCLOF was filed on June 3, 2021 (at Doc. No. 30 in both the District Court and bankruptcy court), but there does not appear on either docket any proof of service or waiver of service with respect to service of the summons and complaint on HCFA that would indicate that HCFA has been served as of this date.

court will be referred to as the “Lawsuit Pertaining to HarbourVest Bankruptcy Settlement.” The timeline below fully explains this.

III. THE RELEVANT TIMELINE

October 16, 2019: Highland filed its voluntary petition for relief under chapter 11 of the Bankruptcy Code (the “Petition Date”).

December 23, 2020: Highland (during its bankruptcy case—and before getting a Chapter 11 plan approved) moved for approval by the bankruptcy court of a significant settlement it reached with entities collectively known as HarbourVest. HarbourVest was a disputed creditor—asserting a \$300 million proof of claim against Highland—and it also happened to own a 49.98% equity interest in the Defendant HCLOF. Pursuant to the proposed settlement between Highland and HarbourVest (the “HarbourVest Settlement”), HarbourVest agreed to transfer its 49.98% equity interest in Defendant HCLOF to Highland (or Highland’s designee) and agreed to greatly reduce its disputed claim in the bankruptcy case from \$300 million to \$80 million (which would be given part unsecured creditor status and part subordinated status).

January 8, 2021: Plaintiff CLO Holdco objected to the HarbourVest Settlement, presumably at the direction of its parent, DAF (the other Plaintiff herein). CLO Holdco argued that: (i) it, as a 49.02% equity member of HCLOF, had a “Right of First Refusal,” pursuant to the HCLOF membership agreement, to acquire the 49.98% equity interest that HarbourVest was going to be transferring to Highland under the HarbourVest Settlement; and (ii) HarbourVest could not transfer its 49.98% equity interest to Highland without compliance with this purported right of first refusal. CLO Holdco did not object on any other basis to the HarbourVest Settlement.

January 14, 2021: The bankruptcy court held an evidentiary hearing on the proposed HarbourVest Settlement, during which CLO Holdco voluntarily withdrew its objection to the

HarbourVest Settlement premised on the “Right of First Refusal.” After an extensive presentation of evidence, the bankruptcy court overruled certain remaining objections (specifically, those of certain family trusts of James Dondero) and approved the HarbourVest Settlement. Note that the Dondero family trusts appealed to the District Court the approval of the HarbourVest Settlement, and their appeal was dismissed for lack of standing.

February 22, 2021: The bankruptcy court entered an order confirming a Chapter 11 plan for Highland [Bankr. Doc. No. 1943] (the “Confirmation Order”), which confirmed Highland’s extensively mediated, negotiated, and litigated plan [Bankr. Doc. No. 1808] (the “Plan”). The Plan became effective on August 11, 2021 [Bankr. Doc. No. 2700] (the “Effective Date”). At least the following provisions are germane to this Lawsuit Pertaining to HarbourVest Bankruptcy Settlement. First, pursuant to the Plan, the bankruptcy court expressly retained jurisdiction/authority to “allow, disallow, determine, liquidate ... any Claim ... including, without limitation, the resolution of any request for payment of any Administrative Expense Claim” Plan, Art. XI. Second, the Plan defined “Administrative Expense Claim,” in relevant part, as a: “Claim for costs and expenses of administration of the Chapter 11 Case . . . pursuant to sections 503(b), 507(a)(2), 507(b) ... of the Bankruptcy Code, including ... (a) the actual and necessary costs and expenses incurred after the Petition Date and through the Effective Date of preserving the Estate and operating the business of the Debtor” Plan, Art. I.B.2.

April 12, 2021: Plaintiffs commenced this Lawsuit Pertaining to HarbourVest Bankruptcy Settlement in the District Court—which was assigned Civ. Action No. 21-CV-0842-B (Judge Jane Boyle)—naming Debtor/Highland, HCFA, and HCLOF as Defendants. To be clear, this lawsuit was filed at a time when Highland was still a debtor in possession (its Plan had been recently confirmed, but the plan Effective Date had not yet occurred—it occurred in August 2021). The

underlying Complaint (“Complaint”) alleges that conduct of Highland during the bankruptcy case in late 2020 and early 2021 revolving around the HarbourVest Settlement—prior to the Confirmation Order—violated contractual and extra-contractual duties Highland purportedly owed (i) to Plaintiff CLO Holdco as an investor in HCLOF; and (ii) to Plaintiff DAF as an advisee under an investment advisory agreement. The Complaint raises claims: (i) by Plaintiffs for breaches of fiduciary duty against Highland and HCFA (Count 1); (ii) by CLO Holdco for breach of the HCLOF Members Agreement against all three Defendants (Count 2); (iii) by Plaintiffs for negligence against Highland and HCFA (Count 3); (iv) by Plaintiffs for violations of the Racketeer Influenced and Corrupt Organizations statute (15 U.S.C. § 1961, et seq. (“RICO”)) against Highland (Count 4); and (v) by CLO Holdco for tortious interference against Highland (Count 5). In Count 1 (breach of fiduciary duty), Plaintiffs allege that Debtor/Highland violated its “broad” duties to Plaintiffs under the Investment Advisers Act and Highland’s “internal policies and procedures” by: (i) engaging in “insider trading with HarbourVest”; (ii) “concealing” the value of HarbourVest’s 49.98% equity interest in HCLOF; and (iii) “diverting” the investment opportunity in the HarbourVest entities to the Debtor without first offering it to Plaintiffs.⁵ In Count 4 (RICO), Plaintiffs allege that Highland and its co-Defendants were an “association-in-fact” engaged in a pattern of racketeering activity for this same underlying conduct; namely, failing to disclose the valuation of HCLOF’s interest and ultimately effectuating the HarbourVest Settlement. Again,

⁵ While specific statutory references to the federal Investment Advisers Act are sparse in the Complaint, subsequent pleadings of the Plaintiffs make clear they are referring to at least 15 U.S.C. § 80b-6 and 80b-15(a) (which they cite as imposing both a duty of care and a duty of loyalty, each unwaivable, on investment advisors, in favor of funds and its investors, citing *SEC v. Tambone*, 550 F.3d 106, 146 (1st Cir. 2008)); 15 U.S.C. § 206(2) (which they cite as requiring investment advisers to seek “best execution” for all their clients’ transactions, citing *SEC v. Ambassador Advisors, LLC*, 576 F. Supp. 3d 286, 300 (E.D. Pa. 2021)); and 15 U.S.C. § 215 (which they cite as recognizing “a limited private right of action for equitable relief including disgorgement, wherein one may seek to void the rights of a violator who performs a contract in violation of the Advisers Act”). Response to Renewed Motion to Dismiss, pp. 12-13. Bankr. Doc. No. 130.

Highland's alleged misconduct was the act of settling the \$300 million proof of claim filed against Highland by HarbourVest under the terms and conditions of the HarbourVest Settlement. To be clear, the HarbourVest Settlement was implemented after full notice to creditors in the Highland case, an evidentiary hearing, and approval by the bankruptcy court after fulsome findings of fact and conclusions of law. And as noted earlier, one of the Plaintiffs, CLO Holdco, even objected to the HarbourVest Settlement and then withdrew its objection the morning of the bankruptcy court's hearing on the HarbourVest Settlement.

May 19, 2021: Soon after the commencement of this Lawsuit Pertaining to HarbourVest Bankruptcy Settlement, Highland moved before Judge Boyle for an order to enforce the Northern District of Texas's standing order of reference (Misc. Order No. 33) [Bankr. Doc. No. 22] (the "Motion to Enforce"), arguing that the Lawsuit Pertaining to HarbourVest Bankruptcy Settlement should be referred to the bankruptcy court, since it asserted claims arising in, arising under, or related to Title 11 and Highland's bankruptcy case.

May 27, 2021: Highland also swiftly moved to dismiss the Lawsuit Pertaining to HarbourVest Bankruptcy Settlement [Bankr. Doc. No. 26] (the "Original MTD"). The Original MTD was fully briefed to Judge Boyle.⁶

June 29, 2021: Plaintiffs reacted by filing their response to the Motion to Enforce [Bankr. Doc. No. 36], arguing the Motion to Enforce should be denied, and *cross-moving therein that Judge Boyle should keep the Lawsuit Pertaining to HarbourVest Bankruptcy Settlement* because the claims therein were subject to mandatory withdrawal of the reference, under 28 U.S.C § 157(d)—i.e., they involved “consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce” and could not be adjudicated

⁶ Defendant HCLOF filed a *Motion to Dismiss and Joinder in Motion to Dismiss of Highland Capital Management, L.P.* in the District Court at Doc. No. 57 (Bankr. Doc. No. 57) on August 30, 2021.

in the bankruptcy court. To be clear, the underlying Complaint (while all about the HarbourVest Settlement) asserts claims of breach of fiduciary duty under the federal Investment Advisers Act (“IAA”) and state law; breach of contract; negligence; RICO; and tortious interference with contract. Notably, the arguments in Plaintiffs’ cross-motion on June 29, 2021 appear to be identical to those in Plaintiffs’ Renewed MTWR now before the court.

August 26, 2021: Plaintiffs filed a motion before Judge Boyle asking her to stay the action before her, pending appeal of the Confirmation Order [Bankr. Doc. No. 55] (the “Stay Motion”), arguing that the Plan injunction somehow prohibited the prosecution of the Lawsuit Pertaining to HarbourVest Bankruptcy Settlement. The Stay Motion was fully briefed to Judge Boyle.

September 20, 2021: The District Court (Judge Boyle) granted Highland’s Motion to Enforce and referred this Lawsuit Pertaining to HarbourVest Bankruptcy Settlement to the bankruptcy court, including the Original MTD, “[p]ursuant to 28 U.S.C. § 157 ... to be adjudicated as a matter related to the ... Bankruptcy of Highland Capital Management, L.P.” [Bankr. Doc. No. 64].

November 23, 2021: Plaintiffs and Defendants argued the Stay Motion and the merits of the Original MTD, including their alleged claims under the IAA and RICO, to the bankruptcy court. Following the hearing the bankruptcy court denied the Stay Motion.⁷

March 11, 2022: The bankruptcy court granted the Original MTD and issued a written ruling on it (the “MTD Order”)—never getting to the merits of the claims in the Lawsuit Pertaining to HarbourVest Bankruptcy Settlement. [Bankr. Doc. No. 100]. Rather, the bankruptcy court dismissed the Lawsuit Pertaining to HarbourVest Bankruptcy Settlement with prejudice, on the

⁷ See *Order Denying Motion to Stay*, Bankr. Doc. No. 81, entered on December 7, 2021. As noted above,, the bankruptcy court also entered, on December 7, 2021, its *Order Granting Highland CLO Funding, Ltd.’s Motion to Dismiss* [Bankr. Doc. No. 80].

basis that the claims were precluded by the doctrines of collateral estoppel and judicial estoppel. *See Charitable DAF Fund, L.P. and CLO Holco, Ltd. v. Highland Cap. Mgmt., L.P., et al. (In re Highland Cap. Mgmt., L.P.)*, 2022 WL 780991 (Bankr. N.D. Tex., Mar. 11, 2022). The bankruptcy court concluded that the claims in the Lawsuit Pertaining to HarbourVest Bankruptcy Settlement were barred due to the strategic decisions of Plaintiff CLO Holdco during the bankruptcy case (i.e., choosing to withdraw its objection to the HarbourVest Settlement) and that decision was also binding on its Co-Plaintiff DAF (its parent) since the two were in privity. On March 25, 2022, the Plaintiffs appealed the MTD Order to the District Court. *See* 3:21-cv-00695-B, Doc. No. 2. The Plaintiffs did not raise 28 U.S.C. § 157(d) in the appeal or otherwise argue that the bankruptcy court lacked jurisdiction or authority to have entered the MTD Order.

June 17, 2022: Judge Boyle entered an order consolidating the appeal of the MTD Order with Plaintiff's appeal of the bankruptcy court's order denying the Stay Motion, which had been assigned Civ. Act. No. 3:21-cv-03129. *See* 3:21-cv-03129-B, Doc. No. 20.

September 2, 2022: Judge Boyle, sitting this time in an appellate capacity: (i) reversed the bankruptcy court's conclusion that collateral estoppel barred Plaintiffs' claims but (ii) remanded on the judicial estoppel determination.⁸ *See Charitable DAF Fund, L.P. v. Highland Cap. Mgmt., L.P. (In re Highland Cap. Mgmt., L.P.)*, 643 B.R. 162, 166 (N.D. Tex. 2022). Specifically, Judge Boyle determined that the bankruptcy court had erred in its ruling that collateral estoppel barred entirely the claims in this Lawsuit Pertaining to HarbourVest Bankruptcy Settlement, but Judge Boyle separately, in evaluating the bankruptcy court's determination that judicial estoppel also barred Plaintiff's Lawsuit Pertaining to HarbourVest Bankruptcy Settlement, ruled that the bankruptcy court did not make a certain finding necessary to conclude judicial estoppel applied

⁸ Judge Boyle also affirmed the bankruptcy court's order denying the Stay Motion.

(i.e., a finding of “inadvertence”). Thus, Judge Boyle remanded to the bankruptcy court for possible further findings on the judicial estoppel doctrine and presumably for an adjudication on the merits of the various claims asserted in the Lawsuit Pertaining to HarbourVest Bankruptcy Settlement, if the bankruptcy court concluded judicial estoppel did **not** apply (after evaluating the “inadvertence” factor).

September 8, 2022: Meanwhile, the U.S. Court of Appeals for the Fifth Circuit affirmed, in material part, the Confirmation Order’s factual findings and legal conclusions in support of the Highland Plan. *NexPoint Advisors, L.P., et al. v. Highland Cap. Mgmt., L.P.*, 48 F.4th 419 (5th Cir. 2022). A petition for writ of certiorari is now pending before the U.S. Supreme Court regarding the Plan Confirmation Order. To be clear, there has never been a stay of the Plan (i.e., the Confirmation Order), and the Highland Plan has been in effect since August 11, 2021.

October 14, 2022: In response to Judge Boyle’s remand, *Charitable DAF Fund, L.P. v. Highland Cap. Mgmt., L.P. (In re Highland Cap. Mgmt., L.P.)*, 643 B.R. 162, 166 (N.D. Tex. 2022), Highland filed a renewed motion to dismiss [Bankr. Doc. No. 122] (the “**Renewed MTD**”). It addresses the “inadvertence” factor on the judicial estoppel defense (arguing it bars Counts 2 and 5 of the Complaint), and also argues that all claims in this Lawsuit Pertaining to HarbourVest Bankruptcy Settlement—even if not precluded by the doctrine of judicial estoppel—are not plausible on their face, under *Iqbal* and *Twombly*. *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

November 18, 2022: Plaintiffs responded to the Renewed MTD and also filed their Renewed MTWR, again urging mandatory withdrawal of the reference. Plaintiffs once again are arguing that this Lawsuit Pertaining to HarbourVest Bankruptcy Settlement “requires consideration” of non-bankruptcy federal laws regulating interstate commerce and, thus,

mandatory withdrawal of the reference applies under 28 U.S.C. § 158(d). ***Interestingly, Plaintiffs have now moved to dismiss their RICO count (without prejudice).***⁹ Thus, their sole “other federal law” argument boils down to this:

This adversary proceeding primarily involves fiduciary duties imposed upon Registered Investment Advisers by the Investment Advisers Act of 1940 (“Advisers Act”) and corresponding state law claims for breach of those duties. As a result, presiding over this action will require extensive consideration of federal laws regulating interstate commerce, which renders withdrawal of the reference to bankruptcy court mandatory under 28 U.S.C. § 157(d).

Renewed MTWR, at ¶ 5.

IV. RECOMMENDATION

The bankruptcy court recommends that Plaintiffs’ Renewed MTWR be denied. The bankruptcy court clearly has subject matter jurisdiction over these claims pursuant to 28 U.S.C. § 1334(b). The Renewed MTWR was not timely filed, which is required under the mandatory withdrawal provisions of 28 U.S.C. § 157(d), and it is the quintessential attempt at a second bite at the apple.

A. Jurisdiction and Core Nature of the Action

First, there is no concern about lack of bankruptcy subject matter jurisdiction here. Bankruptcy subject matter jurisdiction exists over the claims against the Defendant pursuant to 28 U.S.C. §§ 1334(b) and 157. Under 28 U.S.C. § 1334(b), “district courts shall have original but not exclusive jurisdiction of all civil proceedings ***arising under*** title 11, or ***arising in*** or ***related to***

⁹ See Plaintiff’s Response to Renewed MTD at 23 (“Plaintiffs respectfully dismiss the RICO claim under Rule 41(a) to the extent such a claim is revealed to have existed under non-securities bases. Because Highland has conceded that Plaintiffs’ claims are actionable under the federal securities laws and the Advisers Act, and has cited same as a basis for dismissing the RICO claim, Highland is precluded and estopped from denying the violations of the Securities Laws and the Advisers Act. As such, to the extent that other, non-securities law violations may give rise to RICO violations, Plaintiffs respectfully reserve the right to bring such a claim but respectfully dismiss their RICO claim at this time.”)

cases under title 11.”¹⁰ (Emphasis added.) The bankruptcy courts, in turn, are delegated authority to exercise that jurisdiction from the district courts, under 28 U.S.C. § 157(a).¹¹ There does not appear to be any dispute that this Lawsuit Pertaining to HarbourVest Bankruptcy Settlement is at least “related to” the Highland bankruptcy case. Thus, bankruptcy subject matter jurisdiction exists.¹² Moreover, there does not appear to be any dispute that the action involves “core” matters over which a bankruptcy court may generally enter final judgments.¹³ As noted recently by the Fifth Circuit: “[A] proceeding is core under section 157 if it invokes a substantive right provided by title 11 or if it is a proceeding that, by its nature, could arise only in the context of a bankruptcy case. For example, claims concerning the administration of the estate, allowance or disallowance of claims against the estate, and sale of property of the estate are all core proceedings.”¹⁴ *See generally In re Southmark Corp.*, 163 F.3d 925, 930-31 (5th Cir. 1999) (malpractice suit against an examiner’s accountant was a core proceeding; “The bankruptcy court must be able to assure itself and the creditors who rely on the process that court-approved managers of the debtor’s estate are performing their work, conscientiously and cost-effectively. . . . Award of the professionals’

¹⁰ 28 U.S.C. § 1334(b); *see also In re Bass*, 171 F.3d 1016, 1022 (5th Cir. 1999) (“[Section] 1334(b) grants jurisdiction to district courts and adjunct bankruptcy courts to entertain proceedings ‘arising under,’ ‘arising in a case under,’ or ‘related to’ a case under Title 11 of the United States Code, i.e., proceedings ‘related to’ bankruptcy.”).

¹¹ *In re PFO Glob., Inc.*, 26 F.4th at 252 (citing 28 U.S.C. § 157(a)).

¹² *In re Bass*, 171 F.3d at 1022 (“To determine whether [bankruptcy] jurisdiction exists, ‘it is necessary only to determine whether a matter is at least “related to” the bankruptcy.’” (quoting *In re Walker*, 51 F.3d 562, 569 (5th Cir. 1995))).

¹³ Plaintiffs’ Renewed MTWR seemed to dispute that core matters are involved. But their position on this at the status conference on this seemed equivocal. In addition, as noted earlier, there is a non-debtor Defendant named herein, HCFA, that is a subsidiary of Highland. Likely, claims asserted against it by Plaintiffs (which appear to be asserted at Counts 1-3) would not be core matters. However, HCFA has not been served and has failed to appear or defend in this matter. Thus, presumably there will be no adjudication of the claims against it in this action and the claims against it are irrelevant.

¹⁴ *Foster v. Aurzada, et al.* No. 22-10310 and No. 22-10318, slip. Op. at p. 5 (5th Cir. Jan. 3, 2023) (per curium), *citing In re Wood*, 825 F.2d 90, 97 (5th Cir. 1987) and 28 U.S.C. § 157(b)(2)(A), (B), (N), (O)).

fees and enforcement of the appropriate standards of conduct are inseparably related functions of bankruptcy courts.”).¹⁵

Again, there appears to be no dispute here regarding the “core/noncore” status of the claims. Plaintiffs’ argument is that, even if the claims are core, mandatory withdrawal of the reference is necessitated, pursuant to 28 U.S.C. § 157(d), because of other federal law, besides bankruptcy law, being significantly implicated.

B. *Untimeliness.*

Plaintiffs’ request for mandatory withdrawal of the reference is by any reasonable measure “untimely.” Under 28 U.S.C. § 157(d), a district court “shall, on *timely* motion of a party, so withdraw a proceeding if ... resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.” 28 U.S.C. § 157(d) (emphasis added). Assuming a timely motion, mandatory withdrawal is warranted only if a matter requires “substantial and material consideration” and “significant interpretation of federal laws[,]” rather than a “straightforward application of a federal statute to a particular set of facts.” *In re Nat’l Gypsum*, 14 B.R. 188, 192-93 (N.D. Tex. 1991); *Kirschner v. Dondero (In re Highland Cap. Mgmt., L.P.)*, 2022 Bankr. LEXIS 1028, at *27-28 (Bankr. N.D. Tex. Apr. 6, 2022) (same). The Renewed MTWR was filed *fourteen months* after Judge Boyle referred this action to the bankruptcy court. Moreover, it was filed after: (a) the bankruptcy court made a final ruling on a motion to dismiss, (b) Judge Boyle ruled on that final bankruptcy court ruling in an appellate capacity, and (c) remanded back to the bankruptcy court for further proceedings.

¹⁵ See *id.* at 930 (citing 28 U.S.C. § 157(b)(3)) (stating that whether claim has a state law origin is not dispositive to whether it is a core bankruptcy matter); *In re Wood*, 825 F.2d at 97 n.34 (stating that whether right is state created is not dispositive to whether proceeding is core under 28 U.S.C. § 157).

To be clear, 28 U.S.C. § 157(d) does not define “timely,” but it has been interpreted as requiring a motion to be made at the first reasonable opportunity. *See In re Fresh Approach, Inc.*, 51 B.R. 412, 415-16 (Bankr. N.D. Tex. 1985) (finding a motion to withdraw the reference untimely when filed sixteen days after the court entered its decision on the matter); *see also Sec. Farms v. Int’l Bhd. of Teamsters*, 124 F.3d 999, 1007, n.3 (9th Cir. 1997). (“A motion to withdraw is timely ‘if it was made as promptly as possible in light of the developments in the bankruptcy proceeding.’”); *Connolly v. Bidermann Indust. U.S.A., Inc.*, 1996 U.S. Dist. LEXIS 8059, at *8 (S.D.N.Y. June 13, 1996) (“Plaintiff’s delay of over eight months renders her motion untimely, and as such it does not meet the threshold requirement set forth in 28 U.S.C. § 157(d).”); 9 COLLIER ON BANKRUPTCY ¶ 5011.01[2] (“[M]otions for mandatory withdrawal must be made as soon as it is apparent that it is necessary for the district court to hear the proceeding”).

But this isn’t just any untimely motion. This is a ***second*** motion. This appears to be the proverbial second bite at the apple—urged right after Highland, after reviewing Judge Boyle’s September 2022 appellate ruling, moved for dismissal of this Lawsuit Pertaining to HarbourVest Bankruptcy Settlement, this time fully arguing the judicial estoppel factors that Judge Boyle determined had not been fully vetted. The Highland Renewed MTD also asks the bankruptcy court to, this time, rule on the merits of the claims (which the bankruptcy court did not do last time), in the event judicial estoppel does not apply. The Renewed MTWR appears to be an attempt by Plaintiffs to avoid the bankruptcy court exercising its duties in response to Judge Boyle’s remand. It appears to be forum shopping and an attempt at delaying adjudication. The reality is that, if the bankruptcy court rules on the Renewed MTD in a way Plaintiffs find unsatisfactory, they can appeal again to the District Court. The further reality is that if judicial estoppel prevails, there will never be any “substantial and material consideration” and “significant interpretation of federal

laws]” in this Lawsuit Pertaining to HarbourVest Bankruptcy Settlement. *In re Nat’l Gypsum*, 14 B.R. 188, 192-93.

C. No “Substantial and Material Consideration” and “Significant Interpretation of Federal Laws” are Implicated Here; This is At Bottom a Request for Allowance of an Administrative Expense Claim

To be clear, the causes of action in this Lawsuit Pertaining to HarbourVest Bankruptcy Settlement are tantamount to the assertion of administrative expense claims against a Chapter 11 Debtor. As a general matter, the filing of administrative expense claims triggers the claims allowance process and subjects a claimant to the bankruptcy court’s equitable jurisdiction. *See, e.g., In re UAL Corp.*, 386 B.R. 701, 707 (Bankr. N.D. Ill. 2008) (“[B]y filing a claim ... the creditor triggers the process of ‘allowance and disallowance of claims,’ thereby subjecting himself to the bankruptcy court’s equitable power ... As such, there is no Seventh Amendment right to a jury trial ... Claims for payment of an administrative expense are no different from other claims in this regard.”) (citing *Langenkamp v. Culp*, 498 U.S. 42 (1990)); *see also Harpole Constr., Inc. v. Medallion Midstream, LLC (In re Harpole Constr., Inc.)*, 565 B.R. 193, 202 (Bankr. D. N.M. 2017) (same); *Carter v. Schott (In re Carter Paper Co.)*, 220 B.R. 276, 290-311 (Bankr. M.D. La. 1998) (finding breach of fiduciary duty claim against bankruptcy trustee originally filed in state court was an administrative expense claim and no jury trial right existed). It is difficult to see Plaintiffs’ strategy here as anything other than an attempted end-run around the bankruptcy court. They argue as justification that there is substantial other federal law involved. But Plaintiffs’ claims do not seem complex. If Plaintiffs survive the Renewed MTD (based on the judicial estoppel factors) their federal claims are simply: (a)(i) did Highland owe both Plaintiffs a fiduciary duty under the IAA; (ii) if so, what was the nature of that duty and was it violated; and (iii), if violated, what are the remedies and potential damages? Fiduciary duties (and interpretation of

different sources of fiduciary duties) certainly are not outside a bankruptcy court's expertise. *See In re Vicars Ins. Agency, Inc.*, 96 F.3d 949, 953-54 (7th Cir. 1996); *City of N.Y. v. Exxon Corp.*, 932 F.2d 1020, 1026 (2d Cir. 1991) (mandatory withdrawal requires "significant interpretation, as opposed to simple application, of federal laws"). "[M]andatory withdrawal is to be applied narrowly" to "prevent 157(d) from becoming an 'escape hatch.'" *Manila Indus., Inc. v. Ondova Ltd. (In re Ondova Ltd.)*, 2009 U.S. Dist. LEXIS 102134, at *6 (N.D. Tex. Oct. 1, 2009), *aff'd* 2009 U.S. Dist. LEXIS 102071 (N.D. Tex. Nov. 3, 2009). Moreover, bankruptcy courts frequently consider other federal law (as well as state law) in adjudicating claims against the estate.

"Claims against the estate" is what's implicated here. The claims were asserted against the Debtor/Highland before its plan went effective and involve a time period during its case. Administrative expense claims include claims arising from a debtor-in-possession's postpetition negligence, tortfeasance, and malfeasance. *See Reading Co. v. Brown*, 391 U.S. 471, 478-79 (1968) (holding that if a debtor-in-possession commits a tort or harms a non-debtor following the petition date, the resulting claim is an administrative expense claim even though there was no benefit to the debtor's estate). Moreover, the Plan made very clear that claims such as this were required to be filed in the bankruptcy court by a date certain. *See In re Weblink Wireless, Inc.*, 2003 Bankr. LEXIS 2312, at *3 (Bankr. N.D. Tex. Mar. 12, 2003) ("The allowance of an administrative expense to be paid pursuant to a confirmed plan of reorganization constitutes a core matter over which the court has jurisdiction to enter a final order."); *see also In re Taco Bueno Rests., Inc.*, 606 B.R. 289, 292 (Bankr. N.D. Tex. 2019) (finding core jurisdiction to adjudicate administrative claim); *In re Pilgrim's Pride Corp.*, 453 B.R. 691, 692 (Bankr. N.D. Tex. 2011) ("Objections [to administrative expense claims] are subject to the court's core jurisdiction pursuant to 28 U.S.C. §§ 1334 and 157(b)(2)(B)"). The bankruptcy court has "core" jurisdiction to

adjudicate the Lawsuit Pertaining to HarbourVest Bankruptcy Settlement and can enter final orders under 28 U.S.C. §§ 157(b) and 1334(b).

For all these reasons, the Renewed MTWR should be denied.

V. COMPLAINT WITH LOCAL BANKRUPTCY RULE 5011-1

Finally, in compliance with Local Bankruptcy Rule 5011-1, the bankruptcy court reports that it held a status conference in this matter on Wednesday January 25, 2023, at 1:30 pm. All parties appeared through counsel. As noted above, Highland opposes withdrawal of the reference, and the Plaintiffs continue to urge it. Both sides presented their arguments orally. There is no stay of this action in place. As noted earlier, there is a pending Renewed MTD of Highland, filed after remand to the bankruptcy court by Judge Boyle, that the bankruptcy court has under advisement. There is no scheduling order in place currently. The parties are not ready for trial (indeed, the Defendant argues no trial is warranted, given its positions urged in the Renewed MTD). As discussed herein, this action presents core matters. There are no jury trial rights.

Again, it is the conclusion and recommendation of the bankruptcy court that the Renewed MTWR should be denied in its entirety.

###END OF REPORT AND RECOMMENDATION###

BTXN 221 (rev. 09/22)

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS

In Re:		§	
Highland Capital Management, L.P.		§	
	Debtor(s)	§	Case No.: 19-34054-sgj11
Charitable DAF Fund, LP et al.		§	Chapter No.: 11
	Plaintiff(s)	§	Adversary No.: 21-03067-sgj
vs.		§	
Highland Capital Management, LP et al.		§	Civil Case No.: 3:22-cv-02802-S
	Defendant(s)	§	
Charitable DAF Fund, LP et al.		§	
	Plaintiff(s)	§	
vs.		§	
Highland Capital Management, LP et al.		§	
	Defendant(s)	§	

NOTICE OF TRANSMITTAL OF REPORT AND RECOMMENDATION

I am transmitting:

One copy of: Report and Recommendation to the District Court on "Renewed Motion to Withdraw the Reference" [Bankr. Doc. No. 128].

DATED: 2/6/23

FOR THE COURT:
Robert P. Colwell, Clerk of Court

by: /s/Sheniqua Whitaker, Deputy Clerk

006942



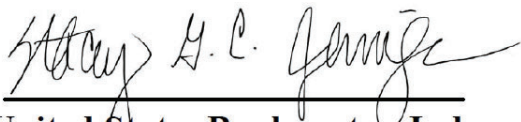
CLERK, U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS

ENTERED

THE DATE OF ENTRY IS ON
THE COURT'S DOCKET

The following constitutes the ruling of the court and has the force and effect therein described.

Signed February 6, 2023


United States Bankruptcy Judge

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

IN RE:	§	
	§	
HIGHLAND CAPITAL MANAGEMENT	§	BANKR. CASE NO. 19-34054-SGJ-11
L.P.,	§	(CHAPTER 11)
REORGANIZED DEBTOR.	§	
	§	
CHARITABLE DAF FUND, L.P. and	§	
CLO HOLDCO, LTD.,	§	
	§	
PLAINTIFFS,	§	
	§	
VS.	§	ADV. PRO. NO. 21-03067-sgj
	§	
HIGHLAND CAPITAL MANAGEMENT,	§	CIV. ACT. NO. 3:22-cv-02802-S
L.P.,	§	CIV. ACT. NO. 3:21-cv-0842-B
	§	
DEFENDANT.	§	

REPORT AND RECOMMENDATION TO THE DISTRICT COURT
ON "RENEWED MOTION TO WITHDRAW THE REFERENCE"
[BANKR. DOC. NO. 128]

006943

I. INTRODUCTION

The above-referenced adversary proceeding is related to the now long-running Chapter 11 bankruptcy case of Highland Capital Management, L.P. (“Highland,” the “Debtor,” or sometimes the “Reorganized Debtor”). Highland is the main Defendant in this action, which was filed by Charitable DAF Fund, L.P. and CLO Holdco, Ltd. (“Plaintiffs”) on April 12, 2021, in the District Court (*during* Highland’s bankruptcy case and *prior* to the effective date of Highland’s Chapter 11 plan) and assigned to Judge Jane Boyle. For the *second* time since this action was filed, the Plaintiffs are urging the District Court to withdraw the reference from the bankruptcy court. The *first* time that Plaintiffs urged it (unsuccessfully) was on June 29, 2021, to Judge Boyle, in Civil Action No. 3:21-cv-0842-B, in response to Defendant’s motion to *enforce* the reference and in their cross-motion thereto, in which Plaintiffs specifically urged the District Court to find that mandatory withdrawal of the reference under 28 U.S.C. § 157(d) applied to the action and so enforcing the reference (and, thus, sending the action to the bankruptcy court) would be pointless. Judge Boyle entered an order on September 20, 2021, granting Defendant’s motion to enforce the reference, referring the action to this bankruptcy court “to be adjudicated as a matter related to the consolidated Chapter 11 Bankruptcy of Highland Capital Management, L.P., Chapter 11 Case No. 19-34054.”¹ Plaintiffs brought their “Renewed Motion to Withdraw the Reference” (“Renewed MTWR”) on November 18, 2022,² more than a year after Judge Boyle rejected their arguments and referred the action to the bankruptcy court. The Renewed MTWR was transmitted to the District Court on December 15, 2022 and assigned to a different district judge – Judge Karen Scholer – under the above-referenced civil action number.³ Much has happened during this time

¹ See *Order of Reference*, Civ. Act. No. 3:21-cv-0842-B, Doc. No. 64.

² See *Renewed Motion to Withdraw the Reference*, Adv. Pro. 21-3067-sgj, Bankr. Doc. No. 128.

³ See Civ. Act. No. 3:22-02802-S, Doc. No. 1.

span. This “jurisdictional ping pong” (as it might fairly be described) is best understood with the timeline of relevant events set forth in Part III below. But first, a description of the parties is in order.

II. THE PARTIES

Highland is the main Defendant in this action. There were originally two other Defendants: (a) Highland CLO Funding, Ltd. (“HCLOF”), a Guernsey-based investment vehicle that is now past its investment period, and (b) Highland HCF Advisors, Ltd. (“HCFA”), which has been described as a non-debtor, wholly owned subsidiary of Highland, which served as a portfolio manager for HCLOF. HCLOF was dismissed with prejudice from this action on December 7, 2021 [Bankr. Doc. No. 80]. The other Defendant, HCFA, has never appeared in this action, and it appears it was never served with the summons and complaint.⁴ The court is unclear why—perhaps it was dissolved as part of the Highland reorganization or has no assets.

The Plaintiffs are CLO Holdco Ltd. (“CLO Holdco”) and Charitable DAF Fund, L.P. (“DAF”). DAF is CLO Holdco’s parent company. Both Plaintiffs are Cayman Island entities and are affiliated with Highland’s former chief executive officer and founder (James Dondero). Plaintiff CLO Holdco also happens to own a 49.02% equity interest in the dismissed Defendant HCLOF.

For ease of reference—and because there are a very large number of lawsuits pending in the Northern District of Texas involving Highland and its affiliates—this action presently before the

⁴ Highland noted on page 3 of its *Motion for an Order Extending the Time to File a Responsive Pleading*, filed in the District Court on May 6, 2021, at Doc. No. 9 (and entered on the bankruptcy court docket on September 29, 2021 at Bankr. Doc. No. 9) that “[w]hile Highland agreed to accept service on its own behalf, it could not and did not accept service on behalf of the other defendants, Highland HCF Advisors, Ltd. and Highland CLO Funding, Ltd. (together, the “Other Defendants”)” and that “to the best of Highland’s knowledge, the Other Defendants have not been served with the Complaint such that the time for each of them to serve a responsive pleading has not begun to run.” A *Waiver of Service of Summons* with respect to HCLOF was filed on June 3, 2021 (at Doc. No. 30 in both the District Court and bankruptcy court), but there does not appear on either docket any proof of service or waiver of service with respect to service of the summons and complaint on HCFA that would indicate that HCFA has been served as of this date.

court will be referred to as the “Lawsuit Pertaining to HarbourVest Bankruptcy Settlement.” The timeline below fully explains this.

III. THE RELEVANT TIMELINE

October 16, 2019: Highland filed its voluntary petition for relief under chapter 11 of the Bankruptcy Code (the “Petition Date”).

December 23, 2020: Highland (during its bankruptcy case—and before getting a Chapter 11 plan approved) moved for approval by the bankruptcy court of a significant settlement it reached with entities collectively known as HarbourVest. HarbourVest was a disputed creditor—asserting a \$300 million proof of claim against Highland—and it also happened to own a 49.98% equity interest in the Defendant HCLOF. Pursuant to the proposed settlement between Highland and HarbourVest (the “HarbourVest Settlement”), HarbourVest agreed to transfer its 49.98% equity interest in Defendant HCLOF to Highland (or Highland’s designee) and agreed to greatly reduce its disputed claim in the bankruptcy case from \$300 million to \$80 million (which would be given part unsecured creditor status and part subordinated status).

January 8, 2021: Plaintiff CLO Holdco objected to the HarbourVest Settlement, presumably at the direction of its parent, DAF (the other Plaintiff herein). CLO Holdco argued that: (i) it, as a 49.02% equity member of HCLOF, had a “Right of First Refusal,” pursuant to the HCLOF membership agreement, to acquire the 49.98% equity interest that HarbourVest was going to be transferring to Highland under the HarbourVest Settlement; and (ii) HarbourVest could not transfer its 49.98% equity interest to Highland without compliance with this purported right of first refusal. CLO Holdco did not object on any other basis to the HarbourVest Settlement.

January 14, 2021: The bankruptcy court held an evidentiary hearing on the proposed HarbourVest Settlement, during which CLO Holdco voluntarily withdrew its objection to the

HarbourVest Settlement premised on the “Right of First Refusal.” After an extensive presentation of evidence, the bankruptcy court overruled certain remaining objections (specifically, those of certain family trusts of James Dondero) and approved the HarbourVest Settlement. Note that the Dondero family trusts appealed to the District Court the approval of the HarbourVest Settlement, and their appeal was dismissed for lack of standing.

February 22, 2021: The bankruptcy court entered an order confirming a Chapter 11 plan for Highland [Bankr. **Doc. No. 1943**] (the “Confirmation Order”), which confirmed Highland’s extensively mediated, negotiated, and litigated plan [Bankr. **Doc. No. 1808**] (the “Plan”). The Plan became effective on August 11, 2021 [Bankr. **Doc. No. 2700**] (the “Effective Date”). At least the following provisions are germane to this Lawsuit Pertaining to HarbourVest Bankruptcy Settlement. First, pursuant to the Plan, the bankruptcy court expressly retained jurisdiction/authority to “allow, disallow, determine, liquidate ... any Claim ... including, without limitation, the resolution of any request for payment of any Administrative Expense Claim” Plan, Art. XI. Second, the Plan defined “Administrative Expense Claim,” in relevant part, as a: “Claim for costs and expenses of administration of the Chapter 11 Case . . . pursuant to sections 503(b), 507(a)(2), 507(b) ... of the Bankruptcy Code, including ... (a) the actual and necessary costs and expenses incurred after the Petition Date and through the Effective Date of preserving the Estate and operating the business of the Debtor” Plan, Art. I.B.2.

April 12, 2021: Plaintiffs commenced this Lawsuit Pertaining to HarbourVest Bankruptcy Settlement in the District Court—which was assigned Civ. Action No. 21-CV-0842-B (Judge Jane Boyle)—naming Debtor/Highland, HCFA, and HCLOF as Defendants. To be clear, this lawsuit was filed at a time when Highland was still a debtor in possession (its Plan had been recently confirmed, but the plan Effective Date had not yet occurred—it occurred in August 2021). The

underlying Complaint (“Complaint”) alleges that conduct of Highland during the bankruptcy case in late 2020 and early 2021 revolving around the HarbourVest Settlement—prior to the Confirmation Order—violated contractual and extra-contractual duties Highland purportedly owed (i) to Plaintiff CLO Holdco as an investor in HCLOF; and (ii) to Plaintiff DAF as an advisee under an investment advisory agreement. The Complaint raises claims: (i) by Plaintiffs for breaches of fiduciary duty against Highland and HCFA (Count 1); (ii) by CLO Holdco for breach of the HCLOF Members Agreement against all three Defendants (Count 2); (iii) by Plaintiffs for negligence against Highland and HCFA (Count 3); (iv) by Plaintiffs for violations of the Racketeer Influenced and Corrupt Organizations statute (15 U.S.C. § 1961, et seq. (“RICO”)) against Highland (Count 4); and (v) by CLO Holdco for tortious interference against Highland (Count 5). In Count 1 (breach of fiduciary duty), Plaintiffs allege that Debtor/Highland violated its “broad” duties to Plaintiffs under the Investment Advisers Act and Highland’s “internal policies and procedures” by: (i) engaging in “insider trading with HarbourVest”; (ii) “concealing” the value of HarbourVest’s 49.98% equity interest in HCLOF; and (iii) “diverting” the investment opportunity in the HarbourVest entities to the Debtor without first offering it to Plaintiffs.⁵ In Count 4 (RICO), Plaintiffs allege that Highland and its co-Defendants were an “association-in-fact” engaged in a pattern of racketeering activity for this same underlying conduct; namely, failing to disclose the valuation of HCLOF’s interest and ultimately effectuating the HarbourVest Settlement. Again,

⁵ While specific statutory references to the federal Investment Advisers Act are sparse in the Complaint, subsequent pleadings of the Plaintiffs make clear they are referring to at least 15 U.S.C. § 80b-6 and 80b-15(a) (which they cite as imposing both a duty of care and a duty of loyalty, each unwaivable, on investment advisors, in favor of funds and its investors, citing *SEC v. Tambone*, 550 F.3d 106, 146 (1st Cir. 2008)); 15 U.S.C. § 206(2) (which they cite as requiring investment advisers to seek “best execution” for all their clients’ transactions, citing *SEC v. Ambassador Advisors, LLC*, 576 F. Supp. 3d 286, 300 (E.D. Pa. 2021)); and 15 U.S.C. § 215 (which they cite as recognizing “a limited private right of action for equitable relief including disgorgement, wherein one may seek to void the rights of a violator who performs a contract in violation of the Advisers Act”). Response to Renewed Motion to Dismiss, pp. 12-13. Bankr. Doc. No. 130.

Highland's alleged misconduct was the act of settling the \$300 million proof of claim filed against Highland by HarbourVest under the terms and conditions of the HarbourVest Settlement. To be clear, the HarbourVest Settlement was implemented after full notice to creditors in the Highland case, an evidentiary hearing, and approval by the bankruptcy court after fulsome findings of fact and conclusions of law. And as noted earlier, one of the Plaintiffs, CLO Holdco, even objected to the HarbourVest Settlement and then withdrew its objection the morning of the bankruptcy court's hearing on the HarbourVest Settlement.

May 19, 2021: Soon after the commencement of this Lawsuit Pertaining to HarbourVest Bankruptcy Settlement, Highland moved before Judge Boyle for an order to enforce the Northern District of Texas's standing order of reference (Misc. Order No. 33) [Bankr. **Doc. No. 22**] (the "Motion to Enforce"), arguing that the Lawsuit Pertaining to HarbourVest Bankruptcy Settlement should be referred to the bankruptcy court, since it asserted claims arising in, arising under, or related to Title 11 and Highland's bankruptcy case.

May 27, 2021: Highland also swiftly moved to dismiss the Lawsuit Pertaining to HarbourVest Bankruptcy Settlement [Bankr. **Doc. No. 26**] (the "Original MTD"). The Original MTD was fully briefed to Judge Boyle.⁶

June 29, 2021: Plaintiffs reacted by filing their response to the Motion to Enforce [Bankr. **Doc. No. 36**], arguing the Motion to Enforce should be denied, and *cross-moving therein that Judge Boyle should keep the Lawsuit Pertaining to HarbourVest Bankruptcy Settlement* because the claims therein were subject to mandatory withdrawal of the reference, under **28 U.S.C § 157(d)—i.e.**, they involved "consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce" and could not be adjudicated

⁶ Defendant HCLOF filed a *Motion to Dismiss and Joinder in Motion to Dismiss of Highland Capital Management, L.P.* in the District Court at **Doc. No. 57** (Bankr. **Doc. No. 57**) on August 30, 2021.

in the bankruptcy court. To be clear, the underlying Complaint (while all about the HarbourVest Settlement) asserts claims of breach of fiduciary duty under the federal Investment Advisers Act (“IAA”) and state law; breach of contract; negligence; RICO; and tortious interference with contract. Notably, the arguments in Plaintiffs’ cross-motion on June 29, 2021 appear to be identical to those in Plaintiffs’ Renewed MTWR now before the court.

August 26, 2021: Plaintiffs filed a motion before Judge Boyle asking her to stay the action before her, pending appeal of the Confirmation Order [Bankr. **Doc. No. 55**] (the “Stay Motion”), arguing that the Plan injunction somehow prohibited the prosecution of the Lawsuit Pertaining to HarbourVest Bankruptcy Settlement. The Stay Motion was fully briefed to Judge Boyle.

September 20, 2021: The District Court (Judge Boyle) granted Highland’s Motion to Enforce and referred this Lawsuit Pertaining to HarbourVest Bankruptcy Settlement to the bankruptcy court, including the Original MTD, “[p]ursuant to **28 U.S.C. § 157** ... to be adjudicated as a matter related to the ... Bankruptcy of Highland Capital Management, L.P.” [Bankr. **Doc. No. 64**].

November 23, 2021: Plaintiffs and Defendants argued the Stay Motion and the merits of the Original MTD, including their alleged claims under the IAA and RICO, to the bankruptcy court. Following the hearing the bankruptcy court denied the Stay Motion.⁷

March 11, 2022: The bankruptcy court granted the Original MTD and issued a written ruling on it (the “MTD Order”)—never getting to the merits of the claims in the Lawsuit Pertaining to HarbourVest Bankruptcy Settlement. [Bankr. **Doc. No. 100**]. Rather, the bankruptcy court dismissed the Lawsuit Pertaining to HarbourVest Bankruptcy Settlement with prejudice, on the

⁷ See *Order Denying Motion to Stay*, Bankr. **Doc. No. 81**, entered on December 7, 2021. As noted above., the bankruptcy court also entered, on December 7, 2021, its *Order Granting Highland CLO Funding, Ltd.’s Motion to Dismiss* [Bankr. **Doc. No. 80**].

basis that the claims were precluded by the doctrines of collateral estoppel and judicial estoppel. *See Charitable DAF Fund, L.P. and CLO Holco, Ltd. v. Highland Cap. Mgmt., L.P., et al. (In re Highland Cap. Mgmt., L.P.)*, 2022 WL 780991 (Bankr. N.D. Tex., Mar. 11, 2022). The bankruptcy court concluded that the claims in the Lawsuit Pertaining to HarbourVest Bankruptcy Settlement were barred due to the strategic decisions of Plaintiff CLO Holdco during the bankruptcy case (i.e., choosing to withdraw its objection to the HarbourVest Settlement) and that decision was also binding on its Co-Plaintiff DAF (its parent) since the two were in privity. On March 25, 2022, the Plaintiffs appealed the MTD Order to the District Court. *See* 3:21-cv-00695-B, Doc. No. 2. The Plaintiffs did not raise 28 U.S.C. § 157(d) in the appeal or otherwise argue that the bankruptcy court lacked jurisdiction or authority to have entered the MTD Order.

June 17, 2022: Judge Boyle entered an order consolidating the appeal of the MTD Order with Plaintiff's appeal of the bankruptcy court's order denying the Stay Motion, which had been assigned Civ. Act. No. 3:21-cv-03129. *See* 3:21-cv-03129-B, Doc. No. 20.

September 2, 2022: Judge Boyle, sitting this time in an appellate capacity: (i) reversed the bankruptcy court's conclusion that collateral estoppel barred Plaintiffs' claims but (ii) remanded on the judicial estoppel determination.⁸ *See Charitable DAF Fund, L.P. v. Highland Cap. Mgmt., L.P. (In re Highland Cap. Mgmt., L.P.)*, 643 B.R. 162, 166 (N.D. Tex. 2022). Specifically, Judge Boyle determined that the bankruptcy court had erred in its ruling that collateral estoppel barred entirely the claims in this Lawsuit Pertaining to HarbourVest Bankruptcy Settlement, but Judge Boyle separately, in evaluating the bankruptcy court's determination that judicial estoppel also barred Plaintiff's Lawsuit Pertaining to HarbourVest Bankruptcy Settlement, ruled that the bankruptcy court did not make a certain finding necessary to conclude judicial estoppel applied

⁸ Judge Boyle also affirmed the bankruptcy court's order denying the Stay Motion.

(i.e., a finding of “inadvertence”). Thus, Judge Boyle remanded to the bankruptcy court for possible further findings on the judicial estoppel doctrine and presumably for an adjudication on the merits of the various claims asserted in the Lawsuit Pertaining to HarbourVest Bankruptcy Settlement, if the bankruptcy court concluded judicial estoppel did *not* apply (after evaluating the “inadvertence” factor).

September 8, 2022: Meanwhile, the U.S. Court of Appeals for the Fifth Circuit affirmed, in material part, the Confirmation Order’s factual findings and legal conclusions in support of the Highland Plan. *NexPoint Advisors, L.P., et al. v. Highland Cap. Mgmt., L.P.*, 48 F.4th 419 (5th Cir. 2022). A petition for writ of certiorari is now pending before the U.S. Supreme Court regarding the Plan Confirmation Order. To be clear, there has never been a stay of the Plan (i.e., the Confirmation Order), and the Highland Plan has been in effect since August 11, 2021.

October 14, 2022: In response to Judge Boyle’s remand, *Charitable DAF Fund, L.P. v. Highland Cap. Mgmt., L.P. (In re Highland Cap. Mgmt., L.P.)*, 643 B.R. 162, 166 (N.D. Tex. 2022), Highland filed a renewed motion to dismiss [Bankr. Doc. No. 122] (the “Renewed MTD”). It addresses the “inadvertence” factor on the judicial estoppel defense (arguing it bars Counts 2 and 5 of the Complaint), and also argues that all claims in this Lawsuit Pertaining to HarbourVest Bankruptcy Settlement—even if not precluded by the doctrine of judicial estoppel—are not plausible on their face, under *Iqbal* and *Twombly*. *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

November 18, 2022: Plaintiffs responded to the Renewed MTD and also filed their Renewed MTWR, again urging mandatory withdrawal of the reference. Plaintiffs once again are arguing that this Lawsuit Pertaining to HarbourVest Bankruptcy Settlement “requires consideration” of non-bankruptcy federal laws regulating interstate commerce and, thus,

mandatory withdrawal of the reference applies under 28 U.S.C. § 158(d). *Interestingly, Plaintiffs have now moved to dismiss their RICO count (without prejudice).*⁹ Thus, their sole “other federal law” argument boils down to this:

This adversary proceeding primarily involves fiduciary duties imposed upon Registered Investment Advisers by the Investment Advisers Act of 1940 (“Advisers Act”) and corresponding state law claims for breach of those duties. As a result, presiding over this action will require extensive consideration of federal laws regulating interstate commerce, which renders withdrawal of the reference to bankruptcy court mandatory under 28 U.S.C. § 157(d).

Renewed MTWR, at ¶ 5.

IV. RECOMMENDATION

The bankruptcy court recommends that Plaintiffs’ Renewed MTWR be denied. The bankruptcy court clearly has subject matter jurisdiction over these claims pursuant to 28 U.S.C. § 1334(b). The Renewed MTWR was not timely filed, which is required under the mandatory withdrawal provisions of 28 U.S.C. § 157(d), and it is the quintessential attempt at a second bite at the apple.

A. Jurisdiction and Core Nature of the Action

First, there is no concern about lack of bankruptcy subject matter jurisdiction here. Bankruptcy subject matter jurisdiction exists over the claims against the Defendant pursuant to 28 U.S.C. §§ 1334(b) and 157. Under 28 U.S.C. § 1334(b), “district courts shall have original but not exclusive jurisdiction of all civil proceedings *arising under* title 11, or *arising in* or *related to*

⁹ See Plaintiff’s Response to Renewed MTD at 23 (“Plaintiffs respectfully dismiss the RICO claim under Rule 41(a) to the extent such a claim is revealed to have existed under non-securities bases. Because Highland has conceded that Plaintiffs’ claims are actionable under the federal securities laws and the Advisers Act, and has cited same as a basis for dismissing the RICO claim, Highland is precluded and estopped from denying the violations of the Securities Laws and the Advisers Act. As such, to the extent that other, non-securities law violations may give rise to RICO violations, Plaintiffs respectfully reserve the right to bring such a claim but respectfully dismiss their RICO claim at this time.”)

cases under title 11.”¹⁰ (Emphasis added.) The bankruptcy courts, in turn, are delegated authority to exercise that jurisdiction from the district courts, under 28 U.S.C. § 157(a).¹¹ There does not appear to be any dispute that this Lawsuit Pertaining to HarbourVest Bankruptcy Settlement is at least “related to” the Highland bankruptcy case. Thus, bankruptcy subject matter jurisdiction exists.¹² Moreover, there does not appear to be any dispute that the action involves “core” matters over which a bankruptcy court may generally enter final judgments.¹³ As noted recently by the Fifth Circuit: “[A] proceeding is core under section 157 if it invokes a substantive right provided by title 11 or if it is a proceeding that, by its nature, could arise only in the context of a bankruptcy case. For example, claims concerning the administration of the estate, allowance or disallowance of claims against the estate, and sale of property of the estate are all core proceedings.”¹⁴ See generally *In re Southmark Corp.*, 163 F.3d 925, 930-31 (5th Cir. 1999) (malpractice suit against an examiner’s accountant was a core proceeding; “The bankruptcy court must be able to assure itself and the creditors who rely on the process that court-approved managers of the debtor’s estate are performing their work, conscientiously and cost-effectively. . . . Award of the professionals’

¹⁰ 28 U.S.C. § 1334(b); see also *In re Bass*, 171 F.3d 1016, 1022 (5th Cir. 1999) (“[Section] 1334(b) grants jurisdiction to district courts and adjunct bankruptcy courts to entertain proceedings ‘arising under,’ ‘arising in a case under,’ or ‘related to’ a case under Title 11 of the United States Code, i.e., proceedings ‘related to’ bankruptcy.”).

¹¹ *In re PFO Glob., Inc.*, 26 F.4th at 252 (citing 28 U.S.C. § 157(a)).

¹² *In re Bass*, 171 F.3d at 1022 (“To determine whether [bankruptcy] jurisdiction exists, ‘it is necessary only to determine whether a matter is at least “related to” the bankruptcy.’” (quoting *In re Walker*, 51 F.3d 562, 569 (5th Cir. 1995))).

¹³ Plaintiffs’ Renewed MTWR seemed to dispute that core matters are involved. But their position on this at the status conference on this seemed equivocal. In addition, as noted earlier, there is a non-debtor Defendant named herein, HCFA, that is a subsidiary of Highland. Likely, claims asserted against it by Plaintiffs (which appear to be asserted at Counts 1-3) would not be core matters. However, HCFA has not been served and has failed to appear or defend in this matter. Thus, presumably there will be no adjudication of the claims against it in this action and the claims against it are irrelevant.

¹⁴ *Foster v. Aurzada, et al.* No. 22-10310 and No. 22-10318, slip. Op. at p. 5 (5th Cir. Jan. 3, 2023) (per curium), citing *In re Wood*, 825 F.2d 90, 97 (5th Cir. 1987) and 28 U.S.C. § 157(b)(2)(A), (B), (N), (O)).

fees and enforcement of the appropriate standards of conduct are inseparably related functions of bankruptcy courts.”).¹⁵

Again, there appears to be no dispute here regarding the “core/noncore” status of the claims. Plaintiffs’ argument is that, even if the claims are core, mandatory withdrawal of the reference is necessitated, pursuant to 28 U.S.C. § 157(d), because of other federal law, besides bankruptcy law, being significantly implicated.

B. *Untimeliness.*

Plaintiffs’ request for mandatory withdrawal of the reference is by any reasonable measure “untimely.” Under 28 U.S.C. § 157(d), a district court “shall, on *timely* motion of a party, so withdraw a proceeding if ... resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.” 28 U.S.C. § 157(d) (emphasis added). Assuming a timely motion, mandatory withdrawal is warranted only if a matter requires “substantial and material consideration” and “significant interpretation of federal laws[,]” rather than a “straightforward application of a federal statute to a particular set of facts.” *In re Nat’l Gypsum*, 14 B.R. 188, 192-93 (N.D. Tex. 1991); *Kirschner v. Dondero (In re Highland Cap. Mgmt., L.P.)*, 2022 Bankr. LEXIS 1028, at *27-28 (Bankr. N.D. Tex. Apr. 6, 2022) (same). The Renewed MTWR was filed *fourteen months* after Judge Boyle referred this action to the bankruptcy court. Moreover, it was filed after: (a) the bankruptcy court made a final ruling on a motion to dismiss, (b) Judge Boyle ruled on that final bankruptcy court ruling in an appellate capacity, and (c) remanded back to the bankruptcy court for further proceedings.

¹⁵ See *id.* at 930 (citing 28 U.S.C. § 157(b)(3)) (stating that whether claim has a state law origin is not dispositive to whether it is a core bankruptcy matter); *In re Wood*, 825 F.2d at 97 n.34 (stating that whether right is state created is not dispositive to whether proceeding is core under 28 U.S.C. § 157).

To be clear, 28 U.S.C. § 157(d) does not define “timely,” but it has been interpreted as requiring a motion to be made at the first reasonable opportunity. *See In re Fresh Approach, Inc.*, 51 B.R. 412, 415-16 (Bankr. N.D. Tex. 1985) (finding a motion to withdraw the reference untimely when filed sixteen days after the court entered its decision on the matter); *see also Sec. Farms v. Int’l Bhd. of Teamsters*, 124 F.3d 999, 1007, n.3 (9th Cir. 1997). (“A motion to withdraw is timely ‘if it was made as promptly as possible in light of the developments in the bankruptcy proceeding.’”); *Connolly v. Bidermann Indust. U.S.A., Inc.*, 1996 U.S. Dist. LEXIS 8059, at *8 (S.D.N.Y. June 13, 1996) (“Plaintiff’s delay of over eight months renders her motion untimely, and as such it does not meet the threshold requirement set forth in 28 U.S.C. § 157(d).”); 9 COLLIER ON BANKRUPTCY ¶ 5011.01[2] (“[M]otions for mandatory withdrawal must be made as soon as it is apparent that it is necessary for the district court to hear the proceeding”).

But this isn’t just any untimely motion. This is a *second* motion. This appears to be the proverbial second bite at the apple—urged right after Highland, after reviewing Judge Boyle’s September 2022 appellate ruling, moved for dismissal of this Lawsuit Pertaining to HarbourVest Bankruptcy Settlement, this time fully arguing the judicial estoppel factors that Judge Boyle determined had not been fully vetted. The Highland Renewed MTD also asks the bankruptcy court to, this time, rule on the merits of the claims (which the bankruptcy court did not do last time), in the event judicial estoppel does not apply. The Renewed MTWR appears to be an attempt by Plaintiffs to avoid the bankruptcy court exercising its duties in response to Judge Boyle’s remand. It appears to be forum shopping and an attempt at delaying adjudication. The reality is that, if the bankruptcy court rules on the Renewed MTD in a way Plaintiffs find unsatisfactory, they can appeal again to the District Court. The further reality is that if judicial estoppel prevails, there will never be any “substantial and material consideration” and “significant interpretation of federal

laws]” in this Lawsuit Pertaining to HarbourVest Bankruptcy Settlement. *In re Nat’l Gypsum*, 14 B.R. 188, 192-93.

C. No “Substantial and Material Consideration” and “Significant Interpretation of Federal Laws” are Implicated Here; This is At Bottom a Request for Allowance of an Administrative Expense Claim

To be clear, the causes of action in this Lawsuit Pertaining to HarbourVest Bankruptcy Settlement are tantamount to the assertion of administrative expense claims against a Chapter 11 Debtor. As a general matter, the filing of administrative expense claims triggers the claims allowance process and subjects a claimant to the bankruptcy court’s equitable jurisdiction. *See, e.g., In re UAL Corp.*, 386 B.R. 701, 707 (Bankr. N.D. Ill. 2008) (“[B]y filing a claim ... the creditor triggers the process of ‘allowance and disallowance of claims,’ thereby subjecting himself to the bankruptcy court’s equitable power ... As such, there is no Seventh Amendment right to a jury trial ... Claims for payment of an administrative expense are no different from other claims in this regard.”) (citing *Langenkamp v. Culp*, 498 U.S. 42 (1990)); *see also Harpole Constr., Inc. v. Medallion Midstream, LLC (In re Harpole Constr., Inc.)*, 565 B.R. 193, 202 (Bankr. D. N.M. 2017) (same); *Carter v. Schott (In re Carter Paper Co.)*, 220 B.R. 276, 290-311 (Bankr. M.D. La. 1998) (finding breach of fiduciary duty claim against bankruptcy trustee originally filed in state court was an administrative expense claim and no jury trial right existed). It is difficult to see Plaintiffs’ strategy here as anything other than an attempted end-run around the bankruptcy court. They argue as justification that there is substantial other federal law involved. But Plaintiffs’ claims do not seem complex. If Plaintiffs survive the Renewed MTD (based on the judicial estoppel factors) their federal claims are simply: (a)(i) did Highland owe both Plaintiffs a fiduciary duty under the IAA; (ii) if so, what was the nature of that duty and was it violated; and (iii), if violated, what are the remedies and potential damages? Fiduciary duties (and interpretation of

different sources of fiduciary duties) certainly are not outside a bankruptcy court's expertise. *See In re Vicars Ins. Agency, Inc.*, 96 F.3d 949, 953-54 (7th Cir. 1996); *City of N.Y. v. Exxon Corp.*, 932 F.2d 1020, 1026 (2d Cir. 1991) (mandatory withdrawal requires "significant interpretation, as opposed to simple application, of federal laws"). "[M]andatory withdrawal is to be applied narrowly" to "prevent 157(d) from becoming an 'escape hatch.'" *Manila Indus., Inc. v. Ondova Ltd. (In re Ondova Ltd.)*, 2009 U.S. Dist. LEXIS 102134, at *6 (N.D. Tex. Oct. 1, 2009), *aff'd* 2009 U.S. Dist. LEXIS 102071 (N.D. Tex. Nov. 3, 2009). Moreover, bankruptcy courts frequently consider other federal law (as well as state law) in adjudicating claims against the estate.

"Claims against the estate" is what's implicated here. The claims were asserted against the Debtor/Highland before its plan went effective and involve a time period during its case. Administrative expense claims include claims arising from a debtor-in-possession's postpetition negligence, tortfeasance, and malfeasance. *See Reading Co. v. Brown*, 391 U.S. 471, 478-79 (1968) (holding that if a debtor-in-possession commits a tort or harms a non-debtor following the petition date, the resulting claim is an administrative expense claim even though there was no benefit to the debtor's estate). Moreover, the Plan made very clear that claims such as this were required to be filed in the bankruptcy court by a date certain. *See In re Weblink Wireless, Inc.*, 2003 Bankr. LEXIS 2312, at *3 (Bankr. N.D. Tex. Mar. 12, 2003) ("The allowance of an administrative expense to be paid pursuant to a confirmed plan of reorganization constitutes a core matter over which the court has jurisdiction to enter a final order."); *see also In re Taco Bueno Rests., Inc.*, 606 B.R. 289, 292 (Bankr. N.D. Tex. 2019) (finding core jurisdiction to adjudicate administrative claim); *In re Pilgrim's Pride Corp.*, 453 B.R. 691, 692 (Bankr. N.D. Tex. 2011) ("Objections [to administrative expense claims] are subject to the court's core jurisdiction pursuant to 28 U.S.C. §§ 1334 and 157(b)(2)(B)"). The bankruptcy court has "core" jurisdiction to

adjudicate the Lawsuit Pertaining to HarbourVest Bankruptcy Settlement and can enter final orders under 28 U.S.C. §§ 157(b) and 1334(b).

For all these reasons, the Renewed MTWR should be denied.

V. COMPLAINT WITH LOCAL BANKRUPTCY RULE 5011-1

Finally, in compliance with Local Bankruptcy Rule 5011-1, the bankruptcy court reports that it held a status conference in this matter on Wednesday January 25, 2023, at 1:30 pm. All parties appeared through counsel. As noted above, Highland opposes withdrawal of the reference, and the Plaintiffs continue to urge it. Both sides presented their arguments orally. There is no stay of this action in place. As noted earlier, there is a pending Renewed MTD of Highland, filed after remand to the bankruptcy court by Judge Boyle, that the bankruptcy court has under advisement. There is no scheduling order in place currently. The parties are not ready for trial (indeed, the Defendant argues no trial is warranted, given its positions urged in the Renewed MTD). As discussed herein, this action presents core matters. There are no jury trial rights.

Again, it is the conclusion and recommendation of the bankruptcy court that the Renewed MTWR should be denied in its entirety.

###END OF REPORT AND RECOMMENDATION###

United States District Court
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CHARITABLE DAF FUND, L.P. and
CLO HOLDCO, LTD., directly and
derivatively,

v.

HIGHLAND CAPITAL
MANAGEMENT, L.P., HIGHLAND
HCF ADVISOR, LTD., and HIGHLAND
CLO FUNDING, LTD.

§
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CIVIL ACTION NO. 3:22-CV-2802-S

ORDER

This Order addresses the Joint Motion to Transfer Proceeding and Consolidate Before Original Court [ECF No. 11] ("Motion"). The Court **GRANTS** the Motion and the above-numbered case is hereby transferred to the docket of the Honorable Judge Jane Boyle, and shall henceforth carry the suffix letter "B."

SO ORDERED.

SIGNED April 3, 2023.



KAREN GREN SCHOLER
UNITED STATES DISTRICT JUDGE

006960

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS (DALLAS)

IN RE:	.	Case No. 19-34054-11 (SGJ)
	.	
HIGHLAND CAPITAL	.	
MANAGEMENT, L.P.,	.	
	.	
Debtor.	.	
.	
	.	Adv. No. 21-03067 (SGJ)
CHARITABLE DAF FUND, LP,	.	
et al.,	.	
	.	
Plaintiffs,	.	Earle Cabell Federal Building
	.	1100 Commerce Street
v.	.	Dallas, Texas 75242
	.	
HIGHLAND CAPITAL,	.	
MANAGEMENT, L.P., et al.,	.	
	.	
Defendants.	.	Tuesday, November 23, 2021
. . . . .	.	9:40 a.m.

TRANSCRIPT OF HEARING ON
PLAINTIFFS' MOTION TO STAY ALL PROCEEDINGS (55);
PLAINTIFFS' MOTION TO STRIKE REPLY APPENDIX (47); AND
DEFENDANTS' MOTION TO DISMISS COMPLAINT (26)

BEFORE HONORABLE STACEY G. JERNIGAN
UNITED STATES BANKRUPTCY COURT JUDGE

TELEPHONIC APPEARANCES CONTINUED ON NEXT PAGE.

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006961

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1 THE COURT: Good morning. Please be seated.

2 All right. We have a setting in the Charitable DAF
3 Fund, et al., v. Highland, Adversary 21-3067. We have three
4 motions that are set.

5 Let me get appearances from the Plaintiffs' counsel
6 first. Go ahead.

7 MR. SBAITI: Good morning, Your Honor. This is Mazin
8 Sbaiti for the Plaintiffs.

9 THE COURT: Okay. Thank you.

10 Now for the Defendants, who do we have appearing?

11 MR. POMERANTZ: Good morning, Your Honor. It's Jeff
12 Pomerantz and John Morris from Pachulski Stang Ziehl & Jones.
13 Your Honor, before -- I understand Your Honor is going to take
14 up the motion to stay first.

15 Before Your Honor does so, I have a procedural issue
16 relating to that motion that I would like to address the Court
17 after appearances are made.

18 THE COURT: All right. I assume that's all the
19 lawyer appearances for this adversary.

20 MR. JORDAN: Your Honor?

21 THE COURT: Oh, go ahead.

22 MR. JORDAN: Your Honor, we are a nominal defendant,
23 but John Jordan on behalf of Highland CLO Funding, Ltd.

24 THE COURT: Okay. Thank you. Sorry about that.

25 MR. BESSETTE: And, Your Honor, Paul Bessette, Mr.

1 Jordan's colleague is on the phone, as well.

2 THE COURT: Okay. Thank you.

3 All right. Anyone else I missed?

4 (No audible response)

5 THE COURT: All right. Mr. Pomerantz, your
6 procedural issue?

7 MR. POMERANTZ: Thank you, Your Honor.

8 Your Honor, I must once again bring to this Court's
9 attention a violation of the Court Rules by the various counsel
10 representing Mr. Dondero. This time it's by Mr. Sbaiti.

11 When the district court entered its order granting
12 Highland's motion to enforce the reference and referring this
13 matter to Your Honor, there were three matters on the Court's
14 docket, district court's docket that got transferred. First
15 was the motion to dismiss, second was the motion to stay, and
16 third was the motion to strike, which essentially has been
17 rendered moot.

18 The briefing was complete with respect to the first
19 two matters, the motion to dismiss and the motion to stay. And
20 all that remained for the Court to do was to set a hearing and
21 have oral argument. Your Honor, on October 13th, Your Honor
22 set a hearing for today for each of those two motions.
23 Nevertheless, on November 10th, almost a month after the Court
24 set the matters for hearing and after pleadings were closed,
25 Plaintiffs filed what they called their amended motion to stay.

1 As an initial matter, Your Honor, the amended motion
2 was not even filed in this adversary proceeding initially. It
3 was filed in the main case, and there was an error that Mr.
4 Sbaiti corrected on November 18th, five days before this
5 hearing. Plaintiff did not ask for leave of court to file any
6 further pleadings. They did not provide the time under the
7 local rules for response. And, in fact, they raised additional
8 arguments in their amended motion.

9 Well, Your Honor, we can certainly argue to the Court
10 that the amended motion constitutes a new motion, is untimely,
11 and the hearing should be continued to allow us to file a
12 response. We're not going to do that, Your Honor. As I will
13 discuss when it's my time to response substantively to the
14 motion, the new arguments to stay the proceedings, the amended
15 motion are equally as frivolous as the arguments contained in
16 the original motion.

17 But I bring this to the Court's attention because,
18 again, it's extremely frustrating to have the lawyers
19 representing Mr. Dondero's related entities continue to act as
20 if the rules do not apply to them. Your Honor will recall just
21 a week or so ago, Your Honor made a -- we had a similar issue
22 in connection with the motion to dismiss. Failure to follow
23 the rules is unprofessional, and it's disrespectful not only to
24 Highland's professionals but also to the Court and it
25 interferes with Your Honor's ability to control your docket and

1 sufficiently prepare for contested matters.

2 At some point, Your Honor, there should be real
3 consequences for the continued violation of the rules. Having
4 said that, Your Honor, we are prepared to go forward with the
5 motion to stay today.

6 THE COURT: All right. Mr. Sbaiti, what say you?
7 I'm looking at Docket Entry Number 69 in the adversary
8 proceeding that was filed last Thursday. So, obviously, very,
9 very late in the game, shall we say. What is your response to
10 this?

11 MR. SBAITI: Your Honor, that was not filed in the
12 adversary as an error. When we asked one of our paralegals to
13 file it, we're not as familiar with the bankruptcy court system
14 and it was an error. It was corrected once the lawyers
15 realized it, which was last -- which was on November the 18th.
16 It was filed in, I guess in the main case. But it was simply
17 an inadvertent error, Your Honor.

18 MR. POMERANTZ: I would add, Your Honor, the original
19 motion filed inadvertently was November 10th. It still was not
20 timely. I think Mr. Sbaiti needs to answer the question of why
21 that was filed untimely, okay.

22 THE COURT: All right. Thank you, Mr. Sbaiti.

23 So, one of my pet peeves in life is people blaming
24 paralegals, by the way. But be that as it may, as Mr.
25 Pomerantz points out that it was still untimely the motion

1 filed in the underlying bankruptcy case November 10th. So what
2 is your --

3 MR. SBAITI: Your Honor, when we looked at the motion
4 and looked at the progression of the case, we filed an amended
5 motion simply to clarify our position. And really I don't
6 think we've changed our arguments all that much. We simply
7 clarified our position. We've seen amended motions filed in
8 the bankruptcy in our prior dealings, and so at that point, we
9 felt like there wasn't a rule explicitly saying we couldn't
10 have an amended motion.

11 But if it's untimely, Your Honor, you know, we don't
12 think it changes the underlying arguments. As Mr. Pomerantz
13 said, we don't think there's any prejudice to Highland either.

14 THE COURT: All right. Well, just to be clear, you
15 know, it's one thing in an underlying bankruptcy case to file
16 an amended motion after you've gotten a motion set for hearing
17 that might slightly adjust, you know, facts or relief sought.
18 And, of course, we independently look at it when it happens in
19 an underlying case to see do we need more notice to affected
20 parties.

21 But in an adversary proceeding, you know, you just
22 don't do this. All right? If you have some sort of
23 exceptional circumstances, you can file I guess a motion to
24 amend because I got to include this new information that didn't
25 exist. But you just don't do this, okay?

1 So I don't -- could you be clear what was the new
2 information? What was the new information that had to be
3 brought before the Court suddenly?

4 MR. SBAITI: Your Honor, there wasn't new
5 information. We were simply giving notice of our understanding
6 of where the legal arguments were going. The reason being is
7 that after those motions were filed and recently, the debtor
8 took the position in two other cases that they should be
9 dismissed pursuant to the permanent injunction.

10 And so that clarified for us at least a couple of
11 arguments that were unclear to us where the debtor stood on
12 whether or not the permanent injunction would be a basis to
13 dismiss or stay any of the claims that were pending. There are
14 two other claims pending in district court. Since we had filed
15 that motion, the debtor filed a motion to reconsider the stays
16 that were granted in those two courts. And then they also
17 moved to dismiss on the basis of the permanent injunction.

18 And so given that the debtor took the position that
19 they were willing to dismiss those cases based upon the
20 permanent injunction, it in many ways contravenes the position
21 they took in response to our motion which is that the -- for
22 example, they somewhat take the position in Paragraph 22, it
23 wasn't as clear then but it's clear -- it seems clearer now
24 that the permanent injunction is not relevant to whether or not
25 the case can go forward in any capacity.

1 And so we simply wanted to incorporate that, but it's
2 mainly legal argument about the choices that are before the
3 Court. That was really it. I mean, theoretically, I would
4 have made them for the first time during oral argument and we
5 thought we were doing something good by giving -- apprising the
6 Court in writing and giving notice of these arguments to the
7 other side by filing an amended motion. We didn't add new
8 evidence or anything like that.

9 MR. POMERANTZ: Your Honor, that argument is
10 completely disingenuous because our motion to dismiss and
11 motion for reconsideration that Mr. Sbaiti refers to is several
12 weeks ago, okay. It wasn't November 10th. It was several
13 weeks ago.

14 I will respond substantively why Mr. Sbaiti is wrong
15 and there's no inconsistent positions when it's my time to
16 speak. But for Mr. Sbaiti to say he was doing us a favor and
17 he was reacting to recent new information is just wrong, Your
18 Honor. And they should just not be continued to allowed to get
19 away with flouting the rules.

20 THE COURT: All right. Well, let me just say I'm
21 confused, maybe I should say baffled, about this amended
22 motion. You know, the motion to dismiss that is before the
23 Court for oral argument today isn't about the injunction, isn't
24 about the plan injunction. It's about res judicata and other
25 12(b)(6) arguments.

1 So I'm confused and I think, you know, it's been
2 clear for many months in this adversary proceeding, in
3 particular, the debtor's position on the plan injunction,
4 particularly, you know, in the whole argument on the motion to
5 leave to add Mr. Seery as a defendant.

6 So I'm confused, but we're going to go forward on the
7 argument today, whatever argument you want to make. And you've
8 been, I guess, forewarned. I will say that these last-minute
9 amended motions are not going to be tolerated, are not going to
10 be considered. And so, you know, I hope you won't do it again.
11 Your firm has already been sanctioned once in this adversary
12 proceeding. I'm sure we all remember.

13 So, you know, I'm just kind of baffled why you would
14 take a chance filing an amended motion without leave or somehow
15 getting it to the attention of the Court or running it by the
16 other parties for their consent to you doing it. But we're
17 going to go forward and just hear the arguments, okay. And so
18 --

19 MR. SBAITI: Thank you.

20 THE COURT: -- I'll hear your argument.

21 I'm letting people know I don't know where this time
22 estimate came on the calendar today, three hours. I don't know
23 if someone specifically expressed that. But I'm letting you
24 know at noon I have a swearing-in ceremony that I'm doing back
25 in my chambers. So I will stop at noon Central time.

1 And so does anyone think that's going to be a
2 problem?

3 MR. SBAITI: It should not be, Your Honor, from our
4 perspective.

5 THE COURT: Mr. Pomerantz?

6 MR. POMERANTZ: I don't believe so. Mr. Morris is
7 going to handle the motion to dismiss which is going to be the
8 bulk. My presentation on the motion to stay is only going to
9 be around ten minutes or so.

10 THE COURT: Okay. Thank you.

11 Mr. Sbaiti, your argument on the motion for stay.

12 MR. SBAITI: Thank you, Your Honor.

13 Your Honor, may I share my screen?

14 THE COURT: You may.

15 MR. SBAITI: I have a PowerPoint that can kind of --

16 THE COURT: Okay. You may.

17 MR. SBAITI: -- walk us through. Thank you.

18 Is Your Honor able to see my screen?

19 THE COURT: I can, yes.

20 MR. SBAITI: Thank you, Your Honor.

21 Your Honor, what I would point you to is, first, the
22 injunction language. This is what Your Honor's permanent
23 injunction says, and this is really what animates our motion to
24 stay. Our motion to stay is derived specifically because my
25 clients and I feel like our case has been enjoined by this

1 injunction, if not completely disposed of.

2 The language says that we're an enjoined:

3 "An enjoined party is permanently enjoined from
4 commencing, conducting, or continuing in any manner
5 any suit, action, or other proceeding of any kind
6 including any proceeding in a judicial, arbitral,
7 administrative, or other forum against or affecting
8 the debtor or the property of the debtor."

9 And then (v) of that injunction says:

10 "or acting or proceeding in any manner in any place
11 whatsoever that does not conform to or comply with
12 the provisions of the plan."

13 One of the things that was suggested in Paragraph 22
14 of their response was that the DAF and Holdco are not enjoined
15 parties. But the final plan defines an enjoined party in
16 Article 1(b) (56) as any entity who has or -- all entities who
17 have held, hold, or may hold claims against the debtor; any
18 entity that has appeared and/or filed any motion, objection, or
19 other pleading in this Chapter 11 case regardless of the
20 capacity in which such entity appeared and any other party in
21 interest. And, five, the related persons of each of the
22 foregoing.

23 Article 1(b) (22) defines a claim as any claim that's
24 defined in Section 1015 of the Bankruptcy Code. And Section
25 1015 of the Bankruptcy Code defines a claim as a right to

1 payment whether or not such right is reduced to judgment,
2 liquidated, unliquidated, fixed, contingent, matured,
3 unmatured, disputed, undisputed, legal, equitable, secured, or
4 unsecured.

5 So given this definition, when we've read this
6 injunction, we believed that we were enjoined parties, the DAF
7 and Holdco were both enjoined parties. They had appeared in
8 the -- they have claims. Obviously, those are the claims being
9 asserted here.

10 And so going back to the injunction language, we
11 believe this lawsuit has been disposed of by this permanent
12 injunction. We believe there's really only one or two things
13 that should probably happen with this lawsuit. Either it could
14 be dismissed based upon the permanent injunction or what we
15 proposed in our motion to stay is that the Court exercise its
16 inherent authority to simply stay the case pending the appeal
17 of this language, which is up on appeal in the Fifth Circuit
18 right now.

19 If that language, and if the injunction gets affirmed
20 by the Fifth Circuit, then certainly the dismissal can happen
21 once that affirmance happens and there's no harm, no foul, and
22 no one's wasted any time.

23 If they're not, if it's overturned, then, obviously,
24 the injunction would be vacated, presumably by the Fifth
25 Circuit. And at some point, if the Court decides not to enter

1 a similar injunction that would likewise dispose of this case,
2 then the case could proceed on the merits.

3 The issue we've identified both in our original
4 motion and as we fleshed out in our -- as a matter of law in
5 our amended motion to simply put a finer point on it is that
6 the merits are now -- have been disposed of. This injunction
7 ends this case, at least as far as we read it. It ends this
8 case irrespective of the underlying merits of the lawsuit,
9 which means that the lawsuit merits themselves have become moot
10 and any opinion or any attempt to resolve it is obviously an
11 advisory opinion by the Court.

12 So we really only see two ways that this could go
13 right now without either gutting the injunction or
14 circumventing it completely, which is to say that either the
15 case should be dismissed based upon the permanent injunction or
16 the case should be stayed based upon the permanent injunction.

17 Mr. Pomerantz or the debtors' brief suggests that,
18 well, the injunction doesn't prevent hearing pending motions.
19 But I would respectfully disagree with that. If you look at
20 the language, "commencing, conducting, or continuing in any
21 manner in any suit, action, or other proceeding against or
22 affecting the debtor."

23 As 12(b)(6) hearing, I would imagine, was intended to
24 fall under the umbrella of a proceeding. And us arguing a
25 12(b)(6) motion would us be conducting and maybe even

1 continuing the suit because we're trying to protect the merits
2 of the suit, which as I said are at this juncture already moot.

3 And so it comes down to I think a very simple
4 question, which is what do we do at this juncture. Do we just
5 simply dismiss the lawsuit in light of this permanent
6 injunction or stay the lawsuit in light of this permanent
7 injunction?

8 The debtor makes a lot of hay out of the fact that,
9 well, there are special rules that apply when you're trying to
10 stay a case pending appeal. But if you look at all of their
11 case law, it has to do with different circumstances where an
12 appeal -- where there's a matter on appeal that could
13 substantially affect the resolution of the case, which here we
14 think it actually could. But in those cases, those appeals
15 would affect the resolution of the case on the merits; whereas,
16 here, the question goes to whether or not a permanent
17 injunction that really has stopped us all in our tracks.

18 As soon as we understood this injunction and its
19 scope, we're the ones who reached out to the debtor's counsel
20 and asked them on a meet-and-confer whether or not they would
21 just agree to stay the matter. And we were a little bit
22 surprised by their reaction when they first didn't think that
23 this applied to our case, and we didn't understand how. And
24 then they changed their mind, said it did apply to our case but
25 they didn't think that we should stay the case. And they

1 didn't suggest let's just dismiss it based upon the permanent
2 injunction.

3 So it kind of comes down to the same small -- same
4 simple issue, Your Honor. There's this permanent injunction,
5 and I don't think there's any way for us to get around it at
6 this juncture.

7 THE COURT: Mr. Pomerantz:

8 MR. POMERANTZ: Yes, Your Honor.

9 I'm going to respond to several of the arguments Mr.
10 Sbaiti made in his motion, which apparently he's abandoned
11 because he only is focused on the injunction. And I'm also
12 going to tell Your Honor, what our arguments are because
13 despite Mr. Sbaiti's efforts, he's completely misquoted them.

14 So in the motion and the amended motion, the
15 Plaintiffs make several arguments why this Court should stay
16 the matter. First, they argue they're entitled to a stay
17 because the exculpation provision in the plan prohibits them
18 from proceeding against the Defendants in the action. And
19 there are several problems with that argument.

20 First, Mr. Sbaiti and the Plaintiffs don't even
21 attempt to meet the Fifth Circuit's standards for a stay
22 pending appeal because, of course, they can't. Mr. Sbaiti's
23 trying to sidestep the grounds for a stay pending appeal by
24 arguing it doesn't apply just is incorrect.

25 They would have to show that there is a likelihood of

1 success on the merits, they would suffer irreparable harm, the
2 debtor wouldn't suffer irreparable harm, and there is -- public
3 interest supports a stay. They can't do any of them.

4 In fact, as Your Honor is well aware, Your Honor
5 denied the actual appellants in that suit, in that order, the
6 confirmation order, a stay pending appeal and that was denied
7 by the district court and also denied by the Fifth Circuit
8 Court of Appeals.

9 The Plaintiffs didn't object to the plan, they are
10 not parties to the appeal, and they never sought a stay pending
11 appeal. So they really can't explain why they as really
12 strangers to the appeal are entitled to a stay of the
13 effectiveness of the plan when the actual appellants to that
14 order were denied a stay pending appeal up through the
15 appellate ladder.

16 Second, notwithstanding Mr. Sbaiti's arguments in the
17 motion, the exculpation provision is neither as broad nor does
18 it affect all the parties that are subject to this litigation.
19 There are three Defendants in the complaint. The only
20 Defendant that is covered by the exculpation provision is the
21 debtor. The exculpation provision does not apply HCF Advisors,
22 and it does not apply to Highland CLO Funding.

23 Also, while the exculpation provision does apply to
24 the debtor, it only exculpates the debtor from claims of
25 negligence. The complaint raises a variety of causes of action

1 that have nothing to do with negligence and would not be
2 covered by the exculpation provision.

3 But, Your Honor, the biggest problem with their
4 argument that the exculpation provision supports a stay is that
5 the exculpation -- the appeal of the exculpation provision has
6 nothing to do with this case. Why? Because the Fifth Circuit
7 appeal concerns whether the exculpation provision is
8 appropriate for parties other than the debtor. The debtor is
9 the only Defendant in this case that obtains the benefit of the
10 exculpation.

11 And there is no dispute, there was no dispute at
12 confirmation, there's no dispute in the case law, there's no
13 dispute in Pacific Lumber, there's no dispute in the appeal
14 that a plan can exculpate the debtor. So the Fifth Circuit
15 appeal doesn't implicate the exculpation provision and cannot
16 support a basis for a stay.

17 The next argument Mr. Sbaiti makes is the injunction
18 provision, and the injunction provision is on appeal to the
19 Fifth Circuit. But the aspect of the appeal of the injunction
20 is not the provision that Mr. Sbaiti points to.

21 And, again, as with the exculpation provision, the
22 same arguments about failure to obtain a stay, failure to be
23 party to the appeals, and failure to object to the plan apply,
24 as well. But as is the case with the exculpation provision,
25 the resolution of the appeal of the injunction provision will

1 not affect this case in any way.

2 They point to the portion of the injunction that
3 prohibits enjoined parties from directly or indirectly
4 continuing, commencing, or conducting in any manner any suit or
5 action proceeding against the debtor. They argue that they
6 cannot proceed without violating the injunction because the
7 injunction was intended to put all litigation against the
8 debtor to an end.

9 But, of course, Your Honor, that is not true. That
10 is not what the injunction is. The issue on appeal before the
11 Fifth Circuit as it relates to the injunction is whether the
12 injunction impermissibly enjoins parties from enforcing their
13 rights with respect to post-effective date commercial
14 relationships with the reorganized debtor. And, of course, we
15 argue that it's appropriate, but it has nothing to do with the
16 provision Mr. Sbaiti identified.

17 The appeal does not impact in any way whether a plan
18 can enjoin prosecution of claims that arose prior to the
19 effective date. And, of course, such a plan provision is
20 completely appropriate and is customary. The plan provided the
21 debtor as the plan provides all debtors with a fresh start and
22 enjoins litigation against the debtor.

23 But importantly, Your Honor, that does not mean as
24 Plaintiffs argue that any liability for pre-effective date
25 conduct just goes away and that creditors are left without a

1 remedy to pursue claims against the debtor for pre-effective
2 date conduct.

3 Rather, if they have a pre-petition claim in lieu of
4 their litigation that's pending, they file a pre-petition claim
5 against the estate and that matter is resolved in the claims
6 objection procedure. Or, as in the case here, when they make
7 an allegation that there is a post-petition claim, what do they
8 do? They file a request for payment of an administrative
9 claim, and this Court addresses the validity of the
10 administration claim. The lawsuit pending in another
11 jurisdiction stops, but the claim has to be resolved in the
12 bankruptcy court.

13 The only conduct that the injunction really prohibits
14 is them from proceeding with actions in other courts. It does
15 not deny them a remedy. Accordingly, their argument that they
16 cannot proceed with claims against the debtor because of the
17 injunction provision just lacks any merit and can't form the
18 basis for a stay.

19 Plaintiffs' next argument in their briefing is that
20 if the Court refuses to stay the complaint, they will file a
21 motion to withdraw the reference of this matter to the district
22 court. Your Honor, this is the biggest head-scratcher of them
23 all given how this complaint ended up before Your Honor. This
24 exact issue and Plaintiffs' arguments as to why the reference
25 should be withdrawn have already been fully briefed and decided

1 by the district court.

2 As Your Honor may recall, the Plaintiff filed this
3 action in the district court, conveniently failing to include
4 the bankruptcy case as a related case or mentioning that the
5 bankruptcy courts have related jurisdiction in the filings.
6 Your Honor may have had occasion to review the underlying
7 complaint when the debtor brought a motion for contempt against
8 counsel for Plaintiffs for pursuing a claim against Mr. Seery
9 in violation of Your Honor's January 9th, 2020 and July 16th,
10 2020 orders.

11 Your Honor issued an order finding counsel and
12 various parties in contempt which order is, of course, subject
13 to appeal. At the time we were litigating the contempt motion,
14 we filed two motions in district court. The first was a motion
15 to enforce the reference and have the district court send that
16 complaint to Your Honor. And that motion to enforce the
17 reference is now on Your Honor's docket at Number 22 and 23.

18 The second was the motion to dismiss which is before
19 Your Honor today. Plaintiffs oppose the motion to enforce the
20 reference arguing that mandatory withdrawal was required
21 because the matter involved consideration of non-bankruptcy
22 federal law, specifically federal securities laws and the
23 Investment Advisors' Act.

24 Plaintiffs further argue to the district court why
25 would you refer the case to the bankruptcy court if it's only

1 going to end up back in the district court upon mandatory
2 withdrawal of the reference. They argue to the district court
3 that would be a complete waste of time.

4 We filed our reply at Docket Number 42 explaining to
5 the district court why mandatory withdrawal of the reference
6 did not apply and why this case should be referred to Your
7 Honor. And what did the district court subsequently do? It
8 entered an order referring this action to Your Honor which is
9 why we are here today.

10 Plaintiffs now flout the district court's order of
11 reference by telling the Court that if the Court does not stay
12 the matter, they will file a motion to withdraw the reference
13 before Your Honor, and they attach virtually identical pleading
14 that they filed in opposition to our motion to enforce the
15 reference.

16 Plaintiffs did not disclose in their amended motion
17 that there was a fully-briefed motion to enforce the reference
18 before the district court. Plaintiffs' argument is
19 disingenuous and designed to mislead the Court.

20 The district court has only agreed that mandatory
21 withdrawal of the reference does not apply and this case
22 belongs in Your Honor. And while we cannot stop the Plaintiffs
23 from filing any motion before this Court, we want to put them
24 on notice that if they do file a motion for withdrawal of the
25 reference in light of the facts as I just stated them, we will

1 seek sanctions.

2 In any event, Your Honor, the fact that they may file
3 a motion for withdrawal of the reference at some point in the
4 future is not grounds to stay the matter.

5 Lastly, Your Honor, Plaintiffs argued in the opening
6 that Highland's position today in opposing the motion to stay
7 is inconsistent with positions Highland has taken in two other
8 lawsuits commenced by the Sbaiti firm. Like all of their other
9 arguments, they misrepresent the facts and are frivolous.

10 The Sbaiti firm filed a complaint on behalf of the
11 DAF in the district court arguing that Highland mismanaged
12 (audio drop). That complaint followed in the heels of an
13 almost identical complaint filed by Dugaboy asserting the same
14 claims.

15 And Your Honor may recall questioning Mr. Sbaiti at a
16 hearing in June how Dugaboy could pursue such a claim in the
17 district court if Dugaboy had a pending proof of administrative
18 claim on file in the bankruptcy case. Well, soon after that
19 hearing, Your Honor, the Dugaboy complaint was dismissed, and a
20 few days later the DAF complaint was filed. That complaint has
21 never been served on Highland.

22 The second lawsuit is also a lawsuit filed by the
23 Sbaiti firm on behalf of an entity called PCMG in the district
24 court. And PCMG previously held less than five one-hundredths
25 of a percent interest in a certain fund managed by highland.

1 The lawsuit alleges that Highland acted improperly to sell
2 certain assets of the fund, thereby damaging PCMG. That
3 complaint has also never been served on Highland.

4 The Plaintiffs sought a stay of those matters before
5 Highland could file a response, and the court -- the district
6 court's entered stays in those matters. And Highland has filed
7 motions for reconsideration and the motions to dismiss because
8 they violate the injunction.

9 But, importantly, Your Honor, if you read the
10 motions, Highland does not argue that Plaintiffs do not have a
11 remedy for the alleged wrongs they say they suffer. Rather,
12 Highland's argument is that any claims alleged in those
13 lawsuits, just like any claims alleged in the lawsuit before
14 Your Honor today, must proceed in bankruptcy court as part of
15 the claims objection process. That's where they will have
16 their day in court. The lawsuits don't go away. The
17 injunction prevents them from continuing on in district court.

18 Accordingly, Highland is being totally consistent in
19 all matters, and the litigations may not proceed there but must
20 proceed before Your Honor. And, of course, none of these three
21 matters are implicated by the Fifth Circuit appeal.

22 Your Honor, the amended motion was procedurally
23 improper and is substantively without merit. And for all these
24 reasons, we request that the Court deny the stay motion and
25 proceed with the hearing on the motion to dismiss.

1 Thank you, Your Honor.

2 THE COURT: All right.

3 Mr. Sbaiti, you get the last word.

4 MR. SBAITI: Thank you, Your Honor.

5 Your Honor, the administrative claim process that was
6 described as being the way that these claims were supposed to
7 proceed, by the language of the order that we read, does not
8 allow for these claims. Those claims are limited to a specific
9 category of claims that don't include the claims that are
10 alleged in this lawsuit.

11 And in any event, this lawsuit wasn't filed as an
12 administrative claim. So if that's the case and it needs to be
13 refiled or reasserted as an administrative claim, then I think
14 that's a subject for another day. All I know is that we have
15 this injunction right now that either should stay this case
16 pending the appeal, which I'll address the issue on appeal in a
17 moment, or it should be dismissed, perhaps without prejudice so
18 that it can be refiled properly as an administrative claim if
19 that's what's supposed to happen, because I guess this converts
20 the matter.

21 The appeal, the subject of the appeal as to the
22 injunction, Your Honor, the appeal actually encompasses many of
23 the issues that we're talking about in this case. Now Mr.
24 Pomerantz tries to narrow the scope of what's up on appeal, and
25 that may indeed be the argument that they're going to present

1 to the Fifth Circuit or that they've presented to the Fifth
2 Circuit.

3 But the actual issue up on appeal is the
4 enforceability and validity of the order for a variety of
5 reasons which includes the provision that we're talking about
6 and the enforceability of the provision that we're talking
7 about because it gets rid of particular claims. And I guess
8 the argument back is, no, it doesn't because there's now an
9 alternative means of going there.

10 Mr. Pomerantz says that we shouldn't have proffered a
11 motion to enforce the reference. That proffer, however, was
12 because Judge Boyle's reference to this Court didn't deal with
13 our motion to -- our cross-motion to withdraw the reference.
14 All it dealt with was their motion to enforce the reference as
15 a -- to enforce the standing order in the district court. And
16 that's all she ordered was she cited the standing order and the
17 statutes, I think it's 157(a), and that's really all it did.

18 So it left open the question of whether she wanted
19 Your Honor to deal with the withdrawal of the reference
20 specifically as to the 12(b)(6) issue in the first instance.
21 It didn't resolve the question. It doesn't purport to resolve
22 that question. And it's not unheard of for the district court
23 then to send the matter to the bankruptcy court and then to
24 piecemeal which proceedings the withdrawal of the reference is
25 applicable to and then all the other proceedings would stay

1 with Your Honor or with the bankruptcy court.

2 So we weren't flouting the district court's order,
3 and we certainly weren't flouting any of the previous orders.
4 And the threat of a sanction for simply exercising our rights
5 in due course is not well taken.

6 Now Mr. Pomerantz says, well, the DAF and CLO Holdco
7 are not parties to the appeal. I don't think that's relevant
8 because if the provision is struck by the Fifth Circuit, it's
9 not only struck for the appellants, it's struck as to all.
10 It's either valid or it's invalid. And even if it's declared
11 to be invalid only as to the appellants, it's not suddenly
12 valid as to everyone else who didn't appeal. That's not
13 generally how these appeals have worked.

14 If the Court doesn't stay this matter, Your Honor,
15 and doesn't dismiss it, we still maintain, Your Honor, that as
16 it stands today, the question on the merits have been mooted
17 and we cannot proceed. I think what Mr. Pomerantz is hoping
18 for or the debtor is hoping for is a provision where our hands
19 are potentially tied to argue the motion.

20 And if the Court tells us they're not, then we'll
21 certainly argue the 12(b)(6). But what I don't want to do is
22 argue a 12(b)(6) motion that on its face appears to violate the
23 permanent injunction and then be held in contempt for violating
24 that injunction.

25 And so that's why we've asked for the Court to either

1 stay the matter under its inherent jurisdiction or to -- if
2 you're going to -- if it's not going to be stayed, then we
3 believe it has to be dismissed according to the permanent
4 injunction as it stands right now.

5 THE COURT: All right.

6 The motion to stay is denied. The amended motion to
7 stay is likewise denied. This is an odd argument. I guess one
8 might say the traditional four-factor test for a stay of a
9 proceeding has really not been the subject of the argument here
10 for a stay.

11 So suffice it to say the four-prong test for a stay,
12 you know, hasn't been met here. There hasn't been a showing of
13 substantial likelihood of success on the merits or irreparable
14 injury if the stay's not granted or a stay will not
15 substantially harm others or the stay would serve a public
16 interest.

17 But going on to the arguments that were focused on by
18 movant, I just don't think that you have shown that, you know,
19 either the exculpation clause or the injunction provisions of
20 the plan somehow tie your hands in arguing the 12(b)(6) motion,
21 defending against the 12(b)(6) motion today or I just think
22 that your arguments reflect, frankly, a misunderstanding of how
23 the injunction language and exculpation language applies here.

24 So the motion for stay is denied, and I will ask Mr.
25 Pomerantz to submit an order reflecting the Court's ruling.

1 So it looks like we have another procedural matter,
2 Mr. Sbaiti. You filed a motion to strike reply appendix of the
3 Plaintiffs quite a while back. So did you want to present
4 that?

5 MR. SBAITI: Yes, Your Honor. I think it's a very
6 simple procedural issue.

7 Generally, a party that files a 12(b)(6) is limited
8 to the four corners of the complaint. And if there's a
9 contract incorporated or a document incorporated as an
10 intrinsic part of the complaint, you know, that's usually
11 considered under the 12(b)(6) motion.

12 What the Defendants did, what the debtor here did is
13 they filed a bunch of evidence in their 12(b)(6), essentially
14 attempting to argue it as a summary judgment. We raised that
15 in our response. So as part of our response, we objected to
16 all the evidence. But then on the reply, they filed a bunch
17 more evidence both without leave and improperly, basically
18 sandbagged us.

19 And so we raised two points for striking that
20 evidence. One was akin to the first argument, which is it's
21 not an evidentiary hearing. It's not an evidentiary process in
22 the first instance. A 12(b)(6) motion has to assume that the
23 facts pled are true, and then the question is whether they
24 state a claim.

25 And, secondly, adding them to the reply is especially

1 egregious because the reply is the last word. And we didn't
2 have an opportunity to respond, and we also don't think it's
3 relevant nor should we have to respond to a whole bunch of
4 extra evidence that was attached.

5 That's essentially the basis of our motion, Your
6 Honor.

7 MR. POMERANTZ: Your Honor, the simple answer to the
8 issue is we filed the reply of the appendix in connection with
9 the motion to enforce the reference. We didn't file it in
10 connection with the motion to dismiss. The motion to enforce
11 the reference is moot. So what Mr. Sbaiti, his whole argument
12 doesn't make any sense.

13 As a substantive matter, just there wasn't any
14 evidence. It was pointing to court pleadings, orders, and
15 stuff. So it's irrelevant. I don't know why it's still on the
16 docket. It shouldn't be on the docket since it related to the
17 motion to enforce the reference.

18 THE COURT: All right. Mr. Sbaiti, did you just
19 simply --

20 MR. SBAITI: Your Honor, much of that evidence was --

21 THE COURT: -- misunderstand or what?

22 MR. SBAITI: I think we might have because it was
23 filed as a separate item, and it may have been miscalendared or
24 misapplied on our system. But the way it was presented to us
25 when we got it was it appeared to be evidence in support of,

1 well, I guess both, but certainly evidence that was averted to
2 in the reply.

3 But if they're saying that the Court's not going to
4 consider it, then that moots the motion and I think we can move
5 on.

6 MR. POMERANTZ: Yes, Your Honor. I had nothing to do
7 with his motion. I guess there was another mistake on their
8 end. I guess that stuff happens occasionally.

9 THE COURT: Okay. All right. So I'll deny it as
10 based on a mistake that's been acknowledged here. And so with
11 that, let's have an order cleaning that up, as well, Mr.
12 Pomerantz, please.

13 With that, we'll move on to the Defendants' motion to
14 dismiss complaint. I think, Mr. Pomerantz, you said Mr. Morris
15 will be making this argument?

16 MR. POMERANTZ: That is correct, Your Honor.

17 THE COURT: All right.

18 Mr. Morris, I'll hear your argument.

19 MR. MORRIS: Good morning, Your Honor. John Morris
20 for Pachulski Stang Ziehl & Jones for the reorganized debtor.
21 Can you hear me okay?

22 THE COURT: I can. Thank you.

23 MR. MORRIS: Okay.

24 Your Honor, this is a bit like Groundhog's Day. I
25 believe that we're going to spend the next half hour or an hour

1 discussing the very issues that were before the Court earlier
2 this year on the HarbourVest 9019 motion.

3 As the Court will recall from the June 8 hearing,
4 there is a complaint that's been filed ostensibly by the DAF
5 and CLO Holdco. As Your Honor will recall, the testimony
6 established that Mark Patrick had just been installed as the
7 trustee, had no knowledge of the prior events, and Mr. Dondero
8 and Mr. Sbaiti spent quite some time together formulating this
9 particular complaint that is nothing less than a collateral
10 attack on the Court's prior order.

11 I'd like to, if I can, just walk through a PowerPoint
12 presentation to try to make the debtor's position quite clear,
13 if I may.

14 THE COURT: You may.

15 MR. MORRIS: And I would ask my assistant, Ms. Canty
16 (phonetic), to put up the first slide.

17 Your Honor, you'll recall that last December, the
18 debtor filed its motion under Rule 9019 for court approval of a
19 settlement. The debtor was completely and utterly transparent
20 in what the terms of the settlement were.

21 Very briefly, as set forth in Appendix 2 or Exhibit 2
22 which was the motion itself, in Paragraph 32, Your Honor, the
23 debtor set forth the terms of the transaction for which it was
24 seeking approval. Those terms included in the very first
25 bullet point a statement that HarbourVest shall transfer its

1 entire interest in CLOF to an entity to be designated by the
2 debtor.

3 And that's an important point that we'll talk about
4 in a number of different contexts, Your Honor. The debtor made
5 it very clear at the very first moment of this matter that it
6 was not going to acquire the asset but the asset was going to
7 be transferred to an entity to be designated by the debtor.
8 The debtor's motion filed last December clearly stated the
9 value of the interest that it would be acquiring in return.
10 That was also set forth in Paragraph 32 in a footnote.

11 It didn't say that it was the fair market value. It
12 said the method of valuation was the net asset value and gave a
13 valuation date of December 1st so that all parties in interest
14 who received the motion understood the economics of the deal.
15 And the deal that the debtor was asking the Court to approve
16 was one whereby HarbourVest would receive certain claims and in
17 exchange for those claims, they were going to transfer their
18 interest in CLO -- HCLOF.

19 The debtor also filed on the docket for all to see a
20 copy of the settlement agreement. The settlement agreement
21 sets forth the terms of the deal, including again the statement
22 that HarbourVest "will transfer all of its rights, title, and
23 interest in HCLOF." It actually says to an affiliate or an
24 entity to be designated by the debtor. And the transfer
25 agreement itself was also put on the docket.

1 So that's where things stood just before Christmas.
2 I know that there's some due process and other type arguments
3 that are in the Plaintiffs' opposition to the motion. But, of
4 course, the undisputed facts are that the debtor timely filed
5 the motion. The time period was consistent with all applicable
6 rules. Nobody ever asked the debtor for an extension of time.
7 Nobody ever filed a motion for an extension of time. And so
8 those due process arguments I think carry no weight at all.

9 So the debtor filed the motion. And if we can go to
10 the next slide, we see what the responses were, and there were
11 several. All of the responses, the only responses were
12 objections to the motion filed by Mr. Dondero and his certain
13 of his affiliated entities.

14 Mr. Dondero's objection can be summarized as follows.
15 He made the following observations and asserted the following
16 objections to the proposed settlement. The first thing he said
17 is that the settlement far exceeds the bounds of
18 reasonableness. Now, of course, one cannot make a
19 determination of reasonableness without having an understanding
20 of value. The debtor was giving something and it was getting
21 something.

22 And so Mr. Dondero understood that the issue of value
23 was front and center. If there was any mistake about it, he
24 also noted that he understood that as part of the settlement
25 and, again, I've written this incorrectly, HarbourVest will

1 transfer its entire interest in HCLOF to the debtor. That is
2 not what Mr. Dondero understood. In fact, Mr. Dondero
3 understood that it would transfer its entire interest in HCLOF
4 "to an entity to be designated by the debtor," again, making it
5 clear that he knew exactly what the debtor was doing here. And
6 that can be found at Appendix 4 in Footnote 3 on Page 1 if you
7 want the exact quote from Mr. Dondero's pleading.

8 In the same footnote, he also specifically
9 acknowledges that he understood the valuation. He understood
10 the method valuation. He understood the valuation date of
11 December 1st. And he urged the Court in his pleading to
12 scrutinize the settlement to make clear that the available
13 value of the investment should be realized by the debtor's
14 estate.

15 And this is such a critical point, Your Honor. His
16 concern was that by placing the value in an entity other than
17 the debtor itself, that the Court wouldn't have jurisdiction
18 over that asset. That was his concern. So not only did he
19 understand that the asset was going to be transferred to an
20 affiliate, he wanted to make sure that this Court had
21 jurisdiction over the asset.

22 And, of course, Mr. Seery in his testimony and
23 otherwise, we provided the Court with all the comfort it needed
24 to know that even though it was being assigned to a special-
25 purpose vehicle wholly-owned by the debtor, it would

1 nevertheless be subject to the Court's jurisdiction.

2 Mr. Dondero's trusts also filed an objection if we
3 can go to the next slide.

4 Dugaboy and Get Good represented by Douglas Draper
5 made the following observations and asserted the following
6 objections to the HarbourVest Settlement. They, too, made
7 clear that they understood that the asset was going to be
8 transferred to an entity designated by the debtor. They, too,
9 acknowledge that they understood that the debtor was valuing
10 the asset at approximately \$22 million as of December 1st. And
11 their objection was that the Court couldn't evaluate the
12 settlement without knowing how the asset was valued, without
13 knowing whether the debtor could acquire the asset, very
14 critical point.

15 These are the points that are made in the complaint.
16 These are the exact same points that are made in the complaint.
17 And also the Court couldn't evaluate the settlement unless they
18 understood that the value would be inure to the benefit of the
19 debtor's estate, again, mimicking Mr. Dondero's concern that by
20 placing the asset in an affiliate of the debtor, that it might
21 not be subject to the Court's jurisdiction.

22 Finally, and most importantly, if we can go to the
23 next slide. The Plaintiff, CLO Holdco, filed an objection to
24 the 9019 motion. And this is just so critical. And this is
25 the Groundhog Day aspect that I specifically speak of. CLO

1 Holdco's objection was based solely on its assertion that it
2 had a superior right to the opportunity to acquire the asset
3 that was being transferred by HarbourVest. It only made one
4 argument in support of its contention that it had a superior
5 right, but that argument was specifically premised on the
6 membership agreement, Section 6.1 and 6.2 of the membership
7 agreement.

8 CLO Holdco, the Plaintiff in the underlying action,
9 argued to this Court that HarbourVest had no authority to
10 transfer the asset without complying with the right of first
11 refusal that would give CLO Holdco the opportunity to take the
12 asset for itself. That's what this Court was told. CLO Holdco
13 didn't make this argument fleetingly. They provided an
14 extraordinarily detailed analysis of Sections 6.1 and 6.2 of
15 the membership agreement and concluded "that HarbourVest must
16 effectuate the right of first refusal before it can transfer
17 its interest in HCLOF. That was the objection. Objections
18 have consequences, as Your Honor knows.

19 If we can go to the next slide.

20 By filing an objection, CLO Holdco and the trusts and
21 Mr. Dondero became participants in the litigation.
22 Notwithstanding the Plaintiffs' arguments to the contrary, when
23 they file the objections, they participate in what's called a
24 contested matter. And in a contested matter, they had every
25 right to take all discovery on any issue that was related to

1 the 9019 motion, including the transfer, the disposition of the
2 asset to an affiliate of the debtor, the valuation of the asset
3 that's being received, the merits of the settlement itself, the
4 causes of action, whether, you know, what communications that
5 were, the negotiations, what did Mr. Seery and Mr. Pugatch
6 discuss? Right?

7 They could have taken any discovery they wanted. And
8 they did avail themselves of discovery, in fact. They did -- I
9 don't know why they did what they did, but they chose to take
10 one deposition, and that was Mr. Pugatch, okay.

11 His deposition transcript, I think is at Exhibit 7,
12 or Appendix Number 7, and it was a long deposition. It really
13 was. And they asked Mr. Pugatch at the deposition if he knew
14 what the value of the asset that was being transferred was.
15 And he said \$22.5 million. So it wasn't just Mr. Seery or the
16 debtor who was subscribing to this valuation. The party on the
17 other side of an arm's length negotiation was subscribing to
18 the exact same valuation.

19 The Plaintiffs could have taken whatever discovery
20 they wanted. This is a full and fair opportunity to
21 participate in the litigation. We proceeded to trial. Before
22 we got there, actually, the debtor filed its response to CLO
23 Holdco's objection and proffered its own very detailed and
24 apparently very persuasive analysis that CLO Holdco's objection
25 was without merit, that CLO Holdco had no right of first

1 refusal under the facts and circumstances as they existed, and
2 with Grant Scott, Mr. Dondero's childhood friend at the helm,
3 we got to Court for the contested hearing on the debtor's 9019
4 motion, and CLO Holdco withdrew their objection.

5 And I've put up on the screen just an excerpt of the
6 transcript because, you know, when we talk about whether or *res*
7 *judicata* should apply, because was there a hearing on the
8 merits? Was there a decision on the merits? Just look at the
9 words of CLO Holdco's lawyer. "CLO Holdco has had an
10 opportunity to review the reply briefing and after doing so has
11 gone back and scrubbed the HCLOF corporate documents based on
12 our analysis of Guernsey law."

13 And some of the arguments of counsel in those
14 pleadings and our review of the appropriate documents, counsel
15 obtained the authority from Mr. Scott to withdraw the CLO
16 Holdco objection based on the interpretation of the member
17 agreement. We were grateful for that and the Court
18 specifically said in response, "That eliminates one of the
19 major arguments that we had anticipated this morning."

20 Apparently, the Plaintiffs believe that those events
21 have no meaning and that this Court's reliance on CLO Holdco's
22 substantive withdrawal of its objection has no meaning. I
23 think they're wrong, and we'll get to that in a moment.

24 We proceeded with the hearing. Mr. Seery and
25 Mr. Pugatch testified at length. If you look at Footnote 3,

1 you'll see Mr. Seery testified for almost 70 pages of
2 testimony. Mr. Pugatch testified for almost 45 pages of
3 testimony. His testimony was exhaustive. And, again, any of
4 the objecting parties had the right to ask whatever questions
5 they want.

6 But I do want to just note a few things that aren't
7 up on the screen right now. If you go to Appendix 9, Your
8 Honor, which is the transcript of the hearing, at Page 13, you
9 will see that the very first thing I discussed in my opening
10 statement was the economics and how with a valuation of \$22.5
11 million this deal made sense for the debtor.

12 You will see from Pages 30 to 42 there is extensive
13 testimony from Mr. Seery about the amount and the value of the
14 asset. But the most important part of Mr. Seery's testimony is
15 that he explains how it came to be that HarbourVest agreed to
16 transfer its interest in HCLOF to an affiliate of the debtor.
17 And that came about, not because Mr. Seery or the debtor was
18 initially at all interested in doing this. The whole idea
19 originated with HarbourVest.

20 They wanted to extract themselves from the Highland
21 platform. They wanted to give this piece up. So there's no
22 conspiracy going on here. The unrebutted testimony that all of
23 the objecting parties had an opportunity to challenge was that
24 the whole idea originated with Mr. Pugatch and with
25 HarbourVest. I think that's an important point to take into

1 account.

2 And finally, again, from the hearing, if you look at
3 at Appendix 9, you'd also find that Mr. Pugatch, again,
4 testified, as he had in his deposition, as to the value of the
5 interest being transferred. So we completed the testimony. We
6 rested our case having had a full and fair opportunity to
7 contest the motion. The objecting parties rested as well. And
8 we got to the point where we had to prepare the notice, and we
9 were discussing that at the hearing, if we can go to the next
10 slide.

11 And it's very important, because again, this was all
12 done transparently, and it was all done on the record. And
13 after the close of evidence, I addressed the order that was
14 going to be prepared. I specifically said that I wanted to
15 make clear that we were going to include a provision, "that
16 specifically authorizes the debtor to engage in, to receive
17 HarbourVest the asset, you know, the HCLOF interest," right. I
18 wanted everybody to know that was what was going to happen, and
19 then I said, "The objection has been withdrawn." I think the
20 evidence is what it is and we want to make sure that nobody
21 thinks they're going to go to a different court somehow to
22 challenge the transfer. But yet, that is exactly what the
23 complaint seeks to do.

24 Having put everybody on notice as to where we were
25 going, as to what the evidence showed, the debtor drafted and

1 the Court adopted an order, and the order says, among other
2 things, that HarbourVest was authorized to transfer its
3 interest to the debtor. Actually, it says, "to a wholly owned
4 and controlled subsidiary of the debtor," pursuant to the
5 transfer agreement, "without the need to obtain the consent of
6 any party or to offer such interest first to any other investor
7 in HCLOF." So the Court heard the 9019 motion pursuant to a
8 Bankruptcy Rule and entered an order that was unambiguous and
9 that the Plaintiffs did not appeal from.

10 We can go to the next slide.

11 At a very high level, Your Honor, it is just crystal
12 clear that the complaint is just inextricably intertwined with
13 the 9019 proceedings and the order itself. I think Mr. Sbaiti
14 would agree with me that but for the order that approved the
15 transfer of the asset and the testimony about the value of that
16 asset, they have no claims.

17 Every single claim is predicated on what happened in
18 the 9019 hearing. Every single claim is predicated on the
19 Court's order approving the transfer of the asset and the
20 testimony and evidence that was adduced in relation to that
21 asset.

22 There were really only two issues that the Court -- I
23 mean, if you want to think about it at its most simplistic
24 level, the Court was being asked to assess, is it fair, is it
25 reasonable, is it legally permissible for the debtor to give

1 something. In this case, allowed claims and releases, and to
2 get something in return. In this case, HarbourVest's interest
3 in HCLOF and releases in return. And that is really the
4 gravamen of the complaint.

5 The complaint is based whether it's breach of
6 fiduciary duty or RICO or breach of contract or tortious
7 interference, whatever the claim is, none of them exist if the
8 debtor doesn't get this. They just don't exist. And that is
9 why the complaint and the proceeding are inextricably
10 intertwined. And if you just take a look at just one paragraph
11 of the pleading, it says at the core of this lawsuit is the
12 fact that HCM, that's the then debtor, purchased the
13 HarbourVest interests in HCLOF for \$22.5 million knowing that
14 they were worth far more than that. There's not a cause of
15 action that exists in the complaint that isn't dependent on
16 Paragraph 36.

17 So if we can go to the next slide with that
18 background, I'd like to argue why under 12(b), the complaint
19 should be dismissed because the claim should be barred under
20 the doctrine of *res judicata*. Luckily, Your Honor, there is at
21 least one area of agreement between the parties here, and that
22 is the purpose of the doctrine and the elements that have to be
23 satisfied in order to meet the burden of proof necessary to
24 have the claims barred. And in Footnote 1, you can -- I've
25 tried to just be helpful to the Court to show that we may not

1 cite to the exact same cases, but the parties agree that the
2 doctrine is intended to foreclose the re-litigation of claims
3 that were or could have been raised in a prior action and that
4 there's four elements that have to be satisfied for the
5 doctrine to apply.

6 The parties have to be either identical or at least
7 in privity, the judgment in the prior action had to have been
8 rendered by a court of competent jurisdiction. Number three,
9 the prior action had to have been concluded by a judgment on
10 the merits. And the last one is that the same claim or cause
11 of action was involved in both suits. So I just want to spend
12 a few minutes now, Your Honor, going through those four
13 elements to show the Court how easily the reorganized debtor
14 meets this standard.

15 If we can go to the next slide, I can take care of
16 the first two elements very quickly.

17 The first element, the debtor asserted that the
18 Plaintiffs were parties or in privity with parties to the prior
19 proceeding. That's at Paragraph 17 of the motion to dismiss.
20 The debtor relies on the deposition testimony of Grant Scott,
21 who was then the trustee of the DAF.

22 CLO Holdco is a wholly-owned subsidiary of the DAF,
23 or wholly controlled, in any event, and Mr. Scott's testimony
24 was that he was the only director and there were no employees
25 of either entity. So we, in our motion, put forth evidence to

1 establish the first element, and I don't believe, maybe I've
2 missed it. I don't believe that the Plaintiffs have contested
3 that element. If they have, I think Mr. Scott's testimony will
4 carry the day, in any event.

5 The second element as to whether or not a court of
6 competent jurisdiction is the entity or the court that rendered
7 the ruling. Of course, that's been met, too. The Plaintiffs,
8 in their opposition to the motion to dismiss, suggested that
9 the bankruptcy court would have lacked jurisdiction if their
10 cross motion to withdraw the reference was granted. They said
11 if the district court decides that mandatory withdrawal
12 applies, then it cannot find that the bankruptcy courts already
13 entered final judgment was rendered on Plaintiffs' causes of
14 action and had jurisdiction to do so. I think that's just a
15 clear misstatement of the law.

16 But in any event, Your Honor, at this point, I
17 believe it's irrelevant because the district court, in fact,
18 sent the case back to Your Honor and back to this Court. And
19 so, at the end of the day, Plaintiffs' argument doesn't hold
20 water because of the district court's ruling, which can be
21 found -- the order of reference can be found at Docket
22 Number 64. And so I think that easily takes care of the second
23 prong.

24 The third prong is whether -- if we can go to the
25 next slide -- the prior proceeding resulted in a judgment on

1 the merits. And this is really the critical point, Your Honor.
2 As the Court knows, the whole doctrine of *res judicata* is
3 designed to prevent, as the parties agree, the re-litigation of
4 claims. Stated another way, it's to bring finale. It's to
5 make sure that the Court doesn't hear the same claims and the
6 same issues that either were brought or that could have been
7 brought in a prior proceeding. And so, we believe that we
8 easily meet the standards set forth in the third prong. The
9 9019 order necessarily determined that the *quid pro quo* that I
10 described earlier was fair, reasonable, and legally
11 permissible.

12 Notwithstanding their assertions to the contrary, the
13 Plaintiffs are most definitely seeking to unwind at least one
14 half of the Court's order by belatedly claiming that they are
15 entitled to the benefit of the bargain while leaving Highland
16 burdened, frankly, with the claims that HarbourVest got as part
17 of the deal. I will tell you, Your Honor, and this is
18 argument, the debtor would never have asked for, and I don't
19 believe that the Court would ever have granted, the 9019 motion
20 if they thought that there was a risk in the future that
21 Highland wouldn't get the benefit of the bargain and it was
22 incumbent upon CLO Holdco and the DAF, and frankly, any party
23 in interest, to stand up and be counted and tell the Court and
24 the debtor, why the debtor was not entitled to do this deal and
25 CLO Holdco did that. They actually did.

1 They stood up and they filed an objection and they
2 said we have a superior right to this asset in the form of a
3 right of first refusal. They wound up folding in the face of
4 persuasive argument, and I respect the lawyer who did that. I
5 just do. But that was the time to speak up, and that's why it
6 is on the merits because that is exactly what *res judicata* is
7 intended to do. It's intended to have everybody put your cards
8 on the table. You don't put one card on the table and say, I'm
9 going to challenge this under 6.2 of the members agreement, but
10 I'm not going to tell you that I also think you owe me a
11 fiduciary duty under the Advisors Act or as the control party
12 or under any other theory that they had. They can't do that.
13 That's exactly what the problem is here.

14 If we can go to the next slide. Is it a judgment on
15 the merits? The debtor and the Court relied on CLO Holdco's
16 representation that it was withdrawing its argument, its claim,
17 its contention, its assertion that it had a superior right to
18 obtain the HarbourVest interest in HCLOF. Again, they did so
19 not whimsically, not because Mr. Kane was going to be out of
20 town and he couldn't make the hearing. He did it after, and I
21 don't think this matters frankly, but I think it's worth noting
22 that he did it after an extremely careful analysis. I would
23 tell you, Your Honor, that -- well, I would argue, Your Honor,
24 that even if Mr. Kane at CLO Holdco had never filed an
25 objection, if they'd never filed -- if they'd gotten notice

1 that this was happening and they sat silently, that would have
2 been enough for *res judicata* because the issue before the Court
3 was whether it was legally permissible for the debtor to
4 acquire this asset.

5 And if they had an obligation, if they owed a duty to
6 another party, it wouldn't have been legally permissible. And
7 if somebody believed that it wasn't legally permissible because
8 a duty was owed to them, they had an obligation to speak up.
9 And so I think it's very important, particularly for the
10 collateral estoppel argument that I'll make in a moment, that
11 CLO Holdco did in fact file an objection. It was based on the
12 breach of contract claim that's in their complaint. It's the
13 exact same claim. And they withdrew it. I think it's very,
14 very important. I think it highlights why *res judicata*
15 applies. I think it is the linchpin of the collateral estoppel
16 argument.

17 But at the end of the day, I think if they say
18 nothing, they should be estopped or precluded under *res*
19 *judicata* from now asserting -- it would be like -- I was
20 thinking about this earlier, Your Honor. If you'll remember
21 earlier this year, Mr. Dondero and his entities have kind of a
22 habit of withdrawing objections at the last minute. We had a
23 couple of sale hearings earlier this year. And the issue was
24 valuation, you know, and the process, and could the debtor meet
25 its burden of proving that the sale outside of the ordinary

1 course of business was in the debtor's best interest. And they
2 sold that restaurant. And Mr. Dondero objected. And at the
3 last second, they withdrew the objection. Did they sue
4 tomorrow? Does Your Honor really think that they could bring a
5 lawsuit tomorrow and say they just found a document or theory
6 on which the debtor had an obligation to give them a right of
7 first refusal, even though we've already closed on the
8 transaction, even though they were given notice of the
9 transaction, even though they filed an objection to the
10 transaction, even though they withdrew the objection? Would
11 the Court tolerate for one second a new pleading tomorrow from
12 Mr. Dondero that the debtor actually had a fiduciary duty to
13 give him a right of first refusal to buy that asset under
14 whatever theory, just because he pleads it and the Court has to
15 accept as true the allegations in the complaint? I think not.
16 And I think it's worth thinking about that to highlight just
17 how -- just how wrong this is.

18 Continuing on. You know, the Plaintiffs in
19 opposition say it can't be a trial on the merits because we
20 weren't parties. Of course they were parties. Again, they
21 filed an objection. They were the parties to the contested
22 matter, full stop. They rely on a case called Applewood and
23 they say, this is the very first point they make in their
24 brief. Applewood, if it wasn't *res judicata* in Applewood, how
25 could it possibly be *res judicata* here? But the facts are just

1 so inapposite, right?

2 In Applewood, you had a garden variety plan and
3 release where the debtor and the officers and directors got a
4 discharge. No objection to it. And a secured lender later on
5 sought to sue guarantors who happened to be officers and
6 directors. And the court, not surprisingly, said that the
7 confirmation order wouldn't prevent the secured lender from
8 going after the officers and directors, not in their
9 capacities, as such, but in their capacity as guarantors, which
10 were never part of the confirmation order. That just doesn't
11 apply here because here, we have the debtor making a motion
12 before the Court in which it sought permission and authority to
13 acquire a particular asset. Anybody who had a claim to that
14 asset should have stepped forward and put their cards on the
15 table.

16 And again, CLO Holdco put their cards on the table
17 and they lost, and they folded. To use the poker analogy, they
18 folded. And to hear them come into Court today and say we're
19 going to sue you because I reshuffled the deck, it's not right
20 and Applewood has no relevance.

21 Finally, Your Honor, you know, it's not on the
22 merits, they say, because you know, Mr. Seery and the debtor
23 hid the true value of the asset, and had we only known the true
24 value of the asset, we would have made all of these other
25 claims. The fact of the matter is, you either have a fiduciary

1 duty or you don't. And if you had a fiduciary duty, they
2 should have spoken up and they did only under 6.2, but they
3 did.

4 But here's the important part, Your Honor. Take the
5 allegations as true. You have to take all of the allegations
6 as true, not just some of them. And if you look at
7 Paragraph 127 of the complaint, and I would ask Ms. Canty to go
8 to Appendix 11 and let's just put Paragraph 127 up on the
9 board.

10 Here's the irony of the whole thing, right. The
11 whole complaint is based on the fact that somehow Mr. Seery was
12 engaged in insider trading. They accused him of insider
13 trading, and they say he didn't disclose the full value of the
14 asset. Just read Paragraph 127. James Dondero, who was on the
15 board of MGM, is the tippee. You've got an insider trading
16 case -- I mean, I don't represent MGM. I'm not with the SEC.
17 I don't know why Mr. Dondero thought he should be telling
18 Mr. Seery in December, 2020. It's not clear if it was before
19 or after the 9019 motion was filed. But Mr. Dondero is the
20 very source of information -- you can't make this up. He's the
21 very source of the information that he now complains Mr. Seery
22 didn't disclose.

23 Of course, Mr. Dondero, the trust, CLO Holdco could
24 have asked Mr. Seery at any time, how did you come up with your
25 valuation? Mr. Dondero, knowing that he had supplied to

1 Mr. Seery, according to Paragraph 27, please take it as true
2 for purposes of this motion only. He's the source of the
3 inside information. And now he has the audacity to come to
4 this Court, notwithstanding the Court's approval, all of the
5 time and money and effort spent in the 9019 process, and say,
6 Mr. Seery was wrong because he didn't tell CLO Holdco and the
7 DAF about the information that Mr. Dondero gave to Mr. Seery.
8 It's not right.

9 It was a judgment on the merits. And if Mr. Dondero
10 or the DAF or CLO Holdco or the trust wanted to challenge the
11 valuation, they had every opportunity to do so. And based on
12 Paragraph 127, if the Court accepts it as true, shame on them.
13 Shame on them for not pursuing this issue before. The guy gave
14 Mr. Seery, according to this allegation, and I'm just going to
15 leave it there, inside information. And he sits there in
16 silence, right? It says, look at the last sentence: "The news
17 of the MGM purchase should have caused Seery to revalue HCLOF's
18 investment." Seriously?

19 The third element is (indiscernible). The fourth
20 element, if we can go to the next slide.

21 Are they the same claims? Did the claims arise from
22 the same set of operative facts? I've addressed this pretty
23 clearly already, so I don't want to belabor the point. But
24 obviously, both the 9019 motion and the complaint arise solely
25 from the debtor's settlement with HarbourVest. The debtor's

1 acquisition of HarbourVest's interest in HCLOF and the debtor's
2 valuation of that interest. Without those three facts, there
3 is no complaint. It's just not credible to argue that the
4 fourth element is not met.

5 The case law is clear. It's quoted in the
6 Plaintiffs' opposition. It's not just the test of whether the
7 claims are the same. It's whether the claim is the same as
8 that which was brought or could have been brought.

9 In their opposition, the Plaintiffs contend that the
10 claims "did not write them until after the settlement was
11 consummated," and that the first time the plaintiffs heard
12 about the valuation of HarbourVest's interests was at the
13 January 14, 2021, hearing. I think I quoted that. If you
14 look, I don't know if it's Page 10 or Paragraph 10; the way I
15 wrote it, it's probably Page 10. I think that's a quote right
16 out of there. But of course, as we saw the debtor disclosed
17 the valuation in its very initial motion, CLO Holdco's counsel
18 elicited valuation testimony directly from Mr. Pugatch, so that
19 was before the hearing.

20 And of course, Mr. Dondero and the trusts both cited
21 in their objections the valuation. The notion that this was
22 not right, just -- it's contradicted by their own conduct,
23 their objections, their questions in deposition, the
24 information that was contained in the motion that they objected
25 to.

1 I do want to go off-script for just a minute, if we
2 could just take that down because I know that this is probably
3 something that Mr. Sbaiti may argue. And that is, well, gee,
4 but you have to take the allegation as true that Mr. Seery
5 wasn't honest, that Mr. Seery lied to the court. I don't
6 understand why there's not a fraud cause of action in there,
7 but there's not. But that's their theory.

8 And gee, how does he get to skate away Scott free if
9 he's allowed to do that with impunity, right? I will tell you,
10 Your Honor, of course you've seen Mr. Seery many times. You've
11 made your own assessments of his credibility. I'm not here to
12 argue the merits, but I will just say that the Defendants, if
13 ever forced to, will contest the allegation.

14 But here's the thing, and here's the important point
15 about, you know, whether or not he could lie with impunity and
16 say, I suspect that's where Mr. Sbaiti is going to want to go.

17 Mr. Seery said what he said. And he had a reason to
18 speak, and he spoke, and he said what he said and he told
19 everybody who would listen exactly what he was doing and how he
20 was doing it. For whatever reason, the objectors put the
21 valuation front and center. It's right in their objections.
22 They noted the objections. But for whatever reason, they did
23 nothing.

24 Whether they were negligent or whether they were
25 lying in wait is kind of irrelevant. They had a full and fair

1 opportunity to contest this issue. And if they had done so,
2 and the evidence proved what they're now alleging, they can't
3 tell you what would have happened. So, you know, HarbourVest
4 may have taken a different position. The Court may have done
5 something.

6 We're never going to know now because Mr. Seery and
7 the debtor are getting away with something, but because they
8 put in evidence that went unchallenged by Mr. Dondero and the
9 Plaintiffs. It simply went unchallenged. And they say, oh,
10 gee, that's because we didn't know. Well first of all, you
11 didn't ask. And second of all, again, the source of the inside
12 information, the reason that Mr. Seery should have known the
13 asset was worth more. The reason that he should have refrained
14 from trading and not engaged in insider information was
15 Paragraph 127. It was Mr. Dondero.

16 Here's another thing. If -- if again Mr. Seery had
17 not been honest with the Court and that was ever brought out,
18 Maybe HarbourVest -- maybe HarbourVest would have had a right
19 to complain. There's a lot in the complaint about oh,
20 HarbourVest was misled. The actual evidence that's in the
21 record, and this is part of res judicata, Mr. Seery testified
22 very clearly to the arm's length negotiation that took place.
23 He told the Court under oath that the negotiations were
24 contentious.

25 He told the Court under oath that in order to try to

1 resolve the case, he and Mr. Pugatch went off and had their own
2 private conversation without lawyers. They could have taken
3 discovery on any of that, right. What did you guys talk about?
4 It's certainly not privileged. They had every opportunity.
5 But what we do know is that Mr. Pugatch under oath, in
6 deposition, and at trial, said the value is \$22.5 million.

7 So I don't think Mr. Pugatch or HarbourVest is ever,
8 ever, every going to complain about the transaction they did.
9 Because of what the evidence simply shows. But again, you've
10 got the Plaintiffs in their complaint saying that somehow the
11 debtor and Mr. Seery in negotiating this transaction has now
12 exposed the debtor to liability. It just makes no sense.

13 So there was a time and there was a place to
14 challenge Mr. Seery. Somebody, you know, maybe HarbourVest
15 could have done something, maybe they could still do something.
16 I don't know. If they really think that there's a problem,
17 maybe we'll hear from HarbourVest someday. But the Plaintiffs
18 have no right to complain. They just don't. They knew
19 everything. They were the source of the inside information.
20 They sat on their hands, and they shouldn't be allowed to do
21 what they're doing now.

22 If we can go to the next slide. I want to move to
23 the next theory and try to finish this up. The next theory is
24 that the Plaintiffs' claims are barred by judicial estoppel.
25 The judicial estoppel argument is really, really very

1 straight-forward. And it's important because if the Court
2 thinks about this the way I do, it's that the whole issue of
3 valuation is completely irrelevant to the Plaintiffs unless
4 they can show that they were owed some kind of duty, that they
5 had some superior right to acquire the asset. But that's
6 exactly the issue that CLO Holdco relied upon and withdrew and
7 should now be estopped from pursuing. Right.

8 The legal standard, again the parties agree on, that
9 in order to be estopped, the party must take an inconsistent
10 position. And the party must have convinced the Court to
11 accept that position. Again, both prongs are easily met here
12 in just a few sentences from the January 14 hearing. You have
13 Mr. Kane saying that he understands and acknowledges and admits
14 that they have no superior right to the investment. And the
15 Court relying on that very representation in declining to
16 conduct a hearing and render a ruling on the merits of the
17 claim that was withdrawn. The objection that was withdrawn.

18 And for the avoidance of doubt, after Mr. Draper
19 spoke on behalf of the Trust, the Court, at Page 22 engaged in
20 the following colloquy. The Court asked Mr. Draper:

21 "THE COURT: Were you saying that the Court still
22 needs to drill down on the issue of whether the
23 debtor can acquire HarbourVest's interest in HCLOF.

24 "MR. DRAPER: No.

25 "THE COURT: Okay. I was confused whether you were

1 saying I needed to take an independent look of that.

2 Now that the objection has been withdrawn of CLO

3 Holdco, you're not pressing the issue.

4 "MR. DRAPER: No. I am not."

5 Okay. You can call it res judicata, you can call it
6 judicial estoppel, collateral estoppel, the two prongs are
7 easily met. They're taking an inconsistent position today and
8 through all kinds of different theories, including the one that
9 they withdrew, the Plaintiffs assert that they had a superior
10 right to acquire the interest from HarbourVest.

11 And they should have asserted those rights at the
12 hearing. That was the time. And they should be estopped now
13 from taking a completely inconsistent position from the one
14 that was before the Court. And I just do want to point out,
15 the statement from a case called Hall vs. G.E. Plastic. And
16 it's interesting, Your Honor, because there's only a few cases
17 that I focused on, because this is really more fact intensive.
18 And there isn't a dispute as to the, you know, the elements of
19 these matters.

20 But it is interesting that the Plaintiffs, you know,
21 generally ignore all of the cases that we cite to. One which
22 is Hall vs. G.E. Plastic, where the Court said that the focus
23 on the prior success or judicial acceptance requirements is to
24 minimize the degree of a party contradicting a Court's
25 determination, based on a party's prior position. That's the

1 whole point of the exercise. You can't do this. You can't do
2 this.

3 Just quickly, that leaves the individual arguments as to
4 each of the five causes of action and I just want to go through
5 some highlights. There's a negligence claim, Your Honor. And
6 we did not file a pleading, but the Court can certainly take
7 judicial notice of the fact that the effective date has
8 occurred. Under the effective date, the plan is now effective.
9 That includes the exculpation clause, as Mr. Pomerantz, I think
10 accurately and without contradiction pointed out earlier, the
11 exculpation clause applies specifically to the debtor and to
12 negligence claims. And that's not a matter that's at all
13 subject to appeal.

14 So I think just to add to the arguments that we have
15 in our papers, which I adopt and do not abandon for any
16 purpose, I would add to the argument on negligence, that it's
17 now precluded, as a result of the plan becoming effective.

18 The fiduciary duty count suffers from numerous defects. I
19 just want to point out a couple of them. They don't respond to
20 the argument under Corwin, that under the Advisor's Act, there
21 is no private right of action to sue for damages arising from a
22 breach of fiduciary duty. This claim rears its head in
23 virtually every single complaint. They've never addressed
24 Corwin. Corwin is binding on this Court, and it is unambiguous
25 that there is no private right of action to sue for damages for

1 breach of fiduciary duty under the Advisor's Act.

2 They ignore Goldstein. Goldstein is not from the
3 Fifth Circuit, but it's very persuasive authority that advisors
4 do not owe fiduciary duties to their individual investors.
5 Instead, they owe fiduciary duty to their client. Their client
6 is the entity with whom they're in contractual privity. And so
7 in this case, there's no fiduciary duty there, either.

8 The breach of contract claim. Again I just -- I
9 would just say quickly, Your Honor, it's barred under judicial
10 estoppel. Even if it wasn't, it's clear based on Mr. James'
11 analysis and admission that the debtor's, or the reorganized
12 debtor's interpretation of 6.2 is accurate. And you know, I
13 said this in the beginning. Now let me tie it in a bow because
14 the breach of contract claim, and the tortuous interference
15 claim are both tied to the same thing. And that is the
16 assertion that the Plaintiffs had a right under the membership
17 agreement, a right of first refusal.

18 And they basically say that the debtor was playing
19 games. That they shouldn't be able to get through 6.2 by
20 assigning it to an affiliate. And that's where I go back, Your
21 Honor, and just remind the Court that the debtor told the whole
22 world exactly what they were doing in their motion. And their
23 objections, Mr. Dondero and the Trusts both acknowledge to the
24 whole world that they understood exactly what was happening.

25 In fact, their concern was not that it was going to

1 the debtor, but that it might be going to an affiliate outside
2 of the bankruptcy court's jurisdiction. And for them to now
3 say, having taken all of those positions -- talk about
4 inconsistent positions. They should be barred from saying
5 today, that the use of an affiliate to effectuate the
6 transaction was wrongful, because they actually told the Court
7 that they needed to -- that the Court needed to make sure that
8 it had jurisdiction over the very entity they now say somehow
9 shouldn't have been allowed to get the asset.

10 It's a bit much. So that takes care of the tortuous
11 interference.

12 The RICO claim, Your Honor, again is a motion.
13 There's so many different aspects to it. But I don't think the
14 Court needs to get past the Supreme Court holdings in HJ, Inc.
15 Again, just simply ignored by the Plaintiffs in their
16 opposition to the motion to dismiss. In HJ, Inc., the Court --
17 the Supreme Court did an exhaustive analysis to try to
18 determine and ultimately did determine, what a pattern of
19 racketeering activity meant. And the Supreme Court came to the
20 following formulation. That it had to have two or more
21 predicate related offenses that amounted to a threat of
22 continued criminal activities.

23 You know, the notion here is that the debtor and Mr.
24 Seery engaged in insider trading. We've already -- I've
25 already mentioned that according to the complaint, which the

1 Court can take as true. Mr. Dondero, himself, was the tippee.
2 But be that as it may, they don't come close to meeting the
3 very high standards set forth by the Supreme Court in HJ, Inc.
4 to show that whatever conduct Mr. Seery and the debtor engaged
5 in, and if you take the allegations as true, in not telling
6 what the fair value of the asset was, that that doesn't amount
7 to a hill of beans for purposes of RICO. That you don't have
8 any, I think predicate acts. I think here's the Court,
9 predicate acts extending over a few weeks or months,
10 threatening no future criminal conduct, do not meet RICO
11 pleading grounds. Right.

12 Security fraud claims cannot be predicate acts for
13 purposes of RICO. That is also clear. And that is really, I
14 mean they say mail, wire and fraud. But what's really at heart
15 is the 10(b)(5). Okay, it's the 10(b)(5) claim. Again, Mr.
16 Seery being -- I mean Mr. Dondero being the tippee. But those
17 are just some of the reasons.

18 None of, you know, that the RICO claim fails. You
19 know, I'll otherwise rely on the papers, unless the Court has
20 specific questions as to any of the other pieces of the motion
21 to dismiss the RICO claim, or any other aspect of the
22 Defendants' motion. I think this is clear. I think we win, no
23 matter how you slice it. It's just wrong. It's just wrong.

24 This Court will never, ever have a final order if Mr.
25 Dondero is able to engineer complaints such as this, which seek

1 to assert claims that absolutely positively could have and
2 should have been brought at the time the debtor made its
3 motion.

4 Unless the Court has any questions, I have nothing
5 further.

6 THE COURT: I do not. All right.

7 Mr. Sbaiti, I'm going to let you have as much time as
8 Mr. Morris. He took 55 minutes. As I mentioned, I have a hard
9 stop at 12:00 to do a swearing in ceremony. So if you're not
10 finished in 40 minutes, then I'm going to have to take a break
11 and come back and let you finish. All right?

12 MR. SBAITI: Thank you, Your Honor. Although I don't
13 think I'm going to be much longer than 35-ish minutes.

14 THE COURT: Okay.

15 MR. SBAITI: if not less.

16 THE COURT: Okay.

17 MR. SBAITI: I think you'll be able to be done by --
18 we'll be able to be done by noon.

19 THE COURT: All right. Thank you.

20 MR. SBAITI: Thank you, Your Honor. Your Honor, may I
21 share my screen?

22 THE COURT: You may.

23 MR. SBAITI: Thank you, Your Honor. Do you see my
24 Power Point, Your Honor?

25 THE COURT: I do.

1 MR. SBAITI: Thank you, Your Honor. I don't know
2 what which one you see. Is it the --

3 THE COURT: I see presentation.

4 MR. SBAITI: With the full page?

5 THE COURT: Yes, uh-huh.

6 MR. SBAITI: Okay, yeah, great. I just want to make
7 sure we're on the right page. Thank you, Your Honor. So Your
8 Honor, the defendant debtor is a registered investment advisor.
9 And it all begins with that. And this where the distinctions
10 between what happened in the 9019 and I'll get to the elements
11 of res judicata through argument.

12 But the first thing that has to be identified is that
13 the Defendant is a registered investment advisor. The
14 objection filed by Holdco back during the 9019 was an objection
15 against HarbourVest selling its interest by filing the right of
16 first refusal. It did not deal with the investment advisor
17 feature of Highland's relationship. And I'll get to why the
18 9019 doesn't preclude these arguments today.

19 This is essentially the structure. Highland was the
20 investment advisor of HCLOF, and Holdco is an investor in
21 HCLOF. And so Highland would owe a fiduciary duty under the
22 Advisor's Act against -- to CLO Holdco.

23 Highland also had a direct advisor relationship with
24 the DAF. And so under the Investment Advisor's Act, it owed
25 fiduciary duties to both of those entities. The law governing

1 registered investment advisors is that it's a federally
2 recognized and defined fiduciary duties. The fiduciary duty to
3 there's a fiduciary duty to affirmatively keep the advisee
4 informed and the fiduciary duty not to self-deal, i.e., not to
5 trade ahead of an advisee and opportunity that an advisee would
6 want or expect and without the advisee's expressed informed
7 consent.

8 This is a federally recognized and defined fiduciary
9 duty and it's actionable under state fiduciary duty laws.
10 While Mr. Morris ended his argument by saying we didn't deal
11 with their case law saying that there's no private right of
12 action under the Advisor's Act, the fact of the matter is that
13 Judge Boyle, about ten years ago, found that a state -- the
14 breach of fiduciary duty claim can be predicated on breaches of
15 federally imposed fiduciary duties under the Advisor's Act.
16 And that's what Douglass v. Beakley held. And that's actually
17 what we cited in our response. So I'm not sure why he would
18 argue that we haven't addressed the issue of where does this
19 private right of action come from.

20 Federal Law supplies the rules of the relationship
21 and State Law provides the cause of action for those breaches.
22 Now the scope of that has been expounded upon by many cases.
23 The Fifth Circuit held in Laird, as a fiduciary, the standard
24 of care to which an investment advisor must adhere imposes an
25 affirmative duty of utmost good faith and full and fair

1 disclosure to all material facts, as well as an affirmative
2 obligation to employ reasonable care to avoid misleading his
3 clients.

4 The word "affirmative" there is important because it
5 means the investment advisor is not supposed to wait to be
6 asked. The investment advisor as an affirmative duty to
7 proactively provide the information to the client.

8 The next standard comes from the SEC. We call it the
9 SEC interpretation letter. It's a release that came out in
10 2019. And to meet it's duty of loyalty, an advisor must make
11 full and fair disclosure to its clients of all material facts
12 relating to the advisor relationship. Material facts relating
13 to the advisor relationship include the capacity at which the
14 firm is acting with respect to the advice provided.

15 The SEC had another release in 2000 -- or excuse me,
16 in that same release, the SEC said the duty of loyalty requires
17 that an advisor not subordinate its clients interests to its
18 own. In other word, an investment advisor must not place its
19 own interest ahead of its clients' interests. An advisor has a
20 duty to act in the client's best interest, not its own.

21 The SEC general instruction three to part 2 of Form
22 ADV, that every investment advisor has to pull out. And this
23 is cited in our papers. As a fiduciary, you must also seek to
24 avoid conflicts of interest with your clients, and at a
25 minimum, make full disclosure of all material conflicts of

1 interest between you and your clients that could affect the
2 advisor relationship. This obligation requires that you provide
3 the client with sufficiently specific facts, so that the client
4 is able to understand the conflicts of interest you have, and
5 the business practices in which you engage, and can give
6 informed consent to such conflicts or practices or reject them.

7 And, finally, the Third Circuit in Belmont said:

8 "Under the best interest test, an advisor may benefit
9 from a transaction recommended to a client if, and
10 only if, that benefit, and all related details of the
11 transaction are fully disclosed."

12 These fiduciary duties are unwaivable by the advisor.
13 Any condition, stipulation or provision binding any person to
14 waive compliance with any provision of this subchapter, or with
15 any rule, regulation or order thereunder shall be void.

16 So the lawsuit does not allege that the HarbourVest
17 settlement should be undone or unwound. I'd like to move to
18 that point. Mr. Morris says well, you have to unwind half of
19 the settlement. Maybe HarbourVest doesn't have to give back
20 what it got, but Highland would still be saddled with the cost
21 of the settlement, but not with the benefit of the settlement.

22 Well, actually that's not true. There's two points
23 that we would make on that. Number one, our suit is a suit for
24 damages. In other words, the suit would be a suit for money
25 damages, based on the difference between the value of the asset

1 and what HarbourVest or what the actual value of the asset that
2 was represented, \$22.5 million. So the second point, though,
3 is that even under a situation where CLO or Holdco or the DAF,
4 or even HCLOF were to purchase the HarbourVest suit, the
5 expectation would obviously be that they'd pay the \$22.5
6 million that Highland paid for it.

7 So Highland is -- so it's not unwinding, and there's
8 no saddling Highland with a burden that they didn't otherwise
9 have, I think that's a misrepresentation. But we're not
10 seeking to unwind the lawsuit -- or excuse me, unwind the
11 settlement.

12 Now Mr. Morris is correct, the representation of
13 value by Mr. Seery is -- is one of the main points here. And
14 the representation was that the value of the entire asset. Not
15 just the shares of MGM, but the value of the entire asset was
16 \$22.5 million. So in other word, nearly half of HCLOF was
17 represented to be worth \$22.5 million. It was argued by
18 counsel on Page 14 of the January 14th transcript, and then on
19 Page 112 of that transcript, Mr. Seery specifically says the
20 current value is right around \$22.5 million.

21 Now that was also in some of the filing papers and
22 Mr. Morris put up the evidence to Your Honor that Mr. Pugatch,
23 on behalf of HarbourVest also parroted that number. But
24 there's not any evidence today about where that number came
25 from, or whether he was simply relying on Highland's

1 representation of that value.

2 Now as a general rule, in these 12(B)(6) motions, as
3 I said before, we don't look at the evidence because the whole
4 point of discovery is to find out what's behind a lot of the
5 evidence. That's been quoted. The amount of evidence that
6 went into the 9019 motion as not necessarily full-blown
7 discovery.

8 I understand Mr. Morris saying well, they could have
9 asked the question. But as I just showed you, they shouldn't
10 have to ask the question. There should be fair and full
11 disclosure of all the material facts. And if it turns out,
12 which we believe it is true, that by January, the value of
13 HCLOF was twice what it was represented, or the HarbourVest
14 portion of HCLOF was twice as to what it was represented,
15 that's a material omission that Highland had an affirmative
16 duty to not misrepresent. Irrespective of the questions being
17 asked.

18 The DAF found out later on that the representation of
19 the value wasn't true. Now Mr. Morris talked for a very long
20 time about all the opportunities that somebody, Mr. Dondero,
21 somebody other than CLO Holdco. In addition to CLO Holdco,
22 could have asked the magic question to find out whether or not
23 they were telling the truth. But that runs right in the face
24 of the standards set forth by the SEC and by the Courts as to
25 the affirmative obligation of an advisor to disclose all the

1 material benefits that they're going to get as part of a trade.
2 The idea being that when you're a registered investment advisor
3 and you want to engage in a transaction, you make a full
4 disclosure and say this is the transaction. It's worth 41, but
5 I'm paying 22-1/2. But here's why I'd like to be able to do
6 it. And then that's the discussion that happens.

7 That clearly didn't happen here. And when it turned
8 out that there was this entirely huge upside that they were
9 gaining the benefit of, and maybe HarbourVest didn't care, that
10 that was a false statement. Now the reason we don't have a
11 common law fraud claim, or that we don't necessarily hang our
12 hat on a fraud claim is we don't have enough evidence as it
13 stands today, to specifically say that Mr. Seery intentionally
14 misrepresented that. Although we believe that it was grossly
15 reckless of him to do so. But we don't really need a fraud
16 claim with a gross recklessness standard. We have a breach of
17 fiduciary duty, which basically gets us to the same place.

18 So the timeline we have is September 30th was the
19 last valuation of HCLOF assets provided by HCMLP. And the
20 value of HCLOF, at that time, or the HarbourVest of that value,
21 would have been about 22.5 million. So what it appears to be
22 is that in January or in late December, the valuation that was
23 being done -- what was being reported, wasn't the current
24 valuation. It was the valuation as of the end of the third
25 quarter of 2020.

1 On December 22nd, the motion to approve the
2 settlement with HarbourVest was filed. HCMLP should have had
3 or would have had up-to-date valuations of the HCLOF assets,
4 but didn't necessarily disclose them as being different than
5 the 22.5 million. On January the 14th, Your Honor, held the
6 9019 hearing. And then that same day, Your Honor entered the
7 approval order.

8 And finally, in March, the DAF learns the true value
9 of HLOF assets as of January 2021 and starts to look into it.
10 Now Mr. Morris makes much of the fact that well, Mr. Dondero at
11 least knew that he had tipped them off, Mr. Seery. And if you
12 actually read Paragraph 127, you'll see specifically what it's
13 purported that he said. He said stop trading in the MGM
14 assets, because MGM might be in play. So you can't trade
15 because I'm an advisor, Mr. Dondero's an insider, he's the
16 tipper, not the tippee. Mr. Seery becomes the tippee under
17 that theory of the case, and he has to, and is required to,
18 because of their affiliation at the time, he's required to
19 cease trading. And that was the purpose of saying that.

20 The collateral issue that we point is that he at the
21 very least knew about that, and that should have caused him to
22 revalue, if he hadn't done so at the time. Not that, knowing
23 that alone is sufficient to know what the value of HCLOF
24 actually was on that date. That's a complete misrepresentation
25 of the point and purpose of that allegation.

1 And as Your Honor knows, under 12(B)(6)
2 jurisprudence, the way this is supposed to go is we get the
3 benefit of every inference based upon the allegations, not the
4 movant. So the first violation is that the debtor as an IRA
5 failed to affirmatively disclose the true current valuation of
6 HCLOF and failed to keep the DAF and CLO Holdco reasonably
7 informed of the value of the assets.

8 And the debtor as an IRA, failed to obtain CLO
9 Holdco's with the DAF's informed consent before it traded in
10 the asset, because it didn't have all of the information. The
11 typical remedy for breach of fiduciary duty is typically
12 damages for any loss suffered by the Plaintiff as a result of
13 the breach. I don't think there's a debate there.

14 So now we get to Mr. Morris' key argument. His key
15 argument is that we should be talking about res judicata. The
16 elements of res judicata and I think we agree is you have to
17 have identical parties in the action; the prior judgment was
18 rendered by a Court of competent jurisdiction; the final
19 judgment was final on the merits, and the cases involved the
20 same causes of action or the same transaction and nexus of
21 facts.

22 Now I'm going to skip to three, because I think
23 that's one of the key points that we disagree with them on.
24 There is no case, Your Honor, that we could find, and no case
25 that I read them citing that says an order on an 9019 has

1 preclusive effect under res judicata under an objector to the
2 settlement. We looked. We looked in the Fifth Circuit. We
3 looked outside of the Fifth Circuit. No District Court, no
4 Fifth Circuit Court of Appeals' opinion we could find held that
5 a 9019 order has res judicata effect on an objector's
6 objection. And I think the reason is pretty simple. Is it
7 doesn't.

8 Because the Plaintiff's claims, here our claims
9 hadn't even accrued. We have a four year statute of
10 limitations, but I think more importantly is that, as the Fifth
11 Circuit said, the 9019 motion grants the Court discretion.
12 It's not supposed to be a mini trial. The Court can approve a
13 settlement over even the valid objection of an objector. It's
14 not a trial on the merits. It's not supposed to be a trial on
15 the merits. It's not supposed to be a disposition on the
16 merits.

17 So the fact that Your Honor could have approved the
18 9019 settlement with HarbourVest, even if we had a valid
19 objection, means this isn't a disposition on the merits, as res
20 judicata would envision. It wasn't a trial on the merits, even
21 though it was withdrawn.

22 The other elements that we would point out to is that
23 neither the DAV nor Holdco were parties to the dispute between
24 HarbourVest and Highland. And this keys off of the issue that
25 I just raised. The cases that are cited by the debtor to Your

1 Honor all have to do with where one of the settling parties is
2 trying to undo the settlement for some collateral reason. And
3 the Courts have held, no, that's res judicata, because you were
4 a party to the action. HarbourVest brought the claims against
5 Highland. Highland settled those claims.

6 CLO Holdco was collateral to that settlement, it's
7 not a -- excuse me, collateral to that dispute. It's not a
8 party to that dispute. Its claims weren't being resolved by
9 the settlement. And while you have a notice to all creditors
10 and those objections can be raised, there was not inherently
11 any manner for resolving those objections on their own merits.
12 Only -- it was only resolved in so far as deciding whether or
13 not the settlement was in the best interest of the debtor,
14 which Your Honor decided, and we don't challenge that. But we
15 do argue that it caused damages and the debtor shouldn't get
16 off for those damages.

17 The fourth element is that the --

18 THE COURT: Just for the record, the standard in a
19 9019 context is not best interest of the debtor, right?

20 MR. SBAITI: Your Honor, I mean that's what the rule
21 says and Your Honor's order --

22 THE COURT: That is not what the rule says. The rule
23 is actually very sparsely worded and then we have Fifth Circuit
24 case law and U.S. Supreme Court law that talk about what the
25 standard is.

1 MR. SBAITI: Yes, Your Honor. And there are five --

2 THE COURT: And it's -- is it fair?

3 MR. SBAITI: There are five elements.

4 THE COURT: Is it fair and equitable and in the best
5 interest of the estate given a long list --

6 MR. SBAITI: Correct, Your Honor. And I didn't mean
7 to --

8 THE COURT: -- of considerations that the Court is
9 supposed to consider that "bear on the wisdom of the
10 settlement." Okay. So it's actually much more involved, is my
11 point, than is it in the best interest of the estate. Is it in
12 the best interest of the estate and fair and equitable given
13 all factors bearing on the wisdom of the compromise? And then
14 we have a long laundry list of things the Court should consider
15 as part of that analysis.

16 MR. SBAITI: That's a --

17 THE COURT: I just bring that up because if I'm still
18 -- my brain is still stuck five minutes ago on your comment
19 that you can't find any case saying that an order approving a
20 9019 compromise has res judicata effect on creditors. And it's
21 -- let me just say it's shocking to me that someone would argue
22 otherwise. Bankruptcy is a collective proceeding --

23 MR. SBAITI: Your Honor --

24 THE COURT: -- where creditors can weigh in and
25 object and raise whatever arguments they think the Court should

1 consider that bear on the wisdom of the compromise. And the
2 Fifth Circuit in Foster Mortgage has said the Court should give
3 great deference to the views of the creditors, the paramount
4 interest of creditors.

5 So it's a really sort of shocking proposition that
6 the order approving a 9019 compromise wouldn't have res
7 judicata effect on all parties and interests who got notice of
8 that. So if you have any elaboration on that, I'd like to hear
9 it.

10 MR. SBAITI: Your Honor, we looked at the Fifth
11 Circuit cases that they cited, which I believe included that
12 case. And even in that case, the point that we made in our
13 papers and the point I was trying to arrive at is that among
14 the factors, yes, the Court should give great deference to the
15 creditors. But among the factors is not that the objections
16 lack merit or are meritless or that they wouldn't be winnable
17 if they were simply standalone claims.

18 And that was really the only point I was trying to
19 make is that Your Honor has discretion. Granted it's -- as you
20 mentioned, it's not unfettered discretion. It's bounded by
21 standards and there are -- there is, I know, about five
22 standards Your Honor has to consider or the Court has to
23 consider. But among those, that laundry list of standards, is
24 not that the Court finds that any objection lacks merit. And
25 that was really the only point I was making.

1 And in terms of the case law, we looked at the Fifth
2 Circuit. We looked, frankly, outside the Fifth Circuit as much
3 as we could, and because this is actually not an easy one to
4 research, as it turned out, despite the language. And we also
5 looked for district court opinions in the Fifth Circuit to see
6 did any district court or did any court of appeals give this
7 type of approval to the standard that a 9019 order has res
8 judicata effect on a claim raised in an objection by a
9 creditor.

10 And we couldn't find any and I read all the cases
11 that Mr. Morris cited in his papers, and they didn't cite one
12 that explicitly said that. They tried to drive at it through
13 insinuation that, well, if the Court has to give great
14 deference or if the Court has to take into account the
15 underlying facts and the fact that there is discovery, surely
16 that must mean this is akin to the trial on the merits. And I
17 think that's where we simply disagree in good faith. I'm not
18 ascribing any bad intention. But we disagree that that's where
19 the law goes.

20 Res judicata is not -- while it's supposed to stop
21 the relitigation of issues, it is predicated on there having
22 been actual litigation of those issues. And when HarbourVest
23 and Highland settle a case and my clients show up with an
24 objection, even though they withdraw an objection, that, in our
25 opinion -- and we're asking the Court to see it our way -- is

1 not trial on the merits. It's not a disposition on the merits
2 of the objection in and of itself. Some objections we can --

3 THE COURT: But the context matters. In the context
4 of a 9019 compromise, the hearing is about look at the bonafide
5 ease of the settlement. And it's either fair and equitable and
6 in the best interest of the estate or not. And an objector can
7 say this is a terrible settlement and here's why it's a
8 terrible settlement and let me cross-examine the movant and let
9 me put on my own witness that will enlighten the Court as to
10 why this is a terrible settlement, why I say terrible, why it's
11 not fair and equitable.

12 That's your chance to convince the Court, don't
13 approve this settlement because there are, you know, 14
14 problems with it. And if you convince the Court, then you
15 convince the Court and it's not approved. If you don't, you
16 appeal, and we do have an appeal of the settlement order.

17 So, again, I'm not understanding the "res judicata
18 doesn't apply" argument.

19 MR. SBAITI: Your Honor, if I could riff on two
20 points based upon what you just said, if I could address those.

21 The first is there are clearly two kinds of
22 objections that get -- at least two kinds of objections that
23 get raised in these 9019 approval hearings. The two that you
24 heard recounted, some were this is bad for the estate. There's
25 reasons why we don't think the estate will benefit from it and

1 it will be harmed from it.

2 And those types of objections, which I believe mostly
3 comprise the objections that Mr. Morris was talking about
4 because they are concerns for the estate. And so creditors who
5 want to get money from the estate are concerned that the
6 settlement will not enter (phonetic) to the benefit of the
7 estate, and therefore, not enter to their benefit as creditors.
8 That's number one.

9 But those don't adhere in a lawsuit. Those aren't
10 claims for damages that the settlement is going to create for
11 the person objection or for the party objecting. There's a
12 whole separate set of objections similar to the ones HCLO
13 Holdco raised where that what inheres in the objection is this
14 is actually going to cause us some kind of damage.

15 And so, the factors though, don't require the Court
16 in those second set of instances to say, well, you know what?
17 Not only do I think you're wrong, but I think that your
18 lawsuit, the underlying causes of action that give rise to this
19 objection, have no merit on their own face, that the discovery
20 is not there to support them, that a jury is not going to find
21 there. I am now the trier or the Court is now the trier of
22 fact on the merits of the underlying causes of action that
23 animate the objection.

24 And that's where I believe we're diverging with the
25 debtor on the law. It goes too far to say that a 9019 hearing

1 where the Court in the end has discretion to approve it, even
2 over a meritorious objection by any party, regardless of what
3 bucket of objections the objection falls into. It goes -- our
4 argument today, Your Honor, and we're asking the Court to see
5 it our way, is that that would go too far. That an actual
6 cause of action shouldn't be eradicated simply because of the
7 9019 process because, as you pointed out, the Court does have
8 to go through a litany of factors.

9 And if the Court determines that it's fair and it's
10 more equitable to overrule the objection, the Court has that
11 discretion. And we're not here to unwind that discretion.

12 But the settlement process did violate certain
13 obligations and did cause my client damages. And that's what
14 we're saying isn't precluded.

15 THE COURT: Okay.

16 MR. SBAITI: The fourth element, Your Honor, which I
17 guess in many ways maps on to the argument I just made to Your
18 Honor is that the cases, the underlying cases, do not involve
19 the same claims. Plaintiffs' claims arise from the settlement
20 process itself and not from the underlying issues being settled
21 between HarbourVest and Highland. So that's why we think at
22 least three of the four elements aren't met here. And we'll
23 reserve on the papers, you know, whether jurisdiction was
24 applicable because I think that's probably water under the
25 bridge at this point in the oral argument.

1 Now, Mr. Morris attacks the case that we cite,
2 Applewood Chair vs. Three Rivers Planning. And he argues that,
3 well, this is not applicable. And the argument he made however
4 was he put it in the context of, well, the parties there, the
5 issue was you had guarantors who were not parties in their
6 capacity as guarantors. But that's not actually what the Court
7 held.

8 The Court didn't say that the release wasn't
9 applicable to them because they didn't appear as parties in
10 their guarantee capacities. They -- the Court held that, well,
11 the specific discharge language doesn't enumerate those
12 specific guarantees, and so therefore it's not released.

13 And where this dovetails, we believe, as closely as
14 we can, this isn't a 9019 case. This is a final confirmed
15 plan. But where it dovetails with what our argument is, is
16 that the Court there as well was essentially saying the
17 underlying causes of action weren't really presented to us, so
18 we're not -- we -- and the confirmation of the plan didn't
19 involve disposing of them, so we're not going to say that they
20 are precluded. And we think that that's as close an analogy as
21 we've found in the Fifth Circuit to the issues here today.

22 So I would say, Your Honor, that we believe that
23 dispenses with the res judicata argument. The judicial
24 estoppel argument, they conflate the language. I'll go back to
25 this for a second. They conflate the language of judicial

1 estoppel on the success of the claim. None of the cases they
2 cite on judicial estoppel involved where a party took a
3 position, withdrew their argument, and then the Court moved on.

4 Mr. Morris tries to convert a judicial estoppel claim
5 into a judicial reliance claim, which is not the purpose of the
6 doctrine and is not the doctrine at all. The doctrine is that
7 if you take a successful position in one court, you can't take
8 the opposite position in another court. CLO Holdco didn't take
9 a successful position in one court and then change its position
10 later on. In fact, its positions, as Mr. Morris stated, are
11 remarkably similar. They're not inconsistent, which is the
12 problem with their judicial estoppel argument. And we -- I
13 think we fairly briefed that in our papers and we'll otherwise
14 rest on the papers.

15 To deal -- to address the actual claims, again, I
16 come back to the idea of a fiduciary duty claim, which is our
17 lead claim. And to be clear, it's a state claim predicated on
18 the violation of federally imposed fiduciary duties.

19 And I'm looking for a clock to make sure I'm not
20 abusing Your Honor's time, and I don't have one right in front
21 of me because my screen -- my screen is up.

22 Your Honor, the Douglass v. Beakley case is, like I
23 said, is Judge Boyle's case. It specifically provides a cause
24 of action based upon violations of the Advisers Act. We also
25 cite about four or five other cases in footnote 8 of our

1 response from other circuits, including the Third Circuit, the
2 Belton case that I referred to earlier, all of which held that,
3 yes, a state fiduciary duty claim can be predicated on breaches
4 of a federal Advisers Act violation.

5 The other point that they make on the fiduciary duty
6 claim is they argue HCMLP doesn't owe fiduciary duties to CLO
7 Holdco. And the cases they cite, Your Honor, we dealt with in
8 the papers why they were distinguishable, because in those
9 cases they were dealing with the fact that there wasn't any
10 harm or any direct relationship. But what they ignore is the
11 actual language of the Advisers Act, which is important.

12 Well, first of all, Mr. Seery admitted in his own
13 testimony during the approval hearing in July of 2019 that he
14 says, "We owe." He says, "There are third party investors in
15 the fund -- in these funds who have no relation whatsoever to
16 Highland, and we owe them a fiduciary duty both to manage their
17 assets prudently, but also to seek to maximize value." I think
18 Mr. Seery was absolutely correct when he said that. Highland
19 owes fiduciary duties to the investors in the funds that
20 Highland manages. The core of our case is that Highland is
21 using or abusing the assets of the funds it managed in HCLOF
22 for its own enrichment, which is a classic breach of fiduciary
23 duty case under the Advisers Act.

24 Now -- excuse me. The other point that I would say,
25 Your Honor, is that there is a statutory basis for us to argue

1 a breach of fiduciary duty. Excuse me. I didn't mean to stop
2 sharing. I apologize.

3 Are you back with me, Your Honor, on my --

4 THE COURT: Yes.

5 MR. SBAITI: -- PowerPoint?

6 THE COURT: Yes.

7 MR. SBAITI: Sorry about that, Your Honor. I just
8 hit the wrong thing. I'm not very technologically savvy. Here
9 we go.

10 So Holdco is an investor in HCLOF, which is a pooled
11 investment vehicle. A pooled investment vehicle under the case
12 law we cite is simply defined as an investment vehicle that
13 doesn't publicly solicit investors and has few than 100
14 investors. Highland advises it. That's the same holding in
15 TransAmerica Mortgage, by the way, which we also cite.

16 15 U.S. C. Section 80(b)(6) establishes the federal
17 fiduciary standards to govern the conduct of registered
18 investment advisers. That's also the TransAmerica case. 15
19 U.S.C. Section 80(b)(6)(D) delegated to the SEC the power to
20 decide the scope of those duties that are imposed under the
21 statute. And so the SEC enacted 17 C.F.R. Section 275.206(4)-
22 8.

23 And it expressly states, and we cite the statute or
24 the regular in full in our papers, that the fiduciary duties
25 are owed to investors in the pooled investment vehicles. It

1 specifically says that. It talks about two different duties
2 owed and they're owed to the investors in the vehicles, which
3 means they're owed to Holdco as an investor in HCLOF, which is
4 the vehicle that Highland manages.

5 It's black and white in the regulation. And we
6 haven't seen any response. There was no response of that in
7 the reply that was filed, Your Honor. And so the argument that
8 there's not a fiduciary duty owed to Holdco because it's merely
9 an investor in HCLOF simply doesn't comport with the law.

10 And finally, the petition lays out the basis for our
11 claims including the applicable federal and state law.
12 Plaintiffs' response lays out why the legal arguments aren't
13 opposite at the 12(b)(6) stage and Rule 9(b) is met where
14 necessary under the federal claim. And I'm trying to unshare
15 so that I can get back to regular argument.

16 I'd like to briefly address Mr. Morris' argument,
17 Your Honor. Your Honor, I re-raise my argument that I made
18 before, which is that a 12(b)(6) motion and hearing is not the
19 appropriate time for all the evidence that was poured in here.
20 And I understand Mr. Morris' contention, well, it's really hard
21 to ignore all the history of this case. But a lot of that
22 history really boils down to things that were actually admitted
23 in the complaint. The complaint recognized there was a 9019.
24 But what Mr. Morris wants to do is go beyond that and to go to
25 what people said and what they must have meant. What Mr.

1 Dondero must have meant in his objection, what Dugaboy must
2 have meant by their objection, what Mr. Pugatch must have meant
3 by his testimony.

4 All of that is highly improper at this stage of the
5 proceeding, Your Honor. It's outside of the 12(b)(6) confines.
6 It's outside the four corners of the complaint. And we object
7 to all of that evidence being considered.

8 THE COURT: Let me --

9 MR. SBAITI: The question we --

10 THE COURT: Let me ask you about that procedural
11 point.

12 MR. SBAITI: Yes, Your Honor.

13 THE COURT: As we know, 12(d) provides that if
14 matters outside the pleadings are presented to and not excluded
15 by the Court in a 12(b)(6) motion, the motion must be treated
16 as one for a summary judgment under Rule 56 and all parties
17 must be given a reasonable opportunity to present all the
18 material that is pertinent to the motion.

19 Are you -- what are you arguing? That I should treat
20 it as a motion for summary judgment and give you more time to
21 present other materials? I mean, you both presented an
22 appendix, okay. And I'm telling you we're seeing this more and
23 more, I've noticed. People are going beyond the four corners
24 of a motion to dismiss and attaching things. And there's some,
25 you know, Fifth Circuit authority that says, well, if what is

1 attached is integral to understanding, you know, an allegation
2 or whatever in the pleading, you know, there is some discretion
3 to go outside the four corners.

4 So I'm trying to understand the point you're making
5 with this. Are you saying I should treat it as a motion for
6 summary judgment or do these attachments really -- you know, do
7 I have authority under the Fifth Circuit to consider them as
8 part of the 12(b)(6) motion or not?

9 MR. SBAITI: Typically, in our experience, Your
10 Honor, is when a summary or when a 12(b)(6) is going to be
11 treated as summary judgment under 12(d), the Court says that
12 and then the parties are given an opportunity, as you said, to
13 go do some discovery in order to put together the evidence and
14 materials to then come back and respond as a summary judgment.
15 We responded to a 12(b)(6) and objected to the evidence. If
16 the Court wants to treat it as a summary judgment, then we
17 would ask for an opportunity for -- to conduct discovery in
18 order to be able to respond as a summary judgment motion, but
19 we didn't -- because we responded to a 12(b)(6) --

20 THE COURT: You did the same thing though. You did
21 the same thing in your response. You submitted an appendix of
22 evidence, if you want to call it evidence. As someone pointed
23 out, it's stuff from the bankruptcy court record. I don't
24 think it went beyond what was already in the bankruptcy court.

25 MR. MORRIS: And if I -- can I be heard on this, Your

1 Honor?

2 THE COURT: You can. You can.

3 MR. MORRIS: Just to respond. This is really quite
4 simple. The motion to dismiss is based on res judicata. Res
5 judicata necessarily requires a review of what happened in
6 connection with the prior hearing. There's nothing that we
7 have identified or put forth in the appendix or on our exhibit
8 list except for the pleadings in the 9019, the transcripts, the
9 one deposition transcript, the one trial transcript, the
10 settlement agreement, the transfer agreement. I'd love to know
11 what the Court couldn't or shouldn't take judicial notice of.
12 There is no emails. There is no -- there is no -- there is no
13 extrinsic evidence, if you will. All of this is either on the
14 docket or was presented as part of the hearing.

15 THE COURT: Yeah. I'm just trying to ferret --

16 MR. MORRIS: And it's necessary. And it's necessary
17 for the motion.

18 THE COURT: Yeah. I'm just trying to ferret out the
19 procedural position that's being asserted here. And I don't
20 have the case cites off the top of my brain, but there is
21 authority from at least the Northern District judges, if not
22 the Fifth Circuit, saying in a 12(b)(6) motion I can take
23 judicial notice of items in the record. And then, you know,
24 there -- I know there's Fifth Circuit authority saying I can go
25 beyond the four corners in a 12(b) context if it's just basic,

1 you know, explaining things that are in allegations. You know,
2 such as --

3 MR. SBAITI: May I address that, Your Honor?

4 THE COURT: -- such as if a contract is in dispute,
5 okay. Like there's no way you can have a cause of action under
6 the contract and here's the contract. So I'm just trying to
7 nail down your procedural position here.

8 MR. SBAITI: Your Honor, the distinction I was trying
9 to make that I don't think I put as artfully as I might be able
10 to put now is in a 12(b)(6) if there's a contract, as you said,
11 if there's a legal document, a contract and order that's
12 integral to the case, Your Honor can take judicial notice of
13 that. Generally, a court can take judicial notice of filings
14 in a bankruptcy, the fact that they were filed.

15 So the transcripts, which Your Honor can't take
16 judicial notice of, is the truth of those. And that was what I
17 was objecting to is it's one thing for him to say an objection
18 was filed and therefore, because an objection was filed, that
19 should be it. That was your only chance. I'm not saying Mr.
20 Morris can't make that argument.

21 But when he goes beyond the fact of the filing or the
22 fact that there was a transcript or the fact that there was a
23 deposition and starts to read from the depositions or read from
24 the filings and say this is what those mean, that goes against
25 the 12(b)(6) parameters because, number one, now it's

1 substantive evidence and not simply a judicial notice of
2 something that's right there in front of the Court, i.e.,
3 something on its own docket. Because those statements and the
4 interpretation of those statements are subject to credibility
5 findings. They're subject to clarification. They're subject
6 to rebuttal. That's the purpose of discovery.

7 And so if Your Honor -- and Mr. Morris is right.
8 Usually, res judicata involves knowing what happened in the
9 prior proceedings. So if all he wants to do is rest on the
10 fact that an objection was filed by CLO Holdco and maybe even
11 other people, and that should be it and he thinks that's enough
12 for Your Honor to say res judicata applies, then I don't think
13 we have a problem. It's when he goes beyond that and says,
14 Your Honor, these people must have known and this is what they
15 meant by their argument, that's what I'm asking Your Honor not
16 to consider. And if Mr. Morris wants you to consider that,
17 that's a summary judgment motion and we should have the
18 opportunity to do discovery at the very least into the issues
19 he has now raised as supporting his res judicata defense which
20 he has the burden of proof on.

21 MR. MORRIS: Your Honor, this is one of the strangest
22 arguments I have ever heard. I'm allowed to offer the Court
23 and the Court is allowed to accept the documents, but I'm not
24 allowed to read them. I'm not allowed to make arguments. I
25 don't understand what that even means. If it were a contract,

1 I would be allowed to put the contract in front of Your Honor,
2 but I wouldn't be able to argue why the contract doesn't say
3 what the Plaintiff says. I don't get it.

4 THE COURT: Okay.

5 MR. MORRIS: That's --

6 THE COURT: Just I've heard enough on this. I don't
7 think we have moved into Rule 12(e), that realm of me needing
8 to treat this as a motion for summary judgment. I think the
9 so-called evidence, the appendix that was attached to the
10 motion as well as the appendix that was attached to Plaintiffs'
11 response, it's stuff that I can take judicial notice of that's
12 in the record of this Court and I can look at it. You know, it
13 is what it is, the record of this Court.

14 All right. So I have nine people waiting in
15 chambers. I'm trying to figure out should I take a break now
16 or are you fairly close to wrapping up. Either answer is fine,
17 Mr. Sbaiti. I just need to figure out who I make wait here.

18 MR. SBAITI: I have -- oh, I'm sorry. I didn't mean
19 to interrupt you, Your Honor. I was just going to say I have
20 five minutes left, but I know Mr. Morris probably wants to come
21 back. So if you want to break now and we can come back at
22 whenever the Court wants us to, we can do so.

23 THE COURT: All right. Why don't you make your final
24 five minutes and then we'll take a break?

25 MR. SBAITI: Okay. Thank you, Your Honor.

1 I just wanted to address some of the arguments that
2 Mr. Morris raised in his argument. The first thing is -- and I
3 addressed this in part -- but Mr. Morris makes a big deal about
4 paragraph 127 of the complaint and essentially suggests that
5 we're the -- or that Mr. Dondero is the perpetrator of a
6 nefarious scheme. Whereas, what the pleading actually says,
7 and I again encourage Your Honor to re-read -- to read it
8 specifically, is that Mr. Dondero warned Mr. Seery not to trade
9 in the stock and not to make any transactions because the stock
10 was going to appreciate in value.

11 That has two implications for us, Your Honor. Number
12 one, it means Mr. Seery was a tippee of insider information,
13 and number two, it means that Mr. Seery, if he did trade on
14 that information or if he did pass that information on to
15 someone else, that is a problem from the Advisers Act
16 standpoint, which is really the only purpose of saying that.

17 While paragraph 127 also says that that should have
18 caused Mr. Seery to revalue the NAV of HCLOF, it does not state
19 and we did not plead that the entire value of HCLOF is tied to
20 the MGM stock. So the insinuation that that somehow gave us
21 inside information about what the true value of HCLOF was and
22 we should have known or that Mr. Dondero should have known is
23 simply untrue.

24 The other argument Mr. -- that Mr. Morris likes to
25 harp on is that CLO Holdco withdrew its argument, but he

1 characterizes Mr. Kane's withdrawal testimony -- as he says,
2 Mr. Kane admitted that CLO Holdco lacked the superior right to
3 obtain the HarbourVest. If you read the very language that was
4 highlighted on Mr. Morris' slide, that's not what Mr. Kane
5 says. Mr. Kane says, "We've gone back to the drawing board.
6 We've read your reply. And my client has given me permission
7 to withdraw the argument or withdraw the objection." That's
8 all he said. There was not an admission that he was wrong.
9 There was not an admission that they had made a mistake. There
10 was simply an admission that they decided to withdraw the
11 objection for whatever reason.

12 Lastly, on the specific claims --

13 THE COURT: That's not an accurate description of the
14 record. He said he looked at --

15 MR. SBAITI: Your Honor, I was reading it along with
16 him.

17 THE COURT: -- Guernsey Law. And I don't know if his
18 words were deep dive.

19 MR. SBAITI: Yeah.

20 THE COURT: But he had looked at the agreements
21 extensively. That's just not what he said.

22 MR. SBAITI: And he said he was with -- Your Honor,
23 he said he was withdrawing. He didn't say we were wrong. He
24 didn't say we don't have a claim. What he said was, "We're
25 withdrawing the objection."

1 THE COURT: After doing an extensive look at the
2 agreements in Guernsey Law, okay, so.

3 MR. SBAITI: Sure. But, Your Honor, he might have --
4 he could just as easily thought we have a chance, but it's not
5 a good one. And frankly, we'll be here for 20 days and we're
6 withdrawing it for that reason because we'll live to fight
7 another day. Your Honor, there's an innumerable number. To
8 simply say that he admitted that they didn't have a correct
9 claim, it's just he didn't say that. That's all. That's the
10 only point I'm making.

11 Your Honor, I don't disagree with the debtor that the
12 Court's exculpation clause gets rid of the negligence claim
13 which was obviously filed before the effective date, so that
14 claim is gone.

15 And I think the last argument that Mr. Morris makes
16 on the RICO claim is the federal court, the Supreme Court
17 standard for pleading a RICO claim, that acts that only
18 continue for a few weeks are not -- don't set out a RICO claim.
19 Your Honor, in our response to that, we actually submitted an
20 amended complaint that shows that the type of acts we're
21 talking about, the pattern of the debtor using its investor
22 vehicles assets to liquidate is a long pattern and practice
23 than simply the HarbourVest suit. And so, we move to amend on
24 that basis to satisfy that pleading defect, which is the main
25 one that they focused on.

1 That's all I have, Your Honor.

2 THE COURT: All right. Thank you.

3 We're going to take a 15 minute break and come back.

4 I'll ask Mr. Jordan and Mr. Bessette did they have anything
5 they wanted to say today. I know they joined in the debtor's
6 motion. And then we'll let Mr. Morris have rebuttal.

7 All right. So we'll be back in 15 minutes.

8 THE CLERK: All rise.

9 MR. MORRIS: Thank you, Your Honor.

10 (Recess at 12:05 p.m./Reconvened at 12:23 p.m.)

11 THE CLERK: All rise.

12 THE COURT: All right. Please be seated.

13 We're back on the record in Charitable DAF v.
14 Highland Capital. All right. So I promised I was going to go
15 back to counsel for Highland CLO Funding, Ltd. So Mr. Jordan,
16 Mr. Bessette, is there anything you wanted to say for oral
17 argument?

18 MR. JORDAN: Thank you, Your Honor. John Jordan on
19 behalf of HCLOF.

20 Our points are two procedural points. The first is
21 as the Court anticipated, in our motion to dismiss filed back
22 in August, we joined in the motion to dismiss of Highland. And
23 so to the extent that the Court after deliberation is inclined
24 to grant that motion, we would ask that as a joining party,
25 HCLOF be pulled along with that.

1 The second procedural point is that back in our
2 motion to dismiss, we pointed out that the complaint does not
3 actually allege anything against HCLOF. In the story, we're
4 essentially the football and neither Oklahoma nor UT. And we
5 pointed that out as an additional argument to what you've heard
6 today. That motion was never responded to. The deadline by
7 agreement was extended to October 11th. And the lack of
8 response was, we believe, not inadvertent but simply an
9 acknowledgment that HCLOF is not a party that anything is being
10 claimed against.

11 It particularly makes sense since effectively and in
12 rough numbers, they're half owned by both sides. So for every
13 dollar that HCLOF spends hanging around the case, the parties
14 are paying essentially 100 cents collectively. So for that
15 reason, we would ask, and subject to Mr. Sbaiti's input,
16 whether the Court would ask us or direct us to upload an order
17 granting our motion as unopposed. We just feel like we don't
18 have any role in this case.

19 THE COURT: All right.

20 Mr. Sbaiti, what about that?

21 MR. SBAITI: Your Honor, they were originally added
22 as a nominal party. And as a nominal party, because of the
23 potential need to have a derivative action, I think that based
24 upon Highland's arguments and the arguments that we had, I
25 don't think the derivative action is necessary for us to

1 maintain on a go-forward basis. And so we don't oppose them
2 being dismissed.

3 THE COURT: All right. Then I assume, Mr. Morris,
4 you don't have any problem with this, correct?

5 MR. MORRIS: No, Your Honor.

6 THE COURT: Okay. So I'll look for the parties to
7 submit an agreed order of dismissal of HCLOF after the hearing.
8 All right?

9 MR. JORDAN: Thank you, Your Honor.

10 THE COURT: All right. Mr. Morris, you get the last
11 word.

12 MR. MORRIS: Thank you, Your Honor. I hope to be
13 relatively brief. I really just want to focus on the arguments
14 concerning whether or not the order that was entered by this
15 Court was an order that was entered on the merits.

16 As the Court is well aware, a 9019 motion filed by a
17 debtor is done so on notice. It is to give all parties in
18 interest an opportunity to be heard, not just as to whether or
19 not the debtor meets its burden of proof under Rule 9019 but
20 whether or not the Court can find, as it must, that the
21 proposed settlement is in the best interest of the estate.

22 The purpose of -- I mean that is the purpose of the
23 giving notice so that everybody has a chance to be heard. The
24 questions that the Court asked, the questions that every
25 bankruptcy court asks in a 9019 is can the debtor do this deal,

1 should the debtor do this deal, is it in the best interest of
2 the estate to do this deal.

3 And, you know, the idea that a 9019 order is somehow
4 res judicata only to the parties to a settlement is just
5 something that doesn't make any sense to me because it
6 abrogates so many rules that exist that allows and encourages
7 and requires parties who have objections to be heard.

8 Mr. Sbaiti's clients filed an objection. They
9 initiated a contested matter. They obtained rights. They were
10 litigants. They are litigants in a contested matter where
11 they're required to tell the Court what objections they have to
12 the settlement, and they did that.

13 Mr. Sbaiti, you know, told me that I wasn't allowed
14 to characterize the words that are used in the documents that
15 have now been admitted by the Court. And, yet, I heard him say
16 that maybe Mr. Kane (phonetic) really meant to tell Your Honor
17 that he was withdrawing the claim because he was going to save
18 it for another day.

19 I'd just ask the Court to look at the transcript. I
20 don't have to interpret it at all. And I'd ask the Court to
21 read the words. I can put them back up on the screen, but
22 they're pretty short. It's at Pages 7 and 8 of the transcript
23 of what Mr. Kane told you and what you said in response. It's
24 on the page, not my interpretation, and what the import of that
25 was.

1 Mr. Sbaiti believes, I guess, if one is allowed to
2 engage in such conduct without consequence, that one is allowed
3 to allow to file objections, cause the Court and the litigants
4 to participate, to give discovery, to write briefs, to do
5 analyses, withdraw it on the basis of their own good faith
6 analysis of Guernsey law of the documents and somehow say it's
7 irrelevant. Not what the law is, not what res judicata is
8 intended to do.

9 He should have put all of his cards on the table. In
10 fact, I think that Mr. Kane believed he was putting all of his
11 cards on the table because that's what he did. He filed a very
12 comprehensive objection. He asserted a right to the
13 opportunity that the debtor was proposing to take in the 9019
14 motion. That's what he was doing. He was objecting on the
15 basis that he claimed his client had a superior right to this
16 asset.

17 And he didn't -- like I said earlier, Your Honor, I
18 don't think he would be permitted, I don't think these claims
19 would fly today if no objection was filed. But the fact that
20 there was renders, I think, indisputable that there was a
21 finding on the merits, right. And the only reason that the
22 Court didn't rule on Mr. Kane's motion, the only reason the
23 Court didn't rule on it is because Mr. Kane withdrew it.

24 Is that really the way this process is supposed to
25 work, that one can tell the Court that after a review of the

1 documents, I'm going to withdraw the objection and then file a
2 claim for damages three months later with a different client,
3 with a different control person, with a different lawyer?

4 That's okay under doctrine of res judicata? I don't think so.

5 They had a full and fair opportunity. The fact that
6 this was somehow -- you know, they're denigrating the fact that
7 this was a 9019 motion. There's not supposed to be a mini-
8 trial. Your Honor had discretion as to what to do. Every
9 court in every bench trial has discretion as to what to do and
10 whether or not to overrule objections and whether or not to
11 sustain [sic] objections. That's what judges to.

12 And there's nothing offensive about the fact that it
13 happened in the context of a 9019 motion. They don't get to
14 sit on their hands and wait to fight another day. If they
15 believed that the debtor was exposing itself to liability, and
16 that's what they actually say in the opposition, that's what I
17 actually think they say in the complaint, accept it as true,
18 they believe that the debtor created liability for itself by
19 rendering -- by entering into this transaction.

20 Shouldn't they have raised their hand and said you
21 can't do this deal, right? And the only response to that --
22 they have to that is they had no idea about value. Paragraph
23 127, Your Honor, Mr. Dondero, the architect of this complaint,
24 as was proven on June 8th, knew very well about value. And it
25 doesn't matter that it was only MGM. Your Honor commented on

1 that at the June 8th hearing in a different context. But
2 everybody knows, right, it is. He sits on the board of MGM.

3 And I'm sorry if I called him a tippee instead of a
4 tipper. But if this complaint goes forward, we'll dig into
5 that real deep. But there's no reason it ought to, Your Honor.
6 This case ought to be dismissed on res judicata grounds. It
7 should be dismissed on judicial estoppel grounds. And it
8 should be dismissed for all the reasons that I said in my
9 argument in my brief.

10 But I do just want to close with one point, and that
11 is to read from a case called Goldstein, which I think I
12 alluded to earlier on this issue of whether there's a fiduciary
13 duty that's owed by an advisor to an investor and a fund:

14 "At best, it is counterintuitive to characterize the
15 investors in a hedge fund as the clients of the
16 advisors. The advisor owes fiduciary duties only to
17 the fund, not to the fund's investors."

18 There's a lot of discussion about fiduciary duties,
19 Your Honor. But to the extent that they have any basis to
20 defeat the motion to dismiss on res judicata or collateral
21 estoppel grounds, we hope and we trust and we know the Court
22 will review the case law vigorously to test some of the
23 assertions to that.

24 I have nothing further, Your Honor.

25 THE COURT: All right. Well, thank you to all of

1 you.

2 As a reminder, I don't think you need it, but as a
3 reminder, I am essentially acting as a magistrate for Judge
4 Boyle in this action. And whichever way I go on whichever
5 theories, I think she would expect a thorough write-up. It
6 would, of course, be in the form of a report and recommendation
7 for her to either adopt or not if I dispose of some or all of
8 the counts in the lawsuit.

9 Even to the extent I deny dismissal, even though the
10 rule typically does not require a court to make detailed
11 findings and conclusions in connection with a denial of a
12 motion to dismiss, again, since I'm sitting as a magistrate, I
13 think Judge Boyle would expect some thorough explanations and
14 reasoning from me.

15 So that's my way of saying I'm taking this under
16 advisement. I am going to drill down on some of the cases that
17 have been argued. I think some important issues are raised
18 here that need some thorough reasoning.

19 So I will do the best to get this out without too
20 much delay. I think there's probably zero chance, zero chance
21 I'm going to get it done by the end of the year. We're just
22 too behind with some of our under-advisements. But I will try
23 earnestly to get it out fairly soon after the first of the
24 year. All right?

25 Thank you. You all have a good holiday.

1 THE CLERK: All rise.

2 (Proceedings concluded at 12:37 p.m.)

3 * * * * *

4

5 C E R T I F I C A T I O N

6 We, DIPTI PATEL, KAREN WATSON, CRYSTAL THOMAS, AND
7 PATTIE MITCHELL, court approved transcribers, certify that the
8 foregoing is a correct transcript from the official electronic
9 sound recording of the proceedings in the above-entitled
10 matter, and to the best of my ability.

11

12 /s/ Dipti Patel

13 DIPTI PATEL, CET-997

14

15 /s/ Karen Watson

16 KAREN WATSON, CET-1039

17

18 /s/ Crystal Thomas

19 CRYSTAL THOMAS, CET-

20

21 /s/ Pattie Mitchell

22 PATTIE MITCHELL

23 LIBERTY TRANSCRIPTS

DATE: November 23, 2021

24

**UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF
TEXAS, DALLAS DIVISION**

In Re: Highland Capital Management, L.P § Case No. **19-34054-SGJ11**

Charitable DAF Fund, L.P et al

Appellant

§

vs.

§

21-03067

Highland Capital Management, L.P

§

Appellee

§

3:23-CV-01503-B

[167] Order granting Defendant Highland Capital Management, L.P.'s Renewed motion to dismiss adversary proceeding (related document # [122](#)) Entered on 6/25/2023.

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APPELLANT RECORD

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**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

In re:	§ Chapter 11
	§
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§ Case No. 19-34054-sgj11
	§
Debtor.	§
	§
CHARITABLE DAF FUND, L.P. AND CLO	§
HOLDCO, LTD., DIRECTLY AND DERIVATIVELY	§
	§
Plaintiffs,	§ Adversary Proceeding No.
	§
vs.	§ 21-03067-sgj11
	§
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§
HIGHLAND HCF ADVISOR, LTD., AND	§
HIGHLAND CLO FUNDING LTD., NOMINALLY	§
	§
Defendant.	§
	§

INDEX

**APPELLANTS' SECOND AMENDED STATEMENT OF ISSUES
AND DESIGNATION OF RECORD ON APPEAL**

Pursuant to Rules 8009(a)(1)(A)-(B) and (a)(4) of the Federal Rules of Bankruptcy Procedure, The Charitable DAF Fund, L.P. and CLO Holdco, Ltd. ("Appellants") hereby designate the following items to be included in the record and identify the following issues with respect to

their appeal of the Order Granting Defendant Highland Capital Management, L.P.'s "Renewed Motion to Dismiss Complaint" [Adv. Proc. Doc. No. 122] which was entered by the United States Bankruptcy Court for the Northern District of Texas on June 25, 2023.

I. STATEMENT OF ISSUES TO BE PRESENTED ON APPEAL

- Whether the Bankruptcy Court had jurisdiction to rule on Highland Capital Management L.P.'s Renewed Motion to Dismiss Complaint
- Whether the Renewed Motion to Dismiss Complaint was improperly granted

II. DESIGNATION OF ITEMS TO BE INCLUDED IN THE RECORD

Vol. 1
000001

1. Notice of Appeal for Bankruptcy Case Adversary Proceeding No. 21-03067-sgj11 [Doc. 168].

000042

2. The judgment, order, or decree appealed from: Memorandum Opinion and Order Granting Defendant Highland Capital Management, L.P.'s "Renewed Motion to Dismiss Complaint" [Adv. Proc. Doc. No. 122] [Doc. 167].

000080

3. Docket Sheet kept by the Bankruptcy Clerk.

4. Documents listed below and as described in the Docket Sheet for Bankruptcy Case Proceeding No. 21-03067-sgj.

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No.	Date Filed	Docket No.	Description/Document Text
1	9/29/21	1	(36 pgs; 3 docs) Adversary case 21-03067. ORDER REFERRING CASE NUMBER 21-CV-0842-B from U.S District Court for the Northern District of Texas, Dallas Division to U.S. Bankruptcy Court for Northern District of Texas, Dallas Division. Complaint by Charitable DAF Fund, LP, CLO Holdco, Ltd. against Highland Capital Management, LP, Highland HCF Advisor Ltd., Highland CLO Funding, Ltd. Fee Amount \$350 (Attachments: # 1 Original Complaint # 2 Docket Sheet from 3:20-cv-0842-B) Nature(s) of suit: 02 (Other (e.g. other actions that would have been brought in state court if unrelated to bankruptcy)). (Okafor, M.)
2	9/29/21	2	(1 pg) Supplemental Document (cover sheet) by CLO Holdco Ltd., Charitable DAF Fund (RE: related document(s)1 Adversary case 21-03067) [ORIGINALLY FILED IN 21-CV-0842 AS #2 ON 04/13/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)

Vol. 2 000139 000232 000239 000270 Thru Vol. 6	3	9/29/21	6	(93 pgs; 6 docs) MOTION for Leave to File First Amended Complaint filed by CLO Holdco Ltd., Charitable DAF Fund LP (Attachments: # 1 Exh 1_First Amended Complaint # 2 Exh 2_Motion for Authorization to Retain James Seery # 3 Exh 3_Order Approving Retention of James Seery # 4 Exh 4_Order Approving Settlement # 5 Proposed Order) (Bridges, Jonathan) (Entered: 04/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #6 ON 04/19/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
	4	9/29/21	22	(7 pgs; 2 docs) MOTION for an Order to Enforce the Order of Reference filed by Highland Capital Management LP. (Attachments: # 1 Exhibit(s) A--Proposed Order) (Annable, Zachery) Modified text on 5/20/2021 (mjr). (Entered: 05/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #22 ON 05/19/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
	5	9/29/21	23	(31 pgs) Brief/Memorandum in Support filed by Highland Capital Management LP re: 22 MOTION for an Order to Enforce the Order of Reference. (Annable, Zachery) Modified text on 5/20/2021 (mjr).(Entered: 05/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #23 ON 05/19/2021 IN U.S.DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
	6	9/29/21	24	(926 pgs; 29 docs) Appendix in Support filed by Highland Capital Management LP re: 23 Brief/Memorandum in Support. (Attachments: # 1 Appendix 1 # 2 Appendix 2 # 3 Appendix 3 # 4 Appendix 4 # 5 Appendix 5 # 6 Appendix 6 # 7 Appendix 7 # 8 Appendix 8 # 9 Appendix 9 # 10 Appendix10 # 11 Appendix 11 # 12 Appendix 12 # 13 Appendix 13 # 14 Appendix 14 # 15 Appendix 15 # 16 Appendix 16 # 17 Appendix 17 # 18 Appendix 18 # 19 Appendix 19 # 20 Appendix 20 # 21 Appendix 21# 22 Appendix 22 # 23 Appendix 23 # 24 Appendix 24 # 25 Appendix 25 # 26 Appendix 26 # 27 Appendix 27 # 28 Appendix 28) (Annable, Zachery) Modified linkage and text on 5/20/2021 (mjr). (Entered:05/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #24 ON 05/19/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
Vol. 7 001196	7	9/29/21	26	(7 pgs; 2 docs) MOTION to Dismiss Complaint filed by Highland Capital Management LP (Attachments: # 1 Exhibit(s) A--Proposed Order) (Annable, Zachery) Modified text on 5/28/2021 (jmg).(Entered: 05/27/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #26 ON 05/27/2021 IN U.S.DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)

Vol. 7 001203 thru Vol. 8	8	9/29/21	28	(508 pgs; 14 docs) Appendix in Support filed by Highland Capital Management LP (Attachments: # 1 Appendix 1 # 2 Appendix 2 # 3 Appendix 3 # 4 Appendix 4 # 5 Appendix 5 # 6 Appendix 6 # 7 Appendix 7 # 8 Appendix 8 # 9 Appendix 9 # 10 Appendix 10 # 11 Appendix 11 # 12 Appendix 12 # 13 Appendix 13) (Annable, Zachery) (Entered: 05/27/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #28 ON 05/27/2021 IN U.S. DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
Vol. 9 001711	9	9/29/21	33	(1 pg) Amended Civil Cover Sheet by CLO Holdco Ltd, Charitable DAF Fund LP. Amendment to 2 Supplemental Document. (Sbaiti, Mazin) Modified text on 6/23/2021 (mjr). (Entered: 06/22/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #33 ON 06/22/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001712	10	9/29/21	36	(26 pgs) RESPONSE filed by CLO Holdco Ltd, Charitable DAF Fund LP re: 22 MOTION for an Order to Enforce the Order of Reference (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #36 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001738	11	9/29/21	37	(22 pgs) Appendix in Support filed by CLO Holdco Ltd, Charitable DAF Fund LP re 36 Response/Objection Response to Motion for an Order to Enforce the Order of Reference (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #37 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001760	12	9/29/21	38	(45 pgs) RESPONSE filed by CLO Holdco Ltd, Charitable DAF Fund LP re: 26 MOTION to Dismiss (Defendant Highland Capital Management, L.P.'s Motion to Dismiss Complaint) (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #38 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001805	13	9/29/21	39	(88 pgs) Appendix in Support filed by CLO Holdco Ltd, Charitable DAF Fund LP re 38 Response/Objection to Defendant Highland Capital Management, L.P.'s Motion to Dismiss Complaint (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #39 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001893	14	9/29/21	42	(12 pgs) REPLY filed by Highland Capital Management LP re: 22 MOTION for an Order to Enforce the Order of Reference (Annable, Zachery) (Entered: 07/13/2021) [ORIGINALLY FILED IN 21-CV-0842AS #42 ON 07/13/2021 IN U.S.

			DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
VOL. 9	15	9/29/21	43 (852 pgs) Appendix in Support filed by Highland Capital Management LP re: 42 Reply. (Annable, Zachery) Modified text on 7/14/2021 (mjr). (Entered: 07/13/2021) [ORIGINALLY FILED IN 21-CV-0842AS #43 ON 07/13/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001905 thru Vol. 13	16	9/29/21	45 (21 pgs) REPLY filed by Highland Capital Management LP re: 26 MOTION to Dismiss (Defendant Highland Capital Management, L.P.'s Motion to Dismiss Complaint) (Annable, Zachery) (Entered: 07/13/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #44 ON 07/13/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002757	17	9/29/21	57 (7 pgs; 2 docs) MOTION to Dismiss and Joinder in Motion to Dismiss of Highland Capital Management, L.P. filed by Highland CLO Funding Ltd. (Attachments: # 1 Proposed Order) Attorney Paul R Bessette added to party Highland CLO Funding Ltd (pty:dft) (Bessette, Paul) (Entered: 08/30/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #57 ON 08/30/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002778	18	9/29/23	58 (12 pgs) Brief/Memorandum in Support filed by Highland CLO Funding Ltd. re 57 MOTION to Dismiss and Joinder in Motion to Dismiss of Highland Capital Management, L.P. (Bessette, Paul) (Entered: 08/30/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #58 ON 08/30/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002785	19	9/29/23	59 (80 pgs; 5 docs) Appendix in Support filed by Highland CLO Funding Ltd re 58 Brief/Memorandum in Support of Motion (Attachments: # 1 Exhibit(s) A - Jackson v Dear # 2 Exhibit(s) B - Prudential Assurance v. Newman # 3 Exhibit(s) C - Harbourvest Settlement Agreement # 4 Exhibit(s) D - Boleat Declaration) (Bessette, Paul) (Entered: 08/30/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #59 ON 08/30/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002797	20	9/29/21	64 (1 pg) ORDER OF REFERENCE: Pursuant to 28 U.S.C. § 157 and this District's Miscellaneous Order No. 33, this case is hereby REFERRED to Judge Stacey G. C. Jernigan of the United States Bankruptcy Court for the Northern District of Texas, Dallas Division, to be adjudicated as a matter related to the consolidated Chapter 11 Bankruptcy of Highland Capital Management, L.P., Chapter 11 Case No.19-34054. (Ordered by Judge Jane J. Boyle
002877			

Vol. 14 002878 002883 thru Vol. 16				on 9/20/2021) (svc) (Entered: 09/20/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #64 ON 09/20/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
	21	10/19/21	66	(5 pgs) Notice of hearing filed by Defendant Highland Capital Management, LP (RE: related document(s) 26 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP, 47 Motion to strike document filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 55 Motion to abate filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) Hearing to be held on 11/23/2021 at 09:30 AM at https://us-courts.webex.com/meet/jerniga for 26 and for 47 and for 55, (Annable, Zachery)
	22	11/22/21	71	(509 pgs; 2 docs) Witness and Exhibit List <i>for Hearing on November 23, 2021</i> filed by Defendant Highland Capital Management, LP (RE: related document(s) 26 Motion to dismiss adversary proceeding). (Attachments: # 1 Exhibits 1-13) (Hayward, Melissa)
Vol. 17 003392 003394 003583 003585 003611	23	11/22/21	72	(2 pgs) Witness List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 26 Motion to dismiss adversary proceeding, 47 Motion to strike (related document(s): 43 Document), 55 Motion to abate (related document(s) 1 Complaint), 69 Motion to abate <i>Plaintiffs' Amended Motion to Stay All Proceedings</i> (related document(s) 55 Motion to abate (related document(s) 1 Complaint))). (Sbaiti, Mazin)
	24	11/22/21	73	(189 pgs; 4 docs) Exhibit List <i>for November 23, 2021 hearing</i> filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 47 Motion to strike (related document(s): 43 Document), 55 Motion to abate (related document(s) 1 Complaint)). (Attachments: # 1 Exhibit 1_Defendant's Memorandum of Law in Support of Motion for Reconsideration # 2 Exhibit 2_Highland Memorandum in Support of Motion to Dismiss # 3 Exhibit 3_Order (I) Confirming Fifth Amended Plan of Reorganization of Highland) (Sbaiti, Mazin)
	25	12/7/21	80	(2 pgs) Order granting Highland CLO Funding, Ltd.'s motion to dismiss adversary as a party with prejudice (related document 57) Entered on 12/7/2021. (Okafor, Marcey) Modified text on 3/11/2022 (Okafor, Marcey).
	26	3/11/22	99	(26 pgs) Memorandum of Opinion and order granting motion to dismiss the adversary proceeding (RE: related document(s) 26 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP). Entered on 3/11/2022 (Okafor, Marcey)
	27	3/11/22	100	(26 pgs) Order granting motion to dismiss adversary proceeding with prejudice (related document #26) Entered on 3/11/2022. (Okafor, Marcey)

Vol. 18 003637	28	3/21/22	104	(29 pgs) Notice of appeal. Fee Amount \$298 filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 100 Order on motion to dismiss adversary proceeding). Appellant Designation due by 04/4/2022. (Sbaiti, Mazin)
003666	29	5/26/22	120	(177 pgs; 2 docs) Support/supplemental document <i>Motion to Supplement Appellate Record</i> filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 111 Appellant designation). (Attachments: # 1 Amended Transcript of January 14, 2021 Hearing) (Sbaiti, Mazin)
003843	30	6/9/22	121	(1 pg) DISTRICT COURT Order: Case 3:22-00695-B is hereby transferred to the docket of the Honorable Judge Jane J. Boyle for consolidation with The Charitable DAF Fund LP, et al. v. Highland Capital Management LP, Case No. 3:21-cv-3129-N. Judge Karen Gren Scholer no longer assigned to case.(RE: related document(s) 86 Notice of appeal filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 104 Notice of appeal filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Entered on 6/9/2022 (Whitaker, Sheniqua) (Entered: 06/10/2022)
003844	31	10/24/22	122	(7 pgs) Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP (Annable, Zachery)
003851	32	10/14/22	123	(31 pgs) Brief in support filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Annable, Zachery)
Vol. 19 003882 Thru Vol 20	33	10/14/22	124	(513 pgs; 15 docs) Support/supplemental document (<i>Appendix in Support of Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7 # 8 Exhibit 8 # 9 Exhibit 9 # 10 Exhibit 10 # 11 Exhibit 11 # 12 Exhibit 12 # 13 Exhibit 13 # 14 Exhibit 14) (Annable, Zachery)
Vol. 21 004395	34	10/27/22	126	(5 pgs) Notice of hearing (<i>Notice of Hearing and Briefing Schedule on Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP). Hearing to be held on 12/8/2022 at 09:30 AM at https://us-courts.webex.com/meet/jerniga for 122. (Annable, Zachery)

Vol. 21 004400 004410 004442 Thru Vol. 22	35	11/18/22	128	(10 pgs) Motion for withdrawal of reference. Fee amount \$188, filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (Sbaiti, Mazin)
	36	11/18/22	129	(32 pgs) Response opposed to (related document(s): 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP) filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Sbaiti, Mazin)
	37	11/18/22	130	(254 pgs; 2 docs) Response opposed to (related document(s): 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP) filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Attachments: # 1 Appendix) (Sbaiti, Mazin)
Vol. 22 004696 004717 004732 004737 004742	38	9/2/22	131	(21 pgs) DISTRICT COURT MEMORANDUM OPINION AND ORDER: The Court REVERSES and REMANDS the bankruptcy court's Motion to Dismiss Order and AFFIRMS the bankruptcy courts Motion to Stay Order. re: appeal on Civil Action number: Case 3:22-00695-B consolidated with 3:21-CV-3129-B, (RE: related document(s) 81 Order on motion to abate, 100 Order on motion to dismiss adversary proceeding). Entered on 9/2/2022 (Whitaker, Sheniqua) (Entered: 11/29/2022)
	39	12/2/22	133	(15 pgs) Reply to (related document(s): 129 Response filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 130 Response filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) filed by Defendant Highland Capital Management, LP. (Annable, Zachery)
	40	12/7/22	135	(5 pgs) Notice of hearing filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP). Hearing to be held on 1/25/2023 at 01:30 PM at https://us-courts.webex.com/meet/jerniga for 122, (Annable, Zachery)
	41	12/7/22	136	(5 pgs) Notice of hearing filed by Defendant Highland Capital Management, LP (RE: related document(s) 128 Motion for withdrawal of reference filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Status Conference to be held on 1/25/2023 at 01:30 PM at https://us-courts.webex.com/meet/jerniga . (Annable, Zachery).
	42	12/9/22	138	(3 pgs) Response opposed to (related document(s): 128 Motion for withdrawal of reference. Fee amount \$188, filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) filed by Defendant Highland Capital Management, LP. (Annable, Zachery)

Vol. 22 004745	43	12/9/22	139	(25 pgs) Brief in support filed by Defendant Highland Capital Management, LP (RE: related document(s) 138 Response). (Annable, Zachery)
Vol. 23 004770	44	12/9/22	140	(280 pgs; 8 docs) Support/supplemental document (<i>Appendix in Support of Highland Capital Management, L.P.'s Response to Renewed Motion to Withdraw the Reference</i>) filed by Defendant Highland Capital Management, LP (RE: related document(s) 138 Response). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7) (Annable, Zachery)
Vol. 24 005050	45	12/16/22	144	(6 pgs) Reply to (related document(s): 138 Response filed by Defendant Highland Capital Management, LP) filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Sbaiti, Mazin)
005056 Thru Vol. 25.	46	1/23/23	145	(514 pgs; 15 docs) Witness and Exhibit List filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7 # 8 Exhibit 8 # 9 Exhibit 9 # 10 Exhibit 10 # 11 Exhibit 11 # 12 Exhibit 12 # 13 Exhibit 13 # 14 Exhibit 14) (Annable, Zachery)
Vol. 26 005570	47	1/23/23	146	(280 pgs; 8 docs) Witness and Exhibit List filed by Defendant Highland Capital Management, LP (RE: related document(s) 128 Motion for withdrawal of reference. Fee amount \$188.). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7) (Annable, Zachery)
Vol. 27 005850	48	1/23/23	147	(221 pgs; 7 docs) Witness and Exhibit List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Attachments: # 1 Exhibit 1_Excerpts from July 14, 2020 Hearing Transcript # 2 Exhibit 2_HCLOF Members Agreement Relating to the Company # 3 Exhibit 3_HarbourVest Settlement Agreement # 4 Exhibit 4_Order Approving Debtor's Settlement with HarbourVest # 5 Exhibit 5_HCLOF Offering # 6 Exhibit 6 Amended and Restated Investment Advisory Agreement) (Sbaiti, Mazin)
006071	49	1/23/23	148	(3 pgs) Witness and Exhibit List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 128 Motion for withdrawal of reference. Fee amount \$188.). (Phillips, Louis)
Vol. 28 006074	50	1/25/23	150	(56 pgs; 2 docs) Amended Witness and Exhibit List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 147 List (witness/exhibit/generic), 149 List (witness/exhibit/generic)). (Attachments: # 1 Exh 7_Testimony of Mark Patrick at June 8, 2021 hearing) (Sbaiti, Mazin)

Vol. 28 006130	51	1/25/23	152	(3 pgs) Notice of Appearance and Request for Notice by Louis M. Phillips filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Phillips, Louis)
	52	1/25/23	154	(1 pg) Court admitted exhibits date of hearing January 25, 2023 (RE: related document(s) 128 Motion for withdrawal of reference, filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) (COURT ADMITTED DEFENDANT'S EXHIBITS #1, #2, #3, #4, #5 & #6 OFFERED BY ATTY GREG DEMO). (Edmond, Michael) (Entered: 01/27/2023)
Vol. 32 006925 006942 006960	53	2/6/23	158	Report and recommendation to the U.S. District Court by U.S. Bankruptcy Judge. (RE: related document(s) 128 Motion for withdrawal of reference filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Entered on 2/6/2023 (Okafor, Marcey)
	54	2/6/23	161	(18 pgs) DISTRICT COURT Notice of transmission of report and recommendation in re: renewed motion to withdraw reference. Civil Case # 3:22-cv-02802-S. (RE: related document(s) 158 Report and recommendation to the U.S. District Court by U.S. Bankruptcy Judge. (RE: related document(s) 128 Motion for withdrawal of reference filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Entered on 2/6/2023) (Whitaker, Sheniqua)
	55	4/3/23	165	(1 pg) DISTRICT COURT ORDER: The Court GRANTS the 11 Joint Motion to Transfer Proceeding and Consolidate Before Original Court and the above-numbered case (3:22-cv-02802-S) is transferred to the docket of the Honorable Judge Jane Boyle: Civil case 3:21-cv-00842-B (order referring case). (RE: related document(s) 1 Complaint filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 143 Notice of transmission of motion to withdraw reference). Entered on 4/3/2023 (Whitaker, Sheniqua) Modified on 4/10/2023 (Whitaker, Sheniqua). (Entered: 04/10/2023)

TRANSCRIPTS

006961	56	11/24/21	78	(104 pgs) Transcript regarding Hearing Held 11-23-2021 RE: Motion Hearing. THIS TRANSCRIPT WILL BE MADE ELECTRONICALLY AVAILABLE TO THE GENERAL PUBLIC 90 DAYS AFTER THE DATE OF FILING. TRANSCRIPT RELEASE DATE IS 02/22/2022. Until that time the transcript may be viewed at the Clerk's Office or a copy may be obtained from the official court transcriber. Court Reporter/Transcriber Liberty Transcripts/Dipti Patel, Telephone number 847-848-4907. (RE: related document(s) 75 Hearing held on 11/23/2021. (RE: related document(s) 55 MOTION to Stay filed by CLO Holdco Ltd, Charitable DAF Fund LP (Sbaiti, Mazin) (Entered: 08/26/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #55 ON 08/26/2021 IN U.S.
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			<p>DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)) (Appearances: J. Pomerantz and J. Morris for Highland Defendants; J. Jordan and P. Bessett for HCLOF; M. Sbaiti for Plaintiffs. Nonevidentiary hearing. Motion denied. Mr. Pomerantz to upload order.), 76 Hearing held on 11/23/2021. (RE: related document(s) 47 Motion to strike 43 Appendix in support filed by CLO Holdco, Ltd., Charitable DAF Fund, LP (Bridges, Jonathan) Modified text on 7/16/2021 (mjr). (Entered: 07/15/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #47 ON 07/15/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)) (Appearances: J. Pomerantz and J. Morris for Highland Defendants; J. Jordan and P. Bessett for HCLOF; M. Sbaiti for Plaintiffs. Nonevidentiary hearing. Motion denied (Plaintiffs acknowledged complained-of Appendices it did not relate to Motion to Dismiss). Mr. Pomerantz to upload order.)). Transcript to be made available to the public on 02/22/2022. (Patel, Dipti)</p>
57	2/21/23	164	<p>164 (112 pgs) Transcript regarding Hearing Held 1/25/23 RE: HEARING ON DEFENDANT HIGHLAND CAPITAL MANAGEMENT L.P.'S RENEWED MOTION TO DISMISS COMPLAINT (122) AND STATUS CONFERENCE RE: MOTION FOR WITHDRAWAL OF REFERENCE FILED BY PLAINTIFF CLO HOLDCO, LTD., PLAINTIFF CHARITABLE DAF FUND, LP (128). THIS TRANSCRIPT WILL BE MADE ELECTRONICALLY AVAILABLE TO THE GENERAL PUBLIC 90 DAYS AFTER THE DATE OF FILING. TRANSCRIPT RELEASE DATE IS 05/22/2023. Until that time the transcript may be viewed at the Clerk's Office or a copy may be obtained from the official court transcriber. Court Reporter/Transcriber Dipti Patel, Telephone number 847-848-4907. (RE: related document(s) 155 Hearing held on 1/25/2023. (RE: related document(s) 122 Motion to dismiss adversary proceeding, (Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint) filed by Defendant Highland Capital Management, LP filed by Defendant Highland Capital Management, LP) (Appearances: J. Morris and G. Demo for Movants; L. Phillips and M. Sbaiti for Plaintiffs. Evidentiary hearing (appendices). Court took matter under advisement.), 156 Hearing held on 1/25/2023. (RE: related document(s) 128 Motion for withdrawal of reference. Fee amount \$188, filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) (Appearances: J. Morris and G. Demo for Movants; L. Phillips and M. Sbaiti for Plaintiffs. Evidentiary hearing (appendices). Court announced it will recommend denial to District Court. Court is working on Report & Recommendation.)). Transcript to be made available to the public on 05/22/2023. (Patel, Dipti)</p>

Dated: July 14, 2023

Respectfully submitted,

SBAITI & COMPANY PLLC

/s/ Mazin A. Sbaiti

Mazin A. Sbaiti

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was filed electronically through the Court's ECF system, which provides notice to all parties of interest, on this 14th day of July, 2023.

/s/ Mazin A. Sbaiti

Mazin A. Sbaiti

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS (DALLAS)

IN RE: . Case No. 19-34054-11 (SGJ)
HIGHLAND CAPITAL .
MANAGEMENT, L.P., . Earle Cabell Federal Building
1100 Commerce Street
Dallas, Texas 75242
Debtor. .
. Adv. No. 21-03067-11 (SGJ)
CHARITABLE DAF FUND, .
LP, ET AL., .
Plaintiffs, .
v. .
HIGHLAND CAPITAL, .
MANAGEMENT, L.P., ET AL., .
Defendants. . Wednesday, January 25, 2023
. 1:38 p.m.

TRANSCRIPT OF HEARING ON DEFENDANT HIGHLAND CAPITAL MANAGEMENT
L.P.'S RENEWED MOTION TO DISMISS COMPLAINT (122) AND
STATUS CONFERENCE RE: MOTION FOR WITHDRAWAL OF REFERENCE FILED
BY PLAINTIFF CLO HOLDCO, LTD., PLAINTIFF CHARITABLE DAF FUND,
LP (128)

BEFORE THE HONORABLE STACEY G. JERNIGAN
UNITED STATES BANKRUPTCY COURT CHIEF JUDGE

APPEARANCES ON NEXT PAGE.

Audio Operator: Michael F. Edmond

Proceedings recorded by electronic sound recording, transcript
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ID EVD

Motion for withdrawal of reference filed by
Plaintiff CLO Holdco, Ltd., Plaintiff Charitable
DAF Fund, LP (128)

FOR THE PLAINTIFFS:
(None)

FOR THE DEFENDANTS:

1 through 6 31 31

Defendant Highland Capital Management, L.P.'s
Renewed Motion to Dismiss Complaint (122)
DAF Fund, LP (128)

FOR THE PLAINTIFFS:
(None)

FOR THE DEFENDANTS:

1 through 14 58 58

1 (Proceedings commenced at 1:38 p.m.)

2 THE COURT: All right. We have settings this
3 afternoon in Highland Adversary 21-3067. We have a renewed
4 motion to withdraw the reference set for status conference and
5 a renewed Rule 12(b)(6) motion to dismiss.

6 So let's get all of our appearances from the lawyers
7 before we get started. I'll start with our plaintiffs. Who do
8 we have appearing for Charitable DAF and CLO Holdco?

9 MR. SBAITI: Your Honor, this is Mazin Sbaiti on
10 behalf of the two plaintiffs.

11 THE COURT: Thank you.

12 Any other lawyer appearances for plaintiffs?

13 MR. PHILLIPS: Your Honor, Louis N. Phillips on -- I
14 have been asked and agreed to argue the motion to withdraw
15 reference. I did not file a special appearance. We've talked
16 with opposing counsel, and they were aware that I was involved.
17 I am not counsel of record in the lawsuit, but I've been asked
18 to argue this, the bulk of the motion to withdraw reference.

19 THE COURT: All right.

20 Appearing for defendants, who will appear today?

21 MR. MORRIS: Good afternoon, Your Honor. This is
22 John Morris from Pachulski Stang Ziehl & Jones. I'll be
23 arguing if Your Honor chooses to hear the renewed motion to
24 dismiss. I'm joined by my colleague Gregory Demo. Mr. Demo is
25 going to argue on behalf of defendants and our position the

1 motion to withdraw the reference.

2 I would note just procedurally while we have
3 absolutely no objection to Mr. Phillips participating today, he
4 really should be making an appearance on behalf of the entity
5 making the motion. I don't see how he can bind the plaintiffs
6 without serving as their counsel.

7 I've never heard that before. That wasn't my
8 understanding of what was happening. But, you know, given some
9 of the things that have happened in this case, I think it would
10 be prudent to make sure that the person who's advocating on
11 behalf of a party actually represents them.

12 THE COURT: Okay. We'll circle back to that. But
13 have I missed any lawyer appearances?

14 (No audible response)

15 THE COURT: All right. Others --

16 MR. MORRIS: Not for the defendants, Your Honor.

17 THE COURT: Just observers.

18 All right. Well, Mr. Phillips, let's be crystal
19 clear. I know that during the underlying bankruptcy case you
20 have, if not this adversary, you have appeared for the
21 Charitable DAF.

22 Exactly let's be clear, you know, you said your role,
23 you've been asked to argue the motion to withdraw th reference.
24 Are you retained by Charitable DAF and CLO Holdco in connection
25 with this adversary?

1 MR. PHILLIPS: Your Honor, I have and I will -- we
2 will file in today a notice of appearance. And I'm assuming
3 that will be satisfactory, and we will provide any limitations
4 on our representation. But we are authorized to represent the
5 plaintiff CLO Holdco and the plaintiffs in this matter with
6 respect to the motion to withdraw reference.

7 THE COURT: All right.

8 MR. PHILLIPS: And we will file a formal notice of
9 appearance to that effect.

10 THE COURT: Okay. So we will look for that to
11 happen.

12 All right. We're going to take up the motion to
13 withdraw the reference now. Just as a reminder, my courtroom
14 deputy was in communication with the lawyers and I think the
15 lawyers agreed to 15 minutes each as far as your arguments on
16 the motion to withdraw the reference.

17 Are we all on the same page on that?

18 MR. MORRIS: It's 25.

19 THE COURT: Twenty-five.

20 MR. MORRIS: Correct.

21 THE COURT: Okay. That as wishful thinking maybe on
22 my part.

23 Okay, 25 minutes each. And so I will hear from you,
24 Mr. Phillips.

25 MR. PHILLIPS: Okay. Thank you, Your Honor.

1 As an introductory matter, we discussed with Mr. Demo
2 and Mr. Morris. We have a peculiar situation here where we
3 have a motion to dismiss that calls into question the claims
4 arising under federal law. And that argument dovetails almost
5 completely with the argument about the consideration of federal
6 law.

7 And we have agreed that I will defer -- I will grant,
8 carve out some of the 25 minutes so that Mr. Sbaiti who is
9 going to be arguing the motion to dismiss can argue the
10 intricacies of the claim with respect to federal law.

11 THE COURT: Okay.

12 MR. PHILLIPS: Thank you, Your Honor.

13 Louis M. Phillips on behalf of the plaintiffs.

14 We're here on what's been deemed a re-urged motion
15 for withdrawal of reference. We have a response that the
16 withdrawal of reference on multiple grounds, pretty much all
17 the grounds they could oppose. And we'll start with what I
18 think would be kind of a clearing mechanism. We have arguments
19 on both sides about various and sundry approaches to whether or
20 not the reference should be withdrawn. And it seems to me like
21 some of those arguments may not necessarily be relevant.

22 And what I'm talking about is there's an argument,
23 both sides, about the nature of the jurisdiction core versus
24 non-core, whether or not this is an administrative expense
25 claim which is core, whether or not the Court has jurisdiction

1 pointing out that courts have jurisdiction to decide securities
2 law matters certainly, including 5.3(a)(19). We think the
3 following with respect to all of this.

4 Number one, the structure of -- this is a mandatory
5 withdrawal motion. The structure of 157(d) is that motions
6 that the court shall -- the district court shall withdraw upon
7 a timely motion a proceeding that requires for resolution
8 consideration of both Title 11 and other laws of the United
9 States for regulatory organization of activities affecting
10 interstate commerce.

11 So what we have here is a question of authority. as
12 I see it, and as we argue, the withdrawal of reference is
13 compelled upon a timely motion, not with respect to -- not
14 considering whether or not the proceeding is core because core
15 proceedings can be withdrawn, not considering whether or not
16 the proceeding is an administrative expense claim or proceeding
17 because administrative expense claim proceedings if they meet
18 the statutory definition of a proceeding subject to mandatory
19 withdrawal can be withdrawn. In fact, we've got a citation
20 later on in the argument where there's a proof of claim that is
21 subject to mandatory withdrawal.

22 We've seen this -- the point is the question of
23 whether -- there's no question about the Court having
24 jurisdiction. If this was a matter of subject matter
25 jurisdiction, then you couldn't waive subject matter

1 jurisdiction by failing to file a timely motion. And clearly,
2 the jurisdiction of the district court under 1334 is referred
3 to the bankruptcy court in the event there is no motion to
4 withdraw reference.

5 So our position here in argument and before the Court
6 is that the question is not whether the Court has jurisdiction,
7 what the nature of the proceeding is, is it an administrative
8 expense proceeding, is it an adversary proceeding. It's not
9 whether the Court is capable of deciding this type of issue
10 because clearly the statute provides that, number one, the
11 Court has authority to decide the proceeding if there's no
12 motion to withdraw reference and if it's not related to. And
13 if it is related to and there's consent, you have authority to
14 decide the proceeding.

15 So the question is whether or not the Court,
16 notwithstanding its authority, notwithstanding the fact that
17 the proceeding might be a core proceeding, has to recommend to
18 the district court or the district court has to withdraw the
19 reference under mandatory withdrawal Section 157(d). So --

20 THE COURT: Okay. Let me --

21 MR. PHILLIPS: -- I think what we can do --

22 THE COURT: Let me call time out and my law clerk
23 will stop the timer --

24 MR. PHILLIPS: Yes, ma'am.

25 THE COURT: -- when I interrupt with questions.

1 So we're on the same page, I think I hear you saying
2 you don't dispute that this is a core in nature proceeding,
3 that it's essentially a request for allowance of an
4 administrative expense claim and even if those involve federal
5 law or non-bankruptcy law, that's core.

6 What you're saying is sometimes even when you have a
7 core matter, whether it's a proof of claim or a request for
8 administrative expense claim, if it involves I guess a
9 significant enough amount of federal law, 157(d) requires it to
10 be yanked from the bankruptcy court?

11 MR. PHILLIPS: Well, it would be 157(d) would deal
12 with a certain type of federal law, consideration of federal
13 law or an organization and activity involving the regulation of
14 interstate commerce. So it's not federal law --

15 THE COURT: Okay. But I want to make sure I have an
16 answer from you because district courts like you to have
17 certain bells and whistles in your reports and recommendations
18 about is it core or non-core or stern.

19 You acknowledge this is a core matter?

20 MR. PHILLIPS: Your Honor, what I would rather do if
21 tied to the stake, I might approach this in a different manner.
22 And if you want to tie me to the stake, I might have to. But
23 what I would rather do is tell the Court that I don't think --
24 I hear the Court with respect to what the district court might
25 want as regards to whether it's core or non-core.

1 But what I would rather do at this point, I don't
2 have authority to admit or acknowledge. What I would rather
3 acknowledge is that I don't think it's relevant to the question
4 of whether a proceeding gets withdrawn under mandatory
5 abstention because --

6 THE COURT: Okay.

7 MR. PHILLIPS: -- the proceeding, the definition of a
8 proceeding that's subject to mandatory abstention has no
9 reference to core, non-core, or related to. It is just a
10 proceeding. And it clearly is subject to 1334 jurisdiction but
11 this is one provision of Section 157 that does not deal with
12 whether or not a proceeding is core, non-core, arising in,
13 arising under, related to.

14 It's just a proceeding with the assumption that you
15 have jurisdiction under 1334, an assumption that it got
16 referred to the bankruptcy court because of the order of
17 reference and 157 that authorizes reference of matters arising
18 in, arising under, or related to a bankruptcy case to the
19 bankruptcy court.

20 My position is that it's not relevant to whether or
21 not it is core, non-core --

22 THE COURT: Okay.

23 MR. PHILLIPS: -- related to because the statute
24 simply refers to the type of proceeding and its involvement
25 with a certain component of federal law.

1 THE COURT: Okay. We've started the timer again.

2 MR. PHILLIPS: So -- okay, thank you.

3 I've got my own little timer but, of course, my phone
4 goes off and then I have to find it and if the Court could just
5 tell me when I -- I'd like to reserve five minutes. If the
6 Court could tell me when I'm at ten minutes, I'd appreciate it.

7 THE COURT: Okay.

8 MR. PHILLIPS: So where I think we --

9 THE COURT: When you are at ten minutes left. Okay,
10 go ahead.

11 MR. PHILLIPS: Where I think we were, Your Honor, is
12 that we have a motion to withdraw reference that was originally
13 filed in the district court. I think there are two questions
14 here. I think the questions are not -- the questions are
15 whether or not this is a timely motion and, secondly, whether
16 or not the requirements of 157(b) are met with respect to the
17 nature of the proceeding and the involvement of federal law
18 regulating activities or organizations under -- involving
19 interstate commerce. That's what I think we're here to
20 discuss.

21 And so with respect to timeliness, we have a motion
22 filed in the district court. We have a motion to enforce the
23 reference under the local order of reference. And we have a
24 cross-motion that says to the district court don't do that
25 because it's not efficient. You ought to go ahead and just

1 keep it and, quote, withdraw the reference because this is a
2 157(d) type proceeding.

3 I think what happened and what we have in the
4 district court's order of reference is no resolution of the
5 motion to withdraw reference. It's simple an order enforcing
6 local order of reference that applies to all proceedings.

7 So I guess the way I look at this, the way I approach
8 -- I'm arguing to the Court that this should be approached is
9 that you can't withdraw reference of a proceeding unless the
10 order of reference is complied with. And I can see how the
11 district court would say I am not -- we are not going to abide
12 by litigants that file -- we are not going to grant relief
13 because it's efficient in the face of a proceeding
14 automatically referred to the bankruptcy court that should have
15 been filed in the bankruptcy court but was not.

16 And if you look at the order of reference, the order
17 of reference simply says that the matter is referred under the
18 local -- under the order of reference and is to be treated as a
19 proceeding related to the bankruptcy case below and given an
20 adversary proceeding number. There's no ruling on the question
21 of whether or not mandatory abstention applies because I think
22 what we're dealing with here, in fact, I know what we're
23 dealing with here.

24 We're dealing with a situation where the district
25 court considered any withdrawal of reference to be premature

1 because the order of reference in its mind needed to be
2 enforced so that the proceeding was in the bankruptcy court
3 prior to the ruling on, filing of, or consideration of a motion
4 to withdraw the reference.

5 THE COURT: Okay. Let me stop you again there.

6 MR. PHILLIPS: So our position is --

7 THE COURT: Let me stop you again there because --

8 MR. PHILLIPS: Yes, ma'am.

9 THE COURT: -- before I started preparing for today's
10 argument, I had wrongly had in my head that Judge Boyle, the
11 district judge just sua sponte did a one-paragraph order
12 sending this lawsuit to the bankruptcy court. But then as I
13 started preparing, I either was reminded --

14 MR. PHILLIPS: Yes, ma'am.

15 THE COURT: -- or realized for the first time that
16 the debtor, defendants, filed a motion to enforce the reference
17 arguing, please send this to the bankruptcy court. And your
18 clients opposed that and essentially made a cross-motion to
19 keep the case.

20 And so the district judge's short little order was
21 actually -- it wasn't sua sponte, it was after presumably
22 reading everybody's pleadings, right?

23 MR. PHILLIPS: Agreed. I don't think I argued that
24 it was a sua sponte order. I did not do that, no. It was --

25 THE COURT: Well, no. I point that out because I

1 think the argument was essentially no motion to withdraw the
2 reference even though this is called renewed was really fully
3 made and considered by the district court. Was that not what
4 you were arguing?

5 MR. PHILLIPS: I agreed that that's correct. I
6 agreed that that's my argument. And the reason that's my
7 argument is you don't have to rule and in fact the district
8 court -- I'm not going to say the district court was wrong
9 because if the district court made a decision that the order of
10 reference, that the plaintiff did not comply with the order of
11 reference, then trying to short-circuit the order of reference
12 by filing in the district court.

13 The court didn't have to, and this is not something
14 that had to be litigated to decide whether or not to refer in
15 accordance with the order of reference because technically I'm
16 not sure that the district court could have concluded that the
17 order of reference could be withdrawn before it was complied
18 with. So I don't -- I think what we're -- we're not talking
19 about a collateral estoppel or res judicata on the motion to
20 withdraw reference because it was not necessary even to address
21 the motion to withdraw reference before ordering enforcement of
22 the reference.

23 So I'm not saying it was sua sponte. I'm not saying
24 that the plaintiff who I represent in connection with this
25 argument didn't say keep it, but the plaintiffs' argument about

1 keeping it was you might as well keep it because of efficiency.
2 And the district court in our estimate made the determination
3 that we don't care about efficiency. We have an order of
4 reference that needs to be complied with as an initial
5 gatekeeper issue. If you don't comply with the order of
6 reference and file up here, we're going to make sure you start
7 at a right place by ordering the enforcement of the reference.

8 I don't think you have to -- I know you don't. The
9 district court didn't have to get to the issue of whether or
10 not the reference would be withdrawn on a mandatory withdrawal
11 under 157(d) to order compliance with the reference. In other
12 words, you can't refer what's not -- you can't withdraw what's
13 not heard. And I think that's what happened. We're arguing
14 that that is what the district court did.

15 THE COURT: Well, let me stop you again. We're going
16 to be here a long time today, I fear. Did you argue back at
17 that stage you can't send it to the bankruptcy court, Judge
18 Boyle, this involves material consideration of other federal
19 laws affecting interstate commerce, you can't do it. And she,
20 nevertheless, did it?

21 MR. PHILLIPS: No, I think the argument -- I mean I
22 didn't write the brief. I didn't -- I don't think there was an
23 argument, frankly. In the brief, as I read it, it was this
24 matter is subject to mandatory withdrawal. And it makes no
25 sense to order the reference just so we would then bring it and

1 try to bring it back.

2 So I don't think that -- even if -- and I'll tell you
3 that even if the plaintiff argued you can't do it, it's clear
4 to me that the -- it's clear that under the order of reference,
5 that the district court could absolutely have just said I'm not
6 listening to any of this. I'm ordering the reference and
7 that's what I'm doing.

8 But there was never in the order that was issued by
9 the district court a ruling on mandatory withdrawal. Why?
10 Because the district court's concern was that the reference had
11 not been complied with. And so I don't think we're talking
12 about something that had to be actually litigated to get to the
13 district court decision that the order of reference needs to be
14 complied with and this needs to be given an adversary number.
15 Why? That's what our automatic reference requires.

16 What we don't want at the district court is litigants
17 deciding we don't have to comply with the order of reference
18 because it's going to be withdrawn anyway. And I think, Judge,
19 if you look at what the district court did, it did not mention
20 any type of withdrawal ruling. It did not mention any analysis
21 of the nature of the proceeding. I'm not sure it even knew
22 what the proceeding was.

23 I think what it did was exactly what the defendant
24 asked it to do was enforce the reference, which it could do and
25 did do without consideration of the premature request in its

1 mind that the reference be withdrawn as a mandatory withdrawal
2 under 157(d).

3 THE COURT: Okay.

4 MR. PHILLIPS: That's our position.

5 THE COURT: All right. Does that conclude your
6 argument?

7 MR. PHILLIPS: No, ma'am. We have to address
8 timeliness, and we have to address --

9 THE COURT: Okay.

10 MR. PHILLIPS: So the timeliness issue is that this
11 Court, the reference was not enforced. The proceeding came to
12 this Court, and the defendants raised dismissal and basically
13 raised dismissal on the basis that everything raised in the
14 complaint was actually litigated or determined either through
15 the doctrine of res judicata or collateral estoppel and/or was
16 precluded by judicial estoppel.

17 None of -- those issues were not issues of the type
18 of federal law that is applicable to 157(d). Those issues are
19 preclusion issues: res judicata, collateral estoppel. This
20 Court ruled 100 percent on collateral estoppel and res judicata
21 and judicial estoppel and dismissed the complaint with
22 prejudice.

23 In the November hearing, this Court advised the
24 parties that it was in essence sitting as the magistrate and
25 would be writing up a recommendation.

1 "I'm essentially acting as a magistrate for Judge
2 Boyle in this action and whichever way I go and
3 whichever theories I think she would expect a
4 thorough write-up. It would of course be in the form
5 of a report and recommendation. for her to either
6 adopt or, if not" --

7 THE COURT: Can I stop you?

8 MR. PHILLIPS: Yes.

9 THE COURT: Did I later correct myself at some point
10 and go, oh wait, she referred this to me? I thought at one
11 point I misspoke and then later in open court corrected myself?
12 Did I -- am I wrong?

13 MR. PHILLIPS: Your Honor, I will look again.

14 THE COURT: Okay.

15 MR. PHILLIPS: We'll look again.

16 THE COURT: Okay. I --

17 MR. PHILLIPS: But --

18 THE COURT: Go ahead.

19 MR. PHILLIPS: But I will say this. I will say this,
20 we are faced with and we have to argue about and we're dealing
21 with a final order. The Court issued a final order, and the
22 plaintiff appealed.

23 So there's no question that the Court, whether or not
24 it advised the parties, it made the decision to issue a final
25 order. And that order was appealed. So there's no question,

1 we're not challenging the fact that the Court issued a final
2 order. The Court did. And the final order went to the Court
3 of Appeals, and it took time at the Court of Appeals to issue a
4 ruling.

5 And the ruling was that collateral estoppel/res
6 judicata did not apply because of the actual litigation
7 requirement given the difference in burdens of proof and
8 standards of proof; and, secondly, that there was one of the
9 components of judicial estoppel that was not resolved by the
10 Court with respect to the request to dismiss Counts 2 and 5
11 through judicial estoppel.

12 So the matter was sent back to Your Honor. And a
13 motion to dismiss was filed that focuses, re-urges judicial
14 estoppel on Counts 2 and 5 and focuses on the substantive
15 nature of the complaint and kind of a pure failure to state a
16 claim under Rule 12 which involves the substantive nature of
17 the claim.

18 And so what in the answer, in the response to the
19 motion to dismiss, there was a motion to re-urge or renew the
20 motion to withdraw reference. Now that the substantive
21 nature of the claim is put at issue by a motion to dismiss,
22 because there's no preclusion -- there is a preclusion argument
23 on Counts 2 and 5, there's no preclusion argument on res
24 judicata or collateral estoppel.

25 The motion to withdraw reference was re-urged, and we

1 don't think that was a surprise to anybody. In fact, in
2 November of '21, counsel for the defendants was suggesting that
3 a motion to withdraw reference was coming and it would be
4 sanctionable, et cetera, et cetera. We don't think it's
5 sanctionable, clearly, or it wouldn't have been brought.

6 But we now have the substantive issues in the
7 complaint being put to the test by a motion to dismiss. And at
8 this point, we think it's ripe for motion to withdraw
9 reference. And we also --

10 THE COURT: This is your ten-minute warning.

11 MR. PHILLIPS: -- would point out that --

12 THE COURT: This is your ten-minute warning --

13 MR. PHILLIPS: Okay, thank you.

14 THE COURT: -- you asked for.

15 MR. PHILLIPS: Yes, thank you very much, Judge.

16 We'd point out that there are -- you know, this court
17 and other courts take the position that -- some courts take the
18 position motions to withdraw reference are premature until and
19 unless there's a jury trial or a trial that the matters are
20 trial-ready. In fact, I think in the Curson (phonetic)
21 litigation, you have recommended withdrawal of reference but
22 not until it's trial-ready, although those were motions to
23 withdraw reference up at front.

24 But we'd point out In re Reed. We cited -- we'd
25 point out In re Reed, 2017 WL 1788295, which deals with a

1 prematurity finding by the court pending jury trial readiness.

2 And we also look at National Gypsum, 145 B.R.
3 539,542, which is a Judge Fish case. And in that case, you had
4 an objection to a proof of claim and a subject judgment on the
5 proof of claim. I don't really understand that, but the
6 respondent to the summary judgment waited until that was filed
7 to bring a motion to withdraw reference because the summary
8 judgment had raised the issue of antitrust law. And Judge Fish
9 said that this was -- notwithstanding this was late into the
10 case, that the motion to withdraw reference would have been
11 premature prior to that.

12 We understand -- we think this is a very closely
13 analogous case and that the question of the substantive nature
14 of the cause of action and the causes of action are now
15 squarely before the Court which generates a motion to withdraw
16 reference where when we're talking basically about preclusion,
17 that wasn't necessarily -- this is the better time to bring it
18 than that time was.

19 Finally, I would say there's an allegation of
20 prejudice. Everything's been briefed. The only question in
21 our mind is whether the Court issues a final order or proposed
22 findings and conclusions so no party is prejudiced. The Court
23 will either do one or the other based on the briefing that's
24 before the Court.

25 So I'll use the rest of my 20 minutes to defer to Mr.

1 Sbaiti about the applicability of federal law and the intricacy
2 of federal law and necessity of dealing with federal law.

3 THE COURT: Okay. Mr. Sbaiti?

4 MR. SBAITI: Good afternoon, Your Honor.

5 I've prepared some remarks for the actual motion to
6 dismiss, and so if it's okay, I'd like to just go through just
7 the legal portions and then I'll save the actual motion to
8 dismiss arguments for my time during the motion to dismiss. Is
9 that okay?

10 THE COURT: Okay.

11 MR. SBAITI: Your Honor, so the main federal statute
12 or the federal statute that we're dealing with here is the
13 Advisers Act, as Your Honor knows. When we first filed this
14 case, the core allegations or principal allegation was that
15 Highland breached the Advisers Act by -- well, several sections
16 of the Advisers Act by essentially cherry-picking a provision,
17 an opportunity to buy the HarbourVest, the HarbourVest interest
18 in HCLOF.

19 And it does so essentially by making a statement
20 about the value of the HarbourVest, the interest, and then
21 using its position as both a principal and as an adviser in the
22 HarbourVest business in order to accomplish that. Section 206
23 of the Advisers Act establishes fiduciary duties. The Supreme
24 Court in Transamerica Mortgage Advisers v. Lewis, 444 U.S.
25 11,17, held that Section 206 imposes federal fiduciary

1 standards to govern the conduct of investment advisers. And
2 the -- if you actually look at Mr. Seery's appointment hearing
3 in July of 2020, he admitted that the Investment Advisers Act
4 puts a fiduciary duty on Highland Capital to discharge its duty
5 to the investors.

6 And that language that he used I think is going to be
7 important later on when we talk about whether there is a direct
8 fiduciary duty owed by Highland to Holdco, for example, as an
9 investor in HCLOF.

10 I'd like to focus specifically, Your Honor, on
11 Section 206(4) of the Advisers Act which says it's unlawful to
12 directly or indirectly engage in any practice or act in the
13 course of business which is fraudulent, deceptive, or
14 manipulative. Some of the cases cited by the other side tend
15 to argue that, no, there's only a direct fiduciary duty to a
16 client. The language that they refer to or the cases they're
17 referring to are usually citing the language in Section 206(1)
18 or Section 206(2), indeed, do discuss the duties directly owed
19 to a client. Section 206(4) has no such limitation.

20 The next point about that issue, Your Honor, is
21 Section 206(4) also gave the SEC the power to explain the scope
22 of what 206(4) means. And they cast a rule, 206(4)-8, which
23 Your Honor can find at 17 CFR 275.206(4)-8. And it
24 specifically says that an investment adviser shall not make any
25 untrue statement of material fact or admit to state a material

1 fact necessary to make the statements made not misleading to
2 any investor or prospective investor in a pool investment fund,
3 which HCLOF is.

4 And it also prohibits them from otherwise engaging in
5 any act, practice, or course of business that is fraudulent,
6 deceptive, or manipulative with respect to any investor in such
7 a fund.

8 Our argument has been the premise of the complaint --
9 and this rule is cited in the breach of fiduciary duty claim in
10 the complaint. The premise of the complaint is that these
11 (indiscernible) fiduciary duties that Highland had to abide by,
12 and those fiduciary duties can be broken down into a couple
13 that are relevant for us here.

14 The first one is, is there's a fiduciary duty of care
15 which ports, for example, SEC v. Tambone which we cite in our
16 brief, 550 F.3d 106, says the Advisers Act imposes a fiduciary
17 duty to act at all times in the best interest of the fund and
18 its advisers. There's also a duty of care which we -- excuse
19 me, a duty of loyalty, and we cite several cases on that.

20 And one example is SEC v. Word Tree Financial, which
21 is a Fifth Circuit case, 43 F. 4th 448,460. And there, the
22 Fifth Circuit held that because cherry-picking involves
23 allocating more profitable trades to certain accounts, an
24 adviser is stealing from one customer to enrich himself when
25 they engage in cherry-picking.

1 And in that case, an advisor was cherry-picking
2 between one customer and sending the opportunity to another
3 customer. Here, it's worse. Here the --

4 THE COURT: Okay. I'm going to --

5 MR. SBAITI: -- adviser is sending the --

6 THE COURT: I'm going to interrupt again. You did --

7 MS. SBAITI: Yes, Your Honor.

8 THE COURT: -- foreshadow that your argument might
9 overlap a little with the motion to dismiss argument.

10 MS. SBAITI: Yes.

11 THE COURT: I really want to hear why 28 U.S.C.
12 157(d) is triggered here. And I'm going to give you a "for
13 example." This court --

14 MS. SBAITI: Okay.

15 THE COURT: -- other bankruptcy courts get proofs of
16 claim, claims made against the estate that involve other
17 federal law and certainly state law all the time.

18 The most readily -- the example that most readily
19 comes to mind is employee WARN Act claims, okay. We see them
20 sometimes in large Chapter 11s where employees were laid off,
21 didn't get the 60 days' notice that the WARN Act contemplated,
22 so under Fair Labor Standards Act, we think we're entitled to X
23 amount of claim.

24 No one ever asks for those to be sent to the district
25 court. Well, I mean maybe here have been before, but my point

1 is we try things in this Court involving other federal law
2 fairly often. What makes your situation different? What is so
3 hard or beyond what bankruptcy courts should do about your
4 claims if they go forward?

5 MS. SBAITI: Your Honor --

6 MR. PHILLIPS: Your Honor, if I --

7 MR. SBAITI: Yeah, I was going to ask Mr. -- the
8 bankruptcy attorney to --

9 MR. PHILLIPS: Your Honor, I just want to -- we
10 agreed --

11 THE COURT: Well, no, no, no.

12 MR. PHILLIPS: We agreed --

13 THE COURT: I had understood that Mr. Sbaiti was
14 going to address the federal law --

15 MR. PHILLIPS: Okay.

16 THE COURT: -- in more in depth. And so I'm hearing
17 some explanations of the claims, but I'm not really hearing him
18 zero in on what is significant about these claims or so
19 significant that 157(d) is triggered. So Mr --

20 MS. SBAITI: Your Honor, if I may, I would -- sorry,
21 am I on mute?

22 MR. PHILLIPS: No. You're -- we can hear you.

23 MR. SBAITI: Can you hear me?

24 Okay. Your Honor, I would have two points to make,
25 Your Honor. Number one, I don't know much about the WARN Act.

1 I do know that the Advisers Act is one of the statutes that is
2 not as highly litigated as an employment statute. And so while
3 there is case law to support the general proposition --

4 THE COURT: Well, and the argument is because it
5 doesn't give a private right of action is what I hear the other
6 side saying.

7 MS. SBAITI: And that was where I was going is they
8 now are citing cases in their reply that says, well, there's no
9 private right of action, at least their reply to the motion to
10 dismiss. You know, and I'm assuming that's what they've argued
11 in the motion to withdraw reference is that there's not private
12 right of action under Section 215.

13 Well, that kind of -- obviously, we disagree with
14 that because the Supreme Court in Transamerica specifically
15 said there is a private right of action. It's a private right
16 of action for rescission and there's a private right of action
17 for what the Supreme Court called the incidence of voidness.

18 Section 215 does two things. It makes void any
19 contract that requires someone to waive any rights or
20 obligations under the Advisers Act. And Section 215 also voids
21 the rights of anybody who performed a contract in violation of
22 the Advisers Act. Now the precise scope of that hasn't been
23 heavily litigated and it's -- you know, these are broad
24 principles.

25 And, in fact, in the reply to the motion to dismiss,

1 they bring up a case pending in New York where a court there,
2 although against the overwhelming weight of authority said,
3 well, Section 215 only applies when you have a contract that
4 facially requires someone to violate the Advisers Act or which
5 was made in violation of the Advisers Act.

6 But we argue that the settlement was made in
7 violation of the Advisers Act because it was made as part of a
8 way -- a part of a self-dealing scheme. But the intricacies of
9 that law and the background and the underlying rules and
10 regulations that go into that that we claim violated I think
11 are not -- I don't know that 157 is a sort of court-competency
12 issue.

13 The way I've always understood it to be is, you know,
14 when there's an Article III court deciding these types of
15 things and there's going to be a jury, that's where this is
16 supposed to go. I would defer to the bankruptcy experts to
17 correct me on that. But that is how I've always understood the
18 position that -- on the bankruptcy issue on mandatory
19 withdrawal to be.

20 THE COURT: All right. Anything else?

21 MS. SBAITI: Your Honor, I'll just hit the actual
22 causes of action issue and get them (indiscernible) on the
23 motion to dismiss if that's okay with Your Honor. I hope we
24 gave Your Honor a flavor of the federal law issues that are
25 very much at play here.

1 THE COURT: Okay. Yeah, just to be clear, you have
2 one more minute so.

3 MR. SBAITI: Oh, I'll kick it back to Mr. Phillips.

4 THE COURT: Okay.

5 MR. PHILLIPS: We just have one more minute out of
6 the 25?

7 THE CLERK: Yes, Your Honor.

8 THE COURT: Yes.

9 MR. PHILLIPS: Okay. I'll reserve one minute, Your
10 Honor, for rebuttal.

11 THE COURT: Okay.

12 Mr. Demo?

13 MR. DEMO: (Clears throat). Excuse me.

14 Yes, Your Honor. Greg Demo for the record, Pachulski
15 Stang Ziehl & Jones, on behalf of Highland Capital Management.

16 That's a lot to unpack, Your Honor, mostly because
17 most of it is factually inaccurate. And I'll go through why
18 it's factually inaccurate in a minute. But as we go through
19 this -- oh, I'm sorry, Your Honor. Before I start, can I do
20 our exhibits?

21 THE COURT: All right. So you have exhibits on a
22 motion to withdraw the reference?

23 MR. DEMO: We do, Your Honor. And they're at Docket
24 Number 146. There are six exhibits. Five of them are just
25 cases that are either on your docket in the Acis bankruptcy or

1 on the docket. Two of them are SEC guidance. We think Your
2 Honor can just take judicial notice of those.

3 The last which is Exhibit 3 is the investment
4 management agreement between Highland Capital Management and
5 the DAF. I did talk to Mr. Phillips before we started, and he
6 said he had no objection to these being entered.

7 THE COURT: All right.

8 MR. PHILLIPS: Correct. Correct.

9 THE COURT: Then I'll admit them. I'll admit them.

10 (Defendant's Exhibits 1 through 6 admitted into evidence)

11 MR. DEMO: Okay. Thank you, Your Honor. And
12 apologies for that aside.

13 But going back and, again, I'll unpack these facts,
14 you know, as we go through. But the one thing that I'd ask
15 Your Honor to keep in mind as we go through this is that Your
16 Honor has actually already adjudicated this issue. In November
17 of 2023 [sic], Highland filed a substantially similar motion to
18 dismiss. All parties fully briefed that motion to dismiss. On
19 November 23, 2021, all parties argued the merits of that motion
20 to dismiss including the Investment Advisers Act in this court.

21 In March of 2022, Your Honor entered a final order on
22 that motion to dismiss which again is substantially the same as
23 what we're here on today. But we're still here today because
24 plaintiffs are asking you to withdraw the reference on a motion
25 to dismiss that Your Honor has already heard and entered a

1 final order on.

2 I would ask Your Honor just keep that in your mind,
3 keep the absurdity of that in your mind as I walk through the
4 rest of this case because I am going to have a timeline as I
5 normally do. But before we get to that timeline, Your Honor,
6 you've heard plaintiffs' arguments, and their argument boils
7 down to mandatory withdrawal is required because the Investment
8 Advisers Act is somehow implicated.

9 And now plaintiffs also had an argument that
10 mandatory withdrawal is somehow required because this was a
11 non-core proceeding barely even related to this. Now they've
12 backed off that second argument, Your Honor, and I thin they've
13 done it tactically because they don't want to admit it. Mr.
14 Phillips said he couldn't admit to Your Honor that this is a
15 core proceeding.

16 And while we agree that in terms of Section or 28
17 U.S.C. 157(d) that that is not entirely relevant. Your Honor
18 can withdraw or a core proceeding can be referenced and
19 withdrawn in that case. But because it's a core proceeding,
20 and I'll get to this at the end if Your Honor wants me to go
21 once again in the Supreme Court's Reading (phonetic) case, and
22 this is, claims allowance, equitable jurisdiction of an
23 administrative expense claim, Your Honor can enter final
24 orders, which you just heard Mr. Sbaiti said that, well, maybe
25 you shouldn't do it, and there is no jury trial right.

1 And so while again we believe that there's limited
2 relevance to the motion to withdraw the reference, it is an
3 extremely important issue that plaintiffs put into relevance
4 and now are (indiscernible). And now going -- and Ms. Canti
5 (phonetic), can you please put up Slide 1 -- going to the text
6 of 28 U.S.C. 157(d). And this is the text that we all know
7 well. And when it comes up on the screen, you'll see it. It's
8 really the second section of 157(d) that governs mandatory
9 withdrawal of the reference.

10 And there are two elements to that. The first
11 element is timeliness, if a movant -- not this court, but if a
12 movant does not file a timely motion, there can be no mandatory
13 withdrawal. The second element assumes that a timely motion
14 has been filed and requires mandatory withdrawal only if
15 there's substantial consideration, and that's the case law of a
16 non-bankruptcy federal law.

17 Neither of those two elements are met here, Your
18 Honor. And in terms of timeliness, we take fresh approaches in
19 our case, our papers and we cite other case. And for the
20 purpose of timeliness, a movant is supposed to file a motion to
21 withdraw a reference as soon as it becomes apparent that there
22 is going to be issues that must be adjudicated by the district
23 court. Courts look at that dispositively. If that motion is
24 not timely filed, there is no withdrawal of the reference under
25 157(d).

1 But there's more, Your Honor, and again, we cite
2 these cases. If the motion to withdraw the reference seems to
3 be forum-shopping, that goes into the timeliness requirement.
4 If the motion to withdraw the reference is prejudicial to a
5 non-movant -- in this case, Highland and its creditors -- that
6 goes to timeliness.

7 All of those elements are present here, Your Honor.
8 Not timely, forum shopping, and it's prejudicial. And this,
9 Your Honor, is where, you know, I want to go through the
10 timeline again because I think the timeline proves our case.
11 And as we go through the timeline, I'll rebut some of the
12 factual misstatements that Mr. Phillips and Mr. Sbaiti made.

13 And, Ms. Canti, if you can go to the next slide,
14 please.

15 As Your Honor knows, this case was started not in
16 this court, notwithstanding the fact that it sought an
17 administrative expense claim, but it was began in district
18 court on April 12th, 2021.

19 And, Ms. Canti, there should be dates up on the top
20 of those slides if you can make sure that those show.

21 The next slide, I'll give you a second to adjust.

22 They're not there, but I can go through the dates,
23 Your Honor. So this is April 12th, 2021. In the next slide is
24 May 19th, 2021. On this date, Highland filed its motion to
25 dismiss their complaint both for failure to state a claim on

1 the merits and pursuant to res judicata. And this complaint --
2 I'm sorry, this motion to dismiss that we filed originally I
3 believe is Docket Number 36 on the docket.

4 And if you just go to the table of contents of that
5 pleading, Your Honor, Article 3, subsection (c) is failure to
6 state a claim. And it's failure to state a claim under RICO.
7 It's failure to state a claim for breach of fiduciary duty.
8 It's failure to state a claim for negligence. It's failure to
9 state a claim for tortious interference. And it's failure to
10 state a claim for breach of contract.

11 And if you go to the back end of that motion to
12 dismiss, Your Honor, you'll see that we argue Transamerica, no
13 private right of action under 206. We argue Goldstein, no
14 fiduciary duty to an investors in a fund. We argue all of the
15 Investment Advisers Act claims that you are going to hear
16 today. That was in our motion to dismiss filed in May of 2021.

17 Ms. Canti, next slide, please.

18 And this is May 27th, 2021, and it's plaintiffs file
19 their response to the motion to enforce the reference. And
20 you've heard a lot of talk about how plaintiffs filed a motion
21 in district court for mandatory withdrawal, and that's the
22 basis for their timeliness argument, Your Honor, is that
23 there's a motion sitting out there somewhere that's never been
24 ruled on.

25 But if you look at this response, and this is the

1 only thing they filed in the district court, it's a response to
2 our paper and in the title, it says "Cross motion to withdraw
3 the reference." There is no stand-alone motion. It was
4 procedurally improper the way they did it, and basically they
5 only made an argument to the district court that mandatory
6 withdrawal of the reference should apply. And that argument is
7 verbatim, nearly verbatim the arguments that you're hearing
8 today. They brought those two in district court.

9 And now you heard Mr. Phillips says things about how,
10 you know, it's just -- there's no thought of judicial economy,
11 right. It's just you enforce the reference and then Your Honor
12 gets to decide whether it would have to bounce it up to the
13 district court. That's just not true, Your Honor.

14 In this motion, plaintiffs cited a case, it's called
15 In re Harrah's Entertainment. They actually cited it in this
16 round of pleadings. And in that case, which was filed in the
17 Eastern District of Louisiana, there was a case filed in the
18 Eastern District of Louisiana, and the question there was
19 whether or not that case should be referred to the bankruptcy
20 court as a related case.

21 A party filed a motion for mandatory withdrawal of
22 the reference in the district court and also a motion for
23 permissive withdrawal again in the district court. The
24 district court denied the motion to enforce and decided that it
25 wouldn't make sense because you would end up having to withdraw

1 the reference anyway. Judicial economy, Your Honor.

2 Plaintiffs cited that case. And they cited that case
3 in this paper that we're talking about now to argue to the
4 district court that it made absolutely no sense to enforce the
5 reference and bring it down here because it would just get
6 roundtrip back and how does that make sense in terms of
7 judicial economy. The exact opposite of what you heard
8 earlier.

9 And I'll also point you to another case they cite,
10 and this is Continental Airlines, which was affirmed by the
11 Fifth Circuit. Substantially similar facts, and in that case,
12 the Southern District of Texas, the district court said, "This
13 court strongly suspect that if it does not withdraw the
14 reference, it will only see this exact same lawsuit again in
15 the future on such a de novo review of a report and
16 recommendation. That duplication of judicial effort would
17 needlessly waste this court's limited resources."

18 The idea -- and again, we'll get to the order that
19 the district court entered, but the ideas that Mr. Phillips put
20 forth in this Court is not borne out by the case law nor are
21 they borne out by what they actually pled.

22 And next slide, please, and I'll move this a little
23 bit faster.

24 June 28th, 2021 -- I'm sorry, we are now in August,
25 Your Honor. And this is plaintiffs' move to stay the

1 complaint. You've heard this one before, arguing they can't be
2 prosecuted because of the plan injunction.

3 Next slide.

4 September 20th, 2021, this is when the district court
5 entered its order referring this case to Your Honor to be
6 adjudicated as -- and there is a typo there -- it just said
7 related to Highland's bankruptcy. Now you just heard me cite
8 Harrah's, you heard me cite their papers. Now did the district
9 court say that this cross-motion, this procedurally improper
10 cross-motion was denied? No, but it enforced the reference
11 notwithstanding plaintiff's arguments that it would aid
12 judicial economy because the reference would have to be
13 withdrawn. They made the exact same arguments that are being
14 made here today.

15 The inference is not what Mr. Phillips said. The
16 inference is that the district court read plaintiffs' papers
17 and said, no, there's no basis for mandatory withdrawal, let's
18 send it to the bankruptcy court where it should have been filed
19 in the first instance.

20 Next slide, please.

21 This is November 8th, 2021. Now this is the first
22 time that plaintiffs indicate in this Court that they think
23 that the reference should be withdrawn, and they did it by
24 attaching a proposed motion to withdraw the reference to a
25 procedurally improper amended motion to stay pending

1 adjudication of the confirmation order in the Fifth Circuit.
2 Again, that motion that they attached was verbatim the
3 arguments they made in the district court and verbatim the
4 arguments that they're making here today.

5 Now it begs the question, Your Honor, why they
6 thought they needed to file a motion to withdraw the reference
7 in this Court in November of 2021 if they already had a motion
8 to withdraw the reference pending when it was referred down to
9 this Court. It makes not sense, Your Honor.

10 Now they've threatened to file that motion if you
11 were to deny the stay. And now -- can we go to the next slide,
12 please?

13 November 23, 2021, Your Honor denied the stay. What
14 did plaintiffs do? I can tell you what they didn't do. They
15 didn't file their motion to withdraw the reference. Again,
16 they argued in the Court the merits of the motion to dismiss
17 including that the Investment Advisers Act claims should be
18 dismissed.

19 Now fast track because there's a fairly large gap
20 between September '21 and November of '21. What happened in
21 that gap? The answer to that, Your Honor, is not that a motion
22 to withdraw the reference was filed. What happened in that gap
23 is that the parties agreed on the November 23rd date to hear
24 both the motion to dismiss and the motion to stay.

25 Next slide, please, Ms. Canti.

1 And this is March 11th, 2022. This is the date that
2 Your Honor entered a final order. All the equivocation about
3 whether you're acting as a magistrate, all of that stuff goes
4 out the window. Your Honor did not enter a report and
5 recommendation to the district court. Your Honor entered a
6 final order, as Your Honor could do because this is a core
7 proceeding.

8 Important to Mr. Phillips' argument is what did this
9 order say. Primarily it dismissed on collateral and res --
10 and, sorry, and judicial estoppel grounds. That's correct.
11 But if you look at the last paragraph of Your Honor's March
12 2022 order, it said that it reviewed all of Highland's other
13 arguments which are the arguments as to why the Investment
14 Advisers Act claims should be dismissed.

15 And Your Honor in March of 2022 in the last paragraph
16 of that order said she was inclined to agree with our arguments
17 on the Investment Advisers Act claims. Your Honor has done
18 this before, yet we're here again today.

19 Next slide, please.

20 Now this is fast forwarding a year. Now we are in
21 September, specifically September 2nd, 2022. This was when the
22 district court remands this back to Your Honor for one finding.
23 But, again, there's a fairly large gap between March of 2022
24 and September of 2022. And so what was happening during that
25 time period? Again, no motion to withdraw the reference was

1 filed.

2 But what was happening is that the parties were fully
3 briefing the merits of your final order on the motion to
4 dismiss to the district court. Plaintiffs at no point during
5 that briefing made reference to a need to withdraw the
6 reference or made reference to the Court's, your inability to
7 enter a final order. September 2nd, 2022.

8 Next slide, please.

9 This is October 14th, 2022. Now this is when
10 Highland filed its renewed motion to dismiss in this Court.
11 Again, there's a month. September, October, no motion to
12 withdraw the reference filed. The motion to dismiss that
13 you'll hear today from Mr. Morris, again, substantially similar
14 to the motion to dismiss that you heard in November of 2021, a
15 year ago.

16 Next slide, please, Ms. Canti.

17 All right. Now we are at finally, finally November
18 18th, 2022. Plaintiffs respond to the renewed motion to
19 dismiss and file what they call a renewed motion to withdraw
20 the reference pursuant to 28 U.S.C. 157(d). That renewed
21 motion, again, is the exact same as their supposedly cross-
22 motion that was filed in the district court. It's the exact
23 same as the motion they threatened to file a year ago in
24 November of '21. And it's now being asked to be heard today
25 when Your Honor has already adjudicated these exact same facts.

1 And, again, look at that gap, Your Honor. November
2 -- I'm sorry, September to November, Highland takes the time
3 and effort to file a renewed motion to dismiss. At no point in
4 that three-month gap until November of 2022, a year after Your
5 Honor already heard this issue, did they file their first
6 motion to withdraw the reference. And, again, if they already
7 had one on file, why did they file one again? It doesn't make
8 sense, Your Honor.

9 And that's timeliness. And, Ms. Canti, if you can go
10 to the next slide, please.

11 And all this is, Your Honor, is a summary of what I
12 just went through, right. Like look at this, April 2021,
13 November 2022. November 2022 after we've done all of this is
14 the first time they asked this Court to withdraw the reference.
15 Where is the timeliness? This is per-se untimely.

16 They could have filed a motion to withdraw the
17 reference in September of 2021. They didn't. They could have
18 filed their threatened motion to withdraw the reference in
19 November of 2021. They didn't. They could have at any time
20 between November '21 and March '22 before Your Honor entered
21 her final order filed a motion to withdraw the reference. They
22 didn't. Instead, they briefed their appeal, made no mention of
23 it.

24 September 2nd, 2022 it's remanded back here for an
25 adjudication on the merits of the motion to dismiss. They

1 could have filed a motion to withdraw the reference. Didn't.
2 Highland filed this motion to dismiss, no motion to withdraw
3 the reference. Only a year after Your Honor has heard the
4 merits of his exact motion to dismiss did they ask Your Honor
5 to withdraw the reference.

6 That's untimely, Your Honor. That is absolutely at
7 least in my estimation untimely, and I don't know how you get
8 around it. But it's worse than that, Your Honor. It's forum
9 shopping. Again, April 2021, they start this thing in the
10 district court an administrative expense claim. They seek to
11 prosecute outside of Your Honor. That's the first indication.

12 But going back to March of 2022 when Your Honor
13 reviewed the argument that Mr. Morris is about to make and said
14 that it was inclined to agree with Mr. Morris -- I'm sorry,
15 inclined to agree with Highland. Only after Your Honor gave
16 plaintiffs a preview of how you would rule on the motion to
17 dismiss that you're to hear today did Highland -- I'm sorry,
18 did plaintiffs file their motion to withdraw the reference.
19 That's forum shopping.

20 And the prejudice to Highland should also be apparent
21 from the timeline. Each of these little bullet represents a
22 significant cost to the estate. And what do plaintiffs want?
23 They want to go from November 2022 back to April of 2021. They
24 don't want any of this, Your Honor. They want to restart the
25 clock with significant cost to Highland and its creditors.

1 Impermissible.

2 28 U.S.C. 157(d) requires timeliness. If timeliness
3 is not met, the motion must be denied. There is no timeliness,
4 there is forum shopping, and there is prejudice. If that
5 weren't enough, Your Honor, they still lose on the merits on
6 the question of the (indiscernible) consideration of federal
7 non-bankruptcy law. And I think the clearest indication of
8 that is Mr. Sbaiti's argument. Supreme Court case, Supreme
9 Court case, Supreme Court case. Here are the SEC guidance.

10 Where did he say that there's a circuit split? Where
11 did he say that there's any unsettled law? Nowhere, Your
12 Honor, and he did that because there is no unsettled law.
13 These are very simple questions. Was there a fiduciary duty?
14 Was there a breach of that duty? And what is the remedy?
15 That's the exact same question that Your Honor and bankruptcy
16 courts all over this country answer and adjudicate every day.

17 There is nothing complicated about this case,
18 notwithstanding what plaintiffs want you to believe because
19 let's look at the issues, right. Let's drill them down. The
20 first issue is, is there a fiduciary duty under the Investment
21 Advisers Act. Yes. How do we know that? The Supreme Court
22 told us so. Non-issue.

23 The second issue is who does that fiduciary duty run
24 to? Under Goldstein, which we cited in our papers, under the
25 SEC guidance which we cited in our papers, it's very clear that

1 that fiduciary duty which is separate and apart from Rule
2 206(4) that Mr. Sbaiti cited, that fiduciary duty runs only to
3 the fund, not to the investors in that fund. And that makes
4 perfect sense, Your Honor. If an investment manager has a
5 fiduciary duty to the hundreds of -- potentially hundreds of
6 people who are invested in a fund individually, that's chaos.
7 And the investment manager will be sued every day. Settled
8 law, Your Honor.

9 And so what do you have to do? You have to look at
10 two agreements, the HCLOF investment management agreement,
11 Highland is indirectly the investment manager to HCLOF,
12 fiduciary duty. CLO Holdco is an investor in HCLOF. No
13 fiduciary duty between Highland to CLO Holdco because of HCLOF.
14 Again, Goldstein clear precedent.

15 Highland had an investment management agreement with
16 the DAF. Is there a fiduciary obligation to the DAF under that
17 agreement? Yeah. That's it, Your Honor. Okay, question one's
18 done.

19 Question two, assuming there's a fiduciary
20 obligation, what's the scope of that obligation and what's the
21 remedy for breach? Going to breach first, again, you heard Mr.
22 Sbaiti argue 206, 206, 206. Supreme Court precedent is
23 absolutely clear that 206 provides no private right of action.
24 Cases have been dismissed because they've been brought by a
25 private investor under Rule 206. That's the Corman case.

1 That's the Fifth Circuit we cite in our papers.

2 The Fifth Circuit doesn't stand alone on this, Your
3 Honor. Supreme Court precedent. 206 which again is the only
4 actual rule that they pled in their complaint does not provide
5 a private right of action. That's it, Your Honor. That's all
6 you have to do. Not complicated.

7 And I'll get to 215 in a second because even though
8 it wasn't pled in the complaint, I still want to talk about it.
9 Okay. So what is the scope of that allegation? Mr. Sbaiti
10 talked about a duty of care. Okay, that's fine. That's
11 clearly set out in the guidance, and a duty of loyalty. The
12 duty of loyalty under clear, again, Supreme Court precedent,
13 SEC guidance and, as Mr. Morris will talk about, a Northern
14 District of Texas case entered in an appeal from Mr. Dondero,
15 one of this Court's orders said the same thing. That duty of
16 loyalty is satisfied by disclosure.

17 So all Your Honor has to do is look at the
18 disclosures made to the DAF and say are those sufficient to
19 satisfy a reasonable investor about the conflict of interest or
20 the potential conflict of interest. That's it. Easy-peasy.

21 And so where do we go next? And, you know, I'm
22 actually going to leave out 215. It wasn't pled. It can't be
23 a motion.

24 THE COURT: This is your two-minute warning.

25 MR. DEMO: The case law is clear.

1 THE COURT: You have two more minutes.

2 MR. DEMO: Okay. Thank you.

3 Thank you, Your Honor. And I guess the last point,
4 and it bears repeating, is that Your Honor has already
5 adjudicated this in this Court and Your Honor actually
6 adjudicated it in the Acis bankruptcy. And this is on our
7 witness and exhibit list.

8 In the Acis bankruptcy, Highland then under the
9 control of Jim Dondero filed an objection to the plan saying
10 that it could not be confirmed because it violated applicable
11 law. What was that applicable law? The Investment Advisers
12 Act of 1940 for the exact same things that they're doing here.

13 (Indiscernible) examples of significant federal law,
14 plan injunction prohibits it. That's already been addressed
15 three times. Jury trial right, it's not up, but they don't
16 have a jury trial right because this is an administrative
17 expense claim, Your Honor.

18 The motion is untimely, it's prejudicial, it's forum
19 shopping, and there is nothing that's not -- nothing that rises
20 to the level of a material consideration of unsettled federal
21 law. All you have to do is look at the federal law and apply
22 it to a set of facts, the same thing you do every day in this
23 courtroom. For that reason, Your Honor, we'd ask the motion to
24 be denied and I can answer any questions.

25 THE COURT: All right. Mr. Phillips, you get one

1 minute in rebuttal.

2 MR. PHILLIPS: Your Honor, a couple of thing very
3 quickly.

4 Number one, whether or not what the district court
5 did, we asked and frankly maybe don't know the answer to
6 whether or not this Court can decide what the district court
7 did in its order of reference. But I guess, number one, I
8 guess we'll find out what the district court did.

9 We understand the case law, but we also understand
10 there's another version of the approach to matters filed in the
11 district court and that is we want the reference withdrawal
12 order to be complied with before we deal with anything.

13 That is a long-term judicial economy because if you
14 have people filing in the district court making their own
15 determinations, what's the best way to stop that from
16 happening? The order of reference will be enforced and if you
17 have a motion to withdraw reference, file it then.

18 Secondly, one of the things about the scope of
19 fiduciary duty that's before the Court in the lawsuit is that
20 they say there's an investment adviser agreement with DAF Fund,
21 the DAF Fund but not CLO Holdco.

22 But the investment advisory services subject to --
23 (indiscernible) the investment adviser shall act as an
24 investment advisor to the fund -- that's the DAF -- the general
25 partner with respect to the fund and its subsidiaries and shall

1 provide investment advice with respect to the investment and
2 reinvestment of the cash, financial instruments, and other
3 properties comprising the assets and liabilities of the fund
4 and the subsidiaries.

5 The subsidiary CLO Holdco is the one where the
6 investments are. That's where the investment advice actually
7 bore fruit. So the question -- there is a question about scope
8 of fiduciary duty and you couldn't have the investment adviser
9 agreement without the investment adviser being subject to the
10 Investment Advisers Act.

11 THE COURT: Okay.

12 MR. PHILLIPS: My point is from my standpoint --

13 THE COURT: Time's up.

14 MR. PHILLIPS: -- is that there was a question about
15 the scope of the duty. Thank you, Your Honor.

16 THE COURT: Thank you.

17 All right. Here's what I am going to do.

18 I am going to recommend that the district court deny
19 this renewed motion to withdraw the reference. First, I had
20 put together my own timeline before I saw Mr. Demo's and I
21 think I have to find that this is not a timely motion to
22 withdraw the reference.

23 The action as we all know was filed April 12th, 2021.
24 We are now January 25th, 2023. So I don't think the timeliness
25 requirement has been met here.

1 Second, this does feel like a second bite at the
2 apple, to use that worn-out metaphor. I think substantially
3 the same arguments were made, albeit in a differently-worded
4 pleading maybe to Judge Boyle, again, back in 2021. I guess it
5 was June 29th, 2021 when the plaintiffs first argued that the
6 district court should keep this matter and, among other things,
7 argued 28 U.S.C. 157(d). This involved consideration of both
8 Title 11 and other laws of the United States.

9 So it's sort of a second reason on top of
10 untimeliness that I think this has already been asked for once
11 and denied.

12 But yet another reason I will recommend denial of
13 this motion is I don't think this action ultimately involves
14 material consideration or significant consideration of other
15 laws of the U.S. regulating organizations or activities
16 affecting interstate commerce.

17 Again, the Investment Advisers Act is implicated.
18 RICO is implicated. But I don't think it's terribly
19 complicated. As I alluded to, bankruptcy courts consider
20 proofs of claim as well as requests for administrative expense
21 claims all the time that involve significant other law
22 including federal law, and I just don't think this triggers
23 mandatory withdrawal under 28 U.S.C. 157(d).

24 So I am going to go ahead and do that written report
25 and recommendation to the district court. Now normally, I

1 guess my most often followed practice is I don't rule on
2 motions to dismiss or any kind of dispositive motions while I'm
3 waiting on the district court to either adopt or reject a
4 report and recommendation.

5 But I'm going to go ahead and hear the arguments on
6 the motion to dismiss today even with that risk that the
7 district court may say, no, you're wrong, I'm yanking the case.
8 I'm going to go ahead and hear the arguments because my best
9 guess is the district court is going to adopt my report, okay.

10 My best guess is the district court is going to say
11 untimely, is going to say second bite at the apple, and I think
12 this is not materially enough other federal law to yank it from
13 the bankruptcy court. I may be wrong, and this may all be a
14 waste of time today. But I'm going to go ahead and hear the
15 hearing, the arguments on the motion to dismiss.

16 I'll say a couple of additional things. It's still
17 nagging at me the transcript that Mr. Phillips read from where
18 I said in this adversary I'm going to do a report and
19 recommendation to the district court on the previously-argued
20 motion to dismiss. I'm not questioning that because I have
21 this memory of me later going why did I say that.

22 This was referred to me. I had in my mind core
23 matter because it was a request for an allowance of
24 administrative expense claim against a debtor for conduct while
25 it was still a debtor in possession. So I thought at some

1 point I had come out and announced maybe in a different
2 Highland hearing and maybe others, not everyone was on the
3 call.

4 I thought I remembered correcting myself out loud to
5 the parties. Maybe I didn't. Maybe that was just back in
6 chambers to my law clerk, and I had every intention of coming
7 out and telling y'all and I didn't. So that's just an
8 explanation of that. I misspoke when I did that.

9 And then what was the other thing I wanted to say.
10 Well, gosh, I've lost my train of thought on that. Oh, I know
11 what it was. My law clerk noticed this week that when the
12 renewed motion to withdraw the reference was transmitted to the
13 district clerk's office from the bankruptcy clerk's office,
14 guess what? A new district court civil action number was
15 created, and it was assigned to a different district judge,
16 Judge Karen Scholer.

17 I don't think anyone would think that is the most
18 efficient thing to happen here, so we'll do our part on our end
19 to get personnel talking to personnel and hopefully get that
20 fixed to where it goes back to Judge Boyle. But no promises
21 there. We will just point it out and point out that we think
22 that was inefficient and a mistake and they'll do whatever
23 they're going to do.

24 All right. So with that, do you all need a five-
25 minute break before we launch into the motion to dismiss

1 arguments?

2 MR. MORRIS: I would --

3 MR. PHILLIPS: Your Honor, this is Louis Phillips. I
4 just wanted to tell Your Honor that we wanted to make sure that
5 we hadn't overlooked anything in the transcript that we cited.
6 And we read it again. I didn't. Ms. Heard read it again while
7 we were arguing. And we did not find anything else.

8 I have to -- I will tell the Court on the record that
9 we read a lot of pleadings, but we did not -- we did not come
10 across anything that we left out that would contradict that.
11 And we made sure again today there's nothing else in that
12 transcript that would contravene what I read to Your Honor. So
13 --

14 THE COURT: Okay.

15 MR. PHILLIPS: -- look, we understand that what
16 happened after was -- there was a final order. And so we
17 understand there was an appeal of the final order. And we have
18 to admit that we didn't read the entire record, and we have not
19 come across and ignored and not brought before Your Honor
20 something that would contravene what we've mentioned today in
21 argument.

22 THE COURT: Okay. Thank you for that. And, again,
23 it may have been back in chambers that I said what did I say
24 that for. I have the authority to issue a final order, and
25 certainly someone could have raised that on appeal if they

1 thought she made a mistake.

2 All right. So --

3 MR. PHILLIPS: Understood. Understood.

4 THE COURT: -- why don't we take a five-minute --
5 please, five minutes, not six -- five-minute break, and we'll
6 hear the oral arguments on motion to dismiss.

7 THE CLERK: All rise.

8 MR. PHILLIPS: Thank you, Your Honor.

9 (Recess at 2:58 p.m./Reconvened at 3:05 p.m.)

10 THE CLERK: All rise.

11 THE COURT: Please be seated.

12 All right. We are going back on the record in the
13 Adversary, CLO Holdco DAF versus Highland, the renewed motion
14 to dismiss.

15 Mr. Morris, I think we agreed 45 minutes and 45
16 minutes, right?

17 MR. MORRIS: That's correct.

18 THE COURT: Okay. You may proceed.

19 MR. MORRIS: Okay. Before I begin, Your Honor, may I
20 please just move for the admission into evidence of the
21 Defendant's Exhibits that are lodged at Docket 145? It's
22 Exhibits 1 through 14, and I understand there's no objection.

23 THE COURT: Confirm there's no objection.

24 MR. SBAITI: Your Honor, we agreed that we would
25 reserve our rights to object to the relevance of those to

1 certain arguments, but overall, we have no objection. And I
2 guess while we're on it, we also were asking to admit our
3 exhibits, which are on Docket 150.

4 THE COURT: Okay. And there's no objection to those,
5 Mr. Morris?

6 MR. MORRIS: Yeah. It's a little vague to say that I
7 have no objection to the exhibits, except potentially as to
8 relevance. I didn't quite understand that part.

9 THE COURT: Well --

10 MR. MORRIS: Is there objection or isn't there?

11 MR. SBAITI: Well, I just, they might not be relevant
12 to some arguments, is all I'm saying, but they can still be --

13 THE COURT: Well --

14 MR. MORRIS: So --

15 THE COURT: I'm going to say something. I've been
16 saying this a lot lately. You probably haven't heard it. But
17 I'm old enough to remember when a 12(b)(6) motion was, I look
18 at the motion response reply and look at the four corners of
19 the complaint, and there's either a plausible claim articulated
20 or not.

21 And what I have been seeing is these motions to
22 dismiss with appendices that are hundreds of pages long and
23 then responses with appendices that are hundreds of pages long.
24 So much so that one day, different case, I had a law clerk go
25 do research for me. Am I an old fogey who has it wrong, who

1 thinks I'm only supposed to look at the four corners of the
2 complaint?

3 And to my surprise, there is a Fifth Circuit case,
4 maybe everyone knew about it but me, that says if it's either
5 something attached to the complaint or something that goes at
6 the heart of the claims in the complaint, or words to that
7 effect, yeah, you can go beyond the four corners of the
8 complaint and have some evidence.

9 But I will tell you, I and every judge I know just we
10 keep getting these longer and longer and longer appendices and
11 then people just agree, as opposed to saying no, it doesn't go
12 to something at the heart of the complaint. And then, we find
13 ourselves with 4,000 pages of stuff to read before we can even
14 rule on a 12(b)(6) motion.

15 So that was my rant. If each side thinks the
16 appendices are within the spirit of that Fifth Circuit case
17 that says these items go to the heart of the complaint, the
18 claims articulated in the complaint, then I'll consider it all.
19 So are you both --

20 MR. SBAITI: Your Honor, if I may --

21 THE COURT: -- conceding to that?

22 MR. SBAITI: If I may, Your Honor --

23 MR. MORRIS: No, Your Honor. The point I was
24 making --

25 THE COURT: Okay. One at a time. One at a time. So

1 I'll let Mr. Sbaiti --

2 MR. MORRIS: -- with respect to the defendants'
3 exhibits --

4 THE COURT: -- since he --

5 MR. MORRIS: -- Your Honor --

6 THE COURT: Okay. Mr. Sbaiti, do you agree or not
7 agree that the Court can consider these exhibits of defendant?

8 MR. SBAITI: Yeah, Your Honor. Your point went to
9 the heart of my reservation of rights to argue relevance. I
10 think a lot of the exhibits they've attached and what we've
11 attached are relevant to the judicial estoppel argument because
12 I think that's something we do have to look outside the
13 complaint to look to whether judicial estoppel was there.

14 I don't think those exhibits are relevant to the
15 other issues. That's the heart of my reservation.

16 MR. MORRIS: And I would agree with that, Your Honor.
17 I was going to actually make the exact same point. So --

18 THE COURT: Okay.

19 MR. MORRIS: -- there you've got (indiscernible)
20 agreement on the admission of the exhibits, but on the scope.

21 MR. SBAITI: Yeah.

22 THE COURT: Okay. Got it. So you both agree to all
23 of your exhibits with the understanding that these go to the
24 judicial estoppel arguments. Yes?

25 MR. SBAITI: Not all of them. Exhibits 13 and 14 are

1 two agreements that are at the heart of the case that --

2 MR. MORRIS: I agree with that.

3 MR. SBAITI: -- at the heart of the matter.

4 THE COURT: All right. So with that out of the way,
5 we'll start the timer. I've admitted these exhibits.

6 You may proceed.

7 (Defendants' Exhibits 1 to 14 admitted into evidence)

8 MR. MORRIS: Okay. Thank you, Your Honor.

9 John Morris, Pachulski Stang Ziehl and Jones, for the
10 defendants.

11 Your Honor, I want to begin with just a brief
12 background. Although I know how familiar the Court is with
13 these facts, this entire adversary proceeding arises from the
14 debtor's settlement with HarbourVest. HarbourVest had a \$300
15 million claim based, unfortunately, on misrepresentations and
16 other causes of action.

17 And as the Court is aware, a settlement was a reach
18 that was effectively a rescission of HarbourVest's investment
19 whereby the debtor divided HarbourVest with allowed claims of
20 \$80 million, which was their investment amount, a portion of
21 which was in Class 8 and a portion of which was a subordinated,
22 unsecured claim in Class 9. And HarbourVest surrendered their
23 interest in HCLOF to a wholly owned affiliate of Highland.

24 There's no dispute that CLO Holdco objected,
25 contending that the transfer of HarbourVest's interest was not

1 permitted under the members agreement because it violated
2 supposedly its right of first refusal and there's no dispute
3 that after the issue of the ROFR was fully briefed that CLO
4 Holdco did further diligence and thereafter acknowledged that
5 the ROFR did not apply to the circumstances at issue, and they
6 withdrew their objection.

7 Following the withdrawal of CLO Holdco's objection,
8 the Court heard argument, overruled the remaining objections,
9 and approved the 9019 settlement and the settlement was
10 effectuated. The settlement order expressly provided that the
11 transfer of the HarbourVest interest to the debtor's affiliate
12 could be effectuated "without the need to obtain the consent of
13 any party or to offer such interest first to any other investor
14 in HCLOF." And while that order is the subject of an appeal
15 pending in the Fifth Circuit right now, it wasn't appealed for
16 purposes of challenging that provision.

17 A couple of months later, the plaintiffs brought this
18 action with new counsel and a new trustee. Your Honor may
19 recall that shortly after the HarbourVest settlement, Grant
20 Scott left the trustee, and John Kane, his lawyer, was
21 terminated as well to be replaced by Mr. Patrick and
22 Mr. Sbaiti.

23 And they commenced this action originally in the
24 district court. And in substance, there's really two issues
25 that underlie the entirety of the complaint. Number one, the

1 plaintiffs allege that the debtor had a legal obligation to
2 offer the HarbourVest interest to the plaintiffs before
3 effectuating the transfer. We'll show in a few minutes that
4 the plain and unambiguous terms of the two agreements I just
5 pointed out, Exhibits 13 and 14, the very agreements that
6 plaintiffs rely upon, prove that no such duty existed and no
7 such duty exists under federal law or fiduciary duty for this
8 particular transaction because of the nature of the parties'
9 agreements.

10 The second issue that underlies the complaint is the
11 allegation that Mr. Seery received inside information in
12 December, 2020, and therefore, knew or should have known, the
13 \$22.5 million value be placed on HarbourVest's interest was, I
14 think the words used in the complaint are, "off the mark."

15 Rest assured, Your Honor, if Highland is ever
16 required to do so, Highland will prove that these insider
17 trading allegations are absurd. But we understand the law. We
18 understand that for purpose of a motion to dismiss, the Court
19 must accept the allegations as true.

20 But at the end of the day, Your Honor, since Highland
21 had no legal or contractual obligation to make this transaction
22 available to the plaintiffs, the valuation is completely
23 irrelevant. It really doesn't matter because there's nothing
24 for the plaintiffs to rely upon at the end of the day if they
25 had no ability to participate in the transaction.

1 Based on these two issues, Your Honor, plaintiffs
2 have conjured up five separate causes of action, breach of
3 fiduciary duty, breach of the members agreement for the ROFR,
4 negligence in regards to Mr. Seery's testimony about the sales
5 price, and the failure to give plaintiffs the opportunity to
6 buy the asset. There is a RICO claim, of course, and there's
7 tortious interfere.

8 Procedural history, very briefly, Your Honor.
9 Highland, as Mr. Demo described, moved to dismiss on
10 substantive grounds, as well as on grounds of collateral and
11 judicial estoppel. Ultimately, this Court granted the motion
12 on collateral and judicial estoppel and stated that while it
13 was inclined to agree with the defendants on the substantive
14 points, it simply refrained from addressing the motion to
15 dismiss on 12(b)(6) grounds really for purposes of judicial
16 economy.

17 The plaintiffs appealed that final order. After
18 determining that collateral estoppel did not apply, the
19 district court affirmed this Court's findings on the first two
20 elements of judicial estoppel, but remanded on the sole issue
21 of whether the plaintiffs' inconsistent positions was
22 "inadvertent" and really the only issue that the Court sent
23 down here, and here we are.

24 Let me begin with Counts 2 and 5 and the matter that
25 the district court referred back to the bankruptcy court,

1 judicial estoppel. The only issue is whether the inconsistent
2 positions are inadvertent. CLO Holdco, as I mentioned and as
3 the Court knows, withdrew its objection to the 9019 motion
4 based on the ROFR with the advice of very sophisticated
5 counsel, John Kane.

6 Mr. Kane's statements to the Court provide all the
7 evidence that's needed to show that CLO Holdco's decision to
8 withdraw the objection based on the ROFR was deliberate,
9 intentional, and made on a fully informed basis.

10 Ms. Canty, if you can put up Slide 1.

11 I'm putting up on the screen, Your Honor, just an
12 excerpt of Mr. Kane's presentation to the Court where he said,
13 among other things, that CLO Holdco has had the opportunity to
14 review the reply briefing. After doing so, has gone back and
15 scrubbed the HCLOF corporate documents. They analyzed
16 Guerensey law and some of the arguments of counsel in those
17 pleadings and they reviewed appropriate documents.

18 And after doing all of that work, Mr. Kane informed
19 the Court that he had obtained the authority from his client,
20 Grant Scott as the trustee for CLO HoldCo, to withdraw the CLO
21 Holdco objection based on "the interpretation of the member
22 agreement."

23 You can take that down now.

24 Plaintiffs can't refute this, right? There's nothing
25 to refute. Those words are clear as day. The decision to

1 withdraw was informed. It was deliberate. It was purposeful.
2 And it was consequential.

3 Instead, new counsel makes arguments concerning
4 basically the state of mind of Mr. Scott and Mr. Kane that not
5 only have no factual basis but really are not plausible at all,
6 right? If they wanted this Court to know what Mr. Scott or
7 Mr. Kane thought, perhaps they should have had them submit some
8 evidence into this. They didn't do that. They didn't do that,
9 and instead, they speculate as to what they would have done if
10 they were in their shoes. That's not proper here.

11 They argue first that the claim now is that Highland
12 breached the members agreement, a claim that Mr. Kane and
13 Mr. Scott were apparently unaware of since they only waived the
14 objection with respect to HarbourVest's obligations under the
15 agreement. So this is their first argument that it was
16 inadvertent because they didn't know.

17 There's no evidence that they didn't know, but that's
18 their argument. Simply an argument that they made by new
19 counsel on behalf of a new trustee with citation to nothing.
20 More importantly, Your Honor, the district court has already
21 held that CLO Holdco "made clear in the withdrawal of its
22 objection that it no longer disputes the other party's
23 interpretation of the right of first refusal, which now forms
24 the basis of Charitable DAF's second and fifth causes of
25 action. That's at Page 16 of the Court's order.

1 The district court's holding that CLO Holdco's
2 position applied to all parties was correct. It's the law of
3 the case and cannot be overcome by new counsel's speculative
4 musings.

5 Second, plaintiffs speculate that quote, and this is
6 I think on Page 9 of their opposition, "But for the
7 misrepresentation, Holdco would not have withdrawn its
8 objection. It would've made a more robust objection to the
9 settlement or sought a different path." This argument fails
10 for at least the following reasons.

11 Again, there's absolutely no evidence to support it.
12 It's simply an argument made by new counsel on behalf of a new
13 trustee with citation to nothing. But more troubling to me,
14 Your Honor, is it suggests that Mr. Kane would have engaged in
15 unethical conduct. We know what he told the Court. We know
16 that he concluded that his clients couldn't rely on the ROFR to
17 prevent the transfer. That's what he told you.

18 Even the plaintiffs don't contend that valuation is
19 relevant to determining whether ROFR applies. It doesn't. The
20 ROFR applies or it doesn't, and it has nothing to do with
21 value. And yet, we're told today that counsel wants this Court
22 to find that even though the legal analysis would not change at
23 all, Mr. Kane would have pressed the objection or done
24 something different, even though he concluded it was without
25 merit based on a representation that has absolutely nothing to

1 do with the ROFR. I don't think that's proper.

2 I don't think the Court should find that Mr. Kane,
3 having concluded that the ROFR applied, would have told the
4 Court that it did simply because you have to accept the
5 misrepresentation claim as true. It's not a particularly
6 credible argument. (Indiscernible), Your Honor, that the
7 purpose of judicial estoppel is to protect the integrity of the
8 judicial process by "preventing parties from playing fast and
9 loose with the courts to suit the exigencies of self-interest."

10 The evidence conclusively establishes that based on
11 Mr. Kane's thoughtful advice and analysis, after due
12 deliberation, that CLO Holdco knowingly and intentionally
13 acknowledge that the ROFR and the members agreement did not
14 preclude the HarbourVest transaction to an affiliate of the
15 debtor.

16 The Court should protect the integrity of the
17 judicial process, reject plaintiffs' attempts to play fast and
18 loose, and dismiss Counts 2 and 5 on the ground of judicial
19 estoppel.

20 Having said all that, it's kind of easier on a
21 certain level, although I think that's pretty black and white.
22 If you just look at Mr. Kane's own words, it's really easy to
23 dismiss both counts on the merits. Even if Count 2 wasn't
24 barred by judicial estoppel, it must be dismissed for failure
25 to state a claim upon which relief can be granted.

1 And if we can put up Slide 2, please.

2 Let's take a look at the members agreement, Your
3 Honor. This is the members agreement. It's Defendant's
4 Exhibit 13. We're looking at Sections 6.1, 6.2.

5 Section 6.1 of the members agreement expressly
6 provides that members shall not transfer their shares other
7 than to an affiliate of an initial member party hereto without
8 getting consent.

9 So if a member wants to transfer their shares to an
10 affiliate of an initial member to this agreement, they don't
11 have to get consent. They can do it whenever they want. And
12 there is no dispute that HarbourVest was a member. And there's
13 no dispute that the transfer was to an affiliate of Highland
14 who was an initial member and party to this agreement. So I
15 don't think there's any argument at all that HarbourVest had
16 the ability to transfer its interest in HCLOF to an affiliate
17 of Highland.

18 6.2 is the ROFR, okay. So what we've done is we've
19 highlighted the portion that I think applies here. Prior to
20 the transfer, prior to making any transfer, and that's where
21 the parenthetical really ends the whole discussion. Other than
22 transfers to affiliates of an initial member, a member must
23 first offer to the other members the right to purchase the
24 shares.

25 So the obligation, the ROFR, by the plain unambiguous

1 terms of the agreement simply does not apply to transfers to
2 affiliates of an initial member. Again, this was a transfer in
3 the settlement to an affiliate of an initial member. In this
4 instance, Highland. This is the parties' agreement.

5 Highland and HarbourVest had every right under this
6 agreement to do this transaction. They had no obligation to
7 offer it to the plaintiffs or to anybody else. That's what the
8 plain terms say. So while we think they should be estopped,
9 judicially estopped, from making the arguments and pursuing
10 these claims, they fail on the merits anyway. And these
11 Counts 2 and 5 should be dismissed with prejudice because
12 there's nothing they can do to rewrite this agreement. There's
13 no way around it. The agreement says what it says. The
14 parties are bound by it.

15 Let's turn to Count 5. We can take that down.

16 Count 5 fails to allege a plausible plan for tortious
17 interference, and that's kind of simple because the tortious
18 interference here is that Highland allegedly interfered with
19 CLO Holdco's rights under Section 6.2 of the management
20 agreement. As we just saw, it did not. It could not. It had
21 no obligation. It simply had no obligation.

22 Let me state it differently. CLO Holdco had no right
23 to participate in this transaction. They had no right of first
24 refusal and there was no right in the contract otherwise
25 because they cite exclusively to 6.2. There's no right

1 otherwise that the plaintiffs rely upon as a right that
2 Highland tortiously interfered with.

3 So since 6.2 did not provide CLO Holdco with a ROFR
4 under these particular circumstances, Highland could not have
5 tortiously interfered with it. Stated differently. There
6 can't be a cause of action for tortious interference with a
7 contractual right that never existed. No amendment changed
8 that. Count 5 should be dismissed with prejudice.

9 Count 4 fails to state a cause of action for RICO.
10 Plaintiffs allege that defendants are liable under RICO. The
11 defendants move to dismiss this count because there is no
12 plausible cause of action for at least the following reasons.

13 RICO claims can't be predicated on Securities Law
14 violations. Allegations concerning mail and wire fraud were
15 not stated with particularity and otherwise fail to meet the
16 heightened pleading requirements under Rule 9(b).

17 Plaintiffs fail to plead a pattern of racketeering
18 activity, nor could they since, based on the pleading, the
19 entire complaint is based on a singular statement during the
20 9019 hearing concerning a singular transaction with no
21 suggestion that there would or could be a continuing or future
22 threat. So you don't have a pattern of racketeering activity.

23 They fail to state a cause of action because they
24 fail to plead that the RICO association in fact enterprise.
25 They fail to plead causation. And here's the thing, Your

1 Honor, this is really simple, they didn't contest any of this.
2 Plaintiffs did not file a substantive response to the motion to
3 dismiss on RICO.

4 Instead, at the end of their pleading, at Page 23,
5 they purport to move to dismiss the RICO claim "at this time,
6 pursuant to Rule 41, while purportedly reserving the right to
7 bring the claim at some future time." Your Honor has heard
8 this playbook before. We heard it in HCRE. We heard it with
9 claims that have been withdrawn. You know, don't rule on this
10 because we want to save it for another day. They can't do
11 that. The Fifth Circuit has said you can't do that. That's
12 not what Rule 41 is about.

13 Their so-called motion on Page 23 is improper for at
14 least the following reasons.

15 It doesn't comply with Bankruptcy Rule 8013(a)(2)(A)
16 because it fails to state with particularity the grounds for
17 the motion and the legal argument necessary to support it.

18 Rule 41(a) is made applicable to this adversary
19 pursuant to Bankruptcy Rule 7041. The title of that rule, Your
20 Honor, is "Dismissal of Adversary Proceedings." Neither the
21 title of the Rule nor the substance of the Rule concerns,
22 addresses, or permits the dismissal of individual claims.

23 The same is true for Rule 41 itself. It is titled,
24 "Dismissal of Actions." Section (a), which the plaintiffs rely
25 upon, states "Plaintiff may dismiss an action without a court

1 order under certain circumstances." That's not what they're
2 trying to do here. They're trying to dismiss a singular claim.

3 Even if they had complied with 8013, and they didn't,
4 they have no right to do that under Rule 41. You don't have to
5 take my word for it, Your Honor, we cite it in our brief. The
6 Fifth Circuit's decision in National Horsemen's. It's in
7 Paragraph 1 of our reply.

8 The Fifth Circuit said very clearly that Rule 41(a)
9 does not allow for the dismissal of individual claims, right.
10 If they wanted to dismiss an individual claim, they had to
11 amend their pleading and proceeded under Rule 15, and we would
12 have had the opportunity to say they can't do this unless it's
13 without prejudice -- you know, unless it's with prejudice,
14 right.

15 We would have argued hard that all of these issues
16 should be pled together, that there is no basis to with
17 withdraw it to save it for another day. It would be, you know,
18 it would wreck havoc on the judiciary. You'd be trying the
19 same case in multiple forums at multiple times. They didn't do
20 that. They went under Rule 41(a). The Fifth Circuit has said
21 you can't do that.

22 So the dismissal of this claim, the RICO claim,
23 should be with prejudice. There is no plausible claim that can
24 be alleged under the circumstances. There is no defense to the
25 motion to dismiss. There is no substantive defense. They'll

1 never be able to plead a pattern of racketeering. We know what
2 the factual predicates are here.

3 It's the HarbourVest settlement, a singular
4 transaction that occurred over a matter of weeks with no
5 continuing or future, you know, harm that could ever be done.
6 That's the claim that they have. So this cause of action, too,
7 should be dismissed with prejudice.

8 Negligence, Count 3, should also be dismissed with
9 prejudice. Count 3 alleges that Mr. Seery negligently valued
10 HarbourVest's interest in HCLOF. They fail to give plaintiff
11 the opportunity to purchase the interest. This count should be
12 dismissed with prejudice for the following reasons.

13 Number one, of course, Highland's plan of
14 reorganization exculpates the debtor for claims of negligence
15 arising from the administration of the estate. That part of
16 the confirmation order has been specifically affirmed by the
17 Fifth Circuit Court of Appeals. I can't think of a better
18 example of a debtor administrating the estate and resolving
19 claims.

20 If there's one thing that I know a debtor does, and I
21 know a debtor does many things, but there's no dispute that one
22 of the -- there's one thing debtors must do to administer the
23 estate is to resolve claims. So the exculpation provision bars
24 Count 3.

25 They suggest somehow that the defense should be

1 stricken because it was raised previously and therefore waived.
2 I'm not sure what that means, but there's no evidence. There
3 will never be any evidence that Highland ever knowingly,
4 intentionally, you know, relinquished their protection from
5 negligence claims arising from the administration of the
6 estate. The plan's exculpation clause really should end this
7 inquiry.

8 But there is more if Your Honor needs it.

9 The plaintiffs also refer to the Advisers Act to
10 contend that it imposes a duty of care and loyalty. You heard
11 Mr. Sbaiti say that earlier under Section 206. This is their
12 argument.

13 You know, he did refer to some case out there that
14 said otherwise. And he's right and he should know that because
15 it's his case. He brought the case on behalf of NexPoint from
16 Mr. Dondero, the Southern District of New York, against Josh
17 Terry and Acis. It's the case that we've cited in our brief.

18 And last summer, the Southern District of New York,
19 who probably does have a lot of experience with Investment
20 Adviser Act claims, said "No private right of action under
21 206." Plain and simple. They cited to Transamerica. They
22 quoted Transamerica. They said the Supreme Court held there
23 that there is no private right of action under Section 206.
24 Transamerica made no distinction between investors or the fund.
25 It unequivocally held that there is no private right of action

1 under Rule 206.

2 But there's more because there's always more. In the
3 advisory agreement, there's a very explicit separate
4 exculpation clause that the DAF agreed to. And if we can put
5 up to the screen Slide 3. And I will admit, Your Honor, this
6 is not in our brief. But this is the document that the
7 Plaintiffs are relying upon. This is the advisory agreement
8 that they contend, you know, imposes duties on Highland.

9 I'll wait for Mr. Sbaiti to explain his views as to
10 this agreement, but the Court has to consider the four corners
11 of the agreement. It is the principal -- one of the principal
12 basis for the whole lawsuit. And in Section 11, the DAF agreed
13 that to the fullest extent permitted by law, no covered person
14 shall be liable, general partner, or the Fund, or any of its
15 subsidiaries including CLO Holdco.

16 I heard Mr. Phillips say that somehow CLO Holdco is a
17 beneficiary under this agreement. Well, if they are, they've
18 also exculpated Highland for any reason whatsoever, less the
19 act or omission constituted willful misconduct or gross
20 negligence. They can't bring their own agreement. And it's
21 funny, Your Honor, because think about the context in which
22 this agreement is drafted.

23 This agreement is drafted by Mr. Dondero's company,
24 Highland, who's going to provide advisory services to his own
25 Donor Adviser Fund, the DAF. This is his agreement. I want to

1 hear why it doesn't apply. I want to hear why this exculpation
2 provision doesn't preclude a negligence claim. It absolutely
3 does.

4 Finally, the negligence claim could never be
5 plausible in any event, because the Plaintiffs didn't have a
6 right of first refusal. We saw that they reached an agreement
7 with Highland that said they were not going to get a right of
8 first refusal if there's a transaction between affiliates of
9 initial members.

10 And so if you have agreed that that conduct is
11 permitted, you cannot plausibly assert a cause of action that
12 says you were negligent in executing that same contract. And
13 by the same token, the whole concept of oh, they misstated the
14 value. Also irrelevant, because the valuation has nothing to
15 do with any rights that the Plaintiff has. There's nothing for
16 them to rely on.

17 HarbourVest maybe. You know, HarbourVest would have
18 a complaint. I haven't heard from them on that point, although
19 I speak to from time to time. But Plaintiffs have no standing
20 here. They have no interest. There's no reliance. Whatever
21 Mr. Seery said about value, the Court can accept as true. All
22 the allegations in the complaint, it is a big so what.

23 Finally, the fiduciary duty issue. That also must be
24 dismissed. Count 1 is for breach of fiduciary duties. It's
25 premise are the exact same facts; insider trading,

1 misrepresentation, or the concealment of the true value of
2 HarbourVest's interests and the diversion of the investment
3 opportunity. This count must also be dismissed with prejudice.
4 To be clear, as a matter of law, the Defendants never owed a
5 fiduciary duty to CLOF -- CLO Holdco.

6 HCF as the adviser, is a wholly-owned affiliate of
7 the debtor and it serves as the portfolio manager of HCLOF, but
8 it is black-letter law -- and this is gold standard, you heard
9 Mr. Demo refer to it earlier -- that there is no fiduciary
10 relationship between a Fund adviser and the funds investors.

11 The relationship is between the Fund adviser and the
12 Fund. That's who the agreement is with. That's who they
13 serve. They all take direction from Fund investors. They have
14 no obligation to listen to Fund investors. And as Mr. Demo
15 cogently pointed out, think about the chaos that would result
16 if Fund advisers owed fiduciary duties to each of the Fund's
17 investors.

18 To the extent that the Plaintiffs allege that the
19 fiduciary duties are owed by Highland to the DAF under the
20 Investment Advisers Act, I'd again point out, Your Honor, there
21 is no private right of action under the Investment Advisers Act
22 to enforce violations of Rule 206, which is the only thing that
23 the Plaintiffs have pled. There is no viable remedy. You
24 can't bring a claim for damages as they're trying to do here.
25 That's the holding of the Supreme Court in TransAmerica. And

1 that's the holding in Mr. Sbaiti's NexPoint case from the
2 Southern District of New York.

3 But here's the thing. Even if a fiduciary duty
4 existed, they still can't plead a plausible cause of action.
5 Why? Because Highland owes no duty to CLO Holdco as an
6 investor in HCLOF. None. Even if it did, Highland complied
7 with the members agreement governing HCLOF. They were
8 permitted to do this transaction. How can you breach your
9 fiduciary duty by complying with the very agreement that the
10 Plaintiff is a party to? They can't.

11 Second, Highland had an investment advisory agreement
12 with the DAF as Mr. Demo conceded. It does give rise to
13 fiduciary duties. But what are the obligations? To make a
14 full and fair disclosure of potential conflicts of interest.
15 And what did Highland do under the direction of Mr. Dondero?
16 He did exactly that. Right? Mr. Dondero is always looking out
17 for Mr. Dondero. And he's got to live with the consequences of
18 that now, even though he's not in control of Highland.

19 And here's the thing. Mr. Dondero knows that because
20 Dugaboy made the exact same argument that Mr. Sbaiti is making
21 here. He did it in connection with the UBS settlement. Your
22 Honor, will recall that Dugaboy objected to that settlement.
23 They appealed that settlement to Judge Starr. It wound up in
24 front of Judge Starr in the District Court. And he heard the
25 exact same argument that these folks are making here.

1 Dugaboy argued that Highland, that's Multi Strat's
2 investment manager, had fiduciary duties that could not be
3 waived, right? We hear Mr. Sbaiti say that. Unwaivable
4 fiduciary duties could not be waived. But Judge Starr found
5 that the applicable provision, and I'm going to quote from it
6 here, this is the Dugaboy decision that we've cited in our
7 brief.

8 He said, "It's true that the Act prohibits any
9 provision binding any person to waive compliance with any
10 provision of the Act, but that provision stands for the
11 proposition that general waivers of the Investment Advisers Act
12 protections will not be enforceable." It says nothing about
13 whether a fiduciary duty beneficiary, such as the Plaintiffs
14 here, gave informed consent to a specific scheme.

15 So the notion that the fiduciary duties somehow can
16 never be waived, it's not true, right? Take Judge Starr's word
17 for it. He's in the District Court, right. The same court
18 that these guys think would be a more appropriate forum to hear
19 these very sophisticated issues. Judge Starr said no.
20 Dugaboy, you're absolutely wrong.

21 Judge Starr found specifically in the conflict of
22 interest section in the Multi Strat private placement memo,
23 evinced informed consent that Highland might resolve issues in
24 a manner inconsistent with the interests of Multi Strat's
25 investors. Highland was allowed -- Highland had complete

1 authority to settle or compromise suits on behalf of Multi
2 Strat without notice, without seeking anybody's prior approval.

3 He went through in detail and quoted some of the
4 conflict of interest language. The same result hold here.
5 Let's take a look at the advisory agreement and see the
6 conflict of issues that were disclosed to the Plaintiffs here.
7 If we can put Slide 4 on the screen.

8 So Slide 4, this is Exhibit A, again to the advisory
9 agreement. It's Exhibit 14, and they've got a whole section.
10 It goes on for a couple of pages, Your Honor, called potential
11 conflicts of interests. And it says that the Highland Group
12 can age in transactions whether or not such vendors are
13 competitive with the Fund. The Fund here is the DAF.

14 "The Fund will be subject to a number of actual and
15 potential conflicts of interest involving Highland, including
16 among other things, that Highland may actively engage in
17 transactions for the same securities saw by the Fund and may
18 compete with the Fund for investment opportunities, or may hold
19 positions opposite to positions maintained by the Fund." If we
20 can go to the next slide, because it continues.

21 "Highland Group Trading as part of its regular
22 business, the members of the Highland Group may hold, purchase,
23 sell, trade, or take other related actions for their own
24 account. The members of the Highland Group will not be
25 restricted in their performance of any services or in the types

1 of debt or equity investments, which they may make."

2 And this is the most important part here. In
3 connection with those activities, "The members of the Highland
4 Group may hold, purchase, sell, trade, or take related actions
5 in securities or investments of a type that may be suitable to
6 investments for the Fund.

7 "Members of the Highland Group will not be required
8 to offer such securities or investments to the Fund or provide
9 notice of such activities to the Fund." In other words,
10 Highland could enter into this -- this is the party's
11 agreement. This is exactly what Judge Starr said was
12 permitted. Informed consent.

13 This is Mr. Dondero talking to Mr. Dondero. It's his
14 company talking to his Donor Adviser Fund, and he's talking to
15 himself, and he's saying, okay, look, I may -- I'm going to be
16 able to do whatever I want. And don't worry. You know, it may
17 conflict with you. But if I want to look out for this guy,
18 I'll look out for this guy. I want to look out for that guy,
19 I'll look out for that guy. I'm not going to tell you. I'm
20 not going to give you the opportunity. This is the agreement
21 that he struck with himself. He may not like it today. But
22 that's the agreement that he struck with himself.

23 Through these provisions, Highland has made full
24 disclosure about potential conflicts of interest. DAF, a
25 fiduciary duty beneficiary, to use Judge Starr's term, gave its

1 informed consent to a specific scheme. It was not a general
2 waiver of the IAA's protections. That would be wrong. No
3 general waiver. That's what Judge Starr said he couldn't do.
4 And that's not what's happening here. Rather, a specific
5 scheme was agreed upon between Mr. Dondero's company and his
6 donor advised Fund.

7 Finally, let's just look at reality. There was no
8 corporate opportunity to divest. Highland didn't buy anything.
9 They settled a \$300 million claim. They structured it at the
10 request of HarbourVest in a manner of rescission. So they took
11 the investment back, gave the \$80 million back in the form of
12 claims. And that's it. That's not an opportunity that ever
13 existed for the Plaintiffs or for anybody else.

14 In short, no fiduciary duty to CLO Holdco. Highland
15 made full and complete disclosure of its conflicts of interest,
16 including expressly stating that Highland could acquire
17 securities without offering them to the DAF or even giving the
18 DAF notice. At the end of the day, Highland didn't take an
19 opportunity that was ever available to the DAF that they had no
20 right to. Rather it settled a \$300 million claim and
21 transferred its interest as part of the settlement.

22 No amendment can change these facts, Your Honor.
23 There was no private cause of action under the Investment
24 Advisers Act. Highland owed no duty to CLO Holdco. Highland
25 fully disclosed the very scheme that purported to settle the

1 HarbourVest claim as it did. And there was no opportunity that
2 the Plaintiffs could have taken advantage of. By my count,
3 Your Honor, I'm at 38 minutes, so I'd like to reserve seven for
4 rebuttal.

5 THE COURT: Okay. My law clerk confirms 38 minutes.

6 All right. Mr. Sbaiti?

7 MR. SBAITI: Thank you, Your Honor. Your Honor, the
8 -- I'm going for the most part rest on our briefs because I
9 think they deal with a lot of the issues that were discussed.
10 And I'd like to focus on the Advisers Act and the fiduciary
11 duty argument and I'll address Mr. Morris' arguments there.

12 The case does begin though with Mr. Seery's testimony
13 at the settlement appeal hearing on January 14th, 2021. Mr.
14 Morris has that correct. He testified specifically that the
15 HarbourVest interest in HCLOF was worth 22 and a half million.
16 He also testified that that was the value at the end of
17 November of 2020. He also testified that that was a fair value
18 for the HarbourVest interest that Highland actually had, and he
19 testified that the value hasn't gone up explosively. And he
20 said that we think that's good real value.

21 After Your Honor approved the settlement, the DAF
22 discovered two months later that in January 2021, Highland's
23 internal metrics did or should have valued HCLOF under an NAV,
24 a net asset value basis, because these are not totally liquid
25 securities. And when they went back and did the math

1 internally, the net asset value as we pled of those securities
2 at the end of November, would have been about 34 and a half
3 million, not 22 and a half million. And it would have been
4 closer to \$42 million by the time that he was testifying in
5 Your Honor's court. So we start with that misrepresentation
6 and the case it arises from the outcroppings of the
7 implications of that misrepresentation.

8 One of the things that we looked at is under the
9 Advisers Act is that under Transamerica Mortgage, as I said
10 earlier, it says that violations of Section 206 are actionable
11 under Section 215. You've heard Mr. Demo and now Mr. Morris
12 say that the Supreme Court has held that Section 206 does not
13 have a private right of action for damages. And he's
14 absolutely correct. But that doesn't mean that if there's a
15 violation of Section 206, that you have nothing.

16 What Transamerica Mortgage held, was that there was a
17 private right of action under Section 215 of the Advisers Act
18 for breaches of Section 206. You do have a private right of
19 action. And that's one of the ways we believe violations of
20 Section 206 are actionable.

21 The other way we argued that violations of Section
22 206, which does impose fiduciary duties on an investment
23 adviser, purely by virtue of its activities as an investment
24 adviser is that Judge Boyle and other courts, as we cite in our
25 brief, Judge Boyle had a case called Douglas v. Beekley

1 (phonetic). Held that state fiduciary duty actions can be
2 predicated upon breaches of the fiduciary duties owed under the
3 Investment Advisers Act.

4 Judge Boyle found that, and then we've also cited
5 cases in other jurisdictions that have similarly found. And I
6 would note that although in the reply, Mr. Morris, or excuse
7 me, Highland takes the position that, you know, we haven't pled
8 a state cause of action. We actually pled a breach of
9 fiduciary duty and then pled both damages, and
10 discouragement/rescission, the full panoply which are available
11 under both state and federal.

12 And in fact, as you've heard Highland's lawyers say
13 multiple times today that they originally filed their motion to
14 dismiss, and that this new motion to dismiss is substantially
15 similar. In our response to their original motion to dismiss,
16 we also cited the case law that says that violations of Section
17 206 of the Advisers Act are actionable through state law,
18 fiduciary duty actions, and that's what we've pled. We didn't
19 limit ourselves to only state or federally available remedies.
20 So I'll concede --

21 THE COURT: Can I stop you? Because I'm really hung
22 up on this issue. If it's actionable, what is the remedy? If
23 it's not damages, what is the remedy you think is available?

24 MR. SBAITI: So I do believe damages are available
25 under a fiduciary duty claim under Section -- under the Section

1 215. And this is where I was going earlier on. Section 215
2 essentially voids either a contract that waives or waives
3 compliance with the Advisers Act or voids the provisions, but
4 it also voids the rights of someone who performs a contract in
5 violation or makes a contract in violation of one of the duties
6 under the Advisers Act.

7 And what the Supreme Court said in Transamerica is,
8 once you have a void right or a void provision, then the
9 incidences of voidness, which they included to be restitution
10 or disgorgement, and other courts have construed to mean other
11 equitable remedies that would happen once you have voided a
12 right, it could include things like disgorgement, of course,
13 then you actually have those rights.

14 And in fact, Judge Boyle's case, Douglas v. Beekley
15 also addresses the fact that those can be the remedies once the
16 rights of a violator have been voided under Section 215 of the
17 Advisers Act.

18 THE COURT: So let's take that from conceptual to
19 these facts. How would that play out?

20 MR. SBAITI: Sure. So Your Honor, we would argue,
21 because we're seeking damages for the lost opportunity, or
22 disgorgement of the asset, and so one of two options could
23 happen. Either Highland could transfer the interest in
24 exchange for, you know, would have an offset, would have an
25 unjust enrichment right. DAF I think would owe \$22 and a half

1 million to Highland to compensate for what it paid. Or we
2 could just get damages under a state cause of action for
3 whatever the potential value is. I'm not sure what the value
4 of it is stands today. But that would be the idea.

5 THE COURT: Okay. Well, I have to say, and you can
6 either move on or not, I'm very confused. Because --

7 MR. SBAITI: Okay.

8 THE COURT: -- no private right of action -- and you
9 say that just applies to damages -- you know, no private right
10 to damages. But you can get the remedy of voiding a contract
11 or voiding provisions of the contract. But somehow at the end
12 of it, you're saying damages or disgorgement? You want to --

13 MR. SBAITI: Sure. Let me be a little bit more
14 specific, Your Honor.

15 If there's a violation of Section 206, the Supreme
16 Court in Transamerica has held that you can seek to avoid the
17 rights of the other party violating Section 206. And then you
18 can seek the equitable remedies surrounding the voiding of
19 those rights. That's what Transamerica held. It held that you
20 can simply walk in and say you violated Section 206. We want
21 damages. But you can seek to (indiscernible) the rights of the
22 violator and then seek whatever equitable remedies arise out of
23 that, whatever those may be.

24 The flip side of that, Your Honor, is that as Judge
25 Boyle has held and as other courts have held, is that because

1 the Advisers Act imposes fiduciary duties, those are formal
2 fiduciary duties recognizable under Texas fiduciary duty law.
3 So I can have a Texas fiduciary duty claim for breach. And
4 then I get the full panoply of remedies, including damages that
5 are available under Texas law for a breach of fiduciary duty.

6 So in other words, Section 206, and both of these
7 regimes simply provides the duty, the basis of the duty. It's
8 a federal law imposition of a fiduciary duty. The violation of
9 that then is actionable through either Section 215, or it's
10 bore by the state or adopted by the state fiduciary duty cause
11 of action. That's what the case law says that we cite.

12 THE COURT: Okay. And again --

13 MR. SBAITI: I'm hoping I'm answering your question.

14 THE COURT: Sorry to interrupt. Maybe you're going
15 to get to this, but --

16 MR. SBAITI: It's okay.

17 THE COURT: But the argument very strongly made --
18 vehemently made by Highland is there's no fiduciary
19 relationship to investors, i.e. the DAF. If you're right, this
20 could only be a tool of CLO Holdco. You disagree with that?

21 MR. SBAITI: I do, for a couple of reasons, Your
22 Honor.

23 THE COURT: Okay.

24 MR. SBAITI: I can address that.

25 THE COURT: Okay, go ahead.

1 MR. SBAITI: And if Mr. Morris is correct, they
2 didn't argue the implications of the contract as it would apply
3 to the fiduciary duty. So I'll address that at the end of
4 these comments, Your Honor.

5 THE COURT: Okay.

6 MR. SBAITI: Because I think they're obviously
7 relevant and they've been brought up. But in terms of simply a
8 matter of federal law, there is a fiduciary duty by Highland to
9 the DAF and its subsidiaries and that's in the agreement that
10 Mr. Morris was going through. So they can't escape the idea
11 that there's not a fiduciary duty. Those fiduciary duties
12 arise as a result of Highland performing services as an
13 investment adviser to the DAF.

14 I think what Mr. Morris was arguing is that because
15 that contract waives anything, what anything -- any liability
16 for anything that was less than gross negligence or intentional
17 misconduct. I think he was arguing that therefore that
18 contract takes away the idea that the fiduciary duties imposed
19 under the Advisers Act, to the extent that they're actionable
20 is negligence. I think he was arguing that goes away, because
21 that's where I understood his argument to come from.

22 I didn't understand his argument to say there is no
23 fiduciary duty from Highland directly to the DAF. In fact, I
24 believe Mr. Demo conceded that that fiduciary duty existed
25 because he was trying to show Your Honor how simple of an issue

1 it is and how not complicated it is in terms of for the
2 purposes of the question of withdrawing reference.

3 So you have a direct fiduciary duty from Highland as
4 the DAF's adviser. You also have a direct fiduciary duty by
5 Highland to Holdco. Now you've heard them cite a case. They
6 call it Goldstein. It's a DC Circuit case. And what Goldstein
7 held is that you own -- is that an investment adviser only has
8 a fiduciary duty to its client. And the client is the Fund.
9 It's not the investors in the Fund.

10 And I mentioned this without mentioning the name of
11 the case. But I mentioned that they had cited cases that deal
12 with Section 206(1) or (2) of the Advisers Act, which Goldstein
13 is a Section 206 -- I believe (2) case. And indeed, it
14 specifically says Section 206(2) specifically only applies to
15 the clients or the advisers due to its client.

16 So under 206(2), indeed, you have a fiduciary duty
17 only for the Fund. The part that they miss is that Rule
18 206(4)-8, which I brought up earlier in regards to when I was
19 going through the mechanisms. That rule was actually passed in
20 response to Goldstein to actually clarify that, no, under
21 206(4), those same duties are going to exist directly to the
22 Fund and its (indiscernible).

23 And that's what I read, Your Honor, the rule and it's
24 -- I believe I read you the statutory -- the actual cite, which
25 is -- get to it again, for Your Honor's record. And it's in

1 the CFR. I believe it's 17 CFR 275.206(4)-8. And it is very
2 clear. And if you look at the SEC -- and the SEC passed it, if
3 you look at when they passed it. They passed it the year after
4 Goldstein. So Goldstein isn't good law for the provision that
5 there's no fiduciary duty to the investor in a Fund. It's just
6 not good law at this point. Nor in any of the other cases that
7 they cite, or that Goldstein backs with the same proposition,
8 because it relies on the wrong part of the statute. The
9 statute, I should say.

10 So now that we have an agreement that Highland and
11 its subsidiary are the investment advisers to HCLOF, and this
12 provision, this regulation passed by the SEC says there -- the
13 duties under 206(4) actually do apply to the investors in the
14 Fund, and not just Fund itself. That's the direct investment
15 advisory relationship to Holdco. So you can get at it either
16 way, Your Honor, under the statute. And that's kind of the
17 point that we make.

18 And then you look at the other cases that we've
19 cited, and the statutes that we've cited, and they're all
20 basically get to the same provision. So the math is pretty
21 simple for us on this. Section 206 of the Advisers Act says,
22 those fiduciary duties, that's what Transamerica and its
23 progeny held. And Rule 206 defines the scope of Section 206,
24 which includes investors in the managed Funds, which means
25 there's a direct fiduciary duty.

1 They hang their hat a lot on the lack of a direct
2 fiduciary duty or the lack of a cause of action for actuating
3 these duties when they've been breached, but they're just
4 simply wrong as a matter of law. In their reply, Your Honor,
5 they also bring up the argument which we talked about a little
6 earlier, that there is -- they cite the Acis -- NexPoint v.
7 Acis decision for a premise that, you know, therefore, there's
8 no private right of action. That's actually not what that case
9 held.

10 What that case held is that under Section 215, you
11 could only void -- you can't void someone's performance of an
12 otherwise lawful agreement. Which is not the issue here.
13 Here, we're saying that an agreement was made in violation of
14 the Advisers Act, because the settlement agreement was
15 predicated on a misrepresentation of fact to the advisers and
16 breached the adviser's duty to cherry-pick for itself the best
17 investments.

18 And if you look at the contract that Mr. -- and which
19 I'll get to now -- look at the contract that Mr. Morris was
20 talking about, right after the provisions he read under the
21 Attachment A specifically says, "It is the policy of the
22 investment adviser to allocate investment opportunities fairly
23 and equitably over time." And it goes on to say that the
24 considerations -- that's its fiduciary duties -- owed to the
25 accounts, the primary mandate of the accounts.

1 In other words, if there are some accounts that are
2 specifically there for certain types of investments, those
3 investments are going to be allocated there. The capital
4 available to the accounts, restrictions on the accounts and the
5 investment opportunity, the sourcing of the investment, the
6 size, and so on. It goes through about 11 different
7 considerations.

8 So as a matter of fact, we can argue later whether or
9 not Highland went through those provisions when it decided to
10 take it for itself. But the most important thing about
11 everything that Mr. Morris read to you about Highland's ability
12 to trade and to do these things, is that the allocation of the
13 investments is amongst its other accounts. It doesn't get to
14 (indiscernible) it somewhere for itself at the expense of its
15 advisees, number one.

16 And number two, if it does, we would argue that
17 that's void under Section 215(a) and (b), that the Advisers Act
18 doesn't let it -- the Advisers Act imposes duties where it's
19 not allowed to do that.

20 Now he cited anew Judge Starr's decision, which I
21 actually haven't had a chance to read. I tried to pull it up
22 while he was reading from it, but it just didn't come up and so
23 I don't know what to say about that specifically, what he found
24 or how he relates in any way.

25 I don't have the underlying documents to see whether

1 or not it's the exact same language or different. But the
2 upshot, I believe, of what he said was that by disclosing all
3 of these things that Highland, the person who signed it
4 basically made an agreement that they were going to let
5 Highland do whatever it did.

6 And that was an informed -- that amounted to informed
7 consent except for one thing, that the Advisers Act doesn't let
8 you do it ahead of time. You have to go through specifically
9 with the actual investment, talk about it just like the
10 provisions in the agreement I was reading from which comes
11 right after Mr. Morris's quotation.

12 And those provisions don't talk about it being ahead
13 of time. Those considerations have to be done on an
14 investment-by-investment basis. So it is a general waiver
15 otherwise, if you're not talking about a particular investment
16 and that's all I can really comment on that, Your Honor,
17 because I don't have Judge Starr's opinion or the underlying
18 facts in front of me, unfortunately.

19 Turning back to sort of the core argument, Your
20 Honor, so the alleged breach we have is that Highland as an
21 adviser is liable for cherry-picking and making it, bringing it
22 over to itself.

23 In our brief, we actually cited a Fifth Circuit case
24 that said that's a violation of the Advisers Act and it's not
25 -- again, it's not a waiveable -- it's simply not waivable in

1 the way that they've cited. And the second alleged breach that
2 we have is that Highland failed to disclose the true violation
3 of it, excuse me, the true valuation of the HarbourVest
4 interest.

5 And so the fact that they didn't do those two things
6 and keep the DAF apprised or keep Holdco apprised as the case
7 may be, are two independent and actionable violations -- and
8 I'm making these points in summary -- and that's really what it
9 boils down to is it was an act of self-dealing.

10 The remedy for breach of fiduciary duty is, Your
11 Honor, as is for any loss suffered by the plaintiff. And I
12 would cite, I would refer Your Honor, for example, to the cases
13 we cited, but also to Hsin-chi-Su v. Vantage Drilling, for
14 example, 474 S.W.3d 284, which also says, under state law
15 disgorgement of profits is an equitable remedy appropriate when
16 a party has breached his fiduciary duty; its purpose is to
17 protect relationships of trust by discouraging disloyalty.
18 We've got both state and now federal remedies, including a
19 panoply of possibilities for violations of breaches of
20 fiduciary duty.

21 Turning to, Your Honor, to some of the arguments that
22 were made by Mr. Morris regarding these, the argument that they
23 make about, excuse me, about Section 215 not having a, having a
24 viable cause of action -- and like I said, the argument's
25 incorrect. It is a viable cause of action -- I admit it is a

1 limited cause of action.

2 It's limited to declaring a provision or a right void
3 and then, you know, crafting an appropriate remedy that arises
4 out of that. But it doesn't mean that there's no cause of
5 action.

6 And I've seen no case cited by them, and I've looked,
7 and I haven't seen a case saying that a Texas or a state
8 fiduciary duty action cannot be predicated on the breach of a
9 federally imposed fiduciary duty, which is what (indiscernible)
10 actually held.

11 Interestingly, Your Honor, twice, at the beginning
12 and at the end of his colloquy, Mr. Morris said that the
13 settlement was essentially a rescission of the HarbourVest
14 investment in HCLOF, a rescission to Highland. The problem
15 with that language and maybe it is a rescission, but I don't
16 see how it could possibly be because we actually pled the
17 background of that transaction.

18 And the background of that transaction is that HCLOF
19 was a hundred percent owned by Holdco, by the DAF, not by
20 Highland. So if it was a rescission then the shares should
21 have gone back to the DAF or Holdco. They shouldn't have gone
22 to Highland if that's how they were going to treat it.

23 And I believe he makes that argument because he
24 wanted to show that it's just not a big deal that this is
25 simply a way to settle the case, and I can see that. This

1 lawsuit is not about unwinding the HarbourVest settlement to
2 drag them back in here and undo and unscramble the egg.

3 But that doesn't mean that there aren't specific
4 equitable remedies that Highland had, excuse me, that the DAF
5 or Holdco had vis-a-vis Highland because of the breaches of
6 fiduciary duty. The fact that he admits that it's a rescission
7 action but it was rescinded to the wrong party, I think, is
8 very telling.

9 I'll briefly touch upon the other arguments, Your
10 Honor. I think, I don't think I need to use all 45 minutes. I
11 think these arguments are pretty well laid out in our brief. I
12 think the law is pretty well laid out in our brief as much as
13 they want to argue that, you know, that we're just misstating
14 it.

15 When he says Highland owes no duty to Holdco, I think
16 I've addressed that. But he also says, well, how could there
17 be a breach of fiduciary duty when Highland was complying with
18 the agreement that Holdco agreed to, and I believe he's talking
19 about the membership agreement. But we have two different
20 readings of the membership agreement, which is why I don't
21 think it's appropriate to dismiss at this stage.

22 The reading that Highland wants you to adopt is that
23 when it says in 6.1, no member shall sell its shares other than
24 to an affiliate of an initial member, thereto, without the
25 prior written consent of the portfolio manager, and then it

1 goes on in 6.2 to say you have to offer it to another member,
2 highland wants you to read that as saying that well, then you
3 can only sell, as long as you don't sell to your own affiliate,
4 which is how we read it, then you're in the clear.

5 But if you actually look at the way it's constructed,
6 it's the member selling to its own affiliate that was supposed
7 to be carved out. So Holdco might be able to sell to its own
8 affiliate. That was the purpose and intent, otherwise it
9 really doesn't make any sense that a member has to offer it to
10 another member unless it sells to another member's affiliate.

11 It's actually kind of an absurd reading that Highland
12 wants you to adopt.

13 THE COURT: You're going to have to repeat that. I
14 got very lost during that.

15 MR. SBAITI: Oh, sure. Would it help if I bring it
16 up, Your Honor?

17 THE COURT: It would be helpful if it was on the
18 screen again, but if you could --

19 MR. SBAITI: May I share my screen, Your Honor?

20 THE COURT: Absolutely.

21 MR. SBAITI: Do you see the contract, Your Honor?

22 THE COURT: I do.

23 MR. SBAITI: I just want to make sure I -- where it
24 says "no member," so it's this language, Your Honor, that we're
25 looking at, 6.1 and then down here, 6.2. And I'll just -- so

1 6.1 first says, "no member shall sell, pledge, charge,
2 mortgage, assign, assign by way of security transfer." And it
3 goes on "other than to an affiliate of an initial member party
4 thereto without the prior written consent of the portfolio
5 manager."

6 That exclusion which also exists in 6.2, prior to
7 making any transfers of shares other than transfers to
8 affiliates of an initial member, or in the case of CLO Holdco
9 or Highland, to Highland, its affiliates or another Highland
10 principal, "a member must first offer to the other members a
11 right to purchase the shares."

12 Your Honor, setting aside the judicial estoppel
13 argument, I'm simply talking about the read of this. What
14 Highland wants you to adopt here is the idea that where it
15 says, "other than transfers to affiliates of an initial
16 member," it's talking about an affiliate of a member other than
17 the one doing the transferring, and that's an absurd read.

18 What it means, the way they read it, it means that
19 if I'm CLO Holdco, I can't transfer it to HarbourVest but I can
20 transfer it to a HarbourVest affiliate. But if I transfer it
21 to HarbourVest, then I have to offer it to the other members.
22 That makes no sense. There's no reason for that.

23 The better reading, we believe, is that the exclusion
24 is that if I'm Holdco, I could transfer it to my own affiliate
25 without offering it to anybody else because it's basically the

1 same person sitting in that membership seat. The same would go
2 for HarbourVest. HarbourVest can offer it to its own
3 affiliate, but shouldn't be able to offer it to somebody else
4 or their affiliate without first offering it to the other
5 membership pro rata.

6 So that's --

7 THE COURT: What about that word --

8 MR. SBAITI: -- the reading in the --

9 THE COURT: -- "initial member?" In your example,
10 you said HarbourVest could only transfer it to an affiliate of
11 HarbourVest, but HarbourVest wasn't an initial member.

12 MR. SBAITI: I actually believe HarbourVest is an
13 initial member to this agreement, Your Honor, because they're
14 actually named up here. Sorry to scroll. See, those are
15 there. I believe all the signatories of this are initial
16 members and I believe that definition is down here. Sorry to
17 scroll fast. I'm just trying to find it. It may not be a
18 defined term here, Your Honor.

19 THE COURT: Well, I saw HarbourVest. It's just what
20 you would expect, all the HarbourVest entities, but it wasn't
21 an initial member. It was not an initial member of HLO or
22 whatever the --

23 MR. SBAITI: It's an initial member of this --

24 MR. MORRIS: Your Honor, I believe it is. I think if
25 you just scroll to the top you'll see they are. This is the

1 original document.

2 THE COURT: They were an initial member?

3 MR. MORRIS: Yes, they were.

4 MR. SBAITI: Yes.

5 THE COURT: Oh.

6 MR. MORRIS: They are right there. This is the

7 original agreement.

8 MR. SBAITI: And they're an original member.

9 MR. MORRIS: I would agree with that. So.

10 THE COURT: Okay.

11 MR. SBAITI: So anyway, Your Honor, our position is
12 it's -- this is at best an ambiguous contract that would
13 require discovery to go into what that was really supposed to
14 mean. I know there is a judicial estoppel. I think that
15 argument's been beaten to death by both sides in the briefing
16 so, you know, we'll rest on our briefing in that issue and, you
17 know, I guess to the extent they are relevant in the exhibits.

18 But, Your Honor, the point of the matter is the
19 agreement, you know, read the way Highland is suggesting just
20 really doesn't make a whole heck of a lot of sense from a
21 practical and common sense standpoint. I think it's ambiguous
22 as to what that meant, "an affiliate of the initial member."

23 I think it was intend -- we believe it was intended
24 to mean the member doing the transferring can transfer to its
25 own subsidiary, its own affiliate without anybody objecting,

1 which makes perfect sense because all of these investment
2 company are, you know, they sometimes need to move investments
3 around.

4 HarbourVest did it. That's why there's ten, you
5 know, the half dozen of their affiliates that are there, Your
6 Honor. So, you know, when it comes down to that, I don't
7 really don't have an argument other than that because I think
8 that's the only argument Mr. Morris made on the membership
9 agreement.

10 And I believe the tortious interference argument,
11 specifically, has, you know, has a little bit heightened
12 relevance because of the testimony and because nobody knew what
13 the actual value was until one of Highland's people left and
14 there was a discussion which you have heard about.

15 I believe at one of the hearings there was a
16 discussion where he actually told some of the advisers to the
17 DAF that those values were actually much higher at the
18 (indiscernible). I think discovery if bears true then there's
19 been a misrepresentation and there should be consequences for
20 those misrepresentations.

21 And nothing in Highland's agreement with the DAF or
22 with HCLOF says that misrepresentations are somehow excused or
23 that those misrepresentations don't rise above the negligence
24 level, you know, to the extent where those are actionable.

25 I don't know if you have any more questions, Your

1 Honor, but that really is the argument, I think. We rest on
2 our briefs and ultimately we have fulsome argument on a lot of
3 these issues the last time. So unless Your Honor has
4 additional questions, I'll rest.

5 THE COURT: I guess a couple of follow-up questions.

6 Okay, I'm zeroing in on the -- what exhibit is this?
7 I think it's Exhibit 6 in your notebook, the amended and
8 restated investment advisory agreement.

9 MR. SBAITI: Okay.

10 THE COURT: Paragraph 11, the exculpation, the
11 indemnification, 11B. I think every single adviser agreement
12 I've seen in my history of dealing with Acis and Highland has
13 had a provision like this, substantially similar if not exactly
14 like this.

15 Is your position that basically even though these
16 provisions are always in investment advisory agreements, this
17 is a meaningless provision? That you cannot contract around
18 some federal fiduciary duty in the IAA, so any, you know,
19 agreement between sophisticated people that says, you know,
20 we're not going to hold you liable for negligence or any other
21 misconduct, it's just wasted ink on paper.

22 It's not -- it's overridden by the IAA.

23 MR. SBAITI: Your Honor, I've seen this. Yes. I
24 mean in a word, yes. I think a lot of times these are in
25 boilerplate -- this is boilerplate -- not only in Highland's

1 but in a lot of investment adviser agreements.

2 And one thing you're allowed to do under the IAA is
3 define the scope of your services, what you're going to do and
4 what you're not going to do in terms of the types of
5 investments you're going to advise; whether you're going to be
6 the one to buy them or make the investor go buy them
7 (indiscernible). There's a whole way to discuss the scope.

8 But within that scope, the Advisers Act is fairly
9 crystal clear in Section 215(a) and (b) that when there is a
10 duty imposed -- and the duties are under Section 206 and
11 elsewhere, by the way. Section 208(d) says you can't do
12 indirectly what you can't do directly, you know, you can't
13 waive those.

14 It specifically says anything that allows someone to
15 not comply with the Advisers Act is void.

16 THE COURT: Okay.

17 MR. SBAITI: And I don't blame investment advisers
18 for putting things, I mean they're not the only ones who put
19 things like this in their contracts to give themselves a
20 fighting chance, I suppose, or to make the arguments that Mr.
21 Morris has made and maybe sometimes they're even successful.

22 But I think the statute is so plain and clear that I
23 don't know how this --

24 THE COURT: Okay. My last question was the motion to
25 dismiss the RICO claim that is --

1 MR. SBAITI: Yes.

2 THE COURT: -- on Page 23 of your response to the
3 motion to dismiss. What about the argument that you dismiss
4 actions not claims pursuant to Rule 41, this is not a proper
5 procedural mechanism for what you're trying to do here.

6 MR. SBAITI: Here's how I was thinking about it, Your
7 Honor, when we put that in. If Your Honor doesn't dismiss the
8 Securities Act claim, essentially the Advisers Act claim, then
9 I think the lead argument that they made because we've pled
10 RICO in the alternative, the lead argument that they made is
11 that if we have an Advisers Act claim we don't have a RICO
12 claim, I think, is correct.

13 So in a world where you uphold the Advisers Act
14 claim, then I think the RICO claim is dismissed with prejudice,
15 without prejudice because we have an actionable Securities Act
16 claim, so I think their lead argument on that was correct.

17 In a world where you dismiss based upon everything
18 because you don't think we have a Securities Act claim, we are
19 asking Your Honor to dismiss that claim without prejudice
20 because we believe there would be other reasons to plead
21 because we do think we can show a, you know, as we argued in
22 response to the first motion to dismiss, there are other things
23 that we think this adviser has done in similar fashion that
24 show a pattern of activity of misleading the activity or
25 violating their duties under state law, for example, but using

1 the interstate wires to accomplish that.

2 We do believe we can plead that, but we agreed with
3 their lead argument that if we succeed on Count 1 then we don't
4 have a RICO.

5 THE COURT: Okay. But what is the efficiency in
6 taking it out now without prejudice to reasserting it? Where's
7 the judicial economy and efficiency there?

8 MR. SBAITI: I guess what we're asking for, Your
9 Honor, is either a dismissal for, well, allowing us to re-plead
10 to meet the other issues that they talked about, which is the
11 further, you know, is there an actual (indiscernible).

12 Rather than brief that all the way, we saw the argument
13 that they've cited which they didn't bring in their first
14 motion, but we saw the argument that they were making, "Well,
15 these two can't co-exist. You can't have a Securities Act
16 claim and a RICO claim." We agree. So if we win our Advisers
17 Act claim, RICO claim goes away. We agree with that.

18 If we don't though, we should be allowed to re-plead
19 because we disagreed with everything else he said. I think we
20 do have, we do meet 9(b), but we should have an opportunity to
21 plead the other acts that we believe make this part of a
22 (indiscernible).

23 THE COURT: Okay, thank you.

24 All right, Mr. Morris, you have seven minutes.

25 MR. MORRIS: Okay. To try to get to this as quickly

1 as I can, first of all, Your Honor, to the extent that Mr.
2 Sbaiti is suggesting that there is more claims to come, I'll
3 just remind him in court that the administrative bar date
4 passed a year and a half ago.

5 Going to Section 6.1, there is not two readings of
6 this. There's nothing irrational about the plain words that
7 are on this page. It says other than to an affiliate of an
8 initial member. It doesn't say other than to an affiliate. It
9 says other than to an affiliate of an initial member.

10 And it makes absolute perfect sense. Just look at
11 the percentages of the interests that were held at the time
12 this agreement was entered into. HarbourVest had almost but
13 not quite 50 percent and every entity and person controlled by
14 Mr. Dondero, the majority.

15 Mr. Dondero was in control. He didn't care if, you
16 know, it was never going to happen under his watch that somehow
17 somebody was going to transfer something to HarbourVest. He
18 was always going to be in control, so it didn't matter to him.

19 It didn't matter to him how among the members it was
20 transferred because the one thing he knew was not going to
21 happen was that he was not going to lose control. I guess he
22 just didn't foresee the bankruptcy two years later. But that's
23 perfectly consistent with this.

24 What this provision does say is that we're keeping
25 this in the family. We're keeping this among ourselves and

1 we're not letting anybody in who's not already here. Because
2 dealing with the people who are already here, he knew he would
3 always be in control and that's perfectly consistent with the
4 way this is drafted.

5 The language is unambiguous, "other than to an
6 affiliate of an initial member." That is exactly what this
7 transaction did. It transferred HarbourVest's interests.
8 HarbourVest was a member. It transferred HarbourVest interest.
9 They sold, they assigned, they transferred, actually, the word
10 is "transfer."

11 HarbourVest is the member who transferred its
12 interest to an affiliate of an initial member. Highland is the
13 initial member. Actually, Your Honor had it right before
14 because HarbourVest actually acquired its interest from CLO
15 Holdco, so you were right. I don't know that HarbourVest was
16 an initial member, but I know Highland was. I know HarbourVest
17 was a member. But these provisions say --

18 THE COURT: Yeah. And again, I'm not counting -- I
19 had thought it came along, you know, a couple years down the
20 road but, you know, shortly --

21 MR. MORRIS: You may be right.

22 THE COURT: -- shortly before the whole Acis. But
23 anyway, but I guess Mr. Sbaiti's wanting me to read this
24 parenthetical in 6.2 as other than transfers from --

25 MR. MORRIS: To an affiliate.

1 THE COURT: -- an initial member to its own
2 affiliate. And that's, it's not worded that way.

3 MR. MORRIS: It's not what it says.

4 THE COURT: Yeah.

5 MR. MORRIS: It's just not what it says. It may be
6 what they wish it said today, but that doesn't -- you can't
7 just change a contract to make it say what you wished it did.
8 This is the contract that they drafted. This is Dondero's
9 contract.

10 It says other than to an affiliate of an initial
11 member. And it's kind of irrelevant as to whether HarbourVest
12 was an initial member. The important point is that Highland
13 was an initial member and HarbourVest was a member. So the
14 member HarbourVest transferred its interest to an affiliate of
15 an initial member. Period, full stop. It was permitted under
16 6.1 and the ROFR doesn't apply under 6.2.

17 Number two, next, the concept of rescission is a
18 euphemistic term, okay. It's not like what Mr. -- because, you
19 know, if Mr. Sbaiti was right and we were trying to undo it and
20 put everybody back to where they were, his clients would have
21 to take on \$300 million of liability.

22 You don't just get to take the interest. The whole
23 thing was part of a transaction. He forgot the 300 million
24 dollar debt. Let's go to Section 215. 215 is not anywhere in
25 the complaint, okay, but the important point here is what does

1 215 say?

2 If you go back to the Nexpoint case from the Southern
3 District of New York, it says that every contract made in
4 violation of a provision of the Investment Advisers Act shall
5 be void. Period. Full stop. It doesn't have other remedies.
6 It doesn't mean that the plaintiffs here get money.

7 In fact, I would argue that they don't even have
8 standing to pursue this under 215. They are not party to the
9 agreement. How do they even have the ability to come in?
10 There's no case that Mr. Sbaiti can cite to. No court has ever
11 said a nonparty to the agreement can come in and somehow try to
12 void it.

13 No case in the history of the world has ever said
14 that a third party who's not party to the agreement cannot only
15 come in and void the agreement but somehow benefit from it.
16 They're nobody. Like the plaintiffs are nobody here. The
17 agreement that they signed said that Highland that they didn't
18 have a right of first refusal.

19 The agreement that the court approved was an
20 agreement between Highland and HarbourVest. If there's a
21 misrepresentation as to the price, maybe HarbourVest has a
22 complaint. I don't know what their remedies would be. I'm not
23 saying they do, but they're not here.

24 Who are the plaintiffs? What on earth gives them the
25 right to come in here and say they should have that contract,

1 they should have that benefit without, of course, the
2 liability? There's nothing. It's prohibited under the
3 members' agreement.

4 It's permitted under the advisory agreement. No
5 fiduciary duty at all. How can you breach a fiduciary duty
6 when all you're doing is complying with the terms of the
7 parties' agreement? There's no connection between 215 and 206,
8 like he said.

9 There's no case that's ever said that. Just take a
10 look at the Nexpoint case from the Seventh District of New
11 York. It says a plaintiff may only pursue a remedy, may only
12 pursue a claim to avoid the contract, right. That's all there
13 is to it.

14 And so again, you can't just unwind the portion of
15 the contract that they're really interested in. You can't just
16 say Highland has to give back its interest. That means that
17 Highland also has to pay back the 300 million-dollar liability.
18 Where is HarbourVest here? How come HarbourVest doesn't have
19 notice? How come -- think about how HarbourVest's rights would
20 be impacted from what the plaintiffs are saying here.

21 They need to be at the table. They're the biggest
22 party of interest of all. They thought this was in their
23 rearview mirror. They wanted to get out of here. And now
24 we're going to -- you can't just unwind part of a contract.
25 You have to unwind the whole contract.

1 This is so much, this is so untenable, Your Honor,
2 that it really needs to be dismissed with prejudice. I think
3 that's all I have. I mean there's no -- you know, the remedies
4 that are being suggested now, they're not in the pleading. But
5 how, I just ask the Court to consider where's HarbourVest?

6 How do you unwind the piece of the transaction and
7 not the only full transaction? Where does the plaintiff who
8 agreed that it wouldn't have a right of first refusal, who
9 agreed that Highland could pursue transactions on its own
10 without notice of the other side, how do they come in here and
11 try to undo a piece that they want? They can't.

12 Complaint should be dismissed with prejudice, Your
13 Honor. Thank you very much.

14 THE COURT: All right. Thank you all.

15 Well, I'm obviously going to take this one under
16 advisement and read all of your cases and pleadings. And I
17 feel like I'm becoming a broken record on that sentence. Right
18 now let's see where we are under Highland advisements.

19 We have the written ruling I need to do on the motion
20 to conform plan to be consistent with the Fifth Circuit. We
21 have the HCRE proof of claim trial. And then we have the
22 motion, the renewed motion to recuse me, and then now we're
23 going to have this, okay?

24 So that's going to be four Highland matters under
25 advisement. All I can tell you is we've had a brutal December

1 and January with things under advisements, trials, and
2 different court commitments of all different kinds. So I hope
3 we can have a very productive rest of January and February and
4 March.

5 Inside baseball, judges, they tend to look at March
6 31st and September 30th as important catch-up days because we
7 do these reports of how many things you have under advisement
8 to our circuit courts. And I'm just giving you that inside
9 baseball to let you know I really anticipate catching up on
10 some of these things before that looming deadline. But
11 hopefully, hopefully sooner.

12 And, of course, the report and recommendation I
13 should have that out in a few days because I need to get that
14 squared away, I feel like with the district court, especially
15 since a different district judge is now in that loop because of
16 what I think was a mess up between the clerk's offices.

17 So anyway --

18 MR. MORRIS: They've been pretty good about moving
19 them when we've asked, Your Honor, as well. So maybe we can
20 file something.

21 THE COURT: Okay. All right. But just circling
22 back, the report and recommendation I should have out in a few
23 days. But there may be a little bit of waiting on the ruling
24 on the motion to dismiss.

25 All right. Is there anything else as far as

1 housekeeping?

2 MR. MORRIS: Just thank you very much, Your Honor. I
3 know this was a long day. We appreciate your diligence, as
4 always, and for your time.

5 THE COURT: Okay. All right.

6 MR. SBAITI: Thank you for your time, Your Honor.

7 THE COURT: Okay. Thank you. We're adjourned.

8 THE CLERK: All rise.

9 (Proceedings concluded at 4:35 p.m.)

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13 **C E R T I F I C A T I O N**

14 I, DIPTI PATEL, court approved transcriber, certify
15 that the foregoing is a correct transcript from the official
16 electronic sound recording of the proceedings in the above-
17 entitled matter, and to the best of my ability.

18

19 /s/ Dipti Patel

20 DIPTI PATEL, CET-997

21

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